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Take hard look at proposed law before encouraging ABA's blessing

By Tonda F. Rush

The American Bar Association in February will be asked to endorse a proposed uniform law aiming at new standards for state government websites that host legal materials. The Uniform Electronic Legal Material Act (UELMA) is proposed by the Uniform Law Commission to address a trend, still in its infancy, of shuttering public printers and posting laws only online. But shifting an entire system of laws to online-only postings puts our legal system at risk.

UELMA attempts a first step in the long journey ahead to use the Internet with the same confidence entrusted to the printing press. But, like the Internet itself, the proposal is not yet ready to bear the burden it takes on.

The Internet is an unreliable partner unless it is managed properly. Its chief flaw is the appearance of being cheap to use, when the truth is that keeping documents authentic, available and findable costs money. The expense is not so much in the technology as in human management costs, the complexity of proper designs and the continuous investment required to update and archive.

The Obama administration learned that costly lesson from its USAJobs website. The Office of Personnel Management last October announced the successful launch of the agency's new searchable database for job opportunities, launched by OPM at a cost of \$1.7 billion. But users soon complained that searches produced irrelevant results. Search failure rates ran in the 90 percent range. At one point, the whole site was down for three days before the agency noticed it and took it off-line for repairs.

Keeping a satisfactory digital archive has as yet proven beyond the reach even of the National Archives and Records

Administration. It contracted with Lockheed Martin for \$317 million in 2005 for help with its obligation to preserve the nation's official history. In February 2011, the Government Accountability Office reported the project was far behind and might cost as much as \$1.4 billion.

Maintaining a secure system from hackers and thieves also is no easy proposition. Major companies with revenues larger than any single state are challenged to protect information, as daily headlines indicate. Witness the Sony Corp.'s loss of customers' personal information, which required it to take down its Playstation network in the spring of 2011. Could a state protect its laws from being hacked and changed?

The prefatory note to UELMA states the nut of the problem: "Many years of experience allow us to determine when we can trust the integrity of a printed document. It stands to reason, therefore, that before state governments can transition fully into the electronic legal information environment, they must develop procedures to ensure the trustworthiness of their ... information."

True enough. The question is not whether legal materials can be published online. The question is how much security, authentication, updating and archiving a state must be able to develop and maintain before it can trust the Internet as "official publisher."

UELMA does not answer the question. Instead, it sets out what the sponsors call an "outcomes-based approach" that leaves states to decide for themselves how much is enough. Having introduced a subjective test, it then endows the system with a presumption of accuracy. Then it doubles down by permitting not only state level legal materials — where there may be some small hope of adequate funding — but those of governmental subdivisions like counties or townships, small agencies and lower courts to join the digital platform. Then it seals in the risk by putting the burden on a challenger to prove the materials may not be accurate.

For example, UELMA acknowledges that for digital records to replace print, a user

must be assured of authenticity. An attorney or court must be able to trust that the online version of a case or statute is the current, true and accurate version. UELMA's explanatory notes suggest that digital signatures like those used by the Government Printing Office would endow a digital document with trustworthiness. But it does not require digital signatures or their equivalents. UELMA leaves it to a state to pick a standard.

It advises in notes, but does not require, that a "baseline" version should be kept for comparisons in case the system fails. It does not say that the baseline must be in print or how a challenger might find it.

UELMA takes the same approach to archiving. It acknowledges that archived versions of laws are essential to jurisprudence — when, for example, a lawsuit is governed by an older statute superseded by later acts. But UELMA leaves it to the state to decide how much archiving is adequate. "Continued usability" must be ensured. But it does not say what happens if funding for updating fails or administrations simply forget, and some versions are left behind, possibly forever.

UELMA permits printed documents to continue without effect from the new mandates. But it does not require paper copies to be kept.

UELMA requires reasonable public access, recognizing that public participation is essential in a democracy. But it pays little heed to the considerable burdens for citizens who cannot or do not use the Internet, particularly senior citizens, rural residents, minorities and the poor.

Finally, it requires states to accord reciprocity to other adopting states, requiring users to accept inadequate systems as adequate because the sponsoring state says they are.

The proposal falls short on questions where guidance is most needed. Which tools provide a successful authentication and which do not? If the cut-and-paste of a signature looks as good as a "digital signature" on an Internet printout will users — or courts — know the difference? Which search mechanism is needed — full text or

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only metadata? What if the state sets up the shell of an archiving system but can't afford properly to populate it, maintain it or make it search for the right records? How might one compare an available online version to the true copy, particularly if the true copy is kept only by an administrator? Where will it be kept? How will it be kept? What if some records cannot be updated with changing applications? Will there be a record of what was left behind for a digital archeologist to resurrect some day?

The drafters chose to be technology neutral and to leave it to the governments to find standards they wish to follow. The committee's notes reflect some concern that

being more prescriptive would raise unwelcome questions of cost. Precisely. Doing it right costs money that states may not have.

If the systems can be done cheaply, if not well, but be immunized from challenge, our system of laws is at greatest risk. Thinking digital is cheaper than print could cause even subdivisions and other creatures of the state — small towns, water boards, local courts, for example — to leap at the invitation, because UELMA protects them.

In fact, the standards in UELMA are too subjective to be standards at all.

Coming from the respected author of such pillars of state law as the Uniform Commercial Code and Uniform Probate

Code, UELMA will arrive at state capitals with an honored imprimatur. But thoughtful attorneys should take a hard look before endowing the proposal with the ABA's blessing.

What the drafters did was aspirational — a model to urge states to remember the need for authenticity, archives and security when moving materials to a digital platform. Drafters should go back and remove “uniform” from the draft, replace it with “model” and do more work to set measurable standards. Meanwhile, the states should look at UELMA's work. It states the right goals, even if it does not propose the right solutions.