

Lack of The \ Effort to Ensure Integrity and Trustworthiness of Online Legal Information and Documents

By Hon. Herbert B. Dixon, Jr.

As an unabashed promoter of technology in all facets of the business of courts, I was hesitant to write this article concerning a recent study that I had an opportunity to review. However, I am convinced that the time is ripe to make an assessment of how far we have come in the use of technology and the importance of the work left to be done. Therefore, even at the risk of giving aid and comfort to the enemies of technology advancement in the courts, I have chosen to sound the alarm. First, a little background may be helpful to the reader.

As more and more state and federal courts and administrative bodies have permanently moved toward institutional use of electronic filing and maintenance of documents and records, certain unaddressed and lurking issues have advanced to the forefront. The first of the lurking issues concerns whether the document or record received by electronic means is the same as the document or record transmitted. That is, has the submission been corrupted during the process of its uploading to the Web site or during

its transmission? It is possible for one to ask the same question in many different ways. Is the document that the court or agency received the same as the document that the filing party transmitted? Can we ensure that the order filed electronically by the judges is the same order received by the parties? Or is the version of the statute uploaded to the Web site the same as that enacted by the legislature? Until now, this concern has not commanded a significant part of our technical resources because there were relatively few instances, if any, wherein a legal document was intercepted during its transmission and substituted with an altered version of the original document.

The parallel issue of this concern is the long-term integrity of those same electronic documents. To what extent can we guarantee that a document in the official record has not been modified after it was posted online or entered into the database of the respective court or agency? What guarantee do we have that the document has not been altered since the date it was originally filed or posted? Until now, we have not been excessively concerned with fraudulent paper records, even though most of us in the legal profession can point to the occurrence of fraud concerning our trusted paper. Note the fiasco a few years ago about forged or fraudulent papers concerning President Bush's National Guard Service. And, although we have yet to achieve perfection concerning authentication and integrity issues involving paper documents, there is an accepted belief that we should pay more attention to fraudulent alteration of electronic records than we ever demonstrated

about our precious paper.

Courts and administrative agencies are not alone in their move to electronic storage of documents and records. This movement to electronic record keeping has occurred in nearly every segment of society, including government, private industry, and personal records. The concern about the integrity of electronic documents and records is not limited to courts and administrative agencies; however, the concern takes on special significance with these institutions because they are a primary repository for the storage of legal documents and information.

The American Association of Law Libraries (AALL) recently took up this concern in the form of a very comprehensive study entitled *State-by-State Report on Authentication of Online Legal Resources*.¹ According to the AALL, the study and report are intended to address the question How trustworthy are state-level primary legal resources on the Web? The study finds that state online resources are not authenticated and do not afford ready authentication by standard methods. Additionally, the AALL reports that only three of the state survey respondents expressed special concerns about authentication.² According to the study's conclusion, state online primary legal resources are not sufficiently trustworthy and the public may reasonably doubt their authority and should approach such resources critically. Whatever the reader's reaction to these startling conclusions, this writer is satisfied that the study is not a veiled effort to ensure job security of law librarians. The AALL study is a timely

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wake-up call for work that needs to be done to ensure the integrity and trustworthiness of electronically transmitted and maintained legal documents and information.

Obviously, the trustworthiness of electronically stored documents is fundamental to the trustworthiness of all legal documents, whether the documents are court records, court decisions, statutes, or administrative decisions or regulations. Indeed, the trustworthiness and integrity of resulting research are inherently a matter of great concern to anyone seeking legal information online. As the study describes its own function, it “examines the results of an online state survey that investigated which government hosted legal resources on the Web are *official* and capable of being considered *authentic*.”

The AALL study states a concern with the trustworthiness and reliability of legal information that is obtained from online sources because there is general acknowledgment that, as technology has improved, professional researchers and the public have evolved from reliance on print sources to online sources to access legal documents and information. According to the study, this evolution is a positive development, provided that the online sources are actually trustworthy. Trustworthiness necessarily implicates the twofold determination referenced earlier: first, that the information as uploaded online or as received by the court or administrative agency is an accurate and trustworthy rendition of what was actually submitted and, second, that the legal information electronically maintained online or in the databanks of the court or administrative agency is the same as initially submitted.

The AALL study points out that the trustworthiness of electronically stored information can be affected by lapses in management and control, corruption, and tampering and argues that, to be considered equivalent to print official legal resources, online legal resources must be authentic; that is, accurate replications of the original

legislative acts, municipal regulations, and court or administrative decisions. The study adopts the premise that since print official legal resources have generally served as a touchstone for authoritative and reliable statements of the law, then the designation of an official online resource and assurance of the authenticity of that resource would lead to a general acceptance of the accuracy and integrity of the online information on par with official print sources. The study notes that there are likely circumstances where a government entity might be concerned about the reliability and integrity of unofficial versions; however, the study itself adopts the definition that the term “authentic legal resource” generally pertains to official sources. For purposes of this article, this writer does not distinguish between official and unofficial and is focused strictly on issues related to authenticity, trustworthiness, and integrity of legal documents and information that are accessible online.

The AALL study started with a survey of the 50 states and the District of Columbia. The working definition of the term “official legal resource,” drawn from the latest editions of *Black’s Law Dictionary* and *Fundamentals of Legal Research* and adopted as a guide to survey participants, was as follows:

An official version of regulatory materials, statutes, session laws, or court opinions is one that has been governmentally mandated or approved by statute or rule. It might be produced by the government, but does not have to be.

After evaluation of the survey responses, the survey borrowed from the definition of terms contained in the *Authentication* white paper prepared by the U.S. Government Printing Office to outline that agency’s designs for a federal digital system to replace print government documents. That definition of an *authentic* legal resource reads:

An *authentic* text is one whose content has been verified by a government

entity to be complete and unaltered when compared to the version approved or published by the content originator. Typically, an *authentic* text will bear a certificate or mark that conveys information as to its certification, the process associated with ensuring that the text is complete and unaltered when compared with that of the content originator. An *authentic* text is able to be *authenticated*, which means that the particular text in question can be validated, ensuring that it is what it claims to be.

The study concludes that this concept of an authentic legal resource is especially suited to the digital world.

Some survey results were not especially surprising. For example, one of the findings in this category is that states have begun to discontinue print official resources and substitute online official legal sources. Indeed, according to the study, ten states³ and the District of Columbia have deemed as official one or more of their online primary legal resources and five of those states⁴ have declared the online versions of legal resources a substitute for a print official source. The concern expressed by the study is that not one of the substitute online legal sources is capable of being considered authentic. In one state, New Mexico, the first official administrative code is its online publication, although an unofficial version is commercially published in traditional print form. In another state, Utah, the sole official version of the state’s statutes is on the Web.

Another concern expressed by the study is that the states, in their move to promote unofficial online legal resources, have not recognized the public need for accurate legal information by their extensive use of disclaimers concerning their accuracy and reliability. Indeed, according to the study, some online official legal resources also make such disclaimers and that this prevalent use of disclaimers is contrasted with the very limited use of similar disclaimers for official and unofficial print titles.

Although both government and commercial entities have long recognized that digital materials are vulnerable to lapses in management and control, corruption, and tampering, the study notes that publishers simply have not taken the extra steps needed to put online legal resources on the same footing as print. This is so even for publishers of online official legal resources. According to the study, this failure represents a serious neglect of the needs of citizens and law researchers seeking government information, who obviously seek accurate and reliable information and documents.

The AALL study supports the proposition that the time has arrived to use available technological capabilities to ensure the reliability, integrity, and trustworthiness of information and documents that are electronically transmitted and maintained. This writer agrees. While a few well-known instances of chicanery and fraud can fuel a healthy debate about whether the greater reliability of a paper document compared to an electronic document is more perception than reality, that does not change the fact that society is generally satisfied with the trustworthiness of print sources for legal documents and information as compared to the electronic counterpart.

With the advent of electronic filing and maintenance of legal documents and information,⁵ a requirement to use only the most secure forms of electronic transmission and storage of legal documents and information would have stymied the growth and development of the electronic process as an alternative to the old processes for transmitting and storing paper that society deemed reliable. Now, however, society's infrastructure, the way the public does business on a daily basis, is more accepting of the need to use more secure features for electronic transmission and storage of legal documents

and information. According to the AALL study, it is time to change the prevalent approach of "that's good enough" as related to the transmission and storage of online legal information.

Although the study does not offer specific solutions to the online document integrity issues, the good news is that most concerns about the integrity of electronic documents and information can be addressed effectively and within a reasonable budget. For example, courts and government agencies can maintain the integrity of electronically transmitted and stored documents by complying with Federal Information Processing Standard Publication (FIPS PUBS) 200 or its successor.⁶ Federal Information Processing Standards are issued by the National Institute of Standards and Technology (NIST) after approval by the Secretary of Commerce pursuant to the Federal Information Security Management Act (FISMA) of 2002. FIPS PUBS 200 sets forth the minimum security requirements for federal information and information systems. Federal agencies must meet the minimum security requirements as defined in FIPS PUBS 200 through the use of the security controls in accordance with NIST Special Publication 800-53, Recommended Security Controls for Federal Information Systems, as amended.

In February 2004, the ABA House of Delegates approved Standard 1.65, Court Use of Electronic Filing. The standard included both practical and aspirational provisions. However, with technological advances, as demonstrated by the AALL study, even the aspirational provisions of that 2004 standard should now be considered as necessary best practices. The standard addresses the issue of integrity and trustworthiness of electronically transmitted and stored information in a way that we should heed today. Electronic transmission and storage systems

... should include robust security features to ensure the integrity, accuracy, and availability of the information contained in them. They should include, at a minimum, document redundancy; virus protection software; firewalls, intrusion detection systems, authentication and authorization features; plans for system archival, contingency, and disaster recovery; and other generally accepted security features to detect and prevent attempts by unauthorized persons to gain access to or modify court records; system audit logs; secured system transmissions; privilege levels restricting the ability of users to create, modify, delete, print or read documents and data; means to verify that a document purporting to be a court record is in fact identical to the official court record; and reliable and secure archival storage of electronic records in inactive or closed cases.⁷

The AALL study is convincing that the time is now to implement these steps to ensure the integrity and trustworthiness of online legal information. ■

Endnotes

1. The American Association of Law Libraries (AALL) was founded in 1906 to promote and enhance the value of law libraries to the legal and public communities. Its Web site is located at <http://www.aallnet.org/>. The referenced AALL study is available to the public at http://www.aallnet.org/aallwash/authen_rprt/AuthenFinalReport.pdf.

2. Minnesota, Virginia, and Vermont.

3. Alaska, Indiana, Maryland, Michigan, Minnesota, New Mexico, New York, Tennessee, Utah, and Virginia.

4. Alaska, Indiana, New Mexico, Tennessee, and Utah.

5. The State of Delaware implemented the first court electronic filing project on December 9, 1991, using a proprietary system called the Complex Litigation Automated Docket, or CLAD.

6. Federal Information Processing Standard (FIPS) 200, Minimum Security Requirements for Federal Information and Information Systems, may be found at <http://csrc.nist.gov/publications/fips/fips200/FIPS-200-final-march.pdf>.

7. ABA Standard 1.65(a)(xiv).