

# EXECUTIVE SUMMARY

## How trustworthy are state-level primary legal resources on the Web?

The *State-by-State Report on Authentication of Online Legal Resources* is essentially an answer to that question. The report and the Authentication Survey on which it is based investigate which government-hosted legal resources on the Web are *official* and capable of being considered *authentic*.

The Authentication Survey investigated six sources of law: state administrative codes and registers, state statutes and session laws, and state high and intermediate appellate court opinions. The summary answer to the question of their trustworthiness is:

**A significant number of the state online legal resources are *official* but none are *authenticated* or afford ready authentication by standard methods. State online primary legal resources are therefore not sufficiently trustworthy. Citizens and law researchers may reasonably doubt their authority and should approach such resources critically.**

The emergence of online *official* legal resources is a positive development, providing that the publications are actually trustworthy. To be trustworthy, digital materials – vulnerable to lapses in management and control, corruption, and tampering – must be equivalent to print *official* legal resources. To be equivalent, they must be *authentic*. Some states cast online legal resources in a facilitative role, intending citizens and law researchers to use such materials as a means to identify law they must take steps to verify elsewhere. This is a misleading and self-defeating role for government information. As fully demonstrated in the detailed findings, some online sources now replace print *official* legal resources. For the states to rely on an approximation of the law – even one “good enough” most of the time – completely fails in its role where the online source is the sole *official* statement of the law and is not authenticated.

## Definition of Online *Official* Legal Resource

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An online *official* legal resource is one that possesses the same status as a print *official* legal resource. The concept of an *official* legal resource applied to print publications is well established. Print *official* legal resources have generally served as a touchstone for authoritative and reliable statements of the law.

The working definition of *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, reads:

**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.** (Instructions for Completing the Survey Form and Summarizing the Situation in your State, reproduced as Appendix D-2.)

This definition is firmly rooted in the print world. Now, however, the survey results make it evident that the very concept of an *official* legal resource fits print much more easily than online sources of law. Insofar as courts and public officials turn to *official* legal resources for authoritative and reliable statements of the law and require citation to such sources in the documents that come before them, the operative element of *authenticity* is implicit in the definition. The fixed nature of the print medium, coupled with the paper publication's multiple copies and wide distribution, ensures that the print *official* legal resource, as "governmentally mandated or approved by statute or rule," is an *authentic* resource. An online *official* legal resource offers no such automatic assurance.

## Definition of Online *Authentic* Legal Resource

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The Authentication Survey investigated the *authenticity* of online legal resources as a separate and distinct question – as, indeed, a complete analysis requires. 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 (*see* Appendix C). The Authentication Survey's working 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.** (Instructions for Completing the Survey Form and Summarizing the Situation in your State, reproduced as Appendix D-2.)

This concept of an *authentic* legal resource is especially suited to the digital world. It contemplates encryption-based authentication methods, especially digital signatures and public key infrastructure. The concept of an *authentic* text as one "able to be *authenticated*" broadens the definition to include technologies or practices beyond digital signatures and public key infrastructure. The definition clearly recognizes that online legal resources are inherently capable of being corrupted or tampered with at the level of

the individual copy. In that respect, online legal resources are fundamentally different from print legal resources.

In the broadest sense, an online legal resource capable of being considered *authentic* is one that is *authenticated* or clearly possesses characteristics that would readily allow it to be *authenticated* by a recognized authentication process. An *authenticated* resource is one shown to be a complete and unaltered version of an approved text.

Appendix B provides definitions for “encryption,” “digital signature,” “public key infrastructure,” “digital watermarking,” and various terms related to computer-based technologies and practices that readily allow online legal resources to be *authenticated*. Going beyond this, the Authentication Survey approached the issue of authentication without preconceptions. The analysis centered on what authentication technologies or practices each state may use or be considering. It also inquired into “chain of custody” information as very basic evidence of procedures for data handling that would contribute to online resources being *authenticated* by other than purely technological means.

One basic prescription appears to be warranted: The approved text of an *authenticated* legal resource on the Web *should* be the *official* version of the online source. While there may be circumstances where a state would be concerned to preserve *authentic* unofficial versions (*e.g.*, original court slip opinions superseded by the final *official* version), the concept of *authentic* legal resources generally pertains to *official* sources.

## Inductive Approach to Survey

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The overall approach of the Authentication Survey has been inductive. Rather than begin by investigating what laws or rules would likely support a court or other formal determination that a particular online resource is *official* or *authentic*, the Authentication Survey collected evidence of what resources officials and others consider *official* or *authentic*. Using deductive methods to start from sources of law that *might* lead researchers to identify resources that now form an acknowledged category of online materials was not a viable approach.

What is considered *official* or *authentic* formed the starting point leading to further inquiry and analysis as to what statutes, court rules, administrative regulations, and other factors support or inform what is considered *official* and *authentic*.

A number of the states express unequivocally on their Web sites that the online legal resources are *official*. Online sources that now substitute for discontinued print *official* resources typically indicate they have *official* status. Officials responsible for online publications often demonstrated an informed understanding and conviction that particular online sources have *official* status.

At the same time, no definite laws or rules state that particular online legal resources are entitled to judicial notice and other recognition as authoritative statements of the law.

Statutes are sometimes unclear as to whether they apply to both print and online versions of legal resources or to print alone.

## Key Findings of the Authentication Survey

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Summaries of the six Key Findings of the Authentication Survey follow. A discussion is included of deficiencies in current approaches to state dissemination of legal resources on the Web.

**KEY FINDING 1: *States have begun to discontinue print official legal resources and substitute online official legal sources.***

Ten states, plus the District of Columbia, have deemed as *official* one or more of their online primary legal resources. This is fully discussed under Key Finding 2. Five of these ten states – Alaska, Indiana, New Mexico, Tennessee, and Utah – have declared the online versions of legal resources a substitute for a print *official* source. The online resource is, therefore, the sole *official* statement of the law. This is a very significant concern to law librarians and the legal community. None of the substitute online legal sources is capable of being considered *authentic*.

The discontinuation of print in favor of online sources has occurred principally with state administrative registers (Alaska, Indiana, Tennessee, and Utah) and state administrative codes (Indiana, Tennessee, and Utah). The first *official* administrative code for New Mexico is its online publication; the sole print unofficial version is commercially published. The sole *official* version of the Utah statutes is on the Web.

This section of the detailed findings (pp. 33-37) analyzes the situation in the five states where online versions of legal resources are the sole *official* source of the information. *Official* resources demand authenticity. The disappearance of print *official* legal resources without an authentic online substitute critically erodes the bedrock of trustworthy statements of the law.

**KEY FINDING 2: *Ten states & D.C. have deemed as official one or more of their online primary legal resources.***

Ten states – Alaska, Indiana, Maryland, Michigan, Minnesota, New Mexico, New York, Tennessee, Utah, and Virginia – plus the District of Columbia, have made twenty-three sources of law available in online repositories that are considered *official*. The analytical table in Appendix A gives a source-by-source account of how the six sources for each state are distributed among separate *official* repositories.

Online legal resources that unequivocally state they have an *official* status based on a specific corroborative statute could be said to be *official* sources about which we are the most confident. We found no such absolutely explicit online *official* source. Indiana's

online *official* administrative code and administrative register may be thought to be among the closest contenders. They state they are *official* and their status is based on a corroborative statute. They do not themselves state they are *official* on the basis of that statute, however, and their declaration is not especially prominent on the Web site or in its documentation.

This section of the detailed findings (pp. 37-48) examines the use of the term “official” on state Web sites declaring the official status of online legal resources. It distinguishes between unequivocal representations of that status and statements requiring additional corroboration. The section also examines several resources deemed as official without so stating.

**KEY FINDING 3:** *One or more of the online primary legal sources of eight states have “official traits,” where evidence as to the actual status of the resources is conflicting.*

Eight states – Alaska, California, New Jersey, Ohio, Texas, Utah, Vermont, and Virginia – plus the District of Columbia, are responsible for sixteen sources of law that are inchoate as *official* resources or unresolved as to their official or unofficial status. These inchoate and unresolved sources fall into the category we label “O traits” or “official traits.”

Such resources are vexing to citizens and law researchers. The “O traits” or “official traits” category of online legal resources is contentious. It would be reasonable to assert that any resource that is not *official* is simply unofficial. Nonetheless, recognizing this category helps highlight certain confusing situations we examined that involve “official traits” of legal resources. It signals a need for statutory reform or changes in state policies and practices.

We find the “official traits” category is warranted for resources where a state has intended to create an online *official* legal source but a definite impediment has blocked its realization. Additionally, we find the category is warranted where states have failed to recognize the consequences of steps taken in making a legal resource available on the Web. This characterizes situations where a mismatch exists between applicable statutes and the state’s implementation, or where statutory provisions themselves are ill-coordinated. Intentions of those responsible for the resources may be unclear and steps with confusing consequences may have been taken.

This section of the detailed findings (pp. 48-55) examines the variety of situations where online resources fall into the “official traits” category. In some states, various issues with the statutes that create particular online legal resources are responsible for the “official traits” status. In other states, evidence beyond the underlying statutes is examined. Users tend to be misled or confused by resources falling in the “official traits” category. Online resources within this category deserve the states’ immediate corrective attention.

**KEY FINDING 4: *States have not acknowledged important needs of citizens and law researchers seeking government information; they have not been sufficiently deliberate in their policies and practices.***

The representations and disclaimers made by online legal resources were a starting point for the Authentication Survey's investigation of official or unofficial status. Online legal resources that disclaim *official* status often make extensive disclaimers concerning their accuracy and reliability. Online *official* legal resources also sometimes make such disclaimers. The prevalent use of disclaimers – which may be contrasted with very limited use of disclaimers for official and unofficial print titles – points to fundamental differences between online and print media.

Publishing entities, both government and commercial, have long recognized that digital materials are vulnerable to lapses in management and control, corruption, and tampering. Through extensive use of disclaimers, publishers have avoided steps needed to put online legal resources on the same footing as print. This is so even for publishers of online *official* legal resources. This failure represents a serious neglect of the needs of citizens and law researchers seeking government information. It is axiomatic that persons using legal resources seek trustworthy – *official* and *authentic* – government information without reservations concerning how online versions relate to authoritative originals, transcription accuracy, completeness, and currency.

Beyond fundamental problems concerning use of disclaimers, states generally have not been sufficiently deliberate in their policies and practices affecting the authority of online legal resources. States need to deliberate some very practical issues, including:

- Should the title of the online source be identical to the print version?
- What features and formatting of the online publication would best serve applicable citation systems?
- Should formatting of online sources correspond to their print counterpart?
- Should updating for an online source occur more frequently than the print version?
- How are any differences as to currency and other essential features best communicated?
- How is the official or unofficial status of the online source best communicated?

There are some overarching structural concerns as well:

- How might maintenance of online legal resources be integrated into the flow of administrative, legislative, and judicial activity generating the law?
- What systems best reflect the natural life-cycle of legal information?
- What processes ensure permanent public access?

This section of the detailed findings (pp. 55-65) examines the states' use of formal representations and disclaimers in detail. It also provides a comprehensive list of practical concerns required to make online sources serve as improved or, at least, adequate substitutes for print *official* legal sources and to meet important needs of citizens and law researchers (pp. 56, 64-65).

**KEY FINDING 5: *No state's online primary legal resources are authenticated or afford ready authentication by standard methods.***

The Authentication Survey analysis found, unfortunately, that it is sometimes difficult to know with certainty whether an online legal resource is *official* or not. The report examines statutes responsible for online *official* legal resources. It demonstrates that the concepts of *official* status and *authenticity* of online legal sources are inextricably interrelated. Our understanding of the relationship is this: An online *official* legal resource is one that possesses the same status as a print *official* legal resource. The essential means to ensure the online legal resource is equal to the print *official* source is to ensure the online resource is *authenticated* or affords ready authentication by standard methods.

No state's online primary legal resources are *authentic* – meaning that none of those resources are *authenticated* or afford ready authentication by standard methods. 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.” It bears a certificate or mark as proof of its certification, “the process associated with ensuring the text is complete and unaltered” from the original. An *authentic* text is able to be *authenticated*, “ensuring that it is what it claims to be.”

This section of the detailed findings (pp. 65-69) examines three states – Minnesota, Virginia and Vermont – identified by the state authors as addressing in some way the authentication of online legal resources. These states have a heightened awareness of the need to *authenticate* online resources but none has implemented a proper means to authenticate digital content. At least eight other states – Alabama, Arkansas, Connecticut, Maryland, Montana, Ohio, South Carolina, and Tennessee – potentially perceive authentication or its absence as a specific concern warranting attention.

**KEY FINDING 6: *Eight states have provided for permanent public access (PPA) to one or more of their online primary legal resources.***

Eight states – Alaska, California, Indiana, Minnesota, Ohio, Pennsylvania, Texas, and Utah – have afforded thirteen sources of law permanent public access. Permanent public access (PPA) is a policy and practice that ensures “applicable government information is preserved for current, continuous and future public access.” See GOV'T RELATIONS

COMM. & WASH. AFFAIRS OFFICE, STATE-BY-STATE REPORT ON PERMANENT PUBLIC ACCESS TO ELECTRONIC GOVERNMENT INFORMATION 2 (2003).

For five of these states – Alaska, Indiana, New Mexico, Tennessee, and Utah– the online versions of legal resources substitute for a print *official* source. Where the online source is the sole *official* statement of the law – as it is in these five states – those digital materials demand safeguards that ensure permanent public access. While relatively few online legal resources are afforded PPA, disappearing print has prompted affected states to address PPA.

The analytical table in Appendix A shows that most states that substitute online *official* legal resources for discontinued print have begun to provide for the long-term accessibility and preservation of those online sources. Three of four states – Alaska, Indiana, and Utah – that have discontinued print *official* administrative registers afford PPA for the online resource. Tennessee does not. The situation with discontinued print *official* administrative codes is less optimistic. Utah affords PPA for its online *official* administrative code but Indiana and Tennessee do not. New Mexico does not afford PPA for its sole online *official* administrative code.

This section of the detailed findings (pp. 69-73) describes efforts by these states and several others to enact statutes or implement reasonably secure policies and practices to address the permanent public access of these legal resources.

## Conclusion

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The Authentication Survey’s findings point to a critical need for action on the part of state legislators and government officials. The detailed findings of this report provide guidance for revising existing laws and, at the administrative level, adjusting policies and practices to ensure each state’s publicly available legal resources on the Web are authoritative and reliable. The need is particularly acute for those online legal resources that replace discontinued print *official* sources and are now the sole *official* published source of the information.

The Survey found that online legal resources are increasingly the sole *official* published source. Laws addressing those resources and other online *official* sources are seriously deficient, failing to require certification as to completeness and accuracy for online resources comparable to that required for print *official* sources. Moreover, those laws fail to recognize the authentication linchpin, essential to online *official* sources, tying together their official status, their certification or other formal endorsement, and their judicial and administrative recognition as authoritative and reliable statements of the law.

Official status demands appropriate authentication procedures. Standard methods of authentication may include encryption, digital signatures and public key infrastructure but other methods to adopt best practices are also possible. Certification or other types of formal endorsement of legal resources are a vital link in the “chain of custody” involved

in dissemination, maintenance, and long-term preservation of digital materials. That chain may contain a link to computer technologies that guarantee the very copy delivered to one's computer screen is uncorrupted and complete or it may be part of other archival methods.

The fundamental trustworthiness of online legal information is not the only concern, however. Fully recognizing the needs of citizens and law researchers related to the authority of online legal resources necessitates that the states take action to make online sources serve as improved or, at least, adequate substitutes for print *official* legal sources. This means that the states think through a number of practical matters, particularly their use of disclaimers. The detailed findings discuss issues relevant to the *authenticity* and authority of online legal resources, as measured against print *official* sources.

The *State-by-State Report on Authentication of Online Legal Resources* raises concerns that need to be addressed by the states both as high-level policy decisions and practical matters. The American Association of Law Libraries hopes that it will serve as a guide for the states to correct smaller-scale deficiencies in their current dissemination of online legal resources and to initiate long-term progress toward the all-digital legal information environment that will enhance each state's fundamental interaction with its citizens.