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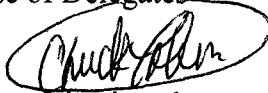
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MEMORANDUM

TO: Members, ABA House of Delegates

FROM: Charles D. Tobin 
Chair, Forum on Communications Law

DATE: February 1, 2012

RE: Uniform Electronic Legal Material Act

I write in my capacity as Chair of the American Bar Association Forum Committee on Communications Law (the "Forum").

The Forum only recently learned that the American Bar Association House of Delegates will consider the Uniform Electronic Legal Material Act (the "UELMA") at its February meeting. The Governing Committee of the Forum promptly appointed a committee to study the UELMA and to make a recommendation as to whether the House of Delegates should endorse this proposed uniform law. Because the Forum has considerable experience and expertise with respect to issues that touch upon public access to governmental decision-making, it seemed appropriate—indeed, important—for the Forum to offer its thoughts about the UELMA to the House of Delegates.

The Forum strongly recommends against endorsement of the UELMA. The Forum believes that, in its current form, the UELMA raises a number of significant concerns. A brief discussion of our two principal concerns follows.

First, until the well-documented "digital divide" that exists within this country is significantly narrowed, adoption of the UELMA would frustrate public access to critical governmental materials. At present, access to, sophistication regarding, and use of computers and online resources is troublingly unequal across economic, racial, ethnic, geographic, and generational lines. Under current social conditions, a state that decides to rely exclusively on online platforms for access to its primary sources of legal authority will immediately disenfranchise a portion of its population.

Second, the UELMA itself flags a serious access problem that would result from moving these governmental materials online, but does not adequately address or resolve that issue. The UELMA Prefatory Note recognizes that the preservation of legal information with "long-term, historical value" is a "critical consideration" here. The Prefatory Note cautions that "Electronic legal information of long-term value must be preserved in a usable format. Unfortunately, few states have addressed this critical need, and fewer still have an infrastructure in place to monitor older data and keep their storage methods up-to-date." Unfortunately, as a result of its outcomes-based approach, the UELMA does not (a) specify a method of preservation that allays these concerns; (b) set sufficiently precise criteria for assessing various methods of preservation; or (c) require the maintenance of printed versions of these materials—even though the Prefatory Note appears to acknowledge that these preservation issues could be ameliorated through the simple expedient of also producing and keeping printed copies. The UELMA does not provide adequate assurances that valuable materials will be preserved, and the proposal thereby imperils public access to "critical" information.

The Forum is aware that others have expressed additional concerns, such as whether the UELMA adequately addresses authenticity issues and whether the evidentiary presumption embodied in the UELMA is sensible and fair. The Forum joins in those concerns. Because the access problems created by the UELMA most clearly fall within our bailiwick, however, we have focused our objections there.

For these reasons, the Forum respectfully urges the House of Delegates to decline to endorse the UELMA at this time and as currently written. Please do not hesitate to let me know if the Forum can provide any further information on this issue.