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## E-Filing: Entering the Electronic Age—Part I

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## **E-Filing: Entering the Electronic Age—Part I**

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## THE SCRIVENER: MODERN LEGAL WRITING

# E-Filing: Entering the Electronic Age—Part I

by K.K. DuVivier

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*Writing has changed more in recent decades than in any other period in the past few centuries. In other eras, when the pace of life was slower, writing could be more stylized and pieces longer. Now attention spans have shortened, and communicators have to get to the point far more quickly than they once did. . . .<sup>1</sup>*

In the seventh century A.D., the English language experienced a transformation, shifting from an oral tradition to written form.<sup>2</sup> This shift altered the way people received and processed information: communication turned from word-of-mouth to lines of words preserved on a page.

With today's communication converting from paper to electronic format, we are living in an age of transformation as well. This shift will metamorphose the way lawyers and judges read—and write—legal documents.

### Electronic Filing in Colorado

Colorado state courts are on the cutting edge with respect to electronic filing ("e-filing"). Colorado is one of the first states to enact "E-Record" legislation,<sup>3</sup> and all district courts in Colorado have e-filing capability for the civil, probate, domestic, and water divisions.<sup>4</sup> In addition, as of the summer 2003, the following Colorado courts mandated e-filing: the Probate Court in Denver;<sup>5</sup> Seventeenth Judicial District Court for Broomfield County (domestic, probate, and civil cases); Twentieth Judicial District in Boulder (civil cases);<sup>6</sup> and Civil Division 206 Court in Arapahoe County (domestic, probate, and civil cases).<sup>7</sup>

The Colorado appellate courts are fast following in the district courts' electronic footsteps. At the April 2003 meeting of the Colorado Bar Association ("CBA") Appellate Practice Subcommittee, John Doerner, the Clerk of the Colorado Court of Appeals, announced that more than 119 appellate cases already have been designated as electronic records cases through a pilot

project between the Court of Appeals and Arapahoe County.<sup>8</sup> Doerner provided the group with information about preparing and filing electronic briefs for the Colorado Court of Appeals.

Although the Tenth Circuit Court of Appeals and U.S. District Court for the District of Colorado do not yet have an e-filing and case management system, the Administrative Office of the U.S. Courts announced that all federal courts would have such systems by 2005.<sup>9</sup> At present, e-filing systems are being established in more than 102 federal courts, and an additional nine courts are added to the total every two months.<sup>10</sup>

### Reading Paper Versus Electronic Documents

While novels are read for pleasure, judges read briefs with a single-minded purpose: they are seeking assistance in making a sound judicial decision. Most of us approach novels from start to finish, using a sequential and linear reading model.<sup>11</sup> Playful or poetic word constructions, mysteries and twists in the plot, and delicious details all can be an intended part of the novel experience.

In contrast, a brief is a utilitarian document, and busy judges want from a brief "exactly the material needed for the decision—not less and not more."<sup>12</sup> Thus, judges and other experienced legal readers approach a brief or judicial opinion quite differently from a novel. Instead of reading word-for-word sequentially, many judges skim portions of a brief and concentrate on other portions. They may skip around to confirm the

#### DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the *Scrivener* column. Send your questions to: [kkdುವಿವಿ@law.du.edu](mailto:kkdುವಿವಿ@law.du.edu) or call her at (303) 871-6281.



*K.K. DuVivier is an Assistant Professor and Director of the Lawyering Process Program at the University of Denver College of Law.*

analysis or any gaps in the reasoning, and they may backtrack to focus on key concepts.<sup>13</sup> This legal reading process may be closer to the “snatch and grab” approach used by many readers of electronic materials,<sup>14</sup> yet a purely electronic format will further alter the process of digesting the information.

E-filing will permit the use of hypertext links in legal materials. Briefs on paper may contain footnotes or appendices that interrupt the linear reading process, but a good legal writer keeps readers focused and relegates these interruptions to a minimum.<sup>15</sup> In contrast, hypertext links in an electronic environment place greater emphasis on these types of asides and convert the process of taking in information. In the electronic environment, “the reading process is often referred to as ‘browsing’ or ‘navigating’ instead of just ‘reading.’”<sup>16</sup> Thus, electronic readers “feel that they can move freely through the information, according to their own needs.”<sup>17</sup> The hypertext links allow these readers to break away from “the sequential process envisioned by conventional text.”<sup>18</sup> Instead, reading can become “a discontinuous or non-linear process” more “like thinking [which] is associative in nature.”<sup>19</sup>

## Writing with the Hypertext Link

While it may seem liberating for electronic readers to follow a link or not, thus taking control over the order in which they process information in a brief, this freedom creates a dilemma for writers. Carefully constructed arguments that move through a deductive pattern of general to specific may be lost if readers are too distracted by the associative links. Thus, the pressure to hold readers’ attention places a higher premium on how writers present the argument.

Eventually, briefs may take on a form much like online newsletters, starting with a home page that is something like a “clickable” table of contents,<sup>20</sup> allowing readers to follow whichever path they wish to pursue. However, writers need not surrender so much to the electronic format. Because hypertext links can disorient, readers appreciate context and a logical sequence.<sup>21</sup> Fortunately, many of the techniques for providing context and a logical sequence on paper should translate well to electronic format.

Use thesis paragraphs as roadmaps to communicate the major concepts and provide context.<sup>22</sup> Both large and small-scale arguments should be constructed to flow in a logical sequence, with the information that comes first providing context for information that follows.<sup>23</sup> In addition, the temptation to diverge into a hypertext link will be diminished if references are specific enough for readers to follow the argument<sup>24</sup> without clicking on the link. Finally, readers may be less tempted to stray if text is clear and succinct.

## Conclusion

This column has focused on Colorado’s conversion to e-filings and how that conversion may change the ways legal readers and writers construct briefs. The next “Scrivener,” to be published in the November 2003 issue, will address some of the physical considerations surrounding electronic briefs and the advantages of accessing records or legal authorities with a single mouse click.

## NOTES

1. Stark, *Writing To Win: The Legal Writer*, xiv-xv (Mansfield, OH: Main Street Books, 1999).
2. *The Norton Anthology of English Literature*, Vol. 1 (New York, NY: W.W. Norton & Co., Inc., 1968) at 4.
3. Gorrell and Kamicar, “Colorado Launches E-Recording,” 31 *The Colorado Lawyer* 21 (Dec. 2002). In the 2002 legislative session, Colorado enacted the Uniform Electronic Transactions Act and the E-Record bill. See CRS §§ 30-10-405.5 *et seq.*, CRS §§ 12-55-102 *et seq.*, and CRS §§ 24-71.3-101 *et seq.*
4. See <http://www.courts.state.co.us/exec/media/pressrelease/efilings.doc> and [http://www.courts.state.co.us/supct/rules/2003/2003\(8\).doc](http://www.courts.state.co.us/supct/rules/2003/2003(8).doc) (adopted April 17, 2003, by the Colorado Supreme Court, *en banc*, with the exception of Justices Rice and Coats). Also confirmed with Steve Loftus, Office of the State Court Administrator.
5. See <http://www.courts.state.co.us/district/02nd/probate/mandated-e-filing.htm>.
6. See <http://www.courts.state.co.us/district/20th/efilingpacket.pdf>.
7. <http://www.courts.state.co.us/district/18th/arapahoeefileorder.pdf>.
8. <http://www.courts.state.co.us/coa/clerkofthecourt/elecbriefpilot.htm>.
9. Nelson and Simek, 26 *Wyoming Lawyer* 25 (April 2003).
10. *Id.* (The 102 courts referenced include 71 bankruptcy courts and 31 district courts.)
11. See Sutherland-Smith, “Weaving the Literacy Web: Changes in Reading from Page to Screen,” *Reading Teacher* (April 2002).
12. Neuman, Jr., *Legal Reasoning and Legal Writing: Structure Strategy and Style*, 4th ed. (New York, NY: Aspen Law & Business, 2001) at 52.
13. Stratman, “Investigating Persuasive Processes in Legal Discourse in Real-Time: Cognitive Biases and Rhetorical Choices in Briefs,” 17 *Discourse Processes* 1 (1994).
14. Sutherland-Smith, *supra*, note 11.
15. DuVivier, “The Footnote=An Interruption,” 26 *The Colorado Lawyer* 47 (May 1997).
16. Perez Crist, “The E-Brief: Legal Writing for an Online World,” 33 *New Mexico Law Review* 49, 69 (2003) (citing Rouet *et al.*, eds., *Hypertext and Cognition* 14 (Hillsdale, NJ: Lawrence Erlbaum Assocs., Inc., 1996)); Nielsen, *Multimedia and Hypertext—The Internet and Beyond* (San Diego, CA: Academic Press, 1995) (also citing Britton and Glynn, eds., *Computer Writing Environments: Theory Research and Design* (Hillsdale, NJ: Lawrence Erlbaum Assocs., Inc., 1989); Charne, “The Effect of Hypertext on Processes of Reading and Writing,” in Selfe *et al.*, eds., *Literacy and Computers—The Complications of Teaching and Learning with Technology* (New York, NY: Modern Language Association of America, 1994).
17. Rouet, *cited in* Perez Crist, *supra*, note 16.
18. Slatin, “Reading Hypertext; Order and Coherence in a New Medium,” Delany and Landow, eds., *Hypermedia and Literary Studies* 158 (Cambridge, MA: MIT Press, 1991), *cited in* Sutherland-Smith, *supra*, note 11.
19. Slatin, *supra*, note 18.
20. Perez Crist, *supra*, note 16 at 71.
21. Berk and Devlin, eds., *Hypertext/Hypermedia Handbook* (New York, NY: McGraw-Hill, 1991), *cited in* Perez Crist, *supra*, note 16 at 70.
22. DuVivier, “Road Maps,” 22 *The Colorado Lawyer* 25 (Jan. 1993).
23. DuVivier, “Getting Organized,” 20 *The Colorado Lawyer* 1399 (July 1991).
24. DuVivier, “Cross-References, As Stated Above,” 30 *The Colorado Lawyer* 87 (July 2001). ■



# HISTORICAL PERSPECTIVES

## Turbulence a Mile High: Equal Employment Opportunity in the Colorado Sky

*This historical perspective was written by Tom I. Romero II, Western Legal Studies Fellow, University of Colorado at Boulder: ttromero@colorado.edu.*

In 1957, Captain Marlon Green, a distinguished pilot in the U.S. Air Force's Air-Sea Rescue Service, decided he wanted to fly large passenger airplanes. Green subsequently traveled to San Francisco, Chicago, New York, Washington, D.C., and Denver in quest of work as a pilot for the nation's major air carriers. In every instance, Green's superior credentials and experience seemingly held little significance. Despite exemplary service to his country, Green discovered that several air carriers, including Denver-based Continental Air Lines ("Continental"), had rejected his application.

What made Green's experience peculiar, but not all that out of the ordinary, was the fact that he was African American. During the 1950s, no major airlines in the United States employed black aviators. Some airlines argued this was due to the lack of experienced and qualified African American pilots. Others believed that co-workers or paid customers would not accept a black aviator. To challenge such beliefs, Colorado legislators passed increasingly strong fair employment legislation during the 1950s. By 1957, Colorado had one of the most far-reaching civil rights laws in the nation. [CRS 53, §§ 80-24-1 *et seq.*]

Green's experience with Continental seemed an especially clear expression of discrimination. After the company invited Green to Denver for an interview and flight test, the flight instructor remarked that Green was the "first Negro pilot who ever applied to his company" and, subsequently, he asked Green to complete his application by stating his race on the application form. [*Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 355 P.2d 83 (Colo. 1960) at 55-60.] After the interview, Continental chose not to select Green for its pilot training program, despite the fact that he had substantially more flight time on a multi-engine aircraft than any of the four white candidates selected. Consequently, Green relied on Colorado's nascent civil rights infrastructure for a redress of his grievances.

After extensive hearings, the Colorado Anti-Discrimination Commission ("Commission") found Continental guilty of racial discrimination and ordered the company to give Green the first opportunity to enroll in Continental's pilot training school. [Civil Rights Comm'n Hearing Case Files Record #83-376, Box 109904.] Continental, represented by the Denver firm of Holland and Hart, appealed the ruling to Denver's District Court. In his analysis of the case, Judge William Black vocally denounced the form and manner of the Commission's order and eventually held that Colorado's 1957 civil rights statute was an unconstitutional burden on interstate commerce and was preempted by, among other things, several federal acts and Executive Order No. 10557. [Trial transcript, appellate record, *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, Civ.Act. No. B-29648 (June 25, 1959).]

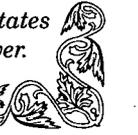
A divided Colorado Supreme Court upheld Judge Black's opinion. An effectual fair employment law seemed to be a lost cause. Not long after, however, the U.S. Supreme Court decided to take up the Commission's appeal due to the "the obvious importance" of Colorado's civil rights law. In a case that involved as *amicus curiae* the NAACP, Colorado and national branches of the ACLU, the Anti-Defamation League of B'Nai Brith, American Jewish Congress, Department of Justice, and the attorneys general of several states, Green's complaint had national ramifications.

The U.S. Supreme Court overruled the Colorado high court. It held that Colorado law was not preempted by either the letter or spirit of non-discrimination covered by federal legislation and executive acts. [372 U.S. 714 (1963).] On remand, Continental was compelled to hire Green. After seven years of litigation, Green became the first African American in the United States to be employed as a pilot by a major commercial air carrier.

Green's legal struggles heralded a new era in Colorado employment law. One commentator observed in 1969: "This case, as much as any other . . . put employers on notice that in Colorado fair employment is more than just a mere statement of policy." [Penwell, "Civil Rights in Colorado," 40 *Denver L.J.* (Spring 1969) at 189.] Moreover, Colorado's anti-discrimination statutes and subsequent interpretation by state courts posited human rights found in such legislation as a basic privilege of American life. Colorado Supreme Court Justice Otto Moore, in describing the Court's analysis of Colorado's 1959 fair housing law, stated: ". . . there are fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitutions." [*Colorado Anti-Discrimination Comm'n v. Case*, 380 P.2d 34, 39 (Colo. 1962).] Indeed, Coloradans increasingly asserted these rights with various degrees of success in the second half of the twentieth century.

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*Green's complaint to the Commission provided the Colorado Bar an unprecedented opportunity to "make" national civil rights law in the 1950s and 1960s. Internal and public debates examining the scope and legality of Colorado's Civil Rights Acts can be found in the Commission's files at the Colorado State Archives and Papers of the Mountain States Chapter, Anti-Defamation League of B'Nai Brith, housed in the Beck Memorial Archives at the University of Denver.*



· ->>> · **In Memoriam** · <<<- ·

**The Colorado Bar Association Remembers  
The Lives and Contributions of  
Colorado Attorneys**



Denver attorney **Joseph V. Hatala** died March 31, 2003. He was 34. Hatala grew up in Cleveland, Ohio. He received an undergraduate degree from Ashland College in Ashland, Ohio. He attended the University of Cincinnati College of Law and received his J.D. degree in 1994. He practiced law in Cleveland for seven years before moving to Denver. Hatala was employed at Qwest for two years. He was the chief regulatory attorney for Iowa. He got his license to practice law in Colorado in 2001 and became a member of the Colorado and Denver Bar Associations that year. Hatala was an outdoor enthusiast and was considered a "superb athlete" by his closest friends. He played golf and basketball; enjoyed skiing, rock climbing, and mountain biking; and recently took up horseback riding as his newest diversion. Hatala is survived by his parents, one brother, and special friend Ann Gard. Contributions in Hatala's memory may be made to the American Heart Association, 1689 E. 115th St., Cleveland, OH 44106.

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**Stanley Raymond Johnson**, former El Paso County Commissioner and former Mayor of Palmer Lake, Colorado, died July 8, 2003. He was 81. Johnson, a native Denverite, was a World War II veteran who fought in several battles, including the Battle of the Bulge. He attended the University of Denver, earning an undergraduate degree in Business and a J.D. degree. He and his wife Edla Josephine Wilson moved to Palmer Lake in the mid-1950s. He practiced law there, as well as in Colorado Springs, Castle Rock, and Denver. Johnson served on many community, state, regional, and national boards and committees throughout his life. He was co-founder and first president of the Swedish Club of Denver and the founder of the Swedish American Foundation of the United States. Johnson served two two-year terms as Mayor of Palmer Lake, from 1966 to 1970, and he was elected El Paso County Commissioner from 1970 to 1974. As Palmer Lake Mayor, Johnson was the founding member of the Pikes Peak Area Council of Governments, which deals with regional planning issues. He also was a municipal judge for Denver and Arapahoe Counties before he retired and moved to Bluff, Utah, in 1991. For seven years, Johnson served as secretary of the Four Corners Monument Planning Team, a project to develop a visitors' center at the monument. Johnson is survived by his wife, four children, and six grandchildren.

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**Norman A. Palermo**, of Colorado Springs, died July 15, 2003. He was 66. Palermo received a B.S. degree in Geology in 1958 from Tulane University in New Orleans, Louisiana. He served eight years of active duty in the U.S. Navy, where he also was a physics professor and a military law instructor at the U.S. Naval Academy. During this time, Palermo also attended Georgetown University and earned a law degree. He moved to Colorado Springs after graduating from law school and opened a law practice, which existed for thirty-six years. Palermo served as El Paso County Attorney and was an assistant municipal judge for the city of Colorado Springs. He joined the Colorado and El Paso County Bar Associations in 1966. He served on the CBA Board of Governors and Budget Committee, and was a member of many CBA Sections, including the Business Law, Real Estate Law, and Trust & Estate Sections. He was appointed by the Governor to the Colorado State Judicial Performance Commission and the Colorado Commission on Taxation. Palermo also was active in civic and community committees. He was on the board of directors of Goodwill Industries for thirty years. He served as chairman of both the El Paso County Republican Party and the Community Board of Penrose-St. Francis Health Services. Palermo is survived by his wife Wynne, three children, and six grandchildren. Contributions in Palermo's memory may be made to: Penrose-St. Francis Health Foundation, 961 E. Colorado Ave., Colorado Springs, CO 80903; or Goodwill Industries of Colorado Springs, 2320 W. Colorado Ave., Colorado Springs, CO 80904.

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Native Denverite **Charles Edward Palmer** died August 1, 2003. He was 68. Palmer received his undergraduate degree from the University of Montana before going on active duty with the U.S. Army. After completing active duty, he moved with his wife and two children to Denver, where he attended the University of Denver College of Law. In 1960, Palmer graduated "Order of St. Ives" and joined the Denver firm of Sherman and Howard, LLC. He practiced with the firm until he retired in 1990. Palmer joined the CBA, DBA, and First Judicial District Bar Association in 1961. He was a member of the CBA Real Estate Law Section. Palmer also was a member of the Denver Law Club and the Lakewood Jaycees. He is survived by his wife Phyllis, two children, and five grandchildren. Contributions in Palmer's memory may be made to the Bonfils Blood Center or to a charity of choice.

· ->>> · **In Memoriam** · <<<- ·

Retired Federal Administrative Law Judge **Richard B. Paynter** died September 2002. He was 84. Paynter received his law degree from the University of Colorado–Boulder and was admitted to practice law in Colorado in 1947. He was an Honor Life member of both the CBA and the Thirteenth Judicial District Bar Association. He was a former Morgan County Judge and Deputy District Attorney. Paynter is survived by five children and three grandchildren. Contributions in Paynter's memory may be made to: Colorado Alliance for the Mentally Ill, 1100 Fillmore St., #201, Denver, CO 80206.

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**Jack P. Sakdol**, a Littleton attorney, died July 1, 2003. He was 76. Sakdol was born in Blackwell, Oklahoma. He was a World War II veteran, having served in the Asian-Pacific Theatre in the U.S. Navy. He and his wife Margie moved to Colorado in 1950. Sakdol attended the University of Denver, where he earned an undergraduate degree in Business, and received his J.D. degree from the University of Denver College of Law. He was licensed to practice law in Colorado in 1946. Sakdol maintained a law practice for several years. He also owned a commercial real estate development company. During his CBA membership, he served as secretary of the Arapahoe County Bar Association. Sakdol is survived by his wife, three children, and eleven grandchildren.

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**Gerald M. Shea** died in 2003. He was 80. Shea was licensed to practice law in Colorado in 1949. He was a solo practitioner. Shea joined the CBA and DBA in 1981. He was an Honor Life member of the Associations.

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Lakewood native **Fred Vincent V. Witaschek** died in April 2003. He was 76. Witaschek graduated from Colorado State University in Fort Collins, where he earned his degree in civil engineering. He attended the University of Denver College of Law and was admitted to practice law in Colorado in 1972. A U.S. Navy veteran, Witaschek worked as a water rights attorney for Chevron. He was a member of the CBA Elder Law, Mineral Law, Trust & Estate, and Water Law Sections. Witaschek is survived by two daughters and two grandsons. Contributions in Witaschek's memory may be made to the Susan G. Komen Breast Cancer Foundation—(303) 744-2088; National Keratoconus Foundation—(800) 521-2524; or St. Philip and St. James Episcopal Church in Denver—(303) 936-3992.

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*The Colorado Bar Foundation ("Foundation") is one means of commemorating members of the profession. The Foundation was established in 1953 and functions exclusively for educational and charitable purposes. The Foundation promotes the advancement of jurisprudence and the administration of justice in Colorado through grants to help educate the general public and provide assistance to the state's legal institutions. All gifts to the Foundation are deductible contributions for federal income tax purposes. For details about becoming a Foundation supporter, call Dana Collier Smith in Denver at (303) 824-5318 or (800) 332-6736.*

## Colorado Judicial Institute Seeks Nominations for Judicial Excellence Award

Deadline for Submissions: September 30, 2003

The Colorado Judicial Institute ("CJI") annually presents Judicial Excellence Awards to honor state court judicial officers whose judicial accomplishments exemplify the highest standard of excellence. CJI is a nonprofit citizens' group that is committed to excellence in Colorado's courts. CJI invites nominations for three awards in 2003: (1) to a district judge; (2) to a county court judge; and (3) to a magistrate.

Nominees must: efficiently, expeditiously, and objectively manage cases and dockets; be recognized as respectful and even-handed, but in firm control of activities within the courtroom; be recognized as an innovator who is creative in dealing with the processes within the courtroom; display extraordinary courage, energy, and tenacity in the handling of high-profile, controversial, or difficult cases; be respected by and have the confidence of other judges, court staff, and lawyers; and exemplify the highest standards of excellence throughout a distinguished career.

Nomination forms are available online at <http://www.coloradojudicialinstitute.org> or by calling (303) 683-1324. Forms must be returned to CJI by September 30, 2003, to: Colorado Judicial Institute, 4471 Lyndenwood Circle, Highlands Ranch, CO 80126. Recipients will be honored at CJI's Judicial Excellence for Colorado Dinner on November 6, 2003, at the downtown Denver Marriott Hotel.

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