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THE SCRIVENER: MODERN LEGAL WRITING

Straddling the Electronic and Paper Realms—E-Filing: Part II

by **K.K. DuVivier**

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In August 2003, Colorado took another huge stride toward the electronic age by announcing that it would become the first state to allow free online filing of civil cases for qualifying low-income people.¹ The last "Scrivener" column addressed how the courts' shift to electronic formats may alter the way lawyers and judges read and write legal documents.² This column addresses some of the practical aspects of preparing documents that some readers will view on paper and others will view only in electronic format.

Hypertext's Impact on the Use of Authorities

The use of hypertext links in legal documents should enhance the accuracy of the analysis. With paper briefs, readers who have questions about an authority must put down the brief and go to the computer or the library to look up the statute or case. Law clerks who are charged with the task of verifying case citations may quickly embrace the hypertext links that make this task much easier. Using a single mouse click, readers can see with ease the relevant authority or excerpt connected by the link.

Hypertext links also should enhance accountability. Any temptation to distort or overstate a concept or holding will be minimized by the readers' easy access to the source and the high probability they will be checking it. This requires heightened diligence on the part of the writer to be sure that the appropriate material is linked and that the link is relevant and accurate.

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

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

Pinpoint a citation and link directly to the relevant page of a complete copy of a case, instead of linking only to an excerpt.³ Your motivation in editing a case may be to spare the court from reading irrelevant sections; yet, readers who want to be assured that you are not attempting to hide any negative parts of the cited case will be frustrated to have only a portion of the case to check.

As with faulty citations, you can lose much credibility if the linked material is inaccurate and does not say what you think it says. This caveat applies to records as well as cases; just because an appellate record is on a CD does not mean that it is any more accurate than a paper copy. The same concerns about incomplete or incorrect records that currently occupy appellate attorneys will continue to be a concern in the electronic filing ("e-filing") age.

Tables to Help Both Electronic And Paper Readers

One of the biggest challenges for attorneys trying to adapt a brief to the electronic age is recognizing that some readers may be using the electronic format and others may be digesting the brief through the traditional paper medium. Judges and clerks have busy schedules and sometimes read briefs on a bus or other places where no computer screen is available. Thus, when preparing a brief, the writer also must consider those who will be reading a hard copy as they have in the past.

One way for an electronic brief to accommodate the hard-copy readers is to provide more tables, such as a table of au-



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thorities. That way, if a judge or clerk would like to have hard copies of the cases while reading a brief, there is one place to go to print out all of the cited cases. In addition to a table of authorities, e-filed briefs could contain a table of record cites, perhaps in an appendix. This also would make it easy to print every document in the record that is cited in the brief and make each document available for the hard-copy reader.

Reading from a Computer Screen

If the objective of e-filings is to save paper, then inevitably more and more documents will be read on the computer screen rather than on a printed page. Present technology makes reading from a screen tiring; early feedback from the Court of Appeals pilot project on e-filing indicates that attorneys reviewing electronic records find it harder to look at a monitor for long periods of time than to look at binders with paper copies of the records.⁴ Thus, when it is necessary to review an entire record, the electronic format can make the process more burdensome. However, if attorneys are searching for a particular item, the word-search feature gives electronic records a significant advantage.

One way to address the issue of losing readers to fatigue when reading on a screen is to make your e-briefs shorter. In addition, the screen limits the amount of text visible to readers at any one time. Just as television transformed the emphasis of news reporting from full stories to sound bites, e-filing may shift the emphasis of legal filings from the page to the paragraph level.

Although adjustments can be made, the average computer screen displays less than a full page of text, usually only one to three paragraphs.⁵ Consequently, you should keep your paragraphs shorter than a full screen. You also may want to add more frequent headings as a way of making sure readers see connections within one screen. Readers of paper versions generally will appreciate these adjustments because shorter briefs and more heading divisions are benefits to them as well.

Avoiding Visual Distractions From Hypertext Links

While you should highlight hypertext links so electronic readers can identify them, it is important to make sure they are not confusing or distracting to hard-copy readers. The link may be in a different color, as long as the new color does not print lighter or darker than the shade of the other text. Similarly, it is best to eliminate any underlining on the hypertext link because this would draw inordinate attention away from the text.

Finally, some online magazines reproduce hyperlinked information at the end of a printed-out version of the article. If hypertext information follows the printed-out text of a brief, however, the result is similar to a law review article with lengthy endnotes. Most judges vehemently object to briefs with extensive information in footnotes or endnotes.⁶ Not only does it interrupt the flow of the analysis, but it also creates the risk that readers may miss important information outside of the text.

Conclusion

Filing legal documents electronically can provide some significant advantages, but it also presents some significant challenges. One of the greatest challenges may be using the same document to address the needs of both electronic and paper readers. Effective legal writers must recognize this time of transition and be flexible in accommodating and persuading both types of readers.

NOTES

1. Pankratz, "Online Link to Civil Courts Opens Doors for State's Poor," *The Denver Post* (Aug. 29, 2003) at A1.

2. K.K. DuVivier, "E-Filing: Entering the Electronic Age—Part I," 32 *The Colorado Lawyer* 69 (Sept. 2003).

3. Although no rule creates a responsibility to provide every authority in full, your goal should be to convince the court it can rely on you to honestly give it everything it needs to decide the case. Adding copies of cases as an appendix can make a concise paper brief look like a monster, but a CD with ten pages of data looks exactly the same as a CD with 1,000 pages of data.

4. Communication with John Doerner, Clerk of the Colorado Court of Appeals (Sept. 2003).

5. Many LCD monitors can be set to a "portrait" rather than a "landscape" configuration to display an entire page of text.

6. DuVivier, "The Footnote=An Interruption," 26 *The Colorado Lawyer* 47 (May 1997). ■

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...is not being able to.

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