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Holographic and Nonconforming Wills: Dispensing With Formalities—Part II

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This column is sponsored by the CBA Trust and Estate Law Section. The column focuses on trusts and estate law topics, including estate and trust planning and administration, elder law, probate litigation, guardianships and conservatorships, and tax planning.

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This two-part article contains a primer on holographic and nonconforming wills, an update on applicable Colorado law, and a discussion of future issues and considerations regarding holographic and nonconforming wills.

This article addresses issues specific to holographic wills and those that do not conform to statutory formalities. The first part reviewed the laws of Colorado and other jurisdictions as they relate to requirements for and litigation of holographic wills.1 Part II provides an overview of the varieties of holographic and nonconforming wills. It discusses the effects that technology has had on wills, as well as possible changes in the way wills may be made and executed in the future.

Varieties of Holographic Documents

Not all wills are drafted by attorneys or signed before qualified witnesses. Consider these examples of unusual situations in which holographic wills were written.

Beth A. Baer, who was blind, wrote her will with a pen that had run out of ink. The blank paper will was filed for probate in Los Angeles Superior Court after a handwriting expert made out the words of the will from indentations left on the paper by the pen.2

One of the wills on file at the Surrogate Court in the District of Kerrobert, Canada, was written on a fender cut from a farm tractor. The testator scratched the will onto the fender after a disc apparatus attached to the tractor trapped his legs, which were bleeding profusely. He used his pocketknife to scratch these words into the fender: "In case I die in this mess, I leave all to the wife. CECIL GEORGE HARRIS." Harris was found nine hours after the accident and was rushed to a hospital, where he died shortly thereafter. A few days later, a man investigating the accident site noticed the fender. The fender was removed and admitted to probate as the decedent's last will and testament.3

During World War I, a British soldier wrote a "trench will" on the back of a photograph of his Yorkshire sweetheart. He wrote, "In event of my death I leave all my effects and money to this young lady." After he was killed in the line of duty, the photo was found and admitted to probate.4

Unable to locate a blank sheet of paper, George Hazeltine of Los Angeles dictated his will and had one of his two in-home nurses write it on her white petticoat. He left the bulk of his considerable estate to a grandniece and bequeathed $10,000 apiece to the nurses. He signed the garment with a cross, being too weak to write his name, and the two nurses signed as witnesses. The petticoat, as well as an earlier formal will executed by Hazeltine at a bank, were offered for probate. A jury found the petticoat will to be genuine, but a judge ruled that the will's bequests to the nurses were null and void because the nurses also were witnesses to the will.5

Holographic will cases, besides involving documents written in the testator's hand on paper (or whatever surface may be convenient), often involve hybrid wills and "envelope wills." These types of instruments are discussed below.

Hybrid Wills

Many "do-it-yourself" products for the preparation of wills are readily available to consumers in the forms of computer software, Internet downloads, or office supply store kits. Some will kit forms contemplate that the testator will use the form to prepare a holographic will; other form kits might direct that the will is to be witnessed. However, the testator may not
follow the directions. If portions of the document are in the handwriting of the testator, the document's validity as a holographic will becomes at issue.

"Hybrid" holographic wills are those in which some portions of the document are handwritten, while other portions consist of text that is computer generated or preprinted on a form. Hybrid wills present interesting issues regarding what constitutes the "material portions" or "material provisions" of the document.6 ***Estate of Muder***,7 a 1987 Arizona case, involved a hybrid will. Arizona's statute regarding validity of holographic wills required that the "material provisions" of a holographic will be in the handwriting of the decedent.

The will in question in ***Muder*** states, "I give, devise, and bequeath of this my gross estate, after all of my just debts, expenses, taxes, and administration costs of the estate have first been paid, settled, or compromised to. . . ."8 A blank line follows. In handwriting, the testator inserted in the blank, "my wife Retha L. Muder, our home and property in Shumway, Navajo County; car-pickup truck, trailer, & all other earthly possessions belonging to me, livestock, cattle, tools, savings accounts, checking accounts, retirement benefits, etc." The testator also listed in his handwriting the name of his wife as his executor and his name as the name of the testator. He filled in the dates in his handwriting and signed the document. The document in question also was signed by a witness and notarized.

In ***Muder***, the testator clearly listed in his own handwriting all of the property to be devised under his will. He also specifically named his wife as the devisee to whom such assets should be distributed. The trial court admitted the will to probate and the decedent's daughters from a prior marriage appealed. The Arizona Court of Appeals reversed the trial court's decision to admit the will to probate on the ground that the handwritten parts of the document, standing alone, did not establish testamentary intent and, therefore, the document was not valid as a holographic will.9 A dissenting justice's opinion stated:

I suggest that, in interpreting [the statute], the law can productively distinguish between distributive content and testamentary context. ***I do not believe that a will form can provide distributive content for a holographic will.*** A testator who resorts to holography must designate his beneficiaries and apportion his estate among them ***by his own hand.*** I would hold, however, that when a would-be testator designates his beneficiaries and apportions his estate among them in the spaces provided on a printed will form, his handwritten distributive provisions constitute the necessary "material provisions" of the will and can draw testamentary context from the printed language of the form.10 (***Emphasis added.***)

After granting ***certiorari*** in the case, the Arizona Supreme Court essentially adopted the same analysis as the dissent in the appeal. The Court held:

. . . [A] testator who uses a pre-printed form, and in ***his own handwriting*** fills in the blanks by designating his beneficiaries and apportioning his estate among them and signs it, has created a valid holographic will. . . . We believe that our legislature, in enacting the present statute, . . . intended to allow printed portions of a will form to be incorporated into the handwritten portion of the holographic will as long as the testamentary intent of the testator is clear and the protection afforded by requiring the material provisions be in the testator's handwriting is present.11 (***Emphasis added.***)

It is clear from ***Muder*** that incorporating preprinted provisions is permissible only for establishing testamentary intent (testamentary context). It remains necessary for the testator to handwrite the words that describe the property being devised and identify the beneficiaries (distributive content). Applicable Arizona law did not permit testamentary intent to be established by the preprinted portions of an alleged holographic will.

The Uniform Probate Code II ("UPC II") provides that "[i]ntent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's writing."12 Colorado has adopted verbatim this section of the UPC II.13 It is important to note that the UPC II both addresses and resolves the "testamentary context" issue because it expressly permits testamentary intent to be established by preprinted provisions or extrinsic evidence. However, until the term "material portions," as used in CRS § 15-11-502(2), is interpreted by Colorado's appellate courts, hybrid holographic documents will be an area for probate litigation to determine what constitutes the "material portions."

Envelope Cases

A number of cases throughout the United States address whether a testator's signature on an envelope containing his or her otherwise unsigned holographic will meets the signature requirement. Courts that have denied probate of holographic wills in executed envelopes have done so using the rationale that the writing on such an envelope did not evidence the decedent's signatory intent but supported the inference that the decedent intended to identify the contents of the envelope.

Virginia has a series of executed envelope cases, the most famous of which is an 1890 case, ***Warwick v. Warwick***.14 That case involved a document offered as a holographic will in which the testator's name appeared not only in the document's exordium (introductory) clause but also on the back of the envelope in which the document was found. The testator wrote on the envelope, "My Will—Abraham Warwick, Jr." The Court found no evidence of signatory intent either in the document or on the envelope:

The intention of the name, . . . at the beginning, is an equivocal act; and, being so, it cannot be held to be such a signing of the paper as to make it manifest that it was intended as a signature. The indorsement on the envelope is not a signing of the will, and was doubtless not so intended by the deceased. The apparent object of indorsing an envelope or wrapper is for a label, to mark or designate the contents, but does not afford internal evidence that the signature on the back of the envelope was intended as a signature to the will.15

The Kentucky Court of Appeals addressed the issue in ***Miller's Executor v. Shannon***.16 The court held that, although Kentucky law required liberal construction of wills, by no stretch of the imagination could a signing by the testator of a sealed envelope containing her unsigned will comply with the statute.17

The Arizona Supreme Court, in ***In re Tyrrell's Estate***,18 refused to validate a purported will that was placed, unsigned, in an envelope that then was sealed and signed by the testator. The court held:

> Our statute does not designate where the signature shall be placed upon the instrument. But the difficulty here is that the signature is not placed anywhere upon the instrument. . . . The writing on the envelope, which is signed, is neither dispositive nor testamentary in character. . . . The writing upon the envelope is not a will for it lacks the essential features of a will, and the writing upon the note paper is not a will because it is not signed.19

Several states, most notably California and North Carolina, have specific statutes that are intended to effectuate, rather than defeat, holographic wills. Courts in California, North Carolina, and other states must adhere to liberal rules of construction that require giving interpretations to instruments that will prevent intestacy. Courts in these states have upheld holographic wills contained in envelopes bearing the decedents' signatures along with other extrinsic evidence, such as location of the will, witnesses to the signing of the envelope, and delivery of the will in the envelope.20

Colorado does not have a statute requiring courts to avoid intestacy by giving preference to a will instrument. The Colorado Probate Code provides that "the policy of the Uniform Probate Code is to discover and make effective the intent of a decedent in distribution of his property."21 Courts throughout the United States, when confronted with envelopes bearing decedents' signatures (and containing unsigned wills) must determine whether the signatures sufficiently demonstrate the signatory intent of the testators. Courts generally have held that a signature on an envelope alone is insufficient without other supporting extrinsic evidence. Each case must be examined on a case-by-case basis in the context of that state's probate code.

Curing Minor Flaws

CRS § 15-11-503 is a codification of the harmless error doctrine dealing with writings ostensibly intended as wills. CRS § 15-11-503(1) allows a document or writing that was not executed in compliance with CRS § 15-11-502 (this is Colorado's execution formalities and holographic will statute) to nonetheless be treated as if it were executed in compliance with that statute. However, a proponent must prove by clear and convincing evidence that the decedent intended the writing or document to be a will, or a revocation, alteration, addition, or revival of all or part of a will. A critical adjunct to CRS § 15-11-503 is CRS § 15-11-502(3), which gives teeth to the statute by providing that "[i]ntent that the document constitute the testator's will can be established by extrinsic evidence." Previously, extrinsic evidence could be used only for the narrow purpose of resolving patent ambiguities.

CRS § 15-11-503(1) was adopted as part of the UPC II that went into effect July 1, 1995. When this section was enacted, many critics were wary of the potential ramifications of the new section, pondering how broadly Colorado courts would interpret it.22 This concern was based on the possibility that the term "writing" as used in CRS § 15-11-503 could be interpreted to include all kinds of non-traditional forms of wills, such as audiotapes, videotapes, and computer disks. However, in the years since the enactment of the statute, Colorado courts have narrowly limited the scope and purpose of the section.23

After the enactment of CRS § 15-11-503 in 1995, some important changes were made to the statute. Effective July 1, 2001, the statute was amended to include, for purposes of revival, documents that are not formally executed but are proven by clear and convincing evidence to constitute "a partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will." The change permits revival of previously revoked wills by means other than strict compliance with will execution formalities under CRS § 15-11-502. The new provision, as well as the revocation and revival statutes, overrule prior case law holding that a revival of a previously revoked will could be accomplished only through formal execution of a new will or codicil.24

CRS § 15-11-503 also was amended to narrow its application to minor mistakes. The section now applies "only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse."25

In addition, the Colorado Court of Appeals, in ***Estate of Sky Dancer***,26 limited the application of CRS § 15-11-503 to the resolution of technical mistakes in drafting that frustrate the intent of the testator (assuming

a proponent can prove what the intent of the testator was by clear and convincing evidence).27 The purported will in *Sky Dancer* consisted of several pieces of paper—some handwritten, typed, and plain, as well as some preprinted legal forms. A number of pages stated how various property of the decedent was to be disposed of at her death. Included in the papers was a pre-printed will attestation clause that had been notarized and signed by the decedent and two witnesses.28 In upholding the lower court's decision that the hodgepodge of papers presented for probate did not collectively amount to a valid will, the *Sky Dancer* court stated:

> In application, the larger the departure from prescribed, formal execution, the greater the burden on the proponent to prove by clear and convincing evidence that the instrument reflects the testator's intent. . . . The statute is limited in its application to those instruments which are not executed in strict compliance with the requisites of CRS § 15-11-502, not to those which are not executed at all.29

A Wider Berth for Extrinsic Evidence

Under the Colorado Rules of Evidence ("C.R.E."), testimony of disinterested parties as to conversations with a decedent related to the execution, revocation, identification, or terms of the decedent's will has been allowed since 1980. That was the year of the adoption of C.R.E. 803(3), the hearsay exception for a "then existing mental, emotional, or physical condition."30

Additionally, the admission of extrinsic evidence consisting of testimony of interested parties pursuant to the Colorado Dead Man's Statute has recently been liberalized.31 Such testimony previously was barred by the statute. However, effective for cases filed on or after July 1, 2002, the Colorado legislature amended the Colorado Dead Man's Statute to permit the testimony of *any party* as to oral statements made by a decedent as long as: (1) those statements were made under oath; (2) the statements can be corroborated by material evidence of an independent and trustworthy nature; or (3) evidence of related communications is introduced by an opposing party.32

The Impact of Technology on Wills

Phonographic, photographic, and electronic recording technologies have led some to push for a broader definition of "writing" that would allow testators to make their wills using recording devices. There are reports of wills being made on phonograph records in the early twentieth century. Hollywood even helped to inspire some mid-century commentators' visions of motion picture wills. The climax of the 1934 Twentieth Century Pictures film, "The Last Gentleman," was the "reading" by the main character of his own will; his attorney dimmed the lights and turned on a movie projector so that those assembled could watch the decedent tell, in his own words, who got what.33

The Wyoming Supreme Court upheld the decision of a probate court that refused to recognize an audiotape recording as a decedent's will.34 The tape recording had been found by police in the decedent's home inside a sealed envelope bearing this inscription: "Robert Reed to be played in the event of my death only! (signed) Robert G. Reed." The proponent of the audiotape had urged that it be admitted as a holographic will because the magnetic voice print on the tape was a type of "writing." The proponent argued that under the state's evidentiary rules, audiotapes were included in the definition of "writing."

However, the Court held that because rules of evidence are procedural and not substantive, they cannot change, modify, or enlarge a statute. Thus, adhering to a strict construction of the holographic will statute, the Court stated that "writing" under that statute did not include audiotapes.35

Beginning in the mid-1980s, a small group of commentators began advocating not only the videotaping of will execution ceremonies, but the acceptance of videotaped wills as valid wills. One of the rationales was that videotaped wills would enable a testator to, in effect, appear personally before the court to express his or her intentions, thus providing protection against fraud and ambiguity.36 One supporter of videotaped wills said that the testator's appearance on camera made the requirement of a signature superfluous

because a positive identification of the testator could be made visually. Furthermore, because written signatures could be duplicated more easily than testators themselves, videotaped wills were less likely to be fraudulent.37

Other commentators explained the psychological value of a videotaped will:

> [A] videotaped will would preserve the testator's thoughts and feelings beyond death. Thus, videotape could enable the average person to perceive the will preparation process not as a contemplation of death but as an expression of life.38

The same commentators stated that offering videotaped wills to clients would enhance a law firm's public relations because this type of will was less likely to be contested. Furthermore, even if it were contested, it could be proved more quickly and thereby save money and expedite the probate process.39 The commentators tried to bootstrap admissibility of videotapes as "writings" using Federal Rule of Evidence 1001, which classifies videotapes as photographs and therefore includes them under "writings and recordings."40

One of the drawbacks acknowledged by those advocating videotaped wills was that the technology would become obsolete. This indeed may occur with the advent of digital video cameras, DVD technology, and other future technological advances.

Unauthorized Practice of Law

The future of holographic wills inevitably will be complicated by computer-generated and Internet-downloaded wills. Whether designing and selling computer-generated will documents constitutes the unauthorized practice of law was a question recently addressed in the federal courts.

In 1999, the U.S. District Court of the Northern District of Texas found Parsons Technology, Inc.—maker of the software Quicken Family Lawyer ("QFL")—to have engaged in the unauthorized practice of law.41 The Texas court entered a permanent injunction against Parsons Technology, Inc. from selling within the state of Texas QFL version 8.0 and its updated version QFL '99.

While the Parsons appeal was pending, the Texas legislature amended its unauthorized practice of law statutes to permit the creation, distribution, and sale of written materials and software that include legal forms and instructions, as long as "the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. . . ."42 Due to the change in the law, the Court of Appeals vacated the injunction and reversed the judgment against Parsons.43

Future of Holographic Wills

Increasing use of the Internet may have an impact on will preparation. The Internet affords individuals the opportunity to take care of all kinds of business, including making wills, from the comfort of home, saving both time and money.

The authors heard of a recent Denver Probate Court case in which the court was asked to admit to probate a form that a decedent had downloaded from a website that sold wills over the Internet. The form was from a company in California that promised to draft the decedent's will after he completed and returned the downloaded form with payment. The company went out of business and the decedent never sent in the completed form. Because this "will" was not contested, the court admitted it to probate.

Electronic signatures are becoming more frequent in "e-business" transactions. The use of this technology raises important questions for will drafters and probate courts in the twenty-first century. Could an electronic signature act as valid authentication for a will that exists only in electronic form and is stored on

disk? Would an electronic will be more vulnerable to fraud and forgery than a written will? What issues are involved in the permanence and storage of electronic wills?

Not surprisingly, recorded cases have yet involved the validity of a will that exists only in electronic form. The American Bar Association Real Property, Probate, and Trust Section has formed an Electronic Wills, Trusts and Probate Committee devoted to studying the impact of electronic signatures on the law of wills and trusts and making suggestions for incorporating the technology into this area of law.[44]

At this time, the Colorado legislature has not passed the Uniform Electronic Transactions Act ("UETA"), which governs electronic commercial transactions and provides for the use and validity of electronic signatures in those transactions.[45] However, the UETA specifically excludes wills, codicils, and testamentary trusts. Until the UETA is adopted in Colorado and provisions are made for its applicability to the Colorado Probate Code, the validity of electronic wills remains highly questionable and is fertile ground for future litigation.

Conclusion

The modern trend followed by courts throughout the United States is to relax the technical requirements for holographic wills. In Colorado, the applicable statute governing holographic wills has been amended and now requires only that the "material portions" of a document be in the decedent's handwriting. Moreover, testamentary intent now may be established by referring to typed or preprinted language on a hybrid will, as long as the distributive content is in the decedent's handwriting.

The Colorado Court of Appeals ruling in ***Estate of Sky Dancer***[46] clarifies that the application of CRS § 15-11-503 is limited to curing minor flaws in wills. Consequently, practitioners will have to rely on other authority when seeking to have non-conforming wills admitted to probate. There are many varieties of holographic and non-conforming wills, as demonstrated by the foregoing envelope cases and exordium clause cases examined in Part I of this article.[47]

Practitioners need to stay informed about the future law of holographic, hybrid, and formally drafted wills. Moreover, this area undoubtedly will be affected by technological developments such as electronic signatures and digital storage of documents.

NOTES

1. Tucker ***et al.***, "Holographic and Nonconforming Wills: Dispensing With Formalities—Part I," 31 ***The Colorado Lawyer*** 57 (Dec. 2002).

2. Menchin, ***Where There's a Will*** (New York, NY: Farnsworth, 1979) at 80.

3. ***Id.*** at 86.

4. Million, "Wills: Witty, Witless, and Wicked," 7 ***Wayne L.Rev.*** 335, 341 (1960) (***citation omitted***).

5. Sellers, "Strange Wills," 28 ***J. Crim. L. & Criminology*** (1937-38) 106, 110.

6. For a discussion of these terms, ***see*** Tucker ***et al., supra***, note 1.

7. Estate of Muder***, 751 P.2d 986 (Ariz.App. 1987),*** rev'd, Estate of Muder***, 765 P.2d 997 (Ariz. 1988).***

8. ***Id.*** (Ariz.App.) at 991.

9. ***Id.***

10. ***Id.*** at 992-93 (dissent).

11. ***Muder*** (Ariz.), ***supra***, note 7 at 1000.

12. UPC § 2-502(3)(c).

13. CRS § 15-11-502(3).

14. ***Warwick***, 10 S.E. 843 (Va. 1890).

15. ***Id.*** at 848. ***See also Meany v. Priddy***, 102 S.E. 470 (Va. 1920); ***Hamlet v. Hamlet***, 32 S.E.2d 729 (Va. 1945)***.***

16. ***Miller's Executor***, 299 S.W.2d 103 (Ky. 1957).

17. ***Id.***

18. ***Tyrrell's Estate***, 153 P. 767 (Ariz. 1915).

19. ***Id.*** at 770.

20. ***In re Bloch's Estate***, 248 P.2d 21 (Cal. 1952); ***Rowe v. Abercrombie***, 230 Cal.App.2d 442 (1964). ***See also*** Cal. Prob. Code § 21120; ***Alexander v. Johnston***, 468 S.E. 785 (1916); ***In re Lowrance's Will***, 155 S.E. 876 (1930).

21. CRS § 15-10-102.

22. Johns, "Probating Flawed Wills: Colorado's New CRS § 15-11-503," 25 *The Colorado Lawyer* 85 (Nov. 1996).

23. ***Id.***

24. ***See also Restatement (Third) of Property: Wills and Other Donative Transfers*** at § 3.3 ("A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will."). For more information and background, ***see*** Langbein, "Substantial Compliance With the Wills Act," 88 ***Harv. L.Rev.*** 489 (1975); Langbein, "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law," 87 ***Colum. L.Rev.*** 1 (1987); Mann, "Formalities and Formalism in the Uniform Probate Code," 142 ***U.Pa. L.Rev.*** 1033 (1993-94); Sherwin, "Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice," 34 ***Conn. L.Rev.*** 453 (Winter 2002).

25. CRS § 15-11-503(2).

26. ***Sky Dancer***, 13 P.3d 1231 (Colo.App. 2000).

27. ***Id.*** at 1234.

28. ***Id***. at 1232.

29. ***Id.*** at 1234.

30. ***See Murphy v. Glenn***, 964 P.2d 581 (Colo. App.1998).

31. CRS § 13-90-101. ***See also*** Tucker ***et al.***, "The New Colorado Dead Man's Statute," 31 *The Colorado Lawyer* 119 (July 2002).

32. ***See*** Tucker ***et al.***, ***supra***, note 1 at 119, 120.

33. Million, "Wills: Witty, Witless, and Wicked," 7 ***Wayne L.Rev.*** 335, 342 (1960). ***See also*** Atkinson, 2d ed. ***Wills*** (1953) § 63 at 296 (discussing use of phonograph and motion pictures with sound as wills).

34. ***Estate of Reed***, 672 P.2d 829 (Wyo. 1983).

35. ***Id.*** at 829, 830, and 834.

36. Buckley and Buckley, "Videotaping Wills: A New Frontier In Estate Planning," 11 ***Ohio Northern Univ. L.Rev.*** 271 and 274 (1984).

37. Nash, "A Videowill: Safe and Sure," 70 ***A.B.A. J.*** 87 and 88-89 (Oct. 1984).

38. Buckley and Buckley, ***supra***, note 36 at 271 and 280.

39. Buckley, "Videotaped Wills: More Than a Testator's Curtain Call," 67 *Mich. B.J.* 266 (March 1988).

40. ***Id.*** at 267. ***See also*** Buckley and Buckley, ***supra***, note 36 at 271 and 277.

41. ***Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.***, No. CIV.A.3:97CV-2859H (N.D.Tex. 1999), ***overruled, Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.***, 179 F.3d 956 (5th Cir. 1999).

42. Tex. Gov't Code Ann. § 81.101.

43. ***Parsons Tech., Inc., supra***, note 41 at 956.

44. ***See*** http://www.abanet.org/rppt/commit tees/pt/k3/home.html.

45. UETA § 7 (1999). Thirty-eight states and the District of Columbia have adopted the UETA. ***See also*** Berkowitz, "Electronic Transactions: You Can Run But You Cannot Hide," 30 ***The Colorado Lawyer*** 9 (Nov. 2001).

46. ***Sky Dancer, supra***, note 26.

47. Tucker ***et al., supra***, note 1.