

Richmond Journal of Law & Technology



University of Richmond School of Law

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May 18, 2006

Richmond Journal of Law & Technology
University of Richmond School of Law
28 Westhampton Way
University of Richmond, Virginia 23173

Dear Readers:

Welcome to the fourth issue and final of the Richmond Journal of Law & Technology for the 2005-2006 academic year. Volume 12, Issue 4 is the second publication of the Journal's Annual Survey on Electronic Discovery. The topic of Electronic Discovery is particularly relevant considering the impending applicability of the proposed amendments to the Federal Rules of Civil Procedure. The Annual Survey Editor has worked extensively to bring together different commentary on Electronic Discovery.

With the close of this academic year I would like to thank the Staff Members of the Richmond Journal of Law & Technology for their outstanding work on the Journal. In particular, I have been honored to work with the members of the Administrative Board, consisting of the Managing Editor, Kathryn Kransdorf, Executive Editor, Brooke Alexander, and the Administrative Editor/Manuscripts Editor, Stacey McDonough.

The hard work of the Editorial Board has resulted in four outstanding publications this year. Additionally, the Board has completed a local and a national writing competition. In total, every member of the Editorial Board and Staff has significantly contributed to efforts of the Journal over the past year. As a result, the hard work and enthusiasm of the outgoing board has ensured that the energy and reputation associated with the Richmond Journal of Law & Technology continue to improve with the new Editorial board.

I am certain that the incoming Executive Board will continue the Richmond Journal of Law & Technology's tradition of excellence. I wish

our graduating members the best of luck in their upcoming careers. And I am certain that the incoming membership will continue the conversation the Richmond Journal of Law & Technology began over twelve years ago.

Respectfully,

A handwritten signature in black ink, appearing to read "Neal H. Lewis". The signature is fluid and cursive, with a large initial "N" and "L".

Neal H. Lewis
Editor-in-Chief

May 19, 2006

Dear Readers,

Welcome to the Annual Survey issue, Volume 12, Issue 4, of the *Richmond Journal of Law & Technology* for the 2005–06 academic year. The Annual Survey edition exclusively covers emerging issues in the field of electronic discovery (“e-discovery”), monitoring changes in the law as they develop. This subject has become particularly timely following the recent promulgation of several amendments to the Federal Rules of Civil Procedure, set to take effect this December, which will directly and significantly shape the future practice of e-discovery.

Thomas Y. Allman is Senior Counsel to Mayer, Brown, Rowe & Maw, LLP. He is a member of the Sedona Conference WG1 Steering Committee on Electronic Information Management, co-chair of the Lawyers for Civil Justice Committee on Electronic Discovery and was an early advocate of e-discovery amendments. His article, *The Impact of the Proposed Federal E-Discovery Rules*, is a comprehensive exploratory piece, analyzing the newly developed “safe harbor” and detailing preservation obligations under the new standards, as well as the steps entities can take to meet those standards. He argues that, although it is limited and restricted, the safe harbor is a “significant step towards bringing a sense of proportion and rationality to the debate over corporate and individual responsibility.” Mr. Allman characterizes the proposed amendments as “a remarkable and balanced achievement which will have a positive influence.”

Michael R. Nelson and Mark H. Rosenberg are attorneys at the firm of Nelson Levine de Luca & Horst, LLC. Mr. Nelson serves as Chairman of the firm and has testified in Washington D.C. concerning class action reform and e-discovery. Mr. Rosenberg serves as an Associate in the Complex Litigation Department, and has also assisted in preparing comments to the Civil Rules Advisory Committee of the United States Judicial Conference regarding proposed revisions to the Federal Rules on e-discovery. Mr. Nelson and Mr. Rosenberg present an in-depth analysis of the newly proposed Federal Rules of Civil Procedure as they pertain to addressing the problem of spoliation of data in their article *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation in*

an Electronic Age. Particularly, they identify how the emerging standards may present a potentially debilitating effect on corporations who are frequently involved in litigation, and suggest striking a balance between the “benefits of preserving relevant evidence” and the “burdens of limitless retention policies.”

Dennis Kiker is a partner at Moran Kiker Brown in Richmond, Virginia, where his practice emphasizes e-discovery in the realm of commercial and product liability litigation. He presents an article entitled *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, in which he discusses the emerging changes in the law concerning the inadvertent disclosure of privileged, work product and trade secret information. The newly proposed Federal Rules allow parties to “claw-back” such inadvertently disclosed material, but fail to address substantive waiver. Mr. Kiker proposes the implementation of a uniform standard for determining the status of inadvertently disclosed information, placing particular emphasis on the adoption of an ethical rule placing responsibility on an attorney receiving inadvertently disclosed information to protect an opposing attorney’s attorney-client communication.

Rebecca Rockwood is a 2007 J.D. candidate at the University of Richmond T.C. Williams School of Law. She presents a compelling piece, *Shifting Burdens and Concealing Evidence: Discovery in the Digital Age*, in which she criticizes the proposed amendments to the Federal Rules regarding e-discovery due to the apparent protection they afford defendants in allowing them to evade discovery of otherwise discoverable data by claiming it is inaccessible. She argues that the proposed Rules’ apparent acquiescence to the evading of discovery undermines the litigation process as a whole, and any burden on a large corporate litigant to merely maintain records is secondary when balancing the equities. This presents an interesting contrast to Mr. Nelson and Mr. Rosenberg’s article.

Finally, Professor Timothy Coggins, Associate Dean for Library and Technology Services and Professor of Law at the University of Richmond T.C. Williams School of Law has provided his first installment into his annually updated database of Internet resources. This database, which will

be annually updated in the Annual Survey issue, will provide a comprehensive catalog of resources for scholars, practitioners and students conducting research over the Internet.

I would like to thank all of the authors for their excellent submissions and for their continuing efforts throughout the publication process. I would also like to thank the University of Richmond T.C. Williams School of Law faculty for their continuing encouragement and support of the *Journal*. Lastly, I would like to thank the Editorial Board (both incoming and outgoing), the Annual Survey Committee, and the rest of the *JOLT* staff for their efforts above and beyond their required duties in realizing the publication of this issue.

Please e-mail any comments, suggestions, or submissions to jolt@richmond.edu. Thank you for your readership, past submissions, and your continued support of our publication.

Sincerely,



Joshua Forbes Clowers
Annual Survey Editor
Richmond Journal of Law & Technology

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