

# **INADVERTENT PRODUCTION: *GOLD NUGGET OR ROTTEN EGG?***

Washington Defense Trial Lawyers  
Annual Ethics Seminar  
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**Mark J. Fucile**  
Fucile & Reising LLP  
mark@frllp.com  
503.224.4895  
www.frllp.com

fucile  reising | LLP

# INTRODUCTION

- ▶ **Old Times**  
(When paper reigned supreme):  
“Finders Keepers, Losers Weepers”
- ▶ **New Times**  
(When email reigns supreme):  
“Gold Nugget or Rotten Egg?”

# THREE QUESTIONS

1. *Ethics:* Do we have to notify?
2. *Procedure:* How do we raise waiver?
3. *Evidence:* Has privilege been waived?

# ETHICS

*The way it was....*

- ▶ **ABA Ethics Opinions 92-368 & 94-382**
- ▶ **WSBA Informal Ethics Opinions 1544 (1993) & 1779 (1997)**

# ETHICS

*The way it is now....*

- ▶ **ABA Model Rule 4.4(b)**
- ▶ **ABA Ethics Opinions 05-437 & 06-440**
- ▶ **RPC 4.4(b)**
  - √ **Duty to notify**
  - √ **Litigating waiver left to procedural law**
  - √ **Waiver left to evidence law**

# PROCEDURE

*The way it was....*

- ▶ *In re Firestorm 1991,*  
129 Wn.2d 130, 916 P.2d 411 (1996)
- ▶ *Richards v. Jain,*  
168 F. Supp.2d 1195 (W.D. Wash. 2001)

# PROCEDURE

*The way it is now (or pretty close)....*

▶ **FRCP 26(b)(5)(B):**

- √ Return/destroy/sequester
- √ Don't use until waiver resolved
- √ Can file under seal for waiver review

▶ ***Proposed CR 26(b)(6)***

- √ Modeled on the federal rule

# EVIDENCE

## *The way it was....*

- ▶ *Harris v. Drake*,  
152 Wn.2d 480, 99 P.3d 872 (2004)  
(Alexander, C.J. dissenting)
  
- ▶ *Banks v. U.S.*,  
2005 WL 974723 (W.D. Wash. 2005)  
(unpublished; compiling cases)



# EVIDENCE

## *The way it is now....*

- ▶ ***Sitterson v. Evergreen School Dist. No. 114,***  
**147 Wn. App. 576, 196 P.3d 735 (2008) (Div. 2)**
  - ✓ Reasonableness of the precautions
  - ✓ Amount of time taken to remedy the error
  - ✓ Scope of discovery
  - ✓ Extent of the disclosure
  - ✓ Fairness

# EVIDENCE

*The way it is now....*

▶ **FRE 502(b)**

- √ Disclosure is inadvertent
- √ Reasonable steps to prevent disclosure
- √ Reasonable steps to rectify

# **GOLD NUGGET TO ROTTEN EGG**

- ▶ ***Richards v. Jain,***  
**168 F. Supp.2d 1195 (W.D. Wash. 2001)**
- ▶ **Disqualification risk to the recipient**

# **FOR FURTHER READING**

- ▶ **“Inadvertent Production Revisited (Again)”**  
—October 2009 WSBA Bar News
- ▶ **“The Shifting Sands of Inadvertent Production”**  
—Winter 2009 OADC Magazine
- ▶ **“Inadvertent Production: Where We’ve Been & Where We’re Going”**  
—February 2008 DRI For the Defense