INADVERTENT PRODUCTION:
GOLD NUGGET OR ROTTEN EGG?

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

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*,
(Alexander, C.J. dissenting)

► *Banks v. U.S.*, 
2005 WL 974723 (W.D. Wash. 2005)
(unpublished; compiling cases)
EVIDENCE

The way it is now....

  - 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