INADVERTENT PRODUCTION DEVELOPMENTS

Washington State Bar Association
New Developments in Discovery-Related Ethics
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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....

► (Since December 2006) FRCP 26(b)(5)(B):
  ✓ Return/destroy/sequester
  ✓ Don’t use until waiver resolved
  ✓ Can file under seal for waiver review
  ✓ Now encourages “claw back” agreements

► New (as of January 2010) CR 26(b)(6)
  ✓ Modeled on the federal rule
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(unpublished; compiling cases)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….

► (Since September 2008) FRE 502(b)
  √ Disclosure is inadvertent
  √ Reasonable steps to prevent disclosure
  √ Reasonable steps to rectify
EVIDENCE

The way it is now....

- New (as of September 2010) ER 502
  - Disclosure is inadvertent
  - Reasonable steps to prevent disclosure
  - Reasonable steps to rectify

- Modeled on the federal rule
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
QUESTIONS?