

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**
- ▶ **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....

- ▶ **(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**

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(unpublished; compiling cases)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....

- ▶ **(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?