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Court of Appeals Holds that Fee Rules Don't Apply to In-House Counsel's Wages

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Division I of the Court of Appeals recently held that the rules governing lawyer fees do not apply to an in-house counsel's wages. *Chism v. Tri-State Const., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (2016), involved a wage claim by a former in-house general counsel against his former corporate employer.

The lawyer had worked for the client as outside counsel for many years before eventually joining the corporate client as an employee. Although he was initially general counsel, his portfolio of responsibilities eventually expanded to include operational management of a corporate subsidiary. Over the years as a corporate employee, the lawyer-executive negotiated a variety of compensation arrangements with the owners. Eventually, they had a falling out and the lawyer-executive sued the corporation for \$750,000 in unpaid bonuses (plus statutory penalties for unpaid wages). At trial, a jury awarded the lawyer-executive the \$750,000 sought, plus made the required predicate findings to support the statutory penalties for unpaid wages.

Following trial, the judge heard additional evidence and argument on whether the lawyer-executive's agreements with the company constituted an impermissible modification of an attorney fee agreement and related arguments from the company that the lawyer-executive had a conflict negotiating his

compensation agreements with the company's owners. Although the trial judge did not void the agreements, he did order disgorgement of a substantial amount of the jury's award as a regulatory sanction. The Court of Appeals reversed.

In doing so, the Court of Appeals first made a sharp distinction between an outside counsel's *fees* and an in-house counsel's *wages*. The Court of Appeals noted that longstanding Washington appellate authority supports disgorgement of fees in appropriate circumstances (such as a breach of the fiduciary duty of loyalty)—citing, among others, *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), and *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012). But, the Court of Appeals observed that neither the parties nor their experts (or the trial judge) had offered any authority for the proposition that the remedial device of disgorgement can be applied to an in-house counsel's wages. Instead, the Court of Appeals stressed the strong statutory preference for payment of wages: “lawyer-employees are protected by the same wage and hour laws that apply to employees in comparable positions.” 374 P.3d at 214. It concluded, therefore, that the trial judge should not have applied the rules governing attorney fees to in-house counsel wages.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.