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Court of Appeals Discusses Implied Waiver of Privilege When Claiming Attorney Fees as Damages

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Division I of the Court of Appeals recently discussed implied waiver of the attorney-client privilege when claiming attorney fees as damages. *Bellevue Farm Owners Association v. Stevens*, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 1293482 (2017), was on discretionary review. The underlying litigation involved the development of waterfront property and included a counterclaim for abuse of process. The damages asserted under the counterclaim were solely attorney fees and related costs.

The counterclaim defendant sought discovery of billing records relating to the attorney fees and costs claimed. Following an order at the trial court requiring production, the counterclaimant requested—and was granted—discretionary review. At the Court of Appeals, the counterclaim defendant argued that the counterclaimant had impliedly waived privilege by claiming the attorney fees and associated costs as damages. The counterclaimant, in turn, contended that implied waiver only applied to legal malpractice claims.

The Court of Appeals found implied waiver, noting that Division II had taken a similar position outside the legal malpractice context last year in *Steel v. Olympia Early Learning Center*, 195 Wn. App. 811, 381 P.3d 111 (2016). The Court of Appeals in *Bellevue Farm Owners* concluded:

“[Counterclaimant] impliedly waived the attorney-client privilege and work product by claiming attorney fees as his only damages for abuse of process. Because discovery is necessary to determine the proximate cause of his alleged harm, . . . [Counterclaimant] . . . waived the right to assert attorney-client privilege and work product for attorney fees and cost billing records.”

2017 WL 1293482 at *9.

Bellevue Farm Owners highlights the practical risk of seeking attorney fees as damages through a counterclaim: the other side may be entitled to attorney billing records in the very case being litigated.

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.