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**Court of Appeals:
Claiming Attorney Fees as Damages Waives Privilege**

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Division I of the Washington Court of Appeals held recently that the attorney-client privilege is waived when claiming attorney fees for the work involved as damages in a subsequent legal malpractice case. *Leen v. Defoe*, 2018 WL 582448 (Wn. App. Jan. 29, 2018) (unpublished), arose against the backdrop of a commercial transaction. The plaintiffs had hired the defendant law firm to represent them in negotiating the sale of a business. After the sale closed, the purchaser sought indemnification from the plaintiffs regarding a number of product liability lawsuits. The plaintiffs retained a second law firm to handle the indemnification litigation because the defendant law firm had a conflict in one of the underlying product liability lawsuits. The plaintiffs later sued the original law firm for malpractice, claiming that the asset purchase agreement it negotiated failed to adequately protect them from the indemnification litigation. The plaintiffs included the legal fees paid to the second law firm in the indemnification litigation as part of their asserted damages.

In the malpractice case, the defendant law firm sought communications between the plaintiffs and the second law firm. Although the plaintiffs were seeking the second law firm's fees for the work involved as damages, they argued that the communications remained privileged. The trial court granted the

defendant law firm's motion to compel and on discretionary review the Court of Appeals affirmed.

The Court of Appeals' reasoning was twofold. First, relying primarily on *Pappas v. Halloway*, 114 Wn.2d 198, 787 P.2d 30 (1990), the Court of Appeals concluded that the plaintiffs impliedly waived privilege as to the second law firm by suing the first for malpractice and, in doing so, making its otherwise privileged communications with the second law firm relevant to the malpractice claim. Second, the Court of Appeals also concluded that by including the second law firm's fees as damages, the plaintiffs had also impliedly waived privilege again because they made them relevant to the malpractice claim. The Court of Appeals also agreed with the trial court that the second law firm's work product should also be produced because under CR 26 it was both relevant and the defendant law firm showed the requisite substantial need.

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.