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## **Idaho Supreme Court Allows Fee Disgorgement for Breach of Fiduciary Duty**

**By Mark J. Fucile**  
**Fucile & Reising LLP**

In a case of first impression, the Idaho Supreme Court recently held that fee disgorgement is available as a remedy against a lawyer for breach of fiduciary duty even if there are no resulting damages.

*Parkinson v. Bevis*, 448 P.3d 1027 (Idaho 2019), involved comparatively simple facts. A lawyer representing Parkinson in her divorce proceedings shared a confidential attorney-client communication with opposing counsel. In a subsequent lawsuit against the lawyer, Parkinson conceded that she was not damaged by the unauthorized disclosure—instead framing her claim as one for breach of fiduciary duty seeking fee disgorgement as a remedy. The trial court dismissed the claim, but the Idaho Supreme Court reversed.

The Idaho Supreme Court first distinguished breach of fiduciary duty from legal malpractice: “A breach of fiduciary duty claim is an equitable claim for which a defendant may have to disgorge compensation received during the time the breach occurred, even if the plaintiff cannot show actual damages.” 448 P.3d at 1033. The Court noted that confidentiality was one of the central fiduciary duties lawyers owe their clients. Citing Section 37 of Restatement (Third) of the Law Governing Lawyers (2000), the Court held: “If a fact-finder were to determine that . . . [the] conduct [involved] was serious and clear, disgorgement

of all or a portion of the attorney fees paid would be appropriate. *Id.* at 1035.

The Court then adopted criteria set out in the *Restatement* as a guide in assessing fee forfeiture as a remedy in a given case:

“The criteria listed in section 37 are to be used to determine whether the trial court may order forfeiture of all or a portion of an attorney’s fee as an appropriate equitable remedy in these circumstances. To reiterate, those factors are (1) the extent of the misconduct, (2) whether the breach involved knowing violation or conscious disloyalty to a client, (3) whether forfeiture is proportionate to the seriousness of the offense, and (4) the adequacy of other remedies.” *Id.*

*Parkinson* is similar to Washington’s approach to disgorgement in, among others, *Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729 (2012).

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 a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the 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.