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Court of Appeals Clarifies Fiduciary Exception and Internal Law Firm Privilege

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Over the past generation, law firms increasingly institutionalized internal ethics, claims and risk management advice. Firms large and small now often have general counsel or the equivalent to advise firm lawyers and staff. Along with that, courts have generally recognized a law firm's own attorney-client privilege over those confidential conversations. Some jurisdictions—including Washington—have also recognized an exception to privilege when the advice rendered is adverse to a current client. Usually called the “fiduciary exception,” the rationale is that a law firm's fiduciary duty to a current client trumps its own internal law firm privilege. The exception usually plays out in the malpractice context when a by-then former client seeks internal documents or testimony of law firm personnel reflecting privileged internal advice concerning events in dispute during the time the law firm represented the client. *Versuslaw, Inc. v. Steel Rives LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005), is the leading case in Washington on both internal law firm privilege and the fiduciary exception.

A recent decision from the federal court in Spokane, however, distinguished *Versuslaw* and found that the fiduciary exception did not apply to a fee dispute that followed an essentially completed representation. The ruling in *Lee & Hayes, P.C. v. Continuous Composites Inc.*, 2025 WL 1886667 (E.D.

Wash. May 9, 2025) (unpublished), was painted against the backdrop of a collection action by the plaintiff law firm against the defendant former client over fees owed after the law firm obtained a large verdict for the client in a commercial case. The client—citing *Versuslaw*—sought internal discussions with the firm’s in-house counsel over the client’s request for a reduction in the fee after the work involved had been completed. The client didn’t contend that there was anything wrong with the firm’s work. Rather, the issues over the fee surfaced after a \$17.3 million jury verdict for the client and subsequent concerns about the solvency of the defendant involved led to post-trial settlement discussions. The client was negotiating directly with the defendant over settlement and, at the same time, was asking the firm to reduce its fee to maximize the client’s share if it had to resolve the case for less than the verdict. The present litigation followed.

The federal court found that the fiduciary exception did not apply to the law firm’s internal discussions with the firm’s in-house counsel because those discussions concerned the post-trial fee reduction request rather than the firm’s work for the client. Since *Versuslaw* was decided two decades ago, its boundaries have remained comparatively indistinct. The recent decision from Spokane, however, suggests a line of demarcation between questions over work

for the client and later contract negotiations over the fee involved without regard to the quality of the work.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of 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 *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* 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 503.860.2163 and Mark@frllp.com.