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Court of Appeals Voids Fee-Sharing Agreement

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Division I of the Washington Court of Appeals recently refused to enforce a fee sharing agreement between two plaintiffs' lawyers because the arrangement had not been confirmed in writing with the client as required by RPC 1.5(e)(1)(ii). *Kayshel v. Chae, Inc.*, __ Wn. App.2d __, __ P.3d __ (2021), involved an individual employment discrimination claim and a separate wage class action. The attorney who was retained initially by client—the claimant in the individual case and the then-potential class representative in the class action—later associated another lawyer in the class action.

The two lawyers eventually agreed on a fee-split in percentage terms. They hand-wrote the agreement over breakfast and later confirmed the terms between themselves by email. Although the second lawyer related that he had received the client's oral consent in a telephone call, the client was never presented with the written agreement.

The first lawyer then had a dispute with the client and withdrew from both cases. The class action was later certified and the second lawyer was appointed class counsel. The class action settled and resulted in an $800,000 attorney fee award. At that point, the first lawyer sought part of the award under the fee sharing agreement. The trial court agreed, but the Court of Appeals reversed.

The Court of Appeals found that the agreement between the lawyers was unenforceable because they had not confirmed the client's consent in writing:

> RPC 1.5(e)(1)(ii) provides that a fee division between attorneys who are not at the same firm is permitted only if the client agrees to "*the* arrangement, including *the* share each lawyer will receive, and *the* agreement is confirmed in writing." . . .
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> We agree with . . . [the first lawyer] . . . that the "agreement confirmed in writing" does not require the client to physically sign the . . . Agreement, though that would be preferred for obvious reasons. However, there must be something in writing that conveys the client actually is aware of and agrees to the terms of the fee division agreement.
> (Emphasis in decision).

Because the first lawyer had withdrawn, his fee claim was framed procedurally as an attorney lien. The Court of Appeals, therefore, remanded the case to the trial court to determine whether the first lawyer was instead entitled to *quantum meruit* recovery based on evidence of his contribution to the fund created. In the meantime, *Kayshel* serves as a very pointed reminder of the importance of carefully following the requirements of the fee sharing rule.

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 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 *Bar News* 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.