

New Considerations in Personal Injury Litigation

by Michael W. Young

Members of the Utah Bar are no doubt well aware of the recent changes in the Utah Rules of Civil Procedure. Seasoned practitioners and young associates alike have begun to work under the new procedural regime, and adjustments in prior practices and mores are demanded. Some changes are straightforward and easy to apply; they require minor revisions to format and case management. Other changes, however, require more critical reflection.

Among the more notable changes in the civil rules is the addition of Rule 26.2: disclosures in personal injury actions.

This rule lays out additional disclosure requirements for plaintiffs filing personal injury actions. *See, generally*, Utah R. Civ. P. 26.2 credits (adopted effective December 22, 2011, and amended effective April 1, 2013). These additional disclosure requirements are particularly considerable

when applied within the general disclosure framework outlined in Rule 26. Specifically, Rule 26(d)(4) precludes a party from using an “undisclosed witness, document or material at any hearing or trial.” *Id.* R. 26(d)(4).

Accordingly, failure to abide by the disclosure requirements of Rule 26.2 may dramatically impair a plaintiff’s pursuit of relief. Compounding this new dynamic are long-standing ethical considerations applicable to all attorneys. In particular, an attorney’s ethical obligations of competence and diligence should be carefully understood vis-à-vis Rule 26.2.

Ultimately, Rule 26.2 and its attendant obligations have further shifted the resource burden to the attorney evaluating a prospective case. In most cases, significant time and resources should be spent before an attorney files a complaint or even

enters into a payment agreement. Because personal injury matters are often taken by attorneys under a contingent fee arrangement, this shift in burden is significant and may press attorneys and firms with less resources into entering into fee-sharing agreements with larger firms. While doing so may often best serve the client’s interests, such arrangements come with their own legal and ethical considerations that should also be critically reviewed.

Rule 26.2’s Requirements and Practical Implications

Pointedly, Rule 26.2 no longer allows an attorney to offload the

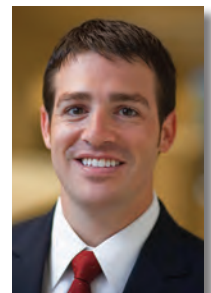
gathering of information critical to the underlying case to the discovery phase of litigation. The rule’s disclosure requirements are not complicated and are intended to advance the litigation at issue by providing the defendant(s) “key fact elements that are typically

requested in initial interrogatories in personal injury actions.” *Id.* R. 26.2 advisory committee note. Accordingly, a plaintiff is now required to disclose upfront a significant amount of sensitive information.

While much of the required information can easily be obtained at an initial intake meeting or consultation, securing some information is more challenging. For example, gathering

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required medical information and documents can often be time consuming and expensive. Additionally, working with third parties to obtain wage loss and disability information can also be painstakingly slow and difficult. Perhaps most importantly, the disclosure of medical and wage documentation to opposing counsel prior to reviewing that information yourself immediately puts a client's interests in jeopardy. Beyond the need to protect information that should not be disclosed in the underlying matter for reasons of relevance and privilege, plaintiff's counsel must take every care to preserve the plaintiff's ability to shape the case narrative. Providing opposing counsel with a list of healthcare providers without first reviewing what relevant records those providers actually have fails to protect basic client interests.

Prior to the implementation of Rule 26.2, an attorney lacking the resources necessary to gather this information could still file a complaint with the hope of entering into settlement negotiations or discussions. In the least, an attorney could file a complaint and simply review medical and wage documentation "later." Such is no longer the case. Notwithstanding what might be considered an initial disadvantage to the personal injury lawyer, Rule 26.2 provides a personal injury client with two distinct advantages.

First, as noted above, the rule serves to expedite the litigation process by forcing both parties (defendants have enhanced disclosure obligations too) to exchange critical information at the outset of the case. Such a dynamic should move the litigation along more quickly, providing the plaintiff his or her prospective relief sooner. Second, Rule 26.2 compels personal injury attorneys to engage with the facts of the case sooner. Such an investment in time and resources is consistent with ethical obligations already imposed on practitioners but which have often been overlooked or discarded.

An Attorney's Obligation To Represent a Client in a Competent and Diligent Manner

Rule 1.1 of the Rules of Professional Conduct requires a lawyer to provide his or her client with competent representation. Utah R. Prof'l Conduct 1.1 (2013). This rule indicates that competence requires "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* The relevant factors considered in determining whether an attorney has the requisite knowledge and skill in a particular matter include the attorney's "general experience, the lawyer's

training and experience in the field in question, the preparation and study the lawyer is able to give" to the underlying matter, and whether it is feasible for the attorney to refer, associate, or consult with an attorney of competence in the particular field at issue. *Id.* cmt. 1.

The rule of professional practice regarding competence indicates that the proficiency of a general practitioner is typically sufficient for competent handling of a potential matter but also notes that expertise in a particular field may be required in some circumstances. *Id.* For the attorney considering representation in a personal injury matter, this nuance is important. Certainly not all cases are created equal. Some personal injury matters might simply require the careful application of tort law principles familiar to most general practitioners. However, personal injury matters dealing with medical malpractice, mass torts, or complex regulatory regimes, e.g., transportation and trucking, will often demand a higher level of expertise. An attorney without the requisite skill to *competently* pursue such a matter should carefully consider accepting such a case given the requirement of Rule 1.1.

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As noted above, Rule 26.2 of the Utah Rules of Civil Procedure renders dubious the proposition of filing a complaint with the hope of entering into a quick settlement. Indeed, such an approach threatens to violate the ethical obligations an attorney has to a prospective client. Rule 1.16 of the Rules of Professional Conduct dictates when an attorney *shall not* represent a client. Notably, “[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and *to completion*.” *Id.* R. 1.16 cmt. 1 (emphasis added). Willingness to see the matter through to trial is an inherent obligation assumed by an attorney representing any client. Accordingly, acceptance of a personal injury matter with an eye toward quick settlement would appear to be a violation of the spirit of the rule, if not its letter.

The ethical obligation of diligence is also implicated by Rule 26.2. “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” *Id.* R. 1.3 cmt. 1. A lawyer’s requirement to represent his or her client with “diligence” touches upon all aspects of representation. *See, e.g., Camco Constr., Inc. v. Utah Baseball Acad., Inc.*, 2010 UT 63, ¶ 21, 243 P.3d 1269 (concluding that an attorney’s failure to exercise reasonable diligence in identifying key legal case law and theories early in the matter precluded the same from receiving the sought relief); *Brown v. Glover*, 2000 UT 89, ¶ 30, 16 P.3d 540 (stating that an attorney’s professional responsibility to act with reasonable diligence and promptness imbues a responsibility on an attorney to “use the available discovery procedures to diligently represent her client” (citing Rule 1.3)). Indeed, failure by an attorney to exercise diligence in representing his or her client can lead to sanctions, such as suspension of one’s license. *See, e.g., Utah State Bar v. Jardine*, 2012 UT 67, ¶¶ 78, 83, 289 P.3d 516.

By entering into an agreement to represent a personal injury client, an attorney is obligated to do so with diligence. Again, “a lawyer should carry through *to conclusion* all matters undertaken for a client.” Utah R. Prof’l Conduct 1.3 cmt. 4 (emphasis added). Presupposing the settlement of a case is a mistake. Moreover, assuming that one can later obtain the necessary expertise to represent his or her client competently and diligently is an equally dangerous proposition. Utah Rule of Civil Procedure 26.2 affords the practitioner very little time to understand and evaluate legal concepts otherwise unfamiliar or

new, yet critical to the issues implicated by the underlying matter. In the end, the attorney considering representation in a personal injury matter must be self-aware. Does the attorney have the time, knowledge, resources, and expertise to pursue the matter to trial? If not, an alternate approach is required.

Fee Splitting as a Work-Around

Attorneys approached with a potential personal injury action should be acutely aware of the procedural and ethical obligations that accompany such a matter as described above. Whether the lawyer works in a larger firm, a smaller firm, or as a solo practitioner, a determination to refer the matter to another attorney with the requisite expertise is often made. The propriety of the arrangement between the originating attorney and the referral attorney is of utmost consideration. As Judge Kate A. Toomey advised as then-Assistant Counsel with the Office of Professional Conduct, there are serious considerations to be made when entering an arrangement with another lawyer to divide fees. Kate A. Toomey, *Practice Pointers: Fee Splitting and Referral Fees Under the Rules of Professional Conduct*, 7 UTAH BAR JOURNAL 17 (1999). Judge Toomey explained, “Attorneys should be aware that referral or forwarding fees, ‘which by their nature involve an economic benefit for little or no actual services performed beyond the referral’ *are not permitted* in Utah.” *Id.* (emphasis added) (quoting *Phillips v. Joyce*, 523 N.E.2d 933, 939 n.5 (Ill. App. Ct. 1988)). In light of Judge Toomey’s conclusion, a practitioner is forced to ask what arrangements, if any, are permitted in Utah. Again, the Rules of Professional Conduct provide guidance.

Rule 1.5 of the Rules of Professional Conduct prohibits an attorney from charging or collecting an “unreasonable fee or an unreasonable amount for expenses.” Utah R. Prof’l Conduct 1.5(a) (2013). The rule also expressly describes the kind of fee-splitting arrangements that are permitted in Utah. Specifically, a division of fees between lawyers who are not in the same firm is permitted *only* if: (1) “the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation”; (2) “the client agrees to the arrangement” and such agreement is reduced to writing; and (3) “the total fee is reasonable.” *Id.* R. 1.5(e); *see also* Ethics Advisory Opinion Committee (EAOC) 121, *May a Lawyer Pay Another Lawyer a Fee for Referring a Case?* (Dec. 16, 1994).

The proportionality requirement of Rule 1.5 is intended to

preclude an attorney from collecting fees for merely referring a matter to another attorney. As one court observed, “[a]n attorney is not entitled to a division of fees for ‘services performed and responsibility assumed’ when that attorney does nothing but refer a fee-generating client to another attorney without any other actual participation in or handling of the case.” *Fitzgibbon v. Carey*, 688 P.2d 1367, 1374 (Or. Ct. App. 1984) (citation omitted). In other words, the proportionality requirement requires the actual participation in the matter by the referring attorney. *King v. Housel*, 556 N.E.2d 501, 504 (Ohio 1990) (citing *Palmer v. Breyfogle* 535 P.2d 955, 966–67 (Kan. 1975)); see also Toomey, *Practice Pointers: Fee Splitting and Referral Fees Under the Rules of Professional Conduct*, at 19.

Under a joint responsibility arrangement, both attorneys assume responsibility for the pursuit of the matter, regardless of the proportion of work performed by each. However, even under this arrangement, “[t]he lawyer receiving a referral fee under a joint-responsibility arrangement cannot simply ‘hand off’ the client to the receiving lawyer.” EAO 121. The joint-responsibility

arrangement requires each lawyer to assume “responsibility for the representation as a whole.” Utah R. Prof'l Conduct 1.5 cmt. 7. In other words, each lawyer is responsible and liable for the other lawyer’s actions in the matter, including ethical violations by either attorney.

Whether a proportionality or a joint-responsibility arrangement is made, it is clear that a referring attorney must be engaged in the litigation. This should be seen as an advantage and opportunity for the practitioner lacking the resources or experience to pursue complex personal injury matters. For the seasoned practitioner with little or no interest in the substantive litigation, fee arrangements can be made that merely require minimal feedback and engagement, proportional to the work done by the referring attorney. For the young or inexperienced attorney seeking to foray into personal injury law, but lacking resources or expertise, an arrangement can be made that will not only provide the resources necessary to pursue the matter but will also allow that attorney to gain crucial experience and expertise in the specific legal area.



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