

# Statute of Limitations Boo-Boos

By Anne E. Thar, Vice President and General Counsel, ISBA Mutual

**L**egal malpractice claims based on missed statute of limitations deadlines are particularly frustrating because they are easily preventable. Let's examine some of the most common causes of blown statutes of limitations and consider some possible cures.

## **Suing Anytown, USA, et. al.**

The award for the statute of limitation most frequently missed goes to the one-year statute of limitations for claims against public entities and their employees. This error usually occurs when an attorney fails to identify a municipal defendant until after the one-year time limit has passed. Here are several examples:

Attorney represents one client who slipped and fell at the Rosemont Horizon during a concert and another client who tripped in a University of Illinois parking lot. Attorney doesn't realize that a one-year statute of limitations deadline applies to the defendant facilities owned by governmental entities and therefore misses the filing deadline. In another claim, Attorney failed to discover that the defendant doctors in a medical malpractice action were employees of Cook County Hospital until it was too late. In yet another case involving a car accident with an ambulance, Attorney was not aware that the ambulance was owned by a municipality and that the driver was a municipal employee.

**Solution: assume the worst.** This prevalent mistake could be avoided if plaintiffs' attorneys assumed that all personal injury actions involved at least one potential public entity-employee defendant and therefore conducted their investigations within a one-year period after the injury or accident. This would provide attorneys with sufficient



***The number one cause of legal malpractice claims is missed statute of limitations deadlines. Here's how to get it right.***

time to file a complaint against any public entity or municipal defendants who are identified during the investigation.

## **The \$10,000 Typo**

Suppose you give your secretary or docketing clerk a calendaring slip for a new statute of limitations date and ask him or her to enter it into your computerized calendaring system. Unfortunately, your employee is suffering from the flu that day and accidentally inverts the 1-7-99 date to 7-1-99 on the system. Or perhaps out of habit, your secretary enters a two-year deadline into the calendar instead of the correct one-year period. As a result, you don't pick up either file until the statute of limitations has already passed. Instant malpractice.

**Solution: redundant or dual entries.** Whether you use a paper calendar or an automated docketing system, each statute of limitations date should be entered into two separate calendars by different people. No calendaring system is foolproof unless it provides for such checks and balances. It also doesn't hurt to explain to your staff the severe consequences of a careless calendar entry.

## **The Guessing Game**

An attorney who doesn't identify the correct statute of limitations for a particular cause of action is doomed to blow the filing deadline. For instance, Attorney is hired solely to pursue a dram shop action on behalf of a minor who was injured by a drunk driver. Attorney has worked on dram shop cases in the past, but not those involving a minor. Attorney assumes that the dram shop statute tolls for minors. He is wrong and pays for his mistake with a malpractice claim.

In another matter, Attorney represents Client in a suit to enforce her mechanic's lien for concrete work she has performed. Attorney incorrectly assumes that the two-year statute of limitations for filing the suit runs from the date the lien was filed rather than two years from the completion of the work. Attorney could have avoided this error by checking the statute's language to determine when the limitations period began to run.

**Solution: get back to basics.** Check the statute of limitations and interpretive case law every time, particularly if you find yourself in uncharted territory with a cause of action you have never handled before or an unusual set of facts. You can also co-counsel with or seek advice from a colleague who is

---

more experienced in the field. Remember that things are rarely as simple as they appear.

### Trusting Your Client's Memory

Clients don't always get their facts straight—with disastrous results for the unwary attorney. For example, assume Client tells Attorney that her car accident occurred on June 13. The accident actually took place on June 10. Although the police report clearly shows the date of the accident as June 10, Attorney does not verify the date given to her by Client. Attorney files the complaint on June 12, missing the statute of limitations by two days.

**Solution: verify dates.** Don't rely solely on information provided by any one source, particularly clients, in establishing the date of the injury or accident. Instead, verify those dates through other means such as a police report or physician's notes.

### The Mystery of the Vanishing File

Simple filing errors have cost more than one attorney a legal malpractice claim. Take the following illustrations: Attorney X interviews New Client regarding a personal injury matter and then records the facts on a New Client/Matter Intake Form. Attorney X promptly loses the intake sheet on the paper-strewn slab of wood she calls her desktop. As a result, no file is ever set up for the matter and the statute of limitations deadline isn't entered into the docket. Attorney X learns of the mistake when New Client calls for an

update several months later. Unfortunately, the statute of limitations period has expired in the interim.

Then there's the case of Attorney Y. Attorney Y is from the old school and doesn't believe in lots of fancy calendaring systems. Instead, he keeps all matters that are not in suit yet in "The Drawer." Every week or so, he reviews the files in "The Drawer" to refresh his memory on upcoming statute of limitations deadlines. He represents Client with respect to two separate and unrelated accidents, one of which occurred in 1993 and the other in 1995. His secretary removes the 1995 file from "The Drawer" to add doctor's bills that were just received in the mail. The secretary then inadvertently refiles the 1995 file with the 1993 file on the regular file shelves rather than in "The Drawer." Since Attorney Y has no backup calendaring system, he misses the statutes of limitations deadline for the misplaced file.

**Solution: design a better filing system.** Attorney X could reduce the chances of losing critical information by printing her file intake sheets and calendaring slips on brightly colored paper. She could also establish a special in-box for these forms so they can't get lost at the bottom of a generic pile of work.

Attorney Y can solve his problem by bagging "The Drawer" and instituting a mandatory file review system that requires each file to be pulled and reviewed every 60 days. Under this system, a file cannot be misplaced or

neglected for several months without notice.

### The Scarlett O'Hara Syndrome

"I'll think about it tomorrow" may have worked for Scarlett, but it's a dangerous philosophy for lawyers. For example, Attorney agrees to represent Client on a simple slip and fall matter. Attorney has Client sign the contingency fee agreement and then ignores the matter for months as he works on other, more pressing, cases. After all, Attorney reasons, there is plenty of time left on the clock. As the two-year limitations period draws near, Attorney keeps promising himself that he'll work on the matter next week. Another case in the office suddenly heats up at the same time Attorney's first child is born. When Attorney finally gets a chance to pick up the file, the limitations period has expired. In another situation, Attorney manages to get a complaint filed at the last minute but fails to identify all potential causes of action and defendants.

**Solution: just do it.** First, investigate the facts and file the complaint as *soon* as possible rather than as late as possible. Second, implement the mandatory file review system discussed above. Third, don't ignore the scheduled tickler or reminder dates—they're designed to avoid just such a claim. Finally, if you constantly feel overwhelmed, close your office for a day and come up with concrete suggestions for reducing the burden. Then follow through.