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A A R E B C

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■ Bulletin #123

Is your limitations system complete?

Limitation dates are deadlines that, if missed, result in clients losing rights and lawyers losing sleep and malpractice suits. Any system that is effective for keeping track of deadlines will also be effective for limitation dates, but limitation dates should be particularly flagged because of the negative outcome of missing one.

Four basic steps are involved in meeting your responsibility to have an adequate limitations system:

1. Develop a date information storage system.
2. Establish policies to govern use of the system.
3. Input information into the system.
4. Get information out of the system and act on it.

Steps 1 and 2 are 'design' steps, while 3 and 4 are 'operational' steps.

Develop a date information storage system

Computers are very good at storing, sorting, and manipulating dates, and in this day and age should be part of every law firm's limitations system. Many 'calendar' and 'case management' programs contain excellent calendaring modules. To name a few (Amicus Attorney, Time Matters, Integra, MS Outlook, Time & Chaos) is to miss out many more. However, there is no dedicated limitations software you can buy 'off the shelf.' You will need to buy a calendaring program that works for your firm and build your own system.

It's best if the program you use for limitations is the same as, or integrated with, other program(s) used for keeping track of other deadlines in your office (and every office should have an integrated, networked calendar system into which all deadlines are entered, which is accessible to everyone in the office).

Some lawyers are concerned about losing their data as programs change, but most programs are 'upwardly compatible', and as time goes on, we will have more interchangeability of data between programs. Even so, deadlines information, including limitation dates, should be backed up at least daily and stored off-site.

Establish policies to govern use of the system

A policy that is not written down is just a hope. It is essential to go through the process of articulating and writing down the principles and procedures that govern the limitations system. These

should be part of the office procedures manual, and every new lawyer and non-lawyer who joins the firm should be taken through them as part of their orientation.

The policy and procedures should describe the rules for recording deadlines whenever a deadline-triggering event occurs, such as opening a file, filing a statement of claim, obtaining a judgment or order, registering a document, or attending for the execution of a document (for example, a lease with an option). They should be reviewed and updated from time to time to ensure they continue to reflect actual current practice.

Input information into the system

The key to getting all deadlines into the system is to create a culture that embraces the limitations policy. The best software and written policies have little impact in organizations that are cavalier about deadlines. On the other hand, law offices that are attentive to all deadlines don't have limitations problems, because responding to deadlines is part of their culture.

The motivation for people to input the information may be negative ('We'll be sued if we don't do this, and your job may be on the line.') or positive ('This is an issue of client service: we are not the type of firm to let our clients down by missing a limitation.').

Get information out of the system and act on it

Lawyers' insurers see many problems in law offices that have limitation systems but don't use them. Again, this is a matter of firm culture. In disorganized offices that fly by the seat of their pants, deadlines of all sorts slip by, including limitation dates. In organized, client-oriented offices, they don't.

A monthly look at the limitations diary is not good enough. One advantage of a computerized system is that the system can throw your deadlines at you daily, sorted by priority. Then it will be up to you to respond appropriately.

Limitations management is a matter of client care and self-preservation, of service and survival.

From Paul McLaughlin, Practice Management Advisor, Law Society of Alberta

■ Bulletin #124

Are you suing the right party?

When you file a lawsuit, beating the statute of limitations is not your only concern. You must also ensure that you've named the proper defendant. Malpractice claims arising out of failure to name the proper party are common. Here are two illustrations:

1. Lawyer asks associate to draft a claim for client, who was in an automobile accident. The police report says the driver of the other vehicle was Mr. X, so associate names Mr. X as defendant. Just before the limitation runs out, lawyer files the statement of claim. Mr. X gets the claim against him dismissed, because his son was actually the driver. By now the limitation has passed, and lawyer is barred from suing the correct defendant.
2. Client slips and falls at convenience store. Lawyer reviews convenience store's business licence, which is issued to PDQ Corp. Three weeks before the limitation date, lawyer files suit against PDQ Corp., which files bankruptcy, causing a stay of the personal injury action. Long after the limitation date passes, the stay is lifted and discovery begins. In response to a question, it is learned that someone other than PDQ Corp. was the occupier.

In each situation, lawyer relied on a single source to identify the defendant: a police report, a registrar, a business licence. A more complete investigation would have disclosed the proper defendant. What's more, lawyer waited until the last minute to file the lawsuits and lost any opportunity to correct mistakes. To reduce the likelihood of malpractice claims from naming the wrong party, take these precautions:

Before filing the lawsuit, investigate thoroughly

Police reports, medical reports, and such documents can contain incorrect information. Insurance companies may name the policy owner rather than the alleged wrongdoer on their correspondence to you. Your client may not remember the name of the wrongdoer. Talk to witnesses. Research public records. If a corporation is involved, find out when it was formed and if it remains active.

File the lawsuit early

Give yourself enough time to correct a mistake if one is made. Filing early lets you conduct discovery to make sure you have named the correct party.

Stay alert to clues that you have named the wrong party

Pay attention to the defendant's statement of defence; if you've named the wrong party, it will contain key denials that signal your error. Clues about mistaken identity will also be found in answers to interrogatories and deposition questions. Make sure you are not so caught up in prosecuting the case that you fail to pick up on these clues and take appropriate action.

Adapted from ISBA Mutual News, Summer 2000

■ Bulletin #125

Who is responsible, senior or junior?

Insurance claims against lawyers arise too often in situations when a senior lawyer delegates work to a junior without ensuring that the junior has the necessary support to carry out the work adequately. This lack of support can take many forms. Among the most common are: inadequate office systems, unavailable clerical staff, failure to supervise, or just plain bad advice.

Of course, junior lawyers must remember that as soon as they are admitted to the bar their responsibility level rises. But senior lawyers should not use this fact as an excuse to abdicate their responsibility to green lawyers who rely on them for considered and competent advice.

■ Bulletin #126

Four tips for curing the common claim

1. Document your client's decision not to pursue viable causes of action for 'personal' reasons. What if your client tells you not to name as a defendant the company his wife works for, but then gets a divorce? Will you be able to prove that he instructed you to forego a viable cause of action against the company?
2. Document the scope of your engagement, especially when it is limited. If you don't get it in writing, it will be your word against the client's that the contested services were excluded from your scope.
3. Don't answer questions posed by parties you do not represent. Tell them you do not represent them and advise them to get individual advice. You represent Ms. A on the purchase of a small business. You attend a meeting of all the parties, the other purchaser, unrepresented Mr. B, asks you about the buyout provisions in the agreement. You give him a brief overview of the buyout terms. The deal goes through, and the company is a big success. Unfortunately, when Mr. B decides to retire he finds that the contract requires him to sell his interest to Ms. A for a 'fire sale' price. Mr. B sues you for malpractice, alleging that you represented him as well as Ms. A in the transaction and failed to advise him of the potential ramifications of the buyout provisions.
4. Use a detailed disengagement letter to document your withdrawal from a legal matter. When you withdraw from an ongoing matter, give your client written notice stating when and why your representation will cease, summarizing the status of the case, and warning of impending deadlines.

Adapted from ISBA Mutual News, Summer 2000