



LOSS PREVENTION BULLETIN

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Editor: Karen L. Dyck,
Loss Prevention Coordinator

36 Toronto Street
Suite 510
Toronto, Ontario
M5C 2C5
Email: karen.l.dyck@gmail.com

■ Bulletin # 219 Limiting Missed Limitation Claims

Two years ago, just after Christmas, there was a small fire in my home, caused by a defective furnace. My home insurer quickly responded, covering the replacement and cleanup. I paid the deductible and that was the end of the matter from my perspective.

This winter, a couple of weeks before Christmas, a lawyer acting for my insurer contacted me to ask for details of the loss. He noted that nearly two years had passed and the limitation date was now approaching. He was preparing to file a statement of claim against the supplier and the manufacturer of the furnace. A few weeks later, I received a copy of the claim, filed one week before the limitation period expired.

This is how it is supposed to work. A plaintiff retains a lawyer to pursue a claim. The lawyer enters limitation dates into the firm's system. Investigatory work takes place before the limitation date arrives. The lawyer files the claim in advance of the expiry of the limitation period. The matter proceeds.

Limitation dates are critical in a litigation practice. Missing the limitation period means your client may be without recourse.

For this reason, failing to file a claim on time often leads to a claim against the lawyer who missed the limitation period. Each year, claims based on a missed limitation period represent a significant proportion of all professional liability. Over the past 5-6 years, a missed limitation period was the basis for 10% of claims in Nova Scotia, 12% in Manitoba, 22% in New Brunswick, 25% in Saskatchewan, and 56% in Newfoundland.

While missing a limitation date often results from poor practice management, it may also result from a lack of knowledge of the applicable statute or rule.

Application of limitation provisions will vary across jurisdictions. For example, Nova Scotia's limitations statute sets out criteria for extension of the limitation period for up to 4 years. As well, court rules, such as Alberta's "drop dead" rule, may further dictate the timing in which a matter must proceed.

Lawyers who take on cases in other jurisdictions must know the relevant limitation periods. The best limitation reminder systems can't make up for a failure to know the applicable law.

The point is simply this: Never assume. In every case, make sure you have checked and diarized the correct limitation periods and deadlines. This is especially important when dealing with matters outside your home jurisdiction. Statutes are amended; rules change. Don't assume otherwise.

Missing a limitation period may also be the result of a failure to adequately investigate the facts at issue. Your systems are only as good as the information you enter into them. If your client has a "fuzzy" recollection of the details, you should take further steps to confirm the facts before you file a claim.

Keeping track of limitation periods and deadlines is essential to good practice management. These habits are best learned in the early years of practice and maintained throughout a career. Though it's sometimes too late to file a pleading, it's never too late to pick up a new habit.

There's nothing much new in the advice in this area, though the tools used may change from time to time. An "old school" paper-based calendaring system remains effective, but should have a backup. Such a system functions to track, bring forward, check and double-check for limitation dates.

Computer-based systems are equally effective whether used alone or with a paper-based backup. The key, regardless of the kind of system used, is to be consistent in using your system. You must enter relevant dates into the system on a timely basis, update as necessary, and review regularly. Your staff should be well-trained in the use of the system and must understand why it is critical to do so.

Furthermore, as already alluded to, you need a reliable backup plan. If your office server is down, do you have paper copies or an accessible electronic backup available? What if your office is inaccessible, as in the case of a natural or other disaster? Do you have offsite backup of your calendaring systems (not to mention your files) available? And, do you know that your backup plan is functioning based on regular testing?

The advice given above assumes that you'll take appropriate action. The reminders set in your system are not effective if you don't follow up. Human failure is as much a concern in this area as is systems failure. Tana Christianson, Director of the Law Society of Manitoba's Professional Liability Claims Fund says:

"In our experience, most lawyers are aware of the correct limitation period, but they miss it anyway, usually because they have left dealing with it until the last moment and it falls through the cracks."

It is up to you to allow enough time to get the job done, have a plan for handling contingencies due to illness or weather, and get over your bad case of procrastination. If you fail to do so, you may just find yourself named as a defendant.

For further reading:

How to keep track of your time by Sam Glover (February 10, 2014): <http://lawyerist.com/keep-track-time/>

The Case of the Procrastinating PI Attorney by Jay Reeves (January 16, 2014): <http://solopracticeuniversity.com/2014/01/16/the-case-of-the-procrastinating-pi-attorney/>

Resolutions to capture more time (and make more money) by Tim Lemieux (January 15, 2014): <http://avoidaclaim.com/2014/resolutions-to-capture-more-time-and-make-more-money/>

■ Bulletin # 220

10 Tips for Safe Pro Bono

Access to justice is an ongoing problem across Canada and the call is out for lawyers to contribute to the solution.

Late last fall, the Canadian Bar Association's Task Force on Access to Justice issued a final report, *Envisioning Equal Justice*. The Task Force set targets to bridge the growing gap between those who can afford legal services and those who are eligible for publically funded legal services (i.e. legal aid). One of those targets is that by 2020, all lawyers will volunteer legal services at some point in their career.

Around the same time, the Action Committee on Access to Justice in Civil and Family Matters issued a report calling on lawyers to support access to justice initiatives. The Action Committee proposed that lawyers continue delivering pro bono and "low bono" (low-cost) legal services.

Whether you're new to pro bono or you've provided low and no cost legal services throughout your career,

you need to ensure you manage risk in your pro bono files.

You have the same professional obligations to a pro bono client as you do to one who is paying your fees. And your pro bono client will likely have the same expectations of you as if you were sending out bills.

To manage your risk on a pro bono file, remember always to:

1. Make sure you are competent. Your client deserves competent legal services. If you can't provide that, you should decline to act.

2. Get yourself up to speed. If you have limited experience in the relevant area of law, sign up for relevant continuing professional development programs. Review the relevant legislation and any texts on the subject. Talk to your colleagues who do practice in that area.

3. Check for conflicts. While some law societies have rules in place that support giving summary advice or information without extensive conflict checks, those rules don't likely apply to pro bono representation of a client. Make sure you can act for the client without putting yourself into a conflict.

4. Open a file. This may seem obvious, but the point is, treat your pro bono files like every other file. Follow the same internal procedures.

5. Use a retainer letter. Confirm the scope of the work you will do. Confirm your expectations of the client and set out what the client can expect from you. Managing expectations is essential to the success of the pro bono relationship.

6. Communicate. Clear and effective communication is essential with every client. Don't take shortcuts in this area.

7. Use checklists. Checklists are always a good idea, but particularly so if you may be stepping into a practice area in which you're not experienced.

8. Diarize and follow-up. Calendar limitation dates, deadlines and bring forward dates as you would for any other file.

9. Keep time records. You're not sending out bills and you're not getting paid, but you still should keep time records. This will assist you in keeping the right balance between your obligations on pro bono and fee-paying matters.

10. Report on closing. Like a retainer letter, a closing report is always a good idea. It confirms what you have and have not done for a client. A closing letter can be a particularly useful communication tool in the absence of an itemized statement of account.

In other words, treat your pro bono files with the same care as you would your paid files. Your clients deserve no less.