It's what you don't do that prompts clients to sue

Legal malpractice

By EDWARD J. ROLWES

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A review of legal malpractice suits filed during a recent one-month period in Cook County Circuit Court confirms that a record number of attorneys are being sued for what they fail to do, rather than their active conduct. The bulk of these omission cases claim the attorney missed a critical deadline during earlier litigation.

While every lawsuit involves deadlines, the risk of either missing a date or being accused of doing so increases with certain types of cases. A better awareness of the high-risk situations should help to reduce the number of lawyer malpractice claims.

According to the Cook County Jury Verdict Reporter's 1993 Financial Malpractice Suit Filing List, a record 221 lawsuits against attorneys were filed in Cook County in 1993. This compares with 178 suits in 1992, an increase of 24 percent. In December alone 32 new claims were brought in Chicago; and there were 31 new suits filed in January and February, compared with 18 for the same two-month period a year earlier.

An overwhelming 66 percent of the suits filed in December 1993 involve attorney omissions, rather than active conduct. Nearly half the claims alleged that the attorney missed a statute of limitations, failed to refile after a dismissal for want of prosecution or delayed too long in serving the defendant. Including the three additional cases that involved either a failure to timely file a cause of action, answer or counterclaim, a full 53 percent of all suits filed during the one-month period against lawyers center around a missed deadline.

There are several factors that increase the risk of missing a deadline in a case. In general, the risk escalates in any case involving either multiple plaintiffs, multiple defendants, multiple potential causes of action, a case declination or a case referral.

Common sense reveals why a case with many potential defendants increases the likelihood the plaintiff's lawyer will miss a critical deadline — whether it's the statute of limitations or the period to obtain timely service.

The situation involving multiple plaintiffs is less obvious. Many times a plaintiff's attorney is hired to file a claim on behalf of less than all the injured parties. When this happens there is a risk that the individual whom you did not represent will later claim you were hired. Unless there is written evidence in the file, such as a letter confirming who is and who isn't your client, the door is left open for a later claim by the non-client that you failed to file a timely action. The key is to reduce any uncertainty, which only creates a fact question for trial.

When an existing client has multiple potential actions the chances of missing a deadline also increases. This commonly arises in the personal injury/workers' compensation situation. Often the attorney agrees to file either the personal injury case or the workers' compensation suit, but not both; particularly if the retained firm concentrates in only one area of practice.

Many tort lawyers simply tell the client at the initial interview that they do not handle workers' compensation cases or informally refer the client to an attorney who does, without more. While this may be enough to meet the standard of care, the safer practice is to expressly exclude the omitted action in the written attorney-client retainer agreement. It is also a good idea to send a letter to the client confirming that the scope of the retention excludes the separate claim. Otherwise, there is no independent evidence that you were not retained for this purpose.

You may win the subsequent malpractice claim, but the idea is to reduce the risk that you'll ever have a claim in the first place.

The wording of the retention agreement is also important, especially when any preprinted forms are used. Many standard forms provide that the attorney has been retained to file all potential causes of action arising out of the incident. This language is frequently left in the signed agreement even when the scope of retention is more limited.

If a form is used, the lawyer must take the time to tailor the document to the individual case. The preprinted form also should prompt the attorney to list any claims that are not part of the retention.

The risk of a claim that a deadline was missed also increases any time a lawyer refers a case to another attorney or declines to accept a case.

Although often inconvenient, if you decline a case, it's wise to document the declination in some manner, usually through correspondence to the person being turned down. This safeguard is often put off due to inertia or the time constraints of practice. Many attorneys have learned the hard way that it is much less inconvenient to send a letter declining retention than to defend the legal malpractice claim. If you don't you are increasing the odds that the non-client will later conclude, either through a misunderstanding or otherwise, that you were in fact hired to file the claim and failed to do so.

Whether or not the standard of care requires the lawyer to send the letter to the non-client when there is an upcoming deadline is an issue beyond the scope of this article. The point is that regardless of the standard, prudence suggests you should send a declination letter to reduce the risk of a missed deadline claim later on.

Although often overlooked, attorney referrals also increase the chance of a missed deadline suit. If the referring attorney, or Attorney A, is going to receive a referral fee she remains on the hook for any negligence of the referred lawyer. Even so, Attorney A has a natural tendency to rely on Attorney B to meet any deadlines, including the statute of limitations.

In practice, Attorney A often has little control over whether the deadline is met unless the referring attorney independently documents all important dates. To maintain control, the referring lawyer should docket all critical dates, including the statutes of limitations and then follow up with Attorney B ahead of time.

If you are the referring lawyer, it is also wise to require Attorney B to send you copies of any letters to the client and to forward any court orders setting discovery deadlines. While particular cases may not always warrant these procedures, the lawyers should adopt some method that informs Attorney A of all critical dates. All this sounds like common sense, but the fact is these safeguards often are not adopted.

Beyond question, attorney omissions account for the majority of legal malpractice claims, and most oversight cases involve missed deadlines. By recognizing ahead of time some of the risk factors that increase the chance of missing a critical date and adopting safeguards to reduce the likelihood of either an oversight or a claim by a non-client that a deadline was missed, the number of legal malpractice claims should subside. Otherwise it's a safe bet that the legal malpractice suit filing record set in 1993 will soon be surpassed.