

# WHOOSH!

## There Goes Another Deadline

With the wide availability of easy-to-use, affordable case management systems, there's no excuse for lawyers to miss deadlines in civil litigation.

If you attend any of my risk management programs, you likely will hear me quote Douglas Adams to introduce some levity to the very serious issue of legal malpractice. This is another gem from Adams's book, *The Salmon of Doubt*: "I love deadlines. I love the whooshing noise they make as they go by."

Deadlines are very important in the practice of law, and if "whoosh" is the sound they make as they pass by unaddressed, such noise may be accompanied by a feeling in the pit of the lawyer's stomach followed by a call to the lawyer's malpractice carrier that is laced with profanity and brimming with regret. In civil litigation, the consequences of a missed deadline can be severe, including the loss of a client's right to litigate further.

Although a missed deadline might not meet all the elements of a legal malpractice claim, the mistake makes it easier for the legal-malpractice plaintiff to prove their case. And even if the client does not bring a legal-malpractice claim, the embarrassment in having to communicate the glaring error to the client can be significant. A reliable calendaring system is imperative to avoiding missed deadlines, and effectively using that system should be a regular part of every lawyer's practice to maintain competence and avoid malpractice risks.

### Competence

At the heart of effective representation of a client is maintaining competence to provide such representation. Wisconsin SCR 20:1.1 states, "A lawyer shall provide competent representation

to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Wisconsin adopted ABA Comment [8] to Rule 1.1 to reflect the importance of competence in the use of "relevant technology."<sup>1</sup> This does not mean that lawyers must become information technology specialists to be competent. But it does mean that lawyers need to be aware that almost every aspect of law practice includes some level of technology, and calendaring is no exception.

### The Numbers and a "Whoosh" Moment

One may doubt that missed deadlines occur with any regularity or

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Sophisticated software programs that assist in the proper calculation of deadlines and setting reminders are readily available in many forms and styles to assist lawyers in their efforts to provide competent representation to their clients.



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wonder if there are just a few horror stories out there that make for the dramatic presentation of a more remote issue. However, the American Bar Association's Standing Committee on Lawyers' Professional Liability reported that from 2016 to 2019, the "administrative error" category, which includes calendaring, was responsible for 19% of legal malpractice claims. Closer to home (Wisconsin), "failure to calendar correctly" and "failure to react to calendar" are two top categories of errors reported to Wisconsin Lawyers Mutual Insurance Co. (WILMIC) every year, together accounting for 20% of all claims reported between 2010 and 2020. According to Brian Anderson, WILMIC's director of claims, "Handling injury claims that occurred out of state, involve the government, or that the attorney was not enthusiastic about pursuing in the first place continue to cause claims that involve missed deadlines."

In addition, attorney migration between firms has been increasing in recent years. One study of larger firms reported that in the last two years,

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lateral partner moves are up more than 50% over the previous four-year average.<sup>2</sup> Lateral hires and transitions carry inherent risks, including a new attorney's lack of familiarity with firm policies and procedures, which may lead to calendar oversights.

Any discussion of lawyers' failures in meeting deadlines would be remiss if procrastination were left out. Wisconsin SCR 20:1.3 requires a lawyer to act with "reasonable diligence and promptness" when representing a client. Comment [3] states, "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when

a lawyer overlooks a statute of limitations, the client's legal position may be destroyed...." Too often, lawyers wait until the last moment to meet deadlines, despite knowing consequences can be severe – especially in the digital age, in which technology and electronic filing play a large role in litigation.

As of July 1, 2023, e-filing is mandatory in the Wisconsin Supreme Court<sup>3</sup> and Court of Appeals<sup>4</sup> and all Wisconsin circuit courts.<sup>5</sup> This means that Wisconsin lawyers must file actions and pleadings electronically and that Wisconsin courts will send notices, including about deadlines, and other communications via email. Lawyers must read notices in their entirety and refer to the court's electronically maintained docket to keep abreast of pending deadlines in their clients' matters. The failure to do so can have very serious effects for clients.

In one recent case involving a missed deadline, a bankruptcy court denied a bank's motion to extend time for filing and dismissed an adversary complaint when counsel for the bank filed a mere 16 minutes late.<sup>6</sup> In that

case, the attorney represented the bank as a judgment creditor. The attorney attended the meeting of creditors and noted in a calendar the deadline (April 22, 2019, 60 days after the meeting) to file an adversary complaint.<sup>7</sup> Counsel conducted a Rule 2004 examination of the debtor on April 22, 2019, and "completed drafting the complaint (on which he had begun work prior to the Rule 2004 examination) at 11:24 p.m., according to metadata on the document. He finished creating PDF files of exhibits at 11:36 p.m. and logged into the court's Electronic Case Filing System ("CM/ECF") at 11:40 p.m., 20 minutes before the filing deadline."<sup>8</sup> The attorney, allowing only 20 minutes for filing, then committed a series of data-entry

errors, including mistakenly entering a "\$" in the system's "demand" dialogue box, which only allowed integers, not symbols. These seemingly insignificant errors cost the client the case as the lawyer was not able to meet the 12 a.m. deadline, and the court concluded that the late filing resulted from delays caused by "user error," not that the CM/ECF system was malfunctioning.<sup>9</sup>

### Using Technology to Stay Ahead of Deadlines

Although the above example may portray technology as anything other than an attorney's friend, it is important to recognize that lawyers can and should leverage technology when it comes to calendaring to avoid last-minute efforts to meet deadlines. Maintaining a *centralized* calendaring system (all members of the firm and staff have access) rather than a *decentralized* system (a private calendar for each attorney) is essential to avoid missing deadlines. With built-in redundancy, more people having access to the calendar, and heightened awareness by all lawyers and staff members, important dates are less likely to be missed.

Although Microsoft Outlook may be sufficient for solo and small firms, larger firms might benefit from a legal calendaring and docketing software program, such as Clio, MyCase, Rocket Matter, or others. Factors such as cost, number of users, and areas of practice will likely weigh heavily on the decision of which software to choose. In today's "virtual lawyer" environment, it is also imperative that a software-based calendaring system synchronize across devices without requiring multiple entries. In other words, once a date is entered on your desktop software, it appears immediately on your laptop, tablet, cell phone, and so on.

The "tickler system" still has application within robust calendaring and docketing software. An effective system will provide notifications (sometimes called "nudges") of upcoming

deadlines at periodic intervals, not just the deadline itself. For example, upon case intake, if a statute of limitation for the claim is one year away, monthly notifications will begin at six months out, with weekly notifications in the last month and daily notifications in the last week, until the work required is performed. This will help prevent missed deadlines and help alleviate last-minute pushes by encouraging lawyers and staff members to develop effective work-ahead habits.

Just as lawyers are expected to deliver documents to the courts electronically, courts will deliver notices the same way. Lawyers' email inboxes can fill up rapidly – especially when the lawyer is away from work. To avoid losing important notices in the sea of daily emails, consider a separate email or inbox specifically designated for all court notices. This can be accomplished by setting up a separate email address to include on the list of contacts provided to the court or by filtering incoming messages, a tool available on most email software programs.

Finally, train everyone (lawyers and staff) who will be using the system. Then, train them some more. Follow that up with more training! As the old saying goes, “garbage in, garbage out.” Lawyers and staff members must know how to use the software to use it effectively. In addition, the importance of accurately calculating deadlines must be emphasized to ensure that correct dates are entered into the system. If the calendar is off by one day or even only one hour, the results can be catastrophic to the client and result in a malpractice claim against the lawyer and the firm.

### Conclusion

Whoosh! There goes another deadline. Lawyers' failures to use calendars correctly or to react to calendar notifications are common occurrences that have serious, and sometimes irreparable, consequences for clients' cases.

Sophisticated software programs that assist in the proper calculation of

deadlines and setting reminders are readily available in many forms and styles to assist lawyers in their efforts to provide competent representation to their clients. A centralized system that is transparent, redundant, and accurate is essential. For the system to be effective, users must know how to implement it and understand the importance of correctly calculating deadlines. A little prevention from the start can make a world of difference in avoiding claims. **WL**

### ENDNOTES

<sup>1</sup>Sup. Ct. Order No. 15-03, 2016 WI 76. See also Wis. Formal Ethics Op. EF-21-02, Working Remotely. Ethics opinions are available at <https://www.wisbar.org/ethop>.

<sup>2</sup>Ames & Gough, 2023 LPL Claims Survey. See generally [amesgough.com](https://amesgough.com) (last visited Sept. 12, 2023).

<sup>3</sup>See Sup. Ct. Order Nos. 19-02C, 20-07C.

<sup>4</sup>Wis. Stat. § 809.801.

<sup>5</sup>Wis. Stat. § 801.18.

<sup>6</sup>*State Bank of S. Utah v. Beal (In re Beal)*, 633 B.R. 398 (D. Utah 2021), *aff'g* 616 B.R. 140 (Bankr. D. Utah 2020).

<sup>7</sup>*Id.* at 399-400.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 405. **WL**

## HONORING



### Joseph “Skip” Beisenstein

This year, Menn Law Firm, Ltd. celebrates the exceptionally bright legal mind, character, and career of Skip Beisenstein and all that he has been to so many colleagues, clients, and legal communities in Wisconsin and beyond.

For nearly 50 years, Menn Law Firm was fortunate to have had Skip's natural and compassionate leadership. He was an exceptional trial lawyer and was proud to be one. The presence of his legal practice will surely be missed.

We wish Skip the very best in his retirement, where he will be spending his winters in Florida, visiting with family and friends, and his summers at ballfields in northeast Wisconsin cheering on his grandchildren.