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All the best,

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Checklist of Actions to Take if You Miss the Deadline

If you miss a court or statutory deadline, here is a ten point action checklist for you. This checklist will you give you a course of positive actions.

1. Don’t panic

If you just found out about the problem of a missed deadline, take the time for a cup of coffee or a walk around the block to give yourself the time to think rationally and carefully and s l o w l y.

Until you have taken those few minutes by yourself, don’t rush around talking to anyone. Don’t talk to anyone. Think; don’t talk. Fifteen minutes is not going to make much difference (unless the deadline is 20 minutes away, and you can get to the courthouse in 20 minutes with the document to be filed).

When their emotions are in control, people tend to overlook a possible available option.

A main reason for the following nine items in this checklist is to prevent panic. It is almost impossible not to have an emotional reaction when you have that first knowledge that the deadline has passed. But emotion is not going to help you. Thinking will help you. By focusing on the following nine items of this checklist, one by one, you will have changed an emotional reaction into a course of positive actions.

Although you must not panic, don't fall into a state of do-nothing bliss. The matter of your missing the deadline must be your priority to which you apply full attention until it is resolved. In short, although you do not panic, don't avoid panic by the technique of wearing rose-colored glasses.

2. Confirm whether the deadline was for "Serving" or "Filing or "Issuing"

Be sure what the deadline was for. For example, in federal court and many state courts, an answer must be "served" (but not filed) within a certain period after service on a defendant. As another example, in many state courts, the complaint has to be "filed with the court", or a summons "issued by the clerk," within a statutory period, but the "service" of the process or of the complaint may come later.

3. Recalculate the deadline

Rules of civil procedure are specific on how time shall be computed. For example, the federal rules say the time period to respond to a motion starts on the first day *after* you were served with the motion, but the last day to respond is counted. If the time period is less than 11 days, then Saturdays, Sundays and legal holidays are excluded from the computation. If the last day of the period is a Saturday, Sunday, or legal holiday, the period runs until the next business day. As another example, most courts provide you with three extra days to respond to a notice or paper served by mail or other specified means. *See, e.g., F.R.Civ.P.,* Rule 6(e).

It is surprising how many times reading the rules very, very, carefully, and then recalculating the deadline will give you a day more than you thought you had.

4. Remember there probably is 24-hour access to the court

Many courts have a statutory statement or a rule or a policy that they are open 24 hours a day, even if the staff leaves at 4:00. With a little effort and phone calls, you may find that you can still access the court's drop-box or filing window after hours to complete a filing. If you have not been a pain to the clerk of court in the past, by a phone call to the clerk at home, you may be able to get your document filed in time (for example, tell you to shove the paper under the locked front door of the courthouse tonight and see them with a fresh copy in the morning).

Additionally, in most jurisdictions, the judge is the court, that is, if you can hand your document physically to the judge, you have filed it with the court. If you have not been a pain to the judge in the past, and explain the problem, most judges are willing to do

what they can to help a lawyer (for example, tell you to stop by their house at dinnertime and hand the document to him/her).

5. Research the law on the date, on extensions, and on relief from your omission

Research the case law, as well as the statute or rule involved, and also the general statutes and rules on time deadline, for each of the following.

A. Research how the date is to be computed.

B. Then research whether there are case law exceptions to the deadline, for example the “discovery rule” in medical malpractice cases.

C. Then research whether there is a provision for relief from default by an application to the court, as by showing excusable neglect and making the application within a stated time.

6. Don't attempt to go it alone; don’t try to sweep the matter under the rug

You need to bring the missed deadline to the attention of anyone in your office who might be able to help you. Two heads frequently are better than one, and your head may be missing the obvious solution. More important, help can come from someone else because of their added research time, or their different slant on research, or their ability to approach others. Someone else in the office may be better able than you to approach the judge, or the senior partner of the adverse law firm, and seek extensions or remedies. Often a senior member of your firm may be able to approach a senior member of the adversary firm and get a necessary extension on the basis of "these things can happen in both our firms, and I'll understand it if it happens in your firm."

Don’t try to eliminate your problem by sweeping the problem out of everyone’s sight. Your senior partner, and even your junior associate, are not going to appreciate finding out about the matter when they hear about it for the first time when the firm is sued. Your insurer, your client, and the court are going to consider you must be guilty became you demonstrated your guilt by an attempt to hide what you did.

A classic example of attempting to hide the problem was the subject of an April 2007 jury verdict. After awarding almost $20 million in compensatory damages in a legal malpractice claim against Chicago-based Seyfarth Shaw for missing a statute of limitations, the Los Angeles jury added $15 million more in punitive damages. The punitive damages were based on the plaintiff’s charge that the firm intentionally covered up its mistakes. In short, trying to hide the problem is not only ethically wrong, it also can be expensive to you.

7. Read your legal malpractice policy, especially the policy provisions about notice to the insurer

You're an attorney. If your client was negligent and in an accident, you would look at her insurance policy to see whether there is coverage and what the policy requires regarding (1) the time and (2) the content of notice to the insurer. Treat yourself as well as you would treat your client. Read the policy. You do not want to void your insurance coverage because of insufficient notice to your insurer.

8. Even after the deadline, seek a stipulated extension of time

The first time you have to seek a favor from adverse counsel such as an extension of time, you will appreciate the value of your past civility to all lawyers. Good guys do get favors that Rambo does not get.

If the deadline is not set by statute, even after the deadline day you can ask opposing counsel's agreement to an extension of time. Depending upon your relationship with opposing counsel and the status of the case, professional courtesy may get you a stipulated extension.

Once you have your adversary's consent, depending on the deadline involved, that may be sufficient by itself. Even if not sufficient by itself, it's a lot easier to approach the court for mercy if you can show the court all attorneys in the case agree the deadline should be moved.

9. Ask the clerk or judge to save you

For short delays (a few hours, or a day or two) after the deadline, your error might be corrected by a well-placed telephone call to the court's clerk or scheduler explaining the inadvertent delay and offering to have a courtesy copy walked to the clerk or to the court's chambers. If the clerk's intervention is not sufficient, for short delays the error might be corrected by a well-placed telephone call to the judge herself, explaining the inadvertent delay and offering appropriate amends. The court may be especially understanding of the plight of a litigator who is concerned that his/her career is going down in flames.

Remember when seeking the court's grant of a delay, it may be an ethical or rule violation to contact the judge without the adverse attorney present (or having given consent to your approaching the court unilaterally).

If informal action won't work for you, you may be able to make a formal motion for leave of court to take the needed action after the deadline. Of course, whether the deadline may be moved by the court depends upon the law involved. (See the above point "# 5 - Research the law")

10. Tell your client

Clients are entitled to know substantial matters that occur in their case. Never lie to the client. Don't be tempted to dream up some excuse for the loss of the case other than what happened

> Important: You may be in a conflict of interest situation. When you are guilty of malpractice, you run a grave risk if you prepare a defense against your client or even attempt to fix the problem over a course of days, while continuing to represent the client, unless the client consents

Of course, you do not have to waste time attempting to contact the client if you have only four hours to fix the problem and you have a good chance to do it if you spend your time and energy doing it during those four hours. But if your "fix" is going to take enough time for your client to have retain another attorney to do it, you better tell your client what happened and what you are doing.

As a lawyer, you are in a fiduciary relationship with your client. You must tell your client if you think you acted at less than the standard of care, i.e., are guilty of malpractice. You must tell enough to give the client the ability to make an informed decision whether to discharge you and hire new attorneys. The client has a right to decide that she wants a new lawyer to do the research and other work necessary to repair the damage you caused.

Remember if you are in an attorney-client relationship, then whatever you do or say is available to the client. It makes sense, because of the fiduciary duty to disclose. Even oral discussions among firm members about the possibility of malpractice and the legal defenses against the client have no protection if the client sues the attorney. This is illustrated by cases like *Versuslaw, Inc. v. Stoel Rives, LLP*.[1] In *Versuslaw*, the court held that internal law firm memoranda concerning a possible malpractice claim against the law firm would not be privileged if they were written while the lawyer-client relationship still existed. Another example is *Thelen Reid & Priest, L.L.P. v. Marland*.[2] In *Thelen*, the court held that once the firm determines that the client may have a claim against the firm, the firm should disclose its conclusions to the client. Furthermore, among the documents the court ordered produced were the litigation preparation communications among the firm's defense counsel, the attorneys on the case, and the partners in the firm.

The only safe harbor in which to prepare a defense against your client is by first getting out of the attorney-client relationship. Only then can you protect from your client your research, your worries, your admissions and your talks with your partner or your insurer or your personal attorney about the malpractice possibility and how to remedy or defend against it.

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[1] 2005 Wash. App. LEXIS 586 (Wash. App. April 4, 2005)

[2] U.S. District Court for the Northern District of California, 2/21/07.