



## EPISODE #24

### Beating deadlines

**Total run time:** 12:11 minutes

**Givonna:** Managing deadlines to file documents early helps avoid missed deadlines, among other significant benefits. I'm Givonna Long, and you're listening to The Portable Ethics Lawyer.

In this episode, we're joined by Randy Curato, Vice President, and Senior Loss Prevention Counsel at ALAS, who will discuss why it's important to file early rather than waiting for the last day. He'll also tell us how to do that. Randy, welcome.

**Randy:** Thanks, Givonna. Great to be with you.

**Givonna:** Let's start by looking at the problem. Have we seen a lot of missed deadline claims?

**Randy:** You bet. We've had plenty of missed deadline claims. Missed deadlines are an ongoing problem and have led to significant malpractice claims. Some lawyers think that docketing and calendaring dates is just a litigation issue—but they are wrong. We have had, and continue to have, missed deadlines from every practice area. Many missed deadlines result from waiting until the last day and rushed efforts on the due date. And no doubt there have been lots of close calls where lawyers dodged a bullet and got lucky.

**Givonna:** How do the ethics rules address missed deadlines?

**Randy:** Several rules speak to deadlines. First is Rule 1.1 on competence. Clearly lawyers need to know about deadlines in their matters, how to plan for them, and how to meet those deadlines. Rule 1.1 specifically says, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

Comment [5] explains: Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what's at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

**Givonna:** You mentioned that there are several applicable rules; what other rules apply?

**Randy:** Rule 1.3 on Diligence is key, that rule says, "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment [1] explains, "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. Further, a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Comment [2], importantly, adds, "A lawyer's workload must be controlled so that each matter can be handled competently."

Comment [3] of Rule 1.3 pokes at us a bit, saying, "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. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

**Givonna:** Are there any other rules that apply to missed deadlines?

**Randy:** Indeed, there are. Rules 5.1 and 5.3, which address the responsibilities of a partner or supervisory lawyer address these obligations. Rule 5.1 says:

- a) "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

It goes on:

- b) “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”

Now Rule 5.3 discusses a lawyer’s responsibilities with nonlawyer assistants. Among other things, it says:

- a) “a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

and

- b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”

All these implicate and bring into play Rule 1.3 and 1.1 with regard to a lawyer’s obligations.

**Givonna:** Could these rules be used to discipline or sue a lawyer or law firm?

**Randy:** They could. The rules set the standard for compliance with the rules of professional conduct—and the ones we’ve been discussing are all proscriptive—that is that they say the lawyer shall do these things. So, not doing them is a violation of the rules which can lead to a disciplinary action—that is, a failure to comply is a basis for invoking the disciplinary process. In contrast to a disciplinary matter, when it comes to bringing a malpractice claim against a lawyer, the rules preamble says this:

[20] “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. They are not designed to be a basis for liability.”

Sounds good, right. But what the preamble gives, it takes away. The preamble goes on: “Nevertheless, since the Rules do establish standards of conduct by lawyers, a

lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct." Which means it can be used in a malpractice case.

**Givonna:** So, how could a blown deadline play out in a malpractice case?

**Randy:** I think it's helpful to start by looking at the standard of care in a malpractice case: it is essentially what a reasonably well-qualified lawyer in the same or similar circumstances would have done.

And malpractice is essentially a tort claim. Now we all learned in first year of law school what the required elements of proof are for a tort. You probably remember them, Givonna?

**Givonna:** How could I forget. Duty, breach, causation, and damages—it was drilled into our heads!

**Randy:** Exactly, and the defenses follow from the proof. In a blown deadlines case, duty and breach are a given so no defense there; that leaves just causation and damages at issue.

So, a blown deadline is really a gift to a skilled plaintiff's lawyer—it makes that lawyer's job a lot easier. And the defense on causation and damages isn't easy either—in essence the lawyer will have to argue one of two things: first, it didn't hurt the client that much; or second, the client's claim had no merit and/or it would not have recovered any damages or lost any money, or at least wouldn't have recovered, or lost, the damages it now claims. Those are both tough arguments to make for a case the lawyer took on—if the client's claim or defense had no or only had a questionable chance of success, the lawyer shouldn't have taken the case in the first place or should have counseled the client on other solutions. Rule 3.1 reminds us that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact that is not frivolous." Moreover, missed deadlines not only demonstrate a lawyer's lack of diligence—required by Rule 1.3—many also have significant consequences for the client. And a plaintiff's lawyer will have a lot to say about the consequences, real or imagined.

Regardless of the defense though, the claimant's lawyer will have fun cross-examining the involved lawyer, and perhaps his practice group leader or other supervisor, and maybe even the firm's managing partner.

**Givonna:** Alright, we understand the problem. Now, let's talk about prevention. What can lawyers and law firms do to avoid missed deadlines?

**Randy:** It really means good risk management, and that's putting systems, procedures, and people in place to manage deadlines. A lot of what must be done is already in place at most firms. Most firms have a central docketing or calendaring system where firms and lawyers can collect and track deadlines. They also have procedures for requiring lawyers to calculate and submit dates into the docketing system and onto their own calendars. And most firms also have professional docketing staff who are familiar with the calculation, entry, and reminding of deadline dates—those folks are an important part of avoiding missed deadlines. But it all comes down to the individual lawyer using those systems, procedures, and people—regularly and thoroughly. That means every lawyer regardless of practice area.

**Givonna:** Ok, now we've talked about systems and procedures that lawyers and staff can use to avoid missed deadlines, what else should the individual lawyers do?

**Randy:** One more big thing. As we noted at the outset, many missed deadlines arise from waiting until the last minute—or the last hour—and then rushed efforts on that due date. We solve this big problem by beating the deadline—that means filing early. And that means managing to a date prior to the actual deadline and sticking to that early date . . . at least one day early for local or domestic filings and three days for international filings.

**Givonna:** How does that help?

**Randy:** First, you get the filing done and eliminate the stress of having to file on the day of the deadline. No more around like chickens with their heads cut off.

Second, you never know what might go wrong, particularly given that most filings these days are done electronically, which has its own risks. So, if there are any filing glitches, like an Internet issue during a filing attempt at 11:55 pm, you still have the next day to file.

Third, once you've submitted the filing, you now have time to go on the court or agency filing system and check what was filed to be sure it went through, that it was the correct version of the document, and that it contains all the parts you intended, like exhibits or other attachments.

Fourth, if something is wrong or missing, you can fix it and still file within the original, actual deadline.

Fifth, and again, the pressure is off. And you have just demonstrated that you are a thoughtful and careful lawyer.

**Givonna:** Alright, do you have any words of encouragement for our listeners?

**Randy:** Yes. Meeting any deadlines on a matter you are working on is your job, even if you are part of a team of lawyers and assistants. And once you get into the habit of filing early, or making sure your team does, it will make your life a lot easier.

But don't be like the ones who set their watch 15 minutes ahead and then rely on the fact they have 15 more minutes. Stick to the plan and file early.

We can do this! So, give it a try. You might just be surprised how great you feel after completing an early filing, and you might just avoid a significant malpractice claim.

**Givonna:** Thanks, Randy, that was great insight and thank you for your encouragement!

**Randy:** My pleasure, Givonna.

**Givonna:** Until next time I'm Givonna Long, and this is the Portable Ethics Lawyer.

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