

You Think You Know Statutes of Limitations?

by Erin W. Haggood

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Most attorneys know that the statute of limitations for personal injuries is two years, but what about defamation or a guardian's claim for a child's medical expenses? When does the cause of action accrue and what may toll it? As the bar exam fades into history, the bells that ring on limitations issues get fainter and fainter. Recently a partner in our firm reviewed the Virginia Code sections related to limitations. The results were surprising. This article cannot address all matters relating to limitations, but will refresh memories and provide a starting point, should you ever have a limitations problem.

Even attorneys who do not file a complaint or an answer are presented with statute of limitations issues. A friend may ask casually for legal advice or a client for whom you prepared limited liability company papers now wants an accounting. Maybe a court-appointed client tells you that the last time he was in jail they did not respect his dietary restrictions and he wants to sue. Any response provided by an attorney can lead to a belief by the recipient that there is an attorney-client relationship with respect to that claim, which can present problems for attorneys. There are few substantive or procedural areas of the law that can lead to malpractice as fast as missing a statute of limitations. All attorneys should have a passing familiarity with them.

So, how well do you know your statutes of limitations? Before you continue reading, test yourself by taking the quiz on page 45.

So when does the cause of action accrue? Knowing the period is necessary, but so is know-

ing when the clock started ticking. As with all of the statutes involved, there are exceptions, but there are some basic rules which can be relied on in many cases. For injury to the person or damage to property the right of action accrues on the date the injury is sustained. Va. Code § 8.01-230. For contracts, when the breach occurred (not when the damage is discovered except when only equitable relief is sought or as otherwise provided). Va. Code § 8.01-230. For a medical malpractice claim based on a foreign object being left in the body the cause of action does not accrue until discovery of the object. Va. Code § 8.01-243 (C) (1). If fraud concealed the medical malpractice, a plaintiff will have one year from when the fraud was or should have been discovered. Va. Code § 8.01-243 (C) (2). For failure to diagnose a cancer tumor a patient has one year from when the diagnosis is communicated to the patient. Va. Code § 8.01-243 (C) (3) (prior to July 1, 2008).

Even if a limitation period has passed, certain events can toll the statutes of limitations. § 8.01-229. These include infancy and incapacity, which toll the limitations period until that disability is removed. § 8.01-229 (A)(1). The death of one party or another also affects the limitations (§ 8.01-229 (B)) as does an injunction (§ 8.01-229 (C)), obstruction by the defendant (§ 8.01-229 (D)), and other factors (§ 8.01-229 (E) – (K)). A suit filed in which the plaintiff has no standing does not toll the limitations period because such a suit is a legal nullity. *E.g., Johnston Memorial Hosp. v. Bazemore*, 277 Va. 308, 312 – 13, 672 S.E.2d 858, 860 (2009).

Limitations issues present in amendment to pleadings as well. *See*, Va. Code §§ 8.01-6, 8.01-6.1, 8.01-6.2, 8.01-18. On the defense side, the bar of the statute of limitations is raised as an affirmative defense in a responsive pleading, but not a demurrer. Va. Code § 8.01-235.

The failure to comply with the statute of limitations is an absolute bar to a claim and often leads to malpractice claims.¹ The lesson is, if an attorney in any way enters into representation of a claimant — even if the intent is to advise rather

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		Virginia Code Section
1. Personal injury	_____	8.01-243 (A)
2. Property damage	_____	8.01-243 (B)
3. Fraud	_____	8.01-243 (A)
4. Parent's claim for children's medical expenses	_____	8.01-243 (B)
5. Medical malpractice (minor plaintiff)	_____	8.01-243.1
6. Wrongful death	_____	8.01-244
7. Written contract	_____	8.01-246 (2)
8. Unwritten contract	_____	8.01-246 (4)
9. Partner suits against each other for accounting	_____	8.01-246 (3)
10. Defamation	_____	8.01-247.1
11. Others not specifically listed	_____	8.01-248
12. Repose (damages from improvements to real property)	_____	8.01-250
13. Enforcement of judgments	_____	8.01-251
14. Money claim against the Commonwealth	_____	8.01-255
15. Notice for money claim against the Commonwealth	_____	8.01-255
16. Claims by the Commonwealth	_____	8.01-231
17. Claims by convicts related to the conditions of confinement ²	_____	8.01-243.2
18. Notice for negligence claims against local governments	_____	15.2-209
19. Monetary claims against counties	_____	15.2-1248
20. Notice for tort claims against the Commonwealth	_____	8.01-195.6
21. Breach of condition subsequent or termination of fee simple determinable interest	_____	8.01-255.1
22. Workers' compensation injuries	_____	65.2-601
23. Legal malpractice	_____	8.01-246

than represent—she must be sure to make the limitation on filing and her scope of representation perfectly clear to the client. The Virginia Supreme Court recently addressed a legal malpractice case where the issue of whether the failure to timely

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file a Virginia personal injury action. *Williams v. Joynes*, 278 Va. 57, 677 S.E.2d 261 (2009). The Court did not even discuss whether missing the deadline for filing the action was a breach of the attorney’s duty. The negligence seemed to be presumed and the case turned on whether the negligence was the proximate cause of the plaintiff’s injury.

Missing the statute of limitations is clearly a violation of an attorney’s ethical obligations to his client, including the Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), and potentially 1.4 (communication) if the attorney does not promptly inform the client of his mistake. Negligent failure to timely file an action, particularly in the personal injury context, “is one of the more common grounds of liability in legal malpractice actions.” See authorities and discussion in, James Lockhart, *Cause of Action Against Attorney for Malpractice in Handling Personal Injury Claim*, 10 Causes of Action 87 (Originally published in 1986, updated 2009).

The attorneys in *Williams v. Joynes*, 278 Va. 57, 62, 677 S.E.2d 261, 264 (2009) missed the statute of limitations on a personal injury action, but assisted their client once the mistake was discovered. They informed the client “that the lawsuit had not been timely filed within the two-year statute of limitations governing personal injury actions in Virginia” and that the client “may have a malpractice claim” against them so should “consider hiring other counsel to explore this possibility.” Given the situation, this was the best action the attorneys could have taken.

Many jurisdictions adhere to the rule that fraudulently concealing the mistake will toll the statute of limitations. George L. Blum, *Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, Sec. II, § 3(a) (Originally published in 2001). Concealing a mistake would not only toll the

statute, but would place the attorney in an even more tenuous position regarding her license. Disciplinary committees would likely be more lenient when faced with a mistake which the attorney addressed head on and attempted to mitigate the damage done to her client, as it appears the *Joynes* attorneys did. Concealing such a mistake would not benefit anyone involved—particularly the attorney.

Missing a statute of limitations is a discreet and identifiable event that constitutes a breach of the contract for services entered into by an attorney and his client, but it is not always so clear. The Virginia Supreme Court ruled that a cause of action for legal malpractice arising from “an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run ... until the termination of the undertaking or agency.” *Keller v. Denny*, 232 Va. 512, 516, 352 S.E.2d 327, 329 (1987) (citing *Riverview Land Co. v. Dance*, 98 Va. 239, 244, 35 S.E. 720, 722 (1900)). The Court then held that “when malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney’s services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney’s work on other undertakings or transactions for the same client.” *Keller v. Denny*, 232 Va. 512, 517-18, 352 S.E.2d 327, 330 (1987) (relying on reasoning from *Wilson v. Miller*, 104 Va. 446, 51 S.E. 837 (1905) (attorney-in-fact appointed to sell real estate, collect proceeds, and collect accounts receivable); *Beale v. Moore*, 183 Va. 519, 32 S.E.2d 696 (1945) (attorney employed to collect debts owed to bank in receivership); *McCormick v. Romans and Gunn*, 214 Va. 144, 198 S.E.2d 651 (1973) (attorney employed to develop subdivision, sell lots and collect proceeds); *Wood v. Carwile*, 231 Va. 320, 343 S.E.2d 346 (1986) (attorneys employed to handle many interrelated real estate financing transactions).

Attorneys may take statutes of limitations a bit too casually. We tend to view them as so basic and straightforward that it is easy to rely on that law school/bar review knowledge that stays with you. A review of the statutes and case law associated with limitations issues reveals that there are many issues that attorneys must address that are not so obvious. Accrual of actions and tolling

provisions can be complicated; the annotations to some of the statutes comprise many pages.

Even providing off-the-cuff advice on a limitation period can lead to potential problems if the recipient thinks more of it than the attorney. Before providing an information regarding limitations of actions, pick up the code book and refresh your memory. You will be glad you did. ☺

The author thanks Jim Guynn for the refresher course and initial research.

Endnotes:

- 1 A cause of action for legal malpractice has three separate elements: 1) the existence of an attorney-client relationship creating a duty; 2) a breach of that duty by the attorney; and 3) damages that were proximately caused by the attorney's breach of duty. *E.g.*, *Shipman v. Kruck*, 267 Va. 495, 501, 593 S.E.2d 319, 322 (2004) (cited in *Williams v. Joynes*, 278 Va. 57, 62, 677 S.E.2d 261, 264 (2009)).
- 2 See also, the Virginia Prisoner Litigation Reform Act, Va. Code § 8.01 – 689 *et seq.*

General Practice

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