A statute of limitations sets a period of time beyond which a lawsuit cannot be filed. It is intended under the law to provide peace of mind to potential defendants and some degree of certainty with respect to risk management. Florida Statute 95.11 contains a number of different statutes of limitation that apply to various types of lawsuits. Florida Statute 95.11(4)(b) is the section that applies to medical malpractice. One generally does not obtain a great sense of certainty or peace of mind when initially reading the statute itself since it sets forth time periods of 2, 4, 7 and 8 years. This article will briefly summarize how those time periods have been applied under Florida law.

As a starting point, it is important to understand that Florida recognizes not only a “statute of limitations” but also a “statute of repose” in medical malpractice cases. There are important legal distinctions between the two. The statute of repose is a period of time that always begins on the date of the alleged incident of malpractice and then runs for a defined period of time. A statute of limitations, on the other hand, does not necessarily begin on the date of the alleged malpractice. In Florida, the statute of limitations does not begin to run until such time as the alleged incident of malpractice “is discovered or should have been discovered with the exercise of due diligence”. This means that the starting time of the statute of limitations can vary depending upon the facts of each case.

How do these concepts interact with the 2, 4, 7 and 8 year time periods set forth in Florida Statute 95.11(4)(b)? The statute of limitations for medical malpractice cases in Florida is always 2 years. When the 2 years starts to run depends on the facts of the case. All the other time periods (4, 7 and 8 years) refer to the statute of repose. For almost all cases, the 4 year statute of repose will apply. The 7-year statute of repose only applies to cases that could not be discovered due to fraud or concealment. The 8-year statute of repose applies only to actions brought on behalf of children on or before their 8th birthday.

In cases in which an injury from malpractice is immediately apparent, the statute of limitations would run concurrently with the statute of repose. For example, if the alleged act of malpractice was “cut off wrong leg”, the patient would be aware of the incident of malpractice immediately following the procedure. Thus, the statute of limitations would begin to run on the day of the surgery and would expire the day following the 2nd anniversary of the surgery date. The statute of repose would not be a factor in this case because the 2-year statute of limitations would have expired 2 years before the 4-year statute of repose. So if the surgery were done February 14, 2006, February 15, 2008 would be too late to commence an action.

Things get trickier when it is not so obvious when the patient would be expected to realize that they had been injured by an incident of malpractice. For example, assume that a patient goes to a dermatologist because of concern about a mole that has recently increased in size. The dermatologist performs a biopsy and reads it on February 14, 2006 as a “benign nevus”. The patient is informed that the mole was benign and that no further treatment is required. The patient does fine until 2009, when she presents to her primary care physician with painless enlarged lymph nodes of unknown etiology and is diagnosed that same year with metastatic malignant
melanoma. The original 2006 biopsy slides are reviewed in 2009 and are read as diagnostic of melanoma extending to the margins of the biopsy specimen.

Under these facts, could a malpractice action be commenced in 2009? At first blush, one may be inclined to think that the 2-year statute of limitations would forbid commencement of an action after February 14, 2008. However, because the patient could not be reasonably charged with discovery of the alleged incident of malpractice until 2009, Florida law would not construe the statute of limitations as having begun to run until 2009. The question then becomes whether the action would be barred by the statute of repose. Under these facts, the 4-year statute of repose would have begun on February 14, 2006 but would not expire until February 14, 2010. So neither the statute of limitations nor the statute of repose would prevent an action from being commenced in 2009.

In any given case, there will be a “race” between the statute of limitations and the statute of repose. The expiration of EITHER will extinguish any action commenced after that date. The Florida Supreme Court has expressly held that expiration of the statute of repose will prevent commencing an action even if the statute of limitations has not yet expired. This generally occurs in cases involving a misdiagnosis or where the patient believes that his injury resulted from his underlying disease rather than an incident of malpractice.

As mentioned above, there are two exceptions where the statute of repose will extend beyond 4 years. The first is for fraud or concealment. If the court finds that fraud or concealment prevented the patient from discovering the malpractice, the statute of repose is extended to 7 years. In the past there was a difference of opinion within Florida’s courts as to what constituted “concealment”. It had been contended that misdiagnosis was by definition “concealment” of the true nature of the disease from the patient and that every case of misdiagnosis should therefore be controlled by the 7 year statute of repose. The Florida Supreme Court resolved this legal issue in 2003. In Nehme v. Smithkline the Court held that misdiagnosis did not constitute fraud or concealment. Rather, the Court determined that there must have been an intentional withholding of the truth from the patient, not merely a negligent diagnosis. Accordingly, the 4-year, not the 7-year, statute of repose applies to misdiagnosis cases.

The 2nd exception involves children under the age of 8. Under Florida law the statute of repose cannot expire prior to or on a child’s 8th birthday. This exception was created to cover those situations where an injury could not be detected until the child had reached a certain point in their expected development. This exception is often misunderstood even by Florida attorneys. It does not mean that a malpractice action can never be barred prior to the child’s 8th birthday. If the injury is such that the parents or guardians of the child should have discovered it with the exercise of due diligence, then the two year statute of limitations starts to run from the time that the parents or guardians would be charged with that knowledge. Accordingly, the 2-year statute of limitations may bar an action well prior to expiration of the 8-year statute of repose.

Finally, Florida physicians should be aware that an “action” for medical malpractice is commenced via a Notice of Intent and an accompanying Verified Written Medical Opinion. Although a lawsuit cannot be formally filed until Florida’s mandatory presuit phase has been completed, the statute of limitations and statute of repose are “tolled” when presuit begins. In addition to several tolling provisions associated with the presuit process, there is a 90-day extension that can be obtained automatically upon request to the Clerk of Court. This 90-day
extension can be obtained at any time prior to expiration of the statute of limitations or statute of
repose and is in addition to any other tolling periods or extensions.

Each case presents a unique set of facts that determines when the statute of limitations and/or the
statute of repose will run in that case. While it is impossible to cover every scenario, it is hoped
that this article will assist the Florida physician in understanding the fundamental concepts that
will universally apply.

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