

# Year 2000 — Potential Liability for Every Lawyer

By Anne E. Thar, Vice President and General Counsel, ISBA Mutual

Let's put aside all of the apocalyptic predictions of planes falling out of the sky and global economic collapse. Do lawyers truly face any risks from the Year 2000 problem? Yes, whether you are a personal injury lawyer or a small firm general practitioner, you face two broad concerns with respect to Y2K: business interruption and legal malpractice. The time is now to assess your practice's vulnerability to these problems and take action to minimize the risks.

## The business-interruption threat

The first concern that Y2K raises for lawyers is that their day-to-day business operations will be interrupted by Y2K glitches. In some cases, the business interruption will be minor and result in only a few hours' lost work. In other cases, the interruption may affect a lawyer's ability to serve his or her clients for days or even weeks.

The most likely business interruption risk posed by Y2K is that you will discover that your computer system has malfunctioned on Monday, January 4, 2000. So — what's the big deal? Just call the software manufacturer and find out how to fix it — along with thousands of other callers who are experiencing the same simple problem.

Now suppose that you pick up the phone to rent new computer equipment and discover that your telephone and voice mail systems are down. No problem. You use your cellular phone to call for assistance. A perky customer service representative informs you that a repairperson will be able to correct that little problem...in about five weeks. Get the picture?

Besides computers, other equipment and office systems that may fail as a result of Y2K problems are fax and



***Last month we told you about D&O liability for Y2K problems. This month we hit closer to home.***

copy machines, security systems, elevators, and HVAC systems (heating, ventilation, and air conditioning). For more on how to check your office computers and equipment for Y2K problems, see the sidebar on page 564.

In addition, lawyers should consider the financial impact that Y2K may have on their practices. Will you have the financial resources necessary to rent or buy Y2K-compliant computer equipment? Some lawyers may also experience a slowdown in receivable collections and new business matters as clients struggle with their own Y2K costs and headaches. The financial impact of Y2K may hit law firms with small business clients the hardest. Some analysts are predicting that small businesses generally will be the least prepared to handle Y2K obstacles.

Finally, don't be surprised if your

clients start inquiring about whether your law office is "Y2K compliant." As clients become aware of their own susceptibility to Y2K issues, they will want assurances from their legal counsel that client matters will not be impeded by Y2K problems at the lawyer's end.

## The legal malpractice threat

The second source of concern for lawyers with respect to Y2K is legal malpractice claims. The most predictable Y2K problem is

missing a critical deadline because of a Y2K computerized calendaring malfunction. Fortunately, this type of Y2K malpractice is easily preventable. In addition to testing their calendaring systems in advance for Y2K errors, lawyers can follow standard risk management procedures by maintaining a duplicate "paper" calendar and backing up databases once a day.

The gravest legal malpractice threat, however, involves legal advice rendered to clients purchasing businesses. If there is a hidden Y2K time bomb ticking in the weeds for lawyers, this is it.

Assume that Lawyer currently represents Client in the purchase of a small manufacturing business ("Company"). A few months down the road, Client discovers that it will cost between \$500,000 and \$750,000 to make Company Y2K compliant. Without these technical modifications, the business will shut down on January 1, 2000.

The purchase agreement drafted by Lawyer contains no representations or warranties concerning Company's Y2K compliance. Client is left with no other remedy but to sue Lawyer for negligently drafting the agreement. This scenario may become more frequent as corporations rush to sell off subsidiaries or divisions for which the cost

---

of Y2K compliance is deemed too high.

Let's change the facts a bit, with the same result. Under this scenario, Seller represents to Client that Company's internal operations will be Y2K compliant by the Year 2000. Nonetheless, Company comes to a virtual standstill in January of 2000. Although Company's own operations are fine, Client learns that its suppliers and distributors are in total chaos due to Y2K malfunctions. Client cannot make new products without the necessary parts and cannot sell its finished products without viable distributors. Client again turns to Lawyer for redress.

This time Client's malpractice complaint against Lawyer contains allegations that Lawyer should have recommended a Y2K due-diligence check of Company's suppliers, distributors, and customers. Client may also allege that the purchase-price formula should have included adjustments for future Y2K costs or that the contract should have allowed for consequential damages.

Similarly, lawyers can expect to see

third party actions brought by shareholders against both management and its legal advisors when such losses occur. Because D & O liability policies may exclude or deny coverage for Y2K losses, outside consultants such as lawyers will be hot targets (for more on D & O liability, see the September *Journal* beginning at page 494).

Thus, lawyers who provide legal advice to corporate clients or business purchasers should familiarize themselves with Y2K issues from the client's standpoint. Without this knowledge, the lawyer may miss a critical issue.

Lawyers who are fully informed about Y2K issues will also be in a better position to assist clients who are considering legal action to recoup Y2K losses. Other issues that lawyers may need to consider include potential copyright infringement in the context of Y2K fixes, tax and accounting treatment for Y2K expenses, insurance coverage, and client compliance with new Y2K regulations in such industries as banking, insurance, and securities.

### **The lawyer-turned-Y2K-expert**

The final malpractice risk posed by Y2K involves lawyers offering their services as Y2K consultants. There is a big difference between providing general corporate advice on Y2K issues and holding oneself out as a Y2K expert. Clients who suffer damages as a result of Y2K glitches will undoubtedly attempt to hold professionals who provided them with Y2K advice liable. The stakes are high, so don't call yourself a Y2K consultant unless you can really walk the walk.

### **An ounce of prevention**

Will any of these problems occur? The simple answer is that no one knows what will happen as technology adjusts to the new millennium. The issue is whether you plan to take a "wait and see" attitude. The prudent lawyer will Y2K-proof his or her office systems, prepare a disaster recovery plan for the unexpected, and bone up on the Y2K issues affecting clients.