

The Year 2000 Glitch: A Law Firm Business Problem and A Practice Development Opportunity

The Year 2000 Problem. Y2K. The Millennium Bug. Century Date Change. Of these, "Y2K" is emerging as the best abbreviation. Not only is it pleasantly brief, but the bizarre-looking abbreviation resembles the very sort of indecipherable computer code that, along with estimated hundreds of billions of other lines of existing code, will require analysis in order for businesses to actually *do* business on and after January 1, 2000.

Perhaps Carl Sagan would not have flinched at such an imponderable number, but CEOs, CFOs, and CIOs will surely tremble. At an estimated \$1.10 to \$1.65 per line of code, the tally for Y2K solutions will reach at least \$300 billion, and some estimate as high as \$600 billion, with no more reward than the ability to simply remain in business in the new millennium. Companies that fail to become "Year 2000 compliant"—a generally accepted term that indicates a company's completion of, or commitment to complete, the necessary adjustments—face legal issues galore.

Since the problem is technical in nature, it's no wonder that a goodly amount of information and idea-sharing is taking place on the Internet. At least a dozen Web sites devote themselves to the problem. *Year2000.com*, for instance, received more than 142,000 hits for the month of February 1997.

Other Internet sites, such as *y2k.com* and *comlinks.com*, maintain a legal and managerial perspective. Gregory Cirillo, co-founder of *y2k.com*, says he and two other tech-partners at Washington, D.C.'s 30-lawyer Galland, Kharasch & Garfinkle began following Y2K about a year ago after meeting with a colleague at the Information Technology Association of America. The site pro-

notes the "positive and productive role legal counsel can play in approaching this problem."

Like all law practices, Galland, Kharasch's core practice of transportation and aviation law will itself feel the effects of Y2K and will need to become Year 2000 compliant. Meanwhile, Cirillo and the other four or five technology lawyers at the firm have generated new business and nationwide publicity as a result of the Web site. Cirillo says Y2K has given his firm a "national recognition that we could never have achieved if we just were promoting ourselves as technology lawyers."

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The volume of speaking invitations dramatizes the widespread concern. "So many different trade and industry areas are facing [Y2K] that whenever they have an annual meeting of an association, . . . everybody wants to have someone there," Cirillo says. For law firms, the challenge is twofold: to make themselves compliant, and to take advantage of the practice development opportunities the millennial event presents.

The problem itself is rather simple to explain; computer programs that record years with two digits instead of four won't function properly after January 31, 1999 (and, for some, sooner). Simply

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being a good technology lawyer may, in some instances, be all the qualification attorneys need to find themselves in high demand. "What you gain as a technology attorney," says Cirillo, "is that you know a greater variety of options available to you when you hit a stumbling block."

In fact, say many Y2K authorities, the problem can be looked at as one might simply look at defective technological products. Many technology and commercial lawyers have, of course, already dealt with similar problems in other contexts. This time, however, the stakes are much higher, and the deadline immutable.

Bottomless Exposure

Part of those high stakes for law firms, says tech attorney Ronald Palenski, is legal malpractice.

Palenski, a partner at Washington, D.C.'s 22-lawyer information technology boutique Gordon & Glickson, warns that "a lawyer who's representing a technology user today and drafting contracts and not including [Y2K language] may well face liability if things go south."

Palenski also notes that, if docket control systems go down or "provide inaccurate dates because the law firm's own internal systems are not Year 2000 compliant, that could be a problem for the law firm."

Gordon & Glickson has already developed specific Y2K language to use throughout its mainly transactional practice. He says, for instance, that a contract he's currently working on has a warranty with a provider stating that the software to be provided will be Year 2000 compliant.

The firm doesn't exclusively represent those purchasing software; clients also include Y2K solution providers. "We represent both sides in the transaction," he says. "We have a perspective on this from both the IT users' side as well as from the IT providers' side."

Dating in the Digital Age

For a number of programming-related reasons, the solution to the Year 2000 problem won't be as simple as scanning computer programs for two-digit date fields such as YY or XX. Consider a few salient dating problems, based on examples given by lawyer Jeff Jinnett at LeBoeuf, Lamb, Greene & MacRae and consultant Warren Reid of the Warren S. Reid Consulting Group.

For one, computer programmers use three basic ways to represent dates. Besides the usual Gregorian system (*i.e.*, year, month, and day), there is the Ordinal system, which lists the year and what day of the year it is. For instance, this year's Easter occurs in 1997 on the 89th day of the year.

There is also the Base dating system, often used in databases because it can be more exact. Here, a single bit of data can represent a particu-

lar year, month, day, minute, and second. A given company's programs may contain any or all of these dating methods, which further compounds the repair work difficulties.

Once a system has been updated, other problems may occur after the millennium. Some of the first things to go wrong with the "fixed" systems will be errors in the new dating logic. After the January 1 problems are surmounted, the month-end logic will cause problems, and faulty leap-year logic will cause further problems.

Fixing all of this means plenty of opportunities to make new mistakes. Consultants have established metrics to predict the number of new blunders. In fixing your company's or your law firm's 10 million lines of code, says Reid, you'll add "1,200 brand new and exciting errors." Reid fully expects law suits to continue for three or four years after the changes are made.

—Jim Dee

Litigation arising from Y2K disputes is the one related area where Gordon & Glickson isn't yet actively involved. But the litigation will come. "In my experience," says Palenski, "a management issue poorly managed will inevitably lead to a legal problem. I think it's our obligation as counsel to encourage our clients to manage this issue early and properly, and I think that's the best service we can give our client."

According to Reid, the 'mega-buck' cases will be the D&O suits, whereas lawsuits against vendors are likely to be based on the value of their goods and services.

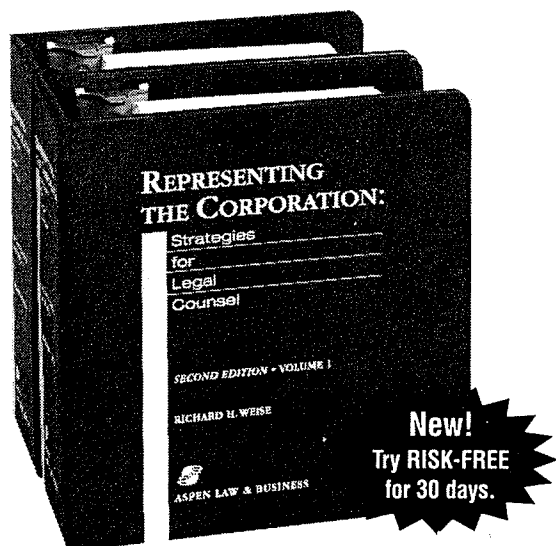
Part of that client service might entail the recommendation of a Y2K solution provider (*i.e.*, a consultant or consulting firm). These providers come in all forms, from freelance programmers to teams

of techies complete with project managers. Consultants begin by alerting their lawyer-counterparts to potential areas of failure. The lawyer must then determine which failures pose the most serious legal risks.

Warren Reid, of the Warren S. Reid Consulting Group in Encino, Calif., who's played a large part in bringing Y2K to the attention of the legal profession, says he's heard astronomical litigation cost estimates. Some projections top one trillion dollars. Also, warns Reid, stock values of companies where directors and officers are grossly negligent or fraudulent could plummet. According to Reid, the "mega-buck" cases will be the D&O suits, whereas lawsuits against vendors are likely to be based on the value of their goods and services.

Expecting their liability, Reid says that, as of September 20, 1996, directors and officers may no longer be able to claim ignorance to exempt them of Y2K liability. Reid arrived at that date by noting Y2K's presence for three consecutive days (from Sept. 17-19, 1996) in Scott Adams' ubiquitous *Dilbert* comic strip.

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"No explanation was given as to how to interpret the jokes, why they were funny, why they were timely, and why the reader should care," he says. Any good plaintiff's attorney will have a similar reason to identify a comparable time frame as one in which Y2K was too common a knowledge to justify a plea of ignorance.

Team Approach

While everyone agrees that prophylactic measures must be taken now in order to protect clients, some law firms have gone an extra step by forming whole practice teams to address the problem. For example, as New York's LeBoeuf, Lamb, Greene & MacRae began receiving inquiries from its core client base, Jeff Jinnett, of counsel in the firm's intellectual property group, saw the issue "mushroom" beyond solutions that one or two dedicated practitioners could deliver.

One serious question arose as to whether Y2K is considered a *force majeure*. Even if Company X becomes Y2K compliant, what if it still can't perform because Company Y, its sub-supplier, is not Y2K compliant? Is Company X excused from performance? "That's not what was intended to be covered by an act of God clause," Jinnett says, "but it could be what would happen . . . so we may have to rewrite the *force majeure* clauses to say, '[the] failure of your sub-suppliers to become Year 2000 compliant is deemed within your control. It's not an excuse.'"

After considering literally scores of such issues, Jinnett decided that a Year 2000 Team was the best way to handle the problem. All of LeBoeuf's 580 attorneys were polled to find out who was interested in being on a Year 2000 Team, and 40 to 50 responded positively. Of those, 20 are actively working on Y2K issues now, with the remaining 20 to 30 still in need of training. After a formal training program, says Jinnett, "each member of the team will advise clients within their specialty."

Other firms have taken the team approach as well. Probably the first to do so was San Francisco's

Thelen, Marrin, Johnson & Bridges, where IP partner Steven Hock started following the issue a few years ago. While talking with consultants Ian Hayes and Bill Ulrick, Hock asked what the biggest problems facing the computer industry would be over the next several years. "The first words out of their mouths were 'The Year 2000 Problem,'" he says.

Hock says he then realized that the legal minefields "cut across disciplinary boundaries," and that "the best way to really serve clients in this area would be to put together an interdisciplinary team of attorneys with expertise in all of the areas that the Year 2000 problem raises. That's how it got started, and it's grown from there."

A cross-sampling of Thelen's interdisciplinary Y2K team includes Dean Morehous, who deals with technology-related litigation, especially in insurance issues relating to high-tech products; Joan Paul, a federal and state income tax expert with a high-tech industry specialty; Michelle Johnson, who deals with securities issues; Rauer Meyer, an expert in computer licensing and technology transfer transactions; Benjamin Delancy, an ERISA and employment benefits expert; and Charles Birenbaum, an expert in labor and employment matters.

The 22-member team meets "at least once a week," Hock says, often with several participating via conference call. Hock stresses the cross-discipline approach as crucial to the firm's full-service strategy.

Interestingly, Thelen, Marrin is best known for litigation, the one major Y2K area that hasn't yet erupted. Now, concern among firms is mainly with present Y2K issues such as contracting. Yet one imagines that the larger firms with critical litigation resources will soon be well-positioned indeed.

Hock, for one, brings a 20-year career as a tech litigator to the table. He already sees an advantage in that "a lot of counseling on this problem has to do with litigation avoidance. The best qualified people to counsel on litigation avoidance, in my experience, are experienced trial lawyers."

—Jim Dee