

Y2K and Malpractice

Y2K is the computer nerd term for the worry that in Year 2000 many computer systems will crash because they are programmed to recognize only the last two digits of a year through 1999. Thus, 2000 becomes 00 which the computer reads as 1900. This causes chronological data to go into fatal error. The ensuing disaster for banks, insurance companies, and yes, even lawyers is gripping. Estimates of the worldwide cost of correcting the Y2K problem are between \$300 and \$600 billion dollars. Oh, and by the way, Y2K is expected to trigger lots of litigation.

Two things are clear about Y2K. First, there is wide disagreement over just how serious the problem is. Second, it cannot be ignored - the stakes are too high. In particular Y2K presents lawyers with these questions: What should they be advising business clients about Y2K? What should they be doing to make sure that firm computer systems are Year 2000 compliant? Getting it wrong for either the client or the firm could result in malpractice. What follows is an outline of some of the key considerations in reviewing your situation. The idea is to help determine what action you need to take to stay ahead of the problem.

Business Client Considerations:

Director and Officer Liability Issues.

- Does the client have a serious Y2K problem that requires disclosure in the Management's Discussion and Analysis of Financial Conditions and Results of Operations section of the annual report?
- Is the client considering a sale of securities that requires disclosure of a Y2K problem?
- Is the client involved in a merger or acquisition which requires disclosure of Y2K problems? Conversely, has proper inquiry been made of the other party as to their Y2K problems?
- Does the client's Director and Officer liability policy cover Y2K claims?

Advising Directors and Officers.

- Do the circumstances make it appropriate to counsel on the duty of care, due diligence, and the duty to inquire about Y2K issues?
- Should advice be given concerning staying active in Y2K compliance efforts and documentation of progress toward compliance?

Other Actions to Consider

- Reviewing all client insurance policies for coverage for Y2K expenses and liability for claims based on Year 2000 failures.
- Developing a client tax strategy to optimize the tax consequences of Year 2000 compliance costs.
- Preparing for litigation by preserving documentation and communications showing efforts to comply.
- Inventorying all client insurance policies and computer contracts including warranties and limitation periods.
- Reviewing contractual and noncontractual relations to identify parties to whom the

client may be liable for Year 2000 failures and vice versa.

- Assuring that other companies with whom the client is inter-dependant are in Year 2000 compliance.
- Determining whether the client has the right to modify licensed software before changes are made to correct Y2K.
- Assuring that all new client computer contracts and purchases address the Y2K issue.

Law Firm Y2K Considerations:

- Y2K is not just a mainframe issue. It is estimated that 80% of all PC's have Y2K problems. Solo practitioners and small firms should be as concerned as larger firms.
- Y2K problems could cause software programs to fail e.g., time and billing, and accounting programs will miscalculate - docketing programs will give wrong suspense dates - documents can be deleted or erroneously dated.
- If you have a pre-Windows 95 operating system or a Novell network, you may have problems.
- Test your system to see how it works with dates of 2000. There are free programs available on the internet to check whether your computer is Year 2000 compliant. Two of them are: <http://www.righttime.com> and <http://www.sbhs.com/y2k/index.htm>.
- Another approach is to inventory hardware and software. List the manufacturers, vendors, model numbers, and dates of purchase. Call vendors for help in determining whether their product creates a problem.
- Consider whether Y2K could effect office security systems or any other system using chips with embedded software.

The internet has several sources on Y2K. A good place to start is The Year 2000 Information Center: <http://www.year2000.com>. The article "Why You Must Do Something Now About The Year 2000 Problem Before It Affects Your Office Computers" in the September 22, 1997 issue of Lawyers Weekly USA is helpful. Whatever you do, don't ignore Y2K. It just might be the big one all the experts claim.

Incidents Of Potential Malpractice Are Not Incidental

Too many lawyers opt not to report to their professional liability carrier an event (read incident) that could develop into a malpractice claim because it is only a minor issue (read incidental). Their reasoning is that the situation is manageable, a little embarrassing, and they will quietly resolve it themselves. Reporting will only cloud their record with the insurance company and may cost them their deductible or increase the firm's insurance premium.

This kind of thinking is dangerous and can be harmful to the health of your practice and your wallet. Here are the reasons we urge our insured lawyers to never treat an incident as incidental and report them to us without delay:

- Minor or potential errors often blossom into major problems involving large sums of money. The erring lawyer is not the best one to evaluate the seriousness of the situation or its potential to become a claim. Lawyers Mutual's claims counsel, an experienced Kentucky legal malpractice lawyer, is ready to help you evaluate the issue and advise on the claims prevention or repair steps to take. He also will determine whether the matter should be treated as a reported incident which means should a claim later be made your

current policy will provide coverage. This is more important than you may realize because our policy is an annual claims made policy. If a claim based on the incident is made in a later policy year, it will be against the liability limits of the policy enforce at the time the incident was reported. It will not reduce the limits of the policy enforce when the claim is made. The result is that incident reporting could get you more insurance coverage for your money.

- If what you considered to be an incident was, in fact, a claim and you failed to report it in the policy year it occurred, you lose all coverage. Better to be safe than sorry. Don't forget that you are required to report incidents on your renewal application so you might as well do it sooner rather than later, get the help you need, and the comfort of knowing you are covered.
- Incident reporting costs you nothing. Our policy is to encourage incident reporting. Neither your deductible nor your annual premium will be affected in any way by reporting incidents in any number. Help from our claims counsel is policy service at no charge to insured lawyers.
- Your goals when an incident occurs should be to fix the problem, meet ethical requirements of client communication, treat the client fairly, and keep the client with your firm. Incident reporting is a strong first step in meeting all these goals.

The Advantages of Purchasing Insurance Directly From An Insurance Company

One of Lawyers Mutual's greatest advantages for Kentucky lawyers is that we are a direct writer of lawyers professional liability insurance. This means that only employees working for Lawyers Mutual do sales and marketing. Most commercial lawyers professional liability companies sell through independent agents. These agents typically sell several lines of insurance and may sell products of either one large multi-line commercial carrier or of many commercial carriers. Agents receive compensation from commercial carriers based on the amount of business sold. As a result of agents representing numerous companies or offering several different products, they may lack expertise in the highly specialized area of lawyers professional liability insurance.

In contrast, as a direct writer of only lawyers professional liability insurance, Lawyers Mutual pays no agent commissions and devotes all effort to lawyer liability protection and claims service. We concentrate on serving insured lawyers on a personal basis in a professional manner. As Vice President, Marketing, I personally speak with every lawyer asking about coverage with Lawyers Mutual. Since I am a lawyer, I'm in an especially good position to work with a firm's risk management needs and advise on professional liability coverage.

Because we are a direct writer, insured lawyers do not contact us through an intermediary such as an agent. They have direct access to all parts of Lawyers Mutual, including underwriting, claims, and risk management. This ability to contact us directly minimizes delay or miscommunication on coverage questions. We work hard on quick response time, and believe we are second to none in policy service, claims service, and risk management for lawyers in Kentucky.

Our story is short and sweet. Lawyers Mutual, as a direct writer, offers focused expertise and commitment to providing professional liability insurance to Kentucky lawyers. As Kentucky's bar-related and KBA endorsed insurance company, our goal of providing the best possible service and coverage to Kentucky lawyers is always our greatest priority.