Mediating a Y2K dispute

by Stuart M. Widman
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Think of a honeycomb. A big one. Your client is one of the hexagons. The six sides adjoin walls of other hexagons, representing customers, suppliers, employees and other business contacts.

They, in turn, abut other business relations. Thus, your client touches, directly or indirectly, hundreds of immediate and remote contacts. What happens to your client can effect them – and vice versa.

The honeycomb, a metaphor for the Y2K problem, shows how to approach the resolution of Y2K disputes, which likely will spread to include program and software designers, systems purchasers/users, systems sellers, customers, suppliers, insurers, the government and even unsuspecting individuals. The ripple effect of business

Mediating Y2K disputes may be a cost-effective way to resolve them. In mediation, a neutral mediator helps the parties reach a settlement. Mediation has become a popular alternative to litigation and arbitration. It enables the parties to craft a business solution, rather than having a jury, judge or other neutral impose one.

The mediator and the parties need to agree whether the mediation is going to be merely facilitative or evaluative. In facilitated mediation, the classical format, the mediator expresses no judgments about the parties' respective claims, defenses or likelihood of success. Through questioning, a skilled facilitative mediator will challenge each party's positions and uncover common interests or goals upon which settlement can be based.

In evaluative mediation, the mediator will offer views about the parties' positions. Often mediators are asked to start with a facilitative approach but shift to evaluative if the parties have made no good progress toward settlement.

Former judges are perceived to be effective evaluative mediators, but their experience rendering judgments may make them less effective facilitative mediators. All mediators should have significant training in the psychology, listening skills, and mining for interests that

A mediator's technical knowledge of computers and software systems is usually of secondary importance because most Y2K disputes will involve contracts, statutes or torts unrelated to the software or hardware components.

Ironically, one of mediation's great benefits also can be a disadvantage when the dispute is as potentially widespread as Y2K. Unlike litigation, where both privitied and remote parties can be forced to appear by being served with a complaint and summons, mediation is strictly voluntary. Thus, it can potentially involve many more hexagons of the honeycomb if those parties are willing to participate. In turn, broad-based participation can lead to a successful and widespread business solution.

Conversely, lacking the compulsion of court rules, mediation may not be as successful as possible if all the necessary parties do not participate. Indeed, there is conflicting authority whether a court can require a party already before it to mediate. Thus, those who do participate each must decide not only whether their settlement is a good deal, but also whether it is worth the risk and uncertainty of not settling with all other necessary participants.

One way to reduce that risk, however, would be to include a provision in the settlement agreement requiring the settling parties to somehow allocate and collectively share liability later assessed against one of the settling parties by a non-participant, or to make the mediated settlement contingent upon no such other liability within a certain time period.

Since the mediated settlement is the parties' agreement, they can best decide the risk sharing. A mediator can help them balance those risks and arrive at a fair and time-testable solution.

Another aspect of mediation that involves both positives and negatives is the participation of multiple parties. Multiple parties provide more resources and more participants with which to craft a creative solution. In that respect, the honeycomb can reverberate the positives arising from the Y2K solution. The risk, of course, is that the size and reach of the dispute makes it very complex and unmanageable. That, in turn, limits the likelihood of solution.

Accordingly, more complex Y2K mediations should be divided into stages. The mediator and parties should first agree on the management of the mediation. That would include aspects such as submission of materials, party (as opposed to representative) participation, agreed-upon discovery, sequencing the issues to be addressed (such as addressing mini-mediations of the parties with more clearly identifiable common interests, and other logistics. Only after the management issues are resolved would the parties turn their attention to the merits of the problem.

The changing legal landscape also makes mediation an attractive alternative to litigation or arbitration.

Significant federal legislation has now been passed by Congress. It could likely affect many state law claims and remedies to the point of preempting them. Traditional Uniform Commercial Code causes of action could be substantially modified or disappear, damage limits will arise, and certain potential defendants might be given immunity from suit.

Just about every state is or will also be legislating the Y2K problem. I predict that recently enacted immunities of state and local governments will be expanded to protect quasi-public businesses, such as utilities. Wherever there is such broad legislation, ambiguities and uncertainties arise. Those become the battlegrounds for trials and appeals. A mediated solution can take the risks and costs arising from the changing legal landscape out of the problem, thereby permitting the client to focus its resources on its business goals.

The honeycomb nature of the Y2K problem also should enhance the candor and good faith with which the parties participate.

Since each party could be both a claimant and a respondent in the dispute, each party's positions and interests are more likely to be balanced and not one-sided posturing. Each party is akin to a defendant/counter-plaintiff in litigation who denies liability but, in turn, must somewhat acknowledge responsibility by trying to pass it on to someone else.

Thus, a party in a mediation will find it difficult, for example, to take inconsistent positions regarding the breadth or interpretation of new legislation. This could make otherwise complex mediations more manageable and help the mediator find common interests among the parties.

Attorneys have vital roles both before and during a mediation of a Y2K dispute. Since all businesses may somehow be impacted by the Y2K problem, attorneys should now be discussing with and advising their clients on means to resolve those disputes, including through mediation.

Implicit in the Illinois Rules of Professional Conduct and the ABA Model Code is an obligation of attorneys to advise their clients of and inform them about mediation, arbitration and other alternatives to litigation. Clients must be told about those alternatives so they can make informed decisions on how to

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& Pinkus.

Clients had been requesting counsel on worker's compensation issues for some time, the firm said.

The firm "never had been in a position to follow up on that," Harman said, until Harman joined the firm.

Harman is planning to hire at least one more attorney, but "at the moment, it is one and two-halves of an attorney," she said. Senior trial counsel **Edward L. Cooper,** and **Bradley D. Alexander,** an insurance defense associate, give half of their time to assisting Harman with trials and file handling, she said.

Querrey

Querrey & Harrow shareholders have elected **Dennis A. Marks** president and chair of its board of directors, replacing **Ronald Jerrick** as chairman. He has been on the board for eight years and with the firm since 1976. He headed Querrey's commercial litigation group and professional liability group.

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resolve their business disputes and allocate their resources. The pluses and minuses of mediation should be reviewed with clients.

As part of that advice, the attorney should ensure that the client understands that mediation can and should be the client's "day in court." A client also should be told that advocacy skills necessary for effective litigation apply to effective mediation.

Those include, among other things, developing a theme, making a compelling opening statement, organizing points and proof, formatting a mediation strategy, and being fully prepared. Of course, since mediation is totally consensual, there are no assurances that it will succeed and no guarantees that the agreement that is forged will be inviolate.

Perhaps you (or your client) have already done a Y2K audit and know where and at which wall of the hexagon the Y2K problems exist or are likely to arise. Knowing that, there is no reason to wait until Monday, Jan. 3, 2000, to seek mediated business solutions to Y2K disputes. The bees must know how to work together. They've been around a long time.*

Litigator Stuart M. Widman is a partner at Much Shelist Freed Denenberg Ament & Rubenstein. He is a graduate of Wharton School of Finance and Northwestern University School of Law. He has been on the faculties of the National Institute of Trial Advocacy Program on Negotiation and Mediation and the American Arbitration Association.

People

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Neville & Gray; and **Sandra S. Yamate,** with Polychrome Publishing.

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Moves

To **Blatt, Hammesfahr & Eaton: Keith B. Daniels,** professional and employment practices liability insurance associate, from **Hanson & Peters.**

To **Matuszewich, Kaminski, Zou & Avramovich: Hai-Jin Helena Shin,** commercial litigation, of counsel, from **Shin & Litowitz.**

To **Sachnoff & Weaver, Ltd: George A. Vinyard,** securities, corporate and computer law, of counsel, from general counsel, secretary and vice president 3Com.

To **Sullivan & Hincks** as an associate: **Desmond P. Curran** from **Pretzel & Stouffer.**

To **Schiff, Hardin & Waite: Kathryn D. Zalewski,** intellectual property associate, from **Bodman, Longley & Dahling LLP** (Detroit/Ann Arbor); and **William A. Montgomery,** general litigation partner, from senior vice president and general counsel, State Farm Insurance Companies.

To **Wildman, Harrold, Allen & Dixon: Carol Pegnato,** corporate law partner, from the **Fitzpatrick Law Offices.**

To Moore Corp. Ltd.: **Nicholas L. Giampietro,** vice president, mergers and acquisitions, from Brown-Forman Corp.

To **Davis, Friedman, Zavett, Kane & MacRae: Doris S. McMorrow** from **Nottage & Ward,** and **Daniel Donohue** from the **Lewis Law Firm** (Washington).

To **Kroll Associates: Joseph S. Kieffer,** managing director, from senior vice president, general counsel and secretary of Thorn Americas, Inc. (Wichita).

To **Vedder, Price, Kaufman & Kammholz: Jean M. Langie,** estate and financial planning partner, from partner at **McDermott, Will & Emery.**

To **Hinshaw & Culbertson: James Matthew Allen,** environmental litigation associate (Rockford), recent graduate; and **Robert T. Shannon,** litigation associate, from the **City of Chicago Department of Law.**

To **Williams & Montgomery,**

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