

# Ventures

## Honors & Awards

**John Frank** was elected a Fellow of the American College of Trust and Estate Counsel, an association of outstanding lawyers from the U.S., Canada, and foreign nations. ■ **Malina R.P. Fischer** took office as president of the Legal Association for Women in January 1999. ■ **Don Heaney** (business litigation) and **John Frank** (trusts and estates) are among “the best lawyers in town” according to the January 1999 issue of *Madison Magazine*. The article was excerpted from *Best Lawyers in America*. ■ **Bill Fahey** was elected chair of Lathrop & Clark for 1999, but the race for a seat on the firm’s steering committee ended in a dead heat between Ken Axe and John Frank. So the candidates drew lots to decide the election. And the winner was—**John Frank**. ■ As of January 1999, **Frank Sutherland** and **Paul Johnson** became partners in Lathrop & Clark.

## New Faces

**Colleen M. Crowley Dring** joined the firm in November 1998 as offices services supervisor. A UW-Madison graduate with a B.A. in Spanish, Colleen did part of her coursework in Mexico. She worked previously as a business manager for Virchow Krause Stafford Waller and for American TV. ■ **Fred Simani** began work as the firm’s computer support specialist in January 1999. Fred has a B.A. in psychology. For the past several years, he was a training manager and supervisor at New Horizons Computer Learning Center, where he earned numerous computer certifications. ■ Also in January, **Jennie M.L. Gagner** filled Oma Kortsch’s old post—paralegal (probate & trust administration). Jennie has a B.S. in business management from UW-Whitewater and 6 years of experience administering estates for Firststar Bank’s trust division, most recently as an associate account manager. ■ **Don Lins** took over as the firm’s accounting clerk in February 1999. For the previous decade, Don was a member of the accounting department at American TV.

## Civic & Charitable Activities

**Lathrop & Clark** held a charity auction at the firm’s holiday party. Organized by **Michele Walker** and **Lisa Heindl**, the first step was selection of the charity to receive the proceeds. After lively lobbying, the Respite Center, which offers 24-hour child care and parent counseling, was chosen. Then members of the firm created 20-odd gift baskets, including **Amy Miller’s** “wags & whiskers” (pet treats, toys, and gift certificates), **David Stienon’s** “comics galore” (40-plus comics from his world-class collection), **Richard McCloskey’s** “culinary delights” (herbed vinegar, lentils, spices, tomatoes, and more), and **Smith & Sutherland’s** “sportsman’s dream” (trap and skeet with Jeff and Frank—shells, clay pigeons, and gun provided). The highest bidders went home with the baskets. **John Frank** carried off several. His

advisable for parties to define clearly when a contractor may make unilateral substitutions and when owner involvement is necessary.

## When will the project be completed?

At the outset, the parties must understand what “completion date” means. Within the construction industry, there are two common types of completion date: “substantial” and “final.” Substantial completion means that a structure is ready to be occupied by the owner and utilized for its intended purpose. A project may, therefore, reach substantial completion while painting, finishing, or other work remains undone. Final completion, by contrast, means exactly what one would expect—the project is finished. When parties are negotiating a completion date, they must identify which type of date they mean.

Equally important, what circumstances will justify an extension in the completion date? Almost all construction contracts permit extensions beyond the original completion date in the event of such “acts of God” as floods, bad weather, and other factors entirely outside the contractor’s control. But how about delays caused by material suppliers or other subcontractors? Should these also serve as valid justifications for delays in completing the project? How these issues are addressed in the contract ultimately determines who will bear the risk of delays attributable to specified causes.

## What happens if the project is not completed on time?

This question raises issues that extend beyond the scope of this article and for which legal advice is often necessary. That said, both parties should understand the terms “actual damages” and “liquidated damages” when negotiating a construction contract. To recover actual damages, the owner generally must prove to a reasonable certainty the monetary damages s/he incurred as a result of a delay. Liquidated damages, on the other hand, are damages the parties agree (at the time they enter in to the contract) will represent fair compensation to the owner if the contractor fails to complete the project on time.

Most contractors are reluctant to include a liquidated damages clause in a contract because so many unforeseen problems can arise during the course of construction. But it may be difficult for an owner whose life has been disrupted by a delay to prove the

monetary damages associated with the delay. To accommodate the interests of both owners and contractors, it may be necessary to negotiate alternatives, such as providing additional time to complete a project in exchange for a liquidated damages clause. The events that trigger the payment of liquidated damages and the size and timing of payments may also be negotiated.

## If a dispute arises, how will it be resolved?

Many standard-form construction contracts require the parties to resolve their disputes in arbitration rather than in court. Mandatory arbitration clauses often call for construction-industry professionals as arbitrators and require the arbitrators to apply construction-industry standards. Owners are understandably hesitant to agree to such provisions, suspecting that industry professionals may tend to empathize with contractors. On the other hand, arbitration (and other forms of nonjudicial dispute resolution) are often less expensive and more efficient than court proceedings. The pluses and minuses of mandatory arbitration must be weighed by the parties and negotiated as part of the contract.

*The foregoing questions by no means exhaust the issues that should be considered before embarking on a construction project. Other relevant issues include the nature and timing of contract payments, retainage, lien rights and waivers, and the provision or disclaimer of warranties, to name just a few. All these issues should be reviewed with appropriate professionals well in advance of entering in to a construction contract. Sound planning and clear expression of common understandings will help ensure that all parties get what they expected from their bargain.*

by Frank C. Sutherland



Frank’s practice includes the representation of businesses, individuals, and public institutions in construction contract negotiations and disputes. As part of his academic training, he completed a law degree at the

UW as well as an M.B.A. at the New Hampshire College Graduate School of Business.

generosity helped push the firm’s donation to the Respite Center over \$1,000. ■ Carolers from **Lathrop & Clark** visited Lodi’s Good Samaritan Nursing Home and Poynette’s Pioneer Place, an apartment and elderly housing complex, in mid-December. Members of the firm seeking an antidote to commercialization of the holidays began caroling four years ago. This year’s vocalists were **Michelle Moe** and daughter, **Jo Nicholls**, **Paul Johnson**, **Brenda France**, **Cynthia Reece**, **Marja Barger** and daughter, **Ted Long**, **Mary Lou Goninen**, **Rachael Collins**, **Lisa Heindl** and daughter, **John Frank**, **Delores Kreisler**, **Renee Ninnemann**, and **Chris Longseth**. ■ **Debra Veith-Tessmann** is coaching girls’ volleyball and basketball for St. Dennis Catholic School. ■ **Mike Julka** coaches the YMCA girls’ basketball team and serves as bench coach for the West Flyers Boys Hockey Team.

## Publications & Presentations

**Jerry McAdow** discussed Y2K legal issues at the November 1998 meeting of the Madison Area School Business Officials. **Jerry** presented a seminar at the State Bar convention in January 1999 about Y2K issues in commercial leases, real estate transactions, and buying or selling a business. ■ **Mike Julka** addressed the Association of Wisconsin School Administrators in December 1998 about student discipline. ■ The January 1999 issue of *In Business* magazine carried a piece about newsletters. **Lathrop & Clark’s Counselor** was featured, and **Jill Dean** was among the editors interviewed for the in-depth article.

## Celebrations

**Kirk Strang**, the firm’s expert on New Orleans culture and cuisine, added a new twist to his celebration of Mardi Gras—king cake. According to Kirk, this confection is served (at work and elsewhere) on each of the days leading up to Twelfth Night, the traditional start of carnival. A “baby” is baked into each cake, and whoever gets the baby must bring the cake the next day. With no local sources for king cake, Kirk rejected the 12-day option in favor of a 1-day extravaganza. He had a king cake shipped from Louisiana and treated the firm to a taste of the genuine article.

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# Counselor

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## Oma Calls It Quits

All good things, it is said, must come to an end. Still, no one believed it would really happen. But last October there it was, in black and white—the announcement of Oma Kortsch’s retirement. After serving Lathrop & Clark LLP for nearly four decades as a legal secretary and paralegal, Oma was calling it quits at the end of the year.

Her retirement party, held on December 28, was a smash. For one thing, Oma was there. (After she had surgery on her shoulder in mid-November, many feared she wouldn’t be able to attend her own celebration. With typical toughness, however, she returned to work in early December.) There was a gigantic cake. And among the gifts was Oma’s typewriter, marking the first time in firm history that the typewriter retired with the typist.

The firm Oma left at the end of 1998 is quite different from the one she joined 38 years earlier. Lathrop & Clark is the outgrowth of a merger between two older firms—Ela, Esch, Hart & Clark and Isakson, Lathrop, Heaney & Long. Only three members of today’s Lathrop & Clark (John Esch, Jim Clark, and Don Heaney) were working for their respective branches of the firm when Oma was first employed.

Oma’s chapter in the history of Lathrop & Clark began when she responded to an ad from the “Ela” branch. Burgess Ela hired her as his secretary in May of 1960. Oma already had several years of

experience as a legal secretary at that time. Among her prior posts was Peickert, Anderson & Fisher. That firm represented major automobile insurers and did personal injury work. Oma found the grisly photos in the files distressing, but she gained excellent experience converting bushel baskets of bank statements and receipts into the formal documents and tax returns needed to close an estate.

At the Ela firm, Oma was expected to open the office each morning. She arrived early, unlocked the doors, and turned on the lights and equipment. Burgess Ela was an early riser, too. Oma could barely get her coat hung up before he would begin dictating to her. Oma usually took dictation in shorthand for about an hour. (The firm had dictaphones, but Burgess never learned to use one.) By that time, some of the other attorneys would have arrived, and Burgess would join them for breakfast.

In 1960, the Ela firm was located on Main Street. About a decade later, the firm moved to the Hovde Building. Located on West Washington Avenue, the new quarters were further from the courthouse. From Oma’s perspective, this was not a plus. She had to go to the courthouse a couple of times a week to file or record documents, and the trip had suddenly grown longer.

To add insult to injury, shortly after the firm moved into the Hovde Building, a pipe broke, dousing the file room. “The carpet and floor were never right after that,” Oma observed. “It was all sort of rippled up.”

But Oma’s battles with the

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LATHROP & CLARK

# Y2K—The End of the World?

building did not end there. When the firm arrived, the Hovde Building featured ornate, brass elevators with operators. Modern elevators were soon installed, but without much effect on efficiency. Still responsible for opening the office each morning, Oma frequently found herself traveling in the elevators while alone in the building. On several occasions, the balky elevators stopped between floors and refused to budge, trapping Oma inside. Once, she had to summon the fire department to rescue her.

If there was a pivotal year in Oma's career, it was 1976. First, her home was burnt to the ground by a pyromaniacal youth.

Second, Burgess Ela became ill during a real estate closing and asked Oma and John Esch to fill in for him. It was, in Oma's words, "the closing from Hell." As a host of problems arose, the closing took forever. Finally done, Oma went to check on Burgess. His office door was closed. When Oma went in, she found Burgess lying on the floor. He was breathing but not responsive. She immediately called for an ambulance. Then, kneeling beside him, she removed his tie and unbuttoned the top buttons of his shirt. Burgess was taken to the hospital, but all efforts were unavailing, and he died later that same day.

Third, before the loss of the man with whom she had worked for 16 years could begin to sink in, Oma was besieged by job inquiries from other law firms. But the Ela firm had recognized Oma's expertise and had assured her it wanted her to stay. And so she did.

For the next 22 years.

Now savoring a well-deserved rest, Oma plans to start tackling a long list of "rainy day" projects. She and her husband, Bob, keep an RV at Boulder Junction. Come spring, they will be in the northwoods, fishing and poking around in the quaint shops. In August, they hope to drive the RV up the Alcan Highway to explore Alaska.

Godspeed.

by Jill Weber Dean

Oma's contributions to Lathrop & Clark LLP have been extraordinary. But the firm would be remiss if it did not also acknowledge the dedication and fine work of such other long-term employees as Evelyn DuBois (1958-1993), Norma Judd (1974-1994), and Joann Nicholls (1964-present).

No one knows for sure.

First, let's be certain we know what Y2K means. Until recently, many computers and microchips were designed with only a two-digit date capacity. This was done on purpose to save memory, which was extraordinarily expensive in the early days of computer design and construction. The first two date digits were programmed automatically to be 19. Only the last two digits could be changed.

As a result, when the year changes from 1999 to 2000, noncompliant computer chips the world over may register the date as January 1, 1900. Any computer function, no matter how trivial, is literally programmed for failure if it depends on a correct date. But the exact nature of each computer's potential malfunction is not known. It depends on what the noncompliant chip does in the operation of the program.

Computer experts characterize the most likely malfunctions as either "hard" crashes or "soft" crashes. In a hard crash, the program or computer will stop running or refuse to start. In a soft crash, the program or computer will continue running, but it will generate incorrect information.

Now you understand what the problem is. Can you protect yourself? If only we knew. You can begin to answer that question by making a list of all the ways in which you rely on computers. No matter how long your list, it will probably only skim the surface because computer chips are embedded in literally millions of applications. We are generally aware of only the most obvious. Thus, we face a compound problem. We are unlikely to identify all the ways in which we depend on computer applications. And we cannot be sure what the impacts of noncompliance will be.

That is the bad news. The better news is that many businesses, individuals, and governments (at least in the U.S.) have undertaken corrective efforts. (The level of corrective steps in other countries, though very important, is beyond the scope of this article.) However, not all of these computer users will complete their efforts on time and

accurately. So there could still be failures. But where? We will not know for certain until January 1, 2000, though we may get a preview on September 9, 1999.

Why 9/9/99? Because over the years many programmers have used a series of 9s to indicate the termination of a program. Computers may interpret this date as a cue to shut down.

What should you be doing? Let me answer that question in two parts. Part I, covered in the balance of this article, focuses on what you should be doing as an owner/user of computers and software. Part II (in the next issue of *Counselor*) will focus on what you should be doing to protect your self/business in areas where you are dependent upon some other user's computers and software.

To bring your own computers and software into compliance, the following steps are widely recommended:

1. Undertake a Y2K compliance audit. This audit is a detailed assessment of the nature and scope of your computer usage. Determine what operations will be impaired, identify the consequences of each impairment, and establish a budget for making necessary corrections.
2. Set a timetable for solving the problems identified by your audit. Determine how much time will be needed to correct the problems that have been identified and establish a schedule for completion. Your timetable must allow time for implementing and testing proposed solutions.
3. Test your solutions. You must test and retest your remedial measures to make sure you have solved your known problems. Failure to do a 100% test (as opposed to selective testing) might be considered a serious deviation from an accepted standard of care, which could have liability consequences.
4. Establish a contingency plan. After you have taken all these steps, create a contingency plan to ensure that you will have funds available and procedures in place to handle the unexpected problems that will surely occur because of the uncertain scope of Y2K effects.

When Y2K failures occur, computer users and consumers of the benefits of computer applications will undoubtedly want to enforce their warranties and hold others liable for the consequences they suffered. Whether you are a potential plaintiff or a potential defendant, your legal position will be strengthened by the

steps you took to protect yourself from loss or other adverse impact—the protective steps listed above. As a plaintiff, the steps will help demonstrate you took all reasonably prudent measures to minimize your damages. As a defendant, the steps will help demonstrate you exercised due diligence to maximize the likelihood your computers and applications would be compliant.

In all of this, your first objective is to identify and solve all of your Y2K problems and make a trouble-free transition from December 1999 into January 2000. Because full success at achieving that objective is not assured, however, your second objective is to make sure you have recourse against those upon whom you relied—vendors, suppliers, consultants, insurance companies, and the like. Part II will discuss warranties you may give or receive, disclaimers you should make when others seek warranties from you, and additional steps you should consider to protect yourself from Y2K problems.

by Jerry E. McAdow



Jerry's practice emphasizes business, corporate, banking, commercial, and real estate law. A past president of the State Bar's Office Management Section, he currently serves on Lathrop & Clark LLP's technology committee and chairs the firm's Business Team. Jerry has given seminars about the legal aspects of Y2K for the State Bar and school district business officials. If you would like to arrange a Y2K seminar for your business or group, he would welcome your inquiry.



Will civilization grind to a halt as computers crash all around the world? Skepticism is expressed in this cartoon by Fitzsimmons, copyright 1999 by The Arizona Daily Star, reproduced by permission.

# Construction Contracts

Constructing a new home, office, or addition to a commercial site almost always involves the expenditure of substantial sums. Indeed, a construction project frequently represents the most significant investment an individual or business undertakes in a lifetime.

Despite the investment a construction project usually entails, construction contracts often contain informal and inadequate terms. For major public and commercial projects, a handful of form contracts are recognized as standard within the construction industry. However, no standard-form construction contract for smaller projects has gained widespread acceptance. The few standard-form contracts that do exist for residential and other smaller projects are generally prepared by contractors or contractor associations and, not surprisingly, contain provisions that tend to favor contractors.

In addition, the construction process itself is complex and often challenging for both contractors and owners alike. Opportunities abound for disputes to erupt between the parties. Owners and contractors can reduce the likelihood of disputes and achieve a common understanding of the construction process and the project's scope and requirements by addressing basic issues in a contract before construction begins.

## What work will the contractor do for the contract price?

To answer this fundamental question, the project must be defined by a complete set of plans and specifications. "Plans" generally consist of blueprints and other measured drawings prepared by an architect or similar professional. "Specifications" are written descriptions of finishes, material types, and other details that provide a comprehensive picture of the structure to be built. In the absence of adequate plans and specifications, incorporated into the construction contract, it is extremely difficult, in the event of a subsequent dispute, to determine just what the parties' agreement was.

## Are the allowances sufficient to cover anticipated costs?

When a project includes interior finishing, it is common to include allowances for specified items in the construction contract. An owner may, for example, wish to choose

carpet throughout a new home. The contract would typically permit the owner to select carpet as long as the cost does not exceed a stated carpet allowance. If the cost of carpet exceeds the allowance, the owner would be responsible for the extra expense. It is imperative that the allowances be realistic. Otherwise, an owner who anticipates completing a project for the contract price may end up with major additional costs.

## Is there a written "change order" process to govern changes in the project?

Despite having extensive plans and specifications, the owner and contractor often need to address changes in the project during the course of construction. Perhaps a certain style of brick is unavailable. Perhaps the owner wants to alter the shape of a room. Such changes are virtually unavoidable. Hence, at the conclusion of a project the parties commonly ask: What changes have been made? What additions or deductions to the contract price are appropriate as a result of the changes?

The failure of parties to agree to and document changes in a construction project in a manner that provides clear answers to such questions leads to a significant number of disputes. For that reason, it is advisable to state in the contract that changes in the project cannot be made without the written consent of both parties. The written consent should identify the nature of the changes and whether they required revision of the contract price or completion date. The document that records such an agreement is typically called a "change order."

Without a doubt, a written change-order process increases the amount of paperwork and administration associated with a construction project. In some cases, it may also reduce a contractor's ability to keep a project moving forward by making certain changes. Nevertheless, adhering to a written change-order process will greatly reduce the risk of later disputes.

But must all change orders be agreed to in writing? For example, may the contractor substitute equivalent materials for those specified in the contract if the only distinction is aesthetic? This is a significant question, in part because Wisconsin law is not altogether clear about whether an owner can recover monetary damages for deviations from contract specifications that result in aesthetic differences alone. Thus, it is