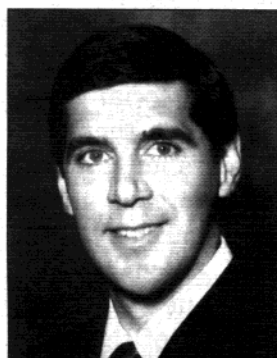


Representing Hotel Owners Against Their Management Companies: Classic Fiduciary Lawsuits

by Dana J. Dunwoody, Esq. of Mazzarella, Dunwoody & Caldarell: LLP



Dana J. Dunwoody

Lawsuits by hotel owners against the companies that manage their hotels are on the upswing. The recent downturn in the hospitality industry is expected to increase the number of these suits as individual owners more closely scrutinize their financials and begin to question whether illegal practices by their respective management company are a factor, in addition to a deteriorating economy, in their specific hotel's unacceptable performance. This article is a broad overview of how these suits should be approached from the owner's perspective. Most complaints filed on an owner's behalf focus on allegations of breach of contract and negligence.

The essential point of this article is that the focus in such actions should be on the management company's breach of fiduciary duty. (For a primer on the complexities of unlawful management company business practices and interpretation of management agreements, see, "100 Questions To Which Hotel Owners And Managers Should Know The Answers," Pricewaterhouse Coopers Press, 1997,

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An Overview of the New Rules Governing the Prosecution and Defense of Class Actions in California State Court

by Alan M. Mansfield, Esq., of Rosner, Law & Mansfield and
William S. Dato, Esq., of Milberg Weiss Bershad Hynes & Lerach

Effective January 1, 2002, both counsel and judges who are involved in class action litigation in California will be governed by a new set of uniform class action rules, promulgated as Rules 1850-1861 of the California Rules of Court. These rules are an outgrowth of Rule 981.1, which became effective in July 2000 and, in an effort to achieve statewide uniformity, preempted most local court rules that applied to the conduct of civil litigation. Recognizing that there were no current statewide class action rules, Rule 981.1 specifically exempted local class action rules from preemption, but only until January 1, 2002. The Judicial Council therefore made it a priority to

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William S. Dato

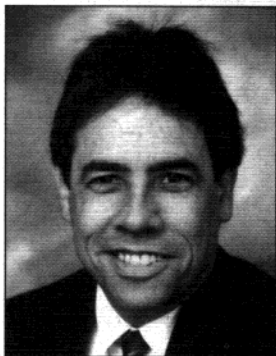
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PRESIDENT'S COLUMN:

All the World's a Courtroom?

by Howard E. Susman, Esq. of Duckor, Spradling & Metzger



Howard E. Susman

Does it seem to you that more than ever, Americans are fascinated by courtrooms? It does to me. I think it is now possible to view TV lawyers at any time of the day or night, and that's not even counting the commercials or "Court TV." "Law and Order" episodes can be seen on three networks! The number of "Lawyer Shows" probably exceeds the number of "reality" programs.

Lawsuits are always part of the front page and the nightly news. I have no idea whether all of this means anti-lawyer sentiments have abated, people just love judges, we are desperate for any conflict based drama, the entire nation needs psychoanalysis, or all of the above. It is plain, however, that the third branch of government, and we who operate in that

arena, are highly visible and closely watched. And I think the spotlight is about to get even brighter and the audience even more attentive.

We have already seen the effects of the 9/11 attack and its aftermath spread to many aspects of our society, culture and economy. The national agenda for responding presents myriad issues for civil and criminal justice systems, but they are still ripening. The controversy over the procedure to be followed in military tribunals for trying Al Qaeda or Taliban members accused of violent anti-American conduct has thus far been confined to the political forums. Similarly, the question of "profiling" in security checks has drawn sharp comment and rejoinder from ethnic organizations, constitutional rights groups, law enforcement agencies, and their advocates in Congress, but as yet, no lawsuits. It thus appears the issues will arise first in political form, then evolve into legal claims and contentions. For the politicians, the questions are: When is it appropriate to provide security by criminal enforcement of the laws and when by military action? Which of the various tools by which our government protects us should be used, and in what man-

ner? In the context of the inevitable cases and controversies, the questions will be transformed into issues for judges and lawyers: What is terrorism? When does violent antisocial conduct move from a "criminal act" to an "act of war?" Are the traditional or existing definitions and understandings of these terms even applicable to the present conduct and character of perceived "enemies?" C-SPAN gets no ratings, but when certain of these disputes reach courtrooms, the major networks will rejoice.

Speaking at our December dinner program, Clay Jenkinson as Thomas Jefferson observed that we are confronted with the vulnerability of our "Hamiltonian" way of life. Jefferson's agrarian model, with population and capital assets dispersed in a rural setting, would not have afforded Al Qaeda targets such as the World Trade Center. The social and political question raised is: "What are we willing to tolerate and sacrifice in order to maintain the concentrated nature of our economy and its attendant society?" Assuming the politicians provide a framework, the legal question then will be: "How are we going to enforce the new social compacts incorporating such sacrifices?" Can there be any doubt that over the next few years judges and lawyers will once again be debating how much "process" is "due," and what "searches and seizures" are "unreasonable?" Can there be any doubt that the ultimate shape of the new security framework will be as much a product of the outcome of this debate as of those in Congress?

At last October's ABTL Annual Seminar, 9th Circuit Judges Alex Kozinski and Stephen Reinhardt warned us that the controversies in the post 9/11 era will not be confined to the criminal courts. Ultimately, the issues will impact major economic interests. They did not specify examples, but it is easy for me to imagine that the confidentiality of commercial transactions in general, and of banking transactions in particular, are at "ground zero." I think we can also expect new arguments over restrictions on the exploitation of intellectual property . . . high-tech and bio-tech. Given the ever-increasing speed, scope, and importance of telecom-

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VIEW FROM THE BENCH

Paperless Courts: An Interview With New Presiding Judge Strauss

by Bonnie M. Simonek, Esq. Of Klinedinst, Fliehm & McKillop

On January 1, 2002, The Honorable Richard E.L. Strauss began a two-year term as San Diego Superior Court's newest Presiding Judge. As he prepares for his new position, Judge Strauss shares his thoughts and insights on the transition to a paperless system and other issues.

Q: Do you see the San Diego Court system moving toward being a "paperless" system?

A: Yes. All institutions in society are taking advantage of new technology. Courts around the country are looking for ways to do business electronically.

Q: How will a paperless system affect the San Diego Court system and the attorneys who practice in San Diego?

A: At first, there will be training issues for judges, the Court employees and the bar. Any system, however, needs to be as simple and as intuitive as possible. Once we have it implemented, however, it will allow us to do our work more easily and efficiently. E-filing is already emerging in construction defect and other paper-intensive types of cases, and it is being met with approval. The paperless system we envision will be better than anything currently being used and will operate more efficiently. The ultimate goal is to be able to eliminate the paper medium and be able to handle all cases electronically with information stored in a database. This is not unlike the way most other large institutions in our society now do business. With filing and information retrieval accomplished through the internet, people having business at the Court will be afforded easier and faster access.

Q: How will a paperless system affect litigants who use the San Diego Court system?

A: For those who are computer literate, it will be easier and faster to access information in their case. For those who are not as familiar with computers, there will be alternate access methods such as assisted kiosks and imaging capabilities. No one will be placed in a position of not being able to do business with the Court because of a lack of computer familiarity. As a case progresses, information will be put on websites for such things as rulings and decisions so

that lawyers can give better service at lower costs. Additionally, cases will be prepared for electronic presentation at trial which will reduce costs associated with trial.

Q: When can we expect San Diego Courts to move to a paperless system?

A: We are searching for the right case management system to allow us to do business electronically. We want a system which will be universal for all our case types and operate in a consistent manner for all of our users. Various suppliers have parts of what we require but not all of what we require. There is recognition in the market of what we are seeking, not only by us, but by courts throughout California and in all other states, and the vendors are responding by creating the software to fill the need.

Q: Who is designing the paperless system?

A: The electronic approach to doing business requires both modern hardware and software. We are participating with the County of San Diego in the hardware and technology infrastructure replacement, and several national software firms are developing case management systems for electronic courts of the future.

Q: What other changes do you see in store for the San Diego Court system?

A: We are looking at our processes in family law with an eye toward finding ways to give even better service. Many family law cases do not have a lawyer involved and, consequently, they have difficulty moving through the system. All family law cases can benefit from expeditious handling and we are determined to find the best practices and apply them. Additionally, we are exploring the use of one judge to hear both the family law matters as well as any juvenile law matters that may overlap.



Bonnie M. Simonek

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Covenants Not To Compete: A Race To The Courthouse

by Cynthia A. Freeland, Esq. of Baker and McKenzie



Cynthia A. Freeland

On June 13, 2001, the California Supreme Court granted review of the Second Appellate District's decision in *Advanced Bionics Corporation v. Medtronic, Inc.* (2001) 87 Cal.App.4th 1235, a case involving a covenant not to compete, dueling state lawsuits, and preliminary injunctions. The case presented the question of whether a Minnesota employer can be enjoined from enforcing a covenant not to compete in Minnesota if the employee (a California resident) has already filed a lawsuit in California seeking a declaration that the covenant is void against

California public policy. The Court of Appeal answered this question in the affirmative. While numerous prior lawsuits address the propriety of covenants not to compete, this case highlights an issue that is becoming a more important one: can California's public policy against covenants restricting an employee's marketplace mobility be circumvented by an out-of-state employer who beats the employee and his or her new California employer to the courthouse? Until the California Supreme Court responds, lawyers must assume that the answer is yes and must be prepared to counsel their clients accordingly.

California's Prohibition Against Covenants Not to Compete

With few exceptions, California prohibits covenants not to compete. (See Cal. Bus. & Prof. Code 16600) Underlying this prohibition is a strong belief that every citizen has the right, and cannot be deprived of the right, to pursue any lawful employment and enterprise of his or her choice. (See *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 859.) One California court notes "[t]he interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any

illegal act accompanying the employment change." (*Diodes, Inc. v. Franzen* (1968) 260 Cal.App.2d 244, 255) So strong is the public policy expressed in Section 16600 that it has been held to invalidate covenants not to compete that were signed outside of the state but that are invoked to prevent those employees from seeking new employment in the state. (See *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881.) The question currently before the California Supreme Court is whether the public policy is strong enough to prevent parties from participating in lawsuits regarding the enforceability of such covenants in other courts having concurrent jurisdiction.

Advanced Bionics

In 1995, Medtronic, Inc., a Minnesota corporation, hired Mark Stultz to work in its marketing department in Minnesota. In an effort to protect its trade secrets and confidential information, Medtronic required all employees to execute an employee agreement containing a covenant not to compete. The agreement contained a Minnesota choice of law provision. Under Minnesota law, such a covenant probably would have been deemed reasonable.

On June 7, 2000, Stultz resigned from Medtronic and went to work for Advanced Bionics Corporation, a Medtronic competitor, in California. That same day, Mr. Stultz and his new employer filed and served a declaratory relief action in Los Angeles Superior Court, seeking a declaration that the covenant not to compete was unenforceable because it violated fundamental public policy. On June 9, 2000, Stultz and Advanced Bionics amended their pleading to assert additional claims against Medtronics for unfair competition and unfair business practices.

On June 9, 2000, Medtronic filed their own lawsuit in Minnesota against Stultz and Advanced Bionics for injunctive relief and for damages. That same day, the Minnesota court entered a temporary restraining order, restraining Stultz and Advanced Bionics from taking any action in any other court that would interfere with the Minnesota action and prohibiting Advanced Bionics from employing Stultz in a way that would violate the covenant not

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Race

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to compete. The Minnesota court set a preliminary injunction hearing for June 21, 2000.

On June 21, 2000, Medtronic filed a motion to dismiss or stay the California action pending a resolution of its Minnesota action. The motion was denied on July 21, 2000, and the declaratory relief portion of the lawsuit was set for trial on October 16, 2000.

On August 3, 2000, the Minnesota court issued a preliminary injunction that prevented Advanced Bionics from employing Stultz in a manner that would violate his non-competition provision. Stultz and Advanced Bionics appealed this order, which was silent as to any injunction against the California declaratory relief action.

On August 8, 2000, Advanced Bionics and Stultz applied for and obtained a temporary restraining order to prohibit Medtronic from taking any further steps in connection with the Minnesota action. Medtronic then appealed the Minnesota court's failure to issue a preliminary injunction, which would have enjoined Advanced Bionics and Stultz from pursuing their California action.

On August 11, 2000, Medtronic informed the Minnesota court of the Los Angeles Court's restraining order. On August 15, 2000, Stultz and Advanced Bionics filed an *ex parte* application for an order setting their unfair competition claims for trial at the same time as their declaratory relief claim.

On August 16, 2000, the Minnesota court entered an order noting that it had failed to include in its preliminary injunction language that would limit Stultz and Advanced Bionics from obtaining relief in another court and it incorporated such a restriction in its preliminary injunction, *nunc pro tunc*. Moreover, the Minnesota court ordered Stultz and Advanced Bionics to seek an order in the Los Angeles court vacating that court's August 8 temporary restraining order.

When Stultz and Advanced Bionics informed the Los Angeles court of the Minnesota court's order, the Los Angeles court refused to vacate its order. Based on this refusal, the Minnesota court amended its preliminary injunction, prohibiting Stultz and Advanced Bionics from seeking permanent relief in any other court.

The Los Angeles action subsequently was stayed so that the appellate court could address the propriety of the Minnesota court's restraining order.

The appellate court was faced with the following dilemma: should the California court defer to the Minnesota court. In answering this question in the negative, the California court considered both the strong public policy in California against covenants not to compete and issues of comity.

The appellate court noted that where two courts of different states have concurrent jurisdiction, the first to assume jurisdiction takes it exclusively unless the exercise of such jurisdiction violates the public policy of the second forum or the exercise of such jurisdiction furthers a party's efforts to harass the adverse party. The court concluded that, because the California lawsuit was filed first, because California had a materially greater interest in the application of its laws to the parties' dispute, and because California's interests would be more substantially impaired if its policy was subordinated to Minnesota's policy, California law would apply and would render the covenant not to compete unenforceable. The court rejected Medtronic's argument that the restraining order impermissibly restricted its right to petition for redress and that it had the effect of immunizing Stultz and Advanced Bionics from liability for damages. It concluded that the restraining order was necessary and appropriate to protect the interests of Stultz and Advanced Bionics pending a final disposition of the action.

Lessons To Be Learned

Despite the fact that the California Supreme Court has granted review, the case still conveys valuable lessons that remain true regardless of the high court's decision. Attorneys must advise their employer clients to be mindful of potential new employees' obligations to previous employers and to do nothing to encourage potential employees to breach their obligations. If despite these obligations an employer decides to hire an employee who is a party to an out-of-state covenant not to compete, that employer should be advised to consider the advantages to filing a lawsuit first for a declaration of rights under California law. The risk in the absence of such a lawsuit is that an out-of-state former employer may beat the California employer to the courthouse, seeking out-of-state relief that effectively deprives the California employer of a valued employee. Δ

Class Actions

Continued from page 1

draft a set of uniform statewide class action rules that would be ready by the beginning of this year. The task was undertaken by the Council's Complex Civil Litigation Subcommittee chaired by Court of Appeal Justice William F. Rylaarsdam.

Unless the court determines otherwise, Rule 1850 provides that the new rules will apply to every class action brought under Civil Code Section 1750 et seq. (the Consumer Legal Remedies Act) or Code of Civil Procedure 382 (the generic class action statute). While in a general sense these rules codify existing practice and provide a procedural framework for issues that typically arise in class litigation, there are several new rules that arguably modify or at least clarify existing law. The new rules will provide ruling for the courts, tactical challenges for practitioners, and new issues for both advocates and decision-makers. The following summary highlights the most significant features.

Rule 1854 allows for motions to certify a class,

decertify a class, or determine subclasses. In adopting this rule, the drafters specifically rejected a proposal that would have allowed defendants to make a preemptive motion to deny certification of a class. Responding to defense complaints of occasional delays by plaintiffs' counsel in making the class certification motion, the rules provide instead that defendants (as well as plaintiffs or the court) can request a case conference under Rule 1852 at any time after defendants first appear, with at least 20 days' notice. During this conference, the parties can discuss and ask the judge to issue an order under Rule 1853 addressing class issues, the conduct and scheduling of discovery, and the scheduling and deadlines for plaintiffs' class certification motion.

Absent a specific scheduling order, class certification motions "should be filed when practicable." Rule 1854 also modifies the timing for briefing on

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Hotels

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Mazzarella, Dunwoody & Caldarelli, LLP and Pricewaterhouse Coopers, LLP.)

The travel and hotel industry as a whole had a banner 2000 only to be followed by financial disappointments as signs of recession began to set in the first half of 2001. The events of September 11, 2001 absolutely tanked the hotel sector. Business and convention hotels that regularly run north of 90% occupancy were running below 50% through the mid-November of 2001, and began to recover only toward the end of last year.

Historically, litigation over the long-term management rights of hotels increases in inverse proportion to the strength of the economy, as independent hotel owners who were already disappointed with their hotels' performance during good times begin to look for ways out of their management agreements during poor times. Many hotel owners justifiably believe that a different brand bringing new management, marketing, and strategic planning will improve the hotel on both a short-and long-term basis. As you can imagine, management companies fight hard to maintain their agreements, which often exceed 25-years and, for a 350 room downtown hotel in a large market catering to the transient business traveler, will bring to the management company net revenues of about \$1 million per year. An individual owner's desire to terminate the management agreement is of course completely at odds with the management company's goal of keeping it in place, with litigation being the only practical way to resolve the high-stakes dispute.

Before further discussion, it will be helpful to describe the features of the typical management agreement and the interrelationship between the independent owner and its management company.

Typically, the independent owner seeks out the large management company (a well known brand) in order to obtain specific benefits including: brand affiliation and chain membership; centralized national reservations; national sales and marketing; cross referrals from other hotels in the chain; and cost efficiencies that should result from centralized management and purchasing. For those services, management companies usually demand and receive very long-term contracts. Also typically, the management agreement provides that the management company is entitled to compensation from

two, and only two sources: it is to receive a "base management fee" of a certain percentage of the hotel's gross revenues in exchange for its management services (such as accounting and personnel services); and an additional fee based on a percentage of gross revenues in exchange for "chain services" (such as national sales, national marketing and central reservations). The combined fee for the management company's performing management services and chain services averages between 4% and 5% of gross revenues.

There are other features common to most owner-management company relationships. Management agreements usually specify that all of the personnel working at the hotel are employees of the management company, and not the owner. The contract will vest in the management company, and not the owner, the responsibility of managing all aspects of the hotel on a day-to-day basis without owner interference. "All aspects" means just that: everything from collecting all revenue to incurring liabilities and paying all expenses on the owner's behalf.

Every owner with whom I have spoken believes that the owner-management company relationship is fiduciary, rather than merely a contractual relationship. Surprisingly, however, most of these cases are filed on the owner's behalf as breach of contract and negligence actions.

This is a mistake for two reasons.

First, viewing the relationship as merely contractual (rather than fiduciary) in nature ignores the fundamental dynamic of that relationship. As an example, among the expenses paid on the owner's behalf by the management company are intra-company charges from the management company's corporate office to the hotel. The determination whether to pay or even to question the intra-company charges is made by management company employees working locally at the hotel based on their review of invoices prepared and sent to them by their corporate office supervisors who work for the same organization. Even assuming competence at both the corporate and local levels (which is often unjustified), it is not realistic to further assume that the local accounting personnel whose career longevity and year-end performance bonuses are based largely on how they are perceived by their corporate supervisors will have much incentive to question the supervisor about the propriety,

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Hotels

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amount, or fairness from the owner's perspective of intra-company charges that were approved by that supervisor. The management company also has near plenipotentiary control over the owner's multi-million dollar asset (the hotel), and it becomes apparent that intra-company charges, by which hotel owners are charged annually for vast and varied expenses, can easily be abused as a means for the management company to pay itself amounts in addition to the limited fees to which it is entitled.

Management companies have evolved many ways of charging their owners amounts in addition to the base management and chain services fees allowed under the management agreement. Many of these charges are for relatively small amounts individually, and only become more significant in the aggregate. Even the aggregate amount of certain wrongful charges is often small. But it is a breach of fiduciary duty for a fiduciary to pay itself any amount (even a small amount) beyond that to which it is entitled under the governing contract. The amount of money taken is irrelevant to the issue of breach; a fiduciary who knowingly takes even a small amount from his beneficiary has irrevocably destroyed the trust and confidence essential to that relationship. Absent the existence of the fiduciary relationship, however, the amount wrongfully taken under a contract must be material in order for the act to constitute a breach. Because many of the specific management company breaches involve just a few thousand dollars in the context of a contract worth several hundred thousand dollars or more per year, establishing the existence of the fiduciary duty precludes the management company from arguing that such breaches are immaterial breaches of contract.

Just as it is wrong to focus on the breach of contract at the expense of the fiduciary duty, it is a mistake to try these cases as negligence actions. Brand recognition studies have demonstrated time and again that the average consumer considers the largest hospitality management companies (Marriott, Hilton, Hyatt, etc.) to be competent because he or she sees a generally efficient and pleasant uniformity among hotel rooms managed by such companies, and that predictability is viewed as competence. Indeed, most of the smaller management companies aspire to the reputation

and customer goodwill achieved by the larger management companies. It is therefore an uphill battle to try to convince a trier of fact that a defendant such as Marriott, Hilton or Hyatt, or a smaller management company who has purposely adopted and implemented similar management practices, is incompetent or negligent in the operation of a hotel. It is counter-intuitive.

It is not as difficult for the trier of fact to understand that the fiduciary duty requires more than average industry competence; it requires the management company to manage each of its hotels as an individual asset with individual needs (because they are owned by individual owners with separate management agreements). There is no defense to a claim of breach of fiduciary duty that the management company is not liable for failing to manage a specific hotel property in accordance with the distinct geographical and business needs of that hotel and in accordance with its specific management agreement terms because the management company did succeed, on average, in managing all of its hotels globally at a certain level of competence and uniformity. If my fiduciary invests my money and achieves a return of 15%, and takes a third off the top that he is not entitled to so that my real return is only 10%, it is no defense for him to say that nobody else could have achieved a return in excess of 9%. The fact is, he wrongfully took that 5%.

In every case I have seen or read about save only two, the management company disagreed that it owed its independent owner any fiduciary duty. (One of the exceptions is *Pacific Landmark v. Marriott International*, 19 Cal.App.4th 615 (1993), in which Marriott acknowledged it was an agent but asserted, unsuccessfully, that its agency was coupled with an interest and could not be terminated. See also, *Government Guarantee Fund of the Republic of Finland v. Hyatt Corporation* 95 F.3d 291 (3rd Cir. 1996).) In fact, management companies frequently specifically disavow that a fiduciary relationship exists despite the fact that management agreements often specify clearly that the management company is an "agent," or even more specifically a "fiduciary." Other management agreements purport to expressly disavow the agency relationship, and so the management company argues that it cannot be a fiduciary. In these cases it can be argued that the written disavowal of

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agency does not control; rather, the specific provisions in the contract which are demonstrative of the fiduciary relationship do control. See, e.g., C.C.P. 1859; Restatement of Contracts, (2d ed.) 203(c); *Continental Casualty Company v. Phoenix Construction Company*, 46 Cal.2d 423, 431 (1956). More fundamentally, and irrespective of whether a contract purports to disavow the agent-principal relationship, a fiduciary duty can be demonstrated in such cases by the trust and confidence reposed in the management company by the owner — especially given that the management company has vast control over the owner's hotel. See e.g., *Lynch v. Cruttenden & Co.*, 18 Cal.App.4th 802, 809 (1993); and BAJI 12.36 ("a fiduciary or a confidential relationship exists whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another."). In other words, while all agents are perforce fiduciaries not all fiduciaries are agents.

At some point these issues will be firmly decided by the appellate courts. Until then, if you represent the hotel owner, keep your eyes focused on the fiduciary relationship. Δ

President's Column

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munications, there are First Amendment cases out there involving commercial speech and data. And, . . . I have no doubt we will see new waves of issues to be tried in the traditional litigation contexts of insurance policies, international shipping contracts, *force majeure* provisions of every stripe, and, of course, employment.

As the advocates for those with stakes in these features and components of our economy, we business trial lawyers will be in the center of the crucible. In other words, pretty soon it will be our turn to perform the solemn and vital duties entrusted to us when our fellow citizens are counting on it. When New York's firefighters were called upon to fulfill the duties of their chosen profession, they did so with total commitment and tragically, with great sacrifice. They were there to save lives. They gave it their best. We lawyers will not be expected to run into burning or collapsing buildings. People will not be depending upon us to save their lives from imminent physical peril. They will depend upon us to save the system, our "way of life." By faithfully performing the duties of our chosen profession, we can reaffirm the value of legal process which is the foundation of that system. Let's hope we are up to the task. Δ

Association of Business Trial Lawyers of San Diego

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QUESTIONS: For membership or registration information call Susan Christison at (619) 521-9570. All refund requests must be in writing and received by February 22, 2002. (Sorry, no refunds after this date.) Preregistrations are transferable.

Class Actions

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class certification, which will now be on a minimum 28-14-5 day schedule similar to that applied to summary judgment motions. Opening and opposition memoranda cannot exceed 20 pages without court approval, with reply briefs similarly limited to 15 pages.

Rule 1855 specifies that any class order must contain a description of the class, but significantly also allows a case to be maintained as a class action limited to particular issues. Consistent with California's policy to foster and facilitate class actions, this will permit both the parties and the court the opportunity to focus on certification of one or more key issues around which the case will revolve, rather than mandating an "all or nothing" approach to the class certification inquiry.

Rule 1856 provides detailed standards for the timing and content of class notice, and incorporates prior California law permitting a court to require either party to provide or pay for class notice. This new rule also acknowledges that if individual mailed notice is unreasonably expensive or if the individual stakes involved in the litigation do not justify the expense, notice may be provided by other means such as publication, TV or radio broadcast or over the Internet.

Rule 1857 discusses the various types of orders a court may enter in the course of conducting a class action, including the scope notice, conditions on class representatives or intervenors, amendments of pleadings or facilitating case management through coordination, consolidation, bifurcation, severance or other procedural mechanisms.

Rule 1858 addresses obtaining discovery from absent class members, specifically allowing for depositions and document requests to be directed to absent class members. But this right to seek limited discovery is expressly subject to a class representative or other affected person requesting a protective order, and the rule lists a number of factors the court must consider in deciding whether to permit the discovery. Interrogatories to absent class members are not permitted absent court order.

Rule 1859 establishes a procedure for the approval of class settlements, largely corresponding to current practice of a preliminary and final approval process. Rule 1860 restates current Rule 365 mandating court approval before the dismissal of a class action, but also adds a new subdivision (c)

requiring class-wide notice where a class has been certified and notice given. On the other hand, the rule also expressly permits the dismissal of class claims without notice to the class, in the court's discretion, if class notice has not yet been sent.

Writing for a unanimous California Supreme Court more than 30 years ago in *Vasquez v. Superior Court*, the late Justice Stanley Mosk noted the many "salutary by-products" of the class action device, and he urged trial judges to adopt "innovative procedures" to facilitate this form of group litigation. The new uniform rules adopted by the Judicial Council represent the cumulative experience of California courts and lawyers during the intervening years. Consistent with California's express judicial policy favoring class actions, these rules attempt to give substance to Justice Mosk's goal of devising class action procedures "which will be fair to the litigants and expedient in serving the judicial process." Δ

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Q: Do you have any thoughts on civility in the courtroom?

A: Civility is an essential tool for any lawyer. It is difficult to convince people of your point of view on an issue if they do not like you. Judges and juries are like everyone else; if you are uncivilized they are likely to be unimpressed with you and unaccepting of your positions. All the best lawyers maintain a high degree of civility while, at the same time, professionally advocating for their clients. Δ

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