

Asset Manager: Gatekeeper or Bean Counter?

In virtually every hotel trade journal these days, you read about the role of the asset manager. The asset manager is the intermediary between the hotel operator and the owner. Not only does the asset manager review and interpret financial data prepared by the operator and submit its results to the owner, the asset manager must also disclose any irregularities on the part of the hotel operator and franchisor to the owner.

From a legal perspective, the asset manager is the agent of the owner. Under agency law principles, the agent owes a duty of loyalty to the owner, its principal, to put the owner's interest first, even before its own interest. The asset manager also has a duty of candor to disclose any and all matters relating to the hotel to the owner. As such, the asset manager is the eyes and ears of the owner with respect to the operator's management of the hotel, as well as the franchisor's actions.

No matter how small an irregularity may be, the asset manager must report it to the owner. Failure to do so can result in significant damage to the owner and tremendous liability to the asset manager.

What types of irregularities do asset managers uncover? For instance, if the monthly financial statement indicates that year-end expenses are lower and thus out of budget, should that create a red flag for the asset manager? Could it be the hotel operator has an incentive clause in the management agreement for a year-end bonus if the net operating in-

operator may have breached the terms and conditions of the management agreement, thereby breaching its fiduciary duties to the owner, its principal.

An asset manager's role has clearly evolved to more than bean counting, or performing financial analysis, preparing financial reports and determining yields. An asset manager is also required to review hotel management contracts, franchise agreements and vendor-related agreements.

In particular, the asset manager should review the management contract (or franchise agreement) to determine if there are provisions relating to rebates or commissions, related parties, incentive provisions relating to fees, and/or termination rights.



Under agency principals, the agent (in this case, the asset manager) must be above reproach and always act in the best interest of the owner. As the owner's agent, the asset manager must act in the owner's best interest; be loyal to the owner; disclose relevant information to the owner; maintain and render accounts (books and records) to the owner; not accept secret payments; maximize the principal's profits; exercise a duty of care and skill on behalf of the owner to protect and manage the hotel; exercise good conduct in managing and operating the hotel; act only as authorized; and not act for an adverse party without the consent of the owner.

If the asset manager breaches its obligations to its principal and thus, its fiduciary duties, the asset manager can be liable for breach of contract and potentially punitive

damages. The role of the asset manager has evolved in recent years to one of a gatekeeper, or protector of the financial and legal interests of the owner.

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come is a certain amount for that year?

Does it possibly indicate the hotel operator is purchasing goods in the current year and moving expenses to the first quarter of the next year, to increase net income in the current year, while receiving goods from a vendor in the current year? If so, that could be fraud.

Another example pertains to the issue of commissions, rebates or kick-backs from vendors. If, in accordance with the management contract, the practice is not allowed, the asset manager should immediately notify the owner. The

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