



JOURNAL

ABA

THE LAWYER'S MAGAZINE / AUGUST 1, 1987

THE LAWYERS OF SAN FRANCISCO

**THE TROUBLE
WITH RULE 11**

**THE DUPONT
PLAZA HOTEL FIRE**

BY MARK DIAMOND

Dec. 31, 1986—3:00 p.m.:

It is a hot, sunny day. The kind of weather that draws tourists to the shores of Puerto Rico only to head for the air-conditioned environs of the island's grand hotels and casinos.

A man enters the empty ballroom of the San Juan Dupont Plaza Hotel. Twenty minutes earlier it had been filled with employees as they confirmed a job strike for midnight. He walks over to a stack of furniture that has been stored in the corner of the room. He looks around. He places a Sterno beneath the 6-foot-high pile of chairs and dressers and packing material. He lights the Sterno and walks away.

In the casino, guests are shooting craps, playing the slots, laying their bets. In the lobby, people are checking in. In minutes they all will be engulfed in a fire that will leave 96 people dead and more than a hundred others burned and maimed. It is now 3:20 p.m.

On the beach, a man walking his dog spots a dark cloud seeping out of the 22-story resort. Inside, a hotel executive sees smoke rolling up a stairwell; he rushes to the lower level and finds fire raging in the ballroom.

The fire feeds off the carpeting and wall covers and races through the hollow spaces between the structural and drop ceilings. Hidden from view, a deadly blanket of flames and lethal gases begins to surround the casino.

The gamblers see smoke crawling outside the large pane windows and along the ceiling in an undulating, almost life-like layer 6 inches thick. Still, the roulette wheels continue to spin.

A SLAUGHTERHOUSE

And then hell breaks loose. The ceiling blackens and fire enters the room. Flames steal oxygen from the air, leaving patrons to swallow superheated smoke and gas. People literally explode as a wave of intense heat, 1200 degrees hot, flashes through the casino.

Mark Diamond is a lawyer and free-lance writer in Garden City, N.Y. His last article for the ABA Journal, "A Trace Element in the Law," appeared in the May 15, 1987 issue.



Anatomy of a Disaster

The Dupont Plaza Hotel Fire

Others pound on windows and locked doors or run for the exit to the lobby, only to be struck by an inferno that forces them back into the death chamber.

The hotel's air conditioner feeds the fire. Clouds of smoke particles build up, then suddenly ignite. The very air explodes.

Two men hurl a young woman through a window and leap out behind her. Others jump through a casino window 20 feet high. Once outside, survivors find the pool gate locked and are forced to climb over a barbed wire fence.

Guests trapped in higher floors throw themselves from balconies. Others with more time or presence of mind slide down bed sheets to safety. Some scale the outside walls like mountain climbers and claw their way 15 or more stories to the roof.

A helicopter charter pilot is the first on the scene. He lifts people off

the roof and sets them down on the beach, where temporary hospitals are set up.

Eventually larger government helicopters move in. They balance on the edge of the roof to keep their rotors from slicing into the hotel's bulky air conditioning plant.

People run out of the pool area, bloody from showering glass. Two croupiers dash out of the hotel and jump into the pool, their clothing smoldering.

People die in elevators jammed between floors.

Outside, crowds are forming as fire engines come screaming from all parts of the island. Raymond Acosta, a federal judge who will wind up hearing the case, is just one more helpless bystander as the dense smoke, black as pitch, pours out of the dying hotel and the screams continue and the people die.

While the fire will rage over six



◀ The most deadly fire on American soil in more than 40 years.

protect the evidence through court motions and media attention.

"We took hell because he was on the scene so quickly," says Gauthier. "There was a lot of animosity from local attorneys. They felt they were being invaded and that we had designs on capturing all the litigation. That wasn't true. We knew we'd need good, local attorneys."

Meanwhile, Minneapolis attorney Gary Gordon was resting from New Year's Eve when the phone rang. It was the hotel's general counsel asking if Gordon's firm would represent his client. By that afternoon Gordon and his team were on a plane.

"It was utter chaos when we arrived," Gordon says. "Bodies were strewn around. State and federal people were all over trying to get a piece of the action. There was tremendous bad blood between labor and management; witnesses were threatened, bomb threats were made—the hotel owner was despondent. The first thing we did was fence off the site and set up controlled access points.

"In a situation like this you have to work with government investigators. You must be cooperative, but at the same time try to keep them from being bulls in a china shop.

"The next thing we did was find a high-quality local firm to work with. Language was a barrier for us but not for local attorneys. And we needed people with a knowledge of the local courts and laws. We also set up a field office to act as liaison and representative on the island."

Access to the disaster location is a crucial issue because the physical evidence is vital.

In the early days following a mass tort, plaintiffs' attorneys will ask the courts to order the defendant who is in control of the area not to disturb the evidence and to let the plaintiffs' investigators onto the site.

There are two problems. First, the plethora of plaintiffs often means that a united front is slow in developing. Less experienced attorneys may be unfamiliar with the measures

hours, all but two of the deaths will have occurred during the first few minutes. The remains of 91 people will be found in the casino, most lying in two heaps near a small door and a row of floor-to-ceiling windows, mere yards from the sea-blue swimming pool. It is the most deadly fire on American soil in more than 40 years.

New Year's Day, 1987:

As the embers glow at the Dupont Plaza, the legal system ignites. For perhaps more than any other type of litigation, mass torts require fast action.

Wendell Gauthier, a Metairie, La., attorney who will become the chairman of the plaintiffs' permanent committee, first hears of the disaster on television.

"When I saw the fire my immediate reaction was sympathy," recalls Gauthier. "Then I thought, 'Oh my God, I hope no one I know is in it.' Then I thought, as any plaintiffs'

lawyer worth his salt would, 'I would like to be in on the action.'"

In Gauthier's case, it was more than a daydream. Months earlier he had been the lead counsel on the MGM Grand fire trial in Las Vegas.

"But I was hesitant," Gauthier says. "I was in the middle of trying a major air crash and didn't know if I'd have the time and energy."

THE TEAMS ASSEMBLE

The next day, Gauthier received a call from an attorney in Puerto Rico—Luis Colon Ramery—who had already signed up several victims as clients. Ramery was the brother of a plastic surgeon Gauthier had met during the MGM litigation. Gauthier decided to take the case.

On Jan. 1, John Coale, a Washington, D.C., lawyer, was on holiday in New York. Gauthier tracked him down. Within hours, Coale was on a jet bound for Puerto Rico. His job: to

needed to obtain a freeze on the evidence.

Second, defendants are in a hurry to start cleaning up the disaster site.

"After the MGM fire, 200 workers with bulldozers were waiting to move in," recalls Gauthier. "The judge didn't want to sign a motion to stay the demolition because MGM would have been closed too long. We were able to convince the defendant that the judge was going to allow our motion, so they agreed to halt the bulldozers until we had time to investigate."

"It's critical when making a motion like this to use the magic words, '... defendants be restrained from cleaning any debris or altering the fire scene in any manner.'"

Soon after the Kansas City Hyatt Regency Hotel skywalk collapse in 1981 in which more than a hundred people died, the hotel shipped out debris (and evidence) in the dead of night, locking away the remains in storehouses on the edge of town.

"The importance of gaining access to the site of a mass disaster as soon as possible cannot be overstated," says Gauthier. "At least one suit should be filed right away to provide a vehicle for judicial intervention to allow plaintiffs' counsel access to the site. Then an order by the court to prohibit any clean up should be sought."

"The bar is prohibited from soliciting plaintiffs. In mass disasters, this is foolish. It severely hampers the plaintiffs' cases because it is most important to file a suit to protect evidence right away. And unless the injured can be solicited by attorneys, most will not have lawyers right away to do this work."

Gaining access to a disaster site is perhaps as much a marketing effort as it is a legal one. Hotels, airline companies and other defendants are very concerned about their public image after a disaster. By talking to the press, plaintiffs' attorneys can play up the need to preserve evidence. It then looks bad if the defendants are unwilling to cooperate.

"As the defendant's attorneys, we are caught between a rock and a hard place," says Gordon. "The public has a right to know what went on and the press has a job to do. But there's the attorney-client privilege

and the sensitivity of the situation. So part of our job is to help our client deal with the press."

While the media battle went on in the early days of the Dupont fire, the defendant was filing an informative motion. It notified the court that the defendant was represented and asked that no ex parte relief be granted to any plaintiff.

Attorneys representing the injured and dead also filed several motions in federal dis-

Wendell Gauthier ▶



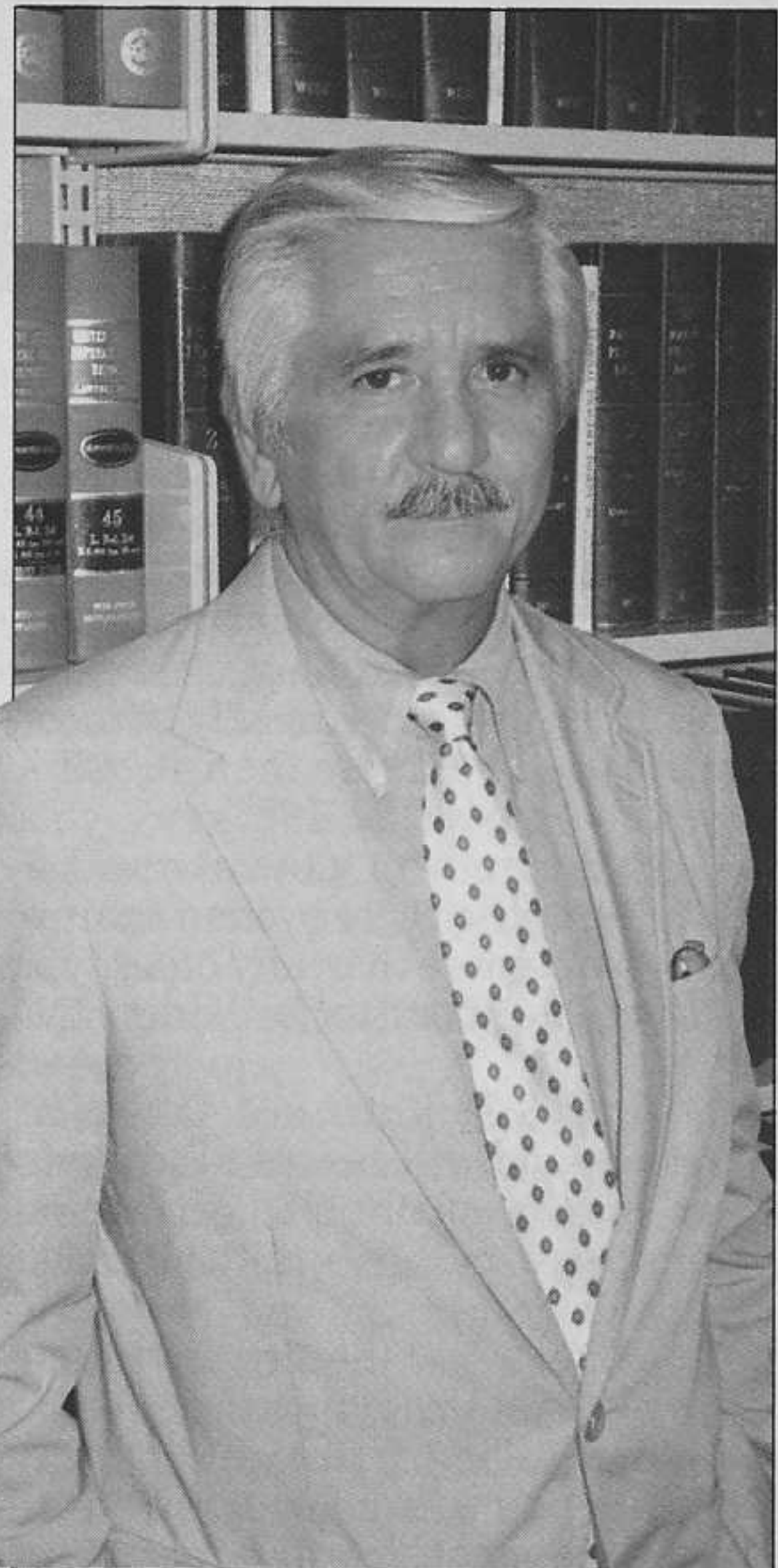
trict court on Jan. 2. They sought damages and an order granting plaintiffs' investigators access to the hotel. The motions were denied.

Likewise, on Jan. 7, a motion seeking a temporary restraining order to force the hotel to close and allow private investigators to enter the hotel was denied.

"The plaintiffs' motions were denied because the hotel is private property," says U.S. District Judge Acosta. "Also, I did not want any evidence removed before I had time to appoint a temporary plaintiffs' committee. I wanted to give the parties time to get together and work out an agreement as to how to proceed. I did tell the defendant to secure the site of the fire."

In the second week after the fire a plaintiffs'

U.S. District Judge
Raymond Acosta ▶



committee was appointed. Both sides were then able to draft a stipulation, with court approval, that allowed the committee, its investigators and photographers onto the scene of the fire. A motion was then granted, allowing the committee to examine government-collected samples of the victims' blood and lung tissue.

"The samples are critical," says Gauthier. "They will tell us how the fire developed and what these people died of. All our evidence, including documents and depositions, will be entered into computerized data bases for quick recall."

THE BIG STIP

The stipulation, "The Big Stip," stated that the plaintiffs' investigative teams would be allowed in the hotel for five consecutive days and detailed the investigation plan. The committee agreed not to remove any evidence without the defendant's permission, which would not be "withheld unreasonably," and that any evidence so removed would be placed in a joint storage area, access to which requires two keys—one held by each side.

"We agreed to this stipulation because we were dead certain that the court would allow it, and we wanted to negotiate our own terms," points out Gordon.

In a second stipulation, "The Little Stip," the hotel promised not to remove guest luggage and clothing until the committee had time to videotape every room in its original post-fire condition.

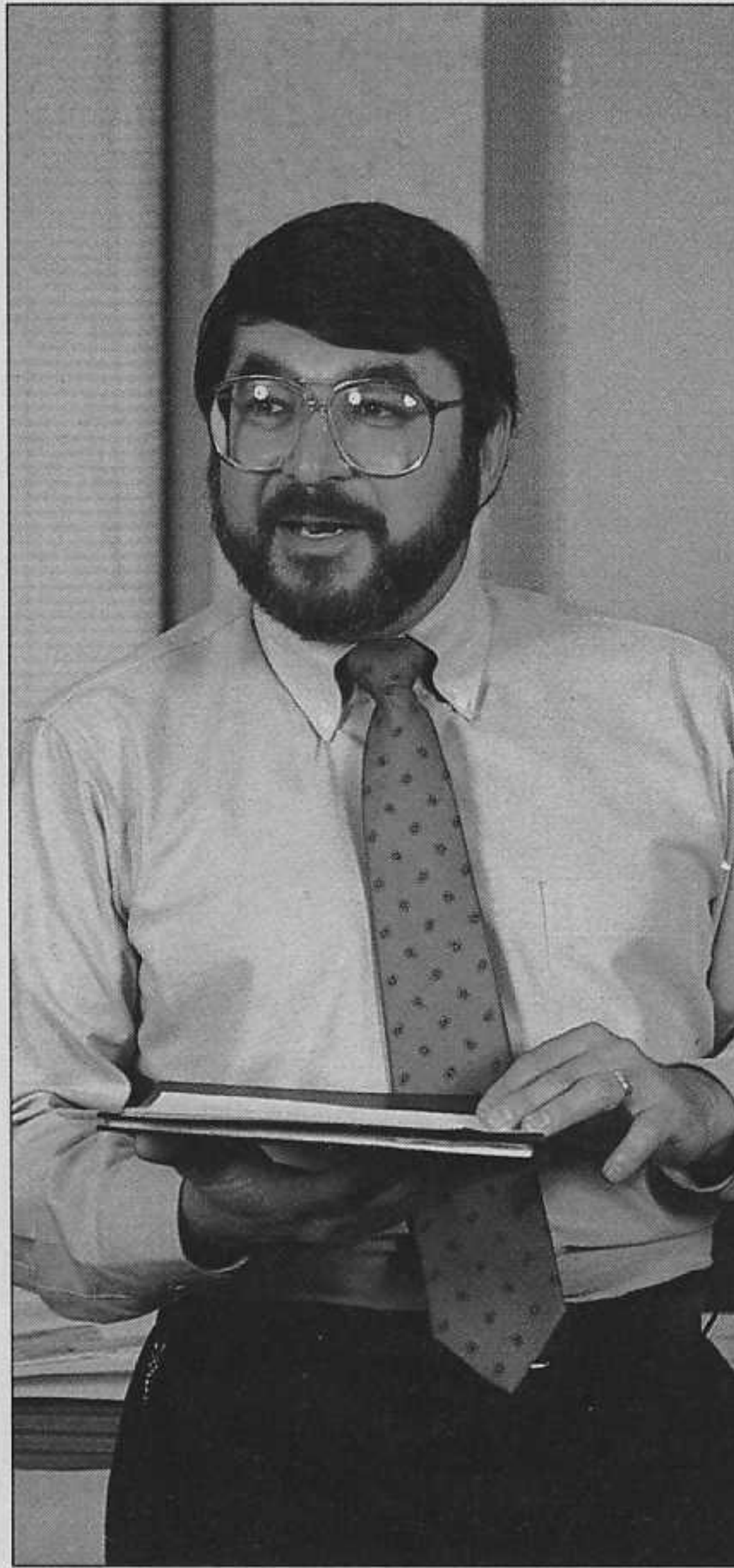
"The purpose of taping is to follow the trail of smoke to find the fire's cause and course of travel," says Gauthier.

While these stipulations were being worked out, the committee was gathering information on the hotel's corporate structure.

"We discovered a big problem," says Gauthier. "The hotel only has \$1 million in insurance. So we had to find other assets, such as equity in the hotel itself. Its appraised value after the fire was about \$40 million.

"We had to keep the property from being further encumbered by the owners. So we filed a *lis pendens* and asked for a restraining order to keep the owners from further mortgaging the hotel.

"The judge postponed a ruling



▲ Gary Gordon: "Utter chaos when we arrived."

and told us to negotiate. The defendant's attorneys agreed there would be no encumbrances. Now, that doesn't bind the corporation, but I know that the attorney who made the promise is an up-front person. So we felt comfortable with his promise."

MUTUAL RESPECT

Such agreements are facilitated by the fact that mass tort attorneys know one another personally or by reputation. "There is always friction, don't misunderstand," says Gordon. "But it helps us agree to many things."

The reputation of certain mass tort attorneys also makes the federal judge's job in appointing a plaintiffs' steering committee easier. The steering committee is just one of the recommendations made by the Manual for Complex Litigation (MCL), "the bible," as Acosta calls it. The MCL is a handbook on federal court procedures for mass tort litigation.

"The courts have found that it is more efficient to have such a large

case as *Dupont* handled by one judge in one jurisdiction using one discovery process," notes Gordon. "Clients benefit by having lots of money pooled to investigate and litigate properly. They also benefit by having very knowledgeable lawyers on the plaintiffs' committees."

The job of the interim plaintiffs' steering committees, to be replaced in the ninth week after the fire by a permanent committee, is to act as fiduciary for all the plaintiffs in federal court.

Its duties include conducting discovery, reporting on progress to all the plaintiffs' counsel, acting as spokesperson at pretrial and motion hearings, responding to court inquiries, preparing a trial plan, exploring trial alternatives and, subject to court approval, entering into stipulations with defendants.

"The court cannot deal with all the plaintiffs' attorneys; there will be about 200 at the peak of this case," says Gauthier. "This is one reason why a plaintiffs' committee is formed."

To pay for the committee and its work, the court in *Dupont* assessed each plaintiffs' attorney \$800 for every death claim they represented and \$300 for each injury claim. In addition, every committee member put up \$50,000. "This takes care of our immediate fiscal needs," says Gauthier. "Later we will build up rapport with a bank, which will lend us money to continue with the case, using any future settlement or judgment as collateral."

Two of the early jobs of both the committee and the defendant's attorneys are to locate and interview witnesses, and to hire experts to investigate the site of the disaster.

Government and quasi-governmental investigators, such as those from the Bureau of Alcohol, Tobacco and Firearms, as well as the National Fire Protection Association, were at the Dupont Plaza almost immediately after the fire. But they did not tag and document evidence, nor were they necessarily looking for the same things as attorneys.

The defendant's attorney had experts on the scene soon after the fire. It was not until the third week that plaintiffs' attorneys and their experts had access to the hotel site. There were five plaintiffs' investigative teams,

each consisting of five experts, one attorney and one photographer.

"We had one of our experts, photographers and attorneys with each plaintiffs' team," notes Gordon. "We felt this was important because we wanted to memorialize everything to make sure they didn't interfere with the evidence. They didn't ask to do this on our teams, though."

TEMPERS FLARE

"Once we had our experts and were into the investigation, it was a very tense time," notes Gauthier. "There were several near fist fights between attorneys and experts from both sides.

"For example, they removed a box of blueprints to an office. When we asked to see what they had removed they said they didn't have the key to the office. We said we'd tape the office shut and kick the door in the next day. There was a shoving



match. But they came up with the key. This kind of thing is common."

The administration of the *DuPont* case is a monumental task.

"A case like this comes to a judge once in a lifetime, if at all," Acosta says. "For me, it's like flying a Cessna all your life, then suddenly being asked to fly a 747. But it's not the legal issues that pose the problem; it's the logistics.

"It's a nightmare trying to keep

up with everything the parties are doing, the evidence, the discovery, the jurisdictional issues, third-party actions, who are the proper party defendants and all the rest. There are millions of documents. I deal with it by referring to the MCL. I have a magistrate ruling on discovery. And I try to anticipate what's coming down the road."

What has come down the road during the several months after the



fire is collating, coordinating and studying information. There have been discovery requests, petitions for multi-district handling, motions on procedures and motions to sequester insurance funds.

So far, 46 complaints have been filed in federal court, by more than 400 plaintiffs. Some claim more than \$500 million in damages. Fourteen defendants have been named.

Despite all the trial preparations, attorneys from both sides agree that the *Dupont* case, like most mass tort

cases, will probably be settled.

A fire took place at the start of the year. Almost a hundred people died in ways that few of us can begin to imagine. Soon, perhaps within the next year or so, the Dupont Plaza will reopen. Gamblers will once again be pumping the slots, vacationers lounging by the sea-blue swimming pool, and guests sipping coladas. All will be back to normal.

And there will be very little to remind anyone of what happened on New Year's Eve 1986. ■