

LePatner Report

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Setting Our Sights on the Stars

The following is excerpted from a memo sent by Barry LePatner to the staff at BBL&A. It seeks to define the firm's philosophy of trying to develop well-rounded professionals attuned to a service ethos that is aimed at meeting all of our client's varying needs. Readers are invited to provide us with their comments.

Each of us, at one time or another, pictures ourselves as a star in one field or another. Some see themselves enjoying fame on Broadway, some envision themselves hitting the late-inning home run to win the World series. Lawyers may wish for the moment of greatness that comes when Perry Mason has brought a key witness to his (usually his) knees and, at the last moment, discloses the true perpetrator of the crime in question.

Dreams of success are nurtured within us by the world around us. Movies, television, magazines and books all feature the rise of those who have achieved or are on the way towards success (Elton John, Bill Gates, Leonardo DiCaprio, or Mark McGuire – and chronicle the downfall of those who have fallen from favor (O.J. Simpson, Donald Trump, Frank Gifford, to name a few). For better or for worse, we are inured to weighing ourselves and others by standards that often do not properly measure the criteria for how one becomes truly "successful" at one's chosen endeavor.

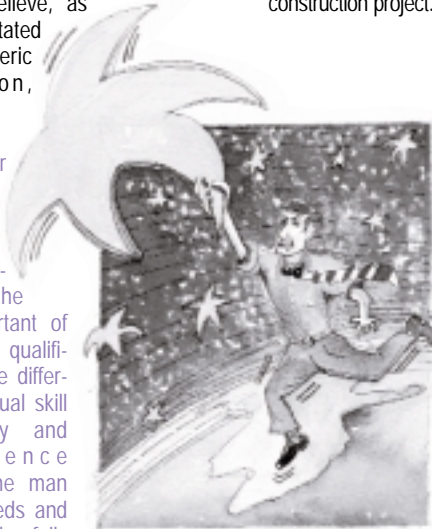
As with every organization, BBL&A has its own defined standards for creating and advancing stars within our firm. To a certain extent, the firm was founded upon the recognition that "stars are made, not born". As author Frank Tyger once wrote: "Success comes to those who know it isn't coming to them and who go out and get it."

The success of BBL&A was neither achieved overnight or through any extraordinary talents. It was, to be brutally honest, the result of taking advantage of opportunities, coupled with lots of hard work and an insistence upon the belief that our clients wanted construction attorneys who were cre-

By Barry B. LePatner, Esq.
ative, business like and knew the law. It was Benjamin Disraeli who said: "The great secret of success in life is for man to be ready when his opportunity comes."

There is no question in my mind that each of the attorneys and professionals at BBL&A has the ability to become a star within the LePatner & Associates orbit. The truth is that you would not have been hired if you did not have one or more of the star attributes that the firm looks for during interviews. Most of you already are well aware of the fact that one of the most highly-valued traits we look for is that of enthusiasm. I believe, as was well stated by - Frederic Williamson, that:

"The longer I live the more certain I am that enthusiasm is the most important of all traits or qualifications. The difference in actual skill and ability and intelligence between the man who succeeds and the man who fails usually is not very



"Reaching for the Stars" by RRP

Owners Should Understand The Importance of Obtaining Proper Insurance Coverage When Undertaking a Construction Project. By Ronald B. Feingold, Esq.

requently, our owner-clients are confronted with a project site accident or the partial collapse of their own building or an adjacent structure undergoing construction. The owner may sustain property damage to its building or a collapse may cause damage to a neighbor's property, or even to a passerby. Each is a separate loss. Different liability issues apply and different insurance policies may govern each loss.

Owners undertaking construction projects should verify that they have proper insurance coverage in place before the commencement of construction. This will ensure that they are sufficiently covered in the event of property damage or loss sustained to their building, or in the event a claim is filed against them by a third party which arises out of the construction project.

For property loss, the owner will generally look to its property insurance policy. If a collapse endorsement is included, coverage will be provided for collapse caused by, among other reasons, hidden decay, weight of people and contractor-related construction errors. Owners should be certain that their property

insurance policy includes a separate endorsement covering collapse. Some policies may, in fact, exclude coverage for collapse. It is thus important for an owner undertaking a construction project to request and confirm coverage for collapse, including collapse caused by either the contractor or the architect's acts, errors or omissions.

If an accident occurs, the owner should immediately notify its property insurer of the loss. Under its policy, the owner must cooperate completely with the insurer's investigation, compile a claim file and submit its claim for all property damage to its insurer. The claim should include all expenses related to debris removal as well. This is generally done by the submission of what is commonly known as a Proof of Loss. Unless the insurer disclaims coverage for some reason related to a provision in the policy, the insurer may agree to pay all or a portion of the loss, but in no event more than the policy limits. The owner always has the option of commencing a lawsuit against its insurer seeking to recover its total loss up to the policy limits. This is known as a declaratory judgment action. Unless the insurer commences the declaratory judgment action, all legal fees incurred by the owner in the lawsuit are borne by the insured-owner.

In almost all instances, after settling with its insurer, the owner is required to assign its claim for damages to its insurer. The assignment, however, is limited to the amount paid by the insurance company on the claim. This is known as subrogation. The insurer is subrogated to the insured-owner's claim and steps into the owner's shoes and seeks recovery against the party at fault. Typically, the insurer looks to the contractor who was performing the construction work at the premises. In the subrogation lawsuit, the insurer seeks to recover the amount paid to its insured. The owner may also elect to join in the subrogation lawsuit for the amount of damages sustained which exceed the amount paid to it by its insurance company.

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WAT&G is the First Architectural Firm to Prove a Correlation Between Hotel Design and the Bottom Line

By: Howard J. Wolff and Robert Zheng

With statistics gathered by Smith Travel Research ("STR"), Wimberly Allison Tong & Goo (WAT&G) is the first architectural firm worldwide to conduct research which reveals a consistent and quantifiable relationship between good design and the clients' bottom line.

Using the hospitality industry's own yardsticks of occupancy rates, room rates, and revenue per available room (Rev PAR), the research illustrates that hotels designed by WAT&G have outperformed competitors on all three measurements over the seven-year period covered by the study.

The research methodology involved isolating several key variables that can influence the economic success of hotel properties: location, management, time frame, and design. Keeping all the variables constant except for who designed the hotel - the results indicate a very strong, statistically significant relationship between WAT&G's designs and the hotels' revenue stream.

On average, nationwide in the United States, hotels designed by WAT&G earn RevPAR for their clients that is \$50 per night higher than the competitive set of hotels managed by the same operators over the same seven-year period. Similar results were obtained comparing WAT&G-designed hotels in California and Hawaii to those designed by other firms.

Hotels in the study are operated by Four Seasons, Hilton, Hyatt, Ritz-Carlton, Sheraton, and Westin.

STR is the recognized leader in providing lodging industry statistics and tracking hotel performance. They maintain a database of over 40,000 lodging establishments in the United States, Canada, Mexico, and the Caribbean.

WAT&G has been steadily honing its expertise in hotel design since its first project in 1945 - the renovation of the Royal Hawaiian Hotel in Waikiki. Today, the firm is recognized as the world's number one specialist in hospitality, leisure, and entertainment design.

Introduction

The firm of Wimberly Allison Tong & Goo (WAT&G) has been responsible for the architectural design of more hotels than any other firm in the world. Very often, WAT&G is asked to provide a measure of the added value it provides to its clients; so the firm's principals sought a methodology for quantifying the impact of design on the bottom line and for assessing the value that WAT&G offers its clients. What follows is a brief description of the methodology employed and an analysis of the results.

Hypothesis

Is it possible that hotel design can have an impact on the bottom line?

Most industry experts acknowledged that it can.

Good design can affect profitability in one or both of the following ways:

1 A well-designed hotel is going to feel pleasing to guests, thereby creating positive first impressions, strong word of mouth and, ultimately, impacting occupancy through greater lengths of stay and more repeat visits.

2 A hotel whose back-of-house is well laid out can produce greater operating efficiencies, thereby reducing staff costs, which typically account for over fifty percent of a hotel's operating expenses in many parts of the world. Relatedly, well-designed environments that are pleasant to work in can increase morale and productivity, decrease turnover and recruiting expenses, and, in the end, put a significant dent in the labor costs of running a hotel, allowing more money to drop to the bottom line.

To demonstrate the positive impact of hotel design on the bottom line, it is necessary to isolate the factors that account for a property's economic success.

Methodology

Research was conducted using the hospitality industry's own yardsticks for measuring financial performance:

- ADR (average daily room rate);
- Occupancy (the percentage of nights per year that there is a head on the bed);
- RevPAR (revenue per available room - computed by multiplying occupancy rate times ADR).

Since WAT&G's clientele includes some of the most prestigious hotel operators in the country, it was appropriate to compare WAT&G-designed hotels not to a national average but to a more elite subset. STR therefore provided data on the performance of luxury-priced hotels - defined as the top 15% of the U.S. market as determined by hotels' ADR's.

Since a hotel's management company can have a significant impact on the bottom line, the sample of WAT&G-designed hotels chosen was not dominated by any

one operator. The group of 19 WAT&G-designed hotels included three-, four-, and five-star properties managed by Westin, Hyatt, Hilton, Sheraton, Four Seasons and Ritz-Carlton.

To further ensure an "apples to apples" comparison, the comparative set of STR luxury properties included only those hotels managed by the same six operators.

And because location can have such an obvious impact on a hotel's financial performance, three separate comparisons were run between STR's luxury hotel database and WAT&G-designed hotels: nationwide, in Hawaii and in California.

In addition, since anything can happen in any single year, data was analyzed over a period of seven consecutive years (from 1991 through 1997).

While general managers acknowledge that a well-designed hotel increase operating efficiencies, no industry yardstick exists by which to measure the resultant cost savings. Therefore, this analysis is restricted to revenue-related data.

Results

Average Daily Room Rate (ADR): In every year during the period of 1991-1997, the WAT&G-designed hotels enjoyed significantly higher ADRs than the average ADRs of the comparable U.S. luxury hotel group. The difference ranged from \$51 higher in 1993 to \$61 higher in 1997. It is interesting that the gap has widened over time.

Since the Hawaii and California markets usually see higher average daily room rate than the rest of the nation, the question arose as to whether WAT&G-designed hotels in these markets stayed on top of the top.

The average daily room rate of the typical WAT&G-designed hotel beat that of the California luxury hotel every year from 1991 to 1996 by an average of \$17. It ranged from \$11 higher in 1991 to \$23 higher in 1996. Such is the case in Hawaii, too, where the WAT&G hotels' ADR was an average of \$13 higher than the ADR of Hawaii luxury hotels.

Occupancy Rates

Usually, hotels concentrate on one of two strategies to affect their bottom line: improving average daily room rates or boosting occupancy rates. Increasing both at one time can be difficult.

However, WAT&G hotels' higher ADR did not come at the expense of occupancy rates. On the contrary, their occupancy rates were also higher against the averages of luxury hotels in the U.S., including the California and Hawaii markets.

Nationwide, the WAT&G-designed hotels ran an average of 4.1 percentage points higher occupancy rates than the comparable U.S. luxury hotel group in the period of 1991 to 1997. In recent years, the occupancy rate at WAT&G-designed hotels was as much as five percentage points higher than the average for U.S. luxury hotels. In the Hawaii and California markets, the WAT&G-designed hotels enjoyed consistently higher occupancies, as well.

More significantly, occupancy rates at WAT&G-designed hotels grew faster than those of the comparable luxury hotels, at an annual rate of 2.9%, compared with 1.8% in the same period.

Another interesting note: Occupancy rates in the U.S. industry dropped by 2-3 percentage points in 1997. But rates at WAT&G-designed hotels have continued to move upward by 2-3 percentage points, bucking the industry trend.

Mathematically, RevPAR equals occupancy rate multiplied by ADR. With both higher occupancy rates and ADR, it is no surprise that WAT&G's hotels achieved higher RevPAR from 1991 to 1997. Nationwide, they outperformed the comparable luxury market by an average of nearly \$50 per room, ranging from a \$38 to \$60 differential in that period.

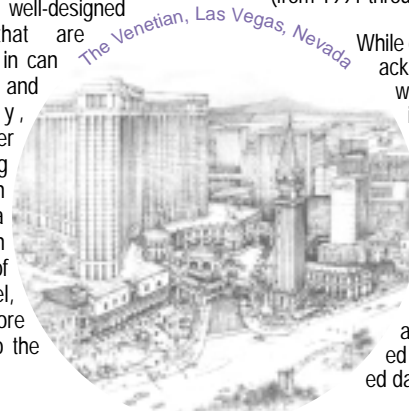
In California, RevPAR at WAT&G-designed hotels averaged \$15 more than that of the state's luxury hotels. In Hawaii, the WAT&G-designed hotels saw an average of \$16 higher RevPAR than their luxury counterparts in the same time period.

Penetration

Nationwide, WAT&G-designed hotels account for 3.2 percent of the U.S. luxury hotel inventory, while generating over 7% of the revenue in that category. In other words, WAT&G-designed hotels generate more than twice their share of revenues.

Conclusion

Clearly, hotels designed by WAT&G outperform comparable properties on three measures, simultaneously: occupancy rate, ADR



A LICENSE TO ENTER ADJOINING PROPERTY TO EFFECTUATE IMPROVEMENTS AND REPAIRS

By Robert M. Boder, Esq.

and RevPAR. The firm's value to its clients can be evaluated with a certainty not often associated with creativity.

When the cost-saving aspects of good design - in the form of improved operating efficiencies - are taken into account as well, the impact of design on the bottom line is even greater.

This article was written by Howard J. Wolff, Vice President and Director of WAT&G. Chao "Robert" Zheng, research analyst for WAT&G helped prepare this data used in this article. WAT&G is one of the leading architectural and design firms in hospitality, leisure and entertainment design. For more information, contact the above at info@watg.com or by calling 808-521-8888.

Graphics and Chart provided by WAT&G.

IN LUMINAE The Quiz

- 1 Withholding a percentage of the contractor's requisition for payment is commonly referred to as _____?
- 2 True or False: An owner almost never has the option of commencing a lawsuit against its insurer to seek recovery of the total loss up to the policy limits.
- 3 What is a Bid-Bond and how does it protect the Owner?

Answers below.

1. **RETAINAGE**
An owner always has the option of commencing a lawsuit against its insurer seeking to recover its total loss up to the policy limits. This is known as a declaratory judgment action.
2. **FALSE**: An owner always has the option of commencing a lawsuit against its insurer seeking to recover its total loss up to the policy limits. This is known as a declaratory judgment action.
3. A Bid Bond is bid security in the form of a forfeiture bond that is required by public agencies and some private owners. It helps to safeguard the owner by guaranteeing that a bidder will sign a contract, if offered, in accordance with the bid proposal. Bid Bonds are usually made for 5 - 10 % of the bid amount and are activated if the selected bidder refuses to sign the contract.

Answers to In Luminæ Questions :

WEB NEWS

At BBL&A's website, on-line visitors may now access new segments of the site by going to: www.bblesq.com. Visitors will find a new case study of a structural collapse, an upgraded home page for enhanced site navigation, the Fall 1998 Issue of the LePatner Report (Volume 18, Issue 3), and a new segment on our newest marketing initiative: O'Brien Kreitzberg LePatner. Check it out!



In a busy hub such as New York City where improvements and repairs to real property are an everyday occurrence, owners face numerous roadblocks. One such roadblock surfaces when the improvements or repairs can only be effectuated by gaining entry to the adjoining property. The simple solution is to this roadblock request permission from the owner of the adjoining property to enter his property. Although some neighboring property owners may grant such permission, the astute owner will have concerns such as safety issues, recovery for damages including lost use of property and injury to real property. Of course, an agreement between the parties for remuneration can be reached in some instances.

However, in many cases an amicable agreement between neighbors cannot be reached. Rather, the owner who desires to improve or repair his property will have to look to the courts for assistance in obtaining a license to enter an adjoining property. In fact, Section 881 of the Real Property Actions and Proceedings Law (RPAPL), was passed in furtherance of the public interest in preventing the urban dilemma which often ensues when a property owner who has constructed his building close to the adjoining property finds that he cannot make improvements or repairs without entering the premises of an adjoining owner. RPAPL Section 881 provides as follows:

"When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date

or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining property owner or his lessee for actual damages occurring as a result of the entry."

Procedurally, as set forth in the statute, an owner must request permission from his neighbor prior to bringing this special proceeding. Although we recommend that such a request be made in writing requesting a response, it may also be made orally. If permission is denied, a special proceeding under RPAPL Section 881 may be brought in a court of proper jurisdiction. The facts, including the nature of the improvements and/or repairs, must be set forth in the petition before the court. Additionally, the dates where entry is required must be stated with accuracy. The adjoining owner may submit a response to the petition whereby he may object to the entry onto his land for any number of reasons, including, but not limited to hardship and potential damage to his property.

It is clear that the legislature intended this to be an equitable statute necessary to avoid litigation. However, an owner must keep in mind that the statute does not direct the court to grant a license to every applicant. On the contrary, it may be granted only "in an appropriate case". The court will consider whether to grant the license based upon both the interests of the parties in addition to the public interest in having a properly maintained building. The New York Courts have held that a license is temporary in nature and should be granted only when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his

neighbor if the license is refused. *Chase Manhattan Bank v. Broadway Whitney Co.*, 294 N.Y.S.2d 416 (1968).

To illustrate the above, a New York Appeals Court adopted a reasonableness test in finding that a lower court's granting of a license to an owner for entry upon his neighbor's property for repairs to his property was properly granted. In that case, the adjoining property owner objected because he feared damage to his property from falling debris during the repairs. The Court found that protective devices such as scaffolding and netting proposed by the owner were a reasonable protection against any damage to the adjoining property.



Not only does the statute afford an avenue for all owners of property to enter their neighbor's premises when necessary and under reasonable circumstances, to preserve their own property interests, it also provides for full compensation in the event of damage to their neighbors property. For actual damages caused by entry, the adjoining property owner has a cause of action under the statute and to insure payment of such damages, the court will generally require a bond from the owner.

Although it is expected that neighboring property owners will be reasonable in dealing with each other and be able to reach an agreement without utilization of the court system, RPAPL Section 881 gives owners of real property the opportunity to apply for and receive a temporary license to gain access to a neighboring property when improvements and repairs can only be effectuated with such access. In a city such as New York where there are an abundance of improvements and repairs to closely proximated property, utilization of RPAPL Section 881 is a necessary and expeditious avenue for owners to keep in mind. ■

Setting Our Sights on the Stars

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great. But if there are two individuals staring out with equal ability and intelligence, physical strength and the other important qualifications, the one who is enthusiastic is the one who is going to come in first. And often a one with second-rate ability will outstrip the more capable individual if the former has enthusiasm and the first-rater hasn't."

Those who do not accept this fact may stop reading this memo now and spend their time more fruitfully preparing a resume for future employment. For those who are current and future stars – of which I believe all in our firm to be – the current question is:

What are the most valued attributes I can develop that will bring the most value to the firm and its clients, thereby entitling me to the firm and its clients, thereby entitling me to be recognized as a star?

Stars, in a professional services firm, do not have to be famous to be stars. It is, in the final analysis, a state of mind. Stars can take the form of great business getters, great problem solvers, great idea generators, great instigators of strategies, great brief writers, etc. The "great" part is the hardest part as it requires that you rise well above the really good folks in your field and willingly assume the added stature of becoming the one who comes through most if not all of the time when the heat is on. This requires a steadfast commitment to becoming great since we are looking for stars who really shine, not the kind that hits .228 in the major leagues (i.e. is unsuccessful more than 75% of the time yet demands \$4 million a year with a no-cut contract!).

To help start the dialogue, I would offer the following questions:

- Do I personally know anyone who is a star in the legal or business world? What makes he or she a star?
- What is it that separates the star from the "very good" professional? From the "excellent" professional?
- Even if I am not yet a star, how can I show that I am on my way to becoming a star? Do I agree with Denis Waitley that: "Tomorrow's leaders not only have dreams, goals and plans. They are willing to work hard and to take responsibility for turning their plans into energy, perspiration and effort. They don't sit back and wait for

someone else to turn their plan into action. They take charge of executing their own plan."

- What additional skills do I need to advance my chances of moving into a star orbit?
- Where do I go to find out the specific attributes the firm looks for in identifying and moving forward the stars within the firm (P.S. you are already in trouble if you missed the proactive words in this question)?
- Am I troubled by the fact that the firm is actively seeking to identify and nurture stars within its ranks? If so, what is troubling about it? Would I feel better if the firm was content to move forward without encouraging star performance levels?
- Would I be content to watch others pass me by in this small firm that provides the highest quality of services to an exclusive, high level clientele? Do I understand that the firm is committed to a policy of seeking to make clients say WOW! As Michael J. Ferguson said: "The first mark of good business is the ability to deliver. To deliver its product or service on time and in the condition which the client was led to expect. This dedication to provision and quality gives rise to corporate reliability. It makes friends and, in the end, is the reason why solvent companies remain solvent."
- Do I wish to continue to practice in this milieu where the best is regularly expected of me and everyone else? Do I wish to be an average professional or do I wish to be seen as a star? Do I want to shine? Or, would I be content never to have pushed myself to see what the best in me is really about?

Give this subject some serious thought as we explore all aspects of how we can identify, nurture and expand the wonderful talents of the stars that make LePatner & Associates a very special place for us to shine and have fun. ■

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Owners Should Understand...

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When, as a result of collapse, damage is caused to a neighbor's property as well as to the insured's own property, or to a third party, e.g., a pedestrian or nearby motor vehicle, the owner's general liability policy governs should the neighbor or third party assert a claim for damages. A comprehensive general liability policy ("CGL") protects the owner against claims brought by guests, invitees, passersby, contractor employees, neighboring property owners or even a passing motor vehicle owner, who may have sustained injury and damages as the result of the collapse. As in the case of property insurance, unless there is some provision excluding coverage for the claim asserted by the third party, the liability policy should cover the claim. An owner should therefore be certain that there is no exclusion in its liability policy for collapse which arises out of contractor's or architect's work.

As in the case of property insurance, in the event an accident occurs and a claim is filed against the owner, the owner should immediately notify its liability carrier insurer of the claim. Under its policy, the owner must require contractor and architect to name owner and all additional insureds under their respective policies.

In addition to obtaining its own insurance through its liability policy, the owner can provide further protection against these third party claims by requiring its contractor to obtain general liability insurance for the owner, i.e., to name the owner as an additional insured under the contractor's CGL policy. In this instance, the contractor's liability insurer is obligated to come in and defend and indemnify the owner from and against the third party claims.

In situations where a lawsuit is brought against the owner by a third party, the owner should "tender its defense" to the contractor and its insurer, i.e., request the contractor to defend the owner's interests in the lawsuit by having counsel appointed and provide full insurance coverage for the claims.

In the event the contractor and/or its insurer refuses to accept the tender, the owner may elect to commence a declaratory judgment action, seeking to enforce the insurer's obligation to defend and indemnify the owner.

Caveat emptor; owners beware. Claims often occur during construction projects as the result of construction site accidents and/or collapse. By obtaining sufficient insurance coverage for property damage and liability, the owner will go a long way in reducing the likelihood of having to expend its own money to repair and/or replace its damaged property or to compensate others for their injuries and damages. ■

F N I R M s

BBL&A is proud to announce that **Victoria R. Drogin** has been named as a partner of the Firm. Victoria has been instrumental in several of the Firm's recently completed major projects, including the move by Thirteen wnet to its new executive offices and studios, work for Starwood Lodging Corporation's new W Hotel, and contract negotiations for projects involving several major financial organizations. In addition, Victoria has assisted in developing some of the Firm's recent marketing initiatives throughout the country.



On behalf of one of our large architectural healthcare clients, **BBL&A** will again be assisting in the structuring of a new acquisition in the Southeast. This work will entail complex corporate re-structuring, multi-state licensing and negotiations with principals, key employees and creditors of the firm to be acquired.

BBL&A is pleased to have successfully assisted our client, Barnard College in structuring a completion agreement to avoid defaulting a major contractor and securing completion of the College's newly-renovated Altschul and Milbank Halls without further delays. The Firm provided a detailed completion analysis and negotiation of the finish agreement with the assistance of **David Pfeffer** and Design Consultant, **Brad Cronk**.

Assisting our architect client, **BBL&A** finalized a multi-million dollar settlement of a complex additional services claim involving a major airport terminal. The result was achieved with the creation of a multi-media presentation that tracked the history of the project through its detailed design development and enabled the settlement to be achieved without recourse to litigation. **Rob Boder** and Design Consultant **Roy Pachecano** worked closely with **Barry B. LePatner** to achieve this favorable result.

Quote of the Quarter

"You can judge your age by the amount of pain you feel when you come in contact with a new idea."

— John Nuveen