LePatner Report

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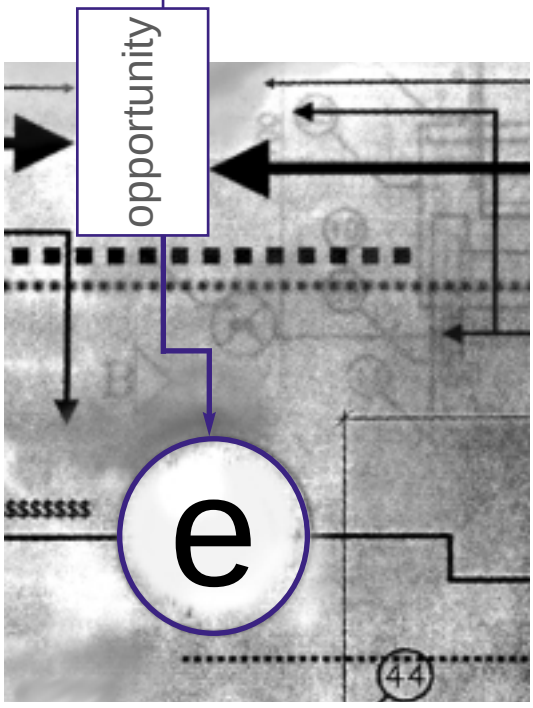
Are You Ready?

Marketing for the Millennium *Part I*

By Barry B. LePatner, Esq.

Barry B. LePatner, Esq. is a member of the team with A. Eugene Kohn, of Kohn Pedersen Fox, and others, that has presented **Marketing for Architects** *at Harvard's Graduate School of Design for the past nine years. Barry's presentation this summer was* **"Marketing for the Millennium: Are You Ready?"** *Excerpted here in Part I, you can read the entire presentation on our website,* **www.bblesq.com.** *Part II will be excerpted in the Fall issue of the LePatner Report.*



"Technology is reshaping this economy and transforming businesses and consumers. This is about more than e-commerce, or e-mail, or trades, or e-files. It is about the 'e" in economic opportunity."

– William Daley, U.S. Commerce Secretary

As we count down to the new millennium, we find ourselves living in a truly new business environment, one that is dramatically different from any era in our nation's history. The business environment of the new millennium is now shaped by three controlling factors which will re-cast the way that all professionals will be marketing their services and carrying on their practices in the years ahead:

1. The advent of the newest generation of technology, spearheaded by the dynamic force of the Internet;
2. The increasing impact of a global economy; and
3. The speed of connectivity which has measurably increased the pace at which you and your firms are now required to market your services and manage your projects.

Many design firms have made great strides in recent years to incorporate CAD and other new technologies into their practices. Others have built an international presence that covers projects across the globe. And many are connecting with clients by fax, via a web site as well as other high speed digital communications.

But few firms have structured themselves to maximize these imperatives. Only a few firms are taking advantage of these trends to strengthen their markets in the face of this new industrial and technological order. And few firm leaders have begun to fully recognize the vast array of changes that are affecting the way they need to market existing and future clients.

New Technology and the Internet

One of the most significant changes affecting our lives today is the latest technological advances that are impacting upon clients and professionals alike. The most important of these advances is the empowering force of the Internet.

The Internet is changing everything on the planet. In its wake, it will alter every facet of how we do business in the world, how we interact with each other, how we educate our children, how we run our households and our offices, how we are entertained and how we see ourselves. As

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Mergers & Acquisitions

By: Ronald B. Feingold, Esq.

Frequently, out-of-state A/E clients of LePatner & Associates desire to come into New York and establish a professional practice in this state. A firm may be practicing in another state and seeks to set up a New York office to undertake projects for its New York-based clients. Our firm is often asked about the best way to accomplish this objective. There are two mechanisms to achieve this end. First, the out-of-state A/E firm can form a new corporation or partnership. New York State's Education Law and Business Corporation Law require that all of the shareholders, directors and officers, if a corporation, or the partners, if a partnership, be licensed in their profession in New York (architecture or engineering). Often, this requirement creates a concern for our clients. While one or even a few of the out-of-state firm's principals may be licensed as an architect or engineer in New York, rarely are all of the principals licensed in this state. Only the New York licensees may become principals, in a New York licensed firm and share in its profits. A complication thus results where all of the out-of-state principals are unable to share in the profits generated by the New York entity.

We often advise our clients who are faced with this situation to establish a business corporation in New York as well a professional corporation or partnership. In the case of a business corporation, there are no licensing requirements for architects or engineers. The principals of the A/E's out-of-state corporation may all become shareholders in the new New York business entity. While this business corporation is prohibited from practicing either architecture or engineering in New York, it may provide support services for the newly established professional corporation or partnership for the New York projects. This business corporation will be compensated for the support services it performs for the projects. We also advise our clients that the principals of the business corporation may share in its profits. By proceeding in this fashion, as long as the non-licensed business entity does not perform licensed services, the business corporation may maintain a presence in New York.

Instead of forming a new firm in New York, an alternative is to have the out-of-state firm authorized to do business in New York as a foreign corporation. The foreign corporation must be licensed to perform architecture or engineering in its home state and maintain good standing in that state. New York also requires that all of the foreign corporation's principals be licensed in their home jurisdiction. However, as long as one individual employed by the foreign corporation is licensed in New York, the individual who is to perform professional services in New York (who need not be a principal), the New York licensing requirements are satisfied. Once authorization is obtained from the New York licensing authorities at the Education Department and Secretary of State, the foreign corporation is permitted to practice architecture or engineering in this State.

An out-of-state A/E's corporation may do business in New York by one or two negotiations.

Once the professional entity is established, we are occasionally asked to counsel our A/E clients with respect to licensing issues which are related and applicable to the purchase of existing design firms in New York. Clients inquire about whether they can purchase the assets or the ongoing business of a New York A/E firm. We advise our clients that they can purchase another A/E firm and continue to practice the profession of architecture or engineering provided all the principals of the acquired firm are licensed professionals in New York.

Often, inquiry is made about purchasing a "grandfathered" corporation, one whose incorporation preceded the strict requirements of the New York State Education Laws. A "grandfathered company is one which existed and practiced engineering prior to April 15, 1935 or existed and practiced architecture prior to April 12, 1929. While New York requires that all of the A/E corporation's shareholders, officers and directors be licensed as either an engineer or architect in New York, a "grandfathered" corporation need not satisfy this requirement. Only the firm's CEO must be licensed, as well as those actually carrying on the practice of architecture or engineering for the corporation. The benefit inuring to an A/E firm who purchases a "grandfathered" corporation is ostensible. It need not satisfy the strict licensing requirements. It is permitted to engage in the practice of architecture or engineering even though all of its principals are not licensed. It can have shareholders and officers, not licensed as engineers or architects, and who nevertheless share in the firm's profits. Since the New York Education Department recognizes that the advantages acquired are so beneficial, and results in a circumvention of the newly enacted licensing statutes, it must first consent to the transfer of any interest in the exempt "grandfathered" company.

It should be noted that the acquiring firm has the option of purchasing either the stock or only the assets, receivables and equipment of the existing firm. In the event the stock of the firm is purchased, the purchasing firm becomes responsible and liable for all the outstanding obligations, liabilities and debts of the acquired firm. It steps into the shoes of the acquired firm. However, if only the assets and equipment are purchased, then the purchaser is not assuming the liabilities of the acquired firm. The acquired firm still exists since its stock ownership has not been transferred. In fact, it might be prudent for the purchasing firm to ensure that the acquired firm dissolve and discontinue its business.

These are just a few of the nuances which should be explored when an out-of-state A/E firm aspires to come to New York to engage in design projects. It can certainly be achieved. Following the procedures described above will guide you along the way to a successful transition. ■

Understanding Building Failures *Part II*

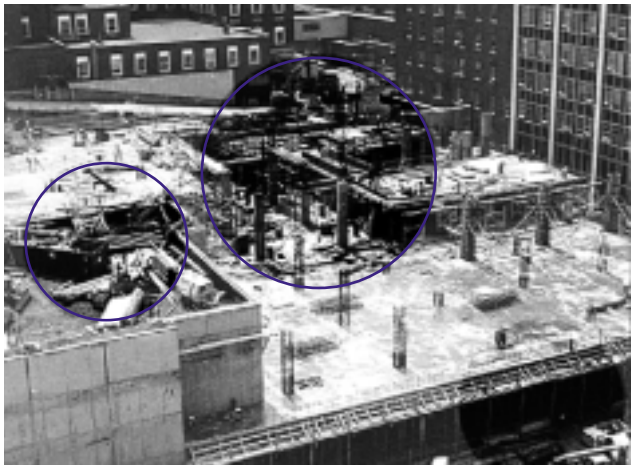
By Brad Cronk *Design Consultant*

In the last issue of the LePatner Report, Part I introduced the broad categories of building failures. Part II discusses some common causes of such failures and then identifies the steps a building owner should take if such a failure occurs.

The ability to identify and recognize the warning signs before major damage occurs to your property or others' is crucial. Some signs may be obvious to the naked eye, but most will require a trained eye to be properly identified and diagnosed. Begin looking for signs of building failure when you become aware of the following conditions:

- ***Improper Design and/or Construction***
  Careful design detailing by the architects, thorough calculations and analysis by the engineers, and reliable construction practices by the contractors are the critical steps needed to minimize the "weak links" that can lead to building failures.

  Water is the root cause of most building failures, especially in freeze-thaw climates. Proper flashing and drainage detailing ensures that water caught within the building envelope or wall construction will be routed back to the exterior along controlled weep paths. What may begin as simple water infiltration of the facade (a non-structural failure), can easily lead to corrosion of structural members and a potential structural failure. For example, a recent expose' on ABC's 20/20 faulted EIFS (Exterior Insulating Finish System -- a synthetic stucco-like material) of being an inherently poor system for residential applications as it did not allow water to drain once it had worked its way behind the exterior surface. Ultimately, the trapped moisture fostered fungal growth within the walls causing accelerated deterioration of the building's structural wood framing.



  The inclusion of "isolators" to separate dissimilar building materials (e.g. metal and brick) is another key design and construction element required to minimize the corrosive power of water. Isolator materials include silicone sealant, PVC tape, and specially formulated paint, and should be clearly specified in the project documents and, more importantly, observed during installation. Left unseparated, dissimilar materials will undergo galvanic action leading to corrosion, rust, and ultimately, the failure of many "sensitive" materials such as aluminum and steel.

- ***Environmental Forces***
  Extreme natural forces or unanticipated impacts, such as that from a collision, can cause immediate catastrophic failures in buildings if the designers do not make reasonable efforts to provide "fail-safe" designs. Adoption of stricter building codes and continued advancements in building materials and construction technologies already serve to create more failure-resistant buildings. For example, New York City recently adopted seismic codes mandating that new and renovated building construction must withstand increased lateral and eccentric loading imparted by seismic forces.

- ***Deterioration of Building Materials***
  If undetected, deteriorated or naturally aged materials can lead to building failure. Older construction is especially susceptible. Rusted metal anchors for brick and masonry, dried and cracked sealant, and water-damaged wood are common signs of deterioration. Recently, a famous museum on Manhattan's Upper East Side was required to remove its entire granite-clad facade when it became aware that many of the original steel anchors had nearly rusted to the point of failure. The anchors were replaced with new, stainless steel, corrosion resistant anchors, and the granite cladding was reinstalled without any visible difference to the facades. Many of today's metal, wood, and synthetic building materials possess finishes and material property characteristics (e.g. U.V. resistance) that are far superior to their predecessors of even ten years ago. For some of these products it is worth the initial up-front investment in order to minimize or prevent higher maintenance and replacement costs at a later date.

  But no matter how faithfully a comprehensive building design is executed by even the most competent builder, the unfortunate truth is that building owners, especially in urban centers, are likely to encounter some degree of building failure over their property's lifespan. Acting quickly to implement the following steps should help to significantly limit the damage caused by such a failure.

1. Observe. In conjunction with your construction counsel, owner's representative, facilities manager, or even your architect, begin photographic and written documentation of the failure as soon as possible. If the failure is dynamic in nature, such as exaggerated foundation settlement over a short period of time, begin recording the movement to the extent possible prior to retaining experts.

2. Identify. Although you may possess in-house personnel qualified to participate in the observation, it is highly recommended that a professional engineer be retained to fully and accurately identify and assess the true nature of the failure. Often, surface conditions may not accurately reveal the true source of the problem.

3. Strategize. Depending on the severity of the failure and whether other parties appear to be liable, the owner should seriously consider legal advice from one conversant in construction law. Items of discussion at this stage would include the proper means to notify the insurance carrier(s) of the impending claim. If another party is liable, correspondence should request documents to be analyzed by your team of professionals. Potential impacts on your business and, if relevant, personal life need to be strongly considered. Scheduling, lost business income, and the cost of your consultant team are all valid issues to be weighed.

4. Quantify. The various consultants should coordinate and compile reports of their findings and make specific recommendations as to the proper remedial work required. Detailed analysis may later be needed at presentations for insurance claims, litigation, or at settlement discussions with opposing parties.

Just as in the last ten years the model for many healthcare organizations has focused on prevention, so too should building owners in today's more "maintenance-conscious" environment. Whether voluntary or required, routine inspection and maintenance programs will go far to prevent, or at least minimize, building failure risks. In New York City, the new Local Law #11 passed in 1998 supercedes and broadens the building facade inspection requirements of 1980's Local Law #10. Briefly, it requires additional responsibilities of both the Owner and Architect/Engineer. These include: inspecting all exterior walls, not just street facing; determining the cause of any deficiencies observed; and completing repairs immediately or a establishing a finite maintenance program. Your construction counsel and/or Architect/Engineer will have more detailed information on the intricacies of this law.

Approached with careful planning, maintenance, and action programs, the dangers of building failures can be greatly reduced and your property's value greatly increased. ■

For more information about this topic, see Barry B. LePatner's book on this subject, **Structural Failures: A Case Study for Architects Engineers, and Lawyers**, *co-authored with Sydney P. Johnson, P.E. Or, see our website,* **www.bblesq.com** *for selected cases reproduced from the book.*

Marketing for the Millennium: Are You Ready?

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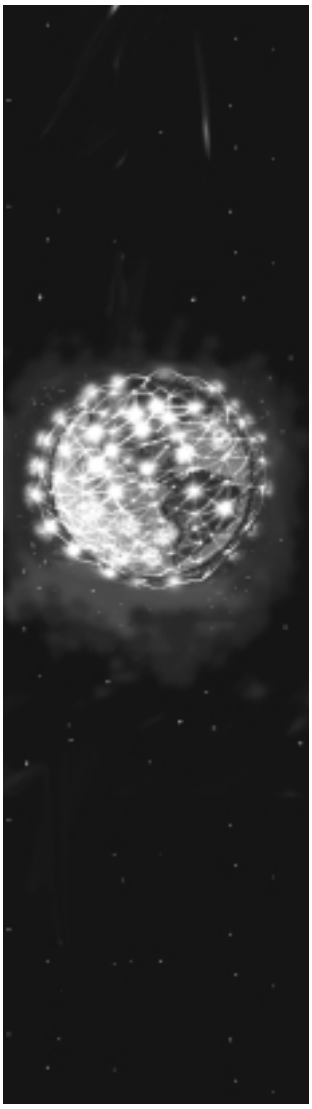
noted economist Lester Thurow recently wrote: "Knowledge is the new basis for wealth."



Have you stopped for the briefest of moments to consider retail shopping on the Internet? Retail sales on the web totaled $7 billion in 1998 and is currently estimated to reach $41 billion online by 2002. That's revolutionary!

The U.S. is riding a groundswell of innovation that will carry it well into the next century. Over the next ten years, such information-dependent industries as finance, media and wholesale and retail trade will change the most.

The Global Economy

Offering client-specific services and expanding into global markets are the hallmark of today's corporate organizations. When you choose to market to companies such as Coca Cola or Nike, or a local fabric factory that gets its goods from overseas, you are pursuing clients who have a need for you to recognize a simple imperative about how they do business today – these companies must be quick and agile because the half-life for bringing their new ideas, services or products to market continues to shrink. Corporations need design and construction solutions that enable them to concentrate their capital and resources on their core businesses.

The ability to reach a global market will only require a modest investment in computers and your commitment to develop client databases, to research your niche markets and to create the analytical capability that corporations and other clients require in helping them make strategic decisions.

What we truly have now, thanks to a global economy energized by the Internet, is a common, global post office, a global shopping center for our purchases, a global library, a global stock market and a global school system for all to take courses in whatever subjects interest them.

FIRM News

News

BBL&A has been retained by one of the largest A / E firms in Florida for strategic planning of the firm's future. We are assisting its principals in developing a strategic business plan involving one or more the possible acquisitions/mergers with other A/E firms and even possibly an IPO. Our goal is to ensure the continuing success of our client into the new millennium.

BBL&A is representing a client as construction counsel and owner's representative for the renovation of an historic townhouse in Greenwich Village in lower Manhattan.

BBL&A has recently been retained to provide consulting services to a well known restauranteur for the operations and management of a restuarant in one of the city's most historical landmarked buildings. The client also has plans for an extensive restoration program.

BBL&A has successfully resolved various construction/union labor disputes for client Barnard College and client Rye Country Day School.

BBL&A has been retained by OENJ Cherokee Corporation to assist in construction issues for conversion of a brownacres project to be developed into a golf course oerlooking New York Harbor.

The firm's first website referral client, Tetra Tech, retained BBL&A to provide legal services concerning its recent acquisition of New York's Cosentini Associates LLP, a large mechanical, electrical and plumbing ("M.E.P.") engineering firm.

IN LUMINAE

The Quiz

1 **True or False:** The New York Education Department must consent to the transfer of an interest in an exempt "grandfathered" A/E company.

2 What four steps should an owner take to minimize damages when a building failure occurs?

3 What three factors are shaping the business environment of the new millennium?

Answers below.

Answers to In Luminae Questions :

1. TRUE - Since the New York Education Department recognizes that the advantages of acquiring a "grandfathered" company are so beneficial, and results in a circumvention of the licensing statutes, it must first consent to the transfer of any interest in the exempt "grandfathered" company.

2. When a building failure occurs the Owner should: (1) observe and record the building failure; (2) retain a qualified professional engineer to identify and assess the nature of the failure; (3) immediately consult its construction counsel to evaluate available insurance coverage and formulate a strategy to maximize recovery dollars for the failure; and (4) require its consultants to compile reports of their findings and make recommendations as to the proper remedial work required.

3. (1) The advent of new technology, spearheaded by the dynamic force of the internet. (2) The increasing impact of a global economy. (3) The speed of connectivity which has measurably increased the pace at which firms are required to market its services and manage its projects.

Quote of the Quarter

"Five years from now, we will be a different company, and five years from then, we'll be another different company."

--Jacques Nasser

President and CEO of Ford Motor Co.

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