

Talk to Me About A&E: Episode 9

JEFF COLEMAN: The contractor is 100% responsible for site safety. That has to be a very clear bright line. And it is a deal breaker, frankly.

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SPEAKER: Welcome to Talk to Me About A&E, a podcast series focused on risk management for architects and engineers. Host, Dan Buelow, managing director of Willis A&E, will engage experts across the A&E spectrum on topics ranging from contract details to the broadest trends impacting design professionals in North America.

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DAN BUELOW: Hello and welcome to Talk to Me About A&E, a Willis A&E podcast series where we focus on a risk management topic for architects and engineers. I'm Dan Buelow, managing director of Willis A&E.

And our topic today is on construction administration, or also referred to as CA, and the role of the design professional. And my special guest today is Mr. Jeff Coleman, from the Minneapolis law firm, Coleman and Erickson. Hello, Jeff.

JEFF COLEMAN: Hello, Dan. It's great to be here. Thank you.

DAN BUELOW: It's great to have you, Jeff. So, let me tell you a little bit about Jeff. So, Jeff Coleman is an attorney at law and both a licensed professional engineer and has been a partner in the Coleman law firm, which is now the Coleman and Erickson law firm, for many years now. And Jeff, couple of interesting things here, is he's an ACI fellow, the American Concrete Institute, and has been a member for 40 years.

And he's also past president. He just finished being the past president for ACI, and it's my understanding the only lawyer ever to be president of American Concrete Institute. Is that correct, Jeff?

JEFF COLEMAN: That is absolutely correct, yes.

DAN BUELOW: And he also wrote a book that I have a signed copy on the legal issues in concrete construction, published by ACI in 2004. And Jeff has a great background, because, again, his engineering and his legal background. And after finishing getting his degrees in structural engineering and civil engineering from Iowa State University, moved off to Minneapolis-Saint Paul, and was a structural engineer with LRB and Associates, a large design firm in Minneapolis. And then he went on to complete his law degree and eventually became general counsel for LRB before going off and finding his law firm.

And so, I've had the pleasure of knowing Jeff for many years, and he's a fellow Minnesotan. So, whenever I get back to Minnesota, we try to get together. And I've had the pleasure of knowing him and working with him on a number of issues. And he is a true standout and expert and specialist when it comes to legal defense and risk management for design professionals. So, we're real lucky to have Jeff here today.

JEFF COLEMAN: And Dan, one other thing, it just occurred to me-- in my engineering days, I actually served in a construction administration role for a year and a half during the reconstruction of the collapsed Hartford Coliseum in the early '80s. So, I've actually been there, done that when it comes to construction administration and some of these site safety issues.

DAN BUELOW: A nice segue into our topic here today. So, Jeff, in our last podcast on deal makers, we discussed how important it is for design firms to have language in all of their contracts clearly stating that they are not responsible for job site safety and construction means and methods, and that it would be a deal breaker for most any design firm to take on that responsibility. There are significant job site-related risks that need to be recognized and managed.

I want to discuss with Jeff here what these risks are and what firms need to be thinking about when it comes to managing the risk. So, Jeff, what is the AE's, architecture engineer's, responsibility when it comes to site safety?

JEFF COLEMAN: Well, in many ways this is a really simple one and a simple discussion because there should be none whatsoever. And the contract language should be not responsible for construction means, methods, technique, sequences, or procedures, nor for safety programs or procedures in association with the work.

And a second sentence would say that's because the contractor is 100% responsible for site safety. That has to be a very clear bright line. And it is a deal breaker, frankly.

DAN BUELOW: And as we get into this, I think we're going to always keep coming back, how important it is to educate your staff. So, it's one thing for certain individuals to understand this within the design firm, those nuances of the standard of care of a design professional versus, in this case, a contractor. But you really got to really educate anyone that's out on behalf of your firm out on the site.

And in fact, there's a real distinction, isn't there, Jeff, between observation-- we think that the firm should be out there on the site, but they need to be out there observing that things are progressing in general conformance with their plans and specs, versus inspection. Can you talk to us a little bit about those words?

JEFF COLEMAN: That's absolutely correct. What the typical architect engineer does while on-site is observe. Now there is one place in the AIA documents, and I think EJCDC documents, where they use the word inspection. And that's for final punch list to look at the final items that have to be repaired.

But everything other than that is an observation. And that goes into the distinction by certain courts in a lot of legal decisions where inspection is considered a much higher level of review of the work in progress. Keep in mind that typically you're making a periodic site observation, maybe once a week. Even if you have a full-time person on-site, you can't be everywhere and at all times. Now inspection comes into play with special inspections, which are the code-required special inspections that are very specific, very detailed, and usually undertaken by somebody who's on-site more often, usually not the architect engineer.

DAN BUELOW: Anyone that has ever completed a professional liability application, one thing that all of these carriers want to know is what percentage of your work are you out there observing. And they want to see a high percentage there. And the reason is that they have good actuarial data that if that design professional is actually on the site providing CA services, meaning that they're observing that things are progressing in the general conformance of their plans and specs, the likelihood of that project being on time and on budget is much greater than if you're not.

And so, it's important to remember that we want you to be out on that site. Because, frankly, if you're not on that site, guess who they're all talking about. So that's another issue here. But let's talk about the contract side of this, then, so you mentioned the wording in there. We really do want to say, it is the sole responsibility of the general contractor, right.

JEFF COLEMAN: That is absolutely correct, well-stated.

DAN BUELOW: And the word supervisor sometimes, we'll see that. It'll sneak into some of this wording. And the problem that we have is, again, how important these words are. Talk to us about that, supervise, and what's wrong with that.

JEFF COLEMAN: Well, certainly, every architectural and engineering firm has an obligation to supervise their own employees, but that's it. You have no obligation to supervise the on-site people doing the work, like the contractor's personnel, the laborers, the material suppliers, and so on.

So that's the important distinction there. There's no responsibility and obligation to supervise the people performing the work for the contractors.

DAN BUELOW: And if he accepts supervision, that wording, you're taking on potentially not only safety, but possibly even the qualitative aspects of the contractor's work, right.

JEFF COLEMAN: Yes, you're taking on potentially means, methods, techniques, sequences, or procedures, and/or safety precautions and programs in association with work-- absolutely. You're wandering into that area where you don't belong. Yes.

DAN BUELOW: Yep, and back to that point of staying in your lane.

JEFF COLEMAN: Correct.

DAN BUELOW: If there's any--

JEFF COLEMAN: This is the one where the contract language has to build an absolute 8-foot-high barrier between the two lanes. So, you can't cross over into that other lane. Correct.

DAN BUELOW: And it's so important that as we get into this is that remember that these words are so important in your documentation. And certainly, it begins with your contract that you're not going to be responsible for site safety. And specifically, it's the sole responsibility of that contractor.

But also, you have to think about this in other forms of documentation. That's why it's so important for all of your staff to understand. This would include field notes or project meeting minutes, and so forth. We see those kinds of words leak in, don't we.

JEFF COLEMAN: And, of course, emails. And now text messages can be discovered. So even in your text messages, your emails, your meeting minutes, and your correspondence, you want all your people to be trained to say, we'll come out and observe the construction-- not, we will come out and inspect something for you. So yeah, observation, inspection, and no supervision-- those are key buzzwords that everybody needs to be trained to use observation and not the others.

DAN BUELOW: And one scenario that's not too uncommon is that you'll have design professionals that'll be at a project meeting. And in the middle of that project meeting, they'll start going into a conversation around site safety. And in fact, you should as the professional, I think, to be there to listen to what the contractor's prescribing so that you can then make sure you follow it-- and, again, back to your point, the responsibility for your own staff.

But what happens often is that minutes will be generated after these project meetings by other parties other than the design professional. And if you read those meeting minutes, you might see that it's not clear what the role of the design firm was in that discussion. And it would be a good idea to send up some follow-up to that meeting minutes if they're not clear to clarify that.

JEFF COLEMAN: Let's draw a distinction there. Everybody who goes on a construction site has a responsibility to comply with the contractor's safety program-- hardhats, safety vests, steel-toed shoes, whatever it is. But you do not have any responsibility or obligation to develop that program or administer it or critique it as the project goes on.

So, when the project meeting gets into, OK, how's the safety program working. What happened here? What happened there? Actually, you ought to just step out of the meeting. All you need to know is enough to do your job on-site, observing the construction, and no more.

And if you show up in meeting minutes with a safety program discussion, you ought to send a follow-up that says, look, we didn't participate in that part of the meeting. The contractor's 100% responsible for site safety.

DAN BUELOW: Great point. And so, if you're stuck with the bad word sometime in your agreements-- in this case, you're stuck with the word inspection, which a lot of these public agreements you might have little recourse when it comes to negotiating these agreements. Is there any workarounds as far as documentation? Or should there be a little more emphasis around maybe scope of services or something just to again to add some clarification to what the role of the design firm is?

JEFF COLEMAN: One option would be to try to use as an opportunity to educate your client, the difference between observation and inspection. Another might be to define what inspection means for purposes of that agreement. It means you'll visit periodically, and you'll review for general conformance only. In other words, take the language out of the AIA document and use that as a definition of inspection for purposes of that agreement. Those are a couple of options.

DAN BUELOW: No, I think that's a good point. And then you have this scenario also where the owner decides, even though there's good evidence that the project's going to be likely more successful and on budget and so forth, if the design firm is there observing it in their CA role, their traditional CA role, but they may try to cut costs, if you will, and take them and eliminate or reduce their role out on the site and/or bring in the dreaded third-party CM. I mean, is there anything that you would advise in that scenario?

JEFF COLEMAN: Well, I agree with you. There's part offense and part defense to being on-site. The offense is-- and it's to the owner's benefit that you're out there to make sure that things are generally moving in conformance with the project documents and the key elements are being constructed properly.

The defensive part you mentioned earlier was if something's going wrong on-site, it's going to get resolved a lot quicker if you're there to help. And they always try to blame the empty chair. So, you won't be the guy getting blamed. You can play defense that way. So, it is an important role.

I have had cases where owners just don't want to pay for on-site observations. And in fact, they've hired a third party to do the observations, which I think is a complete mistake, because the party who designed the project is best positioned to take on that role.

I want to back up and give you one other thought on what if you've got inspection in your contract. One of my favorite sentences is that you've got a bad paragraph or something that you don't like in the contract. And you get to the bottom and the sentence says, notwithstanding the above, inspection for purposes of this agreement shall be defined as A, B, C, D. And that can work on a lot of different clauses that you may not like. So, notwithstanding the above, here's what the rule is going to be, or here's what the definition is going to be.

DAN BUELOW: It's great, as a design firm, you can also use that phrase, notwithstanding the above. So that's nice to know. So, let's say the contractor decides to submit their safety manual to the design professional, and for your review and approval.

JEFF COLEMAN: I've seen that happen, and you send it back and say, no review required.

DAN BUELOW: Return to sender.

JEFF COLEMAN: Yeah. You should be very careful about what submittals you ask for. And then only review the submittals you've asked for. And the contractor safety manual is not a submittal. You ever want to ask for it-- it's not a submittal. You ever want to review-- it's not a submittal. You want to approve or take no exception to or whatever the words you're going to use. It's very important-- just send it back, no review required. Not reviewed-- none required.

DAN BUELOW: So, we know you're out there as a professional. You're not taking responsibility for site safety or construction means or methods. And you have that in your contract. So, we know, OK, in this scenario we've done all the right things in that case.

But now you have employees that go out onto that job site. And their actions, they do something on that job site. For example, they stop the work. What are the implications there?

I mean, are we protected because we have this in our contract? Or are we now in a predicament here because of the actions of our staff?

JEFF COLEMAN: You have to be very careful. First of all, typically we only have the authority to reject work. Before you stop the work, you talk to your owner/client and tell them they have authority to stop the work.

But the other thing I think you're alluding to is you don't want to be in a position where you're walking around telling people to put their safety vests on or put their hardhats back on or make sure you're tied off when you're up there. And because by your actions, you could take responsibility for site safety.

And any of that that's in the record, any of that that's in meeting minutes, could be used against you later if there's an accident on-site where they would argue that look, you by your actions we're taking responsibility for site safety. So, you're in this with us.

DAN BUELOW: We run into that where there's a lot of different scenarios obviously. But the two scenarios that seem to come up for design firms of our clients we talk to is, the one is what you've described there. Somebody goes out in the site; the design professional is out on the site. And they are looking around.

And nobody's in imminent harm, but the site's a mess. They're not wearing the proper vests or hard hats or shoring up properly. What do you do in that scenario, Jeff, if you're there? Nobody's in imminent harm, but how would you react to that or advise-- you would respond to that situation?

JEFF COLEMAN: What you do not want to do is to go around and start telling people to put their safety harnesses on and everything else. What you want to do is go back to the job site trailer and have this conversation with the contractor. Say, look, I'm not responsible for safe safety. You're 100% responsible for safety.

And because you're responsible for site safety and managing this program, I just want to point out to you that I saw these things. Now if nothing happens, then the next conversation you might have with the owner to tell them what's going on on-site.

And the last thing a contractor ever wants to do is have OSHA called out to a site because-- I don't know if you realize this, but the violations ratchet up. The first violation, you get fined \$500. The second one could be \$5,000, and the next one could be \$50,000. So, they go up exponentially.

So, they never want OSHA to be called. So, most good contractors should be more than willing to make sure everybody's following the site safety program.

But again, all you say is, look, I'm not responsible for site safety. I simply notice these things. And you're responsible for site safety. Just be aware of this.

DAN BUELOW: that's a good point. And the other scenario, the second scenario, we see is when somebody you see something that there is a safety issue. And I like the example because it's a true story where one of our clients goes out on the site and he sees an employee of the contractor having lunch in an unshored trench and sand is falling in their sandwich. And so, what do you do?

Well, I think at the end of the day, our advice is that, hey, you've got to live with yourself. Life is too short. And arguably, Jeff, you have responsibility for the public welfare of others. And in this scenario, there's a real safety issue. So, what do you do in the event that you do see something where you feel like, geez, if I don't step in here, if I don't say something, this could be a real live safety issue?

JEFF COLEMAN: It's a really, really good question. And it is based on a real-life case out of New Jersey. I want to explain this in a way that it doesn't create what some people might perceive as a gray area.

So, you're not responsible for safe safety. Your contract sites, you're not responsible for site safety. You're not taking responsibility for site safety by your actions. But you see-- and here's a good example-- you see a concrete block falling down the side of the building and a guy is under it. You yell, look out. Or you see somebody in a trench that's unshored, and you go to the superintendent and say look this is dangerous. You just need to be aware; this is really dangerous.

What you want to do is if something happens, you don't want to testify later in a deposition that, gee, was there and I saw the whole thing. And then they asked, well, what did you do. And you say, I did nothing. And that's not where you want to be. But I want to make sure everybody understands that this is not taking responsibility for site safety. This is simply raising an issue that you don't have time to go back to the job site trailer in private and explain to the contractor.

DAN BUELOW: So, in that scenario, you see somebody, they're having lunch in an unshored trench. And you think, if you don't do something, they're going to surely perish before your eyes. It's fair to say that the advice then is to say, tell the poor slob to get out of the ditch without hurting yourself in the process.

JEFF COLEMAN: Right.

DAN BUELOW: Because life is too short. You arguably have a responsibility in that example. But then I think what's really important is that we want to memorialize this somehow. Because you know it's going to happen is a claim if somebody's hurt. Certainly, the inevitable claim will come down and you're going to want to be able to state clearly, ideally, with some good documentation, that this is what transpired and here's what you did.

And that is an exact scenario where you as a design professional would want to trigger your policy, your pre-claim assistance under every one of these policies out there, which allow you to exactly do this, is to tell, I just had this scenario that just happened, and this is what transpired. And your carrier, together with appointed counsel, will help you draft or memorialize what you're going to want to send to your owner, your client, to, again, review what exactly transpired, and then reiterate that. And as you know, we're not responsible for job site safety.

JEFF COLEMAN: What Dan is referring to there is pre-claim assistance where the carrier would retain me or somebody like me and pay me directly. It doesn't go against your deductible. It doesn't go against your claim experience. They are such believers in early intervention that they're willing to pay somebody like me in advance to help. But, yeah, in that case, if there's any need for documentation or responding to job site meeting minutes or some letter or something, we could certainly help with that and the carrier would pay for it

DAN BUELOW: In fact, there is a real-life scenario. I was at DPIC. We had a case study, and it was about the collapse of the Chicago Post Office, which a lot of interesting things came out of that case study around, what do you do when disaster strikes. But one of the things that was a takeaway from this case study discussion was reporting this immediately to your carrier.

In this scenario, in this real-life case, what happened was that we were able to appoint counsel and also get a forensic engineer on the site to review and investigate the site before the site was contaminated. And in fact, there was discovered that the contractor wasn't properly nutting some bolts and so forth. Again, taking advantage of pre-claim assistance, but I think when it comes to these types of, in this case, catastrophe or something very tragic, knowing what to do as a firm in response to that to make sure you got your right legal and professional insurance all lined up and to help you advise you through the scenario here.

A couple of other words or phrases that we'll hear sometimes, what I want to talk to you about also, was designed for safety. Sometimes you might see that. What does that mean exactly in the context of what we're talking about?

JEFF COLEMAN: Well, it really is something that irritates me when it comes up there's a group out there promoting design for safety. Now let's draw a line and make another distinction here. Obviously, architects and engineers have a responsibility to design the final building so that it's safe.

In other words, rail heights are proper, stair step distances are proper, exiting distance are proper, all those things. But there's no responsibility to design safety systems into the construction as it's progressing-- tie-offs or other safety barriers during construction. That's simply not the role of the design professional.

So, I don't know where this whole thing started. There are a number of people out there talking about it. Again, this issue of site safety has to be an absolute bright line that keeps you in your lane. Don't go there. Don't let anybody write up a contract that says you're somehow designing for safety during construction.

DAN BUELOW: Sometimes you may have a contractor come to an engineer, for example, and say, hey, we want to move some heavy equipment from A to B. Will you help us with this load-bearing bridge? Or again, it's temporary. And I think the flag really has to go up.

And that is where you would want to get some advice and say, well, look it, is this an additional service. And is it also outside our scope? And is it also outside what I may potentially have insurance for?

Maybe, maybe not. But it may be very well treated as a separate contract if you want to do it at all. Again, I think you want to huddle up with your good legal and insurance consultants on something like that.

JEFF COLEMAN: Another quick comment on that. There's an ethical rule in a lot of states that will help you in that it's not ethical to accept compensation from more than one party on the same project. So, if you're getting paid by the owner and then being asked to be hired by the contractor, you really can't do that without a waiver from the owner. And the owner might not want you working for the contractor for a number of different reasons. So that might be an easy way to avoid that. That's a situation where the contractor really needs to hire an independent engineer that they hire and pay to help with those means, methods, techniques, sequences, procedures, issues.

DAN BUELOW: And we talked about if you're on the site and you witness something. What if you hear about an accident on the site and you happen to not be there at the time? What would you suggest?

JEFF COLEMAN: There isn't as much to do there. If you're on site and there's an accident, say, on the other side of the site, you want to document it-- not for purposes of investigating the accident, but for purposes of showing what the conditions were when you were there and what you saw, what you observed, what you heard, and so on. That might be necessary later just to help defend ourselves later. If you hear of an accident, again, you have no responsibility to undertake an investigation. Our job, then, is to make sure that we didn't do something to take

responsibility for safety by our actions, and then if possible, document the conditions, what happened as far as you know.

DAN BUELOW: So that's great. So, all good stuff, Jeff, really appreciate that. And kind of recap a few things here is that, OK, so understanding what the standard care of the design professional is versus that of the contractor, understanding that you don't have the training, you're not OSHA-trained typically at most design firms, nor do you have the insurance.

So, you have to really understand that you really are going out on a limb if you take any sort of responsibility for site safety. So, you have to be very careful with that and educate all your staff that is actually going out on the site-- I think having these ongoing conversations about what your role and what it is not.

I would also add this, also raises the importance of getting named on the contractor's GL policy on a primary and non-contributory basis. This is very important. And some firms do a better job than others.

Some clients, including a lot of public agreements-- and clients won't allow that, unfortunately. But the reason you want to strive to do this is that that's where the insurance belongs. It's with that party that has and can control that risk. In this case, it's the contractor's own employees.

So, if the contractor has an employee and they're hurt on the job site, if you are not named as an additional insured on that contractor's GL policy, you very likely will get sued and have to tender that to your own professional liability policy. Your package policy is not going to cover it. It's going to come under your very costly professional policy.

And the reason is that you want to ask for that is that's where it belongs. And most contractor's GL policies have an additional insured provision by contract. If you strive to get that in through an A201 or similar contractual vehicle, the prime really needs to work on this. A traditional design-bid-build, that would be through an A201 or similar vehicle.

And you're asking for nothing more than what the owners get. And the owner is going to get named on there, right. And so, we would want to be on there as well, if at all possible. I don't know, Jeff, any thoughts on that? I know we've talked a bit about that in the past.

JEFF COLEMAN: Yeah, a couple of thoughts. One, if you're able to take the general conditions where the owner has had their insurance professional draft the additional insured provision, just give you added. So, it says, the owner and architect and engineers. That's the best approach because they've usually got the right language.

If you have to take it on yourself, work with your broker, because there's very important things that have to be clarified. You have to make sure that the coverage will be primary, that your coverage won't have to come first. It'll

be non-contributory tort so that you won't have to contribute to that coverage with your policy. It's a constant battle to try to keep these things separate.

Now the GL carrier might say, well, later it's excluded because it's a professional service. And then we have to get involved battling with the GL carrier about this accident did not arise out of a professional service. It arose out of the construction work. And we've had to bring declaratory judgment actions to get ourselves established as an additional insured on the GL policy and we won a few of those. So, it's not a simple issue. Work with your broker to make sure you get the language right.

DAN BUELOW: Great points. Well, Jeff, thanks a lot. This has been great and concludes our addition of Talk to Me About A&E on our issue of safety. I want to thank Mr. Jeff Coleman. Thanks, Jeff.

JEFF COLEMAN: Thank you. Thank you very much.

DAN BUELOW: Thank you. And thank you for joining us for another edition of Talk to Me About A&E. And I'll talk to you soon.

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