

Talk to Me About A&E: Episode 17

DAVID ERICKSEN: Dan, there's been no profession out there that has been more impacted in different ways, I believe, than the design industry in terms of technology and what's evolved. It is how they deliver their service, it's what gets incorporated into their service, and it's now how they work together.

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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.

DAN BUELOW: Hello, and thanks for joining me for another episode of Talk to me about A&E, a Willis A&E podcast series that focuses on managing design professional liability risk. I'm Dan Buelow, Managing Director with Willis A&E, the center of excellence that is exclusively dedicated to providing insurance and risk management solutions to architects and engineers. Our program today is on technology and the evolving standard of care. And my special guest is Mr. David Ericksen, an attorney with the law firm Collins & Collins. Hello, David.

DAVID ERICKSEN: Hello, Dan. It's good to see you, and it's a great opportunity to be with you today.

DAN BUELOW: It's great to have you, David. So, David has repeatedly and successfully represented design professionals in jury trial, bench trials, single arbitrator arbitration and panel arbitration, as well as mediation and other forms of alternative dispute resolution in state and federal courts. He has built on that experience of troubled projects and contracts and failed communications to become a trusted resource and counselor on the risk management strategies to avoid such disputes through strategic planning and management.

David has written numerous articles addressing these issues important to the design and construction communities. He is a graduate of the law firm at the school University of California, Berkeley, and has been named Northern California super lawyer for more than 15 years. I personally have had the great pleasure of knowing David and working with him for many years over the last 10 plus years, and he is both a super lawyer and a super individual. And David is a regular guest and speaker for our Willis A&E education programs, including our on-demand webinars and our annual conferences. As you will hear and learn today, David is a passionate advocate for the design professions, and we are very fortunate to have him today on our side with us today for this special podcast. So David, welcome to our podcast.

DAVID ERICKSEN: Thank you, Dan. It's an honor to be here, and I very much appreciate those comments. It's been a great partnership trying to support the design community and keep them out of trouble as I've worked with Willis Towers Watson over the years and you Dan.

DAN BUELOW: So, there's a lot of different things that we have talked with you about over the years and this one in particular is of interest with all the changes going on. And in a recent Willis A&E education program, in fact, that

you presented for us on this very topic of technology, you referenced an article that was titled "The Future of Employment: How susceptible are jobs to computerization?" And you also reviewed certain aspects of a design professionals work that are being impacted by digital technologies. Talk to me about the impact of automation and evolving technology in the design profession.

DAVID ERICKSEN: Dan, there's been no profession out there that has been more impacted in different ways, I believe, than the design industry in terms of technology and what's evolved. It is how they deliver their service, it's what gets incorporated into their service, and it's now how they work together. And so, all of those things have dramatically impacted the design profession. There are other people I've been around, Dan, long enough that I can go back before fax machines, and then emails, and then we had dial-up internet, and all of those types of things that are so antiquated now.

And as we have gone into the design process and particularly let's talk about how a design is developed, it has really evolved. The promise of what can come out of technology, and clash detection, and BIM, and all of that versus the old school pencil and paper and the old way of doing things, has really evolved over time. And it's a question of where the standard of care is. Remember that for a professional, you're supposed to be measured against what other people are doing.

And when you are supposed to be measured against the other ordinary architect or engineer for what's out there, this technological innovation really challenges that. Does it mean that doing it the old way, the way that's been going on for decades with paper and pencil and sketching and all of that is wrong? That doing hand calculations is wrong? Does it mean that you have to embrace all of the new technology to make yourself the standard of care?

The reality is that there is no one answer for all of that. It depends on the project. It depends on the professional. It depends on where they are doing it. And it depends on the client and what they are looking for out of the expectations that are there. And so, it really creates quite a spectrum of challenges and introspection as we move forward with technology sanely, strategically, and doing it in a responsible way without just sticking to the old ways or getting too far ahead of the curve.

DAN BUELOW: Great points. And David, from an insurance perspective, there is a direct correlation between a design firm standard of care, and their professional liability insurance coverage. All good PL insurance policies will cover a design professional for virtually everything they do within their standard of care per the terms of that policy. That's the good news. The bad news or the challenge is that any firm will find itself in a potentially uninsurable position if they accept risk either by contract or their actions that is over and above that standard of care.

And as you pointed out, standard care is generally defined as the standard care where it's ordinarily provided by architects in the same or similar locality, under the same or similar circumstances. The challenge is that our world, as you noted, is not static and little in fact can be described as ordinary or same and similar when it comes to evolving technologies or the products for that matter. What happens to the standard of care when technology changes, and what challenges does the design firm face in your opinion?

DAVID ERICKSEN: Let's break it down at least into the first two categories, Dan. And the first one is the technology supporting the design. And one of the great challenges of all of that is as we have-- Historically, we would have looked at the standard of care and it has never been perceived as something which is perfection. There's no such thing as a perfect set of plans, a perfect set of specifications. But if we look at the literature that's out there over the last couple of decades, I can go back to some of the BIM-related literature even coming out of the AIA, and they would even use words of moving towards perfection or words of eliminating errors or omissions. Well, that moves us real close to that perfection standard that's out there. And I'll submit to you, even with technology, that's not a realistic standard, that's not what the courts would be out there.

But where I've seen the problem come up, Dan, is when we incorporate technology into it and we promote it to the clients, we're going to do your design using this technology, and all of that literature, and the support, and the rationale for it gets built in, that can elevate the standard of care or at least the client expectations for what's out there from that perspective. The other great challenge in all of that, Dan, is as we've talked about the standard of care, it is what would people be doing at the same time, in the same place. It is a historical standard, and we see that all the time both respect to the delivery of the design itself, and the technology that goes into it.

It's really easy to design a traditional concrete and steel building. We've been building with those things for years and years and years. We get into the more innovative products, the more innovative HVAC, or mechanical systems that might be out there. They don't have that proven record, that track record of a history behind them to put them within the standard of care. And so, as the products move us forward, we're also taking a step forward because we don't have the 10, 20, 30 years of looking back at similar projects to know that they are proven and true.

And so it's both respect to the technology that encompasses the design, and then what goes into the project itself has really challenged the standard of care as we are constantly evolving and moving forward, and really learning as we go. And to keep that in context and to make people understand that is a great challenge in the courtroom. It's a great challenge for the disputes, particularly if we don't have the client on board early on.

DAN BUELOW: You wrote a paper, David, a while ago and it was titled-- it was an AIA white paper for AIA Trust on sustainable design and the standard of care and it was titled, "Managing evolving and innovative products, processes, and performance standards in design delivery." And in this paper, you stated that, quote, "In a world of rapidly changing design options, project objectives, and design tools, the standard of care for architects and engineers is best promoted, elevated, and defended by focused and strategic process management."

And that translated more simply, this means the process of information and communication management matters as much or more to a successful architectural design or engineering design professional practice as does the technical design itself. Can you talk about what you defined in this as that PCAD model, and the benefits for the design professional?

DAVID ERICKSEN: And where this comes from, Dan, that was a paper that the AIA Trust commissioned me to write. And we were going to talk initially about three things. We were going to talk about technology and design, all of the things that were changing in terms of BIM design and so on. We were talking about new products coming into the design, the two things we've already talked about. And we were talking about sustainability, and how that's come

into it. And I wrote that and then the AIA came back to me and said, Dave, we want you to write a new chapter 1. We want a chapter about informed consent. Because they looked at the other professions like doctors and lawyers and all the people that get the disclaimers and all the things signed off that historically design professionals haven't done.

And so, we built in this first part of this, which is really the process about getting the informed consent of the client. Getting them to make the election for what they want. We can do all sorts of technology designs, we can bring BIM, and clash detection, and all of those types of things to the table, but with those things comes expenses. With those things comes realistic expectations of what's going on. We can bring new products into the project, new HVAC systems, new piping systems, new heating and cooling systems, whatever it might be, and we can bring that in. But without that track record of the history and experience, we are making a risk. At the end of the day, it's the clients project, and they should be the ones agreeing to what's taking place on the project and taking on that risk.

And so essentially, what we talked about there is it's a process of informing the client, confirming their acceptance, and then designing based on that with the directions to where they are going and what they're going through into the future. I've seen it in every one of those elements. The technology behind the design, the products going into it, or the sustainability or some of the other factors coming out to it, the informed consent of the client to manage the programming expectations, to manage the standards for the project is absolutely critical.

DAN BUELOW: And it's something that really is often overlooked, isn't it? At the end of the day, I think there was the whole green issue and managing green and now we're talking about climate change. But at the end of the day, the design professional has just been faced with the challenge of managing innovation where their client wants something newer, shinier, cooler, whatever it might be. And at the end of the day, if they're not entirely pleased with something that could be very cutting edge, the design professional could certainly be left holding the proverbial bag. So at the end of the day, how do you-- and this is kind of this whole process here, but I think this is-- at the end of the day, what we're trying to do is not be stuck with these performance-based exposures that really would be an unfair transfer of risk.

DAVID ERICKSEN: Yes. Let me give you a couple of examples, Dan. We like stories, right? That's what you and I do, a lot of storytelling. And one of the issues that I was facing a lot in the early 2000s had to do with concrete structures and the introduction of elements into that to achieve the sustainable standards for LEED. And one of the things they would frequently do in those situations was, in addition to the traditional concrete that we've been using for decades, we would start to introduce foreign products like fly ash and slag into the process so that they would be a sustainable product coming in.

Ultimately, it actually made for a better concrete product. But what was different was the curing time on it was more than probably four times longer. So instead of curing something in seven days to almost full strength, it would be out there about 30 days before it would reach capacity. And that would lead to problems because either people would not wait and damage would happen to the concrete, or they'd have to wait and all of a sudden, their project was delayed. They had a very good reason for doing it, but they were not accepting or recognizing the trade-off for what's there.

And what really comes out of that, there are two things to deal with it. There's in the first instance, setting this up contractually. That there might be objectives in sustainability or technology or other things coming into the project, and the client is making a trade-off as they do it, recognizing one value over another and just having up front. Educating the client that there are trade-offs in their decision making. And then really important to getting the client's agreement to doing it. The AIA documents really set up a good platform for that because at each stage, schematic, design development, 50% CD, final CD, it's supposed to proceed based on the client's informed and written approval of what's taking place. It's a great moment, but we need to take it down to the micro issues.

Once upon a time I had one of these situations where I had a civil engineering client that was doing a new storm drain system for an airport. In that situation, the contractor came in and said, hey, there's this great new product out there. We can install it so much faster because it's a better product, it's more adaptable. And it has these connection points that make it so much faster for us. My civil engineer looked at it, my civil engineer weighed both options and then gave the client the option for which one to proceed with. Well, the client with faster and cheaper, chose faster and cheaper.

Years later, there was a class action taking place in California. A class action means a huge lawsuit about this particular piping system and its performance, and they sued every engineer basically in the state that it ever incorporated into a project. My client brought out the letter, brought out the informed consent, and so unlike literally dozens of their brethren who went through years of litigation and paid massive amounts of money, my client could say, no, we weighed the options for you, you chose this option, it's on you. And so, we walked out of that situation.

And so, educating the client, getting them to make the decision, and then proceeding based on that affirmative decision that they make is really critical. Ideally, it's going to be in some sort of a letter format that they're going to sign off or acknowledge. It could also be in meeting minutes. It can be in an email confirming a decision with the closing line or something alike. If you have any disagreements or want to clarify or correct anything in the foregoing, please let us know. But somehow getting that affirmative consent in writing or documented in writing is really the critical moment in that.

DAN BUELOW: Such great points there. And it's often, the worst response can be a tacit response, right? You have literally laid out a great example where an engineering firm in this case really protected their business by following through on this. And in your white paper-- I'm going to include a copy of this whitepaper when we issue this podcast. But in that paper, you break down these-- as you noted these as documentation priorities that you would recommend in this PCAD model. And you broke it down assumptions, reliance points, priorities, pros, cons, risk limitations, process and sequence occurrence, milestones, internal evaluations, and changes. You highlighted changes there at the end. And I think you're really stressing this as something that you need to actively and proactively manage throughout this process, isn't it?

DAVID ERICKSEN: Well, yeah. And particularly the changes, Dan, because there's a quote-- I'll paraphrase Glenn Close out of, I think the movie *The Natural* which is one of my favorites. To paraphrase her from that movie, there's the project we contract for, and then there's the project that we deliver after that. There's also the project we design, and there's the project that gets built after that. And once we leave the design, and we go out and we're dealing with

contractors, these oxymoronic things like value engineering come into the mix. Other concepts like that because other people are going to try to change things in terms of what's taking place on the project.

And when that's happening, we need to identify the source, we need to identify who is standing behind it, and then we can do our appropriate due diligence. And there are different levels of due diligence that we can do into it. I always kind of, Dan, recommend that in our due diligence of looking at a change or a value engineering, there's the public level with our client and the contractor that we're going to go through and we're going to document that. I think just as a responsible professional and also protecting ourselves. Internally, I like to always even kind of one level beyond that.

And so, for example, if I'm getting a value engineering or a substitution request, and they're giving me the manufacturer's data and information, I'm going to do my investigation on that, I'm going to sign off on them to say, in reliance on the manufacturer's information and the representations of the contractor, we take no issue with this or we have no objection to this. I probably would then want to internally take one further step, kind of internet research, maybe talking to some other professionals, checking some periodicals-- whatever it might be to take me one step further. Just kind of a trust but verify moment. The verification being my internal due diligence protection moment, as opposed to publishing that to others.

DAN BUELOW: You talked already quite a bit around informed consent. And now if we consider what's upon us here in this area of climate change, and I want to have a separate podcast series as we talked about, which I want to include you on here-- David on this point here, but I think it fits in certainly with this model in order to manage this risk that you've outlined years ago here. Here's another area where this certainly applies and design professionals are being asked to lead the way in reducing emissions with innovative projects that are more energy efficient and/or resilient to changes and impacts from climate change.

And design professionals are more frequently being required at the same time to evaluate, as you point out, complex, in this case, energy performance issues, and select cost effective options. If this design fails to perform as intended as we know or subject to unforeseen in this case climate conditions in the future, the designer may be exposed to liability. And so, David, apply your thoughts around climate change and this model and how this relates in your opinion here.

DAVID ERICKSEN: So first of all, really important, I think, to-- let's go back to that standard of care that we started with, Dan And most of the professional service organizations, AIA, and other agreements, EJCDC, are going to have a good standard of care clause these days. Even the Association of General Contractors has a good one. And the key to the standard of care is that it is tied to what other architects or engineers or professionals would or are doing on similar projects, at the same time and place. And so, it ties it to that time and place in terms of what we have in all of that. Really important to tie it that way and then to document it that way.

But let's be honest Dan, when you talk about sustainability you talk about new products and technology, you talk about how buildings are having to be changed now with this whole virus scenario that we've been dealing with now for more than two years in terms of how buildings build and operate and all of that. It really challenges us to, what does that mean? We need to tie it to the time and place of what's going on. I think that what becomes just as

important in that, Dan, is in this concept with the technology and the standard of care is to make very clear that this is not a warranty or a guarantee. And so, we need to tie it to that. So, we've tied it time and place and then we're being very clear it's not a warranty or a guarantee for anything that's out there. That helps us reinforce that standard of care.

You're going to have all of these products. You're going to have all the technology that's going to promise all these great things. We are tying into what we know today without any guarantee of perfection, and so linking it up that way. The follow-on part of that is so much of what comes up in climate change. So much what comes up in sustainability, and going forward, arises not out of our design, but how buildings are owned and operated and maintained and repaired.

And so, one of the things, Dan, that I think is really important is that we disclaim-- we say, essentially, we acknowledge the truth. All buildings and projects require maintenance and operation and inspection during their time of life. That is not the design professional's responsibility. Our services are complete as of the time of whatever it is. Final design, substantial completion. So, we set down a marker in time to make it very clear when our services have ended and the rest of that is somebody else's responsibility.

Kind of the side note on that, Dan, is there's going to be concerns coming up. I am seeing it all the time right now, particularly with respect to either storm event issues or ambient temperature issues on projects, where people who have recently designed a project are being asked to come back in and reevaluate it. When we do that, really important to make clear that's a new engagement. We're coming back to look at a historic project. One of the worst things we could do, Dan, is to do it as an amendment to our prior services which would then continue this clock forward and make us responsible for everything in time.

DAN BUELOW: It's a very good point. We always have to remember the coverage, and I touched on it earlier is that this relationship between the standard of care and your professional liability insurance. And professional liability insurance is out of claims-made form, and that means the coverage today is going to apply what you have in force today. Well, whatever you're working on today, you don't know what coverage is even going to be available or what carriers are going to be in place by the time this evolves into a claim or an issue.

And it's something that is very important that we are monitoring this marketplace because I think about climate change, what's going to be covered now versus in the future. I think about cyber, for example. We're starting to see cyber exclusions on policy, we've certainly seen some exclusions for condos, and so forth and even some question around alternative risk depending on the program. So just again, I would argue that a good policy should cover you for the standard of care and recognize that standard of care will evolve. We really do have to monitor and stay close to what's happening in the marketplace to make sure that firms are getting what they bought and paid for.

DAVID ERICKSEN: Well, Dan, I'm going to turn this around. I'm going to turn to interviewing you because I think one of the things you really-- you've teed it up here. But one of the really important points around these technology issues, these issues that are going to continue on in time is if you change firms, if you evolve as a firm into a merger or acquisition, if you happen to change insurance carriers is to make sure you have full prior acts coverage in terms of what you have going on and to have no retro dates on that. You might want to just address that for a moment.

DAN BUELOW: Good point. I think whenever we're talking to our clients that are on either side of an acquisition or a merger, we really want to look closely at all the options specific to addressing those prior acts. And even if it's an asset-only purchase which most of these deals are, you still have to address the professional liability prior act exposures. And so I'm not a big fan of relying completely on a tail policy because I think if you're bringing people into your corporate family, then they're going to be sitting potentially bare of any coverage three to five years down the road which can be a strain on everybody, including the firm that acquired them. So, I think that you need to know your options, and there's some hybrid approaches to that. I actually have a blog on that very topic that's important.

I will say the other thing I'm seeing here, I just-- I don't know-- a little tangent here, but we've seen a real spike in merger acquisitions with this private equity money coming in. It seems that they're overpaying for these firms and they're creating an environment out there which you're not seeing one engineering or architecture firm buying another, you're seeing these private equity firms often coming in. And I'm just concerned with some of these deals, what the investment will be in the quality controls and the risk management practices that are so important. And it's some of the things that you've touched on today. Well David, give us some parting thoughts on this topic here.

DAVID ERICKSEN: So, I think the other thing is really evolved, Dan. And you feel it, I feel it, we all feel it. We're doing a podcast right now because people get together in the same workspace far less than they had before. I saw a piece on Saturday on CNN about what was taking place in the workplace. And the larger urban communities are staying largely remote, other parts of the country are really coming back into the office, and it is hugely disproportionate how that's all taking place.

But historically, design has been a team sport. It's a team sport within the firm itself. The architecture, the engineering firm, where you have project managers and engineers or architects of record, and then draftspeople all working together, working towards that common goal. And then a design team as a whole coming together to coordinate and work together to bring together the architectural, the mechanical, the structural, and all of the elements into the project. Well, what's happened in this time of technologies, we don't sit around a table the way we used to.

We don't sit with a roll of plans, and we're redlining it, and all of that sort of thing. Instead, we are doing it on computer models and computer monitors and trying to do it-- Some people are doing it from offices, some people are doing it from kitchen counters. And what that has really created is a whole new dynamic of how we are communicating. And here I want to really distinguish two parts of it. I want to distinguish the internal part for our team as we're working together. And we need to be very intentional to make that meaningful. We need to make it meaningful collaboration and communication for two reasons, I believe.

First of all, I think that's inherent in the standard of care. I think that's inherent in sealing and stamping a set of documents where the architect or engineer of record is in responsible charge, which means they are knowledgeable essentially in all layers of the development of the documents. And to do that actively and intentionally in this remote medium can be a big challenge. And so, I think we need to do that. And I think we need to have records created of how we are going through to do that. But I want those records to be kind of at a macro level. The worst thing in the

world to me would be to have a Zoom conference working back and forth between architect of record and project manager, architect of record or draftsman, and to record the Zoom meetings internally.

Because if something gets missed, we have just created the moment of, aha, you knew about it, you failed to catch it. Normally standard care, we're fine because things like that happen, but we would have created that moment. But I think to have something of a template and an initial sign off to do that is really important. And I have some templates out there, Dan, which basically talk about the milestones, who participated in the coordination, and this just kind of signing off of some bullet points at the end as opposed to recording them. Once we get to the design team as a whole, it becomes even more important to do this intentionally. And I think we need to do it intentionally in sequence and having confirmations that people have done it.

I know as a manager that one of the great challenges for me is I have people working for me. A lot of them are working at home now. I don't have active eyes on to know what's going on. I can't stop by their workstation and talk about it. I can't have them into my office to sit across my desk and talk about it the same way. And so we need to actively undertake those activities to make sure that we have coordinated and communicated effectively. This is a constantly evolving challenge. Dan, when this all started two and a half years ago, I thought this was going to last three weeks. And on some level, we stay in this situation and everything I read about employment standards and things like that is that in many of our communities, the perception is we are never going back to a full time in the office team environment. And so, we need to find the ways to work through it. And again, doing it intentionally, strategically, both in terms of how we do it and how we document it.

DAN BUELOW: Those are some great points David. I mean, we're seeing, like you pointed out, some real changes here. It's definitely a hybrid approach at the very least. In our own business in the brokerage side, we're experiencing that as well. There's not a whole lot of people in all the floors at the Willis Tower these days. I really question again how designed professionals over the long run will be impacted by this. Because they're collaborating, they're innovating, they're working together, and they're going to have to figure out how to do that very differently as you pointed out.

DAVID ERICKSEN: And one of the flip sides of it, Dan, is this challenge we just talked about with respect to our internal teams. Actually, for that informed consent where we started this conversation, is kind of a weird opportunity. Because by sending out an email to the client describing what's going on or confirming what's going on and asking them to acknowledge acceptance in an email back, that seems to be a much more viable and common approach and successful approach these days than it might have been years ago when we might walk into a client's office with a roll of plans under our arm and talk it through. So that actually, for a client consent and informed consent, the new world has actually created some nice opportunities.

DAN BUELOW: Yeah and take advantage of it. Well, David, I want to thank you once again for sharing your time and advice on this important topic. It was great having you.

DAVID ERICKSEN: Good to talk to you, Dan. Thanks to you and everybody at Willis for the opportunity. And I hope there's something people can take away from this for just one step forward to better managing the technology today and tomorrow.

DAN BUELOW: Great. Thanks, David. And this concludes another episode of Talk to me about A&E. For more information on upcoming Willis A&E podcast, education events, check out our website at www.wtwae.com. Thanks for joining us, and talk to you soon.

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