

Talk to Me About A&E: Episode 8

MARK BLANKENSHIP: Here's something they can do proactively to help themselves get a better insurance rates, and let's talk about those things that will influence my judgment. One would be experience. How long have you been doing this? You as a design professional, how long have you been licensed and practicing?

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NARRATOR: 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 our Willis A&E podcast series, Talk to Me About A&E, where we invite industry experts to share their thoughts on important risk management topics for architects and engineers. I'm Dan Buelow, managing director of Willis A&E, and my guest today is Mr. Mark Blankenship. And our topic is assessing professional liability risk from an underwriter's perspective. Mark Blankenship is currently AVP of underwriting for Liberty Ironshore's architects and engineer's professional liability program.

Hello, Mark. How are you doing?

MARK BLANKENSHIP: Hello, Dan. Doing well. Thank you.

DAN BUELOW: It's good to have you here. So, Mark and I go way back. I mean, this is one of the things I like about these podcasts is getting to talk to some old friends here. And Mark has been underwriting A&E professional liability insurance for well over 10 years now. Prior to that, Mark and I actually worked together on the brokerage side. So, Mark has seen that perspective for about 10 years. And prior to that, Mark was on the claims side of the house. In fact, that's where Mark and I met when we were at DPIC Companies together. I was on the underwriting side, and Mark was on the claims side.

And so, when I was thinking about this topic about assessing professional liability risk, I really did first think of Mark as an excellent source for this discussion given his diverse background within the specialty area of A&E professional liability. Not many people with over 30 years of A&E experience out there that has seen it from this perspective of claims, brokerage, and underwriting. So, I think that's great. So, let's-- before I turn Mark loose here on a couple of things, the question is, what is an underwriter?

One of the stories I like to tell-- and I think it's true. I keep telling it. I hope it is. It's where the term "underwriter" comes from. And that's back in the 1700s or so when Lloyd's Coffeehouse in London-- and it was here that individuals, while imbibing in their favorite libations, would write their names under a name of a ship, essentially placing a bet that that ship would get to the New World and back. So, it sounds a lot like gambling, placing a bet on the safe journey of ships. Mark, as an underwriter, are you essentially placing a bet?

MARK BLANKENSHIP: Essentially, what I do is legalized gambling.

DAN BUELOW: But as an underwriter for A&E PL, what are some of the primary areas you are analyzing to determine if you want to select a given risk? And if so, what terms might you offer and at what cost? How do you decide that?

MARK BLANKENSHIP: Well, the primary issue that we look at is project types. As we will see, no matter what discipline you're practicing in, the project type has a profound impact on your risk profile. The other factor that I will look at very quickly to make a triage decision as to whether or not to proceed is claim history. Basically, I'm trying to determine if you have been a profitable account, if you've been paying an adequate rate, or if there's something in the claim history that should be of concern.

DAN BUELOW: As I know in my underwriting in the past, what you look at is that-- we're looking at size of firm as well, right? And if you think about it, maybe there's 100-plus thousand firms out there in the world. 90% of those are 10 professionals or less, which is interesting. In fact, if you look at the ENR 500, number one is several billion in revenue. Number 500 is \$20-some million in revenue. So, it's kind of an interesting mix there. But when you're looking at size of firm, does that also indicate or drive as far as, certainly, pricing-- at the end of the day, you're looking at revenue-- but also limits and deductibles?

MARK BLANKENSHIP: Yes, it does, Dan. We find that the size of the firm roughly correlates to the size of the project that somebody is working on. And the larger the project, the more complex the project, typically, the larger the values involved, and the more likely there really is to be a claim. And by way of example, I could tell you that if you're working on a \$100,000 project and you have 1% change orders, well, you're not likely to get sued over that \$1,000. But if you're working on a billion-dollar project and now it's \$1 million, well, the odds of getting sued go up. So that's a correlation that we see.

DAN BUELOW: So, you're looking at assessing the risk, looking at the size, the project type, so forth. How about geography if you're a state-- there are certain states that I know that we term as red flag states that tend to be a little more litigious. So, are you going to be paying a little more in Texas than you would for that same risk in Kansas, for example?

MARK BLANKENSHIP: Yes, geography is a factor. And I'm glad you brought that up. I would invite your listeners to google "judicial hellholes." And that's an article by the Association of Defense Counsel that talks about venues in very specific terms and in detail. And if you're really interested in your state, you can do a Google search

again for "legal liability venues," and you can find maps that will break it down county by county as to what counties are favorable jurisdictions for corporate defendants and what counties are unfavorable.

DAN BUELOW: All right. Well, that's great. So of course, then, as you touched on, is disciplines when we're thinking about from an underwriting standpoint. Let's talk a little more about the different disciplines within the design profession and how you as an underwriter view these different disciplines. What are the disciplines, and what factors drive those risks?

MARK BLANKENSHIP: Well, the main factor that drives the risk associated with the disciplines is the severity factor. The secondary factor would be frequency. But structural engineers are widely regarded to have the highest risks because when there's a structural problem or a failure, it's typically very expensive to fix. Therefore, they have high severity, typically. Likewise, with geotechs, if there is a problem and a building settles, this becomes a very expensive problem to fix.

As of late, we've seen traffic engineers make the high-risk list. We used to think of traffic engineers as being very low risk. And in fact, if what you're doing is planning traffic patterns, I would say that is still very low risk. The other flavor of traffic engineering, which is temporary traffic control design in construction zones, that has become high risk due to bodily injury. And bodily injury claims generally are high severity, and that remains a concern. But it's also a risk management item that's within a firm's control, to some extent, with regard to good contracting practices where you exclude responsibility for construction means or methods, and then you live within the terms of the contract. So, you don't assume responsibility for means or methods and expose yourself to bodily injury claims.

We view construction managers and architects as, more or less, average risk. They generally have overall responsibility for the project, frequently including subconsultants. So, there's significant exposure there. And as we start to drill down to some of the engineering disciplines, the subconsultants, they have less area of responsibility. They typically have lower exposure to claims. So, this would include the civil engineers, process engineers. Mechanical engineers, with the possible exception of HVAC design-- HVAC issues tend to be expensive to fix, so they have a bit of a severity issue. Then you move on to my lower-risk, and therefore favorite consultants, the electrical engineers, the environmental scientists, and interior designers.

DAN BUELOW: And as an underwriter, then, you will rate and price these differently. You're going to be spending more on a radon fee. So, for example, if an average firm is paying 1% of gross revenue-- and now that average has come down, but to use that round number-- a structural might be paying 2-plus, 3%, right? And a geotech more, and your interior is much less. So, you're looking at that.

And on that subject too, as you listed those off, those disciplines here, which is interesting, is we recently did a Willis A&E survey of 12 carriers out there and talking to their claims folks. And we broke it out. Who was the number one, two, three of disciplines for frequency and number one, two, three as far as severity down the list? Architects were number one for frequency. And we would say that's probably due to the vicarious exposure, right? They're taking on more vicarious risk. And then number one for severity, as you noted, was structural. Number two is geotechs.

And so, one of the questions we get sometimes-- and as an underwriter, I don't know how you assess this or not-- is taking on certain subs as a prime. Should an architect or engineer, for example, take and hire on the geotech, which often, they might not have a whole lot to say in that equation? But that's something that they certainly need to be aware of, the vicarious. You might have enough insurance because you-- or you might have insurance because you do have coverage for vicarious exposure under your professional policy. The question is, do you have enough, right?

MARK BLANKENSHIP: Well, that's a good point, Dan. And just to clarify, whenever you hire a subconsultant and their service flows through your office, then you have liability for whatever they do. And we call that vicarious liability. So, for the engineering disciplines of mechanical engineering, plumbing, electrical, structural, I think the architect adds value by virtue of coordinating those. I think the architect adds, really, no value to the geotech report. And really, it's good practice to avoid taking on a geotech as a subconsultant. We always recommend it.

And another maybe subsurface or hidden reason would be geotechs are very adamant about insisting on a limitation of liability in their services, architects much less so. So, you would be wary of a situation where you would take on a geotech as a sub and give them a limitation of liability but don't have a matching limitation in your prime agreement. You could be contractually biting off their liability.

DAN BUELOW: Yeah, great points Mark. Well, let's shift gears a little bit and talk about project types. How do you rate the risks associated with the various project types and what factors drive those risks?

MARK BLANKENSHIP: Well, let's look at that from the broad-brush perspective initially. The project types with the lowest associated risks would be industrial. And I would hypothesize that that's because industrial clients are really only interested in one thing-- that the project works. It doesn't have to look pretty. Also, they're experienced owners, and they're busy making money. They aren't interested in filing lawsuits. And they're sophisticated. They understand maintenance and the requirements to maintain your building or your facilities.

After that, we see the commercial and office-type exposures, retail exposures, as being favorable again-- again, because you have sophisticated clients who understand building and construction and contingencies and maintenance requirements. And then we have schools, which over the last 10 years have trended badly. I think it's primarily because of the involvement of boards of directors and lack of funding, kind of a champagne taste with a beer budget type of issue. And schools have become one of the leading sources of claims against design professionals.

And then we get even worse when it comes to residential. People talk about their dream home. The expectations are very high. And nobody ever talks about their dream factory or their dream office. Also, you have certain consumer protection statutes that give special remedies to homeowners, and they make very sympathetic plaintiffs generally. And the worst of the worst, if you will, for design professionals is condominiums. We have several perverse incentives that align to make that the worst class of business. First, the guy who builds it is never going to live there, so his incentive is to do everything on the cheap. And it's typically a single-purpose LLC that will dry up and go away after the project is sold off.

Then you have, again, a board of directors, and you have an unsophisticated board, typically of homeowners, who are all looking to not pay for maintenance. And this typically results in problems. And about one in four to one in three condo projects eventually winds up in litigation.

DAN BUELOW: Yeah. And also, there's, of course-- I think the primary driver in those condos is those third-party exposures, as you know, which is that you're in bed now-- a developer-client puts you in bed now with 200, 300-plus unsophisticated, emotionally charged residential consumers that are looking at their ceilings every night. And as you noted earlier, you got the HOA that can whip together a lawsuit in pretty short order. My single advice on risk management for if you're going to design a condominium and do that-- don't design it with a common meeting space so they won't figure out how to get together and sue you.

Now, Mark, I remember-- I think it was 2008. Mark and I were speaking at the National AIA Conference in Boston. And our title of our program is "Managing the Condo Craze." And by the time we showed up, because of the economic downturn, the crash of the housing, it was over. The craze was over. And it's back, so it's a big risk. And we're going to have a separate podcast just on managing condo and residential exposure. Because there's a lot to unpack around that, isn't there?

MARK BLANKENSHIP: There is, Dan. But as you may recall, it was 6:30 on a Friday evening when the Red Sox were playing at 7:00. And much to my surprise, when we walked in the room, there were 450 architects waiting to learn how to make condos work. Even though the craze was over, we had a good crowd.

DAN BUELOW: Yeah, we did. So, we did, again, this Willis survey I was mentioning. And on the question about disciplines-- interesting-- from these 12 leading carriers on professional, they had condos listed up number one on frequency. On severity, roads and highways and infrastructure. And I think that you touched on already a big area. We've seen a lot of these third-party bodily injury claims these poor firms get sucked into wherever there's an auto accident, a sympathetic plaintiff, sovereign immunity with the state, and they're left holding the proverbial bag. It's also the design bill discipline, isn't it, which has also created an issue with these budgets being set, an incomplete set of drawings, and so on. As an underwriter, are you also looking at delivery method? You're looking at that a little bit, are you not, in some of the questions, in addition to owner types?

DAN BUELOW: Absolutely. I think personally, the safest delivery method is the design-bid-build delivery method. Once you get involved in design-build, there are-- if you have a good partner, it can go very, very well. But if you're not with a trusted partner, what can happen is the contractor will try to push the inevitable change orders down to the design firm. And we lose a legal defense. We lose, potentially, the betterment defense.

If I forget the toilets in the women's bathroom in my design, well, that doesn't become automatically my full responsibility. It's called a betterment to the owner, and they still have to pay for it. They had to pay for it in the first place. What I might be responsible for is the upcharge, is doing it as a change order or after the fact rather than part of the bid package. So that defense potentially goes away.

But the other delivery method that I feel is worse by far than design build is fast track. And the largest claims that I've ever handled as a claim rep, and the largest claim that I was ever responsible for as an underwriter, both came from fast-track projects. One, it was a stadium, and they designed the building, and then it got built before they put the mechanical equipment in, and they couldn't fit it. And there were numerous other changes.

The other was a processing plant, and there was a clean room to put manufacturing equipment in where there was steam being emitted. Again, by the time they picked the equipment, the clean room was already built, and it wouldn't fit. They had to put the processing equipment out on the floor, and off-gassing through the concrete roof allowed the roof to tear off in a storm. It was horrible. It was millions of dollars.

DAN BUELOW: I guess the problem is what projects are not fast-tracked in this day and age, it seems. But that's a great point. In fact, we're going to have a separate podcast, again, on this whole issue around design build and alternative delivery. So, Mark, on the underwriting, then, you go through this process, you assess everything, and at the end of the day, you punch stuff into your computer or whatever magical rate disks that you have. And you get this number, and you say, oh, my gosh. I will never be able to sell this.

Talk to us about the judgment factor. Because we'll see pricing all over the map with some of these underwriters. It's like, somebody-- I know you have different appetite for risk. Some firms for carriers, for example, won't accept design-build exposures or geotech exposures and so forth. But what goes into this judgment?

MARK BLANKENSHIP: Well, Dan, I hope your clients are paying attention to this part in particular, because here's something they can do proactively to help themselves get a better insurance rate, and let's talk about those things that will influence my judgment. One would be experience. How long have you been doing this? You as a design professional, how long have you been licensed and practicing? Are you a specialist at what you do? This is very encouraging to me.

And in fact, when we look at hospitals, for instance, they're highly technical structures. But generally, for architects, the experience is very good because most of the people who are doing it are specialists. And so, this works out to be a very favorable factor. Are there other issues associated with the quality of your firm and staff? Do you have PhDs on staff? Do you have master's degrees? Do you have other special qualifications? Has somebody worked as a builder, and therefore understand construction better than the average bear? That would be an issue.

Contracts-- we talk a lot about contracts. And of course, the big factor is limitation of liability. That's actually a credit that we'll give if you're successful in limiting your liability to \$250,000 or less, because that can impact payouts under your policy.

DAN BUELOW: On a certain percentage of your projects, you're looking at--

MARK BLANKENSHIP: Right, yeah. And are you getting written contracts? A surprising number of projects go ahead without a written contract in place at all. We view that as a very negative factor because a verbal contract isn't worth the paper it's written on, Dan. That's all I have to say.

Do you have business practices that encourage or include risk management? Are you taking classes? Are you reaching out-- are you taking the Willis A&W seminars? We give credit for that because we think it's valuable. And in fact, as an underwriter, I've seen the effect of firms participating risk management, and it's generated a markedly better result when firms do participate in risk management.

Are you doing work outside of your normal territory? Are you doing field evaluation? Are you getting out to observe the work that's under construction for general conformance with the construction documents? I would view this as a plus. What type of clients are you are you working with? Generally, commercial clients treat their design professionals better than developers, I would say. And we kind of view public clients as good clients with bad contracts, generally. But that's another factor that we would consider for judgment rating.

DAN BUELOW: Great points. I think you illustrate there the value of working with an underwriter that has the expertise. In fact, we really work with-- rumor has it, there's 40 or so insurance carriers out there that will offer professional liability insurance. And I, honestly, have been doing this for a long time. I can't think of 10 of them that I would want to do business with.

And the reason we work with a smaller group than that, even, is for this reason, is the expertise that you have, but also that, as you just discussed here, the importance for us as a broker to the quality of the submission, getting that information that this underwriter can use so it's not just a piece of paper. There might be a phone call that we need to even have with the underwriter. But certainly, a little background on what the risk management practices of the firm are so important, the background to get the very best pricing in, really, a long-term partnership, ideally.

And also, if you have any claims-- and this is why you buy this stuff-- what did you learn from that claim? Underwriters want to hear that, don't you? What are the lessons learned? Again, you're placing that bet. You just don't want them to keep repeating these same errors. So, did they make any changes to their business practice to try to mitigate this from happening?

MARK BLANKENSHIP: Right. And in terms of business practices that would influence judgment rating, two other important things that typically are not captured on applications but would be useful and very interesting to me to reveal or talk about. One would be, do you have a client selection process that sometimes will lead to saying no?

DAN BUELOW: I'm going to have to stop you right there, Mark, not just because we're over time, but you're just touching on another program that we may very well have you back for a podcast on go/no-go project evaluation. Running out of time here, but I want to thank you because you really hit on some great points and gave us a lot to think about, Mark. I really appreciate you joining us.

MARK BLANKENSHIP: My pleasure, Dan.

DAN BUELOW: Well, thanks, Mark Blankenship, and thank you for joining us for another episode of our Willis A&E Talk to Me About A&E podcast series and talk to you soon.

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