Talk to Me About A&E: Episode 16

FRANK MUSICA: As emails came, as instant messaging, texting, cell phones, came in, a lot of these same firms that were very careful in the past now just feel overwhelmed.

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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: Well, hello, and thanks for joining me for another episode of "Talk to Me About A&E." I'm Dan Buelow, Managing Director with Willis A&E, and our program today will be part two of my discussion with Frank Musica on the topic of documentation and communication.

In part one, I introduced Frank and reviewed Frank's extensive background in managing risk, including his current position of Risk Manager for Victor, the Program Manager for CNA'S A&E Professional Liability Program, which Frank has worked for the last 50 plus years. In this role, Frank has led the group's management efforts to support their design professional insureds across North America.

In part one, we discussed the standard of care and the importance of documentation and effective communication in order to manage professional liability risk. We talked about the fundamental tension between risk management and marketing. We also talked about the importance of documentation and communication when it comes to contract formation, and the importance of using this process as a critical vehicle in managing client expectations.

And we also discussed how important words are when it comes to all the forms of documentation and phases of a project, including construction and administration. And we talked about the risks associated with evolving technology, and the various types of mediums of communication that design professionals are exposed to and need to manage, including proposals, plans and specifications, websites, field notes, meeting minutes, submittals, advertising, marketing materials, social media, video conferencing, texting, and last but not least, emails.

So, let's pick up my conversation where we left off with Frank. We can't have a conversation about documentation communication without talking about emails. And we have seen, and I know you have as well, but we've seen these emails become, again, exhibit A against firms.

And I think just a few points I want to make, and then I want to open up to you, Frank, on this, but at the end of the day, emails are discoverable and retrievable. You know, who's making a lot of money these days? These forensic attorneys and such, and the cost of discovery.

And at the end of the day, if you have a client and that client is unhappy, they're going to hire some pretty smart 14-year-old kids and go find whatever you thought about putting in an email, right? And so, some points that I always try to stress when it comes to emails, because it really is such a significant exposure, but again, back to this, having conversations, and that people need to understand that this is a business, that these emails are discoverable.

Keep these emails short, and sweet, and to the point. And we're all guilty of writing a bad email, and emails are a valuable tool. But they're a double-edged sword. So, you can pick up the phone, but at the end of the day, people must realize that these emails can and will be used against you.

I mean, I use the example of a claim that we had. This was years ago, but a principal says to another internally, between themselves, “Boy, Bob, we sure screwed up on this one,” right? And case closed if you can discover that, if you're the plaintiff attorney, right?

So, share some of your thoughts. I mean, we can go on and on on this, but this email issue-- and lastly, I would add to that, your voicemails are now being transcribed into emails and residing on servers you don't even know exist.

FRANK MUSICA: Years ago, I think we were very good at educating firms to put things in writing carefully and to document telephone calls carefully. But as emails came, as instant messaging, texting, cell phones, came in, a lot of these same firms that were very careful in the past now just feel overwhelmed and do not document things properly. And I think you're right.

Email is certainly one of the egregious things, because people will put stuff in the emails that they should never write. Those emails never disappear. There is a tremendous industry out there called forensic email analysis. The emails are discoverable because they're never really properly organized.

Email forensic tools are used to search your hard drive. They not only turn up relevant evidence for that case. They may lead to other claims against you. Sometimes it's a fishing expedition, and they can go in there and they can look through everything you've got.

And as you said, it's not just the emails. It's some of the other things as well. But we also see that it's not just limited to office records, and I think that's always a problem. And during the entire performance, your goal is to clarify your services, confirm your performance, show your client your meeting expectations that were set forth in your contract, and you develop the record that could be important in future claims against your firm.

So, the fact that emails are always a permanent record, you have to treat them appropriately. You don't be casual. You don't be accusatory. You don't admit to something. You're careful and consistent with the subject line, so that they can be properly retained.

And you don't use texting or instant messaging, or other systems that, by their very nature, are extremely casual, and they can create confusion. They can be taken out of context. So, it's a disappointment to us who have been advising firms for decades on communication and documentation, that these same firms are now so sloppy.

DAN BUELOW: Back in the day, you would lick a stamp and sign your name on something, and we're just not doing that anymore.

FRANK MUSICA: And you would have carbon copies of it.

DAN BUELOW: Yeah.

FRANK MUSICA: What happens, and I think a lot of firms don't realize this, is that you get a call and you answer that call. You don't do anything about documenting it. Somebody else is.

And that can be dangerous. I mean, we had a situation where an engineer was on a site and looking at the contractor was behind and was pouring concrete formwork and trying to move as quickly as possible. And the engineer was out there.

Left the site. While he's in the car leaving the site, he gets a phone call from the contractor saying, oh, you saw the formwork we did. If we can move that now, we can get back on schedule pretty quickly, do you have any problems with us moving it now?

And the engineer's in this car, and that's not what he looked at. And he said, do whatever you think's right. And that's it.

Well, when that collapse happened because they moved the formwork too soon, engineer had no documentation of that telephone call, but the contractor had documented it fully-- date, time, and that the engineer had authorized them to move the formwork.

So how do you get out of that? They've got the documentation. You don't.

DAN BUELOW: You get into this-- I mean, I'm thinking about so many different examples. We've seen a real rise, for example, in bodily injury claims, where you have a very sympathetic plaintiff and there's an auto accident and so forth. And one claim I'm thinking about where the civil engineer is notified about some accidents, and contacts the contractor and has a conversation with them about their responsibility around signage and so forth.

But nothing was followed up, memorialized in writing, right? And so of course it's one word against the other, and what they could have possibly have done to mitigate their exposure with some better documentation practices, I think, is an important point. We talk about emails-- well, emails are also a valuable tool and they are used frequently.

But they are, as we've discussed, a double-edged sword. But you have situations, Frank, don't you, where you have value engineering or substitutions you may not agree with. The worst response, often, is a tacit response, right? So, there's where you'd want to use your email to memorialize something. Would you agree on that?

FRANK MUSICA: Yeah, and that's one of the things that I think we're going to be seeing more and more problems with. The problems will show up in the next year or so. But because of the supply chain issues, there's a lot more requests for substitutions. And if firms aren't being paid to analyze it, aren't documenting it, aren't being paid to redesign if they need to accommodate the substitution, you end up with a problem.

You can't just allow a client and a contractor to say, yeah, let's switch out this for that. We'll save time. Or, we can't get that, it's going to take too long. There has to be a process built into that and it has to be carefully assessed and carefully documented.

DAN BUELOW: So, Frank, I'd like us to drill down on this and review some examples of a couple of bad or problematic emails involving design professionals. You presented a Willis A&E webinar for us a while back on this very topic, and you pulled out some examples.

And I got a couple here I'd like to run past you, to have you talk to us about this. In this first example, a client sends an email to the engineer that states, quote, "I'm concerned that the systems will fail in case of a storm surge. Please make sure they are protected," end quote. Talk to us about this email and possible unintended consequences.

FRANK MUSICA: I'm not sure when this happened in the course of the events. If it happened early in the design stage, or after design is finished. That makes a big difference. And how you respond to it would make a big difference.

Yes, the owner may very well have some concerns, but in a response to this, the engineer certainly can express a professional opinion which does not by itself jeopardize the firm's ability to defend itself if that concern is realized and a professional liability claim is brought against the firm. But I think, when you respond to something like this, you have to qualify your response.

You can't just say, yes, we'll watch out for that, or yes, we'll do our best to make sure it's protected. I think you have to state something like, while we design the systems according to existing codes and standards of professional practice, in an unanticipated weather event that standards have not taken into account, there may be some concern with storm surge damage.

I think that way, you're expressing a professional opinion and you're not committing to protecting it. During the initial design stage, the "Please make sure they are protected," is troubling, because that could really be interpreted during dispute as a guarantee that the firm understood that it would design beyond existing codes and standards to keep a volatile weather event from causing the disruption.

And you don't want to be in that situation where your response is seen as a, OK, we've got this. We'll take care of it. That could be seen as a guarantee.

And as we said before, the firm can be sure that this email will be discovered, and any response will be discovered because no email actually disappears. There's that entire industry of forensic email analysts who can scour digital information to find such an email.

So if you respond to the client or the client's representative with a professional opinion and the suggestion to the client that perhaps a client's actions are important-- that the client needs to take proper precautions to activate protection systems that maybe were provided by others during the design, or perform the kind of maintenance that would help to mitigate the danger of extreme weather events-- you know, again, I think any response has to be pretty specific that the system is designed to meet code requirements and recognize good design practices.

But there is always a possibility and in fact, maybe an increasing probability, that unforeseeable weather events could create problems beyond what the design was meant to handle. So, I think he can't just respond. Even though I think a lot of design firms would respond affirmatively, yes, we are thinking about that, or we are doing something about that, when in fact, you really need to qualify what you've been designing to.

DAN BUELOW: I also would stress, too, is that-- and I mentioned this earlier-- sometimes the worst response is a tacit response. You would have some firms that might not even respond to this, and that can be a real issue, too, to your point.

FRANK MUSICA: Because it's going to come up.

DAN BUELOW: Yeah. It's going to come up.

FRANK MUSICA: And if something happens, they're going to find that.

DAN BUELOW: And again, I think this is an example of where emails are an important tool, aren't they, in memorializing a firm's position or clarifying scope, and managing expectations and then just clarifying. Because somebody is going to see this someday, right?

FRANK MUSICA: I think that's right on, that you really need to respond with a clarification.

DAN BUELOW: Right.

FRANK MUSICA: This is what we designed to. There may be other factors that are involved. You need to be aware of that, client, and you need to take the proper precautions. You need to make sure that you're filing this in a way you can find it later.

But yeah, not responding to this is basically saying, don't worry about it. We've got it. And that's not what you want to do.

DAN BUELOW: Right. OK, so here's the next example of an email that could be a problem here. In this example, it's an engineer sends an email to the project team, OK. And so in that email, the engineer states, quote, "I have some concerns with the details for the hanging walkway. It seems hard to build, but probably will be OK on this project. We should definitely not reuse that detail in the future. It might create problems," end quote.

Frank, I would think it's safe to say that if there was a problem on this project, and if and when this email was discovered, it would be pretty bad news for the engineering firm.

FRANK MUSICA: This email brings up the tragedy of such proportions that it was the largest, non-deliberate structural failure ever-- the collapse 40 years ago in the Hyatt Regency Hotel in Kansas City, when the two overhead walkways collapsed, killing over 100 and injuring a couple hundred more. And this is basically what the engineer said when they did a cursory review of the shop drawings.

Yeah, there might be some issues, but let's go ahead with what the fabricator is doing with this. In that case, even the details that were planned would not have been adequate to keep those hanging walkways in place. It only met 60% of the load requirements and applicable codes.

So, for listeners who are too young to remember, investigators concluded that the underlying problem in that Hyatt collapse was a lack of proper communications between a design engineer and a steel fabricator. In that situation, the drawings were prepared by the engineer as a preliminary sketch. The fabricator interpreted them as finalized drawings. The design engineer failed to review the initial design thoroughly.

They accepted the fabricator's proposed plan, and not in writing-- a phone call. It was just a phone call without performing any necessary calculations or viewing sketches that would have revealed the flaws of that. And you can later say, oh, yeah, yeah. Yeah, I thought there might be something wrong with it.

But that's not going to help you. In the high case, the reports, the court testimony and all that, really looked at a feedback loop of the design team's unverified assumptions. Even having believed that someone else has performed the calculations or checked the reinforcements.

So just stating that you have this kind of a-- yeah, might be a problem. We shouldn't use it again-- doesn't solve that problem. And that problem in the Hyatt case was a disaster. The engineer, in that case, realized later on that even a first-year engineering student could figure out there was a problem with it if somebody had checked it, and his firm was determined to be culpable of gross negligence, misconduct, unprofessional conduct.

Lost the license. Never was able to practice again. So, this kind of email could be the smoking gun in any later effort to determine fault if the design failed in the incident that was referenced in the email.

One thing I think this also says is that designing something safely is one issue. Suffering the consequences can be far more than just an insurance payment. We insured the architecture firm in the Hyatt Regency collapse, and it was not determined to be liable.

There were claims seeking a total of $3 billion, which today is probably like $9 billion. And I think $140 million-- or multiply that by 3 in today's dollars-- was actually paid out. The engineer paid its insurance limits, lost license to practice. But when I spoke with the architect years later, it was clear that everyone involved in that design of that facility suffered from the memories of the collapse.

So, you know, that email may get you in trouble, but that collapse would get you into a lot more mental stress and more trouble. So, I think the lesson is not that it's inappropriate to express a concern in an email but expressing the concern but not taking action is unprofessional.

DAN BUELOW: And it's a great point, and I had mentioned earlier of that email that was found through discovery where one principal at a firm says to another, boy, Bob, we sure screwed up on this one, right? And as mentioned, this was case closed once the plaintiff attorneys got a hold of that email.

I think some general risk management advice would be, don't say that, right? Don't put that in an email. Go down the hall. Pick up the phone.

FRANK MUSICA: Right, exactly.

DAN BUELOW: Talk this through, but whatever you do—

FRANK MUSICA: --That's right.

DAN BUELOW: --Don't put this or something like this in an email. It's arguably, as we talked about, it's unprofessional, and it could be very damaging if and when it came to light, and/or is taken out of context. It's informal, and I think we come back to the informality around these emails, and that they're so easy to send out. That's something that we've got to be aware of.

FRANK MUSICA: Firms have to analyze what they're doing. They have to understand, well, maybe that wasn't the best design. But if it's something that could lead to an imminent collapse, you have to do something more than talk about it.

DAN BUELOW: Right.

FRANK MUSICA: But even if you talk about it, you don't document it. And one of the things we saw years ago, especially with engineering firms, is that they really wanted to improve quality. And they used the same kind of statistically based quality control system that Toyota used, and other manufacturers used, to increase their quality. And they would document whenever anything went wrong. And it could be anything from an invoice that was sent out improperly, or shop drawings that weren't reviewed in a timely manner, or designs that perhaps would cause a problem in the future. And they documented that as part of an effort, internally, to increase their quality.

And then they found out that that's all discoverable. So, there you are, documenting, over the course of time, that you screwed up. And you're just handing that over to a plaintiff that said, you know, obviously you knew you had problems, yet you did nothing about it.

DAN BUELOW: Yeah, everyone has to remember the simple fact that have never deleted an email in your life. And your emails and texts, by the way, are both discoverable and retrievable, as we've talked about. So, the specific

email, and what you're talking about, really, I think raises a very important point that design firms and all their staff need to remember.

And that is this-- it's one thing to admit you have a problem. But it's entirely different to take the blame-- to accept the blame. Hey, it's OK to say, you know what, there's a delay here. We recognize that.

Or, worst case scenario, there's a collapse. People got hurt. There's an issue here. We recognize the problem. We're going to collaborate to deal with this how we need to with our respective counsel and insurance partners.

That's one thing. But to say, we've screwed up, or to take this blame, is something that's completely different. And far too often, I find that and see that design firms are quick to take the blame. And I understand that design professionals take a great deal of pride and responsibility in the work that they do. However, they need to be careful of the premature mea culpas, right?

FRANK MUSICA: That's right. And that happens especially in critical situations where there's been a collapse, or an injury on site, and they go out there and they say, oh, we must have done x.

DAN BUELOW: I think it's important-- it's very important here, is that there's a very good chance that they are not entirely at fault, and that after the dust settles, there may very well be other mitigating factors and actors involved that contributed to, or even may be primarily responsible for the issue of the problem. And so that's something I think firms have to remember that.

And this is where emails can get them in trouble. And the second-- and I would say, most important point, really, from a coverage standpoint-- is that you may very well avoid coverage if you unilaterally accept fault without the consent of your professional liability insurance carrier. As the broker here, I like to really always stress that. And in fact, we had our recent Willis A&E survey-- which your group helped us with-- where we had 12 leading A&E professional liability carriers out there. Number one reason-- the number one reason carriers will deny coverage under their professional liability policy is failure to timely report. The second leading reason is that the firm settled without consent.

So, you have to remember that your insurance policy-- it's a contract, and like any contract, there are two parties to that contract and each party has certain responsibilities and obligations under that policy/contract. So, it's very important that firms-- they need to engage their professional liability carriers whenever they have a claim or potential claim, and do not settle a matter without the carrier's consent.

FRANK MUSICA: Yeah, often they'll do that simply because they don't want to offend the client. They don't want to end up having to be in a lawsuit with the client. This might be a minor problem. Let's solve the problem now, and then the problem turns out not to be a minor problem. They thought they took care of it, and what they did was really jeopardize their coverage.

DAN BUELOW: You voided something you paid a lot of money for, and I think the other reason, Frank-- I think you're right-- is, oh, this is under our deductible, or I don't want this insurance group to come in here-- or this

carrier-- to mess up this relationship. But when you're working with the quality of a carrier like CNA/Victor in their program, those claim adjusters are very well-versed and understand the importance of those relationships, don't they're? They're going to work with and collaborate with you.

FRANK MUSICA: Adjusters really want to solve a problem. But they don't want you to hide the problem from them. They want to be able to work with you to solve the problem.

DAN BUELOW: And they're entitled to under the policy provisions, right? It's in there in writing that you've agreed to. So Frank, I'm going to recap, if you've got anything to add to this discussion on emails here. But all documents of communications can become evidence. So, these emails, again, are discoverable. They're retrievable.

And be careful of taking blame without reviewing the situation without your counsel and your carrier. And remember, this is a business. As complex as this risk around emails can be, I think the simple understanding that everybody needs to be thinking about is this is a business, and you need to keep your emails professional.
And I think it's very important, and I keep coming back to this, is have the discussion with all your staff so that they understand this and these issues specific to emails.

FRANK MUSICA: Some firms are very wise in that they say, you cannot send an email out on a project without the Project Manager's approval of that language. It keeps the emails from floating around.

DAN BUELOW: To your point, though, I think that having a conversation around the importance of this in words are important. To wrap us up here, take us home on this discussion, Frank, talk to us about this documentation and document retention policies. What should a firm be keeping, and how long should they keep it?

You've touched on emails and photos and so forth. What's your general advice around document retention?

FRANK MUSICA: You know, I've seen many project files that I wish have been destroyed as soon as the project was finished. Some firms treat documentation as kind of a costly and painful process, especially as the project is closing down. And the project files might be a dumping ground for information that never should be kept.

Often, it's poorly worded communication, or the photographic evidence we talked about. You don't want someone to look in your files as a fishing expedition. I can go back to the guidance we offered a firm in the program 50 years ago.

In fact, we published the documentation and document retention article from 1972. We republished it in 2017, because it was still relevant. I mean, it was still the same thing. It suggested purging files immediately after the project is completed and having a set record retention policy for the firm that keeps the pared-down information for the period of the statute of repose, plus one or two years, because many statutes of repose have a claim extension period about that time.

But there's no hard and fast rules about how long the keep project files. Firms-- other records, employee records, contracts, building information-- often have to meet specific standards, but most firms keep project records until at

least the statute of repose. We have always suggested that a good set of project records be kept in using the applicable statute of repose, and having a policy based on purging records, and then keeping them for that period-- probably makes sense.

Statutes of repose is different from statutes of limitations in that they provide an absolute cutoff. Keeping it for the statute of repose often isn't the only obligation you have. They limit the total time period during which a design firm is exposed to liability. But they don't apply to every service or design a firm provides, right?

They were originally created to provide benefits to construction contractors, so they usually only apply to professional services when those services lead to actual construction-- improvements to real property. Some statutes of repose never cut off the right of a public entity to bring a claim. In most states, a client can negotiate either an extension of that period or eliminate it totally.

So, if you're relying on that, that might not work. And some firms have contractual obligations to keep project records for a certain period, but if there's no unusual contractual obligations, having a system of purge of records, of extraneous information when the project is complete, and having a system to evaluate the longevity of records once the statute proposed runs, is important, because the records retention policy is actually a record destruction justification.

Now some states do not have cutoffs of exposure that are realistic. New York's an example, so a firm doing a project in New York has to be careful. And if you have a policy, you have to follow the policy, right? A firm can never be casual about enforcing its policy once it has it in place.

And of course, there's also the issue of, when a claim comes up, you can't get rid of the information, right? Even if it's after that period, because of the spoliation of evidence-- destroying records once the claim is filed-- can lead to serious consequences for firms. So, I think there's a lot of issues involved.

But paring down the records, keeping them for the statute of repose plus a couple of years, probably make sense. But you've got to look at where your project is, who the client is, what the client requires, and all that, because you could be in a situation where you're destroying the information and violating the contractual obligation or keeping the information beyond what's reasonable.

DAN BUELOW: Great points. That's what I always feel, is that at the end of the day, a firm really needs to have some protocols in place and follow those protocols. At the end of the day, if you have sound, good, consistent documentation practices, beginning with your contract, that's actually going to be a benefit to the design professional in the event that there's a claim done.

So, get rid of the extraneous stuff. I think you hang on to the stuff that matters in your contracts-- ideally, that you have a good, consistent practice, so that you're able to demonstrate that, in the event that there is a dispute. It is probably going to go a long way in getting you out of trouble.

FRANK MUSICA: Starting back after the Twin Towers collapsed and people were worried about security, we always told policyholders to ask their clients what they cared about with security, then to document that. It's true now. It's true with issues that arise now that you've got to communicate with your client. Client, I want you to tell me what specific issues you want us to design to.

We're going to design to these codes and standards, and we're putting that documentation in the file or in our contract so that in the future, they know that we're designing to these specific codes and standards. But if you have other concerns, express them now so we can either put that in our contract, or in a contemporaneous document with the contracts. So, in this age of climate change, that becomes very important again.

You've got to get that client to say, yes, I am concerned about rising sea levels, or I don't care. I want you to design to the minimal codes and standards right now.

DAN BUELOW: Right. It's going to be cheaper for them to do that often, is to rely on these archaic codes. But to your point, you want to have something in writing that's going to get them to give them informed consent, essentially, to the design professional, but to the design professional to also memorialize that more resilient design might be what they're recommending.

FRANK MUSICA: Right. You can say, look, I know three years from now, that code might change, or I know the federal government is using these codes that the state hasn't adopted, or that jurisdiction over there is using these codes. And I could design to those higher standards if you want me to. And here's the advantage to you.

If you don't see that as an advantage, and you don't want me to do it, we've got to document that right now, because I don't want a future purchaser or a user who's injured to come back and say, oh, you should have known. Because you told me to only use the standard, and that's the standard of care I have to meet right now.

DAN BUELOW: Great way to end the conversation here, Frank. I want to thank Frank Musica joining us. Frank, you were top of my list here of my many special guests here that wanted to have you on this program. And especially, on this specific topic here around communication documentation.

Thank you for joining us, Frank.

FRANK MUSICA: Happy to be here.

DAN BUELOW: And thank you for joining us for another program here of "Talk to Me About A&E." Talk to you soon. Take care.

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