Beware the risks of recorded conversations

By Colleen M. Palmer

The Risks of Recorded Meetings

We have long cautioned design professionals that written documents are generally discoverable, absent an exception to the disclosure requirement such as attorney-client privilege. Advanced communication platforms allow us to conduct business while maintaining appropriate social distancing. They should be used mindfully though, especially when recording conversations or meetings that previously would have been memorialized solely through written meeting minutes, if that.

These platforms bring many benefits to businesses, enabling many to seamlessly maintain their relationships and business activities under very challenging circumstances. However, design professionals should be mindful that the recordings of these meetings are discoverable in a litigation situation so they should weigh the risk with the desired reward of recording the session. If a recording is made, there must be a heightened awareness among the participants. Professionals should stick to objective facts and be particularly careful if discussing controversial issues and opinions. Statements that may be construed as an admission of liability, or as critical of subconsultants should not be made. To paraphrase what we once said about e-mail, do not say anything on a recording that you would not put in a written letter.

Privacy issues can also arise when recording meetings. In some states, it is mandatory to inform participants and obtain consent if calls are recorded. Design professionals should clearly state at the beginning of all such meetings that it is being recorded and require everyone to acknowledge the same. The firm might also want to include language, if allowable, in its employee handbook that employees consent to recording of calls and other meetings.

What Does Experience Tell Us?

In recent discussions with three attorneys with extensive experience representing design professionals, there was unanimous agreement that recording meetings and conversations poses significant risks.

Sam Muir of Muir Law in Oakland, California cautions that if firms were not recording in-office communications by video or audio pre-COVID-19, they should not do so now:
“Such recordings are definitely discoverable and may have a chilling effect on the discussion. The recordation of any discussion (in person, Zoom, phone calls, Microsoft Teams, etc.) should never be by a video or audio recording, but only as a follow up memo or e-mail stating: ‘here is a summary of what we discussed’. Couple the chilling effect with the fact that the recording can, and will, be turned over to our adversary if there is a claim, and it is a no brainer to avoid recording.”

Ross Ginsberg of Weinberg Wheeler Hudgins Gunn & Dial in Atlanta, Georgia agrees:

"Personally, I think creating a record of conversations that have an informal tenor is a bad idea. As we all know well, the most urgent pleas to project personnel to be careful in what they e-mail do not accomplish the objective of avoiding the recordation of regrettable thoughts. I would guess that people will be even less guarded when they begin to engage in conversation. So, I think that there is significant downside."

In addition to the risks of recording informal meetings, there are dangers of recording conversations discussing problematic projects. Attorney Ginsberg continues: "From a practical perspective, if claims or litigation are being discussed, I would have concern that communications in anticipation of litigation and attorney-client communications may be recorded. I would question how such communications could be marked and segregated in order to avoid inadvertent production. Therefore, both discussions about anticipated or pending litigation and discussions including in-house lawyers or retained counsel should be subject to a procedure that identifies as privileged and segregates recordings of such conversations. If this cannot be accomplished then I would not record such meetings."

Attorney Ken Walton of Lewis Brisbois in Boston, Massachusetts echoes the aforementioned concerns: "Recordings are a bad idea. In short, there is simply no reason to create an audio record of conversations that could be used against you at a later date."

The numerous communication tools available to design professionals should be explored and used carefully. While we acknowledge such technology is valuable in facilitating communication in an era where in-person meetings are not possible or impractical, design professionals should proceed cautiously.

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Colleen joined Beazley in December 2007 as an A&E Risk Manager and is based in the New York office. Before joining Beazley, Colleen was a practicing attorney in Boston, MA, where she focused on assisting architects and engineers.
She specialized in providing risk management services to design professionals on a nationwide basis, including conducting risk management seminars and advising on contractual issues.
Colleen earned her Bachelor of Science degree in Biology from Cornell University and her Juris Doctor, cum laude, from the University of Miami School of Law.

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