

EXAMPLE DIALOGUE #1

Design Professional (DP) with a Client Who Expects Perfection

Scenario: This is the first meeting you're having with your client since you were informed you won the job. The purpose of the meeting is to go over the first draft of your proposed scope, schedule and budget. The meeting goes relatively well, with both sides needing to do a little more refinement and follow up. In your opinion the client chopped too much off your scope and budget, especially in the area of quality reviews, and had a much shorter timeframe in mind to complete the project than you had envisioned.

DP: Before we adjourn I think we need to discuss your expectations for the quality of our deliverables, especially the construction documents.

Client: Well I've got a very tight budget; virtually no contingency will be in the construction budget. So I expect error-free plans and specs. We don't tolerate mistakes. Everyone should be accountable for their mistakes, don't you agree?

DP: Basically you're asking me to be perfect – to deliver a perfect set of plans and specs. As you and I both know, there is no such thing as a perfect set of plans. I think you'd also agree that no matter how much time and budget there is for QA/QC there are almost always conflicts, discrepancies and errors that are discovered during construction.

Client: That's right, and I'm sick of it. It's time for the cost of fixing those problems to rest with the designer who created them!

DP: So you agree that you never saw a perfect set of construction documents, and many projects have change orders that may be due in part to errors or discrepancies on the plans?

Client: That's right.

DP: Well there are a lot of reasons for that. First, a design and construction project is in a state of constant change; things like owner-directed changes, unforeseen conditions, dramatic price changes in the cost of materials, new standards and codes, new technologies, underground utilities not being where they were supposed to be, contractor requests for deviations from the plans and specs, etc. Second, each project is unique; it is a virtual prototype. As designers we don't have the luxury to experiment and design something over and over again until we get it near perfect. That is something product manufacturers do, but not us. Third, there is a steep price for perfection or near perfection, and owners don't want to pay for it and I can't blame them. If we, as designers, had a limitless budget and schedule we could probably give you plans that were error free or very close to it. However, that would cost you a lot of money and time, and would probably not give you much of a return on your investment.

Client: Wait a minute. Are you trying to get more fee out of me?

DP: No. My point is that you wouldn't want to pay me what it would take to assure you a near perfect set of plans; neither would you have the time it would take. Take this project, for example. You just took some scope, fee and schedule away from what I felt I needed to do a good job, and some of that scope was quality review checks. But then you say you expect me to deliver a perfect set of plans. How do you reconcile that?

Client: OK. I'm not asking you to be perfect. I understand that stuff happens and it might not be your fault. But what I want is for you to pay for costs you cause because YOU screwed something up – when the blame is yours.

DP: There's a long-standing principle that has developed in the courts in our business called the "standard of care". And I think that it might be what you're getting at. It says that an engineer should exercise the same degree of care, diligence and skill as another reasonable design professional would have acted under the same or similar circumstances. If the engineer does not exercise this applicable standard of care, he or she is considered to be "negligent". No reasonable person would suggest that we shouldn't be held accountable if we're negligent.

Client: I'm not sure that's what I mean. I've heard other consultants talk about this vague thing called "negligence". But I can't get anyone to give me a definition of it other than "failure to meet the standard of care". That's not good enough for me. What I want is an assurance that you're going to stand behind your work and reimburse me for any costs I incur that were caused by your errors.

DP: Well the standard of care recognizes that we aren't perfect and we're allowed to make some level of mistakes.

Client: So what's that level?

DP: It's different on every project, and is based on whether we acted in a manner consistent with the standard of care.

Client: You're just going in circles now. You can't define it any better than anyone else has. Here's my standard of care: "You make a mistake, and it is your mistake, you pay me for any costs it might cause me."

DP: I won't agree to that, and I'm not insured for that. It is an unreasonable request, especially in light of the cutting you just did to my scope and schedule.

Client: What do you mean you're not insured for that!? We require all of our consultants to carry errors and omissions insurance.

DP: Well there is no such thing as "errors and omissions" or "E&O" insurance despite the fact that some people call it that. We carry "professional liability" insurance which covers our negligence. It covers us if we fail to meet the professional standard of care I discussed earlier. It does not cover us for everything you might call an "error" on our part. Also, all engineers' professional liability insurance policies come with large deductibles that require us to pay the first dollars of any claim. So what you think of as insurance money is really a lot of my own money.

Client: Insurance or not, I expect you to be responsible for your errors.

DP: We will be responsible. If we and we alone make a mistake on the plans, we'll most likely fix the plans on our own nickel; but we won't necessarily pay for a contractor change order that you might have to pay for. Again, we're not perfect; your schedule and budget does not allow us to be perfect; and the law of the land doesn't expect us to be perfect. Can I at least convince you to find more contingency for your construction budget to handle the normal course of changes, design clarifications, unforeseen conditions and what have you?

Client: Maybe that's possible. But you better not assume that a big chunk of it is dedicated to your errors.

DP: It doesn't need to be dedicated to anything other than the inevitable changes and cost overruns that you and I see every day in our business on construction projects.

Client: I can probably do that. Are we done now?

DP: Not quite. I can't go forward on this project if you still believe that it is only fair for me to pay you for any costs you incur that may be the cause of an error you believe I committed.

Client: OK. Let me talk to our in-house counsel about some of the concepts you discussed and I'll set up another meeting.

Notes:

Regardless of what the ultimate outcome is of these discussions, you have at least adjusted the expectations of your client. If problems and cost overruns occur on the project you will be able to reference this meeting and remind your client that he/she understood that a perfection standard is unreasonable.

This same discussion can be had if you are responding to contract language that holds you to an unreasonably high standard of care and expects you to pay for all errors you make. It is not uncommon to find client contracts that contain red-flag provisions that you need to negotiate: your work will conform to the "highest standards of the engineering profession"; you are to deliver "error-free plans and specifications"; and you will pay the client for "all costs associated with your errors and omissions". These are just a few examples. There are other ways the contract can elevate the expectations for your performance.