

EC RISK REVIEW

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Communication Key to Avoiding Claims

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

The quality of communication between you and your client is perhaps the single greatest determinant in whether your project will result in a claim. In fact, a study of more than 17,000 closed claims published by insurer XL Design Professional showed that communication failures were a contributing factor in 27% of all claims.

Today, when projects are scarce, profit margins are thin and client expectations are high, frequent communication is more important than ever. Fortunately, you can anticipate and avoid many potential project upsets by correcting the factors that lead to miscommunication between environmental professionals, their clients and other members of the design and construction team. The need for effective communication starts before the beginning of the project.

Communicate Early

Never overestimate a client's knowledge of the environmental services you intend to provide on his or her proposed project. Indeed, don't assume even a sophisticated client understands the full scope of professional services provided by an environmental firm. It is your responsibility during the earliest stages of bidding and negotiations to explain to your client exactly what services you will perform and – equally

important – what services you will *not* perform on the project for the negotiated fee.

Likewise, make it clear during the earliest stages of negotiations that no environmental firm has ever executed a perfect set of plans or ever completed a project without error or omission. Similarly, there are no foolproof materials or systems, despite any guarantees or warranties given by equipment manufacturers. Clear communication can make sure your clients have the information and expectations they need to understand your responsibilities and liabilities regarding your scope of services.

Clients, especially those new to the design and construction process, often get upset when you add items to your specifications after the initial work scope and budget is accepted. They may perceive add-ons as a sign of incompetence or even an unscrupulous attempt to increase your fees and profits. Make it clear up front that your estimates and specifications are based on your opinion of probable cost and subject to modification once the project commences. Your client needs to be educated to expect reasonable changes and budget revisions as a normal part of the design and construction process.

Communicate Often

All important design and construction issues need to be communicated clearly before you accept and begin a new project. From the earliest conceptual stage, through the refinement of your work scope, through the negotiation of your contract, through the development of final designs and into construction, make sure you communicate every step of the way.

Also make sure this communication is two-way. Have your client clearly explain his or her desires, needs and expectations. Discuss the client's ability to handle a few

surprises in budget and schedule. Set up a formal communication channel between you and designated client representatives so that any errors, omissions, delays, changes and other problems and surprises are conveyed quickly and dealt with swiftly and constructively with the intent to fix the problem rather than fix the blame.

Similarly, make sure communication channels are open with the contractor, subconsultants and other parties important to the project. In fact, it's a good idea to have all parties attend a pre-construction meeting to review plans and procedures as well as clarify roles, expectations, communication channels and methods of reaching problem resolution. It is really quite amazing how much a little open communication can do to get a project off to a smooth start or help get it back on track if a problem occurs.

Put It in the Contract

Every important decision made by you and your client during negotiations needs to be documented in a written professional services contract. Discussing your areas of responsibility and limits of your liabilities is not enough. Even a hearty handshake won't do. Formalize your agreement in a written and signed contract.

Work with your legal representation to draft a solid contract specifically written to reflect your practice and your role on the particular project. You can start with recommended contract language provided by your industry associations. As your professional liability specialist, we can provide additional resources and assistance in helping you draft a fair and equitable contract.

If you are asked to sign a client-written contract, ensure it is thoroughly reviewed by your attorney. Again, we can provide advice as well, particularly regarding the insurability of the client's contract language. Any liability you agree to take on contractually for which you would not otherwise be responsible can be uninsurable.

Communicate During the Project

Too often, once the professional service contracts are signed, communications diminish. Parties do not take the time to sit down and correspond on a regular basis over the life of the project.

To keep lines of communication open and encourage frequent feedback, schedule regular meetings (preferably face-to-face) with all key parties to the project. On large jobs, consider weekly project review sessions with representatives of the contractor, the client and the other environmental and design consultants involved. Smaller projects may not require such frequent formal meetings involving all parties, but regular communication is crucial nonetheless. These sessions can pinpoint jobsite, design and construction problems before they become serious. They also foster solutions satisfactory to all involved parties.

Also, plan weekly internal conferences among all key members of your staff working on the project. Have staff convey their progress since the previous meeting. List problems that need resolution and make requests for whatever information is necessary to solve them. Progress reports with action items serve as effective diaries of the project that can be reviewed after project completion – or when a project dispute arises.

Clients will find progress reports to be valuable as well. Reporting regularly to your clients on the progress of their projects can avoid surprises and form a bond of trust that will keep you working together, even when adversity strikes. Nothing demonstrates a professional approach as effectively as well-planned and timely transmissions of clear and honest information.

Confirm It in Writing

Even when verbal communications are frequent, memory failure and misunderstandings can cost huge sums of money and precious time when disputes or litigation result. No one remembers all the details of telephone calls, group teleconferences or face-to-face conversations. It is important to record in writing all important information and decisions that concern or influence a project.

Memorialize meetings and telephone conversations with clients, subconsultants and contractors. Require that all discussions involving key project decisions are documented by brief memoranda. Have clients formally approve such memoranda as accurate and complete. These memoranda and logs are particularly useful in the event of a dispute or claim. They are invaluable if there is a change in the project team and a new member needs to be brought up to speed with the current state of affairs.

It is a good idea to have all of your firm's written correspondence regarding projects or plans reviewed by a senior member of your firm – a project manager, department head or principal – before it is sent out to the client, contractor or other external parties. An internal review provides a crosscheck to discover misstatements and avoid misunderstandings. For sensitive correspondence, a legal review by your attorney should be required as well.

Email and Other Electronic Communications

It is amazing how email, text messaging, and other electronic communications have taken the place of a phone call, an express-mail package or a face-to-face meeting. While such technology has certainly been a boon for productivity, it can also be a bust when it comes to formalized communication. Emails and text messages are easily forgotten, deleted, misfiled or ignored. We often assume someone has received an electronic message, but it may go unopened or otherwise be lost.

It's a good idea to formalize your company electronic communications policy. It should address not only email and text messages, but also extranets, e-conferences, teleconferencing, webinars, news groups, bulletin boards and any other electronic media being used. Make sure all employees are aware of and adhere to the policy.

Keep electronic correspondence regarding each project filed in an orderly manner within your computer network. Back up all critical emails and documents in printed hard copy or on separate electronic media such as external drives, CDs, or remote servers. Use the "return receipt" email function to confirm your message has been received and opened. Follow up quickly when your electronic messages appear to be ignored, misdirected or lost.

Communication the Key

It seems so obvious: clear communication is a vital key to a successful project void of disputes and claims. Yet at the root of litigation between environmental professionals, their clients and other parties to the design and construction process are misunderstandings based on the failure to communicate.

Effective communications should be a core competency of any environmental firm that strives to understand and meet the needs of its clients. A program of regular communication helps ensure the client understands the true scope and extent of your services. With expectations properly communicated, documented and verified, project upsets can be addressed quickly, calmly and effectively with minimal negative impact on time, costs, reputations and relationships.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.