

Landscape Contractor's, Does Your Work Satisfy the Industry Standard of Care?

Part One: Contract Documents

For landscape contractors not familiar with the legal term “standard of care”, you need to understand the meaning and legal implications of NOT performing to the professional standard of care expected and common within the landscape contracting industry. Wikipedia defines the professional standard of care as “In certain industries and professions, the standard of care is determined by the standard that would be exercised by the reasonably prudent manufacturer of a product, or the reasonably prudent professional in that line of work. The standard of care is important because it determines the level of **negligence** required to state a valid cause of action.

This definition means if you perform landscape contracting services and your work product is found defective, deficient and or results in personal injury or property loss, you can be sued and found guilty in a court of law. The financial settlement will depend on the severity of the accident, property loss or injury. If you don't think a lawsuit is a concern to your business, then you are most likely a candidate for a future lawsuit. Understanding your contractual and legal obligations as a licensed professional landscape contractor is paramount to protecting yourself and company from future legal action.

As a consulting C-27 California landscape contractor, one of my consulting services is as a landscape expert witness for plaintiff and defendant attorneys. In that capacity, I have witnessed many projects where the landscape contractor failed to meet simple industry standards that ultimately resulted in costly lawsuits that could have been avoided. This is the first article in a series of publications addressing landscape contracting standard of care and common landscape contracting deficiencies, how to correct the problem and avoid a costly lawsuit.

The Contract:

As an expert witness, the commonality in every landscape case evolves from the failure of the landscape contractor to have executed in industry approved written contract. By not having a thoroughly written agreement, the contractor is vulnerable to a variety of client complaints about what was or not included in the project scope of work. As the landscape professional, unless there is a landscape architect or general contractor, the Client typically looks to the YOU, the Landscape Contractor as the professional and expects YOU to advise them on what is needed for a given project. It is incumbent upon you to take the time to discuss and educate your Client about the project. You are responsible for

providing the quantities, details and specifications that allows the Client to make an informed decision.

Don't assume your Client understands everything you tell them and do not rely on your or their memory about what you may have said. If you are a member of a trade association, such as the California Landscape Contractor Association, (CLCA) you can easily go online and purchase a standard Residential Landscape Home Improvement Contract, a Commercial Landscape Construction Contract, a Landscape Maintenance Contract a Landscape Subcontract Agreement and a Change Order form. The following are excerpts from a CLCA residential landscape contract.

- 1) The date, the parties to the contract, your name, contractor license number, telephone number, business address, the client home address, project address, work address, phone numbers and email address.
- 2) A legal description of the lot and tract number.
- 3) Who the notice of cancellation may to be sent to (usually the contractor address).
- 4) A description of the project and significant materials to be used and equipment to be installed.
- 5) Additional information, exclusions or addendums.
- 6) Attachment to the contract may include:
 - a) Shop drawings with notations as specified on shop drawings
 - b) Plans, details and specifications governing the Contractor's work provided to the Contractor by the Client before execution of the Agreement.
 - c) Notice of commercial liability insurance.
 - d) Notice of workmen compensation insurance.
 - e) Specify any other documents and attach to the contract.
- 7) Stipulate the Contract Price:
 - a) Total contract price.
 - b) Finance charge (if any)
 - c) Down payment (if any)

A common mistaken practice are large down payments, this is usually a signal of a contractor in financial distress, or ignorant of contracting law. A down payment may not exceed \$1,000 or 10 percent of the contract price, whichever is LESS.

- 8) Provide a schedule of progress payments.
 - a) Work or service performed = amount due on completion
 - b) The schedule of progress payments should describe in detail each phase of work including the type and amount of work or services provided in each phase along with the amount of the progress payment for each defined phase.

Another mistaken and illegal practice is collecting payment for work not completed or materials not delivered. You can require a legitimate down payment.

By providing the information above in a contract, the Contractor can clearly define the project scope of work, which will prove invaluable in a lawsuit.

Communication

Everybody is different, some Client's want you to do everything with little or no involvement on their part, while other Clients need constant hand holding, they are out there watching everything taking place on a daily basis. Regardless of the Client interaction, you should frequently make the effort to communicate with the Client throughout the project. Don't assume everything is fine just because they have not spoken with you during the project, which can be a fatal error on your part.

Communication is vital from the day you first meet with the Client to the project completion. Explaining each construction phase, timing and coordination displays your knowledge and professionalism that instills confidence within your Client and prevents misunderstandings and additional work. Today's technologies make it an easy task to communicate and store the communication through many digital devices.

Change Orders

As the project progresses, Clients frequently request changes to the work. Sometimes the changes are not substantive or minor, without changing the scope of work. Often though, the request is not minor, it might require going back and making substantive changes in the field that were not part of the scope of work. Managing changes to the scope of work requires three important components. First, you must already have a thoroughly written executed agreement that clearly defined the project scope of work. Secondly, you must provide immediate and effective communication explaining what the contract defined as included within the scope of work so the Client understands why their request is EXTRA and not contract work. Lastly, you must provide a written change order BEFORE you provide Client requested extra work. A Contractor providing extra work without a written change order is at risk for not being paid as the Client can claim they never approved the extra work.

The change order should incorporate of the terms of the original contract into the change order; it becomes part of the original agreement. CLCA provides a standard change order form for landscape contractors. The CLCA form includes the following information:

- 1) The project name, date, location, owners name, date of the original contract and change order number.
- 2) A section identifying the name, address and information pertaining to the contractor who will perform the work specified in the change order.

- 3) A section identifying the name, address and information pertaining to the person (Client) responsible for authorizing the work specified in the change order.
- 4) A description of the changes in work or scope of work specified in the change order.
- 5) The increase or decrease in contract price for the proposed work and a statement of when payment is due for the proposed change order.
- 6) If the work is going to lengthen or shorten the project duration, state the number of workdays that will be affected by the change order.
- 7) State the existing contract is incorporated into and made part of the change order and the change order is governed by the original contract to the extent it is unchanged.
- 8) Include a signature block for the Contractor performing the work, license number and date.
- 9) Include a signature block for the individual (Client) authorizing the work and date.

Extra work is a recurring contract issue in most lawsuits mainly due to the Contractor failing to take the time to communicate with the Client and provide a written change order. Never assume a verbal discussion in the field substitutes for a written change order document. Avoid misunderstandings that can lead to an upset Client and potential lawsuit. Taking the time to execute a written change order displays your knowledge and professionalism, while securing Client authorization for PAYMENT of the extra work.

Conclusion

As a professional landscape contractor, the law holds you to a higher standard of care for your work product and conduct. Lawsuits from Clients often center on misunderstandings about the scope of work and extra costs they never agreed to. Having written industry approved contract and written change orders when an Client requests extra work provide the documentation required that help prevent lawsuits or provide an affirmative defense when a lawsuit occurs. Lawsuits frequently occur due to poor communication, leading to Client irritation and frustration. Effective communication combined with written documentation is an effective tool to minimize Client negative emotional buildup that can turn into a costly lawsuit.