

SLEEP WELL

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CERTIFIED MASTER INSPECTOR®

A HOME INSPECTOR'S GUIDE TO MANAGING RISK

SECOND EDITION



SLEEP WELL: A Home Inspector's Guide to Managing Risk

Second Edition

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Introduction

Inspectors often worry about getting sued so much that they can't sleep at night. There is risk in being in the inspection business. There is risk in being in any business. Life is a risk. What matters is how you manage those risks.

I personally love risk. I love risk because, most often, the profits generated by taking those risks far offset the costs of managing them.

This book will show you how to manage the risks that naturally come with being in the inspection business. Follow the advice within... and sleep well.

Incorporate or Form an LLC

Every home inspector should form a corporation or limited liability company (LLC) for his or her inspection business. The reason for this is that in Western legal systems, corporations and LLCs are treated as entities that are separate and distinct from their owners. Therefore, the owners of an entity are not personally liable for the debts of the entity. This book assumes you have already incorporated or formed an LLC.

Note: I realize that an LLC is technically a type of company – not a corporation – so when I use the word “corporation,” I’m referring to both.

So, you formed a corporation or LLC. Now what?

Limited liability is an inherent purpose for incorporation; however, this protection is not absolute. Employing a remedy known as “piercing the corporate veil,” a court may disregard the separateness of a corporation or LLC when failure to do so would bring about an injustice.

Typically, courts will not allow the corporate veil to be pierced, except in certain factual circumstances. Courts consider a variety of factors to determine whether the corporate form should be disregarded, including:

1. whether the corporation is operated as a separate entity;
2. commingling of funds and other assets;
3. the failure to maintain adequate corporate records;
4. the nature of the corporation's ownership and control;

5. the absence of corporate assets and under-capitalization;
6. the use of the corporation as a mere shell;
7. disregard of legal formalities; and
8. diversion of the corporation's funds or assets for non-corporate uses.

Generally, if an entity looks like it is not the alter ego of its owner(s), the courts will treat it as a separate entity. While every case is different, there are steps an inspector may take to reduce the risk that a court might pierce the corporate veil of the inspector's business entity.

The following strategies are recommended:

1. Obtain a separate Employer Identification Number (EIN) or Taxpayer Identification Number (TIN) from the IRS. Corporations are required to do this, but LLCs with a single owner are not because a single-member LLC owner may use his or her Social Security Number. Nevertheless, we recommend that single-member LLCs obtain their own separate EIN.
2. Open a separate bank account for your corporation or LLC.
3. Do NOT mix personal money and business money.
4. Do NOT pay personal expenses from a business account.
5. Do NOT pay business expenses from a personal account.
6. File the required annual report with the Secretary of State in your jurisdiction.
7. File the required tax returns for your business.
8. Title business property in the name of the entity.
9. File business property tax returns, if required by your state/province.
10. Prepare minutes of meetings of shareholders and directors (for corporations), or minutes for annual meetings of members (for LLCs).
11. If the corporation or LLC has more than one owner, make sure there are written bylaws (for a corporation) or a written operating agreement (for an LLC).
12. Keep licenses and insurance in the name of the entity.

13. Make sure the public knows your business is a corporation or LLC. If a customer knows he or she is doing business with a corporation or LLC and voluntarily chooses to do so, the customer is not in a good position to ask a court to pierce the corporate veil. On the other hand, if the customer has no knowledge of the existence of a separate entity, a court may determine that equity requires it to pierce the corporate veil. Therefore, the wise inspector puts the public on notice by including “Inc.” or “LLC” on the inspector’s website, advertisements, forms, and business cards.
14. Make certain that when you sign your pre-inspection agreement or other legal documents, it is clear that you are signing as a representative of your LLC or corporation rather than in your own individual capacity. More on that later.

If you think this is all just abstract legal theory, you might read the opinion of the Indiana Court of Appeals in *ABC Home & Real Estate Inspection, Inc. v. Plummer*, 500 N.E.2d 1257 (Indiana App. 1987). In that case, the inspector’s corporation never issued stock, the inspector advertised himself as the owner of the business, and the inspector kept his contractor’s license in his name rather than in the corporation’s name, so the trial court determined that the inspector’s corporation was a sham and was the mere alter ego of the inspector. The inspector appealed, but the Indiana Court of Appeals determined that the trial court properly pierced the corporate veil, and the inspector was personally liable to the home buyers who sued him.

The Importance of Advertising the Corporate Structure of Your Inspection Business

You did the smart thing. You formed an LLC or S-corporation for your inspection business because you know it can help protect your personal assets in the event of a lawsuit. Now what?

You must understand one thing: forming an LLC or S-corporation is not foolproof. A court may disregard the separateness of the entity and may pierce the corporate veil if it finds that upholding the separateness of the entity would be unjust.

One key factor a court will look at is whether the plaintiff – your former client – knew he or she was dealing with an entity, rather than you personally. That’s why it is critical that you make sure your business cards, website, marketing materials, and contract forms all show that you are doing

business as an LLC or S-corporation. If you form XYZ Inspections, Inc., for your business, but your contract just has your name on it and no mention of your corporation, your clients have no way of knowing that they're dealing with a separate entity, and a court will hold you personally liable every time.

In addition to making sure your clients know that they're contracting with an entity and not you personally, consider giving yourself an appropriate title to emphasize that point. If you formed an S-corporation, you would normally refer to yourself as its president. If you formed an LLC, you could refer to yourself as the manager or president. In either case, you could use CEO, but be cautious about that because it could be construed as a representation that your entity has more than one officer when it does not. And if your inspection business is a one-person operation, a jury might feel that naming yourself the CEO was pretentious.

The bottom line is that you should make sure your clients know that you're doing business as an LLC or corporate entity, and make sure they know it **BEFORE** you do the inspection. If your clients think they're contracting with you personally – because that's what your written agreement says – you can't change that after the fact.

How to Sign a Contract on Behalf of a Corporation or LLC

The main benefit of doing business as a corporation or LLC is the limited liability it affords. However, the doctrine of limited liability protects you only if your customers know you are doing business as a corporation or LLC. This is why we encourage inspectors doing business under the umbrella of an entity to print "Inc." or "LLC" on their business cards and all their marketing materials and business documents. To avoid confusion, an inspector doing business as a corporation or LLC should also execute all legal documents pertaining to their business in a way that makes clear that they are not signing in their personal capacity.

Today, corporations are generally managed by a "President" or CEO. Therefore, a proper signature on behalf of a corporation might look like this:

XYZ Inspections, Inc.

By: _____

President

An LLC is typically managed by one or more managers. Therefore, a proper signature on behalf of an LLC might look like this:

XYZ Inspections, LLC

By: _____
Manager

Always remember that in order to preserve the limited liability an entity affords, you must make sure your customers understand that you and your entity are two separate things. Signing legal documents as explained above is one simple way to do this.

Asset Protection for Inspectors

An asset is anything of value in your name, such as a house, a vehicle, your business, and even your bank account. Unfortunately, if you are successfully sued by someone who is unhappy with the results of home inspection that you performed — regardless of whether the lawsuit has merit — attempts will likely be made to tap some of your assets as compensation if you wind up on the losing side. In order to protect your home and personal property from being exposed to such liability, along with your business assets beyond your E&O insurance, it's important to safeguard all your assets through a collection of techniques known as asset protection. Taking some of these urgent precautions will ensure that, in the event that you lose a lawsuit brought against you and your inspection business, your home, personal vehicle and other personal property will be exempt from garnishment, repossession or seizure. It will also provide you with the opportunity to rebuild your business.

Approximately 50,000 lawsuits are filed daily in the United States, which equals one lawsuit for every 17 Americans, annually. In professions that are predisposed to litigation, such as home inspection, medicine, law and business, the chances of being sued are considerably higher, although unscrupulous opportunists may target anyone who they perceive as having deep pockets. And there are plenty of ways besides litigation that unprotected assets can be taken away, such as through identity theft, divorce, death, healthcare costs, probate, auto accidents, home fires, floods and bankruptcy, to name a few. Any of these events can ruin someone's finances if they lack proper asset protection.

The first things every new small business owner should consider include the following:

- **Incorporate.** Incorporating a business limits the owner's personal liability in lawsuits filed against the business because a corporation or LLC is considered under the law to be a separate legal entity from its owners. However, the "corporate veil" can be pierced in certain circumstances, such as when it can be proven that the business owners did not obey corporate formalities.
- **Use a family limited partnership (FLP).** Family limited partnerships are specially designed partnerships that consist of general and limited partners. The FLP allows an individual to maintain full control and enjoyment of their property while separating themselves from actual legal ownership. A creditor of a single partner cannot reach the assets owned by the partnership because the partnership, as an entity, owns the asset. This does not prevent the partnership from being sued, but it will keep certain assets separate and unexposed to legal liability or claim.
- **Purchase general liability (GL) and errors and omissions (E&O) insurance.** The cost of insurance premiums is generally small compared to defending a lawsuit.
- **Keep major assets encumbered.** If you own property free and clear, you can imagine how attractive that is to a judgment creditor. Many home inspectors lease their company vehicles to prevent them from becoming a target.
- **Check your state's homestead exemption.** Homestead property protection laws help protect your home from creditors (as well as help provide survivors with a home after the death of the primary wage earner).

To be effective, asset protection should be performed years before you find yourself in financial trouble. Any transfer of ownership of property after the emergence of a significant claim may be deemed fraudulent, which can result not only in seizure of the asset anyway, but significant civil penalties. After a claim arises, you need debtor and possibly pre-bankruptcy planning, as asset protection becomes more difficult as legal proceedings progress. Most importantly, have an attorney and an accountant guide you through the process of asset protection. You need these experts to make sure that asset protection planning is performed competently and, even more importantly, within the parameters of the law. Professionals will make sure that you use

appropriate legal structures to safeguard your assets without deliberately defrauding creditors.

In summary, inspectors should invest in legal asset protection strategies to keep their business assets separate from their personal assets, and also to ensure that, should they face a tough legal battle, they will be able to re-establish themselves when the dust settles.

Easy Steps That Help Home Inspectors Avoid Lawsuits

1. Join InterNACHI®!

InterNACHI® is the world's largest inspection trade association, and its Standards of Practice can be pointed to as definitive for the inspection industry. Substantially abiding by InterNACHI's Standards of Practice provides a strong defense against a claim that you failed to perform to a level of care or acceptable practice for the inspection profession.

Furthermore, InterNACHI's membership requirements are in addition to whatever your local, state or provincial government licensing and regulation may demand. Membership is evidence that you are the type of inspector who voluntarily goes above and beyond the minimum requirements that merely allow you to legally operate in your area.

2. Take every one of InterNACHI's online courses.

We all know that many claims against inspectors are frivolous. Education and training won't prevent such suits from being filed, but education and training will help you prevail in court. Each of InterNACHI's online courses produces a Certificate of Completion. You should be prepared to produce all your certificates as evidence of your professionalism. However, the dates of completion have to precede the date of the inspection in question, so complete them now.

Furthermore, education and training are key to performing high-quality inspections, which eliminates frivolous suits. Knowledge is a powerful tool you can use to stay out of court – or win, if you should find yourself there.

Why Inspectors Should Take Continuing Education Even When It's Not Required

Some states and provinces require home inspectors to meet minimum Continuing Education requirements each year. However, even if your state or province does not, there are still good reasons for taking such courses regularly.

- First and most obviously is the fact that taking courses can help you become a better inspector. Smart inspectors who are serious about their business will stay on top of their game by continually learning. Furthermore, the growing innovations in the building industry mean that there's always something new for the inspector to know.
- An inspector who keeps current with the industry will almost always have greater credibility with consumers. Taking Continuing Education classes strengthens an inspector's credentials, and the inspector's credentials are important in marketing his/her services. Many InterNACHI® members now display on their website their Certificates of Completion from all the courses they've taken. Inspectors who have taken any of InterNACHI's courses can download and print off multiple copies of their Certificates of Completion.
- An inspector who has completed many Continuing Education courses provides a measure of protection for the real estate agent who referred the inspector. Often, when an inspector gets sued, the agent also gets sued for a negligent referral. It is difficult to succeed in such a claim if the inspector is able to produce a long list of robust courses that he or she has completed.
- Attending or taking online Continuing Education classes can strengthen an inspector's credibility in court. In states and provinces where Continuing Education classes are mandatory, an inspector's failure to meet the state or province's requirements could result not only in administrative action, but could also be considered evidence of negligence in a civil suit against the inspector. Even in states and provinces that have no mandatory education requirements, an inspector's failure to keep current in the field will diminish the inspector's credibility if he or she ever testifies in court or at a deposition. A judge or jury is far more likely to find an inspector's testimony persuasive if the inspector regularly takes Continuing Education classes.

- Finally, like it or not, inspectors must sometimes testify as experts. Failure to keep current in the field could result in a ruling that disqualifies the inspector as an expert altogether. An interesting case that illustrates this point is *Pettit v. Hampton and Beech, Inc.*, 922 A.2d 300 (Conn. App. 2007). In this case, the plaintiffs asked the court to disallow an inspector's testimony because they alleged he was not qualified to give an expert opinion on the cost of repairs. The court overruled the plaintiff's objection and qualified the inspector as an expert, in part, because of his Continuing Education activities. In another case, *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535 (Tenn. App. 2005), the court qualified the inspector as an expert, in part, because of his Continuing Education and teaching background.

To sum up, there are many good reasons for inspectors to take Continuing Education courses. InterNACHI's online inspection courses are approved, accredited, and free. So, inspectors really have no excuse for failing to avail themselves of InterNACHI's educational offerings.

The House of Horrors®

Taking online courses is convenient for all the reasons cited previously. But hands-on training is also useful for obvious reasons. And the best live classroom training emulates real-world conditions. That's why InterNACHI® created the House of Horrors®.

The House of Horrors® is a full-size house with a thousand defects purposely built in. InterNACHI® has constructed two House of Horrors®, with the original located at InterNACHI® Headquarters in Boulder, Colorado, and the second HOH located in Weston, Florida. InterNACHI® holds one-day and weeklong classes at both locations. Inspectors can receive hands-on experience performing home inspections, guided by a Certified Master Inspector®. Students also learn how to write professional and robust inspection reports quickly and accurately, while keeping their liability low.

Find out more by visiting www.nachi.org/school



Become a Certified Master Inspector®

Attorneys fear going up against an inspector who knows what he is doing and knows the laws regarding his profession. Attorneys prefer weak targets. Your average attorney won't be involved in a home inspection case at all in his entire career and doesn't want to take on someone who is at the top of his profession. Becoming a Certified Master Inspector® deters lawsuits.

Also, most insurance companies that offer Error & Omissions Insurance give Certified Master Inspectors® a discount on their premiums.

Become a Certified Master Inspector® by visiting
www.CertifiedMasterInspector.org

The Dangers of Calling Yourself an Expert

I sometimes see inspectors refer to themselves as an “expert” on their websites or in marketing materials. With so many inspectors competing for business, it is natural to want to stand out. However, inspectors who describe themselves as “experts” may unknowingly be creating potential legal problems for themselves if an unhappy customer sues them. There are many legal theories an unhappy customer may attempt to employ if the he or she files suit.

Negligence

Under the standard InterNACHI® Residential Inspection Agreement, the inspector agrees to perform the inspection in accordance with InterNACHI's Standards of Practice. But when an inspector claims to be an “expert,” a court may hold the inspector to a higher standard. This is particularly true if the inspector claims to be an expert in a specific aspect of home inspections, such as the inspection of log homes. Just as a primary care physician is not held to the same standard as a board-certified neurologist, an inspector claiming expertise in log homes may be held to a higher standard than other

inspectors. In *European Bakers, Ltd. V Holman*, 338 SE2d 702 (Ga. App. 1985), an insurance agency held itself out as an expert in certain types of insurance matters. The court ruled that, by doing so, the agency imposed on itself a higher standard of care.

Even if a court does not hold an inspector to a higher standard, calling yourself an expert creates other potential legal claims.

Deceptive Trade Practices

Most states/provinces have statutes that prohibit deceptive trade practices. These laws make it illegal to make a false representation as to the quality of services provided, or to represent that the services are of a particular quality if those providing them know they are not. See, for example, § 6-1-105 of the Colorado Revised Statutes. These statutes generally allow a successful plaintiff to recover treble damages, as well as attorney's fees and court costs. In some jurisdictions, home inspectors are considered professionals and are exempt from its deceptive trade practices act, but in other jurisdictions, they are not.

Breach of Contract

Holding yourself out as an expert plays a role in influencing potential customers to choose you. If a problem arises after your inspection, an unhappy customer may claim that you breached the contract by failing to provide the expertise you claimed to possess.

Misrepresentation

In addition to any negligence, contract, or statutory claims that an unhappy customer may assert against you, he or she may also allege the tort of misrepresentation. You may be liable for misrepresentation if you make a false statement, the statement is material, and the customer relies on your statement to his or her detriment. Under the law, both negligent misrepresentation and intentional misrepresentation may give rise to liability. Intentional misrepresentation may result in an award of punitive damages.

It is even possible that a court may hold that by declaring yourself an expert, you made an implied warranty to the customer concerning the quality of your services.

How a Plaintiff's Lawyer Will Use Your Claim of Expertise Against You in Court

You did everything right. The customer signed a contract before you performed the inspection. You performed your inspection in accordance with InterNACHI's Standards of Practice. You wrote a thorough, professional report. Your customer purchased the home and later discovered an alleged defect. Now, the unhappy client has sued you.

Once the customer files the lawsuit, their lawyer will depose you. At your deposition, that lawyer will hand you a copy of every web page, business card, brochure, or other publication where you claimed to be an "expert." The lawyer will ask you to look at each one and verify that you created those things. With regard to each one, the lawyer will ask, "You chose to declare yourself an 'expert,' isn't that correct?" You will have to admit that you did. Then the lawyer will ask, "You did that to persuade potential customers to choose you, correct?" Again, you will have to admit that you did. Next, the lawyer will ask, "You intended that my client would rely on that representation, correct?" You will have to admit that you did. Next, depending on the nature of the case, the lawyer will ask something like, "Would you agree that an 'expert' home inspector should report all indications observed of active roof leaks?" You will have to agree. Finally, the lawyer will ask, "But you did not do that, did you?"

Now, suppose the case does not settle and the jury selection process is about to begin. When the plaintiff's lawyer starts to question the potential jurors, one of the questions the lawyer will ask them is, "What does the word 'expert' mean to you?" The lawyer does not care that much how each potential juror answers the question — he's trying to plant the seed in the minds of the potential jurors that you should be held to a higher standard.

Next come the opening statements. When the plaintiff's attorney speaks to the jurors, you can bet the opening statement will include something like this: "In fact, the evidence will show that the inspector *admitted* that he chose to describe himself as an 'expert' in order to persuade my client to choose him. You will see pages from the inspector's website where he repeatedly claimed to be an 'expert.'"

But the fun is just beginning because, at some point, you will be called to testify, and that lawyer is going to ask you all the same questions you were asked during your deposition.

When all the testimony has been presented, the judge will instruct the jury on the law. This may include an instruction that an "expert" is held to a

higher standard of care.

Finally, it will be time for closing arguments. You can be sure that the plaintiff's closing argument will contain the word "expert" many times.

Conclusion

In the highly competitive world of home inspections, inspectors naturally want to persuade potential customers to choose them. However, declaring yourself an "expert" comes with risks. There are safer ways to try to accomplish your goal. For instance, you could say you are "experienced" or "knowledgeable," or that you have "performed thousands of inspections." When marketing your business, you should always consider how a plaintiff's lawyer might try to use your statements against you in court.

Courts will hold you to the claims you make about yourself in your marketing materials. If you claim you are an expert in something, you'd better stand ready to prove that you are. And it is especially dangerous to claim you are an "expert" if you aren't able to point to evidence that you are because, unlike the other defensible adjectives and descriptions – such as Certified Master Inspector®, "licensed," "insured," etc., which have clear industry definitions – what makes you an expert?

Make sure your claims about yourself are defensible.

How to Choose the Right Lawyer

As a home inspector, there will be times when you'll need legal counsel. You may need advice on forming a business, want help with a contract, or require assistance in defending yourself against a lawsuit. Here are some tips for how to choose the best lawyer for your situation.

Tips for Choosing an Attorney

1. Take your time.

When choosing a lawyer, take your time to find the best one – before you actually need one. If a client sues you, your instinct will be to find a lawyer as soon as possible because you just want the problem to go away. Guard against the tendency to choose the first lawyer who answers the phone. The best lawyer for you may not be able to take your call right away. Talk with at least three attorneys before you decide on which one to hire.

2. Decide what kind of lawyer you need.

The law is so complex that it's impossible for one lawyer to know everything. Most of them specialize, to some extent. Decide on the type of lawyer you need. An attorney who's competent in small business issues may not be the best choice to defend you in a lawsuit.

3. Identify a few potential candidates.

Once you determine the type of lawyer you need, ask people you trust whether they know any lawyers they can recommend. You may also ask fellow home inspectors for referrals.

Also, consult state and local bar associations, which often have lawyer referral programs.

4. Assess their qualifications.

Once you identify a short list of potential candidates, find out everything you can about them. Most lawyers have websites. Study them. Does the website list the lawyer's areas of practice? Does it tell you how many years he or she has been in practice? Does it provide the lawyer's professional biography?

You may also be able to find online reviews through Google or sites such as www.avvo.com. Read any reviews you can find written by the lawyers' previous clients.

Lastly, every state regulates lawyers and maintains records of complaints filed against them. In some states, this may be a function of the bar association, but in other states, this task falls under the purview of the state supreme court. Check the public records to determine whether the lawyer you're considering hiring has been disciplined for misconduct.

5. Interview your top choices.

Call each one and explain what you need. If they can't help you, ask if he or she can recommend someone else. If you and the lawyer decide to meet in person, make sure you are clear on whether you'll be charged for that meeting. Contrary to popular myth, most lawyers do not offer free consultations; the ones most likely to do that are personal injury lawyers who charge on a contingency basis. Before you meet, ask what you should bring to the meeting, such as any relevant documents. Organize them in a way that

will enable the lawyer to quickly understand what your needs are, especially if you're being sued.

6. Fee Agreements

Once you decide to hire a lawyer, he or she will probably ask you to sign a fee agreement, which most states require of attorneys. Be sure to read the agreement thoroughly and ask questions, if necessary, before you sign it.

How to Help Your Lawyer

Lawyers lead stressful lives. They have multiple clients and are often under several deadlines imposed by different judges. Time is precious to them, and they don't like clients who consume their time without a good reason. Here are some tips on how you can help your lawyer serve you best and keep your costs down.

- **Be patient.** Think of lawyers as air traffic controllers. You are just one of many aircraft they must keep track of. So, don't be upset if your attorney is not immediately available to talk to you.
- **Use email rather than phone.** This allows the lawyer to respond when it's convenient for him or her to do so, and email will maintain a paper trail of correspondence and to-do's. It's also less likely the lawyer will charge you to respond to a brief email.
- **Preserve all relevant documents.** Do not discard any documents related to your case, whether hard-copy or online, regardless of what it is. In matters of litigation, the court can penalize you for destroying or failing to disclose relevant documents. You're not in the best position to determine what's relevant, so keep everything.
- **If you're being sued, don't talk to the opposing parties without your lawyer's knowledge.** It may be tempting to respond to something they say that's negative, but that's exactly the time you shouldn't. Keep your lawyer apprised of any contact you receive from the person who's suing you or their attorney.
- **Be honest with your lawyer.** He or she can't effectively defend you if you aren't completely upfront with them. And the attorney-client privilege protects what you tell your lawyer.

- **Be careful of what you post on social media.** Your adversary or his/her lawyer may be watching. Even if they're not, they can subpoena social media records. And anything published publicly is fair game. So, if you're being sued or are in the middle of a dispute with a former client, follow your attorney's lead and keep such matters private and off social media unless you're advised otherwise.
- **Monitor your reputation online.** While you may purchase the services of a reputation-monitoring company to police online mentions of your home inspection company, it's best to set a Google Alert to let you know when your or your company's name pops up. This is your responsibility, rather than your attorney's.

If you've been disparaged by a former client – regardless of the reason – don't let it stand unanswered. Your livelihood is at stake. Especially if your former client has a legitimate beef with you, do what you can to mitigate it by first capturing an image of the online post, comment or review. If it's a matter you can easily resolve directly, do so to preserve goodwill. If you've been unfairly attacked, you can ask your former client and the website they posted on to remove the negative comments or review on threat of legal action. Notify your attorney of the issue. If your request is ignored, you or your attorney can send a cease-and-desist letter.

It's important to be pro-active in maintaining a positive professional image, so make monitoring your online reputation a regular part of business management.

If you're not certain what kind of lawyer you need, or if you have any legal questions about your home inspection business, contact the InterNACHI® Legal Team at legal@internachi.org

Website Legal Issues

The Internet has created tremendous opportunities for marketing your business, but it has also created new legal traps for the unwary. Here are five considerations inspectors should bear in mind when building and adding to their business websites.

1. Jurisdiction

This is important if you live close to a state border and routinely offer or provide services across state lines. Generally, a court cannot exercise jurisdiction over a resident or company in another state unless that person or entity does business in that state. If your website attracts potential customers from another state, you want to make sure that if an out-of-state customer sues you, the customer must do it in your state – not the customer's home state. In other words, you want the home-field advantage. For this reason, you should consider posting something like this on your homepage:

This site provides general information about our services and qualifications. By using this site, you agree that our maintenance of this site does not constitute the transaction of business in any state other than [inspector's state/province]. You agree that the exclusive venue for any action against us arising out of your use of this site or any subsequent relationship with us shall be in [inspector's state/province].

2. Protecting Copyrights and Trademarks

Many people do not realize that to copyright something, all you must do is put the public on notice of your claim by including the copyright symbol © on your work. Similarly, to trademark something, all you must do is put the public on notice by use of the TM symbol. You do not have to file any documents with the government; you only have to do that if you want to register your copyright or if you want to register a trademark so you can use the ® symbol with your trademark. Registration does offer some advantages if you end up in litigation, but it is not mandatory. Your website may contain photos, drawings, and/or wording that you worked hard to create. You should protect these things by placing a notice on your homepage, such as this:

This website and its entire contents are copyrighted 2017 by [your company name].

Or even just:

© InterNACHI® 2018

Note that three elements must be included in your copyright notice in order to make it legally enforceable:

1. your name or your company name;

2. the copyright symbol or the word “copyright”; and/or
3. the year of copyright.

3. Other People Protecting Their Copyrights and Trademarks

- a. Do not copy photos, drawings, or language from other websites or sources that are copyrighted without permission. Most people never get caught, but if you do, you will pay thousands of dollars to defend and/or or settle a lawsuit.
- b. Do not create a trademark that is so similar to a competitor's trademark that it is likely to cause confusion for the public.
- c. Do not use the ® symbol unless the U.S. Patent and Trademark Office (USPTO) has issued you a Certificate of Registration for your trademark.

4. Your Website as Evidence Against You

One of the first things attorneys do when deciding whether to sue on behalf of a client is to visit the potential defendant's website. They often find language they will be able to use against the defendant. View your website with a critical eye. Does your website make promises that you cannot keep or claims you cannot prove? For instance, if your website claims that you are “The Most Experienced Home Inspector in Colorado,” or you are an “Expert” (which is a legal term), you had better have some data to back that up; if you do not, some plaintiff's attorney may make you eat those words in court some day.

5. Privacy Issues

Websites are great because they allow you to collect the email addresses of visitors, and that information becomes more valuable as that list grows. However, if you use that list to send commercial emails to others, you must comply with the federal CAN-SPAM Act.

A “commercial email” is defined as “any electronic mail message, the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.”

All commercial emails must include:

- a. a legitimate return email address and a physical address;

- b. a clear and conspicuous notice of the recipient's opportunity to "opt out";
- c. a mechanism that must be provided or an email address to which a recipient may send a message to opt out; and
- d. a clear and conspicuous notice that the message is an advertisement or solicitation.

Note that the law governing emails and fax advertisements is different. The federal Junk Fax Prevention Act contains an exception if the fax sender has an "existing business relationship" with the recipient. This exception does not apply to commercial emails, so even if you have a prior relationship with the recipient, you must still comply with the Act.

Do You Have a Fear of Hiring?

I once heard an InterNACHI® member say, "At this point, I feel that I really can't afford to hire help." My response was the following:

Notice your use of the word "feel"? Anyway, your employees shouldn't cost you anything. None of my companies has a single employee that costs the company a penny. Every one of my employees generates black ink.

Maybe what you meant to say is, "I don't have the capital to cover their first few paychecks until they begin to bring in more money than they cost to employ."

So, it's a lack of temporary cash flow... or is it?

Or, maybe what you really meant to say is, "I have the capital to cover their first few paychecks until they bring in more money than they cost to employ, but I won't hire them. I won't hire them because unless an employee can actually hand me a certain amount of cash at the end of the day that is greater than what I paid him that day, my brain won't let me attribute the additional profits indirectly generated by that employee's efforts to that particular employee, so I only focus on what I'm paying the employee, and not what the employee is paying me, indirectly, by making my company more profitable." So, it's a lack of basic business acumen... or is it?

Or, maybe what you really, really meant to say is, "I have the capital to cover their first few paychecks until they bring in more money than they cost to employ. And I realize that, although an employee might not actually hand me a certain amount of cash at the end of the day that is greater than what I

paid him that day, I do attribute the additional profits indirectly generated by that employee's efforts to that particular employee. So, I don't focus on what I'm paying the employee but, rather, on what the employee is paying me, indirectly, by making my company more profitable. However, I don't think I will be able to accurately quantify the profits generated indirectly by the employee, and that keeps me from hiring." So, it's a lack of financial analysis skills... or is it?

Or, maybe what you really, really, really meant to say is, "I earn enough to pay my bills. My wife has a steady job. Between the two of us, we live comfortably and can even afford a few luxuries. But I'm afraid. I'm afraid of being poor, so I work hard and take few risks. I'm afraid of being rich, so I don't hire because hiring is a risk. If I were going to hire someone, I would be afraid to hire someone much different than me, or someone much more confident than me, or someone much smarter than me." So, it's a problem dealing with your own fears.

Unless you were born with some freak talent (such as being able to hit a baseball into the stands), it is very difficult to get rich without good help.

You can overcome your fears by doing some preparation. Ask yourself what you'd look for in a good boss, and be that boss. You can start by understanding what every employee needs in order to succeed at their job.

Regardless of the type of job, every employee needs the following:

1. An Employee Contract: As I just discussed earlier, InterNACHI® has both employee and subcontractor agreements for you to use.

2. A Job Description: That would seem to go without saying, but if you aren't explicit about what your employee should be doing each and every day to assist you and help your business, don't be surprised if they stray and invent their own daily to-do list, which may have little to do with why you hired them in the first place. A job description should not only state what should be done, but also how.

3. Clear Expectations: You need to be sure to state what you expect from your employee, both in terms of what they should be doing, and what they should not be doing. This goes for job tasks and deadlines, as well as on-the-job conduct, including schedule, attire, how to deal with unhappy clients – whatever is important to you.

4. Supervision and Feedback: You might think that you need to simply have an introductory meeting, explain the job, discuss the details about how it should be performed, and you may even go over your expectations, including any deal-breakers. But all employees, regardless of how competent and self-sufficient they are, need feedback. And the less experienced they are, the more oversight they'll require, at least initially. Remember, you can't improve what can't be measured. So, set some reasonable goals for your employee, and review them together regularly. This will help you keep them on the right track, and it will give your employee the confidence they need to continue to perform well, or the opportunity to course-correct early, if necessary.

5. The Right Tools: Whether it's a fairly new computer, a decent chair, or a key to the file cabinet to retrieve a new ink cartridge for the printer, don't hobble your employee by not providing the basic tools they need to perform their job. And when the suggestions or requests begin to sound like annoying complaints (or, worse, warnings to spend more of your money), consider yourself on notice – your employee may be unhappy because you may be inadvertently sabotaging their ability to do their job for you. If the request is reasonable – and even if it's not – don't ignore it or be dismissive. It's bad for morale, which is bad for business. Either pony up, or explain why you can't do it, or why you can't do it now, and provide reasonable alternatives or substitutes.

6. Proper Compensation: Make sure you pay the prevailing wage for your area. And if you expect loyalty, you've got to give a little to get a little. It usually means regular merit raises based on performance. It may also mean benefits, such as health insurance and paid holidays off. It may mean commissions. It may be all of these or a combination of some of them. Just like you expect to be paid fairly for quality work, remember that your employees expect the same thing.

7. Recognition: When your business succeeds, it does so because of everyone's effort. Valuing your employees means making them stakeholders. So, keep them informed about how the business is doing (as far as is appropriate), especially if it's doing well. Give credit where credit is due. Celebrate your goals and achievements together. And if your rewards occasionally include perks and incentives, make sure they're meaningful. Your best employees will never forget how well you treat them.

A successful business doesn't mean that it has to expand until it's unrecognizable. But if you do expand, you'll soon discover that you can't do

everything by yourself and still provide the same level of quality that your brand represents. A good leader delegates. A good leader trusts. A good leader actually leads. Becoming a boss is a leap of faith. But if you've ever worked for anyone else, you know instinctively what makes a good boss and what makes a lousy one, so apply those lessons when you prepare to hire your first employee. Fear is just a false obstacle, so put it aside, and figure out how you can be a boss that inspires excellence.

And be sure to download InterNACHI's Employee Handbook Template to customize for your business. Protect your business and cover your bases as an employer by spelling out compensation, holidays, protocol for employee grievances, and more. You'll find the Employee Handbook Template and more useful legal documents at www.nachi.org/documents

If You're Going to Hire a Helper, Use a Contract

I prefer to hire helpers as independent contractors rather than as employees. A good independent contractor agreement makes it difficult for a helper to:

- bind you or your inspection company into a contract;
- incur any liability on your behalf;
- claim rights associated with your publications, trade secrets, copyrights, or trademarks;
- reveal your confidential information, such as marketing ideas, business plans, pricing strategies, etc.;
- steal your real estate agent database or solicit your clients;
- compel you to pay his/her expenses, insurance premiums or taxes;
- demand severance pay; or
- later claim he/she was an employee or is owed money.

But regardless of whether you are hiring your helper as a subcontractor or an employee, use a contract. Both types of sample contracts can be found at www.nachi.org/documents

Ride-Along Release

Many inspectors agree to mentor inexperienced inspectors who want to accompany them or ride along on appointments to learn the ropes. InterNACHI® encourages this, as it instills practical skills and best practices in the next generation representing the home inspection industry.

But this onsite education shouldn't come at an unintended cost for the home inspector, especially in a job that's fraught with built-in risks of injury and mishaps. Something could go wrong because of the ride-along's lack of experience, or it could be the result of some issue with the property. Whatever the cause, the inspector shouldn't have to worry about being sued just because he or she agreed to extend this courtesy. That's why we've developed a Release from Liability form that inspectors can use to avoid any legal blowback, should something happen to the newbie on an inspection.

You can download a Ride-Along Release at www.nachi.org/documents

Use InterNACHI's Pre-Inspection Agreement

It includes:

- a definition of the scope of the inspection;
- a disclaimer of warranties;
- a limitation on liability, and a liquidated-damages provision;
- a provision for payment of costs and attorney's fees;
- a "merger clause" stating that there are no promises other than those set forth in the agreement, and that all prior discussions are merged into the agreement;
- a clause stating that any modification of the agreement must be in writing;
- a forum-selection clause so that any lawsuit must be filed in the county or district where the inspector has his principal place of business; and
- a personal guaranty of payment if the client is a corporation or similar entity. A copy of InterNACHI's Pre-Inspection Agreement can be found at www.nachi.org/documents

Use InterNACHI's Free, Online, Signable Agreement System

It's simple:

- Start out with suggested wording written by InterNACHI's lawyers.
- Add additional clauses.
- Make any changes you want.
- Add your company logo.
- Add HTML code to your agreement for additional images or formatting.
- Hide clauses that don't apply to your business.
- Save your changes for future use.
- Add specific notes pertaining to an inspection to each individual agreement.
- Add additional terms pertaining specifically to a client.
- Sign it digitally according to your state/provincial regulations. You can then:
 - notify your clients automatically by a customizable email when you create their agreement;
 - check the signed status of your agreements quickly and easily;
 - receive instant notification by email when your client has signed the agreement; and
 - print out the signed agreement with your client's IP address and the exact date of signing.

Other features include the following:

- Clients are able to sign their signature with a mouse or their finger (on a tablet or smartphone).
- Agreements signed online by the inspector and client are legally binding.
- You can require that the agreement be signed before the client views the report.

- Past agreements are stored online for you or your client to view and print at any time.

InterNACHI's inspection agreement system is great for situations when the client is not attending the inspection, when you want the client to read and sign the agreement first, or when you are delivering the inspection report electronically and want your client to sign the agreement before they view the report. Simply direct those clients to their agreement and tell them to enter their email address to view and sign the agreement. You'll be notified by email when they've signed.

InterNACHI® stores your online agreements forever and stands ready to testify in court as to the exact date and time your client read the agreement (so that they can't argue that you didn't give them time to read it), and the exact date and time they signed it.

For more information about InterNACHI's electronic, signable agreement system, visit: www.nachi.org/onlineagreement

Turn Away Some Consumers

You don't have to accept work from everyone who wants to retain you. If a client starts off being difficult or unreasonable, it usually gets worse, not better. While it may be hard to walk away from an inspection fee, it's sometimes cheaper in the long run.

Furthermore, an added bonus of refusing to allow these consumers to become your clients is that they'll become your competitors' clients. Pity your competitors!

Don't Book Inspections Too Close Together

The best way to keep from rushing during an inspection is to give yourself enough time. An inspection can take longer if the client is accompanying you, if the home occupied, if the home is far away, if the home is older, if the home is larger, or if you have been hired to perform additional ancillary inspections. When you rush, you make mistakes.

Whoever schedules your inspections should use InterNACHI's online Time-Slot Estimator. It is free for all inspectors at www.nachi.org/time-slot

Purchase InterNACHI's "Caution" Stop Sign

In 2009, a home inspector opened a floor hatch to go down into a crawlspace to inspect it. While he was busy inspecting, his client fell into the opening, breaking his arm in three places. The client sued. The suit claimed that the inspector was negligent for not putting up a "caution" sign.

Also in 2009, a home inspector was on the roof of a home he was inspecting. A newer real estate agent decided to climb up the ladder to join the inspector. She slipped, fell 7 feet, and landed on top of the client, who was steadying the ladder for the agent. Both suffered injuries that required them to be hospitalized. The client sued the inspector for not posting a sign to keep others off his ladder.



It gets worse. An inspector was recently blamed for an unsafe condition that already existed. During the review at the end of a home inspection, the inspector pointed out severely rotted deck planking. The client walked out onto the deck to see what the inspector was talking about, when the client's foot broke through the decking, causing a minor injury. The client didn't sue, but he later complained to his real estate agent that the inspector should have kept everyone off the deck, once he had discovered the issue.

The InterNACHI® "Caution" Stop Sign does four things:

- It shows that you care about your clients' safety.
- It reminds everyone that there are risks, especially to children, in attending an inspection.
- It actually keeps your clients at a safe distance.
- It demonstrates in court that you are not reckless.

To purchase the sign, which is written in both English and Spanish, visit www.InspectorOutlet.com

And save the receipt as evidence that you are a responsible inspector. You might need to show it to a judge some day.

Purchase Tools to Do Your Job Well

Such tools may include:

- personal protective equipment (PPE)
- powerful flashlights
- a voltage detector
- a carbon monoxide (CO) meter
- moisture meters
- a microwave oven leak detector
- crawl gloves
- circuit load testers
- a combustible gas leak detector
- a Spectroscope
- an infrared camera
- a camera-mounted drone

These inspection tools and more are available at www.InspectorOutlet.com

Doing Damage During an Inspection: It's Your Job

Have you ever broken something at a home during an inspection? We're not talking about accidentally knocking over a vase or putting a gouge in a doorframe with your toolbox. We're talking about snapping the handle off a hose bibb, or putting your foot through the roof of the garage, and similar mishaps. If this has ever happened to you and your first instinct is to calculate a discount on your service fees while offering profuse apologies, it's time you reframed the situation. Your client shouldn't be upset with you; they should be thanking you!

According to InterNACHI's Standards of Practice (and any other state/province-mandated SOP you're required to follow), you're performing a non-invasive, visual examination of the home's systems and components that is designed to identify defects. When you perform any type of testing to verify functionality, you're using normal operating controls under normal

conditions, and assuming regular maintenance.

So, when the photo-electric eyes on the garage door become stuck in the “on” position and the door or motorized components overheat, become disabled, or simply break, you’ve just identified a major defect and serious safety hazard. Your client should be grateful that it was a trained inspector who discovered the defect, rather than the family’s inexperienced teenage driver who may panic and try to hide the problem from mom and dad.

Likewise, although roofs aren’t made to be regularly walked on the way stairs and sidewalks are, they’re constructed to support multiple roof layers, as well as snow loads, and even workers repairing or replacing them. So, if you manage to put your foot through the roof, you’ve discovered a severely weakened area that was likely going to give the next time heavy weather hits, or when dad tries to install a satellite dish, clean the gutters, or mount a lighted holiday display. You haven’t caused damage; you’ve actually spared your client from disaster.

The same logic applies to other components that the homeowner may rarely or never touch, such as the various switches and shutoff valves you inspect. If by merely operating it under normal conditions, the switch or valve or component breaks off, malfunctions, or just falls apart in your hands, you’ve just identified a serious defect and alerted your client to an immediate repair issue. It’s truly impossible to calculate the expense and grief you’ve saved your clients by encountering such a problem before they do.

Use this simple test: If it would break during normal use for your clients on the day they moved into the house, could you imagine that your clients (rightly or wrongly) might call you and complain, even if it wasn’t your job to check it? If your answer is “yes,” then it would not be your fault that it broke at the inspection during normal operation if you *did* happen to check it — and it’s certainly not your responsibility to have it repaired.

Remember to reframe the situation the next time you think you’ve caused damage during an inspection: It’s not your responsibility to repair things; it’s your responsibility to break them!

The Duty to Warn About Immediate Hazards

Let’s say you’re doing an inspection for a home-buying client and you find a defect that, in your opinion, is hazardous. Someone could get seriously hurt. Does a home inspector have a duty to warn not just the client, but also the

occupants, real estate professional, and the owner of the property?

Many inspectors consider it their ethical and even moral duty to disclose to all relevant parties any imminent hazards they discover in the course of an inspection. Some inspectors are required by their state/province's licensing authority to report emergent hazards on pain of license revocation, especially if such hazards may result in physical injury. But inspectors don't bear this burden alone. The obligation of disclosure also falls to the property owner.

Whether the client is the home buyer or seller, it's important for the inspector to know some of the obligations, limits and liability when it comes to disclosure, including when they may intersect — or not — with the homeowner's.

The Homeowner's Duty to Warn

The homeowner's obligation to warn others of any known dangers or hazards on the property covers invited guests, licensees (such as home inspectors and other professionals who are allowed onto the property to perform specific functions, with the homeowner's permission), and, in some cases, even trespassers. This obligation may also be assumed by the non-owner occupant, depending on the situation and the jurisdiction. The precedent for such disclosure is found in civil law and is called "the duty to warn." The duty to warn says that a party — the homeowner — will be held financially liable for injuries caused to another, given that the homeowner had the opportunity to warn the other party of a known hazard but failed to do so. Such hazards may be hidden from visitors but known to the homeowner or occupant, and may or may not be the result of negligence. The duty to warn certain parties about known hazards can range from a deadly condition (such as a gas leak), or it may encompass all known hazards. The law makes distinctions between licensees, invitees, and trespassers in order to determine the plaintiff's legal standing, the owner or occupant's level of liability, and the limits on damages awarded to the injured party.

As with all civil law, and even some criminal law, it is the individual state or province's precedents and statutes that determine the obligations of and potential consequences for the homeowner. For example, many state/provinces do not enforce a duty on owners or occupants to warn trespassers of any potential dangers on the property, while others, such as California, enforce a "reasonable duty of care" toward any person who enters a property. As an example, a rural property owner who sets animal traps for pesky prairie dogs may be required to post signs warning trespassers of the danger.

It's important for homeowners to know that they have a legal obligation to maintain a safe property for all invitees, and this includes having performed an inspection – personally or hired out – to discover any hidden hazards, whether or not a property transaction is involved.

The Seller's Disclosure

The duty to warn and a seller's disclosure address different legal concerns, but the types of potential hazards they cover can overlap considerably. While a duty to warn is designed to prevent physical injury (and subsequent legal action and damages), a seller's disclosure is designed primarily to address a home's value – both its selling price and its resale value.

There are six general categories that should be included in all seller's disclosures, as they can significantly affect a home's price:

1. termite/wood-destroying organism infestation;
2. mold and/or damage due to moisture intrusion;
3. lead-based paint;
4. natural hazards;
5. general repairs; and
6. infamous or notorious past.

Again, these disclosures cover items that the homeowner or home seller either knows about or should know about, and the breadth of these categories may vary by state/province.

- **Termite/WDO infestation** is not always obvious, and the presence of such pests may not be detected until the damage to the home's structure is. However, if a home has been treated for infestation by termites or other wood-destroying organisms, most states in the U.S. require this disclosure for a sale. In areas where termites or other WDOs are a common problem, this disclosure doesn't have to be a deal-breaker, which is why InterNACHI® recommends a WDO Inspection, along with a Move-In Certified® Seller's Inspection for all home sellers.
- Most homes have some evidence of **mold**, but the level of **moisture intrusion** — whether past or active — can mean the difference between a smooth home sale and a costly lawsuit after the fact. Most

moisture intrusion is easy to spot, such as a leaky roof, a musty-smelling basement, or bubbling paint on damp drywall. Unfortunately, many home sellers whose homes have serious water-intrusion problems attempt to hide them, as this is the number one reason new homeowners sue their homes' former owners.

- Homes in the U.S. built before 1978 — before **lead-based paint** and related products were outlawed — may have lead paint at the exterior, interior, or both. According to the Environmental Protection Agency, lead that is not disturbed does not pose a serious hazard, but in households with small children, who may explore and ingest old and chipped paint, lead can be a serious health hazard that can result in severe, long-term neurological damage. Sellers of older homes are required to disclose any known lead-based paint in the home, as well as extend the prospective buyer a 10-day window to test the home for the presence of lead. The failure to disclose the known presence of lead that results in a lawsuit can trigger an automatic award of treble damages.
- **Natural hazards** cover homes located in floodplains, along earthquake faults, and similar natural dangers. This disclosure is designed primarily to give prospective buyers the heads-up for the need to obtain appropriate additional homeowner's insurance coverage or specific riders.
- The category of **general repairs** is the broadest one for disclosure and is meant to include major repairs and unique maintenance to a home's major systems and components, as well as structural fixes, including those required because of weather-related damage and moisture intrusion. While this category may result in litigation, determined on a case-by-case basis, the general rule here is that if you would want to know about it as a home buyer, you should disclose it as a seller.
- Not all states/provinces have laws regarding a home's **infamous past**, but if some previous undisclosed activity or history significantly lowers a home's resale value (or jeopardizes its ability to be resold), a lawsuit may be the only way that a seller can recover on a poor investment. This category ranges from a home thought to be haunted, to a home where a murder was committed, and the more prevalent problem of a home used to manufacture methamphetamine. This last type of home poses more of a physical danger than one of notoriety, since the chemicals used to manufacture meth can permeate structural components and remain permanently, which can lead to severe neurological, respiratory, and other health hazards for the home's future occupants.

A Seller's Inspection

InterNACHI® strongly urges home sellers to obtain an inspection prior to even listing their home for sale. A Move-In Certified® Seller's Inspection alerts the seller to any defects or problems so that they can be addressed before prospective buyers discover them. Sellers can then take the time they need to obtain reasonable repair estimates to address those defects so that they don't become stumbling blocks later. A seller's inspection is also a demonstration to prospective buyers that the seller is dealing in good faith and is interested in providing full disclosure as to the home's condition, including repairs already performed as a result of an earlier seller's inspection. It has the added advantage of helping the seller obtain his or her asking price. Home inspectors who don't currently offer seller's inspections should avail themselves of this built-in real estate marketing niche. Sellers should provide copies of their inspection report, along with receipts for repairs, to all real state professionals and prospective buyers who tour their home.

The Home Inspector's Duty

Inspectors should bear in mind that they serve as a licensee of the homeowner when it comes to their own duty to warn. If there is an imminent danger or hazard that can cause physical injury, the obligation to warn those who may be harmed outweighs any confidentiality they owe their client.

While the inspection report is the bargained-for product between the inspector and the client, and while the report and contract may contain confidential information whose disclosure to other parties may require prior permission by the client, your jurisdiction may dictate that you must warn all visitors of known hazards and dangers discovered on a property, irrespective of the client's right to privacy and confidentiality.

InterNACHI's own Home Inspector Code of Ethics provides for the notification of all relevant parties – not just the client – of an imminent danger or hazard:

I. Duty to the Public

[...]

7. The InterNACHI® member shall not communicate any information about an inspection to anyone except the client without the prior written

consent of the client, except where it may affect the safety of others or violates a law or statute.

[...]

An informal survey of InterNACHI® home inspectors has revealed that many inspectors rely on common sense when it comes to notifying parties other than their clients of hazards, primarily because inspector licensing is limited to a small number of states in the U.S.

Inspectors cited the following hazards as those they would immediately report, regardless of the party: the risk of carbon-monoxide poisoning (perhaps due to an inoperative detector, or a potential problem with the door separating an attached garage and the living space); the lack of a temperature/pressure-relief valve on a hot water heater or furnace, which can result in a deadly explosion; and other hazards that pose an immediate risk of injury. Of course, not all defects qualify as imminent dangers, and all identified but unaddressed defects require that occupants exercise reasonable care, such as when going up and down a staircase that lacks a required handrail on at least one side.

In all cases, the inspectors stated that they would maintain documentation for themselves in the form of notes and photos. This type of record-keeping can be critical if the matter takes a legal turn in the future. Some inspectors stated that they would inform their clients as a courtesy of the additional disclosure to other parties, and would also note the hazards in their inspection report summaries to highlight their emergent nature.

Some states/provinces that license home inspectors require the disclosure of immediate health and safety hazards to parties other than the homeowner or home seller. Such provisions may be covered in the state/province's Standards of Practice or statutory requirements covering contracts.

In the case of New York, disclosure is covered in their New York State Home Inspection Code of Ethics:

Section 197-4.2 Written Contracts

(a) Prior to performing a home inspection, home inspectors shall provide a client with a written pre-inspection agreement that clearly and fully describes the scope of service to be provided and the cost associated with that service. All said contracts shall contain the following clause:

“If immediate threats to health or safety are observed during the course of the inspection, the client hereby consents to allow the home inspector to disclose such immediate threats to health or safety to the property owner and/or occupants of the property.”

Such “occupants” may be renters, but this definition may extend to any visitors whose health and safety may be at risk due to an identified hazard.

Where to Draw the Line?

For all potential legal matters arising from a home's condition and any associated hazards, homeowners should check with their homeowner's insurance carrier to understand their obligations and liability.

Inspectors should check with their local licensing authority, real estate board, or other authority having jurisdiction (AHJ). They should also make sure that their general liability (GL) insurance and errors and omissions (E&O) insurance are at levels appropriate to cover their particular state/province's liability limits for injuries caused by their negligence, or their failure to warn of a defect they discovered or should have discovered during the course of their inspection.

InterNACHI® reminds its inspector-members that its Residential Standards of Practice does not require or recommend that inspectors quote local building code to their clients or in their reports. Doing so exceeds the role of a home inspector, as well as opens the door to greater liability, if such code were to be relied upon and some injury or defect were to arise from quoting code, or even failing to quote code. It's also important that inspectors understand that most building codes are based on safety. So, in the limited role of a home inspector, where does the professional draw the line?

It's worth noting that anyone who's willing to pay a filing fee can file a lawsuit. Very often, people spend months in litigation arguing about whether there was a duty and who the duty was owed to. Even if the inspector wins because it is determined that he did not owe a duty to the claimant, he still “loses” because he had to suffer through the court battle concerning that issue. But even this reality is not enough to dissuade some inspectors from notifying all parties of an imminent danger.

InterNACHI® reminds its members that its Code of Ethics does not compel the inspector to disclose information about any immediate hazards to non-client parties, but the inspector can disregard his confidentiality to the client if he feels he should warn others about an immediate hazard – as

distinguished from other material defects. In fact, inspectors may wish to add the following language to their own Client Agreement:

If Inspector discovers a condition that, in his/her judgment, presents a risk of imminent harm, Client agrees that Inspector may disclose that condition to the Seller or such other third parties as Inspector deems appropriate.

To Exceed or Not to Exceed: That Is the Question

Inspectors sometimes ask me about the potential legal consequences if their inspections go beyond what InterNACHI's Standards of Practice (SOP) require.

Of course, every inspection must, at a minimum, substantially meet the requirements of the SOP. If an inspector fails to comply with the SOP, the customer would have valid claims against the inspector for breach of contract and misrepresentation.

Therefore, when in doubt about what the SOP requires in a particular situation, the inspector should err on the side of caution and exceed what the SOP requires. It is better to do a little more than what may be required than to do less and risk a potential claim and harm to your reputation.

A word of caution: if an inspector consistently goes far beyond what the SOP requires, a customer might successfully argue that the inspector voluntarily assumed a duty greater than what the contract required. Most inspection contracts contain language stating that the inspector will perform the inspection in accordance with InterNACHI's SOP. An inspector who goes far beyond what the SOP requires may open himself up to a claim that there was an oral agreement that he was going to do a more rigorous inspection than what's required by the SOP.

If an inspector voluntarily assumes a duty greater than the duty required by the contract, the inspector has an obligation to perform those additional tasks with reasonable care.

Write Your Reports Properly with InterNACHI's Library of Narratives

InterNACHI's Inspection Narratives Library is the world's largest collection of dedicated, industry-savvy home inspection narratives. These narratives were developed using a variety of sources, including the International Residential Code (IRC), technical data sheets, systems specifications from various manufacturers' associations, installation manuals for a variety of building products, and several insurance company policies. The narratives are worded with safety in mind, and specific code is not quoted.

In addition to reducing the amount of time you spend filling out reports, the quality of your reports will improve, and you'll enjoy greater protection from liability.

For more information about InterNACHI's Inspection Narratives Library, visit www.nachi.org/narratives



“Houston...we have a problem.”

If you are on an inspection site and in need of immediate help from your fellow members, InterNACHI® staffers, or subject-matter experts, you can get immediate assistance with InterNACHI's Emergency On-Site Help Button.

The button takes you to a dedicated members-only message board forum. This forum is for time-sensitive emergencies only. It is not to be used to host discussions, make announcements, or get help with off-site inspection report writing. This forum is dedicated solely to helping fellow members who are on an inspection site and need IMMEDIATE help from fellow members. InterNACHI® has various subject-matter experts who have agreed to monitor this forum. Like other forums, you can upload photos to it.

If you see a potential issue on an inspection and don't know what it is or how to report it... don't guess. Get help.

For more information about InterNACHI's free Emergency On-Site Help Button, visit www.nachi.org/on-site-help

Three Photos Every Inspector Should Include at the End of the Report

As a home inspector, you never want to be accused of failing to note a water line leak, or – worse – of causing water damage because you forgot to turn off a fixture. One way you can prevent this is to take some photos of the water meter just prior to leaving the property.

Of course, in some jurisdictions, the water meter is below ground or requires a key and so is not readily accessible. Other water meters are inaccessible due to the weather, overgrown foliage, or because they aren't properly maintained by the utility company. In these cases, it will be difficult (if not impossible) to obtain any photos. But you should alert your client to the fact that they are entitled to be able to read their water meter in order to reconcile its readout with their monthly water bill, so they should either rectify the problem themselves, or complain to the appropriate party to get the situation addressed.

Assuming you have safe access to the water meter, take these photos after you've:

- completed your home inspection;
- turned off all the sink and tub faucets after checking them for functional flow; and
- made sure that the washing machine, dishwasher, sprinkler system, and any other water-using systems, devices and fixtures are turned off.

Take three photos of the water meter that show that no water lines are leaking, assuming you didn't find any.

Here are the three photos to include sequentially at the end of your inspection report. Of course, the photos should show that the water meter is actually not running.



This is the first photo that demonstrates that the water meter is not running. This is your baseline photo.



This second photo shows that the meter is still not running.



This final photo, showing that the water meter is still not running, confirms that there are no hidden and undiscovered water leaks in the house, and that the inspector didn't leave any faucets running anywhere.

It's best if the photos are actually time-stamped and show several seconds between each shot. Since some cameras don't come with this feature, take each photo from a slightly different angle to show that they are, in fact, different. But make sure that the meter's display can be viewed – the angle shouldn't distort the reading.

Of course, if these photos show that the meter is still running, you have cause to recommend to your clients that they have the plumbing system checked out by a licensed plumber, warning them in advance that the leak is apparently hidden somewhere behind a wall, ceiling or floor, and so was beyond the scope of your home inspection. But take the opportunity to remind them that by performing this extra step – which most home inspectors wouldn't even think of to do – you have been able to notify them about a problem that should be immediately addressed before it would have become an expensive disaster.

While taking these photos is an easy thing to do, this kind of customer service will give your clients some much-appreciated reassurance that you're a straightforward professional who understands his/her job, such as by being careful to return all fixtures and settings to their original, pre-inspected state. (So, you can also take photos of the thermostat before and after testing the furnace and air-conditioning system.) It also proves that you're the kind of pro who puts his/her clients' best interests first by confirming either the presence or absence of potential problems in a non-invasive but inventive way.

Providing these photos at the end of your inspection report also teaches your clients a simple home-maintenance tip. By comparing the meter readings for the first few months, they can monitor their family's average water usage, and they can be alerted to any unexpected surges that may indicate a leak in the plumbing system.



Include InterNACHI's Estimated Life Expectancy Chart with Every Report

The chart details the predicted life expectancy of household materials, systems and components so that you don't have to. Life expectancy varies with usage, weather, installation, maintenance, and quality of materials. This chart provides your client with a general guideline – and not a guarantee or warranty – from the world's largest inspection association. And a reminder that there is no guarantee or warranty is stated at the bottom of the chart.

Download InterNACHI's free Estimated Life Expectancy Chart by visiting www.nachi.org/life-expectancy

Use InterNACHI's “Now That You’ve Had a Home Inspection” Home Maintenance Book



The book is written specifically to reduce your liability by reminding your clients that a home inspection does not reveal every defect that exists, that certain issues are outside the scope of a home inspection, and that the homeowner is now responsible for maintaining their home.

One of the best things an inspector can do to help reduce his liability is to give his clients as much information as possible about how to maintain their new home and to look for issues after the purchase. Many new homeowners give little thought to maintaining their new home and assume it will always be in the same good condition it was when they first moved in. If you tell a client what he or she should do after their purchase, and the client fails to heed your advice, you have laid the groundwork for a successful defense in a potential future lawsuit. With the delivery of their inspection report, many inspectors include a copy of InterNACHI's home maintenance manual, "Now That You've Had a Home Inspection." This comprehensive guide takes homeowners through checklists and steps of the regular and seasonal maintenance of their greatest investment.

This large-format, soft-cover book is also available in three additional versions: in Spanish; for Florida homeowners; and with a customized cover that includes your logo and contact information. It works well with the Client Satisfaction Survey (discussed next).

For more information about the "Now That You've Had a Home Inspection" book, visit www.nachi.org/now

Use InterNACHI's Client Satisfaction Survey

The Client Satisfaction Survey creates a factual record of the client's version of events surrounding the inspection in the relevant time frame, thus inhibiting the client's ability to change his or her story to the circumstances of a later claim.

The Client Satisfaction Survey hits seven birds with one stone:

1. **It limits your liability.** Often, a dissatisfied client will describe your services to his/her agent – or, worse, to a judge – much differently than the truth. Procuring and maintaining a copy of this survey will bring them back to Earth, so to speak. It is a handy document to have to present to a complaining agent, and it can often end a legal action all by itself. It is the next best thing to a deposition.

2. **It alerts you to weaknesses in your service.** Often, a client is too shy to complain to you in person about your service – or, worse, complains only to the agent who referred you. Providing this survey offers your client a way to express his or her dissatisfaction while you are still on the inspection site and can do something about it. Client feedback is necessary to improving your service.
3. **It reminds your client that you don't have X-ray vision.** It is important to explain to your client that a home inspection can't reveal every defect that exists, or will ever exist, in their new home. This survey works in conjunction with InterNACHI's Agreement (between you and your client) in that it again reminds them of this fact.
4. **It suggests that your client may wish to order ancillary inspections.** Some InterNACHI® members offer additional inspections, such as WDO, radon, water quality, and mold – for additional fees, of course. This Survey reminds them to ask about other services you might offer.
5. **It lets your client know that you care about his/her opinion.** Everyone likes being asked what they think, especially about the products and services they've paid for.
6. **It helps you get more work.** By sending a copy of the flattering survey back to the agent who referred you, you remind that agent to refer you again.

And, if you provide your client with a copy of “Now That You've Had a Home Inspection” book, which I previously discussed, you drastically reduce your liability even further.

For more information about the Client Satisfaction Survey, visit www.nachi.org/survey



The International Association of Certified Home Inspectors'

Client Satisfaction Survey

Client's Name: _____ Client's phone number: _____

Property address: _____

Inspector's name _____ InterNACHI ID #: _____

Was the inspector on time for the inspection? _____ yes ☐ no ☐

Was the inspector clean and courteous? _____ yes ☐ no ☐

Was the inspector knowledgeable? _____ yes ☐ no ☐

Did the inspector explain that hidden and/or obstructed areas
could not be inspected and why? _____ yes ☐ no ☐

Did the inspector explain that the inspection cannot reveal
every defect that exists? _____ yes ☐ no ☐

Did the inspector give you a copy of the book:
Now that You've had a Home Inspection? _____ yes ☐ no ☐

Did the inspector explain about other ancillary inspections
you can order? _____ yes ☐ no ☐

Was the value of this inspection worth the fee you paid? _____ yes ☐ no ☐

Would you hire this inspector again or recommend this inspector
to a friend? _____ yes ☐ no ☐

Besides your real estate agent and attorney, do you permit the inspector to discuss
their findings with anyone else?

Seller? _____ yes ☐ no ☐

Seller's agent? _____ yes ☐ no ☐

Contractor's? _____ yes ☐ no ☐

Other? _____ yes ☐ no ☐

If you would like InterNACHI to email you free seasonal maintenance reminders about home care
tips enter your email address:

Client Signature: _____ Date: _____

Please write your suggestions for improving this inspector's service on back.

What Happens When Your Inspection Report Gets Used Over and Over?

It's a sad but true fact that sometimes the product of a home inspector's labor — the inspection report — will be recycled, either at the behest of an unscrupulous agent, or based on the prospect's own uneducated attempt to save some time and money. Too often, an inspection report will be presented to prospective home buyers at open houses and other events, and promoted as an accurate representation of the home's current condition.

There are all kinds of problems with this situation, including the following:

1. A home inspection — and resulting report — is a snapshot in time. It conveys the home's condition only for the date and time of the inspection. Most inspector-client agreements explicitly state as much — and if yours doesn't, it should.
2. If the person relying on the report is not the person who hired the inspector, that person is being short-sighted indeed, as there may have been all kinds of changes in the condition of the home since the inspection that were not covered in the report, including weather events, minor defects that have progressed to become major ones, infestations, and even repairs that have been performed since then. (It's like going on a dating website and assuming that someone's profile picture is what they look like now, when it's actually their high school yearbook photo from 20 years ago — only the ramifications are much worse!) It's penny-wise but pound-foolish to try to save a few bucks by using an old report, even if that report is only a week old. The cost of an inspection is a pittance compared to the value of the home.
3. As a corollary to #1 and #2, a home inspection is not a warranty of the home's condition — not at the time of the inspection, and certainly not at some future date. And as it is not technically exhaustive, it carries no guarantee. It's difficult enough to make these points clear to the client; imagine the unmanaged expectations of someone reading the report who isn't the client.
4. An outdated report can have the effect of unfairly damaging an inspector's reputation if the home's condition has substantially changed, but the home buyer makes unfounded complaints (perhaps to a Realtor, or maybe online) based on a report that s/he never contracted for. Some bells you just can't unring.
5. Some inspectors may try to cut their losses by negotiating a halfway

approach, such as by performing an abbreviated re-inspection for a new client based on an old report. Why would you sell yourself short, literally? It's alright to offer a discount to a previous client, but the house is not your client, so don't allow a new client to haggle with you about the price of your services. Nothing says "cheap inspector" like one who is willing to bargain away his/her livelihood, job by job.

6. Related to #5, it may actually be illegal in your state/province for you to recycle your own report. Check with your state/province's real estate laws to make sure you're not violating any statutes in a misguided attempt to ingratiate yourself with a prospective client. It's one thing for an agent or buyer to be convinced to use you in the future based on your report's overall look, quality, and easy-to-read format. To be sure, it's terrific marketing for prospects to see what your reports look like; it's exactly why we recommend putting a sample report on your website. But you could be treading in dicey territory in terms of liability if you allow any of your reports' contents to be used by those other than your paid clients.
7. Again, the report is the product of your labor, and you should be fairly compensated for it. Each inspection has only one client. Read item #3 in InterNACHI's Home Inspection Agreement (<https://www.nachi.org/agreement/template/view/1.htm>).

There are some simple solutions to help home inspectors reinforce these points to non-clients and other third parties who may get their hands on an inspection report, the contents of which are the property of the client and inspector, and no one else, even if permission is given by the client for others to read it.

Here's what you should do to prevent problems that can arise if someone other than your client tries to use your report:

1. Be sure to maintain adequate coverage through your Errors & Omissions and General Liability Insurance, as your clients, and even some third parties in some state/provinces, do have a legal right to rely on the contents of your inspection report.
2. Number each page of your report (even using the format "Page 1 of 30") so that a page removed will be conspicuous by its absence.
3. Note in the summary of your report that any digital photos and/or video included are time- and date-stamped, and make sure that they are.

4. Use the header/footer function of your report-writing software to identify the property by address, and add the time and date of the inspection.
5. Always include a disclaimer in your report and agreement stating that the inspection you performed at 123 Main Street in Anytown, USA, is valid only for the date and time of the inspection. Somewhere within the middle of the report, insert the following paragraph:

A general home inspection is a non-invasive, visual examination of the accessible areas of a residential property, performed for a fee, which is designed to identify defects within specific systems and components that are both observed and deemed material by the inspector. It is based on the observations made on the date of the inspection, and not a prediction of future conditions. It is a snapshot in time. A general home inspection will not reveal every issue that exists or ever could exist, but only those material defects observed on the date of the inspection.

6. Since it's impossible to control who reads your report, monetize the possibility and turn things to your advantage. Include a direct message at the end of your report addressed to any unauthorized third parties, stating something along the lines of:

If you're reading this report but did not hire me, XYZ Inspectors, to perform the original inspection, please note that it is likely that conditions related to the home have probably changed, even if the report is fairly recent. Just as you cannot rely on an outdated weather report, you should not rely on an outdated inspection report. Minor problems noted may have become worse, recent events may have created new issues, and items may even have been corrected and improved. Don't rely on old information about one of the biggest purchases you'll ever make. Remember that the cost of a home inspection is insignificant compared to the value of the home. Protect your family and your investment, and please call me directly at (000) 555-1212 to discuss the report you're reading for this property so that we can arrange for a re-inspection. Thank you!

Always look for the opportunity to turn a potential negative into a positive, and that includes being pro-active in making sure you get paid for your work. Keep your prices respectably high, maintain sound business ethics – especially those related to protecting your clients' privacy, including the contents of their reports – and let your reputation and the quality of your inspections and reports be your calling card.

Use InterNACHI's Free Issue Resolution Service

If your client has an issue, InterNACHI® may be able to resolve it for you. Often, just the act of filling out the online Issue Resolution Form causes the client to realize that the inspector isn't to blame.

For more information about InterNACHI's free Issue Resolution Service, visit www.nachi.org/issue-resolution

How a Home Inspector Can Stop Defamation

Sellers and their agents often blame home inspectors when an inspector's report causes the buyer to back out of the deal. These sellers and agents will rarely be able to successfully sue the inspector because they have no standing, since they were not the inspector's client. However, sometimes disgruntled sellers and agents resort to publicly attacking the inspector by posting defamatory statements about him on consumer review websites, such as Angie's List, Google Reviews, Yelp, or on real estate blogs.

If you learn that someone is defaming you, here is a sample letter you can use to try to stop it. As always, have your lawyer review it. InterNACHI® can also intercede in an effort to stop the defamation.

[Recipient's Address]

[Date]

RE: Defamation

Dear _____:

You made defamatory statements about me that damaged my reputation as a home inspector. Specifically, you made the following false statements:

[Describe each false statement, when it was made, on what website it was made or what publication it appeared in, what was said or written about you, and who heard or read the statement. Consider attaching proof of the statement and/or copies of the defamatory writings.]

The law is clear that when you make defamatory statements about a private person in his/her trade, business or profession, it is defamation *per se*. In such cases, the law presumes injury and the victim need not

prove actual damages. The U.S. Supreme Court upheld this principle as fully consistent with the U.S. Constitution. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In one recent case, a Virginia jury awarded a home inspector actual damages and exemplary damages against a person who had posted defamatory statements about the inspector on Angie's List. See *Sessa v. Shaffer*, Virginia Beach Circuit Court Case No. CL 12-5448.

[INSERT APPROPRIATE PARAGRAPH; SEE BELOW.]

I take my professional reputation very seriously. To that end, I demand that you immediately retract your defamatory statements. I specifically ask that you take the following actions:

[State what corrective action you want the potential defendant to take.]

Your willingness to take these actions immediately will play an important role in whether I decide to sue you for defamation.

If you refuse to take these corrective measures, a judge or jury may consider your refusal as evidence of malice and may award me exemplary damages.

If you believe your statements are not defamatory, I ask that you immediately provide me with copies of all documents you intend to rely on. I also request the name, address, phone number and email address of each person you believe can testify that the statements were not defamatory. I need this information to determine whether to file suit. If I must file suit, the court will likely require you to provide this information to me anyway as part of the mandatory disclosure and discovery process.

Otherwise, please comply with my request for corrective action, as noted above, immediately. After you have done so, please email me at [inspector's email address] notifying me, and include any relevant links to show that your defamatory remarks have been deleted.

Sincerely,

Joe Home Inspector

If you're writing to a past client who defamed you, insert this paragraph in the space noted above:

I complied with our contractual obligations and with state/provincial law. The contract you signed clearly states that I would perform the inspection in accordance with InterNACHI's Standards of Practice and any applicable local laws. I did that. Your statements falsely represent that I was negligent and/or that I breached our contract. Your statements hurt me in my profession, which is defamation *per se*.

If you're writing to a Realtor or other third party, insert this paragraph in the space noted above:

I am disturbed that you made your statements without knowing the terms of my contract with [name of client] or the scope of InterNACHI's Standards of Practice (www.nachi.org/sop). The contract clearly states that I would perform the inspection in accordance with InterNACHI's SOP and any applicable state/provincial laws. I did that. Your statements falsely represent that I was negligent and/or that I breached the contract. Your statements hurt me in my profession, which is defamation *per se*. In 2012, a home inspector in Virginia won an \$11,000 judgment against a person who had defamed him on Angie's List. He won another \$11,000 in punitive damages. (See *Sessa v. Shaffer*, Circuit Court for Virginia Beach, Case No. CL12-5448.)

You can download templates for letters to parties to stop defamation at www.nachi.org/documents

Remember to always be pro-active in protecting your reputation and that of your business. Be sure to set Google Alerts so that you can keep track of any instances that your name and your company's name appear online. If someone libels you, you must defend yourself by taking immediate action. Your livelihood may depend on it.

If You Settle a Dispute with a Client, Get a Signed Release and a Letter of Reference

Right or wrong, in some cases, it makes sense to cut a deal with a complaining client to avoid a lawsuit.

Never apologize. An apology may be used to support a future claim that you were negligent.

If you have to pay to have a repair done to correct a defect your client claims you missed, always ask for a handwritten letter of reference thanking you

for quickly solving the issue. Then take a stack of those letters back to the referring agent, brag about how you paid to keep your mutual client happy, and ask that the stack be passed out at the next real estate sales meeting.

Also, after you get the reference letter, get a release signed to end the issue forever.

You can download a Plain English General Release at www.nachi.org/release

Note: InterNACHI® has built the release into its free, online agreement system that I discussed earlier for you to procure the release electronically.

Participate in InterNACHI's "We'll Buy Your Home" Guarantee Program

If you participate in InterNACHI's Buy-Back Guarantee program and you miss something during the inspection, InterNACHI® will buy the home back! InterNACHI® will pay whatever price your client paid for the home — it's that simple!

InterNACHI's Buy-Back Guarantee is a game-changer for the real estate and home inspection industries, and it's valid only for inspections performed by participating InterNACHI® inspectors.

Here are the details:

- The home must be listed with a licensed real estate agent.
- The Guarantee excludes homes with material defects not present at the time of the inspection, or not required to be inspected, per InterNACHI's Residential Standards of Practice.
- The Guarantee will be honored for 90 days after closing.
- It's valid for home inspections performed for home buyers only by participating InterNACHI® members.

The Buy-Back Guarantee all but eliminates lawsuits by eliminating your client's damages. Damages are one of the four things a plaintiff must prove in order to be awarded a judgment.

The four elements of a negligence claim are:

1. duty;
2. breach;
3. causation; and
4. damages.

To be successful, a plaintiff must prove all four elements by a preponderance of the evidence. Let's look at each of the elements.

Duty

The plaintiff must prove that the inspector owed a duty to him. The duty may be created and defined by a contract, a statute, or the standard of care in the industry. In common law, every person has a duty to exercise ordinary care in all activities to prevent foreseeable risks. Even if no duty would ordinarily exist, a person who voluntarily undertakes to do something must exercise ordinary care in doing it. (Even though you have no duty to provide a free inspection to a relative, if you assume that duty, you must carry it out properly).

An inspector has a duty to comply with all applicable laws and regulations, but some state/province laws do not define any additional duties that inspectors owe to their clients. Put differently, not all states/provinces have statutes that specifically define the standard of care. Therefore, it is vital that the written contract define the additional duties assumed by the inspector. If the client and inspector both understand the scope of the duties owed, disputes are far less likely.

The best thing an inspector can do to protect himself is to insist that the client sign a written contract BEFORE the inspection. You can do that easily by using InterNACHI's free, online signable agreement system, which I discussed earlier. The contract should explain what the inspector will and will not do.

Generally, the inspector works for the prospective buyer. A seller may sometimes threaten to sue an inspector for negligence because of statements in the inspector's report, but this threat is often hollow because the inspector's duty is to his/her client, not to the seller or real estate agent.

Generally, the existence of a duty is a question of law, meaning that the judge – not the jury – decides whether the inspector owed a duty to the client.

Breach

Once the plaintiff proves the existence of a duty, he or she must prove that the inspector breached that duty. In other words, the plaintiff must show that the inspector was negligent. Because it is impossible to prescribe definite rules in advance for every combination of circumstances that may arise, the question of whether the inspector breached a duty is usually a question for the trier of fact (the jury in a jury trial, or the judge in a non-jury trial).

One way the inspector can reduce the risk of being found negligent is to prepare a thorough report that lists all relevant observations. The inspector should take plenty of photos during the inspection, as they may be useful if litigation ensues.

Causation

Even if the plaintiff proves that the inspector owed a duty and breached that duty, the plaintiff must also demonstrate that the breach was the cause of the claimed damages. The test traditionally used to determine cause is the “but for” test. Under this approach, the inspector’s conduct is a cause if the damages would not have taken place but for the inspector’s breach of the duty owed.

Think of it this way: If an inspector breaches his/her duty by failing to perform a proper electrical inspection, but the client is complaining about the cost of replacing the roof, the inspector’s breach of his/her duty was not the cause the client’s damages.

The “but for” test works well, but there is one situation where it fails. If two causes combine to bring about an event, either of which would have been sufficient to cause the damages, many courts ask whether the defendant’s breach of duty was a “substantial factor” in bringing about the damages. If so, the inspector’s negligence will be considered a cause of the claimed damages.

It is important to remember that even in situations where a home inspector has been negligent, other parties, including the buyer, may have also been negligent. For instance, suppose an inspector lists a defect in his/her report, fails to fully inform the buyer of the possible consequences of this defect, but advises the buyer to hire an expert to follow up on the defect. If the buyer fails to hire an expert, the buyer may be at least partly at fault for failing to heed the inspector’s recommendation. When more than one party has been negligent, many states/provinces now require courts and juries to allocate a

percentage of fault to each negligent party.

Damages

If the plaintiff establishes the first three elements of a negligence claim, he must still prove that he was damaged, and he must also prove the amount of his damages. Damages in a negligence suit against a home inspector will often be the costs incurred in correcting defects that the inspector failed to find. However, there have been cases when an unhappy client claimed that he would not have purchased a property had the inspector performed a proper inspection and, in such cases, the claimed damages may be much greater.

The goal of allowing an award of damages is to make the plaintiff whole – to restore him to the situation he was in before the negligent act or omission. One issue to be aware of is claims that seek to make the plaintiff better off than he would have been but for the inspector's negligence. For example, if an inspector fails to mention defects in a roof that is 10 years old and the roof must be replaced, the plaintiff is not entitled to a brand new roof, but is only entitled to damages equal to a non-defective roof that is 10 years old.

The law recognizes direct damages and consequential damages. Direct damages include damages such as the cost of repair or replacement. Consequential damages may include damages such as loss of productivity, or loss of profits resulting from the inability to use a home office, for example. In many states and provinces, an inspector can limit his liability for damages to direct damages and disclaim any responsibility for consequential damages. In some states/provinces, an inspector may be able to limit his liability to the amount paid for the inspection.

InterNACHI's "We'll Buy Your Home" Guarantee all but eliminates this fourth element: damages.

For more information about InterNACHI's "We'll Buy Your Home" Guarantee and to watch videos of the Buy-Back Guarantee in action, visit www.nachi.org/buy

Home Inspector Insurance: E&O and General Liability

I have been a speaker at inspection events for more than 25 years. From the stage, I often ask for attendees to raise their hands if they think the inspection business is a high-liability business. Almost every hand goes up. I

then ask if anyone in the room has ever been sued. Very few hands go up, and out of those who have been sued, very few have ever paid out much.

Yep... I've probably met with more inspectors than anyone else in the world, and I have trouble finding any inspectors who have lost much money in a lawsuit. It's as rare an event as having your house burn down. Nevertheless, we all carry fire insurance, so, perhaps you should consider buying insurance to cover yourself in the case of a rare event.

InterNACHI® members now have access to some of the most comprehensive and competitively priced insurance coverage in today's market. InterNACHI® and EliteMGA have partnered to offer insurance, discounts, and broad coverage with additional enhancements through the I-Elite Risk Purchasing Group. If you're a member, you can request a quote.

Discounted Rates: Almost every consumer shops for insurance with the goals of paying the least and getting the most. Obtaining your liability insurance from an industry specialist like InterNACHI's Elite Risk Insurance program can help you achieve both. The I-Elite Risk Purchasing Group, which is just for InterNACHI® members, provides competitive rates through an A-rated carrier. With a program designed specifically for the home inspection industry, you'll have access to competitive premiums and comprehensive coverage. If you find a quote with a lower premium, just contact your agent at EliteMGA so that they can review it and make sure it fits your needs in terms of coverage, deductible, carrier status, etc.

Better Coverage: What good are low premiums if the policy doesn't cover a claim filed against you? You don't want to find that out the hard way, as it can create a tremendous financial hardship having to defend a claim on your own. Liability insurance has many facets. Home inspectors have a need for both Professional Liability – often referred to as Errors & Omissions or E&O Insurance – and General Liability Insurance. Insurance policies are contracts with significant limitations and exclusions, which could leave you with wide gaps in coverage if the right protection is not in place. Our E&O policies go above and beyond the norm by including free General Liability coverage, as well as endorsements for a wide variety of ancillary inspections, including mold, drone use, 203k consultations, and more. EliteMGA's agents will work with you to help customize your coverage to fit your company's needs. Elite's representatives also understand the importance of maintaining continuous coverage to protect you from claims for inspections you performed in the past. Most importantly, they have a team of professionals who will take the time to assess your insurance needs and provide you with appropriate solutions.

Fighting for the Inspector Who's Sued: It's not a matter of "if" so much as "when." As an inspector, if you stay in this business long enough, chances are you're going to get sued. The vast majority of lawsuits against home inspectors are meritless and fairly defensible, but it's imperative to report the matter to your agent ASAP so that you don't jeopardize your coverage down the road. Many inspectors are reluctant to report an incident because they don't want a blemish on their record or their rates to increase. That fear will do more harm than good. Reporting a claim does not always mean that your rates will automatically increase. In the event of a claim, a specialized claim representative will work directly with you to gather information and guide you through the process of dealing with a disgruntled client to ultimately diffuse the situation. In order to further mitigate your exposure, the program utilizes a third-party expert in home inspection litigation, when appropriate. Should you be named in a lawsuit and need an attorney, the carrier will appoint local, vetted and specialized counsel to defend the matter, whenever possible. It's important to note that every claim situation is different in terms of liability, but the goal of the program is to vigorously defend you if you've met the standard of care owed to your client.

Risk Management: As a home inspector, you need to be aware of the potential exposure you have as a business owner and look for the best and most effective ways to manage those risks. Insurance is an excellent way to mitigate potentially costly liability and exposure, which could put you out of business, or worse. There are other techniques to consider, such as risk transfer, but the first step is to identify the different kinds of exposure you have by working with a professional insurance agent or risk manager to create a comprehensive plan to address them.

To better manage your risk, here are some other questions to consider:

- Is your inspection agreement compliant with all state licensing and consumer laws, where applicable?
- Does your insurance policy cover you for all the different services you offer?
- Do you use subcontractors to perform your ancillary services, such as radon testing, wood-destroying insect inspections, or mold testing? If so, are these subcontractors adequately insured? Do they list your company as an additionally named insured party on their policy?
- Do you hire independent contractors to perform inspections on behalf of your company? If so, are they covered under your policy?

- How large is your deductible? The InterNACHI® insurance program features a vanishing deductible that automatically reduces your deductible by \$500 each year you renew without any claims (some restrictions apply).

If you're an InterNACHI® member, you can request a quote. Getting a free quote is as simple as answering a few simple questions by visiting **www.nachi.org/insurance**

More for You Online

Here are some more articles and information you'll find on our website at **www.nachi.org** that will be of interest:

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CONTRIBUTORS

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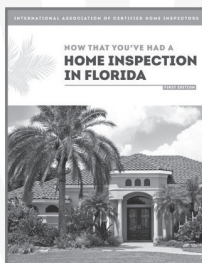
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