

InterNACHI's  
2018 Professional Home Inspector's Convention  
Atlantic City, New Jersey

# LEGAL SELF-DEFENSE FOR HOME INSPECTORS and CHOICE OF ENTITY

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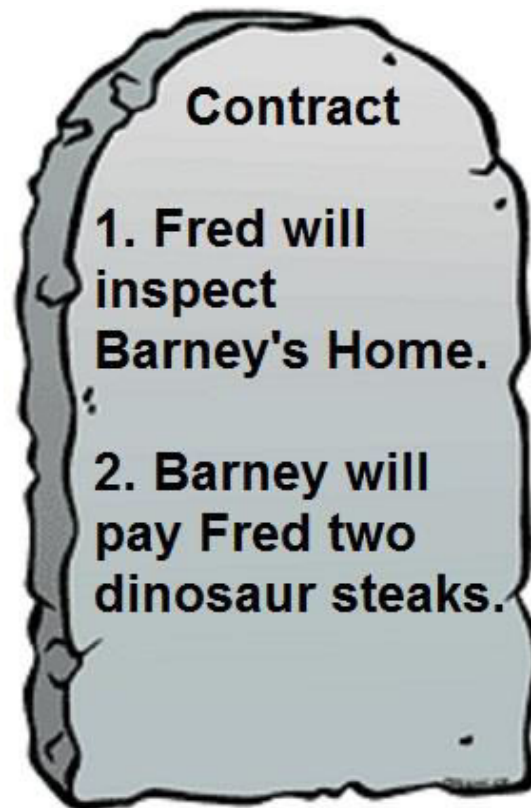
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# Part 1. Legal Self-Defense for Home Inspectors

Back in the days when home inspections were simple.



# The First Contract



# Today's Contract

## InterNACHI® Home Inspection Agreement

Revised November 2017

This is an Agreement between you, the undersigned Client, and us, the Inspector, pertaining to our inspection of the Property at \_\_\_\_\_ . The terms below govern this Agreement.

1. The fee for our inspection is \$ \_\_\_\_\_, payable [in full / in part at \$ \_\_\_\_\_] at a time [before / after] the appointment.
2. We will perform a visual inspection of the home/building and provide you with a written report identifying the defects that we (1) observed and (2) deemed material. The report is only supplementary to the seller's disclosure.
3. Unless otherwise noted in this Agreement or not possible, we will perform the inspection in accordance with the current Standards of Practice (SOP) of the International Association of Certified Home Inspectors ("InterNACHI"), posted at [www.nachi.org/sop](http://www.nachi.org/sop). If your jurisdiction has adopted mandatory standards that differ from InterNACHI's SOP, we will perform the inspection in accordance with your jurisdiction's standards. You understand that InterNACHI's SOP contains limitations, exceptions, and exclusions. You understand that InterNACHI is not a party to this Agreement, has no control over us, and does not employ or supervise us.
4. Unless otherwise indicated in writing, we will NOT test for the presence of radon, a harmful gas. Unless otherwise indicated in writing, we will not test for mold. Unless otherwise indicated in writing, we will not test for compliance with applicable building codes or for the presence of or for any potential dangers arising from the presence of asbestos, lead paint, soil contamination, or other environmental hazards or violations. If any structure you want us to inspect is a log structure or includes log construction, you understand that such structures have unique characteristics that may make it impossible for us to inspect and evaluate them. Therefore, the scope of our inspection will not include decay of the interior of logs in log walls, log foundations or roofs, or similar defects.
5. Our inspection and report are for your use only. You give us permission to discuss our observations with real estate agents, owners, repair persons, or other interested parties. You will be the sole owner of the report and all rights to it. We are not responsible for use or misinterpretation by third parties, and third parties who rely on it in any way do so at their own risk and release us (including employees and business entities) from any liability whatsoever. If you or any person acting on your behalf provide the report to a third party who then sues you and/or us, you release us from any liability and agree to pay our costs and legal fees in defending any action naming us. Our inspection and report are in no way a guarantee or warranty, express or implied, regarding the future use, operability, habitability or suitability of the home/building or its components. We disclaim all warranties, express or implied, to the fullest extent allowed by law.
6. **LIMITATION ON LIABILITY AND DAMAGES.** We assume no liability for the cost of repair or replacement of unreported defects, either current or arising in the future. In all cases, our liability is limited to liquidated damages in an amount not greater than 1.5 times the fee you paid us. You waive any claim for consequential, exemplary, special or incidental damages or for the loss of the use of the home/building. You acknowledge that this liquidated damages is not a penalty, but that we intend it to: (i) reflect the fact that actual damages may be difficult or impractical to ascertain; (ii) allocate risk between us; and (iii) enable us to perform the inspection for the agreed-upon fee. If you wish to eliminate this liquidated damages provision, we are willing to perform the inspection for an increased fee of \$ \_\_\_\_\_, payable in advance.
7. We do not perform engineering, architectural, plumbing, or any other job function requiring an occupational license in the jurisdiction where the property is located. If we hold a valid occupational license, we may inform you of this and you may hire us to perform additional functions. Any agreement for such additional services shall be in a separate writing.
8. If you believe you have a claim against us, you agree to provide us with the following: (1) written notification of your claim within seven days of discovery, in sufficient detail and with sufficient supporting documents that we can evaluate it, and (2) immediate access to the premises. Failure to comply with these conditions releases us from liability.
9. You agree that the exclusive venue for any litigation arising out of this Agreement shall be in the county where we have our principal place of business. If you fail to prove any claim against us, you agree to pay all our legal costs, expenses and attorney's fees incurred in defending that claim. You agree that the exclusive venue for any legal action against InterNACHI itself, allegedly arising out of this Agreement or our membership in InterNACHI, will be in Boulder County, Colorado. Before bringing any such action, you must provide InterNACHI with 30 days' written notice of the nature of the claim, in sufficient detail and with sufficient supporting documents that InterNACHI can evaluate it. In any action against us or InterNACHI, you waive trial by jury.
10. If a court declares any provision of this Agreement invalid, the remaining provisions remain in effect. This Agreement represents our entire agreement; there are no terms other than those set forth herein. All prior discussions are merged into this Agreement. No statement or promise by us shall be binding unless reduced to writing and signed by one of our authorized officers. Any modification of this Agreement must be in writing and signed by you and by one of our authorized officers. This Agreement shall be binding upon and enforceable by the parties and their heirs, executors, administrators, successors and assigns. You will have no cause of action against us after one year from the date of the inspection.
11. Past-due fees for your inspection shall accrue interest at 8% per year. You agree to pay all costs and attorney's fees we incur in collecting the fees owed to us. If the Client is a corporation, LLC, or similar entity, you personally guarantee payment of the fee.
12. If you request a re-inspection, the re-inspection is subject to the terms of this Agreement.
13. You may not assign this Agreement.
14. If a court finds any term of this Agreement ambiguous or requiring judicial interpretation, the court shall not construe that term against us by reason of the rule that any ambiguity in a document is construed against the party drafting it. You had the opportunity to consult qualified counsel before signing this.
15. If there is more than one Client, you are signing on behalf of all of them, and you represent that you are authorized to do so.
16. If you would like a large print version of this Agreement before signing it, you may request one by emailing us.
17. If you elect to participate in InterNACHI's Buy-Back Guarantee Program, you will be bound by the terms you may view at [www.nachi.org/buy](http://www.nachi.org/buy).

I HAVE CAREFULLY READ THIS AGREEMENT. I AGREE TO IT AND ACKNOWLEDGE RECEIVING A COPY OF IT.

CLIENT

(Date)

CLIENT

(Date)

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# The 3 Main Causes of Contract Disputes

- **Ambiguity**

When an ambiguity is found to exist and cannot be resolved by reference to other contractual provisions, **extrinsic evidence** must be considered by the trial court in order to determine the mutual intent of the parties at the time of contracting. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310 (Colo. 1984).

- **Inconsistency**

Where it is impossible to reconcile conflicting clauses of a contract, it is proper to receive **extrinsic evidence** for the purpose of determining the intent of the parties. *Ryan v. Fitzpatrick Drilling Co.*, 342 P.2d 1040 (Colo. 1959).

- **Failure to address an issue altogether**

Silence on a matter in a contract creates an ambiguity when it involves a matter naturally within the scope of the contract. *Cheyenne Mtn. Sch. Dist. #12 v. Thompson*, 81 P.2d 711 (Colo. 1993). **Extrinsic evidence** is admissible to determine the intent of the parties.

If a court allows **extrinsic evidence**, there will be depositions where everyone testifies about what was allegedly said. You will have to produce **all emails** between you and the client before and after the inspection. You want an **airtight contract** so a court won't allow extrinsic evidence.

# Avoiding Claims

**99%** of all claims against inspectors arise because your client did not understand the limited scope of a home inspection. **You** failed to educate your client.

# Avoiding Claims

- **Always** get a signed contract **BEFORE** you do the inspection.
- Legal terms contained in a report delivered **after** the inspection are **not** binding on the client. The client must understand the terms of the agreement **BEFORE** the client agrees to hire you for the inspection.



# InterNACHI's Contract is Written in **Plain English**

- “You” and “us” rather than “inspector” and “client”
- No “wherefores” or “hereinafters”
- Minimum passive voice

# Courts Are More Likely to Enforce Contracts Drafted in Plain English

“Furthermore, the release agreement here was **written in simple and clear terms**, it was **not inordinately long and complicated**, and Riehl indicated in her deposition that she understood that by executing the agreement, she was in fact granting B & B a release.” *B&B Livery, Inc. v. Riehl*, 960 P.2d 134 (Colo. 1998). (Release that was broader than statutory limitation on liability was enforceable).

Indemnification provision was enforceable where it is “**clear and unambiguous** and is **written in plain language, not hidden nor lost in a haze of small print and legalese**.” *Midwest Concrete Placement, Inc. v. L&S Basements, Inc.*, 363 Fed.Appx. 570 (10<sup>th</sup> 2010).

Disclaimer language in employee manual **not enforceable** where written in “**confusing legalese**.” *Nicosia v. Wakefern Food Corporation*, 643 A.2d 554 (N.J. 1994).

# Key Clauses in InterNACHI's Contract

3. Unless otherwise noted in this Agreement or not possible, we will perform the inspection in accordance with the **current Standards of Practice (SOP) of the International Association of Certified Home Inspectors ("InterNACHI")**, posted at [www.nachi.org/sop](http://www.nachi.org/sop). If your jurisdiction has adopted mandatory standards that differ from InterNACHI's SOP, we will perform the inspection in accordance with your jurisdiction's standards. **You understand that InterNACHI's SOP contains limitations, exceptions, and exclusions.** You understand that InterNACHI is not a party to this Agreement, has no control over us, and does not employ or supervise us.

**When a client claims you missed something, you want to be able to show them that they signed this.**

# Key Clauses in InterNACHI's Contract

4. Unless otherwise indicated in writing, we will NOT test for the presence of **radon**, a harmful gas. Unless otherwise indicated in writing, we will not test for **mold**. Unless otherwise indicated in writing, we will not test for compliance with applicable **building codes** or for the presence of or for any potential dangers arising from the presence of **asbestos**, **lead paint**, **soil contamination**, or other **environmental hazards** or violations. If any structure you want us to inspect is a **log structure** or includes log construction, you understand that such structures have unique characteristics that may make it impossible for us to inspect and evaluate them. Therefore, the scope of our inspection will not include decay of the interior of logs in log walls, log foundations or roofs, or similar defects.

# Key Clauses in InterNACHI's Contract

7. We do not perform engineering, architectural, plumbing, or any other job function requiring an occupational license in the jurisdiction where the property is located. If we hold a valid occupational license, we may inform you of this and you may hire us to perform additional functions. Any agreement for such additional services shall be in a separate writing.

# Key Clauses in InterNACHI's Contract

**6. LIMITATION ON LIABILITY AND DAMAGES.** We assume no liability for the cost of repair or replacement of unreported defects, either current or arising in the future. In all cases, our liability is limited to liquidated damages in an amount not greater than 1.5 times the fee you paid us. You waive any claim for consequential, exemplary, special or incidental damages or for the loss of the use of the home/building. You acknowledge that this liquidated damages is not a penalty, but that we intend it to: (i) reflect the fact that actual damages may be difficult or impractical to ascertain; (ii) allocate risk between us; and (iii) enable us to perform the inspection for the agreed-upon fee. **If you wish to eliminate this liquidated damages provision, we are willing to perform the inspection for an increased fee of \$\_\_\_\_\_, payable in advance.**

# Key Clauses in InterNACHI's Contract

8. If you believe you have a claim against us, you agree to provide us with the following: (1) **written notification of your claim within seven days of discovery**, in sufficient detail and with sufficient supporting documents that we can evaluate it; and (2) **immediate access to the premises**. Failure to comply with these conditions releases us from liability.

# Key Clauses in InterNACHI's Contract

9. You agree that the **exclusive venue** for any litigation arising out of this Agreement shall be in the county where we have our principal place of business. If you fail to prove any claim against us, you agree to pay all our legal costs, expenses and **attorney's fees** incurred in defending that claim.

You agree that the exclusive venue for any legal action against InterNACHI itself, allegedly arising out of this Agreement or our membership in InterNACHI, will be in Boulder County, Colorado. Before bringing any such action, you must provide InterNACHI with 30 days' written notice of the nature of the claim, in sufficient detail and with sufficient supporting documents that InterNACHI can evaluate it. In any action against us or InterNACHI, you **waive trial by jury**.



# Key Clauses in InterNACHI's Contract

10. If a court declares any provision of this Agreement invalid, the remaining provisions remain in effect. **This Agreement represents our entire agreement; there are no terms other than those set forth herein. All prior discussions are merged into this Agreement. No statement or promise by us shall be binding unless reduced to writing and signed by one of our authorized officers. Any modification of this Agreement must be in writing and signed by you and by one of our authorized officers.** This Agreement shall be binding upon and enforceable by the parties and their heirs, executors, administrators, successors and assignees. **You will have no cause of action against us after one year from the date of the inspection.**

# Key Clauses in InterNACHI's Contract

11. Past-due fees for your inspection shall accrue interest at 8% per year. You agree to pay all costs and attorney's fees we incur in collecting the fees owed to us. **If the Client is a corporation, LLC, or similar entity, you personally guarantee payment of the fee.**

**15. If there is more than one Client, you are signing on behalf of all of them, and you represent that you are authorized to do so.**

**16. If you would like a large print version of this Agreement before signing it, you may request one by emailing us.**

17. If you elect to participate in InterNACHI's Buy-Back Guarantee Program, you will be bound by the terms you may view at [www.nachi.org/buy](http://www.nachi.org/buy).

# Arbitration?

Arbitration is popular with some E&O carriers.

## **Disadvantages:**

- No appeal. If arbitrator gets it wrong, you're stuck.
- Wide variety in quality of arbitrators.
- Limited discovery in arbitration.
- AAA administrative fees.
- Difficult to seek indemnity or contribution from other responsible parties.
- Arbitration works both ways. No right for you to sue a customer that defames you.

**Alternatives:** require non-binding mediation before customer can sue you.

**Article:** [Think Twice about Arbitration Clauses](#)

# Preventing Claims

InterNACHI's Buy Back Program.



<https://www.nachi.org/buy.htm>

# Dealing with Claims

- **Stay off the phone.** You want a record of what was said. And what wasn't.
- Thank client for their feedback. **Ask client to put their concerns in an email to you.**
- Send client to **InterNACHI's Issue Resolution Program:**  
<https://www.nachi.org/issue-resolution.htm>
- Mark Cohen, J.D., LL.M., InterNACHI General Counsel.  
(303) 302-1841. [Legal@internachi.org](mailto:Legal@internachi.org)
- If you offer a refund, get a **signed release** that includes a **non-disparagement clause.**  
<https://www.nachi.org/release.htm>

## Part 2

# CHOICE OF ENTITY

# To Incorporate or Not: 4 Options

- Sole Proprietor
- Limited Liability Company
- Corporation
- Partnership

# To Incorporate or Not

## Sole Proprietor

- You are your business. Your business is not a separate entity.
- Your personal assets are at risk.
- You pay self-employment taxes on **all** income from the business.



# To Incorporate or Not

## LLC

- Your business is a separate entity. Owners are called members.
- Get a separate EIN from the IRS.  
<https://sa.www4.irs.gov/modiein/individual/index.jsp>
- Put “LLC” on your cards and brochures, etc.
- If you pay yourself a guaranteed salary, you may be able to shield some income from self-employment taxes. Consult a CPA.
- You list revenue and expenses on Schedule C of your 1040. No separate corporate tax return.
- Get a written operating agreement if you have more than one member.

# To Incorporate or Not

## Corporation

- Your business is a separate entity. Owners are called shareholders.
- Get a separate EIN from the IRS.  
<https://sa.www4.irs.gov/modiein/individual/index.jsp>
- Put “Inc.” on your cards and brochures, etc.
- You may be able to shield some income from self-employment taxes. Consult a CPA.
- You file a separate tax return for the corporation on Form 1120-S. (You must make S election within 75 days of forming the corporation. Use [Form 2553](#)). **NEVER** use a C corporation – there is a double taxation problem.
- Get a written shareholder agreement if you have more than one member.

# To Incorporate or Not

## Tax Benefits of LLC or Corporation.

- Sole proprietor that earns 100K pays 12.4% FICA and 2.9% for Medicare (15.3%) = \$15,300.
- LLC or Corporation that earns 100K. Assume you call 75% of that salary or wages. That means \$25,000 is not subject to 15.3% tax. Saves you \$3,825.00 in taxes.

# Corporations and LLC's Are Not Foolproof

A corporation or LLC will protect your personal assets from breach of contract claims, but a client can still sue you PERSONALLY for alleged professional negligence.

Consider E&O insurance.

# To Incorporate or Not

## Partnership

There is **NO** reason for any home inspector to have a partnership. Partners are fully liable for the acts of their partners. Instead, form an LLC and have a written operating agreement.

# Complaints about the NHIE

If you took the NHIE and did not pass, I want to talk to you. Come talk to me.

(303) 302-1841 or [Legal@internachi.org](mailto:Legal@internachi.org).

# Concerns about Homesafe

If you received a threatening letter from Homesafe, paid money to Homesafe, or decided not to use IR because of Homesafe, I want to talk to you. Come talk to me.

(303) 302-1841 or [Legal@internachi.org](mailto:Legal@internachi.org).

# Unfair Practice or False Statements

If you believe a real estate agent, home builder, or other association is engaging in unfair practices or making false or misleading claims about InterNACHI, I want know about it.

I also want to know about any person pretending to be an InterNACHI member or Certified Master Inspector.

(303) 302-1841 or [Legal@internachi.org](mailto:Legal@internachi.org).



# About Mark

Mark Cohen has been InterNACHI's General Counsel since 2004. Mark has 34 years of experience as a lawyer. He earned a B.A. in Economics at [Whitman College](#) and earned his law degree at the [University of Colorado in Boulder](#). He earned an [LL.M. Agricultural and Food Law](#) from the [University of Arkansas](#), where he also taught advanced legal writing. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for Boulder, six years on the Advisory Board of [The Colorado Lawyer](#) (including one as chairperson), and service on the Executive Board of the [Colorado Municipal League](#). In 1986, the ABA named him the Outstanding Young Military Service Lawyer of the Year.

Mark wrote six articles in the Am.Jur. *Proof of Facts* series, including the seminal article on piercing the corporate veil. He has written numerous articles and book reviews for [The Colorado Lawyer](#). In 2004, he won 2nd prize in the SEAK National Legal Fiction Writing Competition. He wrote two mysteries published by Time Warner, and his first mystery, [The Fractal Murders](#), became a Book Sense® mystery pick and was a finalist for the Colorado Book of the Year. His non-legal articles have appeared in magazines such as *Inside Kung Fu*, *Camping & RV*, and *Modern Dad*. He is a member of the [Institute of General Semantics](#) and the [Mystery Writers of America](#). He writes a regular column for the [Nederland Mountain-Ear](#).

Mark has appeared on The Today Show, and served as a military law expert for MSNBC.

Mark holds a black belt in karate and serves on the board of directors of [Dart, Inc.](#), a Boulder non-profit that offers training in personal safety, violence prevention, and appropriate dating relationships.

# InterNACHI Legal Staff

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