

Good Contracts



Standards of Care

Home Inspectors should use good business decisions and moral values in the operation of their business and the conduct of inspections. These include (but are limited to) the following:

1. Use a written contract, Pre-Inspection Agreement, for every inspection performed.
2. Follow and adhere to the Standards of Practice as a minimum benchmark for performance of every home inspection.
3. In general, the home inspection applies to the inspection of four dwelling units or fewer, but may include inspections of common-ownership property, such as condominium units and complexes and co-operatives.
4. Prepare a concise report of conditions as actually observed at the time of inspection.
5. The primary purpose of a home inspection and the home inspection report is to educate and substantiate to the customer the condition of the home.
6. The inspector is performing a visual inspection, using the natural senses, to observe the structure and major components of the home. Sometime the inspector may use special tools as an extension of the visual senses.
7. The inspector is not required to do things or go places where dangerous to the structure or the inspector, or others.
8. The inspector does not perform invasive procedures.
9. The inspection report is the tangible product that must accurately explain what was inspected and what was observed during the inspection.
10. Home Inspectors are required to recommend that the proper type of qualified specialists remedy defects. This will educate the client as to which type of professional should be used for the repairs or for further evaluation.
11. The inspector is NOT to advise the client as to how to make repairs.
12. The inspector must avoid conflicts of interest and observe the Code of Ethics.
13. The inspector must comply with applicable laws and regulations.

Good Contracts are Good Business

It is important to recognize that the home inspector is simply an independent advisor. It is vitally important to communicate the limits of your responsibilities so that the client knows what roles you can and cannot perform. Lawyers and doctors do not guarantee performance; neither should the home inspector. Good contracts allocate risk fairly.

Contract law is different from other kinds of law, because it typically only involves the parties to a given contract. Under the law, contracts exist between professionals and their clients, even without a written agreement; courts will hold the professional to the required professional's 'reasonable standard of care'. The written contract may define the contractual obligations between the parties more precisely than would otherwise have been the case. Contracts can seem lengthy because it is important that they express as clearly as possible the intentions of all parties under a wide variety of possible circumstances.

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Torts are civil wrongs, which involve violations of the personal, business or property interests of persons whom the inspector ought reasonably to have foreseen would be impacted by their actions, if they were not prudently carried out. With or without a contract, home inspectors are, like any other people, still responsible and liable for any of their actions that cause physical or economic harm to others.

In basic terms, home inspectors should not accept 'unfair' risk, that is, risk that is not under their control. Are you inspection a home where disclosures have been made or should have been made indicating the selling condition of the property – if not indicate that such information was not disclosed by the listing agent or owner.

Due Diligence

Due diligence in its simplest form means working with care and respect for your workplace and for others and to know your responsibilities under the law and then taking all reasonable steps to carry them out. It requires that you participate in identifying any hazards.

Due diligence generally means that all reasonable care to avoid the harm was taken. Due diligence is also a dynamic concept in that it is a constantly evolving standard of care that is determined by the requirements of law, industry standards as well as professional and other codes of practice.

Example: Good record keeping is usually a sign of good management and it is proof of your due diligence.

To demonstrate due diligence, a corporation or an individual must show one of two things. Either they must show that they did everything within their power to prevent the offence, or they must show that the individual or the directing minds of the company reasonably believed in a mistaken set of facts that, if true, would make them innocent.

The specific requirements of due diligence will depend on several factors, including the potential harm, the available alternatives, the likelihood of harm, and the degree of knowledge or skill that can be expected of the person charged. Overall, the defendant must prove that it was more likely than not that they did everything reasonable to prevent the damage.

Reports to Third Parties

Others view the distribution of reports written for a client. This could lead to third party claims against the inspector for negligent misrepresentation, if that third party relied on inaccurate information or statements in the report. For that reason, the inspector should not only try to control the distribution of reports but also include in them appropriate qualifications and limitations on the opinions and information they express.

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This report was prepared by _____ for the client _____

The information in it reflects _____ best judgment in light of the information available to it at the time of the inspection. Any use which a third party makes of this report, or any reliance on or decisions to be made based on it, are the responsibility of such third parties. This Home Inspection Company accepts no responsibility for damages, if any, suffered by any third party because of decisions made or actions based on this report.

Records

Much of the value of good communication is lost without documentation. Home inspectors can face detailed questions many years after an event or incident took place. Without written records, disputes can be decided on some other basis other than the facts as they were recalled.

When a Statement of Claim arrives, the inspector might not even remember the job. Even worse, not one piece of paper about the project had been retained. It is difficult to exaggerate the difficulties in defending this claim. There should be a formal system of record keeping on each project and the records should include, at a minimum, the following material:

Retain records at least until the statute of limitations, which effectively means that the records should be kept indefinitely.

Ease the burden of remembering and completing written records by providing pre-printed forms, where possible. In addition, this provides for consistency.

Resolution of Claims

The notification for a “claim” can take any one of three basic forms. The first one is an oral demand, the second is a written notice and the third is a formal Statement of Claim. Please note that if it is a Statement of Claim, you only have a certain amount of time to respond, and the period is different in various jurisdictions.

Callback: This commonly refers to a call from a client to attend to a concern about the inspection. It may be something small requiring clarification to a much larger and costly issue. It is in the best interest of the inspector to listen and attend to such concerns.

Mediation: In the non-binding mediation process, an independent third party works with the parties to reach solutions. This is usually the ‘low-cost’ alternative to arbitration and litigation.

Arbitration: In arbitration, a third party settles the dispute. Arbitration is private and it can be fast and final, but it can also cost a lot of time and money, and there is no right of appeal, except in special circumstances. Arbitration clauses in a contract often specify disputes under a certain dollar figure.

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Litigation: Litigation, or deciding the dispute in court, can be a lengthy, time-consuming and expensive process. The direct cost of litigation to the insured is the deductible; indirect costs include damage to reputation and loss of business focus and relationships. Trials and their results are public and even a legal victory may have damaging consequences.

Limitation on assertion of claims: Parties to an agreement can include a provision that defines the time within which a client can pursue a claim against the design professional and the start date for the running of that contractual limitation period. That date should refer to an objectively determined date or event, like substantial completion rather than something vague like the date the client first discovered the basis for a claim. (This does not affect tort claims.)

Limitation of liability: Under a limitation of liability provision, the design professional and owner agree to limit the design professional's liability exposure to: a specified dollar amount; available insurance proceeds; particular types of damages; or, change order costs.

Unreasonable expectations: As discussed elsewhere in this guide, when words with absolute connotations like "all", "best", "complete" or "most economical" appear in contracts, there could be very serious problems for design professionals. These superlatives could establish a standard of care that would be impossible for any human or institution to meet. In fact, the design professional who signed a contract promising to meet the "highest professional standards" may be held responsible notwithstanding having acted in accordance with reasonably prudent practice. There is no reason for these superlatives to appear in professional contracts.

Do not respond to the claim until you have thoroughly researched the documentation and any available information and sought the advice of your legal counsel.

Professional Capability

There is a great deal of risk involved in 'overselling' professional capabilities, either through published, promotional material, statements in proposals or statements to clients.

Caveat: The opinions expressed in this paper are exclusively opinions of the author and do not necessarily reflect the professional opinion, opinion of the business, agency, peers, or professional affiliates.

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