

ANATOMY OF A CONTRACT

by

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From one home inspector to another, you're crazy if you work without a contract! A well-drafted contract prevents misunderstandings and limits exposure to liability by clarifying in advance what the rights and obligations of the parties are.

Certainly a home inspector can elect to operate without a contract, but such a practice means that an oral or implied agreement is in effect and exposes the inspector to unnecessary areas of liability. A good contract is like a "suit of armor" that will shield you from attack! How can you afford to inspect homes without one?

A pre-inspection contract lists everything right up front for the consumer to see and explains in writing all about the scope of the services offered. For the home inspector, the pre-inspection contract (combined with a written report) is the most important strategy for protection against negligence claims. Drafting such a contract requires careful research and legal advice. You should obtain model contracts from ASHI national (AGREEMENTS FOR HOME INSPECTION SERVICES, Harry S. Rosenthal, Esquire, July 1992), and together with your attorney, draft a contract that corresponds with the services you provide, your method of operation and the rules & regulations specific to the state department of consumer protection at the attorney general's office. The pre-inspection contract should also be reviewed with your insurance carrier if you carry errors & omissions coverage.

Reading the fine print in a contract is a task that most consumers and home inspectors detest. However, as a businessperson, you cannot afford to just scan the text. You must be familiar with every written word on the paper for your performance and degree of negligence will be measured according to the services & standards that were agreed to by the parties.

While I am not an attorney and certainly do not have the perfect contract, I have learned to understand the basic anatomy of a contract and offer the following general reference material that you should review and then **consult with your own attorney for guidance and advice**. Lets start by breaking the pre-inspection contract down into simple categories for easy comprehension and then build on the terms and conditions within. (Note: you and legal counsel should research All text in bold or caps.)

1. **Business heading** - Your business heading should be prominent at the top of the document.
2. **"BUILDING INSPECTION CONTRACT"** or **"PRE-INSPECTION CONTRACT"** should be centered near the top of the form and in caps. Underlining the text further alerts the consumer that he or she should read what is about to follow in order to understand the rights and obligations of the parties. **"PLEASE READ CAREFULLY"** - Reading this clause encourages

the client to study the contract before signing. If your contract is more than one page in length, then the client should be asked to initial each page and sign the last page.

3. **THIS CONTRACT SUPERSEDES ALL PREVIOUS COMMUNICATIONS:** Also in caps, this phrase should fall under the contract title of the document. This text provides you, the inspector, with one more line of defense by explaining to the consumer that the home inspection will be performed according to this signed contract and prevents any misunderstandings over telephone discussion or promotional brochures. Perhaps a 3rd party explained your services over the telephone or an obsolete brochure was obtained and the consumer has false expectations. The above clause denotes the contract as the sole agreement between the parties.

4. **Data section:** In a simple form, the client's name, property inspected, file number, date and fee should be listed.

5. **SCOPE:** Under this heading, your contract should explain to the client that you will perform a visual inspection of the above listed property, including an examination of the exterior, roof, mechanical systems, foundation, etc. Furthermore, you should state that a final written report representing a summation of your observations (**on this date only**) will be provided. (Note: If your report is prepared in the office, then it may differ from the verbal impressions given your client at time of inspection. The Client should be told to wait for the final written report before reaching any commitment or drawing conclusions about the home.)

6. **SERVICE:** Under this heading, your contract should state what services are provided. Phrases such as the following are protective:

"the inspector will use an honest effort to document visual observations and opinions based on knowledge, experience and training..."

"to prevent false expectations, please understand that the inspector does not have X-ray eyes, he does not move furniture or stored goods and cannot observe latent or concealed defects..."

"The inspector does not perform destructive testing or dismantling of anything, nor does he enter dangerous or inaccessible areas..."

The Massachusetts State Attorney General's office required the following phrase: "**THERE ARE NO EXPRESS WARRANTIES MADE IN CONJUNCTION WITH THE INSPECTION OF THE PREMISES.**" I have also found through experience that the following phrase is protective: "**THERE ARE NO EXPRESS WARRANTIES MADE AGAINST ROOF LEAKS, WET BASEMENTS OR MECHANICAL BREAKDOWN.**"

7. **STANDARDS OF INSPECTION:** If you adhere to the ASHI Standards of Practice, you should tell the consumer and list your certification number. The list of items to be observed and those to be excluded as written in the Standards should be identical in your contract and your report. If you depart from or exceed the standards, then you should also tell the client. (Note: If the standards are referred to in the contract, then the client should have access to them before

signing the Agreement.)

Typical phrases include:

"...the inspection will be performed in accordance with the Standards of Practice of The American Society Of Home Inspectors (ASHI)..."

"...The property will NOT be inspected for compliance with any codes, zoning regulations or lot boundaries as compliance with such items falls under the jurisdiction of local appointed officials in authority..."

"...No engineering services are offered..."

8. EXCLUSIONS & LIMITATIONS REGARDING THE REPORT: Under this heading, your contract should list specific items to be excluded.

Typical language might include:

"It is agreed that the findings and opinions of the inspector are limited in scope and nature to the visual and accessible areas only and that the following items are specifically EXCLUDED FROM THIS REPORT:"

Latent or concealed defects

Waste disposal systems

Swimming pools

Locks & security systems

Detached structures are not inspected etc.

"...Any general comments which may appear about these areas of exclusion are provided as a courtesy only and do not represent or form part of the inspection..."

9. EXCEPTIONS: Under this heading, your contract should explain to the client that unforeseen circumstances or personal safety concerns might exclude certain items from inspection.

"The inspector is not required to walk on the roof, move furniture & personal goods, operate portable appliances, enter hazardous areas, nor report on cosmetic flaws. It is agreed that areas, systems or components that may be injurious to the health, safety or welfare of the inspector shall be **EXCLUDED as EXCEPTIONS** beyond his control."

10. CONFIDENTIALITY: This heading and language helps to protect you from 3rd party liability and tells the client that you respect his or her rights. The following phrases are useful:

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"...The contents of this report are confidential and shall NOT be revealed to anyone without your written authorization..."

"...Neither the contents of this report nor any representations made herein are assignable without the express written consent of ABC Inspection..." If your client wants a copy of the report to go to other parties, have them initial the contract where applicable:

Initial release of report to:

Broker Attorney Other _____

11. **ESTIMATES:** As every buyer needs figures to make intelligent decisions, protective phrases are beneficial under this heading. If you provide "cost to cure" estimates, you should explain how they are derived.

"To obtain true repair prices, estimates should be obtained from a minimum of three licensed & insured tradesmen applicable to each area of concern."

12. **FEES:** Under this heading, you should list your entire fee schedule for services and elected options. Fee changes should be by mutual agreement. The inclusion of a simple order form will help to distinguish which services are elected by the client or excluded.

"It is agreed that payment is due and payable upon delivery of the final report..."

"The total amount due is based on your verbal description of the property, an allotted 2 1/2 hours of professional time, and verification of size, age and condition. It is agreed that an additional charge of \$__ /hour will be charged for unanticipated crawl spaces or delays beyond the inspectors control."

"It is agreed that a fee of \$__ will be charged if you elect to schedule a 'return visit' to inspect items that were concealed, shut-down or inaccessible at time of inspection..."

13. **LIMIT OF LIABILITY:** The legality of attempting to limit your liability to the cost of the home inspection is debatable, but such language is used by many companies in spite of recent rulings. The Massachusetts Attorney General has stated that a professional cannot disclaim his own liability, for he holds himself to be a professional home inspector offering an implied warranty and standard of care. Nevertheless, some protective phrases include:

"...Any claim against ABC Inspection shall not exceed the total fee for this limited inspection..."

"...The client agrees to allow ABC Inspection to examine any subject matter and area of any claim and offer a reasonable resolution prior to the client's performance of remedial repairs..."

"...The client agrees to arbitrate any claim which may arise out of this Agreement in accordance with the Construction Industry Arbitration Association..."

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"...In the event of a problem, the Client agrees to notify the Company within two business days and to provide the Company with five business days to respond before performing repairs or replacement... except in case of emergency..."

14. **ACKNOWLEDGEMENT:** The contract should be signed and dated by both parties. You sign in your corporate capacity, and the client should both sign and print his signature.

THIS CONTRACT REPRESENTS THE WHOLE AGREEMENT BETWEEN YOU AND ABC INSPECTION, INC. YOU ACKNOWLEDGE THAT YOU HAVE READ THIS CONTRACT AND UNDERSTAND AND AGREE TO ALL OF THE ABOVE TERMS & LIMITATIONS EXPRESSED HEREIN.

In closing, I can not emphasize enough the importance of a pre-inspection contract. Send for the model contracts, do the research, seek the advice of your own attorney and limit your liability through the use of a defensible contract.

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