



Consulting, Resource, Education, Training, and Support Services for Home Inspectors
"A candle loses no light when it lights another candle."

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Contract Limitations on liability and the Use of the Terms "Professional," "Profession," "Practice," "Client," and "Customer"

Some **ProSpex** subscribers have noticed that the **ProSpex** website and **ProSpex** documents and articles now use the term *customer* instead of *client* and no longer refer to the business of home inspection as a *profession* or to home inspectors as *professionals*.

There are important reasons behind these changes.

Many home inspectors have a liability limitation clause in their home inspection contracts which limits their liability to a specific amount – often the fee charged for the inspection. The **ProSpex Prototype Home Inspection Contract and Agreement** recommends the use of this kind of provision. However, this important provision may not be enforceable under some state laws. Some states may prohibit home inspection companies from limiting their liability to the amount paid for the inspection but may permit them to set a cap on their liability in an amount which is greater than the cost of the inspection, i.e., \$2,000.00 or \$5,000.00 or even \$10,000.00. A state which allows contractual limitations on liability may not allow such limitations where the individual performing work or providing a service is regulated by the state, particularly if the state views such individuals as "*professionals*."

The **ProSpex Prototype Home Inspection Contract and Agreement** also contains provisions which help inspectors manage their liability risk using a legal concept known as the "*economic loss rule*." The economic loss rule relates to the issue of whether a claim may be brought in negligence. The key phrase in the **ProSpex Prototype Home Inspection Contract and Agreement** which targets the economic loss rule as it applies in Colorado is the sentence which reads, "CUSTOMER EXPRESSLY INTENDS AND AGREES THAT THE INSPECTOR AND COMPANY HAVE NO OBLIGATION OR DUTY TO CUSTOMER EXCEPT AS EXPRESSLY SET FORTH IN THIS CONTRACT." The ability to take advantage of the economic loss rule might be particularly important in states where liability limitations are not enforceable.

The issue of referring to oneself as a *professional* is important because professionals have independent duties (making the economic loss rule inapplicable). The liability limitation places a limitation on recovery regardless of the legal theory upon which recovery may be sought, i.e., contract or negligence. The issue of the use of the term *professional* might also be important because *licensed* professionals are typically unable to limit their liability as a matter of public policy (otherwise doctors and lawyers could take undue advantage of their clientele).

Whether or not a specific state which regulates home inspectors also views them as *professionals* may not be determinable until an inspection company's contractual limitation on liability is challenged by a plaintiff's attorney, is upheld or denied by a lower court, or an appellate court makes a ruling regarding such a limitation on liability.

Regardless of whether or not a state regulates home inspectors, inspectors should be aware that referring to themselves as *professionals* or as *professional home inspectors* or referring to their work as a *profession* may be viewed by a plaintiff's attorney or by a court as a sufficient reason to hold that a limitation on liability is unenforceable. Under such circumstances the limitation on liability clause of an inspection contract may be struck from the inspection contract, thereby potentially leaving an inspection company open to much higher or even open-ended liability.

Finally, *professionals* work for *clients* while others provide goods or services to *customers*. Also, avoid using the term *practice* when referring to the work of home inspection as in *the practice of home inspection* because the term *practice* refers to the exercise or pursuit of a *profession*.

Leaving out the terms *Professional* and *Practice* when referring to a home inspector trade association's standards and simply referring to such documents as the ASHI® *Standards*, the NACHI® *Standards*, etc. may be worth considering.

We are all aware that Murphy's Law is inevitable. Ask yourself if you want to be the test case, if you want to face a plaintiff's attorney who argues before a court that your use of the term *client*, your reference to yourself as a *professional*, or to your work as a *profession* or a *practice* constitutes grounds for setting aside your limitation on liability.

These may seem like minor or unimportant points. They are not. A court's application of the law often comes down to such fine distinctions. Keep in mind that there can be costs for proving a point or for being right. While an inspection company's attorney may be able to successfully argue that the use of such terms isn't sufficient grounds for striking a limitation on liability clause from the inspection contract, that attorney will charge for the time spent preparing for and making such an argument. It only makes sense to minimize risk by avoiding the use of these terms in the first place so that plaintiffs' attorneys cannot hang their hats on them later.

Whether a home inspector likes or dislike the legal aspects of their work is immaterial – they are an ever-present reality in business. As the great American Olympian, Jackie Joyner-Kersey, observed, “*It is always better to look ahead and prepare than to look back and regret.*” Therefore, home inspectors would be well-advised to consult with their attorneys regarding the points discussed here, their own contractual duty of care, and any duty of care they may have outside of their inspection contracts.

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