

6 Ways to Lower Your Risk Profile

BY JOE FERRY

The most frequent cause of a home inspection claim is a bad result. An unexpected problem develops some time after the inspection: a roof leak develops following a major storm, a foul odor begins to emanate from a drain, water seeps into the basement, the HVAC malfunctions.

Notice that I did not say that the most frequent cause of a home inspection claim is inspector negligence. In fact, that is almost never the case. In my experience, the home inspector was truly negligent in less than one percent of the claims.

Example of Risk Claim

The following is a prototypical case. The inspection takes place in August of 2008. Because the outside temperature is in the 90s, the inspector could only test the heat pump's cooling feature, which was satisfactory. In the report, the inspector advised his clients that the device was operational, but cautioned them that heat pumps are delicate flowers that require regular maintenance and advised them to have the unit serviced before closing and annually thereafter.

The clients closed on the house and took possession in mid-October. Two months later, on Friday, December 19, 2008, the entire northeast section of the country was walloped by an epic storm that dumped 30-some inches of snow over an area stretching from the nation's capital to Nova Scotia. And that was the very day that this inspector's clients' heat pump decided to stop working. A bad result, four months after the inspection.

Since no one wants to be in a house without heat during an epic snowstorm, the clients retreated to a nearby hotel to wait out the storm. The following Monday, after the storm had passed and the municipalities had cleared the streets, the clients called in a repairman.

You don't have to be Buckminster Fuller to guess what happened next. The repairman proceeded to throw the home inspector under the bus. Then, notwithstanding that it had never entered the clients' minds that the home inspector bore any responsibility for the breakdown of the heat pump, because the repairman planted that thought in their heads, they can't get it out. Shortly thereafter, they contacted the home inspector and wondered what he intended to do about it.

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That is a fact pattern that is all too

familiar to me. And one that it is impossible to protect against because it is the modus operandi of virtually every roofer, electrician, plumber, HVAC technician, butcher, baker and candlestick maker who a home inspection client happens to consult about a bad result. But while it is impossible to prevent tradesmen from underbussing you, it is possible to minimize their chances of succeeding if you implement the following six techniques.

1. Manage Clients' Expectations

First, you must thoroughly manage your clients' expectations. Most laymen have no idea what a professional home inspection entails. That's the bad news. The really bad news is that, to the extent that they do have an idea, it is by and large a preposterously unrealistic one. Some of them think that you are going to take the house apart and put it back together again; that you are going to tell them not only what is currently wrong with the house but everything that has ever been wrong with it and everything that will be wrong with it in the future. Since you are not going to do that, you have to disabuse them of that notion by taking the time to align their expectations with reality.

2. Present Professional Pre-Inspection Agreement

Second, you have to have a strong, well-written, easily understandable pre-inspection agreement that incorporates reasonable protections. The most charitable characterization that I can give an extraordinarily large percentage of the pre-inspection agreements that I see in my practice is that they are inadequate. Often, in the extreme. If they are not ponderous, they are skimpy. If not full of typographical, spelling, grammatical and syntactical errors, they are internally inconsistent. A provision on Page 2 of the agreement directly contradicts a provision on Page 1.

Leaving aside the unprofessionalism that this evinces, poorly written pre-inspection agreements can be very difficult to enforce.

3. Follow Standards of Practice

Third, you have to follow your Standard of Practice ("SOP"). The SOP limits your liability to issues that are both extant at the time of the inspection and within the SOP. Underground pipes? Sorry. Code violations? Unh-uh. Toxic substances? No, no, no, no.

4. Conduct Professional Inspection

Fourth, you have to conduct a professional inspection. You have to do the sort of inspection that you are capable of doing by reason of your knowledge, training and experience. That is something you probably could have figured out for yourself, I know. And as my experience conclusively demonstrates, home inspectors seldom conduct a negligent inspection.

5. Present Appropriate Disclaimers

Fifth, you have to disclaim appropriately. Disclaimers come in two flavors: general and specific. General disclaimers are true of every property and ones that are idiosyncratic to this property. You need not concern yourself with general disclaimers because your SOP performs that task better than you could ever do. Specific disclaimers, on the other hand, have to be hammered home.

The roof was covered by ice and snow. Consequently, all bets are off on the roof. The crawlspace was full of standing water or did not have sufficient clearance. Therefore, the inspector is unable to report on potential issues therein. The basement was finished; therefore, any issues existing behind, below or above the finishing cannot be reported.

I am sometimes asked if it is possible to have too many disclaimers. Short answer: no. Look at all the disclaimers that you are bombarded with every day. I am especially fond of the drug disclaimers that seem to consume about half of the commercial. May be habit-forming. Don't take this if you're taking that. May cause sudden drop in blood pressure.

6. Establish Defense of Contributory Negligence

Finally, you have to establish the killer defense of Contributory Negligence. Contributory Negligence is a common law doctrine that simply states that if the plaintiff contributes in any respect to his own injuries, he cannot recover from the defendant. Thus, if the defendant is ninety-nine percent at fault and the plaintiff is one percent at fault, the plaintiff loses.

That is a pretty harsh result for a plaintiff who has been seriously injured in, say, an automobile accident and who may have been partially at fault himself. And because it is such a harsh doctrine, legislatures in 46 of the 51 jurisdictions in America have moderated the harshness of the doctrine by enacting Comparative Negligence statutes that apportion fault between the plaintiff and the defendant. In four states and the District of Columbia, the Contributory Negligence Doctrine still pertains.

Under these statutes, as long as the plaintiff contributed no more than fifty percent to his own injuries, he is not shut out. He would still get a damage award, but it would be reduced by the percentage of fault that is attributed to him. Thus, a verdict that would have been \$100,000 had the plaintiff not been negligent at all would be reduced to \$70,000 if the jury found him to be thirty percent contributorily negligent.

What is interesting about these Comparative Negligence statutes from a home inspector's perspective is that, in the majority of jurisdictions that have enacted such laws, they only apply to cases involving bodily injury and/or property damage, two losses that a professionally negligent home inspection never causes.

The only loss that a professionally negligent home inspection can ever cause is an economic loss. A failure to discover a material defect that should have been discovered — that is, a deficiency that was within the SOP, was not concealed, was not disclaimed, was not working and was

not reported as such — prevents the client from negotiating concessions from the seller. The client paid more for the house than he might have had the inspector discovered and reported the defect. That is an economic loss. And any negligence whatsoever on the client's part would prevent him from prevailing in a lawsuit.

Thus, as frequently happens, an inspector may have to disclaim responsibility for potential defects due to inaccessibility. If the inspector, then, advises the client to seek further assurances from the sellers that there was no history of issues with areas or systems not inspected and/or to seek further investigation of those areas and/or systems by a qualified electrician, roofer, plumber, structural engineer or other professional and the client fails to do so, that is unreasonable conduct on the client's part in light of the inspector's report and would bar all recovery from the inspector pursuant to the Contributory Negligence doctrine.

So, if you manage your clients' expectations, have a strong, well-written pre-inspection agreement, follow your SOP, conduct a professional inspection, disclaim appropriately and establish The Killer Defense, it will be virtually impossible for a professional negligence claim to succeed against you. ■

Joe Ferry, The Home Inspector Lawyer, discovered that professional home inspectors across the country did not have anyone covering their back against meritless claims. To defend competent home inspectors from the avalanche of reckless pursuits against them, he created ClaimIntercept™, a strategic defense response to the potential E&O claims initiated by threatening demand letters from former homeowners and their attorneys. A lawyer of 27-plus- years, an educator, public speaker and home inspector advocate, Joe Ferry's mission is to stop the UNDERBUSSING of competent home inspectors. Join his free video tips series and learn more about ClaimIntercept at his website. www.JoeFerry.com. ■