

Inspect and Protect

Avoiding Litigation

Brought to you by NACHI Education

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You might be thinking:

I've never been sued.

That's never going to happen to me.

I do a great inspection, and never make a mistake.

You may be right, and I hope you are, but don't count on truth and justice to protect you.

The threat is real:

According to The National Center for Tort reform, lawsuits have increased 32% over the last fifteen years, but let's hear what three attorneys have to say:

“You must be ready for a lawsuit, even on an inspection where you did everything right,” reports Kris Thompson, Esq., in his article entitled “Case Law,” published in the Sept/Oct issue of *The Inspector 2004*.

“While there are a number of lawyers who prosecute actions with merit, there are nonetheless a significant number of cases pursued in bad faith.” San Diego attorney Mark D. Stavros, in his article *Mediation: Anecdote to Legal Abuse against Home Inspectors?*

“At least seventy percent of claims that reach my office are without merit.” Nigel Bonny, attorney and General Counsel for FREA Insurance, reports in an article published in *Florida's Inspection Voice*.

Reasons Why Inspectors get sued:

Psychological: Consumer dependency, and unreasonable expectations.

Corrupted judicial process: The courts are a market place where huge sums of money change hands daily.

The elusive nature of truth and justice.

These and many more causes combine to create litigation.

Human nature seems to dictate that if a property was inspected an inspector is somehow directly responsible for it, regardless of what may have been said to the contrary.

Talking about inspecting, here's a pretty picture with a story...

A View of a Fireplace



Here's the story.

I'd been on the roof, looked down the chimney, and saw what looked like new liners all the way down to the smoke shelf. In fact, everything looked new. I went inside the house, sat on the hearth, and turned on the log-starter long enough to smell the gas. I didn't get my head and shoulders inside the fireplace, because I was satisfied with everything that I'd seen so far, and I really didn't want to bother removing and replacing the seven objects on the hearth. So I stood up and was about to get on with the inspection, when I imagined hearing the carefully chosen words of an attorney: "Tell me, Sir, did you even attempt to look at the smoke shelf?" I paused for a moment, and then imagined hearing the familiar voice of my wife: "Well, did you?" Suddenly inspired, I removed everything from the hearth, slid my head and shoulders inside the firebox, looked up, and saw this this abomination.

The view from inside the firebox



Click Next...

What you can dimly see in the photograph is a space adjacent to the lintel that is big enough to qualify as an attic access.

The first fire in this fireplace would have probably burned the house down.

But, here's the point and the moral to the story: There's absolutely no defense for a poor inspection, so always take the extra time to do the best inspection possible, or be prepared to stand accused of negligence, fraud, or worse.

Bad, or inferior, inspections are one thing, but even good inspectors and inspections can be challenged, and especially by a smart attorney. And don't think that attorneys aren't smart; they're very smart.

Let's look at a few pictures taken within the same foundation crawlspace, and decide what we see. And then let's consider what a smart attorney might see.



Click Next...

Ignoring the hanging wires and cables, the copper naphthenate on the joists, and the evidence of a seismic retrofit (in the form of Simpson foundation anchors), you'll notice the open boot of an abandoned floor duct capable of allowing dust to be drafted into the living space. But what an attorney might notice, and argue convincingly, is a boot that is paper-wrapped with a known asbestos-containing material (ACM), that is capable of causing cancer and an extremely painful and lingering death.

Which point of view is the truth? That's for you to decide, or a jury of your peers. Regardless, let's look at another photograph.



Click Next...

What I see is an open and overfull electrical junction box that should be serviced and sealed to contain any arcing or sparking. But an attorney might see a criminally miswired and overloaded electrical junction box that is about to arc and spark at any moment and burn the house down with a defenseless family trapped inside.

Here's another photograph, taken from within the same foundation crawlspace.



Click Next...

What I see is the rusty path of a drip leak on an old galvanized pipe, which is no big deal. But an attorney might see evidence of a leak that is capable of fostering a whole colony of life-threatening biological organisms, and yet another chance to prove to the world that mold is gold. However, let me assure that the three rather ordinary deficiencies we've just seen within a single foundation crawlspace could result in a lawsuit that could involve an inspector in litigation for a long time.

Regardless, now you've got some idea about how allusive and subjective the truth can be.

Let's talk a little more about communication and about the elusive nature of truth. "Communication" comes from a word that means "to share," but what is truth? Truth is commonly decided by numbers, authority and tradition. For instance, if a great number of people say something is true, we tend to believe it. Similarly, if an authority figure, like a pope, a president, a policeman, or even a parent says something is true, we also tend to believe it. And finally, if something has been done the same way for generations that too is often said to be the truth. In short, truth can be different things to different people at different times.

Regardless, seeing is sometimes said to be believing. So, ask yourself what you see in the following picture:



Click Next...

Well, what do you think about this roof?

What I can confirm is that a listing agent became quite indignant when I told her that the roof was ready to be replaced, and assured me that the seller not only claimed that the roof had never leaked, but that a roofing contractor had recently reported that it had a few more years of life left in it.

Just for the record, I believe that both of them were telling the truth. But, I wasn't lying when I told them that the roof was shot.

Protecting our Assets

Traditional Defenses

Standards and Contracts

The use of Specialized Instruments

Effective communication

(Whatever happened to common sense)?

Our contracts and standards of practice were written by the best minds in the business, and have saved a number of inspectors in either mediation, arbitration, or the courtroom. But, unfortunately, the vast majority of lawsuits are settled out of court. (It's cheaper for an insurance company to pay somebody say ten-thousand dollars to go away, rather than spend sixty thousand dollars to defend an innocent inspector).

That's the nature of capitalism, so inspectors will have to get used to thinking about ways to avoid litigation rather than dreaming about truth and justice.

And that leads us to a consideration of the use of specialized instruments in avoiding litigation.

Most of us use specialized instruments, although it's been argued that their use takes us beyond our SOP's and could leave us in legal jeopardy. However, this is only likely to be tested once we've been named in a lawsuit, and the trick is to avoid lawsuits, not win them. Besides, a simple outlet tester can be argued to be a specialized instrument, and many of us are using instruments that are far more specialized than that. Nevertheless, the decision of whether to use them or not is a decision that each of us must make at some point.

Let's talk about something you might not have considered when it comes to avoiding litigation...

Digital Cameras



I favor the use of specialized instruments, and carry a laser level, moisture meter, and carbon monoxide tester, in addition to several other common instruments. However, my favorite has become my digital camera, which is a formidable weapon when it comes to avoiding litigation, but not in the way that one might naturally expect.

Most inspectors take pictures of problems and proudly display them in their reports, which is great and makes for an impressive report. But, consider taking pictures of things that are not problems, and don't include them in your reports - save them. It's commonly a picture of something that is perfect—the pool light shining, the water whirling down the shower drain, or the neatly wired electrical panel that will save you when you get that nuisance call from a client or nasty letter from an attorney.

One of the best ways to avoid litigation is effective communication, oral or written. Inspectors need to inspire trust, and that happens when they know what they're talking about. And this typically means having a vast amount of information at their fingertips, which typically means having a computer, which is nothing less than a mechanism of storage and retrieval. Complicated codes and safety regulations can be just a click away. However, codes should always take second place to common sense.

Take a look at the following pictures of a pool and spa, which is located on a hillside high above a major city. You can almost imagine the devil whispering in the ear of an inspector: "Isn't this perfect?"

Open a door, and step in!



A two foot railing with a twenty-eight foot drop to the street below



This pool and spa was designed by a licensed architect, built by a licensed pool contractor, and signed-off by a city inspector from the local Department of Building and safety.

- So much for the sanctity of codes –

Remember this: Built to code means built to the lowest acceptable standard and, sometimes, without one ounce of common sense.

Note: The buyer of this home had a three year old child who was virtually unsupervised, and who continued to run in and out of the pool area during the inspection.

While we realize that inspectors can never completely avoid litigation, they can do many things to minimize their risk.

To this end NACHI has one guiding principle, which is to protect consumers and its membership through continuing education and enlightenment.

Thank You

NACHI Education hopes you have enjoyed this presentation.



For more information, to purchase Dr. Swift's book *Inspect & Protect*, or order marketing materials visit:

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