



## Settling Disputes Out of Court

by Bob Merz

Sooner or later you will likely be involved in a dispute with a customer that is tough to resolve. As a mediator and arbitrator for the last 15 years, I've tried to help settle over 1,900 such construction disputes. Most of these don't stem from bad intentions on anyone's part, but instead from a mismatch of expectations between the client and contractor.

When this happens, the first thing to do is to try to work something out with the customer before the two of you dig in. This starts with acknowledging that, even though your work might be of good quality, a problem still exists because a certain part of it isn't to your customer's satisfaction.

Let the clients know what you can't or won't do, and what simply won't work from their point of view. It might be the case, for example, that a repair might be even less aesthetically pleasing — the cure they want might be worse than the disease. Point this out in as helpful a way as possible, and try to find some other solution.

Don't be afraid to ask for suggestions from your clients. They may have an idea saved as a fallback position that could help resolve the situation.

### When Things Get Serious

If after a sincere effort, however, you aren't able to find a compromise, the stage is set for serious conflict and a possible lawsuit. Once you get to this point, you should keep two things firmly in mind:

First, prepare your position (or defense, if you will) on all issues as if you are ultimately going to court. Ask for all complaints and repair or warranty requests in writing, and acknowledge their receipt and any offers or corrective action you make in writing. Contact subcontractors and suppliers to verify run number, dye lots, and other important product information. Tell manufacturer's representatives of any possible product flaws involved. Check with distributors to see if other contractors have had similar problems with a material. Document your findings as you go.

Second, at all costs, avoid going to court. You will rarely gain by doing so. Due to its complexity, construction is an industry in which disputes are quite expensive and laborious to settle in court. And win or lose, it doesn't help to have it said around town that you're being sued.

### Find an Alternative

If you can't work it out cordially and you don't want to go to court, what's left? Fortunately, the abundance of lawsuits over the past 10 years or so has spawned a whole generation of "alternative dispute resolution" methods. These methods generally rely on assistance from a neutral third party, in the form of a mediator or arbitrator. Being private and confidential, they also are less likely to generate adverse publicity.

In mediation, the third party tries to facilitate communication, untangle misunderstandings, and suggest compromise solutions; the mediator does not "rule" on the issue, but simply acts as a facilitator for negotiation.

In arbitration, both parties agree beforehand that they will present their arguments to the arbitrator and then accept whatever solution the arbitrator specifies. Generally, an arbitrator's ruling is as final and binding as a court ruling. (For more on arbitration, see The Legal Column, 5/89 and 6/89.)

### Mediation

On the surface, mediation may seem a waste of time — if you couldn't work it out before, how is another person going to make a difference? But a mediator can help you focus on the real issues and stay away from nonproductive areas of discussion. The mediator should, of course, be well versed in the means and methods of your industry.

Since one of the rules of mediation is that nothing said there can be used against you later, both parties will feel free to tell all, admit mistakes, or consider solutions that might be used against them if said outside of mediation. Finally, many people tend to be more reasonable when presenting their arguments and requests to a third party.

Sometimes, of course, mediators are unable to find a middle ground, and the dispute remains unresolved. At that point, the only forum short of court is arbitration.

### Making it Final

Arbitration is a "quasi-judicial" process that generally has the force of law. Courts will reconsider a previously arbitrated case only in the most unusual circumstances, such as when it is found the arbitrator had a conflict of interest. Arbitrators, like mediators, should be chosen for their experience in the industry and their experience as arbitrators.

As in court, you'll do best by supplying documentation that the work done and materials used are up to industry standards, and that you have made good-faith efforts to satisfy the customer within reason. The arbitrator will be less interested in questions of character than in facts.

### Avoiding Disputes to Start With

There are several things you can do to help reduce the chance of unresolvable disputes and court battles.

**Include an arbitration clause in your contract.** A typical wording for this clause might be:

*All claims or disputes arising out of or relating to this agreement, or breach thereof, shall be decided by binding arbitration in accordance with applicable state statute.*

Check with a local attorney for the proper language in your state. Such a clause gives you a known end to any disputes that arise, and virtually eliminates the possibility of court battles. Many home warranty programs such as Home Owners Warranty provide arbitration as part of the warranty. You can also find either mediators or arbitrators through the Better Business Bureau in most areas, or by looking in the yellow pages.

**Outline a procedure for callbacks.** The specifics of where and how a complaint is handled will increase your efficiency in handling them, and will give you more credibility in the eyes of both the client and any third party called upon to settle the dispute.

**Specify the standards of performance on which you base your work.** Phrases such as "to the standards of the industry" or "workmanlike manner" are as likely to breed arguments as to resolve them. You might consider using and specifying in your contract a more exact standard, such as the NAHB Remodelers Council's recently updated Quality Standards for the Professional Remodeler.

**Provide a written warranty.** This will assure customers that you intend to do quality work and increase your credibility in case of a dispute. Be careful not to make yourself responsible for things outside of your control or to promise to correct "all defects," lest you end up bearing responsibility for material defects beyond your control. (The manufacturer should be responsible for those, providing you took reasonable care in specifying and selecting them. See The Legal Column, 7/91.) ■

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