

# ACR Resolution



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The Quarterly Magazine of the Association for Conflict Resolution

Fall 2008

## Resolving Consumer Disputes



Fall 2008 • Volume 8, Issue 1

ACResolution is published by the  
Association for Conflict Resolution (ACR).

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**Editorial Assistant/  
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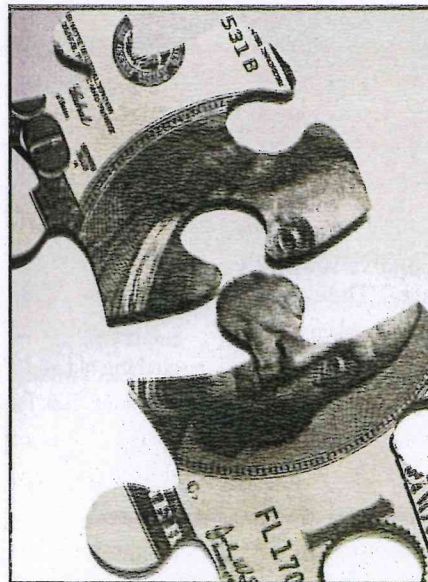
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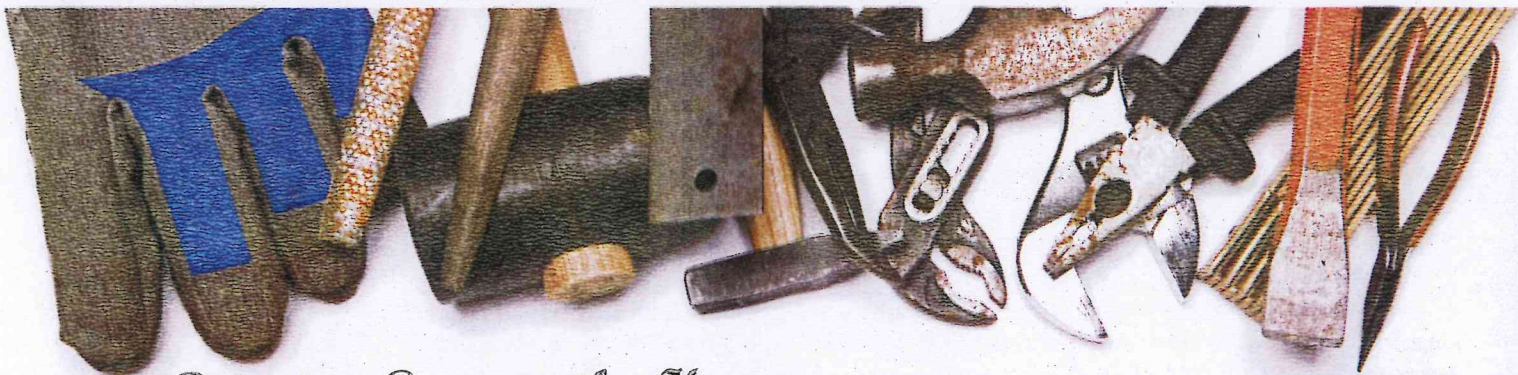
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## *Bringing Peace to the House:*

## Mediating Home Improvement Disputes

By Kenneth A. Vogel

**D**isputes between homeowners and home improvement contractors are among the most contentious type of consumer disputes because they are so personal and directly involve the consumer. They are completely unlike construction disputes between businesspeople (e.g., developers and building contractors). Businesspeople tend to be focused on construction costs and development timelines. Projects are dollars and cents; emotions play less of a factor in construction disputes than they do in disputes involving one's home. For homeowners, their house is probably their largest investment, as well as being their family's home.

Homeowners have a dream - a vision - for their home. After all, it is not just a house, but an embodiment of one's self. The owners build the space in their minds before embarking on the project. It is both a visual and an emotional construction. The homeowners envision the space as they believe it will be, and then mentally begin living in that space. This vision motivates the project. The homeowners will then hire a builder to make their vision a reality. The contractor, who may employ a professional salesperson, usually by commission, recognizes this phenomenon with the owners, and feeds it. Basically, the contractor promises to build the dream. One contractor even advertises: "If you can dream it, we can build it."

The basic documents of a home improvement contract are the contract itself, the plans and the specifications. The clearer a contract is written as to scope of work, the better. When the scope is clearly defined, there is less opportunity for a dispute as to what is or is not included in the project. A well-written contract also has a work timeline with start and completion dates, and a payment schedule, which outlines how much gets paid at what point in the job.

If the projects go poorly, either due to construction defects and delays or cost overruns, the homeowners may get bitter. Emotional highs become emotional lows, as dreams become shattered. They can no longer see themselves living in and enjoying their dream space because it has been ruined by a contractor they feel is inept, incompetent, and/or unscrupulous.

Disappointment and frustration are often replaced by rage. Whereas rational homeowners would just want to get the project finished, highly angered homeowners often want to thoroughly destroy the contractors, both economically and emotionally by ruining their reputation. For those homeowners, seeking justice and vengeance can become an overriding impulse, while getting the job done becomes secondary. Completion is no longer the goal because the homeowners believe they will not be able to enjoy the space at the end of the process. How can they enjoy themselves in a room that was the source of so much upset? Financial considerations and stresses also may be present. For a job that is over budget, completing it might cause considerable financial strain on the family.

What is the legal posture of the case? Usually, one of the parties is asking for money. Either the contractor is claiming an unpaid fee, or the homeowners are seeking a refund and other damages.

The author's experience is that most established and reputable contractors really do want to do a good job. Contractors who are purely thieves just vanish, since they do not have home improvement licenses or bonds to protect and they do not worry about their reputations or getting repeat business. Fly-by-night contractors rarely have much in the way of assets and may not even have strong ties to the area. If they are sued, and even if the homeowner wins, the judgments may be uncollectible (assuming that they can even be served.) Such contractors do not come to mediation.

Parties in home improvement disputes generally find themselves in mediation for one of two reasons: either their contract with the home improvement contractor provides for mandatory mediation, or the court requires them to mediate before the case can move forward to trial.

Ideally, the mediators should review the construction documents prior to the mediation to gain an understanding of the job, and to get a better grasp of the facts presented during the mediation itself. At the mediation, mediators must employ special listening skills to ascertain what the parties really want. Logically, homeowners want their projects completed, and at



fair prices. Or, maybe the projects were completed by other contractors and the homeowners want to recover their additional costs. But is that actually true in all cases? Perhaps the emotional component is that the homeowners want blood, they want their day in court, and they want to tell the world about their rotten contractor. They want vindication.

What do contractors want? A reputable contractor wants to just finish the job and get paid. He or she does not want to succumb to homeowner blackmail. Contractors will tell stories of how they went above and beyond the contract in every respect, included lots of extra time, consulting, work, and upgrades for which the contractors never charged and were not paid.

When the parties find themselves in mediation, the first task of the mediator should be to let the parties express their frustrations, as well as their versions of the facts. I usually begin by saying up front that both sides are probably frustrated by the job, and then I give the parties a forum to express that frustration. If the parties cannot express themselves in the mediation, they will want to do so in their front yard or in a courtroom. Only after getting it off their chests can they figure out how to complete the construction project.

The contractor can be alerted to expect to hear the homeowners complain about job delays, cost overruns, change order fees and poor workmanship. The homeowner can be alerted to expect to be told by the contractor why he is at fault, for reasons such as slow decision making, lack of access, constant changes to the scope of work or slow payments. This is a normal part of the process and each party needs to be coached to listen to any legitimate grievances that the other party may have.

One of the first issues for the mediator to consider is the current status of the job. Did the homeowners fire the contractor? Do they not want the contractor back in their home for any purpose? Have they hired someone else to finish the job?

Construction is very detail-oriented. In helping the parties come to a compromise, the mediator can be more effective if he has some construction knowledge. He or she should go through the outstanding issues one by one in order to try to reach a consensus between the two parties as to which parts of the project are complete, which parts are not complete, or even which parts need to be re-done due to poor quality or other factors. A good technique is to come up with a comprehensive list of criteria (a punch-list) that need to be completed and to put a dollar value on each of those items. Then, explore whether an option for settlement can be based on an agreement by the contractor to come and fix

those items, with access provided by the homeowners and an agreed-upon completion date. If so, the parties also need to agree on a payment amount and payment schedule. If there is distrust between the parties, some form of escrow might need to be arranged under which the homeowners deposit money into an escrow account managed by a third-party (not the mediator!), to be paid to the contractor according to the payment schedule. The mediator should never forget to refer back to the contract as the parties discuss issues of what is or is not included, or other aspects of the job.

Homeowners frequently hold unrealistic expectations about what they expect to receive from contractors. The homeowners might expect to receive money from a large laundry list of damages, such as a refund of monies paid, relocation expenses (hotel rooms and restaurant meals) due to delays and loss of use of the house, back-charges for money paid to any replacement contractor brought in to finish the job, and the consumers' favorite phantom recovery – their attorneys' fees, plus emotional and punitive damages.

Contractors can pile on additional fees as well. Those fees take the form of cost adjustments for delay, "mobilization fees," increases in material and labor costs and change orders, and their favorite phantom – interest on everything they are owed.

It is impossible to settle a case through mediation if either party fiercely clings to a belief that a judge will award them a pot of gold at trial. I believe that a good use of caucus time is to speak with each party about likely outcomes in order to temper their expectations. The reality of trials is that judges rarely award damages much beyond provable out-of-pocket costs and will not go beyond what is provided for in the contract. A big settlement is a myth in breach of contract cases regarding consumer home construction.

To me, an ideal outcome is a job where the contractor returns, finishes to the homeowner's satisfaction, and gets paid. While this may not always occur, even in a mediated compromise the parties can walk away feeling that the homeowner got at least some value for whatever was paid, and that the contractor can live with what he or she agrees to accept as payment in full.



*Kenneth A. Vogel is a mediator and arbitrator. His background is as a real estate general contractor, developer and a licensed real estate broker in Washington, DC, Maryland and Virginia. Ken is also an attorney who practices law in Washington, DC, and Maryland. He has represented both consumer homeowners and contractors.*