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Designing with Water | Flattop Grills at Home | Avoid Costly Lawsuits

PROFILES

THE DESIGN ISSUE

MAGAZINE Winter 2009

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law & order

AVOID COSTLY LAWSUITS

Kitchen and bath professionals can slash their legal expenses through arbitration. By Peter G. Merrill, CKD

When a homeowner decides to remodel his kitchen or bath, they seek out a kitchen and bath specialist. Likewise, when a person becomes ill or injured, he seeks out a doctor. In neither case would you turn to a judge or jury—they simply don't have the training or experience to perform the service needed.

Keeping this in mind, when you have a dispute related to a kitchen or bath project, doesn't it make sense to turn to someone with kitchen and bath expertise who also has experience handling construction disputes, especially if that person has the authority to render a decision that will be binding on the parties? Most judges will admit that they have a very limited knowledge of kitchen and bath remodeling, and when presented with a case on this topic, they'll rely on the presentation of the parties to "educate them" so that they can render a verdict or decision that will be fair and equitable.

Most of these cases aren't decided on who is actually at fault in the construction or remodeling project; instead, each is decided for whichever party makes the best presentation in "educating" the judge and jury toward seeing things your way. The party with the most convincing presentation will prevail; often, this is the party that was actually in the wrong. A typical lawsuit in the court system costs several thousand dollars, as the parties usually hire experts to try to convince the judge or jury that they're correct in their position. Add your attorney's fees and expenses to the costs of the experts, and you'll most likely be spending many thousands of dollars in your attempt to convince the judge or jury that they should find in your favor. ▶▶

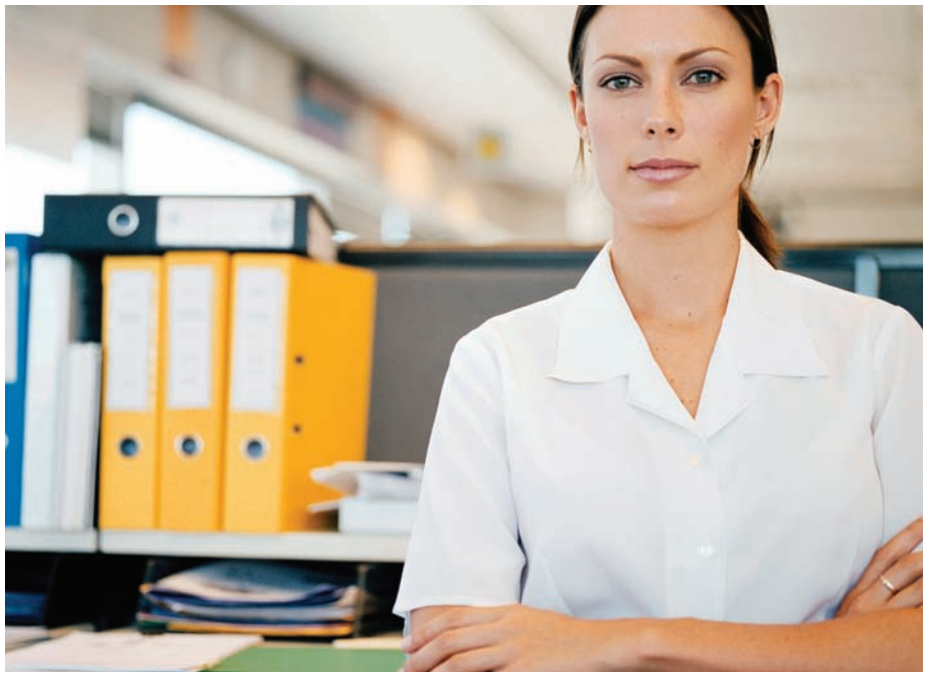
Every U.S. citizen has a constitutional right to their day in court; however, you have the right to waive the right to use the court system to settle a dispute. You may choose binding mediation or binding arbitration as an alternative dispute resolution (ADR) process to achieve a "final and binding" resolution to your dispute instead of going through the court system.

The general legal rule is that any two people can agree to anything as long as it isn't contrary to the law. On any kitchen or bath project, you and your client can specify in the contract that all disputes will be settled by flipping a coin or playing rock-paper-scissors. As long as both parties understood what they were signing, it would be a legal method to settle their disputes. They could not decide to take two loaded pistols, take 50 paces, and then fire at each other. That would be contrary to the law, as individuals are not allowed by law to shoot each other.

The use of ADR has been growing over the years, but has experienced an exceptional increase in use over the last few years. There are several reasons why litigation is falling out of favor as a method of handling business disputes.

The most important reason is mentioned above in this article. When you go to court, the parties usually have no say in who the judge will be. The judge is usually determined solely by the jurisdiction in which the case will be held. If a jury is used, the parties will have limited involvement in the selection of the jury, but the jury pool is usually made up of average citizens with very limited construction knowledge.

In both binding mediation and binding arbitration, the parties mutually agree on who will hear your dispute. You have the opportunity to not only review the biographies of potential mediators or arbitrators, including their backgrounds and experience in the subject matter of your dispute, but you also have the opportunity to conduct neutral interviews under the supervision of the ADR provider firm and your attorney.



As mentioned above, you'd select a doctor based on that person's knowledge of your medical condition. You may even been referred to a specialist if the primary doctor doesn't have the depth of knowledge and experience to properly handle your medical problem. In a similar manner, you may choose a mediator or arbitrator who has kitchen and bath remodeling or construction experience, but you might also look to a kitchen and bath specialist who has a special knowledge of HVAC issues if a major issue in your dispute centers around a ventilation problem.

Arbitrators are also allowed to make jobsite visits to better acquaint themselves with the issues in dispute. Have you ever seen a judge visit a jobsite? Green-related conflicts are a whole different breed of dispute as they will most likely be centered on performance issues as opposed to prescriptive issues. Green issues will include items such as indoor air quality, energy savings, and , sustainability of natural resources such as water. A special group of ADR specialists will be required to handle those disputes. These green issues will most certainly be well out of a judge or jury's scope of knowledge.

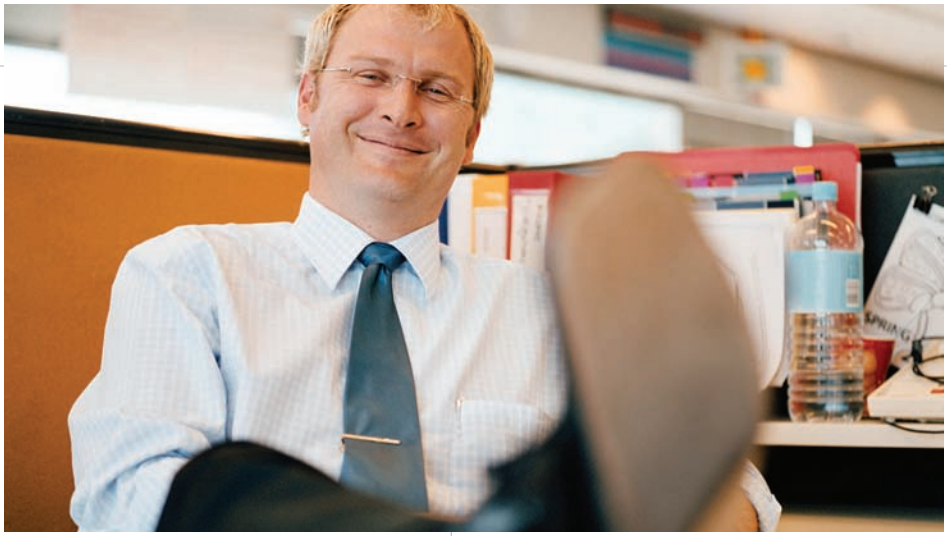
"Many designers, contractors, and tradespeople find that it's so costly going to court that they don't even pursue litigation against an unreasonable client, even if they know that they're right."

A second benefit of ADR is that it's usually much faster than going to court. A typical arbitration, with the cooperation of the parties, can be conducted within 60 – 90 days of filing the case and is usually far faster than the court process. I've seen arbitrations conducted within two weeks of filing the case when time was of the essence and the parties all cooperated with the ADR provider in executing the required paperwork. Although there are certain rules to be followed in conducting the arbitration process, it's far less formal than the rules and procedures of the litigation process. Many parties choose to represent themselves in minor arbitrated cases; it's almost impossible to represent yourself in court. You have to bear the cost of an attorney if you want to win in court.

A construction dispute can easily take years to proceed through the court system.

A third related benefit is the much lower costs of the ADR process as opposed to the litigation process. Many designers, contractors, and tradespeople find that it's so costly going to court that they don't even pursue litigation against an unreasonable client, even if they know that they're right. ADR can allow you to pursue even small amounts of money in an expeditious, inexpensive and simple process.

However, choose your arbitrator carefully to ensure that you won't have to waste time and money educating that individual about construction or remodeling processes. I've seen some arbitrations drag on for months because they were conducted by an attorney, judge, retired judge, or another person who had limited or no knowledge of the issues in dispute.



With that kind of arbiter, the arbitration process plays out much like a court case since the parties are forced to present experts, where the most convincing presentation wins the hearing.

A fourth benefit of arbitration is that it's usually more final than going to court. If a judge issues a verdict and one of the parties is unhappy with that verdict, they can file an appeal, and then another appeal, and then another appeal. When an arbitrator issues an "arbitration award" (the verdict), it's only appealable on very specific and limited procedural grounds, such as if the arbiter failed to reveal a personal vested interest in ▸▸

the outcome of the hearing. Parties are bound by the arbitration award whether they like it or not. That is why it's imperative to have a arbitrator who's knowledgeable about construction or remodeling. In larger construction projects, a three-person tri-partite arbitration panel is sometimes used as opposed to a single arbitrator, but it is usually pre-specified in the construction contract.

There are many other advantages for both parties to use ADR in settling disputes. As part of the dispute resolution clause in your remodeling contract, in addition to specifying the ADR process, it's just as important to specify the ADR provider, such as the American Arbitration Association or my firm, Construction Dispute Resolution Services. You should exercise the same care and diligence in selecting and specifying your ADR provider in your contract as you do in selecting your arbitrator or mediator. Also note that almost every insurance company or home warranty company specifies in their contracts that binding arbitration conducted by construction knowledgeable arbitrators must be used to settle their disputes. These companies must know something about the benefits of ADR. ADR providers are specified in the construction contract and the arbiter is selected after the dispute develops.

In a future issue of Profiles, I'll review the proper language not only to specify ADR in your construction or remodeling contracts, but I'll also review other necessary contract provisions that you should use, including issues such as price escalation clauses. P

Peter G. Merrill, CKD, is the President and CEO of Construction Dispute Resolution Services, LLC. A former kitchen and bath designer, Peter received the NKBA's first honorary life membership in 2004. He has served on the NKBA's Builder/Remodeler Advisory Council and is a past president of the NKBA New York Tri-State Chapter. **For more information, visit www. cdrsllc.com or contact Peter at 888-930-001 or petermerrill@cdrsllc.com.**

LEGISLATIVE UPDATE

Get the Lead Out

On April 22, 2010, the new Lead: Renovation, Repair, and Painting rule will take effect. Industry professionals who remodel pre-1978 buildings will face major changes in the way they work in many homes and businesses.

This rule specifically targets households or buildings where children under the age of six are present or where pregnant women might live, and applies to projects disturbing more than six square feet of painted surface. To qualify as a child-occupied facility, there has to be at least one child under six years of age in the home at least two different days a week, for at least three hours each day with a combined total for the week of at least six hours, and an annual time frame of 60 hours in the space.

Remodelers will require new training prior to the rule's implementation. An eight-hour course (six hours in the classroom and two hours hands on) will be implemented based on the existing EPA/HUD remodeling course. New additions to the course will include how to use the pre-renovation lead test kit, as well as the post-renovation cleaning verification.

In addition, a new record-keeping requirement that the EPA has included mandates that records must be kept for three years after each project has been completed.

EPA-approved training is expected to be made available by April 2009. However, the new consumer pamphlet is already available and has been required for use since December 2008. Violations of this new rule will carry up to a $25,000 fine.

For more information, please visit www.epa.gov/lead/pubs/renovation.htm.