

THE CONNECTICUT LAW TRIBUNE

WEEK OF JANUARY 1, 2006 • WWW.CTLAWTRIBUNE.COM

ALM

ADR

Mediation, Arbitration and Non-Litigation Strategies

Avoiding The 'Resolution Trap'

By **PETER W. BENNER**

Law Tribune Contributing Writer

In a prior column, I suggested involving a mediator early in a dispute, not necessarily to try to settle the case but at least initially to establish a structure for potential resolution. Further developing that theme, I draw on a recent book by Bernard S. Mayer entitled "Beyond Neutrality: Confronting the Crisis in Conflict Resolution." Mayer is a leader in the field whose ideas warrant attention, a couple of which I raise here.

The book itself is a comprehensive analysis of Mayer's view of, and proposed solutions to, his characterization of a "crisis" in the conflict resolution field, by which he refers to the fact that mediation is not finding the frequency or diversity of use that its proponents would like to see.

I do not intend to address Mayer's views on the "crisis," or whether there really is one at all. But his observations on the role of the mediator and current conceptions about the use of mediation and nature of the process are intriguing. He introduces the idea that mediators might be viewed and act more as professionals who work with parties toward the resolution of their dispute not by limiting themselves to a neutral capacity, but by becoming involved in the conflict to assist in its resolution in whatever way might be most helpful, depending on the stage of the dispute or what is really needed to find solution. That could even include advocacy. In other words, the field of conflict resolution, particularly as perceived by the public, would expand, and "mediators" could be engaged to go "beyond

neutrality" to apply their process skills and substantive knowledge in ways in addition to those of the traditional role of the mediator as it has developed over the past 30 years.

Mayer would have mediators avoid the "resolution trap" in which engaging a mediator generally means that you are ready for resolution—you just need a neutral third party to get you there. Focusing on an end to the conflict at the time the mediator is hired is not necessarily what the mediator would be expected to do. This expanded vision of private dispute resolution leads Mayer to view those who practice in the field as "conflict engagement" professionals, whose expertise is used for purposes beyond sitting down at a table as a neutral to settle a case and leave either with or without a settlement.

This further evolution of the role of the mediator addresses certain beliefs that Mayer feels get in the way when thinking about mediation and the role of a mediator. One such belief is that "constructive communication is more important than passionate advocacy."

Here is the tie in to my prior column, in which I suggested the retention of mediators early in a dispute to frame and guide the process. Counsel can still sharpen the dispute, and zealous advocacy can play out for as long as it takes the disputants to be in a position to know their case and to see a way toward resolution, with the "conflict engagement" professional involved along the way to assist as needed. This person could contribute substantive knowledge to help frame and understand the issues. Involving such a "neutral" could provide real value by giving

perspective to the dispute that the parties have difficulty finding themselves. Such an approach can address the reluctance toward using mediation too early, before a case is really ready to be settled.

Another of Mayer's identified current misconceptions is that "facilitative mediation means minimal substantive influence". Contrasting "evaluative" or "directive" mediation with the work of a mediator whose approach is to "facilitate" the process of negotiation (i.e., not interject his or her judgments) glosses over the fact that mediators by nature have a key substantive role. The skill of the mediator (conflict engager) is to interact with the parties as needed to delve into the issues while letting the disputants have their say. The mediator intervenes throughout that process to prompt the participants toward a resolution. The parties expect evenhandedness, but they also should not expect less than an all out effort by a fully engaged mediator to assist in the discovery of a solution.

These are just a couple of ideas to stir up thinking about what the dispute resolution field can be about. Mayer's use to the term "crisis" captures attention, which is good. The point is to keep looking for ways in which those who practice as mediators (or call them what you will) can provide valuable service. ■



Peter Benner is a mediator and arbitrator in West Hartford and is chair of the Alternative Dispute Resolution Section of the Connecticut Bar Association.

This article is reprinted with permission from the January 1, 2006 edition of THE CONNECTICUT LAW TRIBUNE. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM, Reprint Department at 800-888-8300 x6111 or visit www.almreprints.com. #301-08-06-0005