



 Office of Dispute Resolution

The Neutral Zone is a free quarterly newsletter provided through the Colorado Judicial Branch's Office of Dispute Resolution.

As a resource for mediators, court staff, and the mediation community, The Neutral Zone focuses on best practices, training opportunities, and news from around the state. This newsletter is for informative purposes.

Any views or opinions found within this publication do not reflect the position of the Judicial Branch.

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FROM THE OFFICE OF DISPUTE RESOLUTION... "NEW YEARS' RESOLUTIONS: SELF-IMPROVEMENT"

In looking forward to 2017, I found myself wanting to look back into 2016 and, professionally, I was curious as I perused the two-inch thick "[Judicial Branch, Annual Statistical Report, Fiscal Year 2016](#)" (the "FY16 Report") on how ODR settlement rates might compare to the general settlement rate of cases in Colorado in general.

The answer to this question proved to be virtually impossible for a variety of statistical reasons; however, I was able to make a few observations. I zeroed in on a set of statistics from small claims court that may provide a picture of Colorado's post-filing settlement rate.

In FY 2016, there were 7,309 small claims cases filed in the State of Colorado, with court trials held in only 1,768 cases. This is an "attrition" or "settlement rate" of about 75%.

It is fair to say that many plaintiffs in small claims court are unable to perfect service, decide they do not want to continue, or are awarded a default judgment; the attrition rate though did provide some settlement gauge for cases with amounts in controversy that does not exceed seven thousand five hundred dollars, exclusive of interest and costs. Last fiscal year, ODR's settlement rate for small claims cases was about

60%. Similarly, when looking at the 6,050 domestic relations cases ODR reported (of the 8,125 total cases handled by ODR), the settlement rate was about 56.4%. What do these percentages mean and how can we improve the ability of parties to maximize their settlement discussions? This is an invitation for you to ponder that question and I hope it will be the subject of the first "open space" dialogue to be held on March 21, 2017 during the lunch hour.

Sharon Sturges
ODR Program Coordinator



ODR took the Mediating Domestic Relations Cases in Colorado Courts training to Grand Junction in September.

THE AUTHORIZATION OF MEDIATION IN COLORADO COURTS: A RESOURCE GUIDE FOR PRACTITIONERS

- compiled in collaboration with Judge Lynn J. Karowsky (ret.)

SAMPLE BEST PRACTICE MEDIATION GUIDES FROM OTHER JURISDICTIONS

Alabama Judges' Mediation Bench Book – ADRC –
<http://alabamaadr.org/blog/2016/06/updated-alabama-judges-mediation-bench-book>

Florida OCI Benchbook –
www.flcourts.org/core/fileparse.php/559/url/Mediation.pdf

Michigan Judges Guide to ADR Practice and Procedure – <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf>

North Carolina Mediation Benchbook for District Court Judges – Family Financial Settlement Conference Program (FFS) District Court – http://www.nccourts.org/Courts/CRS/Councils/ODR/Documents/FFS_Judges.pdf

Utah Mediation Best Practice Guide – <http://www.utcourts.gov/mediation/docs/Mediation%20Best%20Practices%20Guide%20-%20Final%20Draft.pdf>

In collaboration with the Office of Dispute Resolution, the Colorado Judicial Institute's ADR Subcommittee has begun the process of developing a "Best Practices Guide for the Use of Mediation in Colorado Courts." One of the goals of this project is to identify the use of and resources for mediation that vary widely throughout Colorado and are inconsistent even within judicial districts. As there currently appears to be no standard practice for the use of mediators by the Colorado Courts or formal opportunities for discussion among mediators, attorneys, and judicial officers to improve the quality of court-ordered mediations, this project attempts to meet those needs by developing policies and guidelines for the use of mediation by the Colorado Courts and to develop feedback loops among court-ordered mediation stakeholders.

One of the resources created by the subcommittee in connection with its Best Practices Guide is a comprehensive list of the statutes authorizing mediation under Colorado law. This list, in addition to the mediation resources compiled within the guide, will help to inform feedback received from the first phase of the project, a survey of judicial officers and mediators of their perceptions regarding the use of mediation in Colorado (some of the results of which are shared on page 5 of this newsletter). The end result of the ADR subcommittee's work will be a final guide similar to those created by other jurisdictions as outlined below.

For more information on the this project, any additional thoughts or comments for the guide, or to speak with the lead project manager from the Colorado Judicial Institute, contact CJI's Project Coordinator, Judge Lynn J. Karowsky (Retired) at lynnkarowsky@gmail.com.

COLORADO REVISED STATUTES AND THE USE AND PRACTICE OF MEDIATION

As collected by the CJI project team, the Colorado Revised Statutes address mediation services throughout 29 different chapters, 80 different articles, and over 100 specific mentions in addition to the authorizing legislation provided by § 13-22-301, et seq. Within topics such as workers' compensation, state government, and landlord-tenant disputes, Colorado law provides for a variety of opportunities in which mediation may be utilized to resolve conflict through an alternative process outside the context of a court setting. The reference key below is designed to help navigate the statutes provided by this article as well.

Children's Code § 19, **Topics:** Grandparent Visitation Issues, Community Accountability Programs
Court Procedure § 13, **Topics:** Construction Defects, Dissolution of Marriage, CDRA, Uniform Arbitration
Education § 22, **Topics:** Charter School and District Disputes, School Attendance Law
Election § 1, **Topics:** Use of ADR to resolve vote complaints under rules established by Secretary of State
Government §§ 24, 29, 30, 31, **Topics:** Administrative Law Judges, Civil Rights Commission, Interstate
Compacts, Boundary Disputes, Urban Renewal
Human Services § 26, **Topics:** Homeless Youth, Homeless Prevention Activities Program
Insurance § 10, **Topics:** General Provisions regarding ADR use in dispute of fees, services provided
Labor & Industry § 8, **Topics:** Unfair Labor Practices, Workers' Compensation, Labor Disputes
Parks & Wildlife §§ 33, 35, **Topics:** Fence Law, Damage by Wildlife, Noxious Weed, Livestock Transportation
Probate, Trust and Fiduciaries § 15, **Topics:** Estate Administration, Creditor Claims, Claims Against an Estate
Professions and Occupations § 12, **Topics:** Use of Private Investigators, Student Practice, Child Support
Property—Real and Personal § 38, **Topics:** Landlord/Tenant, Mobile Homes, Real Estate, Harvesters' Liens
Public Health & Environment, and Safety §§ 9, 25, **Topics:** Excavation, High Voltage, Hazardous Waste
Special Districts, Utilities, Vehicles & Traffic, Water §§ 32, 27, 40, 42, **Topics:** Sewage, Water Compacts
Taxation §§ 39, 40, **Topics:** Property Valuations, Shipping Damage Disputes, County Boards of Equalization
Universal Commercial Code §§ 4, 6, 7, **Topics:** Lease Defaults, Consumers' Rights, Nonprofits, Corporations

LIST OF COLORADO REVISED STATUTES AUTHORIZING MEDIATION

§ 1-1.5-105 § 12-47-406.3
§ 4-2.5-501 § 12-5-116
§§ 6-1-410, 509 § 12-58.5-103
§ 7-30-107 §§ 13-20-802.5,
§§ 7-90-102, 803.5 (6), 806
911, 912 § 13-21-102
§§ 8-1-115, 116, § 13-22-201,
122, 123 301, 501
§ 8-13.5-104 § 13-23-101
§ 8-14.3-102 § 13-25-135
§§ 8-3-108, 112, § 13-3-113
113 § 13-62.1-101
§ 8-40-201 § 13-80-107.5
§§ 8-43-205, 206.5 § 13-90.5-103
§ 9-1.5-104.3 § 13-90-204
§ 9-2.5-103 § 14-10.5-104
§§ 10-1-135, 212 (1)(a)(I)
§ 10-16-318 §§ 14-10-115,
§ 12-14.1-106 124(8), 128.1,
§ 12-14.3-106.7 129.5
§ 12-43-215, 403 § 15-10-604

§ 15-12-809; § 15-14-732; § 15-1-804; § 18-9-121; § 19-1-117.5; § 19-2-309.5; § 22-30.5-107.5; § 22-33-103.5; § 24-30-1003; § 24-32-3209; §§ 24-34-306, 506.5; § 24-50-604; §§ 24-60-602, 702, 1301, 2802, 3202, 3402, 3502; § 24-61-102; § 25.5-5-406; § 25-15-301.5; §§ 25-37-103, 114; § 26-5.7-103; § 26-7.8-103; § 29-22-104; § 29-5-210; § 30-20-101.5; § 30-6-101; § 31-25-107; § 32-11.5-205; § 32-1-1006; §§ 33-3-104, 203, 204; §§ 35-27-122, 123; § 35-41.5-105; §§ 35-46-102, 103, 104; §§ 35-5-109, 110; § 35-53-125; § 37-69-101; § 37-75-105(2)(a); § 37-83-106; § 37-90.5-105; §§ 38-12-103, 216; § 38-22.5-105; § 38-24.5-102; § 38-33.3-124; § 38-5-107; § 39-24-101; §§ 39-8-108, 108.5; § 40-10.1-507; § 40-27-110; § 42-10-107

The following page summarizes the CBA Legal Ethics Committee Formal Opinion 101 (released May 21, 2016) concerning the limited representation of clients in the legal system by practicing attorneys. Formal Ethics Opinion 101 clarifies unbundled and limited scope representation and is titled “Unbundling/Limited Scope Representation.”

ISSUING AUTHORITY:

Formal Ethics Opinions are issued by the Colorado Bar Association Ethics Committee and are advisory only. *Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions.* Formal ethics opinions, however, may carry weight with judicial officers.

HOW DOES THE OPINION IMPACT MEDIATION?:

On page 18 of the opinion, the CBA specifically addresses the use of unbundling/limited scope representation in the context of mediation services and reads as follows:

“Issues in ensuring fairness to opposing parties may arise in domestic relations cases, especially if both parties request assistance from one attorney. A lawyer should not mediate a divorce agreement between unrepresented parties and also prepare a proposed judgement of dissolution of marriage, a marriage separation agreement, or a joint parenting agreement. When a lawyer drafts these formal documents after mediating between the adverse parties, the lawyer goes beyond the role of mediator and takes on the role of representing both parties, which creates a non-waivable conflict of interests. *See* Ill. State Bar Ass’n Op. 04-03 (2004). Under Colo. RPC 1.7(b), a lawyer cannot represent a client if that representation would be materially limited by the representation of another client. In the situation explained here, the mediating lawyer who prepares official documents would be effectively representing two adverse parties in one proceeding. *See* CBA Formal Op. 47, “Attorney Representation in Dissolution of Marriage” (1972, Addendum 1995)(“[C]onflicting interests will nearly always exist in dissolution of marriage cases, whether or not one or both clients know or agree that their interests are conflicting[.]”). Alternatively, the mediating lawyer can help the parties draft an informal agreement or memorandum of understanding and then recommend that each party obtain independent and separate legal counsel to draft the final documents for the court.”

Non-attorney court staff are not impacted by this opinion. There is a concern, however, that the language on page 18 creates an issue for attorneys who are self-represented litigant coordinators (Sherlocks) or family court facilitators (FCFs) and implicates activities currently conducted by attorney Sherlocks and attorney FCFs under Chief

Did you know in FY 2015:

- *75% of all litigants in domestic relations cases were estimated to be pro se*
- *Over 23,000 DR cases filed have no attorney (67% of all DR cases).*
- *This amounts to just over 50,000 people in DR cases that do not retain counsel.*

source: Colorado Judicial Branch FY 15 Pro Se Data
<https://www.courts.state.co.us/Administration/l.cfm?Unit=anurpc>

Justice Directive 13-01’s authorization. In the list of “Basic Services” covered by CJD 13-01, specifically, subsections (a)(8)-(11), and (19) which, *inter alia*, include the following activities:

- (8) Assist Self-Represented Litigants in selecting the correct forms, and instructions on how to complete forms, based on the Self-Represented Litigant’s description of what he or she wants to pursue or request from the court, including, but not limited to, providing forms for the waiver of filing fees. Where no form exists to accomplish the Self-Represented Litigant’s request, Self-Help Personnel should inform the litigant of that fact;
- (9) Record information provided by the Self-Represented Litigant on approved forms if that person cannot complete the forms due to disability, language, or literacy barriers;
- (10) Assist Self-Represented Litigants to understand what information is needed to complete filling in the blanks on approved forms;
- (11) Review finished forms to determine whether forms are complete, including checking for signatures, notarization, correct county name, and case number;
- ...
- (19) Assist Self-Represented Litigants with preparation of proposed court orders based upon the parties’ agreement or situation for signature of judge or magistrate.

The entire opinion can be accessed at the link below:

http://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_101.pdf

If you have any questions regarding your mediation practice and the formal ethics opinion, please feel free to contact Sharon Sturges, ODR Program Coordinator, at sharon.sturges@judicial.state.co.us.

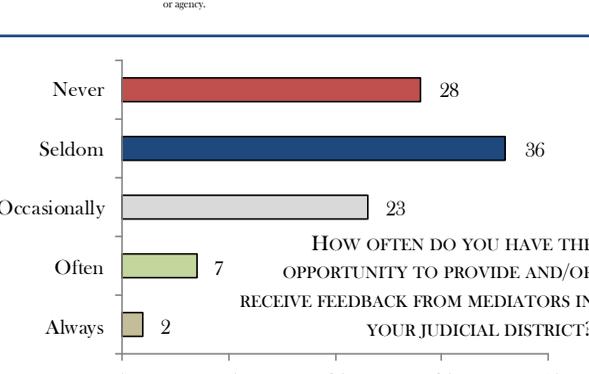
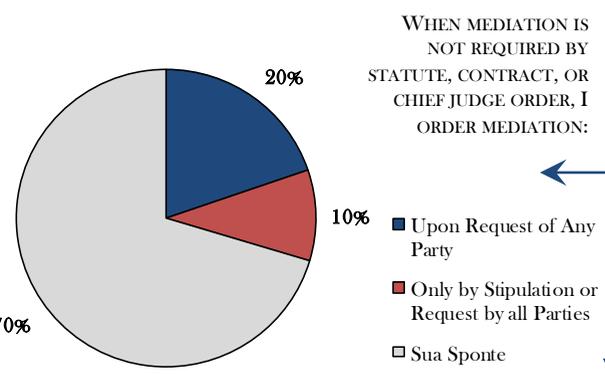
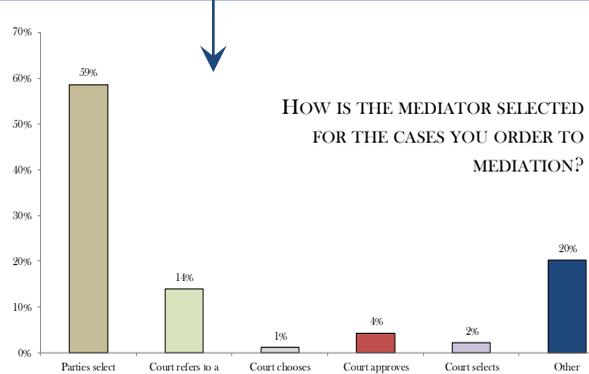
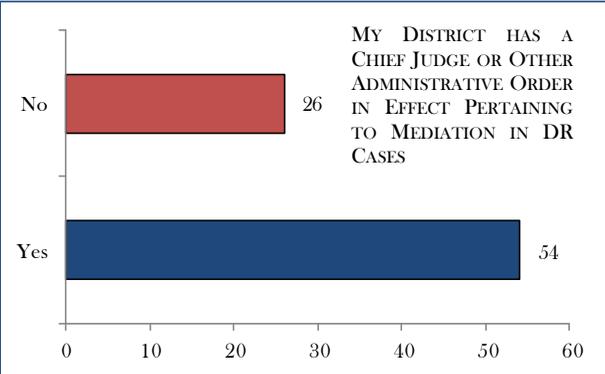
2016 SURVEY OF MEDIATION PRACTICES IN COLORADO COURTS

As adapted from two surveys conducted by the Office of Dispute Resolution and the Colorado Judicial Institute regarding mediation practices statewide, the graphs and charts that follow reflect the responses from a series of questions related to the use of mediation in the court system for a variety of case types and from the perspective of a mixture of court roles, namely judicial officers and ODR contract mediators.

JUDICIAL SURVEY RESPONDENTS	
County Court Judge	16
District Court Judge	63
County Court Magistrate	2
District Court Magistrate	17
Appellate Judge or Justice	1
Total	99

When asked what criteria was used in a DR case to determine the best time to commence a mediation, judges most frequently responded that they order mediation relative to a procedural point in domestic relations cases such as prior to permanent orders hearing being set with a deadline of when mediation must be completed by. Mediation in these instances is either a standard order for cases in these jurisdictions or set at the initial status conference. Another criteria used by judges relates to the completion of exchanging disclosures or after discovery has been completed.

Similarly, mediation is also ordered at a point wherein the parties have reached a disagreement or complex issues exist in cases that require the use of a mediator. Other divisions see that mediation is best completed as early as possible in the case and issue orders that correspondingly reflect this perspective. Some judges find that mediation should only be ordered when parties agree to mediation. A few judges adopted a more fluid process that adopts a mixture of all of these elements into their decision-making process about when mediation is appropriate to be ordered in a DR case.

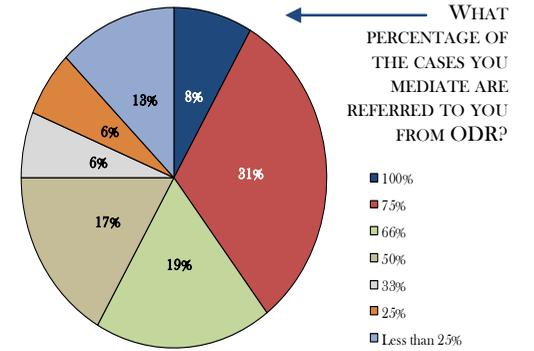
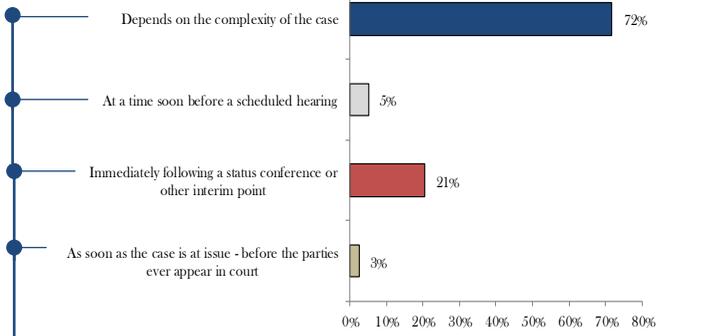


FROM THE MEDIATORS... (total of 48 survey respondents)

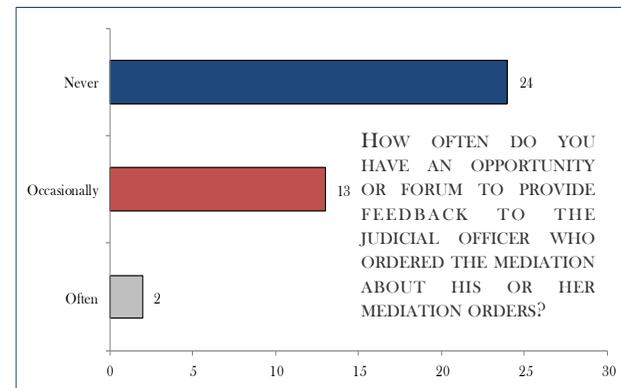
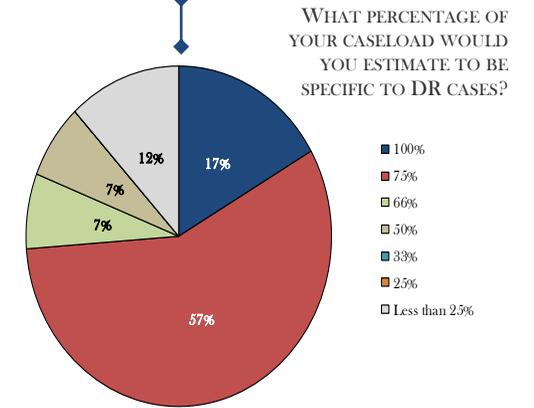
WHAT IS YOUR PRESENT STATUS IN THE COLORADO MEDIATION COMMUNITY?

25% of ODR Contract Mediators are full-time, non-attorney mediators; 23% are full-time attorney mediators, 15% are part-time non-attorney mediators and 37% are part-time attorney mediators. 100% of which have completed a 40-hour basic mediation course.

IN DOMESTIC RELATIONS CASES, WHEN IS THE MOST EFFECTIVE TIME FOR MEDIATION TO RESOLVE ISSUES?



- Typically, 55% of mediators found that there was no general pattern of representation in their DR cases that they could distinguish whether or not both parties were pro se or one or more parties were represented by counsel.
- The majority of ODR mediators [45%] observed no particular pattern as to whether mediation occurring before temporary orders to be more, less, or as successful as when done before a hearing on permanent orders.
- However, 54% of the surveyed mediators believe that mediating at temporary orders, whether successful or unsuccessful, is more likely to resolve all issues when they mediate again regarding the permanent agreement.



PRIMARY REGION OF MEDIATION PRACTICE	
Metro Denver	24
Eastern Plains	0
Northern Colorado	6
Western Slope	8
Southern Colorado	10
Total	48

If you have not completed the survey regarding mediation practices and would like to do so, please feel free to access the survey via this [link](#). The full survey results will be compiled by the Office of Dispute Resolution and the Colorado Judicial Institute for use in a summary report regarding statewide mediation practices as well as developing future training opportunities, a best practices guide, and other materials related to mediation.

UPCOMING DATES

February 24, 2017

Child Support Calculations for Mediators

March 21, 2017

ODR Lunch and Learn Open Forum

November 16, 2017

ODR Contractor Meeting at Ralph Carr Judicial Center

November 17, 2017

ADR Statewide Conference

ODR MEDIATOR REMINDERS

- Make sure all indigent proof is attached to the time sheet when time sheets are sent in to the ODR referral coordinator
- Turn in all time sheets as soon as possible upon completion of mediation services, and please add vendor number to all time sheets

Any billing questions or concerns, please contact Veronica Chacon, ODR Referral Coordinator, at:

odrmmediations@judicial.state.co.us

- Even though you are mediating, a good conflict database is essential to avoid the appearance of partiality and to ensure, if you are an attorney or have another job which involves clients in the legal system, you do not have a conflict. Word allows you to create tables, enter names of the parties, and to cross reference opposing parties easily. It is also easy to search when a new mediation referral comes your way. *If you have questions, give Sharon a call!*

THE MEDIATOR'S CORNER ... *with contribution from John Tweedy*

One might not think of 2016 as a particularly auspicious year for dispute resolution, but after the election we've just endured, our legal system suddenly looks pretty good by comparison. There's a lot of worry lately about our inability to agree politically. But I'm actually more concerned about our ability to disagree.

We will always have a spectrum of values and beliefs. I think democracy depends on airing our differences in a respectful, structured, fact-based, fair way.

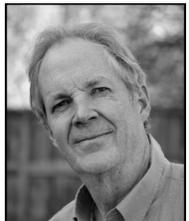
I think our politicians could learn a thing or two from how an average couple finds ways to express themselves at the mediation table. In many ways, the challenges of the two settings are similar, to be honest. Anger at disappointed expectations of prosperity and happiness. The unhappy prospect of having to confront a diminished pool of resources and address an overload of debt.

The struggle to find a common language, or even to see each other clearly through a toxic fog of mutual distrust. Difficultly focusing on the present, given the accumulation of insults, scar tissue and traumas from the past. Unrealistic fantasies of disempowering and marginalizing the adversary.

But the opportunities are similar too. There's pride in a shared history, even if some its moments come tinged with pain. There's hope for the future, infused with at least some trace of the greatest asset of all - love. Love may be the least accessible element in the conversation, a faint, acrid absence, like gunpowder on the wind. Love that still burns somewhere, even when we can't find it.

So when a couple sits down to mediate, they have to throw out the campaign promises. They have to tell, and accept, hard truths. They have

John Tweedy is an attorney and mediator with 25 years of experience. John got his JD from Stanford Law School, his BA from the University of Colorado at Boulder, and his MA in Sociology from Brown University. A contract mediator with the Office of Dispute Resolution, he mediates cases involving domestic conflicts, civil and business disputes, and construction and real property cases. John has been married for 29 years and has two children. When not mediating or practicing law, he makes documentary films and writes occasional columns for the Boulder Daily Camera.



"What lies behind us and what lies before us are tiny matters compared to what lies within us."

- Ralph Waldo Emerson

to explore tough options -- not just with an eye for the good, but also from the honest perspective of sizing up the least bad.

This is the point where our ability to disagree becomes vital for our survival. When we get beyond the pantomime of lawyers and emerge from the caves of our history, we come to realize that our choices are simple. Because in a time of scarcity - which, to me, is the necessary future of our species - democracy is no longer the distribution of plenty. It is the apportionment of sacrifice.

The imposition of sacrifice upon the powerless is the path of dictatorship. Democracy, increasingly, will be the process of how to apportion sacrifice fairly. Unfortunately, I don't think our politicians have yet developed good rules for this, as anyone who has watched a legislature try to cut a budget can attest.

Perhaps this is where the mediation table can offer lessons. Couples in mediation apportion sacrifice all the time, often in ways that are moving to behold. The most beautiful moments in mediation come when a party agrees to sacrifice for love of a good greater than the self - for children, for the future. The same thing is possible in society, too.