MEMORANDUM

TO: **Professor Andrew Schepard**
CC: **Yishai Boyarin**
FROM: **Ashley Lorance**
DATE: **November 14, 2008**
RE: **Collaborative Law Act: Issues regarding *Pro Se* Litigants**

I. Issues Presented

Many parties involved in matters who might be interested in participating in collaborative law are self represented, especially in divorce and family disputes. In that area, estimates of self represented litigants are as high as 88%.[1] Some of those litigants may even be lawyers.

The Collaborative Law Act requires that a party identify and retain a collaborative lawyer. Self representation is not an option under the Act. This memorandum briefly sets out some of the issues regarding self representation in alternative dispute resolution (hereinafter "ADR"), especially in the collaborative law context.

(A) Are any other ADR processes (e.g. mediation or arbitration) limited to litigants represented by counsel?

(1) Short Answer:

No. Neither mediation nor arbitration require counsel to proceed *per se*, however courts have taken varying views regarding whether *pro se* representation is appropriate in either process. One must consult case law and court rules of the relevant state or federal jurisdiction to find out what type of self-representation is allowed in ADR processes.

(2) Analysis:

Some courts view ADR as entirely appropriate for pro se parties, especially in light of its cost savings. Other courts view ADR as inappropriate with *pro se* parties.[2] Many courts do not have a procedure to provide ADR to *pro se* litigants who cannot use ADR if they are required to pay a court fee for the service.[3]

a. Arbitration

Generally, *pro se* litigants are allowed to participate in arbitration.[4] Several federal and state courts allow litigants to appear *pro se* in arbitration.[5] However, some states have taken the opposite view, finding that arbitration is not appropriate for *pro se* litigants.[6]

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[1] *See* Sales, et al., *Self-Representation in Divorce Cases: A Report Prepared for the ABA Standing Committee on the Delivery of Legal Services*, American Bar Association, 1993.
[2] Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. Tex. L. Rev. 407, fn 178 (1997).
[3] Gina Viola Brown, *A Community of Court ADR Programs: How Court-Based ADR Programs Help Each Other Survive and Thrive*, 26 Justice System Journal 327, 327-41 (2005).
[4] *See* Uniform Arbitration Act § 16 (2000)("A party to an arbitration proceeding *may* be represented by counsel.")(emphasis added); Unif. Arbitration Act, comment 3 at p. 46.
[5] *E.g.*, United States District Court for the District of Idaho Home Page, http://www.id.uscourts.gov/pro-se.htm#Arbitration (last visited Nov. 12, 2008); United States District Court for the Eastern District of Tennessee Home Page, http://www.tned.uscourts.gov/arbitration_handbook.php (last visited Nov. 12, 2008; Delaware Superior Court Home Page, http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_compulsory_arbitration.htm#b2 (last visited Nov. 12, 2008).
[6] *E.g.*, US District Court for the Eastern District of New York Home Page,

b. Mediation

Similarly, *pro se* litigants are allowed to participate in mediation. The drafting committee of the Uniform Mediation Act elected to let the parties decide whether to bring counsel into mediation.[7]

State statutes differ regarding whether to allow the mediator to exclude lawyers from mediation. Some statutes allow the mediator to exclude lawyers from mediation.[8] Others permit exclusion of counsel from mediation.[9] [10] Most statutes are silent on whether the parties' lawyers can be excluded; alternatively, they state that the parties may bring lawyers to the sessions. [11] [12] However, some courts require party representation to proceed with mediation.[13] Thus, state statutes vary greatly regarding whether counsel is required in mediation.

(B) Does a litigant in a civil dispute have a right (statutory or constitutional) to represent him or herself in court?

(1) Short Answer

Yes. Although no constitutional right to self-representation in civil suits exists, 28 U.S.C. 1654 and the statutory law of many states provide for such a right.

(2) Analysis

The right to self-representation stems from the right of access to the courts.[14] The Constitutional bases for this right include "the Privileges and Immunities clause, the First Amendment right to petition the government for redress of grievances, the Due Process clause of the Fifth and Fourteenth Amendments, and the Sixth Amendment right to be heard."[15]

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http://www.nyed.uscourts.gov/adr/Arbitration/Arbitration_FAQ/arbitration_faq.html (last visited Nov. 12, 2008).

[7] Unif. Mediation Act, § 10, comments (2001).

[8] *See, e.g.*, Cal. Fam. Code Section 3182 (West 1993); McEwen, et al., Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1345-1346 (1995).

[9] *See, e.g.*, Cal. Fam. Code Section 3182 (West 1993); McEwen, et al., Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1345-1346 (1995).

[10] The United States Third Circuit and the United States District Court for the Western District of Pennsylvania have both implemented pro bono pro se mediation programs. *See*, Lisa M. Wolfe, *Western District's ADR Pilot Program a Success*, 9 Lawyers J. 1 (2007).

[11] *See, e.g.*, Neb. Rev. Stat. Section 42-810 (1997) (domestic relations) (counsel may attend mediation); N.D. Cent. Code Section 14-09.1-05 (1987) (domestic relations) (mediator may not exclude counsel); Okla. Stat. tit. 12, Section 1824(5) (1998) (representative authorized to attend); Or. Rev. Stat. Section 107.600(1) (1981) (marriage dissolution) (attorney may not be excluded); Or. Rev. Stat. Section 107.785 (1995) (marriage dissolution) (attorney may not be excluded); Wis. Stat. Section 655.58(5) (1990) (health care) (authorizes counsel to attend mediation).

[12] The Third Circuit and the Western District of Pennsylvania have both implemented pro bono pro se mediation programs. *See*, Lisa M. Wolfe, *Western District's ADR Pilot Program a Success*, 9 Lawyers J. 1 (2007).

[13] *E.g.*, Supreme Court of Indiana Home Page, http://www.in.gov/judiciary/opinions/archive/120402.rul.html (last visited Nov. 12, 2008).

[14] Edward M. Holt, *How to Treat "Fools": Exploring the Duties Owed to Pro Se Litigants in Civil Cases*, 25 J. Legal Prof. 167, 168 (2001).

[15] *Id.*

An individual's right to self-representation was initially recognized by the Judiciary Act of 1789 and later codified in 28. U.S.C. 1654 (1994)("In all courts of the United States, parties may plead and conduct their own cases personally").[16] [17] Additionally, the statutory law of many states either expressly or by interpretation provide for the right to self-representation.[18]

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(C) Is there any constitutional problem with excluding self represented litigants from participating in collaborative law?

(1) Short Answer

Not yet. Since collaborative law is a private, contractual agreement to resolve disputes, it is subject to no constitutional safeguards.

(2) Analysis

The current understanding of ADR is that constitutional safeguards do not apply because the processes are private, alternative hearings.[19] However, the increasing establishment, use, and regulation of mediation and arbitration processes by federal and state courts and agencies, (including incorporation of neutral decisions into court decisions), could eventually be characterized as 'public' and thereby subject to constitutional constraints.[20] However, the same 'state actor' logic would not apply to collaborative law, which has remained largely private in nature. Therefore, constitutional standards will not apply to collaborative law in the foreseeable future.

(D) Are there any policy or practical benefits or difficulties (e.g. the operation of the disqualification clause) with allowing self represented litigants to participate in collaborative law?

(1) Short Answer

If self-represented litigants engaged in collaborative law, there would likely be more difficulties than benefits. To the best of my knowledge, there has not been any research done on this particular topic.

(2) Analysis

a. Benefits

i. This approach could take on a more team-oriented atmosphere for negotiations.

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[16] Holt, 25 J. Legal Prof. 168.

[17] Task Force on Pro Se Litigation of the Judicial Council. *Guidelines for Best Practices in Pro Se Assistance. October 1, 2004* http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf

[18] For a list of U.S. state constitutional provisions allowing self-representation in state courts, *see* http://en.wikipedia.org/wiki/List_of_U.S._State_constitutional_provisions_allowing_self-representation_in_state_courts.

[19] *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 954 (2000).

[20] *Id; see also*, 113 Harv. L. Rev. 1851, 1870 (2000)(arguing state involvement should make ADR subject to minimum constitutional standards, including due process).

b. Difficulties

i. **Role confusion –** If self-represented parties participated in collaborative law, especially if one side was *pro se*, there would be a high potential for role confusion, because both clients could be asking the single lawyer about their rights or relative weakness or strength of their case.

ii. **Power or information imbalance –** Without an adjudicator or a neutral party to help balance two sides who may greatly differ in power or resources, a self-represented party runs a great risk of impairing his or her case and being manipulated, although this risk may not be any greater than negotiation with a self-represented and represented party.

Additionally, consent to agreements may not be truly informed without counsel. If a self-represented party were to engage in collaborative law, he or she might unknowingly giving up his or her rights. Caution would advise requiring a lawyer to look over the agreement before submittal to the court, similar to mediation. In contrast, by going to court, a *pro se* litigant would at least have a chance to be given basic information regarding his or her rights.

iii. **No Value-Added** – Collaborative law with self-represented parties seems little more than negotiating with a potential cooperative atmosphere but no two-way mechanism to foster that cooperation. The self-represented party would lose nothing in participating, whereas a represented party would lose the time and money spent securing and consulting with his or her first lawyer as well as securing and consulting with his or her second lawyer for trial.

II. Conclusion

Other ADR processes may be limited to representation by counsel, depending on the state, so collaborative law is not necessarily alone in this regard. Federal and state statutes and some state constitutions protect the right to self-representation in court, however, no constitutional problem is posed by excluding self-represented litigants from participating in collaborative law, especially if it retains its private character. Finally, due to the inherent nature of collaborative law, it is ill-suited to self-representation.