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Jeffrey M. Senger, Esq.
Deputy Senior Counsel for Dispute Resolution
United States Department of Justice
950 Pennsylvania Avenue NW
Room 4328
Washington, D.C. 20530

Re: Federal ADR Council Report

Dear Mr. Senger:

On behalf of the Association of the Bar of the City of New York, we are writing to provide you with our comments on the Federal ADR Council Report on the Reasonable Expectations of Confidentiality under the Administrative Dispute Resolution Act of 1996 (the "Report"), which was issued in draft form on September 27, 2000, for comments by November 1, 2000. As you may know, the Association, which was established in 1870, has over 22,000 members, drawn from every sector of the Bar, including practicing lawyers, academics, and members of the judiciary. The Association's Alternative Dispute Resolution Committee, which is principally responsible for the comments made in this letter, includes representatives from a broad range of interests, including lawyers who serve as advocates and neutrals in the alternative dispute resolution processes, academics who specialize in this field, and members of the judiciary.

In view of the short amount of time that has been available to us, our comments will necessarily be general, and aimed at those aspects of the Report about which we have the most significant concerns. As described below, we would be pleased to assist the Federal ADR Council in addressing the concerns that we have raised in any way that would be of use. The Association in general, and our Alternative Dispute Resolution Committee in particular, represents a broad range of perspectives and has significant experience and expertise in the issues that are addressed herein.

You have identified the purpose of the Report as to assist Federal agencies in developing alternative dispute resolution ("ADR") programs mandated under Administrative Dispute Resolution Act of 1996 ("ADRA"), 5 U.S.C. §§ 571-84. That Act sets forth a framework for addressing issues of confidentiality, including in particular confidentiality in mediation. To that end, the Act establishes various procedures and rules for the conduct of mediation and arbitration, and in particular, for the handling of confidential information and communications made in the course of government administrative alternative dispute resolution proceedings. We have not undertaken to comment on the

wisdom of the provisions of ADRA concerning confidentiality, since these matters have already been addressed definitively by Congress.

Although the Report and ADRA appear to cover all types of dispute resolution proceedings, the confidentiality provisions are most relevant to mediation and similar non-binding ADR processes. It is important to note that the level of confidentiality under ADRA differs from the level of confidentiality which many state statutes provide for mediation communications. The principal difference is that the confidentiality provisions in ADRA (unlike the provisions in most state statutes) do not apply to communications which are made in the presence of all parties to the dispute. Generally, they apply only to confidential communications made to the neutral, and it is only the neutral who is prohibited from disclosing or being compelled to disclose what he or she learns in a dispute resolution proceeding. The Report makes it clear that, if the parties desire confidentiality for communications which they make to each other, they must provide for the level of confidentiality they desire in a written agreement. Courts will usually respect such confidentiality agreements subject to an overriding need to prevent a manifest injustice, prove a violation of law or prevent harm to the public

The ADRA confidentiality framework is markedly different than the structures commonly found in other ADR and mediation settings. In particular, in many mediation settings, a high level of confidentiality protection is afforded to all communications made in the context of the mediation, whether the communications are made in joint session or in "caucus" between the mediator and one party to the dispute. In addition, in many mediation settings, it is virtually impossible to compel disclosure by the neutral of communications made in the mediation process. Many experts in this field consider that confidentiality is a very important aspect of building confidence in the mediation process, because of the significant role that it plays in achieving openness and candor in communications by counsel, parties, and the neutral.

Accordingly, we believe that there is a substantial need for the Report to explain with great clarity the extent of confidentiality that will, and will not, be afforded to mediation communications in mediations convened under the authority of ADRA, as well as the consequences of the parties' attempting to agree to more confidentiality than is provided by the statute. Otherwise, we are concerned that ADRA's confidentiality provisions may pose a trap for the unwary.

It is clear that a significant effort has been made to meet this need. The Report, through its section-by-section explication of the statute, provides detailed information about ADRA's individual terms, including the confidentiality provisions contained in ADRA. The Report also includes a useful question-and-answer discussion and a "Model Confidentiality Statement" for use by neutrals that will assist parties in understanding the aspects, and limits, of the process in which they are participating.

But we remain concerned that the Report's tools of "Q&A" and the Model Confidentiality Statement do not go far enough in advising the non-government participant in an ADRA mediation that the rules of the road on confidentiality may well be very different than what he or she expects. We would like to see the limits on confidentiality identified clearly, simply, and directly, and possibly to see them contrasted explicitly to other confidentiality frameworks, so that all of the parties to the process are aware of the "ground rules" and expectations of the government and the neutral.

The issue of confidentiality arises in two additional settings in the Report that we would like to comment on, albeit briefly. First, at Q&A No. 11(D), the court-ordered exception to confidentiality is

described, and the absence of interpretative case law is noted. ADRA appears to set a very high standard for such court-ordered disclosure, and we believe that the existence of this very high standard is essential to parties having confidence in the mediation process. We would like to see the Report emphasize the importance of this standard remaining very high, and to the extent that the Report may be used as a reference by government counsel representing interested parties in lawsuits seeking disclosure, we would like to see the Report urge government counsel to argue for a very high standard, and to resist disclosure vigorously in all but the most extreme circumstances of manifest injustice or threat to the public health or safety.

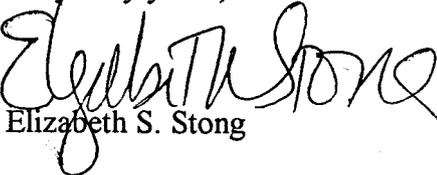
Second, at Q&A No. 15, the Report addresses the disclosure of dispute resolution communications to other federal entities, pursuant to various statutes such as the Inspector General Act, the Whistleblower Protection Act, and the Federal Service Labor-Management Relations Act. The Q&A notes that there is no stated exception in ADRA for requests for disclosure of information from other government entities, and correctly observes that "a tension between these statutory authorities exists."

In response, the Report proposes a number of steps that agencies may take, including entering into dialogue with potential requesting agencies so that each may be educated about their respective missions, establishing procedures for access to information, identifying classes of information that are not confidential, and so on.

We are concerned that this approach does not set a sufficiently high standard, either explicitly or implicitly, for the disclosure of confidential information revealed in mediation proceedings to government entities. We recognize that the public interest might be at stake in a sufficiently extreme circumstance, arguably justifying disclosure of confidential information among government entities, although here, as above, the standard should be very high and the necessary circumstances should be extreme. We believe that Congress has provided a framework for considering the issue of disclosure of confidential information in the court-ordered disclosure permitted for extreme situations of manifest injustice, to help establish a violation of law, or where there is a threat to the public health or safety. We believe that the Report should direct, or at a very minimum urge, government entities seeking to invade the limited protections of confidentiality that are afforded under ADRA to apply for a court order, under the same standard set forth in ADRA at 5 U.S.C. §§ 574(a)(4) and (b)(5), and that the Report should direct agencies both making and responding to such applications to accord great weight to the need to protect the integrity of dispute resolution proceedings and the confidence of parties in future cases, as stated by Congress in ADRA. See id.

Thank you for the opportunity to comment on this important Report. We look forward to the opportunity to work further with the Federal ADR Council on the issues that we have identified, or on other matters related to the implementation of ADRA where we may be of assistance.

Very truly yours,


Elizabeth S. Stong

cc: Evan Davis, President
Association of the Bar of the City of New York