4 [Critique of "The Wannabe Ombudsman Legitimacy Report"] 2000

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Larry Hill (key word)
famous critique of organizational Os at ABA discussions (keyword) in 2000

Rowe was a (UCOA) rep
(COA) TOA people also there

ABA discussions helped influence ACUS recommendations for Fed Court Os

CRITIQUE OF "THE WANNABE OMBUDSMAN LEGITIMACY REPORT":

A Dissent from the Draft Report and Recommendation of the American Bar Association's Ombudsman Committee, Presented to the Section of Administrative Law and Regulatory Practice, on April 24, 2000

BY
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Summary Conclusion: My main critique is that the report fails to distinguish in meaningful ways between traditional, or "classical," or real, ombudsmen, on the one hand, and the internal, "quasi-" or executive, ombudsmen, on the other, when the making of such distinctions is necessary. This failure is especially blatant in discussions of the criterion of independence. The consequence of adopting the report would be that weak, internal offices that have only a shred of independence would be dubbed by the ABA as full-fledged ombudsmen, and the American people would be duped. Furthermore, the option of creating a real ombudsman for a particular jurisdiction that had an ABA-sanctioned internal "ombudsman" probably would be foreclosed forever: Who could argue for the need to create a real ombudsman if the ABA says one already exists?

I served as the Steering Committee's sole academic member and participated fully in its activities and meetings up until mid-1999, when I concluded that the Committee was not an authentic deliberative body and that it had no interest in promoting real ombudsmen. After that time, I made the details of my position known to the Committee's leaders and thereafter monitored the emails and offered advice on specific matters when asked, but did not participate in the monthly conference calls or attend the remaining meetings. In reading the Committee's final product, I see that my substantive concerns were well founded.

Disagreements in Defining the U.S. "Ombudsman Problem"

I conclude that the root cause of my disagreement with the Committee's product is that I have fundamental differences in interpreting the "ombudsman problem" that exists in this country with your colleagues Ms. Judith Kaleta and Mr. Philip Harter, who acted as the Committee's advisers and drafters. I believe that they are well-intentioned, capable individuals who misperceived the situation and who also came under the influence of a group of people who were strongly pursuing their own interests in this matter, interests that are inimical to those of real ombudsmen.

Most of those in the group to which I refer belong to the pretentiously named TOA (The Ombudsman Association); I also mean to include like-minded individuals who may not be TOA members. I enclose a copy of my address delivered at the 1997, Spring meeting of this Section: "American Ombudsmen and Others; or, American Ombudsmen and 'Wannabe' Ombudsmen." In the address, I discuss the TOA, beginning on page 6, and report the feeling developing among real ombudsmen at that time that the TOA "was trying to 'hijack' the ombudsman movement." The remainder of the paper—all of which is extremely relevant to the Steering Committee's recommendations—sets out comparisons between the TOA-style ombudsmen and real ombudsmen.

In addition, I mean to include in the group referenced above representatives of the dispute resolution movement. From that perspective, the Ombudsman (to the extent that it ever comes to mind) is a weak, internal office. But it is, for the most part, merely a disembodied "function" performed by someone who essentially is a mediator with a slightly unusual perspective, that is, one that doesn't have much power and merely develops,

evaluates, and discusses "options" for a client. I discussed the dispute resolution movement' relation to the TOA-ombudsman on pages 6–7 of the enclosed ABA address. Both Ms. Kaleta and Mr. Harter have had strong ties to the dispute resolution movement, but virtually none to the ombudsman as far as I know. Because I knew that the Committee's draft was just what the Dispute Resolution Section wanted, I did not send them a copy of my dissent.

Let me be clear: I believe that the main ombudsman problem facing this country is that several varieties of internal, quasi-ombudsmen whose structure is inherently weak (many of them are in several ways very dependent on higher-ranking executives) demand to be called unqualified "ombudsmen." Thus, the term is diluted, and Americans who could potentially be interested in creating real ombudsmen are misled into thinking that the pale imitations they hear about are the most they could expect to have. Ironically, at the time I gave the paper, I could not have known that the Steering Committee formed afterward, which I was asked to join, would be dominated by the TOA-style ombudsmen, who are, indeed, now very close to succeeding in hijacking the American ombudsman movement. More about the Steering Committee's composition and deliberations later.

According to Ms. Kaleta's and Mr. Harter's direct comments (both those I have heard and those that have come to me through hearsay) and according to my reading-between-the-lines analysis of their emails and drafts, they hold four main beliefs about the nature of this country's ombudsman problem. The listing of my perception of each of their beliefs is followed by my reaction to it.:

1) Ms. Kaleta and Mr. Harter have often said that the main ombudsman problem is that so many people are misappropriating the name "ombudsman"—by giving it to such obvious non-ombudsmen as public relations officers and administrative assistants—that it is in danger of losing all meaning.

2)

3)To be sure, the proliferation of "pseudo-ombudsmen" is a significant concern, and I have often inveighed against them. But I doubt that the ABA's adoption of these recommendations would have an appreciable effect on the practice. Unless the ABA has more power than I realize, public relations and marketing people within corporations and government agencies who want to trade on a term perceived as having sex appeal are unlikely to pay attention to these admonitions. But it may be worth a try.

4)

5) In addition, Ms. Kaleta and Mr. Harter have often said that they believe it to be of paramount importance that the highly variegated category of internal "ombudsmen," whether inside or outside of government, that do try to perform ombudsman-like functions should be tidied up and strengthened.

6)

7)I agree that attempting to strengthen the disparate types of internal ombudsmen, which vary tremendously within types, is a worthy goal, but I am not sure that it constitutes an important public problem. Some of the weakest corporate "ombudsmen" that are directly under a mid-range executive might, for example, use the standards to get moved up a step or two in the hierarchy, but—as we shall see—the committee's standards are so low that they would be likely to have no impact even on most of the weak offices. Whether pursuing this goal rises to the level of being sufficiently important for this body to champion I cannot say.

8)In any event, this report's recommendations are so general as to be unlikely to have much real impact. Far more useful would be such attempts as offering, for example, detailed best practices for structuring real ombudsmen and then for each category of ombudsman-like office—governmental personnel ombudsmen, university ombudsmen, corporate ombudsmen, and so forth. (When these kinds of ideas were presented to the Committee, consternation ensued, followed by rejection: "privileging" certain kinds of offices—i.e., real ombudsmen—was verboten! And going into details within subtypes of internal offices unmasked just how weak many of them were; the heartburn experienced by many people in the room when this was brought up was palpable.) Because the Committee's recommendations are too general to have a substantive impact on all but the weakest ombudsman-like offices, the real consequences for the internal ombudsmen of adopting the recommendations would be symbolic. As I indicate below, these symbolic consequences are absolutely vital to those concerned. The consequences of adopting these recommendations for existing and prospective real ombudsmen in this country would, however, be catastrophic, I fear.

9)

10) Furthermore, Ms. Kaleta and Mr. Harter appear to believe that the movement to create real ombudsmen in this country is essentially dead, so that no need to respect the traditional meaning of the concept exists, and it can be completely redefined—*for this country only*—without doing substantial harm.

11)

12)I disagree sharply. The recent creation of the Arizona state Ombudsman shows that the drive to create real ombudsmen still exists in this country. And the successes of the real ombudsmen in the states of Hawaii (now in business for more than thirty years), Iowa, Nebraska, and Alaska, as well as in such urban areas as King County (Washington) and Detroit indicate that the traditional model of the ombudsman retains its saliency. Of course, in nearby Canada all of the populous provinces have real ombudsmen, and several exist for specialized functions at the federal level. Creating a special U.S. definition for the "ombudsman" seems to me a very bad idea.

13)

14) Finally, Ms. Kaleta and Mr. Harter appear to believe that the unqualified label "ombudsman," which is now available for the taking, should be given to these ombudsman-like individuals. Why not cave in to the lobbying of the TOA-style ombudsmen and boost their self-esteem?

I certainly do not believe that the unqualified term "ombudsman" is lying fallow and should be appropriated and given indiscriminately to ombudsman-like offices. In addition to the substantive reasons for my opposition to this proposal, endorsing it would embarrass the ABA, since large numbers of real ombudsmen exist in a great many countries and the knowledge of the offices is well known around the world. I know that several of these ombudsmen will be in the meeting in London and expect that they will speak against the recommendations.

Weaknesses of the Proposed Section on Independence

As was true of the earlier drafts, the most debilitating flaw of the current Report is its craftily drafted section on independence. Although the Section title mentions structure, the approach is almost entirely functional. Structure matters. I find it extremely odd that I, a mere political scientist, should have to repeatedly lecture lawyers who specialize in administrative law on this point's importance.

As I have repeatedly pointed out, it is possible that any particular internal Ombudsman could be effective if it happened to have the support of the executive or the head of the organization within which it is placed. But I have emphasized that effectiveness was dependent on the often transient support of those higher officials. A given state nursing home ombudsman, university Ombudsman, federal agency Ombudsman for the workplace, or corporate Ombudsman, could do useful things for clients, but if the relevant administrator on aging, university president, agency head, or CEO were hostile to that internal Ombudsman, then the office would be likely to lose much of its effectiveness. Many such officers are from time to time forced to choose between performing their mission or losing their jobs. Not surprisingly, they sometimes roll over, quietly. Although these events are usually kept as quiet as possible, certain events have become well known in the folklore of each type of internal Ombudsman. Be assured that members of the Committee are well aware of such episodes. The office might even be eliminated, or the position left unfilled, as has often happened to such offices. These facts have been generally known for many years.

This simple matter of lack of a solid institutional base is the most identifiable single structural feature of the internal ombudsmen. I have interviewed a great many of these kinds of officials and have been invited to talk to them at their conferences. Be assured that, despite what those on the Committee say now, this structural weakness is often uppermost on their minds, it is always in the back of their minds, and it is a leading topic of conversation among themselves.

The hidden agenda of the independence section is to fuzz wherever possible and finally to obliterate the distinctions between traditional ombudsmen and the internal ones; the newest of the latter are the TOA/dispute resolution ombudsmen.

In a functional sense paragraph one of the independence section is effective, as far as it goes. I would add to it these (capitalized) notions:

OMBUDSMEN ARE ORGANIZATIONALLY SEPARATE FROM THE ENTITY BEING INVESTIGATED, AND DO NOT REPORT TO OFFICIALS OF THAT ENTITY.

Both notions are needed. Internal, executive ombudsmen do, in fact, report to officials of the entity being investigated even though the Committee evidently is not under the impression that these officials can "control or limit the ombudsman's performance of duties ...."

Paragraph two is an excellent, two-sentence statement about the traditional ombudsman. I believe that if the authors of the ABA's 1969 ombudsman definition had looked at the weaknesses of the plethora of internal ombudsmen they would have followed that paragraph with one that said something like this:

WE RECOMMEND THAT AS MANY AS POSSIBLE OF THE INTERNAL GOVERNMENTAL OMBUDSMEN THAT HAVE BEEN CREATED IN RECENT DECADES SHOULD BE TURNED INTO TRADITIONAL, CLASSICAL OMBUDSMEN. THAT IS, THAT THEY SHOULD BE MADE INDEPENDENT OF THE EXECUTIVE AND PLACED UNDER THE AEGIS OF THE LEGISLATIVE BRANCH. MUCH THE SAME THING CAN BE DONE FOR OTHER, NON-GOVERNMENTAL INTERNAL OMBUDSMEN. FOR EXAMPLE, UNIVERSTIES COULD HAVE THE OMBUDSMAN REPORT TO THE BOARD OF REGENTS, AND CORPORATIONS COULD HAVE THE OMBUDSMAN REPORT TO THE BOARD OF DIRECTORS.

In my view, inserting a paragraph with this intent is very important to keeping faith with the ABA's historic policy, which the drafters claim is still in effect.

Paragraph three is the really tricky one. The draft innocently begins: "In the United States since the late 1960s, a number of other ways have been developed to ensure independence. Examples of approaches that contribute to an ombudsman's independence include:" A laundry list of supposed elements of independence follows. Note this crucial fact: no indication is given of the drafters' making a transition to talking of internal ombudsmen. One wonders, also, What is the meaning of "other ways"? Is that meant to refer only to the previous paragraph on the traditional ombudsman? Does it also refer to the more functionally oriented first paragraph?

No indication is given that the laundry list of "examples" is ordered, and the next paragraph says that "Choosing which of these approaches are appropriate will depend on the environment." Fortunately, the draft goes on to stress the importance of using the strongest elements of independence available. I would suggest including language such as the following:

IN THE CASE OF THOSE OFFICES THAT ARE DETERMINED TO BE BEST KEPT AS INTERNAL OMBUDSMEN , CARE SHOULD BE GIVEN TO MAKING THEM AS INDEPENDENT AS POSSIBLE. SIGNIFICANT STEPS CAN BE TAKEN TO ACCENTUATE THE INDEPENDENCE OF OMBUDSMEN LOCATED WITHIN AN ORGANIZATION. THE FOLLOWING IS A GENERAL RANK ORDERING OF SIGNIFICANT ELEMENTS OF INDEPENDENCE. WE RECOMMEND THAT DESIGNERS OF INTERNAL OMBUDSMEN INCLUDE IN THE OFFICES' DESIGN AS MANY OF THESE ELEMENTS AS POSSIBLE:

The rank-ordered list would follow.

What comes next? Nothing. The drafters move on to impartiality. They said earlier in the draft that they were setting standards. Do we have standards here? No. We have only an unordered laundry list, or a cafeteria line. What "ombudsmen" do not meet the standards? Probably none. Would they say that as long as an office has one of the elements of independence, that's enough. Or two? The crucial matter of how the standards are evaluated and measured is never addressed, so there are no real standards.

At least we could say something like this with respect to all three elements of the definition:

IN ORDER TO DESERVE THE TITLE OF OMBUDSMAN, AN OFFICE MUST ATTAIN A HIGH THRESHOLD LEVEL OF INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY. FOR

MAXIMUM EFFECTIVENESS, AN OMBUDSMAN SHOULD BE GIVEN AS MUCH OPERATIONAL INDEPENDENCE FROM OTHER POLITICAL AND ADMINISTRATIVE ACTORS AS POSSIBLE (WHILE CONTINUING TO BE RESPONSIBLE FOR ITS PERFORMANCE TO THE LEGISLATURE), IT SHOULD OPERATE AS IMPARTIALLY AS POSSIBLE, AND SHOULD MAINTAIN AS MUCH CONFIDENTIALITY AS POSSIBLE IN ORDER TO PROTECT CLIENTS AND ASSURE ADMINISTRATORS THAT IT IS TRUSTWORTHY.

These are my main criticisms of the Report's content. Other items could be mentioned. For example, more attention needs to be given to the centrality of investigations for ombudsmen and to the office's investigatory powers. I do not see anywhere a mention that a defining characteristic of the office is that it conducts informal yet thorough investigations. Of course, it would be completely unacceptable that offices lacking even enough power to be willing to assert that they conduct investigations should succeed in keeping the Ombudsman's essential investigatory function out of the ABA's institutional definition!

How the Committee's Composition Tilted the Outcome

The composition of the committee had a definite impact on the outcome. The consequence was that in drafting sessions the vast preponderance of those in the room were dedicated to the TOA/dispute-resolution style "ombudsman." The personnel were very different from those who wrote the ABA's 1969 definition of the Ombudsman, and this explains the disparities in the outcomes.

Crucial mistakes were made in establishing the Steering Committee. As I feared would happen when I first saw the list of members, these mistakes haunted the committee's work. The first mistake is that nearly all of those invited to membership were official representatives of a variety of organizations of supposed ombudsmen. Rather than trying to come up with an optimal definition of the ombudsmen, most committee members clearly tried to come up with a definition of which their members would approve. The comment was often made in the deliberations: "My members could not possibly accept that provision." In a great many such cases, these comments acted as a veto on the deliberations, leading to a dumbing-down of the definition or what I call a lowest-common-denominator result. This mistake also led to delays as members consulted with their constituents. One of the phenomena that was most evident in the committee's deliberations is the distressing effects of identity-group politics in action.

Compounding this mistake is the much greater one that the committee's group membership was profoundly unbalanced: all but a few members came from groups or offices that were INTERNAL ombudsmen representing such non governmental organizations as corporations and universities, and some others were INTERNAL ombudsmen representing public agencies.

The traditional EXTERNAL ombudsmen and those who were familiar with the traditional ombudsman in this country and around the world were vastly outnumbered on the committee. And the pressures of work kept all but a few of those committee members representing the classical ombudsmen from attending most meetings.

As mentioned above, yet another grave error was to add membership from the Dispute Resolution Section, which reinforced the TOA's hegemony.

At the Committee's meetings in Denver and Chicago, long, often frustrating hours were spent attempting to explain to people who were consultants, mediators, dispute-resolution specialists, and other kinds of low-level, internal complaint handlers what an Ombudsman is, yet they claimed that title and had been authorized by the ABA to define the office of Ombudsman! Sometimes the experience was bizarre. For example, it was often necessary for some members of the group to explain the most elementary aspects of the Ombudsman to many others who genuinely knew virtually nothing of its structure, function, and history, and I wondered whether I had somehow fallen, with Alice, down the rabbit hole.

But many other committee members representing internal Ombudsman organizations and offices were not at all naive about the Ombudsman institution. Putting it bluntly, the fact that a very large proportion of the steering committee's members were TOA members who shared its philosophy was a major error. Someone should have

said, "Hey; we're choosing mostly TOA members; shouldn't we worry about prejudicing the outcome?" A number of members and officers of the other internal Ombudsman organizations, who may or may not have been TOA members, shared its goals. They demanded the status of being called full-fledged ombudsmen, even though they did not have the institution's requisites. These internal ombudsmen appeared to have the agenda of using the ABA to get legitimacy for their offices.

In the Chicago meeting of the Committee, when I brought up its glaring refusal to consider seriously the Ombudsman's structural independence, I expected some resistance because of the composition of the group, but I was shocked by the vociferous response. A spokesperson for the internal ombudsmen said: "I will never again accept being given a name indicating that I am not quite an Ombudsman, or a "quasi" Ombudsman, or an "internal" Ombudsman; such a name makes me a second-class citizen." This comment and other similar ones finally made it crystal clear what really was going on in the room: a naked power grab. If the draft stands, one can argue that a group of extremists will have succeeded in capturing the ABA to legitimate their weak offices.

What To Do?

I express my views with some passion, but I believe that any neutral expert on the ombudsman in the US or around the world would agree that their content is unexceptional. Only in the artificial climate created by this out-of-control Committee would my proposed revisions be considered anything other than the most conventional statement of the obvious.

Blowing the whistle on this attempt to capture the ABA is necessary in order to protect it from the black eye it would get when the implications of the proposed recommendation became apparent. I believe that the ABA would be subject to ridicule if under its definition virtually all but the ludicrously weakest internal complaint offices could rightfully claim to be real ombudsmen.

Unfortunately, if the problems are to be fixed, the Section will have to decouple its report from that already accepted by Dispute Resolution. Although this would cause all sorts of bureaucratic problems, I hope you will take that course.

I have heard through second-hand reports that Ms. Kaleta and Mr. Harter have announced an intent to fix the “independence” problem to which others and I have pointed between the Section’s meeting at which the report and recommendations are expected to be rubber stamped and the London conference. I would be very leery of such a plan. A number of people have thoroughly educated them about the deficiencies of their plan for more than a year now and they have repeatedly and adamantly refused to budge.

Given this history, I am suspicious that this announced plan was mostly a ploy to forestall criticism, such as this document, and that they would write a sentence or two that feinted toward addressing the problem but would have no real impact in distinguishing real ombudsmen from the others. Such sentences that seemed to lead in the right direction, but were quite incomplete, have been put in and taken out more than once during this process. And the promises made were very soothing. But as this draft report reveals, no significant progress was made.

I suggest that a broader drafting group be brought in to fix the problems.

Appendix
In Praise of the Committee’s Section on Impartiality

I believe that the Committee got it exactly right in stressing the importance of impartiality for an ombudsman. The Committee courageously came down against the adoption of an investigatory posture of advocacy—even with representatives of the long-term care ombudsmen in the room at the time! They correctly pointed out that the ombudsman appropriately becomes an advocate after an impartial investigation has revealed the necessity for change.

Now comes the representation of Mr. F. Wm. McCalpin on behalf of the Commission on Legal Problems of the Elderly, urging the Council to revise the Committee's "Impartiality Section." He argues that the long-term care "ombudsmen" should be able to continue to investigate as "advocates," while retaining the "ombudsman" name. He does an excellent job of defending a position that I believe to be untenable.

Since 1972, when the program was created, I and various of my colleagues who study ombudsmen have been well aware of the structural deficiencies of the long-term care ombudsmen. One of the most obvious weakness is their advocacy orientation; central to the ombudsman idea is that the office carries out impartial investigations. On page three of his submission, Mr. McCalpin asserts the existence of "at least two basically different models" of ombudsmen. I do not find this to be the case: there is one model: the traditional, impartial ombudsman, and the anomaly: the long-term care "ombudsman." Sometime in the early 1980s, I made this issue the focal point of my address to the national meeting in Washington of the long-term care ombudsmen. Many of them were well aware of the problem at that time. In speaking with committee staff members of Rep. Claude Pepper around the same time, they reported to me that a member of Congress who did not understand the ombudsman concept insisted that the offices be made advocates. (This records my recollection of the interview; my notes are not at hand.) Advising Congress to change the office's orientation with the intent of making them more ombudsman-like seems entirely appropriate.

Mr. McCalpin makes the argument that since the long-term care ombudsmen represent a vulnerable population, advocacy is needed. At first blush, this is an appealing argument, but it evaporates upon close examination. The problem is that adopting a position of advocacy causes an *adversarial* situation to develop with those being investigated. This contributes to the vociferous opposition that nursing homes often display in responding to the offices' investigations. My belief is that this vulnerable population deserves a more effective investigator, one that is seen as impartial and, therefore, receives greater cooperation from those being investigated and has more clout.

The irony is that, as Mr. McCalpin suggests on page 5 the "advocacy" of the long-term care ombudsman is for many jurisdictions in many cases not all that much different from the traditional ombudsman's mission as a citizen's protector. Yet the long-term care ombudsman's role is always tainted by the perception that it is a client advocate predisposed to find fault with the provider.

In arguing against the Committee's view of the importance of impartiality, Mr. McCalpin argues (page 3) that it should confine itself to "identifying some bedrock principles rather than operating procedures. Those principles may not be more than independence and confidentiality …." Here's the rub. Long-term care ombudsmen have a major problem with independence. These offices are poster children for the need for real reform. They are weak, executive ombudsmen, whose only strength is a federal mandate. The usual situation is this: they are imbedded in a state's office on the aged (however it may be named), which provides an environment more or less hostile to the "ombudsman." The long-term care industry is a very wealthy one that typically makes huge campaign contributions to the state's top political candidates, both for the executive and the legislature. After elections, the industry is seldom disappointed. Weak regulatory laws and enforcement are the norm in most states. The long-term care ombudsmen often fight valiantly to be effective, despite severe limitations in resources and often despite constant threats to their viability. I encourage those who are interested in the fates of the populations served in long-term care facilities (1) to support the Committee's thrust for "impartiality" for the long-term care ombudsmen and (2) to fight for much more real independence for the offices. Making them into real ombudsman offices—as impartial investigators and as truly independent actors—would be a good thing.

DRAFT/3-30-2000

March 29, 2000

ADDRESS LIST -- MERGE FIELD 1

Re: Federal ADR Confidentiality – Invitation to Collaborate

Dear MERGE FIELD 2:

We are writing to invite you to collaborate with the American Bar Association and other interested entities to develop practical guidance for mediators, program administrators, and other parties addressing confidentiality in federal agency alternative dispute resolution ("ADR") practice. Recent seminars and meetings sponsored by the ABA Sections of Dispute Resolution and of Administrative Law and Regulatory Practice have indicated widespread concern over confidentiality issues, such as appropriate levels of protection for information submitted in confidence in federal ADR proceedings.

The ABA decided late last year to sponsor a neutral forum for developing practical guidance on confidentiality. As you may know, the ABA played a key role in passage of the federal Administrative Dispute Resolution Act. This law has stimulated extensive growth in use of ADR methods by agencies and those who deal with them, and contains detailed provisions on confidentiality. We think the current project will build on the ABA's prior contributions, and will advance the Administrative Law Section's purposes of promoting sound development of administrative practice and improving the operations of federal administrative agencies and the Dispute Resolution Section's goals of implementing programmatic models for effective dispute resolution and providing comprehensive technical assistance and public and professional education.

We will be moving ahead with this process immediately, and believe that it should ideally be co-sponsored with other potentially affected groups. We especially hope to work closely with those that have a particular interest and expertise in federal dispute resolution or in protection of -- or access to -- communications made in dispute resolution proceedings. We would be quite pleased to discuss whether and how your organization might participate.

The issues raised may be complex and potentially controversial, and we believe that they will benefit from guidance developed collaboratively. These issues could affect the interests, expectations, and legal and ethical duties of public sector ADR programs, government employees, investigative entities, private participants and their lawyers, and public and private neutrals. For instance (and without committing to or excluding particular issues at this early stage), the guidance might address:

- when confidential treatment begins and ends,
- who can assert confidentiality protections and how,
- possible agency approaches to the ADR Act's "judicial override" provision,
- special concerns posed by in-house mediation programs or in-house mediators, and
- other operational matters that may benefit from clarifying expectations and competing needs concerning handling of ADR communications.

We believe that the best way to develop such guidance is by joining with affected entities in a genuinely collaborative process that brings together agency leaders, program managers,

mediators, and representatives of other interested or affected public and private entities. These persons would exchange ideas, educate one another, and seek to develop a guidance document by consensus. We will take steps to assure that the process is an open one, concluded in a prompt manner, with an acceptable facilitator and ground rules spelled out in advance.

Our effort will start with a brief information-gathering process. We will ascertain your views as to substantive and procedural issues that should be addressed, gauge your interest in participating, and identify possible representatives to the drafting group.

We look forward to your participation, and to speaking to you in the near future. A representative of the ABA will be contacting you in April or May to discuss your possible participation. Should you wish to discuss any aspect in the meantime, please call Charles Pou at 202-887-1037.

Sincerely yours,

Ronald M. Levin, Chair Elect
ABA Section of Administrative Law and
Regulatory Practice

James J. Alfini, Chair
ABA Section of Dispute Resolution

cc: MERGE FIELD 3