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February 13, 2009

VIA E-MAIL

Robert A. Ficano, JD
ESD, Member of the Board
Wayne County Executive

and

Darlene Trudell, CAE
Vice President
The Engineering Society of Detroit
20700 Civic Center Drive, Suite 450
Southfield, MI 48076

Dear Mr. Ficano & Ms. Trudell:

The International Institute for Conflict Prevention and Resolution ("CPR") is pleased to provide its comments to The Engineering Society of Detroit ("ESD") with respect to its Green Zone Initiative for southeastern Michigan.

It is our understanding that ESD intends to convene a by-invitation-only Symposium prior to March 31 and thereafter issue a formal presentation and/or report to be considered by policymakers. The topic of this Symposium is the creation of a "Michigan Green Enterprise Zone," to attract new capital and industries to Michigan. Five innovations distinguish the contemplated Zone, and one of these would be the mitigation of legal risk by the creation of a Panel of Neutrals to address commercial and public-sector conflict traditionally resolved through litigation. "Legal services within the Zone would emphasize 'problem solving' instead of 'fault finding' as a core objective."

International Institute for Conflict Prevention and Resolution (CPR)

As you may know, CPR is a membership-based nonprofit educational organization based in New York City. Our mission is to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes. CPR members include General Motors, and many law firms.

To fulfill our mission, CPR is engaged in an integrated agenda of research and development, education and advocacy. We are also the leading proponent of self-administered ADR and serve as an appointing authority for parties in need of neutrals.

Publications and Training

Since our founding as the Center for Public Resources in 1979, we have published numerous books, protocols and other works to foster the use of alternative forms of dispute resolution. Among our achievements are:

Corporate Dispute Management (1982)
Containing Legal Costs(1988)
Court ADR: Elements Of Program Design (1992)
Managing Conflict In Health Care Organizations (1995)
Building ADR Into The Corporate Law Department: ADR Systems Design(1997)
Building ADR Into The Law Firm: ADR Systems Design (1997),
Mediator's Deskbook (1999)
Model ADR Procedures & Practices Series (22 books)

CPR Master Guide Series:

Commercial Mediation in Europe (2004),
Patent Mediation (2005),
Avoiding and Resolving Information Technology Disputes (2005),
Drafting Dispute Resolution Clauses (2006) & Supplement (2008)

Our award winning news magazine ALTERNATIVES, regularly features articles on problem solving techniques including collaborative law, hybrid processes and new and innovative programs.

Over the years, CPR has trained countless individuals in mediation, mediation advocacy and other forms of ADR.

CPR is committed to communicating the best and most innovative dispute resolution ideas and theories from academic leadership to the CPR membership of corporate general counsel, partners in leading law firms, judges, and public sector leaders.

CPR's Objectives

- Bridge the perceived divide between theory and practice of ADR
- Build the best of dispute resolution theory into the mainstream of law practice and dispute resolution design
- Ensure that theorists and researchers understand the realities of real-world problem-solving

This dialogue has particular importance at this time, as more and larger private and public ADR systems are being developed to handle growing segments of legal, business, environmental, and public disputes.

Academic Contributions

Under the CPR Academic Project, legal educators are routinely involved in CPR projects and in meetings of its various industry practice groups. Academics contribute to the revisions of CPR publications and rules, and serve as faculty at CPR meetings and trainings.

Law Student Intern Program

CPR has an ongoing Law Student Intern Program, which draws students from a variety of law schools. Under the mentoring of CPR senior staff, the students assist in cutting-edge projects and publications.

The CPR Pledge and Protocols

In 1984, CPR created a means by which corporations and law firms commit to trying ADR procedures before moving to full-scale litigation. The CPR ADR Pledge, clearly articulated and broadly communicated, can be an effective way to initiate processes to resolve conflicts in straightforward and constructive ways, to yield better resolutions, and to control risks and expenditures of time and money.

The CPR Pledge is not intended to impose judicially enforceable rights or obligations, nor does it constitute a waiver of any substantive or procedural right or obligation. Rather, the Pledge is a statement of policy aimed at encouraging greater use of flexible, creative and constructive approaches in resolving disputes.

Indeed, to focus on issues of “legal enforceability” misses the entire point of the Pledge, which is meant to benefit signatories by signaling their mutual willingness to approach the resolution of disputes in constructive, reliable, and commercially rational ways that give them maximum control over the process, the outcome, and related costs. The beauty of the Pledge is that it gives businesses and their attorneys much greater flexibility in problem solving rather than tying their hands contractually. Companies can point to their adherence to the Pledge as a symbol of corporate policy favoring appropriate use of face-to-face negotiation, interest-based bargaining, mediation, and other approaches. Over 4,000 business organizations have signed the Pledge and it has been utilized in Europe and elsewhere throughout the world.

CPR is proud that over the course of its history it has also helped to create and/or execute a number of industry-based innovative solutions to disputes, including the “Wellington Agreement” which resolved coverage issues for asbestos manufacturers; the CPR International Reinsurance Industry Protocol; the CPR Chemical Industry Dispute Resolution Commitment; the CPR Non-Prescription Drug Industry Dispute Resolution Commitment; and most recently, the CPR Mediation Principles for Insurer-Insured Disputes.

Disputes

Through the course of its existence, CPR has also maintained its own Panels of Neutrals trained in various forms of ADR. CPR’s Panels of Distinguished Neutrals comprise the most highly qualified

mediators and arbitrators from throughout the world. They include prominent attorneys, retired state and federal judges, business executives, legal experts, academics, and ADR professionals who are particularly well suited to resolve significant disputes involving major corporations or issues of public sensitivity. Focusing in 18 practice areas, CPR's esteemed arbitrators and mediators have provided resolutions in thousands of cases, with billions of dollars at issue worldwide.

Innovations

Over the course of the last three decades, CPR has been involved in groundbreaking ADR innovations. In the last decade, the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR developed the Principles for ADR Provider Organizations to provide guidance to entities that offer ADR services, consumers of their services, the public and policymakers. The Commission was a joint initiative of CPR and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The Commission, which was chaired by Professor Carrie Menkel-Meadow of the Georgetown University Law Center, also developed the CPR-Georgetown Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (2002), and provided guidance to the ABA Ethics 2000 Commission in its reexamination of the Model Rules of Professional Conduct on ADR ethics issues.

Through the work of its committees, CPR continues to innovate in the field of ADR. Our Employment Disputes Committee is one such example. This Committee includes more than 100 corporate representatives, arbitrators, lawyers, employee representatives, former judges, human resources professionals, mediators, and professors. Recently, the Committee discussed developments in the field and held a roundtable on the perspective of claimants' counsel on current practices in arbitration and mediation. A presentation was also made on the pending federal legislation amending the Federal Arbitration Act to exclude the arbitration of statutory employment claims.

The ESD Initiative

ESD's proposal to create Panels of Neutrals to offer early alternative dispute resolution to mitigate legal risk and adverse collateral effects arising from conflicts traditionally resolved through litigation is sound. Alternative dispute resolution, or "ADR," encompasses a wide range of dispute resolution processes including negotiation, mediation, non-binding evaluative processes, and non-binding and binding arbitration. It is to be distinguished from EDR, which emphasizes early dispute resolution often characterized by processes within an organization to prevent conflicts from escalating. Employment programs that begin with ombuds and proceed ultimately to dispute resolution are one such example. See *How Companies Manage Employment Disputes: A Compendium of Leading Corporate Employment Programs* (2002) and CPR Institute's *Resource Book for Managing Employment Disputes* (2004). We understand the ESD Initiative will be wisely aimed at both early and alternative dispute resolution.

Governmental Support for ADR

The U.S. Federal Government and Congress have long been supporters of ADR, and especially binding arbitration, in the realm of private contract. The Federal Arbitration Act ("FAA") embodies that

support. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) (the FAA embodies a Congressional policy in favor of the strict enforcement of arbitration clauses in commercial contracts; there is a presumption in favor of arbitrability.) The Administrative Dispute Resolution Act ("ADRA") explicitly authorizes arbitration for federal agencies, (5 U.S.C. § 575(c)(1)). Moreover, Congress has approved numerous treaties that provide for the resolution of trans-border disputes, including financial disputes by ADR. See, e.g., NAFTA, ICSID Convention, and various Bilateral Investment Treaties.

The judiciary has also indicated its support for commercial ADR. U.S. Supreme Court precedent has unequivocally held that pre-dispute arbitration agreements should not be viewed with suspicion, but rather seen as fostering the use of a process that is worthy of resolving all types of disputes, including important statutory and public policy issues:

"We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 (1991) (quoting *Mitsubishi Motors Corp. v. Sole Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616 (1985)).

Indeed, the arbitral forum has been deemed to be fully acceptable to resolve important statutory claims involving securities issues, employment issues and other important public policy matters. See, e.g., *Alexander v. Garner-Denver*, 415 U.S. 36 (1974) (Title VII); *Mitsubishi Motors Corp. v. Sole Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust); *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act (RICO)); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 21 (1991) (Age Discrimination in Employment Act (ADEA)).

The Supreme Court has made clear that it believes that judicial review of arbitral decisions will protect mandatory constitutional and statutory rights. See *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.").

That various governmental branches support arbitration and other forms of ADR is not surprising, as commercial disputants have likewise underscored the value of ADR in planning their businesses:

*"It is critical to address the management of potential conflict as a part of contract planning and negotiation. Such issues need to be considered prior to the emergence of disputes; otherwise, decisions regarding conflict resolution are likely to be hampered by a lack of cooperation between the parties. In the absence of an agreement regarding conflict resolution options, disputes will probably end up in court. Given the amount of time and money that businesses spend resolving conflicts, they should carefully consider such issues in contract planning."*CPR/ABA Commercial Arbitration At It's Best Guidelines at 6.

FDIC “has long been and continues to be a strong advocate for the use of various forms of Alternative Dispute Resolution,” Statement of Policy Regarding Binding Arbitration, 66 FR 18632 (March 26, 2001), and recognizes that the “[p]otential benefits of arbitration are its greater flexibility, potential for limited discovery and streamlined hearing process, use of panels of trained and subject-area expert arbitrators, and restricted judicial review rights.” *Id.* (emphasis supplied). In the Statement of Policy, FDIC gives examples of where arbitration is appropriate, including complex commercial/business transactions, securities and securitization. *Id.* at 18633.

ADR is now used in various proceedings and transactions involving the Federal Energy Regulatory Commission, Regional Transmission Organizations (RTOs), Independent System Operators (ISOs), Department of Energy, Environmental Protection Agency, Nuclear Regulatory Commission, and state utility/public service commissions. Using ADR to Resolve Energy Industry Disputes: The Better Way, Report of the ADR Forum, September 2006.

ADR is Successful in Resolving Disputes

The number one reason that ESD’s proposal on mitigating risk is sound is that ADR works. In 1997 CPR and Cornell/PERC surveyed more than 600 companies on various ADR processes:

- The great majority had experiences with mediation or arbitration – but 4 out of 5 “only occasionally”
- Mediation was the most widely used ADR approach (87%)

By 2004, when CPR again surveyed its corporate members:

- Most respondents reported settlement rates for mediation in 80-90% range
- Most responding companies were highly satisfied with mediation under private auspices
- Nearly all were at least moderately satisfied with court-annexed mediation

CPR’s research has supported the premise that ADR works even in areas not traditionally thought of as amenable to ADR. For example, a survey by the American Intellectual Property Law Association in 1995 found that 56% of patent infringement cases brought to mediation were resolved in that manner. Seymour E. Hollander, “Patent Counsel Debate Pros and Cons of ADR”, *The National Law Journal* (Jan. 27, 1997), *quoting* AIPLA Report of Economic Survey, at 72 (1995).

Of course, in designing programs, care must be taken to guard against potential abuses, especially if the process chosen is binding arbitration imposed by a pre-dispute contractual clause. There are contracts of adhesion, typically involving parties of unequal bargaining power and sophistication, as to which courts and legislatures have expressed concerns. See Comments to Revised Uniform Arbitration Act at 23 (2000) (examples of unequal bargaining power can exist in employer-employee, sellers-consumers, banks-customers, and health maintenance organizations-patients); *see e.g., Ingle v. Circuit City Stores, Inc.*, No. 04-55927 (9th Cir. May 18, 2005).

Benefits of ADR

Why does ADR work?

- It permits party control and selection of process and outcome
- It is well suited to expert handling of complex technical matters
- It may bring about prompt resolution of time-sensitive issues
- It permits flexible, tailored business responses to problems
- It can avoid significant direct and indirect costs, risks
- It maximizes privacy, confidentiality

Of course, not all ADR processes support the same set of benefits. It is well known that in the US, the arbitration process has in many cases been turned into a process not that dissimilar from litigation. Indeed, many contracts we have seen call for stepped processes that begin with negotiation, mediation and finally either litigation or mandatory arbitration. *See e.g., Drafter's Deskbook: Dispute Resolution Clauses* (CPR Institute 2002). The key is to design the process that works best in the given industry.

The Green Zone's Industrial Base Supports ADR

ESD's proposed initiative identifies several industry groups that have traditionally supported ADR.

- The auto industry has long used ADR in connection with both vendor and distributor contracts. For example, from 2004 through 2005, CPR administered GM's mediation plan with its distributors. Mediation Works succeeded to that business. Ford, General Motors, Bridgestone/Firestone, Goodyear, DaimlerChrysler and Subaru, among others, are all signers of the CPR ADR Pledge.
- The construction industry has long supported ADR, including arbitration clauses in their standard form contracts. CPR has developed special Expedited Construction Arbitration Rules.
- The defense industry supports ADR. Northrop Grumman has long been involved in CPR's works. Its attorneys sit on various committees and one is included among our Law Firm Excellence in ADR Award judges. Lockheed and Boeing join as signatories to the CPR Pledge.
- The Franchise Mediation Program was established in 1993 by a group of franchisors who sought a way to resolve disputes with franchisees without the rancor, uncertainty and cost of litigation, wherever possible. The Program's goal is to encourage the mediation or other non-judicial management of disputes arising between franchisors and franchisees and to encourage all members of the franchise community -- and those who counsel them -- to resolve such conflicts fairly, amicably and cost-effectively. It is administered by

the CPR Institute and is governed by a Steering Committee of leading franchisors, franchisees, and other influential participants in the franchise community.

- In 2005 and 2006, a group of CPR members active in the London reinsurance market devised a Protocol to rationalize and encourage the prompt resolution of disputes between cedents and reinsurers. The Reinsurance Industry Dispute Resolution Protocol was issued in June 2006. The Protocol drafters devised a set of “best practices” that would be applicable throughout Europe (and indeed around the world) and that would address the most common sources of waste and inefficiency. Over the years, CPR has been responsible for a number of initiatives in the area of property casualty insurance. The CPR publications below provide information as to each.
 - [CPR Insurance Industry Dispute Resolution Commitment](#)
 - [CPR Future Disasters Commitment](#)
 - [CPR Insurance Commitment for Claims Arising from September 11, 2001 Disaster](#)
 - [CPR California Construction Defect Protocol](#)
 - [CPR Nevada Construction Defect Protocol](#)

The Green Zone Embraces Ontario Communities

Recognizing that communities stretch across national boundaries, ESD has wisely included Ontario communities in the Green Zone. NAFTA’s dispute resolution provisions build on centuries of recognition that disputes respecting international commercial transactions, as well as international sovereign disputes are best resolved through arbitration. In this context, ADR is not only an alternative, it is essential. As outlined below, furthering the inclusion of problem solving ADR techniques rather than the dispute resolving techniques will further enhance the Green Zone’s management of litigation risk.

The New ADR

Current ADR scholars are focusing their thought leadership on problem solving ADR, as is CPR in its think tank role. CPR’s Information Technology Conflict Management Committee was charged in 2004 with piloting new procedures for the management of conflict within relationships between companies and IT providers. It advocated the use of partnering and other techniques to resolve IT disputes as they emerge. The Committee’s 2005 Expedited ADR Procedures for IT Contracts are currently in use as models by other committees.

CPR’s Early Dispute Resolution Committee is adapting techniques from the collaborative and cooperative law models into tools that can be used by corporations and their outside counsel to avoid conflicts, identify them early and solve the underlying causes.

As early as 2001, when it published the ADR Suitability Screen, CPR recognized that in long term contracts or other relationships that require the parties to continue to deal with each other long after a dispute arises the best method of dispute resolution is interest based mediation. This allows a neutral third party to identify all of the interests at issue and unencumbered by the positional

bargaining techniques that are reflective of traditional settlement discussions, help the parties come to a workable settlement of the issues.

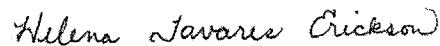
Traditional litigation and even traditional arbitration and their inherent delays are ill equipped to address problems in a society where disputes over a certain technology, patent, license or product are quickly overtaken by new developments and/or newer technology. Fighting over fault or even correct interpretations when developments were never even contemplated, imagined or foreseen simply detracts from progress. Should a country delay the introduction of VOIP technology within its borders because it has granted an exclusive license to a company to give the majority of its citizens who do not have landlines "phone services"? ADR is well suited to solving just this kind of problem.

For all of the above reasons, CPR agrees that the development of a Panel of Neutrals as part of the Green Zone Initiative is the right step at this time. CPR would be pleased to share its learning at a Symposium organized by ESD or to provide consultancy services as needed for ESD's Initiative.

Sincerely,



Kathleen A. Bryan
President and CEO



Helena Tavares Erickson
Senior Vice President & Secretary