

ICANN

**Moderator: Brenda Brewer
March 19, 2015
2:00 pm CT**

Coordinator: The recording are now started.

Leon Sanchez: Excellent, thank you very much. So welcome to these debriefing call of the (unintelligible) sub team. We have just finished our second call (unintelligible).

And I'd like to open the floor for comments and, of course, opinions of voting sub team on whether you think that if we have what it takes to provide the apprise we're looking for in - while developing our work or do you think that we should be engaging with both [firm] and [firm]? So I see (Edward)'s hand is up so please, (Ed) take the floor.

Edward Morris: Thanks, Leon. Yes, the first thing I want to talk about are the optics of this second call. When it was brought up yesterday it was sold me by (Sam) as being [firm's] chance to actually respond to the scoping document. I was under the impression that [firm] had not received the scoping document, that's why I went along with the call.

Robin has put on the list that [firm] had access to the scoping document. So I'm a bit worried about the optics here where we have two firms in contention and we're giving one of them a second bite at the apple.

[Sensitive information about deliberations]

[Sensitive information about deliberations]. They certainly have the expertise and if we decide to go with them, I'm confident that eventually they'll get it right.

But I can't help but think that where they need a team to approach the matter [firm] doesn't. We're dealing with a named partner at [firm]. We're also dealing with somebody that does this full time.

And the importance of this was - came to me again yesterday during our WT1 call. I had a - I had to make the presentation on what the membership organizations and what the delegate organizations are. And I screwed up. Now I read the TLD manual for nonprofits.

I've looked at Westlaw. And I misinterpreted a bit of the California statute about delegates one-word members because within that one paragraph members could take on two meanings; one being members of an organization and one being the Board of Directors.

I'm fairly talented. I've looked at the proper sites. But that was pointed out to me by [name] who's a member of the California Bar. For me it's still very important for us to have California nonprofit expertise. And I'm sorry, we can say, hey, the bios online don't reflect who I am.

[Sensitive information about deliberations]

And in fairness, we may have to do that because I would hate - particularly with some of the comments that have already been posted today about our group - I would hate to go out there and have [firm] picked and have us sit as not being fair to everyone involved, thanks.

Leon Sanchez: Thank you very much, (Ed). Now I see Greg's in the queue and (unintelligible), Greg.

Greg Shatan: [Sensitive information about deliberations]

Edward Morris: I'm sorry, Greg, not to interrupt, I - for the record, I have no question that there's no impropriety here. As I mentioned, I'm talking about the optics.

Greg Shatan: Yes, I guess I'm just responding that the optics - it will be - you know, one thing if the optics were that we were, you know, constantly, you know - maintained a constant friendship, I'm just saying we didn't. So just to be clear on that.

[Sensitive information about deliberations] indeed when I started the very beginning of looking for counsel for the CSG and was looking for nonprofit counsel and researching, you know, major firms and more specialized firms, one of the things I kept running up against is that people who identified themselves as nonprofit lawyers were really nonprofit tax lawyers and that was kind of how they approached the nonprofit world.

Didn't matter whether they spent 50% or 100% of their time on it, it often had to do with, you know, dealing with their 501c3 status or dealing with various requirements. And you know, whether or not that also kind of led them into dealing with a lot of, you know, corporate governance advice for them, at least

superficially, a lot of them look like tax lawyers and indeed, you know, started out as tax lawyers.

[Sensitive information about deliberations]- and I'm not sure how different the two of them are and what they do, you know, is kind of a - more of a unique subset of the nonprofit lawyer that you're not necessarily going to find all over the place.

So you know, it's - I'm not necessarily, you know, coming out one way or the other on this point. And I - also, I'm not really sure when [firm] had the scoping document. I sent it to them yesterday afternoon and I believe that was the first time that they had seen it.

So you know, the access was - you know, as of like 5:00 Eastern Time yesterday. And that was kind of - I think that, you know, one of the things we had heard was that - or we assessed was that they hadn't had access previously so I'm not going to take the time to go through my emails and figure out whether that was the second time they received it or the first.

But I think the idea was to give them an opportunity to speak to the document the way that [firm] had the opportunity to speak to the document. So I think that was at least the idea here.

[Sensitive information about deliberations]

Leon Sanchez: Thank you very much, Greg. I see David McAuley's hand is free so, please, David, could you take the floor?

David McAuley: Thank you, Leon. I want to begin with some thanks to my four colleagues in this group and the staff. I think this has been a very healthy process. I think we face a good difficulty in that we have had two good firms present to us.

I after the first round came down in favor of [firm] taking the lead to be backed up by [firm] if needed. By the way, I'll include (Sam) in that if she's still on the phone, I didn't mention her.

But I've changed it a little bit. I still think [firm] would be a good lead firm [Sensitive information about deliberations]. But I'm very, very impressed with [firm] and [Sensitive information about deliberations].

But any nonprofit questions should be coordinated with [firm]. There should be a clear line, as (Sam) has said to us, I don't have any quarrel with that. But I think while they're all impressive lawyers and [Sensitive information about deliberations]. And so my vote would be that structure that is [firm] take the lead and [firm] fill in on any nonprofit California questions. Having said that, if the group feels strongly there should be the other way around I don't have a problem with that either. So Leon, those are my two cents worth.

Leon Sanchez: Thank you very much, David. I see Robin is next in line so could you please take the floor, Robin.

Robin Gross: Thank you, can you hear me?

Leon Sanchez: Yes, we can, loud and clear.

Robin Gross: Great, thank you. I want to echo a lot of what David just said in that I think we have had some wonderful expertise and some really impressive lawyers from both firms and I'm - and I - frankly, I think I'm still where I was about a week

ago, which was that I think we want to do some kind of a hybrid because of the - when we put the two together we've got such a - more of a rich depth of understanding, I think, on the issues. [Sensitive information about deliberations]. So I would hate to lose the benefit of some of that expertise that I think we could really benefit from. So I think I'm still where I was about a week ago where I'm really impressed with both and would like to work out a hybrid utilizing the specific expertise of the two firms where they can provide the most benefit.

Leon Sanchez: Thank you very much, Robin. I see (Ed)'s hand is still up. I don't know if that's an old hand or a new hand.

Edward Morris: Old hand, Leon, my apologies.

Leon Sanchez: Thanks, (Ed). So well, now I think it's my turn and I couldn't agree more with the views of the team. And I think that going to a hybrid model would be the way to go. From my point of view - and please correct me if I'm wrong, while [firm] is a very large law firm, would allow various expertise, what we're looking to (unintelligible) before us is someone that needs the expertise that amazingly has the - demonstrated [firm].

And I would suggest that we - while we embrace this hybrid model we would go with [firm] leading and [firm] then filling in for those other aspects that [firm] might not have handy. And the reason for me to say this is that most of the goals or pretty much all of the goals that we need to achieve depend on governance structure. And for me, it strikes me as [firm] have the most or the best expertise and skill so therefore that's why I would suggest we go with them as leads and then [firm] filling in with those areas where they don't have the expertise needed. So I see Greg's hand is up so please, Greg, can you take the floor?

Greg Shatan: Thanks, Leon. Just kind of thinking through that, I think - you know, that would mean essentially that we as a group and ultimately the ccWG would be taking its advice on governance matters and really the core of our, you know, inquiry from [firm]. And that where [firm] identified an area where they had a lack of expertise such as antitrust or where there might be some reason, say for coordination with the CWG or for some other - you know, at that point, [firm] would be kind of brought in from the bench so to speak to deal with a specific area of expertise or, you know, potentially coordination.

But that essentially [firm] would be the lead counsel. And I think it's important to point out, you know - I think it's been pointed out already that you can't separate it on basis of California law versus other law. It's really - you know, corporate governance advice versus the various ancillary issues that may arise.

And I'm not saying that's, you know, a good idea or a bad idea to do it that way but just that clearly that would, I think, be the way it would have to be done. And I you couldn't have kind of two people both - or two firms both giving corporate governance advice on the same set of questions to the same group, that's just - maybe I'm saying the obvious but I just felt like it had to be said.

Leon Sanchez: Thank you very much, Greg. That's exactly the way I see it. I don't think that having [firm] lead we should define the scope of work between the two law firms very clearly and now I'd like to have you look forward to Robin who's hand is up already. So please, Robin, take the floor.

Robin Gross: Thanks, yes, I just was thinking while Greg was talking just now, and I was wondering, you know, I wonder if we want to be quite so rigid and I wonder if

there might be a time when we think, you know, on this particular corporate governance question maybe we want a second opinion, maybe we want an opinion from more of a broader perspective or a global view. And so I think, you know, I wouldn't necessarily want to rule out categorically discussing some of these issues with both firms because I think it is in the - it is in the breadth of their knowledge on some of this stuff that we can really have more of a benefit.

Leon Sanchez: Thank you, Robin, (unintelligible). Thank you very much. Greg, can you please take the floor?

Greg Shatan: Thanks, you know, I have no problem with that formulation either. I think if it's up - it just kind of has to be up to us to say, okay, it might be helpful to talk to [firm] about this too because, you know, [name] does a lot of corporate governance, you know, across all kinds of structures and jurisdictions and, you know, we won't really want to kind of talk to her or any other person that - at [firm].

But I think it's just important as between the firms and in our relationship to the firms to kind of understand who's the primary and kind of who is going to at least - we're going to turn to first generally for advice on things within the sweet spot of corporate governance.

You know, I think, you know, if [firm] is also on retainer as it were and is already working with the CWG I don't think they would be hard-pressed to come in and provide either a second opinion or a clarifying or extending opinion or to get on the phone with [firm] and kind of hash out some different thoughts as well.

So yes, I don't - I wasn't intending to set up anything that rigid but I think that ultimately you kind of need to have somewhat of a buck stops here or at least a buck starts here relationship with one firm rather than the other. You know how many times you get into a teaming approach with firms, unless you're going to have kind of a coordinating committee of somebody from each firm you kind of half to decide where your - you know, where your bread, you know, is more buttered. Thanks.

Leon Sanchez: Thank you, Greg. I see David McAuley's hand is up, please. David, could you take the floor.

David McAuley: Thank you, Leon. And like Robin I like Greg's use of the word primary. Let me just also say we have to keep - I think we have to keep cost in mind. I think that ICANN may have a legitimate concern about having - going to two firms for questions.

I think that's one reason or that's possibly one of a number of reasons why I thought it would be good to have [firm] take charge because it may be easier to handle more discrete California nonprofit law questions and hand those off to another firm than to do the reverse, have a nonprofit California law firm take the lead and then hand off other questions.

But having said that, I just think that there has to be some primary secondary relationship in the better - it's more in our interest to come up with some kind of clean line in that respect, thank you.

Leon Sanchez: Thanks, David. Is that an old hand, Greg? Okay, that's actually an old hand. Is that a new hand, Greg?

Greg Shatan: Mow it's a new hand. So - or a refreshed hand. Yes, and just to prove my independence [Sensitive information about deliberations] that they have there who really combines expertise in corporate governance with the kind of deep understanding of California nonprofit law and what - you know, nonprofits do.

And you know, therefore - you know, I think that if we're going to turn for governance advice we - on governance questions. And you know, it's not a California law question first, it's really a governance question first.

So the question is whether you want to get your answer from somebody who is a governance guru, unquestionably one of the best in the country; or somebody who is a nonprofit governance guru who lives and breaths the air of California everyday and is also viewed as someone who is one of the best in that particular swim lane so to speak.

And I think that as between the two I would go - you know, with [firm] first for that reason. I think it's just depth in a very specific way. And we - and I think it just - it helps ICANN to define who we will go to first and who we will not kind of. And that we won't be constantly kind of ping-pong back and forth and keeping two firms busy on a regular basis.

Leon Sanchez: I'm mindful of the time and that some members need to make it to other calls. So just to wrap up this debrief, the agreement would be - and correct me if I'm wrong, that we would be in fact engaging with both law firms and we would be having [firm] as the primary source of advice for (unintelligible) and [firm] as the secondary source.

Could you please indicate with a (unintelligible) if this is accurate? Robin?

Robin Gross: Yes, can I just ask a clarifying question? You - we were talking about primary for particular issue areas per say, right?

Edward Morris: Do you mean issues or areas of legal expertise?

Robin Gross: I guess I mean the same thing. I'm not sure what the distinction would be in this sense. I just thought we were - there was some areas - I guess, okay, areas of expertise we were going to seek one firm as the primary and there were other areas of expertise we were going to seek the other firm as the primary source.

Edward Morris: I guess I would view that kind of in terms of as antitrust for instance. At least we'd be identifying perhaps if there was an antitrust issue and at that point we'd say to [firm], you know, you don't do antitrust so we're going to go to [firm] on this. So [firm] in a sense would be the primary for antitrust.

Robin Gross: For antitrust and perhaps jurisdiction or something, yes, that's my understanding.

Leon Sanchez: Okay. Okay, so our next step would be if you agree to have a draft of the engagement letter, I think, correct me if I'm going too fast or I'm being too strong forward with this. But I think that our next step would be to draft this engagement letter and, of course, let the law firms know our decision.

And for this I think that we should be reaching out to the firms to let them know we have discussed to have David, Greg, Robin, (Ed) and myself, which is practically all the legal sub team mediate between the communications of ccWG and the law firm.

So we'd - I would prepare a draft email for us to send to the law firms. And I will circulate it with the compact team before sending it. Yes, who's that?

Samantha Eisner: Leon, this is (Sam). Sorry, I'm not on Adobe Connect. I'm at home trying to recover from pneumonia in time to get to Istanbul. The fact of any engagement ICANN legal needs to be involved in that because, you know, as part of the engagement process so we need to actually talk with the - with [firm] as well as [firm] specifically and it's fine, this isn't about an ICANN legal only conversation.

Of course, members from the ccWG if necessary could be on any call while we're trying to discuss how we'd frame an engagement model.

But this part of the exercise is not solely within the ccWG's remit because it is - ICANN has the responsibility to make sure the engagement's done correctly.

So we - ICANN legal should be involved in any conversations surrounding the engagement. I think we do want to separate the issue of engagement from working methods so there's a separate issue of working methods and that there's a subgroup of this group that will be taking a lead in communicating assignments, etc., with either of the firms for whichever work is needed. But that's a separate issue from the engagement itself.

And so it might be worthwhile to - and Greg, you might be able to share the scoping or the working methods document that you did with the CWG as a way to start the thinking of trying to put some parameters around that, but that's really a separate exercise.

So maybe work can start on that as well but - so I guess what I'm saying is for the [firm] - for the engagement with either one and communication of the final

decision as to how we'd like to see this happen - at least I and likely John Jeffrey, the general counsel, should be involved in the engagement conversations.

Leon Sanchez: Thanks, Samantha. I see Robin's hand is up, Robin, please.

Robin Gross: Yes, I just have sort of a question for Samantha about what she envisions those communications would entail because I was sort of thinking that we would take the engagement letter that the CWG had used and ICANN was involved in the drafting of that.

And we could sort of use that as a starting place as a template and just change some aspects of it to apply to this particular situation and present it to the law firms.

Is there - are there - is there something more to this that you're envisioning in terms of necessary communications between ICANN, the corporation, and...

Samantha Eisner: So I think that any - I think you're right that it's - there's not a lot that has to go into or hopefully not a lot that has to go into the drafting of the engagement letter itself. I think we would really - there was work that went into the way that the first engagement letter was crafted, clearly that's a great place for us to start.

I think any communication that says that this is who ICANN is hiring on behalf of this - of the ccWG and clearly all of the things that we had in there about waiver privilege as this is expected to be, you know, the client - even if ICANN is named as the client, the work is being performed for the ccWG.

You know, all those same things would be in there but we're - just from the corporate side, we need to have ICANN as part of that, we are engaging you conversation.

But I don't think that it's really - I don't think it's a big thing, right, it's just that we need the presence in that conversation.

Robin Gross: So basically included in the email that sends that document that says we are engaging you, that would be sufficient communication to include ICANN in?

Samantha Eisner: Well, no, I would think that maybe we would want to call them first with ICANN legal and ccWG members on the phone and say, this is where we're thinking of going and we're also - we have an engagement letter that we think is a worthwhile template to use.

Can we send you that language? Because we don't know what form engagement letter [firm] would we use. So you know, we could give them language. Us sending a firm an engagement letter is a bit of a presumptive act on our part. So we do have the language that we want them to reflect in it.

So I think it comes first with the phone call and, you know, they have to - ICANN has to have some sort of presence in those conversations as we're paying the bill. Of course, it's not about us controlling the conversations with the ccWG, that's not it at all. But I would say we start with a phone call to the firm saying this is what we intend to do, this is how we want to proceed.

Robin Gross: Okay, I was just thinking maybe we could send it to them via email and, you know, do it via email but if you think we should do it over telephone, provided, you know...

Samantha Eisner: It can be over email as well but I would - even if it's an email I wouldn't send a draft engagement letter with that first one. I would say, you know, we have language that has been worked out in a CWG side.

We'd like to consider using that, would you have to consider how the retention of both firms would be reflect in there, that they would be expected to coordinate with [firm] at the ccWG direction? And then the same counterpart on the [firm] side for that letter.

It's not really a difficult process. I think it's just making sure that we have the right people and the - in mind as the communications are happening. And if this group would prefer that that happens first by email that's fine.

Leon Sanchez: Thanks, (Sam). I think - my feeling is that the group would be more comfortable having some engagement over email rather than phone. It's more difficult to coordinate phone calls with other members.

So if no one opposes to having this conversation over email I mean it's just a matter of 20th century technology over 21st. So it's - if everyone is okay with having emails, I would be okay with that as well.

Greg Shatan: This is Greg. I mean I personally think, you know, telling somebody they're being engaged is more appropriately done by phone but if everyone else wants to do it by email or because they feel that there's some unintended consequences that could come by having a phone call I think it's fine.

And clearly at some point there's going to have to be a phone call, it can't all be done by email. And so that's going to have to come really quickly because of Istanbul and, you know, email has its own problems with people not paying attention to emails or not reading them fully or etc., etc.

So it's a kind of only a question of - we're not going to be able to avoid a phone call so I guess it's only a question of when we do a phone call.

Samantha Eisner: And also before any email is sent I need to make sure that (John) is - has seen the email and approves it and is part of it because he is the officer who can physical bind the organization to it. And so we can't have communications coming externally that don't have an officer included that would indicate that we're binding the organization to an engagement.

Greg Shatan: I personally would be in favor of an informal phone call first while we're getting the formal email approved. And I'm happy to be on that phone call with [firm] and anybody else wants to join either. That's just my approach. I mean I'm obviously - I can be outvoted very handily by the other three members of the committee.

I think David's dropped off and also seemed to be more of an email person. So I just - it seems like we'll just get further faster with making a phone call and that - you know, happy to make that as a large a group of people on the phone as to make people feel comfortable that there isn't going to be a - kind of a communication that will kind of be off trend.

Leon Sanchez: Thanks, Greg. Now putting my...

Greg Shatan: Robin's saying in the chat that she's fine with that. And Robin would like to be on the call. You know, she's geographically appropriate too, I'm the oddball being in the East Coast. I'm fine with not being on the call too if it ends up being later than I can be on the call.

But right now it's 2:00 pm for me and I have to leave the office about 6:15. So I've got about a four-hour window plus I'd like to get some lunch right now.

Leon Sanchez: Thanks, Greg. Well, I think going with the call is okay with everyone as a starting point and with my co-chair hat on I would definitely support this idea since we need to get going and we need to have at least [firm] ready to go to Istanbul if they are able to do so.

So I would also like to be on the call if that's possible. I would ask for help on coordinating this call. So I think that the ones that have been most in touch with the firms are both Greg and (Sam). So I will kindly ask you to coordinate this call if that's possible.

And of course, let us know when that's going to happen and along with the [name] in or [name]'s out, of course. And well, let's have this conversation, let's get going.

Greg Shatan: Yes, so I think it probably makes the most sense if you don't mind that - I mean (Sam) just has better conference call capabilities. I'm happy to send the email, you know, cc'ing everybody here. But (Sam) would probably need to set up the conference call capabilities.

One of the things that happened moving from a very large firm to a somewhat smaller firm is a significant downgrade in conference bridge capabilities. I'm now a CustomerFreeConferenceCall.com.

Samantha Eisner: We can use an ICANN bridge, that's not a problem. I need to get in contact with (John) and find out what his availability is for a call and then we'll be back to the group.

Greg Shatan: Yes, why don't you do that and then we can set up a call - you know, probably should call [firm] first, you know, logistically. And then, you know, we'll be on the call with them.

Samantha Eisner: Okay.

Greg Shatan: So...

Leon Sanchez: Thanks. And yes, when I say coordinate the call I mean facilities wise, not leading wise as opposed to having ICANN staff leading the call. So with that we are all on the same page, well, let's take the next step. And I thank you all for your time and we'll hope to hear from you soon, Greg and (Sam), so we can have the call with [firm].

Greg Shatan: Thanks.

Leon Sanchez: Excellent. Thanks everyone.

Greg Shatan: Bye all.

Leon Sanchez: Talk to you soon, bye-bye.

END