

Yvette Guigneaux

From: Karen Mulberry <karen.mulberry@icann.org>
Sent: Tuesday, November 15, 2016 4:01 PM
To: Lori Schulman
Cc: León Felipe Sánchez Ambía; Mathieu Weill; Thomas Rickert; ACCT-Staff
Subject: Response from ICANN Legal questions from Guidelines For Standard of Conduct...Subgroup
Attachments: image001.png; image002.png; image003.png; image004.png
Signed By: karen.mulberry@icann.org

Here is a response from ICANN Legal to the questions that the Guidelines Subgroup raised.

Karen Mulberry

Multistakeholder Strategy and Strategic Initiatives ICANN

Here's the response from ICANN Legal

There has not been any conflict assessment of this issue, and indeed no conflict arises.

The ICANN legal team does not report to the Board. The ICANN legal team's obligation is to the organization and to uphold the Bylaws. The ICANN Bylaws now include a right of the community to directly remove Board members, and also allow for, at Section 20.2, the indemnification of community members who participate in good faith in those removal proceedings. It is ICANN's obligation to uphold that Bylaw.

Providing guidelines to the community on what "good faith" could mean in these circumstances was recommended by ICANN. It is of benefit to all - the ICANN community, board and organization, to understand and agree upon what conduct is appropriate in these circumstances. This is a collective - and not an adverse - effort. The guidelines developed by the community are not expected to be overly burdensome or restrictive, but to provide some path of "if you do x while participating in the conversation, that tends to demonstrate good faith".

There could be concerns, of course, depending on how the guidelines are drafted, as to whether they meet the requirements of law. For example, a guideline that suggests that "good faith" participation allows willful avoidance of facts (which, of course, is not part of the group's deliberations to date) should not be acceptable to any attorney reviewing the document, whether they are with ICANN's legal department or external. It will also be very important to understand if the ICANN legal department identifies any potential legal issues with the text as drafted, as that could impact whether the Board is in a position to accept the recommendation based on issues of legality.

We recommend, as a starting point, that the guidelines be presented to the ICANN legal department for review. If it were to occur that the ICANN legal department raises a challenge to any of the guidelines, and it is believed by those participating in the discussion that there would be a benefit to obtain additional advice or a different viewpoint, that might be an appropriate point for reference to external counsel.

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From: Lori Schulman <lschulman@inta.org>
Date: Tuesday, October 18, 2016 at 7:08 PM
To: MSSI Secretariat <mssi-secretariat@icann.org>
Subject: Question for CCWG Legal Sub Team from Guidelines For Standard of Conduct...Subgroup

Dear Secretariat,

Our subgroup has a question regarding legal review of the Draft **Guidelines for Standard of Conduct Presumed to Be Good Faith with Exercising Removal of ICANN Board Members**. We discussed the issue at our October 3 meeting and we do not anticipate the need for heavy assistance. However, it would be prudent, once the draft guidelines are completed, to have a review by a legal expert with substantial experience in California nonprofit governance. We want to make sure that there are no red flags or precedents contrary to our recommendations. Diligence requires process and as long as we have a clear and documented process, we should be able to meet a “good faith” standard. However, given the quirks of CA law, the subgroup would not want to assume anything. We would anticipate maybe 8-10 hours of very experienced, independent attorney time at a maximum. Our understanding is that we are to ask for the assistance of the ICANN in-house legal team before we go to outside counsel. This seems to be a prudent, cost-effective measure. However, we are concerned about a possible conflict of interest with an in-house team that essentially reports to the Board. Has this particular conflict been vetted with regard to creating guidelines for good faith conduct for petitioning for a Board member’s removal, or the entire Board for that matter, and having a legal team that reports to the Board review it? If so, would you kindly direct us to the opinion? If not, may we have guidance in this area?

We are happy to discuss our concerns with members of the Legal Sub team as necessary.

Lori

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