

# Legal SubTeam Meeting #2 (10 March)

## Attendees:

**Sub-Group Members:** David McAuley, Edward Morris, Greg Shatan, Leon Sanchez, Par Brumark, Robin Gross, Samantha Eisner

**Guests:** Cameron Kerry, Edward McNicholas, Holly Gregory, Rich Boucher, Josh Hofheimer, Janet Zagorin

**Staff:** Alice Jansen, Brenda Brewer, Theresa Swinehart

## Apologies:

*\*\*Please let Brenda know if your name has been left off the list (attendees or apologies).\*\**

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## Transcript

[Transcript CCWG ACCT Legal Subteam meeting 10 March.doc](#)

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## Recording

The Adobe Connect recording is available here: <https://icann.adobeconnect.com/p3rglijlvej/>

The audio recording is available here: <http://audio.icann.org/gnso/gnso-legal-subteam-10mar15-en.mp3>

## Notes

Aim of call: Determine if Sidley has expertise and skills the CCWG is looking for to provide independent legal advice the CCWG needs to build proper proposal for ICANN's transition.

### 1. Introductions

Call participants introduced themselves.

### 2. Brief Discussion

CCWG stems from need to enhance ICANN accountability mechanisms. CCWG is looking at existing accountability mechanisms and trying to determine which mechanisms need to be integrated for a smooth transition. Work has been divided into Work Streams:

- WS1 - mechanisms fairly committed or put in place by transition;
- WS2 - no need to be in place before transition takes place but needs to take place post transition.

Main focus of the CCWG is to determine: how to appropriately enhance ICANN's accountability to its community in the absence of the historical back stop of the U.S. Government after the conclusion of their historical relation when the IANA managing functions contract ends. A lot of external advice is needed.

CCWG has reached out to ICANN legal first to obtain initial feedback but is also looking for independent advice.

A draft scoping document is available at. [https://docs.google.com/document/d/132V7P8nmyalhoso7zcevJW3\\_ox1aXn5JIEH3dDAF3A/edit#](https://docs.google.com/document/d/132V7P8nmyalhoso7zcevJW3_ox1aXn5JIEH3dDAF3A/edit#)

Three items need to be put in place as part of WS1.

- Recalling members of the ICANN board of directors.
- Community empowerment over ICANN's management.
- Limiting the scope of ICANN's activity.

Timeline is a real challenge.

The CCWG is focused on making ICANN the best organization it can be for the purpose it serves.

### 3. Discussion

- Transparency is essential . Do you have any issues with your advice being made public available?

--> Sidley is very comfortable with advice being public: it had this conversation with CWG and crosschecked process with internal general counsel in process of retention with CWG. Working procedures are designed to ensure that process is transparent. The firm has spent a lot of time working with the CWG thinking about structure of relationship. It understands that the intent is to provide independent legal advice. One of difficulties: neither CCWG nor CWG are incorporated, legal entities - ICANN will pay for the bill. The choice was 1) have every member of the CWG/CCWG become client which would imply going through onerous conflict check for each individual and get them to sign a contract; 2) Have a direction signed by ICANN (technical/nominal client) which stipulates that all directions are taken by CWG or CCWG and advice is directly provided to WGs only. It is very clear that intent is that we ought to be thinking of concerns that are being brought by the CWG or CCWG as we provide advice and not think about project from an ICANN perspective. Firm is comfortable that is the direction given and that retention letter is clear on that. They have worked through with internal general counsel to make sure it complies with ethical obligations.

- Important to know our task is not only because the NTIA contract has a window of opportunity for opening - it is also because ICANN's accountability mechanisms are generally regarded as inadequate (irrespective of NTIA contract).

- Timeline will most likely need to be adjusted since the community will not have reached sufficient consensus or exploration of issues on the timeline suggested now.

- What is the firm's understanding of its duty of loyalty to ICANN, the corporation (as opposed to CWG)?

--> Understand that duty of loyalty to ICANN is to fulfill direction it was given: provide independent advice to CWG and take directions from CWG only. ICANN has waived all privileges and made all directions direct. Will fulfill obligations to ICANN by carrying out what is in retention letter.

- Do you see any other mechanism to achieve goal of transparency towards our own community?

--> Make retention letter public. Response to legal scoping document should also be made public as well, subject to concerns. It may be that we ask some information to remain confidential if providing information about client. There are a lot of mechanisms for transparency through discussions, posting emails etc. We are open to suggestions.

- As in CWG, we should have public archived mailing list for substantive engagement to make sure it is a transparent process to ICANN and global multistakeholder community.

- How would you see us interacting with you? Are there any concerns with respect to requirements to track interactions with stakeholders? E.g. interaction from members of group that might approach you. Ideally the relationship would be between Legal Subteam and firm but some may approach you directly. Having a record may be desirable.

--> Important for clarity, efficiency and transparency that it be clear who we are taking direction from. Comfortable with protocol that don't interact with individuals on one-on-one basis without being logged in. We can move faster if understand who is authorized to pose questions. Cannot be efficient if large number of people.

- We could also log that into mailing list so that all can see interaction. We would have to limit to subject matter of CCWG.

--> Communicate progress and guidance to larger group so that people understand how decisions are arrived at (iterative process) - this will help bolster confidence of larger stakeholder group in recommendations.

- Would you be able to attend March meeting: how would you participate in working sessions with larger group?

--> Will do best to work on conflicts. Committed to working in whatever way CCWG considers useful. What is the timeframe?

- León Sanchez walked Sidley through timeline - [https://community.icann.org/download/attachments/50823981/CWG-CCWG\\_timeline\\_20150303.pdf?version=1&modificationDate=1425369129000&api=v2](https://community.icann.org/download/attachments/50823981/CWG-CCWG_timeline_20150303.pdf?version=1&modificationDate=1425369129000&api=v2). Working towards having a draft out of Istanbul for public comment. Ultimate goal for WS1 would be to submit to Board by mid June for approval.

--> This is an aggressive timeframe in terms of legal advice. Priority is to get it right while getting it done. Need to understand how you have identified three issues in the scoping document and what else you considered and took off the table and why. Your insight on potential pathways you considered would be useful to make sure we are giving a full view of what could be considering. Diligence would need to be done soon through a call with Legal Subteam. A lot of it is contingent on items that not in lawyer's control.

- May need to adjust timeline when time comes.

--> What sort of presentation is the CCWG contemplating during F2F meeting: is the need for discussion of pros/cons of various specific proposals that have already been floated? Might be doable if already in legal scoping vs. full out legal analysis submitted particularly if want to suggest one system is more effective than the the other. This would be a more robust undertaking that could not accomplished before Istanbul.

- First need to decide whether engage with law firm and then advise. Supposing we are engaging with Sidley, should begin by answering legal scoping questions and combine how different answers to questions may fit into work done by WPs. Need to have a broader look at different mechanisms so far designed by WPs and see how they are legally feasible and play along with answers to scoping document. This would be the expectation for Istanbul.

--> Experience with California Law not-for-profits: large not for profit practice, we have expertise of that group behind us should need it.

--> Work for not for profits on general matters but also have been advising on governance, directors, bylaws issues - recent research has been done on these. Large practice behind us. Substantial knowledge of trust structures.

--> Experience with California not for profits on governance issues. Worked with large, federated, international organizations many of which have complex relationships that need to be considered where accountability system needs to be built that show interest are heard and have effect in organization. Project helping on external communities finding consensus including governance reforms. Commonalities in issues.

- Is it advisable to get same firm for CWG and CCWG? Would there be any cons to representing both groups?

--> Both groups are working towards common end and have very similar interests. There is a fair degree of crossover on some of the issues. No conflicts seen. We have deep bench on not for profit side, on corporate side, on governance side and would be committed to putting any resources may have.

- Some of our proposals concern restructuring ICANN into a membership or delegate based organization. Do you have any experience in this type of restructuring?

--> Worked with membership organizations and helping restructure governance into membership organizations with complex structure that helped to restructure but no experience with making a non-member organization into a membership organization. Not for profit folks we can come up with examples. Comfortable with advising around it. Don't think this would pose any difficulties.

- We have had experience converting cooperative organizations into more traditional full profit entities. Governance and membership organization could be a possibility we could deploy here. Further discussion needed on utility of this. There may be conflicting priorities that arise of membership organization we would need to think about.

- Very significant advantages and minor disadvantages we can control for. Advantage are learning curve, natural coordination and convergence of work going on between 2 groups. Accountability has a longer lifespan – part of accountability work will dovetail with stewardship group but bigger field of play. Disadvantages are conflicting timeline, overlapping responsibilities and against trend.

- How is workload balanced in the firm between partners and associates doing the work in this matter?

--> Unusual project. It will take start up time to determine right balance. Commitment to be as efficient as possible. Many of issues are not simple or straightforward and it will require partner time. Process in place whereby on call to be informed on non-billing basis.

- How would you describe knowledge of ICANN and how would you get better understanding?

--> Quick-learner – have people with real expertise in area.

--> Worked on internet law issues. ICANN has featured prominently. Dealt with domain name dispute, country level, complicated jurisdictional issues over root zone services. Practice involves dealing with world's largest technology, software companies. Former General Counsel for Department of Commerce has just joined us and has clear knowledge of NTIA perspective on contract with ICANN, political state of play, legal side of operations and importance of IANA functions. Realistic founded knowledge of ICANN and Internet. We have associate who lectured on cyber at Harvard.

--> Knowledge going back to inception and prior to that. Chaired subcommittee that has oversight and jurisdiction for NTIA. In 2009, IANA contract was awarded to ICANN and subcommittee conducted a whole set of hearings. At the time, a lot of developing countries were urging ITU to get a role. Passed a resolution that received rare unanimous consensus that internet remain under governance of multistakeholder process and ITU not be involved. Long acquaintance of ICANN – understand functions very well as well a counter forces at play. Can help advising on that to optimize opportunity for Congress to accept.

--> Worked in communications law – migrated from broadcasting to telecommunications to representations of ISPs. As general counsel, established the internet policy task force which combined NTIA with other agency that dealt with digital economy and multistakeholder model policy-making. As general counsel, had legal team provide services to NTIA. Knowledge also includes renewal of IANA functions contract to issues surrounding top level domain names, broader issues of internet governance etc. Wrote paper about defending transition – aware of post policy issues of importance to an effective transition.

--> More clarity is needed on timeframe for making decision. Ability to work effectively depends on time between decision and Istanbul.

- Debrief call will be organized with legal sub team. Will get more clarity on timeline by the end of this week.

**ACTION ITEM: Provide more clarity on timeline as soon as possible.**

- If there is a decision, staff could complete engagement letter fairly quickly using similar language to CWG letter.

--> Simple if same approach.

--> Agreement needed between CWG and CCWG that comfortable with process.

--> We would need CWG consent.

- Doubt CWG would refuse but will verify.

**ACTION ITEM: Verify CWG would have no objection if CCWG deduces to engage with same firm.**

## Action Items

**ACTION ITEM: Provide more clarity on timeline as soon as possible.**

**ACTION ITEM: Verify CWG would have no objection if CCWG deduces to engage with same firm.**

## Documents Presented

## Chat Transcript

Brenda Brewer: (3/10/2015 16:43) Hello all! Welcome to the CCWG Accountability Legal SubTeam call on 10 March at 22:00 UTC.

Alice Jansen 5: (16:55) Chat sessions are being archived and follow the ICANN Expected Standards of Behavior: <http://www.icann.org/en/news/in-focus/accountability/expected-standards>

Robin Gross [GNSO - NCSG]: (16:59) draft of Legal Scoping document: [https://docs.google.com/document/d/132V7P8nmyalhoso7zcevJW3\\_ox1laXn5JIEH3dDAF3A/edit#](https://docs.google.com/document/d/132V7P8nmyalhoso7zcevJW3_ox1laXn5JIEH3dDAF3A/edit#)

David McAuley: (17:04) few min to call in

David McAuley: (17:06) ok on phone

Brenda Brewer: (17:07) Joshua Hofheimer and Rick Boucher are on phone line

Brenda Brewer: (17:09) Theresa is on phone line now

Holly Gregory 2: (17:12) We have two additional persons on the line that we would like to introduce -- Joshua Hofheimer and Rick Boucher

Robin Gross [GNSO - NCSG]: (17:16) Important to know our task is not only because the NTIA contract has a window of opportunity for opening - it is also because ICANN's accountability mechanisms are generally regarded as inadequate (irrespective of NTIA contract)

Robin Gross [GNSO - NCSG]: (17:18) Current timeline will most likely need to be adjusted since the community won't have reached sufficient consensus or exploration of issues on the timeline suggested now.

Robin Gross [GNSO - NCSG]: (17:20) Q: what is the firm's understanding of its duty of loyalty to ICANN, the corporation (as opposed to CWG)?

David McAuley: (17:20) Thanks Holly - the directive letter itself would be public I take it

David McAuley: (17:20) i.e. the directive from ICANN to Sidley to take all direction, give advice to CCWG/CWG

Holly Gregory 2: (17:21) Yes --

David McAuley: (17:21) thanx

David McAuley: (17:29) This kind of clarity is in our interest (CCWG) as well altho we should mention it to CCWG generally, in my opinion

Pär Brumark (GAC): (17:30) Agree

David McAuley: (17:32) March 23-24 with some pre meetings Sunday 22nd

David McAuley: (17:33) Istanbul for 23rd-24th

Samantha Eisner: (17:33) Same location as the CWG session

Robin Gross [GNSO - NCSG]: (17:35) proposed timeframe is questionable by many in the community

Alice Jansen: (17:36) Also available here - [https://community.icann.org/download/attachments/50823981/CWG-CCWG\\_timeline\\_20150303.pdf?version=1&modificationDate=1425369129000&api=v2](https://community.icann.org/download/attachments/50823981/CWG-CCWG_timeline_20150303.pdf?version=1&modificationDate=1425369129000&api=v2)

Robin Gross [GNSO - NCSG]: (17:37) the community's priority it getting it right. not meeting an arbitrary timeline.

Edward Morris: (17:37) I think it's important to recognize that these deadlines are very likely going to be extended.

Edward Morris: (17:37) Out of necessity.

David McAuley: (17:39) Holly, have you had a timeline discussion with CWG - how did that come out

Robin Gross [GNSO - NCSG]: (17:40) I agree that takes time. This is complicated. We are building a global governance institution. We can't do it right in the timeline proposed.

David McAuley: (17:40) This discussion underscores importance of attendance in Istanbul

Holly Gregory 2: (17:41) we have not had a specific time line discussion at this level of detail

David McAuley: (17:41) thanx

David McAuley: (17:44) glad you brought mechanisms up Leon

David McAuley: (17:46) sounds fine

Leon Sanchez: (17:46) :-)

Edward Morris: (17:50) Holly, some of our proposals concern restructuring ICANN into a membership or delegate based organization. Do you have any experience in this type of restructuring?

Robin Gross [GNSO - NCSG]: (17:52) Q: how is workload balanced in the firm between partners and associates doing the work in this matter?

David McAuley: (17:59) Good points Greg - I too am one who sees scales tipping in favor of advantages of having one firm

Leon Sanchez: (18:00) +1

Leon Sanchez: (18:02) good

Leon Sanchez: (18:02) I like non-billing :-)

Robin Gross [GNSO - NCSG]: (18:03) Thanks! My concern is more about making sure the expertise is of a high level, given the stakes in this matter.

Leon Sanchez: (18:03) Excellent point Robin

Holly Gregory 2: (18:04) Thanks Robin

David McAuley: (18:06) Cam has hand up

Robin Gross [GNSO - NCSG]: (18:08) Hi Rick! We met about a decade ago when you were in congress working on the right side of Internet issues!

Leon Sanchez: (18:08) @Cameron we'll go to you after Rick

Edward McNicholas, Sidley: (18:09) Sorry; did not see that Cam has joined.

Cameron Kerry: (18:10) thanks

Robin Gross [GNSO - NCSG]: (18:16) thanks to the firm for taking time to speak with us!

Samantha Eisner: (18:18) If there is a decision to engage Sidley, I can share (which I will in any event) the engagement letter that has been entered into with teh CWG, for information

David McAuley: (18:19) Good point - thanks Sam

David McAuley: (18:21) Thanks Leon. This was very informative and helpful – thanks to Holly and her team.

Edward McNicholas, Sidley: (18:22) Many thanks for allowing us an opportunity to present our credentials and speak with the CCWG today.

Edward Morris: (18:22) Thanks everybody.

Pär Brumark (GAC): (18:22) Thank you all!

Robin Gross [GNSO - NCSG]: (18:22) thanks, all. bye!

Holly Gregory 2: (18:22) thanks and good evening.