Evaluation of ICANN
(Public Version)

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This is the public version of a document submitted to ICANN's Board of Directors. This public
version is different in the following ways:

- Items that reflect on the performance of named employees have been elided.

- Typos and misspellings have been corrected.

1   Introduction

As a Director one of my duties is to evaluate ICANN for the purpose of improving the
corporation and helping it meet its obligations.

ICANN is an organization that is in many ways a much better organization than it was two years
ago. This report necessarily focuses more on the negatives than on the positives; that focus is not
intended to denigrate from the large body of constructive improvements that have occurred.

ICANN recently selected a new President. Most of the material and events upon which this
report have been written date from before the new President's term. I have found the new
President to be a person who brings a new positive attitude and approach to ICANN. It is my
belief that he has already begun to correct, on his own authority and initiative, several of the
flaws that I mention below.

My overall assessment of ICANN is:

- ICANN has diminished its role with regard to the technical stability of the internet and
  has, instead, become a body that gives too much emphasis to the regulation of business,
  economic, and social practices that have little relationship to the technical stability of the
  internet.

- ICANN primarily serves a few select business interests, most particularly that portion of
  the legal community that practices in the area of trade and service marks.

- ICANN has created a series of barriers between itself and the public. ICANN's decision-
  making processes are not really open to the public; its decisions are in the hands of a
  small body of insiders. ICANN's decision-making procedures are not transparent; the
  public may not truly observe how ICANN makes its decisions. Nor is ICANN
  accountable to the public; too many layers have been interposed between the public and
  ICANN's decision-making functions.

- ICANN has commingled its identity with that of IANA and thus has created a significant
  lack of clarity about whether an act is an act of ICANN or an act of IANA.

- ICANN has failed to gain the support of key elements of the internet technical community, most particularly the operators of the DNS root servers, the regional IP address registries (RIRs), and the technical standards communities (IETF, ITU, W3C, etc.)

- IANA, via ICANN, has been a weak steward of the DNS root. IANA, via ICANN, has not delivered sufficiently comprehensive plans for the secure creation of the DNS root zone or its dissemination to the root server operators. Neither ICANN nor IANA has proposed, much less put into effect, adequate measures to secure the upper layers of the internet's Domain Name System against intentional attack or natural disaster.

- ICANN has been a vehicle through which US trademark laws and (non) privacy policies have been exported onto other countries whether they want them or not.

- ICANN has done some things very well. ICANN's role regarding the issues of internationalized domain names (IDN) has been that of a capable manager who has done a good job harnessing, coordinating, and channeling the energies of other bodies.

An additional question is whether ICANN is in a position to adequately meet the obligations that are imposed upon ICANN by the various agreements between ICANN and the United States. It is my conclusion that ICANN remains structurally unable to meet those obligations.

These questions are made all the more difficult by a lack of clarity between ICANN and IANA, the two are often intermingled in peoples' thoughts, which is quite understandable given that the tasks of ICANN and IANA are performed by exactly the same people working out of the same offices. There appears to be a strong concern that ICANN qua IANA uses the power to withhold IANA services as a means to coerce unwilling entities, particularly ccTLDs, into entering into agreements with ICANN. In addition, there is very little support among the technical community or the regional IP address registries (RIRs) for the present ICANN-IANA structure

2 Giving Credit

Most people in ICANN and IANA work unbelievably hard to create a better internet. Many of these people work behind the scenes and are frequently not known to the public. These people are rarely, if ever, thanked for their work. I would like to take this opportunity to mention a few of these people. I do not know everyone within ICANN, so the list is necessarily incomplete.

For myself and on behalf of the community of internet users I would like to thank:

- <list elided from the public version>

3 The Symptoms of Trouble

There are many symptoms indicating that ICANN has structural problems:

- Recent events in which a DNS root server was moved and new root servers created, all without even notice to ICANN, indicate that the level of disdain for ICANN has reached the point where ICANN's technical role in DNS has, as a practical matter, ceased.

- The IP address allocation system has also, as a practical matter, disengaged from ICANN, with the fact of independence covered only by a few rather transparent veils.

- ICANN has little support from the rank and file of the internet technical community.

- The national governments in the GAC have given ICANN strong notice of their concerns. The US Dept of Commerce has also put ICANN on short notice.

- The ccTLD community reacted strongly to ICANN's overreaching demands for data access (a practice that ICANN has since discontinued.) There is widespread belief that ICANN has abandoned RFC1591/ICU1 and used its ability to grant or withhold IANA services to coerce ccTLDs to sign ICANN contracts. The community of internet users has never given ICANN any real support.

- What was once a growing and internally vibrant public "at-large" community has withered due to frustration and a creeping eradication of the role of the public within ICANN commensurate with the roles accorded to other groups.

What are the causes? One cause is that ICANN has a Board of Directors that directs weakly, leaving staff too much discretion. Another cause is that ICANN has adopted measures that are in opposition to the goal of being a body that is transparent, open, and accountable to the public. A third cause is that ICANN has strayed from the path of being a limited organization dealing with matters affecting the technical stability of the internet.

4   Evaluation of ICANN

4.1   Is ICANN A Floor Wax Or A Dessert Topping?[1]

ICANN clearly is having a difficult time deciding whether it is a technical coordination body or a social engineering and public-policy body. For example ICANN executives have made inconsistent claims – sometimes claiming that ICANN must avoid regulation of business practices because ICANN is limited to technical matters and sometimes claiming the opposite – that ICANN must become deeply engaged in the regulation of business practices even when there is no link to technical matters.[2]

ICANN has a similar difficulty deciding whether its job is to protect consumers and users of the Internet or whether to leave that up to legislatures and other governmental bodies.

4.1.1 Undefined Terms

There is one thing that pretty much everyone agrees upon – ICANN's role is somehow supposed to be related to the stability of the internet. And ICANN's structure is premised on the notion that there are identifiable groups, called stakeholders.

But those words, "internet", "stability", and "stakeholder" are not defined.

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[1]   From a skit on the TV series "Saturday Night Live", date unknown.
[2] See "ICANN: Regulator, or Technical Coordination Body?" on ICANNWatch at
http://www.icannwatch.org/article.pl?sid=02/12/19/180428&mode=thread

It may seem petty to be concerned about definitions of words. Yet, often the resolution to thorny disagreements may be found by looking at the ways in which the disagreeing parties use words.

As will be discussed in the next section, it is my opinion and that of many of my constituents, that ICANN's role be balanced more towards the technical and away from social engineering, and that that the communities who are considered as having standing, i.e. "stakeholders" be read broadly rather than narrowly. Thus I suggest the following definitions for use when discussing ICANN and its role:

> *Recommendation: The term "internet" ought to be defined as the open system that carries IP packets from source IP addresses to destination IP addresses.*

> *Recommendation: The term "stability of the internet" ought to be defined as a mode of operation of the internet such that flows of IP packets may occur in a predicable manner and that DNS queries are accurately and quickly transformed into DNS replies.*

> *Recommendation: The term "stakeholder" ought to be defined as any person who is affected by the internet.*

4.1.2 What Is ICANN's Job

ICANN is not lazy. When ICANN sees a job, it adds that job to its repertoire. ICANN is, however, a poster child for the old adage that "a jack of all trades is a master of none".

ICANN's proper role can be easily rolled up into a few bullets:

- To coordinate the assignment of internet technical parameters as needed to maintain universal connectivity on the internet. To a large extent this is a clerical job occasionally augmented with the need to ask a question of a technical expert designated by the IETF.

- To coordinate the job of fairly assigning IP addresses so that the packet routing systems of the internet can work efficiently, accurately, and reliably and to avoid unreasonable inefficiencies in the use of assigned blocks of addresses. An additional aspect is to create and apply policies to determine under what conditions an application for IP address space is to be granted and when denied. To a large extent this job is already being well performed by the regional IP address registries (RIRs).

- To coordinate the daily creation of a DNS root zone definition (or root zone file) and operation of a suite of DNS root servers so that the resolution of top-level domain name labels is efficient, reliable, and accurate. An additional aspect is to create and apply policies for determining the circumstances under which new top-level domains are added to the ICANN operated DNS root system.

ICANN has no other jobs, or rather, it ought to have no other jobs. ICANN ought not be a legislature enacting trademark law. ICANN ought not be a consumer protection agency. And ICANN ought not be a regulatory agency that says what business structures are acceptable and what are not. Unfortunately ICANN has exceeded itself; ICANN has become all of these.

All technical decisions on a system as pervasive as the internet have social and economic implications. I use the following guideline to distinguish matters that are primarily technical from those that are social policy:

A matter is "technical coordination" of the internet if a decision on that matter has an immediate and direct impact on the ability of the internet to deliver its fundamental service, i.e. the end-to-end transport of IP packets or the timely and accurate transformation of DNS queries into DNS responses. Otherwise it is a policy matter.

As measured by that yardstick, ICANN has done very little in its four years of existence that can be unquestionably labeled "technical coordination" – the bright spot being ICANN's fine performance with regard to internationalized domain names. Otherwise, nearly every act of ICANN has, from its inception, been social engineering.

At the present time there really is no standard to judge whether ICANN is acting within its scope or not.

At the time of this writing, ICANN's staff is nearing 30 people (with the prospect of 40 on the visible horizon) and its budget could readily reach the $10,000,000(US) mark within a short time.

There has been little pressure to reduce this growth. ICANN's cost-based budgeting technique does little to discourage an ever-increasing bureaucracy. Those who provide the funds for this budget are principally those businesses that are able to pass those costs onto internet users who, in turn, bear the costs of ICANN as an involuntary tax imposed on their use of the internet.

Recommendation: ICANN must adopt a realistic statement of its job. That statement must contain sharply defined limits on ICANN's job.

Recommendation: ICANN must adopt a budget process that contains stringent caps on growth and that requires the positive and express consent of those from whom the money is ultimately derived, the users of the internet.

4.2   ICANN and IANA

ICANN is not IANA. IANA is not ICANN. Yet ICANN is not careful to avoid commingling these two entities. Decisions are too frequently shuttled between ICANN and IANA.

ICANN performs the IANA function under a purchase order from the US Department of Commerce. This IANA function includes the prompt performance of several duties, not the least of which is the handling of ccTLD redelegations and the maintenance of ccTLD NS records in the root zone of the DNS.

ICANN has a desire to enter into contractual arrangements with as many ccTLD operators as possible.

This creates a conflict. ICANN is suspected by many of manipulating the granting and withholding of IANA services in order to induce ccTLD operators into signing a contract with ICANN. It is important to break that link, even if that link exists only as a perception.

Another part of the IANA function is maintenance of "protocol parameters".

The IANA "protocol parameter" function is essentially a clerical function performed for the IETF.

A third part of IANA concerns the allocation of IP addresses.

The IANA IP address function is something with very large potential economic effects.

The technical aspects of IP allocation are esoteric and complex; it is hard, and perhaps impossible, to fully understand the ultimate effects of IP address policies. For the time being, experience has demonstrated that the Regional IP Address Registry (RIR) system is working acceptably well (and it appears, whether measured in terms of efficiency and justifiability of allocations or in terms of concern for non-technical issues, to be improving.) There is no reason to fix something that is not broken.

There has been a great deal of concern about how ICANN operates IANA by those who use IANA services

> *Recommendation: ICANN should not continue to provide the IANA function pertaining to IP address allocations and protocol parameters. Those functions should be transferred to the RIRs and the IETF respectively.*

> *Recommendation: If ICANN does continue to provide the full range of IANA services, it should be done in a way that minimizes any discretionary aspects in the provision of those services.*

4.3   Is ICANN Able To Adequately Meet Its Obligations Under the Agreements Between ICANN and the United States?

A primary aspect of ICANN's contractual obligation is that it operate for the public benefit and be open, transparent, and accountable to the public. Unfortunately ICANN has since its formation structured itself with increasing efficiency to operate to a rather opposite purpose and is thus has diminished, rather than increased, its ability to meet these obligations.

ICANN has shed institutional features related to public accountability and has been captured by the industry groups that ICANN is intended to regulate. ICANN is unable to distinguish what matters are in the public interest, if for no other reason than that ICANN has expelled the public from its policy-making bodies.

ICANN has also been captured by its law firm and transformed into an engine that efficiently generates large legal fees flowing into that firm's coffers.

As for ICANN's obligations pertaining to DNS, IP address allocation, and "protocol parameters":

DNS – New Top Level Domains – ICANN has found it difficult to meaningfully increase the number of DNS top-level domains. Only seven have been added during ICANN's 4 ½ years of existence. Several of those new top-level domains have not in any cognizable way contributed to the public value or usefulness of the internet.

ICANN is losing the ability to use the claim that ICANN is studying the deployment of new TLDs as a reason to further delay further TLD allocation.

There are signs that ICANN's future path of TLD allocation will be even more limited in number and even more focused on benefiting tiny industry segments with no benefit accruing to the broad community of internet users.

Academic papers that have examined ICANN's TLD processes, past and present, have found them to contain many disconcerting similarities to radio frequency allocation methods that were tried and found severely wanting.

DNS – Competition – ICANN was supposed to introduce competition into DNS. While it is true that there are more players than there were in the past, it is arguable that there really is competition. Among other things, ICANN has created a contractual straitjacket that stifles many, perhaps most, avenues of competition.

In addition, ICANN has created a price floor of roughly $6. Some analyze this situation by comparing the typical customer price of names today – a number ranging from about $10/year to $35/year – to what it was pre-ICANN, about $35/year. However, that comparison fails to recognize that there is a strong likelihood that without ICANN and the price floor, prices could readily be an order of magnitude lower.

DNS – Customer Protection – ICANN's purpose to promote stability of the net has been restated on several occasions as justifying business regulation of DNS providers so that those who acquire domain names won't discover that those names have been lost or rendered unusable due to provider failure or error.

However, while ICANN has in fact built a highly intensive business regulatory structure, one of the most important components of value to the DNS name users is still weak. That part that is still incompletely fulfilled is the escrow of all DNS registration data so that the customer base of a failed of a DNS provider can be recovered, and service restored.

IP Address Allocation – The IP address allocation system is today exactly as it would have been had ICANN never existed. IP address allocation policy is made and administered by the regional IP address registries (RIRs). ICANN's only involvement is through an occasional grant of address space to the RIRs by IANA, not ICANN.

The RIRs themselves maintain a most tenuous linkage with ICANN. It is clear that ICANN is not actually overseeing IP address allocation policy.

Protocol Parameters – ICANN operates IANA. IANA has been doing a competent and adequate job of allocating numbers.

It is difficult to understate the complexity of this task. To a large extent the job consists of simply incrementing the previous number assignment and writing the result down in a ledger. ICANN has filled its periodic status reports to NTIA with lists upon lists of the numbers assigned but without revealing the clerical nature and nearly trivial work required to process the large majority of those events.

4.4 ICANN's Organizational Structure

ICANN's organizational structure has always been Byzantine. The "reform" has made ICANN rather more convoluted.

ICANN today is too complicated; there is enormous structural friction and little benefit from shared administration.

This highly ramified organization structure leaves ICANN open to manipulation by sophisticated industry advocates who have plenty of time and money and, at the same time, makes it nearly impossible for the public to penetrate beyond ICANN's outermost shell.

> *Recommendation: Split ICANN into separate organizations along technical functional lines: one for DNS, one for IP addresses, and one for Protocol Parameters.*

4.5   Communications Between Elements of ICANN (the Board, Management, the Supporting Organizations)

ICANN's management provides the board with essential information. However that information is often provided late, forcing the Board to make snap decisions without adequate consideration and without the time to consult with the public.

> *Recommendation: ICANN's management should make a monthly report to the board. This report should be in standardized form to facilitate comparison of changes of position. The report should contain standard financial reports as well as a list of all non-trivial financial and business transactions, including transactions pertaining to the acquisition and delivery of professional services. Except for those parts dealing with employee matters, contract negotiations, litigation, or those that are subject to confidentiality imposed via written contracts, this report should be made available to the public.*

4.6   Inadequate Oversight by the Board

The public depends on ICANN's Board of Directors to guide ICANN in the public interest. Yet, no matter how much that voice is reflected in the Board, that voice is muted because ICANN's Board of Directors leaves too much policymaking to ICANN's management.

ICANN's Board rarely challenges any act performed by management.   The Board rarely requires management to provide the timely and complete information that the board needs to make informed decisions.

On many occasions I have heard board members excuse the board's lack of supervision on the grounds that the individual directors are not professional directors, that they are, in essence, contributing their time and energies. There is validity in the fact that being a Director is an enormous burden that may have significant ancillary implications on one's personal finances and relationships. However, rather than using that as means to excuse lack of supervision by the Board, ICANN ought to take steps to empower its non-professional directors to act more like professionals.

> *Recommendation: ICANN's Board of Directors should hire its own outside counsel to advise the Board on its rights and duties. The choice of outside counsel should be in the hands of the non-management Directors. This outside counsel must not be affiliated with any law firm used by ICANN management and this outside counsel must have clear and unambiguous responsibility to ICANN's Board of Directors as a collective body and not to any Director*

individually or to ICANN's management. Any Director may raise questions for this outside counsel.

Recommendation: Every member of the Board should be given the opportunity to privately interact with the outside auditors. ICANN's management should have no role in financial audits except to provide information to the board and to whomever the board selects as outside auditors. No member of ICANN's management should sit on ICANN's Audit committee.

Recommendation: The membership of ICANN's committees should rotate yearly with at most one holdover. No person who remains on a committee may chair that committee and no person may remain on a committee for more than two years.

Recommendation: ICANN should revise its organic documents to constrain the powers of the Executive Committee, limiting it only to exigent matters. No member of ICANN's management should sit on the Executive Committee.

Recommendation: ICANN's directors should all be encouraged to take a course on the subject of corporate governance and the rights, duties, and liabilities of corporate directors, particularly in the context of a 501(c)(3) corporation.

Recommendation: ICANN's president should not have an ex-officio seat on ICANN's Board of Directors. The President may be permitted the right to attend Board meetings as a non-voting observer.

Recommendation: All Directors of ICANN, with the exception of those who hold their seats through ex-officio mechanisms, ought to receive a yearly expense allowance with the expectation that that allowance will be used by each Director to improve his or her ability to oversee and supervise the corporation and its management. It is recommended that this allowance be between $10,000(US) and $25,000(US) per year.

4.7   Excessive Secrecy

Too many of the discussions and meetings of ICANN's Board of Directors are closed to the public; the public learns about what transpired only by means of minutes.

It is important to both ICANN and the public that the workings of the board be more observable. ICANN will benefit by increased public confidence that the board is properly doing its job. The public will benefit by having a better sense of what changes should be made in ICANN so that ICANN more closely operates in accord with what the public perceives to be in its interest.

Recommendation: All meetings of the Board of Directors and of its committees should be audio-recorded and made available to the public. No matter may be elided except after an on-record decision that a particular matter should be discussed off the audio recording. Only matters pertaining to personnel matters, litigation (or potential litigation), and contract negotiations may be discussed off the audio record.

4.8   ICANN's Employee Policies

ICANN has been too slow when creating and establishing rules and procedures for employees.

Until as late as September 2002, nearly three years after ICANN's formation, ICANN had no cohesive collection of employee rules and procedures. Indeed, it appears that the eventual creation of what exists now was partially a response to my inquiries for more than 18 months whether such rules and procedures even existed.

I have reviewed ICANN's employee polices and, in general find that those that do exist are competent and well done. However, as compared to other such collections of employee policies, ICANN's have less breadth than I have seen among technical companies in California.

ICANN appears to have paid a considerable amount of money to ICANN's law firm over a period of roughly two years for the creation of those policies that do exist. At the current rate and expense, an employee handbook of normal scope will cost ICANN quite a bit more money in legal fees and may not be in place for another year or longer.

I have personally used some software packages to generate employee handbooks – these packages cost on the order of a few hundred dollars and take about a day to use. The results have been quite good, to my mind the specific policies are at least on par with those that ICANN has in place today and the overall scope of coverage of the policies considerably broader than that which ICANN has in place.

ICANN's employee count is already on the order of 30 people and is likely to climb to nearly 40 people within the next year. ICANN has probably passed the employee count that triggers increased employee obligations such as those imposed by the Americans with Disabilities Act (ADA)[3] and the Family and Medical Leave Act (FMLA)[4]. I saw no materials in ICANN's employee materials regarding ICANN's obligations and policies under these laws.

> *Recommendation: ICANN's management should take steps to increase the breadth of its employee policies. This process may be made more efficient through the use of readily available software packages that generate employee handbooks.*

> *Recommendation: ICANN should undertake an immediate review of its personnel policies to ensure compliance with all applicable laws such as the Americans with Disabilities Act and the Family and Medical Leave Act.*

4.9   Employee and Contractor Travel

I have examined selected travel records of ICANN employees and contractors. There are too many people traveling to too many places. For example, one ICANN employee, when measured on an annualized basis, traveled around the world several times visiting nearly 50 non-US venues a year. And one meeting in Africa was attended at least four members of ICANN's staff despite the presence of an ICANN Director.

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[3]   See: http://www.usdoj.gov/crt/ada/adahom1.htm
[4]   See: http://www.dol.gov/esa/whd/fmla/

In addition, invoices from some of ICANN's contractors, particularly its law firm, indicate travel expenses that, on average, are well in excess of $1000 per day.

> *Recommendation: Except for the public meetings of the Board or when special circumstances can be clearly articulated and documented in advance, ICANN should avoid sending more than a single staff member to any meeting.*

> *Recommendation: Contractor travel expenses should be subject to explicit limitations.*

4.10 ICANN's Financial Controls and Business Practices

ICANN's financial controls could be improved.

After looking at many vague expense reports and invoices that ICANN has paid, it is clear to me that ICANN's ledgers are partially un-auditable. The paper trails have too many gaps and too little detailed information. For example, as of October 2000, ICANN's primary creditor, Jones Day, switched from detailed billing to summary billing. For the last two years, ICANN has paid millions of dollars on JDRP invoices that contain little more than names of attorneys and total hours billed without any indication of what work was done during those hours. In fact, there is apparently no engagement letter between ICANN and JDRP that establishes the bounds of JDRP's job or sets the billing rates (which is particularly important in light of the "discounts" that JDRP purports to be giving ICANN.) There are expense reports from people I have never heard of and without any written links to indicate why ICANN is obligated to pay that money or how (or even if) the payment was in fact made. In some cases it is hard to determine who incurred the expenses or who approved them**.**

ICANN's finances are sufficiently complicated that a person trained and experience in the field of accounting, particularly in the context of a 501(c)(3) organization, ought to be performing the CFO function.

> *Recommendation: ICANN should fill the CFO position with a person who has strong accounting experience and credentials. ICANN's CFO should not be asked to perform additional jobs.*

> *Recommendation: ICANN's CFO should establish standardized forms for expenses that require clear identification of who is incurring the expenses and why ICANN is obligated to pay them. There should be clear approvals with more than an undecipherable set of initials to identify who is making the approval. No person should be allowed to approve his or her own expenses or expenses they submit on behalf of a third party. And there should be a clear linkage to entries in the financial ledgers showing how and when those expenses were paid.*

> *Recommendation: ICANN's CFO should not permit summary invoices. Instead ICANN should require that all invoices, including those from professional service providers, give detailed information on what work was done and show all applicable rates and discounts. No invoice should be paid without a written agreement between ICANN and the provider. In addition, ICANN's CFO should require JDRP to provide ICANN with detailed statements for the period beginning approximately October 2000.*

4.11 Duties of Consultants and Contractors Are Not Adequately Differentiated From Those of Employees

In recent years Microsoft and other companies have used consultants and contractors in lieu of employees. However, in many cases these non-employees had duties and schedules that were not sufficiently different from those of the true employees. This caused several problems both for the companies and for the non-employees.

ICANN is understandably and reasonably concerned about the cost of employees and the long-term obligations that arise from an employment relationship. The use of consultants and contractors is a reasonable business tactic for ICANN to use.

However, I have examined certain of the consulting contracts that ICANN has entered into and find them to have characteristics that could cause the IRS or others to re-construe them as employment contracts and thus trigger all of the obligations and expenses that ICANN is trying to avoid.

> *Recommendation: ICANN should take steps to amend existing consulting and contractor agreements to ensure that they are clearly not employment contracts. For example, ICANN ought to avoid using contractors or consultants for more than 16 or 20 hours per week for more than a few weeks. Nor should contractors or consultants have supervisory roles over actual ICANN or IANA employees or other contractors or consultants. Contractors and consultants should only have limited access to ICANN facilities and documents. Contractors and consultants should be required to clearly identify themselves as not being ICANN employees or officers in public communications.*

4.12 Jones Day (JDRP)

Jones Day (JDRP) is ICANN's law firm. This has been the case ever since before ICANN was formed.

It is standard professional practice for the relationship between a client and its law firm to be governed by an "engagement letter" that sets for the terms and conditions of the relationship, establishes billing rates, and clarifies any conflicts of interest.

There was an engagement letter between JDRP and ICANN that set forth a pro-bono arrangement. However, an examination of the billing records indicates that this arrangement lasted only for approximately 6 weeks after the time of ICANN's formation.

From a time beginning a few weeks after ICANN's formation until at least last fall there has been no engagement letter in place that sets forth the present arrangements. Despite this lack, ICANN has paid JDRP several millions of dollars in legal fees.

ICANN's law firm has never provided ICANN with any statement of its conflicts of interest, yet it is quite clear that such conflicts exist. For example, AOL is an accredited DNS registrar, yet that law firm represents both ICANN and AOL. There is no shame or wrong in the existence of conflicts if such are properly disclosed and knowingly waived by the client, ICANN. However, there is much that is wrong if the law firm fails to disclose or fails to obtain from the client, ICANN, a knowing, written waiver of those conflicts.

I have observed several aspects of the work product coming out of JDRP. It is my opinion that this work has on occasion been below acceptable professional standards.

(I should note, however, that JDRP has also done much work of exceptional quality, meeting the highest of professional standards.)

In addition, certain JDRP personnel have engaged in what I believe are unprofessional actions that give rise for significant claims by ICANN against JDRP.

Recommendation: ICANN should establish a current engagement letter with JDRP setting forth the terms of the relationship of ICANN and JDRP.

Recommendation: ICANN should require Jones Day to make the necessary disclosures and take other steps to bring its practice into conformance with applicable laws and professional standards. ICANN should make a dispassionate review of these disclosures and consider whether the integrity of any of ICANN's acts have been compromised as a result and consider whether to seek compensation. The Austin-Sidley letter reviewing the work of certain JDRP personnel should be disregarded because it was based on inaccurate information provided to Austin-Sidley by ICANN management.

Recommendation: ICANN should refuse to pay invoices for substandard legal work.

Recommendation: ICANN should require JDRP to provide detailed invoices in the future and should obtain detail information from JDRP for the nearly three years that ICANN has been receiving summary invoices.

Recommendation: ICANN's Board should inquire whether ICANN would be better served by a different law firm.