ICANN | IPC
Intellectual Property Constituency

ICANN Community Participant Code of Conduct on SOIs and General Ethics Policy

Response to Call for Public Comment

December 2, 2024

I. Introduction:

Thank you for the opportunity for the IPC to provide feedback on the ICANN Community Participant Code of Conduct regarding Statements of Interest (“Code of Conduct”) and the development of the ICANN Community Ethics Policy. At the outset, the IPC notes its support for the goal of this proposed policy—improved transparency and an ethical participation in ICANN’s multistakeholder model. However noble the goals of the proposed policy are, the actual requirements are unworkable, unenforceable and violate ICANN’s bylaws.

Under the Code of Conduct “all that participate in ICANN’s processes are required to disclose interests influencing their participation.” This is incredibly broad and gives us grave concerns as outlined below. Further compounding our concerns is that this Code of Conduct was not developed by the multistakeholder process—the exact process it aims to improve.

II. Our concerns are as follows:

1. The Code of Conduct requires the Governmental Advisory Committee (“GAC”) members to disclose those who are lobbying their governments to take positions within ICANN. In fact, the language is so broad that it appears to require the GAC to not only provide advice and communicate issues and views to the ICANN Board, but it would be required to disclose the specific interests of each of those member countries, including the identity of any lobbyists presenting to GAC members at any stage. This forcing of transparency of national interest would significantly inhibit GAC members from fulfilling their role. Imagine a GAC member from one country filing an SOI saying that their government was being lobbied by numerous parties to gain favor in the New gTLD Rounds? The Code of Conduct would undermine the purpose and function of the GAC to provide streamlined views of many member countries in a concise manner designed to reach consensus.

2. The Code of Conduct confuses “interests” with “conflicts of interest.” Multi-stakeholder governance is the heart of ICANN success. Unfortunately, the Code of Conduct confuses the purpose of the multi-stakeholder process. Participant interests, whether personal, corporate, or client-driven, have shaped the ICANN community positively. These interests,

even if they are conflicting with the interests of others, do not create a conflict of interest since multistakeholder participants do not have duties to represent the opinions and preferences of others in the multistakeholder process. This is in contrast to the Members of the ICANN Board who make fiduciary decisions that may affect the entire DNS. They are prohibited from making decisions for their personal benefit. The potential conflict must be disclosed and then the Board can determine whether that conflict can be resolved or waived. That is a different situation than what the Code of Ethics seeks to achieve.

3. In fact, the code does not provide any background information or materials that identify the specific problem it is trying to solve or how any proposed solutions will be enforced. The vagueness of the language, if applied to the ALAC, would result in an absurdity requiring each ALAC member to disclose each individual Internet user for which they are the voice. If the language were applied to an association or membership organization, then they would have to release the names of individual members which is contrary to privacy laws. This has both practical and legal consequences and evidences the need for a multistakeholder approach to this issue rather than a poorly drafted document handed down by Staff.

4. The Code of Conduct significantly inhibits representation by an attorney. Many jurisdictions mandate strict attorney client confidentiality. In the United States, for example, a core right is the right to attorney-client privilege which includes the right of a client to not disclose they are represented by counsel[1]. Other examples include United Kingdom law[2], French law[3] and Indian law[4]. A broader global survey would reveal more.

5. The often-argued response of having attorneys not participate if they fail to uphold their ethical duty to their clients effectively vitiates the human right of representation by counsel and is not for the public benefit. ICANN has agreed to uphold human rights and therefore counsel cannot be compelled to disclose client identity. Such action would not only violate ethical rules but would effectively eliminate clients' ability to have an attorney guide them through the ICANN process. A process, we note, which is notoriously technical and requires expertise. Forcing the client to consent to their identity to be disclosed undermines the privilege and has the potential to put the client under extreme competitive disadvantage. The is particularly true for clients who may be formulating business strategies based on ICANN's policy outcomes including, but not limited to, the allocation of domain names.

6. The Code of Conduct violates section 1.2(a) of the bylaws "commitments and core values" which states:

> "In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent

processes that enable competition and open entry in Internet-related markets."

7. As noted above, the proposed rule eviscerates the centuries old concept of attorney-client privilege. That is the opposite Section 1.2 (a) requirement of conforming to relevant principles of applicable local law. Second, requiring client identity to be disclosed would effectively eliminate competition in the new gTLD space since the disclosure of new or anticipated market entrants would subject them to gamed competing applications and ICANN auctions of last resorts.

8. The Code of Conduct effectively vitiates the human right of representation by counsel and breaches section 2.3 of the bylaws which prohibit discrimination. As set forth in Section 2.3, "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

9. The Code of Conduct's clause titled "When Disclosure of Interest Cannot Be Made" includes attorney/client relationships. This clause effectively eliminates attorney representation and participation when it concludes: "In these and similar situations, withholding relevant information about the interests involved in the deliberations could impair the legitimacy of ICANN's processes. When disclosure cannot be made, the participant must not participate in ICANN processes on that issue."

10. The clauses within the Code of Conduct are drafted utilizing vague language which will open it up to gaming or weaponizing. It simply has not been thought through. Specifically, the language of "interests influencing their participation" is incredibly broad. Most participants have numerous "interests" influencing their participation including life experiences in general, current, and past job roles, participation in ICANN itself, etc. If one really thinks about this, it would be almost impossible to accurately list every single "interest" that is influencing them. This broad language combined with the penalty of exclusion from ICANN is unworkable.

11. There is no enforcement mechanism. ICANN has no tools in its toolchest to compel disclosure of client identities in violation of ethical rules. ICANN should not adopt any mechanism that it cannot enforce.

12. The collaboration of the participants in the ICANN community expressing their varying interests has created a generally collaborative environment with some notable successes. Mandatory disclosure of client identity not only strips away an important right to competent counsel, but it also impacts consultants with the specialized knowledge that is required to function well in the ICANN space. It is not unusual for an ICANN specialist to carry a diverse portfolio of clients. It is up to the professional to disclose to each client any potential conflict that they may have due to representing another client. However, that is to

protect the client's interests not the professional's. The heart of the ethics rules is about the client.

13. Forcing the client to disclose their identity to third partes does not necessarily benefit the client. It is the client's right to determine whether disclosure is warranted. They should not be punished if disclosure runs against their business objective. Choosing between disclosure and competent representation by an attorney or a consultant creates an adverse environment for negotiation in a sphere such as ICANN. It discouraged participation in the MSM.

14. Finally, we address the point raised by others that these rules mirror what is required of those who advocate for others before governmental legislatures or courts. This rule has no comparison to lobbying, regulatory, or court rules. ICANN is not a governmental entity. ICANN itself emphasizes that it is not a regulator. References to lobbyist rules is a non sequitur in this context. Complex national and local rules and regulations concerning lobbyists and advocates have been developed over decades. Here we have a single, broad edict to "disclose interests influencing their participation" which as noted above is vague and likely impossible to define or enforce.

III. Conclusion

The IPC understands that ICANN is engaged in a bona fide effort to promote transparency and ethical conduct with ICANN's Multi Stakeholder Model. However laudable the intention, this effort lacks the required specificity and enforcement mechanisms to form a workable policy. Further, the language of the policy violates ICANN's by-laws and the right to representation by qualified counsel and other professionals in complex business transactions. The IPC stands ready and willing to work with the ICANN community on strengthening ethical guidelines that are appropriate, compliant with ICANN's bylaws, and have meaningful impact.

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[1] See ABA Rule Model 1.6
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/

[2] The Solicitors Regulation Authority (SRA) Code of Conduct (Rule 6.3) prohibits the disclosure of client information, including the client's identity, **unless the Client provides explicit consent** or there is a clear legal basis.

[3] In France, professional confidentiality (or "secret professionnel") is a public policy principle, primarily designed to protect the confidentiality of the attorney-client relationship. Codified under Article 66-5 of the Law of 31 December 1971 and Article 2.1 of the National Internal Regulations of Lawyers (Règlement Intérieur National des Avocats, RIN), this duty is characterized as "general, absolute, and unlimited in time." **Lawyers are bound to uphold confidentiality unconditionally, even when the client consents to disclosure.** This obligation transcends the client's wishes and imposes a significant ethical responsibility on the lawyer. The recent Decree No. 2023-552 of 30 June 2023 reaffirms and clarifies the guiding principles applicable to attorneys in their interactions with clients, colleagues, and other parties. This decree implements Article 53 of the Law No. 71-1130 of 31 December 1971, as

amended by Article 42 of Law No. 2021-1729 of 22 December 2021, which aims to build public confidence in the judicial system. The decree reiterates that professional confidentiality is public policy-based, absolute, general, and perpetual. **Lawyers are prohibited from disclosing any information protected by confidentiality in any context, with exceptions only in cases of legal authorization or when disclosure is necessary for the attorney's defense.**

[4] Attorney-client privilege is a cardinal principle governing the relationship of lawyer and a client under Indian law. Section 126 of the Indian Evidence Act, 1872 **("Evidence Act")** prohibits attorneys (except in certain provided exceptional situations) from disclosing any information or document shared by a client during the former's employment. Section 127 of the Evidence Act extends Section 126 to interpreters or agents of attorneys, who are subject to the same restrictions and are entitled to the same immunity. Based upon this provision, the Bar Council of India has laid down Rules on an Advocate's Duty as per which "An advocate should not by any means, directly or indirectly, disclose the communications made by his client to him. He also shall not disclose the advice given by him in the proceedings"