BECKY BURR: Okay. We are essentially Avri and David and Becky in terms of the working group members, so we'll just plunge in and see what we can get accomplished. But I'm a little concerned regarding what we'll be able to take away from this. We may have to report out to the working group on our discussion and see if we can move the ball forward.

The first thing I want to talk about is that Sidley has raised a question about the definitions of covered action and dispute. Typically, the question is we need to consider whether those two definitions are either coterminous or circular. I really don't want to leave us with a situation where we have that problem, although I read it and the issue didn't jump out at me. So I wonder if Holly or Dave or Ed could tell us what the concern is.

HOLLY GREGORY: Sure. This is a note that I made, and I haven't really had a chance to discuss it with Ed. Covered actions, according to this, are any actions or failures to act by or within ICANN, committed by the Board and other folks that are listed, that give rise to a dispute.

When you get to the definition of dispute, it's more specific. It's a claim that a covered action – and then, again, constituted an action or inaction that violated ICANN's Articles of Incorporations or Bylaws, including – and it gives a list.

My question really is that language in the definition of dispute, that it's a claim that a covered action constituted and action or inaction. I don't think we need the language "constituted an action or inaction" because

that's part of the definition of covered action. A covered action is an action or inaction by one of these people that gives rise to the dispute.

So I'm not sure why we're repeating it there, and I [move] that we take out just under disputes – it should simply read "claims that covered action violated ICANN's" – a dispute of the claim that a covered action, meaning an action or inaction, that was done by one of these actors, that violated the articles or Bylaws.

So I just thought that language – "constituted an action or inaction that" – within the definition of dispute was redundant or [inaudible] circular or something.

BECKY BURR: That makes sense to me. I agree we don't need the "constitute an action or an inaction." I think, unless after further thought we have an objection, that from ICANN Legal we should probably do that.

HOLLY GREGORY: Okay. Thanks.

BECKY BURR: Take out "claims that covered actions violated ICANN's Articles of Incorporation or Bylaws."

HOLLY GREGORY: Right.

BECKY BURR: All right. Great. The next issue has to do with the proposed modification where the new rules would apply if they come in, but somebody could make the case that they would be harmed by that. ICANN has suggested it's premature to make this kind of issue. David, I think you had a comment on this and suggested essentially that the old rules continue to apply, unless a claimant made a substantive claim that they would be harmed by that, which I also felt was sort of an intriguing potential resolution.

I don't know if you guys can see when I make my screen bigger, but I'm going to make the comments a little bigger here. I think that what ICANN is saying – I failed to do that entirely – is slightly different in the sense that this would invite – what they're saying is the rules that were in existence should apply, period.

I think that we have to have something to address the rule change. I sort of like the approach that David suggested, which was essentially that the rules would not change, but a party would have the right to say that they were being substantively harmed by not being able to use the new rule.

To me – David, I see your hand up there.

DAVID MCAULEY: Well, yes. I was just going to say, Becky, that that's pretty much what I was suggesting. When I read Sam's comment, I tended to agree with it, so my suggestion was, "Okay. Why don't we just turn this on its head and say the former rules apply, but a party could seek to apply the new rules, and if it was just impracticable, the panel could agree to do it." I

looked at the Federal Rules of Civil Procedure in the United States. When the Supreme Court adopts new rules – in the most recent iteration when they adopted new rules, they use that phrase: "just impracticable." They basically said the new rules apply for things filed hereafter, unless it's just impracticable to apply them to pending matters.

So I basically agreed with the comment and suggested that maybe we could just reverse this and still leave a way to apply new rules if that could be done fairly. Thanks.

BECKY BURR: Thank you. Amy or Kate or Sam, my sense is that you're concerned about changing rules which could then change again sometime down the road. But I think, one way or another, we either have to say – I just think that we're going to get arguments about this no matter what.

I wonder if there is some way of limiting this to essentially substantive rules and getting rid of the five extra pages of arguments over five extra pages. I think that we're talking about if they're substantive rights are impaired, if there is some way that we could phrase the language to really limit the application of this to important substantive rules as opposed to the five extra pages.

HOLLY GREGORY: This is Holly, and I'm apologize, Becky. I can't raise my hand because I'm only on the phone. I thought we had fairly good agreement that, as to substantive rules, it needed to be on a going-forward basis because

that's a change in the law, right? And substantive rights arise. Very rarely would you hold them to apply to behaviors retroactively, if at all.

But procedural rules sometimes make sense to apply looking in the back, in the rear-view mirror. I like David's solution as to procedural rules, that the former rules will apply unless the party is disadvantaged or [inaudible] to the language [inaudible] impracticable to apply.

Maybe what we should do is try to formulate that and put it in and then see if Sam and Amy in the ICANN Legal and [inaudible] people can live with that.

BECKY BURR: Okay. I will take that as a good suggestion unless anybody has a change.

Good morning. I see Kavouss has joined us. Is Tijani on the phone? I don't know. I thought somebody was doing a call up for him, but we may not have reached him.

Okay. Let's try to do that: draft that up and see if that solves the problems a bit more.

Okay. Footnote 16 – I just wanted to get to where that comes up – the IRP Panel will comprise three panelists elected from the Standing Panel, unless not in place. The note we have here is that there's been discussion about whether it makes sense to require disclosure to be formed when a person is appointed to the Standing Panel and when that person is selected for a particular IRP. The suggestion is that we add language that says a Standing Panel member's appointment will not take effect unless and until the Standing Panel member signs a notice of

Standing Panel appointment, affirming that the member is available to serve and is independent and impartial. The IRP Panel member's appointment will not take effect unless and until the panel member signs a notice of IRP Panel appointment, affirming that the member is available to serve and is independent and impartial.

I see Kavouss's hand, and then Sam.

Kavouss is asking for a dial up, I believe. Samantha?

SAMANTHA EISNER: Hi, Becky. I actually wanted to just revisit the last issue we were talking about. We're happy to take a look at the language that Holly said her opinion [through] looking at – and evaluate that. I think we'd also probably want to run the procedural issue through the ICDR as well and just get their inputs on whether that's something they're used to doing and how they would see that, too. When we get that language, we would forward that over to the ICDR.

BECKY BURR: Okay. Great. That's fine. I see David has said that he suggests Footnote 16 is a good idea. "It makes sense to me that we would have an affirmation of independence on a case-by-case basis because obviously the conflicts might arise on a case-by-case basis. So that seems like a good idea to me."

Okay. Moving along –

HOLLY GREGORY: Becky?

BECKY BURR: Yeah?

HOLLY GREGORY: Again, I apologize for interrupting. Before we leave that page, I had an issue that I just wanted to raise. On Page 4, we talk about language that's changed to talk about when an independent review has commenced, and then on the next page, under Section 4, the time for filing.

I'm wondering if we need to add some kind of definition about what it means for something to be commenced. I understand that it's when the claimant shall file the written statement of the dispute with the ICDR. I think that was clearer in the old language. I'm not opposed to using the words "commence" instead of "received by the ICDR" on Page 4, but I think we need to tie those two concepts together clearly.

BECKY BURR: Okay. I noticed the same [panel] appointment. Yeah, if there's ambiguity in that, we should think about it. In this particular case, what we're saying is that it will not –

ED MCNICHOLAS: My sense is that that's clear in the Bylaws. I'm trying to find a provision but I thought the Bylaws were very clear about that. What they actually meant is in the Bylaws.

HOLLY GREGORY: Yeah. I think so, too. I just think we need to make it as clear in the rules. I thought it wasn't clear. I thought it was more clear when we used the language in the last draft. "A request for an independent review is received by the ICDR." I believe ICANN suggested that we change that language to "commence." I just want to tie to the language "commence" into [inaudible] in Section 4 so we have it clear.

BECKY BURR: Okay. That's fine. I think we all agree that the fees have to be paid forth things to commence.

Okay. The conduct of the independent review. Again, this is an issue that we've talked about a couple of times. I think the group last week said that we wanted to put in this concept that it's in the best interest of ICANN community to resolve these issues expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process. So it's getting in the concept that that would need to be balanced, that the panel would conduct its proceedings by electronic means to the extent feasible, and where necessary, there could be telephonic or video conferences.

The language that we have here I think really comes closer to responding to the concerns that ICANN has raised. It retains the notion that an in-person hearing would be allowed only in extraordinary circumstances, where the IRP Panel determines that an in-person hearing is necessary for fair resolution of the claim and/or an in-person hearing is necessary to further the purposes of the IRP, and

consideration of fairness and furtherance of the purpose of the IRP outweighs the time and financial expense.

I see that ICANN is still objecting to this language. Avri?

AVRI DORIA: Thanks. I guess I'm a little concerned about us narrowing the what and the who that can appear at a hearing. If the circumstances are indeed extraordinary – and I understand that, though I assume we're leaving it up to the panel to decide that these are extraordinary circumstances – then the limitations on what that can be about and who can be asked to appear at that meeting seem to me wrong-minded, to put it bluntly. If you have an extraordinary circumstance, you have something in which you may need to have witnesses and question the testimony of experts and witnesses spoken of; if, for example, there's a situation where the appellant just believes that they're not being understood and it really gets to an extraordinary impasse where it is.

So I think that calling it extraordinary is fine. Limiting what it can do within the bounds of the IRP and limiting who can be asked to appear is problematic, in my view. If it isn't an extraordinary circumstance, the members of the panel should be able to decide who they need to talk to and who they need to hear from, and about what. Thanks.

BECKY BURR: Okay. If I could just clarify that, Avri, you're okay with the description of it as extraordinary and for the IRP Panel to make a determination that it's necessary for fair resolution of the claim. But what you're concerned

about is the – I'm not sure what the language of that "limiting who can appear."

AVRI DORIA: Okay. Partly it starts out just "an in-person [inaudible] to further purposes and consideration." So I think that that is fine. The notion that it has to outweigh the time and financial expense is okay, fine. Obviously if it's an extraordinary need, they should be able to show that, though I'm not really sure that I see the need for that extra wordage. If it's an extraordinary need, it's an extraordinary need. And brining money into it at that point becomes a due process question of: do we weigh financial burden in terms of this to be more important than the issues of due process and justice within the appeal?

The second part of my thing goes to the next, which basically says it's "limited to argument only. Witness statements must be submitted in advance." Now, maybe I was misreading that to say, "And therefore witnesses weren't invited to this." If I'm misreading that, then obviously my objection is not well thought out. Thanks.

BECKY BURR: Yes. This is the status quo also: any witness statements must be submitted in advance. But there's no prohibition of having witnesses, although the – yes, go ahead.

AVRI DORIA: Okay. Can I say something about the status quo constraint that we've got? I understand that we're building on what exists, but I do not

understand – I've heard it a couple times now in the last conversations – why always it's "This is status quo. Therefore we are not changing it," as opposed to "Okay. This is status quo. It's a starting place for discussion." I don't understand this trumping effect that status quo has in our discussions here. Thanks.

BECKY BURR: Thank you, Avri. Just to be clear for my purposes, I was describing status quo as a statement of just what the situation is here and certainly not as a trumping statement because, if we were going with status quo, we wouldn't be changing anything. So I totally hear you on that.

David, you have up your hand. Then I want to see if we can tease out the substantive concerns that Avri is expressing.

DAVID MCAULEY: Thank you, Becky. In a large part, I believe that I agree with Avri. As I read them – I think they're Sam comments – over the weekend – I'm reading this a lot as we get closer to August 12th – it occurred to me that what we're searching for are the words to describe extraordinary circumstances. I think we all agree that in the ordinary course, there's not going to be hearings. There's not going to be depositions. There's not going to be this, that, or the other thing, and I think that's the approach that we have to take.

But I do think that there has to be some leeway for the extraordinary case, and we need to come up with the words that impart to the panel: "This is not a routine thing. You can't simply turn to this whenever you

want to." Maybe drafting notes. Sometimes, like in the federal rules, there's drafting notes to the people.

One of the things that we need to keep in mind is the context in which these are going to be applied. We are constructing what I think, in my opinion, is a very fair IRP process. Panels have been issuing rules up until two days ago under circumstances where I think a lot of people believed "This is not a fair process." So elbows tend to come out and push sideways because people are operating in a system that many think is unfair.

That'll change, and I think the application of the rules will settle down because we'll be in a new context. So I hope we keep that in mind as we do this.

So in large part, I believe I agree with Avri. Now, Avri, I have to say I didn't understand your point about money. I'd be interested in what you're saying. I do believe that the parties have to be responsible for their costs, and if there were hearings and things like that, no one should turn to ICANN and say, "This is your obligation to pay for this," other than what ICANN typically pays for anyway. At least that's the way I see it.

Anyway, thank you, Becky. That's my opinion. Thank you.

BECKY BURR: Okay. Thank you, David and Avri. I guess I don't read the language here as saying, "You cannot have witnesses in a hearing." First of all, I think that there's a question about, "Okay. We're trying to define what extraordinary circumstances are to help the panel to determine when

an in-person hearing is appropriate." I'm not hearing substantial objection to the language that describes that.

To Kavouss's point, this is not a question about whether a case is extraordinary. The issue here is that we would like generally for the IRP processes to be conducted through an exchange of documents, telephonic or video [inaudible] processes. But in an extraordinary circumstance, there could be a face-to-face meeting, a face-to-face hearing. That's what we're talking about.

Then the question, Kavouss, is: okay, well when is it an extraordinary circumstance, and how do you decide whether that is? So we provide a definition that says it's necessary for the parties to have a face-to-face hearing in order to fairly resolve the claim, that that face-to-face meeting will further the purposes of the IRP, and that the fairness issues outweigh the time and expense. So a balance sets.

So we say to the panel, "You're going to decide whether an in-person hearing needs these tests if a claimant or ICANN asks for an in-person meeting." I think the answer is that the panelists apply the definition that we've put in here to make a determination about whether a face-to-face hearing makes sense.

Then it goes on to say that the hearings are going to be limited to argument only. All evidence, including witness statements, must be submitted in writing in advance.

Now, this does not preclude putting on witnesses for the purpose of making the argument. I don't know whether it constrains in any

meaningful way the ability to include a witness in the hearing, but that's what I thought Avri's concern was. I'm not seeing how it does that.

Sam?

SAMANTHA EISNER: Thanks, Becky. I think you've been talking a bit about it, and I think David raised a really good point, that one of the things that we're really struggling with is getting some more information in here about what extraordinary circumstances mean and how that can be considered and what type guidance there is to provide that.

As I look at this, I see that one thing that we don't really have explicitly in here – I think the first statement should be that there's a presumption that all these should proceed without a live hearing. That would further support the extraordinary circumstances. But I think that we need to really start thinking about what we mean about extraordinary circumstances and how we can build out that sort of drafting note for guidance that David was talking about.

Is it matters that are of a certain level of complexity? It shouldn't just be about whether or not a witness feels that they haven't been understood well or not because that's their job in laying out their case. But if there's something that has such complexity in the matter that warrants it to be in front of the panel, is there a guidance we can give on things like the number of days that should be allowed? No one would want this to be a two-week hearing, right?

If this is about, for the most part, a violation of ICANN Bylaws, those things should be hopefully pretty straightforward. Of course, there's

issues that surround it, but also there should guidance on number of witnesses, making sure that, if there is live witness testimony, it's limited to the items that were within the papers that had previously been provided, etc. And try to give some guidance in how to, first, identify extraordinary circumstances and then the types of things that we would expect to then focus on that efficiency aspect of it so that it doesn't become a full-blown trial at every point.

BECKY BURR: I understand and agree with what you're saying, although I do sort of feel like we are saying what an extraordinary circumstance is and that it is definitely consistent with what the group I think pretty strongly felt like last week: an in-person hearing is necessary for a fair resolution of a claim. That was the most important thing that people said.

Now, what's obviously necessary is a fairly high bar, and we talked about that in particular. So I guess I'm having a little trouble understanding. And I have no problem at all – and I think David is saying the same thing – with a presumption that there wouldn't be a face-to-face hearing. That's okay. I don't have a problem with that.

But I think that, necessary for a fair resolution of a claim, taking into account the purposes of the IRP and balancing additional time and expense seems to me to be quite a workable test.

I see your question, Sam, or your comment that "necessary doesn't help explain why it's necessary," but if it's necessary for a fair resolution of the claim, I'm not sure why we care why it's necessary, if you can't have

a fair resolution of the claim without it. That seems to me to be quite straightforward. It will be a determination by the panel in this case.

SAMANTHA EISNER: Becky, this is Sam.

BECKY BURR: Yeah. Go ahead.

SAMANTHA EISNER: That's a new hand I just put up.

BECKY BURR: Sorry. Go ahead.

SAMANTHA EISNER: I think that we're almost saying the same thing, but the concern that we have from the ICANN side is that, once there's a panel that says that a hearing is necessary, we need to make sure that there's enough information in there about why it's necessary so that it doesn't become then the presumption of "all future cases." There has to be some requirement of what it is that would be shown to say that it's necessary. We need to make sure that this isn't drafted.

This is really where ICANN concern comes from. We understand. We've been in the position before where panels have ordered hearings, and we need to make sure that it doesn't become the presumption and that it really is reserved for extraordinary circumstances. Just telling a panel

that a claimant, for example, says that it's necessary isn't enough to actually deem something as necessary.

But what types of things could rise to the level of necessary? I think that's the type of information that we think that this could really benefit from so that– and this would be something actually to the detriment of the entire ICANN community – each IRP doesn't become a week-long hearing. That's unsustainable. ICANN's whole budget could go to IRPs if people choose to bring them for that.

So I think we do need to really provide some input as to what would give rise to that so that, once the first person says, "My pretty run-of-the-mill claim actually requires this extraordinary circumstance being necessary because I want to talk to the panelists and I want them to see me and see that I'm truthful," that shouldn't then become the standard by which everything else is measured. That's really the worry that we have.

BECKY BURR: Okay. I think we all agree that it would not be in anybody's best interest. It would not further any of this to have the default become that there are week-long, in-person hearings.

I just want to make sure I understand. I think there's a three-part test laid out here, and it's not just the claimant or ICANN. Somebody has to make the case in a motion, and the IRP panel has to determine that an in-person hearing is necessary for fair resolution of the claim and that an in-person hearing is necessary to further the purposes of the IRP and

that that considerations of fairness and furtherance of the purposes outweigh the time and financial expense.

What you're saying is, in addition to the three-part test, we need something – I don't know whether you're suggesting that it would be a drafting note – that describes and gives examples of the kind of situation in which this test will be met to guide the panelists? Is that what you're saying? I'm just a little confused about what you're saying here.

Ed?

ED MCNICHOLAS: I just wanted to ask whether or not the development of guidance through case law would be an appropriate resolution here. If we laid out a clear test in the rules and then had panelists expound that over time, that would seem to set things up so that we could have a very strong presumption against more elaborate hearings.

But in those very rare cases where fairness demands something more elaborate, we would have particular guidance and a test in the rules and then cases to explain how that test could evolve over time.

So, essentially, case law as opposed to a drafting note.

BECKY BURR: I think that the concern here is that a case law somehow will default to the other situation, where basically if somebody asks for an in-person hearing, they get it.

Now, I'm not sure I understand how that would happen under the tests laid out here. I think Ed is talking about IRP case law.

So we just seem to be having a dispute about whether this is the high bar or not, and I just want to note Avri's concerns with the balancing test about fairness outweighing the time and financial expense.

But I think that, if we start with an explicit statement like, "Any hearing should be conducted telephonically or electronically or via video conferences," that will be the standard situation, and the presumption would be that that would be adequate. But in an extraordinary situation, where a person makes the case and the panel agrees, the three-part test is made.

At some level, what I'm hearing I think is that ICANN Legal would like a higher bar, but I'm not hearing the words or what other piece could be put into the test to make it a higher bar.

I see your question, Kavouss, and we will get there.

Ed, is your hand new?

ED MCNICHOLAS: Sorry. No.

BECKY BURR: Okay. Sam, could you give some examples of what you might think in terms of initial guidance and what would demonstrate a necessary?

SAMANTHA EISNER: Sure. As I mentioned earlier, I think things like guidance as to whether this is an issue of first impression or something that raises multiple issues or an IRP on multiple different grounds of covered actions might be things that are sufficiently complex that would warrant that an in-person hearing is necessary for a fair and just resolution to help unwind all the different issues.

But on the other side, an IRP that's very similar to one that has happened in the past, even if that one that happened in the past went to a hearing, but is now on the standard precedential ground? That similarity would actually go against something being necessary because the IRP panels have already started developing cases around it.

Those are the types of things that I think we could think about now as saying, "These are things that we can look at today," and say of course they're objective determinations but they go more towards one or the other. We think that it would also be important to not have witnesses or claimants create necessities such as witness information that they hadn't put forward early or something like that, things that could have been handled in papers and warrant those aren't the sorts of things that should rise to the level of necessity, if you could actually demonstrate it within papers and not call for an in-person hearing to handle new information that came up within the proceeding.

BECKY BURR: I certainly don't have any problem with [adding] examples or information to give more of a flavor for necessary if you guys want to draft up some examples of that that might help. Can you guys take a stab at that? I think that would really help us if we can see this.

Now I want to get to Kavouss's questions. One question that he has is who decides if something is necessary or if it meets the test? And I think the Panel determines whether it's necessary or meets the test based on the test here and any other guidance that we provide. He then asks whether it's a majority of the panel or whether it has to be unanimous. I don't think we've talked about that. I think in the ordinary, I don't know. The panel makes those determinations now and I don't know how they normally do it, whether it just comes out as a panel decision. Maybe we can ask ICDR about how they do that.

Likewise, the definition of extraordinary is essentially a situation would be extraordinary if it met the test that we lay out. I think Kavouss, in terms of the criteria that the panel uses to determine whether something is necessary right now is the three-part test that's laid out here, and it may be enhanced by some examples and guidance that Sam and ICANN Legal are going to determine.

Then there is a question I think that Kavouss has about "All hearings shall be remitted to argument only," and maybe Ed or Holly or Sam or Amy can describe what that means and then I just want to touch back again on the issue that Avri has raised regarding the third prong of the test. Ed?

ED MCNICHOLAS: just speaking to the point about argument only, I think the issue there is whether or not live witnesses are actually helpful for the presentation of evidence to the panelists or whether it's seen as something that is not helpful. We would suggest that the direct testimony, that is the

prepared testimony of the witnesses, be submitted in writing as the norm. It would seem that if there is to be anything but written testimony, courts in the U.S. that allow direct submission of direct often will allow live cross examination so that there is some way that a person can be challenged as to their statements so that the parties can bring any disputes about matters of fact very clearly to the attention of the Panelists.

Again, that would be only in an extraordinarily complex circumstance. Normally there would not be a factual dispute, and so entirely written submissions would be much more sensible.

BECKY BURR: Okay, so basically for establishing the facts, written witness statements would be used and there would be witnesses only where there was a dispute about the facts. Is that what that means?

ED MCNICHOLAS: Yes.

BECKY BURR: Okay. Thank you. I hope that that helps, but basically the notion here is that where the facts are not in dispute you don't need a live witness. That can be submitted in writing.

And then I want to go back to Avri's concern about the third prong where "consideration of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of an in-person hearing."

I think on our call last week there was a clear sense, we had competing values here that the IRP process has to be efficient, it has to be accessible from a cost perspective, it needs to reach resolution in a manageable timeframe, and in-person hearings add both time and cost to the process. And so there was a sort of explicit discussion that said that there should be some kind of weighing, and I think the notion here was that people definitely agreed that the cost and efficiency issues shouldn't outweigh the fairness and furtherance of the purpose of the IRP but there ought to be some consideration of proportionality here. And so that prong was meant to say that on balance the fairness and furtherance values outweigh the time and expense of an in-person hearing.

So I think that Avri is saying in the chat that some consideration may be fine, but should not be in equal condition. I don't think that this is meant to suggest that those things could trump necessary and furtherance prongs, and maybe it's just a slight tweak to the language. But I think that the point is that the panelists should look at these things and where it's necessary for a fair resolution of the claim and to further the purposes of the IRP and notwithstanding.

"Consideration of fairness could conclude that fairness is not at risk." David, I'm not quite sure I understand.

Amy, your hand is up.

AMY STATHOS: I just wanted to – I think I've mentioned this on a prior call – just for information only, in terms of the IRPs that we have had to date – and

I'm only talking from ICANN's perspective because we only have real information about what we have spent on the IRPs – where we have had witness testimony and just cross examination witness testimony, the costs have been an order of magnitude higher than if it is only argument at the hearings. Over a million dollars in the two instances where we've actually had witnesses, and in the first instance approximately $2 million that it's cost because of the witness testimony. I just wanted to mention that because I'm not sure if everybody on this call had been on the previous call.

BECKY BURR: Thank you, Amy. David?

DAVID MCAULEY: Thanks, Becky. I just wanted to explain that note I put in chat is I just was saying that I think that test "considerations of fairness and furtherance of the purposes of the IRP outweigh, etc." is not so bad because when people consider whether fairness is at risk, one conclusion is this particular issue really doesn't involve fairness. It's not at risk here. And so that would be a case where time and expense may outweigh or may have to take precedence. It was a botched attempt, but anyway.

Thank you.

BECKY BURR: Right. So we may need to just run this particular issue through one more call. I do think that there was a fairly strong agreement on the last call

that while fair resolution of the claim is the most important issue, that it is appropriate to consider as part of this process the time and financial impact here. So let's note that we still need to discuss this test one more time and we're going to have that opportunity because Sam's going to come back with some additional language that might help provide guidance on the kinds of circumstances where that arises.

Okay. Then moving on to – I am having trouble – okay, so I guess this note 22 goes to the crossed out language "whether" and so here's the example and again this is the is exactly the same kind of language about "The cross-examination of live witnesses shall be allowed only in extraordinary circumstances" – I'm in Footnote 22 by the way – so whether we need to actually have a specific test about cross-examination of live witnesses, and I think we should consider that again if we need to. I don't think that the current language precludes the provision of live witnesses.

I guess one question I have for the ICANN staff is, are you suggesting that the language without any live witness testimony should go back into the, "All hearings shall be limited to argument only. All evidence including witness statements must be submitted in writing in advance without any live witness testimony." And the question I have for ICANN is, is your point that we want to reinsert the prohibition on live witness testimony. David?

DAVID MCAULEY: Hi, Becky. Old hand.

BECKY BURR: Okay, thanks. So I agree the high bar language I think it's very similar to what we just discussed, but I'm not quite sure if the implications of the meaning of the ICANN note in the Footnote is that they would like to reinsert the prohibition on live witness testimony.

Okay, so Sam is saying that that would be their preference.

Okay, so we're going to talk about this at the next call.

Okay. In consolidation of disputes in#7, there's highlighted language, "A claimant may join in a single written statement of a dispute as independent or alternative claims as many claims as it is [has that] give rise to a dispute," and "There's a sentence doesn't quite work. Is a word missing?" I think that's right. If you guys could go back and try to figure out what was trying to be said.

Okay. The next issue, again it's the discovery methods. This very much goes to the same sorts of issues. It starts out by saying, that "The IRP Panel shall be guided by considerations of accessibility, fairness, and efficiency, in its consideration," and then goes on to say, "Upon a motion by one party and a finding that discovery is necessary, that the panel could order a party to produce to the other party documents in its possession, custody, or control, that are relevant and material to the resolutions of the claim and are not subject to attorney client privilege, work product doctrine, etc." So basically this permits a party to basically come to the panel, "describe documents or classes of documents or other information that relate to the matter, make the case to the panel that access to these documents is necessary for the purposes of resolving the dispute," which is the purpose of the IRP. And then the

panel could order that and then "a prohibition on depositions, interrogatories, and requests for admissions."

That's consistent, I think, with the discussion that we had here last week. And it's also consistent as I recall with some of the discussion that we had. I'm just looking at Footnote 33 and trying to figure out – and so I think that this is kind of where we ended up last week, which was to say we should permit discovery of documents that would be managed by the panel, but that we should not permit at this time depositions or interrogatories. So this seems to work that out. David?

DAVID MCAULEY: Thanks, Becky. When we spoke about this last week we talked about the concept of materiality, and I made the point that I thought that was conclusory and should not be included. And it's still included. It's not in the same way. And I agree that in the third paragraph where it says, "The parties should explain why they believe the documents are relevant and material." I think that's fine. In the paragraph before that, it may be fine but it basically talks about documents or electronically stored information that are irrelevant and material.

I just think it needs to be clear that what we mean by material is what someone believes to be material. The test of materiality per se cannot be the test for a document discovery. No one knows what's material until they actually take a look at the document. They can look for classes of documents and say, "I believe these are material," and if they can make that case I think they ought to be able to get them.

Thank you.

BECKY BURR: Okay. And indeed the requirement here is that the moving party would describe the documents or classes of documents or other information sought and explain why this information is likely to be relevant and material to resolution of the dispute. The concern David has is that a judge may order one of the parties to provide documents that are relevant and material. I guess though the judge has to… Sam?

SAMANTHA EISNER: Hi, Becky. I might be going the same place you're going on this. I think the materiality and if those two are making a request for the documents make an assertion of materiality, but it would be the panel that actually determines whether something is material or not.

BECKY BURR: In sense of the panel is going to be making a determination that it's likely to be relevant and material because I think David's point is until you see the documents how will you know whether they are relevant and material.

SAMANTHA EISNER: Right.

BECKY BURR: So I think that the "likely to be relevant and material" – that

The panel determines are likely to be relevant and material is probably the right construction here. Clearly that the panel is going to make a determination based on one party or the other's assertions about it, but the final determination is of relevance and materiality, it seems to me, can't be made until after the documents are produced.

SAMANTHA EISNER: Right.

BECKY BURR: Okay, so I think we agree on that point, and I think we just need to look to align the language in those paragraphs.

I think that brings us to the end of… I just want to go back and make sure we've covered off of…

Okay, so David, you had a couple of suggestions that aren't in the discussion that are not really highlighted here. But I think that your proposal on the interim measures of protection would be that once the determination is made that there should be some mechanism for the other party to go back and say, "Okay, circumstances have changed and this interim measures of protection is no longer needed." So basically, that the other party is given a chance to rebut or overcome that order within a reasonable time. Do you want to talk about that a little bit?

DAVID MCAULEY: Sure. Thanks, Becky. When I read – and I don't have the language right here in front of me – but when I read the original language about

interim relief, the way I read it – and maybe it was just me – is that it could happen ex parte. And I thought, "Well okay. That's fine if it's really urgent." But I thought that if that did happen ex parte the other party ought to have a reasonable chance to step in and say, "Hey, I need to be heard on this," within a reasonable period of time. That's all I'm getting after.

Thank you.

BECKY BURR: Okay. That seems reasonable. Sam?

SAMANTHA EISNER: Sorry, old hand.

BECKY BURR: Okay. So in 11 in the standard of review, David raised a question with respect to Paragraph D. David, do you have a new hand?

DAVID MCAULEY: It was, Becky. I was just going to ask you if you wanted me to run through a couple of those things just in a summary fashion.

BECKY BURR: Yes, that would be great if you would do that.

DAVID MCAULEY: Okay, thank you. I mentioned under Paragraph – we don't need to go there right now – under Paragraph 3 under the composition of an IRP Panel, there currently was language that included that the panel should have "or the requisite diversity of skill and experience needed for a particular IRP proceeding," and I thought that particular language might invite challenges and I wondered if we could just strike it out. So that was one thing I put on the table.

Let me just go quickly through here. Okay, that was covered.

SAMANTHA EISNER: David, I'm sorry, which section were you just talking about?

DAVID MCAULEY: Number 3, it's called Composition. I don't have it. Oh, there it is. It was Composition, Sam.

Becky, you just raised the one about Paragraph D in Section 11. My thought, I wasn't sure it was ICANN's briefs that we were going to be concerned with.

And then finally, one thing I had a concern with is with respect to Paragraph 14: "Appealing a Decision to the Standing Panel." The way we have it drafted now is, "An appeal to the Standing Panel would exclude from the Appellate Panel the three members that sat on the IRP Panel," below it. I just don't understand that. Why shouldn't they be able to sit on an appeal? These are not juries; these are supposedly objective arbitrators that can easily consider what amounts to a reconsideration request.

That's the nub of what I was raising. Thanks, Becky.

BECKY BURR: Okay. I think to me that one could go either way in terms of the composition of the IRP Panel. I don't have strong views on it one way or another. Kavouss?

KAVOUSS ARASTEH: I'm sorry, Becky, I did not follow the comments of David. He talk about Section [D]. I didn't found the sentence that he wanted to be deleted. He talk about Section 11. I didn't follow what he wanted to say. And he talk about Section 14. I don't know, maybe it was meant something else. I didn't follow it at all. Could he goes to the section, [call it] Section 3 and exactly tell what he does not wants to be included. Thank you. And so on for 14, what he added or deleted in 11. So I didn't follow all these three things because it was back and forth and was unclear.

Thank you.

BECKY BURR: Thank you, Kavouss. And might I suggest as we're getting to the end of our time here, David also sent a note out to the entire group with each of these items outlined. I think we'll probably need to talk about each of these, although I think the question on 14 which we are on right now is that it basically says an appeals panel – an IRP Panel decision – will exclude – will not include – members issuing the IRP Panel decision. And the question is why are we doing that? Is it okay to include members of the Standing Panel in and on bank when the full appeal comes into play,

after all they will have some understanding of the details of the case that they can bring but in general they would be a minority of the on bank group, so that it might make sense to include them. I think that is a question that's been placed on the table right now.

Sam?

SAMANTHA EISNER: Sure. I just wanted to give a little bit of background from where that limitation came from. Amy and I had an initial conversation with the ICDR contact that we work with and we were talking to him about the potential for appeals, etc. He had actually suggested that limitation of – given that we were having a Standing Panel – to exclude those panelists that had already heard the case from that panel. We were carrying over that thought. If I recall, he was relying on some other experience that he had had within the ICDR. I think it is something that could go either way. This might be something that we want to take back to the ICDR for Best Practice recommendations as well.

BECKY BURR: Okay, that makes sense to me. David?

DAVID MCAULEY: Thank you, Becky. Two matters. First with respect to the excluding the panelists from below, I would disagree with the person at the ICDR. That may work for them but it seems to me that when a panel issues a decision and a claimant or ICANN has one down below, I don't know why they would give that away on appeal and go to basically what's

almost like a de novo trial with the other four members, I just don't understand it. And I would mention that at least in the United States – courts may vary around the world – but at least in the United States in the Federal courts, Federal judges, three judge panels, sit on the end bank panel that hears appeals when there's end bank appeals. And I think that's a good practice. It seems to work.

The second thing is with respect to Kavouss's question, I unfortunately have to leave this call five minutes early. I will send Kavouss a mail and try and explain myself a little bit further, more clearly, in the next couple of days.

But I'm basically right at the cusp of leaving the call in the next couple of minutes. Thank you.

BECKY BURR: Thank you, David. Yes, and we're trying to get through this. Kavouss?

KAVOUSS ARASTEH: Yes, Becky. I'm very sorry. I have a general question. And my question is that what we are doing is implementation of the IRP. It means that we must remain within the envelope and limit of what is in the Bylaw. We should be ensured that we would not add something which is not foreseen or was not accepted, or we do not delete something that was discussed and agreed. Usually the rules – were they supplementary or any other rules – is written for one – provide details of implementation for the people who execute the rules, or to clarify any point which was

not clear in the basic law, whatever it was. Whether it is the Bylaws or whether it is any other regulations and so on, so forth.

I think that we are going much beyond that. We try to add something and to expand something which may run risk of into the risk of going beyond of what was really meant by that. How you could ensure that we remain within that limit?

And then the second question that what would you do with this supplementary rules? Does it goes for any comment from any public or any community, or these 14 people that only three people or two and a half people speaking and remaining people are almost silent would draft everything for implementation of such a very, very, important and complex. Could you kindly clarify that for me?

Thank you.

BECKY BURR: Kavouss, we absolutely cannot do anything that is inconsistent with the recommendations of the CCWG or the Bylaws, you are absolutely correct on that. The charge of this group, however, is slightly broader in that the recommendation of the CCWG contemplated development of detailed rules of procedure for the IRP, and that is what we are charged with. So we definitely have a [role] and that's what we have been working on for many weeks now in filling out gaps in those rules.

With respect to the supplementary rules, what we are doing here is simply ensuring that we have a set of rules that match the requirements of the recommendations, the CCWG final report, and the Bylaws, for

October 1st when the transition takes place. Notwithstanding the fact that we know that there is in some places a much deeper dive and we need to constitute the panel and create the detailed rule book from that. But what we're doing now is looking at the ICANN Supplementary Rules and conforming them to ensure that we have a compliant rule book. But in doing that, we need to obviously make sure that we're consistent with the Bylaws.

The notion is yes, this will go to the CCWG and it would be issued by the CCWG for comments, although these are ICANN rules and ICANN would adopt them. So we don't have a requirement but consistent with our practices we would put them out for comment. I think that should answer your question, Kavouss, but I'm not sure.

Okay, so I'm going to go back over my notes. I think that there are some areas where we need the lawyers to take a look at drafting glitches that we've identified. There are a few other tidying up things. Sam is going to provide some proposed guidance in terms of how we should understand necessary in the context of face-to-face hearings, and then we will go through hopefully a smaller list of issues in the meanwhile.

I do want to report that David kindly drafted up a first draft of a call for Expressions of Interest for panelists, which I will shortly circulate to the group and hopefully we will also be discussing that shortly. At this point I'd like to plan on having a call next week, but I'm going to reach out to all of the members of the working group because as Kavouss noted, this was a rather lightly attended call and so we need to make sure that we have more of the group on the call. Yes, Kavouss?

KAVOUSS ARASTEH: Just one small request. Is it possible that Secretariat Brenda or anyone kindly provide us – the whole people, not only the IRP and IOT, but the whole CCWG – a weekly program of all meetings because there are so many meetings, and some of us are involved in many. Sometimes we really forget where we are and how we are and sometimes we miss. I miss your meeting [as] the first 10 minutes because I ignored unfortunately mistakenly that you have this meeting. Is it possible that instead of having a long-term meeting plan for September and so on, so forth, have at least weekly meetings schedule or 15 days schedule in order to put it in our table or in our memory and we will prepare for that. Is it possible that, I'm sorry it may not involve you, but it is a question that is to the Secretariat. Is it possible to do that?

Thank you.

BECKY BURR: Thank you, Kavouss. Brenda has included a link to meetings, and I believe that there are calendar invites sent out for all of the meetings. But I know this is going to get very complicated with all of the working groups and the like, so I will certainly also look at that issue. Bernie?

BERNIE TURCOTTE: Actually Kavouss, we are developing a master schedule for the CCWG. We're already populating it and should be releasing it in the form of a Google sheet and basically it lists the days and we basically agree that there are three time slots where staff can support each business day for

meetings. And so we've got the meetings listed in there. Ideally, if the IOT could fall into those time slots that would be ideal, and these are 05:00, 13:00, and 19:00 UTC until we revert back to Daylight Savings Time.

So the announcement of that should be coming your way very soon, Kavouss, and should meet your requirement we hope. Thank you.

BECKY BURR: Okay, thank you very much and I will take a look at those time slots as well.

Alrighty, we are at the bottom of the half hour or whatever it is. Thanks to everybody, and I will be circulating revisements and we will talk next week.

[END OF TRANSCRIPTION]