

# IRP IOT – moving toward first reading of DISCOVERY, EVIDENCE, STATEMENTS issue

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*Tue Oct 24 18:20:10 UTC 2017*

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Dear members of the IRP IOT:

This email below from Liz presents the latest draft on getting this topic to first reading.

Below Liz's mail is my original mail on the issue.

As a little additional context, we are discussing here the rule as contemplated by bylaw 4.3(n) (iv) (C) and (D), which state:

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements: ...

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN's Response;

(D) Availability and limitations on discovery methods; ...

(Note - we have split out the topic of "Hearings" for separate handling.)

These rules deal with what the parties can do. We are not discussing the panel's right to request additional written submissions from parties under bylaw 4.3(o) (ii).

Please consider and agree to the mail Liz sent either on list or on our next call (Nov. 14 at 19:00 UTC), or if you suggest a change please provide specific language and rationale.

Many thanks and best wishes,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

From: Elizabeth Le [mailto:[elizabeth.le at icann.org](mailto:elizabeth.le@icann.org)]  
Sent: Tuesday, October 24, 2017 1:18 AM  
To: [iot at icann.org](mailto:iot@icann.org)  
Cc: McAuley, David <[dmcauley at Verisign.com](mailto:dmcauley@verisign.com)>  
Subject: [EXTERNAL] Re: [IOT] Discovery, Evidence, Statements issue  
discussion IRP IOT call Oct 5 (19:00 UTC)

Dear IRP IOT members,

During our call on 5 October 2017, ICANN organization raised some concerns regarding the proposed addition to Rule 6 in so far as it may be inconsistent with the rule on joinder. As promised, below are our proposed amendments to the current version that was circulated by David on 4 October. David's proposed additions are in red and ICANN organization's proposed revisions are in blue. Also, during the call, Kavouss raised some concerns about page limitation for supplemental briefing and David asked that we attempt to capture and address this concern in our proposed amendments. The following includes ICANN organization's suggestion on page limitation for additional written submissions.

#### 6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the Claimant's Claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties. In addition, the IRP PANEL may grant a request for additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other persons or entities that meet the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, parties upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages.

Best regards,

Liz

Elizabeth Le

Associate General Counsel, ICANN

From: <[iot-bounces at icann.org](mailto:iot-bounces@icann.org)<mailto:iot-bounces at icann.org>> on behalf of "McAuley, David via IOT" <[iot at icann.org](mailto:iot@icann.org)<mailto:iot at icann.org>>  
Reply-To: "McAuley, David" <[dmcauley at verisign.com](mailto:dmcauley@verisign.com)<mailto:dmcauley at verisign.com>>  
Date: Wednesday, October 4, 2017 at 5:24 AM  
To: "[iot at icann.org](mailto:iot@icann.org)<mailto:iot at icann.org>" <[iot at icann.org](mailto:iot@icann.org)<mailto:iot at icann.org>>, "[aloup at usc.edu](mailto:aloup@usc.edu)<mailto:aloup at usc.edu>" <[aloup at usc.edu](mailto:aloup@usc.edu)<mailto:aloup at usc.edu>>  
Subject: [IOT] Discovery, Evidence, Statements issue discussion IRP IOT call Oct 5 (19:00 UTC)

Dear members of the IRP IOT,

Let's address the public comments on Discovery, Evidence, Statements on our call this Thursday (19:00 UTC).

Background.

The public comments in this area are shown at the bottom of this mail.

The Draft Updates to ICDR Supplementary Procedures[icann.org]<[Other sections are relevant as well, such as section 5 \(Conduct of the Independent Review, pages 6-7\).](https://urldefense.proofpoint.com/v2/url?u=https-3A_www.icann.org_en_system_files_files_draft-2Dirp-2Dsupp-2Dprocedures-2D31oct16-2Den.pdf&d=DwMFAg&c=FmY1u3PjP6wrcrwl13mSVzgfkbPSS6sJms7xcl4I5cM&r=3mBfUTvyfqDEumrbzweVIA6qFyeEmDaNE5eHQf9QFdU&m=isNrHaGWPuOK7Q8EC8td30qRmee0LdKO_29uN_4Anwc&s=QELgIUuK8j9P3W-n7pZHTX8nH8tkix_KWKmm4TPa1-0&e=> address Written Statements in section 6 (pages 7-8) and Discovery Methods in section 8 (pages 8-9).</a></p></div><div data-bbox=)

The primary ICDR rules[icdr.org]<[Brief summary of comments:](https://urldefense.proofpoint.com/v2/url?u=https-3A_www.icdr.org_icdr_faces_i-5Fsearch_i-5Frule_i-5Frule-5Fdetail-3Fdoc-3DADRSTAGE2025301&d=DwMFAg&c=FmY1u3PjP6wrcrwl13mSVzgfkbPSS6sJms7xcl4I5cM&r=3mBfUTvyfqDEumrbzweVIA6qFyeEmDaNE5eHQf9QFdU&m=isNrHaGWPuOK7Q8EC8td30qRmee0LdKO_29uN_4Anwc&s=dFgOT1sBd2cuG5bYizhnOhjlWpOfM7HfVplhPKlkGP8&e=> applicable in this area appear to be Articles 20 (Conduct of Proceedings) and 21 (Exchange of Information) (although others may also apply, such as Article 22 on Privilege). (Care should be exercised in accessing these rules inasmuch as they appear in the same publications as rules for mediation.)</a></p></div><div data-bbox=)

I suggest you read the public comments in their entirety.

They express, in my personal opinion, various concerns with:

- \* Deadline issues on submitting written statements and the impact it might have on what is submitted;
- \* Limits on numbers of pages (25 pages written statements);

- \* Ability to reply, not just on expert witness statements;
- \* More expansive discovery allowed in rules, not just at panel discretion;
- \* Allowance of certain depositions, interrogatories, and requests for admission;
- \* Ability to produce confidential documents;
- \* Sanctions power (or consequences) for non-compliance.

(This is by no means comprehensive.)

Recommendation:

I recommend an addition into Rule 6 as follows (where the red, underlined language is the addition).

#### 6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the Claimant's Claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties. In addition, the IRP PANEL may grant a request for additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties upon the showing of a compelling basis for such request.

Otherwise, with respect to Rule 8, Discovery Methods, I recommend no change. The rule directs the panel to be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in considering discovery requests. This leaves the matter to the panel, where it will be better handled than by us trying to imagine a context to fix. I also note that ICDR Article 21 states that depositions, interrogatories, and requests to admit are not appropriate for these arbitrations. Article 21.5 deals with exchanging confidential information. We should keep in mind that the IRP is not just for US lawyers and it is meant to be streamlined and efficient.

Best regards,

David

David McAuley