

**City of New York
Office of Administrative Trials and Hearings**

Notice of Adoption of Rule

Pursuant to the authority vested in the Office of Administrative Trials and Hearings (OATH) by sections 1043, 1049, and 1049-a of the New York City Charter, OATH has adopted amendments to its Rules of Practice in chapter 6 of title 48 of the Rules of the City of New York to clarify procedures for appearances and representation in OATH's Hearings Division.

The Environmental Control Board voted to approve a proposed version of these amendments on April 7, 2022. A proposed version of these amendments was published in The City Record on April 14, 2022. A public hearing was held on May 18, 2022. Four (4) oral comments were made at the public hearing, and eleven (11) written comments were submitted. After considering the comments, OATH amended section 6-24(a)(4) of subchapter F of chapter 6 of title 48 of the Rules of the City of New York. OATH addresses the oral and written comments in the Statement of Basis and Purpose of the Rule below. The Environmental Control Board voted to approve a final version of these amendments on August 4, 2022.

Statement of Basis and Purpose of Rule

The Office of Administrative Trials and Hearings (OATH) has adopted amendments to chapter 6 of title 48 of the Rules of the City of New York to clarify procedures for appearances and representation in OATH's Hearings Division.

Section one of this rule amends section 6-09 of title 48 of the Rules of the City of New York to clarify what constitutes a proper appearance before the Tribunal, either via remote means or in person, and to renumber the provisions of the section. Given the large volume of matters processed and the added layers of complexity involved in simultaneously providing electronic and in-person hearings, it is critical to the continued efficient running of the Tribunal that its staff be afforded the preparatory time necessary to ensure that the hearings are properly executed and recorded.

Section two of this rule amends section 6-16 of title 48 of the Rules of the City of New York to add a new subsection (d). This subsection requires that registered representatives and attorneys appearing on behalf of respondents provide OATH with an executed authorization to appear form before the hearing. This rule is intended to prevent individuals from falsely claiming to be a respondent's authorized representative at an OATH hearing.

On a regular basis, either intentionally or mistakenly, attorneys and registered representatives appear at OATH hearings on behalf of respondents who have neither retained them nor given them authority to act on their behalf in a given matter. When respondents discover this, they exercise their right under OATH rule section 6-26 to have the agency vacate the determination and schedule a new hearing. Unauthorized representation results not only in hardship and added expense for the respondent, but also in the duplication of effort and wasted resources at OATH. In order to prevent, or, at minimum, reduce this waste, OATH adds subsection (d).

Requiring all registered representatives and attorneys who appear before OATH to submit a signed authorization to appear form from the respondent named on the summons before appearing at a hearing assists OATH in ensuring that the person appearing on behalf of the respondent is in fact authorized to do so. The signature requirement includes electronic signatures. This rule also represents one step in OATH's continuing efforts to identify and to stop impersonators and protect the integrity of OATH proceedings.

In comments replying to these amendments, attorneys assert that the provision requiring the signed authorization unduly burdens attorneys who are already required to conform to the Rules of Professional Conduct and aware of the ethical rules regarding falsely claiming to represent a client. They assert that the rule will burden indigent and vulnerable clients, who might not have access to the requisite technology such as printing, scanning, and e-mail to complete the authorization form. They assert that the provision erects barriers to representation by competent attorneys by increasing the complexity of representation.

Despite state ethics rules governing the behavior of attorneys, in practice, both attorneys and representatives regularly hold themselves out as representing parties they do not represent. The consequences of these misrepresentations are identical: When two or more attorneys sign in for the same summons, they cause as much confusion and delay as registered representatives who do the same. Moreover, OATH is under the same obligation to schedule a new hearing for a respondent who asserts after the fact that the wrong attorney appeared at the original hearing as OATH is when a respondent asserts that the wrong representative appeared.

As noted above, the "original signature" requirement in the proposed rule includes electronic signatures, which are now recognized by state and federal courts. Given the widespread use of these tools in both commercial and personal transactions, obtaining electronic signatures from respondents likely will not cause significant hardship. Where electronic signatures and ink signatures are difficult to obtain in a timely manner, OATH's procedures provide a number of safeguards to protect the freedom of choice of respondents seeking to retain a particular attorney. Where permissible, respondents may reschedule or adjourn the matter to a date when the attorney is available. When rescheduling or adjourning is not an option, and the matter goes into default, the respondent or the chosen representative may seek and obtain vacatur within 75 days of the default, where applicable.

Finally, the provision requiring signed authorization is not intended to impose any substantive ethical obligations on attorneys. The confirmation of representation merely constitutes a ministerial act sought in response to the waste, inefficiency, and duplicated effort created by assertions of representation made by multiple representatives for the same summons.

Sections three and four of this rule amend sections 6-24 and 6-24-a of title 48 of the Rules of the City of New York to clarify procedures established to ensure the timeliness of appearances on fifteen (15) or more summonses. These amendments will help OATH's Hearings Division efficiently and timely process to completion the high volume of matters heard by telephone, videoconference, or other similar remote means. These amendments will also provide OATH's personnel with sufficient time to sort and assign matters.

In order to make a timely appearance, a respondent's attorney or representative must be available and ready to proceed within three (3) hours of the scheduled hearing time for each summons. In practice, however, respondents' representatives schedule themselves to appear on more summonses than they can handle within the three-hour window. Should, for example, an attorney or registered representative appear at 8:30 a.m. for all 30 summonses, by the time the respondent's representative goes forward on the remaining matters, it may be well past the three-hour timeliness period. Should that be the case, the petitioner's representative might no longer be available, putting the petitioner at a disadvantage. Moreover, in such cases, the summonses are likely to be adjourned, further delaying the process.

In comments responding to these amendments, attorneys assert that the proposed three-day rule prevents clients from being represented by the lawyer of their choice, as attorneys are forced to reject clients seeking their services less than three days prior to a hearing. As a result, these clients are forced to hire lawyers who may be less familiar with OATH's practices.

As noted with respect to the concerns expressed about the amendments to section 6-16, OATH's procedures provide a number of safeguards to protect the freedom of choice of respondents seeking to retain a particular attorney. Where permissible, those respondents may reschedule or adjourn a matter to a date when the attorney is available. When rescheduling or adjourning is not an option and the matter goes into default, within 75 days of the default, the respondent or the chosen representative may seek and obtain vacatur, where applicable.

Comments in response to section 6-24(a)(4) raise the prospect of a *pro se* respondent's inability to e-mail evidence to the parties and the Tribunal, due to the *pro se* respondent's lack of access to the technological means to do so. Accordingly, the provision has been amended to apply to attorneys and representatives only.

Concerns also were raised about the three-hour appearance time period of section 6-24(b). The attorneys point out that delays are often caused by petitioners and circumstances outside their control. The attorneys suggest that OATH stagger hearing times throughout the day, as an alternative solution.

To clarify, respondents are not the only parties facing OATH time limitations. OATH also requires the petitioner's appearance within 30 minutes of a hearing officer's notifying a petitioner of a respondent's appearance, or the matter will proceed without the petitioner (the agency's representative).

Moreover, these timeliness provisions do not constitute a departure from longstanding OATH practice. They merely constitute a digital adaptation of that practice. Specifically, before the pandemic, when OATH conducted mostly in-person hearings, whenever OATH staff members observed that an attorney or representative would be unable to complete all of the matters scheduled in one day, the staff member requested that the attorney or representative enlist a colleague to assist, rescheduled the matters, or allowed the respondent to go into default, with understanding that such default could be reopened within sixty (now seventy-five) days upon request. This practice benefited from the flexibility inherent in face-to-face communication and

did not require the establishment of set time limitations. The stakeholders were observing the same facts and exchanging information on the spot. Such is not the case in remote communications, as each stakeholder is separated from the other and unable to instantaneously exchange information and make observations. The amendments merely adapt the timing practices used during in-person hearings to the rigidities of remote communication by imposing a specific time limit communicated to all parties at the outset. These timeliness provisions enable the parties and the tribunal to plan ahead and ensure more efficient processing of the tribunal's large docket.

Finally, OATH has tried to implement staggered hearing times without success, as delays in appearances caused backlogs.

These rules are intended to avoid waste and delay and ensure the fairness of the process to both sides, clarify the timeliness standard, and promote the efficiency of OATH's adjudications.

Deleted material is in [brackets].

New text is underlined.

Section 1. Section 6-09 of title 48 of the Rules of the City of New York is amended to read as follows:

(a) A Respondent may appear for a hearing personally or be represented by:

- (1) an attorney admitted to practice law in New York State, [or]
- (2) a representative registered to appear before the Tribunal pursuant to §6-23 of this chapter, or
- (3) any other person authorized by a Respondent to appear at or before the Tribunal on behalf of the Respondent, as set forth in §6-23(a) of this chapter.

(b) [A] Respondents may appear for a hearing by:

- (1) Appearing themselves or by representative on the date and time scheduled for the hearing [either] by telephone, [videoconferencing] videoconference, or similar remote means[or in person at the place, date, and time scheduled for the hearing. Respondent's appearance is timely if Respondent or Respondent's representative appears at the scheduled hearing location in person or by telephone, videoconferencing, or similar remote means, and is ready to proceed within three (3) hours of the scheduled hearing time for a summons. However, a representative or attorney appearing on fifteen (15) or more summonses on a given hearing date must comply with the requirements set forth in § 6-24 to be considered timely]; or
- (2) Appearing themselves or by representative in person at the place, date, and time scheduled for the hearing, provided that where the Respondent wishes to

proceed in person, the Respondent or the Respondent's representative must make a request for an in-person hearing by e-mailing the Clerk's Office at the e-mail address designated to process in-person hearing requests five (5) business days prior to the scheduled hearing date; or

(3) Appearing by written communication, including postal mail, written online communication, or by other similar remote means, pursuant to 48 RCNY § 6-10, when the opportunity to do so is offered by the Tribunal.

(c) An appearance is timely if the Respondent or Respondent's representative appears at the scheduled hearing location in person or by telephone, videoconference, or similar remote means, and is ready to proceed within three (3) hours of the scheduled hearing time indicated on each summons to be heard or, where applicable, within three (3) hours of the scheduled hearing time indicated on an adjournment or reschedule notice for each summons to be heard. However, a representative, attorney, or Respondent appearing on fifteen (15) or more summonses on a given hearing date must also comply with the requirements set forth in 48 RCNY § 6-24 or § 6-24-a to be considered timely.

(d) The failure to make a timely appearance constitutes a default and may subject the Respondent to penalties in accordance with 48 RCNY § 6-20.

[(c)] (e) Where the terms of a summons authorize a Respondent to do so, a Respondent may also appear by admitting the violation charged on the summons and paying the penalty for the cited violation in the manner and by the time directed in the summons. Payment in full is deemed an admission of liability and no further hearing or appeal will be allowed.

[(d)] (f) Current Owner of a Property.

(1) Notwithstanding the foregoing, if a prior owner of a property is named on the summons, the current owner of a property may appear on behalf of the prior owner if the summons:

(A) involves a premises-related violation, and

(B) was issued after title to the property was transferred to the current owner.

(2) The current property owner may appear for purposes of presenting a deed and indicating when title passed.

(3) The current owner of the property may also present a defense on the merits of the charge only if the current owner agrees to substitute him or herself for the prior owner and waives all defenses based on service.

[(e)] (g) Failure to Appear by Respondent. A Respondent's failure to appear timely, pursuant to subsections (b), (c) and (d) [(1) of subdivision (b)] of this section, or to make a timely request to reschedule pursuant to 48 RCNY § 6-05, constitutes a default and subjects the Respondent to penalties in accordance with 48 RCNY § 6-20.

[(f)] (h) Notwithstanding any other provision of this section, attorneys or registered representatives who appear in person on fifteen (15) or more summonses on a given hearing date, and those who appear remotely on any matter, must comply with the requirements set forth in 48 RCNY § 6-24 and 48 RCNY § 6-24a, respectively. Failure to do so constitutes a default and subjects the Respondent to penalties in accordance with 48 RCNY § 6-20.

[(g)] (i) A Petitioner may appear for a hearing through an authorized representative at the place, date, and time scheduled for the hearing or by remote methods when the opportunity to do so is offered by the Tribunal. If Petitioner elects to appear at the Tribunal, Petitioner's appearance for a hearing is considered timely if Petitioner is ready to proceed within thirty (30) minutes of the timely appearance by Respondent.

[(h)] (j) Failure to Appear by Petitioner. If Petitioner fails to make a timely appearance [timely to appear] at the scheduled place, date, and time, pursuant to subdivision [(g)] (i) of this section, the hearing may proceed without the Petitioner.

§ 2. Section 6-16 of title 48 of the Rules of the City of New York is amended to add a new subsection (d) to read as follows:

(d) In order to appear on behalf of a Respondent:

(1) A registered representative or attorney must provide a signed authorization to appear form prior to the hearing; and

(2) The registered representative or attorney must keep and maintain the authorization to appear form with the original signature of the person authorizing the representation, produce it to the Tribunal upon request, and include a copy of it with all e-mail correspondence to the Tribunal relating to that representation (including but not limited to requests for telephone or online hearings). Failure to produce this form with the original signature for an in-person hearing creates a rebuttable presumption that the registered representative or attorney is not authorized to represent the Respondent. Failure to include a copy of this form with all e-mail correspondence to the Tribunal relating to the representation shall result in rejection of the request for a hearing.

§ 3. Section 6-24 of title 48 of the Rules of the City of New York is amended to read as follows:

§6-24 Pre-[h]Hearing Notification of Schedule for [Attorneys and Registered Representatives for] In-Person Hearings on 15 or More Summonses

- (a) No Respondent, attorney or registered representative may appear in person on fifteen (15) or more summonses [on a given hearing date] unless:
- (1) No later than noon [three (3)] five (5) business days before the scheduled hearing date, the Tribunal [office in the borough where the cases are scheduled to be heard] receives from the Respondent, attorney, or registered representative [by email] a [written] list of all scheduled [cases] summonses in the format required by and made available by the Tribunal;
 - (2) [Notices of Appearance are submitted in advance of the scheduled hearing, as directed by the Tribunal, to the Tribunal office in the borough where cases are scheduled to be heard; and] The Respondent, attorney, or registered representative submits only one list of scheduled summonses per hearing date and submits that list electronically, pursuant to the Tribunal's direction, to a recipient designated by the Tribunal, regardless of the county in which the summonses were scheduled to be heard;
 - (3) [the Respondent's attorney or representative appears no later than the earliest scheduled hearing time set forth on the summonses to be heard. The timeliness requirements set forth in § 6-09(b)(1) do not apply in such circumstances.] Notices of Appearance are submitted in advance of the scheduled hearing, as directed by the Tribunal, to the Tribunal office in the borough where summonses are scheduled to be heard;
 - (4) The attorney or representative is able, during the hearing, to e-mail to all parties and the Tribunal the evidence the Respondent, attorney, or representative wishes to submit; and
 - (5) The attorney or registered representative submits an authorization to appear form signed by the Respondent, authorizing the attorney or registered representative to appear at OATH on the Respondent's behalf.
- (b) [Cases may be added to this list on the day of the hearing at the discretion of the Tribunal.] To be considered timely, the Respondent, the Respondent's attorney or representative must:
- (1) Appear at the earliest scheduled hearing time indicated on each summons to be heard, or, if applicable, at the earliest scheduled hearing time indicated on each adjournment order or reschedule notice for each summons to be heard, and
 - (2) Be available and ready to proceed within three (3) hours of the scheduled hearing time indicated on each summons to be heard, or if applicable, within three

(3) hours of the scheduled hearing time indicated on each adjournment order or reschedule notice for each summons to be heard.

(c) The failure to make a timely appearance constitutes a default and may subject the Respondent to penalties in accordance with § 6-20.

§ 4. Section 6-24-a of title 48 of the Rules of the City of New York is amended to read as follows:

§6-24-a Pre-[h]Hearing Notification of Schedule for Attorneys and Registered Representatives for Hearings by Telephone, [VideoConferencing]Videoconference, or Other Similar Remote Means.

- (a) No attorney or registered representative may appear by telephone, [video-conferencing]videoconference, or other similar remote means unless:
- (1) No later than noon three (3) business days before the scheduled hearing date, the Tribunal receives from the attorney or registered representative a list of all scheduled summonses in [a] the format required by and made available by the Tribunal;
 - (2) The attorney or registered representative submits only one list per hearing date and submits that list electronically, pursuant to the Tribunal's direction, to a recipient designated by the Tribunal, regardless of the county in which the summonses were scheduled;
 - (3) The attorney or registered representative makes no changes or additions to the list, unless it is to withdraw [their] representation on a matter; [and]
 - (4) The attorney or registered representative calls in for the first scheduled hearing no later than the earliest scheduled hearing time [as set forth] on [the] each summons[es] to be heard or, if applicable, no later than the earliest scheduled hearing time indicated on each adjournment order or reschedule[s] notice[s] for each summons to be heard[. The timeliness requirements set forth in § 6-09(b)(1) do not apply in such circumstances]; and
 - (5) The attorney or registered representative submits an authorization to appear form signed by the Respondent, authorizing the attorney or registered representative to appear at OATH on the Respondent's behalf.
- (b) No one registered representative or attorney may appear by remote means on a single hearing date for more than twenty-five (25) summonses, unless an exception is granted by the Tribunal prior to the hearing date.
- (c) Where a law firm, [or] representative firm, or in-house legal department has more than twenty-five (25) cases scheduled on a hearing date, it must assign an additional registered representative or attorney for each group of up to twenty-five (25) summonses to be heard on that date, unless an exception is granted by the Tribunal prior to the hearing date.

(d) The law firm, [or] representative firm, or in-house legal department must provide the names of the additional registered representatives or attorneys who will appear on [the] each additional group[s] of [cases] summonses on that date. Once a registered representative or attorney is assigned to appear on a group of summonses, a different registered representative or attorney may not appear as a substitute [their], unless an exception is granted by the Tribunal prior to the start of the hearing.

(e) To be considered timely, the Respondent's attorney or representative must:

(1) Appear at the earliest scheduled hearing time [set forth in the group of] on each summons[es] to be heard or, where applicable, at the earliest scheduled hearing time indicated on each adjournment order or reschedule notice for each summons, and

(2) Be available and ready to proceed within three (3) hours of the scheduled hearing time on each [of the] summons[es] to be heard or, where applicable, within three (3) hours of the scheduled hearing time indicated on each adjournment order or reschedule notice for each summons to be heard.

The failure to make a timely appearance constitutes a default and may subject the Respondent to penalties in accordance with § 6-20.