CORRECTED

NEW YORK CITY

OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

PUBLIC HEARING

ON PROPOSED RULES REGARDING:

(1) APPEARANCES AND REPRESENTATION AT OATH HEARINGS,

(2) CONDUCT OF REGISTERED REPRESENTATIVES AND ATTORNEYS AT OATH HEARINGS, AND

(3) CORRECTING CROSS-REFERENCES REGARDING CITY COMMISSION ON HUMAN RIGHTS CASES

WEBEX VIDEO CONFERENCE

May 18, 2022

Time: 11:00 a.m. - 1:00 p.m.

May 18, 2022

MEMBERS PRESENT:

Joy A. Thompson, Esq. - Assistant General Counsel, OATH
Elizabeth Nolan - OATH
Frank Ng, Esq. - Deputy General Counsel, OATH
Asim Rehman, Esq. - Commissioner/Chief Administrative Law Judge, OATH, Chair/Executive Director, OATH ECB

ALSO PRESENT:

Peter Mazer, Esq. - MTOBT
Robert Hochman, Esq. - Cohen, Hochman & Allen
Lindsay Garroway, Esq. - Cohen, Hochman & Allen
Phoebe Dosset, Esq. - Nacmias Law, PLLC

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May 18, 2022

(The public meeting commenced at 11:00)

JOY A. THOMPSON, ESQ., ASSISTANT GENERAL COUNSEL, OATH: Good morning. This is Joy Thompson. I'm Assistant General Counsel with the Office of Administrative Trials and Hearings. I'm going to allow -- good morning. Welcome. I'm just going to give a minute or two for anyone else who cares to join our hearing this morning. So we'll get started very shortly. It's 11:01. I'm going to wait for 11:02.

Good morning. It is 11:02, and we will get started. I noticed there is one individual who has dialed in. I see that we have several of our members are joining us today. So we will officially start.

Again, my name is Joy Thompson. I am an Assistant General Counsel with the Office of Administrative Trials and Hearings, also known as OATH. OATH is conducting this hearing in accordance with the requirements of the City Administrative Procedure Act, also known as CAPA. The purpose of this hearing is to receive comments from the public on three proposed rules.

May 18, 2022

The first proposed rule is OATH's proposed rule regarding appearances and representation at OATH hearings. The second is OATH's proposed rule regarding the conduct of registered representatives and attorneys at OATH hearings. And the third is OATH's proposed rule correcting cross-references regarding City Commission on Human Rights cases. During this hearing, you will have the opportunity to comment on each of these proposed rules.

I will start by introducing the first proposed rule, which is OATH's proposed rule regarding appearances and representation at OATH's hearings. This proposed rule would clarify procedures for appearances and representation in OATH's Hearings Division. Given the large volume of matters processed and the added layers of complexity involved in providing electronic and in person hearings, OATH has found that 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.

Accordingly, Section 1 of this proposed rule would amend the section 6-09 of Title 48 of the Rules of the City of New York to clarify what constitutes a proper appearance before the Hearings Division, either via remote means or in person, and to renumber the provisions of the section.

Section 2 of this proposed rule would amend section 6-16 of Title 48 of the Rules of the City of New York to add a new subsection (d), which requires registered representatives and attorneys appearing on behalf of respondents to 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.

Sections 3 and 4 of this proposed rule would 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 15 or more summonses. In order

to make a timely appearance, a respondent's attorney or representative must be available and ready to proceed within three 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.

The amendments in sections 3 and 4 of this proposed rule would help OATH's Hearing Division, Division, excuse me, efficiently and timely process to completion the high volume of matters heard by OATH's Hearings Division by telephone, video conference or other similar remote means, and provide personnel with sufficient time to sort and assign matters.

OATH's proposed rule regarding appearances and representation at OATH Hearings was published in the City Record on April 14, 2022. OATH e-mailed the rule to the Speaker of the City Council, every member of the City Council, all community board managers, the news media, as well as civic organizations. In

addition, OATH posted the proposed rule on OATH's website, the New York City Rules website, and the City Records Online website. OATH has been accepting written comments on the proposed rule since the day it was published in the City Record, and it will continue to accept written comments through the close of business today.

At this hearing, you may present an oral statement concerning this proposed rule. Before you begin speaking, please identify yourself by stating your name and affiliation, whether you are with an agency, the media, etcetera. Speak slowly and clearly so that your statement can be accurately recorded. And please limit your statement to no more than three minutes.

Shortly after today's hearing, all, copies of all written comments received by OATH concerning this proposed rule, and a summary of the statements given today, will be made public on OATH's website. And I'm going to read the website address. It is long. I'll also post it in the chat. The website address is https://www1.nyc.gov/site/oath/about/legal-

resources-and-rule-making.page Again, I am going to add this address in the chat so everyone can access it.

Before issuing its final rule, please know that OATH will carefully consider the statements presented at today's hearing, as well as all written comments received by the close of business today.

Now, the floor is open for comments. At this time, I will ask if you would indicate if you have any comments to OATH's, the first rule, which is OATH's proposed rule regarding appearances and representation. Okay, sir?

MR. PETER MAZER: Yes

MS. THOMPSON: Could you please identify yourself?

MR. MAZER: Sure. May I begin?

MS. THOMPSON: Yes, of course.

MR. MAZER: Okay, thank you. Good morning. My name is Peter Mazer and I am General Counsel to the Metropolitan Taxicab Board of Trade. We are a 70-year-old association, representing the owners and operators of licensed

New York City medallion taxicabs. We operate a full-service driver center that provides free representation for taxicab drivers in traffic court, criminal court and at OATH. During the past five years, MTBOT attorneys have appeared at OATH hearings on behalf of drivers in more than 4,800 TLC-related matters and has appeared at OATH Trials and other OATH Hearings cases in another 160 cases. I have represented drivers personally in the vast majority of these hearings.

I speak today against certain provisions of the proposed rules under consideration. First, I speak against the requirement that attorneys be required to submit written authorization before appearing at or conducting business before the OATH Hearings Division. This is a requirement already in place on non-attorney representatives who, in many cases, are acting as attorneys and may be practicing law without a license. Under the proposed rules, OATH would now require attorneys to submit authorization forms signed by their

clients before conducting business. This requirement does not exist for attorneys appearing at the OATH Trials Division.

The Traffic Violations Bureau, where I, where I also practice, also seems to function well without having attorneys provide authorization letters from their clients. Even in criminal court, I can appear as an attorney and conduct business on behalf of my client by filing a notice of appearance.

To be clear, what does it mean to be an attorney of record at a TLC-related case before the OATH Hearings Division? It doesn't mean that I will get notices of scheduled or rescheduled hearings. OATH doesn't send them to attorneys, even if they refile documents with respect to the specific case. It doesn’t mean that I will get copies of hearing officers' decisions when I've appeared at a hearing. No, I don't get them either. I don't get notices of appeals taken by the Agency. And, usually, I only find out about an appeal taken by a petitioner when OATH reverses its decision and informs my client, not

me. And since OATH's summonses tracker does not cover TLC summons, I don't get notice of scheduled hearing dates and times until the published calendar for the week appears online, usually on a Friday afternoon, when it is already too late to schedule a remote hearing for a case scheduled for Monday, Tuesday or Wednesday, even if I am the attorney of record and have previously appeared on the case.

I urge OATH to redraft the rules to eliminate the authorization form requirement for attorneys admitted to practice in New York. This can be replaced with a notice of appearance form that attorneys can file with OATH at the onset of the case. At the same time, OATH should give attorneys the usual courtesies that attorneys receive in other tribunals, like copies of court papers, decisions, adjournments, schedule notices and the like. We all have e-mail addresses and we can receive notices that way.

Second, while I understand the difficulty in scheduling large numbers of cases, the three-day notice requirement for appearing at

a remote hearing is not workable. I'll give an example.

Recently, I rescheduled a TLC-related summons online. My reschedule request was granted and I was advised that I would receive a new hearing date by mail or e-mail. I did not, but, instead, learned of the new hearing date when the week's calendar was posted on Friday afternoon. The hearing was scheduled for the following Wednesday. I filed a request for a remote hearing, but this was turned down because I failed to give the requisite three days' notice. It probably would have been turned down, even if timely, because I had already submitted my one e-mail that I would be entitled to, to submit for that day's hearings. So my case was defaulted.

I understand that a tribunal cannot handle large volumes of cases without rules, but there have to be exceptions when an attorney receives late notice of a hearing. A limited number of add-ons can be accommodated. Maybe attorneys can add one late case occasionally, or

one or two cases a week. Of course, the whole situation could be avoided if attorneys who file notices of appearance on cases be given notices of the hearings and all correspondence from the tribunal.

I practice before OATH nearly every day. I want the tribunal to work and I want fair hearings. While the tribunal has raised genuine concerns, attorneys should be permitted to represent their clients without the imposition of unnecessary burdens and without being able -- unable to receive timely information needed to defend their clients.

And I thank you for giving me the opportunity to speak today, and I would be happy to answer any questions that you may have. Thank you.

MS. THOMPSON: Thank you so much, Mr. Mazer. I just want to point out that we will not be having, it's not so much a discussion. It's to take comments. However, once again, your comments will be reported, will be included with any transcript, and, importantly to you, I know,

will be considered in any final drafting of the rules. So, thank you.

Do we have another speaker, please? And, again, just so you'll know where we are, we are currently, the first item on the agenda is the appearances rule. It seems, Mr. Mazer, you've articulated quite a, for several of our members. Okay.

MR. MAZER: Mm-mm.

MS. THOMPSON: Okay. So I will move on to the next proposed rule. At this time, I will introduce OATH's proposed --

MR. ROBERT HOCHMAN: I, I'm sorry.

MS. THOMPSON: Oh, so, sure. Yes, please.

MS. LINDSAY GARROWAY: Let him come in first.

MS. THOMPSON: Okay, so --

MR. HOCHMAN: Robert Hochman.

MS. THOMPSON: Okay. So, sir, what's your name again?

MR. HOCHMAN: Robert Hochman, Cohen, Hochman and Allen.

MS. THOMPSON: Robert Hochman.

MR. HOCHMAN: Cohen, Hochman and Allen. We appear before OATH every day. And we cover, --

MS. THOMPSON: Thank you.

MR. HOCHMAN: -- we cover anywhere between 300 and 500 cases per week. I just want to know, how is the three hours being defined? Recently, one of my partners signed in at 9:05. Her case was not called or assigned to a judge until 12:05. She waited three hours. Now, unfortunately, she had to bring her daughter to daycare that morning, so she wasn't able to call in at 8:15. She was, had to call in a little bit later, around 9:05, and there were 30 people ahead of her. In the past, when there were 30 respondents and you were doing live hearings, you'd wait maybe about an hour and a half, two hours. This time, she waited three hours and then the Building Department attorney showed up 40 minutes later.

So, my comment is, how are you defining the three hours? Are you putting the same time

constraints upon the petitioner? Shouldn't they have to appear within 30 minutes of a case being given to an ALJ? Why is only the pressure being put upon respondents' representatives? And then, if you are getting near the end of the day and you, you have a second call-in, you're being threatened with default as opposed to just having the matters rescheduled as a professional courtesy. There's always a, an attitude lately, as if there's a gotcha type of mentality. Oh, well, you've, you've taken too long. We're going to default you. Rather just professionally and courteously rescheduling the matters so they can be heard on a different day.

And I don't think attorneys overbook during that three-hour period. I don't, I think the three-hour period doesn't start the minute the attorney signs in. They often wait, then they wait for the judge, then they wait for the judge to familiarize themselves, then they wait for the petitioner to come in. Then, the petitioner often takes 15 or 20 minutes to research something and come back, and this all

counts against the respondent representative when it should actually count against petitioner's representative or be added to the three-hour timeframe.

I have nothing further. Thank you.

MS. THOMPSON: Thank you, Mr. Hochman. At this time, I believe, Ms. Garroway, your name is on. If you would please make your comments. Thank you.

MS. GARROWAY: Yeah. Good morning, Ms. Thompson. Good morning, everyone. Thank you for hosting us at this comment session. I'm just going to echo some of the points that were just made, as I wholeheartedly agree.

My name is Lindsay Garroway. I'm also from the law firm of Cohen, Hochman and Allen. I've had the great pleasure of practicing before OATH myself for 12 years, since 2010. And our law firm has practiced before OATH for over 30 years now, so we are very pleased to be working with the Court during this new time, with the new changes that are happening. We applaud them for making changes to the rules to make it work for

the safety and health of everyone. However, I do have some comments. I want to highlight some problems with the new rule that we are troubled by, particularly two points.

I already submitted some written comments, but just to add some additional points. There are two aspects that really impede people's ability to choose the attorney that they want and we think OATH should, hopefully, reconsider these points.

The first is the authorization letter. From some of the reasons that Mr. Mazer commented very clearly on, I agree that it is unnecessary and redundant to have lawyers submit authorization letters when New York State and the Bar govern a lawyer's conduct in not representing someone that they have not been retained by. So, it, it seems a bit surprising, and also counterproductive, for the Tribunal to add this requirement for lawyers, when it seems like most of the rule is being set forth in the interest of moving the cases along more quickly and to address certain time constraints. So, adding a

written reschedule notice is going to be counterproductive to that goal. So we think that is unnecessary. It's certainly necessary for non-attorney representatives, but for lawyers who were already governed by their own ethics rules, it's not necessary.

And, then, the other aspect that's, that's hugely burdensome on respondents and their lawyers is the three-day rule requirement. I actually think that submission of lists three business days in advance of the hearing date is great for both sides, and I can absolutely understand why the Court needs that for their administrative staff constraints. However, there must be an exception to add to the list, when necessary.

I, all the time, clients try and seek to hire me the day before their hearing or two days before their hearing, and I am now, under the new rules, put in the very uncomfortable position of either turning them away and saying, no, you cannot hire me as your counsel, despite the fact that I am the lawyer of your choice. I have to

say no to them and they can't hire the lawyer they want. But they could, they would be free to hire a different lawyer that's not a high-volume person before OATH. That is unjust and unfair, and also a great disservice to them. They, instead, have to hire a lawyer that's not familiar with the Court's procedures and is not specialized in this area. But, also, they have the option of appearing on their own and asking the judge for the adjournment and hoping they get it. They're in a very precarious situation and not able to hire the lawyer.

So I'm not saying the three-day rule shouldn’t remain, but there must be an exception added where attorneys can add to their lists the day before when they are newly retained by clients who very much want a lawyer of their choice, from our firm or a different firm or any of the high-volume firms. They must be granted that exception.

In my experience, in the times I have asked in the past for, for cases to be added to my list the day before, the answer has been no.

I don't know what criteria OATH considers. Perhaps the rule should lay out what criteria an exception will be granted for so that these things are clearly set out.

Thank you very much.

MS. THOMPSON: Thank you, Ms. Garroway. At this time, I'm going to ask if there is any other comments to the first rule, which is the proposed rule regarding appearances.

MS. PHOEBE DOSSET: I would like to make one additional comment. This is Phoebe Dosset. I'm an attorney with Nacmias Law. I --

MS. THOMPSON: Could you re-, could you repeat where you're with, please? The firm.

MS. DOSSET: Nacmias, Nacmias Law, --

MS. THOMPSON: Thank you.

MS. DOSSET: -- PLLC. In the past two years, I've had the privilege of working as a DOB attorney at OATH, and now I have gone private and take care of the respondents.

To add to what Ms. Garroway said, I think this three-day rule, it, it not only affects our clientele, but if someone from Cohen,

Hochman, Allen cannot take a case from a client because the three-day rule appla- applies to them, it applies to every firm. So, effect-, we're effectively disenfranchising potential respondents from seeking any legal counsel whatsoever. So I think this is a bigger and more comprehensive issue as far as New York City citizens being able to obtain the representation they need at an OATH, at an OATH hearing. So I just wanted to make that bigger point, as well.

MS. THOMPSON: Thank you, Ms. Dosset. Any other comments to the appearances rule at this time? Okay. Alright. I believe that that completes the comments for -- is, there's a number, 917. Is someone trying to say something? Okay, maybe that's just background noise. I would encourage everyone, if they are not speaking, to just mute, just to cut down on any background noise.

And so we will, we'll go on to our next item. At this time, I will introduce OATH's proposed rule regarding the conduct of registered representatives and attorneys at OATH hearings.

May 18, 2022

This proposed rule would amend OATH's rules of practice located in subchapter F of Chapter 6 of Title 48 of the Rules of the City of New York, governing the conduct of registered representatives and attorneys appearing before OATH's Hearings Division. These amendments would require registered representatives to have proper authorization when representing respondents and to be familiar with the relevant facts and applicable law under- underlying a summons.

These amendments also would clarify and address the types of misconduct and patterns of misconduct, particularly those involving dishonesty and integrity, such as registered representatives who misrepresent themselves as attorneys, file false documents, and make statements they know, or should know, not to be true, as well as soliciting on OATH's premises.

Section 1 of this proposed rule would add the following amendments to Section 6-23 of subchapter F of Chapter 6 of Title 48 of the Rules of the City of New York. It would define a representative as an individual who is not

attorney -- not an attorney -- admitted to practice in the State of New York, but who is authorized by a respondent to appear on behalf of that respondent. It would require a registered representative to register every two years and clarify that the representative must submit proof of identity to register. It removes the statement concerning the consequences of failing to register, since registration is con-, is now a condition of appearance at the tribunal. The rule would require the representatives to accurately represent the representative's qualifications and services. It would clarify the obligation of registered representative to exercise due diligence, including demonstrating knowledge of the facts and subject matter of the summons, complying with adjournment and rescheduled hearing dates, and ensuring that oral and written statements and documents submitted to the tribunal are authentic and correct. It would require that a registered representative act in the respondent's best interests and avoid any conflicts that would

impair the representative's ability to do so, and it would require, and it would acqui-, require, excuse me, the submission of an authorized to appear form.

Section 2 of this proposed rule would add the following amendments to section 6-25 of subchapter F of Chapter 6 of Title 48 of the Rules of the City of New York. It would clarify what constitutes misconduct by using consistent terminology; it would prohibit the making of fraudulent, false or misleading statements to the Tribunal; it would create a rebuttable pre- presumption that the exchange of money at the Tribunal is evidence of solicitation; it prohibits falsely representing to be an attorney or government employee; prohibit acting in a fashion that demon-, that demonstrates a lack of integrity in the representation of parties; substitute paragraph (f) for former paragraph 1 of subdivision (b) concerning ex parte communication; move former paragraph 2 of subdivision (b) concerning communicating with a hearing officer to influence a decision; move

that paragraph to paragraph 6 of subdivision (a); subject respondents and witnesses, in addition to attorneys and representatives, to penalties for misconduct; and subject attorneys, in addition to representatives, to summary suspension or bar. These proposed amendments represent important steps in OATH's continuing efforts to identify and stop impersonators and fraud, facilitate professionalism and efficiency, and protect the integrity of OATH proceedings.

OATH's proposed rule regarding the conduct of registered representatives and attorneys was published in the City Record on April 14, 2022. OATH e-mailed the rule to the Speaker of the City Council, every member of the City Council, all community board members -- excuse me, all community board managers, the news media, as well as civic organizations. In addition, OATH posted the proposed rule on OATH's website, the New York City Rules website, and the City Records Online website. Again, OATH has been accepting written comments on this proposed rule since the date it was published in the City

Record and will continue to accept written comments through the close of business today.

At this hearing, you may present an oral statement concerning this proposed rule. And, once again I remind you, please state your name and affiliation, please speak slowly and clearly so that your statement can be accurately recorded, and please limit your statement to no more than three minutes. Again, now the floor is open for comments to OATH's proposed rule regarding the conduct of registered representatives and attorneys at OATH Hearings.

And, again, I have added to the chat, in case there is a desire to add a written comment by close of business today at 5:00 p.m., there is a website address. I'll add it again for those who may have joined the meeting a little later. And, again, we're now taking comments on OATH's proposed rule regarding the conduct of parties before the Tribunal.

MS. GARROWAY: I'll make a comment.

MS. THOMPSON: May I ask, is this Ms. Garroway?

MS. GARROWAY: Yes.

MS. THOMPSON: Please.

MS. GARROWAY: Thank you, Ms. Thompson. Again, Lindsay Garroway from Cohen, Hochman and Allen. Good morning. I am, I am legitimately confused by a portion of the rule that I hope OATH will elaborate or clarify. Perhaps an amendment is necessary to clarify.

Section 48 RCNY 6-25 Subsection (16) is the language that says, talks about abandonment of cases and it seems to require that an attorney alert the Tribunal to the fact that they will no longer be appearing on a case or it will be considered abandonment and that could constitute misconduct. I am legitimately confused about how this will be enforced or what this means, particularly because it seems to contradict the three-day list requirement, which is, that constitutes an attorney's notice of appearance. So if an attorney did not file a summons within their list, they have not filed a notice of appearance on it. So I, I'm not quite sure how that, how that jibes with the other,

this aspect of the rule.

So I would res-, I wish I could ask a question, but this is only comments. So I would strongly urge or request that OATH either elaborate on, within the rule of how they intend to enforce this or what they intend to use this, this tool for, or specify more clearly what they mean by this type of misconduct so that lawyers like myself have proper guidance and can be sure not to violate OATH's rules in this capacity. Certainly, some sort of clarification or elaboration is necessary here. Thank you.

MS. THOMPSON: Thank you again, Ms. Garroway. Are there any other comments to the proposed -- oh, yes, Mr., I believe you are Mr. Mazer. Yes.

MR. MAZER: Yes, hi. I just want to follow up and just add something that Ms. Garroway mentioned, which is a concern of that particular san- section. Dealing with the Taxi and Limousine Commission, what I typically find is that I publish my list of cases, as I am required to do, three days or more in advance.

Many times, those cases will, in fact, be settled, that I will, my clients will take settlement offers from the Taxi and Limousine Commission. So we don't go forward with the hearings, but I don't want to be, I mean the Tribunal may look at that and say that that's abandonment.

We don't really, I mean the TLC is not prosecuting the cases. The TLC, in fact, is withdrawing those summonses. But I don't want to be tripped up and be considered to do something that's violative of OATH rules or engaging in some sort of misconduct because I simply neglected to inform the Tribunal that I will no longer be going on cases that have, in fact, been settled. I just want to make sure that that's, that it's clear that if you settle a case before the, the hearing date that you're not abandoning the case in, in the strict sense of the word, because you've pretty much done what your client wanted you to do by settling it. Just wanted to add that point.

MS. THOMPSON: Thank you, Mr. Mazer.

Are there any further comments to this proposed rule regarding the conduct? Thank you so much. That said, we will continue with our agenda.

At this time, I will introduce the final rule for today, OATH's proposed rule regarding the -- excuse me. I lost my place here. Pardon me. OATH's proposed rule correcting cross-references regarding City Commission on Human Rights cases. This proposed rule would amend Sections 2-23, 2-24, 2-28 and 2-31 of OATH's Rules of Practice located in subchapter C of Chapter 2 of Title 48 of the Rules of the City of New York.

The City Commission on Human Rights recently updated its rules and OATH simply aims to update its references to those rules for consistency's sake. OATH's proposed rule correcting cross references regarding City Commission on Human Rights cases was published in the City Record on April 15, 2022. OATH e-mailed the rule to the Speaker of the City Council, every member of the City Council, all community board managers, the news media, as well as civic

organizations. In addition, OATH posted the proposed rule on OATH's website, the New York City Rules website, and the City Records Online website. OATH has been accepting written comments on this proposed rule since the date it was published in the City Record and will continue to accept written comments through the close of business today.

Now, at this hearing, you may present an oral statement concerning this proposed rule. Again, please state your name and affiliation, speak slowly and clearly, and limit your statement to no more than three minutes. Now, at this time, the floor is open for comments and response to OATH's proposed rule correcting cross-references regarding City Commission on Human Rights cases. I heard what may have been some background noise. Okay. I do not believe we have any comments for this third rule.

So, once again, shortly after today's hearing, copies of all written comments received by OATH concerning these proposed rules and a summary of the statements given today will be

made available to the public on OATH's website. Again, the website address, I'll put one more time. I believe we have a few people joined us. That web address is in the chat.

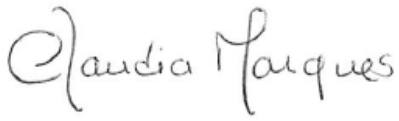
Before issuing its final rules, OATH will carefully consider the statements presented at today's hearing, as well as all written comments received by the close of business today at 5:00 p.m. At this point, as there are no further comments on these three proposed rules, this meeting, this public hearing, is now adjourned. Thank you for attending and please stay safe and well. Take care.

(The public meeting concluded at 11:39 a.m.)

CERTIFICATE OF ACCURACY

I, Claudia Marques, certify that the foregoing transcript of OATH Public Hearing on Proposed Rules on May 18, 2022, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Certified By



Date: June 1, 2022

GENEVAWORLDWIDE, INC

256 West 38th Street - 10th Floor

New York, NY 10018

Reviewed and corrected by OATH General Counsel Office.

June 7, 2022

Written Comments in response to OATH's Proposed Rule regarding Appearances and Representation at OATH Hearings.

OATH received eleven (11) written comments in response to OATH's Proposed Rule regarding Appearances and Representation.

(1) Comment added May 11, 2022 at 2:12 p.m. by Matthew Shapiro

I am writing regarding the proposed rule:

> § 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.

This proposed rule is an undue hardship for attorneys who are "Officers Of The Court" and already subject to the numerous Rules of Professional Conduct found in the New York State Court Systems Rules Of Professional Conduct regarding attorney-client relationships.

The proposed rule will add an added hardship for attorneys who represent indigent clients (many of whom receive summonses returnable to OATH), especially in this era of remote work where clients may not have such access to technology such as printing, scanning, and email, to comply with the requirement to complete an authorization form. This is especially the case for attorneys who may represent hundreds of such clients and will not be able to timely ensure that paper authorizations forms are sent, filled out correctly, and received back by clients that usually do not speak English as a first language or have technological fluency.

Additionally, it should be noted that "Authorization Forms" are not required by any Court in New York state for attorneys admitted to the bar.

It is understood that "representatives" are not similarly subject to ethical rules and obligations regarding client relationships, but this proposed rule for attorneys should be removed.

(2) Comment added May 12, 2022 at 12:26 p.m. by Andrew Mundo

I am writing regarding the proposed rule:

> § 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.

This proposed rule is an undue hardship for attorneys who are "Officers Of The Court" and already subject to the numerous Rules of Professional Conduct found in the New York State Court Systems Rules Of Professional Conduct regarding attorney-client relationships.

Additionally, it should be noted that "Authorization Forms" are not required by any Court in New York state for attorneys admitted to the bar.

It is understood that "representatives" are not similarly subject to ethical rules and obligations regarding client relationships, but this proposed rule for attorneys should be removed.

(3) Comment added May 17, 2022 at 2:15 p.m. by Lindsay Garroway, Esq.

Will lawyers be required to use the same Authorization form (titled Authorization for Registered Representative to Appear) that other non-lawyer representatives submit to OATH? For each summons number, or for each Respondent?

When and how will that Authorization be submitted to OATH for each case that the attorney is appearing on?

(4) Comment added May 17, 2022 at 3:39 p.m. by Robert Ligansky, Esq.

My name is Robert Ligansky, Esq. and I am sending these comments about the proposed rule changes. I have practiced at OATH/ECB for many years without any problems.

First, I object to the requirement that attorneys provide an authorization for all cases. There is no such requirement to represent clients in the NYS state courts or the Federal District Courts. I have had the opportunity to represent clients in both court systems.

Ironically, this rule puts attorneys in a worse position that non-attorney representatives. Attorneys are governed by a code of ethics. Representatives have no such requirement. For instance, representatives can solicit OATH clients. Attorneys cannot solicit such business.
The only benefit attorneys who practice at OATH had over non-attorney representatives is that we were not required to submit such authorizations. This proposed rule, as I have said before, puts attorneys in a worse position that non-attorney representatives.

In addition keeping the original authorization is unworkable. With computers and email, no one maintains original documents. The Federal District Courts do not require original documents. Furthermore, how long will we be required to keep such records? One year? Five years? Forever? In addition, how can I demand a client send me the original authorization?

Assuming that OATH wants authorizations from attorneys, it should identify those cases were issues about representation frequently appear. It would seem counterproductive to require authorizations for idling cases, DOT and NYPD traffic summonses, failure to yield summonses and DEP asbestos summonses if issues about authorization never appear in such cases. Why require unwieldly authorizations and other documents to fix a problem that does not exist? It would make more work for everyone including OATH staff to monitor authorizations for all cases. I suspect issues about authorization appear most often in DOB cases simply because they are the highest volume of cases.

The proposed rule also requires representatives to call in within 3 hours of the scheduled hearing for a summons. If OATH seeks to impose such a rule. OATH should also put all cases in one pin number.

OATH judges are required to handle all types of cases. If you have less than 15 cases, all cases should be on 1 pin number.

Also, if I have multiple pin numbers and am under a 3 hour deadline, why should I be required to wait at least 30 minutes for the agency representative to join the call?

Finally, I would like to add that I have enjoyed practicing at OATH/ECB. I have handled cases for many years and have always tried to maintain a level of competence and decorum in handling my cases.

I think the telephone system has been a wonderful addition to OATH. Furthermore, the people who work at OATH, who put the cases together, should be praised for the hard work and dedication that they bring to their jobs.

I sincerely hope you take these comments seriously. I can be reached at **[EDITED]** if you to discuss them with me further.

(5) Comment added May 17, 2022 at 11:30 p.m. by Lindsay Garroway, Esq.

There should be clarification on what "timely" appearance means within the rule. While a Respondent's attorney should be able to adequately assess the general amount of time it will take them to get through their caseload for the day, the three hour appearance window set out in the rule does not address the wait time caused by OATH in having a Hearing Officer assigned, and then the 30 minutes that Petitioner is allowed to take in making its appearance once a Hearing Officer is ready. There are sometimes OATH computer system problems causing delay as well. Considering these factors are outside Respondent's counsel's control, it is unreasonable to require Respondent's counsel to be able to complete its daily caseload within three hours of the 8:30 am hearing appearance time.

Given a scenario where Respondent's counsel waits three hours for a Hearing Officer to be assigned to her cases in the morning, Respondent's counsel then does not actually have three hours to get through her hearings. She would also then not be permitted to complete her second call for the day (if her hearings were divided into multiple phone calls) even though she was ready and able to begin hearings at the start of the work day. This unjustly penalizes Respondents and their attorneys for delays outside their control.

The three hour requirement also impinges on Respondent's counsel's ability to present adequate defenses by introducing harsh time constraints that are unrealistic and burdensome on Respondent.

Perhaps OATH should consider staggering the hearing times throughout the day if it cannot handle the volume of calls coming in at 8:30 am (the time that the vast majority of cases are adjourned to).

(6) Comment added May 18, 2022 at 9:23 a.m. by Phoebe Dossett, Esq.

I am writing regarding the proposed rule:

> § 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.

This proposed rule is an undue hardship for attorneys who are "Officers Of The Court" and already subject to the numerous Rules of Professional Conduct found in the New York State Court Systems Rules Of Professional Conduct regarding attorney-client relationships.

Additionally, it should be noted that "Authorization Forms" are not required by any Court in New York state for attorneys admitted to the bar.

It is understood that "representatives" are not similarly subject to ethical rules and obligations regarding client relationships, but this proposed rule for attorneys should be removed.

There should be clarification on what "timely" appearance means within the rule. While a Respondent's attorney should be able to adequately assess the general amount of time it will take them to get through their caseload for the day, the three hour appearance window set out in the rule does not address the wait time caused by OATH in having a Hearing Officer assigned, and then the 30 minutes that Petitioner is allowed to take in making its appearance once a Hearing Officer is ready. There are sometimes OATH computer system problems causing delay as well. Considering these factors are outside Respondent's counsel's control, it is unreasonable to require Respondent's counsel to be able to complete its daily caseload within three hours of the 8:30 am hearing appearance time.

Given a scenario where Respondent's counsel waits three hours for a Hearing Officer to be assigned to her cases in the morning, Respondent's counsel then does not actually have three hours to get through her hearings. She would also then not be permitted to complete her second call for the day (if her hearings were divided into multiple phone calls) even though she was ready and able to begin hearings at the start of the work day. This unjustly penalizes Respondents and their attorneys for delays outside their control.

The three hour requirement also impinges on Respondent's counsel's ability to present adequate defenses by introducing harsh time constraints that are unrealistic and burdensome on Respondent.

Perhaps OATH should consider staggering the hearing times throughout the day if it cannot handle the volume of calls coming in at 8:30 am (the time that the vast majority of cases are adjourned to).

(7) Comment added May 18, 2022 at 9:47 a.m. by Rick Shea, Esq.

I am writing regarding the proposed rule:

> § 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.

This proposed rule is an undue hardship for attorneys who are "Officers Of The Court" and already subject to the numerous Rules of Professional Conduct found in the New York State Court Systems Rules Of Professional Conduct regarding attorney-client relationships.

The proposed rule will add an added hardship for attorneys who represent indigent clients (many of whom receive summonses returnable to OATH), especially in this era of remote work where clients may not have such access to technology such as printing, scanning, and email, to comply with the requirement to complete an authorization form. This is especially the case for attorneys who may represent hundreds of such clients and will not be able to timely ensure that paper authorizations forms are sent, filled out correctly, and received back by clients that usually do not speak English as a first language or have technological fluency.

Additionally, it should be noted that "Authorization Forms" are not required by any Court in New York state for attorneys admitted to the bar.

It is understood that "representatives" are not similarly subject to ethical rules and obligations regarding client relationships, but this proposed rule for attorneys should be removed.

(8) Comment added May 18, 2022 at 11:01 a.m. by Geli Glatzer

There should be clarification on what "timely" appearance means within the rule. While a Respondent's attorney should be able to adequately assess the general amount of time it will take them to get through their caseload for the day, the three hour appearance window set out in the rule does not address the wait time caused by OATH in having a Hearing Officer assigned, and then the 30 minutes that Petitioner is allowed to take in making its appearance once a Hearing Officer is ready. There are sometimes OATH computer system problems causing delay as well. Considering these factors are outside Respondent's counsel's control, it is unreasonable to require Respondent's counsel to be able to complete its daily caseload within three hours of the 8:30 am hearing appearance time.

Given a scenario where Respondent's counsel waits three hours for a Hearing Officer to be assigned to her cases in the morning, Respondent's counsel then does not actually have three hours to get through her hearings. She would also then not be permitted to complete her second call for the day (if her hearings were divided into multiple phone calls) even though she was ready and able to begin hearings at the start of the work day. This unjustly penalizes Respondents and their attorneys for delays outside their control.

The three hour requirement also impinges on Respondent's counsel's ability to present adequate defenses by introducing harsh time constraints that are unrealistic and burdensome on Respondent.

Perhaps OATH should consider staggering the hearing times throughout the day if it cannot handle the volume of calls coming in at 8:30 am (the time that the vast majority of cases are adjourned to).

(9) Comment added May 18, 2022 at 11:10 a.m. by Indi Wanebo

I am writing regarding the proposed rule:

> § 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.

Continuing to undermine the general publics access to representation by creating more and more hoops for attorney's and their clients to jump through fundamentally undermines our judicial system. If OATH has an untenable workload, the effort would be better spent mobilizing lawyers to contact their representatives and request more funding for the court system so that it can be adequately staffed, not attempting to impose new barriers that will effect vulnerable clients the most. In actual practice, these proposed rules are going to mean that more people will not have adequate representation in court, and will be forced to navigate a system that is convoluted and constantly changing. I would argue that these rules are designed to reduce representation by competent attorneys in order to increase the fine amounts the city makes on each violation as people will increasingly be forced to represent themselves with absolutely no education on how to mitigate, corrections, etc. Even if this is not the designed purpose of these rules, it would be their natural consequence.

(10) Comment added May 18, 2022 at 12:00 p.m. by Jack Jaffa & Associates

The Office of Administrative Trials and Hearings (OATH) published in the New York City Record on April 14, 2022, proposed changes to its rules regarding appearances and authorizations. As required by law, OATH provided a period of time allowing the public to comment on the proposed changes. Jack Jaffa and Associates, Inc. ("Jaffa") submits this comment in opposition of the proposed changes and urges OATH not to adopt them.

Jaffa is a real estate consulting company that offers property owners in New York City services such as lead testing, cost segregation, tax incentives, alert services, among much else. Jaffa specializes in navigating the city's Byzantine compliance requirements and assists individual homeowners, licensed tradespeople, and real estate developers in dealing with city-issued summonses. This assistance includes filing of the correction affidavits and appearing at the administrative hearing at OATH.

In this industry, companies with multiple representatives and/or attorneys are known as high-volume representatives, or HVR's. Jaffa is by no short measure the largest HVR in the city. In 2021, for instance, Jaffa appeared at OATH on 36,924 summonses. For 2022 to date, Jaffa appeared on 10,542 summonses.

Owing to its large number of cases, Jaffa is especially attuned to a change in rules governing appearances and authorizations. Even a minor adjustment can have major ramifications on Jaffa. Jaffa, as the largest HVR, can also draw on its repository of cases and statistics and is in a unique position to gauge the rationale and effect of the rules.

The rules propose two main changes. First, all respondents, including HVR's will be required to essentially complete all their cases for the day within three hours of the scheduled hearing time. Second, all representatives and attorneys will be required to obtain and maintain an original form authorizing them to appear and submit it to OATH when requesting a hearing.

These changes will cripple respondents' access to a fair hearing, which is constitutionally guaranteed under the Due Process clause of the Fourteenth Amendment. Since respondents often cannot know in advance how long their cases will take, the three-hour rule is an unattainable moving target. They are also arbitrary and capricious, because, as explained below, they disregard the facts and are taken without solid basis in reason.

The attempt to require lawyers to obtain and maintain an originally signed form is beyond OATH's scope of authority since it regulates the practice of law. The rule is also preempted by current rules allowing an attorney to proceed on a matter without any written agreement if the fee is less than $3,000.

I. JAFFA OPPOSES THE PROPOSED CHANGES REQUIRING RESPONDENTS TO APPEAR ON ALL THEIR CASES WITHIN THREE HOURS OF THE SCHEDULED HEARING TIME

Front and center of the proposed rules are changes to the timeliness requirements. Under the existing regulatory framework, there was a clear bifurcation between non-HVR's and HVR's: non-HVR's were required to appear and be "ready to proceed" within three hours of the scheduled time for "a" summons, § 6-09(b)(1), while an HVR's appearance was timely so long as he "appear[ed] no later than the earliest scheduled time set forth on the summonses to be heard," § 6-24(a)(3). The rules specifically provided that HVR's are not subject to the three-hour requirement of a non-HVR ("The timeliness requirements set forth in § 6-09(b)(1) shall not apply." § 6-24(a)(3). This common-sense rule recognized that HVR's often require more than three hours to complete their assigned cases and afforded them the remaining hours of the day to do so while still being considered timely. The rules also made no mention of a potential default in case of an untimely appearance.

Not so under the proposed rules. The new guidelines, if adopted, would require all respondents—HVR and non-HVR alike—to be "ready to proceed" on "each" summons within three hours of the scheduled hearing time. The rules repeat this new requirement not less than three times: in the proposed § 6-09(c) regarding appearances in general, in the proposed § 6-24(b)(ii) regarding HVR's, and in the proposed § 6-24(e)(ii) regarding remote appearances, although, notably, § 6-09(c) requires the respondent merely to be "ready to proceed" while the other two sections require the respondent to be "*available and* ready to proceed" (emphasis added.)

The rules also change the vague language in § 6-09 of "a summons" which implied that a respondent who was appearing on more than one summons (but less than fifteen) was timely on all summonses as long as he appeared within three hours on any summons, to the more restrictive "each summons." This would make the three-hour rule apply to every individual summons for which a respondent was appearing.

Finally, the new rules make clear that non-adherence to these restrictions would subject the respondent to penalties under 48 RCNY § 6-20, namely the summons would be in default.

OATH offers two reasons to justify these radical changes. First, it asserts that proceeding on summonses after three hours of the scheduled hearing time prejudices petitioners who "might no longer be available." Second, OATH alleges that summonses that cannot go forward within three hours of the scheduled hearing time "are likely to be adjourned, further delaying the process."

Jaffa believes that these proposed changes are unnecessary, arbitrary and capricious, not narrowly drawn to the extent practicable and appropriate to achieve its stated purpose, and above all, violative of respondents' constitutional rights. Therefore, Jaffa opposes their adoption.

A. OATH DOES NOT OFFER COMPELLING REASONS FOR THE CHANGE IN RULES

An administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious. *Association of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991), citing *Matter of Bates v. Toia*, 45 N.Y.2d 460, 464 (1978); *Matter of Bernstein v. Toia*, 43 N.Y.2d 437 (1977), 448; *Ostrer v. Schenck,* 41 N.Y.2d 782, 786 (1977).

A regulation may be declared null and void "upon a compelling showing that the calculations from which [it is] derived [are] unreasonable." *Matter of Society of N.Y. Hosp. v Axelrod*, 70 N.Y.2d 467, 473 (1987); *Matter of Catholic Med. Center v Department of Health,* 48 N.Y.2d 967, 968 (1979); *Matter of Sigety v. Ingraham*, 29 N.Y.2d 110, 114 (1971).

1. *Proceeding on matters after three hours of the scheduled hearing time is not prejudicial to petitioners*

(a) *OATH's claim that petitioners are prejudiced is based on a false assumption*

As stated above, OATH offers two justifications for the new rules. Neither are compelling. First, OATH claims that allowing respondents to proceed on cases three hours after the scheduled hearing time is prejudicial to petitioners who may no longer be available. In the Statement of Basis and Purpose, OATH writes, "Should, for example, an attorney or registered representative appear at 8:30 AM 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 requirement."

At the outset, this concern is based on faulty logic. As noted above, there is no three-hour timeliness requirement for HVR's in the existing rules; that is only in the proposed ones. Thus, petitioner's supposed unavailability after three hours cannot be because respondents are appearing "well after the three-hour timeliness requirement" as OATH suggests, since no such requirement exists. On the contrary, because HVR's are permitted to appear on their cases throughout the day (so long they begin their cases at the earliest time in the set of summonses, pursuant to § 6-24(a)(3)), and this fact is well known to petitioners, it is petitioners' responsibility to likewise appear throughout the day, even after the three-hour window.

(b) *OATH's claim that petitioners are prejudiced is contrary to the facts*

Faulty logic aside, the assertion does not square with the facts on the ground. In practice, petitioners *are* available even after the three-hour window. Certainly, the unavailability rate of petitioners does not increase after the three-hour window has expired. On the contrary, petitioners' custom is to pair a representative to each HVR who remains paired to that HVR for the duration of the day. Thus, the unavailability

of petitioners, if any, is not because respondents could not begin a matter soon enough.

Nor is it logical to assume that a petitioners' failure to appear is because it passed the three-hour window. Petitioners naturally know which cases are scheduled for each day. Petitioners, it appears, also know on which summonses a particular HVR will be appearing, as they often contact a specific HVR before the hearing to discuss the cases. Thus, petitioners are well aware what time a case is likely to be heard and know how to apportion their staff accordingly.

(c) *OATH cites no facts or statistics to support its position, nor does it likely have any*

Pointedly, OATH does not explain how it knows that this is a problem. Instead, it speculates that petitioners "might" be unavailable without stating the basis for that notion. It does not state how frequently this phenomenon occurs, if it keeps track of known occurrences, or if it even has a system in place able to track such occurrences.

OATH and petitioners are different agencies. Even if OATH requires hearing officers to carefully report every time a petitioner fails to appear, which is unlikely, OATH has no way of knowing if it was because it was after three hours, understaffing of petitioner that day, an unusually high volume of summonses, or some other reason. Thus, OATH's justification in adopting this rule is speculative and contrary to the facts. This rule is a solution in search of a problem.

2. *Proceeding on matters after three hours of the scheduled hearing time does not cause unnecessary adjournments*

(a) Respondents suffer most from the ongoing adjournment problem at OATH

Next, we turn to the second justification for the proposed timeliness requirements, that of unnecessary adjournment and delay. OATH is correct that there exists a serious issue of needless adjournments and Jaffa is encouraged by OATH's attempt to address it. Postponing cases multiple times clogs the docket and frustrates respondents' right to a fair hearing. However, the adjournment crisis at OATH has nothing to do with respondents appearing after three hours and everything to do with the extreme willingness of hearing officers to adjourn cases at petitioners' request, often many times, when there is no compelling reason to do so.

It is important to note that no one suffers from delay more than respondents. Besides the natural and legitimate frustration of being denied a fair hearing in a timely fashion, delaying adjudication often has significant financial consequences. Consider the following common scenario. A homeowner is issued a straightforward summons alleging work without a permit. Naturally, the summons contains an order to correct the condition, which in this case entails hiring an architect to draw plans, submit them for approval to the Department of Buildings (and pay a hefty penalty which the respondent has no opportunity to contest at a fair hearing and under no

circumstances will be refunded,) receive a permit from the Department of Buildings, and submit affidavits that the condition was corrected. Needless to say, this is a very expensive undertaking.

On the other hand, if the homeowner contests the summons at OATH and prevails, none of this would be required. The fly in the ointment, however, is that the Department of Buildings will issue further summonses for failing to correct the original summons so long it has not received affidavits that it was corrected. The first one is typically $2,500 and subsequent ones $6,250 per summons. This is in addition to a $3,000 "civil penalty" internally imposed by the Department of Buildings for a late certification (which, again, the respondent has no opportunity to contest at a fair hearing and under no circumstances will be refunded.) Thus, any delay in adjudicating the summons exposes the respondent to further liability.

Obviously, every adjournment affects not just that respondent, but all respondents. Since a hearing officer will have to start from scratch and hear the case again, the time spent adjourning that case could have been utilized to adjudicate the summons of another respondent. And the next time the summons is on the calendar, the hearing officer will have to spend time dealing with an old case that should have been completed already instead of dealing with the more recently issued summonses. This dilutes OATH's resources and hampers its ability to effectively clear its docket.

(b) OATH misidentifies the root causes of the adjournment problem

For these and other reasons, Jaffa considers excessive adjournments and the overloaded docket an issue of paramount concern. Where OATH misses the mark, however, is attributing the excessive adjournments to HVR's who cannot complete their assigned cases in a timely fashion. OATH writes in the Statement of Basis and Purpose, "In practice, however, respondents' representatives schedule themselves to appear on more summonses than they can handle within the three-hour window."

This statement, as noted above, is misleading because it pre-supposes that respondents are violating some rule when their hearings extend past three hours. This is an error. Under current rules, HVR's are *permitted* to proceed on their cases past three hours. OATH's claim that there needs to be a rule requiring respondents to appear within three hours because respondents are currently violating the rule by not appearing within three hours is circular. Also, the argument that these cases are often adjourned rings hollow since they can be heard for the rest of the day, after the three-hour window.

It seems, rather, that OATH's concern is not that HVR's are appearing on more summonses than they can handle in a three-hour window but appearing on more

summonses than they can handle *by the end of the day*. [1] Jaffa firmly and fundamentally disagrees.

Jaffa, and presumably other HVR's, meticulously evaluates which cases it has on its schedule for a particular day and carefully apportions them out so that each representative has enough time to complete the full list. To be sure, signing in cases at OATH is more of an art than a science since there are so many factors beyond respondents' control. A representative may get a fast-paced hearing officer one day and finish his cases in under two hours. Or he may be assigned a slower-paced hearing officer where it takes two hours just to complete one case. Nevertheless, respondents err on the side of caution and only sign in an amount they will almost certainly be able to complete.

(c) OATH's claim that respondents often sign in for more cases than they can handle is contrary to the facts

In preparation for this comment, Jaffa analyzed its own statistics and found that out of thousands of appearances in 2022, about 28 cases were adjourned for lack of time. Thus, OATH's belief that this phenomenon is a significant drain of judicial resources is unsupported by the facts.

As in the previous justification proffered, OATH offers no data, statistics, or evidence to support its position. OATH writes that respondents "schedule themselves" on more summonses than they can handle but fails to state how frequently this occurs. Nor, it must be pointed out, can this phenomenon be easily tracked since OATH would have to monitor not just the number of adjournments, but the reason for them as well. In short, OATH's concern that respondents often cannot timely finish their caseload by the end of the day is unfounded and against the provable facts.

(d) The true cause for delay at OATH is hearing officers granting unwarranted adjournments

Having established that adjournment due to HVR's running out of time at the end of the day is a statistical rarity, we turn to address the true culprit of delay at OATH, which is the excessive granting of petitioners' adjournment requests. Starting around April of 2020, OATH dramatically shifted its policy on adjournments. Essentially, all adjournment requests were granted, with or without a legitimate reason. Several hearing officers stated at the time that they were instructed to "grant all adjournments," or "to be very lenient with adjournments," or similar language. The core of this policy is still in place today, despite the return to normal business operations after the COVID-19 shutdown.

Before the shift in policy, OATH granted adjournments for the issuing officer when the case was particularly fact-laden, or for a summons carrying a major penalty such

[1] This ambiguity itself in the reason for the proposed rule is violative of New York City Charter § 1043(d)(1)(iv) which requires the proposed rule "[contain] a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule."

as transient use. This fair and sensible policy balanced petitioners' right to have its witness present on cases when it legitimately needed it, respondents' right to have their cases decided in a timely manner, and OATH's concern for the smooth running of its docket.

Not so after the shift. Now, hearing officers grant adjournments for the issuing officer as a matter of course, at least for the first request, even when their presence will have little to no bearing on the defense being raised. For example, a wrongly named respondent defense, with ACRIS documents to show the titled owner, is a purely legal argument that does not require the issuing officer. Whatever document the issuing officer relied on in naming the respondent, if any, should be findable by petitioners' attorney. Another example is a class challenge on a failure to comply summons solely because the predicate summons was reduced from a class one to a class two. Here again, the issuing officer will have virtually nothing to offer as to the class.

Not coincidentally, when OATH signaled a willingness to adjourn, petitioners started seeking adjournments for the testimony of the issuing officer on virtually every summons, which per policy, was uniformly granted. This open-door adjournment policy naturally caused a dramatic decrease in the summons completion rate.

To make matters worse, OATH often granted adjournments for the issuing officer more than two times, violating its own rule set forth in § 6-15 which provides, "A Hearing Officer may not adjourn a hearing on more than two (2) occasions for the appearance of the Inspector." An internal review at Jaffa revealed that this happened dozens of times.

In addition to the obvious problem of hearing officers refusing to proceed on a case, adjourning such an excessive number of cases for the issuing officer virtually guaranteed that issuing officers—who testify at OATH one day a month—would be unavailable to testify on the adjournment date. So, petitioner would seek another adjournment. And another. And another.

Of course, a hearing with the testimony of the issuing officer takes much longer than without it. That meant that even when the hearing officer actually proceeded on the summons, the hearing was unnecessarily time consuming. The end result of all of this is the current situation where old cases are endlessly kicked down the road and usurp the hearing officers' attention from the current calendar.

The sequence of events should be lost on no one. First, OATH implements a policy that is deferential to petitioners. This caused a backlog of cases, which OATH now proposes to solve by informing respondents that any case that cannot fit into the new, highly restrictive time slots will be defaulted.

Because the rule proposed will not address any issue that OATH identified as a reason for its promulgation, the adoption of it is without basis and thus arbitrary and capricious.

B. THE PROPOSED SOLUTION VIOLATES THE CITY ADMINISTRATIVE PROCEDURE ACT, IS ARBITRARY AND CAPRICIOUS, AND VIOLATES RESPONDENTS' CONSTITUTIONAL RIGHT TO A FAIR HEARING

This comment detailed at length above why the justifications put forth by OATH for the proposed rules are less than compelling. We now address the proposed solution itself. The new rule requires that all respondents be ready to proceed on all cases within three hours of the scheduled hearing time and any case that does not make this strict cutoff will be in default.

This policy, if implemented, severely restricts respondents' access to a fair hearing. The policy will also result in disparate outcomes depending on factors beyond respondents' control, which is unfair, arbitrary, and capricious. The language of the rule is vague and unclear, and ultimately will not provide any increased efficiency at OATH. And defaulting cases when respondent has made a reasonable effort to timely appear violates respondents' fundamental guarantee of a fair hearing. For all these reasons, Jaffa opposes the adoption of the proposed rule.

Reason no. 1: The language of the new requirement is unclear

Before turning to the unfairness of the new rule, the language of the requirement must be addressed. The rule does not say the respondent must complete each case within three hours of the scheduled hearing time, or even begin each case, but "be ready to proceed" or "be available and ready to proceed." What is the definition of "ready to proceed"? An HVR that is present in the reception area at OATH or awaiting a hearing officer to come on the line in a remote hearing is "ready to proceed" on all his cases despite having started none of them. Clearly, then, a respondent does not have to actually start the case to be "ready to proceed." If that is true, even after a judge is assigned and hearings begin, the HVR is still "ready to proceed" on all of them, and is in fact proceeding on them, although naturally the cases will be heard one by one. By the same token, an HVR that has two call-in lists and calls in at 8:00 AM, is "ready to proceed" on all his cases including the second set.

If this rule is adopted, respondents will not know what precisely they need to do to be considered "ready to proceed" in OATH's eyes. The New York City Charter § 1043(d)(1)(iv) requires the proposed rule to "[contain] a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule." Item (a) of that section further requires the rule to be "understandable and written in plain language. . ." The proposed rule here satisfies neither one of those sections and its adoption violates the New York City Charter.

Reason no. 2: The rule would result in disparate outcomes which is arbitrary and capricious

The problems deepen. The rule makes no exception for delays beyond respondents' control of which there are many. Instead, it unsparingly mandates that all cases that respondent is not ready to proceed on within three hours will be in default. What should happen, for example, if an HVR called in at 8:00 AM but the hearing officer did not come on the line for two hours? The rule still requires the respondent to complete all his cases in one hour, which is unfair. What would happen if the hearing officer did not come onto the line until three hours have passed, which has happened several times in the past? Respondents' cases would be in default before he even started.

There are many such delays that are no fault of the respondent. OATH's remote technology is often slow or not working altogether. Petitioners take time to prepare cases while respondent is waiting with the hearing officer for the hearing to begin. Petitioners often need time to locate their witnesses and patch them into the call. All of these whittle away respondents' limited time to complete the hearings.

In short, there is a host of scenarios where the hearings are delayed for no fault of the respondent. The proposed rule does not concern itself with these problems. Instead, it puts the onus of ensuring the cases are heard within three hours entirely on the respondent, even though respondent has no control over when the hearings begin.

The net result of the rule would be that some respondents have ample time to complete their cases while others have virtually none. Aside from the fundamental unfairness of this policy, the inconsistent results make the rule arbitrary and capricious, and therefore *ultra vires*. Since the rule unfairly penalizes respondents and results in unpredictable, disparate outcomes, the rule should not be adopted.

Reason no. 3: The solution proposed by the rule is not narrowly drawn to achieve its stated purpose

The New York City Charter § 1043(d)(1)(iii) requires the rule to be "narrowly drawn to achieve its stated purpose." Far from being "narrowly drawn," OATH selected its bluntest and harshest tool available: defaulting cases. Defaulting a case is respondents' worst-case scenario and should only be used by OATH as an absolute last resort. A default judgment means respondent will have to pay five times the penalty, but even worse, respondent was never heard on the merits of the case.

There is a strong public policy in favor of resolving cases on the merits and avoiding a default judgment. *Moore v. Kendra Day*, 55 A.D.3d 803, 804 (N.Y. App. Div. 2008), citing *Schmidt v. City of New York*, 50 A.D.3d 664 (N.Y. App. Div. 2008); *Schonfeld v. Blue White Food Prods. Corp.,* 29 A.D.3d 673, 674 (N.Y. App. Div. 2006); *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573, 574 (N.Y. App. Div. 2004).

In addition to respondents' financial hardship, it is unnecessary to achieve OATH's goals as laid out in the Statement of Basis and Purpose. OATH complains of unnecessary delay. The solution to that is not to force default cases that are not adjudicated in time, but to maximize judicial economy of OATH's limited resources.

Jaffa offers the following alternative, narrower, solutions, that if implemented, would entirely resolve the issue.

i. Reinstate the pre-pandemic policy regarding adjournments. First and foremost, OATH can and should revert to its original policy and only grant petitioners' request for the issuing officer when his presence would have a substantial impact on the outcome of the hearing. This would have a marked and immediate effect of clearing the calendar from stale cases and reduce the time spent on each summons.

ii. Apply the current rule forbidding adjournments for the issuing officer more than twice. As explained above, OATH violates this rule on several occasions. Each time a summons is adjourned further, it has a ripple effect on all other summonses scheduled for a hearing and is unfair to all respondents that want a fair hearing. Enforcing this rule would make sure that cases that should proceed do so.

iii. Dismiss cases where the petitioner failed to appear after half an hour. OATH wants to penalize respondents by defaulting their cases if they do not make the three-hour deadline. As a matter of fundamental fairness, and to treat all parties equally, OATH should dismiss cases if petitioner fails to appear after 30 minutes. In addition to clearing the calendar, it would at least make the harsh measures apply somewhat uniformly to both parties. Jaffa notes that OATH already implements this policy for Taxi and Limousine cases, pursuant to § 501a(b).

iv. Exercise the discretion afforded under § 6-09(g) to proceed without the petitioner after half an hour. The current rules give ample time for a petitioner to appear at the hearing after the case has been called. Generally, though, hearing officers are reluctant to proceed without them. Instead, they wait, sometimes for an hour or longer. Proceeding without the petitioner would ensure that OATH's time is not wasted.

   It must be pointed out that this rule does not prejudice petitioners. Petitioners already know in advance which cases it has on its calendar on a given day and are already informed by OATH prior to the hearing date which cases are assigned to a particular HVR. Considering that they have all this information in advance of the hearing, half an hour is a reasonable time to wait for an appearance.

v. Schedule cases throughout the day. Currently, a majority of cases are scheduled for 8:30 AM, and virtually no case is scheduled later than 10:30 AM. Applying the three-hour rule creates tremendous pressure on respondents to complete all their cases in the first few hours of the day.

A legitimate question is why. OATH, like all businesses public and private, operate until 5:00 PM, yet the rule, if applied, will cause a crushing bottleneck of cases in the morning, and hours of untapped time in the afternoon. If OATH is concerned that respondents are not appearing within three hours of the scheduled hearing time, the solution is to change the scheduled hearing time, not to default the case. Spacing cases throughout the day would ensure that cases can be heard quickly and efficiently at their scheduled time, while at the same time maximizing OATH's resources.

vi. Assign the faster hearing officers to the HVR's. As OATH is well aware, some hearing officers proceed faster than others. A simple solution would be to assign the faster ones to the HVR's with larger caseloads. As in the previous suggestions, implementation of this suggestion alone will have a significant impact on the summons completion rate. Nor would this prejudice *pro se* respondents who will still be heard by the other hearing officers at the same time.

vii. Ensure the remote technology is working. Often, the remote access technology employed by OATH is slow or dysfunctional. This causes needless delays in the hearings. Ensuring that the technology is in working order is an easy way to expedite hearings.

viii. Reinstitute OATH's extended hours. In years past, OATH (or ECB) had night hours available to respondents. OATH can reinstate this policy which is a small price to pay to ensure that respondents are able to access a fair hearing. Indeed, considering that most hearings are remote anyway, OATH would not have to pay the extra overhead of maintaining the office space for a longer period. The staff working remotely can continue to do so at any time of the day.

These are just a few suggestions that are fair, straightforward, and easily implemented. Unfortunately, OATH eschews these ideas and reaches for its most drastic weapon. This is not in keeping with the case law and violates the requirement that the rule be narrowly drawn to suit its purpose. For this reason, Jaffa opposes the rule.

Reason no. 4: The rule does not promote efficiency at OATH

OATH writes in the Statement of Basis and Purpose that adoption of the rule would "promote the efficiency of OATH adjudications." In fact, the opposite is true. Since respondents have the threat of default hanging over their heads, each HVR will be forced to sign in fewer cases per day. This will trigger the need for more HVR's to cover the caseload, and OATH will have to assign a hearing officer to each one. As OATH only has a limited number of hearing officers, respondents will have to wait longer for a hearing officer to be free. This, in turn, forces HVR's to sign in for even fewer cases in order to meet the three-hour deadline, which requires even more HVR's to cover all the cases. Thus, this rule creates a race to the bottom.

OATH seems to be on a mission to cut down the number of cases HVR's can appear for in a given day. This policy is misguided. HVR's greatly improve the efficiency of adjudications since OATH can assign just one hearing officer for many respondents. HVR's are also familiar with the practice and procedures of OATH, are well-versed in the case law, and can proceed to the merits of the defense faster than an uninitiated *pro se* respondent.

It has been said that HVR's take up a disproportionate amount of OATH's resources. That is misleading. While HVR's naturally use more of OATH's time *overall*, they use significantly less time *per summons*. The simple truth is that if OATH banned HVR's and required every respondent to appear individually, OATH would be instantly overwhelmed by the sheer number of respondents and adjudications would come to a screeching halt. OATH, then, existentially needs HVR's and the more cases the HVR's can complete, the smoother OATH will run. Because the proposed rule will not improve efficiency at OATH and will create unnecessary obstacles for respondents, Jaffa opposes it.

Reason no. 5: The rule does not minimize compliance costs for the discrete regulated community

The New York City Charter § 1043(d)(1) item (b) requires the rule to "[minimize] compliance costs for the discrete regulated community." This rule will have the opposite effect. The immediate outcome will be the vast number of defaulted cases that could not make the three-hour deadline. The respondent will then be required to pay the defaulted penalty amount, which is five times the face penalty.

The rule will also significantly increase the cost for an average New Yorker to hire an attorney or authorized representative to represent him at OATH since each HVR can only appear on a reduced amount of cases each day. HVR's will also have to turn away respondents seeking professional representation due to the constraints on the numbers, forcing more respondents to appear without an attorney. Thus, the adoption of the rule will increase the cost of representation at OATH and impede access to justice. Therefore, Jaffa opposes the rule.

Reason no. 6: The rule violates respondents' constitutional right to a fair hearing

Lastly, and most alarming, is the rule's infringement on respondents' constitutional right to a fair hearing. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 US 319, 333 (1976), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). It is well settled that procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a

meaningful time." *Matter of Kaur v New York State Urban Dev. Corp.*, 15 N.Y.3d 235, 260 (2010); *Acme Folding Box Co. Inc. v. Finance Admin.*, 67 A.D.2d 689 (N.Y. App. Div. 1979) (finding that an administrative agency may not, simply for its own purposes and convenience, interfere with a citizen's availing himself of a statutory right to review.)

Instead of guaranteeing respondents' right to be heard, the harsh and uncompromising effect of the rule forces respondents and their representatives to play Russian roulette with their cases. This comment detailed at length how the rule is unclear, results in unpredictable outcomes, and unreasonably forces respondents to appear in the first few hours of the morning. Even when a respondent does everything required of him, he may still be unable to meet the three-hour deadline by because of delay caused by the petitioner or OATH itself.

It cannot be emphasized enough that respondents are unable to accurately predict how long a case will take. Depending on which hearing officer will hear the case, which attorney from petitioner will be assigned, whether the issuing officer will actually appear, and other factors, a case can take twenty minutes or two hours. While it seems reasonable in theory to enforce rules ensuring that HVR's only sign in for cases they can complete in a given amount of time, it is unworkable as a practical matter due to the wild unpredictability.

So long as an HVR signs in for a reasonable number of cases, OATH is duty-bound to provide a fair hearing, even if the hearings occasionally take longer than expected. The upshot of these requirements is a respondent has a right to a hearing, but only if he conforms to OATH's extremely difficult demands. This violates the Fifth and Fourteenth Amendments of the Constitution.

II. **JAFFA OPPOSES THE PROPOSED CHANGES REQUIRING ATTORNEYS AND AUTHORIZED REPRESENTATIVES TO PRODUCE AUTHORIZATION FORMS**

The other major change proposed by OATH—the new § 6-16(d)—requires attorneys and authorized representatives to present an authorization form signed by the respondent before appearing on any case. It also requires a representative or attorney to maintain the form with the "original signature" for an indefinite time.

The attorney or representative must produce the form with the original signature for an in-person hearing and failure to do so creates a rebuttable presumption that he is not authorized. For a remote hearing, the attorney or representative must include a copy of the signed form on all email correspondence to OATH relating to the representation and the request for a hearing will be rejected if it is absent. In all

cases, the attorney or representative must produce the form with the original signature to OATH upon request.

This is a dramatic shift from the existing rules under which no authorization form was required—not for representatives or attorneys—though in practice, OATH demanded representatives to produce the form[2].

To justify these changes, OATH writes in its Statement of Basis and Purpose that the rule will prevent "individuals from falsely claiming to be respondent's authorized representative. . ." It notes that on "a regular basis, either intentionally or mistakenly, authorized representatives appear at OATH hearings on behalf of respondents who have neither retained them nor given them authority to act. . ." When this happens, respondents exercise their right to vacate the decisions, which results in "hardship and expense for the respondent" and wastes OATH's resources. OATH concludes by writing, "This rule also represents one step in OATH's continuing efforts to identify and to stop impersonators, and, thus, protect the integrity of OATH proceedings."

As explained below, this rule is without sound basis in reason, is unclear, overly burdensome, against the City Agency Procedure Act, arbitrary and capricious, and an infringement on attorneys' constitutional right to practice law. Therefore, Jaffa opposes its adoption.

A. THE NEW RULES ARE ARBITRARY AND CAPRICIOUS BECAUSE THEY DO NOT HAVE A SOUND BASIS IN REASON AND DISREGARD THE FACTS

When reading the Statement of Basis and Purpose, one might reasonably conclude that representatives consistently lie and misrepresent their authority to act on respondents' behalf, and OATH must deal with an imposter on virtually a daily basis. The concern appears to be unfounded.

OATH asserts generally that representatives appear without the authority to do so on a "regular basis" but offers no data or evidence of the frequency of this event, or the percentage of overall cases in which it occurs. In fact, the only sure way for OATH to ascertain if the representative was properly authorized by the respondent, is if the respondent attempted to vacate the decisions after the fact. OATH claims that this indeed occurs, but noticeably fails to cite how many times. Reason and experience dictate that this is an extremely rare occurrence and could hardly be a justification for these sweeping new rules.

[2] OATH promulgated a rule August 6, 2018, requiring authorized representatives (but not attorneys) to produce the form with the original signature but the official online repository of the Rules of New York, American Legal Publishing, omits those rules from its current version, as does OATH on its website. It appears that this rule was never adopted.

It should be noted that the mere application by a respondent to vacate the decisions does not necessarily mean that it is with merit. OATH's procedures to investigate such claims are unknown and it is entirely possible that it is an attempt by an unscrupulous respondent to re-try his cases after an unfavorable result. Thus, to properly evaluate the effect of unauthorized representations at OATH, it is necessary to ascertain the number of times such an application was made, the quality and nature of the investigation process, and the number of times such applications were granted. None of this was provided.

What does occur, occasionally, is two representatives sign in for the same case. But that hardly means that one of them is necessarily not properly authorized. What frequently occurs, rather, is that the respondent authorized one representative to appear, and then for any number of reasons, decides to hire someone else instead. The respondent may neglect to inform the first representative that he hired someone else to appear, and both representatives sign in. In this situation, both representatives were legitimately authorized.

Another common scenario is when two representatives are retained by two different persons of authority of the respondent. The rules require that the authorization be from "the respondent," which is straightforward for a natural person. But a significant number of summonses issued by city agencies are to companies, LLC's condominium boards, and other non-natural entities. The respondent entity may have a CEO, chairman of the board, a project manager, vice president of operations, an office of legal affairs, director of compliance, or a variety of other titles and positions, all of whom can legitimately authorize a representative to appear. What follows from this is two people of authority of the same respondent may authorize two different representatives to appear. In this situation, as in the last, both representatives are legitimately authorized.

In short, there are a host of scenarios where the representatives might have a double sign-in and still be properly authorized. These cases account for virtually all the times two representatives sign in for a summons. In all of these cases, requiring the representative to maintain and produce the authorization form will have no effect on reducing the number of double sign-ins at OATH.

As noted above, the law requires the proposed rules to be soundly based in reason and not disregard the facts. This rule is an example of the opposite. Because the proposed rule is rooted in a misinterpretation of the facts and is not supported by hard evidence or data, Jaffa opposes its adoption on these grounds.

B. THE PROPOSED SOLUTION VIOLATES THE CITY ADMINISTRATIVE PROCEDURE ACT, IS ARBITRARY AND CAPRICIOUS, AND VIOLATES ATTORNEYS' CONSTITUTIONAL RIGHT TO PRACTICE LAW

Turning to the merits of the solution itself, Jaffa is concerned that it is unnecessarily burdensome and will ultimately not provide any greater integrity to OATH proceedings. The solution also is vague, overly broad, and an infringement of an attorneys' right to practice. Therefore, Jaffa opposes its adoption.

Reason no. 1: Oath did not identify a benefit of an original form over a copy

Even if we take OATH's justifications on face value, OATH still has not identified the benefit of an original signature over a copy. The natural benefit would be, of course, the guarantee of authenticity. Seemingly, OATH wants to ensure that the form was actually signed by the respondent, and not the representative who wished to appear without respondent's knowledge or consent.

While this seems instinctively rational, it actually belies logic. The rule cannot be designed to target honest representatives who were mistakenly authorized by the respondent, because in that case, the mistake would have been made even if the representative had an originally signed form. Nor can it target unscrupulous representatives who forge the form, since someone who is willing to falsely fill out a form with a copy of a signature will have no hesitation in signing the form himself, producing "an original." Thus, the rule will have no effect: the people making an honest mistake will continue to err, and the malicious ones will continue to lie.

As Ms. Statz noted at OATH's April 7th Board meeting, "We've had so many instances where documents have been doctored. Signatures from one document are lifted and put onto another document and then scanned through. And then the, the, the respondent says, yeah, this is my signature, but I never signed this paper. And then it's discovered later that some machinations were, were engaged in to, to, to shift signatures." (OATH Board meeting minutes, p. 19, line 7.)

This only supports the ineffectiveness of the rule. Fraud is fraud. If a representative is willing to forge a PDF document, they will not hesitate to forge an original one either.

A rule adopted by an agency needs to be logical and not arbitrary and capricious. Because the rule, even if adopted, will not promote OATH's stated goals, Jaffa opposes its adoption.

Reason no. 2: The rule is overly broad

OATH claims it has an authorization problem and wants to address it by requiring all representatives and attorneys to submit an original authorization form for in-person hearings and to attach a copy of the form when requesting a remote hearing.

This solution is unnecessarily broad. If OATH is motivated to ensure proper authorization, a more reasonable and targeted solution would be to require submission of the form if a respondent made a request to vacate due to lack of proper authorization, or if there is a double sign-in for a case. In such cases, OATH would legitimately seek to clarify if the representatives were authorized. But that hardly translates into a reason that the form must be *submitted* in all cases.

The New York City Charter § 1043(d)(1)(iii) requires the rule be "narrowly drawn to achieve its stated purpose." The solution that OATH proposed is unnecessarily broad and therefore in violation of this section and Jaffa opposes its adoption.

Reason no. 3: The rule is arbitrary and capricious because representatives will generally not be required to submit an original

Whatever benefit OATH gains in demanding an original over a copy is defeated by the fact that representatives will almost never be required to submit an original. Respondents today usually appear remotely, and the proposed rule allows representatives who appear remotely submit a copy of the form even though an original would be required if they appeared in person. This distinction proves that there is no legitimate concern of false representation and requiring the original in one but not the other is without foundation. Because the rule has disparate requirements that are unfounded, it is arbitrary and capricious and should not be adopted.

Reason no. 4: OATH lacks authority to impose new requirements on attorneys and requiring lawyers to produce an authorization form is an unwarranted infringement on their constitutional right to practice law

A. OATH cannot impose new requirements for attorneys

The admission of attorneys to the New York bar, as well as their supervision and regulation, is vested solely with the judiciary of New York. Section 90 of the New York Judiciary Law provides, in relevant part:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such

> admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

Id. § 90(2).

As the New York courts have recognized, the language of § 90 establishing that "[t]he supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law," *id*., "broadly establishes judicial governance over the conduct of attorneys." *In re Wong*, 275 A.D.2d 1, 5 (N.Y. App. Div. 2000); *see Matter of Roth v. Turoff*, 127 Misc. 2d 998, (N.Y. Sup. Ct. 1985) (striking down a law requiring attorneys to register with the Taxi and Limousine Commission and post a bond before acting in the role of a broker, noting that "the boundaries of permissible practice for attorneys is a matter for the State Legislature and the Supreme Court"), aff'd sub nom., *Roth v. Turoff*, 124 A.D.2d 471, (N.Y. App. Div. 1986); *see also Eric M. Berman, P.C. v. City of New York*, 770 F.3d 1002, 1008 (2d Cir. 2014) (holding that only the legislature or the supreme court could limit the "usual and normal privileges" of attorneys; *see also Eric M. Berman, P.C. v City of New York*, 25 NY3d 684, 691 (2015) (upholding a local statute regulating debt collectors only because it expressly excepted attorneys from regulation during their normal practice of law.)

OATH, with these rules, impermissibly creates new regulations for attorneys—and very burdensome ones at that—which is the sole province of the legislature and the supreme courts of New York.

Even if OATH had such authority, the rule proposed is contravened by existing law. 22 NYCRR § 1215.1(1) provides, "Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation[.]" However, § 1215.2 provides a list of exceptions where no written engagement letter is required. First among them is, "representation of a client where the fee to be charged is expected to be less than $3,000." *Id* § 1.

Since the cost of representation of a summons at OATH is less than $3,000, the law permits an attorney to proceed without a written retainer of any form, much less an original. Thus, OATH's new requirement is preempted.

B. The regulations impinge on an attorney's constitutional right to practice law

A lawyer's interest in pursuing his calling is protected by the Due Process Clause of the Fourteenth Amendment. *Leis v. Flynt*, 439 US 438 (1979) (citing *Konigsberg v.*

State Bar, 353 U. S. 252; *Schware v. Board of Bar Examiners*, 353 U. S. 232, 238-239, and n. 5.) Such a right is both a liberty and property right protected from state deprivation or undue interference. *See Keker v. Procunier*, 398 F.Supp. 756, 760 (E.D. Cal. 1975); *see Greene v. McElroy*, 360 U.S. 474, 492, (1959) (right to hold specific private employment and to follow chosen profession free from unreasonable governmental interference protected by Fifth Amendment); *see also In re Griffiths*, 413 U.S. 717, 722-27, (1973) (state requirement of United States citizenship violates attorney's right to practice law.)

The proposed rule, by its terms, applies equally to attorneys and non-attorneys alike. The onerous requirements of the new rule pose serious limitations on attorneys to practice law. HVR's typically appear for dozens of cases each week and easily over a thousand cases a year. Demanding that attorneys obtain, maintain, and present the original signatures of hundreds of respondents as a prerequisite to appearing is an unwarranted burden and unconstitutional. The rule should not be adopted.

Reason no. 5: The language of the rule is vague because it does not address the paramount issue of electronic verification

The rule requires that representatives obtain and maintain the form with the "original signature" but does not define that phrase. Specifically, the rule does not clarify if an electronic signature of the respondent will be considered an original. The difference is vast. If the rule requires a physical copy of the form, respondents will have to deliver by mail or in person a hand-signed copy of the form, which the representative is required to store indefinitely. This is obviously a tremendous and needles burden on respondents and their representatives.

There are many compelling reasons why an electronically authenticated document should be treated as an original:

i. First and foremost, a handwritten signature provides no greater guarantee of authenticity than an electronic one. Electronic authentication has become the standard practice of the business community and millions of people every day securely sign contracts, withdraw or deposit money from their bank accounts, sign checks, enter into loan agreements, and perform other business activities electronically. An electronically signed document is digitally marked as an original and cannot be altered after it was signed. And the use of electronic authentication has only increased after the COVID-19 pandemic. Allowing an electronic signature reflects best business practices and comports with the post-pandemic reality of remote work.

ii. Federal and New York State law mandate that electronic signatures be given equal validity and effect as handwritten ones. 15 U.S.C. § 7001 et seq. (2000); N.Y. Tech. Law. § 304(2) (2014) ("The use of an electronic

signature shall have the same validity and effect as the use of a signature affixed by hand.") The law applies even to the judicial system (*id*. § 306) and indeed, the New York State Court system accepts electronic signatures from attorneys submitting documents. The proposed rules themselves contain two certifications (one from Steven Goulden and one from Francisco Navarro,) both electronically signed.

iii. OATH's rules expressly allow for the submission of documents in either physical or electronic format. 48 RCNY § 1-07 ("Papers may be filed at OATH in person, by mail or by electronic means.") Indeed, OATH permits the use of electronic signatures of issuing officers on the summonses submitted by petitioners, on the decisions of the hearing officers which are signed electronically, and on every other submission to OATH by the respondent that require a signature. OATH's website even contains the following message on its appeal submission form, "By clicking the submit button below, I understand that I am signing and filing this application with the OATH Hearings Division and the enforcement agency. *This has the same effect as signing by hand*." (Emphasis added.) Thus, OATH's practice, policy, and procedure is to treat an electronic signature as a handwritten one and demanding that the authorization form be signed in ink would be inconsistent, violating New York City Charter §1043(d)(1)(ii) which requires that the new rule not be in conflict with other applicable rules.

iv. Finally, OATH itself has interpreted the proposed rule to include electronic signatures. OATH writes in the Statement of Basis and Purpose, "The signature requirement includes electronic signatures." While it does not clarify if it is referring to the copy submitted by the representative when seeking a remote hearing, or the original that must be maintained and produced upon request, it appears that OATH is ready to recognize that electronic signatures are equal to handwritten ones.

For these reasons, Jaffa believes that even if the rule was adopted in its current form, an electronically authenticated document will satisfy the requirement to obtain and maintain an authorization form with the "original signature." Nevertheless, because the rule is not explicit on the matter, Jaffa opposes its adoption as violating New York City Charter §1043(d)(1)(iv) and item (a) which requires the agency to provide a clear explanation of the rules and requirements, and that the rule be understandable and written in plain language for the discrete community being regulated.

In the alternative, Jaffa proposes to add the following sub-section (3) to the proposed § 6-16(d):

(3) An electronically signed authorization form has the same validity and effect as a handwritten one.

Adding this simple paragraph will foreclose any doubt as to the acceptability of electronic documents and is an easy way to resolve this issue.

Jaffa notes that in OATH's April 7 Board meeting, the members discussed this issue extensively. (OATH Board Meeting minutes, p. 14 et seq.) Mr. Schneid in particular, correctly pointed out that requiring a handwritten signature is out of step with the modern world and flatly against the law. ("I'm just concerned that, practically, most people just, they don't get originals. Like I, I signed, literally, unrelated to this, but I could do a $200 million sale of a building in my day-to-day life and there's no original of a signature.") (*Id*. at p.16, line 14.)

The Board seemed open to recognize this, and even suggested an amendment similar to what Jaffa suggested above, but ultimately felt more secure in keeping the language as is. Though not entirely clear, the Board apparently felt that expressly allowing representatives to submit electronically signed documents would open the door to fraud. As a compromise of sorts, it added the one sentence to the Statement of Basis and Purpose indicating that electronic documents will be included in the rule.

First, as noted above, that sentence is vague because it does not clarify if it is referring to the original that respondent must maintain, or the copy submitted to OATH when requesting a remote hearing. But the solution is in any case insufficient. Without codification of the rule and a binding policy in place, the clerks will still unjustifiably deny hearing requests, as Jaffa has experienced many times in the past. If OATH is ready to recognize electronic signatures as originals, it should have no qualms in amending the language of the rule, crafting a policy to determine what is legitimate or not, and properly train its staff about what is and what is not acceptable. Until such time, Jaffa's opposition to the rule is unchanged.

> *Reason no. 6: The rule does not specify if the respondent must authorize the representative or the representative's organization*

The rule is further vague because it does not explicitly clarify who the respondent needs to authorize—the representative's firm or the individual representative himself. Jaffa can conceive of no reason or benefit why OATH would demand that a particular attorney or representative be specifically named on the form. Obviously, if a respondent authorizes a firm to represent him, he authorizes all the employees of that firm to represent him. There is no question of proper authorization here. Nor would it even be possible as a practical matter since the form is signed when the firm first takes on the case, but the individual attorney is only assigned months later. Thus, there is no way of knowing in advance which attorney's name to write on the form.

Despite having no reason or logic, OATH has in the past rejected forms submitted by Jaffa that state that the respondent authorizes "Jack Jaffa and Associates, Inc." since it did not identify which Jaffa employee would be appearing. Therefore, Jaffa opposes

the rule as vague, unclear, and violative of New York City Charter §1043(d)(1)(iv) and item (a) which require the agency to provide a clear explanation of rules and requirements, and that the rule be understandable and written in plain language for the discrete community being regulated.

III. JAFFA OPPOSES THE NEW REQUIREMENT TO ELECTRONICALLY SUBMIT EVIDENCE AT AN IN-PERSON HEARING

The proposed § 6-24(a)(4) requires respondents to be able to email the tribunal and all parties the evidence the respondent wishes to submit. This is a puzzling requirement for an in-person hearing where presumably the respondent will submit a physical copy of the evidence, as was the practice before the pandemic. Nor is there any reason provided in the Statement of Basis and Purpose for it. A simple respondent appearing *pro se* may not have the means to bring an i-Pad or similar device to the hearing to email the hearing officer. Because the rule is without sound basis in reason, and because no explanation was provided in the Statement of Basis and Purpose, Jaffa opposes this new requirement as arbitrary and capricious, and violative of the City Procedure Act.

IV. Conclusion

This comment exhaustively analyzed the reason behind the proposed rules and its likely effect on respondents. The arguments presented are based on extensive research and are buttressed by evidence, data, statistics, case law, relevant statutes, and reason. Jaffa believes that this comment clearly demonstrates why the rules are misguided, impotent, and above all, supremely unfair to respondents.

For better or worse, OATH and HVR's are joined at the hip. HVR's need OATH to run smoothly, and OATH equally depends on HVRs' cooperation in reaching that goal. When one fails, so does the other. The overarching goal of the new rules is, as OATH writes, "to promote the efficiency of OATH's adjudications." In that, OATH has respondents' unmitigated support. The adoption of the proposed rules will have the opposite effect.

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WRITTEN COMMENTS OF PETER M. MAZER

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METROPOLITAN TAXICAB BOARD OF TRADE

OATH Public Hearing

May 18, 2022

My name is Peter Mazer, and I am General Counsel to the Metropolitan Taxicab Board of Trade (MTBOT). We are a 70 year old association representing the owners and operators of licensed New York City medallion taxicabs. We operate a full service drivers' center that provides free representation for taxicab drivers in traffic court, criminal court (for vehicle-related offenses), and OATH. During the past five years MTBOT attorneys have appeared at the OATH Hearings Division on behalf of taxicab drivers in more than 4,800 TLC-related matters and have appeared at OATH Trials Division and at other, non-TLC OATH Hearings Division cases in another 160 cases. I have represented drivers personally at the vast majority of these hearings.

I speak today against certain provisions of the proposed rules under consideration. First, I speak against the requirement that attorneys be required to submit written authorization before appearing at, or conducting business before, the OATH Hearings Division. This is a requirement already placed on authorized non-attorney representatives who, in many cases, are acting as attorneys and may be practicing law without a license. Under these proposed rules, OATH would now require attorneys to submit authorization forms signed by their clients before conducting business before the tribunal. This requirement does not exist for attorneys in the

OATH Trials Division. The Traffic Violations Bureau, where I also practice, also seems to function well without having attorneys provide authorization letters from their clients. Even in Criminal Court, I can appear as an attorney and conduct business on behalf of my client, by filing a notice of appearance.

To be clear, what does it mean to be an attorney of record in TLC-related cases before the OATH Hearings Division? It does not mean that I will get notices of scheduled or rescheduled hearings--- OATH does not send them to attorneys, even if they have previously appeared or filed documents with respect to the specific case. It does not mean that I will get copies of hearing officers' decisions when I have appeared at a hearing--- no, I don't get them either. I don't get notices of appeals taken by the Agency, and usually only find out that an appeal has been taken by the petitioner when OATH reverses its decision and informs my client--- not me. And since the OATH summons tracker function on its website does not cover TLC summonses, I do not get notices of scheduled hearing dates and times until the published calendar for the week appears on-line, usually on a Friday afternoon—when it is already too late to schedule a remote hearing for a case scheduled for a Monday, Tuesday or Wednesday, even if I am the attorney of record and have previously appeared on the case.

I urge the OATH to redraft these rules to eliminate the authorization form requirement for attorneys admitted to practice in New York. This can be replaced with a notice of appearance form that attorneys can file with OATH any time after the onset of case. At the same time, OATH should give attorneys the usual courtesies that attorneys receive in other tribunals, like copies of court papers, decisions, adjournment and reschedule notices, and the like. We all have email addresses and can receive notices that way.

Second, while I understand the difficulty in scheduling large numbers of cases, the three-day notice requirement for appearing at a remote hearing is at times not workable. Recently, I rescheduled a TLC-related summons on line. Therefore, OATH knew I was the attorney of record on the case. My reschedule request was granted and I was advised that I would receive a notice of a new hearing date by mail or email. I did not, but instead, learned of the new hearing date when the following week's calendar was posted on Friday afternoon. The hearing was scheduled for the next Wednesday. I filed a request for a remote hearing, but this was rejected because I failed to give the requisite three days' notice. It probably would have also been turned

down if timely because I had already submitted my one allowable email for that day's hearings. So the case was defaulted. This default could have been avoided if either (a) OATH sent me a rescheduled hearing notice, since I was the attorney of record; or (b) OATH permitted a one-time exception to the three day rule.

I understand that a tribunal cannot handle large volumes of cases without rules, but there can be exceptions where an attorney receives late notice of a hearing. A limited number of add-ons can be accommodated; maybe attorneys can add a late case occasionally. The effect of this rule is to limit the ability of respondents to engage legal representation, since most unrepresented respondents are aware of OATH rulers in this regard.

I practice before OATH nearly every day. I want the tribunal to work and I want fair hearings. While the tribunal has raised genuine concerns, attorneys should be permitted to represent their clients without the imposition of unnecessary burdens, and without being unable to receive timely information needed to defend their clients.

Respectfully submitted,

Peter M. Mazer