

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

Notice of Adoption of Rule

Pursuant to the authority vested in the Office of Administrative Trials and Hearings (OATH) by sections 1043, 1049, and 1049-a of the New York City Charter, OATH has adopted amendments to chapters 1, 5 and 6 of title 48 of the Rules of the City of New York.

The Environmental Control Board voted to approve a proposed version of these amendments on August 12, 2021. A proposed version of these amendments was published in The City Record on August 20, 2021. A public hearing was held on September 20, 2021. One person spoke at the hearing, and one written comment was received. The Environmental Control Board voted to approve a final version of these amendments on October 5, 2021.

Statement of Basis and Purpose of Rule

Pursuant to sections 1043, 1049, and 1049-a of the New York City Charter, which authorize the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (OATH) to establish rules of conduct, OATH has adopted amendments to provisions of title 48 of the Rules of the City of New York in order to clarify, refine, and establish rules for the conduct of remote proceedings. OATH also has adopted amendments to streamline and modernize its Trials Division's and Hearings Division's processes. The provisions codified in chapter 6 of title 48 of the Rules of the City of New York amended by this proposal govern Environmental Control Board adjudicatory proceedings, as well as other proceedings under the jurisdiction of OATH's Hearings Division.

State and local authorities facilitated the use of remote methods to conduct adjudications during the COVID-19 pandemic. Mayoral Emergency Executive Order 177, dated January 27, 2021, and Mayoral Emergency Executive Order 179, dated February 1, 2021, which have since been extended by a series of subsequent Mayoral Emergency Executive Orders, broadened OATH's authority to adjudicate most summonses filed in the OATH Hearings Division and petitions filed in the OATH Trials Division by remote means. In implementing these Mayoral Emergency Executive Orders, OATH developed and refined the processes and protocols that make telephone and videoconference communications easier to use and more efficient.

As of the date of this notice, OATH continues to adjudicate most matters remotely. In order to ensure that parties appearing before OATH continue to have the option to appear remotely even beyond the end of the present local declaration of emergency, OATH amended its rules to make appropriate procedural adjustments and to establish OATH's general ability to use remote methods of adjudication.

Prior to the pandemic, the full complement of parties, witnesses, adjudicators, and staff required to process the nearly 1,000 matters heard daily by OATH involved hundreds of individuals. Because of space constraints and the ongoing risk of COVID-19 transmission from close in-person contact, remote appearances remain a critical option for many New Yorkers, in order to

ensure that they may avail themselves of their right to due process in contesting a City agency's enforcement or disciplinary action. The adoption of these rules was necessary to prevent any potential interruption of this option.

Section one of this rule amends section 1-01 of title 48 of the Rules of the City of New York by adding definitions for "appearance" and "remote means."

A definition of "appearance," much like the one added by section one of this rule, already exists in chapter 6 of title 48 of the Rules of the City of New York. By adding this definition in chapter one, OATH provided the same clarity regarding proceedings in the OATH's Trials Division. This definition of "appearance" incorporates the term "remote means" to allow for a broader range of remote proceedings at the discretion of OATH's Trials Division. "Remote means" encompasses a wide range of means of communication that do not require the physical presence of the parties.

Section two of this rule amends the definition of "trial" in section 1-01 of title 48 of the Rules of the City of New York to clarify that such proceedings may, at the discretion of the OATH Trials Division, be conducted either in person or by remote means.

Section three of this rule amends subdivisions (a) and (c) of section 1-11 of title 48 of the Rules of the City of New York to further clarify that appearances before the OATH Trials Division are not limited to those occurring in person.

Section four of this rule amends subdivision (a) of section 1-14 of title 48 of the Rules of the City of New York to specify that, with respect to the rule prohibiting *ex parte* communications in the OATH Trials Division, parties may be present either in person or by remote means.

Section five of this rule amends subdivision (a) of section 1-28 of title 48 of the Rules of the City of New York to ensure that notices contain all relevant information respecting the time, means, and, if applicable, location of OATH Trials Division conferences and trials, whether live or remote. Section five also authorizes that notice of conferences or trial be served by e-mail, upon consent of the parties.

Section six of this rule amends subdivision (a) of section 1-30 of title 48 of the Rules of the City of New York, regarding the procedures of conferences, to substitute the phrase "appear at" for "attend," as "attend" could potentially be misinterpreted, without further context, to require a party's in person presence. The substitution clarifies that appearances at conferences may be by remote means, where permitted by OATH's Trials Division. This section also removes a provision authorizing telephonic conduct of conferences, as other sections of this rule broadly expand the potential use of remote means of appearance, beyond telephonic means.

Section seven of this rule amends subdivisions (b) and (c) of section 1-31 of title 48 of the Rules of the City of New York to allow OATH Trials Division settlement conferences to be conducted by remote means, under certain circumstances. This provision will increase the efficiency of OATH's Trials Division by allowing law clerks and other personnel specifically designated by the Chief Administrative Law Judge to oversee settlement negotiations to provide that such

individuals cannot be called to testify in any proceeding concerning statements made at a settlement conference. Insulating these personnel from being called to testify will allow them to effectively oversee such conferences and promote candor and constructive negotiations at settlement hearings.

Section eight of this rule amends section 1-45 of title 48 of the Rules of the City of New York to substitute the word “appear” for the phrase “be present,” as the phrase “be present” could potentially be misinterpreted, without further context, to require a party’s in-person appearance. The substitution is intended to clarify that appearances at conferences may be conducted by remote means, where permitted by OATH’s Trials Division.

Section nine of this rule amends subdivisions (a) and (b) of section 1-49 of title 48 of the Rules of the City of New York to provide that public access of OATH Trials Division proceedings may be in person or by remote means, in the discretion of the Administrative Law Judge.

Section 10 of this rule amends subdivisions (a) and (c) of section 5-02 of title 48 of the Rules of the City of New York to specify that, with respect to certain proceedings concerning the Taxi and Limousine Commission (TLC), the TLC may produce complaining witnesses either in person or by remote means.

Section 11 of this rule amends the definition of “appearance” in section 6-01 of title 48 of the Rules of the City of New York to provide that an appearance may be made in person or by remote means, at the discretion of OATH’s Hearings Division, as provided by other rules included in title 48.

Section 12 of this rule amends section 6-01 of title 48 of the Rules of the City of New York to add a definition of “remote means” nearly identical to the amendment in section two, above, but applicable to OATH’s Hearings Division.

Section 13 of this rule amends subdivisions (b), (e), and (f) of section 6-09 of title 48 of the Rules of the City of New York to provide that appearances before OATH’s Hearings Division made by written communication, including communication transmitted by postal mail or through the internet, are subject to particularized protocols and procedures that are distinct from those applicable to telephonic communication, videoconferencing, in-person appearances, or other similar means of appearance. Authorization for the use of written appearance methods will require the permission of the Tribunal. These rules are also intended to instruct attorneys and representatives appearing in person on 15 or more summonses on any given hearing date to adhere to the specific protocols and processes identified in section 6-24 of the subchapter. Separate provisions apply to hearings held by telephone, videoconferencing, or by other similar remote means, as set forth in section 6-24a, detailed below.

Section 14 of this rule amends the title and subdivision a of section 6-10 of title 48 of the Rules of the City of New York to clarify that only written means of communication, including written communication transmitted by postal mail, online, or other similar remote means, as permitted by OATH’s Hearings Division, are subject to the procedures set forth in such section 6-10 of title 48 of the Rules of the City of New York.

Section 15 of this rule repeals subdivision (d) of section 6-10 of title 48 of the Rules of the City of New York, relating to adjudications by telephone before OATH's Hearings Division, because only written means of communication are contemplated by that section, based on the revisions made by section 14 of this rule.

Section 16 of this rule amends section 6-24 of title 48 of the Rules of the City of New York to require attorneys and representatives appearing in person on 15 or more summonses on any given hearing date to provide a list of applicable summonses three days prior to such hearing date. This rule will help OATH's Hearing Division efficiently process to completion the high volume of matters typically heard in person and provide personnel with sufficient time to sort and assign matters.

Section 17 of this rule adds a new section 6-24a to title 48 of the Rules of the City of New York that limits individual attorneys and representatives appearing before OATH's Hearings Division by telephone, videoconferencing, or other similar remote means to 25 summonses per hearing date, and requires attorneys and representatives to provide a list of summonses three days prior to such hearing date, regardless of the total number of summons on which he or she is appearing remotely. This amendment will help OATH's Hearings Division efficiently process to completion the high volume of matters heard by OATH's Hearings Division by telephone, videoconferencing, or other similar remote means and provide personnel with sufficient time to sort and assign matters.

These rules will promote the efficiency of OATH's adjudications.

Deleted material is in [brackets].

New text is underlined.

Section 1. Section 1-01 of title 48 of the Rules of the City of New York is amended by adding definitions for “appearance” and “remote means” in appropriate alphabetical order to read as follows:

Appearance. “Appearance” means a communication with the OATH Trials Division or any other participation in a proceeding before the OATH Trials Division by a party, the attorney or representative of a party, or another individual in connection with a petition that is or was pending before the OATH Trials Division. An appearance may be made in person or, at the discretion of the OATH Trials Division, by remote means.

Remote means. “Remote means” refers to any means of communication or attendance, as applicable, that does not require the physical presence of a party, representative, or other individual and that has been approved by the OATH Trials Division. At the discretion of the OATH Trials Division, remote means may include, but are not limited to, telephonic communication, postal mail and online communication, including e-mail and videoconferencing.

§ 2. The definition of “trial” in section 1-01 of title 48 of the Rules of the City of New York is amended to read as follows:

Trial. "Trial" means a proceeding before an administrative law judge in the OATH Trials Division. Such proceedings may either be conducted in person or, at the discretion of the OATH Trials Division, by remote means.

§ 3. Subdivisions (a) and (c) of section 1-11 of title 48 of the Rules of the City of New York are amended to read as follows:

(a) [A party] Parties may appear [in person] themselves, by an attorney, or by a duly authorized representative. A person appearing for a party [, including by telephone conference call,] is required to file a notice of appearance with OATH. Docketing of a case by an attorney or representative of a party will be deemed to constitute the filing of a notice of appearance by that person. The filing of any papers by an attorney or representative who has not previously appeared will constitute the filing of a notice of appearance by that person, and must conform to the requirements of subdivisions (b), (d) and (e) of this section.

(c) Absent extraordinary circumstances, no application may be made or argued by any attorney or other representative who has not filed a notice of appearance. Any application submitted on behalf of a party or participation in a conference [, whether by e-mail, letter or phone,] will be deemed an appearance by the attorney or representative. After making such an appearance, the attorney or representative must file a notice of appearance in conformity with subdivisions (b), (d) and (e) of this section.

§ 4. Subdivision (a) of section 1-14 of title 48 of the Rules of the City of New York is amended to read as follows:

(a) Except for ministerial matters, on consent, in an emergency, or as provided in § 1-31(a), communications with the administrative law judge concerning a case must only occur with all parties present, either in person or by remote means. If an administrative law judge receives an ex parte communication concerning the merits of a case to which he or she is assigned, then he or she must promptly disclose the communication by placing it on the record, in detail, including all written and oral communications and identifying all individuals with whom he or she has communicated. A party desiring to rebut the ex parte communication will be allowed to do so upon request.

§ 5. Subdivision (a) of section 1-28 of title 48 of the Rules of the City of New York is amended to read as follows:

(a) When a case is placed on either the trial calendar or the conference calendar, and within the time provided in § 1-26(d), if applicable, the party that placed the case on the calendar must serve each other party with notice of the following: the date, the time and, if applicable, the place of the trial or conference and whether the OATH Trials Division has determined if it will be held in person or by remote means; each party's right to representation by an attorney or other representative at the trial or conference; the requirement that a person representing a party at the trial or conference must file a notice of appearance with OATH prior to the trial or conference; and, in a notice of a trial served by the petitioner, the fact that failure of the respondent or an

authorized representative of the respondent to appear at the hearing may result in a declaration of default, and a waiver of the right to a trial or other disposition against the respondent. The notice may be served personally [or], by mail, or, upon consent of the parties, by e-mail, and appropriate proof of service must be maintained. A copy of the notice of conference, with proof of service, must be filed with OATH at or before the commencement of the conference. A copy of the notice of trial, with proof of service, must be filed with OATH at or before the commencement of the trial.

§ 6. Subdivision (a) of section 1-30 of title 48 of the Rules of the City of New York is amended to read as follows:

(a) All parties are required to [attend] appear at conferences as scheduled unless timely application is made to the administrative law judge. Participants must be prompt and prepared to begin on time. No particular format for conducting the conference is required. The structure of the conference may be tailored to the circumstances of the particular case. The administrative law judge may propose mediation and, where the parties consent, may refer the parties to the Center for Creative Conflict Resolution or other qualified mediators. [In the discretion of the administrative law judge, conferences may be conducted by telephone.]

§ 7. Subdivisions (b) and (c) of section 1-31 of title 48 of the Rules of the City of New York are amended to read as follows:

(b) If settlement is to be discussed at the conference, each party must have an individual possessing authority to settle the matter, either present at the conference or readily accessible. All individuals participating in the conference shall be present or readily accessible either in person or, at the discretion of the OATH Trials Division, by remote means, as applicable. A settlement conference will be conducted by an administrative law judge or other individual designated by the Chief Administrative Law Judge, other than the administrative law judge assigned to hear the case. During settlement discussions, upon notice to the parties, the administrative law judge or other person conducting the conference may confer with each party and/or representative separately.

(c) All settlement offers, whether or not made at a conference, will be confidential and will be inadmissible at trial of any case. Administrative law judges or other individuals designated by the Chief Administrative Law Judge to conduct settlement conferences must not be called to testify in any proceeding concerning statements made at a settlement conference.

§ 8. Section 1-45 of title 48 of the Rules of the City of New York is amended to read as follows:

§ 1-45 Failure to Appear.

All parties, attorneys and other representatives are required to [be present] appear at OATH and to be prepared to proceed at the time scheduled for commencement of trial. Commencement of trial, or of any session of trial, will not be delayed beyond the scheduled starting time except for good cause as determined in the discretion of the administrative law judge. Absent a finding of

good cause, and to the extent permitted by the law applicable to the claims asserted in the petition, the administrative law judge may direct that the trial proceed in the absence of any missing party or representative, render a disposition of the case adverse to the missing party, or take other appropriate measures, including the imposition of sanctions listed in § 1-13(e). Relief from the direction of the administrative law judge may be had only upon motion brought as promptly as possible pursuant to § 1-50 or § 1-52. The administrative law judge may grant or deny such a motion, in whole, in part, or upon stated conditions.

§ 9. Subdivisions (a) and (b) of section 1-49 of title 48 of the Rules of the City of New York are amended to read as follows:

(a) Other than settlement conferences, all proceedings are open to the public, unless the administrative law judge finds that a legally recognized ground exists for closure of all or a portion of the proceeding, or unless closure is required by law. Members of the public may be provided access to such proceedings in person or by remote means, in the discretion of the administrative law judge. Trial witnesses may be excluded from proceedings other than their own testimony in the discretion of the administrative law judge.

(b) No person may make or cause to be made a stenographic, electronic, audio, audio-visual or other verbatim or photographic reproduction of any trial or other proceeding, whether such trial or other proceeding is conducted in person [, by telephone, or otherwise] or by remote means, except upon application to the administrative law judge or as otherwise provided by law (e.g. N.Y. Civil Rights Law, § 52). Such application must be addressed to the discretion of the administrative law judge, who may deny the application or grant it in full, in part, or upon such conditions as the administrative law judge deems necessary to preserve the decorum of the proceedings and to protect the interests of the parties, witnesses and any other concerned persons.

§ 10. Subdivisions (a) and (c) of section 5-02 of title 48 of the Rules of the City of New York are amended to read as follows:

(a) Pursuant to Administrative Code § 19-506.1, the TLC must produce the complaining witness in person or by remote means where such witness's credibility is relevant to the summons being adjudicated. [If the TLC is unable to produce such witness in person, the TLC must make reasonable efforts to make the witness available during the hearing by videoconferencing or teleconferencing.]

(c) If the Respondent previously requested an adjournment to obtain the testimony of the complaining witness, the non-attendance of the complaining witness, either in person or by remote means, will be considered a failure by the TLC to produce a complaining witness under paragraph (b) and may be grounds for the Hearing Officer to dismiss the summons.

§ 11. The definition of “appearance” in section 6-01 of title 48 of the Rules of the City of New York is amended to read as follows:

“Appearance” means a communication with the Tribunal [that is made] or any other participation in a proceeding before the Tribunal by a party [or], the attorney or representative of a party, or another individual in connection with a summons that is or was pending before the Tribunal. An appearance may be made in person [, online] or by [other] remote [methods approved by] means at the discretion of the Tribunal, as provided in this title.

§ 12. Section 6-01 of title 48 of the Rules of the City of New York is amended by adding a new definition of “remote means” in appropriate alphabetical order to read as follows:

“Remote means” refers to any means of communication or attendance, as applicable, that does not require the physical presence of a party, representative, or other individual and that has been approved by the Tribunal. At the discretion of the Tribunal, remote means may include, but are not limited to, telephonic communication, postal mail and online communication, including e-mail and videoconferencing.

§ 13. Subdivisions (b), (e) and (f) of section 6-09 of title 48 of the Rules of the City of New York are amended to read as follows:

(b) A Respondent may appear for a hearing by:

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

(2) Appearing by written communication, including postal mail, written online communication, or by other similar remote [methods] means, pursuant to § 6-10[, only where the summons indicates that such opportunity is available to a Respondent. Where the summons requires personal appearance, a Respondent must appear pursuant to subsection (1) of this subdivision] when the opportunity to do so is offered by the Tribunal.

(e) *Failure to Appear by Respondent.* A Respondent’s failure to appear timely pursuant to subsection (1) of subdivision (b) of this section, or to make a timely request to reschedule pursuant to § 6-05 constitutes a default and subjects the Respondent to penalties in accordance with § 6-20.

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

§ 14. The title and subdivision (a) of section 6-10 of title 48 of the Rules of the City of New York are amended to read as follows:

§ 6-10 Written Remote Adjudications.

(a) When the opportunity to do so is offered by the Tribunal, a Respondent may contest a violation by written communication, including by postal mail, written online communication, [by telephone] or by other similar remote [methods] means, as permitted by the Tribunal.

§ 15. Subdivision (d) of section 6-10 of title 48 of the Rules of the City of New York, relating to adjudications by telephone, is REPEALED.

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

§ 6-24 Pre-hearing Notification of Schedule for Attorneys and Registered Representatives for In Person Hearings.

(a) No attorney or registered representative may appear in person on fifteen (15) or more summonses on a given hearing date unless:

(1) No later than noon [two (2)] three (3) business days before the scheduled hearing date, the Tribunal office in the borough where the cases are scheduled to be heard receives from the attorney or registered representative by email a written list of all scheduled cases;

(2) Notices of Appearance are submitted in advance of the scheduled hearing, as directed by the Tribunal, to the Tribunal office in the borough where cases are scheduled to be heard; and

(3) [The attorney or registered representative appears at or before the scheduled hearing time, at the place and date for the scheduled hearing. The timeliness requirements set forth in § 6-09(b)(1), which allows a Respondent or a Respondent's representative to appear within three (3) hours of the scheduled hearing time, does not apply when an attorney or representative is appearing on fifteen (15) or more summonses on a given hearing date] The Respondent's attorney or representative appears no later than the earliest scheduled hearing time set forth on the summonses to be heard. The timeliness requirements set forth in § 6-09(b)(1) do not apply in such circumstances.

(b) Cases may be added to this list on the day of the hearing at the discretion of the Tribunal.

§ 17. Subchapter F of chapter 6 of title 48 of the Rules of the City of New York is amended by adding a new section 6-24a to read as follows:

§ 6-24a Pre-hearing Notification of Schedule for Attorneys and Registered Representatives for Hearings by Telephone, Video-Conferencing or Other Similar Remote Means.

(a) No attorney or registered representative may appear by telephone, video-conferencing or other similar remote means unless:

(1) No later than noon three (3) business days before the scheduled hearing date, the Tribunal receives from the attorney or registered representative a list of all scheduled summonses in a format required by the Tribunal;

(2) The attorney or registered representative submits only one list per hearing date and submits that list electronically pursuant to the Tribunal's direction to a recipient designated by the Tribunal, regardless of the county in which the summonses were scheduled;

(3) The attorney or registered representative makes no changes or additions to the list, unless it is to withdraw their representation on a matter; and

(4) The attorney or registered representative calls in for their first scheduled hearing no later than the earliest scheduled hearing time as set forth on the summonses or reschedule notices to be heard. The timeliness requirements set forth in § 6-09(b)(1) do not apply in such circumstance.

(b) No one registered representative or attorney may appear by remote means on a single hearing date for more than twenty-five (25) summonses, unless an exception is granted by the Tribunal prior to the hearing date.

(c) Where a law firm or representative firm has more than twenty-five (25) cases scheduled on a hearing date, it must assign an additional registered representative or attorney for each group of up to twenty-five (25) summonses to be heard on that date, unless an exception is granted by the Tribunal prior to the hearing date.

(d) The law firm or representative firm must provide the names of the additional registered representatives or attorneys who will appear on the additional groups of cases on that date. Once a registered representative or attorney is assigned to appear on a group of summonses, a different registered representative or attorney may not appear in their place.