

## **Department Of Justice Guidance Regarding Agency Lay Representation in Contested Cases**

The Attorney General is authorized to consent to lay representation in particular hearings or particular classes of hearings in accordance with ORS 183.452. Such authorization is provided in writing, in the form of a letter from the Attorney General. If your agency does not have such a letter, please contact your DOJ attorney to begin the Lay Representation authorization process.

Use of agency representatives during contested case hearings also requires that the agency, by rule, has authorized agency representatives to appear on its behalf in the particular type of hearing being conducted. The agency's rule should align with the authorization granted by the Attorney General and the requirements of ORS 183.452.

Although some lay representatives have a law degree, they may not act as an attorney for the agency. All lay representatives are prohibited by ORS 183.452(3) from presenting legal argument in contested case hearings or providing legal advice to the agency. If a case may require legal argument, an assistant attorney general (AAG) must be assigned to make legal argument for the agency.

The Attorney General typically consents to lay representation of an agency by its employees in contested case hearings referenced, within certain parameters, for example:

- a. The agency must maintain the authorized administrative rule that describes the "particular types of hearings" for which lay representation has been authorized and that meet the requirements of ORS 183.452. Please consult your agency's assigned legal counsel before amending the rule.
- b. The agency must consult with its assigned legal counsel<sup>1</sup>, as early in the case preparation process as possible, if any of the following situations arise: (a) it appears that a case may have a significant impact on the interpretation of state law; (b) it appears that legal issues will be raised in a case; (c) it appears that a hearing may involve an issue beyond the lay representative's ability or authority; or (d) the agency believes the case is likely to result in an appeal. If any of these situations arise *during a hearing*, the agency must consult with its assigned legal counsel and should request time to do so from the administrative law judge or hearing officer.
- c. The agency must consult with its assigned legal counsel if a party is represented by an attorney or notifies the agency of its intent to call an expert witness, where the involvement of counsel or expert witness indicates that legal issues are likely to be

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<sup>1</sup> "*Consult with its assigned legal counsel*" refers to a timely and meaningful conversation with the agency's assigned AAG that includes sufficient background information so that the AAG can adequately respond to the particular question or issue presented. Unless impossible, this consultation shall occur at least two weeks before the scheduled hearing.

- raised. Consultation must also occur if one of the parties to the hearing is another state agency.
- d. The agency must consult with its assigned legal counsel, or other designated DOJ legal counsel for purposes of criminal matters, if it has reason to believe or if it is notified that there is an ongoing criminal investigation or criminal proceeding involving a party which relates to the contested case hearing.
  - e. In hearings in which the potential sanction is disqualification from pursuing a profession and that sanction is contested by the party, the agency must consult with its assigned legal counsel to determine whether legal assistance is warranted.
  - f. The agency must ensure that its employees who represent the agency at hearings have the necessary skills and knowledge regarding notices, procedures and conduct of hearings, and that they coordinate and consult with other agency lay representatives and with assigned legal counsel as necessary in order to ensure consistency of agency rule interpretation.
  - g. The agency must ensure that its employees who represent the agency at hearings review at least once during each biennium the most recent version of the Code of Conduct for Non-Attorney Representatives at Administrative Hearings, which is maintained by DOJ and available on its website at <http://www.doj.state.or.us>.

An agency authorization is subject to revocation if the Attorney General determines that the best interests of the state require that the agency be represented in its contested case proceedings by an AAG. In addition, DOJ may determine that the state's interests require that an AAG represent the agency in a particular hearing.

Consistent with ORS 183.471, non-exempt agencies are required to maintain their final orders in digital searchable format. The agency must confer with its assigned AAG to identify the categories of final orders that may serve as precedents for future agency cases or which would facilitate effective legal consultation and shall provide a digital searchable version of those final orders, when issued, to its assigned AAG.

On a biennial basis, DOJ will request summary information from agencies about the use of lay representation. This request will be made at the end of the biennium. In addition, the agency's assigned AAG will meet with the agency's lay representatives on an annual basis to review and discuss the Agency's lay representation program.