

Secretary of State
Certificate and Order for Filing
TEMPORARY ADMINISTRATIVE RULES
A Statement of Need and Justification accompanies this form.

I certify that the attached copies* are true, full and correct copies of the TEMPORARY Rule(s) adopted on February 3, 2010 by the
(Date prior to or same as filing date.)

Construction Contractors Board OAR 812
(Agency and Division) (Administrative Rules Chapter Number)

Catherine Dixon 700 Summer St NE Suite 300, Salem OR 97301 378-4621 ext. 4077
(Rules Coordinator) (Address) (Telephone)

to become effective February 3, 2010 through August 1, 2010
(Date upon filing or later) (A maximum of 180 days including the effective date.)

RULE CAPTION

Lay representation in certain classes of hearings

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

List each rule number separately, 000-000-0000.

ADOPT: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

AMEND:
OAR 812-009-0340

SUSPEND:

ORS 183.310 to 183.550, 670.310 & 701.235
Stat. Auth.: ORS

Other Authority

ORS 183.452 & 183.457
Stats. Implemented: ORS

RULE SUMMARY

OAR 812-009-0340: In 2007, the Oregon legislature changed several statutes. In 2008 the Attorney General changed the format for lay representation rules. There are some very basic cases not previously included (e.g., bond suspensions, insurance cancellations) in which the agency needs to appear. For all of the matters covered by the rule, the Attorney General authorized the agency, by letter of June 12, 2008, to represent the agency.

Continuing use of the old rule may result in serious prejudice to the public because (1) persons reading the old will be unable to determine its meaning, and (2) persons requesting hearings before CCB impacted by the rule may not receive timely hearings unless CCB has an appropriate rule in place.

The revised rule will accomplish the following:

- Revise the rule to follow the format in the AG's Administrative Law Manual (January 1, 2008), at page A-28.
- Revise the rule to incorporate reference to OAR 812-005-0280(1), the "fitness" rule adopted by the board in 2008.

Authorized Signer Catherine Dixon February 3, 2010
Printed Name Date

*With this original and Statement of Need, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules..

ARC 940-2005

NOTE: In order to save postage and printing costs in these difficult times, CCB is only providing a copy of the notice. To view the language of each individual rule change, please go to our web site at http://www.oregon.gov/CCB/Laws_Rules.shtml#Administrative_Rule_Notices. If you don't have web access, contact Cathy Dixon at (503) 378-4621 ext. 4077 for assistance in receiving a copy.

Secretary of State
STATEMENT OF NEED AND JUSTIFICATION
A Certificate and Order for Filing Temporary Administrative Rules accompanies this form.

Construction Contractors Board

OAR 812

Agency and Division

Administrative Rules Chapter Number

In the Matter of: Amendments to OAR 812

Rule Caption: (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

Lay representation in certain classes of hearings

Statutory Authority: ORS 183.310 to 183.550, 670.310 & 701.235

Other Authority:

Stats. Implemented: ORS 183.452 & 183.457

Need for the Temporary Rule(s):

Amend OAR 812-009-0340: In 2007, the Oregon legislature changed several statutes. In 2008 the Attorney General changed the format for lay representation rules. There are some very basic cases not previously included (e.g., bond suspensions, insurance cancellations) in which the agency needs to appear. For all of the matters covered by the rule, the Attorney General authorized the agency, by letter of June 12, 2008, to represent the agency.

Continuing use of the old rule may result in serious prejudice to the public because (1) persons reading the old will be unable to determine its meaning, and (2) persons requesting hearings before CCB impacted by the rule may not receive timely hearings unless CCB has an appropriate rule in place.

The revised rule will accomplish the following:

- Revise the rule to follow the format in the AG's Administrative Law Manual (January 1, 2008), at page A-28.
- Revise the rule to incorporate reference to OAR 812-005-0280(1), the "fitness" rule adopted by the board in 2008.

Documents Relied Upon, and where they are available: ORS 701 and OAR 812. Documents are on the agency website at www.oregon.gov/ccb or a paper copy is available upon request.

Justification of Temporary Rule(s):

In 2007, the Oregon legislature changed several statutes. In 2008 the Attorney General changed the format for lay representation rules. There are some very basic cases not previously included (e.g., bond suspensions, insurance cancellations) in which the agency needs to appear. For all of the matters covered by the rule, the Attorney General authorized the agency, by letter of June 12, 2008, to represent the agency.

Continuing use of the old rule may result in serious prejudice to the public because (1) persons reading the old will be unable to determine its meaning, and (2) persons requesting hearings before CCB impacted by the rule may not receive timely hearings unless CCB has an appropriate rule in place.

The revised rule will accomplish the following:

- Revise the rule to follow the format in the AG's Administrative Law Manual (January 1, 2008), at page A-28.
- Revise the rule to incorporate reference to OAR 812-005-0280(1), the "fitness" rule adopted by the board in 2008.

Substantively, this rule is much like the rule previously approved by the Attorney General.

Under *previous* OAR 812-009-0340(1)(b)(A), lay representatives were authorized to appear at hearings involving refusals to reissue or suspensions arising from the failure to pay a final order of the CCB. The same concept is found in proposed OAR 812-009-0340(1)(b)(C), (1)(b)(D) and (1)(b)(F). Those provisions cover final orders of the CCB relating to unpaid construction debts (a term newly added by the 2007 legislature).

In the same way, *previous* OAR 812-009-0340(1)(b)(B) authorized lay representatives to appear at hearings involving refusals to reissue or suspensions arising from violations of employer status regulations, including violations of ORS chapter 656, 657 and 316 (as then provided in ORS 701.100). These chapters refer, respectively, to laws enforced by: (1) the Department of Consumer and Business Services (DCBS), Workers' Compensation Division (WCD); (2) the Employment Department; and (3) the Department of Revenue (DOR). In 2007, the legislature repealed ORS 701.100 and enacted OAR 701.106. ORS 701.106 similarly refers to laws enforced by WCD, Employment and DOR. The statute also adds laws

enforced by DCBS-Building Codes Division and the Landscape Contractors Board. The proposed rule, OAR 812-009-0340(1)(b)(E), refers to the specific agencies as well as to the statute, ORS 701.106. It is substantially similar to the rule previously approved.

The items that are new to the rule are found in subsections (1)(b)(A), (1)(b)(B), some portions of (1)(b)(F), (1)(b)(G), and (1)(b)(H) of OAR 812-009-0340.

- Subsection (1)(b)(A): Permits a lay representative to appear in a hearing involving the refusal to issue, reissue, renew or suspend because a contractor fails to have or maintain the surety bond required under ORS 701.068 (2005), 701.081, or 701.084 (various laws apply depending on the date of renewal and the endorsement of the contractor). The agency has authority under ORS 701.098(4)(a)(A) to immediately suspend a license (without prior hearing) if the contractor's surety bond is cancelled. The facts giving rise to a suspension usually originate with a notice of cancellation from the surety. This authority would allow the lay representative to prove the lack of a surety bond. The issue is factual and straight-forward: is there a surety bond in place?
- Subsection (1)(b)(B): Permits a lay representative to appear in a hearing involving the refusal to issue, reissue, renew or suspend because a contractor fails to have or maintain an insurance policy required under ORS 701.073(2005), 701.081, or 701.084 (various laws apply depending on the date of renewal and endorsement of the contractor). The agency has authority under ORS 701.098(4)(a)(B) to immediately suspend a license (without prior hearing) if the contractor's insurance policy is cancelled. The facts giving rise to a suspension usually originate with a notice of cancellation or non-renewal from the insurance company. This authority would allow the lay representative to prove the lack of an insurance policy. The issue is factual and straight-forward: is there an insurance policy in place?
- Subsection (1)(b)(F): Permits a lay representative to appear in a hearing involving failure to pay an obligation that has not matured into a construction debt but the non-payment of which indicates unfitness for lack of financial responsibility. OAR 812-009-0340(1) (rulemaking notice, copy enclosed). This broader concept was included in the law (and incorporated into old OAR 812-009-0340) that preceded the 2007 legislative amendments. However, because of the new definition of "construction debt" with its limitations as a final order, the previous concept was readopted by rulemaking authorized by ORS 701.098(2) and 701.102.
- Subsection (1)(b)(G): Since the old rule was adopted, the legislature created additional bonding requirements. The CCB may require contractors to post a surety bond in an amount greater than the statutory amount. This subsection permits a lay representative to appear in a hearing to refuse to issue or suspend a license for failing to obtain and maintain the increased bond.
- Subsection (1)(b)(H): Permits a lay representative to appear in a hearing involving the failure of the contractor to provide information during the licensing process required by statute or rule, such as a date of birth or driver's license number.

Authorized Signer

Catherine Dixon
Printed Name

February 3, 2010
Date

Agency Representation by Officer or Employee

(1) ~~[As authorized by]~~ **Subject to the approval of** the Attorney General as provided in ORS 183.452, agency officers and employees may appear, but not make legal argument, on behalf of the agency in ~~[compliance hearings involving]~~ **the following types of hearings conducted by the agency:**

(a) **Hearings involving the possible imposition** ~~[Imposition]~~ of civil penalties **for violations of statutes or regulations;** ~~[and]~~

(b) ~~[Refusals to reissue and suspensions in the following classes of hearings:~~

(A) ~~Failure of a licensee to pay a final order of the Board;~~

(B) ~~Violations of employer status regulations, including violations of ORS chapters 656, 657, and 316, in accordance with ORS 701.106; and~~

(c) ~~Other compliance and claims hearings as approved in writing by the Attorney General on an individual case basis.]~~ **Hearings involving refusals to issue, reissue or renew, or suspensions, which will be lifted upon correction of a deficiency, payment of a penalty or payment of a construction debt, based upon:**

(A) ORS 701.098(4)(a)(A) (no bond);

(B) ORS 701.098(4)(a)(B) (no insurance);

(C) ORS 701.098(4)(a)(E) (unpaid construction debt);

(D) ORS 701.102 (unpaid construction debt);

(E) ORS 701.106, where the violation is based on a final order issued by:

(i) Department of Consumer and Business Services, Building Codes Division;

(ii) Department of Consumer and Business Services, Workers' Compensation Division;

(iii) Department of Consumer and Business Services, Oregon-OSHA,

(iv) Employment Department;

(v) Department of Revenue; or

(vi) Landscape Contractors Board.

(F) Failure to pay an outstanding obligation, as required by OAR 812-005-0280(1);

(G) Failure to obtain or maintain an increased bond, as required by ORS 701.068(5) or

(6).

(H) Failure to provide information such as a date of birth or driver's license number, as required under ORS 701.046.

(2) ~~[Legal argument as used in ORS 183.457 has the same meaning as in OAR 137-003-0008.]~~ **The agency representative may not make legal argument on behalf of the agency.**

(a) **"Legal argument" includes argument on:**

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency; and

(C) The application of court precedent to the facts of the particular contested case proceeding.

(b) **"Legal argument" does not include presentation of motions, evidence, examination and cross-examination of witnesses or presentation of factual argument or arguments on:**

(A) The application of the statutes or rules to the facts in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statute or rules directly applicable to the issues in the contested case;

(D) The admissibility of evidence;

(E) The correctness of procedures being followed in the contested case hearing.

Stat. Auth.: ORS 183.310 to 183.550, 670.310 & 701.235

Stats. Implemented: ORS 183.450

(3/87, 12/87, 1/88, 5/93, 12/93, 1/94, 6/94, 7.94, 10/98, 6/00, 6/08, 2 temp. 2/10 eff. 2/3/10)