

Oregon  
State  
Bar

# Preparing for Fee Arbitration



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# Preparing for Fee Arbitration

The OSB Fee Dispute Resolution Program offers clients and lawyers a voluntary, out-of-court method for resolution of disputes over fees that is informal, quick, confidential, and inexpensive.

This guide is designed to help clients understand the OSB Fee Arbitration process and to assist you in presenting your information at the hearing. It is not a substitute for legal advice.



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## INTRODUCTION

Fee arbitration is a private method for resolving disputes about the reasonableness of attorneys' fees. Fee Arbitration is a binding process. Volunteer arbitrators listen to both sides and then make a decision and issue an award and money award.

### *What is Fee Arbitration?*

The Oregon State Bar Fee Arbitration process is an informal method for resolving fee disputes between Oregon attorneys and their clients, Oregon clients with out-of-state attorneys, and between attorney members of the Oregon State Bar over how to apportion a fee. Fee Arbitration is voluntary, but if there is an agreement to arbitrate under the OSB Fee Arbitration Rules, the award will be binding on the parties.

The Agreement to Arbitrate contains a promise that any award will be paid promptly. Arbitration should not be used to delay payment of fees for which the client has no genuine dispute.

Arbitrators do not have authority to award affirmative relief in the form of damages, or to reduce a fee to compensate for alleged malpractice or otherwise.

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## APPOINTMENT OF ARBITRATORS

### *Who are the arbitrators?*

Arbitrators are volunteer lawyers and nonlawyers (public members). For disputes involving less than \$10,000, a single lawyer-arbitrator is appointed to decide the matter. For disputes involving \$10,000 or more, a panel of arbitrators will be appointed, consisting of two lawyers and one public member. The arbitrators are selected from a panel of volunteers who reside or maintain their offices in the same Board of Governors district as the lawyer in arbitration.

### *What if I have concerns about an arbitrator's fairness?*

You may challenge two arbitrators without stating a reason. Additional challenges are subject to approval of General Counsel and must be supported by a specific reason why you believe the arbitrator cannot be fair in your case. Challenges will be denied if the only reason given is along the lines of "all the lawyers in this area stick together." You must offer a specific reason why you believe the prospective arbitrator cannot be fair; for instance, challenges are typically granted if there is a prior attorney-client or financial relationship between the arbitrator and one of the parties, or if the arbitrator was involved in the underlying case. The decision of General Counsel on a challenge to an arbitrator is final.

If three arbitrators cannot be found in the BOG district where the lawyer practices, General Counsel may choose an arbitrator from another district or, with the agreement of the parties, assign the matter to a single (lawyer) arbitrator.

***Who is in charge of the arbitration?***

In a three-person arbitration panel, one of the lawyer-arbitrators will be appointed as the “chairperson.” The chairperson is responsible for scheduling and conducting the hearing, and for ruling on any issues involving the presentation of evidence. In cases in which there is a single arbitrator, the single arbitrator has all of the powers and authority of the chairperson.

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**SCHEDULING A HEARING**

***When and where is the hearing held?***

Once the parties sign the agreement to arbitrate, the chairperson will inquire about the parties’ availability for a hearing. You should respond promptly to any requests from the chairperson regarding your availability on specific dates. Based on the information provided and the arbitrators’ schedules, the chairperson will set the date and location for the hearing. The hearing must be held within ninety (90) days after the arbitrators are appointed. If you plan to be represented by a lawyer at the hearing, inform the chairperson so that your lawyer’s schedule can be taken into consideration.

Hearings are usually held in the office of the chairperson, but other locations, such as the Oregon State Bar office or the local courthouse, may be used.

***Do I have to appear in person?***

With the consent of the chairperson, you may participate in the hearing by telephone, although this is not recommended. If both parties agree and the chairperson consents, the dispute may be submitted on written statements and supporting documents, without a personal appearance.

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**PREPARING FOR THE HEARING**

***Do I need to know any special rules?***

Arbitration hearings are intended to be informal. You will not be expected to know technical rules of evidence or procedure. Each party is entitled to be heard. You may present documents that you think will help explain your position and you may be allowed to present the testimony of witnesses as the chairperson determines is appropriate. The arbitrators may consider any information they believe is helpful in resolving the dispute.

***What should I bring to the hearing?***

You should bring to the hearing any documents you would like the arbitrators to consider in making their decision. At the very least, you should have a copy of any written fee agreement with the lawyer or any correspondence confirming the agreement, and copies of billing statements received from the lawyer that contain the disputed amounts. You may also wish to provide copies of court pleadings and other documents reflecting the work the lawyer performed for you.

Do not send copies of documents you want the arbitrators to consider to General Counsel’s Office. Only send documents to arbitrators in advance of the hearing if you are instructed to do so by the

chairperson. If you provide documents to the arbitrators, you should also provide a copy to the other party.

### ***What should I say at the hearing?***

Prepare your arguments in advance. You may find it helpful to make notes or prepare a written outline of your position. While the proceedings are informal, you will be expected to state your position as clearly and concisely as possible. If you have documents to support your position, you may want to organize them in date order and mark them in some way (e.g. Petitioner's Exhibit A, Petitioner's Exhibit B) to help you explain which documents support your position.

### ***Can the arbitrators help me?***

The arbitrators cannot help you decide what evidence to present or how to present it. If you are unsure about what you need to say or how to present your case, you may wish to consult with an attorney of your choice.

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## **AT THE HEARING**

### ***What is the procedure for making my case?***

The chairperson presides over the hearing and decides any questions about procedure or evidence. If you are the petitioner, you will present your position first. You may do that using documents, questioning witnesses, or just by explaining your objections to the lawyer's fees. After you have presented your case, the lawyer has an opportunity to respond. If you are the respondent, the lawyer will go first and you will be allowed an opportunity to respond.

Each party may question the other party and may ask questions of ("cross-examine") the other party's witnesses. You may call the lawyer as a witness in the presentation of your case; the lawyer may question you in the presentation of his or her response. The arbitrators may also ask questions of you or the lawyer. They do this to clarify the facts and to make sure that they have all the information they need to make a fair decision. Upon the request of either party or an arbitrator, the testimony of the parties and other witnesses may be given under oath.

You should try to present your position clearly and concisely. Avoid arguing about matters that don't affect the fees charged. Except in a contingent fee case, your obligation for fees is not dependent on the outcome of the case. The amount you owe your lawyer is also not dependent upon what the other client paid to his or her lawyer, although that evidence may be of interest to the arbitrators.

### ***Can I have a lawyer at the hearing?***

You may be represented at the hearing by a lawyer at your own expense. Even if you prevail in the arbitration, you will not be awarded any amount for the fees you pay to be represented by your own lawyer in the arbitration hearing.

### ***Can I be represented by a friend at the hearing?***

A friend or relative may accompany you at the hearing. Except in the most unusual cases, a person who is not an attorney cannot speak for you or present your case for you. A friend may help you to stay organized and provide administrative support. The chairperson will determine the extent to which another person may participate in your case.

### ***Are accommodations available if I have a disability?***

If you have a disability for which you would like accommodation at the hearing, contact the Oregon State Bar General Counsel's Office.

### ***What if I don't show up for the hearing?***

If you fail to appear for a scheduled hearing without being excused, the arbitrators are entitled to decide the case based on the available evidence, which may be only the evidence offered by the lawyer. Even if you do not participate in a hearing, an order issued by the arbitrators is a binding order.

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## **THE ARBITRATION AWARD**

### ***What are the arbitrators deciding?***

The purpose of arbitration is to determine whether the fees charged were reasonable under the circumstances. This generally begins with a determination of the existence and nature of the fee agreement between the parties. If there was no written fee agreement, the arbitrators will look at other evidence to determine if there was an oral agreement and, if so, its terms. When the terms of a fee agreement are determined, the arbitrators then look at whether the services provided by the lawyer were reasonable and necessary. What is reasonable and necessary will be different in each case depending on such things as the complexity of the matter, the degree to which it is contested, the skill and expertise of the lawyer, time constraints imposed by the client or others, and any special circumstances that existed.

### ***What if my lawyer and I didn't have an agreement about fees?***

In the absence of an express agreement for fees, a lawyer is generally entitled to be paid for the reasonable value of services performed. In order to establish the reasonable value of the services, the arbitrators will consider, in addition to the factors mentioned above, fees charged by other lawyers of similar experience in the community for similar services.

In addition to determining the reasonableness of the legal fees, the arbitrators may also determine the reasonableness of any costs charged by the lawyer. The arbitrators can also decide whether you should pay interest on outstanding amounts.

### ***What if I think my lawyer committed malpractice?***

Arbitrators cannot award damages or reduce the fees owed to compensate you for a loss caused by alleged malpractice. However, the arbitrators may consider evidence of the quality of the representation in determining whether the fees charged were reasonable.

### ***What will the arbitrators decide?***

Depending upon the circumstances, the arbitrators may decide that you owe additional fees, that no additional fees are owed, or that you are entitled to a refund from the lawyer of fees already paid.

The party in whose favor the award is rendered is the "prevailing party." If you petitioned successfully for a reduction in fees owed or for a refund of fees previously paid, you will be the prevailing party. You may also be the prevailing party if the lawyer petitioned for a determination of fees owed, but is required to refund some or all of what has been paid.

### ***How will I know what the arbitrators decide?***

The decision of the arbitrators is made by majority vote in the case of a three-person panel. The award may be announced at the conclusion of the hearing, but most often is deferred until it is put in writing. The award must be issued within 30 days after the hearing, unless General Counsel grants an extension for good cause. The arbitrators submit a written award to General Counsel's Office, and it is reviewed to ensure conformity with the requirements for written awards. General Counsel's Office retains the original award and provides certified copies to the parties.

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### **MODIFYING OR CORRECTING AN AWARD**

Within 20 days after the parties receive notice of the award, either party may request that the award be modified or corrected. If the other party does not object within 10 days, General Counsel's office will resubmit the award to the arbitrator(s) if it appears (1) there is a mathematical miscalculation or mistake in the description of persons or things in the award; (2) the arbitrator made an award on an issue not submitted to arbitration; (3) the award is not final and definite on the issues presented; or (4) to otherwise clarify the award. ORS 36.690.

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### **CONFIRMING THE AWARD IN COURT**

The arbitration award is binding on the parties. Either party may petition the court for an order confirming the award in accordance with ORS 36.700. If no objections are filed by the other party within the time allowed by statute, the court will enter a judgment that is enforceable as provided by law. If one party petitions the court to confirm the award, the other party may challenge the award and seek to have it modified or vacated as provided in ORS 36.705 and 36.710.

The Oregon State Bar cannot help you with filing your award with the court. See ORS 36.700 to 36.730 for an explanation of the process for having an award confirmed by the court. If you have questions that the court staff cannot answer, you should consult an attorney for assistance.

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