

FEE ARBITRATION TASK FORCE
REPORT
April 22, 2011

Summary & Introduction

In 2009, the Board of Governors approved the creation of a Fee Arbitration Task Force to evaluate the current fee arbitration rules and make proposals for changes where appropriate, to determine whether and how to increase participation in the program, and to develop recommendations for training and/or recruitment of arbitrators in order to improve the quality and consistency of fee arbitration awards.

The following Task Force members were appointed in early 2010: the Honorable Kristena LaMar, Nena Cook, Lori DeDobbelaire, Scott T. Downing, Cynthia M Fraser, Nancy E Hochman, Dan MW Johnson, Jonathan Levine, Donald W McCann, Melvin Oden-Orr, David W Owens, Ronald L Roome, John L Svoboda and Suzanne Townsend. Task Force members were from throughout the state of Oregon who had vast experience either in arbitration in general, or with the Oregon State Bar Fee Arbitration Program in particular. Two public members from the Fee Arbitration Panel participated in the Task Force, as well as a couple of lawyers who specialize in mediation. The Honorable Kristena LaMar served as the Task Force chair.

The Task Force met five times during 2010 and early 2011, spending the bulk of its time reviewing the current rules and discussing potential changes to those rules. In conducting its review, the Task Force considered comments submitted by participants in the program as well as fee arbitration rules adopted by the ABA and other jurisdictions.

Proposed Rule Changes

The attached redline version of the OSB Fee Arbitration Rules shows the changes proposed by the Task Force.

Many of the changes are simply housekeeping and meant to make the program easier to administer. For example, the Task Force saw no need to send the initial petition and arbitration agreement by certified mail. Instead, it changed the notice provisions under both 3.2 and 6.1 to allow notice by mail, e-mail or any method reasonably calculated to provide actual notice to the parties. In addition, instead of organizing and choosing panel members by judicial district, the proposed rules organize panel members by board region. Categorizing the fee arbitration volunteers in a manner that is consistent with other bar volunteers makes for easier administration and a broader pool of available arbitrators in the more remote regions of the state.

A few of the changes are more substantive and warrant some explanation.

Rule 1.1. The Task Force is recommending that the fee arbitration program be made available to resolve disputes between lawyers from out of state and their Oregon clients. This change is in response to the concern that some Oregon citizens are being left without a simple and efficient way to resolve fee disputes with their out-of-state lawyers. While it will undoubtedly mean some additional administrative costs for the program, there is no way to determine how many people will take advantage of this change.

Rule 4.2. This section presented the most difficulty for the Task Force. Nena Cook, who regularly defends legal malpractice cases, was perhaps the most vocal and articulate in expressing concerns about the rule as written. While arbitrators may not award damages for alleged malpractice, the rule specifically allows for consideration of allegations of the attorney's mishandling of a case. Many arbitrators struggle with this apparent contradiction in the rule. In addition, the ambiguity of the rule may allow for the argument that a fee arbitration award precludes subsequent litigation of a malpractice issue. The changes to this rule are meant to address those issues.

Rule 6.10. This section provides for either the stay or dismissal of a fee arbitration proceeding if the client files a malpractice suit against the lawyer during the pendency of the proceeding. It is meant to mitigate the confusion that often arises when a malpractice suit is brought while a fee arbitration proceeding is pending. Typically as a practical matter, the fee dispute is resolved by the malpractice suit.

Rule 8.4. The Task Force proposes changing Section 8.4 to mirror the language of RPC 8.3(a), as the current language has proved to be confusing to implement. While this is a relatively simple and minor change, the Task Force wants the Board to know that it had a lengthy and healthy discussion about whether the proceedings should be not just exempt from the public records laws, but confidential. The argument in favor of requiring the parties to keep the proceedings confidential was that it would allow the parties to maintain the privilege of any attorney-client communications that are disclosed during the course of the fee arbitration. The argument against confidentiality was that it may keep the arbitrator and client from disclosing ethical misconduct that either occurred during the proceeding or that occurred during the underlying representation and became apparent during the arbitration. In the end, a majority of the Task Force members felt strongly that the proceedings should not be confidential, and the lawyer arbitrators' duty to report ethical misconduct should be clarified.

Rule 9.1. This section provides that arbitrators are immune from civil liability and may not be compelled to testify regarding the arbitration proceedings over which they preside. This proposal is in response to concerns that several arbitrators have expressed regarding disgruntled participants threatening to sue them.

Training & Recruitment of Arbitrators

Staff reported receiving regular comments from the panel arbitrators requesting training on the OSB fee arbitration program and how to conduct fee arbitrations. In addition some task force members expressed concern that some arbitrators may not have or display appropriate listening skills and/or temperament during the arbitrations.

The Task Force discussed whether arbitrators should have either minimum qualifications or some level of training before being allowed to act as an arbitrator in the OSB Fee Arbitration Program. ORS 36.415 requires arbitrators to be a member of the bar for 5 years. Multnomah County Circuit Court requires arbitrators who want to be on the list to handle court-annexed arbitration to complete a two hour training

course. For its part, the OSB supplies a small handbook for arbitrators that covers the Fee Arbitration Rules and provides general guidelines on how to conduct arbitrations.

The OSB Fee Arbitration Program includes non-lawyers on the three-member panels and while it requires lawyers to be active members of the bar, it does not require a certain number of years of experience. The Task Force believes that continued inclusion of public members is important, although included a change in its rules to allow participants to opt out of the 3-panel requirement.

The Task Force was reluctant to impose a training requirement, as it did not want to impose additional barriers to recruiting and retaining volunteers and did not want to exclude public members from participation in panels. Instead, the Task Force recommends that the bar develop a webinar on the basics of the OSB Fee Arbitration Program and how to conduct an arbitration, and that the bar make that webinar available at no cost to volunteer panel members.

In addition, the Task Force recommends that the Board appoint an advisory committee, made up of at least one lawyer-arbitrator from each Board region to act as a resource for training and recruitment. Other jurisdictions with robust fee arbitration programs have such advisory committees and rely heavily on their support.

Increasing Participation in the Program

The Task Force discussed several ways of increasing participation in the Fee Arbitration Program. First, the Task Force discussed the possibility of making the arbitration of fee disputes mandatory in Oregon. The Task Force spent a long time discussing this option, and reviewed both the ABA Model Rules and rules from other states which provide for mandatory fee arbitration. The primary concern of the Task Force was that, were participation mandatory, any amounts in excess of the Small Claims Court's jurisdiction (\$7500) could not be made binding since the Oregon Constitution guarantees the right of jury trial for those larger sums. Therefore, the process would not provide a final resolution to the parties, and would offer little beyond what is available in the circuit court. In the end, the Task Force consensus was to keep the process as it is (absent an alternate agreement by the parties): not mandatory, but binding.

Second, the Task Force discussed including mediation as an option both to encourage greater participation in the program and to allow for an alternate means of resolving fee disputes. The Task Force recommends that the Board approve the implementation of a three year pilot project, incorporating mediation into the current fee arbitration program as an alternative dispute resolution option. At the conclusion of the pilot project term, the Board should evaluate the success of the project and determine whether mediation should continue to be made available as an alternative fee dispute resolution option.

Respectfully submitted,

Hon. Kristena LaMar, chair, Fee Arbitration Task Force