ARBITRATIONS

AT THE

FINANCIAL SERVICES

COMMISSION OF ONTARIO:

A DEFENCE PERSPECTIVE

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Arbitrations: An Insurer's Perspective

Introduction

It is virtually unheard of that an advocate would appear before the Superior Court of Justice, whether for the determination of a motion or the hearing of a trial, before consulting the *Rules of Civil Procedure*, filing all documents as required by the courts' timelines and consulting with the case law that speaks to the subject matter. Not only would such actions inevitably draw seething comments from the Bench, but it would also expose that advocate to a claim of professional negligence. Yet this is exactly what is occurring in matters before the *Financial Services Commission of Ontario ("FSCO").* Unfortunately, there are many advocates who regularly attend at *FSCO* who have never taken the time to read the *Dispute Resolution Practice Code* ("*DRPC*")[1], FSCO's guiding rules akin to the *Rules of Civil Procedure,* to investigate their obligations as imposed by the rules of the tribunal. While *FSCO* is perceived to be informal and casual in its approach, it is a body that has been in existence since 1990, and in that time has generated thousands of decisions, many of which decisions have strong precedential value. Yet, many advocates are unfamiliar with the case law and precedents from *FSCO*.

It is important for advocates to take notice that failing to understand the processes set out by *FSCO* as to how an arbitration is to be conducted, is no different than appearing before the courts wantonly unprepared. It is for that reason that this paper intends to provide a brief overview of the arbitration process as guided by the *DRPC* and relevant *FSCO* case law.

1. **Before the Pre-Arbitration Hearing**

One of the most important and useful states in the entire arbitration process is the pre-arbitration hearing. The pre-arbitration hearing at FSCO is one of the first and often opportunity in the arbitration process to have all the decision makers to a claim in the same room, at the same time. As such, the pre-arbitration hearing is the best opportunity for the resolution of part of, if not all issues in dispute at an early stage of the claim.

[1] Dispute Resolution Practice Code, 4th Edition – Updated September 2010

The invaluable opportunity at the pre-arbitration hearing to settle the claim cannot be overstated. The success of the hearing on this date however, is directly governed by the efforts of all parties before the hearing. In order to maximize the utility of this hearing, all parties should consider completing the following:

a. Seek Productions Early

As arbitrations are designed to be relatively quick and informal, the early production of documents allows the parties to succinctly determine the issues early in the process and allows the parties to make a complete assessment of the strengths, weakness and to determine an overall theory of the case. Early production also alleviates the risks of delay, adjournments and the possibility that the hearing arbitrator may subsequently refuse to admit the documents into evidence or the drawing of an adverse inference about the same due to late disclosure.

In an ideal world, production requests should normally begin immediately after the mediation. The Report of the Mediator lists all materials requested by the insured and insurer at mediation which had been requested but were not produced. This part of the Report of Mediator is rarely utilized to the fullest extent possible. The failure to produce all relevant documentation before the mediation itself is often a reason why the claim could not be resolved previously and should not be permitted to hinder the progress of settlement discussions at the pre-arbitration hearing.

The Application for Arbitration and Response to the Application for Arbitration are also supposed to list all documents that the parties require from the other party. It is common practice for counsel to prepare a *pro-forma* Schedule “B” and “C” in these respective documents. While simple and arguably applicable the majority of the time, parties should prepare file specific requests for documentation at this early stage, as it reduces the volume of documentation required, reduces disbursements and costs and reduces the number of contested productions to be dispute at the pre-arbitration hearing itself.

Conversely, parties also need to develop the habit of paying attention to the documents requested upon receipt of the application or responses as opposed to leaving it to be addressed for the first time at or following the pre-arbitration hearing. If there is to be any real chance at the resolution

of a claim at the pre-arbitration hearing, it is essential to have all documentation available well in advance of the hearing itself.

The production of documents during a *FSCO* proceeding is governed by rule 32 of the *DRPC* which reads:

> *"32.1 At least 10 days before the pre-hearing discussion, each party must:*
>
> *(a) exchange all documents identified in the Application for Arbitration and the Response by Insurer, or explain why a document has not been provided;*
>
> *(b) establish reasonable time frames for the exchange of any remaining documents;*
>
> *(c) file the key documents the pre-hearing arbitrator will require to understand the issues in dispute;*
>
> *(d) file a list of outstanding document requests and identify any disputed items."* [2]

In addition to the ten day production requirement as set out above, all parties have an obligation pursuant to Rule 32.2, to provide updated and additional documentation that are reasonably necessary to arbitrate the outstanding issues on an ongoing basis. Rule 32.2 reads:

> *"32.2 Subject to the time lines under Rule 39, the parties have an ongoing responsibility to ensure the prompt and complete exchange of documents that are reasonably necessary to determine the issues being arbitrated, including updates to the information previously exchanged and any additional documents obtained."* [3]

It is important to recognize that the ten day requirement in Rule 32 is considered an absolute minimum and it is expected that all parties will produce the same well in advance of the hearing. Practice Note 4 of the *DRPC* reads:

[2] *Supra*, note 1 at Rule 32.1
[3] *Supra*, note 1 at Rule 32.2

> *"The exchange of documents should be worked out between parties and their representatives as soon as possible, and in any event, well before the pre-hearing discussion.*
>
> *The parties should contact each other and:*
>
> - *disclose what documents they intend to use at the hearing;*
> - *arrange to give the documents to the other side;*
> - *request any documents that they think they require from the other side; and*
> - *arrange to share documents obtained from third parties."*[4]

Pragmatically, insurers require productions significantly in advance of the ten day minimum to properly assess the documentary evidence and to seek authority relative to their assessments of the strengths, weakness and potential exposure of the claim. If a party is insistent on providing documents close to the date of the pre-arbitration hearing, it should not be a surprise if the insurer is not in the position to negotiate a settlement.

If documents are exchanged as directed by Rule 32 and Practice Note 4 of the *DRPC*, the only documentary issues that would be remaining at the pre-arbitration hearing should be with respect to contested and third party productions. At this time, the arbitrator presiding over the pre-hearing discussions has the authority under section 22 of the *Insurance Act*[5] and Rule 32.3 of the *DRPC* to order the production of documents. [6] Rule 32.3 reads:

> *"Subject to Rule 39, an arbitrator may at any time order the production of documents or the giving of information that he or she considers relevant to the determination of the issues in the arbitration, on such terms as he or she considers appropriate."* [7]

It is worth mentioning that while the pre-hearing arbitrator has the final say on what documents must be produced or exchanged prior to the arbitration hearing, the decision on what documents will be considering during the hearing remain with the hearing arbitrator.[8]

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[4] *Supra*, note 1 at Practice Note 4
[5] *Insurance Act,* R.S.O. 1990, c. I.8
[6] *Supra*, note 4
[7] *Supra*, note 1 at Rule 32.3
[8] *Supra*, note 4

b. Presumption of relevant documentation

It is well established through *FSCO* case law that documents are producible based on a test of relevance. As articulated by Arbitrator M. Murray in the decision of *Varatharajah v. TTC Insurance Co.*:

> *"[T]he test for production of a document is relevance … degree of relevance is weighed against other factors such as the sensitivity of the information."* [9]

Also, an arbitrator may order the production of documents that "*he or she considers relevant to the determination of the issues in the arbitration*".[10]

Practice Note 4 provides that the following documents carry a presumption of relevance where disability benefits are in dispute:

1. *Clinical notes and records of physicians who treated the insured person during the year leading up to the accident and after the accident;*
2. *Ambulance call reports if the insured person was transported from the accident;*
3. *Hospital records if the insured person has received treatment at a hospital in the year before the accident or after the accident.*
4. *Records of the Workplace Safety & Insurance Board if the insured person was receiving workers' benefits in the year before the accident*
5. *Reports and clinical notes of any medical examination of the insured person that was requested by the insurance company under the Statutory Accident Benefits Schedule.*
6. *Medical reports in the possession of the insurance company.*
7. *OHIP statements for the year before and after the accident*
8. *Surveillance or investigative evidence if a party intends to rely on any portion.*
9. *Certain employment records, such as a job description.*[11]

Where the amount of benefits is in dispute, Practice Note 4 states that the following are presumed to be relevant:

1. *Certified income tax returns from Revenue Canada from one year pre-accident;*
2. *Financial statements from one year pre-accident*
3. *Any application for Canada Pension Plan disability benefits and a copy of the granting letter;*
4. *A copy of any health or disability insurance policy*
5. *Certain employment records for the year pre-accident.*[12]

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[9] *[FSCO A05-001257, February 2, 2006],* Arbitrator M. Murray
[10] *Ibid.*
[11] *Supra,* note 4
[12] *Ibid.*

The decision of *Al-Obaidi v. Allstate Insurance Co. of Canada* confirms that if a party is seeking disclosure for a time period beyond what is established as preemptively relevant, than a reason must be provided based on the issues in dispute to substantiate the request.[13]

There are several groups of productions however, which consistently causes contention which has created substantial *FSCO* caselaw, specifically the production of:

1. third party records including the clinical notes and records of hospitals and doctors;
2. adjusters log notes;
3. reserves and practice/policy manuals of the insurer;
4. files and documents from related tort actions
5. records beyond the one year "guideline" for pre-accident records

c. Third party records

An advantage of parties seeking relevant productions well in advance of the pre-arbitration hearing is that *FSCO* often requires requests and reasonable efforts to obtain third party records by the parties before the arbitrator will consider providing an Order compelling the same. Early requests for documentation will increase the likelihood that the arbitrator will be able to provide an Order on the day of the pre-hearing to compel third party production, therein alleviating the need to bring a subsequent motion.

It is of interest to note that in *Al-Obaidi v. Allstate Insurance Co. of Canada,* it was determined that third party medical documentation is presumed to be relevant, even where the third party documents contain private or confidential medical information which is not specifically relevant to the subject accident. The pre-hearing arbitrator will still order these productions on the basis that the probative value of the documents evidencing the medical condition of the claimant before and after the accident is relevant. Whether this information will be admissible however, will fall under the purview of the hearing arbitrator.

[13] *[FSCO P99-00009,May 2, 2000],* Appeal, Director's Delegate Susan Naylor

d. Adjuster's Log Notes

The relevance and production of the complete adjuster file, including the adjuster log notes is one area that has created a substantial amount of case law at *FSCO*. In the appeal decision of *Leitgeb v. Allstate Insurance Co. of Canada*, Directors Delegate Draper (as he then was) determined that requests for adjuster log notes was not to have a separate test for its production and some relevance to the issues before the arbitrator must still be demonstrated. It is of significance to notes that Director's Delegate Draper in this case specifically determined that documentation detailing the insurer's handing of a file does not become relevant as soon as a "claim" for a special award is advanced, contrary to the views of the arbitrator at first instance. The special award provision does not expand the arbitration into a generalized inquiry into the insurer's conduct, but rather is a direction or statutory authority given to the arbitrator to make an award if benefits are found to be owing but unreasonably withheld. As a consequence, the focus of the arbitration must remain on the applicant's entitlement to benefits or the proper amount of the benefits. In other words, a claim for one type of benefits in arbitration does not justify production of adjuster notes respecting other issues not in dispute.[14]

The approach from *Leitgeb v. Allstate Insurance Co. of Canada (supra)* has been expanded through the years, specifically in the decision *Campeau v. Liberty Mutual Insurance Co.,* before Arbitrator Blackman (as he then was).[15] In this decision, it was determined that adjusters' notes are a class of documents similar to the clinical notes and records of medical practitioners, as it comes into existence solely as a result of the accident in question. As a result, adjusters notes were found to be *prima facie* relevant and it remains the onus of the insurer to establish that there is privilege or that alternative factors applied, such as clear irrelevance, that prevents it from being producible.

[14] *[FSCO P-012407, November 16, 1995],* Director's Delegate D.R. Draper
[15] *[FSCO A00-000522, March 21, 2001]*, Arbitrator L. Blackman

Arbitrator Blackman acknowledged that while the *prima facie* dividing line between producible and non-producible insurer documentation has typically been the date of the application for mediation, subject to the submissions of parties as to why the production period or scope in a particular case should be narrowed or broadened.

The reasoning in *Campeau v. Liberty Mutual Insurance Co.,* appears to have been gained support and has been followed in the subsequent decisions of *Ghaedsharagy v. Kingsway General Insurance Co*.,[16] and *M.S. v. ACE INA Insurance.*[17] While there is presumption of relevance for adjuster's notes up to the application for mediation, Arbitrator Ashby states in *Claybourne v. Gore Mutual Insurance Co.*, that it cannot be presumed that any notes after the application for mediation is privileged as this would be counter to the "consumer protection purpose of legislation". The onus remains on the insurer to establish that any information it seeks to withhold is not reasonably relevant or is properly protected by privilege.[18]

e. Production of Reserves and policy/procedure manuals

Hand in hand with the request for adjusters notes and records is often the issue of whether reserve information and the company manuals are required to be produced as a right. Arbitrator Blackman (as he then was) also determined in *Campeau v. Liberty Mutual Insurance Co.* that reserves are part of the overall insurer's file and are presumptively producible subject to other factors outweighing their production.[19] Arbitrator Ashby, in the decision of *Uka v. Aviva Canada Inc*., also determined after considering the decisions of *Grisci and Non-Marine Underwriters, Mbrs. of Lloyd's*., *Nigro and State Farm Mutual Automobile Insurance Company* and Master Dash's decision in *Contos v. Kingsway General Insurance Company,* that reserve amounts should not be redacted from the disclosure of the adjuster's file up to the date of the application for mediation, subject to the insurer's submissions of privilege.[20]

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[16] *[FSCO A07-001061, February 12, 2008],* Arbitrator R. Bujold
[17] *[FSCO A08-000567, October 30, 2008],* Arbitrator S. Alves
[18] *[FSCO A08-000390, December 10, 2008],* Arbitrator D. Ashby
[19] *Supra*, note 15
[20] *[FSCO A07-001692, October 31, 2008]*, Arbitrator D. Ashby

With all due respect to Arbitrator Ashby, it is not unlikely that the issue of the producibility of reserve amounts will be revisited, as it is hard to conceptualize a more privileged and less relevant thing than reserve information. The reserve amounts set by the adjuster do not illustrate anything more than the practice of each insurer. The only thing that the reserve amounts prove is that one insurer is more conservative than another and proves nothing respecting the risk or file handling. The suspicion is that despite the presumed relevance as stated by Arbitrator Ashby, there will be continued contentions over whether this is clearly irrelevant to the issues in dispute.

In the decisions of *Halford v. Allstate Insurance Co. of Canada*, Arbitrator Blackman concluded however that:

> *"I find that for general policy manuals to be ordered produced the specific relevance to the particular claim and/or the reasonable necessity of the document should be established. The routine production of all possibly applicable policy manuals whenever a special award is sought, is simply too cumbersome and expensive. In this case, I am not satisfied that the broad request made is reasonably necessary or relevant."* [21]

In other words, requests for policies and manuals do not carry the same presumption of relevance as the documents laid out in Practice Note 4. Parties requesting the same must demonstrate that the documents are relevant with respect to a specific issue in dispute before they can be considered producible.

f. Production of documents from a related tort action

Where a parallel tort action has reports or investigations that may have some relevance to the arbitration hearing, the test for producing such documents is again largely based on the relevance test. Other factors such as the sufficiency of the insurer's current evidence, the impact of ordering production on the arbitration particularly with respect to unduly complicating or prolong the proceeding, the relative prejudice to the parties of ordering production and the

[21] *[FSCO A04-001379, April 27, 2005],* Arbitrator L. Blackman

FSCO's need to have the best evidence before it also are relevant considerations to its production.[22]

In the decision of *Ledoux v. Federated Insurance Co. of Canada*, it was determined that reports prepared in the context of a tort action were producible as the claimant had put these reports before some of the medical experts in the arbitration. By importing the medical reports from the tort action into the arbitration process, the claimant had waived any right to deny the insurer access to the same. The documents were therefore relevant and it would not unduly complicate the proceedings to reference them. [23]

2. <u>At the Pre-Arbitration Hearing</u>

As previously mentioned, the pre-arbitration hearing is often the first and only opportunity to have all the decision makers to a claim in the same room. As a result, it is imperative to have the client present for the pre-hearing.

First, it is a great opportunity for the decision maker to directly observe the claimant. Up to this point, the insurer has likely only dealt with the claimant on paper and a face to face meeting is often a good way to determine whether the claimant would make a good impression and will be found credible before an arbitrator. The credibility and likeability of the claimant are the greatest factors in determining how successful the claim will be at arbitration. As there is no examination for discovery process, the opportunity for the insurer to get a sense of whom it is that they will be facing at arbitration is critical.

Second, it is vital to have the client in attendance to avoid potential delays and cost consequences. Arbitrators have looked poorly on when the principle with full authority to resolve the claim is not at the pre-hearing. In *Lees v. Pilot Insurance Co.,* Arbitrator Blackman (as he

[22] *Lombardi and State Farm Mutual Automobile Insurance Company*, [*FSCO* A99-000957, December 4, 2003], *Vossos and Western Assurance Company*, [*FSCO* A04-001072, September 9, 2005] and *Snook and ING Insurance Company of Canada*, [*FSCO* A02-000728, September 15, 2003]
[23] *[FSCO A06-000984, November 3, 2006],* Arbitrator E. Bayefsky

then was) awarded costs to the insured when no representative from the insurance company attended the pre-hearing.[24] Arbitrator Wilson in *Premananda v. RBC General Insurance Co.*, awarded costs to the insured for the same reasons.[25]

a. Adding issues to arbitration

One issue that should be addressed early at the pre-arbitration hearing is whether other issues or related applications should be added or combined into one proceeding. Combining multiple applications respecting a single claimants where there are common issues, questions of law, fact or policies is in line with the objective of avoid costs, time and the duplication of effort. The simplest way to accomplish this would simply to be request the opposing party's consent to combine the applications pursuant to rule 30 of the *DRPC*, which reads:

> *30.1 Where two or more Applications for Arbitration have been filed and it appears that:*
>
> *(a) they have an issue or question of law, fact, or policy in common; or*
> *(b) the application of this Rule will result in the most just, quickest, and least expensive means to deal with the Applications;*
>
> *The Dispute Resolution Group will notify the parties in writing of the intention to:*
> *(c) combine the proceedings;*
> *(d) schedule the proceedings to be heard at the same time;*
> *(e) schedule one or more proceedings to be heard one immediately after the other by the same arbitrator; or*
> *(f) suspend the scheduling of a proceeding or proceedings until the determination of any one of them.*
>
> *30.2 Where a party objects to a notice made under Rule 30.1, the party must promptly notify the Dispute Resolution Group and the other parties involved,in writing, of the objection.*
>
> *30.3 An arbitrator will consider an objection made under Rule 30.2 and make an order on such terms as he or she considers just.* [26]

[24] *[FSCO A03-000421, July 7, 2003],* Arbitrator L. Blackman
[25] *[FSCO A05-001236, February 7, 2006]*, Arbitrator J. Wilson
[26] *Supra*, note 1 at Rule 30

In the decision of *Bertram v. CGU Insurance Co. of Canada,* Arbitrator Wacyk determined that the five criteria to consider before adding an issue to a current arbitration include:

1. whether the issue has been mediated;
2. whether the issue involves a different benefit category;
3. whether it is reasonably incidental to the issues raised by the insured person;
4. whether it would unduly expand the scope of the arbitration proceeding and;
5. whether its inclusion would benefit both parties by avoiding multiple proceedings.[27]

Issues and applications should be added or combined as soon as reasonably possible and at the very least, well in advance of the arbitration hearing or the parties run the risk of being unable to do the same. In the decision of *Monteiro v. Aviva Canada Inc.,* Arbitrator Sone determined that though it is best to have one arbitration proceeding to deal with all outstanding issues between the parties, there may be times where the hearing is so closely looming, that it becomes prejudicial to the other party and as such, refused to add the new issues sought to the arbitration therein.[28]

b. Discussions at the pre-hearing

As set out by Practice Note 7 of the *DRPC*, the arbitrator will use the pre-arbitration hearing to resolve and streamline the following, if no settlement was possible:

1. attempt to settle some or all of the issues in dispute;
2. clarify the issues to be arbitrated;
3. explain the rules of the hearing;
4. review what witnesses and evidence will be brought to the hearing;
5. review each party's list of outstanding document
6. requests and disputed items;
7. decide which documents should be exchanged where the parties cannot agree;
8. set a mutually convenient date and location for the hearing.[29]

[27] *[FSCO A02-000468, August 16, 2003],* Arbitrator T. Wacyk
[28] *[FSCO A02-000055, March 31, 2004],* Arbitrator A. Sone
[29] *Supra*, note 1 at Practice Note 7

It is again important to emphasis that all parties present at the pre-arbitration hearing have sufficient authority to resolve the claim. Practice Note 3 specifically deals with issues of authority stating:

> *"A lawyer or an employee representing an insurance company must have the authority to change the company's position based on the evidence presented by the insured at a mediation, neutral evaluation or arbitration. In the case where an insurer's representative has limited authority to enter into an agreement or settlement, an officer of the company with the requisite authority must attend or be available by telephone for the duration of the proceeding."*[30]

Insurers are not the only parties that suffer issues with authority. Where Plaintiff counsel sends a junior associate with strict marching orders to obtain a hearing date, this constitutes a violation of the requirement to negotiate in good faith. As stated by Arbitrator Wilson in *Premananda v. RBC General Insurance Co:*

> *No-one is required to settle at a pre-hearing. The failure to settle is not a reason to conclude that a pre-hearing was a waste of time. It is expected, however, that parties will, in good faith, be in a position to seriously consider both settlement options, and also react to new and relevant information. Patently, Mr. D. was not in a position to do this and alter the Insurer's position, without resort to outside authorization, so any discussion of whether settlement could or could not have resulted is merely speculative.* [31]

The same idea was conveyed by Arbitrator Miller in *Karpenko v. ING Co. of Canada*, wherein the arbitrator stated:

> *"Succinctly, the main reason why parties are required to appear in person at a pre-hearing discussion is to engage in settlement talks. While this does not mean that the parties must settle their dispute, it does however mean that, unless there is a valid reason not to have a settlement discussion, e.g. legal defences or production issues, the parties must come with full authority and in good faith to be prepared to engage in settlement talks."*[32]

[30] *Supra,* note 1 at Practice Note 3
[31] *Supra,* note 25
[32] [*FSCO A04-002404, April 1, 2005*], Arbitrator J. Miller

In both instances, the inability of a party to negotiate in good faith resulted in a cost award. It may be worth mentioning that a "valid reason" does not include refusing to negotiate settlement without the tort representatives present. It was the claimant the chose to take a portion of the claim before *FSCO* and this is not an excuse that will be accepted before arbitrators. There are numerous instances where arbitrators adjourn the pre-hearing arbitration and refused to provide a hearing date until the impediment to discussing settlement was resolved, either by a settled tort case, a global mediation or requiring the parties to the tort action to attend the pre-arbitration hearing, a right the arbitrator is granted under Practice Note 3 of the *DRPC*.[33]

It is imperative to use the pre-arbitration hearing to frame the issues clearly with the assistance of the arbitrator. It may also be a good habit to ask the arbitrator presiding over the pre-hearing to re-state the issues as he or she has them written down, to ensure that they are accurate and complete, as so much attention is often placed on settlement, witnesses and productions that the importance of a clear delineation of issues is often is overlooked.

3. <u>Approaching Arbitration</u>

In the months approaching the arbitration hearing, there are a significant number of procedural requirements that need to be complied to ensure a successful arbitration.

a. Expert Reports, Witness Lists and Other Procedural Requirements

A minimum of thirty days before the arbitration hearing, each party must provide a list of witnesses that the party intends to call and a list of persons that each party requires for cross-examination on a report, pursuant to rule 41.1 of the *DRPC*.

Each party must also disclose the names and qualifications of the parties that secured any surveillance evidence, the date, time and place and copies of all videos, photos, and surveillance summaries, notes and reports that the party intends to rely on a minimum of thirty days before the hearing. It is essential that all the information detailed in Rule 41.1 be provided to counsel,

[33] *Supra*, note 30

failing which the surveillance or at least the parts thereof where information was inadequately provided may be inadmissible at the hearing.

Finally, pursuant to Rule 39 of the *DRPC*, all documents, including medical expert reports and assessments, that are to be introduced at a hearing by a party must be served on all parties a minimum of thirty days before the first day of the hearing. Only in "extraordinary circumstances" will a party be granted leave by the arbitrator to serve the evidence less than 30 days before the first date of the hearing. [34]

b. Identify, Determination and Summons of Witnesses

The procedure and the admissibility of oral evidence at *FSCO* is unlike the those for trials before the Superior Court of Justice. Legislation which create timelines for the production of information before the courts such as those in the *Rules of Civil Procedure* and the *Evidence Act,* do not apply to arbitrations at *FSCO*. Instead, the rules governing the evidence of witnesses at *FSCO* can be found in Rule 41 and 42 of the *DRPC*.

One of the principle restrictions to witnesses at *FSCO* is found in rule 42.4 of the *DRPC*, which restricts each party to calling no more than two expert witnesses to give oral evidence at arbitration, unless leave is provided to call more. Regardless of the number of witnesses however, each party is to identify all experts and lay witnesses intended to be called at the hearing as part of the pre-hearing processes.

In addition to the abovementioned, Rule 42.2 also requires the party intending on relying on reports or evidence from expert witnesses, to serve and file a document setting out:

> *(a) the full name, address and qualifications of the expert witness;*
> *(b) subject matter of the testimony to be presented; and*
> *(c) substance of the facts and opinion which the witness will present.* [35]

[34] *Supra*, note 1 at Rule 39
[35] *Supra*, note 1 at Rule 42

Rule 41 requires each party to serve these documents at least 30 days before the first day of the hearing. The parties are also required to notify potential witnesses at least 30 days before the first day of the hearing. The failure to comply with the any of the procedural requirements set out in rule 41 may result in the arbitrator excusing the witness from the hearing.[36]

The *DRPC* also sets out the requirements for summoning the witness to give evidence at the arbitration hearing. Pursuant to the Rule 73 of the *DRPC* and Practice Note 8, a summons to the witness must be delivered in person no less than five business days before the first day of hearing. The witness must also be provided with remuneration pursuant to the *DRPC,* failing which the witness may be excused from the hearing. [37]

It is vital that a witness is properly summoned and that copies of all documents are retained. If a witness does not attend the hearing, fails to stay, or does not bring the documents listed on the summons, the hearing arbitrator will review the affidavit to ensure that all the procedural steps were complied with, the arbitrator may grant an adjournment, set another hearing date, or issue a sheriff's warrant for the failure to adhere to the Arbitrator's summons (which summons has the same authority as one issued by a judge) and have the witness brought to the hearing.[38] If the documents evidencing proper summons is not available or there was an improper summons, your witness may be excused and the arbitration ordered to proceed without the witness.

Before summonsing any witnesses however, each party should review all relevant evidence so as to only call witnesses that are essentially to support the theory of their case. The determination of which experts to put under summons is more art than science. In addition to basic considerations of credibility and the strength of the expert reports, each party should ask whether the expert will stand up to direct cross examination. If a party calls the expert to give oral evidence, opposing counsel will undoubtedly choose to cross examine the expert on the same. If the expert is not particularly credible in the presentation of oral evidence, it may be more advantageous to allow the report to be entered as evidence without oral testimony. There is a significantly reduced possibility that opposing counsel will summons the expert only for a cross-

[36] *Supra*, note 1 at Rule 41
[37] *Supra*, note 1 at Rule 73 and Practice Note 8
[38] *Supra*, note 1 at Practice Note 8

examination on the report. Other considerations include whether the witnesses for opposing counsel have provided reports that are sufficiently damaging to the theory of the case that the expert must be summons for the sole purpose of a cross examination, keeping in mind the relative risk in cross examining the expert in their own field of expertise.

At *FSCO*, it is not unheard of to file a report without making the expert available for cross examination. If there is an expert who has delivered an opinion you cannot allow in without testing it by way of cross examination, it is your obligation to serve that expert with a summons to ensure that he or she is available. This is a substantial shift of responsibility from the way it is done in court.

c. Motions

It may be necessary from time to time to require a motion before an arbitrator to obtain a preliminary or interim order. While these can in theory be request anytime in the proceeding, it is most common at this stage of the arbitration process.

The service requirements and timings are again different before *FSCO* as they are in the Superior Court of Justice. For example, for the production of third party records, Rule 67 states that before the adjudicator will grant an order for the same, (s)he must be satisfied that:

> *(a) the parties have made reasonable efforts to obtain the document sought;*
> *(b) the document sought is in the possession, control or power of the third party;*
> *(c) the third party has had a reasonable opportunity to respond;*
> *(d) the document is reasonably required to ensure a just and fair hearing.* [39]

It is always beneficial to seek motions as early as possible to allow for these records to be received well in advance of the "final discussion" that is arranged by *FSCO*. This provides the parties all the evidence that is required to assess the risks of an arbitration hearing and to provide a fully informed last attempt to settle the issues before the hearing commence with a complete picture that may have been lacking at the pre-arbitration hearing.

[39] *Supra*, note 1 at Rule 67

4. <u>The Arbitration Hearing</u>

It is essential to view arbitrations as an entirely different process than a trial before the Superior Court of Justice. Arbitrations are designed to adjudicate issues in a timely and cost-effective manner. There is no jury before which to make submissions and the arbitrators are very informed and familiar with any issue that is likely going to be brought before them. As a consequence, arbitrations should typically be concluded within two or three days of commencement.

The *DRPC,* in limiting the number of witnesses to be called to give oral evidence, clearly delineates that the objective is to ensure the arbitrations continue to be an expeditious alternative to the court system. In this respect, all parties should endeavor to minimize the issues that remain in dispute by agreeing to a list of undisputed facts and provide a joint document briefs so parties only need lead evidence which speaks directly to the pith and substance of their theory of the case.

As previously discussed, the only expert witnesses that should be called to provide oral evidence are those with particularly significant evidence that speak directly to the issues in dispute. It may also be advantageous to call an expert whose report was specifically challenged by the opposing witnesses to provide oral evidence substantiating their written evidence or an opportunity to explain away the contradictory evidence. The counter point is that where there is a particularly damaging report or documents entered as evidence and where the other party has not called the writers for oral evidence, it is entirely permissible and likely necessary for the responding party to summon the expert for cross-examination on the written evidence.

All parties should make it a priority to remain within the time allocated for the arbitration. Incomplete arbitrations lead to a plethora of difficulties, including difficulties re-canvassing availabilities of all counsel and the arbitrator, re-summoning all required witnesses and the undue delay that results as it often take several months if not longer to schedule the continued arbitration.

a. Costs

Pursuant to section 282 (11) of the *Insurance Act,* Rules 75 and 76 and Regulation F of the *DRPC*, an arbitrator shall only consider the following expenses with respect to arbitration:

> *1. Each party's degree of success in the outcome of the proceeding.*
> *2. Any written offers to settle made in accordance with subsection (3).*
> *3. Whether novel issues are raised in the proceeding.*
> *4. The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders.*
> *5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.*

Pursuant to the same section however, the arbitrator is also to consider all written offers to settle that were made after the conclusion of mediation and before the conclusion of the arbitration in coming to a determination as to costs.

The types of fees that can be awarded by an arbitrator are specifically listed by the *Insurance Act*, which include:

1. The filing fees paid by the insured person when applying or appealing an arbitration;
2. The legal fees payable:
   i. For all services performed before an arbitration, appeal, variation or revocation hearing
   ii. For the preparation for an arbitration, appeal, variation or revocation hearing.
   iii. For attendance at an arbitration, appeal, variation or revocation hearing.
   iv. For services subsequent to an arbitration, appeal, variation or revocation hearing.
   v. The number of hours for which legal fees may be awarded with consideration of the criteria set out by 282(11) of the *Insurance Act;*

The total and hourly amount for legal fees is also strictly governed by the maximum as prescribed by Rule 78 of the DRPC. Rule 78.1 reads:

> *78.1 The maximum amount that may be awarded to an insured person or an insurer for legal fees, is an amount calculated using:*

> *(a) the hourly rates established under the Legal Aid Services Act, 1998 for professional services in civil matters before the Ontario Superior Court of Justice; or*
> *(b) the hourly rate referred to in Rule 78.1(a) adjusted to include, where appropriate, the experience allowance established under the Legal Aid Services Act, 1998;*
>
> *Where an adjudicator is satisfied that a higher amount for legal fees to an insured person is justified, an hourly rate of up to $150 may be awarded.*

Where there remains any dispute with respect to the amount of expense being claimed by a party, the issue can be referred to an Assessment of Expense, which parties may request pursuant to Rule 79 of the DRPC. An arbitrator will be appointed to determine issue, so long as the request is made within thirty days from the date of the decision.

Rule 79.2 provides stricter procedures to appeal an order of expenses, requiring that:

> *Where an adjudicator has issued an order of expenses to be paid and the parties cannot agree on the amounts to be paid under that order, either party may request, in writing, an appointment before an adjudicator provided that:*
>
> *(a) within 30 days from the date of the order awarding expenses, the party awarded expenses provides the other party with an account describing each of the expenses claimed, services received and the costs;*
> *(b) the party ordered to pay expenses must promptly provide the other party with a written response to the account, identifying the items in dispute and the reasons for the dispute;*
> *(c) the party awarded expenses must promptly provide the other party with copies of supporting documentation, such as invoices, receipts, computerized dockets or cancelled cheques in respect of the disputed items;*
>
> *(d) if a dispute remains, the parties shall serve and file the above materials, together with a written request for an assessment of expenses upon all parties to the proceeding and legal counsel or representatives whose time and disbursements are reflected in the*
> *expenses sought…*

One expense that has traditionally been a matter of considerable contention is the reasonableness of preparation time when determining cost awards. In determining the reasonableness of legal expenses, arbitrators at FSCO have generally accepted ratios of hearing to preparation time

ranging from one to one to as high as one to four (four hours of preparation for every hour of the hearing). As evidenced in the decisions of *Victor v. Wawanesa Mutual Insurance Co.*[40], and *Argirovski v. Zurich North America, Canada*[41], arbitrators will assess the appropriate ratio on a case by case basis by looking at factors such as where most of the work and time was spent in the process and whether there were necessity for length pre-hearing processes to determine the ratio that is reasonable.

It is a misnomer that plaintiffs' counsel will always lose money by going to FSCO for arbitration rather than court. While a case settled early at FSCO may generate modest costs, there are arbitral decisions allowing 3 and 4 times the number of hearing hours as costs, at a rate of $150 an hour. On a typical 4 day arbitration, that could amount to $24,000 in fees.

Offers to Settle

Offers to settle have a significant impact on the determination of costs after the hearing. Rule 76 specifically states that an adjudicator must consider any offers to settle in connection with an award of expenses provided that it was made and served in writing, complete with the full terms of the offer to settle. Particular consideration is paid to any offer served after the conclusion of the prehearing up to five days before the hearing. Reponses will also be considered if it was made in writing and was served before the conclusion of a hearing. [42]

To withdraw an offer or a response to an offer to settle, Rule 76.3 states that it must be withdrawn by written notice, or it can be allowed to expire as per Rule 76.4. In order to have a proper acceptance of an offer or response, it must against be made in writing and *served* prior to the withdrawal or expiry of the offer. [43]

[40] [FSCO A03-000370, June 10, 2004] Arbitrator J. Sandomirsky
[41] [FSCO A02-001448, November 19, 2003], Arbitrator D. Muir
[42] *Supra*, note 1 at Rule 76
[43] *Supra*, note 1 at Rule 76.3 and 76.4

Rule 77 states that where there are offers and responses to offers to settle and the parties want the arbitrator to consider these with respect to the awarding of expenses, the parties are to jointly advise the arbitrator at the end of the hearing. The arbitrator will at the time, only determine the issues in dispute exclusive of costs at the hearing. Upon receiving the arbitrator's written decision, the parties have ten days to file all relevant offers or responses to offers to settle for consideration by the arbitrator. [44]

Conclusion

At the end of the day, whether one advances a claim before the Superior Court of Justice or before a FSCO arbitrator, the obligations of an advocate remains the same. Counsel must know the rules applicable to the forum that (s)he is before. Advocates before FSCO however, find themselves at a unique advantage over their courtroom counterparts, in that when appearing before the courts and a judge who may draw expertise from other fields of law, FSCO arbitrators specialize in only auto related injury claims. Unlike an unsophisticated panel of jurors, an arbitrator does not require expensive physiological illustrations or PowerPoint presentations to explain the affect of a whiplash injury. The arbitrators most likely know the law around the issues in dispute better than most of the advocates that appear before them and also likely know how credible your expert doctors and rehabilitation witnesses will be before they are ever called to provide oral evidence, having crossing paths with them on prior cases.

To put it succinctly, if all the work leading up to the arbitration hearing is done diligently and proactively, it should leave the attention of the advocates focused only on providing a concise and clear theory of your case with an economical rendition of the evidence to prove the claim. As the arbitrators are familiar with the benefits being claimed, there really becomes no need to call superfluous evidence and witnesses to prove facts that do not go to the core of the issues in dispute.

[44] *Supra*, note 1 at Rule 77

The reality is that with a likeable claimant, good preparation and believable supporting evidence, most claimants will be successful at *FSCO* arbitrations. While there is little the advocate can do to change who the claimant is, the remainder as they say, is all up to you.