How to Succeed before the Financial Services Commission of Ontario: Practice Tips from Mediation to Arbitration The Insured's Perspective

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**How to Succeed before the Financial Services Commission of Ontario:
Practice Tips from Mediation to Arbitration
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Appearing before the Financial Services Commission (FSCO) presents counsel with the unique opportunity of litigating a case from start to finish within a world where alternative dispute resolution prevails over going to trial. Although similarities exist between FSCO and the Superior Court, proceeding by way of Arbitration is a stream-lined and cost-effective process that is primarily governed by the Dispute Resolution Code rather than the Rules of Civil Procedure[1], where Arbitrators are not bound by *stare decisis* and have more flexibility to decide the matter on a case by case basis.

The purpose of this paper is to provide counsel with practice tips for succeeding at FSCO from Mediation to Arbitration and all points in between.

Getting to FSCO

The first step in litigating a *SABS* denial is to file an Application for Mediation with the Financial Services Commission. The Application for Mediation must be filed in duplicate and contain a description of each issue in dispute along with a list of the documents you intend to rely on at the Mediation. It is our practice to attach the documents to the Application for Mediation. If you wish to file additional documents, this must be done at least 10 days before the Mediation[2]. A copy must also be provided to the Mediator. The Mediation is usually conducted by phone. You will have to decide whether you want your client to participate in the call. If the matter is not going to settle at Mediation, you may want to have your client "available" in order to avoid putting him/her through the frustration of hearing the adjuster defend their position.

It should be noted that FSCO is currently experiencing a significant backlog when it comes to assigning Mediators. In our experience, it may take up to 12 months to have

[1] The Rules of Civil Procedure will apply where the Code is silent.
[2] Dispute Resolution Code, Section 16.2.

a Mediator assigned to a matter. If this delay will cause your client to suffer a significant hardship, you can write to FSCO and request the process be expedited and when appropriate, deemed a failure. You should only take this approach if you have evidence of hardship and it is clear the dispute cannot be settled at Mediation, such as a CAT dispute and your client has exhausted his/her medical benefits and is at risk of physical or psychological deterioration if the matter is not expedited.

There are two limitation periods to be mindful of when you are litigating a *SABS* denial. Firstly, you have two years from the date of the denial to Mediate and file for Arbitration or issue a Statement of Claim. Contained within the 2-year limitation period is a second limitation date which requires you to file an Application for Arbitration within 90 days from the date the Report of Mediator is delivered to you or your client[3]. This second limitation period does not apply if you are proceeding by way of a Statement of Claim.

The right to choose which forum to proceed is the insured's right alone and does not extend to the insurer. It is impossible to say that one forum is preferable over the other, however, there are a number of factors you can take into consideration when deciding whether to proceed by way of an Arbitration or Statement of Claim, including:

Time	You have a reasonable chance of having the Arbitration heard within one year of filing the Application.
No Examinations for Discovery	This is a double edged sword. Although there is some advantage to ensuring defence counsel's first opportunity to question your client is on the stand; you lose the right to examine the adjuster which could be important especially where you are advancing a bad faith claim.
Early settlement discussions	A Pre-Hearing is usually scheduled within a few months after filing the Application. The Pre-Hearing Arbitrator will engage in a discussion of the issues and encourage counsel to resolve the dispute.

[3] Dispute Resolution Code, Section 11. Also see *Pilot v. Tyler* (FSCO Appeal No. P11-00001, May 25, 2011)

Fixed Hearing Dates	FSCO will set fixed Hearing dates for the Arbitration. There are no running lists. This makes it easier for your witnesses to schedule time to attend and give evidence.
Costs	Costs are awarded at Legal Aid rates. In certain circumstances the Arbitrator has the power to increase the counsel fee to $150/hour.
No Punitive Damages	The Arbitrator does not have the power to award punitive damages. The Arbitrator may order a "special award".

Applying for Arbitration

The Report of Mediator forms the basis for the pleadings in an Application for Arbitration. Immediately review the Report of Mediator to ensure that the issues are described correctly. Preparing the Application for Arbitration is no different than drafting a Statement of Claim. A well drafted Application is the first step to success in the Arbitration.

Summary of Issues

The Application for Arbitration is your first opportunity to present your client's position to the Arbitrator in a way that identifies the issues and sets the stage for the story you will tell at the Hearing. It is easy to simply list the issues in dispute in the Application, however, if you do you lose the opportunity to use your written advocacy skills to begin persuading the Arbitrator from the moment he/she reads your Application. Take the time to set out the facts in a logical manner. Don't shy away from including a summary of cases that can help your position. Provide an overview of the medical evidence that supports your position and weakens the insured's. Lastly, tell the Arbitrator what you will be asking him/her to decide at the Arbitration, including the amount of the award you want.

Document List

The Application for Arbitration also begins the documentary discovery phase of the process. This is similar to the discovery obligations under the *Rules of Civil Procedure* as you are required to list all of the relevant documents you intend to rely on at the Arbitration. The test for admissibility at Arbitration is **relevance**. Practice Note 4 sets out a list of pre and post collision documents that are presumptively admissible. You are only required to produce certain documents such as clinical notes and records and income tax returns starting 1 year before the collision unless the insured can show there is a reason to produce documents prior to that date. It goes without saying the lists in Practice Note 4 are not exhaustive and represents the minimum amount of documents you will need to prove your case.

Your list should also include the documents you intend to rely on and are contained within the insurer's file. This will ensure that you and the Arbitrator are working from the same Document Brief during the Hearing. The Arbitrator will appreciate your effort and you will avoid the risk of a last minute discovery that one of the key documents in the insurer's file is not listed in its Reply to the Arbitration.

Take the time to review the insurer's list of documents set out in its Response to the Arbitration as this will form the foundation of your request for documentary disclosure. Your disclosure request will include the adjuster's complete file, including adjuster's log notes, emails, letters of instruction, correspondence, surveillance and investigation reports and any other documents relevant to adjusting the file up to the date of the Application for Mediation. Documents contained in the adjuster's file after that date are privileged[4].

The clinical notes and records of any Section 42 IE assessors are not protected by privilege, therefore all correspondence, emails, test results and draft reports generated

[4] *Kuan v. Kingsway General Insurance Company* (FSCO A07-002341, March 4, 2008)

by the insurer's assessor should be requested.[5] There may be a wealth of information within the adjuster's file that may support your claim for a special award.

Section 32 of the Code requires the parties to exchange their documents at least 10 days prior to the Pre-Hearing discussion and establish reasonable time frames for the exchange of any remaining documents. You would be wise to make your documentary requests well in advance of the Pre-Hearing so you can ask the Arbitrator for an Order compelling the insurer to produce any outstanding documents in a timely fashion[6].

Your documentary discovery obligations do not end with the Application for Arbitration but rather both parties have an ongoing responsibility to ensure the prompt and complete exchange of documents that are reasonably necessary to determine the issues being arbitrated. Section 39 requires that all documents be served no later than 30 days before the first day of the Arbitration. This includes any surveillance or investigative evidence the insurer intends to rely on, updating previously exchanged documents and production of defence medical reports prepared in the companion tort action.

In *Thach v. State Farm,* the insured provided her experts in the SABS claim with a copy of the defence medical reports from the companion tort action but refused to produce a copy of the defence medical reports to the insurer. At the Pre-Hearing, the Arbitrator concluded that, since the applicant's experts had reviewed the defence medical reports and had relied upon them for their opinions, it was only fair the insurer and its assessors be given the same opportunity. Ms. Thach appealed. Director's Delegate Blackman agreed with the Arbitrator and that the opinions of the insured's experts were based, in part, on the defence medical reports and therefore the insured, having provided them to her experts, could not now withhold them[7].

[5] *Compeau and Liberty Mutual Insurance Company* (FSCO A00-000522, March 12, 2001)
[6] Dispute Resolution Code, Section 32.3.
[7] *Sros (Elizabeth) Thi Thach v. State Farm Mutual Insurance Company* (FSCO P10-00019, July 14, 2011).

Although the production of the Plaintiff's Facebook site is a growing trend in civil actions, FSCO has not adopted the Court's willingness to order this information be disclosed. In *Prete v. Farm State Insurance*, the insurer requested production of "photographs and video images" appearing on Facebook. In reviewing the request, Arbitrator Denis Ashby considered the impact production of social networking documents would have in the context of an administrative law Hearing and concluded this would be "procedurally burdensome". In refusing to order production, Arbitrator Ashby stated as follows:

> *"I find the potential relevance of images posted on a social networking forum to be too remote when weighted against such factors such as sensitivity and practicality. Therefore I find that Mr. Prete is not required to disclose photographs and video images in which his image appears and were created between December 10, 2007 and December 10, 2009 and were posted and remain on his Facebook account."*[8]

Arbitrator Ashby's opinion reflects the words of Arbitrator Murray in *Varatharajah v. TTC Insurance Co*[9] where he defined "relevance" as being a degree that is weighted against other factors including the sensitivity of the information and that credibility alone is not a sufficient basis upon which to order production.

The Pre-Hearing

Section 33 of the Code requires the parties to participate in a Pre-Hearing. Parties are expected to come to the Pre-Hearing with full authority to settle the issues in dispute. During the Pre-Hearing, counsel will be required to:

1. identify and obtain agreements as to the issues for Arbitration;
2. obtain an agreement as to facts;
3. decide if there are any disputes relating to the identification and exchange of documents;
4. deal with procedural and preliminary issues, and requests for interim relief or interim expenses;

[8] Prete v. State Farm Mutual Automobile Insurance Company (FSCO A09-002996, January 13, 2011) at page 6.
[9] *Varatharajah v. TTC Insura*nce *Co. FSCO A05-001257*

5. identify the expert and lay witnesses to be called at the Hearing and determining the length of the Hearing;

6. set dates for the Hearing;

7. arrange the form in which document briefs or a joint book of documents will be submitted to the Hearing Arbitrator; and

8. deal with any other matter that the Arbitrator consider appropriate including requesting an interpreter and clarifying which party will be hiring the Court Reporter.

Do not take your obligation to identify your expert and lay witnesses at this stage lightly. Section 41.3 provides an Arbitrator the discretion to exclude witnesses from testifying if he/she is not identified at the Pre-Arbitration Hearing[10].

Make sure you over-estimate the number of days you will need to put in your case. Inevitably, what appears to be a perfect witness schedule is thrown into a state of disarray during the proceeding and usually for reasons beyond your control. If you have not scheduled enough days, the Arbitrator will be forced to split the case. The last thing you want is to have a Hearing restart with the insured's case going in a couple of months after yours.

As noted above, the Code requires parties to attend the Pre-Hearing with full authority to settle the issues in dispute. In many instances, the insurer will be looking to use this opportunity to negotiate a full and final settlement of the entire claim. Although it may be tempting to enter into a full and final settlement at this stage, you should consider whether you will face an improvident settlement argument in the tort action. Where there is an ongoing tort claim, it is advisable to schedule a global Mediation before the Arbitration and invite the tort insurer and the *SABS* insurer to attend.

[10] Additionally, a witness may be excluded from testifying where he/she did not receive notice of the requirement to testify 30 days before the first day of the Hearing.

Preparing for Arbitration

Preparing for an Arbitration Haring is no different than preparing for a Trial. You need to organize your documents, consider the benefit of using demonstrative evidence, interview and schedule witnesses and prepare opening and closing submissions.

Making use of a comprehensive checklist is a good way to identify what steps you need to take in the months leading up to the Arbitration. An effective checklist will prioritize which tasks need to be completed and by whom as well as keeping track of deadlines for completion. Certain tasks, such as writing to your witnesses to advise of the Hearing date, updating clinical notes and records, obtaining your witnesses' curriculum vitae and beginning to gather will say statements should be started no later than 180 days before the Arbitration. Preliminary witness briefings should be scheduled 90 days before Arbitration. Have your clerk or assistant begin compiling your Document Briefs 60 days before Arbitration. This will give you time to obtain any missing documents before the 30-day deadline.

Preparing your documents

Preparing your documents for use at the Arbitration can be an arduous process. Depending on the issues in dispute your file could be quite voluminous. You will need to review each document in detail to determine if it proves the elements of your case and/or supports your theory of the case. You may find it helpful to use an "Arbitration Prep Sheet" during this process which lists the facts you need to prove (or disprove), the evidence which supports or contradicts the fact and where it is located. This will be a handy reference tool that can be used during the Arbitration to keep you focused on what evidence has been introduced and what is outstanding. A sample Arbitration Prep Sheet is attached at Appendix "A".

Once you have determined which documents you will be relying on, you may want to consider how you will present the document to the Arbitrator. Make sure your

Document Brief is indexed, tabbed and bound. The pages should be numbered. Highlight the specific paragraphs you will be referring to in each report. This small courtesy will go a long way when you are directing the Arbitrator to a certain reference in your documents.

Provide the Arbitrator with a memorandum of law to assist him/her in dealing with any potential legal issues that could arise.

Lastly, have an extra copy of your opening and closing statements to give to the Arbitrator so he/she can follow along while you make your submissions. If you are persuasive enough, the Arbitrator may use your statements as a guide when writing the Reasons.

Demonstrative Evidence

Everyone has heard the phrase "*a picture is worth a thousand words"*. Don't shy away from using demonstrative evidence to help the Arbitrator understand complex or boring evidence. Examples of powerful yet cost-effective ways to bring the evidence to life are:

- before and after photographs of your client;
- photographs of your client's vehicle after the collision;
- a medication summary chart and/or treatment chronology chart;
- a chronology of return to work attempts;
- videotape of your client undergoing pain injections; and
- your client's assistive devices to demonstrate how they are used.

Depending on the complexity or value of the issues in dispute, you may want to consider investing in more costly types of demonstrative evidence such as a Day in the Life Video, Work Site Video or Medical Illustrations. Consider what technology you have that will help you present your evidence such as an Elmo, DVD player, flip chart or a smart board.

Witnesses

A properly prepared witness is the key to a successful Arbitration. This includes preparing your witness for examination in chief as well as cross-examination. Before you embark on preparing your witnesses, make sure you have their complete file and have read it. Use an outline program in Word or NoteMap to keep track of the evidence you will want to enter through the witness. This will be the roadmap you will follow as you take the witness through his/her testimony. You may be comfortable doing the initial briefing of your experts by phone. This should not replace a final in-person briefing before he/she takes the stand. Always brief your client in person and plan on having more than one session. In our experience, each briefing should not last more than 2-3 hours. The briefings should take place in the week leading up to the Hearing. Allow one day between briefings as this is a stressful process and you will want your client to absorb as much of the briefing as possible without feeling completely overwhelmed and exhausted. Use this time to begin mapping out your witness schedule of witnesses. Make sure you have all of your witnesses contact numbers and warn them you may have to change the date or time they are scheduled to appear due to unforeseen delays during the Hearing.

Lastly, use the briefings as an opportunity to manage your client's expectations. Make sure your client understands the Arbitration process along with the strengths and weakness of his/her case and how you intend to deal with them. You will have an easier time dealing with your client at the Arbitration if he/she understands the challenges you will be facing during the Hearing.

The parties must exchange the names of witnesses that they intend to call at least 30 days prior to the first day of the Hearing. Take the time to include in your letter a request that the insurer produce any expert witness whose reports it intends to rely upon at the Hearing for the purposes of cross-examination. Additionally, you must notify a potential witness of your intention to call him or her to give evidence at the Hearing at least 30 days before the first day of the Hearing. FSCO will issue a Summons to Witness for you to serve on the witness together with the appropriate fees.

The Summons must be served at least 5 days before the first day of the Hearing. Confirmation of service must be filed when the Hearing begins.

Expert Reports

You need to choose your experts carefully and where you have multiple opinion experts consider who should be called to present opinion evidence versus a written report only. Pursuant to Section 42.4, no party may call more than 2 experts to give opinion evidence unless otherwise ordered by the Arbitrator. If a party intends to call an expert witness or rely on an expert report, the party must serve and file that expert's report that sets out the full name, address and qualifications of the expert, the subject matter of the testimony and the substance of the facts and opinion which the expert will present at least 30 days before the first day of the Hearing unless there are "extraordinary circumstances."

From a best practice perspective, you should deliver reports well in advance of the Hearing or run the risk of having the Arbitration adjourned in order to allow the insurer an opportunity to obtain responding reports. In *Certas v. Gonsalves,* the insured delivered two expert reports 31 days before the Hearing[11]. The Arbitrator adjourned the Hearing in order to allow the insurer time to obtain responding reports. An IE was scheduled however Ms. Gonsalves refused to attend and appealed the Decision. The Director's Delegate overturned the Arbitrator's Decision. Certas applied for Judicial Review. Justice Lederer, on behalf of the Court, reversed the Director's Delegate's Order on the basis that it was unreasonable and could not stand. In doing so, Lederer, J. stated as follows:

> *Fundamental to any administrative process is the requirement that it be fair. At its most basic, procedural fairness requires that a party have an opportunity to be heard and that it be able to respond to the position taken against it.*
>
> *In the circumstances of this case, if this arbitration is allowed to proceed in the absence of a further orthopaedic examination by a doctor of the insurer's*

[11] *Certas v. Gonsalves* 2011 ONSC 3986 (CanLII).

> *choosing, the insurer will have no practical ability to respond to the opinions with which it was provided thirty-one days before the commencement of the arbitration.*

In short, although the reports were delivered within the time prescribed by the Code, Justice Lederer concluded this was “trial by ambush”.

Offers to Settle

Always serve an Offer to Settle prior to the start of the Arbitration. Section 76 compels the Arbitrator to consider an Offer in connection with an award of expenses provided it was made in writing and contains the full terms of the Offer, the date the Offer was served and the time period it remained open for acceptance and provided the Offer was made *after* the conclusion of Mediation and *before* the conclusion of the Arbitration. Particular consideration will be given to Offers served after the Pre-Hearing and up to 5 days before the start of the Hearing. The Offer to Settle must be filed with the Arbitrator no more than 10 days after the Order has been delivered if it is to be considered when awarding expenses.

The maximum amount that may be awarded to an insured person or insurer for legal fees is calculated using the hourly rates established under the *Legal Aid Services Act, 1998* for professional services in civil matters before the Superior Court of Justice. Where appropriate, this rate can be adjusted to include an experience allowance to a maximum of $150.00 per hour.

The Hearing

Appearing before an Arbitrator requires the same advocacy techniques you would use if you were before a Judge and Jury. It requires a concise opening statement, an organized and efficient presentation of evidence and persuasive arguments.

Arrange to have a law clerk or assistant with you at the Hearing. This person will liaise with your witnesses. It is impossible to predict with certainty how long each witness will be on the stand. A witness may be running late or not show up at all. It will be your clerk's responsibility to make the calls to locate witnesses and have them on standby.

Opening Submission

Your opening submission is the first occasion the Arbitrator has to hear your theory of the case. It is a roadmap which gives the Arbitrator a sense of the evidence to come and how it is relevant to the issues in dispute. Use plain language; how many people do you know refer to a car as a "motor vehicle" or will say "the insurer was operating his 2005 GMC Sierra motor vehicle northbound on the Queens Highway 401 when …." Finish your opening submission by telling the Arbitrator what relief you will be asking for at the end of the Hearing.

Presenting your case

Storytelling is one of the greatest tools we have at our disposal. Stories are the basic way people process facts. Use your witnesses as the conduit for presenting different chapters in your client's story. Whenever possible, prompt your witness to offer examples to illustrate your client's disability, the level of attendant care required or the deterioration in your client's condition since treatment was denied. The Arbitrator will be able to recall the evidence if he/she can picture it in his/her "mind's eye".

Start and end with your strongest witnesses but do not forget to confront the weaknesses in your case. Your client should make concessions whenever it is reasonable to do so. It will enhance their credibility and take away opposing counsel's ability to shock or surprise the Arbitrator with evidence that is harmful to your case. Once your client's credibility is lost, it is lost forever.

Cross- Examining the Insurer's Experts[12]

The purpose of this paper is not to discuss in detail the art of cross-examination. Cross-examination is a difficult task that is a subject all on its own, however, there is a general framework that you can work within when preparing to cross-examination the insurer's expert. The four categories of this framework are: 1) good credentials; 2) an adequate foundation; 3) a fair opinion; and 4) sustainable science.

You should have, as part of your Document Brief, a comprehensive curriculum vitae from the insurer's expert witnesses and taken the time to research his/her credentials. If the expert delegated part of the assessment, you may want to obtain their curriculum vitae as well and perform the same searches. There are 3 sources of information readily available to you: 1) educational institutions; 2) regulatory bodies; and 3) computer database searches. You may not always uncover a misstatement about their qualifications, but if you do, it can undermine the confidence of the expert while on the stand and challenge his/her credibility in the mind of the Arbitrator.

The 2 questions you may want to ask when cross-examining the foundation of the opposing expert's report: Did the expert have all of the relevant and necessary background information to properly form his/her opinion?; and Was the examination or assessment undertaken adequately? Review the document list within the expert's report in detail to determine whether he/she had the entire documentary record and all of the anecdotal information relevant to the subject matter of his/her testimony. If you can establish that the facts upon which his/her opinion is based have changed, the expert will have a difficult time denying that his/her opinion has also changed. You have the advantage of knowing your client better than the insurer's expert. Your client and the lay witnesses will be able to provide credible anecdotal evidence of what he/she can or cannot do. Their testimony can undermine the expert's opinion which is, more often than not, formed within a brief assessment.

[12] The information in this section is a brief overview of the information contained in The Art and Science of Cross Examining the Expert Witness by Richard Shekter, The Advocates Society "Civil Litigation Skills Certificate Program; Winning with Experts" December 9, 2005.

Use what you have learned from your own expert as to what constitutes an adequate examination, investigation or assessment in the circumstances. Knowing what the expert ought to have done and comparing it to what was done can be an effective cross-examination tool.

Expert opinions are intended to be independent opinions. The expert is required to fully and fairly describe the factual underpinnings of his/her opinion. Compare the report to the underlying data contained in your medical brief to establish whether relevant information has been omitted. Use the online legal research sites and the OTLA database to determine if the expert has testified before on the same subject and taken a different view or has been discredited on prior occasions.

Challenging the science the expert has relied on is dangerous territory as the expert will always know more about the subject than you. You should not enter into this area unless you are certain you can neutralize the opinion. This does not mean you should not at a minimum have reviewed any articles or publications the expert relied on and discussed them with your expert to determine if the science relied on is “junk science”.

Closing Submission

Your closing submissions should highlight the key elements of your case and provide a summary of the evidence introduced during the Hearing in support of the story you are telling. It is tempting to put every possible argument in your closing. This may result in a long closing that only serves to overwhelm the Arbitratar. Instead, present the Arbitrator with a well-reasoned theory and explain how the facts and law come together in a way that will allow the Arbritrator to find in your favour. If extensive submissions are required, suggest the parties deliver written submissions as part of their closing argument.

Conclusion

Every case is different and will present its own unique challenges, but if you if start from the premise that every case is a story waiting to be told, you can marshal the evidence in such a way that grabs the Arbitrator's attention from the moment he/she reads your summary of issues until they write the Decision. This can only be accomplished by first developing a well thought out and organized strategy and, most importantly, taking the time to do extensive document and witness preparation. Hopefully, this paper has given you the beginning of your own roadmap to success.

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