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Practice Note 4: Exchange of Documents

This Practice Note outlines the role and the need for early disclosure of supporting documents in FSCO's dispute resolution process. The note offers general guidelines as to the type of documents that may be relied upon to support a claim, and when they should be gathered and exchanged with the other party. In certain cases, documents relating to a period more than one year prior to the accident may be relevant and ought to be produced.

A. DOCUMENTS

Documents that may assist to resolve a dispute vary with the issues in dispute, but can include the following:

1. Where disability benefits are in dispute:

- **Clinical notes and records of physicians** who treated the insured person during the year leading up to the accident and after the accident.
- **Ambulance call reports** if the insured person was transported from the accident by ambulance.
- **Hospital records** if the insured person has received treatment at a hospital in the year before the accident or after the accident.
- **Records of the Workplace Safety & Insurance Board (formerly the Workers' Compensation Board)**, if the insured person was receiving workers' benefits at the time of the accident or in the preceding year.
- **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.
- Any **report of a Designated Assessment Centre (DAC)** that conducted an assessment of the insured person under the Statutory Accident Benefits Schedule.
- **Medical reports** in the possession of the insurance company, such as those prepared by the insured person's treating physicians.
- **An OHIP statement** listing the physicians who have treated the insured person in the year before the accident and after the accident, if it is unclear who has treated the insured person.
- **Surveillance or investigative evidence** if a party intends to rely on any portion. The party must provide particulars of the names and qualifications of any person who took such evidence, including the dates, times and places where any surveillance or investigation was undertaken. The party must provide copies of all surveillance evidence taken or prepared by anyone in

connection with the issues in dispute if the party intends to rely on any portion of the surveillance at the hearing.

- **Certain employment records**, such as a job description.

2. Where the amount of benefits is in dispute:

- **Certified income tax returns** from Revenue Canada for the year before the accident, and the year of the accident.
- **Financial statements** for the year before the accident and the year of the accident in the case of self-employed claimants. In certain circumstances, more detailed raw financial documentation may be required such as bank statements and records.
- **Any application for Canada Pension Plan disability benefits** and a copy of the granting letter, if it appears that the insured person has applied for or received these benefits.
- **A copy of any health or disability insurance policy**, if it appears that the insured person had coverage at the time of the accident, and a copy of any application form or granting letter.
- **Certain employment records**, such as payroll records, for the year before the accident.

B. DOCUMENTS IN MEDIATION

It is important that parties start discussions about exchanging documents **BEFORE** applying for mediation. Parties should immediately begin to collect material from sources, such as doctors, employers, or accountants. Producing documents and providing them to both the other party and the mediator at an early stage, greatly improves the chances for a successful mediation. Recent amendments to the *Insurance Act*, include a provision respecting early disclosure of key materials required to discuss the resolution of the issues in dispute. As a result of this amendment, parties should review their file early to determine whether they will require any materials from the other party to discuss settlement, and **request these materials, in writing from the other party, as soon as possible**. Claimants will be required to list available documents to which they intend to refer in mediation as well as existing documents they wish to obtain from other sources, at the time they file their **Application for Mediation**.

Remember that the request for documents at the mediation stage should be realistic and limited to those items which are critical to settlement discussions. The amount and type of documentation necessary to discuss settlement will vary from case to case. The intent of this provision is to facilitate settlement at this early stage of the dispute resolution process, not to introduce a time consuming and costly process of document exchange.

In the majority of cases the documents necessary to settle disputes at mediation, such as income tax returns, employment records and DAC reports, are readily available. In some instances, documents such as bank statements must be secured at a nominal cost. It is not anticipated that in the majority of cases, historical records such as past medical clinical notes and records and OHIP statements will be necessary to discuss settlement at mediation. Records of this nature are expensive and take a significant amount of time to secure. They are more commonly requested at the arbitration stage of dispute resolution.

If either party objects to providing documents requested by the other, they should immediately communicate their objection and their reasons for objecting in advance of the mediation.

If mediation fails, the **Report of Mediator** will contain a list of materials that were requested by the parties in writing but have not been produced that, in the opinion of the mediator, were required for the purpose of discussing settlement of the issues in dispute at mediation.

The **Report of Mediator** will not necessarily list all of the materials requested by the parties for discussion at mediation.

The failure to produce relevant documentation by a party as outlined in the **Report of Mediator** may delay the commencement of an arbitration or may be considered by an arbitrator at the conclusion of a hearing, when deciding a claim for expenses.

C. DOCUMENTS IN NEUTRAL EVALUATION

Parties wishing to proceed to neutral evaluation within an arbitration proceeding at FSCO, must jointly certify that all the documents listed in the **Report of Mediator** have been exchanged, and that no other documentation is required for an evaluation of the issues in dispute. The person appointed to conduct the neutral evaluation may request additional information to assist in evaluating the issues in dispute.

If the dispute does not settle as a result of neutral evaluation, the evaluator will prepare a **Report of the Neutral Evaluator** listing any materials he or she requested that were not provided by the parties.

The failure to produce relevant documentation by a party as outlined in the **Report of the Neutral Evaluator** may delay the commencement of an arbitration or may be considered by an arbitrator at the conclusion of an arbitration hearing, when deciding a claim for expenses.

D. DOCUMENTS IN AN ARBITRATION HEARING

Parties to an arbitration should exchange all documents necessary to decide the issues in dispute at the earliest possible stage. Applicants will be required to list key documents in their possession as well as documents they intend to obtain from other sources as part of their **Application for Arbitration**.

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.

As a general rule, the party asking for the document is responsible for paying the cost of getting it. When an insurance company arranges to collect documents directly from a third party, it may require the applicant to authorize the collection beforehand. The company must give copies of any documents it obtains to the applicant, as soon as possible.

Where the parties to the arbitration cannot agree which documents to exchange, the pre-hearing arbitrator will rule on what is required.

Where third parties (like hospitals or doctors) are asked to supply documents, the arbitrator will insist that parties make their own reasonable efforts to obtain the documents from the third party before issuing an order requesting the third party to release the documents. One exception to this practice is a request for information from OHIP where, to speed up the process, an arbitrator will make an order at the parties' request. The pre-hearing arbitrator has the final say on what documents must be produced or exchanged **prior** to the arbitration hearing. The hearing arbitrator has the final say on what documents will be considered **during** the hearing.

Arbitration is designed to be relatively informal and quick. It does not have the broad discovery and disclosure processes of the court system. Parties to an arbitration can participate most effectively by promptly disclosing all relevant documents well before the date of the arbitration pre-hearing discussion.

Failing to produce documents well in advance of a hearing can result in adjournments and delays. Furthermore, if documents are not produced promptly, the hearing arbitrator may refuse to admit the documents into evidence or may draw an adverse inference against the party who failed to produce the

document. The hearing arbitrator may also deny expenses to that party or award expenses to the other party.

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- from Toronto, call (416) 250-6714
- from outside Toronto, phone 1-800-517-2332

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