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Practice Note 5: Mediator Referral to Private Neutral Evaluation - Financial Services Commission of Ontario

WHAT IS NEUTRAL EVALUATION?

Neutral evaluation is a process designed to encourage the settlement of disputes in certain types of cases. A neutral evaluator will give you and your insurance company a frank review of both of your positions, as well as an assessment of the probable outcome, or range of outcomes, should the dispute be decided in private arbitration, arbitration at FSCO or in court.

Neutral evaluation provides the parties with an additional opportunity to settle outstanding disputes and avoid adjudication. This step in the dispute resolution process has the potential to save the parties time and the expenses associated with taking the dispute through the full process of arbitration or to court. Under the *Insurance Act*, neutral evaluation takes place after mediation fails and before a case proceeds to arbitration or court.

HOW DO I OBTAIN NEUTRAL EVALUATION?

Neutral evaluation can be obtained privately or at the Commission, as part of FSCO's arbitration process. To obtain neutral evaluation at FSCO you must first apply for arbitration and pay the filing fee. You must indicate on your Application for Arbitration that you wish to participate in neutral evaluation. If the insurer agrees, the Director of Arbitrations will appoint a neutral evaluator from within FSCO and will suspend the arbitration process until the neutral evaluation has been completed. If your case does not settle at neutral evaluation, your dispute will normally be fast-tracked to an arbitration hearing, bypassing the pre-hearing stage. (See Practice Note 6 "Neutral Evaluation at the Financial Services Commission of Ontario" for more information on this option.)

If you and your insurer choose private neutral evaluation (under the Insurance Act), you must agree upon the choice of the neutral evaluator, negotiate the fee, and determine who will pay. The evaluator must then be appointed by FSCO's Director of Arbitrations. The appointment process is simple. The parties write the Director of Arbitrations providing the name, address and telephone number of the neutral evaluator. You must also include written confirmation that the parties agree to pay for the evaluation and that the neutral evaluator has agreed to conduct the evaluation in accordance with the requirements of the *Insurance Act*. Based on this information, the Director of Arbitrations will appoint this individual as your neutral evaluator and provide him or her with a copy of the Report of the Mediator as well as an approved format for the Report of the Neutral Evaluator.

FSCO is not responsible for payment of the private evaluator's fees nor does it maintain an approved or recommended list of private neutral evaluators.

If a mediator recommends that you and your insurance company engage in neutral evaluation, your case must proceed through private neutral evaluation that is recognized under the Insurance Act. This process must be completed before your dispute can proceed to private arbitration, arbitration at FSCO, or court.

WHEN DOES A MEDIATOR MAKE A REFERRAL TO NEUTRAL EVALUATION?

Mediators consider stringent criteria before recommending a referral to neutral evaluation.

First, the mediator must be of the opinion that the neutral evaluation process will likely result in a settlement of your dispute. This opinion will be based on many factors, including the nature of the dispute, the parties' understanding of their case, their expectations, and their reasonableness.

Second, the mediator will evaluate whether the parties have fully documented their positions. Have they provided disclosure to the other side at mediation or can they realistically exchange the documents required within 30 days of the date of the Report of the Mediator?

Third, if both parties agree to proceed to neutral evaluation it will be noted in the Report of the Mediator. In this case, a mediator referral is not required. The mediator will outline the features of both private and FSCO-delivered neutral evaluation. The parties then may choose the route they will pursue.

Fourth, if mutual consent cannot be reached, but the insured person wishes neutral evaluation, the mediator can consider a referral. Under these circumstances the mediator will outline the features of private neutral evaluation as detailed under the *Insurance Act*.

Fifth, before making the referral to private neutral evaluation, the mediator must ensure that the parties have agreed how they will pay for these services. The parties will have to agree on who will perform the evaluation and obtain the appointment of this person's service by the Director of Arbitrations, as outlined above.

HOW DO I CONTACT THE OFFICE OF THE DIRECTOR OF ARBITRATIONS?

The Director of Arbitrations' office can be contacted at:

Financial Services Commission of Ontario
Dispute Resolution Group
Arbitrations Unit
5160 Yonge Street, 14th Floor
Toronto ON M2N 6L9
phone (416) 590-7202
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