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Practice Note 6: Neutral Evaluation at the Financial Services Commission of Ontario

WHAT IS NEUTRAL EVALUATION?

Neutral evaluation is a voluntary dispute resolution option within the arbitration process at the Financial Services Commission of Ontario designed to provide the parties, in appropriate cases, with an additional opportunity to settle their disputes. Neutral evaluation has the potential to save both parties the time and expense associated with taking disputes through to a full arbitration hearing.

Neutral evaluation is conducted before a neutral evaluator, who is an arbitrator with FSCO. The neutral evaluator provides an early, authoritative, independent, yet non-binding opinion of the probable outcome, or range of outcomes, should the dispute continue to a hearing.

Not all cases are suitable for neutral evaluation. Most arbitration cases at FSCO are scheduled for a pre-hearing discussion prior to a hearing (See Practice Note 7, "The Arbitration Pre-hearing Discussion")

Neutral evaluation is not a substitute for a pre-hearing discussion. The neutral evaluator will not decide disputes relating to the identification and exchange of documents, make procedural rulings or deal with preliminary issues or requests for interim relief.

WHAT CASES ARE APPROPRIATE FOR NEUTRAL EVALUATION?

For neutral evaluation to be effective, both parties must already have requested, produced and received all documents that are necessary and relevant for a determination of the issues in dispute. The neutral evaluator can only provide an authoritative opinion of the probable outcome of the dispute, if the parties are aware of the pertinent facts of the case. The parties to neutral evaluation ought to have all of the Documents they would have during final submissions at the conclusion of a hearing. Therefore, cases where important documentation is not yet available are not appropriate for neutral evaluation.

Neutral evaluation is intended to resolve the entire dispute between the parties. A neutral evaluation will generally not be arranged for only part of the overall dispute.

Cases especially suited for neutral evaluation are those where the facts are not in dispute or the dispute centres on a question of legal interpretation which has been canvassed to some extent by either FSCO or by the courts.

Cases involving allegations of fraud or significant credibility issues are generally less likely to benefit from neutral evaluation. In such cases, the opinion of the neutral evaluator may only succeed in further polarizing the parties thereby reducing the probability of settlement.

HOW DO I OBTAIN NEUTRAL EVALUATION AT THE FINANCIAL SERVICES COMMISSION OF ONTARIO?

Neutral evaluation can be requested by an insured person as part of the Application for Arbitration (Form C). Where an insured person has requested neutral evaluation, through the application process, the insurer may consent to neutral evaluation by completing an Agreement to Neutral Evaluation at the Commission, in FORM D and filing it by facsimile transmission within 20 days of the receipt of the Application for Arbitration.

The insurer may also initiate neutral evaluation by obtaining the written consent of the Applicant and by completing an Agreement to Neutral Evaluation at FSCO, in FORM D and by filing both by facsimile transmission within 20 days of the receipt of the Application for Arbitration.

FSCO will not schedule a neutral evaluation unless both parties agree.

http://www.fSCO.gov.on.ca/en/drs/DRP-Code/Pages/practicenote-6.aspx[19/01/2012 1:34:16 PM]

HOW SHOULD I PREPARE FOR NEUTRAL EVALUATION?

Parties need not be represented by legal counsel at neutral evaluation. However, legal and factual issues which are evaluated are often complex. Most parties are represented by lawyers during the arbitration process, including neutral evaluation.

A date for neutral evaluation will not be scheduled until the parties file a Joint Statement for Neutral Evaluation at the Commission (Form H) under Rule 44 of the Dispute Resolution Practice Code setting out each issue in dispute. In addition, each party must prepare a case summary under Rule 45, setting out exactly what the party seeks, and an outline of the evidence being relied upon, at least 10 days prior to the date set for the evaluation.

Each party must also provide copies of the relevant and necessary documents which support their case and which the neutral evaluator should read and consider before giving an opinion.

Each party should be completely familiar both with their own case, and the other side's case before attending the neutral evaluation. Neither side calls witnesses at a neutral evaluation. In the exceptional case a party may wish to consider having a key individual, such as a bookkeeper or doctor, attend the neutral evaluation to help the evaluator understand the evidence. To do this, it will be necessary to obtain the written consent from the Office of the Registrar prior to the evaluation.

DO I NEED TO ATTEND AT THE NEUTRAL EVALUATION?

ABSOLUTELY.

The neutral evaluation can only be effective if both parties, as well as their representatives are present to hear the information and the opinion of the neutral evaluator.

WHAT HAPPENS AT NEUTRAL EVALUATION?

Before the neutral evaluation occurs, the neutral evaluator will read the summaries of the parties and the documentation filed.

The neutral evaluation will be scheduled for one half day and can take place either at the offices of FSCO in Toronto, or by telephone conference.

The format of the neutral evaluation is flexible and can be adapted to meet the particular needs of the parties and the circumstances of the case. At the beginning of the evaluation the neutral evaluator will generally review various alternative approaches to the neutral evaluation and ask the parties which format would be most conducive to resolving their dispute.

Usually the neutral evaluator will hear brief oral submissions from each party, highlighting the positions and supporting evidence of each side. The neutral evaluator may then have questions of each party regarding the evidence, the conclusions to be taken from the evidence, or the parties' interpretation of the pertinent legislation.

After considering all of the evidence and arguments, both written and oral, the neutral evaluator will generally attempt to facilitate settlement between the parties, prior to providing an oral opinion of the probable outcome of a hearing. The neutral evaluator may meet with each side on consent, or may break to allow parties a private opportunity to discuss settlement options generated during the process. When the dispute settles, the neutral evaluator will prepare a report identifying the issues that were evaluated and settled.

WHAT HAPPENS IF THE CASE DOESN'T SETTLE AT NEUTRAL EVALUATION?

If the neutral evaluation does not resolve all of the issues in dispute, the neutral evaluator will set a date for the arbitration hearing. A pre-hearing discussion will not be scheduled. Therefore, neither party will be able to obtain any production orders prior to the arbitration hearing, except in extraordinary circumstances where new information, which could not have been anticipated, has come to light since the neutral evaluation.

The neutral evaluator will prepare a written report confirming issues which remain in dispute. The opinion of the neutral evaluator is confidential and will not be included in the written report. The parties cannot communicate the neutral evaluator's opinion to the hearing arbitrator. The hearing arbitrator will not be the same person as the neutral evaluator.

For information about arranging a Private Neutral Evaluation, see Practice Note 5, "Mediator Referral to

Private Neutral Evaluation".

HOW DO I GET MORE INFORMATION?

Our telephone numbers are:

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

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