Accident Benefits

A Practical Desk Reference

Darryl Singer & Andrea Sesum
with Meena Saini

emond professional

Accident Benefits

Accident Benefits: A Practical Desk Reference is designed to help lawyers, paralegals, law clerks, and insurance adjusters properly file, negotiate, and complete accident benefits claims.

Accident Benefits analyzes the many forms of compensation available to injured parties after motor vehicle accidents, and contains insightful practice tips for all parties involved in a claim. This indispensable resource includes OCF forms, application documents, model letters, and precedents. It covers the regime before and after 2016 changes, highlighting key differences.

The author team has drawn on their extensive knowledge and experience to create a comprehensive guide for all stakeholders in an accident benefits claim. Access to a companion website is included with a print or ebook purchase.

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Table of Contents

CHAPTER FIFTEEN

2016 Changes to the SABS

I. Overview

As of June 1, 2016, there are a number of major changes to the accident benefit regime. These can be broken down into two categories: (1) benefits and (2) dispute resolution procedure. This chapter deals with those changes in brief.

Because not all of the changes have been announced by the Ontario government, this chapter is current to the date of publication only. A new edition of this book will be released in 2017, once there has been some development of the new rules in practice, application, and case law.

The present edition does, however, provide an important overview of the pending changes. These changes reduce the overall entitlement to benefits, make some benefits harder to obtain, and streamline the dispute resolution process.

> Some of these changes apply only to policies of auto insurance issued on or after June 1, 2016; others apply to all accidents that occur on or after June 1, 2016.

While AB reps must be aware of the changes, in practice you may not encounter any clients to whom the new rules apply for many months. I would recommend as a *best practice* that applicant reps update whatever file-opening procedure is now in place to ensure that every new intake after June 1, 2016 is properly streamed so that no limitation periods are missed and the appropriate procedure is followed and appropriate benefits are applied for. After the 2010 SABS changes, more than a few applicant reps were caught off guard through bad file management when they applied for claims no longer available, or failed to apply for claims still available under the transitional provisions.

I suggest updating your checklist as follows:

1. date of accident
2. accident occurring before June 1, 2016
3. accident occurring on or after June 1, 2016 for policy issued before June 1, 2016
4. accident occurring on or after June 1, 2016 for policy issued on or after June 1, 2016

II. Benefits Applicable to Polices Issued on or After June 1, 2016

The changes below affect only automobile insurance policies issued on or after June 1, 2016.

A. Medical Rehabilitation/Attendant Care

> Under the current regime, as noted in Chapter 3, medical and rehabilitation benefits for non-catastrophic injuries that exceed the Minor Injury Guideline are capped

at $50,000. Attendant care benefits are capped at $36,000. The time limit for which med-rehab benefits are payable is ten years from the date of the accident.

Under the 2016 amendments, the medical rehab benefit is increased to $65,000, but this is combined with the attendant care benefit. The benefits are no longer payable for anything beyond the five-year anniversary of the accident, except in the case of children under the age of 16.

For catastrophic cases, the current limits of $1,000,000 for med-rehab and an additional $1,000,000 for attendant care is reduced to a combined $1,000,000 for both attendant care and med-rehab.

B. Non-Earner Benefit (NEB)

At present, there is a six-month waiting period before the NEB kicks in. This is eliminated in the new system, which has only a four-week waiting period.

The non-earner benefits will no longer be available to anyone under 18 years of age, increased from the present age of 16. Further, while under the current system the NEB is available on an ongoing basis, in the new regime it is only payable for up to 104 weeks post-accident.

Applicants' counsel need to pay attention not only to the date of the accident, which obviously affects limitation periods, but—until at least until the middle of 2019—also to the date of the policy itself. For example, an accident that occurs in May 2017 might involve a policy that was issued on May 30, 2016, which would mean that the current, pre–June 2016 benefits apply. This is obviously advantageous to the applicant, given the greater benefits available.

C. Catastrophic Impairment

Arguably, the most significant change is the definition of "catastrophic." The existing definition, as set out in the SABS and developed by the case law, is replaced by a stricter one. In brief, applicants will have to demonstrate more severe injuries. (See Chapter 11 for more information on the new requirements.) For adjusters, this new definition appears on its face to prevent an applicant from obtaining catastrophic benefits in all but the most obviously severe cases. This means that insurers should take an even harder look than in the past regarding the determination of catastrophic impairment (CAT), because applicants will be put through a lengthier and more difficult process to prove that they meet the CAT threshold.

III. Benefits Applicable Only to Accidents on or After June 1, 2016

A. Additional Services

Claims for additional non-itemized goods and services will require the insurer's decision on whether they are necessary. At present, the benefit can be incurred and then

applied for, before the insurer denies the claim and it can be disputed. Under the new rules, the benefit is not even on the table in terms of a disputed amount unless the insurer has pre-approved the availability of the benefit as reasonable and necessary. It is anticipated that insurers will routinely deny these additional benefits, and thus there is, among the plaintiff bar, an anticipated uptick in these types of disputes. If I were an adjuster, however, I would deny most of these claims, because the amount of money at stake is likely to be far less significant to the applicant than the legal costs of pursuing such a claim.

IV. Dispute Resolution

At present, when the issues on an application are mediated unsuccessfully, the applicant can either apply for arbitration at the Financial Services Commission of Ontario (FSCO) or issue a statement of claim to pursue the disputed benefit in court.

The latter option will no longer be available to applicants after March 31, 2016. It will no longer be possible to litigate accident benefits disputes through the court system. Applicants will be limited to the administrative tribunal route.

In that regard, FSCO will no longer be the tribunal to resolve these disputes after March 31, 2016. FSCO will accept applications for mediation up to and including March 31, 2016, provided that the accident occurred before that date. All AB disputes not commenced at FSCO by March 31, 2016, regardless of the actual date of the accident, will be commenced before the Licence Appeal Tribunal (LAT) as of April 1, 2016. FSCO will no longer accept any AB dispute resolution applications after March 31, 2016.

Only after the matter is adjudicated there can the losing party (either applicant or insurer) proceed to court. But this is not a trial, simply an appeal to the Divisional Court. Divisional Court appeals are based, like all upper court appeals, on the record before the court. Other than in exceptional circumstances, this means that no new evidence will be presented, and the court will base its decision not on fact (unless there was palpable and overriding error, which is rarely proven) but rather on the law. Unless the LAT made an error in the application of the law to the facts, the appellate court is more likely than not to uphold the decision.

This means that the dispute resolution system will be heavily weighted against the insured party. The law is well established that on appeal, the appellate court should defer to the tribunal of first instance where the law was properly applied and the arbitrator simply made a determination on the facts before the tribunal, as opposed to when the arbitrator makes a clear error in the correct application of the law.[1]

Also gone will be the requirement to mediate a dispute. The new dispute process will be as follows.

1 *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

An injured party will continue to initiate a claim for benefits by submitting an OCF-1 (Application for Accident Benefits) to his or her own insurer. The other various forms will also continue to be submitted as under the existing system. Once the insurer denies the benefit, the applicant will file an Application for a Settlement Meeting. An arbitrator appointed by LAT will then assist the parties in trying to resolve the matter at a settlement conference. If the matter is still not resolved, an application for arbitration is made to the Licence Appeal Tribunal. Once this is submitted, the insurer will respond. A date will then be set for a pre-hearing.

The pre-hearing conference will be conducted in much the same way as the current pre-hearings that take place at FSCO, which were discussed in detail in Chapter 14, Dispute Resolution: Arbitration or Trial. If the matter is not resolved, an arbitration date will be set. As for the procedure at arbitration, the rules and format are similar to those described in Chapter 14. The primary difference is that instead of the *Dispute Resolution Practice Code* (DRPC) as the procedural guide, the governing rules are the *Licence Appeal Tribunal Rules of Practice*. These are quite similar to the DRPC in terms of disclosure obligations and conduct of the hearing.

However, LAT has the mandate to determine that the arbitration be conducted by paper review rather than a full hearing. It remains to be seen whether this option will be exercised by LAT on a regular basis. If so, it will significantly deprive applicants for accident benefits of their previously taken-for-granted right to have their matter tried, either by a court or tribunal, in a trial format with live witnesses.

Practice Tip

If you have any matters in your case inventory prior to March 31, 2016, it would be advisable to commence the application at FSCO before that date. Regardless of one's opinion of the efficacy of FSCO, it is for most seasoned practitioners a known entity. Additionally, the mediators and arbitrators at FSCO are experts in AB dispute resolution. Because the member appointments to the LAT's arbitration roster have yet to be made (as of the date of writing), and because the LAT has never before dealt with AB cases, it is at present the great unknown, and no doubt will take months or even a couple of years to find its footing and be able to operate with the efficiency and fairness with which FSCO operates.

V. References

1. *Licence Appeal Tribunal Rules of Practice* [see Appendix A]
2. Changes to Automobile Insurance Regulations; Guideline Update (FSCO Bulletin No A-06/15) [see Appendix A]
3. *Dispute Resolution Practice Code* (DRPC) [see companion website]

CHAPTER SEVENTEEN

Advocacy Tips

I. Overview

Throughout this book you can find technical and procedural requirements for mediation, pre-hearing, and arbitration. In this chapter, I provide a few practical tips for preparing and attending at these events.

II. Mediation

Since mediation is generally done over the phone and can be very informal, I typically do not prepare in the same way that I would if I were to be attending an in-person mediation or another stage of the proceeding such as pre-hearing or arbitration. No briefs need to be filed in advance. All that will have been filed by your office prior to the mediation will be the application for mediation.

That said, don't think you can wing it. One lawyer I know settles over 50 percent of AB cases at mediation, and with good results regardless of the merits of the clients' cases, simply because she is prepared and takes the time prior to the mediation to drill down and understand every aspect of the file at issue.

This is the key to a successful mediation: know your file. In other words, the best preparation for a FSCO telephone mediation is a thorough review and understanding of the issues in dispute and of the medical evidence for and against you, and an intricate knowledge of the technical aspects of the SABS and how they apply in the case before you.

Whether you are an adjuster or an applicant's rep, you should review the dates and timelines of all OCF forms submitted to the date of the mediation. Many of those conducting the mediations review only the substance of the forms submitted. But you can create a negotiating advantage for yourself by finding, for example, an OCF-9 or other denial letter from an insurer that was sent late or that does not comply with the requirements of the SABS. Similarly, you should match up all OCF-18s with the OCF-9s/denials. Amazingly, I have often found that the insurer did not respond to a treatment plan that was properly submitted. These sorts of things create a situation in which you can gain some negotiating leverage for your client.

Adjuster's Tip

I am equally amazed at how often there are invoices for treatments on which the applicant seeks reimbursement at the mediation for which no formal treatment plan had been submitted. This is where your thorough review of all documents in the file, cross-referenced by date of submission and receipt, may put the insurer in the driver's seat.

I cannot stress enough the importance of understanding the injuries and the medical evidence submitted, regardless of which side you are on. Does the evidence truly support the finding of which you are trying to persuade the other side?

Your client will likely never have participated in a telephone mediation before. His or her role is usually fairly passive, because all the conversation will be between the mediator, the lawyer, and the adjuster. I generally do not allow my clients to speak at this stage, particularly when the adjuster asks questions of my client to which I may not know the answer. Mediation is not a discovery, and there is no obligation to answer such queries. That said, perhaps your client can provide clarification that will allow the adjuster to offer a settlement to your liking. Like many things in the law, for every rule there are exceptions.

I advise my client to sit quietly and not to be angry if the insurer expresses doubts about the seriousness of his or her injuries or his or her honesty. The key is always to keep the client focused on the reality and to prevent the client's emotions from getting the better of him or her. Settlement at a mediation means not only persuading the adjuster to allocate some money, but also managing your client's expectations. Most injured parties do not understand the difference between a tort and an accident benefit, so they do not realize the very limited funds the insurers can legally give them to settle in all but the most serious of cases.

You will want to review with your client just before the mediation how much money has been paid in benefits along the way, because this number, particularly if it is significant, will often reduce the amount available for settlement, and you will want your client to be in the right frame of mind at the outset. For this reason it is important to walk through the numbers with your client to ensure that he or she understands that, while the focus is on the settlement offer, the amount of the offer will be affected by any previously paid expenses.

You will always want to negotiate for *futures* (future med-rehab expenses). Some insurers have recently adopted a blanket policy of not paying anything for futures at a settlement. However, others will, although the amounts are less than they used to be. Typically, any amount allocated for futures will be commensurate with what was already spent on med-rehab. But even if you end up settling for an amount that does not include futures, you must at least ask for it as part of the negotiation, or you risk leaving money on the table.

Be prepared in the mediation to provide an offer broken down by benefit category and time period. Although at the end of the day, the amount agreed upon may very well be an all-inclusive number, and although the second, third, and fourth round of negotiations may also be all-inclusive numbers, if your opening offer (and this applies equally to both sides of the dispute) is precise in terms of benefit category and time period, your opposition will at least see that you actually know and understand the file and will take you more seriously. Such a well thought out offer may give your opposition more to work with in terms of persuading their client to meet your terms.

III. Pre-Hearing

As noted in Chapter 14, the pre-hearing is similar to the telephone mediation, in that the settlement discussion aspect is present, yet it is conducted in person. The pre-hearing is also not unlike what would be called in a court a *pre-trial*, because there will be a case management discussion to ensure that the matter is ready to proceed to arbitration and can in fact proceed smoothly.

As with the advice above regarding mediation, I cannot stress enough the importance of preparation. Know your case! Know how the SABS affects each benefit claimed and how that interplays with the facts of your case. This means reviewing all the medical records and cross-referencing dates of all forms submitted and responses received. You will already have done this at mediation. Do it again before the pre-hearing. The mediation will have taken place many months earlier. Unless this is your only AB file, you will need to refresh your memory. In addition, if the file is being managed properly, there will likely be new forms and medical reports that were not available at the mediation.

Adjuster's Tip

Look through the documents for possible issues of non-compliance on the part of the applicant. If you find any (failure to attend an insurer's examination, treatment invoices claimed for which no OCF-18 was submitted), you will be able to attend the pre-hearing and schedule a preliminary issues motion. Even if you are unlikely to win the motion, there is a strategic and tactical advantage to putting it on the table.

As an applicant's representative, you will want to meet with your client before the pre-hearing. Never walk into a such a hearing without having prepared your client for the process. The client should not hear about possible cost consequences or preliminary issues for the first time from the other lawyer or the arbitrator in the room. This preparation can usually be done at the location of the pre-hearing a half-hour before it. You must first get an update on your client's injuries to confirm that the medical information is still accurate. You will want to describe the process that is about to occur. Explain the role of the arbitrator, and indicate that both the insurance adjuster and the insurer's lawyer will be present. Explain to your client that he or she may hear things from the opposing side or the arbitrator that he or she does not want to hear. Clients often show up thinking that this is the hearing day, no matter what the notice from FSCO said or what your office told them on the phone. They will appreciate your heads-up on the process and the realities of the numbers. A successful pre-hearing is as much about a properly prepared and managed client as about your understanding of the facts and the law.

In terms of any sort of argument you wish to make in the pre-hearing or any numbers you wish to put on the table, put yourself in the shoes of the opposing lawyer and adjuster before going in. If you were on the other side, what are the best arguments you could use against your client? Take those and be prepared to refute them, not with hyperbole but with facts you can tie into the law. Do not take untenable positions. If you stake out a patently ridiculous position just to appease your client, you will lose credibility in the eyes of the insurer, their counsel, and the arbitrator. This is the fine balancing act of any good litigator.

Two concepts are seemingly in conflict—that you must fearlessly advocate for your client and advance every available argument, and that you must not be foolish or protract proceedings unnecessarily. In fact, the "argue my client's position no matter what" mentality may result in your client being penalized at the end of an unsuccessful arbitration with costs, and possibly with you being personally responsible for some of those costs. Admittedly, the ability to manage this balance comes only with experience and cannot be captured in some pithy aphorism to conveniently end this paragraph. Just remember that your ability to settle cases and persuade triers of fact in hearings transcends any one individual case and is partly based on your reputation.

You will be asked at the pre-hearing how many days the hearing will require; who your witnesses will be; what defined benefits and time periods are in dispute; and what documentary requests you have of the other side. I am shocked to hear from arbitrators how many applicants' reps show up for the pre-hearing with no knowledge of how they intend to advance their case. Prepare your answers to these questions in advance by thoroughly reviewing the file and planning ahead as if you were proceeding to arbitration.

Adjuster's Tip

Make sure you or your lawyer show up at the pre-hearing with a formal list of documents you wish produced by the applicant. This might be as simple as a request for all itemized medical records/reports already in the file, and any additional documents you think the applicant needs to prove his case. While the applicant's failure to produce such documentation could be fatal to his or her ability to succeed at arbitration, failure to produce it in accordance with your request made at the pre-hearing may result in your being able to open the arbitration with a preliminary issue for non-compliance. Although the *Dispute Resolution Practice Code* requires that documents be delivered at least 30 days in advance of the hearing, you might ask for an earlier deadline, and the arbitrator might be inclined to grant it.

IV. Arbitration or Trial

For this section, let us assume the following scenario.

You are representing a Mrs. Smith who suffered minor injuries in an accident on September 6, 2013. The insurer put her within the Minor Injury Guideline (MIG) and paid $3,500 in med-rehab expenses. She then received another $10,000 in treatment based on OCF-18s, properly submitted, all of which were denied coverage by the insurer (there are no technical deficiencies with the denials). She also had her sister provide attendant care services from September 6, 2013 until December 12, 2013. The sister stayed home from work to do this. All OCF-6 expense claims were properly submitted by your office and denied by the insurer on the basis of the MIG classification. She received all of her treatment at ABC MedRehab, and from Dr. Psych, a psychologist. In addition, she went to her family doctor for prescriptions for sleeping pills and depression medication, and occasionally for painkillers.

The benefits in dispute at arbitration, which have all been mediated and failed to resolve, are as follows:

- $10,000 outstanding in med-rehab expenses;
- $6,000 in attendant care expenses; and
- an amount for a special award as defined by the SABS, since the medical evidence, in your opinion, clearly establishes that she was outside the MIG.

The pre-hearing has failed, and a date has been set for a week-long arbitration six months down the road. You have returned from the pre-hearing, and sooner or later will have to turn your mind to preparing for the arbitration.

When the pre-hearing finishes and the arbitration date is set, immediately, before putting the file away, do the following:

1. Make a list of the witnesses that you intend to call, including experts; make sure your file contains updated contact information for those witnesses, and if it does not, do the necessary background work to locate the correct contact information. If summonses are necessary to compel any of the witnesses, prepare them now and file them away with a reminder in your tickler system to send these out at the appropriate time. However, right away you should write a standard letter to the witnesses indicating your need for their attendance and ask them to "save the date."
2. Make a list of all the documents you will require at the hearing, including medical records and medical reports. If they are not already in your file, commission them immediately.
3. Determine whether there are any updated medical records or reports that could bolster your client's case, and if there are, arrange for your client to attend at those doctors immediately.

4. Mark the dates for the arbitration in your calendar, and then, working backward, diarize in your tickler system the dates by which certain items have to be done (always diarize a week or two earlier than the actual due date to ensure you get it done and do not miss any deadlines).
5. Prepare what I call a "trial outline"—a document that will essentially be your table of contents or working agenda for all the preparation necessary for the arbitration, and again diarize the dates in your tickler system. This is more important than it might seem, because if you do not plan like this and are running a busy practice, you may find yourself with a week remaining before the hearing with no time to prepare or witnesses you cannot locate or who refuse to attend on such short notice—and you will be unable to mount the best case possible. Moreover, your failure to properly diarize tasks can result in missed time limitations for the serving of documents, reports, summonses, etc.

V. Trial Outline

What follows is a sample trial outline, completed with notes and tickler dates. Note that I am using the word "outline" even though in our example we are talking about an arbitration hearing. This is because the elements are the same, and the comments below are equally applicable to any civil or criminal case before any level of court or tribunal.

A. Theory of the Case

(To be done at least two months prior to the arbitration.)

This is where you try to boil down your case into one or two sentences. This theory is the backdrop for the rest of the preparation. Being able to synopsize the facts and law into one or two sentences forces you to be focused on where your narrative is going. After all, running a trial or arbitration is about telling a story. If your client's case were a book, what would the blurb on the back jacket be? If your client's case were a movie, what would the TiVo or Netflix description be? In our case scenario set out above, my theory would be:

> Mrs. X suffered physical and psychological injuries that put her outside the MIG.

B. Issues

(Do this at the same time as the theory of the case.)

This is a more detailed synopsis that builds on the theory. Set out each benefit in dispute, and each legal issue that flows from the benefit dispute.

1. Is Mrs. Smith entitled to recovery of the med-rehab benefits of $10,000 for the med-rehab treatments incurred?

2. Is Mrs. Smith entitled to attendant care benefits from September 13, 2013 (one week post-accident) until December 12, 2013?
3. Is the insurer liable for a special award as a result of its refusal to move Mrs. Smith out of the MIG in the face of the medical evidence?

C. Opening Argument

(To be prepared at the same time as the theory and the issues.)

This is similar to the issues, but is actually an outline for your oral opening argument at the hearing. In addition to defining the issues, you should include some basic factual background (without leading evidence) and should also include by name and connection to the case a list of witnesses that you anticipate calling along with a *brief* synopsis of their expected evidence. In preparing your opening, remember that more is not necessarily better. Except in the most exceptional cases, your opening argument should be five to seven minutes long.

D. Preparation of Document Brief

(To be done at least two months prior to hearing.)

You will assemble a *document brief* containing all the documents you will be using at the hearing. Resist the temptation to throw in everything but the kitchen sink. Put in only those documents that actually advance your case. Be cognizant of the standard 30-day time limit and of any other deadlines imposed by the pre-hearing arbitrator for delivery of materials.

Note that in recent years it is the practice at FSCO for both counsel to cooperate on a *joint document brief*, as this avoids duplication. This should be done at least two months prior to trial that so you will still have a month to gather any required documents that have yet to be received. It will also ensure that you have a proper list of witnesses, because a review of the documents may unearth someone you had not thought of (e.g., a service provider who was inadvertently left off your witness list when you prepared it months earlier).

In our scenario, you will want, among other things, ABC MedRehab's medical records, Dr. Psych's clinical notes and reports, the family doctor's clinical notes, the prescription summary from the pharmacy, and the attendant care expense forms, as well as any contemporaneous logs written by the service providers.

E. Examination-in-Chief of Each Witness

(To be completed at least two to four weeks in advance of the hearing.)

For each issue you will list the witnesses required and the basic evidence of each and every document they will speak to. A full analysis of how to set up an examination-in-chief is beyond the scope of this book. In simple terms, prepare an exam for each of

your witnesses, using as your guide the issues that each witness will be speaking to and the legal tests that must be overcome.

Practice Tip

When preparing the "exam-in-chief," don't write out the question; rather, write out the information you want to elicit. Also, cross-reference in your notes any documentary evidence that the witness will speak to. Once you have completed the written preparation, arrange to have each witness come into your office for a mock examination. Although this preparation might be done several weeks earlier, in my experience, unless your witnesses are professional litigants or medical experts who earn a significant portion of their income giving legal testimony, the closer to the actual court appearance it is done, the better he or she will perform.

In our scenario, the obvious witnesses are:

- Mrs. Smith,
- the supervising practitioner at ABC MedRehab,
- Dr. Psych,
- Mrs. Smith's sister, who provided the attendant care,
- Mrs. Smith's family doctor, and
- possibly a friend or co-worker who could speak to the differences in Mrs. Smith's physical and psycho-emotional states both pre- and post-accident.

F. Cross-Examination for Each Expected Witness of the Other Side

(To be done a week before trial.)

This is much the same as noted above with the examination-in-chief; a full discussion of cross-examination techniques and preparation is beyond the scope of this book. Again, you should never write out the anticipated question, but rather itemize each piece of information, or each admission, that you wish to elicit from the witness you are cross-examining.

For example, say the defence is calling the doctor who conducted the insurer's examination (IE). That person is likely to be the main witness for the defence. Note that more than one IE doctor may be called depending on the number of IEs conducted. You might want to elicit the following key points:

- The doctor saw your client on only one occasion.
- The doctor's report was commissioned by the insurer.
- The doctor was paid by the insurer.
- Your client did not have any follow-up visits with this doctor.
- The entire medical exam at the office lasted less than an hour.

Again, cross-reference in your notes and highlight any documents you intend to cross-examine on. This will help you, even in the heat of the moment, to come across to the arbitrator as prepared. There is nothing worse than stumbling through a cross-examination while searching the document brief for what you need.

G. Closing Argument

(To be done a week before the hearing.)

The closing argument should mirror your opening argument, but it should also go into an analysis of the legal issues, if there are any. You will reference case law and the relevant statutory provisions.

In our scenario, you will want to find FSCO decisions at an appellate level or, better yet, Superior Court accident benefit cases in which applicants with similar injuries were deemed outside the MIG. You will also want to include the statutory definitions of the MIG and show how your client's case is distinguishable. It is important to undertake the legal research and draft the closing argument on the law at least a week before the trial.

Practice Tip

As a young litigator, I used to wait until the trial was almost over before I prepared my closing. But once I started I would sometimes discover I had missed something in my exam-in-chief or cross-exam, and the time for drawing out relevant evidence had passed. When I changed this approach and started preparing my closings a week before trial, I found I would almost always come up with something in my research and drafting that improved the examination-in-chief or cross-examination while there was still time to make the improvement count.

H. Post Mortem

(To be done at the end of each day of hearing.)

No matter how prepared you are before a hearing starts, there will be things that arise in the moment. All good litigators need to be able to revise the script in real time. Thus, you will want to review your notes at the end of each hearing day (or even at each break throughout the day) and tweak each upcoming piece of the outline according to what has transpired.