



## THE COMMONWEALTH OF MASSACHUSETTS AUTO DAMAGE APPRAISER LICENSING BOARD

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LIEUTENANT GOVERNOR

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RICHARD STARBARD  
WILLIAM E. JOHNSON  
LYLE M. PARE

**Minutes of Meeting of the Board of January 26, 2016 Approved by the Board at the May 25, 2016 Board Meeting; Motion of Board Member Joseph Coyne, Seconded by Board Member William Johnson. The Motion Passed by a Vote of: 4-0, Chairman Cox abstained.**

January 26, 2016 Minutes of Board Meeting  
Held at 1000 Washington Street, Boston, Massachusetts.

**Members Present:**

Gilbert Cox, Chairman  
Joseph Coyne  
Richard Starbard  
William Johnson  
Lyle Pare

**Attending to the Board:**

Michael D. Powers, Counsel to the Board  
Steven Zavackis, Executive Secretary to the Board, assigned to the Office of the General Counsel of the Division of Insurance, took the minutes of the Board meeting.

**Proceedings recorded by:**

Jillian Zywiec of the Alliance of Automotive Service Providers of Massachusetts (AASP) (Audio/Video). Joel Gausten of GRECO Publishing (Audio/Photography). Chris Gervais of MAPFRE (Audio/Video).

**Review of minutes:**

The meeting was called to order by Chairman Cox, and he requested a motion to approve the minutes of the Board meetings held on December 8, 2015. A motion was made by Board Member William Johnson to approve the minutes, as submitted, of the Board meeting held on December 8, 2015, and the motion was seconded by Board Member Joseph Coyne. The motion to approve the minutes of the Board meeting held on December 8, 2015, passed by a vote of: 4-0 with Chairman Cox abstaining on the motion.

**Report on the Part-II examination for motor vehicle damage appraiser license held on January 6, 2016:**

Board Member Richard Starbard reported that 57 people took the test for the Part-II examination for motor vehicle damage appraiser license which was held on Wednesday, January 6, 2016. Mr. Starbard informed the Members of the Board that the examination was held at the Assabet Valley Regional Technical High School, and that not everyone passed the examination with 31 passing the examination and 26 people failing it. Mr. Starbard thanked the following people: Mr. Tom Ricci for arranging for the location of the examination and providing an automobile for the appraisal, Mr. Pete Smith and Ms. Sue Conena from Commerce Insurance Company for their continuing assistance, and Mr. Steven Zavackis of the Division of Insurance. Board Members Lyle Pare and Joseph Coyne assisted administering and marking the examination. Board Member Starbard reported that the location of the Part-II examination at the Assabet Valley Regional Technical High School is an excellent location because it is a great facility. The next Part-II examination will be held on March 16, 2016, at the same location in the Assabet Valley Regional Technical High School.

Chairman Cox observed that the failure rate seemed inordinately high.

Board Member Starbard responded that the failure rate was about the average that he has observed since overseeing the Part-II examination process since August of 2015, and that none of the people who failed the examination had reached out to discuss it with him.

Board Member Coyne informed the Board, and members of the general public attending the Board meeting, that he had received a couple of calls from people whom had failed the examination, and they indicated that they had problems reviewing the damage to the motor vehicle which had been provided as a demonstration of damage for the appraisal questions on the test.

Mr. Johnson queried whether the Board should post the Part-II examination as a public meeting. The Legal Counsel to the Board, Michael D. Powers, responded that all gatherings of the Board do not require a posting of a public meeting according to the Office of the Attorney General's Guide to the Open Meeting law, as long as the Board is simply administering the Part-II examination and not discussing matters within the Board's jurisdiction and deliberating on those matters that would require they be brought before the Board and voted on at a Board meeting. Board Members could administer the examination without holding a public meeting, and in fact under the enabling statute the Board is duty bound to administer the examination for applicants for motor vehicle damage appraiser licenses [G.L. c. 26, § 8G "[T]he board shall give examinations at such times and places within the commonwealth as it deems necessary to serve the convenience of both the board and applicants."]. Mr. Powers said that he would review the matter further and report back.

**Discussion about the Massachusetts Automobile Insurance Bureau's (AIB) new language inserted into the Standard Private Passenger Motor Vehicle Insurance Policy:**

The next item of the agenda was opened to discussion by Chairman Cox.

At the Board meeting held on December 8, 2015, the Board voted to have the Legal Counsel to the Board, Michael D. Powers, draft a letter from Chairman Gilbert W. Cox to the Division of Insurance about the new language contained in the Automobile Insurers Bureau's standard

private passenger “Massachusetts Automobile Insurance Policy” providing the following, “[T]he most we will pay will be either the actual cash value of the auto or the cost to repair the auto, whichever is less. The cost to repair the auto is the competitive price, which we secure from a licensed repair facility under our direct payment plan....” Such language is found under Part-7 Collision, Part-8 Limited Collision, and Part-9 Comprehensive. The Board noted that the ADALB regulation 212 CMR 2.04 (e) requires that the licensed motor vehicle damage appraiser (licensed appraiser) for the insurance company and the licensed appraiser representing the claimant or insured negotiate the cost to repair damage to a motor vehicle.

Board Legal Counsel Michael Powers read a draft letter which stated the following:

January 26, 2016

Mr. Matthew Mancini  
Director of State Rating Bureau  
Division of Insurance  
1000 Washington Street  
Boston, MA 02118

Re: Recent Changes in the Standard Private Passenger “Massachusetts Automobile Insurers Policy” under Part-7 Collision, Part-8 Limited Collision, and Part-9 Comprehensive, Issued by the Massachusetts Automobile Insurers Bureau

Dear Director Mancini:

At the Auto Damage Appraiser Licensing Board (ADALB) meeting that was held on December 8, 2015, it was brought to the Board’s attention that the standard private passenger “Massachusetts Automobile Insurance Policy” issued by the Massachusetts Automobile Insurers Bureau (AIB) has been recently changed adding new language that may conflict with the ADALB’s regulation 212 CMR 2.04 (1)(e). The following is the relevant new language and where it may be found in AIB’s Massachusetts Automobile Insurance Policy, “[T]he most we will pay will be either the actual cash value of the auto or the cost to repair the auto, whichever is less. The cost to repair the auto is **the competitive price, which we secure from a licensed repair facility under our direct payment plan....**” (Emphasis added). This new language, which is found under Part-7 Collision, Part-8 Limited Collision, and Part-9 Comprehensive, must be applied consistently with the ADALB’s regulation requiring that the licensed motor vehicle damage appraiser (licensed appraiser) for the insurance company and the licensed appraiser representing the claimant or insured negotiate the costs to repair damage to a motor vehicle.

This new language, if applied in an improper manner, would conflict with the ADALB’s regulation 212 CMR 2.04 (1)(e) which requires in relevant part:

“(e) Determination of Damage and Cost of Repairs. The appraiser shall specify all damage attributable to the accident, theft, or other incident in question and shall also specify any unrelated damage. If the appraiser determines that preliminary work or

repairs would significantly improve the accuracy of the appraisal, he or she shall authorize the preliminary work or repair with the approval of the claimant and shall complete the appraisal after that work has been done. **The appraisers representing the insurance company and the registered repair shop selected by the insured to do the repair shall attempt to agree on the estimated cost for such repairs. The registered repair shop must prepare an appraisal for the purpose of negotiation....”**

This new language in AIB’s “Massachusetts Automobile Insurance Policy”, cannot be used in a manner that would conflict with the ADALB’s regulation 212 CMR 2.00 et seq., that requires negotiations between the licensed appraiser representing the consumer and the licensed appraiser representing the insurance company. We respectfully request that you conduct a review of this matter and, after your review, respond to the concerns that have been raised in this letter.

We appreciate your time and attention to this matter and await your response.

Sincerely yours,

Gilbert W. Cox Jr.  
Chairman for the ADALB

After Legal Counsel Powers read the letter, Board Member Richard Starbard made a motion that Chairman Cox sign the letter and that it be sent to the Division of Insurance, and Board Member William Johnson seconded the motion. Chairman Cox called for a vote on the motion and the motion passed by a vote of: 4-0, Chairman Cox abstained.

**Discussion by the Board about sending a letter to the Chairman of the Financial Services Committee of the Massachusetts House of Representatives responding to testimony provided at a legislative hearing held in December of 2015 supporting a bill to abolish the Auto Damage Appraiser Licensing Board :**

Chairman Cox opened the discussion on this item on the Board’s agenda. At the Board meeting held on December 8, 2015, the Board voted to have the Legal Counsel to the Board, Michael D. Powers, draft a letter from Chairman Gilbert W. Cox to the Chairman of the Financial Services Committee of the Massachusetts House of Representatives responding to testimony provided at the legislative hearing held in December of 2015 supporting a bill to abolish the Auto Damage Appraiser Licensing Board.

Legal Counsel Michael Powers read a draft letter which stated the following:

January 26, 2016

The Honorable Aaron Michlewitz  
Chairman Joint Committee on Financial Services  
State House Room 218

Boston, MA 02108

Re: H778 Amending M.G.L. c. 26, § 8G by Deleting the Entire Section Creating the  
Auto Damage Appraiser Licensing Board

Dear Chairman Michlewitz:

At the Auto Damage Appraiser Licensing Board (ADALB or Board) meeting that was held on December 8, 2015, it was brought to the Board's attention that on December 1, 2015, your committee heard oral testimony in support of H778. At that time two witnesses testified in support of this legislation. These witnesses, in sum, testified that they supported H778 because of difficulty the automobile insurance industry allegedly experienced in obtaining temporary motor vehicle damage appraiser licenses during emergencies created by severe snowstorms. The ADALB would like to submit the following facts responsive to the testimony that was submitted at the December 1, 2015 hearing before your committee and in opposition to H778.

As the result of the severe snowstorms of last winter, automobile insurance companies requested the ADALB hold meetings to issue temporary motor vehicle damage appraiser licenses. In response to those requests, the ADALB quickly held a meeting within ten days of the requests, and on February 24, 2015, the Board approved thirty-eight temporary licenses. Thereafter, the ADALB received additional requests for temporary licenses from automobile insurance companies and at the ADALB meeting held on March 10, 2015, the Board approved nine additional temporary licenses.

On or about August 5 of 2015, several communities in Massachusetts were struck by severe hale-storms and, thereafter, automobile insurance companies requested the ADALB hold an emergency meeting to issue temporary licenses. On August 18, 2015, the ADALB held a meeting and issued twenty-two temporary licenses.

The ADALB has provided rapid responses to any requests received from insurance companies for temporary appraiser licenses due to extreme weather conditions. It is noteworthy that during the short time it took the ADALB to issue the temporary licenses for motor vehicle damage appraisers for the insurance companies' appraisers who resided, worked, and were licensed in another state, these companies' licensed appraisers who reside in Massachusetts were writing appraisals of damage to motor vehicles caused by the extreme weather conditions.

On behalf of the ADALB,

Gilbert W. Cox Jr.  
Chairman of the ADALB

After Legal Counsel Powers read the letter, Board Member William Johnson made a motion that Chairman Cox sign the letter and that it be sent to Chairman Michlewitz, and Board Member Joseph Coyne seconded the motion. Chairman Cox called for a vote on the motion and the motion passed by a vote of: 5-0, Chairman Cox voting in favor.

**Requests of Mr. Calvin Smith and Mr. Steven G. Martin, who are two non-resident licensed motor vehicle damage appraisers, to waive the experience and course requirement for taking the Part-I examination for motor vehicle damage appraiser license:**

The prominent Attorney Owen Gallagher, a renowned expert on Massachusetts insurance laws, requested permission to address the Board, and Chairman Cox consented.

Attorney Gallagher, in a strong stentorian voice, eloquently presented the case of Mr. Smith and Mr. Martin who are employed by The Hanover Insurance Company as licensed motor vehicle damage appraisers. Attorney Gallagher informed the Board Members that his two clients have long and varied backgrounds in the insurance industry and extensive experience with motor vehicle damage appraising. Beginning in 1996, Mr. Smith has been involved in appraising damage to motor vehicles, obtained a degree in Business Administration from Eastern Michigan University, and currently holds motor vehicle damage appraiser licenses in New York, Connecticut, and North Carolina. Mr. Martin for 10 years, from 2005 through 2015, was employed by Travelers Insurance Company as a motor vehicle damage appraiser whereby he appraised heavy equipment, motorcycles, and automobiles in the states of Virginia, Tennessee, and Connecticut. Since June of 2015, Mr. Martin has been employed by The Hanover Insurance Company appraising damage to motor vehicles in Connecticut and reports to The Hanover Insurance Company's Worcester, Massachusetts office. Attorney Gallagher submitted two affidavits of Mr. Smith and Mr. Martin detailing their backgrounds, training, and experience and requested that the Board waive the requirement that Mr. Smith and Mr. Martin attend the course for motor vehicle damage appraiser based upon their background, training, and experience.

Board Member Joseph Coyne made a motion that the Board waive the requirement that Mr. Smith and Mr. Martin attend the course for motor vehicle damage appraising and be allowed to take the Part-I portion of the examination, the motion was seconded by Board Member Pare. The motion passed by a vote of: 4-0 with Chairman Cox abstaining.

**Discussion about amending the ADALB regulation 212 CMR 2.00 et seq. and scheduling a Special Public session of the Board:**

Board Member Richard Starbard began the discussion by stating he had proposals for the Board to consider and that some of the changes that he would like adopted by the Board reflect the impact on new technology since that last time the Board amended the regulation.

Mr. Starbard read the following:

**2.04: Procedures for the Conduct of Appraisals and Intensified Appraisals.**

(1) Conduct of Appraisals.

(c) Contact with the Claimant and Selection of Repair Shop. Strike the last sentence  
"The provision of 212 CMR 2.04(c) shall not apply to any direct payment plan

pursuant to 211 CMR 123.00.”

(e) Determination of Damage and Cost Repairs. 2<sup>nd</sup> to last sentence 1<sup>st</sup> paragraph, change to read- “Manufacturers warranty repair procedures, I-Car, Tec Cor and paint manufacturer procedures shall also apply.”

(e) Determination of Damage and Cost Repairs. Paragraph 4, insert the following 3<sup>rd</sup> sentence- “Costs associated with the shipping, handling, and returning of parts or cores shall not be considered overhead costs of the repair shop and shall be listed on the appraisal.”

(e) Determination of Damage and Cost Repairs. Paragraph 4, 1<sup>st</sup> sentence insert the following after the word which, “locally sourced.”

(e) Determination of Damage and Cost Repairs. Paragraph 4, 4<sup>th</sup> sentence, change to read- “With respect to paint, paint materials, body materials and related materials, if the formula of dollars times hours is not accepted by a registered repair shop or licensed appraiser, then a published database shall be used.”

(e) Determination of Damage and Cost Repairs. Paragraph 6, amend 1<sup>st</sup> sentence to read- “The appraiser shall fax or electronically transmit the completed appraisal within 3 business days of the assignment, or at the discretion of the repair shop, shall leave a signed copy of field notes, with the completed appraisal to be electronically transmitted or faxed within 3 business days of the assignment.”

(h) Supplemental Appraisals-Amend 3<sup>rd</sup> and 5<sup>th</sup> sentence to read: “The insurer shall assign an appraiser who shall personally inspect the damaged motor vehicle within one business day of the receipt of such request. If the personal inspection does not occur in one business day, an expedited supplement must occur. The appraiser shall have the option to leave a completed copy of the supplement appraisal at the registered repair shop authorized by the insured or leave a signed copy of his or her field notes with the completed supplement to be faxed, electronically transmitted or hand delivered to the registered repair shop within one business day.”

Board Member Starbard explained that these proposed amendments are necessary because they clarify what is currently going on in the motor vehicle damage appraiser industry today. Re-manufactured wheels and used suspension parts are being used which create a safety issue for consumers. Shipping and handling costs are part of the repair process and not part of the standard overhead of an auto repair shop. Paint and materials language in the regulation needs to be tightened-up and when the formula of dollars by hours is not accepted by the insurance company’s appraiser then manuals shall be used. Also, from the original assignment of the appraiser by the insurance company to the time that the appraisal shall be written needs to be shortened from the current requirement of five days to three days. Mr. Starbard also said that the Board needs to tighten-up the language about a “conflict of interest” and better define when it exists.

Mr. Johnson was given the floor and said that the regulation needs to be tightened-up as to when the published manual must be used. In his auto repair shop Mr. Johnson provides consumers

with a lifetime warranty for his paint and materials and published manuals do not account for that.

Mr. Starbard opined that the manuals are based on the average cost of things.

Board Member Lyle Pare requested permission from Chairman Cox to respond and permission was granted. Mr. Pare said that he would like to make a motion for the Board to adopt an advisory opinion that he was proposing. Mr. Pare then proposed an advisory ruling stating that the term “appraiser” in the third sentence of 212 CMR 2.04(e) refers “only to the appraiser representing the insurer.” Board Member Pare elaborated that all subsections listed under 212 CMR 2.04 (1) refer only to a staff or independent appraiser who represents the insurer. The regulation does not make sense if the word “appraiser” in 2.04 (e) is mistakenly read to apply to a repair shop appraiser. Under that mistaken reading, the repair shop would have a conflict of interest and could do unneeded preliminary work without the insurance company’s approval.

Board Members Johnson, Starbard, and Pare engaged in a discussion of various issues: the proper use of manuals during an appraisal, the breakdown of a labor rate in an appraisal; and the difference between a labor rates among different auto repair shops.

**Date of next Board meeting:**

The Board agreed to schedule the next meeting on February 23, 2016, at 1000 Washington Street, Boston, Massachusetts at 9:30AM. The Board also set a tentative date for a Special Public meeting to receive input from interested members of the general public of April 26, 2016.

Board Member Starbard brought up the issue of insurance companies sending out lists of referral shops and the manner in which they send them to consumers being a violation of the law.

Board Member Coyne suggested that the manner in which he was aware of insurance companies sending out referral lists to consumers involved in a car accident for the repair of the damage to their motor vehicles was consistent with law in that the lists were by alphabetical order with the referral shops that the insurance companies do business with highlighted.

Board Member Pare returned to the previous discussion about his proposed advisory opinion.

Mr. Peter D’Agostino a lobbyist for the Alliance of Automotive Service Providers of Massachusetts interjected that Board Member Pare’s proposed advisory ruling would go beyond statutory authority and change the definition currently contained in the ADALB’s regulation.

Board Member Starbard agreed with Lobbyist D’Agostino and said that Mr. Pare’s proposed advisory ruling should be the subject of an amendment to the ADALB regulation.

Attorney Catherine Henley, General Counsel of Plymouth Rock Assurance Company, requested permission to speak, and Chairman Cox granted permission. General Counsel Henley succinctly presented her position to the Board by asserting that 212 CMR 2.04(a) states that upon receipt of the claim from the claimant the insurer shall assign an appraiser. With very few exceptions the repair shop is not doing the appraisal but a preliminary assessment of the damage. There is an

inherent conflict of interest when not allowing the insurance company's appraiser to review the damage prior to beginning work. The insurance company is thereby prevented from investigating the claim when a repair shop begins performing work without giving an insurance company's appraiser an opportunity to first review the damage to the motor vehicle. General Counsel Henley recommend that the Board adopt the proposed advisory ruling.

Attorney James A. Castleman, of the highly regarded law firm of Paster, Rice & Castleman, LLC was allowed to address the Board.

**Executive session:**

The last item on the agenda was:

Executive session to review and discuss the background of applicants for motor vehicle damage appraiser test who have disclosed a criminal conviction on the application. Review of the sufficiency of Complaint #2015-4 brought against a licensed motor vehicle damage appraiser to determine whether it contains sufficient facts for the ADALB to have jurisdiction over the matter contained in the complaint. Review of the sufficiency of Complaint #2015-3 brought against a licensed motor vehicle damage appraiser to determine whether it contains sufficient facts for the ADALB to have jurisdiction over the matter contained in the complaint. The licensed appraiser, through his attorney, has requested that this matter be held in the executive session at which time he will provide a response to the complaint. All such discussions during the executive session are allowed for under M.G.L. c. 30A, §21 (a)(1) and in accordance with the Office of the Attorney General's Open Meeting Law (OML) decisions such as *Board of Registration in Pharmacy Matter*, OML 2013-58, and *Department of Public Safety Board of Appeals Matter*, OML 2013-104. During the executive session meeting, the Board Members will also be provided with legal advice by Board Legal Counsel about pending litigation filed against it by representatives of the Association of Automotive Supply Providers of Massachusetts with the Office of the Attorney General alleging violations of the Massachusetts Open Meeting Law and the legal strategy for defending the litigation. For this purpose under Massachusetts law, in addition to the reasons set-forth previously, a public body may vote to enter an executive session and conduct a meeting pursuant to M.G. L. c. 30A, §21 (a)(3) "To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares."

Prior to entering the executive session Chairman Cox read the following statement:

Under Massachusetts law, Chapter 30A, §§ 18-25, the Open Meeting Law, requires specific reasons that allow a public body to enter an Executive Session.

Today we have several matters on our agenda that are allowed by law to be heard in the executive session. Some of the reasons are covered in G.L. c. 30A, § 21(a) are to "discuss the reputation, character, physical condition or mental health, rather than the professional competence, of an individual or to discuss the discipline or dismissal of complaints or charges brought against, a public officer, employee, staff member or

individual.” Two matters on the agenda today are covered by this portion of the statute which allows the Board to enter the executive session. We have an individual who has indicated on his application to take the test for motor vehicle damage appraiser that was convicted of a felony offense, and he has asked that he appear before the Board to tell us about the circumstances surrounding the conviction and about himself, so that the Board can determine whether it will allow the person to take the Part-I portion of the test. He has requested that his matter be heard in the executive session.

We have another individual who has had a complaint brought against him and is represented by an attorney. This person has requested the opportunity to respond to this complaint and hold the matter in the executive session.

A third reason for entering the executive session is a complaint that was filed against the Board by the AASP-Massachusetts for allegedly violating the Open Meeting Law. We will be provided with legal advice by Board Legal Counsel Michael Powers and it is necessary to hear the legal advice in the executive session because to have the legal advice provided in the public session will have a detrimental effect on the litigation position of the Board. This reason is allowed under G.L. c. 30A, § 21(a)(3).

#### **Motion to Enter the Executive Session:**

Chairman Cox announced that the law requires a roll call vote by the Chairman before the Board can enter an executive session. Chairman Cox asserted that he would call for a motion to enter the executive session, indicating that the Board will not return to the public session and a second to the motion. Chairman Cox entertained a motion to enter the executive session which included the announcement that the Board would not meet in the open session after the executive session’s business was completed. A motion was so made by Board Member Coyne and seconded by Board Member Pare.

#### **Roll Call on Vote to Enter the Executive Session**

Chairman Cox then called for a roll call vote of each member of the Board present, Yea or Nay: Mr. Coyne, Mr. Starbard, Mr. Johnson, and Mr. Pare each answered yes. Chairman Cox announced that he abstained. The motion passed by a vote of: 4-0, with Chairman Cox abstaining.

The applicant to take the Part-I examination for motor vehicle damage appraiser license who had indicated on the application that he had been convicted of a felony appeared before the Board. The applicant informed the Board that he became addicted to drugs as the result of prescriptive medicine. His drug addiction led him to the use of illegal controlled substances for which he was arrested and convicted. He had obtained substance abuse treatment and was drug free for several years and needed the license for his employment and as a means to support himself.

Board Member Coyne made a motion that the applicant be allowed to take the Part-I examination and the motion was seconded by Board Member Pare. The motion passed by a vote of: 4-0, with Chairman Cox abstaining.

The second item on the agenda concerned the decision issued by the Office of the Attorney General's Division of Open Government [DOG is the actual acronym used by the Office of the Attorney General on its website] OML-2016-6. The Alliance of Auto Service Providers had filed a complaint with DOG against the Board alleging that the Board violated the Open Meeting Law when it entered the executive session at its June 2, 2015, meeting and alleging the Board had violated the Open Meeting Law at three previous meetings when it entered the executive session to conduct a preliminary review of complaints filed against licensed appraisers.

The Legal Counsel to the Board, Michael D. Powers, reported that DOG had rendered its decision and found that the Board violated the Open Meeting Law on June 2, 2015, when the Board discuss a threatened lawsuit against it during the executive, in sum, because Chairman Cox had not stated verbatim the statutory words of the Open Meeting Law prior to entering the executive session. Prior to entering the June 2, 2015 Executive Session, a discussion was held among the Board members concerning the matters to be discussed during the Executive Session, as was reported in the June 2, 2015, meeting minutes. The discussion included responses given by the Board Legal Counsel describing the matters to be discussed during the Executive Session, why these matters needed to be discussed during an Executive Session, and the fact Board Legal Counsel would be providing legal advice to the Board about a threatened lawsuit during the executive session. Legal Counsel Powers pointed out as noted in the June 2, 2015 meeting minutes, during the Executive Session the Board Members were provided with copies of a letter sent by a former licensee and a discussion was held among the Board Members, which included legal advice that was provided to the Board. In an April 11, 2015 letter from the former licensee, Stephen Mazzola, he had written that he had been an appraiser licensed by the ADALB up through January 15, 2008. He further stated that, in 2006 he had been convicted in a criminal proceeding, for which he ultimately served a little over a year in a federal detention facility. Mr. Mazzola wrote in his letter that he subsequently learned, while he was serving detention, the ADALB during its January 15, 2008 public meeting voted to suspend Mr. Mazzola's appraiser license. In his letter, Mr. Mazzola asserted that the Board's action to suspend his license was done, "without a hearing, without prior notification, without due process..." and he requested that the ADALB give him a "hearing" on his request for "reinstatement of his Massachusetts Damage Appraisers license." He also threatened in the letter that he would, "inquire with regard to additional remedies available to [him] for the unfair actions of the ADALB."

During the Executive Session, the ADALB members specifically discussed the claims being made by Mr. Mazzola in his letter, those that he had raised with Board Legal Counsel over the telephone, considered his request for the prior suspension to be vacated, and deliberated over the legal advice provided to them, and whether and in what manner Mr. Mazzola's license might be reinstated. Because of the long passage of time since the suspension, the circumstances surrounding the Board's vote to suspend in 2008, and the subsequent non-renewal of Mr. Mazzola's appraiser license, after a discussion among them the Board members and legal advice provided by Board Legal Counsel, the Board determined the best course of action was to send a letter to the Mr. Mazzola inviting him to submit another application for a license to be a motor vehicle damage appraiser which would be processed in the usual manner. The summary of the Board's actions was publicly reported at the next meeting held on July 21, 2015, when the Board voted to approve the minutes of the June 2, 2015, Board meeting.

Notwithstanding these undisputed facts DOG found that:

The first executive session topic discussed by the Board during its June 2, 2015, meeting was appropriate under Purpose 3 [M.G.L. c. 30A, § 21 (a)(3)] because it concerned imminently threatened litigation. See OML 2014-121. The mere possibility of litigation is not sufficient to invoke executive session Purpose 3. See OML 2012-5; OML 2011-30. Litigation must be pending, clearly and imminently threatened, or otherwise demonstrably likely. See *Perryman v. School Committee of Boston*, 17 Mass. App. Ct. 346, 352 (1983); OML 2012-43. Here, an individual whose license had been suspended by the Board sent a letter that the Board understood to threaten litigation. Therefore, the Board was permitted to discuss this topic in executive session. G.L. c. 30A, § 21(a) (3). However, it appears that the Board Chair failed to make the required public statement prior to entering executive session, **that an open session discussion would have detrimental effect on the Board's litigation position.** Id. This violated the Open Meeting Law. (Emphasis added) (Citation omitted). OML-2016-6, at p. 3.

Legal Counsel Powers informed the Board that he disagreed with DOG's decision because, as the Office of the Attorney General properly found, the substance matter for the executive session was clearly allowed for by Massachusetts law, and the Board was entitled to have a legal advice provided to it in the executive session so that a open and frank discussion could be held among the Board members about the lawsuit, the defenses to it, and the merits and weaknesses of the potential lawsuit. The Open Meeting Law is primarily concerned about the substance of a public board's deliberations, and DOG's decision primarily places procedure over substance. Moreover, regardless of the specific statutory exemptions provided for in the Open Meeting Law that allow for executive sessions, the Massachusetts Supreme Judicial Court has held that public officials are provided with the protections of the attorney/client privilege doctrine when consulting with their attorney and being provided with legal advice under the holding of *Suffolk Construction Co. Inc. v. Division of Capital Asset Management*, 494 Mass. 444 (2007). This decision of the Supreme Judicial Court is independent of the Open Meeting Law, and indeed the attorney/client privilege is not even mentioned in the Open Meeting Law's statutory exemptions for entering the executive session.

Fundamentally, the Open Meeting Law's statutory exemption for litigation and the Supreme Judicial Court's holding in the *Suffolk Construction* case, is meant to protect public boards, governmental officials, and the public purse in matters involving litigation. Mr. Powers gave as an example the situation where if the general public were allowed to hear attorney/client communications many times the public purse would suffer harm because litigants would know the public's negotiating positions such as the view of the strength or weakness of a case or recommendations for potential monetary settlements.

Legal Counsel Powers provided an opinion about this portion of DOG's decision, and after a discussion among the Board Members the consensus was that they would not file an appeal. Mr. Powers informed the Board that going forward, any time that the Board holds an executive session he would provide a script for Chairman Cox to read which would state the specific statutory language contained in G.L. c. 30A, before entering an executive session.

The second issue that the lobbyists for the AASP filed in their complaint against the Board had to do with the manner in which the Board conducted a preliminary review of complaints filed against licensed motor vehicle damage appraisers in accordance with the ADALB's Complaint Procedures. Under this procedure, the Board reviewed the allegations of a complaint in the executive session to determine if it alleged a violation of either the ADALB's regulation or enabling statute. If the Board determined that no factual violations were alleged that would implicate the statute or regulation, then the Board would have no jurisdiction to review the matter and, therefore, no legal basis to continue on with an adjudicatory proceeding against the appraiser. Board Legal Counsel Powers stated that this procedure is akin to the review conducted by courts under the Massachusetts Rules of Civil Procedure, Rule 12 or the legal standards applied by clerks reviewing applications for criminal complaints whereby if the application is legally insufficient by not setting out a prima facie case for all of the essential elements of a violation of a criminal offense, then the clerk will not issue the complaint and the putative defendant is not notified to appear in court for a probable cause hearing.

Board Legal Counsel Powers stated that he had argued against this portion of the complaint filed by the lobbyists for AASP, by asserting that under this procedure an individual appraiser's rights to participate in any disciplinary process against him or her were protected. After the initial review of the complaint by the Board, if the Board determined to proceed with any complaint brought against an individual appraiser, then the appraiser would be notified and provided with all required notice and due process protections under Chapter 30A. At previous Board meetings the lobbyists for AASP had insisted that complaints filed by AASP or their lobbyists against licensed appraisers should be automatically issued and a public hearing held at the Board meeting. Mr. Powers informed the Board that he argued that this procedure would result in the harm of: public hearings automatically scheduled regardless of whether the complaints are totally groundless; wrongfully accused licensed appraisers' good names and reputations would be harmed; licensed appraisers would sustain lost time from work to appear and defend against groundless charges; and licensed appraisers would be put to the expense of retaining attorneys to defend groundless charges.

Mr. Powers had moved to dismiss this portion of the AASP complaint as not timely filed within 30 days of the violation as provided for by the statute. DOG agreed, but insisted that in the future a licensed appraiser must be: notified of the complaint, informed of his right to appear at the Board meeting, have the opportunity to have an attorney present, have the right to speak on his behalf, to have audio-recording or transcription made of the meeting, and to have the matter heard in the public session or the executive session.

Mr. Powers said that to comply with this portion of DOG's decision going forward he would send out such a notice any time that a complaint is received against a licensed appraiser and provide at least twenty-days notice to appear before the Board. Mr. Powers informed the Board that he felt that this was an unfortunate outcome, because in the past the Board was able to conduct a preliminary review of groundless and frivolous complaints without having to bother licensed appraisers about them and, thereby, saving appraisers the lost time from work and expense, including potentially hiring an attorney, to appearing at a Board meeting to respond to a groundless or frivolous complaint.

**Complaint 2015-3 filed by The Hanover Insurance Company:**

The licensed appraiser appeared before the Board with his attorney James Castleman. Mr. Castleman requested to address the Board and Chairman Cox granted his permission. Attorney Castleman said that he took great issue with all of the allegations contained in the complaint and asked the Board how they would like him to proceed.

Board Member Pare responded by asking Attorney Castleman, are you able to answer specific allegations of the complaint?

Mr. Castleman replied that he was. He first addressed the allegation of the complaint that alleged his client completely dismantled a motor vehicle without the insurance company's appraiser having viewed the original damage of the vehicle. He asserted that had pictures of the motor vehicle before the vehicle was dismantled and after it was dismantled. The pictures display that the "tear-down" of the vehicle was not excessive and, indeed, necessary to properly assess the damage to the motor vehicle.

Mr. Castleman further elaborated that the allegations made in the complaint about his client not allowing the insurance company's appraiser to have access to the vehicle was because his client didn't want the appraiser mishandling the vehicles bumper and causing damage to it.

Board Member Pare said that there is a lot of allegations made in the complaint.

Attorney Castleman responded that his client had problems with the manner in which the insurance company's appraiser was communicating and he reached the point whereby he specifically informed the insurance company's appraiser to place any problems that they had with him in writing. His client also had a problem with notification by the insurance company's appraisers for coming in to do the appraisal, and requested that the insurance company notify him by email and not show-up unannounced.

The licensed appraiser informed the Board that Hanover Insurance Company's appraisers are currently coming to his auto repair shop to conduct appraisals, sometimes they have brought trainees with them and he is concerned about his liability coverage for a trainee, you need a supervisor with trainees.

Board Member Johnson agreed and stated that this brings into play an auto repair shops certificate of insurance. When someone wants to train an appraiser at his auto repair shop the insurance company has to provide a certificate of insurance to show that his company is covered for any liability for the trainee and supervisor.

The licensed appraiser informed The Board that Hanover Insurance Company sent out two people to conduct appraisals and it appeared to him that one was a trainee who was consulting with the licensed appraiser because the trainee would periodically walk over to the person he knew was a licensed appraiser, and who appeared to be a supervisor, and discuss the damage with him as he was appraising the motor vehicle.

Board Member Starbard asserted that he did not allow such conduct in his auto repair shop.

Mr. Castleman announced that he would suggest that his client may have a lawsuit against The Hanover Insurance Company.

The licensed appraiser informed the Board that he does the best that he can under the circumstances.

Mr. Pare asked the licensed appraiser, do you have an objection to the appraiser going under the damaged motor vehicle?

The licensed appraiser responded, no.

The complaint raised an issue about audio-taping during the appraisal. The licensed appraiser said that he tells the insurance company's appraisers not to do that and they walk out.

Board Member Coyne noted that the complaint filed by The Hanover Insurance Company did not have an appraisal attached to it and, therefore, appeared to be defective in that regard.

Board Member Johnson made a motion to dismiss the complaint and Board Member Starbard seconded the motion. The motion passed by a vote of: 4-0, Chairman Cox exited the meeting before the vote was taken and did not return.

**Adjournment of the Board:**

Motion to adjourn which was made by Board Member Johnson and seconded by Board Member Starbard. The motion passed by a vote of: 4-0, Chairman Cox was absent.

Whereupon, the Board's business was concluded.

The form of these minutes comports with the requirements of M.G.L. c. 30A, §22(a).