



# THE COMMONWEALTH OF MASSACHUSETTS AUTO DAMAGE APPRAISER LICENSING BOARD

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WILLIAM E. JOHNSON  
LYLE M. PARE

**Minutes of Meeting of the Board held on October 4, 2016, Approved by the Board at the December 6, 2015, Board Meeting; Motion of Board Member Board Member Starbard and Seconded by Board Member Lyle Pare. The Motion Passed by a Vote of: 3-0, Chairman Cox Not in Attendance and Board Member Johnson Abstained Because He was Not in Attendance at the Meeting Held on October 4, 2016**

October 4, 2016 Minutes of Board Meeting  
Held at 1000 Washington Street, Boston, Massachusetts.

**Members Present:**

Gilbert Cox, Chairman  
Joseph Coyne  
Richard Starbard  
Lyle Pare

**Attending to the Board:**

Michael D. Powers, Counsel to the Board  
Steven Zavackis, Executive Secretary

**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). Paul Harden, Hanover Insurance Company.

**Review of minutes:**

The meeting was called to order by Chairman Cox. It was reported that Board Member Johnson had called to inform the Board he would be unavailable for the meeting. Thereafter, Chairman Cox asked about the minutes of the Board meetings held on August 3, 2016, and September 7, 2016, which were submitted for approval by the Board.

By way of background, Legal Counsel to the Board, Michael D. Powers reported at the previous meeting held on September 7, 2016, a letter had been sent by John P. Murphy, Executive Director of the Massachusetts Insurance Federation, wherein he raised several questions about the drafted Board minutes of the meeting was held on August 3, 2016 relative and June 22, 2106 (Mr. Murphy's letter is copied at the end of these minutes). Mr. Murphy questioned the accuracy of the proposed amendments to the ADALB regulation as they were reported in the minutes of

these two dates. At the end of his letter, Mr. Murphy raised a question about the record of a vote by the Board which was taken near the end of the August 3, 2016, Board meeting that was reported in the draft minutes. Mr. Murphy wrote that the draft minutes indicated that the Board voted by a vote of 3-2 with Chairman Cox, Board Member Coyne and Board Member Pare voting in favor of adopting a specific amendment to the Board's regulation under 212 CMR 2.04(k), and in fact that vote reported in the drafted Board minutes was inaccurate. Because of Mr. Murphy's letter, the vote on approving the minutes of the August 3, 2016, Board meeting was tabled, and Chairman Cox requested an update as to the status of the matter.

Legal Counsel Powers elaborated that at the September 7, 2016, meeting of the Board he had informed the Board about the letter from Mr. Murphy which had arrived the day before the meeting on September 6, 2016, and he provided copies to all the Board members to review. Legal Counsel Powers said that the letter broke down into two components: the first component addressed the accuracy of the votes taken for proposed amendments to the Board's regulation as cited in the draft minutes, and the second issue, raised in Mr. Murphy's letter, questioned the accuracy of proposed amendments contained in Board Member Starbard's submission.

Mr. Powers said that at the Board meeting that was held in May of 2016, the Board agreed to have Board Member Richard Starbard keep track of the proposed amendments. Following that meeting, there were several Board meetings wherein there had been extensive discussions and debates over the language of the regulation and the proposed amendments to it, possibly there may be some inaccuracies in the submissions that were created by Mr. Powers' notes of the meetings. Mr. Powers reflected that under the circumstances Board Member Starbard had done outstanding work in attempting to track everything that had been discussed by the Board during these meetings, by attempting to create a document reflecting the discussions, the proposed amendments as approved, and editorial notes. The procedure that was followed involved Mr. Starbard forwarding the proposed amendments with comments after each Board meeting to Mr. Powers who, thereafter, would place Mr. Starbard's proposed amendments and comments to the regulation in the agenda for the following meeting for further discussion. According to Mr. Murphy, after a review of the minutes of the June 22, 2016, and August 3, 2016 Board meetings, the report of the proposed amendments did not accurately reflect some of the votes that had been taken as they appeared in the draft minutes of the August 3, 2016, meeting. Mr. Murphy also pointed out some typographical errors in the proposed amendments.

At the Board meeting held on September 7, 2016 Board, Peter D'Agostino of AASP of Massachusetts was allowed to address the Board and responded that he may be able to provide the video of the August 3, 2016, Board meeting. Mr. Powers requested that the videotapes of the August 3, 2016 and June 22, 2016, Board meetings be made available to him, so he could check the accuracy of the Board's votes and the proposed language. Mr. Powers asserted that because of the 6 hour length of the Board meeting and the manner in which the Board discussed and agreed to amend the regulation, he had difficulty following along and recording the votes. To ensure the accuracy of the draft minutes, he attempted to locate the videos of those meetings through the internet but to no avail. Mr. D'Agostino agreed to provide Mr. Powers a link to the video of the June 22, 2016, Board meeting and would attempt to get a copy of the video of the August 3, 2016, Board meeting. At that point, Mr. Powers requested that the Board table the minutes until he had time to review the videos and make any corrections to the draft minutes.

Legal Counsel Powers reported that he had reviewed the video of the August 3, 2016, Board meeting, which was about 6 hours long, and made a thorough review of the discussions which were held at that meeting. The minutes were corrected to create an almost verbatim account of the August 3, 2016, meeting, and the draft minutes appeared to comply with the requests that had been made by Mr. Murphy, Executive Director of the Massachusetts Insurance Federation, and Mr. Powers recommended that the Board adopt the minutes of the meetings held on August 3, 2016, September 7, 2106 as submitted. Mr. Powers thanked Peter D'Agostino for his assistance of sending the link to the website of the August 3, 2016, meeting and the June 22, 2016, meeting.

Thereupon, Board Member Richard Starbard made a motion that the Board approve the minutes as submitted for the meetings held on August 3, 2016, and September 7, 2016, and Board Member Joseph Coyne seconded the motion. The motion passed by a vote of: 3-0 with Chairman Cox abstaining and Board Member William Johnson absent.

**Next Meeting:**

The Board determined that the next regularly scheduled Board meeting would be held on December 6, 2016, at 9:30 AM at the Pathfinder Vocational Technical High School 240 Sykes Street, Palmer, Massachusetts in the school library.

**Report on the Part-II examination for motor vehicle damage appraiser license:**

Board Member Richard Starbard asserted that it was becoming difficult to hold the Part-II examination at the Assabet Valley Regional Technical High School in Marlboro, Massachusetts. Board Member Starbard reported he was informed that the school requested a certificate of liability insurance coverage from the ADALB, a memorandum of understanding for the costs of utilizing the schools facilities which could include money or an in-kind payment, and Criminal Offender Record Information (CORI) checks of those administering the tests for the ADALB. This CORI information would include anyone administering the test such as: Board Member Starbard, Board Member Joseph Coyne, and Pete Smith, but did not include the people taking the examination. Board Member Starbard asked if the Board had such insurance coverage and Board Legal Counsel Powers informed the members of the Board that in fact they did not have such coverage immediately available, but under the enabling statute M.G.L. c. 26, § 8G the Board was allowed to spend money for such an expense and, therefore, could obtain such a certificate of insurance if need be, but this would take several months before the process was completed.

Board Member Starbard responded that the new requirements by Assabet Valley Regional Technical High School looked like too much bureaucracy, and the Board would have to come up with an alternative location. He reported that there were 40 to 50 applicants signed-up for the next Part-II examination and he would work with others obtaining another location for the examination.

**Discussion about amending the ADALB regulation 212 CMR 2.00 et seq.:**

The final version of the proposed amendments to the ADALB's regulation were submitted to all of the Board Members for their review (a copy is listed at the end of these minutes). Board Member Richard Starbard made a motion to adopt the final version of the proposed amendments and to send them to the Office of the General Counsel for the Division of Insurance for review.

The motion was seconded by Board Member Pare and the motion passed by a vote of: 3-0, with Chairman Cox abstaining.

**Executive Session:**

Chairman Cox then informed the Board and members of the general public that the Board was about to enter an executive session and would not be returning to the public session at the conclusion of the executive session.

Chairman Cox then made the following statement:

We are about to enter the 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. We will also review and discussion a draft of an Order to Show Cause in Complaints 2016-4, and Complaint 2016-5, along with a discussion of potentially assigning a Board Member as Presiding Officer for the administrative hearing. Also during the executive session we will be discussing Complaint 2016-8, Complaint 2016-10, and Complaint 2016-12 filed against motor vehicle damage appraisers licensed by the Auto Damage Appraiser Licensing Board. 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. Section 21 (a) states "A public body may meet in executive session only for the following purposes:

- (1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the session be open. If an executive session is held, such individual shall have the following rights:
  - i. to be present at such executive session during deliberations which involve that individual;
  - ii. to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session;
  - iii. to speak on his own behalf; and
  - iv. to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense.

The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective

bargaining agreements and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

In addition, a portion of the executive session is also exempt because it is considered a meeting of the Board covered under subsection (d) of Section 18, of General Laws Chapter 30A as “a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it.”

The licensed appraisers’ attorneys have requested several of these matters be heard in the executive session.

**Motion to enter the executive session and roll-call vote:**

Chairman Cox then declared, before the Board can enter an executive session there must be a Roll-call vote of the Members of the Board. He asked for a motion to enter the executive session and Board Member Coyne made the motion which was seconded by Board Member Starbard. The Roll-call was taken with Board Members Coyne, Starbard, and Pare answering in the affirmative with Chairman Cox abstaining, and the motion passed by a vote of: 3-0.

Before the executive session began, Attorney Gallagher stated he sent a letter to ADALB Legal Counsel requesting that he be allowed to attend the executive session on this matter and asked if the Board would be discussing the complaints that were filed against his clients (A copy of the letter appears at the end of these minutes and was provided to the Board before the meeting began). Chairman Cox informed him that the complaints were an item on the agenda and the Board intended to have a discussion. Attorney Gallagher asked to participate, and he was informed that the discussion was limited to preparing the matter for the Order to Show Cause and Attorney/Client advice between the Board and Board Legal Counsel. Attorney Gallagher requested the opportunity to object to such discussions and he was informed that he would be allowed the opportunity to object.

Attorney Gallagher was informed that in the meantime, the Board was holding a discussion with an applicant who applied to take the examination for motor vehicle damage appraiser, who had indicated on his application that he had been convicted of a felony, his matter was listed on the agenda first, and Attorney Gallagher was asked to leave the room so that the Board could begin the executive session. Attorney Gallagher, his client, and the court stenographer left the room.

Thereafter, the Board invited the applicant into the executive session. The applicant was asked about the circumstances that led to his arrest and conviction. The applicant stated that he had never been involved in such activity before, had made a mistake, and needed this opportunity to begin a good career in the motor vehicle damage business.

A motion was made by Board Member Pare to approve the applicant to take the examination, seconded by Board Member Starbard, and the motion passed by a vote of: 3-0 with Chairman Cox abstaining.

**Discussion about the Order to Show Cause for Complaint 2016-4 and Complaint 2106-5:**

Chairman Cox requested Legal Counsel Powers provide an update on these matters to the Board. Board Member Lyle Pare questioned whether he should participate in the discussion because he had volunteered to mediate these matters. Legal Counsel Powers responded that the better way would be for Board Member Pare to recuse himself from the discussion and Board Member Pare exited the room.

Legal Counsel to the Board, Michael D. Powers, reported that he was in the process of reading the complaints, the answers made to them by Attorney Gallagher, and drafting an Order to Show Cause. Although the board had voted to proceed with an Order to Show Cause in Complaint 2016-4 and Complaint 2016-5, Mr. Powers informed the Board that because of his other duties with the Division of Insurance, at this time, he would only be able to draft the Order to Show Cause in Complaint 2016-4. Mr. Powers explained that this complaint was filed against two licensed appraisers employed by The Hanover Insurance Company who were represented by Attorney Gallagher, came before the Board repeatedly, and at this time the Board's formal complaint proceedings under the Administrative Procedures Act was about to begin.

In response to Attorney Gallagher's assertion that he and his clients were entitled to appear before the Board at this executive session, Mr. Powers recounted the previous appearances of Attorney Gallagher in these matters. The first appearance of Attorney Gallagher and his clients was at the June 22, 2016, Board meeting wherein Attorney Gallagher requested the matters be heard in the executive session. At that meeting the Board had allowed Attorney Gallagher to appear before the Board with his clients, and present a very lengthy rebuttal. Although the Open Meeting Law provides the accused the right to appear before the Board and have a representative appear with him, it does not require the representative to speak to the Board. Mr. Powers read from the agenda reference to the Open meeting Law "to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session." Mr. Powers noted, notwithstanding that provision, the Board did allow Attorney Gallagher to speak and actively participate. Mr. Powers pointed out that at the conclusion of that executive session, Board Member Johnson asked if Attorney Gallagher would be willing to attempt mediation by a member of the Board. Attorney Gallagher and his clients, the appraisers, assented. Board Member Pare volunteered to contact the auto body appraiser who filed the complaints and ascertain if they were willing to mediate the matters, and, thereafter, Board Member Pare would contact Attorney Gallagher. Board Member Pare agreed to report the outcome at the next Board meeting on August 3, 2016.

At the following Board meeting held on August 3, 2016, Attorney Gallagher requested the matter remain in the executive session and the Board complied with the request. Attorney Gallagher appeared with his clients, the two licensed appraisers. Because the complaints were the subject of an attempted mediation by Board Member Lyle Pare which was unsuccessful, Mr. Pare was advised that he should not participate in any further deliberations in the matter. Mr. Powers informed Mr. Pare, and the other Board Members, as part of his legal research for the Board's proposed new Complaint Procedure he reviewed the "Manual for Conducting Administrative Adjudicatory Proceedings" published by the Administrative Law Division of the Government Bureau of the Office of the Attorney General, and the manual advises that Board Members who participate in the mediation of a dispute should not, thereafter, deliberate on future matters that involve that same dispute. The Board Member is only allowed to report the outcome of the mediation and cannot provide any information

about the discussions between the parties of the mediation. Mr. Pare recused himself and left the meeting.

Mr. Powers noted that at the August 3, 2016 Board Meeting Attorney Gallagher was again allowed to participate at the Board meeting and presented his clients' version of the case. The Board gave Attorney Gallagher a second opportunity which is not provided for in the Open Meeting Law. At that meeting the Members of the Board expressed their dissatisfaction with the licensed appraisers' response to the complaints, and Attorney Gallagher volunteered to work with Legal Counsel Powers to attempt to reach a resolution that would be satisfactory to his clients. Mr. Powers informed the Board that he would work with Attorney Gallagher to attempt to reach a mutually agreeable resolution.

At the September 7, 2016, Board meeting Attorney Gallagher appeared with his clients, the two licensed appraisers, along with a court stenographer to record the session and requested the matter be heard again in the executive session.

At that meeting Legal Counsel Powers reported that Attorney Gallagher contacted him and stated that his clients did nothing wrong. Attorney Gallagher said that his client's felt that they did not violate the Board's regulation and, therefore, if the Board wanted to proceed forward with formal complaints against his clients they would have to issue the formal complaints and the Board voted to proceed.

Mr. Powers concluded his summation by stating Attorney Gallagher and his clients had been provided with more opportunities to have the complaints heard and resolved by the Board than was required by the Open Meeting Law, and Attorney Gallagher and his clients were not entitled to be present at this portion of the executive session. Mr. Powers opined that at every stage over the past several months the Board had bent over backwards providing every possible right to the licensed appraisers. Mr. Powers informed the Board that after reviewing the Manual for Conducting Administrative Adjudicatory Proceedings, which states the Board should conduct a thorough review of the Order to Show Cause to ensure the legal elements of due process is being followed and it conforms to technical legal notice requirements. This review should be conducted before formally issuing an Order to Show Cause, and such review and discussions are covered by the exemption cited in the agenda and the Suffolk Construction case holding public bodies and boards have the right to be provided with legal advice in the executive session. Therefore, Attorney Gallagher and his client did not have a right to participate at this executive session by joining in the discussion of any potential legal elements which would be covered before the Board approves the Order to Show Cause that would be docketed against the licensed appraisers.

Legal Counsel Powers said before presenting the formal Order to Show Cause to the Board, he had two legal questions about the grounds that he was contemplating placing in the Order to Show Cause for a violation of the ADALB regulation by the licensed appraisers that he wanted to discuss with the Board. The Board and Legal Counsel Powers discussed the legal issues and it was determined to not include them in the Order to Show Cause.

Mr. Powers informed the Board that he would have the Order to Show Cause prepared by the following Board meeting, they could vote on approving it at that time, and to forward it to the General Counsel for the Division of Insurance who would assign one of the legal counsels to

docket the case and begin the administrative proceedings against the licensed appraisers. The Board would hear the case, and Mr. Powers would assist the Board as Legal Counsel to the Board during motion proceedings and during the public hearing.

At the conclusion of the discussion between Legal Counsel Powers and the Board which Mr. Powers asserted to the Board was exempt from the public session not only under subsection (d) of Section 18, of General Laws Chapter 30A as “a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it.” but also under the principles enunciated in the *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444 (2007).

Chairman Cox thanked Legal Counsel Powers for his hard work on behalf of the Board and requested Mr. Powers to notify Attorney Gallagher that he could appear at the executive session. Mr. Powers left the room to speak with Attorney Gallagher and returned.

Thereafter, Attorney Gallagher entered the room with one of the licensed appraisers, a court stenographer, and requested time for the court stenographer to set-up her machinery.

Attorney Gallagher requested to speak to the Board and Chairman Cox assented.

Mr. Gallagher stated that 18 minutes had elapsed since the last person left that Board meeting, and suggested that the Board had discussed the complaints without him being present. He stated that he would object to any discussions about the complaints as listed in the agenda (d) of Section 18, of General Laws Chapter 30A as “a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it.”

Legal Counsel Powers informed Attorney Gallagher that the Board had a brief discussion about the Order to Show Cause that would be issued against his clients, and in addition to the statutory exemption cited, the discussion involved legal issues that were privileged communications. Based on the statute cited in the agenda, and the Attorney/Client privilege doctrine as established in the Suffolk Construction case, the Board had a right to discuss these issues in the executive session. Mr. Powers confirmed that he was drafting an Order to Show Cause that would be going to the General Counsel to the Division of Insurance for the assignment of an attorney, Attorney Gallagher would be provided with it in due course, he would be duly served with the Order to Show Cause by the legal counsel assigned the case from the Division of Insurance, and he would be provided with all the rights afforded under the Massachusetts Administrative Procedures Act and the case would proceed publicly. He informed Attorney Gallagher a summary of the discussion that was held in the executive session would appear in the Board minutes, but nothing would be reported about any legal issues that were discussed, because such a discussion would be an exempt and privileged communications.

Attorney Gallagher asserted that he would reserve all of his rights with regard to the Open Meeting Law.

### **Complaint 2016-8**

Attorney John Callahan of the law firm Finnegan, Underwood, Ryan & Tierney represented the licensed appraiser in this matter and he requested the matter be heard in the executive session.

At the August 3, 2016, Board Member Starbard volunteered to mediate the matter and Attorney Callahan agreed to attempt mediation. Board Member Starbard reported to the Board Members that the matter was resolved and that the complainant agreed to dismiss the complaint.

**Complaint 2016-10**

Attorney Bosse agreed to participate in mediation of this matter with Board Member Starbard. Board member Starbard reported that he knew that Attorney Bosse was attempting to reach a resolution but had not finalized the matter with the complainant and requested the Board table the matter to the following meeting.

**Complaint 2016-12**

Chairman Cox requested the status of this matter. Legal Counsel Powers reported that he received a letter from the licensed appraiser in response to the complaint which indicated he contacted the complainant and resolved the matter with him. Mr. Powers reported that he contacted the complainant who confirmed the fact that he resolved the matter, was satisfied with the resolution, and no further action by the Board was needed.

**Motion to adjourn the business of the Board:**

Chairman Cox called for a motion to adjourn the meeting and Board Member Coyne made a motion to adjourn which was seconded by Board Member Pare. The motion passed by a vote of: 3-0 with Chairman Cox abstaining.

Whereupon, the Board's business was concluded.

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

List of Documents Referred to at the Meeting:

**1.) Letter from John Murphy, Executive Director of the Massachusetts Insurance Federation**

September 6, 2016

Gilbert W. Cox, Jr., Esq,  
Chairman  
Auto Damage Appraiser Licensing Board  
1000 Washington Street, Suite 810  
Boston, MA 02118-6200

Re: Minutes of the August 3, 2016 Meeting—Discussion of Changes to 212 CMR 2.0

Dear Chairman Cox:

In reviewing the draft minutes of the August 3, 2016 meeting, we noted several errors or discrepancies that ought to be corrected in the minutes to ensure that the proposed changes to 212 CMR 2.0 accurately reflect the actions taken by the Board. We also encourage the Board to

publish both a clean and redlined version of its proposed changes to 212 CMR 2.0. There have been many discussions of the changes and things can be easily confused so having a final clean and red-lined version will ensure that we are all working off the same document. Here are the issues we identified:

**Section 2.04 (e)- Paragraph 1.** During the July 22, 2016 meeting the Board voted to remove the proposed language related to partial disassembly (see page 5 of August 3, 2016 agenda attachment). Thus, the 4-0 vote in the August 3, 2016 meeting was supposed to be on the definitional changes to insurer, repair shop, and the manufacturer's recommended repair procedures. However, the language in the minutes incorrectly incorporates the language that had previously been removed in June (see page 15). Additionally, the section printed in the agenda on August 3, 2016 had typos (bold below), but the language as voted on in the August 3, 2016 meeting should read:

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 ~~insurer 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. No appraiser shall modify any published manual **or electronic data system** (*i.e.*, Motors, Mitchell or any automated appraisal system) without prior negotiation between the parties. Manufacturers ~~recommended warranty~~ repair procedures, I-Car, Tec Cor and paint manufacturer procedures ~~shall may also~~ apply. **However, the selection of parts shall comply with 211 CMR 133.00 and 212 CMR 2.00.** Further, no appraiser shall use more than one manual or system for the sole purpose of gaining an advantage in the negotiation process.

**Section 2.04 (e)- Paragraph 4.** In the fourth paragraph of section 2.04(e), the Board voted in the June 22, 2016 to move the proposed first sentence relating to used suspension and steering (see page 5 of the August 3, 2016 agenda attachment). Yet, the language is included in the motion voted on by the Board (see page 16). Additionally, the agenda on August 3, 2016 only listed price in the sixth sentence (bolded below), whereas the version in the minutes states "price cost." The minutes printed on page 16 include that language. After the August 3<sup>rd</sup> meeting, that section should read:

The appraiser shall determine which parts are to be used in the repair process ~~in accordance with 211 CMR 133.00.~~ **Determination of parts shall comply with 211 CMR 133.00 and 212 CMR 2.00, the appraiser shall recognize that certain parts, including but not limited to; used suspension and steering parts that contain wearable components may affect the operational safety of the vehicle. If both parties agree that specified part is unfit and must be replaced, the insurer is responsible for paying the retail price for all parts indicated on an appraisal, including but not limited to, parts ordered and subsequently returned based on the criteria set in 211 CMR 133. The insurer is responsible for returning the parts to the supplier and recovering their costs from the supplier. The repair shop may agree to return parts on behalf of the insurer, if the insurer agrees to pay all costs, including but not limited to freight, handling and**

administrative costs, associated with such return. As to such costs, nothing in 212 CMR 2.00 shall preclude an insurer from exercising any available rights of recovery against the supplier. Delays in repair cycle time shall be considered when sourcing parts and materials.

**Section 2.04 (e)- Paragraph 4.** In the June 22, 2016 meeting, the Board voted to remove the proposed language “labor times, hourly rate” from the section on itemizing in the fourth paragraph of section 2.04(e), which changes the section to the original language (see page 6 of the August 3, 2016 agenda). Yet, this language is incorrectly included on page 17 of the minutes. Thus after the August 3, 2016 vote, the section should read:

The appraiser shall itemize the cost of all parts, **labor, materials**, and necessary procedures required to restore the vehicle to pre-accident condition and shall total such items. The rental cost of frame/unibody fixtures necessary to effectively repair a damaged vehicle shall be shown on the appraisal and shall not be considered overhead costs of the repair shop.

**Section 2.04 (e)- Paragraph 6.** In the agenda for the August 3, 2016 meeting, the sixth paragraph of section 2.04(e) regarding submission of the appraisal, maintained the five business day time period (see page 6 of the August 3, 2016 agenda). The minutes for the discussion during the August 3, 2016 have three days proposed and voted on (see page 17). As a three day time period was not discussed or voted on, this section should read:

The appraiser **representing the insurer** shall mail, fax or electronically **submit** ~~transmit~~ the completed appraisal within **five** 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 mailed, faxed **or electronically submitted** within **five** business days of the assignment. The repair shop may also require a completed appraisal at the time the vehicle is viewed. If the repair shop requires a completed appraisal, then the repair shop shall make available desk space, phone facilities, calculator and necessary manuals. A reasonable extension of time is permissible when intervening circumstances such as the need for preliminary **work, repairs or partial disassembly repairs**, severe illness, failure of the parties **other than the insurer** to communicate or cooperate, or extreme weather conditions make timely inspection of the vehicle and completion of the appraisal impossible.

**Section 2.04 (f).** The minutes do not include section f, which was amended to include the term “personally.”

**Section 2.04 (i).** In section 2.04(i), the minutes of the August 3, 2016 meeting incorrectly include the phrase “within one two business days” (see page 19) . This phrase was removed at the June 22, 2016 meeting (see page 7 of the August 3, 2016 agenda). Section 2.04(i) should read:

- (i) If an insurer, a repair shop and the claimant agree to utilize an expedited supplemental appraisal process, an insurer shall not be required to assign an appraiser to personally inspect the damaged vehicle. In such event, the repair shop shall fax or electronically submit to the insurer a request for a supplemental appraisal allowance in the form of an itemized

supplemental appraisal of the additional cost to complete the repair of the damaged vehicle, prepared by ~~an appraiser representing the repair shop licensed appraiser employed by the repair shop~~, together with such supporting information and documentation as may be agreed upon between the ~~appraiser representing the~~ insurer and the ~~appraiser representing the~~ repair shop. The ~~appraiser representing the~~ insurer shall then be required to fax or electronically submit ~~within two business days~~ to the repair shop its decision as to whether it accepts the requested supplemental appraisal allowance, ~~by the end of the next business day, excluding holidays and weekends~~. Within this same period, ~~an licensed~~ appraiser representing the insurer and ~~an licensed~~ appraiser representing the repair shop may attempt to agree upon any differences. In the event that an insurer does not accept the repair shop's request for the supplemental appraisal allowance, or if the insurer fails to respond to the repair shop by the end of the next business day, excluding weekends and holidays ~~within two business days~~, the ~~appraiser representing~~ insurer and the ~~appraiser representing the~~ repair shop shall be obligated to proceed in accordance with 212 CMR 2.04(1)(h), and within the time limits set forth in such provision. In such event, the date of the initial request for a supplemental appraisal allowance shall be the starting date for when the insurer must assign an appraiser to personally inspect the damaged vehicle.

**Section 2.04 (k).** The minutes reflect that proposed section 2.04(k) regarding access for the purpose of appraisal was approved by a vote of 3-2. My notes of the meeting reflect that this language was rejected, with the Chairman joining Board Members Coyne and Pare opposed.

Sincerely yours,



John P. Murphy  
Executive Director

cc: ADALB Members  
Michael Powers, Esq., Counsel to the ADALB

**2.) Letter from Attorney Owen Gallagher**

**FORBESGALLAGHER**

OWEN GALLAGHER

DIRECT DIAL: 617.598.3801

OGALLAGHER@FORBESGALLAGHER.COM

October 3, 2016

Michael Powers, Esquire  
Counsel to the Commissioner of Insurance and  
Counsel to the Auto Damage Appraisers Licensing Board  
Legal Division, Division of Insurance  
1000 Washington Street, Suite 810  
Boston, MA 02118

**Re: Executive Session, ADALB Complaints #2016-4 and #2016-5, October 4, 2016**

Dear Attorney Powers:

The ADALB's agenda for the Board meeting scheduled for tomorrow October 4, 2016 states that the Board will meet in executive session for "Review and discussion of the draft of an Order to Show Cause in Complaints 2016-4, and Complaint 2016-5, along with a discussion of potentially assigning a Board Member as Presiding Officer for the administrative hearing."

I am writing to confirm that my clients, who are the subject of these complaints but who have received no notice of this hearing under G.L. c. 30A, §21(a)(1), may exercise their right to be present at the executive session pursuant to this section of G.L. c. 30A.

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My clients reserve any and all rights that they may have under the Open Meeting Law, but I would appreciate your advising me of the Board's position. Thank you.

Sincerely,

Sincerely,

Owen Gallagher

**The Gateway Center • 14 Summer Street, Suite 102 • Malden, MA 02148**

### **3.) Proposed Changes to the ADALB Regulation Presented by Board Member Starbard and Approved by the Board**

212 CMR 2.00: THE APPRAISAL AND REPAIR OF DAMAGED MOTOR VEHICLES

Section

- 2.01: Scope of Regulations
- 2.02: Licensing Requirements and Standards for Appraisers
- 2.03: Duties of Insurers and Repairers
- 2.04: Procedures for the Conduct of Appraisers and Intensified Appraisals
- 2.05: Penalties
- 2.06: Severability

Additions (as approved 8/3), (Typo's edited 9/7)

Deletions (as approved 8/3 (Typo's edited 9/7)

#### 2.01: Scope of Regulations

(1) Purpose and Applicability. The purpose of 212 CMR 2.00 is to promote the public welfare and safety by improving the quality and economy of the appraisal and repair of damaged motor vehicles. Any licensed appraiser, individual or corporate entity who employs licensed appraisers shall be bound by 212 CMR 2.00.

212 CMR 2.00 is intended to be read in conjunction with 211 CMR 133.00, *Standards for the Repair of Damaged Motor Vehicles*.

(2) Authority. 212 CMR 2.00 is promulgated under the authority granted to the Auto Damage Appraiser Licensing Board by M.G.L. c. 26, § 8G, as added by St. 1981, c. 775, § 1.

(3) The Board may from time to time issue Advisory Rulings and shall do so in compliance with M.G.L. c. 30A, § 8.

(4) Definitions.

Appraisal – means a ~~written~~ motor vehicle damage report prepared by an appraiser licensed by the Board, on forms approved by the Board, and conducted ~~as defined in M.G.L. c. 26, § 8G and~~ in compliance with the provisions of 212 CMR 2.00, M.G.L. c. 93A, c. 100A, c. 90, § 34R, and c. 26, 8G.

Appraiser - means any person licensed by the Auto Damage Appraiser Licensing Board to evaluate motor vehicle damage and determine the cost of parts and labor required to repair the motor vehicle damage.

Board – means the Auto Damage Appraiser Licensing Board established by M.G.L. c. 26, 8G.

Claimant - means any person making a claim for damage to a motor vehicle for either first or third party damages.

Independent appraiser - means any appraiser other than a staff appraiser who makes appraisals under an assignment by an insurer or repair shop and shall include the owner or employee of a repair shop who makes appraisals under a contract with an insurer.

Insurer – means any insurance company involved with a claim in the Commonwealth.

Intensified appraisal - means the combination of the appraisal of a motor vehicle before its repair and the reinspection of the vehicle subsequent to its repair.

Staff appraiser - means an appraiser who is an employee of an insurer and whose job duties include the making of appraisals for his or her employer.

Repair Shop Appraiser – means an appraiser who is an employee of a repair shop and whose job duties include the making of appraisals for his or her employer.

Repair Shop – means a motor vehicle repair shop registered pursuant to the requirements of M.G.L. c. 100A.

~~Supervisory appraisal – means an appraisal conducted by an insurance company or appraisal company supervisor solely for the purpose of evaluating the appraisal ability of one of his or her appraiser employees or for the purpose of providing on-the-job training of an appraiser employee.~~

## 2.02: Licensing Requirements and Standards for Appraisers

(1) Requirement That License Be Obtained and Displayed. No person in Massachusetts shall appraise, ~~or estimate~~ **or determine** damages to motor vehicles or otherwise present himself or herself as an appraiser unless he or she has first obtained a license from the ~~Auto Damage Appraiser Licensing~~ Board. This license shall be valid for one year or less and shall be renewed annually on July 1st. Any appraiser, while making an appraisal, shall carry his or her license and shall, upon request, display it to any person involved in the claim or to any representative of the Board.

(2) Qualifications for a License. Any applicant for a license shall be 18 years of age or over and of good moral character. He or she shall furnish satisfactory proof to the Board that he or she possesses the educational qualifications required for graduation from high school or that he or she possesses relevant work experience deemed satisfactory by the Board. No applicant shall be considered competent unless the applicant has assisted in the preparation of appraisals for at least three months under the close supervision of ~~an a~~ **licensed** appraiser. He or she shall complete an approved appraisal course or at the Board's discretion work experience may be substituted for said schooling.

(3) Application and Examination Fee for a License. Any applicant for a license shall complete an application to be prescribed by the Board and shall sign it under the penalties of perjury. He or she shall submit this application and non-refundable fee of \$100 to the

Board. After an application is received and approved, the applicant shall be required to pass an examination given under the supervision of the Board. All successful applicants will be issued a numbered license. Any applicant failing to pass an examination, upon the payment of a further non-refundable fee of \$50.00, shall be entitled to a reexamination after the expiration of six months from the date of the last examination. Any applicant failing to pass an examination shall be allowed to review his or her examination.

(4) Renewal of License. The Board shall mail to each ~~licensed~~ appraiser an application for renewal. Such application shall be completed and returned to the Board. Each application shall be accompanied by a renewal fee of \$50.00. After verification of the facts stated on the renewal application, the Board shall issue a renewal license dated July first, and this license shall expire on the June thirtieth of the year following. Any ~~licensed~~ appraiser who fails to renew his or her license within 60 days after notification by the Board of his or her license expiration date, before again engaging in the practice of ~~an a licensed~~ appraiser within the Commonwealth, shall be required to re-register, pay a penalty fee determined by the Board and any back license fees, or may be required by the Board to be reexamined and pay applicable fees.

(5) Procedure for ~~Auto-Damage~~ Appraisals.

(a) All forms used for ~~auto-damage~~ appraisals must be approved by the Board.

(b) All forms used are required to have an itemization of parts, labor and services necessary, ~~as required in 212 CMR 2.00~~, for repairs thereof. The prepared appraisal shall be sworn to under the penalties of perjury and shall include the appraiser's name, signature, license number, seal or stamp, employer, ~~insurer insurance company~~, repair shop registration number if applicable, fee charged, the date the vehicle was appraised and the name of the ~~database manual~~ used (if any) in preparing the appraisal. The appraisal seal or stamp shall be of a design approved by the Board. All appraisals sent electronically need not include the appraiser's signature and his or her seal or stamp.

(6) Schedule of Appraisal Fees.

(a) The Board may consider the appraisal fees charged within the territories where said appraiser operates. Any appraiser shall establish his or her own fee schedule unless limited by the Board. Any appraiser must post his or her appraisal fee schedule in a conspicuous location at his or her work place. The Board may establish a maximum schedule of fees by territory, type of business or complexity of work. Fees charged in excess of maximums approved by the Board shall result in penalties as established by the Board.

(b) Fees paid by a claimant for an appraisal that was requested by the insurer are recoverable from the insurer. Fees for ~~auto-damage~~ appraisals not requested by the insurer in first party claims are not recoverable from the insurer.

(7) Conflict of Interest. It shall be a conflict of interest for any appraiser who has been assigned to ~~write an appraisal, appraise a damaged motor vehicle~~ to accept, in connection with that appraisal, anything of value from any source other than the assignor of that appraisal.

Further, it shall be a conflict of interest for any **repair shop** appraiser ~~employed by a repair shop~~ to accept the assignment of an appraisal from an insurer unless that appraiser's employment contract prohibits the repair shop from repairing damaged motor vehicles that have been so appraised. In addition, it shall be a conflict of interest for any appraiser who owns or has an interest in a repair shop to have a vehicle repaired at that shop if that appraiser has appraised that vehicle at the request of an insurer. It shall be a conflict of interest if any **licensed** appraiser operates a Drive-in Appraisal Service **or Drive-In Claim and Appraisal facility** for, **or on behalf of**, an insurer at a repair shop. **Notwithstanding this provision, all drive-in appraisal services or drive-in claim and appraisal facilities must inform consumers of their right to have their vehicle repaired at any repair shop. No insurance company appraiser shall coerce or use any tactics the purpose of which is to prevent insureds or claimants from seeking damage reports on repairs from their own repair shop rather than utilizing a company appraisal drive-in facility.**

(8) Revocation or Suspension of a License. The Board may revoke or suspend any appraiser's license at any time for a period not exceeding one year if the Board finds, after a hearing, that the individual is either not competent or not trustworthy or has committed fraud, deceit, gross negligence, misconduct, or conflict of interest in the preparation of any **appraisal motor vehicle damage report**. The following acts or practices by any appraiser are among those that may be considered as grounds for revocation or suspension of an appraiser's license:

- (a) material misrepresentations knowingly or negligently made in an application for a license or for its renewal;
- (b) material misrepresentations knowingly or negligently made to an owner of a damaged motor vehicle or to a repair shop regarding the terms or effect of any contract of insurance;
- (c) the arrangement of unfair and or unreasonable settlements offered to claimants under collision, limited collision, comprehensive, or property damage liability coverages;
- (d) the causation or facilitation of the overpayment by an insurer of a claim made under collision, limited collision, comprehensive, or property damage liability coverage as a result of an inaccurate appraisal;
- (e) the refusal by any appraiser who owns or is employed by a repair shop to allow an appraiser assigned by an insurer access to that repair shop for the purpose of making an appraisal, ~~supervisory reinspection,~~ or intensified appraisal.
- (f) the commission of any criminal act related to appraisals, or any felonious act, which results in final conviction;
- (g) knowingly preparing an appraisal that itemizes damage to a motor vehicle that does not exist: and
- (h) failure to comply with 212 CMR 2.00.

(9) Drive-in Claim and Appraisal Facilities. Drive-in claim and appraisal facilities shall possess the following equipment:

- (a) Operating telephone service.
- (b) A calculator.

- (c) Current collision, paint and body cost estimating guide manuals or an automated system.
- (d) An operating flash light.
- (e) A tape measure of at least 30 feet.
- (f) An operating camera and film.
- (g) A fax machine or other device capable of transmitting data.

### 2.03: Duties of Insurers and Repairers

(1) Responsibilities for Actions of Appraisers. An insurer or repair shop shall be responsible for the actions of ~~all of its~~ the appraisers ~~working on their behalf whether staff or independent~~, and shall be subject to the applicable penalties under law for any violation of 212 CMR 2.00 by its appraiser.

The Board may assess penalties against either the appraiser, the insurer, the repair shop or all three. In the event of default by the appraiser, the insurer or the repair shop may be responsible for penalties.

(2) Records and Analysis of Appraisals. Every ~~insurer or repair shop~~ appraiser shall retain for at least two years, copies of all records related to appraisals and inspection. Every insurer shall retain copies of all records including photographs in accordance with state law.

### 2.04: Procedures for the Conduct of Appraisals and Intensified Appraisals

(1) Conduct of Appraisals.

(a) Assignment of an Appraiser. Upon receipt by an insurer or its agent of an oral or written claim for damage resulting from a motor vehicle accident, theft, or other incident for which an insurer may be liable, the insurer shall assign ~~an either a staff or an independent~~ appraiser to ~~conduct an appraisal appraise the damage~~. Assignment of an appraiser shall be made within two business days of the receipt of such claim. However, the insurer may exclude any claim for which the amount of loss, ~~less any applicable deductible~~, is less than \$1,500.00.

(b) Repair Shop Appraisal. All repair shops shall maintain one or more licensed appraisers in their employment for the purpose of preparing ~~an motor vehicle damage~~ appraisals ~~and conducting negotiations~~. No ~~staff or independent~~ appraiser shall knowingly negotiate a repair figure with an unlicensed individual or an unregistered repair shop.

(c) Contact with Claimant and Selection of Repair Shop. No staff or independent appraiser, insurer, representative of insurer, or employer of ~~an staff or~~ independent appraiser shall refer the claimant to or away from any specific repair shop or require that repairs be made by a specific repair shop or individual. ~~The provisions of 212 CMR 2.04(c) shall not apply to any approved direct payment plan pursuant to 211 CMR 123.00.~~

(d) Requirement of Personal Inspection and Photographs. The appraiser shall personally inspect the damaged motor vehicle and shall rely primarily on that personal

inspection in making the appraisal. As part of the inspection, the appraiser shall also photograph each of the damaged areas.

(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 ~~insurer 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. No appraiser shall modify any published manual ~~or electronic data system~~ (i.e., Motors, Mitchell or any automated appraisal system) without prior negotiation between the parties. Manufacturer ~~recommended warranty~~ repair procedures, I-Car, Tec Cor and paint manufacturer procedures shall ~~may also~~ apply. ~~However, the selection of parts shall comply with 211 CMR 133.00 and 212 CMR 2.00.~~ Further, no appraiser shall use more than one manual or system for the sole purpose of gaining an advantage in the negotiation process.

If, while in the performance of his or her duties as an ~~licensed auto damage~~ appraiser, an appraiser recognizes that a damaged repairable vehicle has incurred damage that would impair the operational safety of the vehicle, the appraiser shall immediately notify the owner of said vehicle that the vehicle may be unsafe to drive.

The ~~licensed auto damage~~ appraiser shall also comply with the requirements of M.G.L. c. 26, § 8G the paragraph that pertains to the removal of a vehicle's safety inspection sticker in certain situations.

The appraiser shall determine which parts are to be used in the repair process ~~in accordance with 211 CMR 133.00~~. ~~Determination of parts shall comply with 211 CMR 133.00 and 212 CMR 2.00.~~ The appraiser shall recognize that certain parts, including but not limited to; used suspension and steering parts that contain wearable components may affect the operational safety of the vehicle. If both parties agree that a specified part is unfit and must be replaced, the insurer is responsible for paying the retail price for all parts indicated on an appraisal, including but not limited to, parts ordered and subsequently returned based on the criteria set in 211 CMR 133. The insurer is responsible for returning the parts to the supplier and recovering their cost from the supplier. The repair shop may agree to return parts on behalf of the insurer, if the insurer agrees to pay all costs, including but not limited to freight, handling and administrative costs, associated with such return. As to such costs, nothing in 212 CMR 2.00 shall preclude an insurer from exercising any available rights of recovery against the supplier. ~~Delays in repair cycle time shall be considered when sourcing parts and materials.~~ The appraiser shall itemize the cost of all parts, labor, materials, and necessary procedures required to restore the vehicle to pre-accident condition and shall total such items. The rental cost of frame/unibody fixtures necessary to effectively repair a damaged vehicle shall be shown on the appraisal and shall not be considered overhead costs of the repair shop. ~~Costs associated with the shipping and handling or parts, including cores, shall not be considered overhead costs of the repair shop either and shall be listed on the appraisal and negotiated.~~ With respect to paint, paint materials, body materials and related materials, if the formula of dollars times

hours is not accepted by an ~~registered repair shop or licensed~~ appraiser, then a published ~~manual database~~ or other documentation shall be used unless otherwise negotiated between the parties. All appraisals written under 212 CMR 2.00 shall include the cost of replacing broken or damaged glass within the appraisal. When there is glass breakage that is the result of damage to the structural housing of the glass then the cost of replacing the glass must be included in the appraisal in accordance with 212 CMR 2.04. The total cost of repairing the damage shall be computed by adding any applicable sales tax payable on the cost of replacement parts and other materials. The appraiser shall record the cost of repairing any unrelated damage on a separate report or clearly segregated on the appraisal unless the unrelated damage is in the area of repair.

If aftermarket parts are specified in any appraisal the appraiser shall also comply with the requirements of M.G.L. c. 90, § 34R that pertain to the notice that must be given to the owner of a damaged motor vehicle.

The appraiser ~~representing the insurer~~ shall mail, fax or electronically ~~submit transmit~~ the completed appraisal within five 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 mailed, ~~or~~ faxed ~~or electronically submitted~~ within five business days of the assignment. The repair shop may also require a completed appraisal at the time the vehicle is viewed. If the repair shop requires a completed appraisal, then the repair shop shall make available desk space, phone facilities, calculator and necessary manuals. A reasonable extension of time is permissible when intervening circumstances such as the need for preliminary ~~work, repairs or partial disassembly repairs~~, severe illness, failure of the parties ~~other than the insurer~~ to communicate or cooperate, or extreme weather conditions make timely inspection of the vehicle and completion of the appraisal impossible.

(f) Determination of Total Loss. Whenever the appraised cost of repair plus the estimated salvage may be reasonably expected to exceed the actual cash value of a vehicle, the insurer may deem that vehicle a total loss. No motor vehicle may be deemed a total loss unless it has been ~~personally~~ inspected ~~or~~ and appraised by an ~~licensed~~ appraiser nor shall any such motor vehicle be moved to a holding area without the consent of the owner. A total loss shall not be determined by the use of any percentage formula.

(g) Preparation and Distribution of Appraisal Form. All appraisers shall set forth the information compiled during the appraisal on a form that has been filed with the Board. Staff and independent appraisers shall, upon completion of the appraisal, give copies of the completed appraisal form to the claimant, the insurer, and the repair shop and shall give related photographs to the insurer.

(h) Supplemental Appraisals. If a ~~registered~~ repair shop or claimant, after commencing repairs, discovers additional damaged parts or damage that could not have been reasonably anticipated at the time of the appraisal, either may request a supplementary appraisal. The ~~registered~~ ~~appraiser representing the~~ repair shop shall complete a supplemental appraisal prior to making the request. The insurer shall assign an appraiser who shall personally inspect the damaged vehicle within ~~two three~~ business days of the receipt of such request. The appraiser ~~representing the insurer~~ shall have the option to leave a completed copy of the supplemental 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 mailed, faxed, electronically

~~submitted~~ ~~transmitted~~ or hand delivered to the registered repair shop within one business day. The appraiser shall also give a copy of the completed supplement to the insurance company in a similar manner. A reasonable extension of time is permissible when intervening circumstances such as the need for preliminary ~~work, repairs or partial disassembly~~ ~~repairs~~, severe illness, failure of the parties ~~other than the insurer~~ to communicate or cooperate, or extreme weather conditions make timely inspections of the vehicle and completion of the supplemental appraisal impossible.

(i) Expedited Supplemental Appraisals. If an insurer, a repair shop and the claimant agree to utilize an expedited supplemental appraisal process, an insurer shall not be required to assign an appraiser to personally inspect the damaged vehicle. In such event, the repair shop shall fax or electronically submit to the insurer a request for a supplemental appraisal allowance in the form of an itemized supplemental appraisal of the additional cost to complete the repair of the damaged vehicle, prepared by ~~an appraiser representing the repair shop~~ ~~licensed appraiser employed by the repair shop~~, together with such supporting information and documentation as may be agreed upon between the ~~appraiser representing the~~ insurer and the ~~appraiser representing the~~ repair shop. The ~~appraiser representing the~~ insurer shall then be required to fax or electronically submit to the repair shop ~~within two business days by the end of the next business day, excluding weekends and holidays, its decision as to whether it accepts the requested supplemental appraisal allowance~~. Within this same period, ~~an a licensed~~ appraiser representing the insurer and ~~an a licensed~~ appraiser representing the repair shop may attempt to agree upon any differences. In the event that an insurer does not accept the repair shop's request for the supplemental appraisal allowance, or if the insurer fails to respond to the repair shop ~~within two business days, by the end of the next business day, excluding weekends and holidays~~, the ~~appraiser representing the~~ insurer and the ~~appraiser representing the~~ repair shop shall be obligated to proceed in accordance with 212 CMR 2.04(1)(h), and within the time limits set forth in such provision. In such event, the date of the initial request for a supplemental appraisal allowance shall be the starting date for when the insurer must assign an appraiser to personally inspect the damaged vehicle.

No insurer or repair shop shall be obligated to utilize an expedited supplemental appraisal process and the determination of whether to utilize such process shall be made separately by an insurer or by a repair shop only on an individual claim basis. Utilization of an expedited supplemental appraisal process shall not be used as a criterion by an insurer in determining the insurer's choice of shops for a referral repair shop program under an insurer's direct payment plan; and being a referral shop shall not be a criterion in determining whether to utilize an expedited supplemental appraisal process.

(j) Completed Work Claim Form. If the ~~insurer insurance company~~ does not have a direct payment plan or if the owner of the vehicle chooses not to accept payment under a direct payment plan then a representative of the insurer shall provide the insured with a completed work claim form and instructions for its completion and submission to the insurer. ~~When a completed work claim form is utilized, the appraiser representing the insurer and the appraiser representing the repair shop shall negotiate all costs without regard to the direct payment plan/referral shop program.~~

(2) Temporary Licensing. The Board may grant at its discretion either an emergency or a temporary license to any qualified individual to alleviate a catastrophic or emergency situation for up to 90 days. The Board may limit the extent of such emergency

authorization and in any event, if the situation exceeds 30 days, a fee determined by the Board shall be charged for all emergency or temporary licenses. **The Board shall vote to authorize the Chairman of the Board or his/her designee to grant a temporary license up to 60 days to any qualified individual to alleviate a catastrophic or emergency situation as long as the following conditions are met: (1) the applicant is licensed as a motor vehicle damage appraiser in another state and provides a copy of that license to the Chairman of the Board or his/her designee; (2) is in good standing in the other state and the applicant provides consent to the Chairman of the Board or his/her designee to verify the applicant's licensing status through the insurance licensing database maintained by the National Association of Insurance Commissioners; its affiliates or subsidiaries; (3) the applicant has not been found guilty of fraud, deceit, gross negligence, incompetence, misconduct or conflict of interest in the preparation or completion of any motor vehicle damage report; (4) the applicant does not have criminal felony charges pending against him/her in any state; (5) the applicant properly fills out the application; and (6) pays the applicable license fee.**

**Copies of all such applications and temporary licenses issued by the Chairman of the Board or his/her designee shall be submitted to the Board at its next scheduled meeting for review by the Board. After review, the Board may revoke any such temporary license that was issued if the Board finds such applicant does not conform to the six listed conditions, or the Board finds that a person who was issued a temporary license is not qualified to hold such license.**

#### 2.05: Penalties

**(4) Violations of M.G.L. c. 26, § 8G, and 212 CMR 2.00 may result in penalties including administrative costs, revocation or suspension of license or both. All administrative costs are subject to the discretion of the Board. The administrative costs may be assessed against the appraiser, the appraiser's employer, the insurer, or the repair shop.**

**An alleged violation of 212 CMR 2.00 by ~~an a-licensed~~ appraiser at the direction of an insurer may be reported to the Division of Insurance which may impose applicable penalties against such an insurer.**

#### 2.06: Severability

**If any provision of 212 CMR 2.00 or its application to any person or circumstances is held invalid, such invalidity shall not affect the validity of other provisions or applications of 212 CMR 2.00**

#### REGULATORY AUTHORITY

**212 CMR 2.00: M.G.L. c. 26, § 8G.**



# THE COMMONWEALTH OF MASSACHUSETTS AUTO DAMAGE APPRAISER LICENSING BOARD

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## Amendment to Board Minutes of October 4, 2016

Motion to waive the Attorney/Client Privilege doctrine as enunciated by the Massachusetts Supreme Judicial Court in the case of *Suffolk Construction Co. Inc. v. Division of Capital Asset Management*, 494 Mass. 444 (2007) for that portion of the minutes of the executive session of the October 4, 2016, Board meeting that involved legal advice and the discussion between Board Legal Counsel and the Members of the Board about the legal elements of a proposed Order to Show Cause and to approve and publish the minutes of that part of the executive session during which time these discussion were held. Such publication was ordered by the Division of Open Government in case OML 2017-72 and the Board voted on May 17, 2017, not to appeal the decision rendered in that case for the reasons stated in the minutes of the May 17, 2017, Board meeting.

As approved by the Board on June 13, 2017, by a motion of Board Member William Johnson and seconded by Board Member Richard Starbard. The motion passed by a vote of: 3-0 with Board Member Pare recusing himself and not voting because he did not participate at the portion of the executive session, and Chairman Cox abstaining.

### **Amended minutes of the October 4, 2016, executive session:**

Board Counsel Powers informed the Board that he had a question about legal elements of the Proposed Order to Show Cause that he was drafting. Mr. Powers said that during the course of his review of the complaint and the Board's regulation it appeared that the licensed appraisers could be charged with violating that part of the Board's regulation requiring payment for broken glass. Mr. Powers read the pertinent provision of the regulation to the Members of the Board by quoting the following from 212 CMR 2.04: Procedures for the Conduct of Appraisals and Intensified Appraisals:

(1) Conduct of Appraisals.

(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.

...

The appraiser shall determine which parts are to be used in the repair process in accordance with 211 CMR 133.00. The appraiser shall itemize the cost of all parts, labor, materials, and necessary procedures required to restore the vehicle to pre-accident condition and shall total such items. The rental cost of frame/unibody fixtures necessary to effectively repair a damaged

vehicle shall be shown on the appraisal and shall not be considered overhead costs of the repair shop. ... All appraisals written under 212 CMR 2.00 shall include the cost of replacing broken or damaged glass within the appraisal. When there is glass breakage that is the result of damage to the structural housing of the glass then the cost of replacing the glass must be included in the appraisal in accordance with 212 CMR 2.04.

After reading the above-provision of the Board's regulation Mr. Powers asked the Board whether the initial refusal by the appraisers to include the cost of replacing the quarter-glass would be considered a violation of this provision of the Board's regulation and, therefore, should be included in the Proposed Order to Show Cause. Mr. Powers informed the Board this raised two legal questions, the first was whether the conduct alleged in the complaint violated this provision of the regulation. If the answer to the question is yes, the second legal issue is whether both appraisers could be held responsible for violating this provision of the regulation.

Board Member Coyne responded that the regulatory provision that was quoted was intended to cover the glass breakage of windshields and rear windows of motor vehicles when there is structural housing damage, and not intended for the replacement of the quarter-glass in the circumstances described in the complaint filed against the licensed appraisers. He elaborated that the reason for this language in the Board's regulation is because in the past insurance companies were refusing to pay for any glass breakage. This language was inserted so that in those instances where there is damage to the structure of the car affecting the glass, appraisers could include such glass damage as an item on an appraisal.

Board Member Starbard agreed, stating that the portion of the regulation that was quoted by Legal Counsel Powers was only intended to cover items such as the windshield glass when there is damage to the structural housing and not the circumstances described in the complaint relating to the quarter-glass. The consensus of the Members of the Board was that this provision of the regulation did not apply.

Mr. Powers thanked the Board Members for their insight, pointed out the reason that he brought these issues to the Board for their review was because of the extensive background that each Board Member has in the auto body industry and repairing motor vehicle damage. Mr. Powers pointed out that, to a layman who does not work within the auto body industry on a daily basis, the literal reading of the language of the regulation would have led one to believe this portion of the regulation was violated, and it was very helpful discussing this issue with the Board before presenting the proposed Order to Show Cause.

Mr. Powers asserted, based on the Manual's guidance, it is prudent to put every factual and legal issue in an Order to Show Cause and, thereafter, allow a licensed appraiser's attorney to raise any legal or factual defenses to each element of the Order to Show Cause. Because Members of the Board were very clear that this glass provision of the regulation did not apply, he would not include it in the Proposed Order to Show Cause.

Mr. Powers concluded that he would prepare the Proposed Order to Show Cause and it would be placed on the agenda at the following Board meeting. At that time the Board would be able to review it, and to make any recommendations to it. Mr. Powers advised that between now and the

next Board meeting scheduled for December 6, 2016, Board Members should review the complaint and consider any violations that may be brought against the licensed appraisers.