

Memo from Ed McCabe
September 1, 1991

RE: Inspection Sticker removal policy
spoliation of evidence

Valued client;

I would like to share some thoughts with you on two subjects that are of concern to those of us interested in combating insurance fraud.

INSPECTION STICKERS

Effective October 1, 1991 all licensed appraisers were required to comply with provisions of Chapter 138, Acts of 1990 pertaining to damaged motor vehicles - and an appraisers duty to remove the inspection stickers from them.

In my view, this requirement may prove to be a very significant detriment to insurance carriers and law enforcement persons investigating claims involving these cars.

In nearly all cases the appraiser sees the car before the investigator and when he removes the sticker, a very valuable source of information is taken away from the investigator.

Not only does the sticker identify when, where and by whom the sticker was issued, but it also has the registration plate number on it, sometimes an old one that will lead to a prior owner or carrier. I can't count the number of times that information from the back side of a sticker has helped to prove a claim fraudulent.

All appraisers have to abide by the new statute, but there is a simple way to turn the situation around and make the potential loss of information into a windfall of new data for your SIU and claim reps to work with.

I feel that it would be very much to the advantage of your company if a simple system to preserve the information from the sticker be developed, and all appraisers be required to implement the system.

I propose that space for six pieces of data from a sticker be incorporated into existing appraisal documents - the best way - or that a separate document be developed that would be left with the car. In either case, the important data wouldn't be lost when the sticker is removed. Information from the sticker being on the appraisal would be a big asset to those evaluating the claim early

in the process, and would be important evidence for those doing the investigation.

The Vehicle Examination form I developed for our use many years ago has always has the sticker data on it, but the way it is now, the sticker is nearly always gone by the time we see the car.

A little box like this could be easily incorporated into the appraisal forms:

It would be a simple matter to have a rubber stamps made up so that existing appraisal forms could be used up and the system could be implemented right away.

SPOLIATION

The second matter concerns removal of evidence from vehicles, and the right of a plaintiff to have equal access to that evidence and the vehicle.

Over the last year courts in at least five states have allowed a cause of action, a tort called spoliage - as a remedy to plaintiffs who have been denied access to evidence that should have been preserved or shared. Preserved is the key word here.

In cases where an insurance company defendant has failed to retain evidence (a vehicle in several cases) involved in a disputed claim - not only has there been a verdict for the plaintiff without consideration of the facts of the issue - but the concept of spoliage has come into the picture: the plaintiff may be entitled to damages for loss of use, diminished reputation, loss of creditability, etc.

These decisions were based on complete destruction of the evidence but the verdicts did not limit scope to just that.

In my view these new decisions will give the plaintiff bar a new mechanism to circumvent the true facts of a claim - if carriers are not prepared, and do not act in a responsible manner.

Being the subject of depositions, and cross examinations on the stand, has taught me that an investigator is accountable for every word of their report and for their every action during an investigation, and that issues in contention are more often settled on procedural lapses than on their merits.

Years ago I set up our procedures for the gathering and preservation of evidence, and we have never had a problem, or caused one for a client, so it is not us I am concerned with.

In principle, evidence must not be destroyed during an

investigation and must be made available to all parties involved. To me, this means that if I or one of my investigators comes onto some evidence that is meaningful to the outcome of a claim, we have an obligation not only to document that evidence, but also to take the necessary steps to preserve it for reference during our own testimony and to insure that others interested in the matter have equal access to it.

Herein lies the area of my concern: I feel that it is absolutely essential that any person, so called expert or otherwise, who removes parts from an automobile does so at the risk of not only having any evidence he might uncover and his entire testimony disallowed, but also of committing a fatal blunder, unless he has the mechanical qualifications to do it. If he does not, and is discovered to be unqualified by plaintiff counsel, he is placing himself and his client at risk of having his testimony, the evidence and the entire matter, thrown out without consideration of the facts, and of bearing the penalties that result.

A plaintiff attorney can make a strong argument that his client has been prejudiced due to material evidence being removed by a non-professional - without regard to whether that evidence has actually been damaged or not, or even whether it has any bearing on the facts of the claim or not.

Be assured that ISB has not, and will never put you at risk in this regard. Ron Anderson, John Barton, John Miller, Bob McKenna and I are master mechanics, each with many years of experience repairing automobiles, trucks and heavy equipment, and we are well qualified to disassemble, analyze and render our opinion on anything to do with an automobile, truck or piece of heavy equipment. None of us has ever been discredited on the stand or disqualified as an expert.

Because of the importance of having physical evidence to back up testimony, and because if we have it it won't get lost, we will continue to preserve anything of importance, but be assured that the evidence will be gathered by a professional, and that our actions will protect your company from becoming a victim of spoliation.