

CCRE's Fall Seminar Covers Adhesion, Warranties, and Much More

As a follow-up to the CCRE legal seminar held in March 2012—which I attended and wrote about in *Autobody News* (search “CCRE” at autobodynews.com)—the Pennsylvania Collision Trade Guild (PCTG) hosted the Coalition for Collision Repair Excellence for the second event in this series of seminars.

CCRE's 2012 Fall Seminar was held Friday and Saturday, September 21–22 at the Airport Embassy Suites in Philadelphia, PA. PCTG decided to host CCRE again due to the overwhelmingly positive responses they received on the 2012 Spring Seminar. An audience of nearly 50 came to Philadelphia from as far away as Alaska.



Steve Behrendt addresses the contract of adhesion

Attorneys **Erica Eversman** and **John Parese** joined the CCRE's legal seminar as featured speakers to share their legal expertise on the collision repair industry.

In his welcome and introduction speech, **Steve Behrendt**, president of PCTG and CCRE Board Member, addressed the importance of understanding *adhesion*, or more specifically, an *adhesion contract*. [Editor's note: An adhesion contract is one which is imbalanced in favor of one party over the other so that there is a strong likelihood it was not freely negotiated.]

Example: a rich landlord dealing with a poor tenant who has no other options and must accept all terms of a lease, no matter how restrictive or burdensome, because the tenant cannot afford to move. An adhesion contract can give a “little guy” the opportunity

to claim in court that the contract with the “big shot” is invalid. This doctrine should be used and applied more often, but the same big guy-little guy inequity may apply in the ability to afford a trial or find and pay a resourceful lawyer.]

Behrendt explained how a relationship with a third party (i.e., the insurance company) triggers a legal and binding contract which exploits a shop's ability to do business individually. Behrendt said that avoiding adhesion will help collision repair shops operate independently by providing them with the freedom to be paid based on the services performed as adhesion can influence a court's decision against a shop as it regards their relationship with a third party. In contrast, an authorization to repair form protects a shop's independence, their relationship with the customer, and their need to make a profit by distancing them from the insurance company. Through adhesion, third parties try to make the reserve estimate part of a shop's repair process by utilizing their estimate as a method of payment, but the estimate is only the third party's guess at the cost of the repair, not a blueprint for the repair.

The insurance company's estimate is created to verify that there is a legitimate claim and to set a claims reserve which is money earmarked for eventual claim payment. Shops need to find a way to eliminate this estimate in order to prevent insurance companies from controlling their business. One way to do this is by stamping all third party documents as “for informational purposes only.” This preserves the shop's independence by avoiding adhesion and any type of agreed-price scenario. It also allows shops to distance their business from a third party's control and behavior. Shops should prepare and work off of their own repair blueprint and analysis, and this is what should be used for the repair and the final invoice. Shops should properly prepare and close their final invoice based on the shop's job costing and gross profit, handing the invoice to the insurance company for final payment.

Moving from a collision repairer's point of view to a legal point

of view, attorney Erica Eversman took the floor to discuss repair contracts and authorization to repair which was very similar to the presentation she gave in



Attorneys Erica Eversman and John Parese

March of this year. Discussing the differences between the two contracts in a non-DRP relationship compared to the three contracts that make up a DRP relationship, she noted that “insurers like to think they're in charge of everything. They want all of the control and none of the responsibility.” In a DRP relationship, two informed parties

have an agreement about how to satisfy the obligations of their individual contracts to the customer, usually before a collision actually occurs. In the current aberration for individual shops, the insurer acts as if the repairer has duties to this third party which is why it is so important for shops to utilize a written repair contract. A classic example of a contract of adhesion is found in insurance policies as one party has more power than the other since consumers are legally required to have auto insurance. This is the only industry where consumers do not really have the ability to negotiate their contracts or even see the terms before they purchase it, which is why this binding contract can be cancelled.

In the relationship between a repairer and a consumer, the repairer's responsibility is to inform the customer, acquire authorization and repair the vehicle, while the consumer should receive information, approve the re-

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pairs and pay. Repairers have no right to expect payment from the insurance company as they should expect payment from the consumer, but though it's important to provide customers with an estimate of the repair cost, consumers are more concerned with how their car gets fixed since the insurance company actually pays the bill. This is why Erica recommends getting the customer's informed consent after the repair process has been fully explained to them so they understand what is going on with their vehicle.

A repair contract should define the customer, the shop's duties, what type of parts will be used, the damages to the vehicle and the repairer's professional judgment. A wise inclusion is the right to expectancy damages which will entitle the collision shop to get paid for costs accrued if the customer opts to take their car to a different shop. This also includes reimbursement for loss of work if the insurance company persuades the consumer to have their vehicle repaired at a DRP shop. Additionally, this encompasses the preparations that the shop has made, such as ordering parts and allocating time and personnel. This can also include opportunity cost, defined as potential business that may have been turned away because the shop's resources had already been dedicated. This will help to establish recovery from tortious interference. The signed contract ensures that the shop has the right to sue for expectancy damages.

The repair contract is designed to emphasize that the repairer is the professional and that repairs are based on the repairer's professional judgment. When there is a conflict in the opinions of the repairer and the insurance company regarding what is right to do, the repairer's opinion should take precedence because they are the professional. Erica believes this is important for developing a better public relations standing regarding how complicated collision work is since there are many variables that come into play; unfortunately, the collision industry is losing the public relations war because insurance companies spend a lot of money advertising about how they repair vehicles, leaving consumers with the misconception that their insurance company will fix their car, through the insurer only pays for the repair.

Emphasizing that shops "must remember that the insurance company is not their customer," Erica reiterated her lesson from March about the three

options that insurers have when handling a claim and how a DRP relationship allows them to control the repair without accepting liability. She discussed the usefulness of addressing *replevin* in the repair contract. Replevin, sometimes known as "claim and de-



Truman, Steve, Rick, Mike and Tony of CCRE

livery," is a legal remedy which allows the recovery of goods unlawfully withheld from possession via a legal process in which a court may require a defendant to return specific goods to the plaintiff at the outset of the action (i.e. before judgment). Replevin grants the shop the right to a possessory lien, allowing them to retain the vehicle until payment is received. Erica explained the benefits of an Assignment of Proceeds and other documents.

Another useful document is the *Acknowledgement Terminating Repair Contract and Releasing of Motor Vehicle* which is designed to protect collision shops by giving them the chance to retain business by informing the customer of what is going on and by improving a shop's chances should they decide to take the case to court. A *Customer Notice of Insurance Deficiency* informs the customer of their insurance company's refusal to fully pay to properly and safely repair the vehicle. This helps in the public relations battle as it shows the shop's refusal to breach their repair contract by adhering to the insurer's pressure to provide an unsafe repair.

A *Customer Notice of Insurer Delay* keeps the customer informed regarding their repair by alerting them to delays caused by their insurance company. Shops can also provide their customers with the *Vehicle Damage Insurance Election* form which they can send to their insurer demanding to know how they plan to pay for the repair. Though it is highly unlikely that any insurance company will sign this document, the insured has the right to demand a response from their insurance provider. A *Notice of Additional Cost* can also be sent to the insurance company to inform them of additional

costs incurred during the repair. This document helps independent collision shops avoid third party interference by refusing to permit the insurer to cause inefficiency and by giving the impression that the insurer must respond to the shop, reiterating the point that the

repairer is in control of the repair.

Erica Eversman also recommended providing consumers with a Parts Notice and Authorization document, which she plans to publish on autoepi.org for distribution, in order to help consumers understand the various types of parts that may be used to repair their vehicle. She ended this presentation by repeating her opinion of the dangers of aftermarket and salvage parts and discussing what shops should and should not warrant, em-

phasizing that shops should not offer a warranty on anything other than their workmanship.

Next, **John Parese, Esq.**, discussed the definition and uses of an assignment. An assignment is a transfer of property or another right from one person to another which confers a complete and present right in the subject matter. As a contract between these two parties, an assignment is subject to contract law and interpretation. Causes of action issuing from a wrong which causes injury to the property or from tort by which the property is diminished or damaged are generally assignable, and a party may assign their right to recover damages to the property without conveying title to the property. A valid assignment requires clear evidence of the intent to transfer rights and a description of the subject matter of the assignment; it must be clear and unequivocal, and it must be noticed to the obligor. While there are no formal requirements for an assignment, the language used must indicate the owner's intention to transfer the claim.

Valuable consideration is essential to support an assignment, and though the word "consideration" does not nec-

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essarily have to appear on the assignment, Parese recommends it. An assignment requires an exchange, such as allowing a customer to take their vehicle without the shop receiving payment if they sign the assignment. An *Assignment for Money Due* should identify the customer, facility, vehicle and loss. The document does not need to be notarized and should be enforceable without defects. Parese also advises shops to have all customers sign a repair contract. Parese ended his presentation by using clips from “Hot Coffee” and several insurance commercials to reiterate his message about public relations from the March seminar.

Tony Lombardozzi, President of CCRE, followed with a brief talk on the need to change the mindset of collision repairers and to send a message of whose business the insurer is visiting. In the collision industry, “we operate every day on fear”, Lombardozzi claimed, continuing to elaborate that shops fear losing business and being subjected to steering.

On Saturday, John Parese began the seminar with a presentation entitled *Ten Steps to Consider When Filing a Lawsuit*. The first step is to provide proper documentation, including a signed repair contract and the final invoice. Noting that “the insurance company doesn’t like being sued,” Parese reminded attendees that the insurer’s estimate is just a guess on the likely damages and is not reliable. The second step is to verify that all work was completed and billed correctly. Because lawsuits result in hyper scrutiny on both ends, it is imperative that the repairer did everything they claim they did during the vehicle’s repair.

Step 3 requires the use of a proper Assignment of Claim which will allow the shop to stand in the customer’s shoes to acquire payment. The fourth step involves choosing a reasonable customer, and it is important to lay the proper foundation of information as surprises in the courtroom are a bad idea. The case a shop chooses to fight in court should involve a cooperative and informed consumer.

Step 5 is to establish liability with the information to prove the basis of the claim. Parese notes that “you have to establish negligence in order to prove liability”, but on short pay cases, it can be argued that the insurance company

accepted liability by paying on the damages, even if they did not pay in full.

Step 6 requires securing all necessary documents, including the police report, proof of liability and all information about the parties involved. Providing all of this will make the process as easy as possible on the lawyer. While shops may not win every single case, each small victory affects business since it will dissuade insurance adjusters from harassing the shop. The seventh step involves finding an attorney to take the case, and Parese notes that small cases are often combined into one larger case. Step 8 is to create a labor rate survey by surveying 12–20 local shops to disprove the insurance company’s common claim that a shop has the highest labor rates in the area. This survey can help justify the claim that your rates are reasonable, and the goal is for your posted rates to fall somewhere in the middle of the shops included in the survey; however, it is important not to share this information to avoid accusations of conspiring with others to increase labor rates.

Step 9 is to provide several examples of being paid your labor rate, proving your posted rate is reasonable and fair. This is critical as the insurer should be paying the same rate as a customer off the street. The tenth step is to stamp all documents with “accepted under protest as partial payment only for property damage.” Repairers should appear at court dressed professionally and with a business-like approach in order to show the judge that they are taking the case seriously, and this will help overturn preconceived misconceptions and stereotypes about the industry as well as to show that the repairer is not trying to take advantage of anyone but is trying to stop getting taken advantage of.

Parese ended his presentation by discussing tortious interference with the repair contract and how to prove the insurance company intentionally sought to interfere with the contract between the repairer and the customer. In order to show that the defendant’s conduct is tortious, the plaintiff must prove improper motive and willful malice. This sends the message that the insurer is not above the law and that they can and will be sued for refusal to comply with the Code of Ethics and other laws.

Once Parese concluded, **Kurt Lundgren**, an attorney in the medical insurance industry, presented about the similarities between the automotive

and medical insurance industries and their issues. He noted that it is naive for collision repairers to believe they are immune to the insurance companies, but repairers are in the business of fixing vehicles and providing customer service to make money, so they should get to the bill when dealing with insurers. He pointed out that “this is all a game for the insurance company, but this isn’t a game for you guys.”

Lundgren noted that in both the auto and medical insurance industries, proof is required to prosecute, but he urged repairers to recognize and emphasize that they are doing this to help the consumer. He also praised attendees for being on the right track about how they deal with insurers, agreeing that shops should not negotiate with insurance companies.

Tony Lombardozzi led a discussion about the audience’s experiences. He urged attendees not to put anything on paper or online that they are not prepared to defend in court. Though he admits that the industry can be depressing at times, he insists that repairers can have fun with fighting the insurers, as well as making money, because it is exciting to make the insurance companies justify their actions. He believes that

shops “need to see that the process works and they can have fun with it.”

Discussing how insurers have their own versions of estimating software that provides a lower estimate than the shop’s version, Tony noted that everything insurers do is based on this estimate, so repairers need to take that tool out of their hands by removing the insurance company’s estimate from the equation. Tony added that the insurers “constantly have their hand in our pocket... and come at us in so many ways that it’s hard to keep up with them.”

Tony noted that the insurance companies have spent 30 years brainwashing repairers to believe they are the insurer’s servants, but in reality, collision shops only need to allow adjusters to look at the vehicle, complete their paperwork and go home. Erica chimed in, encouraging attendees to “make it painful for [the insurance companies] by doing it your way, the right way... make it clear to them that you’re not going to be the one who changes.” She went on to state that insurance companies have no right to expect collision repairers to stop their process just because the insurer has adopted another bizarre practice. In-



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insurance companies are great at propaganda and brainwashing, but when they try to dictate what a shop can and cannot do, it is necessary to ask why or who says so. Erica stressed, "they can't make you do anything because you don't work for them."

For the final segment, Tony introduced the Stump the Layers panel which consisted of Erica Eversman, John Parese and Kurt Lundgren. Responding to questions from the audience, the three attorneys and the seminar attendees discussed topics such as liens, total loss, consumer fraud, repair contracts, unfair claims, how to handle estimates, supplementals, court cases, invoices, short pay, explaining things to customers, codes of ethics and bringing claims. As he wrapped the event up, Tony explained that he wants everyone to understand that collision shops do not need to keep operating the way the insurance companies want them to. His goal is to show independent collision shops how to successfully operate their shops without outside influence by focusing on the legal aspects of running their business without insurer interference.

For more information contact: CCRE at theCCRE.com.

Collision Repair Industry Loses a Legend and a Friend; McBroom Passed Away Oct. 11

Dave McBroom

February 16, 1945 – October 11, 2012

The collision repair industry is mourning the loss of **Dave McBroom**, president of the Florida Autobody Collision Alliance, and friend, brother and mentor to countless people whose lives he touched.

William David "Dave" McBroom passed away peacefully on October 11, 2012 in Jacksonville, FL, at the age of 67. A native of Cookeville, TN, and a graduate of the University of Tennessee, Dave served in the U.S. Army for 21 years and was a decorated helicopter pilot in Vietnam before retiring as a Colonel.

Dave was also president of *Sunbeam Autobody* in Jacksonville and was committed to raising the professional image of the collision repair industry. Through Dave's leadership and passion, the Florida Autobody Collision Alliance was formed and grew from three body shop owners having coffee once a month to more than 400 members in six chapters throughout the state.

"FACA's members and board of directors grieve Dave's untimely death and extend our deepest condolences to his wife Terri and his entire family,"

said **Cathy Mills**, FACA's executive director. "Dave was an absolute role model—a caring friend, a supportive husband and loving father and grandfather, and a passionate industry advocate. Our lives will be forever changed with his passing."

"I have lost a very dear friend," said **Chuck Sulkala**, executive director of the National Auto Body Council. "Dave's ever present greeting of 'what can I do to help you today' will be my pleasure to ask of others I now meet. I am sad beyond belief and he will be missed deeply. May Dave's legacy be with us forever."

"Dave McBroom was an amazing, inspiring individual," shared SCRS executive director **Aaron Schulenburg**. "His membership, his peers, and his friends flocked to him. He had a lifetime of well earned experiences that gave him the apt ability to tell an inspiring tale on just about any subject matter, and a compelling kindness in his disposition that offered a charisma held by few. His passion for

the industry, for what is right, and for living life to its fullest was unparalleled and it is an immeasurable loss for all of us."

Dave leaves behind his wife **Terese "Terri" Walker McBroom**, sister Marilyn Joyce "Joby" Cloutiaux; children Kevin McBroom (Pam) of St. Augustine, FL, Stephanie Nelson (John) of Cookeville, TN and Amy Helms (Alan) of South Carolina; niece Shayne Harris (Kirk), nephew Robin Trousdale (Sonia); grandniece and nephew Ashley Pelfrey and Clayton Hopper. As "Pap," he will be missed by his adoring grandchildren Andrew, Isaac, Kingston, Winston, Ally, Abby, Lily, Lyla, William, Ashlyn, and Lexy.

Funeral services were held Oct. 18 in the Chapel of Hardage-Giddens Funeral Home of Mandarin. Interment will be held at a later date in Double Springs Cemetery of Cookeville, TN.

In lieu of flowers, the family requests donations be made in memory of Dave McBroom to Hubbard House Women's Shelter, Attn: Development, P.O. Box 4909, Jacksonville, FL 32201, or Concerns of Police Survivors (C.O.P.S) 5530 Beach Blvd, Jacksonville, FL 32207.



Dave McBroom



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