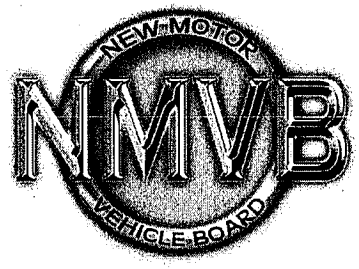
STATE OF CALIFORNIA




# MEMO

**To : RAMON ALVAREZ C., PRESIDENT** **Date: February 21, 2012**

**From : WILLIAM G. BRENNAN**
**ROBIN PARKER**

**Subject: APPOINTMENT OF BOARD MEMBER DESIGNEE IN COMPLIANCE WITH THE BOARD'S 1997 "REVISED BOARD POLICY REGARDING REPRESENTATION IN COURT ACTIONS", BY BOARD PRESIDENT**

In response to the 1996 Performance Audit conducted by Business, Transportation & Housing Agency, the former Judicial Policies and Procedures Committee (members Livingston and Skobin) developed the initial policy regarding representation in court actions that was adopted by the Board at its October 22, 1996, General Meeting. One aspect of the initial policy concerning the Office of the Attorney General filing a "perfunctory answer with the court" was problematic as the Attorney General's Office was reluctant to make any appearance on the Board's behalf without thoroughly reviewing the underlying action. At its February 12, 1997, General Meeting, the Board adopted the attached "Revised Board Policy Regarding Representation in Court Actions" (hereinafter collectively referred to as "Policy").

According to the Policy, the Board, as a general rule, should not substantively participate in mandamus actions in which a Board decision is challenged. The Policy specifically provides that:

> When the Board renders a final decision which is challenged by way of a petition for writ of administrative mandamus, and an important state interest is not raised in the mandamus proceeding, then the Board shall notify the parties to the proceeding (the petitioner and the real party in interest) of the Board's policy not to appear in the mandamus action, and request that the parties so notify the court. As such, unless the court specifically requests otherwise, the Board would not file any pleadings in the court action, which would obviate the necessity of involvement by the office of the Attorney General. (See attached Revised Policy, paragraph 2).
>
> However, in mandamus actions in which an important state issue is raised, the Board would have the option to participate by the filing of pleadings opposing the petition and by presenting oral arguments on only those limited issues affecting the state interest...In such situations, prior to Board

> participation, the matter would be presented to the full Board for review at a regularly scheduled meeting of the Board. In the absence of sufficient time for consideration at a noticed Board meeting, the President, or a Board member designated by the President, can authorize the filing of appropriate pleadings in opposition to the petition and/or the presentation of oral arguments. When this occurs, a copy of the petition and supporting documents would be mailed to each Board member with an indication that the President, or his designee, has authorized Board participation. Any Board member who objects to Board participation would then immediately so notify staff, and the matter would be scheduled for discussion at either the next general meeting of the Board or, if three public members request, then at a special meeting of the Board...Any appearance by the Board would be made by the office of the Attorney General or, with the consent of the Attorney General, by the Board's own counsel... (See attached Policy, paragraph 4, pages 2-3).

The above policy was modified in 2008 to provide that when a Dealer Member is President, only those matters in which a Dealer Member would be disqualified from having heard in the first place are delegated. Furthermore, if you have a Dealer Member as Board President, and a Public Member as Vice President, then the designation should automatically go to the Vice President.

The designation of a Board Member by the Board President consistent with this Policy is being agendized for the March 20, 2012, General Meeting in Sacramento.

If you have any questions, please do not hesitate to contact me at (916) 324-6197 or Robin at (916) 323-1536.

Attachments

STATE OF CALIFORNIA

# MEMO

To : ALL BOARD MEMBERS Date: January 29, 1997

From : NEW MOTOR VEHICLE BOARD
Judicial Policies and Procedures Committee
(Committee members: Dan Livingston and Alan Skobin)
(916) 445-2080

Subject: REVISED BOARD POLICY REGARDING REPRESENTATION IN COURT ACTIONS

At its General Meeting of October 22, 1996, the members of the Board adopted a policy regarding legal representation of the Board and Board appearances in court proceedings. A copy of the memorandum which sets forth the Board's policy in this regard is attached hereto.

Since the time that the Board's policy has been adopted and implemented, it has been determined that one aspect of this policy has not worked in the manner that we had hoped. Specifically, the policy requires that, in mandamus actions in which an important state issue is **not** raised, the office of the Attorney General would file a perfunctory answer with the court, and advise the court of the Board's policy not to file a memorandum of points and authorities in opposition to the petition or to present oral arguments on the issues raised. The problem that has arisen is the Attorney General's understandable reluctance to make any appearance on the Board's behalf without thoroughly reviewing the pleadings and Board decision in the underlying action to determine if any significant policy or legal issues are raised by the mandamus action. Accordingly, it is recommended that the Board's policy in this regard be revised as follows. When the Board renders a final decision which is challenged by way of a petition for writ of administrative mandamus, and an important state interest is not raised in the mandamus proceeding, then the Board shall notify the parties to the proceeding (the petitioner and real party in interest) of the Board's policy not to appear in the mandamus action, and request that the parties so notify the court. As such, unless the court specifically requests otherwise, the Board would not file any pleadings in the court action, which would obviate the necessity of involvement by the office of the Attorney General. In all other respects, the policy regarding legal representation of the Board and Board appearances in court proceedings, as set forth in the attached memorandum, would remain unchanged.

This matter will be discussed at the General Meeting of the Board scheduled for February 12, 1997. Your interest in this matter is greatly appreciated.

STATE OF CALIFORNIA

# MEMO

To : ALL BOARD MEMBERS Date: October 17, 1996

From : NEW MOTOR VEHICLE BOARD
Judicial Policies and Procedures Committee
(Committee members: Dan Livingston and Alan Skobin)
(916) 445-2080

Subject: BOARD POLICY REGARDING REPRESENTATION IN COURT ACTIONS

This memorandum is in reference to the agenda item discussed at the last Board meeting, specifically the legal representation of the Board in court proceedings. The relevant issues involve the question as to when and to what extent the Board should participate in mandamus actions in which a Board decision is challenged, as well as whether Board staff or the Office of the Attorney General should represent the Board in those actions in which the Board participates[1]. The members of the Board referred this matter to the Board's Judicial Policies and Procedures Committee (the "Committee") for further evaluation and recommendation back to the full Board for consideration. The Committee has thoroughly reviewed the law and policies regarding these issues, and the following recommendations are a result of this analysis.

Government Code sections 11042 and 11043 require that all state agencies utilize the services of the Office of the Attorney General in all legal matters in which the agency is involved. Government Code section 11040 provides that the agency may employ independent legal counsel only after having obtained the written consent of the Attorney General. Section 11041 enumerates several agencies which are exempt from these requirements. The Board is not contained in the list of exempted agencies.

The Committee has reviewed and discussed the circumstances relating to mandamus actions in which the Board may be involved. There are often two distinct phases to the proceedings. In the first phase, the party challenging the decision would seek a court order staying the effect of the Board decision. This would either be done ex parte (with as little as 4 hours notice to the Board), or by noticed motion giving the Board 10 to 15 days notice. In the past, staff of the Board has appeared at the ex parte matters because of the difficulty with getting a Deputy Attorney General assigned to the matter and/or knowledgeable about the case with such short notice. However, as a result of the state of the law

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[1] Pursuant to Vehicle Code sections 3058 and 3068, as well as Code of Civil Procedure section 1094.5, any party to a final decision of the Board may challenge the Board decision by filing a petition for writ of administrative mandamus in the superior court.

regarding the Office of the Attorney General discussed above, it is the Committee's position that, in all future ex parte matters, that staff contact the Attorney General's office to apprise them of the pendency of the ex parte proceedings but to take no further action in representing the Board before the court without the consent of the Attorney General.

The second phase of the proceedings would be the briefing and hearing on the merits of the mandamus actions, ie. whether the Board's decision was supported by substantial evidence and whether the Board's actions were proper procedurally. In the past, the Attorney General's office has represented the Board in these matters, and the Board's staff has provided assistance by way of research and drafting of pleadings, as well support in court. The Committee has reviewed this practice and recommends that it be retained in all future cases, subject to the limitations below.

The second issue which was reviewed by the Committee pertains to when, and to what extent, the Board should participate in mandamus actions challenging a Board decision. An analogy was drawn between the Board and a civil action initiated and tried in the superior court. When the superior court renders a judgment in a civil action and a party files a petition for an extraordinary writ with the Court of Appeal, the superior court is named as the responding party, much the same as in those actions challenging a Board decision. The court, however, does not make an appearance in the writ proceeding before the Court of Appeal, but instead allows the real party in interest to present the relevant arguments to the appellate court supporting the actions taken by the superior court. The Committee has determined that this practice should be utilized by the Board and, as a result, recommends the following policy.

The Board, as a general rule, should not substantively participate in mandamus actions in which a Board decision is challenged. There are a number of sound reasons for such a policy. In most of the mandamus actions in which the Board is named as a respondent, the interests of both parties are adequately represented by their respective counsel. In addition, the appearance by the Board in such cases would lead to an unnecessary expenditure of state resources. Instead, the Attorney General (or Board attorneys, if permission is given by the Attorney General), should be requested to file only a perfunctory answer to the Petition for Writ of Administrative Mandamus, advising the court of the Board policy and that it is not appropriate for the Board to file a memorandum or points and authorities in opposition to the petition or to present oral arguments on the issues raised.

However, in mandamus actions in which an important state issue is raised, the Board would have the option to participate by the filing of pleadings opposing the petition and by presenting oral arguments on only those limited issues affecting the state interest. Examples of important state issues could include challenges to the jurisdiction of the Board, a decision which could affect future Board cases, unusual issues concerning the standard of review in the mandamus action, as well as serious matters of public safety. In such situations, prior to Board participation, the matter would be presented to the full Board for review at a regularly scheduled meeting of the Board. In the absence of sufficient time for consideration at a noticed Board meeting, the President, or a Board Member designated by the President, can authorize the filing of appropriate pleadings in opposition to the petition and/or the presentation of oral arguments. When this occurs, a copy of the petition and supporting documents would be mailed to each Board member with an indication that the President, or his designee, has authorized Board participation. Any Board member who objects to Board participation would then immediately so notify staff, and the matter would be scheduled for discussion at either the next general

meeting of the Board or, if three public members request, then at a special meeting of the Board. The same policy would apply to ex parte hearings for a stay of the Board's order, as well as law and motion proceedings in which a stay order is sought. In any event, any appearance by the Board would be made by the office of the Attorney General or, with the consent of the Attorney General, by the Board's own counsel.

The Committee has considered the various aspects regarding these issues, and believes that the policies, as set forth above, will ensure that the interests of the State and Board are adequately represented when appropriate.