

After receiving public comments, the New Motor Vehicle Board is proceeding with the text originally noticed for the 45-day comment period with several clarifying additions that were noticed during the 15-day comment period. All of the changes noticed during the 15-day comment period (June 17 through July 2, 2015) pertaining to misuses of the discovery process are being stricken. Since it is difficult to show these changes, a clean version follows.

The changes to the original text are illustrated in the following manner:

- Text proposed to be deleted for the 45-day comment period is displayed in ~~strikeout~~ type.
- Text proposed to be added for the 45-day comment period is displayed in underline type.
- Text proposed to be deleted for the 15-day comment period (June 17 through July 2, 2015) is displayed in ~~italicized double strikeout~~ type using quote marks.
- Text proposed to be added for the 15-day comment period (June 17 through July 2, 2015) is displayed in *italicized double underline* using quote marks.
- Text proposed to be deleted for the subsequent 15-day comment period is displayed in ~~bold, double strikeout~~ type using quote marks.
- Text proposed to be added for the subsequent 15-day comment period is displayed in **bold, double underline** using quote marks.

#### § 551.21. Sanctions - ~~Bad Faith Actions.~~

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are “*misuses of the discovery process*” “~~misuses of the discovery process~~”, frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, “party” or “representative of a party” includes, but is not limited to, a party’s officer, director, managing agent, dealer principal or the equivalent, or their attorney.

(a) The ALJ may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics” “*that are misuses of the discovery process*” “~~that are misuses of the discovery process~~” include, but are not limited to:” “~~the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order~~” “**the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order**”.

“(A) *Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;*

“(B) *Using a discovery method in a manner that does not comply with its specified procedures;*

“(C) *Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;*

(D) Failing to respond or to submit to an authorized method of discovery;  
(E) Making, without substantial justification, an unmeritorious objection to discovery.  
(F) Making an evasive response to discovery;  
(G) Disobeying a board order to provide discovery;  
(H) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery;  
(I) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.”

~~“(A) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery;~~  
~~(B) Using a discovery method in a manner that does not comply with its specified procedures;~~  
~~(C) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;~~  
~~(D) Failing to respond or to submit to an authorized method of discovery;~~  
~~(E) Making, without substantial justification, an unmeritorious objection to discovery.~~  
~~(F) Making an evasive response to discovery;~~  
~~(G) Disobeying a board order to provide discovery;~~  
~~(H) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery;~~  
~~(I) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.”~~

(2) "Fivolous" includes, but is not limited to means:  
(A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or  
(B) For the sole purpose of harassing an opposing party or counsel.  
(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.  
(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party’s representative, or both.  
(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party’s representative, or both.  
~~(b)~~ (e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party’s representative against whom sanctions are sought notice and an opportunity to be heard.  
(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

~~(c) (g)~~ Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence. Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

~~(d) (h)~~ A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions is shall not be considered by the board members and is final upon issuance by the ALJ.

~~(e) (i)~~ The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred "as a result of the misuse of the discovery process and also" "as a result of the misuse of the discovery process and also" in bringing and pursuing the motion. However, "payment of" attorney's fees and expenses will not be ordered if:

(1) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(2) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(3) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in "opposing the motion for sanctions as well as" bringing and pursuing the motion for ~~such~~ expenses and attorney's fees. However, "payment of" attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 2023.010, 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

## Clean Version of Proposed Revisions

### § 551.21. Sanctions.

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, "party" or "representative of a party" includes, but is not limited to, a party's officer, director, managing agent, dealer principal or the equivalent, or their attorney.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order.

(2) "Frivolous" includes, but is not limited to:

(A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.

(e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or documentary evidence presented.

(g) Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

(h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions shall not be considered by the board members and is final upon issuance by the ALJ.

(i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred in bringing and pursuing the motion. However, payment of attorney's fees and expenses will not be ordered if:

(1) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(2) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(3) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in opposing the motion for sanctions as well as bringing and pursuing the motion for expenses and attorney's fees. However, payment of attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 2023.010, 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.