having appeals attempt to develop facts? I know that
with business taxes that sometimes happens, the
conference holder tries to develop additional facts, but
isn't it more appropriate for FTB to do that?

MR. HELLER: It absolutely -- this is Bradley
Heller. In most of these cases it absolutely just
depends on the situation. And many times what we see in
income tax appeals is that the briefings seem to
diverge, and basically both people -- or the FTB and the
taxpayer are talking about stories that are somewhat
different, that have different legal approaches to how
the facts should be handled and cite different documents
as being operative and refer to different historical
facts occurring and people having said things, and
really it's something that just can't be resolved by
having FTB tell us what they still think is the
situation, since they've already briefed us on exactly
what they thought was the situation.

And for us to just request additional briefing,
which we basically do have authority to do right now,
still just gets us continuing, you know, responses of
the same material. Sometimes it improves, sometimes it
doesn't, but at the cost of additional time.

MS. MANDEL: This is Marcy. If the problem is
that we're getting two different stories, which sounds
like two different factual stories, and what are the
facts based on the evidence that's been presented, the
tax court on which I thought you had modeled -- tried to
model all your stuff, there's a requirement that the
parties stipulate to the facts to the greatest extent
possible, including the documents that come in.

And so if it's just that there are factual
disputes that you want some other staff person in
appeals to sit and listen to the two factual sides, hear
it orally so that maybe they make a decision -- you
know, say, well, you know, we think FTB's fact is right
and not -- you know, I mean, I don't know how -- in a
stipulation process years ago I think I tried to do
stipulations and it was, like, oh, we don't do that.

But if it's a factual issue, then that's, you know, one
thing.

If it's an interpretive issue, we both agree
that this is the document, this is the agreement, and
then they're arguing off of that as to what it means,
you know, legally, they're not going to agree on what it
means legally, because otherwise the case wouldn't be
before the Board. But if it's factual stuff that can be
resolved by stipulation, maybe we ought to be
encouraging stipulation. I don't know.

MR. LANGSTON: And, you know, in most cases we
try to point that out in our briefs. You know, we say
dhere are the facts at issue, here's what we disagree on,
dhere's what we don't know. But that is a possibility
dfor -- I'm still trying to get an idea behind, are we
talking about complex cases? Are we talking about
dsimple cases? Are we talking about unrepresented
taxpayers? Because in the complex cases, absolutely, it
would help to have a stipulation of facts. In the
dsimple cases, it's the facts. No one is worried about
dthe law. It's, where did the child live? When was this
dfiled? You know, did you reinvest your IRA? That kind
do of stuff that -- again, we try to point that out in our
dwritten submissions.

And in those cases, I mean, one of the issues
dalways is, well, how can we prove this? What evidence
dwould be appropriate?

So, I mean, I can see in cases where there was
dthat kind of factual dispute, where there isn't the best
evidence, but somebody wants to testify or, you know,
dsomehow prove something indirectly, that might be
appropriate not to bring before the full Board, but to
get resolved, you know, with the Board staff and our
dstaff and the taxpayer.

MR. HELLER: We're going to have to move on.

We've really got two whole articles to still cover, and
we have a half an hour to do that and --

MR. KOCH: One short comment, if I may? Al Koch. I'm surprised this is at the conclusion of briefing rather than at the beginning of briefing. That's all I can say.

MR. HELLER: I can understand that surprise. And actually, the Board staff does not have any information on an appeal until all the briefings have been filed.

MR. KOCH: On the FTB, I see.

MR. HELLER: Because we're just the Board and we're not in audit and we're not --

MR. FOSTER: In a business tax case there's a petition filed, and in an FTB case we have no record to work from.

MR. HELLER: It is a big distinction.

MS. RUWART: Any other big, distinctive comments that can't be submitted in writing?

MR. DAVIS: Just one other -- Ken Davis -- just one issue, and that's just, from what I understand, the length of time of this is going to be -- it may be substantial only because you've got the equivalent of a hearing officer and the procedures and then having a hearing. You've got a hearing officer preparing a D & R, then that goes to the Appeals Division, as I
understand it, and the Appeals Division has the
opportunity to modify or -- reject, modify, or amend the
D & R, and then it goes to the Board.

MS. RUWART: It takes a long time.

MS. PELLEGRINI: Just a real quick
clarification from a business tax standpoint. Case
management gets to have their appeals to schedule. It
could take anywhere, depending on the particular
district office the taxpayer wants it in, from a couple
of days to a year to get one scheduled, particularly if
it's in a very obscure place like Eureka or Redding or
something like that. If it's, like, Culver City or
something like that, they go down regularly. It's a
60-day notice. Then the appeals conference is held, and
then they get three months in which to write the D & R.
When that is completed, then it goes up to discussion
for hearing. So we are looking at a minimum of six
months away.

MS. RUWART: Okay. Section 4040(a),
Scheduling. This probably addresses at least, answers
some of the questions, Board proceedings, contact of
parties, schedules, the appeals conference, and talks
about the appeal held by various means, and scheduling.

Is there any substantial comment on these?

Okay. Subsection (b), the Notice?
Subsection (c), the Response to Notice and a
Waiver?

MR. PENILLA: This Jess Penilla.

I have a question, and maybe this has already
been answered. Once a decision and recommendation is
issued, will these decisions and recommendations be
available to the public or published as Board decisions
are?

MS. MANDEL: They're not Board decisions.

MR. HELLER: Definitely not.

MR. VINATIERI: D & Rs, on the business tax
side, are available on a redacted basis.

MR. PENILLA: That's why I'm asking the
question.

MR. HELLER: They could be released in a
redacted version pursuant to a Public Records Act
request. And they're obviously provided to the parties.
And they'd even become record of public, they will be
part of the record, for a Franchise Tax Board appeal if
they're adopted by the Board.

MR. PENILLA: I'm wondering about -- it's
always better to have items for taxpayers, and if these
issues are coming up, and there's been a decision
recommendation, it's always good to know that because
you may not need to pursue your case.
MR. BRADLEY HELLER: These would not be precedential, in terms of precedential value at all.

MR. PENILLA: I understand that.

MR. LANGSTON: Bruce Langston.

One comment on (c)(4). Are you sure that we want to, if the taxpayer doesn't respond, that FTB gets to go lobby the Board staff? I mean, I have a feeling FTB is pretty much always going to send someone, but I'm not sure if -- I mean, the way this reads, taxpayer doesn't show up, FTB staff gets to go and argue their case to the Board, which we currently do not do.

And I'm just pointing that out, that, you know, I'm a little surprised to see that.

MR. VINATIERI: This is Joe.

That's consistent with the way business tax appeals are.

MS. MANDEL: Except in business taxes appeals, the appeals division, so denominated, is actually part of Board staff as are the Board auditors who conducted the audit in the first place as is the Board the administrator of the tax.

So in the franchise tax context, it's, you know, completely different. The Board members all have their own personal staff to advise them of how they -- what the law is and the facts are on the cases.
coming before them. And if you do this process of
taking what is a fair and neutral presentation by the
appeals division to the Board members in hearing
summaries and set up an appeals conference procedure
where you expect that appeals hearing, that appeals
person, to actually conduct some kind of hearing
and reach a conclusion, not, you know, mutually making a
presentation to the Board, but actually of the party's
position, but actually making a conclusion, then, as
Bruce says, if the taxpayer who is the one who was filed
the appeal whose right it is to have the hearing and
everything else decides that they're not going to go sit
down and talk to this person from appeals, then you do
have -- and you have FTB come in, then it is -- that,
you know, falls into whatever happens on -- I mean, FTB
would view that, I guess, as sort of, you know, an
ex parte thing.

Of course if the rule provides for it, then
they can do it. He's just, you know, pointing --
pointing that out, that it's kind of the taxpayer's
right to have that kind of hearing.

MR. VINATIERI: It's a choice.

MR. FOSTER: This is Ian.

That point by Bruce and Marcy is very well
taken. And really more what I was envisioning, and I
hadn't thought about it when I thought about the
language, was FTB saying, oh, this is some simple
penalty case, I don't want to go to the expense of
sending an attorney to it, and the taxpayer can still
show up and make their case if they want to.

MR. HELLER: On the reverse side, I think we
were concerned that taxpayer control the ability for the
FTB to have an appeals conference. If the taxpayer
wants to prevent the FTB from meeting with us, they can
always just not show up or waive that conference and
then now we don't really achieve any of our goals. So
those were concerns, but we definitely weren't looking
at it from the perspective of maybe creating a potential
additional questionable communication.

MS. MANDEL: I guess it all depends on what is
the ultimate goal.

MR. HELLER: We'll definitely take that into
consideration.

MS. RUWART: Good comments.
Anything else on Subsection (c)?
Subsection (d), Rescheduling?
Subsection (e), the Conduct and Nature of the
Appeals Conference?

And, again, we will take comments after this.
This is not your last opportunity.
And Subsection (f), Submission of Additional Briefing and Evidence, basically the conference holder can ask for anything additional that the conference holder feels they need.

Moving on to Section 4041, the Decision and Recommendation. Ian, is there anything -- what would you like to highlight in this section?

MR. FOSTER: If you're familiar with the business taxes procedures, the D & Rs define very much the same -- includes basically the same kinds of requirements of what has to appear in the D & R. It's just rephrased a little bit to fit the FIT situation better. And it just clarifies, too, that if everybody waives their right to appeals conference and one is not held, then a D & R is still prepared based on the written --

MS. MANDEL: And this is a significant change from practice over the last, I don't know, since the early '90s. Very, very significant proposed change.

MS. RUWART: Do you want to say a little bit more about that?

MS. MANDEL: Well, because, as I said, what Appeals Division has been charged with for many, many years is for presenting the members with a fair and neutral presentation of the facts in the case and the
arguments made by both sides. And perhaps, you know, the -- how those have been done more recently may not, you know, include sufficient neutral -- sufficient analysis on a neutral basis of those arguments. They may have just been cut-and-paste jobs, and maybe they have not been serving their purpose as well. But to have an affirmative finding, if you will, by a lawyer in the appeals section is a radical change from what the Board has been doing.

MR. LANGSTON: But is that really different than the hearing summary we get now before hearings? I mean, we haven't talked about that yet, but . . .

MS. MANDEL: It would be.

MR. FOSTER: It's different from the hearing summaries. This is Ian again. Currently, in the vast majority of cases, we issue what we call summary decisions, which are findings --

MS. MANDEL: Those are where people have -- right -- those are where people have waived their hearing. Those are where people have waived their hearing, where the Board has taken a case under submission and it comes back at a later date on a nonappearance calendar. And in some rare instances, in the latter situation, the Board has actually said, you know, you don't need to prepare anything. We just need
to think about it further.

But for cases where there is an oral hearing before the Board, this would be a radical departure from what has been the practice, so that the hearing summary would now be something where you actually have a staff lawyer for the Board making a -- I don't know what to call it -- making an interim decision, if you will.

MS. RUWART: Thanks. I just wanted to repeat that for the -- to make it with that section.

That said, we've had the global comments about the decision and recommendation. Is there anything on subsection (a) that just requires the Appeals Division to prepare the D & R? Subsection (b) provides, if no appeals conference, what do we do? Subsection (c) is the contents of the decision and recommendation. And aside from the substantive issues that Marcy just said, is there anything --

MR. SMITH: One quick comment on (c). Is there, like, a section for finding of fact, where the hearing officer is actually going to be the finder of fact, and if there's a dispute, a factual dispute, they're going to come down one way or the other on a factual dispute?

MR. FOSTER: Yeah. I think we can envision there being findings of fact. I guess it wasn't phrased
that way, but . . .

    MS. MANDEL: The issue being legal or factual; is that your understanding?
    MR. FOSTER: Yes.
    MR. KOCH: Al Koch. I wonder if this might work better if there wasn't a recommendation and decision, and instead of that, you have what would be an expanded summary of the case that would contain agreed facts, contested facts, points of difference on the law, and just lay out the case objectively for Board members, subject to objection by either party if they didn't like that summary or they disagreed with some part of that summary, rather than having either side feel that, uh-oh, here we're going in with the decision-maker, the adjudicating agency already against us.

    I think if I were a party that were involved in that, I would feel that the objectivity of the Board member decision had been prejudiced. And I think it's -- I don't think it's really helpful in that respect to the whole process. But I do think there's a function that I see you reaching for that might be appropriate, because the hearings I've been participating in on local tax allocations all involve D & Rs. And, frankly, there hasn't been a lot of factual contest over those situations. And we only had
a few hearings. Probably will be.

    But I just -- I feel that if you had a really
3    objective, full statement of the case in summary form,
4    that that would certainly make me feel that the
5    adjudicating agency is objective rather than
6    unobjective, which I think you want.
7
8    MS. RUWART: Okay.
9
10    MR. FOSTER: If I could ask clarification, Al,
11    would you say that generally you would prefer more of an
12    idea along the lines of a prehearing conference where,
13    just in the cases where it goes to Board hearing, that
14    there's a conference, and then out of that comes more of
15    a detailed expanded hearing summary that --
16
17    MR. KOCH: Yes.
18
19    MR. FOSTER: -- tries to resolve a lot of
20    outstanding issues before it goes to --
21
22    MR. KOCH: Yes. And I would make that summary
23    fully available to both sides so that they could then
24    express written disagreement in advance of the hearing.
25
27    Very good comments.
28
29    MS. CROCETTE: I'm sorry, Carole. This is
30    Sabina Crocette. I don't have a problem with the format
31    we have now. That's why the Board members have their
32    own staff do a thorough review. And they usually -- you
know, they do know that that is an argument and that is
an opinion, and that's what they are there for, to vet
whether or not they agree with that, to ask questions,
et cetera, so I don't think that necessarily changing
the format is going to get at another answer. That's
just my opinion.

MS. RUWART: So, in other words, the fact that
a D & R reaches a conclusion you don't think unduly
prejudices the Board one way or the other?

MS. CROCETTE: It's my opinion that the Board
members have their own staff, and they don't just go,
oh, okay, well, that's okay, check, check, check. I
mean, they do if -- if it doesn't sound right to you,
you make a call, you check on it.

So I'm just saying that that's an opinion.

This is just another -- from reading them from that
side, I don't think that they preclude any further
analysis or you just automatically agree because someone
else said it.

MS. RUWART: Okay. Thank you. That's a
valuable perspective.

Moving on to Section 4042, the Board hearing
details. Is there anything significant here, Ian? Or
is this part of consolidation and reorganization?

MR. FOSTER: Yeah. This is -- I mean, it takes
a lot of the provisions that were in the prior version
that we posted in September and just sort of reorganized
it in a way that makes it make more sense in the context
of appeals conferences.

MS. RUWART: So subsection (a), it's the time
and manner of making a written request for an oral
hearing. Any comments on that?

MS. BORGMAN: Well, we appreciate the right to
request an oral hearing.

MS. RUWART: I see.

MS. MANDEL: Yes. Right.

MS. RUWART: Subsection (b), denial of request
for an oral hearing. And this goes back to the waiver
issue of, you know, what is one of the potential
consequences of waiving the appearance.

Subsection (c)?

MS. MANDEL: Wait a minute. Wait a minute.

So in (a), and the reason you'd get, would get
the right, is because of course it's only appeals staff.
But in (b), then, if someone said that's okay, do the
appeals conference on the written record, then they have
no right?

MR. LANGSTON: We're talking about the hearing
before the Board. This is 4042 we're talking about.

MS. MANDEL: Right, 4042, but in (b) it says,
you -- if -- if -- if you -- if at the D & R it comes
out and you say, "I want a hearing before the Board.
What did this guy write? I want a hearing before the
Board." (b) says, you don't get that hearing before the
Board if you waived your right to show up at the appeals
conference.

MR. VINATIERI: Well, small business -- small
tax -- this is Joe.

MR. FOSTER: It's both to clarify -- well,
first of all, it's clarifying the small tax and HRA
cases as we talked about earlier.

MS. MANDEL: Right.

MR. FOSTER: It also clarifies that regardless
of what kind of case we're talking about, if you waive
an appeals conference, you don't challenge the
D & R -- and here's the reason for that. It's because a
lot of the reasons for having the appeals conference in
the first place are defeated if people don't show up and
go straight to the Board anyway.

MR. HELLER: So the problem is then
transferred.

MR. FOSTER: Then the appeals division hasn't
been able to dig into the case, get more issues resolved
or anything like that, then there's no point in having
the appeals conference.
MS. MANDEL: So if -- so if a taxpayer thinks
he's made an adequate case in writing, doesn't want to
go to the expense of showing up at an appeals conference
or paying his representative to go to an appeals
conference because they feel pretty good that only a
fool would conclude against them having read their
papers, and then the fool concludes against them having
read their papers, then he again has no right to a
hearing.

MR. FOSTER: Then the right is to file a
petition for rehearing. And that is essentially the
same, substantively that is the same as it works right
now, where a taxpayer says, I have done a great job on
my written briefing, and only a fool would rule against
me, and I waive my right to oral hearing. Then the
summary decision comes out that says, no, you lose.
It's the same way it works right now.

MS. MANDEL: All right, I understand that, but
here again it's the -- it's an attorney in the appeals
division rather than the Board.

MR. FOSTER: Well, the Board still has to adopt
the D & R just like they have to adopt a summary
decision.

MR. LANGSTON: Would you be happier if this
last sentence about they may in their discretion if
there was a procedure for --

    MS. MANDEL: Well, that, they don't want to put
a procedure for the Board in the rules.

    MR. LANGSTON: How is the Board going to order
it?

    MS. MANDEL: That was my question before.
Typically now all these summary decisions, for example,
go on a, you know, they go on a nonappearance calendar,
and then if a Board member, for whatever reason, whether
it's required to be pulled off a consent calendar
because of a Kopp Act type issue or because the Board
member has a question and wants to talk to staff about
it, or, you know, because you don't want to adopt that
decision for whatever other reason you might have, it
almost seems like that would be the time.

    And we get a long -- I mean, those
nonappearance calendars are very, very long, so you
would have to not only look at it to say, I agree or
don't agree with the summary decision, all you get is
that summary decision, you would have to conclude from
reading whatever they presented in this D & R that you
think an oral hearing would be useful or you want to
have an oral hearing, which is different than just
deciding that you want to pull it off consent and when
it comes back on an adjudicatory nonappearance, make a
pitch for reaching a different conclusion.

And there's no particular way for -- you know, then our Board office is going to get a bunch of sort of calls and contacts about, you know, please, please -- I mean, I just sort of wonder how it's all going to play out from a practical standpoint.

MS. PELLEGRINI: This is Deborah Pellegrini.

Because this does depart from our present procedures because our present procedures is up to the day, the day before the hearing, if you're on a nonappearance calendar, you say, no, I want an oral hearing, we'll give you an oral hearing.

MS. RUWART: Okay. Any other questions on (a) and (b), taken together?

Okay. Ian, could you just briefly explain (c), unless it was transported over from something else.

MR. FOSTER: (c) is -- I don't remember how it was numbered before, but it was -- it's existing practice and it was in the prior order.

MR. LANGSTON: One comment I had was, you know, in a lot of innocent spouse cases, there might not be a court order but the parties really would prefer not to have it together, so maybe soften that a little bit to let the taxpayers, you know, not have to deal with each other.
MS. MANDEL: Not have to be in the room at the same time.

MR. FOSTER: Our previous practice is, and I imagine it would continue is to say, okay, you can have it at 9:00, and you can have it at 10:00. That's basically what we do now, is shuffle one person out of the room.

MS. BORGMAN: But in sub (b) you said, "There shall be one oral hearing."

MR. LANGSTON: Maybe let -- maybe just expand it, the court order, to good cause or something like that.

MS. RUWART: Yeah, Court will reasonably order it if they were before them.

Subsection (d), this is the appeals division preparing the hearing summary. Is everybody clear on that, what document it is and how that relates?

MR. DAVIS: This is Ken Davis.

I'm not, because -- Ian, if you could clarify, because you have dropped out the section on hearing summary in the old, and so we've got -- we're in the D & R stage. I thought the Board is going to be approving or considering the D & R.

MR. FOSTER: Only if no hearing is requested.

MS. MANDEL: Can I make a suggestion? This is
Marcy.

There are a lot of people who have experience with this in tax cases where we have the D & R and then there's actually a hearing summary that's prepared for the Board meeting. The Franchise Tax Board has no experience with that. Can you get them a redacted copy of a D & R and a hearing summary? Because what the hearing -- because that's what you're modeling this on.

And the hearing summary for business tax cases was started because the D & R, there may be ten issues that the taxpayer brought and ultimately things got resolved, and for a hearing there's only two. And Board members and their staff used to have to read through the whole D & R and then figure out what was left to decide.

And so the hearing summary now just is very short and has, you know, issue No. 1 is what is blah-dee-blah, and then there's a very, you know, crisp one or two paragraphs about that issue, and then the next issue, so it's kind of like a shrunken of the essence of the D & R.

But they're not going to understand what the issue is. They can understand it better, I think, if you give them a copy so they can see kind of what happens in the other.

MR. DAVIS: That would be very helpful. Thank
you.

MS. RUWART: Any specific comments on (d), given that?

And Subsection (e), the Board can Order Additional Briefing or Evidence after the Hearing, any significant comments on that, aside from the extreme hardship, is there a comment on that? I assume that came in writing.

Joe?

MR. VINATIERI: Absolutely.

MS. RUWART: Subsection (f), Recommendation of Formal Opinion. We haven't talked about what a formal opinion is, but we'll talk about that later. Is there any issue of about actually recommending that?

Moving on to Section 4043, a decision without an oral hearing. You want to just briefly explain the setup here or is this --

MR. FOSTER: It's mostly self-explanatory. It's basically just if nobody requests an oral hearing after the D & R issues, then the D & R goes to the Board for consideration as a nonappearance matter the same way that a summary decision in our current practice would go to the Board as a nonappearance matter.

MS. RUWART: Given that, are there any questions or comments on subsection (a)?
Subsection (b)? Subsection (c)? Subsection (d)? Okay.

Very good.

MR. VINATIERI: I'm sorry, Carole. This is Joe. I have a question regarding depublication.

On occasion there are decisions rendered by the Board that are overturned as a result of a Court of Appeal decision, and there currently is no mechanism to deal with that. And as long as we're talking about changing the rules here, we ought to make sure that there's a provision for depublication.

MS. RUWART: Of a formal opinion? Is that what you're talking about?

MR. VINATIERI: That's correct.

MS. RUWART: Okay. So that would be a global comment about Section 4044, formal opinions. He's bringing up a good point, that we have a historical legacy of formal opinions, some of which may be outdated and obsolete.

MR. VINATIERI: Right.

MS. RUWART: Do we have a procedure for depublishing them and letting people know they cannot be relied on anymore?

MR. VINATIERI: That's correct.

MS. RUWART: Okay. Any other global comments on 4044?
MR. DAVIS: Carole, excuse me. Again, just to understand the process, are letter decisions and summary decisions still going to be part of the process?

MS. RUWART: Why doesn't Ian explain 4044 in that regard?

MR. FOSTER: Okay. They're slightly different. Summary decisions will no longer be part of the process. If this goes through, there will not be summary decisions anymore. I'm not sure yet if or how or -- a letter decision would be part or exactly what it would look like. We haven't put details in here about what the notice looks like of the Board's action, because we don't want to write ourselves in a corner.

MS. MANDEL: But I thought I heard you say that the D & R would effectively be the new equivalent of a summary decision.

MR. FOSTER: Well, the way we wrote it is that the D & R goes to the Board for consideration as a nonappearance matter, leaving open the possibility that the Board could either adopt it or simply issue a letter saying --

MS. MANDEL: Right. But in the -- in the situation where the Board -- okay. I'm sorry. In the situation where the Board -- if the Board rejects the D & R because it reaches a different conclusion, then
that's where a letter would normally go out; right?

MR. FOSTER: Yes.

MS. MANDEL: And those letters aren't sort of available. I mean, I don't think they wind up anywhere, even on any tax research website.

MR. FOSTER: No. They're public record.

MS. MANDEL: Right. They're public record, but they don't become any sort of even informal body of administrative law, whereas, the summary decisions do.

And so what you're saying under this is the D & Rs, if adopted by the Board, would be the equivalent of today's summary decisions and be available to CCH and BNA and all of that?

MR. FOSTER: We've left those sorts of nuts and bolts open to question.

MS. MANDEL: Well, yeah. To the extent -- I mean, one of the complaints that, you know, I've heard over the years, even before I ever was working at the controller's office, I had the same issue, which was that when the Board went to having the nonprecedential decisions as opposed to sort of every decision in income tax being what it was, that there was -- there was less and less of a body of administrative law, which made it very difficult for people to advise clients as to, you know, what things were -- because very few things really
wind up in court, you know, historically. And now that
the agencies have had settlement authority for so many
years, there's even less cases in court than there used
to be. And so that's a sort of practical issue for
people if -- but I think the D & R is the equivalent of
today's --

MR. FOSTER: As far as -- I mean, getting a
formal body of law that people can rely upon, there's
been an outcry from FTB, from tax practitioners, from
the State Bar, from everywhere, saying we need to be
adopting more formals. And, you know, I can't write
regulations, I don't think, that require the Board to
adopt --

MS. MANDEL: No.

MR. FOSTER: -- more formals. But I've tried
to write these regulations to encourage the adoption of
more formals by setting forth criteria and by
encouraging the Appeals Division to provide formal
recommendations.

MS. MANDEL: Right, right. But even to the
extent that the summary decisions are currently
available, and the summary decisions have become much
more than they originally were, they're much more -- and
I suppose that depends on how busy you guys are in
Appeals, how much they work on them, but even the
availability of those for research purposes gives people some indication of how a case would go, so . . .

MR. FOSTER: Yeah.

MS. RUWART: Okay. I've kind of lost track of where we are. I think we're still on subsection (a). We've kind of talked about that, unless there's other specific comments? Okay. Subsection (b), just what is the date of the decision? Subsection (c), and maybe this is worth discussion or comments or not, reasons for issuing a formal opinion, several criteria and factors.

Yes.

MR. DALY: Charles Daly. Are these reasons intended to be exhaustive?

MR. FOSTER: No.

MS. MANDEL: Then it should sort of have a different phrasing.

MR. LANGSTON: Well, they're considered.

MS. MANDEL: Right.

MR. FOSTER: But it doesn't say "only the following factors."

MS. MANDEL: I've had cases, albeit with county assessors, over regulations where this kind of phrasing, "the following factors shall be considered," with four things listed, they would say those are the only things, so . . .
MR. LANGSTON: Including, but not limited to.

MS. RUWART: Okay. Very good. Subsection (d),
the precedential effects of the formal opinion.

MR. LANGSTON: I like Joe's comment about
somehow depublishing them.

Another very common situation is there's a
legislative change that affects the statute, and, again,
it would be helpful for somehow that to be indicated on
the website, you know. Note that -- I know the CCH and
other publishers try to do that, but don't always do it
right.

But, you know, for years after 2002 this was
changed.

MR. FOSTER: Sure, and I don't know -- if we
may not necessarily want to put that in regulations, but
we are in the process of redoing a lot of things on the
website, and that's the sort of thing that could be
added on there, you know, please read this opinion at
your own risk.

MS. RUWART: And to provide more editorial
comments.

Moving on to Section 4045, Dissenting Opinions.

MS. MANDEL: I just had one comment. We have
not made any provision for a concurring opinion.

MR. FOSTER: Well --

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MS. MANDEL: You can have a dissenting opinion. It's always entirely possible there could be a concurring.

MS. RUWART: Same result, different analysis.

MS. MANDEL: Same result different analysis.

There have been formal opinions of the Board in the past where the number of Board members voting affirmatively on a motion was not the same as the number of Board members voting for a formal opinion. And sometimes that's because a particular Board member may not want a formal opinion at all, but sometimes, you know, unbeknownst to the world, it may be because a Board member agrees with the result but has a different view.

And if you're going to start making provisions for dissenting opinions, I mean, I don't know, members may want to say, well, then, I want to -- I want to be able to have a concurring opinion.

MS. RUWART: Probably all -- that's an excellent idea.

That said, Subsection (a), anything in particular? Just, again, it gives the appeals division the task of preparing this dissenting opinion.

Subsection (b), the date, just the date and the effect of that?
And Subsection (c), a parallel provision of precedent value?

Section 4046, Frivolous Appeal Penalty, is there anything in here, Ian?

MR. FOSTER: This is -- this is substantially similar to the prior version posted on the web and also incorporates our existing practices.

MS. RUWART: Any particular comments on (a)?

MS. BORGMAN: This Susan Borgman.

I think you should add the claimants into this, into this provision, since you're only addressing taxpayers since the Board has to impose penalties for HRA cases.

MS. RUWART: Okay. Very good. Any others on the global concept or (a)? (b)?

(c)?

(d)?

(e)?

Very good.

Now, on to Article 5. Well, we really have three minutes, but again we'll take as much time as we need to, but we will have herds of people coming in here at 1:30.

MS. MANDEL: And staff needs, you know,
sustenance and fortification for that meeting.

MS. RUWART: Staff will be a lot happier in the afternoon if staff gets a chance to eat lunch.

MR. FOSTER: I could point out real quickly on all of this, Article 5 is substantially similar to what was numbered as Article 6 in the prior version posted in September.

It's been amended to be renumbered, and we've made some minor grammatical technical changes here and there, but substantially it's all the same, I think.

MS. RUWART: Very good. This deals with, the first part, 4050 is the Finality of Decision. Any global comments or comments on Subsection (a)?

MR. LANGSTON: Bruce Langston for Franchise Tax Board.

You know, we have had litigation on this issue and the problem that we are constantly being faced with, and taxpayers are, is until a written decision or opinion comes out, it's not always clear to the taxpayer how they can either file a petition for rehearing or go to court in the case of a refund action.

And I'm not suggesting -- I mean, this is just a general comment to consider saying that for purposes of either choosing to file a petition for rehearing or going to court, the decision be final when the written
decision is issued.

MS. MANDEL: This is Marcy.

That's why -- we haven't really had it lately, but maybe with all this stuff, you would need it.

But the Board used to be very careful if it ordered a formal opinion to be written on a franchise tax case because the time to file for rehearing is very different in franchise and income tax matters than it is in business tax matters. What it keys off of in franchise tax matters, it keys off the Board's decision, so if the Board affirmatively votes on a case and then orders an opinion, what we used to make sure of was that it wasn't really voted on until the opinion came back for adoption, so that that was -- was the key date, for example, and whereas in sales tax, they don't have to petition until they get that notice of redetermination.

So it's a very --

MR. SHALTES: This is Craig Shaltes.

We still do that. It says it's not final until the Board adopts what is drafted by the appeals.

MS. MANDEL: But to the extent that staff is drafting a regulation that would make less clarity, you've got to make sure you watch out for that.

MS. RUWART: Good action on that.

Anything else on Subsection (a)?
MR. DAVIS: This is Ken Davis.

We're suggesting we add back in at page -- a
section in the current one that we think is a good one,
and that's, "Either party may file only one petition for
rehearing."

MS. RUWART: For clarification.

Subsection (b), is there a need to explain
this? Well, actually, (b) has a lot of sub-elements.

MR. FOSTER: Yeah. It's -- well, there's some
reason behind it. We have this oddly-written statute
that says the decision is final 30 days after it's
adopted. And there's always this debate, well, what
does that mean? Why is there a 30-day period? What's
30 days? What's final?

There have been cases where the Board -- you
know, prior to that 30-day period ending, the Board or
staff discovers there's a clerical error or somebody
lied and we have relied upon that lie, there's a
misrepresentation, some other problem, or somebody's had
their rights denied, like they requested an oral hearing
and we forgot to grant it. And what we're looking for
here is a mechanism to correct the decision that -- the
reason for all the detailed procedure here is that often
there isn't a regularly scheduled Board meeting to
expunge the vote within that 30-day period.
MS. MANDEL: Yeah. The Board used to meet more often.

MR. FOSTER: Yeah. And it's a practical problem to get the Board members together sooner just to vote to expunge one decision. So we put in this procedure where the Board chair, within that 30-day period, can hold it in abeyance, and then at the next regularly scheduled Board meeting there would be the expunging vote. And essentially our feeling is that the Board, if they adopt this procedure and regulation, would be essentially delegating that authority to the Board chair.

MS. MANDEL: Then do you -- well, you maybe don't have to have it in here, but somebody might -- I know there was something somewhere else where it was a Board member request or the Board chair or -- but I suppose they could always do that, but I'd have to find that in the regs.

MR. BRUCE LANGSTON: Bruce Langston. The only other comment is, that procedure is not really authorized by the statute. If you read the statute, it basically says the determination becomes final on 30 days unless one of the parties files a petition for rehearing. So, you know, that would -- that should be addressed one way or another. I mean, that's a perfect
legislative change proposal. I mean, everyone agrees
this is a good government kind of thing to do, but what
we don't want is somebody citing the statute, saying,
sorry, it became final, I won, even though one of these
things happens.

MS. RUWART: Good comment.

Let's take subsection (b)(1), which is the
reasons under which the chair may make this order;
(b)(2), notification; (b)(3), exactly the next step in
the process, I suppose; (b)(4), how it all goes down
with the vote; (b)(5), a chance to reconsider; and
(b)(6), the last step of the procedure.

People may want to take a closer look at this,
but if there's no particular comments, I'll move on to
4051, the petition for rehearing under the reply.
Subsection (a) is definitions. Ian, did you have any
general comments or . . .

MR. FOSTER: Basically that this is essentially
similar to the prior version. Just had some renumbering
in it. And it's basically consistent with existing
practice.

MS. RUWART: Subsection (a), definitions;
subsection (b), the petition for rehearing filing,
references back; subsection (c), accepting or rejecting
the petition. Any comments on (c)(1)? (c)(2)? (c)(3)?
Subsection (d), the briefing schedule.  (d)(1)?  (d)(2)?
Very good.

Moving on to Section 4052, the decision on the petition for rehearing.  Ian?

MR. FOSTER:  My same comments as a few seconds ago.

MS. RUWART:  Okay.  Subsection (a), defining a decision on rehearing.  Any comments?  Subsection (b), the Appeals Division prepares the decision; subsection (c), additional briefing and evidence; subsection (d), the date of the decision and adoption.

MR. LANGSTON:  I have one comment.  Bruce Langston.  In this situation, and not to be pedantic, but let's say January 1st was the original decision. Somebody requests a petition for rehearing, which is what this is.  It seems to me the -- we just need to clarify that the entire action doesn't become final until the petition is denied.  Unless I'm missing something, I didn't see that here.  Just, again, because the final action starts all sorts of deadlines like collection actions by FTB, refund court filings.  And so we'll put this in writing, but we just want to be crystal clear what that date is so there's no ambiguity about it.

MR. FOSTER:  Very good comment.
MS. RUWART: Anything else on subsection (d)?

Moving to subsection (e), the reasons for granting a
rehearing, five different reasons; (e)(1); (e)(2);
(e)(3).

MS. MANDEL: These are basically the Wilson --

MS. RUWART: Yes. (e)(4) and (e)(5). So what
we're probably looking for here is just phrasing and
ambiguity, so people can think about that. And
subsection (f), no precedent, no lack of precedential
value.

Moving on to section 4053, rehearings
themselves. Subsection (a) is the briefing schedule.
Do we have any global comments on this section?

MR. DAVIS: This is Ken Davis. One thing we
just would like staff to maybe clarify a little bit
more, and maybe it's through headings or just the
difference between the petition for rehearing and the
rehearing process, just because the -- it appears to be
a two-step process. One is petition. You've got to
petition. You've got an elongated process for petition,
briefing and decision for the petition process, and then
you've got the next level, which is the granted
rehearing process, which has its own level, but is
actually the substance, so it goes back to the final
decision. So that's . . .
MS. RUWART: Okay. So (a)(1), (a)(2), (a)(3), (a)(4), and (a)(5), that's just the briefing schedule considerations. Moving on to subsection (b), the hearing and decision, Subsection (b)(1)? (b)(2)? Subsection (c), no precedential value? Subsection (d), the finality of the Decision, do you have any specific comments on that, Bruce?

MR. LANGSTON: We're going to put all of these together and do it in writing, because I want it to --

MS. RUWART: Okay. Great.

MS. MANDEL: Read it and think.

MR. LANGSTON: -- yeah, kind of see how this fits into the other ones.

MS. RUWART: At this point in time, I'd like to invite any burning comments, anything that you feel you want to say here and now in this forum.

MS. CROCETTE: Let's go to lunch.

MS. RUWART: And seeing none, I would like to thank you all for coming, participating, being extremely thoughtful. We really appreciate all of this, to the greatest extent possible, in writing. We will consider everything, and, as Brad said, provide the revised version on the schedule as soon as possible.

And with that, I think, unless Brad has anything more to add.
MR. HELLER: No, other than we'll be meeting again at 1:30 to discuss Part 5, which contains the communications with Board members provisions and disclosure provisions, so we'll be discussing it at that time. So please enjoy the 45 minutes that we have planned for you.

MS. RUWART: Yes, see you at 1:30.

(The proceedings were adjourned at 12:41 p.m.)

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I, CAROLE W. BROWNE, Certified Shorthand
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