

**M e m o r a n d u m****420.0325**

To: Audit Evaluation and Planning (BDR)

November 30, 1988

From: Donald J. Hennessy

Subject: Regulation 1528(a)(2) – Statutory Evidence Code Charges

Your November 4, 1988 memorandum to me concerns the last four paragraphs (6<sup>th</sup> through 9<sup>th</sup> paragraphs) of Regulation 1528(a)(2). You attached a copy of my February 17, 1984 letter, on the same subject, to Mr. A. T--- S---, Attorney for C--- Systems, SR -- XX XXXXXX. You state your opinion that a statutory fee pursuant to Evidence Code Sections 1158 or 1563 is always exempt from tax. That is, if the fee is passed on as a separate charge it is exempt, regardless of who bills it. As an example, you state that if a copying service bills a requestor for copies, any separately stated statutory fee previously billed to it by a subpoenaed party is exempt from tax. You ask if this is a correct interpretation. Additionally, you ask whether the subpoenaed party has to invoice the statutory fee in order for the fee to be exempt, or may a copying service acting as the agent of the subpoenaed party invoice the requestor directly, with the statutory fee remaining exempt. You then pointed out that the last paragraph of Regulation 1528(a)(2) indicates that some such billings by a copying service are taxable, but the reasoning for this conclusion is unclear to you.

In explanation of the last paragraph of Regulation 1528(a)(2) which is unclear to you, I am attaching a copy of my April 26, 1984 opinion letter, also to C--- Systems Attorney, A. T--- S---. My April 26, 1984 letter responds to a factual situation in which the hospital (hereinafter "hospital" includes other persons or entities holding the sought-after records) does not provide the copies, nor does the hospital bill for the copies. Rather, the hospital merely sends the subpoena or authorization letter to a copying service and makes its records available to the copying service; the copying service then performs the copying, delivers the copies to the requesting party, and bills the requesting party. Given such facts, our opinion was that tax applied to all charges by the hospital's copying service to the requesting party. We concluded that none of the charges by the copying service were a mere passing on of the charges the hospital was authorized to make under the Evidence Code. The incoming facts, as stated by Mr. S---, were that the hospital may or may not impose a charge on its copying service for making its records available. In our response, we stated our belief that in such a factual situation

the hospital would not make any charge to its copying service, and if the hospital makes no charge, then the copying service can make no nontaxable statutory charge, regardless of how such charge is stated to the requesting party. Not hearing further from Mr. S---, the conclusion in our April 26, 1984 letter eventually became the rule stated in the last paragraph of Regulation 1528(a)(2). Granted, the result may change if a hospital did make a valid Evidence Code charge to its own copying service. If any of our audits turn up facts which call the last paragraph of Regulation 1528(a)(2) into question, we should work them out through the opinion writing or petition process.

Therefore, the interpretation in your November 4, 1988 memorandum is subject to the rule stated in the last paragraph of Regulation 1528(a)(2), which should be considered in the context of our April 26, 1984 opinion. As to your question on whether who bills the fee can change the result, again, see our opinion of April 26, 1984.

DJH:jb