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November 1, 2006

Sean R. Smith
Duane Morris
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Re: McKesson Information Solutions LLC v Duane Morris LLP

Dear Mr. Smith:

I have just received by email from Mr. Manning a copy of your letter dated today to Judge Moore regarding my testimony yesterday, and in particular the relevance of ABA Formal Ethics Opinion 05-436.

You will see from the packet of duplicated materials that I brought to court and provided to you and to Judge Moore as well as Mr. Manning that I included immediately after ABA Formal Ethics Opinion 93-372 a highlighted copy of Opinion 05-436. I included Opinion 05-436 in that packet because I expected to testify regarding its relevance, including its effect on Opinion 93-372; however I was not asked any question about Opinion 05-436 by Mr. Manning or you. I am surprised that you have chosen to question the accuracy and candor of my testimony by this letter to Judge Moore rather than by asking me directly in cross-examination on the subject yesterday.

Had I been asked about Opinion 05-436 during my testimony, I was prepared to explain that Opinion 05-436 clearly indicates that it replaces Opinion 93-372 only because of an intervening change in the text and commentary of ABA Model Rule 1.7 – in particular new comment 22. Opinion 05-436 does not in any way indicate that Opinion 93-372 was erroneous when it was issued. To the contrary Opinion 05-436 begins by stating that ABA Model Rule of Professional Conduct 1.7 as amended in 2002 “permits effective informed consent to a wider range of future conflicts than would have been possible under the Model

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Rules prior their amendment.” Thus by its terms Opinion 05-436 is not relevant to jurisdictions still operating under the version of Rule 1.7 that preceded the 2002 amendments. Further the clear implication is that the kind of “general and open-ended” advance waiver sanctioned by Opinion 05-436 does not meet the requirement of effective informed consent in jurisdictions that have not have not adopted the 2002 amendment to Rule 1.7 (including comment 22). Although Georgia Rule 1.7 is different in material respects from either the pre or post 2002 ABA Model Rule 1.7, there is no question that Georgia Rule 1.7 (promulgated by the Georgia Supreme Court in 2000) is based on the pre-2002 version of ABA Model Rule 1.7 and does not include any comment comparable to comment 22, which is the basis for Opinion 05-436.

Should you correspond in the future with the Court regarding the accuracy of my testimony, I would appreciate your sending me a copy of the correspondence at the same time as it is sent to the Court. As you know, I only appeared in court yesterday under subpoena as an independent witness and am not retained in any way as an expert witness by McKesson Information Solutions or its lawyers.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Clark D. Cunningham". The signature is fluid and cursive, with the first name "Clark" and last name "Cunningham" clearly distinguishable.

Clark D. Cunningham
W. Lee Burge Professor of Law & Ethics

cc: Joseph Manning