IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA: CIVIL DIVISION

- -X

MCKESSON INFORMATION SOLUTIONS LLC, :

Plaintiff :

Vs. :

DUANE MORRIS LLP :

:

Defendant. :

- -X

Case No. 2006CV121110

Atlanta, Georgia

October 31, 2006

BEFORE:

HONORABLE THELMA WYATT CUMMINGS MOORE,

Justice

APPEARANCES:

MORRIS MANNING & MARTIN, LLP
Attorneys at Law
1600 Atlanta Financial Center
3343 Peachtree Road N.E.
Atlanta, Georgia 30326-1044
By: JOSEPH R. MANNING, ESQ.

ASSISTANT GENERAL COUNSEL
5995 Windward Parkway
Alpharetta, Georgia 30005
By: AMI R. PATEL

DUANE MORRIS
Attorneys at Law
1180 West Peachtree Street
Atlanta, Georgia 30309
By: SEAN R. SMITH

DUANE MORRIS
1180 West Peachtree Street
Atlanta, Georgia 30309

By: John C. Herman

Court Reporter
KAREN RIVERS, RPR, CCR-2575

2

THE COURT: We are proceeding with McKesson Information Solutions, and this is a petition for an injunctive relief.

MR. MANNING: That's correct, your Honor.

MR. SMITH: If I might, without jumping in front of Mr. Manning, raise a couple of just sort of procedural and perhaps one slightly substantive issue.

First of all, since I think it's my understanding that MIS wants to call one or more witnesses, and if they do, we may need to call witnesses of our own.

THE COURT: You stated that.

MR. SMITH: And my question was, should we do all the witnesses first and then have argument or how would the Court like to proceed?

THE COURT: Well, I would proceed as you would in any evidentiary -- you can do an opening statement. You can call your witnesses on each side, and then you argue.

MR. SMITH: And then there are two other issues. One is a standing issue, and the second is whether there is actually a private right of action under the Georgia Bar Rules. They themselves say there is not, and that issue is raised in our

3

papers, and I wanted to get that out to the forefront, that we are not waiving the fact that the Bar Rules themselves under the Code comment, eighteen specifically says, there is no civil liability. There is no private right of action. He should not be used as litigation tactics. These are Advisory Rules for members of the Bar.

Secondly, and we could address this issue in more detail, and I'm sure we will. I'm not sure

that the correct party has brought this suit. I'm not sure that MIS has standing to raise this suit as opposed to McKesson Medication or McKesson Automation which are the two parties which claim to have a direct lawyer client relationship with my law firm. So that's raised in our papers again, and I want to make sure that's reserved before we proceed.

THE COURT: Thank you.

MR. MANNING: Thank you, your Honor.

I'm Joe Manning for McKesson Information Solutions. I would like to introduce you to Ms. Patel, whose Assistant General Counsel for McKesson Provider Technology. And I'm going to spend a lot of time later talking about that. Who is assisted today by Mr. Patella a recent graduate

from Vanderbuilt University Law School and successfully negotiated the Bar recently. He is looking as soon as we can get him sworn in we will have him down here.

I want to give you as it relates to-- we will call a witness, Professor Clark Cunningham, whose a professor at Georgia State School of Law, and since he is on somewhat of a tight schedule, I'd like to limit my opening comments to those facts which are for the purpose of his testimony, if I may.

In the Spring of this year, April, McKesson Corporation is the parent company of a number of subsidiaries, and they're organized into two business segments, one of which is McKesson Provider Technologies. It's a fictitious entity, and I will talk about that a lot later. A McKesson Corp. subsidiary. McKesson Automated, Inc., which is referred to as MAI, through my office, engaged the law firm of Duane Morris to serve as counsel to it and its local counsel for us in a bankruptcy pending in the, I believe, it's the Middle District of Pennsylvania. And that was in April.

Now, let's switch sides for a moment to the MIS side which is Mckesson Information

Solutions. A little over a year ago Mr. and Mrs. Smith filed an arbitration demand before AAA here in Atlanta, and thereby instituted a legal action against McKesson Information Solutions. I forget the date. I think it's almost a year and a half ago, if I recall correctly. And they were represented at that time principally by a fellow from Miami name Richard Wolfe with local counsel here. Shortly before there was to be a hearing with the arbitrator in July of this year we received notice that Duane Morris was -- had filed, made appearance, and they were substituting as counsel for Richard Wolfe in one of the local orders. I will get into that in more detail later. When that happened we raised an objection to Duane Morris and being our current counsel. It's a current representation not a prior representation. And it's significant for these purposes. That Duane Morris was our current counsel representing MAI in the bankruptcy in Pennsylvania, and we opposed their representation in the representing of the Smiths in the arbitration, and hence, this hearing they have refused to withdraw their request. And if I may approach the Bench. Before I do that they have raised as in response to our

objection the engagement letter which they appeared back in, I think it's dated May 30th of this year, addressed to McKesson Entities, in care of one of our associates in our office Dan Sinaiko. And there is in that engagement letter the provision which contemplates the future waiver representation which would be the subject matter of Professor Cunningham. And if I may, I have highlighted the relevant paragraph.

Also, Professor Cunningham will address another issue that is the applicable standard in this case, and one of the issues we have had is that the law firm as relied upon Rule I, Part 7(b) that I have put up there before you, and it says that they say it says -- "provides that a lawyer may represent an interest that is indirectly adverse to its client if the client so consents.

And then in (b), sub-paragraph (b), and I'm assuming that under sub(1) "the lawyer reasonably believes that the lawyer will be able to provide confident representation and so forth."

The problem we have is that's not the rule in Georgia. That's the ABA Model Rule. They have either neglected to discover the applicable rule in Georgia, which I choose to believe or they

7

have ignored it, which I doubt.

The applicable rule in Georgia 1.7(b) says the way to do all of that, but (b) 2, 1.7(b) 2 says "after the client has received in writing reasonable and adequate information about the material risks of the representation." Those are the matters that Professor Cunningham will be addressing, and I call Professor Cunningham.

PROFESSOR CLARK D. CUNNINGHAM, having been first duly sworn, was examined and testified as follows::I do.

DEPUTY: Please state and spell your name for the record?

A. Clark D. C-L-A-R-K. D. Cunningham. C-U-N-N-I-N-G-H-A-M.

Q. Professor Cunningham, where are you presently employed?

A. Georgia State University College of Law.

Q. And what --

How long have you been so employed?

A. Since 2002.

Q. And do you have a specialty that you teach?

A. Yes. I'm the WB Professor on Law and Ethics, so legal ethics is actually -- the chair is designated for a specialist in that field, and I was recruited and hired by Georgia State because I'm a

8

specialist in that area.

I teach professional responsibility, and I also speak and write about that subject.

Q. Are you appearing here pursuant to a subpoena?

A. Yes, I am.

Q. Have you been engaged by my law firm or our client to appear as an expert witness?

A. No, I have not.
Q. Did you choose not to do that, and to appear here solely as a witness; is that your choice to appear here as a witness rather than be engaged as an expert?
A. Yes. It may be helpful to explain my response a little bit, which is that I became involved in this matter when I was contacted by a reporter from the Fulton County Daily Report, who provided me with additional pleading in the matter, and asked if I would comment on it for an article that he was writing, and I agreed to do so. That article appeared. I was quoted in that article. Your firm read the article and contacted me and indicated some interest in engaging me on a hourly basis as an expert witness. I said I would be willing to testify under subpoena, but I did not think it was appropriate to be paid for my testimony in this matter.

9

Q. All right. Sir, has my law firm had any contact with you prior to that newspaper article about this law suit?
A. None whatsoever.
Q. And in preparing for your testimony have you reviewed certain documents and pleadings that relate to this dispute?
A. I have.
Q. And could you identify for the Court what you have reviewed?
A. Yes. Just a moment. In terms of what I believe are documents that have been filed in this case I have reviewed the verified complaint for emergency injunctive relief and disqualification which apparently was filed on August the 11th. I have reviewed -- and the exhibits to that. I have reviewed the memorandum in opposition to the emergency motion filed by Duane Morris apparently on August 21st, and the attached -- I'm not sure there are any attachments to that, but I have reviewed that memorandum. I have reviewed a letter dated April 27, 2006, from Duane Morris to McKesson and Medication Management which you understand which is that draft engagement letter that was provided to the -- by Fulton County Daily Report court records. I have reviewed a letter dated August 8th, 2006, from Duane

Morris to Lawrence Kumin of your firm regarding this matter which I take to be the Duane Morris refusal to step out of the case at your firm's request. And then most recently, I have reviewed two affidavits that were, I believe, filed last week by Duane Morris. One affidavit by Brian Bisignani, who is a partner at Duane Morris, and attached to that affidavit is both the draft engagement letter of April 27th, and what I take to be the actual executed engagement letter of May 2006. And then I have also reviewed an affidavit from Steven Krane. That affidavit is submitted as I understand it as a -- he is -- as an expert witness in support of the Duane Morris position.

Q. How long have you been interested in the focus legal professional responsibility?

A. I first taught a law school course on the subject probably in 1984 or 1985 as an adjunct or part time professor. I have been full time law professor since 1987. During that time some years I have taught a course actually called Professional Responsibility Illegal Ethics. Some years I have taught other courses in which professional responsibility and ethics would be a topic.

Q. Are you familiar with the Georgia Rules of Professional Conduct that govern lawyers practicing

before tribunals in this state?

A. I am.

Q. How did you become so familiar?

A. When I came to this position in 2002, it seemed to be an important part of my job in this position to become familiar with these rules. I have reviewed the --I have assigned some of the rules to my students and talked about how the Georgia Rules differ from the ABA Model Rules. I do continuing legal education in Georgia that requires me to be familiar with the Georgia Rules, and of course, I'm licensed as an attorney in Georgia, and like all licensed attorneys I'm required to be familiar with all these rules.

Q. Are you familiar with differences between the ABA Model Rules and Georgia Rules Professional Conduct?

A. I am.
Q. Is there a difference between the two rules? I have put up this which you have observed?
A. My eyesight is not as good as it once was. I believe that the poster board on the left is an excerpt from the memorandum in opposition, dated August 21st; am I right about that?
Q. I will represent to you it is. That's a quote.

12

A. Right. It appears to be from page thirteen and 14 of that memorandum, and I wrote in the -- right next to this as soon as I read the brief that this is, although it says Georgia rule 1.7(b) provides, this was when I was preparing to provide comment. I wrote not Georgia rule 1.7, but Model Rule with an exclamation point. I was really startled that the law firm did this.
Q. My chart as you have recognized is a quote from their brief, page thirteen?
A. What they present as Georgia rule 1.7(b) is not. What it is, in fact, ABA Model Rule 1.7 as adopted by the American Bar Association in 2002.
Q. Do you recognize the board to the right as, in fact, a copy of the Georgia 1.7 Rule of Professional Conduct?
A. It appears to be.
Q. And quickly, can you explain the -- any material difference between the two?
A. Well, as I indicated to you, Mr. Manning, when you served me with the subpoena, I thought it would be helpful to prepare copies of materials that I would refer to during my testimony, so I do have copies of that with me. Ones which are highlighted, one of which I prepared for the Judge and another for opposing

13

counsel, and one of which you have already received.
MR. MANNING: May I approach the Bench, your Honor?
THE COURT: You may.
BY MR. MANNING:
Q. Professor Cunningham, would you explain to Judge Moore what I just handed her?

A. This is a series of documents that begins with Georgia rule 1.7 on conflict of interest. Do you want me to go through the packet?

Q. Before we do that because it's important and I don't want to forget it. If I don't ask you now I may forget.

Are you familiar with the term tribunal as it's used in the Georgia Rules of Professional Conduct?

A. Yes, I am.

Q. Does that include an arbitration proceeding?

A. In the terminology section at the beginning of the Georgia Rules tribunal is defined in a dozen included arbitration proceedings.

Q. If you would take that packet before you and go through it, not too much detail because the schedule as it were. Point out the significant parts of these documents that you think have a material relevance to the issue before this Court?

A. The first page is a highlighted copy of Georgia Rule 1.7. The next page is a highlighted copy of rule 4.403 of the Rules of the State Bar of Georgia are called Form Advisory Opinions. I have that there because what follows is that Form of Advisory Opinion number 99-1, which I believe is controlling for this issue before the Court. And then I have also attached a highlighted copy of proposed Formal Advisory Opinion number 05-11. If you want I will explain why I have attached that.

Q. If you would explain 99-1 and the proposed 05-11?

A. Would you like me to do that now?

Q. Yes, please?

A. Well, the first thing that I wanted to which of course the Court is probably familiar with this fact, but the second page of my packet which is rule 4-403 regarding Formal Advisory Opinions. Georgia has a rule which I don't find in every state, but it's a good provision, that there is a procedure for, first of all, for Formal Advisory Opinions to be drafted and issued by a specially appointed body called the Formal Advisory Opinion Board. There is a procedure where those Formal Advisory Opinions can be submitted to the Georgia

Supreme Court for review. And under 4-403(e) it says at

the end of that provision "if the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the Official Georgia Court and Bar Rules Manual. The Supreme Court shall record such approved or modified opinion the same precedential authority given to the regularly published judicial opinion of the Court." And then the next thing is (1) "such Formal Advisory Opinion which, in fact, was issued by the Supreme Court of Georgia and is published in the State Bar of Georgia Handbook. As I interpret rule 4-403 that makes this formal opinion the same thing as published opinion of the Georgia Supreme Court on the subject. And is therefore binding precedence for courts in this state and is binding on members of the State Bar of Georgia.

Q. And what is your reliance on advisory-- I'm sorry, proposed Advisory Opinion 05-11? How does that relate to this issue?

A. 99-1 in my opinion continues to be precedential authority in Georgia because it has not been modified or withdrawn by the Georgia Supreme Court. However, opinion 99-1 was issued before the Supreme Court of Georgia adopted our current set of rules and professional conduct. Our current set of rules and professional conduct of which 1.7 is one of those rules.

Those were approved and issued by the Supreme Court in 2000, effective January 1, 2001. 99-1 interprets the predecessor of our current rules. The Formal Advisory Opinion Board is in the process of going through opinions that were approved by the Supreme Court prior to 2001, to see whether any of those opinions either should be withdrawn or modified in light of the change or should be reaffirmed. Formal Advisory Opinion Number 05-11 was -- has already been issued and approved by the Formal Advisory Opinion Board. It is intended to replace 99-1. It reaches the same conclusion as in 99-1, but it explains those conclusions by referring to the current 1.7 and comment rather than to the now replaced predecessor rules. 05-11 has been approved by the Formal Advisory Opinion Board. It was published for

comment in the Georgia Bar Journal in October of 2005 as required. I don't believe any effort comment were made. After the comment period was expired the State Bar of Georgia petitioned the Supreme Court to review it. It's my understanding is the Supreme Court has accepted it for review. It has not yet been issued by the Supreme Court, but in my view the fact that 05-11 has gotten along this far in the process for me as expert in Georgia ethics indicates that the conclusion reached in 09-1 are still controlling law in Georgia.

17

Q. Would you recite those conclusions that relate specific to the issue here?

A. Well, the thing that is most relevant to the case here appears on the second page of the advisory opinion number 99-1 which I think would be -- I have not numbered the pages in this packet, but it would be the fourth page in my packet. It's the first full paragraph. And I'm just going to read the highlighted portions. The opinions--I guess I should back up and explain what the factual predicate is for 99-11. The Formal Advisory Opinion Board had then presented with the following fact pattern. A law firm is representing currently client A which is an insurance company as a client. That law firm then is engaged to defend client B in a law suit. In that law suit client A the insurance company has a subrogation right to the plaintiff's claim. So the law suit is not directly against client A; however, the Formal Advisory Opinion concludes that the litigation is nonetheless directly adverse to client A because if the law firm successfully defends client B plaintiff will recover less or nothing. The insurance company which has a subrogation right is thereby affected because they did not recover through the plaintiff. The question then becomes under what circumstances, if any, can the law firm represent client

18

B in the law suit while it's still representing client A the insurance company. They're totally unrelated matter.

Under those facts the Georgia Supreme Court has come to a conclusion which is not by any means the position around the country. It is a unusual position,

okay. But it is clearly the position taken by the Georgia Supreme Court which is that under those circumstances, under no circumstances may that law firm represent client B because that is a non consentable conflict of interest. The law firm may not even ask the insurance company to waive that conflict. Under both the prior predecessor of 1.7 and the current version of 1.7 where there is a conflict of interest under some circumstances a law firm can ask the two clients to consent to allowing the law firm to represent both clients. However, there are some circumstances where the rules prohibit the law firm from even asking consent. 99-1 says that when a law firm is litigating on behalf of one client in a situation where that litigation is directly adverse to another current client that that's not consentable and the language here is some simultaneous -- this is the first full paragraph. "Some simultaneous representation conflicts can be consented to by the simultaneously represented client."

19

I then jump down to the next highlighted line. "Consent is limited by standard of conduct 37." That's the predecessor of 1.7. "To those circumstances in which it is obvious that the lawyer can adequately represent the interest of each client." Then I go onto the next highlighted sentence. "Ethical consideration 5-15." And this is the predecessor. "Advises that all doubt about the provided loyalty should be resolved against the proprietor of the representation, and that general consent should not be obtained when client have differing interest in litigation and rarely obtained when they have only potential interest in litigation." The next paragraph. "In the circumstances presented here it would be reasonable for an attorney to be concerned that the adverse interest of the simultaneously represented client could adversely affect the quality of the representation by jeopardizing the quality of the relationship with the client. It is, therefore, not obvious that adequate representation will be provided. This is not because Georgia lawyers are not sufficiently trustworthy to act professionally in these circumstances by providing independent professional judgment for each client by the other

client. It is instead a reflection of the reality that reasonable client concerns with the experience created

20

by such directly adverse interest could by themselves adversely affect the quality of the representation." Then skipping down to the last full sentence in that column. "We conclude, therefore, that if the representation in the situation described in question presented is a true representation of an insurance company that an unconsentable conflict of interest exist, and that entering into or continuing with such simultaneous representation would be a violation of the standards of conduct." The rational here as I understand it is that the clients will lose their confidence in their lawyers if they find that the law firm that they have engaged to represent them in matter A has suddenly appeared against them on behalf of a different client in another matter. In that situation it's not possible to adequately represent both clients. Therefore, it's not a consentable waiver.

Q. If you may, in the interest of time, if you will pass possess look at the ABA excerpt in 93, which I think follows the proposed advisory?

A. This is ABA American Bar Association Formal Ethics Opinion 93-27 date?

Q. Would you briefly tell the Court why you have added that to the materials?

A. Well, your Honor, as I teach my students an

21

ABA ethics opinions are not authoritative for a question, for example, in any given state about what the rules of professional conduct require. They're simply persuasive and certainly in a state like ours where you have Formal Advisory Opinion system the formal -- you should first look to see if there is a Formal Advisory Opinion and there is one that controls. Nonetheless, this ethics opinion from 1993, I think, does do a good job of explaining what the majority position is around the country, which is a position that is more lenient than the Georgia position, but nonetheless, I think, would preclude the reliance here by Duane Morris on the engagement letter as a waiver. And the summary which is the first paragraph simply says in highlighted

provision, this about waivers of future conflicts of interest. "If the waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed point was given." And then turning to the body of page five and the top of page six of that opinion, the last sentence on page five. "Given the importance that the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a

22

prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting client would survive scrutiny." I think it's helpful to look back on the first page here on our version of 1.7. We have in Georgia, your Honor. 1.7(b) 2, which does not -- you will not find that in ABA Model Rule provides as you mentioned in your opening statement. "That before a lawyer can ask a client to waive a conflict of interest either at the moment or prospectively in Georgia, that lawyer has to provide in writing to the client reasonable and adequate information about the material risk of the representation." That's the same point that the ABA Formal Opinion makes. In other words, the only way a future waiver could possibly satisfy certainly Georgia 1.7(b)2, would be if it provides enough information so the client understands the risks that they are taking by agreeing to that waiver now or in advance. And when I look at --

Q. Do you have Duane Morris?

A. I do.

Q. Would you read to the Court the paragraph that addresses future waivers?

A. Right. Actually two paragraphs. It's on page three. It's the second and third paragraph.

23

Really the next one. "Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have matters adverse to McKesson while we are

representing McKesson.
We understand that McKesson has no objection to our representation of parties with interest adverse to McKesson, and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson."
The next paragraph. "We agree; however, McKesson shall not apply in any instance whereas a result of our representation of McKesson we have obtained proprietary or other confidential of a non-public nature, that if known to such other client, could be used in any such other matter by such client to McKesson's material disadvantage or material disadvantage.
By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our subject matter to McKesson, McKesson also agrees --
THE COURT: You read much faster than you talk. I want to make certain our court reporter

has everything because we generally read like that.
A. "By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our services to McKesson, McKesson also agrees that we are not obliged to notify McKesson when we undertake such a matter that may be adverse to McKesson."
Q. Professor, without more than what you have just read, is it your opinion that those two paragraphs constitute the valid waiver of a future conflict under Georgia rule -- the Georgia rule 1.7?
A. Absolutely. It absolutely does not.
Q. And briefly, why not?
A. Well, first there is nothing in here that provides any information about the material risks of this waiver. There is nothing that says here are the risks that you're incurring about allowing us in advance to represent people adverse to you. There is no indication there is a risk, and it's very hard to imagine how there could be reasonable and adequate information about the material risk without engagement letter describing as the ABA Formal Opinion points out who the other adverse party might be. What type of

claims they might be and so on.
There is another provision in this letter which I find really makes this purported waiver even

25

more egregious, and that is the last sentence where they say that "McKesson agrees that the law firm is not obliged to even notify McKesson when they undertake a matter that's adverse to McKesson." So not only is the client not warned at the time of signing the engagement -- well, actually the client never signed this, but receiving this engagement letter. Not only are they assumed to agree in advance not to object to any situation where admittedly in case that's not substantially related, there may be an adverse party to them, but they don't even know about it. So they're not in any way warned at all, all of a sudden their law firm is representing someone adverse to them, and it also put Duane in the inappropriate position of being their own Judge. It's entirely up to Duane Morris to decide whether or not a new case is substantially related to their representation, whether there is any risk of the disclosure or proprietary or confidential information. And if they decide in their own mind that it's not substantially related there is no risk of confidentiality they don't even warn McKesson. It would -- it would seem obvious to me and certainly what the rules are all about the client is in the best position to know whether the next representation creates a risk for it. Whether it's substantially related. Whether

26

confidential information that's given to its law firm is information they don't want in this case dismissed to have access to they can't even have a discussion with their law firm about this because the law firm isn't even obliged to tell them that the new situation has come up. This provision is ultimately inconsistent with the language and the spirit of the Georgia Rules.

Q. Professor Cunningham, are you familiar with the Worldspan versus Sabre Group Holdings out of the Northern District of Georgia, 5 F. Supp. 2d 1356?

A. I have read the decision. Don't know it by heart.

Q. Did you believe that opinion supports your

view of the application of Georgia Rules of Professional Conduct to future waivers? Are you not familiar with enough of that case?

A. I'm familiar with it. There is a more recent decision by the Federal Court, the Snapping Shoals case which I'm very familiar with, which follows Worldspan, more or less takes the same position. I think that's a more helpful decision because that decision which came down this year, which decided after Georgia. I think Worldspan predates the current version. So I think Snapping Shoals which comes to the same conclusion, is a more relevant authority.

27

Q. We supplied you, I believe, with an affidavit of Mr. Steven Krane. K-R-A-N-E. Do you recall that?

A. Yes, I have it.

Q. Have you had an opportunity to review that?

A. Yes, I have.

Q. I'm assuming one of these gentleman, Mr. Krane, will be testifying. I'm going to ask you since you're going to be leaving, a couple of questions about that affidavit.

A. Isn't he -- is Mr. Krane in the courtroom, I don't know.

MR. SMITH: He is right there.

Q. In anticipating he is going to testify consistent with his affidavit, I have a couple of questions.

Does this affidavit indicate that he looked at the real Georgia Rule 1.7?

A. Well, the affidavit does not quote the text of Georgia Rule 1.7 nor does it in anyway acknowledge that the Georgia version of 1.7 is different in material ways from the ABA Model Rules or Pennsylvania Rule which is what he does discuss.

Q. He opines in that affidavit that the Pennsylvania Rules of Professional Conduct would be

28

applicable to the practice of these lawyers in the State of Georgia, do you recall that?

MR. SMITH: Objection, your Honor. That mischaracterizes intentionally what Mr. Krane says

in his affidavit, and I have to finally object. That is totally --

MR. MANNING: Let me strike that. I don't think it does.

THE COURT: Let's go to his affidavit so that it is clear.

A. I believe you're referring to paragraph 21 on page seven. And paragraph 22 on page eight.

Q. Let me put it this way. Duane Morris counsel sitting at this table, Mr. Smith, will be appearing as counsel for the Smith's in the arbitration for the AAA which will occur in Georgia. Whose -- what state rules professional conduct apply to their representation in the Smith in that case?

A. The Georgia Rules of Professional Conduct have a choice of law provision, which I believe is Rule 8.5. Yes, 8.5(b). And Georgia Rule 8.5(b) provides that in the exercise of disciplinary authority that the rules of professional conduct to be applied in sub-part 1, for conduct in connection with the matter pending before a tribunal, the rules of jurisdiction in which

the tribunal sits unless the rules of tribunal might otherwise. The tribunal I take to mean the American Bar Association. You indicate to me that it sits here in Georgia. I'm not aware of its rule to provide otherwise. In addition, the relevant decision here is when I guess --I gather it's Mr. Smith was asked to substitute or his firm was asked to substitute for the plaintiffs or petitioners in the arbitration. At that point, I believe as a Georgia lawyer being asked to come into an arbitration pending in Georgia the question should be is there -- once I'm aware that the arbitration is against a client of the law firm that is in the same corporate family. I'm assuming he is aware of that, and I gather he was or certainly became aware of it. Do I have a conflict of interest that should cause me to tell the Smith's go find another lawyer. That's the relevant ethical decision here, and at that point, it's obvious to me that what Mr. Smith needs to do is look at the Georgia Rules to make a decision about whether he should take on that case. One of the questions then becomes obviously it presents a potential

conflict. A concurrent conflict. Then the issue there is engagement letter executed in Pennsylvania is to look at what their engagement letter meets his professional obligations in Georgia which might under some

30

circumstances allow him to proceed with informed consent of both clients. He then needs to look at that engagement letter which of course was written for Pennsylvania case to see whether it meets Georgia standards. I'm merely just surprised by Mr. Krane's assertion that Pennsylvania Rules apply to that decision that Mr. Smith was called upon to make.

MR. MANNING: Thank you.

Would you like to break for lunch?

THE COURT: Well, you all told me two hours and that's the only reason I'm proceeding. So I was trying to wrap up the entire hearing to be honest with you. I have a doctor's appointment at 3:00, but of course people need to stop and eat so I don't want to --I don't want to be giving any type of cruel and unusual punishment to the staff.

MR. SMITH: I agree. And as my folks know since I'm the wrong person to ask.

THE COURT: We will get as far as we can for as long as we can, but I'm actually -- we started at about a quarter to 12, and I thought that if we finish by a quarter to two that would be adequate. Then we can all have lunch.

CROSS EXAMINATION

BY MR. SMITH:

31

Q. Mr. Cunningham, we have never met. I'm Sean Smith, partner of Duane Morris.

Your entire testimony today is premised on the idea that there is a conflict of interest that exist, right, in that matter?

A. Yes.

Q. What is that conflict?

A. For purposes of my analysis of whether the engagement letter is an effective waiver, I'm assuming for purposes of my analysis that conflict's purposes the two members of McKesson corporate family should be treated as the same client.

Q. Are you here to give an expert opinion that that assumption is true?
A. No, I'm not.
Q. So all of your testimony is premised on a proposition that you're not willing to say; is it correct? Do I understand that?
A. That was not my answer.
Q. Isn't what I just said true, though. All of the testimony you gave up to this point was premised on a proposition that you're not here to say whether it's correct or not?
A. I can provide an opinion if you want one based upon the facts alleged as to whether or not the

32

two corporate subsidiaries should be treated together. Conflict purposes I just will say that wasn't what my direct testimony was about.
Q. Right. That's not what you're here to talk about.
Let me get you to pull back out that engagement letter that you were quoting from?
A. I have it in front of me.
Q. Do you have the May 30th version that incorporates the changes requested by McKesson Medication and McKesson Automation?
A. The version I'm referring to is the version which is attached to the affidavit of Brian Bisignani you filed with the Court.
Q. Look at the second one which is dated May 30, 2006?
A. That is the one I'm looking at.
Q. Please read in the record the first sentence of that letter?
A. "Thank you for selecting Duane Morris to represent McKesson Medication Management LLC and McKesson Automation (collectively, "McKesson") as local counsel in connection with the action entitled -- the next few words are underscored -- In Re: Moshannon M-O-S-H-A-N-N-O-N. Valley Citizens, Inc. P/A

33

Philipsburg Area Hospital. Pending in United States Bankruptcy Court for Middle District of Pennsylvania."
Q. So this is simply put. It's an engagement

letter between Duane Morris and McKesson Medication Management and McKesson Automation, right?
A. Yes.
Q. No other McKesson entity is mentioned in this engagement letter, right?
A. Not by name, though, on page three there is a reference to parent subsidiary or affiliated entities.
Q. Let's focus on that. That's the bottom of page three. And it says, and I will read it. "This will also confirm that unless we reach an explicit understanding to the contrary, we are being engaged and will represent McKesson Medication Management LLC and McKesson Automation, and not any parent subsidiary or affiliated entities of McKesson Medication Management LLC and McKesson Automation. And that we are not being engaged to represent any officers, directors, members partner, shareholders or employees of McKesson Medication Management and McKesson Automation."
You're familiar with that provision of the engagement letter, are you?
A. I have read it several times.
Q. And you do not express any opinion in your

direct testimony about that particular provision that was agreed to by McKesson Medication and McKesson Automation?
A. I was not asked any question with that particular sentence.
Q. Okay. Now, you understand that an engagement letter doesn't have to be countersigned by a client in order to be effective, right?
A. Under various circumstances that could be true.
Q. So in other words, it would be fair to say in this particular instance that McKesson Medication and McKesson Automation agree that unless there was an explicit understanding to the contrary, Duane Morris did not represent any parent subsidiary or affiliated entity of those two companies, right?
A. I don't want to be difficult with you. I think you're asking me to assume facts that not only do I not know, but they're not in your question. I don't know if the May 30th letter was received by them, for

example. I don't know if they objected to it.
Q. You don't have any reason to believe any of those things are true? You have never seen in any pleading. You have never seen that engagement, you're just making that part up because you don't want to

35

answer the question now, come on.
MR. MANNING: I object.
THE COURT: I will sustain.
Q. Let me ask you straight up. You don't know of anything that causes you to believe anything other than that McKesson Medication and McKesson Automation agreed to this provision in this engagement letter, right?
A. I believe a responsive answer is that both my comments to the daily report and my opinion today assumed for purposes of my opinion that the May 30, 2006, is indeed an effective engagement letter.
Q. And you specifically would agree with me that McKesson Medication and McKesson Automation on the one hand, and Duane Morris on the other hand, agreed that absent an explicit understanding to the contrary, Duane Morris only represents Medication and Automation, right?
A. That's what the sentence says.
Q. Clearly if there is not a conflict there is no need to consider prospective waivers as an issue in this case; is that right? There is nothing to waive?
A. I do want to be clear in my answer to issues I deal with my students quite a bit. Conflict of interest for purposes of 1.7 is a situation where there

36

is a risk that a lawyer's exercise independent professional judgment on behalf of one client maybe affected by responsibility the lawyer has to another client or to a third party. That's what it means to be a conflict of interest. Doesn't require there be any actual harm involved, only that there be a risk that the lawyer might conduct his representation of one client differently because of a duty to another client. So with that understanding, the lawyer has to -- that risk has to be present for a lawyer to have a duty to either avoid the conflict or attempt to resolve it through

informed consent. Is that a responsive answer?
Q. No.
A. I really intended it to be.
MR. SMITH: Could you read back my question, please.
(Whereupon, the requested testimony is read back by the court reporter.)
A. I'm sorry, would you read it just one more time?
(Whereupon, the requested testimony is read back by the court reporter.)
A. I would agree if you and I both agree that by conflict you're referring to the definition which appears in Georgia 1.7, which is a significant risk that

37

the lawyer's duty to another client will materially and adversely reflect the representation. If you and I agree that's what you mean by conflict, I would agree that there is no significant risk there is no duty to get a waiver.
Q. Based on this engagement letter that we have been talking about, does Duane Morris represent McKesson Corporation?
A. I don't have a complete understanding of how the corporate family is structured, but if by McKesson Corporation you're referring to a corporate entity which is not McKesson Management, McKesson Management or McKesson Automation, I would agree that the letter limits the representation to those two corporate entities.
MR. SMITH: I don't think I have anymore questions, your Honor.
THE COURT: Have you any redirect?
MR. MANNING: I have no more questions, your Honor.
THE COURT: May Professor Cunningham be excused? Is there any reason he may not be?
MR. SMITH: None that I can think of.
(Witness excused.)
THE COURT: Your next witness.

38

MR. MANNING: I have no further witnesses.

And if you would permit me, I've got a head cold, to go get a drink of water. Why don't we take five minute. If I move I'm flooded with messages and everything else when I go back, so I can't go for five minutes. Would you like to take a break, madam court reporter.

COURT REPORTER: Yes, I would. Thank You.

(Brief recess declared.)

(Record resumed.)

MR. SMITH: Thank you, your Honor. I would just like to give a real brief overview what the case is about by a very short opening statement, and then call Mr. Krane to the stand.

First, I'd like to introduce all the folks sitting back here. I haven't had a chance to do. With me, John Herman one of my partners, and also Michael Silverman whose the firm General Counsel, April Mitchell who is my paralegal. Nan Smith who actually is the client we are representing in the arbitration. And then that's Mr. Krane who introduced himself briefly.

Your Honor, this motion should never have been filed by the plaintiff. This complaint should

have never been filed by the plaintiff. There is not a conflict here, plain and simple.

Very first piece of any analysis of whether there is a conflict is to ask whose the client, and in this case you don't have to go any further than the engagement letter. Is what Professor Cunningham was talking about at the end of the cross examination, and it's what's clear the Georgia Rule you've got to have a conflict. You've got to have something both material and adversely affect the representation of the client. This is the case where you got a far flung corporate intent. McKesson Corp. the parent is the sixteenth largest corporation in America.

MR. MANNING: I don't mean to interrupt, but I haven't gotten to that point of my presentation yet. The issue of the conflict is yet to be discussed, and I will represent to counsel I intend to explore that in all detail.

THE COURT: In your argument?
MR. MANNING: Yes, your Honor. I thought we were rebutting this issue of the letter here.
THE COURT: Would you rather hold your statement on that issue?
MR. SMITH: Well, Mr. Krane is going to

40

testify as to the legal import to some of these issues in my due course.
THE COURT: If you will proceed.
MR. SMITH: McKesson is the sixteenth largest corporation in America. They were one, by definition, one of the consumer of legal services in the entire United States, and that's why this letter is important. The ABA tells you when you're dealing with the corporate super structure like this the best thing to do, and this was back in 1995, was when this was just arising as an issue. The ABA told lawyers plain and simple deal with it up front and get an expressed agreement as to who your client is. That was in this ABA opinion back in '95. The best solution to the problems that may rest by reasons of a client corporate affiliation is to have a clear understanding between the lawyer and client at the very start of the representation as to which entity or entities in the corporate family to be the lawyers clients are to be treated so conflict purposes. That's what the rules -- that's what the opinion instructs lawyers to do so that these types of issues don't materialize and that's exactly what happened here.
I read it into the record or Professor

41

Cunningham talked about it. I won't read it out loud again. It's on page three of the engagement letter. It tells us who the client is. Once you realize the party agrees to this up front there is not a conflict. Waiver does not even come into play. Because there is nothing to be waived. It's that plain and simple. That's really what frames the issue here.
Now, after we hear from Mr. Krane and Mr. Manning had a chance to argue what ever he

refers to the rest of his case, then I will go into this in more detail, but that's the framework within which this has to be used and that's the framework that's missing from every piece of analysis in this case. And at this point now we'd like to call Mr. Steven Krane to the stand.

STEVEN C. KRANE, having been first duly sworn, was examined and testified as follows:

DEPUTY: Say your name, spell your first and last name for the court reporter, please.

THE WITNESS: Steven S-T-E-V-E-N. C. Krane. K-R-A-N-E.

DIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Krane, if you would tell us what you do

for a living, please?

A. I'm partner with the Law Firm of Proskauer Rose in New York City, practice in the area of representing lawyers in law firms.

Q. What source of clients do you represent in that field?

A. I represent law firms large and small in a wide variety of advisory matters and litigations and at disciplinary proceedings as well as individual lawyers and corporations of mostly large corporations my firm represents on other matters, advise them or their general counsels on issues of ethics and professional responsibility.

Q. In addition to the work you do for client and for folks who call you up, do you have involvement with other Bar Associations?

A. Yes, I do.

Q. What sorts of roles do you play in those instances?

A. Well, currently--

MR. SMITH: Instead of making this a memory test, if I might, your Honor, let me pass out a copy of his affidavit which also has his resume attached to it.

A. Thank you.

The principle activities that I have is

currently I'm Chairman of the American Bar Association standing Committee on Ethics and Professional Responsibility. I have been a member of that committee since 2004. I have -- I'm Chairman of the New York State Bar Association Committee on Standards of Attorney Conduct which has been -- which I have led and its predecessor since '95, and we are currently in the process of evaluating the Model Rules of Professional Conduct and presenting them to the State Bar House of Delegates for adoption in New York. I spent nine years on the New York City Bar Association Ethics Committee, ultimately spending three years of -- as Chairman of that Board. I spent four years on the New York State Bar Ethics Committee, and I have been on a number of other Bar Associations Ethics Committees relating to cross border practice attorney/client privilege and wide range of issues.

Q. Have you ever taught legal ethics?

A. I did. For four years I taught Professional Responsibility Course at Columbia University School of Law.

Q. And do you serve in a judicial capacity periodically?

A. Yes, I have served as a Hearing Panel

Chairman in the State and Federal Courts in New York City, and currently I serve as a Special Referee in disciplinary matters in nine judicial districts which is northern suburbs of New York City.

Q. Now, what have you done -- what have you reviewed in this particular matter in order to form the opinions that you express in your affidavit?

A. In terms of the papers that have been submitted in this proceeding, I have reviewed the, I guess, it was the complaint that was filed by McKesson Information Systems. The responsive submission of Duane Morris Firm, and I guess there was one other piece of paper that brought on this motion. But essentially my review has been confined to the record on file in this proceeding.

Q. Okay. And as part of that did you have occasion to review the engagement letter that governs the relationship between McKesson Automation and

McKesson Medication on the one hand, and Duane Morris on the other?
A. Yes, I saw three different versions of that letter.
Q. Let me hand up to you what we have marked as Exhibit 7. It's the final version of that letter. It's the one that Professor Cunningham was referring to in

45

his testimony as well.
A. All right.
Q. Is the letter --I apologize in advance of this question if this question seems awful.
Is it common for law firms and clients to have engagement letters like that that control their relationship and define their --
A. It's very common. In most firms it is required that the terms of the representation be set forth in a writing given to the client. Whether it's -- whether it's given to the client or counsel or signed by the client really doesn't matter all that much. It is just viewed as important, and in some states. For example, in New York, it's mandatory that certain terms and conditions of the contractual relationship between lawyer and client are set forth in a writing so that everyone is on the same page at the outset.
Q. Is it common in your experience for sophisticated client on the one hand and law firm on the other to expressly set forth who the client is in an engagement letter?
A. Yes, that's actually the preferred course of action in dealing with a sophisticated corporate client, particularly one that has a wide range of affiliates within a corporate family to set forth up front who it

46

is we represent and who we don't.
Q. Why is it important to do?
A. Well, it's important because there have been a lot of -- there are a lot of cases that developed in the 80s and 90s where a law firm would take on a small matter for one piece of a corporate family and end up being hit with a disqualification motion because it was adverse to some other piece of the family and some other unrelated proceeding, and the client would -- was

seeking disqualification. I will use that term sort of broadly. Said, well if you represent this piece of us you represent all of us. So the approach that was taken in response to this problem was all right let's agree up front. We represent piece A and piece B and that's it. And that's a matter of notion between the lawyer and the client at the outset.

Q. In this ABA Formal Opinion that I was pointing out a minute ago it mentions not only what you just discussed where you define who the individual subsidiaries or pieces of the puzzle are your client, but it assist you can also list the client's to be treated so for conflict purposes?

A. That's really the main idea of doing this in the first place is so that you don't run into trouble particularly in a large firm with multiple offices if

someone else in another office wants to be adverse in an unrelated matter to some other piece of this corporate family you have defined up front, you have circumscribed that portion of the corporate family that you're representing, and it's primarily conflict purposes although it has other purposes as well. Who are the other lawyer client duty run to.

Q. In your experience is it reasonable to rely on that agreement from that point forward between a law firm and a client?

A. Well, it's reasonable on both fronts. The client relies on it and the lawyer relies on it and certainly in my practice and in discussing this issue with my counterpart ethics partners at other firms we expect that when this is determined up front whether the client -- at the client's insistence, and sometimes it's the client who insists on defining the scope of the entities represented or at the lawyer's insistence that these will be the terms under which we will represent these entities, and there is a very very strong degree of reliance on that.

Q. Okay. Now if a client enters into an engagement letter agrees to the terms and the representation going forward, and then the client changes its mind, can it force the law firm to continue

to represent it on terms differing from engagement letter?
A. That will be giving the client control. That would be no different from the client saying we don't want to pay you $300 an hour anymore, we want to pay you $50 an hour, and we insist that you work that. They're changing the terms of the representation, the terms of the engagement. So their recourse-- they don't have a right to insist on lawyers doing -- working on terms that they dictate. Their recourse is to -- is defined -- is to find another law firm and to discharge the law firm and saying we don't like this material anymore, we are not willing to abide by them any longer so thank you very much we are going to go elsewhere for our legal services.
Q. And I hate to admit this in open court, but that happens all the time?
A. It does not as much as you would think because for the most part clients abide by their agreements. And you don't have problems with clients trying to in hindsight wishing that they had made a better deal with their law firm. Certainly, the law firm is not in a position to say you know what, instead of charging $300 an hour we want to charge a thousand dollars an hour; I know you didn't agree to it, we are

going to insist. We are not going to continue to represent you unless you agree to that. The lawyer doesn't have that option. So it provides a balance to the relationship of the --
Q. Now, in looking over the engagement letter. I think it's marked as Exhibit 7. On page three there is a paragraph that defines who amongst all the far flung McKesson entities are, the actual clients at issue for all purposes in this engagement. Is that a common paragraph in most engagement letters in your experience?
A. It's very common when you're particularly -- when you're taking on a representation of a piece of a large entity in a relative small matter. And it's -- again, it's a matter of notion that client doesn't have to accept this limitation, but it's the law firm saying these are the conditions on which we will be willing to represent you. We will represent you as long as you

understand that we are representing these two companies and no more. So this is very typical and particularly since the 1995 ABA Ethics Committee Opinion that says this is the best solution to the corporate family problem most firms in the country, and to my knowledge do exactly what is set forth in Exhibit 7.

Q. Now, if there were some perceived conflict, even if it not to a direct client to someone that would

50

be governed under Rule 1.7?

A. That's correct.

Q. And in your affidavit you have discussed generally speaking advanced waivers, conflict waivers?

A. Right.

Q. In that context, to your knowledge is there anything under Georgia Law that says advanced waivers of conflicts are prohibited in all circumstances; period, end of discussion?

A. I'm not aware of anything that states that.

Q. In fact, advanced waivers are commonplace --

MR. MANNING: He is leading the witness. The witness is doing fine on his own. I would object to counsel leading him.

THE COURT: Sustained.

Q. Do advanced waivers exist as a commonplace for non United States legal world today?

A. Yes, they do.

Q. Why is that?

A. Because, well -- situations like this. Where this is really the parodine for the need for an advanced waiver where you have a large law firm, offices around the country being engaged to serve as local counsel which is really a very very small, it's important engagement, but it's a very small engagement

51

in the sense of the overall business of the firm and the firm wants to make sure that by accepting this engagement it's not precluded from taking on adverse matters that even in this case as to the two companies that are specifically named in the engagement letter. They want to be sure that that is understood up front. If the client isn't willing to do that they're free to go find some other law firm to serve as local counsel,

but it is a way that most large law firms that I'm familiar with use to really to protect themselves against conflicts of interest on an unanticipated technical conflict of interest that don't affect the interest of the clients, and also the interest of other clients who are going to want to come to that firm and don't want to be barred from hiring the firm of their choice because some client's being represented in a small matter somewhere in something that has nothing to do with their matter.

Q. Now, sometimes unfortunately issues like this arise at court and disqualification motions get filed. What are the dangers to the system associated with the filing of disqualification motions in various types of legal matters.

MR. MANNING: First of all, ambiguous and it doesn't relate to specific issues. He is

talking about raising conflicts in most disqualified general, and I don't think that has any relevance. If you want to save that for argument, that's fine. I don't think that requires expert testimony.

MR. SMITH: It's specifically set forth in the Rule of Common Eighteen, in the scope of Georgia Rules, and that's where I'm going.

THE COURT: I will overrule it.

A. Well, one of the risks -- one of the dangers of disqualification notion one of the main ones is that they can be used tactically in situations where the client seeking disqualification of the law firm really is not harmed and the representation is not materially limited at all, but they are done to just try to throw a monkey wrench in a proceeding and slow things down or disrupt a proceeding. So they can sometimes even be made in complete bad faith, but they are -- it is very -- it is a weapon that is sometimes susceptible to abuse.

Q. Now, I think you're familiar with these facts because they're reflected in your affidavit.

Is it your understanding that after this conflict rose up, and after it was back about between the law firms that Duane Morris offered to withdraw from

its representation in the bankruptcy matter?
A. Yes.
Q. Was there anything wrong with that offer?
A. No, that was the proper response under the circumstance. If the client no longer wished to abide by the agreement that they entered into up front the proper approach, and this happens in a variety of context, is for the client to find new counsel. They can't insist that the other client who is completely innocent in this situation that they go and they have to find another law firm.
Q. Does that offer to withdraw constitute extortion by the law firm in your opinion?
A. In my opinion that was the ethically proper if not required thing to do. Couldn't abandon the other client that had nothing to do with the creation of the alleged conflict.
Q. In your professional opinion is disqualification of Duane Morris warranted on the facts of this case?
A. Not at all.
Q. Thank you.
CROSS EXAMINATION
BY MR. MANNING:
Q. Mr. Krane, my name is Joe Manning.

Is your professional responsibility for sale?
A. My professional responsibility is not for sale, no.
Q. I would hope not. It's a serious matter, isn't it?
A. Yes, it is.
Q. Do you have a moral responsibility or less responsibility -- strike that, start over.
If you have a small client that you represent, and you used the word three or for times, "small matter." In a small matter, do you owe them, that client, a less professional responsibility than you do a major corporation?
A. You do if you have agreed to that up front.
Q. And they understand --

A. I'm answering your question. Then my answer to your question is, no, you do not necessarily owe them the same level of professional responsibility. It depends on the contract between you. If in the absence of a contract, yes, it is the same level of responsibility to all clients.
Q. Is your professional responsibility a matter of contract?
A. Your relationship with the client is a

55

matter of contract.
Q. Is your professional responsibility to be governed by contract law?
A. It can be in certain --
Q. Is it your position in this case contract law governs professional responsibility to Duane Morris in this case?
A. It provides the framework of the application of law of professional responsibility.
Q. So if the contract says, they can do it, they can do it; is that your answer?
A. When you're dealing with a sophisticated client represented by counsel in the transaction independent counsel your own law firm representing them in and advising them on engagement letter, yes, that is what governs, and that is what they should be required to abide by.
Q. Would you agree with this statement. The requirements of this court and this is a quote in Georgia Charles Moore in this jurisdiction for many years. He states an opinion. I will ask you if you agree with it? "The requirements of this Court rules govern a conduct lawyers practicing before it in the course, and of course of the Georgia Code of Professional Responsibility transcends mere contract

56

law." Would you agree with that statement?
A. I don't remember that. You're quoting from the Worldspan case, I believe, and I don't remember exactly where that fits in Judge' Moi's opinion. I again reiterate that the ethical and professional responsibility of a lawyer is established in rules of professional conduct, but it has -- the rules must be

supplied in the context of the relationship that they govern. They don't exist in a vacuum.

Q. Let me go back to my question, Mr. Krane. And you're right it's Judge Moi's opinion in Worldspan, and the Court information that's 5 F. Supp. 2d 1358. I want to ask if you agree or disagree. That's my only question. With his statement that "the requirements of this Court rules govern the conduct of lawyers practicing before it, and the course of Georgia Code of Professional Responsibility transcends mere contract law;" agree or disagree?

A. It's hard for me to agree or disagree with a statement taken just like that. It may or may not be the case that in every circumstance the ethics rule transcends contract. Clients can waive conflict of interest. That's a contract. And that is away in which contract law can govern the professional responsibility of lawyers. The relationship between a lawyer and

client. That's a matter of contract. Provides the framework on which we apply the rules of professional conduct. So, I guess, if I have to give a yes or no answer, and maybe it is not acceptable, I'd have to say I respectfully disagree with Judge Moi on that quote.

Q. I would assume that was your answer. I will go back to the small matter in a minute. I'm disturbed by your testimony. And leaving aside, let's assume there is no written agreement, we don't have to deal with that. But you have a client that you're representing on a small matter, how ever you define small matter. And you or your firm resolve for the opportunity to represent a larger or potentially much more profitable client. Do you mean to tell this Court that you could go tell the client with a small matter to take a hike, go find another lawyer?

A. You started your question within the absence of an agreement.

Q. Correct?

A. And in the absence of an agreement I agree with you, you cannot abandon the client even though he represented them in a small matter because something better comes along. I agree with you.

Q. So the matter of the fee is not relevant to

your professional responsibility, isn't it?

58

A. I'm not sure I understand that question.
Q. Your profession amount?
A. Oh, the amount of the fee, that's correct.
In the -- we are talking about the basic framework a client is a client is a client.
Q. Correct. And you can't reduce your professional responsibility to a client by contract, can you?
A. In some circumstances you can. You can define -- you're not reducing your professional responsibility. You're defining the terms and conditions under which you will represent them and there are many Ethics Committee Opinions as well as cases around the country that recognize that the agreement, particularly when you're dealing with sophisticated clients, that they can agree to a lot of things that the little guy couldn't agree to.
Q. So you could say that by contract you could limit one professional responsibility to a large client but not to a small client?
A. In some ways, yes.
Q. Okay. We will talk to the Court about that.
I find that disturbing.
I want to --
Your affidavit doesn't mention the Georgia

59

Rule that I put on the board, does it?
A. No, it doesn't. I didn't think it was necessary to talk about Georgia Rule 1.7(b), but I would be happy to talk about it now.
Q. You think that 1.7(b) is irrelevant?
A. Yes, I do.
Q. It's not a matter of contract?
A. Well, in a sense it is because the contract we are interpreting here was entered into in Pennsylvania for a Pennsylvania representation with Pennsylvania lawyers. That's the only lawyer client agreement that we are talking about here, and the expectation of the parties who entered into that was that Pennsylvania law would apply not any other state in which matters happen to arise. So, yes, I agree. I

believe that Georgia law is completely irrelevant, but I don't think the conclusions any different.
Q. So Georgia law professional responsibility subservient to Pennsylvania?
A. The choice of law -- Georgia Law Rules of Professional Responsibility have nothing to do with the representation of these two McKesson entities in Pennsylvania, and the only duties that Duane Morris as a law firm owes to any clients are the duty that owes to those two McKesson entities in the bankruptcy matter in

60

Pennsylvania, and that's the governing law for this determination.
Q. McKesson has not objected to Duane Morris' representation in Pennsylvania?
A. Well, sounds to me like they are taking the position that not withstanding their agreement limiting the scope of the representation to two entities they are -- McKesson Information Systems says it's a client.
Q. Mr. Krane, has McKesson asked the Duane Morris lawyers in Pennsylvania to withdraw, step down, curtail the activities at all?
A. No, they have no right to do that.
Q. They haven't done that, have they?
A. No. Well, actually they have no right to do that.
Q. You have been -- you're being paid to testify?
A. Yes.
Q. How much?
A. I'm being paid by the hour.
Q. And how much per hour?
A. $795, my regular rate.
Q. And how many hours have you devoted in this matter so far?
A. Ten or 15.

61

Q. And did you draft your affidavit?
A. Yes, I did.
Q. Or did the lawyers draft it?
A. I drafted it myself.
Q. The lawyers change any part of your affidavit?

A. They corrected a typo, and may have made one other editorial suggestion, but no, they did not make any material substantive changes. It was all my own.
Q. Now, McKesson has lodged an objection -- let's start over again.
McKesson Information Solutions has lodged an arbitration in this state, the state being Georgia; is that correct, isn't it?
A. That is correct.
Q. And the lawyers who have just made appearance to represent the claimant's are the Duane Morris firm located in this state; is that correct, isn't it?
A. Yes.
Q. The lawyer who -- from Duane Morris who are representing the claimants are members of the Georgia Bar; aren't they?
A. Yes?
Q. Do you dispute that the Georgia Rules of

Professional Responsibility govern that their conduct in that matter?
A. If they were to engage in some misconduct -- let's put aside the conflict issue. If they were to engage in some misconduct, if they were to engage in some misrepresentation to the tribunal, yes, the Georgia Rules of Professional Conduct would govern this individual conduct.
Q. Is it your position that this Court applying Georgia Rules of Professional Conduct has no jurisdiction to disqualify the Duane Morris firm?
A. No, it's my position this Court should apply the Pennsylvania Rules of Professional Conduct to the contract entered into between McKesson Automation and McKesson Medication Management which was entered into for representation in Pennsylvania. That is the only lawyer client relationship that any McKesson entity has with Duane Morris and it's governed unquestionably by Pennsylvania law.
Q. You have a statement in your affidavit which I bring to your attention and to the Court, paragraph 15?
A. All right, yes.

Q. And the fourth line second sentence. "Duane Morris lawyers have limited contact with any employee of

63

McKesson entity and have received little confidential information relating to such entity." You see that?
A. Yes, I do.
Q. Does it make any difference to you that they have received little confidential information. Is that relevant to your testimony?
A. Little as opposed to know or little as opposed to much?
Q. I didn't write your affidavit, Mr. Krane?
A. Well, I'm asking. I don't know what direction you're going in. My point is that to the extent this matters at all, and I don't think it does, to the extent it matters at all, what kind of contact they had, the fact that they had very little contact which would be consistent with the roll of local counsel and received little confidential information which given the lack of any relationship between the matter is unlikely to have anything to do with the arbitration, makes it clear to me that there is no potential injury to any McKesson entity by virtue of the representation in the arbitration.
Q. Have you researched Georgia law on whether this Court even has the authority to inquire into whether there's been a disclosure confidentiality? Have you looked at that question?

64

A. I believe that there is a reference in Judge Moi's Worldspan case that talks about in the absence of a relationship between the matters it's incumbent on the party seeking disqualification to point out specific confidential information that this imparted to their lawyers that could now be used against them, and I believe I cited that in my affidavit at some point.
Q. Is it limited to the Worldspan?
A. That was one place where I saw it. That is the approach --my understanding of the approach nationwide. You have a -- what the agreement is, it was used a substantial relationship test as a way in effect in determining up front whether there was a risk that anything confidential could be used in an adverse

representation.
Q. I will address that with the Court.
A. You don't want me to finish?
Q. I'm sorry, I thought you were?
THE COURT: You may finish your answer.
A. I was explaining that the substantial relationship test which was used to determine when you could be adverse to a former client which McKesson -- the McKesson subsidiaries could be if they accepted the offer of withdrawal would look -- the relationship between the matters to see if there was any continuing

65

risk that anything you learned in matter one would now be used adverse to you in matter two. Failing a relationship it would be up to the client seeking disqualification to make -- to -- they would have the burden of establishing actual confidentiality information that was used. The burden would shift to them. I think that was ultimately what you were asking me.
Q. Worldspan was a case where there was a prior representation and not a concurrent representation?
A. Which is why the discussion about substantial relationship.
Q. Now, let me ask you. I'm glad you pointed that out because my question was ambiguous.
Where you have a concurrent representation where you're represented and being adverse, and there is a question of a conflict, does this Court even have the authority to inquire as to whether there's been a disclosure of confidentiality?
A. The only reason that I mentioned it at all was because of the language in the advanced waiver in the May 30th letter that said we won't -- we can be adverse to you in other matters, but not if it's -- not if it's related to the subject matter of the services to the McKesson entities. That's the only reason I pointed

66

it out, and by making the point that there is really no risk of harm here to any of these McKesson entities.
Q. Let's leave the letter aside for a moment, sir. Let's deal with this situation. We have a concurrent representation?

A. Right.
Q. And one preceding the other as in this particular instance. Does this Court in a concurrent representation have the authority to look into whether there's been an actual disclosure or can she -- is she required to assume that there has been?
MR. SMITH: Objection, your Honor. There is no basis for asking that hypothetical because he's never stated that there is concurrent representation of MIS.
MR. MANNING: I will get there.
Q. Assuming concurrent representation?
A. Should I answer the question?
THE COURT: Yes. I'm going to allow it if it's connected just as I had allowed it with you.
A. Let me try to answer it this way.
Q. Can you give me a yes or no?
A. I don't remember.
MR. MANNING: Your Honor, he has been

ducking these questions constantly.
THE COURT: If you would please answer yes or no then you may explain.
A. Would you restate the question with the introduction, I got a little lost.
Q. Concurrent representation, no agreement?
A. Confidential information is irrelevant.
Q. Thank you, sir.
And this Court should inquire into that question; isn't that correct?
A. If your hypothetical were true that there were no agreement whether there is confidential information doesn't -- let me take that back. I'm sorry I know you were about to sit down. But Court's in assessing whether or not to disqualify a law firm also have to take into account -- let me phrase it that way. I don't want to seem like I'm telling your Honor what to do.
Court's very often and generally take into account the equities of the situation and in deciding whether to exercise their discretion in disqualifying a law firm look to things such as whether the party

seeking disqualification will be harmed. Whether there will be a taint to any proceeding by a law firm remaining in. These are the credential consideration

68

that court's routinely take into account in deciding whether or not to disqualify even if there is a violation of a rule.

MR. MANNING: Thank you. That's all I have.

THE COURT: Have you any redirect?

MR. SMITH: Just one thing.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Manning asked you a lot of questions about there is a professional responsibility as a contract.

Would you agree with this statement from the 1995 ABA Formal Opinion about corporate representation? "The client lawyer relationship is principally a matter of contract and the contract may be either expressed or implied?"

A. Yes, I agree with that statement.

Q. Why is that important to this matter?

A. That if you look to contract law to determine what the lawyer client relationship is because determining the parameters of the relationship is a matter of to be agreed upon between the lawyer and the client. The absence of a written agreement or an oral understanding the law will imply certain terms that

69

apply as gap fillers, but where a lawyer and a client agree these are going to be the terms and conditions of our employment that governs the relationship. The ethical rules and professional responsibility principles are an overlay over that, but you have to know what relationship is you're talking about before you apply the rules, and that's where contract law comes into play.

MR. SMITH: Thank you, Mr. Krane.

THE COURT: Have you any recross?

MR. MANNING: No, your Honor.

THE COURT: Is there any reason Mr. Krane may not be excused?

MR. MANNING: Not from us, your Honor.
MR. SMITH: Not from our side.
THE COURT: You're excused.
(Witness excused.)
THE COURT: Have you any further witnesses?
MR. SMITH: No more witnesses to call.
THE COURT: And what would be your estimate of time on your argument, Mr. Manning?
MR. MANNING: I would probably have 20 minutes.
THE COURT: And yours?

70

MR. SMITH: I can't imagine I'd be any longer than that.
THE COURT: Can you all last that long with no lunch.
Are you able to Madam, Court Reporter?
COURT REPORTER: Yes.
THE COURT: Go ahead.
MR. MANNING: I'd like to spend a few minutes on this question of is there a client. Such that the issue of conflict arises and certainly that's an issue. It's not a client relationship. Actually, we've taken this in kind of reverse order, but that's the first question for you, your Honor. And then we get to the question of the latter.
McKesson Corporation is a large company. But I submit to you that they use the same consideration for the counsel professional responsibility as any client regardless of size. The only case that I'm aware of that deals with this question of sister corporation in a concurrent representation is the Ramada Franchise versus Hotel of Gainsville. Association case from Judge O'Kelley out of Gainsville district. This is at 988 F. Supp. 1460, and I'm sure your Honor is very

71

familiar with Judge O'Kelley. There was a prior representation, concurrent representation, and as here the motion to disqualify the defendant on the basis that they were separate corporations. And

which is the principle argument here, that it's a matter which I find offensive and a matter of contract and not a professional responsibility. A professional responsibility does transcend ones contractual obligations, and you cannot contract.

In addressing the question of whether sister corporations were a client and had an identity of interest Judge O'Kelley says "Courts. have to come to differing conclusions about whether an affiliated entity, a parent or sister corporation of an entity that was represented by an attorney should be considered a "client" for disqualification purposes. However, underlying each court's analysis typically runs a similar theme. Rather than he focus on labels as a mean of resolving attorney disqualification disputes in making its determination, a court should sift the facts and circumstances involved, and cites Baxter Diagnostic Inc. versus AVL Scientific Corp. 798 Supp 612, 616. Finding the subsidiary to be inextricably intertwined with its parent company

was an identity of company for purposes of a claim. Also, cites Terodyne, Inc. v. Hewlett Packard Company, 1991 WL 239940. "Because of the parent company's control and supervision of the legal affairs of the subsidiary, the court found that there was sufficient identity of interest for treating two as a single client for the limited purposes of determining whether it was a conflict."

Also cites the case of Hartford Accident and Indemnity versus RJR Nabisco, Inc. at 721 F. Supp 534, where the court found that they also claim assiduous supervision of the subsidiary's litigation. Judge O'Kelley went onto affirm. States this court summarily finds that a pragmatic approach that takes the relationship of the parties into account is superior to the exaltation of form over substance. In this motion to disqualify, and in the Affidavit of Joel Buckberg, plaintiff has asserted his portrayal of the relationship between The parent company, HFS, and its wholly-owned subsidiaries, Ramada and New DIA. According to

plaintiff, all three entities have substantially similar management personnel that share the same headquarters and have the same "corporate principles and business philosophy." The legal

73

department services all three. The court finds that the plaintiff has provided sufficient information pointing to an identity of interest between New DIA and Ramada for the limited purposes of determining whether there was a conflict requiring disqualification of defendant's counsel."

So when they talk to you about what's here. And it's in our brief, and we have attached affidavits, and so to understand whether there is an identity of interest --

MR. SMITH: Your Honor, I need to raise a point. Mr. Manning just referred to the existence of a brief with affidavits attached to it, and I never received anything. If I misspoke I will sit back down.

MR. MANNING: I meant exhibits. I apologize if I said affidavits. I will tell you right now we didn't file any affidavits.

MR. MANNING: McKesson, as I stated breaks its business down into three business segments. I can't recall the names of the other two, but one of them is Provider Technologies. And they are separate corporations. And if your Honor wants to find that McKesson Information Solutions was not a corporation, it's a Limited Liability

74

Corporation today, but it is an entity. As is McKesson Automation, Inc. But to understand these businesses are related in the market business, and they are governed by, and we are part of this, as I told your Honor this earlier today, this fictitious entity. McKesson Provider Technologies. That's that business segment. They have stated in our verified complaint interplay between the companies. They share business philosophy. They share business plans. They report their income for tax purposes under the SCC jointly as a business unit.

What is telling in the cases that I just

read to you from Judge O'Kelley's opinion in Ramada. The legal counsel is up here. Ms. Patel is -- who deals with us in this case in arbitration and supervises the bankruptcy. Ms. Patel is an employee, Assistant Legal Counsel for McKesson Provider Technologies. So in all those cases with the exception of one that was the primary thing that the court's pointed to. That when you deal with the legal counsel in the supervision of the case that where they represent you, and she's involved in one, you're opposed to, that's a significant factor that creates the identity of interest among other things that exist here without

75

dispute. We believe that Ramada to the extent that it controls it's a District Court case. It's not binding on the court, but we believe that there is no opposing quoted decision to Ramada in this state that I'm aware of, and so that when you consider the factors, not the little determination of the contract, that it requires finding that, in fact, there is an identity of interest in a client relationship such as McKesson Information Solutions, not only standing, but a right to object to the concurrent representation because if your Honor needs any briefs on this, I think Mr. Krane finally agrees if you have a concurrent representation you don't even get into the question of exchange of confidential information. The case is talking about being assumed. I think one case is irrebuttably assumed. You can't defend on the basis of saying I didn't get any or as they tried to say we only got a little. Well, it's not relevant.

The other case I want to talk to you about goes back to the issue we had earlier and that's the waiver. Worldspan is a decision by Charlie Moore in the District Court, and I'm sure you're well aware of Judge Moore, a distinguished

76

court. And he was -- he had this issue of the standard engagement letter. That is here and Mr. Krane is right as we serve multi jurisdiction

and multi national law firms. It's unfortunate, but these types of letters have come in bulk, and so when I say to your Honor sitting on earnest, this is a matter of great import to the profession, and so your decision is being weighed by a number of people because I have had contact with a number of lawyers about this issue. Judge Moore had a case where if I'm not mistaken the engagement letter actually predated the subsequent representation, something like five years, and he goes through and some language in this case, and he says the let law affirm engagement letters sent to plaintiff's when their first representation was undertaken. September 16, 1992, shows the plaintiff respective gave required consent to present dual representation in this law suit commenced five years subsequent to the claim consent and he does state as I read to Mr. Krane the requirements of this court rules govern comment of lawyers practicing before it, and in the course of Georgia Code of Professional Responsibility transcends mere contract law. In extracting some

77

of our agreement which I will read to you with the languages that we have in Duane Morris if you don't see how big that firm is just look at the letterhead on the engagement letter. The language says quote. This is from this engagement letter. "As we have discussed because of the relative large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and the Worldspan or a transaction which Worldspan interest do not coincide with another-- of another client." In other words, to distinguish those instances in which Worldspan consents to our representation such other clients from those instances in which such consent is not given you have agreed as a condition to the undertaken in this engagement that during the period of this engagement we will not be precluded from representing clients who have an interest adverse to Worldspan. The court finds that its very

language is ambiguous. The phrase "will not be precluded from representing clients who may have an interest adverse to Worldspan so long as one such adverse matter does not necessarily or even imply for such matter adverse litigation. It is the

78

opinion of this court that future directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that probability, if not in plain language or at least irresistible inferences including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant lack of information." That is precisely what is contemplated and required by Georgia rule 1.7(b)2. If you're going to have someone waive a conflict it is incumbent of a lawyer practicing in this state that they give the client notice in writing, reasonable information about the material risk of the representation. They may not have to do that in Pennsylvania, but they have got to do it here. And they didn't do it. This engagement letter may be fine in every state outside of Georgia, but it is not, it is not in compliance with Georgia code -- I'm sorry, Georgia Rule of Conflict 1.7(b). It doesn't even attempt nor could

79

it have given notice of the future representation in that arbitration. No effort was ever made to make that disclosure prior to Duane Morris making the appearance in that arbitration. We are entitled to an order restraining them in our brief memorandum recited to the authority this court has to deal with, and the best I could tell since the case is not opinion here, and we would request that your Honor issue an injunction prohibiting Duane Morris Law Firm from participating representing the Smith's in the arbitration matter, and I appreciate

your Honor's indulgence.

THE COURT: Your argument.

MR. SMITH: Thank you, your Honor. I want to say a couple of things up front before I get into the meat of the argument. One of them is we apologize for miss citing the rule in having a typographical error in our brief. It doesn't make any substantive difference. I think that's been clear from the testimony. It's clear from briefing itself. It's clear from the Georgia Rules. It's clear from the fact that Mr. Cunningham said he doesn't know anything that prohibits prospective waivers in Georgia nor than they be prohibited or allowed anywhere else, but we do apologize to the

court.

It was not as Mr. Manning accused me of an intentional misrepresentation.

And secondly, I would like to apologize if I got a bit emotional a time or two. So far in this case I have been called an extortionist. I have been told my conduct is unconscionable and offensive, and all this has come from the plaintiff's lawyers and their experts. So if I get a bit emotional I apologizes. I'm sure Mr. Manning understands. I'm sure he recalls back in the day when in the case of Glover versus Lieberman, when it was moved for him to be disqualified in a case, and he testified in court, I think this was in front of Judge Moi, and how upset he got, and how I took it as a professional affront, and how he had trouble communicating with people about the case because he was so angry. And so he knows where I'm coming from I suppose 23 years later. Probably still fresh in his mind. So that's what I'm here to talk about. I wanted to get those out of the way.

Mr. Manning ended up at a point that I want to start with. They're asking for an injunction. They have a burden to carry. They

haven't met it. It's that simple. They come in, and they have to prove who the clients are, what

the supposed conflict is and why this would be either unwaivable or unaddressed under the law, and they simply have not carried that burden. It's that simple.

When I started out as a young associate I could remember the risk management partner telling me, Sean, when ever you have a problem like this the first thing you ought to ask is whose the client. That takes cares of those things. And that's exactly the way it is here. You ask who the client is the letter touched. It's McKesson Medication. It's McKesson Automation, and I believe if I heard Mr. Manning correctly, he specifically said that they didn't have any trouble with our representation. They don't object to our representation over in Pennsylvania. We offered to step down. There is a reason they didn't accept that offer because this would have kicked it over into a rule 1.9 issue, the two matters substantially are not even close to be substantially related in their tactical move to try to get this disqualification motion going would have disappeared, puff, up in smoke. So that's why

they didn't. That's the point. They have not presented any evidence to this court to determine straight that this particular issue, entity that's used for some accounting purposes, some how links these two, so that by representing this company you by definition and as a matter of law become this company's lawyer. They have failed to meet that burden. They have not even put forward a shred of evidence that supports that necessary argument. This case fails at that point. They didn't agree to it. They didn't reveal the existence of this fictitious company. That's not in the engagement letter. That's not anywhere. First I heard about it was in the complaint. These companies are head quartered in separate states. They have separate employees. They're separately incorporated. I don't believe Mr. Manning meant to suggest that the McKesson subsidiaries are dishonoring the corporate form. In fact, they Honor it quite well. You look

at the Secretary of State findings. McKesson Information Services list as principle place of business as being in San Francisco, California. McKesson Automation is outside of Pittsburg, Pennsylvania. The company we haven't heard a lot of about today. McKesson Medication is head

83

quartered outside Minneapolis. They have all got separate clients. They have got separate employees. They have got separate locations. They have got separate officers. As they allege Morris Manning says on behalf of McKesson Automation Solutions and the complaint, they have separate contracting obligations. Contract with one doesn't mean you have got a contract with another. In the particular underlying arbitration before I and others got involved in representing Mrs. Smith there is no complaint. It was actually filed against McKesson Corp, and we got a very frank notice from Mr. Manning's firm. Actually it's Morris Manning who couldn't be here today. Oh, no, you can't sue them for something this company did. You mean to sue down here because that's the only company you could sue, and that's the only company that could possibly be liable to. That's the way they represent when it's to their advantage. When they want to disqualify us from representing Mrs. Smith here all they got a different view. Stuff they didn't tell us. Suddenly becomes cast in stone. And that's just not the way it is. There is not a conflict here. They have separate -- these are separate companies, and if they're not

84

honoring the corporate form they need to say so and they need to abolish all these corporations. They cannot agree on certain corporations and say you only represent us and no other parent subsidiary or affiliate and then when it's their advantage, oh, we didn't really mean. We deem you to be the lawyer who ever we think it would be to our advantage to say. That's what they have done plain and simple. There is not a lot more I could put on this, your Honor. You look at some of the cases

Mr. Manning cites. The Ramada case for instance. As he puts it the only case where he could find where there was a concurrent representation of sister corporations. You look at the operative line in that case. The operative line in that case comes at the end. "Plaintiff's motion to disqualify defendant's counsel is hereby denied." In the case where Mr. Manning's accused of having a conflict, the court found, in fact, he did have a conflict and yet, the court refused to disqualify him because they recognized it's a litigation tactic not as a real worry. You look at Judge Moi in his decision in the Worldspan case. We quoted it in our brief, but I think it's important to remember here. Judge moi points out that the court

85

must make sure that its interpretations are consistent with the main stream of current legal thought and law and no provincial, and therefore, looks to decisions from other jurisdictions by which it is bound and which it finds persuasive. And this is necessary. Judge Moi recognized back in '98, just as we have argued, and I'm sure this court recognizes these are important issues. They're difficult issues, and they're issues as Mr. Manning said that a lot of people are looking to this court about right now. I mean, I know that folks around the city, big and small firm alike; clients all around the city, big and small alike; law firms all around the country, are actually talking about this case because it's been picked up in so many newspaper from Florida out to California. This article that was in the Fulton County Daily Report, and that's why this matter, and that's the cases, Ramada and Worldspan case actually break off. That's why you don't see a lot of emphasis. Respective waiver is quite secondary in this case. What matters is who the client is. Whether they've been able to carry their burden, and whether they demonstrate that my law firm should be disqualified. And I would propose to you

86

quite simply they cannot carry that burden. This

case matters to a lot of people, your Honor. It matters obviously to the people here in court today talking to you. It matters to other law firms. It matters to other officers in my law firm. It matters to other clients. It matters to folks here, but there is somebody who I really want to thank, and that's Nan Smith, and she's allowed us to pursue this. She cares that she have the right to choose her own lawyers, and she doesn't think some big corporation who at least under the allegation in an arbitration we hope we will be able to have the opportunity to prove has done her wrong before and now they're trying to do it again. That's what this comes down to in the end. Mr. Krane mentioned it. Cases mention it repeatedly. One of the most important public policy factors in any decision like this is, in fact, the right of anybody, big or small, to choose her own counsel. Mrs. Smith has asked -- she was kind enough to shop around and ask Mr. Herman and me to represent her. And we hope this court will allow us to continue to do that because we believe she deserves to get good representation, and we believe this is exactly the sort of tactical move to try to disqualify lawyers

who come into cases like this that this court should put a stop to. We dealt with it up front in the engagement letter. The law is on our side. The facts are on our side, and certainly McKesson Information Solutions has not carried its burden of having this court issue such an injunction as it seeks.

I appreciate the court's indulgence today. Thank you so much.

THE COURT: Have you any final?

MR. MANNING: I have a few closing comments, your Honor.

I tell you I resent being accused of litigation tactics. We raised this at first opportunity within a week or so after we discovered it. It's interesting Mr. Smith keeps talking about my case in front of Judge Foster. Judge Foster was so upset before Rule 11 he sanctioned them, and

when they filed for motion to rehear he attached that affidavit and reabandoned it. That's a case where a lawyer sits in my office, and he says I think you have a conflict, and I disputed, and I said, I don't think so. And I said all right, fine, file your motion. And he looks at me and he said I'm going to wait till you get ready to go to

88

trial and he did. He filed his motion, and I testified. We have raised this immediately. Mrs. Smith had counsel in this arbitration for over a year. We have not done anything to delay that arbitration. When they made their appearance, I think, on July 19th, if I'm correct, your Honor, has those letters attached. I think we sent an email from the 25th, if I'm correct from the 26th, objecting to that entry. The letter he keeps saying where they offered didn't, and I don't have it in front of me. I looked twice and I can't find it. They offered to withdraw in the bankruptcy. Number one, I have two comments about that. My recollection, I could stand corrected, but I would say in all honesty. If we don't withdraw this motion or if we file the motion they're going to withdraw. In other words, they threaten to withdraw if we pursue or rights in seeking disqualification here. Even if they had withdrawn it would not have cured the conflict. The conflict was created the moment they signed that engagement letter with Mrs. Smith. And subsequent withdrawal from bankruptcy matter would not have cured the conflict. And under "responsibility of Georgia" they have to withdraw in this case. Thank you.

89

MR. SMITH: I don't have any further argument, but it was pointed out to me that I got to formally ask that Defense Exhibit 5 and 7 be moved into evidence, Mr. Krane's affidavit and the engagement letter.

MR. MANNING: My only objection is relevancy. I don't think it's relevant because it doesn't talk about the code of responsibility, so I would object on the basis of relevancy.

THE COURT: I will go ahead and admit both the exhibits, five and seven Five being the affidavit, and so it is admitted over objection. And seven without objection.

MR. SMITH: And what ever it was Mr. Manning just moved, I have no objection.

THE COURT: And what ever petitioner's exhibits are admitted without objection.

MR. MANNING: It was the engagement letter, your Honor.

THE COURT: As much as I want to rule immediately I'm not going to be able to do so, and so I'm going to have to go ahead and take this under advisement and issue a ruling as rapidly as I possibly can. But I do want to give the proper consideration given the weight of this decision on

all of the parties involved as well as the significance of it.

I will point out to you that I serve for three years as chair of the Judges Advisory Committee on Ethics to the American Bar Association, so I'm well aware of the iterations that these matters go through and in digesting the testimony of the experts you have offered. That will certainly be a consideration. But I don't want to rush my ruling, and I will try to issue it as speedily as I possibly can this week.

MR. MANNING: Thank you.

****

C E R T I F I C A T E

STATE OF GEORGIA
COUNTY OF FULTON:

I do hereby certify that the foregoing pages are a true, complete and correct transcript of aforesaid. (And Exhibits admitted.)

This certification is expressly withdrawn and denied upon the disassembly or photocopy of the foregoing transcript, or any part thereof, including exhibits, unless said disassembly or photocopy is done by the undersigned official court reporter and original signature and seal are attached thereto.

This, the 31st Day of October, 2006.

_____

Karen Rivers, CCR 2575
RPR, OFFICAL COURT REPORTER
SUPERIOR COURT OF FULTON COUNTY