

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IN RE: KUGEL MESH HERNIA :
REPAIR PATCH LITIGATION : MDL Docket No. 07-1842ML

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Pending before the Court are Motions for Admission Pro Hac Vice of Attorneys Michael Miller and David Dickens as Plaintiffs' counsel in sixty-six of the Kugel Mesh cases pending in this District.¹ These Motions were all filed by Attorney Neville Bedford who is acting as local counsel in these cases. Chief Judge Lisi referred these Motions to me pursuant to 28 U.S.C. § 636(b)(1)(B) for preliminary review, findings and recommended disposition. In connection with that referral, I sent a letter to Attorney Miller on July 28, 2011 seeking further information and documentation. Attorney Miller submitted a timely response to me on August 15, 2011. My letter and Attorney Miller's response are appended to this Report and Recommendation as Exhibits B and C, respectively, and incorporated by reference.

Background

These Motions were prompted by the death of Attorney David Andersen. Attorney Andersen had previously been admitted pro hac vice to represent the Plaintiffs in these sixty-six Kugel Mesh cases. Attorney Andersen was an experienced trial attorney with The Miller Firm LLC located in Orange, Virginia. The current applicants for pro hac vice admission to succeed

¹ A list of the cases subject to this Report and Recommendation is appended as Exhibit A.

Attorney Andersen are also with The Miller Firm. Attorney Michael Miller is the principal of the Firm, and Attorney David Dickens is an associate with the Firm.²

This review was prompted by Attorney Miller's disclosure on his pro hac vice Application that he received a public reprimand in Mississippi in 2003 related to the unauthorized practice of law and related, reciprocal reprimands in Virginia and Maryland in 2005.

Attorney Miller is licensed to practice in Virginia, Maryland, Pennsylvania and the District of Columbia. He has been a licensed attorney in Virginia since 1979. He has also been admitted to practice before the Federal Court in the District of Columbia, the Eastern District of Virginia, the District of Maryland and the Eastern District of Pennsylvania. He represents that he has served as a member of the Plaintiffs' Steering Committees in the In re Zyprexa Products Liability Litigation, MDL No. 1:04-md-01596-JBW-RLM (E.D.N.Y.), the In re Viagra Products Liability Litigation, MDL No. 0:06-md-01724-PAM (D. Minn.), and the In re Avandia Marketing, Sales Practices and Products Liability Litigation, 07-md-01871-CMR (E.D. Pa.). (See Exhibit C, Attachments 5, 6 and 9). Attorney Miller also represents that he has been admitted pro hac vice in other state and federal cases and that he has never been denied pro hac vice admission other than in the Mississippi case which is discussed below.

² Attorney Dickens' Application indicates that he was admitted to the Virginia Bar in 2006 and to practice before the Eastern District of Virginia in 2008. He did not disclose any prior discipline or other circumstances warranting further investigation. However, if Attorney Miller is denied pro hac vice admission in these cases, there would be a question as to Attorney Dickens' qualification to independently handle these cases, given their number and complexity, which would have to be reviewed. See Local Rule Gen. 204(b)(2). Attorney Dickens appears to have only a few years' experience in practice according to both his Application and his biography on The Miller Firm website.

The Mississippi situation was the subject of an en banc 5-4 decision by the Mississippi Supreme Court in 2002, In re Edward A. Williamson and Michael J. Miller, 838 So.2d 226 (Miss. 2002), and the filing of an unsuccessful petition for writ of certiorari with the U.S. Supreme Court Miller v. McMillin, 540 U.S. 821 (2003). It arose out of a medical malpractice action which “came directly to Miller’s office by way of a 1-800 number advertised in Mississippi.” 838 So.2d at 235. A local attorney filed the Complaint in Mississippi Circuit Court under his signature but Attorney Miller’s name, office address and D.C. Bar number were typed under the local attorney’s signature and information. Id. at 230. After defense counsel accused Attorney Miller of unauthorized practice of law, local counsel filed a Motion for Attorney Miller’s pro hac vice admission. On September 12, 2000, the Circuit Judge denied the pro hac vice Motion because Attorney Miller had appeared in more than five cases as pro hac vice counsel during the preceding twelve months and thus had violated Miss. Rule of Appellate Procedure 46(b) and engaged in the unauthorized practice of law.

In addition to denying Attorney Miller’s request for pro hac vice admission, the Circuit Court found him in contempt for making “false representations to the court in the affidavits,” “blatantly and willfully disobey[ing] the court’s order barring his participation at the deposition [of the defendant doctor] by writing down questions and handing them to [local counsel],”³ and “repeatedly misspell[ing] the name of the defendant in [a prior] case, making it difficult for the circuit court to ascertain the correct facts” as to Attorney Miller’s prior involvement in Mississippi cases. 838 So.2d at 233.

³ The specific circumstances of the deposition are set forth in the Supreme Court’s decision at 838 So.2d at 232 233.

The Supreme Court affirmed the denial of Attorney Miller's request for pro hac vice admission. It concluded that the totality of Attorney Miller's involvement with Mississippi cases constituted the unauthorized practice of law. Id. at 237. It relied upon a combination of factors including the facts that Attorney Miller "procured clients in this state, investigated their claims, consulted with local counsel, and allowed his name to be placed on the pleadings in those cases." Id. at 238. The Supreme Court found that "[a]ll of these combined actions go beyond merely referring clients to other counsel or merely serving in an advisory capacity." Id.

As to the contempt finding, the Supreme Court reversed. It did not address the substance of the Circuit Court's findings. Rather, it concluded that Attorney Miller's local counsel was not given notice that he might also be the subject of a contempt finding and thus he was denied due process. Id. Also, the Supreme Court concluded that, since the issue involved criminal contempt and the Circuit Judge had personal involvement, he was required to recuse as to both Attorney Miller and the local counsel. Id. Thus, the Supreme Court reversed the Circuit Court's judgments of contempt and remanded for a new hearing on the Motion for Contempt. Id.⁴ It also referred a copy of its opinion to the Mississippi Bar. Id.

On July 24, 2003, the Committee on Professional Responsibility of the Mississippi Bar found that Attorney Miller engaged in the unauthorized practice of law in Mississippi and issued a public reprimand. Subsequently, Attorney Miller was reciprocally reprimanded in 2005 by the Maryland and Virginia Bars for the same finding that he engaged in the unauthorized practice of law in Mississippi.

⁴ In his Affidavit, Attorney Miller indicates that "[t]he Chief Judge of the District, when the matter was remanded, elected not to proceed with any further action on the reversed contempt issue."

Discussion

It is well settled that “[t]he decision to grant or deny a motion for pro hac vice admission is a matter within the discretion of the Court.” Kampitch v. Lach, 405 F. Supp. 2d 210, 215 (D.R.I. 2005). Such admission is “considered a privilege and not a right.” Id. at 214. Under Local Rule Gen. 204(b), an applicant for pro hac vice admission must (1) “[b]e a member in good standing of the bar of another state and another federal district court and the bar in every jurisdiction in which the attorney has been admitted to practice;” and (2) “[e]stablish, to the satisfaction of this Court, that he or she is of good moral character and otherwise qualified and fit to be admitted pro hac vice before this Court.” “The district judge to whom a case has been assigned shall have discretion to grant or deny motions for admission pro hac vice based upon the applicant’s qualifications, character, past conduct and any other factors that bear on the applicant’s fitness to practice in this Court.” Local Rule Gen. 204(f)(1).

Here, Attorney Miller does not report any disciplinary findings or pro hac vice denials other than the Mississippi situation. Although the allegations which resulted in the contempt finding are very troubling (particularly the alleged defiance of the Circuit Court’s order not to participate in the deposition), the contempt finding was reversed on substantive grounds related to the conduct of the hearing. In particular, the Supreme Court noted a due process violation arising out of lack of notice to Attorney Miller’s local counsel and the improper involvement of the trial judge in the contempt hearing. Since the contempt issues were never the subject of a subsequent hearing on remand, it would be inappropriate to rely on the reversed contempt findings as grounds for denial of pro hac vice status in this case. As to the unauthorized practice

finding, it apparently was not a crystal clear violation since four justices of the Mississippi Supreme Court dissented from the finding. See In re Williamson and Miller, 838 So.2d at 238.⁵ While Attorney Miller's business practices in Mississippi placed him at risk of an unauthorized practice finding, I do not believe that such finding should result in denial of pro hac vice privileges in this case.

First, it appears that the Mississippi occurrence was a one-time transgression, and Attorney Miller does not report any other disciplinary violations. Second, this prior discipline has not caused other courts to deny pro hac vice admission to Attorney Miller and he has since been appointed to the Steering Committee in other MDL cases. Third, and most importantly, the denial of pro hac vice admission to Attorney Miller could substantially prejudice the Plaintiffs in these sixty-six cases. These pending pro hac vice motions were triggered by Attorney Andersen's unexpected death. This MDL is entering the trial/settlement phase, and the denial of pro hac vice privileges to Attorney Miller could present a hardship to the Plaintiffs in these sixty-six cases at this late stage. Further, it appears that Attorney Bedford's role has been limited to that of local counsel and that Attorney Dickens does not have the depth of experience to step in as lead counsel in these cases.

In recommending that Attorney Miller be granted pro hac vice status, I am in no way condoning or minimizing the activity which originally resulted in the Circuit Court contempt finding and ultimately the reprimand due to the unauthorized practice of law. These issues are

⁵ In dissent, Justice McRae observed that Attorney Miller was "subjected to an ad hoc decision making process, for which no legal foundation exists" and "to rules that are not crystal clear." 838 So.2d at 239. (emphasis in original). He contended that the majority held Attorney Miller "to a standard that did not exist, and worse appears to hold him guilty of violating it." Id. (emphasis in original).

serious, and the allegations are troubling, particularly in connection with Attorney Miller's alleged behavior at the deposition. He is advised that this Court does not tolerate unethical or unprofessional conduct and that any such conduct on Attorney Miller's part will result in the initiation of proceedings to revoke his pro hac vice privileges and, if warranted, a referral to bar disciplinary authorities.⁶

Conclusion

For the foregoing reasons, I recommend that the pending Motions for Admission Pro Hac Vice of Attorneys Michael Miller and David Dickens be GRANTED. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
September 6, 2011

⁶ Attorney Miller was also asked to address certain statements on his firm's website about requesting trial dates in these cases. The summary "Kugel Mesh Patch Update" on the website is, at best, poorly worded and, at worst, overstates The Miller Firm's role in this MDL and the directness of the firm's attempts to secure trial dates. However, Attorney Miller's response is deemed satisfactory since the substance of the update (the desire to secure trial dates) appears to be at least generally accurate. In the future, Attorney Miller and his firm are advised to be more precise in the wording used to communicate updates to the Plaintiffs in these cases to avoid any risk of misleading them as to the status of these important cases.