

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE) :
PRODUCTS LIABILITY LITIGATION : MDL DOCKET NO. 1203
:
:
THIS DOCUMENT RELATES TO :
ALL ACTIONS :

PRETRIAL ORDER NO. 26

APPOINTMENT OF SPECIAL DISCOVERY MASTER

AND NOW, TO WIT, this 30th day of March, 1998, pursuant to Fed. R. Civ. P. 53 the parties are ordered to show cause why

GREGORY P. MILLER, ESQUIRE

should not be appointed as Special Discovery Master in MDL-1203.

MDL-1203 IN RE: DIET DRUGS PHENTERMINE/FENFLURAMINE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION was commenced by the docketing in this district of a transfer order under 28 U.S.C. §1407 on December 10, 1997 by the Judicial Panel on Multidistrict Litigation covering 200 civil actions that were pending in federal district courts in 40 states and the District of Columbia. The filing of these actions was accompanied by a similar substantial filing in state courts throughout the country of the same sort of claim. The litigation involves allegations of defects in and related to three different diet drugs - known by the chemical names Fenfluramine, Dexfenfluramine, Phentermine and which had been widely prescribed in the treatment of obesity. These three diet drugs were presumably all dispensed in pill form

and more commonly prescribed for women than for men. In September 1997 certain manufacturers and distributors of these products acting on a request from the FDA initiated a voluntary withdrawal from the market of those products sold under the trade names of Pondimin (Phenfluramine) and Redux (Dexfenfluramine). The estimates on the number of persons taking these products and the number of prescriptions that have been written vary but it has been stated that an estimated 300,000 persons at about the time of the voluntary withdrawal from the market place were taking Fenfluramine and another 300,000 were taking Dexfenfluramine. The principle claim by the persons who are plaintiffs in these cases is that use of the products have caused or can cause heart valve injury, primary pulmonary hypertension and other closely related disorders. Since that first transfer of 200 cases to this district there have been an additional 200 cases transferred here and it is anticipated that additional large numbers of cases will arrive here through that process. Since the initial transfer this court has convened two hearings and following conference with assigned liaison counsel for plaintiffs and defendants has issued a number of orders governing the administration of these cases in the transferee district. See PTO's 2, 3, 4, 5, 6, 7, 15, 16, 19, 10, 21 and 22.

In addition, PTO 22 has provided for a lengthy detailed plaintiff fact sheet to be completed by every plaintiff and filed together with executed information authorizations within 45 days of the plaintiff's discovery initiation date. On February 5, 1998 by PTO 6 the court appointed a nine member Plaintiffs' Management Committee and also appointed several liaison counsel to represent manufacturers and others representing discrete defense interests. Substantial Rule 33 Interrogatories and Rule 34 Document Requests have recently been served on defendants and PTO 22 has directed that objections to those be filed promptly. The court has noticed a hearing for April 21, 1998 to dispose of those objections. It is anticipated that the discovery process now will begin to proceed to a point where the taking of depositions in person, or by telephone will be soon underway. It is anticipated that at least 20 and as many as 40, or possibly more, tracks of deposition activity will be functioning simultaneously on any one day in order to assure that the MDL pretrial coordination will proceed promptly so that all parties will benefit from the opportunity to develop their respective claim and defense positions without unnecessary delay.

It is the court's policy in regard to both discovery and non-discovery motion practice that the parties attempt to resolve their differences amicably before seeking judicial intervention which is costly and time consuming. (See Local Fed.

R. Civ. P. 26.1(f)). Discovery is expected to continue at an increasing level and create discovery obligations in many places simultaneously throughout the United States. This circumstance is obviously the consequence of having consolidated in this district, cases that come from districts located in what may ultimately be every state in the United States for not only persons to be deposed and interviewed, but for the furnishing of many documents and other items of evidence as well.

With these thoughts in mind it is the court's view that there are two major areas that warrant the participation as an adjunct resource to the parties and the court, of a Special Discovery Master. The first is in respect to the administration of a discovery schedule that will require the coordination of many attorneys and witnesses participating in the taking of depositions as well as responding to document requests and other discovery at many locations. While it is true that many of these depositions will not be lengthy, and though many will be taken by telephone with the consent of the parties, the day to day administration of such efforts, and especially a multi-track deposition schedule will be complex even if it functions smoothly. The court finds that this deposition-discovery schedule can best be administered by a Special Discovery Master in cooperation with the court and the parties. Secondly, it is also likely that matters will develop from time to time

concerning the content of discovery that will require the resolution of disputes. Much of this can be promptly resolved at the time and at the place of its occurrence if there is available a capable, competent and dedicated neutral party in the person of a Special Discovery Master.

While it is true that the parties can be expected to do their best to resolve these differences without judicial intervention, there will nevertheless be those instances when a more formal presentation to the court will appear to be the only avenue to resolve differences. It is the court's belief that the introduction of a Special Discovery Master, who will be in a position to promptly and informally consider the views of the parties and attempt to mediate them, will be an invaluable aid to the overall administration of the case. If he is unable to succeed informally, he will be authorized to render a written decision and recommendation to the court forthwith. This more formal second step will allow the parties to secure a written decision from the master after a fair and full review of the parties respective positions, with either party thereafter having the right within seven (7) days to appeal such ruling to the court which will promptly consider the matter de novo.

The responsibility of the Special Discovery Master subsidiary to these areas of his authority shall be to interact and regularly communicate and confer with liaison counsel in

order to monitor the progress of all discovery as required or expected by the court's orders.

In order to execute the duties of his office, the Special Discovery Master shall be vested with the powers described and contemplated under Fed. R. Civ. P. 53(c), (d), and (e) including the right to:

(1) review and analyze all papers, affidavits and legal memoranda filed with the court bearing upon the parties' discovery disputes;

(2) schedule, convene, preside over and otherwise conduct any meetings, hearings, conferences, disposition or proceedings deemed necessary to resolve these disputes; and

(3) prepare and file decisions and recommendations and other necessary reports including a report every thirty (30) days on the progress of the activities under the jurisdiction and authority conferred by this order.

(4) incur necessary expenses and costs at reasonable levels to permit him to function fully in pursuance of the tasks covered by this reference. This power shall include the authority to incur expenses and costs needed to engage the services of needed personnel, and to acquire office space, supplies and customary services associated therewith.

From time to time during the course of his stewardship, the Special Discovery Master shall submit to the court an

application for counsel fees and costs associated with his service as Special Discovery Master and, in that respect, is authorized to incur only such fees and costs as may be reasonably necessary to fulfill his duties under this order, or such other orders as the court may issue from time to time hereafter. Upon receipt of such application, and to the extent that such application is approved, the court will allocate between and among the parties the approved sums that the court finds should be borne by each party. In this regard, the court will expect the Special Discovery Master to provide sufficient information and/or recommendations to assist the court in determining the manner in which fees and costs should be allocated. Fulfilling this task as Special Discovery Master should, among other things, take into account the extent to which any unresolved discovery request or response has been unnecessarily caused, unreasonably delayed or resisted, or improperly responded to.

All decisions and recommendations, reports and application for fees and costs should be served on the PMC and the defendants' liaison counsel at the time they are filed with the court.

In those instances where a ruling made by the Special Discovery Master is accepted by the parties, he shall confirm the same by letter to the PMC and affected liaison counsel (but not to the court) if a party requests such a written confirmation.

All rulings made by the Special Discovery Master on disputes that are not accepted by any affected party shall be prepared by the Special Discovery Master as a "Decision and Recommendation" sequentially numbered beginning with the first such determination and recommendation. It shall be served upon the PMC, the defendants' liaison counsel affected by the order, and the court.

The parties seeking to prevent the decision and recommendation from taking effect shall have seven (7) calendar days from the date it is filed with the court to appeal in the form of a motion with the court, accompanied by a copy of the decision and recommendation attached. The motion should set forth the relief requested. If no appeal is filed with the Clerk within the seven (7) day period the decision and recommendation will be deemed to be accepted by all parties, and the court will enter an order accordingly.

Since Mr. Miller's service as a Lieutenant in the Navy and as senior trial counsel in the Judge Advocate General's Office in 1978 he commenced an active trial practice in the United States Attorney's Office where he served from 1978 until 1984 concluding his career there as Chief of the Criminal Division. Since that time he has been in private practice first as an associate and then as a partner in Hoyle, Morris and Kerr from 1985 until 1989. Thereafter from 1989 to the present he has been a partner and currently a majority shareholder in Miller,

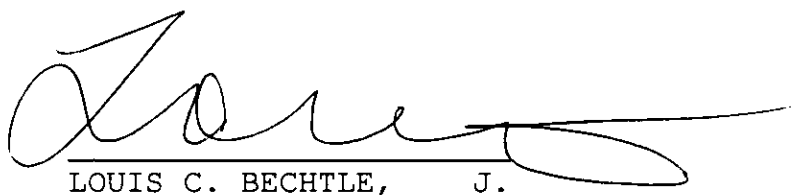
Alfano and Raspanti, PC, here in Philadelphia. He has had a brisk and active trial practice. Much of his trial work has involved him in regulatory compliance litigation representing interests associated with the Commonwealth of Pennsylvania Insurance Department. This experience has brought him into that field and not only litigation but also in speaking to that industry at seminars and conferences in the area of compliance designed to avoid health care fraud and abuse. In this regard he has been asked to speak to a number of organizations and associations including the National Health Lawyers' Association, 1992; Health Care Providers Association of Delaware, 1995; Kent County Delaware Medical Society, 1995; Blue Cross and Blue Shield Association at its National Conference in Chicago, Illinois, 1995; National Health Care Fraud and Abuse Symposium in Los Angeles, California, 1997; and others. He has also been a speaker at the Pennsylvania Bar Institute CLE Second Annual Lawyers' Business Institute, topic: Corporate Compliance and Internal Corporate Investigations, Philadelphia, PA 1996 and at the Pennsylvania Bar Association's Annual Meeting on Corporate Compliance in Pittsburgh, Pennsylvania, 1996. Mr. Miller was graduated from Mount Union College with a B.A. in 1972 and Case Western Reserve University where he received his J.D. in 1975.

The court believes that Gregory P. Miller, Esquire, possesses the requisite skills, experience and knowledge and

other attributes which will be necessary to serve in the capacity as Special Discovery Master in this litigation. In summary Mr. Miller is known to the court and to the legal community in this region as an active, successful and highly regarded trial lawyer. He has represented plaintiffs and defendants in the private sector and the government in the Justice Department and other officials of State Government in his wide practice. It is the court's view that the parties to this litigation, counsel and the court will benefit from the high quality of professionalism that Mr. Miller has demonstrated in his 10 years of combined service in the United States Navy Judge Advocate General's Corps. and the United States Department of Justice together with his 14 years of service in private practice.

Any party having a reason to show cause why this appointment should not be made shall file the same with the court within 10 days of the date of this order.

SO ORDERED.


LOUIS C. BECHTLE, J.