In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 01-679V

Filed: 21 March 2007

ANDREA KANTOR and ROBERT KANTOR, on their own behalf and as friends of their daughter, MADELYN KANTOR,	*	
Petitioners,	*	**PUBLISHED**
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	Lodestar Method Laffey Matrix Non-expert services Vaccine Data Safety Link
Respondent.	*	

John F. McHugh , Esq., New York, New York, for Petitioners.
Robin Brodrick, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DECISION ON ATTORNEY FEES AND COSTS[1]

ABELL, Special Master:

On 3 December 2001, Petitioners filed an action seeking an award under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)[2] on behalf of their daughter, Madelyn,

[1] Pursuant to 42 U.S.C. § 300aa-12(d)(4) and Rule 18(b)(2) of the Vaccine Rules of this Court, within fourteen days (14) of this decision, Petitioner(s) may request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

[2] The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq*. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

for alleged vaccine-related injuries resulting from an measles-mumps-rubella ("MMR") vaccination administered on 3 June 1999, which they claim caused Type I diabetes.

Petitioners moved for the Court to issue a Ruling on the Record, and on 7 October 2005, an entitlement decision denying compensation was filed by the undersigned Special Master.

In reviewing the record before the purview of the Court, the 7 October 2005 Entitlement Decision sets forth the following recitation of this case's exceptional course:

> At the outset, Petitioners were facing an uphill challenge....Petitioners plumbed the depths for relevant information. They first turned to the vaccine manufacturer. Under a Protective Order from the Court, which included a confidentiality agreement, Petitioners' expert eventually gained access to the information sought, though it ultimately proved unhelpful. Petitioners then sought information from the Vaccine Data Safety Link at the national Centers for Disease Control and Prevention, a computer data pool of information from various HMOs and health care providers. Though official access was denied, a private organization controlling six of the seven databases courteously allowed Petitioners access to their data. Having neither filings nor discussions on the subject, the Court is not aware as to whether any of that data was helpful. No expert report ever derived from these forays, though it is understood that at least two experts were consulted. Rather than pursue the case further, Petitioners instead sought a ruling on the record as it presently stands.

Decision at 3.

Since judgment entered on that decision, Petitioners moved the Court to recover their attorney fees and costs in an application filed on 21 June 2006. A flurry of briefs and supplemental materials (of various and potentially confusing denominations) were then submitted by both sides, until the dust settled on 3 October 2006 with Petitioners' final submission on attorney's fees.[3] This case is now ready for a ruling on the issue of attorney's fees.

I.

In general, the Vaccine Act allows for the recovery of reasonable attorney fees and costs. § 15(e). However, such an award is not automatic. When compensation is denied, as it was in this case, reasonable attorney fees and costs may be awarded provided the special master finds that the

[3] Due to the potential for confusion caused by reference to submitted materials by their originally designated names, the Court will refer to the parties' submissions by their filing date instead.

petition was (1) brought in good faith and (2) there was a reasonable basis for the claim. § 15(e)(1).

In determining whether fees and costs are reasonable, the case law on point indicates that special masters ought to rely on their judgement and prior experience. See Wasson v. Secretary of HHS, No. 90-208V, 1991 WL 135015 (Fed. Cl. Spec. Mstr. July 5, 1991), remanded 24 Cl. Ct. 482 (1991), aff'd 988 F.2d 131 (Fed. Cir. 1993); Saxton v. Secretary of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993); See also Baker v. Secretary of HHS, No. 99-653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005). In so doing, and given the nature of this Program, special masters need not engage in a line-by-line analysis of an application but may utilize their experience with litigation before this body and the attorneys involved. Castillo v. Secretary of HHS, No. 95-652V, 1999 WL 1427754, *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1999); Plott v. Secretary of HHS, No. 92-633V, 1997 WL 842543, *5 (Fed. Cl. Spec. Mstr. Apr. 23, 1997).

However, there are certain guidelines that are habitually heeded. For instance, compensation ought not be granted for "hours that are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Moreover, the Court's inquiry "is not whether counsel expended the number of hours claimed but whether it was reasonable and necessary for him to do so." Wasson v. Secretary of HHS, No. 90-208V, 1991 WL 135015, at *3 (Fed. Cl. Spec. Mstr. July 5, 1991), remanded 24 Cl. Ct. 482 (1991), aff'd 988 F.2d 131 (Fed. Cir. 1993) ("The Special Master did not abuse her discretion in substantially reducing compensation for attorney fees using her considerable experience with the Vaccine Act, her knowledge of the issues in this case, and comparison with awards in similar cases.").

As recently as November last, the Chief Special Master stated the rule that the Undersigned deems best to govern this particular case:

> To determine reasonable attorneys' fees, it is settled law to employ the lodestar method which involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The resulting lodestar figure is an initial estimate of reasonable attorneys' fees which may then be adjusted if the fee is deemed unreasonable based upon the nature of the services rendered in the case. Blanchard, 489 U.S. at 94; Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J. et al., concurring); Blum, 465 U.S. at 897, 899; Hensley, 461 U.S. at 434; see also Ceballos v. Secretary of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

English v. Secretary of HHS, No. 01-0061V, 2006 WL 3419805 (Fed. Cl. Spec. Mstr. Nov. 09, 2006).

As with attorneys' fees, time expended by medical experts should be reasonably allocated. Crossett v. Secretary of HHS, No. 89-73V, 1990 WL 293878, at *4 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). Finally, as purveyor of the burden of proof, Petitioner bears the burden of substantiating an expert's hours and the rate requested. See Kuperus v. Secretary of HHS, No. 01-0060V, 2006 WL 3499516 at *4 (Fed. Cl. Spec. Mstr. Nov. 17, 2006).

II.

Although Respondent's objections to Petitioners' application for attorney fees are multifarious, much of the objections are standard, and contest the amount of time spent and the rate at which the time is charged. However, there are two especially thorny issues brought before the Court in this case, and these the Court will address principally. The first of these two issues is Petitioners' request that the Court defenestrate the so-called "lodestar" method of tabulating attorney's fees in favor of another mechanism known as the "Laffey matrix."[4] The second issue is how to award attorney's fees for the discovery and research work done via the Vaccine Data Safety Link.

A.

When Petitioners' fee application was submitted, and the issues presented thereby were briefed, there emerged a question as to whether the undersigned Special Master should continue to apply the "lodestar" analysis traditionally used in the Vaccine Program, or should move to a "forum rule" that would apply the "Laffey matrix" as has been applied in other contexts. Since then, the Court of Federal Claims directly ruled on this issue in the case of Avera v. Secretary of HHS, __ Fed.Cl. __, 2007 WL 594920 (reissued for publication Feb. 22, 2007, reviewing the decision of the Special Master, No. 04-1385V (Fed. Cl. Spec. Mstr. Aug. 29, 2006)). Therein the Court of Federal Claims reinforced the lodestar method, which is the general test historically used by the Vaccine Program as a two-step analysis for calculating attorney fees. See Id. at 4 (and numerous citations located there).

In reaching that decision, the Court restated rules that address the issues presented in the instant concern. The Court presented the lodestar method in two steps, stating, "the first step is to multiply the number of hours expended on the litigation times a reasonable hourly rate," and the second is to consider if "upward or downward adjustments" are appropriate to conform that rate to

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[4] The Laffey Matrix is a chart of hourly rates for computing attorneys' and paralegals' fees and is used by the United States Attorney's Office for the District of Columbia to evaluate requests for attorneys' fees in certain civil cases in District of Columbia courts that are handled by the U.S. Attorney's Office. These are cases that involve fee-shifting statutes which permit a prevailing party to recover reasonable attorneys' fees from the government. The Laffey Matrix is prepared by the U.S. Attorney's Office based on the hourly rates allowed by the U.S. District Court for the District of Columbia in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985). The rates are updated yearly by adding the increase in the Consumer Price Index for All Urban Consumers for the Washington, D.C., area to the corresponding rates for the prior year. The rates are subject to further adjustment to ensure that the relationship between the highest and lowest rates remain reasonably consistent from year to year.

English v. Secretary of HHS, No. 01-0061V, 2006 WL 3419805 (Fed. Cl. Spec. Mstr. Nov. 09, 2006), referencing http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_4.html.

"the services rendered in the particular case." Id. at 5. The Court noted that the 'centerpiece' of this method is "the prevailing market rate for an attorney's services," and that the market rate is favored with a judicial presumption, such that "the burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant." Id. (quoting Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984)). This presumption may be rebutted by "specific evidence" showing the "superior" quality of the services provided, which contributed to "exceptional" success. The ruling sets as an outer limit the Court's discretion to adjust the rate to keep the fee award proportional to "the nature of the services rendered in a particular case." Avera at 7 (citation omitted). In response to the same argument of economic hardship imposed upon petitioner's counsel and medical expert that was raised in this case, the Court lamented: "As much as the Court would like to authorize interim fee payments to petitioner's counsel where warranted, such relief is not authorized by the Vaccine Act." Id.

The undersigned Special Master would not be the first to analogize the ruling in Avera with the instant case. Petitioners repeatedly noted in their submissions that the arguments raised in Avera bore significantly on the instant case. See, e.g., Petitioners' submission filed on 19 September 2006, entitled "Errata", at 26, 36. As the Court's reasoning there bears directly on the current dispute, the Undersigned accepts the rule stated in Avera as the rule obtaining in this case. Therefore, the lodestar test, as described above, is the rule to be applied herein. That calculation follows below.

B.

On the issue of Dr. Classen's work in this case, a few of the Court's considerations may be appropriate to enumerate here. No expert report was ever filed in support of this petition, despite time and resources expended in a costly process. To Petitioners' credit, the Court acknowledges that it was their intention so to file, and understands the strategic and pragmatic reasons stated as to why they did not do so. However, the practical upshot of this circumstance is that most of Dr. Classen's billed time was spent researching, or pursuing database resources from admittably recalcitrant custodians, activities that are not typically the subject of attorney's fees applications. For this reason, further discussion of Dr. Classen's contributions in this case is warranted.

There is some dispute between the parties as to the necessity or wisdom of these enterprises, but no contention that time was not thus spent. The Court finds it is necessary, then, to consider these tasks in separate categories. There is a difference between enlisting an expert to perform tasks that only tangentially require his expertise, and those that do not require it at all.

1.

Leaving aside, for one moment, how necessary and/or reasonable the research performed by Dr. Classen may have been, the Court examines with more focused scrutiny the time spent requesting documents and otherwise corresponding with the custodians of the Vaccine Data Safety Data Link, and the Center for Disease Control (CDC). Respondent objects to "20 hours of expert time coupled with 25 additional hours of attorney time," questioning "why such extensive time and expert involvement was [sic] required to get information from a drug company" and "why Dr. Classen's

expertise was required to handle what was essentially a discovery matter." Respondents submission filed 17 July 2006 at 10.

Petitioners' answer to this objection is to explain the various uses to which experts are commonly put in modern litigation, and among which are numbered several non-testifying purposes. This argument is well-taken by the Court on the next issue, regarding research within the Vaccine Data Safety Link, but it is not sufficient to explain why Dr. Classen's services were needed to counter the "obstructionist tactics" employed by the HMOs and the CDC, which, Petitioners claim, "are directly responsible for most of the costs in issue." Petitioners' submission filed 19 September 2006 at 5. In fact, the Petitioners never address why their expert Dr. Classen undertook such tasks, which are traditionally circumscribed within an attorney's purview, or, even more appropriately, that of a junior associate or paralegal staff member. Such tasks are so delegated because correspondence requesting documents and information does not require extensive learning or experience in a technical field; it only requires the patience and organization to harry an uncooperative custodian of those items. In contrast, Dr. Classen's internal memorandum to Petitioners' Counsel (included in Petitioners' 19 September 2006 submission) describes writing to the CDC twice, e-mailing Dr. Pope of the CDC twice and William Broom once.

The Court sympathizes with the frustrating recalcitrance noted in Petitioners' briefing; however, the Court is skeptical of Dr. Classen's involvement in such matters. This issue is separate from the more general question of the appropriate rate to award for Dr. Classen's work as an expert, to be discussed below. Petitioner, in discussing that generalized rate, expresses understanding of the rule that obtains here, that someone may charge more (or less) to perform work of a particular nature, based on what consumers are willing to pay that person to perform that task. If an engineer performs automotive mechanical repairs for paying consumers, the price arrived at in the marketplace for that service will likely approximate more closely to that of an auto mechanic's service rate than that of an engineer's rate. If Dr. Classen was performing duties such as document and information requests, which are more typically categorized with junior associate attorneys (or paralegals), rather than applying his special expertise in the medical field, his services should be compensable by reference to the services rendered, and not by reference to his medical qualifications as such, standing alone. Therefore, the Court rules that the time spent so engaged should be valued at the rate of an associate in Petitioners' Counsel's law firm. However, as the Court understands the frustration and difficulty of seeking after those documents and information, it will not diminish the time spent thereon.

This is not a novel approach to this potentially troublesome issue. The Undersigned has ruled previously that, where a medical expert is engaged for research activities that do not require his particularized expertise, but are more menial in character, "it is not unreasonable to have him conduct the research;" however, such expert "should not be reimbursed at an expert's hourly rate." Densmore v. Secretary of HHS, No. 99-588V at 7 (Fed. Cl. Spec. Mstr. Aug. 14, 2006) (geneticist was retained "not as an expert but as a consultant"); see also Kuperus v. Secretary of HHS, No. 01-0060V, 2006 WL 3499516 (Fed. Cl. Spec. Mstr. Nov. 17, 2006) ("The most obvious reductions, of course, result when an expert is either testifying to or performing tasks that are disproportionate to his skill level or outside his subject matter expertise."). The Undersigned awarded attorney's fees

for the research work performed by the doctor in the Densmore case at "the highest rate attributed to [a law firm] associate" during the period at issue therein.

2.

Next, the Court moves to the similar question of the time spent by Dr. Classen researching and reviewing the data from the Vaccine Data Safety Link. Earlier in this case, the issue may have ripened as to whether pursuing new research to support the petition, in the absence of medical studies addressing the theory forwarded by Petitioner, was appropriate. There remains some question regarding whether the Vaccine Act contemplates a petitioner proving her case by reference to (medical) research and studies undertaken specifically for that case, for the purpose of proffering the same as proof, and then requesting an attorney fee award for the time spent thereupon. See Kuperus, *supra*, at 6. Nevertheless, that issue is not now before the Court. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (noting that "a request for attorney's fees should not result in a second major litigation"). What is clear is that the Statute does envision compensation for attorney (and expert) fees for petitioners whose claims are (1) brought in good faith and (2) reasonably based. § 15(e)(1). Once that two-pronged issue is answered in the affirmative, then the Court's task is simplified, to determine the number of hours that are compensable, and the rate at which those hours are to be credited. See Avera, *supra*. As noted above, the Court will not order compensation for "hours that are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

Contrary to arguments set forth in Petitioners' submission of 19 September 2006, the primary purpose of the Vaccine Program is not to fund parties in an effort to "police corporate conduct and products" through private litigation; its primary purpose is to compensate persons who have suffered a vaccine-related injury (and who meet their burden of proof). Vaccine Act §§ 10, 13. Moreover, there is no textual ambiguity that would precipitate the Court's consideration of statutory purpose. See BP America Production Co. v. Burton, __ U.S. __, 127 S.Ct. 638 (2006) ("We start, of course, with the statutory text," and thus arguments premised on statutory purpose "are insufficient to overcome the plain meaning of the statutory text.").

In contrast, Petitioner does argue well that a Court's award of attorney (and expert) fees should be "sufficient" to facilitate thorough investigation and prosecution of suspected vaccine-related injuries. The Court appreciates Petitioners' citation to Interfaith Community Organization v. Honeywell Intern., Inc., 426 F.3d 694, 716-717 (3d Cir. 2005), which states, inter alia, "It is not unreasonable to expect that attorneys will rely on experts to educate them as to scientific and technical issues involved in a given case." To the extent that Dr. Classen researched the medical scholarship on the issues affecting the alleged injury in this case and educated Petitioners' Counsel thereupon, his time was well spent, and Respondent can hardly be heard to contest fees allocatable to that purpose.

As Petitioners pointed out, the trouble arose when Petitioners determined that, under the burden of proof analysis followed by this Court at the outset of this litigation, their only chance of

success would be to scientifically establish the medical basis for their claim, and then to build upon that basis their legal case before the Court. The case took an even more non-traditional turn as Petitioners announced their intention to prove their theory scientifically by reviewing data from the Vaccine Data Safety Link, a course they themselves describe as "novel". Petitioners' submission filed 19 September 2006 at 6-7. As there were apparent outstanding issues as to who is truly the custodian of that database and which entity maintains sufficient managerial control to provide Petitioners the access they requested, the case grew increasingly complicated.

Speaking rather cryptically in their briefs, Petitioners assert that they could not wait for the medical or scientific communities to verify their theory, arguing that "[d]ue to the limitations imposed by law, [they] cannot await full confirmation of their claims, as would a child of similar age under applicable state law," adding "[t]hey must act." The course they chose was to investigate the basis for the standard warnings included on the vaccine manufacturer's package insert, which they discovered was data collected by the CDC through the Vaccine Data Safety Link. As fatalistically stated by the Petitioners, "The CDC data had to be analyzed." In this, Petitioners saw an opportunity to contest the source which Respondent relied upon to dispute the petition's claims. Noting a timing issue that was not addressed or resolved by any of the studies available in this case, the Petitioners concluded, "Thus, data existed."[5] Through this process, 'the data' achieved a near mythical status, transforming this case into an epic quest to obtain it.

The Court finds that although it may not have been explicitly necessary in this case to pursue the particular strategy employed by the Petitioners through their retained Counsel and experts, it was reasonable to do so. Respondent rebutted Petitioner's theory of recovery by reference to a report that analyzed a confidential source of statistical data, and Respondent can hardly be heard to dispute Petitioners' attempt to counterattack that rebuttal. Furthermore, as no study had been completed addressing the specific theory raised by Petitioners, it was reasonable for Petitioners to attempt a statistical analysis of the same data pool from which Respondent was privy. Although discovery is not had as of right in the Vaccine Program, resistance against Petitioners' discovery attempts to analyze the materials relied upon by Respondent should not defeat Petitioners' claim for relief as if by ambuscade. See N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 253 (1978) (ruling that Congress expressed its judgment in the Federal Rules of Civil Procedure that "'trial by ambush'...well may disserve the cause of truth").

As an indirect (though not necessarily unavoidable) consequence of the centrality this search developed within the case, Dr. Classen spent the predominant portion of his time occupied thereby. Petitioner argues that "The frustrating pursuit of CDC data consumed nearly all of Dr. Classen's time here once he had determined that the material received...did not provide the answers we were seeking." Petitioners' Submission filed 19 September 2006 at 3. Petitioners defended the use of Dr. Classen's time *reviewing the data* by stating, "Dr. Classen was needed to guide these efforts," because "[o]nly he knew what documents to look for and what types of reports would reveal the

[5] The Petitioners do not discuss why it was necessary to pursue this data as the sole basis for ultimate relief in this case. In their submissions, it is put forward as sufficient that the unknown data existed for possible study, regardless of what such data might support, essentially arguing "*exstat ergo crede.*" (It exists; therefore, believe it.)

information needed." Id. at 8. Petitioners proceeded to argue that this task required Dr. Classen's medical expertise, saying, "Only Dr. Classen could do this work, as only he would recognize what he was looking for when he found it." Id. at 10.

The Court considers this case within the context in which it arose: the Vaccine Program. As noted, the Vaccine Act provides for attorney's fees and costs to be awarded to petitioners in the Program, an exception to the traditional "American Rule" which expects each party to bear its own attorney fees. Key Tronic Corp. v. U.S., 511 U.S. 809, 814-15 (1994). One aspect of the American Rule is that attorney fees are typically kept a private, contractual matter. As a party bears the cost of litigating a case, it is that party's prerogative as "master over his own case"[6] to expend any amount to pursue any theory, for no one else to gainsay. The advent of attorney fee awards in the Vaccine Program, then, can present a quandary in many cases regarding what strategy and expenditures were "reasonable" or "necessary", as viewed from a scrutinizing hindsight.

In this circumstance, it is easy for parties on either side to argue deterministically about what is now or what was then 'obvious' to all involved. In reality, what can best be said of the course of this case is that it was a series of strategic decisions made by experienced counsel and experts on both sides, based on their sophisticated understanding of the state of science, medicine, and the law at that time, and based upon the availability (or lack thereof) of potential sources of proof. The entire reason that attorney fees are awarded in Program cases is to reward capable representation of petitioners' claims for vaccine-related injuries. Petitioners' assertion is well-taken by the Court regarding counsel's "right and obligation to be careful" (and the Court would add, thorough), which inures to a petitioner's benefit. See Petitioners' submission filed 19 September 2006 at 10.

The Court holds that the lion's share of the hours spent prosecuting this case are recoverable by Petitioners, but that, consistent with the rationale discussed above and in the above-referenced cases of Kuperus v. Secretary of HHS and Densmore v. Secretary of HHS, the time spent by Dr. Classen performing simple document requests and intake of data from the Vaccine Data Safety Link shall be reduced to the rate of an attorney associate. Also, consistent with the reasoning in the Interfaith case referenced above, Petitioner may recover at the full expert rate determined below for the time that the expert(s) spent actually advising Petitioners' Counsel on technical matters, as well as the time spent reviewing the medical literature necessary to render that advice. The Court additionally rules that the time spent actually analyzing the data recovered from the Vaccine Data Safety Link statistically is an expert service for which the expert rate is appropriate.

III.

At this point, the Court's analysis becomes slightly more mechanical, and the only tasks left are to tabulate the hours worked, and to categorize the nature of the work at an appropriate rate.

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[6] Paraphrasing the well-pleaded complaint rule that "the plaintiff is 'the master of the complaint.'" See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 831 (2002).

A.

As a principal concern, the Court awards the Petitioners their out of pocket expenses, described in their affidavit, which was attached to their fee application. There is no reason to assail this allocation as objectionable or unreasonable, and the Court therefore awards Petitioners **$152.03** for that purpose.

B.

The Court next turns briefly to the fees allocated for Petitioners' secondary experts, Dr. Richwald and Dr. Rosenstreich. These experts were retained to bolster and support Dr. Classen's theory, which sought to provide a causative link between the vaccine at issue and the injury complained of in this case. Respondent objects "generally" to the award of the fees incurred through the use of these experts, and disputes whether retaining these experts was "related to the petition in the instant case." Respondent's submission filed 17 July 2006 at 2. However, as Respondent repeatedly pointed out, Dr. Classen's reputation and credibility in the Vaccine Program has been known to ebb and flow (Id. at 6-7), and having other experts to provide a second (or third) opinion on the merits of Classen's theory could very likely have aided the Court's understanding in a factual determination. The theory upon which these experts were retained to opine was the theory for recovery in this case, and it can hardly be said that their services were not related to the petition in the instant case. It was therefore reasonable to retain these experts, not for a duplicative function that was redundant with Dr. Classen's services, but for the limited purpose of reinforcing the admittedly "novel" theory proposed in this case. As to the adequacy of proof that these costs were actually expended in exchange for the services provided, the other disputation tendered by Respondent, there is no reason given to doubt the truthfulness or substance of the affidavits, letters, and other documents submitted by Petitioners in this case. Therefore, the Court finds that the exhibits submitted by Petitioners are sufficient to establish the fees for Dr. Richwald and Dr. Rosenstreich, and awards compensation for those fees. These fees are included in Mr. McHugh's allocation for Expenses, and shall be calculated as part of the analysis below.

C.

Before its later amendment, Petitioners requested in their fee application that the Court award attorney fees at the rate of $350 for work performed by Petitioners' Counsel, Mr. McHugh, Esq.. The Petitioners later amended their fee application to argue for a different tabulation, based on the Laffey matrix, which proposes a rate that is higher than that typically charged Mr. McHugh's clients in other contexts. Respondent argued in its submission dated 20 September 2006 that Petitioners should be estopped from amending their fee application. The Court notes that the Vaccine Program typically gives liberal leave for amendment of filings, and denies Respondent's objection on that point. However, as discussed above, the Laffey matrix is not the mechanism used in this Court to calculate

attorney fee rates; instead, the lodestar method has traditionally been used. The Court then proceeds to consider the appropriate rate for Mr. McHugh's billed time under the lodestar method.

In support of their fee application Petitioners submitted tally records and affidavit from the professionals retained by them. In addition, Petitioners attached the declaration of Omer S. J. Williams, Esq. of Thacher Proffitt and Wood where he serves as partner. That declaration corroborates Petitioners' claimed rate of compensation for Mr. McHugh. Respondent argues that reference to just one affidavit of an attorney in the same general market with a level of experience approximating Mr. McHugh's is insufficient to establish the rate of $350 as reasonable for Mr. McHugh's services. The Court disagrees.

The lodestar method of fee calculation is based upon a prevailing market rate: what the (geographically-circumscribed) market would pay for the same or similar services as were rendered by the attorney in question. Arguably, the best indicator of what "the market" will pay for Mr. McHugh's services is what other clients are willing to pay for the same or similar services from the same attorney. Also, Mr. McHugh assuredly provides his other clients with services that are similar, if not equivalent to the services rendered here. Mr. McHugh certifies, and Respondent does not seriously dispute, that he charges other clients $350 per hour. If this rate were unreasonable, rational market forces and rational consumers (clients) would not pay that price for those services, and then Mr. McHugh would either change that price or would not have sufficient clients to stay in business. His continued solvency thus militates on his behalf.

Respondent cites case law to assert that the Petitioners "must submit specific, detailed evidence of what the relevant community rate is for similar services by lawyers of reasonably comparable skill, experience, and reputation," using affidavits which "state the rates charged by attorneys in the same or similar geographic location with similar qualifications performing similar work for fee-paying clients." Respondent's submission filed 17 July 2007 at 13. Respondent goes on to assert that the declaration of Mr. Williams is not sufficient for this purpose. The Court finds that it is. Mr. Williams' firm serves a broad area of New York City and its surrounding environs, certainly encompassing the geographic location in which Mr. McHugh is located. Although Mr. Williams may not be the astral twin of Mr. McHugh, their comparative career paths, similar experience, and geographic proximity persuade the Court that $350 is in fact reasonable for Mr. McHugh.[7]

As to whether Mr. McHugh's claimed fees relate reasonably to the time spent and the nature of the service performed, the Court finds that the time spent, as enumerated in Petitioners' original fee application, is, for the predominant part, reasonable.

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[7] In his declaration, Mr. Williams notes that senior partners in his firm charge almost double the rate claimed by Mr. McHugh in the fee application. The Court defers ruling on whether a rate greater than $350 is reasonable for Mr. McHugh, but notes that large firms such as Thacher Proffitt Wood often charge a premium because of their size, prestige, the number of attorneys employed, and the diversity of their practice area expertise, a premium not typically charged by smaller firms and solo practitioners, such as Mr. McHugh.

Respondent disputes some of the itemizations related to preparation of the petition itself, arguing that "the amount of time necessary to prepare the petition is generally minimal." Respondent's submission filed 17 July 2007 at 15. The Court finds that less than 20 hours to prepare a petition, which includes fact witness affidavits and medical records as thorough as the one at issue, is not unreasonable. Too often, petitions are filed in the Vaccine Program with sparse allegations and no supporting documents. The Court appreciates it greatly when a petitioner's counsel takes the initiative to thoroughly prepare the petition prior to its initial filing, and does not wish to disincentivize this approach. It would be highly counterproductive to encourage slip-shod preparation of petitions, by penalizing those attorneys who perform the task well, without requiring commonition and numerous status conferences with a special master simply to complete their initial petition.

Having said all of this, the Court does recognize Respondent's point concerning some tasks that seem to represent disproportionate blocks of time in Mr. McHugh's tally. For instance, a quarter hour was spent tracking a UPS package and half an hour was spent to pay the CDC for documents the CDC sent. Therefore, the Court finds that Mr. McHugh worked 174 full rate hours and 7 half rate (travel) hours, for totals of $60,900.00 and $1,225.00 respectively, and together totaling **$62,125.00**. Furthermore, the Court sees nothing objectionable or unreasonable in Mr. McHugh's itemization of expenses, and finds accordingly that **$5,034.83** is the amount fairly recoverable by Petitioners for expenses expended by Mr. McHugh.

D.

The final calculation in this case is also the most difficult and contentious: the award for fees incurred through Dr. Classen's services. Respondent's objection that the tally submitted by Petitioners on this point lacks specificity and compartmentalization is well-taken. As noted above, a petitioner bears the burden of substantiating an expert's hours and the rate requested, as part of his burden of proof that extends throughout the case. The Court notes that Petitioners had ample opportunity to supplement their filings with greater detail in enumerating the time spent on the tasks performed by Dr. Classen. With these considerations in mind, the Court analyzes (1) the appropriate expert and non-expert rates for Dr. Classen, and (2) the hours spent in each of those subdivisions.

1.

In the fee application submitted by the Petitioners, the rate sought by Dr. Classen is $250.00, and that is the rate at which he contracted with the Petitioners. Considering that this rate is at or below the rate one could expect to retain an expert witness in Baltimore in order that such expert might review medical literature, examine a person, render a written and/or verbal opinion of that person, and/or advise counsel of their opinion for purposes of litigation, such contracted rate is reasonable for these typical expert tasks. Respondent makes much of another attorney fee decision of another special master, but in the decision cited the special master there referenced the rule that "a prior award to Dr. Classen does not bind this special master." Baker v. Secretary of HHS, No. 99-653V, 2005 WL 589431 at 6 (Fed. Cl. Spec. Mstr. Feb. 24, 2005). Moreover, the special master in

that case proceeded to focus her distinguishment on the specific contractual terms Dr. Classen was able to negotiate with another attorney in a separate context. Id.

In this context, which is clearly a separate matter from the Baker petition, petitioners negotiated with Dr. Classen at a rate of $250 per hour. That this case was novel is a characterization that neither party can deny. Petitioners may not have found an expert to develop a theory causally linking vaccination and injury, except that they retained Dr. Classen in this case and he contributed time into developing this theory. Respondent's argument essentially challenges the quality of Dr. Classen's theoretical ability and credibility, issues which are certainly germane to the issue of entitlement, but less so here. Petitioners were aware of Dr. Classen's diminished clout before the Vaccine Program, and that is why they (reasonably, as was determined above) retained other experts to opine in a more traditional sense upon Classen's theory. Unfortunately, this case's current procedural posture resulted in a difficult position, inasmuch as that theory was never committed to a filed expert report or expressed in live testimony, a circumstance that leaves the Court to consider whether the claim was reasonably-based (§ 15(e)(1)), without ever considering in a full hearing if it was persuasive. Nevertheless, Respondent does not contest that the claim was not reasonably-based, and therefore the Court is loathe to interpose such a supposition.

The issue before the Court, then, is what a rational consumer (litigant) would pay for Dr. Classen's services rendered in this case, at least those services that required a level of medical expertise. Petitioners have submitted the Certification of a Suzanne G. O'Brien, who works with a firm which places medical experts with attorneys for the purposes of expert opinion. O'Brien's statements lend support to Dr. Classen's claimed rate of $250.00, and provide knowledgeable market data on the going market rates for experts rendering that service. Her statement is that, for the *service* of forming and rendering a medical opinion, $250 is below the market rate throughout most of the country, certainly in Baltimore, the market in which Dr. Classen is located. As noted above, under the Lodestar method of calculating fees, the Court is concerned with the market value of the services rendered. The work Dr. Classen performed in forming and rendering an opinion for Petitioners is the same as what almost any medical doctor would have to have done in the same situation, given the novelty of this case. In Dr. Classen's invoice, filed with Petitioners' fee application, he states that he "had to find, read, and analyze the data to determine if published data supported the case," and then "to write a draft report incorporating the papers I had reviewed to make my opinion." The Court thus finds that the rate of $250 is a reasonable rate for the expert services rendered by Dr. Classen in the circumstances of this case. And as the Undersigned has ruled before, "the Court will not interpose itself between [a party or their attorney] and whomever [they] wish[] to consult, so long as any fees coming out of said engagement are considered reasonable." Densmore v. Secretary of HHS, No. 99-588V, unpublished slip. op. at 5 (Fed. Cl. Spec. Mstr. Aug. 14, 2006).

The Court's focus on the market value of the services rendered cuts both ways, however. Although Petitioners were justified in retaining Dr. Classen's services as an expert at an expert's rate, his expenditure of time for other tasks not requiring his expertise do not command that same rate. See discussion, *supra*, at II-B. As to what rate is appropriate here, the Court has no immediate reference as to what an associate attorney could bill for these services in Dr. Classen's immediate locality. Consequently, the Undersigned turns to the aforementioned Densmore attorney fee decision

to provide a frame of reference. In Densmore, the geographical market at issue was Northern Virginia (Vienna), which is an outlying area adjacent to Washington, D.C., such as is Dr. Classen's base of operations in Baltimore, Maryland. Due to this similarity, as well as the similarity in services between Dr. Classen's non-expert services and those non-expert services rendered in that case, the Court finds this an apt comparison. Therefore, based upon this analysis, and upon the reasoning set forth above, the Court sets the compensable rate for Dr. Classen's non-expert services at $175 per hour.[8]

2.

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[8] The tasks enumerated on Dr. Classen's invoice which the Court categorizes as expert services are as follows:

- Initial review of chart, literature, and draft report (2/11/02 - 3/25/02)
- Talk to McHugh (4/2/02)
- Letter to McHugh (4/6/02)
- Draft letter to Merck (4/8/02)
- Letter to McHugh (4/29/02)
- Talk to McHugh (6/6/02 - 7/8/02)
- Review Merck's Data Disclosure, letter to McHugh (3/7/03 - 3/14/03)
- Talk to McHugh (4/17/03)
- Letters to McHugh (7/6/03 - 7/15/03)
- Letter to VSD headquarters in re: study proposal (8/26/04 - 9/17/04)
- HIPPA Class required by the custodian parties (11/27/04 - 11/28/04)
- Correspondence with McHugh on blood test (7/2/04 - 8/15/04)
- Correspond with McHugh & CDC in re: study without GH (10/12/04 - 10/29/04)
- Talked to Ridgewald (11/1/04)
- Prepare to meet with Ridgewald (11/5/04)
- Met with Ridgewald (11/6/04)
- Prepare documents for Ridgewald/McHugh (11/19/04 - 11/25/04)

The tasks enumerated on Dr. Classen's invoice which the Court categorizes as non-expert services are as follows:

- Prep for [discovery] meeting with Merck/Strain (7/18/02 - 7/19/02)
- Meeting with Merck/Strain in re: discovery (7/19/02)
- Letter to Strain (7/23.02)
- Southern California IRB Request (9/2404 - 11/3/04)
- UCLA IRB Request (11/29/04 - 1/6/04)
- Northern California (1/14/04 - 1/17/04)
- GH IRB Request (1/19/04)
- Northwest Kaiser (1/20/04 - 2/7/04)
- UCLA for additional info (2/7/04 - 3/12/04)
- Northern California Kaiser response to inquiry (3/12/04 - 4/19/04)
- GH response to denial (4/20/04 - 6/9/04)
- Correspondence with McHugh on subpoena (3/12/04 - 3/15/04)
- Correspond with McHugh in re: subpoena Group Health (9/16/04 - 9/23/04)
- Correspond with McHugh in re: subpoena Group Health (1/12/05)
- Correspond with IRBS to get extensions on IRB approvals (2/27/05 - 3/28/05)
- Prepare invoice (4/3/05 - 4/6/05)

The Court's task in tabulating and categorizing Dr. Classen's time is made difficult by his variability in the allocation of time worked within his invoice. Oddly, for those activities which Dr. Classen does deem pertinent to log independently, he gives their amount to the second decimal place, without rounding to the nearest quarter, or even tenth of an hour. More troubling, however, is his lack of thorough time-keeping records in a consistent fashion. The Undersigned is not the first to address this shortcoming with Dr. Classen. See Baker, *supra*. He logged 0.17 hour to write a letter to Mr. McHugh, but expended 47.92 hours for "Initial review of chart, literature, and draft report" without further break-down of those hours. Worse still are time log entries such as one for 4.27 hours simply for "Misc." As a general observation, the Court notes for Petitioners' benefit that the way to avoid the Respondent and the Court from second-guessing every single entry in a time log is by providing *more* detailed accountings, not less.

Because of the scarcity of detail in record-keeping, Petitioner has not persuaded the Court as to the overall reasonable nature of several of the entries on Dr. Classen's invoice, and therefore the Court must rule on what amounts are reasonable in this case.

As to the tasks that are compensable at the expert rate of $250, some diminution is appropriate. Typically, it should take a medical expert more than 40 hours to review the records and medical literature pertinent in a case in order to form an opinion. However, the Court reiterates its general appreciation for thorough preparation of petitions and encourages work at the front end that tends to save time later on. Recognizing that this case's theory was novel, the Court does not impugn Dr. Classen's expenditure of time for that purpose. However, the Court is less avuncular regarding certain other expenditures of time that should not increase even in a complicated case such as this one. Without elucidation on their number or content, the letters to Mr. McHugh the week of 7/6/04 should not require almost three hours to draft. Lastly, the meeting with Dr. Ridgewald occupied an inordinate time, considering that Ridgewald was primarily retained merely to review Classen's already-developed theory. The sparse time log leaves the Court to wonder what Dr. Classen had left to do at that point.

The Court is even more skeptical of many of the tasks that are compensable at the non-expert rate of $175. It is certainly unclear why a "response to a denial" would take almost eight hours. Also, the task of corresponding with IRBS to request extensions on IRB approvals does not seem to require almost four hours over two days. Lastly, preparing a detailed time log and invoice should not necessitate 5.33 hours, and Classen's slapdash invoice most certainly does not.

Additionally, the Court will not award attorney fees for items listed simply as "Misc." Therefore, the 4.27 hours claimed for 8/12/02 - 2/24/03 listed under that nondescript heading are not subject to compensation because Petitioners have failed to substantiate that this amount is compensable under the governing rules. However, even though there is neither a detailed listing nor receipts for substantiation, the Court does credit Dr. Classen for the $65.00 he expended in this case listed under the heading of "Expenses" in the Invoice attached to the fee application. The Court takes the Doctor at his professional word that such amount was actually expended by him on

Petitioners' behalf, but adjures him and Petitioners' Counsel to make more detailed accountings henceforward.[9]

Therefore, the amount to be awarded Petitioners for Dr. Classen's services is $28,022.50 (at the expert rate of $250) and $12,544.00 (at the non-expert rate of $175), which, when added with the $65.00 in expenses, combines for a total of **$40,631.50**.

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[9] Therefore, the Court allocates the following time intervals for Dr. Classen's expert services ($250/hr.) as follows:

- Initial review of chart, literature, and draft report (47.92 hours)
- Talk to McHugh (0.97 hour)
- Letter to McHugh (1.27 hours)
- Draft letter to Merck (0.17 hour)
- Letter to McHugh (0.82 hour)
- Talk to McHugh (0.23 hour)
- Review Merck's Data Disclosure, letter to McHugh (11.95 hours)
- Talk to McHugh (0.35 hour)
- Letters to McHugh (2 hours)
- Letter to VSD headquarters in re: study proposal (4.9 hours)
- HIPPA Class required by the custodian parties (12.85 hours)
- Correspondence with McHugh on blood test (1.18 hours)
- Correspond with McHugh & CDC in re: study without GH (1 hour)
- Talked to Ridgewald (0.6 hour)
- Prepare to meet with Ridgewald (3 hours)
- Met with Ridgewald (7.08 hours)
- Prepare documents for Ridgewald/McHugh (15.8 hours)

The Court allocates the following time intervals for Dr. Classen's non-expert services ($175/hr.) as follows:

- Prep for [discovery] meeting with Merck/Strain (2.90 hours)
- Meeting with Merck/Strain in re: discovery (4.33 hours)
- Letter to Strain (0.97 hour)
- Southern California IRB Request (6.7 hours)
- UCLA IRB Request (16.43 hours)
- Northern California (4.48 hours)
- GH IRB Request (7.43 hours)
- Northwest Kaiser (7.93 hours)
- UCLA for additional info (7.5 hours)
- Northern California Kaiser response to inquiry (1.95 hours)
- GH response to denial (4 hours)
- Correspondence with McHugh on subpoena (1.38 hours)
- Correspond with McHugh in re: subpoena Group Health (1 hour)
- Correspond with McHugh in re: subpoena Group Health (0.68 hour)
- Correspond with IRBS to get extensions on IRB approvals (2 hours)
- Prepare invoice (2 hours)

CONCLUSION

Accordingly, the **total amount to be awarded to Petitioners for their attorney's (and expert) fees shall be $107,943.36**. which shall be made out to Petitioners and Petitioners' Counsel jointly. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell
Special Master