OFFICE OF SPECIAL MASTERS

No. 99-0774V

(Filed: February 14, 2002)

HOLDEN RUPERT, by his Mother and next friend, ANDREA RUPERT	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Ronald C. Homer, Esq., Boston, Massachusetts, for petitioner.

Michael P. Milmoe, Esq., United States Department of Justice, Washington, D.C., for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS

EDWARDS, Special Master

Petitioner, Andrea Rupert (Ms. Rupert), as next friend of her son, Holden Rupert (Holden), seeks an award of $15,706.00 in attorneys' fees and $2,160.25 in costs for an action that she pursued under the National Vaccine Injury Compensation Program (Program).[1] Petitioner's Application for Fees and Costs (Fee Petition), filed December 26, 2000, at 2; Petitioner's Reply to Respondent's Opposition to Application for Fees and Costs (Reply), filed March 27, 2001, at 12. Three attorneys--Ronald C. Homer, Esq. (Mr. Homer), Kevin Conway, Esq. (Mr. Conway), and Sylvia Chin-Caplan, Esq. (Ms. Chin-Caplan)--and several paralegals performed a variety of tasks in the case. *See generally* Fee Petition, Exhibit 1A. Mr. Homer claims 18.1 hours. Fee Petition, Exhibit 1A at 17; Reply at 12. He requests $225.00 an hour for his work. Fee Petition at 5. Mr. Conway claims 20.9 hours. Fee Petition, Exhibit 1A at 17; Reply at 12. He requests $250.00 an hour for his work. Fee Petition at 7. Ms. Chin-Caplan claims .7 hours. Fee Petition, Exhibit 1A at 17. She requests $225.00 an hour for her work. Fee Petition at 7. The paralegals claim 71.4 hours. Fee Petition, Exhibit 1A at 17. The paralegals request $85.00 an hour for their work. Fee Petition at 4.

Despite the United States Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and despite the United States Supreme Court's implied preference that parties "settle the amount of a fee," *id.*; *see also Blum v. Stetson*, 465 U.S. 886, 902 n.19 (1984), the parties have filed reams full of rhetoric, accompanied by numerous lengthy exhibits, debating vigorously--and with some measure of animosity--the hourly rate that the attorneys and the paralegals should receive.[2] While

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[1] The statutory provisions governing the Vaccine Program are found in 42 U.S.C.A. §§ 300aa-1 *et seq.* (West Supp. 2001). For convenience, further reference will be to the relevant section of 42 U.S.C.A.

[2] Respondent does not contest apparently that an award of attorneys' fees and costs in this (continued...)

respondent concedes clearly that Boston, Massachusetts--where the attorneys and the paralegals base their practice--is "a 'high-cost' area," Opposition at 5 n.1, respondent maintains that the attorneys and the paralegals have "failed to establish" that their rates are reasonable. Opposition at 2. Rather, respondent recommends that the special master grant $175.00 an hour to Mr. Homer and to Mr. Conway; $140.00 an hour to Ms. Chin-Caplan; and $60.00 an hour to the paralegals. *Id.* In justifying the recommendations, respondent criticizes obliquely certain billing entries. *See, e.g.*, Opposition at 16-17, 19 n.11; Surreply at 8 n.10, 12. Nevertheless, respondent does not assert specific deductions.

PROCEDURAL BACKGROUND

Ms. Rupert filed her Program petition on September 20, 1999. She alleged that Holden "suffered neurologic injuries" after he received a diphtheria-pertussis-tetanus (DPT) vaccination on September 19, 1996. Petition (Pet.) at 1. Ms. Rupert did not include any medical records or other documentary evidence with the petition because of the impending statute of limitations. On September 22, 1999, the special master directed Ms. Rupert to file by no later than November 19, 1999, either an amended petition that identified specifically her theory or theories of the case; all outstanding medical records; and a medical expert's opinion if the medical records alone did not substantiate her claim; or a status report informing the special master about the investigation of the case. *Rupert v. Secretary of HHS*, No. 99-0774V, Order of the Special Master (Fed. Cl. Spec. Mstr. Sept. 22, 1999).

On November 19, 1999, Ms. Rupert filed a status report. She represented that she was awaiting responses to requests for medical records that she sent to all of Holden's providers on November 10, 1999. Petitioner's Status Report, filed November 19, 1999, ¶¶ 4-5. On November 22, 1999, the special master enlarged to January 21, 2000, Ms. Rupert's time within which to complete the record or to file a status report informing the special master about the investigation of the case. *Rupert v. Secretary of HHS*, No. 99-0774V, Order of the Special Master (Fed. Cl. Spec. Mstr. Nov. 22, 1999).

On February 1, 2000, Ms. Rupert filed a status report. She represented that she was awaiting receipt of medical records from two providers. Petitioner's Status Report, filed February 1, 2000, ¶ 3. She stated that after she reviewed the outstanding records, she would "be in a better position to assess how to proceed." *Id.* On February 4, 2000, the special master enlarged to March 1, 2000, Ms. Rupert's time within which to complete the record or to file a status report proposing to the special master a date certain for the completion of the record. *Rupert v. Secretary of HHS*, No. 99-0774V, Order of the Special Master (Fed. Cl. Spec. Mstr. Feb. 4, 2000).

On March 14, 2000, Ms. Rupert filed a status report. She represented that she was awaiting "receipt of medical records." Petitioner's Status Report, filed March 14, 2000, ¶ 3. Ms. Rupert suggested that an additional "90 days" would be "sufficient time to comply with the" special master's September 22, 1999 order. *Id.* On March 16, 2000, the special master enlarged to June 16, 2000, Ms. Rupert's time within which to complete the record. *Rupert v. Secretary of HHS*, No. 99-0774V, Order of the Special Master (Fed. Cl. Spec. Mstr. Mar. 16, 2000). The special master stated that he did not contemplate any additional enlargement of time for Ms. Rupert to complete the record. *Id.*

On June 26, 2000, Ms. Rupert filed a status report. Ms. Rupert reviewed aspects of a discussion at a June 4, 2000 status conference. Ms. Rupert represented that when she was "analyzing" the medical records that she had received in response to her November 10, 1999 requests, she determined that she did not have records from at least six providers. Petitioner's Status Report, filed June 26, 2000, ¶ 2. Ms. Rupert indicated that she was awaiting receipt of the outstanding records. *Id.* at ¶ 3; *see also* Motion for Issuance of Subpoena, filed June 5, 2000. In addition, Ms. Rupert represented that she had consulted a medical expert for a preliminary opinion. Petitioner's Status Report, filed June 26, 2000, ¶ 3. Ms. Rupert suggested that an additional "90 days" would be "sufficient time to comply with the" special master's September 22, 1999 order. *Id.* On June 29, 2000, the special master enlarged to September 15, 2000, Ms. Rupert's time within which to complete the record. *Rupert v. Secretary of HHS*, No. 99-0774V, Order of the Special Master (Fed. Cl. Spec. Mstr. June 29, 2000). The special master stated that he did not contemplate any additional enlargement of time for Ms. Rupert to complete the record. *Id.* In addition, because Ms. Rupert had "yet to comply completely with the special master's September 22, 1999 order," the special master directed Ms. Rupert to show cause why the special master should not dismiss the case if Ms. Rupert did not complete the record by September 15, 2000. *Id.*

On September 19, 2000, Ms. Rupert filed two volumes of medical records. On September 22, 2000, Ms. Rupert filed a response to the special master's June 29, 2000 order to show cause. Ms. Rupert represented that although she had provided all of Holden's medical records to her medical expert, the expert had not completed a review of the medical records. Petitioner's Response to the Court's Order to Show Cause, filed September 22, 2000, ¶ 6. Thus, Ms. Rupert implied, the expert had not perfected an opinion. *See id.* Ms. Rupert asserted that although she had "been diligent in her attempts to retrieve all records, summarize the records and seek expert review of the file," *id.* at ¶ 9, she had been hampered in the investigation of her claim by "the very difficult process" of collecting medical records from numerous facilities. *Id.* at ¶ 7. In pleading with the special master "to refrain from dismissing" the petition, Ms. Rupert requested "another 60 days" to comply completely with the special master's September 22, 1999 order. *Id.* at ¶ 10.

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[2](...continued)
case is appropriate. *See* Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs (Opposition), filed February 27, 2001; Respondent's Surreply to Petitioner's Reply to Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs (Surreply), filed May 16, 2001.

On October 30, 2000, Ms. Rupert dismissed voluntarily the petition without producing an amended petition that identified specifically her theory or theories of the case and a medical expert's opinion that supported the amended petition. According to Ms. Rupert, her medical expert could not reconcile inconsistencies between information in Holden's medical records that were contemporaneous with Holden's September 19, 1996 DPT vaccination and information in potential fact witnesses' affidavits. Fee Petition at 2.

THE STANDARD

Congress provided two fee-shifting provisions in the legislation enacting the Program. *See* § 300aa-15(e). First, the statute mandates the special master to award "reasonable attorneys' fees" and "other costs" to the successful petitioner "as part of" the petitioner's "compensation." § 300aa-15(e)(1). Second, the statute accords discretion to the special master to "award an amount of compensation to cover" an unsuccessful "petitioner's reasonable attorneys' fees and other costs" as long as "the special master or court determines that" petitioner possessed "a reasonable basis for the claim" and that petitioner filed the petition "in good faith." *Id.*; *see, e.g., Di Roma v. Secretary of HHS*, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). As the United States Supreme Court has cautioned in cases involving other fee-shifting schemes, the special master's "discretion is not without limit." *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989). Thus, absent "special circumstances," the special master "should ordinarily" award attorneys' fees and costs to an unsuccessful petitioner. *Id.*, (citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)); *Hensley*, 461 U.S. at 429.

The statute neither defines specifically the term "reasonable attorneys' fees" nor prescribes specifically a method to assess "reasonable attorneys' fees." Therefore, special masters use the traditional lodestar standard promulgated in many Supreme Court decisions. In calculating an "initial estimate of the value of a lawyer's services" in a case, a special master multiplies "the number of hours reasonably expended on the litigation" by "a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *Erickson v. Secretary of HHS*, 1999 WL 1268149, *2 (Fed. Cl. Spec. Mstr. Dec. 10, 1999). An attorney must provide "evidence supporting the hours worked." *Hensley*, 461 U.S. at 433. Because time that is "not properly billed to one's client also" is "not properly billed to one's adversary," the attorney "should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Id.* at 434. In addition, an attorney must "produce satisfactory evidence," besides "the attorney's own affidavits," supporting the hourly rate. *Blum*, 465 U.S. at 895 n.11. A special master may "adjust the fee upward or downward" if the initial estimate of the fee is not reasonable given the circumstances of the case. *Hensley*, 461 U.S. at 434; *see also Pierce v. Underwood*, 487 U.S. 552, 581 (1998)(Brennan, J., concurring); *Saxton v. Secretary of HHS*, 3 F.3d 1517 (Fed. Cir. 1993)(special master may rely upon his experience to decide the reasonableness of a fee.).

A special master determines an appropriate hourly rate based upon "prevailing market rates in the relevant community" for an attorney with "reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895. The standard evokes simple, common, economic principles of "supply and demand." *Id.* at n.11. Yet, the process of fixing an appropriate hourly rate is "inherently difficult."[3] *Id.* First, "there is no such thing as a prevailing market rate for" lawyers' time in any "particular community" because of wide variations in "the hourly rates of lawyers in private practice" reflecting differences in lawyers' services, abilities and status. *Id.* Second, Program practice attracts a diverse, national bar, blurring possibly the concept of a distinct, "relevant community." *See Erickson*, 1999 WL 1268149.

A special master establishes generally an attorney's appropriate hourly rate by examining several factors--many of which may be peculiar to the specific case--including the attorney's experience and skill; the expertise required to prosecute the case effectively; the attorney's customary fee; awards in similar cases and the overall quality of representation. *See, e.g., Erickson*, 1999 WL 1268149 at *2; *Hensley*, 461 U.S. at 434, n.9 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974)); *Pierce*, 487 U.S. at 573. A special master must ensure that an hourly rate is sufficient "to attract competent counsel." *Blum*, 465 U.S. at 893-894. Thus, "the rates" that attorneys charge "in private representations" may be pertinent. *Id.* at 896, n.11. However, the special master must ensure also that an hourly rate does "not produce" a windfall. *Id.* at 894. Indeed, in Program cases, "[p]etitioners are not given a blank check to incur" attorneys' fees and costs. *Perreira v. Secretary of HHS*, 27 Fed. Cl. 29, 34 (1992); *see also Pusateri v. Secretary of HHS*, 18 Cl. Ct. 828, 830-831 (1989)(citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)(Fee shifting statutes are not intended "to replicate exactly the fee any attorney could earn through a private fee arrangement with his client.")). Moreover, there is support for the proposition that when, as in Program cases, a fee award is not "contingent" in the sense that a fee award is not dependant upon a successful outcome on the merits of the case, some factors that Federal courts consider to set reasonable fees--such as the undesirability of the case; the preclusion of other employment; or, even, the results obtained--may assume less importance, if any importance at all, in the analysis of an appropriate hourly rate. *See Blum*, 465 U.S. at 902-904 (Brennan, J., concurring); *Pusateri*, 18 Cl. Ct. at 832.

DISCUSSION

Ms. Rupert proffers a billing "worksheet" that contains discrete entries classifying work that her attorneys and paralegals accomplished in the case and listing the time that her attorneys and paralegals expended on the work. *See* Fee Petition, Exhibit 1A. Respondent does not challenge specifically any of the entries. Yet, the amount of time that attorneys and paralegals expend on a case is an important component of the fee

[3] Indeed, according to the Chief Special Master, "the determination of attorney's fees under the Program" involves "inevitably a small level of arbitrariness." *Erickson*, 1999 WL 1268149 at *7.

calculation. Therefore, the special master "must engage in a thoughtful analysis of the number of house expended. . . to ensure" that the hours are "reasonable." *Guckenberger v. Boston University*, 8 F.Supp.2d 91, 100 (D. Mass. 1998).

This case progressed in two phases: entitlement proceedings over the course of one year involving preliminary factual and medical investigation of the claim--predominantly medical record production--leading to a voluntary dismissal before the special master directed the submission of respondent's Rule 4 report, and, then, protracted fee proceedings. As Ms. Rupert's attorney of record, Mr. Homer delegated appropriately major responsibilities to paralegals. Indeed, the paralegals claim 65.4 hours during entitlement proceedings for coordinating initial discovery--including collecting medical records; organizing medical records; summarizing medical records and filing medical records--preparing routine pleadings and communicating with Ms. Rupert. For the most part, the hours appear reasonable. But, the special master expresses particular concern regarding the paralegals' billing judgment in charging consistently incremental hours for menial tasks, like leaving telephone messages; in charging consistently incremental hours for tasks better described as purely administrative or secretarial, like receiving invoices and preparing checks; and in charging consistently incremental hours for nebulous tasks, like case meetings between paralegals. Therefore, the special master allows just 60 hours of the paralegals' time during entitlement proceedings.

In addition to the substantial number of hours that the paralegals logged during entitlement proceedings, Mr. Homer, Mr. Conway and Ms. Chin-Caplan claim a total of 22.1 hours during entitlement proceedings for consulting with Ms. Rupert; managing the paralegals; reviewing documents; developing strategy; consulting with Ms. Rupert's expert; preparing pleadings; participating in status conferences; dismissing the case and performing post-judgment activities. The division of the work between the three attorneys "is not relevant" as long as "the total hours spent" are reasonable. *Walsh v. Carney Hospital Corporation*, 1998 WL 1284167 at *2 (Mass. Super. June 10, 1998). The special master recognizes that Ms. Rupert deserved certainly the services of an attorney possessing superior skills in explaining to clients complicated aspects of Program law; in interviewing potential fact witnesses to elicit critical information; in analyzing the documentary record to identify pertinent factual and medical issues; in engaging appropriate medical experts; in discussing the case with medical experts and in advocating clients' interests before the special master. Yet, given that this case presented at the outset such serious, straightforward factual issues that Ms. Rupert's medical expert declined to support the claim, the special master questions definitely the need for three attorneys to charge collectively time involved discussing strategy. *See* Fee Petition, Exhibit 1A. Moreover, given that this case did not involve significant, intensive pleadings, the special master questions the reasonableness of several attorney hours devoted to reviewing simple scheduling orders that reiterated Ms. Rupert's primary duty to complete expeditiously the petition and to drafting or to editing repetitive status reports. Therefore, the special master allows just 12.5 hours of Mr. Homer's time for substantive work on the case during entitlement proceedings. In addition, the special master allows just 2 hours of Mr. Conway's time for substantive work on the case during entitlement proceedings. The special master does not allow any of Ms. Chin-Caplan's time during entitlement proceedings.

Mr. Homer and Mr. Conway claim a total of 21.1 hours--and the paralegals claim 6 hours--during fee proceedings for compiling the fee petition; editing the fee petition and replying to respondent's opposition to the fee petition. The request presents an excruciating conundrum for the special master. Of course, Ms. Rupert is entitled to reasonable attorneys' fees and other costs related to fee proceedings.[4] Yet, the number of hours that Mr. Homer, Mr. Conway and the paralegals claim for fee proceedings appears facially excessive--perhaps, even, unseemly--especially since the raw number of attorney hours for fee proceedings rivals so closely the raw number of attorney hours for ostensibly more substantive entitlement proceedings. On the other hand, the special master appreciates that, absent a strong rationale, a large deduction of hours related to fee proceedings in this case may discourage attorneys from pursuing what they believe to be a rightful hourly rate, or, in an absolute worst case scenario, may encourage respondent to oppose strongly and frequently fee petitions, forcing attorneys either to concede quickly close issues or to use their own limited funds to defend a fee petition. Nevertheless, guided by his experience, and based upon a careful review of the fee proceedings, the special master decides that many of the hours related to fee proceedings are simply not reasonable. In the special master's view, the quality of the fee petition is, at best, average. In pages and pages of argument, Ms. Rupert states and restates several points that are totally obvious to the special master after ten years of service, if not to each special master: Ms. Rupert's attorneys and paralegals are undoubtedly among the Program's elite practitioners, litigating successfully vast quantities of cases presenting complex and sometimes ground breaking issues and contributing effectively to many aspects of the Program's success; and Boston is an expensive metropolitan area in which to practice law. But, as the special master will explain in his discussion regarding the hourly rates that he will grant, Ms. Rupert's fee petition does not contain much probative evidence on a central issue: The hourly rates that attorneys and paralegals in Boston, Massachusetts, who offer services similar to Ms. Rupert's attorneys and paralegals, actually

[4] In the past, some special masters have awarded only one hour of attorney time for the preparation of a fee petition, compensating other hours related to fee proceedings at a reasonable paralegal rate. *See Watson v. Secretary of HHS*, No. 91-1345V, 1992 WL 181022 (Cl. Ct. Spec. Mstr. July 2, 1992); *Cain v. Secretary of HHS*, No. 90-2212V, 1992 WL 79948 (Cl. Ct. Spec. Mstr. Apr. 2, 1992). Federal courts in Massachusetts deem apparently "time spent preparing a motion for attorneys' fees" as "non-core" legal work. *Wilson v. McClure*, 135 F.Supp.2d 66, 72 (D. Mass. 2001). The Courts multiply a reasonable number of hours expended on the fee petition by "two-thirds of the particular attorney's hourly rate." *Id.*

charge. *See, e.g, Wilson*, 135 F.Supp.2d at 71. Thus, overall, Ms. Rupert's fee petition does not aid tremendously the special master.[5] The special master allows generously 12.5 hours of Mr. Conway's time during fee proceedings. In addition, the special master allows generously 2.5 hours of Mr. Homer's time during fee proceedings. Finally, the special master allows generously 2.5 hours of the paralegals' time during fee proceedings.

Ms. Rupert proffers several items of evidence to support generally the hourly rates that her attorneys and paralegals request. First, Ms. Rupert submits two pieces from MASSACHUSETTS LAWYERS WEEKLY. Fee Petition, Exhibit 3. One piece reports anecdotally that the legal market in Boston, Massachusetts, changed significantly between 1990 and 2000, with huge increases in law firm associates' salaries. One piece lists according to size the 100 largest law firms in Boston, Massachusetts. In a few instances, the piece includes information that some firms provided regarding customary hourly rates. Second, Ms. Rupert submits the Mid-Year 2000 North America Office Market Report. Fee Petition, Exhibit 7. The report suggests that office rental costs in Boston, Massachusetts, were among the highest in the Nation during the first six months of 2000. Third, Ms. Rupert submits fee decisions in *Erickson*, Fee Petition, Exhibit 2; *Clifton v. Massachusetts Bay Transportation Authority*, 2000 WL 218397 (Mass. Super. Feb. 3, 2000), Fee Petition, Exhibit 4; and *Guckenberger*. Fee Petition, Exhibit 5. In *Erickson*, the Chief Special Master awarded $175.00 an hour to an experienced Program attorney located in Twin Falls, Idaho. In *Clifton*, a Massachusetts Superior Court judge awarded $250 an hour to the lead attorney in a successful employment discrimination suit. In *Guckenberger*, a United States District Court judge awarded $325.00 an hour to a California-based attorney who acted as the lead attorney and $60.00 an hour to paralegals in a successful Americans with Disabilities Act (ADA) action brought in the United States District Court for the District of Massachusetts. Fourth, Ms. Rupert submits affidavits from attorneys in Boston, Massachusetts. Fee Petition, Exhibit 6. Two attorneys--Paul Needham, Esq. (Mr. Needham), and Arthur F. Licata, Esq. (Mr. Licata)--attest broadly that the rates that Mr. Conway and Mr. Homer request "are reasonable and proper." Fee Petition, Exhibit 6 at 2, ¶ 5; 4, ¶ 6. A third attorney--Stephen I. Lipman, Esq. (Mr. Lipman)--attests that when he performs "work on an hourly basis," he commands "$365.00 per hour plus 6% general and administrative charge." Petitioner's exhibit (Pet. ex.) 19, ¶¶ 3-4. Mr. Lipman states that he has practiced "for over 33 years." Fee Petition, Exhibit 6 at 5, ¶ 2. According to Mr. Lipman, "a significant portion of [his] practice" entails the representation of "personal injury claimants." *Id.*

Respondent counters with several items of evidence. First, respondent submits a survey about the economics of law practice in Massachusetts commissioned by the Massachusetts Bar Association. *See* Respondent's exhibit (R. ex.) G. Respondent asserts that the survey establishes that, in 1997, the median hourly rate for attorneys practicing in metropolitan Boston was $180.00 and that, in 1997, the average hourly rate for paralegals was $65.00. Surreply at 3. Second, respondent submits several older fee decisions from the Office of Special Masters. R. ex. A-C. Third, respondent submits fee decisions in *Walsh v. Carney Hospital Corporation*, 1998 WL 1284167 (Mass. Super. June 10, 1998), R. ex. H; *Wilson*, R. ex. J; and *Alfonso v. Aufiero*, 66 F.Supp.2d 183 (D. Mass. 1999). R. ex. K. Respondent submits also biographical information about the attorney in *Walsh*, R. ex. I, the attorney in *Wilson*, R. ex. J at 9-10, and the attorney in *Alfonso*. R. ex. L. In *Walsh*, a Massachusetts Superior Court judge determined that, "based upon [the attorney's] affidavit," $175.00 an hour was reasonable for the lead attorney in "an extremely successful" employment discrimination suit. *Walsh*, 1998 WL 1284167 at *1. The attorney, Daniel J. Driscoll, Esq. (Mr. Driscoll), gained admission to the Massachusetts Bar in 1991. R. ex. I. In *Wilson*, a United States District Court judge awarded $250.00 an hour to a "prominent" and "highly-skilled civil rights attorney with years of experience" who was the lead attorney in a successful racial discrimination suit brought in the United States District Court for the District of Massachusetts. *Wilson*, 135 F.Supp.2d at 71. The attorney, Harvey A. Schwartz, Esq. (Mr. Schwartz), gained admission to the Massachusetts Bar in 1978. R. ex. J at 9. In *Alfonso*, a United States District Court judge awarded $250.00 an hour to an lead attorney in a successful civil rights suit brought in the United States District Court for the District of Massachusetts. The attorney, Robert L. Hernandez, Esq. (Mr. Hernandez), gained admission to the Massachusetts Bar in 1977. R. ex. L. Finally, respondent submits biographical information about Andrew W. Dodd, Esq. (Mr. Dodd). R. ex. E. Mr. Dodd, who gained admission to the California Bar in 1970, maintains his law practice in Los Angeles County, California. *Id.* Mr. Dodd has appeared in many Program cases. Citing the Chief Special Master's decision in *Corder v. Secretary of HHS*, No. 97-0125V, 1999 WL 1427753 (Fed. Cl. Spec. Mstr. Dec. 22, 1999), awarding $175.00 an hour to Mr. Dodd, respondent asserts that Mr. Dodd is a fitting benchmark for the fee decision in this case. Opposition at 6-7.

Little of the parties' evidence is truly educational. For instance, special masters and Federal courts in Massachusetts have rejected as essentially uninformative general surveys like Ms. Rupert's submission from MASSACHUSETTS LAWYERS WEEKLY that lists information about the 100 largest law firms in Boston, Massachusetts, and respondent's submission from the Massachusetts Bar Association. *See, e.g., Marston v. Secretary of HHS*, No. 91-0355V, 1998 WL 719493 at *3 n.12 (Fed. Cl. Spec. Mstr. Sept. 29, 1998); *Erickson*, 1999 WL 1268149 at *6 ("[I]n setting the appropriate rate for an individual attorney," a special master cannot rely "heavily" on "the average or median" rate in a survey.); *Corder*, 1999 WL 1427753 at *4; *Wilson*, 135 F.Supp.2d at 67. Likewise, case law regarding the prevailing market rate for civil rights attorneys and their paralegals in Boston, Massachusetts, is inapposite to the determination of the prevailing market rate for personal injury attorneys, or Program practitioners, and their paralegals in Boston, Massachusetts, because the nature of the services and the demands of each discipline appear to be very different.

However, in *Willis v. United States Postal Service*, the United States Court of Appeals for the Federal Circuit noted that as a member of a bar and as an officer of a court, an attorney who offers a sworn affidavit is subject to discipline for false statements. *Willis v. United States Postal Service*, 245 F.3d 1333, 1341 (Fed. Cir. 2001). According to the Federal Circuit, the special master should presume that the "attorney-affiant" is "truthful unless and until he is shown to be otherwise." *Id.* Thus, in this case, the special master may accept Mr. Needham's and Mr. Licata's statements as basic support regarding the reasonableness of the hourly rates that Mr. Homer and Mr. Conway seek. Moreover, in this case, the special master may accept Mr. Lipman's affidavit as a direct, reliable indication of the prevailing market rate in Boston, Massachusetts, for a personal injury

[5] Respondent's submissions are not immune from like criticism. And, the special master notes, respondent's vigorous opposition in this case fueled in part the high number of hours that the attorneys and paralegals claim.

lawyer with over thirty years experience.[6] Based solely upon Mr. Lipman's affidavit, the special master can state that the hourly rates that Mr. Homer and Mr. Conway seek are not *per se* unreasonable. After all, the hourly rates that Mr. Homer and Mr. Conway seek do not exceed Mr. Lipman's usual hourly charge. Nevertheless, the special master's determination that the hourly rates that Mr. Homer and Mr. Conway seek are not *per se* unreasonable does not mean necessarily that the hourly rates that Mr. Homer and Mr. Conway seek are inherently reasonable for Program cases. Therefore, the special master resorts to an examination of recent awards within the Office of Special Masters for guidance on the appropriate hourly rate for Mr. Homer and for Mr. Conway.

In *Erickson*, the Chief Special Master addressed two "oft-repeated and ill-supported" propositions affecting the award of attorney's fees in Program cases. *Erickson*, 1999 WL 1268149 at * 4. First, the Chief Special Master refuted resolutely the assumption that Program practice "is uncomplicated," requiring "less expertise or preparation than traditional tort litigation." *Id.* Rather, the Chief Special Master recognized that following two administrative revisions to the Vaccine Injury Table (Table), Program cases involve consistently now a variety of complex, substantive issues. *Id.* Therefore, the Chief Special Master concluded that Program attorneys must be "knowledgeable, able and experienced" to mount the "effective presentation" of their cases. *Id.* And, the Chief Special Master acknowledged, "[s]uch counsel" garner "high hourly rates in the open market." *Id.* Second, the Chief Special Master dispelled completely a dated pronouncement that $175.00 an hour is the "premiere rate" in Program cases, reserved only for "attorneys evidencing the highest level of experience and skill in the highest cost areas." *Id.* at n.7. Then, the Chief Special Master suggested a "dual approach" for resolving an attorney's hourly rate. *Id.* at *5. The Chief Special Master stated that after a special master "define[s] a range of reasonable hourly rates for the petitioning attorney" based upon the attorney's location, the special master should identify "a specific rate by comparing the attorney's abilities, efforts and other relevant factors to other attorneys practicing" in the Program. *Id.*

The Chief Special Master applied his "dual approach" to a request for $175.00 an hour from Curtis Webb (Mr. Webb), a Program attorney practicing in Twin Falls, Idaho. Based particularly upon a "highly probative" affidavit from a judge who "has had the opportunity in his judicial capacity to consider and approve fees in Twin Falls and Idaho," the Chief Special Master deemed $175.00 an hour to be reasonable, despite a survey reflecting that the rate "would place [Mr. Webb] in the top ninth percentile for his years of practice and for partners practicing in cities" like Twin Falls, Idaho. *Id.* at *6. In addition, the Chief Special Master concluded that $175.00 an hour was "comfortably" within the historical range of $55.00 an hour to $250.00 an hour for Program fee awards. *Id.* at *7. Finally, by contrasting Mr. Webb to other Program attorneys, the Chief Special Master confirmed that Mr. Webb warranted $175.00 an hour. *Id.* The Chief Special Master noted especially that Mr. Webb "is an advocate at the high end of the spectrum" with "considerable skill" and an "unblemished reputation." *Id.* Indeed, the Chief Special Master implied strongly that Mr. Webb would receive a substantially greater hourly rate if he practiced in a large metropolitan area. *Id.* at *4.

In *Corder*, the Chief Special Master applied again his "dual approach" to a request for $225.00 an hour from Mr. Dodd. The Chief Special Master found that although Mr. Dodd "has extensive experience in vaccine litigation," he failed to adduce adequate evidence establishing that $225.00 an hour is reasonable. *Corder*, 1999 WL 1427753 at *5. Instead, the Chief Special Master determined that Mr. Dodd merited just $175.00 an hour. *Id.* at *6. The Chief Special Master reasoned that while Mr. Dodd exhibits "an above-average grasp" of Program practice, he "has not shown the same level of ability as those receiving the highest hourly rates." *Id.* at *5.[7]

In *Slay v. Secretary of HHS*, 2001 WL 1168103 (Fed. Cl. Spec. Mstr. Sept. 13, 2001), Special Master Millman considered the appropriate hourly rate for three Program attorneys--Bradley J. Horn (Mr. Horn), Clifford J. Shoemaker (Mr. Shoemaker) and Ghada Anis (Ms. Anis)--who practice in the Virginia suburbs of Washington, D.C. Special Master Millman did not employ the "dual approach" advanced in *Erickson*. Rather, Special Master Millman limited her review of each attorney's request to the evidence in the record; to fee decisions in other cases involving the same attorneys and to her "own, past experience." *Id.* at *2. Special Master Millman stated that affidavits that Mr. Horn submitted reflected that the rate

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[6] The special master notes specifically that the special master invited respondent to obtain "*rebuttal affidavits from personal injury attorneys in Boston, Massachusetts, whom respondent has interviewed*" regarding Mr. Lipman's statements. *Rupert v. Secretary of HHS*, No. 99-0774V, Order of the Special Master (Fed. Cl. Spec. Mstr. Apr. 13, 2001)(emphasis in original); *see also Guckenberger*, 8 F.Supp.2d at 30 (Defendant rebutted successfully plaintiff's requested hourly rate by providing affidavits from active, local lawyers that "more than adequately fill[ed] the hole in plaintiff's proof.").

[7] To the casual observer, the result in *Erickson* may seem incongruous with the result in *Corder*. Yet, as the Chief Special Master remarked in *Erickson*, "it would not be impossible for two attorneys from different cost areas to have the same rate were one's reputation, skill, and experience sufficiently greater so as to balance the calculation." *Erickson*, 1999 WL 1268149 at *6 n.13. Moreover, given the his "superior understanding of the litigation" in *Erickson* and in *Corder*, the Chief Special Master possessed "discretion" in setting each attorney's hourly rate. *Saxton v. Secretary of HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993).

that Mr. Horn requested was "less than the hourly rate" that the affiants charged. *Id.* Therefore, according to Special Master Millman, the evidence supported an hourly rate of $175.00 for Mr. Horn. *Id.* In Special Master Millman's view, Mr. Shoemaker "has far more experience in the Program than Mr. Horn." *Id.* Thus, Special Master Millman determined that $195.00 an hour was reasonable for Mr. Shoemaker. *Id.* Finally, Special Master Millman relied upon one of the Chief Special Master's unpublished decisions to rule that $135.00 an hour was reasonable for Ms. Anis. *Id.* at *3.

In *Macrelli v. Secretary of HHS*, No. 98-0103, slip op. (Fed. Cl. Spec. Mstr. Jan. 30, 2002), Special Master French considered the appropriate hourly rate for Peter Meyers (Professor Meyers), who supervises student attorneys in The George Washington University Vaccine Injury Law Clinic (Clinic). Professor Meyers requested $200.00 an hour. *Id.* at 4. Adopting the "dual approach" advanced in *Erickson*, Special Master French awarded $190.00 an hour to Professor Meyers. *Id.* at 7. To support her decision, Special Master French cited the number of years that Professor Meyers has served in the Program and "the special services" that Professor Meyers provides through his management of the Clinic. *Id.*

The hourly rates that Mr. Homer and Mr. Conway request are clearly at the upper end of the range of rates that special masters have approved since the Program's inception. Indeed, the special master has awarded previously much lower hourly rates to Mr. Homer and to Mr. Conway. *See, e.g.*, *Therneau v. Secretary of HHS*, No. 90-1722V (Fed. Cl. Spec. Mstr. Feb. 16, 1994)(granting $150.00 an hour to Mr. Conway and $110.00 an hour to Mr. Homer.). Yet, in the special master's view, *Erickson*, *Slay* and *Macrelli* signal clearly upward pressure on hourly rates in the Program.[8] Still, the hourly rates the Mr. Homer and Mr. Conway request surpass even the hourly rates in *Erickson*, *Slay* and *Macrelli*. But, the special master cannot justify reducing Mr. Homer's hourly rate and Mr. Conway's hourly rate simply because other attorneys in various locations have not received the same rates. Besides, some of the other attorneys may exhibit marginally comparable skills. Rather, the special master must award an hourly rate that not only reflects fairly the special master's assessment of Mr. Homer's expertise and Mr. Conway's expertise, but accounts for the realities of sustaining a practice in Boston, Massachusetts.

Throughout the years, Mr. Homer and Mr. Conway have distinguished themselves as preeminent and dedicated Program attorneys.[9] Like Mr. Webb, Mr. Homer and Mr. Conway are among the few prime attorneys who have practiced almost continuously in the Program, developing extensive, "laudable" expertise that places them solidly "at the high end of the spectrum." *Erickson*, 1999 WL 1268149 at *7. The special master acknowledges that Mr. Homer may not have as many years of legal experience as other attorneys in the Program. But, sometimes, the elementary examination of an attorney's years of legal experience fails as a dependable gauge of the attorney's proficiency. Through passionate persistence and natural talent, Mr. Homer has eclipsed easily most supposedly seasoned Program attorneys with more years of legal experience. Although Mr. Conway may not appear frequently in status conferences or hearings, he performs obviously substantive, taxing, legal work that employs the scope of his considerable skills and tact. Moreover, Mr. Conway's worth to the Program extends beyond the mere representation of clients. Based upon Mr. Conway's exquisite understanding of Program practice and procedure, the Chief Special Master has invited Mr. Conway to serve recently on two committees examining potential improvements to the system. Unlike Mr. Webb, Mr. Homer and Mr. Conway practice in an undeniably expensive metropolitan area. Therefore, the special master finds that $225.00 an hour is reasonable for Mr. Homer and $250.00 is reasonable for Mr. Conway.

The special master is vexed by the hourly rate that the paralegals request. Quite frankly, the special master cannot discern any support in the record for the contention that $85.00 an hour represents the prevailing market rate for paralegals in Boston, Massachusetts. Neither Mr. Needham, Mr. Licata nor Mr. Lipman addresses reasonable paralegal rates in Boston, Massachusetts. And, Ms. Rupert did not submit any affidavits from active paralegals disclosing their hourly rate. Further, the special master has not identified any Program fee decision awarding a paralegal rate nearing $85.00 an hour. Regardless, the special master comprehends the role that paralegals fulfill in Mr. Homer's and Mr. Conway's firm. In the special master's view, high-caliber attorneys like Mr. Homer and Mr. Conway must be able to continue to recruit and to retain extremely competent paralegals in order to maintain the level of success that their practice has achieved. Therefore, in the absence of appropriate evidence establishing that $85.00 an hour for the paralegals is reasonable, the special master finds that $75.00 an hour is reasonable.[10]

CONCLUSION

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[8] The special master is aware that an experienced Program attorney in Cheyenne, Wyoming, is requesting now regularly $175.00 an hour. In fact, based upon the parties' informal representations in one case, the special master entered a fee decision that awarded *de facto* $175.00 an hour to the Cheyenne, Wyoming attorney.

[9] In addition, it is known commonly that Mr. Homer and Mr. Conway participated in at least one high-profile personal injury case.

[10] The result is consonant at least with *Corder*. In *Corder*, the Chief Special Master awarded $60.00 an hour to a paralegal associated with an average to above-average, but not exceptional, attorney. *Corder*, 1999 WL 1427753 at *6.

Ms. Rupert is entitled to $11,687.50 in attorneys' fees[11] and $2,160.00 in costs. In the absence of a motion for review filed under RCFC Appendix J, the clerk of court shall enter judgment

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ATTORNEY	HOURS	RATE	TOTAL
KEVIN CONWAY	14.5	$250.00	$3,625.00
RONALD HOMER	15	$225.00	$3,375.00
PARALEGALS	62.5	$75.00	$4,687.50
			$11,687.50

in Ms. Rupert's favor for $13,847.75. The judgment shall reflect that Mr. Homer may collect $13,847.75 from Ms. Rupert.

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John F. Edwards
Special Master