OFFICE OF SPECIAL MASTERS

No. 96-361V

Filed: December 10, 1999

DAVID ERICKSON and VICKIE THORNE-ERICKSON, as the Legal Representatives of the Estate of SOPHIA VICTORIA ERICKSON,	*	
Petitioners,	*	To Be Published
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Curtis R. Webb, Twin Falls, Idaho, for petitioners.

David L. Terzian, U.S. Department of Justice, Washington, D.C., for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS

GOLKIEWICZ, Chief Special Master.

On June 24, 1996, petitioners filed a claim on behalf of their daughter's estate under the National Vaccine Injury Compensation Program. Petition ("Petn."), filed June 24, 1996. Petitioners alleged that Sophia Victoria Erickson died as a direct result of a MMR vaccine she received July 1, 1994. Petn. at 1, 4. Following submission of relevant medical records and an expert report from Ralph Shapiro, M.D., respondent conceded entitlement on August 4, 1999, to an award of $250,000. Subsequently, petitioners' counsel submitted a request for fees and costs in the amount of $13,007.05, which was amended November 1, 1999, for a final request of $13,707.05.[1] Petition for

[1] Specifically, petitioners request $6,261 in attorney and legal assistant fees for their former counsel Barbara Ashley, $5,670 in attorney's fees for Mr. Webb, $161.30 in costs incurred by Ms. Ashley's firm, and $1,614.75 in costs incurred by Mr. Webb's firm. Petitioners did not incur any costs directly. Petitioners' Statement Re: Costs, filed October 13, 1999.

Attorneys' Fees and Costs ("Fee Petn."), filed October 13, 1999; Reply to the Secretary's Objections to Petitioners' Request for Attorneys' Fees and Costs ("P. Reply"), filed November 1, 1999. Respondent filed a timely objection to petitioners' fee petition and contests the request on two grounds. Respondent's Opposition to Petitioners' Application for Attorneys' Fees and Costs ("R. Opp."), filed October 21, 1999. First, counsel challenges Mr. Webb's hourly rate as unreasonable. R. Opp. at 2-12. Second, respondent considers some tasks performed by former counsel Barbara Ashley to be secretarial in nature and, therefore, unreimbursable. R. Opp. 13-14. Petitioners filed a reply to respondent's objections, and the fees issue is now ready for resolution.

I. DISCUSSION

A. Curtis R. Webb's Hourly Rate[2]

Petitioners' Position

Petitioners request $5,670 in attorney's fees for Mr. Webb's services. Mr. Webb believes his hourly rate of $175, which he instituted in all his cases since January 1, 1998, is reasonable in light of several factors. These include his considerable experience and expertise with products liability, vaccine-litigation and Program cases; the increased cost and complexity of cases due to administrative changes to the Vaccine Injury Table (see §14(a) and 42 C.F.R. §100.3); a general increase in the cost of legal services; the market rate for Twin Falls and the State of Idaho, as corroborated through affidavit testimony; and previous Program awards at the $175 rate. Fee Petn. at 3-5; Affidavit of Mr. Webb at 2-4; P. Ex. D (Affidavit of Daniel B. Meehl); P. Ex. E (Affidavit of John C. Hohnhorst); P. Ex. F (Affidavit of Kenneth L. Pedersen); P. Reply at 2-5, 8. In addition, Mr. Webb believes he should not be penalized for living in a smaller city, citing several U.S. Court of Appeals decisions where the lodestar was found based on the prevailing market rate in the forum city. P. Reply at 5-6. Finally, Mr. Webb argues that the market rate is premised on factors specific to the petitioning attorney, not an average rate for a similarly-sized town as respondent submits. P. Reply at 6, 8-9.

Respondent's Position

Respondent considers Mr. Webb's hourly rate excessive because the case was straightforward and involved minimal proceedings. R. Opp. at 2. Respondent notes no hearings or lengthy settlement negotiations ensued and petitioners filed most of the relevant records prior to Mr. Webb's notice of appearance. In addition, this court recently found $150 a reasonable hourly rate for Mr. Webb in a case of limited complexity. R. Opp. at 2-3. Respondent also maintains that a $175 hourly rate is not consistent with the prevailing market rate in Twin Falls for an attorney with similar

[2] Respondent does not challenge the amount of time Mr. Webb expended in this case, nor the tasks he completed. The court finds Mr. Webb's application reasonable in these respects and awards the 32.40 hours requested (i.e., the 28.40 hours originally requested plus 4 hours expended in responding to respondent's fee opposition). P. Reply at 11-12; Supplemental Affidavit of Curtis R. Webb, filed November 1, 1999, at 2.

experience. R. Opp. at 3-12. Respondent argues this second point from several angles.

First, counsel relies on the Consumer Price Index to reject Mr. Webb's increase in fees from $150 to $175. R. Opp. at 4. Respondent concedes, at best, that a cost-of-living adjustment would permit a maximum hourly rate of $159.65, and even then only if Mr. Webb did not live in Twin Falls which has a cost-of-living 12% *lower* than the national average. R. Opp. at 4-5. Second, respondent considers the court decisions awarding Mr. Webb $175 unpersuasive on the issue of Mr. Webb's hourly rate. R. Opp. at 5. Counsel notes that in at least one instance, the special master did not have the opportunity to weigh the economic evidence presented here. In other instances, the special master considered Mr. Webb's experience twice in awarding the higher fee, failed to sufficiently focus on the prevailing market rate in Twin Falls, and improperly considered Mr. Webb's Program experience. R. Opp. at 5-7. Third, respondent rebuffs Mr. Webb's supporting affidavits as generally conclusory and uninformative regarding the rates in Twin Falls. Respondent also notes that while this court considered these same affidavits highly probative in a previous case, the undersigned nevertheless only awarded Mr. Webb a $150 hourly rate. R. Opp. at 8-9. Fourth, respondent submits that because $175 has been considered the premier rate for attorneys living in a high cost area who demonstrate the utmost expertise and exemplary performance, Mr. Webb could not be entitled to such a rate given the low cost of living in Twin Falls. R. Opp. at 9. Fifth, based on an economic survey comparing population figures with attorney experience, respondent believes $125 is an acceptable hourly rate for Mr. Webb's location and years of practice. R. Opp. at 10. Finally, respondent maintains that $125 is an hourly rate in line with those awarded other Program attorneys. R. Opp. at 10-12.

Relevant Case Law

To determine reasonable attorney's fees, this court has traditionally employed 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 attorney's 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.

In assessing the number of hours reasonably expended, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." Hensley, 461 U.S. at 434. Likewise, the court must ensure that the hourly rate requested is reasonable. The Supreme Court has repeatedly opined that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the *relevant community*." Blum, 465 U.S. at 895 (emphasis added). More specifically, "the burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum, 465 U.S. at

896, n. 11. This is not an easy task. The Supreme Court has acknowledged that determining the appropriate market rate for attorneys is "inherently difficult" since the types of services, experience, skill, and reputation may vary not only throughout the marketplace, but within the petitioning attorney's firm as well. Blum, 465 U.S. at 896, n. 11. In any event, the prevailing market rate or reasonable hourly rate is a product of a number of considerations, including the quality of representation, the attorney's legal skills and experience, the novelty and difficulty of issues presented, the undesirability of the case, and the results obtained. Pierce, 487 U.S. at 573; Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 726-727 (1987); Blum, 465 U.S. at 899. Described differently, the prevailing market rate is "determined by the relative supply of that kind and quality of services furnished" by the petitioning attorney. Pierce, 487 U.S. at 571. In essence, the market rate "is determined by a reference to the *particular* attorney involved rather than to a minimally qualified hypothetical lawyer." Pierce, 487 U.S. at 581 (Brennan, J. et al., concurring)(citations omitted)(emphasis added).

However, even with these guidelines the lodestar analysis is complicated. One critical factor in ascertaining the prevailing market rate is defining the "relevant community." Petitioners claim that respondent's focus on Twin Falls's market rate is misplaced, since several federal circuit cases denote the relevant community as the situs of the court where the claim is prosecuted, here Washington, D.C. P. Reply at 5-6. Petitioners raise an interesting question although they nevertheless request Mr. Webb's hourly rate according to the Twin Falls market, not the District of Columbia's. In fact, Mr. Webb appears to be the first Program counsel to cite a market other than the local market for calculating a reasonable hourly rate. Given the Program attracts counsel nationwide, a review of the existing case law governing this issue is warranted.

Attorney's fees decisions in federal complex litigation have offered three explanations of what constitutes the relevant community for purposes of ascertaining the prevailing market rate. The first cluster of cases rely on the prevailing market rate for the city within which the petitioning attorney practices. This is a commonly used definition and one which the special masters have consistently followed. The U.S. Court of Federal Claims and the Federal Circuit also subscribe to this governing principle.

In contrast, as petitioners indicate, various circuits have stated that "generally, the relevant community is the forum in which the district court sits." Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997)(citing Davis v. Mason County, 927 F.2d 1473, 1488 (9th Cir. 1991), cert. denied, 502 U.S. 899 (1991))[3]; see also Rum Creek Coal Sales v. Caperton, 31 F.3d 169, 179 (4th Cir. 1994);

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[3] The plaintiffs in Barjon unsuccessfully relied on Casey v. City of Cabool, Missouri, 12 F.3d 799 (8th Cir. 1993) to assert a national market concept. Barjon, 132 F.3d at 501; see also the discussion of a national market at pages 5-6, *infra*. The Casey court stated:

> The relevant market for attorneys in a matter such as this [§ 1983] may extend beyond the local geographic community. A national market or a market for a particular legal specialization may provide the appropriate market. To limit rates to those prevailing

P. Reply at 5. This is known as the local forum rule. "However, rates outside the forum may be used 'if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case.' Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1992)." Barjon, 132 F.3d at 500. See also Ilick v. Miller, 1999 WL 781654, at *5 (D.Nev. 1999); Guckenberger v. Boston University, 8 F.Supp.2d 91, 103 (D.Mass. 1998)("Plaintiffs have the 'burden of rebutting the presumption that local rates apply by bringing forward evidence that would justify the expenditure of *higher* rates.' Morse v. Republican Party, 972 F.Supp. 355, 364 (W.D.Va. 1997).")(emphasis added).

Finally, a third set of cases reference a national market. In Covington v. District of Columbia, 57 F.3d 1101, 1103 (D.C. Cir. 1995), reh'g and suggestion for reh'g in banc denied, cert. denied, 516 U.S. 1115 (1996), the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's determination "that complex federal litigation was the relevant market for purposes of establishing the prevailing market rates in the District of Columbia." In the consolidated case, plaintiffs had filed civil rights claims against the District of Columbia in the U.S. District Court for the District of Columbia; all of plaintiffs' counsel were also located in Washington, D.C. Covington, 57 F.3d at 1102. In support of their fee petition, plaintiffs submitted "evidence of their attorneys' billing practices, their attorneys' legal experience, skill, and reputation, and the prevailing market rates for complex federal litigation in the District of Columbia." Covington, 57 F.3d at 1103. This evidence also included the Laffey Matrix which provided a breakdown of appropriate fees for experienced federal court litigators based on their years out of law school; the matrix, while updated, was based on a §1983 case before the U.S. District Court for the District of Columbia. Covington, 57 F.3d at 1105 (citing Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983), rev'd on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985)). The Covington plaintiffs also relied on the U.S. Attorney's Office's matrix of attorney's fees which was based on the Consumer Price Index increase for Washington, D.C.'s metropolitan area and the prior year's rate. Covington, 57 F.3d at 1105, n.14. The District countered that within Washington, D.C. there is a "submarket of plaintiff attorneys who handle civil rights and employment discrimination cases . . . and that the prevailing market rate for this submarket of attorneys with between ten and twenty years of experience was well below that requested by plaintiffs." Covington, 57 F.3d at 1106. The court rejected the District's narrow definition and agreed with the District Court that "the District failed to show that a civil rights and employment discrimination market actually exists independent

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> in a local community might have the effect of limiting civil rights enforcement to those communities where the rates are sufficient to attract experienced counsel. Civil rights would be more meaningful, then, in those communities (large cities) where experienced attorneys can command their customary fees.

Casey, 12 F.3d at 805. The Barjon court rejected plaintiffs' assertion stating that they failed to offer evidence "that San Francisco rates [rates of the place of business] are necessary to the enforcement of civil rights cases in Sacramento [rates of the forum court]. Without evidence that Sacramento rates preclude the attraction of competent counsel, their argument remains too theoretical to warrant departure from the local forum rule given in Davis." Barjon, 132 F.3d at 501.

of attorneys who handle other types of complex federal litigation . . . And even assuming, arguendo, the existence of such a submarket, the trial court found no evidence that submarket rates are lower than the prevailing rates in the broader legal market."[4] Covington, 57 F.3d at 1111 (citations omitted). The D.C. Circuit has continued to use the U.S. Attorney's Office's updated Laffey matrix to establish a starting point for awarding reasonable hourly rates in other federal actions. See Blackman v. District of Columbia, 59 F.Supp.2d 37, 43-44 (D.D.C. 1999)(§1983 action).[5]

Analysis

Given the various definitions of the "relevant community," the court must first decide which one applies here. Since Mr. Webb cites Barjon but does not request fees commensurate with the hourly rates of similarly situated counsel in Washington, D.C., and indeed requests an hourly rate marginally *less* than would be expected in this metropolitan region, the court will not address the application of the local forum rule here.[6] However, the court must still consider whether Mr. Webb's

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[4] The D.C. Circuit further cited Student Pub. Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988):

> Courts that try to establish public interest market rates by looking to the going rate for public interest work . . . do not examine an independently operating market governed by supply and demand, but rather recast fee awards made by previous courts into "market" rates. Courts adopting this micro-market approach, therefore, engage in a tautological, self-referential enterprise.

Student Pub. Interest Research Group, 842 F.2d at 1446.

[5] The Blackman court also relied in part on a national market for §1983 cases. In explaining one of the ways in which counsel could prove two of the three elements of a reasonable hourly rate (i.e., his/her billing practices and his/her skill, experience and reputation), the District Court specified: "If plaintiffs' counsel has not previously been compensated by the District for prevailing in an administrative due process hearing, then plaintiffs have the burden of establishing that the hourly rate charged is comparable to the amount paid to other attorneys of comparable experience for prevailing *in IDEA cases*." Blackman, 59 F.Supp.2d at 43 (emphasis added). However, the court then went on to address the third element, the prevailing market rates in the relevant community, and relied on the U.S. Attorney's Office's compilation of the updated Laffey fee matrix as the governing point of reference. Blackman, 59 F.Supp.2d at 43. Similarly, in Board of Trustees of Hotel and Restaurant Employees Local 25 v. Madison Hotel, Inc., the District Court stated: "[T]he updated Laffey matrix, *along with other evidence of rates charged by ERISA attorneys*, meets plaintiffs' burden of establishing the third element, market rates." Board of Trustees of Hotel and Restaurant Employees Local 25 v. Madison Hotel, Inc., 43 F.Supp.2d 8, 13 (D.D.C. 1999)(emphasis added).

[6] Nor does the court suggest that in future cases Mr. Webb would be awarded an hourly rate based on the Washington, D.C. market were he to so request. Simply stated, the court is

hourly rate should be influenced by or compared with the rates afforded other counsel either in Program litigation or other complex federal litigation. Before reaching this determination, however, the court must dispose of respondent's oft-repeated and ill-supported assumption for lower hourly rates: that is, that litigation under the Program is uncomplicated and requires less expertise or preparation than traditional tort litigation.

The court has historically viewed vaccine cases as fairly straightforward and involving less difficult issues of causation than are seen in traditional tort litigation. Scheuer v. Secretary of HHS, No. 90-1639V, 1992 WL 135577, at *2 (Cl. Ct. Spec. Mstr. May 21, 1992)(quoting Miller v. Secretary of HHS, No. 90-474V, slip op. at 6 (Cl. Ct. 1991): "vaccine cases require less legal preparation than traditional tort litigation since the burden of proving causation is lessened"); Zeagler v. Secretary of HHS, 19 Cl. Ct. 151, 153 (1989)("[a] suit under the Act was meant to be, and is, a straightforward proposition").[7] However, the viewpoint has changed over the past several years and the undersigned can no longer agree with the supposition that the Act is not a complex piece of federal legislation. Indeed, the Federal Circuit recognized as much in Amendola v. Secretary of HHS, 989 F.2d 1180 (Fed. Cir. 1993).[8] While the rules of procedure are relaxed, complex legal and

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skeptical of this approach given the vast differences in overhead costs between Twin Falls and Washington, D.C. The court fails to see the logic of this approach. Since Mr. Webb has advanced none, the court will not pursue it on its own.

[7] As a result of these assumptions, the court has awarded in the past hourly rates which are often lower than those charged by attorneys in other areas of civil litigation. Edgar v. Secretary of HHS, 32 Fed. Cl. 506, 508 (1994). In addition, several special masters have adopted a "cap" for attorney's fees under the Program, awarding a premier rate of $175 per hour only to those attorneys evidencing the highest level of experience and skill in the highest cost areas. Pinegar v. Secretary of HHS, No. 90-3375V, 1997 WL 438761, at *2 (Fed. Cl. Spec. Mstr. July 22, 1997)(citing Betlach v. Secretary of HHS, No. 95-3V, 1996 WL 749707 (Fed. Cl. Spec. Mstr. Dec. 17, 1996)); Anaya v. Secretary of HHS, No. 91-285V, 1993 WL 241433, at *1 (Fed. Cl. Spec. Mstr. June 17, 1993); Scheuer v. Secretary of HHS, No. 90-1639V, 1992 WL 13577, at *3 (Cl. Ct. Spec. Mstr. May 21, 1992). This premier rate has been increased in recent years to account, in part, for inflation and also to account for the increased complexity of Program litigation. Childers v. Secretary of HHS, No. 96-194V, 1999 WL 159844 (Fed. Cl. Spec. Mstr. June 11, 1999)(awarding an hourly rate of $190 for an attorney practicing in Washington, D.C.); Mandel v. Secretary of HHS, No. 92-260V, 1998 WL 211914 (Fed. Cl. Spec. Mstr. Apr. 2, 1998) (awarding an hourly rate of $190 for an attorney practicing in Suffern, New York).

[8] In emphasizing the importance of construing provisions of complex federal legislation together, the Federal Circuit stated:

> The Vaccine Compensation Act is such **a complex piece of legislation**. **It creates a major Federal compensation program.** After establishing the basic rule for eligibility for compensation--the vaccine-related injury--the Act addresses **in**

medical issues are encountered with relative frequency and many claims require as much preparation as traditional tort actions. Clearly, the straightforward nature of the Act, as originally contemplated by Congress, has proven a falsity in many instances. Not only do most claims take years to resolve, but the amount of damages awarded may reach in the millions over a vaccinee's lifetime. These scenarios are quite comparable with the traditional tort system. In addition, because of the 1995 administrative changes to the Vaccine Injury Table, most petitioners are forced to pursue actual causation theories. Consequently, when the medical records fail to sufficiently support petitioners' contentions, as they often do, petitioners are obligated to present testimony from qualified medical experts who may have spent hours reviewing the records and preparing one or several expert reports. Furthermore, it is this court's experience that one expert is often inadequate to support petitioners' claims; it is not unusual for one to four experts from various disciplines within the medical community to testify on petitioners' behalf. In addition, multiple hearings in any given case are not infrequent. And, of course, the court relies heavily on the experts' testimony to comprehend what are often truly difficult medical matters in causation-in-fact cases. The effective presentation of these cases requires knowledgeable, able, and experienced counsel. Such counsel command high hourly rates in the open market; the same market the lodestar is premised upon. Therefore, the argument that Program litigation is uncomplicated and requires less expertise or preparation than traditional tort litigation is no longer valid and will not be considered a factor in determining hourly rates.

Turning to the question of how to properly determine the hourly rate under the lodestar method, the special masters have consistently utilized two "relevant communities" in making the determination. First, the special masters have analyzed hourly rates under the "locality approach."

> **elaborate detail** three kinds of issues: the substantive rules for determining when a compensable injury has occurred; the procedural steps for making that determination and the availability and scope of review of the initial determination, made by a special master; and thirdly, certain gate-keeping rules resulting from the fact that there are **a complex set of effective dates for various parts and provisions of the Act**.

Amendola, 989 F.2d at 1182 (emphasis added). The U.S. Claims Court similarly recognized the Act's complexity:

> Although Congress chose to provide petitioners with an alternative to the traditional civil forum, relax standards of causation, and ease rigid procedural rules, issues under the Act are **nonetheless complex**. Vaccine litigation requires counsel's extensive knowledge of biology, microbiology, immunology, neurology, pediatrics and infant and child development, and a variety of complex damages issues. It does not follow that simply because the legal issues have changed, and perhaps been simplified, that significant skill is not required to competently represent a petitioner. The substantive issues of vaccine litigation remain complex, both factually and legally--**it is merely the procedural framework which has simplified.**

Monteverdi v. Secretary of HHS, 19 Cl. Ct. 409, 434 (1990)(footnotes omitted)(emphasis added).

Under this approach, the special master attempts to determine what the market rate would be for an attorney with similar experience, ability, and reputation practicing in a comparable legal field in either the petitioning attorney's city of practice or a similar local venue. Information considered includes bar surveys, supporting affidavits, and historical rate charges by the petitioning attorney. To say the least, it is a difficult decision-making task which oftentimes borders on guesswork. What has proven to the special masters to be far more objective and intellectually comforting is the comparison of the petitioning attorney's performance with other petitioners' counsel practicing before the special masters, in essence the "national market" approach. Edgar v. Secretary of HHS, 32 Fed. Cl. 506, 509 (1994); Maloney v. Secretary of HHS, No. 90-1034V, 1992 WL 167257, at *5, 6 (Cl. Ct. Spec. Mstr. June 25, 1992, Awarding Order June 30, 1992). This comparison has been upheld by the Federal Circuit in Saxton v. Secretary of HHS, 3 F.3d 1517 (Fed. Cir. 1993).[9] Considering an attorney's actual performance, comparing those efforts to others practicing before the court, and weighing the respective claimed and awarded hourly rates gives the court far more reliable information in determining an attorney's hourly rate. Utilizing this analytical approach, the court reviews the locality rate evidence to define a range of reasonable hourly rates for the petitioning attorney and then "zeroes" in on a specific rate by comparing the attorney's abilities, efforts, and other relevant factors to other attorneys practicing before the court.

Accordingly, the lodestar analysis as it pertains to the relevant community should consider first not only the prevailing market rate in the city or locale where the attorney practices, but as a second confirmatory measure, the market rate for attorneys practicing Program-wide and in other complex federal litigation, where that information is available. The court is convinced that this dual approach benefits the Program Trust Fund, petitioners, and the court by reducing or eliminating the guesswork involved in determining reasonable attorney's fees. In short, the two approaches provide a more objective basis for ascertaining a reasonable hourly rate. Applying this analysis to the instant case, the court finds Mr. Webb's hourly rate of $175 reasonable for the following reasons.

First, under the more commonly utilized lodestar analysis based upon locality data, the evidence provides satisfactory support that the rate requested is in line with those prevailing in the Twin Falls community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Mr. Webb has been in practice for 15 years, is a member of the bar of various courts, and a partner in a small firm. He has represented over 100 petitioners before the special masters and currently represents families in 30 pending cases. In addition, Mr. Webb served as a representative on the Advisory Commission on Childhood Vaccines, including a term as the Chair of that body. The majority of his practice is devoted to Program petitioners. Throughout his representation of these individuals, he has performed efficiently, persuasively, and professionally in status conferences, evidentiary hearings, and arguments. In addition, he has filed numerous pleadings and briefs of

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[9] "The trial forum 'has discretion in determining the amount of a fee award. This is appropriate in view of the [trial forum's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters' . . . Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications." Saxton, 3 F.3d at 1521 (citations omitted).

commendable quality; his filings are well-organized and timely and his briefs cogent and insightful. Overall, the special masters have repeatedly found Mr. Webb's skills, experience, and reputation as an attorney admirable. Respondent does not challenge this assessment and these qualities were apparent in the dealings with Mr. Webb in this case as well.

In comparing Mr. Webb's skills, experience, and reputation with Twin Falls's attorneys offering similar services, the court finds the supportive affidavits from Messrs. Hohnhorst and Pedersen, and especially that provided by Judge Meehl, highly probative. First, each of the affiants have considerable years of practice in the Twin Falls area. Second, each claim familiarity with the hourly rates charged by attorneys in the city. The court finds highly persuasive Judge Meehl's affidavit since he has had the opportunity in his judicial capacity to consider and approve fees in Twin Falls and Idaho and considers Mr. Webb's hourly rate in line with those awarded. Third, and equally important, Judge Meehl and Mr. Pedersen have specific and significant knowledge of Mr. Webb's experience and expertise, as a general attorney and in vaccine cases. Taking account of Mr. Webb's experience and expertise, each believe $175 is a reasonable hourly rate for Twin Falls and is in line with rates charged by attorneys with similar experience and ability. Taken together, these affidavits provide persuasive support that Mr. Webb's hourly rate is reasonable.[10] While ideally such affidavits would provide a more detailed comparison of the petitioning attorney's abilities with other attorneys of like skills offering similar services, the court finds the affidavits here more detailed and informative than those typically submitted and weighs their relevance accordingly.[11]

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[10] Respondent relies on the court's recent award in Haislop v. Secretary of HHS, No. 92-366V (Fed. Cl. Spec. Mstr. June 24, 1999)(unpublished) to demonstrate that although the court found the same affidavits probative, it nevertheless reduced Mr. Webb's hourly rate from $175 to $150. It should be mentioned that this unpublished decision consisted of 1½ pages and the court specifically limited its findings to the circumstances of that case: "Given the low level of complexity of the proceedings that counsel was involved in at the close of this case, the court awards $150 per hour. In doing so, the court emphasizes that this ruling is limited to the facts and circumstances of this case and *will not be relied upon by the undersigned in future awards involving this counsel.*" Haislop, slip op. at 1 (emphasis added). In addition, the undersigned declined to address at length what further proof might convince the court to grant the $175 requested "given the relatively small amount at issue in this case." Haislop, slip op. at 2. While not clear from that decision, in balancing the amount at issue with the time and effort required to resolve the rate issue, the undersigned, rightly or wrongly, chose expediency. Here, the court relies on evidence in addition to the affidavits to grant Mr. Webb's hourly rate. Moreover, although the Ericksons' claim was relatively straightforward, as in Haislop, factors other than the complexity of the issues figure into the lodestar calculation.

[11] Directly comparing Mr. Webb with other attorneys practicing vaccine law in Twin Falls, while the ideal method of comparison, is nearly impossible given the lack of these practitioners in that geographic region. Given the arcane practice of vaccine litigation, this is a common problem in attorney's fees issues. As an alternative, Mr. Webb is most comparable to lawyers handling medical malpractice, products liability or personal injury claims. Messrs. Pedersen and Hohnhorst both practice in the personal injury field, and although they do so on a contingency fee basis, their

Having found the affidavits persuasive, the court also finds respondent's submissions enlightening but insufficient to reject the $175 hourly rate requested here. While Mr. Webb has raised his fee by $25 as of January 1998, the issue here is not his reasons for increasing his hourly rate, but the reasonableness of the rate requested. Mr. Webb's current rate is not based solely on the increase over time of legal costs. Thus, respondent's focus on what increase the inflation rate would permit is misplaced and does not take into account other factors, such as Mr. Webb's reputation, skill, and experience. R. Opp. at 4-5. It is, after all, possible that Mr. Webb's prior rates were **too low**. In addition, the 1998 small law firm economic survey (R. Ex. A) shows a range of fees inclusive of Mr. Webb's, even though a $175 hourly rate would place him in the top ninth percentile for his years of practice and for partners practicing in cities with a population less than 100,000. The court is not required to reduce an hourly rate to coincide with the average or median figure prevailing in a particular city. Instead, the court must insure that the requested rate is in line with the range of fees charged in the city, focusing particularly on which rate matches the petitioning attorney in terms of the services provided and his/her skills, experience, and reputation. While surveys provide a useful piece of the rate puzzle, they cannot be relied upon too heavily in setting the appropriate rate for an individual attorney. Furthermore, that other special masters have already factored into Mr. Webb's previous Program fee awards his vaccine litigation experience (R. Opp. at 6) does not prevent this court from re-evaluating that experience in each case. Respondent's argument implies that an attorney's fee should never be increased based on his/her gained experience. But, every fees petition must be decided on a case by case basis and consideration of one's experience is a must in calculating the lodestar. Moreover, while cost-of-living data is also informative (R. Ex. C), it cannot provide the useful information which directs the lodestar analysis, that is the attorney's skill, experience, reputation, and services provided.[12] Finally, the court need not be bound by the previous decisions which have limited the premier rate under this Program to $175, especially if that "cap" does not conform with the lodestar analysis for a particular attorney.[13]

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affirmation of the reasonableness of Mr. Webb's fee is nevertheless influential in the lodestar analysis. It also does not go unnoticed that Mr. Webb charges $175 as his customary rate in all hourly rate cases including vaccine claims. That non-vaccine clients in Twin Falls are presumably willing to pay this rate further supports the reasonableness of the fee.

[12] In addition, the cost-of-living figures may differ depending on the foundation for that information. In the court's own use of an Internet Salary Calculator, and seemingly the same one cited by respondent, the percentages differed by several points from what respondent provided.

[13] While the court agrees that a premier rate should be awarded only to those demonstrating the utmost experience, skill, and reputation in the highest cost area, this rate is not necessarily fixed at $175. Indeed, many factors may have changed since the court established the $175 premier rate **in 1992**. See Scheuer v. Secretary of HHS, No. 90-1639V, 1992 WL 135577 (Cl. Ct. Spec. Mstr. May 21, 1992)($175 is the premier rate awarded under the Program); Martin v. Secretary of HHS, No. 90-3820V, 1992 WL 34910 (Cl. Ct. Spec. Mstr. Feb. 2, 1992)($175 is the premier rate awarded under the Program). These factors include the cost of living, an attorney's skill, experience, reputation, and the complexity of cases under the Program. Every lodestar calculation

In rejecting respondent's evidence, the court recognizes that the lodestar calculation is not without difficulty, even given the amount of information provided in this case. And the court always welcomes respondent's efforts to provide further guidance to the court on this complicated analysis. As respondent notes and the court concurs, supporting affidavits are easily attacked for their generality and conclusory opinions and previous fees decisions have either misapplied the lodestar or failed to consider the type of evidence presented here. R. Opp. at 5-8. In addition, bar surveys are typically absent or outdated. Attorneys practicing in small geographical areas often have few attorneys to compare themselves with and even fewer vaccine attorneys practice in the same area. In addition, many attorneys choose, for various reasons, to charge fees below or at the low end of the prevailing market rate. In short, comparisons under the lodestar are inherently difficult and even more so given the unique set up of the Vaccine Program. While the lodestar analysis using the locality approach generally yields a range of reasonable hourly rates, the data is often unsatisfactory in determining the final rate. Thus, the court has resorted to the second avenue of examination, reviewing this lodestar figure in light of the national Vaccine Program bar. Comparing the fees awarded to other Program attorneys functions to select the appropriate rate from the range of reasonable rates by objectively comparing attorneys' performance, experience, and reputation before this court and the hourly rates awarded to them. Applying that comparison here, the court is convinced that the rate requested by Mr. Webb is in line with those prevailing in the Vaccine Program.[14]

Since the Act's effective date, counsel from diverse areas of the country with various skill levels have been awarded hourly rates ranging from $55 to $250. Comparatively speaking, Mr. Webb is one of the few attorneys who has been practicing under the Program since its enactment. His representation has been continuous and his detailed, extensive knowledge of the Program laudable. His oral and written efforts serve to educate this court, and he always evidences a cooperative nature and respect for his clients, opposing counsel, and the court and its staff. Mr. Webb's considerable skill and experience with the Program's specifics and his unblemished reputation make him one of the most competent attorneys practicing Program-wide; he is an advocate at the high end of the spectrum. Relating his hourly rate to those awarded in other vaccine cases shows his current rate falls

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should be specific to the case's circumstances, and 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. As noted, *infra,* at page 7, note 7, the application of these factors has resulted in the award of rates exceeding $175.

[14] While the special masters have repeatedly looked to similar federal statutory constructs when awarding reasonable attorney's fees, due to the lack of evidence here, the court was unable to compare Mr. Webb's hourly rate with those granted in other complex federal litigation. Heston v. Secretary of HHS, No. 90-3318V, 1997 WL 702561, at * 6-11 (Fed. Cl. Spec. Mstr. Oct. 3, 1997), remanded, 41 Fed. Cl. 41 (1998); Riley v. Secretary of HHS, No. 90-466V, 1992 WL 892300, *3, 5, 9, n. 4 (Fed. Cl. Spec. Mstr. Mar. 26, 1992); Pusateri v. Secretary of HHS, 18 Cl. Ct. 828, 829-831 (1989).

comfortably within the range of fees awarded in the Program.[15] In light of this comparison, the court is further convinced that an hourly rate of $175 is reasonable in this matter.[16]

As mentioned, the determination of attorney's fees under the Program is not an exact science and inevitably a small level of arbitrariness is involved.[17] It may be that contrasting attorneys Program-wide provides the most objective means of determining a reasonable hourly rate since the special masters are familiar with the skill, experience, reputation, and hourly rates of a number of Program attorneys. Nevertheless, the lodestar's locality method remains the starting point by which fees are to be determined. In this case, Mr. Webb's hourly rate is supported by the lodestar method through affidavit testimony and bar survey information. This lodestar figure is corroborated by the hourly rates awarded Program-wide to attorneys of comparable skill, experience, and reputation. The court is comfortable that this dual analysis is reasonable and provides a more constructive method for determining an attorney's hourly rate. Furthermore, this method complies with the Supreme Court's mandate in Blum that the court must determine a fee which is "adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys." Blum, 465 U.S. at 897 (quoting S. REP. NO. 94-10011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913). Considering all of the above, the court finds that $175 is a reasonable hourly rate for Mr. Webb's services in this matter.

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[15] Respondent makes her own performance comparisons and suggests $125 is a reasonable rate based on fees awarded to Program attorneys in the same area of the country: Wyoming (Cheyenne), Utah (Ogden, Salt Lake City), Montana (Helena), and Idaho (Pocatello). R. Opp. at 10-12. The court notes that all the cases cited were resolved within five years of the Program's start. As noted at pages 7-8, *infra*, practice under the Program has drastically changed with the 1995 Table changes. Also, the court is unclear, without further information, how closely the geographic regions compare with Twin Falls or, more importantly, how the attorneys involved equate with Mr. Webb. In addition, respondent specifically compares Mr. Webb to Messrs. Gage and Moxley of Cheyenne, Wyoming, who receive at most a $125 hourly rate. R. Opp. at 11. Respondent also submits a 1995 Wyoming State Bar survey which claims the average rate in Cheyenne is $75-$125. R. Ex. B. However, this rate results from information provided by only 65% of the attorneys contacted. Although the court understands that 61% of the 65% responding have an average billable rate between $75-$125 per hour, the court wonders what the remaining 39% of the responders charge. In addition, Mr. Moxley has recently been awarded $160 per hour in Barnes v. Secretary of HHS, No. 90-1101V, 1999 WL 797468, at *3 (Fed. Cl. Spec. Mstr. Sept. 17, 1999).

[16] Incidentally, the respondent filed no objections to Mr. Webb's $175 hourly rate in Murphy v. Secretary of HHS, No. 93-194V, slip op. at 1 (Fed. Cl. Spec. Mstr. Oct. 6, 1998)(wherein Special Master Wright granted Mr. Webb's $175 hourly rate). In addition, respondent did not contest Barbara Ashley's claimed $175 rate for this case. See page 14 at note 18, *infra*. The court considers Mr. Webb comparatively on par with Ms. Ashley.

[17] For that reason, settlement is particularly appropriate. In fact, the parties resolve informally well over 90% of the fees cases. Hopefully the guidance provided in this decision will assist in raising that percentage higher.

B. Barbara Ashley's Tasks[18]

Respondent estimated that 3.7 hours billed at Ms. Ashley's hourly rate of $175 were secretarial in nature and, therefore, not compensable.[19] R. Opp. at 13. These tasks included organizing and paginating medical records; summarizing medical records for filing; completing letters for filing; and organizing, finalizing and supervising document mailings. R. Opp. at 13-14. Following a review of petitioners' fee request, the court concurs with respondent that the 3.2 hours cited are more appropriately billed at a rate other than Ms. Ashley's; however, the court disagrees that these tasks are necessarily secretarial in nature. It is this court's experience that paralegals, not secretaries, are typically charged with the duties listed, as they suggest a more detailed review and familiarity with the case's documents. Thus, these tasks are more properly deemed paralegal tasks which should be compensated accordingly. Since Ms. Ashley has indicated that her firm charged $40 per hour for legal assistance, the 3.2 hours at issue will be compensated at this lower rate. Therefore, petitioners' fee request **is reduced by $432** which reflects the difference between the attorney rate charged and the hours as compensated at the paralegal rate of $40. All other fees not specifically mentioned are granted.

C. Costs Incurred

Petitioners seek a total of $1,776.05 in costs in this matter. Although petitioners did not submit any receipts or other documentation supporting the expenses, the court is satisfied that the costs incurred were related to proceedings on this case and were reasonable. The expenses are in line with those typically incurred by vaccine litigants, and respondent cited no objection to the costs incurred. Therefore, petitioners' request for costs incurred by both counsels' firms is granted without modification.

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[18] Respondent does not contest Ms. Ashley's $175 hourly rate or the legal assistant's hourly rate nor their hours expended. Moreover, Mr. Webb does not request reimbursement for Ms. Ashley's legal assistants' time (for Kim Wedin and Mary Feyereisen) since "Ms. Ashley's statement lacked an itemization of the work done by these assistants." Affidavit of Mr. Webb at 5. This time would have amounted to $173.

[19] Respondent considers unreimbursable the tasks entered on May 26, 1996 (1 hour), June 14, 1996 (1 hour), and June 21, 1996 (1.2 hour); although respondent requests that 3.7 hours be deducted, these objections reflect only 3.2 hours.

D. Summary of Fees and Costs Awarded

Total fees requested:	$11,931.00	
Fees reduced or deducted :	- 432.00	(difference per Ms. Ashley's "paralegal" tasks)
Total fees awarded:	**$11,499.00**	

Total costs requested:	$ 1,776.05
Costs reduced or deducted:	- 0.00
Total costs awarded:	**$ 1,776.05**

II. CONCLUSION

After a thorough review of the fee application and respondent's objections, petitioners are awarded $11,499 in attorney and paralegal fees ($5,829 to Ms. Ashley and $5,670 to Mr. Webb), and $ 1,776.05 in costs ($161.30 to Ms. Ashley and $1,614.75 to Mr. Webb).

Accordingly, pursuant to Vaccine Rule 13, petitioners are hereby awarded a total of $13,275.05 in attorneys' fees and costs.[20] The Clerk of the Court is directed to enter judgment in accordance herewith.[21]

IT IS SO ORDERED.

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Gary J. Golkiewicz
Chief Special Master

[20] This amount is intended to cover *all* legal costs. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. It should be noted that §15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).

[21] The parties may expedite entry of judgment by filing notices renouncing their right to seek review in this matter.