In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 04-184V

Filed: March 30, 2006

TO BE PUBLISHED

ELISE VICTORIA RAY, a minor by her parents and natural guardians, LANCE RAY and KATRINA RAY,	*	
Petitioners,	*	Attorney's Fees; Laffey Matrix; Failure to Support Requested Hourly Rates; Use of Expert as Consultant in Evaluating Case
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Clifford Shoemaker, *Shoemaker and Associates, Vienna, Virginia, for Petitioner.*

James Reistrup, *United States Department of Justice, Washington, D.C., for Respondent.*

ATTORNEYS' FEES AND COSTS DECISION[1]

GOLKIEWICZ, Chief Special Master

I. PROCEDURAL BACKGROUND

On February 6, 2004, petitioners, Lance and Katrina Ray, filed for compensation on behalf of their daughter, Elise, alleging that Elise's idiopathic thrombocytopenia (ITP) injury was

[1]The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

caused by the October 3, 2002 administration of Measles Mumps Rubella (MMR), Varivax and Influenza vaccinations. See Petition, filed February 6, 2004. Respondent subsequently filed a Motion to Dismiss on the grounds that petitioners did not make a *prima facie* case for compensation and because Elise did not suffer the residual effects or complications of her vaccine injury for more than six months after the administration of the MMR vaccine. See Respondent's Motion to Dismiss, filed January 6, 2005. On April 15, 2005, the court issued a decision dismissing the petition because the medical records demonstrated that Elise did not suffer the residual effects of her ITP for more than six months, and thus, failed to satisfy the requirements for eligibility to compensation under the Vaccine Act. See Decision, filed April 15, 2005.

On June 23, 2005, petitioners' counsel filed an application for attorneys' fees and costs that included exhibits documenting, among others, the hours expended for attorneys Clifford J. Shoemaker, Renee J. Gentry, and Sabrina Knickelbein, their paralegals, and expert witness fees for Dr. Mark Geier. See Application for Attorneys' Fees & Costs (P. App. Fees), filed June 23, 2005. Respondent filed his opposition to petitioners' application for fees and costs on July 26, 2005 stating that petitioners provided no evidence for the requested hourly rates. See Opposition to Petitioners' Application for Fees and Costs (R. Opp. P. App.), filed July 26, 2005. On August 12, 2005, petitioners filed their response to the respondent's opposition and an amended fee petition. See Petitioner's Response to Respondent's Opposition to Petitioner's Application for Fees and Costs and Amended Application for Fees (P. Amend. Petn. and Resp. to R. Opp.), filed August 12, 2005. Petitioners' amended application increases their attorneys' hourly rates from their previous application citing as evidence the Laffey Matrix's[2] table of hourly rates for attorneys practicing in the Washington, DC area. Id. On August 18, 2005, respondent filed a motion for leave to file a response to petitioners' application since petitioners raised new issues in their amended application, namely the new evidence of the Laffey Matrix and requested a status conference to discuss this issue. See Motion for Leave to File Reply to Petitioners' Application for Fees and Costs and Amended Application for Fees, filed August 18, 2005.

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[2]The Laffey Matrix is chart of hourly rates for computing attorney's and paralegal's fees and is used by the United States Attorney's Office for the District of Columbia to evaluate requests for attorneys' fees in certain civil cases in District of Columbia courts that are handled by the U.S. Attorney's Office. These are cases that involve fee-shifting statutes which permit a prevailing party to recover reasonable attorneys' fees from the government. The Laffey Matrix is prepared by the U.S. Attorney's Office based on the hourly rates allowed by the U.S. District Court for the District of Columbia in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985). The rates are updated yearly by adding the increase in the Consumer Price Index for All Urban Consumers for the Washington, D.C. area to the corresponding rates for the prior year. The rates are subject to further adjustment to ensure that the relationship between the highest and lowest rates remain reasonably consistent from year to year. See Declaration of Daniel F. Van Horn, filed September 14, 2005. See also http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_4.html.

The court held a status conference with the parties on August 26, 2005 in which the undersigned encouraged the parties to informally resolve the dispute, as the parties do in the majority of Vaccine fees cases. Additionally, the undersigned requested the petitioners to file supplementary information regarding the Laffey Matrix. Specifically, the petitioners were to address the genesis of the matrix, its applicability to the Vaccine Program, and how it fit into existing court precedence. See Order, filed August 29, 2005. On October 3, 2005, petitioners filed their response to the undersigned's order. See Petitioners' Response to the Chief Special Master's Order Requiring Additional Information Regarding the Laffey Matrix and Its Applicability to the Vaccine Program (P. Resp. to CSM Order), filed October 3, 2005. On November 10, 2005, respondent filed his reply. See Respondent's Reply to Petitioners' Response to the Chief Special Master's Order (R. Reply P. Resp. to CSM Order), filed November 10, 2005. After several unsuccessful attempts to informally resolve this dispute, this fees issue is now ripe for decision.

I. DISCUSSION

A. Hourly Rate

Petitioners' Position

Petitioners' initial application for fees and costs requested a total of $17,599.49 in attorneys' fees. This amount was determined by multiplying petitioners' counsels' total number of hours requested and petitioners' counsels' requested hourly rates of the following: Clifford Shoemaker, $258.75 per hour; Renee Gentry, $165 per hour; Sabrina Knickelbein, $155.25 per hour; and legal assistants, $55 per hour. See P. App. Fees at 27. The fee petition included expert witness/litigation consultant fees for Dr. Mark Geier at $250 per hour. See P. App. Fees at 2. Petitioners' fee application was accompanied by detailed billing worksheets and copies of receipts of costs for attorneys and petitioners.

In petitioners' reply to respondent's opposition, petitioners amended their fee petition, requesting a total of $26,477.00 in attorneys' fees. Petitioners' attorneys increased their hourly rates to the following:

Clifford Shoemaker

2003-2004	1 hour @ $370/hour
2004-2005	17 hours @ $380/hour
2005	1.8 hours @ $380/hour

Renee Gentry

2003-2004	1.5 hours @ $265/hour
2004-2005	50.4 hours @ $270/hour
2005	18.25 hours @ $270/hour

See P. Amend. Petn. and Resp. to R. Opp. at 4.[3] These hourly rates were multiplied by the number of hours requested in petitioners' initial fee application. See Id. Petitioners contend that these increased hourly rates reflect reasonable attorneys' fees based on the Laffey Matrix, which petitioners submitted as evidence of reasonable hourly rates. Id. at 4. As summarized in note 2 *supra*, the Laffey Matrix is a table of hourly rates, based on years of experience, for attorneys and paralegals practicing in federal court proceedings in the Washington, DC metropolitan area. Petitioners argue that this matrix is "evidence of reasonable fee awards in the relevant community – complex federal litigation[], as well as the geographic community of the Washington DC area where Counsel is located." Id. at 5-6. Petitioners state that "[t]he *Laffey* Matrix is widely accepted as evidence of prevailing market rates for litigation counsel in the Washington DC area, and is in fact referenced on Respondent's Counsel's website as such." Id. at 6. Petitioners argue that "[t]he historically negotiated and settled, and therefore by definition, depressed hourly rates in the Program, do not reflect the statutorily mandated lodestar rates." Id. Thus, petitioners conclude that "[a]ccording to Respondent's counsel's website the *Laffey* Matrix *may be relied upon* as evidence of the relevant reasonable prevailing lodestar market rate." Id. (emphasis in original).

In response to the undersigned's order of August 29, 2005 requesting the petitioners to file supplementary information regarding the applicability of the Laffey Matrix to the Vaccine Program, petitioners argued that although the Vaccine Program is not a classic fee-shifting statute, the program "represents the very social goals animating classic fee-shifting statutes, and it exemplifies the rigorous and complex nature of the litigation that typifies other fee-shifting statutes." P. Resp. to CSM Order at 5. Further, petitioners argue that although the Laffey Matrix was originally created for a Title VII discrimination suit, it has been applied to other "fee-shifting practice areas and has been recognized by the courts . . . as a determinant of 'reasonable attorneys' fees' in complex federal litigation further public interests as delineated by Congress." Id. at 4.[4] These other practice areas include health, safety and the environment. Id. Thus,

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[3]Petitioners did not amend the hourly rates for Sabrina Knickelbein or for their legal assistants.

[4]Petitioners cite several cases from DOJ's website in which the Laffey Matrix has been applied, including Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc); Covington v. District of Columbia, 57 F.3d 1101, 1105 & n. 14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996); Blackman v. District of Columbia, 59 F. Supp. 2d 37, 43 (D.D.C. 1999); Jefferson v. Milvets System Technology, Inc., 986 F. Supp. 6, 11 (D.D.C. 1997); Ralph Hoar & Associates v. Nat'l Highway Transportation Safety Admin., 985 F. Supp. 1, 9-10 n.3 (D.D.C. 1997); Martini v. Fed. Nat'l Mtg Ass'n, 977 F. Supp. 482, 485 n.2 (D.D.C. 1997); Park v. Howard University, 881 F. Supp. 653, 654 (D.D.C. 1995). See http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_4.html.

petitioners argue, the Vaccine Program represents the same level of public values that warrant the award of attorneys' fees. Id. Petitioners acknowledge that the Laffey Matrix has never been applied to the Vaccine Program. However, petitioners argue that the fact that it has never been applied to the program "cannot be used to demonstrate a lack of relevance. Rather it merely recognizes an issue that has not yet reached legal ripeness." Id. at 6.

Respondent's Position

Respondent opposes petitioners' counsels' hourly rates contending that petitioners have not provided any evidence that the rates sought for Mr. Shoemaker and Ms. Gentry are reasonable. R. Opp. to P. App. at 3. Further, respondent argues the petitioners' request to apply the current hourly rates retroactively "would amount to improper compensation for the delay in receiving the award," since no evidence was provided by petitioners that these rates should be applied for the three years in which petitioners' counsel worked on the case. Id. Respondent also opposes the number of hours billed by Mr. Shoemaker. Respondent argues that although Mr. Shoemaker was the attorney of record in this case, the majority of the work as counsel for petitioners was performed by Mr. Shoemaker's colleague, Ms. Gentry. Respondent has no objection to the 70.15 hours expended by Ms. Gentry. However, respondent objects to the 19.8 hours of time expended by Mr. Shoemaker because the time entries for him appear unreasonable. Id. at 4. Respondent questions, among others, the need for both Mr. Shoemaker and Ms. Gentry to review medical records, the vague and excessive time entries by Mr. Shoemaker, and Mr. Shoemaker's review of records for petitioner in November 2003 when the invoices submitted by Mr. Shoemaker indicate that petitioners did not receive copies of their medical records until January 2004. Id. Respondent stated that he would not object to a fee award of ten hours of Mr. Shoemaker's time. Id. at 5.

Regarding the Laffey Matrix, respondent argues that the matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, nor does it apply to the Vaccine Act's fee award provisions. R. Opp. to P. App. at 5. Moreover, respondent argues, other federal courts have declined to apply the matrix to law firms that are not physically located in downtown Washington, DC. Id. Additionally, the matrix only applies to fee-shifting statutes in which the prevailing parties' attorneys are compensated. Id. Respondent supports this assertion with the affidavit of Daniel F. Van Horn, Deputy Chief of the Civil Division, U.S. Attorney's Office for the District of Columbia. Id. at 5, Ex. A. Thus, respondent contends that petitioners' argument that the Laffey Matrix applies to the Vaccine Program is "misplaced" because all of the practice areas to which the matrix has been applied "impose a measure of success prior to the consideration of an award of attorneys' fees." Id. at 6.

As noted above, respondent argues that the Laffey Matrix "is geographically based, and

would not apply to a Vienna, Virginia firm," the location of the firm at issue in this case. Id. at 7. Respondent cites as support a case considering an award of attorneys' fees under the Clean Water Act in which the District Court in Virginia rejected the use of the Laffey Matrix to establish the prevailing market rate for Alexandria, Virginia located five miles outside of Washington, DC. Id. See American Canoe Ass'n v. Environmental Protection Agency, 138 F. Supp. 2d 722, 741 (E.D. Va. 1991). Thus, respondent argues that "an attorney's mere geographical proximity to downtown Washington, D.C. does not justify the automatic imposition of hourly rates consistent with the Laffey matrix." R. Opp. to P. App. at 7-8.

Finally, respondent argues that the appropriate market rates for petitioners' attorneys should be calculated according to the prevailing market rates in the relevant local community. R. Opp. to P. App. at 9. Using the Laffey Matrix as evidence of prevailing market rates would amount to discarding the two-step lodestar analysis which the Federal Circuit has "embraced" to determine fee awards. Id. Petitioners, respondent argues, have provided no evidence that their attorneys' increased rates "are in line with the prevailing market rates in Vienna, Virginia." Id. at 14. Respondent concludes that using the two-step lodestar analysis and the Chief Special Master's considerable discretion and past experience, the court should reduce the amounts requested by the petitioners to a reasonable fees and costs award. Other than the expert's fee, respondent does not object to the requested attorney's costs or petitioners' costs.

Relevant Case Law

Pursuant to 42 U.S.C.A. § 300a-15(e), special masters may award "reasonable" attorney's fees as part of compensation. 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. See also, Ceballos v. Secretary of Health and Human Services, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

The court must ensure that the hourly rate requested is reasonable. The Supreme Court has made clear 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 (italics 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 (italics added). 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. 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) (italics added).

Analysis of Hourly Rate

1. Petitioners Have the Burden of Establishing Hourly Rates

It is petitioners' burden to prove that the hourly rates submitted by their attorneys are in fact reasonable and are in line with the prevailing market rate in the relevant community. In this case, petitioners submitted no evidence traditionally relied upon in support of their hourly rates. As discussed in Morris v. Secretary of Health and Human Services, 20 Cl. Ct. 14, 29 (1990), the applicant has a wide latitude in meeting its burden. Specifically, petitioners may submit

> (1) affidavits of other attorneys or experts; (2) citations to prior precedents showing reasonable rate adjudications for the fee applicant, for comparable attorneys, or for comparable cases; (3) references to fee award studies showing reasonable rates charged or awarded in the relevant community; (4) testimony of experts or of other attorneys in the relevant community; (5) discovery of rates charged by the opposing party; (6) reliance on [the] court's own expertise to recognize applicable prevailing rates.

20 Cl. Ct. at 28-29. This list is not exhaustive.

Petitioners submitted "the *Laffey* Matrix as evidence of reasonable fee awards in the relevant community - complex federal litigation[], as well as the geographic community of the Washington DC area where Counsel is located." P. Resp. to R. Opp. and Amend. App. at 5-6. However, petitioners have submitted no resumes showing years of experience, no curriculum vitaes, no citations to previous fee awards, no citations to prior precedent showing reasonable rates for comparable attorneys or comparable cases, no affidavits of other attorneys practicing in the same community, nor have they submitted affidavits of local attorneys attesting to what the prevailing market rate is in their community. Further, petitioners provided no evidence that the hourly rates in the Laffey Matrix represents the rates for comparable attorneys handling comparable cases to those handled in the Vaccine Program. Instead, petitioners submit in essence a policy statement couched in a legal argument that the Laffey Matrix should be relied upon to establish the hourly rates not only in this case, but also nationally. P. Resp. to CSM Order at 9.

Petitioners cited no support for their suggestion.

2. The Lodestar Two-Step Analysis is the Proper Method for Determining a Reasonable Fee Award

As stated earlier, the lodestar method has been employed in determining reasonable attorney's fees under the Act. The Court of Appeals for the Federal Circuit, whose decisions are binding on the special masters, has affirmed the usage of the lodestar method. See Saxton v. Secretary of HHS, 3 F.3d 1517 (Fed. Cir. 1993). Counsel's policy-laced argument aside, in the absence of supportive evidence the lodestar method for determining reasonable fee awards cannot be replaced by a fee matrix constructed by another litigating unit for another class of cases. Petitioners have provided no persuasive evidence showing why the lodestar analysis should not be used in the instant case in determining a reasonable fee award.

In lieu of evidence, petitioners' amended application states that their attorneys' hourly rates are "a negotiated litigative risk rate designed to facilitate and expedite the Fees & Costs process." P. Resp. to R. Opp. at 2. These rates, petitioners argue are not the lodestar market rates required by the Vaccine Program and are "below the lodestar market rate." Id. at 3. Petitioners argue that ". . . rates which are the product of compromise and settlement [] cannot represent an objectively reasonable market rate for similar work in this jurisdiction." Id. at 3 quoting Salazar v. District of Columbia et al. 123 F. Supp. 2d 8, at 11 (D.D.C 2000). The undersigned agrees that rates which were established in a settlement do not necessarily establish a reasonable market rate. However, it is reasonable to assume that the settled rates are within the accepted range of rates or counsel would not have accepted them. Additionally, respondent does not argue that rates which were the product of negotiations necessarily represents a reasonable market rate. However, if such negotiated hourly rates in past cases are below the reasonable market rate in petitioners' attorneys' relevant community, it is incumbent upon petitioners to produce the necessary evidence in support of higher rates. Petitioners have not submitted any evidence as to what constitutes a reasonable market rate in the relevant community. Petitioners' evidence of the Laffey Matrix alone to establish a reasonable market rate in Vienna, Virginia is insufficient and cannot displace the traditional lodestar method.

It should be noted that while the undersigned does not accept the petitioners' evidence of the Laffey Matrix alone to establish reasonable hourly rates, the Department of Justice's (DOJ) use of the Laffey Matrix does raise legitimate questions regarding reasonable hourly rates for attorneys practicing in the Washington, DC area. It appears that DOJ accepts the Laffey Matrix as the lodestar for attorneys awarded fees under fee-shifting statutes. It is not clear why being a prevailing party should impact the determination of the lodestar. Thus, it is not clear to the undersigned that the data used to construct the Laffey Matrix should not be utilized in determining reasonable fees for Washington based attorneys.[5] Therefore, while in the instant case the

[5]The explanatory notes on respondent's website state that the rates are "determined by the change in the cost of living for the Washington, D.C. area. . .," and use the Consumer Price Index

undersigned is not prepared to accept the Laffey Matrix alone to establish rates in the relevant community, the court may in a future case accept the use of the Laffey Matrix in conjunction with other evidence of prevailing market rates in the suburbs of Washington, DC.[6]

In sum, petitioners argue essentially that the Laffey Matrix represents the lodestar calculation for the Washington, DC area. However, while the matrix may represent, and indeed appears to represent, DOJ's accepted lodestar for Washington, DC under at least some fee-shifting statutes, there is no showing that it should be used as the lodestar under the Vaccine Act and there is no evidence to support extending the boundaries of the Laffey Matrix beyond Washington, DC.

3. Even if the Laffey Matrix Applies to Washington, DC, It Is Not Shown to Apply to Vienna, Virginia

Petitioners argue that the Laffey Matrix should be applied nationally "given the *national* scope of the policy and the value of ensuring the immunization program, and [] ensuring an effective alternative for disputes that arise. In short, the requirement that counsel be appropriately compensated at the relevant market rate, as demonstrated by the *Laffey Matrix*." P. Resp. to CSM Order at 9 (emphasis in the original). Petitioners only support for this argument is citations to District Court cases in Washington, DC in which attorneys practicing in Washington, DC have been awarded attorney's fees by the U.S. Attorney's Office using the Laffey Matrix. See FN 4, *supra*.

The affidavit of Daniel F. Van Horn, Assistant U.S. Attorney for the District of Columbia, who is responsible for updating the Laffey Matrix, submitted by respondent, sets forth the limits

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for all Urban Consumers for Washington-Baltimore, DC-MD-VA-WV. See http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_4.html at note 3. Thus, this indicates that the rates apply to the metropolitan area of Washington, DC and not just downtown Washington, DC. Surely the suburbs of Washington, DC are similar, if not the same, in terms of a high cost of living area i.e. office rents, cost of doing business, salaries etc.

[6]Developing a Laffey-like matrix for the Vaccine Program could be greatly beneficial. The undersigned would like to direct the parties in the instant case, as well as other parties practicing in the Vaccine Program to a publication from the Federal Judicial Center entitled "Awarding Attorneys' Fees and Managing Fee Litigation" 2d ed. 2005; Appendix A, Local Rules of the U.S. District Court for the District Court of Maryland. Those rules establish guidelines for determining lodestar attorneys' fees in civil rights cases, including among others, guidelines for reasonable hourly rates. Establishing a similar set of rules and guidelines for attorneys practicing in the Vaccine Program could eliminate or greatly reduce a second round of litigation regarding attorneys' fees and costs. The parties have been highly successful in resolving informally petitioner's fees applications. Thus, the undersigned is confident that discussions between the Bar leadership could produce an appropriate fees matrix which could be used in resolving future fees cases. The undersigned is prepared to participate in any discussions as needed.

of the Laffey Matrix. See Declaration of Daniel F. Van Horn. Mr. Van Horn states that "[t]he matrix has not been adopted by the Department of Justice generally for use outside the District of Columba, or by other Department of Justice components, or in other kinds of cases." Id. at 3, but see FN 5 *supra*. He states further that the matrix's use is limited to certain fee-shifting statutes where the prevailing party is eligible to recover attorneys' fees from the government. Id. Finally, he asserts, the recovery of attorneys' fees under the Vaccine Act is different from these types of statutes in that petitioners may recover reasonable attorneys' fees if "the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." Id. at 4. Again, the undersigned is uncertain why or how the prevailing party requirement impacts the determination of the lodestar. Neither respondent nor Mr. Van Horn addressed that point.

Petitioners have also not addressed existing precedent in which the use of the Laffey Matrix outside of Washington, D.C. has been rejected by other courts. As noted earlier, in American Canoe, the court rejected the use of the Laffey Matrix to establish the prevailing market rate for attorney's fees in Alexandria, Virginia under the fee-shifting provisions of the Clean Water Act. Id. at 742. The court noted that the plaintiffs in this case "failed to carry their burden of demonstrating that Washington, D.C., and Alexandria are in the same legal market and that the use of the *Laffey* Matrix here is appropriate."[7] Id. at 741.

In Cooper v. PayChex, 163 F.3d 298 (Table) (4th Cir. 1998), the court considered the appropriate hourly rate for the plaintiff's counsel under the fee-shifting provisions of the Civil Rights Act. The plaintiff argued that the Laffey Matrix provided the accepted rate in the Washington, DC metro area. Id. at *13. The plaintiff's attorneys were located in Washington, DC and the district court in which the case was tried was located in Alexandria, Virginia. The court noted that "a trial court determining what fee to award may take into account a rate schedule like the *Laffey* court did. But it need not do so." Id. The court stated that a district court could use its own discretion by using its own precedents to determine the hourly rate for attorneys in civil rights cases. Id. Finally, the court, in a footnote, stated that the Laffey Matrix "may be the wrong indicator for attorneys fees in the Eastern District of Virginia" because the prevailing rate for attorneys practicing in the suburbs of Washington, DC may be lower than the prevailing rate in downtown Washington, D.C. Id. at FN7. Therefore, even if the undersigned were to accept the rates in the Laffey Matrix as the prevailing rates for attorneys working in downtown Washington, D.C., petitioners have submitted no evidence which demonstrates that those rates should be applied to attorneys working in Vienna, Virginia, a suburb of Washington, D.C. In short, petitioners have failed to support their argument for applying the Laffey Matrix to Vaccine cases in general, to counsel from Washington, DC handling Vaccine cases, or specifically to petitioners' counsel in this case.

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[7]In American Canoe, the plaintiffs attempted to demonstrate that Washington, DC and Alexandria, VA are in the same legal market with an affidavits from counsel in Alexandria, VA and McLean, VA. The court criticized these affidavits as lacking because they did not compare law firms of similar size or similar practice areas, in this case environmental litigation. Id. at 741-742.

Other than the force of argument, petitioners have not submitted any evidence, nor cited any legal support, substantiating their arguments. Thus, petitioners failed to establish the reasonableness of their hourly rates. Petitioners submitted no traditional proof in the form of affidavits, fee surveys, or other evidence establishing the rates in Vienna, VA. Petitioners' efforts to extend the Laffey Matrix beyond Washington, DC are rejected for the reasons stated.

Moreover, no court, including this court, is *required* to accept the rates in the Laffey Matrix as *the* prevailing market rate, even for attorneys located in downtown Washington, DC. The Laffey Matrix is merely a starting point. See Blackman v. District of Columbia, 59 F. Supp. 2d 37, 43-44 (D.D.C. 1999); Covington v. District of Columbia, 57 F.3d 1101, 1109 (D.C. Cir. 1995); Cooper v. PayChex, 163 F.3d at *13 (stating that "[w]e are skeptical about endorsing a fee schedule" since courts may use, in addition to such a fee schedule, their own discretion in determining fee awards). A court may, while using the Laffey Matrix as a guide, exercise its discretion and adjust a fee award "upward or downward to arrive at a final fee award that reflects 'the characteristics of the particular case (and counsel) for which the award is sought.'" Muldrow v. Re-Direct, Inc., 397 F. Supp. 2d 1, 5 (D.D.C. 2005)(quoting Falica v. Advance Tenant Services, Inc., 384 F. Supp. 2d 75, 78 (D.D.C. 2005)). Finally, there is no District of Columbia circuit precedent requiring the application of the Laffey Matrix to an award of attorney's fees. In Adolph Coors Co. v. Truck Insurance Exchange, 383 F. Supp. 2d 93 (D.D.C. 2005), the law firm of Dickstein Shapiro sought hourly rates higher than those in the Laffey Matrix. The defendant argued that the Laffey Matrix is the prevailing community rate and therefore, the plaintiffs' attorneys' rates should be reduced. The court disagreed and stated the evidence submitted by the plaintiffs shows that the prevailing rate in the Washington, DC community is higher than those in the Laffey Matrix, and the rate that Dickstein Shapiro charges its clients is the market rate. Id. at 98. Thus, at most, the Laffey Matrix is a piece of evidence; a piece of evidence petitioners failed to show applies in this case.

4. A Special Master is Entitled to Use Discretion in Determining a Reasonable Fee Award

In the absence of sufficient proof, the undersigned may rely on his own experience and use his discretion to establish a reasonable fee award. See Ceballos v. Secretary of HHS, 2004 WL 784910 at *27 relying on Rupert v. Secretary of HHS (Rupert II), 52 Fed. Cl. 684, 688-89 (2002); Saxton v. Secretary of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993). Additionally, the court must glean evidence from other sources to determine a reasonably hourly rate. Such evidence includes a comparison of the attorney's performance in the instant case and the claimed hourly rate with other attorneys in this Program of similar quality and experience who practice in similar geographic areas. See Ceballos, at *28.

Other highly experienced attorneys living in high cost areas have previously been awarded as much as $250 an hour. See Ceballos (awarding an hourly rate of $250 for Stanley Kops, an attorney with over 30 years of experience practicing in the Philadelphia metropolitan area); Rupert II (awarding hourly rates of $250 for Kevin Conway and $210 for Ronald Homer, Program attorneys practicing in Boston, Massachusetts). Mr. Shoemaker was recently awarded an hourly

rate of $205 and Ms. Gentry an hourly rate of $145 in Beatty v. Secretary of HHS, No. 98-911V, 2003 WL 21439671 (Fed. Cl. Spec. Mstr. Mar. 17, 2003) for work on a case that was litigated between 2001-2002. In that case, the Special Master noted that Mr. Shoemaker did not present any evidence such as affidavits from disinterested attorneys or any other evidence substantiating that Mr. Shoemaker's requested hourly rate of $295 was in line with the prevailing market rate. Thus, the Special Master reduced Mr. Shoemaker's requested hourly rate to $205. She also noted that no evidence was provided to substantiate Ms. Gentry's requested hourly rate of $200. The Special Master thus reduced her hourly rate to $145. The Special Master based her decision on her experience with the attorneys and their firm and on her past decisions regarding hourly rates for Mr. Shoemaker and other associates of his firm. Id. at *2.

In the instant case, Mr. Shoemaker requests an hourly rate of $370 for work done from 2003-2004 and an hourly rate of $380 for work done from 2004-2005. Ms. Gentry requests an hourly rate of $265 for work done from 2003-2004 and an hourly rate of $270 for work done from 2004-2005. While a Special Master is not bound by the hourly rates awarded by another Special Master, prior awards are highly probative in determining a reasonable fee. Here, petitioners' attorneys have not substantiated the $165 increase for Mr. Shoemaker or the $125 increase for Ms. Gentry since the time of their award in 2003. The undersigned recognizes an increased cost of living/cost of expenses over the three years since the fees were awarded in Beatty, but given that the Special Master recognized a $10 increase over one and one-half years as reasonable and that petitioners submitted no evidence for an increase of about 80% for Mr. Shoemaker and about 86% for Ms. Gentry, the petitioners' requested hourly rates in this case are patently unreasonable.

The undersigned has no choice but to fashion a reasonable hourly rate based on his own experience and evidence from other sources. Mr. Shoemaker is an experienced Program attorney living in a relatively high cost area. The number of years Mr. Shoemaker has been practicing was not indicated in the fee petition or in any of the following briefs that petitioners filed. Petitioners' request of $380 an hour which, according to the Laffey Matrix, is based on 20 years or more of experience indicates Mr. Shoemaker's years of experience. The undersigned acknowledges Mr. Shoemaker's experience. Further, although Mr. Shoemaker was the attorney of record in this case, Ms. Gentry did the majority of the work and represented the petitioners at every status conference. It would be difficult to evaluate Mr. Shoemaker's performance in the instant case. However, Mr. Shoemaker's signature appears on every brief throughout the fees portion of this case. The fact that these briefs failed to provide any supportive legal citations and failed to include any evidence to substantiate petitioners' attorneys requested hourly rates is indicative of Mr. Shoemaker's performance in preparing said briefs. Additionally, while Mr. Shoemaker is a talented litigator, in several other cases in which the undersigned has worked with Mr. Shoemaker, there have been lapses in performance. In the undersigned's judgment, in comparison to other Vaccine attorneys, Mr. Shoemaker's reputation, skill and participation is not comparable to those who have been awarded the highest hourly rates in the Program. Accordingly, the undersigned compensates Mr. Shoemaker at an hourly rate according to the following fee schedule:

Clifford Shoemaker
2003-2004 $225/hour
2004-2005 $235/hour
2005 $245/hour

The number of years of experience for Ms. Gentry were also not provided anywhere in the fee petition or in any of the petitioners' filings. Ms. Gentry's requested rate of $270 indicates, according to the Laffey Matrix, 8-10 years of experience. Ms. Gentry ably represented her clients in this case which involved an interpretation of a statute in the Vaccine Act. Although her clients were denied entitlement, Ms. Gentry vigorously fought for her clients with creative, albeit ultimately unpersuasive to the undersigned, legal arguments. Ms. Gentry made sure the petitioners' filings were timely, and she was well-prepared for status conferences. Thus, the undersigned finds Ms. Gentry's performance commendable. However, without any further evidence substantiating Ms. Gentry's requested hourly rate, this court cannot grant her request. Accordingly, based on Ms. Gentry's experience and her performance, the undersigned compensates Ms. Gentry at an hourly rate according to the following fee schedule:

Renee Gentry
2003-2004 $165/hour
2004-2005 $175/hour
2005 $185/hour

B. Hours Expended: Hours Billed by Clifford Shoemaker

Petitioners' Position

Petitioners' request 19.8 hours of time expended by Mr. Shoemaker and 70.15 hours of time expended by Ms. Gentry. P. App. Fees at 2. Petitioners' request an additional 10 hours of time for Ms. Gentry in preparing the response to respondent's opposition. P. Resp. to R. Opp. at 12. All of this time was documented in detailed invoices that were submitted with the petition and the amended petition. In response to respondent's objections, petitioners state that Mr. Shoemaker received medical records from the client for the initial review of the case. P. Resp. to R. Opp. at 9. Thus, Mr. Shoemaker did review medical records in 2003 and the 1 hour of time expended is justified.

Respondent's Position

Respondent does not object to the hours requested by Ms. Gentry. R. Opp. to P. App. Fees at 4. Respondent does object to the 19.8 hours of time expended by Mr. Shoemaker as unreasonable. Id. Respondent contends that many of the time entries for Mr. Shoemaker are for the review of medical records, and Ms. Gentry's time entries are for review of medical records. Thus, respondent questions the necessity of two attorneys reviewing medical records. Respondent

suggests reducing Mr. Shoemaker's time to 10 hours. Id. at 5.

Relevant Case Law

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." Hensely v. Eckerhart, 461 U.S. 424, 434 (1983). In making reductions, the special master is not necessarily required to base his or her decisions on a line-by-line evaluation of the fee application. Wasson v. Secretary of HHS, 24 Cl. Ct. 482, 484 (1991) (affirming the special master's general approach to petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff'd, 988 F.2d 131 (Fed. Cir. 1993). Moreover, special masters may rely on their experience with the Vaccine Act and its attorneys to determine the reasonable number of hours expended. Wasson, 24 Cl. Ct. at 486, aff'd, 988 F.2d 131 (Fed. Cir. 1993). Just as "[t]rial court courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . . [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications." Saxton v. Secretary of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (citing Farrar v. Secretary of HHS, 1992 WL 336502. at * 2-3 (Cl. Ct. Spec. Mstr. Nov. 2, 1992) (requested fees of $24,168.75 reduced to $4,112.50); Thompson v. Secretary of HHS, No. 90-530V, 1991 WL 165686, at * 2-3 (Cl. Ct. Spec. Mstr. Aug. 13, 1991) (requested fees of $18,039.75 reduced to $9,000); Wasson, 24 Cl. Ct. at 483 (1991), on remand, No. 90-208V, 1992 WL 26662 (Cl. Ct. Spec. Mstr. Jan. 2, 1992), aff'd, 988 F.2d 131 (Fed. Cir. 1993) (hourly rates reduced, and requested fees of $151,575 reduced to $16,500; special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty). "It is well within the special master's discretion to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done." Saxton, 3 F.3d at 1521.[8]

Analysis of Hours Expended

As a general proposition, it is reasonable for a senior attorney to oversee the work of associates. However, it is unreasonable and unproductive to duplicate the work of the junior employee. Additionally, the more experienced the junior employee, the less amount of time is expended by the supervising partner to oversee the associate. Ms. Gentry is a very able attorney with a great deal of experience in Vaccine cases. Further, given that, based upon the Laffey

[8]The Federal Circuit noted that "The Court of Federal Claims erred in prohibiting the special master from considering his past experiences with attorneys in the vaccine program -- this past experience is a relevant factor and should be taken into account." Saxton, 3 F.3d at 1521, citing Hensley, 461 U.S. at 430, n.3 (awards in similar cases and counsel's experience and ability are two of twelve factors relevant to a fee determination); Slimfold Mfg. Co. v. Kinkead Indus., Inc., 932 F.2d 1453, 1459 (Fed. Cir. 1991) (district court may rely on its prior experience and knowledge in determining reasonable hours and fees).

Matrix, Ms. Gentry's requested hourly rate indicates she has 8-10 years of experience, the amount of time Mr. Shoemaker should have expended in overseeing her work should have been minimal. In some instances, it is also reasonable for attorneys in law firms to consult one another regarding the firm's cases. However, this case was dismissed because petitioners failed to establish a *prima facie* case. Should this case have gone to hearing, it would have been reasonable for Mr. Shoemaker to have expended more time consulting with his colleague, Ms. Gentry. But that is not the case here. Therefore, Mr. Shoemaker should not have had to spend much time reviewing Ms. Gentry's work, an experienced and highly capable attorney. The fact that he did so indicates an unreasonable duplication of efforts. After reviewing and comparing Mr. Shoemaker's and Ms. Gentry's billing records, the undersigned would reduce Mr. Shoemaker's hours to 5. However, respondent indicated that he would not object to a fee award reflecting 10 hours of time expended by Mr. Shoemaker. Thus, the undersigned will award Mr. Shoemaker 10 hours of time, but notes that this is extremely generous.

C. Costs Incurred: Expert Witness Fee for Mark Geier, M.D.

Petitioners' Position

Petitioners seek a total of $1562.50 in expert witness fees for Dr. Mark Geier's review of medical records, consultation, and literature research. This fee was calculated by multiplying Dr. Geier's hourly rate of $250 by the 6.25 hours expended. Petitioners provided invoices detailing his fees. P. App. Fees at 30-31. Petitioners, in their response to respondent's objections, argue that although Dr. Geier was not offered as an expert in this case, he was necessary to the processing of this case. P. Resp. to R. Opp. at 11. Petitioners argue that "the legal issues were directly related and dependent upon the nature of the literature regarding acute idiopathic thrombocytopenia and chronic idiopathic thrombocytopenia." Id. Petitioners contend that their counsel have a right to consult with outside personnel. The alternative would be for counsel to do the research themselves. Finally, petitioners state that respondent has routinely accepted Dr. Geier's invoices in the past for other cases. Id. at 12.

Respondent's Position

Respondent objects to any reimbursement in this case for Dr. Geier. R. Opp. to P. App. Fees at 5. Respondent argues that Dr. Geier was unqualified to provide expert testimony in this case since his specialty is genetics. The instant case alleged an injury called Idiopathic Thrombocytopenia (ITP), which is a blood disorder. Id. at 6. Respondent questions whether Dr. Geier's "services were reasonable and necessary" since he did not produce an expert report and there was no evidence submitted by petitioners which showed that the services indicated in Dr. Geier's invoices were actually performed and why his services were reasonable and necessary for this case. Id. at 7. Thus, Dr. Geier's services should not be reimbursed, and in any event, should not be reimbursed at the expert witness rate of $250 an hour since Dr. Geier did not serve as an "expert" in this case. Id. at 6.

Analysis of Costs: Expert Witness Fee

Regarding requests for costs, the special masters' Guidelines provide that "such expenses . . . should be explained sufficiently to demonstrate their relation to the prosecution of the petition." Guidelines at 32. Further, Barnes v. Secretary of HHS, No. 90-1101V, 1999 WL 797468 (Fed. Cl. Spec. Mstr. Sep. 17, 1999) notes that "[p]etitioners' counsel is reminded that reimbursement for costs under the vaccine program is fairly straightforward: save receipts/documentation associated with a particular case, organize them, and submit them along with a petition for fees and costs. The court reimburses petitioners for all of their documented expenses so long as they are reasonable." Id. at * 7. Barnes also provides the following guidance:

> It is petitioners' burden to substantiate costs expended with supporting documentation such as receipts, invoices, canceled checks, etc. See Long v. Secretary, HHS, No. 91-326V, 1995 WL 774600, at * 8 (Fed. Cl. Spec. Mstr. Dec. 21, 1995). However, jurisprudence dictates that petitioner is required only to provide "reasonably specific documentation." Comm. Heating & Plumbing Co., Inc. v. Garrett, III, 2 F.3d 1143, 1146 (Fed. Cir. 1993). "[S]ufficient documentation requires... 'a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and other expenditures related to the case.'" Id. at 1146, citing Naporano Iron & Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987).

Barnes, 1999 WL 797468, at *7, n. 19.

In awarding expert fees, the following factors are helpful determinants:

> Fees for experts are subject to the same reasonableness standards as fees for attorneys. Crossett v. Secretary of HHS, 1990 WL 293978, at *4 (Fed. Cl.). To determine if a fee is reasonable, the special master should examine: the witness' area of expertise; the education and training required to provide him the necessary insight; the prevailing rates for other comparably respected available experts; the nature, quality, and complexity of the information provided; the cost of living in the expert's geographic area; and any other factor likely to assist the undersigned in balancing the various interests in the case. Wilcox v. Secretary of HHS, 1997 WL 101572, at *4 (Fed. Cl.).

Baker v. Secretary of HHS, 2005 WL 589431, at *1 (Fed. Cl.).

In the instant case, $1562.50 in expert witness fees for Dr. Mark Geier's services is reasonable. His hourly rate is also reasonable and is in line with other expert's and consultant's hourly rates who have been compensated by the Program. Given the undersigned's experience

with Dr. Geier and his expertise in vaccine literature, it is reasonable for petitioners' counsel to have consulted with Dr. Geier in their review and assessment of this case. The undersigned agrees with petitioners' counsel that counsel may employ consultants if necessary and reasonable. Petitioners have set forth in their response to respondent's objections why Dr. Geier was consulted. It is not unreasonable for Dr. Geier to have spent 6.25 hours doing research and review. The fact that Dr. Geier did not testify as an expert is irrelevant. Petitioners' use of Dr. Geier as a consultant, as opposed to contracting with another expert, is a cost-effective means of evaluating the case prior to full-blown litigation.

III. CONCLUSION

After a thorough review of petitioners' fee application and respondent's objections, petitioners are awarded **$17,501 in attorneys' fees** (attorney's hourly rate and paralegal's hourly rate multiplied by number of hours - see table below) and **$1991.79 in attorneys' costs**.[9] The award shall be made payable jointly to petitioners and their attorneys. Additionally, petitioners are awarded **$488.00 in petitioners' costs**. The award shall be made payable solely to petitioners.

Clifford Shoemaker
2003-2004 $225/hour x 1 hour = $225
2004-2005 $235/hour x 8.2 hours = $1927
2005 $245/hour x 1.8 hours = $196

Renee Gentry
2003-2004 $165/hour x 1.5 hours = $247.50
2004-2005 $175/hour x 50.4 hours = $8820
2005 $185/hour x 28.25 hours = $5226.25

Sabrina Knickelbein
2004 $155.25/hour x 1 hour = $155.25

Legal Assistants
2003-2004 $55/hour x 12.8 hours = $704

Accordingly, pursuant to Vaccine Rule 13, petitioners are hereby awarded a **total of**

[9]This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-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).

$19,980.79 in attorneys' fees and costs.[10] In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment according to this decision.[11]

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

[10]This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-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).

[11]Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.