OFFICE OF SPECIAL MASTERS

No. 99-963V

(Filed: October 12, 2004)

DOROTHY FLANNERY, as Administratrix of the Estate of RILEY ELTON, Deceased,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

ORDER TO SHOW CAUSE

On October 14, 2003, petitioner filed a Request for Attorneys [sic] Fees and Costs Pursuant to 42 U.S.C. Section 300AA[sic]-15(e). Petitioner's counsel requested an hourly fee of $300.00.

On January 8, 2004, respondent informed the undersigned's office that the parties had reached an agreement on attorney's fees and costs, which included $9,141.11 in costs and $14,700.00 in attorney's fees (reflecting 70 hours at an hourly rate of $210.00), as well as paralegal fees of $2,850.00 (reflecting 38 hours at an hourly rate of $75.00). When contacted, petitioner's counsel derided the hourly fee of $210.00 and queried why he could not receive an hourly fee of $300.00.

On July 2, 2004, the undersigned ordered petitioner to provide affidavits in support of his hourly fee request of $300.00. On July 6, 2004, petitioner sent an affidavit from Mr. Joel Finkelstein (attached to this Order and filed by my leave), dated June 28, 2004, stating that he has been a

personal injury attorney for more than 20 years and considers an hourly fee of $300.00 "totally acceptable and reasonable." On August 16, 2004, petitioner faxed an affidavit to the undersigned from Mr. Robert W. Mance (attached to this Order and filed by my leave), dated August 13, 2004, stating he has been in private practice both civilly and criminally for more than 20 years, and regards an hourly fee of $300.00 as "totally acceptable and reasonable." Both Mr. Finkelstein and Mr. Mance practice law in Washington, D.C., the geographic location where petitioner's counsel also practices law. (Excerpts from www.martindale.com showing Mr. Finkelstein's and Mr. Mance's professional addresses are attached to this Order and filed by my leave.)

Mr. Barry Nace, petitioner's counsel, is a senior partner in his firm. He received his J.D. in 1969, which is 35 years ago. He also received an L.L.D. in 1994. His specialty is medical malpractice, drug product liability, trial and appellate practice. He is Board Certified by the NBTA (National Board of Trial Advocacy) in civil litigation and is a member of the bars of the United States Supreme Court, Maryland, District of Columbia, Pennsylvania, and West Virginia. He has been President of the Association of Trial Lawyers of America, and is a member of the International Academy of Trial Lawyers, and the D.C. Trial Lawyers Association where he was President from 1977-78 and 1986-87. He is a member of the Maryland, West Virginia, and Pennsylvania Trial Lawyers Associations and the Association of Personal Injury Lawyers of Great Britain. He is a founding member of the Trial Lawyers for Justice and a permanent Trustee of the Roscoe Pound Foundation.[1] Mr. Nace is a member of the American Board of Trial Advocates and is certified by

[1] "The Roscoe Pound Foundation seeks to carry on the legacy of Roscoe Pound, dean of the Harvard Law School from 1916 to 1936, and one of the outstanding figures of 20th-century American jurisprudence and legal education. Pound believed that the discipline of law is active and ever-changing. The law itself, he believed, is not static. Rather, it must encompass the development of new concepts that take account of actual social conditions and permit people to exercise a measure

the American Board of Professional Liability Attorneys in medical malpractice. Mr. Nace has been listed in Who's Who in American Law, Best Lawyers in America, and as one of the Best Lawyers in Washington, D.C. He is an elected member of the American Law Institute and the American Inns of Court (Master). He has been a frequent guest lecturer on torts throughout the United States and on numerous radio and television programs. He received the following awards: Attorney of the Year (1976), Metropolitan Washington, D.C. Trial Lawyers Association; Special Recognition Award (1988) and Outstanding Achievement Award (1994) by the D.C. Trial Lawyers Association. (Mr. Nace's resume is attached to this Order and filed by my leave.)

The respondent is ORDERED TO SHOW CAUSE why petitioner's counsel should not receive an hourly fee of $300.00.

DISCUSSION

Pursuant to 42 U.S.C. § 300aa-15(e), the special master may award "reasonable" attorney's fees. To determine reasonable attorney's fees, the court employs the lodestar method. Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); Blum v. Stenson, 465 U.S. 886, 897 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983). "[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on litigation times a reasonable hourly rate." Blanchard, 489 U.S. at 94 (quoting Blum, 465 U.S. at 888). Petitioner has the burden of proving that a requested hourly rate is reasonable and representative of hourly rates in a particular market or geographic location. "The burden is on the fee applicant to produce

---

of control over them. Since its establishment in 1956, The Foundation has honored Roscoe Pound's life and teachings through its publications, conferences, research projects on issues of law and public policy, a series of roundtable discussions, forums for state court judges, and a program of law professor and student awards that recognizes and encourages excellence in our law schools." http://www.roscoepound.org/new/digest/9604/cj9604ah.htm

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, expertise, and reputation." Blum, 465 U.S. at 896, n.11.

The special masters are expected to use their discretion in awarding fees, based on their experience in the Vaccine Program. Ceballos v. Secretary of HHS, No. 99-97V, 2004 WL 784910, *4, n.8 (Fed. Cl. Spec. Mstr. Mar. 25, 2004), citing Saxton v. Secretary of HHS, 3 F.3d 1517, 1519 (Fed. Cir. 1993); Wasson v, Secretary of HHS, 24 Cl. Ct. 482 (1991), aff'd per curiam, 988 F.2d 131 (Fed. Cir. 1993); Hines v. Secretary of HHS, 22 Cl. Ct. 750, 753, aff'd, 940 F.2d 1518 (Fed. Cir. 1991); Edgar v. Secretary of HHS, 1994 WL 256609 (Fed. Cl. Spec. Mstr. May 27, 1994), aff'd, 32 Fed. Cl. 506, 509 (1994); Guy v. Secretary of HHS, 38 Fed. Cl. 403, 405-06 (1997). See also, Rupert v. Secretary of HHS, 52 Fed. Cl. 684 (2002) (special master may use his or her own experience with fees, citing Saxton, but first must determine that the prevailing market rate cannot be ascertained) and 55 Fed. Cl. 293 (2003).

Legislative history states that the special masters should rely on their expertise, experience, and discretion to resolve claims fairly. See generally H.R. Rep. No. 99-908, reprinted in 1986 U.S.C.C.A.N. 6344; H.R. Rep. No. 101-247, reprinted in 1989 U.S.C.C.A.N. 1906; H.R. Conf. Rep. No. 101-386, reprinted in 1989 U.S.C.C.A.N. 3018.

In Saxton, supra, respondent took the position that "determining what is 'reasonable' requires the special master to use his [or her] prior experiences to compare attorneys across cases. Such prior experiences are particularly relevant in the context of the vaccine program because a small group of attorneys reportedly appears before the small group of special masters." 3 F.3d at 1520.

The Honorable Christine O.C. Miller described what is a reasonable rate for a petitioner's attorney's fee in Rupert, supra, 52 Fed. Cl. at 687: "A rate is normally reasonable when it is in line with the prevailing market rate, defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'" (citing Blum, supra, 465 U.S. at 895-96, n.11).

Petitioner's counsel, Mr. Nace, has provided two affidavits from counsel with similar experience practicing in the same area (the prevailing market rate),[2] and that amount is $300.00 per hour. He has fulfilled the requirements of the Vaccine Act and the case law interpreting it. As Judge Miller states in Rupert, supra, 52 Fed. Cl. at 692: "It is appropriate for a court to use the affidavit of a third-party attorney as evidence of the prevailing market rate" (citing Blum, supra, at 895-96, n.11, and Norman v. Hous. Auth. of the City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988)).

Judge Miller in Rupert, supra, 52 Fed. Cl. at 692-94, specifies that if the submitted affidavits are not adequately specific to determine the prevailing market rate, the Special Master may rely on other proof, such as personal experience (citing Case v. Unified School Dist. No. 233, 157 F.3d 1243, 1256 (10th Cir. 1998), and Bordanaro v. McLeod, 871 F.2d 1151, 1168-69 (1st Cir. 1989)). The undersigned does not find that Mr. Finkelstein's and Mr. Mance's affidavits are inadequate to prove that the prevailing market rate for the type of work Mr. Nace did in this case involving complex medical issues is $300.00 per hour. But, assuming arguendo that the undersigned writes a decision in this case on this issue which respondent appeals to the United States Court of Federal Claims, if

[2] Judge Miller calls the relevant community "the local community, defined as the forum in which the court sits or as the community where the attorney practices." Rupert, 52 Fed. Cl. at 688. In this case, the court is a national court and the attorney practices in Washington, D.C.

a judge on that court viewed these affidavits as inadequate, the undersigned relies on her personal experience as follows.

In another case, Camerlin v. Secretary of HHS, No. 99-615V, the undersigned recently had a telephonic status conference with petitioner's attorney in that case, Mr. Ronald C. Homer, and two of respondent's attorneys (the line attorney and a supervising attorney) about the possible settlement of Mr. Homer's attorney's fees. Their dispute centered on his claimed hourly wage. Mr. Homer practices in Boston, Massachusetts, and based on Judge Miller's second Rupert decision, 55 Fed. Cl. 293 (2003), respondent agreed to accept what Judge Miller decided would be Mr. Homer's hourly wage in that decision, which was $210.00 (which Judge Miller said would hold for two years starting from January 2003, the date of the decision).

The undersigned advised respondent's counsel in Camerlin that the Rupert decision was not binding upon me. Hanlon v. Secretary of HHS, 40 Fed. Cl. 625, 630 (1998), aff'd, 191 F.3d 1344 (Fed. Cir. 1999) ("Special masters are neither bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand.")

In addition, the undersigned asked if what she had heard was true–that respondent had no objection to paying an hourly fee of $250.00 to a suburban Virginia attorney (who shall remain nameless) even though he is notorious for delaying proceedings by not filing medical records and expert reports on time. Respondent's counsel admitted that it was true. When the undersigned asked how respondent could pay $250.00 an hour to someone who delays litigation whereas Mr. Homer was always dependable and fulfilled deadlines, respondent's counsel said the suburban Virginia attorney had been in practice a long time. The undersigned said, "That's it?" We never went further down this road because counsel in Camerlin did settle fees and costs after the conference.

If the case at issue does go further down the road and, ultimately, a judge on the U.S. Court of Federal Claims determines that the affidavits of Mr. Finkelstein and Mr. Mance are inadequate to prove the prevailing market rate in Washington, DC, the undersigned holds, based on her personal experience, that Mr. Nace in Washington, DC, who has been in practice for 35 years and has a stellar reputation as a leader in the area of complex civil litigation, should receive more per hour than the suburban Virginia attorney who epitomizes delay. In other words, if the procrastinating suburban Virginia attorney merits $250.00 an hour for his fee, then Mr. Nace of Washington, DC, certainly merits $300.00 an hour. If the undersigned agreed with respondent's position that Mr. Nace's hourly rate should be $210.00 an hour (the amount for which respondent was willing to settle fees earlier this year), the undersigned would commit a miscarriage of justice.

Respondent is ORDERED TO SHOW CAUSE by October 29, 2004 why Mr. Nace shall not receive $300.00 as his hourly fee (for a total award of $9,141.11 in costs and $23,850.00 in fees, which consists of $21,000.00 in attorney's fees and $2,850.00 in paralegal fees).

IT IS SO ORDERED.

_____ _____

DATE Laura D. Millman
Special Master