IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 06-559V
Filed: July 17, 2008
TO BE PUBLISHED

GABRIEL GENE RODRIGUEZ AS ADMINISTRATOR OF THE ESTATE OF GIAVANNA MARIA RODRIGUEZ FOR THE BENEFIT OF GABRIEL GENE RODRIGUEZ AND JENNIFER ANN RODRIGUEZ Petitioners, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	*	Attorney Fees; Laffey Matrix; Forum Rate; Geographic Rate; Prevailing Market Rate; Due Process; Petitioner's Burden; Reasonable Hourly Rate

John E. McHugh, Esq., New York, NY, for Petitioners;
Robin Broderick, Esq., (entitlement)*; Alexis Babcock, Esq.,* (fees and costs)*,* U.S. Department of Justice, Washington, DC, for Respondent.

ORDER REGARDING FEES AND COST APPLICATION[1]

VOWELL, Special Master:

On July 31, 2006, petitioners, Gabriel and Jennifer Rodriguez[2], timely filed a petition for compensation under the National Vaccine Injury Compensation Program, 42

[1] Because I have designated this order to be published, petitioner has 14 days to request redaction of any material "that includes medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire order will be publicly available. 42 U.S.C. § 300aa-12(d)(4)(B).

[2] Pursuant to my order of September 14, 2007, Gabriel Rodriguez secured appointment as the administrator of his daughter's estate. *See* 42 U.S.C. §§ 300aa–11(a)(9) and 11(b)(1)(A). The case was subsequently recaptioned to reflect a claim on behalf of the estate. *See* Order, dated October 5, 2007. I will therefore refer to Gabriel Rodriguez as "petitioner" throughout the remainder of this opinion.

U.S.C. § 300aa-10, *et seq*.[3] [the "Vaccine Act" or "Program"], based on the death of their daughter, Giavanna Maria Rodriguez ["Giavanna"]. After conducting an entitlement hearing in Philadelphia, PA, on May 18, 2007, and considering the parties' post-hearing filings, I ordered respondent to show cause why I should not find that Giavanna had suffered a "Table" injury[4] and thus that her estate was entitled to compensation. The parties subsequently negotiated a settlement and on November 11, 2007, I issued a decision based on the joint stipulation and awarded compensation in the agreed amount.[5]

On February 25, 2008, petitioner filed his Application for Fees and Expenses ["Fees App."], requesting fees in the amount of $65,925.00,[6] expenses in the amount of $4,817.48, unpaid expert fees in the amount of $4,200.00, and petitioner's own expenses of $2,252.16.[7] Respondent filed an opposition to the fees and expenses application ["Res. Opp."] on March 20, 2008, arguing that the claimed rate of $450.00 per hour was unreasonable and challenging some of the hours claimed.

On March 31, 2008, petitioner filed a reply to respondent's objections ["Pet. Reply"]. Petitioner argued that the claimed attorney fee rate of $450.00 per hour was amply supported by the original application. On April 3, 2008, petitioner filed an "Amended Reply Memorandum" ["Amend. Reply"] which increased the requested hourly rate from the $450.00 per hour originally claimed to $598.00 per hour for work performed in May, 2006, $614.00 per hour for work performed from June, 2006–May, 2007, and $645.00 per hour thereafter. The amended demand raised the amount

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[3] Hereinafter, for ease of citation, all "§" references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

[4] A "Table" injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified. A presumption of vaccine causation attaches to such injuries.

[5] Petitioner's Application for Fees and Expenses mistakenly characterizes my show cause order as a "ruling" and, equally mistakenly, states that the settlement was in lieu of a government appeal of that ruling.

[6] According to respondent's calculation, based on the hours and rates claimed, the attorney fees total should have been $64,125.00, not the $65,925.00 claimed. See Respondent's Sur-Response to Petitioners' Amended Reply Memorandum ["Res. Sur-Response"] at n.1. The discrepancy is based on an error in the hours claimed. The hours claimed actually total 146.5, not the 142.5 stated in the body of the application. Petitioner's "bottom line" figure of $65,925.00 correctly reflects the hourly rate claimed times the number of hours claimed.

[7] The application included a declaration of Mr. Rodriguez, requesting $2,252.16 in expenses. The declaration referred to an "accompanying sheet" itemizing the expenses, but that sheet was not filed with the application. Mr. Rodriguez's expenses included an unspecified amount paid to his expert, Dr. Shane. Petitioner's Fees Application (Exhibit I) indicated that Dr. Shane was paid $1,675.00 by petitioner and that a bill for an additional $4200.00 for Dr. Shane's services remained outstanding.

claimed to $84,322.00 for work previously performed, and added 16 hours of work on the amended reply at $645.00 per hour, for a total of $94,642.00 in fees. He also sought an additional $90.00 in costs for the purchase of the National Law Journal's 2007 fees survey. Petitioner claimed that respondent had conceded that his attorney was entitled to the forum rate, as reflected in the "updated" Laffey Matrix.

Respondent's Sur-Response was filed on April 18, 2008, denying any concessions regarding petitioner's rates and urging me to determine a reasonable award, based on my experience. Petitioner filed a brief Sur-Reply Memorandum ["Pet. Sur-Reply"] on April 28, 2008.[8] After analyzing the evidence and arguments presented, I conclude that, thus far, petitioner has failed to provide sufficient evidence regarding the appropriate forum rate. I offer the parties the opportunity to file additional evidence focused on the forum rate issue.

Three major issues are presented in this fees dispute: what hourly rate should be paid to petitioner's counsel; whether the hours for which compensation is sought are reasonable; and whether counsel should be compensated for travel time at the same hourly rate paid for performing case-related work. Because I have determined that I do not have sufficient evidence regarding what is a reasonable hourly rate in this forum, I do not address the second two issues at this time.

I. Applicable Law.

This court applies the lodestar method to any request for attorney's fees and costs. *See Blanchard v. Bergerson*, 489 U.S. 87, 94 (1989) ("The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate" (*quoting Blum v. Stenson*, 465 U.S. 886, 888 (1984)). *See also, Avera v. Sec'y*, *HHS*, 515 F.3d. 1343, 1347-48 (Fed. Cir. 2008) and *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993).

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896, n.11. The "prevailing market rate" is determined using the "forum rule." *Avera*, 515 F.3d at 1349 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). An exception to the forum rate is applied when the majority of the work is performed outside the forum in a location where the attorneys' hourly rates are substantially lower. *Avera*, 515 F.3d at 1349 (*citing Davis County Solid Waste Management and Energy Recovery Special Service District v. EPA*, 169 F.3d 755 (D.C.

[8] No additional attorney fees were sought for the Sur-Reply Memorandum, as indicated by the final paragraph of the document (which was not paginated).

Cir. 1999). Prior to the Federal Circuit's decision in *Avera*, the Court of Federal Claims applied the "geographic rule" to determine the appropriate rate of compensation. The geographic rule is based on the community in which the attorney performs the services, rather than the prevailing market rate in the forum community. *See Avera v. Sec'y, HHS*, 75 Fed. Cl. 400, 405-406 (2007).

The rates requested must be line with those prevailing in the community for similar services. *Blum*, 465 U.S. at 895, n.11.

In determining the number of hours reasonably expended, a court must exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

Special masters may use their experience in Vaccine Act cases to determine whether the hourly rate and the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 483 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (special master is given broad discretion in calculating fees and costs awards).

Once the court determines the appropriate attorneys' fees using the lodestar method, the court may then make adjustments to the award. The Supreme Court has cited with approval the 12 factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974) as relevant to the calculation of a reasonable attorney fee. *Blum*, 465 U.S. at 900.

Petitioner has the burden to demonstrate that the hourly rate requested is reasonable. *See Blum*, 465 U.S. at 896 ("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 reasonable comparable skill, experience and reputation.").

As petitioner was awarded compensation in this case, an award of reasonable attorney's fees and costs is mandatory, not discretionary. § 300aa-15(e)(1)(A).

II. Issues Presented.

The initial issue before me is the question of what hourly rate to apply for work performed outside the forum (Washington, DC). It is uncontested that the bulk of the work on behalf of petitioner was performed in New York City and that the entitlement hearing was held in Philadelphia.

Petitioner originally requested an hourly rate based on a discount applied to the rates billed by senior partners in New York City firms. He later argued that the Laffey Matrix rates for experienced attorneys practicing in Washington, DC, should apply. For

the reasons indicated below, I conclude that the forum rate rule applies, but that petitioner has failed to demonstrate that the forum rate is set by the Laffey Matrix or by the rates charged by senior partners in DC area law firms. Petitioner has therefore failed to produce sufficient evidence to establish the forum rate pertaining to Vaccine Act cases.

A. Initial Fee Request.

Petitioner's initial argument was that his attorney, Mr. McHugh, should receive $450.00 per hour, based on his attorney's billing rate. Fees App. at 2. He argued that this rate was well below the prevailing rates for senior litigators in New York City, where Mr. McHugh is located (*id.* at 4), that his attorney had 40 years of general litigation experience (*id*. at 5), and that he has been handling Vaccine Act cases since 2000 (Fees App. Exhibit ["Ex."] A, Resume of John McHugh).[9] Based on the Fees App. and the exhibits attached thereto, I have no difficulty in concluding that the $450.00 per hour rate is less than that awarded by New York courts for experienced litigators, and less than that billed by partners in Wall Street firms (in the same general geographic area of New York City as Mr. McHugh's office). In support of this rate, petitioner cited to the Federal Circuit decision in *Avera*.

Respondent contended that *Avera* does not support petitioner's requested hourly rate, that the hourly rate should be based on the rates charged in the year in which the services were performed, and that Mr. McHugh's billing rate should reflect the lower hourly rate ($350.00) he had requested (and received) in another Vaccine Act Case, *Kantor v. Sec'y, HHS*, No. 01-679V, 2007 U.S. Claims LEXIS 100 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

In his Reply Memorandum, petitioner reiterated his arguments that the market rate should apply, citing to numerous decisions of New York courts on fee awards.

Both parties argued that the *Avera* decision supported their positions. In *Avera*, the Federal Circuit held that the forum rule applies to attorneys' hourly rates in Vaccine Act litigation. The forum rule dictates that the reasonable hourly rate is based on the rates paid to similarly qualified attorneys where the court sits, which in Vaccine Act litigation is Washington, DC However, the Federal Circuit also held that, based on the facts of *Avera*, an exception to the forum rule applied, and the petitioners' attorney in that case was entitled to a lower hourly rate–his "billing rate"–because the bulk of the work in that case was performed outside Washington, DC, and in an area where the

[9] The Fees App. indicated that Mr. McHugh's billing rate is lower than that of experienced litigators and senior partners in New York City firms because Mr. McHugh is a solo practitioner and, thus, performs tasks himself that might be performed by an associate attorney or paralegal in a larger firm. *Id.* at 6. His lower billing rate reflects that some of the work he performs would, in a larger firm, be done by those whose services would be billed at a lower hourly rate than that of a partner or senior litigator.

prevailing attorneys' rates were substantially lower. *Avera*, 515 F.3d 1343.

However, *Avera* does not address whether there is an exception to the forum rule when hourly rates are substantially higher than those in the Washington, DC area. In *Avera*, the court analyzed the *Davis* exception to the forum rule in terms of the "windfall" to petitioners that occurred when no work was performed in the higher cost area of the forum. In this case, the legal work, other than the hearing in Philadelphia, was performed by Mr. McHugh in New York City. Assuming, *arguendo*, that the prevailing rate in New York City is substantially higher than the prevailing rate in Washington, DC, *Avera* provides little direct guidance on whether a "higher cost" exception to the forum rule should obtain.

The *Avera* decision placed significant reliance on the DC Circuit's decision in *Davis*. In *Davis*, the court held that an attorney, practicing in a location where the hourly rates were lower, would be limited to the lower rate, rather than receiving the rates obtaining in the forum. In dicta, the court suggested that an attorney practicing in a location where hourly rates were higher would be limited to those rates obtaining in the forum. *Davis*, 169 F.3d at 759-60. Other federal courts considering a "higher cost" exception to the forum rule have approved higher rates only when it was demonstrated that the out of town counsel possessed special expertise or that local counsel[10] were unwilling to take such cases. Res. Opp. cites many of these cases at pp. 6-7, n.3.

The Second Circuit has recently considered the forum rule's application in the context of a Voting Rights Act case. Plaintiffs argued that the district court's requirement of extraordinary special circumstances to justify an upward adjustment to the local hourly rate was error. The court commented: "Moreover, this dispute concerning the "forum rule" is but a symptom of a more serious illness: Our fee-setting jurisprudence has become needlessly confused – it has become untethered from the free market it is meant to approximate. We therefore suggest that the district court consider...what a reasonable, paying client would be willing to pay, not just in deciding whether to use an out-of-district hourly rate in its fee calculation." *Arbor Hill Concerned Citizens Neighborhood Association, et. al., v. Count of Albany*, 522 F.3d 182, 184 (2d Cir. 2008). The court held that district courts could use an out of district hourly rate, the local rate, or some rate in between in calculating what it called the "presumptively reasonable fee," if it found that a reasonable client would have been willing to pay the higher rates. The court also noted that most reasonable paying clients would hire a

[10] In view of the nationwide jurisdiction conferred on the Court of Federal Claims and the special masters who hear Vaccine Act cases, the term "local counsel" is something of a misnomer. Counsel in Vaccine Act cases come from New York City, Honolulu, and many places in between. While there are some Washington, DC area attorneys representing Vaccine Act litigants, none of the cases on my active docket involve Washington attorneys representing petitioners. Although there are well over 200 attorneys currently representing Vaccine Act litigants, the vaccine bar is specialized and dominated by a small number of firms who handle a large number of cases.

local attorney or one whose rates approximated those of the local counsel. *Arbor Hill*, 522 F.3d at 190.

Analyzing *Avera*, I conclude that if a higher cost exception to the forum rule exists, it would apply only if the additional factors of special expertise or unavailability of other counsel willing to take Vaccine Act cases could be established. The automatic applicability of a higher cost exception without such showing would, in essence, eviscerate the forum rule *Avera* established. If there are exceptions for attorneys who practice in either substantially higher or substantially lower cost areas, the geographic rule that *Avera* rejected will continue to govern many of our attorney fees cases. This will likely increase litigation over attorneys' fees, rather than provide predictability for the parties which would decrease such litigation, at least over the hourly rate to be applied.

Petitioner's arguments that the market rate in New York City should apply run counter to *Avera*. Applying the market rate in New York City would be applying the geographic rule that the Federal Circuit rejected.

B. The Amended Fee Request.

Three days after filing the Pet. Reply, petitioner filed an amended fee request, arguing that respondent had conceded that the market rate for the District of Columbia should apply and that the "updated" Laffey Matrix[11] represented that "market rate." Petitioner also filed the declaration of petitioner's mother, describing her difficulties in finding an attorney willing to take this case.[12] Mr. McHugh's declaration asserts his billing rate in *Kantor* was "ridiculously low" (McHugh Declaration, ¶ 10), that his firm

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[11] The Laffey Matrix is 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. Dir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The matrix itself is prepared by the U.S. Attorney's Office for the District of Columbia, and includes a chart of hourly rates for attorneys, based on the number of years in practice. Yearly updates to the original hourly rates allowed by the district court are based on annual increases in the Consumer Price Index. The Laffey Matrix may be viewed at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_4.html (last visited July 16, 2008). The "updated" Laffey Matrix contains higher hourly rates, based on price index calculations specific to legal services. The updated rates were applied by the District Court for the District of Columbia in *Salazar v. DC*, 123 F. Supp. 2d 8, 13 (D. DC 2000).

[12] This declaration and that of Mr. McHugh are not filed as exhibits or tabs to the petition. The declaration of Mary Rodriguez is not paginated, although the paragraphs are numbered. Mr. McHugh's declaration is paginated separately from that of the Amend. Reply Memorandum but is attached directly to it. The additional declarations filed with the Amend. Reply Memorandum are, like those attached to the Fees App, labeled as lettered exhibits. In accordance with the Guidelines for Practice under the National Childhood Vaccine Injury Compensation Program, respondent's exhibits in the entitlement phase of this case were lettered. The re-use of these letters has the potential for confusion. Petitioner's apparent inability to properly enumerate his exhibits has persisted from the entitlement phase of this litigation. It has occasioned considerable extra work by this court. *See* Order, dated July 11, 2007, and Order to Show Cause, dated September 14, 2007, n.9.

"appears to have become the last resort for victims of vaccines who cannot find representation elsewhere" (*id*., ¶ 11), that the decisions of the courts handling Vaccine Act cases and respondent's frequent challenges to attorneys' fees and expert fees have resulted in attorneys being unwilling to accept such cases, and that, as a result, persons with vaccine injuries are being unconstitutionally denied due process of law. Further, he contends that respondent's refusal to concede that Giavanna suffered a Table injury entitles him to full compensation. Petitioner argued that Mr. McHugh's political connections and years of experience equate him to senior partners in major Washington, DC, firms, and, therefore, he is entitled to the "updated" Laffey Matrix rates (filed as Amend. Reply Memorandum, Ex. P). Most of the remaining exhibits filed with the Amend. Reply Memorandum are copies of declarations filed in the *Avera* case. Exhibit J is the declaration of another Vaccine Act attorney, Mr. Clifford Shoemaker, that was filed in the *Kantor* case in support of Mr. McHugh's fees request in *Kantor*.

Respondent's Sur-Reply, citing *Saxton*, 3 F.3d at 1520-22, encourages me to use my broad discretion and prior experience to determine reasonable attorney's fees and costs in this case, without suggesting what hourly rate I should apply. Respondent reiterates the argument that petitioner did not establish that his attorney was entitled to fees of $450.00 per hour, much less the newly claimed rates based on either the Laffey Matrix or the updated Laffey Matrix. Respondent vigorously challenges petitioner's assertion that respondent's discussion of *Avera* constituted a "judicial admission" that forum rates (interpreted by petitioner as the Laffey Matrix rates) should apply.

III. Discussion.

As Judge Rader predicted in his concurring opinion in *Avera*, jettisoning the "hometown rule" approach requires this court to "undertake a complex *Davis* exception analysis rather than simply determining the local applicable rates for a reasonable fee award." 513 F.3d at 1353. Petitioner first argued that his attorney's New York City "market rate" of $450.00 per hour applied, in effect contending that there is a *Davis* exception for high cost areas, as well as the lower cost exception applied by the court in *Avera.* Then, abandoning his earlier approach, petitioner argued that the local rate in the District of Columbia applied, and that the Laffey Matrix constitutes that local rate.

A. The Laffey Matrix (Updated or Not) is Not The "Forum Rate."

Petitioner's later pleadings in this attorney's fees dispute treat the applicability of the Laffey Matrix as a foregone conclusion. It is not. In *Avera*, the Federal Circuit left open the question of the applicability of the Laffey Matrix in Vaccine Act cases. Applying the Laffey Matrix to Vaccine Act cases has a certain allure because a bright line rule would go a long way toward reducing unnecessary litigation over attorneys' hourly rates in Vaccine Act cases. It would eliminate the necessity for a petitioner to establish the local hourly rate. Were the court to adopt such an approach, the question of what hourly rate is "reasonable" could be easily established by reference to the

Laffey Matrix.

However, there are significant differences between the litigation in which the Laffey Matrix is applied and Vaccine Act litigation. As Judge Rader noted in *Avera*, procedures under the Vaccine Act differ from those in other fee-shifting statutes, with the Vaccine Act providing for a "less adversarial, streamlined process." 513 F.3d at 1353. In *Blum*, the Supreme Court indicated that the nature of the services provided is a factor in determining the reasonable rate of compensation. 465 U.S. at 895, n.11. In the fee-shifting cases in which the Laffey Matrix is applied, a party must prevail in the litigation in order to receive fees. Under the Vaccine Act, nearly all litigants receive attorneys' fees and costs because the Act provides that fees may be awarded to unsuccessful litigants. Our court has been extremely generous in finding that unsuccessful petitions have been brought in good faith and upon a reasonable basis in order to award fees and costs to these litigants and their attorneys. *See Hamrick v. Sec'y, HHS*, 99-683V, 2007 U.S. Claims LEXIS 415 (Fed. Cl. Spec. Mstr. January 9, 2008). Thus, the risk of receiving no compensation at all is significantly reduced.

In *English v. Sec'y, HHS*, No. 01-061, 2006 U.S. Claims LEXIS 356 (Fed. Cl. Spec. Mstr. Oct. 26, 2006), the Chief Special Master considered arguments similar to those advanced here regarding the applicability of the Laffey Matrix to a determination of reasonable attorneys' fees. He rejected them. In *Kantor*, Mr. McHugh advanced the same Laffey Matrix arguments with regard to his fees. Special Master Abell rejected them. For similar reasons, I do so as well. The Laffey Matrix does not represent the prevailing market rate as defined by the Supreme Court in *Blum*: that rate paid in the community for "similar services by lawyers of reasonably comparable skill, experience, and reputation."[13] 465 U.S. at 895, n.11. The Laffey Matrix applies to litigation in which one must prevail in the litigation, jury trials are the norm, discovery disputes abound, and the rules of evidence apply. None of these factors apply to most Vaccine Act litigation.

B. There is Insufficient Evidence in This Case Upon Which to Determine the Forum Rate.

As petitioner proffered no evidence, other than the Laffey Matrix, of what constitutes the forum rate, I must determine that rate myself. The information currently

[13] If I were to conclude that the Laffey Matrix constituted the forum rate for purposes of calculating attorney fees, Mr. McHugh would fall into the *Davis* exception adopted in *Avera*. The "updated" Laffey Matrix filed by petitioner calculates that the rate of compensation for work performed from June, 2007 through May, 2008, for an attorney in practice for more than 20 years is $645.00 per hour. The original fee application indicated that Mr. McHugh's "billing rate" for that period was $350-450.00 per hour, or approximately $200-300.00 per hour less than what he contended was the "forum rate." This is a significantly lower hourly rate and thus comparable to the difference that constituted a windfall in *Avera*. All of the work in this case was performed outside the District of Columbia. Therefore, consistent with the decision in *Avera*, Mr. McHugh would only be entitled to the lower "billing rate."

available in this case is insufficient, post-*Avera,* to determine the forum rate.

The burden is on petitioner to establish the "forum rate." Although petitioner's Amend. Reply, Ex. O, contains evidence regarding a nationwide sampling of law firm billing rates, including Washington, DC firms, it does not provide sufficient detail concerning the nature of these law firms' practice areas to provide much guidance on the forum rate in Vaccine Act cases. There is no evidence that any of these firms engage in similar litigation. Nor is it established that the senior partners in these firms practice law of the same degree of complexity or with the same degree of skill as Mr. McHugh. By Mr. McHugh's own admission, his solo practice means that he does some tasks that would, in a larger firm, be performed by associates or paralegals, and not a senior litigator or partner.

I could turn to Vaccine Act cases that have awarded fees to Mr. McHugh. However, *Kantor* is the only recent Vaccine Act case in which Mr. McHugh's fees are discussed.

In *Kantor*, Mr. McHugh originally billed for $350.00 per hour. 2007 U.S. Claims LEXIS 100 at *27. He explained in his declaration here that the fee charged in *Kantor* represented his billing rate from 1998. Upon revisiting his rate after filing his fees application in that case, he raised his billing rate to $400.00 per hour, effective November 2006, and to $450.00 per hour as of January, 2007. McHugh declaration, ¶ 2. The same paragraph indicated that this billing rate is that which he charges his clients in the transportation industry. From Mr. McHugh's resume, it appears that transportation law constitutes the bulk of his experience and practice. Whether his transportation law practice is comparable to Vaccine Act litigation is an open question.

What another special master determined to be a reasonable hourly rate for work performed between 2001 and 2007 is relevant to, but not binding upon, my decision on the same issue. The decisions of the Court of Appeals for the Federal Circuit are binding on special masters. *Guillory v. Sec'y, HHS*, 59 Fed. Cl. 121, 124 (2003), *aff'd*, 104 Fed. Appx. 712 (Fed. Cir. 2004). Decisions issued by special masters and judges of the Court of Federal Claims constitute persuasive, but not binding, authority. *Hanlon v. Sec'y, HHS*, 40 Fed. Cl. 625, 630 (1998).

With regard to the fees charged and received by other attorneys handling Vaccine Act cases, I have not had the opportunity, post-*Avera*, to consider the issue of the "forum rate" for any attorneys, other than those in which respondent and petitioner have negotiated an hourly rate. Because *Avera* changed the focus from the geographic rule previously used in the lodestar calculation to the forum rate, decisions of special masters determining reasonable hourly rates issued prior to *Avera* must be viewed with some caution, as they are likely based on evidence of geographic rates. I echo the sentiment expressed by the Chief Special Master in *Ray v. Sec'y, HHS*, No. 04-184V, 2006 U.S. Claims LEXIS 97, n.6 (Fed. Cl. Spec. Mstr. Mar. 30, 2006), regarding the

utility of establishing a "Laffey-like" matrix for attorneys' fees for the Vaccine Program, based on reasonable attorneys' fees for the entire Vaccine Act bar.

In the absence of such a matrix, rates negotiated between the parties could be informative. I am aware that two small firms representing many vaccine claimants have, in recent years, negotiated hourly rates with respondent for each of the firms' attorneys.[14] A reasonable fee is what a willing buyer would pay a willing seller. *See Arbor Hill,* 522 F.3d at 184, n.2 ("in calculating the reasonable hourly rate for particular legal services, a district court should consider all relevant circumstances in concluding what a reasonable client would expect to pay.") These fee negotiations represent some evidence of what constitutes the forum market rate for experienced Vaccine Act practitioners. However, no case sets forth these agreements, and no document filed in this case establishes those rates.

I note that Mr. McHugh has somewhat less experience in Vaccine Act litigation than the lead counsel at each of these two firms, but each of those counsel and Mr. McHugh have been practicing law for similar (and lengthy) periods of time.

C. Due Process Objections.

Petitioner contends that "the limitations placed on legal fees in this program have driven attorneys from the program, have denied numerous injured persons access to the Courts [sic] and have denied those persons due process of law." Amend. Reply at 21. In support, petitioner refiled several declarations, previously filed in *Avera*, concerning the reasons some attorneys no longer take Vaccine Act cases, and the declaration of Mary Rodriguez detailing difficulties she had in finding an attorney to take her son's case. In his declaration attached to the Amend. Reply, Mr. McHugh stated that respondent's "scorched earth" defense of this case entitled him to the "full cost's [sic]" incurred.

Although I agree that respondent's failure to concede that Giavanna suffered a Table injury was inexplicable, this was hardly a "scorched earth" defense. Rather, both parties were so focused on litigating the "actual cause" of Giavanna's death and arguing about what the autopsy slides revealed that they failed to focus on the incontrovertible fact that she had a "Table" encephalopathy, as defined by the Qualifications and Aids to Interpretation portion of the Vaccine Table. *See* 42 C.F.R § 100.3(b)(2). Petitioner's expert's personal attack on respondent's expert's age and responsibilities (*see* Pet. Ex. 10 and Order, dated February 6, 2007) undoubtedly played a role in reshaping the litigation to a battle between what an eminently qualified pediatric neuropathologist saw

[14] Presumptively, a negotiated rate would be accepted by the court as a reasonable rate. That has been born out in practice. I was unable to find any decision in which the special master rejected an hourly attorney fee rate that had been agreed to by the parties.

on autopsy slides and what a much less qualified pathologist indicated those slides revealed.[15] In the ultimate analysis, unless the slides demonstrated the existence of a specific cause for this child's death, rather than an idiopathic or unknown cause such as SIDS,[16] they were not relevant. The slides did not reveal a specific cause for Giavanna's untimely death.

The evidence that Mrs. Rodriguez had difficulty in locating an attorney willing to take her son's case fails to establish that no attorney practicing in the Vaccine Program, at the rates customarily paid by this program, would take the case. Thus, that evidence fails to demonstrate one of the conditions precedent for a "higher cost" exception to the forum market rate to Mr. McHugh's fees. There are many reasons a law firm may decline a case, and the facts of this one may have contributed to the reluctance of the firms contacted to do so. Child death cases attributable to SIDS are not generally found to be Table injuries and off-Table claims involving apparent SIDS deaths are not routinely compensated.[17]

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[15] Although I did not find it necessary in the show cause order to delve into the expert testimony in detail, I did state my factual conclusions regarding the relative qualifications and credibility of the two experts:

> I have not summarized the expert medical testimony, as it primarily concerns the actual causation claim. In view of my tentative finding that this case meets the criteria for a Table encephalopathy, it is unnecessary to address the evidence pertaining to the actual causation claim. However, I note that the two experts frequently disagreed about what the tissue slides taken at Giavanna's autopsy actually showed. In general, I found Dr. Rorke-Adams to be a more qualified, reliable, and credible witness than Dr. Shane, particularly with respect to the autopsy slides and what they represented.

Order, dated September 14, 2007, at 8. I also stated:

> Doctor Rorke-Adams' testimony was clear, lucid, and compelling on the issue of vaccine causation of Giavanna's death. Were I to reach the issue of actual causation, my conclusions regarding petitioners' entitlement to compensation might well be different. Her opinion undercut that of Dr. Shane on how a vaccine could cause Giavanna's condition and ultimately her death. However, more importantly, it demonstrated that the pathologic findings upon which he based his opinion were either not present or he misinterpreted them.

Id., at 13.

[16] "SIDS" is sudden infant death syndrome. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY ["DORLAND'S"] at 1695 (30th ed. 2003).

[17] Giavanna's death presented an uncommon scenario, involving resuscitation and a subsequent coma that constituted the Table encephalopathy, followed by her death. In *Hellebrand v. Sec'y, HHS*, 999 F.2d 1565 (Fed. Cir. 1993), the Federal Circuit overturned a Court of Federal Claims decision that a SIDS death within 72 hours of a DPT vaccination established a Table injury. *Id.* at 1568; *see also Hodges v. Sec'y, HHS*, 9 F.3d 958 (Fed. Cir. 1993).

The fact that some attorneys or firms have ceased to handle Vaccine Act cases does not, standing alone, constitute sufficient evidence that the hourly rates paid to attorneys in Vaccine Act cases are inadequate. Cases under the Vaccine Act continue to be filed, both by attorneys and by *pro se* litigants. The numbers of *pro se* litigants remain small. Some litigants who initially file *pro se* petitions subsequently secure counsel. Some litigants who are represented by counsel have a parting of the ways with their attorneys and subsequently proceed *pro se.*[18]

Petitioner asserts that two Supreme Court cases support his position that a "program which limits attorneys fees to what the program will pay denies due process where the fees paid cause plaintiffs to be unable to find counsel." Neither of the cited cases, *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715 (1990) and *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617 (1989), support petitioner's claim that the Vaccine Act, as administered, violates a petitioner's due process right to obtain representation. Initially, I note that petitioner's assertion is similar in structure, but different in meaning, from a statement by the Court in *Triplett*, 494 U.S. at 720-21 ("A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle") (*citing Caplin & Drysdale, Chartered*, 491 U.S. at 623-24, n.3). This statement was made in regard to the attorney's standing to litigate the issue of attorney's fees. It did not constitute the holding of that case, which upheld the constitutionality of a statute that limited attorney fees to what the Department of Labor considered reasonable. I note that in *Triplett*, the Supreme Court found evidence similar to that submitted in this case (statements from attorneys concerning the unavailability of counsel willing to take black lung cases) "anecdotal" and insufficient to "overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled." 494 U.S. at 723. This type of evidence is insufficient, even if "entirely unrebutted." *Id.*, at 724.

Petitioner's arguments here echo those made in *Triplett*. Complaints about the rates of pay and delays[19] in receiving attorney's fees are insufficient evidence upon

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[18] Petitioner's anecdotal evidence of attorneys leaving the Vaccine Program may correctly reflect that specific counsel have elected to practice elsewhere. However, reasoning from the specific to the general may result in a fallacious argument. Petitioner has provided no evidence of a general exodus of attorneys from the Vaccine Program. Data available from the Clerk of Court is to the contrary. Of the attorneys who had three or more vaccine cases filed in 1997 or 1998, all but one of those attorneys also filed cases in 2007 or 2008. In addition, eight more attorneys joined the list of those filing three or more cases in 2007 or 2008.

[19] The delay in payment of fees until the case is resolved appears to be common to all cases involving fee-shifting statutes, not simply the Vaccine Act. Under most fee-shifting statutes, attorneys' fees are paid only when that party prevails in the litigation. Under the Vaccine Act, fees are paid in most cases even when compensation is denied, so long as the claim was brought in good faith and upon a reasonable basis. The courts handling vaccine cases have been generous in finding both. As *Avera* indicates that interim fees may be paid in Vaccine Act cases, delays in payment of fees are even less likely to constitute a reason for attorneys to cease handling vaccine litigation.

which to establish a deprivation of a constitutional right. The "conclusory impressions of interested lawyers" does not demonstrate that Vaccine Act litigants are unable to retain qualified counsel, much less that the rates of pay authorized by this court are the cause of any such inability to find representation. *Triplett*, 494 U.S. at 726.

IV. Conclusion.

Petitioner has argued that his attorney is entitled to hourly rates as established by the Laffey Matrix. I conclude that he has failed to demonstrate that the Laffey Matrix represents the "forum rate" for Vaccine Act litigation. Respondent has urged that I exercise my broad discretion and experience in the Vaccine Program to determine a reasonable hourly rate for this forum. Given the posture of this case, I decline to do so at this time. Instead, I offer the parties the opportunity to file additional **focused** evidence and argument to address the following questions:

1. What hourly rates have been negotiated in the last two years between other petitioners' counsel and respondent for attorneys of reasonably comparable skill, experience, and reputation? The names of the other attorneys may be redacted from the evidence submitted, but information concerning years in practice and years in Vaccine Act litigation should be supplied. To the extent that geography may have affected the rates negotiated, the geographic location of the attorney or firm may be identified.

2. In the absence of a negotiated agreement, what hourly rates have recently been requested and paid to Washington, DC area attorneys who have represented Vaccine Act litigants?

3. What is the relevant legal "community" for purposes of determining the forum rate? Is it the "Vaccine Bar" or some geographical construct?

a. If a geographic forum, what are its boundaries?

b. If it is those attorneys representing Vaccine Act petitioners, should the relevant community also reflect compensation by years in vaccine litigation or by some other factor(s)?

Evidence and argument addressing these questions shall be filed **no later than Friday, August 29, 2008. If either party desires to file a response to the information and argument submitted by opposing counsel, that party may do so by no later than Friday, September 12, 2008.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master