

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 05-941V

Filed: February 21, 2008

### TO BE PUBLISHED

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**TOBIAS T. SIMON**, Administrator of  
the Estate of **DEVIN T. SIMON**,  
Deceased,

Petitioner,

v.

SECRETARY OF HEALTH AND  
HUMAN SERVICES,

Respondent.

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\* Reasonable Hourly Rate for  
\* Expert Witness; Reasonable  
\* Number of Hours Spent;  
\* Obligation of Counsel to Monitor Expert  
\* Fees; Factors for Determining Hourly Rates;  
\* Dr. Kinsbourne’s Hourly Rate.  
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*Ronald C. Homer*, Conway, Homer & Chin-Caplan, PC, Boston, MA, for Petitioner.

*Ryan Pyles*, United States Department of Justice, Washington, DC, for Respondent.

### ATTORNEYS’ FEES AND COSTS DECISION<sup>1</sup>

**GOLKIEWICZ**, Chief Special Master

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<sup>1</sup> 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.*

## I

### PROCEDURAL BACKGROUND

On August 26, 2005, the petitioner filed a petition pursuant to the National Vaccine Injury Compensation Program<sup>2</sup> alleging a DTaP vaccine administered to Devin Simon on March 18, 2003, caused his death. A Hearing was held on November 30, 2006, and the court subsequently ruled that the DTaP vaccine caused the death of Devin Simon. Simon v. Sec’y of HHS, No. 05-941V, 2007 WL 1772062 (Fed. Cl. Spec. Mstr. June 1, 2007). A Joint Notice Not to Seek Review was filed by the parties on June 28, 2007. Judgment was entered on July 2, 2007. On June 29, 2007, the petitioner filed an Application For Attorneys’ Fees and Costs. The respondent filed oppositions to petitioner’s application for fees and costs on July 16, 2007 and on September 11, 2007. The respondent’s opposition was limited to the \$500 hourly rate charged by petitioner’s expert, Dr. Marcel Kinsbourne.<sup>3</sup> A Hearing was held on November 2, 2007, after which the court stated, in an off-the-record conversation with the parties, that based primarily upon the testimony of respondent’s witness, Dr. Kinsbourne’s hourly rate of \$500 was appropriate.

The court noted, however, that such protracted disputes over experts’ hourly rates was wasteful of the parties’ and the court’s time, and the limited resources of the Vaccine Program. See Bou v. Sec’y of HHS, No. 04-1329V, 2007 WL 924495 at \*21 (Fed. Cl. Spec. Mstr. March 9, 2007)(“Everyone benefits from eliminating disputes such as this.”). For this reason, **the court invited the parties** to attempt to agree upon the material considerations for determining appropriate rates for future expert witnesses in the Vaccine Program. Such discussions, it was hoped, would lead to agreed upon guidelines that would assist respondent and petitioners in informally resolving similar issues in future cases. In response to the court’s invitation, the parties filed agreed upon “considerations” which should be used in determining reasonable hourly rates for petitioners’ expert witnesses in the Vaccine Program. The undersigned appreciates greatly the parties’ cooperative efforts. After considering the parties’ submission and after considering the entire record of the case, the undersigned offers the following findings and observations for determining an appropriate hourly rate for Dr. Kinsbourne, and for other experts testifying in the Vaccine Program.

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<sup>2</sup> The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 300aa-10 et seq. (West 1991 & supp. 2002) (“Vaccine Act” or the “Act”). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

<sup>3</sup> Respondent did not object to the request for attorneys’ fees or to petitioner’s other costs.

## II

### LEGAL STANDARD

The legal standard for determining a reasonable hourly rate for expert witnesses is superficially quite simple: it is calculated in the same manner as attorneys' fees, the lodestar method- *i.e.* the number of hours reasonably expended multiplied by a reasonable hourly rate. See Crossett v. Sec'y of HHS, No., 89-73V, 1990 WL 293878 (Fed. Cl. Spec. Mstr. Aug. 3, 1990). The special masters award "reasonable" attorney's fees pursuant to 42 U.S.C.A. § 300aa-15(e). 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. Sec'y of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

The reasonableness of the experts' hourly rates must be determined on a case-by-case basis and considering the attendant circumstances of each case. See Isom v. Sec'y of HHS, No. 94-770V, 2001 WL 101459 (Fed. Cl. Spec. Mstr. Jan. 17, 2001). The burden is on the petitioner to demonstrate the reasonableness of the expert's requested hourly rate. In this regard, such determinations of "reasonableness" must be based on evidence provided by the petitioner for a special master's consideration. Such evidence might include information about the witnesses' area of expertise, the education and training required to provide the necessary insight to render an opinion, the prevailing rates for other comparably respected 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 special master. Wilcox v. Sec'y of HHS, No. 90-991V, 997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997); Baker v. Sec'y of HHS, No. 99-653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 25, 2005). In addition to providing evidence to substantiate the experts' rates, the **petitioner must monitor the expert's overall fees to ensure that the fees remain reasonable.** Perreira v. Sec'y of HHS, No. 90-847V, 1992 WL 164436, at \*4 (Cl. Ct. Spec. Mstr. June 12, 1992), *aff'd* 33 Fed. 3d 1375 (Fed. Cir. 1994). ("This court has continuously warned counsel of their obligation to monitor expert fees.") (citations omitted). In other words, while the obligation to ensure that a petitioner's expert fees are reasonable is one that is shared by respondent, the special master, and the petitioner, the initial and primary responsibility is shouldered by petitioner.

### III

#### THE PARTIES AGREED UPON GENERAL CONSIDERATIONS IN DETERMINING EXPERT WITNESS HOURLY RATES

What a reasonable rate is for an expert has proven a somewhat vexing issue over the history of the Vaccine Program. See Bou v. Sec'y of HHS, No. 04-1329V, 2007 WL 924495 (Fed. Cl. Spec. Mstr. March 9, 2007) (The undersigned provides an extensive discussion on determining an expert's rate.). Petitioners must have access to high quality experts. Avera v. Sec'y of Dept. of Health and Human Servs., --- F.3d ---, 2008 WL 313927, at \*7 (Fed. Cir. 2008) (“[O]ne of the underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims.”). This is especially true given the declining relevance of the Vaccine Injury Table and the increasing number of cases where petitioners must prove that the vaccine in-fact caused the alleged injury. On the other-hand, respondent is obliged to protect the fiscal integrity of the Vaccine Trust Fund, the source of compensation payments. An obvious and natural tension is built into those respective roles. In addition, the court acknowledges based upon years of experience, that there is a wide range of reasonable hourly rates for expert witnesses in the Vaccine Program. Thus, in determining where a particular expert's rate fits in this range, it is important for each party to appreciate and understand the other party's respective concerns.

The ultimate goal is to balance the parties interests so that the party retaining the expert is not “unduly hampered in [its] efforts to attract competent experts” while the opposing party is not “unfairly burdened by excessive ransoms which provide windfalls for the [opposing side's] experts.”

Cabana v. Forcier, 200 F.R.D. 9, 16 (D. Mass. 2001)(quoting Anthony v. Abbott Lab., 106 F.R.D. 461, 465 (D. RI 1985)). Hopefully, the **parties' extensive efforts** in agreeing upon factors to be considered in determining a reasonable hourly rate for an expert will provide other counsel guidance in contracting the services of expert witnesses and thus minimizing future litigation over this issue.

In the case at hand, respondent presented the testimony of Dr. Julian Loube on the issue of reasonable hourly rates for medical experts.<sup>4</sup> Dr. Loube is a physician who for the past 20 years has provided medical/legal consulting through a company that he founded. Dr. Loube

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<sup>4</sup> Dr. Loube's affidavit filed in Bou was found “compelling” in determining the expert's hourly rate. Bou v. Sec'y of HHS, No. 04-1329V, 2007 WL 924495 at \*11 (Fed. Cl. Spec. Mstr. March 9, 2007).

described his functions as two-fold: “[r]eviewing medial records and helping our clients to understand their legal implications, and the other . . . is identifying and recruiting medical experts to participate in legally related medicine.” Transcript of November 2, 2007 Hearing at 61 (Tr. at \_\_\_). It is Dr. Loube’s recruitment of experts that is of interest in this case. The undersigned was extremely impressed with Dr. Loube’s experience and testimony on the issue of experts’ hourly rates. In fact, it was Dr. Loube’s testimony, as will be discussed below, that supports Dr. Kinsbourne’s \$500 hourly rate. Dr. Loube testified that his company has a database of approximately 3,000 experts and a client base of about 1,400 law firms, hospitals and governments. *Id.* at 61-62. In addition, in preparation for his testimony, Dr. Loube testified that he reviewed his database and contacted a number of pediatric neurologists to confirm the current hourly rates being charged. Tr. at 65. The undersigned found Dr. Loube to be very helpful and will utilize his testimony in resolving this dispute and also hopefully in guiding counsel in future cases.<sup>5</sup>

Based upon Dr. Loube’s testimony, and the parties’ extensive experience with medical experts testifying in the Program, **the parties agreed upon** the following factors to be considered in determining an appropriate hourly rate. In sum, the following factors should be considered relevant in determining the “reasonableness” of a petitioner’s expert’s hourly rate:

- **The expert’s education, training, and experience**
  - The expert’s academic affiliations
  - The expert’s publications
  - The expert’s experience in the Vaccine Program as indicative of an ability to efficiently utilize time
  
- **The expert’s area of expertise**
  - The expert’s board certifications
  - The prevailing market rates for comparable experts
  - Rates traditionally charged by comparable experts in the Program
  
- **The nature, quality and complexity of the information provided**

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<sup>5</sup> Petitioner provided evidence in support of Dr. Kinsbourne’s requested rate through the testimony of Dr. Kinsbourne, as well as various documentation. While petitioner’s evidence was helpful, the undersigned found Dr. Loube’s testimony most persuasive on the issue of appropriate hourly rates for expert witnesses. Thus, the undersigned does not discuss petitioner’s evidence in any detail.

- **The expert's efficient use of time**
  - The cost of living in the expert's geographic area<sup>6</sup>
  - The rate petitioner's counsel has contracted to pay the expert, but only if the rate were based on a consideration of the other factors herein
- **Past Vaccine Program decisions**
  - With regard to individual cases, the ability of the expert to specifically account for time spent
- **Any other factor likely to assist the special master.**

The parties pointed out that in all cases, the involved counsel are strongly advised to consider all of the factors herein listed and to agree upon mutually acceptable hourly rates. To avoid misunderstandings and protracted litigation of expert rate issues, counsel are encouraged to discuss and agree upon an expert's hourly rate at the time the expert is retained, rather than when the petitioner applies for fees and costs.

If petitioner is concerned that the expert's requested rate may exceed accepted levels typically encountered in the Program, or if petitioner expects that an expert's rate will deviate from the past experience the parties have had regarding the same expert, then petitioner's counsel should inform respondent as early as possible. If the parties are unable to agree upon an expert's rate, or if the parties expect a conflict regarding expert fees for a given case, then the parties should request an early status conference with the assigned special master as the best method of expeditiously resolving the issue. See Isom v. Sec'y of HHS, No. 94-770V, 2001 WL 101459 at \*4 (Fed. Cl. Spec. Mstr. Jan. 17, 2001) (“[a]ny aberrant or unforeseen expense should be brought to the Court's attention before they are incurred.”).

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<sup>6</sup> Dr. Loube recognized that there may be some variation in expert rates based upon geographic location, but stated that “there really isn't much difference.” Tr. at 73.

Absent an agreement by the parties, the special master will be required to issue a decision as to an appropriate hourly rate. In so doing, the special master will consider all of the evidence submitted by the parties, and all of the relevant factors described herein. In addition, the parties recognize and agree that the special master can and should rely upon his or her own personal experience in determining reasonable rates. A special master has broad discretion to do so. Wasson v. Sec’y of HHS, 24 Cl. Ct. 82, 86 (1991), aff’d 988 F. 2d 131 (Fed Cir. 1993).<sup>7</sup>

#### IV

#### The Court’s Guidance

**In addition to the factors the parties agree upon**, the undersigned was highly persuaded by a number of additional observations Dr. Loube noted in considering the strength and credibility of an expert, which in turn impacts the expert’s hourly rate. Accordingly, the undersigned finds that the additional following factors should be considered by counsel in procuring the services of an appropriate expert and negotiating a reasonable fee for those expert services.

- - The expert should not derive a significant portion of their income from testifying. Dr. Loube saw this as an undesirable characteristic that lowered one’s value, since the expert could be perceived as having developed a particular bias or viewpoint. Tr. at 74-75. Dr. Loube explained from his personal observations that either petitioners’ or respondent’s experts who derive a significant portion of their income from testifying “tend to become aggressive in finding things about the case that they can support in order to keep their employer, the attorney, happy.” Id. at 74. Accordingly, the expert’s credibility as an expert “declines.” Id. at 72.

- - The expert should have significant clinical experience. Dr. Loube strongly advises his clients “that they would be better served by a doctor who is actively involved in the practice area in which the case is taking place.” Tr. at 68. He stated “[y]ou have to be able to understand all the clinical issues and especially the technology, and understand the scientific issues.” Id. at 71. In fact, Dr. Loube noted that a number of states have enacted laws requiring experts to be actively involved in the area of practice covered by their testimony. Id. at 69.

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<sup>7</sup> The factors courts have considered in determining whether an expert’s fee is reasonable have included the following: (1) the expert witness’ area of expertise; (2) the education and training required; (3) the prevailing rates for comparable experts; (4) the nature, quality and complexity of the discovery provided; (5) the cost of living in the relevant community; (6) the fee being charged by the expert to the party who retained him; (7) fees traditionally charged by the expert on related matters; and (8) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26. See e.g., Cabana v. Forcier, 200 F.R.D. at 15-16 and Brew v. Ferraro, 1998 WL 34058048 at \*3.

- - Dr. Loube testified that the more expertise an expert has in a particular field, the better equipped that expert ought to be in expeditiously addressing the issues in a case with a minimum of research. The expert should not have to engage in extensive research. Dr. Loube noted that the expert “should know the field [testifying about] and so there’s no need” for extensive research. Id. at 79. He noted that there may be a specific reference requiring an hour to review, but 10-15 hours of research is unwarranted. Id. Specifically regarding testifying in the Vaccine Program, Dr. Loube noted that unless there is a change in available research or science, the expert’s research should be minimal because “you just pick up where you left off last time.” Tr. at 133.

- - Providing consulting services to an attorney is **not** an expert service, and should not be compensated at the same rate. Dr. Loube contrasted advising counsel on case strategy or preparing other experts for testifying with “making the evaluation of a patient and coming to a conclusion.” Tr. at 83. The former are consulting services which do not utilize the expert’s specialized skills and thus should be compensated at a lower rate. Dr. Loube explained why the expert should be paid more when utilizing their specialized knowledge and skills as follows:

a medical expert has years of training, years [of] experience with patient care, something that gives him a special expertise that can’t be duplicated by anyone other than [with] that experience and training, and that is required to [opine] on whether causation is there. In other words, to review the symptoms in a disease of a child . . . and offer an opinion as to whether there exists a [causal] relationship.

Tr. at 125. Case-related strategic sessions with counsel do not utilize this special knowledge and experience. Id. at 81-3.

- - Dr. Loube stated that the “fairest” way of compensating the expert is to compensate with varying rates depending upon the nature of the work performed. Tr. at 123. Specifically, Dr. Loube noted that consulting is not performing as an expert and should not be compensated as such. On the other-hand, research and testimony is performing as an expert and commands the expert’s rate. Dr. Loube stated for example that, when he testifies as an expert, he charges \$250 per hour for consulting with lawyers and \$400 per hour for testimony.

- - Dr. Loube stated that he generally recommends physicians charge \$350 an hour for reviewing medical records, and \$450 an hour for in-court testimony. He also noted he does not recommend experts that charge over \$700 an hour. Resp. Ex. G at 3-4; Tr. at 100-101. He also stated that “I generally try my best to use or to recommend experts who charge less than \$500 an hour.” Tr. at 97-8. However, Dr. Loube recognized that, on occasion, the most economical expert may charge more, stating for example that “I have recommended on occasion experts who charge \$900 an hour because I know that they never take more than an hour to review a case, and



so our client is only going to pay \$900.” *Id.* at 78-9. Clearly, determining an appropriate hourly rate is **not a science**, but must balance a number of factors, including the expert’s experience, credentials and the overall economies of less time spent by a more expensive, but vastly superior expert. The bottom-line reasonableness of the total fees of the expert should not be lost on the parties or the court.

- - Regarding a reasonable number of hours spent on a case, Dr. Loube testified that the average case involves about **four** hours of record review (dependent upon the size of the file); **one** hour of consultation with counsel; and **one** hour to prepare an expert report. If there is a deposition, there would be **one-two** hours of preparation with the attorney and **two** hours for reviewing the medical records and **four** hours (one-half day) for the deposition. If the case goes to trial, there would be the same **two** hours of preparation with counsel, the same **two** hours reviewing the file, plus the time at trial. For the average case, Dr. Loube found about **25** hours to be reasonable. *Tr.* at 130-131. For comparative purposes, excluding time spent post-trial, Dr. Kinsbourne billed for 24 hours in this case.

- - Regarding the issue of an appropriate amount petitioner should pay an expert who must travel to give hearing and deposition testimony, Dr. Loube advised: “For in-court testimony or depositions that require travel, I recommend they charge a minimum of ten hours, as in my experience these services generally require the physician to block a full day of time. For local testimony such as depositions, I recommend that physicians charge a half day.” Accordingly, Dr. Loube advises the medical experts who bill for block time testifying, that they should not then charge for their travel time, but should bill for their actual travel expenses. *Resp. Ex. G* at 4; *Tr.* at 101-102. Dr. Loube’s testimony on this issue is offered as a comparative reference, since the practice over the past 20 years in the Vaccine Program has been to compensate the expert for actual time spent traveling and testifying.

## V

### Determining Dr. Kinsbourne’s Hourly Rate

First, the court emphasizes, the hourly rate awarded to Dr. Kinsbourne in this case is limited to Dr. Kinsbourne, and is not necessarily indicative of other expert’s hourly rates. In this regard, while respondent does not believe any expert in the Vaccine Program should typically receive \$500 per hour, **the parties and the court** do agree that Dr. Kinsbourne’s experience, qualifications, publications, academic affiliations, and active participation in Vaccine Program cases since its inception (insofar as knowledge should result in more efficient use of an expert’s time), **entitle him to charge and receive a higher hourly rate than most petitioners’ experts.**

As noted by the parties, Dr. Kinsbourne's *curriculum vitae* reflects a long history of experience in neurology, having begun practice as a physician in England in 1955, following medical education at Oxford University, England. Soon thereafter, his *curriculum vitae* reflects work in the field of neurology, namely as Senior House Officer, Neurosurgery, in London between 1956-57. Among many distinguished professional appointments, Dr. Kinsbourne served as an associate professor in pediatrics and in neurology from 1967-1974 at Duke University Medical Center; director of the Behavioral Neurology Department, Eunice Kennedy Shriver Center, from 1981-91; lecturer in neurology at Harvard Medical School from 1981-91; and has held numerous professorships over the years. Dr. Kinsbourne has authored or co-authored over four hundred articles and edited approximately eight books. He has earned numerous awards and honors and has both previously and currently served on many neurology-related editorial boards. Dr. Kinsbourne currently, *inter alia*, teaches courses in the field of neuropsychology.

It must be noted that in determining that Dr. Kinsbourne's hourly rate is reasonable, the parties agreed that consideration should be given that Dr. Kinsbourne has testified in the National Vaccine Injury Compensation Program from its inception. Depending on the case, Dr. Kinsbourne has been found to be credible, but also has been criticized over the years. Compare, e.g., Asbury v. Sec'y of HHS, No. 99-682V (Fed. Cl. Spec. Mstr. January 30, 2008) (unpublished) (Dr. Kinsbourne found "not credible.") available at <http://www.uscfc.uscourts.gov/unpublished%20decisions%20osm.2008.htm>., with Lindsey v. Sec'y of HHS, No. 90-2586V, 1995 WL 715513, at \*1. (Fed. Cl. Spec. Mstr. Nov. 21, 1995) ("one of the most credible experts in the field of vaccine injuries"). Nevertheless, Dr. Kinsbourne frequently testifies in cases involving similar alleged injuries. He has testified in numerous cases, in which the subject matter, like here, concerned seizures. Therefore, Dr. Kinsbourne has the expertise to draw upon past work in the program, and has utilized that expertise effectively, to **minimize the number of hours that otherwise would be necessary to work on a particular case**. As Dr. Loube testified, such economies can justify a higher hourly rate. However, this imputed efficiency of time use as one consideration warranting Dr. Kinsbourne's rate must be borne out by the number of hours billed. This requires detailed and precise accounting of how time is spent, so that respondent and the court can review the reasonableness of Dr. Kinsbourne's, or any expert's, overall bill.

Having considered Dr. Kinsbourne's testimony, Dr. Loube's testimony and the parties' agreed upon considerations, the undersigned finds that Dr. Kinsbourne, in appropriate circumstances - that is where Dr. Kinsbourne was found credible and provided very good expert services - should be compensated at \$500 per hour for services provided as a medical expert (e.g., reviewing medical records, testifying and researching). Dr. Kinsbourne's somewhat unique qualifications and 20-year participation in the Vaccine Program overcome the two primary criticisms Dr. Loube had of Dr. Kinsbourne as an expert, and other experts that share similar credentials. While Dr. Loube testified, after reviewing Dr. Kinsbourne's

credentials and having listened to his testimony, that “Dr. Kinsbourne has outstanding educational qualifications, a distinguished career. He is, I think, probably could give excellent causation testimony in some cases that maybe weren’t as tainted by frequent testimony as these vaccine cases.” Tr. at 85. However, Dr. Loubé would not recommend Dr. Kinsbourne as an expert “at this time in his career” because his lack of an active clinical practice and the fact that he derives 60% of his income from testifying. However, with these two significant reservations, Dr. Loubé opined that Dr. Kinsbourne should receive \$500 per hour for reviewing medical records and testifying - efforts which require his expertise as a pediatric neurologist. See Tr. at 124, 135. The undersigned notes, as the parties recognized, it is the combination of Dr. Kinsbourne’s knowledge and efficiency that supports this high hourly rate. As Dr. Loubé noted, the economics of an expert like Dr. Kinsbourne make the high hourly rate reasonable. See Tr. at 78-79.

The undersigned agrees with Dr. Loubé that the competent medical expert should be expeditious with his or her time as “you don’t expect an expert who’s reviewing a medical record and offering an opinion to spend hours and hours doing that.” Tr. at 128. You expect the expert “has already reviewed the science and he has an understanding of it and he has reached an opinion and now he’s just repeating it on every case.” Id. In addition, the undersigned is persuaded that **the expert hourly rate is deserved only for those hours spent as an expert.** Thus, Dr. Kinsbourne’s billing request, as that of all experts, will be scrutinized for the efficient use of time and for time spent and required as an expert. That is, the expectation will be that the expert will bring to the case a reservoir of foundational knowledge that will not be refilled on the billable time submitted to the Program. It is understood that some vaccine cases raise rather unique issues requiring substantial research, that is acceptable. However, foundational research or research of the same issue in repeated cases will be found unacceptable, and not compensated.

The undersigned also finds that for research and consulting, as opposed to providing medical expert services, Dr. Kinsbourne should be paid a lesser fee. Tr. at 124-25. The undersigned agrees with Dr. Loubé that an expert providing a medical opinion and offering testimony performs a task of a different nature than one retained as a consultant to petitioner’s counsel. The former function is at the heart of what is necessarily required of a medical expert; utilizing their vast experience and knowledge in evaluating the complete medical record, offering an opinion based upon that evaluation, and ultimately assisting the court by and through the expert’s testimony. **Unrelated services provided to counsel, such as consulting on strategy, selection of experts, or trial tactics, while legitimate and even valuable services, are not the services of a medical expert and should not be compensated as such.** See Kantor v. Sec’y of HHS, No. 01-679V, 2007 WL 132378 (Fed. Cl. Spec. Mstr. Mar. 21, 2007) (awarding a lower hourly rate for services not requiring a particularized expertise). Thus, time spent with consulting with counsel, as opposed to time spent utilizing the specialized knowledge and experience which justifies an expert’s hourly rate, will be scrutinized closely for its necessity and reasonableness, and if allowed will be

compensated at a lower rate. Dr. Loube indicated that he is paid \$250 per hour for these lesser services. Id. Considering the record for Dr. Kinsbourne, the undersigned will award \$300 per hour for allowable time spent in a non-expert capacity.

In the instant case, Dr. Kinsbourne billed petitioner a total of 31.75 hours at \$500 an hour for time spent on “services performed” (as opposed to travel time) prior to January 27, 2007. Petitioner’s Application for Fees and Costs, Tab B at 12. However, the undersigned notes that with the exception of 7.75 hours<sup>8</sup> billed for “post hearing conferences, literature review and report” these services were performed prior to December 2006.<sup>9</sup> Id. Dr. Kinsbourne testified he raised his rate from \$300 an hour to \$500 an hour in December of 2006. Tr. at 47-49. Accordingly, the undersigned will award Dr. Kinsbourne \$300 an hour for services performed prior to December of 2006, and \$500 an hour for services performed as a “medical expert” after December of 2006. Dr. Kinsbourne billed petitioner a total of 7.5 hours at \$500 an hour for “services performed” subsequent to January 27, 2007. Petitioner’s Supplemental Application for Fees and Costs, Tab B at 3. Respondent, “specifically objects to a rate of \$500/hour for preparation and attendance at a Hearing in which the issue was determining appropriate fees for Dr. Kinsbourne. The Hearing required no knowledge of medicine that would ordinarily justify Dr. Kinsbourne’s rate, whatever that rate might be.” Respondent’s Opposition to Petitioner’s Supplemental Application for Fees and Costs at 1. Respondent suggests the undersigned award Dr. Kinsbourne “a rate equivalent to one-half (½) Dr. Kinsbourne’s rate for medical testimony.” Id. at 1-2. The undersigned agrees with respondent. The 7.5 hours spent by Dr. Kinsbourne for preparation and attendance at the fees and costs Hearing in this matter was not time spent acting as a “medical expert,” but rather can be analyzed as time spent as a consultant, discussed supra at 7. Therefore, the undersigned awards petitioner \$300 an hour to compensate Dr. Kinsbourne for those 7.5 hours.

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<sup>8</sup> The undersigned has reviewed the record and finds these 7.75 hours were spent performing services as a medical expert in December of 2007, and therefore the rate \$500 an hour is appropriate to award petitioner to compensate Dr. Kinsbourne for such time.

<sup>9</sup> Prior to December 2006, Dr. Kinsbourne charged \$300 per hour. Tr. at 46. Dr. Kinsbourne testified that he was under the impression that the \$300 was a fixed rate established by the court. Id. at 47, 51. He “updated” the rate in December, 2006. Id. at 47. However, during this period of billing \$300 for work in the Vaccine Program, for at least a period of 10 years, Dr. Kinsbourne billed \$500 per hour for his work in the civil arena. Id. at 52. In civil litigation, his testimony as an expert in neurology has never been rejected, nor has his hourly rate of \$500. Id. at 52, 57. Dr. Loube testified that it would be “unethical” for Dr. Kinsbourne to charge different rates for litigation in different fora. Id. at 135. Thus, Dr. Kinsbourne’s increase from \$300 to \$500 per hour, which at first blush appears exorbitant, was warranted.

## VI

### CONCLUSION

The parties in this case devoted much time and effort in an attempt to provide helpful guidance to counsel for petitioners and respondent on appropriate hourly rates for experts. The undersigned appreciates greatly those good efforts, and is hopeful that those efforts, documented herein, will reduce greatly future disputes over experts' hourly rates.

After a thorough review of petitioner's fee application and the respondent's objections, the petitioner is awarded \$48,830.55 in attorneys' fees and \$14,898.55 in attorneys' costs. The award shall be made payable jointly to the petitioner and his attorneys. In addition, petitioner is awarded \$380.85 in costs. That award shall be made payable solely to her. Accordingly, pursuant to Vaccine Rule 13, the petitioner is hereby awarded a total of \$64,109.95 in attorneys' fees and costs. 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.<sup>10</sup>

**IT IS SO ORDERED.**

s/ Gary J. Golkiewicz  
Gary J. Golkiewicz  
Chief Special Master

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<sup>10</sup> 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 U.S. Court of Federal Claims judge.