

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**OFFICE OF SPECIAL MASTERS**

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SHEMEKA N. RAMSEY, Personal Representative of the Estate of DEMARIUS JAMAR RAMSEY,	*	No. 07-21V Special Master Christian J. Moran
Petitioner,	*	Filed: October 7, 2009*
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Attorneys' fees and costs; reasonable hourly rates; attorney with no experience in Vaccine Program
Respondent.	*	

\* \* \* \* \*

*Ronald C. Homer*, Conway, Homer & Chin-Caplan, P.C., Boston, MA., for petitioner;  
*Althea Walker Davis*, United States Dep't of Justice, Washington, D.C., for respondent.

**PUBLISHED DECISION AWARDING ATTORNEYS' FEES AND COSTS\*\***

Shemeka N. Ramsey, as the personal representative of the estate of Demarius Ramsey, originally sought compensation for the death of her son, Demarius Ramsey. Ms. Ramsey and

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\* The decision was originally issued on June 29, 2009, but then withdrawn on July 27, 2009. The decision is being issued again today. For reasons explained in an order, which is being filed concurrently, today's decision does not change the June 29, 2009 decision.

\*\* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

respondent agreed to resolve the case and the estate received compensation. Decision, filed May 7, 2008.

Ms. Ramsey now seeks an award for her attorneys' fees and costs. After considering the material, including respondent's objections, **Ms. Ramsey is awarded \$57,661.65.**

## I. Procedural History

The procedural history about the attorneys' fees and costs is somewhat lengthier than usual. The parties disagreed about some portions of the request. After the parties reached an impasse, the process of presenting Ms. Ramsey's request for attorneys' fees and costs expanded.

On May 9, 2008, Ms. Ramsey filed an application for an award of her attorneys' fees and costs. Ms. Ramsey sought approximately \$60,000 in attorneys' fees and approximately \$2,700 in costs. Ms. Ramsey's current law firm, Conway, Homer & Chin-Caplan, P.C., sought approximately \$20,000 in attorneys' fees. Ms. Ramsey's original law firm, Joe Griffith Law Firm LLC, sought approximately \$40,000 in attorneys' fees. Apparently, respondent objected informally to some items.

On May 30, 2008, Ms. Ramsey filed an amended application. The amount requested in attorneys' fees decreased from approximately \$60,000 to approximately \$54,000. The decrease is reflected in the amount requested by Ms. Ramsey's original law firm, the Joe Griffith Law Firm, not Ms. Ramsey's current law firm. The amended application also decreased the amount of costs by \$200, again a cost incurred by the Joe Griffith Law Firm. The amended application stated that respondent did not object to the requested amounts.

This amended application was neither approved nor rejected. An order, filed June 5, 2008, requested information, primarily about background of the two attorneys from the Joe Griffith Law Firm who had requested attorneys' fees. As of June 5, 2008, the record contained no information about the attorneys from the Joe Griffith Law Firm. Therefore, a review of the reasonableness of the requested amount, even at an amount reduced from the original amount, was not possible. See Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 318 (2008) (stating that "The Vaccine Act compels each special master to determine independently whether a particular request is reasonable. This obligation is not suspended – nor the sound discretion and common sense that underlie it rendered inoperable – merely because respondent failed to object to a particular fee item.").

Ms. Ramsey did not provide the requested information immediately. Rather, Ms. Ramsey "respectfully withdraw[ed] her settlement agreement."<sup>1</sup> Ms. Ramsey's decision seems to be based

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<sup>1</sup> To be precise, respondent did not "agree" to the amended request for \$54,000 in attorneys' fees and costs. Respondent chose "not to object."

upon the mistaken understanding that the June 5, 2008 order “rejected” the parties’ agreement. Pet’r Resp., filed July 9, 2008, at 5.

Because there was no longer a proposed award acceptable to both parties, a briefing schedule was established. Order, filed July 21, 2008. Respondent filed an objection to Ms. Ramsey’s application for attorneys’ fees and costs. Among other items, respondent requested additional information to justify the hourly rate requested by attorneys at Ms. Ramsey’s original firm, the Joe Griffith Law Firm. Resp’t Resp., filed Aug. 15, 2008, at 5.

Ms. Ramsey filed a reply, presenting the additional information requested by respondent. Notably, Ms. Ramsey filed information about attorneys from the Joe Griffith Law Firm. Exhibit 18, exhibit 20. The June 5, 2008 order had requested this information. Ms. Ramsey also stated that she intended to file a supplemental application for attorneys’ fees and costs incurred after the May 9, 2008 application. Pet’r Reply, filed Sep. 5, 2008, at 9 n.9.

In accord with her request, Ms. Ramsey filed a supplemental motion for attorneys’ fees and costs on September 23, 2008. Ms. Ramsey requested approximately \$16,000 in additional attorneys’ fees (no additional costs). Thus, the total amount request was approximately \$76,000, which is \$60,000 (the original request) plus \$16,000 (the supplemental request).

This supplemental motion generated a response from respondent. To some extent, the additional information provided in Ms. Ramsey’s September 5, 2008 reply eliminated some of respondent’s concerns. For other points, respondent maintained her objection. Additionally, respondent objected to one item in Ms. Ramsey’s supplemental motion for attorneys’ fees and costs, the hourly rate for a new associate at Conway, Homer, & Chin-Caplan, P.C., Amy Fashano. Resp’t Resp., filed Oct. 6, 2008, at 12.

The objection about Ms. Fashano’s hourly rate potentially carried implications for other cases. Because the Conway firm represents many petitioners in the Vaccine Program, it has reached an understanding with the United States Department of Justice about hourly rates to which the respondent will not object. This general understanding did not include Ms. Fashano because she graduated from law school in 2007. Thus, this case seemed to offer the possibility of litigation to resolve the reasonableness of Ms. Fashano’s hourly rates.

However, after three status conferences, respondent did not object to an hourly rate of \$200 for Ms. Fashano. Respondent maintained her other objections. Resp’t Status Rep’t, filed Dec. 22, 2008.

Respondent’s objections fall into several categories. They include (1) objections to the fees and costs billed by Conway, Homer & Chin-Caplan, and (2) and objections to the attorneys’ fees and costs billed for attorneys Griffith and DeLuca of the Joe Griffith Law Firm.

## **II. Attorneys' Fees**

### **A. Introduction**

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. Like other litigation allowing a shift in attorneys' fees and costs, awards for attorneys' fees and costs in the Vaccine Program must be "reasonable." 42 U.S.C. § 300aa-15(e)(1) (2006).

When a party seeks an award of attorneys' fees, the fee-applicant bears the burden of showing the reasonableness of the request. "The burden is not for the court to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero. In the process and especially in the end result, [trial] courts must continue to be accorded wide latitude." Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986).<sup>2</sup>

Reasonable attorneys' fees are determined using a two-part process. The initial determination uses the lodestar method – "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The second step is adjusting the lodestar calculation upward or downward. Id. at 1348.

### **B. Conway, Homer, & Chin-Caplan, P.C.**

Ms. Ramsey is currently represented by the firm of Conway, Homer, & Chin-Caplan, P.C. This firm primarily represented her when she was seeking compensation.

#### **1. Reasonable Hourly Rate**

For one aspect of the lodestar determination, the reasonable hourly rate, the parties generally do not dispute the reasonable hourly rate for attorneys in this law firm. See Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293, 304 (2003) (Rupert IV) (setting hourly rates for some attorneys in this law firm).

Ms. Ramsey's request for attorneys' fees became complicated when Ms. Ramsey sought compensation for work performed by Amy Fashano. Ms. Fashano graduated from law school in 2007. Thus, her reasonable hourly rate has not been the subject of previous negotiations. Initially, Ms. Ramsey requested \$225 per hour. Pet'r Supp. Appl., filed Sept. 23, 2008, at 3-7. Respondent objected to the proposed hourly rate. Resp't Resp., filed Oct. 6, 2008, at 12.

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<sup>2</sup> Although Mares did not interpret the attorneys' fee provision of the Vaccine Act, fee-shifting statutes are interpreted similarly. Avera, 515 F.3d at 1348.

The parties were urged to discuss this issue. Eventually, respondent stated that she would not object to an hourly rate of \$200 per hour. Resp't Status Rep't, filed Dec. 22, 2008.

This rate is reasonable for Ms. Fashano. Ms. Fashano possesses several qualifications that entitle her to an hourly rate that may seem relatively high for new attorneys. First, Ms. Fashano practices in Boston, Massachusetts, which is a fairly expensive area. Second, Ms. Fashano worked, as a paralegal, for Conway, Homer, & Chin-Caplan, P.C. while she was attending law school. Third, she is working with attorneys who are very experienced in the Vaccine Program. The second and third factors mean that Ms. Fashano possesses more knowledge about the Vaccine Program than an attorney who graduated from law school recently. Thus, the \$200 per hour rate for Ms. Fashano is accepted.

Ms. Ramsey originally sought compensation for Ms. Fashano's 49.6 hours of work at \$225 per hour. Pet'r Supp. Appl., filed Sept. 23, 2008, at 6. Ms. Ramsey has agreed to lower this rate to \$200 per hour. Thus, Ms. Ramsey's fee request is reduced by \$1,240 (\$25 \* 49.6).

## **2. Reasonable Number of Hours**

The second component of the lodestar formula is to determine the reasonable number of hours. In this regard, respondent challenged the reasonableness of some activities performed by Thao Ho, an attorney who was formerly (but not currently) associated with Conway, Homer, & Chin-Caplan, P.C. Resp't Resp., filed Aug. 15, 2008, at 4. Ms. Ramsey provided additional information to support Ms. Ho's entries. Pet'r Reply, filed Sept. 5, 2008, at 4-6. After reviewing the additional material, respondent withdrew her objection to some entries, but maintained the objection to others, which total 9.6 hours. Resp't Resp., filed Oct. 6, 2008, at 1-3.

Respondent's remaining objections are well founded. Ms. Ramsey has not met her burden of establishing the reasonableness of Ms. Ho's work. Ms. Ho stated that she spent 4.7 hours reviewing medical literature and talking to Dr. Shane, and an additional 2.7 hours for reviewing medical literature. Pet'r Appl., Tab A, at pdf page 8 (entries for Aug. 14, 2007 and Aug. 20, 2007). Ms. Ho previously spent time reviewing medical literature. See entry for July 16, 2007. Very few medical articles were filed. Thus, spending additional time is duplicative and, therefore, unreasonable. In addition, Ms. Ho recorded 2.2 hours for completing expert report and medical literature and conferring with Mr. Conway on August 29, 2007. Ms. Ramsey attempted to defend this entry by stating that this work was "in preparation for the upcoming hearing." Pet'r Reply, filed Sept. 5, 2008, at 6. However, Ms. Ho did not say that she was preparing for an upcoming hearing and no hearing was scheduled. Thus, the amount of time spent was unreasonable. Consequently, Ms. Ramsey is not entitled to compensation for 9.6 hours of Ms. Ho's work, for which Ms. Ho billed at \$255 per hour. The amount of this deduction is \$2,448 (\$255 \* 9.6).

<b>Summary for Attorneys' Fees for Conway, Homer &amp; Chin-Caplan, P.C.</b>	
Item	Amount
Amount of Original Request	\$19,342.50
Additional amount in Supplemental Request	\$15,818.00
Adjustment for Ms. Ho's hours	(\$2,448.00)
Adjustment for Ms. Fashano's hourly rate	(\$1,240.00)
<b>TOTAL</b>	<b>\$31,472.50</b>

Therefore, Ms. Ramsey is awarded **\$31,472.50** in attorneys' fees for work performed by Conway, Homer, & Chin-Caplan, P.C.

### C. Attorneys' Fees for the Joe Griffith Law Firm, LLC

Ms. Ramsey was originally represented by the Joe Griffith Law Firm, LLC. Two attorneys who worked on Ms. Ramsey's case were Joe Griffith and Christy M. DeLuca.<sup>3</sup> Pet'r Appl., filed May 9, 2008, Tab C. They worked on Ms. Ramsey's case from March 2005 through March 2007. Pet'r Appl., Tab C at 23-26. Ms. Ramsey's case appears to be the only case in the Vaccine Program in which either Mr. Griffith or Ms. DeLuca represented a petitioner.

Ms. Ramsey did not file any information about the background of Mr. Griffith or Ms. DeLuca with her application initially. See Pet'r Appl., Tab C. Mr. Griffith requested a relatively high hourly rate, \$300 per hour, for 21.625 hours. Ms. DeLuca also sought \$300 per hour. Ms. DeLuca sought compensation for 109.75 hours. Id. The total request for attorneys' fees was initially \$39,412.50. This amount was approximately twice the amount originally sought by Conway, Homer, & Chin-Caplan, P.C. Pet'r Appl. at 1. After discussions between the parties, Ms. Ramsey agreed to reduce the amount requested for Joe Griffith Law Firm, LLC by approximately \$6,000. Pet'r Supp. Appl., filed May 30, 2008, at 1.

The lack of information about Mr. Griffith and Ms. DeLuca caused the initial delay in awarding Ms. Ramsey her attorneys' fees and costs. The undersigned requested some information to support the requested hourly rates. Order, filed June 5, 2008. Ms. Ramsey chose to withdraw the supplemental application and briefing followed.

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<sup>3</sup> Mr. Griffith's affidavit mentioned that another attorney, Erin Cohen, also worked on this case, but compensation was not requested for her time. Exhibit 18.

## **1. Reasonable Hourly Rate**

The hourly rate is “‘the prevailing market rate,’ defined as the rate ‘prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.’” Avera, 515 at 1348 (Fed. Cir. 2008), quoting Blum, 465 U.S. at 896 n. 11.

Determining the reasonable hourly rate can be difficult because there is relatively little guidance about how to determine what the prevailing market rate is for similar services. A determination about the prevailing market rate “cannot be made with the same certainty as ascertaining the value of a futures contract for pork bellies or wheat on a given day.” Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1300 (11th Cir. 1988). Furthermore, what types of work constitute “similar services” are disputed. There appears to be only one appellate case determining what work is similar to the work performed by attorneys representing petitioners in the Vaccine Program, Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293, 304 (2003) (Rupert IV). Rupert IV is not binding upon special masters, except as an order on remand. Although not binding authority, Rupert IV is entitled to consideration. See Barber v. Sec'y of Health & Human Servs., No. 99-434V, 2008 WL 4145653, at \*5-11 (Fed. Cl. Spec. Mstr. Aug. 21, 2008), citing Rupert IV.

### **a. Mr. Griffith**

In reply, Ms. Ramsey presented new information and argument. Ms. Ramsey argued that Mr. Griffith and Ms. DeLuca are entitled to be compensated at the “forum rate,” meaning the hourly rate paid to attorneys practicing in Washington, D.C. Pet'r Reply, filed Sep. 5, 2008, at 8-10, citing Avera, 515 F.3d at 1348. However, it appears that Mr. Griffith was not actually requesting compensation pursuant to the adjusted Laffey matrix. “In these circumstances, his requested rate of \$300 per hour for his work on this case in the Vaccine Program is remarkably reasonable. It is approximately \$300 below the forum rate as established under the Adjusted Laffey Matrix.” Pet'r Reply at 10. Ms. Ramsey's argument seems to be that Mr. Griffith's proposed rate is reasonable because it could have been higher.

In terms of evidence, Ms. Ramsey submitted biographical information about Mr. Griffith, an affidavit from an attorney attesting to the reasonableness of Mr. Griffith's proposed hourly rate, and a printout showing rates from the adjusted Laffey matrix.

Respondent did not agree with the hourly rates proposed for Mr. Griffith. Respondent maintained that Ms. Ramsey “failed to establish that the appropriate forum rate is based on the Adjusted Laffey Matrix.” Resp't Resp., filed Oct. 6, 2008, at 6. Respondent also suggested that the information submitted to support Mr. Griffith's usual hourly rate was not sufficient. Id. at 6-7.

**b. Ms. DeLuca**

The process of briefing Ms. DeLuca's hourly rate paralleled the process for Mr. Griffith. In reply, Ms. Ramsey argued that Ms. DeLuca was entitled to be compensated at the forum rate, pursuant to Avera. Thus, according to Ms. Ramsey, Ms. DeLuca's request for an amount that is lower than the rate to which she is entitled must be reasonable. Ms. Ramsey also argued that Ms. DeLuca's hourly rate should not be reduced to reflect that she performed tasks that are more consistent with duties of a paralegal. Pet'r Reply, filed Sept. 5, 2008, at 12-13.

For evidence, Ms. Ramsey submitted an affidavit from Ms. DeLuca. The information about the Laffey matrix is also pertinent to Ms. Ramsey's argument in support of Ms. DeLuca's hourly rate.

Respondent argued that the information did not justify the hourly rate requested. Respondent also maintained her argument that Ms. DeLuca's hourly rate should be lower because she performed tasks that could have been done by a paralegal. Resp't Resp., filed Oct. 6, 2008, at 9-11.

**c. Determination**

The first step in setting an attorney's reasonable hourly rate in the Vaccine Program is to determine the reasonable rate for the attorney's local area. Relevant information includes the hourly rate received by local attorneys who are comparable in reputation, skill and ability to the attorney under consideration.

On this point, Ms. Ramsey supplied a statement from Mr. Griffith and a copy of an affidavit submitted by another attorney, E. Bart Daniel, in another case. Exhibit 18. Mr. Griffith stated that in 2006, when he performed most of the work for Ms. Ramsey, his usual billing rate was \$425 per hour. Exhibit 18 at 4; see also Pet'r Appl., Tab C at 23. Mr. Griffith sought compensation not at his usual amount, but instead at the reduced rate of \$300 per hour. Pet'r Appl., Tab C at 23. Mr. Griffith did not explain why he sought compensation at a lower rate of compensation in Ms. Ramsey's case.

Mr. Griffith has an extensive background. He graduated from law school in 1982. By 1991 (and possibly earlier), he appears to have specialized in litigation. He has earned various awards by his peers. Mr. Griffith's current practice focuses on "white collar criminal defense, business disputes litigation, and personal injury litigation." Exhibit 18 at 2 (capitalization eliminated without notation). As mentioned, he requests compensation at a rate of \$300 per hour.

One piece of support for this request is the affidavit of Mr. Daniel. However, this affidavit is entitled to relatively little weight for several reasons. First, Mr. Daniel's affidavit was filed in a different case, Young v. BDO Seidman, L.L.P. No. 4:04-902-25 (D. S.C.). There is no

information in Ms. Ramsey's case to explain anything about Young v. BDO Seidman, L.L.P.. Without any information to understand Mr. Griffith's work in Young, it is difficult to translate Mr. Daniel's assertion that Mr. Griffith's proposed rate of \$425 per hour was reasonable in Young to Ms. Ramsey's case. The cases may be very different.

Second, Mr. Griffith did not supply any information about the outcome of Young. The context of Mr. Daniel's affidavit suggests that Mr. Griffith was seeking approval from the court for an award of attorneys' fees. If so, the judge's determination would be worth at least reviewing.

Third, as noted by respondent, Mr. Daniel's affidavit did not indicate what Mr. Daniel received as his hourly rate. Mr. Daniel also did not explain why Mr. Griffith's hourly rate is appropriate for litigation in the Vaccine Program. See Resp't Resp. at 7. These omissions make Mr. Daniel's affidavit relatively conclusory and lessen its persuasive value. See Barber v. Sec'y of Health & Human Servs., No. 99-434V, 2008 WL 4145653, at \*6 (Fed. Cl. Spec. Mstr. Aug. 21, 2008).

The relevant geographic community for determining the hourly rate of attorneys in the Joe Griffith law firm is South Carolina. See Public Interest Group v. Unidell, 51 F.3d 1179, 1187-88 (3rd Cir. 1995) (Where the district court serves the entire state, the "relevant market" is the entire state, rather than a more narrowly defined geographic location).

Within South Carolina, the hourly rate awarded to attorneys varies greatly. Within the last approximately ten years, some courts have awarded lead attorneys \$150 per hour and other lead attorneys \$300 per hour.

The parties did not cite any cases from the Vaccine Program that determined the reasonable hourly rate for an attorney from South Carolina. Research identified two cases, although both are more than 15 years old. DeVore v. Sec'y of Health & Human Servs., No. 89-120V, 1991 WL137310, at \*1 (Cl. Ct. Spec. Mstr. July 9, 1991) (awarding \$150 per hour and \$85 per hour); Roberts v. Sec'y of Health & Human Servs., No. 89-37V, 1989 WL 250167, at \*9 (Cl. Ct. Spec. Mstr. Dec. 18, 1989) (recommending an award equaling the rate provided in the Equal Access to Justice Act (\$90.00 per hour)).

Mr. Griffith's own billing practice is entitled to some consideration but it is not dispositive. "[T]he proper measure of fees is the prevailing market rate in the relevant market, and not the rate charged by the actual attorney in question." Trimper v. City of Norfolk, 58 F.3d 68, 76 (4th Cir. 1995); accord Buffington v. Baltimore County, 913 F.2d 113, 129-30 (4th Cir. 1990) (refusing to use a lawyer's historic billing rate when the attorney lacked experience in subject area of litigation).

Another factor to consider is the rates paid to attorneys in the Vaccine Program. This case, itself, contains evidence that a reasonable hourly rate for an attorney with many years of

experience in this Program, Kevin Conway, is \$307.50. See Pet'r Appl., Tab A, at 12. Mr. Conway practices in a relatively high cost area, Boston, Massachusetts. While Mr. Conway's rates do not serve as a ceiling on the rates to be paid to other lawyers, Mr. Conway's rates may be considered. Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517 (Fed. Cir. 1993).

These factors support a finding that the appropriate hourly rate for Mr. Griffith, in this case, is \$250 per hour.<sup>4</sup> One important factor is that this case was Mr. Griffith's first experience with the Vaccine Program. If Mr. Griffith continued to practice in the Vaccine Program, it is likely that he would work more efficiently and, therefore, be entitled to a higher hourly rate. "A fee applicant cannot demand a high hourly rate—which is based on his or her experience, reputation, and a presumed familiarity with the applicable law—and then run up an inordinate amount of time researching that same law." Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983). Many cases recognize that the lack of experience in litigating in a particular field of law affects the lodestar determination. See Spell v. McDaniel, 852 F.2d 732, 768 (4th Cir. 1998) (eliminating a number of hours for "reviewing or ascertaining simple aspects of Fourth Circuit procedure"); New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1146 (2d Cir. 1983).

This principle also restricts the reasonableness of hourly rates for attorneys in the Vaccine Program. Carter v. Sec'y of Health & Human Servs., No. 04-1500V, 2007 WL 2241877, at \*3 (Fed. Cl. Spec. Mstr. July 13, 2007). "In addition, a more experienced Program attorney will likely log fewer hours than a less experienced attorney. In fact, in this case, the special master denied quite a number of hours, reasoning that the hours were not necessary based upon his view of the attorneys' skills and experience." Rupert ex rel. Rupert v. Secretary of Health & Human Servs., No. 99-0774V, 2002 WL 31441211, at \*5 (Fed. Cl. Spec. Mstr. Aug. 26, 2002), aff'd in part, rev'd in part and remanded, Rupert IV, 55 Fed. Cl. 293 (2003).

In sum, a reasonable hourly rate for Mr. Griffith in this case is \$250. This determination takes into account both his general experience in litigation and his lack of experience in the Vaccine Program.

The determination of Mr. Griffith's hourly rate establishes a scale for Ms. DeLuca. Ms. DeLuca graduated from law school in 1995. Her affidavit does not mention winning any awards

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<sup>4</sup> Mr. Griffith appears not to have requested compensation based upon the adjusted Laffey matrix, which, according to Ms. Ramsey, establishes the reasonable hourly rate for attorneys in Washington, D.C. See Pet'r Reply, filed Sep. 5, 2008, at 10.

Whether Mr. Griffith would be entitled to compensation at the forum rate is a more complicated question. See Masias v. Sec'y of Health & Human Servs., No. 99-697V, 2009 WL \_\_\_\_ (Fed. Cl. Spec. Mstr. June 12, 2009). Moreover, the Federal Circuit neither accepted nor rejected using rates from the Laffey matrix as the rates for the forum. Avera, 515 F.3d at 1350. Given that Mr. Griffith appears to have waived any right to hourly rates as prevailing in Washington, D.C, exploring this complicated question is not necessary in this case.

for her legal work. Exhibit 20. These qualities suggest that Ms. DeLuca's hourly rate should be less than Mr. Griffith's hourly rate.

Another factor to consider for Ms. DeLuca's hourly rate is the type of work that she performed. She spent a fair amount of time doing tasks, such as gathering records, that can be done by paralegals. The Vaccine Program has consistently refrained from compensating attorneys for performing paralegal work at rates for attorneys. E.g., Valdes v. Sec'y of Health & Human Servs., No. 99-310V, 2009 WL 1456437, at \*4 (Fed. Cl. Spec. Mstr. April 30, 2009); Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520, at \*2-3 (Fed. Cl. Spec. Mstr. June 30, 2005); Borden v. Sec'y of Health & Human Servs., No. 90-1169V, 1992 WL 78691, at \*1 (Cl. Ct. Spec. Mstr. March 31, 1992); Kosse v. Sec'y of Health & Human Servs., No. 90-930V, 1992 WL 26196, at \* 2 (Cl. Ct. Spec. Mstr. Jan. 30, 1992) ("It should be noted that Mr. Webb properly reduced the necessary attorney hours by employing paralegals to gather the medical records, essentially a clerical task. Vaccine cases do not always require the full application of a range of legal skills.").

This distinction has been recognized in South Carolina, the jurisdiction in which Mr. Griffith and Ms. DeLuca practice, as well. See United States ex rel Abbott-Burdick v. University Medical Assoc., No. 2:96-1676-12, 2002 WL 34236885, at \*18 (D.S.C. 2002), quoting Halderman v. Pennhurst State School & Hosp., 49 F.3d 939, 942 (3d Cir. 1995) (stating a trial court should not "condone the wasteful use of highly skilled and highly priced talent for matters easily delegable to nonprofessionals.").

One way to account for Ms. DeLuca's tasks is to blend the rate for work done by attorneys and the rate for work done by paralegals. A reasonable hourly rate for Ms. DeLuca is \$165 per hour. Like Mr. Griffith, Ms. DeLuca's hourly rate would probably be higher if she gained experience in the Vaccine Program, refrained from performing duties that could be performed by a paralegal, and operated more efficiently.

## **2. Reasonable Number of Hours**

Given that the undersigned inquired about the reasonableness of the proposed hourly rates, it is not surprising that respondent raised this issue in her response. Respondent also questioned the reasonableness of some activities. Resp't Resp., filed Aug. 15, 2008, at 5-6.

For both Mr. Griffith and Ms. DeLuca, the submission of additional information affected respondent's evaluation of the requested number of hours. Presently, the parties do not dispute the reasonableness of the number of hours requested.

For Mr. Griffith, Ms. Ramsey supplied additional information about his activities. Pet'r Reply, filed Sept. 5, 2008, at 11-12. After receiving this information, respondent did not object to the number of hours for Mr. Griffith. Resp't Resp., filed Oct. 6, 2008, at 7-8.

Likewise, Ms. Ramsey submitted additional information for Ms. DeLuca's work. Pet'r Reply, filed Sept. 5, 2008, at 14-15. Thereafter, respondent did not object to the number of hours for Ms. Ramsey. Resp't Resp., filed Oct. 6, 2008, at 11.

The attorneys gathered medical records, including autopsy records. See Pet'r Appl., Tab C, at 23-26; see also Pet'r Reply, filed Sept. 5, 2008, at 11-12 and 14-15 (providing additional information about the attorneys' work). These medical records were not extensive – approximately two inches worth of records. Ms. DeLuca also drafted the petition and communicated with an expert. Approximately two months after the petition was filed, Ms. DeLuca was replaced as counsel of record by Mr. Homer. Ms. DeLuca did not participate in any status conferences.

When attorneys at the Joe Griffith Law Firm stopped working on the case, it essentially was through the first phase. In this phase, the attorneys (or their assistants) gathered the medical records and filed the petition. In the next stages of the case, the attorneys would have been involved with obtaining reports from experts. This work was done by attorneys from Conway, Homer & Chin-Caplan, P.C. The successor firm also negotiated a reasonable settlement.

The additional information supports a finding that the number of hours claimed by Mr. Griffith and Ms. DeLuca are reasonable, although at a lower hourly rate than requested. Thus, the full number of hours will be compensated.

### **3. Calculation**

Based upon the previous findings, the following table presents the calculation of the lodestar amount.

<b>Lodestar Amount for Attorneys at Joe Griffith Law Firm, LLC</b>			
Attorney	Hourly Rate	Number of Hours	Subtotal
Mr. Griffith	\$250.00	21.625	\$5,406.25
Ms. DeLuca	\$165.00	109.75	\$18,108.75
<b>TOTAL</b>			<b>\$23,515.00</b>

### **4. Adjustment to Lodestar**

After the lodestar is calculated, the resulting amount may be adjusted either upward or downward. Avera, 515 F.3d at 1348. Here, an adjustment is not needed. Given the changes to the attorneys' hourly rates, the resulting calculation is reasonable.

As previously mentioned, respondent did not object to an award of approximately \$34,000. But, respondent's failure to object does not impair a special master's review of the matter. See Savin, 85 Fed. Cl. at 318. Based upon the information presented about Mr. Griffith and Ms. DeLuca, and the amount of work that Joe Griffith Law Firm actually did, an award of \$23,515.00 fits within the range of awards for comparable cases. For off-Table cases that resolved before petitioners obtained an expert report (meaning no hearing was held), an award of \$23,515.00 for attorneys' fees is probably slightly above average. Therefore, Ms. Ramsey is awarded **\$23,515.00** as compensation for work performed by the Joe Griffith Law Firm, LLC.<sup>5</sup>

### **III. Costs**

#### **A. Standards for Adjudication**

Ms. Ramsey is entitled to an award for the reasonable costs incurred by her attorneys. 42 U.S.C. § 300aa–15(e). The reasonable amount of an expert's compensation is determined using the same lodestar method used to determine the reasonable amount of compensation for an attorney. Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833, at \* 1; (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378, at \*4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

As the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault v. United States, 52 Fed. Cl. 667, 670 (2002). When petitioners fail to meet their burden of proof, such as by not submitting appropriate documentation, special masters have refrained from awarding compensation. See, e.g., Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520, at \*4 (Fed. Cl. Spec. Mstr. June 30, 2005). This practice is consistent with how the Federal Circuit and the Court of Federal Claims, two courts that review decisions of special masters, have interpreted other fee-shifting statutes. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault, 52 Fed. Cl. at 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970). On the other hand, special masters have also compensated experts when the petitioner failed to submit information about the expert's hourly rate. See, e.g., English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805, at \*16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006).

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<sup>5</sup> In some ways, this case could illustrate the fluidity in determining the reasonable amount of attorneys' fees. Here, the hourly rate was reduced, but the number of hours remained unchanged. An alternative approach would have been to keep constant the proposed hourly rate, but reduced the number of hours because attorneys who charge \$300 per hour should have accomplished certain tasks more quickly. A third approach would have been to keep the proposed hourly rate and the proposed number of hours, but adjust the result. See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 188-189 (2d Cir. 2008) (discussing whether lodestar formula is meaningful).

**B. Costs for Conway, Homer & Chin-Caplan, P.C.**

Ms. Ramsey requested \$1,588.90 for costs incurred by Conway, Homer & Chin-Caplan, P.C. The predominant expense was \$1,350 for work performed by Dr. Shane. However, Dr. Shane's invoice lacked information about his hourly rate or the number of hours he spent. Pet'r Appl., Tab B, at 6-8.<sup>6</sup> Conway, Homer & Chin-Caplan, P.C. did not request any additional costs in the supplemental application for attorneys' fees.

Respondent objected to the amount requested for Dr. Shane's work. Respondent noted the lack of supporting information. Resp't Resp., filed Aug. 15, 2008, at 4-5.

In reply, Ms. Ramsey presented additional information that she had obtained from Dr. Shane. This information showed that Dr. Shane spent 6.5 hours working on the case and that Dr. Shane charged either \$200 per hour or \$225 per hour. Pet'r Reply, filed Sept. 5, 2008, at 7.

After reviewing the additional information, respondent did not challenge the number of hours claimed by Dr. Shane. However, respondent maintained that Ms. Ramsey did not justify the proposed increase in Dr. Shane's hourly rate. Resp't Resp., filed Oct. 6, 2008, at 3.

In light of Ms. Ramsey's failure to file any evidence supporting an increase in Dr. Shane's hourly rate, he will be compensated at his initial rate of \$200 per hour. Ms. Ramsey is awarded \$1,300 (\$200 \* 6.5) for Dr. Shane, which is \$50 less than the amount requested. This determination reduces the amount of costs awarded to Conway, Homer & Chin-Caplan, P.C. to \$1,538.90.

**C. Costs for Joe Griffith Law Firm, LLC**

Ms. Ramsey requested \$1,135.25 for costs incurred by Joe Griffith Law Firm, LLC, her original law firm. One item was a cost of \$589.77 for postage and delivery charges. Ms. Ramsey presented a list of charges. Pet'r Appl., Tab D, at 9.

Respondent objected to awarding costs when Ms. Ramsey failed to submit information, such as the person receiving the material, and what material was sent, to explain the reasonableness of the charges. Resp't Resp., filed Oct. 6, 2008, at 11-12; see also Resp't Resp., filed Aug. 15, 2008, at 6-7.

The record-keeping by the Joe Griffith Law Firm, LLC was less than ideal. Additional comments would have been useful to understand the reasonableness of using an expedited delivery service. If these attorneys continued in the Vaccine Program, they would be expected to

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<sup>6</sup> The undersigned has previously noted problems with Dr. Shane's invoices. Williams v. Sec'y of Health & Human Servs., No. 07-320V, 2008 WL 3843348, at \*1 (Fed. Cl. Spec. Mstr. July 24, 2008).

provide additional support. On the other hand, the minimal notation supports a finding that the costs were incurred to advance Ms. Ramsey's case. Thus, they are allowed in full.

**IV. Conclusion**

Ms. Ramsey is awarded the following items for her attorneys' fees and costs.

Attorneys' Fees - Conway, Homer & Chin-Caplan, P.C.	\$31,472.50
Attorneys' Fees - Joe Griffith Law Firm LLC	\$23,515.00
Attorneys' Costs - Conway, Homer & Chin-Caplan, P.C.	\$1,538.90
Attorneys' Costs - Joe Griffith Law Firm LLC	\$1,135.25
<b>TOTAL</b>	<b>\$57,661.65</b>

The Clerk's Office is ordered to file a judgment in accord with this decision unless a motion for review is filed.

**IT IS SO ORDERED.**

S/ Christian J. Moran

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Christian J. Moran  
Special Master