

In the United States Court of Federal Claims

OFFICE OF THE SPECIAL MASTERS

No. 92-46V

Filed: February 3, 1997

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LAVELL THOMAS, by his Mother and  
Next Friend, LINDA A. THOMAS,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

Respondent.

\* \* \* \* \*

PUBLISH

Ronald C. Homer, Esq., Boston, Massachusetts, for petitioners.

Mark C. Raby, Washington, D.C., for respondent.

ATTORNEY FEES DECISION

GOLKIEWICZ, Chief Special Master

Petitioner moved for an award for fees and costs in this compensated case. Respondent filed in opposition thereto, objecting to a number of items contributing to the relatively high fee request. Petitioner thereafter filed a Reply addressing respondent's objections. The court has considered the parties' filings along with the remainder of the record of this case and renders the following decision.

Prior to discussing the individually contested items, the court notes in general that this is an unusual case. Its unusual character derives from petitioner, Linda Thomas, in that she is a somewhat unusual and difficult person. The court is being kind in its description, but wants to make certain that anyone reading this decision is aware that Ms. Thomas' involvement as the petitioner in this case generated more work for all involved. The practical effect of the "difficult" client can be seen in several areas of the requested fees. First and foremost was the use of local counsel in the handling of this case. Second, greater client communication was involved, and third, the court insisted on state oversight of the award. One last factor that impacted the time spent on the processing of this case was the method of settlement. Rather than proceeding to hearing, respondent suggested and pursued a litigative risk settlement of this case. That process took much longer and much greater effort than anticipated. Time and effort translates into cost. With this preliminary statement in mind, the court proceeds to petitioner's request.

#### GENERAL RULE

In order to determine what are reasonable attorneys' fees, the court applies the lodestar method. See Blanchard v. Beraeron, 489 U.S. 87, 109 (1989), Blum v. Stenson, 465 U.S. 886 (1984), and Hensley v. Eckerhart, 461 U.S. 424 (1983). "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." Blanchard, 109 S.Ct. at 944-45 (quoting Blum, 465 U.S. at 888.) In determining the hours reasonably expended, the court should "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." Hensley, 461 U.S. at 434. The reasonableness of the attorney fee rate claimed is "to be calculated according to the prevailing market rates in the relevant community ...." Blum, 465 U.S. at 896 (reasonable fee rate under 42 U.S.C. 1988). "The burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Id. at 896, n.11. Against these standards the court measures petitioner's request.

Mr. Furr

Petitioner requested \$5,707 87 for petitioner's first counsel, Mr. Furr. Respondent contested the hourly rates for Mr. Furr and his paralegal, the duplication of efforts and the billing in quarterly hour increments. Petitioner did not reply directly to these objections. The court agrees with respondent. In fact, the court sees little meaningful advancement of this case by Mr. Furr. Virtually every entry is for a written communication, billed at one quarter hour, either requesting a piece of information from a provider or subsequent counsel or informing petitioner of the status of this case. In fact, the majority of time was expended after the case was transferred to current counsel. Petitioner provided no explanation or justification for Mr. Furr's efforts and the court discerns little. Petitioner simply failed to meet its burden of proof on this portion of her fees request. Giving petitioner every benefit of the doubt, the court awards Mr. Furr 5 hours at \$150 per hour and his paralegal 2 hours at \$50 per hour for a total of \$850. The hourly rates were determined given the minimum level of expertise needed to accomplish the claimed tasks. The court also notes that the costs claimed of \$157.87 are denied as unsubstantiated. Mr. Furr's letter states that the bill is attached, however, the bill was not submitted.

Mr. Homer and Mr. Barnes

The court will consider jointly many of the issues affecting the two remaining firms.

Hourly Rates

Respondent did not question the hourly rates requested for Mr. Homer and Mr. Conway. The court finds as it has in the past that \$150 per hour is reasonable for their efforts. Respondent questioned the rate for Ms. Larkin. While the court notes that some special masters have awarded Ms. Larkin \$150 per hour for her efforts, given the nature of the work performed in this case the court finds that \$100 per hour is reasonable. Respondent questioned the hourly rates for Mr. Barnes and Mr. Moses. The court is satisfied by petitioner's explanation of Mr. Moses's expertise that the \$175 figure is reasonable. However, the court is not satisfied with the support for Mr. Barnes' rate. Neither the substantiation, the self-serving two-page affidavit (the second

page of which was missing), nor the nature of the work performed on this case justify the claimed \$150 per hour. The court was not provided the most basic of information concerning Mr. Barnes, i.e., where he graduated and how long he has been practicing. In addition, it is clear from the services provided that a highly paid partner was not required. Most of the services were in essence "hand holding" and explaining decisions made by the lead counsel, Mr. Homer. The services of an associate would have sufficed in this role. Therefore, while a partner is free to perform the necessary level services, the court is not obliged to pay the partner's rate. See Hawk v. Secretary of DHHS, No. 90-1928V, slip op. at 2, (Fed. Cl. Spec. Mstr. Sep. 30, 1992) citations omitted; see also Copeland v. Marshall, 641 F.2d 880, 882 (D.C. Cir. 1980). Weighing the above factors, the court finds that \$125 per hour is reasonable for Mr. Barnes' time.

#### Hours Claimed

By far and away, the largest area of dispute is the number of hours claimed by the three law firms which worked on this case. Respondent does not contest per se the use of multiple attorneys, but in essence questions the duplication of work and excessive communications between the firms. Respondent also notes that the proceedings were protracted "by petitioner's acceptance and subsequent rejection" of two settlement offers.

Regarding petitioner's responsibility for this protracted litigation, the court does not completely agree. The court sees respondent's method of approaching the litigative risk settlement as a major contributor to the delay. In addition, the court, not petitioner, rejected respondent's offer of a trust vehicle to settle this case. The court saw the settlement proposal as insufficient to deal with Lavell's needs while large enough to disqualify him for other forms of aid. On balance, the court holds respondent with its vast experience in these matters accountable for this wasted effort.

Regarding the use of more than one counsel to litigate this case, the court finds that not only was 'it reasonable, it was essential. Respondent notes that Vaccine cases,' like other cases, are routinely handled without the assistance of 'local counsel. However, as noted above, this is not your ordinary case or client. Without local counsel, the court is convinced that even a larger

request for fees and costs would have occurred. Ms. Thomas required, and respondent and the court benefitted from, the assistance provided by local counsel in this matter. The court also notes that respondent is somewhat disingenuous in its objection, as perusing Mr. Barnes' time sheet shows many conferences and calls between respondent's counsel and local counsel. One cannot benefit from the service and later complain about the cost. As noted by the 8th Circuit Court of Appeals:

A court may reduce attorney hours, and consequently fees, for inefficiency or duplication of services in cases where more than one attorney is used. [citation omitted] We are not aware of any cases, however, which hold that a court may reduce attorneys' fees solely on the basis that multiple attorneys helped to secure a prevailing party's success.

A.J. BY L.B. v. Kierst, 5.6 F.3d 849, 864 (8th Cir. 1995). Thus, the court must review the respective time sheets for reasonableness, inefficiency, and duplication of efforts.

Regarding the issue of client communications, while they were certainly extensive, other than discussed below relating to duplications by the firm and the paralegal contacts, the court cannot categorically say that they were unreasonable. The parties offered no legal precedent for their respective positions on this issue. Other than the general standards regarding reasonableness and efficiency, the court was unable to find any bright line test. However, another trial judge wrestling with defendant's argument that plaintiff's attorney spent excessive time communicating with other attorneys and the client, found that:

The truth of this proclamation is not-evident. It is true that the plaintiff's attorney spent a good deal of time conferring with his client and others on the phone. None of the time claimed, however, is patently spurious, and attorney do have an ethical duty to keep clients informed about their cases.

Hutchison v. Wells, 719 F.Supp 1435, 1445 (S.D. Indiana 1989) (emphasis added).

The trial judge went on to note that many of the alleged offending hours had been stricken for other reasons. The case at hand has similarities. While this court sees client communication important and ethically necessary, especially so in this case where the basis for the second counsel is communicating with the client, repeated phone calls during periods where the case is awaiting action by a doctor, respondent or someone other than petitioner or her counsel, is unreasonable. During these periods of time there simply is nothing to report. The court rejects petitioner's argument that the client initiated the call and counsel was obligated to talk. While the court is sympathetic, given that my office handled many such calls from Ms. Thomas, the fact that she called does not convert the conversation into a reasonable billing to be paid by the Vaccine Fund.

One additional argument that respondent made that the court rejects is that the time and costs involved in setting up the conservatorship are unreimbursable. While there is precedent for respondent's argument, the court notes that this court has for years compensated such costs utilizing a "but for" test. That is, the only reason these costs were incurred were to comply with respondent's demand to set up an estate to receive the money, by the court's demand that a conservatorship be set up to protect the funds from dissipation, or by the terms in a settlement stipulation which require as a condition of settlement that a conservatorship be set up. Ironically, respondent's counsel in this case was counsel of record on one the earliest of these decisions. Peitz v. Secretary of DHHS, No. 90-996V, unpublished opinion, (Cl. Ct. Spec. Mstr. Dec. 4, 1991). This court sees no distinction between the time and costs incurred between generating information, such as an IME, that is later presented to the court and the court ordered conservatorship. While performed outside of this court's physical viewing, the information is presented to the court at its behest and for its approval. As such, the services are rendered as part of the proceedings on the Vaccine Petition. My colleague, Special Master Hastings, has recently discussed the issue at length and reached a similar conclusion. Velting v. Secretary of DHHS, No. 90-1432V, slip op. at 4-7, (Sept. 24, 1996). This court is in full agreement with the reasoning contained there.

The court now turns to the firms' requests.

Mr. Homer's Firm

The court after literally reviewing each time entry finds that the following categories of time were unreasonably or inefficiently spent, or resulted in an improper duplication of effort:

- - telephone calls to Ms. Thomas' mother;
- - client conversations with Mr. Homer's office (the justification for Mr. Barnes' efforts was communicating with Ms. Thomas, as is substantiated by his time sheets);
- - paralegal time spent on administrative tasks;
- - paralegal spending too much time accomplishing a task (20 hours were billed for the attorneys' fee submission that consisted of two double-spaced pages of narrative with the remainder consisting of attachments; this was an administrative task);
- - Mr. Homer represents that billings were adjusted to tenths of an hour, they were not. The minimum time billed by Mr. Homer's firm is one-sixth of an hour.

Other areas of inefficient use of time included time spent arranging the IME and time spent communicating between paralegals from the respective firms. While clearly the firms needed to communicate, if Mr. Barnes was handling the IME stage of the case, it was not necessary for extensive communications between firms as part of completing the IME. Stated another way, it only took one lawyer, not two to oversee the IME stage of this case. However, by communicating each step of the process, counsel effectively billed for two firms arranging Lavell's IME. That was unnecessary and wasteful. A simple telefax of updates would have more than sufficed, as opposed to the numerous paralegal calls during this time frame; and

- - calls with Mr. Furr's office served no useful purpose in moving this case. No explanation of Mr. Furrs' role in processing this case was given. The court sees no reasonable basis for three counsel handling this case at the same time.

With the above discussion in mind, the following results. Mr. Homer's firm requests \$25,249.20 in fees. Four attorneys and a

paralegal charged time as part of the request. Unfortunately, there was no summary page of the charges. The court assumes that this was an oversight and that it will not occur in the future. In addition, as noted earlier, while represented that billings were adjusted to tenths of an hour, they were claimed in one-sixth hours. The difference adds up as a tenth of an hour is 6 minutes, while a sixth of an hour 10 minutes. Clearly, reading a one page Order can reasonably take 6 minutes, but unreasonably takes 10 minutes. The court sees billing in tenths of an hour as the more reasonable and preferred method. Co-counsel used tenth of an hour billing.

The court read through each entry for Mr. Homer's firm and matched the entry to the record of this case and to co-counsel's time sheets. The court adjusted Ms. Larkin's time by a mere .21 hours, but adjusted her hourly rate to \$100 per hour. Ms. Larkin did not play a major role in this case. The court awards 11.61 hours at \$100 per hour for a total of \$1,161, or a reduction of \$612 from the amount claimed.

Mr. Hugo's hourly rate was reduced in conformity with past decisions resulting in a reduction of \$37.50.

Mr. Conway's time is reduced by 7.83 hours. Mr. Conway charged this time for efforts on December 15 and 16, 1992, to review records and "draft petition for compensation". The petition in case was filed on January 15, 1992. Without an explanation, Mr. Conway's billing 11 months later for working on the petition makes no sense. Therefore, this time is disallowed as unsubstantiated. This disallowance results in a \$1174.50 reduction in the claimed fees.

Mr. Homer's time is adjusted by a total of 11.10 hours. The majority of the adjustment is for the 99 billings of .17 hours, which is a sixth of an hour. Adjusting this to a tenth of an hour results in a reduction of 6.93 hours. The remaining 4.17 hour reduction is for client conversations during the time when Mr. Barnes is being paid for this service, and some minor duplication of services. On the whole, the court felt Mr. Homer's time was well spent, in particular when viewed with the rather efficient use of his paralegal. The reduction computes to \$1,665.



The paralegal's time is reduced by 47.4 hours. On the whole, the paralegal's time was well spent. However, 9.31 hours were reduced for 133 instances of billing in sixths of an hour. One half of the remaining reduction relates to the fee petition. The court cannot fathom how the paralegal spent so much time on this petition. This petition represents an accounting and secretarial effort. The remaining reduction relates to client contact and excessive communications with Mr. Barnes' paralegal during a period of time when Mr. Barnes' firm was working on the IME. The reduction computes to \$2,844.

In summary, the court reduces the \$25,292.20 request by \$6,333 for an allowable total of \$18,916.20. Mr. Homer supplemented this request for his Reply. The court agrees. Thus, the court adds \$510, for a grand total of \$19,426.20.

#### Mr. Barnes' Firm

The court now turns its attention to the request from Mr. Barnes' firm. As stated earlier, the court sees no problem regarding the participation of this firm in conjunction with Mr. Homer. Ms. Thomas' idiosyncracies created a situation which required the efforts of both counsel to ensure a just outcome for Lavell. However, the court scrutinized the time sheets for both firms to eliminate inefficient, duplicative efforts. Unfortunately, Mr. Barnes' firm billed for a fair amount of unproductive time.

The court's general criticisms are as follows:

- - communications with Mr. Furr's firm were not shown to serve any productive purpose;

- - far too many of the billings relate to internal communications, as opposed to working with outside entities in 'an effort to resolve the dispute (examples include continuous conferences with Ms. Thomas and staff, e-mails, memos to staff regarding conference calls with the client or Mr. Homer, memos and conferences with staff on the same day, literally page after page of mere communications). While it is understood that counsel has an obligation to communicate with the client and to communicate with staff in order to manage their activities, it is clear from a complete and thorough review of this record that far too much time

was spent communicating and insufficient time was spent on the substance of the case. Stated another way, counsel had no substance to communicate during many of the calls since the calls were continuously taking place or were occurring during periods of dormancy in the case.

- - the paralegals were duplicating work that the lead attorney was handling or should have been handling. This is clearly seen in the number and timing of contacts with the client. The basis for the need for Mr. Barnes' efforts was to work with Ms. Thomas. Yet, much time was spent by the paralegals, in addition to Mr. Barnes, to that end. If the paralegal was able to deal with the difficulties presented by Ms. Thomas, the premise for Mr. Barnes' involvement comes under serious question.

- - the paralegals did a great deal of administrative work;

- - Ms. Lynch worked on matters for Ms. Thomas that were not vaccine-related;

- - some efforts duplicated the efforts put forth by Mr. Homer's firm.

The above are some categorical criticisms. The court is also compelled to cite some specific examples of improper billings. Quite frankly, some of the time billed was humorous at first glance, maddening at second thought. The court gives the following examples; this is by no means a complete list:

- - 6/05/95 Mr. Barnes billed for a conference with Mr. Homer's secretary;

- - 8/23/95 Ms. Lynch billed for a letter sent to Mr. Homer regarding a letter Mr. Barnes sent to Mr. Raby (one asks themselves why not send a copy of Mr. Barnes' letter instead);

- - 10/16/95 conference with client regarding obtaining a copy of the LCP;

- - 10/25/95 "Telephone conference with Linda Thomas; telephone conference with Ron Homer; telephone conference with Linda Thomas; telephone conference with Ron Homer; ietter to Linda Thomas .80 hrs 150 /hr 120.00";

- - 10/30/95 Ms. Lynch bills a second time at \$110 /hr for a conference with Ms. Thomas on obtaining the LCP (why not simply send a copy);

- - 11/6/95 Ms. Lynch billed one-half hour for two calls to Mr. Homer regarding the LCP, a memo to Mr. Barnes on the same topic, a telephone conference with the Clerk of the court and a memo to the same partner regarding that call;

- - 2/5/96 Ms. Lynch billed for receipt and review of Mr. Barnes' memo regarding a memo for the client to sign;

- - 2/12/96 Mr. Barnes billed for sending internal e-mail (one of several such billings);

- - 2/26/96 Ms. Lynch billed for calling Mr. Homer regarding the hearing date (secretarial duty if ever there was one);

- - 3/7/96 Ms. Lynch billed for a call to Mr. Homer regarding a status conference, a call to the client for the same, a letter to the client for the same, and finally a memo to Mr. Barnes for the same;

- - 3/8/96 Ms. Lynch again billed for a conference with Ms. Thomas regarding the status conference;

- - 3/8/96 In one of the more galling billings, Ms. Lynch billed for a status conference with Mr. Homer regarding Ms. Thomas' phone number, a memo to Mr. Barnes for the same, a letter to Mr. Homer confirming the telephone number and a status conference;

- - 3/8/96 Ms. Lynch billed for a call with Ms. Thomas regarding her lights being cut off in the house;

- - 5/8/96 Ms. Lynch billed for work on a car loan (one of several such billings);

- - 6/3/96 Ms. Lynch billed for discussions with Ms. Thomas' sister (one of several such billings).

In summary, while Mr. Barnes' firm, overall, contributed greatly and positively to the successful completion of this case, many of the claimed hours were duplicative of Mr. Homer's time,

represented improper utilization of time, represented work which should have been performed by administrative staff, and generally were not reasonably expended in this litigation. Based upon the discussion above, the court awards fees as follows:

Kevin Balkwill	0 hrs	30/hr	0
Bryan Barnes	75 hrs	125/hr	9,375
Marshall Biddle	27.8 hrs	45/hr	1,251
Chris Fortier	14.1	45/hr	634.50
Stacey Lynch	56.45	110/hr	6,209.50
Albert Moses	2.35	175/hr	411.25
Loretta Novak	6.1	45/hr	274.50
Greg Talbot	8.0	50/hr	400.00
Gina Willis	.9	45/hr	40.50
Total			\$18,596.25

In addition, the court awards a total of \$1,008 in fees for the work on the Reply to respondent's objections. Mr. Barnes' firm is awarded a total of \$19,604.25 for fees.

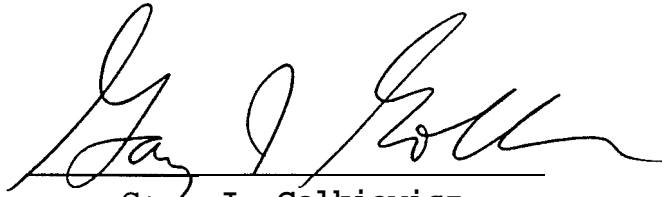
#### COSTS

The court has reviewed the claimed costs and the parties' respective arguments regarding those costs. The court finds that Mr. Homer's firm is entitled to \$6,893.91 for costs. The court deducts \$600 from Dr. Kinsbourne's billing, since no justification was given for awarding higher than \$200 per hour, and \$42.38 for telefaxes. The court is willing to consider telefaxes as a cost item, as opposed to overhead, but without justification the court cannot understand why a significant cost component is involved in sending telefaxes. In addition, petitioner would have to establish the need for such item given the compensated telephone calls and mailed communications.

Mr. Barnes firm is awarded \$3,344.14 (which includes \$50.12 related to the Reply Brief). The court deducts \$179.48 for excess photocopying as agreed to by the firm, \$55 for Lavell's doctor visit (no showing of vaccine-relatedness was made and if it was related, the cost should have been claimed as a 'past medical, not as a litigation cost), and \$190 for telefax costs for the reasons discussed above. The court has reviewed all other claimed costs and finds them allowable for both firms.

SUMMARY

The court rejects respondent's belief that because a case settles without a hearing the fees and costs should be relatively low. The settlement process employed by respondent is unduly lengthy and burdensome. In fact, the court firmly believes that in many instances the hearing process would be less expensive and faster. Where there is no complaint regarding the process used to resolve a case, there cannot reasonably be a complaint for the cost of that process. Petitioner is awarded a total of \$50,118.50 to pay for the services rendered on her behalf. The court sees this total cost as reasonable in comparison to other cases handled by this court and reasonable given the amount of process involved in settling this dispute. Of that total figure, Mr. Furr is owed \$850; Mr. Homer's firm is owed \$26,320.11; and Mr. Barnes' firm is owed \$22,948.39. The Clerk shall enter judgment accordingly. The judgment shall set forth the total dollars awarded and shall set forth the amounts owed each of the three firm.<sup>1</sup>



Gary J. Golkiewicz  
Chief Special Master

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<sup>1</sup>This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against the client, "advance costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e) (3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).