Contesting the Costs of Independent Counsel

Using Regional Fee Scales as Evidence of Reasonable Rates

By John E. Zulkey

While *Cumis* may prohibit an insurer from dictating the tactics of litigation, it does not delegate to *Cumis* counsel a meal ticket immunized from judicial review for reasonableness.

—*United Pacific Insurance Co. v. Hall*, 199 Cal. App. 3d 551 (1988).

How much is an insurer obligated to pay for independent counsel? The rates for legal counsel can vary wildly, from less than $200 an hour to over $1,000, with insurers often negotiating significant discounts from counsel who they employ frequently (*i.e.*, "panel counsel"). But insureds, upon learning of their right to independent counsel (at the insurer's expense) sometimes will decide that panel counsel is no longer sufficient and that only the most expensive counsel will do. In these situations, what is an insurer to do? May it insist on paying no more per hour than it would have for panel counsel, or does it risk a bad-faith claim if it balks at giving the insured a blank check for its defense? In most states, the answer lies somewhere in between: the insurer is required to pay only "reasonable" rates. This article is intended to aid insurers and their counsel in identifying and proving what a reasonable rate is through reference to empirical and unbiased matrices of regional rates.

Disputing Independent Counsel Costs

Insurers disputing the costs of independent counsel should avoid the temptation to withhold all reimbursement until the parties have reached an agreement on rates and terms. For even when the amount sought by an insured and an independent counsel is exorbitant, an insurer may be penalized if it does not timely reimburse the insured for at least those amounts that the insurer agrees to be reasonable. *Compare Northern Sec. Ins. Co. v. R.H. Realty Trust*, 941 N.E.2d 688, 692–93 (Mass. App. Ct. 2011) (holding insurer acted in bad faith by unreasonably delaying payment even of amounts it deemed reasonable), *with Wallis v. Centennial Ins. Co.*, 982 F. Supp. 2d 1114, 1125–26 (E.D. Cal. 2013) (holding insured could not prove that insurer acted in bad faith by paying only rates it found reasonable absent proof that reductions in payment affected the underlying defense or otherwise interfered with the defense); *see also* William T. Barker, *Insurer Control of the Defense: Reservation of Rights and Right to Independent Counsel*, 71 Def. Couns. J. 16, 27 (2004) (explaining the pitfalls of refusing outright to pay even reasonable defense costs).

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Accordingly, when an insurer and its insured cannot agree on a reasonable cost for independent counsel, the insurer generally has two options: (1) the insurer may pay only the amount that it deems reasonable, leaving the insured to make up any shortfall and to make a claim against the insurer for that amount; or (2) it may pay the full amount sought by the insured and the independent counsel and later seek to recoup the excess amount that the insurer believed was unreasonable. *See* Douglas R. Richmond, *Independent Counsel in Insurance*, 48 San Diego L. Rev. 857, 887–88 (2011). The former approach hopefully would encourage an insured to be more cost-conscious as the litigation progressed, while the later likely would dull any accusations that an insurer acted in bad faith by failing to pay the full cost of the independent counsel. But under either approach, an insurer must be prepared to prove to a court or an arbitrator why it is unreasonable for an insured to seek full reimbursement for the rates or hours billed, or both, by the independent counsel.

Disputing Hours

Defense costs are typically the product of an hourly rate charged by an attorney multiplied by the number of hours that the attorney worked on the matter (and the bill would include a description of the work performed by the attorney during that time). The primary purpose of this article is to address ways to contest the rates charged by independent counsel, but coverage counsel disputing defense costs will likely want to examine the reasonableness of the total hours billed as well. Specifically, counsel may want to question whether the time billed for certain tasks was excessive, or whether the work performed was duplicative or unnecessary. Coverage counsel likely will also review whether any tasks were performed by expensive partners that could have been performed by less expensive associates or paralegals. In disputing defense costs, it can be extremely helpful to retain an expert on the issue. Such experts can aid both in identifying which entries and expenditures are unreasonable and in providing testimony explaining why they are unreasonable. These defense cost experts may come in the form of claims advisory firms or in the form of litigators with specialized expertise in this area.

Lastly, if an insured is a frequent party to litigation, the insured may have its own litigation guidelines dictating for what it will and will not pay its counsel. Coverage counsel will want to request and review such guidelines and contest reimbursement for any costs that the insured would have refused to reimburse were it footing the bill itself.

Disputing Rates

Turning to the other half of the defense-cost equation, what is a reasonable rate for an insurer to pay for independent counsel? As noted in the introduction, the range of hourly rates among various attorneys has expanded dramatically. With such a wide margin, what rate is an insurer obligated to pay?

The answer depends strongly on the complexity of the litigation, the damages potentially at issue, and the region in which the claim is being litigated. However, any examination into the reasonableness of rates must begin with Model Rule of Professional Conduct 1.5(a) (and its state equivalents), which states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The rule lists eight factors to consider when weighing the reasonableness of a lawyer's fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

Id.

It should go without saying that insurers should not be obligated to pay a rate that is so high as to breach the rules of professional conduct, but neither should an insurer be required to pay any rate that meets that minimum ethical requirement. So we return to the central question: what rate should an insurer be required to pay?

Insurers typically take the position that they should not be obligated to pay any more for independent counsel than they would have paid when they do not have a conflict of interest. After all, the insurer has not done anything wrong, so why should the insured's right to independent counsel obligate the insurer to pay higher rates? A handful of states have passed legislation codifying this view. *See*, *e.g.*, Cal. Civ. Code §2860(c) ("The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended."); Alaska Stat. §21.96.100(d) ("Unless otherwise provided in the insurance policy, the obligation of the insurer to pay the fee charged by the independent counsel is limited to the rate that is actually paid by the insurer to an attorney in the ordinary course of business in the defense of a similar action in the community in which the claim arose or is being defended."). *See also* Fla. Stat. Ann. §627.426(2)(b)(3) ("Reasonable fees for the [independent] counsel may be agreed on between the parties or, if no agreement is reached, shall be set by the court."); Or. Rev. Stat. §465.483(1) (where insurer provides independent counsel in environmental claims, amount the insurer is obligated to pay to independent counsel and environmental consultants is based on the regular and customary rates for the type and complexity of environmental claim at issue in the community where the underlying claim arose or is being defended); *Select Comfort Corp. v. Arrowood Indem. Co.*, No. 13-2975, 2014 WL 4232334, at *7 (D. Minn. Aug. 26, 2014) (in dicta, expressing support for California's limitation of independent counsel fees to those that would have been paid to panel counsel).

Unfortunately for insurers, most states without such statutes have been reluctant to limit an insurer's obligation to what it would have paid in the absence of a conflict. Instead, most courts have reasoned that because insureds typically lack the same bargaining power as insurers, insureds are not

limited to receiving the discounted rates for attorneys' fees that insurers can negotiate. *E.g., Photomedix, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 07-0025, 2008 WL 324025 (E.D. Pa. Feb. 6, 2008); *Oscar W. Larson Co. v. United Capitol Ins. Co.*, 845 F. Supp. 458, 462 (W.D. Mich. 1993) (holding that the higher rate charged by counsel selected by insured over panel counsel used by breaching insurer was justified in part by attorney's "extensive experience and high professional standing"); *Charter Oak Fire Ins. Co. v. Hedeen & Cos.*, 280 F.3d 730, 738–39 (7th Cir. 2002) (holding that district court did not abuse discretion in refusing to limit rate of defense counsel selected by insured to reduced amounts that would have been paid by breaching insurer to panel counsel); *Northern Sec. Ins. Co. v. R.H. Realty Trust*, 941 N.E.2d 688 (Mass. App. Ct. 2011) (holding that panel counsel rate was not necessarily the reasonable rate because it reflected what the insurance company could bargain panel counsel down to accept); *Azar v. Farmers Ins. Exch.*, No. 13-cv-00658, 2013 WL 5430779, at *6 (D. Colo. Sept. 26, 2013) (rejecting the argument that independent counsel rates were limited to panel counsel rates). *But see Lone Star Indus., Inc. v. Liberty Mut. Ins. Co.*, No. 89 C-SE-187-CV, 1990 WL 127826, at n.3 (Del. Super. Ct. Aug. 28, 1990) (limiting independent counsel to rate caps mandated by insurer); *Aquino v. State Farm Ins. Cos.*, 793 A.2d 824 (N.J. Super. Ct. 2002) (noting that independent counsel may not be entitled to its full rate where insurer could have provided panel counsel for lower rates).

Rather than panel counsel rates, courts typically have held that insurers are obligated to reimburse independent counsel at "reasonable rates." *E.g., Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.*, 200 F. Supp. 2d 84, 93 (D. R.I. 2002) ("Massachusetts law only requires reimbursement for reasonable attorneys' fees [for independent counsel]."); *Metlife Capital Corp. v. Water Quality Ins. Syndicate*, 100 F. Supp. 2d 90, 96 (D. P.R. 2000) ("The protection for the insurer from runaway legal fees is the principle that the insurer need only pay those fees that are 'reasonable.'"); Barry R. Ostrager & Thomas R. Newman, Handbook on Ins. Coverage Disputes §2.03[c] (17th ed. 2015).

Seizing upon this, insureds typically argue that the expensive rates charged by their high-end independent counsel are reasonable by virtue of the fact that those rates are paid by other clients. But this argument fails to take into consideration the needs of the claim at issue and would justify excessively expensive counsel for even the simplest of claims. Just as an insured might reasonably object to the assignment of a solo practitioner to handle a complex, multimillion dollar product liability claim, an insurer would be equally justified in objecting to the assignment of an expensive international firm to handle a minor slip-and-fall case. Accordingly, courts typically have held that a rate is not to be deemed reasonable merely because other clients in other cases have paid it, but only if it is commensurate with "the custom and practice within the applicable jurisdiction." 14 Couch on Ins. at §20:20 (updated Nov. 2014); *Watts Water Tech., Inc. v. Fireman's Fund Ins. Co.*, No. 05-2604-BLS2, 2007 WL 2083769, at *10 (Mass. Sup. Ct. July 11, 2007) (reasonable rate of independent counsel based on the "usual price charged for similar services by other attorneys in the same area"); *Curtis v. Nutmeg Ins. Co.*, 256 A.D.2d 758 (N.Y. App. Div. 1998) (reasonable rate of independent counsel based on fee customarily charged in the locality, as well as the time, effort and skill required, the difficulty of the questions presented, the responsibility involved, the counsel's experience, ability and reputation, and the contingency or certainty of compensation).

Evidence of Regional Rates

Once in arbitration or litigation, the burden of proof should fall on the insured and its independent counsel to prove that the rates charged were reasonable. *See Liberty Mut. Ins. Co. v. Cont'l Cas. Co.*, 771 F.2d 579, 582 (1st Cir. 1985) (calling it "obvious that the party claiming such expenditures has the burden of proving them, including the burden of proving whether the fees were in fact reasonable"); *See also* Ostrager & Newman, *supra*, at §2.03[c]. However, the insurer will have a responsibility to state any objections with "particularity and clarity." *Pfiefer v. Sentry Ins.*, 745 F. Supp. 1434 (E.D. Wis. 1990).

Burden of proof aside, an insurer should be prepared to offer evidence proving that the rate that it proposes is reasonable (and that the rate sought for the independent counsel is unreasonable). But how? As noted above, courts have been reluctant to accept as definitive evidence either the rates that panel counsel would have charged, or the rates that the independent counsel has been paid by other clients in other litigation. Instead, evidence of reasonable rates often comes in the form of affidavits from experienced attorneys about what a reasonable rate would be (such as the type of experts referred to previously in this article), but such affidavits are likely to appear biased to a court or an arbitrator. Accordingly, it may be helpful to corroborate such testimony by reference to an independently prepared matrix of reasonable rates in the given jurisdiction. Such matrices are often used in the context of civil rights claims or other types of litigation not involving insurance, but there is no reason that they could not be used in the context of independent counsel rates as well. To the contrary, these matrices are created precisely to be used as evidence to answer the question posed by both types of cases: what is a reasonable rate for attorney's fees in a given region?

The Community Legal Services Matrix

Community Legal Services is a Philadelphia-based nonprofit that provides legal services to the impoverished. Because it frequently seeks attorney's fees while providing its services pro bono, it compiles a matrix of reasonable attorney's fees for the region to assist courts in deciding upon an appropriate lodestar to award. This benchmark has been accepted by the Third Circuit Court of Appeals as a reasonable measure of attorney's fees in the region. *E.g., Maldonado v. Houstoun*, 256 F.3d 181, 187 (3d Cir. 2001). This matrix is available at https://clsphila.org/about-cls/attorney-fees. The Community Legal Services fee schedule that became effective September 12, 2014. See Table 1.

The *Laffey* Matrix

Outside of the Third Circuit, another popular reference is the *Laffey* Matrix, which takes its name from *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371 (D. D.C. 1983), in which a court awarding attorneys' fees employed a variety of hourly billing rates to account for the various attorneys' different levels of experience. Since then, this compilation of attorney and paralegal rate data has

been annually updated by the Civil Division of the U.S. Attorney's Office for the District of Columbia. For example, the *Laffey* Matrix provides for the following rates for legal services in the District of Columbia from June 1, 2015 to June 1, 2016. See Table 2
Rates for previous years are available on the U.S. Department of Justice website.

Because the *Laffey* Matrix calculates the market rates for the District of Columbia, there is no shortage of opinions dismissing its relevance to the reasonableness of rates in other jurisdictions. But it has been gaining greater acceptance recently by courts, which adjust the District of Columbia rates to reflect more accurately the costs in their own jurisdictions. For example, the chief judge for the U.S. District Court of the Northern District of California determined that the cost for legal services in his district should be approximately 9 percent higher than in the District of Columbia, based upon the relative locality pay differentials built into the Judicial Salary Plan tables. *In re HPL Tech., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 922 (N.D. Cal. 2005) (providing a mathematical formula for adjusting the rates based on locality). While not binding, those adjusted rates have subsequently been applied frequently outside of the insurance context in determining the market rate for legal services. *E.g., Davis v. Perry*, 991 F. Supp. 2d 809, 847–49 (W.D. Tex. 2014), *rev'd on other grounds by* 2015 WL 1219269 (5th Cir. 2015); *House v. Wackenhut Servs., Inc.*, No. 10 Civ. 9476, 2012 WL 4473291, at *2 (S.D.N.Y. Sept. 27, 2012); *Rolland v. Patrick*, 765 F. Supp. 2d 75, 78 (D. Mass. 2011).

Although the *Laffey* Matrix has not yet been used to help gauge the rates for independent counsel, at least one decision has indicated that it may be a superior benchmark than the rates charged by panel counsel. In *Syers Props. III, Inc. v. Ranking*, 226 Cal. App. 4th 691, 695 (Cal. Ct. App. 2014), the court awarded attorney's fees in favor of the defense in an attorney malpractice action, and the plaintiff argued that because the defense counsel marketed itself as a "premier insurance defense firm" (*i.e.*, panel counsel) that it should be granted a lower rate than it sought because such firms often charge insurers lower rates. The court rejected this argument—finding that the appropriate measurement was the market rate rather than whatever the firm actually charged—and supported its decision that the rates were reasonable by referring to the *Laffey* Matrix.

In addition to the *Laffey* Matrix provided by the U.S. Department of Justice, the U.S. Department of Labor provides what is referred to as the "LSI-Updated *Laffey* Matrix," which is based upon the 1989 update of the U.S. Department of Justice's *Laffey* Matrix, adjusted according to the Legal Services Index produced by the U.S. Bureau of Labor Statistics. The Updated *Laffey* Matrix produces higher hourly rates than the U.S. Department of Justice version and has been met with mixed reactions by courts. *Compare Salazar v. District of Columbia*, 809 F.3d 58 (D.C. Cir. 2015) (affirming a fee award based on the Updated *Laffey* Matrix), *with Williams v. Johnson*, No. 06-2076, 2016 WL 1257831 (D.D.C. Mar. 30, 2016) (rejecting the Updated *Laffey* Matrix in favor of the U.S. Department of Justice version).

Other Matrices

A quick Google search would reveal a number of other fee scales prepared by local bar associations and consumer advocacy groups, such as the annual regional scale of attorney's fees prepared by Ronald L. Burge at the National Consumer Law Center, the Real Rate Report published by Wolters Kluwer, and the Legal Billing Report published by Thomson Reuters. *See* Gerald G. Knapton, *How to Prove an Attorney's Reasonable Hourly Fee*, California Lawyer, Nov. 5, 2015. Reactions by courts to such other matrices have been mixed, but they may nonetheless provide additional support to an insurer's position to the extent that the rates listed within them are less than the rate sought by independent counsel.

Conclusion

The matrices described above are no silver bullet against runaway rates for independent counsel, and it would be folly for any coverage counsel to argue that a court or an arbitrator is bound by them. But as the chief judge of the U.S. Court for the Northern District of California explained in applying the *Laffey* Matrix, "[T]he court must find some objective source for setting counsel's hourly rates; the court cannot simply look at a lone out-of-context dollar figure and pronounce it 'reasonable.'" *In re HPL Tech., Inc. Sec. Litig.*, 366 F. Supp. at 921–22.

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At present, courts and arbitration panels are frequently without such an objective source. Panel counsel rates have been rejected as benchmarks in most states, and the opinions of even seasoned experts on the issue may encounter skepticism. Accordingly, even if these matrices are not strictly enforced, they may be of use in anchoring a court or a panel to a reasonable range of rates. FD

Table 1: Community Legal Services fee schedule, effective September 12, 2014

Years' Experience	<2	2–5	6–10	11–15	16–20	21–25	>25	Law Student	Paralegal
	$180–200	$200–250	$265–335	$350–420	$435–505	$520–590	$600–650	$90–145	$115–165

Table 2: *Laffey* Matrix rates for legal services in the District of Columbia from June 1, 2015 to June 1, 2016

Years' Experience	<2	2–3	4–5	6–7	8–10	11–15	16–20	21–30	>31	Paralegal/ Clerk
	$284	$315	$325	$332	$386	$445	$504	$530	$586	$154