

The Expert's Corner

REASONABLE RATES: TIME TO RELOAD THE (LAFFEY) MATRIX

William B. Rubenstein*

What's an hour of your time worth? How would you know? How could you prove that to a federal judge? Ultimately, all class action fee petitions come down to these inquiries, either because fees are awarded on a lodestar (hours x rate) basis or because a percentage fee award is cross-checked using a lodestar calculation. The "hours" portion of the lodestar is fairly straightforward; judges may of course scrutinize counsel's submissions, but rarely does this lead to significant changes in sought-after fees. The "rate" portion of the lodestar has a lot more play in its joints in that there is no commonly-accepted and easily-identifiable standard by which to set the hourly rate.

There are, however, better and worse ways of establishing an acceptable hourly-rate. One methodology infrequently but recurrently used by courts – the so-called "Laffey matrix" – is a good example of a method that generally is pretty crummy. It may be surprising to learn, then, that Chief Judge Vaughan R. Walker, of the U.S. District Court for the Northern District of California, is the *Laffey* matrix's primary proponent in the federal courts. Judge Walker takes a greater interest in class action cases generally, and in fees issues specifically, than do most federal judges. His opinions are invariably thoughtful

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and often quite interesting and novel – usually, though not inevitably, to the detriment of the plaintiffs' counsel. Regardless of his bottom line, a Walker class action opinion is worth reading and considering. Since April 2005, Judge Walker has employed the *Laffey* matrix to determine fee awards in nine separate cases and referenced it in another four. This is rather remarkable in that the matrix appears in only 76 federal cases altogether in the same time period, meaning that Judge Walker accounts for about 1 of every 5 references to the matrix in

this time period though he is only 1 of about 1,000 active and senior federal judges in the US.

A recent example of Judge Walker's use of the *Laffey* matrix is *In re Chiron Corp. Securities Litigation*, C-04-4293-VRW, 2007 WL 4249902 (N.D. Cal., Nov. 30, 2007). By this decision, Judge Walker denied preliminary approval to a class action settlement (how often do you hear about a judge doing that?). He gave four reasons for doing so, one of which

was that "the settlement proposes to pay class counsel fees that, for the amount of time worked, are eight to ten times typical hourly attorney fees." The case – six consolidated class actions filed in 2004 and 2005 – alleged false and misleading statements by Chiron concerning its capacity to deliver flu vaccine from manufacturing plants in England. The lead plaintiff (a union pension fund) appointed Milberg Weiss to be lead counsel. Counsel eventually negotiated a \$30 million settlement for which it sought approval from Judge Walker and from which it sought \$7,500,000, or 25%, in fees.

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Judge Walker provided more careful scrutiny to the fee request on this *preliminary* motion than most judges do in approving the fee at the final fairness hearing.¹ He first requested that counsel produce its lodestar to enable a cross-check. The lodestar amounted to \$1,126,338.50, hence requiring a multiplier of 6.6 to reach the 25% figure. Judge Walker then began to take apart the petition. First, he extracted from the lodestar \$227,209.25 that counsel had attributed to “professional support staff” (library service, investigators, economic analysts, etc.), stating that these services were more properly characterized as expenses, not costs – meaning that they would not be available to be multiplied. Once these hours were deleted from the lodestar, that number was diminished to \$899,129.25 and hence a 8.34 multiplier was now needed to hit the \$7.5 million, 25% figure.

But Judge Walker had only yet begun. He next scrutinized counsel’s proposed sample billing rates, concluding that counsel had not “ma[d]e a case that these rates were truly representative and, still less, systematically compiled.” To remedy that problem, Judge Walker employed the so-called “*Laffey*-matrix” fee rates – the critical move to which I return below – then adjusted these D.C.-based rates for the Los Angeles and New York setting of most counsel in this matter, and concluded that the \$899,129.25 lodestar actually amounted to \$718,236.81. Now counsel needed a 10.44 multiplier to reach the desired \$7.5 million, 25% figure.

Judge Walker found that either of these multipliers (the 10.44 he ended up with, or the 8.34 counsel needed once he deducted the support staff hours) far exceeded those normally used in securities class actions under \$50 million. In support of that conclusion, he cited two cases noting multiplier ranges of 3-4² and 2.26-4.5³ and the 2003 Class Action Reports data (391 cases with multipliers, 353 with recoveries under \$50 million) showing

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multipliers ranging from 0.5-3.0.⁴ Hence Judge Walker concluded that “class counsel’s fee request is patently unreasonable.” For this – and several other reasons – he rejected the proposed settlement.

I could teach an entire seminar on all of the issues Judge Walker’s decision raises, but for the limited purpose of this column, I want to focus in on the *Laffey* matrix. Judge Walker replaced counsel’s proposed billing rate with the *Laffey* matrix rates, implying the former were unreliable and the latter reliable. Why? What’s the *Laffey* matrix and what makes it so reliable?

*Laffey v. Northwest Airlines*⁵ was a hard-fought Washington, D.C. sex discrimination class action case brought on behalf of female flight attendants that commenced in 1970 and led to the filing of a fee petition by plaintiffs’ counsel (Bredhoff & Kaiser) in 1982. Counsel’s fee award was based on a federal statute enabling fee-shifting. Counsel’s request therefore triggered a vigorous opposition from the defendant that had to foot the bill (represented by Hughes Hubbard & Reed), and class counsel hired another large Washington law firm (Arnold & Porter) to represent it in soliciting the fee award. The fee litigation was “the most hotly contested” the District Court had ever encountered, engendering “the most extensive fee petition” the Court had ever seen, which included 36 affidavits, some detailing prevailing rates in the community for similar

1 Whether motions for preliminary approval ought to provoke such careful scrutiny is a debatable point for another column.

2 *Van Vranken v. Atlantic Richfield Corp.*, 901 F.Supp. 294, 298 (N.D. Cal. 1995).

3 *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988).

4 Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REP. 167, 197 (2003).

5 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).

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work.⁶ From this, the court culled a “matrix” of rates, as follows:

- \$175/hour for lawyers 20+ years out of law school;
- \$150/hour for lawyers 11-19 years out of law school;
- \$125/hour for lawyers 8-10 years out of law school;
- \$100/hour for lawyers 4-7 years out of law school;
- \$75/hour for lawyers 1-3 years out of law school.⁷

The United States Attorney's Office for the District of Columbia regularly adjusts these *Laffey* matrix data for cost of living changes in the DC area, posting at its website the current equivalent rates of these 1981 rates.⁸ Such updated *Laffey* rates have been approved in subsequent decisions within the D.C. Circuit⁹ and are occasionally used, particularly in fee-shifting cases, outside that circuit as well.¹⁰

That said, I find Judge Walker's embrace of the *Laffey* matrix peculiarly at odds with his self-styled rigor in discerning the proper approach to fee awards. There are

6 572 F.Supp. at 360.

7 *Id.* at 371.

8 http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_3.html.

9 The U.S. Attorney's website reports that: “[The] *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the United States Attorney's Office as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n. 14, 1109 (D.C. Cir. 1995), cert. denied, 516 U.S. 1115 (1996).” Later District of Columbia cases have employed a different version of the matrix that yields higher rates than does the matrix of the U.S. Attorney's Office. See, e.g., *Salazar v. District of Columbia*, 123 F.Supp.2d 8, 13 (D.D.C. 2000). I return to this point, *infra*, at text accompanying note 12.

10 See, e.g., *Anderson v. Penn Nat. Gaming, Inc.*, 3:04CV42, 2007 WL 2750679 (N.D. W.Va. 2007) (fee-shifting statute fee award); *Selph v. Bruno-Cusamano-Montesi-Tataglia-Pamlina-Capone & Associates, LLC*, 06-C-4090, 2007 WL 433103 (N.D. Ill. Feb. 2, 2007) (same).

four problems that cast real doubt on the reliability of the (US Attorney's) *Laffey* matrix, some of which have induced other courts to stop using it.

First, the matrix was developed in the context of a fee-shifting statute, not in the context of a fee award paid by the plaintiff class from a common fund. Thus, the U.S. Attorney's website itself states: “The matrix is intended to be used in cases in which a ‘fee-shifting’ statute permits the prevailing party to recover ‘reasonable’ attorney's fees.” In some circuits the standards in fee-shifting and common fund cases tend to merge, in that both look to prevailing market rates in the community for similar work; as Judge Walker notes only in passing, however, the Ninth Circuit is less fond of the market rate approach, although it may be willing to accept it in situations (not present here) where lawyers compete for lead counsel status.¹¹ But even assuming that the task was the same (find the local market rate for that type of work), generally speaking, fees awarded by fee-shifting statutes are far less than those awarded in common fund cases. Often, counsel securing a fee-shifted fee award works for a public interest organization at a relatively low salaried rate; convincing a court to approve commercial rates prevailing in the private market is difficult. Even if the prevailing rate is used, the prevailing rate for an employment discrimination attorney will likely pale in comparison to the prevailing rate for a securities class action attorney at a firm like Milberg. Moreover, fee shifting statutes tend not to permit risk be taken into account.

Second, the matrix was developed in a different time period than the present. Why imagine that the fees

11 See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049-1050 (9th Cir. 2002) (stating “[w]hile an exclusively market-based approach may have superficial appeal, in the context of class action litigation in which attorneys' fees are determined post hoc by the court (without regard to any private arrangement), it may in many cases be illusory. Unlike in cases where lawyers compete for lead counsel status and may even bid in a court-supervised auction, in employment class actions like this one, no ascertainable ‘market’ exists. The ‘market’ is simply counsel's expectation of court-awarded fees.”). Milberg originally appeared to be competing with the Lerach firm for lead counsel status in Chiron, but the Lerach firm's client withdrew its bid to be lead counsel.

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charged in 1981-2 have any relation to current fees, a quarter of a century later? If the *Laffey* court had, in 1984, relied on fees from 1957, it is unlikely its decision would have much salience. The *Laffey* matrix assures its users that the 1981-2 fees are relevant because they are updated regularly by the U.S. Attorney's Office according to the Consumer Price Index, which employs data from the Bureau of Labor Statistics. However, the US Attorney's website uses the full CPI change in the Washington area to adjust its data; it does not isolate the CPI changes in attorney's fees. It therefore will fail to capture times in which lawyer's fees in the prevailing market rise faster than the CPI itself – in other words, attorney's fees occur in a particular market not captured by the general CPI itself. For this reason, some subsequent cases have replaced reliance on the US Attorney's data and employed lawyer-specific CPI adjusted data in its place,¹² a fact that Judge Walker does not acknowledge.

Third, the matrix was developed in a different geographic location. It is based on fees in the Washington, D.C. area. Judge Walker assured his readers that he was cognizant of this as he adjusted the current matrix numbers according to current differentials in cost-of-living

¹² See, e.g., *Salazar, supra*; *Interfaith Community Organization v. Honeywell Intern., Inc.*, 426 F.3d 694 (3d Cir. 2005); *North Carolina Alliance For Transportation Reform, Inc. v. U.S. Dept. of Transp.*, 168 F.Supp.2d 569 (M.D. N.C. 2001); *Smith v. District of Columbia*, 466 F.Supp.2d 151 (D.D.C. 2006).

between DC and the NY and LA markets where the class action counsel in this case worked. But this barely begins to grapple with the real geographic problem: the *Laffey* matrix has been updated regularly for 25 years based solely on CPI data from the Washington, D.C. area. This means that if the CPI changes differently in different parts of the country, the US Attorney's data will not reflect that. Correcting geographic CPI differences that exist now will not atone for the geographic CPI differences that have infected each year's adjustment to the *Laffey* matrix for the past quarter century.

So far, I have shown that use of the *Laffey* matrix employs data (1) from a different context (fee shifting vs. common fund, employment vs. securities); (2) from a different era, updated poorly; and (3) from a different part of the country, adjusted incorrectly. Nothing Judge Walker did truly fixed any of these problems. But these three problems do not even cut to the heart of the matter, which is this: the extraordinary efforts Judge Walker takes to employ the *Laffey* matrix – update it, CPI it to different parts of the country, etc. – imply that there is something magical about the *Laffey* matrix data. The implication is that the original numbers that commenced the matrix in 1981 were so perfect that any other set of numbers subsequently developed (even those in relevant case types, time periods, and regions) could not match the careful methodology that went into the *Laffey* numbers and therefore the best we can ever do is desperately attempt to update and contextualize those numbers. But here's the rub: there was nothing magical about the *Laffey* data at its inception. The numbers were not handed down from Mt. Sinai.

The *Laffey* matrix numbers were based on evidence presented by affidavits in that legal community at that time. Milberg propounded evidence of this sort (albeit not a lot of it) in its fee petition in *Chiron*, but Judge Walker stated that they had “failed to make a case that these rates were truly representative and, still less, systematically compiled.” This implies that the data in the *Laffey* case were “truly representative and systematically compiled,” though the case itself does not necessarily

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support that assumption.¹³ Is the 1981 *Laffey* evidence any better than the 2007 Milberg evidence? Well, it is true that the *Laffey* evidence was developed in an adversary proceeding (though in the case the defendants did not challenge as inaccurate the plaintiffs' proposed matrix data).¹⁴ Moreover, there are lots of cases with hourly rates developed adversarially subsequent to *Laffey*. And of course, this fee award could have been subject to adversarial dispute as well had Judge Walker permitted the settlement to be sent to the class and had objectors emerged. If they hadn't, Judge Walker could also have appointed an advocate to contest the hours or rate on behalf of the absent class members or a special master to review the situation.¹⁵ Rather than attempt one of these means for assessing *current* fee rates for *this type of litigation* in the *relevant legal markets*, Judge Walker simply fell back on the data developed in a different kind of case, in a different legal market, at a different time – with all kinds of mathematical hocus pocus to make it look relevant to the case before him.

I begrudge neither Judge Walker nor the US Attorney's office that keeps the *Laffey* matrix for their efforts. The latter may in fact be providing a useful template for fee awards in employment discrimination matters in the Washington, D.C. area, though frankly, a new systematic survey would be better than the 1981 data with general CPI updates for a quarter century. Judge Walker should also be commended for taking seriously his responsibility to safeguard the class's interest in a class action, particularly where the fee award may be extracted from a common fund. That said, it may have been premature for Judge Walker to take such an active role at the preliminary review stage and it was surely

13 A lot of data was submitted in *Laffey*, see *Laffey*, 572 F.Supp. at 371-72 (noting that plaintiffs supported their fee request "with a barrage of data, including twenty-five attorney affidavits secured specifically for this litigation, information gleaned from affidavits filed in other cases, and fee data reflected in previous judicial decisions"), but nothing suggests it was any more or less one-sided than such data submitted by plaintiffs in other cases.

14 *Laffey*, 572 F. Supp. at 372.

15 See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006).

misguided of him to destroy the preliminary settlement on the basis that its fee request deviated from the relatively useless data in the DC US Attorney's *Laffey* matrix. Worse still, Judge Walker's mathematical efforts have the appearance of lending legitimacy to his final numbers, though those numbers are really very meaningless in the context of the task before him. The bind he's in, however, is that he is understandably suspicious of numbers that will be submitted to him in one-sided submissions from plaintiffs' counsel. The ideal solution to the judicial dilemma may well be a truly independent study of fee rates in particular markets, updated regularly within those markets – but of course this is an expensive undertaking without a great market to support it. Short of that, Judge Walker might have encouraged the attorneys to provide more thorough current and relevant data and/or, as noted above, waited for objectors or appointed a special master to look into the real data. He also might have heeded more closely the Ninth Circuit's stance that relevant data in this circumstance may well be other common fund fee awards in class actions, not private market rates.

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