DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
COLORADO CROSS-DISABIITY COALITION, et al., Plaintiffs, v. COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, et al., Defendants.	Case No. 09CV11761 COURTROOM 280
ORDER	

This case is before me on Plaintiff Colorado Cross-Disability Coalition's ("CCDC's") request for $116,849.50 in fees and $5,437.52 in costs, for a total request of $122,287.02. Based on my review of the briefs and attachments, on the evidence and arguments presented at the reasonableness hearing held on July 21, 2011, and on the supplemental written closing arguments filed August 1, 2011, I award CCDC $42,250.00 in fees.

I. INTRODUCTION

Plaintiff CCDC is a non-profit Colorado corporation. The other named Plaintiffs are disabled and indigent citizens, or the legal representatives of disabled and indigent citizens, who receive Medicaid benefits, including benefits for home health care, and on whose pro bono behalf CCDC is prosecuting this class action. Defendants are the Colorado Department of Health Care Policy and Financing and its executive director.

Under a relatively new program called Consumer Directed Attendant Support Services ("CDASS"), the subject home health care Medicaid benefits are now paid directly to the recipients themselves, by-passing what was an interim layer of bureaucracy in the form of provider agencies. Plaintiffs claim that Defendants failed to give them proper notice and an opportunity to be heard when in September and December of 2009 Defendants reduced all Medicaid reimbursement rates, including payments for CDASS benefits, as part of the Governor's across-the-board budget cuts.

The named individual Plaintiffs brought this class action on their behalf and on behalf of all CDASS recipients in Colorado whose CDASS benefits were reduced in September and December 2009 without proper notice and an opportunity to be heard. Plaintiffs' counsel estimates the size of this putative class to be in excess of 1,400. In their Amended Complaint, Plaintiffs assert four claims for relief: 1) a statutory claim for damages under the Medicaid Act; 2) a constitutional claim for damages under the 14th Amendment and 42 U.S.C. § 1983; 3) a declaratory judgment claim; and 4) a claim for an injunction.

On September 15, 2010, before any class certification hearing, the case settled in mediation. Under the written settlement, Defendants agreed not to reduce any CDASS benefits without first sending an agreed-to form of notice to all CDASS recipients. The parties also agreed that CCDC would submit its requested fees to Defendants for their review, and that if the parties could not agree to a reasonable fee to be paid by Defendants to CCDC then the amount of reasonable fees would be submitted to the mediator. The settlement agreement was silent as to what happens if the fee mediation were unsuccessful, which it was. It was also silent as to costs.

Plaintiffs filed a motion to enforce settlement agreement, in which they sought CCDC's requested fees, as well as costs. Defendants objected, taking the position they never agreed to pay CCDC's fees under the settlement. Defendants did not specifically respond to CCDC's request for

costs. By my Order dated January 17, 2011, I concluded that the written settlement agreement was unambiguous, and that Defendants had in fact agreed to pay CCDC's reasonable fees. I also concluded that the settlement agreement did not shift costs, and that each side would pay its own costs. I ordered the parties to file briefs on the amount of fees sought. In those briefs CCDC sought reconsideration of my denial of costs, and Defendants requested a hearing on the reasonableness of the fees.

In addition to fees through the date of the settlement agreement, September 15, 2010, CCDC seeks post-September 15, 2010 fees, as well as co-called fees-on-fees through the end of the fee hearing, on two alternate theories: 1) these post-September 15 fees and fees-on-fees are all awardable under the written settlement agreement, which did not by its terms cut off fees as of its date; and 2) these fees are in any event awardable under § 13-17-102, because Defendants' post-September 15 positions in resisting the motion to enforce and in resisting the reasonableness of the fees were substantially groundless and frivolous. CCDC also seeks costs from the beginning of this case through the fee hearing.

Defendants object to the reasonableness of CCDC's fees incurred through September 15, 2010,[1] object entirely to the award of any fees post-September 15, 2010, and object to the award of any costs pre- or post-September 15, 2010.

I conclude that CCDC is entitled to all of its reasonable fees through the filing of its reply brief in support of its motion to enforce settlement, on December 21, 2010, but that it is not entitled to any fees after that point. I conclude that the reasonable amount of these awarded fees through December 21, 2010, is $42,250.00. I also reaffirm that CCDC is not entitled to any costs.

II. GENERAL PRINCIPLES

Of course, we still subscribe to the American Rule, under which each side to litigation pays its own fees, unless fee-shifting is agreed to by contract or authorized by statute. *Crandall v. City and County of Denver*, 238 P.3d 659, 662 (Colo. 2010); *Sifton v. Stewart Title Guar. Co.*, ___ P.3d ___, 2011 WL 2321431, at *3 (Colo. App. 2011). In addition to some organic statutory fee-shifting provisions, § 13-17-102 requires trial courts to award fees against a party whose claims or defenses were substantially groundless, frivolous or vexatious.

The party seeking to recover fees bears the burden of demonstrating its entitlement to the fees it requests. *Regency Realty Inv. v. Clear Fire Prot. Dist.*, ___ P.3d ___ 2009 WL 2782228, at *7 (Colo. App. 2009). Moreover, it has been well-settled since *Ramos v. Lamm*, 539 F. Supp. 730 (D. Colo. 1982), *aff'd in part and rev'd in part*, 713 F.2d 546 (10th Cir. 1983), that where, as here, lawyers are representing clients on a pro bono basis, that fact does not disable the lawyers from seeking to recover a reasonable fee, as long as there is a basis to depart from the American Rule.

To determine whether fees are reasonable, trial courts must begin with the lodestar analysis, that is, an analysis first of the reasonableness of the rates then of the reasonableness of the hours billed. *See, e.g., Spensieri v. Farmers Alliance Mut. Ins. Co.*, 804 P.2d 268, 270 (Colo. App. 1990). The reasonableness of these two components is in turn to be decided in light of all the circumstances of the case, including consideration of the eight factors specifically set forth in Rule 1.5(a) of the Colorado Rules of Professional Conduct. *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143, 147 (Colo. App. 1996); *Spensieri, supra*, at 271. These eight factors are:

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 the acceptance of the particular employment will preclude other employment by the lawyer.

[1] Defendants also continue their objection to an award of *any* fees, preserving this issue for any appeal.

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.

8. Whether the fee is fixed or contingent.

Colo. R.P.C. 1.5(a). Before I apply these factors to the loadstar here, let me address CCDC's renewed request for costs.

III. COSTS

CCDC's renewed request for costs is DENIED.

Since the substantive case was settled rather than litigated, Rule 54, which is limited to "a decree or order from which an appeal lies," does not apply. C.R.C.P. 54(a). Even if it did apply, I cannot say that CCDC prevailed in this litigation for Rule 54(d) purposes, any more than I could say it prevailed under the fee and cost shifting provisions of § 1983, on which it does not seem to rely. Finally, Rule 54(d) expressly provides that "costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law." This phrase has been interpreted to mean that costs may not be awarded against the state unless the General Assembly has enacted a statute specifically allowing an award of costs. *E.g., Farmers Reservoir & Irrig. Co. v. City of Golden*, 113 P.3d 119, 130 (Colo. 2005); *Smith v. Furlong*, 976 P.2d 889, 890 (Colo. App. 1999). No such statute exists that allows these costs.

Plaintiffs' reliance on § 13-16-104 is misplaced. First, that statute simply does not apply here. It is limited to cases in which a plaintiff sues for and recovers damages for a wrong. This case was not only settled, but Plaintiffs recovered no damages under the settlement. As I have

already ruled, the parties agreed in the written settlement agreement to shift fees, but not costs. Moreover, even if it applied, our court of appeals has expressly found that § 13-16-104 is *not* a specific grant of authority to allow the awarding of costs against the state. *Smith v. Furlong, supra,* 976 P.2d at 890-91.

IV. THE FEE-SHIFTING PROVISION IN THE SETTLEMENT AGREEMENT ENTITLES PLAINTIFFS TO ALL THEIR REASONABLE FEES INCURRED IN ENFORCING THE SETTLEMENT, BUT NOT TO THE FEES-ON-FEES INCURRED AT THE REASONBALENESS HEARING

I agree with Plaintiffs that the fee-shifting provision in the written settlement agreement entitles Plaintiffs to recover all the reasonable fees they incurred not just in litigating and settling this case but also then in moving to enforce the settlement agreement. Any other conclusion would reduce the value of the fee-shifting provision below what I believe were the parties' contracted-for expectations. It is a hollow promise indeed if I promise to pay your fees, and then force you to incur additional fees by claiming I never made that promise.

My conclusions in this regard are bolstered by the extrinsic evidence. Plaintiffs' counsel is in-house to CCDC, a not-for-profit entity. The only way they can keep their doors open is through charitable contributions and fee awards. It is inconceivable to me that Plaintiffs' counsel would have entered into an agreement for fees, knowing that the value of that agreement could be compromised through the simple artifice of Defendants denying that they had agreed to pay fees.

Alternatively, I find and conclude that Defendants' position on the motion to enforce was substantially groundless and frivolous. It is utterly ridiculous to argue, as Defendants did here, that they agreed to a two-step process to liquidate CCDC's fees—first by trying to reach an agreement on their own and then, failing that, by submitting the reasonableness issue to the mediator—with the understanding that in the end if no agreement on reasonableness could be reached then

Defendants would pay *no* fees. The only reason Defendants agreed to the processes to try to liquidate CCDC's fees is because Defendants agreed to pay those fees.

Indeed, when at the fee hearing I asked Defendants' counsel how she could square this two-step liquidation provision with Defendants' position that they never agreed to pay fees, the only thing she could come up with was that this provision was from earlier drafts, and was left in the final settlement agreement by mistake. That explanation itself is groundless and frivolous. This was an extraordinarily short written settlement agreement, consisting of just a little over two typed pages. The idea that the assistant attorney general and her public clients all signed this short agreement without reading it is simply not credible, and course even if it were true, such a unilateral and wholly unreasonable mistake would not be a defense.

But it is a much closer question for the so-called fees-on-fees, that is, the fees CCDC incurred in preparing for and conducting the reasonableness hearing. For one thing, it seems to me to be quite a stretch to say that by agreeing to shift fees, Defendants necessarily agreed to pay CCDC's fees incurred in objecting to the *amount* of the requested fees. Indeed, here, with no market forces cabining Plaintiffs' counsel's fees, it seems unlikely that the attorney general would ever have agreed to constrain her clients' own right to object to the reasonableness of the requested fees by agreeing in advance to pay for fees-on-fees. Moreover, the state of the law on fees-on-fees is somewhat uncertain. There are several cases that purport to state the rule that fees-on-fees are not recoverable unless the defense interposed to the fees was itself substantially groundless, frivolous or vexatious within the meaning of § 13-17-102. *See, e.g., Foxley v. Foxley,* 939 P.2d 455, 460 (Colo. App. 1996). Here, not only was Defendants' resistance to the reasonableness of the requested fees not groundless or frivolous, it was in part successful, as discussed below.

V. THE REASONABLENESS OF THE FEES

Through the date of their reply brief in support of their motion to enforce the settlement agreement, which was filed on December 21, 2010, Plaintiffs seek $55,996 in fees.[2]

Before I look at each of the loadstar components to these fees, let me apply each of the eight Rule 1.5(a) factors to this case.

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. Disability law tends to be complex, both substantively and procedurally, and this case was more complex than average. It took counsel into several different uncharted territories, including two particularly unique areas: 1) whether the usual forms of notice required by federal law also apply to this new kind of program, CDASS, where the benefits are paid directly to the recipients rather than through a service provider; and 2) the interplay between the federally-required notice and the Governor-mandated budget cuts. Defendants' contention that they were willing all along to enter into this settlement is belied by the undisputed facts. It took this lawsuit, the mediation that arose from it, and apparently enough drafts of the settlement agreement to confuse defense counsel and her clients, to settle this case.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. There was no evidence at this hearing directly on this factor, at least as to what Plaintiffs themselves may have known. But we do know that CCDC's legal "department" consists entirely of Messrs. Williams and Montoya as lawyers and Ms. McCarten as paralegal. Any significant litigation like this case will divert any

[2] I derive this figure from the bills attached to the motion for fees. Those bills, attached as Exhibit 2 to the motion, show total fees through February 7, 2011, of $94,861. Of that total, $38,865 was for work done after December 21, 2010, the date Plaintiffs filed their reply in support of their motion to enforce settlement. The difference between these two amounts is $55,996, which therefore represents the fees billed for work from the beginning of this case through December 21, 2010.

small firm's attention away from other employment. And, indeed, Mr. Williams represented in his brief that the suddenness of these cuts forced CCDC to "drop everything" to address them. Brief, filed February 7, 2011, p. 27. On the other hand, any such "other employment" would also be pro bono work, so I give very little weight to this factor in assessing the reasonableness of these fees.

3. The fee customarily charged in the locality for similar legal services. There was no particular evidence on this factor, other than what is discussed below regarding the reasonableness of Plaintiffs' counsel's hourly rates.

4. The amount involved and the results obtained. Although Plaintiffs had damage claims, the real focus of this litigation was to stop the proposed cuts until proper notice and an opportunity to be heard. Plaintiffs accomplished that goal.

5. The time limitations imposed by the client or by the circumstances. There was some general urgency created by these proposed cuts. Had they gone forward, some recipients of these direct benefits may have already overspent their monthly allocations.

6. The nature and length of the professional relationship with the client. There was no evidence that any individual Plaintiff had any particularly long or deep relationship with Plaintiffs' counsel. On the other hand, this is what CCDC and its lawyers do: they represent classes of disabled and indigent people, many of whom undoubtedly overlap case to case.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services. I address this factor below, in discussing the reasonableness of Messrs. Williams' and Montoya's hourly rates.

8. Whether the fee is fixed or contingent. Here, the fee was neither fixed nor contingent; it was pro bono. But this factor is meant to reflect the degree of risk a lawyer takes on by the nature of his fee. A contingent fee is riskier than a fixed fee, and therefore weighs in favor of a

higher overall fee. No fee at all—or more precisely, CCDC's hope that it would either prevail on the § 1983 claim, with its attendant fee-shifting provision, or, short of that, get some fees as part of a settlement—makes this kind of arrangement at least as risky for CCDC as a contingent fee arrangement, and in my view therefore weighs in favor of a higher fee.

With these eight factors in mind, let me now turn to the two loadstar components.

A. The Reasonableness of the Rates

Plaintiffs seek fees for the work of three different time-keepers: attorney Kevin Williams, who billed $330 per hour in 2010 and $345 per hour in 2011; 2) Andrew Montoya, who was first a law student who billed at the paralegal rate of $100 per hour, then, after he passed the bar, billed at the associate's rate of $200 per hour; and paralegal Briana McCarten, who billed $90 per hour in 2010 and $100 per hour in 2011. I share Defendants' general skepticism about the reasonableness of these rates, given the fact that they are not the market product of any arms-length agreement by any clients to actually pay those rates. But I am nevertheless persuaded, despite this skepticism, that Mr. Williams' rates and the paralegal rates were all reasonable. I find that $200 for a first-year associate is unreasonable in these circumstances, and that a reasonable rate for Mr. Montoya would have been $160 per hour.

Let me start with the two easiest rates. Paralegal hourly rates of $90 in 2010 and $100 in 2011 are eminently reasonable, and indeed probably a little low based on my experience presiding over these kinds of fee issues. By contrast, the $200 per hour for Mr. Montoya once he passed the bar is palpably unreasonable. The Colorado Bar Association 2008 Economic Survey shows that the average hourly rate charged by associates in one-partner firms was $227, but of course this included associates who had been out of law school many years. A first-year associate generally knows much less about how law really works than an experienced paralegal, though I recognize

that here Mr. Montoya worked in both capacities. In any event, doubling his hourly rate because he passed the bar is simply unreasonable. I conclude that a reasonable hourly rate for Mr. Montoya's work as a first-year associate would have been no more than $160.

As for Mr. Williams' hourly rates of $330 in 201 and $345 in 2011, I am satisfied that these are reasonable. Mr. Williams is an experienced lawyer who specializes in disability law. As already mentioned, this is a highly specialized area of the law, both substantively and procedurally, often involving, as it did here, class action allegations. Mr. Williams graduated third in his class from the University of Denver School of Law in 1996, and has represented disabled plaintiffs in more than 100 cases, including *Lucas v. Kmart Corp.*, Case No. 99-JLK-001923 (D. Colo.), a class action in federal court, and *Rossart v. Developmental Pathways, Inc.*, Case No., 06CV4479 (Denver Dist. Ct.), a class action in state court and a case over which I happened to preside. Mr. Williams' work in the subject case was performed at the same high level I have consistently seen from him in the past.

I was persuaded by Plaintiffs' expert, Mr. Timothy Fox, who does this very same kind of litigation, and who testified these rates were reasonable. Indeed, Mr. Fox testified that he charges real, paying, clients as much as $360 per hour. True, Mr. Fox has been practicing since 1991—a little longer than Mr. Williams—but, as I understand it, Mr. Fox has been focused on disability law only since 1996.

I was not at all persuaded by Defendants' expert, Mr. David Brougham. Though Mr. Brougham is more experienced than Messrs. Williams and Fox put together, he has never represented a plaintiff in any kind of case, let alone a disability class action. The entirety of his experience is on the defense side, and most of that was defending municipalities who are either insured or self-insured members of groups who pool their risks. For as long as I practiced, and for

as long as I have presided over attorneys fee issues, insurance defense lawyers have always commanded hourly rates substantially lower than prevailing rates. Indeed, the 2008 Economic Survey shows that the average civil litigator billed at $260 per hour, while the average insurance defense lawyer billed at $166 per hour. See also 2011 SURVEY OF BILLING AND PRACTICES FOR SMALL AND MIDSIZE LAW FIRMS, HTTP://ACCOUNTING.SMARTPROS.COM/X71411.XML (national survey showing commercial litigators at medium and small firms billed at $398 per hour and insurance defense lawyers at $199 per hour). The fact that in all of Mr. Brougham's 39 years as an insurance defense lawyer he has never billed more than $175 per hour may speak volumes about the competitiveness of the insurance industry and the lawyers who in turn compete for insurers' legal business, but it tells me virtually nothing about the reasonableness of Plaintiffs' counsel's rates.

Nor was I persuaded by Mr. Brougham's reliance on a recent case in which former Justice Jean Dubofsky billed $300 per hour for a civil rights case. All of us can cherry-pick rates of highly respected lawyers who bill less than Plaintiffs' counsel, and less highly respected lawyers who bill more than Plaintiffs' counsel. One or two lawyers, no matter their professional standing, does not a reasonable rate make. In fact, if I were to cherry-pick cases and lawyers I might be much more inclined to look at what these very Defendants have in the past agreed to pay this very same Plaintiffs' counsel in a case very similar to this one. In *Rossart, supra*, the fees Defendants agreed to pay Mr. Williams were based on an hourly rate of $360, which I found reasonable. Admittedly, Defendants in that case agreed to pay only $245,000 out of the $360,000 loadstar. Even so, the effective compromised rate—$245 per hour—is substantially more than the defense expert, Mr. Brougham, has ever billed.

In the end, the reasonableness of a fee is a broad and normative inquiry, and I am persuaded that $330 in 2010 and $345 in 2011 are not unreasonable rates for this kind of work, done by a lawyer of Mr. Williams' caliber, and taking into consideration all of the Rule 1.5(a) factors discussed above.

B. The Reasonableness of the Hours

My conclusion on fees therefore comes down, as it so often does, to an assessment of the reasonableness of Plaintiffs' hours. Taking into consideration all the Rule 1.5(a) factors discussed above, and for the more particular reasons set forth below, I conclude that a reduction in the hours billed, and therefore in the total fees awarded, is appropriate.

1. Billing Overhead as Paralegal Time. I agree with Defendants that both Mr. Montoya and Ms. McCarten occasionally billed for professional services when their activities are more properly characterized as overhead. For example, Ms. McCarten billed for time spent in "transcribing" a pleading, and Plaintiffs did not meet their burden of demonstrating that this was instead drafting work. There was other work that appeared to be secretarial work that was billed as if it were paralegal work.

2. Redundant or Unnecessary Work. There were some items billed for work that I conclude was redundant, unnecessary, took too long or otherwise should not be recovered. For example, Mr. Williams has an entry in which he purported to bill 20 hours for general research into Medicaid. This was a complicated case, but Mr. Williams is a Medicaid expert, and surely he did not need to spend 20 hours refreshing himself about Medicaid notice requirements. Likewise, he spent a comparable amount of time researching "class certification issues." Mr. Montoya spent a large amount of time doing what the defense expert called "getting himself up to speed." Of course, part of the reason for discounting Mr. Montoya's reasonable hourly rate from $200 to $160

is to reflect the fact that all first-year lawyers have to spend lots of time getting up to speed. But some of this seemed excessive even for a first-year lawyer, largely repeated what Mr. Williams was already doing, and did not advance the case. Plaintiffs' counsel also spent a considerable amount of time getting ready for a class certification hearing that was never held; indeed, the case settled two full months before the scheduled certification hearing.

3. Block Billing. There are some examples of bills that include so many disparate items under a single reported time that I agree with Defendants' characterization of them as "block bills." This was not a common problem, and in general Plaintiffs' counsel's bills were as good or better in this regard than most I've seen over the years. But some small reduction is warranted for those block entries that make it impossible for me to determine whether the time spent was reasonable.

4. Erroneous Entries. A very few entries were mistakes, including time reported to amend a complaint after the amended complaint was already filed, and one entry for researching CCDC's non-profit status with the I.R.S.

C. Adjusting the Loadstar

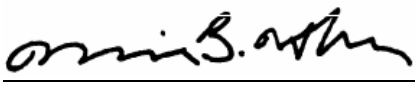
Taking all of the circumstances of this case into consideration, including the eight factors of Rule 1.5(a) and the particular circumstances discussed above, and remembering also that I am reducing Mr. Montoya's rate from $200 per hour to $160 per hour, I conclude that of the $55,996 loadstar still in play (representing the fees Plaintiffs incurred from the beginning of this case through December 21, 2010), $42,250 is reasonable.

VI. CONCLUSION

JUDGMENT FOR FEES HEREBY ENTERS in favor of Plaintiff Colorado Cross-Disability Coalition, and against Defendant Colorado Department of Health Care Policy and Financing, in the amount of $42,250.00, plus post-judgment interest at the statutory rate.

DONE THIS 10TH DAY OF AUGUST, 2011.

BY THE COURT:



Morris B. Hoffman
District Court Judge

cc: All counsel