

BEFORE THE
DEPARTMENT OF MANAGED HEALTH CARE
STATE OF CALIFORNIA

In the Matter of the Application for an
Award of Advocacy and Witness Fees of:

The Legal Aid Society of San Mateo County
dba Health Consumer Center, a California
corporation

Applicant.

DMHC Decision 07-08-01 August 31, 2007
Application Received Date: April 9, 2007

Proceeding Control No. 2004-0115
For 28 CCR § 1300.67.04
and 28 CCR § 1300.67.8(f)
(Re: Language Assistance Programs)

**OPINION GRANTING AWARD OF ADVOCACY AND WITNESS FEES
TO THE LEGAL AID SOCIETY OF SAN MATEO COUNTY DOING
BUSINESS AS HEALTH CONSUMER CENTER FOR
SUBSTANTIAL CONTRIBUTION TO PROCEEDING NO. 2004-0115**

1. SUMMARY

This decision awards The Legal Aid Society of San Mateo County doing business as Health Consumer Center, a California corporation (“HCC” or “APPLICANT”), Advocacy and Witness Fees for its substantial contribution to Proceeding No. 2004-0115 of the Department of Managed Health Care (Department) regarding Language Assistance Programs (“proposed regulation”), which became final as set forth at 28 CCR §1300.67.04 and deleted subsection (f) of 28 CCR § 1300.68.8.

2. BACKGROUND OF CONSUMER PARTICIPATION PROGRAM

The Consumer Participation Program, enacted in Health and Safety Code § 1348.9 (the Statute), required the Director (the Director) of the Department of Managed Health Care (the Department) to adopt regulations to establish the Consumer Participation Program to allow for the award of reasonable advocacy and witness fees to any person or organization that (1)

demonstrates that the person or organization represents the interests of consumers and (2) has made a substantial contribution on behalf of consumers to the adoption of any regulation or to an order or decision made by the Director if the order or decision has the potential to impact a significant number of enrollees.

The statute requires the regulations adopted by the Director to include specifications for: (1) eligibility of participation, (2) rates of compensation, and (3) procedures for seeking compensation. The statute specified that the regulations shall require that the person or organization demonstrate a record of advocacy on behalf of health care consumers in administrative or legislative proceedings in order to determine whether the person or organization represents the interests of consumers.

Pursuant to the Statute, Consumer Participation Program (the Program) regulations were adopted as section 1010 of Title 28 of the California Code of Regulations (the Regulations). The Regulations specified:

- a. Definitions for the Program, including: “Advocacy Fee,” “Compensation,” “Market Rate,” “Represents the Interests of Consumers,” “Substantial Contribution,” and “Witness Fees.” (§ 1010, subsection (b)).
- b. Procedure for a Request for Finding of Eligibility to Participate and Seek Compensation. (§ 1010, subsection (c)).
- c. Procedure for Petition to Participate. (§ 1010, subsection (d)).
- d. Procedure for Applying For An Award of Fees. (§ 1010, subsection (e)).

3. REQUIREMENTS FOR AWARDS OF ADVOCACY AND WITNESS FEES

3.1. PROCEDURAL REQUIREMENTS

All of the following procedures must be followed and criteria satisfied for a person or organization that represents the interests of consumers to obtain a compensation award:

- a. To become a “Participant,” the person or organization must satisfy the requirements of either or both of the following by:

(1) Submitting to the Director a Request for Finding of Eligibility to Participate and Seek Compensation in accordance with 28 CCR §1010(c), at any time independent of the pendency of a proceeding in which the person seeks to participate, or by having such a finding in effect by having a prior finding of eligibility in effect for the two-year period specified in 28 CCR § 1010(c)(3).

(2) Submitting to the Director a Petition to Participate in accordance with 28 CCR §1010(d), no later than the end of the public comment period or the date of the first public hearing in the proceeding in which the proposed Participant seeks to become involved, whichever is later (for orders or decisions, the request must be submitted within ten working days after the order or decision becomes final).

b. The Participant must submit an “application for an award of advocacy and witness fees” in accordance with 28 CCR §1010(e), within 60 days after the issuance of a final regulation, order or decision in the proceeding.

c. The Participant must have made a Substantial Contribution to the proceeding. (Health & Safety Code § 1348.9(a); 28 CCR § 1010(b)(8)).

d. The claimed fees and costs must be reasonable (Health & Safety Code § 1348.9(a)) and not exceed market rates as defined in 28 CCR § 1010.

3.2. APPLICANT’S APPLICATION TO PARTICIPATE

On March 22, 2006, APPLICANT submitted its Request for Finding of Eligibility to Participate and Seek Compensation with the Department giving notice that it represents the interests of consumers and of its intent to claim compensation.

On April 19, 2006, the Department Director (Director) ruled that APPLICANT was eligible to participate and to seek an award of compensation.

On September 18, 2006, APPLICANT submitted its Petition to Participate (Petition) with the Department in the Language Assistance Programs rulemaking proceeding. In its Petition, APPLICANT estimated its fees to be \$4,500.00.

In its Petition, APPLICANT stated that, with respect to language assistance issues that:

As an organization that serves a culturally diverse and politically, socially and linguistically disadvantaged population, we are invested in guaranteeing our community the greatest possible access to health care services. In parts of San Mateo County, nearly 60 percent of the population speaks a language other than English at home. About half of this group – 30 percent of the population – is limited English proficient (LEP). Providing culturally and linguistically appropriate services is therefore vital to ensuring meaningful access to quality health care for residents of our county, and for all Californians. We have a unique understanding of the language access needs of the population we serve and believe our participation is necessary to ensure their needs are considered in the rulemaking process. In 2005, 22 percent of the Legal Aid Society of San Mateo County’s clients were limited English proficient. Almost half of the clients of the Health Consumer Center (HCC), the project in our office that assists consumers with issues related to health care access, were LEP. Of the clients who received assistance from our ...[HCC] last year, 43 percent spoke a language other than English, 35 percent spoke Spanish, 6 percent spoke an Asian language, [and] 2 percent spoke another language. We have extensive experience representing individuals with limited English proficiency who have barriers accessing health care.

On September 25, 2006, the Director approved APPLICANT’s Petition to participate in the Language Assistance Programs rulemaking proceeding.

3.3. APPLICATION FOR AWARD OF ADVOCACY AND WITNESS FEES

The regulation (28 CCR § 1300.67.04) became final and effective on February 23, 2007. Within 60 days thereafter (on April 9, 2007), APPLICANT timely submitted its Application for an Award of Advocacy and Witness Fees (Application). 28 CCR § 1010(e)(1).

After the Application was publicly noticed, no objections to the Application were received.

The application for an award of compensation must include (as required by 28 CCR § 1010(e)(2) and (3)):

“a. A detailed, itemized description of the advocacy and witness services for which the Participant seeks compensation;

- b. Legible time and/or billing records, created contemporaneously when the work was performed, which show the date and the exact amount of time spent¹ on each specific task²; and
- c. A description of the ways in which the Participant's involvement made a Substantial Contribution to the proceeding as defined in subpart (b)(8), supported by specific citations to the record, Participant's testimony, cross-examination, arguments, briefs, letters, motions, discovery, or any other appropriate evidence." 28 CCR §1010 (e)(2).

With its request for fees, APPLICANT submitted a billing specifying the dates of services, a description of each specific task or each activity of advocacy and witness service, identification by initials of the person providing each service, the elapsed time (exact amount of time spent) for each service in quarters (15 minutes) of an hour for attorney advocates and in 0.5 hour or 30 minute increments for non-attorney advocates, the hourly rate requested,³ and the total dollar amount billed for each task. The total fees requested for work performed by APPLICANT is \$4,400.00.

However, the Application did not contain: (1) a detailed, itemized description of advocacy and witness services for which APPLICANT seeks compensation (22 CCR § 1010(e)(2)a); (2) time and/or billing records which show the date and time spent on each specific task (22 CCR § 1010(e)(2)b); (3) biographies or resumes of the persons who provided the services for which the fee award is sought; and (4) a description of how Market Rate was determined for the fees claimed.

By letter dated June 5, 2007, the Department requested additional information from APPLICANT, including: (1) a detailed, itemized description of advocacy and witness services for which APPLICANT seeks compensation (22 CCR § 1010(e)(2)a); (2) time and/or billing records which show the date and time spent on each specific task (22 CCR §

¹ "...the phrase 'exact amount of time spent' refers either to quarters (15 minutes) of an hour for attorneys, or to thirty (30) minute increments for non-attorney advocates." 22 CCR § 1010(e)(3).

² "The phrase 'each specific task,' refers to activities including, but not limited to:

- a. Telephone calls or meetings/conferences, identifying the parties participating in the telephone call, meeting or conference and the subject matter discussed;
- b. Legal pleadings or research, or other research, identifying the pleading or research and the subject matter;
- c. Letters, correspondence or memoranda, identifying the parties and the subject matter; and
- d. Attendance at hearings, specifying when the hearing occurred, subject matter of the hearing and the names of witnesses who appeared at the hearing, if any." 28 CCR § 1010(e)(3)a, b, c, and d.

³ Under the PUC Intervenor Compensation Program, the intervenors submit time logs to support the hours claimed by their professionals. Those logs typically note the dates, the number of hours charged, and the issues and/or activities in which each was engaged. D.06-11-009 (November 9, 2006), p. 26.

1010(e)(2)b and 22 CCR § 1010(e)(3)); (3) biographies or resumes of the persons who provided the services for which the fee award is sought; and (4) a description of how APPLICANT determined the Market Rate for each person for whom fees were claimed.

By letter dated July 6, 2007, APPLICANT provided: (1) a detailed, itemized description of advocacy and witness services for which APPLICANT seeks compensation; (2) the dates and time spent on each task; (3) a biography of each staff member for whom fees are claimed stating the name, job description, experience and skills of the staff member; and (4) a summary of the data and methodology followed in determining the hourly rate for the fees claimed, including records and data used in the hourly rate determination.

The Hearing Officer finds that the application of APPLICANT, as supplemented, substantially complies with the technical requirements of 28 CCR § 1010(e)(2) and (3).

4. PROCEDURAL HISTORY

Beginning in September of 2005, the Department invited parties who would be the subject of the proposed regulation to public discussions (“stakeholder meetings”) in order to increase public participation and improve the quality of the proposed regulation. Gov’t Code § 11346.45.

On December 23, 2005, the Department issued a Notice of Proposed Rulemaking (Notice) proposing to adopt 28 CCR section 1300.67.04 and to delete subsection (f) of 28 CCR § 1300.67.8, and establishing a 60-day comment period from December 23, 2005 to February 21, 2006.

In the Informative Digest/Policy Statement Overview contained within the Notice, the Department stated that:

Proposed adoption of section 1300.67.04

SB 853 (2004) added Chapter 2.2, section 1367.04 of the Health and Safety Code (section 1367.04) expressly instructing the Department to develop and adopt regulations by January 1, 2006. The statute also contained specific requirements for the content of the regulations, including requirements that the regulations establish the standards and requirements for plans’ provision of translation and interpretation services. Accordingly, the regulation establishes standards and requirements related to: assessing the linguistic needs of enrollees; arranging for

and providing translation and interpretation services; training plan staff; and monitoring compliance with the regulation.

Proposed deletion of subsection (f) of section 1300.67.8

The Department has determined that it is necessary to rescind subsection (f) of Rule 1300.67.8. Subsection (f) has been suspended since it was promulgated in November 2003, in response to additional information obtained by the Department regarding unintended consequences that may result from application of subsection (f), and the identified potential for a more workable approach through the language assistance regulation. The Department has determined that the workable aspects of subsection (f) can be appropriately incorporated into the proposed language assistance program regulation, rendering the existing suspended subsection (f) unnecessary.

Two Public Hearings on the proposed regulation were scheduled and noticed for February 14, 2006, in Los Angeles, and February 16, 2006, in Oakland, California. The notice of public hearings extended the written comment period to March 3, 2006.

On July 26, 2006, the Department issued a notice of a second public comment period for 30 days from July 26, 2006 through August 25, 2006. By notice dated August 15, 2006, the Department extended the second comment period for 30 days ending September 25, 2006.

On November 17, 2006, the Department issued a notice of a third public comment period for 16 days from November 17, 2006 through December 3, 2006.

On December 22, 2006, the final regulation package was submitted to the Office of Administrative Law (OAL). The regulation was approved by OAL and filed with the Secretary of State on January 24, 2007. The regulation was effective on February 23, 2007.

5. SUBSTANTIAL CONTRIBUTION

Health and Safety Code section 1348.9, subdivision (a) provides that:

“[T]he director shall adopt regulations to establish the Consumer Participation Program, which shall allow for the director to award reasonable advocacy and witness fees to any person or organization that demonstrates that the person or organization represents the interests of consumers and has made a substantial contribution on behalf of consumers to the adoption of any regulation....” (Emphasis added).

28 CCR § 1010(b)(8) defines “Substantial Contribution” as follows:

“‘Substantial Contribution’ means that the Participant

significantly assisted the Department in its deliberations by presenting relevant issues, evidence, or arguments which were helpful, and seriously considered, and the Participant's involvement resulted in more relevant, credible, and non-frivolous information being available to the Director."

The definition of "Substantial Contribution" provides the criteria for evaluating whether the consumer participant has made a substantial contribution.⁴

5.1 APPLICATION MUST INCLUDE DESCRIPTION OF CONTRIBUTION

The application for an award of compensation must include "a description of the ways in which the Participant's involvement made a Substantial Contribution to the proceeding⁵..., supported by specific citations to the record, Participant's testimony, cross-examination, arguments, briefs, letters, motions, discovery, or any other appropriate evidence." 28 CCR § 1010(e)(2)c.

5.2. APPLICANT'S DESCRIPTION OF ITS CONTRIBUTION

APPLICANT described the following documents and testimony in support of its substantial contribution to proposed adoption of 28 CCR § 1300.67.24:

⁴ Further guidance is provided in PUC Decisions awarding intervenor compensation – for example:

"In evaluating whether ... [an intervenor] made a substantial contribution to a proceeding, we look at several things. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the ... [intervenor]? ... Second, if the ... [intervenor's] contentions or recommendations paralleled those of another party, did the ... [intervenor's] participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? ... [T]he assessment of whether the ... [intervenor] made a substantial contribution requires the exercise of judgment.

"In assessing whether the ... [intervenor] meets this standard, the Commission typically reviews the record, ... and compares it to the findings, conclusions, and orders in the decision to which the ... [intervenor] asserts it contributed. It is then a matter of judgment as to whether the ... [intervenor's] presentation substantially assisted the Commission. [citing D.98-04-059, 79 CPUC2d 628, 653 (1998)].

Should the Commission not adopt any of the ... [intervenor's] recommendations, compensation may be awarded if, in the judgment of the Commission, the ... [intervenor's] participation substantially contributed to the decision or order. For example, if ... [an intervenor] provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the ... [intervenor] made a substantial contribution." PUC Decision D.06-11-031 (November 30, 2006), PP. 5 - 6; similarly, D.06-11-009 (November 9, 2006), pp. 7 - 8.

⁵ Decisions under the PUC's Intervenor Compensation Program go further and require intervenor's to assign a reasonable dollar value to the benefits of the intervenor's participation.

"D.98-04-059 directed ... [intervenors] to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of ... [an intervenor's] participation should bear a reasonable relationship to the benefits realized through their participation. This showing assists us in determining the overall reasonableness of the request." D.06-11-031 (November 30, 2006), p. 11; D.06-11-009 (November 9, 2006), pp. 31 - 32.

a. Written comments by APPLICANT's staff in response to the second comment period that closed on September 25, 2006, including: recommendation that Section 1300.67.04(c)(2)(C)(i) place more of the burden of language services upon the provider; emphasis on the importance of taking the burden of seeking language services entirely off the enrollee, and instead requiring plans to affirmatively offer services regardless of whether the enrollee arrives with his or her own ad hoc interpreter; recommendation that the regulation toughen its approach to the required qualifications of interpreters; concern that the regulations left far too much of the enforcement in the hands of the plans, with a scenario that simplified noncompliance; and recommendation that the regulation require more accountability to the Department.

5.3. PROCEDURAL VERIFICATION OF SUBSTANTIAL CONTRIBUTION

On September 25, 2006, APPLICANT's staff presented written comments signed by the Executive Director of APPLICANT on the proposed regulation. That submission contained five comments including recommendations requesting changes:

- (1) that the regulation should retain the revised definition of "interpretation" to include "with appropriate cultural relevance;"
- (2) that health plans must prioritize the use of qualified interpreters and address the disadvantages and detrimental effects of ad hoc interpretation and interpretation by unqualified friends and relatives; and the regulation must prohibit the use of minor children as interpreters;
- (3) that the regulation lacks sufficient authority in the types of interpretive services required of plans; the regulation should be revised to require plans to list a range of language assistance services and to require plans to utilize at least one option;
- (4) that the regulation should require a higher standard of accountability from plans; and it is imperative that the Department try to capture and address all points of noncompliance, not rely solely on consumers and providers to report or complain about problems with language access, and be directly involved in monitoring plans' compliance with the regulation; and

5) that the regulations place the burden of language assistance services on plans, rather than on enrollees, and require plans to affirmatively offer translated materials and oral interpretation services to enrollees upon obtaining information about the enrollee's preferred language, so that the onus is not on enrollees to request language services.

Of the five September 25, 2006, comments requesting changes, one was accepted in part and four were declined with explanation in the record.

5.4. FINDING OF SUBSTANTIAL CONTRIBUTION

The Hearing Officer finds that participation by APPLICANT: (1) significantly assisted the Department in its deliberations by presenting relevant issues, evidence, and arguments that were helpful and seriously considered, and (2) resulted in more relevant, credible, and non-frivolous information being available to the Director to make her decision regarding the proposed adoption of 28 CCR §1300.67.24 than would have been available to the Director had APPLICANT not participated.

The Hearing Officer hereby determines that by its participation APPLICANT made a substantial contribution on behalf of consumers to the proceedings, to the Department in its deliberations, and as a whole, to the adoption of 28 CCR §1300.67.24.

The Hearing Officer finds that APPLICANT has made a Substantial Contribution, pursuant to 28 CCR section 1010(b)(8), to the Language Assistance Programs rulemaking proceeding.

6. REASONABLENESS OF HOURS AND COSTS AND MARKET RATE

Health and Safety Code section 1348.9 allows the Director to award reasonable advocacy and witness fees to any person or organization that demonstrates that the person or organization represents the interests of consumers and has made a substantial contribution on behalf of consumers to the adoption of a regulation. "The hearing officer shall issue a written decision that ... shall determine the amount of compensation to be paid, which may be all or part of the amount claimed." 28 CCR § 1010(e)(7).

6.1. FEES REQUESTED

APPLICANT billed the following time, hourly rates, and fees for its representatives.

Staff / Title	Hours	Rates	Fees
Law Clerk/Law School Graduate	35.0	\$100.00	\$3,500.00
Staff Attorney	4.0	\$200.00	*\$600.00
Directing Attorney	1.0	\$300.00	\$300.00
TOTAL FEES		→	\$4,400.00

*Although 4 hours were reported for Staff Attorney, only \$600.00 was claimed. The amount of fees awarded may not exceed the amount claimed.

6.2. CONSIDERATIONS USED IN PUC'S INTERVENOR COMPENSATION PROGRAM

Reference to the intervenor compensation program of the California Public Utility Commission ("PUC") seems appropriate because it is similar to the Department's Consumer Participation Program⁶ and has an extensive history of awarding intervenor compensation and updating hourly rates used in computing awards of compensation to intervenors who make substantial contributions to PUC decisions.

In each proceeding before the PUC in which intervenors participate, the PUC issues a written opinion setting forth the decision regarding award of intervenor compensation. Therefore, the many PUC written decisions granting intervenor compensation provide a valuable source of guidelines to determine reasonableness and market value. Some of the common threads of the PUC decisions are summarized as follows.

In considering an intervenor organization's request for compensation, the PUC opinions:

a. Separately consider and approve the individual hourly rate of compensation for each of the intervenor's experts and advocates.⁷

⁶ The Legislative history behind the Department's Consumer Participation Program specifically referred to the PUC's program.

"The Legislature finds and declares that consumer participation programs at the Public Utilities Commission and the Department of Insurance have been a cost-effective and successful means of encouraging consumer protection, expertise, and participation...." Stats 2002 C. 792 § 1 (SB 1092).

⁷ PUC Decision (D.) 06-11-031 (November 30, 2006).

b. Have awarded the same rate for an individual expert that was approved in a prior proceeding in the same year,⁸ and have declined to approve a requested increase in hourly rate for an expert over the rate approved in a prior proceeding in the same year.⁹

c. Have awarded increases of three percent (3%) rounded to the nearest \$5 over the prior year when increase in hourly rates is requested by the intervenor organization or where the hourly rate for an individual expert or advocate was approved in the prior year and an increase is considered warranted for the current year.¹⁰ The PUC has consistently rejected requests for increase over 3%.¹¹

d. Have stated that documentation of claimed hours by presenting a daily breakdown of hours accompanied by a brief description of each activity, reasonably supported the claim for total hours.¹²

e. Have approved compensation for travel time at one-half the normal hourly rate.¹³

f. Have approved compensation for preparation of the intervenor organization's compensation request or compensation claim at one-half the normal hourly rate.¹⁴ However, administrative costs are considered non-compensable overheads, and therefore, the PUC has disallowed time charged by an intervenor's office manager for gathering expense data for the compensation claim.¹⁵

g. Have approved compensation for efforts that made a substantial contribution even where the PUC did not wholly adopt the intervenor's recommendations.¹⁶

h. Have approved payment of itemized direct expenses where the request shows "the miscellaneous expenses to be commensurate with the work performed," including costs for photocopying, FAX, Lexis research, postage, courier, overnight delivery, travel, and parking.¹⁷

i. Have reminded intervenors of the requirements for records and claim support, and that PUC staff may audit the records – for example:

“We remind all intervenors that Commission staff may audit their records related to the award and that intervenors must make and retain adequate

⁸ D.06-11-031 (November 30, 2006).

⁹ D.06-11-032 (November 30, 2006), pp. 10 – 11.

¹⁰ D.06-11-031 (November 30, 2006), p. 11.

¹¹ D.06-11-031 (November 30, 2006), p. 11.

¹² D.06-11-031 (November 30, 2006), p. 10.

¹³ D.06-11-031 (November 30, 2006); D.06-11-032 (November 30, 2006), p. 8, fn. 4.

¹⁴ D.06-11-031 (November 30, 2006), p. 9, fn. 2; D.06-11-032 (November 30, 2006), p. 8, fn. 4.

¹⁵ D.06-11-009 (November 9, 2006), p. 27.

¹⁶ D.06-11-031 (November 30, 2006), p. 10.

¹⁷ D.06-11-031 (November 30, 2006), p. 12; D.06-11-032 (November 30, 2006), pp. 14 – 15; D.06-11-009 (November 9, 2006), p. 32.

accounting and other documentation to support all claims for intervenor compensation. [Intervenor's]... records should identify specific issues for which it requested compensation, the actual time spent by each employee or consultant, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.”¹⁸

j. Have disallowed time where the “hours seem excessive” or the “proposal is not persuasive,”¹⁹ and have changed or disallowed compensation amounts requested for the following reasons:²⁰ “Excessive hourly rate; arithmetic errors; failure to discount comp prep time [and travel time]; hours claimed after decision issued; ...administrative time not compensable; unproductive effort.”

6.3. REASONABLENESS OF TIME BILLED

We must assess whether the hours claimed for the consumers’ efforts that resulted in substantial contributions to the proceedings are reasonable by determining to what degree the hours and costs (if any costs are claimed) are related to the work performed and necessary for the substantial contribution.²¹

APPLICANT billed for activity summarized as follows:

1. Review and analysis of the revised text of the proposed regulation against the backdrop of existing law, best practices research, and client experience; and preparation of written comments submitted in the second written comment period ending September 25, 2006, for a total of 40.0 hours, with focus on: the importance of taking the burden of seeking language services off the enrollee, and instead requiring plans to affirmatively offer services regardless of whether the enrollee arrives with his or her own ad hoc interpreter; toughening the requirements regarding the qualifications of interpreters; and requiring accountability to the Department.

The Hearing Officer hereby finds that the time billed is related to the work performed, necessary for the substantial contributions made, and reasonable for the advocacy and witness services performed and work product produced.

¹⁸ D.06-11-031 (November 30, 2006), pp. 14 -15.

¹⁹ D.06-11-032 (November 30, 2006), pp. 9 - 10.

²⁰ D.06-11-009 (November 9, 2006), Appendix p. 1.

²¹ See, e.g., PUC D.06-11-031 (November 30, 2006), p. 10; D.06-11-032 (November 30, 2006), p. 9; D.06-11-009 (November 9, 2006), p. 26.

6.4. MARKET RATE

Public interest attorneys are entitled to request the prevailing market rates of private attorneys of comparable skill, qualifications and experience. (*Serrano v. Unruh* (“*Serrano IV*”) (1982) 32 Cal.3d 621.). APPLICANT is entitled to be compensated for Advocacy Fees and Witness Fees at hourly rates that reflect Market Rate for services. Advocacy Fees and Witness Fees cannot exceed Market Rate, as defined in the Regulation. 28 CCR §§ 1010(b)(1), (3) and (10). “Market Rate” is defined at 28 CCR section 1010(b)(3) as follows:

“‘Market Rate’ means, with respect to advocacy and witness fees, the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas at the time of the Director’s decision awarding compensation for attorney advocates, non-attorney advocates, or experts with similar experience, skill and ability.”

6.5. HOURLY RATES THAT REFLECT “MARKET RATE”

The Hearing Officer finds that hourly rates for services provided in a statewide proceeding or proceeding of a state agency having statewide jurisdiction and effect (such as proceedings of the California Public Utilities Commission, see *infra*) are essentially equivalent to “comparable services in the private sector in the Los Angeles and San Francisco Bay Areas,” as required by 28 CCR § 1010, subsection (b)(3).

Accordingly, we must take into consideration whether the claimed fees and costs (if any) are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services.²² In order to determine Market Rate, we must look to available data inside and outside the Department.

6.6. APPLICANT’S JUSTIFICATION FOR RATES BILLED

In support of the hourly fee rates requested, APPLICANT did not submit any justification other than the experience and biographical information regarding the persons providing services.

²² See, e.g., PUC D.06-11-031 (November 30, 2006), p. 10; D.06-11-032 (November 30, 2006), p. 10.

In support of the hourly fee rates requested, APPLICANT submitted the following: APPLICANT claims advocacy and witness fees for: (1) one law clerk at the hourly rate of \$100.00; (2) one staff attorney at the hourly rate of \$200.00; and (3) one directing attorney at the hourly rate of \$300.00. To determine reasonable attorney fees, APPLICANT relied reported that it relied on two sources: (1) Rates claimed by and awarded to the Health Rights Hotline – an organization that engages in similar advocacy – for services in similar proceedings; and (2) Declaration of Richard M. Pearl, Esq., in Support of Motion for Award of Reasonable Attorney’s Fees, an expert on attorneys’ fees issues. APPLICANT’s attorney fee claims are based on time practicing law since admission to the bar and relevant experience of the attorney. A separate flat rate is claimed for law clerks who have not yet gained admission to the bar.

6.7. HOURLY RATE DETERMINATIONS UNDER THE PUC PROGRAM

A recent PUC Decision²³ approved and adopted hourly rates within the following ranges for 2006:

For attorneys: \$170, \$175, \$190, \$210, \$250, \$260, \$285, \$310, \$325, \$335, \$360, \$375, \$400, \$405, \$425, \$435, and \$505.

For non-attorney, policy experts: \$110, \$150, \$340, and \$360.

Another PUC Decision²⁴ provided the following examples of “recently adopted non-attorney rates and years of professional experience (as provided by an expert seeking a rate increase).

Non-attorney Hourly Rates		
<u>Experience (years)</u>	<u>Year Work Performed</u>	<u>Hourly Rate</u>
16	2003	\$215
12	2005	\$130
12	2003-2005	\$180
5	2005	\$120
7	2005	\$120
12	2005	\$150
8	2005-2006	\$150

²³ Id. at pp. 30-31.

²⁴ D.06-11-032 (November 30, 2006), pp. 11 – 12.

Until PUC Decision R.04-10-010 in 2004, the PUC set hourly rates for intervenors in a piecemeal manner –i.e., for each proceeding, the PUC might revisit the reasonableness of the hourly rate for each intervenor and each appearance by a particular representative of an intervenor. The PUC recognized the need for coordination by establishing, through periodic rulemakings, the rates to be paid to all intervenors’ representatives for work done in specified time periods.²⁵ The first such rulemaking was R.04-10-010, D.05-11-031, which set certain guidelines, recognized that hourly rates had stabilized, and determined that the PUC would not authorize a general increase to intervenor hourly rates for work performed in 2005.²⁶

In an Interim Opinion on Updating Hourly Rates,²⁷ the PUC adopted a three percent (3%) cost-of-living adjustment (COLA) for work performed in calendar year 2006, adopted an additional 3% COLA for work performed in 2007, and established effective with 2007 work three rate ranges for non-attorney experts based on levels of experience, similar to the five levels already established for attorneys.²⁸ The three levels for non-attorney experts are: 0-6 years; 7-12 years; and 13-plus years. In so doing, the PUC found that:

“...basing expert rates on levels of experience, similar to the levels established for attorneys, will better ensure that an expert’s given rate is within the market rates paid to persons of comparable training and experience. However, in no event should the rate requested by an intervenor exceed the rate billed to that intervenor by any outside consultant it hires, even if the consultant’s billed rate is below the floor for a given experience level. ...[I]ntervenors must disclose the credentials of their representatives in order to justify the requested rates.”²⁹ (Emphasis added).

The following table shows the PUC’s adopted ranges for work performed by intervenor representatives in 2006 and 2007. The rate ranges for attorneys and non-attorney experts are based on levels of applicable experience.

²⁵ PUC Order Instituting Rulemaking R.06-08-019 (August 24, 2006), p. 2.

²⁶ Id. at pp. 2-3.

²⁷ D.07-01-009 (January 11, 2007)(part of Rulemaking R.06-08-019).

²⁸ Id. at pp. 1, 3-4.

²⁹ Id. at p. 5.

Hourly Intervenor Rate Ranges for 2006 and 2007³⁰

(For 2006, rates adopted in D.05-11-031 x 3%, rounded to nearest \$5)

(For 2007, rates adopted for 2006 x 3%, rounded to nearest \$5)

Years of Experience	2006 Range	2007 Range
Attorneys:		
0 - 2	\$140 - \$195	\$145 - \$200
3 - 4	\$190 - \$225	\$195 - \$230
5 - 7	\$260 - \$280	\$270 - \$290
8 - 12	\$280 - \$335	\$290 - \$345
13+	\$280 - \$505	\$290 - \$520
Experts:		
All	\$115 - \$370	
0 - 6		\$120 - \$180
7 - 12		\$150 - \$260
13+		\$150 - \$380

Note: The rates intervenors request for the use of outside consultants may not exceed the rates billed to the intervenors by the consultants, even if the consultants' rates are below the floor for any given experience level.

The PUC decided to continue to update hourly rates annually on a calendar year basis.³¹

The PUC based its 3% COLA adjustments on the Social Security Administration's COLA, which is released annually in late fall, and reliance thereon would be consistent with a calendar year adjustment of hourly rates.³²

6.8. DETERMINATION OF MARKET VALUE HOURLY RATE

Fees claimed may be adjusted to reflect Market Rate. "The hearing officer shall issue a

³⁰ Id. at pp. 8 - 9.

³¹ Id. at p. 9.

written decision that ... shall determine the amount of compensation to be paid, which may be all or part of the amount claimed.” 28 CCR § 1010(e)(7). APPLICANT claims advocacy and witness fees for seven non-attorney staff: two policy analyst/experts; one Executive Director and health care consumer advocate; one project director for a video medical interpretation pilot project; a health care policy coordinator; and two community organizer support staff.

The PUC’s adopted hourly intervenor rate ranges for attorneys for 2006 are: \$140 - \$195 for 0 – 2 years of experience; \$190 - \$225 for 3 – 4 years of experience; \$260 - \$280 for 5 – 7 years of experience; \$280 - \$335 for 8 – 12 years of experience; and \$280 - \$505 for 13 and more years of experience. For 2007, the PUC’s adopted hourly intervenor rate ranges for attorneys are: \$145 - \$200 for 0 – 2 years of experience; \$195 - \$230 for 3 – 4 years of experience; \$270 - \$290 for 5 – 7 years of experience; \$290 - \$345 for 8 – 12 years of experience; and \$290 - \$520 for 13 and more years of experience.

For work performed by APPLICANT’s Law Clerk, APPLICANT claims advocacy and witness fees at the hourly rate of \$100.00. The credentials provided by APPLICANT indicate that at the time of the work for which claim is made, APPLICANT’s Law Clerk: had approximately five months of experience as a Law Clerk at Applicant, working on poverty law issues generally, with specific focus on public benefits; gained firsthand knowledge of the practical requirements for an adequate language access plan through extensive interaction with public benefits clients; is multilingual in English, German, Hindi, and Tamil; has a background in sociocultural anthropology and linguistics; and is a JD student at Stanford Law School. The PUC rates for 2006 for attorneys with 0 – 2 years of experience range from \$140 to \$195. Regarding services provided by APPLICANT’s Law Clerk, the Hearing Officer finds that the claimed hourly rate of \$100.00 does not exceed “Market Rate” as defined in 28 CCR § 1010(b) for the services provided in 2006.

³² Id. at pp. 4 and 11.

For work performed by APPLICANT's Staff Attorney, APPLICANT claims advocacy and witness fees at the hourly rate of \$200.00. The credentials provided by APPLICANT indicate that at the time of the work for which claim is made, APPLICANT's Staff Attorney: had approximately three years of experience as an attorney, joining APPLICANT in February of 2005, and focusing on public benefits and systems, especially for immigrant communities and language-minority individuals; had approximately one year of experience working for the Kern County Public Defender program; and is a graduate of Stanford Law School. The PUC rates for 2006 for attorneys with 3 – 4 years of experience range from \$190 to \$225. Regarding services provided by APPLICANT's Staff Attorney, the Hearing Officer finds that the claimed hourly rate of \$200.00 does not exceed "Market Rate" as defined in 28 CCR § 1010(b) for the services provided in 2006.

For work performed by APPLICANT's Directing Attorney, APPLICANT claims advocacy and witness fees at the hourly rate of \$300.00. The credentials provided by APPLICANT indicate that at the time of the work for which claim is made, APPLICANT's Directing Attorney: had approximately eight years of experience as an attorney; served as APPLICANT's Directing Attorney since August 2003, and supervised all of the health law work in APPLICANT's office; served as a Staff Attorney at APPLICANT from July 1999; has extensive experience in administrative and legislative advocacy; worked for the Center for Families of the Court of the Judicial Council of California; and earned a law degree from Harvard University in 1998. The PUC rates for 2006 for attorneys with 8 – 12 years of experience range from \$280 to \$335. Regarding services provided by APPLICANT's Directing Attorney, the Hearing Officer finds that the claimed hourly rate of \$300.00 does not exceed "Market Rate" as defined in 28 CCR § 1010(b) for the services provided in 2006.

Additional information and documentation was considered necessary by the Hearing Officer. The additional information and documentation was provided by APPLICANT, and

therefore, the Hearing Officer did not consider it necessary to audit the records and books of the APPLICANT to verify the basis for the amount claimed in seeking the award. 28 CCR § 1010(e)(6).

7. AWARD

APPLICANT is awarded Advocacy and Witness Fees as follows:

Staff / Title	Hours	Rates	Fees
Law Clerk/Law School Graduate	35.0	\$100.00	\$3,500.00
Staff Attorney	4.0	\$200.00	*\$600.00
Directing Attorney	1.0	\$300.00	\$300.00
TOTAL FEES		→	\$4,400.00

*Although 4 hours were reported for Staff Attorney, only \$600.00 was claimed. The amount of fees awarded may not exceed the amount claimed.

8. ASSIGNMENT OF PROCEEDING

This proceeding was and is assigned to Stephen A. Hansen, Staff Counsel III, as Hearing Officer.

FINDINGS OF FACT

1. APPLICANT has satisfied all the procedural requirements necessary to claim compensation in this proceeding.

2. APPLICANT made substantial contributions to Proceeding No. 2004-0115 as described herein.

3. APPLICANT requested hourly rates for its representatives that are reasonable when compared to market rates for persons with similar training and experience.

4. The total reasonable compensation for APPLICANT is \$4,400.00.

CONCLUSIONS OF LAW

1. APPLICANT has fulfilled the requirements of Health and Safety Code § 1348.9 and 28 CCR § 1010, which govern awards of advocacy and witness compensation, and is entitled to such compensation incurred in making substantial contributions to Proceeding No. 2004-0115 and 28 CCR § 1300.67.04.

2. APPLICANT should be awarded \$4,400.00 for its contribution to Proceeding No. 2004-0115 and 28 CCR § 1300.67.04.

AWARD ORDER

1. Legal Aid Society of San Mateo County doing business as Health Consumer Center is hereby awarded \$4,400.00 as compensation for its substantial contribution to the Language Assistance Programs regulatory Proceeding No. 2004-0115, 28 CCR § 1300.67.04.

2. Payment shall be made within thirty (30) days of the effective date of this decision.

3. This decision is effective thirty (30) days after posting of this decision on the Department's website. 28 CCR § 1010(e)(7) and (8).

Dated: August 31, 2007.

Original Signed by:



STEPHEN A. HANSEN
Hearing Officer
Department of Managed Health Care