

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

DARALD G. BLY,)	
)	
Appellant,)	
)	
v.)	Vet.App. No. 15-0502
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLEE’S SUPPLEMENTAL MEMORANDUM
IN RESPONSE TO THE COURT’S MAY 31, 2016, ORDER**

On May 31, 2012, this honorable Court ordered the parties to provide supplemental memoranda addressing issues arising from Appellant’s application for attorney fees and expenses, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (EAJA Application), which was filed with the Court on February 5, 2016.

Both parties were instructed to address the following issues: 1) In light of the Supreme Court’s holding in *Scarborough v. Principi*, 541 U.S. 401 (2004), is the 30-day filing period for an EAJA application, pursuant to 28 U.S.C. § 2412(d)(1)(B), subject to the doctrine of equitable tolling?; (2) If so, what standard should be applied; (3) Under the standard presented, is equitable tolling warranted in this case?; and (4) Whether Appellant has any alternative means of ensuring that his potential overall award is not reduced beyond the Court accepting the EAJA application as timely, including whether the Court is able to

hold, and should hold, that payment of fees out of any award of past-due benefits under 38 U.S.C. § 5904(d) should be offset by the amount sought in an EAJA application when that application has been denied for failure to timely file that application. The Secretary sets forth the following response.

1. In Light Of The Supreme Court’s Holding In *Scarborough v. Principi*, 541 U.S. 401 (2004), Is The 30-Day Filing Period For An EAJA Application Subject To The Doctrine Of Equitable Tolling?

a. Secretary’s Response

Yes. In light of the Supreme Court’s holding in *Scarborough v. Principi*, 541 U.S. 401 (2004), the Secretary concedes that the 30-day filing period for an EAJA application, pursuant to 28 U.S.C. § 2412(d)(1)(B), is subject to the doctrine of equitable tolling.

b. Analysis

The Court has historically held that equitable tolling is not available for the 30-day deadline for filing an application under the EAJA. “A party seeking an award of fees and other expenses” under the EAJA must therefore file an application within 30 days “of final judgment in the action” underlying the application. 28 U.S.C. § 2412(d)(1)(B); see U.S. Vet. App. Rule 39(a). As the EAJA represents a waiver of sovereign immunity, the prerequisites to an award delineated therein, to include the requirement that an application be timely filed, “are to be strictly construed in the government’s favor.” *Grivois v. Brown*, 7 Vet.App. 100, 101 (1994). “Neither the parties nor the courts may waive the 30-day filing period.” *Id.*; see also *Strouth v. Brown*, 8 Vet.App. 502, 503 (1996) (per

curiam Order) (rejecting, as a potential basis for recognizing as timely an application filed outside of the 30-day period, the allegation that the appellant's EAJA application was untimely only because of erroneous advice received from a member of the Court's staff).

The Secretary notes that the Court has previously held that the 30-day deadline for filing an EAJA application is "jurisdictional." *Grivois*, 7 Vet.App. at 101 ("The timely submission of an EAJA application is a jurisdictional prerequisite to government liability for attorney fees."). However, the Supreme Court subsequently held, in *Scarborough v. Principi*, that the EAJA statute does not invoke subject-matter jurisdiction but instead concerns a "mode of relief" in a matter over which the court already had jurisdiction. 541 U.S. 401, 413 (2004). The Supreme Court held that the "provision's 30-day deadline for fee applications and its application-content specifications are not properly typed 'jurisdictional.'" *Id.* at 413. Although the Supreme Court specifically reserved the question of whether equitable tolling was applicable for an EAJA application, *id.* at 421 n.8, the *Scarborough* holding undermines this Court's reasoning in *Grivois* and its progeny and likely abrogates its holding. Indeed, the Supreme Court has held generally that there is a "rebuttable presumption of equitable tolling" even in suits against the government. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

In view of the foregoing, and in light of the Supreme Court's holding in *Scarborough v. Principi*, 541 U.S. 401 (2004), the Secretary concedes that the

30-day filing period for an EAJA application, pursuant to 28 U.S.C. § 2412(d)(1)(B), is subject to the doctrine of equitable tolling. The Secretary notes that this position is consistent with the Sixth Circuit Court of Appeals, which relied on *Scarborough* to hold that the time for filing an application under the EAJA may be equitably tolled. *Townsend v. Comm’nr of Soc. Sec.*, 415 F.3d 578 (6th Cir. 2005).

2. What Standard Should Be Applied?

a. Secretary’s Response

Should the Court conclude that 30-day filing period for an EAJA application, pursuant to 28 U.S.C. § 2412(d)(1)(B), is subject to the doctrine of equitable tolling, the Secretary urges the Court to conclude that equitable tolling should be limited to situations where: (1) extraordinary circumstances precluded a timely filing despite an attorney’s due diligence; or (2) an untimely filing was the direct result of a mental or physical illness that rendered the attorney: (a) incapable of rationale thought or deliberate decision making, or (b) incapable of handling his own affairs or unable to function in society.

b. Analysis

Generally, equitable tolling is limited to situations where extraordinary circumstances preclude a timely filing despite the claimant’s due diligence. *Checo v. Shinseki*, 748 F.3d 1373, 1380 (Fed.Cir.2014) (adopting the “stop-clock approach” that an appellant “must only demonstrate due diligence during the extraordinary circumstances period.”); see also *Pace v. DiGuglielmo*, 544 U.S.

408, 418 (2005) (“[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”). “[O]rdinary attorney neglect, such as missing a filing deadline, does not rise to the level of an extraordinary circumstance, and thus does not warrant equitable tolling.” *Nelson v. Nicholson*, 19 Vet.App. 548, 553 (2006), *aff’d*, 489 F.3d 1380 (Fed.Cir.2007).

Equitable tolling may also be warranted based on mental or physical illness. To obtain the benefit of equitable tolling based on mental or physical illness, the litigant must demonstrate an illness “prevented him from engaging in rational thought or deliberate decision making” or “rendered him incapable of handling [his] own affairs or unable to function [in] society.” *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed.Cir.2005). In *Bove v. Shinseki*, the Court held that equitable tolling may be warranted if an untimely filing was “the direct result of a mental illness that rendered [a claimant] incapable of rationale thought or deliberate decision making, or incapable of handling [a claimant’s] own affairs or unable to function in society.” *Bove*, 25 Vet.App. 136, 144 (2011), quoting *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed.Cir. 2004).

Notably, the proponent of equitable tolling bears the burden of demonstrating that tolling is justified. See *Chastain v. West*, 13 Vet.App. 296, 300-01 (2000) (Appellant bears the burden of demonstrating that equitable tolling is warranted); see also *McCreary v. Nicholson*, 19 Vet.App. 324, 332 (2005) (“It

is the appellant's obligation...to produce any evidence supporting his claim for equitable tolling.").

3. Under The Standard Presented, Is Equitable Tolling Warranted In This Case?

a. Secretary's Response

No. Equitable tolling is not warranted in the instant case because: (1) Appellant fails to demonstrate that equitable tolling is warranted under the particular circumstances of this case; (2) Appellant has not shown that extraordinary circumstances precluded a timely filing despite a claimant's due diligence; and (3) Appellant has not shown his counsel's mental or physical health illness prevented counsel from engaging in rational thought or deliberate decision making or rendered him incapable of handling his own affairs or unable to function in society.

b. Analysis

The Court has authority to award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F). An EAJA application must be filed with the Court within 30 days after this Court's judgment becomes final. 28 U.S.C. § 2412(d)(1)(B) (providing that the application must be submitted "within thirty days of final judgment in the action[.]"); U.S. Vet.App. R. 39(a) (effective Sept. 15, 2011) ("An application pursuant to 28 U.S.C. § 2412(d) for award of attorney fees and/or other expenses in a case shall be submitted for filing with the Clerk not later than 30 days after the Court's judgment becomes final."). "[T]he 30-day

period to file an EAJA application with the Court begins to run when the judgment becomes final and not when the Court issues its mandate.” *Strouth v. Brown*, 8 Vet.App. 502, 504 (1996) (per curiam order).

In the instant case, on January 5, 2016, the Court issued an Order granting the parties’ Joint Motion for Partial Remand (JMPR). The Order specifically stated that it was “the mandate of the Court.” Court orders granting joint motions for remand are considered orders on consent and, under Rule 41(b)(2), constitute final judgment of the Court.¹ By virtue of being an order on consent, an order granting a joint motion for remand is “final and not appealable.” 28 U.S.C. § 2412(d)(2)(G). Thus, the Court’s January 5, 2016, order was the final judgment and mandate of the Court pursuant U.S. VET.APP. R. 41(b). To have been timely filed, therefore, Appellant’s EAJA application was due 30 days after final judgment, that is, on or before February 4, 2016. *See Westfall v. McDonald*, 27 Vet.App. 341, 343 (2015) (“Final judgment is important because it ends the time period for parties to appeal a decision of the Court and begins the 30-day period for a party to submit and EAJA application.”). Thus, because Appellant’s application was filed on February 5, 2016, it was untimely. *See Hernandez*

¹ Pursuant to U.S. VET.APP.R. 41(b), final judgment generally occurs 60 days after the entry of judgment unless (1) a timely Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit is filed, (2) an order on consent is issued or (3) the Court directs otherwise. U.S. Vet.App.R. 41(b); *See also Strouth* 8 Vet.App. at 504 (“Unless there is an order on consent remanding the case under U.S. Vet.App.R. 41(b), the 30-day period to file an EAJA application with the Court begins to run when the judgment becomes final and not when the Court issues its mandate.”).

Garcia v. Nicholson, 485 F.3d 651, 652 (Fed.Cir.2007) (EAJA application that was filed 31 days after final judgment was found to be untimely).

Whether equitable tolling is warranted in a particular case must be assessed on a case-by-case basis. See *Sneed v. Shinseki*, 737 F.3d 719, 726 (Fed.Cir.2013) (noting that equitable tolling is not “ ‘limited to a small and closed set of fact patterns’ ”) Here, Appellant fails to demonstrate that equitable tolling is warranted under the particular circumstances of this case. See *Chastain*, 13 Vet.App. at 300-01 (Appellant bears the burden of demonstrating that equitable tolling is warranted); see also *McCreary* 19 Vet.App.at 332. In fact, Appellant has not averred that equitable tolling is for application. See Appellant’s March 10, 2016, Response to Show Cause Order (Appellant’s Response). Nor has Appellant alleged that circumstances precluded a timely filing despite the exercise of due diligence or that a timely filing was precluded by mental or physical illness. Instead, Appellant mistakenly asserts that his February 5, 2016, EAJA Application was timely because the Court’s January 5, 2015, Order granting the parties’ December 28, 2015, Joint Motion for Partial Remand was not final. Appellant’s Response at 1. Appellant claims that, pursuant to U.S. VET.APP. R. 36, he had sixty (60) days to appeal the January 5, 2016, Order to the Federal Circuit.

Appellant’s argument fails, however, because – as set forth immediately above – Court orders granting joint motions for remand are considered orders on consent which effectively terminate the parties’ appellate rights and, under Rule

41(b)(2), they constitute final judgment of the Court. By virtue of being an order on consent, the January 5, 2016, Order granting the parties Joint Motion for Partial Remand was “final and not appealable.” 28 U.S.C. § 2412(d)(2)(G). Thus, the Court’s January 5, 2016, order was the final judgment and mandate of the Court pursuant U.S. VET.APP. R. 41(b). To have been timely filed, therefore, Appellant’s EAJA application was due 30 days after final judgment, that is, on or before February 4, 2016. See *Bowers v. Brown*, 8 Vet.App. 25, 27 (1995) (holding that an order of the Court that granted a consensual motion for remand pursuant to U.S. VET. APP. R. 41 (b) was “final and not appealable,” pursuant to 28 U.S.C. § 2412(d)(2)(G), and dismissing the EAJA application where the application was untimely filed.).

It is counsel’s responsibility to know the Court’s Rules and to do research on significant questions that arise, such as when a judgment from the Court is final. See *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir.1991) (“[I]gnorance of the law is not sufficient to warrant equitable tolling.”). Counsel’s failure to comply with the Court’s Rules due to counsel’s neglect – actual or inferred – does not warrant the tolling of the deadline for filing an EAJA application here.

Further, counsel for the Secretary notes that, on December 29, 2015, subsequent to the parties filing the JMPR, the parties conferred via email.² In

² The Secretary submits these emails to the Court as they contain information that may affect the Court’s decision. See *Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013) (parties have a duty to “notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision); cf. U.S.

the email exchange, Appellant's counsel inquired "[o]nce the Court answers our joint motion, do I submit EAJA time sheet and waiver to you or someone else?" See Exhibit 1 (December 29, 2015, emails). In response, counsel for the Secretary stated "[o]nce the Court grants the joint motion and issues mandate, which should occur on the same day, you will then have 30 days to file your EAJA Application with the Court. I will then have 30 days to respond." *Id.* This email exchange wholly undermines any argument that equitable tolling is warranted in the instant case as it demonstrates that Appellant's counsel was put on notice as to the time frame within which he had to file his EAJA application.

In view of the foregoing, Appellant has not shown that extraordinary circumstances precluded a timely filing despite Appellant's due diligence or that counsel's health problems rendered him incapable of handling his own affairs. See *Checo*, 748 F.3d at 1380 and *Arbas*, 403 F.3d at 1381. Without more, the failure to meet the EAJA filing deadline based on a misunderstanding with respect to the Court's Rules, amounts to no more than a case of excusable neglect. See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling ... do not extend to what is at best a garden variety

VET.APP. R. 33(d) (providing that statements and memoranda submitted for purposes of the staff conference may be disclosed to a Judge of the Court for purposes of judicial review of a subsequent EAJA application). The Secretary also notes that, in other cases before the Court where equitable tolling was at issue, the Court has looked beyond the traditional record to make a determination as to whether equitable tolling is warranted. For example, in *Bove*, the Court considered a physician's letter, which was attached to a response to a court order, when evaluating whether equitable tolling of the 120-day period to file a notice of appeal was warranted. *Bove*, 25 Vet.App. at 144-145.

claim of excusable neglect.”); see also *Nelson v. Nicholson*, 19 Vet.App. 548, 554 (2006) (Because “ordinary attorney neglect, such as missing a filing deadline, does not rise to the level of an extraordinary circumstance,” equitable tolling is not warranted here); see e.g. *Holland v. Florida*, 560 U.S. 632, 651-52 (2010) (The United States Supreme Court held that “a simple ‘miscalculation’ that leads a lawyer to miss a filing deadline” is not grounds for equitable tolling).

Accordingly, the Secretary urges the Court to conclude that equitable tolling is not warranted in the instant case.

4. Does Appellant Have Any Alternative Means Of Ensuring That His Potential Overall Award Is Not Reduced, Beyond The Court Accepting The EAJA Application As Timely, Including Whether The Court Is Able To Hold, And Should Hold, That Payment Of Fees Out Of Any Award Of Past-Due Benefits Under 38 U.S.C. 5904(d) Should Be Offset By The Amount Sought In An EAJA Application When That Application Has Been Denied For Failure To Timely File That Application?

a. Secretary’s Response

Yes, Appellant has at least three means of ensuring that his potential overall award is not reduced, beyond the Court accepting his EAJA Application as timely.

b. Analysis

In the instant case, Appellant’s counsel filed his Notice of Appearance, along with a February 24, 2015, Fee Agreement, with the Court on February 27, 2015. In the Notice of Appearance, Appellant’s counsel acknowledged that his representation of Appellant before the Court was pursuant to the Fee Agreement.

In the February 24, 2015, Fee Agreement, Appellant and his counsel agreed, *inter alia*, that if the Court remanded Appellant's claim to the VA for a new decision, and VA ultimately awards benefits on the claim, Appellant's counsel would be entitled to one-fifth (20%) of any amount owed by the VA to Appellant as a lump sum and representing Appellant's retroactive benefits, from the date benefits began through the date benefits are awarded on the claim. Fee Agreement, para. 3. Appellant and his counsel further agreed that, if the Court either awarded benefits or remanded Appellant's claim to the VA for a new decision, Appellant's counsel could seek an order from the Court directing that the VA pay attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. section 2412. *Id.* at para. 4. Appellant and his counsel agreed that, if the Court awards attorney's fees under the EAJA, the entire amount of the award shall be paid to the attorney. *Id.* Appellant and his counsel also agreed that, in the event that the Court were to award EAJA fees and VA ultimately awarded benefits on the claim, Appellant's counsel's contingent fee would be offset by the amount of fees awarded under EAJA. See Fee Agreement, para. 5.

In the instant case, Appellant's claim for VA benefits based on service connection for bilateral hearing loss was remanded to the Board via the parties' December 28, 2015, JMPR, which was granted by the Court on January 5, 2016. Under the fee agreement, should VA ultimately grant Appellant's claim for VA benefits, Appellant's counsel would be entitled to one-fifth (20%) of any amount owed by the VA to Appellant as a lump sum contingency fee. If Appellant's

counsel timely filed Appellant's EAJA application, and if that application were to be granted, the 20% contingency fee payable to Appellant's counsel – if it was greater than the amount of the EAJA fees received by Appellant's counsel – would then be offset by the amount of the fees awarded under EAJA.

However, if Appellant's EAJA application is denied, for being untimely filed or on the merits, Appellant would not be entitled to the reimbursement that would have resulted had his EAJA application been granted and past-due benefits awarded.

With regard to the Court's concern whether Appellant has any alternative means of ensuring that his potential overall award is not reduced other than this Court accepting the EAJA application as timely, the Secretary responds that Appellant has at least three avenues of relief. The first avenue is pursuant to 38 U.S.C. §7263(c). Section 7263(c) provides that "[a] person who represents an appellant before the Court shall file a copy of any fee agreement between the appellant and that person with the Court at the time the appeal is filed." 38 U.S.C. § 7263(c). Pursuant to section 7263, "[t]he Court, on its own motion or the motion of any party, may review such a fee agreement." 38 U.S.C. § 7263(c). "In reviewing a fee agreement under subsection (c) of ... section [7263] ..., the Court may ... order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable." 38 U.S.C. § 7263(d).

The second avenue is pursuant to 38 U.S.C. § 5904(c)(3)(A), which provides that "[t]he Secretary may, upon the Secretary's own motion or at the

request of the claimant, review a fee agreement filed pursuant to paragraph (2) and may order a reduction in the fee called for in the agreement if the Secretary finds that the fee is excessive or unreasonable.

Third, Appellant may be able to bring a legal malpractice action against his counsel. See *Overton v. Nicholson*, 20 Vet.App.427, 445, Fn. 2 (2006) (“To the extent that an attorney may be incompetent, the law does not leave a claimant without remedy. The claimant’s remedy is against the attorney in a claim for legal malpractice.”). To prevail, Appellant likely would have to prove: (1) an attorney-client relationship giving rise to a duty; (2) negligence in the actual representation of Appellant; (3) the attorney’s breach of duty proximately caused injury to the client; and (4) Appellant sustained actual injury, loss or damage. See e.g. *Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C.*, 631 F.3d 1367, 1372 (Fed.Cir.2011).

Thus, Appellant has at least three means of ensuring that his potential overall award is not reduced, other than the Court accepting his EAJA Application as timely.

With regard to the question whether the “Court is able to hold, and should hold, that payment of fees out of any award of past-due benefits under 38 U.S.C. § 5904(d) should be offset by the amount sought in an EAJA application when that application has been denied for failure to timely file that application[,]” the Secretary responds as follows. As a general matter, pursuant to 38 U.S.C. § 7263(c), the Court has the authority to review a fee agreement, and the power to

hold that a particular fee is unreasonable because the untimely filing of the EAJA application deprived the appellant of the potential reimbursement that would have resulted from a grant of past-due benefits and an EAJA award. *In re Wick*, 40 F.3d 367, 371 (Fed. Cir. 1994) (“[T]he court’s review of fee agreements under § 7263 is strictly limited by the language of the statute ... [T]he court is authorized only to ‘order a reduction in the fee called for if it finds the fee is excessive and unreasonable.’ ”). As a remedy, the Court could order the payment of fees out of any award of past-due benefits under 38 U.S.C. § 5904(d) to be offset by the amount sought in an EAJA application.

With regard to the question as to whether the Court should so hold in the instant case, the Secretary urges the Court to conclude that such a determination is premature at this time. While the Court and the Secretary are vested with the power to review fee agreements, the Court has concluded that it “should intrude upon such a free and voluntary contract only upon invitation of the parties or where the fee agreement is patently unreasonable on its face.” *Lewis v. Brown*, 5 Vet.App. 151, 154 (1993); *see also In Re Mason*, 12 Vet.App. 135, 136-38 (1999). In the instant case, neither Appellant nor his counsel has moved the Court for review of the fee agreement and the Secretary observes that the fee agreement is not patently unreasonable on its face. Therefore, to hold that payment of fees out of any award of past-due benefits under 38 U.S.C. § 5904(d) should be offset by the amount sought in an EAJA application when that

application has been denied for failure to timely file that application in the instant case would be venturing into the realm of an advisory opinion.

WHEREFORE, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully responds to the Court's May 31, 2016, Order.

Respectfully submitted,

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General Counsel

MARY A. FLYNN
Chief Counsel

/s/ Joan E. Moriarty
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EXHIBIT 1

**APPELLEE'S SUPPLEMENTAL MEMORANDUM
IN RESPONSE TO THE COURT'S MAY 31, 2016, ORDER**

Vet.App. No. 15-0502

From: [Joseph Whitcomb](#)
To: [Zimmer, Justin](#)
Subject: [EXTERNAL] RE: DRAFT JMR CAVC 15-0502
Date: Tuesday, December 29, 2015 11:05:28 AM

OK. I am used to do appellate work with SSA and every EAJA submission turns into a bidding war. This may turn out to be a refreshing change.

Joe

From: Zimmer, Justin [<mailto:Justin.Zimmer@va.gov>]
Sent: Tuesday, December 29, 2015 9:01 AM
To: Joseph Whitcomb <joe@rmdlg.com>
Subject: RE: DRAFT JMR CAVC 15-0502

It appears that VA does do it differently from what you described.

What I outlined is how we do it here, at least since I got here in 2008 J

From: Joseph Whitcomb [<mailto:joe@rmdlg.com>]
Sent: Tuesday, December 29, 2015 10:58 AM
To: Zimmer, Justin
Subject: [EXTERNAL] RE: DRAFT JMR CAVC 15-0502

OK. When I have done business with other OGC's, we have usually submitted a stipulated EAJA Motion. Does the VA do things differently?

Joe

From: Zimmer, Justin [<mailto:Justin.Zimmer@va.gov>]
Sent: Tuesday, December 29, 2015 8:53 AM
To: Joseph Whitcomb <joe@rmdlg.com>
Subject: RE: DRAFT JMR CAVC 15-0502

Hi Joe,

Once the Court grants the joint motion and issues mandate, which should occur the same day, you will then have 30 days to file your EAJA Application with the Court. I then have 30 days to respond.

I will get your EAJA time sheet etc., from the Court's e-filing, so no need to submit it separately.

Justin

From: Joseph Whitcomb [<mailto:joe@rmdlg.com>]
Sent: Tuesday, December 29, 2015 10:49 AM
To: Zimmer, Justin
Subject: [EXTERNAL] RE: DRAFT JMR CAVC 15-0502

Justin,

Once the Court answers our joint motion, do I submit EAJA time sheet and waiver to you or someone else?

Joe
