

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

HERLINDA C. RICHARD,)
)
 Appellant,)
)
 v.) Vet. App. No. 19-1619
)
DENIS McDONOUGH,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

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FOR AWARD OF REASONABLE ATTORNEYS’ FEES AND
EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)**

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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APPELLANT’S APPLICATION FOR AWARD OF REASONABLE ATTORNEYS’ FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)

Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), and U.S. Vet. App. Rule 39, Appellant, Herlinda C. Richard, applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$ 29,001.92.**

PROCEDURAL HISTORY

On November 16, 2018, the Board of Veterans’ Appeals (“Board”) issued a decision that denied Appellant’s claim for entitlement to an effective date prior to October 7, 2011, for the grant of service connection for lung cancer, status post right lung lobe removal, for accrued purposes. Appellant filed a timely notice of Appeal with this Court on March 11, 2019.

On May 9, 2019, the Secretary served on Appellant’s counsel the 1,414-page Record Before the Agency (“RBA”). On July 15, 2019, the Court issued an Order file Appellant’s brief within sixty days. On August 1, 2019, the Court issued an Order scheduling an August 29, 2019 Rule 33 Staffing Conference.

Pursuant to the Court's Order, Appellant's counsel prepared detailed Rule 33 Summary of the Issues addressing the legal errors committed by the Board in the decision on appeal, which he served on counsel for the Secretary and Central Legal Staff ("CLS") counsel on August 15, 2019. On August 29, 2019, the Rule 33 Staffing Conference was held as scheduled, but the parties failed to arrive at a joint resolution.

On November 14, 2019, Appellant filed her 29-page initial brief (hereinafter: "App. Br.") with the Court. In her brief, Appellant argued that the Board committed reversible error by failing to award her entitlement to an earlier effective date for accrued benefits purposes pursuant to 38 C.F.R. § 3.156(c)(3) when VA: (1) initially denied service connection in 2003; (2) later received relevant official service department records; and (3) then awarded service connection based in part on those service department records. See 38 C.F.R. § 3.156(c); App. Br. at 18–25. Alternatively, Appellant argued that the decision on appeal must be vacated because the Board erred by failing to address entitlement to an earlier effective date pursuant to § 3.156(c)(3) for accrued purposes. See 38 U.S.C. § 7104(d)(1) (2018); App. Br. at 25–26. Finally, Appellant argued that the Board's error was not harmless because properly addressing § 3.156(c) would have or at the very least could have affected whether the Board granted the relief that Appellant sought on appeal: an effective date earlier than October 7, 2011. See 38 U.S.C. § 7261(b)(2); App. Br. at 27–28.

On April 24, 2020, the Secretary filed his responsive brief (hereinafter: "Sec.

Br.”) urging the Court to affirm the Board decision on appeal. In his brief, the Secretary argued that Appellant failed to present any persuasive basis for vacating the decision because she failed to demonstrate that the factors triggering reconsideration under § 3.156(c) were met. See Sec. Br. at 10–18. Furthermore, the Secretary argued that because § 3.156(c) has no application in this case, Appellant failed to demonstrate that the Board’s statement of reasons and bases in this regard is inadequate. See Sec. Br. at 18–19. Finally, the Secretary argued that *Project CHECO Southeast Asia Report: Base Defense in Thailand* (“the CHECO Report”) was not constructively of record and VA had no duty to obtain the report on Appellant’s behalf; thus, reconsideration of her claim under § 3.156(c) was not triggered. See Sec. Br. at 19–29.

On June 25, 2020 Appellant filed her 10-page Reply Brief (hereinafter: “App. Rep. Br.”) with the Court. Responding to the Secretary’s argument, Appellant explained that VA received the CHECO Report within the meaning of § 3.156(c)(1), despite not being associated with the claims file. See 38 C.F.R. § 3.156(c)(1); App. Rep. Br. at 3–7. Additionally, Appellant explained that the CHECO Report was relevant to her claim. See 38 C.F.R. § 3.156(c); App. Rep. Br. at 8–10.

On July 1, 2020, the Secretary filed the Record of Proceedings with the Court. On July 1, 2020, Appellant filed her response to the Record of Proceedings. On September 24, 2020, the Court ordered that the case be submitted to a panel for decision. On October 2, 2020, the Court scheduled oral argument in the case for December 8, 2020. The case was argued before the Court, as scheduled.

On January 11, 2021, the parties filed a Joint Motion to Terminate, and stipulated agreement with the Court. In the Joint Motion to Terminate, and stipulated agreement, the Secretary agreed to (1) award an effective date of October 9, 2002, for the award of service connection for lung cancer, status post lobe removal, for accrued purposes; (2) award a 100% evaluation for the service-connected lung cancer from October 9, 2002, until September 12, 2012, for accrued purposes; (3) grant Appellant entitlement to special monthly compensation pursuant to 38 U.S.C. § 1114(l) from November 10, 2002, until September 12, 2012, for accrued purposes; and (4) assign an earlier effective date of November 7, 2002, for the award of service connection for diabetes mellitus.

The Court granted the parties' motions on January 25, 2021, thereby effectuating the terms of the Stipulated Agreement pursuant to Vet. App. Rule 42. This order was the Mandate of the Court, under Rule 41(c)(2) of the Court's Rules of Practice and Procedure.

ARGUMENT

I. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD.

Under 28 U.S.C. § 2412(d), a court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action. To obtain "prevailing party" status, a party need only to have obtained success "on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing the suit." *Shalala v. Schaefer*, 509 U.S. 292, 302

(1993) (quoting *Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989)).

In this case, Appellant is a prevailing party entitled to an award of fees and costs because the Court terminated the relevant part of the appeal and effectuated the stipulated agreement based on the terms of the agreement that were favorable to Appellant. *Cullens v. Gober*, 14 Vet. App. 234, 237 (2001) (en banc). The Court-ordered relief creates the “material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.” *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Garland Indep. Sch. Dist.*, 489 U.S. at 792).

Appellant is a party eligible to receive an award of reasonable fees and expenses because her net worth did not exceed \$2 million (two million dollars) at the time this civil action was filed. As an officer of the Court, the undersigned counsel hereby states that Appellant’s net worth did not exceed \$2 million (two million dollars) at the time this civil action was filed, nor did she own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7 million (seven million dollars) and which had more than 500 employees. See *Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996). In addition, Appellant submitted a Declaration of Financial Hardship, which was accepted for filing by the Court on March 21, 2019. See *Owens v. Brown*, 10 Vet. App. 65, 67 (1997).

II. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED.

The Secretary can defeat Appellant's application for fees and costs only by demonstrating that the government's position was substantially justified. See *Brewer v. Am. Battle Monument Comm'n*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); accord *Beta Sys. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary's administrative position was not substantially justified. As described more fully in the "Procedural History," *supra*, the Court granted the parties Joint Motion to Terminate, thereby effectuating the terms of the stipulated agreement, requiring the Secretary to agree to (1) award an effective date of October 9, 2002, for the award of service connection for lung cancer, status post lobe removal, for accrued purposes; (2) award a 100% evaluation for the service-connected lung cancer from October 9, 2002, until September 12, 2012, for accrued purposes; (3) grant Appellant entitlement to special monthly compensation pursuant to 38 U.S.C. § 1114(l) from November 10, 2002, until September 12, 2012, for accrued purposes; and (4) assign an earlier effective date of November 7, 2002, for the award of service connection for diabetes mellitus. This was the very action that had been denied by the Board.

III. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNT OF REASONABLE FEES AND EXPENSES

An itemized statement of the services rendered and the reasonable fees and expenses for which Appellant seeks compensation is attached to this application as Exhibit A. Included in Exhibit A is a certification that lead counsel has “(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige v. Nicholson*, 19 Vet. App. 227, 240 (2005). In the exercise of billing judgment, Appellant has eliminated **28.7** hours of attorney time and **0.2** hours of paralegal and law clerk time from this itemized statement and this fee petition.

Appellant seeks attorneys’ fees at the following rates for representation in the Court of Appeals for Veterans Claims:¹

¹ A rate in excess of \$125 per hour for the attorneys for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. See 28 U.S.C. § 2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Washington Metropolitan Area, was \$ 209.14 in November 2019, the month the initial brief was filed. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV area adjusted for inflation between March 1996 and November 2019. Exhibit B; *Mannino v. West*, 12 Vet. App. 242 (1999). The market rates for Appellant’s attorneys exceeded the requested rates per hour during the relevant time period. See *Covington v. District of Columbia*, 839 F. Supp. 894, 904–05 (D.D.C. 1993), *aff’d*, 58 F.3d 1101 (D.C. Cir. 1995). The prevailing market rate for the work done by paralegals and law clerks was at least \$166.00 from June 1, 2018, to May 31, 2019, at least \$173.00 from June 1, 2019 to May 31, 2020, and at least \$ 180.00 from June 1, 2020 to the present. See USAO Attorney’s Fees Matrix, 2015-2021 (Exhibit C) (“The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest*

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Barton F. Stichman (1974 law graduate)	\$ 209.14	4.9	\$ 1,024.79
Karen Galla (1986 law graduate)	\$ 209.14	2.1	\$ 439.19
Christine Cote Hill (1996 law graduate)	\$ 209.14	1.0	\$ 209.14
Richard V. Spataro (2005 law graduate)	\$ 209.14	4.2	\$ 878.39
Stacy A. Tromble (2007 law graduate)	\$ 209.14	0.5	\$ 104.57
John Niles (2008 law graduate)	\$ 209.14	113.0	\$ 23,632.82
Amie Leonard (2015 law graduate)	\$ 209.14	2.3	\$ 481.02
Angela Nedd (paralegal)	\$ 166.00 \$ 173.00 \$ 180.00	0.5 0.4 0.3	\$ 83.00 \$ 69.20 \$ 54.00
Janee LeFrere (paralegal)	\$ 173.00	0.5	\$ 86.50
Bryan Medema (law clerk)	\$ 166.00	3.0	\$ 498.00
Brianna LeFrere	\$ 173.00	0.1	\$ 17.30

Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore . . . area.”); *see also Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008).

(law clerk)	\$ 180.00	1.0	\$ 180.00
Jack McCaffrey (law clerk)	\$ 180.00	2.9	\$ 522.00
Alexandra Gonsman (law clerk)	\$ 180.00	3.7	\$ 666.00

SUBTOTAL: \$ 28,945.92

The reasonable expenses for which Appellant seeks compensation are:

<u>Nature of Expense</u>	<u>Expense Amount</u>
Federal Express and USPS Charges	\$ 31.00
Duplication Charges	\$ 25.00

SUBTOTAL: \$ 56.00

TOTAL: \$ 29,001.92

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$ 29,001.92.**

Respectfully submitted,

FOR APPELLANT:

Date: February 24, 2021

/s/ Christine Cote Hill
Christine Cote Hill
Barton F. Stichman
National Veterans Legal
Services Program
1600 K Street, NW, Suite 500
Washington, DC 20006-2833
(202) 621-5674

Counsel for Appellant

CERTIFICATION

As lead counsel in this appeal, I have reviewed the combined billing statement attached as Exhibit A and I am satisfied that it accurately reflects the work performed by all counsel and I have considered and eliminated all time that is excessive or redundant.

/s/ Christine Cote Hill
Christine Cote Hill

EXHIBIT A

**NVLSP Staff Hours for Herlinda C. Richard
Vet. App. No. 19-1619**

Date: 1/20/2019 1.2 Staff: Amie Leonard
Review Board of Veterans' Appeals (BVA) decision and identify issues to raise on appeal. (0.2); draft memorandum regarding issues to be raise on appeal. (1.0)

Date: 2/7/2019 0.5 Staff: Angela Nedd
Draft correspondence to client regarding BVA decision and issues to raise on appeal.

Date: 2/15/2019 0.2 Staff: Amie Leonard
Review correspondence from client regarding case status.

Date: 2/19/2019 0.1 Staff: Amie Leonard
Draft correspondence to client regarding case initiation.

Date: 2/25/2019 0.3 Staff: Amie Leonard
Teleconference with client regarding BVA decision, issues to raise on appeal, and questions regarding same.

Date: 3/5/2019 0.2 Staff: Amie Leonard
Finalize correspondence to client regarding case initiation (0.1); finalize Notice of Appeal and Notices of Appearance (0.1).

Date: 3/21/2019 0.2 Staff: Amie Leonard
Review correspondence from client regarding case initiation and finalize retainer and Declaration of Financial Hardship.

Date: 5/10/2019 0.1 Staff: Amie Leonard
Review correspondence from VA regarding Record Before the Agency (RBA).

Date: 5/22/2019 3.0 Staff: Bryan Medema
Review and analyze 1,414-page RBA to ensure legibility and completeness.

Date: 5/22/2019 0.0 Staff: Amie Leonard
Draft email to VA General Counsel regarding motion for extension of time to respond to the RBA (0.1); draft and finalize motion for extension of time to respond to RBA (0.2). **[Entire 0.3 eliminated in the exercise of billing judgment]**

Date: 8/6/2019 0.5 Staff: John Niles
Teleconference with client regarding case status and questions regarding Rule 33 Staff Conference.

Date: 8/8/2019 1.6 Staff: John Niles
Review and analyze 1,414-page RBA and take detailed notes for preparation of Rule 33 Summary of the Issues, through page 1,000.

Date: 8/9/2019 4.2 Staff: John Niles
Review and analyze 1,414-page RBA and take detailed notes for preparation of Rule 33 Summary of the Issues, through end (1.5); draft Rule 33 Summary of the Issues (2.7).

Date: 8/15/2019 0.4 Staff: John Niles
Review and analyze relevant evidence to prepare attachment to Rule 33 Summary of the Issues (0.2); draft and finalize Rule 33 Certificate of Service (0.2).

Date: 8/15/2019 0.5 Staff: Stacy A. Tromble
Add insert to argument and finalize Rule 33 Summary of the Issues, for J. Niles.

Date: 8/29/2019 1.0 Staff: John Niles
Prepare for Rule 33 Staff Conference, including review of Rule 33 Summary of the Issues and relevant evidence (0.3); teleconference with client regarding Rule 33 Summary of the Issues and settlement authority, with enclosure (0.3); participate in Rule 33 Staff Conference (0.2); teleconference with client regarding outcome of Rule 33 Staff Conference (0.2).

Date: 9/3/2019 4.5 Staff: John Niles
Review relevant law for inclusion in initial brief, including regarding availability of

38 C.F.R. § 3.156c (3.0); continue review (1.5).

Date: 9/6/2019 1.3 Staff: John Niles
Supplement research and analysis for initial brief argument and availability of 38 C.F.R. § 3.156c.

Date: 9/9/2019 0.0 Staff: John Niles
Draft and finalize motion for extension of time within which to file initial brief **[0.3 eliminated in the exercise of billing judgment]**.

Date: 9/12/2019 0.0 Staff: Janee LeFrere
Draft Notice of Withdrawal. **[0.2 eliminated in the exercise of billing judgment]**

Date: 10/16/2019 0.1 Staff: John Niles
Teleconference with client regarding case status.

Date: 11/1/2019 8.0 Staff: John Niles
Review tabbed RBA for outstanding issues for preparation of initial brief (1.0); fact; draft chronology for preparation of initial brief, Statement of Facts (1.5); outline initial brief argument (1.8); draft Statement of the Issues (0.5); draft Statement of the Case (1.2); begin to draft Statement of Facts (2.0).

Date: 11/2/2019 6.5 Staff: John Niles
Continue to draft Statement of Facts (3.0); continue drafting same (3.0); add inserts to Statement of Facts. (0.5)

Date: 11/3/2019 2.6 Staff: John Niles
Continue to draft Statement of Facts.

Date: 11/4/2019 4.3 Staff: John Niles
Continue to draft Statement of Facts (3.0); continue drafting Statement of Facts (1.0); continue drafting same (0.3)**[Additional 1.0 eliminated in the exercise of billing judgment]**.

Date: 11/5/2019 5.9 Staff: John Niles
Draft Summary of the Argument (1.0); begin to draft argument (3.0); continue drafting argument (1.9).

Date: 11/6/2019 1.5 Staff: John Niles
Continue to draft inserts to argument.

Date: 11/7/2019 1.0 Staff: John Niles
Draft inserts to add persuasive value and clarity to legal argument.

Date: 11/8/2019 0.4 Staff: Angela Nedd
Draft and finalize correspondence to client regarding initial brief for review, with enclosure.

Date: 11/12/2019 0.5 Staff: Janee LeFrere
Prepare Table of Authorities.

Date: 11/14/2019 2.4 Staff: John Niles
Finalize 30-page initial brief (0.4); review relevant materials to prepare exhibits to initial brief. (2.0)

Date: 11/15/2019 0.2 Staff: John Niles
Draft email to VA counsel regarding client's position on VA counsel motion to strike.

Date: 12/3/2019 0.1 Staff: John Niles
Review recent legal development relevant to argument; provide update to client.

Date: 12/13/2019 0.3 Staff: John Niles
Review correspondence from VA counsel requesting position on motion for stay of proceedings (0.1); analyze follow-up correspondence from VA counsel regarding position on motion for stay of proceedings and draft response to same (0.2).

Date: 12/16/2019 0.2 Staff: John Niles
Review correspondence with VA counsel regarding NVLSP position on motion for stay of proceedings.

Date: 12/17/2019 4.0 Staff: John Niles
Review motion to strike exhibits for preparation of written opposition (1.5); review relevant law for inclusion in argument (2.5).

Date: 12/19/2019 0.1 Staff: Brianna LeFrere
Draft correspondence to client regarding case status.

Date: 12/19/2019 6.5 Staff: John Niles
Review authorities regarding 38 U.S.C. 7252(b) as setting the floor versus jurisdictional limit on CAVC review of materials cited in motion to strike, for preparation of written opposition, against relevant law for inclusion in arguments regarding same (1.0); draft written opposition introduction and recitation of relevant facts (2.5); draft written opposition argument (3.0).

Date: 12/22/2019 0.9 Staff: Barton F. Stichman
Review of VA motion to strike and J. Niles draft response and prepare final inserts to draft written opposition response, for J. Niles.

Date: 12/26/2019 0.6 Staff: John Niles
Draft insert to add persuasive value and clarity to written opposition (0.4); finalize 10-page written opposition (0.2).

Date: 1/7/2020 0.3 Staff: John Niles
Teleconference with client regarding case status.

Date: 1/13/2020 0.1 Staff: John Niles
Draft email to VA counsel regarding position on motion for extension of time within which to file responsive brief.

Date: 2/19/2020 0.6 Staff: John Niles

Correspond with VA counsel regarding NVLSP position on motion and draft inserts in email to VA counsel regarding proposed settlement.

Date: 2/19/2020 0.0 Staff: Stacy A. Tromble
Review email from lead attorney and legal advice regarding position on motion for extension. **[0.2 eliminated in the exercise of billing judgment]**

Date: 3/24/2020 0.4 Staff: John Niles
Review and analyze email from VA counsel to Court Central Legal Staff (CLS) attorney regarding status of pending motions; draft email to VA counsel and CLS attorney with clarification regarding representation in VA counsel email.

Date: 3/27/2020 0.0 Staff: John Niles
Correspond with VA counsel regarding position on third motion for extension of time. **[0.3 eliminated in the exercise of billing judgment]**

Date: 3/28/2020 0.0 Staff: John Niles
Outline and draft written opposition to motion for a third extension of time to file responsive brief. **[2.0 eliminated in the exercise of billing judgment]**

Date: 3/31/2020 0.0 Staff: John Niles
Finalize written opposition. **[0.5 eliminated in the exercise of billing judgment]**

Date: 3/31/2020 0.0 Staff: Stacy A. Tromble
Review written opposition. **[0.9 eliminated in the exercise of billing judgment]**

Date: 4/7/2020 0.0 Staff: John Niles
Review Order and email exchange with S. Tromble regarding same. **[0.3 eliminated in the exercise of billing judgment]**

Date: 4/29/2020 4.2 Staff: John Niles
Review 30-page responsive brief for preparation of reply brief (2.0); outline Secretary's argument for preparation of reply brief argument outline (1.0); draft reply brief argument outline (1.2).

Date: 5/2/2020 1.2 Staff: John Niles
Begin drafting reply brief argument.

Date: 5/5/2020 0.5 Staff: John Niles
Teleconference with client regarding case status and reply brief argument and questions regarding same.

Date: 5/8/2020 0.0 Staff: John Niles
Correspond with VA counsel regarding position regarding motion for extension of time to file reply brief and draft motion for same. **[0.2 eliminated in the exercise of billing judgment]**

Date: 6/1/2020 2.9 Staff: Jack McCaffrey
Review relevant law/legislative history on legal validity of distinction between tactical and commercial herbicide exposure (2.0); outline same for inclusion in argument (0.9).

Date: 6/12/2020 0.0 Staff: John Niles
Correspond with J. McCaffrey regarding research. **[0.2 eliminated in the exercise of billing judgment]**

Date: 6/13/2020 2.0 Staff: John Niles
Continue drafting reply brief argument.

Date: 6/24/2020 2.8 Staff: Barton F. Stichman
Prepare inserts to Preliminary Statement and Argument I, for J. Niles.

Date: 6/25/2020 1.2 Staff: Barton F. Stichman
Finish preparing inserts to Argument I, for J. Niles.

Date: 6/25/2020 1.5 Staff: John Niles
Prepare Table of Authorities (0.5); finalize 10-page reply brief; draft style edits to add persuasive value to legal argument. (1.0)

Date: 7/1/2020 0.5 Staff: John Niles
Review and analyze Record of Proceedings (ROP) to ensure legibility and completeness (0.3); draft and finalize statement accepting ROP (0.2).

Date: 8/31/2020 0.4 Staff: John Niles
Review assignment of Judge and teleconference with client regarding case status and questions regarding next steps.

Date: 9/24/2020 0.2 Staff: John Niles
Review Order regarding panel decision and oral argument in order to provide update to client.

Date: 9/30/2020 0.3 Staff: John Niles
Teleconference with client to answer client follow-up questions regarding case status and next steps.

Date: 10/2/2020 0.3 Staff: Angela Nedd
Draft Notices of Appearance for B Stichman and S. Tromble.

Date: 10/9/2020 0.0 Staff: Stacy A. Tromble
Administrative matter. **[0.3 eliminated in the exercise of billing judgment]**

Date: 11/3/2020 0.0 Staff: John Niles
Update internal file; correspond with J. Pennington regarding same. **[0.5 eliminated in the exercise of billing judgment]**

Date: 11/4/2020 0.0 Staff: John Niles
Teleconference with B. Stichman regarding administrative matter **[0.1 eliminated in the exercise of billing judgment]**

Date: 11/6/2020 0.3 Staff: John Niles
Listen to *Euzebio* oral argument for issues relevant to appeal; outline same for preparation for oral argument (0.3); administrative matter **[0.2 eliminated in the exercise of billing judgment]**.

Date: 11/10/2020 0.0 Staff: John Niles
Correspond with B. Stichman regarding draft oral argument presentation. **[0.2 eliminated in the exercise of billing judgment]**

Date: 11/20/2020 0.0 Staff: John Niles
Analyze *Romero* for issues relevant to appeal **[0.9 eliminated in the exercise of billing judgment]**; Correspond with NVLSP regarding oral argument preparation, moot presentation **[0.2 eliminated in the exercise of billing judgment]**; correspond with CAVC clerk's office regarding updated contact information **[0.1 eliminated in the exercise of billing judgment]**.

Date: 11/30/2020 3.0 Staff: John Niles
Prepare for oral argument: revise draft affirmative presentation (1.9); evaluate legal strategy (0.3); analyze new CAVC precedent for impact on appeal (0.8).

Date: 11/30/2020 1.0 Staff: Karen Galla
Prepare for moot oral argument presentation.

Date: 12/1/2020 8.3 Staff: John Niles
Prepare for oral argument: review parties' briefing, cited case law, legal developments; anticipate panel questions and develop responses to same (3.0); continue same (1.2); participate in workshopping of argument (1.1); follow up regarding same (3.0).

Date: 12/2/2020 4.2 Staff: John Niles
Prepare for oral argument: draft inserts to increase persuasive value of affirmative presentation (3.0); continue to anticipate panel's questions and develop responses to same (1.0); participate in teleconference with CAVC Clerk's office regarding oral argument (0.2).

Date: 12/1/2020 1.1 Staff: Karen Galla
Participate in moot oral argument.

Date: 12/1/2020 2.4 Staff: Richard V. Spataro
Prepare for moot oral argument (1.0); participate in oral argument moot (1.1).

Date: 12/3/2020 3.5 Staff: John Niles
Prepare for oral argument: analyze ROP (1.5); analyze non-ROP portions of the RBA [**1.5 eliminated in the exercise of billing judgment**]; analyze parties' cited cases [**3.0 eliminated in the exercise of billing judgment**]; continue to analyze parties' cited cases [**3.0 eliminated in the exercise of billing judgment**]; continue to prepare responses to panel questions (2.0).

Date: 12/3/2020 1.8 Staff: Richard V. Spataro
Prepare for and participate in second oral argument moot of J. Niles.

Date: 12/3/2020 0.0 Staff: Stacy A. Tromble
Prepare for and participate in second oral argument moot. [**1.8 eliminated in the exercise of billing judgment**]

Date: 12/6/2020 0.8 Staff: John Niles
Prepare for oral argument.

Date: 12/7/2020 6.5 Staff: John Niles
Prepare for oral argument: refine presentation, responses to anticipated questions from the panel (3.0); continue same (2.5)[**Additional 5.5 eliminated in the exercise of billing judgment**]; outline anticipated rebuttal argument (1.0).

Date: 12/8/2020 9.0 Staff: John Niles
Prepare for oral argument: final preparation (3.0); continue same (2.0); appear for and present oral argument (1.5); follow up regarding same, including review of argument and debrief with client and lead counsel (2.0); analyze new Federal Circuit precedent for potential relevance to appeal (0.5).

Date: 12/9/2020 3.5 Staff: John Niles
Evaluate proposed bases for settlement (0.8); analyze relevant facts and outline counteroffer (1.5), confer with co-counsel and client regarding same (0.6); revise counteroffer and correspond with VA attorney regarding same (0.6).

Date: 12/11/2020 0.0 Staff: John Niles
Analyze new CAVC legal developments for issues relevant to appeal. [**0.4 eliminated in the exercise of billing judgment**]

Date: 12/16/2020 1.2 Staff: John Niles
Evaluate new settlement offer.

Date: 12/17/2020 1.5 Staff: John Niles
Supplement analysis of settlement offer and possible counteroffer (0.4)**[Additional 0.5 eliminated in the exercise of billing judgment]**;
teleconference with VA attorney regarding settlement proposal (0.2);
teleconference with client regarding same (0.4); draft correspondence to VA attorney, regarding response to VA counteroffer (0.5).

Date: 12/22/2020 0.6 Staff: John Niles
Teleconference with client regarding VA counteroffer, including detailed discussion of risks and range of outcomes stemming from contemplated response to same (0.6); correspond with B. Stichman and S. Tromble regarding same **[0.2 eliminated in the exercise of billing judgment]**; revise draft correspondence to VA attorney regarding response to VA counteroffer; draft correspondence to client regarding same **[1.0 eliminated in the exercise of billing judgment]**.

Date: 12/23/2020 0.1 Staff: John Niles
Teleconference with B. Stichman regarding settlement offer and response **[0.1 eliminated in the exercise of billing judgment]**; correspond with VA attorney regarding status of same (0.1).

Date: 1/5/2021 0.0 Staff: John Niles
Evaluate draft settlement and stipulated agreement. **[0.3 eliminated in the exercise of billing judgment]**

Date: 1/6/2021 0.6 Staff: John Niles
Draft revisions to settlement and stipulated agreement (0.4); confer with client regarding draft settlement and stipulated agreement, and authority for response and finalization (0.2).

Date: 1/8/2021 0.0 Staff: John Niles
Draft response to VA attorney, with attachments (draft revised settlement and stipulated agreement) (0.2); telephone calls to and emails with NVLSP co-counsel regarding same (0.3) **[Entire 0.5 eliminated in the exercise of billing judgment]**

judgment].

Date: 1/8/2021 0.0 Staff: Christine Cote Hill
Email exchange with J. Niles regarding settlement. **[0.2 eliminated in the exercise of billing judgment]**

Date: 1/14/2021 3.7 Staff: Alexandra Gonsman
Draft application for reasonable attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), including recitation of relevant procedural history (1.7); Prepare list of itemized hours to be attached as exhibit to EAJA application (2.0).

ate: 2/17/2021 1.0 Staff: Christine Cote Hill
Add insertion to application for reasonable attorneys' fees and expenses under the EAJA, and elimination of hours in the interest of billing judgment. (1.0)**[Additional 2.0 eliminated in the exercise of billing judgment]**

Date: 2/22/2021 1.0 Staff: Brianna LeFrere
Finalize application for C. Hill, to include adding detail to application and itemized list.

EXHIBIT B



Databases, Tables & Calculators by Subject

Change Output Options: From: 1996 To: 2021 [GO](#)
 include graphs include annual averages [More Formatting Options](#)

Data extracted on: February 10, 2021 (11:17:22 AM)

CPI for All Urban Consumers (CPI-U)

Series Id: CUURS35ASA0, CUUSS35ASA0
 Not Seasonally Adjusted
Series Title: All items in Washington-Arlington-Alexandria, DC-VA-MD-WV, all urban consumers, not seasonally adjusted
Area: Washington-Arlington-Alexandria, DC-VA-MD-WV
Item: All items
Base Period: 1982-84=100

Download: [xls](#) [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1996	156.8		158.4		159.0		160.1		160.8		161.2		159.6	158.3	160.8
1997	161.6		161.9		162.1		162.9		163.6		161.8		162.4	162.0	162.8
1998	162.5		163.5		163.6		164.9		165.2		164.5				
1999	165.4		165.9		167.0		168.3		169.8		169.1				
2000	169.8		173.2		172.5		174.8		175.0		175.3				
2001	175.9		177.2		178.0		179.2		180.9		179.5				
2002	180.0		181.9		183.6		184.2		185.8		185.4				
2003	186.3		188.8		188.7		190.2		190.8		190.4				
2004	190.7		192.8		194.1		195.4		196.5		197.2				
2005	198.2		200.4		201.8		202.8		205.6		204.3				
2006	205.6		206.4		209.1		211.4		211.2		210.1				
2007	211.101		214.455		216.097		217.198		218.457		218.331				
2008	220.587		222.554		224.525		228.918		228.871		223.569				
2009	221.830		222.630		223.583		226.084		227.181		226.533				
2010	227.440		228.480		228.628		228.432		230.612		230.531				
2011	232.770		235.182		237.348		238.191		238.725		238.175				
2012	238.994		242.235		242.446		241.744		244.720		243.199				
2013	243.473		245.477		245.499		246.178		247.838		247.264				
2014	247.679		249.591		250.443		250.326		250.634		249.972				
2015	247.127		249.985		251.825		250.992		252.376		251.327		250.664	249.828	251.500
2016	250.807		252.718		254.850		254.305		253.513		253.989		253.422	253.049	253.795
2017	254.495		255.435		255.502		255.518		257.816		257.872		256.221	255.332	257.110
2018	260.219		260.026		261.770		262.016		263.056		261.120		261.445	260.903	261.987
2019	262.304		264.257		265.967		265.170		265.500		265.026		264.777	264.252	265.301
2020	266.433		265.385		265.733		267.287		268.788		268.700		267.157	265.954	268.359
2021	270.535														

EXHIBIT C

USAO ATTORNEY'S FEES MATRIX — 2015-2021

Revised Methodology starting with 2015-2016 Year

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
31+ years	568	581	602	613	637	665
21-30 years	530	543	563	572	595	621
16-20 years	504	516	536	544	566	591
11-15 years	455	465	483	491	510	532
8-10 years	386	395	410	417	433	452
6-7 years	332	339	352	358	372	388
4-5 years	325	332	346	351	365	380
2-3 years	315	322	334	340	353	369
Less than 2 years	284	291	302	307	319	333
Paralegals & Law Clerks	154	157	164	166	173	180

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-

Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. The USAO rates for years prior to and including 2014-15 remains the same as previously published on the USAO's public website.
5. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). See *Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. See, *e.g.*, *EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.
6. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, \$150 for 2014-15) updated with the PPI-OL index. The formula is \$150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
7. The attorney's fees matrices issued by the United States Attorney's Office are intended to facilitate the settlement of attorney's fees claims in actions in which the United States may be liable to pay attorney's fees to the prevailing party and the United States Attorney's Office is handling the matter. The United States Attorney's Office is presently working to develop a revised rate schedule, based upon current, realized rates paid to attorneys handling complex federal litigation in the District of Columbia federal courts. This effort is motivated in part by the D.C. Circuit's urging the development of "a reliable assessment of fees charged for complex federal litigation in the District." *D.L. v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). This new matrix should address the issues identified by the majority in *D.L.*, but it is expected that it will be some time before a new matrix can be prepared. In the interim, for matters in which a prevailing party agrees to payment pursuant to the matrices issued by the United States Attorney's Office, the United States Attorney's Office will not demand that a prevailing party offer the additional evidence that the law otherwise requires. See *Eley*, 793 F.3d at 104 (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995)) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'").