

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT W. JENSEN)	
Appellant,)	
)	
v.)	CAVC No. 15-4788
)	EAJA
)	
DAVID J. SHULKIN, M.D.,)	
SECRETARY OF)	
VETERANS AFFAIRS,)	
Appellee)	

APPELLANT'S APPLICATION FOR AN
AWARD OF 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) (1994), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$27,167.50**.

The basis for the application is as follows:

Grounds for an Award

This Court has identified four elements as being necessary to warrant an award by the Court of attorneys' fees and expenses to an eligible party pursuant to the EAJA. These are: (1) a showing that the appellant is a prevailing party; (2) a showing that the appellant is eligible for an award; (3) an allegation that the government's position is not substantially justified; and (4) an itemized statement

of the fees sought. *Owens v. Brown*, 10 Vet. App. 65, 66 (1997) (quoting *Bazalo*, 9 Vet. App. at 308). See also 28 U.S.C. §§ 2412(d)(1)(A),(B).

As will be demonstrated below, Appellant satisfies each of the above-enumerated requirements for EAJA.

1. THE APPELLANT SATISFIES EACH OF THE REQUIREMENTS FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES

A. *The Appellant Is a Prevailing Party*

In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S.Ct 1835 (2001) (hereafter "Buckhannon"), the Supreme Court explained that in order to be a prevailing party the applicant must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties. 532 U.S. at 603-605. The Federal Circuit adopted the *Buckhannon* test in *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) and applied it to an EAJA applicant. The Federal Circuit explained in *Rice Services, LTD. v. United States*, that "in order to demonstrate that it is a prevailing party, an EAJA applicant must show that it obtained an enforceable judgment on the merits or a court ordered consent decree that materially altered the legal relationship between the parties, or the equivalent of either of those." 405 F.3d 1017, 1025 (Fed. Cir. 2005).

In *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006), this Court explained that the Federal Circuit case of *Akers v. Nicholson*, 409 F.3d 1356 (Fed. Cir. 2005) "did not change the focus for determining prevailing party status from a standard that looks to the basis for the remand to one that looks to the outcome of the remand. *Akers* simply did not involve a remand that was predicated on an administrative error." 19 Vet. App. at 547. (internal quotations omitted). The Court held in *Zuberi* that *Motorola* provided the proper test for prevailing party. *Id.* Next in *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006), the Federal Circuit held that:

To be considered a prevailing party entitled to fees under EAJA, one must secure some relief on the merits. Securing a remand to an agency can constitute the requisite success on the merits. [W]here the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party ... without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court.

Id. at 1353 (internal citations and quotations omitted).

The Appellant in the instant matter is a prevailing party. In a precedential decision, the Court set aside and remanded that portion of the Board's October 22, 2015 decision denying entitlement to specially adapted housing based upon the Board's application of the wrong standard for loss of use. See pages 1-19 of the Panel Decision. The mandate was issued on December 6, 2017. Based upon the foregoing, Mr. Jensen is a prevailing party.

B. Appellant Is Eligible For An EAJA Award

Appellant also satisfies the EAJA requirement that his net worth at the time his appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Mr. Jensen had a net worth under \$2,000,000 on the date this action was commenced. See Paragraph 3 of the fee agreement filed with the Court. Therefore, Mr. Jensen is a person eligible to receive an award under the EAJA.

C. The Position of the Secretary Was Not Substantially Justified

In *White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2004) the Federal Circuit applied the totality of the circumstances test and noted that "EAJA requires that the record must supply the evidence of the Government's substantial justification." 412 F.3d at 1316. The Secretary's position during proceedings before the Agency and in Court was not reasonable, either in law or in fact, and accordingly the Secretary's position was not substantially justified at either the administrative or litigation stage in this case. There thus is nothing substantially justified in the Board's application of the wrong standard for loss of use. Moreover, there is no evidence that special circumstances exist in Appellant's case that would make an award of reasonable fees and expenses unjust. 28 U.S.C. § 2412(d)(1)(A).

2. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

Appellant has claimed a reasonable amount of attorneys' fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997) (quoting *Elczyn*, 7 Vet. App. at 176-177).

Nine attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Barbara Cook, Danielle M. Gorini, Megan Ellis, Matthew Ilacqua, Alexandra Lio, Jenna Zellmer, Sarah Barr, Dana Weiner, and Zachary Stolz.¹ Attorney Barbara Cook graduated from University of Michigan Law

¹"There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988); see also *Baldrige v. Nicholson*, 19 Vet.App. 227, 237-38 (2005) ("the fees sought must be 'based on the distinct contribution of each individual counsel.'"). "The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work." *Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) holding modified by *Gaines v. Dougherty Cty. Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985). "Careful preparation often requires collaboration and rehearsal[.]" *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1st Cir. 1998). As demonstrated in Exhibit A, each attorney involved in the present case provided a distinct, and non-duplicative contribution to the success of the appeal. See *Baldrige*, 19 Vet.App. at 237 ("An application for fees under EAJA where multiple attorneys are involved must also explain the role of each lawyer in the litigation and the tasks assigned to each, thereby describing the distinct

School in 1977 and the *Laffey* Matrix establishes that \$581.00 is the prevailing market rate for an attorney with her experience.² Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$465.00 is the prevailing market rate for an attorney with her experience.

Megan Ellis graduated from Boston College Law School in 2014 and the *Laffey* Matrix establishes that \$322.00 is the prevailing market rate for an attorney with her experience. Matthew Ilacqua graduated from Boston University Law School in 2010 and the *Laffey* Matrix establishes that \$339.00 is the prevailing market rate for an attorney with his experience. Alexandra Lio graduated from Roger Williams University School of Law in 2010 and the *Laffey* Matrix establishes that \$339.00 is the prevailing market rate for an attorney with her experience. Jenna

contribution of each counsel.”).

²The U.S. Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by years of practice, taking into account annual price increases, pursuant to *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff’d in part* by 746 F.2d.4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488 (1985). This Court has approved the use of the Laffey Matrix for determining the prevailing market rate for EAJA fees. *See, e.g., Wilson v. Principi*, 16 Vet. App. 509, 213 (2002) (finding the Laffey Matrix a “reliable indicator of fees...particularly as to cases involving fees to be paid by government entities or determined under fee-shifting statutes”), *vacated on other grounds* by 391 F.3d 1203 (Fed. Cir. 2004); *see also Sandoval*, 9 Vet. App. at 181 (using the Laffey Matrix as an indicator of prevailing market rate and holding that once a prevailing market rate is established, the government has the burden of producing evidence to show that the rate is erroneous.) *See* Exhibit B (Laffey Matrix).

Zellmer graduated from Boston University Law School in 2013 and the *Laffey* Matrix establishes that \$322.00 is the prevailing market rate for an attorney with her experience. Sarah Barr graduated from Suffolk University Law School in 2014 and the *Laffey* Matrix establishes that \$322.00 is the prevailing market rate for an attorney with her experience. Dana Weiner graduated from Roger Williams University School of Law in 2015 and the *Laffey* Matrix establishes that \$291.00 is the prevailing market rate for an attorney with her experience. Zachary Stolz graduated from the University of Kansas School of Law in 2005 and the *Laffey* Matrix establishes that \$465.00 is the prevailing market rate for an attorney with his experience.

In addition, one non-attorney practitioner, Landon Overby, worked on this case. Mr. Overby's credentials are set forth in detail in the Court's decision in *McDonald v. Nicholson*, 21 Vet. App. 257 (2007). He entered his appearance and started working on the case shortly after the appeal was filed in this case.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$195.81 per hour for Ms. Gorini, Ms. Ellis, Mr. Ilacqua, Ms. Lio, Ms. Zellmer, Ms. Barr, Ms. Weiner, and Mr. Stolz for representation services before the Court.³ This rate per hour,

³This rate was determined by adjusting the \$125 per hour statutory EAJA rate by

multiplied by the number of hours billed for these eight attorneys (105.9) results in a total attorney's fee amount of \$20,737.09.

Appellant seeks attorney's fees at the rate of \$189.16 per hour for Ms. Cook's representation services before the Court.⁴ This rate per hour, multiplied by the number of hours billed for Ms. Cook (19.1) results in a total attorney's fee amount of \$3,612.95.

In addition, Appellant seeks attorney's fees at the rate of \$165.15 per hour for representation services before the Court for Mr. Overby's time.⁵ This rate per

the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to May 2016, the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

⁴ This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Cincinnati. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to May 2016, the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

⁵ The hourly billing rate at which fees are claimed for those hours expended is based on the rate of \$120.00 per hour plus the cost-of-living allowance ("COLA"), which is adjusted according to the formula described in *Apodackis v. Nicholson*, 19 Vet. App. 91, 95-96 (2005). *McDonald v. Nicholson*, 21 Vet. App. 257, 262-63 (2007); *see Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994) ("[T]he Court will permit-and encourage-the selection of a single mid-point date, such as the date upon which an appellant's principal brief...is filed with the Court, as the base for

hour, multiplied by the number of hours billed (3.7) results in a total attorney's fee amount of \$611.06.

In addition, Mr. Jensen seeks reimbursement for the following expenses:

Filing Fee: \$50.00

Roundtrip Airfare for oral argument – SKB: \$609.33

Roundtrip Airfare for oral argument – BC: \$721.40

Airport Transportation – SKB: \$42.53

Hotel in DC for oral argument – BC: \$414.49

Hotel in DC for oral argument – SKB: \$319.93

Parking at airport – BC: \$21.00

Taxi from Hotel to CAVC – SKB: \$9.55

Taxi to Hotel in DC – SKB: \$18.17

calculating a cost of living increase.”). This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. The mid-point date in this litigation is May 2016, the period of time during which the opening brief was filed with the Court.

Based upon the foregoing, the total fee sought is **\$27,167.50**.

I, Zachary M. Stolz, am the lead counsel in this case. I certify that I have reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives. I have considered and eliminated all time that I believe, based upon my over ten years of practicing before this Court, is either excessive or redundant.

Respectfully submitted,

Robert W. Jensen
By His Attorneys,
CHISHOLM CHISHOLM & KILPATRICK
/s/Zachary M. Stolz
One Turks Head Place, Ste. 1100
Providence, Rhode Island 02903
(401) 331-6300
Fax: (401) 421-3185

Exhibit A

		<u>Hours</u>
10/28/2015 LEO	Reviewed BVA decision. Researched law re: SAH. Accepted case for appeal.	0.40
10/28/2015 MI	Reviewed Board decision, researched law regarding specially adapted housing, made recommendations for appeal and potential arguments.	0.40
12/22/2015 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, and Fee Agreement with the Court. Received, reviewed, and posted Court confirmation email to the file. Updated case checklist.	0.20
12/28/2015 DMG	Received and reviewed emails from Court with docketed appeal documents. Posted emails to the file. Ensured Notice of Appeal, Notice of Appearance, and Fee Agreement were properly docketed. Updated case information and case checklist.	0.20
1/14/2016 AL	Review case assignment. Prepare and e-file notice of appearance. Check docket to confirm successful filing. Review docket for procedural status of case. Update client file.	0.20
2/25/2016 AL	Review notice of RBA transmittal. Review for accuracy. Save to file. Update file. Calculate dispute deadline and update case calendar.	0.10
3/1/2016 AL	Called VA re: RBA being blank. Update file.	0.10

Exhibit A

		<u>Hours</u>
3/16/2016 AL	Review notice to file brief for accuracy. Update client file. Calculate brief due date and update case calendar.	0.10
3/18/2016 AL	Review RBA from R-1 to R-900 for briefing purposes.	2.30
3/21/2016 AL	Complete review of RBA from R-901 to R-1723 for briefing purposes.	2.50
3/22/2016 AL	Review PBC order for accuracy. Save to file. Update client file. Update case calendar with PBC date and time. Calculate new brief due date and memo due date and update case calendar.	0.10
3/28/2016 AL	Prepared letter to client re: status of appeal. Updated file.	0.30
4/4/2016 AL	Review notes in file and BVA decision. Research regulation for SAH and std. of proof. Draft summary of issues.	2.70
4/5/2016 AL	Email CLS and GC copy of summary of issues. Draft and efile certificate of service. Update client file.	0.20
4/19/2016 AL	Review notes and memo. Participate in PBC. Record outcome to file.	0.40
5/17/2016 AL	Draft issues presented, summary of the argument, std. of review and conclusion sections of brief.	0.60
5/17/2016 AL	Research cases involving SAH and SMC. Compare statutes and implementing regs. Outline issue for brief.	1.40

Exhibit A

		<u>Hours</u>
5/17/2016 AL	Draft argument portion of brief.	1.70
5/18/2016 LEO	Reviewed RBA and litigation notes in preparation for review of draft opening brief. Suggested revisions to draft opening brief to ensure accuracy of legal arguments as well as record and legal citations. Updated file.	0.80
5/18/2016 AL	Make revisions to opening brief. Check citations to the record and relevant authority. Finalize brief and efile it. Check docket to ensure proper filing. Update file.	0.50
5/18/2016 AL	Complete draft of brief (SOC and revisions).	0.80
7/7/2016 AL	Review notice of filing of Appellee's brief. Save to file, review for accuracy, and update file. Update case calendar with reply brief due date.	0.10
8/31/2016 LEO	Reviewed VA's brief and opening brief in preparation for providing review of draft reply brief. Suggested edits to draft reply brief to ensure accuracy of legal arguments as well as legal and record citations. Updated file.	0.70
8/31/2016 AL	Client called to discuss status of case. Updated file.	0.20
8/31/2016 AL	Make final edits to reply brief. Check citations. Finalize brief and efile it. Update client file.	0.50
8/31/2016 AL	Review Appellee's brief. Research cases cited by OGC. Draft reply brief.	3.00
9/13/2016 AL	Review ROP to ensure all documents are included. File acceptance of ROP. Update file.	0.30

Exhibit A

		<u>Hours</u>
9/21/2016 AL	Review notice of judge assignment for accuracy. Update client file.	0.10
11/23/2016 BJC	Review case file to evaluate for supplemental briefing or oral argument. Note to file re: oral argument. Update file.	0.30
11/30/2016 AL	Email OGC re: motion for leave and OA. Update file.	0.10
11/30/2016 AL	Prepare and efile motion for leave and motion for oral arguemnt. Efile same and update client file.	0.20
12/2/2016 AL	Review court order granting motion for leave and for OA. Save to client and update file.	0.10
1/26/2017 JZ	Reviewed case file notes and docket for procedural status of case. Drafted and filed notice of appearance. Updated client file	0.20
2/2/2017 JZ	Spoke to client re: status of case and motion for OA. Note to file on conversation. Updated client file.	0.20
3/8/2017 JZ	Reviewed CAVC email scheduling OA for March 20th. Updated client file and case calendar with date for argument.	0.20
3/8/2017 SKB	Further discussed oral argument with client on phone. Updated file.	0.20
3/8/2017 SKB	Discussed oral argument strategy with co-counsel. Updated file.	0.30

Exhibit A

		<u>Hours</u>
3/8/2017 ZMS	Reviewed OA order and notes on case. Reviewed pleadings and discussed OA strategy with Sarah Barr and Barbara Cook.	2.50
3/9/2017 SKB	drafted and e-filed notice of appearance. Updated file.	0.10
3/9/2017 SKB	Located and printed parties' briefs, board decision, and relevant regulations in order to review in preparation for oral argument.	0.20
3/9/2017 SKB	Researched and booked flights and hotel for oral argument in DC; scheduling team meetings to discuss oral argument strategy; scheduled moot argument. Updated file.	0.70
3/9/2017 SKB	Honed oral argument strategy with co-counsel. Updated file.	1.00
3/10/2017 BJC	Reviewed relevant statutes and regulation for SAH in preparation for OA. Updated file.	0.70
3/10/2017 ME	Discussed argument strategy with co-counsel. Updated file.	0.50
3/10/2017 SKB	Reviewed Board decision and relevant regulations; and began reviewing opening brief in preparation for oral argument.	0.60
3/10/2017 SKB	Discussed oral argument strategy with co-counsel; researched regulatory law for argument. Updated file.	1.00
3/10/2017 ME	Researched relevant case law and memorandum decisions re: SAH. Updated file.	1.10

Exhibit A

		<u>Hours</u>
3/10/2017 ME	Reviewed case pleadings, Board decision and record evidence in order to provide input to devise oral argument strategy.	1.20
3/10/2017 ME	Researched legislative history documents for relevant statute and regulation re: SAH. Updated file.	2.90
3/10/2017 SKB	Reviewed remainder of parties' briefs in preparation for oral argument; researched history of regulation and statute; researched relevant case law re: SAH.	3.00
3/12/2017 BJC	Reviewed statute and discussed with co-counsel, added issues to consider in email to SB for consideration with argument. Updated file.	0.40
3/12/2017 BJC	Reviewed record, BVA decision, SJ decisions, statute and regulations; created a list of issues relevant for discussion for case. Updated file.	1.20
3/13/2017 BJC	Discuss legal theories with Sarah re: oral argument.	0.20
3/13/2017 SKB	Received and reviewed OGC's notice of appearance for accuracy; saved appearance and court email to client file; updated client file to reflect attorney information.	0.10
3/13/2017 SKB	Drafted notes on Board decision in preparation for oral argument.	0.20
3/13/2017 JZ	Reviewed pleadings and case file notes to prepare for OA prep. Researched case law on memorandum decisions defining LOU and prepared memo for Sarah. Updated file.	3.00

Exhibit A

		<u>Hours</u>
3/13/2017 SKB	Reviewed RBA in preparation for oral argument and prepared notes for argument.	3.00
3/13/2017 SKB	Discussions about oral argument strategy with team working on OA preparation. Update file.	0.30
3/14/2017 SKB	Reviewed important case law relevant to issue on appeal re: SAH; outlined argument incorporating case law for SAH argument.	1.60
3/15/2017 BJC	Discussion with SB and ME about deference; locate and send them materials for review on the topic.	0.30
3/15/2017 BJC	Participated in oral argument walk through meeting to discuss issues; followed up with Sarah afterwards about next steps and potential issues for further development before first moot.	1.30
3/15/2017 ME	Discussed arguments and strategies for oral argument with co-counsel. Updated file.	1.00
3/15/2017 JZ	Reviewed pleadings and case law in preparation for OA meeting and participated in OA walk through meeting.	1.30
3/15/2017 ME	Researched additional legislative history; reviewed authority cited in Appellee's briefs. Updated file.	2.20
3/15/2017 SKB	Reviewed relevant case law for SAH and misapplication of law issues in preparation for oral argument.	3.00

Exhibit A

		<u>Hours</u>
3/15/2017 SKB	Discussed oral argument with colleagues; continued working on oral argument strategy and outline.	3.00
3/15/2017 ZMS	Reviewed pleadings and conducted legal research re: SAH. Participate in first oral argument walk through and preparation with Sarah Barr and co-counsel.	3.00
3/15/2017 SKB	Reviewed legislative history for oral argument; outlined argument strategy.	3.00
3/16/2017 LEO	Reviewed pleadings in preparation for moot argument. Conducted legal research re: SAH and LOU. Participated in first moot. Discussed oral argument strategy following moot and necessary changes and further areas for development in light of this moot.	1.80
3/16/2017 BJC	Note to SB re: supplemental pleading. Update file.	0.10
3/16/2017 BJC	Reviewed and suggested edits to draft 30b letter and motion to ensure clarity and accuracy.	0.20
3/16/2017 BJC	Participated in discussion about what interpretation is at issue after reviewing briefs.	0.30
3/16/2017 JZ	Discussed OA issues with SB.	0.20
3/16/2017 ME	Participated in moot argument and discussion of argument strategy tweaks after argument.	0.90
3/16/2017 SKB	Researched board decisions; drafted and e-filed rule 30b letter. Updated file.	1.40

Exhibit A

		<u>Hours</u>
3/16/2017 JZ	Reviewed pleadings and researched case law re: legislative history and SAH to prepare for first moot. Participated in moot.	1.50
3/16/2017 ZMS	Discussion with SB concerning deference questions. Conducted legal research on interplay of canons of construction. Updated case file.	1.50
3/16/2017 SKB	Prepared for moot by reviewing RBA and prepared materials.	2.00
3/16/2017 SKB	Participated in moot.	2.00
3/16/2017 ZMS	Prepared for and participated in moot argument.	2.20
3/16/2017 ME	Reviewed Appellee's arguments, researched pertinent case law, created outline for key points for participation in moot argument.	2.40
3/16/2017 SKB	Researched case law and regulation/statutory interpretation in preparation for oral argument. Updated file.	3.00
3/17/2017 BJC	Reviewed all prepared notes and RBA for moot argument.	1.40
3/17/2017 BJC	Discussed argument with SB and walked through issues possible to encounter during argument. Updated file.	1.60
3/17/2017 SKB	Worked on opening and closings for oral argument.	1.00
3/17/2017 SKB	Discussed case with second chair for oral argument; refined argument strategy. Updated file.	1.60

Exhibit A

		<u>Hours</u>
3/17/2017 SKB	Continued refining strategy for oral argument; worked on outlines for answers to anticipated questions from judges. Updated file.	3.00
3/18/2017 SKB	Preparations for oral argument by continuing to draft notes for use during argument.	2.00
3/19/2017 BJC	Travel to DC.	3.50
3/19/2017 SKB	Preparations for oral argument; printed all documents and organized binder for use during argument. Updated file.	3.00
3/19/2017 SKB	Travel to DC for oral argument.	3.00
3/19/2017 SKB	Reviewed outline and notes in preparation for oral argument.	3.00
3/20/2017 BJC	Review pleadings, BVA decision, check rules, all in prep for OA, prepare email to Sarah about issues for argument.	0.70
3/20/2017 BJC	Participate in discussion with co-counsel after OA regarding case.	1.40
3/20/2017 BJC	OA: go to court, meet with Greg Block, second chair OA.	2.00
3/20/2017 BJC	Travel from DC.	3.50
3/20/2017 SKB	Final oral argument preparation and review of oral argument and notes.	1.00
3/20/2017 SKB	Travel to Court for oral argument; participate in pre-oral argument conference; participate in oral argument.	2.00

Exhibit A

		<u>Hours</u>
3/20/2017 SKB	Travel from DC to Providence after oral argument.	3.00
3/22/2017 SKB	Corresponded with client via email regarding oral argument. Updated file.	0.20
3/22/2017 SKB	Recapped oral argument and discussed next steps with co-counsel.	0.40
3/28/2017 SKB	Received and reviewed OGC's opposition to the motion for leave to file 30b; saved opposition and court email to client file. Updated file.	0.10
3/28/2017 SKB	Drafted summary of argument and saved to client's file. Updated file.	0.20
3/28/2017 SKB	Responded to client's email regarding questions about oral argument. Updated file.	0.20
5/18/2017 SKB	Called client to touch base re: appeal status; left voicemail; recorded call attempt to client file; scheduled follow up call.	0.10
5/18/2017 SKB	Discussed case status with veteran; wrote note to client file re: phone call. Updated file.	0.10
9/12/2017 SKB	Received and reviewed precedential decision; saved decision and court email to client file; updated client file.	0.30
9/12/2017 ZMS	Reviewed Court decision, pleadings, and notes in case. Prepared letter to client concerning Court's decision. Ensured case file was updated with necessary letters, pleadings, and correspondence so that client could be properly informed of case progress, disposition, and next steps.	0.90

Exhibit A

		<u>Hours</u>
9/14/2017 SKB	Drafted summary to prepare to discuss with client after in depth review of panel decision. Updated case file.	0.30
9/26/2017 SKB	Attempted to call client to discuss decision; no answer; recorded call attempt to client file. Updated case file.	0.10
10/6/2017 SKB	Received and reviewed judgment for accuracy; saved judgment and court email to client file; updated client file.	0.10
10/9/2017 ZMS	Prepared letter to client concerning entry of Court's judgment.	0.30
10/13/2017 SKB	Discussed decision with client. Updated case file.	0.20
12/5/2017 SKB	Called client to discuss mandate; left voicemail; updated case file.	0.10
12/6/2017 DNW	Prepared and filed notice of appearance as co-counsel; updated file.	0.10
12/6/2017 ME	Prepared and filed notice of appearance. Updated case file.	0.20
12/6/2017 DNW	Received mandate; reviewed for accuracy and saved to file; updated case file.	0.10
12/6/2017 ZMS	Reviewed EAJA petition for proofreading purposes and to ensure billing accuracy.	0.30
12/6/2017 DNW	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA petition for proofreading and billing accuracy review.	1.70

Exhibit A

		<u>Hours</u>
12/7/2017 SKB	discussed expenses with attorney working on EAJA petition to ensure all expenses included in bill	0.20
		<u>Amount</u>
		128.70 \$24,961.10
Expenses		
Airfare for DC - SKB		609.33
Airfare for Oral Arg- BC		721.40
Airport Transportation - SKB		42.53
Filing Fee		50.00
Hotel in DC - BC		414.49
Hotel in DC - SKB		319.93
Parking at airport - BC		21.00
Taxi from Hotel to CAVC - SKB		9.55
Taxi to Hotel in DC - SKB		18.17
Total Expenses		<u>\$2,206.40</u>
		<u>Amount</u>
		128.70 \$27,167.50

Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alexandra Lio	18.60	195.81	\$3,642.06

Exhibit A

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Barbara J. Cook	19.10	189.16	\$3,612.95
Dana Weiner	1.90	195.81	\$372.04
Danielle M. Gorini	0.40	195.81	\$78.32
Jenna Zellmer	6.60	195.81	\$1,292.34
Landon E. Overby	3.70	165.15	\$611.06
Matthew Ilacqua	0.40	195.81	\$78.32
Megan Ellis	12.40	195.81	\$2,428.04
Sarah K. Barr	0.20	200.08	\$40.02
Sarah K. Barr	54.70	195.81	\$10,710.78
Zachary M. Stolz	10.70	195.81	\$2,095.17

EXHIBIT B

USAO ATTORNEY'S FEES MATRIX – 2015 – 2017

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
31+ years	568	581
21-30 years	530	543
16-20 years	504	516
11-15 years	455	465
8-10 years	386	395
6-7 years	332	339
4-5 years	325	332
2-3 years	315	322
Less than 2 years	284	291
Paralegals & Law Clerks	154	157

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. Because the USAO rates for the years 2014-15 and earlier have been generally accepted as reasonable by courts in the District of Columbia, see note 9 below, the USAO rates for those years will remain the same as previously published on the USAO's public website. That is, the USAO rates for years prior to and including 2014-15 remain based on the prior methodology, *i.e.*, the original *Laffey* Matrix updated by the CPI-U for the Washington-Baltimore area. See *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015) and Declaration of Dr. Laura A. Malowane filed therein on Sept. 22, 2015 (Civ. Action No. 12-1491, ECF No. 46-1) (confirming that the USAO rates for 2014-15 computed using prior methodology are reasonable).
5. Although the USAO will not issue recalculated *Laffey* Matrices for past years using the new methodology, it will not oppose the use of that methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods prior to June 2015, provided that methodology is used consistently to calculate the entire fee amount. Similarly, although the USAO will no longer issue an updated *Laffey* Matrix computed using the prior methodology, it will not oppose the use of the prior methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods after May 2015, provided that methodology is used consistently to calculate the entire fee amount.
6. 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.
7. 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).
8. The USAO anticipates periodically revising the above matrix if more recent reliable survey data becomes available, especially data specific to the D.C. market, and in the interim years updating the most recent survey data with the PPI-OL index, or a comparable index for the District of Columbia if such a locality-specific index becomes available.
9. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the USAO as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Most lower federal courts in the District of Columbia

have relied on the USAO Matrix, rather than the so-called “Salazar Matrix” (also known as the “LSI Matrix” or the “Enhanced Laffey Matrix”), as the “benchmark for reasonable fees” in this jurisdiction. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)); see, e.g., *Joaquin v. Friendship Pub. Charter Sch.*, --- F. Supp. 3d ---, 2016 WL 3034151 (D.D.C. 2016); *Prunty v. Vivendi*, --- F. Supp. 3d ---, 2016 WL 3659889 (D.D.C. 2016); *CREW v. U.S. Dep’t of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015); *McAllister v. District of Columbia*, 21 F. Supp. 3d 94 (D.D.C. 2014); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Fisher v. Friendship Pub. Charter Sch.*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 93-96 (D.D.C. 2012); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011); *Queen Anne’s Conservation Ass’n v. Dep’t of State*, 800 F. Supp. 2d 195, 200-01 (D.D.C. 2011); *Woodland v. Viacom, Inc.*, 255 F.R.D. 278, 279-80 (D.D.C. 2008); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148-50 (D.D.C. 2007). But see, e.g., *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000). The USAO contends that the Salazar Matrix is fundamentally flawed, does not use the Salazar Matrix to determine whether fee awards under fee-shifting statutes are reasonable, and will not consent to pay hourly rates calculated with the methodology on which that matrix is based.