

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

THOMAS I. LYLES, JR.	)	
Appellant,	)	
	)	
v.	)	CAVC No. 16-994
	)	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), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$26,492.47**.

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. After oral argument, in a precedential decision, the Court reversed the Board's finding that Appellant's pain and swelling associated with his left knee meniscal disability were compensated by his thirty percent evaluation under DC 5257 and set aside and remanded that portion of the Board's January 14, 2016 decision denying entitlement to a separate left knee evaluation based on locking or other manifestations of the

semilunar cartilage based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-18 of the Decision. The mandate was issued on February 21, 2018. Based upon the foregoing, Mr. Lyles 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. Lyles 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. Lyles 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 failure to provide an adequate statement of reasons or bases. 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 Elcyzyn*, 7 Vet. App. at 176-177).

Ten attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Jenna Zellmer, Danielle M. Gorini, Dana Weiner, Megan Ellis, Alyse Galoski, Christian McTarnaghan, Michael Just, Nicholas Phinney, Barbara Cook, and Zachary Stolz.<sup>1</sup> Attorney Jenna Zellmer graduated from Boston University Law

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<sup>1</sup>"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 Baldridge 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,

School in 2013 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience.<sup>2</sup> Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with her experience. Dana Weiner graduated from Roger Williams University Law School in 2015 and the

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each attorney involved in the present case provided a distinct, and non-duplicative contribution to the success of the appeal. *See Baldridge*, 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 contribution of each counsel.”). Additionally, a total of 11.5 attorney hours were spent in moot courts to aid in preparing counsel to participate in oral argument. For a successful hour-long oral argument at a federal appellate court, counsel must be familiar with all relevant facts and law, analyze and anticipate the Secretary’s arguments and the Court’s questions, and hone a litigation strategy that aids the Court in establishing precedent for the entire country. Because of this responsibility, a significant amount of time is spent mooting the case with a team of attorneys with varying experience levels and backgrounds. Such practice and strategic planning was essential to the successful outcome in this case.

<sup>2</sup>The 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.2d4 (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).

*Laffey* Matrix establishes that \$334.00 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 \$346.00 is the prevailing market rate for an attorney with her experience. Alyse Galoski graduated from Roger Williams University Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience. Christian McTarnaghan graduated from Suffolk University Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with his experience. Michael Just graduated from Roger Williams University Law School in 2008 and the *Laffey* Matrix establishes that \$410.00 is the prevailing market rate for an attorney with his experience. Nicholas Phinney graduated from Roger Williams University Law School in 2007 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with his experience. Barbara Cook graduated from University of Michigan Law School in 1977 and the *Laffey* Matrix establishes that \$602.00 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 \$483.00 is the prevailing market rate for an attorney with his experience.

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$196.63 per hour for Ms. Zellmer, Ms. Gorini, Ms. Weiner, Ms. Ellis, Ms. Galoski, Mr. McTarnaghan, Mr. Just, Mr. Phinney, and Mr. Stolz for representation services before the Court.<sup>3</sup> This rate per hour, multiplied by the number of hours billed for these nine attorneys (125.80) results in a total attorney's fee amount of \$24,736.05.

Appellant seeks attorney's fees at the rate of \$191.73 per hour for Ms. Cook's representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for Ms. Cook (3.90) results in a total attorney's fee amount of \$747.75.

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<sup>3</sup>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. *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 September 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.

<sup>4</sup> 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 September 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.



In addition, Appellant seeks reimbursement for the following expenses:

Airfare to and from Washington DC – CM: \$330.99

Airfare to and from Washington DC – ME: \$218.40

Hotel in DC – CM: \$262.69

Travel expenses – CM: \$196.58

Based upon the foregoing, the total fee sought is **\$26,492.47.**

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,  
Thomas I. Lyles, Jr.  
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>
1/25/2016 MSJ	review BVA decision; make recommendation for appeal and potential issues/arguments	0.30
3/21/2016 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, Fee Agreement, and Declaration of Financial Hardship with the Court. Received, reviewed, and saved Court confirmation email to the file. Updated case file	0.20
3/22/2016 DMG	Reviewed emails from Court with docketed appeal documents. Posted emails to the file. Checked Court docket sheet to ensure Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, Fee Agreement, and Declaration of Financial Hardship were properly docketed. Updated case information and case file	0.20
3/23/2016 CM	Draft and file notice of appearance. Check docket to ensure proper filing and for procedural status. Update client file.	0.20
4/6/2016 CM	Receive and review copy of BVA decision. Ensured copy was the same as was saved in the file. Update client file.	0.10
4/6/2016 CM	Receive and review BVA decision transmittal. Update client file.	0.10
5/5/2016 CM	Receive and review VA counsel notice of appearance. Update client file.	0.10
5/20/2016 CM	Receive and review RBA certificate of service. Calculate review / dispute deadline. Update client file. Update client calendar.	0.10

## Exhibit A

		<u>Hours</u>
5/24/2016 CM	Receive and review notice that RBA was uploaded to the file. Ensured correct BVA decision was included. Update client file.	0.10
6/7/2016 CM	Draft and send status letter to client.	0.10
6/7/2016 CM	Review RBA pages 1-1632.	2.70
6/9/2016 CM	Receive and review notice to file brief. Calculate brief due date. Update client file. Update client calendar.	0.10
6/16/2016 CM	Review and review PBC order. Calculate memo due date. Update file and update client calendar.	0.10
6/24/2016 CM	Draft PBC memo.	1.40
6/28/2016 JZ	Reviewed PBC memo drafted by CM; suggested edits and revisions prior to submission	0.20
6/28/2016 CM	Revise PBC memo. Email memo to VA and CLS. Draft and file rule 33 certificate of service.	0.30
7/12/2016 CM	Prepare for PBC - review Board decision and memo.	0.20
7/12/2016 CM	Participate in PBC. Memo to file with Secretary's position to defend.	0.30
7/14/2016 CM	Send email to client requesting him to contact firm.	0.10
7/19/2016 CM	Telephone call with client to discuss status of case.	0.10
8/9/2016 CM	Begin to draft statement of the case section of opening brief.	1.40

## Exhibit A

		<u>Hours</u>
8/10/2016 CM	Continue to draft statement of the case section of opening brief.	0.60
9/20/2016 CM	Continue to draft argumnet section of opening brief.	1.70
9/20/2016 CM	Begin to draft argument section of opening brief - misinterpretation / misapplication argument	2.50
9/21/2016 MSJ	review draft opening brief prepared by CM; suggested edits/revisions to argument section for clarity and suggested adding more to statement of facts	0.60
9/26/2016 CM	Edited brief. Ensure all citation to the record and law were correct. File brief.	1.20
10/17/2016 CM	Telephone call with client to discuss case.	0.10
11/21/2016 CM	Review notice with Secretary's brief. Update client file. Calculate deadline for reply.	0.10
1/13/2017 CM	Telephone call with client to discuss status of case.	0.10
1/19/2017 CM	Review Secretary's brief and outline argument for reply brief. Begin to draft reply brief.	1.50
1/22/2017 CM	Continue to draft reply brief - separate rating argument	1.70
1/23/2017 JZ	Reviewed case file notes, and Aee brief in preparation of reviewing CM's reply brief. Reviewed reply brief and suggested edits to same.	0.30
1/23/2017 CM	Edited reply brief argument. Ensure all record and legal citations are correct. File reply brief.	0.70

## Exhibit A

		<u>Hours</u>
1/23/2017 CM	Continue to draft reply argument.	1.10
2/2/2017 CM	Receive and review notice with ROP. Update client file. Calculate response deadline.	0.10
2/2/2017 CM	Review ROP. Compare ROP to all record citations in all filed briefs. Draft and file letter accepting ROP. Update client file.	0.50
2/15/2017 CM	Receive and review judicial assignment. Update client file.	0.10
5/4/2017 CM	Telephone call with client to discuss status of case.	0.10
5/4/2017 CM	Left voicemail for client requesting call back. Note to file.	0.10
5/11/2017 CM	Telephone call with client to discuss status of case.	0.10
5/22/2017 CM	Email VA to ascertain position on motion for oral argument out of time.	0.10
5/26/2017 BJC	Review CM's motion for oral argument and suggest edits to draft	0.20
5/26/2017 CM	Edit motion for oral argument. Draft motion for leave to file motion for oral argument out of time. File both motions.	0.50
5/26/2017 CM	Draft motion for oral argumnet.	1.20
5/30/2017 CM	Telephone call with client to discuss oral argumnet.	0.10

## Exhibit A

			<u>Hours</u>
5/31/2017 CM	Receive and review VA's motion in opposition to motion for leave to file oral argument. Update client file.		0.30
6/2/2017 CM	Receive and review Court's grant of motion for leave to file motion for oral argument. Update client file.		0.10
6/2/2017 CM	Receive and review Court's grant of the motion for oral argument in this case. Update client file.		0.10
6/19/2017 CM	Receive and review order scheduling oral argument. Update client file. Update client calendar.		0.10
6/22/2017 CM	Receive and review email from VA proposing to change argument date. Respond with available dates.		0.20
6/27/2017 CM	Receive and review VA's motion to change oral argument date and time. Update client file.		0.10
6/28/2017 CM	Receive and review Court's Order revoking original oral argument date. Update client file.		0.10
6/28/2017 CM	Carefully read DAV case. Draft and file 30(b) letter.		0.30
7/10/2017 CM	Telephone call with client to provide update on case.		0.10
7/18/2017 CM	Receive and review Court's new oral argument order. Update client file. Update client calendar.		0.10
7/24/2017 CM	Telephone call with client to discuss status of case.		0.10
7/26/2017 ME	Prepared and filed notice of appearance; updated file.		0.10

## Exhibit A

		<u>Hours</u>
7/26/2017 CM	Begin to prepare for oral argument strategy - review pleadings, case law.	1.70
7/27/2017 BJC	Review pleadings in preparation for oral argument moots	0.40
7/27/2017 BJC	Prepared for participation in moot for oral argument - prepared questions and comments as judge	0.90
7/27/2017 CM	Continue to prepare for moot of oral argument - gather relevant case law and anticipate questions from judges	0.50
7/27/2017 ME	Participated in moot of oral argument - second chair	1.00
7/27/2017 DNW	Prepared for participation in moot for oral argument - prepared questions as judge	1.00
7/27/2017 CM	Participate in moot of oral argument	1.00
7/27/2017 ME	Reviewed Board decision, briefs, and case notes in preparation for moot of oral argument; outlined additional potential arguments and counter-arguments for oral argument; reviewed relevant case law, regulations, and VA policy - second chair	1.20
7/27/2017 AG	Prepared for participation in moot for oral argument - prepared questions as counsel for the Secretary	2.10
7/31/2017 CM	Begin to prepare for second moot of oral argument - review notes from first moot, review case law	2.70

## Exhibit A

		<u>Hours</u>
8/1/2017 CM	Continue to prepare for second moot of oral argument - review RBA for facts and medical examinations. Take notes.	1.50
8/1/2017 CM	Continue preparing for second moot of oral argument - review entirety of procedural history of case - review each document in procedural history. Take notes on procedural history.	2.00
8/2/2017 ME	Discussed procedural history of case and potential arguments with co-counsel in preparation of sitting second chair at oral argument.	0.20
8/2/2017 CM	Review all rating decisions in case carefully to prepare for oral argument. Take notes.	2.10
8/2/2017 CM	Review lay evidence of symptoms in detail in preparation of oral argument. Take notes.	2.30
8/2/2017 CM	Review Board decision in the context of the evidence of symptoms to discern why decision was made. Create outline of the basis of all decisions made in case.	2.80
8/3/2017 AG	Conduct legal research regarding rating criteria for ortho conditions and pyramiding to prepare for second moot of oral argument as counsel for the Secretary	0.90
8/3/2017 CM	Continue to prepare for oral argument. Research additional applicable case law. Take notes.	2.50
8/3/2017 CM	Begin to prepare outline to be used at additional moots for oral argument as well as at actual oral argument.	2.70



## Exhibit A

		<u>Hours</u>
8/4/2017 BJC	Prepare for additional moot of oral argument as judge - review facts of case.	1.30
8/4/2017 ME	Reviewed case notes and pleadings in preparation for additional moot for oral argument as second chair	0.50
8/4/2017 ME	Participated in moot argument as second chair	1.00
8/4/2017 AG	Participate in additional moot for oral argument as counsel for the Secretary.	1.00
8/4/2017 DNW	Participated in moot for oral argument as judge.	1.00
8/4/2017 CM	Participate additional moot for oral argument	1.00
8/4/2017 CM	Complete outline of arguments and facts to be used in moots for oral argument as well as actual oral argument.	2.50
8/4/2017 AG	Conduct additional legal research regarding pyramiding, law of the case, knee disabilities, and other issues to prepare for moot of oral argument. Draft notes to be used in moot as counsel for the Secretary.	3.00
8/4/2017 ZMS	Reviewed record and conducted legal research concerning interpretation of diagnostic codes and knee disabilities in preparation for moot of oral argument. Participate as judge in moot court to prepare Christian for oral argument	3.00
8/6/2017 BJC	Review CM's outline to be used as oral argument - suggest additional research to add to arguments - reviewed Esteban, check cases that applied it for test	1.10

## Exhibit A

		<u>Hours</u>
8/6/2017 CM	Revise oral argument outline after moot Additional review of record to find evidence of functional loss due to other symptoms.	2.10
8/7/2017 NP	Discussed case with CM to prepare to review VBMS file	0.20
8/7/2017 CM	Prepare for oral argument - review VA's brief. Review case law pertaining to law of the case. Add to that part of outline of argument presentation.	1.80
8/7/2017 CM	Review oral argument outline. Revise misinterpretation argument. Revise argument about symptoms under 5257 and 5261.	2.10
8/7/2017 CM	Prepare for oral argument - review pyramiding case law, compare facts of case to case law.	2.40
8/8/2017 NP	Reviewed client's VBMS file; discussed with CM	0.20
8/8/2017 ME	Discussed potential questions from judges and potential issues for oral argument with co-counsel	0.40
8/8/2017 CM	Re review lay statements regarding symptoms for oral argument. Add to oral argument outline.	1.50
8/8/2017 CM	Review record for medical evidence to ensure complete list of symptoms included in outline for oral argument	1.80
8/8/2017 CM	Review all rating decisions, SSOC, SOC, and board decisions in preparation for oral argument. Add notes to outline.	2.50
8/9/2017 CM	Draft answers to questions Court may have during oral argument and most effective responses.	2.10

## Exhibit A

		<u>Hours</u>
8/9/2017 CM	Review outline for oral argument and the record in preparation for argument.	2.20
8/9/2017 CM	Revise draft of oral argument outline. Begin to memorize talking point for oral argument	2.80
8/10/2017 ME	Reviewed case notes, pleadings, and argument outline in preparation for additional moot	1.00
8/10/2017 ME	Participated in additional moot in preparation for oral argument as second chair	1.10
8/10/2017 CM	Participated in additional moot court in preparation of oral argument.	1.10
8/10/2017 AG	Participated in additional moot court in preparation for oral argument as counsel for the Secretary	1.10
8/10/2017 DNW	Participated in additional moot court in preparation of for oral argument as judge.	1.10
8/10/2017 ZMS	Participated in additional moot court in preparation of oral argument as judge.	1.10
8/11/2017 CM	Review record and revise argument and outline after moot.	1.60
8/15/2017 CM	Continue to prepare for oral argument - review outline and memorize arguments to be presented with supporting case law.	2.20
8/16/2017 CM	Train to Logan airport for flight from Boston to DC for oral argument.	0.50

## Exhibit A

		<u>Hours</u>
8/16/2017 ME	Discussed case and additional points and responses for oral argument with co-counsel in preparation of oral argument - participating as second chair	0.60
8/16/2017 CM	Flight from Logan Airport in Boston to National Airport in DC for oral argument.	2.50
8/16/2017 CM	Continue to prepare for oral argument - review additional case law and re review pleadings - opening brief, VA brief, reply brief. Add to outline.	2.80
8/17/2017 ME	Reviewed case notes in preparation for argument	0.50
8/17/2017 ME	Second chaired oral argument	2.00
8/17/2017 CM	Participate in oral argument.	2.00
8/17/2017 CM	Prepare for oral argument - review outline, discuss possible questions and responses with ME.	2.50
8/17/2017 CM	Flight from National airport in Washing to DC to Logan Airport in Boston.	2.50
8/17/2017 ME	Traveled to Washington DC from Providence for argument	2.70
8/17/2017 ME	Traveled from Washington DC to Providence, RI	2.70
8/24/2017 CM	Telephone call with client to discuss status of case.	0.10
10/11/2017 CM	Telephone call with client to discuss status of case.	0.10

## Exhibit A

		<u>Hours</u>
11/29/2017 CM	Receive and review favorable precedential opinion. Memo to file about impact of decision. Update client file.	1.50
12/15/2017 CM	Telephone call with client to discuss precedentail decision.	0.30
12/21/2017 CM	Receive and review judgment. Ensure filed for proper client. Udpate client file.	0.10
12/22/2017 ZMS	Prepared letter to client concerning entry of Court's judgment.	0.30
2/21/2018 CM	Receive and review mandate. Update client file.	0.10
2/22/2018 DMG	Prepared and e filed Notice of Appearance. Received, reviewed, and saved Court confirmation email. Checked docket sheet to ensure proper filing. Updated case file.	0.20
2/22/2018 ZMS	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	1.50
2/22/2018 DMG	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.50
		<u>Amount</u>
		129.70 \$25,483.81

## Exhibit A

### Expenses

	<u>Amount</u>
Airfare for oral argument - CM	330.99
Airfare for oral argument - ME	218.40
Hotel - Oral Argument- CM	262.69
Travel expenses in DC - CM	196.58
Total Expenses	<hr/> \$1,008.66
	<hr/> 129.70    \$26,492.47

### Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Alyse Galoski	8.10	196.63	\$1,592.70
Barbara J. Cook	3.90	191.73	\$747.75
Christian McTarnaghan	89.80	196.63	\$17,657.34
Dana Weiner	3.10	196.63	\$609.55
Danielle M. Gorini	2.10	196.63	\$412.94
Jenna Zellmer	0.50	196.63	\$98.32
Megan Ellis	15.00	196.63	\$2,949.46
Michael S. Just	0.90	196.63	\$176.97
Nicholas Phinney	0.40	196.63	\$78.66
Zachary M. Stolz	5.90	196.63	\$1,160.12

## USAO ATTORNEY'S FEES MATRIX — 2015-2018

*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
31+ years	568	581	602
21-30 years	530	543	563
16-20 years	504	516	536
11-15 years	455	465	483
8-10 years	386	395	410
6-7 years	332	339	352
4-5 years	325	332	346
2-3 years	315	322	334
Less than 2 years	284	291	302
Paralegals & Law Clerks	154	157	164

### *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's *Laffey* 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.*, 188 F. Supp. 3d 1 (D.D.C. 2016); *Prunty v. Vivendi*, 195 F. Supp. 3d 107 (D.D.C. 2016); *CREW v. U.S. Dep't of Justice*, 142 F. Supp. 3d 1 (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). Since initial publication of the instant USAO Matrix in 2015, multiple courts similarly have employed the USAO Matrix rather than the *Salazar* Matrix for fees incurred since 2015. E.g., *Electronic Privacy Information Center v. United States Drug Enforcement Agency*, --- F. Supp. 3d ---, 2017 U.S. Dist. LEXIS 111175, at \*17 (D.D.C. 2017) ("After examining the case law and the supporting evidence offered by both parties, the Court is persuaded that the updated USAO matrix, which covers billing rates from 2015 to 2017, is the most suitable choice here.") (requiring re-calculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), slip op. at 9-10 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"). 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.