

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ERIC J. STEWART	)	
Appellant,	)	
	)	
v.	)	CAVC No. 15-4458
	)	EAJA
	)	
ROBERT L. WILKIE,	)	
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 **\$30,150.78**.

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).

Most recently, this Court in *Blue v. Wilkie*, 30 Vet.App. 61 (2018), laid out the following three-part test relating to when an appellant is considered a prevailing party under the EAJA:

An appellant who secures a remand to an administrative agency is a prevailing party under the EAJA if (1) the remand was necessitated by or predicated upon administrative error, (2) the remanding court did not retain jurisdiction, and (3) the language in the remand order clearly called for further agency proceedings, which leaves the possibility of attaining a favorable merits determination.

*Id.* at 67, citing *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016).

The Appellant in the instant matter is a prevailing party. After oral argument, in a precedential decision, the Court vacated and remanded the Board's October 20, 2015 decision based upon the Board's error in relying on an inadequate medical opinion and based upon the Board's failure when it misapplied § 3.317(a)(2)(ii). See pages 1-23 of the Decision. Mandate issued on September 17, 2019. Based upon the foregoing, and because the three-part test promulgated in *Blue* is satisfied, Appellant 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. Stewart 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. Stewart 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 error in relying on an inadequate medical opinion or in the Board's failure when it misapplied § 3.317(a)(2)(ii). 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).

Eight attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Nicholas Phinney, Danielle M. Gorini, Emma Peterson, Angela Bunnell, Matthew Pimentel, Megan Ellis, Barbara Cook, and Zachary Stolz.<sup>1</sup> Attorney Nicholas Phinney graduated from Roger Williams 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

School in 2007 and the *Laffey* Matrix establishes that \$491.00 is the prevailing market rate for an attorney with his experience.<sup>2</sup> Danielle Gorini graduated from

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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, 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.”). The Exhibit A in this case is separated into two documents as our firm is transitioning to a new time keeping program beginning October 1, 2018.

<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).

Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$491.00 is the prevailing market rate for an attorney with her experience.

Emma Peterson graduated from Roger Williams University Law School in 2011 and the *Laffey* Matrix establishes that \$417.00 is the prevailing market rate for an attorney with her experience. Angela Bunnell graduated from Northeastern University Law School in 2014 and the *Laffey* Matrix establishes that \$351.00 is the prevailing market rate for an attorney with her experience. Matthew Pimentel graduated from Roger Williams University Law School in 2013 and the *Laffey* Matrix establishes that \$358.00 is the prevailing market rate for an attorney with his experience. Megan Ellis graduated from Boston College Law School in 2014 and the *Laffey* Matrix establishes that \$351.00 is the prevailing market rate for an attorney with her experience. Barbara Cook graduated from University of Michigan Law School in 1977 and the *Laffey* Matrix establishes that \$613.00 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 \$491.00 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 \$195.81 per hour for Mr.

Phinney, Ms. Gorini, Ms. Peterson, Ms. Bunnell, Mr. Pimentel, Ms. Ellis, 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 seven attorneys (143.50) results in a total attorney's fee amount of \$28,098.76.

Appellant seeks attorney's fees at the rate of \$189.16 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 (3.20) results in a total attorney's fee amount of \$605.31.

In addition, Appellant seeks reimbursement for the following expenses:

Airfare to and from Kansas City – ZMS:      \$210.98

Airfare to and from Kansas City – EP:      \$286.00

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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 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 (1994).

<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 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 (1994).



Hotel – ZMS and EP: \$763.73

Travel in Kansas City – ZMS and EP

(parking, travel, car rental): \$186.00

Based upon all of the foregoing, Appellant seeks a total fee and expense in the amount of **\$30,150.78.**

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,  
Eric J. Stewart  
By His Attorneys,  
CHISHOLM CHISHOLM & KILPATRICK  
/s/Zachary M. Stolz  
321 S Main St #200  
Providence, Rhode Island 02903  
(401) 331-6300  
Fax: (401) 421-3185

## Exhibit A

		<u>Hours</u>
10/27/2015 NP	Reviewed BVA decision and made recommendation for appeal.	0.70
11/25/2015 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 posted Court confirmation email to the file. Updated case file.	0.20
11/30/2015 DMG	Received and 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, Fee Agreement, and Declaration of Financial Hardship were properly docketed. Updated case information and case file.	0.20
12/7/2015 AB	Prepared and efiled notice of appearance; updated file.	0.10
12/14/2015 AB	received notice of BVA Dec Transmittal and a copy of the BVA decision. Saved both of the documents to the file and updated file	0.10
1/28/2016 AB	Received Aee Notice of Appear and saved it to the file. Updated the client file.	0.10
2/9/2016 AB	Reviewed pages 1-524 of the RBA for outlining purposes.	1.50
2/10/2016 AB	Prepared status letter to client.	0.10
2/18/2016 AB	Received the notice to file brief. Saved it to the file, calculated brief due date, and updated the client file	0.10

## Exhibit A

		<u>Hours</u>
2/25/2016 AB	Received the PBC order. Saved it to the file. Calculated PBC memo due date and updated file	0.10
3/3/2016 AB	Finalized the pbc memo. Submitted to VA counsel and CLS. Prepared and e-filed the certificate of service. Updated the client file.	0.50
3/3/2016 AB	drafted the pbc memo	2.80
3/22/2016 AB	Participated in the pbc. Drafted a recap for the file. Updated the client file.	0.20
3/22/2016 AB	Reviewed materials to prepare for pbc.	0.30
3/28/2016 AB	Left voicemail for Veteran; made a note to the file.	0.10
3/29/2016 AB	Received call from Veteran and discussed case.	0.10
4/18/2016 AB	Reviewed the BVA decision and the summary of issues. Briefly researched section 3.317 in preparation of drafting the opening brief	0.90
4/20/2016 AB	drafted the statement of the case, issue presented, standard of review, and summary of the argument for the opening brief.	1.70
5/6/2016 AB	Received and reviewed notice of appearance for new VA counsel. Updated the Veteran's file.	0.10
5/25/2016 AB	finished drafting the opening brief.	1.00
5/25/2016 AB	Revised the opening brief.	1.80
5/26/2016 AB	Made final revisions to the opening brief. Prepared the brief for filing. Filed the opening brief. Updated the client file.	2.00

## Exhibit A

		<u>Hours</u>
6/23/2016 AB	Received and reviewed the appellee's motion to extend time to file the brief. Saved it to the Veteran's file. Updated the file	0.10
6/23/2016 AB	Received and reviewed clerk's stamp granting Aee motion to extend time to file the file. Updated the Veteran's file.	0.10
9/16/2016 AB	Reviewed Aee brief in preparation of drafting the reply	1.50
9/19/2016 MP	Reviewed and suggested edits to the reply brief.	0.50
9/19/2016 AB	drafted the reply brief.	1.50
9/20/2016 AB	Made final edits to the reply brief; e-filed the reply brief; updated client file.	0.60
9/29/2016 AB	Received and reviewed notice with the record of proceedings; updated client file.	0.10
10/4/2016 AB	Reviewed the record of proceedings; prepared and e-filed the letter of acceptance.	0.30
10/5/2016 AB	Received and reviewed the Judge assigned to the case. Updated client file	0.10
1/4/2017 AB	Discussed case with Veteran.	0.10
1/9/2017 AB	Received and reviewed notice from the Court the case was submitted to panel. Updated client file.	0.10
1/11/2017 AB	Reviewed pleadings and outline of RBA. Prepared memorandum outlining case and legal issue.	3.00
1/13/2017 AB	Received court order for supplemental pleadings. Reviewed questions presented.	0.20

## Exhibit A

		<u>Hours</u>
1/26/2017 AB	Received and reviewed Aee motion to extend time to respond to supplemental pleadings for both parties. Updated client file.	0.10
2/1/2017 AB	Received and reviewed clerks stamp granting aee motion to extend time. Updated file.	0.10
2/9/2017 AB	Received notice of supplemental pleadings filing. Reviewed the pleadings. Saved them to Veteran's file. Calculated deadline for response. Updated client file.	0.80
2/15/2017 AB	Left voice mail for Veteran. Made note to the file.	0.10
2/16/2017 AB	Discussed case with Veteran.	0.20
2/16/2017 AB	Began researching relevant case law for supplement pleadings.	1.60
2/21/2017 AB	Finished the initial draft of the supplemental pleadings.	2.20
2/22/2017 AB	Added additional arguments to the supplemental pleadings.	0.90
3/3/2017 BJC	reviewed supplemental pleading and suggest edits to draft	1.20
3/3/2017 BJC	reviewed and suggested edits to the revised draft, add cases on interpretation, add definition, review and suggest edits to other arguments for clarity	1.20
3/3/2017 AB	Revised section two of the supplemental pleadings.	1.10
3/3/2017 AB	Edited argument one of the supplemental pleadings.	2.90

## Exhibit A

		<u>Hours</u>
3/5/2017 AB	Made additional edits to the first argument section. Researched relevant law.	2.20
3/6/2017 AB	Performed final proofread to the supplemental pleadings. E-filed the pleading. Updated client file.	0.80
3/6/2017 AB	Revised the third argument section.	2.00
3/6/2017 ZMS	Reviewed pleadings, notes on case, and Court order. Conducted legal research concerning 1117 issues and medical treatises. Reviewed and revised supplemental pleading.	3.00
3/16/2017 AB	Received and reviewed order to stay. Saved order to the Veteran's file. Updated client file.	0.10
4/14/2017 AB	Discussed case with Veteran.	0.10
5/3/2017 AB	Discussed case with Veteran.	0.10
5/22/2017 AB	Discussed case with Veteran.	0.10
6/12/2017 AB	Discussed case with Veteran.	0.20
7/21/2017 EP	Prepared and filed notice of appearance. Updated file.	0.10
8/28/2017 EP	Telephone call with client regarding the status of his appeal.	0.10
9/20/2017 EP	Conducted review of DAV v. Sec and Goodman v. Shulkin. Started draft letter to Court re decisions in both.	0.80
9/21/2017 EP	Email to OGC re position on lifting stay at CAVC	0.10

## Exhibit A

			<u>Hours</u>
9/22/2017 EP	Prepared and filed motion to lift stay, saved and updated client file.		0.20
10/23/2017 EP	Received and reviewed Court Order lifting stay and ordering a supplemental memorandum of law. Saved and updated client file.		0.10
10/24/2017 EP	Telephone call with client regarding the status of his appeal		0.20
10/26/2017 BJC	review pleadings, review Goodman and DAV with focus on the issues raised, draft outline of responses for supplemental memorandum of law		0.80
10/30/2017 EP	Telephone call with client regarding status of his appeal.		0.20
11/7/2017 EP	Received Order for Argument, reviewed for content, saved, and updated client file.		0.10
11/16/2017 EP	Started drafting response to Court Order.		3.00
11/16/2017 EP	Continued drafting response to Court Order re DAV and Goodman		3.00
11/17/2017 EP	Continued drafting response to Court order. Conducted research on Fast Letters and Training Letters for response.		1.70
11/27/2017 EP	Received Secretary's response to Court's order, reviewed, and saved.		0.20
11/28/2017 EP	Telephone call from OGC re supplemental memo of law and Court's stamp grant of joint motion for extension.		0.10
12/1/2017 ME	Reviewed draft supplemental pleading, suggested edits		0.50

## Exhibit A

		<u>Hours</u>
12/1/2017 EP	Continued drafting supplemental memo of law.	0.60
12/5/2017 EP	Continued drafting supplemental pleading.	0.60
12/6/2017 EP	Prepared response to Court Order for submission and e-filed the same.	0.30
12/6/2017 EP	Continued drafting response to Court's Order	1.10
12/6/2017 EP	Continued drafting response to Court Order.	2.10
12/6/2017 ZMS	Reviewed all pleadings and notes on case. Conducted legal research concerning Fast and Training letters. Made final revisions to supplemental pleading.	3.00
12/28/2017 EP	Detailed review of all pleadings to map out progression of arguments in preliminary preparation for oral argument.	2.20
1/10/2018 EP	Received updated order of the Court rescheduling oral argument, reviewed, and updated client file.	0.10
1/10/2018 EP	Review of pleadings in prep for walk through oral argument.	0.40
1/10/2018 EP	Participated in walk through oral argument - discussed arguments and VA's responses	0.80
1/10/2018 ZMS	Reviewed pleadings and notes on case. Conducted legal research concerning deference to regulatory and statutory interpretations, plain language, and M21 provisions. Reviewed the Goodman and DAV cases. Participated in case walk through.	3.00
1/17/2018 EP	Telephone call with client regarding status of his appeal.	0.20



## Exhibit A

		<u>Hours</u>
1/19/2018 EP	Reviewed cases on deference cited in pleadings in preparation for oral argument	0.80
1/22/2018 EP	Continued review of cases and other authorities cited in pleadings in preparation for oral argument.	1.50
1/23/2018 EP	Continued reviewing cases, statutes, and regulations cited in pleadings in preparation for oral argument.	1.50
1/28/2018 EP	Continued review of cases, regulations, and other citations in supplemental pleadings in prep for oral argument	2.30
1/28/2018 EP	Review of cases cited to in supplemental pleadings in preparation for oral argument.	3.00
1/29/2018 EP	Started preparing opening statement for oral argument	1.60
1/29/2018 EP	Reviewed all cases regarding deference - prepared outline for oral argument	3.00
1/29/2018 EP	Reviewed all cases regarding general vs specific medical determinations and added to outline for oral argument	3.00
1/29/2018 EP	Reviewed all caselaw regarding terms of art and statutory interpretation and added to outline of oral argument	3.00
1/30/2018 EP	Participated in oral argument moot as first chair	1.50
1/30/2018 ZMS	Prepared for and participate in first formal moot court as judge.	3.00

## Exhibit A

		<u>Hours</u>
2/3/2018 EP	Reviewed Trafter and other deference cases in prep for oral argument. Refined outline and opening statement.	2.60
2/5/2018 EP	Practiced answers to potential questions for oral argument	0.70
2/5/2018 EP	Review of Westlaw for cases addressing 3.317 and 1117. Continued adding to outline for oral argument	2.90
2/6/2018 EP	Preparation for second moot for oral argument	0.70
2/6/2018 EP	Participated in second moot of oral argument as first chair	1.30
2/6/2018 ZMS	Prepared for and participated in second formal moot court. Preparation included legal research concerning deference to VA training materials, statutory and regulatory plain language, medical diagnoses, etc. Participated as VA counsel	3.00
2/13/2018 EP	Participated in final Moot for oral argument as first chair. Discussed possible questions with ZMS	1.20
2/13/2018 ZMS	Prepared for and participated in final moot court. Final legal research and assembly of materials for second chair. Discussed strategy with Emma.	3.00
2/13/2018 EP	Continued preparing for oral argument - reviewed all pleadings and cases. Refined outline.	3.00
2/14/2018 ZMS	Travel from Providence, RI to Kansas City, MO.	6.50
2/15/2018 ZMS	Final preparation for and participation in oral argument, including travel time.	3.00

## Exhibit A

		<u>Hours</u>
2/16/2018 EP	Traveled to T.F.Green Airport for flight to Kansas City for oral argument	0.30
2/16/2018 EP	Traveled from T.F. Green Airport to home	0.30
2/16/2018 EP	Meeting with Greg Block, Clerk pre-argument	0.40
2/16/2018 EP	Detailed telephone call with Veteran and his wife regarding oral argument and next steps in his appeal.	0.50
2/16/2018 EP	Final review of notes and outline before argument	0.50
2/16/2018 EP	Travel from hotel in Lawrence to Washburn School of Law	0.80
2/16/2018 EP	Travel from Kansas City Airport to hotel in Lawrence, Kansas	1.00
2/16/2018 EP	Oral Argument held	1.00
2/16/2018 EP	Traveled from Washburn University to Kansas City Airport	1.20
2/16/2018 EP	Flight from Philadelphia to Providence	1.20
2/16/2018 EP	Flight from Providence to Philadelphia	1.50
2/16/2018 EP	Flight from Kansas City to Philadelphia	2.30
2/16/2018 EP	Flight from Philadelphia to Kansas City	2.90
2/18/2018 ZMS	Travel from Kansas City to Providence.	5.00
3/9/2018 EP	Telephone call with client and his wife re status of the case	0.40

## Exhibit A

		<u>Hours</u>
3/29/2018	EP Telephone call with client regarding the status of his appeal.	0.10
9/18/2018	EP Telephone call with client regarding the status of his appeal	0.10

	<u>Amount</u>
	141.10
	\$27,607.53
Expenses	
Airfare - oral argument - EP	286.00
Airfare - oral argument - ZMS	210.98
Expenses - oral argument - ZMS (parking, travel, car rental)	186.00
Hotel - Oral Argument - ZMS	763.73
Total Expenses	\$1,446.71

	<u>Amount</u>
	141.10
	\$29,054.24

### Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Angela Bunnell	36.90	195.81	\$7,225.39
Barbara J. Cook	3.20	189.16	\$605.31
Danielle M. Gorini	0.40	195.81	\$78.32
Emma Peterson	66.40	195.81	\$13,001.79
Matthew Pimentel	0.50	195.81	\$97.91
Megan Ellis	0.50	195.81	\$97.91
Nicholas Phinney	0.70	195.81	\$137.07
Zachary M. Stolz	32.50	195.81	\$6,363.83

# Exhibit A

Time from 10/1/2018 to 9/17/2019

**Case No. 226392**

**Client: Stewart, Mr. Eric J.**

			<u>Hours</u>
11/19/2018	EMMA	telephone call with client regarding the status of his appeal.	0.10
12/20/2018	EMMA	telephone call with client regarding outcome of panel decision from CAVC	0.40
12/20/2018	EMMA	Received panel decision from CAVC, reviewed and compared to arguments advanced in pleadings, supplemental pleadings, and at oral argument. Prepared memo to file regarding outcome.	0.90
12/24/2018	ZACH	Reviewed Court's precedential 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.	0.80
1/11/2019	EMMA	Received Judgment of Court, reviewed for accuracy, saved and updated client file.	0.10
1/11/2019	ZACH	Prepared letter to client concerning entry of Court's judgment.	0.30
3/8/2019	EMMA	telephone call with veteran and his wife regarding upcoming Mandate and next steps.	0.30
3/12/2019	ZACH	Reviewed appeal to Federal Circuit. Updated client file.	0.20
3/13/2019	ZACH	Email exchange with DOJ attorney concerning Circuit appeal.	0.20
9/17/2019	DANIELLE	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
9/17/2019	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.50
9/17/2019	EMMA	Received Mandate of Court, reviewed for accuracy, saved and updated client file.	0.10
9/17/2019	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.50

## Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
<b>DANIELLE</b>	<b>1.7</b>	<b>\$ 195.81</b>	<b>\$ 332.88</b>
<b>EMMA</b>	<b>1.9</b>	<b>\$ 195.81</b>	<b>\$ 372.04</b>
<b>ZACH</b>	<b>2.0</b>	<b>\$ 195.81</b>	<b>\$ 391.62</b>
	<b>5.6</b>		<b>\$ 1,096.54</b>

## USAO ATTORNEY'S FEES MATRIX — 2015-2019

*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
31+ years	568	581	602	613
21-30 years	530	543	563	572
16-20 years	504	516	536	544
11-15 years	455	465	483	491
8-10 years	386	395	410	417
6-7 years	332	339	352	358
4-5 years	325	332	346	351
2-3 years	315	322	334	340
Less than 2 years	284	291	302	307
Paralegals & Law Clerks	154	157	164	166

### *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*, 142 F. Supp. 3d 1 (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
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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. Holzmänn*, 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, numerous 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*, 266 F. Supp. 3d 162, 171 (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 recalculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), 2017 WL 3669617, at \*5 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"); *Gatore v. United States Dep't of Homeland Security*, 286 F. Supp. 3d 25, 37 (D.D.C. 2017) (although plaintiff had submitted a "'great deal of evidence regarding [the] prevailing market rates for complex federal litigation' to demonstrate that its requested [*Salazar*] rates are entitled to a presumption of reasonableness, . . . the Court nonetheless concludes that the defendant has rebutted that presumption and shown that the current USAO Matrix is the more accurate matrix for estimating the prevailing rates for complex federal litigation in this District"); *DL v. District of Columbia*, 267 F. Supp. 3d 55, 70 (D.D.C. 2017) ("the USAO Matrix ha[s] more indicia of reliability and more accurately represents prevailing market rates" 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. The United States recently submitted an appellate brief that further explains the reliability of the USAO Matrix vis-à-vis the *Salazar* matrix. See Br. for the United States as *Amicus Curiae* Supporting Appellees, *DL v. District of Columbia*, No. 18-7004 (D.C. Cir. filed July 20, 2018).