

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN R. RATZER,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-107
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

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

Pursuant to U.S. Vet. App. Electronic Rule 7, this PDF file is paginated:

Table of Contents	1
Appellant’s Application for Award of Reasonable Attorneys’ Fees and Expenses Pursuant to 28 U.S.C. § 2412(d)	2
Exhibit A	13
Exhibit B 2	23
Exhibit C	26

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN R. RATZER,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-107
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

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

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), and U.S. Vet. App. Rule 39, Appellant, John R. Ratzer applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$ 22,451.58.**

PROCEDURAL HISTORY

On October 24, 2017 the Board of Veterans’ Appeals (Board) issued a decision that denied Appellant’s claim for an effective date of November 18, 2008 for service connection for 1) a blood disorder, to include thrombocytopenia with pancytopenia and chronic cholelithiasis, secondary to alcoholic liver cirrhosis; 2) alcoholic liver cirrhosis; and 3) posttraumatic stress disorder (PTSD). Appellant filed a timely notice of appeal with this Court on January 1, 2018.

On March 12, 2018, the Secretary served on Appellant’s counsel the 2,088-page Record Before the Agency (RBA). On April 3, 2018, the Court issued an Order

to file Appellant's brief within sixty days. On April 19, 2019, the Court issued an Order scheduling the Rule 33 Staff Conference for May 17, 2018.

Pursuant to the Court's Order, Appellant's counsel prepared a detailed 4-page Rule 33 Summary of the Issues addressing the legal errors committed by the Board in the decision on appeal, which he served on counsel for the Secretary and Central Legal Staff (CLS) counsel on May 3, 2018. On May 17, 2018, the Rule 33 Staff Conference was held as scheduled, but the parties failed to arrive at a joint resolution.

On August 2, 2018, Appellant filed his 24-page initial brief (hereinafter, App. Br.) with the Court. In his brief, Appellant argued that the Court should reverse the Board's denial of an earlier effective date for thrombocytopenia because it was not in accordance with the law, as it erroneously found that the effective date was controlled by 38 C.F.R. § 3.310. See App. Br. at 4, 5–8. Specifically, the Board's statement that an earlier effective date was not available to Appellant for his thrombocytopenia because that disability was service-connected on a secondary basis to his liver cirrhosis, was contrary to law. See *Ellington v. Peake*, 541 F.3d 1364 (Fed. Cir. 2008); App. Br. at 6–7.

Appellant argued that the Court should also reverse the Board's dismissal of entitlement to an earlier effective date for alcoholic liver cirrhosis because it too narrowly read the Notice of Disagreement (NOD) as applying to only thrombocytopenia, when the conditions were unquestionably closely related. See *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011); App. Br. at 4, 9–17. Specifically, the

Board's determination that a NOD was not filed with respect to the effective date awarded for the liver cirrhosis is erroneous as a matter of law. See 38 C.F.R. § 20.201 (2014); App. Br. at 4, 9–12. Further, under *DeLisio*'s holding, where a rating decision awards service connection for both the causal disability and secondary disability, a disagreement with the effective date of the secondary condition is necessarily a disagreement as to the effective date of the causal disability. 25 Vet. App. at 55; App. Br. at 4, 13–17.

Finally, Appellant argued that, on remand, the Court should also order VA to address whether the June 1, 2012, substantive appeal amounted to a NOD with respect to the September 2011 award of service connection for PTSD. See App. Br. at 17–18. Specifically, Appellant's argument for secondary service connection directly implicated the effective date provisions of *DeLisio*, and the Vet Center letter raises the possibility of a valid PTSD diagnosis existing in the far past. See *id.*

On November 15, 2018, the Secretary filed his responsive brief (hereinafter, Sec. Br.) with the Court. In his brief, the Secretary argued that the Court should affirm the Board's denial of entitlement to an earlier effective date for Appellant's secondary condition, blood disorder because Appellant overlooked that 1) *Ellington* did not address how to determine the "date entitlement arose" for a secondary condition, and 2) the Board assigned an effective date based on the "date entitlement arose" in accordance with the applicable effective-date regulation. See Sec. Br. at 8–12. Additionally, the Secretary argued that the Board properly dismissed the issue of entitlement to an earlier effective date for alcoholic liver cirrhosis because Appellant's

August 2013 correspondence did not constitute a NOD as to the effective date of the liver cirrhosis as a matter of law. See Sec. Br. at 13–21.

On January 15, 2019 Appellant filed his 17-page Reply Brief (hereinafter, App. Rep. Br.) with the Court. Responding to the Secretary's argument, Appellant explained that the Secretary's defense of the Board's effective date decision for the award of benefits for thrombocytopenia is inconsistent with the statute and regulation governing effective dates – 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400 – and the Court's decision in *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011); see App. Rep. Br. at 1–9. Specifically, the plain language of the statute and the regulation governing effective dates captures the same concepts to conclude that the date entitlement arose is the initial date on which it appears that the claimant satisfied all of the substantive criteria for entitlement to the benefit. See 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400; *DeLisio*, 25 Vet. App. at 51. Further, applying the holding in *DeLisio*, it is immediately apparent that if Appellant suffered from all three diseases—thrombocytopenia, alcoholic liver cirrhosis, and PTSD—on or before November 18, 2008, then he is entitled, to an effective date of November 18, 2008, for the award of service connection for thrombocytopenia. See 25 Vet. App. at 55; App. Rep. Br. at 3–5.

Additionally, Appellant argued that the Secretary's argument, that a sympathetic reading of the August 2013 NOD expressly disagreeing with the effective date assigned for thrombocytopenia cannot include a disagreement with the effective date assigned for Appellant's cirrhosis, is without merit. See App. Rep.

Br. at 9–10. First, Appellant’s NOD as to the effective date for thrombocytopenia reasonably encompasses the effective date assigned for cirrhosis as a matter of law, based on the principles in *DeLisio*. 25 Vet. App. at 54–55; see also *id.* Second, even if Appellant’s NOD as to the effective date for thrombocytopenia does not necessarily encompass the effective date assigned for cirrhosis as a matter of law, a sympathetic reading of Appellant’s NOD should count as a disagreement with the assigned effective date for cirrhosis because the assignment of the effective date for cirrhosis was based on the date of filing for this unnecessary claim, rather than on the controlling principles in *DeLisio*. See App. Rep. Br. at 10. The Record of Proceedings was filed on January 16, 2019.

The Court scheduled oral argument for Wednesday, October 2, 2019, at the John Marshall Law School in Chicago, Illinois. Appellant filed a notice of supplemental authorities on September 25, 2019. Oral argument was conducted, as scheduled. Thereafter, on October 4, 2019, the Court issued a per curiam order holding submission of the case for panel review, until October 17, 2019.

The parties began discussions regarding joint disposition, and on October 16, 2019, , the parties filed a Joint Motion to Terminate, and stipulated agreement with the Court. In the Joint Motion to Terminate, and stipulated agreement, the Secretary agreed to grant an effective date of November 18, 2008, for the awards of service connection for (1) a blood disorder, to include thrombocytopenia with pancytopenia and chronic cholelithiasis, secondary to alcoholic liver cirrhosis; (2) alcoholic liver cirrhosis; and (3) posttraumatic stress disorder (PTSD). The Court granted the

parties' motion on October 25, 2019, thereby effectuating the terms of the Stipulated Agreement pursuant to Vet. App. Rule 42.

ARGUMENT

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

Under 28 U.S.C. § 2412(d), a court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action. To obtain “prevailing party” status, a party need only to have obtained success “on any significant issue in litigation which achieved some of the benefit ... sought in bringing the suit.” *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (quoting *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989)).

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

Appellant is a party eligible to receive an award of reasonable fees and expenses because his net worth did not exceed \$2 million (two million dollars) at the

time this civil action was filed. As an officer of the Court, the undersigned counsel hereby states that Appellant's net worth did not exceed \$2 million (two million dollars) at the time this civil action was filed, nor did he own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7 million (seven million dollars) and which had more than 500 employees. See *Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996). In addition, Appellant submitted a Declaration of Financial Hardship, which was accepted for filing by the Court on January 22, 2018. See *Owens v. Brown*, 10 Vet. App. 65, 67 (1997).

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

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

In this case, the Secretary's administrative position and litigation positions were not substantially justified. As described more fully in the "Procedural History," *supra*, the Court granted the parties Joint Motion to Terminate, thereby effectuating the terms of the stipulated agreement, requiring the Secretary to grant an effective

date of November 18, 2008, for the awards of service connection for (1) a blood disorder, to include thrombocytopenia with pancytopenia and chronic cholelithiasis, secondary to alcoholic liver cirrhosis; (2) alcoholic liver cirrhosis; and (3) posttraumatic stress disorder (PTSD). This was the very action that had been denied by the agency. The Board's error (conceded by the Secretary), and the other errors made by the Board, had no reasonable basis in fact or in law.

The Secretary's litigation position, defending the agency action until after oral argument in the matter, had no reasonable basis in fact or in law.

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

An itemized statement of the services rendered and the reasonable fees and expenses for which Appellant seeks compensation is attached to this application as Exhibit A. Included in Exhibit A is a certification that lead counsel has "(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant." *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005). In the exercise of billing judgment, Appellant has eliminated **65.6** hours of attorney time and **0.2** hours of paralegal and law clerk time from this itemized statement and this fee petition.

Appellant seeks attorneys' fees at the following rates for representation in the

Court of Appeals for Veterans Claims:¹

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Barton F. Stichman (1974 law graduate)	\$ 207.18	4.1	\$ 849.44

¹ A rate in excess of \$125 per hour for the attorneys for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. See 28 U.S.C. § 2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Washington Metropolitan Area, was \$ 207.18 in August 2018, the month the initial brief was filed. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV area adjusted for inflation between March 1996 and August 2018, using the average of the data for the months prior to and after initial brief was filed. See Exhibit B; *Mannino v. West*, 12 Vet. App. 242 (1999); see also *Apodackis v. Nicholson*, 19 Vet. App. 91, 95 (2005). Related to the work of Patrick Berkshire, the \$125 attorney fee rate, adjusted for inflation for the Augusta, Georgia area, was \$195.86 in August 2018, the month the initial brief was filed. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for the South adjusted for inflation between March 1996 and December 1996 and the South B/C area adjusted for inflation between December 1996 and August 2018. The market rates for Appellant's attorneys exceeded the requested rates per hour during the relevant time period. See *Covington v. District of Columbia*, 839 F. Supp. 894, 904–05 (D.D.C. 1993), *aff'd*, 58 F.3d 1101 (D.C. Cir. 1995). The prevailing market rate for the work done by paralegals and law clerks was at least \$164.00 from June 1, 2017, to May 31, 2018, at least \$166.00 from June 1, 2018 to May 31, 2019, and at least \$173.00 from June 1, 2019, to the present. See USAO Attorney's Fees Matrix, 2015-2020 (Exhibit C) ("The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore . . . area."); see also *Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008).

Amy F. Odom (2006 law graduate)	\$ 207.18	3.3	\$ 683.69
Stacy Tromble (2007 law graduate)	\$ 207.18	9.4	\$ 1,947.49
John Niles (2008 law graduate)	\$ 207.18	4.8	\$ 994.46
Patrick Berkshire (2009 law graduate)	\$ 195.86	69.7	\$ 13,651.44
L. Michael Marquet (2017 law graduate)	\$ 207.18	2.4	\$ 497.23
Angela Nedd (paralegal)	\$ 164.00	1.4	\$ 229.60
Alexandra Gonsman (law clerk)	\$ 173.00	5.9	\$ 1,020.70

SUBTOTAL: \$ 17,926.56

The reasonable expenses for which Appellant seeks compensation are:

<u>Nature of Expense</u>	<u>Expense Amount</u>
Travel expenses, lodging, local transportation for P. Berkshire, S. Tromble	\$ 2,550.36
Federal Express and USPS Charges	\$ 26.17
Duplication Charges	\$ 1.00

SUBTOTAL: \$ 2,577.53

TOTAL: \$ 20,504.09

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$ 22,451.58.**

Respectfully submitted,

FOR APPELLANT:

Date: November 21, 2019

/s/ Patrick Berkshire
Patrick Berkshire
Barton F. Stichman
National Veterans Legal
Services Program
1600 K Street, NW, Suite 500
Washington, DC 20006-2833
(202) 621-5710

Counsel for Appellant

Exhibit A

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

Date: 12/27/2017 0.5 Staff: Patrick A. Berkshire
Review and analyze Board of Veterans Appeals (BVA) decision and draft memorandum regarding issues to raise on appeal.

Date: 12/28/2017 0.0 Staff: Amy F. Odom
Review memorandum regarding issues to raise on appeal and provide legal advice to lead counsel regarding additional issues to raise. **[0.2 eliminated in the exercise of billing judgment]**

Date: 12/28/2017 0.2 Staff: Angela Nedd
Draft correspondence to client regarding BVA decision and issues to raise on appeal and provide to attorney to finalize.

Date: 12/29/2017 0.0 Staff: Angela Nedd
Prepare mailing of correspondence to client regarding BVA decision and issues to raise on appeal. **[0.1 eliminated in the exercise of billing judgment]**

Date: 1/8/2018 0.3 Staff: Patrick A. Berkshire
Teleconference with client regarding BVA decision and issues to raise on appeal and questions regarding same.

Date: 1/8/2018 0.2 Staff: Angela Nedd
Draft Notice of Appeal and Notices of Appearance and provide to attorney to finalize (0.1); Draft email to Clerk of the Court regarding case initiation, with attachments (0.1); Prepare internal file **[0.1 eliminated in exercise of billing judgment]**.

Date: 1/24/2018 0.1 Staff: Angela Nedd
Draft email to VA General Counsel regarding consent to release of information, with attachment.

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

Date: 2/10/2018 0.0 Staff: Christine Cote Hill
Prepare and finalize Notice of Appearance. **[0.1 eliminated in the exercise of billing judgment]**

Date: 3/9/2018 0.1 Staff: Patrick A. Berkshire
Draft email to VA counsel regarding consent to release information, with attachment, per his request.

Date: 5/3/2018 3.0 Staff: Patrick A. Berkshire
Review and Begin drafting outline of Rule 33 SOI argument (1.2); finalize outline and draft Rule 33 SOI (0.8); Add inserts to argument and finalize Rule 33 SOI (0.8); Draft email to VA counsel and Court Central Legal Staff regarding Rule 33 SOI and draft and finalize Rule 33 Certificate of Service (0.3)

Date: 5/17/2018 0.3 Staff: Patrick A. Berkshire
Prepare for Rule 33 Staff Conference, including review of Rule 33 Summary of the Issues and relevant evidence (0.2); Participate in Rule 33 Conference and take detailed notes regarding outcome of Rule 33 Staff Conference in order to provide update to client and to evaluate litigation strategy (0.1).

Date: 7/27/2018 4.5 Staff: Patrick A. Berkshire
Review and analyze 2,088-page RBA for preparation of initial brief, through page 500 (2.0); Continue review and analysis of RBA for preparation of initial brief, through page 1,000 (2.5).

Date: 7/30/2018 7.5 Staff: Patrick A. Berkshire
Continue review and analysis of RBA for preparation of initial brief, through end (1.0) and begin drafting outline of same (1.0); Begin drafting argument I for initial brief (2.0); Draft argument II for initial brief (2.5); Draft argument III for initial brief (1.0).

Date: 7/31/2018 0.5 Staff: Angela Nedd
Draft correspondence to client regarding status of appeal and initial brief for review (0.3); Finalize correspondence (0.2).

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

Date: 7/31/2018 3.0 Staff: Patrick A. Berkshire
Draft Statement of Facts (2.5); Review and add inserts to draft initial brief (0.5).

Date: 7/31/2018 0.0 Staff: Amy F. Odom
Review BVA decision in preparation for drafting insert to argument. **[0.1 eliminated in the exercise of billing judgment]**

Date: 8/1/2018 4.5 Staff: Patrick A. Berkshire
Draft inserts to Statement of Facts to tailor to argument and draft final inserts to Argument III of initial brief (1.5); Draft additional inserts for argument II of brief (3.0).

Date: 8/1/2018 1.5 Staff: Amy F. Odom
Draft *Frost* argument insert and finalize Argument I for P. Berkshire.

Date: 8/2/2018 1.8 Staff: Amy F. Odom
Draft inserts to legal argument to add persuasive value to same for P. Berkshire.

Date: 8/2/2018 1.0 Staff: Patrick A. Berkshire
Update legal support to argument and update RBA citations and finalize 24-page initial brief.

Date: 11/29/2018 0.0 Staff: Patrick A. Berkshire
Draft motion for extension of time to file reply brief. **[0.3 eliminated in the exercise of billing judgment]**

Date: 1/11/2019 0.4 Staff: Angela Nedd
Draft correspondence to client regarding status of appeal and reply brief for review, with enclosures, and finalize correspondence.

Date: 1/11/2019 11.8 Staff: Patrick A. Berkshire
Review 24-page responsive brief and outline Secretary's argument for

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

preparation of reply brief argument outline (2.0); Draft outline of reply brief argument (1.5); draft reply brief argument I (2.0); Draft reply brief argument II (2.0); continue drafting same (1.5); Draft reply brief argument III-IV (1.8); Review and add inserts to argument (1.0).

Date: 1/14/2019 0.0 Staff: Barton F. Stichman
Review responsive brief **[0.5 eliminated in the exercise of billing judgment]**; Draft inserts to reply brief argument I for P. Berkshire **[2.4 eliminated in the exercise of billing judgment]**.

Date: 1/14/2019 0.0 Staff: Patrick A. Berkshire
Review edits to reply brief argument I **[0.6 eliminated in the exercise of billing judgment]**; Teleconference with B. Stichman regarding reply brief edits **[0.7 eliminated in the exercise of billing judgment]**.

Date: 1/15/2019 4.1 Staff: Barton F. Stichman
Review law cited by Secretary in order to respond to argument (1.0) **[Additional 1.0 eliminated in the exercise of billing judgment]**; continue drafting inserts to argument I for P. Berkshire (1.9) **[Additional 1.0 eliminated in the exercise of billing judgment]**; Draft inserts to argument II for P. Berkshire (1.0) **[Additional 0.8 eliminated in the exercise of billing judgment]**; Draft conclusion (0.2)

Date: 1/15/2019 3.0 Staff: Patrick A. Berkshire
Draft final inserts to argument I and II (2.5); Finalize reply brief, to include style edits to add persuasive value to legal argument (0.5) **[Additional 2.0 eliminated in exercise of billing judgment]**.

Date: 9/5/2019 0.0 Staff: Stacy A. Tromble
Prepare for and participate in preliminary meeting regarding oral argument. **[2.2 eliminated in the exercise of billing judgment]**

Date: 9/5/2019 0.0 Staff: John Niles
Prepare for and meeting with lead counsel regarding oral argument and additional advice to lead counsel **[Entire 4.8 eliminated in exercise of billing judgment]**.

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

Date: 9/9/2019 0.0 Staff: John Niles
Provide legal advice to lead attorney regarding preparation for oral argument.
[2.2 eliminated in the exercise of billing judgment]

Date: 9/9/2019 2.5 Staff: Patrick A. Berkshire
Prepare for oral argument, to include review of filings for preparation of oral argument outline.

Date: 9/10/2019 1.3 Staff: Stacy A. Tromble
Review briefing and selected RBA evidence in matter in preparation for role as second chair **[2.6 eliminated in the exercise of billing judgment]**; Draft questions for moot (1.3)

Date: 9/10/2019 2.0 Staff: Patrick A. Berkshire
Conference with John Niles and Stacy Tromble in preparation for oral argument; begin outlining oral argument outline.

Date: 9/10/2019 0.0 Staff: John Niles
Conference with P. Berkshire regarding oral argument, add inserts to oral argument outline. **[1.3 eliminated in the exercise of billing judgment]**

Date: 9/10/2019 2.4 Staff: L. Michael Marquet
Review cases and authority in preparation for oral argument; compile same for P. Berkshire.

Date: 9/11/2019 0.0 Staff: John Niles
Correspond with lead attorney regarding moot arguments. **[0.1 eliminated in the exercise of billing judgment]**

Date: 9/17/2019 0.8 Staff: John Niles
Provide legal advice to lead attorney regarding moot argument, oral argument; participate in moot argument. (0.8) **[Additional 0.2 eliminated in the exercise of billing judgment]**

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

Date: 9/17/2019 3.5 Staff: Patrick A. Berkshire
Prepare for moot argument (2.5); Continue preparation **[2.5 eliminated in the exercise of billing judgment]**; Participate in moot argument (1.0).

Date: 9/18/2019 0.0 Staff: John Niles
Provide legal advice to lead attorney regarding oral argument **[0.4 eliminated in exercise of billing judgment]**.

Date: 9/23/2019 0.0 Staff: John Niles
Provide legal advice to lead attorney regarding oral argument **[0.5 eliminated in exercise of billing judgment]**.

Date: 9/23/2019 0.0 Staff: Patrick A. Berkshire
Begin preparation for second moot argument, including review of additional supportive law and add inserts to oral argument outline. **[0.5 eliminated in the exercise of billing judgment]**

Date: 9/24/2019 4.5 Staff: Patrick A. Berkshire
Prepare for second moot argument, including drafting oral presentation/statements (2.5); Participate in second moot argument (2.0).

Date: 9/24/2019 2.0 Staff: John Niles
Provide legal advice to lead attorney regarding moot argument, oral argument; participate in moot argument (2.0) **[Additional 1.8 eliminated in exercise of billing judgment]**.

Date: 9/24/2019 0.0 Staff: Stacy A. Tromble
Prepare for and participate in moot argument **[3.6 eliminated in the exercise of billing judgment]**

Date: 9/25/2019 3.5 Staff: Patrick A. Berkshire
Draft oral presentation for oral argument based on moot argument (2.5); continue drafting oral presentation **[1.5 eliminated in the exercise of billing judgment]**; review issue, and draft and finalize notice of supplemental authority (1.0).

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

Date: 9/27/2019 0.0 Staff: John Niles
Provide legal advice to lead attorney regarding oral argument **[Entire 2.3 eliminated in exercise of billing judgment]**.

Date: 9/29/2019 0.0 Staff: Patrick A. Berkshire
Travel for moot argument **[No charge, 2.5 eliminated in exercise of billing judgment]**.

Date: 9/30/2019 2.0 Staff: John Niles
Provide legal advice to lead attorney regarding moot argument, oral argument; participate in moot argument (2.0) **[Additional 2.1 eliminated in exercise of billing judgment]**.

Date: 9/30/2019 3.0 Staff: Patrick A. Berkshire
Prepare for moot argument (1.0); Participate in moot argument (2.0).

Date: 9/30/2019 0.0 Staff: Stacy A. Tromble
Prepare for and participate in moot argument **[4.3 eliminated in the exercise of billing judgment]**.

Date: 10/1/2019 0.0 Staff: John Niles
Provide legal advice to lead attorney regarding moot argument, oral argument; participate in moot argument. **[3.2 eliminated in the exercise of billing judgment]**

Date: 10/1/2019 7.0 Staff: Patrick A. Berkshire
Prepare for additional morning moot argument **[1.0 eliminated in the exercise of billing judgment]**; Participate in moot argument with B. Stichman, J. Niles, S. Tromble (2.0); Travel for oral argument in Chicago, Illinois (2.5); Draft inserts to oral presentation (2.5); Practice oral presentation, add inserts to oral argument outline/statements **[1.5 eliminated in the exercise of billing judgment]**.

Date: 10/1/2019 3.4 Staff: Stacy A. Tromble
Draft timeline of facts in preparation for oral argument and summarize case

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

law (second chair) **[4.6 eliminated in the exercise of billing judgment]**
Prepare for and participate in moot argument **[2.4 eliminated in the exercise of billing judgment]**; Travel from Chicago, Illinois for oral argument (3.4)

Date: 10/2/2019 2.2 Staff: Patrick A. Berkshire
Practice oral presentation with S. Tromble, add final inserts to oral argument outline/statements (1.0); Participate in oral argument (1.0); Teleconference with client concerning arguments and outcome of same and next steps (0.2).

Date: 10/2/2019 3.7 Staff: Stacy A. Tromble
Prepare for and participate in oral argument as second chair (1.0)**[Additional 3.3 eliminated in the exercise of billing judgment]**; Travel from Chicago to DC (2.7)

Date: 10/2/2019 0.0 Staff: John Niles
View oral argument proceedings **[No charge, 1.0 eliminated in exercise of billing judgment]**.

Date: 10/10/2019 0.0 Staff: John Niles
Legal advice to lead attorney regarding proposed bases to terminate **[No charge, 0.7 eliminated in exercise of billing judgment]**.

Date: 10/11/2019 0.2 Staff: Patrick A. Berkshire
Review Joint Motion to Terminate and Stipulated Agreement.

Date: 10/11/2019 0.0 Staff: Christine Cote Hill
Review Joint Motion. **[0.3 eliminated in the exercise of billing judgment]**

Date: 10/16/2019 0.3 Staff: Patrick A. Berkshire
Teleconference with client regarding Joint Motion (0.2); Draft e-mail to VA counsel regarding final settlement, with attachment (0.1).

Date: 11/13/2019 5.9 Staff: Alexandra Gonsman
Draft application for reasonable attorneys' fees and expenses under the Equal

**NVLSP Staff Hours for John R. Ratzer
Vet. App. No. 18-107**

Access to Justice Act (EAJA), including recitation of relevant procedural history (4.4); prepare list of itemized hours to be attached as exhibit to EAJA application (1.5).

Date: 11/16/2019 1.5 Staff: Patrick Berkshire
Add insertion to application for reasonable attorneys' fees and expenses under the EAJA, and elimination of hours in the interest of billing judgment (1.0);
Draft final letter concerning case closing and settlement (0.5).

Date: 11/20/2019 0.0 Staff: Christine Cote Hill
Review and add inserts to application. Review itemized list and eliminate more hours than recommended in billing judgment and legal advice to P. Berkshire regarding same. **[2.5 eliminated in the exercise of billing judgment]**

Date: 11/21/2019 0.0 Staff: Patrick Berkshire
Finalize application, to include adding detail to application and itemized list **[0.6 eliminated]**.

CERTIFICATION

As lead counsel in this appeal, I have reviewed the combined billing statement above and I am satisfied that it accurately reflects the work performed by all counsel and others entitled to be included above and I have considered and eliminated all time that I believe could be considered excessive or redundant.

Date: November 21, 2019

/s/ Patrick Berkshire
Patrick Berkshire

Exhibit B

CPI for All Urban Consumers (CPI-U)**Original Data Value**

Series Id: CUURS35ASA0
Series Title: All items in Washington-Arlington-Alexandria, DC-VA-
Area: Washington-Arlington-Alexandria, DC-VA-MD-WV
Item: All items
Base Period: 1982-84=100
Years: 1996 to 2019

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

CPI for All Urban Consumers (CPI-U)**Original Data Value****Not Seasonally Adjusted****Series Title:** All items in South - Size Class B/C, all urban**Area:** South - Size Class B/C**Item:** All items**Base Period:** DECEMBER 1996=100**Years:** 1996 to 2019

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
1996											
1997	100.3	100.6	100.9	101.1	101.0	101.3	101.3	101.4	101.5	101.8	101.9
1998	101.5	101.6	101.8	102.0	102.2	102.3	102.4	102.5	102.5	102.8	102.8
1999	102.9	103.0	103.3	103.9	104.1	104.1	104.3	104.4	104.8	105.1	105.1
2000	105.4	106.0	107.0	107.2	107.2	107.6	107.8	107.8	108.1	108.1	108.2
2001	108.6	109.2	109.4	109.9	110.1	110.3	109.8	109.8	110.2	109.7	109.4
2002	109.2	109.3	110.0	110.8	110.7	110.9	111.0	110.9	111.2	111.6	111.9
2003	111.7	112.5	113.3	113.3	112.8	113.1	113.1	113.4	113.8	113.6	113.3
2004	113.8	114.3	114.9	115.6	116.4	117.0	116.9	116.9	116.9	117.4	117.4
2005	117.1	117.7	118.4	119.3	119.4	119.7	120.2	120.9	122.3	122.5	121.4
2006	122.0	122.1	123.0	124.1	124.6	125.0	125.5	125.4	124.4	123.7	123.4
2007	123.817	124.521	125.726	127.000	127.893	128.265	128.226	127.833	128.263	128.600	129.556
2008	129.937	130.351	131.442	132.516	133.714	134.980	135.643	135.004	135.093	133.285	130.324
2009	129.615	130.380	130.873	131.370	131.777	133.056	132.736	132.729	132.722	133.035	133.342
2010	133.517	133.575	134.363	134.606	134.500	134.173	134.130	134.335	134.658	134.890	134.892
2011	135.925	136.625	138.211	139.177	139.833	139.639	139.783	140.378	140.471	140.303	140.218
2012	140.388	141.133	142.056	142.718	142.161	141.906	141.774	142.432	143.088	142.927	142.219
2013	142.543	143.758	144.293	143.935	144.071	144.627	144.851	145.056	145.098	144.825	144.377
2014	144.668	145.341	146.254	147.265	147.499	147.733	147.559	147.178	147.257	146.905	145.976
2015	143.769	144.591	145.392	145.939	146.482	147.126	147.095	146.695	146.361	146.314	145.974
2016	145.209	145.279	146.263	146.907	147.507	148.037	147.629	147.934	148.202	148.435	148.071
2017	149.312	149.643	149.675	149.998	149.962	150.192	149.951	150.509	151.547	151.270	151.121
2018	151.752	152.413	152.888	153.429	153.842	154.051	154.097	153.964	153.924	154.301	153.813
2019	153.212	154.019	155.168	155.916	155.595	155.687	156.192	155.873	155.717	156.136	

Exhibit C

USAO ATTORNEY'S FEES MATRIX — 2015-2020

Revised Methodology starting with 2015-2016 Year

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

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

Explanatory Notes

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

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

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