

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JAMES D. SMITH,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-1209
)	
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	12
Exhibit B	19
Exhibit C	21

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Secretary of Veterans Affairs,)	
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APPELLANT'S APPLICATION FOR AWARD OF REASONABLE ATTORNEYS' FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), and U.S. Vet. App. Rule 39, Appellant, James D. Smith applies for an award of reasonable attorneys' fees and expenses in the amount of **\$9,289.45.**

PROCEDURAL HISTORY

On October 25, 2018 the Board of Veterans' Appeals (Board) issued a decision that, *inter alia*, denied Appellant's claim for entitlement to a rating higher than 20% for status-post compression fracture of the lumbar spine with degenerative arthritis and spondylolisthesis¹. Appellant filed a timely notice of appeal with this Court on February 22, 2019.

¹ In its decision, the Board granted a rating of 20% for status-post compression fracture of the lumbar spine with degenerative arthritis and spondylolisthesis, prior to October 21, 2014. That favorable finding was not before the Court. See *Medrano v. Nicholson*, 21 Vet. App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

On April 17, 2019, the Secretary served on Appellant's counsel the 1,330-page Record Before the Agency (RBA). On May 7, 2019, the Court issued an Order to file Appellant's brief within sixty days. On May 17, 2019, the Court issued an Order scheduling a June 14, 2019 Rule 33 Staff Conference.

Pursuant to the Court's Order, Appellant's counsel prepared a detailed Rule 33 Summary of the Issues addressing the legal errors committed by the Board in the decision on appeal, which she served on counsel for the Secretary and Central Legal Staff (CLS) counsel on May 31, 2019. On June 14, 2019, the Rule 33 Staff Conference was held as scheduled, but the parties failed to arrive at a joint resolution.

On August 29, 2019, Appellant filed his 19-page initial brief (hereinafter, App. Br.) with the Court. In his brief, Appellant argued that the Board erred by relying on inadequate September 2014 and October 2014 VA Medical Examinations to deny the claim. See 38 U.S.C. § 5103A; *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011); *Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010); *DeLuca v. Brown*, 8 Vet. App. 202 (1995), *Sharp v. Shulkin*, 29 Vet. App. 26, 34 (2017); App. Br. at 10–15. Specifically, the September 2014 and October 2014 VA Medical Examinations did not contain any opinion on what additional range of motion would be lost during flare-up or after repeated use over time. App. Br. at 13–15. Appellant also argued that the Board erred by failing to provide adequate reasons or bases for its denial. See 38 U.S.C. § 7104(d)(1); App. Br. at 15–19. Specifically, the Board failed to explain its emphasis on “conservative” pain medication, and

failed to address whether a new prescription for Hydrocodone and VA clinicians' decisions to increase the dosage of that medication evidenced a worsening of the low back disability sufficient to trigger the duty to provide a more contemporaneous medical examination. App. Br. at 16–18.

On November 6, 2019, the Secretary filed his responsive brief (hereinafter, Sec. Br.) urging the Court to affirm the relevant part of the Board decision. In his brief, the Secretary conceded that there were aspects of the September 2014 VA examination that were inadequate to fully describe Appellant's lumbar spine disability. See Sec. Br. at 5. Nevertheless, the Secretary argued that the Board provided an adequate statement of reasons or bases for its determination that the "medical" evidence of record that only conservative treatment was required and Appellant's statements as to what disability rating he thought was warranted was sufficient to render a decision. See Sec. Br. at 5–11.

On January 6, 2020 Appellant filed his 7-page Reply Brief (hereinafter, App. Rep. Br.) with the Court. Responding to the Secretary's argument, Appellant explained that the Secretary had not rebutted his arguments that Board erred by failing to provide an adequate statement of reasons or bases. See 38 U.S.C. § 7104(d)(1); App. Rep. Br. at 1–4. Specifically, Appellant argued that the Secretary's assertions ignored the fact that no examiner addressed lay evidence of flare-ups, translated that data into a range of motion estimate, or explained why such an estimate was not feasible. See 38 C.F.R. §§ 4.40, 4.45, 4.59; *Correia v. McDonald*, 28 Vet. App. 158, 168; *Mitchell*, 25 Vet. App. 32; *Jones*, 23 Vet. App.

at 390; *DeLuca*, 8 Vet. App. 202 (1995), *Sharp*, 29 Vet. App. at 34; App. Rep. Br. at 3. Additionally, Appellant argued that the Secretary offered no response to his arguments that: (1) the Board failed to explain its repeated emphasis on “conservative” pain medication, or what relevance such a characterization had in its decision to deny a higher rating; and (2) failed to address whether the prescription of increasing doses of the strong opioid medication, Hydrocodone, reflected a worsening of his low back disability sufficient to warrant a more contemporaneous medical examination. Thus, those arguments should be deemed conceded. App. Rep. Br. at 4–6.

On January 8, 2020, the Secretary filed the Record of Proceedings with the Court. On April 28, 2020, the Court issued its Memorandum Decision (hereinafter, Mem. Dec.). In the decision, the Court held vacated and remanded the October 25, 2018 Board Decision. The Court found that the Board erred by relying on VA examinations that did not include an opinion regarding the extent to which Appellant’s range of motion was limited during flare ups or a competent explanation for why an estimate was not feasible. See Mem. Dec. at 3; *Sharp*, 29 Vet. App. at 34. The Court also held that the Board erred by failing to provide adequate reasons or bases. First, the Court held that conservative treatment for a condition does not, on its own, adequately inform the Board about the extent of functional impairment during flare ups. See *DeLuca*, 8 Vet. App. at 206–07; Mem. Dec. at 3–4. Second, the Court held that the Board could not reasonably construe the Appellant’s assertion that he felt he was entitled to “at least” a 20% rating as a

medical finding obviating the need for a VA examiner to provide an estimate. Mem. Dec. at 4. The Court held that remand was required so that the Board could afford an examination that provides an estimate of functional impairment in terms of degrees of motion loss during flare-ups or provides a satisfactory explanation for why an estimate is not feasible. Mem. Dec. at 4.

The Court entered Judgment on May 20, 2020. Mandate entered under Rule 41(b) of the Court's Rules of Practice and Procedure, effective July 20, 2020.

ARGUMENT

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

Under 28 U.S.C. § 2412(d), a court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action. To obtain "prevailing party" status, a party need only to have obtained success "on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing the suit." *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (quoting *Texas State Teachers 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 vacated the relevant part of the Board's October 25, 2018 decision based on administrative error and remanded the matter for readjudication consistent with its decision. *See Zuberi v. Nicholson*, 19 Vet. App. 541 (2006);

Sumner v. Principi, 15 Vet. App. 256 (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 March 15, 2019. See *Owens v. Brown*, 10 Vet. App. 65, 67 (1997).

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

The Secretary can defeat Appellant’s application for fees and costs only by demonstrating that the government’s position was substantially justified. See *Brewer v. Am. Battle Monument Comm’n*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the

position of the government to be substantially justified, it must have a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord Beta Sys. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary’s administrative and litigation positions were not substantially justified. As described in the “Procedural History,” *supra*, the Court vacated and remanded the Board’s October 25, 2018 decision because the Board erred by relying on inadequate VA Medical Examinations and failing to provide adequate reasons or bases for its denial. These errors and others committed by the Board, had no reasonable basis in fact or in law.

In addition, the litigation position of the Secretary, defending the Board’s decision despite the aforementioned errors had no basis in fact or 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 v. Nicholson*, 19 Vet. App. 227, 240 (2005). In the exercise of billing judgment, Appellant has eliminated **0.2** hours of attorney time and **0.1** 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:²

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Barton F. Stichman (1974 law graduate)	\$ 209.38	1.3	\$272.19
Christine Cote Hill (1996 law graduate)	\$ 209.38	0.7	\$146.57
Richard V. Spataro (2005 law graduate)	\$ 209.38	0.2	\$41.88
Stacy A. Tromble (2007 law graduate)	\$ 209.38	33.9	\$7,097.98
L. Michael Marquet (2017 law graduate)	\$ 209.38	3.9	\$816.58

² A rate in excess of \$125 per hour for the attorneys for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. See 28 U.S.C. § 2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Washington Metropolitan Area, was \$ 209.38 in August 2019, the month the initial brief was filed. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV area adjusted for inflation between March 1996 and August 2019 (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). The market rates for Appellant's attorneys exceeded the requested rates per hour during the relevant time period. See *Covington v. District of Columbia*, 839 F. Supp. 894, 904–05 (D.D.C. 1993), *aff'd*, 58 F.3d 1101 (D.C. Cir. 1995). The prevailing market rate for the work done by paralegals and law clerks was at least \$166.00 from June 1, 2018 to May 31, 2019, 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).

Angela Nedd (paralegal)	\$ 166.00	0.9	\$149.40
Janee LeFrere (law clerk)	\$ 173.00	2.0	\$346.00
Brianna LeFrere (law clerk)	\$ 173.00	1.0	\$173.00
Jack McCaffrey (law clerk)	\$ 173.00	1.3	\$224.90

SUBTOTAL: \$ 9,268.50

The reasonable expenses for which Appellant seeks compensation are:

<u>Nature of Expense</u>	<u>Expense Amount</u>
Federal Express and USPS Charges	\$ 10.95
Duplication Charges	\$ 10.00

SUBTOTAL: \$ 20.95

TOTAL: \$ 9,289.45

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$9,289.45.**

Respectfully submitted,

FOR APPELLANT:

Date: August 10, 2020

/s/ Stacy A. Tromble
Stacy A. Tromble
Barton F. Stichman
National Veterans Legal
Services Program
1600 K Street, NW, Suite 500
Washington, DC 20006-2833
(202) 621-5672

Counsel for Appellant

EXHIBIT A

**NVLSP Staff Hours for James D. Smith
Vet. App. No. 19-1209**

Date: 1/9/2019 0.2 Staff: Richard V. Spataro
Review and analyze BVA decision and identify issues to raise on appeal.

Date: 1/11/2019 0.6 Staff: Stacy A. Tromble
Draft memorandum regarding issues to be raised on appeal (0.3); Finalize correspondence to client regarding BVA decision and issues to raise on appeal (0.3)

Date: 2/22/2019 0.4 Staff: Angela Nedd
Draft Notice of Appeal. Draft Notices of Appearance. Provide to attorney to finalize (0.1); Draft email to Clerk of the Court regarding case initiation, with attachments (0.1); Draft letter to client regarding case initiation. Draft documents for client to execute and return; (0.2). Prepare internal file **[0.1 eliminated in the exercise of billing judgment]**

Date: 2/28/2019 0.7 Staff: Stacy A. Tromble
Teleconference with client regarding Board decision and issues to raise on appeal and questions regarding same.

Date: 3/4/2019 0.8 Staff: Stacy A. Tromble
Teleconference with client and wife to discuss case initiation and questions regarding next steps.

Date: 3/5/2019 0.3 Staff: Angela Nedd
Finalize letter to client regarding case initiation, and documents to be executed and returned by client.

Date: 3/15/2019 0.2 Staff: Angela Nedd
Review correspondence from client regarding appeal. Finalize retainer agreement and Declaration of Financial Hardship.

Date: 5/14/2019 1.3 Staff: L. Michael Marquet
Review and analyze 1,330-page Record Before the Agency ("RBA") to ensure legibility and completeness.

Date: 5/14/2019 0.3 Staff: Stacy A. Tromble
Review documents identified as illegible or incomplete to determine whether motion to respond to RBA (dispute) is necessary. Evaluate that no dispute necessary.

Date: 5/30/2019 1.9 Staff: Stacy A. Tromble
Review and analyze 1,330-page RBA and take detailed notes for preparation of Rule 33 Summary of the Issues, through page 509.

Date: 5/31/2019 4.7 Staff: Stacy A. Tromble
Review and analyze 1,330-page RBA and take detailed notes for preparation of Rule 33 Summary of the Issues, through end (3.0); Draft outline of Rule 33 Summary of the Issues argument (0.3); Draft Rule 33 Summary of the Issues (1.2); Draft Certificate of Service and draft email to VA counsel and Court Legal Staff regarding Rule 33 Conference, with attachment (0.2).

Date: 5/31/2019 0.3 Staff: L. Michael Marquet
Review relevant evidence in RBA to prepare attachment to Rule 33 Summary of the Issues.

Date: 6/11/2019 0.1 Staff: Stacy A. Tromble
Review docket due to notice of appearance of new lead counsel for Rule 33 Staff Conference.

Date: 6/14/2019 1.0 Staff: Stacy A. Tromble
Prepare for Rule 33 Staff Conference, including review of Rule 33 Summary of the Issues and relevant evidence (0.5); Participate in Rule 33 Conference (0.2); Teleconference with client regarding outcome of Rule 33 Staff Conference. (0.3)

Date: 7/11/2019 0.0 Staff: Stacy A. Tromble
Draft motion for extension of time within which to file initial brief. **[0.1 eliminated in the exercise of billing judgment]**

Date: 7/12/2019 0.1 Staff: Stacy A. Tromble
Telephone client and leave detailed voicemail message regarding cast status.

Date: 8/25/2019 1.3 Staff: Stacy A. Tromble
Outline initial brief argument.

Date: 8/26/2019 4.4 Staff: Stacy A. Tromble
Draft Statement of Facts (3.0); Continue draft of fact section and draft statement of the issues (1.2); Teleconference with client to discuss status of case and briefing (0.2).

Date: 8/27/2019 2.9 Staff: Stacy A. Tromble
Draft argument related to inadequacy of VA examination reports.

Date: 8/28/2019 3.4 Staff: Stacy A. Tromble
Draft arguments related to medications (1.9); Add inserts to argument (1.2); Teleconference with client to discuss arguments in brief and received authorization to file same (0.3).

Date: 8/29/2019 0.6 Staff: Barton F. Stichman
Draft final insert to argument and style edits to add persuasive value and clarity to legal argument, for S. Tromble.

Date: 8/29/2019 1.5 Staff: Janee LeFrere
Add legal authority and information to footnotes for S. Tromble to bolster legal argument; (1.0) Prepare Table of Authorities. (0.5)

Date: 8/29/2019 0.9 Staff: Stacy A. Tromble
Finalize inserts to Statement of Facts to tailor to argument; finalize 19-page initial brief.

Date: 11/12/2019 0.0 Staff: Stacy A. Tromble
Draft motion for extension of time to file reply brief. **[0.1 eliminated in the exercise of billing judgment]**

Date: 1/2/2020 1.7 Staff: Stacy A. Tromble
Review 12-page responsive brief and outline Secretary's argument for preparation of reply brief argument outline (0.7); outline reply brief argument (1.0)

Date: 1/3/2020 5.9 Staff: Stacy A. Tromble
Draft reply brief (3.0); Add inserts to argument (2.9).

Date: 1/6/2020 0.5 Staff: Janee LeFrere
Finalize Table of Authorities.

Date: 1/6/2020 0.7 Staff: Barton F. Stichman
Draft style edits to add persuasive value and clarity to legal argument, for S. Tromble.

Date: 1/6/2020 0.8 Staff: Stacy A. Tromble
Add final insert to argument and finalize 7-page reply brief (0.4);
Teleconference with client to discuss arguments in reply brief and received authorization to file same (0.4).

Date: 1/16/2020 1.0 Staff: Brianna LeFrere
Review and analyze record of proceedings to ensure legibility and completeness.

Date: 4/6/2020 0.1 Staff: Stacy A. Tromble
Teleconference with client regarding status of case.

Date: 4/28/2020 0.5 Staff: Stacy A. Tromble
Review Memorandum Decision (0.3); Teleconference with client regarding Memorandum Decision and next steps (0.2).

Date: 5/7/2020 0.3 Staff: Stacy A. Tromble
Teleconference with client to answer additional questions regarding Memorandum Decision.

Date: 6/24/2020 0.2 Staff: Stacy A. Tromble
Teleconference with client regarding next steps.

Date: 7/23/2020 1.6 Staff: L. Michael Marquet
Draft application for reasonable attorney's fees and expenses under the Equal Access to Justice Act (EAJA), including recitation of procedural history (1.0); prepare list of itemized hours to be attached as exhibit to EAJA application (0.6).

Date: 7/24/2020 0.7 Staff: L. Michael Marquet
Add inserts to application for reasonable attorney's fees and expenses.

Date: 7/28/2020 1.3 Staff: Stacy A. Tromble
Add insertion to application for reasonable attorneys' fees and expenses under the EAJA, and elimination of hours in the interest of billing judgment (0.9); Draft letter to client regarding Memorandum Decision and recommendations regarding same (0.4).

Date: 8/4/2020 0.7 Staff: Christine Cote Hill
Reconstruct hours for S. Tromble for itemized list and at her request.

Date: 8/7/2020 1.3 Staff: Jack McCaffrey
Finalize application for S. Tromble, to include adding detail to application and itemized list.

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: August 10, 2020

/s/ Stacy A. Tromble
Stacy A. Tromble

EXHIBIT B



Databases, Tables & Calculators by Subject

Change Output Options:

From: 1996 To: 2020

☐ include graphs ☐ include annual averages

GO

[More Formatting Options](#)

Data extracted on: July 1, 2020 (1:32:19 PM)

CPI for All Urban Consumers (CPI-U)

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

Download: [xlsx](#)

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

U.S. BUREAU OF LABOR STATISTICS Postal Square Building 2 Massachusetts Avenue NE Washington, DC 20212-0001

[Telephone:1-202-691-5200](tel:1-202-691-5200) [Federal Relay Service:1-800-877-8339](tel:1-800-877-8339) www.bls.gov [Contact Us](#)

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'").