

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1364

September Term, 19 81

National Association of Concerned Veterans, et al. CA 79-0211

v.

United States Court of Appeals
for the District of Columbia Circuit

Secretary of Defense, et al., Appellants

FILED JUL 15 1982

and consolidated case No. 81-1424

No. 81-1791

GEORGE A. FISHER
CLERK

Mark Green, Corporate Accountability Research Group CA 77-0363

v.

Department of Commerce, Appellant

No. 81-1965

Beverly L. B. Parker

CA 79-3443

v.

Drew Lewis, Secretary, Department of Transportation,
Appellant

Before: Tamm and Wilkey, Circuit Judges, and Gesell,* United
States District Judge for the District of Columbia

O R D E R

It is ORDERED by the Court, sua sponte, that the opinion for the
Court filed in the above entitled cases be, and it hereby is, amended
as follows:

Page 8, second line from the bottom - delete the entire
sentence beginning with "On the other hand,".

Page 9 - before the first full paragraph, insert two new paragraphs
to read as follows:

On the other hand, generalized and conclusory "information
and belief" affidavits from friendly attorneys presenting
a wide range of hourly rates will not suffice. To be useful
an affidavit stating an attorney's opinion as to the market
rate should be as specific as possible. For example, it should
state whether the stated hourly rate is a present or past one,
whether the rate is for a specific type of litigation or for
litigation in general, and whether the rate is an average one or
one specifically for an attorney with a particular type of
experience or qualifications. The affidavit should also state

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the factual basis for the affiant's opinion. The best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm. Alternatively, the affidavit might state that the stated rate is based on the affiant's personal knowledge about specific rates charged by other lawyers or rates for similar litigation.

This does not mean that the affidavit must be replete with names of other attorneys and firms or otherwise filled with minute details, as these may be difficult to obtain. But when the attorney states his belief as to the relevant market rate, he should be able to state, for example, that it was formed on the basis of several specific rates he knows are charged by other attorneys. The District Court's task is to determine the approximate market rate. Its inquiry is aided little by an affidavit which just offers one attorney's conclusory and general opinion on what that rate is. Nor is it helpful if the affiant simply states that he is familiar with the attorney and the litigation and that he thinks the fee request is reasonable. What is needed are some pieces of evidence that will enable the District Court to make a reasonable determination of the appropriate hourly rate.

Page 9, first full paragraph, line 1 - delete the word "should" and insert the words "may be required to".

Page 9, first full paragraph, line 3 - after the word "period" delete the period, insert a comma and add the following: "if in fact applicant has a billing practice to report."^{7A/}

Page 9, bottom of the page - after footnote 7 and before footnote 8, insert the following:

^{7A/} If the applicant is a public interest attorney who does not do any work for fees he does not need to submit any evidence in this regard, nor does he need to submit information about his salary. See Copeland III, 641 F.2d at 898.

Page 10, first full paragraph, line 1 - delete the word "is" and insert in lieu thereof the words "may be".

Page 10, first full paragraph, line 2 - delete the word "should" and insert in lieu thereof the word "may".

Page 10, first full paragraph, line 10 - after the word "billing" and before the word "for" insert the words "at the market rate or".

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Page 10 - immediately following the first full paragraph insert two new paragraphs to read as follows:

Once the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous. And when the Government attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence. Although there may be occasions in which the applicant's showing is so weak that the Government may without more simply challenge the rate as unsubstantiated, in the normal case the Government must either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate.

" Evidence submitted by attorney fee applicants in prior cases may also be relied on in compiling an attorney fee application. There is no requirement that each attorney develop all of the evidence for the hourly rate he seeks from scratch. The probativeness of such prior submissions will depend on the comparability of the attorneys in terms of skill, the nature of the cases and the currency of the information. Hopefully a more uniform structure for rate determination will evolve. While this depends considerably upon the stability of charges in the area the process will be facilitated if Government counsel develop an ability to inform the court and litigants of pertinent current factual affidavits filed in other comparable cases.

Page 17, first full paragraph, last line - delete the period, insert a comma in lieu thereof, and add the following after the comma:

and the District Court has full discretion to deny such requests. Moreover, if the District Court finds that discovery is being pursued solely to cause delay or for other improper purposes, it may apply appropriate sanctions.

Page 32, first full paragraph, line 6 - delete the word "litigated" and insert in lieu thereof the word "tried".

Per Curiam
For the Court

George A. Fisher
George A. Fisher
Clerk