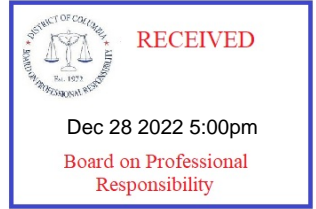


**DISTRICT OF COLUMBIA COURT OF APPEALS  
BOARD ON PROFESSIONAL RESPONSIBILITY**



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**In the Matter of** :  
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**MARY DAVIS, ESQUIRE,** : **Disciplinary Docket No. 2021-D078**  
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 **Respondent** :  
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 :  
 **A Member of the Bar of the** :  
 **D.C. Court of Appeals** :  
 :  
 **(Bar Registration No. 385583)** :  
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**PETITION FOR NEGOTIATED DISCIPLINE**

Disciplinary Counsel and Respondent agree to this petition for negotiated discipline pursuant to D.C. Bar Rule XI, § 12.1 and Board Rule 17. Disciplinary Counsel opened an investigation of Respondent pursuant to D.C. Bar Rule XI, §§ 6(a)(2), 8(a), and Board Rule 2.1, and filed charges against her in June 2022.

**I. STATEMENT OF THE NATURE OF THE MATTER THAT WAS BROUGHT TO DISCIPLINARY COUNSEL’S ATTENTION**

This matter was brought to Disciplinary Counsel’s attention by the U.S. Department of Justice, Office of Professional Responsibility. OPR provided Disciplinary Counsel with the decision of the United States Court of Appeals for the D.C. Circuit in *United States v. Scurry*, 987 F.3d 1144 (D.C. 2021), in which the court held that “the appointment of [Respondent] was not in the interests of justice under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), given her unwaived

and material conflict of interest.” 987 F.3d at 1155.

## **II. STIPULATION OF FACTS AND RULE VIOLATIONS**

1. Respondent became a member of the Bar of the District of Columbia Court of Appeals on January 11, 1985, and was assigned Bar number 385583.

2. In 2010 and 2011, the government charged Eric Scurry and five other men and one woman with conspiracy to distribute cocaine and other drug offenses.

3. In July 2011, Respondent’s law partner, who also is Respondent’s husband, entered his appearance as counsel for Scurry in the district court proceedings. Respondent’s law partner was the principal counsel for most of the representation in 2011 through September 2012. Respondent, however, researched and prepared a number of the motions that were filed with the court and reviewed the motions filed by her partner.

4. On October 14, 2011, Scurry, through counsel, filed a motion to suppress the evidence from the wiretap of Scurry’s phone. His co-defendants also filed motions to suppress the evidence from the wiretaps of their phones and, in the case of some of them, also to suppress the evidence from the wiretaps of their co-defendants’ phones.

5. On June 25, 2012, Scurry, through counsel, joined in the motions of three of his co-defendants to suppress, and adopted the response of a fourth co-defendant.

6. On August 3, 2012, the district court denied the motions filed by Scurry

and his co-defendants to suppress the evidence from the various wiretaps.

7. Shortly before the trial was to begin, Scurry and his co-defendants accepted plea offers.

8. Respondent represented Scurry in negotiating the plea offer between September 7 and 10, 2012, and she represented him at September 10, 2012 hearing before the district court when he entered his plea of guilty.

9. Scurry's plea agreement included the condition that he had reserved the right to appeal the district court's order denying his motion to suppress the evidence from the wiretap of his phone. Pursuant to the plea agreement, Scurry could withdraw his plea only if the United States Court of Appeals for the D.C. Circuit reversed the district court's decision denying his motion to suppress.

10. Some of Scurry's co-defendants entered plea agreements that preserved a broader right to appeal. They could withdraw their pleas if the D.C. Circuit overturned the denial of the motions to suppress the evidence from the wiretaps of not only their phones, but also other co-defendants' phones. Respondent states that the government would not agree to Scurry preserving the broader right to appeal provided to some of his co-defendants. There is no contemporaneous documents to support her statement and the issue was not raised or discussed when Scurry entered his plea. The Assistant United States Attorney responsible for the prosecution initially could not recall whether he had told Respondent that he would not agree to condition Scurry's plea on a broader right of appeal, but in October 2022, the AUSA

confirmed to Respondent that he had.

11. Respondent did not discuss with Scurry whether his plea should be conditioned on his right to appeal the denial of the motions to suppress the evidence from the wiretaps of the other co-defendants' phones and the consequences for not including such a condition. Scurry did, however, review the plea agreement prior to entering his guilty plea.

12. On September 10, 2012, Scurry pleaded guilty to conspiracy to distribute and possession with the intent to distribute cocaine and conspiracy to launder money gained from a drug distribution scheme. If convicted of all the charges filed against him, Scurry would have received a sentence of life imprisonment pursuant to the sentencing guidelines.

13. The district court later sentenced Scurry to 12 years of imprisonment, followed by five years of supervised release.

14. Scurry and four of his co-defendants appealed the district court's denial of their motions to suppress.

15. Respondent signed her partner's name on the notice of appeal, which was filed on December 3, 2012 – the day Scurry was sentenced.

16. On December 17, 2012, the D.C. Circuit appointed Respondent to represent Scurry in his appeal.

17. On March 27, 2013, Scurry filed a *pro se* request asking the D.C. Circuit to appoint him new counsel "due to conflicts of interest." Scurry claimed

that Respondent had coerced him into signing a proffer of evidence and plea agreement and that her co-counsel had provided ineffective assistance of counsel.

18. On March 29, 2013, Respondent filed a motion to withdraw, which the D.C. Circuit granted on July 25, 2013.

19. The D.C. Circuit appointed new counsel to represent Scurry. Scurry's new counsel filed a joint brief with the four co-defendants who appealed, arguing that all the wiretap evidence should have been suppressed. Scurry's counsel did not raise an ineffective assistance of counsel claim.

20. On April 8, 2016, the D.C. Circuit reversed the district court's order denying the motions to suppress evidence from the wiretaps of two of Scurry's co-defendants, finding that the wiretap orders authorizing the wiretaps were invalid on their face because they did not identify the high-level Justice Department official who approved the wiretap applications.

21. The D.C. Circuit, however, affirmed the denial of Scurry's motion to suppress the evidence from the wiretap of his phone.

22. On remand, the government dismissed the charges against the two defendants who prevailed on appeal. The government also dismissed the charges against the two other co-defendants because the authorizations for the wiretaps of their phones were based on evidence from one of the wiretaps the Court found was improper and therefore subject to suppression. This meant that of the five defendants who appealed, only Scurry remained in the case.

23. On October 5, 2016, Scurry filed a *pro se* motion to dismiss the charges against him.

24. Shortly after Scurry filed his motion, he talked to Respondent who agreed to represent him in his efforts to challenge his conviction.

25. Respondent did not discuss with Scurry his previous claims that she and her co-counsel had provided ineffective assistance of counsel and she had coerced him to plead guilty. Respondent insisted that she did not remember Scurry's March 2013 motion requesting new counsel or Scurry's stated reasons for doing so.

26. When Scurry talked to Respondent about challenging his conviction, he did not tell Respondent that he wanted to raise ineffective assistance of counsel.

27. Respondent, however, did not advise Scurry that a likely or viable way to challenge his guilty plea and conviction would be to raise ineffective assistance of counsel, which she could not do so without creating a conflict of interest.

28. On December 19, 2016, Scurry filed a *pro se* motion asking the district court to re-appoint Respondent and her co-counsel as his counsel. The district court granted the motion and appointed Respondent under the Criminal Justice Act.

29. On March 23, 2017, Respondent filed a motion under 28 U.S.C. § 2255 to vacate Scurry's plea on the ground that it was not voluntarily and intelligently entered because he was "induced" to plead guilty to a conspiracy to distribute more than 280 grams of cocaine based on evidence collected from the wiretaps of his co-defendants' phones which the D.C. Circuit ruled were inadmissible.

## **B. Relevant Precedent**

The Court has imposed a range of sanctions for violations of Rules 1.7 and 8.4(d), ranging from non-suspensory to suspensory sanctions. *See In re Rachel*, 251 A.3d 1038 (D.C. 2021) (30-day suspension, stayed with CLE requirement, for violating Rule 1.7(b)(1) and (2), as well as Rule 1.3(b)(2)); *In re Robbins*, 192 A.3d 558 (D.C. 2019) (60-day suspension for violating Rule 1.7(b)(2) and (4), and Rule 1.4(a)); *In re Evans*, 902 A.2d 56 9D.C. 2006) (six-month suspension, with three months stayed and probationary terms, for violating Rules 1.7(b)(4) and 8.4(d), as well as Rule 1.1); *In re Ponds*, 888 A.2d 234 (D.C. 2005) (30-day suspension with CLE requirement for violating Rules 1.7 and 1.16(d)); *In re Butterfield*, 851 A.2d 513 (D.C. 2004) (30-day suspension for violating Rule 1.7(b)(1) and (2)); *In re Artis*, 883 A.2d 85 (D.C. 2005) (30-day suspension for violating Rule 8.4(d)); and *In re Hill*, 619 A.3d 936 (D.C. 1993) (public censure for conduct prejudicial to the administration of justice and neglect).

## **C. Circumstances in Aggravation and Mitigation of Sanction**

A 30-day suspension, fully stayed, with probationary terms, is justified because it is within the range of sanctions that could be imposed for Respondent's misconduct and takes into account certain mitigating factors, including that: (a) Respondent has no prior discipline; and (b) Respondent cooperated in the investigation, and (c) Respondent is accepting responsibility by entering into this petition for negotiated discipline.

23. On October 5, 2016, Scurry filed a *pro se* motion to dismiss the charges against him.

24. Shortly after Scurry filed his motion, he talked to Respondent who agreed to represent him in his efforts to challenge his conviction.

25. Respondent did not discuss with Scurry his previous claims that she and her co-counsel had provided ineffective assistance of counsel and she had coerced him to plead guilty. Respondent insisted that she did not remember Scurry's March 2013 motion requesting new counsel or Scurry's stated reasons for doing so.

26. When Scurry talked to Respondent about challenging his conviction, he did not tell Respondent that he wanted to raise ineffective assistance of counsel.

27. Respondent, however, did not advise Scurry that a likely or viable way to challenge his guilty plea and conviction would be to raise ineffective assistance of counsel, which she could not do so without creating a conflict of interest.

28. On December 19, 2016, Scurry filed a *pro se* motion asking the district court to re-appoint Respondent and her co-counsel as his counsel. The district court granted the motion and appointed Respondent under the Criminal Justice Act.

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30. The government opposed Scurry's § 2255 motion and his motion to dismiss.

31. On August 22, 2018, the district court denied the § 2255 motion and Scurry's *pro se* motion to dismiss, finding that Scurry's guilty plea was valid.

32. On September 10, 2018, Scurry filed a *pro se* appeal.

33. On December 23, 2019, the D.C. Circuit appointed Respondent as his counsel for the appeal.

34. In representing him on appeal, Respondent did not discuss with Scurry that she had or might have a conflict of interest in representing him given his previous claim that she and her co-counsel had coerced him to plead guilty. As stated above, Respondent claimed she did not recall his motion requesting new counsel because of alleged conflicts and alleged ineffective assistance.

35. Respondent also did not discuss with Scurry that an ineffective assistance of counsel claim was a likely and viable way to challenge the voluntary and intelligent nature of his plea.

36. Respondent argued on appeal that Scurry's plea was not knowing and voluntary because it was induced by inadmissible wiretap evidence.

37. Scurry, while represented by Respondent, had not reserved in his plea agreement the right to challenge the denial of the motions to suppress evidence from the wiretaps of his co-defendants' phones, including those in which Scurry's communications were captured. Scurry reserved only the right to challenge the

denial of his motion to suppress the evidence from the wiretap of his own phone.  
*See* paragraph 10 above.

38. The D.C. Circuit rejected Scurry's argument that by wrongly evaluating the admissibility of evidence, his guilty plea was rendered involuntary. The court went on to state that this was not "the end of the story" because the "foundational presumption that the decision to plead guilty rested on competent legal advice from counsel."

39. The D.C. Circuit found that "the only legally viable avenue for challenging the plea apparent on this record would have been for [Respondent] to argue that her own and/or her husband's representation of Scurry in the decision to plead guilty was constitutionally ineffective."

40. The D.C. Circuit found that Respondent had not obtained an informed waiver from Scurry and therefore reversed and remanded the matter to the district court for the appointment of conflict-free counsel to represent Scurry in the § 2255 proceedings.

41. Respondent's conduct violated the following Rules of the D.C. Rules of Professional Conduct:

a. Rule 1.7(b)(4), in that without her client's informed consent, Respondent represented Scurry in his § 2255 proceeding and subsequent appeal notwithstanding that her professional judgment was or reasonably could have been adversely affected by her own interests;

b. Rule 8.4(d), in that Respondent engaged in conduct that seriously interfered with the administration of justice.

### **III. STATEMENT OF PROMISES MADE BY DISCIPLINARY COUNSEL TO RESPONDENT**

In connection with this Petition for Negotiated Disposition, Disciplinary Counsel agrees not to pursue any charges arising out of the conduct described in Section II, *supra*, other than the Rule violations set forth above, or any sanction other than that set forth below.

### **IV. AGREED-UPON SANCTION**

#### **A. Agreed Sanction**

Respondent and Disciplinary Counsel have agreed that the appropriate sanction for the stipulated misconduct and rule violations in this matter is a 30-day suspension, fully stayed, with the following conditions: (1) Respondent shall not be the subject of a disciplinary complaint that results in a finding of misconduct in this or any other jurisdiction for the nine-month period following the filing of the charges against her, *i.e.*, from June 21, 2022, and (2) Respondent shall take three hours of continuing legal education courses in legal ethics.

If Respondent fails to comply with the above conditions, she agrees to serve the 30-day suspension.

## **B. Relevant Precedent**

The Court has imposed a range of sanctions for violations of Rules 1.7 and 8.4(d), ranging from non-suspensory to suspensory sanctions. *See In re Rachel*, 251 A.3d 1038 (D.C. 2021) (30-day suspension, stayed with CLE requirement, for violating Rule 1.7(b)(1) and (2), as well as Rule 1.3(b)(2)); *In re Robbins*, 192 A.3d 558 (D.C. 2019) (60-day suspension for violating Rule 1.7(b)(2) and (4), and Rule 1.4(a)); *In re Evans*, 902 A.2d 56 (D.C. 2006) (six-month suspension, with three months stayed and probationary terms, for violating Rules 1.7(b)(4) and 8.4(d), as well as Rule 1.1); *In re Ponds*, 888 A.2d 234 (D.C. 2005) (30-day suspension with CLE requirement for violating Rules 1.7 and 1.16(d)); *In re Butterfield*, 851 A.2d 513 (D.C. 2004) (30-day suspension for violating Rule 1.7(b)(1) and (2)); *In re Artis*, 883 A.2d 85 (D.C. 2005) (30-day suspension for violating Rule 8.4(d)); and *In re Hill*, 619 A.3d 936 (D.C. 1993) (public censure for conduct prejudicial to the administration of justice and neglect).

## **C. Circumstances in Aggravation and Mitigation of Sanction**

A 30-day suspension, fully stayed, with probationary terms, is justified because it is within the range of sanctions that could be imposed for Respondent's misconduct and takes into account certain mitigating factors, including that: (a) Respondent has no prior discipline; and (b) Respondent cooperated in the investigation, and (c) Respondent is accepting responsibility by entering into this petition for negotiated discipline.

**WHEREFORE**, the Office of Disciplinary Counsel requests that the Executive Attorney assign a Hearing Committee to review the petition for negotiated disposition pursuant to D.C. Bar Rule XI, § 12.1(c).

Respectfully submitted,



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