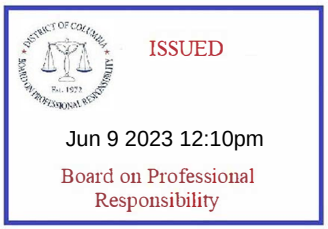
THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE



In the Matter of:	:	
	:	
MARY E. DAVIS,	:	
	:	Board Docket No. 22-ND-007
Respondent.	:	Disciplinary Docket No. 2021-D078
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 385583)	:	

REPORT AND RECOMMENDATION OF AD HOC HEARING COMMITTEE
APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. PROCEDURAL HISTORY

This matter came before the Ad Hoc Hearing Committee on April 25, 2023, for a limited hearing on a Petition for Negotiated Discipline (the "Petition"). The Office of Disciplinary Counsel was represented by Deputy Disciplinary Counsel Julia Porter. Respondent, Mary E. Davis, appeared *pro se*.

The Hearing Committee has carefully considered the Petition signed by Disciplinary Counsel and Respondent, the supporting affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Disciplinary Counsel and Respondent. The Hearing Committee also has fully considered information collected during the Chair's *in camera* review of Disciplinary Counsel's files and records and *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, the Hearing Committee finds

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* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

that the negotiated discipline of a thirty-day suspension, fully stayed with conditions,[1] is justified and recommends that it be imposed by the Court.

II. FINDINGS PURSUANT TO D.C. BAR R. XI, § 12.1(c) AND BOARD RULE 17.5

The Hearing Committee, after full and careful consideration, finds that:

1. The Petition and Affidavit are full, complete, and in proper order.

2. Respondent is aware that there is currently pending against her a proceeding involving allegations of misconduct. Tr. 20-21;[2] Affidavit ¶ 3.

3. The allegations that were brought to the attention of Disciplinary Counsel are that Respondent violated D.C. Rules of Professional Conduct 1.7(b)(4) (conflict of interest) and 8.4(d) (serious interference with the administration of justice) while representing a client in a criminal matter. Petition at 8-9.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 22; Affidavit ¶ 4. Specifically, Respondent acknowledges that:

> (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.
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> (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.
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> (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

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[1] As discussed below, the parties have stipulated that Respondent completed both conditions prior to the date of the limited hearing.

[2] "Tr." refers to the transcript of the limited hearing held on April 25, 2023.

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 [a] 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 [are] 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 [AUSA] 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.

(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."
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> (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."
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> (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.

Petition at 2-8.

5. Respondent is agreeing to the disposition because she believes that she cannot successfully defend against discipline based on the stipulated misconduct. Tr. 21; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition. Affidavit ¶ 6. Those promises are that Disciplinary Counsel agrees not to pursue any additional charges or sanctions arising out of the conduct described in the Petition. Petition at 9. Respondent confirmed during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. 25.

7. Respondent is aware of her right to confer with counsel and is proceeding *pro se*. Tr. 14; Affidavit ¶ 1.

8. Respondent has freely and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction set forth therein. Tr. 22-25; Affidavit ¶ 2.

9. Respondent is not being subjected to coercion or duress. Tr. 20, 25; Affidavit ¶ 2.

10. Respondent is competent and was not under the influence of any substance or medication that would affect her ability to make informed decisions at the limited hearing. Tr. 15.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

a) she has the right to assistance of counsel if Respondent is unable to afford counsel;

b) she will waive her right to cross-examine adverse witnesses and to compel witnesses to appear on her behalf;

c) she will waive her right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

d) she will waive her right to file exceptions to reports and recommendations filed with the Board and with the Court;

e) the negotiated disposition, if approved, may affect her present and future ability to practice law;

f) the negotiated disposition, if approved, may affect her bar memberships in other jurisdictions; and

g) any sworn statement by Respondent in her affidavit or any statements made by Respondent during the proceeding may be used to impeach her testimony if there is a subsequent hearing on the merits.

Tr. 14-20; Affidavit ¶¶ 7-11.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a thirty-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. Petition at 9; Tr. 23-24. Because more than nine months had elapsed from the date of the Specification of Charges, the parties confirmed during the limited hearing that both conditions had already been fulfilled. Tr. 24.

13. The parties have not cited any circumstances in aggravation of sanction. Tr. 28.

14. The parties have agreed to the following circumstances in mitigation of sanction, which the Hearing Committee has taken into consideration: (1) Respondent has not received any prior discipline; (2) she has cooperated with Disciplinary Counsel; and (3) she has accepted responsibility for her misconduct, including by accepting the negotiated discipline. Petition at 10; Affidavit ¶ 14; Tr. 26-27. Respondent cited the following additional mitigating factors during the limited hearing: Noting that the following facts did not constitute an excuse but rather were offered as an explanation, Respondent reported that at the time of the incidents which form the basis of this complaint, she was recovering from surgery and was taking prescribed medications to control pain, which she believes affected her ability to recall the details of her prior representation of Mr. Scurry. Tr. 27.

15. The complainants, two attorneys at the Office of Professional Responsibility in the U.S. Department of Justice, were notified of the limited hearing but did not appear and did not provide any written comment. Tr. 11, 29-30. Though

he was technically not a complainant, Disciplinary Counsel also notified Mr. Scurry, who appeared at the hearing, alongside his current counsel, but declined to provide any oral or written comment. Tr. 6, 11-12.

III. DISCUSSION

The Hearing Committee shall recommend approval of a petition for negotiated discipline if it finds:

> (1) The attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the petition and agreed to the sanction set forth therein;
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> (2) The facts set forth in the petition or as shown at the hearing support the admission of misconduct and the agreed upon sanction; and
>
> (3) The sanction agreed upon is justified. . . .

D.C. Bar R. XI, § 12.1(c)(1)-(3); *see also* Board Rule 17.5(a)(i)-(iii).

A. Respondent Has Knowingly and Voluntarily Acknowledged the Facts and Misconduct and Agreed to the Stipulated Sanction.

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition, and denied that she is under duress or has been coerced into entering into this disposition. *See supra* Paragraphs 8-9. Respondent understands the implications and consequences of entering into this negotiated discipline. *See supra* Paragraph 11.

Respondent has acknowledged that any and all promises that have been made to her by Disciplinary Counsel as part of this negotiated discipline are set forth in

writing in the Petition and that there are no other promises or inducements that have been made to her. *See supra* Paragraph 6.

B. The Stipulated Facts Support the Admissions of Misconduct and the Agreed-Upon Sanction.

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing and concludes that they support the admission of misconduct and the agreed-upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because she believes that she could not successfully defend against the misconduct described in the Petition. *See supra* Paragraph 5.

With regard to the second factor, the Petition states that Respondent violated Rule of Professional Conduct 1.7(b)(4), in that without her client's informed consent, Respondent represented Mr. Scurry in his Section 2255 proceeding and subsequent appeal notwithstanding the fact that her professional judgment was or reasonably could have been adversely affected by her own interests. The stipulated facts support Respondent's admission that she violated Rule 1.7(b)(4) in that Respondent agreed, in 2016, to represent Scurry by filing a Section 2255 motion without discussing with Scurry the fact that Scurry's 2012 guilty plea, which was negotiated by Respondent and her law partner, included only a limited right to appeal, which could form the basis of an ineffective assistance claim. Respondent similarly did not remind Scurry about his 2013 motion requesting new counsel or his stated reasons for the request; failure to engage in such a discussion with Scurry, and to obtain his informed consent to a new representation, was a violation of Rule

1.7(b)(4). Petition at 6. These violations were compounded when Respondent agreed to represent Scurry in an appeal from the denial of his Section 2255 motion.

The Petition further states that Respondent violated D.C. Rule of Professional Conduct 8.4(d), in that she engaged in conduct that seriously interfered with the administration of justice. The stipulated facts support Respondent's admission that she violated Rule 8.4(d) because, due to her conflicted representation of Mr. Scurry, the D.C. Circuit was forced to remand the matter to the district court for the appointment of conflict-free counsel to represent Scurry in the Section 2255 proceedings.

C. The Agreed-Upon Sanction Is Justified.

The third factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(iii) (explaining that hearing committees should consider "the record as a whole, including the nature of the misconduct, any charges or investigations that Disciplinary Counsel has agreed not to pursue, the strengths or weaknesses of Disciplinary Counsel's evidence, any circumstances in aggravation and mitigation (including respondent's cooperation with Disciplinary Counsel and acceptance of responsibility), and relevant precedent"); *In re Johnson*, 984 A.2d 176, 181 (D.C. 2009) (per curiam) (providing that a negotiated sanction may not be "unduly lenient"). Based on the record as a whole, including the stipulated circumstances in mitigation, the Hearing Committee Chair's *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel, and

the Committee's review of relevant precedent, the Hearing Committee concludes that the agreed-upon sanction is justified and not unduly lenient, for the following reasons:

First, the agreed-upon sanction appears to fall within the range of discipline imposed for similar misconduct in contested cases. *See, e.g.*, *In re Rachal*, 251 A.3d 1038 (D.C. 2021) (per curiam) (thirty-day suspension, stayed in favor of one year of probation with CLE, for continuing a representation of two beneficiaries of a trust as well as a creditor, despite a conflict of interest, and filing a praecipe in which he accused his clients of making misrepresentations, in violation of Rules 1.3(b)(2) and 1.7(b)(1), mitigated by a finding that the misconduct arose from a mistake, rather than self-interest); *In re Robbins*, 192 A.3d 558 (D.C. 2018) (per curiam) (sixty-day suspension with CLE for recruitment of a friend and prior client to serve as an indemnitor for another client without adequately explaining the agreement or disclosing the conflicts of interest, in violation of Rules 1.4(a) and 1.7(b)(2) and (b)(4)); *In re Evans*, 902 A.2d 56 (D.C. 2006) (per curiam) (appended Board Report) (six-month suspension, three months stayed, and required CLE for acting as an owner of title company on one hand and as probate and real estate lawyer on the other, which led to incompetent handling of matter and conduct that seriously interfered with the administration of justice, in violation of Rules 1.1(a), 1.1(b), 1.7(b)(4) and 8.4(d), aggravated by prior discipline); *In re Boykins*, 748 A.2d 413 (D.C. 2000) (per curiam) (thirty-day suspension, stayed in favor of probation, for failure to provide a written fee agreement, failure to advise a client with respect to

the fees she was entitled to as conservator, failure to comply with duties as counsel to a conservator, failure to withdraw, failure to prevent a conflict between the conservator and heirs, and failure to comply with a court order to repay the estate, in violation of Rules 1.1(a) and (b), 1.3(a) and (c), 1.5(b), 1.7(b), and 8.4(d)); see also *In re Zipin*, Board Docket No. 19-ND-006 (HC Rpt. Feb. 21, 2020) (recommending approval of a petition for negotiated discipline providing for a sixty-day suspension, stayed in favor of probation, for failure to file tax returns or an accounting while serving as attorney and conservator for an elderly client, drafting a will naming himself personal representative of the client's estate, and preventing the court from discovering misconduct committed by the client's personal representatives, in violation of Rules 1.1(a) and (b), 1.3(a) and (c), 1.7(b)(4), and 8.4(d)), *recommendation adopted*, D.C. App. No. 20-BG-182 (Apr. 23, 2020) (per curiam).

Furthermore, Respondent has practiced law for many years with an unblemished disciplinary record. Her decision to enter into the prohibited engagements here, both for the original Section 2255 motion and the appeal therefrom, followed requests from the client himself for such representation. Respondent has taken full responsibility for her actions, has cooperated fully with Disciplinary Counsel's investigation, and has already fulfilled all the conditions included in the agreed-upon sanction.

IV. CONCLUSION AND RECOMMENDATION

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose a thirty-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.

AD HOC HEARING COMMITTEE

Kathleen Wach
Chair

Trevor Mitchell
Public Member

Elizabeth Greenidge
Attorney Member