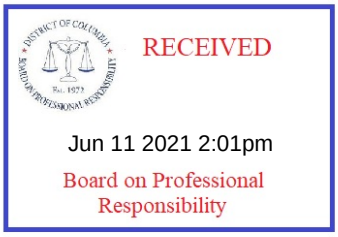
DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of **KEVIN E. CLINESMITH,** **Respondent** **A Member of the Bar of the** **District of Columbia Court of Appeals** **Bar Number: 984265** **Admitted: November 7, 2008**	 **Disc. Docket No. 2019-D305**

AMENDED PETITION FOR NEGOTIATED DISCIPLINE

Pursuant to D.C. Bar R. XI, § 12.1 and Board Rule 17.3, the Office of Disciplinary Counsel and Respondent Kevin E. Clinesmith, respectfully submit this Petition for Negotiated Discipline in the above-captioned matter. Jurisdiction for this disciplinary proceeding is prescribed by D.C. Bar R. XI, § 1(a), because Respondent is a member of the Bar of the District of Columbia Court of Appeals.

I. STATEMENT OF THE NATURE OF THE MATTER BROUGHT TO DISCIPLINARY COUNSEL'S ATTENTION

Disciplinary Counsel docketed this matter for investigation in December 2019 based on allegations about Respondent's conduct in *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, 247-256, U.S. Department of Justice, Office of the Inspector General (December 2019) (the "December 2019 DOJ IG Report").

On August 25, 2020, Respondent, by and through counsel, timely notified the Board on Professional Responsibility and Disciplinary Counsel that he had pled guilty in the U.S. District Court for the District of Columbia to one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3) in connection with the conduct alleged in the December 2019 DOJ IG Report. Respondent also sent the Board and Disciplinary Counsel a certified copy of the Information filed by the government and the docket entry of the plea.

II. STIPULATIONS OF FACTS AND CHARGES

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on November 7, 2008, and assigned Bar number 984265.

2. On August 19, 2020, Respondent pled guilty in the U.S. District Court for the District of Columbia to one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3).

3. As part of Respondent's guilty plea, he stipulated that had the case gone to trial, the government's evidence would have proved, beyond a reasonable doubt, the facts laid out below in ¶¶ 4 - 15.

4. From July 12, 2015 to September 21, 2019, Respondent was employed full-time with the Federal Bureau of Investigation as an Assistant General Counsel in the National Security and Cyber Law Branch of the FBI's Office of General

Counsel. As part of Respondent's duties and responsibilities, Respondent assisted FBI Special Agents and Supervisory Special Agents in connection with applications prepared by the FBI and the National Security Division (NSD) of the United States Department of Justice to conduct surveillance under the Foreign Intelligence Surveillance Act.

5. On July 31, 2016, the FBI opened an investigation known as Crossfire Hurricane into whether individual(s) associated with the Donald J. Trump for President Campaign were aware of and/or coordinating activities with the Russian government. By August 16, 2016, the FBI had opened individual cases under the Crossfire Hurricane umbrella on four United States persons, including a case involving Carter Page.

6. Respondent was assigned to provide legal support to FBI personnel working on Crossfire Hurricane. One of Respondent's tasks was to communicate with another specific United States government agency (the "Other Government Agency," or "OGA") to raise questions or concerns for the Crossfire Hurricane team.

7. As part of his responsibilities, Respondent provided support to FBI Special Agents and Supervisory Special Agents working with the NSD to prepare FISA applications to obtain authority from the United States Foreign Intelligence Surveillance Court to conduct surveillance on Page. There were a total of four court-approved FISA applications targeting Page. Each alleged that there was probable

cause that Page was a knowing agent of a foreign power, specifically Russia.

8. On August 17, 2016, prior to the approval of the first FISA application, the OGA provided certain members of the Crossfire Hurricane team – but not the Respondent – a memorandum indicating that Page had been approved as an "operational contact" for the OGA from 2008 to 2013 and detailing information that Page had provided to the OGA concerning Page's prior contacts with certain Russian intelligence officers.

9. The first three FISA applications did not include Page's history or status with the OGA.

10. Prior to submission of the fourth FISA application, Carter Page publicly stated that he had assisted the United States Government in the past. During the preparation of the fourth FISA application, an FBI Supervisory Special Agent asked Respondent to inquire with the OGA as to whether Page had ever been a "source" for that agency.

11. Respondent knew that if Carter Page had been a source for the OGA, that information would need to be disclosed in the fourth FISA application.

12. On June 15, 2017, Respondent sent an email to a liaison at the OGA (the "Liaison") stating: "We need some clarification on [Carter Page]. There is an indication that he may be a '[designation redacted]' source. This is a fact we would need to disclose in our next FISA renewal . . . To that end, can we get two items

from you? 1) Source Check/Is [Carter Page] a source in any capacity? 2) If he is, what is a [designation redacted] source (or whatever type of source he is)?"

13. Later that same day, the Liaison provided Respondent with a list (but not copies) of memoranda previously provided to other members of the Crossfire Hurricane team, including a reference to the above referenced August 17, 2016 Memorandum, as well as an explanation that the OGA uses:

> the [designation redacted] to show that the encrypted individual . . . is a [U.S. person]. We encrypt the [U.S. persons] when they provide reporting to us. My recollection is that [Page] was or is . . . [designation redacted] but the [memoranda] will explain the details. If you need a formal definition for the FISA, please let me know and we'll work up some language and get it cleared for use.

14. It was not typical for someone in Respondent's position to review the memoranda listed in the Liaison's email. Respondent's role generally was to conduct legal reviews of the FISA applications, not to obtain, review, or evaluate the underlying documents related to the applications. That was the case agent's role.

15. As such, the same day that Respondent received the Liaison's email, he forwarded it—including the list of memoranda that would "explain the details" of Page's relationship with the OGA—to the case agent and the case agent's acting supervisor. Upon receiving the email, the case agent's supervisor responded by telling the case agent (copying Respondent) that she would "pull these [memoranda] for you tomorrow and get you what you need."

16. Respondent responded that same day to the Liaison via email with: "Thanks so much for that information. We're digging into the [memoranda] now, but I think the definition of the [designation redacted] answers our questions."

17. The following day, Respondent also forwarded the Liaison's email to the DOJ attorney drafting the FISA renewal application. The DOJ attorney replied to Respondent, "thanks I think we are good and no need to carry it further."

18. On June 19, 2017, the FBI Supervisory Special Agent followed up with an instant message to Respondent, asking, "Do you have any update on the [OGA source] request?" During a series of instant messages between Respondent and the Supervisory Special Agent, Respondent indicated that Page was a "subsource," "was never a source," and that the OGA "confirmed explicitly he was never a source." When asked whether he had that in writing, Respondent stated that he did and would forward the email that the OGA provided to Respondent.

19. Immediately following the instant messages between the Respondent and the SSA, Respondent forwarded the Liaison's June 15, 2017 email to the SSA with alterations that Respondent had made so that the Liaison's email read as follows:

> the [designation redacted] to show that the encrypted individual . . . is a [U.S. person]. We encrypt the [U.S. persons] when they provide reporting to us. My recollection is that [Page] was or is "[designation redacted]" **and not a "source"** but the [memoranda] will explain the details. If you need a formal definition for the

> FISA, please let me know and we'll work up some language and get it cleared for use

(emphasis added). Respondent knew that the original email from the Liaison did not contain the words "and not a source." Respondent knowingly and willfully altered the email making it appear that the OGA's Liaison had written in the email "and not a source".

20. Relying on the altered email, the Supervisory Special Agent signed and submitted the fourth FISA application on June 29, 2017. This application also did not include Page's history or status with the OGA.

21. Respondent violated the following provisions of the District of Columbia Rules of Professional Conduct and D.C. Bar Rules:

a. Rule 8.4(b) in that Respondent committed a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects, namely making a false statement in violation of 18 U.S.C. § 1001(a)(3);

b. Rule 8.4(c) in that Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; and

c. D.C. Bar R. XI, § 10(d), in that Respondent was convicted of a serious crime as defined by D.C. Bar R. XI, § 10(b) because his offense was a felony involving false swearing, misrepresentation, and/or fraud.

III. STATEMENT OF PROMISES MADE BY DISCIPLINARY COUNSEL

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

IV. DISCIPLINARY COUNSEL'S CERTIFICATIONS REGARDING MORAL TURPITUDE

Pursuant to the framework set forth in *In re Rigas*, 9 A.3d 494, 497 (D.C. 2010), Disciplinary Counsel certifies the following:

(1) Respondent's crime does not involve moral turpitude *per se*. *See, e.g.*, *In re Squillacote*, 790 A.2d 514, 521 (D.C. 2002) (appended Board Report finding that conviction for 18 U.S.C. § 1001 was not a crime of moral turpitude *per se*).

(2) Disciplinary Counsel has exhausted all reasonable means of inquiry to find proof in support of moral turpitude. Disciplinary Counsel considered Respondent's admissions made as part of his guilty plea, records from the underlying criminal matter, review of a report from the Office of the Inspector General of the U.S. Department of Justice, and statements Respondent made in a meeting with the Office of Disciplinary Counsel;

(3) Disciplinary Counsel does not believe that there is sufficient evidence to prove moral turpitude on the facts. In particular, Disciplinary Counsel considered the available evidence of Respondent's state of mind while committing the offense.

Although Respondent admitted knowingly altering an email to include information that was not originally in the email and sending it to the SSA as if the information was originally in the email, thereby knowingly and willfully using a false writing knowing the same to contain a materially false entry thereon, Disciplinary Counsel would be unable to prove by clear and convincing evidence that his conduct rose to the level of moral turpitude;

(4) All of the facts relevant to a determination of moral turpitude are set forth in the petition;

(5) Any cases regarding the same or similar offenses have been cited in the petition.

V. AGREED UPON SANCTION

Disciplinary Counsel and Respondent agree that the sanction to be imposed in this matter is a one-year suspension. Disciplinary Counsel does not object to having this suspension run *nunc pro tunc* from August 25, 2020, the date on which Respondent promptly self-reported his guilty plea to Disciplinary Counsel and the Board on Professional Responsibility. Because Respondent and Disciplinary Counsel were negotiating this petition, Disciplinary Counsel did not promptly report the plea to the Court and initiate a disciplinary proceeding under D.C. Bar R. XI, § 10. This report eventually occurred in January 2021, and the Court suspended Respondent on February 1, 2021. It is likely that the Court would have suspended

Respondent in August or September 2020 had Disciplinary Counsel promptly reported the guilty plea to the Court, and Respondent has not practiced law since his guilty plea. It is therefore appropriate for the suspension to be *nunc pro tunc* to the date Respondent reported his guilty plea to Disciplinary Counsel because D.C. Bar R. XI, § 10 made him effectively ineligible to practice law after his guilty plea and that is the earliest date the matter could have reasonably been reported to the Court.

Respondent and Disciplinary Counsel agree that there are no additional conditions attached to this negotiated discipline that are not expressly agreed to in writing in this Petition.

VI. RELEVANT PRECEDENT

The agreed sanction in a negotiated discipline case must be "justified, and not unduly lenient, taking into consideration 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." Board Rule 17.5(a)(iii). A justified sanction "does not have to comply with the sanction appropriate under the comparability standard set forth in D.C. Bar Rule XI, § 9(h)." *Id*. There is case law that provides guidance regarding the parties' agreed-upon sanction in this matter.

A suspensory sanction is appropriate for submitting falsified documents. *See, e.g. In re Uchendu*, 812 A.2d 933 (D.C. 2002) (suspending attorney for 30 days for falsely notarizing signatures, even with clients' consent); *In re Zeiger*, 692 A.2d 1351 (D.C. 1997) (60 day suspension for falsifying medical records); *In re Brown*, 672 A.2d 577 (D.C. 1996) (60 day suspension in reciprocal matter for misrepresentations on three certificates of service); *In re Lopes*, 770 A.2d 561, 570 (D.C. 2001) ("Sanctions for dishonesty range generally from 30 days suspension to disbarment.").

Sanctions for a violation of Rule 8.4(b) involving a conviction of making a false statement in violation of 18 U.S.C. § 1001 often involve a one-year suspension. *In re Thompson*, 538 A.2d 247 (D.C. 1987) (imposing a one-year suspension upon an attorney for knowingly assisting in the presentation of false statements to the Immigration and Naturalization Service); *In re Cerroni*, 683 A.2d 150 (D.C. 1996) (imposing a one-year suspension without a fitness requirement on an attorney for knowingly making false statements to the United States Department of Housing and Urban Development and the Federal Housing Administration); *In re Belardi*, 891 A.2d 224 (D.C. 2006) (imposing a one-year suspension without a fitness requirement for making false statements to the Federal Communications Commission).

VII. MITIGATING FACTORS

Disciplinary Counsel agrees that (a) Respondent has no prior discipline; (b) Respondent has taken full responsibility for his misconduct and has demonstrated remorse; (c) Respondent has fully cooperated with Disciplinary Counsel; (d) prior to the facts leading to his criminal offense, Respondent had over a decade of distinguished public service; (e) Respondent's conduct was not motivated by any personal financial, economic, or commercial motive; (f) Respondent's conduct involves only a single incident, not a pattern of misconduct; (g) the sentencing judge credited Respondent's explanation that he had wrongly believed that the information he was inserting into the email was accurate; and (h) the sentencing judge, who is also the presiding judge of the FISC, concluded that "even if [Respondent] had been accurate about Dr. Page's relationship with the [OGA], the warrant may well have been signed and the surveillance authorized."

Respondent also asserts the following additional mitigating factors: (a) Respondent asserts that it was not his intent to deceive his colleagues or the court about Page's relationship with the OGA; (b) Respondent asserts that although he was not yet suspended, he voluntarily stopped practicing law or seeking legal employment in December 2019 while this matter was under investigation by the government and Disciplinary Counsel; and (c) the December 2019 DOJ IG Report states that days before sending the altered email, Respondent emailed the *unaltered*

information he received from the OGA to (1) Page's case agent, who was responsible for requesting the fourth FISA application and providing the factual basis for the request, (2) that agent's acting supervisor, and (3) the DOJ NSD attorney responsible for drafting and submitting the fourth FISA application to the FISC. Although Disciplinary Counsel lacks sufficient knowledge to affirm or deny these asserted mitigating factors, Disciplinary Counsel acknowledges that Respondent would raise these issues in a contested disciplinary hearing and a hearing committee might find clear and convincing evidence of some or all of these mitigating factors.

VIII. AGGRAVATING FACTORS

Disciplinary Counsel and Respondent agree that: (a) as a Department of Justice lawyer, Respondent enjoyed a position of trust; and (b) Respondent's misconduct occurred during an ex parte process where it is particularly important that a lawyer not cause inaccurate representations.

Disciplinary Counsel also asserts the following aggravating factor: Respondent's misconduct has been used to discredit what appeared otherwise to have been a legitimate and highly important investigation. Although Respondent denies this asserted aggravating factor, Respondent acknowledges that Disciplinary Counsel would raise it in a contested disciplinary hearing and a hearing committee might find clear and convincing evidence of it.

IX. RESPONDENT'S AMENDED AFFIDAVIT

Accompanying this Petition is Respondent's Amended Affidavit pursuant to D.C. Bar R. XI, § 12.1(b)(2).

X. CONCLUSION

Respondent and Disciplinary Counsel request that the Executive Attorney assign this matter for review pursuant to D.C. Bar R. XI, § 12.1(c) and Board Rule 17.4(b).

Dated: June 11, 2021

Hamilton P. Fox, III
Disciplinary Counsel

Kevin E. Clinesmith,
Respondent

William R. Ross
Assistant Disciplinary Counsel

Eric L. Yaffe
Frank J. Sciremammano
LATHROP GPM LLP
The Watergate – Suite 700
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 295-2200
eric.yaffe@lathropgpm.com
frank.sciremammano@
lathropgpm.com
Attorneys for Respondent

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X. CONCLUSION

Respondent and Disciplinary Counsel request that the Executive Attorney assign this matter for review pursuant to D.C. Bar R. XI, § 12.1(c) and Board Rule 17.4(b).

Dated: June 11th, 2021

/s/ Hamilton P. Fox, III
Hamilton P. Fox, III
Disciplinary Counsel

Kevin E. Clinesmith
Respondent

WmR Ross
William R. Ross
Assistant Disciplinary Counsel

Eric L. Yaffe
Frank J. Sciremammano
LATHROP GPM LLP
The Watergate – Suite 700
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 295-2200
eric.yaffe@lathropgpm.com
frank.sciremammano@
lathropgpm.com
Attorneys for Respondent