DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER SIX

In the Matter of:	:	
	:	
ROBERT W. MANCE, III,	:	
	:	
Petitioner.	:	**Bar Docket No. 2013-D250**
	:	**Board Docket No. 13-BD-058**
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 285379)	:	

REPORT AND RECOMMENDATION
OF HEARING COMMITTEE NUMBER SIX

I. INTRODUCTION

This is a contested reinstatement proceeding. The Petition for Reinstatement follows an order of the D.C. Court of Appeals (the "Court") suspending Petitioner for six months, with the requirements that he demonstrate his fitness to practice and pay restitution as conditions of reinstatement. *See In re Mance*, 35 A.3d 1125 (D.C. 2012) (per curiam). The discipline arose from a negotiated disposition in which Petitioner admitted to multiple violations of the disciplinary rules arising from his neglect of three client matters.

Based upon the evidence presented at the May 2, 2014, hearing, and for the reasons set forth below, the Hearing Committee concludes that Petitioner has not met his burden of showing by clear and convincing evidence that, under D.C. Bar Rule XI, § 16(d) and the factors set forth in *In re Roundtree*, 503 A.2d 1215 (D.C. 1985), he should be reinstated to the Bar of the District of Columbia. We therefore recommend denial of the Petition for Reinstatement.

II. PROCEDURAL HISTORY

Petitioner was admitted to the District of Columbia Bar ("D.C. Bar") on November 19, 1979. He is also a member of the Maryland and South Carolina bars. In 1979, South Carolina imposed a private reprimand upon Petitioner for failing to perfect an appeal. Petition for Reinstatement at 4. Petitioner received two informal admonitions in 1996 and 2000, respectively, for failure to provide written fee agreements. DX 4.[1] Then, in 2005, Petitioner was suspended for 30 days, stayed in favor of one year of probation for incompetent representation, neglect, failure to communicate, failure to withdraw, and serious interference with the administration of justice in connection with a criminal appeal. DX 4 (*In re Mance*, 869 A.2d 339, 340-41 (D.C. 2005) (per curiam)). In 2009, Petitioner received a public censure for commingling and failing to promptly return client funds upon termination of the representation, for which he received reciprocal discipline of a public censure in Maryland. Petition for Reinstatement at 5; DX 4 (*In re Mance*, 980 A.2d 1196, 1208-09 (D.C. 2009)).

In the instant case, Petitioner entered into a negotiated disposition based upon numerous violations of the Rules of Professional Conduct: Rule 1.1(a) (competence), Rule 1.1(b) (skill and care), Rule 1.3(a) (zealous and diligent representation), Rule 1.5(b) (provide writing stating the rate or basis of the fee), Rule 1.7(b) (conflict based on attorney's own interest), Rule 1.8 (business transaction with client), and Rule 1.16(d) (timely surrender of client's papers upon termination of representation). *Mance*, 35 A.3d at 1126. Petitioner agreed to stipulate to misconduct involving three different clients in exchange for the agreement of Disciplinary

[1] "DX" is used to designate Disciplinary Counsel's exhibits, which were originally designated as "BX" in reference to Bar Counsel's exhibits. The District of Columbia Court of Appeals, however, changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015, after the hearing in this matter. We use the current title and abbreviation herein.

Counsel to dismiss charges involving a fourth client. *Id.* at 1127. Disciplinary Counsel provided notice to Petitioner in the petition for negotiated disposition that it could raise those matters in a subsequent reinstatement hearing. *Id.* at 1127 n.3. The District of Columbia Court of Appeals accepted the negotiated disposition and imposed a six-month suspension with a fitness requirement on January 26, 2012. *Id.* at 1127. With respect to restitution, the Court's order specifically provided that "[Petitioner's] restitution to his clients or the client security trust fund shall be a prerequisite to any future reinstatement proceeding on the question of fitness." *Id*.

Shortly after the Court imposed the negotiated discipline, Disciplinary Counsel dismissed another complaint pending against Respondent. DX 2 (Certificate Concerning Discipline at 1). In the letter of dismissal, Disciplinary Counsel again reserved the right to present evidence of the unadjudicated acts of misconduct underlying the complaint should Petitioner seek reinstatement.[2]

On June 26, 2013, Petitioner filed a Petition for Reinstatement with the Board on Professional Responsibility ("Board"). Disciplinary Counsel moved to dismiss the Petition on the basis of Petitioner's failure to make full restitution to all of the clients harmed by Petitioner's misconduct. Petitioner opposed the motion, claiming that he had repaid his former clients. The Board denied Disciplinary Counsel's motion on November 13, 2013. Disciplinary Counsel opposed the Petition for Reinstatement in an Answer filed on November 20, 2013. In the Answer, Disciplinary Counsel provided the notice required by Board Rule 9.8(a) of its intent to present evidence of the unadjudicated acts of misconduct at the hearing on reinstatement. At a pre-hearing conference on February 10, 2014, the Hearing Committee Chair directed Disciplinary Counsel to provide the written proffer required by Board Rule 9.8(b) to support the admissibility of the unadjudicated acts of misconduct. Disciplinary Counsel filed the written

[2] The letter of dismissal is not in the record. *See* Section IV.A.2.b, *infra*.

proffer on February 11, 2014. On April 14, 2014, the Hearing Committee issued an order directing Disciplinary Counsel to submit proof of the unadjudicated acts of misconduct at the hearing, at which time the Hearing Committee would rule on its admissibility.

The Hearing Committee held a hearing on the Petition on May 2, 2014. At the hearing, Petitioner, who was represented by counsel, testified on his own behalf, and called three witnesses, Elijah Rogers, Frederick Cooke, and Antoini Jones, each of whom attested to Petitioner's character and the emotional impact that the suspension had on Petitioner. Disciplinary Counsel called one witness, Wilmer Riley, a former client of Petitioner who was harmed by Petitioner's misconduct. The Hearing Committee received all of Petitioner's and Disciplinary Counsel's exhibits submitted into evidence.

On June 18, 2014, Petitioner filed a Post-Hearing Brief ("Pet. Brief"), in which he maintained he had proven, by clear and convincing evidence, that he is fit to resume the practice of law. On July 7, 2014, Disciplinary Counsel filed an opposition to the Petition ("DC Brief"), arguing that Petitioner has not demonstrated by clear and convincing evidence that he meets the *Roundtree* factors and sustained his burden of establishing his fitness to resume the practice of law.

III. STANDARD OF REVIEW

The Hearing Committee's findings of fact must be supported by clear and convincing evidence. *See* Board Rule 11.6; *In re Williams*, 464 A.2d 115, 119 (D.C. 1983) (per curiam). The Court reviews the Hearing Committee's conclusions of law *de novo*. *See In re Micheel*, 610 A.2d 231, 235 (D.C. 1992).

D.C. Bar R. XI, § 16(d)(1) sets forth the legal standard for reinstatement. It places upon a petitioner the burden of proving by clear and convincing evidence:

> (a) That the attorney has the moral qualifications, competency, and learning in law required for readmission; and
>
> (b) That the resumption of the practice of law by the attorney will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest.

Clear and convincing evidence is more than a preponderance of the evidence; it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) (internal quotation omitted).

In *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), the Court identified five factors that should inform the reinstatement determination. They include:

> 1) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> 2) whether the attorney recognizes the seriousness of the misconduct;
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> 3) the attorney's post-discipline conduct, including steps taken to remedy past wrongs and prevent future ones;
>
> 4) the attorney's present character; and
>
> 5) the attorney's present qualifications and competence to practice law.

The following findings of fact, supported by clear and convincing evidence, establish that Petitioner has failed to fully satisfy the criteria for reinstatement. The Hearing Committee thus recommends, for the reasons set forth below, that the Court deny the Petition for Reinstatement.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Nature and Circumstances of the Misconduct

The nature and circumstances of the misconduct for which an attorney was disciplined is a significant factor in the reinstatement determination, "because of their obvious relevance to the attorney's 'moral qualifications . . . for readmission'" and the Court's "duty to insure that readmission 'will not be detrimental to the integrity and standing of the Bar.'" *In re Borders*, 665

A.2d 1381, 1382 (D.C. 1995) (quoting D.C. Bar R. XI, § 16(d)). In addition, the Hearing Committee considers the acts of unadjudicated misconduct, which were dismissed as part of the negotiated discipline and after negotiated discipline was imposed. *See* Board Rules 9.8(a) and (b); *In re Roxborough*, 775 A.2d 1063, 1076 (D.C. 2001) (per curiam) (appended Board Report).

The nature and circumstances of the misconduct underlying the negotiated discipline and the evidence of unadjudicated misconduct introduced by Disciplinary Counsel on reinstatement are serious. The misconduct involved a consistent pattern of neglect, including the failure to communicate with clients and to comply with multiple court orders, and two instances of conflict of interest. As a result of the misconduct, Petitioner's clients were prejudiced. The nature and circumstances of the misconduct are set forth below.

1. The Adjudicated Misconduct

Petitioner admitted to misconduct in three client matters that were the subject of the Petition for Negotiated Discipline.

a. *The Garrett Matter*

Petitioner represented Leonard Garrett in an appeal to the Superior Court from an administrative action in an employment matter. *Mance*, 35 A.3d at 1126; *In re Mance*, Bar Docket Nos. 2009-D247, *et al.*, at 3 (HC Rpt. Oct. 26, 2011) ("*Mance* HC Rpt."). The court directed Respondent to file a brief, but Petitioner failed to comply or to respond to the court's order to show cause, resulting in dismissal of the case for want of prosecution. *Mance*, 35 A.3d at 1126. Petitioner thereafter failed to take any steps to reinstate the matter. *Id.*

As a result, Mr. Garrett lodged a complaint with the Office of Disciplinary Counsel. *Mance*, 35 A.3d at 1126. Respondent subsequently met with Mr. Garrett, assured him that he would reopen the case and appeal the dismissal, and persuaded him to withdraw the complaint.

Id. Soon thereafter, Petitioner entered into a written agreement with Mr. Garrett to pay him $4,500, representing the retainer fee plus an additional $15,000, as settlement of "any issues or differences between them." *Id.* Petitioner failed to advise Mr. Garrett of his right to obtain the advice of outside counsel and to obtain his client's informed consent in writing. *Id.*; *Mance* HC Rpt. at 6. Petitioner made two payments to his client in 2009 totaling $900, but made no further payments and stopped communicating with his client. *Mance*, 35 A.3d at 1126. Petitioner's client obtained a judgment against Petitioner in the amount of $5,000 in January 2012. DX 6 at 1. Petitioner paid the judgment in full in August 2013. PX 3.[3]

Based on the above facts, Petitioner admitted to violations of Rules 1.1(a) (competent representation), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.5(b) (written statement of fee basis or rate), and 1.8 (improper business transaction with a client). *Mance*, 35 A.3d at 1126; *Mance* HC Rpt. at 17-19.

b. *The Riley matter*

Petitioner represented another client, Wilmer Riley, in a civil action filed in the Superior Court alleging encroachment and damage to his District of Columbia property from the construction of a building next to his property. *Mance*, 35 A.3d at 1126-27; *Mance* HC Rpt. at 6-7. Petitioner failed to respond to a request for production of documents and submit them to opposing counsel, although his client had provided the documents to him and the trial court had directed compliance by a certain date. *Mance*, 35 A.3d at 1126. Petitioner failed to respond to several court orders directing him to respond to discovery requests. *Mance* HC Rpt. at 7-8. As a result, the court granted a motion for sanctions, which prohibited Mr. Riley from testifying or presenting certain exhibits at trial. *Mance*, 35 A.3d at 1126. Petitioner did not move the court to

[3] "PX" is used to refer to Petitioner's exhibits.

vacate or reconsider the order. *Mance*, HC Rpt. at 8. When the defendant moved for summary judgment, Petitioner again failed to respond. *Mance*, 35 A.3d at 1126. The trial court granted the motion and dismissed the case. *Id*.

Petitioner filed an appeal, claiming he had produced the documents by hand delivery, although he never obtained a receipt. *Id*. at 1127. He also failed to inform Mr. Riley that the appeal involved deficiencies in Petitioner's representation, that Petitioner had a potential or actual conflict of interest in representing him, and that Mr. Riley had a right to obtain the advice of outside counsel. *Mance*, HC Rpt. at 7. The court vacated the order imposing sanctions and the entry of summary judgment and remanded the case. *Mance*, 35 A.3d at 1127 (citing *Riley v. Metro New U*., *et al*., 989 A.2d 711, No. 08-CV-1391 (D.C. Feb. 3, 2010)).

Mr. Riley testified at the hearing that he paid Petitioner approximately $36,000 in attorney's fees. Tr. 206-07. He further testified that, on remand, he retained another attorney and paid him approximately $60,000, and the case eventually settled. Tr. 212-13. Petitioner testified that he had earned the fees Mr. Riley paid him and it never occurred to him that he owed Mr. Riley a refund. *See* Tr. 132-34.

Based on the above facts, Petitioner admitted to violations of Rules 1.1(a) (competent representation), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), and 1.7(b) (conflict of interest). *Mance*, HC Rpt. at 17-18.

c. *The Randolph Matter*

Petitioner represented another client, Sedley D. Randolph, in a criminal trial in Superior Court, which resulted in a conviction. *Mance*, 35 A.3d at 1127; *Mance* HC Rpt. at 10. On or around May 26, 2009, Mr. Randolph, who was incarcerated pending appeal and represented by

court-appointed counsel at the time, requested the return of his file from Petitioner, who failed to produce it. *Mance*, 35 A.3d at 1127; *Mance*, HC Rpt. at 10.

Mr. Randolph wrote to the Office of Disciplinary Counsel asking for assistance in obtaining his file. *Mance* HC Rpt. at 10. Disciplinary Counsel sent a letter to Petitioner on December 4, 2009, requesting a response to the complaint and reminding him of his ethical obligation to release a client's files upon termination of representation. *Id*. Petitioner failed to respond to Disciplinary Counsel's letter, which prompted Disciplinary Counsel to open a formal investigation and impose a deadline by which Petitioner was required to respond. *Id.* at 10-11.

Petitioner provided a response on February 11, 2010, acknowledged Mr. Randolph's request for his file, and agreed to send it to Mr. Randolph. *Id.* at 11. However, Petitioner did not send the file until April 7, 2010. *Id*. The file was returned by the federal correctional institution where Mr. Randolph was housed because Petitioner failed to follow the appropriate protocol for mailing packages to inmates housed in federal correctional institutions. *Id*. Petitioner subsequently completed the requisite form and mailed the files to Mr. Randolph on May 17, 2010, over three months after he promised Disciplinary Counsel he would do so and nearly one year after Mr. Randolph's request. *Id*.

Based on the above facts, Petitioner admitted to violating Rule 1.16(d) (failure to surrender papers after termination of representation). *Mance* HC Rpt. at 19.

2. Petitioner's Unadjudicated Acts of Misconduct

Pursuant to Board Rule 9.8(a),[4] Disciplinary Counsel also introduced evidence of Petitioner's unadjudicated acts of misconduct during the hearing. We find that the unadjudicated

[4] Board Rule 9.8(a) provides:

Notice to attorney. Evidence of unadjudicated acts of misconduct occurring prior

acts are supported by a preponderance of the evidence and, as such, are admissible, as explained below. *See* Board Rule 9.8(b).[5]

a. The *Swann* Matter, Bar Docket No. 2011-D219

As part of the negotiated discipline agreement, Disciplinary Counsel dismissed a complaint in the *Swann* matter with the understanding that it reserved the right to present the underlying facts and circumstances at a hearing on reinstatement. *Mance*, 35 A.3d at 1127, n.3; *Mance* HC Rpt. at 12-13. Disciplinary Counsel provided notice of its intent to introduce the *Swann* allegations in its Answer to the Petition for Reinstatement, as required by Board Rule

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to the Court's order of disbarment or suspension with fitness ("unadjudicated acts") may be introduced by Disciplinary Counsel at a hearing on reinstatement only if: (i) Disciplinary Counsel demonstrates that the attorney seeking reinstatement received notice, in Disciplinary Counsel's letter dismissing the complaint alleging the unadjudicated acts, that Disciplinary Counsel reserved the right to present the facts and circumstances of the unadjudicated acts at a reinstatement hearing; and (ii) Disciplinary Counsel gives notice in the Answer to the petition for reinstatement that he intends to raise the unadjudicated acts at reinstatement.

[5] Board Rule 9.8(b) provides:

> Admissibility of Unadjudicated Acts. Unadjudicated acts are admissible if supported by a preponderance of the evidence. Disciplinary Counsel shall be required to make a written proffer of the evidence to support admissibility of unadjudicated acts to the Chair of the Hearing Committee considering the petition for reinstatement, and to serve a copy of the proffer upon the petitioner. Except for good cause shown, this proffer shall be filed no later than ten days before the date of the prehearing conference, conducted pursuant to rule 9.7(c). The attorney seeking reinstatement may file a response within five days of the filing of Disciplinary Counsel's proffer. Unless the attorney indicates in writing that he or she does not contest Disciplinary Counsel's proffer, the Chair shall determine whether Disciplinary Counsel has met his burden of establishing the misconduct or may require the submission of proofs. The Chair, in his or her discretion, may also refer the matter to the full Hearing Committee for a determination.

9.9(b) and otherwise satisfied the criteria for admissibility for unadjudicated acts of misconduct. *See* note 5, *supra*.

Petitioner admitted to the misconduct in *Swann*, as described in the memorandum opinion and judgment of the D.C. Court of Appeals in *Swann v. Office of the Attorney General*, No. 09-CV-1509 (D.C. May 26, 2010). DX 5; *see* Tr. at 98-99, 108-09. The Court found that Petitioner represented Mr. Swann in a petition for judicial review of an adverse decision by the Office of Employee Appeals ("OEA"). DX 5 at 1. Petitioner filed untimely and failed to name and serve the proper party, the OEA, but instead named Mr. Swann's former employer, the Office of the Attorney General ("OAG"). *Id.* Petitioner then failed to oppose the OAG's motion to dismiss and the court granted the motion from the bench during a hearing in which Petitioner failed to appear. *Id.* Petitioner later filed motions to reinstate the appeal, but continued to miss court deadlines and to explain why he had not named the OEA, resulting in another order of dismissal. *Id.* at 1-2. Petitioner again noted an appeal, even though the appeal involved deficiencies in his representation. *Id.* at 2. The Court affirmed the trial court's order of dismissal. *Id.* at 3.

Mr. Swann paid Petitioner $3,500.00 for the representation. Tr. 75-76 (Mance). Petitioner refunded the fee to Mr. Swann only after he filed the Petition for Reinstatement. *Id.*; PX 5.

b. The *Hemphill* Matter, Bar Docket No. 2011-D398

Disciplinary Counsel dismissed a second complaint pending against Petitioner in the *Hemphill* matter after the Court imposed the negotiated discipline. In its Answer to the Petition for Reinstatement, Disciplinary Counsel asserts that it notified Petitioner in the letter of dismissal of its right to present the underlying facts and circumstances of *Hemphill* on reinstatement, but failed to *demonstrate* that Petitioner received the required notice by introducing the letter itself into evidence. *See* Board Rule 9.8(a) (unadjudicated acts may be introduced on reinstatement

"only if: (i) Disciplinary Counsel *demonstrates* that the attorney seeking reinstatement received notice, in Disciplinary Counsel's letter dismissing the complaint alleging the unadjudicated acts, that Disciplinary Counsel reserved the right to present the facts and circumstances of the unadjudicated acts at a reinstatement hearing . . . .") (emphasis supplied). Petitioner, however, does not dispute that he was notified in the letter of dismissal of Disciplinary Counsel's intent to introduce the *Hemphill* matter. We therefore accept Disciplinary Counsel's proffer that it provided the required notice to Petitioner.

Disciplinary Counsel did file the written proffer required by Board Rule 9.8(b) to support the admissibility of the unadjudicated acts of misconduct in *Hemphill*. The written proffer states as follows:

> On or about April 2011, Mr. Hemphill retained Petitioner to assist him with matters involving a deposition by the United States Attorney's office. Petitioner represented Mr. Hemphill at the deposition. After the deposition, Petitioner agreed to write a letter on Mr. Hemphill's behalf to the Assistant United States Attorney who was threatening to seize additional funds from a pension owned by his wife and used by both Mr. Hemphill and his wife to pay expenses. Mr. Hemphill understood that the letter would discuss why it would be a hardship on him to seize additional funds from this account. Between April and August 2011, Mr. Hemphill tried to reach Petitioner to discuss the letter and its status. Petitioner did not respond to Mr. Hemphill's attempts to communicate with Petitioner. On September 1, 2011, Mr. Hemphill received a letter from the United States Attorney's Office stating its intent to attach a portion of the pension unless he contacted them to stop the process before October 1, 2011. Mr. Hemphill tried unsuccessfully to reach Petitioner again. Petitioner never filed a letter on Mr. Hemphill's behalf. Mr. Hemphill paid Petitioner $1,000. Petitioner has not returned any of the funds to Mr. Hemphill.

[Disciplinary] Counsel's Proffer Pursuant to Board Rule 9.8(B) (Feb. 11, 2014).

Petitioner did not contest the written proffer, as provided in Board Rule 9.8(b). At the hearing, however, he admitted only that he failed to communicate with his client. Tr. 106-08. Disciplinary Counsel did not call Mr. Hemphill as a witness.

In light of Disciplinary Counsel's failure to introduce evidence to support the allegations in the written proffer, we find that Disciplinary Counsel established only that allegation in the proffer admitted by Petitioner – that Petitioner failed to communicate with Mr. Hemphill.

B. Recognition of the Seriousness of the Misconduct

The Court assesses "a petitioner's recognition of the seriousness of misconduct as a 'predictor of future conduct.'" *In re Sabo*, 49 A.3d 1219, 1225 (D.C. 2012) (quoting *In re Reynolds*, 867 A.2d 977, 984 (D.C. 2005) (per curiam)). "'If a petitioner does not acknowledge the seriousness of his or her misconduct, it is difficult to be confident that similar misconduct will not occur in the future.'" *Id*.

Disciplinary Counsel agrees that Petitioner "has not been reluctant to admit the misconduct and he has acknowledged it to others." DC Brief at 10. Petitioner recognized that his clients were entitled to better service, Tr. 55, and testified credibly, and at length, that he was remorseful and disappointed in himself and had gone through a period of introspection. *Id.* ("[I]t was disappointing to me that I did not respond to [Mr. Garrett] in a manner that I should have."); Tr. 61-63 ("It was difficult to understand how I could allow these things to happen, when I had the ability for it not to happen, if I had done what I was supposed to do."). Petitioner's character witnesses corroborated his testimony. Tr. 23-26 (Rogers); Tr. 32-36 (Cooke). For example, they both recounted conversations with Petitioner in which he expressed remorse for his ethical lapses and a desire to change the behaviors that caused his misconduct. *E.g.*, Tr. 24-25 (Rogers); Tr. 32-33 (Cooke).

At the same time, true recognition of the seriousness of misconduct requires more than admissions or expressions of remorse. Thus, while Petitioner recognized the need to "control [his] calendar" and not take on too much work, Tr. 64, he failed to demonstrate that he fully grasps the root causes of his misconduct and has taken concrete steps to address it by, for

example, taking the courses or training necessary to establish his proficiency in case management. *See* Section C, *infra*. Moreover, Petitioner paid restitution to Mr. Hemphill, Mr. Swann, and Mr. Garrett only after he filed his petition for reinstatement years after his representation of these clients ended. PX 3-5. Thus we find that Petitioner has failed to satisfy the second *Roundtree* factor.

C. Petitioner's Post-Discipline Conduct, Including Steps Taken to Remedy Past Wrongs and Prevent Future Ones

Under the third *Roundtree* factor, the Court considers a petitioner's "conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones." *Roundtree*, 503 A.2d at 1217. While Petitioner has made some efforts to address his misconduct, those efforts are insufficient to establish that he is prepared to implement the significant positive changes necessary to create a clear and convincing case of rehabilitation.

Petitioner testified that he attended training sessions and continuing legal education courses on ethics, electronic filing systems, and the D.C. Bar's Basic Training and Beyond course in 2012. PX 2; Tr. 51-57, 192-96. He testified that the "Basic Training and Beyond" course taught him to adhere to deadlines and be more responsive to clients, Tr. 65, and he acknowledged the need to control his calendar and to not accept work he is unable to handle, Tr. 64. At the same time, however, Petitioner failed to establish that he has taken the proactive measures necessary to address the deficiencies in his practice, including such fundamental steps as developing a practice management plan. *See, e.g.*, Tr. 144 (Petitioner stopped using an accounting system because "it was just too complicated for [him]"), 191 (Petitioner is unsure of the type of office support he will require if reinstated, because he does not know what kind of client base he will have). The gap between Petitioner's recognition of the seriousness of his

misconduct and his failure to take practical steps to address it gives little assurance that, if reinstated, Petitioner will not repeat the pattern of misconduct that led to his suspension.

Disciplinary Counsel asserts that Petitioner's failure to pay restitution to Mr. Garrett, Mr. Swann, and Mr. Hemphill until after he filed the petition for reinstatement, and to pay any restitution to Mr. Riley, coupled with his ongoing and repeated overdrafts on his personal account, bar his reinstatement.[6] In its order imposing negotiated discipline, the Court held that restitution would be a "prerequisite to any future reinstatement proceeding on the question of fitness." *Mance*, 35 A.3d at 1127. Petitioner fully satisfied his restitution obligations only after Disciplinary Counsel moved to dismiss the Petition for Reinstatement for failure to pay restitution.

Specifically, in the *Garrett* matter, Petitioner agreed to refund his client's $4,500 retainer and to pay him an additional $15,000 to settle their differences, after Mr. Garrett filed the disciplinary complaint against him. *Id.* at 1126. Petitioner paid $900.00 to Mr. Garrett in 2009, and thereafter stopped communicating with his client. *Id.* Mr. Garrett then filed a claim in Small Claims court and obtained a stipulated judgment in January 2012 for $5,000, plus post-judgment interest at the statutory rate and court costs. DX 6. Despite the existence of the stipulated judgment, however, Petitioner failed to refund the full $4,500 legal fee to Mr. Garrett for over eighteen months, and then only after Disciplinary Counsel filed a motion to dismiss the petition

[6] Disciplinary Counsel did not introduce any documentary evidence of Petitioner's overdrafts; however, Petitioner did admit to the overdrafts during his testimony. *See* Tr. 92-93 (admitting that he has had an overdraft in his checking account about once per month for the past year, which have since been "taken care of"), 198 (admitting he had been bouncing checks from his checking account in 2013).

for reinstatement for failure to pay restitution.[7] *See* PX 3 (checks to Mr. Garrett totaling $4,700 and Mr. Garrett's acknowledgement that he received an additional $300). When asked why he failed to satisfy his restitution obligation earlier, Petitioner explained that it was "bad budgeting and bad money management." Tr. 59.

In the *Riley* matter, Petitioner maintains that he had no restitution obligation, because he earned the legal fees he had received between 2006 and 2008, and he was not paid any fees in 2009, when the misconduct occurred. Tr. 128, 132. Disciplinary Counsel disputes Petitioner's contention, arguing that he owed restitution to Mr. Riley because of the harm he caused his client. DC Brief at 6, 9-10. Restitution, however, is distinct from damages resulting from an attorney's malpractice. *See In re Robertson*, 612 A.2d 1236, 1240 (D.C. 1992). Rather, restitution is defined as "a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation." *Id*. On this record, there is an insufficient basis to conclude that Petitioner owed restitution to Mr. Riley.

With respect to Mr. Swann and Mr. Hemphill, Petitioner also refunded their legal fees, but only after Disciplinary Counsel moved to dismiss the Petition for Reinstatement.[8] Petitioner

[7] Petitioner paid Mr. Garrett a total of $5,900, including his initial $900.00 payment in 2009. His restitution obligation attached only to his obligation to refund the $4,500 retainer. *See In re Robertson*, 612 A.2d 1236, 1240 (D.C. 1992) (the restitution obligation applies to the reimbursement of funds paid to the lawyer).

[8] Because neither the *Swann* nor the *Hemphill* matters were the basis of the Court's order of discipline, they technically are not subject to the Court's restitution condition. Petitioner's repayment of the legal fees, although late, is nonetheless relevant to the reinstatement determination, because it is evidence of his recognition of the seriousness of the misconduct and steps taken to remedy it.

maintains that the payments show he has taken "full responsibility" for his misconduct, but he did not otherwise explain the reasons for the late payments. *See* Pet. Brief at 5.

Generally, the Court has granted reinstatement, even where a petitioner has not fully satisfied a restitution obligation, where the petitioner explained the basis for non-payment, acknowledged that restitution was owed, and established he or she had taken substantial steps to pay restitution. *See*, *e. g.*, *In re Courtois*, 931 A.2d 1015, 1016 (D.C. 2007) (per curiam); *In re Turner*, 915 A.2d 351, 353 (D.C. 2006) (per curiam); *In re Kerr*, 675 A.2d 59, 60 (D.C. 1996) (per curiam); *see also Roxborough*, 775 A.2d at 1064.

Here, Petitioner finally satisfied his restitution obligations but, rather than providing any specific basis for late payment in the *Garrett* matter, merely offered a general explanation of "bad budgeting and bad money management." Tr. 59. Although, without more, Petitioner's delayed restitution payment might not be a barrier to reinstatement, when combined with the repeated overdraft status of his personal account[9] and his failure to establish that he is prepared to address the practice management problems that contributed to his misconduct, it demonstrates that Petitioner has failed to satisfy the third *Roundtree* factor.

D. <u>Present Character</u>

Elijah Rogers, Frederick Cooke, Esquire, and Antoini Jones, Esquire, long-time friends of Petitioner, each testified as to his good character. Tr. 10 (Rogers), 29 (Cooke), 154 (Jones). Mr. Rogers testified that he "always found [Petitioner] to be extremely responsible, dedicated to his family, dedicated to his friends, someone who is just very concerned about Washington, D.C., its

[9] We recognize that the Court did not discipline Petitioner for financial irregularities. Nonetheless, the problems with his finances are germane to the reinstatement determination, though of less consequence than the factors most relevant to the violations for which he was suspended. *See Roundtree*, 503 A.2d at 1217.

residents." Tr. 15. Mr. Rogers was unaware of the details of Petitioner's misconduct and appeared to believe it was related to the mishandling of funds. Tr. 19-20 ("[H]e indicated it was something dealing with some clients and funds."). Notwithstanding Petitioner's history of discipline, Mr. Rogers testified that he would not be reluctant to consult with Petitioner or refer clients to him. Tr. 16.

Mr. Cooke testified that Petitioner "is regarded well by many other practitioners, who know he and I – him and myself, I guess. I know that he cares very much about what he does and tries to be diligent, but he has fallen short on occasion, as we all do to some degree or another; but I know that he really very much wants to do the right thing, try to do the right thing." Tr. 34. Mr. Cooke was aware of Petitioner's misconduct and had read the Court's summary order imposing negotiated discipline, but he was unaware of the details. Tr. 33. He testified that, in his opinion, "the probability of [Petitioner] engaging in the behavior that resulted in [his] current suspension from the practice of law are not likely to be repeated in the future." Tr. 36. Mr. Cooke acknowledged that his friendship with Petitioner influenced his prediction that he was likely to correct the issues that led to his misconduct. Tr. 39. Both Mr. Rogers and Mr. Jones testified that Petitioner's misconduct impacted him emotionally and offered their respective opinions that it was unlikely to recur. Tr. 15 (Rogers); Tr. 32, 36 (Cooke).

Mr. Jones testified that Petitioner has the character and competence to practice law. Tr. 158, 161. He was fully aware of Respondent's disciplinary record and the basis for his current suspension and testified credibly that it did not change his opinion that Petitioner has the competence and character to practice law. Tr. 166.

Because two of Petitioner's character witnesses – Messrs. Rogers and Cooke – were unfamiliar with the details of Petitioner's prior disciplinary rule violations, however, we give

their testimony little weight. *See In re Fogel*, 679 A.2d 1052, 1056 & n.9 (D.C. 1996). This is not an instance where their character testimony is of limited importance because the Hearing Committee has been assured that Petitioner has taken the steps to avoid future disciplinary rule violations. *Id*. (citing *In re Bettis*, 644 A.2d 1023, 1029-30 (D.C. 1994)). To the contrary, and as explained above, the Hearing Committee has no such assurance. Indeed, notwithstanding that Petitioner has taken responsibility for his misconduct and has expressed remorse, Tr. 76-80, which we credit, and the credible testimony of Mr. Jones, we find that Petitioner's failure to follow through and take concrete steps necessary to avoid similar misconduct in the future raises doubts about his present character. We therefore find that Petitioner has failed to satisfy the fourth *Roundtree* factor.

E. Present Qualifications and Competence to Practice Law

Petitioner testified that he has kept abreast of the law by working in the offices of his attorneys, Mr. Robinson and Mr. Jones, assisting with research and consulting on legal matters on an "informal" basis. Tr. 117-19. Mr. Jones testified that Petitioner's understanding of the cases on which he worked was consistent with his own and that he had produced competent legal research. Tr. 157. Petitioner also attended Continuing Legal Education courses on legal ethics in the tri-state area, a course on electronic filing and, as noted above, the "Basic Training and Beyond" course offered by the D.C. Bar's Practice Management Advisory Service. PX 2; Tr. 51-57, 192-96.

Petitioner may have kept current in his legal skills, but he failed to demonstrate that he is prepared to address the case management problems underlying his misconduct. He testified that, upon reinstatement, he plans to maintain his solo practice, would implement a tickler system, install financial and case management software, would try to employ legal interns and part-time

staff to assist with file management, and would consult with the office manager at Mr. Jones's law firm concerning practice management. Tr. 145, 190-91. He further testified that he understood he would need administrative assistance, even with a software program. Tr. 183-84.

While Petitioner may have the best of intentions, the applicable legal standards require him to show more – *i.e.*, that he understands and is prepared to implement the case management techniques necessary to control his caseload and avoid future misconduct. Thus, while Petitioner promised that he would install case management software programs and use them in his practice, Tr. 145, there remains a substantial question as to whether he will actually be able to so, particularly because his previous attempt to employ a software program "was just too complicated for [him]." Tr. 144. Petitioner also failed to explain with any specificity how he intended to manage his case load, communicate with his clients, or calendar cases so that he can respond to court orders and schedules and meet filing deadlines. *See, e.g.*, Tr. 183 ("I think it would have to be something that on a daily basis or on a monthly basis, you can look at your schedule and see what to due [*sic*] and when it's due, and adhere to what – you know, what you have to do."). Accordingly, we find that Petitioner has failed to satisfy the fifth *Roundtree* factor.

Perhaps recognizing the shortcomings of his showing, Petitioner testified that he would comply with conditions of reinstatement requiring professional counseling and the completion of courses in accounting for attorneys. Tr. 143-44; *see* D.C. Bar R. XI, § 16(f) (providing for reinstatement with conditions). The imposition of conditions for reinstatement, however, is appropriate only if the Hearing Committee is satisfied that Petitioner has demonstrated he is fit to practice in the first instance, without conditions. *See In re Sabo*, 49 A.3d 1219, 1233 (D.C. 2012) ("[C]onditions on reinstatement are not a substitute for proof of fitness but are instead intended to 'help even a fit attorney . . . meet the challenges of returning to practice.'") (quoting *In re*

Robinson, 915 A.2d 358, 361 (D.C. 2007) (per curiam)). Given the persistence of Petitioner's case management problems, and his failure to show that he has the qualifications and competence to practice law, we can find no basis to recommend Petitioner's reinstatement with conditions. If Petitioner is to gain reinstatement, he must seek out professional counseling and obtain training in case management before he seeks reinstatement.[10]

V. CONCLUSION

Based on the foregoing, the Hearing Committee concludes that Petitioner has failed to establish all of the *Roundtree* factors and, therefore, has not demonstrated by clear and convincing evidence that reinstatement is warranted or appropriate. The Hearing Committee recommends denial of the Petition for Reinstatement.

HEARING COMMITTEE NUMBER SIX

/ALB/
Andrea L. Berlowe, Esquire
Chair

/SAW/
Ms. Sherry A. Weaver

/SRH/
Sharon Rice-Hicks, Esquire

Dated: February 22, 2016

[10] Petitioner might contact Dan Mills, the Assistant Director of the D.C. Bar's Practice Management Advisory Service, for more targeted training in case management.