DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
KEVIN M. SABO,	:	
	:	D.C. App. No. 11-BG-421
Petitioner.	:	Bar Docket No. 015-11
	:	Board Docket No. 11-BD-003
A Disbarred Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 435676)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes to the Board on Professional Responsibility (the "Board") from Hearing Committee Number Six (the "Committee"), which concluded that Petitioner Kevin M. Sabo's Petition for Reinstatement should be granted with conditions.[1] Bar Counsel does not except to the Committee's recommendation. Upon review of the record, the Board disagrees with the Committee and recommends that the Petition for Reinstatement be denied.

I. PROCEDURAL HISTORY

Petitioner was disbarred on consent on July 3, 2003. *See In re Sabo*, 828 A.2d 168 (D.C. 2003) (per curiam).[2] On January 4, 2011, Petitioner filed a Petition for Reinstatement with the Board and the required Reinstatement Questionnaire. On April 5, 2011, Bar Counsel filed a report with the Court pursuant to D.C. Bar R. XI, § 16(e). The report stated that Bar Counsel was satisfied that Petitioner met the criteria for reinstatement and that it did not contest the

[1] The Hearing Committee recommended that Petitioner's reinstatement be conditioned on his continued mental health counseling for a period of five years.

[2] The disbarment by consent was imposed *nunc pro tunc* to May 19, 2003, the date Respondent filed the affidavit required by D.C. Bar R. XI, § 14(g). By the same order, Bar Counsel's petition for discipline based upon Respondent's criminal conviction in the Circuit Court of Arlington County, Virginia, was dismissed as moot.

petition, although it recommended the imposition of a condition of reinstatement,[3] that Petitioner "be required to continue his mental health counseling . . . for five years after his reinstatement." Bar Counsel's Report to District of Columbia Court of Appeals Regarding Petitioner's Petition for Reinstatement ("Bar Counsel's Report") at 7. By Order of June 7, 2011, the Court referred the Petition for Reinstatement to the Board for its recommendation pursuant to D.C. Bar R. XI, § 16(e),[4] and ordered the Board's recommendation to be filed in 60 days. On June 9, 2011, the Board ordered the parties to file simultaneous briefs within 15 days, addressing questions set forth in the Court's Order.

On June 14, 2011, Petitioner filed a consent Request for Hearing before a Hearing Committee "to present character and mental health testimony" to aid in the analysis of questions raised by the Court. The Board on June 24, 2011, directed that "this matter should be referred to a Hearing Committee to develop the record to determine whether Petitioner meets the criteria for reinstatement," and to provide an opportunity for Bar Counsel "to more fully explain the details of its investigation and its basis for not opposing the petition for reinstatement." The Committee was tasked to conduct the required evidentiary hearing and file its Report with the Board within 60 days. The Board also filed a Report with the Court on June 24, 2011, advising it of the scheduling of the evidentiary hearing, and recommending that the Board's recommendation be due 60 days following receipt of the Committee's Report. By Order of July 12, 2011, the Court ordered the filing of the Board's recommendation within 120 days, or by November 9, 2011.

[3] Bar Counsel had filed an unopposed motion on March 1, 2011, for additional time to investigate the Petition, including an independent mental health evaluation of Petitioner, in order to complete its investigation and determine whether it would contest the Petition. The Board granted the Motion on March 10, 2011.

[4] The specific guidance given by the Court to the Board is set forth hereinafter.

The Hearing Committee Chair issued an order on June 24, 2011, scheduling a pre-hearing conference for June 29, 2011, at which time the parties would know the availability of their witnesses for scheduling an evidentiary hearing in July, and be prepared to set due dates for "the filing of witness lists, exhibits, and stipulations." At the June 29, 2011 pre-hearing, a hearing date of July 21, 2011, was set. Following a telephonic status conference on July 12, the one-day evidentiary hearing took place July 21, 2011. Petitioner testified and also called five witnesses – four provided character testimony and one testified as to Petitioner's mental health treatment during 2005 and 2006. Bar Counsel presented one witness, Dr. Neil Blumberg, the psychiatrist who had been retained by Bar Counsel "to evaluate Kevin Sabo"[5] and to assist Bar Counsel in determining its position on the reinstatement petition. The hearing concluded that day with the testimony of Petitioner. Following the filing of briefs by both parties specifically responding to the Court's questions, as directed by the Committee, the Committee filed its Amended Report and Recommendation on September 20, 2011, having received a brief extension of time from the Board.[6] On September 21, 2011, Bar Counsel filed a letter notifying the Board that it did not take exception to the Committee Report.[7] The Board has since reviewed the record and makes the following findings and recommendation.

[5] Transcript ("Tr.") of July 21, 2011 at 10.

[6] The Committee filed its Amended Report under seal pursuant to the Board's Protective Order of August 9, 2011. In an order issued simultaneously with this Report and Recommendation, the Board has (1) modified the Board's August 9, 2011 Protective Order to permit disclosure of the material from Petitioner's Exhibit Four (the subject of the Protective Order) referenced and quoted in both the Hearing Committee's Report and this Board Report, and (2) provided that both reports shall be made a part of the public record.

[7] Petitioner has not filed a notice of exception or otherwise responded to the Hearing Committee Report.

II. FINDINGS OF FACT

The Board has reviewed and adopts the Findings of Fact made by the Committee as supported by substantial evidence in the record. To avoid duplication of those Findings, we incorporate them by reference. What follows is a summary of the relevant facts.

A. January 28, 2000 Felony Conviction

Petitioner, a member of the District of Columbia Bar since December 7, 1991, was convicted in the Circuit Court of Arlington County, Virginia, on January 28, 2000 of attempted malicious wounding in violation of Virginia Code §§ 18.2-26 and 18.2-51, a Virginia Class 3 felony. Petitioner was sentenced to an 18-month term of imprisonment and ordered to pay a fine of $1,668.00. The conviction was upheld on appeal. Petition at 1-2.[8] The facts presented to the jury were that Petitioner cut the brake lines of his girlfriend's car, causing her to lose control and hit a fence. Neither she nor anyone else sustained injuries. HC Report at 7, FF 3.[9] The Court disbarred Petitioner on consent pursuant to D.C. Bar R. XI, § 12 on July 3, 2003.

Petitioner maintained his innocence at trial and continues to do so in this reinstatement proceeding. HC Report at 7, FF 8. His contention on appeal, and to this day, has been that incriminating statements made by him during tape-recorded telephone conversations with his girlfriend, and intended victim, should have been suppressed at trial.[10] Petition at 2, 90-91. The

[8] Petition for Reinstatement, Reinstatement Questionnaire, and Accompanying Attachments (hereinafter "Petition").

[9] Amended Report and Recommendation of Hearing Committee Number Six to the Board on Professional Responsibility, September 20, 2011, hereinafter "HC Report," or "FF __."

[10] Petitioner claimed the telephone conversations, wherein he made key admissions on tampering with Ms. Lawrence's car, were made in violation of his constitutional rights, *i.e.*, (1) that the victim was acting as an agent for the Commonwealth, and (2) that she got the admissions from him by coercion and threats. Petition at 93-95. The Court of Appeals of Virginia affirmed the trial court's denial of Petitioner's motion to suppress. In its Opinion, the Virginia Court noted that the trial record showed that Petitioner's attorney was able to cross-examine Ms. Lawrence (the "girlfriend/victim") regarding her taped telephone conversations with Petitioner, and Petitioner "was able to testify regarding statements made by the parties that were not recorded," and "threats she made to him that prompted him to falsely admit tampering with her car." Petitioner did concede that "he made the statements contained on the tapes." Petition at 102.

Hearing Committee understood that Petitioner "has always denied tampering with Ms. Lawrence's car and thus attempting to injure her" but recognized that "'he has never questioned the seriousness of the personal behavior that brought about the series of events leading to his conviction and eventual disbarment.'" HC Report at 7, FF 9 (quoting Petition at 3).

> In brief, the circumstances of [Petitioner's] original conviction were the obsessive behavior of a medically depressed individual.

Petitioner's Brief Before Hearing Committee Six, August 2, 2011, at 21.

Petitioner concedes that he was convicted of a crime of moral turpitude. Petition at 3. He also concedes that he has faced a long-term struggle with depression, that he "ignored evidence" in the late 1990's that his depression "was playing a large role in the decisions" he was making as to his personal life, and that at the time of the crime, he was "suffering from severe bipolar depression accompanied by suicidal ideations." Petition at 3; Petition at 14 (Reinstatement Questionnaire ¶ 14).

B. Petitioner's Life Since the 2000 Conviction

Prior to his 1999 arrest, Petitioner worked as a senior staff member on the House of Representatives' Committee on Government Reform and Oversight. HC Report at 9, FF 19. In the decade since his arrest and conviction, "[Petitioner] has sought to restructure his life in a manner to ensure that he returned to be a productive and honest contributor to society." Petition at 3; Tr. at 218-25. Petitioner was separated from his wife in 1999 and involved in a destructive relationship with Ms. Lawrence. HC Report at 9, FF 16. "During the trial and thereafter, Petitioner has established a more stable relationship with his former wife, and has maintained a good relationship with his daughter." HC Report at 9, FF 17. In 2003, he inquired about acquiring a real estate license in Virginia. He was informed that due to his criminal conviction, it would be denied. Petition at 12 (Reinstatement Questionnaire ¶ 9). Petitioner has "established

a small home renovation business that is well-regarded in his community." HC Report at 9, FF 20.

Petitioner has further strengthened his personal life by becoming "very active, in increasingly responsible positions, at the Annandale United Methodist Church." HC Report at 10, FF 22. Rev. Clarence R. Brown, Jr., Senior Pastor there, and a witness with whom the Committee was "particularly impressed" and whose testimony it "places great weight on," has known Petitioner since 2004 and stated how Petitioner has "transformed his life for the better since his arrest and conviction." HC Report at 12, FF 35; HC Report at 10, FF 26. Petitioner considered becoming a candidate for the ministry in 2008, but was informed that due to the nature of his criminal conviction, the church would not endorse him. Petition at 12 (Reinstatement Questionnaire ¶ 9).

Another witness providing credible character testimony on behalf of Petitioner was Mr. J. Russell George, the Inspector General of the Internal Revenue Service. HC Report at 12, FF 36. He has known Petitioner since before his 2000 conviction, having worked with Petitioner in 1995 on the Committee on Government Reform and Oversight. HC Report at 12, FF 37. Mr. George has seen a "dramatic difference" in Petitioner's attitude since before the 1999 arrest and after. HC Report at 13, FF 42. He believes Petitioner understands and has internalized how his personal actions led to the 1999 arrest, and has "taken significant steps to try to overcome those personal failings." HC Report at 12, FF 38-39. Mr. George is aware of Petitioner's legal abilities and would hire him if able. HC Report at 13, FF 40.

C. 2009 Criminal Charge – Home Depot

As part of his remodeling business, Petitioner has purchased tens of thousands of dollars of raw material at Home Depot, Lowes, and other stores. HC Report at 14, FF 52. On April 19,

2009, Petitioner sought to resolve a dispute with Home Depot over a special order that was damaged. Petition at 8-9 (Reinstatement Questionnaire ¶ 21). Petitioner needed the item to complete a remodeling job he was doing for a customer. HC Report at 15, FF 55. In the past when this had happened, Home Depot had agreed to accept "purchase returns." HC Report at 15, FF 56. "In this instance, the Home Depot clerk accused Petitioner of damaging the [special order] item after he received it, which infuriated Petitioner." HC Report at 15, FF 57; Tr. at 190. Petitioner asked the customer service representative to simply accept as a "return" various items in his shopping cart, which also included a few off-the-shelf items he had not yet purchased. Petition at 8-9 (Reinstatement Questionnaire ¶ 21). As Petitioner left the store, he was stopped by a Home Depot employee who had been observing Petitioner's "heated" conversation with Home Depot customer service staff. *Id.* Some of the items in Petitioner's cart had not yet been purchased, prompting the store to press charges. *Id*.

Petitioner stated in his Reinstatement Questionnaire that it was all a mistake; that "in his frustration over the special order dispute, he had forgotten that some of the items in his cart had not yet been purchased." *Id.* The Committee found this explanation "very credible." HC Report at 15, FF 59. When Home Depot pressed charges, the Fairfax County police issued a Virginia Uniform Summons for Petitioner to appear in court on a charge of Larceny by False Pretenses, a violation of Virginia Code § 18.2-178. HC Report at 14, FF 53. On May 15, 2009, Petitioner appeared in Fairfax County General District Court and "entered a plea of guilty to the charge of larceny by false pretenses." HC Report at 16, FF 64. The judge deferred the entry of any judgment and placed Petitioner on probation in a "VAC program."[11] *Id.* In that program, Petitioner was required to perform 75 hours of community service, plus make restitution of

[11] Respondent was offered this first-offender treatment, notwithstanding his prior felony conviction. Petition at 33; Petitioner's Brief to Hearing Committee at 12 n.1.

$52.00 to Home Depot. HC Report at 16, FF 65-67. On May 20, 2010, the court dismissed the charges based on Petitioner's successful completion of all terms of the probation. *Id.*

D. Petitioner's Mental Health Condition and Treatment

Petitioner has been in mental health treatment since 1995. HC Report at 19, FF 80. Petitioner has acknowledged that at the time of the events leading to his conviction, he suffered from "severe bipolar depression accompanied by suicidal ideations" and that "[h]is treating psychiatrist testified as to his condition in a November 1999 suppression hearing." Petition at 14 (Reinstatement Questionnaire ¶ 14). The evidence adduced at the hearing, however, was that Petitioner suffered from chronic or recurrent depression. Petitioner's first treating psychiatrist, Dr. Brantley, provided counseling to Petitioner "intermittently from 1995 through 2000." HC Report at 19, FF 80-81. Dr. Brantley diagnosed Petitioner as suffering from "a chronic depressive illness." HC Report at 19, FF 82. In March 1999, just prior to the attempted malicious wounding, Dr. Brantley found that Petitioner "experienced an exacerbation of his depression, depressive symptoms as well as severe anxiety symptoms." HC Report at 19, FF 83. Following Petitioner's release from incarceration, he ceased his therapy with Dr. Brantley due to insufficient funds. HC Report at 20, FF 86. In 2005 and 2006, Petitioner received psychotherapy and prescription medication at the Alexandria Community Services Board, which was free or discounted. HC Report at 20, FF 86-90. Petitioner's therapist at that time, who testified before the Committee, "saw some depression, but nothing major." Tr. at 126. In July 2006, Petitioner completed his treatment at the Alexandria Community Services Board and received medication for several months thereafter. HC Report at 22, FF 101. In 2008, Petitioner began medication treatment with Dr. Richard Blanks, associated with George Washington

University. At the time of the hearing, Petitioner was seeing Dr. Kristine Dangremond, a psychiatry resident at George Washington University. HC Report at 22, FF 104.

Petitioner has also been examined by Bar Counsel's forensic psychiatrist, Dr. Neil Blumberg, over five sessions. HC Report at 23, FF 110. Dr. Blumberg testified that it is his opinion that Petitioner

> has had a history of a major depressive disorder that at times has been severe. It falls into the recurrent category as opposed to just a single episode . . . . [A]t the present time, his depression is in remission.

Tr. at 13.

According to Dr. Blumberg, Petitioner's depression is currently in remission because he is taking antidepressant medication and is actively involved in mental health treatment. "[T]hat combination has kept his depression in check." Tr. at 13 (Blumberg). Nonetheless, Dr. Blumberg also had the following exchange with Bar Counsel at the hearing:

> Q. [Y]ou said that the depression is recurring . . . If you continue with counseling and antidepressant medications, will it reoccur anyway, or is that likely to keep him in remission?
>
> . . . .
>
> A. [T]he answer is yes, yes . . . . [T]his is an illness. It can have a mind of its own . . . . with treatment, with both psychotherapy and antidepressant medication, it is more likely than not that the depression will be kept in check . . . . I would not anticipate with treatment that he would have a major worsening of the depressive illness. It's possible, but that's the whole point in keeping him in treatment.

Tr. at 14-15.

Dr. Blumberg further described Petitioner's illness as chronic: "If he stops treatment, especially with having had at least several depressive episodes, there's a high likelihood that he's going to become depressed again, so I would say that this is really a lifelong commitment for

him." Tr. at 20. As succinctly put by the Committee: "Petitioner, Bar Counsel, Dr. Blumberg, and Dr. Dangremond all believe that continued therapy is essential for Petitioner to avoid depressive episodes and the attendant problems such episodes might create." HC Report at 29, FF 134.

III. CONCLUSIONS OF LAW AND RECOMMENDATION

D.C. Bar R. XI, § 16(d), places upon a disbarred attorney seeking reinstatement the burden of proving by clear and convincing evidence:

> (1) That the attorney has the moral qualifications, competency, and learning in law required for readmission; and
>
> (2) 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.

In *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), the Court described five factors to guide the determination of whether the required burden of proof has been met: (1) the nature and circumstances of the misconduct for which the attorney was disciplined; (2) the attorney's recognition of the seriousness of the misconduct; (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 Court in its referral order has also set forth two added concerns we must address: (1) "[whether] in light of petitioner's re-arrest, petitioner has sufficiently addressed his health issues that led to the circumstances that resulted in his disbarment;" and (2) "to what extent the condition suggested by Bar Counsel [five years of continued mental health counseling] was chosen and deemed adequate." Order, *In re Sabo*, No. 11-BG-421 (D.C. June 7, 2011).

1. Nature and Circumstance of Misconduct

Petitioner was convicted after a jury trial of attempted malicious wounding, a Virginia Class 3 felony.[12] The facts underlying the conviction were that Petitioner cut the brake lines of a car owned by Ms. Lawrence, his former girlfriend. When she attempted to drive the car, she lost control and drove into a fence. Although neither Ms. Lawrence nor anyone else was injured, "the severed brake line clearly had the potential to injure her or others." HC Report at 32. As concluded by the Committee: "[Petitioner's] misconduct was extremely serious." HC Report at 33. Petitioner served approximately twelve months in prison for his conviction. HC Report at 32.

2. Attorney's Recognition of Seriousness of Misconduct

The Court has consistently relied upon this *Roundtree* factor "as a predictor of future conduct." *In re Reynolds*, 867 A.2d 977, 984 (D.C. 2005) (per curiam) (appended Board report). The failure to acknowledge the seriousness of misconduct is a potential bar to reinstatement. *See id.*; *In re Molovinsky*, 723 A.2d 406, 409 (D.C. 1999) (per curiam); *In re Lee*, 706 A.2d 1032, 1035 (D.C. 1998) (per curiam) (appended Board report); *In re Fogel*, 679 A.2d 1052, 1055 (D.C. 1996). "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." *Reynolds*, 867 A.2d at 984 (appended Board report).

Petitioner has "consistently and continuously maintained his innocence of any criminal conduct involving Ms. Lawrence." HC Report at 33. Bar Counsel nonetheless submits that this is not a potential impediment to his reinstatement, because Petitioner "recognizes the seriousness of the events that led to his depression and the destructive relationship with his girlfriend." Bar

[12] Virginia Code §§ 18.2-26 and 18.2-51. One who attempts to cause "bodily injury [to any person] with the intent to maim, disfigure, disable, or kill. . . ."

Counsel's Report at 3. Bar Counsel explains that although Petitioner does not admit his guilt, "he was willing to discuss and answer questions concerning the government's and the defense's trial evidence, the events and circumstances of the conviction, and his state of mind at that time." *Id*. at 4.

At the hearing, Petitioner did not testify regarding the circumstances underlying his conviction. There is also some suggestion in the record that Petitioner continued to rely on his Fifth Amendment right against self-incrimination concerning his conduct even as late as August 2002, when appearing in the Circuit Court of Arlington County as a defendant in Ms. Lawrence's lawsuit for compensatory and punitive damages. Petitioner's Exhibit Two at 1168-73. There is evidence in the Petition that Petitioner did testify at his criminal trial concerning the tape recordings of his conversations with Ms. Lawrence. Petition at 102 (attached Opinion of Court of Appeals of Virginia affirming Petitioner's conviction).

At the same time, Bar Counsel's expert, Dr. Blumberg, interviewed Petitioner and found that he was "pretty forthcoming" when probed about his 2000 felony conviction and the 2009 Home Depot incident:

> [T]here was no indication that he was particularly defensive, which suggested to me that at least on the psychological measures, he was being open and disclosing . . . . I did not see him [in his interviews] as being particularly manipulative or hiding issues. I mean, when I probed him about the offense or probed him about the Home Depot situation or probed him about the details of the relationship with the girlfriend, who was the victim in this case and his marital relationship, he was pretty forthcoming.

Tr. at 22.

In light of Petitioner's continued denial of guilt in the attempted malicious wounding, which led to his disbarment, there is a question whether we can find that he recognizes the seriousness of his crime. Petitioner states that "he has never questioned the seriousness of the

personal behavior that brought about the series of events leading to his conviction and eventual disbarment." Petition at 3. Petitioner also does not contest that his criminal conviction involved an act of moral turpitude. *Id.* These "admissions" do not include an acknowledgment by Petitioner that he was personally involved in the criminal conduct, but instead suggest that he was involved in an out-of-control relationship. *Id.*

This case is somewhat similar to *In re Reynolds*, *supra*, where the petitioner, who had been convicted of DWI, eluding the police, and hit and run resulting from alcohol abuse, was denied reinstatement. Petitioner there (1) attempted to minimize the seriousness of his conduct as "mere 'traffic violations'", (2) only acknowledged "the seriousness of his offenses in the eyes of the law", and (3) failed to see the "import of his alcohol abuse (which caused his criminal conduct) in relation to his fitness to practice law." *Reynolds*, 867 A.2d at 985 (appended Board Report). Petitioner herein (1) has admitted the "seriousness of the personal behavior that brought about the series of events leading to his conviction", and (2) admitted the large role his depression has played in his life and need for continuing therapy and counseling. Petition at 3. He nevertheless continues to maintain that he is innocent of the charges. Tr. at 188.

This case is also similar to *In re Borders*, 665 A.2d 1381 (D.C. 1995), insofar as the Court denied reinstatement where the underlying crime was extremely serious (petitioner had been convicted for soliciting bribes from criminal defendants in exchange for lenient treatment by a federal district judge), and the petitioner did not provide a full explanation for his conduct. *Id.* at 1382-84. Even though the petitioner recognized the seriousness of his crime and was genuinely remorseful, his reinstatement was denied. *Id.* at 1383, 1385. The Court noted that (1) in his reinstatement hearing, the petitioner "refused to answer questions about the underlying events, although admitting that his conduct had been 'corrupt'", and (2) the petitioner "offered

no explanation for his involvement in the crimes." *Id.* at 1383. In contrast, Petitioner herein has made no such admission that he engaged in criminal conduct and has not accepted responsibility that his conduct was corrupt. Instead, he has ambiguously acknowledged that his "serious[]" and "flawed personal behavior" set off a chain of events, which led to his conviction and disbarment. Petition at 3.

As the Court explained in *Borders*, "[w]ithout an understanding of how or why Petitioner engaged in conduct so out of keeping with the William Borders everyone knew and respected in 1981, it is very difficult for the Bar to have confidence that he will not do the same thing again." *Borders*, 665 A.2d at 1385 (quoting Hearing Committee Report). In this case, we have some understanding of Petitioner's mental health condition at the time of the crime leading to his felony conviction, but that understanding is meaningless without Petitioner's recognition that it was connected to his criminal conduct. Without such recognition, the Board does not have the confidence that Petitioner will maintain his mental health treatment and will not engage in the criminal conduct that resulted in his felony conviction and disbarment and his subsequent plea of guilty to larceny by false pretenses from the Home Depot. Thus, as to *Roundtree* factor two, the Board does not believe that Petitioner has carried his burden that he recognizes the seriousness of his misconduct.

3. Post-discipline Conduct

Both the Committee and Bar Counsel point to the positive changes Petitioner has made in his life since his conviction and disbarment a decade ago: (1) his commitment to maintain mental health treatment, (2) his development of more stable personal relationships, (3) his development of a well-regarded, small home renovation business, and (4) his growing involvement in a church life. HC Report at 35-37; Bar Counsel's Report at 4-5. Having examined the Home Depot

incident in 2009, and while finding it troubling, the Committee concluded that with his commitment to health care counseling for the rest of his life, "coupled with his strong support network," Petitioner has satisfied *Roundtree* factor three. HC Report at 35-36, 40. Bar Counsel is of the same view. Bar Counsel's Report at 4-5.

There seems to be no doubt that Petitioner has turned his life around since the events of 1999. This is well-described in the Committee Report, at 35-40. Petitioner's pastor, Rev. Clarence R. Brown, Jr., "testified credibly and eloquently about [Petitioner's] transformation since his 1999 arrest and 2000 conviction . . . . " HC Report at 37. Taking into account all the testimony concerning Petitioner's changed life, the Board remains troubled about Petitioner's mental condition, described during the hearing as a lifelong depression, which led directly to the 2000 conviction, to some degree influenced the 2009 Home Depot incident,[13] and although "well controlled" at the time of the hearing, requires continued psychotherapy and antidepressant medication to prevent a major worsening. HC Report at 50 (quoting Dr. Blumberg). Petitioner admits to a long-term struggle with depression and underlying insecurities for which he was being treated in the mid-1990's. Petition at 14 (Reinstatement Questionnaire ¶ 14). Petitioner's psychiatrist then diagnosed him as having a "chronic depressive illness." HC Report at 19, FF 82.

Petitioner discontinued his medication and medical supervision in 1997, however, and at the time of his criminal conduct in 1999, admits that he "was suffering from severe bipolar depression accompanied by suicidal ideations." Petition at 14 (Reinstatement Questionnaire ¶ 14). The issue of bipolar illness was not explored at the hearing. However, we know that Petitioner has "consistently been on anti-depression medication since 2004." *Id*. Psychotherapy

[13] "[A]nger is just sort of one component of the depression." Tr. at 30 (Blumberg).

has, however, been intermittent, sometimes due to a lack of sufficient funds. Petitioner visited the Alexandria Community Services Board during the period March 2005 through July 2006 and saw a therapist there. HC Report at 20, FF 90. At the time of the hearing in July 2011, Petitioner was seeing a psychiatry resident at George Washington University. HC Report at 22, FF 104. These weekly visits commenced on May 19, 2010. Petitioner's Exhibit 4. It is unclear from the record what therapy Petitioner received between July 2006 and May, 2010. "At the time of the Home Depot incident (April 2009), Petitioner was taking medication, but he was not involved in psychotherapy." HC Report at 51.

To prevail on his Reinstatement Petition, Petitioner must by clear and convincing evidence demonstrate he has taken the steps necessary to prevent any recurrence of his misconduct. *Roundtree*, 503 A.2d at 1217. Dr. Blumberg opined that Petitioner's depression is recurring, but that with both psychotherapy and anti-depressant medication, "it is more likely than not that the depression will be kept in check . . . . [T]hat's the whole point in keeping him in treatment." Tr. at 14-15. As Dr. Blumberg described Petitioner's depression:

> [T]his is a major depressive disorder that's recurrent [and] is really no different than diabetes. It's a chronic condition. It's going to need to be treated and monitored throughout the person's lifetime. If one stops treatment with a history of having had at least two, if not more, significant depressive episodes, he's at a very high risk for having a third one if he stops treatment.

Tr. at 34.

The question for the Board is whether Dr. Blumberg's opinion that it is "more likely than not" that Petitioner's depression will be kept in check satisfies the standard for reinstatement. Does reinstatement on this basis protect the public interest? Further, has Petitioner carried his burden of proving that he will follow medical advice, keep current on his prescribed visits to his therapist, and continue to take his medication? Petitioner's record on this going back to 1994 is

not too promising. Petitioner was not seeing a therapist regularly when he had his two "problems" with the law in 1999 and 2009, and there is no evidence that a lack of funds was the reason that Petitioner was not regularly seeing a therapist at those times. HC Report at 25, FF 120-121.

The Committee and Bar Counsel recommend that the Court require mental health counseling for five years as a condition of reinstatement. HC Report at 59-60; Bar Counsel's Report at 7. The Board has seen no rationale as to why a five-year mental health counseling requirement would suffice. Bar Counsel states that the five-year period is somewhat arbitrary. Bar Counsel's Brief to the Hearing Committee, August 9, 2011, at 3. Dr. Blumberg believes the problem is of lifelong duration. Tr. at 34. We are mindful of the Court's concern about engaging the Board and Bar Counsel in monitoring an attorney's medical visits and medication regimen "solely to accommodate . . . [his] desire to continue practicing law . . . . " *In re Appler*, 669 A.2d 731, 740 (D.C. 1995) (attorney raised his bipolar disorder in mitigation of his sanction for numerous violations (illegal conduct, dishonesty and fraud)). In *Appler*, the Court thus declined to place the respondent on probation under *In re Kersey*, 520 A.2d 321 (D.C. 1987), and instead imposed disbarment, since indefinite monitoring of the respondent's mental health treatment by Bar Counsel, the Board, or the Court was necessary to protect the public. *Appler*, 669 A.2d at 739-42.

The Home Depot incident merely increases our concern under *Roundtree* factor three (post-discipline conduct). Most importantly, it occurred at a time that Petitioner had discontinued psychotherapy and, as the Committee recognized, evidenced Petitioner's inability to control his frustration or his anger. HC Report at 46, 57. The Committee noted that "this appears to be the only incident in the past 12 years in which Petitioner's frustration or anger has

been out of his control. All of the witnesses who testified for Petitioner attest that this behavior is inconsistent with Petitioner's character." HC Report at 47.

Dr. Blumberg testified that he was "concerned," following his interview with Petitioner, about the Home Depot incident. Tr. at 23. He was aware that Petitioner had been ordering products there and Petitioner had told him that some came in broken and needed to be returned. *Id.* According to Petitioner, Petitioner was getting pressure from his home remodeling customers to get their jobs done. *Id.* The staff at Home Depot, however, became more difficult, and it became more frustrating dealing with them. *Id.* Petitioner's anger and loss of control in handling this incident is a "red flag" for Dr. Blumberg. Tr. at 24. However Dr. Blumberg was "not sure what more . . . to make of it than that." *Id.* When asked about the impact of this incident on Petitioner practicing law again, Dr. Blumberg opined:

> I can't say that that incident would lead me to conclude that he should not be allowed to practice law. I would say that again, one of the safeguards would be his ongoing involvement in psychotherapy . . . .

Tr. at 25.

Bar Counsel has stated its concern about the Home Depot incident, but does not believe it "outweighs Petitioner's otherwise successful attempt to reintegrate himself into the community post-incarceration. Petitioner has a business, is active in his church, established a stable marital relationship, and has been forthright in his Petition, Questionnaire, and to Bar Counsel." Bar Counsel's Report at 5. The Board recognizes Petitioner's strides in the community, in his personal life and in coming to grips with his mental illness. We do not believe, however, that, given his second brush with the law during the Home Depot incident, at a time he was not in psychotherapy, that Petitioner has met the clear and convincing burden to show that his post-discipline conduct supports his reinstatement under *Roundtree* factor three.

4. Present Character

Under this *Roundtree* factor, a petitioner is required to prove that those traits which led to his disbarment "no longer exist . . . that the petitioner is a changed individual having a full appreciation for his mistake and a new determination to adhere to the high standards of integrity and legal competence which this Court requires." *In re Brown*, 617 A.2d 194, 197 n.11 (D.C. 1992) (quoting *In re Barton*, 291 Md. 61, 432 A.2d 1335, 1336 (1981)). Petitioner is expected to "put on live witnesses familiar with the underlying misconduct who can provide credible evidence of . . . petitioner's present good character." *Reynolds*, 867 A.2d at 986 (appended Board Report).

Petitioner called four character witnesses at the hearing. HC Report at 41. Two additional witnesses were listed in the Petition but did not testify at the hearing.[14] *Id.* Each witness was aware of Petitioner's disbarment, "had substantial contact with him" since then, and "spoke highly of Petitioner's character." *Id*. In particular, the Committee put "great weight" on the testimony Rev. Clarence Brown, senior pastor of Annandale United Methodist Church. HC Report at 37-38. Rev. Brown believes Petitioner is "someone who understands his imperfections but is striving to be better." HC Report at 38. Rev. Brown admitted he was only "obliquely" aware of Petitioner's more recent incident at the Home Depot, but stated that it didn't give him any particular concern. Tr. at 159.

J. Russell George, currently the Inspector General of the Internal Revenue Service (a Senate-confirmed position), has known Petitioner since 1994 when they both were staff attorneys on Capitol Hill. Tr. at 57-59. Mr. George not only was aware of the legal troubles that led to Petitioner's 2000 conviction and subsequent disbarment, but had testified as a character witness

[14] These two witnesses were, however, interviewed by Bar Counsel. HC Report at 41.

for Petitioner at the criminal trial. Tr. at 59-60. Mr. George believes that Petitioner has accepted how his personal actions led to his disbarment, and that Petitioner has "taken significant steps to try to overcome those personal failings." Tr. at 61. Were it not for "prohibitions that exist in terms of who you can hire in the federal government," Mr. George testified that he "wouldn't have [had] any hesitancy to hire [Petitioner] in a future capacity because of [his] experience with [Petitioner] in the past and [Petitioner's] legal abilities . . . . " Tr. at 67. Although Mr. George was not aware that the Home Depot dispute led to the issuance of a uniform summons and guilty plea by Petitioner, he was aware that the police were called. Tr. at 77-78. Those facts do not alter his view of Petitioner's good character. *Id.*

Based on the character witnesses and on Petitioner's own testimony, which was found "very credible," the Committee "is satisfied that Petitioner has demonstrated that he has strong moral character and integrity." HC Report at 42. Bar Counsel also believes Petitioner has met his burden of proof on *Roundtree* factor four. Bar Counsel's Report at 6. These are mixed questions of fact and law which the Board respects, but which, of course, are not binding on us. We are concerned about the Home Depot incident in that it shows Petitioner's tendency under highly stressful situations to lose his bearing. Dr. Blumberg testified that the incident, as he understood it, "stemmed from a lot of frustration and anger that [Petitioner] was experiencing." These questions and answers followed:

> Q. I'm told that practicing law can be frustrating, also. Is there anything about that frustrating situation at Home Depot that would make you evaluate whether Mr. Sabo should be admitted as an attorney?
>
> A. Well, it's a red flag. I'm not sure what more . . . to make of it than that. It sounds like it was pretty situation-specific . . . . It's an incident of poor judgment that I would be concerned about.

Id..[15]

Aside from Dr. Blumberg's concern about Petitioner's poor judgment, we are concerned that Petitioner has tended to downplay the Home Depot incident with at least three character witnesses. For example, Mr. George testified:

> Q. Mr. George, how do you factor in the Home Depot arrest . . . ?
>
> A. First of all, your statement is the first I've heard he was arrested. What Kevin did share with me is that there was a dispute and a complaint was filed. . . .

Tr. at 69-70. Later, Mr. George testified:

> Q. If you were aware that he pled guilty to an offense . . . and that it was later dismissed after a year after no further violations, would that affect your thoughts on Mr. Sabo's character?
>
> A. No. I mean, listen, he's been through quite a bit. And I'm going to be honest, he's never mentioned this to me, so that does kind of surprise me because I thought he would have mentioned this to me before.

Tr. at 69-70.

Another principal character witness, Reverend Brown, had also not heard that a uniform summons had been issued in connection with the Home Depot incident. When asked if Petitioner came to him for counseling over the Home Depot incident, Reverend Brown stated that Petitioner "mentioned [it] not in its entirety and not in its fullness that he was having an encounter . . . ." Tr. at 172. Subsequently, the Chair of the Hearing Committee had the following exchange with Reverend Brown:

> Q. My one concern is he was arrested there and it sounds to me like that he did not mention that to you; is that right?

[15] Petitioner disputes whether he was technically "arrested" in connection with the Home Depot incident. *See* Tr. at 196; HC Report at 14 n.4.

A. Yeah. I think I learned of that in a secondary fashion.

Tr. at 179.

A third character witness called for Petitioner was also unaware of the issuance of the uniform summons. Rebecca Webster was asked on cross-examination the following:

> Q. If you're aware that the incident at Home Depot resulted in Mr. Sabo pleading guilty to a criminal offense, would that change your opinion about Mr. Sabo's character?
>
> A. I would want to know the details of that. I'm not aware of that.

Tr. at 97.

Petitioner's unwillingness to fully disclose critical details of the Home Depot incident to his character witnesses (one would understand not wanting to discuss or mention the matter to unnecessary third parties), is consistent with his failure to fully disclose the events and motivations surrounding his 2000 felony conviction. Bar Counsel states that Petitioner "was willing to discuss and answer questions concerning the government's and the defense's trial evidence, the events and circumstances of the conviction, and his state of mind at that time," but the hearing record herein does not include such testimony. Bar Counsel's Report at 4. Dr. Blumberg testified that he "probed him about the offense" and that Petitioner was "pretty forthcoming." Tr. at 22. The details of that conversation are not in the record, however. Further, Petitioner continues to claim his "innocence of the underlying charge." Tr. at 188. We are not recommending that the Court rule that such a claim is an absolute bar to reinstatement. However, Petitioner's inability or unwillingness to place in this evidentiary record the full details and motivations surrounding his 2000 conviction, juxtaposed with his unwillingness to fully disclose all the details of the 2009 Home Depot incident to his own character witnesses, is troublesome. There is no evidence in this record that Petitioner recognizes or accepts his

personal and culpable involvement in the 1999 felony crime or recognizes the connection between his mental illness and that crime. This provides little assurance that Petitioner will not repeat the same or similar misconduct.

There are troublesome parallels between this case and *In re Borders*, *supra*. In *Borders*, the petitioner not only refused to testify as to his part in the crimes committed, but refused to give testimony under a grant of immunity as to the involvement of others in the criminal conspiracy. *Borders*, 665 A.2d at 1383. However, he did admit his conduct was corrupt. *Id.* As to the relevancy of this to the fourth *Roundtree* factor (present character), it was stated that petitioner's "inability or refusal to explain why he had become involved in the criminal conduct" blocked access to information necessary "to assess Petitioner's current moral fitness." *Id.* at 1385 (quoting Hearing Committee report). Further, the Court shared the Board's concern that:

> The fact that Petitioner cannot say why he did this may mean that he has not confronted his motivations from that time.

Id. (quoting Board report).

The Committee heard the testimony of Petitioner and several character witnesses, found him very credible, and found that he carried his burden in proving his present character. Bar Counsel is also of that view. For the reasons set forth above, the Board disagrees and finds that Petitioner has failed to establish the moral character necessary to satisfy *Roundtree* factor four.

5. Present Qualifications and Competence to Practice Law

Although having not engaged in the practice of law since 1999,[16] Petitioner has attended three continuing legal education (CLE) courses offered by the District of Columbia Bar, two in 2010 and one more recently. Petition at 6-7. Petitioner also has taken several introductory

[16] Petitioner, however, did draft his petitions and pleadings for his criminal appeals, *pro se*, and also represented himself successfully in the damage lawsuit brought against him by Ms. Lawrence in 2002. Petition at 6; Petition at 15 (Reinstatement Questionnaire ¶ 15).

courses on government contracting from the Northern Virginia Community College. *Id*. Both the Committee and Bar Counsel believe Petitioner has met his burden under *Roundtree* factor five – his competence and qualifications to practice law. HC Report at 42-43; Bar Counsel's Report at 6. We agree.

IV. SUMMARY

The Court has directed us to analyze this reinstatement petition in light of (1) Petitioner's Home Depot incident, (2) the efficacy of the condition (a required five years of mental health counseling) proposed by the Committee and Bar Counsel, and (3) the requirements of *Roundtree*. The Committee is satisfied as to each of these and is commended on its rapid turn-around of the evidentiary hearing and its written report. Bar Counsel does not contest the petition for reinstatement – indeed Bar Counsel believes that Petitioner has carried his burden under *Roundtree*. Bar Counsel's Report at 3-6.

Given the gravity of Petitioner's felony conviction for a crime of moral turpitude, he bears a particularly heavy burden to establish that he has satisfied the criteria for reinstatement. *See Borders*, 665 A.2d at 1382; *Molovinsky*, 723 A.2d at 409; *Lee*, 706 A.2d at 1032; *Fogel*, 679 A.2d at 1054-55. We find that Petitioner has not satisfied that burden here. Rather, we find that Petitioner's failure to acknowledge responsibility for the conduct underlying his 2000 conviction and to place on the record details of that matter, his mental health condition and history, including chronic depression if not severe bipolar illness,[17] and his guilty plea to larceny by false pretenses at the Home Depot, at a time he had discontinued psychotherapy, preclude a finding that he is fit to practice. We recognize that the Hearing Committee found that Petitioner was "very credible" and sincere when he testified as to how he had turned his life around. HC Report

[17] Petitioner's Response to Questions by Court of Appeals Regarding Application for Reinstatement, June 24, 2011, at 1-2.

at 28, FF 132. We also acknowledge that the record shows that Petitioner has a much healthier life today than in 1999, with strong support from a second marriage and an inspiring church life.

We are, however, required to serve as gatekeepers in recommending whether Petitioner is prepared to hold himself out to the public as fully qualified to practice law. Has Petitioner carried his burden of proving by clear and convincing evidence that his mental illness (which led to an extremely serious criminal act) is no longer of concern? Even with consistent therapy we are told that the depression could reoccur, but is "more likely than not" to be "kept in check." Tr. at 14 (Blumberg). Furthermore, Petitioner has a record of discontinuing treatment, both in 1999, at the time of the conduct underlying his felony conviction, and in 2009, the time of the Home Depot incident.[18] While we do not believe that a chronic mental illness precludes reinstatement, a petitioner should be required to demonstrate a high degree of commitment to maintaining the treatment necessary to manage his condition. Here, notwithstanding the serious consequences of his depression in 1999, Petitioner nevertheless discontinued treatment and thereafter engaged in additional misconduct only two years ago. Under these circumstances, a longer track record of compliance, without incident, is required to assure that Petitioner is and will remain fit to practice law.

The Court has on occasion ordered the reinstatement of a disbarred attorney with conditions designed to "help even a fit attorney to meet the challenges of returning to practice." *See, e.g.*, *In re Robinson*, 915 A.2d 358, 361 (D.C. 2007) (per curiam) (attorney who had been disbarred for misappropriation and dishonesty reinstated on his fourth petition after establishing that he had rectified his personal and business financial practices, with reinstatement conditioned on, *inter alia*, acceptance of a financial monitor for one year); *In re Shorter*, 603 A.2d 462 (D.C.

[18] At the time of the 1999 misconduct, Petitioner's therapy was "intermittent," and in 2009, Petitioner was not involved in therapy. HC Report at 25, FF 120-121.

1992) (per curiam) (attorney disbarred for convictions of willful tax evasion and willful failure to pay taxes reinstated with condition that he attend weekly Gamblers Anonymous meetings and receive monitoring for payment of his taxes for a period of five years); *see also* D.C. Bar R. XI, § 16(f) (providing that the Court may impose conditions on an attorney's reinstatement as it deems appropriate).

We find this case distinguishable from those where the Court has imposed reinstatement with conditions for mental health or addiction concerns. First, Petitioner's original misconduct was not the misuse of client funds (as serious as that is), neglect of client matters, and the like, but conduct that evidenced frustration and a serious loss of control, and which could have resulted in severe bodily injury, not only to the intended victim but to innocent third parties. Before he is reinstated, Petitioner must be able to demonstrate that he is able to cope productively with frustration and stress, which may arise in legal practice. Second, the record herein shows that Respondent's depression is chronic and lifelong, and even with constant counseling and medication, might reoccur. Third, when Petitioner faces frustrating situations (as recently as 2009), he can react badly. This is a red flag. Further, we have no clear and convincing evidence to conclude that Petitioner recognizes and accepts his personal involvement in the original criminal conduct and that he will not repeat it.

Bar Counsel supports a five-year monitoring requirement to assure that Petitioner complies with his treatment regime, including continued mental health counseling and medication "at a frequency and manner consistent with the mental health professional's recommendations." Bar Counsel's Report at 7. Petitioner has the potential for many more years of practice, but, unfortunately, all agree that his mental health condition (requiring constant mental health counseling) is life-long. Under these circumstances, and given the gravity of his

felony conviction, Petitioner must present a solid case to support reinstatement with the conditions the parties propose. Given the record before us, which shows a failure to acknowledge the crime of which he was convicted, a failure of consistent mental health counseling, and a record of recidivism with the Home Depot incident, we cannot find that Petitioner has made that case here. Accordingly, we recommend that the petition for reinstatement be denied.

CONCLUSION

For the foregoing reasons, the Board concludes that Petitioner has not carried his burden of proving that he is currently fit to resume the practice of law, even with the conditions recommended by the parties. We thus recommend that the Court deny the Petition for Reinstatement.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /RSB/
Ray S. Bolze
Chair

Dated: November 9, 2011

All members of the Board concur in this Report and Recommendation. Mr. Frank has filed a separate concurring statement.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
KEVIN M. SABO,	:	
	:	D.C. App. No. 11-BG-421
Petitioner.	:	Bar Docket No. 015-11
	:	Board Docket No. 11-BD-003
A Disbarred Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 435676)	:	

CONCURRING STATEMENT OF THEODORE D. FRANK

I concur in the Board's Recommendation that Petitioner's petition for reinstatement should be denied. I write separately because I reach my conclusion in a somewhat different manner than the Board. Specifically, I believe the Board has rested too much of its decision on Petitioner's mental illness, which apparently led to the events that resulted in his disbarment, but which I believe is not a material impediment to his reinstatement, and has made more of the Home Depot incident than the facts warrant. To me, the record indicates that Petitioner remains unwilling to accept the consequences of his conduct and is willing to shave the facts to avoid the hard truth about his actions.

At first blush, it would appear that Petitioner has made a very credible case that he should be reinstated, as the Hearing Committee recommended. Many of the findings relating to his petition turn on credibility determinations, and we are required to give great deference to such credibility findings. *See, e.g., In re Temple,* 629 A.2d 1203, 1208 (D.C. 1993). Moreover, I do not believe that Petitioner has failed to demonstrate the relationship between his crime and his mental illness, as the Board holds. *See Report and Recommendation* at 14. As I read the record, both Bar Counsel and the Hearing Committee concluded that Petitioner has accepted the fact that

his mental illness was a cause of the conduct surrounding his conviction. *See* HC Report at 34. Moreover, I believe the requirement that Petitioner remain under medical care for that condition is adequate, under the Court's precedent to support his reinstatement.[1]

While the Home Depot incident is troubling because it appears to suggest a relapse of Petitioner's prior problems, I believe the majority has made more of it than the facts warrant and that we may be establishing a standard of conduct few can achieve. I strongly suspect that many others have lost their temper in comparable circumstances where they believe they have been treated unfairly and improperly, but have been lucky to escape Petitioner's fate. Here, upset at what he viewed as mistreatment, Petitioner walked out of the store after receiving a credit for goods he did not purchase. HC Report at 15, FF 58-59. However, he was detained as he walked out the door before he had a chance to realize that he had received an improper credit. HC Report at 17, FF 68-71. The Hearing Committee found credible Petitioner's claim that "at no time did he enter the Home Depot with the intent of committing fraud." HC Report at 18, FF 78. I suspect that, in the normal course, Petitioner never would have been prosecuted. As the Hearing Committee found, Home Depot brought charges only after it learned that Petitioner had been convicted of a felony. HC Report at 15, FF 58-59.

Denying Petitioner reinstatement based on these facts when he has apparently turned his life around strikes me as unduly harsh. This is especially true given that Petitioner resolved the dispute with the individual at Home Depot (HC Report at 17, FF 72) and the court allowed him to plead under a first-offender procedure -- for which he was technically not eligible, and which is designed to avoid tarring individuals with a criminal conviction where, as here, the conduct

[1] *See, e.g., In re Verra*, 932 A.2d 503 (D.C. 2007) (per curiam); *In re Roxborough*, 775 A.2d 1063 (D.C. 2001) (per curiam); *In re McConnell*, 667 A.2d 94 (D.C. 1995) (per curiam).

was more the result of a loss of temper or a mistake of judgment. It is obvious that the court handling the case did not view Petitioner's conduct as egregious.[2]

My concern is that Petitioner has not only demonstrated a pattern of not fully accepting the consequences of his conduct and attempting to elude responsibility, but has also not provided a credible basis for his claim that he is innocent. I agree with the Hearing Committee and Bar Counsel that Petitioner's insistence on his innocence should not be a permanent impediment to reinstatement, but I also believe that, since he bears the burden of establishing his fitness, he has an obligation to demonstrate a reasonable basis to support his claim of innocence.[3] Without that, I do not see how a petitioner who professes innocence can establish his forthrightness and acceptance of responsibility for his conduct, "that he recognizes the seriousness of [his] conduct" or that "he has a full understanding of the nature and ramifications of his conduct," *In re Reynolds*, 867 A.2d 977, 979 (D.C. 2005) (per curiam), short of engaging in a fiction, dissembling, or otherwise contorting his position in order to address these requirements.[4]

---

[2] I recognize that Petitioner pled guilty to the charge arising out of the Home Depot incident, but believe that he did so to gain the benefits of Section 19.2-303-2 of the Virginia Code. Since the Virginia statute provides "[d]ischarge and dismissal under this section shall be without adjudication of guilt . . . . " Va. Code § 19.2-303.2, I believe that we should not place any significance on his plea and should look only at the underlying conduct, as we have.

[3] In arguing that a petitioner who professes innocence of his crime has a burden of establishing that his claim is credible, I recognize that D.C. Bar R. XI, § 10(f) provides that "a finding that an attorney is guilty of any crime . . . shall be conclusive evidence in any disciplinary proceeding based thereon." However, I do not believe that section 10(f) was intended to apply in circumstances such as these, unless the Court intended to preclude reinstatement where a petitioner maintains his or her innocence. Section 10 addresses "Disciplinary Proceedings Based Upon Conviction of Crime," whereas Section 16 addresses "Reinstatement." There is no provision in Section 16 that is comparable to Section 10(f). In the context of a disciplinary proceeding based on a conviction, a conclusive presumption of guilt is essential if the disciplinary system is not to retry the crime. This consideration does not apply with the same force in a reinstatement proceeding since the issue is not the petitioner's guilt or innocence, but rather whether the petitioner, who maintains he is innocent, has a credible basis for taking that position such that his conviction is not a harbinger of future misconduct.

[4] Petitioner here is faced with this dilemma and has attempted to address it by acknowledging the seriousness of the crime and his conduct in dealing with his ex-girlfriend. But, as noted below, those admissions do not, in my view, address the central question raised by the Court in *In re Borders*, 665 A.2d 1381 (D.C.1995) and other reinstatement cases concerning the petitioner's qualifications.

Petitioner has not provided any such showing to support his claim of innocence.[5] Rather, we are told that Petitioner has "recognized the seriousness of the events that led to his depression and the destructive relationship with his girlfriend" and that he "never questioned the seriousness of the personal behavior that brought about the series of events leading to his conviction and eventual disbarment." Bar Counsel's Report at 3; Petition at 3. Neither statement explains what Petitioner's involvement was, if any, with the criminal conduct of which he was convicted nor explains the basis on which he maintains his innocence. Petitioner's statement that "the circumstances of [Petitioner's] original conviction were the obsessive behavior of a medically depressed individual" is similarly devoid of any explanation of the relationship of those "circumstances" to the conviction. Petitioner's Response to Questions by Court of Appeals Regarding Application for Reinstatement, June 24, 2011, at 2. Without a clearer explanation of the basis on which Petitioner continues to profess his innocence, we are left to ponder the grounds on which he maintains innocence, and why he now accepts that his obsessive behavior led to his conviction, without acknowledging the crime, and, indeed, what he did that resulted in his conviction.[6]

Moreover, I find that the Petitioner's position concerning his conviction raises a troubling question about Petitioner's willingness or ability to accept fully his responsibility for his conduct. That concern is heightened by his technical challenge to the finding that he was "arrested" in

[5] Based on the record, it appears that Petitioner's defense to the criminal charges rested largely on his efforts to suppress tapes of his conversations with his ex-girlfriend. *See Sabo v. Commonwealth of Virginia*, 38 Va. App. 63, 561 S.E.2d 761 (2002). As the Board notes, Petitioner admitted during those conversations that he engaged in the criminal conduct for which he was convicted, *Report and Recommendation* at 4 n.9, although he argues that he did so only because his ex-girlfriend promised to drop charges if he did. *See* HC Report at 35 n.5.

[6] I am also concerned about Petitioner invoking his privilege against self-incrimination in the civil litigation brought by his ex-girlfriend. At that point, his criminal conviction had been upheld on appeal when he asserted his Fifth Amendment rights. The hearing on Petitioner's defense of accord and satisfaction was held on August 28, 2002, *see* Petitioner's Exhibit 2 at 1164, and the Court of Appeals upheld the trial court on April 9, 2002. *See Sabo v. Commonwealth of Virginia, supra* n.5.

connection with the Home Depot incident and his failure to tell his character witnesses about the incident.[7] It is true that Petitioner was given a summons and was not taken to the police station. However, insisting on that niggling difference only reinforces the impression on this record that Petitioner is constantly looking for ways to downplay the adverse aspects of his conduct that reflect poorly on him. That impression is also strengthened by his reliance on his mental illness to explain his conduct, and using that illness as a crutch, if not an excuse, for his conduct -- whatever it might have been.[8]

Petitioner bears the burden of proving by clear and convincing evidence that he is qualified to practice when he files a petition for reinstatement. For me, the lack of a record concerning Petitioner's original conduct and his efforts to evade addressing that conduct evidence an unwillingness or inability to accept the adverse consequences of his actions. It is on that ground that I recommend that the Court find that Petitioner has not sustained his burden on reinstatement and that it deny his petition. Accordingly, I concur in the Board's Recommendation.

/TDF/
Theodore D. Frank

Dated: November 9, 2011

[7] *Cf. In re Lee*, 706 A.2d 1032, 1035 (D.C. 1998) (per curiam) (appended Board report); *In re Fogel*, 679 A.2d 1052, 1056 (D.C. 1996).

[8] I do not question the psychiatric testimony, Bar Counsel's conclusion or the Hearing Committee's findings that Petitioner's mental illness led to the conduct for which he was convicted. However, I do not believe that Petitioner's illness justifies his apparent unwillingness to accept responsibility for his conduct – whatever it might have been.