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STATE OF WISCONSIN IN SUPREME COURT

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST NATHAN E. DELADURANTEY, ATTORNEY AT LAW.

CASE CODE 30912

OFFICE OF LAWYER REGULATION,

CASE NO. 2020AP1616-D

Complainant-Appellant;

NATHAN E. DELADURANTEY,

Respondent-Respondent.

**APPEAL FROM REFEREE'S REPORT**

# OLR'S APPELLATE BRIEF (COMPLAINANT-APPELLANT)

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## STATEMENT OF THE ISSUE PRESENTED

Did Attorney DeLadurantey's conduct directed at Heidi Miller constitute offensive personality, violating the Attorney's Oath, SCR 40.15?

Answered by the referee: No.

## STATEMENT ON ORAL ARGUMENT

The Office of Lawyer Regulation (OLR) does not request oral argument.

## STATEMENT ON PUBLICATION

If misconduct is found and the Court imposes public discipline, publication is required pursuant to SCR 22.23(1).

## STATEMENT OF THE CASE

The parties' pre-suit entry into a SCR 22.09 consent reprimand agreement did not lead to resolution. Therefore, on September 29, 2020, OLR filed a disciplinary *Complaint* alleging two rules violations set forth in a single misconduct count. (R. 3, *Complaint*). Each violation alleged the same general factual predicate; namely, that DeLadurantey subjected his subordinate associate attorney, Miller, to unwelcomed physical contact and sexual advances, and that he subjected Miller to inappropriate comments

regarding her physical appearance. OLR's *Complaint* charged such conduct as violating SCR 20:8.4(i) and SCR 40.15, actionable through SCR 20:8.4(g).

On November 11, 2020, counsel for DeLadurantey filed an *Answer* denying and admitting some facts and denying misconduct. (R. 5, *Answer*). On December 10, 2020, the Court appointed Referee Robert Kinney. (R. 7, *Referee Appointment Order*). Discovery ensued, including depositions of Miller and DeLadurantey. A final hearing was scheduled for May 17-18, 2021, at which both the alleged misconduct and OLR's recommended sanction were to be contested.

On May 11, 2021, a final telephonic pre-hearing conference was conducted. The referee requested both parties provide him the exhibits set out in their respective exhibit lists prior to the scheduled hearing. The parties agreed, but requested that the referee not read the transcript of a recorded interview of Miller taken by OLR's investigator Emily Kokie (Kokie), or the deposition transcript of DeLadurantey prior to the hearing.

On May 17, 2021, the hearing convened as scheduled. At the instance of the referee, an off the record discussion was had regarding proffered documentary evidence (the exhibits) and expected testimonial evidence.

During the discussions, OLR acknowledged proof issues existed regarding the alleged violation of SCR 20:8.4(i) and counsel for DeLadurantey acknowledged his client would likely be found to have violated the Attorney's Oath, enforceable via SCR 20:8.4(g).

Following the discussion, and with the assent of OLR's Director and the knowledge of Miller, the parties stipulated to OLR dismissing the alleged violation of SCR 20:8.4(i), and DeLadurantey pleading no contest to the violation of SCR 20:8.4(g). (R. 24 - 5/17/21 *Hearing Transcript*).

The stipulation was an acknowledgement that proof and defense problems existed for each party. The parties further stipulated to all proffered exhibits with the proviso that the transcript of OLR's investigative interview of Miller be withdrawn and replaced with the deposition transcript of Miller. The parties further stipulated the appropriate level of discipline for DeLadurantey would be a private reprimand. (R. 24 - 5/17/21 *Hearing Transcript*).

The stipulation was placed on the record and accepted by the referee. The referee made findings, including the willful nature of the plea, and importantly for the purpose of this appeal, the factual basis for the finding that DeLadurantey's conduct constituted offensive personality. The referee further found that DeLadurantey admitted the

violation. (R. 24 – 5/17/21 *Hearing Transcript*, p. 11, L. 6-8). At the request of the referee, each party filed sanction briefs. (R. 33 *Referee Report* p. 2).

On June 14, 2021, the referee filed his *Report and Recommendation*. (R. 33 *Referee Report*). The majority of the referee's report is dedicated to an analysis of what is required to prove a violation of SCR 20:8.4(i), that is, harassment of a person based upon sex, race, age, creed religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. The referee's analysis of that rule violation, one which was dismissed by OLR, ostensibly formed the basis for a recommendation that the remaining misconduct also be dismissed.

The referee further recommended that if the Court does not dismiss DeLadurantey's violation of the Attorney's Oath, a private reprimand is the appropriate sanction. (R. 33 *Referee Report* p. 22).

OLR appealed.

## STATEMENT OF FACTS

DeLadurantey has been the owner of DeLadurantey Law Offices, LLC. (Firm) in Brookfield, WI since 2008. The Firm's primary focus since 2013 was consumer litigation. (R. 26

Miller Deposition Trans., p. 42-43, L. 22-1). At all times relevant, DeLadurantey was married.

Miller is an attorney and a former employee of the Firm. Miller's employment with the Firm began in February 2012, and ended on October 27, 2017. (R. 25 DeLadurantey Deposition Trans., p. 7-8, L. 19-1).

In 2014, the Firm's growing consumer litigation practice often required DeLadurantey and Miller to work evenings and weekends. It required extensive travel for interviews, depositions and litigation. DeLadurantey and Miller often traveled together. (R. 25 DeLadurantey Deposition Trans., p. 22, L. 11-17).

In 2014, Miller spoke to DeLaudurantey about the need to maintain clear boundaries in their social and professional relationship, given the amount of time the two needed to spend together at the office and while traveling. (R. 26, Miller Deposition Trans., p. 66, L. 6-8).

In August or September 2015, while in Florida for a trial, DeLadurantey rented an AirBNB accommodation, resulting in him and Miller sharing a two bedroom unit that included common areas. (R. 25, DeLadurantey Deposition Trans., p. 41, L. 12-19). On one occasion, Miller had taken a nap, alone, on the couch. When she woke up, Miller found DeLadurantey napping on the same couch. Miller contends

DeLadurantey stated he napped there because he did not want to be alone. DeLadurantey does not deny this. (R. 25 DeLaduratey Deposition Trans., p. 42-43, L. 3-19). During this trip, DeLadurantey also made reference to needing to purchase "lucky trial underwear" at a local mall. (R. 25 DeLadurantey Deposition Trans., p. 44-45 L. 19-8). This behavior by an employer to a subordinate was offensive, and it made Miller uncomfortable.

On another occasion in 2015, while traveling on an airplane, DeLadurantey suggested Miller put her legs across his lap. Miller declined. DeLadurantey admits he then pulled Miller's legs over his lap. In response, Miller removed her legs from DeLaderantey's lap. (R. 25 DeLadurantey Deposition Trans., p. 46, L. 16-23). DeLadurantey then suggested Miller rest her head on his shoulder. (R. 27, OLR Ex.27, p. 5). Miller refused.

During this same period, on several occasions DeLadurantey held Miller's hand, and placed his hand on her leg without her invitation or consent. DeLadurantey admitted Miller never affirmatively placed her hand on his leg or initiated any hand holding with him. (R. 25 DeLadurantey Deposition Trans., p. 52-53 L. 23-5). These incidents also made Miller uncomfortable. As a subordinate employee, Miller did not immediately react.

In December 2015, Miller expressed her objection to DeLadurantey about his physical contact. This is not disputed by DeLadurantey. (R. 25 DeLadurantey Deposition Trans., p. 54-55 L. 22-4). Miller again articulated the need for DeLadurantey to respect clear boundaries. DeLadurantey apologized and agreed to modify his behavior. (R. 27 OLR Ex. 27, p. 5).

In early February 2016, DeLadurantey and Miller traveled to San Francisco for depositions. (R. 25 DeLadurantey Deposition Trans., p. 59 L. 21-23). They stayed in a two bedroom AirBNB type accommodation, with each occupying their own bedroom. On February 3, 2016, while Miller was in a common area, DeLadurantey approached her and began rubbing her back and rubbing his hands up and down her arms and legs. (R. 25 DeLadurantey Deposition Trans., p. 62 L. 7-19). DeLadurantey admits his physical contact was unsolicited, uninvited and without consent. (R. 25 DeLadurantey Deposition Trans., p. 62 L. 7-19). Miller went to her bedroom, upset and afraid to the point where she felt physically ill. (R. 27 OLR Ex. 20).

Later that evening, Miller and DeLadurantey spoke. Despite knowing Miller's then current physical and emotional feelings, DeLadurantey told Miller he desired to take her

upstairs to her bedroom and hold her. Miller said no. (R. 26 Miller Deposition Trans. p. 113 L. 19-22).

DeLadurantey went upstairs and got into Miller's bed. DeLadurantey admits this. (R. 25 DeLadurantey Deposition Trans., p. 65 L. 9-11). When Miller found DeLadurantey in her bed, Miller told DeLadurantey she was not going to share a bed with him. DeLadurantey left Miller's bedroom.

On February 4, 2016, DeLadurantey admitted his actions the previous night were inappropriate, claimed he had been intoxicated, apologized and asked Miller to forgive him. (R. 25 DeLadurantey Deposition Trans., p. 65 L. 9-23)(R. 27 OLR Ex. 27 p. 7). For the third time, Miller discussed with DeLadurantey the need to respect clear boundaries if she was to continue working for the Firm. (R. 26 Miller Deposition Trans., p. 113 L. 10-22). DeLadurantey does not dispute this fact. Further, DeLadurantey admits his claim of intoxication does not constitute a defense for his offensive behavior. (R. 25 DeLadurantey Deposition Trans., p. 68-69 L. 24-5).

Despite the impropriety of DeLadurantey's conduct, Miller continued to work for the Firm until October 2017. (R. 25 DeLadurantey Deposition Trans., p. 77 L. 16-20). The referee's assertion that their socialization stopped after the San Francisco incidents is not accurate. (R. 33 *Referee Report* p. 12). After the incidents in San Francisco, Miller

and DeLadurantey continued to engage together in non-work activities, such as working out at a gym and some traveling. (R. 25 DeLadurantey Deposition Trans., p. 71-72 L. 18-8). They continued to engage in mutual text/email messaging. (R. 27 OLR Ex. 7). DeLadurantey ceased putting his hand on her leg, holding her hand, attempting to hold her or other sexually overt behavior. However, their working relationship was deteriorating.

In 2016 and 2017, DeLadurantey made inappropriate comments to Miller about her appearance, attire and work performance. For example, DeLadurantey at times told Miller she looked like "trash." (R. 27 OLR Ex. 27 p. 8).

OLR's position is that DeLadurantey's uninvited, unprofessional physical touching of Miller without consent, his disrespectful comments about Miller's physical appearance, and his disregard of Miller's requests that he adhere to appropriate boundaries, demonstrate his failure to abstain from offensive personality. DeLadurantey's conduct violated the Attorney's Oath. The Attorney's Oath, in relevant part states, "I will abstain from all offensive personality." SCR 40.15.

## STANDARD OF REVIEW

In attorney discipline cases, a referee's findings of fact will be adopted unless clearly erroneous. *Disciplinary Proceedings Against Lister*, 2010 WI 108, ¶30, 329 Wis. 2d 289, 787 N.W.2d 820.

The Court reviews conclusions of law *de novo*. *Disciplinary Proceedings Against Eisenberg*, 2004 WI 14, ¶5, 269 Wis. 2d 43, 675 N.W.2d 747.

As to sanction, the Court "takes the referee's recommendation as to the discipline into account" but is not bound by it. *Disciplinary Proceedings Against Lister*, 2010 WI 108, ¶35, 329 Wis. 2d 289, 787 N.W.2d 820.

## ARGUMENT

*Overview*

The misconduct to which DeLadurantey pled no contest was intentional, unwelcome, uninvited and without consent. Contrary to the referee's conclusion, Miller did not welcome DeLadurantey's physical contact except for the few occasions she asked DeLadurantey for a shoulder rub. Miller admitted there were occasions she made such a request. (R. 26 Miller Deposition Trans. p. 193 L. 5-8). Any such welcome contact did not, however, open the door for and negate the offensive conduct to which DeLadurantey subjected Miller.

On two occasions, in 2014 and 2015, Miller discussed with DeLadurantey the need for him to respect professional

and personal boundaries. DeLadurantey, Miller's employer, nevertheless continued to defy Miller's request to refrain from unwelcome physical contact. DeLadurantey's conduct in San Francisco of rubbing Miller's shoulders, arms and legs exceeded any of his previous attempts to initiate sexually suggestive physical contact with Miller. His physical contact with Miller in the common area was an attempt to initiate a sexual encounter in which Miller had made DeLadurantey aware she was not interested. (R. 27 OLR Ex. 27 p. 5).

After Miller rejected that attempt and retreated to her bedroom, DeLadurantey initiated communications by text and requested a chance to "fix the awkwardness" caused by his offensive behavior. However, when he did speak with Miller later that evening, instead of trying to fix the awkwardness, he attempted to initiate more unwanted physical contact by telling Miller he wanted to go upstairs with her to her bed and hold her. Miller again, unequivocally, told her boss no. (R. 26 Miller Deposition Trans., p. 168 L. 5-13). She also told him that she might have to quit the Firm because of his conduct. DeLadurantey reacted to the second rejection of his efforts that night by going upstairs and, without Miller's consent, getting into her bed. (R. 25 DeLadurantey Deposition Trans., p. 65 L. 9-11).

The referee's conclusion that DeLadurantey did not engage in conduct constituting offensive personality is wrong. Further, DeLadurantey pled no contest to the misconduct, with the advice of counsel, and his plea was accepted by the referee.

## I. THE RECORD SUPPORTS BY CLEAR, SATISFACTORY AND CONVINCING EVIDENCE THAT DELADURANTEY ENGAGED IN OFFENSIVE PERSONALITY AND VIOLATED THE ATTORNEY'S OATH.

DeLadurantey's pattern of conduct constituting offensive personality escalated over the period of time Miller was in his employ, albeit gradually. Miller's employment with DeLadurantey began in February 2012. (R. 25 DeLadurantey Deposition Trans., p. 6-7 L. 22-2). The firm's growing consumer litigation practice required the two to travel extensively, for depositions and trial work. (R. 5 *Answer*, p. 1 ¶ 4). Miller first approached DeLadurantey about maintaining appropriate boundaries in 2014 around the time the two took a trip to Sturgeon Bay for trial preparation. (R. 26 Miller Deposition Trans., p. 65-66 L. 25-8).

In his *Report and Recommendation*, the referee makes the point that the specific nature of what constituted "boundaries" was not explained. (R. 33 *Referee Report* p. 7). The referee concluded the discussion regarding boundaries in 2014 related to housing accommodations. (R. 33 *Referee Report*

p. 7). Previously, when the parties travelled, they stayed in hotels in separate rooms. This trip was the first time the parties stayed in an AirBNB type accommodation. However, nothing in the record supports the referee's conclusion the boundary discussion in 2014 was limited to housing accommodations. In any event, Miller's 2014 warning to DeLadurantey did not result in DeLadurantey maintaining appropriate boundaries. Rather, he failed to honor Miller's request and ramped up his offensive physical conduct toward her.

In August or September of 2015, the two attorneys travelled to Florida for an extended trial. (R. 25 DeLadurantey Deposition Trans., p. 41. L. 8-11). On one occasion, Miller took a nap on a couch in the common area of their accommodation. When Miller woke, she found that DeLadurantey had lain down on the couch with her. (R. 25 DeLadurantey Deposition Trans., p. 42 L. 3-19). DeLadurantey admits this conduct. In response to OLR's investigation, counsel for DeLadurantey wrote, "Mr. DeLadurantey specifically recalls the situation and acknowledges that is was an awkward scenario." (R. 27 OLR Ex. 27 p. 4). Miller contends that DeLadurantey said he laid down with her because he didn't want to be alone. In his deposition, DeLadurantey admits Miller's account of the event is generally accurate.

(R. 25 DeLadurantey Deposition Trans., p. 42 L. 3-19). DeLadurantey also acknowledges he may have made the statement about not wanting to be alone.

> Q. Attorney Miller contends that when she woke, that you stated you had laid or sat down on the couch where she was because you didn't want to be alone. You understand that's her allegation; right?
>
> A. I do.
>
> Q. And do you admit or deny that you made that statement or do you not recall?
>
> A. I don't recall.
>
> Q. It's possible that you said that?
> A. It's possible.

(R. 25 DeLadurantey Deposition Trans., p. 43 L. 9-19). DeLadurantey could have just as easily, and much more appropriately, taken a nap in his own bedroom.

On that same trip to Florida, on a trip to the mall to purchase items of clothing, DeLadurantey brought up the subject with Miller about buying "lucky trial underwear." (R. 25 DeLadurantey Deposition Trans., p. 45 L. 4-8). DeLadurantey admits it was an awkward scenario for both of them and that it sparked an awkward discussion of lucky trial underwear.

On another occasion in approximately October 2015, the parties were on an airplane, seated in the last row of seats, where the seats did not recline. (R. 27 OLR Ex. 27 p. 5).

First, DeLadurantey claims he suggested Miller place her legs over his lap. Of this behavior, counsel for DeLadurantey states, "DeLadurantey, now realizes that was a poor and awkward suggestion." (R. 27 OLR Ex. 27 p. 5). In his deposition, DeLadurantey admits he in fact pulled Miller's legs onto his lap. (R. 25 DeLadurantey Deposition Trans., p. 46 L. 16-23). DeLadurantey further admits Miller did not request to place her legs there and that she removed her legs from his lap. (R. 25 DeLadurantey Deposition Trans., p. 47 L. 9-14). Counsel for DeLadurantey wrote that at the same time, "DeLadurantey did make the unwise suggestion that she could rest her head on his shoulder ..." and "...that was also an unwise suggestion in hindsight." (R. 27 OLR Ex. 27 p. 5). This "unwise" suggestion came moments after DeLadurantey's "poor and awkward suggestion" Miller place her legs across his lap.

DeLadurantey attempted to, and in fact did, nap on a couch with Miller, uninvited and without consent. DeLadurantey created an "awkward" situation discussing his personal undergarments with Miller. DeLadurantey suggested, and then physically pulled Miller's legs onto his lap uninvited and without consent. When Miller withdrew her legs, he suggested she rest her head on his shoulder. All of this behavior was not welcomed by Miller, as her reaction to it

aptly demonstrates. Consistent with her request to respect boundaries in 2014, Miller refused DeLadurantey's attempts at sexually suggestive physical contact. An objective, reasonable and prudent person would have no trouble seeing Miller's rejection of his advances and realize such attempts were not welcome.

Several times in 2015, while travelling together in a vehicle, DeLadurantey reached over and placed his hand on Miller's leg or held Miller's hand while he was driving. (R. 27 OLR Ex. 27 p. 5). DeLadurantey admits he engaged in this behavior. *Id.* DeLadurantey admits Miller never initiated any such similar physical contact. (R. 25 DeLadurantey Deposition Trans., p. 52-53 L. 23 - 5).

In late December 2015, DeLadurantey again reached out and held Miller's hand while he was driving Miller in his car. Miller contends on this occasion DeLadurantey kissed her hand. Miller remembers this clearly as it was around the time of her birthday. DeLadurantey states he does not recall kissing Miller's hand. (R. 27 OLR Ex. 27 p. 5). It is important to note that in his deposition, DeLadurantey stated he did not know of any instance where Miller was dishonest or lied during her term of employment with him. (R. 25 DeLadurantey Deposition Trans., p. 29-30 L. 1-2). Miller was not lying about DeLadurantey kissing her hand.

This event lead to Miller initiating the second discussion about respecting clear boundaries. In DeLadurantey's deposition, the following exchange took place:

> Q. You have admitted, I believe, in your interview with Ms. Kokie [OLR's investigator]that following that December hand holding incident, you and Ms. Miller had a discussion about setting some kind of boundaries about physical contact. That's a fair statement, isn't it?
>
> A. Correct.
>
> (DeLadurantey Deposition Trans., p. 54-55 L. 23-4).

Counsel for DeLadurantey wrote to OLR of this incident as follows:

> Sometime around Christmas 2015 there was a discussion of the two hand holding occasions. At that time, Ms. Miller did indicate she wasn't comfortable with it, that he was married, and that their mutual faiths — they both are professing Protestants - wouldn't approve of such contact. She indicated that the hand holding should stop before something happened. Mr. DeLadurantey agreed, apologized for having held her hand, and never did it again.
>
> (R. 27 OLR Ex. 27 p. 5).[1]

At this point, a reasonable and prudent individual could easily and objectively conclude that any further uninvited physical contact in the absence of a request, was unwelcome and would necessarily be offensive. Counsel for DeLadurantey is correct that hand holding never happened again.

[1] At his deposition, DeLadurantey testified he had reviewed his lawyer's response to OLR prior to his lawyer's submission, and that it is true and accurate. (R. 25, DeLadurantey Deposition Trans., p. 10 L. 2-12).

Unfortunately, other serious, uninvited, unwelcome and offensive behavior did.

In February 2016, just six weeks after their second discussion regarding boundaries in December 2015, the two attorneys were in San Francisco for depositions. They were staying at an AirBNB type accommodation with common areas. Each had separate sleeping quarters. During the evening of February 3, 2016, while Miller was watching television in a common area, DeLadurantey approached her and began rubbing her back and rubbing his hands up and down her arms and legs. (R. 25 DeLadurantey Deposition Trans., p. 62 L. 15-19). This constituted a blatant sexually suggestive act. Miller, shocked and offended, left the area and went to her bedroom. In his deposition, DeLadurantey acknowledges telling OLR investigator Kokie that he remembers approaching her while she was on the couch and rubbing her shoulders. *Id.*

Miller was upset and afraid, to the point where she felt physically ill. DeLadurantey texted Miller from within the accommodation and attempted to explain his inappropriate behavior. A text exchange ensued, including DeLadurantey texting "Can I try and fix the awkwardness?" Miller responded, "I'm pretty sure I'm going to throw up shortly – I'm struggling not to." (R. 27 OLR Ex. 20 p. 1). In his

deposition, the following exchange occurred regarding Miller's comments about throwing up:

> Q. That's a pretty good indication that she was fairly upset about something that happened between you and her that evening. That's a fair conclusion, isn't it?
>
> A. I can't -- yes.
>
> (R. 25 DeLadurantey Deposition Trans., p. 64 L. 5-9).

Later that evening, after DeLadurantey requested to "fix the awkwardness," Miller and DeLadurantey spoke in the kitchen for a while. (R. 25 DeLadurantey Deposition Trans., p. 64 L. 5-9). Despite knowing Miller's emotional and physical feelings, DeLadurantey told Miller he wanted to take her upstairs to her bedroom and hold her. (R. 26 Miller Deposition Trans., p. 113 L. 19-22). Miller again refused DeLadurantey's attempted intimate physical contact. (R. 26 Miller Deposition Trans., p. 168 L. 5-13). Miller stated to DeLadurantey she may have to quit the Firm because of his conduct. (R. 26 Miller Deposition Trans., p. 113 L. 19-22).

Despite Miller's second rejection, DeLadurantey left the kitchen and went upstairs and got into Miller's bed. (R. 25 DeLadurantey Deposition Trans., p. 65 L. 9-20). When Miller found DeLadurantey in her bed, Miller told DeLadurantey she was not going to share a bed with him. (R. 26 Miller Deposition Trans., p. 168 L. 5-13).

On February 4, 2016, DeLadurantey admitted his actions the previous evening were inappropriate, claimed he had been intoxicated, and apologized. DeLadurantey admitted that his claimed intoxication was not an excuse for his behavior. (R. 25 DeLadurantey Deposition Trans., p. 68-69 L. 24-5). Miller discussed with him, for the third time, the need to respect clear boundaries if she was to continue working for the Firm.

Prior to late 2015, DeLadurantey had been very complimentary about Miller's work performance. However, in 2016 and 2017, DeLadurantey made inappropriate comments to Miller about her appearance, attire and work performance. For example, DeLadurantey at times told Miller she looked like "trash." (R. 27 OLR Ex. 27 p. 8). DeLadurantey also implied to Miller that he had reservations about her joining him at a luncheon with a third person without makeup. (R. 27 OLR Ex. 21).

The evidence supports a finding that DeLadurantey's conduct toward Miller was offensive. The Court should reject the referee's conclusion that DeLadurantey's conduct did not violate SCR 40.15.

## II. THE REFEREE'S ANALYSIS OF SEXUAL HARASSMENT IS MISPLACED.

The referee dedicated the majority of his *Report and Recommendation* to an analysis of what constitutes sexual

harassment, while offering a scant few paragraphs to DeLadurantey's plea to the violation of offensive personality. The referee explained how various agencies, federal and state, define sexual harassment. His *Report and Recommendation* cites case law from the Supreme Court of the United States, Title VII of the Civil Rights Act of 1964, 29 CFR §1604.11, Wisconsin Statute §111.32(13), a Wisconsin Department of Workforce Development (DWD) publication, and an article from William & Mary Law Review.

The discussion appears meant to support the referee's conclusion that because Miller welcomed a singular form of non-sexual physical contact from DeLadurantey in the form of a few shoulder rubs, other more extreme and objectively sexually suggestive physical contact by DeLadurantey cannot be offensive. OLR's position is that a violation of SCR 40.15 is not dependent on whether the attorney's conduct also violated SCR 20:8.4(i).

Absent from the referee's analysis of sexual harassment is reference to the American Bar Association (ABA) Formal Opinion 493, dated July 15, 2020. Formal Opinion 493 provides guidance on the purpose, scope and application of ABA Model Rule 8.4(g), which guidance was developed after years of debate and study within the ABA. (ABA Formal Opinion 493, p.

2). Wisconsin's version of ABA Rule 8.4(g) is SCR 20:8.4(i), which is the rule violation OLR dismissed.

In providing guidance on the application of ABA Rule 8.4(g), the opinion states:

> Furthermore, Rule 8.4(g) prohibits conduct that is not covered by other law, such as federal proscriptions on discrimination and harassment in the workplace. Although conduct that violates Title VII of the Civil Rights Act of 1964 would necessarily violate paragraph (g), the reverse may not be true. For example, a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g).
>
> (ABA Formal Opinion 493, p. 5).

The referee cites both federal and state proscriptions concerning discrimination and harassment in the workplace to support his conclusion that the reasonable person standard applies to the "gravamen" of any sexual harassment claim, that gravamen being "welcomeness." (R. 33 *Referee Report* p. 4). Comment [3] to ABA Rule 8.4(g) defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and otherwise *unwelcome* verbal or *physical conduct* of a sexual nature." (*Emphasis added*).

The referee seemingly concludes that because Miller welcomed a *singular* aspect of non-sexually suggestive physical contact by DeLadurantey, DeLadurantey had license

under a reasonable person standard to engage in more extreme and unwelcome physical contact of a sexual nature. The referee states DeLadurantey "asked" to escalate the relationship in San Francisco. (R. 33 *Referee Report* p. 18.) However, there is nothing in the record to support the referee's conclusions that DeLadurantey "asked" if the relationship could be escalated. The referee provides no citation to the record to support this conclusion. Further, a law firm owner drunkenly groping a subordinate attorney could easily be viewed as an assault, not a request. Moreover, getting into a subordinate attorney's bed, without her consent and after she rejected her boss's desire to go to bed, is not "asking" to escalate a relationship, particularly where the power and control dynamic of the employer/employee relationship exists. DeLadurantey actually getting into Miller's bed after her unequivocal rejection is offensive.

The referee's suggestion that DeLadurantey's February 3, 2016 San Francisco behavior constituted *asking* to escalate the relationship is confounding. Just six weeks earlier, after the December 2015 incident, Miller told DeLadurantey not to engage in intimate physical contact. DeLadurantey agreed. (R. 25 DeLadurantey Deposition Trans., p. 55-56 L. 25-1). After the December 2015 conversation, Miller's second such conversation with DeLadurantey about respecting

boundaries, DeLadurantey was undeniably on notice to leave pursuit of a physical relationship alone.

OLR's Director made the close decision that proof issues rendered dismissal of the SCR 20:8.4(i) harassment violation appropriate, but that the circumstances clearly warranted the SCR 40.15 offensive personality violation. At that point, this was not a sexual harassment case any longer, as the alleged SCR 20:8.4(i) violation was dismissed. This fact alone makes the referee's lengthy sexual harassment analysis misplaced. Nonetheless, the referee posed the question, "If DeLadurantey's conduct was welcome (which, presumably, was the basis for dismissal of the sexual harassment charge), how could the same conduct be offensive"? (R. 33 *Referee Report* p. 18).

By posing this question, the referee makes two critical errors. First, DeLadurantey waived any consideration of welcomeness by admitting he engaged in unsolicited, uninvited, inappropriate physical contact without consent, apologizing for engaging in such behavior and promising to stop. As is demonstrated by Miller's consistent, objective repudiation of DeLadurantey's conduct, and his apologies in December 2015 and February 4, 2016, his suggestive conduct was offensive to Miller. The unmitigated fact is it made her nauseous.

DeLadurantey's repeated apologies and statements of regret and contrition for his unwanted, suggestively sexual physical contact prove he knew his conduct was unwelcome and offensive to Miller.

Second, the referee assumes the reason for OLR's dismissal of the sexual harassment violation was based on an inability to prove DeLadurantey's behavior was unwelcome. However, OLR's decision was not predicated on "welcomeness" but rather was made because the SCR 40.15 violation better fit the circumstances. OLR's dismissal of the charged SCR 20:8.4(i) violation included sexual harassment proof concerns, whereas, DeLadurantey admitted that he engaged in offensive personality. "Unwelcomeness" is not an element of offensive personality.

## III. MILLER'S OCCASIONAL REQUEST FOR NON-SEXUAL PHYSICAL CONTACT DID NOT OPEN THE DOOR FOR DELADURANTEY TO ENGAGE IN PHYSICAL CONTACT OF A SEXUAL NATURE.

Even under an analysis of "welcomeness," the record supports the conclusion that DeLadurantey's conduct was unwelcome and, in fact, objectively rejected. It is true that in her deposition, Miller testified there were a few occasions she asked DeLadurantey for what she described as a shoulder rub. (R. 26 Miller Deposition Trans., p. 193 L. 5-8). Miller

described this conduct as friendly, not flirtatious. (R. 26, Miller Deposition Trans., p. 132 L. 10-14). In other words, Miller did not consider a shoulder rub to be sexually suggestive physical contact. This sworn testimony evidences Miller's subjective state of mind. Her repudiations of DeLadurantey's attempts at sexually suggestive physical contact were her objective notices to DeLadurantey.

The two engaged in other mutual activities which did not constitute sexually suggestive conduct. This included working out at the gym together, side trips during work-related trips, sitting in a hot tub while in a hotel on business or visiting a beach. At no point during these activities did Miller open a door to welcome DeLadurantey's offensive behavior.

In his report, the referee states "While Miller objected to DeLadurantey's conduct in San Francisco, whether it was welcome or unwelcome necessarily involves exploring the conduct which may have led up to it." (R. 33 *Referee Report* p. 6). The referee's exploration should have resulted in the conclusion that Miller *never* welcomed DeLadurantey's sexually suggestive actions. Further, the referee employed the concept of "welcomeness," which applies to sexual harassment violations, not offensive personality violations, to support his recommendation that the SCR 40.15 violation be dismissed.

The referee spent a lot of time describing activities the parties engaged in while traveling for business, some of which are mentioned above. The referee cites to text/email messages the parties sent to each other, as well as pictures taken at various times during their travels. In some of the text/email messages shared, complimentary things were said. In a lot of the pictures, the parties genuinely appear to be enjoying each other's company.

It appears the referee believes that this somehow opened the door in San Francisco for DeLadurantey to attempt to push the relationship in a direction Miller had made known was not acceptable. Miller had made this known in 2014, the first time respecting boundaries was discussed. (R. 26 Miller Deposition Trans., p. 66 L. 6-8). Miller made this known when she did not reciprocate DeLadurantey's attempts to hold her hand or place his hand on her leg. (R. 25 DeLadurantey Deposition Trans., p. 52-53 L. 23-5). Miller made this known when she removed her legs from DeLadurantey's lap on an airplane flight, and did not accept DeLadurantey's suggestion she lay her head on his shoulder. (R. 25 DeLadurantey Deposition Trans., p. 47 L. 9-14).

Miller again addressed the issue of respecting boundaries in December 2015 following the hand holding/kissing incident. (R. 27 OLR Ex. 27 p. 5). According

to DeLadurantey, he knew Miller was not comfortable when he held her hand. *Id.*

All of Miller's signals and outright requests to stop DeLadurantey from uninvited, unreciprocated physical contact of a sexual nature fell on selectively deaf ears, but those ears were also of an experienced attorney, capable of objective reasoning.

The referee seemed to conclude that based upon Miller's interactions with DeLadurantey, DeLadurantey somehow mistook Miller's intentions. The referee goes so far as to say, "While there were oral discussions about "boundaries," either no definition was established by either party as to what the limits were, or, as Miller **conceded**, the goal posts seemed to move. (R. 33 *Referee Report* p. 14-15, *Emphasis added*).

The record is void of any concession by Miller that she allowed the goal posts to be moved or that she moved the goal posts herself. If the supposed concession is a finding, it is clearly erroneous. The referee's conclusion suggested that by being friendly, Miller opened the door and welcomed DeLadurantey's boarish behavior.

The referee also ignores that Miller rejected the one time DeLadurantey's behavior even approached "asking" to escalate their relationship. In San Francisco, after Miller removed herself from the common area to escape

DeLaudurantey's advances, and after he requested the chance to "fix the awkwardness," DeLadurantey told Miller that he wanted to go upstairs with her to her bed and hold her. Miller unequivocally said no, and then added that she might have to quit the firm because of his behavior. DeLadurantey reacted to her rejection of his request by going upstairs and getting into Miller's bed. That behavior, in and of itself, constitutes offensive conduct.

## IV. SANCTION REGARDING SCR 40.15 VIOLATION.

Following its investigation, OLR believed it could sustain its burden of proof on both the SCR 20:8.4(g) and SCR 20:8.4(i) rule violations. OLR's Director determined to seek discipline at the level of a private reprimand, given the particular facts of this matter and after reviewing applicable precedent on both rules.

The parties entered into a SCR 22.09 agreement for imposition of a consensual private reprimand, but the assigned referee declined to approve it. The investigation was presented to the Preliminary Review Committee, which determined there was cause to proceed as to both rule violations. Thereafter, OLR filed the disciplinary *Complaint* that initiated this proceeding.

**A. Precedent**

As disposition of the proceeding now involves only an alleged violation of SCR 40.15, there is less citable precedential guidance. The OLR Director's initial sanction determination included his review of the following private reprimands[2]:

- In *Private Reprimand* 1991-6, while awaiting the return of a jury, an attorney approached a female law enforcement officer at a courthouse and made statements that she interpreted as sexually aggressive. Later, the attorney again approached the officer, grabbed her shoulders and attempted to embrace her. Still later that evening, the attorney approached a different female officer on three occasions, pushing her against a wall and made suggestive and disparaging remarks. The attorney acknowledged his actions were inappropriate and offensive and apologized. The conduct violated SCR 20:8.4(g). The attorney had no prior discipline.

DeLadurantey engaged in multiple instances of unwelcome physical contact with Miller. DeLadurantey's criticism of Miller's physical appearance at times, as well as his unwelcome physical contact, is similar to the offensive personality the attorney demonstrated in *Private Reprimand* 1991-6.

- In *Private Reprimand* 2013-3, an attorney sent emails to opposing counsel that contained derogatory, vulgar and hostile comments, some of which threatened violence. The attorney claimed he had been under the influence of

[2] Private reprimand summaries are available at OLR's online Compendium.

> alcohol when the messages were sent. The attorney did not carry out any of the threats and apologized to opposing counsel for his misconduct. The messages constituted offensive personality and violated SCR 20:8.4(g). The attorney had one prior private reprimand.

DeLadurantey's offensive conduct included making derogatory comments to Miller, such as telling Miller she looked like "trash," although the comments were not necessarily vulgar. DeLadurantey's uninvited touching was offensive conduct, and at least in the San Francisco incidents, conduct that repulsed Miller.

- In *Private Reprimand* 2008-38, an attorney made sexually suggestive comments to a co-worker over a period of several years. On one occasion, the attorney kissed the co-worker without consent. The behavior constituted offensive personality and violated the Attorney's Oath and SCR 20:8.4(g).

DeLadurantey's misconduct also occurred over a period of years. The unwelcome physical contact began in 2014 or 2015, and continued through February 2016. DeLadurantey's inappropriate remarks about Miller's physical appearance spanned from 2016 to 2017.

- In *Private Reprimand* 2014-11, an attorney received a private reprimand for conduct more egregious than DeLadurantey. There, a woman complained to the court the attorney handling an estate as trustee wherein she was a beneficiary, engaged in unwanted physical touching during an office meeting with the attorney. The attorney was criminally charged with three misdemeanor counts of disorderly conduct, ultimately pled no contest to one of

> the counts, and was placed on deferred prosecution. The misdemeanor conviction was vacated after successful completion of a deferred prosecution program. The reprimand was imposed because the attorney engaged in inappropriate behavior and potentially sexual advances toward a female he had a fiduciary duty toward as trustee, thereby violating the Attorney's Oath, enforced via SCR 20:8.4(g); and because the attorney also violated SCR 20:8.4(b) by committing a crime. The attorney had no prior discipline.

The current matter did not involve allegations that a crime was committed. There is no evidence that Miller contacted law enforcement. DeLadurantey's behavior was in that sense less egregious and involved only one rule violation (after OLR dismissed the alleged violation of SCR 20:8.4(i) due to proof issues).

**B. Aggravating Factors**

DeLadurantey engaged in a pattern of physical contact with Miller for his own benefit and to the detriment of his subordinate associate attorney. In that respect, Miller was vulnerable. Miller contends on three occasions she asked DeLadurantey to be respectful of appropriate personal and professional boundaries, and that it was not until after the February 2016 incidents in San Francisco that DeLaudurantey discontinued his inappropriate physical contact. During OLR's investigation, DeLadurantey deflected responsibility by claiming the situation was mutually flirtatious, but

admitted Miller never initiated physical contact such as hand holding or placing her hand on his leg. DeLadurantey has been practicing for 14 years, making him an experienced attorney.

**C. Mitigating Factors**

DeLadurantey has no prior discipline. Concerning the San Francisco incidents, DeLadurantey acknowledges his physical contact with Miller was uninvited, without consent and inappropriate. DeLadurantey alleges this behavior was a result of his claimed intoxication, while acknowledging his intoxication is not a defense.

DeLadurantey was cooperative with OLR's investigation. He ultimately pled no contest to a violation of SCR 40.15, enforceable via SCR 20:8.4(g).

A contested hearing was avoided at which sensitive and embarrassing evidence would have been required from both DeLadurantey and Miller.

The referee cites *one* case in support of his recommendation to dismiss the admitted violation of SCR 20:8.4(g). *Disciplinary Proceedings Against Johns*, 2014 WI 32. That case alleged a violation of SCR 20:8.4(b) and involved an attorney's fitness to practice law following a criminal conviction for homicide of the attorney's own brother, tragically by intoxicated use of a motor vehicle.

It is wholly inapposite to the present case. OLR does not contend DeLadurantey is unfit to practice law, only that his conduct constituted offensive personality. Further, the Court in *Johns* noted that the attorney's actions leading to his conviction were not part of a pattern of misconduct, unlike DeLadurantey's conduct toward Miller.

## CONCLUSION

OLR made decisions concerning its voluntary dismissal of one rule violation, just as DeLadurantey made the decision to plead no contest to the remaining rule violation. Those decisions were not the result of plea bargaining, although OLR felt Referee Kinney encouraged the parties' agreement. The referee accepted DeLadurantey's plea of no contest and found on the record that there was a factual basis for it. The parties relied on the referee's encouragement and acceptance, believed the misconduct aspect of the proceeding had been resolved, and filed sanction briefs.

The referee's recommendation for dismissal of the offensive personality rule violation was a surprise. Some of the referee's findings and conclusions are not supported by, and are contrary to, the record and DeLadurantey's admissions. The referee's legal analysis of what constitutes offensive personality is flawed.

The OLR Director's position is that the facts of the case support a conclusion that DeLadurantey violated SCR 40.15. Further, precedent supports the sanction proposed by the parties - and as an alternative to dismissal, also proposed by the referee.

Dated this 9th day of September, 2021.

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**CERTIFICATION**

I hereby certify that this portion of OLR's brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced with a monospaced Courier font, 10 characters per inch. The length of this brief is 35 pages.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stats. § 809.19(12). I further certify that the text of the electronic copy of this brief is identical to the printed form transmitted for filing.

Dated this 9th day of September, 2021.

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