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SUPREME COURT OF WISCONSIN

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

OFFICE OF LAWYER REGULATION,

Complainant-Appellant,

2020AP1616-D

NATHAN E. DELADURANTEY,

Respondent-Respondent.

ON APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF REFEREE ROBERT E. KINNEY

APPEAL RESPONSE BRIEF OF RESPONDENT-RESPONDENT NATHAN E. DELADURANTEY

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STATEMENT OF THE ISSUES

Did OLR demonstrate by clear, satisfactory and convincing evidence that the conduct of respondent-respondent, Nathan E. DeLadurantey, constitutes offensive personality in violation of the Attorney's Oath set forth at SCR 40.15?

Answered by the referee: No.

What is reasonable and appropriate discipline for the misconduct and under the facts and circumstances of this case?

Answered by the referee: No discipline is warranted because there was no offensive personality violation. In the alternative only, if the Court determines there has been a violation, appropriate discipline for the conduct at issue is a private reprimand.

STATEMENT ON ORAL ARGUMENT

DeLadurantey does not request oral argument.

STATEMENT ON PUBLICATION

SCR 22.23(1) requires publication of the Court's opinion if public discipline is imposed. Publication is not required if the Court dismisses the proceedings or imposes a private reprimand. Because the Court should either issue no discipline or, if it deems discipline warranted, issue a private reprimand, the Court's opinion should not be published.

STATEMENT OF THE CASE

I. Nature of the Case.

OLR filed a complaint on September 29, 2020 that arises from DeLadurantey's employment of grievant, Heidi Miller ("Miller"), as an attorney between approximately February 2012 and October 2017. (See, *generally*, R. 3 (Complaint)) The single count in OLR's complaint alleges the following:

> COUNT 1
>
> 26. By subjecting Miller to physical contact and sexual advances, and by subjecting Miller to inappropriate comments regarding her physical appearance, in each instance DeLadurantey violated SCR 20:8.4(i) and 20:8.4(g).

(Id., ¶ 26) The Supreme Court Rules that OLR's complaint contended DeLadurantey violated are the following:

- SCR 20:8.4(i) provides that "[i]t is professional misconduct for a lawyer to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities."

- SCR 20:8.4(g) provides that "[i]t is professional misconduct for a lawyer to violate the attorney's oath."

- SCR 40.15 (The Attorney's Oath) states in relevant part that "I will abstain from all offensive personality."

OLR's single count complaint sought to prove two different violations under the Rules – sexual harassment and offensive personality.

This matter was before the referee, Robert E. Kinney, for an evidentiary hearing on May 17, 2021. At that time, OLR dismissed its sexual harassment claim. DeLadurantey conceded that his conduct relating to the San Francisco incident referred to in the complaint constituted offensive personality. DeLadurantey and OLR also agreed that the appropriate form of discipline for the conceded conduct was a private reprimand. (R. 24 (5/17/21 Hearing Tr.) at pp. 6-7) The referee directed the parties to submit memoranda on the question of the appropriate discipline for the misconduct for consideration.

II. Statement of Facts.

While there are a number of allegations and disputed facts in the complaint, OLR's dismissal of the sexual harassment claim and DeLadurantey's concession that his conduct relating to the San Francisco incident referred to in the complaint constituted offensive personality narrowed the

issue as to what discipline is appropriate for that misconduct and the offensive personality violation.

The allegations of the complaint involving the San Francisco incident in February 2016 read as follows:

* * *

> 17. In early February 2016, DeLadurantey and Miller traveled to San Francisco for depositions. They stayed in a two bedroom AirBNB accommodation, with each occupying their own bedroom. On February 3, 2016, Miller was watching television in a common area and DeLadurantey approached her and began rubbing her back and rubbing his arms up and down her arms and legs in a suggestive manner. Miller left the area and went to her bedroom.
>
> 18. 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? and Miller responding "I'm pretty sure I'm going to throw up shortly – I'm struggling not to."
>
> 19. Later on that evening, Miller and DeLadurantey spoke in the kitchen for a while. Despite knowing Miller's then current physical and emotional feelings, DeLadurantey told Miller he wanted to take her upstairs (to her bedroom) and hold her. Miller said no. During that conversation, Miller also stated to

> DeLadurantey she may have to quit the Firm.
>
> 20. DeLadurantey left the kitchen and went upstairs and got into Miller's bed. 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.
>
> 21. On February 4, 2016, DeLadurantey admitted his actions the night before were inappropriate, claimed he had been intoxicated, and apologized. Miller discussed with him, for the third time, the need to respect clear boundaries if she was to continue working for the Firm.
>
> * * *

(R. 3 (Complaint) at ¶¶ 17-21) DeLadurantey testified during his deposition[1] as follows at pages 62 through 68:

> Q: Attorney Miller contends on the night of February 3rd of 2016, she was in the living room watching television and that you approached her unsolicited, uninvited, or without her consent, and began running your hands on her arms, shoulder, and back. You're aware of that contention; right?
>
> A: Correct.
>
> Q: And do you recall in your interview with Ms. Kokie you state that you remember approaching her while she was on the

[1] By stipulation of the parties, the referee received the DeLadurantey and Miller depositions in lieu of hearing testimony. (R. 24 (5/17/21 Hearing Tr.) at pp. 7-8, 13-15)

couch and rubbing her shoulders. You don't deny that that took place; right?

A: Correct.

Q: You acknowledge that Ms. Miller became upset and left the area, and, I believe, went up to the bedroom that she going to occupy?

A: It is -- yes. I understand that is her position. Due to my intoxication that night, answering that question in a form of chronology or -- I don't know. But in general terms, I'm aware of that.

Q: It's true that you understood that that physical contact that you initiated with her had made her upset?

A: After the fact?

Q: No. That night.

A: Due to my intoxication, I am not aware of – I have no contemporaneous memories with that evening outside of a very generalized nature of the interaction.

* * *

Q: Okay. You sent her a text, and it's kind of hard to read the time, that says Can I try and fix the awkwardness? She responds How? You respond No clue... I'd happily come down and try to explain... but stairs and I struggle. Do you have any independent recollection of sending her that message?

A: They're there. I think these are the ones that we produced. I obviously sent them,

but at the time, no. I mean, I know we had some interaction that evening.

Q: And she responds I'm pretty sure I'm going to throw up shortly – I'm struggling not to; right?

A: Correct.

Q: That's a pretty good indication that she was fairly upset about something that had happened between you and her that evening. That's the fair conclusion, isn't it?

A: I can't -- yes.

Q: Given the fact that you just testified that you don't really recall sending the message, I have to assume that you don't really know what you meant when you said Can I try and fix the awkwardness?

A: No, I don't.

Q: Clearly at that time and even given your intoxicated -- your claimed intoxicated state, you perceived that there was some awkwardness or you wouldn't have sent the message; right?

A: I can't answer that question. I don't know.

Q: Do you recall later that evening having a conversation with Attorney Miller in the kitchen about what had transpired that evening?

A: I remember being in the kitchen and talking. When you say later, I don't know where that fits in a chronology of things. I remember we were in the kitchen. We

talked. But when and what, I couldn't tell you.

Q: Attorney Miller contends that during this conversation, I believe it was a conversation in the kitchen, you told her that you wanted to go upstairs to her bed and hold her. Do you have any recollection of making that statement?

A: I do not.

Q: While you did wind up in Ms. Miller's bed, it wasn't with Ms. Miller; correct?

A: Correct.

Q: Do you recall having a discussion with Ms. Miller the following morning on February 4th, 2016, about the events that occurred on the evening of February 3rd of 2016?

A: Yes.

Q: In that conversation, you admitted or acknowledged to Ms. Miller that your actions the previous night were inappropriate; fair statement?

A: Correct.

Q: You suggested to Ms. Miller that part of the reason perhaps for that conduct was that you were intoxicated; right?

A: No. The reason for the conduct is I was intoxicated.

Q: I'm sorry. Say that again, please.

A: You asked me if part of the reason for my conduct was intoxication. I disagree

with that. The reason for my conduct was the intoxication.

Q: Understood. Understood. You made some reference to having one drink and making some observation that perhaps the liquor that you found in the kitchen had been spiked. Do you recall that?

A: I recall we had a conversation. I was extremely hungover. I'm not going to ask you if you've been hungover but –

Q: I wouldn't be afraid to answer the question, Attorney DeLadurantey.

A: I can tell you that I was extremely hungover, a raging hangover, and I've had my share of hangovers.

Q: Sure. You don't remember saying anything to her about you had one drink and that possibly the alcohol had been spiked?

A: I recall saying something along the lines of realizing the stupidity of drinking alcohol in a rental place in San Francisco from an open bottle and, like, expressing some concern that it could have been spiked.

Q: All right. But in your interview with Ms. Kokie -- and I believe my notes are accurate that you said that you thought you had done eight to ten shots in an hour or two. Do you remember making that statement to Attorney Kokie?

A: Correct.

* * *

> Q: You've never known Ms. Miller to consume alcohol; is that a fair statement?
>
> A: It is.
>
> Q: And given that answer -- and this is probably the question I should have asked first – you certainly aren't contending that on that evening of February 3rd Ms. Miller had consumed any alcohol?
>
> A: I'm not aware that she had. To answer your question, no, I'm not contending that. If she did, that would be news to me.

(R. 25 (3/3/21 DeLadurantey Depo. Tr.) at 62-68)

III. The Referee's Report.

On July 10, 2021, the referee filed his report, recommending that OLR's complaint against DeLadurantey and sole remaining claim of offensive personality be dismissed. (R. 33 (Referee's Report)) In the alternative only, in the event the Court determined that DeLadurantey's conduct constituted offensive personality, the referee recommended discipline in the form of a private reprimand.

There are several notable findings in the referee's report:

- The centerpiece of OLR's sexual harassment and offensive personality complaint relates to an incident in San Francisco on the evening of February 3, 2016. (Id., p. 6);

- 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. (Id.);

- During the 5 ½ years of Miller's employment with the DeLadurantey firm, the extensive discovery exhibits, which were offered and received in evidence on the remaining issue of the sanction recommendation, show that Miller and DeLadurantey had both a professional and a personal relationship. (Id., p. 7);

- Both attorneys agree that there were discussions in 2014 about the need to set "boundaries." Neither attorney was specific about what those boundaries were to include, but an incident arose in which the boundaries were connected to housing accommodations during travel. (Id.);

- There is simply no reported sexual harassment cases that involved mutual interactions between an employer and employee as agreeable, lengthy, and non-hostile as this case. (Id., p. 10);

- Miller was very well compensated while she was employed by DeLadurantey's firm – one year Miller's compensation was approximately $150,000; within three years of working for DeLadurantey her salary and bonus exceeded $200,000. (Id., p. 11);

- Miller liked beaches, so when they traveled to locations near the ocean, DeLadurantey or Miller arranged for, and DeLadurantey paid for, accommodations near the waterfront. On many of the trips photos were taken and

many were preserved by Miller as memorabilia. Forty-three of them were offered and received into evidence and shed important light on the welcomeness issue. (Id.);

- It is undisputed that DeLadurantey gave Miller more than the usual amount of professional authority, with Miller expressing an expectation of management consultation. (Id.);

- After the San Francisco incident, Miller continued her employment with DeLadurantey for almost another 20 months, DeLadurantey did not terminate Miller's employment during this time, Miller did not quit, and Miller wanted to work things out. (Id., p. 12)

- E-mails and text messages exchanged between DeLadurantey and Miller made apparent that the relationship between the parties was anything but a standard employer-employee relationship, particularly regarding Miller's complaints about taking time for vacation and working too many hours. These communications undercut OLR's contention that Miller was afraid to speak up for fear of losing her job. There is also no mention whatsoever about any other objectionable conduct, hand holding, back rubbing, hot tub sharing or otherwise by DeLadurantey. (Id., p. 14)

- The documentary evidence immediately before Miller's departure sheds considerable light on the tenor of the break-up and clearly demonstrates there was a link between the professional split and the personal one. (Id., p. 15)

- Under all the circumstances, it would have been a difficult slog to have proved by clear and convincing evidence that DeLadurantey fired Miller in October 2017 because she turned him down once for sex in February 2016. (Id., p. 16)

- If DeLadurantey had engaged in retaliatory termination, it seems unlikely that he would have waited 20 months to do it, that he would have invited Miller to participate in setting the terms of her severance, allowed her to write the letter to firm clients, paid her after her departure, and would not have contested her application for unemployment. (Id.)

- On a single occasion, after the parties had engaged in years of consensual dating-like activity, DeLadurantey, while he claims to have been inebriated, asked if the relationship could be escalated. His overture was immediately rebuffed. He not only did not pursue the matter further then, he was completely contrite and never at any time over the ensuing almost 20 months repeated it. His conduct involved no client, no other employee, or any other women. With respect to Miller, the relationship had clearly evolved into a mutual one which did not resemble a standard employer-employee relationship. (Id., p. 18)

- If a reasonable person in DeLadurantey's position on February 3, 2016, would not have known his conduct was unwelcome, how does this conduct form the basis for the charge of "offensive personality"? The cat cannot be both dead and alive at the same time. If DeLadurantey's conduct was **welcome** (which, presumably, was the primary basis for dismissal of the sexual harassment charge), how could the same

conduct be **offensive?** (Id.; emphasis in original)

- It could be argued that DeLadurantey's comments to Miller regarding her dress and appearance support the charge of "offensive personality". Initially, the record shows, and Miller agrees, that he showered her with apologies. Considered in context, it is likely that these comments were not made to Miller as an employee but were instead made to Miller as a female friend and traveling companion, sometimes at the end of a day long, cross country flight. In other words, the comments appear to have been "couple's banter" made in the context of a private, personal relationship. Most importantly, it is clear from the entire record that DeLadurantey's other consistent treatment of Miller was positive, patient, and respectful. (Id., pp. 18-19)

- Most significantly, there is **no indication in the contemporaneous documentary record** that Miller was ever offended by or complained about any comments the respondent made about her appearance or dress. (Id., p. 19; emphasis in original)

- Here, the parties had a lengthy platonic relationship which involved occasionally sharing hot tubs, mutual back rubs, and hand holding, all voluntary, "welcome" conduct. None of this even rises to the level of a "comparable offense". There was no offense. How exactly does this private conduct reflect adversely on the respondent's fitness to practice law? It does not. (Id., p. 20)

- It is highly unlikely that DeLadurantey will again become involved in a relationship with a female employee in his office. Because he

> has no disciplinary record (a critical mitigating factor), and because of all the other unique circumstances of this case, this is not a case in which DeLadurantey should be held up as an example to other attorneys. (Id., p. 20)

The referee concluded by recommending that OLR's remaining charge against DeLadurantey of offensive personality be dismissed. (Id., p. 22) In the alternative, if this Court does not agree to dismiss the charge, the referee recommended DeLadurantey be privately reprimanded. (Id.)

OLR appealed the referee's recommendation to dismiss the offensive personality charge.

STANDARD OF REVIEW

When reviewing the referee's report, the Court will affirm the referee's findings of fact unless they are clearly erroneous. Disciplinary Proceedings Against Inglimo, 2007 WI 126, ¶ 5, 305 Wis.2d 71, 740 N.W.2d 125. The referee's conclusions of law and recommendation for discipline are reviewed *de novo*. Disciplinary Proceedings Against Carroll, 2001 WI 130, ¶ 29, 248 Wis.2d 662, 636 N.W.2d 718; see also Disciplinary Proceedings Against Widule, 2003 WI 34, ¶ 44, 261 Wis.2d 45, 660 N.W.2d 686. The Court determines the appropriate level of discipline to impose given the

particular facts of each case, independent of the referee's recommendation, but benefitting from it. Widule, 261 Wis.2d 45, ¶ 44.

ARGUMENT

I. The Referee's Recommended Dismissal of the Offensive Personality Charge Is Based on Factual Findings That Are Not Clearly Erroneous.

The Court may overturn a referee's factual findings only if those findings are clearly erroneous. Disciplinary Proceedings Against Boyle, 2015 WI 110, ¶ 41, 365 Wis. 2d 649, 872 N.W.2d 637.

Here, the referee chose to believe that the parties had a lengthy platonic relationship which involved occasionally sharing hot tubs, mutual back rubs, and hand holding, all voluntary, "welcome" conduct. (R. 33 (Referee's Report), p. 20) The referee further found that on a single occasion, after the parties had engaged in years of consensual "dating-like" activity, DeLadurantey, while he claims to have been inebriated, asked if the relationship could be escalated, his overture was immediately rebuffed, he did not pursue the matter further then, he was completely contrite and he never at any time over the ensuing almost 20 months repeated it. (Id., p. 18)

Based on those factual findings, the referee recommended that the offensive personality charge asserted against DeLadurantey be dismissed.

This Court has said on numerous occasions that "[i]t is not our place to reappraise the evidence unless it plainly fails to support the findings of the referee—and that is not the case here." See, *e.g.*, Disciplinary Proceedings Against Ritland, 2021 WI 36, ¶ 26, 396 Wis. 2d 509, 957 N.W.2d 540; Boyle, 365 Wis. 2d 649, ¶ 41.

OLR goes to great lengths to argue that there is clear, satisfactory, and convincing evidence that DeLadurantey's conduct constituted offensive personality. OLR's brief states "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." (OLR Br. at p. 9)

OLR goes on to contend that certain of the referee's factual findings are erroneous:

- 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. (Id., p. 10);

- Nothing in the record supports the referee's conclusion that the boundary discussion in 2014 was limited to housing accommodations. (Id., p. 13)

- The referee states DeLadurantey "asked" to escalate the relationship in San Francisco. However, there is nothing in the record to support the referee's conclusions that DeLadurantey "asked" if the relationship could be escalated. (Id., p. 23)

- 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." The referee's exploration should have resulted in the conclusion that Miller never welcomed DeLadurantey's sexually suggestive actions. (Id., p. 26)

- 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." 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. (Id., p. 28; emphasis in original)

The record is the record. From that record, OLR/Miller on the one hand and DeLadurantey on the other have argued their differing points of view. OLR/Miller have contended that DeLadurantey's conduct was unwelcome, uninvited, and offensive, particularly in the employee-employer dynamic. DeLadurantey, on the other hand, has contended that the parties were engaged in a mutually flirtatious personal and professional relationship.

The referee concluded based on his thorough review of the evidence that the facts established a mutual personal and professional relationship consisting of "dating-like" activity and that DeLadurantey's conduct did not amount to any violation. There is more than ample evidence in the record to support both the referee's findings and his conclusion that the facts and circumstances of this case did not involve offensive conduct of a non-consensual and unwelcome nature. The referee's discussion of the appropriate sanction further sheds light on the findings:

> There is no other reported case like this one. I agree that the closest cases factually are 2008-38 wherein a private reprimand was imposed where an attorney made sexually suggestive comments to a co-worker over a period of several years, and kissed her without consent, and 2006-6 where a private reprimand was

> imposed against an attorney who, after a relationship ended, continued to make contact with the woman when she did not want such contact, resulting in a criminal misdemeanor charge. Both cases were more serious because they were clear cases of a lack of consent, where the attorney's actions were flatly unwelcome, involving forcing themselves onto women. ***There is no hint of that here.***

(R. 33 (Referee's Report), p. 20; emphasis added)

While OLR's brief sets out Miller's version of events in contending DeLadurantey's conduct was offensive, unwelcome, uninvited, and nonconsensual, in light of the standard of review set forth above, the existence of that evidence arguably contradicting the findings of the referee is irrelevant. What is relevant is the presence of ample evidence supporting the referee's findings and conclusion that the parties were engaged in a mutual, personal, flirtatious relationship and that, under those circumstances as found to exist by the referee, DeLadurantey's conduct did not constitute offensive personality.

The referee's recommendation to dismiss the offensive personality charge necessarily involved a fact intensive analysis of the facts and circumstances of the parties' personal and professional relationship. Based on that analysis

of those facts and circumstances, he recommended that the offensive personality charge be dismissed.

Longstanding precedent establishes that OLR's attack on those findings is misplaced and cannot be accepted. As this Court has stated: "It is not our place to reappraise the evidence unless it plainly fails to support the findings of the referee—and that is not the case here." See, *e.g.*, Ritland, 396 Wis. 2d 509, ¶ 26; Boyle, 365 Wis. 2d 649, ¶ 41.

The Court should adopt the referee's report and recommendation and dismiss the case.

II. DeLadurantey's No Contest Plea Did Not Prevent the Referee From Making Recommendations Based On His Review Of The Record.

OLR appears to contend that the referee's report is clearly erroneous for recommending dismissal of the offensive personality charge because DeLadurantey pled "no contest" to the charge.

This argument arose in similar contexts in Disciplinary Proceedings Against Clark, 2016 WI 36, 368 Wis. 2d 409, 878 N.W.2d 662 and Disciplinary Proceedings Against Drach, 2020 WI 94, 395 Wis. 2d 32, 952 N.W.2d 122. Those decisions undercut OLR's position here.

In Clark, during the attorney disciplinary hearing, the parties presented a signed stipulation where the attorney admitted five counts of the complaint and entered no contest pleas to four counts. Clark, 368 Wis. 2d 409, ¶ 5. The stipulation also provided that the attorney agreed that the referee could use the allegations of the complaint as an adequate factual basis in the record for a determination of misconduct regarding the nine counts of the complaint. Id.

In the later report and recommendation, the referee concluded that "in spite of the fact that [the attorney] had entered a plea of no contest to count five, the OLR had failed to meet its burden of proof with respect to count five." Id. at ¶ 16.

This Court stated "[t]here is no showing that any of the referee's findings of fact are clearly erroneous, and we adopt them" and "[w]e agree with the referee's conclusions of law that [the attorney] violated the supreme court rules set forth above." Id. at ¶ 23.

Similarly, in Drach the attorney stipulated to all four counts of misconduct alleged. Drach, 395 Wis. 2d 32, ¶ 29. After conducting a hearing on sanctions, the referee filed his report recommending dismissal of the first stipulated count

involving hourly billing charges when there was an existing flat fee agreement. Id. The referee reasoned that there was no testimony or evidence in the record to show the amount billed was unreasonable. Id.

This Court agreed with the referee's recommendation that the attorney did not commit the misconduct alleged in the first stipulated count – despite the stipulation – albeit it on grounds other than those provided by the referee. Id. at ¶¶ 43-45.

Here, the referee accepted DeLadurantey's "no contest" plea on the basis that the referee was satisfied that there was an adequate factual basis for the charge in the record. DeLadurantey is unaware of any authority precluding the referee from making recommendations based on a review of the record regardless of the fact of a "no contest" plea. To the contrary, the Clark and Drach decisions make clear that there was no error by the referees in those cases for concluding that OLR had failed to meet its burden of proof on a charge to which the attorneys in those cases pled "no contest" or stipulated to because the referees' review of the records in those cases demonstrated that OLR had failed to meet its burden of proof.

III. Appropriate Discipline.

In the event the Court adopts the referee's factual findings and conclusions of law that there has been no offensive personality violation, the case should be dismissed and no discipline imposed.

The referee further noted that, if the Court does not agree with his recommendation to dismiss the offensive personality charge, in the alternative, he recommended discipline in the form of a private reprimand.

OLR agrees that a private reprimand is appropriate discipline under the facts and circumstances of this case. DeLadurantey agrees with the referee and OLR that, in the event the offensive personality charge is not dismissed, a private reprimand is appropriate discipline.

Based on the evidence received and as sought by OLR, the appropriate discipline under all the facts and circumstances regarding the single offensive personality count is a private reprimand.

Imposition of a private reprimand is authorized by SCR 22.09. The factors considered for determining the appropriate discipline for professional misconduct include: (1) the seriousness, nature and extent of the misconduct; (2)

the level of discipline needed to protect the public, the courts, and the legal system from repetition of the attorney's misconduct; (3) the need to impress upon the attorney the seriousness of the misconduct; and (4) the need to deter other attorneys from committing similar misconduct. Disciplinary Proceedings Against Carroll, 2001 WI 130, ¶ 40, 248 Wis. 2d 662, 636 N.W.2d 718; Disciplinary Proceedings Against Hammis, 2011 WI 3, ¶ 39, 331 Wis. 2d 19, 793 N.W.2d 884; see also Disciplinary Proceedings Against Grogan, 2011 WI 7, ¶ 15, 331 Wis. 2d 341, 795 N.W.2d 745 (recognizing ABA Standards as a guidepost).

A private reprimand is appropriate discipline in cases of "minor misconduct" – *i.e.*, when there is little or no injury to a client, the public, the legal system, or the profession, and little likelihood of repetition by the lawyer. Disciplinary Proceedings Against Kremkoski, 2004 WI 150, ¶ 18, 277 Wis. 2d 83, 690 N.W.2d 430.

That this is a case appropriate for the imposition of a private reprimand is demonstrated by the private and public reprimands referenced herein. Prior private reprimands involve conduct more aggravated than that involved here and the conduct which produced public reprimands is not

comparable to the circumstances established by the respondent's response to the complaint and the admitted evidence.

Under prior decisions of this Court, the factors identified above are not the only factors – how the facts of any case compare to the facts of prior decisions is an important consideration in determining the appropriate level of discipline.

While each disciplinary case "must be assessed on the basis of its own facts," Disciplinary Proceedings Against Washington, 2007 WI 65, ¶ 20, 301 Wis. 2d 47, 732 N.W.2d 24, the Court relies on precedent to provide guidance as to what discipline is appropriate under similar facts and circumstances. See, *e.g.*, Disciplinary Proceedings Against McKinley, 2014 WI 48, 354 Wis. 2d 717, 848 N.W.2d 295 (discussing appropriate discipline in context of prior precedent regarding tax reporting violations with similar facts and circumstances and mitigating factors); Disciplinary Proceedings Against Runyon, 2015 WI 95, 365 Wis. 2d 32, 870 N.W.2d 228 (discussing appropriate discipline in context of prior precedent regarding trust account violations); Disciplinary Proceedings Against Kitto, 2018 WI 71, 382

Wis. 2d 368, 913 N.W.2d 874 (discussing appropriate discipline in context of prior precedent regarding trust account violations and misappropriation and relying on similarity of past precedent for imposition of suspension). As these decisions make clear, one of the factors determinative of the appropriate discipline is how similarly situated respondents were treated. For that reason, how the admitted conduct in this case compares to that of prior respondents who received private and public reprimands is dispositive.

Properly viewed and accepting Miller's testimony and allegations about the San Francisco incident as accurate, that incident represents the culmination of DeLadurantey's misconception that his relationship with Miller was one of a mutual attraction flirtation, made worse by the fact that DeLadurantey was under the influence of alcohol. As alleged in the complaint and admitted as a fact for purposes of these proceedings by virtue of the no contest response, DeLadurantey apologized to Miller for his conduct in San Francisco the day after it occurred.

Consideration of the factors identified above and precedent here demonstrates a private reprimand is the appropriate level of discipline for that misconduct.

The Supreme Court has imposed private reprimands[2] in the following contexts:

- 2015-2 (attorney grabbed breast of female employee of a bar, made several sexually suggestive and offensive comments to her, followed her home, was arrested, and was charged with fourth degree sexual assault).

- 2014-11 (attorney serving as trustee of trust pled no contest to disorderly conduct charges related to inappropriately touching and contacting one of the trust's beneficiaries).

- 2013-16 (attorney was charged with and pled guilty to charges involving battery and domestic abuse, and involving the imposition of conditions including absolute sobriety).

- 2013-3 (attorney involved in civil litigation sent late-night offensive, vulgar, and suggestively violent e-mails and messages to opposing counsel while under influence of alcohol).

- 2008-38 (attorney made sexually suggestive comments to co-worker over a period of several years and, on one occasion, kissed her without her consent).

- 2008-21 (attorney was charged with and pled no contest to charges involving battery and domestic abuse).

[2] Other examples include: 1991-6 (attorney made sexually suggestive comments and engaged in similar physical contact with female officers while awaiting jury for criminal trial); 1996-24 (attorney inquired into intimate sexual matters and made sexually suggestive comments to client).

- 2008-13 (attorney was charged with battery and domestic abuse).

- 2006-6 (attorney self-reported criminal misdemeanor charges stemming from relationship with woman whom attorney had been dating, woman ended relationship and requested no further contact, and attorney continued to make contacts).

In contrast, the Court determined public reprimands[3] were appropriate in the following contexts:

- Public Reprimand of Norine, 2019-OLR-3 (district attorney communicated in sexually suggestive and offensive manner with several women with pending criminal cases).

- Disciplinary Proceedings Against Beatse, 2006 WI 115, 297 Wis. 2d 292, 722 N.W.2d 385 (district attorney viewed pornographic websites at work, lied about doing so during investigation, and made sexually offensive statements to court reporter).

- Disciplinary Proceedings Against Engl, 2005 WI 102, 283 Wis. 2d 140, 698 N.W.2d 821 (attorney used computer to attempt to commit child sex crime and based on consideration of several mitigating factors).

- Public Reprimand of Plein, 2003-15 (attorney engaged in child sex crimes,

[3] See also Public Reprimand of Dudley (2013-OLR-5) and Public Reprimand of Schellpfeffer (2018-OLR-3), where public reprimands were imposed under circumstances where there were sexually suggestive comments and communications from attorneys to their clients.

> but was charged and convicted after attorney ceased practicing law).

The differences between the private and public reprimand cases are the seriousness of the sexual misconduct and/or to the number and repetitiveness of the sexual misconduct. Because the conduct established here is less serious than that involved in the public reprimand cases and the single serious incident -- the San Francisco incident -- was an isolated outlier, a private reprimand is appropriate. An analysis of the allegations and evidence regarding the San Francisco incident makes this clear.

Another important consideration is the fact that there does not appear to be any Wisconsin precedent supporting discipline beyond a private reprimand under circumstances involving similar misconduct where the sole misconduct alleged by OLR involved offensive personality. As demonstrated above, while the Court has imposed private reprimands on a number of occasions for conduct that involved allegations of offensive personality, each of those instances involved misconduct beyond and in addition to the offensive personality violations. Put another way, there does not appear to be any Wisconsin precedent that supports the

imposition of discipline beyond a private reprimand under comparable facts and circumstances of this case and the sole count of offensive personality charged against the respondent.

As the OLR recognized by dismissing its claim based on sexual harassment, this is not a case of sexually inappropriate conduct constituting harassment. This is a single instance of behavior on an isolated occasion while under the influence of alcohol. DeLadurantey has admitted that his conduct on that occasion in San Francisco was wrong both because of his mistaken belief and because he lacked better judgment because he was acting under the influence of alcohol. While that neither excuses nor justifies his conduct on that occasion, it does place it in a context in which the Court has historically issued private reprimands rather than more serious discipline.

Of the precedent cited above, these facts and circumstances are most akin to Private Reprimand 2008-38, which involved an attorney who made sexually suggestive comments to a co-worker over a period of several years and, on one occasion, kissed her without her consent. The circumstances of the other referenced private reprimands involve more serious and aggravated conduct than that

involved here. The public reprimands clearly involve more serious and aggravated conduct than that at issue here, as each involve significant aggravating factors, ranging from dishonesty in the investigation to sex crimes to conduct ranging over several years and involving multiple individuals.[4]

Not only is the conduct at issue here most akin to the facts and circumstances involved in the private reprimands referenced above, but there are a number of mitigating factors. First, DeLadurantey has never been disciplined before. Second, DeLadurantey has fully cooperated in the OLR investigation. Third, DeLadurantey has admitted that his conduct and actions involving the San Francisco incident were wrong, apologized for his conduct to Miller after the incident occurred and remains remorseful.

The referee's discussion of the appropriate sanction states as follows:

> There is no other reported case like this one. I agree that the closest cases factually are 2008-38 wherein a private reprimand was imposed where an attorney made sexually suggestive comments to a co-worker over a period of

[4] It should be noted that not only did the sexually suggestive communications between attorneys and their clients constitute offensive, harassing communications, but the Rules prohibit attorneys from engaging in a sexual relationship with a client. See SCR 20:1.8(j).

> several years, and kissed her without consent, and 2006-6 where a private reprimand was imposed against an attorney who, after a relationship ended, continued to make contact with the woman when she did not want such contact, resulting in a criminal misdemeanor charge. Both cases were more serious because they were clear cases of a lack of consent, where the attorney's actions were flatly unwelcome, involving forcing themselves onto women. ***There is no hint of that here.***

(R. 33 (Referee's Report), p. 20; emphasis added) Thus, while there are certainly grounds to conclude that no discipline is warranted, consideration of the facts and circumstances of the misconduct at issue, comparable Wisconsin precedent, and the mitigating factors make clear beyond any doubt that a private reprimand is the appropriate form of discipline, if any, in this case.

CONCLUSION

For the reasons set forth herein, respondent-respondent, Nathan E. DeLadurantey, respectfully submits that the referee's report and recommended dismissal of the offensive personality charge should be adopted and this case dismissed. In the alternative only, if the Court disagrees with the referee's recommendation to dismiss, DeLadurantey respectfully submits that discipline in the form of a private

reprimand is appropriate discipline under the facts and circumstances of this case.

Dated at Milwaukee, Wisconsin, this 8th day of October, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. §§ 809.63 and 809.19(8)(b) and (c), for a brief produced using a Times New Roman font. The length of this brief is 6,267 words.

Dated at Milwaukee, Wisconsin, this 8th day of October, 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I HEREBY CERTIFY that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I FURTHER CERTIFY that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated at Milwaukee, Wisconsin, this 8th day of October, 2021.

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I hereby certify that on October 8, 2021, I personally caused copies of the Brief of Respondent-Respondent Robert E. Kinney to be mailed by first-class postage prepaid mail to:

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