

FILED
10-22-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

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

CASE CODE 30912

CASE NO. 2020AP1616-D

OFFICE OF LAWYER REGULATION,

Complainant-Appellant,

v.

NATHAN E. DELADURANTEY,

Respondent-Respondent.

ON APPEAL FROM REFEREE'S REPORT

OLR'S REPLY BRIEF
(COMPLAINANT-APPELLANT)

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ARGUMENT

The evidence received by the referee supports OLR's contention that DeLadurantey violated the Attorney's Oath by engaging in behavior constituting offensive personality, in violation of SCR 40.15. Despite the agreement of the parties that DeLadurantey's conduct violated that rule, the referee recommended the rule violation be dismissed. In the alternative, the referee recommended that if the Court determines DeLadurantey violated the rule, a private reprimand is the appropriate level of discipline. (R. 33 Referee's Report and Recommendation, p. 22).

OLR maintains that the undisputed facts in this case show a violation of SCR 40.15 by clear, convincing and satisfactory evidence. If the conduct DeLadurantey admittedly engaged in is deemed non-offensive, it will establish an acceptable standard of behavior that would be detrimental to the reputation and integrity of the legal profession.

DeLadurantey's brief advances three arguments. First, the referee's Findings of Fact were not clearly erroneous and should be adopted. Second, that DeLadurantey's no contest plea did not prevent the referee

from recommending that the admitted SCR 40.15 violation be dismissed. Third, if the Court finds a violation of SCR 40.15 did occur, then a private reprimand is the appropriate sanction. OLR agrees that if the Court finds a violation of SCR 40.15 did occur, an appropriate sanction is a private reprimand.

I. The Referee's Conclusion of Law that DeLadurantey did not violate the Attorney's Oath is contrary to law.

The referee's Conclusion of Law that DeLadurantey did not violate the Attorney's Oath is based upon an improper sexual harassment analysis. This Conclusion of Law is subject to *de novo* review by the Court. *Disciplinary Proceedings Against Eisenberg*, 2004 WI 14, ¶5. Application of a sexual harassment analysis to the facts of this case is erroneous because it includes an element of proof that is not necessary to prove a violation of offensive personality, namely, unwelcomeness of the offender's conduct. The referee cites no authority to support this analysis, which relates to an entirely different SCR violation.

In his response, by omission, DeLadurantey does not dispute the referee erred by applying a sexual harassment analysis. DeLadurantey presented no argument in his Response Brief that unwelcomeness, the "gravamen" of a

sexual harassment claim, is not an element of an offensive personality claim. (Response Brief, pp. 20-25).

II. The evidence shows DeLadurantey violated the Attorney's Oath.

A referee has the powers of a judge in a civil action. SCR 22.16(1). Included in those powers and responsibilities is the duty to weigh evidence. The referee then formulates findings of fact and conclusions of law and makes a recommendation regarding misconduct, if any is found. SCR 22.16(6).

The referee made three "Findings of Fact." (*Referee's Report and Recommendation*, p.2 as amended July 13, 2021). The third Finding of Fact states, "Additional findings, as well as my conclusion, appear below." *Id.* Throughout OLR's briefs, reference to the referee's findings is based on the statement quoted above.

The referee determined that a reasonable person in DeLadurantey's position would not have known his conduct was unwelcome. (R. 33 *Referee's Report and Recommendation*, p. 18). Implicit in that determination is the referee's conclusion Miller welcomed DeLadurantey's attempts to initiate physical contact of a sexual nature. That is not the only clearly erroneous finding made by

the referee, but it is the most fatal. It is inconsistent with the factual record.

The absence of a finding of unwelcomeness is contrary to the referee's finding that Miller objected to DeLadurantey's conduct in San Francisco. (R. 33 Referee's *Report and Recommendation*, p. 6). DeLadurantey's behavior cannot be both simultaneously objected to and welcome. The referee had uncontested evidence that prior to the San Francisco incident DeLadurantey knew even the act of attempting to hold Miller's hand made Miller uncomfortable. (R. 27 OLR Ex. 27, p. 5). DeLadurantey's groping of Miller in San Francisco was unwelcome. Did Miller not say "no" to DeLadurantey often enough or loud enough?

The referee apparently did not consider DeLadurantey's conduct after his attempt to initiate a sexual encounter was rebuked on the night of February 3, 2016 in San Francisco. Later that evening, DeLadurantey doubled down with more offensive conduct. DeLadurantey told Miller that he wanted to go upstairs to her bed and hold Miller. Miller unequivocally said no. DeLadurantey's statement occurred after Miller told DeLadurantey she thought she was going to throw up because of DeLadurantey's earlier behavior. (R. 27 OLR Ex. 20, p.

1). DeLadurantey responded to Miller's second rejection by getting into Miller's bed. (R. 26 Miller Deposition Trans., p. 113 L. 19-22). Miller later told DeLadurantey she might have to quit the firm because of his behavior. (R. 26 Miller Deposition Trans., p. 113 L. 19-22). DeLadurantey's post-rejection behavior was no more welcome than his initial groping, and standing alone, constitutes offensive personality. The referee's conclusion that DeLadurantey's conduct did not constitute offensive personality in violation of the Attorney's Oath is predicated on his implicit finding Miller "welcomed" the behavior. Any conclusion of law based upon this implicit finding is fundamentally flawed.

III. Drach and Clark are distinguishable.

DeLadurantey's second argument is that the acceptance of DeLadurantey's no contest plea did not prevent the referee from recommending dismissal of a violation to which DeLadurantey admitted. (Response Brief, pp. 25-27). To support that contention, DeLadurantey relies on *Disciplinary Proceedings Against Drach*, 2020 WI 94 and *Disciplinary Proceedings Against Clark*, 2016 WI 36.

Drach stipulated to four counts of misconduct. *Id.* at ¶1. A hearing on the appropriate sanction was then

conducted. *Id.* In his report following the hearing, the referee recommended dismissing one count relating to hourly billing charges when there existed a flat fee agreement. *Id.* at ¶4. The referee found there was no evidence the hourly billings were unreasonable. *Id.* at ¶29.

This Court agreed with the referee's recommendation to dismiss the count, but for an entirely different reason. This Court found that Drach's clerical staff mistakenly made a number of errors on a single bill. *Id.* at ¶44. This Court stated:

On these particular facts, we do not find a SCR 20:1.5(a) violation. While an attorney's fee must unquestionably be reasonable, we decline to hold that the issuance of a single bill containing some inadvertently included time entries rises to the level of misconduct contemplated by SCR 20:1.5(a).

Id. at ¶45.

Drach is distinguishable. The Court essentially found no violation because the violation was minor and inadvertent. By contrast, DeLadurantey's persistent attempts to engage in physical contact of a sexual nature were deliberate, premeditated and hardly inadvertent. Further, while the referee in *Drach* based the dismissal recommendation on a lack of evidence, no such lack of evidence exists in DeLadurantey's case.

In *Clark*, OLR's *Complaint* alleged 10 counts of misconduct. *Id.* at ¶4. At the hearing, OLR voluntarily dismissed one count, leaving nine. Clark admitted to five counts of misconduct and pled no contest to four. *Id.* at ¶5.

One count to which Clark pled no contest had alleged that Clark's disbursement of funds without obtaining court and opposing counsel's permission constituted dishonest conduct. The presiding referee said this count included obligations that were not included in the underlying divorce court's orders or in a relevant marital settlement agreement, and that the evidence at the hearing did not establish otherwise. Neither party appealed. The Court upheld the violations found by the referee.

The dismissal of a count in Clark's case was not briefed directly to the Court, because neither party appealed. The resulting passive dismissal of that count impliedly held that Clark should not be held accountable for the alleged dishonesty for something not required of him. In contrast, DeLadurantey's offensive behavior was repetitive and intentional. DeLadurantey should be held accountable for something he is required to do, which is to abstain from offensive personality and to uphold the Attorney's Oath.

OLR does not contend a referee lacks the discretion to recommend dismissal of an admitted violation. However, DeLadurantey's choice to plead no contest, with advice of counsel, subjectively and objectively evidenced he knew his conduct was offensive from a reasonable person perspective. That fact warrants considerable weight.

CONCLUSION

OLR appealed the referee's recommendation because it was predicated on inapplicable legal standards and clearly erroneous factual findings. In light of all the evidence to the contrary, the finding that DeLadurantey's behavior was not unwelcome is most important. The referee's reliance on that analysis resulted in his flawed Conclusion of Law that DeLadurantey did not violate SCR 40.15.

If welcomeness is to be considered in cases where a violation of SCR 40.15 is alleged, this record is replete with instances where Miller made DeLadurantey keenly aware his advances were unwelcome prior to the San Francisco incident. Further, the few instances of physical contact Miller requested and consented to from DeLadurantey were in a form (shoulder rub) that Miller approved of and had control over. DeLadurantey attempted to take that control away from Miller. His attempts to

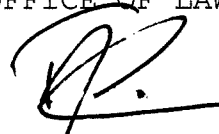
initiate a sexual encounter in San Francisco greatly exceed the form and level of physical contact Miller was willing to allow, and DeLadurantey knew that. DeLadurantey's misconduct was not technical or inadvertent like in *Drach* and *Clark*, but rather, persistent, premeditated and deliberate.

The Court should not adopt the referee's recommendation of dismissal, and should instead find misconduct and impose discipline. OLR declines to increase its sanction request from that which it's Director previously determined to seek.

Dated this 23rd day of October, 2021.

Respectfully submitted,

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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 nine (9) 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 21st day of October, 2021.

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