

STATE OF WISCONSIN

IN SUPREME COURT

**FILED**

SEP 25 2023

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST LYNNE A.  
LAYBER.

CLERK OF SUPREME COURT  
OF WISCONSIN

OFFICE OF LAWYER REGULATION,

Case No. 2023AP000314-D

Complainant;

LYNNE A. LAYBER,

Respondent.

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**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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The Office of Lawyer Regulation alleges that Lynne A. Layber violated SCR 20:8.4(b), which provides that it is professional misconduct to “commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.” The criminal act in this case is a fourth offense of operating a vehicle while intoxicated. The parties filed cross-motions for summary judgment on the issue of whether that criminal offense qualifies as professional misconduct—i.e., whether it reflects adversely on Attorney Layber’s honesty, trustworthiness or fitness as a lawyer in other respects. The summary judgment procedure is not intended to address the issue of appropriate discipline if the criminal offense constitutes professional misconduct; that issue will be separately addressed if necessary.

The summary judgment motions are based on the following undisputed facts according to the Complaint and Answer.<sup>1</sup> On July 4, 2020, Attorney Layber was arrested on suspicion of

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<sup>1</sup> I find that the facts alleged in the Complaint and admitted in the Answer constitute the material undisputed facts for the purpose of summary judgment. Both parties refer to other facts in their briefs and affidavits; some of those additional factual assertions are disputed, but I do not find any of those disputes, or any undisputed fact not alleged in the Complaint, material to the summary judgment issue.

OWI. At that time her driver's license was restricted so as to prohibit her operation of a vehicle with a blood alcohol concentration of more than 0.02%, due to three prior OWI convictions—one in 1991 and two in 1999. *See Wis. Stat.* § 340.01(46m)(c). According to a blood draw performed after the arrest, Attorney Layber had a BAC of 0.106%. She was convicted of OWI-4<sup>th</sup> Offense, a Class H felony. *See Wis. Stat.* §§ 346.63(1)(a), 346.65(2)(am)4. Her sentence included six months in jail with Huber release privileges.

Comment No. 2 to the ABA template for Rule 20:8.4(c) makes clear that not all criminal conduct falls under it:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

*In re Disciplinary Proceedings Against Johns*, 2014 WI 32, 353 Wis. 2d 746, 847 N.W.2d 179, involved an attorney convicted of homicide by use of a vehicle with a prohibited blood alcohol level—namely, 0.257%, more than three times the level that constitutes prima facie evidence of being under the influence of an intoxicant. *Id.*, ¶¶ 9, 11; *see Wis. Stat.* § 885.235(1g)(c). The court found that the conduct underlying the offense did not violate SCR 20:8.4(b). 2014 WI 32, ¶ 32.

The court first reasoned that the conduct resulting in the conviction did not reflect adversely on Attorney Johns' honesty or trustworthiness. It noted that the conviction was his first for a "drunk-driving related" offense; he had no other criminal record; he had been truthful; he never disclaimed responsibility for the offense; and far from gaining from his conduct, he lost his

brother, who had been a passenger in his vehicle. Thus, the court concluded that Attorney Johns' decision to drive drunk "belies a deep-seated tendency toward dishonest or untrustworthy actions." *Id.*, ¶ 34.

The court then discussed whether the criminal conduct reflected adversely on Attorney Johns' fitness as a lawyer in other respects. The court quoted the last three sentences of the ABA Comment, as well as authority that "fitness ... to practice law" implies the characteristics of "preparedness, competence, expertise, [and] credibility." *Id.*, ¶¶ 36-37 (citing *In re Medical Incapacity Proceedings Against Schlieve*, 2010 WI 22, ¶ 24, 323 Wis. 2d 654, 780 N.W.2d 516). It held that Attorney Johns' conduct did not implicate those characteristics because it was "not part of a larger pattern of criminal behavior that suggests indifference toward the law"; and there was no indication that the conviction affected Attorney Johns' professional relationships in the legal system, affected his ability to represent clients competently and vigorously, or diminished public confidence in the legal profession. In contrast to a lawyer who "abuse[s] his professional status as a lawyer in committing a criminal act," Attorney Johns "violated no practice norms," "harmed no clients," and "did not benefit from his misconduct." *Id.*, ¶ 39.

In light of *Johns*, it is legitimate to question whether Attorney Layber's conduct violated SCR 20:8.4(b). While Attorney Johns drove with a blood alcohol level of 0.257% and got into an accident that killed his passenger, Attorney Layber drove with a blood alcohol level of 0.106%, causing no death, injury, or property damage. The answer that suggests itself is that unlike *Johns*, an element of Attorney Layber's criminal offense is commission of three previous impaired driving offenses—namely, three previous OWIs. The issue, then, is whether in the words of the ABA Comment and in contrast to *Johns*, there exists here as a matter of law "a pattern of repeated offenses" that indicates "indifference to legal obligation."

Attorney Layber's argument against the existence of a pattern of repeated offenses relies in part on the fact that her first two OWIs are civil rather than criminal offenses. They are nonetheless traffic "offenses" and the Comment refers not to a pattern of repeated *crimes* but, rather, more broadly to a pattern of repeated *offenses*.

Attorney Layber also relies on the 22-year gap between her third and fourth OWIs to preclude the existence of a pattern of repeated offenses. She equates "pattern" with "habit," which is defined as "something done frequently and almost without thinking." I do not consider those terms synonymous in the context of SCR 20:8.4(b); "pattern" is broader than "habit." To be sure, one definition of "pattern" is "frequent or widespread incidence." *Merriam-webster.com/dictionary/pattern* (viewed 9/21/23). Another, however, is "a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution"—for example, "a behavior *pattern*." *Id.* The former definition is the more apropos when the behavior is inconsequential, such as biting one's fingernails. Engaging in that behavior four times over a span of 30 years would not, in common parlance, demonstrate a pattern. But the latter definition is the more apropos when the behavior is illegal and dangerous conduct such as impaired driving. In that context, events over a long period of time, even three decades, can reveal a behavior pattern. Persons of ordinary intelligence would discern a pattern in Attorney Layber's four OWIs. It is a pattern established in the 1990s, to which she unfortunately reverted over two decades later. I therefore conclude as a matter of law that her four OWIs constitute "a pattern of repeated offenses."

As Attorney Layber points out, the ABA comment states that a pattern of repeated offenses "can" indicate indifference to legal obligation, not that it invariably does so. She argues that "[a]lcohol abuse or overuse is a medical condition—it is not an intentional criminal act." I

agree, but the offense involved here is not alcohol abuse or overuse; it is operating a motor vehicle on a public thoroughfare while impaired as a result of alcohol abuse or overuse. That is a choice—an intentional criminal act.

Attorney Layber protests that “the Comments are only guides to the rules” and, unlike the text of the rules themselves, are “not authoritative.” Nonetheless, ABA Comment No. 2 “explains and illustrates the meaning and purpose of” SCR 20:8.4(b). SCR Ch. 20, Scope, ¶ 21. Because the rule does not elaborate on what constitutes an adverse reflection on “fitness as a lawyer in other respects,” it is appropriate to rely on the comment to construe that clause.

The Wisconsin Supreme Court has frequently held conduct underlying an attorney’s multiple impaired driving offenses—in some cases combined with other criminal conduct—to violate SCR 20:8.4(b). See *In re Disciplinary Proceedings Against Knapp*, 2021 WI 15, 395 Wis. 2d 833, 955 N.W.2d 152 (four OWIs); *In re Disciplinary Proceedings Against Horsch*, 2020 WI 10, 390 Wis. 2d 99, 937 N.W.2d 925 (five or six OWIs—the most recent with children in the vehicle—and neglect of a child resulting in great bodily harm); *In re Disciplinary Proceedings Against Ewald-Herrick*, 2014 WI 40, 354 Wis. 2d 672, 847 N.W.2d 823 (four OWIs in five years); *In re Steinhafel*, 2013 WI 93, 351 Wis. 2d 313, 839 N.W.2d 404 (three OWIs—the most recent with a child in the vehicle—operating with a prohibited BAC, and operating after revocation); *In re Disciplinary Proceedings Against Schreier*, 2013 WI 35, 347 Wis. 2d 92, 829 N.W.2d 744 (four criminal OWIs, among 10 additional criminal convictions); *In re Disciplinary Proceedings Against Brandt*, 2012 WI 8, 338 Wis. 2d 524, 808 N.W.2d 687 (felony OWI conviction in Minnesota premised on three or more previous impaired driving offenses); *In re Disciplinary Proceedings Against Brandt*, 2009 WI 43, 317 Wis. 2d 266, 766 N.W.2d 194 (five OWIs); *In re Disciplinary Proceedings Against Cahill*, 219 Wis. 2d 330, 579 N.W.2d 231 (1998)

(three OWIs among other criminal conduct not involving impaired driving). *See also In re Disciplinary Proceedings Against Stearn*, 2004 WI 73, 272 Wis. 2d 141, 682 N.W.2d 326 (granting petition for consensual license revocation based on convictions for homicide and causing great bodily harm by intoxicated use of vehicle).

The 2009 *Brandt* case is the only one in which the parties contested the issue of whether multiple impaired driving offenses violate SCR 20:8.4(b). In that case, the court reasoned:

From our independent review of the record, we conclude that Attorney Brandt's multiple drunk driving convictions do constitute a violation of former SCR 20:8.4(b). While it is true that no prior cases have held that an attorney who was convicted of drunk driving on more than one occasion automatically violates former SCR 20:8.4(b), and while it is also true that each case must be reviewed on the particular facts presented, Attorney Brandt has been convicted of drunk driving on five separate occasions. Based on that record, we agree with the OLR that Attorney Brandt's multiple OWI convictions demonstrate a pattern of misconduct that evinces a serious lack of respect for the law and as such relate to his "fitness as a lawyer in other respects."

2009 WI 43, ¶ 42.<sup>2</sup> This reasoning accords with my construction of SCR 20.8.4(b) based on ABA Comment No. 2.

It is true that the court has not adopted a rule that multiple impaired driving convictions *per se* result in a violation, and the 2009 *Brandt* opinion indicates that on the contrary, the court considers that issue to be fact-dependent and to require case-by-case determination. It is also true that Attorney Brandt's impaired driving conduct as a whole is more egregious than Attorney Layber's, albeit not by leaps and bounds. In Attorney Layber's case, however, I conclude that the undisputed material facts require a determination that the conduct underlying her fourth OWI conviction violated SCR 20.8.4(b).<sup>3</sup> In that regard I note the undisputed fact that Attorney Layber's BAC was more than five times higher than permitted under her license restriction and well over the limit applicable to drivers with no prior impaired driving offenses. I also note that

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<sup>2</sup> Former SCR 20:8.4(b), which was effective prior to July 1, 2007, did not differ from the current version of that rule. *Id.*, ¶ 1 n.1.

<sup>3</sup> In light of that conclusion, the OLR's burden of proof is, contrary to Attorney Layber's argument, irrelevant.

the sentencing court evidently did not share Attorney Layber's implicit view that the offense was *de minimis* or largely technical in nature; it imposed a jail term of six months—approximately three times as long as the statutory minimum.

Accordingly, I conclude as a matter of law that Attorney Layber's pattern of repeated offenses evinces indifference to legal obligation. The 22-year gap between her two criminal convictions arguably is a mitigating factor in determination of the appropriate discipline but does not move the needle on the summary judgment issue of whether a violation of SCR 20.8.4(b) occurred.

Even apart from the issue of whether a pattern of repeated offenses exists, I find as a matter of law that Attorney Layber's fourth OWI offense violated SCR 20:8.4(b) because, contrary to her contention, it reflects adversely on her trustworthiness. Anyone who gets behind the wheel asks her passengers as well as everyone using public thoroughfares within her potential sphere of influence to trust that she is in a fit condition to operate a motor vehicle safely. Driving while intoxicated breaches that trust. Only if that act is an isolated aberration from an exemplary life and career, as in *Johns*, is the contrary proposition arguable.

In light of ABA Comment No. 2, Attorney Layber reads the rule much too narrowly. She claims "that the rules are limited to professional conduct" and do not apply to "[c]onduct performed ... entirely for personal reasons." If conduct violative of SCR 20:8.4(b) were limited to that undertaken in the course of practicing law, absurd results would follow. A lawyer who operates a Ponzi scheme as a side hustle or willfully fails to file her personal income tax returns would not violate SCR 20:8.4(b) because those activities are unconnected with law practice, yet the comment makes clear that those criminal acts do violate the rule. Moreover, the limitation Attorney Layber proposes is irreconcilable with the supreme court's holding in the 2009 *Brandt*

case, as well as its practice of accepting stipulations that repeated impaired driving offenses violate the rule.

The comment cites adultery as an example of an offense concerning “personal morality,” commission of which should not invoke SCR 20:8.4(b). Adultery and comparable offenses do not harm or endanger the public in any meaningful or practical way. As just discussed, the same cannot be said of impaired driving offenses, every one of which presents a direct and immediate threat to those sharing the vehicle or public byways with the offender—a threat that all too often materializes into tragedy.

For the foregoing reasons, I conclude that Attorney Layber’s conduct underlying her OWI-4<sup>th</sup> conviction violated SCR 20:8.4(b). Accordingly, I grant the OLR’s motion for summary judgment and deny Attorney Layber’s motion for summary judgment.

I request that within 10 days from the date of this order, counsel confer and propose a date and time for a telephone conference to discuss the procedure for addressing the issue of appropriate discipline.

Dated September 25, 2023.



Charles H. Barr, Referee