IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant, Case No. SC00-762

v. TFB File No. 96-00,833(02)

ROBERT EDMUND SENTON,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Answer Brief of Respondent is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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PRELIMINARY STATEMENT

Appellant, **Robert Edmond Senton,** will be referred to as Respondent or as Mr. Senton throughout this brief. The appellant, **The Florida Bar,** will be referred to as such or as the Bar.

References to the stipulated record on appeal, shall be by the symbol **SR** followed by the appropriate page number.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE AND FACTS

Respondent accepts as written the statement of the case and facts contained in the Bar's initial brief.

SUMMARY OF ARGUMENT

I.

The plain language of Section 760.40(1) and (2)(a), Florida Statutes (1999) prohibits the Bar's use of Respondent's DNA analysis in Bar disciplinary proceedings. In fact, it was illegal for FDLE to provide the analysis to the Bar without Respondent's consent and for the Bar to use the DNA analysis without Respondent's consent. Section 760.40(2)(b). Section 760.40(2)(a) states unequivocally that the DNA

analysis of an individual is "the exclusive property of the person tested" and is "confidential". Therefore, the Bar is not allowed to use Mr. Senton's DNA information in any way.

II.

There is nothing in Chapter 760, Florida Statutes (1999) that limits the confidentiality provision of Section 760.40(1) and (2)(a) to allegations of discrimination in the treatment of persons.

III.

The referee in Florida Bar disciplinary proceedings has discretion in determining what evidence will be admitted at final hearing. While the Bar's rules of evidence are relaxed, that does not mean that there are no questions relating to evidence to be decided by a referee. In the case at bar, the referee determined that the DNA analysis

compelled by FDLE pursuant to its subpoena power could be used only in criminal proceedings or paternity proceedings unless Respondent consented otherwise. That was within his discretion and was a proper ruling in light of the fact that Florida Statutes make it a crime for such analysis to be used in anything other than those proceedings. The Bar acknowledges, although indirectly, the validity of the referee's finding. In Complainant's Motion *in Limine*, Bar Counsel expressed doubt as to the Bar's liability for criminal prosecution should it use evidence obtained illegally by Carol Putnal, the complaining witness, who secretly recorded telephone

conversations with Respondent. In its Motion *in Limine*, paragraph five, the Bar asks the referee to determine the admissibility of Ms. Putnal's illegally obtained evidence. The Bar cannot, on one hand, acknowledge that it is within a referee's discretion to admit illegally obtained telephone conversations and on the other hand argue that the referee abused his discretion by determining that illegally obtained DNA analysis is inadmissible.

ARGUMENT

POINTS I AND II.
THE GENETIC TESTS RESULTS OBTAINED PURSUANT TO A CRIMINAL INVESTIGATION CAN ONLY BE USED IN THE THREE SITUATIONS SET FORTH IN SEC. 760.40(2)(a), FLORIDA STATUTES (1999).

Florida Statutes Section 760.40(2)(a) could not be clearer in its mandate: except for criminal prosecution, determining paternity or use in cases involving persons convicted of offenses not relevant here, the results of any DNA analysis

> are the exclusive property of the person tested, are confidential and may not be disclosed without the consent of the person tested.

There is no ambiguity in the statute. The results of Respondent's blood sample are his exclusive property, are confidential and cannot be used against him in any proceedings

except the three enumerated in the statute.

If the Bar's argument is to be accepted, any DNA analysis lawfully taken can be used in any proceeding. Such is antithetical to the plain language of the statute.

The Bar glosses over Respondent's argument to the referee that it was illegal for FDLE to provide The Florida Bar with the results of its DNA analysis without Respondent's consent. Sec. 760.40(2)(b). Indeed, FDLE and The Florida Bar were aware that transmission of DNA results to the Bar could be illegal: the Bar obtained the complaining witness's permission before it received her analysis from FDLE. The

Bar is apparently adopting a double standard here. They recognize that it is illegal to obtain DNA analysis from non-lawyers without the individual's permission, but feel it is legal to obtain DNA analysis without a lawyer's permission. There is no basis for that dichotomy in the statute.

The Bar's argument regarding Chapter 760's purpose, i.e., it only applies to civil rights actions, is rebutted by the plain language of Section 760.40(2)(a). If the Legislature intended Chapter 760 to apply only to civil rights issues, there would have been no need to set forth the three exceptions in Section 760.40(2)(a). If the Bar's interpretation of the statute is followed, then the language in the aforementioned section listing exceptions for criminal and paternity proceedings would not have been needed. And, the Bar's argument ignores the language of the statute to the effect that the results

of DNA analysis "are the exclusive property of the person tested," and that they are "confidential".

Singleton v. Larson, 46 So.2d 186 (Fla. 1950), is not support for the Bar's position in the instant proceedings. On page 189 of that opinion, the Court noted that "legislative intent is the polar star by which the court must be guided." The Legislature's intent in the case at bar cannot be plainer: DNA results can only be used in criminal prosecution, paternity actions and cases under Section 943.325.

While not on point, this Court's decision in Ragsdale v. State, 720 So.2d 203

(Fla. 1998) is instructive. In Ragsdale, the defendant demanded certain records held by the State but obtained from other agencies that he claimed were public documents. The Court held that the State properly denied production. In so doing, the Court stated:

> the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record.... the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.

The fact that the DNA results ended up in the Bar's hands does not strip those results of their confidentiality.

The Legislature's policy as set forth in Section 760.40(2)(a) is quite clear: DNA results can be used only in criminal proceedings, paternity testing or under Chapter

794 proceedings.

III.

THE REFEREE ACTED WITHIN HIS DISCRETION IN DENYING THE ADMISSION OF THE GENETIC TEST RESULTS IN THE CASE AT BAR, NOTWITHSTANDING THE RELAXED RULES OF EVIDENCE.

The Bar has not met its burden of demonstrating that the referee's decision below was "erroneous, unlawful, or unjustified". Rule 3-7.7(a)(5), Rules of Discipline.

The fact that the Rules of Evidence in Bar proceedings are "relaxed" does not mean that they do not exist. In the case at bar, the referee was faced with a statute that was unambiguous and which clearly stated that DNA results are confidential and

without consent cannot be used in any proceedings except criminal cases, paternity determinations and proceedings against convicted individuals not relevant to these proceedings. Had the Legislature intended for DNA analysis results to be used in professional licensing proceedings, bar disciplinary proceedings or any other proceeding, it could have so stated. The fact that the Legislature enumerated three exceptions, and only three exceptions, means there are no other exceptions to the statute.

At the risk of stating the obvious, the referee was not dealing with a rule of

evidence in the case at bar. He was dealing with a statute that allowed extremely invasive procedures, i.e., forced contribution of blood to determine one's DNA. The Legislature set strict controls on the use of the information gained from this invasion of one's privacy. It can only be used in criminal proceedings and paternity testing.

The Florida Bar impliedly recognized this concept. In the motion *in limine* filed by the Bar on September 18, 2000, the Bar expressed concern that its mere possession of tapes of illegally recorded conversations by the complaining witness would subject the Bar to possible criminal prosecution. In its motion *in limine,* the Bar made no mention of relaxed rules of evidence. Rather, the Bar noted that Statute 934.03 "on its face" criminalized both the making and possession of prohibited tape recordings. In paragraph five of its motion, the Bar asked the referee to determine the admissibility

of the tapes.

What's sauce for the goose is sauce for the gander. The Bar cannot on the one hand argue that results of a compelled DNA analysis are admissible in Bar proceedings while at the same time suggesting that illegally made tape recordings might not be admissible.

The fact that the Bar filed its motion *in limine* and asked the referee to determine the admissibility of illegally made tapes is an implicit declaration by the Bar that such rulings on admissibility are within a referee's discretion. This court has

granted referees wide discretion in Bar cases. For example, in The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), this court noted that a referee acted within his discretion in denying Respondent's motion for continuance. In The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987), this court approved a referee's denying a motion for continuance filed by The Florida Bar.

In The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991), the referee allowed the use of information surreptitiously recorded by a State Attorney investigator. In upholding his decision, this court specifically found that the use of such testimony was not proscribed by Florida Statutes and that the investigator acted lawfully. There was no hint in the opinion, however, that the referee did not have the discretion to rule on the admissibility of the evidence.

In the case at bar, the use of Respondent's DNA analysis is specifically and unequivocally prohibited by the plain language of the statute. Unlike McClure, where the evidence was deemed lawfully obtained, the DNA results obtained here were done so in blatant violation of Section 760.40(2)(b).

The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984), is not support for the Bar's position in these proceedings. In Lancaster, the referee allowed into evidence a transcript of a conversation recorded through the use of a warrantless "body bug." While the Court ruled that the exclusionary rule does not apply to bar proceedings,

it did not say that a referee did not have discretion in deciding the admissibility of such evidence. In fact, the Court held only that the referee "was not required to exclude..." the evidence. Apparently, he was not required to accept it, either.

The referee in Lancaster faced a different situation than the one before us today. In Lancaster there was no specific statutory provision making it illegal to use the transcript of the body bug. In Mr. Senton's case there is such a prohibition.

The referee in the case at bar acted within the scope of his authority. Decisions on the admissibility of evidence are within the province of a referee's authority. His decision should not be overturned if reasonable people could differ as to the action taken by that referee. Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

The referee in these proceedings ruled that the DNA results taken pursuant to

subpoena from Respondent were inadmissible in the instant proceedings. His ruling comported with the law and should be upheld.

CONCLUSION

The referee properly held that the results of Respondent's DNA analysis were inadmissible in Bar disciplinary proceedings. His ruling was proper, was pursuant to the plain language of Florida Statutes, and should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief was sent by U.S. Mail to Donald M. Spangler, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and this 11th day of December, 2000.

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JOHN A. WEISS