IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC00-762

vs

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

ROBERT EDMOND SENTON,

Respondent.
_____/

INITIAL BRIEF

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

Undersigned counsel does hereby certify that the Initial Brief of Appellant 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 Robert Edmond 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

Appellant, The Florida Bar, has alleged that Respondent was retained by a female client for the initial purpose of seeking unemployment compensation benefits, then subsequently for the purpose of pursuing bankruptcy, that Respondent delayed the preparation and filing of his client's bankruptcy petition and papers until she succumbed to his demands to engage in sexual conduct with him, and that due to her economic vulnerability she could not retain successor counsel and eventually capitulated to Respondent's sexual demands. (**Complaint 1, 2**). Respondent has denied that sexual conduct occurred. (**Answer 1**).

Respondent was required to provide a blood sample for DNA testing and comparison pursuant to a search warrant obtained by the Florida Department of Law Enforcement (hereafter, "FDLE") in connection with a criminal investigation of alleged sexual battery by Respondent upon the person of the complainant/witness. (**SR1**). An FDLE Crime Laboratory Analyst performed DNA analysis of Respondent's blood sample, and comparison with specimens obtained from the complainant/witness.

The Bar believes the DNA analysis corroborates the complainant/witness's testimony. No criminal charges were brought against Respondent. (**SR2**). Pursuant to a public records request and subpoena, the FDLE provided The Florida Bar with the DNA analysis and comparison results, in connection with The Florida Bar's

investigation and prosecution of complainant/witness's allegations of sexual misconduct by Respondent, in violation of Rule 4-8.4(i), R. Regulating Fla.Bar. The test results were provided to The Florida Bar without FDLE having first obtained Respondent's consent that they be released. FDLE did, however, require the complainant/witness's consent before they released her DNA test results to the Bar. (**SR2**).

Respondent filed a Motion in Limine, asserting that Respondent would not have consented to the release of the DNA analysis of his blood sample, had he been asked to do so, and urging that the release of that information was done contrary to the provisions of section 760.40(2), Florida Statutes, (1999). Respondent also argued that the results of the test are the exclusive property of the Respondent and are confidential. Respondent asked that the Referee enter an order prohibiting The Florida Bar from placing the DNA test results in evidence at trial of this matter. The Referee granted Respondent's Motion in Limine and entered the order on September 21, 2000, which is the subject of this interlocutory appeal. (**SR2, 3**). The proceeding below has been abated pending the Court's review of this issue.

SUMMARY OF ARGUMENT

I.

THE GENETIC TEST RESULTS INVOLVED HERE WERE OBTAINED PURSUANT TO A CRIMINAL INVESTIGATION AND THEREFORE FALL WITHIN THE EXCEPTION OF §760.40(2)(a), FLORIDA STATUTES, (1999).

II.

CHAPTER 760, FLORIDA STATUTES, (1999), DOES NOT APPLY TO GENETIC TESTING DONE IN CIRCUMSTANCES THAT DO NOT INVOLVE ALLEGATIONS OF DISCRIMINATION IN THE TREATMENT OF PERSONS.

III.

THE GENETIC TEST RESULTS SHOULD BE ADMITTED UNDER THE RELAXED RULES OF EVIDENCE APPLICABLE IN BAR DISCIPLINARY PROCEEDINGS.

ARGUMENT

I.

THE GENETIC TEST RESULTS INVOLVED HERE WERE OBTAINED PURSUANT TO A CRIMINAL INVESTIGATION AND THEREFORE FALL WITHIN THE EXCEPTION OF §760.40(2)(a), FLORIDA STATUTES, (1999).

The order from which this interlocutory appeal is taken determined that section 760.40(2)(a), Florida Statutes, (1999)[1], afforded Respondent with a cloak of confidentiality, providing that DNA analysis may be performed only with the informed consent of the Respondent, that the results of such testing are the exclusive property of the Respondent, and therefore the results should not have been released to The

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[1] "760.40. Genetic testing; informed consent; confidentiality

. . .

(2)(a) Except for purposes of criminal prosecution, except for purposes of determining paternity as provided in s. 742.12(1), and except for purposes of acquiring specimens from persons convicted of certain offenses as provided in s. 934.325, DNA analysis may be performed only with the informed consent of the person to be tested, and the results of such DNA analysis, whether held by a public or private entity, are the exclusive property of the person tested, are confidential, and may not be disclosed without the consent of the person tested. Such information held by a public entity is exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution."

Florida Bar without Respondent's consent. The Referee rejected Bar Counsel's argument that, since the DNA samples were obtained by the Florida Department of Law Enforcement (FDLE) in the course of investigating allegations of criminal sexual battery, the first of three exceptions found in the questioned statute should apply, and thus the statute is inapplicable under the facts of the case at bar.

The blood sample from which Respondent's DNA was extracted was lawfully obtained pursuant to a search warrant issued by the Honorable Thomas H. Bateman, III, County Judge for Leon County, at the request of FDLE Special Agent DeVaney, was taken under Special Agent DeVaney's scrutiny, and was preserved and analyzed at the FDLE crime laboratory in Tallahassee, Florida, by an FDLE Crime Lab Analyst, all in the context of investigation of a charge of sexual battery.

It is apparent that Respondent did not consent to the taking of the sample, and that the DNA analysis was not performed with his "informed consent" (as required by the statute where the sample is voluntarily donated), but rather was obtained after review of a probable cause affidavit by a member of the judiciary, and the issuance of the search warrant.

The plain meaning of the statute is not to insulate criminal suspects from the consequences which might flow from the test results, but rather to protect those other classes of persons who consent to providing samples for testing, from discriminatory

use of the test results without their consent.

The fact that the State Attorney's offices for the Second and Third Judicial Circuits elected not to prosecute the criminal matter does not alter the circumstances under which the sample was obtained, nor does that decision relegate the character of the test results, the sample having been obtained in the course of a criminal investigation, to the confidential status required for the protection of non-suspect individuals.

II.

CHAPTER 760, FLORIDA STATUTES, (1999), DOES NOT APPLY TO GENETIC TESTING DONE IN CIRCUMSTANCES THAT DO NOT INVOLVE ALLEGATIONS OF DISCRIMINATION IN THE TREATMENT OF PERSONS.

Chapter 760 of the Florida Statutes, (1999), is found under TITLE XLIV, CIVIL RIGHTS, and is titled "CHAPTER 760. DISCRIMINATION IN THE TREATMENT OF PERSONS; MINORITY REPRESENTATIONS". An examination of the various parts of Chapter 760 disclose that Part I is known as the Florida Civil Rights Act, Part II is the Fair Housing Act, Part IV deals with Minority Representation in Certain Bodies and Part V establishes the Environmental Equity and Justice Commission. Section 760.40 is found within Part III, Miscellaneous Provisions. The legislature's concern in the enactment of the various parts of chapter 760, including the "Miscellaneous Provisions", is thus clearly oriented toward elimination of discriminatory practices in the various areas identified by the titles of the chapter's subparts.

This intent is further evidenced by a reading of subsection 760.40(03), Florida

Statutes, (1999)[2], where the legislature requires that the person performing DNA analysis, or receiving the results thereof, notify the person tested, including in the notice a statement of whether the information was used in any decision to grant or deny any insurance, employment, mortgage, loan, credit, or educational opportunity.

Reading further in chapter 760, Part III, we find section 760.50[3], Discrimination on the Basis of Acquired Immune Deficiency Syndrome, etc., section 760.51[4], Violations of Constitutional Rights, etc. and section 760.60[5], Discriminatory Practices

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[2] "760.40. Genetic testing; informed consent; confidentiality

. . .

(3) A person who performs DNA analysis or receives records, results, or findings of DNA analysis must provide the person tested with notice that the analysis was performed or that the information was received. The notice must state that, upon the request of the person tested, the information will be made available to his or her physician. The notice must also state whether the information was used in any decision to grant or deny any insurance, employment, mortgage, loan, credit, or educational opportunity. If the information was used in any decision that resulted in a denial, the analysis must be repeated to verify the accuracy of the first analysis, and if the first analysis is found to be inaccurate, the denial must be reviewed."

[3] "760.50 Discrimination on the Basis of Acquired Immune Deficiency Syndrome, Acquired Immune Deficiency Syndrome Complex, and Human Immunodeficiency Virus Prohibited"

[4] "760.51 Violation of Constitutional Rights, Civil Action by the Attorney General; Civil Penalty."

[5] "760.60 Discriminatory Practices of Certain Clubs Prohibited; Remedies."

of Certain Clubs Prohibited.

It is a general principle of statutory construction that statutes enacted during the same session of the legislature dealing with the same subject matter must be considered in para materia in order to harmonize them and, at the same time, to give effect to the legislative intent. *Singleton v. Larson*, 46 So 2d 186, 189 (Fla. 1950). Thus, where subsection (3) of §760.40, together with the remaining three subsections of Part III of Chapter 760, all deal with prohibition of discriminatory practices, the legislative intent is clear.

The title of the chapter, "Civil Rights", further supports the interpretation that the various parts and subsections were intended to deal with civil rights violations. It was not the intent of the legislature that section 760.40(2)(a), Florida Statutes, (1999), apply to anything other than civil rights issues, contrary to the finding below that it should be employed to suppress lawfully obtained evidence from being used in a Bar disciplinary proceeding.

III.

THE GENETIC TEST RESULTS SHOULD BE ADMITTED UNDER THE RELAXED RULES OF EVIDENCE APPLICABLE IN BAR DISCIPLINARY PROCEEDINGS.

It is well established that a referee in Bar disciplinary matters is not bound by the technical rules of evidence. *The Florida Bar v. Weed*, 559 So 2d 1094 (Fla. 1990); *The Florida Bar v. Vannier,* 498 So 2d 896 (Fla. 1986); *State ex rel. The Florida Bar v. Dawson*, 111 So 2d 427 (Fla. 1959). Further, in *The Florida Bar v. Lancaster*, 448 So 2d 1019 (Fla. 1984) this Court rejected the argument that a recorded conversation obtained by a warrantless "body bug" should not be admitted into evidence based upon the prohibition of the use of such evidence by the exclusionary rule found in former Article I, section 12, Florida Constitution. This Court agreed that the California case *Emslie v. The State Bar of California*, 11 Cal.3d 210, 520 P2d 991, 113 Cal.Rptr. 175 (1974) and the Colorado case *People v. Harfman*, 638 P2d 745 (Colo. 1981) established that the exclusionary rule does not apply in attorney discipline proceedings, and the evidence was admissible.

More recently, in *The Florida Bar v. McClure*, 575 So 2d 176 (Fla. 1991), it was held that recorded conversations surreptitiously obtained by a State Attorney's

investigator in the course of a criminal investigation, in compliance with the provisions of chapter 934, Florida Statutes, (1981) were admissible in Bar disciplinary proceedings even though not affirmatively authorized by the provisions of section 934.08, Florida Statutes, (1981). Thus, even if the factual scenario involved here comes within the purview of the legislative intent of the statute, and even if it does not fall within the criminal prosecution exception of the statute, the lawfully obtained DNA evidence should nonetheless be admissible under the relaxed rules of evidence as applied in attorney discipline proceedings.

CONCLUSION

Respondent is not entitled to the cloak of confidentiality provided by section 760.40(2)(a), Florida Statutes, (1999), under the factual circumstances of this case, and the matter should be remanded to the Referee for trial with appropriate instruction as to the admissibility of the DNA test results.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case No. SC00-762, TFB File No. 96-00,833 (02) has been mailed by certified mail #7000 0600 0020 9376 7863, return receipt requested, to John A. Weiss, Esquire, Counsel for Respondent, at 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida 32308, on this _____ day of October, 2000.

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