IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC00-762

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

ROBERT EDMOND SENTON,

Respondent

_____/

INITIAL BRIEF OF RESPONDENT

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D PRELIMINARY STATEMENT

The following designations will be used in this brief:

Respondent, Robert Edmond Senton, shall be referred to as Respondent.

The Florida Bar shall be referred to as the Bar.

The transcript of the motion hearing held on July 2, 2001, shall be referred to as MH and the appropriate page number.

The transcript of the final hearing held on January 13-14, 2003, shall be referred to as T-volume number and the appropriate page number.

The transcript of the disciplinary hearing held March 31, 2003, shall be referred to as DH and the appropriate page number.

The report of the referee dated April 28, 2003, shall be referred to as RR and the appropriate page number.

E. STATEMENT OF THE CASE

1. Course of the Proceedings and Dispositions Below

Carol Putnal filed a complaint against Respondent with The Florida Bar on March 4 and March 27, 1996. On October 28, 1996, The Florida Bar sent a letter to Respondent seeking his response to Ms. Putnal's complaint. Respondent responded to The Florida Bar on November 22, 1996. (Respondent's Exhibit 7)

On March 2, 2000, the grievance committee for the Second Judicial Circuit found probable cause for a violation of Rule 4-8.4(i), Rules Regulating The Florida Bar. The Bar filed the original complaint in this matter with this court on April 7, 2000.

On September 12, 2000, Respondent filed a motion in limine seeking to exclude certain DNA evidence obtained by The Florida Bar from the Florida Department of Law Enforcement. On September 18, 2000, The Florida Bar filed a motion in limine in regard to certain tape recorded telephone conversations between Respondent and Ms. Putnal. On September 20, 2000, the referee heard argument by both parties regarding the pending motions in limine and granted both motions. An order was entered in regard to the motions on September 21, 2000. (RR-2)

The Florida Bar then moved to abate the proceedings in order to take an interlocutory appeal of the referee's order prohibiting introduction of the DNA

evidence obtained from the Florida Department of Law Enforcement. The referee granted the motion on September 28, 2000. On January 16, 2001, this court denied The Florida Bar's petition for interlocutory review. (RR-2)

On February 1, 2001, the Second Judicial Circuit Grievance Committee reconsidered the previous finding of probable cause as to a violation of Rule 4-8.4(i) and rescinded its finding. On April 5, 2001, the committee amended its finding of probable cause and found probable cause for violation of Rules 4-8.4 (c) and 4-8.4 (d), Rules Regulating The Florida Bar. (RR-2-3)

An amended complaint was then filed by The Florida Bar. The amended complaint dropped the claim under Rule 4-8.4(i) and substituted a claim under Rules 4-8.4(c) and (d). The amended complaint was filed on June 6, 2001. (RR-3)

On May 22, 2001, the Bar filed a motion to obtain blood, saliva or semen sample from Respondent. (RR-3) Respondent filed an objection to the motion on the basis of Section 760.40, Florida Statutes. (RR-3)

On July 2, 2001, a hearing was held on the motion to obtain blood, saliva or semen sample. The referee granted the motion in a written order dated July 25, 2001. In the interim, Respondent filed a motion for rehearing and a stay of disciplinary proceedings with this court. This motion was filed on July 12, 2001. (RR-4)

On December 13, 2001, this court denied Respondent's motion for rehearing. On February 27, 2002, Respondent, through counsel, advised The Florida Bar that Respondent would not voluntarily appear to submit his bodily fluids unless the procedure was approved by the Supreme Court. The Bar then filed a petition for order to show cause with this court. (*The Florida Bar v. Senton*, SC02-477) (RR-4)

On July 24, 2002, this court ordered Respondent to comply with the referee's order within seven days or immediately be suspended from the practice of law and remain suspended until compliance with the referee's order. Respondent timely complied with this court's order and the order to show cause matter was dismissed by this court on October 22, 2002. (RR-4-5)

The final hearing was held in this matter on January 13-14, 2003. At the conclusion of the hearing on January 14, 2003, the referee made the following findings:

> And although the Bar filed an amended complaint, there was copious testimony regarding the sexual contact. I'm going to allow the pleadings to conform to the evidence presented. The Court finds that the respondent violated Rule 4-8.4(i), 4-8.4(c), and 4-8.4(d).
>
> Mr. Senton, the Court finds that you took advantage of a weak-minded vulnerable woman, who had a history of emotional and financial problems, for your own sexual satisfaction and that you have concocted testimony throughout these proceedings to try to justify that action.
>
> The Court finds your testimony to be quite incredible and finds that the testimony of the plaintiff is credible. The Court finds no way that

> you can satisfactorily explain the collections of your fluids. It doesn't make sense.
>
> And then whenever Mr. Iturralde attempted to pin you down as to your contact with Ms. Fernandez, you gave yourself an out at every opportunity. You failed to give an address for her, where she worked, where she could be found.
>
> The Court even noticed during your testimony that whenever your Exhibit Number 6 was entered into evidence, you attempted to enter a copy, knowing that the original had been tampered with. I find that the notations that you made by ballpoint pen were not made contemporaneous with the calender.
>
> And I noticed also in your testimony that when you noted - - you were asked about the inconsistency of the pens used, were able to tell me that there were three ballpoint notations without even looking at the calender. In short, your testimony has no credibility.

(TIII-297-298)

At the conclusion of the hearing on the discipline to be imposed (held March 31, 2003) the referee recommended Respondent be disbarred. (DH-36) (RR-13) In making the recommendation for disbarment, the referee found the following aggravating factors under Standard 9.22, Florida Standards for Imposing Lawyer Sanctions, apply in this case:

9.22(b)(dishonest or selfish motive); (c) (a pattern of misconduct); (e) (bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency); (f) (submission of false evidence, false

statements, or other deceptive practices during the disciplinary process); (g) (refusal to acknowledge wrongful nature of conduct); and (h) (vulnerability of victim) (RR-17-19)

The Referee then found the following mitigating factors under Standard 9.32, Florida Standards for Imposing Lawyer Sanctions, applied:

(a) absence of a prior disciplinary record; and (g) character or reputation. (RR-19-21)

A petition for review was timely filed on June 25, 2003.

2. Statement of the Facts

Carole Anne Putnal, a former emergency room nurse, retained Respondent to represent her in either October 1994 or January 1995. (TI-11) Respondent was originally retained by Ms. Putnal to help her find out why she lost her job. (TI-12) At some point, Ms. Putnal talked to Respondent about bankruptcy. She wanted to know about it in case anything did not work out, although she had no intention at all of filing bankruptcy. She only wanted to know how long it would take to file. According to Ms. Putnal, Respondent told her it would take "about a month". (TI-13)

Ms. Putnal was asked if Respondent ever came over to her house. She stated that on Wednesday, December 6, 1996, Respondent came to her home between 8:30 and 9:00 at night. (TI-14) Earlier that day she had called Respondent's office and had

got his answering machine. She was mad and left a message on it. Later that night, a car pulled up in her yard. When she looked out, she saw it was Respondent. He was carrying a little ice chest in his hand. Ms. Putnal was shocked to see him. (TI-15)

At the time, Ms. Putnal was talking on the telephone to her daughter. She told her daughter to hold on and then went and let Respondent come in the house. According to Ms. Putnal, Respondent did not say anything at first. She told him she had her daughter on the phone and she would be right back. She then went into the bedroom and told her daughter Respondent was there. Her daughter asked her what Respondent was doing there and Ms. Putnal replied that she didn't know. (TI-16)

Ms. Putnal then asked Respondent if he had brought bankruptcy papers for her to sign. He replied, "Oh, no, they're laying on my desk in my office. I didn't realize I forgot them until I was halfway on the other side of Tallahassee." (TI-16)

When Respondent came in the house, Ms. Putnal saw that he had a six-pack of Budweiser beer in the cooler he was carrying. Respondent sat down on the couch. Ms. Putnal got kind of afraid because it didn't look right. She asked Respondent "Why are you here?" He replied, "Well, you just need to calm down a little bit." Respondent then told her to have a beer and kicked off his shoes. (TI-17)

Ms. Putnal then described what she states occurred that evening:

He kicks his shoes off. He's slowly working his way around to my side. Pretty soon he's around - - right next to me. And I didn't know what to do.

He started talking about how people do things for each other and all this. I said, oh, kind of like the barter system? And he says, yeah.

We talked a little bit about college, about people chugalugging beer, you know, how they used to do with a straw or something.

He put his arm around me. I asked him what he was doing. He said you need to relax a little bit. And he got up, came around, started rubbing my back.

He talked about back problems. He said do you have back problems? I said yeah, a backache once in a while, nothing chronic, anything like that.

The next thing I know he's in front of me trying to put his hand down my pants. And I just told him no, unh-unh. No, we're not going to do this. I don't want to do this. No.

He said, well, you know how people help other people out. You help me, I will help you. I knew then.

Q: What happened after that?

A: I kept telling him no, you know. And at that point I had no more money to pay him. I could not get another attorney. I had nothing. I couldn't believe that I was - - I was in shock I guess. I couldn't think straight.

He kept on and kept on. I was sitting there. I told myself, well, if this is how it's going to be, you're going to get him to finish what you hired him for, then you better do it.

> I just told myself, get him in there, get it over with and get him the hell out of my house.

(TI-17-18)

Respondent then had sexual intercourse with Ms. Putnal. Respondent left her house about 1:00 in the morning and Ms. Putnal sat down and called her daughter. When her daughter asked her what had happened, Ms. Putnal told her. (TI-20)

Eventually, Ms. Putnal told herself, "I'm a nurse. I know what evidence you need to collect, and God knows I had it.

I started - - I got the beer cans out of the garbage can, left them in the bag. I put a mini pad on. I didn't take a shower. I wore it all night. The spread and everything, the blanket that we had been laying on, I got hair off of it and everything. I put it in an envelope.

Then I took two Q-tip swabs and collected the semen, let it air dry, put it in an envelope, dated it, sealed it up. I put them all together and put them away somewhere where they would be safe. I kept them." (TI-21)

Ms. Putnal did not report Respondent to the police at that time. She stated she wanted Respondent in jail and she felt that if she went to the police she would lose everything she owned. She decided she would just stay quiet about the incident. (TI-22)

Two days before a hearing in bankruptcy court, Ms. Putnal called Respondent and asked him if she could meet him at his office. (TI-23) Respondent told her he needed her to come up a little early anyway so he could go over some papers with her. She then got to Respondent's office on the morning of February 14, 1996, about 30 or 45 minutes before they were supposed to be in court. (TI-27) Ms. Putnal then described what happened at Respondent's office:

> I walked in his office. I was nervous and scared of what was going to happen.
>
> He told me to sit down. I did. The next thing I know, he pulls a chair up there, gets alongside of me. I tried to stand up and he pulled me back down. I said, oh, no, unh-unh. No. Not again, unh-unh.
>
> He says, oh, come on. I kept telling him no, and he didn't listen to me. He threw me over his desk and he raped me. And I couldn't believe it. I was like, oh, God.
>
> And we were a couple of minutes late for the bankruptcy hearing.
>
> He gave me a couple of paper towels. He reached down - - he was behind his desk. It was in the right-hand lower drawer of his desk. He opened it up, pulled out a couple of paper towels, handed them to me. I just put them on, and we went to the hearing.

(TI-27-28)

At the bankruptcy hearing, the trustee got mad at Respondent because he was supposed to have given the trustee some papers Ms. Putnal had. Ms. Putnal felt she lost everything she had. She argued with Respondent in the parking lot. He wanted

her to come into his office when they got back to his office, but she said, “no way” and got in her car and went back home. (TI-29)

Eventually, Ms. Putnal reported Respondent to the police department in Perry, Florida. (TI-30) Ms. Putnal met with Sergeant Nelly Walker and gave her all the evidence Ms. Putnal had gathered. (TI-31)

Ms. Putnal admitted she has received psychological or psychiatric treatment. (TI-33) She was treated for depression after her son and best friend were killed in 1981. In addition, Ms. Putnal decided to kill herself around the time “all of this started.” She went to the Apalachee Mental Health Center two times. (TI-34)

During cross-examination, Ms. Putnal admitted she was still depressed at the time of the final hearing in this case. She stated she had not sought or received any type of mental health counseling or treatment since 1996. (TI-39)

Ms. Putnal also stated she never received any correspondence in the mail from Respondent during the time he represented her. (TI-48) Ms. Putnal was shown Respondent’s composite Exhibit 3 which contained a number of letters from Respondent. Ms. Putnal stated she never received anything in the mail from Respondent. (TI-49)

Ms. Putnal was asked about her relationship with her daughter. She stated they used to be fairly close, but she hadn't had any contact with her daughter in over four years. (TI-56)

During re-direct examination, Ms. Putnal stated the reason her daughter has not had any contact with her is because Ms. Putnal lost a wedding dress she was holding for when her daughter got ready to get married. (TI-66)

After Ms. Putnal's testimony, the Bar introduced the deposition of Sergeant Nelly Walker as Bar's Exhibit 5. Sergeant Walker's testimony shows she first spoke with Ms. Putnal on March 8, 1996. (Bar's Exhibit 5, page 5) At that time, Ms. Putnal only reported having intercourse with Respondent at her house. Ms. Putnal did not mention anything about a February 14, 1996 incident at Respondent's office. (Bar's Exhibit 5, page 13)

Chris Larsen, a forensic DNA analyst with ReliaGene, was the next witness for the Bar. (TI-69) Mr. Larsen testified as an expert in DNA analysis. (TI-72) Mr. Larsen was asked to perform an analysis on a Light Days mini-pad and two reference blood samples. (TI-76)

When Mr. Larsen did his preliminary examination of the mini-pad he found the presence of p 30, which is an antigen that is present in seminal fluid, and he was able

to observe sperm cells. (TI-78) Mr. Larsen's report of his analysis was introduced as Bar's Exhibit 6. (TI-84)

According to Mr. Larsen, he concluded that "the referenced sample from Robert Senton was consistent with the sperm cell fraction of the Light Days mini-pad." He also concluded that the "epithelial cell fraction was consistent with the mixture of the suspect and the victim." (TI-88-89) Finally, Mr. Larsen stated that "The likelihood of the genetic profile from the mini pad being from somebody else would be 1.4 billion times more likely that it was the suspect and the victim rather than two unknown people from the population." (TI-92)

During cross-examination, Mr. Larsen admitted he has no control over evidence before it gets to his laboratory. He also cannot vouch for whether or not there was contamination or tampering before items were received at ReliaGene. (TI-99)

Mr. Larsen stated there was very little of Ms. Putnal's DNA on the mini-pad. He would have expected for there to have been more DNA present if the mini-pad had been worn overnight after having intercourse. (TI-101) In addition, Mr. Larsen testified he did not examine any evidence which would confirm whether or not Respondent and Ms. Putnal engaged in sexual intercourse. (TI-102) Further, Mr. Larsen stated he could not tell from a mixed sample when each sample was placed on

an item. He also could not tell whether one sample may have been placed on the item before or after the other sample. (TI-106)

Michael DeVaney, a special agent with the Florida Department of Law Enforcement, was the next witness for the Bar. Agent DeVaney took over the investigation of Ms. Putnal's allegations from the Perry Police Department. (TII-126) As part of his investigation, Agent DeVaney met with Respondent. According to Agent DeVaney, Respondent "made a total denial of all the allegations, denied being at Ms. Putnal's house on the particular date in question, the allegation involving Perry, Florida." (TII-129)

In regard to how Ms. Putnal may have acquired Respondent's DNA, Respondent told Agent DeVaney that Ms. Putnal had made visits to his office. She had wanted to collect beer cans. Also, at one time she was suspected taking some sort of a cloth that Respondent had maintained in his office for wiping sweat or whatever. The towel Respondent talked about was collected from Ms. Putnal. Respondent also never told Agent DeVaney he had an alibi for his whereabouts on December 6, 1995. (TII-130)

During cross-examination, Agent DeVaney was asked if he referred Ms. Putnal's allegations to the State Attorney's Office for the Third Judicial Circuit. He replied that he did and that the office declined to pursue any criminal charges. In

addition, he referred the matter of the alleged incident at Respondent's office to the State Attorney's Office for the Second Judicial Circuit. Likewise, that office declined to pursue any criminal charge. (TII-133)

In regard to the refusal to prosecute by the State Attorney's Office for the Second Judicial Circuit, Agent DeVaney stated that Warren Goodwin, the Chief Deputy State Attorney, declined to prosecute because of Ms. Putnal's "overall credibility", "her past history of mental problems" , "and also inconsistency of her claims that Mr. Senton did not provide her legal assistance at various times during her client-lawyer relationship." (TII-134)

Josephine Roman, a senior crime-lab analyst in the regional crime laboratory for FDLE, was the next witness for the Bar. Ms. Roman did some testing to determine the presence of semen on some exhibits. She identified semen on cotton swabs, a thin pad with a yellow stain, on some tissue paper and on a t-shirt. (TII-138) She also examined a towel and a pair of panties. No semen was identified on those exhibits. (TII-138-139)

After introducing Respondent's deposition of July 18, 2000 (Bar's Exhibit 12) into evidence, the Bar rested. (TII-154)

Respondent's first witness was Susan C. Hayes. Ms. Hayes is an administrative secretary with the Florida Department of Insurance. (TII-155) Ms. Hayes met

Respondent when he worked for the Department of Insurance. She has known Respondent for thirteen years and they are friends. (TII-156)

When Respondent left the Department of Insurance to start his own law practice, Ms. Hayes told him she would help him set up paperwork and files and things like that for his business. (TII-156) In early December 1995, Ms. Hayes was asked to do some work for Respondent. She identified Respondent's Exhibit 2 as a memo dated December 6, 1995 showing the work she had done for Respondent. (TII-157)

Ms. Hayes met with Respondent at her house on December 6, 1995, between approximately 7:30 and 8:00 p.m. The purpose of the meeting was for Respondent to pick up the work Ms. Hayes had done for him. (TII-161) Respondent was at her house continuously from around 7:30 to around 10:30 p.m. (TII-162)

After Ms. Hayes' testimony, Respondent testified in his own behalf. Respondent stated he went to Ms. Putnal's home in Perry, Florida one time. This did not occur during the bankruptcy representation, but instead occurred during the time Respondent represented Ms. Putnal in an unemployment compensation case. (TII-180) The trip to Ms. Putnal's house occurred before December 1995. (TII-181) Respondent specifically denied going to Ms. Putnal's house on December 6, 1995 and having sex with her. (TII-182)

Respondent testified he went to Ms. Hayes home on the night of December 6, 1995. He got there somewhere between 7:00 or 7:30. He stayed there until between 10:00 and 11:00. (TII-188) When he left Ms. Hayes' house, Respondent went home. He denied ever going to Perry, Florida on December 6, 1995. (TII-189)

On February 14, 1996, Respondent had a meeting with creditors before the bankruptcy trustee in Ms. Putnal's case. (TII-189) Prior to the hearing, Ms. Putnal had called Respondent and told him she wanted to meet with him before they went to court because she had some things she wanted to go over. Respondent told Ms. Putnal he would be in his office at 7:30 and, if she wanted to come by, he could answer any questions she had. (TII-190)

Respondent was then shown Respondent's Exhibit 3. He stated he prepared the letters contained in the exhibit and he mailed them to Ms. Putnal. (TII-191)

On the morning of February 14, 1996, Ms. Putnal showed up at Respondent's office some time shortly before 8:00. According to Respondent, she was real nervous. (TII-192)

Respondent was then asked if he had sex with Ms. Putnal on top of his desk in his office on February 14, 1996. Respondent denied that he did so and denied having any sexual contact or intercourse with Ms. Putnal. (TII-193)

Respondent testified he had sexual intercourse in his office the evening before with his then girlfriend. (TII-193) He had been dating a particular woman for the better part of two months, maybe five to six weeks. She was leaving town permanently the following day and the evening of February 13, 1996, was going to be their last evening together. (TII-194) Respondent testified he was out with this woman and they stopped at his office and made love. (TII-195)

According to Respondent, he used a condom and "just took the condom off myself and sat it in the trash can." He also placed tissues and paper towels in the trash can. (TII-196) The items were still in the trash can the next morning when Ms. Putnal came to the office. At one point during that morning, Respondent went to the bathroom and left Ms. Putnal alone in his office. (TII-197)

Respondent was asked why he did not mention anything in his response to The Florida Bar (Respondent's Exhibit 7) about being with Ms. Hayes on December 6, 1995. Respondent replied "No one asked." (TII-203) Respondent said he showed the complaint to Ms. Hayes and discussed it with her. They determined that there was some document missing and he needed to find out exactly what the allegations were. (TII-204)

Respondent contacted the Perry Police Department and met with Chief Putnal. Respondent showed Chief Putnal the complaint he had received and asked "what is this about?" (TII-204)

During Respondent's deposition of July 18, 2000 (Bar's Exhibit 12), he was asked if he knew of any manner in which Ms. Putnal could have obtained a sperm sample. Respondent stated before the referee he was just speculating when he answered the question during his deposition. Respondent was not asked specifically in his deposition about whether he had engaged in any kind of sexual act with any other women in his office. (TII-207) Finally, Respondent insisted he was telling the truth when he testified in his July 18, 2000 deposition that he never had any kind of sexual contact with Ms. Putnal. (TII-208)

During cross-examination, Respondent was asked if he had an explanation for why the notation on his December 6, 1995 calendar (Respondent's Exhibit 6) appeared to be in a different pen than many other dates on his calendar. Respondent replied that "when you take messages down, you typically pick up the first pen available. At that particular time I was trying to use a lot of the darker pens, but it was getting cost prohibitive. As I was running out, I didn't buy any more. I was using ballpoints." (TII-214-215) In addition, Respondent stated that half the time he would use a black pen and half the time he would use a navy blue pen. (TII-215)

Respondent was next asked about his conversation with Investigator DeVaney. Respondent stated he did not tell Investigator DeVaney about having sex in his office on February 13, 1996, because Investigator DeVaney "didn't ask." (TII-216) Respondent stated he provided Investigator DeVaney with his "Bar package with all the attachments to it." Investigator DeVaney said "this answers just about everything." (TII-217)

Respondent was next asked if he ever told The Florida Bar in any response that he had sex with some other woman in his office on February 13, 1996. Respondent replied "There was only one opportunity that I would have had, and that was a deposition. And specifically I was told not to discuss it." His attorney at that time said "don't volunteer anything. If they ask you a question, you tell the truth. You don't volunteer anything." (TII-218)

Respondent stated he wanted to provide the Bar with information about Susan Hayes, but his attorney told him "no, if they ask, you give it to them. If not, you don't say anything. As a consequence [Ms. Hayes'] name did not come up in the deposition, even though it's talked all around her, and neither did the part about my girlfriend and her leaving town and the sex in the office." (TII-218)

Respondent was asked why he told The Florida Bar about Ms. Putnal taking a towel from his office, but he didn't mention anything about a condom. Respondent

replied that he did so because the towel was already in evidence. It was undisputed that the towel was used in the office. Respondent used this in his office and Ms. Putnal used it to clean herself up on the morning of February 14, 1996. According to Respondent, Ms. Putnal "came in looking like a disheveled mess." (TII-220)

Respondent further explained he did not mention anything about a condom because it was only his suspicion that Ms. Putnal had taken a condom out of the trash can and gathered semen from it. Respondent's attorney at the time of the deposition told him not to "answer questions with suspicion." (TII-221)

During re-direct examination, Respondent was asked if there was ever an issue in this case about whether or not he had sex with some other woman than Ms. Putnal in his office. Respondent replied, "No, she was always the focus." (TIII-274) Respondent was then directed to look at his deposition of July 18, 2000. On page eleven of Bar's Exhibit 12, Respondent discussed having a person who did typing for him. According to Respondent, the person who typed for him on an ongoing basis for five years was Susan Hayes. (TIII-275)

Respondent also stated he was never asked in his deposition of July 18, 2000, what he was doing the night before Ms. Putnal came to his office on February 14, 1996. In addition, Respondent stated he does not know how Ms. Putnal may have

obtained a sperm sample from him. (TIII-276) After Respondent's testimony, Respondent rested. (TIII-290)

F. SUMMARY OF ARGUMENT

1. The referee abused his discretion when he ordered Respondent to provide a blood sample for DNA testing.

The referee allowed the Bar to take the nearly unprecedented step of ordering an attorney in a bar disciplinary proceeding to submit a blood sample for DNA testing. The Bar sought the sample under a rule of civil procedure which permits examination by qualified experts "when the condition that is the subject of the requested examination is in controversy." The referee abused his discretion in granting the Bar's request.

The only issue in the present case is whether Respondent was truthful when he denied having sex with Ms. Putnal. In other words, Respondent's veracity is "the condition" "in controversy". Respondent should not have been compelled to submit to the highly invasive process of providing a blood sample to the Bar for the Bar to use to attempt to corroborate Ms. Putnal's testimony.

2. The testimony of Chris Larsen fails to meet the standard of clear and convincing evidence.

The Bar's DNA expert, Chris Larsen, opined that Respondent's DNA matched that found on a mini pad submitted by Ms. Putnal. An examination of Mr. Larsen's

testimony shows it does not rise to the level of clear and convincing evidence. Mr. Larsen was only able to find a match to Respondent on 4 out of 14 markers.

3. The recommended discipline of disbarment is excessive.

Respondent should not be disbarred in this case. The discipline to be imposed should be mitigated by the unreasonable delay in the proceedings. The grievance which initiated these proceedings was filed in March 1996. The Bar then delayed consideration of the matter at the grievance committee while criminal charges against Respondent were being investigated.

After the initial complaint was filed, the referee entered an order denying the Bar's use of test results the Bar obtained from the Florida Department of Law Enforcement. The Bar then delayed the proceedings again by seeking an interlocutory appeal to this Court.

After this Court denied the Bar's request for interlocutory review, the Bar again delayed the case by returning the matter to the grievance committee. The committee rescinded its earlier finding of probable cause and substituted new alleged rule violations. The Bar then filed an amended complaint.

The referee also erred in aggravating the discipline to be imposed by finding Respondent engaged in bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. The only

arguably obstructionist act committed by Respondent was his objection to the referee's order to submit a blood sample for testing. Respondent requested guidance from this Court on the issue and then complied with this Court's order.

G. ARGUMENT AND CITATIONS

1. The referee abused his discretion when he ordered Respondent to provide a blood sample for DNA testing.

On May 22, 2001, the Bar filed a motion to obtain blood, saliva or semen sample from Respondent. The motion noted how The Florida Bar had previously tried to use the results of testing performed by the Florida Department of Law Enforcement, but the referee granted a motion in limine prohibiting such use. The Bar's motion relied upon Rule 1.360, Fla. R. Civ. P., for its request.

As noted in the Bar's motion, Rule 1.360 permits a party to request another party to submit to examination by qualified experts "when the condition that is the subject of the requested examination is in controversy." The Bar's motion asserted that "[t]he controversy at issue here is whether Mr. Senton lied about engaging in a sexual encounter with a client. In order to prove that Mr. Senton's denial is false, The Florida Bar must prove that the sexual act did, in fact, occur."

Respondent filed a response to the Bar's motion to obtain blood, saliva or semen sample. Respondent's response asserted the Bar did not show good cause for an examination, Respondent's medical condition is not at issue in this case, and the Bar was attempting to obtain legally what it had previously been prevented from using illegally.

The referee conducted a hearing on the issue on July 2, 2001. After hearing arguments from both parties, the referee concluded that "it's a two-part problem. If I hear the testimony of both parties, and I'm convinced that there's no way that this woman could have gained this evidence by subterfuge, then the test certainly is dispositive. And for that reason I'm going to grant the motion." (MH-18). The referee abused his discretion in reaching this conclusion.

Rule 1.360(a)(1), Fla. R. Civ. P., permits examination "when the condition that is the subject of the requested examination is in controversy." Respondent's DNA is not the condition that is in controversy in this case. The amended complaint filed by the Bar alleges a violation of Rules 4-8.4(c) and (d), Rules Regulating The Florida Bar, based upon Respondent's deposition testimony. The only issue in this case is whether Respondent's testimony during his deposition that he did not have sex with Ms. Putnal is truthful.

The referee's decision allowed the Bar to attempt to corroborate Ms. Putnal's testimony with scientific evidence. A review of the cases interpreting Rule 1.360, Fla. R. Civ. P., shows this use is unprecedented. The typical case under the rule involves a personal injury claimant submitting to an independent medical examination when the plaintiff's physical condition clearly is in controversy. Other cases primarily involve

paternity actions where the "physical condition" of the child, i.e., whose DNA is present in the child's blood, is in controversy.

2. The testimony of Chris Larsen fails to meet the standard of clear and convincing evidence.

Chris Larsen, a forensic DNA analyst with ReliaGene, testified as an expert witness in the field of DNA analysis. (TI-72) Mr. Larsen performed a DNA amplification analysis on a Light Days mini pad and two blood samples. (TI-76) Based upon this analysis, Mr. Larsen reached the conclusion the blood sample from Respondent was consistent with the sperm cell fraction of the Light Days mini pad. (TI-88)

During cross-examination, however, Mr. Larsen admitted he was only able to find the DNA from two or more individuals ("a mixture") in 4 of the 14 genes he analyzed. (TI-102) In addition, he found an allele which was not possessed by either Ms. Putnal or Respondent. (TI-106) Finally, Mr. Larsen conceded there was a gene present on the Light Days mini pad which did not belong to either Ms. Putnal or Respondent. (TI-109)

A referee's findings of fact are presumed correct and will not be overturned unless they are clearly erroneous or lacking in evidentiary support. *The Florida Bar v. Scott,* 810 So. 2d 893, 897 (Fla. 2002) (quoting *The Florida Bar v. Hayden,* 583

So. 2d 1016, 1017 (Fla. 1991). Mr. Larsen's own testimony shows the lack of evidentiary support for a finding that Respondent's DNA was present on the Light Days mini pad submitted by Ms. Putnal. Mr. Larsen was only able to find a match to Respondent's DNA on four out of 14 genes tested. (TI-102-103)

3. The recommended discipline of disbarment is excessive.

At the conclusion of the hearing on the discipline to be imposed, the referee stated his conclusion that he did not see how he could recommend "anything other than disbarment." (DH-36) The report of referee then recommended Respondent be disciplined by disbarment. (RR-13) Disbarment is an excessive sanction in this case.

The referee reviewed the provisions of the Florida Standards for Imposing Lawyer Sanctions in reaching the conclusion to recommend disbarment. One factor the referee failed to properly consider is Standard 9.32(i) (unreasonable delay in disciplinary proceeding). The initial grievance in this matter was filed by Ms. Putnal in March 1996. Respondent replied to Ms. Putnal's grievance in November 1996. It was not until March 2000 that a grievance committee found probable cause for further proceedings.

As a result of the Bar's attempt to use evidence arguably illegally obtained from the Florida Department of Law Enforcement, the matter was delayed for a number of months. The Florida Bar sought interlocutory review from this court of the referee's

order prohibiting introduction of the DNA evidence from the Florida Department of Law Enforcement. (RR-2)

Subsequently, the matter was returned to the grievance committee for additional consideration. On April 5, 2001, well over one year from the previous probable cause finding, the committee amended its finding of probable cause. (RR-2-3)

The alleged sexual contact between Respondent and Ms. Putnal occurred nearly eight years ago. The allegedly false testimony by Respondent at his deposition occurred four years after the alleged sexual contact and over three years ago from the filing of this brief. This delay in the proceedings should mitigate any sanction to be imposed upon Respondent.

More importantly, Respondent's deposition testimony added nothing new to the case. From day one Respondent has denied he had sex with Ms. Putnal. He denied it in his interview with Agent DeVaney and he denied it in his response to the Bar. In his initial response to the Bar, Respondent stated he was "greatly distressed by [Ms. Putnal's] allegations of sexual battery and vigorously deny them" (Respondent's Exhibit 7, page 1), that "[t]he incidents described in her complaint form and police report are not true" (Respondent's Exhibit 7, page 2), and that "[t]he incident described in her complaint which allegedly took place in my office, did not happen." (Respondent's Exhibit 7, page 3)

In his deposition, Respondent was asked:

Q. And you're aware that she alleges that on that occasion, you had sexual contact with her?

A. Yes.

Q. And do you deny that?

A. Yes.

Q. Do you deny that you ever had any kind of sexual contact with Carol Putnal?

A. Yes.

(Bar's Exhibit 12, page 25)

The Bar delayed prosecution of this matter for quite some time in order to see whether any criminal charges were going to be brought against Respondent. Bar counsel advised the referee that "[t]he grievance committee did not proceed based upon the fact that the criminal case would be dispositive." (MH-23) The Bar further delayed this case by seeking interlocutory review of the referee's decision to prohibit the Bar's use of FDLE's test results. These delays are unreasonable and should mitigate against the sanction to be imposed.

The referee also erred in finding the aggravating factor of bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders

of the disciplinary agency. (RR-18) The referee first found this factor to be supported by Respondent falsely denying his sexual conduct with a client and fabricating evidence and testimony. (RR-18) The plain language of Standard 9.22(e) shows the referee erred in making this finding. The reasons stated by the referee may satisfy the requirements of Standard 9.22(f)(submission of false evidence, false statements, or other deceptive practices during the disciplinary process), but they do not support a finding of bad faith obstruction.

The lack of bad faith obstruction is further evidenced by Respondent's conduct throughout this long ordeal. Respondent did not oppose the Bar's interlocutory appeal of the referee's September 2000 ruling.

In addition, Respondent's action in seeking this Court's interlocutory review of the referee's decision to submit a blood sample cannot be considered "bad faith obstruction." Respondent merely took steps to have this Court consider the nearly unprecedented process of an attorney in a bar grievance matter being subjected to the highly invasive process of submitting a blood sample for DNA analysis. Once this Court denied Respondent's request, Respondent complied with the referee's order.

A sanction less than disbarment is supported by the case of *The Florida Bar v. Bryant,* 813 So. 2d 38(Fla. 2002). The respondent in *Bryant* had two separate disciplinary matters consolidated for hearing before a referee. In one of the matters,

the respondent was accused of exchanging legal services for sexual favors. *Id.* at 41. This Court found the respondent in *Bryant* exploited the lawyer-client relationship by requiring the client to perform sex acts in exchange for legal services. *Id*. at 43. The respondent in *Bryant* received a one year suspension even though he had previously received a private reprimand as a result of making suggestive comments and conducting inappropriate touching of a female client. *Id.* at 43, n. 6.

Respondent is aware that this Court recommended disbarment in the case of *The Florida Bar v. Scott*, 810 So. 2d 893 (Fla. 2002). The respondent in *Scott* had two separate complaints filed against him. *Id.* at 894. In addition, there is no mention in the opinion of the mitigating factor of excessive delay present in the instant case.

The opinion of the Supreme Court of Ohio in a case similar to the present one is persuasive as to the excessive nature of the recommended discipline. In *Office of Disciplinary Counsel v. Kafantaris,* 99 Ohio St. 3d 94, 789 N.E.2d 192 (Ohio 2003), the respondent was accused of appearing unexpectedly at a former employee's home and sexually assaulting and forcibly raping her. *Id*. at 95. In a civil suit filed by the former employee against the respondent, the respondent denied the allegations, specifically denying any physical contact. In a later deposition, the respondent denied ever having any type of sexual relationship or sexual contact with an employee. *Id.* at 95.

A subsequent DNA analysis was performed. The test established a match between the respondent's blood and a semen stain on a skirt belonging to the former employee. Thereafter, the respondent filed a motion for a continuance in the civil action and signed an affidavit in which he continued to deny any sexual conduct with the employee. *Id.* at 95.

When the civil case went to trial, the respondent in *Kafantaris* changed his testimony. He admitted that certain denials he made in his pretrial deposition related to kissing, physical contact or sexual relations with employees were untrue. He also testified that he had actually had sexual relations with the former employee. *Id.* at 95.

The respondent in *Kafantaris* reached an agreement with the Office of Disciplinary Counsel for the State of Ohio. The agreed upon sanction was a suspension from the practice of law for twelve months, with six months stayed. *Id.* at 96.

The referee in this case found Respondent has no prior disciplinary record and enjoys a good reputation in the legal community in the Second Judicial Circuit. (RR-19-20) These findings likewise mitigate against the recommended sanction of disbarment.

H. CONCLUSION

For the reasons stated above, this Court should reverse the referee's order compelling Respondent to submit a blood sample for testing (and the subsequent results thereof) and order a new hearing before a different referee without the introduction of such evidence. In the alternative, this Court should either enter an order dismissing the case against Respondent or reduce the sanction to be imposed.

I. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Respondent has been forwarded by regular U.S. Mail to:

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John A. Boggs, Staff Counsel
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this _____ day of October, 2003.

_____
RICHARD A. GREENBERG

xc: Robert E. Senton

J. CERTIFICATE OF COMPLIANCE

Undersigned counsel does hereby certify the Initial Brief of Respondent is reproduced in the following point size and font: 14 point Times New Roman.