

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR,**

**Supreme Court Case  
No. SC04-1418**

**Complainant/Appellant,**

**v.**

**DAVID MARSHALL BROWN,**

**The Florida Bar File  
No. 2004-50,654(17C)**

**Respondent/Appellee.**

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**THE FLORIDA BAR'S REPLY BRIEF**

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## ARGUMENT

### **THE REFEREE'S RECOMMENDATION OF A TWENTY-DAY SUSPENSION IS NOT SUPPORTED BY THE RECORD, CASE LAW, OR THE STANDARDS FOR IMPOSING LAWYER SANCTIONS**

Standard 10.2 of the Standards For Imposing Lawyer Sanctions in Drug Cases requires a suspension of 91-days followed by probation, absent aggravating or mitigating factors, in cases where an attorney engages in misdemeanor conduct involving a controlled substance, regardless of whether the lawyer is formally prosecuted or convicted of said misconduct.

This Respondent was arrested and charged not with a misdemeanor, but with the more serious felony charge of possession. Respondent still awaits the disposition of a pending misdemeanor driving under the influence charge before the Honorable Fred J. Berman. The Referee expressed concern for the pending DUI case (Transcript 129). The Referee found Respondent guilty of violating Rules 3-4.2, 3-4.3, and 4-8.4(b) of The Rules Regulating The Florida Bar. (RR 5-6).

Respondent's counsel incorrectly attempts to argue that Standard 10.2 does not specifically apply to the Respondent. (Answer Brief, page 30). The Bar disagrees and maintains that Standard 10.2 is owed due consideration given the facts of this case.

In order to refute the presumption of a 91-day suspension in a drug case, Respondent must present mitigating evidence as outlined in Standards 9.32 and 11.0. Mitigation in drug cases requires that in addition to the factors enumerated in 9.32, Respondents must show good-faith, ongoing supervised rehabilitation through FLA, Inc., and any treatment program approved by FLA, Inc. The Referee, while making laudatory comments about the Broward County Drug Court and FLA, Inc., did not make a finding as to whether the programs were comparable or whether Drug Court was an FLA approved program. While the Report of Referee indicates that the Referee considered and found interim rehabilitation [Standard 9.32(j)], (RR 8), the Report of Referee does not contain a specific finding of mitigation in accordance with Standard 11.0 of the Standards For Imposing Lawyer Sanction in Drug Cases.

Respondent completed the Broward County Drug Court in December of 2004 so as to avoid a possible conviction of the felony possession of cocaine charge. In addition to his testimony and as part of the record, Respondent provided a copy of a “little” brochure of the Broward County Sheriff’s Office Drug Court Treatment Program (Transcript 74, Appendix Exhibit 1). The brochure does not contain any endorsement of its approval as an FLA, Inc. sponsored program. Even at the Final Hearing, Respondent offered no testimony from his drug counselors, FLA, Inc. representative, or other treatment professional validating his claims that

the Broward County Drug Program was either an approved or comparable program in this instance.

Assuming, arguendo that the Broward County Drug Court is a comparable program or a program that would have been approved by FLA, Inc., Respondent failed to meet the ongoing supervised rehabilitation requirement of Standard 11.0 through FLA, Inc. or any treatment program(s) approved by FLA, Inc. When asked during cross-examination if he participated in any after-care treatment or counseling following his December 16, 2004, Drug Court graduation, Respondent testified that he had not attended any meetings (including NA or AA), did not submit to urine screens, and did not sign a monitoring contract with FLA, Inc. Respondent cited moving into a new home, spending time with his daughter, and a vacation to Chicago as reasons for not participating in after-care activities during the month following his completion of the Drug Court Program. Respondent testified that he contacted FLA, Inc., at or about the time he enrolled in the Broward County Drug Court Program in order to obtain information about FLA. Respondent was advised that FLA met on Tuesdays, which was a day when he did not have Drug Court meetings. Tuesdays were the days that he could get together with his teenage daughter (Transcript 73). Respondent candidly admitted “The reason I didn’t do this is because I’m trying to maintain a relationship with my daughter.” (Transcript 73). As an additional justification for not participating in

FLA, Inc., Respondent made his own assessment of both the Drug Court Program and FLA, Inc., deciding on his own that Drug Court was “a lot more intensive.” (Transcript 74, 94) and that he didn’t want to “overlap” both programs particularly in light of the financial costs of FLA. (Transcript 94).

Respondent did not proceed with FLA, Inc., in any capacity nor did he obtain any type of written or verbal confirmation from FLA, Inc. that the Broward County Drug Court was a comparable or FLA, Inc. approved program. Respondent testified most tellingly that he feels that he sufficiently addressed the issues that brought him before The Bar and that he does not really have a substance abuse problem (Transcript 94, 96, and 105). However, he failed to provide evidence that he was not in need of additional follow-up care or counseling in order to prevent a relapse.

Respondent attempts to distinguish the cases cited by The Bar in its Initial Brief. To this end, Respondent cites cases such as The Florida Bar v. Fertig, 551 So.2d 1213 (Fla. 1989), a 90 day suspension case involving drug smuggling scheme without proof of a substance abuse problem, and The Florida Bar v. Levin, 570 So.2d 917 (Fla. 1990), a public reprimand case involving gambling and bookmaking without drug related implications, in furtherance of a short term suspension. These cases are not analogous to the factual scenario and findings made in this case. Here, Respondent was arrested for possession of cocaine for

personal use and failed to provide evidence of rehabilitation that is required in drug cases. The Referee determined that Respondent was in need of continued supervision from a drug treatment provider as memorialized in the Report of Referee (RR 6-7). Additionally, the cases cited in Respondent's Answer Brief predate more relevant cases such as The Florida Bar v. Weintraub, The Florida Bar v. West, and The Florida Bar v. Temmer.

In The Florida Bar v. Weintraub, 528 So. 2d 367 (Fla. 1988), this Court upheld a 90 day suspension along with a 2 year period of probation for the sale and use of cocaine. Weintraub submitted to an FLA, Inc. evaluation and participated in counseling sessions during the pendency of the disciplinary proceedings. Unlike Respondent, Weintraub presented expert witness testimony to form the basis of competent substantial evidence that he was not a drug addict in need of rehabilitation.

The Florida Bar v. West, 550 So. 2d 462 (Fla. 1989), upheld an 18-month suspension following a guilty plea to possession of cocaine in spite of numerous mitigating factors including cooperation with The Bar, remorse, completion of a drug treatment program, and on-going counseling for alcohol abuse. The Respondent in this case has not provided proof of on-going supervised rehabilitation or participation in NA/AA classes following the December 2004 completion of the Drug Court Program.

The sanction in The Florida Bar v. Temmer, 632 So. 2d. 1359 (Fla. 1994), also would have resulted in a rehabilitative suspension but for the multitude of mitigating factors, including obtaining assistance from a mental health counselor, FLA, Inc., consultation with a psychiatrist specializing in addictionology, as well as assistance from a license clinical social worker. It was only after reviewing the reports of FLA, Inc., and the psychiatrist, which recommended no further treatment, that the Referee made a recommendation of a 90-day suspension.

The Respondent in the case at bar presented no reports or evaluations, or testimony other than his own self-serving testimony that he no longer had a drug problem, that clearly and convincingly concluded that proof of rehabilitation was not required. Had Respondent presented such testimony, the Referee could have properly concluded that rehabilitation was not necessary and that an automatic reinstatement was appropriate.

**CONCLUSION**

This Court should not approve the Referee’s recommendation as to discipline in this case and Respondent should be suspended for a period of 91 days as the Referee’s recommended discipline is inconsistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions in Drug Cases.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY true and correct copies of The Florida Bar’s Reply Brief have been furnished by regular U.S. mail to Michael D. Gelety, Esq., Counsel for Respondent, 1209 SE 3<sup>rd</sup> Avenue, Fort Lauderdale, Florida 33316; and to Staff Counsel, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300 on this \_\_\_ day of July, 2005.

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LILLIAN ARCHBOLD

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

Undersigned counsel hereby certifies that The Florida Bar's Reply Brief is e-filed in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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LILLIAN ARCHBOLD