

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

CASE NO.: 74,157

Complainant

vs.

JAMES C. BURKE,

Respondent.

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RECEIVED  
JUL 24 1974  
JAMES C. BURKE  
Respondent

CORRECTED  
COMMENTS TO THE COURT

ACADEMY OF FLORIDA TRIAL LAWYERS

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## STATEMENT OF THE CASE AND FACTS

The report of the Referee of January 30, 1990 recommending an eighteen month suspension was subsequently considered by the Board of Governors at its meeting of March 14 through March 17, 1990. The Board denied Burke's request to appear with counsel and testify (See Exhibit A-Affidavit of Burke). The Board then directed the Bar to contest the Referee's recommendation of eighteen month suspension, and to recommend disbarment.

SUMMARY OF ARGUMENT

WHETHER THE BOARD OF GOVERNORS' ACTION REJECTING THE REFEREE'S RECOMMENDATION OF AN EIGHTEEN MONTH SUSPENSION AND RECOMMENDING DISBARMENT WITHOUT AFFORDING RESPONDENT, JAMES C. BURKE, THE OPPORTUNITY TO APPEAR WITH COUNSEL AND TESTIFY VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW.

## ARGUMENT

A license to practice law is a valuable privilege which should not be regarded lightly by those charged with supervision of its enjoyment. It is earned after a difficult and expensive period of education. It is retained as a productive source of livelihood by diligence and ethical devotion. Thus, it has characteristics of property which should not be withdrawn without proper application of traditional concepts of due process. The Florida Bar v. Fussell, 179 So.2d 852, 854(Fla.1965), review after remand 189 So.2d 881(Fla. 1966).

No written rule is necessary to establish that due process contemplates an opportunity to be heard before an individual is subjected to discipline. Fussell id. 854, 855. Due process further requires that the lawyer be given an opportunity to explain the circumstances and offer testimony, in excuse for mitigation of the penalty. Fussell id. 854. Florida Bar v. Pavlick, 504 So.2d 1231, 1234 (Fla.1987) The opportunity to be heard should be tendered unless it is expressly waived. Fussell id. 854.

Unlike Burke, Fussell never received any hearing or opportunity to be heard. Although Burke had a full hearing with an opportunity to be heard before the Referee, due process requires him to be provided an opportunity to be heard at each stage of the process, where the decision maker, here the Board of

Governors, has the power to change the findings as to either guilt or punishment. Given the Board's recommendation, Burke was denied due process when he needed it most.

In Giddens v. State Bar of California, 170 Cal.Rptr. 812(CA 1981), the Supreme Court held that an incarcerated attorney who couldn't attend his hearing on discipline, was denied due process when the hearing continued without him.

The Court stated that the right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection. Yakov v. Board of Medical Examiners, 64 Cal.Rptr. 785(CA 1968).

Giddens was not afforded the rights to defend by introduction of evidence, to be represented by counsel, to examine and cross-examine witnesses. Since he was not present to testify, the decision maker could not evaluate his demeanor and credibility. Since the issue was his suitability for legal practice without any representation of his views, a fair hearing was not possible. In summary, the decision maker only heard one side of the case.

In Disciplinary Matter Involving Walton, 676 P.2d 1078 (Alaska, 1983), State Bar rules expressly permitted an attorney who has been heard before a Hearing Committee, which recommended public censure, to be heard again before the Disciplinary Board which increased the penalty to an eighteen month suspension.

Alaska Bar Rule II-15(i) Since Walton waived those rights, the Court held he could not be heard to complain of due process violations.

At bar, the review of Burke's case by the Board of Governors was a re-hearing on punishment, since the Board had the power to recommend disbarment instead of an eighteen month suspension. The impact on Burke's right to practice resulting from disbarment versus an eighteen month suspension is manifest. Given such circumstances, the requirements of due process, as well as traditional Anglo-American precepts of fair play and substantial justice, are violated. Netterville v. Mississippi State Bar Association, 397 So.2d 878 (Miss.1981)

Fairness demands that Burke be permitted to attend the Board of Governors' Hearing, to be represented by counsel, and to offer his version of events. The Board of Governors only received the Bar counsel's side of the story. It could not evaluate Burke's demeanor and credibility. This is the same as a de-novo hearing in which one party can neither attend, be represented or give testimony. Due process by the Referee is meaningless if it is denied before the Board of Governors.

Accordingly, it is respectfully requested that the Court:

1. Accept the Referee's Recommendation of eighteen months suspension based on the due process violation, which occurred before the Board of Governors.

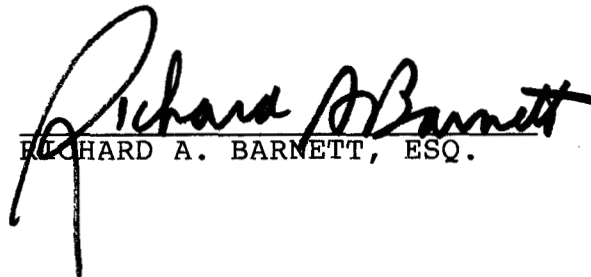


2. Order the Bar to promulgate procedural rules for a Board of Governors' Hearing consistent with due process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered/mailed this 25th day of July, 1990, to: Elizabeth Koebel Russo, Esq., 100 N. Biscayne Blvd., Suite 601, Miami, FL 33132, Robert L. Parks, Esq., 100 N. Biscayne Blvd., Suite 2500, Miami, FL 33132; Warren Jay Stamm, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 and John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

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