

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

vs.

JAMES C. BURKE,
Respondent.

CASE NO. 74,157

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AUG 9 1990
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Deputy Clerk

REPLY OF THE FLORIDA BAR TO THE COMMENTS OF
THE ACADEMY OF FLORIDA TRIAL LAWYERS

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SUMMARY OF ARGUMENT

THE BOARD OF GOVERNOR'S ACTION REJECTING THE REFEREE'S RECOMMENDATION OF AN EIGHTEEN (18) MONTH SUSPENSION AND RECOMMENDING DISBARMENT WITHOUT AFFORDING RESPONDENT, JAMES C. BURKE, THE OPPORTUNITY TO APPEAR WITH COUNSEL AND TESTIFY DID NOT VIOLATE HIS RIGHTS TO DUE PROCESS OF LAW.

ARGUMENT

The position of the Academy of Florida Trial Lawyers (hereinafter referred to as Academy) demonstrates a distressing lack of knowledge as to the nature of the lawyer regulatory system in this State and the role of the respective parties therein.

The Academy states that the practice of law is a privilege that may not be withdrawn without due process of law. The Florida Bar agrees. "A license to practice law confers no vested right to the holder thereof, but is a conditional privilege which is revocable for cause." Rule 3-1.1 As with any other privilege, when violated, it should be taken away.

The Academy states that due process requires that a lawyer be given an opportunity to be heard before he is subjected to disciplinary sanctions. The Florida Bar agrees. The Florida Bar v. Fussell, 179 So.2d 852 (Fla. 1965).

The Academy states that due process requires that a lawyer be given an opportunity to offer evidence in mitigation before the imposition of discipline. The Florida Bar agrees. The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987).

The Academy states that due process opportunities must be afforded unless waived. The Florida Bar agrees. Fussell, supra.

The Academy states that:

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 of [sic] punishment. Given the Board's recommendation, Burke was denied due process when he needed it most.

The Florida Bar does not agree. This Court has not held as such and the Rules Regulating the Florida Bar plainly indicate otherwise.

This Court in Petition of Supreme Court Special Committee For Lawyer Disciplinary Procedures, 373 So.2d 1 (Fla. 1979), amended the Integration Rules and in doing so clearly limited the role of the Board of Governors of The Florida Bar to that of prosecutor by "taking the Board of Governors out of the adjudicatory phase of the disciplinary process." The practical effect of this change was to limit the Board's role in disciplinary actions and prevent exactly what the Academy is claiming has occurred at bar. As such, Respondent, Burke's due process rights have been protected rather than precluded.

The Board of Governors of the Florida Bar is not the "decision maker" for purposes of due process requirements. The Board is a prosecutorial entity that reviews the recommendations of one decision maker (the Referee) and may appeal those recommendations to another decision maker (this Court). See Rule 3-1.2, 3-3.2, 3-7.5, 3-7.6 (k) and 3-7.2 (a) and (c) Rules Regulating the Florida Bar.

As such, the role of the Board in this phase of the proceedings is to act as a conduit between the trier of fact and this Court so as to assure that procedural requirements are met

and judicial economy is best served, by making a determination whether or not to continue on with the prosecution of the underlying matter.

The particular Board of Governors meeting which the Academy claimed violated Mr. Burke's due process rights was one at which the Board considered the recommendations of Bar counsel so that it may exercise its rights as a party to disciplinary proceedings. Rule 3-7.7 (a) (1). Because that meeting was one in which the Board received advice of counsel, it must be deemed as a confidential communication within the scope and meaning of Rule 4-1.6 Rules of Professional Conduct. The Board has chosen not to waive its attorney-client privilege in this regard. Such action by the Board is consistent in that the Board considers whether to appeal in all similarly situated cases in the same manner used at bar.

The Academy relies on Disciplinary Matter Involving Walton, 676 P.2d 1078 (Alaska 1983) and Alaska Bar Rule II-15(i) as support for Mr. Burke's right to be present before the Board. However, in that case the Rules relating to lawyer disciplinary matters in Alaska specifically conferred on the lawyer the right to be present at such proceedings. No such rule exists in Florida.

The Academy also relies on Netterville v. Mississippi State Bar Association, 397 So.2d 878 (Miss. 1981), to conclude that traditional concepts of fair play have been violated in the case at bar. The Academy so concludes based on its belief that the

proceedings before the Board were a "rehearing on punishment, since the Board had the power to recommend disbarment instead of an eighteen month suspension." This is misdirection as evidenced by the very statement itself and establishes that the Academy does not understand the purpose and procedures of the Board of Governors as promulgated by the Supreme Court. The Academy does however, concede that the Board does not determine "punishment" but rather "only recommend[s]" disciplinary sanctions.

The Academy contends that fairness demands that Mr. Burke be allowed to address the Board and present his version of events stating that, "the Board of Governors only received Bar counsel's side of the story." Here too they are in error.

The vehicle in which the Board of Governors reviews reports of referee is by agenda item which sets forth a summation of the proceedings before the referee, prior disciplinary history of the Respondent and other internal administrative information. Appended thereto is a copy of the Report of Referee. As specifically concerns Respondent, James Burke, the agenda item which went before the Board contained the same information that all such items contain and was supported by a Referee's report wherein findings and recommendations were made based on proceedings in which Burke was represented by counsel, afforded the opportunity to testify, present evidence and cross examine witnesses.

Burke was afforded the same opportunities and treated in the same manner as any other respondent who is the subject of

disciplinary proceedings. What James Burke seeks to do in arguing that his due process rights have been violated is to remove himself from the practices and procedures that everyone must follow, while at the same time cloaking himself in their protection.

Such actions cannot be tolerated and must not be allowed to occur or "due process" rights truly will be eroded.

CONCLUSION

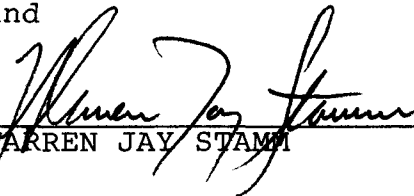
The action of the board in Mr. Burke's case was both fair and afforded all required rights of due process. The position of the Academy should be rejected as contrary to law, the rules and the facts.

Respectfully submitted,



JOHN A. BOGGS

and



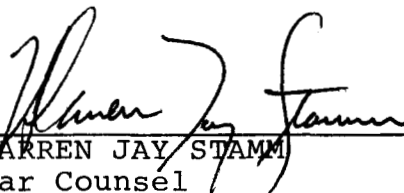
WARREN JAY STAMM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies were served by U. S. Mail upon Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and copies served by regular U. S. Mail upon Richard A. Barnett, 4651 Sheridan Street, #325, Hollywood, Florida 33021, Elizabeth Koebel Russo, 100 North Biscayne Boulevard, Suite 601, Miami, Florida 33132 and Robert L. Parks, 100 North Biscayne Boulevard Suite 2500, Miami, Florida 33132, this 9th day of August, 1990.



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