

2020

Preponderance, Plus: The Procedure Due to Professional Licensees in State Revocation Hearings

Allaina M. Murphy

Follow this and additional works at: https://opencommons.uconn.edu/law_review



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Murphy, Allaina M., "Preponderance, Plus: The Procedure Due to Professional Licensees in State Revocation Hearings" (2020). *Connecticut Law Review*. 473.
https://opencommons.uconn.edu/law_review/473

CONNECTICUT LAW REVIEW

VOLUME 52

JULY 2020

NUMBER 2

Note

Preponderance, Plus: The Procedure Due to Professional Licensees in State Revocation Hearings

ALLAINA M. MURPHY

A licensee who is subjected to professional discipline often experiences harsh and stigmatizing consequences as a result: humiliation; disgrace; loss of reputation, livelihood, and client base. Unfortunately, this, at times, happens on the basis of an unsubstantiated complaint. Procedural due process protections apply to professional license revocation actions to help prevent such error, but states vary widely in the combination and strength of the procedural safeguards they require in such hearings. It is far more likely that an undeserving professional will be unfairly and permanently harmed in a state with minimal procedural safeguards. This Note focuses on procedural due process issues in state administrative professional license revocation hearings—specifically, whether, and under which circumstances, the preponderance of the evidence standard provides sufficient due process for licensed professionals in administrative disciplinary hearings. This Note argues that “preponderance alone” is not sufficient when a state has no other safeguards in place. However, preponderance of the evidence may be appropriate in states that do have additional procedural safeguards in place—a standard termed “preponderance, plus.”

NOTE CONTENTS

INTRODUCTION.....	945
I. STATE PROFESSIONAL LICENSING BOARDS	947
A. BACKGROUND, PURPOSE, AND PUBLIC POLICY	947
B. CONSTITUTIONAL SOURCES OF LICENSED PROFESSIONALS ² PROCEDURAL RIGHTS	951
C. THE DISCIPLINARY HEARING	953
II. STATES DIFFER IN PROCESS DUE WHEN A STATE AGENCY SEEKS TO REVOKE OR SUSPEND A PROFESSIONAL LICENSE	955
A. STATE DIFFERENCES IN PROCESS	955
B. POTENTIAL PROCEDURAL ISSUES	958
III. ANALYSIS: PREPONDERANCE OF THE EVIDENCE ALONE IS NOT SUFFICIENT DUE PROCESS	961
A. STATE SPLIT: COMPARING PREPONDERANCE OF THE EVIDENCE AND CLEAR AND CONVINCING STATES	961
B. PREPONDERANCE ALONE IS NOT ENOUGH.....	966
CONCLUSION.....	971



Preponderance, Plus: The Procedure Due to Professional Licensees in State Revocation Hearings

ALLAINA M. MURPHY *

INTRODUCTION

A license is defined as: “permission to act.”¹ Under its legal definition, a license is “[t]he certificate or document evidencing such permission.”² Professional licenses play an important role in the lives of every American. Whether working in a profession that requires they be licensed, or requiring a service provided by professionals in those professions, every American encounters a professional license on a regular basis. Licensing is required for more than three-quarters of jobs in healthcare, more than two-thirds of jobs in the legal profession, and more than half of jobs in education. This accounts for approximately twenty-three percent of the U.S. workforce, according to the U.S. Bureau of Labor Statistics.³ But also, approximately 2.8 million jobs are lost annually because of licensing issues.⁴

Licensing laws are implemented with the intent to protect public health and safety by creating barriers to employment—through testing, training, and fees—in professions determined to be sufficiently dangerous.⁵ As such, a professional who has obtained a license has presumptively met the requisite level of competency and qualification, and once the state has granted a professional his license, the licensee has a due process protected property interest in the license:

The kind of property interests that due process encompasses extends beyond the actual ownership of real estate, chattels, or

* University of Connecticut School of Law, J.D. 2020; Bates College, B.A. 2015. I would like to extend my sincerest thanks to the members of the *Connecticut Law Review* for their thoughtful editing, diligence, and support throughout this process. Also, I would like to thank my Note Editor for his patient guidance throughout the drafting process. Finally, thank you to my parents, for everything else.

¹ *License*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/license> (last visited May 27, 2020).

² *License*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³ U.S. BUREAU OF LAB. STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY 1, <https://www.bls.gov/cps/cpsaat49.htm> (last updated Jan. 22, 2020).

⁴ MARK FLATTEN, GOLDWATER INST., PROTECTION RACKET: OCCUPATIONAL LICENSING LAWS AND THE RIGHT TO EARN A LIVING 5 (2017), <https://goldwaterinstitute.org/article/protection-racket-occupational-licensing-laws-and/>.

⁵ NAT’L CONF. OF ST. LEGIS., NATIONAL OCCUPATIONAL LICENSING DATABASE EXECUTIVE SUMMARY (Mar. 24, 2020), <https://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx>.

money to include legitimate claims of entitlement to governmental benefits. . . . “Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that ‘[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence.’⁶

Due process protections apply to license revocation actions by the state. The government cannot deprive the individual of an issued license to practice in the profession without the appropriate procedural safeguards. There are harsh and stigmatizing consequences of license discipline—humiliation, disgrace, loss of reputation and client base. This, at times, happens on the basis of an unsubstantiated complaint, making those procedural safeguards—notice, hearing, and perhaps, evidentiary standard—all the more important.

This Note focuses on procedural due process issues in state administrative professional license revocation hearings. Specifically, this Note focuses on whether—and under which circumstances—the preponderance of the evidence standard provides sufficient due process for licensed professionals in administrative disciplinary hearings. It concludes that “preponderance alone” is not enough and additional safeguards must be in place. The preponderance of the evidence standard may be sufficient in states that have other procedural safeguards in place—“preponderance, plus.” In states that lack such safeguards, a higher evidentiary standard of clear and convincing evidence is required to satisfy due process.

Part I of this Note examines the state licensing boards. It begins with the background, function, and policy of state licensing boards as part of the state administrative system. It discusses the background and policy of states delegating authority to such boards, and the disciplinary measures licensing boards are authorized to carry out. Part I culminates in a discussion of the board’s authority to revoke licenses in disciplinary hearings.

While there is a basic process that most states follow—at times, with minimal procedural safeguards for the licensee—for disciplinary hearings, each state formulates its own procedural rules and there is much variation among the fifty states. Part II discusses many of these differences, compares various revocation practices, and discusses potential procedural due process

⁶ J. Bruce Bennett, *The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*, 7 TEX. TECH. ADMIN. L.J. 205, 208 (2006) (footnote omitted) (second alteration in original) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970)).

issues in license revocation hearings. Perhaps the most striking difference between states is that currently, thirty-two states have a preponderance of the evidence standard and sixteen states maintain a clear and convincing standard in disciplinary hearings for professional licensees.⁷ This split has given rise to much debate on which standard is required by procedural due process.

Part III builds on this discussion of the state differences and analyzes the state split of evidentiary standards in the quest to determine whether the preponderance of the evidence standard satisfies procedural due process. This discussion entails the stated rationales and policy implications of each side, as well as the additional procedural safeguards that each side has in place. This analysis concludes that the preponderance of the evidence standard alone—without additional procedural safeguards in place—is insufficient procedural due process for licensees.⁸ This Note suggests that the “plus” required when the preponderance of the evidence standard is utilized is a proper separation of roles and powers—and biases—within the adjudicatory process.

The following discussion will solely reference professional licenses from the medical and dental fields so that tangible public risk and policy concerns can be equitably accounted for.

I. STATE PROFESSIONAL LICENSING BOARDS

A. *Background, Purpose, and Public Policy*

Administrative agencies first entered the United States legal landscape in 1865 to assist with an expanding government under President Johnson.⁹ Administrative law has greatly expanded in the last 150 years and, today, agencies have wide discretion and authority far beyond that originally imagined.¹⁰ This growing authority is due, in part, to the fact that agencies

⁷ FED’N OF STATE MED. BDS., U.S. MEDICAL REGULATORY TRENDS AND ACTIONS 67 (2018), <https://www.fsmb.org/siteassets/advocacy/publications/us-medical-regulatory-trends-actions.pdf> [hereinafter FSMB]. The Federation of State Medical Boards is the national association of medical and osteopathic boards.

⁸ Because of the vast number of state professional and occupational statutes and independent processes, which vary both by state and profession, the following discussion is necessarily limited in scope. The body of this Note focuses on professional licenses over occupational licenses, with special attention to disciplinary processes, over all other functions and powers of state licensing boards. The majority of the discussion is based on medical board sources. However, most professions contain the same standard, with the exception of attorney licensing which typically uses a clear and convincing standard in most states.

⁹ See *A Brief History of Administrative Government*, CTR. FOR EFFECTIVE GOV’T, <https://www.foreffectivegov.org/node/3461> (last visited Mar. 22, 2019) (discussing 1865, a year that Andrew Johnson was President, as the beginning of independent regulatory commissions).

¹⁰ See Judah A. Schechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1483 (1988) (making it

wield powers of each of the three principal branches of government.¹¹ The statutes under which most agencies operate give them: (1) the legislative power to issue rules and the authority to issue penalties for violation of those rules; (2) the executive power to investigate potential violations of rules and prosecute offenders; and (3) the judicial power to adjudicate disputes over failure to comply with the standard.¹²

State administrative agencies mirror federal agencies: most states enact a state administrative procedure act or follow the Revised Model State Administrative Procedure Act,¹³ agencies derive power from authorizing statutes,¹⁴ and agencies oversee a specific field. State agencies more significantly impact the everyday lives of individuals than many federal agencies. In several states, as many as seventy independent agencies make rules and adjudicate contested cases affecting the lives, health, fortunes, safety, labor, and business of millions of citizens.¹⁵ More than two thousand state administrative agencies exercise both legislative and judicial functions.¹⁶ In carrying out their duties, these agencies are largely independent of the legislature and the courts.

A state licensing board, authorized to regulate the corresponding profession for the general welfare of its citizens,¹⁷ is one of the most prevalent state agencies for American citizens. A person seeking to practice in a particular profession must first obtain, and then retain, a license from the state in which they hope to practice.¹⁸

clear that the Founding Fathers “envisioned a judicial system in which most adjudication would take place in judicial, not administrative, tribunals”).

¹¹ 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 25–26 (1965).

¹² *Id.*

¹³ REVISED MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 2010), <https://www.uniformlaws.org/committees/community-home?CommunityKey=f184fb0c-5e31-4c6d-8228-7f2b0112fa42> (last visited Mar. 22, 2019).

¹⁴ *See* *Pork Motel Corp. v. Kan. Dep’t of Health & Env’t*, 234 Kan. 374, 378 (1983) (“Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes; therefore, any exercise of authority claimed by agency must come from within the statutes . . . no general or common law power that can be exercised by an administrative agency.”).

¹⁵ 1 COOPER, *supra* note 11, at 1–2.

¹⁶ *Id.* at 2.

¹⁷ Tara K. Widmer, *South Dakota Should Follow Public Policy and Switch to the Preponderance Standard for Medical License Revocation After In Re the Medical License of Dr. Reuben Setliff, M.D.*, 48 S.D. L. REV. 388, 396 (2003).

¹⁸ *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (“The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.”). Licensing is required for more than three-quarters of jobs in healthcare, more than two-thirds of jobs in the legal profession, and more than half of the jobs in education. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/cps/aa2016/cpsaat53.htm> (last updated Feb. 8, 2018).

In the American federalist system, the authority to issue most licenses lies at the state level, within the purview of each state's police power.¹⁹ The Supreme Court first confirmed the constitutionality of licensing requirements in *Dent v. West Virginia*,²⁰ where the Court considered a state law requiring that a physician graduate from a reputable medical school and pass a qualifying examination or prove that he had practiced medicine in the state for a period of ten years in order to practice medicine.²¹ The Court acknowledged that because every individual has a right to pursue a lawful occupation, the legislature cannot arbitrarily prevent a person from working in the occupation of his choice,²² but a state may adopt a licensing scheme as a means of protecting public health and safety.²³

In the past seventy years, there has been a large increase in the number of regulatory agencies that license and regulate businesses and professionals.²⁴ In the 1950s, the U.S. economy was based on manufacturing, and less than five percent of all workers in the United States were required to have a license to do their jobs.²⁵ Today's economy is more

¹⁹ U.S. CONST. amends. X, XIV. See, e.g., *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) (“[T]here is no right to practice medicine which is not subordinate to the police power of the states.”); *Locke v. Shore*, 634 F.3d 1185, 1197 (11th Cir. 2011) (finding Florida license requirement for interior designers constitutional), *cert. denied*, 132 S. Ct. 1004 (2012); *Onyiuke v. N.J. State Supreme Court*, 435 F. Supp. 2d 394, 406 (D.N.J. 2006) (holding state rule requiring graduation from accredited law school as prerequisite to licensure rationally related to “legitimate interests in ensuring high standards of qualification”), *aff’d in part, vacated in part sub nom. Onyiuke v. New Jersey*, 242 F. App’x 794 (3d Cir. 2007); *Walker v. Bd. of Prof’l Responsibility of Superior Court of Tenn.*, 38 S.W.3d 540, 550 (Tenn. 2001) (finding regulation that required attorneys to disclose specialty certification in advertisements was valid). For information on federal licenses, see *Federal Licenses & Permits*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/what-federal-licenses-and-permits-does-your-business-need> (last visited Mar. 22, 2019).

²⁰ 129 U.S. at 128.

²¹ *Id.* at 124–25.

²² *Id.* at 121–24 (citations omitted).

²³ *Id.* at 122. Although the states’ power to license was not confirmed by the Supreme Court until 1889, state regulation of professional licenses began as early as the mid-1700s. See Kathleen L. Blaner, Comment, *Physician Heal Thyself: Because the Cure, the Health Care Quality Improvement Act, May Be Worse Than the Disease*, 37 CATH. U. L. REV. 1073, 1078 (1988) (“As early as 1760, colonies created boards of medical examiners to evaluate individuals seeking to practice medicine and to issue licenses to those individuals the boards found qualified.”). And, professional licensing boards and societies originated after the Civil War, when societies enacted standards to use as a measure of the professional’s competency in disciplinary actions. *Id.* at 1078–79.

²⁴ See Mary Feighny & Camille Nohe, *A Species Unto Themselves: Professional Disciplinary Actions*, 71 J. KAN. B. ASS’N 29, 29 (2002) (“In Kansas, a person can’t cut hair, trim beards, give legal advice, perform surgery, clean teeth, embalm bodies, fill prescriptions, neuter cats, design buildings, or pierce bodies without getting the State’s blessing. This means that an applicant for such sanctions needs to satisfy a regulatory body that he or she has satisfied certain prerequisites designed to ensure a minimum level of competency. Once permission is secured, a licensee must then comply with rules by the agency or risk losing the privilege to practice that profession.”). For a comprehensive list of all professions that require a state regulated license, see *License Finder*, U.S. DEP’T LAB., <https://www.careeronestop.org/toolkit/training/find-licenses.aspx> (last visited Jan. 5, 2020).

²⁵ FLATTEN, *supra* note 4, at 5.

service-oriented, and as such, between twenty-five and thirty percent of workers must have a license from the government.²⁶ While some of this growth can be attributed to changes in workforce (more people are doing jobs that have long required a license), the last half of the twentieth century saw an explosion in the number of occupations subject to regulation, and approximately two-thirds of the growth occurred because previously unlicensed jobs have been added to the list of those regulated.²⁷ The Supreme Court has outlined the parameters of the state's police power regarding licenses: "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."²⁸

State legislatures create licensure boards to oversee certain professions and give boards the authority to discipline anyone who violates the rules, regulations, ethics, or other standards of the profession.²⁹ The role of the licensure boards is to protect consumers from professionals who fail to maintain the requisite standards.³⁰ It is in a state's interest to ensure that only qualified practitioners serve the public.³¹ The goal of state licensing boards is to protect the public against unprofessional, improper, unauthorized, and unqualified practice, as well as to secure for the public the services of

²⁶ *Id.*

²⁷ THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 3, 6 (2015). For a list of occupations that require a license, see 2 DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 13 (2017). See also *id.* at 44–144 (listing states and their licensing requirements).

²⁸ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). Usually, the power to issue a license and oversee licensee is through a state administrative agency. See, e.g., 243 MASS. CODE REGS. 1.00 (2012) ("Disciplinary Proceedings for Physicians").

²⁹ See Richard Waring, *What Your Licensing Board Expects of You*, in THE MENTAL HEALTH PRACTITIONER AND THE LAW: A COMPREHENSIVE HANDBOOK 101, 101 (Lawrence E. Lifson & Robert I. Simon eds., 1998) ("Despite the fact that the federal government regulates and finances medical practice in the United States in an extensive way, the licensing and disciplining of physicians is exclusively a function of state government."). See *infra* Appendix A for a list of citations for each state administrative procedure act. The state APAs lay out the basic requirements for licensing that are particular to each state. The professions that are licensed in every state are: health related occupations, attorneys, accountants, barbers, cosmetologists, truck drivers, teachers, pesticide applicators, funeral directors, school bus drivers, and athletic trainers. 2 CARPENTER, *supra* note 27, at 44–144. Although these are universally licensed occupations, states vary tremendously with respect to the experience and training required for licensure. For example, a barber in Maryland is required to complete 280 days of experience and education, where in Idaho, a barber is required to complete 630 days of experience and education. *Id.* at 68, 85.

³⁰ See *infra* Part II for a discussion on the public policy supporting licensing boards.

³¹ Feighny & Nohe, *supra* note 24, at 29.

competent and trustworthy practitioners.³² Regulatory and disciplinary authority allow state licensing boards to carry out these goals.³³

The following discussion will solely reference professional licenses from the medical, dental, and legal fields so that a tangible and agreed upon public risk can be accounted for.

B. *Constitutional Sources of Licensed Professionals' Procedural Rights*

To carry out their policy and regulatory goals, licensing boards need the ability to revoke licenses from practitioners who pose a harmful risk to public welfare and safety. However, this authority is necessarily limited by procedural safeguards to protect the licensees: "This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."³⁴

The United States Constitution, and most state constitutions, contain a clause providing that no person shall be deprived of life, liberty, or property without due process of law. The "touchstone" of due process is the protection of the individual from the arbitrary action of the government,³⁵ meaning that procedural due process protects a person from an erroneous or mistaken deprivation of life, liberty, or property by guaranteeing the application of fair procedures.³⁶ Due process is "flexible and calls for such procedural protections as the particular situation demands."³⁷ The "procedure due" is not universally applicable to every situation.

The discussion of the requisite due process required in administrative hearings was first discussed in depth in 1970 when the Supreme Court decided *Goldberg v. Kelly*.³⁸ In *Goldberg*, welfare beneficiaries in New York claimed their payments were terminated without due process of law.³⁹ The welfare program in question was based on a system of statutory entitlements where all applicants who met the conditions were entitled to

³² *Id.* There is no clear health and safety benefit to regulating most of the currently licensed occupations. FLATTEN, *supra* note 4, at 5. Only about thirty professions (most of which are medical, dental, mental health, and legal) are licensed in all fifty states and many are licensed in only one state. Critics suggest this shows that licensing is unnecessary for most occupations: if a license is issued in only one state, and people in the other forty-nine states do not suffer harm, then there is no reason to believe that the license is necessary to protect consumers. *Id.*

³³ Approximately 2.8 million jobs are lost annually because of licensing. FLATTEN, *supra* note 4, at 5.

³⁴ *The Slaughterhouse Cases*, 83 U.S. 36, 51 (1872) (Bradley, J., dissenting).

³⁵ *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974).

³⁶ *Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

³⁷ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

³⁸ 397 U.S. 254 (1970).

³⁹ *Id.* at 260.

receive public assistance.⁴⁰ The Court said that consideration of what procedures due process requires under any given set of circumstances begins with a determination of the precise nature of the government function involved, as well as the private interest affected by the governmental action.⁴¹ As a result, the State had to afford due process safeguards before it could terminate the benefits. The Court held that the welfare recipients in New York had to be afforded an evidentiary hearing before they were terminated from the program.⁴² At the hearing, they would be entitled to safeguards that had historically been available in court proceedings: the right to present a case orally, to confront an adverse witness, and to receive a decision based exclusively on the hearing record.⁴³

Six years later, the Court again revisited the question of what level of process was due in an administrative hearing when it decided *Mathews v. Eldridge*.⁴⁴ This time, the Court considered whether those receiving Social Security disability benefit payments were entitled to an opportunity for an evidentiary hearing prior to the termination of the benefits.⁴⁵ The Court established a three-factor test to determine which level of process is due in administrative hearings:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁶

The Court held that applying this balancing test would illuminate the appropriate level of process due in any given circumstance.⁴⁷ Federal and state administrative agencies have since applied the *Mathews* test.

The type of property interests that due process encompasses extends beyond physical ownership of real estate, chattels, or money and includes claims of entitlements to government benefits,⁴⁸ and the guarantee of

⁴⁰ *Id.* at 262.

⁴¹ *Id.* at 263 (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

⁴² *Id.* at 264.

⁴³ *Id.* at 267–68.

⁴⁴ 424 U.S. 319 (1976).

⁴⁵ *Id.* at 323–24.

⁴⁶ *Id.* at 335.

⁴⁷ *Id.*

⁴⁸ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–72 (1972); *Goldberg*, 397 U.S. at 262 n.8 (“Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that ‘[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses . . . all are devices to aid security and independence.’” (alteration in original)).

procedural due process limits a state agency's ability to impair or terminate that entitlement.⁴⁹ The Supreme Court has also recognized that the right to follow a chosen profession is within the liberty and property concepts of due process of law.⁵⁰

Because licensed professionals have a property interest associated with the retention of their licenses, the government cannot deprive professionals of their license unless procedural due process protections are provided and followed.⁵¹ As such, courts have consistently ruled that, except in emergency situations, due process requires a state agency to give a licensed professional meaningful and adequate notice and a meaningful hearing before the revocation or suspension of the professional's license.⁵²

C. *The Disciplinary Hearing*

Due process does not require that every hearing before a state agency conform to judicial process,⁵³ but does require that a state agency provide the opportunity for a full and fair hearing on all disputed issues that are critical to the property interests of the party.⁵⁴ License revocation entails such interests.⁵⁵ A licensed professional has a right to appear personally or by counsel before an impartial decision maker, to produce witnesses and evidence on his behalf, to examine and cross-examine witnesses, to rebut the evidence produced against him, and to present reasons—either in person or in writing—why the proposed action should not be taken.⁵⁶

⁴⁹ The U.S. Supreme Court has also pointed out that “minimum [procedural] requirements . . . [are] a matter of federal law,” and that “they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.” *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

⁵⁰ *United States v. Robel*, 389 U.S. 258, 265 n.11 (1967).

⁵¹ *See Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102 (1963) (holding that requirements of procedural due process must be met before a state can exclude a person from practicing law).

⁵² “The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing.’” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). To be meaningful, the notice of a hearing or complaint against an individual “must set forth the alleged misconduct with particularity” and be given sufficiently in advance to allow the person a reasonable opportunity to prepare. *In re Gault*, 387 U.S. 1, 33 (1967). This means that when a governmental agency seeks to revoke or suspend a professional's license, meaningful notice requires that the professional is timely and fairly advised of the precise nature of the charges and grounds on which the revocation or suspension is sought.

⁵³ *Martinez v. Tex. State Bd. of Med. Exam'rs*, 476 S.W.2d 400, 405 (Tex. Civ. App. 1972).

⁵⁴ *See, e.g., Trimble v. Tex. State Bd. of Registration for Prof'l Eng'rs*, 387 S.W.2d 876, 876 (Tex. 1965) (holding procedural due process was satisfied by engineer's attendance at license revocation hearing with his attorney, where he introduced evidence and called witnesses).

⁵⁵ This is not a universal opinion, however.

⁵⁶ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Morgan v. United States*, 304 U.S. 1, 18–19 (1938). The APA provides a party to a contested case proceeding, which includes license revocation, with several important procedural rights and protections. These rights and protections include the following: (1) the right to the assistance of counsel; (2) the right to cross-examine witnesses; (3) the

A professional licensing board is a state agency, and, as such, its power is derived from authorizing statutes, it follows a procedural act, and it is responsible for the regulation of a specific field. State practice acts establish boards' missions, structures, and powers, and administrative procedure acts govern many board processes, especially for promulgating regulations and holding hearings.⁵⁷ Boards add specificity to general legislative language through regulations, guidelines, and internal practices.⁵⁸ State statutes grant the authority to conduct disciplinary hearings and ultimately suspend or revoke licenses.⁵⁹ In addition to issuing licenses, state boards maintain standards of practice which they expect professionals to follow.⁶⁰ If a professional is found to have committed a violation of practice standards, the licensing board "[has] the authority to impose discipline, which may range from a verbal sanction, such as a reprimand, to revocation of the license."⁶¹

No person has a fundamental right to practice a profession.⁶² Once a state issues a license, state law treats it "as a form of property vested in the licensee that can be suspended or revoked only if the licensee violates valid regulations imposed by the legislature or by the state . . . agency."⁶³ A licensee has a clear expectation of continued enjoyment of a license absent proof of conduct warranting its suspension, revocation, or withdrawal.

right to have the rules of privilege recognized by law given effect by the agency; (4) upon a showing of good cause and the payment of estimated costs, the right to have the agency issue subpoenas requiring the attendance of witnesses or the production of books, records, papers, or other objects that may be necessary and proper; (5) the right to be notified if the agency takes official notice of any material and the opportunity to contest such material; (6) the right to engage in pre-hearing discovery; and (7) the right to have the hearing be untainted by improper ex parte communications with the agency decision-makers. 5 U.S.C.A. §§ 551-558 (West, Westlaw through P.L. 116-138).

⁵⁷ U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE DISCIPLINE OF PHYSICIANS: ASSESSING STATE MEDICAL BOARDS THROUGH CASE STUDIES 11 (2006) [hereinafter DHHS].

⁵⁸ *Id.*

⁵⁹ A "hearing" is a quasi-judicial proceeding that requires a more formal process than other actions the board may take. The parties to the adjudication must be accorded the traditional safeguards of trial. The standard of proof to be used in such hearings is laid out in some, but not all, authorizing statutes. *See infra* Appendix A (showing some states determine standard of proof through the courts, statutes, or not at all).

⁶⁰ Waring, *supra* note 29, at 105.

⁶¹ *Id.* Though physicians are often used as the example, this is the same across the health field. *See also* MARY W. CAZALAS, NURSING AND THE LAW 82 (1978) ("All nurse licensing boards have the authority to suspend or revoke the license of a nurse found in violation of specified norms of conduct Suspension and revocation procedures are usually provided for in the act; however, in some jurisdictions the procedure is left to the discretion of the board or is contained in general administrative procedure acts.").

⁶² Lambert v. Yellowley, 272 U.S. 581, 596 (1926).

⁶³ J. Bruce Bennett, *The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*, 7 TEX. TECH. ADMIN. L.J. 205, 211 (2006).

II. STATES DIFFER IN PROCESS DUE WHEN A STATE AGENCY SEEKS TO REVOKE OR SUSPEND A PROFESSIONAL LICENSE

As discussed in Part I, one of a licensing board's two main regulatory functions is the discipline of professionals. While every disciplinary hearing has the same basic skeleton—complaint, investigation, formal hearing, and decision—states vary considerably in the ways they handle this process.

A. *State Differences in Process*

Complaint resolution typically proceeds through four main stages: intake, investigation, pre-hearing preparations, and hearing.⁶⁴

1. *Investigation*

A complaint filed against a licensee by a third party triggers most investigations.⁶⁵ Some boards will fully investigate every complaint they receive, while others will conduct a precursory investigation before deciding to devote resources to a full investigation.⁶⁶ The second approach is favorable to some states because a proper full investigation is very resource intensive and states prefer to take steps on the front end of the process to determine if a full investigation is warranted.⁶⁷ For instance, in medical board disciplinary hearings, some states will have nurses and other medical professionals familiar with the field preliminarily review complaints to determine whether they warrant a full investigation before allocating the resources.⁶⁸ Alternatively, a few states, such as California, subject all complaints to a “medical consultant” review before assigning them for investigation in the field.⁶⁹ As a result, California reports a higher percentage of cases closed before investigation than many other states.⁷⁰

The full investigation, consisting of document discovery and interviews, may be conducted by a single sitting board member, a committee of board members, board-hired staff investigators, or government-hired staff investigators who service multiple different agencies.⁷¹

⁶⁴ *Id.* In some states, such as Maryland and Massachusetts, the board performs all functions of the disciplinary process—receiving, investigating, and adjudicating complaints and imposing disciplinary sanctions where appropriate. NICOLE DUBE, OFFICE OF LEGAL RESEARCH, OLR RESEARCH REPORT, STATE MEDICAL BOARDS IN CONNECTICUT AND OTHER STATES (2009). In other states, such as Connecticut and Pennsylvania, the boards do not investigate complaints and are only involved in adjudicating complaints, making final disciplinary decisions, and imposing sanctions. *Id.*

⁶⁵ Feighny & Nohe, *supra* note 24, at 41. However, an audit, inspection, or other source of information may initiate an investigation.

⁶⁶ DHHS, *supra* note 57, at 24–25.

⁶⁷ *Id.* at 24.

⁶⁸ *Id.* E.g. Maryland, Pennsylvania.

⁶⁹ *Id.* at 24–25.

⁷⁰ *Id.*

⁷¹ DUBE, *supra* note 64. See *infra* Appendix A (“Investigator Employment”).

2. Pre-hearing Preparations

Once the investigator feels he has conducted a thorough investigation, the results are presented to either a full board or a panel of board members.⁷² The investigator will often make a recommendation as part of his presentation. The panel or board determines whether sufficient evidence exists to warrant a disciplinary hearing, and, depending on state practices, this may exclude those members from being involved in subsequent proceedings. This is an informal hearing and the licensees are often not present; however, state practices vary.⁷³ It is at this stage in the process that most boards decide whether to drop an investigated case, issue a letter of warning, or bring formal charges and prosecute the case, keeping significant sanctions in mind. Many state licensing boards rely on the Attorney General's office to provide a lawyer who serves as general counsel and advises the board in the pre-hearing preparation.⁷⁴ "The decision to bring charges is akin to a probable cause determination" in a criminal proceeding.⁷⁵ It is during this preliminary stage that certain states provide licensees with notice by a reasonable service, a copy of the complaint, and a reasonable amount of time to answer the complaint.⁷⁶ An accused and charged licensee has a legal right to request an adjudicatory hearing.⁷⁷

3. Adjudicatory Hearing

If the board refers the matter to prosecution, and the licensee does not agree to a consent agreement, then a formal hearing is conducted.⁷⁸ In Delaware,⁷⁹ Massachusetts,⁸⁰ Minnesota,⁸¹ Missouri,⁸² New Hampshire,⁸³

⁷² DUBE, *supra* note 64.

⁷³ See *id.* (detailing how in New York, the Office of Professional Medical Conduct investigates and presents the evidence to a board investigation committee, but if formal charges are brought against the licensee, another hearing is held before an administrative law judge and a separate three-member board panel).

⁷⁴ FSMB, *supra* note 7, at 24. In many states, this same Assistant Attorney General will also prosecute the case. See *infra* Part III for the discussion.

⁷⁵ DHHS, *supra* note 57, at 26.

⁷⁶ Typically, fifteen days. See ALL. FOR NAT. HEALTH, KNOW YOUR STATE'S MEDICAL BOARD 11–80, <https://www.anh-usa.org/wp-content/uploads/2010/12/Know-your-state-medical-board1.pdf> (last visited Mar. 20, 2019) [hereinafter ALLIANCE HEALTH] (showing the State Checklist).

⁷⁷ DHHS, *supra* note 57, at 27.

⁷⁸ "The prosecutor will be given terms under which [he or she] can settle the case. The prosecutor may be willing to negotiate the settlement terms, but all offers are subject to Board approval and the prosecutor's discretion is limited." *Professional Licensing Board Disciplinary Proceedings: Myths and Realities*, HAMEL MARCIN DUNN REARDON & SHEA PC, <https://www.hmdrlaw.com/news-tobys-article.html> (last visited July 2, 2020).

⁷⁹ ALLIANCE HEALTH, *supra* note 76, at 20.

⁸⁰ *Id.* at 36.

⁸¹ *Id.* at 39.

⁸² *Id.* at 41.

⁸³ *Id.* at 46.

New Mexico,⁸⁴ North Carolina,⁸⁵ North Dakota,⁸⁶ and Tennessee,⁸⁷ board members may not participate in the hearing and decision if they have a conflict of interest with the practitioner. It is in this process that a singular board is both (1) bringing charges against the licensee and (2) deciding the final result of those charges. Some states have attempted to counter this lack of separation by sending cases to a separate administrative entity.⁸⁸ States have different processes for conducting the hearing: (1) the full board hears evidentiary presentations and legal arguments on each case at both the preliminary stage and adjudicatory hearing;⁸⁹ (2) the preliminary proceedings are presided over by a subset of the board or administrative law judge, followed by a full hearing before the entire medical board;⁹⁰ (3) an administrative court, presided over by an administrative law judge separate from the board, hears evidentiary presentations and legal arguments on each case, and the board makes the final disciplinary decision;⁹¹ and (4) the case is sent to a complete separate hearing agency.⁹² If the board finds against the licensee, the licensee must appeal the board's decision to the same board before seeking judicial review.

The evidentiary standard of proof is the most contested issue of the adjudicatory hearing. The standard traditionally applied in civil or administrative hearings is preponderance of the evidence, which requires the parties to share equally in the risk of error.⁹³ In recent years, some courts have concluded that it is constitutionally required to use the clear and convincing standard of proof for license revocation.⁹⁴ The Supreme Court

⁸⁴ *Id.* at 48.

⁸⁵ *Id.* at 51.

⁸⁶ *Id.* at 52.

⁸⁷ *Id.* at 62.

⁸⁸ See DHHS, *supra* note 57, at 27 (explaining that in California, prosecutorial staff is part of the Health Quality Enforcement Section of the Attorney General's Office; in Virginia, the Division of Administrative Proceedings).

⁸⁹ See *infra* Appendix A ("Hearing Participants and Procedures"); DHHS, *supra* note 57, at 27–28.

⁹⁰ DHHS, *supra* note 58, at 27–28. For example, Iowa.

⁹¹ *Id.* (detailing that, in some states, the board must strongly consider the discipline recommended by the administrative law judge or panel).

⁹² *Id.* California and Massachusetts send cases to separate hearing agencies. For example, the medical board in California has a specialized unit called the Medical Quality Hearing Panel. This is a separate entity that hears evidence and argument. Similarly, Massachusetts has the Massachusetts Division of Administrative Law Appeals, which is unspecialized and hears matters from many other state agencies and boards. At the close of the evidence, the hearing officer makes written findings of fact and law and recommends an outcome to the board. The board decides whether to accept, reject, or modify the recommendation in issuing a final decision or order. *Id.*

⁹³ *Id.* at 14.

⁹⁴ See, e.g., *Ettinger v. Bd. of Med. Quality Assurance*, 185 Cal. Rptr. 601, 603 (Cal. Dist. Ct. App. 1982); *Davis v. Wright*, 503 N.W.2d 814, 819 (Neb. 1993); *Ferris v. Turlington*, 510 So. 2d 292, 294 (Fla. 1987); *Johnson v. Bd. of Governors of Registered Dentists of State of Okla.*, 913 P.2d 1339, 1347 (Okla. 1996); *Nguyen v. Wash. Dep't of Health Med. Quality Assurance Comm'n*, 29 P.3d 689, 697 (Wash. 2001); *Painter v. Abels*, 998 P.2d 931, 940–41 (Wyo. 2000).

has mandated the use of a clear and convincing standard of proof only when the individual interest involved is “particularly important,” and “more substantial than the mere loss of money,” or when a “significant deprivation of liberty” is involved.⁹⁵ The states that have implemented the clear and convincing standard did so under the contention that more process is due because the private interests at stake and risk of erroneous harm are so great: a professional’s license often represents the fulfillment of extensive educational investment and training, and there are harsh and stigmatizing consequences of license discipline—humiliation, disgrace, loss of reputation and client bases, at times on the basis of an unsubstantiated complaint.⁹⁶

B. *Potential Procedural Issues*

Depending on which combination of the above procedures a state utilizes in an adjudication, various procedural due process issues could arise. These issues include: boards applying vague and subjective standards of professional conduct; board members serving as investigators, prosecutors, and decision makers; the absence of procedural protections available in the context of civil disputes given the informal nature under which boards operate; and the external pressures boards face in securing tough disciplinary penalties from government officials and common interest groups.

1. *Boards Are Permitted to Apply Vague, Subjective Standards of Professional Conduct.*

Boards are permitted to apply vague, subjective standards of conduct. Most states’ practicing acts do not contain definitive standards in their regulations, as it would make prosecuting anyone too difficult. In *Nguyen v. Washington Department of Health Medical Quality Assurance Commission*, the Washington Supreme Court expanded on the risks of erroneous deprivation when the standard applied is almost entirely subjective:

It is difficult to imagine a more subjective and relative standard than that applied in a medical discipline proceeding

⁹⁵ *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (regarding termination of parental rights) (quoting *Addington v. Texas*, 441 U.S. 418, 424–25 (1979) (regarding civil commitment)). From a constitutional standpoint, the clear and convincing standard has been found to be required as a matter of due process when the threatened loss resulting from civil proceedings is comparable to the consequences of a criminal proceeding in the sense that it takes away liberty or permanently deprives individuals of interests that are clearly fundamental or significant to personal welfare. *Id.*

⁹⁶ *Nguyen v. Dep’t of Health Med. Quality Assurance Comm’n*, 29 P.3d 689, 694 (Wash. 2001) (“Loss or suspension of the physician’s license destroys his or her ability to practice medicine, diminishes the doctor’s standing in both the medical and lay communities, and deprives the doctor of the benefit of a degree for which he or she has spent countless hours and probably tens (if not hundreds) of thousands of dollars pursuing.”).

where the minimum standard of care is often determined by opinion, and necessarily so.⁹⁷

On the other end of this argument, some courts have claimed that disciplinary proceedings involve objective facts that professional board members have special expertise to analyze, thus indicating a minimum risk of erroneous deprivations.⁹⁸ There are three issues with this argument, however. First, many boards' actions relate to matters outside of clinical performance or competence.⁹⁹ Second, most boards have non-practitioner members from the public¹⁰⁰ who are highly susceptible to persuasion by practitioner members' opinions. Finally, there is inherent bias present when a practitioner judges a competitor practitioner.¹⁰¹

2. *Some or All Board Members Serve as Investigator, Prosecutor, and Decision Maker.*

Boards and/or their members serve as investigator, prosecutor, and decision maker. While the Supreme Court has not found that the blending of functions in state boards itself violates due process,¹⁰² certain state courts have found that it does:

There is high risk [of error] when an agency seeks to revoke a professional license. . . . [R]evocation proceedings have the agency acting as investigator, prosecutor, and decision maker. The risk is increased where . . . a competitor . . . serves as the investigator and makes prosecutorial recommendations to the Board.¹⁰³

Licensing boards are comprised of colleagues who build relationships and trust. The beliefs and recommendation of one member will inevitably influence others when there is no separation between functions.

⁹⁷ *Nguyen*, 29 P.3d at 696.

⁹⁸ *In re Polk*, 449 A.2d 7, 16 (N.J. 1982) (noting physicians are uniquely qualified judges and the substantive standards are objective); *Gandhi v. Wis. Med. Examining Bd.*, 483 N.W.2d 295, 300 (Wis. 1992) (noting physicians are likely to be uniquely qualified to understand the evidence and standards).

⁹⁹ See DHHS, *supra* note 57, at 14 n.15 (explaining that the Federation model medical practice act names forty-three disciplinary grounds, including "demonstrated impairment or incompetence" from substance abuse, "business related offenses" like misleading advertising, and criminal behavior).

¹⁰⁰ FSMB, *supra* note 7, at 48.

¹⁰¹ See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (stating that because "the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication[, it] has a much more difficult burden of persuasion to carry").

¹⁰² *Id.* at 58 ("the combination of investigative and adjudicative functions does not, without more, constitute a due process violation").

¹⁰³ *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1346 (Okla. 1996).

3. *Many of the Procedural Protections Available in the Context of Civil Disputes Are Absent in the Informal Nature Under Which Boards Operate.*

Many of the procedural protections available in the context of civil disputes are absent in the informal nature under which boards operate. For example, administrative hearings are not required to abide by rules of evidence.¹⁰⁴ The common belief is that boards are comprised of experts in the field, and thus would not be influenced by things such as hearsay. An attorney who represents physicians in board proceedings wrote:

[B]oard and hospital proceedings . . . are held before panels comprised mostly of other doctors who are familiar with the system. The panel members know that before a case ever gets to a hearing, other medical professionals, during the investigation . . . already have decided that the doctor has . . . committed unprofessional conduct. This creates a predisposition to find against the doctor.¹⁰⁵

Some have argued that basic protections such as notice and a hearing are sufficient due process, but the Supreme Court disagreed in *Santosky v. Kramer*.¹⁰⁶ Despite the fact that such cases involve all the formalities of civil trials, the Court nevertheless held that states must employ at least a clear and convincing standard, observing:

[T]he standard of proof is a crucial component of legal process, the primary function of which is “to minimize the risk of erroneous decisions.” . . . Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information *before* the fact finder. But only the standard of proof “instruct[s] the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions” he draws from the information.¹⁰⁷

¹⁰⁴ See William H. Kuehne, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 831 (2004) (“[T]he statutory law governing evidence in administrative proceedings was designed to ease the admission and use of relevant evidence from the type of restrictions applied in court proceedings while still retaining a standard of integrity. This relaxed standard, however, is more amorphous than the particularized judicial rules of evidence and presents continuing problems of application.”).

¹⁰⁵ Roy G. Spece, Jr. & John J. Marchalonis, *Sound Constitutional Analysis, Moral Principle, and Wise Policy Judgment Require a Clear and Convincing Evidence Standard of Proof in Physician Disciplinary Proceedings*, 3 IND. HEALTH L. REV. 107, 126 (2006).

¹⁰⁶ 455 U.S. 745 (1982).

¹⁰⁷ *Id.* at 757 n.9 (alteration in original) (quoting *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 13 (1979) and *In re Winship*, 397 U.S. 357, 370 (1970) (Harlan, J., concurring)).

4. *Boards Face External Pressures to Secure Tough Disciplinary Penalties from Government Officials and Common Interest Groups.*

Boards face external pressures to secure tough disciplinary penalties from government officials and common interest groups. Disciplinary boards are often asked to judge their progress by the number of penalties they successfully impose.¹⁰⁸ As a result, factors other than protecting the public motivate boards when they chase convictions.

III. ANALYSIS: PREPONDERANCE OF THE EVIDENCE ALONE IS NOT SUFFICIENT DUE PROCESS

In trying to determine the level of procedure necessary for professional licensing hearings to satisfy procedural due process, the evidentiary standard of proof inevitably plays a large role in the consideration. A higher burden can supplement for a lack of other procedural safeguards when considering procedural protections as a whole. This leads to the question of whether the preponderance of the evidence standard is sufficient due process for professional license revocation hearings. As this Section will illustrate, the preponderance of the evidence standard alone is not sufficient due process in license revocation hearings.

A. *State Split: Comparing Preponderance of the Evidence and Clear and Convincing States*

The United States Supreme Court has held that the standard of proof implicates due process rights in that it serves “to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”¹⁰⁹ Currently, the states are split as to the appropriate standard in a state license revocation proceeding. Seventeen states have established a clear and convincing standard of proof through either legislation or common law.¹¹⁰ Thirty-two states have maintained a preponderance of the evidence standard, by legislation, common law, or unspoken tradition.¹¹¹

¹⁰⁸ DHHS, *supra* note 57, at 5. Boards measure success by only two performance measures: first, the number of disciplinary sanctions imposed; and second, the timeliness of complaint resolution. *Id.*

¹⁰⁹ *Addington v. Texas*, 441 U.S. 418, 423 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 344–45 (1976).

¹¹⁰ FSMB, *supra* note 7, at 67. See *infra* Appendix A (“Standards of Proof Required”).

¹¹¹ See *infra* Appendix A for a list of cases discussing the appropriate standard for their state. If a “Standard of Proof Required” is without citation, then it is maintained as “unspoken tradition.” See *Johnson v. Ark. Bd. of Exam’rs in Psychology*, 808 S.W.2d 766 (Ark. 1991); *Sherman v. Comm’n on Licensure to Practice the Healing Art*, 407 A.2d 595 (D.C. 1979); *Eaves v. Bd. of Med. Exam’rs*, 467 N.W.2d 234 (Iowa 1991); *Rucker v. Mich. Bd. of Med.*, 360 N.W.2d 154 (Mich. 1984); *In re Wang*, 441 N.W.2d 488 (Minn. 1989); *In re Grimm*, 635 A.2d 456 (N.H. 1993); *In re Polk*, 449 A.2d 7 (N.J. 1982); *Gallant v. Bd. of Med. Exam’rs*, 974 P.2d 814, 816 (Or. Ct. App. 1999); *Anonymous v. State Bd.*

1. *Preponderance of the Evidence*

Thirty-two states maintain a preponderance of the evidence standard in license revocation hearings: some state courts or legislatures have explicitly established the standard, while others have no source authority (and refrain from establishing such authority), but continue to use preponderance of the evidence because it is typically employed in civil proceedings.¹¹² The primary policy rationale for maintaining a preponderance of the evidence standard in license revocation hearings is the protection of the general welfare of the public. The logic of public protection is very straightforward: boards should identify unqualified or unfit practitioners and bar them from practice in the state, which directly protects citizens from them. A preponderance standard makes this easier. Indirectly, imposition of sanctions may also lead other practitioners to practice more carefully or to tailor their practices to their capabilities.¹¹³ It is also argued that the clear and convincing standard would not eliminate or meaningfully reduce the risk of an erroneous fact finding or determination, but would express a preference for one side's interests:¹¹⁴ it reduces the risk of error for the licensee, but increases the risk for the public.

In *In re Polk*, the Supreme Court of New Jersey considered whether the State Board of Medical Examiners unconstitutionally revoked the license of a doctor who was facing various malpractice and professional misconduct claims.¹¹⁵ In analyzing the due process issue, the court applied the *Mathews* balancing test.¹¹⁶ The court determined that a license is a property right, but has "always [been] subject to reasonable regulation in the public interest";¹¹⁷ emphasized the right and duty of the government to protect the public,

of Med. Exam'rs, 496 S.E.2d 17 (S.C. 1998); *Nguyen v. Wash. State Dep't of Health Med. Quality Assurance Comm'n*, 29 P.3d 689, 690 n.3 (Wash. 2001) (listing jurisdictions that have asserted the preponderance standard is sufficient to satisfy due process); *Gandhi v. State Med. Examining Bd.*, 483 N.W.2d 295 (Wis. 1992). Jurisdictions requiring the higher standard of proof: *Silva v. Superior Court*, 17 Cal. Rptr. 2d 577 (Cal. Ct. App. 1993); *Ettinger v. Bd. of Med. Quality Assurance*, 185 Cal. Rptr. 601 (Cal. Ct. App. 1982); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Rife v. Dep't of Prof'l Regulation*, 638 So. 2d 542 (Fla. App. 1994); *Miss. State Bd. of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993); *Davis v. Wright*, 503 N.W.2d 814 (Neb. 1993) (holding that medical discipline, like attorney discipline, requires clear and convincing standard); *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339 (Okla. 1996); *Robinson v. State ex rel. Okla. State Bd. of Med. Licensure & Supervision*, 916 P.2d 1390 (Okla. 1996); *Sobel v. Bd. of Pharmacy*, 882 P.2d 606 (Or. Ct. App. 1994); *Bernard v. Bd. of Dental Exam'rs*, 465 P.2d 917 (Or. Ct. App. 1970); *In re Zar*, 434 N.W.2d 598 (S.D. 1989); *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000); *Devous v. Wyo. State Bd. of Med. Exam'rs*, 845 P.2d 408 (Wyo. 1993).

¹¹² See *infra* Appendix A (comparing Alaska and Maryland to Arkansas, Colorado, and Maine, for example).

¹¹³ DHHS, *supra* note 57, at 8.

¹¹⁴ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983).

¹¹⁵ *Polk*, 449 A.2d at 11.

¹¹⁶ *Id.* at 13.

¹¹⁷ *Id.* at 17.

assuring its health and safety through regulating the medical profession,¹¹⁸ and ultimately held that the preponderance standard “fairly allocates the risk of mistake between the[] two parties and sufficiently reduces for both the risk of an erroneous deprivation.”¹¹⁹

The court held the preponderance standard sufficient for several reasons, but namely because a license can only be revoked in New Jersey under “heightened and strict substantive standards,” including “insanity, physical or mental incapacity, [and] professional incompetence.”¹²⁰ *In re Polk* concluded that the preponderance standard was sufficient to reasonably guard against mistakes, and thus satisfies the constitutional demands of due process when balanced with the interests involved.¹²¹ New Jersey has other procedural safeguards in place that counteract the lower evidentiary standard, such as hiring independent administrative law judges as hearing officers, and investigators are employed by a different state agency.¹²²

In *Gandhi v. State Medical Examining Board*, the Wisconsin Court of Appeals emphasized many of the same points as the *Polk* court.¹²³ *Gandhi* recognized the importance of the private interest and the tremendous deprivation suffered when a medical license is lost, but noted that the license may be regained at a later date.¹²⁴ *Gandhi* emphasized the government’s *obligation* to protect the welfare of its citizens, which is “superior to the privilege of any individual to practice his or her profession.”¹²⁵ Wisconsin does not have the same level of procedural separation as New Jersey.¹²⁶

In *North Dakota State Board of Medical Examiners v. Hsu*, the North Dakota Supreme Court examined this issue and reached the same conclusion.¹²⁷ *Hsu* minimized the State’s role as investigator, prosecutor, and adjudicator—a fact often used to support the clear and convincing standard.¹²⁸ Balancing these interests, *Hsu* upheld the preponderance standard.¹²⁹ North Dakota maintains several procedural safeguards that help counteract the lower evidentiary standard: hearing officers are independent administrative law judges, and there is a separation of general counsel and prosecutor.¹³⁰

¹¹⁸ *Id.* at 22.

¹¹⁹ *Id.* at 15.

¹²⁰ *Id.* at 15.

¹²¹ *Id.* at 16–17.

¹²² *See infra* Appendix A (New Jersey).

¹²³ *Gandhi v. Wis. Med. Examining Bd.*, 483 N.W.2d 295, 298 (Wis. 1992).

¹²⁴ *Id.* at 299.

¹²⁵ *Id.*

¹²⁶ *See infra* Appendix A (Compare Wisconsin to New Jersey).

¹²⁷ *N.D. State Bd. of Med. Exam’rs v. Hsu*, 726 N.W.2d 216, 216 (N.D. 2007).

¹²⁸ *Id.* at 231.

¹²⁹ *Id.* at 230.

¹³⁰ *See infra* Appendix A (South Dakota).

2. *Clear and Convincing Evidence*

“Protection of the public” is the paramount governmental interest commonly argued to be threatened by utilizing the clear and convincing standard. However, the *full* governmental interests include:

- (1) protecting the public from physical, financial, or psychological injury resulting from practitioner “misconduct”;
- (2) preserving existing [practitioner-client] relationships and general public access to practitioners; . . . [(3)] fostering public security and respect for the law through the symbolic statement that our society will not tolerate a significant risk of erroneous deprivations¹³¹

These latter two concerns are best protected by use of the clear and convincing standard.¹³²

The Court’s opinion in *Santosky v. Kramer*¹³³ establishes a preliminary presumption in favor of greater procedural safeguards. In *Santosky*, the Court held that the clear and convincing standard is constitutionally mandated in termination of parental rights cases,¹³⁴ stating that the “standard of proof [at a minimum] reflects the value society places on individual liberty,” and that an elevated standard is constitutionally required when the individual faces “a significant deprivation of liberty” or “stigma.”¹³⁵ *Santosky* further explained that “a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State.”¹³⁶ Some state courts have found this analysis applicable to professional license revocation hearings.¹³⁷

In *Johnson v. Board of Governors of Registered Dentists*, the Supreme Court of Oklahoma discussed the standard of proof the Constitution requires in professional disciplinary proceedings.¹³⁸ The Court understood a professional license to be a protected property interest, the loss of which is penal in character and destroys a professional’s “means of livelihood.”¹³⁹ *Johnson* recognized the State’s interest “in the health, safety and welfare of its citizens,” but considered the risk of erroneous deprivation to be high, particularly because the state agency is the investigator, prosecutor, and decision maker.¹⁴⁰ When balanced against the interests involved, this high

¹³¹ Spece, Jr. & Marchalonis, *supra* note 105, at 128.

¹³² *Id.*

¹³³ 455 U.S. 745 (1982).

¹³⁴ *Id.* at 769–70.

¹³⁵ *Id.* at 755–56 (alterations omitted) (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)).

¹³⁶ *Id.* at 767.

¹³⁷ See *infra* Appendix A (noting the “Standards of Proof Required” for California, Washington).

¹³⁸ 913 P.2d 1339, 1342 (Okla. 1996).

¹³⁹ *Id.* at 1345.

¹⁴⁰ *Id.* at 1346.

risk of error led the *Johnson* court to hold that due process required clear and convincing evidence in professional disciplinary proceedings.¹⁴¹ Other than a higher standard of proof, Oklahoma does not have many procedural safeguards in place.¹⁴²

In *Painter v. Abels*, the Supreme Court of Wyoming, relying on *Johnson*, noted the “quasi-criminal” nature of these proceedings.¹⁴³ Applying the *Mathews* balancing test, *Painter* called the private interest “substantial” and divided the potential loss into three components: (1) the loss of a property right, (2) the loss of a livelihood, and (3) the loss of professional reputation.¹⁴⁴ Balancing this interest was the “state’s interest in protecting the health, safety, and welfare of its citizens from a medical licensee’s incompetence or misconduct.”¹⁴⁵ Finally, *Painter* concludes that the risk of error is high because the same agency investigates, prosecutes, and decides.¹⁴⁶ For these reasons, *Painter* held that due process requires clear and convincing evidence.¹⁴⁷ Other than a higher standard of proof, Wyoming does not have many procedural safeguards in place.¹⁴⁸

The Washington Supreme Court’s opinion in *Nguyen*¹⁴⁹ details the private interests at stake in disciplinary proceedings, which favor application of a clear and convincing standard:

The intermediate clear preponderance standard is required in a variety of civil situations “to protect particularly important individual interests,” that is, those interests more important than the interest against erroneous imposition of a mere money judgment. Examples of such proceedings include involuntary mental illness commitment, fraud, “some other quasi-criminal wrongdoing by the defendant” as well as the risk of having one’s “reputation tarnished erroneously.” Medical disciplinary proceedings fit triply within this intermediate category because they (1) involve much more than a mere money judgment, (2) are quasi-criminal, and (3) also potentially tarnish one’s reputation.¹⁵⁰

Nguyen also observes that while the interest of the individual may dictate a higher standard of proof to avoid erroneous deprivation, the higher

¹⁴¹ *Id.* at 1347.

¹⁴² *See infra* Appendix A (Oklahoma).

¹⁴³ 998 P.2d 931, 941 (Wyo. 2000).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See infra* Appendix A (Wyoming).

¹⁴⁹ 29 P.3d 689 (Wash. 2001).

¹⁵⁰ *Id.* at 693 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

burden vindicates important state interests: society has an important interest in the standard of practice not falling below the acceptable minimum, and in ensuring that a practitioner not be erroneously deprived his license, as that would erroneously deprive the public access to and benefit from his services.¹⁵¹

Of note, nearly all states apply the clear and convincing evidence standard to disbarment hearings, regardless of what standard it applies in medical license revocation hearings.¹⁵² This standard is recommended by the American Bar Association.¹⁵³ The proclaimed reason for this difference is that, where disbarment of attorneys is always permanent, there is no “*de jure* ‘permanent’ punishment for doctors.”¹⁵⁴ Unless otherwise specified, a doctor can reapply for their revoked or suspended license immediately.¹⁵⁵ However, while most doctors can reapply to get revoked licenses back, most do not, making for *de facto* permanence to the sanction.¹⁵⁶

B. *Preponderance Alone Is Not Enough*

“A process satisfies minimum constitutional requisites inherently due when it provides adequate safeguards to the citizen confronted by an action instigated against him by the state. Primary among these safeguards is the standard of proof.”¹⁵⁷

Most state courts that have analyzed the standard under the *Mathews* factors and found preponderance of the evidence sufficient have done so because they have other procedural safeguards in place that downplay the risk of erroneous deprivation.¹⁵⁸ It is clear that use of the preponderance of the evidence standard alone is not sufficient to provide licensees with due process of law.¹⁵⁹ Instead, for states to apply preponderance of the evidence

¹⁵¹ *Id.*

¹⁵² See 7A C.J.S. Attorney & Client § 142 (noting that all but Alaska, Arkansas, Kentucky, and North Dakota maintain a preponderance of the evidence standard for attorney disciplinary proceedings).

¹⁵³ MODEL RULES FOR LAWYER DISCIPLINARY ENF’T r. 18 (AM. BAR ASS’N 2017) (“shall be established by clear and convincing evidence”). There is no American Medical Association equivalent.

¹⁵⁴ Milton Heumann, Brian Pinaire & Jennifer Lerman, *Prescribing Justice: The Law and Politics of Discipline for Physician Felony Offenders*, 17 B.U. PUB. INT. L.J. 1, 21 (2007).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* Additionally, this does not consider that many practitioners’ practices are permanently ruined due to diminished public perception and good will that accompanies even a preliminary complaint, let alone a full revocation.

¹⁵⁷ *Nguyen v. Wash. State Dep’t of Health Med. Quality Assurance Comm’n*, 29 P.3d 689, 691 (Wash. 2001).

¹⁵⁸ See discussion *infra* Section III.B.1 (explaining how New Jersey uses a preponderance of the evidence standard, but has numerous safeguards in place to balance against the lower standard). *But see* discussion *infra* Section III.B.2 (explaining how although Maine has a preponderance of the evidence standard, it does not have other procedural safeguards in place, resulting in a higher likelihood of erroneous deprivation).

¹⁵⁹ See discussion *infra* Section III.B.2 (demonstrating that Maine’s lack of additional procedural safeguards beyond the preponderance of the evidence standard is insufficient).

in license revocation hearings and yet maintain appropriate procedural due process, there must be additional safeguards in place to protect the licensee—preponderance, plus. The “plus” must be some form of distinct procedural separation between the various roles on the board. If a state has no other safeguards in place, then sufficient process due in license revocation hearings requires a higher clear and convincing standard.

New Jersey and Maine both utilize a preponderance of the evidence standard for professional license revocation hearings, yet only New Jersey provides its licensee sufficient procedural due process.¹⁶⁰

1. *New Jersey*

The state of New Jersey serves as an example of a state that, while strongly establishing and subsequently reaffirming a common law principle of the preponderance of the evidence standard in professional license revocation hearings, has also utilized numerous “plusses” to balance the lower standard. As such, New Jersey provides its licensees sufficient due process in the average adjudicatory hearing.

As detailed in Part III.A, the court in *In re Polk* found that the preponderance of the evidence standard supplied sufficient procedural due process under the *Mathews* test.¹⁶¹ However, the court also made note of the various additional procedural safeguards New Jersey had established for its licensees.¹⁶²

For example, when the New Jersey State Board of Medical Examiners (BME) learns that a doctor has allegedly committed an offense, it begins a preliminary hearing before a subcommittee called the Preliminary Evaluation Committee.¹⁶³ The subcommittee listens to the doctor’s testimony and reviews and categorizes every complaint, determining which cases are “no cause” (where no offense was committed), and which ones have probable cause to continue in the disciplinary process.¹⁶⁴ The subcommittee subsequently reports those cases where it is believed that an offense has been committed to the full BME and offers recommendations as to how to proceed with each case.¹⁶⁵ After deliberation, the BME will make recommendations to the Attorney General’s office, which represents the

¹⁶⁰ *Infra* Sections III.B.1–2.

¹⁶¹ *Infra* Section III.A.1.

¹⁶² *Id.*

¹⁶³ Heumann, Pinaire & Lerman, *supra* note 154, at 12; see N.J. STAT. ANN. § 45:9-19.8 (Westlaw through L.2019, ch. 266 and J.R. No. 22) (“The State Board of Medical Examiners shall establish a Medical Practitioner Review Panel.”).

¹⁶⁴ Heumann, Pinaire & Lerman, *supra* note 154, at 12–13; see DIV. OF CONSUMER AFF., STATE BD. OF MED. EXAM’RS, STATUTES AND REGULATIONS 47 (2006), <http://www.state.nj.us/lps/ca/bme/bmelaws.pdf>.

¹⁶⁵ Heumann, Pinaire & Lerman, *supra* note 153, at 13.

BME, as to how the AG should proceed.¹⁶⁶ The Attorney General's office utilizes two deputy attorneys general to represent the BME in disciplinary proceedings—one counseling the BME and the other prosecuting on behalf of BME.¹⁶⁷ If a formal complaint has been lodged, then there will be a hearing.¹⁶⁸ The BME has a choice of holding the hearing either before the full BME or an administrative law judge (ALJ).¹⁶⁹ When a hearing is held before the ALJ, the ALJ issues an initial decision—essentially no more than a recommendation—to the BME, which then reaches a final decision. Thus, the BME's action ultimately becomes permanent public record as a final order.¹⁷⁰

New Jersey has implemented impartiality and eliminated potential biases throughout the entire complaint process. As such, a preponderance of the evidence standard is sufficient in this state.

2. *Maine*

Maine serves as an example of the erroneous deprivation that can occur when there is a lower evidentiary burden and limited (if any) separation of functions on the board.

Maine has acknowledged that a person has a due process-protected property interest in a professional license.¹⁷¹ But Maine has not decided the requisite standard of proof for license revocation in either common law or statute, and thus maintains a preponderance of the evidence standard for license revocation hearings.¹⁷² Additionally, Maine contains no “plus” safeguards.¹⁷³

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 14.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Balian v. Bd. of Licensure in Med.*, 722 A.2d 364, 367 (Me. 1999); *see also* *Bd. of Overseers of the Bar v. Lefebvre*, 707 A.2d 69, 73 (Me. 1998) (discussing due process protections implicated in hearing to suspend attorney's license); *Bd. of Registration in Med. v. Fiorica*, 488 A.2d 1371, 1375 (Me. 1985) (discussing due process protections implicated in proceedings to revoke doctor's license).

¹⁷² *See Gashgai v. Bd. of Registration of Med.*, 390 A.2d 1080, 1084 n.5 (Me. 1978) (“Because of our disposition of this appeal it becomes unnecessary to address the issue of burden of proof.”). *But see* *Bd. of Licensure in Med. v. Diering*, No. AP-08-23, 2008 WL 9500435, at *3 (Me. Super. Ct. Dec. 5, 2008) (“Although the Law Court has not explicitly recognized a default preponderance of the evidence standard in Maine's Administrative Procedure Act, this standard is common in professional disciplinary cases . . . [T]he rationale for applying the clear and convincing standard of proof does not apply to license disciplinary proceedings. The clear and convincing standard ‘was first applied in equity to claims which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of conscience.’ . . . No such concern in the context of a license disciplinary proceeding exists to justify a departure from the general rule that requires proof by a preponderance of the evidence.” (citation omitted)).

¹⁷³ *See infra* Appendix A (Maine).

In Maine, the board receives a complaint and assigns it to an investigator who is either a single member of the board or a “committee” of the board who presents findings to the full board. If a committee of the board investigates, it should be prohibited from taking part in any portion of the subsequent proceeding, but this is often not the case.¹⁷⁴ The investigator(s) will then present findings to the board with a recommendation. The board—with help from its assigned Assistant Attorney General (AAG) serving as general counsel—then decides whether discipline is warranted; if so, the board forwards to prosecution for formal hearing. The same Assistant Attorney General that advises the board to take the case¹⁷⁵ then prosecutes the case to the board. After the hearing, the board votes and issues a final decision. Licensees can appeal back to the same full board.¹⁷⁶

In *Zegel v. Board of Social Work Licensure*, the Maine Supreme Judicial Court has said in dictum that “the combination of investigator, prosecutor, and sitting member of the adjudicatory panel, even if ostensibly a nonparticipating member, creates an intolerably high risk of unfairness.”¹⁷⁷ Two of the most glaring of these are the roles of the investigator and attorney. The investigator(s) will often present findings of the investigation to the board with a recommendation, and then sit on the board for the adjudicatory hearing—after having conducted an investigation and made a recommendation to their colleagues.¹⁷⁸ AAGs work with their assigned boards on a daily basis as general counsel and have built rapport and trust with the board members, which carries great persuasion during the AAG’s prosecution of the case and when the board is tried with making a final decision.

*Moore v. State of Maine Board of Dental Examiners*¹⁷⁹ provides a good example of the issues with the lack of separation in Maine license revocation hearings. The petitioner in that case appealed a decision by the Board that

¹⁷⁴ Compare *Gashgai v. Bd. of Registration in Med.*, 390 A.2d 1080, 1082 n.1 (Me. 1978) (“[W]e observe that the combination of investigator, prosecutor and sitting member of the adjudicatory panel, even if ostensibly a nonparticipating member, creates an intolerably high risk of unfairness.”), with Brief of Petitioner/Appellant at 2–3, *Zegel v. State of Me. Bd. of Soc. Work Licensure*, No. PEN-03-335 (Me. July 10, 2003), 2003 WL 24222872 (Me) (noting that the Board of Social Work Licensure allowed a committee member, who voted twice to advance the case to a formal hearing during the initial stages of the investigation, to take part in subsequent proceedings as an expert witness for the prosecution).

¹⁷⁵ Presumably advising on the legal analysis and why she believes it is a good case to try—belief she can prove the licensee has violated the requisite standards.

¹⁷⁶ Maine Administrative Procedure Act, ME. REV. STAT. ANN. tit. 5, § 8001 (West, Westlaw through 2019 Reg. Sess.).

¹⁷⁷ *Zegel v. Bd. of Soc. Work Licensure*, 843 A.2d 18, 22 (Me. 2004) (emphasis omitted) (quoting *Gashgai v. Bd. of Registration in Med.*, 390 A.2d 1080, 1082 n.1 (Me. 1987)). In *Zegel*, the court held that it “need not determine whether the process here crossed the line because the error, if any, was harmless.” *Id.* The court has yet to determine the issue.

¹⁷⁸ Though they may not vote. See Maine Administrative Procedure Act, ME. REV. STAT. ANN. tit. 5, § 8001 (West, Westlaw through 2019 Reg. Sess.).

¹⁷⁹ No. AP-07-65, at *3–4 (Me. Super. Ct. Apr. 18, 2008).

found he had violated Maine's unprofessional conduct statute¹⁸⁰ by providing care that failed to meet minimum accepted standards of practice.¹⁸¹ The complainant was "recommend[ed] and encourage[ed]"¹⁸² by a member of the Board to file a complaint with the Maine Board of Dental Examiners. This board member also testified at the hearing. One single member of the Board recommended the complaint, initiated investigation, testified at the hearing as an expert,¹⁸³ and then sat on the Board and listened to the rest of the Board debate the findings of a case he brought himself. In closing argument, the AAG stressed the importance of weighing the credibility of the witnesses.¹⁸⁴

It is inconceivable to believe that the board member's testimony, various roles in the process, relationship to the Board, and presence at the proceeding did not have an effect on the decision of the rest of the Board. The Superior Court agreed:

The gloss put on the facts by the Board was impacted by the knowledge that an important and influential member of the Board believed this case to constitute a violation, treated the patient, acted as a witness in front of the Board, and was the person who recommended to petitioner that she file [the] complaint¹⁸⁵

Because the Maine legislature has not taken steps to restructure administrative adjudicatory hearings, a higher clear and convincing standard would help combat these biases and provide a barrier through which the insufficient evidence would have had to break.

In applying the *Mathews v. Eldridge*¹⁸⁶ three-factor test to Maine license revocation procedure, factor two, "the risk of erroneous deprivation of such interests through procedures used,"¹⁸⁷ greatly tips the scale toward injustice and a high risk of erroneous deprivation. Part of the *risk of erroneous*

¹⁸⁰ ME. REV. STAT. ANN. tit. 32, § 3282-A(2)(F) (West, Westlaw through 2019 Reg. Sess.) ("Unprofessional conduct. A licensee is considered to have engaged in unprofessional conduct if the licensee violates a standard of professional behavior . . . that has been established in the practice for which the licensee is licensed."); *id.* § 3282-A(2)(E) ("Incompetence in the practice for which the licensee is licensed. A licensee is considered incompetent in the practice if the licensee has: (1) Engaged in conduct that evidences a lack of ability or fitness to perform the duties owed by the licensee to a client or patient or the general public; or (2) Engaged in conduct that evidences the lack of knowledge or inability to apply principles or skills to carry out the practice for which the licensee is licensed[.]").

¹⁸¹ *Moore*, No. AP-07-65, at *1.

¹⁸² *Id.* at *2.

¹⁸³ Dr. Fister's testimony reveals multiple instances where he compared the work of petitioner with what he would have done. *Id.*

¹⁸⁴ *Id.* at *3 ("Had an appropriate radiograph been taken, such as Dr. Fister's, the root tip would have been visualized and the patient conformed, hopefully.")

¹⁸⁵ *Id.* at *4.

¹⁸⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁸⁷ *Id.*

injustice analysis is “the probable value, if any, of additional procedural safeguards,”¹⁸⁸ and Maine has almost none.¹⁸⁹

Clearly, preponderance alone is not sufficient to protect the interests of the licensees. If Maine is to keep the preponderance standard, which seems likely, the State needs to implement additional procedural safeguards.

CONCLUSION

It is clear that licensees have a protected interest in their licenses that requires sufficient procedural due process of law in revocation hearings. It is equally clear that the use of the preponderance of the evidence standard alone is not sufficient to provide licensees with due process of law. In order for states to appropriately apply preponderance of the evidence in license revocation hearings, there must be additional safeguards in place to protect the licensee—“preponderance, plus.” Completely separate adjudicative agencies for each step of the process is not required for sufficient due process. In the example of Maine, a due process “plus” could take the form of (1) adding additional seats to the Board so as to allow for the full removal of the investigators from the rest of the hearing and still maintain quorum; (2) adding additional seats to the Board so as to allow for the removal of the committee who decides to bring the case to prosecution from the adjudicatory hearing and still maintain quorum; and (3) having split board duties so that one serves as general counsel and another prosecutes cases. But sufficient due process dictates that if a board uses preponderance, it must utilize a “plus.”

¹⁸⁸ *Id.*

¹⁸⁹ See *infra* Appendix A (displaying that Maine lacks most procedural safeguards that other preponderance states have implemented).

Appendix A¹

State	Hearing Participants & Procedures	Standards of Proof Required	State APA Citation	Board Legal Counsel	Investigator Employment
AL	Administrative Hearings conducted before the full Commission.	“Substantial evidence” standard. ALA. CODE § 34-24-360 (West, Westlaw through Act 2019-540).	ALA. CODE § 41-22-1 (West, Westlaw through 2019 legislation).	In-house counsel; Attorney General.	Board.
AK	Board delegates to hearing officer, but may choose to conduct hearing by full board.	Preponderance of evidence. ALASKA STAT. § 44.62.460 (West, Westlaw through Sept. 14, 2019 of the 2019 First Regular Sess. and 2019 1st Special Sess. of the 31st Legislature).	ALASKA STAT. ANN. § 44.62.010 (West, Westlaw through 2019 legislation).	Attorney General.	Another state agency.
AZ	Administrative hearings are conducted by an independent agency.	Clear & convincing evidence. ARIZ. REV. STAT. ANN. § 12-572 (West, Westlaw through 2019 Legis. Sess.).	ARIZ. REV. STAT. ANN. § 41-1001 (West, Westlaw through 2018 legislation).	Attorney General; outside counsel.	Board.

AR	Conducted by full board.	Preponderance of evidence.	ARK. CODE ANN. § 25-15-201 (West, Westlaw through 2019 Legis. Sess.).	Attorney General; outside counsel.	Another state agency.
CA	The panel of board members reviews & approves decisions after stipulation or hearing by a hearing officer.	Clear & convincing evidence. <i>Ettinger v. Bd. of Med. Quality Assurance</i> , 135 Cal. App. 3d 853, 856 (1982).	CAL. GOV'T CODE § 11340 (West, Westlaw through 2019 Legis. Sess.).	In-house counsel; Attorney General; outside counsel.	Another state agency.
CO	Panel of board members; hearing officer.	Preponderance of evidence.	COLO. REV. STAT. ANN. § 24-4-107 (West, Westlaw through 2019 Legis. Sess.).	Attorney General.	Another state agency.
CT	Panel of board members; hearing officer.	Preponderance of evidence.	CONN. GEN. STAT. ANN. § 4-166 (West, Westlaw through 2019 Legis. Sess.).	Attorney General.	Another state agency.

			Sess.).		
DE	Panel of board members; hearing officer.	Preponderance of evidence.	DEL. CODE ANN. tit. 29, § 10101 (West, Westlaw through 2019 Legis. Sess.).	Attorney General.	Another state agency.
DC	The board may choose to hold a hearing before the full board or a panel of the board. The board may choose to send hearings to an independent hearing tribunal instead of holding hearings themselves.	Preponderance of evidence. <i>In re Benjamin</i> , 698 A.2d 434, 439–40 (D.C. 1997).	D.C. CODE ANN. § 2-502 (West, Westlaw through 2019).	Attorney General.	Another state agency.
FL	Full board, panel of board members, or hearing officer.	Clear & convincing evidence. FLA. STAT. ANN. § 458.331 (West, Westlaw through 2019 1st Regular Sess.).	FLA. STAT. ANN. § 120.51 (West, Westlaw through 2019 Legis. Sess.).	Attorney General.	Another state agency.
GA	Full board, panel of board members, or hearing officer.	Preponderance of evidence.	GA. CODE ANN. § 50-13-1 (Westlaw,	In-house counsel; Attorney General.	Board.

			through 2019 Session of the General Assembly).		
HI	Regulated Industries Complaints Office investigates allegations of professional misconduct by licensee.	Preponderance of evidence.	HAW. ADMIN. RULES § 16-201-21(d) (West, Westlaw through December 2019 Hawaii Administrative Rules Listing of Filings).	Attorney General.	Another state agency.
ID	Hearing Officer.	Clear & convincing evidence. IDAHO CODE ANN. § 54-1837 (West, Westlaw through 2019 1st Regular Sess.).	IDAHO CODE ANN. § 67-5201 (West, Westlaw through 2019 Regular Sess.).	In-house counsel; Attorney General; outside counsel.	Board.
IL	Hearing Officer.	Clear & convincing evidence. ILL. ADMIN. CODE tit. 68, § 1110.190 (West, Westlaw through rules published in the Illinois	5 ILL. COMP. STAT. ANN. 100/1-1 (West, Westlaw through P.A. 101-	Department counsel.	Board.

		Register Vol. 43, Issue 37, Sept. 13, 2019).	66).		
IN	Full board.	Preponderance of evidence. <i>Burke v. City of Anderson</i> , 612 N.E.2d 559, 565 (1993).	IND. CODE ANN. § 4-21.5-1-1 (West, Westlaw through 2019 Regular Sess.).	Department counsel; Attorney General.	Attorney General.
IA	Must have quorum of 6–10 board members.	Preponderance of evidence. <i>Eaves v. Bd. of Med. Exam'rs</i> , 467 N.W.2d 234, 237 (1991).	IOWA CODE ANN. § 17A.1 (Westlaw through 2019 Regular Sess.).	In-house counsel; Attorney General.	Board.
KS	Full board, panel of board members, or hearing officer.	Preponderance of evidence. XXIX Kan. Op. Att'y Gen. 22 (1995).	KAN. STAT. ANN. § 77-501 (West, Westlaw through laws effective on or before July 1, 2019, enacted during the 2019 Regular Sess. of	In-house counsel.	Board.

			the KS Legislature).		
KY	Full board, panel of board members, or hearing officer.	Preponderance of evidence.	KY. REV. STAT. ANN. § 13A.100 (Westlaw through 2019 Regular Sess.).	In-house counsel.	Board.
LA	Panel of board members.	Clear & convincing evidence. LA. SUP. CT. R. 19 (2019).	LA. STAT. ANN. § 49:951 (West, Westlaw through 2019 Regular Sess.).	In-house counsel; outside counsel.	Board.
ME	Full board.	Preponderance of evidence.	ME. REV. STAT. ANN. tit. 5, § 8002 (West, Westlaw through 2019 1st Regular Sess.).	Attorney General.	Board.

MD	Board conducts hearing after hearing officer makes recommendation.	Preponderance of evidence. MD. CODE ANN., STATE GOV'T § 10-217 (West, Westlaw through 2019 legislation).	MD. CODE ANN., STATE GOV'T § 10-101 (West, Westlaw through 2019 legislation).	Attorney General.	Board.
MA	Hearings at the Administrative Law Appeals; sanction at board meeting.	Preponderance of evidence. <i>In re Budnitz</i> , 681 N.E.2d 813, 814 n.1 (Mass. 1997).	MASS. GEN. LAWS ANN. ch. 30A, § 1 (West, Westlaw through 2019 legislation).	In-house counsel; Attorney General.	Board.
MI	A central agency handles all hearings.	Preponderance of evidence.	MICH. COMP. LAWS ANN. § 24.201 (West, Westlaw through 2019 legislation).	Attorney General.	Another state agency.
MN	Full board.	Preponderance of evidence.	MINN. STAT. ANN. § 14.001 (West, Westlaw through	Attorney General.	Board.

			2019 legislati on).		
MS	Full board.	Preponderance of evidence.	MISS. CODE ANN. § 25-43- 1.101 (West, Westla w through 2019 legislati on).	Attorney General; outside counsel.	Board.
MO	Hearing officer.	Preponderance of evidence.	MO. ANN. STAT. § 536.010 (West, Westla w through 2019 legislati on).	In-house counsel.	Board.
MT	Hearing officers provided by the department.	Reasonable cause. MONT. ADMIN. R. 42.2.512 (2019).	MONT. CODE ANN. § 2-4-101 (West, Westla w through 2019 legislati on).	In-house counsel.	Another state agency.
NE	Hearing officer.	Clear & convincing evidence. NEB. REV. STAT. ANN. § 71-155 (West, Westlaw through 2019 Regular Sess.).	NEB. REV. STAT. ANN. § 84-901 (West, Westla w through	Attorney General.	Another state agency.

			2019 Regular Sess.).		
NV	Able to have full board, panel, or board members hold meeting but use hearing officers as preferred method.	Preponderance of evidence. NEV. REV. STAT. ANN. § 630.346 (West, Westlaw through 2019 Legis. Sess.).	NEV. REV. STAT. ANN. § 233B.010 (West, Westlaw through 2019 Legis. Sess.).	In-house counsel; Attorney General.	Board.
NH	Subcommittee forwards all Reports of Investigations to the board with a recommendation. Board then determines action.	Preponderance of evidence.	N.H. REV. STAT. ANN. § 541-A:1 (West, Westlaw through 2019 Regular Sess.).	Attorney General.	Board.
NJ	Hearing officers are administrative law judges.	Preponderance of evidence. <i>In re Polk</i> , 90 N.J. 550, 569 (1982).	N.J. STAT. ANN. § 52:14B-1 (Westlaw through L.2019, ch. 246).	Attorney General.	Another state agency.
NM	Individual board members may act as hearing officers or board may contract for these services.	Preponderance of evidence.	N.M. STAT. ANN. § 12-8-1 (West, Westlaw through 2019	Attorney General; outside counsel.	N/A.

			Regular Sess.).		
NY	Hearing officer.	Preponderance of evidence. N.Y. PUB. HEALTH LAW § 230(10)(f) (McKinney 2018).	N.Y. A.P.A. LAW § 102 (Westlaw through L.2019, ch. 316).	In-house counsel; Attorney General; outside counsel.	Another state agency.
NC	Full board.	Preponderance of evidence.	N.C. GEN. STAT. ANN. § 150B-1 (West, Westlaw through 2018 Regular Sess.).	In-house counsel.	Board.
ND	Hearing officers are administrative law judges.	Preponderance of evidence. <i>N.D. State Bd. of Med. Exam'rs v. Hsu</i> , 726 N.W.2d 216, 226 (2007).	N.D. CENT. CODE ANN. § 28-32-01 (West, Westlaw through 2020 legislation).	Attorney General; outside counsel.	N/A.
OH	Hearing officer.	Preponderance of evidence.	OHIO REV. CODE ANN. § 119.01 (West, Westlaw	In-house counsel; Attorney General.	Board.

			w through 133d General Assemb ly 2019– 2020).		
OK	Full board.	Clear & convincing evidence. OKLA. ADMIN. CODE 435:3-3-11 (West, Westlaw through rules published in Vol. 36, No. 22 of the Okla. Register dated Aug. 1, 2019).	OKLA. STAT. ANN. tit. 75, § 250 (West, Westlaw through 2019 Regular Sess.).	In-house counsel; Attorney General.	Board.
OR	Hearing officers are administrative law judges.	Preponderance of evidence. <i>Gallant v. Bd. of Med. Exam'rs</i> , 975 P.2d 814, 816–18 (Or. Ct. App. 1999).	OR. REV. STAT. ANN. § 183.310 (West, Westlaw through 2019 Regular Sess.).	Attorney General.	Board.
PA	Hearing officer.	Preponderance of evidence.	2 PA. STAT. AND CONS. STAT. ANN. § 101 (West, Westlaw through 2019 Regular Sess. Act 72).	Departm ent Counsel.	Another state agency.

RI	Panel; no member of the board who participated in the investigation may participate in any subsequent hearing or action taken by the remainder of the board.	Preponderance of evidence.	42 R.I. GEN. LAWS ANN. § 42-35-1 (Westlaw through ch. 310 of the 2019 Regular Sess.).	In-house counsel.	Another state agency.
SC	Panel of one lay member and not more than three physician members of the Medical Disciplinary Commission, none of which may reside or have a major part of their practice in the same county as the respondent.	Preponderance of evidence. <i>Anonymous (M-156-90) v. State Bd. of Med. Exam'rs</i> , 496 S.E.2d 17, 19 (S.C. 1998).	S.C. CODE ANN. § 1-23-310 (Westlaw through 2019 Sess.).	In-house counsel.	Another state agency.
SD	Full board.	Preponderance of evidence.	S.D. CODIFIED LAWS § 1-26-1 (Westlaw through 2019 Sess. Laws, Exec. Order 19-1 and Supreme Court Rule	Attorney General.	Board.

			19-18).		
TN	Full board.	Preponderance of evidence.	TENN. CODE ANN. § 4-5-101 (Westlaw through 2019 1st Regular Sess. of the 111th Tenn. General Assembly).	Department Counsel.	Another state agency.
TX	The fact-finding part of the trial is done by the State Office of Administrative Hearings. The penalty part is done by the full board.	Preponderance of evidence. <i>Granek v. Tex. State Bd. Of Med. Exam'rs</i> , 172 S.W.3d. 761, 777 (Tex. App. 2005).	TEX. GOV'T CODE ANN. § 2001.001 (Westlaw through the end of the 2019 Regular Sess. of the 86th Legislature).	In-house counsel; Attorney General.	Board.
UT	Full board.	Preponderance of evidence.	UTAH CODE ANN. § 63G-4-101 (Westlaw through the end of the 2019 Regular Sess. of the 86th Legislature).	In-house counsel; Attorney General; outside counsel.	N/A.

			w through 2019 General Sess.).		
VT	Hearing panels hear contested cases, make recommendations; full board acts on record created by panel, may take evidence. Board contracts with a hearing officer to conduct hearings; non-voting member of panel; role is to advise, preside over hearing, rule on procedural matters, and assist in drafting decision.	Preponderance of evidence. <i>In re Miller</i> , 989 A.2d 982, 991 (Vt. 2009).	VT. STAT. ANN. tit. 3, § 800 (Westlaw through Acts of the Regular Sess. of the 2019–2020 Vt. General Assembly).	Attorney General; outside counsel.	Board.
VA	A formal hearing conducted by a hearing officer, a panel of the board or the full board. Members who participate in the informal conference are excluded from the subsequent formal hearing.	Clear & convincing evidence. 1979–80 Va. Op. Att’y Gen. 168 (1979).	VA. CODE ANN. § 2.2-4000 (Westlaw through 2019 Regular Sess.).	Attorney General; outside counsel.	Another state agency.

WA	Panel.	Clear & convincing evidence. <i>Nguyen v. Dep't of Health Med. Quality Assurance Comm'n</i> , 29 P.3d 689, 694–95 (Wash. 2001).	WASH. REV. CODE ANN. § 34.05.010 (Westlaw through 2019 Regular Sess.).	In-house counsel; Attorney General.	Board.
WV	Hearings conducted by full board.	Clear & convincing evidence. W. VA. CODE § 30-3-14 (Westlaw through May 3, 2020 of the 2020 Regular Sess.).	W. VA. CODE ANN. § 29A-1-1 (Westlaw through 2019 Regular Sess.).	In-house counsel; Attorney General.	Board.
WI	Hearing officer issues a proposed decision. Board considers and issues final decision.	Preponderance of evidence. <i>Gandhi v. State Med. Examining Bd.</i> , 483 N.W.2d 295, 297 (Wis. Ct. App. 1992).	WIS. STAT ANN. § 227.03 (Westlaw through 2019 Act 5).	In-house counsel; Attorney General; outside counsel.	N/A.
WY	Hearing officer presides; board members hear and decide the case.	Clear & convincing evidence. WYO. STAT. ANN. § 33-26-407 (Westlaw through the 2019 General Sess. of the Wyo. Legislature).	WYO. STAT. ANN. § 16-3-101 (Westlaw through 2019 General Sess.).	Attorney General; outside counsel.	Board.

ⁱ This information is aggregated from FSMB, *supra* note 7; DHHS, *supra* note 57; and the applicable state administrative procedure statutes.