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Attorney Disbarment Proceedings and the Standard of Proof

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NOTE

ATTORNEY DISBARMENT PROCEEDINGS AND THE STANDARD OF PROOF

I. INTRODUCTION

On March 22, 1994, the New York Supreme Court, Appellate Division, held that the conduct of one Theodore Friedman warranted disbarment.[1] Originally, a Special Referee recommended that Mr. Friedman be suspended from the practice of law for a two year period.[2] However, the recommended suspension was rejected by the Appellate Division and disbarment was imposed as "the only proper punishment."[3]

Mr. Friedman argued, to no avail, that the application of the "fair preponderance of the evidence" standard of proof in attorney disciplinary proceedings violated his due process rights under the United States Constitution.[4] His appeal to New York's highest court was dismissed on May 5, 1994,[5] and certiorari was denied by the United States Supreme Court on October 3, 1994.[6]

In *In re Friedman*, the Appellate Division stated that the New York courts have "conclusively determined that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence."[7] Indeed, in *In re Capoccia*,[8] the New York Court of Appeals

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1. *In re* Friedman, 609 N.Y.S.2d 578 (App. Div.), *appeal dismissed*, 635 N.E.2d 295 (N.Y.), *cert. denied*, 115 S. Ct. 81 (1994). Theodore Friedman was admitted to the practice of law on April 1, 1957, and had been practicing law for over 35 years when this decision was rendered. *Id.* at 578.

2. *Id.* at 585. Mr. Friedman allegedly committed 23 separate counts of professional misconduct arising out of his representation of personal injury claimants in three separate cases. *Id.* at 578.

3. *Id.* at 587. In a per curiam decision, the court stated that "[i]n view of these serious acts of misconduct which had the effect of perverting the administration of justice, we reject the recommended suspension of respondent and find that disbarment of the respondent is the only proper punishment." *Id.*

4. *Id.* at 586. Mr. Friedman also argued that the standard of proof violated his due process rights under the New York State Constitution. *Id.* This Note will focus upon Mr. Friedman's due process rights under the Fourteenth Amendment of the U.S. Constitution.

5. *In re* Friedman, 635 N.E.2d 295 (N.Y.), *cert. denied*, 115 S. Ct. 81 (1994).

6. Friedman v. Departmental Disciplinary Comm., 115 S. Ct. 81 (1994).

7. *Friedman*, 609 N.Y.S.2d at 586.

explicitly ruled that the preponderance standard, and not the higher standard of "clear and convincing evidence," should be applied for the determination of professional misconduct in an attorney's disciplinary proceeding, including disbarment.[9]

This Note proposes that New York should adopt the higher "clear and convincing evidence" standard in its disbarment proceedings. Part II reviews the three different standards of proof. Part III provides an overview of disbarment proceedings in New York. Part IV argues that disbarment represents an infringement of an attorney's liberty interest by destroying the attorney's reputation and professional life. Because of the severe nature of disbarment, such disciplinary action mandates a higher standard of proof, notwithstanding the New York courts repeated holdings to the contrary.[10] Ultimately, this Note will assert that the lower standard is a denial of the attorney's due process rights under the Fourteenth Amendment of the United States Constitution.

II. THE "CLEAR AND CONVINCING" STANDARD

Justice Harlan wrote that "a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[11] As a practical matter, three levels of proof have evolved for determining how strongly the fact finder must be convinced that a given act actually occurred.[12] The lowest level is the fair "preponderance of evidence" standard, typically applied in civil cases, wherein the pecuniary interests of private parties are commonly in dispute.[13] Here, the litigants share a roughly equal risk of error, reflecting society's minimal concern with the outcome of such suits.[14] Thus, the finder of fact must be persuaded merely that it is more likely

8. 453 N.E.2d 497 (N.Y. 1983).

9. *Id.* at 498. *Capoccia* concerned an attorney who was not disbarred, but suspended for a period of six months. *Id.*

10. *See, e.g.*, *Capoccia*, 453 N.E.2d at 497; *In re* Mitchell, 351 N.E.2d 743 (N.Y. 1976).

11. *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The majority in *Winship* held that juveniles, like adults, are constitutionally entitled to the "beyond a reasonable doubt" standard when accused of violating the criminal law. *Id.* at 368. Justice Harlan's concurrence has often been cited by courts for its exploration of the standards of proof and their function. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 423 (1979); United States v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

12. *See Addington*, 441 U.S. at 423.

13. *Id.*

14. *Id.*

than not that a given transgression has occurred before finding against a party.[15]

In contrast, the application of the highest of the three standards, proof of guilt of an accused "beyond a reasonable doubt," is required in a criminal case.[16] Based upon the magnitude of the defendant's interests in such a proceeding, the criminal defendant's rights are protected by a standard designed to minimize the likelihood of an erroneous decision.[17] Indeed, the standard mandates a verdict of not guilty where the evidence of guilt, though more compelling than the evidence of innocence, is not overwhelming.[18] It represents "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[19] Thus, the risk of error in the administration of criminal justice is placed predominantly upon society.[20]

In 1979, the Supreme Court, in *Addington v. Texas*, explored the function of the intermediate standard:

> The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal" and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases.[21]

The Court further stated that, in cases involving individual rights, "'[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'"[22]

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15. *In re* Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring).

16. *Id.* at 372.

17. *Addington*, 441 U.S. at 423-24.

18. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1306 (1977).

19. *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

20. *Addington*, 441 U.S. at 423-24.

21. *Id.* at 424 (citations omitted). The intermediate standard has often been expressed in terms other than "clear and convincing," such as "clear, unequivocal and convincing," or "convincing and to a reasonable certainty." Practically, these variations in terminology do not represent differing levels of proof but simply differing modes of expression. *See Addington*, 441 U.S. at 423.

22. *Id.* at 425 (alterations in original) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)). The specific liberty interest inherent in disbarment proceedings is explored in Part IV.A.

Civil cases involving allegations of fraud or moral turpitude, as well as those where the consequences to the losing party are severe, typically require the "clear and convincing" standard.[23] The U.S. Supreme Court has applied this stricter standard to deportation, denaturalization, and expatriation cases.[24] The standard has even been quantified, with probabilities of between seventy and eighty percent being representative of the minimum level of persuasion required of the standard.[25]

The New York courts have adopted and further refined the U.S. Supreme Court's application of the intermediate standard, describing the evidentiary requirement as a strong caution to the fact finder, forbidding relief when the evidence is "'loose, equivocal, or contradictory.'"[26] The New York Court of Appeals has held that the main considerations, in deciding whether the higher standard is required, include the nature of the interest threatened and a fair allocation of the risk of erroneous judgment between the state and the adverse party.[27] New York has adopted a balancing test to determine when the "preponderance of evidence" standard is appropriate.[28] The courts have articulated that it should be rejected for a higher standard when the possible injury to the adverse party is significantly greater than any possible harm suffered by the state.[29] Invariably, to establish serious charges, more evidence is required than to establish minor or inconsequential ones.[30]

Naturally, New York courts have looked to other in-state proceedings in ruling that a particular area of law requires the intermediate

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23. United States v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

24. *See, e.g.*, Woodby v. INS, 385 U.S. 276 (1966) (applying the "clear and convincing" standard in the deportation context); Chaunt v. United States, 364 U.S. 350 (1960) (applying the "clear and convincing" standard in the denaturalization context). *See generally* JACK B. WEINSTEIN ET AL., EVIDENCE 1158 (8th ed. 1988).

25. WEINSTEIN ET AL., *supra* note 24, at 1158. The representative probabilities of the preponderance of evidence standard and the evidence standard of "beyond reasonable doubt" are 50+% and 95+%, respectively. *Id.* at 1157-59.

26. George Backer Mgmt. Corp. v. Acme Quilting Co., 385 N.E.2d 1062, 1066 (N.Y. 1978) (quoting Southard v. Curley, 31 N.E. 330, 331 (N.Y. 1892)) (holding that to overcome the heavy presumption that a written lease manifested the true intention of the parties, evidence of a very high order was required).

27. *In re* Seiffert, 480 N.E.2d 734, 734-36 (N.Y. 1985) (holding that proof in a judicial disciplinary hearing must be by a preponderance of the evidence rather than by clear and convincing evidence).

28. *Id.* at 736.

29. *Id.*

30. Hutt v. Lumbermens Mut. Casualty Co., 466 N.Y.S.2d 28, 30 (App. Div. 1983) (holding that clear and convincing evidence must be established by an insurer contending that a fire was the result of arson).

standard.[31] Further, New York courts have looked to the doctrines of other states in determining the application of the "clear and convincing" standard. For example, in determining that an insurer, contending that a fire was the result of arson, must prove the affirmative defense by "clear and convincing" evidence, a court noted the division of out of state authorities on the matter.[32] Thus, a broad range of factors contributes to the New York courts' final conclusion as to whether the "clear and convincing" standard is mandated.

III. DISBARMENT PROCEEDINGS IN NEW YORK

A lawyer who violates any standard of ethical or professional conduct of the jurisdiction in which he is licensed to practice is subject to the disciplinary rules of that jurisdiction.[33] Conduct that constitutes a breach of the ethical and professional standards of an attorney generally includes: (1) committing a criminal act which adversely reflects on an attorney's trustworthiness or fitness to practice; (2) engaging in activities involving dishonesty, fraud, deceit, or misrepresentation; (3) engaging in conduct prejudicial to the administration of justice; (4) representing an ability to improperly influence a governmental official; and (5) knowingly assisting a judge or other judicial officer in conduct that violates the applicable rules of law.[34] The New York Code, derived from a version of the Model Code of Professional Responsibility, but containing amendments drawn form the Model Rules of Professional Conduct, contains rules proscribing all of the foregoing conduct.[35]

New York is the only jurisdiction in the United States that does not place authority to discipline its attorney's with its highest court, instead charging the responsibility to the four Appellate Divisions.[36] Each division has consequently enacted rules creating Grievance Committees, or Departmental Disciplinary Committees, which investigate and, where

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31. *See, e.g., In re* Pablo C., 439 N.Y.S.2d 229, 234 (Fam. Ct. 1980) (noting the use of the higher standard of proof by New York courts in other areas of law, specifically, in a case concerning a natural mother's right to visit her children).

32. *Hutt*, 466 N.Y.S.2d at 28.

33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1983); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-4 (1980).

34. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980).

35. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 849 (1995).

36. Gary L. Casella, *The Esoteric World of Attorney Discipline*, 16 WESTCHESTER B.J., Summer 1989, at 177.

appropriate, prosecute complaints of professional misconduct.[37]

Although specific procedures vary somewhat among the four divisions, generally, after a complaint is filed with the Grievance Committee and a subsequent investigation is conducted, the Committee may decide that a disciplinary proceeding should be instituted and a Special Referee appointed.[38] The Special Referee conducts the disciplinary proceeding, which consists of a non-jury trial in which the rules of evidence are followed.[39] Following the proceeding, the Special Referee submits a report to the Appellate Division, which bases its decision on the report's conclusions.[40]

In reaching a decision, the Special Referee applies the "fair preponderance of evidence" standard.[41] However, New York case law has not always been uniform in this regard. In 1916, the Third Department held that, in an attorney disbarment proceeding, evidence sustaining charges of misconduct should be clear and convincing.[42] However, in 1923, the Third Department confirmed without opinion a Special Referee's report recommending an attorney's disbarment based on a "preponderance of evidence."[43] Following this decision, the New York courts have consistently determined that the lower standard should be applied.[44]

The New York courts have justified denial of the intermediate standard by holding that it is only required in cases involving the denial of personal or liberty rights.[45] Thus, the *Capoccia* court held that attorney disciplinary proceedings do not represent such an interest.[46] The court, conceding that the privilege to practice law was not an insignificant one, nonetheless held that it was more akin to a property interest, and consequently concluded that a higher standard of proof was not required.[47]

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37. *Id.*

38. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, §§ 603.4(d), 691.4(e) (1986). The preceding sections apply to the First and Second Divisions, respectively. Similar sections apply to the Third and Fourth Divisions.

39. *See* Casella, *supra* note 36, at 177.

40. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, §§ 603.4(e)(2), 691.4(k)(2) (1986).

41. *See supra* text accompanying notes 7-9.

42. *In re* An Attorney, 161 N.Y.S. 504 (App. Div. 1916).

43. Zevie B. Schizer, *The Brooklyn Judicial Inquiry: A Record of Accomplishment*, 29 BROOK. L. REV. 27, 39 (1963).

44. *See supra* text accompanying notes 7-9.

45. *In re* Capoccia, 453 N.E.2d 497, 498 (N.Y. 1983).

46. *Id.* at 499.

47. *Id.*

Accordingly, New York demands only a showing of a preponderance of evidence in stripping an attorney of his profession, livelihood, and reputation. The state insists that the protection of society and the public interest far outweigh the disbarred attorney's own interest.[48] New York categorizes such interest as a mere property right rather than an interest comprising personal or liberty rights.[49] The New York courts have consistently asserted that there are no compelling arguments that might cause the standard to be altered.[50]

Yet in so ruling, the New York courts have ignored the practical realities that are represented by the imposition of such a severe sanction as disbarment.[51] Further, New York has been inconsistent in applying the standard in other areas of the law, under the very parameters it has so clearly outlined. It is out of step with the majority of jurisdictions in the United States, both at the state and federal level.[52] Ultimately, despite the rulings of New York's highest court, the denial of the "clear and convincing" evidence standard constitutes nothing less than a denial of the disciplined attorney's due process rights under the Fourteenth Amendment of the United States Constitution.

IV. ARGUMENT

A. The Significance of the Sanction

Disbarment, the ultimate disciplinary sanction that can be levied upon an attorney, brings with it profoundly severe repercussions. The Seventh Circuit described the fallout quite accurately in *In re Fisher*:

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. The court should, therefore, disbar in moderation . . . . A removal of an attorney from practice for a period of years entails the complete loss of a clientele with its consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and his

48. *See, e.g.*, *In re* Mitchell, 351 N.E.2d 743, 745 (N.Y. 1976).
49. *Capoccia*, 453 N.E.2d at 499.
50. *See, e.g.*, *Capoccia*, 453 N.E.2d at 498-99; *In re* Friedman, 609 N.Y.S.2d 578, 586 (App. Div.), *appeal dismissed*, 635 N.E.2d 295 (N.Y.), *cert. denied*, 115 S. Ct. 81 (1994).
51. *See infra* part IV.A.
52. *See infra* part IV.B.

> fellow lawyers. In the meantime, his income and livelihood have ceased to exist.[53]

The U.S. Supreme Court has held that the personal interest in reputation is included within the constitutional protection of liberty afforded by the Fourteenth Amendment.[54] Subsequently, the Court narrowed this definition, stating that reputation *alone* was not a constitutionally protected interest.[55] However, the Court maintained that damage to reputation involving "more tangible interests such as employment" would still fall under its definition of liberty.[56] Consequently, deprivation of the kind that occurs in an attorney's disbarment, and the accompanying "stigmatization," are infringements upon liberty interests.[57] The application of the higher standard is therefore appropriate.[58]

Moreover, New York has often applied the "clear and convincing" standard in situations in which the interest at stake is clearly one pertaining to property. Indeed, adverse possession must be established by the more demanding standard.[59] So too with contract reformation[60] and the forfeiture of alimony payments.[61] The mere fact that property interests were at issue did not preclude the application of the intermediate standard in any of the foregoing instances.

However, New York steadfastly asserts that, because the risk of harm to the individual does not outweigh the possibility of harm to society, the greater burden of proof should not be afforded. New York courts have reasoned that the severe repercussions incident to disbarment "'cannot deter the Court from its duty to strike from its rolls one who has engaged in'" misconduct, as the court must "'protect itself, and . . . society, as an instrument of justice.'"[62]

Concededly, a state has legitimate interests in assuring that its bar

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53. *In re* Fisher 179 F.2d 361, 370 (7th Cir.) (citations omitted), *cert. denied*, 340 U.S. 825 (1950).

54. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

55. Paul v. Davis, 424 U.S. 693, 701-06 (1976).

56. *Id.* at 701.

57. Elizabeth Mertz, Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U. L. REV. 492, 505-06 (1988).

58. *Id.*

59. Rusoff v. Engel, 452 N.Y.S.2d 250 (App. Div. 1982).

60. Ross v. Food Specialties, Inc., 160 N.E.2d 618, 620 (N.Y. 1959).

61. Zipparo v. Zipparo, 416 N.Y.S.2d 321, 322 (App. Div. 1979).

62. Mitchell v. Association of Bar of N.Y., 351 N.E.2d 743, 746 (N.Y. 1976) (quoting *In re* Isserman, 345 U.S. 286, 289 (1953)).

membership remains unsullied. Imposition of sanctions upon an attorney serves not only as punishment to the disciplined attorney, but as a deterrent to other attorneys.[63] By effectively policing its bar membership, a state ensures that other attorneys will be less likely to commit a given offense.[64]

More importantly, a state has a compelling interest in protecting the public against an attorney who, quite simply, does not measure up to professional standards.[65] An unfit lawyer can cause irreparable harm to his clients through professional incompetence and should not be left free to practice.[66] Further, by sanctioning the unfit attorney, the state ensures that public confidence in the legal system is not diminished.[67] However, notwithstanding the valid concerns harbored by the state, the significance of an attorney's right to continue practicing law and the liberty interest[68] represented by this right necessitate change.

Indeed, the state has no greater impetus to protect society's interests than in the context of grave criminal offenses.[69] Yet such offenders are afforded the highest burden in the country, that of beyond "reasonable doubt."[70] Two distinct functions are being served by this requirement. First, it reduces the likelihood of erroneous convictions, and second, it is symbolic of the great significance represented by criminal conviction.[71] Hence, despite the severe nature of crimes such as murder, mayhem, and the like, an alleged perpetrator may only be convicted upon the most compelling evidence.

It is, of course, foolish to argue that disbarment proceedings share an equal significance with criminal proceedings. An attorney may be disciplined for non-criminal acts, or for conduct not involving fault, such as mental infirmity.[72] Nonetheless, the two proceedings are not entirely dissimilar, and disbarment proceedings have been described as quasi-

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63. Janine C. Ogando, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 462 (1991).

64. *See id.*

65. *Id.* at 461.

66. *Id.*

67. *Id.* at 461-62.

68. *See supra* part IV.A.

69. *See supra* text accompanying notes 16-20.

70. *See* Underwood, *supra* note 18, at 1306.

71. *Id.*; *see also supra* text accompanying notes 16-20.

72. Wilburn Brewer, Jr., *Due Process in Lawyer Disciplinary Cases: From the Cradle to the Grave*, 42 S.C. L. REV. 925, 929 (1991).

criminal in nature by no less an authority than the U.S. Supreme Court.[73] Underlying the Court's pronouncement were the justifications that a disbarment proceeding is "designed to protect the public," is a "penalty imposed on the lawyer," and that the privilege to practice law is not one to be "lightly or capriciously" revoked.[74] Thus, the "clear and convincing" standard is uniquely suited for attorney disbarment proceedings, where the allegations of wrongdoing are quasi-criminal in nature, the interests at stake are more substantial than mere loss of money, the defendant risks a tarnished reputation, and the individual's right to his continued livelihood is jeopardized.

Further, New York has demanded at least the intermediate standard in proceedings of far less significance than attorney disbarment, within the context of revoking an individual's privilege. New York is required to prove traffic infractions by no less than "clear and convincing" evidence.[75] Certainly, in a proceeding to revoke ones ability to practice law, the individual's interests outweigh the states to a greater extent than in a proceeding to suspend a driver's license. By the very balancing test the New York courts have ascribed to, the logical conclusion is that the higher standard should apply.

B. Disbarment Proceedings in Other Jurisdictions

The majority of both state and federal jurisdictions require a standard of proof higher than a fair preponderance of the evidence in attorney misconduct proceedings.[76] Prominently, California requires that charges of unprofessional conduct by attorneys "should be sustained by convincing proof and to a reasonable certainty."[77] New Jersey,[78] Illinois,[79] Florida,[80] and Connecticut[81] all demand proof by "clear and

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73. *In re* Ruffalo, 390 U.S. 544, 551 (1968) (holding that the absence of any notice as to the reach of a grievance procedure and the precise nature of the charges alleged deprived an attorney of procedural due process).

74. Elizabeth A. Fuerstman, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 COLUM. J.L. & SOC. PROBS. 169, 178 n.48 (1990).

75. N.Y. VEH. & TRAF. LAW § 227(1) (McKinney 1986); *see also* text accompanying note 29.

76. JACOB MERTENS, JR., MERTENS LAW OF FEDERAL INCOME TAXATION § 56.76 (1988). Although the treatise's focus is on tax law, section § 56.76 contains an overview of the disciplinary proceedings of attorneys in general.

77. Greenbaum v. State Bar, 544 P.2d 921, 926 (Cal. 1976).

78. *In re* James, 548 A.2d 1125, 1128 (N.J. 1988).

79. *In re* Bossov, 328 N.E.2d 309, 310 (Ill. 1975).

80. Florida Bar v. Rayman, 238 So.2d 594, 597 (Fla. 1970).

81. Statewide Grievance Comm. v. Presnick, 559 A.2d 227 (Conn. App. Ct. 1989).

convincing" evidence, the last of which cites the Supreme Court's decision in *Addington* as the underlying rationale for its application of the standard.[82] Indeed, in at least one jurisdiction, a state court has required that, in proceedings before the state disciplinary board, the offense charged must be established beyond a reasonable doubt.[83]

In the Federal Circuits, similar reasoning has emerged.[84] Notably, the Fifth Circuit has held that "[a] federal court may disbar an attorney only upon presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction."[85] Further, in the Model Rules for Lawyer Disciplinary Enforcement, the American Bar Association requires that formal charges of misconduct be established by clear and convincing evidence.[86] Yet, in New York, an attorney's career can be ended based on a mere preponderance of evidence.

C. *Due Process and the Standard of Proof*

Beyond the policy arguments supporting an increase in New York's standard of proof lies the fundamental assertion that, in demanding a mere preponderance of evidence, the state is denying the disbarred attorney due process under the Fourteenth Amendment of the United States Constitution. The dominant federal position has been that due process requires "fundamental fairness" in all state proceedings.[87] As stated by Justice Harlan, the Fourteenth Amendment embodies the concept of fundamental fairness "as part of our scheme of constitutionally ordered liberty."[88] The criterion for determining whether an interest deserves due process protection involves a simple assessment of its importance to the individual.[89]

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82. Statewide Grievance Comm. v. Rozbicki, No. CV-0436825, 1990 WL 270416, at *10 (Conn. Super. Ct. June 5, 1990).

83. Cushway v. State Bar, 170 S.E.2d 732, 732 (Ga. Ct. App. 1969).

84. *See, e.g., In re* Thalheim, 853 F.2d 383, 389 (5th Cir. 1988); Koden v. United States Dep't of Justice, 564 F.2d 228, 235 (7th Cir. 1977); Collins Sec. Corp. v. Securities and Exch. Comm'n, 562 F.2d 820, 825 (D.C. Cir. 1977); *In re* Ryder, 263 F.Supp. 360, 361 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967).

85. *In re* Medrano, 956 F.2d 101, 102 (5th Cir. 1992).

86. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 18(C) (1993).

87. GERALD GUNTHER, CONSTITUTIONAL LAW 413 (12th ed. 1991).

88. *In re* Winship, 397 U.S. 358, 372-73 n.5 (1970) (Harlan, J., concurring).

89. Bell v. Burson, 402 U.S. 535, 539-40 (1971) (holding that a driver's license may not be suspended without procedural due process). The test for determining exactly what process is due the individual is explored *infra* in the text accompanying notes 93-98.

The U.S. Supreme Court has clearly stated that disbarment, a punishment or penalty imposed on the lawyer and quasi-criminal in nature, accordingly entitles the attorney to procedural due process.[90] The Fifth Circuit further pronounced that, because of the severe character of the proceeding, a "court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged."[91] Clearly, the power of the courts to discipline attorneys necessitates the administration of due process in the proceeding.[92]

Consequently, the inquiry focuses upon what process is due an attorney under the Fourteenth Amendment. The U.S. Supreme Court has stated that due process "is flexible and calls for such procedural protections as the particular situation demands."[93] Accordingly, the constitutionality of a given proceeding requires the consideration of three factors: (1) the private interest affected by the official action; (2) the likelihood of an erroneous deprivation of the private interest through the procedure used, and the comparative effectiveness of an alternate procedure; and (3) the interests counterpoised in the proceeding.[94]

Mathews v. Eldridge[95] set out the framework under which due process claims are currently assessed.[96] In essence, the balancing test weighs the costs of requiring a particular set of procedures against the benefits of the procedures.[97] The test has been criticized as being overly subjective, allowing the court to override legislative pronouncements by simply reevaluating questions of social utility.[98] Nevertheless, the Supreme Court's approach to due process, as stated in *Mathews*, has remained the dominant one.[99]

Yet this analysis mirrors the very balancing test New York has avowedly applied in denying the "clear and convincing" standard in its own disciplinary proceedings.[100] Thus, if the "fair preponderance of

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90. *In re* Ruffalo, 390 U.S. 544, 550 (1968); *see also supra* part IV.A.

91. *In re* Thalheim, 853 F.2d 383, 388 (5th Cir. 1988).

92. Brewer, *supra* note 72, at 928.

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

94. *Id.* at 335.

95. 424 U.S. 319 (1976).

96. *See* A.C. Pritchard, Note, *Government Promises and Due Process: An Economic Analysis of the "New Property,"* 77 VA. L. REV. 1053, 1062 (1991).

97. *See* Mathews, 424 U.S. at 319.

98. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48-49 (1976).

99. GUNTHER, *supra* note 87, at 599.

100. *See supra* text accompanying notes 57-62.

evidence" standard constitutes a denial of due process, New York courts must necessarily be misapplying the test mandated on both the state and federal level.

Significantly, the U.S. Supreme Court held that just such an erroneous refusal to apply the "clear and convincing" evidence standard occurred in New York in *Santosky v. Kramer*, involving proceedings to terminate parental rights over the parent's natural children.[101] Prior to the U.S. Supreme Court's disposition in *Santosky*, the New York Supreme Court ruled that New York State could terminate, despite parental objection, the rights of parents over their child upon a finding, by a "fair preponderance of evidence," that the child had been "permanently neglected."[102] The Appellate Division upheld this standard,[103] and the New York Court of Appeals dismissed the subsequent appeal.[104] The case ultimately reached the U.S. Supreme Court, which held that the "fair preponderance" standard prescribed by the parental severance law violated the Due Process Clause.[105]

The U.S. Supreme Court described the permanent severance of such parental rights as a "fundamental liberty interest of natural parents in the care, custody, and management of their child," which is protected by the Fourteenth Amendment.[106] As such, it falls well within the *Capoccia* requirement for the denial of personal or liberty rights, for which a "clear and convincing" standard is required.[107] Nonetheless, just over one year before the *Capoccia* requirements were outlined, New York refused to raise its standard in parental rights termination proceedings.[108] It was only after Supreme Court intervention that the denial of due process present in the *Santosky* case was recognized.

The *Santosky* decision is noteworthy in one other respect. In arriving at its conclusion, the U.S. Supreme Court noted the fact that thirty-five other states, and the District of Columbia, specified a higher standard of proof than "fair preponderance of evidence" in their own parental rights

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101. Santosky v. Kramer, 455 U.S. 745 (1982).

102. *In re* John AA, 427 N.Y.S.2d 319 (App. Div.), *appeal dismissed sub nom. In re* Apel, 411 N.E.2d 801 (N.Y. 1980), *vacated sub nom.* Santosky v. Kramer, 455 U.S. 745 (1982).

103. *Id.*

104. *In re* Apel, 411 N.E.2d 801 (N.Y. 1980), *vacated sub nom.* Santosky v. Kramer, 455 U.S. 745 (1982).

105. *Santosky*, 455 U.S. at 747-48.

106. *Id.* at 753.

107. *In re* Capoccia, 453 N.E.2d 497, 498 (N.Y. 1983).

108. *In re* John AA, 427 N.Y.S.2d 319 (App. Div.), *appeal dismissed sub nom. In re* Apel, 411 N.E.2d 801 (N.Y. 1980), *cert. granted sub nom.* Santosky v. Kramer, 455 U.S. 745 (1982).

proceedings.[109] The U.S. Supreme Court clearly felt, in deciding the constitutionality of the New York standard, that the rulings of the other states were relevant to deciding the New York case.[110]

The parallels between the *Santosky* decision and the issues presented in attorney disciplinary proceedings are readily apparent. In both contexts, the interest at stake is one of individual liberty rights, and the remedy is severe. In both contexts, New York denied or denies proof of the alleged conduct by a higher standard than a "fair preponderance of evidence." In both contexts, a strong majority of other jurisdictions required the higher "clear and convincing" standard of evidence or its equivalent. Fundamentally, just as due process required New York to raise the standard of proof in *Santosky*—the state's own ruling notwithstanding—so too should due process require that New York raise the standard in its attorney disciplinary hearings.

V. CONCLUSION

Mr. Friedman's assertion that the standard of proof should be higher was not entertained by the New York Court of Appeals.[111] Further, it is difficult to predict whether the higher standard would have altered the outcome of the case in any significant way. Indeed, in *Santosky*, the case was remanded without deciding the outcome under any standard.[112] The Court was far more concerned with the broader ramifications represented by the denial of due process imposed by New York law than the facts in a particular case.[113] *Friedman* presents identical concerns.

Despite the difficulty in ascertaining the precise difference between various standards of proof, adopting a particular standard is more than "'an empty semantic exercise.'"[114] The U.S. Supreme Court has called it "'a crucial component of legal process, [whose] primary function . . . is "to minimize the risk of erroneous decisions."'"[115] In the case of attorney disciplinary proceedings, it is crucial indeed, as the attorney's reputation and livelihood hang in the balance.

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109. *Santosky*, 455 U.S. at 749.

110. *See id.* at 749-51.

111. *In re* Friedman, 609 N.Y.S.2d 578, 586 (App. Div.), *appeal dismissed*, 635 N.E.2d 295 (N.Y.), *cert. denied*, 115 S. Ct. 81 (1994).

112. *Santosky*, 455 U.S. at 770.

113. *See id.*

114. Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting Tippet v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).

115. *Santosky*, 455 U.S. at 757 n.9 (quoting Rehnquist J., dissenting, at 785 (quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 13 (1979))).

The case of *In re Friedman* is particularly appropriate in this regard insofar as the Special Referee originally recommended that Mr. Friedman be suspended for a period of two years.[116] The Appellate Division, in deeming the sanction too lenient,[117] was well within its authority.[118] Yet, it is nonetheless disturbing that the court would impose such a severe punishment despite the conclusions of its own officer.

It is ironic that the New York courts are denying rights to the very individuals whose duties so closely affect the system of justice. Clearly, the courts are concerned with the continued integrity of the justice system, and are attempting to ensure that attorneys are acting with the utmost propriety. Yet in so doing, they are sacrificing the attorney's individual interests. Thus, in seeking to improve the legal process, the New York courts are, in fact, thwarting it.

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116. *In re* Friedman, 609 N.Y.S.2d 578 (App. Div.), *appeal dismissed*, 635 N.E.2d 295 (N.Y.), *cert. denied*, 115 S. Ct. 81 (1994).

117. *Id.* at 587.

118. *See supra* text accompanying note 39.