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The Florida “Three Strikes Rule” for Medical Malpractice Claims: Using a Clear and Convincing Evidence Standard to Tighten the Strike Zone for Physician Licensure Revocation

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**THE FLORIDA “THREE STRIKES RULE” FOR MEDICAL
MALPRACTICE CLAIMS: USING A CLEAR AND CONVINCING
EVIDENCE STANDARD TO TIGHTEN THE STRIKE ZONE FOR
PHYSICIAN LICENSURE REVOCATION**

I. INTRODUCTION

In a speech made to the Senate Judiciary Committee, Chief Justice John Roberts stated, “Judges are like umpires. Umpires don’t make the rules; they apply them.”¹ This comparison of the judiciary to America’s favorite pastime sparked discussion amongst commentators, one of whom remarked that the analogy was a “rhetorically-appealing comment, no doubt, but not entirely accurate in practice.”² Michael McCann, a writer for the Sports Law Blog, used the strike zone of umpire Angel Hernandez to illustrate this purported inaccuracy of Roberts’ statement.³ McCann noted how Hernandez uses a “uniquely-wide strike zone” and questioned whether this modified strike zone is merely an interpretation of the standard Major League Baseball Zone, or whether it is so distinct that it should be viewed as Hernandez “replacing the standard rule with his own rule.”⁴ Although McCann’s example is most analogous to judicial interpretation, it inadvertently touches on another parallel between umpiring and judicial review: the importance of uniform standards.

In baseball, an umpire may be criticized for calling strikes outside of the standard Major League Baseball strike zone because it is the standard used by every team.⁵ As McCann illustrates in his Angel Hernandez example, a fan determines that an umpire’s call is unfair when it deviates from a common standard every umpire is expected to know and uphold. Fairness, however, becomes more complicated when multiple standards exist for the same rule. What if Major League Baseball created two distinct standards for the strike zone or permitted each team to determine the strike zone used for its own

1. Charles Babington & Jo Becker, *Judges are Not Politicians, Roberts Says*, WASH. POST, Sept. 13, 2005, at A1 (quoting Chief Justice John Roberts’ statements to the Senate Judiciary Committee in 2005).

2. Posting of Michael McCann to Sports Law Blog, <http://sports-law.blogspot.com/2005/09/evaluating-judge-john-roberts-analogy.html> (Sept. 14, 2005 06:25 EST).

3. *Id.*

4. *Id.*

5. Major League Baseball Official Baseball Rules § 2.00, available at http://mlb.mlb.com/mlb/downloads/y2007/02_definitions_of_terms.pdf.

playing field? In that case, an umpire, like a judge, could only determine whether a ball fell within a team's designated strike zone. Umpires do not make the standards; they simply apply them.

Unlike Major League Baseball, the "strike zone," or evidentiary standard used by state medical boards in physician licensure proceedings, varies from state to state.⁶ When a board revokes a physician's medical license, it is compelled by state law to apply either a "preponderance" standard or a "clear and convincing" evidence standard, which creates a double-edged sword of competing policy interests.⁷ As a result of the administrative nature of state medical boards, state judges give board decisions highly deferential treatment if a physician appeals.⁸ Judges, like umpires, usually determine whether the designated evidentiary standard was properly applied and will not question the fairness of the standard unless the parties bring the issue before them.⁹ In recent years, however, more and more state judges have critiqued the constitutional soundness and policy arguments behind state medical board evidentiary standards.¹⁰

Currently, the majority of states use a preponderance standard because legislators and judges believe it provides the public greater protection against incompetent physicians.¹¹ Alternatively, advocates in the minority of states that uphold a clear and convincing evidence standard claim that application of a preponderance standard deprives physicians of their constitutional due process rights. Both factions raise legitimate concerns, yet neither has

6. 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, 108–09 (2006).

7. *Id.* at 108–09.

8. *In re License Issued to Zahl*, 895 A.2d 437, 445 (N.J. 2006) ("Our appellate review of an agency's choice of sanction is limited. Courts generally afford substantial deference to the actions of administrative agencies such as the Board. . . . Deference is appropriate because of the 'expertise and superior knowledge' of agencies in their specialized fields . . ." (citing *Matturi v. Bd. of Trs. of the Judicial Ret. Sys.*, 802 A.2d 496, 504 (N.J. 2002))).

9. *See, e.g.*, *N.D. State Bd. of Med. Exam'rs—Investigative Panel B v. Hsu*, 726 N.W.2d 216, 226 (N.D. 2007) ("It is well established that courts exercise a limited review in appeals from decisions by administrative agencies, including the Board.").

10. *See, e.g.*, *In re Setliff*, 645 N.W.2d 601, 608 (S.D. 2002) (holding that due process requires a clear and convincing evidence standard in state medical board proceedings). *But see Hsu*, 726 N.W.2d 216 (holding that state medical boards may use a preponderance of the evidence standard without violating constitutional due process requirements).

11. Spece & Marchalonis, *supra* note 6, at 108 (stating "approximately three-quarters of our states . . . employ the preponderance of the evidence standard of proof in disciplinary proceedings"); 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, 405–06 (2003) (commenting about the public interest concerns by states that employ a preponderance standard).

attempted to create a uniform standard that equally protects the interests of both patients and physicians.

Unfortunately, medical boards are not sufficiently protecting patients from malpractice under either evidentiary standard, which exacerbates the problem. Studies reveal that today's national "malpractice crisis" is the result of inadequate patient safety rather than an influx of frivolous claims and that medical malpractice payments are not only rational, but often a sound indicator of unqualified physicians.¹² A 2007 Public Citizen report showed that approximately six percent of doctors are responsible for almost sixty percent of all malpractice payments, yet most of these doctors are not disciplined at all by their respective medical boards.¹³ The victims of malpractice and their families are responsible for most of the complaints brought before state medical boards, but as few as one and a half percent of these complaints ever reach the hearing stage before the board.¹⁴ Regarding the ratio of medical malpractice payments to discipline, physicians are only one-third as likely "to be convicted of professional misconduct reportable to the National Practitioner Data Bank as they are to have to make a reportable medical malpractice payment."¹⁵ This proves to be a universal problem among states, regardless of the evidentiary standard applied by the board.¹⁶ Neither regime has met the incompetence dilemma with much success. Although a preponderance standard would theoretically result in a greater rate of discipline, the improvement would be negligible due to the lack of prosecution among state medical boards.¹⁷ The crux of the problem does not stem from the minority of

12. PUB. CITIZEN'S CONG. WATCH, THE GREAT MEDICAL MALPRACTICE HOAX: NPDB DATA CONTINUE TO SHOW MEDICAL LIABILITY SYSTEM PRODUCES RATIONAL OUTCOMES 10-12 (2007), available at http://www.citizen.org/documents/NPDB%20Report_Final.pdf. In 2005, 64% of malpractice payments involved death, severe or major permanent injury, paralysis, brain damage or necessitated lifelong care. *Id.* at 7. In contrast, only 32% involved less severe injuries, disproving the myth that the medical liability system compensates undeserving patients. *Id.* Similarly, 82% of the total values paid out from malpractice claims went to patients who suffered significant injuries or death. *Id.* at 7-8.

13. *Id.* at 12-13. The study describes several "repeat offenders" of medical malpractice who were not disciplined by the state medical board at all. *Id.*

14. RANDALL R. BOVBERG & PABLO ALIAGA, STATE DISCIPLINE OF PHYSICIANS: ASSESSING STATE MEDICAL BOARDS THROUGH CASE STUDIES vi (2006), available at <http://aspe.hhs.gov/daltcp/reports/2006/stdiscp/pdf> ("Some 60-90% of complaints came from the public in the study states, almost entirely from patients and families.").

15. Spece & Marchalonis, *supra* note 6, at 109.

16. *See, e.g.*, BOVBERG & ALIAGA, *supra* note 14. The study compiled data from six different state medical boards. *Id.* at 6. The states used for the study were California, Virginia and Washington, which use a clear and convincing evidence standard, and Iowa, Massachusetts and Ohio, which use a preponderance standard. *Id.*

17. *Id.* at 51 ("One executive director suggested that a Board's 'biggest challenge' is to measure its 'quality of decision-making,' for example, in triaging complaints and deciding on prosecutions and sanctions, a sentiment echoed by another state's executive director.").

cases that slip through the cracks due to less stringent evidentiary standards, but rather from the remaining ninety-eight percent of cases that never even make it to a formal disciplinary hearing.

In light of these concerns, one state has taken an unprecedented step toward solving the dilemma of undisciplined repeat malpractice offenders. On November 2, 2004, Florida passed “Amendment 8,” now known as the “Three Strikes Rule” for medical malpractice.¹⁸ According to the amendment, any physician found liable for three medical malpractice actions will no longer be permitted to practice medicine in the state.¹⁹ The legislature, however, subsequently added a caveat to the rule: the findings of repeated medical malpractice must be based “upon clear and convincing evidence.”²⁰ If a doctor was found to have committed medical malpractice by a preponderance of the evidence, the board must examine the record of the case and determine whether the findings would have been supported by clear and convincing evidence.²¹ Otherwise, the incident will not count as a “strike” against the doctor’s license.²² By tightening the strike zone for physician discipline with a clear and convincing evidence standard, the Three Strikes Rule provides safeguards against undeserved license revocations while making a bold step toward protecting the public from incompetent physicians. Although the scheme is controversial on its face, it offers an innovative solution to the medical malpractice dilemma that equally addresses the concerns of physicians and patients. This three strikes regime potentially balances competing concerns more efficiently than medical boards that currently operate under a preponderance standard or a clear and convincing evidence standard alone.

This paper will first provide an overview of physician disciplinary proceedings. Second, it will give a summary of the case law supporting both the preponderance standard and the clear and convincing evidence standard. Third, it will review the statutory scheme provided by the Florida legislature in enacting the Three Strikes Rule and its subsequent provisions. Fourth, it will analyze the statute’s resolution of adverse policy arguments and its potential effects on traditional physician disciplinary schemes. Finally, it will advocate uniform application of a three strikes regime that utilizes a clear and convincing evidence standard.

18. Melissa Morgan Hawkins, *Amendments 7 and 8 Update: Legislation Enabling the Patients’ Right to Know Act and Three Strikes Rule*, 25 TRIAL ADVOC. Q., Spring 2006, at 7.

19. FLA. CONST. art. X, § 26.

20. FLA. STAT. ANN. § 456.50(2) (2007).

21. *Id.*

22. *Id.* See also Hawkins, *supra* note 18, at 10.

II. A BRIEF OVERVIEW OF STATE MEDICAL BOARD DISCIPLINARY PROCEEDINGS

In general, the purpose of physician licensure is to protect the public from those who are unqualified to practice medicine.²³ If a physician is suspected of misconduct, disciplinary action against the physician usually begins with the state medical board, which attempts to ensure that health care providers conform to "sound professional standards of conduct."²⁴ State medical boards derive their powers and procedures from state statutes, and boards may exercise only those powers that are expressly conferred or implied by statute.²⁵ The state statutes also include the evidentiary standard the state medical board applies when conducting disciplinary proceedings. Generally, state legislatures delegate power to hear and determine the charges for physicians to the state board, which also has discretion in determining the punishment for the physician.²⁶ Statutes usually grant boards the power to impose any of the following disciplinary actions: fine, reprimand, censure, probation, limit, condition, suspension or revocation.²⁷ Although these administrative hearings were once fairly informal, "today such adjudicative hearings more closely resemble a non-jury trial in a civil court."²⁸ The process must comport with due process, but the board is given much discretion in the investigation, adjudication and appeals processes.²⁹

The disciplinary process usually begins with the intake of complaints.³⁰ Patients or family members of patients bring the majority of these complaints, but public agencies and hospitals can also file complaints.³¹ Most state boards

23. Mary Feighny & Camille Nohe, *A Species Unto Themselves: Professional Disciplinary Actions*, 71 J. KAN. BAR ASSN. 29, 29–30 (2002) (The purpose of a professional licensing act is to protect the public "against unprofessional, improper, unauthorized and unqualified practice of the healing arts. The goal is to secure to the people the services of competent, trustworthy practitioners. The act seeks to do this through licensure. The licensing by the state, granted only after minimal standards of proficiency are met, amounts to the state's recognition of the licentiate as a qualified practitioner. The continued holding of the license may be taken by the public as official indication those standards are being maintained. The object of both granting and revoking a license is the same—to exclude the incompetent or unscrupulous from practicing the healing arts." (quoting Kan. State Bd. of Healing Arts v. Foote, 436 P.2d 828, 833 (Kan. 1968))).

24. 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 89 (2007).

25. *Id.*

26. *Id.*

27. Feighny & Nohe, *supra* note 23, at 37.

28. BOVBERG & ALIAGA, *supra* note 14, at 27.

29. 61 AM. JUR. 2D, *supra* note 24, § 92 (2007).

30. BOVBERG & ALIAGA, *supra* note 14, at 20–21 ("Most states call all disciplinary cases 'complaints' even when there is no complainant.").

31. *Id.* at 21 (finding that in some states, as many as 90% of the complaints are brought by the public through patients and family members; however, a small contingent of complaints are

require complainants to submit a formal complaint on a written or online form or by telephone before beginning an investigation.³² Once a physician is suspected of improper actions, the board will first conduct an investigation to determine whether there is sufficient evidence to warrant a disciplinary proceeding.³³ During the investigation stage, the board is not required to disclose to the physician either the nature of the charges against him or the identity of his accuser. Due process simply requires providing the physician with notice of the probable cause hearing and allowing the presence of counsel at the hearing.³⁴ If the investigator finds sufficient evidence, most boards appoint an attorney to serve as a “prosecutor” in the disciplinary proceeding.³⁵

The hearing itself resembles formal adjudication in that both parties are permitted to present evidence, cross-examine witnesses and argue the case; however, the hearings are typically more relaxed than formal adjudications with regard to evidentiary rules.³⁶ Presiding officers in state medical board proceedings are not bound by formal rules of evidence, so several forms of evidence that are normally excluded in formal adjudications may be considered.³⁷

Similar to a formal adjudication, the board must support its decision to discipline a physician with sufficient evidence. Sufficiency of the evidence depends greatly on the evidentiary standard applied. The essential function of this evidentiary standard is to “instruct the factfinder concerning the degree of confidence our society thinks [the factfinder] should have in the correctness of

also brought by health personnel, board staff, hospital peer review, malpractice claims notifications and police or drug enforcement officials).

32. *Id.* Ohio is one of the few states that allow complainants to submit complaints anonymously. Most states require the complainants to submit their names in order to ease investigation and prosecution. *Id.*

33. Feighny & Nohe, *supra* note 23, at 37.

34. *Id.* at 35.

35. *Id.* at 37.

36. *Id.* at 42.

37. *Id.* Feighny and Nohe explain the differences in evidentiary rules between board hearings and formal trials:

[T]estimony is not necessarily excluded simply because the evidence is hearsay. Nonparties may be allowed the opportunity to present oral or written statements provided the parties are able to challenge or rebut any such statements, including requesting that the statement be given under oath. Document copies may be readily available. Official notice may be taken of the agency’s record of other proceedings, technical or scientific matters within the agency’s specialized knowledge, certain standards adopted by state or federal agencies or nationally recognized organizations, and any matter that can be judicially noticed in court provided the parties are notified and afforded the opportunity to contest the ruling.

Id.

factual conclusions for a particular type of adjudication.”³⁸ The preponderance standard, which is most often used in civil cases, means simply that it is more likely than not that the physician committed the alleged malpractice or egregious act. As in civil cases, if the evidence is perfectly balanced on both sides, the board cannot find the physician accountable in accordance with the preponderance standard. The clear and convincing evidence standard, in contrast, more closely resembles the standard in criminal adjudications. This standard is not as difficult to meet as the “beyond a reasonable doubt” standard in criminal trials. However, it clearly requires a greater amount of evidence than the preponderance standard. Although the majority of states apply a preponderance standard in state medical board disciplinary proceedings, nearly one-quarter of states apply a clear and convincing evidence standard.³⁹

If a board decides to sanction a physician, the decision is subject to judicial review.⁴⁰ Unlike most civil adjudications, “the ‘standard of judicial review of board decisions is extremely deferential: courts will generally only overturn board decisions that are unsupported by substantial evidence in the record.’”⁴¹ Among the limited circumstances that warrant a reversal, a state court may reverse the decision of a board if the order violates the physician’s constitutional rights. Usually, as long as the record contains adequate findings of fact sufficient to support license revocation and the court sees no constitutional concerns, the court will affirm the board’s decision.⁴² This

38. N.D. State Bd. of Med. Exam’rs—Investigative Panel B v. Hsu, 726 N.W.2d 216, 227 (N.D. 2007) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

39. Spece & Marchalonis, *supra* note 6, at 110–11.

40. Widmer, *supra* note 11, at 396.

41. *Id.* (quoting Timothy P. McCormick, Comment, *Expert Testimony and Professional Licensing Boards: What Is Good, What Is Necessary, and the Myth of the Majority-Minority Split*, 53 ME. L. REV. 139, 144 (2001)).

42. 61 AM. JUR. 2D, *supra* note 24, at § 102. See also *Hsu*, 736 N.W.2d at 226. According to North Dakota law under N.D. CENT. CODE § 28–32–46, a board decision must be affirmed by a court unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency’s rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

Id. at 226.

adequacy will naturally vary depending on the evidentiary standard applied by the board; a lower standard will necessitate less evidence in upholding disciplinary decisions.

III. BALANCING COMPETING INTERESTS: A SCHISM AMONG STATE COURTS

When administrative proceedings depart from the standard procedural safeguards provided in formal adjudications, constitutional due process concerns may arise. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”⁴³ Similarly, the Due Process Clause of the Fourteenth Amendment provides that the states may not “deprive any person of life, liberty or property, without due process of law.”⁴⁴ Despite the Fifth Amendment’s linguistic simplicity, due process determinations in administrative proceedings are more complex than due process determinations in formal court adjudications. State medical board proceedings differ from formal adjudications in several ways, but these differences do not necessarily create a violation of due process.⁴⁵ Unlike medical malpractice actions, which usually entail compensating the personal harm suffered by a particular plaintiff or class, physician licensure revocation entails protecting the interests of the public at large. As a result, due process analysis entails a complicated balancing act between individual liberties and the interests of the public.⁴⁶

It is worthy to note that appeals from professional disciplinary actions may be brought in federal court when the complainant alleges violation of constitutional due process.⁴⁷ It appears, however, that the majority of due process challenges to state medical board determinations are brought in state court; therefore, the background of this section will place emphasis on state court jurisprudence regarding state medical board due process challenges.⁴⁸

43. U.S. CONST. amend. V.

44. U.S. CONST. amend. XIV § 1.

45. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 266–67 (1970).

46. *See, e.g., Hsu*, 726 N.W.2d at 227; *Nguyen v. State, Dept. of Med. Quality Assurance Comm’n*, 29 P.3d 689, 693 (Wash. 2001) (en banc).

47. *See, e.g., Romero-Barcelo v. Acevedo-Vila*, 275 F. Supp. 2d 177, 189–90 (D. P. R. 2003) (involving an attorney who appealed disciplinary actions from an attorney disciplinary proceeding, claiming that he was deprived of constitutional due process rights).

48. This author has failed to find any court cases brought in federal court by physicians challenging state medical board determinations on the basis of constitutional due process. The following cases involving state board determinations were brought exclusively in state court.

A. *The Three-Prong Test for Due Process Under Mathews v. Eldridge*

Mathews v. Eldridge serves as the landmark case in challenging administrative procedures on the basis of constitutional due process objections.⁴⁹ Under *Mathews*, a court must apply a three-prong test to determine whether or not the agency action violates the Due Process Clause of the Fifth Amendment.⁵⁰ This test has been instrumental to courts in the context of the evidentiary standards dilemma for state medical boards.⁵¹

In *Mathews*, the respondent, Eldridge, collected cash benefits under the disability insurance benefits program of the Social Security Act, which provides workers with funds during times when they are completely disabled.⁵² Eldridge collected his first payment in June 1968 and then received a questionnaire in 1972 from the state agency that monitored his medical condition.⁵³ On the questionnaire, Eldridge indicated that his medical condition had not improved and provided the administration with contact information for his treating physicians.⁵⁴ The state agency, after receiving the questionnaire and medical records from Eldridge's physician and psychiatric consultant, made a tentative determination that he was no longer eligible for disability benefits after May 1972.⁵⁵ The agency informed Eldridge that he could request reasonable time in which to obtain additional information to dispute the agency decision.⁵⁶ In a letter, Eldridge responded that the agency had enough evidence to establish that he had a disability, but the agency still revoked his status as a disabled person in May 1972; the determination was accepted by the Social Security Administration shortly thereafter.⁵⁷ The Social Security Administration informed Eldridge that he would have the right to state agency reconsideration in six months.⁵⁸

Following the determination, Eldridge sued in the Western District Court of Virginia, claiming that the state agency violated his constitutional due process right when it revoked his benefits without an oral evidentiary hearing,

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

50. *Id.* at 334–35.

51. See, e.g., *Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991); *Rucker v. Mich. Bd. of Med.*, 360 N.W.2d 154, 155 (Mich. Ct. App. 1984); *Petition of Grimm*, 635 A.2d 456, 461 (N.H. 1993); *In re Polk License Revocation*, 449 A.2d 7, 13 (N.J. 1982); *Gandhi v. Med. Examining Bd.*, 483 N.W.2d 295, 298 (Wisc. Ct. App. 1992). The *Mathews* framework has translated into the context of most medical licensure revocation cases, even though the framework originated in the context of a disability benefits determination under the Social Security Act.

52. *Mathews*, 424 U.S. at 323 (citing 42 U.S.C. § 423).

53. *Id.*

54. *Id.* at 323–24.

55. *Id.* at 324.

56. *Id.*

57. *Mathews*, 424 U.S. at 324.

58. *Id.*

which welfare beneficiaries are entitled to receive under the Act.⁵⁹ The district court held that under *Goldberg v. Kelly* and *Wheeler v. Montgomery*, an agency under the Social Security Act cannot deprive a beneficiary of disability benefits without giving the beneficiary “an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.”⁶⁰ Although the district court recognized that disability beneficiaries are not as dependent on their supplemental benefits as welfare recipients or the elderly, the court held that the disability payments did not create an “emergency situation” that would permit a lesser due process standard.⁶¹ The Fourth Circuit affirmed the district court and the Supreme Court reversed.⁶²

The Supreme Court in *Mathews* noted that “[D]ue process’ is flexible and calls for such procedural protections as the particular situation demands,” which indicates that not all administrative agencies must follow the same procedures to comport with requirements of the Fifth Amendment.⁶³ To determine whether a plaintiff has been deprived of due process, the Court examined three factors: (1) the private interests affected by the administrative determination; (2) the risk of wrongful deprivation of those interests by the procedures employed by the agency; and (3) the government’s interest, which includes any fiscal or administrative burdens that the suggested procedures would create.⁶⁴ In weighing the governmental, or public, interest, the decision involves a determination as to when the Constitution imposes adjudicative procedures on administrative action to assure fairness.⁶⁵

When the Court applied the three-prong test in *Mathews*, it distinguished a disability benefits scenario from the facts present in *Goldberg*, where due process required an oral evidentiary hearing.⁶⁶ With regard to the private interests affected, the Court determined that disability recipients, unlike welfare recipients, receive compensation from a potential variety of sources, so Eldridge’s deprivation did not rise to the level of that suffered by the affected

59. See *Eldridge v. Weinberger*, 361 F. Supp. 520, 521 (W.D. Va. 1973), *aff’d* 493 F.2d 1230 (4th Cir. 1984), *rev’d sub nom.*, *Mathews*, 424 U.S. at 325.

60. *Mathews*, 424 U.S. at 326 (citing *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *Wheeler v. Montgomery*, 397 U.S. 280, 281–82 (1970)).

61. *Eldridge*, 361 F. Supp. at 527–28 (“It is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.” (quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971))).

62. *Eldridge*, 493 F.2d at 1230 *rev’d*, *Mathews*, 424 U.S. at 318.

63. *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

64. *Id.* at 334–35.

65. *Id.* at 348.

66. *Id.* at 349.

parties in *Goldberg*.⁶⁷ Second, the Court determined that an oral evidentiary hearing was less probative for disability beneficiaries, where an administrative finding was based substantially on "routine, standard, and unbiased" medical records, than in the context of *Goldberg* welfare recipients, where "issues of witness credibility and veracity often are critical to the decisionmaking process."⁶⁸ In balancing the final concern of the public interest, the Court predicted that adding a mandatory evidentiary hearing to a disability benefit proceeding would be costly and tedious and would not provide substantial additional safeguards to the fairness of the administrative process.⁶⁹

Although the *Mathews* decision entailed a critique of specific procedure in the context of a Social Security Act claim, the *Mathews* three-prong test is applied in most cases where a plaintiff raises a due process challenge.⁷⁰ In particular, the test anchors most opinions involving the evidentiary standards question in physician disciplinary proceedings.⁷¹ Courts are split, however, in striking the appropriate balance between the competing interests considered in *Mathews*.

B. Judicial Advocates of the Preponderance Standard: North Dakota State Board of Medical Examiners—Investigative Panel B v. Hsu

As stated above, the majority of state medical boards use the preponderance standard in their proceedings, pursuant to a statute usually found in the state's medical practice act.⁷² In several of these states, physicians have appealed to the state court for judicial review of the standard. In January 2007, the North Dakota Supreme Court ruled on such an issue and affirmed the state board's application of preponderance standard.⁷³

In *Hsu*, the Court applied the *Mathews* test and found that a state medical board's use of the preponderance standard comports with due process.⁷⁴ Dr. Hsu was a physician licensed in North Dakota who maintained two independent rural health clinics.⁷⁵ In 2003, the state medical board brought

67. *Id.* at 343.

68. *Mathews*, 424 U.S. at 343–44. The Court also determined that the second requirement is met in disability benefit actions because the recipient is entitled to view the record prior to the cut-off of benefits. *Id.* Also, the beneficiary may submit additional evidence to specifically refute any crucial issues the decisionmakers saw in deciding to revoke the recipient's benefits. *Id.* This same rationale is not applicable in *Goldberg*. *Id.*

69. *Id.* at 347–48.

70. See cases accompanying *supra* note 51.

71. See cases accompanying *supra* note 51.

72. 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 89 (2007).

73. N.D. State Bd. of Med. Exam'rs—Investigative Panel B v. Hsu, 726 N.W.2d 216, 235 (N.D. 2007).

74. *Id.* at 232.

75. *Id.* at 219.

charges against Dr. Hsu for rendering inappropriate care to seven of his patients and failing to maintain proper medical records for those patients.⁷⁶ An administrative law judge recommended a finding of inappropriate care to the state medical board and suggested revoking Dr. Hsu's license unless he agreed to subject himself to a system of monitoring and review imposed by the board.⁷⁷ The board decided to temporarily suspended Dr. Hsu's license.⁷⁸ Shortly thereafter, while the board was still determining whether to revoke Dr. Hsu's license, Investigative Panel B of the board issued a second complaint against Hsu in 2004, which alleged improper treatment of three other patients and inadequate documentation practices.⁷⁹ After examining the evidence and circumstances surrounding the second complaint, the administrative law judge renewed his prior recommendation and suggested revocation unless Dr. Hsu agreed to monitoring and evaluation by the board.⁸⁰ The board adopted all but one of the administrative law judge's findings and conclusions and opted to revoke Dr. Hsu's license instead of implementing a monitoring and reviewing scheme.⁸¹

Dr. Hsu ultimately appealed the board's decision to the North Dakota Supreme Court, claiming that the board's use of a preponderance evidentiary standard under North Dakota statute section 28-32-46(5) violated his due process rights.⁸² In its review, the court applied the *Mathews* three-prong test

76. *Id.*

77. *Id.* Several states give state medical boards the authority to discipline a physician without oversight by an administrative law judge, while others require an exhaustion of administrative remedies via review by an administrative law judge prior to filing in state court. BOVBERG & ALIAGA, *supra* note 14, at 27–28.

78. *Hsu*, 726 N.W.2d at 219.

79. *Id.* In the second complaint, the administrative law judge recommended finding improper care for Dr. Hsu's failure to timely diagnose and treat an acute myocardial infarction, who subsequently died as a result. The administrative law judge, however, recommended no finding of inappropriate care for the other two patients because his treatment complied with the "patients' families' wishes and essentially obtained informed consent from the patients' families." *Id.* at 220.

80. *Id.* at 221. In response to Hsu's second set of charges, the administrative law judge noted: "Dr. Hsu is not a great physician, but neither does that evidence, even when coupled with the evidence from this hearing, show that he is a poor physician. Rather, the evidence shows that he is a caring physician, though perhaps a somewhat misguided physician." *Id.* at 220.

81. *Id.* at 221.

82. *Id.* Hsu originally appealed to the district court, which determined that his due process rights were not violated, but remanded the case as a result of the Board's violation of N.D. CENT. CODE § 28-32-39(3). *Id.* The court held that the Board unduly delayed its decision on the administrative law judge's recommendations for Hsu's 2003 complaint, and therefore the recommendations of the administrative law judge became the board's final order. *Id.* The court also held the Board's rationale for departing from the administrative law judge's recommendation for the 2004 complaint was insufficient and not supported by the record. *Id.* On remand, the

and determined that a preponderance standard does not violate the due process requirements of the state constitution or United States Constitution.⁸³

The court applied the first prong of the *Mathews* test and determined that a physician maintains a substantial private interest in his ability to make a living in the medical field; however, that interest does not rise to a "fundamental right" requiring greater protection by a higher evidentiary standard.⁸⁴ The court's rationale for the first prong depended greatly on the holding from *In re Polk*, a New Jersey case involving the evidentiary standard issue.⁸⁵ In *Polk*, the court stated that the right to make a living is not a fundamental right.⁸⁶ Though occupational licensure closely resembles a property right, the right is "always subject to reasonable regulation in the public interest."⁸⁷

Second, the *Hsu* court determined that a physician's private interest is properly protected from wrongful deprivation under the preponderance standard.⁸⁸ First, the court followed *Polk's* rationale in determining that state medical board disciplinary proceedings involve "high substantive standards as a basis for discipline and the licensee [can] defend adequately against the charges through the protections of the administrative process."⁸⁹ Due to the adversarial nature of the proceedings, the physician is protected by his ability to present evidence and defenses.⁹⁰ The *Hsu* court also noted that in state medical board proceedings, the factfinders consist primarily of medical professionals, thus minimizing the possibility of confusion and

Board clarified its decision to depart from the administrative law judge's recommendation and once again revoke's Dr. Hsu's license. *Id.*

83. *Hsu*, 726 N.W.2d at 230.

84. *Id.* at 230 (applying the rationale from *In re Polk Licensure Revocation*, 449 A.2d 7 (N.J. 1982)). In *Polk*, the plaintiff allergist was accused of sexually explicit behavior by several of his young female patients. *Polk*, 449 A.2d at 10–11. The lower court also supported its decision to apply a clear and convincing evidence standard by citing parallels between physician licensure hearings and attorney licensure proceedings, stating it was "unable to perceive any justifiable basis for the lawyer to receive the advantage of the more favorable standard of quantum of proof in disciplinary proceedings, while denying the benefit of the same standard to the physician similarly situated." *Id.* The New Jersey Supreme Court, however, found this "equal protection" argument under the Constitution unpersuasive and stated that "a state is free to 'deal with the different professions according to the needs of the public in relation to each' and 'no basis for the charge of an unconstitutional discrimination' is established simply because a regulation affects only one profession." *Id.* at 17 (citing *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610–11 (1935)).

85. *Hsu*, 726 N.W.2d at 229.

86. *Polk*, 449 A.2d at 13–14 ("[I]ndividual interests not rising to the level of fundamental right are not entitled to protection by a standard of proof greater than a fair preponderance.").

87. *Id.* at 13 (quoting *Jeselsohn, Inc. v. Atlantic City*, 358 A.2d 797, 799 (N.J. 1976)).

88. *Hsu*, 726 N.W.2d at 230.

89. *Id.* at 229 (citing *Polk*, 449 A.2d at 15–17).

90. *Id.* (citing *Petition of Grimm*, 635 A.2d 456, 461 (N.H. 1993)).

misunderstanding about the substantive matter of the proceeding.⁹¹ The court concluded that the nature of the proceeding, coupled with the protections of the administrative process, sufficiently satisfied a physician's due process rights under a preponderance standard.⁹²

Finally, after applying the third prong of the *Mathews* test, the *Hsu* court determined that any interests a physician possesses in licensure are overshadowed by the "paramount interest in protecting the general health and welfare of the public."⁹³ According to the court, the special nature of the medical profession is such that "incompetence, wrongdoing, or misconduct could threaten life itself and protecting citizens was one of the fundamental reasons for a government's existence."⁹⁴ Given the serious nature of possible wrongdoing by physicians, the court concluded the state's interest substantially outweighs the interests of the physician.⁹⁵

Although the court recognized the substantial interest physicians have in pursuing a living, the *Hsu* court ultimately decided that the good of society outweighs any harm a physician would incur with license revocation.⁹⁶ The court determined that this societal good is best served with a preponderance standard and that due process is sufficiently granted to physicians with a lower standard, which follows the rationale of several other state courts that advocate the preponderance standard.⁹⁷

C. *Judicial Advocates of the Clear and Convincing Evidence Standard:*

Nguyen v. State, Dept. of Health Med. Quality Assurance Comm'n

Just as several state judges fervently advocate a preponderance standard, other state judges firmly advocate a clear and convincing evidence standard.⁹⁸ *Nguyen v. State, Department of Health Medical Quality Assurance Commission* is a recent example of how courts applying the *Mathews* test may come to very different conclusions regarding the due process implications of the preponderance standard.

91. *Id.* at 230. *See also Grimm*, 635 A.2d at 461.

92. *Hsu*, 726 N.W.2d at 230.

93. *Id.* at 229 (quoting *Polk*, 449 A.2d at 14).

94. *Id.* at 230 (citing *Gandhi v. Med. Examining Bd.*, 483 N.W.2d, 295, 299 (Wisc. Ct. App. 1992)).

95. *Id.* ("We are mindful a physician's interest in a medical license is a property interest and is not insubstantial. In our view, however, the State's interest in protecting the health, safety, and welfare of its citizens is superior to a licensee's interest.")

96. *Id.*

97. *Hsu*, 726 N.W.2d at 229–230.

98. *See, e.g., Nguyen v. State, Dept. of Med. Quality Assurance Comm'n*, 29 P.3d 689, 689 (Wash. 2001) (en banc); *Johnson v. Bd. of Gov. of Reg. Dentists*, 913 P.2d 1339, 1342 (Okla. 1996); *Painter v. Abels*, 998 P.2d 931, 940–41 (Wyo. 2000).

Dr. Nguyen was a medical doctor licensed to practice in Washington state.⁹⁹ In 1989, the state medical board suspended Dr. Nguyen's license after determining "his practice had fallen below acceptable professional standards."¹⁰⁰ The suspension was stayed on the condition that Nguyen be monitored by another doctor. Dr. Nguyen complied with this requirement and in 1991, the monitoring physician recommended that monitoring be reduced.¹⁰¹ Monitoring continued until the state board brought a new set of charges against Dr. Nguyen in 1996.¹⁰² The new charges alleged Dr. Nguyen rendered unprofessional care in the treatment of twenty-two patients and that Dr. Nguyen had engaged in sexual misconduct with three of his patients.¹⁰³ The state medical board summarily suspended Dr. Nguyen's license pending a formal hearing on the merits of the allegations.¹⁰⁴ After a six-day hearing in which counsel represented Dr. Nguyen, the state medical board found by a preponderance of the evidence that Dr. Nguyen had engaged in sexual misconduct with three of his patients.¹⁰⁵ As a result, the board revoked Dr. Nguyen's medical license and forbid him to seek re-licensure for five years.¹⁰⁶

Dr. Nguyen appealed the decision in state court, claiming that his constitutional due process rights had been violated when the board applied a preponderance standard.¹⁰⁷ The *Nguyen* court applied the *Mathews* test and determined that due process requires state medical boards to use a clear and convincing evidentiary standard.¹⁰⁸

In determining the private interests of the physician, the first prong of the *Mathews* test, the *Nguyen* court considered more than just the physician's interest in pursuing a living.¹⁰⁹ In civil proceedings, the interest of the physician is exclusively proprietary. Although the physician has an interest in keeping his money, he does not risk losing the ability to earn money altogether.¹¹⁰ By contrast, in disciplinary proceedings conducted by state

99. *Nguyen*, 29 P.3d at 689.

100. *Id.* at 689–90.

101. *Id.* at 690.

102. *Id.*

103. *Id.*

104. *Nguyen*, 29 P.3d at 690.

105. *Id.*

106. *Id.*

107. *Id.* Nguyen also claimed that use of the preponderance standard violated the Equal Protection Clause because attorney disciplinary proceedings, in contrast, used a clear and convincing evidentiary standard. *Id.* The court, determining that due process required a clear and convincing evidentiary standard, declined to decide the equal protection issue. *Id.* at 697.

108. *Id.* at 693–97.

109. *Nguyen*, 29 P.3d at 694.

110. *Id.*

medical boards, the court claimed that doctors have a liberty interest in the preservation of their professional reputations as well.¹¹¹ The court remarked:

“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 tens (if not hundreds) of thousands of dollars pursuing.”¹¹²

Unlike civil proceedings, disciplinary proceedings are “quasi-criminal”; any adverse consequences of a proceeding are punitive in nature.¹¹³ Applying this rationale from *Addington v. Texas*, the *Nguyen* court held that these special interest considerations afford a doctors a fundamental interest in their profession.¹¹⁴

In applying the second prong of the *Mathews* test, the *Nguyen* court contradicted the rationale used by preponderance courts. The *Nguyen* court was also not convinced that procedural safeguards under a preponderance standard were sufficient.¹¹⁵ The court believed the mechanisms of the proceeding, such as the right to an attorney, the right to judicial review and even the right to a hearing are all irrelevant to the issue of reducing the chance of error.¹¹⁶ Regarding fairness, the court held that a risk of error is already high because (1) the agency is permitted to act as investigator, prosecutor and decisionmaker; (2) the subjective nature of determining standards of conduct, which usually depend on opinion more than set rules; and (3) a lower burden of proof increases the chances that a physician may be deprived of a license based on an isolated instance.¹¹⁷

Finally, the *Nguyen* court examined the public interest under the *Mathews* test. In contrast with cases like *Hsu*, the court did not believe a clear and convincing evidence standard would cause greater harm to the public. The *Nguyen* court explained that although public protection is important, “the government’s interests are only furthered by medical disciplinary proceedings which reach an accurate and reliable result.”¹¹⁸ The court determined that in actuality, the public’s interest would be better served by a clear and convincing

111. *Id.*

112. *Id.*

113. *Id.* (citing *In re Revocation of License of Kindschi*, 319 P.2d 824 (1958)).

114. *Nguyen*, 29 P.3d at 694 (citing *Addington v. Texas*, 441 U.S. 418, 424 (1979)). *Addington* requires proceedings that are “quasi-criminal” in nature to use a clear and convincing evidence standard. The rationale in *Addington* has been used to describe licensure revocation procedure for attorneys as well as physicians. See, e.g., *Golden v. State Bar of Cal.*, 2 P.2d 325, 329 (1931).

115. *Nguyen*, 29 P.3d at 695.

116. *Id.*

117. *Id.* at 695–96.

118. *Id.* at 696–97.

evidence standard because it would result in fewer erroneous license revocations.¹¹⁹

IV. A NEW SOLUTION: THE FLORIDA "THREE STRIKES RULE"

Although many states have taken sides in the debate by choosing one standard over the other, the U.S. Supreme Court has refused to settle the issue.¹²⁰ Florida, on the other hand, has taken a different approach in an attempt to reconcile the competing interests of the issue. In a bold and controversial move, Floridians passed Amendment 8 ("the Amendment") to their state constitution in 2004, which created a Three Strikes Rule that revokes the licenses of physicians found to have committed three instances of medical malpractice.¹²¹

A. *The Citizens' Initiative: Amendment 8*

Preceding Florida's 2004 election, the Academy of Florida Trial Lawyers backed a citizens' initiative to support, among other things, two proposed amendments to the Florida constitution.¹²² The Amendment, now known as the Three Strikes Rule, stated: "No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a doctor."¹²³ The Amendment would affect all doctors practicing in Florida and would take all medical malpractice judgments into account, regardless of whether the malpractice suit had been decided in or out of state.¹²⁴ Floridians for Patient Protection ("FPP") sponsored the Amendment and raised almost

119. *Id.* at 697.

120. *See* Wash. State Med. Quality Assurance Comm'n v. Nguyen, 29 P.3d 689, *cert. denied*, 535 U.S. 904 (2002).

121. FLA. CONST. art. X, § 26.

122. Mark D. Killian, *Academy, FMA Square Off Over Amendments*, 31 FL. BAR NEWS 13 (2004). The other proposed amendment advocated by the Academy of Florida Trial Lawyers, "Amendment 7," promoted citizen access to peer review documents and adverse incident reports of physicians as well as fixed rates for physician services to all patients. *Id.*

123. FLA. CONST. art. X, § 26. The "Three Strikes" Amendment was one of three citizen's initiatives on the ballot for that election. Killian, *supra* note 122, at 13. "Amendment 3," backed by the Florida Medical Association, essentially decreased the percentage of attorney's fees for damages awarded to successful medical malpractice litigants. *Id.* "Amendment 7," the other proposed amendment advocated by the Academy of Florida Trial Lawyers, would allow citizen access to peer review documents and adverse incident reports of physicians. *Id.*

124. FLA. CONST. art. X, § 26. The amendment defines medical malpractice as:

both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized in general law related to health care providers' licensure, and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice.

Id.

\$12 million by April 2004 in support of the initiative.¹²⁵ The ballot title for the Amendment read “Public Protection from Repeated Medical Malpractice.”¹²⁶

Prior to the passage of the Amendment, the Department of Health had discretion in the discipline of physicians for “gross or repeated malpractice.”¹²⁷ The Department maintained the authority to revoke medical licenses of physicians who consistently and repeatedly committed malpractice, but FPP argued that the Department had been too lenient in exercising its authority.¹²⁸ In a 2002 national state survey, Florida ranked forty-fourth in the number of serious disciplinary actions taken against physicians. Florida’s low score raised “serious questions about the extent to which patients . . . [were] being protected from physicians who might well be barred from practice in states with boards that [were] doing a better job of disciplining physicians.”¹²⁹ Ironically, a Public Citizen survey revealed “6 percent of the doctors in Florida [were] responsible for half the malpractice.”¹³⁰ The initiative was targeted at these incompetent physicians who were allegedly responsible for high industry-wide premiums.¹³¹

The Amendment was met with both fear and criticism from the medical profession.¹³² Several doctors thought the Three Strikes Rule, which happened to be heavily supported by attorneys, was aimed at forcing doctors to settle cases.¹³³ The medical community feared a mass exodus of physicians from Florida, particularly in the high-risk areas of obstetrics, neurosurgery, orthopedic surgery and trauma care.¹³⁴ The Florida Dental Association believed the Amendment raised due process concerns because the rule would lower the evidentiary standard in malpractice suits from clear and convincing evidence to a mere preponderance standard.¹³⁵ Doctors also expressed concern

125. OFFICE OF ECON. & DEMOGRAPHIC RESEARCH, THE FLORIDA LEGISLATURE, INITIATIVE FINANCIAL INFORMATION STATEMENT: PUBLIC PROTECTION FROM REPEATED MEDICAL MALPRACTICE (2004), available at http://edr.state.fl.us/conferences/constitutional%20impact/2004%20Ballot/a4fis_complete.pdf.

126. *Id.*

127. *Id.*

128. *Id.*

129. PUBLIC CITIZEN, RANKING OF STATE MEDICAL BOARD SERIOUS DISCIPLINARY ACTIONS IN 2002 (2002), available at <http://www.citizen.org/publications/release.cfm?ID=7234>.

130. Siobhan Morrissey, *Doctors Fear Three-Strikes Law: Florida Amendment Could Make Med-Mal Settlements a Law Practice Niche*, 45 A.B.A. J. E-REPORT 3 (2004).

131. Steve Ellman, *Capped, Exposed and Ejected: Plaintiff Lawyers and Doctors Warn of Dire Consequences in Battle Over Nov. 2 Ballot Initiatives to Limit Attorney Fees, Open Medical Error Records, and Revoke Repeat Offenders’ Licenses*, PALM BEACH DAILY BUS. REV., Oct. 11, 2004, at 7.

132. *Id.* at 7–8.

133. *Id.* at 8.

134. Siobhan Morrissey, *Med-Mal War Hits the Ballot*, 30 A.B.A. J. E-REPORT 1, 2 (2004).

135. Ellman, *supra* note 131, at 8.

over retroactive application: Would doctors who already had two malpractice judgments against them have to settle future cases out of fear of losing their licenses?¹³⁶

To resolve some of these issues, the Florida Attorney General requested an advisory opinion from the Florida Supreme Court regarding the Amendment's constitutionality under Florida law.¹³⁷ The court determined (1) whether the Amendment satisfied the single-subject requirement under Florida's constitution;¹³⁸ and (2) whether the ballot title and summary satisfied the requirements imposed by Florida law.¹³⁹ The Florida Medical Association argued the Amendment violated the single-subject requirement because it would substantially alter or perform "the functions of multiple aspects of government."¹⁴⁰ The court rejected this argument and found that the Amendment did not affect the legislative or judicial branch in "precipitous" or "cataclysmic" ways that would justify striking the proposal.¹⁴¹ The court also rejected that the Amendment would require license revocation on the basis of a preponderance standard instead of the clear and convincing evidence standard applied by the state medical board, which would force the judiciary to either overrule established law or change the standard of proof in malpractice cases.¹⁴² The court stated that this speculation was premature, despite potential for the Amendment's "broad ramifications."¹⁴³ Next, the Florida Medical Association argued the Amendment's language violated Florida law because it was misleading and ambiguous in lacking clear definitions for terms like "medical malpractice" and "found to have committed."¹⁴⁴ The court also rejected these arguments and held that Florida law did not require "an

136. *Id.*

137. *In re* Advisory Opinion to Att'y Gen. re Pub. Prot. from Repeated Malpractice, 880 So. 2d 667, 668 (Fla. 2004).

138. *See* FLA. CONST. art. XI, § 3 ("The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment . . . shall embrace but one subject and matter directly connected therewith.")

139. *In re* Advisory Opinion to Att'y Gen. re Pub. Prot. from Repeated Malpractice, 880 So.2d at 669–73. *See* FLA. STAT. ANN. § 101.161 (2007) ("Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language.").

140. *In re* Advisory Opinion to Att'y Gen. re Pub. Prot. from Repeated Malpractice, 880 So.2d at 669.

141. *Id.* at 670 (citing *In re* Advisory Opinion to Att'y Gen. re Requirement for Adequate Pub. Educ. Funding, 703 So.2d 446, 450 (Fla. 1997)).

142. *Id.* at 670–71.

143. *Id.* at 671 (quoting *In re* Advisory Opinion to Att'y Gen.—English—The Official Language of Florida, 520 So.2d 11, 13 (Fla. 1988)).

144. *Id.* at 671–73.

exhaustive explanation of the interpretation and future possible effects of the amendment' . . . in the ballot title and summary."¹⁴⁵

Despite the controversy, the Florida Supreme Court approved the language of the proposed amendment, and the ballot was put to a vote in the November election.¹⁴⁶ On November 2, 2004, the Amendment passed by a substantial margin.¹⁴⁷

B. Clarifications to Amendment 8 Integrate a Clear and Convincing Evidence Standard

On November 4, 2004, physicians were already discussing challenges to the Amendment, which was then part of the Florida constitution.¹⁴⁸ Attorneys for physicians argued that the Amendment was unconstitutional "because it pressure[d] doctors to surrender their due process guarantee to trial by jury" by not counting pre-trial settlements toward a doctor's three strikes.¹⁴⁹ Another concern arose from the Amendment's application to out-of-state judgments where standards of proof may differ.¹⁵⁰ As a result of several concerns over the implementation of the Amendment, the Florida Hospital Association convinced the circuit court to stay the enforcement of the Amendment for a year in order to allow legislators to draft enabling legislation.¹⁵¹

In late April 2005, the State House passed two bills explaining how the Amendment would be put into effect. First, the legislation provided that only incidents occurring on or after November 2, 2004, would count toward a physician's three strikes.¹⁵² Similarly, multiple findings of malpractice arising from the same incident and incidents involving multiple claimants would count only as a single strike.¹⁵³ For the purposes of the Amendment, strikes would not include settlements—only final judgments in a court of law, final administrative agency decisions or decisions of binding arbitration would

145. *Id.* at 673 (citing Advisory Opinion to Att'y Gen. re Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ., 778 So.2d 888, 899 (Fla. 2000)).

146. *Id.* at 670.

147. Steve Ellman, *Lawyers' Challenges Already in the Works*, MIAMI DAILY BUS. REV., Nov. 4, 2004, at 1–2 (stating that Amendment 8 passed with the support of more than 70% of Florida voters).

148. *Id.* at 2.

149. *Id.*

150. *Id.*

151. Steve Ellman, *Ignoring the Voters: Interest Groups Battle in Court to Block Constitutional Amendments Approved by Floridians Last Month*, MIAMI DAILY BUS. REV., Dec. 20, 2004, at 10.

152. FLA. STAT. ANN. § 456.50(1)(h) (2007).

153. § 456.50(1)(d).

count.¹⁵⁴ One clarification, however, would help to alleviate physician concerns over a "surge of malpractice claims."¹⁵⁵

In its enabling legislation, Florida lawmakers decided to safeguard the procedural due process rights of physicians by applying a strict evidentiary standard to malpractice claims against them. According to current Florida law, for the purposes of implementing the Three Strikes Rule, the state medical board "shall not license or continue to license a medical doctor found to have committed repeated malpractice, the finding of which was based upon *clear and convincing evidence*."¹⁵⁶ Under this addition, if the state medical board determines that a malpractice action was decided under "a standard less stringent than clear and convincing evidence, the board shall review the record of the case and determine whether the finding would be supported under a standard of clear and convincing evidence."¹⁵⁷ The evidentiary standard provides the board with the ability to block a licensure revocation if the board thinks the evidence would be insufficient under the higher standard. In passing this legislation, Florida created a regime that protected the public while simultaneously cushioning the due process rights of physicians.

V. ANALYSIS: INTEGRATING POLICY CONCERNS

The policy concerns behind the evidentiary standards debate are similar to those in many constitutional debates: protection of the individual versus the protection of the public.¹⁵⁸ Arguably, current schemes that grant state medical boards sole discretion in licensure revocations have not effectively reduced the number of incompetent doctors.¹⁵⁹ This raises serious concerns regarding the adequacy of public protection by failing to address the interests of medical malpractice victims. Alternatively, physicians under a preponderance standard regime feel that their due process rights are not properly protected.¹⁶⁰ The Florida Three Strikes Rule provides an alternative scheme that balances the competing concerns of the *Mathews* three-prong test. This regime potentially removes more faulty physicians who pose a threat to the public, while the incorporation of a clear and convincing evidence standard ensures that the due process rights of physicians are protected. This will likely lead to not only a

154. § 456.50(1)(c).

155. Hawkins, *supra* note 18, at 10.

156. FLA. STAT. ANN. § 456.50(2) (2007) (emphasis added).

157. *Id.*

158. *See supra* Part III.

159. *See* PUB. CITIZEN'S CONG. WATCH, *supra* note 12, at 13–16.

160. *See supra* Part III.B.

greater number of license revocations, but also a greater number of *correct* license revocations.¹⁶¹

A. *The Three Strikes Rule Extends Greater Protection to the Public than Current State Medical Board Regimes*

One of the reasons the Amendment was enacted was to provide a mechanism for disciplining doctors with a history of bad medical judgment.¹⁶² Studies show that multiple malpractice judgments are strong indications of doctors who consistently fall below proper standards of care.¹⁶³ A scheme that automatically revokes a physician's license deprives the board of its deferential discretion in situations where peer review has protected incompetent physicians.

Although physicians are arguably some of the most trained and careful professionals in American society, the rate of error still remains high.¹⁶⁴ A 1990 Harvard study of physicians determined that from a group of 7,743 medical records, 280 revealed adverse events that occurred as a result of negligence.¹⁶⁵ Negligence was associated with fifty-one percent of all deaths from medical injury.¹⁶⁶ In a more recent study, medical error was found to be the "fifth-leading cause of deaths in the United States," causing as many as 98,000 deaths every year.¹⁶⁷ Unfortunately, when physicians deviate from the proper standard of care, the potential effects may result in serious harm to their patients. Physicians are among the few professionals who have a direct impact on nearly every individual in society. As a result, the government creates vast

161. For the purposes of this article, the author uses the term "correct license revocations" to mean license revocations that are supported by sufficient evidence in accordance with proper due process procedures.

162. Ellman, *supra* note 131, at 7.

163. See generally PUB. CITIZEN'S CONG. WATCH, *supra* note 12, at 7–9.

164. Lucian L. Leape, *Error in Medicine*, 272 JAMA 1851, 1851–52 (1994). Medical error is substantially attributed to mindset of the medical profession and its expectation of physicians to be infallible. *Id.* at 1851. This creates situation where reporting remains low and little is done to improve the institutional shortcomings that are largely responsible for medical errors. *Id.* The aviation industry, in contrast, has effectively improved its record for adverse incidents by (1) designing a system under the assumption that errors will occur, thereby allowing the system to buffer against the effects of the incident; (2) standardizing procedures; (3) rigidly enforcing the training, examination and certification processes; and (4) creating a system where pilots are not penalized for reporting near misses for adverse incidents. *Id.* at 1855.

165. HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 6–9 (1990). In the context of the article, "adverse event" is defined as "the incidence of injuries resulting from medical interventions." *Id.* at 1.

166. *Id.* at 4.

167. *Medical Error is the Fifth-Leading Cause of Death in the U.S.*, MEDICAL NEWS TODAY, June 23, 2007, available at <http://www.medicalnewstoday.com/articles/75042.php>.

regulatory schemes, primarily through the police power given to the states, to ensure that the public health is properly protected against those who are ill-qualified to practice medicine.¹⁶⁸ Unfortunately, error is still a common occurrence within the medical community.

A report by the Public Citizen indicates that while malpractice payments remain high, the number of physicians who have malpractice judgments against them remains low.¹⁶⁹ Since 1990, only eighteen percent of doctors have paid out a medical malpractice award.¹⁷⁰ This figure reveals that the majority of medical malpractice is committed by a small percentage of doctors.¹⁷¹ Unfortunately, peer review often fails to protect the public from this small faction of repeat offenders. Of the doctors who have made ten or more malpractice payments since 1990, only thirty-three percent had action taken against them by the state medical board.¹⁷² This percentage includes any kind of disciplinary action, not just licensure revocations. One physician "had at least thirty-one malpractice payments between 1993 and 2005,"—three payments alone because the doctor retained a foreign object in a patient's body after surgery.¹⁷³ Another surgeon paid out malpractice payments at least eighteen times; twelve of those payments resulted from "improper performance of surgery."¹⁷⁴ These statistics indicate that the problem of protecting the public does not stem from evidentiary standards, but rather the failure to prosecute incompetent doctors despite glaring red flags that the doctor is consistently negligent in his practice of medicine.

William P. Gunnar explains several reasons why state licensing boards are inefficient monitors of physician misbehavior and incompetence.¹⁷⁵ First, the decision of a state medical licensing board to suspend or revoke a license is subject to judicial review, which decreases the finality of decisions.¹⁷⁶ Second, due to limited budgets and insufficiency of staff, boards have trouble defending lawsuits when physicians contest a board's decision in court.¹⁷⁷ Added costs are associated with investigations and hearings conducted by the

168. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (providing the constitutional foundation for the states' ability to enact public health laws for the protection of the public).

169. PUB. CITIZEN'S CONG. WATCH, *supra* note 12, at 12.

170. *Id.*

171. *Id.*

172. *Id.* at 14.

173. *Id.*

174. PUB. CITIZEN'S CONG. WATCH, *supra* note 12, at 14.

175. William P. Gunnar, *The Scope of a Physician's Medical Practice: Is the Public Adequately Protected by State Medical Licensure, Peer Review, and the National Practitioner Data Bank?*, 14 ANNALS HEALTH L. 329, 340 (2005).

176. *Id.* at 340–41.

177. *Id.* at 341.

board itself.¹⁷⁸ Third, physicians may be lenient when judging a peer.¹⁷⁹ Fourth, there may be lengthy processing delays when a board attempts to discipline the physician.¹⁸⁰ Fifth, due process requires more than circumstantial evidence.¹⁸¹ Finally, courts generally limit their support of disciplinary actions by state boards only in regard to actions involving “regulated narcotics, abortions, and physician-assisted suicide.”¹⁸² The Florida statute theoretically eradicates many of these problems faced by state medical boards that use either a preponderance or clear and convincing evidence standard. This is largely because the Three Strikes Rule provides an automatic mechanism for disciplining physicians as opposed to relying on the discretion of the board to prosecute claims.

Most times, disciplinary committees depend on complaints from patients or patients’ families to begin an investigation.¹⁸³ Several boards can conduct an investigation without a formal public complaint, but they may lack the budget to provide information and tracking systems necessary to spot problematic physicians.¹⁸⁴ While repeated malpractice payments are clear indications of incompetent physicians, the board may lack the fiscal capability or the integrity to conduct an investigation, evaluate the evidence, conduct a hearing and impose sanctions.¹⁸⁵ For instance, the median state medical board spends forty-nine percent of its budget on investigative functions alone.¹⁸⁶ Implementing a structure that automatically revokes a physician’s license would greatly reduce the fiscal restraints on boards by removing several of the costly steps in physician discipline. The investigative costs are substantially diminished because the private parties in past litigation have already assumed the burden by creating a record in the course of the dispute. The records from the formal adjudications create a preserved evidentiary record the board may use in determining whether the license revocation is appropriate.¹⁸⁷ Although the Florida legislature determined that requests for administrative hearings and

178. See BOVBERG & ALIAGA, *supra* note 14, at 15 (“In practice, how much financial support Medical Boards receive depends both upon the level of licensure and other fees assessed (including whether the Board retains any fines or other monies collected) as well as how much of fees the legislature appropriates.”).

179. Gunnar, *supra* note 175, at 341.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. BOVBERG & ALIAGA, *supra* note 14, at vi.

185. *Id.*

186. *Id.*

187. FLA. STAT. § 456.50(2) (2007) (stating “[t]he board may require licensees and applicants for licensure to provide a copy of the record of the trial of any medical malpractice judgment, which may be required to be in an electronic format, involving an incident that occurred on or after November 2, 2004”).

binding arbitration hearings would increase, the cost of these proceedings would be minimal compared to the state board's overall budget.¹⁸⁸

The public is also protected because the amendment removes the potential leniency of peer review. Scholars have criticized medical board for their high composition of other physicians; this may result in a veil of silence and a reluctance to revoke licensure due to the bonds of sharing a difficult profession.¹⁸⁹ The Three Strikes Rule substantially diminishes a board's ability to protect their own in situations where a clearly incompetent doctor should not be permitted to retain a license. Once a doctor has three malpractice judgments against him or her, the board cannot turn a blind eye and shield the doctor from the consequences of his or her actions without violating the law itself.¹⁹⁰ Under the Three Strikes Rule, the board no longer examines the merits of the action, but may only evaluate whether the evidence is sufficient in all three cases to support revocation under the statute.¹⁹¹

Although little investigation has been conducted since the Amendment's passage, the Amendment should logically result in a greater number of disciplinary actions before the board. In this way, a large part of the problem created by peer review boards is rectified because the board may no longer pick and choose all actions that come before it for review. The Amendment taps into a pool of doctors who, by virtue of their malpractice claims, should arguably be examined for their competency, and the law enables boards to examine these doctors without the costs of investigations or hearings.

B. *Weighing the Private Interest of Physicians*

It may be obvious that the public interest is better protected by the Three Strikes Rule in that it diminishes the discretion of medical boards in revoking physician licenses. After all, the Amendment itself was passed by a citizens' initiative.¹⁹² The arguments presented by the physicians in *Hsu* and *Nguyen*, however, should not be taken lightly. Arguably, physicians invest more time and money into pursuing their careers than almost any other professionals in America.

188. OFFICE OF ECON. & DEMOGRAPHIC RESEARCH, THE FLORIDA LEGISLATURE, INITIATIVE FINANCIAL INFORMATION STATEMENT: PUBLIC PROTECTION FROM REPEATED MEDICAL MALPRACTICE (2004), available at http://edr.state.fl.us/conferences/constitutional_impact/2004%20Ballot/a4fis_complete.pdf ("The direct financial impact on state or local governments resulting from the proposed initiative would be minimal. There will likely be additional costs to the state of less than \$1 million per year, but these costs will be offset by licensure fees.").

189. Gunnar, *supra* note 175, at 346.

190. See FLA. STAT. ANN. § 456.50(2) (2007).

191. *Id.*

192. See *supra* Part IV.A.

As of October 2001, the average medical student incurred \$99,089 of debt from attending medical school alone.¹⁹³ In addition, physicians invest countless hours in pursuit of a medical degree and devote over eighty hours per week to work during their residencies and practice.¹⁹⁴ The high price of malpractice insurance has caused several doctors to leave the profession in high-risk areas like obstetrics.¹⁹⁵

Unlike civil actions, which involve the payment of money to the injured party, licensure revocation involves the deprivation of a doctor's ability to pursue his livelihood. The monetary penalty is significant for doctors, especially compared to other professions.¹⁹⁶ Similar to a criminal conviction, professional discipline also "invariably blights a professional's reputation and can destroy one's career and life."¹⁹⁷ Disciplinary actions tend to share similar goals with penal convictions: deterrence, rehabilitation, incapacitation of liberty or behavior, or retribution.¹⁹⁸ As such, it is important to be mindful of the interests held in a life's work, and deprivation of a career can be far more devastating than the simple payment of money.

The *Nguyen* court emphasizes the difference between payment of a civil money damage and the revocation of a medical license.¹⁹⁹ In its opinion, the *Nguyen* court explained several situations that rise above the level of a civil money judgment, which include "quasi-criminal wrongdoings by the defendant" and proceedings that incur the risk of having one's "reputation tarnished erroneously."²⁰⁰ For these reasons, the public interest should not be weighed at the complete expense of the physician's interest. In a three strikes

193. Suri Santana, *Paying the Price to Become a Doctor: The Impact of Medical School Debt*, AAMC, Jan. 2002, available at http://www.aamc.org/newsroom/reporter/jan02/medschool_debt.htm.

194. PUB. CITIZEN'S CONG. WATCH, *supra* note 12, at 18 ("American physicians are famous for their extensive work hours."). The authors of the study suggested limiting physicians to only eighty hours of work per week to reduce the risk of fatigue-induced errors, which implies that most physicians work far beyond the recommended average in consecutive work shifts. *Id.*

195. *High Cost of Malpractice Insurance Threatens Supply of OB/GYNs, Especially in Some Urban Areas*, June 1, 2005, http://www.eurekalert.org/pub_releases/2005-06/uomh-hco053105.php.

196. See U.S. DEPT. OF LABOR, NATIONAL COMPENSATION SURVEY: OCCUPATIONAL WAGES IN THE UNITED STATES, June 2006 (2007), available at <http://www.bls.gov/ncs/ocs/sp/ncbl0910.pdf>. Physician salaries far exceed the salary of the average American worker. The average American earns \$41,231 per year, whereas physicians and surgeons earn an average of \$127,020 per year and dentists earn an average of \$130,057 per year. *Id.* at 4, 10. One of the only other professionals to come close to physicians' salaries were attorneys, who make an average of \$116,375 per year. *Id.* at 7

197. Spece & Marchalonis, *supra* note 6, at 114.

198. *Id.*

199. *Nguyen v. State, Dept. of Med. Quality Assurance Comm'n*, 29 P.3d 689, 693 (Wash. 2001) (en banc).

200. *Id.*

regime, however, the desirability of public protection has a tendency to stifle the individual rights of citizens without providing proper safeguards. This is why a clear and convincing evidence standard is an essential feature to the fairness and constitutionality of the Three Strikes Rule.

C. *The Clear and Convincing Evidence Standard Applied in the Three Strikes Rule Alleviates the Risk of Wrongful Deprivation*

Although the Three Strikes Rule creates a blanket of public protection not originally afforded to victims of malpractice, it is highly likely that enforcement under a preponderance standard would be a clear violation of due process for several reasons.

Under the *Mathews* test, an administrative proceeding violates due process if it creates a substantial risk that an individual will be wrongfully deprived of a private interest.²⁰¹ Some have argued that under the traditional regime, a state board that conducts a formal hearing using a preponderance standard instead of a clear and convincing evidence standard already violates constitutional due process requirements.²⁰² As previously stated, the investigators for state medical boards are often members of the medical profession itself and take part in the investigatory, prosecutorial and administrative functions of the disciplinary process.²⁰³ This "blending of functions" does not in itself violate procedural due process; however, some courts have observed that this scenario increases the risk that a physician's rights will be erroneously violated under a preponderance standard.²⁰⁴ Similarly, advocates for the clear and convincing evidence standard argue that boards that are pressured by the government and the media to be harder on physicians are more likely to erroneously deprive them of their licenses under the preponderance standard.²⁰⁵

Advocates of a preponderance standard argue that a lower standard would result in more licensure revocations, and as a result, the public interest would be greater protected against incompetent physicians.²⁰⁶ While there is very little evidence with regard to the disciplinary outcomes of using either standard, it is probable that in egregious instances of malpractice, a doctor who is disciplined under a preponderance standard would also be disciplined under a clear and convincing evidence standard. For example, Wyoming uses a clear and convincing evidentiary standard in licensure proceedings and was ranked

201. See *supra* Part III.A.

202. See, e.g., *Nguyen*, 29 P.3d at 689; *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000).

203. Spece & Marchalonis, *supra* note 6, at 125–26.

204. *Id.* (quoting *Robinson v. State ex. rel. Okla. State Bd. of Med. Licensure and Supervision*, 916 P.2d 1390, 1393 (Okla. 1996)).

205. *Id.* at 124.

206. See generally Widmer, *supra* note 11.

first in the country in 2002 for the percentage of serious disciplinary actions taken against doctors.²⁰⁷ North Dakota, which uses a preponderance standard, was ranked second that year, showing that evidentiary standards might have little influence on whether or not an incompetent doctor will be disciplined.²⁰⁸ Theoretically, a small contingent of doctors would escape liability under a clear and convincing evidence standard. In this situation, however, Roy G. Spece argues that advocates of a preponderance standard “reflect a willingness to destroy individual physicians’ lives, careers, and reputations even when there is a forty-nine percent chance that the charges are false,” and it is far more favorable to err on the side of caution to protect the private interests of the physician.²⁰⁹

The U.S. Supreme Court has refused to decide whether a preponderance standard in a formal medical board hearing constitutes a violation of due process.²¹⁰ While there are strong arguments indicating that erroneous deprivation of a physician’s rights is increased by use of a preponderance standard, this risk would increase exponentially under a three strikes regime. According to current Florida law, civil malpractice actions use a preponderance of the evidence standard, which is commonly used in most states.²¹¹ If a state were to use that same preponderance standard under a three strikes regime, it would eliminate any need for review of the doctor’s record prior to revoking his license because the evidentiary standards for both proceedings would be identical. Under the *Mathews* test, this situation would not only increase the likelihood that a review proceeding would cause erroneous deprivation, but it also could potentially eliminate the need for any review proceeding at all. Essentially, if a doctor committed three instances of malpractice, all of the proceedings would necessarily meet a preponderance of the evidence standard under Florida malpractice law, collapsing the review process for state medical boards. Therefore, if a state’s Three Strikes Rule used a preponderance standard, theoretically, no added safeguard or review procedure would be necessary to revoke the physician’s license.

This situation is problematic for two reasons. First, the Florida Three Strikes Rule is a mechanism that not only deprives medical boards of discretion in whether to conduct an investigation, but also of some of the

207. PUBLIC CITIZEN, *supra* note 129.

208. *Id.*

209. Spece & Marchalonis, *supra* note 6, at 129.

210. Wash. State Med. Quality Assur. Com’n v. Nguyen, 29 P.3d 689, *cert. denied*, 535 U.S. 904 (2002).

211. FLA. STAT. ANN. § 766.102(1) (2007) (stating that a claimant in a medical malpractice action “shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider”).

decisionmaking power with regard to revocation.²¹² This is one reason the Three Strikes Rule was so unpopular with physicians to begin with—it deprives doctors of a hearing on the merits when they were previously afforded one under traditional licensure laws.²¹³ By depriving doctors of any review procedure whatsoever, it further deprives the board of any discretion to prevent license revocation where it is unjust or inappropriate. Second, the private interests at stake in civil trials are completely different than those at stake in licensure proceedings. In a civil trial, the dispute occurs between two private parties and the consequences are usually monetary. Liability in a malpractice suit generally entails a payment of damages. Unlike a private suit, doctors must defend their ability to practice their chosen careers in revocation proceedings. If a doctor has his license taken away, it deprives him not only of personal funds, but also of the ability to practice medicine and make a livelihood altogether. Therefore, under the *Mathews* framework, the law must leave some procedural safeguards to ensure that a physician is not unfairly deprived of his livelihood.

Under the current Florida Three Strikes Rule, a clear and convincing evidence standard alleviates the due process concerns discussed in *Nguyen* and other cases while still furthering the public interest.²¹⁴ According to the Florida constitution, a doctor's license is not automatically revoked unless he committed three instances of malpractice based on clear and convincing evidence.²¹⁵ Since the evidentiary standard for malpractice actions in Florida is a preponderance standard, the state medical board must review the doctor's record to see if the malpractice findings would have been supported by clear and convincing evidence.²¹⁶ By enforcing a clear and convincing evidence standard, the statute creates a review procedure that is more mindful of due process than a statute utilizing a preponderance standard. The Amendment requires the state medical board to reexamine the doctor's record to assess whether his behavior is worthy of revocation, thus providing a procedure that protects the physician's individual interests.²¹⁷

While the clear and convincing evidentiary standard is ideal for several reasons, it could pose a potential problem in practice—the possibility of essentially retrying cases. The actual procedures under the law have yet to be determined; however, it appears the board would not have to retry each case in the sense of a formal hearing. The law states that if a potential strike, or

212. See *supra* Part IV.

213. See *supra* Part IV.

214. See *Nguyen*, 29 P.3d at 689.

215. FLA. STAT. ANN. § 456.50(2) (2007).

216. *Florida Lawmakers Clarify Amendments*, 22 MED. MALPRACTICE L. & STRATEGY 11 (2005).

217. See FLA. STAT. ANN. § 456.50(2) (2007).

malpractice case, was determined based on a standard lower than clear and convincing evidence, “the board shall review the record of the case and determine whether the finding would be supported under a standard of clear and convincing evidence.”²¹⁸ The procedures for a normal revocation hearing would then apply, which include, but are not limited to: (1) an investigation; (2) a hearing based on the finding of probable cause; (3) a formal hearing before an administrative law judge if there are any “disputed issues of material fact,” not including those determinations regarding reasonable standard of care or laws and regulation of the profession; and (4) standing to seek judicial review of any final order of the board.²¹⁹ It appears that the first two requirements would not be necessary as long as a court deemed the malpractice case records sufficient for the investigation and probable cause requirements. It may be more difficult to determine whether the board’s determinations based on clear and convincing evidence would create “disputed issues of material fact” sufficient to justify an administrative hearing. This situation would clearly take some of the mechanization and efficiency out of a Three Strikes Rule; however, the doctor would still be precluded from disputing determinations of the board based on the standard of care issue in an administrative hearing.²²⁰ Thus, even assuming the professional would be allowed to seek judicial review of the board’s determination, a three strikes regime should still remove some of the costly and time-consuming steps of a current system—even with a clear and convincing evidence standard.

A clear and convincing evidence standard certainly loosens the firm grip of a Three Strikes Rule on repeat medical malpractice offenders. This loosening potentially circumvents some of the intent of the original law. However, it still significantly addresses the concerns behind the citizens’ initiative. For instance, some critics might argue that by placing a discretionary mechanism on the automatic revocation scheme, the board could use the clear and convincing evidence provision to avoid revocation and thus evade the Amendment’s purpose.²²¹ Although this is a possibility, the current scheme still firmly focuses on one of the bigger problems with a traditional licensing board scenario—insufficient prosecution. According to a government study of six state medical boards, only one and a half percent of all complaints regarding physician discipline make it to the formal hearing stage as a result of budgetary restraints, insufficient evidence or other competing concerns.²²² The results are not much better regarding discipline of repeat offenders. According

218. *Id.*

219. *Id.* According to the Three Strikes Rule, the procedures under Florida’s disciplinary proceedings statute would apply. *See* § 456.073 (2007).

220. *Id.*

221. *See* § 456.50(2) (2007).

222. BOVBERG & ALIAGA, *supra* note 14, at 24.

to the Public Citizen, "only [thirty-three] percent of doctors who made 10 or more malpractice payments were disciplined by their state board."²²³ Arguably, these are the problems the citizens' initiative sought to address, and under the current scheme, some cases that would not have originally come before the review board must now be examined. The board is no longer given the choice of ignoring a doctor who has committed ten instances of malpractice—the doctor must undergo examination.²²⁴ The only way the doctor or the board may avoid license revocation is if the evidence in the case does not meet a clear and convincing standard.²²⁵

Further, the Three Strikes Rule does not prevent the board from prosecuting complaints under the traditional scheme and instituting other penalties as it normally would.²²⁶ When the Florida Three Strikes Rule was added to the state constitution and later modified to include the clear and convincing evidence standard, it did not remove the existing medical board procedures for physician discipline.²²⁷ Instead, the Amendment merely added an additional safeguard to ensure that repeat offenders of malpractice did not slip through the cracks of licensure discipline. Nothing prevents the board under the current scheme from investigating, prosecuting and disciplining physicians as a result of a complaint, even for one instance of medical malpractice.²²⁸ The Three Strikes Rule does not lessen the obligations of the board to revoke the licenses of incompetent physicians. Rather, the clear and convincing evidence standard simply requires the board to discipline with a higher degree of certainty in a situation where a legal mechanism automatically takes the doctor's license without a right to a formal hearing.

VI. CONCLUSION

In light of the current medical malpractice dilemma, the need for fair and uniform standards is more important than ever. On the one hand, patients who have suffered at the hands of incompetent doctors deserve not only compensation, but also protection and peace of mind that harmful physicians are no longer permitted to practice. On the other hand, physicians who invest time, money and hard work into their professional practice deserve a fair and meaningful procedure that provides protection for their constitutional rights. Uniform standards provide predictability for litigants and stability in the law. Unfortunately, when state courts are faced with determining the correct

223. PUB. CITIZEN'S CONG. WATCH, *supra* note 12, at 13.

224. FLA. STAT. ANN. § 456.50(2) (2007).

225. *Id.*

226. § 456.073 (2007).

227. *See* § 456.50(2) (2007).

228. § 456.073 (2007) (assuming the Board finds probable cause under the statute to conduct a hearing).

evidentiary standard for state medical boards, the attempt to resolve competing interests creates dissonance in the law and makes fairness impossible under current regimes. Courts that balance these competing interests are forced to tip the scale in one direction or the other, creating a situation where one side must strike out.

A three strikes regime creates a reliable, uniform and cost-effective method for taking on repeat medical malpractice offenders. By automatically removing incompetent physicians from the public, the scheme alleviates the costs of investigation and the potential leniency of state medical boards, thus protecting the public interest. By widening the playing field, however, the scheme creates the likelihood that doctors will be erroneously deprived of their right to practice medicine. This is why a clear and convincing evidentiary standard is necessary in the context of a three strikes amendment. Ideally, the scheme will weed out bad doctors while ensuring fairness of procedure, which will create a better balance between two irreconcilable interests. By tightening the “strike zone” of physician licensure revocations with a clear and convincing evidentiary standard, doctors can get a fair chance at the plate before striking out, and innocent patients can play a game they finally have a chance to win.

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