Flip of a Coin?
The Appropriate Standard of Review in Government Licensing

*By Geoffrey W. Hymans & Daniel J. Appel**

> For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.
>
> *The Slaughterhouse Cases* (1872) (Bradley, J., dissenting)

What standard of proof should the government meet to impose sanctions on an individual licensed by the state to practice his chosen profession? In a series of decisions this decade,[1] the Supreme Court of Washington State required the government to prove facts constituting "unprofessional conduct" by clear and convincing evidence.[2] Dissenters argue that, as a result of these decisions, "some of the state's most vulnerable citizens are now even more at risk for abuse."3 But there has been little empirical evidence to back these claims. Indeed, legislatively mandated biennial reports on the professional disciplinary process in Washington demonstrate that the higher burden of proof has had little effect on the imposition of licensing sanctions in the state.

I. Washington's Legal Landmarks

Prior to 2001, Washington's courts applied a preponderance of the evidence standard to professional disciplinary cases. Yet that year the Supreme Court of Washington accepted review of *Nguyen v. Washington State Department of Health*, a case that generated little attention when it had been decided by the state court of appeals earlier in the year (it had originally been issued as an unpublished decision), but would prove to be of great import.

Dr. Bang Duy Nguyen was a physician who had been accused by the state Medical Quality Assurance Commission of rendering unprofessional care in the treatment of twenty-two patients and of sexual misconduct with three patients. Following a six-day hearing, the Commission, applying a preponderance of the evidence standard, found that Dr. Nguyen had committed sexual misconduct with three patients, revoked his license indefinitely, and barred him from seeking relicensure for five years.

No Washington statute specifically set the standard of proof for administrative professional licensing cases. Yet the Washington State Department of Health, under general administrative-rule making authority granted in the state's Uniform Disciplinary Act, had adopted the following administrative rule: "Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence."[4]

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Dr. Nguyen claimed that the use of a "mere preponderance" standard violated his right to due process of law under the Fourteenth Amendment of the U.S. Constitution. He argued that the individual interests at stake in the revocation or restriction of a professional license were as important as interests the U.S. Supreme Court had already recognized as requiring a higher burden of proof. These interests included the liberty interest in not being civilly committed,[5] in not being deported or denaturalized,[6] and in not having ones parental rights terminated by the state.[7]

The court analyzed Dr. Nguyen's claims under *Mathews v. Eldridge*,[8] which set forth the U.S. Supreme Court's *übertest* for procedural due process. This test balanced the private interest affected by state action—the risk of erroneous deprivation through the procedures used—against the governmental interest in the added fiscal and administrative burden the additional process would entail. While the Supreme Court of Washington felt that these factors had only "uneven relevance and application" to the issue of what burden of proof should be required in any given circumstance,[9] it examined the interests under the *Mathews* framework.

The court first concluded that the private interest was substantial. It recognized that "loss or suspension of the physician's license destroys his 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 probably spent countless hours and probably tens (if not hundreds) of thousands of dollars pursuing."[10] The court noted that it had long characterized professional disciplinary cases as "quasi-criminal," and noted that it had previously held that quasi-criminal bar disciplinary proceedings required no less than clear and convincing proof.[11]

The court found the risk of an erroneous result under a mere preponderance test to be high. It noted that the medical disciplinary board is investigator, prosecutor, and decisionmaker, and that the availability of judicial review provided "little solace" when, under the state's administrative procedures act, that review was "high on deference but low on correction of errors."[12] The court further examined the standard of conduct against which a professional actions are measured in a disciplinary case—in this case "incompetency, negligence, malpractice, moral turpitude, dishonesty, and corruption—and held that "it is difficult to imagine a more subject and relative standard than that applied in a medical disciplinary proceeding where the minimum standard of care is often determined by opinion, and necessarily so."[13]

Finally, the court examined the government interests at stake. It first discussed the government interests that may actually be weighed in determining the process due. Examining U.S. Supreme Court precedent, the court noted that "this requirement relates to the practical and financial burdens to be imposed upon the government were it to adopt a possible

substitute procedure for the one currently employed... [t]he requirement does not relate to the interest which the government attempts to vindicate through the procedure itself."[14] The court concluded that "an increased burden of proof would not have the slightest fiscal impact upon the state, as it would appreciably change the nature of the hearing *per se*."[15]

Balancing these factors, the court found that the higher burden of proof would protect critically important private interests with little or no additional burden on the state. Henceforth, clear and convincing evidence would be required in Washington to impose sanctions upon a physician.

But what about other professionals? The reach of the state in requiring government permission to practice a profession has exploded in recent years, and Washington State has certainly not lagged in this regard. In just the past few years the legislature has licensed[16] athletic trainers, animal masseuses, dental assistants, genetic counselors, speech-language pathology assistants, and landscape architects. This, in addition to the vast number of professional licenses already required by the state.[17]

Following *Nguyen*, Washington's lower appellate courts split on whether a clear and convincing burden of proof should apply to "lesser" professions. One court held that a mere preponderance could still be applied in imposing sanctions upon a real estate appraiser's license,[18] primarily because the resources expended in obtaining the license were less and therefore, according to this court, the individual's liberty and property interest in the license were diminished. In contrast, a different division of the Washington State Court of Appeals applied *Nguyen* in a matter involving a professional engineer's license.[19]

This set the stage for the issue's return to the Supreme Court of Washington in 2006. In *Ongom v. Department of Health*,[20] the court faced a rare factual situation where an administrative hearing officer found misconduct by a preponderance of evidence, but further concluded that the state had not proved its case by clear and convincing evidence. The matter involved a nursing assistant, a profession that, while licensed in Washington and subject to professional discipline under Washington statute, had minimal requirements to obtain a credential.[21]

The court reaffirmed *Nguyen* and applied it to all professional licenses in Washington, this time in a narrow 5-4 ruling. It rejected the state's arguments that "lesser" credentials should be subject to a lesser burden of proof because they represent less of an investment in education and training. "We cannot say Ms. Ongom's interest in earning a living as a nursing assistant is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor."[22]

The court also rejected a contention that the standard of proof should vary according to the actual sanction imposed. The state argued that where less than total revocation of the license was imposed, a lower burden of proof would suffice. This rather strange suggestion was met with the court's declaration that "we do not believe that the constitutional standard of proof in a proceeding can be determined only after the outcome is known.... The burden of proof does not differ based on result of a particular proceeding or the nature of the charges."[23]

Together, *Nguyen* and *Ongom* represent the most thorough recent analysis of the constitutionally required burden of proof in professional disciplinary cases. They also represent the high-water mark thus far in providing protection to the ever-increasing number of state-licensed professionals when they face efforts by the state to restrict, suspend, or revoke their licenses.

II. Other Jurisdictions

The *Nguyen* court accurately noted that "[s]tate precedent from other jurisdictions is divided" on the standard of proof required in professional disciplinary proceedings.[24] Some state courts have chosen or upheld the preponderance standard without addressing the constitutional ramifications of their decisions.[25] Others have summarily rejected any constitutional arguments in favor of the clear and convincing standard.[26] The courts that have carefully analyzed the Constitution's requirements under the Due Process clause have reached differing conclusions based primarily on different views of the interests involved. This section examines these cases, beginning with those upholding the preponderance standard.

A. Cases Upholding the Preponderance Standard

In one of the earlier cases to uphold the preponderance standard in the face of a due process challenge, the Supreme Court of New Jersey considered a doctor whose license to practice medicine was revoked by the State Board of Medical Examiners on the basis of various malpractice and professional misconduct claims.[27] In analyzing the due process issue, the court first noted that the preponderance standard of proof had "been consistently applied in agency adjudications for many years" before proceeding to the *Mathews* balancing test.[28] Beginning with the private interest—a medical license that is a property right "always subject to reasonable regulation in the public interest"[29]—the court discussed the purposes behind the various evidentiary standards.[30] Like *Nguyen*, *Polk* relied on *Addington* and *Santosky* to conclude that the clear and convincing standard applied to civil proceedings in which the loss suffered was comparable to criminal proceedings, such as a deprivation of liberty or a permanent loss of a significant interest.[31] *Polk* borrowed the same phrases used to describe interests that trigger the heightened standard, such as "particularly important" and "more substantial that mere loss of money," the loss of which poses a "significant deprivation of liberty" or is a "stigma."[32] In addition to the nature of the private interest, the *Polk* court also considered the extent of the loss, and noted that the loss of a medical license is not permanent in New Jersey; the licensee can reapply for licensure at a later date.[33] Even so, the court concluded that the private interest "is substantial and the potential deprivation great."[34]

Moving to the next *Mathews* factor, the government's interest,[35] *Polk* emphasized the right and duty of the government to protect the public, assuring its health and safety through regulating the medical profession.[36] In New Jersey, this interest trumps the doctor's interest in practicing medicine: "The right of physicians to practice their profession is necessarily subordinate to this governmental interest."[37] As described above, *Nguyen* limited the government's interests to the additional fiscal and

administrative burdens of applying the higher evidentiary standard. The Supreme Court of Washington refused to consider as part of its *Mathews* inquiry the "interest which the government attempts to vindicate through the procedure itself."[38]

Finally, *Polk* analyzed the third *Mathews* factor, the risk of erroneous deprivation. The Supreme Court of New Jersey framed the question as whether the preponderance standard "fairly allocates the risk of mistake between the two parties and sufficiently reduces for both the risk of an erroneous deprivation."[39] The court found the preponderance standard sufficient for several reasons. First, a medical license can be revoked in New Jersey only under "heightened and strict substantive standards," including "insanity, physical or mental incapacity, [and] professional incompetence," among others.[40] Second, the doctor has the ability to defend himself or herself with a full array of procedural safeguards, including representation by counsel and the ability to call witnesses.[41] And third, the nature of disciplinary proceedings minimizes the risk of error because all those involved—parties, witnesses, and the decision maker—are knowledgeable in the field, and the subject matter is not "elusive or esoteric" such that a higher evidentiary standard is needed to generate confidence in the outcome.[42] For these reasons, *Polk* concluded that the preponderance standard was sufficient to reasonably guard against mistakes, and thus to satisfy the constitutional demands of due process when balanced with the interests involved.[43]

Other state courts have reached similar conclusions. In *Gandhi v. State Medical Examining Board*, the Wisconsin Court of Appeals emphasized many of the same points as the *Polk* court in New Jersey.[44] *Gandhi* recognized the importance of the private interest and the tremendous deprivation suffered when a medical license is lost, but likewise noted that the license may be regained at a later date.[45] On the second factor, *Gandhi* emphasized the government's interest—indeed, its obligation—to protect the welfare of its citizens, which is "superior to the privilege of any individual to practice his or her profession."[46] Finally, *Gandhi* pointed to procedural safeguards protecting the licensee, and the composition of the tribunal—mostly physicians, who understand the substantive standards governing medical disciplinary proceedings.[47] Weighing these factors, the *Gandhi* court concluded that the preponderance standards comports with due process.[48]

In *North Dakota State Board of Medical Examiners v. Hsu*, the North Dakota Supreme Court examined this issue and reached the same conclusion.[49] *Hsu* discussed several cases on either side of the debate, including *Nguyen*, *Polk*, and *Gandhi*.[50] While admitting the physician's interest in his medical license was substantial, the *Hsu* court was persuaded that "the State's interest in protecting the health, safety, and welfare of its citizens is superior to a licensee's interest."[51] Further, *Hsu* minimized the state's role as investigator, prosecutor, and adjudicator, a fact that *Nguyen*, among others, used to support the clear and convincing standard.[52] Balancing these interests, *Hsu* upheld the preponderance standard.[53]

B. Cases Requiring the Clear and Convincing Standard

A number of states have adopted the clear and convincing standard without reference to the demands of constitutional due process.[54] At least one state has adopted the standard by statute.[55] Others, though, have reached that conclusion based on a *Nguyen*-like due process analysis. In *Johnson v. Board of Governors of Registered Dentists*, for example, the Supreme Court of Oklahoma discussed the standard of proof the Constitution requires in professional disciplinary proceedings, beginning with the purposes of the various evidentiary standards.[56] Like *Nguyen*, *Johnson* understood a professional medical license to be a protected property interest, the loss of which is penal in character and destroys a doctor's "means of livelihood."[57] *Johnson* recognized the state's interest "in the health, safety and welfare of its citizens," but considered the risk of erroneous deprivation to be high, particularly because the state agency is the investigator, prosecutor, and decisionmaker.[58] When balanced against the interests involved, this high risk of error led the *Johnson* court to hold that due process required clear and convincing evidence in professional disciplinary proceedings.[59]

Likewise, in *Painter v. Abels*, the Supreme Court of Wyoming, relying on *Johnson*, noted the "quasi-criminal" nature of these proceedings.[60] Applying the *Mathews* balancing test, *Painter* called the private interest "substantial" and divided the potential loss into three components: (1) the loss of a property right, (2) the loss of a livelihood, and (3) the loss of professional reputation.[61] Balancing this interest was the "state's interest in protecting the health, safety, and welfare of its citizens from a medical licensee's incompetence or misconduct."[62] Finally, like *Johnson*, *Painter* concludes that the risk of error is high because the same agency investigates, prosecutes, and decides.[63] For these reasons, *Painter* held that due process requires clear and convincing evidence.

As is evident from the above discussion, more states weighing the commands of due process have upheld the preponderance standard over the clear and convincing standard. But where the higher burden of proof has been applied, has it hindered the imposition of sanctions on licensees who have committed professional misconduct?

III. Effects & Lessons

One dissent in *Ongom* lamented that following *Nguyen* and *Ongom*, "some of this state's most vulnerable citizens are now even more at risk for abuse."[64] The lead dissent claimed that "the *Nguyen* majority's incorrect application of the *Matthews* test will harm the government's ability to protect the public from incompetent health care workers."[65] Have these dire predictions come to pass?

Not according to the data accumulated by the Washington State Department of Health. The Department is required by statute to produce an annual report on health professional discipline cases in Washington, a report which until 2008 was produced biennially.[66] This report contains data on the number of licensed professionals, the number of complaints, and the instances in which discipline was imposed for each reporting period.[67]

Nguyen was issued in August, 2001. During the 1999-2001 biennium, approximately 0.5% (.005) of the licensed health professionals in Washington received some form of discipline. In the preceding biennia the figures were 0.5% (1997-1999 biennium), 0.4% (1995-1997 biennium), 0.4% (1993-1995 biennium), 0.7% (1991-1993 biennium), and 0.5% (1989-1991 biennium).[68]

In the reports since *Nguyen* was issued the level of professional disciplinary sanctions imposed upon licensed Washington State health care professionals has been 0.7% (2001-2003 biennium), 0.6% (2003-2005 biennium), 0.6% (2005-2007 biennium), and 0.4% (for the 2008 initial annual report). Given an expected level of variation across biennia, one can hardly conclude that there has been a significant drop-off in the amount of discipline imposed while the state has operated under a clear-and-convincing evidence burden of proof. While the authors acknowledge that this is a rough measure, not accounting for other factors which may affect the imposition of discipline,[69] what is clear is that the sky has not fallen.

Upon reflection, the complaints of the *Ongom* dissenters seem misplaced. This is partly because increasing the burden of proof may only affect marginal cases which would have presented proof problems anyway. An agency may be less willing to take a case with significant evidentiary holes to hearing if they doubt they can convince a fact-finder to a clear-and-convincing degree.

But another reason the sky has not fallen is that the "burden of proof" is simply a measure of how certain a fact-finder must be that misconduct has been committed. It is not generally a measure of the quantum of proof necessary to meet that level of certainty. In Washington, even a single witness can be sufficient to prove a criminal case beyond a reasonable doubt.[70] Further, under the Washington State Administrative Procedures Act,[71] a court only reviews administrative decisions to determine if substantial evidence exists which supports an administrative law judge's factual findings, a fact noted by the *Nguyen* majority.[72] Finally, the disciplining authority in Washington remains (at least nominally) the investigator, the prosecutor, the fact-finder, and the imposer of professional discipline. It is unlikely that many cases exist comparable to *Ongom* where an administrative decisionmaker would admit to being convinced that misconduct occurred by a preponderance of evidence, but not clearly convinced.

Given these realities, we must ask ourselves whether the higher burden of proof actually has any utility in protecting a professional licensee's constitutional property and liberty interests. The authors intend to explore this further in their forthcoming article, but the most important role of the higher burden of proof is likely the rhetorical one. It allows a legal advocate to seed doubt in an administrative decisionmaker's (sometimes collective) mind by focusing on whether the decisionmaker has reached the required level of certainty. Perhaps, in this era of ever-increasing state regulation of professionals, that is all we can ask.

Endnotes

1 Ongom v. Dep't of Health, 148 P.3d 1029 (Wash. 2006); Nguyen v. Dep't of Health, 29 P.3d 689 (Wash. 2001).

2 The chapter of Washington's Laws governing the imposition of sanctions against licensed health professionals is Revised Code of Washington (RCW) Chapter 18.130, the Uniform Disciplinary Act (UDA). Conduct for which sanctions against a health practitioner's license can be imposed is denominated "unprofessional conduct" under that Chapter. See RCW 18.130.180.

3 *Ongom*, 148 P.3d at 144 (Madsen, J., dissenting).

4 Former Wash. Admin. Code 246-10-606.

5 Addington v. Texas, 441 U.S. 418 (1979).

6 Woodby v. INS, 385 U.S. 276 (1966); Chaunt v. United States, 364 U.S. 350 (1960).

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

8 424 U.S. 319 (1976).

9 *Nguyen*, 29 P.3d at 693.

10 *Id*. at 694.

11 *Id*. at 695.

12 *Id*.

13 *Id*. at 696.

14 *Id*.

15 *Id*.

16 In Washington there are three levels of "licensing"—licensing, certification, and registration. While these different licensure levels may have variations in the requirements to obtain the state-mandated credential (such as testing requirements), for purposes of imposing sanctions on a credentialed individual the different levels of licensing are indistinguishable. By way of example, all health care professionals, whether licensed, certified, or merely registered, are subject to the state's Uniform Disciplinary Act. *See* Revised Code of Washington Chapter 18.130.

17 *See* http://www.dol.wa.gov/listoflicenses.html. This list includes more than just professional licenses, but does include almost all professional licenses required by Washington State.

18 Edison v. Dep't of Licensing, 32 P.3d 1039 (Wash. Ct. App. 2001).

19 Nims v. Bd. of Registration, 53 P.3d 52 (Wash. Ct. App. 2002).

20 148 P.3d 1029 (Wash. 2006)

21 The dissent identified these requirements as the payment of a then $15 fee and the submission of an application. Ongom, 148 P.3d at 1039 (citing Wash. Admin. Code (WAC) 246-841-990(2); RCW 18.88A.080(1).

22 *Id*. at 1032.

23 *Id*. at 1033.

24 29 P.3d at 690.

25 *See, e.g.,* Ferguson v. Hamrick, 388 So.2d 981, 984 (Ala. 1980); Ethridge v. Ariz. Bd. of Nursing, 796 P.2d 899, 904 (Ariz. 1989); Johnson v. Ark. Bd. of Exam'rs in Psychology, 808 S.W.2d 766, 769 (Ark. 1991); Ga. Bd. of Dentistry v. Pence, 478 S.E.2d 437, 444 (Ga. Ct. App. 1996); Parrish v. Ky. Bd. of Med. Licensure, 145 S.W.3d 401, 410–11 (Ky. Ct. App. 2004); In re Wang, 441 N.W.2d 488, 492 (Minn. 1989); In re Wilkins, 242 S.E.2d 829, 841 (N.C. 1978), *abrogated in part on other grounds by* In re Guess, 376 S.E.2d 8 (N.C. 1989); Foster v. Bd. of Dentistry, 714 P.2d 580, 581–82 (N.M. 1986); Lyness v. State Bd. of Med., 561 A.2d 362, 367 (Pa. Commw. Ct. 1989).

26 *See, e.g.,* Snyder v. Colo. Podiatry Bd., 100 P.3d 496, 502 (Colo. Ct. App. 2004); Rife v. Dep't of Prof'l Reg., 638 So. 2d 542, 543 (Fla. Ct. App. 1994) (noting that constitutional due process did not require the clear and convincing standard but that a state statute did); Rucker v. Mich. Bd. of Med., 360 N.W.2d 154, 155 (Mich. Ct. App. 1984); Granek v. Tex. State Bd. of Med. Exam'rs, 172 S.W.3d 761, 777 (Tex. App. 2003) (citing Pretzer v.

Motor Vehicle Bd., 125 S.W.3d 23, 38–39 (Tex. App. 2003) *aff'd in part and rev'd in part*, 138 S.W.3d 908 (Tex. 2004)).

27 In re Polk, 449 A.2d 7, 11 (N.J. 1982).

28 *Id*. at 12–13.

29 *Id*. at 13.

30 *Id*. at 13–14.

31 *Id*.

32 *Id*.

33 *Id*. at 14.

34 *Id*.

35 Courts have altered the order of the last two *Mathews* factors, sometimes considering the government's interest before the risk of erroneous deprivation, *see id.* at 14–15, and sometimes the reverse, *see Nguyen*, 29 P.3d at 695–96.

36 Polk, 449 A.2d at 14.

37 *Id.* (citing Schireson v. State Bd. of Med. Exam'rs, 28 A.2d 879, 881 (N.J. 1942) *rev'd on other grounds*, 33 A.2d 911 (N.J. 1943)). While concluding that the government's interest was paramount, the court noted that the legislature had "significantly increased the substantive burden" the state bore to prove a discipline case by requiring proof of "particularly egregious" misconduct. *Id.* at 15.

38 29 P.3d at 696. The court reasoned in the alternative that even if the government's substantive interests are considered, the doctor still prevailed because the government's interest were advanced only when the proceedings reached an accurate result. *Id.* at 696–97.

39 *Polk*, 449 A.2d at 15.

40 *Id.*

41 *Id.* at 15–16.

42 *Id.* at 16.

43 *Id.*

44 483 N.W.2d 295 (Wis. Ct. App. 1992).

45 *Id.* at 299.

46 *Id.* The *Gandhi* court distinguished *Santosky* by contrasting parents' right to raise their children with the privilege (not the right) to practice medicine. *Id.* at 300.

47 *Id.*

48 *Id.*

49 726 N.W.2d 216 (N.D. 2007).

50 *Id.* at 228–30.

51 *Id.* at 230.

52 *See id.; Nguyen,* 29 P.3d at 695–96.

53 726 N.W.2d at 230. Other courts have reached the same conclusion using similar analysis or relied on a case that does so. *See, e.g.,* Sherman v. Comm'n on Licensure to Practice Healing Arts, 407 A.2d 595, 600–01 (D.C. 1979); Eaves v. Bd. of Med. Exam'rs, 467 N.W.2d 234, 237 (Iowa 1991); In re Grimm, 635 A.2d 456, 461 (N.H. 1993); Gould v. Bd. of Regents, 478 N.Y.S.2d 129, 130 (N.Y. App. Div. 1984); Gallant v. Bd. of Med. Exam'rs, 974 P.2d 814 (Or. Ct. App. 1999); Anonymous v. State Bd. of Med. Exam'rs, 496 S.E.2d 17, 19–20 (S.C. 1998); *In re Smith*, 730 A.2d 605, 609–13 (Vt. 1999).

54 *See, e.g.,* Storrs v. State Med. Bd., 664 P.2d 547, 555 (Alaska 1983); Silva v. Superior Ct., 14 Cal. App. 4th 562, 569–70 (1993); Ettinger v. Bd. of Med. Quality Assurance, 135 Cal. App. 3d 853, 855–56 (1982); Cooper v. Bd. of Prof'l Discipline, 4 P.3d 561, 568 (Idaho 2000); Schireson v. Walsh, 187 N.E. 921, 923 (Ill. 1933); Allen v. La. Bd. of Dentistry, 531 So. 2d 787, 798 (La. Ct. App. 1988), *rev'd on other grounds*, 543 So. 2d 908 (La. 1989); McFadden v. Miss. Bd. of Licensure, 735 So. 2d 145, 152 (Miss. 1999); Davis v. Wright, 503 N.W.2d 814, 818 (Neb. 1993); In re Zar, 434 N.W.2d 598, 602 (S.D. 1989).

55 Fla. Stat. Ann. § 458.331(3).

56 913 P.2d 1339 (Okla. 1996).

57 *Id.* at 1345; *see also id.* at 1346 ("[T]he interest of the [doctor is] substantial. The [doctor] suffers the possible loss of a constitutionally protected property right, the loss of a livelihood, and the loss of a professional reputation. These losses are greater than monetary losses.").

58 *Id.*

59 *Id.* at 1347. The Supreme Court of Oklahoma later reaffirmed Johnson's due process. *See* Robinson v. State ex rel. Okla. State Bd. of Med. Licensure & Supervision, 916 P.2d 1390 (Okla. 1996).

60 998 P.2d 931, 941 (Wyo. 2000).

61 *Id.*

62 *Id.*

63 *Id.*

64 *Ongom*, 148 P.3d at 144 (Madsen, J., dissenting).

65 *Id*. (Owens, J., dissenting).

66 RCW 18.130.310. This statute was amended in 2008 Laws of Washington, chapter 134, section 13, to change from biennial to annual reporting.

67 These reports are available at http://www.doh.wa.gov/hsqa/Professions/Publications/UDA.htm.

68 While a report was produced for the 1987-1989 biennium, the reporting categories were dissimilar so comparison is problematic.

69 The budget a state agency has to expend on disciplinary activities is one such factor. Another can be substantive changes to the discipline statutes, either increasing or decreasing the realm of activities that would constitute unprofessional conduct. The authors are currently analyzing these variables and hope to include their analysis in a longer law review article to be published on this same topic.

70 State v. Jenkins, 766 P.2d 499 (Wash. Ct. App. 1989).

71 RCW Chapter 34.05.

72 *See Nguyen*, 29 P.3d at 695 (quoting RCW 34.05.570(3)(e)). In fact, this standard is even more deferential than it first appears, since the statute requires a reviewing court to view the case "in light of the whole record before the court" and the Washington Supreme Court has placed the burden on reviewing courts to independently undertake a search of the record for evidence that might be considered "substantial." *See* Faghih v. Dep't of Health, 202 P.3d 962 (Wash. Ct. App. 2009).