

 Council on Licensing, Enforcement and Regulation

DENVER

2009 Annual Conference
September 10 - 12

Presenters: Bonni Ellis, Steinecke Maciura Leblanc
Patti Latsch, Washington Department of Health
Bruce Matthews, Professional Engineers Ontario

Promoting Regulatory Excellence

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Understanding "Standard of Proof":
Is it a Moving Target?

The U.S. Perspective


Patti Latsch
Washington State Department of Health

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Balancing Public Interest against Private Rights

- Regulatory authorities have a public safety mission.
- Licenseholders have the right to due process before their credential may be restricted or removed.




CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

What Is a Standard of Proof?

A standard of proof helps instruct the factfinder concerning the degree of confidence society thinks he should have in the correctness of factual conclusions for a particular type of case.


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

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Standards of Proof in the United States

- **Preponderance of the Evidence**
- Clear, Cogent and Convincing Evidence
- Evidence Beyond a Reasonable Doubt


- The elements of the case are shown with evidence that indicates that the information **is more likely to be true than not.**

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Standards of Proof in the United States


- Preponderance of the Evidence
- **Clear, Cogent and Convincing Evidence**
- Evidence Beyond a Reasonable Doubt

- The elements of the case are shown with evidence that indicates that the information is **"highly probable."**


CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Standards of Proof in the United States

- Preponderance of the Evidence
- Clear, Cogent and Convincing Evidence
- **Evidence Beyond a Reasonable Doubt**
- The elements of the case are shown with evidence that leaves little room for doubt. This standard has been equated to **near a moral certainty.**

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


- Most states use the preponderance of the evidence standard in professional discipline.
- Of those that use the clear and convincing standard, most view professional regulation and the loss of a license as "quasi-criminal".

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

The Washington Experience

- In 2001, the Washington Supreme Court determined that medical physicians could not have their licenses revoked unless unprofessional conduct was proven by clear, cogent and convincing evidence. *Nguyen v. Department of Health*, 144 Wn.2d 516, 534, cert. denied, 535 U.S. 904 (2002).


CLEAR 2009
Annual Conference



September 10-12
Denver, Colorado

“The individual's interest in a professional license is profound.”

CLEAR 2009
Annual Conference




September 10-12
Denver, Colorado

The response to *Nguyen*

- The Washington appellate courts, when faced with different types of licenses, reached different conclusions:
 - Engineer discipline was subject to the clear, cogent and convincing standard
 - Real estate appraiser discipline was subject to preponderance of the evidence standard


CLEAR 2009
Annual Conference



September 10-12
Denver, Colorado


The response to *Nguyen*

- The Department of Health, and associated boards and commissions had to make a policy choice.
 - Option 1: limit *Nguyen* to medical physician cases only
 - Option 2: limit *Nguyen* to all physician cases, including osteopathic and podiatric
 - Option 3: use the standard in all cases, but also evaluate by the preponderance standard

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Applying the standard in all health professions

- In a registered nursing assistant case, the health law judge concluded:
 - The Department met the preponderance standard regarding the abuse charge.
 - The Department’s proof, due to the written statement and conflicting evidence, did not meet the clear, cogent, and convincing evidence standard.

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Extending the standard

- Five years after Nguyen, the state Supreme Court determined the standard applies to all licensing cases. *Ongom v. Department of Health*, 159 Wn.2d 132 (2006), cert. denied 127 S.Ct. 2115 (2006).
- An individual’s interest in a professional license is profound.
 - More than money is at stake.
 - Discipline is not civil and has some criminal attributes because it is for public protection and may have punitive results.
 - Procedural safeguards are not a substitute for the standard of proof.


CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Other states’ experience

- Some states have used the U.S. Constitution as the basis for using the higher standard, looking at the “investment” in the license:
 - California (medical)
 - Oklahoma (medical)
 - Wyoming (medical)
 - Oregon (dental)
 - Nebraska (legal)
- Still others looked at the nature of the action:
 - Mississippi (allegations of fraud or quasi-criminal activity)

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

- Many states have adopted the higher standard by choice:
 - North Dakota (medical and dental summary suspensions)
 - West Virginia (when there is conflicting expert testimony in standard of care cases)
 - Florida (when a malpractice award used a standard less than clear and convincing, it is reviewed under that standard)
- Others extended the standard to other professions once it was adopted in another:
 - Oklahoma (veterinary, podiatric, chiropractic, and dental boards)
 - Wyoming (massage board)

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

The implications of clear and convincing standard


- Decision-makers must:
 - Weigh the importance of an individual's interest in her professional license.
 - Emphasize public protection (priority cases and sanction guidelines).
 - Emphasize credibility determinations in well-drafted orders.
- The balance has shifted slightly to the due process side.



CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Moving north...




CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Understanding "Standard of Proof":
Is it a Moving Target?

The Canadian Perspective


Bonni Ellis, MA, JD
Steinecke Maciura LeBlanc

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Onus vs Standard of Proof


- **Onus** of proof refers to which party has the responsibility of proving a case.
- **Standard** of proof refers to the degree to which the trier of fact must be persuaded of the truth of the allegations or facts to be proven.

*"Burden of proof" is often used interchangeably with both concepts.

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


The Canadian Standards (Historically)

Area of Law	Description of Standard
Criminal Law	Beyond a reasonable doubt
Civil Law	On a balance of probabilities
<ul style="list-style-type: none"> • Divorce • Professional Misconduct • Criminal/Immoral Conduct 	<ul style="list-style-type: none"> • Something to do with clear, cogent and convincing evidence • Something to do with a "sliding scale" • Something to do with clear, cogent and convincing evidence on either a sliding scale or a balance of probabilities.

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Some differences...

Civil	Professional Misconduct	Criminal
No presumption	No presumption	Presumption of innocence and burden of proof
Goal: usually financial compensation	Goal: remediation, deterrence, public protection and denunciation	Goal: rehabilitation, deterrence, public safety and condemnation
Stigma not really an issue	Professional stigma	Social stigma

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Some more differences...

Civil	Professional Misconduct	Criminal
Actors choose whether to enter relationships/legal arena	Professionals choose whether to join self-regulated profession	Law applies to everybody
Individual against individual	Individual against the regulatory body	Individual against "the state"
Loss of \$	Loss of ability to earn \$	Loss of freedom

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


"Bernstein"

Bernstein and College of Physicians and Surgeons of Ontario (Re) (1977), 76 D.L.R. (3d) 38 (Div. Ct.)

In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities"...

The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact...

CLEAR 2009
Annual Conference




September 10-12
Denver, Colorado

"Bernstein" (cont.)

In all cases, before reaching a conclusion, the trier of fact must be reasonably satisfied that the fact occurred, and whether the trier is so satisfied, will depend on the totality of the circumstances, including the nature and consequences of the facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding...

[T]he degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based on cogent evidence which is accepted by the tribunal.

CLEAR 2009
Annual Conference



September 10-12
Denver, Colorado


"Jory"

Jory v. College of Physicians and Surgeons of British Columbia (1985) B.C.J. No. 320 (B.C.S.C) (QL)

[T]he standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a mere balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence. The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community.

-Justice Beverly McLachlin of the BCSC (as she then was)

CLEAR 2009
Annual Conference




September 10-12
Denver, Colorado

"McDougall"

F.H. v. McDougall, [2008] 3 S.C.R. 41


Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities.

-Justice Rothstein, writing for unanimous Court

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


McDougall (cont.)

...Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


McDougall (cont.)

To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending on the seriousness of the case.

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Huh?!?

- What has changed?
- Where are we now?
- How can we make sense of this?

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Three key points regarding the standard of proof

1. There is a difference between the process of assessing the weight that should be attributed to the evidence and the job of assessing its persuasiveness.

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Three key points regarding the standard of proof

2. In cases involving serious allegations /consequences, the trier of fact may be more inclined to reduce the weight that s/he will give to various pieces of evidence that are questionable in terms of their reliability, credibility and/or probative value.

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Three key points regarding the standard of proof

3. In terms of assessing the persuasiveness of the evidence, there is one standard for civil cases, a balance /preponderance of probabilities, which means that the trier of fact, when looking at all of the evidence in its totality, must be satisfied that it is more likely than not that what is alleged to have occurred, did occur.


CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Is this a good approach and why do we care?

- Appeals
- Public confidence and accountability
- The integrity of the law
- Fairness to the registrant

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Is this the right approach or even the best approach?

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Understanding "Standard of Proof":
Is it a Moving Target?


Communication & Training Issues

Bruce G. Matthews, P.Eng.
Professional Engineers Ontario

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Why It's Important...

- Risk of Misunderstanding the Standard
 - Misapplication of the standard can lead to appeals of decisions
 - Inconsistent decisions
 - Damage to the image and reputation of the regulator
- Better to get it right the first time, everytime

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Training is Key!

- Most Discipline Committee members are not lawyers and have limited training as jurists
- Question is how to best explain the concepts and principles involved
 - One size does not fit all
 - Know your audience – objective is to find something the discipline committee can wrap its head around

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Quantitative vs. Qualitative Models

- "Preponderance of the evidence"
- "Balance of Probabilities"
- Balance of the Evidence

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Balance of the Evidence

- "Balance" implies weight and comparison
- "More likely than not..."
- 51%
- 50.1%
- 50.0000000001%??

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Weighing the Evidence

- "Size" versus "Density"
- Size
 - Importance / Relevance
- Density
 - Believability / Credibility / Corroboration
- What if evidence is agreed?
 - Relevance may still be an issue
 - How much does that evidence weigh?

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Panel Member Self-Assurance

- I'm not persuaded...
- I'm not convinced...
- It's possible / probable...
- I'm inclined to believe...

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado


Seriousness of the Allegations

- Doesn't change the standard of proof
- Potential consequences of a finding of misconduct are always the same
- Seriousness of the allegations and the extent of the proof can go to the issue of penalty

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

Can't Eliminate Subjectivity

- No training model will ensure identical outcomes across discipline panel members
- Subjectivity cannot be eliminated, only minimized
 - Discipline panels are made up of multiple individuals for a reason

CLEAR 2009 Annual Conference  September 10-12 Denver, Colorado

In Summary...

- Train, Train, Train
- Know your audience and select a training model accordingly (use more than one if appropriate)
- Qualitative explanations are often easier to grasp
- Separate the issue of the finding versus the penalty

CLEAR 2009
Annual Conference



September 10-12
Denver, Colorado

Speaker Contact Information

Patti Latsch
 Director, Office of Investigation and Inspection
 Health Systems Quality Assurance
 Department of Health
 310 Israel Road SE
 Tumwater, WA 98504-7860
 PO Box 47860
 Olympia, Washington 98504-7860
 T: 360-236-4683 F: 360-236-4626
 E: patricia.latsch@doh.wa.gov



CLEAR 2009
Annual Conference



September 10-12
Denver, Colorado

Speaker Contact Information

Bonni Ellis MA, JD
 Steinecke Maciura LeBlanc
 Barristers & Solicitors
 Law Chambers – University Centre
 393 University Avenue, Suite 2000
 Toronto, Ontario M5G 1E6
 T: 416-599-2200 (Ext. 221)
 F: 416-593-7867
bellis@sml-law.com
www.sml-law.com

CLEAR 2009
Annual Conference




September 10-12
Denver, Colorado

Speaker Contact Information

Bruce G. Matthews, P.Eng.
 Deputy Registrar, Regulatory Compliance
 Professional Engineers Ontario
 25 Sheppard Avenue West, Suite 1000
 Toronto, Ontario M2N 6S9 CANADA
 T: 416-840-1076 F: 416-224-9974
 E: bmatthews@peo.on.ca



CLEAR 2009 Annual Conference		September 10-12 Denver, Colorado
<p>Questions?</p>		
