

Shifting Standards of Proof: What's your Burden?

I. Definitions

- A. **Proof.** The process of demonstrating to a required level of certainty the existence or non-existence of a contested fact or assertion.
- B. **Standard of Proof.** The level of certainty or correctness that a party is required to reach in demonstrating the existence or non-existence of a contested fact or assertion. *Translation: How much you have to win by.*
- C. **Burden of Proof.** The necessity, obligation, or duty of a party to a controversy to prove the existence or non-existence of a contested fact or assertion. *Translation: Who has to win by that much.*

Note: In regulatory discipline cases, the board or agency has the burden of proof. An exception to this general rule is in a licensing case where the applicant has the burden of proof.

II. Standards of Proof in Administrative Proceedings.

- A. **Preponderance.** Proof which is of greater weight or more convincing than the proof that is offered in opposition to it; that is, proof which as a whole shows that the fact sought to be proved is more probable than not.
 - 1. This is the standard of proof in regulatory disciplinary cases, whether specifically provided for in the enabling statutes of the board or agency or not.
 - 2. **Real World:** If your proof is 51% stronger or more convincing than that of the opposing party, you win.
 - 3. While this is a relatively low standard of proof, do not be fooled. The board or agency must still **affirmatively** prove the facts it is asserting in every case by the preponderance of the evidence. The regulant is under no obligation to prove anything. If the board or agency does not meet its burden, it loses.
- B. **Clear and Convincing.** Proof that results in a reasonable certainty of the truth of the fact or assertion in controversy.
 - 1. This is the standard of proof that is used in disciplinary actions that have license revocation as an intended sanction.
 - 2. **Real World:** If your proof is 70-80% more convincing or stronger than that of the opposing party, you win.

3. Again, the board or agency has the affirmative duty to prove the facts it is asserting in every case by this standard.

C. Reasonable Doubt. Proof that results in the belief that the fact or assertion offered by a party is true beyond a reasonable doubt.

1. This is the standard of proof that is used in criminal cases, including unlicensed activity.
2. What is a reasonable doubt? Here is how one judge attempted to define the concept “...*that which is a reasonable man or woman might entertain... no a fanciful doubt, not an imagined doubt, not doubt that a trier of fact might conjured up to avoid performing and unpleasant task or duty.*”
3. It is doubt that would cause a prudent man or woman to hesitate before acting in matters of importance to themselves.
4. Real World: If the opposing party proves the existence of a reasonable doubt, they win.

III. The role of standard of proof during intake and investigation.

- A. The standard of proof that will be used at the disciplinary proceeding is directly related to the strength and reliability of the evidence that you collect as the investigator.
- B. The investigator should be aware of the relevant standard of proof that is will be applied if a regulatory charge will be pursued by the board or agency and should factor the standard into the investigative plan from the very beginning.
- C. The relevant standard of proof should also be used throughout the investigation as a measure as evidence is obtained.
- D. Where do you find the standard of proof? Several sources (i) statutes, (ii) regulations, (iii) decisions of hearing officers, and (iv) court decisions.
- E. Review each witness statement or document obtained as having to stand on its own. Match it to the standard of proof that will be used in any possible disciplinary proceeding. Does it leave any questions in your mind? How may those questions be cleared up? If the evidence is a statement of a witness, can the statement be verified or corroborated in some way? (i.e. through the statements of other witnesses or through documentation)
- F. Explore the possibility of developing procedures that incorporate adequate consideration for the standard of proof.