

[J-31-2024]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

OFFICE OF DISCIPLINARY COUNSEL,	:	No. [REDACTED]
	:	
Petitioner	:	No. [REDACTED]
	:	Attorney Registration No.
	:	([REDACTED] County)
v.	:	
	:	ARGUED: April 10, 2024
	:	
ANONYMOUS ATTORNEY,	:	
	:	
Respondent	:	

OPINION¹

JUSTICE DONOHUE

DECIDED: FEBRUARY 12, 2025

Respondent challenges the Disciplinary Board’s recommendation that he be suspended from the practice of law for five years as discipline for alleged misconduct taking place during a bankruptcy proceeding. In addressing his claims, we examine the application of offensive collateral estoppel in attorney disciplinary proceedings and specifically the standard of proof applied in disciplinary matters to establish that misconduct has occurred. We conclude that the standard of proof² is a stricter burden

¹ The caption and citation of any related actions have been omitted in order to protect Respondent’s rights to confidentiality pursuant to Pa.R.D.E. 402. Although our ultimate disposition means that the disciplinary matter is still pending, “the nature of the legal resolution of this opinion requires publication for the benefit of the bar.” *ODC v. Anonymous Att’y A*, 714 A.2d 402, 403 n.2 (Pa. 1998).

² “Evidence is sufficient to prove unprofessional conduct if a preponderance of the evidence establishes the conduct and the proof of such conduct is clear and satisfactory.” *ODC v. DiAngelus*, 907 A.2d 452, 456 (Pa. 2006)

than the preponderance of the evidence standard employed by the bankruptcy court in sanctioning Respondent, so the offensive use of collateral estoppel is inapplicable to this matter. We further clarify that the standard of proof in attorney disciplinary matters, which are in the nature of quasi-criminal proceedings,³ requires the Pennsylvania Office of Disciplinary Counsel (“ODC”) to establish attorney misconduct with evidence that is sufficient to satisfy a clear and convincing evidence standard of proof. Accordingly, for the reasons that follow, the decision of the Disciplinary Board is reversed and the matter is remanded for proceedings consistent with this opinion.

I. Background

Respondent represented a corporate creditor (“Creditor”). In 2008, Creditor was assigned a loan guaranteed by two individuals (collectively, “the debtors”). Shortly after a lawsuit had been commenced on behalf of Creditor to collect the remaining \$150,000 on the loan, Creditor and the debtors entered into a compromise for \$119,000. In 2011, the debtors defaulted and Respondent filed a confession of judgment on behalf of Creditor. Over the next several years, the parties attempted to negotiate a settlement.

In 2012, the trial court ordered the debtors to pay sanctions in connection with their failure to provide requested documents relative to post-judgment discovery. The sanctions awarded Creditor \$100 per day until the debtors fully complied with the discovery orders. In 2016, Creditor sought damages in the amount of \$141,103 against the debtors for the underlying loan and an additional \$135,000 based upon the 2012 sanctions award. A trial judge awarded Creditor \$141,103, but the court crossed out the portion of the proposed order that reflected Creditor’s request for sanctions.

³ See *ODC v. Campbell*, 345 A.2d 616, 620 (Pa. 1975) (“We need only add that although disciplinary proceedings are sui generis, they have been styled as ‘quasi-criminal.’”).

In May 2018, the debtors filed a Chapter 7 petition in bankruptcy court, which stayed all civil proceedings and any enforcement of judgments. See 11 U.S.C. § 362(a). Respondent met with the debtors' counsel ("Debtors' Counsel"). At that meeting, Respondent demanded that debtors pay Creditor \$250,000 or Respondent would send the Chapter 7 trustee and the United States Attorney information about assets allegedly owned by the debtors, but not disclosed in their bankruptcy filings.⁴

Debtors' Counsel advised Respondent via email that the debtors would not pay Creditor and further suggested that Respondent's demand was inappropriate. That same day, though before he received the email from Debtors' Counsel, Respondent sent the bankruptcy trustee eight emails containing information about the debtors' assets. Separately, Respondent filed a "proof of claim"⁵ on behalf of Creditor with the bankruptcy court, asserting a claim for more than \$400,000 against the debtors. This "proof of claim" included the proposed sanctions award that had been denied by the trial court in 2016.

The debtors objected, arguing that the sum was excessive and that Creditor deliberately concealed a "compromise" order that had been entered by the trial court in 2016, given that the trial court had crossed out Creditor's request for sanctions. In response, Creditor asserted that it had been awarded sanctions, referencing the 2012 trial court order, as well as the 2016 order that had awarded Creditor interest until the judgment was paid. In its response, Creditor also included an edited photograph of one of the debtors to show that the debtors had an expensive lifestyle, as the debtor was wearing a watch worth more than \$26,000 in the photograph.

⁴ Respondent has continually expressed his position that he was merely delivering a counteroffer in an ongoing settlement discussion.

⁵ "Proof of claim" refers to a form used by a creditor in bankruptcy proceedings to indicate the amount of debt owed by the debtor on the date of the bankruptcy filing.

On March 4, 2019, the debtors filed with the bankruptcy court a motion to enforce the automatic stay and sanctions against Creditor and Respondent. Motion for Enforcement of the Automatic Stay, Sanctions ... for Fraud on the Court and Contempt for Willful Violations of the Automatic Stay, 3/4/2019. The fraud the debtors alleged in their motion related to the proof of claim, based upon the omission of the 2016 trial court's order denying sanctions as well as the edited photograph. Regarding the photograph, the debtors alleged that it had been cropped to omit the date (i.e., 2004) in an effort to mislead the court into believing it was a recent photo; however, Respondent asserted that he had edited the photo to protect the privacy of the unknown individual who was standing with one of the debtors.

Following two days of hearings, the bankruptcy court awarded the debtors damages in the aggregate amount of \$354,777.75 and held Respondent and Creditor jointly and severally liable for the damages. In its accompanying opinion, the bankruptcy court explained that the debtors did not have standing to advance the position that Creditor's proof of claim was fraudulent. Regarding the edited photo, the court found that it undermined the credibility of Respondent's testimony and provided evidence of bad faith, but offered no opinion on whether it was actually fraudulent. The court primarily focused on Respondent and Creditor's violation of the automatic stay, reasoning that the demand Respondent presented to Debtors' Counsel constituted impermissible coercion or harassment. Respondent did not appeal the bankruptcy court's order and paid the sanctions. Additionally, the bankruptcy court judge did not refer Respondent to the disciplinary authorities in any jurisdiction, despite a request by Debtors' Counsel to do so.

Following the bankruptcy court's decision, ODC filed a petition for discipline in Pennsylvania, asserting that Respondent violated several Rules of Professional Conduct. See Pa.R.P.C. 8.5(b) (affording ODC the discretion to apply the rules of professional

conduct of another jurisdiction for conduct occurring in that jurisdiction). According to ODC, Respondent threatened to disclose incriminating evidence about the debtors to a bankruptcy trustee, concealed relevant evidence (i.e., the proof of claim which did not include the 2016 trial court order), altered evidence to suggest the current wealth of the debtors (i.e., the edited photograph), and made misrepresentations in filings, testimony, and proceedings before the bankruptcy court. ODC maintained that these actions violated, inter alia, Respondent's duty of candor to a tribunal and fairness to opposing party.

ODC filed a Motion to Apply Collateral Estoppel to preclude Respondent from relitigating that: 1) he threatened to disclose purportedly incriminating information about the debtors; 2) he thereby violated the automatic stay; and 3) he altered the photograph of the debtor.⁶ Respondent objected, asserting that the two proceedings had distinct burdens of proof. Specifically, he argued that the "clear and satisfactory" standard required to establish attorney misconduct was more stringent than that required to find a willful violation of an automatic stay by the bankruptcy court judge. Ultimately, the Hearing

⁶ The doctrine of collateral estoppel precludes re-litigation of matters decided in a prior action where: (1) the issues are identical; (2) there was a final adjudication on the merits in the prior action; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior case; (4) that party had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination was essential to the judgment in the prior proceeding. *ODC v. Kiesewetter*, 889 A.2d 47, 51-52 (Pa. 2005).

The offensive use of collateral estoppel by the plaintiff also entails a fairness assessment of the following: "(1) whether the plaintiff could have joined the earlier action; (2) whether the subsequent litigation was foreseeable and therefore the defendant had an incentive to defend the first action vigorously; (3) whether the judgment relied upon as a basis for collateral estoppel is inconsistent with one or more previous judgments in favor of the defendant[;] and (4) whether the second action would afford the defendant procedural opportunities unavailable in the first action that could produce a different result." *Kiesewetter*, 889 A.2d at 52 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979)).

Committee ordered that Respondent was collaterally estopped from relitigating these issues.

At the disciplinary hearing, ODC relied predominantly on the filings and testimony submitted to the bankruptcy court. Despite the collateral estoppel ruling, Respondent presented evidence regarding his in-person meeting with Debtors' Counsel and his alteration of the photograph. At the conclusion of the hearings, the Hearing Committee recommended a two-year suspension. Hearing Committee Report, 8/16/2022, at 62. In justifying its application of collateral estoppel, the Hearing Committee reasoned that Respondent had ample opportunity to litigate his position in the bankruptcy court and that the disciplinary proceedings should not serve as a forum for Respondent to dispute the well-reasoned, detailed, and fully substantiated findings of that court. *Id.* at 40-46.

As to the rules violations, the Hearing Committee reasoned that Respondent breached his duty of candor to the bankruptcy court and the Hearing Committee by continuing a narrative "to subvert his willful threat in violation of the automatic stay, his disclosure to the [bankruptcy court] of incomplete and misleading evidence in the proof of claim to exaggerate his client's claim, and his submission of the edited photograph to show evidence of [the debtors'] current wealth." *Id.* at 48-49. The Hearing Committee, like the bankruptcy court, found Respondent's testimony incredible, and further explained that it was "disturb[ed]" by Respondent's "untrustworthy, if not dishonest testimony" relative to the proof of claim submission. *Id.* at 50. Both parties filed exceptions. ODC sought disbarment, and Respondent contended that the Hearing Committee erred in applying offensive collateral estoppel.

Following its review, the Disciplinary Board adopted much of the Hearing Committee's factual findings and explained that Respondent was given wide latitude to present evidence, despite the collateral estoppel ruling. Disciplinary Board's Report and

Recommendations, 1/26/2023, at 47-48. Addressing the Hearing Committee's application of collateral estoppel, the Disciplinary Board explained that Respondent had the opportunity to litigate the bankruptcy court's sanction before that court and had fair notice that his conduct was proscribed by the rules of professional conduct. *Id.* at 48.

As to Respondent's argument concerning the burden of proof, the Disciplinary Board explained that the bankruptcy court "specifically found that [the debtor] carried his burden of proof of establishing emotional distress," and an element of that claim requires that the evidence "clearly establish the significant harm." *Id.* at 45. In the Disciplinary Board's view, "in comparing this burden with that of the Pennsylvania disciplinary system, which required that [ODC] establish misconduct by a preponderance of clear and satisfactory evidence, we find that [the debtor] satisfied a burden more stringent than the burden [Respondent] must satisfy in the instant disciplinary proceedings." *Id.* Moreover, according to the Disciplinary Board, application of collateral estoppel did not preclude Respondent from litigating whether his conduct violated the rules of professional conduct, but only prevented him from relitigating the factual findings made in the bankruptcy proceedings. *Id.* at 48.

Ultimately, the Disciplinary Board recommended that a five-year suspension should be imposed. In arriving at this conclusion, the Disciplinary Board highlighted Respondent's refusal to accept responsibility and a lack of remorse for his misconduct, despite the bankruptcy court's findings. *Id.* at 55-58.

One Disciplinary Board member filed a dissenting statement explaining that the Hearing Committee should not have applied collateral estoppel in light of the differing burdens of proof between the disciplinary and bankruptcy proceedings. Dissenting Statement at 1-2. According to the dissent, a willful violation of an automatic stay in bankruptcy court need only be established by a preponderance of the evidence, as

opposed to the clear and satisfactory evidence required to establish a violation of the rules of professional conduct. *Id.* To the dissenting member, the standard applied in the prior proceeding in *Kiesewetter* (i.e., clear and convincing evidence) is “identical to that which is employed in disciplinary proceedings.” *Id.* at 2; *see also id.* (stating that this Court “has seen fit to prescribe the ‘intermediate standard of proof’” to disciplinary matters).

In his Petition for Review, Respondent sought review of the Disciplinary Board’s determination and requested oral argument. Respondent focused primarily on the Hearing Committee’s application of offensive collateral estoppel in attorney disciplinary proceedings. In response, ODC argued that the Hearing Committee’s application of offensive collateral estoppel was consistent with this Court’s decision in *Kiesewetter*, and any inconsistencies with *Kiesewetter* were harmless. Thus, ODC contended that the five-year sanction imposed was appropriate. We granted review to determine the following:

1. Whether the Disciplinary Board improperly utilized non-mutual offensive collateral estoppel to preclude [Respondent] from presenting evidence and argument regarding whether he: (1) threatened “to disclose purportedly incriminating evidence about the [debtors] unless the [debtors] paid [Creditor] two hundred and fifty thousand dollars (\$250,000.00) by June 25, 2018”; (2) willfully violated the automatic stay; and (3) altered the photograph, when none of the elements necessary for the application of offensive collateral estoppel are met in this matter.
2. Whether the Disciplinary Board improperly denied [Respondent’s] request to supplement the record to establish that opposing counsel in the underlying matter, whose credibility the underlying court depended on and accepted over Respondent’s to enter the order which was the basis for the Disciplinary Board’s collateral estoppel motion, has been disbarred [in one state] for creating a fraudulent “order” to present to his client, an action taken contemporaneously with his underlying testimony.

3. Whether the Report and Recommendation of the Disciplinary Board dated January 30, 2023, recommending a five year suspension improperly relies on non-mutual offensive collateral estoppel and is inconsistent with discipline in other similar matters.

Respondent's Brief at 5.⁷

II. Parties' Arguments

Respondent's Arguments

Although Respondent does not contest the application of offensive collateral estoppel to disciplinary actions in general, he argues that none of the elements necessary to justify its application can be found in this matter. Respondent's Brief at 51. Initially, he observes that the core justification for collateral estoppel to apply in *Kiesewetter* was because Kiesewetter was a party to the underlying litigation (i.e., a civil fraud trial), which had a higher burden of proof than what is required in disciplinary proceedings. *Id.* at 31-32 (citing *Kiesewetter*, 889 A.2d at 52).

Notably, Respondent argues that the difference in the burdens of proof, prohibits the use of offensive collateral estoppel here. In a disciplinary proceeding, attorney misconduct must be proven by a preponderance of the evidence through clear and satisfactory evidence. *Id.* at 28-29 (citing *Kiesewetter*, 889 A.2d at 54 n.5). However, unlike the type of civil fraud at issue in *Kiesewetter*, Respondent contends that violation of an automatic stay does not require "clear and convincing evidence." *Id.* at 46. He observes that this Court explained that the burden of proof applied in the prior proceeding in *Kiesewetter* was equal to the burden of proof that must be established in a disciplinary proceeding. *Id.* However, Respondent contends that the disciplinary standard is "a term of art indicating a burden of proof greater than 'mere preponderance' and (perhaps) less than 'clear and convincing' evidence." Respondent's Reply Brief at 6. Although the

⁷ Given our ultimate disposition, we need only address the first question presented for our review.

bankruptcy court did not clearly identify the applicable burden of proof in the prior proceeding, Respondent advises that the standard for the violation of automatic stay requires proof of “willful” conduct. Respondent’s Brief at 47. However, he notes that bankruptcy courts do not require specific intent to show willfulness in that context. *Id.* To Respondent, this suggests that the conduct in the bankruptcy proceeding was not established by clear and convincing evidence, and that the standard relied upon by the bankruptcy court “is different from the burden of proof” used in disciplinary matters. *Id.* He also argues that the extension of offensive collateral estoppel to these circumstances would create “an irreconcilable conflict between clients and their counsel” when an “opposing party seeks sanctions jointly” against an attorney and a client. *Id.* at 52.⁸

ODC’s Arguments

ODC maintains that there was no error in applying offensive collateral estoppel under the circumstances of this case. ODC’s Brief at 14-15. Relying on *Kiesewetter*, ODC maintains that the burden to prove professional misconduct is “a preponderance of the evidence” standard. *Id.* at 26-33 (citing *Kiesewetter* 889 A.2d at 53). Thus, as long as the civil trial in *Kiesewetter* applied an equal or stricter burden of proof, collateral estoppel was applicable. *Id.* at 26-27. ODC argues that “since 2012, whenever this Honorable Court has issued an opinion in a disciplinary matter, it has described ODC’s burden of proof as ‘a preponderance of the evidence.’” *Id.* at 28-29.

Moreover, ODC highlights that the rules themselves do not set forth a particular burden of proof for establishing attorney misconduct. *Id.* at 28-29 (citing Pa.R.D.E. 208). ODC points out the clear and convincing evidence standard is explicit in the rule dealing with an attorney’s burden in reinstatement matters, but that language is notably absent

⁸ As a result of our resolution of the burden of proof prong of Respondent’s argument, we do not address this alternative issue.

from the rule addressing proof of attorney misconduct. *Id.* at 29 & n.10 (citing Pa.R.D.E. 218(c)(3) (“[A] disbarred or suspended attorney shall have the burden of demonstrating **by clear and convincing evidence** that such person has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth[.]”)) (emphasis added by ODC). Because the burden of proof is “unqualified” in the rules, ODC contends that this Court intended for “mere preponderance” to be the standard, particularly where there is a “clearly delineated” heightened burden of proof in other disciplinary matters. *Id.* at 28-30 (citing *Se-Ling Hosiery v. Margulies*, 70 A.2d 854, 857 (Pa. 1950) (“[I]n civil cases the phrase ‘burden of proof’ when unqualified by any additional phrase implies ‘by the fair preponderance of the evidence.’”)).

III. Analysis

Our standard of review in all disciplinary matters is *de novo*; however, the findings of the Hearing Committee and the Disciplinary Board are “guidelines for judging the credibility of witnesses and should be given substantial deference.” *ODC v. Altman*, 228 A.3d 508, 516 (Pa. 2020) (citing *ODC v. Pozonsky*, 177 A.3d 830, 838 (Pa. 2018)).

A. Collateral Estoppel and Disciplinary Matters

This Court first addressed the application of the offensive use of collateral estoppel in disciplinary proceedings in *ODC v. Kiesewetter*, 889 A.2d 47 (Pa. 2005).⁹ “Collateral estoppel, or issue preclusion, is a doctrine which prevents the re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated.” *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995). The

⁹ The doctrine of collateral estoppel can be asserted either defensively as a shield to prosecution of an action or offensively, as a sword to facilitate prosecution. *Kiesewetter*, 889 A.2d at 51. In *ODC v. Duffield*, 644 A.2d 1186 (Pa. 1994), we examined whether defensive collateral estoppel could be applied in a disciplinary proceeding.

doctrine applies where: (1) the issues are identical; (2) there was a final adjudication on the merits in the prior action; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior case; (4) that party had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination was essential to the judgment in the prior proceeding. See *Kiesewetter*, 889 A.2d at 51-52. The offensive use of collateral estoppel, as invoked here by ODC, also entails a fairness assessment of the following:

- (1) whether the plaintiff could have joined the earlier action;
- (2) whether the subsequent litigation was foreseeable and therefore the defendant had an incentive to defend the first action vigorously;
- (3) whether the judgment relied upon as a basis for collateral estoppel is inconsistent with one or more previous judgments in favor of the defendant[;] and
- (4) whether the second action would afford the defendant procedural opportunities unavailable in the first action that could produce a different result.

Kiesewetter, 889 A.2d at 52 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979)).

While, for the sake of completeness, we recite the factors informing the application of collateral estoppel, we need not delve into whether each factor applies to the instant matter. We need only look to the first. There is not an identity of issues when the question to be resolved is subject to a greater burden of proof in the subsequent proceeding compared to what was required in the prior proceeding. The principle of collateral estoppel is designed to prevent repetitious lawsuits in order to conserve judicial resources, “and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication.” *Kiesewetter*, 889 A.2d at 51. The principle operates on the premise that matters, “which have once been decided ... remain[] substantially static, factually and legally.” *C.I.R. v. Sunnen*, 333 U.S. 591, 599 (1948).

Where matters are adjudicated pursuant to different evidentiary standards, they are not static and thus the litigation cannot be identically reconstructed or repeated. This is significant because the allocation and weight of the burden of proof is critical in determining who should prevail, and “the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden,” for the purpose of applying the doctrine of the collateral estoppel. See RESTATEMENT (SECOND) OF JUDGMENTS § 28, cmt. f; see also *Weissberger v. Myers*, 90 A.3d 730, 735 (Pa. Super. 2014) (finding that because fraud was proven by a preponderance of the evidence in bankruptcy court, collateral estoppel could not apply in Pennsylvania courts where the burden of proof “substantially increases” to clear and convincing evidence).

The application of differing burdens of proof in the prior and subsequent proceeding does not necessarily preclude the application of collateral estoppel. Where the first adjudication was made based on a higher standard of proof than the burden applicable in the subsequent case, collateral estoppel may apply. See *Commonwealth v. Brown*, 469 A.2d 1371, 1375 (Pa. 1983) (subject to other double jeopardy considerations, rejecting the notion that collateral estoppel is not applicable where the second trial involves a preponderance of the evidence standard when the prior trial involved proof beyond a reasonable doubt). This is based on the logic that when an issue is resolved on a higher burden of proof, it will be resolved in the same way when it is subject to a lower burden of proof.

However, if the standard of proof in a prior proceeding is a lesser burden of proof than what is required in the subsequent proceeding, the outcome in the subsequent proceeding may not be the same as the first. In such circumstances, for purposes of the first requirement of the doctrine of collateral estoppel, there is no identity of the issues and thus, the doctrine cannot be applied. Relevant to this appeal, the question is whether

the standard of proof applied in the bankruptcy proceeding to establish a willful violation of the stay was in fact less stringent than what is required in disciplinary proceedings in Pennsylvania.

B. ODC’s Burden of Proof in Disciplinary Matters

The purpose of imposing a burden of proof is to ensure fair and consistent adjudications pursuant to principles of due process. As this Court has explained

The function of a standard of proof is to instruct the factfinder as to the level of confidence that society believes he should have in the correctness of his conclusions; furthermore, different standards of proof reflect differences in how society believes the risk of error should be distributed as between the litigants. Thus, the most stringent standard—beyond a reasonable doubt—is applicable in criminal trials due to the gravity of the private interests affected; these interests lead to a societal judgment that, given the severe loss that occurs when the individual is erroneously convicted of a crime, the public should bear virtually the entire risk of error. The preponderance-of-the-evidence standard, by contrast, reflects a belief that the two sides should share the risk equally; for this reason, it is applicable in a civil dispute over money damages, where the parties may share an intense interest in the outcome, but the public’s interest in the result is “minimal.” *Addington*, 441 U.S. at 423; *Williams I*, 733 A.2d at 604. The “clear and convincing” standard falls between those two end-points of the spectrum; it is typically defined as follows:

The clear and convincing standard requires evidence that is “so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, the truth of the precise facts [in] issue.”

Rohm and Haas Co. v. Continental Cas. Co., 781 A.2d 1172, 1179 (Pa. 2001) (quoting *Lessner v. Rubinson*, 400, 592 A.2d 678, 681 (Pa. 1991)).

Commonwealth v. Maldonado, 838 A.2d 710, 715 (Pa. 2003).

In re Lemisch, 184 A. 72 (Pa. 1936) was this Court’s first pronouncement of the government’s burden of proof to establish attorney misconduct in disciplinary matters.

The case involved an appeal from a decree of disbarment as a consequence of involvement in illegal lottery activity. *Id.* at 72. The opinion detailed the circumstantial evidence of the attorney’s knowledge of the numbers racket being advanced with his participation and noted that, “though the evidence is circumstantial, it is strongly persuasive and leads to one conclusion—that of guilty connection with organized crime.” *Id.* Rejecting the attorney’s argument that it was others in his firm and not he who was guilty of professional misconduct, the Court found that “while a preponderance of the evidence is necessary to establish an attorney’s unprofessional conduct and the proof of such conduct should be clear and satisfactory in this case, the logical inference that appellant was in league with organized crime is as weighty as any direct evidence could be.” *Id.* at 74 (internal citations omitted).

While the *Lemisch* Court drew on case law from other jurisdictions in support of the application of the “clear and satisfactory” standard of proof in attorney discipline matters,¹⁰ that standard of proof appeared in Pennsylvania case law prior to *Lemisch* to describe the burden of proof that must be met to establish fraud. *See Pusic v. Salak*, 104 A. 751, 753 (Pa. 1918) (“Fraud must be established by clear and satisfactory evidence, as it is never presumed.”); *Suravitz, v. Prudential Ins. Co. of Am.*, 104 A. 754, 756 (Pa. 1918) (to prove the defense of fraud, “defendant assumed the burden of proving [it] by a preponderance of clear and satisfactory evidence”). Thus, while this Court has recognized “clear and convincing evidence” as the standard for proving fraud in civil

¹⁰ *See In re Lemisch*, 184 A. at 74 (citing *Flanders v. Keefe*, 84 N.W. 878, 880 (Wis. 1901) (“The important question is whether such findings of the trial court are sustained by a clear preponderance of satisfactory evidence.”); *In re Dodge*, 100 N.W. 684, 687 (Minn. 1904) (“Given the nature of a charge of attorney misconduct, the rule in such a case is that, to justify a conviction the evidence must be full, clear, and convincing.”); *In re Houghton*, 8 P. 52, 57 (Cal. 1885) (“Unless we are clearly satisfied of respondent’s guilt we ought not to remove or suspend him from the practice of his profession.”); *People v. Silha* 96 N.E. 826, 829 (Ill. 1911) (“Only clear and satisfactory proof can justify a decision from which would flow consequences of such grave nature.”)).

matters for over a century,¹¹ we have also referred to the burden of proof in such cases as “clear and satisfactory.” See also *Commonwealth v Talley*, 265 A.3d 485, 521 n.30 (Pa. 2021) (opining that “clear and satisfactory evidence” is one of the many articulations of the “clear and convincing evidence” standard).¹² Likewise, we have referred to the burden of proof to establish an inter vivos gift, first asserted after a decedent’s death, interchangeably as “clear and convincing” and “clear and satisfactory.” *Snyderwine v. McGrath*, 22 A.2d 644 (Pa. 1941).

Any confusion in understanding the burden of proof to establish attorney misconduct in disciplinary proceedings comes from the use of the phrase “preponderance of the evidence” in conjunction with the phrase “with proof that is clear and satisfactory.” This older articulation appears to mix two distinct burdens of proof. However, a preponderance of the evidence standard is incompatible with the nature of attorney disciplinary cases because it is the lowest burden applied in civil cases. With respect to “preponderance of the evidence,” we have explained that the standard

[R]eflects a belief that the two sides should share the risk equally; for this reason, it is applicable in a civil dispute over money damages, where the parties may share an interest in the outcome, but the public’s interest in the result is “minimal.”

Maldonado, 838 A.2d at 715.

¹¹ See, e.g., *Rohm v. and Haas Co. v. Cont’l Cas. Co.*, 781 A.2d 1172, 1179 (Pa. 2001) (“The burden of proving fraud must be established by clear and convincing evidence and rests with the party alleging it.”); *Bayout v. Bayout*, 96 A.2d 876, 878 (Pa. 1953) (“[A] party who relies on fraud to establish a claim has the burden of proving the facts upon which the fraud is based by clear and convincing evidence[.]”); *Yerkes v. Wilson*, 81 1/2 Pa. 9, 19 (Pa. 1870) (acknowledging that “fraud [is established] by evidence that is clear and convincing”).

¹² But see *Rine v. Hall*, 10 A. 1088, 1090 (Pa. 1898) (observing that “clear and satisfactory” is a burden of proof lesser than clear and convincing).

Attorney disciplinary proceedings are not civil disputes for money damages and the public's and the attorney's interests are clearly not minimal. Disciplinary proceedings are not strictly civil nor criminal in nature, but rather have been styled "quasi-criminal." *Campbell*, 345 A.2d at 620. They are not lawsuits between parties but "are in the nature of an inquest or inquiry as to the conduct" of an attorney. *Id.* at 619-20. Likewise, the proceedings can have a severe impact on the attorney's career and livelihood. *In re Berlant*, 328 A.2d 471 (Pa. 1974). The *Lemisch* Court, in announcing the standard of proof, relied on case law from other jurisdictions where the magnitude of the impact of the proceedings were expressly recognized.¹³ As discussed, the standard of clear and satisfactory evidence had a distinct meaning in Pennsylvania when *Lemisch* was decided and the use of that standard to describe the proof requirement was not accidental. The manner in which the *Lemisch* Court described the evidence in the case demonstrates the heightened burden: "strongly persuasive and lead[ing] to but one conclusion," 184 A. at 72, and "weighty." *Id.* at 74. These are the types of adjectives used to describe clear and convincing evidence. See, e.g., *Matter of Chiovero*, 570 A.2d 57, 60 (Pa. 1990) ("[C]lear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."). *Lemisch* adopted an elevated standard of proof—one between the lowest civil burden (preponderance of the evidence) and the highest criminal burden (beyond a reasonable doubt). That standard, clear and satisfactory, was another articulation of the clear and convincing standard as established by case law preceding and contemporaneous with *Lemisch*.

That "evidence is sufficient to prove attorney misconduct if a preponderance of the evidence establishes that conduct and the proof of such conduct is clear and satisfactory"

¹³ See *supra* note 11.

was the standard consistently stated in disciplinary cases for over seventy years. *ODC v. DiAngelus*, 907 A.2d 452, 456 (Pa. 2006); see also *ODC v. Surrick*, 749 A.2d 441, 444 (Pa. 2000); *ODC v. Price*, 732 A.2d 599, 603 (Pa. 1999); *ODC v. Duffield*, 644 A.2d 1186, 1190 (Pa. 1994); *ODC v. Keller*, 506 A.2d 872, 875 (Pa. 1986); *ODC v. Kissel*, 442 A.2d 217, 219 (Pa. 1982); *ODC v. Ewing*, 436 A.2d 139, 142-43 (Pa. 1981); *ODC v. Grigsby*, 425 A.2d 730, 732 (Pa. 1981); *In re Berlant*, 328 A.2d 471, 473 (Pa. 1976). However, in *ODC v. Cappuccio*, 48 A.3d 1231 (Pa. 2012), in setting forth this Court's standard and scope of review, we stated:

This Court's review of attorney disciplinary matters is de novo; we are not bound by the findings and conclusions of the Hearing Committee or the Board. (Citation omitted). However, the findings of the Hearing Committee and the Board are guidelines for judging the credibility of witnesses and should be given substantial deference. *ODC v. DiAngelus*, 589 Pa. 1, 907 A.2d 452, 456 (2006). **In attorney disciplinary proceedings, the ODC bears the burden of establishing attorney misconduct by a preponderance of the evidence.** *Id.*

Cappuccio, 48 A.3d 1236 (emphasis added)

This emphasized sentence is a scrivener's error. It unintentionally omits the prong of ODC's burden that requires that proof of the conduct must be clear and satisfactory. We know it was a mistake in drafting for multiple reasons. First, *DiAngelus*, to which *Cappuccio* cites as the source of its statement regarding ODC's burden includes the requirement of clear and satisfactory evidence. *DiAngelus*, 907 A.2d 456 ("Evidence is sufficient to prove unprofessional conduct if a preponderance of the evidence establishes the conduct and proof of such conduct is clear and satisfactory."). Second, in *Cappuccio*, ODC's burden of proof was not at issue because the disciplinary proceedings arose out of the respondent's criminal conviction, which serves as conclusive evidence of the commission of the crime in a disciplinary proceeding. See *Cappuccio*, 48 A.3d at 1236

(acknowledging that none of the standards of review or proof were at issue); Pa.R.D.E. 214(e) (“A certificate of conviction of an attorney for a crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.”). Consequently, there was no basis to deviate from the long-established standard of proof and there was no mention of the Court doing so. Third, *DiAngelus* was actually decided based on the Court’s analysis of whether ODC met its burden of proof to establish that the respondent engaged in misconduct. While the *DiAngelus* Majority concluded that ODC had met its burden, Chief Justice Cappy, joined by Justice Castille, dissented finding that the evidence in support of the violations of the Rules of Professional Conduct “falls somewhere short of clear and satisfactory.” *DiAngelus*, 907 A.2d 460 (Cappy, C.J., dissenting). Justice Castille authored *Cappuccio* and surely if it was the intention of the Court to alter the standard to eliminate ODC’s burden of proof to establish attorney misconduct with clear and satisfactory evidence, the opinion would have expressly said so given the centrality of that burden in *DiAngelus* and in the dissent which Justice Castille joined.

The scrivener’s error in *Cappuccio* has persisted. This unintentionally truncated standard of proof has been repeated in our attorney discipline cases. See *ODC v. Preski*, 134 A.2d 1027, 1031 (Pa. 2016) (“ODC bears the burden of establishing attorney misconduct by a preponderance of the evidence.”) (citing *Cappuccio*, 48 A.3d at 1236); *ODC v. Quigley*, 161 A.3d 800, 807 (Pa. 2017) (citing *Preski*, 134 A.3d at 1031); *ODC v. Baldwin*, 225 A.3d 817, 821 (Pa. 2020) (citing *Preski*, 134 A.3d at 1031); *ODC v. Altman*, 228 A.3d 508, 516 (Pa. 2020) (citing *Preski*, 134 A.3d at 1031). Although the standard has been often recited, we have not applied or analyzed the burden in any of these cases.

Until this appeal, the application or analysis of ODC’s burden of proof to establish attorney misconduct has not been an issue for our Court since *DiAngelus*. It arises in this

case because, as discussed, we must decide whether the burden of proof in the bankruptcy case to establish a violation of the automatic stay was less stringent than ODC's burden in Respondent's disciplinary proceeding. In addition to relying on *Cappuccio's* erroneously truncated statement of its burden of proof, ODC's Brief at 28-29, ODC relies on *Kiesewetter* for the proposition that its burden of proof is a preponderance of evidence. ODC's Brief at 26-27. In *Kiesewetter*, like here, the application of collateral estoppel hinged on whether the burden of proof in the prior proceeding was less stringent than ODC's burden in the disciplinary proceeding.

In *Kiesewetter*, the question was whether the attorney-respondent, Kiesewetter, should be disbarred in Pennsylvania following a federal civil jury verdict entered against him in a lawsuit brought by his sisters, in which they claimed he fraudulently misappropriated substantial family assets. *Kiesewetter*, 889 A.2d at 48-49. The civil trial was bifurcated with liability and punitive damages determined by the jury and compensatory damages determined by the court. *Id.* at 49. In the civil trial, the jury found that Kiesewetter was liable for fraud based upon clear and convincing evidence. Like here, ODC sought to apply the doctrine of collateral estoppel, asserting that Kiesewetter should be precluded from denying in the disciplinary proceedings facts established in the civil trial. Ultimately, the Hearing Committee applied collateral estoppel, precluding re-litigation of the issue of whether Kiesewetter had engaged in fraud, as determined by the jury in the civil action. *Id.* at 49-50. The Disciplinary Board eventually¹⁴ applied collateral estoppel to the matter as well and recommended Kiesewetter's disbarment. *Id.* at 50. Notably, the Disciplinary Board concluded that Kiesewetter "had been found to have

¹⁴ Initially, the Disciplinary Board found that collateral estoppel did not apply and remanded to the Hearing Committee for proceedings consistent with its decision. However, ODC filed a petition for review following that decision, and our Court vacated the Disciplinary Board's order and remanded for it to apply collateral estoppel and determine the appropriate sanctions. *Kiesewetter*, 889 A.2d at 50.

engaged in fraud by the same standard of proof applicable to a disciplinary proceeding.”

Id.

On appeal to this Court, Kiesewetter argued, inter alia, that there was no identity of issues “due to the disparity in the burdens of proof” between the civil action and the disciplinary matter. *Id.* at 54. While he appeared to concede that “satisfaction of the burden of proof in the liability phase of his civil fraud action would also satisfy the burden of proof applicable to a disciplinary matter[,]” he maintained that because the civil trial was bifurcated and that the damages phase was subject to the lesser preponderance of evidence standard, collateral estoppel could not preclude him from litigating the issue of whether he engaged in fraud. *Id.* We rejected his reliance on the burden of proof for the damages phase of the case. As we explained in *Kiesewetter*,

[T]he issues in the two proceedings were, in fact, identical for collateral estoppel purposes. The basis for the imposition of discipline is [Kiesewetter’s] violation of his fiduciary duty ... which constituted fraud. The jury in the civil fraud action found Respondent committed such acts and utilized a burden of proof that satisfies the burden of proof employed in a disciplinary action. The fact that the federal court employed a lesser burden of proof that did not require clear and satisfactory evidence in the damage phase of the fraud action is not controlling”

Id. at 54.¹⁵

¹⁵ In arguing the instant appeal, the Disciplinary Board likewise misidentified the correlative issue in the first proceeding. While the correlative issue was the violation of the automatic stay, the Disciplinary Board focused on the bankruptcy court’s finding that the debtors carried the burden of establishing emotional distress where the burden was “more stringent than the burden [Respondent] must satisfy in the instant disciplinary proceedings.” Disciplinary Board’s Report and Recommendations, 1/26/2023, at 45. The Disciplinary Board’s analysis does not address the debtors’ evidentiary burden of proof to establish Respondent’s willful violation of the automatic stay which was the relevant issue for purposes of collateral estoppel in the disciplinary matter. Respondent was precluded from relitigating that he threatened to disclose purportedly incriminating (continued...)

The *Kiesewetter* Court also found the burden of proof relevant to determining if it was fair to apply collateral estoppel to Kiesewetter because it played into whether the disciplinary proceeding would afford procedural protections not available to him in the fraud action. The court concluded that “the respondent was afforded all the safeguards inherent in a civil action and would be entitled to no greater protections in a disciplinary proceeding. “Significantly, ... the burden of proof utilized in the civil proceeding to determine that [Kiesewetter] engaged in fraud satisfied the burden of proof employed in a disciplinary proceeding.” *Id.* at 52-53.

As to the burdens of proof in the two proceedings, the *Kiesewetter* Court noted:

[T]he party alleging fraud in Pennsylvania has the burden of proving the same by clear and convincing evidence. We note that the federal court in the civil fraud action applied this standard. ODC has the burden of proving, by a preponderance of the evidence, that an attorney’s actions constitute professional misconduct. This burden of proof must be established by clear and satisfactory evidence. Therefore, satisfaction of the burden applicable to a civil fraud proceeding would likewise satisfy the burden of proof applicable to a matter alleging professional misconduct.

Id. at 54 n.5 (citations omitted).

In the instant appeal, relying on this footnote, ODC cites *Kiesewetter* for the proposition that “ODC has the burden of proving, **by a preponderance of the evidence**, that an attorney’s actions constitute professional misconduct.” ODC’s Brief at 26 (citing *Kiesewetter*, 889 A.2d at 54 n.5). Respondent faults ODC for omitting the portion of the footnote that states that to establish attorney misconduct by preponderance of the evidence it “must be established by clear and satisfactory evidence[.]” Respondent’s Reply Brief at 13 (citing *Kiesewetter*, 889 A.2d at 54 n.5).

information about the debtors in violation of the automatic stay and that he altered the photograph to misrepresent its date.

We reject ODC's interpretation of *Kiesewetter*. Based on the myriad of cases and reasons discussed, it is ODC's burden to prove attorney misconduct with proof that is clear and satisfactory. Nothing in *Kiesewetter* supports the contrary notion that a preponderance of the evidence is sufficient. In fact, the relevant footnote is drawn to reflect the symmetry between a party alleging fraud who has the "burden of proving [fraud] by clear and convincing evidence" and ODC's "burden of proof [which] must be established by clear and satisfactory evidence." *Kiesewetter*, 889 A.2d at 54 n.5.

Likewise, as highlighted, *Kiesewetter* states that the burden of proof utilized in the civil proceeding to determine that the attorney engaged in fraud satisfied the burden of proof employed in a disciplinary proceeding. *Id.* at 52-53 & 54 n.5. Given that this was a case of first impression on the application of offensive collateral estoppel, if the Court discerned a difference between "clear and convincing" and "clear and satisfactory" evidence, it would have clarified that clear and convincing was a higher standard of proof and, as such, it satisfied the lower burden in the discipline proceeding.¹⁶ The Court did not make the distinction which is consistent with the case law establishing that the standards of proof are the same. See *supra* pp. 14-18. Finally, *DiAngelus* was decided only a year after *Kiesewetter*, and *DiAngelus* hinged on a determination of whether the evidence was clear and satisfactory.

We likewise reject ODC's argument that the absence of a Rule of Disciplinary Enforcement ("Pa.R.D.E.") specifically setting forth a particular burden of proof for establishing attorney misconduct equates with the intent of this Court to impose a mere preponderance of the evidence standard on ODC to carry its burden. ODC believes this

¹⁶ The Court utilized this hierarchical distinction between clear and satisfactory evidence and the "lesser" burden in the damage phase of the civil case. See *Kiesewetter*, 889 A.2d at 54 (explaining that "the federal court employed a lesser burden of proof that did not require clear and satisfactory evidence").

is particularly true because Pa.R.D.E. 218(c)(3)¹⁷ explicitly imposes a clear and convincing evidence burden on an attorney seeking reinstatement after suspension or disbarment. ODC's Brief at 28-30. ODC's argument requires us to ignore almost ninety years of jurisprudence establishing ODC's burden to prove attorney misconduct with evidence that is clear and satisfactory and case law equating that standard with clear and convincing evidence. A rule of disciplinary enforcement is unnecessary.

We concede that the original articulation of ODC's burden was not optimal in that it used language applicable to different standards that were recognized at the time the standard was announced: preponderance of the evidence¹⁸ to establish attorney misconduct **and** proof of attorney misconduct that is clear and satisfactory. As discussed, this Court, in its original articulation, utilized adjectives to describe the actual evidence presented as "weighty," and "strongly persuasive and leading to one conclusion." *In re Lemisch*, 184 A. at 74. This description is inconsistent with a mere preponderance of the evidence and consistent with evidence that is clear and convincing. In this light, *Lemisch* established a burden of proof greater than a civil dispute where only private interests and money damages are at stake. Instead, ODC's burden of proof is the intermediate standard requiring clear and convincing evidence to establish attorney misconduct.

C. Burden of Proof in the Bankruptcy Proceeding and Application of Collateral Estoppel

The prior proceeding was the bankruptcy court's sanctions proceedings. While the bankruptcy court never articulated the standard of proof it was applying to the debtor's

¹⁷ "[A] disbarred or suspended attorney shall have the burden of demonstrating by clear and convincing evidence that such person has the moral qualifications, competency and learning in law required" to be reinstated to the practice of law in Pennsylvania. Pa.R.D.E. 218(c)(3).

¹⁸ In Pennsylvania, one of the earliest articulations of the preponderance of the evidence standard was in *Kaine v. Weigley*, 22 Pa 179 (1853).

claim of a willful violation of the bankruptcy stay, we recognize that the standard applicable to a willful violation of an automatic stay is preponderance of the evidence. In a recent bankruptcy matter, a bankruptcy judge explained the following:

To establish a willful violation of the automatic stay, the movant bears the burden of **showing by a preponderance of the evidence** that: (1) a bankruptcy petition was filed; (2) the violator received notice of the petition; and (3) the violator's actions were in willful violation of the automatic stay." *Daya*, 560 B.R. at 859 (internal citations omitted). "A violation of the automatic stay is willful if the party knew the automatic stay was invoked and intended the actions which violated the stay." ... [.]

In re Edgewater Constr. Grp., Inc., 653 B.R. 221, 226 (Bankr. S.D. Fla. 2023) (emphasis added). Accordingly, the willful violation of the automatic stay was clearly decided pursuant to a preponderance of the evidence standard. As for the finding relating to Respondent's threat, this was also addressed under the same preponderance standard. The bankruptcy court found that Respondent's threat on behalf of his client violated the automatic stay. In other words, the threat was the violation of the automatic stay that needed to be established by a preponderance of the evidence. Lastly, with respect to any references to the photograph, this, too, was discussed in the context of the overall violation of the automatic stay. Thus, all three of the collaterally estopped issues were established by a preponderance of the evidence.

The Disciplinary Board missed the mark by relying on the standard applied to the debtor's emotional distress claim in the bankruptcy proceeding as the issue equivalent to a violation of the rules of professional conduct. Emotional distress damages arose only because of a violation of the stay, regardless of the evidentiary standard required to prove emotional distress. It is irrelevant for collateral estoppel purposes. The correlative issue in the bankruptcy proceeding was whether Respondent violated the bankruptcy stay and

the burden of proof to establish that violation is the point of analysis for collateral estoppel application.

The issues litigated in the bankruptcy sanctions proceedings, i.e., those that were precluded in the disciplinary proceeding, were all addressed pursuant to a preponderance of the evidence standard. Because the burden of proof applied in the prior proceeding was lower than the burden of proof to which ODC is held to prove attorney misconduct, there can be no identity of issues and collateral estoppel cannot preclude Respondent from relitigating the issues concerning the violation of the automatic stay.

IV. Conclusion

We conclude that offensive collateral estoppel cannot apply under the circumstances presented in this case. The articulated evidentiary standard in Pennsylvania disciplinary matters of “the preponderance of the evidence with proof that is clear and satisfactory” is a higher standard than a mere preponderance of the evidence. Because the underlying decision by the bankruptcy court was resolved pursuant to a preponderance of the evidence standard, we hold that neither the Hearing Committee nor the Disciplinary Board can collaterally estop Respondent from relitigating the same issues during his disciplinary proceeding.¹⁹ Collateral estoppel is not applicable where the standard used in the prior proceeding is less stringent than that used in the subsequent matter. We further clarify that the burden of proof that must be met by ODC in establishing attorney misconduct must be sufficient to satisfy a clear and convincing evidence standard of proof. Accordingly, we remand the instant matter to the disciplinary tribunals

¹⁹ Given this disposition, Respondent’s challenge to the lower tribunals’ recommended discipline is moot. Further, our decision makes any challenge regarding the admissibility of evidence premature. While evidence, including evidence to attack the credibility of a witness in the bankruptcy proceeding, cannot be precluded on the basis of collateral estoppel, there may be other grounds to deny its admission. That is for the disciplinary bodies to address on remand.

to consider the disciplinary charges brought against Respondent pursuant to a standard of clear and convincing evidence.

Chief Justice Todd and Justices Dougherty, Wecht, Mundy, Brobson and McCaffery join the opinion.

Justice Wecht files a concurring opinion.

**[J-31-2024] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

OFFICE OF DISCIPLINARY COUNSEL,	:	No. [REDACTED]
	:	
Petitioner	:	No. [REDACTED]
	:	Attorney Registration No. [REDACTED]
	:	([REDACTED] County)
v.	:	
	:	ARGUED: April 10, 2024
	:	
ANONYMOUS ATTORNEY,	:	
	:	
Respondent	:	

CONCURRING OPINION

JUSTICE WECHT

DECIDED: FEBRUARY 12, 2025

I join the Majority in full. The Majority convincingly demonstrates the “symmetry,”¹ between the “clear and convincing” and “clear and satisfactory” burdens of proof. Going forward, courts and litigants would be well-advised to forego invocation of the latter standard in favor of the former. As the Majority shows, the “clear and satisfactory” language traces its lineage to a bygone era.² That language has contributed to confusion for far too long. Presumably, all evidence that was ever “clear” was also at least “satisfactory.” As I find the “clear and satisfactory” standard archaic, unhelpful and, indeed, unclear and unsatisfactory, I would henceforth dispense with it altogether.

¹ Maj. Op. at 23.

² So bygone that the Commonwealth had not yet displaced the numbers rackets with the Lottery. See *id.* at 14-15 (discussing *In re Lemisch*, 184 A. 72 (Pa. 1936)).