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ARTICLE

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JOHN M. BIBONA**

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I. INTRODUCTION

An attorney convicted of a serious crime involving moral turpitude may be consequently disciplined for violation of DR 1-102(A)(5) of the Model Code of Professional Responsibility\(^1\) or Rule 8.4 of the Model Rules of Professional Conduct\(^2\) without the need for relitigating the issue of the attorney's criminal guilt. Likewise, when an attorney is disbarred in one jurisdiction, he can be disbarred by another jurisdiction without relitigating the underlying facts which were the basis for the initial disbarment. When courts thus discipline lawyers, they are invoking collateral estoppel to prevent the attorney from relitigating an issue raised and resolved against him in a prior action even if the tribunal or cause of action is not the same.

However, these same disciplinary courts have refused to invoke collateral estoppel to preclude relitigation of a finding of fraudulent conduct by an attorney who violated an SEC regulation by preparing a prospectus containing false information, or who prepared a Patent Office application containing a false assertion of the date of a relevant document or who drafted a will provision improperly naming the attorney and/or his partner as executor, or who was found to have made fraudulent misrepresentations in a contract matter. A few courts, however, have indicated their intent to do so.

The policy of withholding preclusive effect from civil findings in a subsequent disciplinary action grants an attorney an opportunity to relitigate issues previously examined and decided adversely to the attorney. This special privilege exempts attorneys from processes applicable to laymen and other professionals and conflicts with the judicial goals of finality, efficiency, consistency, and fairness sought to be effectuated through invocation of collateral estoppel.\(^3\)

In this article, we examine the propriety of invoking collateral estoppel in disciplinary cases based on prior civil proceedings and the relevant case law which, with two exceptions, rejects such invocation. We dissent from the majority view and propose uniform treatment of prior civil findings,

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3. See Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67, 492 N.Y.S.2d 584, 588 (1985) ("[Issue preclusion is] intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it."); Pielmeier, Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation, 63 B.U.L. REV. 383, 394 (1983) (noting the benefits yielded by an expansion of collateral estoppel: reducing the number of lawsuits and relitigation of issues; more efficient expenditure of judicial resources; reducing the delay in trials of other lawsuits; easing the burden placed on litigants and witnesses; and promoting consistency, finality, and greater public confidence in the courts).
allowing their use in administrative disciplinary hearings to estop attorneys from contesting prior adverse determinations.

Under our proposal, the findings in a prior civil action could be asserted to preclude an attorney from contesting disciplinary violations constituted by those findings, provided that the civil findings satisfied the traditional elements of collateral estoppel normally required by the jurisdiction. The disciplinary committee would carry the burden of proving identity of issue while the attorney would carry the burden of showing that the prior proceeding's findings are inappropriate for estoppel effect.

II. COLLATERAL ESTOPPEL

Collateral estoppel prevents a party to a prior action from relitigating in

4. Though disciplinary mechanisms vary from state to state, many states use a system similar to that proposed by the ABA's Model Standards for Disciplinary Enforcement. See Standards For Lawyer Discipline and Disability Proceedings (1979), in Professional Discipline for Lawyers and Judges 67 (1979). Typically, an informal administrative investigation is conducted first, to determine whether the inquiry warrants dismissal or disposal with a nondisciplinary admonition. If there is reason to believe that attorney has engaged in professional misconduct, the matter is referred for investigation and, if necessary, plenary hearing. This hearing is generally presided over by an administrative panel, reserving to the lawyer the right to a review hearing and a final right to review on the record in an appellate court. See C. Wolfram, Modern Legal Ethics § 3.4.1, at 99 (1986). Cf. N.Y. Comp. Codes R. & Regs. tit. 22, §§ 605.1 - 605.24 (1988) (Rules and Procedures of the Departmental Disciplinary Committee). For a more extensive description pointing out state distinctions, see Dorf, Disbarment in The United States: Who Shall Do the Noisome Work?, 12 Colum. J.L. & Soc. Probs., 1, 43-71 (1975).

Under the proposition endorsed in this article, once the disciplinary authority satisfies its burden of proving that the adverse finding in the prior civil proceeding addressed the identical issue at question in the disciplinary hearing, the hearing is reduced to a determination of sanction with regard to the violation based on the prior finding. An analogous process would be a tort case where the defendant is estopped from contesting liability and the trial is merely to determine damages. See Goldstein v. Consolidated Edison Co., 93 A.D.2d 589, 462 N.Y.S.2d 646 (1983) (defendant estopped from contesting prior suit's finding of gross negligence though plaintiffs were not parties to that action), aff'd, 62 N.Y.2d 936, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984), cert. denied, 469 U.S. 1210 (1985).

5. Thus, if the jurisdiction still requires mutuality of estoppel for offensive collateral estoppel, offensive preclusion could not be used in a disciplinary hearing. This proposal advocates only that the procedure with respect to attorneys be the same as for others, though it notes mutuality is not a reasonable ground for rejecting the application of collateral estoppel in disciplinary matters. See infra text accompanying notes 57-63.

6. "[T]he burden rests on the [common party] to show that collateral estoppel should not be applied because he did not have a full and fair opportunity . . . just as the burden of showing that the issue was identical and necessarily decided rests upon the moving party." Schwartz v. Public Adm'r, 24 N.Y.2d 65, 73, 246 N.E.2d 725, 730, 298 N.Y.S.2d 955, 962 (1969).

a subsequent action an issue raised and resolved against that party even if
the tribunal or cause of action is not the same. With the steady abandon­
ment of the requirement of mutuality and the embrace of nonparty offen-


8. See Buckingham v. Federal Land Bank Ass'n, 398 N.W.2d 873 (Iowa 1987) (holding son and
daughter-in-law's subsequent suit against bank, dependent on same issues as previous unsuccessful ac­tion against mother's estate, barred by collateral estoppel effect of the first court's finding); Colucci v.
passenger against two drivers in which driver one was found sixty percent responsible for auto accident,
to be used to collaterally estop driver one's suit seeking affirmative relief from driver two). In Ryan v.
N.Y. LAB. LAW § 623(2) (McKinney 1988), the Department of Labor, in an administrative hearing to
determine eligibility for unemployment benefits, found that an employee had removed company property
without authorization and was thus discharged for cause. The employee brought civil charges
against employer for slander and wrongful discharge. The administrative law judge's findings were
given collateral estoppel effect and precluded the employee from prosecuting the action against the
employer. See also Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981) ("[I]ssue preclu­sion prevents parties to a prior action in which judgment has been entered from relitigating in a subse­quent action issues raised and resolved in the previous action.") (footnote omitted); Ryan v. Progressive
is conclusive of the issue in subsequent suits based on a different cause of action involving a party to a
prior litigation").

Historically, the application of collateral estoppel required that four conditions be satisfied: 1) the
issue litigated in the prior adjudication must be identical with the issue now in question; 2) the prior
determination was necessary to the prior judgment and is decisive in the present action; 3) the prior
action offered a full and fair opportunity to litigate the issue; and 4) the parties in the subsequent
action were parties or are in privily with parties to the previous litigation. See RESTATEMENT (SECOND)
OF JUDGMENTS §§ 27-29 (1982). Today, the fourth requirement, mutuality, has been discarded in many
instances. See infra note 9.

9. Under the rule of mutuality only parties to an action or their privies can be bound by or take
advantage of a prior determination. See 18 C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE
AND PROCEDURE § 4463, at 559 (1981) ("[T]he favorable preclusion effects of a judgment [are] availa­ble
only to a person who would have been bound by any unfavorable preclusion effects."); 5 J. WEIN­
STEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 501.38, at 50-209 (1985) (Under
"[m]utuality of estoppel... a party [is] not permitted to take advantage of the result in a prior action
unless he could meet the same standards of participation or privily as a party who was bound by the
judgment in that action."). Thus, a requirement of mutuality often allowed a party who had litigated
and lost in a previous action to litigate identical issues again with new parties. Kuehn v. Garcia, 608
F.2d 1143, 1147 (8th Cir. 1979), cert. denied, 445 U.S. 943 (1980). In order to curb the inefficiency in
relitigation, see Pielemeyer, supra note 3, at 394-95 (noting the efficiencies sought through the use of
preclusion), courts have steadily limited or banished the rule. See, e.g., Blonder-Tongue Laboratories,
prior finding that patent was invalid though mutuality between the parties did not exist); Schwartz v.
Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969) (passenger's separate, suc­cessful negligence suits against drivers involved in accident given collateral estoppel effect in subsequent
suit between drivers); Hansan v. Oregon Dep't of Revenue, 294 Or. 23, 32, 653 P.2d 964, 968 (1982)
(en banc) (ruling United States Tax Court's previous decision that trust was invalid precluded taxpay­ers from relitigating same issue in analogous suit brought by state tax authorities). The decision tradi­tionally credited with initiating this movement is Bernhard v. Bank of America Nat'l Trust & Svas.
Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942) (Traynor, J.) (in administratrix's lawsuit to recover allegedly
unauthorized withdrawals, defendant bank permitted to assert, preclusively, probate court's earlier de­termination that withdrawal was valid gift). Some states, though, have retained mutuality in certain
sive collateral estoppel, the use of issue preclusion has grown substantially.

III. COLLATERAL ESTOPPEL IN DISCIPLINARY HEARINGS

In disciplinary proceedings, courts have limited the use of issue preclusion to determinations arising out of criminal proceedings and the disciplinary proceedings of foreign jurisdictions.

A. DISCIPLINE BASED ON CRIMINAL CONVICTION INVOLVING MORAL TURPITUDE

“A lawyer is subject to discipline under the ABA Model Code of Professional Responsibility, for criminal conduct involving moral turpitude, and, under the ABA Model Rules of Professional Conduct, for criminal conduct reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness to practice.”

In a disciplinary hearing, a lawyer’s prior criminal conviction serves as conclusive proof of the facts of the crime. These facts may not be relitigated in the disciplinary hearing. Moreover, because a criminal conviction circumstances. See, e.g., Norfolk & W. Ry. Co. v. Bailey Lumber Co., 221 Va. 638, 272 S.E.2d 217 (1980) (maintaining requirement of mutuality where offensive collateral estoppel is sought in one of a series of suits arising from a common disaster). See generally Annotation, Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment, 31 A.L.R.3d 1044 (1970).

10. Nonparty offensive collateral estoppel occurs when a plaintiff, not a party to a previous proceeding, litigates with a defendant who has lost on the identical issue in the previous adjudication and the defendant is precluded from relitigating the prior adverse determination. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (precluding corporation, in subsequent shareholder suit, from contesting findings of false and misleading proxy statement arising out of prior SEC suit); Goldstein v. Consolidated Edison Co., 93 A.D.2d 589, 462 N.Y.S.2d 646 (1st Dep't 1983) (estopping defendant from contesting prior suit's finding of gross negligence though plaintiffs were not parties to prior action), aff'd, 62 N.Y.2d 936, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984), cert. denied, 469 U.S. 1210 (1985).

11. See In re Scott, 98 Ill. 2d 9, 16, 455 N.E.2d 81, 84 (1983) (attorney's federal conviction of filing false income tax returns is conclusive of his guilt in disciplinary proceeding); In re Frick, 694 S.W.2d 473, 477-78 (Mo. 1985) (en banc) (attorney at disciplinary hearing estopped from challenging underlying facts of prior criminal conviction); In re Lowell, 88 A.D.2d 128, 452 N.Y.S.2d 621 (1982) (rejecting proffered evidence as casting doubt upon respondent's guilt rather than reflecting upon the importance of the criminal conviction).

12. See In re Witte, 99 Ill. 2d 301, 310-11, 458 N.E.2d 484, 488 (1983) (prior Missouri disciplinary hearing put the facts beyond dispute in reciprocal Illinois action); ILL. ANN. STAT. ch. 110A, para. 763 (Smith-Hurd 1985) (Reciprocal Disciplinary Matters); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.22 (1988) (attorney may be heard in mitigation but, absent procedural infirmity or manifest injustice, attorney may not contest the foreign jurisdiction findings). Foreign jurisdiction refers to another state, territory, or district.


14. C. WOLFRAM, supra note 4, § 3.3.2, at 90-91.
requires a beyond a reasonable doubt standard of proof, the proof will al­
ways meet the standard of proof required in a disciplinary hearing.

The convicted lawyer is permitted, however, to present evidence in miti­
gation of the seriousness of the crime or his own culpability. While he can­
not contest the commission of the acts of which he was convicted, he can
argue for a lesser sanction. The value of this opportunity is limited in situa­
tions where the jurisdiction mandates disbarment for the crime
committed. 15

B. DISCIPLINE BASED ON DISCIPLINE IN ANOTHER JURISDICTION

In general, states have court rules governing reciprocal discipline 16 which
prescribe application of collateral estoppel to foreign disciplinary decrees. 17
A typical rule reads:

The certified or authenticated copy of the findings of fact in [a] discipli­
nary proceeding in . . . [an]other jurisdiction shall constitute conclusive
evidence that the attorney in question committed the unprofessional con­
duct, and the only issue before the Board and the Supreme Court shall be
whether there is any reason for not imposing the same discipline . . . that
was imposed in the other jurisdiction. 18

This treatment of foreign disciplinary determinations is analogous to the
use by federal courts of state court findings when presiding over matters of
exclusive federal jurisdiction. 19 The foreign jurisdiction’s findings of fact
are conclusive while the consequences of those determinations may be con­
tested by the attorney.

Beyond these applications of collateral estoppel, courts have rejected or

15. E.g., N.Y. JUD. LAW § 90.4.a (McKinney 1983) (mandating disbarment upon conviction of a
felony).

16. A reciprocal discipline rule allows “discipline imposed in another jurisdiction [to] form the basis
for local discipline . . . . Under it, the second court reserves the prerogative, very rarely exercised, of
rejecting the first state’s findings if the lawyer can satisfactorily demonstrate that the original findings
were seriously defective.” C. WOLFRAM, supra note 4, § 3.4.6, at 116 (footnotes omitted).

not] govern a domestic proceeding based upon a foreign disbarment. Rather, such proceedings in Vir­
ginia are governed by rules of this Court . . . .”) (footnotes omitted). Despite the court’s disavowal of
collateral estoppel, the rules of the court, in fact, codify the collateral estoppel doctrine. The relevant
rule “does not permit the respondent attorney to relitigate any issues of fact which were expressly or
implicitly decided in the foreign jurisdiction [absent procedural infirmity or unfairness.]” Id. at 36, 355
S.E.2d at 591.

18. UTAH CODE OF JUD. ADMIN. ch. 14 R. XVII (Disciplinary Proceedings Based on Discipline
Imposed in Another Jurisdiction), reprinted in UTAH COURT RULES ANN. 1083 (Michie 1991). Illinois
has an equivalent rule granting preclusive effect to the findings of foreign disciplinary proceedings. See
ILL. ANN. STAT. ch. 110A, para. 763 (Smith-Hurd 1985).

19. See infra note 44 and accompanying text.
refrained from using findings of civil tribunals to estop attorneys from contesting the adverse findings of those tribunals in subsequent disciplinary matters.

IV. DECISIONS REJECTING COLLATERAL ESTOPPEL: ARGUMENT AND COUNTERARGUMENT

Few reported cases address the issue of granting preclusive effect to prior civil tribunals' factual determinations in subsequent disciplinary hearings. Most cases that do address the issue reject the notion, citing as reasons

20. That many disciplinary findings are not publicly reported exacerbates the difficulty of marshalling information on this specific topic. For example, In re Cohn, No. M-5696 (N.Y. App. Div. 1st Dep't July 20, 1983), discussed infra notes 119-29 and accompanying text, was deemed confidential when handed down and therefore not published. See N.Y. JUD. LAW § 90.10 (McKinney 1983). Though the Cohn opinion is no longer confidential and the ensuing disbarment has been made public, see In re Cohn, 118 A.D.2d 15, 503 N.Y.S.2d 759, appeal denied and stay denied, 68 N.Y.2d 712, 497 N.E.2d 698, 506 N.Y.S.2d 331 (1986), the appellate division collateral estoppel opinion remains unreported.

21. See In re Owens, 125 Ill. 2d 390, 532 N.E.2d 248 (1988) (refusing to give collateral estoppel effect in disciplinary proceeding to factual findings arising out of a civil fraud action); In re Tanz, 233 A.D. 300, 252 N.Y.S. 769 (1931) (precedential value significantly limited by subsequent ruling, In re Cohn, No. M-5696, slip op. at 17 (allowing the use of collateral estoppel in disciplinary proceeding as to the truth or untruth of the charges)); In re Strong, 616 P.2d 583 (Utah 1980). Yet another case, State ex rel. Nebraska State Bar Ass'n v. Gudmundsen, 145 Neb. 324, 16 N.W.2d 474 (1944), rejected an assertion that a prior civil action was conclusive in the disciplinary proceeding, noting that the prior civil action had only required a preponderance of the evidence while disciplinary procedures call for a clear and convincing standard of evidence. The court then went on to announce:

It is therefore the holding of this court that the finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment; that notwithstanding the finding in a civil action the culpability of the attorney must be established in the disbarment action by a clear preponderance of the evidence.

Id. at 328-29, 16 N.W.2d at 476. Subsequent Nebraska case law has failed to indicate whether Gudmundsen stands for the proposition that no civil determinations will be conclusive in disciplinary proceedings or, only findings proved by only a preponderance of the evidence will not be accepted as binding in disciplinary proceedings.

Other courts, while deciding whether the record from a previous civil proceeding may be offered merely as probative evidence (rather than conclusive evidence) in a subsequent disciplinary hearing, have, in dicta, rejected the preclusive effect of civil determinations. See In re Wright, 10 Cal. 3d 374, 377, 515 P.2d 292, 293, 110 Cal. Rptr. 348, 349 (1973) ("The findings in the civil [fraud] action are not binding upon this court in this proceeding . . . . We exercise an independent judgment on the facts . . . ."); In re Santusuuoso, 318 Mass. 489, 493, 62 N.E.2d 105, 107-08 (1945) (court will not grant civil judgment same preclusive effect granted another jurisdiction's judgment of disbarment); Levi v. Mississippi State Bar, 436 So. 2d 781, 787 n.1 (Miss. 1983) ("[T]he Bar makes no collateral estoppel argument, which of course would be inconsistent with this Court's peculiar role as fact finder in bar disciplinary matters."). But cf. In re Application of Persky, 92 A.D.2d 372, 374, 460 N.Y.S.2d 316, 318 (Hearing Panel of the Committee on Grievances found against a practitioner "only on the charges it believed it was precluded from considering de novo because of collateral estoppel"), reh'g denied, 94 A.D.2d 23, 462 N.Y.S.2d 860 (1983). The Persky case decides an application for reinstatement as an attorney and does not examine the collateral estoppel issue. Rather, it recounts the respondent's disciplinary history which included an instance of a hearing panel of the Committee on Grievances allowing
exclusive regulatory authority,\textsuperscript{22} mutuality,\textsuperscript{23} foreseeability,\textsuperscript{24} and disparate burdens of proof between proceedings.\textsuperscript{25}

A. EXCLUSIVE REGULATORY AUTHORITY

The primary justification offered for withholding collateral estoppel effect from civil findings in the disciplinary context is that giving such effect to the findings of a civil court would constitute an illegal delegation and abridgment of a high court's power to regulate the discipline of attorneys. By emphasizing their role as the disciplinary arbiter within the bar,\textsuperscript{26} courts seek to portray the adoption of other courts' civil findings as an abdication of that role.\textsuperscript{27}

Generally, the highest court\textsuperscript{28} of each state has arrogated to itself the exclusive power to regulate the practice of law, finding that power inherent in the tripartite form of government that prevails in most states.\textsuperscript{29} Arising

civil findings to be used preclusively in a disciplinary proceeding. The proceeding resulted only in a reprimand which the respondent did not appeal. The Committee on Grievances had no right of appeal. Without any appeal, the matter never came before a court. Thus, this use of collateral estoppel was without judicial approbation. For an extended discussion of the matters giving rise to Persky's disciplinary proceedings, see K. EISLER, SHARK TANK: GREED, POLITICS, AND THE COLLAPSE OF FINLEY KUMBLE, ONE OF AMERICA'S LARGEST LAW FIRMS 35-47 (1990).

22. See infra notes 28-37 and accompanying text.
23. See In re Owens, 125 Ill. 2d at 398, 532 N.E.2d at 251.
24. Id. at 399, 532 N.E.2d at 252.
25. Id. at 400, 532 N.E.2d at 252; In re Gygi, 273 Or. 443, 448, 541 P.2d 1392, 1395 (1975).
26. Courts are vigilant in the protection of the power to discipline attorneys. Cf. United States v. Vague, 697 F.2d 805, 808-09 (7th Cir. 1983) (reversing district court's sua sponte order that criminal defendant's attorney return part of a legal fee because the fee was excessive). The circuit court felt the district court had sought to exercise disciplinary power properly reserved to disciplinary authorities within the bar. For a critique of Vague, see Brickman, A Massachusetts Debacle: Gagnon v. Shablon, 12 CARDOZO L. REV. 1417, 1422 n.36 (1991). See also Silverberg v. Schwartz, 75 A.D.2d 817, 819, 427 N.Y.S.2d 480, 482 (1980) (staying arbitration of sections of a partnership agreement held to be restrictions on the practice of a lawyer in violation of DR 2-107 and DR 2-108 because “public policy requires that violations of the rules of professional conduct not be subject to negotiation and arbitration, but that such violations come before the scrutiny of the courts”); Dorf, supra note 4, at 1 (1975) (“Among the legal profession's most jealously guarded rights has been the ability to discipline its members . . . .”) (footnote omitted).
27. See infra notes 32-35 and accompanying text.
28. Typically, only a state's highest court may suspend or disbar a lawyer. Law. Man., supra note 13, at 101:2003. See C. WOLFRAM, supra note 4, at § 2.2.4. But, in New York, the appellate divisions, intermediate appellate courts, exercise the power to discipline attorneys, see, e.g., In re Keenan, 150 A.D.2d 1, 545 N.Y.S.2d 206 (1989) (imposing two year suspension). See also N.Y. JUD. LAW § 90.2 (McKinney 1983 & Supp. 1990), and the power to promulgate rules of conduct, see Gair v. Peck, 6 N.Y.2d 97, 115, 160 N.E.2d 43, 53, 188 N.Y.S.2d 491, 504-05 (upholding appellate division's power to promulgate fee schedule under that court's statutory power to prescribe rules of professional conduct), modified, 6 N.Y.2d 983, 161 N.E.2d 736, 191 N.Y.S.2d 951 (1959), cert. denied and appeal dismissed, 361 U.S. 374 (1960). See also N.Y. JUD. LAW § 90.2.
29. See Wolfram, Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine, 12 U. ARK. LITTLE ROCK L. J. 1, 3 (1989) (describing the harnessing and manipulation of the inher-
out of this position, each state's supreme court acts as the ultimate disciplinary authority within the state.\textsuperscript{30} In this role, high courts have traditionally reserved for themselves the right to reject the recommendations of disciplinary committees and to make their own findings and impose sanctions of their own formulation.\textsuperscript{31}

Thus, one court has noted that, since "it is the responsibility of this court to determine what conduct is disciplinable and to determine the severity of discipline in a particular case,"\textsuperscript{32} the court is loath to allow fact-finding in the disciplinary process to take place outside of formal disciplinary hearings.\textsuperscript{33} Even a court not resting its rejection of collateral estoppel on dilution of its exclusive authority but rather on its interpretation of a statute governing disciplinary procedures,\textsuperscript{34} was, in reality, most concerned with maintaining its exclusive authority. By professing deference to the intent of the legislature, that court effectively construed the provisions in a way that strengthened its position as the sole authority over the disciplinary

ent-powers doctrine by courts to claim they have the exclusive prerogative of regulating lawyers). "[T]he inherent-powers doctrine [is] a judge-made, lawyer-supported doctrine holding that courts and only courts, may regulate the practice of law." Id. (emphasis in original) (footnotes omitted). In New York, there is a significant degree of legislative control but it has been delegated to the appellate divisions. \textit{See} N.Y. JUD. LAW \S 90. \textit{Cf.} People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928); \textit{In re} Cooper, 22 N.Y. 67 (1860). For a brief discussion of these cases, see Brickman, \textit{supra} note 26, at 1417 n.5.

30. \textit{See} \textit{In re} Mackay, 416 P.2d 823, 829 (Alaska 1964) (state statute imposing upon the Supreme Court of Alaska "the mandatory duty of issuing an order in full accordance with the recommendation of the Board [of Governors] . . . was unconstitutional for being an invasion of the inherent power of the court to discipline and disbar members of the Alaska Bar Association"), \textit{cert. denied}, 384 U.S. 1003 (1966). \textit{Cf.} Smith v. Kates, 46 Ohio St. 2d 263, 266, 348 N.E.2d 320, 322 (1976) ("[W]ith regard to our jurisdiction over the discipline of attorneys[, o]ur authority is exclusive and absolute.") (dismissing disciplinary complaint brought by citizen's group directly to state supreme court and seeking to avoid the disciplinary mechanism set up by the supreme court rules).

31. \textit{See}, \textit{e.g.}, \textit{In re} Crisci, 101 Ill. 2d 332, 335, 344, 461 N.E.2d 994, 995, 999 (1984) (hearing panel recommends censure; review board recommends dismissal of the complaint; supreme court imposes three-year suspension); \textit{In re} Blackham, 588 P.2d 694, 696 (Utah 1978) ("This Court is not bound to accept the disciplinary recommendations proposed by the Bar.") (footnote omitted) (bar commission recommends two-year suspension; court imposes public censure and reprimand).


33. \textit{In re} Owens, 125 Ill. 2d at 400, 532 N.E.2d at 252. \textit{See also} Smith v. Kates, 46 Ohio St. 2d 263, 348 N.E.2d 320 (1976) (dismissing citizen's complaint seeking suspension of attorney without complying with normal disciplinary procedures).

34. The Utah Supreme Court, in \textit{In re} Strong, 616 P.2d 583, 587 (Utah 1980), turned to section 78-51-18 of the Utah Code as its principal basis for denying the use of preclusion. In relevant part, the statute reads: "The board shall make findings and reports to the Supreme Court of the results of its hearings and investigations, and conclusions, with recommendations in the premises, and . . . shall recommend such disciplinary action . . . as the case shall in its judgment warrant." \textit{U}T\textit{AH CODE ANN.} \S 78-51-18 (1987). In interpreting the statute, the Court ruled that "[t]o merely adopt the findings of some other tribunal would be contrary to the obvious intent of the statute that requires the Board to make its own findings based upon an evidentiary hearing." \textit{In re} Strong, 616 P.2d at 587.
1. Adopting a Civil Court Finding Does Not Illegally Delegate the Power to Discipline Attorneys

While fact-finding is a necessary part of disciplinary proceedings, the primary aspect of the disciplinary process is determining whether certain conduct falls below the minimum standard required of attorneys and the sanction thereby warranted.

Thus, adopting the findings of a civil court from that or another jurisdiction is not a delegation of the power to discipline attorneys. It is still the disciplinary court or the disciplinary board, operating under the supervision of the court, that determines whether the civil finding constitutes lawyer misconduct or otherwise violates the rules of conduct promulgated by that court. Moreover, even if the disciplinary court invokes collateral estoppel to determine that there has been a violation, the appropriate sanction is still decided within the disciplinary framework; respondent attorneys are given the opportunity to present mitigating evidence arguing for lesser sanctions. Finally, if the state supreme court, as ultimate authority on attorney discipline, does not agree with the recommendations, it has the power to reject them and impose sanctions it deems appropriate.

35. For accounts describing the willingness of courts to manipulate the doctrine of inherent powers to preserve their sole authority over the practice of law, see Wolfram, supra note 29, at 14 ("the courts in many states have invoked the negative aspect of the [inherent powers] doctrine to outlaw legislation that has nothing to do with lawyers functioning in courts") and Alpert, The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis, 32 BUFFALO L. REV. 525 (1983).

36. Minimum standards for conduct are generally stated in the state's version of the ABA Model Code of Professional Responsibility, see, e.g., THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (N.Y. App. Div. effective Sept. 1, 1990) [hereinafter LAWYER'S CODE], reprinted in N.Y.L.J., May 14, 1990, at S-1, col. 1 (adopting an amended Code of Professional Responsibility), or the ABA Model Rules of Professional Conduct, see, e.g., UTAH CODE OF JUD. ADMIN., ch. 13 Rules of Professional Conduct, reprinted in UTAH COURT RULES ANN. 1,007 (Michie 1991), and in other ethical regulations, see, e.g., N.Y. JUD. LAW § 482 (McKinney 1983) (forbidding an attorney from employing a person to solicit business).

37. See supra note 32 and accompanying text.

38. In re Owens, 125 Ill. 2d 390, 400, 532 N.E.2d 248, 252 (1988); In re Strong, 616 P.2d at 587.

39. See, e.g., LAWYER'S CODE, supra note 36, DR 1-102(A)(4) UTAH CODE OF JUD. ADMIN., ch. 13 Rules of Professional Conduct Rule 8.4, reprinted in UTAH COURT RULES ANN. 1,067 (Michie 1991) (it is misconduct for an attorney to engage in dishonesty, fraud, deceit or misrepresentation).

40. See In re Owens, 125 Ill. 2d at 397, 532 N.E.2d at 250; In re Cohn, No. M-5696, slip op. at 17 (N.Y. App. Div. 1st Dep't July 20, 1983). Cf. Levy v. Association of the Bar, 37 N.Y.2d 279, 281, 333 N.E.2d 350, 352, 372 N.Y.S.2d 41, 43 (1975) (though convicted attorney is estopped from relitigating his guilt, he "may . . . introduce any competent evidence . . . to explain or mitigate the significance of his criminal conviction").

41. Supra note 28.

42. Supra note 31.
process"., any such abridgement appears evanescent.

The federal courts implement a similar type of bifurcated system when presiding over matters designated as exclusively under the jurisdiction of the federal courts. In such federal cases, courts give preclusive effect to prior state court findings of fact, though not of law. The same reasoning allows courts charged with the regulation of attorneys to adopt civil court findings without unlawfully delegating their exclusive power to discipline attorneys.

2. Rejecting Preclusive Effect for Civil Findings on Exclusive Authority Grounds Conflicts With Current Rules Governing the Analogous Cases of Criminal Conviction and Reciprocal Discipline

Courts not only overstate the extent to which the preclusive use of prior findings restrains a disciplinary panel or the court, they also take a position belied by their own court rules. State court rules typically provide for the application of collateral estoppel to the factual determinations of foreign disciplinary bodies and criminal courts. Of course the reliance of the hearing boards on the findings of other tribunals, including other state disciplinary committees, is not held to constitute an illegal delegation of jurisdiction over disciplinary matters; yet these same hearing boards cannot rely on the findings of civil courts applying the law of their own states. The preference of the courts for foreign disciplinary determinations is especially hard to fathom given that civil courts of law (at least of general jurisdic-

43. *In re Owens*, 125 Ill. 2d at 401, 532 N.E.2d at 252.


45. Despite the application of collateral estoppel, the *Strong* hearing ran over the course of three days. *In re Strong*, 616 P.2d 583, 585 (Utah 1980). The assertion of collateral estoppel was granted in a prehearing order. *Id.*

46. *See supra* notes 14-18.

47. Or, in the case of Utah, not a violation of Utah Code § 78-51-18 (1987). Arguably, if one does not accept interpretation of this statute as one motivated by fear of ceding authority, *see supra* note 34, the court’s reasoning falls prey to another deficiency. The court’s reliance on the statute’s intent appears misplaced. The relevant part of the statute is adopted, almost verbatim, from a preceding statute enacted in 1931. *Compare* 1931 Utah Laws ch. 48 § 10, at 168-69 (“The board shall make findings and reports to the supreme court as to the results of their hearings, investigations and conclusions, with recommendations in the premises and in all cases in which the evidence . . . justifies such a course, they shall recommend such disciplinary action . . . as the case shall in their judgment warrant.”) *with supra* note 34. Thus, the language of the statute arose long before the proposed use of preclusion had been contemplated. To hold that the statute was designed to prevent this use of collateral estoppel before the use existed is illogical.
tion) are traditionally held to be superior fact-finding bodies to administrative hearing panels.  

Finally, it should be noted that rules of procedure governing disciplinary hearings are typically adopted from rules of civil procedure—which argues against the notion that civil proceedings contain inherent procedural infirmities that make their findings unworthy of estoppel effect in disciplinary matters.

3. Rejecting Collateral Estoppel for Civil Findings Seemingly Elevates the Disciplinary Hearing Board to a Higher Fact-Finding Position than Civil Courts

Courts' reluctance to rely on civil findings does not comport with their reliance on determinations of their disciplinary hearings. For example, the Illinois Supreme Court has announced that the findings of fact made by a disciplinary hearing board "are entitled to virtually the same weight as the findings of any initial trier of facts in our judicial system." The court's use of the qualifier "virtually" implies that other initial triers of fact are entitled to an even greater weight than, or at least the same weight as, the hearing board. Yet inexplicably, the court mandates that the hearing board, a fact finder of lesser credence, reexamine the issues already examined by the civil court.

The Utah Supreme Court also does not accord its bar's fact finding ability greater deference than civil fact finders. While the Utah Court pro-


50. In re Bossov, 60 Ill. 2d 439, 441, 328 N.E.2d 309, 310-11 (rejecting respondent's contentions that findings of improper conduct were not supported by clear and convincing evidence), cert. denied, 432 U.S. 928 (1975) (citation omitted).

51. See supra note 48.
fesses to look upon the findings of disciplinary hearings with indulgence, the Court reserves a greater prerogative to substitute its own conclusions of fact in disciplinary proceedings than it does with the findings of a civil tribunal. Yet the Utah Court also insists that the disciplinary panel not consider as binding the factual determinations made by a civil tribunal. Thus, civil findings are elevated over disciplinary determinations for purposes of review by the state's supreme court while, inconsistently, the determination of the disciplinary panel is elevated over civil court findings at the disciplinary level.

B. MUTUALITY

Under the rule of mutuality, only parties to both the previous and present actions or their privies can be bound by, or take advantage of, the prior determination. This rule effectively denies preclusive effect to fact-findings in disciplinary matters. A disciplinary prosecutor cannot, in that role, have been a participant in a prior civil court proceeding. Accordingly, the mutuality requirement precludes use of a prior civil court's findings to estop a respondent attorney in a later disciplinary hearing.

Courts which reject the preclusive transfer of civil findings to disciplinary proceedings have held that the absence of mutuality either rules out or calls for a heightened standard for the assertion of collateral estoppel. The reasoning is, at best, strange since it is raised by courts that have previously discarded the mutuality requirement. For example, as justification for rejecting the use of offensive collateral estoppel, one court pointed to the fact that the parties were not the same in the disciplinary proceeding as in the prior civil trial. Previously, the same court had noted "even where the parties may not have been the same, where a party has had an issue adjudicated against him in a prior case, he should be estopped from

52. See In re Johnston, 524 P.2d 593, 594 (Utah 1974) ("[I]n considering the findings . . . of the Committee, [we] will indulge them with [a] presumption of correctness and propriety").
53. Compare In re Bridwell, 25 Utah 2d 1, 2, 474 P.2d 116, 116 (1970) ("[T]he findings of the Utah State Bar should be adopted by this court unless they appear to be . . . not in accord with the preponderance of the evidence . . . .") with Sweeney Land Co. v. Kimball, 786 P.2d 760, 761 (Utah 1990) ("Findings of fact . . . shall not be set aside unless clearly erroneous . . . ." (quoting UTAH R. CIV. P. 52(a))).
54. See supra note 9.
55. Infra notes 56, 58 and accompanying text.
56. The use of preclusion "would be correct under ordinary circumstances where a subsequent trial is being held involving the same parties . . . . However, this is not an adversary proceeding." In re Strong, 616 P.2d 583, 587 (Utah 1980). Notably, this position directly conflicts with that of the United States Supreme Court. See In re Ruffalo, 390 U.S. 544, 551-52 (1968) (characterizing disciplinary proceedings as "adversary proceedings" and reversing respondent's disbarment due to a denial of procedural due process).
relitigating that issue in a subsequent case.”

Similarly, another court indicated that the fall of mutuality called for a heightened prudence in the assertion of offensive collateral estoppel to ensure that preclusion fostered economy and fairness. But the court went on to admit that the issue of judicial economy was not implicated in that case and neglected to show how the preclusion would result in unfairness. Furthermore, the court rejected the conclusive use of civil findings in all disciplinary cases as offering too little in the way of efficiency and risking too much in the way of unfair results. This outright rejection appears at odds with the collateral estoppel standard that it “should be applied only as fairness and justice require under the circumstances of each case.”

Therefore, the mutuality argument must be rejected. The fact that the state bar, rather than the plaintiff in the prior action, prosecutes a disciplinary complaint should not, by itself, prevent the assertion of collateral estoppel in a disciplinary hearing.

C. VIGOR OF FIRST LITIGATION/FORESEEABILITY OF SUBSEQUENT USE OF CIVIL FINDINGS

Another requirement for invocation of collateral estoppel is the foreseeability of the subsequent use of a court’s findings, which is primarily used as a proxy to measure the vigor in the first litigation. That is, one examines whether the subsequent litigation was sufficiently foreseeable so that the defendant had adequate incentive to defend vigorously the former action. At least one court has ruled that a civil fraud action, as opposed to a criminal charge involving moral turpitude, does not sufficiently ensure a vigorous defense.

Rejection of collateral estoppel because the prior civil matter may not have been vigorously litigated by the attorney is unpersuasive. The apprehension that an insufficient effort to defend will be made in the prior civil litigation is understandable in some instances and is provided for under

59. Id. at 399, 532 N.E.2d at 251 (“this consideration [judicial economy] does not directly apply to this disciplinary case”).
60. We will not, however, go beyond permitting the conclusive use of a criminal conviction and begin giving offensive collateral estoppel effect in a disciplinary proceeding to factual findings in a civil fraud action. The risk of unfairly imposed discipline is too great, and the economy to be gained too minimal, to warrant such an abridgement of the discipline process.
61. Fred Olson Motor Serv. v. Container Corp. of America, 81 Ill. App. 3d 825, 830, 401 N.E.2d 1098, 1102 (1980).
62. In re Owens, 125 Ill. 2d at 400-01, 532 N.E.2d at 252.
traditional collateral estoppel doctrines. But, where the initial civil action alleges conduct such as fraud, this apprehension seems misplaced.

D. DISPARATE BURDENS OF PROOF

Criminal trials require the highest of all evidentiary standards: beyond a reasonable doubt. Typically, the standard of proof in civil cases is a preponderance of the evidence. Certain civil cases of a serious nature require a higher burden, clear and convincing evidence, which lies somewhere between a simple preponderance and beyond a reasonable doubt. Common law fraud is an example of a civil cause of action requiring the plaintiff to meet the clear and convincing burden.

The standard of proof in lawyer disciplinary hearings in most states is “clear and convincing evidence.” Some states impose a standard substan-

63. Collateral estoppel allows for exceptions where the initial action offers little impetus to litigate forcefully. Posit a case where the worst outcome has minimal consequences upon a defendant. In light of the mild consequences, the defendant has little incentive to present a vigorous or expensive defense. Should the plaintiff prove successful and then seek to use findings from the first determination preclusively in a second, larger claim, a court will likely deny an assertion of collateral estoppel. See Gilberg v. Barbieri, 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981) (though arising out of a nominally criminal trial, prior findings of minor harassment violation should not be accorded conclusive effect in subsequent civil suit seeking $250,000). See also Restatement (Second) of Judgments § 28 comment d (1982) (“procedures available in the first court may . . . be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim”).

64. Thus, given the nature of the conduct alleged in Owens, which the court labeled “reprehensible,” In re Owens, 125 Ill. 2d at 401, 532 N.E.2d at 253, a lackcluster defense seemed highly unlikely. The civil court’s damages award was indicative of the egregious nature of the alleged conduct. Though the court awarded only $2,000 in compensatory damages, each respondent was assessed $60,000 in punitive damages. Id. at 394, 532 N.E.2d at 249. Moreover, the civil trial lasted 12 or 13 days. Brief for Respondents at 17, In re Owens, 125 Ill. 2d 390, 532 N.E.2d 248 (1988) (No. 67040), and the respondent attorneys incurred substantial legal expenses to defend the suit. Brief for the Administrator at 9, Owens (No. 67040). However, based on the time and expense involved, the defendants decided not to appeal the trial court’s judgment. Brief for Respondent at 17, Owens (No. 67640). Thus, the Illinois Supreme Court could have properly denied preclusive effect on the grounds that the determination of the trial court was based on two counts, breach of the partnership agreement and breach of fiduciary duty, either of which would independently support the result. See In re Cohn, No. M-5696 (N.Y. App. Div. 1st Dep’t July 20, 1983); Restatement (Second) of Judgments § 27 comment i (1982) (alternative determinations by court in the first instance). But cf. Malloy v. Trombley, 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980) (acknowledging the Restatement rule but according estoppel effect to an unappealed determination resting on alternative grounds).


68. See C. Wolfram, supra note 4, § 3.4.4, at 109 ("most commonly employed standard"); Law.
tially equivalent to "clear and convincing" but their formulations include
the term "preponderance," thereby implying a somewhat lower standard.69
Still other states require only a showing of misconduct by a "fair prepon­
derance" of the evidence.70 One state requires disciplinary prosecutors to
prove their complaint "beyond a reasonable doubt."71

When the standard of proof in the disciplinary action is higher than in
the prior civil suit, courts reject giving collateral estoppel effect to the prior
civil findings.72 Disciplinary courts have also sought to justify the rejection
of collateral estoppel for civil findings while granting it for criminal convic­
tions73 on the grounds of the higher burden of proof required for the con­
viction; this higher standard enables the disciplinary court to rely more
confidently on a criminal conviction than on the finding of the civil court.74

However, not only do civil courts regularly give preclusive effect to deter­
minations based on the same standard of proof75 but at least one court has
explicitly disavowed the idea that the assertion of collateral estoppel in dis­
ciplinary hearings requires that the standard in the prior adjudication have
been higher than that for the disciplinary hearing.76 In Georgia, where dis­
ciplinary violations must be demonstrated beyond a reasonable doubt,77
such a margin of error requirement would rule out the application of col­
lateral estoppel to even criminal convictions. Georgia, however, does in fact

70. See id. at 2102.
duct in Georgia requires proof beyond a reasonable doubt), cert. denied, 398 U.S. 910 (1970).
72. In re Gygi, 273 Or. at 448, 541 P.2d at 1395.
73. ILL. ANN. STAT. ch. I 30A, para. 761, at 635 (Smith-Hurd 1985) ("proof of conviction is conclu­
sive of the attorney's guilt of crime").
74. "[T]his court can more confidently rely on a criminal conviction as resting on accurate factual
findings," In re Owens, 125 Ill. 2d 390, 401, 532 N.E.2d 248, 252 (1988). Like the majority of states,
Illinois requires that disciplinary violations be proved by clear and convincing evidence. In re Betts, 109
Ill. 2d 154, 175, 485 N.E.2d 1081, 1089 (1985), cert. denied, 476 U.S. 1105 (1986); ILL. ANN. STAT.
ch. 110A, para. 753.
75. E.g., Illinois State Chamber of Commerce v. Pollution Control Bd., 78 Ill. 2d 1, 398 N.E.2d 9
(1979) (allowing the use of nonparty issue preclusion between two proceedings each requiring a "pre­
ponderance of the evidence" standard of proof), cited with approval in In re Owens, 125 Ill. 2d at 399,
76. While the burden of proof in attorney disciplinary cases ("clear and convincing") is lower
than "beyond a reasonable doubt," the cases do not suggest that the conclusive effect given
to convictions is based on a suggested safety margin resulting from that difference. The im­
portant consideration is the binding determination resulted from a trial where the burden
was no less than the disciplinary proceeding.

In re Coruzzi, 95 N.J. 557, 571 n.7, 472 A.2d 546, 553 n.7 (emphasis in original), appeal dismissed,
apply collateral estoppel to convictions of felonies and misdemeanors involving moral turpitude.78

The courts' failure to explain why attorney disciplinary proceedings require the added margin of safety offered by the higher standard in criminal tribunals before preclusive effect can be granted is exacerbated by comparison to like situations in other self-regulating professions. In contrast to attorney disciplinary proceedings, courts have upheld the preclusive use of adverse civil findings against other professionals in subsequent administrative "disciplinary" proceedings.79 Additionally, no court has enunciated why a higher standard is not required for the assertion of collateral estoppel in reciprocal disciplinary action80 though the tension in the two positions has been acknowledged.81

V. ANALYSIS UNDER PARKLANE Dictates that Civil Findings Be Given Collateral Estoppel Effect in Disciplinary Proceedings

The appropriateness of offensive collateral estoppel is well measured against the four requirements enunciated in the leading collateral estoppel case, Parklane Hosiery v. Shore.82 1) could the plaintiff have joined the earlier action; 2) was the subsequent litigation foreseeable; 3) was the judgment inconsistent with other proceedings; and, 4) does the subsequent action offer procedural opportunities unavailable to the defendant in the prior action.83 The Parklane standards, first announced for federal courts

78. See Georgia Court Rules and Procedures, Rules and Regulations for the Organization and Government of the State Bar of Georgia, Rule 4-102, Standard 66, at 725 (West 1983) ("conviction in any jurisdiction . . . shall be conclusive evidence of conviction and of infraction of this rule").
79. See Bassett v. State Bd. of Dental Examiners, 727 P.2d 864 (Colo. Ct. App. 1986) (approving use of civil court's finding to estop physician, in hearing before state board of examiners, from denying he had committed negligent malpractice). Cf. Richards v. Gordon, 254 Cal. App. 2d 735, 742, 62 Cal. Rptr. 466, 470-71 (2d Dist. 1967) (holding realtor, in proceeding before state real estate commission, was collaterally estopped from impeaching prior findings of fraud because applicable statute specifically provided that a prior civil judgment of fraud was grounds for disciplinary action). Although the Richards court relied on a specific statutory provision, courts do not require such a provision to grant preclusive effect to prior findings. See Kentucky Bar Ass'n v. Signer, 533 S.W.2d 534, 537 (Ky. 1976) (adopting a Florida policy of granting estoppel effect to foreign disciplinary agencies' findings and noting "the absence of a rule [in Kentucky] need not impede the application of a sound principle"); In re Cohn, No. M-5696, slip op. at 3 (N.Y. App. Div. 1st Dep't July 20, 1983) ("We see no reason why the application of collateral estoppel to disciplinary proceedings should be limited to the instances covered by the rule.").
81. In re Owens, 125 Ill. 2d 390, 402, 532 N.E.2d 248, 253 (1988) ("By this opinion, we in no way intend to alter disposition of reciprocal disciplinary matters brought pursuant to Supreme Court Rule 763 [(Reciprocal Disciplinary Action)].").
83. Id. at 331-32.
and subsequently adopted by most state courts, apprise a tribunal of whether or not the defendant has had a full and fair opportunity to defend in the first action and provide guidelines for assessing the resultant efficiency and fairness of invoking collateral estoppel.

A. COULD THE PLAINTIFF HAVE JOINED THE EARLIER ACTION?

Courts should deny collateral estoppel effect to plaintiffs who refused the opportunity to join an earlier suit. Making estoppel available to these plaintiffs multiplies litigation; instead of joining the prior action, they would rather wait for a judgment and, if adverse to the defendant, then use it to estop the defendant from contesting the adverse finding.

Allowing the use of collateral estoppel by disciplinary committees poses no problem of increased litigation by discouraging joinder. As a practical matter, the disciplinary prosecutor—in that role—cannot have joined an earlier civil action. Thus the availability of preclusion will not encourage any additional proceedings. Collateral estoppel, though, will permit a narrowing of the issues to be examined in that proceeding. By adopting a blanket policy of allowing the relitigation of issues already determined, the courts expend judicial resources that would have been conserved, or otherwise deployed, under the traditional parameters of collateral estoppel.

B. WAS THE SUBSEQUENT LITIGATION FORESEEABLE?

The second factor examines whether the subsequent litigation was foreseeable so that the defendant had every incentive to defend the action vigorously. Just as physicians should foresee that civil determinations of malpractice can lead to administrative proceedings, so too should attorneys be

84. See, e.g., In re Owens, 125 Ill. 2d at 398-99, 532 N.E.2d at 251-52.
85. Friedenthal, Kane & Miller, supra note 7, at 691-93. The Owens court even purports to use some of the Parklane criteria yet nevertheless manages to reach a result different than that dictated by the criteria. See In re Owens, 125 Ill. 2d at 398-400, 532 N.E.2d at 251-52.
86. See Restatement (Second) of Judgments § 29(3) (1982). Cf. In re Owens, 125 Ill. 2d at 398-99, 532 N.E.2d at 331.
87. See Reardon v. Allen, 88 N.J. Super. 560, 571-572, 213 A.2d 26, 32 (1965) (“To allow plaintiffs the benefit of the first judgment may actually increase litigation . . . . Two chances are better than one.”) If courts are not wary of making estoppel available where there are inconsistent judgments, the courts will encourage serial litigation, rather than joined litigation.
88. The disciplinary authorities are much like the shareholder plaintiffs in Parklane who were unable to join the SEC action. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332 (1979) (“respondent probably could not have joined in the [SEC] injunctive action had he so desired”).
89. See Polasky, Collateral Estoppel-Effects of Prior Litigation, 39 Iowa L. Rev. 217, 220 (1954) (“[C]ollateral estoppel does not prevent subsequent litigation but only tends to narrow the area of conflict in the second action by preventing the relitigation of issues already decided.”).
90. See Bassett v. State Bd. of Dental Examiners, 727 P.2d 864 (Colo. Ct. App. 1986). The Bassett court labelled the possibility of disciplinary action subsequent to an adverse civil finding “distinctly
aware of the possibility of disciplinary action arising out of civil findings. In both Strong and Owens, the possibility of subsequent disciplinary action was readily apparent.91 Both of the civil actions alleged actual fraud.92 Actual fraud, civil or criminal, violates DR 1-102(A)(4) of the Code of Professional Responsibility,93 which defined misconduct at the time of both trials in their respective states.94 Additionally, once the policy of adopting civil findings in disciplinary proceedings is instituted and made known, the possibility of subsequent disciplinary action will be unquestionably foreseeable.95

C. WAS THE JUDGMENT INCONSISTENT WITH OTHER PROCEEDINGS?

Consistency of judgments is one of the benefits yielded by the proper application of collateral estoppel.96 By allowing attorneys to relitigate adverse findings in disciplinary proceedings, however, the courts are enabling inconsistent judgments to arise. Two different fact-finding bodies, each reaching different conclusions based upon the same operative facts, under-
mines public confidence in the legal system.\textsuperscript{97} This possibility is especially troublesome in the context of attorney disciplinary hearings.\textsuperscript{98}

In addition to a conflict between fact finders, the public may also be faced with the unseemly circumstance of an attorney being found to have engaged in fraudulent conduct by a judge or jury and then exonerated upon the same facts by the profession's special fact finder. That the second opportunity to litigate is granted attorneys in contravention of the conventional rules of collateral estoppel that apply to others accentuates the appearance of professionally self-serving behavior.\textsuperscript{99}

D. DOES THE SUBSEQUENT ACTION OFFER PROCEDURAL OPPORTUNITIES UNAVAILABLE IN THE PRIOR ACTION?

Parklane's last factor considers whether or not the subsequent litigation offers procedural opportunities to the plaintiff likely to yield a different outcome.\textsuperscript{100} Since disciplinary proceedings are adversarial\textsuperscript{101} and draw much of their procedure from state rules of civil procedure,\textsuperscript{102} the existence of spe-

\textsuperscript{97} See McCoid, \textit{A Single Package for Multiparty Disputes}, 28 \textit{STAN. L. REV.} 707, 707 (1976) ("The spectre of public dismay over a system that decides like cases differently is a disturbing one."); Wise, \textit{1 Case, 2 Appeals, 2 Rulings: How Come?: First Department Fail-Safe Measures Fail in Contradictory Decisions in Criminal Case}, N.Y.L.J., May 7, 1990, at 1, col. 5 (discussing how two panels of the same court treated the same issue—the legality of a search—and arrived at opposite positions on the identical issues of law and fact raised in a single trial). Lawyers speculated that the difference in outcomes resulted primarily from the different judges sitting on each panel. Hence, the "one-in-a-million case" portended a decision process that depended more on who the sitting appellate judges were than on facts and law. The statement by the presiding justice that "this should not have happened" refers to the court's failure to note that two panels had been selected to hear the same case and not to the fact of the difference in outcomes.


\textsuperscript{99} Cf. In re Cohn, No. M-5696, slip op. at 2 (N.Y. App. Div. 1st Dep't July 20, 1983) ("We perceive no reason why a member of the Bar should be accorded a significantly more favored position than are others in the application of this principle [collateral estoppel], particularly in a matter in which the public interest is at stake." (quoting Levy v. Association of the Bar, 37 N.Y.2d 279, 281, 333 N.E.2d 350, 352, 372 N.Y.S.2d 41, 43 (1975))). For other special rules favoring attorneys, see Brickman & Cunningham, \textit{Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law}, 57 \textit{FORDHAM L. REV.} 149, 151 & n.9 (1988) (discussing nonrefundable retainers as a special rule favoring attorneys and comparing the standards for medical and legal malpractice).

\textsuperscript{100} In instances of the application of collateral estoppel against the attorney, these would have to be procedural opportunities in disciplinary hearings likely to yield a favorable result to an attorney where an adverse judgment was rendered against the attorney in a previous civil suit. It is not clear that the bar would admit to such procedures if they existed.

\textsuperscript{101} In re Ruffalo, 390 U.S. 544, 551 (1968).

\textsuperscript{102} See supra note 49.
cial favorable opportunities in disciplinary hearings should be rare. Further, in light of Parklane's rejection of the argument that a jury trial is a procedural opportunity calling for the defeat of a collateral estoppel motion, a hearing in front of an attorney disciplinary board is unlikely to qualify as a procedural opportunity that makes a different outcome likely.

Thus, the Parklane analysis suggests that civil findings should be eligible for collateral estoppel effect in disciplinary hearings. Presently, two courts agree and appear willing to grant civil findings such effect.

VI. ADOPTION OF COLLATERAL ESTOPPEL

Application of collateral estoppel to disciplinary matters has been rejected by two courts which have directly addressed the issue. While no

103. This does not refer to criticism of lawyer discipline that focuses on the self-regulatory aspect and the undeniable fact that "[d]isciplinary bodies dismiss the vast majority of complaints as outside their jurisdiction or unfounded." R. Abel, American Lawyers 156 (1989). See also id. at 293-97 (setting forth selected statistics for outcomes of complaints and disciplinary proceedings).

104. See In re Owens, 125 Ill. 2d 390, 532 N.E.2d 248 (1988); In re Strong, 616 P.2d 583 (Utah 1980). Strong was a disciplinary proceeding brought after a civil finding, Holdsworth v. Strong, No. C-190-73 (D. Utah Dec. 21, 1974), aff’d, 545 F.2d 687 (10th Cir. 1976), cert. denied, 430 U.S. 955 (1977), that an attorney had committed common-law fraud and violated Rule 10b-5, 17 C.F.R. § 240.10b-5. The trial court found Strong knowingly and intentionally made false representations to induce a stock sale. Holdsworth v. Strong, No. C-190-73, slip op. at 11-12, 15. The Tenth Circuit affirmed both the district court finding of common-law fraud and the finding of 10b-5 violations. 545 F.2d at 687. Petition for certiorari to the United States Supreme Court was denied. 430 U.S. at 955.

Based on the findings by the district court that Strong had committed common-law fraud, the Disciplinary Screening Committee of the Utah State Bar lodged a complaint. In re Strong, 616 P.2d at 584. The Hearing Panel granted preclusive effect to the findings of the federal district court, prohibited the respondent from introducing evidence inconsistent with the district court’s findings, id. at 587, and eventually recommended disbarment. Id. at 583.

Owens was also a disciplinary action that followed a civil fraud case. The trial court, applying a “clear and convincing” standard of proof, found the respondent attorneys had committed a fraudulent breach of fiduciary duty and a fraudulent breach of the partnership agreement. In re Owens, 125 Ill. 2d at 394, 532 N.E.2d at 249. Respondents had entered into a partnership with clients to operate a radio station. Respondents dissolved the partnership without informing their partners and then formed a new partnership under the same name as the original. However, only the respondents comprised the new partnership. They obtained an F.C.C. license for the new partnership and began operations and broadcasting. Id. at 396, 532 N.E.2d at 250. In the subsequent disciplinary hearing, the respondents were charged with violations of DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit and misrepresentation); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); DR 5-104(A) (entering into a business transaction with clients in which the attorney and client have conflicting interests, without the client’s consent after full disclosure); DR 7-101(A)(3) (intentionally prejudicing or damaging their clients during the professional relationship); DR 7-102(A)(5) (making a false statement of fact); and engaging in conduct that gives the appearance of impropriety. Id. at 393-94, 532 N.E.2d at 249. The Administrator of the Attorney Registration and Disciplinary Commission moved for summary judgment relying on the findings of the civil court; the hearing board granted the motion. Id. at 395, 532 N.E.2d at 249-50. The respondents were precluded from contesting the civil findings and were allowed to present evidence in mitigation, including limited evidence regarding the underlying facts. Id. at 395, 532 N.E.2d at 250. Based on the civil findings, the hearing board adjudged the respondents to have committed all ethical breaches alleged, except DR 1-102(A)(5), and recom-
published decision has yet granted estoppel effect to civil findings in an attorney disciplinary matter,\textsuperscript{105} some courts, faced with a motion for collateral estoppel by disciplinary authorities,\textsuperscript{106} have nevertheless addressed the motion as a legitimate manner of proceeding\textsuperscript{107} rather than dismissing the possibility as inapplicable to a disciplinary procedure.\textsuperscript{108}

In one case, a court denied prior civil findings collateral estoppel effect in a disciplinary proceeding because the standard of proof called for in the disciplinary proceeding was higher than that required in the civil litigation.\textsuperscript{109} Because the court discussed but did not reject the applicability of collateral estoppel, it may be viewed as having given tacit approval to the use of preclusive civil findings in attorney disciplinary hearings.\textsuperscript{110}
In another decision, a court examined the application for reinstatement of a respondent/attorney who had been estopped from contesting the findings of a prior civil suit in a later disciplinary hearing. The court merely noted the use of collateral estoppel at the hearing level as it reviewed the course of the respondent’s disciplinary proceedings. It did not address or comment on the preclusive use of the prior findings; instead, it focused only on the application for reinstatement. In the prior action, a federal district court found, and the circuit court affirmed, that the attorney, after failing to receive the consent necessary for a reorganization, had nevertheless counselled and aided his clients in the effectuation of the reorganization though it violated the clients’ fiduciary obligation to a partnership. The circuit court also affirmed findings that the attorney had threatened an individual with baseless litigation in order to coerce the individual into consenting to a transfer of partnership assets. Based solely on these findings, the disciplinary hearing panel found the attorney brought fraudulent lawsuits merely to harass or injure, and to have advised clients in the furtherance of a fraudulent goal. This use of collateral estoppel, however, never garnered the imprimatur of a court. After applying collateral estoppel, the hearing panel recommended a reprimand. Because the attorney accepted the reprimand and the Committee on Grievances did not have a right to appeal the hearing panel decision, the original hearing panel decision did not come before a court. Therefore, left unscrutinized by the court deciding the application for reinstatement, the issue of collateral estoppel never came under court scrutiny.

New York Appellate Division’s First Department, however, in an unpublished decision, has given an unequivocal endorsement of the use of collateral estoppel. The First Department has indicated that it is prepared to allow civil findings to be used preclusively in attorney disciplinary proceed-
In a disciplinary hearing,\textsuperscript{121} the court was faced with a motion by disciplinary authorities to estop a respondent attorney from contesting the findings of prior litigations,\textsuperscript{122} one in a federal district court\textsuperscript{123} and the other in a Florida civil court of general jurisdiction.\textsuperscript{124} The court declined to allow the assertion of estoppel in this instance but only after performing a plenary analysis dictated by conventional rules and goals of collateral estoppel doctrine. The denial was predicated on different grounds for each case.

In the Florida action, the court revoked the admission of a codicil on grounds that the attorney had misrepresented what it was that he had given the client to sign. The court also found that the testator lacked testamentary capacity at the execution, offering an alternative basis for revoking the codicil. The Florida court’s finding was therefore denied preclusive effect because the determination of the court rested on alternative grounds.\textsuperscript{125} The efficiencies sought through collateral estoppel require that in such a situation the alternative holdings not be given preclusive effect. Granting such effect would induce parties to continue to litigate issues even though such outcomes in the litigation at hand would not be altered.\textsuperscript{126} Indeed,

\textsuperscript{121} In re Cohn, No. M-5696 (N.Y. App. Div. 1st Dep't July 20, 1983).


\textsuperscript{123} SEC v. Pied Piper Yacht Charters Corp., No. 71 Civ. 5341 (S.D.N.Y. Feb. 25, 1976). Under an escrow agreement, respondent was to maintain in escrow twenty-five thousand dollars and two yachts. One yacht could be sold if replaced in escrow with ninety-four thousand dollars. The second yacht was not to be “sold, transferred, hypothecated, pledged or otherwise disposed of.” 118 A.D.2d at 26, 503 N.Y.S.2d at 766. The first yacht was sold and the ninety-four thousand dollars disbursed to the client proved irretrievable. The second yacht was remortgaged, subsequently sunk (while chartered by respondent’s law firm) and part of the insurance proceeds were disbursed. The court held that the dispersals violated the escrow agreement. See generally In re Cohn, 118 A.D.2d at 26-34, 503 N.Y.S.2d at 765-70.

\textsuperscript{124} In re Estate of Rosentiel, No. 76-436 (Fla. Cir. Ct. Dade County June 24, 1976) (court revoked codicil appointing attorney as additional executor and trustee, finding that the attorney misrepresented to the decedent the nature, content and purpose of the codicil when the decedent executed the document).

\textsuperscript{125} A general verdict resting on independent alternative grounds makes the findings of the court ineligible for collateral estoppel effect. See Halpern v. Schwartz, 426 F.2d 102, 105-106 (2d Cir. 1970); In re Cohn, No. M-5696, slip op. at 8; RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i at 259 (1982) (“If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.”). Cf. Hinchey v. Sellers, 7 N.Y.2d 287, 296, 165 N.E.2d 156, 159, 197 N.Y.S.2d 129, 134 (1959) (only findings essential to a judgment may be given preclusive effect in a subsequent proceeding). But cf. Malloy v. Trombley, 50 N.Y.2d 46, 49, 405 N.E.2d 213, 215, 427 N.Y.S.2d 969, 971-72 (1980) (acknowledging the Restatement rule but according estoppel effect to an unappealed determination resting on alternative grounds).

\textsuperscript{126} The respondent’s decision not to appeal the finding of misrepresentation may have been due to a resignation that the finding of a lack of testamentary capacity would have been affirmed, thus upholding the codicil’s recision.
preclusive effect in this circumstance fosters inefficiency.\(^{127}\)

In the federal court case, the federal district court, as part of a contempt proceeding, found the respondent had breached an escrow agreement by allowing dissipation of the fund. Though no specific disciplinary rule was designated, the breach of an escrow agreement constitutes a violation of DR 9-102 (preserving identity of client funds and property). The respondent was given twenty days to reconstitute the escrow fund or be found in contempt. The respondent complied and avoided contempt. The appellate division also refrained from allowing the determination of the federal contempt proceeding to estop the respondent based on the notions of fairness that preclusion should not be used where a party "could not . . . have obtained review of the judgment in the initial action."\(^{128}\)

Despite rejecting the application of collateral estoppel in the *Cohn* matter, the appellate division strongly endorsed the application of collateral estoppel to transfer civil findings to disciplinary hearings.\(^{129}\) The court

\(^{127}\). Cf. Restatement (Second) of Judgments title 5, introductory note, at 249 (1982). "[I]f a party is aware of the potential (and perhaps not wholly foreseeable) preclusive effects of a judgment, he may feel compelled to over-litigate an issue, or pursue an appeal that might not otherwise be taken, out of fear of the consequences in later litigation." *Id.*

\(^{128}\). Restatement (Second) of Judgments § 28(1) (1982) (Exceptions to the General Rule of Issue Preclusion). Since a party can appeal a contempt judgment only after a court has sought to exercise its authority to coerce compliance or punish failure to comply, *see* United Steel Corp. v. Fraternal Ass'n of Steel Haulers, 601 F.2d 1269, 1273 (3d Cir. 1979), and the respondent complied with the court order, the court never moved against him. Therefore, he was never in a position to appeal the contempt judgment. The court indicated that, absent the availability of appeal, the contempt order would not qualify as a final judgment. *In re Cohn*, No. M-5696, slip op. at 12. A final judgment is a prerequisite to the invocation of collateral estoppel. *See* People v. Goodman, 69 N.Y.2d 32, 37, 503 N.E.2d 996, 1000, 511 N.Y.S.2d 565, 569 (1986) ("collateral estoppel applies only when there has been a final judgment"); *Ott v. Barash*, 109 A.D.2d 254, 262, 491 N.Y.S.2d 661, 668 (1985).

\(^{129}\). It is not surprising that New York courts are the first to allow civil findings to be used preclusively in disciplinary matters, given that the primary motivation for the rejection of this position is the courts' desire to safeguard their exclusive authority over attorneys. New York courts have been recognized for their moderation in this tendency. *C. Wolfram*, supra note 4, § 2.2, at 25 (1986) ("New York courts, for a prominent and perhaps extreme example, have resisted exercising broad supervisory powers over lawyers beyond those conferred by legislation."). *See also* Feinstein v. Attorney Gen., 36 N.Y.2d 199, 203, 326 N.E.2d 288, 290, 366 N.Y.S.2d 613, 616 (1975) ("If regulation or supervision beyond the limited powers of the Appellate Division are required, its provision lies with the Legislature.").

With the adoption of new professional disciplinary rules, however, the New York appellate divisions have adopted an exception to the preclusive use of civil findings in disciplinary hearings. The new rules now hold as professional misconduct the unlawful discrimination in the practice of law "in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status." *Lawyer's Code*, supra note 36, DR 1-102(A)(6). The rule mandates that complaints of discrimination against a lawyer be brought first in any available tribunal of competent jurisdiction, other than a disciplinary hearing, such as a state or federal court, or an EEOC hearing. Decisions of these tribunals, which find against the attorney, and after all appellate review has been exhausted, shall constitute *prima facie* evidence of professional misconduct in a disciplinary proceeding. *Id.* Thus, the appellate division discriminates against charges of discrimination since these findings, even if from a federal district court and affirmed by the United States Supreme
noted that collateral estoppel is a routinely used and codified aspect of the New York disciplinary process. Based on these applications, the court announced, "We see no reason why the application of collateral estoppel to disciplinary proceedings should be limited to instances covered by the rule [N.Y. Comp. Codes R. & Regs. tit. 22, § 603 (providing for collateral estoppel effect of criminal convictions and foreign disciplinary determinations)]."

Subsequent to the Cohn matter, the Departmental Disciplinary Committee of the First Department has petitioned the New York Supreme Court, Appellate Division, to invoke collateral estoppel for civil findings and, on at least three occasions, the motion was granted.

VII. PROPOSED APPLICATION: ONE SMALL STEP FOR THE DISCIPLINARY PROCESS

The proposed collateral estoppel rule would effect a significant but limited change in attorney disciplinary procedure. While adopting this propo-
sal would seem to markedly increase attorney vulnerability to sanctions for misconduct, several factors work to mitigate the effect of this proposal. The principal limitation is that relatively few civil court proceedings involving lawyers would be eligible for preclusive effect.

Most civil proceedings require that findings be made merely by a preponderance of the evidence; the overwhelming majority of states require that disciplinary findings be proved by clear and convincing evidence. Thus, the lower level of proof required in civil trials disqualifies most civil findings from being used preclusively.

Additionally, distinctions between civil fiduciary obligations and ethical requirements are germane. Attorneys, as fiduciaries for their clients, are required to deal fairly with clients. To ensure that an attorney meets this standard, courts often regard attorney-client transactions as presumptively void. Thus, when an attorney-client transaction is called into question and later examined in a civil trial, the attorney often bears the burden of coming forward to demonstrate that the transaction was fair and equitable and that the client was fully informed as to all matters relating to the transaction. Should the attorney fail to carry his burden, the court will find against him and strike down the agreement.

Findings arising out of such proceedings are inappropriate for collateral estoppel effect to establish ethical violations. In disciplinary hearings, the disciplinary prosecutor always carries the burden of proving his charges, regardless of the standard required. Because the allocation of the burden can be outcome determinative, a civil proceeding putting the burden on the attorney should not give rise to a finding that may be asserted conclusively.


135. Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 266 (2d Cir. 1984) ("[T]he duty of loyalty requires [a fiduciary] to demonstrate that any actions it does take are fair and reasonable."); Huston v. Schorr, 63 Cal. App. 2d 267, 275, 146 P.2d 730, 733 (1944) (the highest degree of good faith is required in all dealings between attorney and client).


137. See Hicks v. Clayton, 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512, 519 (1977) (attorney must show "by clear and satisfactory evidence" that transaction was fair and that the client was fully informed); Gordon v. Bialystoker Center & Bikur Cholim, Inc., 45 N.Y.2d 692, 698-99, 385 N.E.2d 285, 288-89, 412 N.Y.S.2d 593, 596-97 (1978) (fiduciary must "show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood" (quoting Cowee v. Cornell, 75 N.Y. 91, 99-100 (1878)). This policy especially is strong where courts examine testamentary clauses naming attorney draftsmen as beneficiaries. See In re Putnam's Will, 257 N.Y. 140, 143, 177 N.E. 399, 400 (1931) ("The law . . . requires the lawyer who drafts himself a bequest to explain the circumstances and to show in the first instance that the gift was freely and willingly made."). Cf. C. Wolfram, supra note 4, § 8.12.2, at 486 ("Anglo-American law has always been wary of the power that can be exercised over a donor by a close and trusted legal adviser.").
in a subsequent disciplinary hearing where the burden is on the disciplinary prosecutor.\textsuperscript{138}

Finally, when examining the actions of an attorney, courts often label the attorney's acts "fraudulent" if the attorney is found to have breached his fiduciary obligation to his client. While the term "fraud" is used with some frequency in the judicial literature, care is sometimes not taken to indicate whether actual fraud or constructive fraud is intended.\textsuperscript{139} Actual fraud requires that there be a false representation of a material fact and a present intention to deceive.\textsuperscript{140} Constructive fraud occurs when, in the course of a fiduciary relationship, the fiduciary takes advantage of his client by using his superior knowledge, or an overmastering influence, or the trust and confidence reposed in him, to his benefit at the client's expense.\textsuperscript{141} Because constructive fraud is not itself a sufficient condition for a finding of misconduct in an ethical context, these findings of "fraudulent" acts are not sufficient to preclusively make a misconduct finding.

By way of illustration, consider the following examples.

An attorney and partner are appointed coexecutors in a will drawn by one of the attorneys in a jurisdiction where a statutory provision allows co-executors of estates above a specified size to each receive a full statutory commission.\textsuperscript{142} When testators have made such appointments, courts have found the attorneys to have committed constructive fraud.\textsuperscript{143} As a result of

\textsuperscript{138}. \textit{See} \textsc{Friedenthal, Kane \& Miller}, supra note 7, at 664-65.

\textsuperscript{139}. \textit{See}, \textit{e.g.}, \textit{In re Vilkomerson}, 270 A.D. 166, 58 N.Y.S.2d 922 (1945) (though labelling attorney's conduct simply "fraud," attorney action constituted only constructive fraud), \textit{appeal dismissed}, 296 N.Y. 770, 70 N.E.2d 747 (1946); \textit{In re Will of Hollenbeck}, 65 Misc. 2d 796, 800, 318 N.Y.S.2d 604, 609 (Sur. Ct. 1969) (no evidence of fraud or undue influence), \textit{aff'd}, 37 A.D.2d 922, 325 N.Y.S.2d 736 (1971). This ambiguity may well result from older usages which predate the use of the term "constructive fraud." Thus, in \textit{In re Will of Smith}, 95 N.Y. 516 (1884), a lawyer drew a will which made himself the chief beneficiary of the testator who died five days later. In reversing the admission of the will to probate, the Court of Appeals found "[u]ndue influence, which is a species of fraud . . . ." \textit{Id.} at 522. In modern usage, the opinion would have used the term "constructive fraud" instead of "fraud." This is demonstrated by the court's statement a few lines later that "[t]ransactions between guardian and ward, attorney and client, trustee and \textit{cestui que trust}, or persons one of whom is dependent upon and subject to the control of the other, are illustrations of this doctrine." \textit{Id.} The court was, of course, indicating the now familiar categories of fiduciary relationships and the "fraud" it spoke of was a violation of a fiduciary obligation which is now denominated as "constructive fraud."


\textsuperscript{142}. \textit{See}, \textit{e.g.}, \textit{N.Y. SURR. CT. PROC. ACT LAW} § 2307(5) (McKinney 1967 \& Supp. 1991) (allowing full commission to more than one fiduciary in certain instances).

\textsuperscript{143}. \textit{See} \textit{Katz v. Usdan} (\textit{In re Estate of Weinstock}), 40 N.Y.2d 1, 6-7, 351 N.E.2d 647, 649, 386 N.Y.S.2d 1, 3 (1976) (reversing Appellate Division order on grounds that such action constituted constructive fraud). Constructive fraud occurs when an attorney fiduciary takes advantage of the client by using superior knowledge, or an overmastering influence, or the trust and confidence reposed in him to
this constructive fraud, the attorneys' commissions may be denied\textsuperscript{144} or reduced.\textsuperscript{145}

Such a finding and reduction, however, would not satisfy the requirements for estoppel effect in a subsequent disciplinary hearing charging the attorney with a violation of DR 1-102(A)(4) (conduct constituting dishonesty, fraud, deceit or misrepresentation). Violation of DR 1-102(A)(4) requires intent to engage in the proscribed conduct.\textsuperscript{146} Since courts have indicated that such dual executors are guilty of constructive fraud and face commission reductions even where there is no intent to deceive,\textsuperscript{147} these findings do not supply the necessary prerequisites to finding a violation of DR 1-102(A)(4).\textsuperscript{148}

Consider further that the appointment of the partner as coexecutor arises out of admiration by the client for the partner who, like the elderly client, emigrated to the United States in a penurious state and, by dint of mind and effort, attended law school and succeeded to the American dream. The lawyer, already appointed as executor of this sizeable estate in a previous will he drafted, explains to the client that appointment of his partner as coexecutor would result in charging the estate for two full commissions.\textsuperscript{149} The lawyer does not explain to the client that her admiration for his partner can be manifested by appointing the partner as an alternate

\textsuperscript{144} See, e.g., Weinstock, 40 N.Y.2d at 1, 351 N.E.2d at 647, 386 N.Y.S.2d at 3 n.*.

\textsuperscript{145} See, e.g., In re Estate of Thron, 139 Misc. 2d 1045, 1050-51, 530 N.Y.S.2d 951, 955 (Sur. Ct. 1988).

\textsuperscript{146} For example, in In re Estate of Thron, 139 Misc. 2d 1045, 530 N.Y.S.2d 951 (Sur. Ct. 1988), the court found constructive fraud, see 139 Misc. 2d at 1048, 530 N.Y.S.2d at 954, reduced the commissions due the executors although there was no evidence that the attorneys actively induced the testator to name both executors, see 139 Misc. 2d at 1050, 530 N.Y.S.2d at 955, and noted that instead the dual appointment could be attributed to the attorneys' ignorance of the applicable law. \textsuperscript{147} Of course this does not rule out that the possibility that the attorneys' actions in obtaining the coexecutor appointment could have involved a violation of DR 1-102(A)(4). Rather, the civil findings do not conclusively establish a disciplinary violation. Thus, the respondent should be given the opportunity to litigate the question of the violation in the disciplinary hearing.

\textsuperscript{148} Supra note 142.
or successor executor rather than coexecutor—thus saving a full commission. Failure to so disclose results in a benefit to the lawyer at the client’s expense and therefore breaches the lawyer’s fiduciary obligation.\footnote{150} If a court were to invalidate that testamentary provision on the grounds of overreaching and constructive fraud, those findings would not constitute a violation of a disciplinary regulation. They would not, for example, constitute a violation of DR 5-101(A) because, having explained to the client that there would be double commissions, the lawyer has fulfilled the mandate of DR 5-101(A) that, in the event of a conflict of interest, the lawyer explain the conflict to the client and proceed with the representation only if and after the client assents.\footnote{151} Hence, the invalidation of the testamentary provision on the grounds stated would not be the basis for invocation of collateral estoppel in a subsequent disciplinary proceeding.

Consider further a lawyer\footnote{152} specializing in pension law who receives a telephone call from a close friend, also a lawyer, who informs him that, based on public information, he believes that a tender offer is imminent for a publicly held corporation and urges him to buy the shares and split any profits. The lawyer immediately purchases call options and also informs another friend. The other friend does not act upon the information because he receives it after trading had been suspended due to announcement of the takeover. The lawyer is investigated by the SEC and learns that the information he received was indeed nonpublic information and enters into a consent order with the SEC to surrender his profits. A year later he is convicted in federal district court of criminal violation of the securities laws. The regulation violated makes unlawful the communication of “material non-public information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable” that the other person will purchase or sell securities in the company which is the subject of the tender offer.\footnote{153} Thus, the criminal case was not based on the lawyer’s personal trading but on his communication to the other friend. The punishment meted out was under that part of the statute which permits only a fine when the defendant proves that he had no knowledge of the regulation he was violating.\footnote{154}

\footnote{150} See New York State Bar Ass’n Comm. on Professional Ethics, Formal Op. No. 569 (1985) (lawyer should advise a client of the feasibility of settling a “small estate” without the expense of legal representation); New York County Bar Ass’n Op. No. 371 (1945) (client seeking advice regarding Selective Service matter must be informed that free assistance is available from advisory board created under Selective Service regulations), discussed in H. DRINKER, LEGAL ETHICS 103 (1953).

\footnote{151} There are other reasons why the fact situation does not portray a violation of DR 5-101(A). For example, there is no conflict of interest. See Brickman, supra note 133, at 48-49.

\footnote{152} The facts in this example are suggested by In re Hutchinson, 534 A.2d 919 (D.C. 1987).

\footnote{153} 17 C.F.R. §240.14e-3(d) (1990); Hutchinson, 534 A.2d at 921.

Since the criminal conviction did not require any showing of intent—in fact, a negligent communication was sufficient and, since the record shows that the lawyer did not know that his communication to his friend was unlawful—then, DR 1-102(A)(4) has not been violated. Indeed, on the basis of the facts related, no disciplinary regulation has been violated and, accordingly, collateral estoppel cannot be invoked.

Now consider a successful civil suit alleging common-law fraud on the part of an attorney. The attorney is an owner-manager of a closely held company. In order to persuade other shareholders (not active in the business) to sell their shares to the attorney, he represents that the company is faring poorly and is unlikely to pay out dividends. In actuality, the company is prospering and exhibits a growing earning capability. The trial court, requiring a clear and convincing showing of evidence by the plaintiff, finds active misrepresentation by the attorney and finds the attorney liable. The attorney exhausts all appeals, each upholding the trial court’s findings.

These facts constitute a compelling argument for adoption of this article’s proposal. The evidentiary standard in the civil suit fulfills the requirements in a subsequent disciplinary case in all states except Georgia. The exhaustion of appeals without reversal indicates that the civil proceeding offered a full and fair opportunity on the issue, actual fraud (as opposed to constructive), that is decisive in the subsequent disciplinary hearing. Unless the attorney demonstrates an infirmity in the civil judgment or shows that estoppel will result in unfairness, the attorney, under our proposal, will be precluded from contesting a violation of DR 1-102(A)(4). The attorney would, however, be permitted to present evidence mitigating the significance of the violation and arguing for a lesser sanction.

In these circumstances, the attorney has had a full and fair opportunity to contest the charges and, at the same time, the courts have conserved judicial resources. Additionally, preclusion ensures that the public is not faced with inconsistent judgments upon the same facts.

VIII. CONCLUSION

Findings of civil courts should be given preclusive effect in subsequent

155. Hutchinson, 534 A.2d at 923.
156. These facts are suggested by Holdsworth v. Strong, No. C-190-73 (D. Utah Dec. 21, 1974), aff’d, 545 F.2d 687 (10th Cir. 1976), cert. denied, 430 U.S. 955 (1977). The Court’s determination led to disciplinary proceedings by the Utah Bar Commission and an appeal therefrom. See In re Strong, 616 P.2d 583 (Utah 1980)).
158. The prior litigation is conclusive as to the violation. The sanction warranted must be determined by the disciplinary authorities and ultimately the state supreme court.
disciplinary hearings subject to the same rules of collateral estoppel used for the transfer of factual findings between courts. Adoption of our proposal would require that civil trial courts, sitting in matters where attorneys are defendants or where an attorney's actions are the subject of the litigation, take special care to clearly express their findings regarding the attorney's actions. In particular, if they find inappropriate behavior, the court should unequivocally state whether or not there was intent of the type required for a violation of DR 1-102(A)(4) or Model Rule 8.4(c). Doing so under a regime of collateral estoppel would conserve judicial resources.

Those courts rejecting collateral estoppel for civil findings are promulgating a special rule that aggrandizes the position of attorneys by granting them the advantage of relitigating issues previously litigated and decided adversely to attorneys. The second opportunity granted lawyers by these courts is an opportunity without basis in rules of procedure and beyond the needs of the court to effectuate their power to regulate the practice of law. The opportunity not only conflicts with court policy adopted toward criminal and foreign disciplinary findings but also does not square with analysis under the Parklane paradigm for evaluating the appropriateness of the assertion of collateral estoppel. This privilege exempts attorneys from the burdens of collateral estoppel in circumstances where other professionals and laymen must shoulder this imposition to further the goals of consistent, efficient and nonduplicative litigation. The attorney's ability to relitigate prior civil findings in disciplinary procedures sacrifices these goals that courts otherwise seek. The cost of this privilege is absorbed by the judicial system and thus imposed on all of society while the benefit accrues only to lawyers. Courts are well advised to follow the as yet silent lead of New York's Appellate Division, First Department, and make the findings of civil courts eligible for preclusive effect in attorney disciplinary hearings.