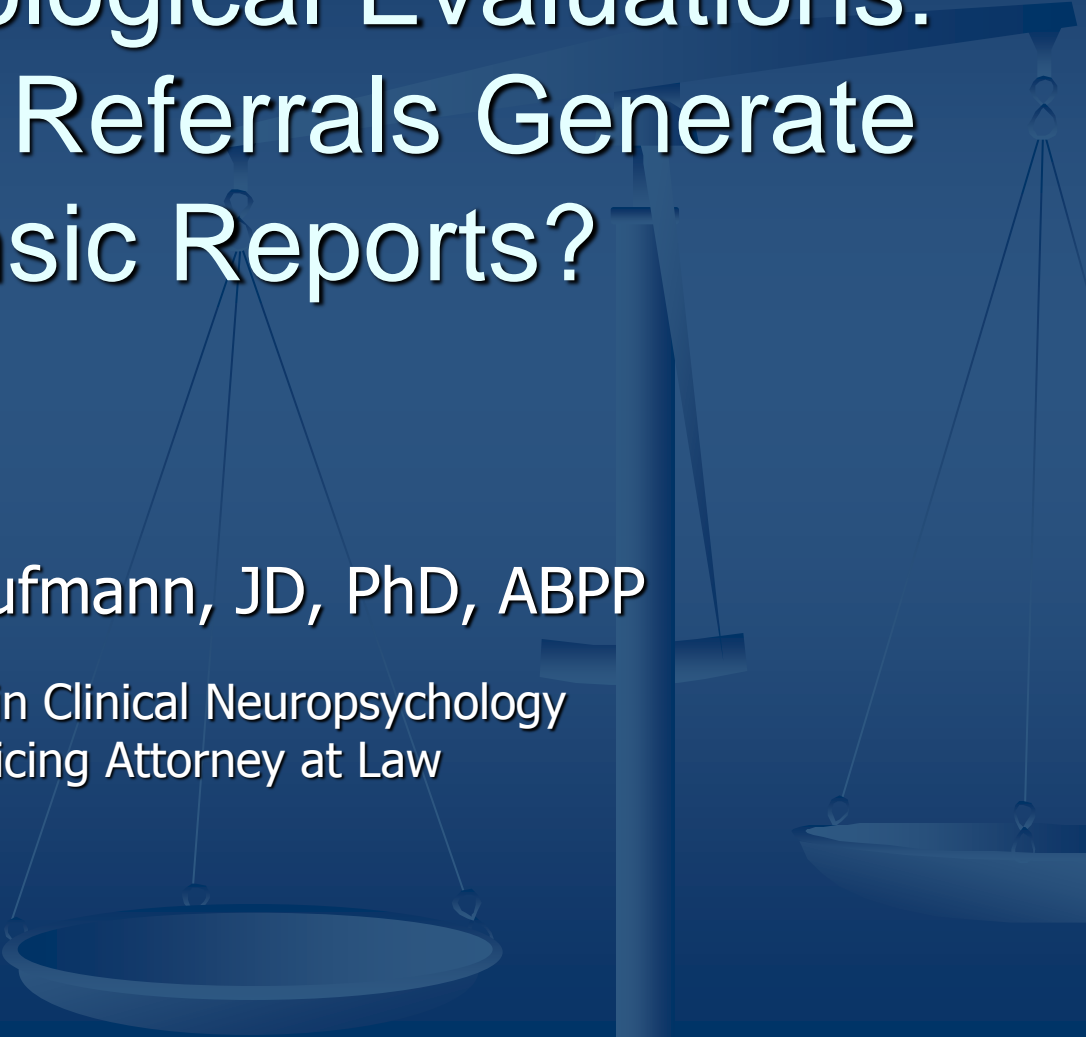


# Assessing Effort and Neuropsychological Evaluations: Can Clinical Referrals Generate Forensic Reports?



Paul M. Kaufmann, JD, PhD, ABPP

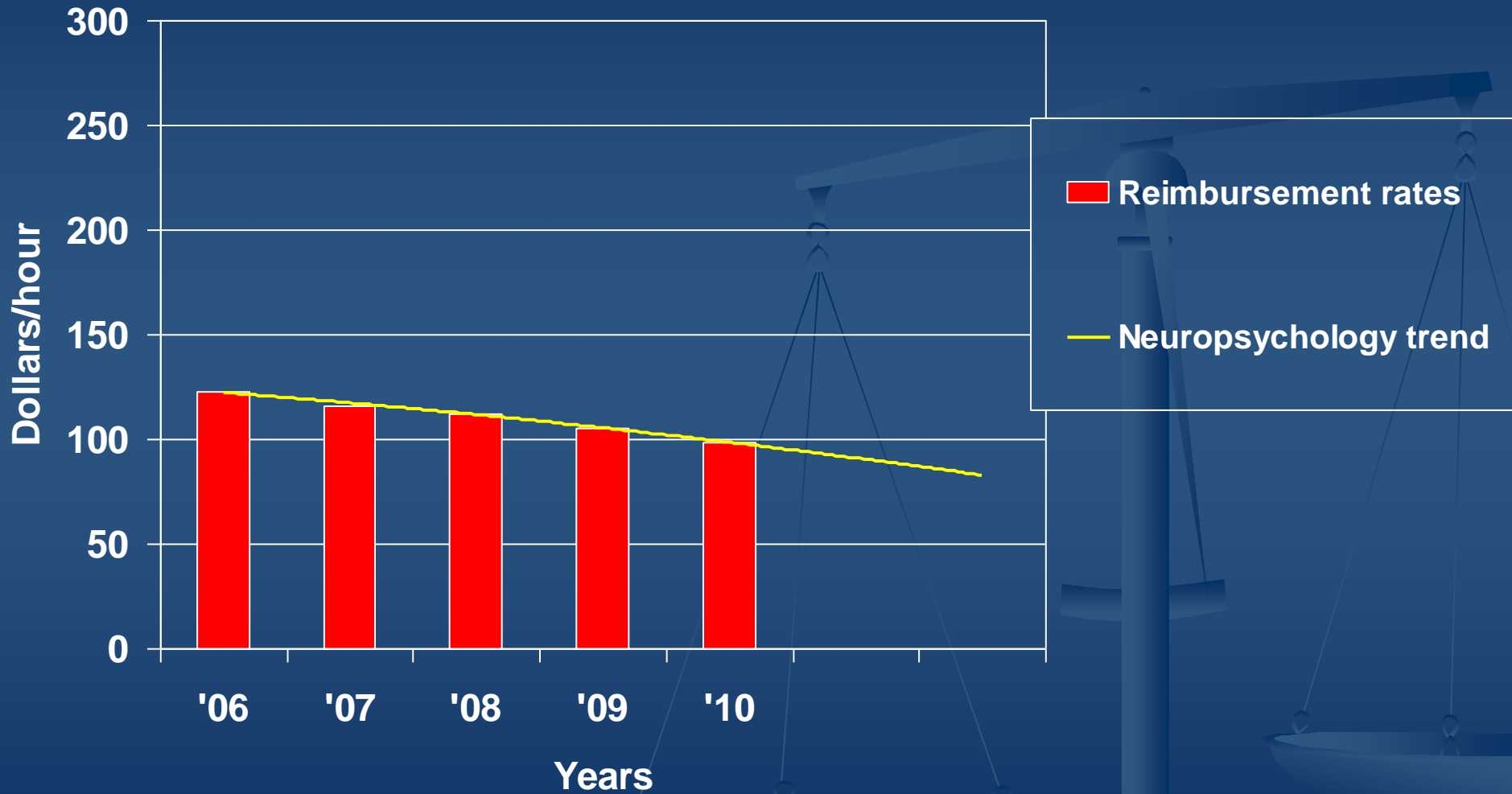
Diplomate in Clinical Neuropsychology  
Practicing Attorney at Law

# Clinical Referrals

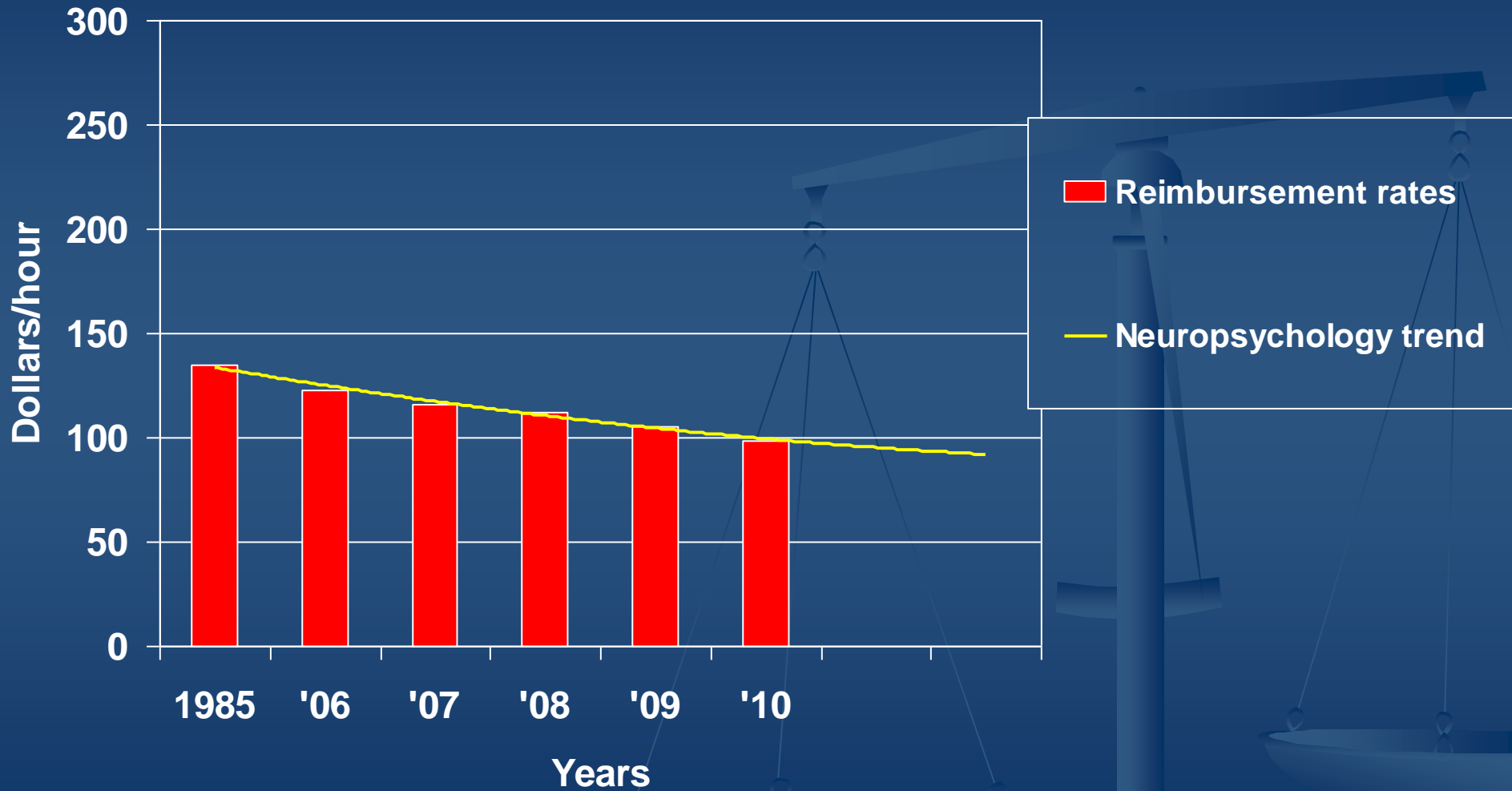
Physician referral to conduct medically-necessary evaluations billable to patient third party payers (insurance or government).

- historical emphasis on diagnosis.
- do such evaluations improve outcomes or reduce other healthcare costs?
- need useful treatment recommendations and other remedial planning.
- health care distinguished from education.

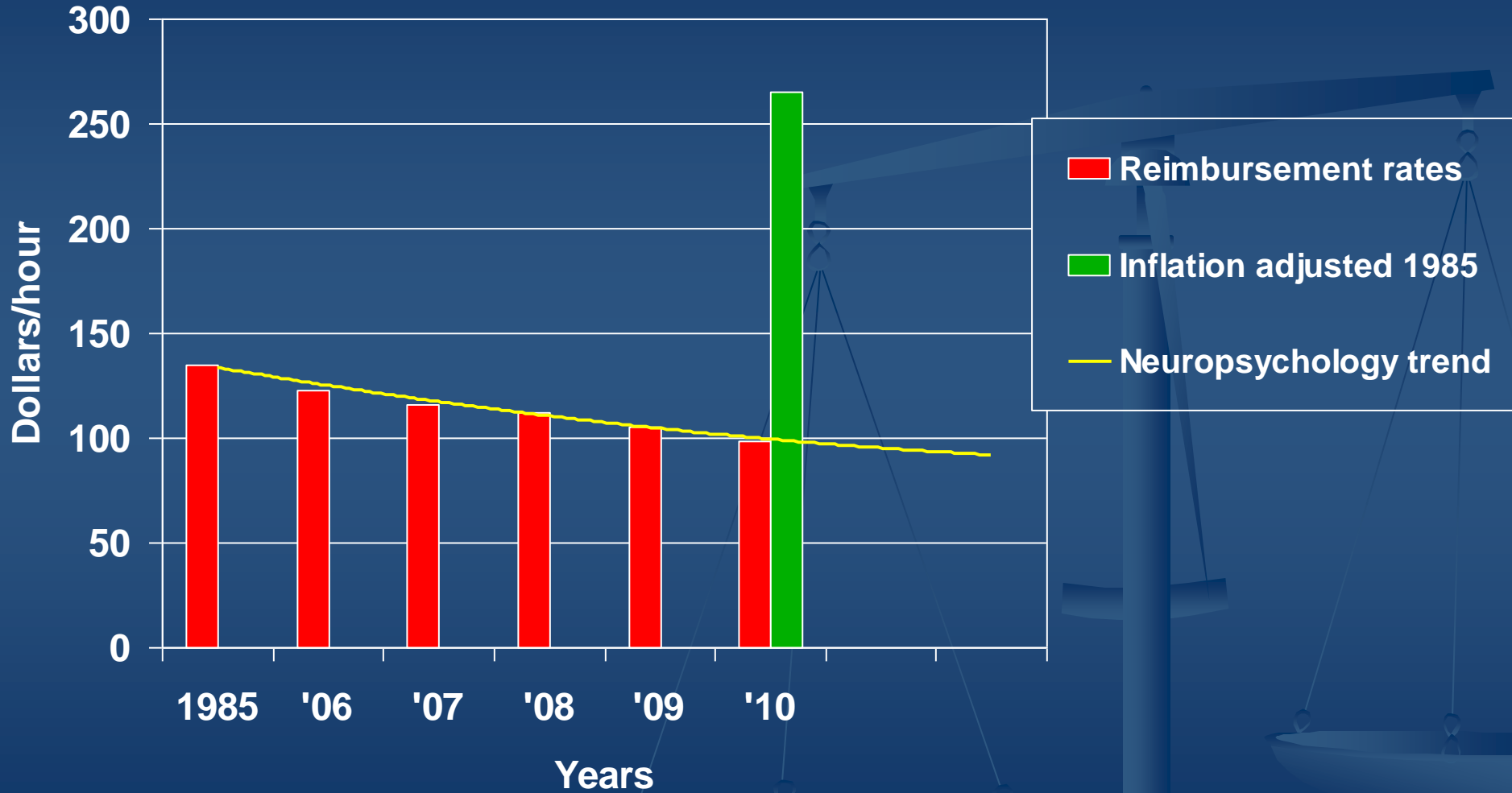
# Medicare Rates for Neuropsychological Evaluations



# Medicare Rates for Neuropsychological Evaluations



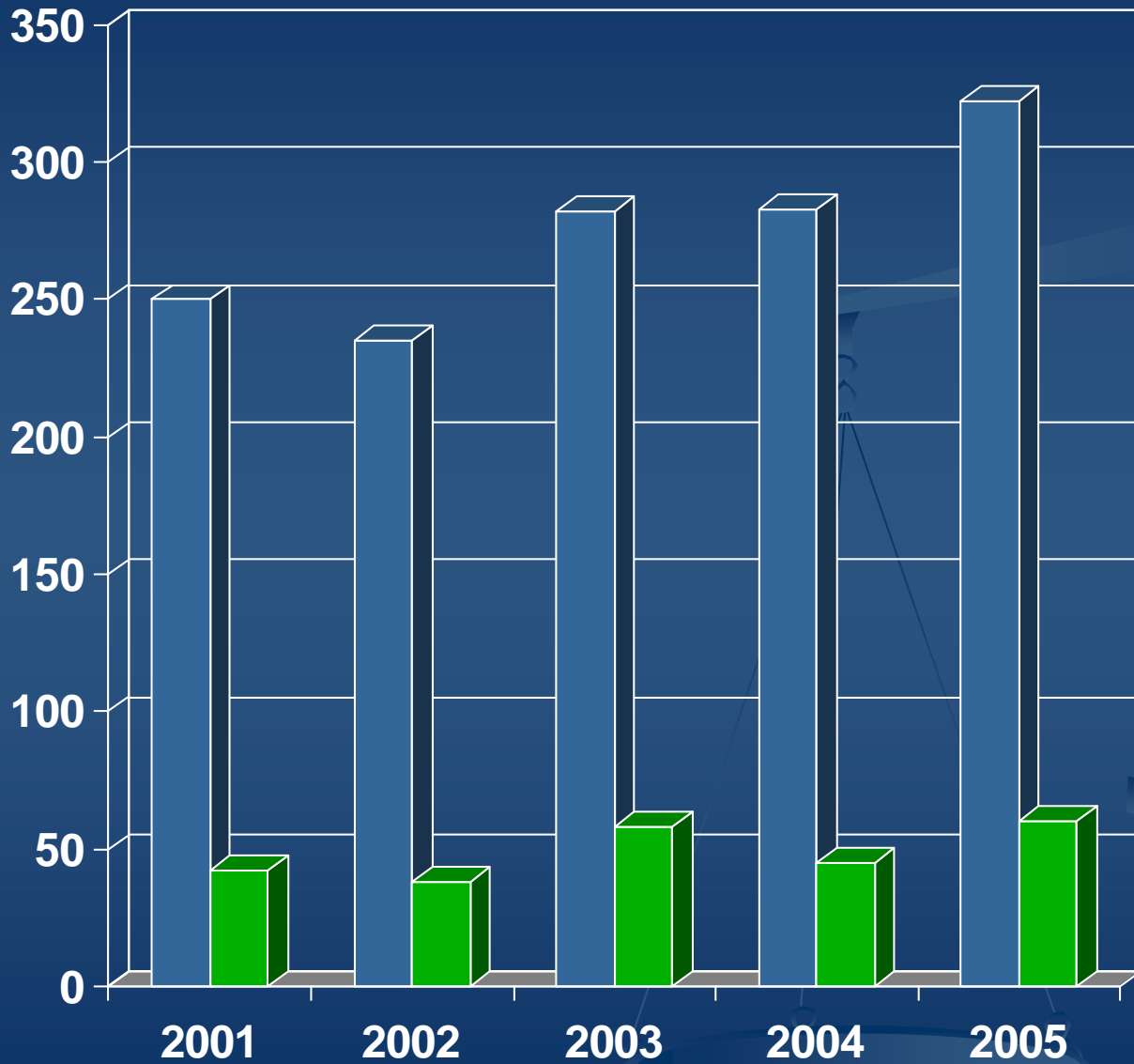
# Medicare Rates for Neuropsychological Evaluations



# Forensic referrals

Lawyer referral to conduct evaluations in reasonable anticipation of litigation billable to attorney (client), court, or state agency.

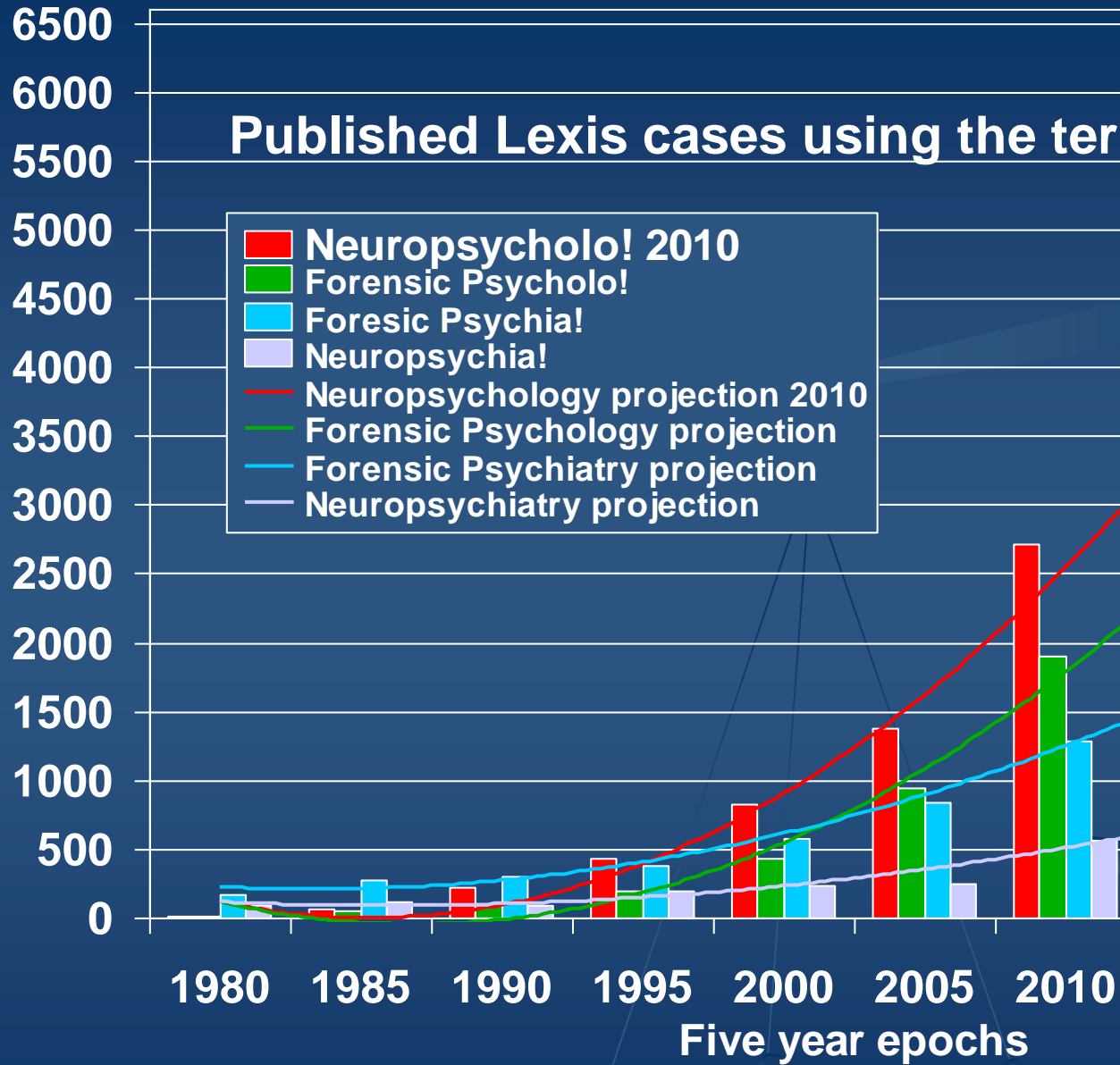
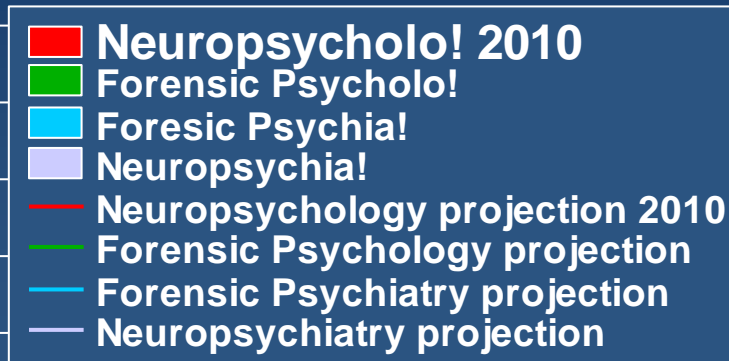
- diagnostic to address psycholegal questions
  - Civil damages and causation
  - Criminal culpability and competence
  - Disability determination
- not healthcare, often no treatment
- limited Dr. – patient relationship?



■ Neuropsycholo  
■ Neuropsychia

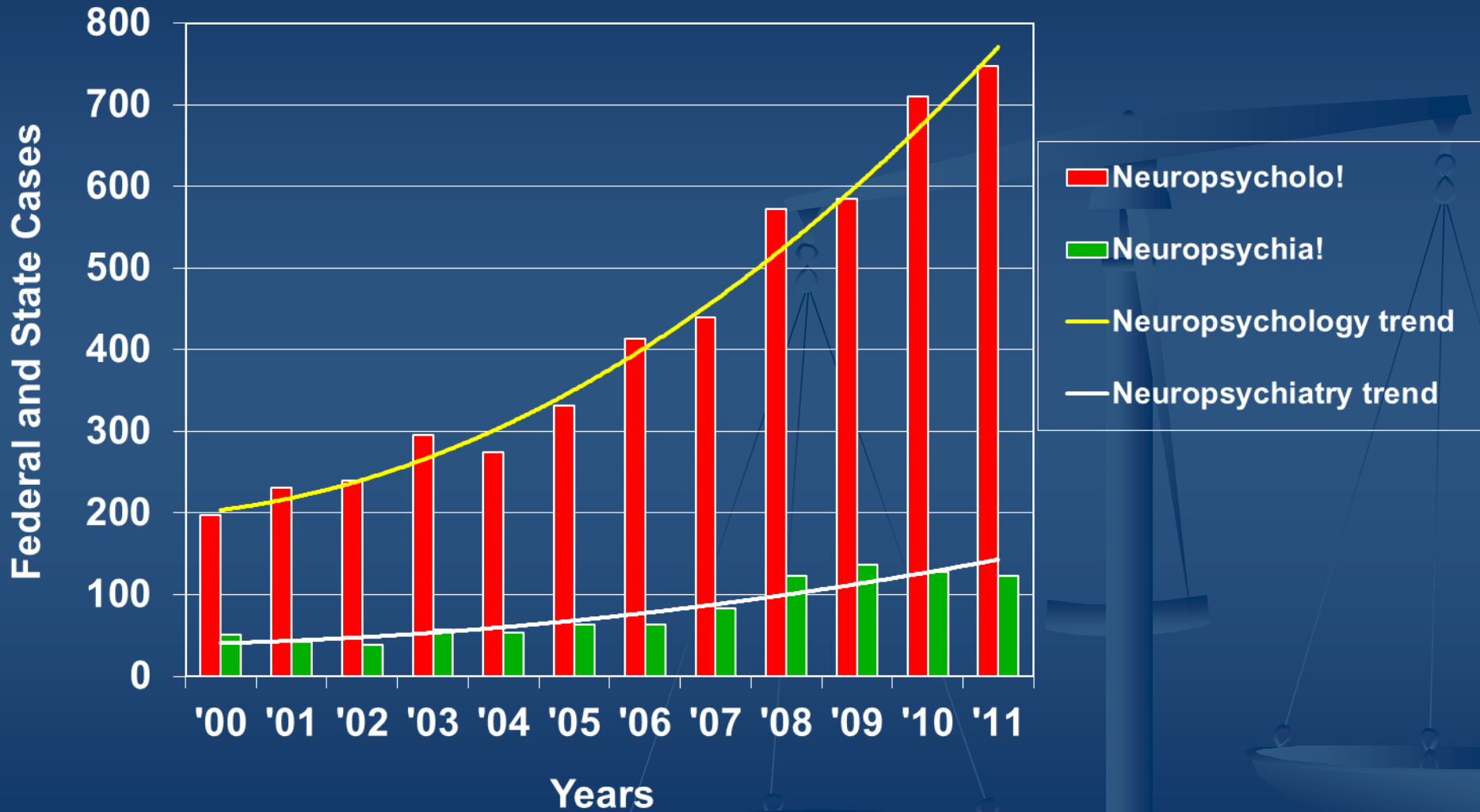
## Published Lexis cases using the term

Federal and State Cases

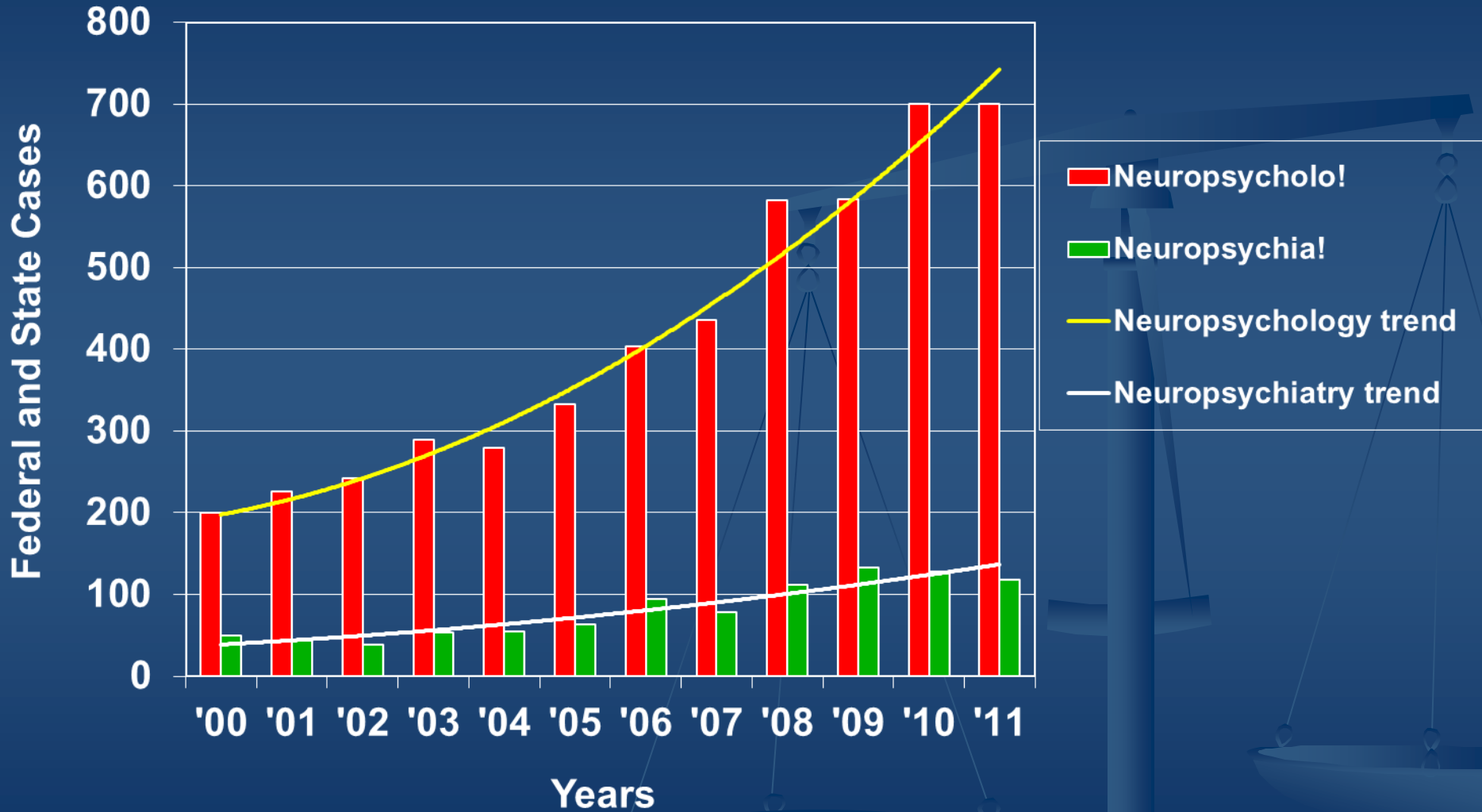




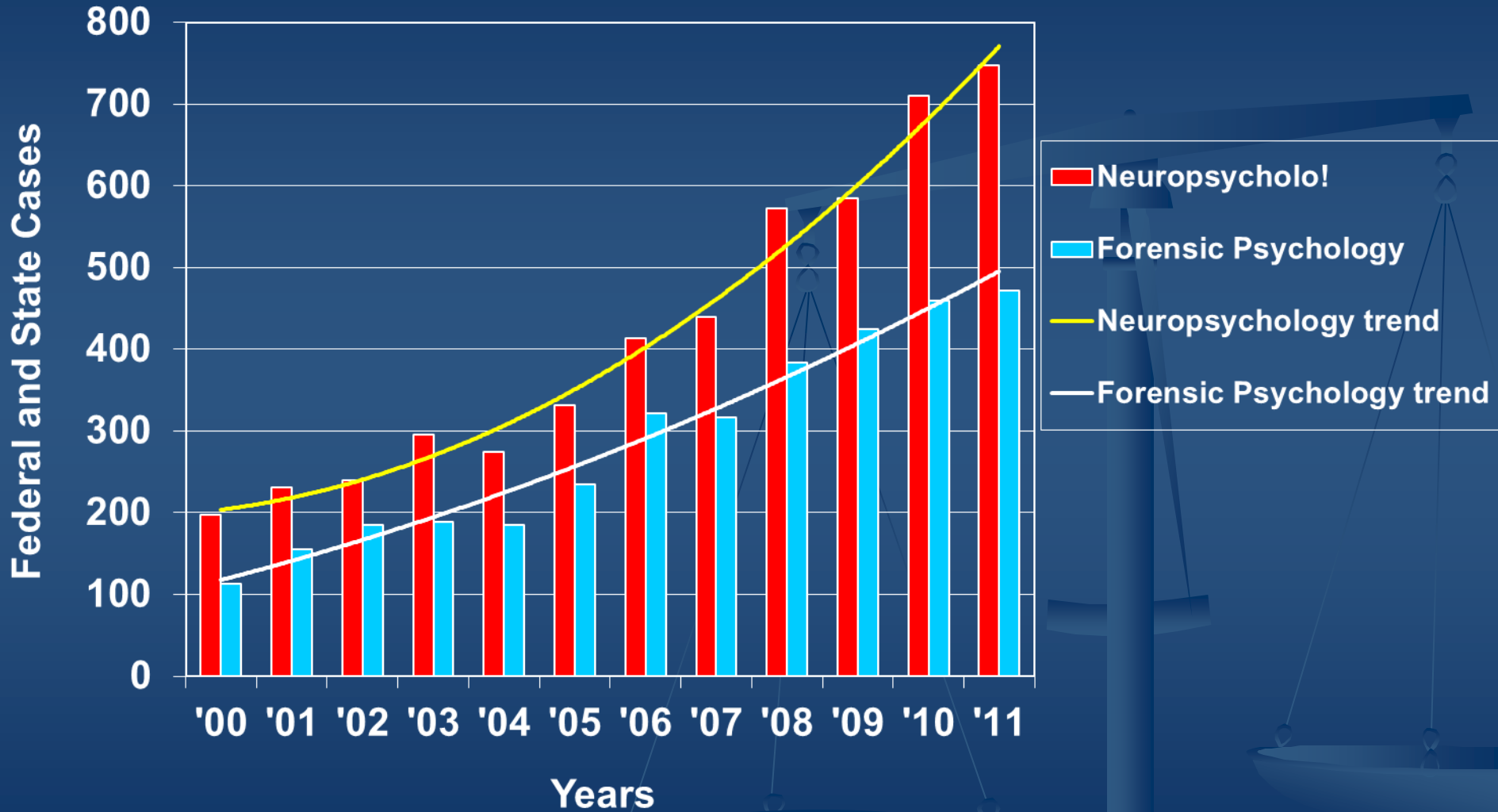
## Published Lexis cases using terms



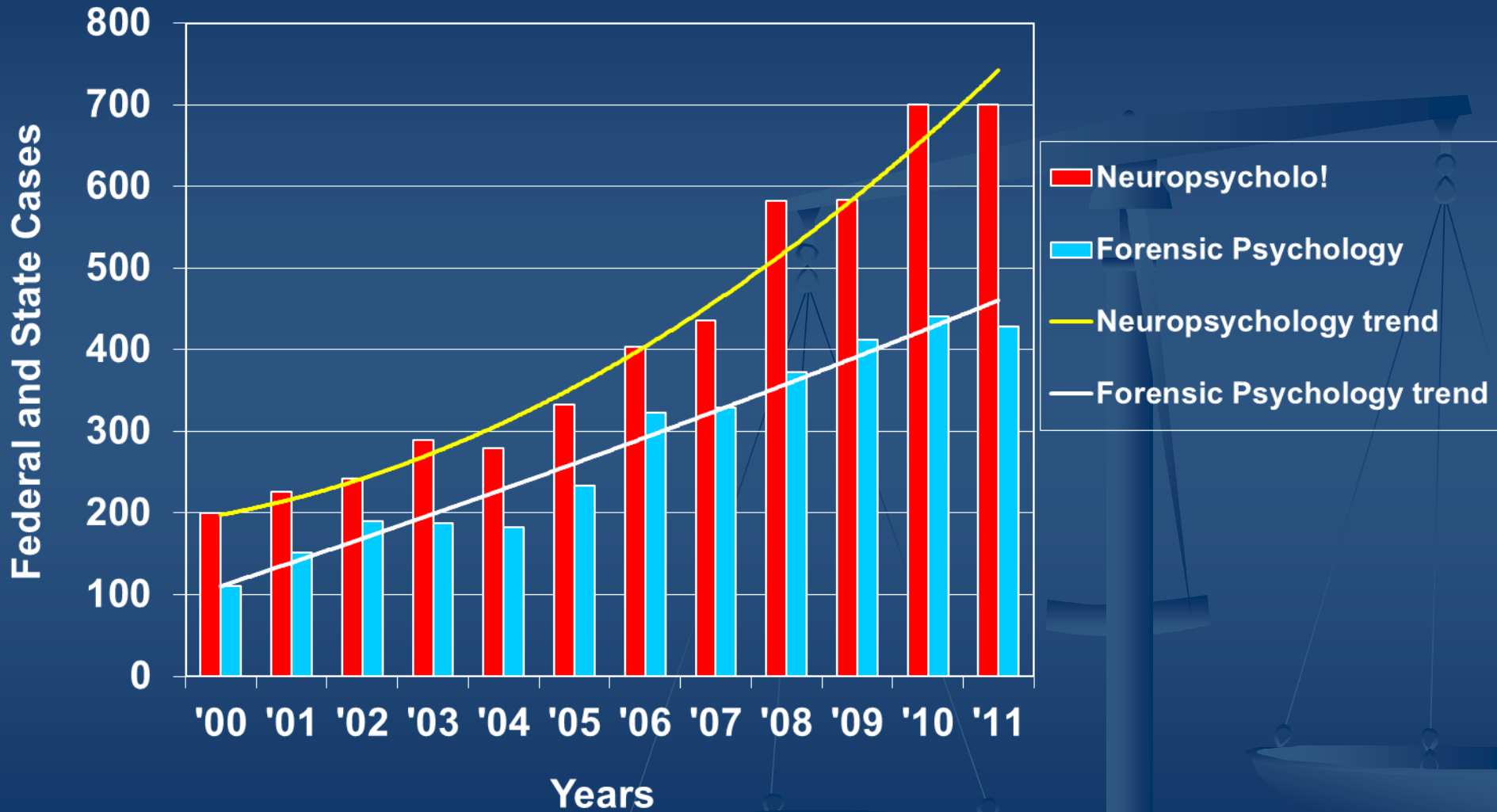
# Published Westlaw cases using terms



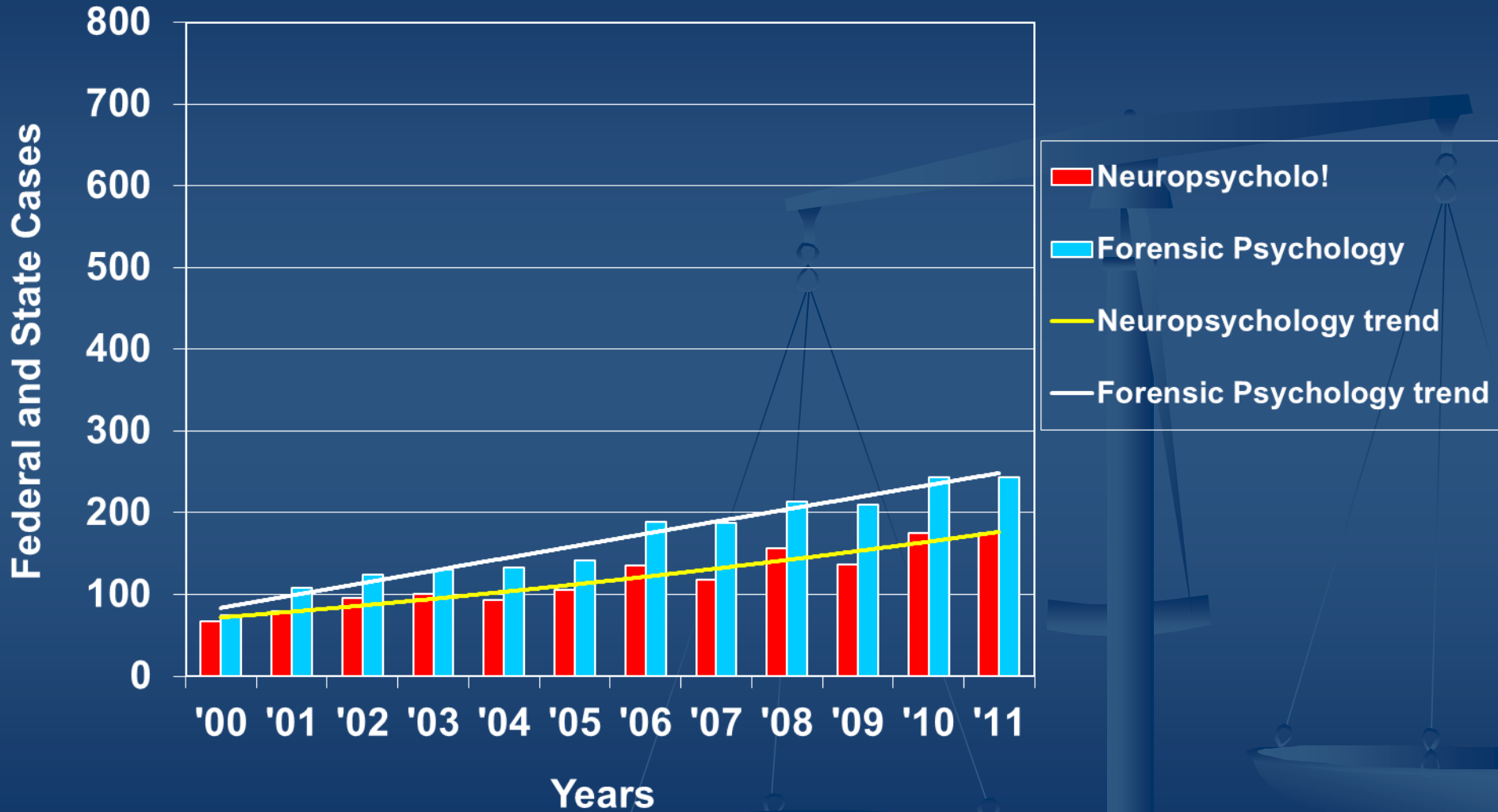
# Published Lexis cases using terms



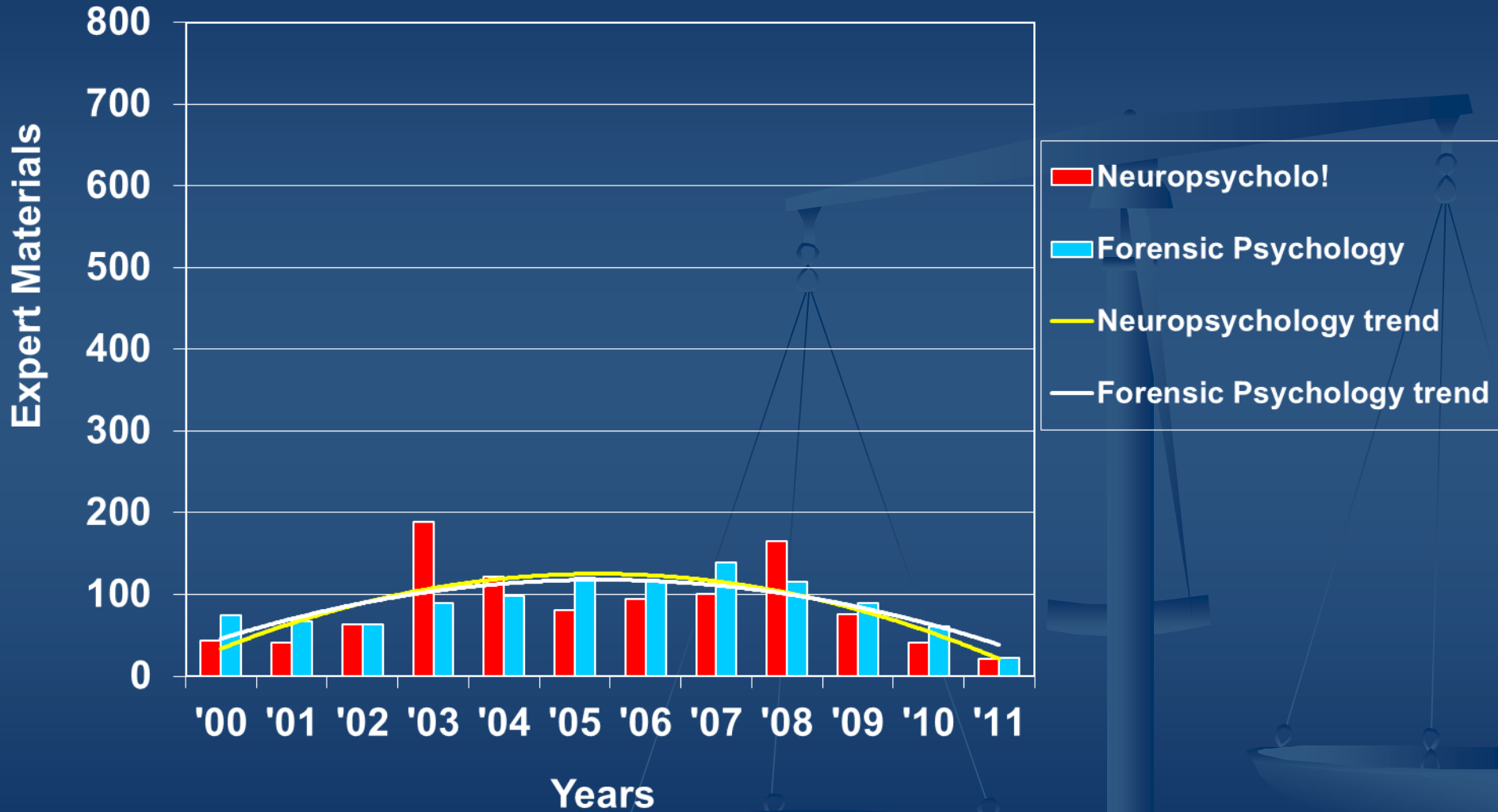
# Published Westlaw cases using terms



# Published Westlaw criminal cases using terms



# Published Westlaw criminal cases using terms



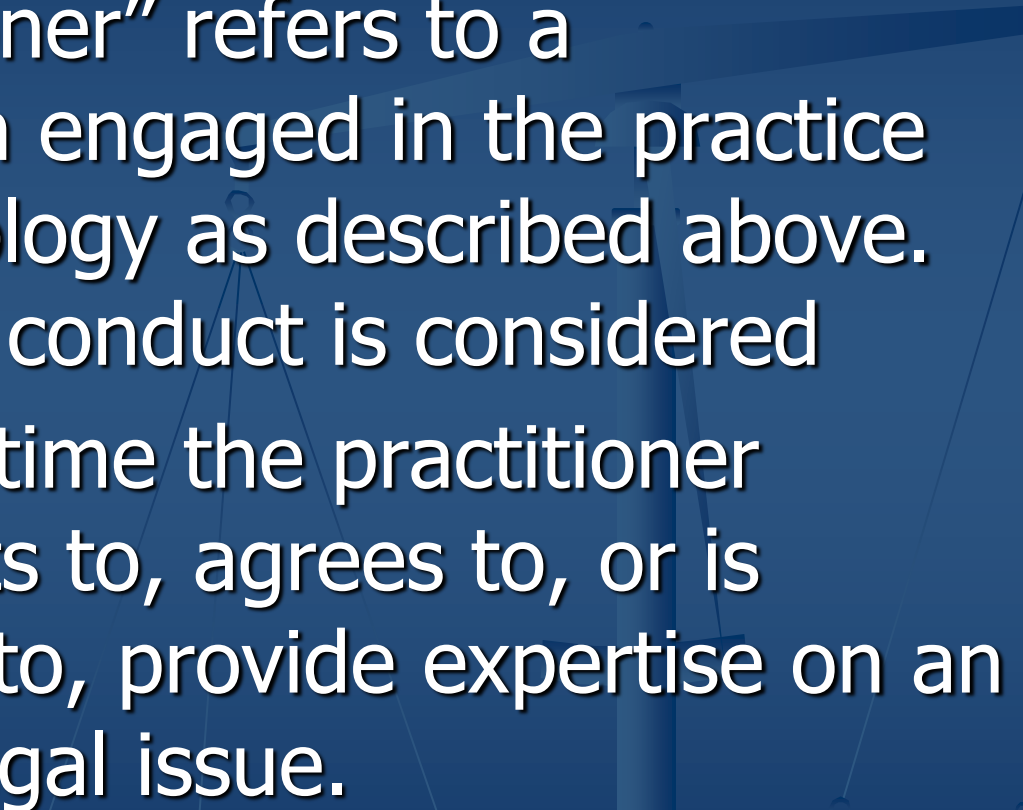
# Specialty Guidelines\* definition

“Forensic psychology” refers to professional practice by any psychologist working within any sub-discipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters.

\* authorized by APA Council of Representatives August 2011

# Specialty Guidelines definition

“Forensic practitioner” refers to a psychologist when engaged in the practice of forensic psychology as described above. Such professional conduct is considered forensic from the time the practitioner reasonably expects to, agrees to, or is legally mandated to, provide expertise on an explicitly psycholegal issue.

A faint, stylized image of a scale of justice is visible in the background on the right side of the slide. The scale consists of a central vertical pillar with two pans hanging from a horizontal beam. The image is semi-transparent and serves as a decorative element.



# The Blended Practice

Neuropsychologists diagnose, evaluate, and treat individuals with known or suspected neurologic disease and/or injury.

- acquired brain injury from various causes
- traumatic brain injury from accidents
- brain damage from medical error
- statutes of limitation and medical records
  - Children = age of majority +  $X$  years

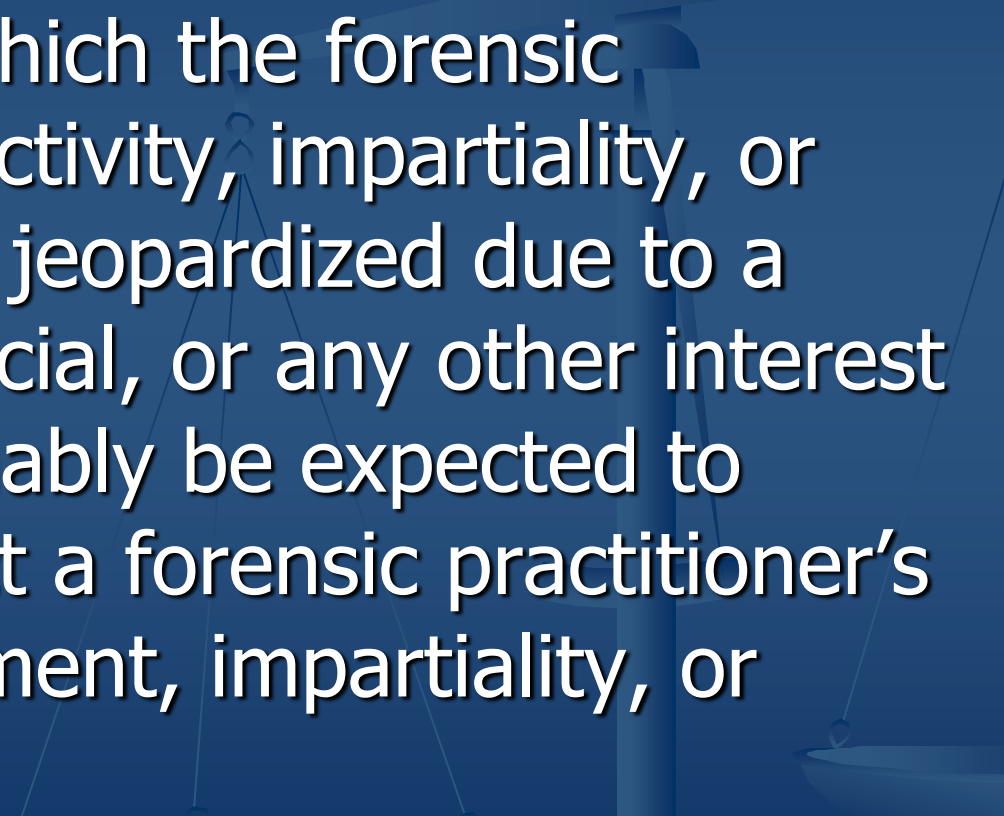
# Both Evaluator and Expert?

## Navigating between *Scylla and Charybdis*

- Most recommend avoiding conflicts of interest (Greenburg & Shuman, 1997, 2007; Heilbrun, 2001)
- More situational approach (Woody, 2009)
- Minority claim compatibility (Heltzel, 2007)
- Psychotherapist expert? (Dvoskin, 2008)

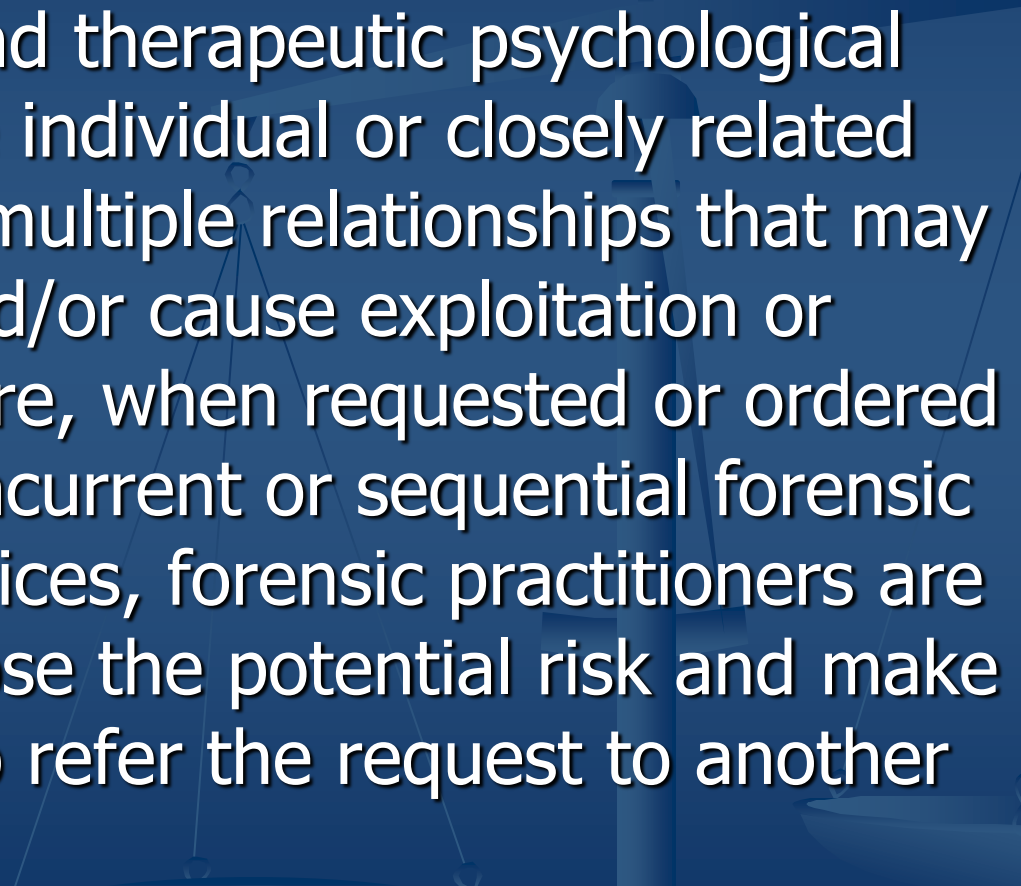
# Specialty Guidelines definition

“Conflict of interests” refers to a situation or circumstance in which the forensic practitioner’s objectivity, impartiality, or judgment may be jeopardized due to a relationship, financial, or any other interest that would reasonably be expected to substantially affect a forensic practitioner’s professional judgment, impartiality, or decision-making.

A faint, stylized image of a scale of justice is visible in the background, centered behind the text. The scale consists of a central vertical pillar with two pans hanging from a horizontal beam. The image is rendered in a light blue color, matching the overall theme of the slide.

# SGFP 4.02.01 Therapeutic- Forensic Role Conflicts

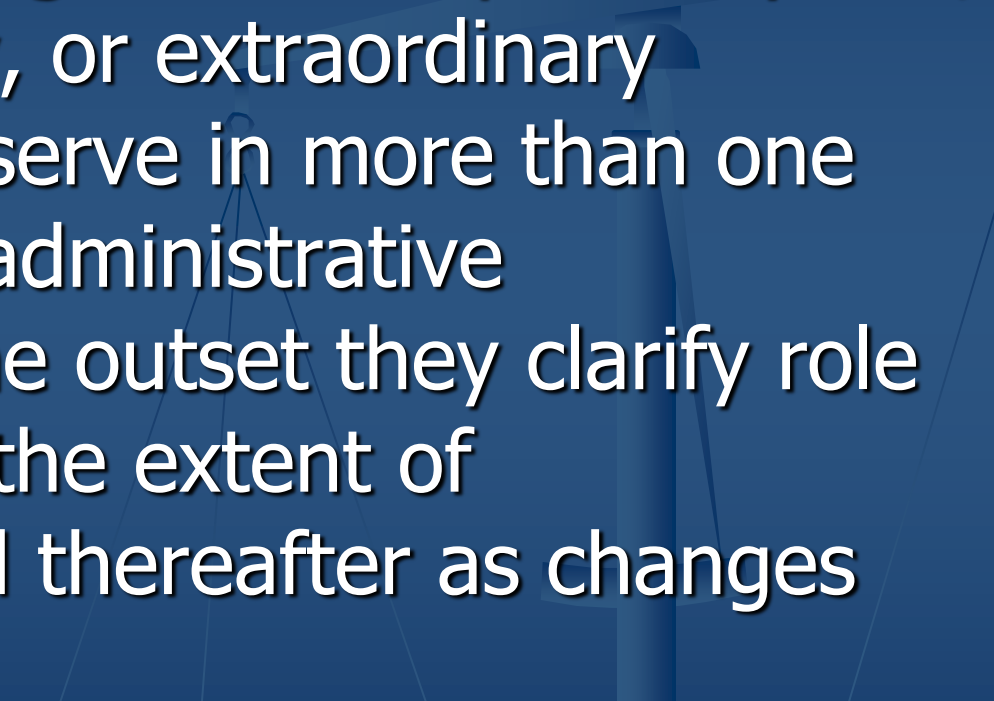
Providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm. Therefore, when requested or ordered to provide either concurrent or sequential forensic and therapeutic services, forensic practitioners are encouraged to disclose the potential risk and make reasonable efforts to refer the request to another qualified provider.



# APA Ethics Code 3.05

## Multiple Relationships

(c) When psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings, at the outset they clarify role expectations and the extent of confidentiality and thereafter as changes occur.

A faint, stylized image of a scale of justice is visible in the background, centered behind the text. The scale has two pans hanging from a central point, with a vertical pillar supporting the structure. The image is rendered in a light blue color that blends with the dark blue background.

# Is Suboptimal Effort Always Malingering?

More answers available from the  
**Consensus Conference on Response  
Bias, Effort and Malingering**

AACN June 20, 2008 Boston, MA published in *The  
Clinical Neuropsychologist* October 2009

**Disclaimer**

# My Short Answer

Suboptimal effort during psychological evaluations is not *always* malingering, but more often than not, it is.

Psychologists have the best techniques available to discern the difference.

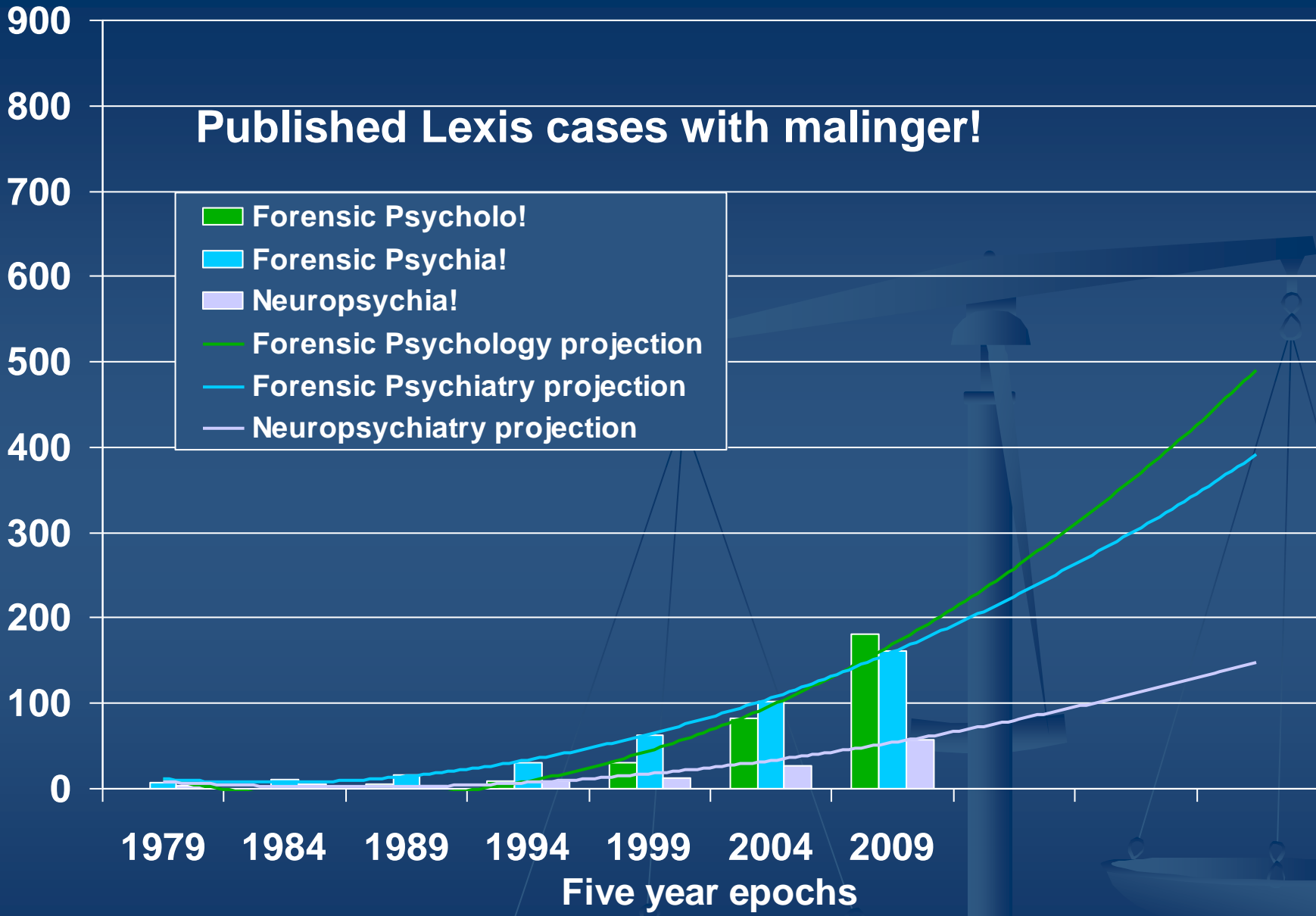
In the 1980's, neuropsychologists gave mTBI patients the "benefit of the doubt" now we give them SVT's and work to reduce doubt.

In the end, it is a professional judgment.

# Published Lexis cases with malinger!

Federal and State Cases

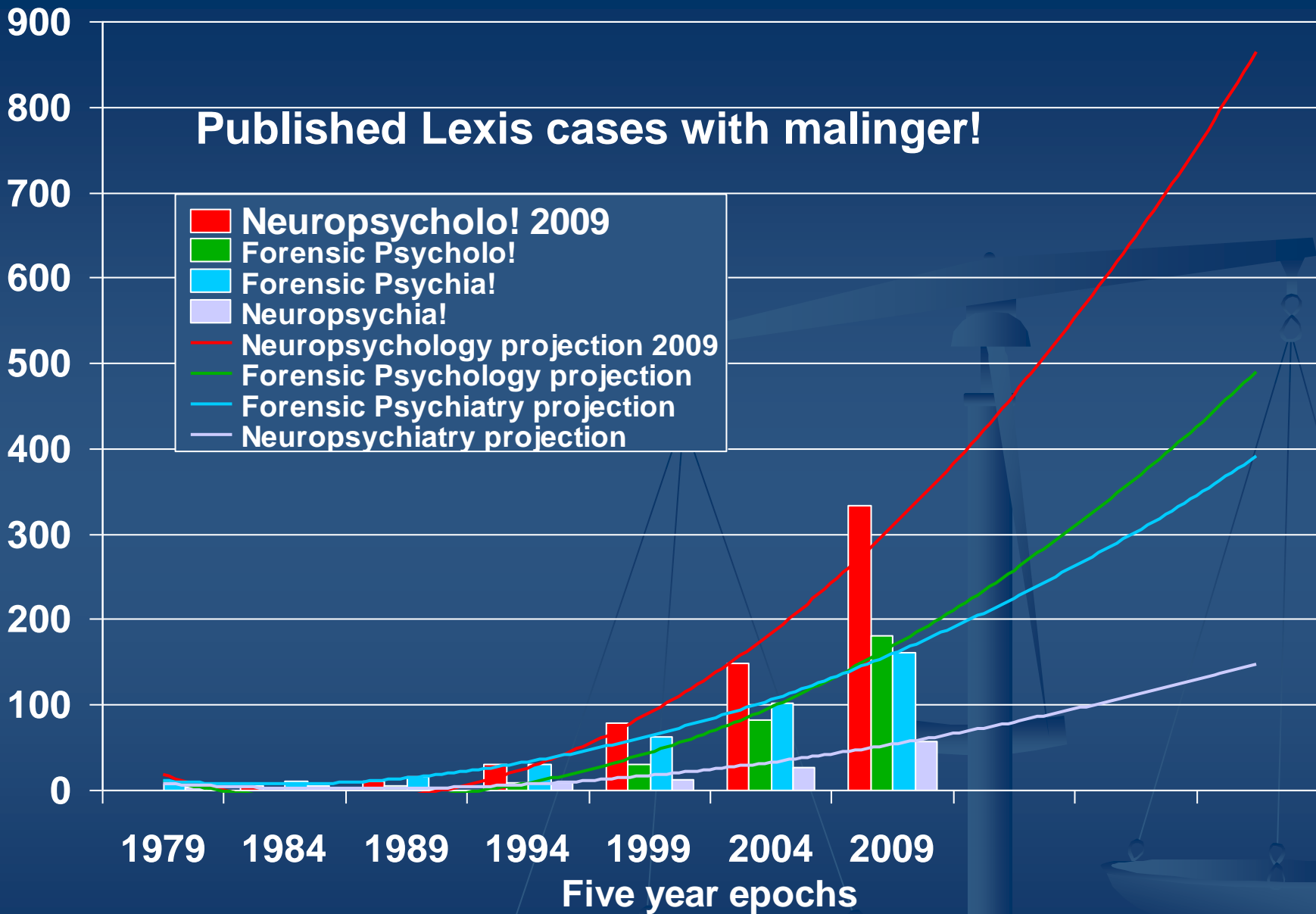
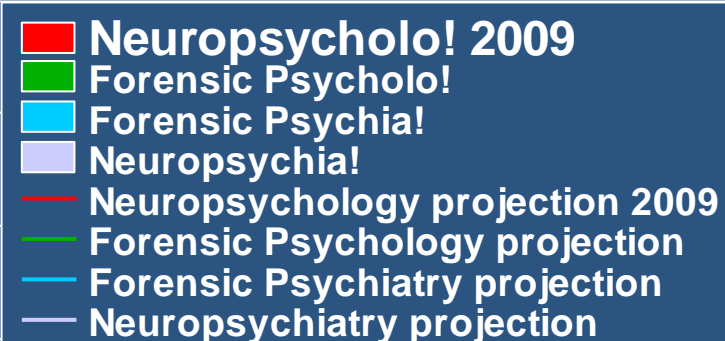
- Forensic Psycholo!
- Forensic Psychia!
- Neuropsychia!
- Forensic Psychology projection
- Forensic Psychiatry projection
- Neuropsychiatry projection





## Published Lexis cases with malinger!

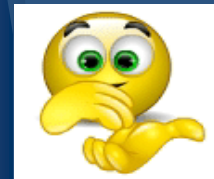
Federal and State Cases



# Do we have Consensus?

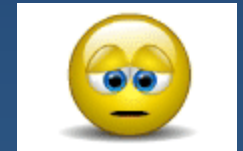
The differential diagnosis of malingering is a clinical process that:

- requires careful analysis on the part of the examiner,
- is based on objective criteria,
- incorporates indicators that have established classification accuracy, and
- combines clinical judgment with the results of scientifically validated measures in this process.



# Consensus brings more Questions

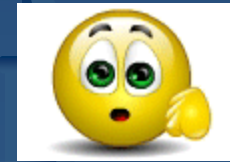
There is consensus regarding the existence of a research foundation that neuropsychologists can rely on in determining an examinee's intent to exaggerate symptoms or perform below their capabilities in testing.



Is intent in a clinical context different than intent in a legal context?

# Know your Limitations

This information can be used to assist the trier-of-fact (e.g., judge, jury) in a legal decision-making process.



Psychologists...

- remain mindful of the important difference between scientifically based clinical decisions and legal adjudication.
- recognize and respect the laws and customs of the jurisdiction in which they practice when describing the behavioral presentation at issue.

# AACN Consensus Statement

- Examiners are advised not to rely on a single symptom validity test, but multiple measures administered throughout the assessment day(s) are suggested.
- Such measures may be useful to assist in the determination of non-credible claims of emotional distress, exaggerated claims of cognitive dysfunction and/or poor effort.

# A Common Problem

- P in dramatic car accident, walked away with no LOC; routine acute neurochecks all normal, GCS=15, NO PTA; CT, MRI, EEG all normal, treated and released in 8 hours; claiming permanent disability due to TBI.
- Suing multiple parties, recovery so far:
  - \$ 25,000 from driver/\$ 100,000 from P insurer
  - \$ 900/month from SSD
- Demanding \$ 2,000,000 from a gov't entity

# Some SVT data

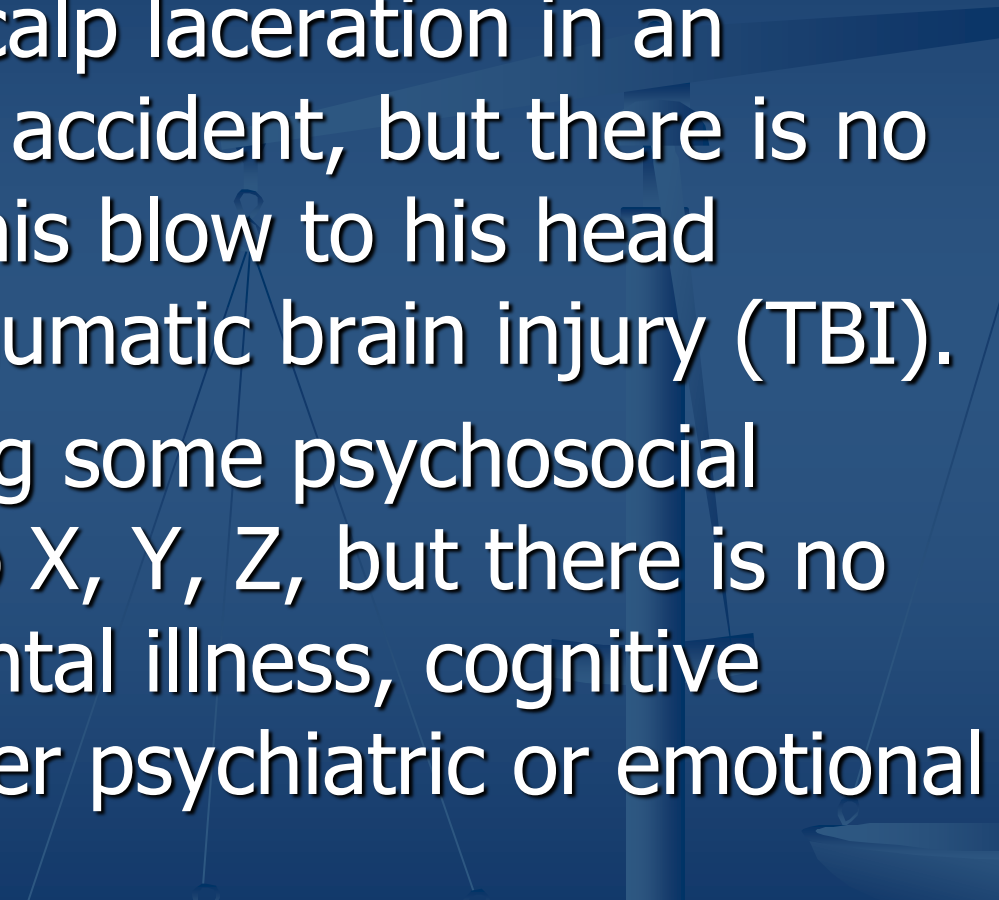
- P Neuropsychologist
  - MMPI-2 raw FBS = 35, RBS = 16 unscored
- D Psychologist
  - WAIS-III FSIQ = 79, PIQ = 81, VIQ = 81
  - MMPI-2 raw FBS = 37, RBS = 15 unscored
  - Reliable Digits F = 4, B = 2
  - WMS – III Faces I = 19/48, Faces II = 29/48
  - VSVT Easy = 21/24, Difficult = 10/24
- Who is the real Neuropsychologist?

# Interpretations/Opinions

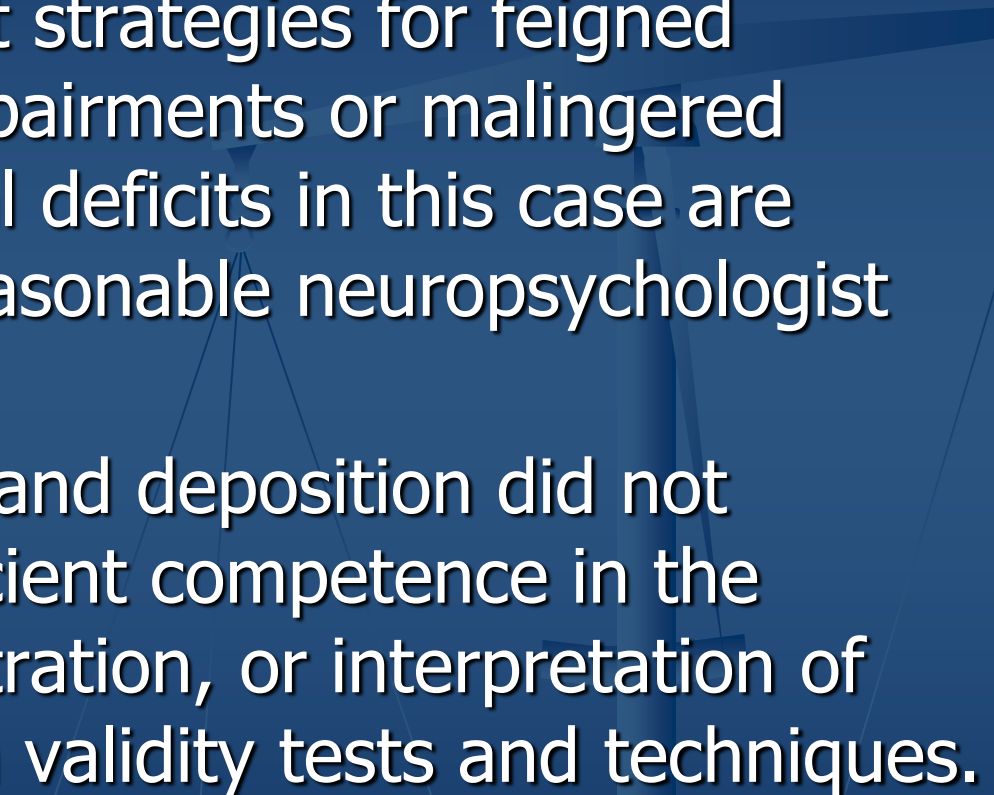
- P Neuropsychologist P “sustained a closed-head injury in an automobile accident. The results of the neuropsychological assessment support difficulties in short-term memory function, language production, executive functioning, and emotional control, due to TBI.”
- D Psychologist P “no evidence of traumatic brain injury or cognitive disorder based on psychological testing, prior indicators and test results and current symptoms. In fact, it appears that P is feigning symptoms.”



# My opinions about P condition

- P sustained a scalp laceration in an unfortunate car accident, but there is no evidence that this blow to his head resulted in a traumatic brain injury (TBI).
  - P is experiencing some psychosocial stressors due to X, Y, Z, but there is no evidence of mental illness, cognitive disorder, or other psychiatric or emotional condition.
- 

# My opinions about evaluations

- Dr. P's assessment strategies for feigned neurocognitive impairments or malingered neuropsychological deficits in this case are below that of a reasonable neuropsychologist similarly situated.
  - Dr. P's evaluation and deposition did not demonstrate sufficient competence in the selection, administration, or interpretation of common symptom validity tests and techniques.
- 

# My Opinions

- Dr. P's findings, diagnosis, conclusions, and opinions regarding the presence and causes of the plaintiff's symptoms are not credible because he/she performed an inadequate evaluation that does not meet the minimal standards for neuropsychological evaluation and forensic consultation.

# My Opinions

- Other professionals who reasonably relied on the inaccurate information contained in Dr. P's report and deposition likely formulated tainted opinions because Dr. P's neuropsychological evaluation of the plaintiff was inadequate.

# Following my reported opinions

- Yet another neuropsychological evaluation was identified, with the following raw data
  - FBS raw score = 34
  - TOMM trial 1 = 29, trial 2 = 37, Recog. = 44
  - Trails A = 45", Trails B = 112"
  - Reliable Digits F = 4, B = 4
  - COWA = 24, animal naming = 11
- This clinician identified insufficient effort during the evaluation.

# Third clinician's conclusions

- TOMM was suggestive of “false or grossly exaggerated deficits.”
- “MMPI-2 suggests the likelihood that he would respond to an emotional trauma with development and or exacerbation of physical or cognitive symptoms.”
- “there could have been insufficient effort but forth on those tests he failed.”

# The implications

For me:

- Discussion of possible ethical violations.
- Possible report to ethics committee
- Possible report to licensing authority

For others (Defense is a former prosecutor):

- Referral to state attorney general
- Investigation of basis for testimony
- Allegation of SSD/Insurance fraud

# For your reading pleasure

Paul M. [Kaufmann](#), Protecting the Objectivity, Fairness, and Integrity of [Neuropsychological Evaluations in Litigation](#): A Privilege Second to None? *Journal of Legal Medicine*, 26: 95-131 (2005)

[Trust me?: Yeah right!](#)

Thank you for your  
Attention

