

Releasing Raw Data and Psychological Test Materials:

Ethical Dilemmas, Legal Requirements, and Simple Solutions to Discovery Demands

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Learning Objectives

The ethics training components of this Workshop presents evidentiary material from actual legal cases illustrating the application of the 2002 APA Ethics Code to dilemmas arising in forensic consultation. Standards 1.02, 2.01(f), 9.04, 9.07, 9.09, and 9.11 are presented, discussed and applied to dilemmas arising from court cases. Workshop participants have the opportunity to learn:

- Public policy – Competing public policies that arise when a psychologist is asked to disclose raw data and psychological test materials to nonpsychologists.
- Law – Relevant law and the proper weight of legal authority when:
a) responding to legal documents, b) weighing ethical dilemmas, and c) formulating policies in a professional forensic practice.
- Practices – Best practices for protecting the objectivity, fairness, and integrity of neuropsychological evaluations in litigation.

Published lexis cases using terms

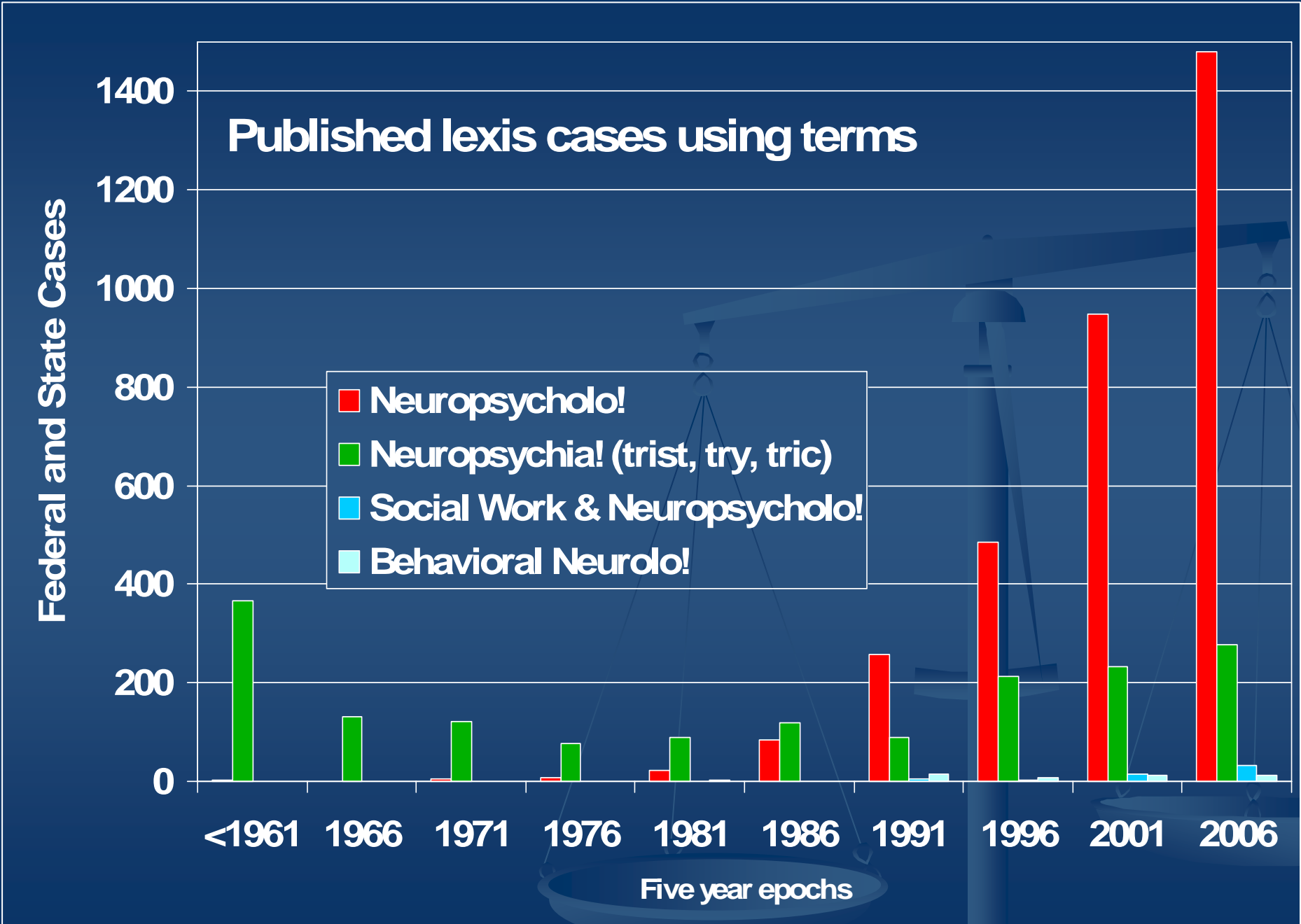
Federal and State Cases

- Neuropsycholo!
- Neuropsychia! (trist, try, tric)
- Social Work & Neuropsycholo!
- Behavioral Neurolo!

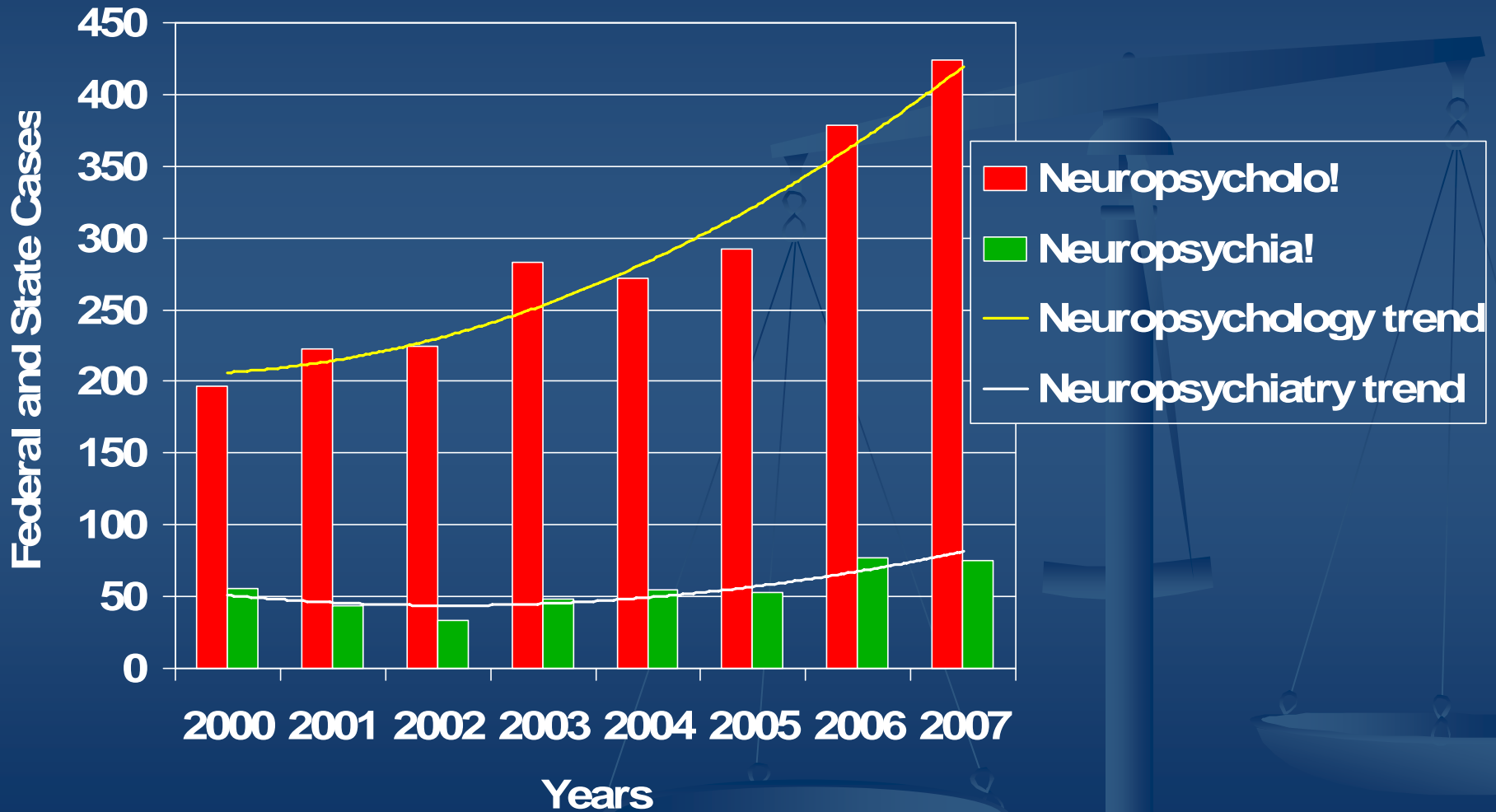
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<1961 1966 1971 1976 1981 1986 1991 1996 2001 2006

Five year epochs



Published Lexis cases using terms



Forensic Consultation Increases

- Lexis search “Neuropsycholo” v. “Neuropsychia”

■ Before 1956	2	cases	230
■ 1956 – 66	0		268
■ 1966 – 76	13		198
■ 1976 – 86	105		209
■ 1986 – 96	678		300
■ 1996 – 06	2404		510
- Legal history of “neuropsycholo” totals 3291 cases of which 74% adjudicated in past decade
- Next decade ~ 6000?

Published Lexis cases using the term

■ Neuropsycholo!

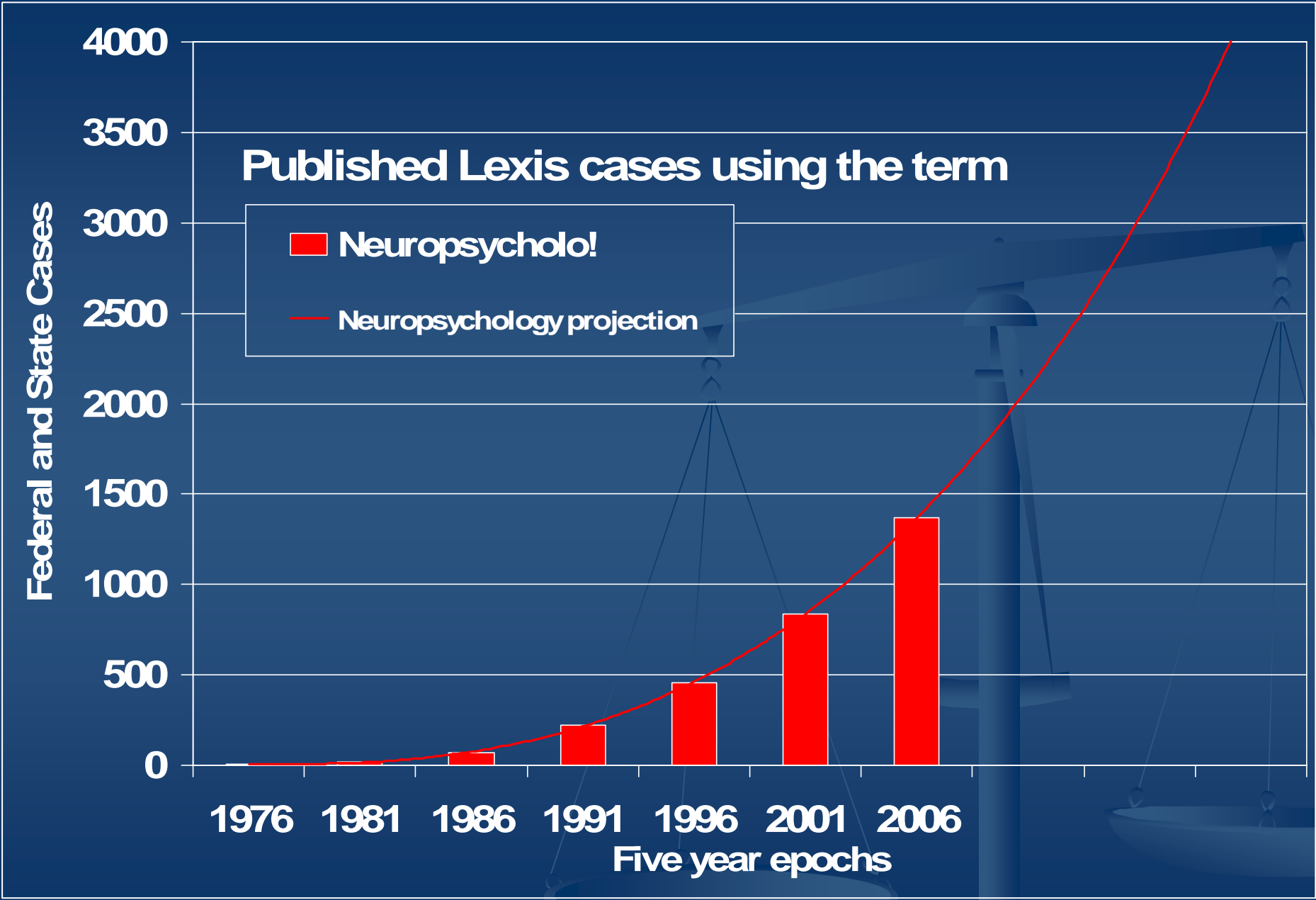
— Neuropsychology projection

Federal and State Cases

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1976 1981 1986 1991 1996 2001 2006

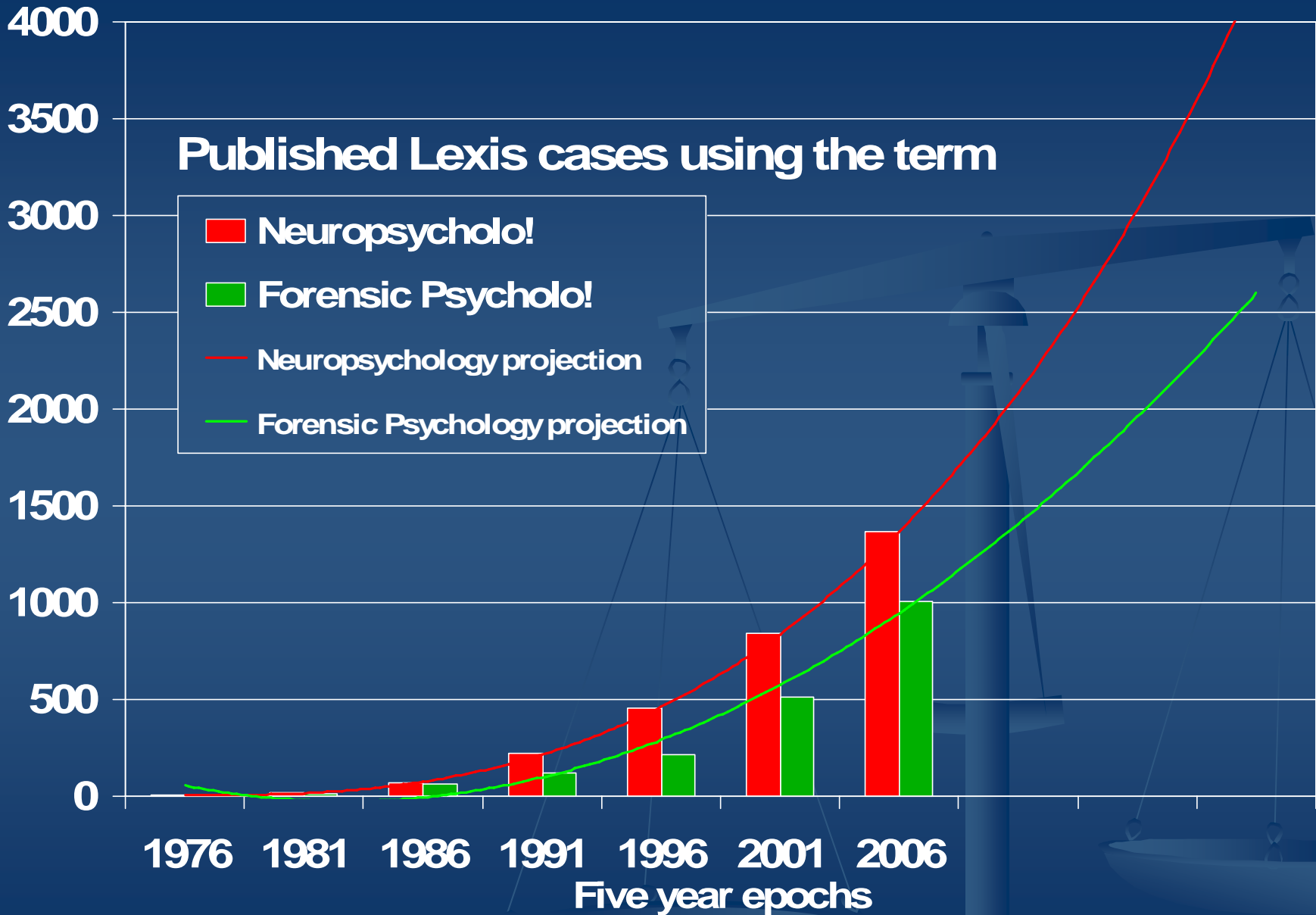
Five year epochs



Published Lexis cases using the term

- Neuropsycholo!
- Forensic Psycholo!
- Neuropsychology projection
- Forensic Psychology projection

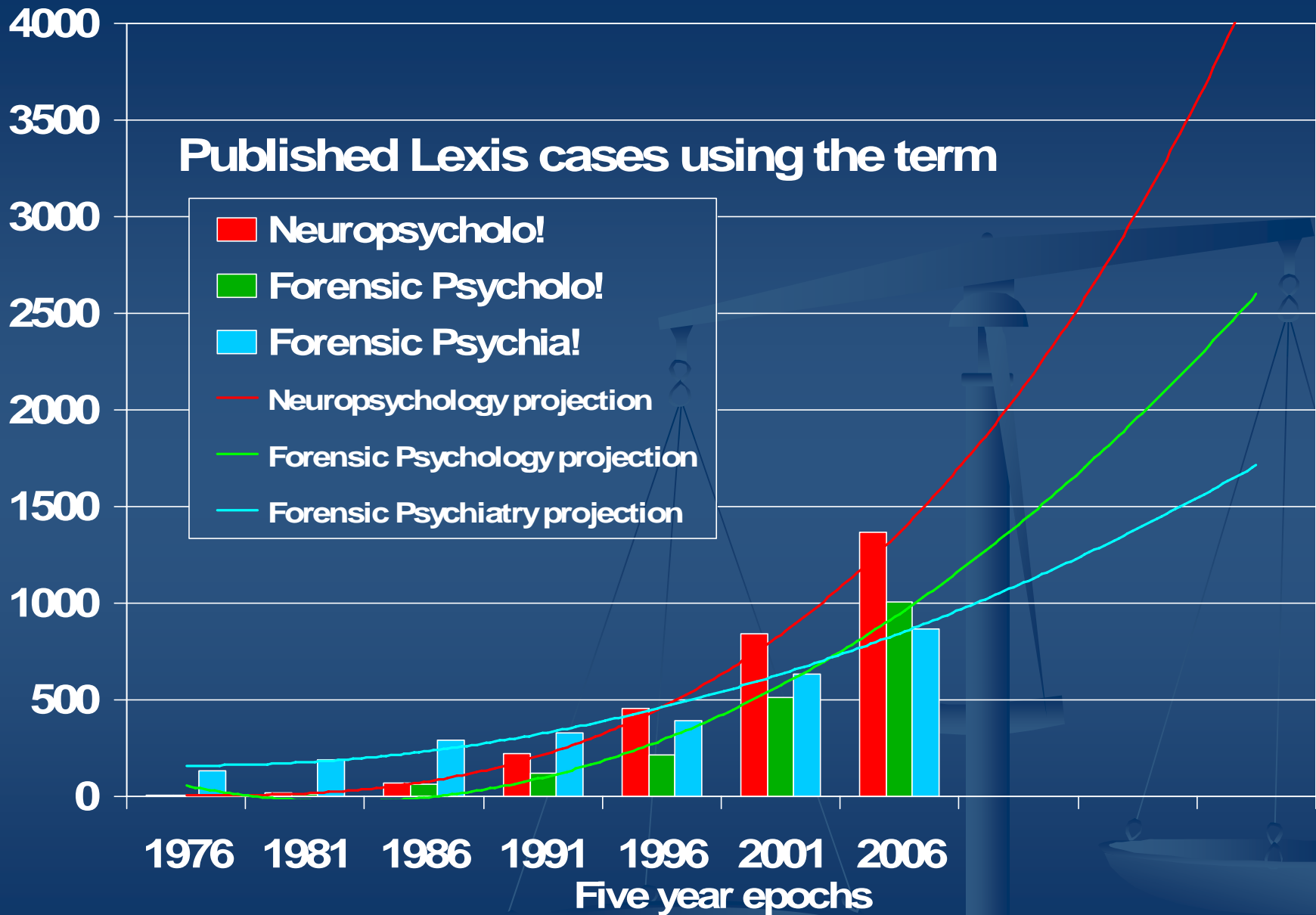
Federal and State Cases



Published Lexis cases using the term

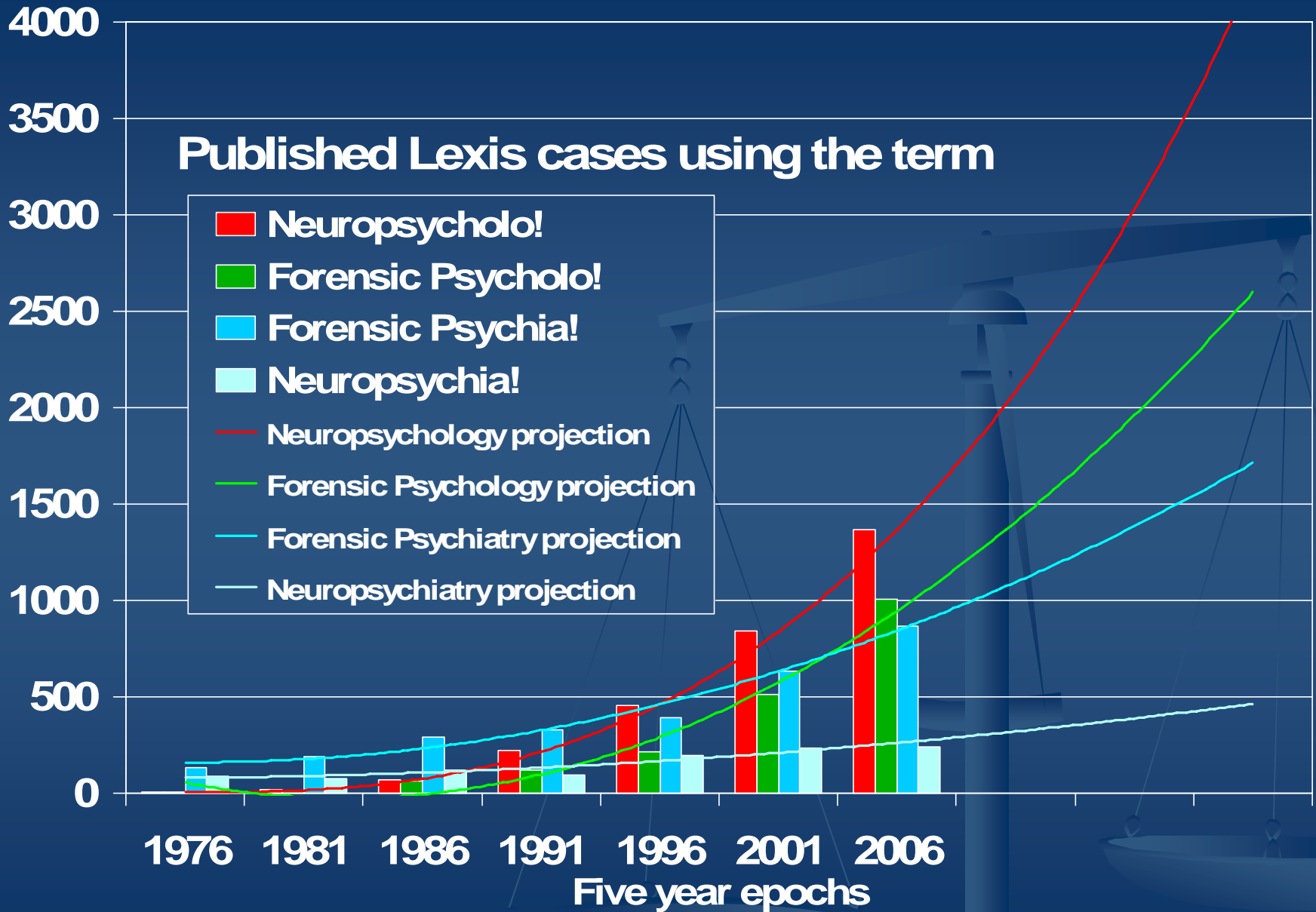
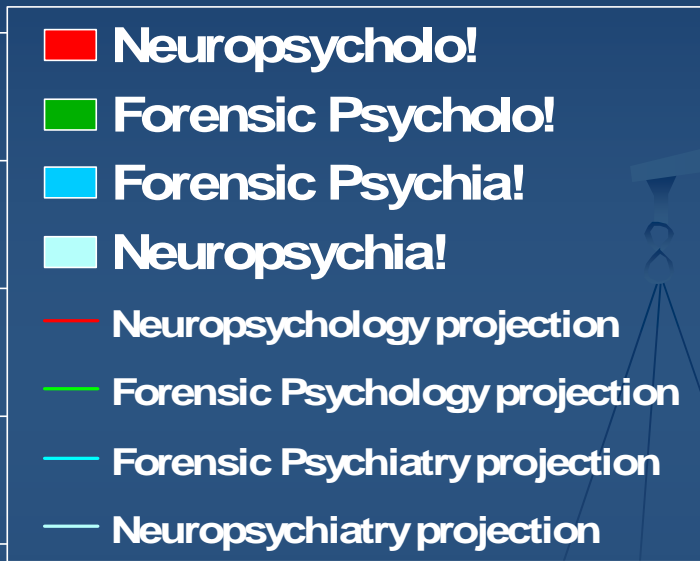
- Neuropsycholo!
- Forensic Psycholo!
- Forensic Psychia!
- Neuropsychology projection
- Forensic Psychology projection
- Forensic Psychiatry projection

Federal and State Cases



Published Lexis cases using the term

Federal and State Cases



Legal Authority in Ethical Decision-making and Practice Policy



- Laws
 - Statutes, regulations, and case law
 - Federal and state
- Rules
 - Evidence and [procedure](#)
 - Court (litigation) and ADR (arbitration, mediation, negotiation)
 - Criminal, civil, and administrative
- Professional Ethics
 - APA 2002 revision
 - Balancing standards in your jurisdiction
 - ABA Model Rules
- Practice Policies
 - Clinical referrals
 - Forensic referrals

About Lawyers

- ABA Model Rule 1.3 Diligence - A lawyer shall act with reasonable diligence and promptness in representing a client.
- A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with **zeal in advocacy** upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.
- The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

About Advocacy

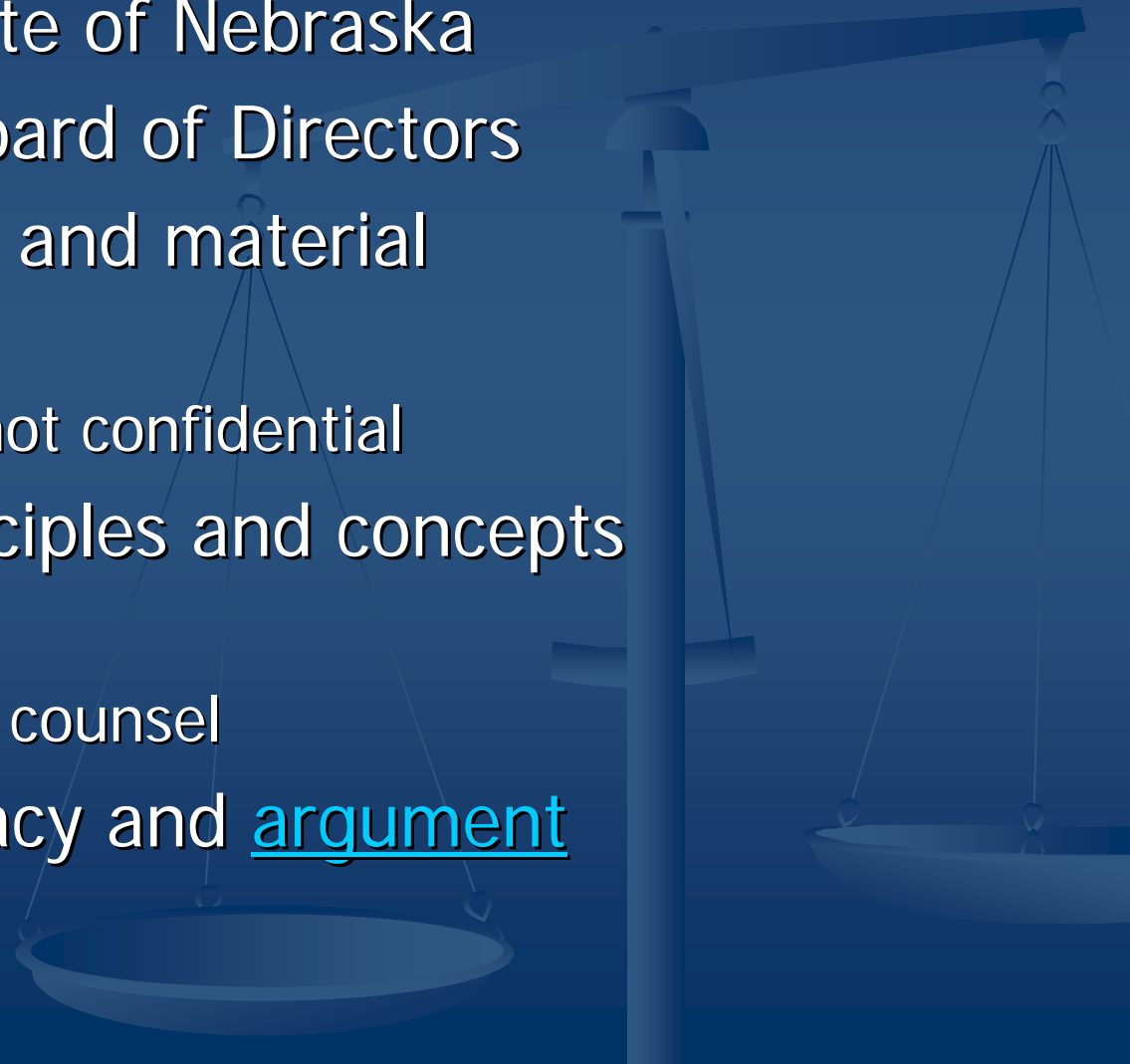
- I am going to get on a soapbox for a little bit and advocate for what I consider to be an important activity in which all neuropsychologists should engage: **advocacy**.
- Advocacy is “the act of pleading or arguing in favor of something, such as a cause, idea, or policy; **active support**.”
- “Renewed commitment to become **vocal advocates** for issues that affect...”
 - Russell Bauer, Ph.D., ABPP-CN, Past President Div. 40, Newsletter 40, 24(1)
 - Keith Yeates, Ph.D., ABPP-CN, President Div. 40, Newsletter 40, 25(1)

AACN Feedback on advocacy

- “question the propriety of advocating your opinion, scientifically based, but never advocate for plaintiff or defense.”
- The scientist-practitioner model as applied to forensic consultation requires professional opinions based on rigorous scientific interpretation of data.
- Never an advocate for a party, but always an advocate for scientific methods and your opinion based on those methods.

Disclaimers, Provisos, Quid Pro Quos

- Represent the State of Nebraska
- Member, AACN Board of Directors
- Use of legal cases and material
 - Public record
 - Party names are not confidential
- General legal principles and concepts
 - Not legal advice
 - Consult with legal counsel
- Facts, law, advocacy and argument



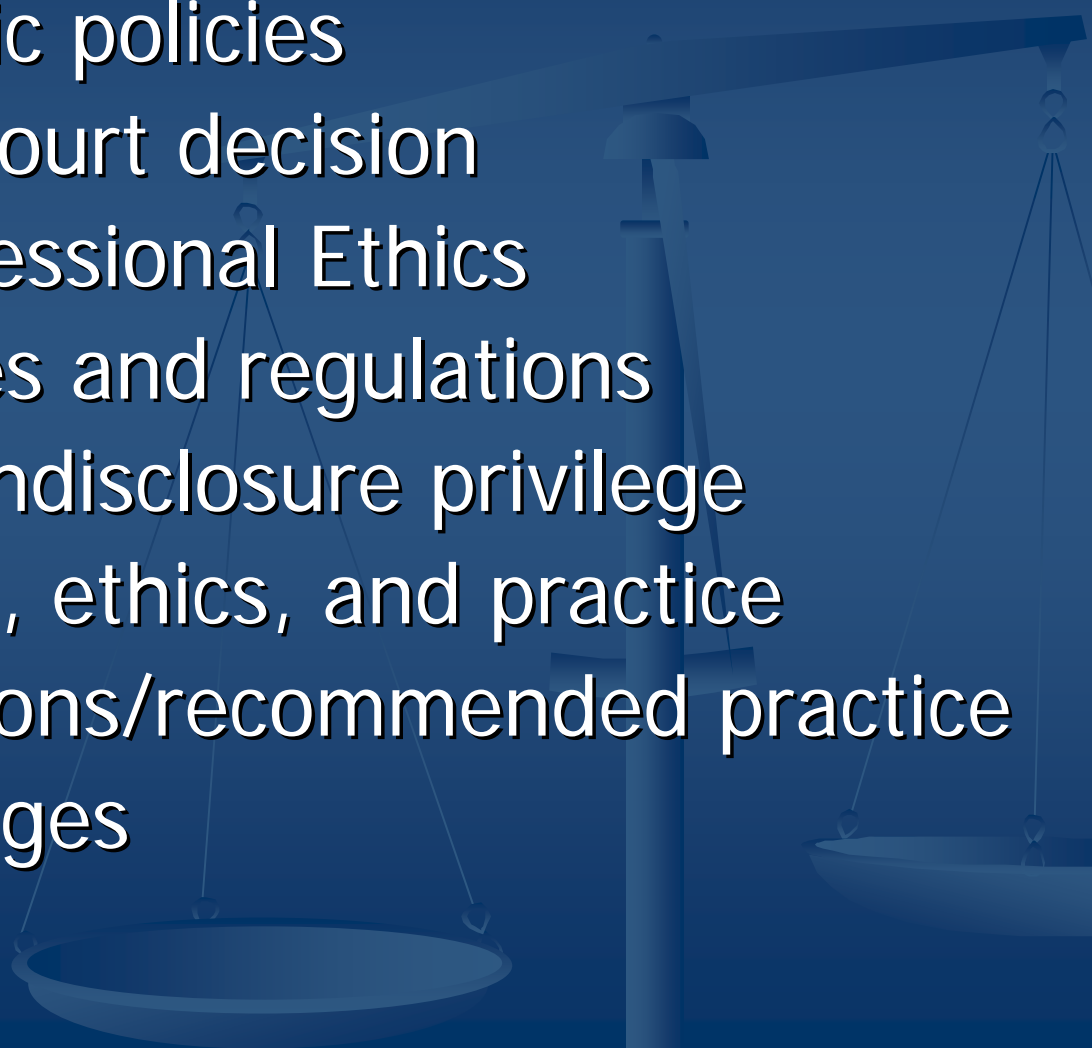
Test Security

- Ask that the raw data be sent to a psychologist.
- Ask for an order of protection and that all materials be returned to you at the end of trial.
- Realistically, though, you may not have to time to file and wait for such an order.
- If it ends up being court ordered, remember that you are in the arena of the court.
- The judge has final say. Don't go putting your neck out there.
- Many of the test materials are published in books or on the internet and someone may get it anyway.
 - “Lessons learned” Christopher Graver, PhD, PNNS 6/11/07

Record disclosure cases

- *Ochs v. Ochs* (NY 2002) – child custody case; no privilege law
“disclosure of such materials makes litigation into a lengthy and expensive critique of methodology rather than conclusions” and test materials were not disclosed.
- *Svejda v. Roldan* (MO 2002) – personal injury; privilege regulation
“ethical principles yield to discovery rules” and the regulation was not argued; protective order restricted access and directed destruction of psychological test materials.

Records Presentation Outline

- Conflicting public policies
 - U.S. Supreme Court decision
 - Analysis of Professional Ethics
 - Privilege statutes and regulations
 - Psychologist nondisclosure privilege
 - Relation of laws, ethics, and practice
 - Common questions/recommended practice
 - Legislative changes
- 

Public Policy in Conflict



■ Cheating is wrong

- Disclosure of psychological test materials erodes the reliability and validity of the tests.
- Turning the best technology available to resolve certain legal claims into junk science in the court room.

■ Access to evidence

- Both parties to a law suit have a fundamental right to review all available evidence relevant to their claim or defense.

Trial Court Order

“...provide the following documents within in 10 days:

All reports, notes, statements, or other materials made or utilized in connection with this case, including, but not limited to, results of a mental examination, interview notes, scientific or **psychological tests and testing materials**, experiments, testing or comparisons made in connection with this case.”

Detroit Edison Co. v. NLRB

440 U.S. 301 (1979)

- Union demanded release of psychological test materials used for hiring/promotion
- I/O psychologists refused release citing APA Ethics Code
- In a 5-4 decision, the U.S. Supreme Court reversed the lower court decision and found in favor of the psychologists
- Citing test security as **strong public policy**, superseding the rights of a labor union under a collective bargaining agreement

Confusion prevails...

- Various psychologists* suggest:
 - “absolute” right to discover raw data
 - psychologists refusing to disclose data:
 - hiding data, lost data, and incompetent data/interpretation
 - believe they are above the standards of the court
 - misguided sense of guild loyalty
 - peculiar defenders of test company interests
 - refusal is irresponsible and damages our credibility
 - “bizarre” privilege laws are unconstitutional

* Paul R. Lees-Haley & John C. Courtney, Are Psychologists Hiding Evidence?, *Claims Magazine* (April 2000). Answer: **NO! not necessarily**

...Practices vary

- Forensic Neuropsychologist (FN) Survey
 - 12% refuse to release raw data
 - 70% disclose intermittently
 - 18% disclose regularly
 - 61% refuse in majority of cases
 - 39% disclose in majority of cases
- Lawyers typically spend up to an hour preparing their clients for neuropsychological evaluations and commonly cover test content, detection of malingering, and brain injury symptoms.
 - Essig, et. al. *ACN*, 16, 271-291 (2001).

Pre – Post Training Opinions

On Release of Raw Data

Upon receipt of a valid order for release of **patient responses** to all psychological test questions to an attorney, duly authorized by the patient, I would:

1. Release patient responses (20%, 21%)
2. Refuse to release (18%, 18%)
3. Retain legal counsel (23%, 18%)
4. Notify parties of ethical obligations, then release patient responses (40%, 43%)

Pre – Post Training Opinions

On Release of Psychological Test Materials

Upon receipt of a valid order to release all **psychological test instructions, questions, answers, manuals** to an attorney, duly authorized by the test taker, I would:

1. Release psych test materials (23%, 9%)
2. Refuse to release (8%, 20%)
3. Retain legal counsel (20%, 28%)
4. Notify parties of my ethical obligations, then refuse to release (49%, 44%)

Concerns about Coaching

Wetter and Corrigan (1995) survey

- 150 law students and 70 practicing attorneys
- Students (22%) and attorneys (42%) said provide as much information as possible about psychological assessment to clients.
- Students (36%) and attorneys (49%) felt an attorney should always or usually inform a client about validity scales of psychological tests.

Absent specific prohibition against coaching, some attorneys may feel preparing a client is a duty.

Preliminary Advice

Public policy and legal maxim "*All relevant evidence is admissible, unless privileged.*"

- Ask if there is a privilege.
- If so, who holds the privilege?
- What type of information is privileged?
- Has the privilege been waived?
- Does a special exception apply?
- Absolute or qualified privilege?

APA Standards on Release

- 1992 Standard 2.02b

“This includes refraining from releasing raw test results or raw data to persons, other than to patients, or clients as appropriate, who are not **qualified** to use such information.”

- 2002 Standard 9.04a

“Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists *may* refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances ***is regulated by law.***”

- Behnke (2003) “presumption favors release”

Duty to Release Test Data

- “Enforceable Standards” introduced in 1992.
- “The requirement to provide test data to any person identified in a patient/client release” contained in the 2002 Ethics Code, is “perhaps the ***most significant shift*** in requirements from the 1992 Ethics Code ... prohibition against release to persons unqualified to use such information.”
- Celia B. Fisher, Ph.D. Chair of the APA Ethics Code Task Force, Decoding the Ethics Code (2003).

Rationale for Ethics Shift

- Definition of “qualified” lacks specificity and is often determined by context of proposed use.
 - Narrowing qualified users is too preclusive of other qualified health professionals.
 - Narrowing invades a patient’s right to discovery/cross-examination when test results/interpretations become the source of legal dispute.
 - Broadening might jeopardize appropriate judicial scrutiny.

■ Fisher (2003), Decoding the Ethics Code

More Rationale

- Even if consensus of “qualified” could be reached, it is unduly burdensome to require psychologists to confirm the education, training, degrees, or certification of other professionals.
- HIPAA requires release of PHI to patients/clients or their representatives, except a threat to life or physical safety of a patient or a third party. Psychotherapy notes exception. Nevertheless,
- APA is seeking a HIPAA test material exception, noted in March 2005 testimony regarding NHIN.

Exceptions to Release Duty

- Substantial Harm to patient/third party (9.04a)
- Misuse/misrepresentation of data/test (9.04a)
- Use of tests by **Unqualified** Persons (9.07) – “psychologists ensure that the administration, scoring, interpretation and use of psychological tests are conducted only by those who are competent to do so by virtue of their education, training, or experience.”

More Exceptions

- Organizational clients (*Detroit Edison v. NLRB*)
 - Cannot obtain test data to evaluate job candidacy or employee or organizational effectiveness, so long as the consulting or I/O psychologists does not assess factors related to medical or mental health conditions of services.
 - Psychologists working under governing legal authority (forensic, military, schools?) may withhold test data when the client is an attorney, the court, or other governing legal authority.
- **Law** (9.04a)
 - Privilege law varies with jurisdiction
 - Exception swallows the Duty to Release test data
- Intellectual Property/Contractual Obligations
 - Trade secret, trademark, copyright, fair use
 - Test makers/publishers/marketers/distributors
 - User Agreements at time of purchase

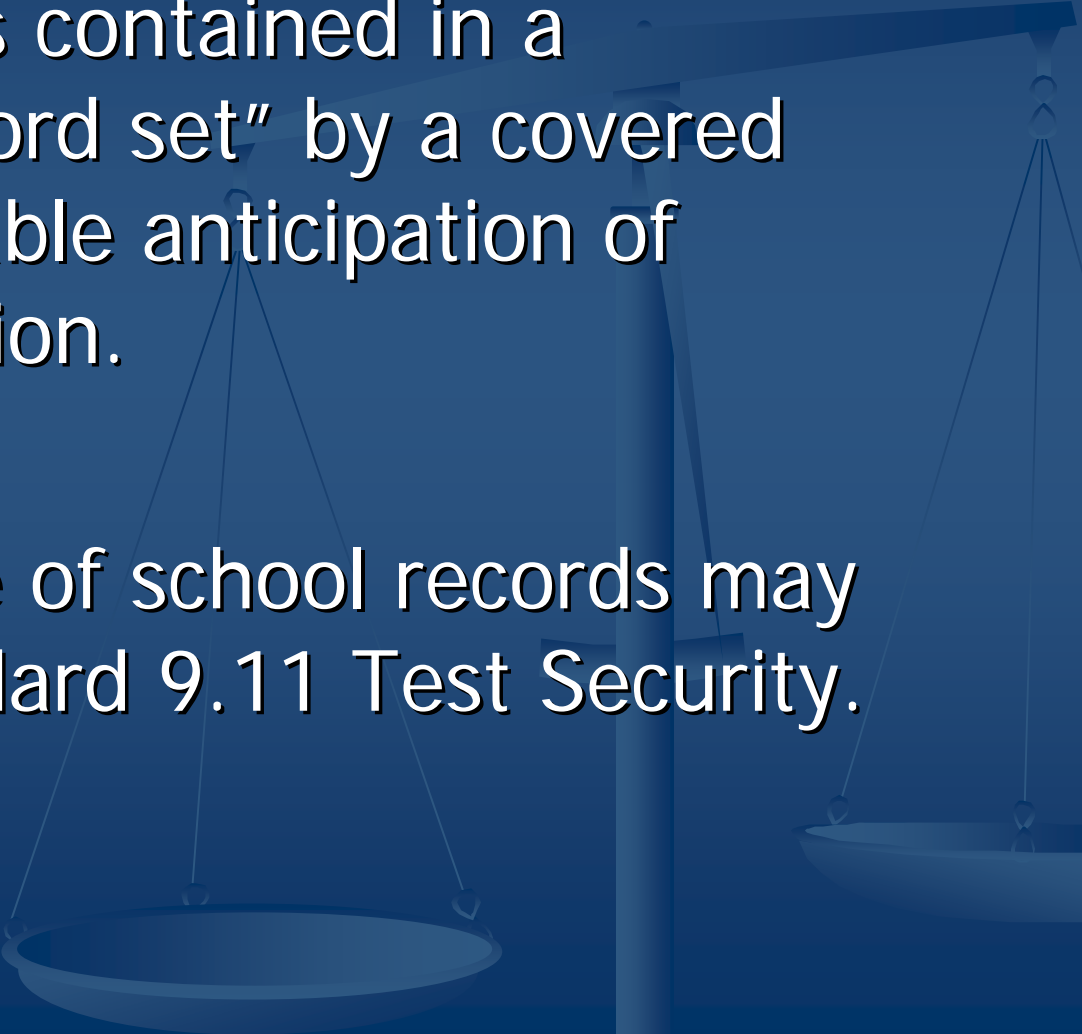
Test Materials Distinguished

- *Test data* refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination.
- *Test materials* refers to manuals, instruments, protocols, and test questions or stimuli.
- Do test materials become test data when patient responses are written on those materials? Should they?

Test Security

- Duty to Maintain Test Security (standard 9.11) – reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with **law** and contractual obligations.
- Test materials “should never be released to clients/patients or others **unqualified** to use the instruments.” (Fisher)
- However, “tests materials become test data when they contain patient responses” (Behnke)

Exceptions to Exceptions

- HIPAA – records contained in a “designated record set” by a covered entity. Reasonable anticipation of litigation exception.
 - FERPA – release of school records may supersede standard 9.11 Test Security.
- 

Final Recommendations

- Test companies redesign test protocols
- “Psychologists may wish to record client/patient responses on a form separated from the test items themselves to protect the test materials from HIPAA regulations.”
- Are these suggestions less burdensome than confirming credentials?

Pre - Post Opinions on Ethics

The Ethics Code for Psychologists provides clear guidance on release of raw data and psychological test materials.

1. True (38%, 8%)
2. False (36%, 88%)
3. Do not know (20%, 2%)
4. Not relevant to my professional practice (5%, 2%)

Pre - Post Opinions on Ethics

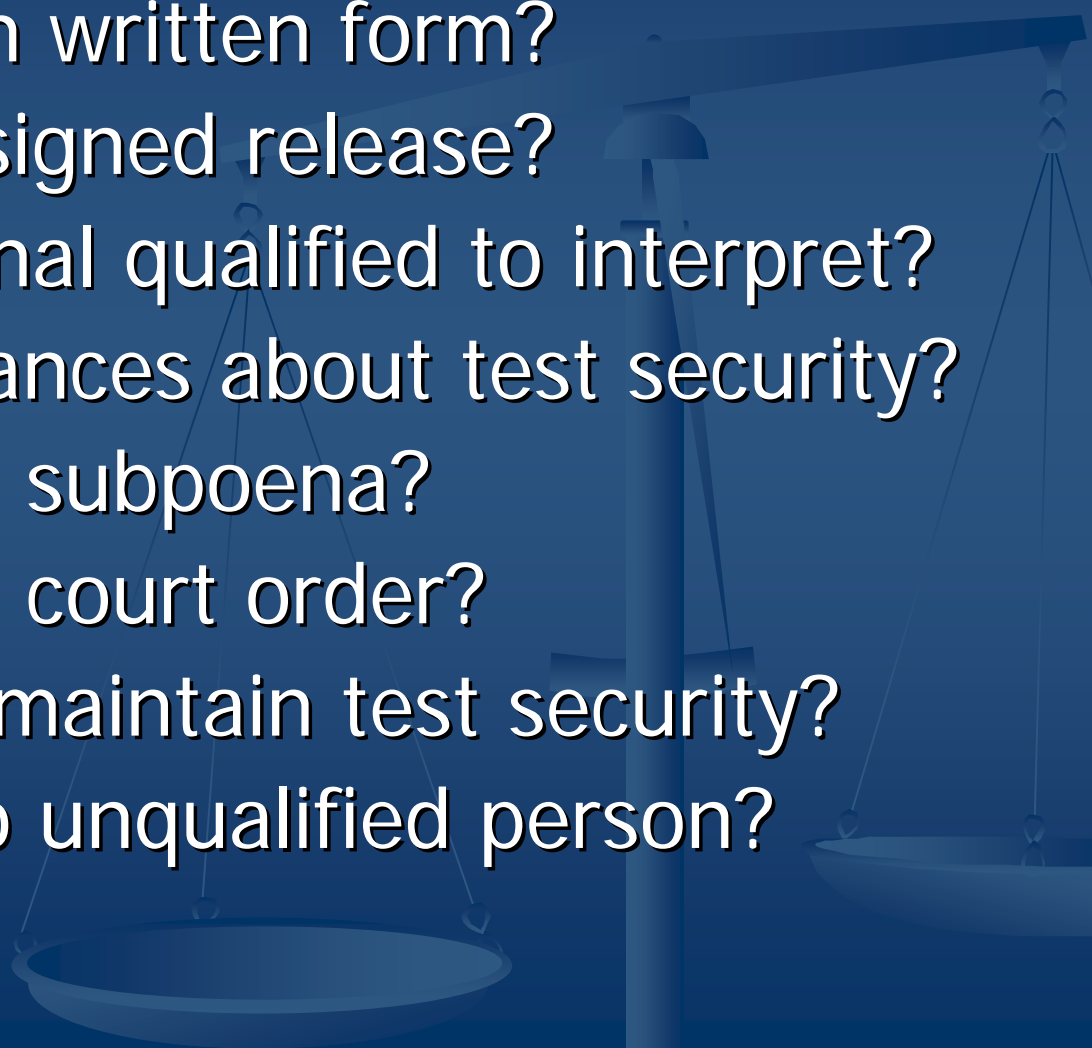
The Ethics Code for Psychologists tells me how to respond to attorney demands for release of raw data and psychological test materials.

1. True (14%, 3%)
2. False (60%, 89%)
3. Do not know (23%, 5%)
4. Not relevant to my professional practice (3%, 3%)

Discovery Wars: What should you do?

- Standard 9.04 ... Psychologists may refrain from releasing test data ... recognizing that in many instances release ... *is regulated by law*.
- Know and follow your jurisdictional law.
- Prepare practice policies based on legal arguments, citing laws.
- "two lawyers working it out"

NAN on Test Security (1999)

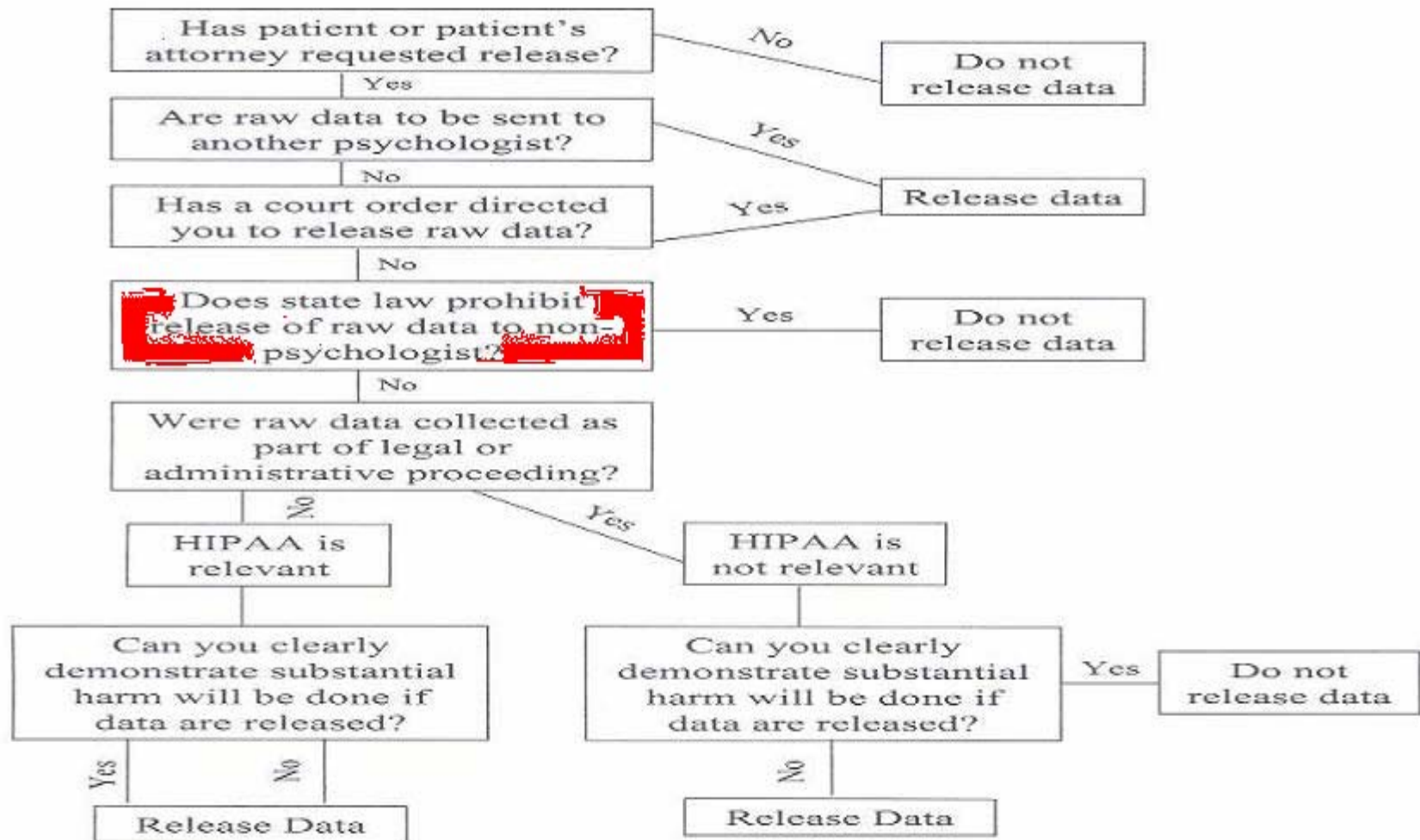
- Is the request in written form?
 - Do you have a signed release?
 - Is the professional qualified to interpret?
 - Are there assurances about test security?
 - Is the request a subpoena?
 - Is the request a court order?
 - Does the order maintain test security?
 - Order release to unqualified person?
- 

NAN also advises

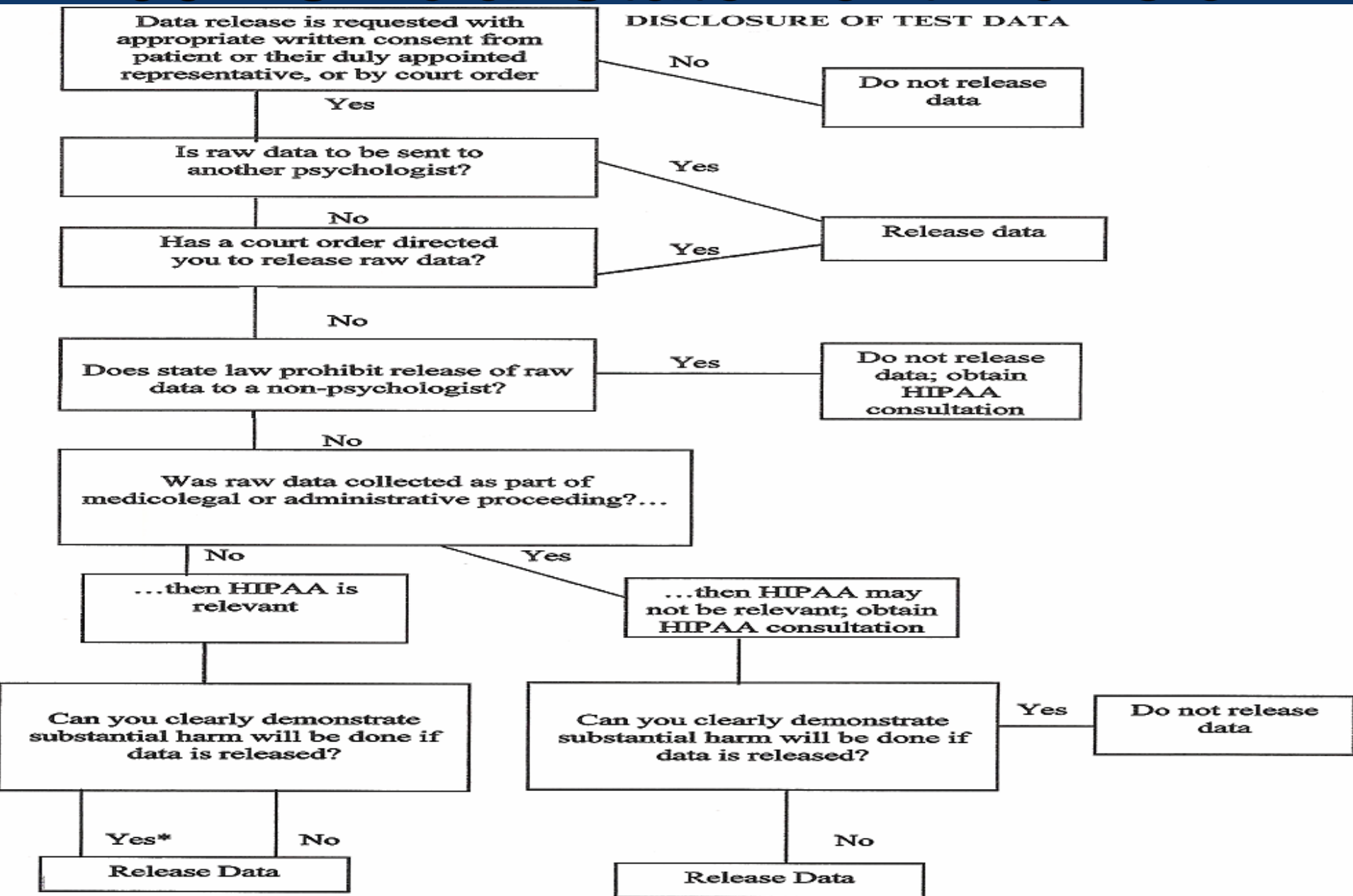
- “These are general guidelines that may not apply to your specific jurisdiction.”
- “Seek advice from personal counsel to determine if these guidelines are appropriate for your specific jurisdiction.”
- NAN has updated the policy since HIPAA, but has not revised the decision tree.
- Law > professional ethics > position papers

Grote's Chapter in Larrabee's text Forensic Neuropsychology 2005

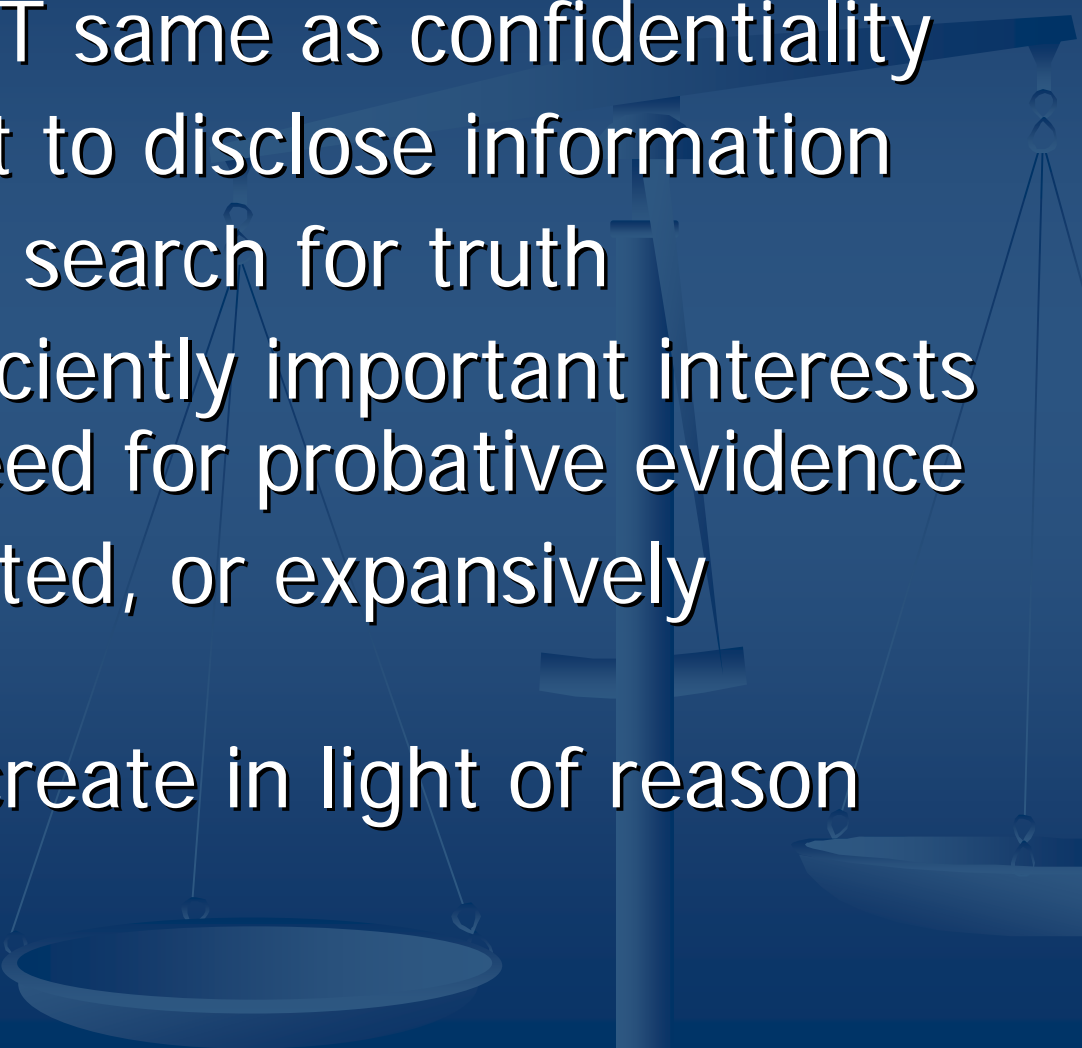
When Should Raw Data Be Released?



2007 Official Statement Revision



Privilege Law

- Testimonial; NOT same as confidentiality
 - Narrow right not to disclose information
 - Limit the court's search for truth
 - Used when sufficiently important interests outweigh the need for probative evidence
 - "Not lightly created, or expansively construed"
 - Federal Courts create in light of reason and experience
- 

IL Psychologist Nondisclosure Duty

- Psychological test material whose disclosure would compromise the objectivity or fairness of the testing process may not be disclosed to anyone including the subject of the test and is not subject to disclosure in any administrative, judicial or legislative proceeding.
- However, any recipient who has been the subject of the psychological test shall have the right to have all records relating to that test disclosed to any psychologist designated by the recipient.
- 740 Ill. Comp. Stat. Ann. § 110/3-c

Elements of Privilege

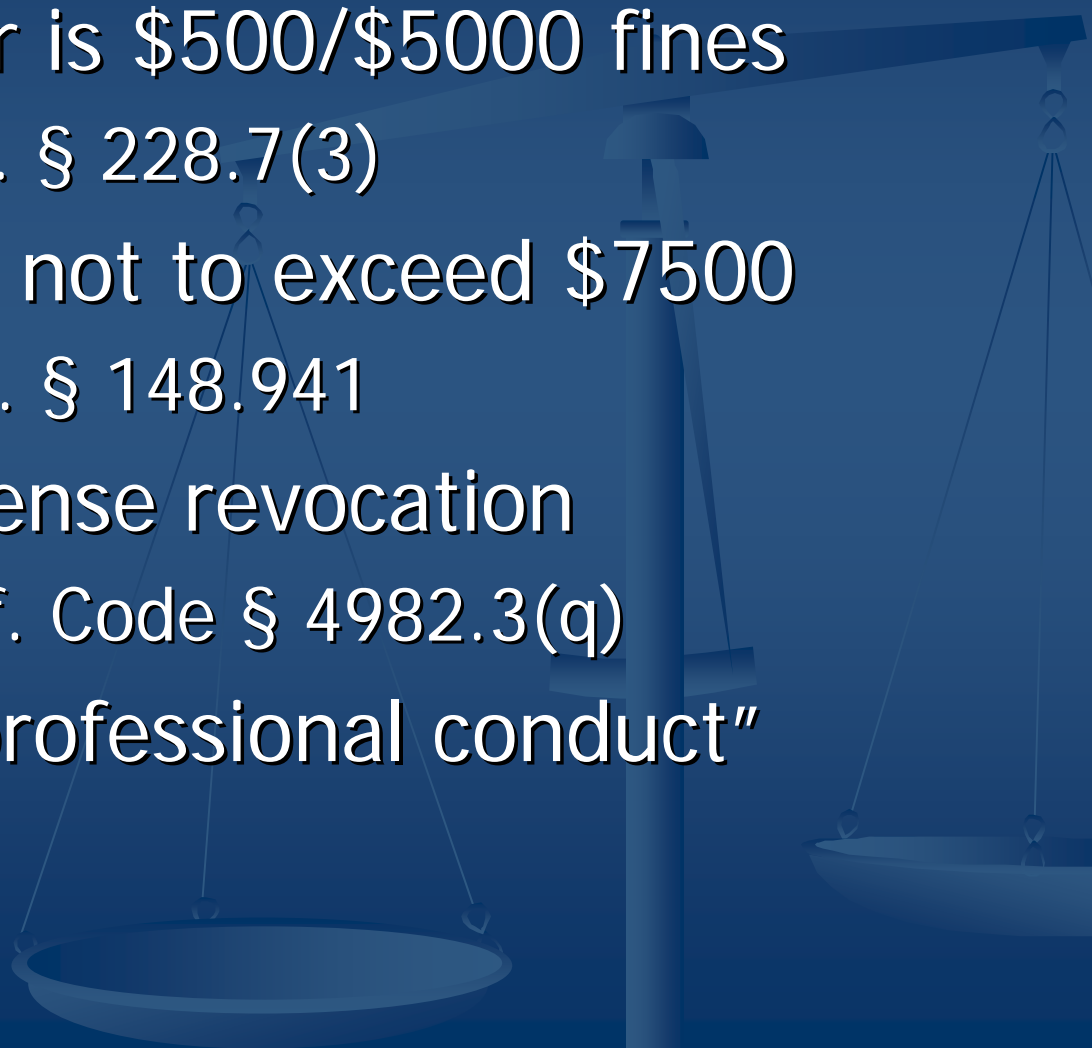


- Objectivity and fairness standard
- Exclusive assertion by psychologists
- Denial of direct patient access to psychological test materials
- Patient autonomy to direct disclosure of test materials to other licensed psychologists
- Integrity of test materials

Additional features

- IL expressly bars any waiver of privilege
 - 740 Ill. Comp. Stat. Ann. § 110/14
- IL imposes sanctions for violators making willful disclosure a misdemeanor
 - 740 Ill. Comp. Stat. Ann. § 110/16
- Privilege or duty?
 - Privilege a psychologist may assert or
 - Duty a psychologist must assert

Range of Sanctions

- IA misdemeanor is \$500/\$5000 fines
 - Iowa Code Ann. § 228.7(3)
 - MN civil penalty not to exceed \$7500
 - Minn. Stat. Ann. § 148.941
 - CA cause for license revocation
 - Cal. Bus. & Prof. Code § 4982.3(q)
 - Commonly “unprofessional conduct”
- 

Privilege Statutes

- Ariz. Rev. Stat. Ann. § 12-2293(A)
- Ark. Code Ann. § 12-12-917(d)(2)(A)(ii)
- Cal. Bus. & Prof. Code § 4982(q)
- Cal. Bus. & Prof. Code § 4992.3(q)
- Ind. Code Ann. § 25-33-1-3(g)
- Iowa Code Ann. § 228.9
- Md. Code Ann., Health-Gen. I § 4-307
- Minn. Stat. Ann. § 148.965

Privilege Regulations

- Ala. Admin. Code r. 750-X, app. III, n. 26
- Ariz. Admin. Code tit. 4, R4-26-106(B)
- Cal. Code Regs. tit. 16, § 1396.3
- Cal. Code Regs. tit. 16, § 1858
- Cal. Code Regs. tit. 16, § 1881
- Fla. Admin. Code Ann. r. 64B19-18.004(3)
- Fla. Admin. Code Ann. r. 64B19-19.005(3)
- Ga. Comp. R. & Regs. r. 510-4-.02(9)(k), (d)(1)(a)-(b)
- Ill. Admin. Code tit. 68, § 1400.80(k)
- Mo. Code Regs. Ann. tit. 4, § 235-5.030(10)(E)
- N.M. Admin. Code tit. 16, § 16.22.2.16(A)-(B)
- Neb. Admin. Code tit. 172, § 156.010(01)
- Ohio Admin. Code § 4732-17-01(F)(2)
- **41-11 Or. Bull. 29(2)(c)(H)(iv)**
- **39-8 Or. Bull. 181 151-020-0070(7)**
- 100 S.C. Code Ann. Regs. 4(J)(4)
- 22 Tex. Admin. Code § 465.16(b), (d)
- 22 Tex. Admin. Code § 465.22(b), (c)(4)
- **Wash. Admin. Code § 246-930-310(7)(a)**

OR Administrative Rule

- **Protection of *integrity*** of assessment procedures. The licensee shall not disseminate, reproduce, or describe in popular publications, lectures, or public presentations psychological tests or other assessment devices in ways that might invalidate them, except by court order.
 - 41-11 OR. BULL. 29(2)(c)(H)(iv) (2002)

More OR rules

- A person qualified to interpret psychometric and vocational tests shall be able to show evidence of **proper training** to make such interpretations. Evidence of proper training consists of the approval of the test publishing company, usually through a test user's qualification statement.
 - 39-8 OR. BULL. 181 151-020-0070(7) (2002)

WA Regulatory privilege

- “It is important to report any information which **might influence the validity** of psychological test findings. Examples of such information include, but are not limited to, the context of the evaluation, the information available to the professional who interpreted the data, whether the interpretations were computer derived and **any special population** characteristics of the person examined.”
 - WASH. ADMIN. CODE § 246-930-310(7)(a) (2002).

Privilege Case Law

New York “special circumstance” rulings

- *Ochs v. Ochs* (NY 2002)
 - Child custody; expert retained by court
- *Drago v. Tishman Construction* (NY 2004)
 - Physician agent subject to medical records law
 - Independent psychologist? Maybe not.
- *Lopardo v. Carboline* (NY 2005)
 - Lawyer agent falls under work product rule protection
- *Martinez v. KSM Holding Ltd.* (NY 2002)
 - Evaluation prepared solely for litigation is exempt
 - Raw data and test materials denied to opposing expert

APA Clarification of 1.02 & 9.04(a)

- **1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority**

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is unresolvable via such means, psychologists may adhere to the *requirements of the law*, regulations, or other governing legal authority.

- Based on standards 1.02 and 9.04(a), and assuming patient-client authorization to release test data, "APA and the 2002 Ethics Code neither encourage nor discourage the release of test data contained on psychological test materials, permitting psychologists to follow privilege laws of their jurisdiction, while recognizing the right of psychologists to engage in civil disobedience against unjust laws."

APA Clarification of 2.01 (f)

2.01 Boundaries of Competence

f) When assuming forensic roles, psychologists are or become *reasonably familiar with* the judicial or administrative *rules* governing their roles.

- Based on standard 2.01 (f), "APA and the 2002 Ethics Code recognize that psychologists who release test data contained on psychological test materials in ignorance of privilege laws prohibiting such release in their jurisdiction, may be engaged in unethical conduct, if they are not *reasonably familiar with* the judicial or administrative *rules* governing their forensic roles."

My Conclusion: *Raise your reasonable familiarity with the rules before taking a forensic case!*

APA Ethical Analysis

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 against the dark blue background.

- 1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority
- 2.01 Boundaries of Competence
 - f) Forensic role
- 9.04 Release of Test Data
- 9.07 Assessment by Unqualified Persons
- 9.09 Test scoring and Interpretive Services
- 9.11 Maintaining Test Security

Specialty Guidelines for Forensic Psychologists (2006)

- Forensic psychologists' decision making regarding access to and release of information in the record is **informed by the jurisdiction** of the matter.
- When others request the release of the records of the forensic psychologist, the forensic psychologist complies with a properly noticed and served subpoena or court order, or other legally proper consent from duly authorized persons, **unless there is a compelling reason** not to do so.
 - Second Official Draft 1/11/06

AACN Practice Guidelines (2007)

TEST SECURITY

- Unique pressures may arise in certain forensic settings, but again the responsibility of the clinician is to maintain the integrity and security of test materials as far as the **law** and practice guidelines of psychology apply **in the relevant jurisdiction(s)** of service or practice.
 - *The Clinical Neuropsychologist*, 21, 209–231.

Official Position on Disclosure of Test Data (2007)

- It is important to **knowledgeable about the state laws** governing test data release.
- **State laws** will in large part define how one must proceed... when responding to release requests.
- **State laws** vary considerably in how test data release is governed.
 - Endorsed by AACN, APA Div. 40, APPCN
 - *The Clinical Neuropsychologist*, 21, 232–238.

2007 APA Recordkeeping policy

Warnings

- "...after release in a litigation context, records may be placed in the public domain and accessible to any member of the public."
- "When a psychologist is responding to a subpoena for 'any and all records' upon which the psychologist relied in forming opinions, it is generally necessary to re-release any third party information included in the record."

More 2007 APA Guidelines

- “Psychological test data, because it may bear more careful consideration before being released, may be clustered and designated, within the file, to ensure that its release is appropriately considered.”
- My Conclusion: **NO PRESUMPTION OF RELEASE!** and stepping away from the 2002 Ethics Code approach to test data.

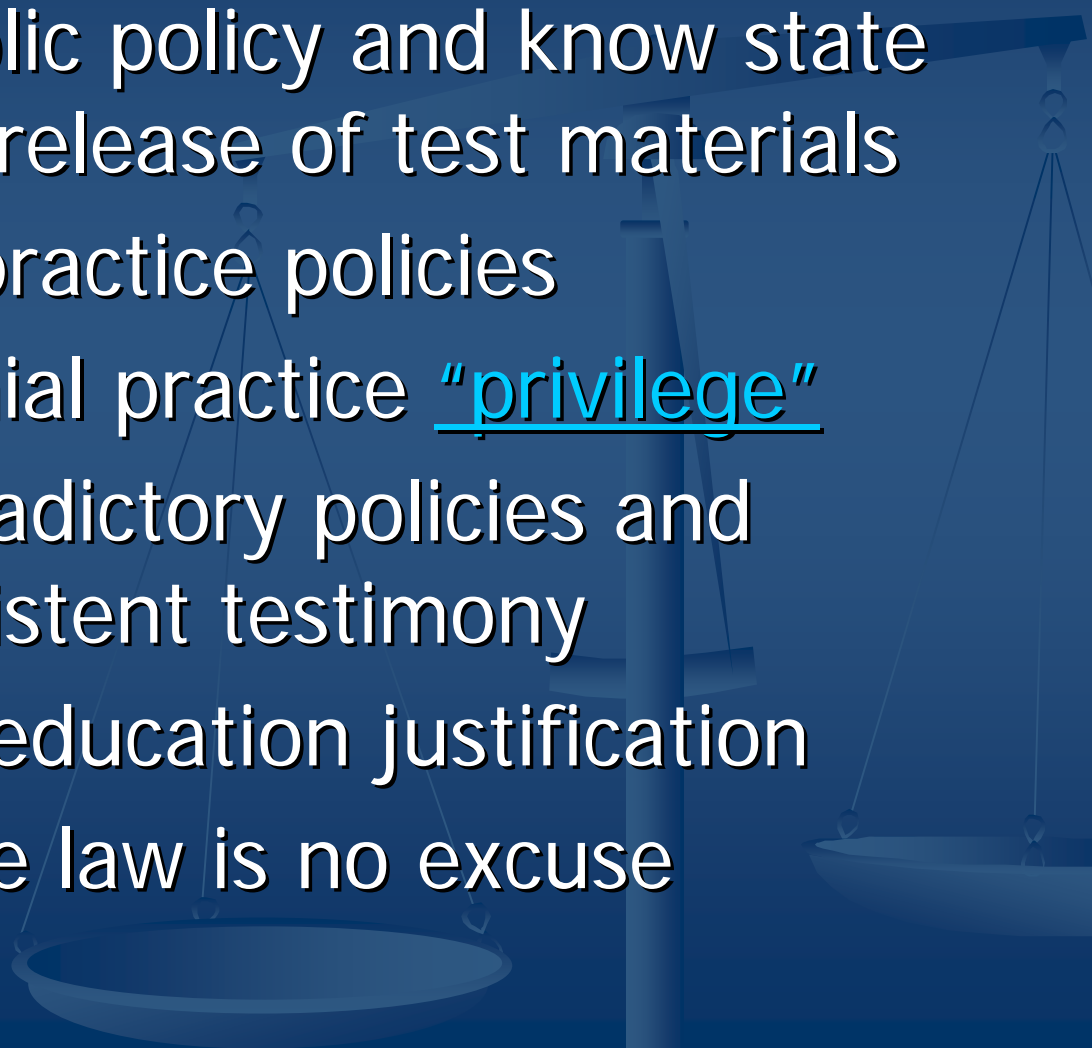
Compare APA statements

- "Psychologists provide test data... Psychologists *may* refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances *is regulated by law.*" (2002)
- "Psychological test data, because it may bear more careful consideration before being released, may be clustered and designated, within the file, to ensure that its release is appropriately considered." (2007)
- Appropriate decisions require legal considerations

Searching for the Best Practice

- Psychotherapist-patient privilege distinguished
- APA Ethics Code revision
 - Test data recorded on test materials
 - Standard 9.04 ... Psychologists may refrain from releasing test data ... recognizing that in many instances release ... *is regulated by law*.
- Laws > Ethics > Practice Policies > Preferences
- Psychologists prematurely release test materials
 - Unaware of jurisdictional laws regulating practice
 - Intimidated by the adversarial process of litigation
- Practice habits set precedent - hard to change.

Changing Practice

- Understand public policy and know state laws governing release of test materials
 - Revise written practice policies
 - Modify testimonial practice “privilege”
 - Managing contradictory policies and previous inconsistent testimony
 - Use continuing education justification
 - Ignorance of the law is no excuse
- 
- 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 beam, and the entire scene is set against a dark blue gradient background.

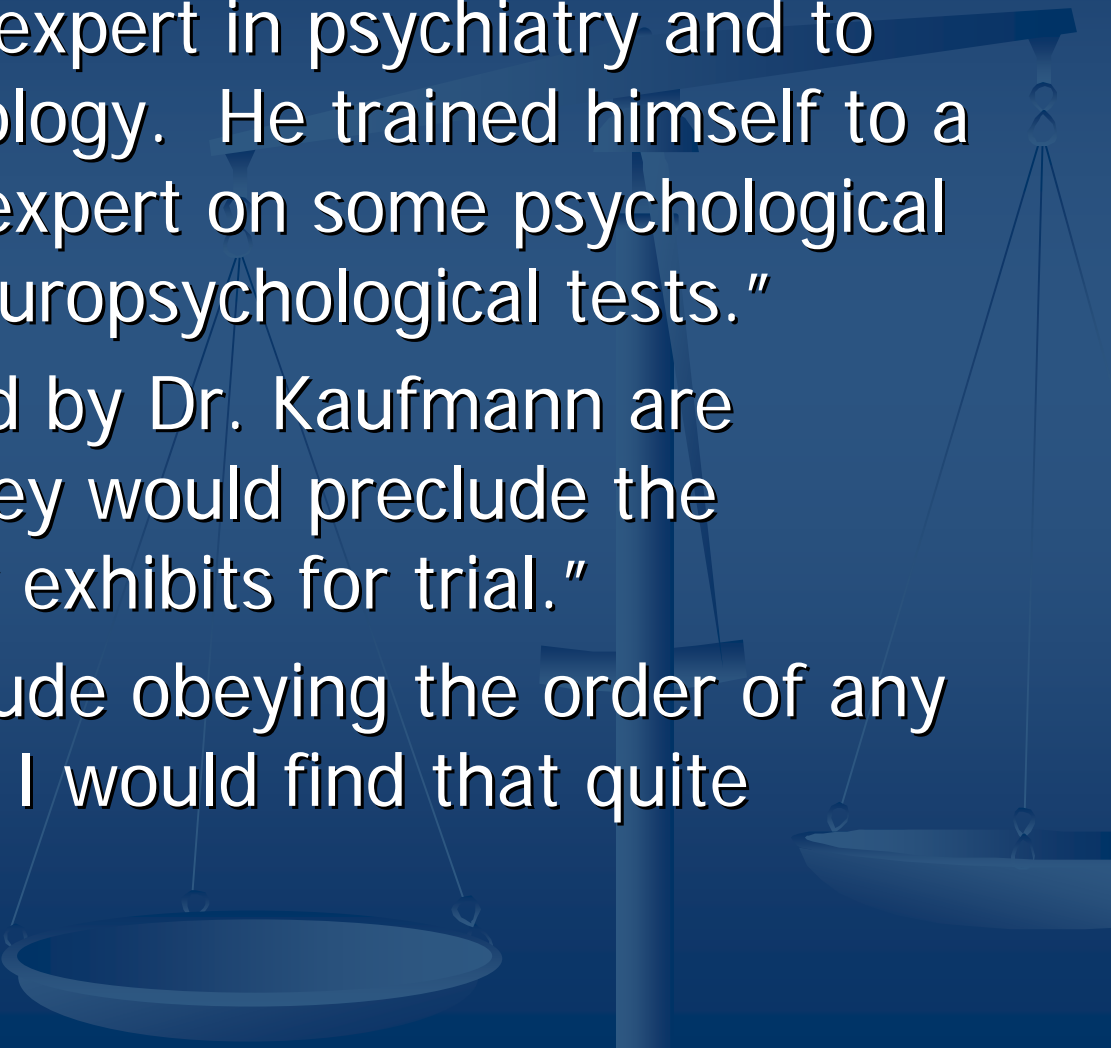
Common Questions

- How and when do I assert a privilege/duty?
- Does a state privilege/duty override HIPAA?
- What if my state has no privilege law?
- What is a protective order? Do they help?
- What if my state changes its privilege?
- What if I am moving to a new state?
- What if I practice in more than one state?
- Do testing companies care? Will they help?
- Do I need an attorney? What else can I do to protect my clients and practice?

Trial court order

- “provide actual test information and raw data of the plaintiff to Dr. [Psychiatrist]”
- Compromise named a psychologist, who in turn would re-release to the psychiatrist, with psychologist affidavit writing,
- “It is very difficult to explain the meaning of raw data with an attorney or an expert without them seeing the data.”

Psychologist affidavit continues

- [Psychiatrist].. “is expert in psychiatry and to some extent neurology. He trained himself to a degree that he is expert on some psychological tests and some neuropsychological tests.”
 - “Stipulations posed by Dr. Kaufmann are unreasonable. They would preclude the preparation of any exhibits for trial.”
 - “They would preclude obeying the order of any court at any level; I would find that quite unacceptable.”
- 

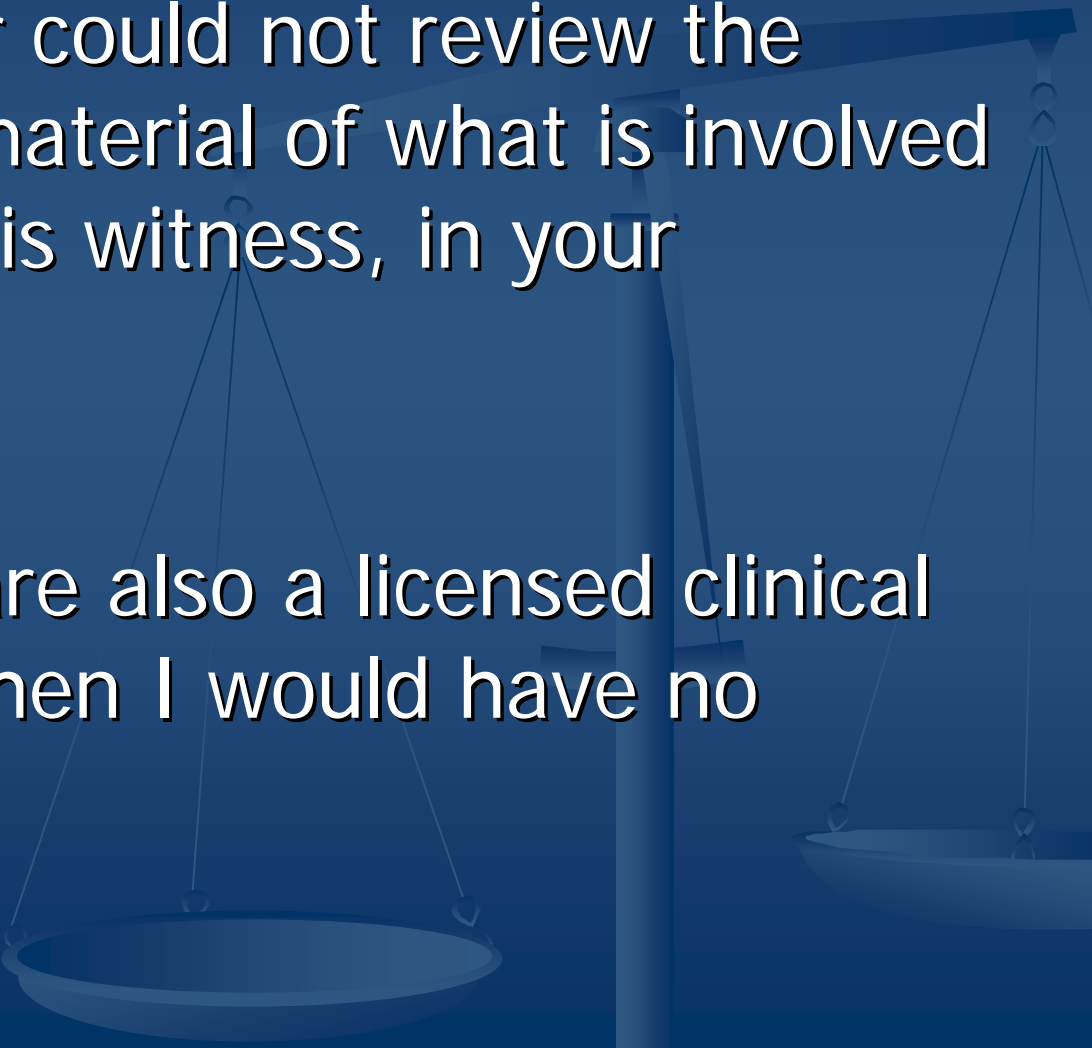
Subpoena *Duces Tecum*

- Command to appear and present “copies of all psychological test results, responses, raw data scores, and interpretations concerning the plaintiff”
- “Your failure to comply with this subpoena will subject you to punishment for contempt of this court.” (fine, jail, or both)

Response to Plaintiff attorney

- PQ: Can you explain to the Judge, the reason why you do not wish to disclose this information to [Psychiatrist]?
- A: My interpretation of the Confidentiality Act indicates that the release of psychological test material can be made only to a psychologist in the state of Illinois. I have reservations in a number of domains, one of which is [the law](#).

Response to Defense Attorney

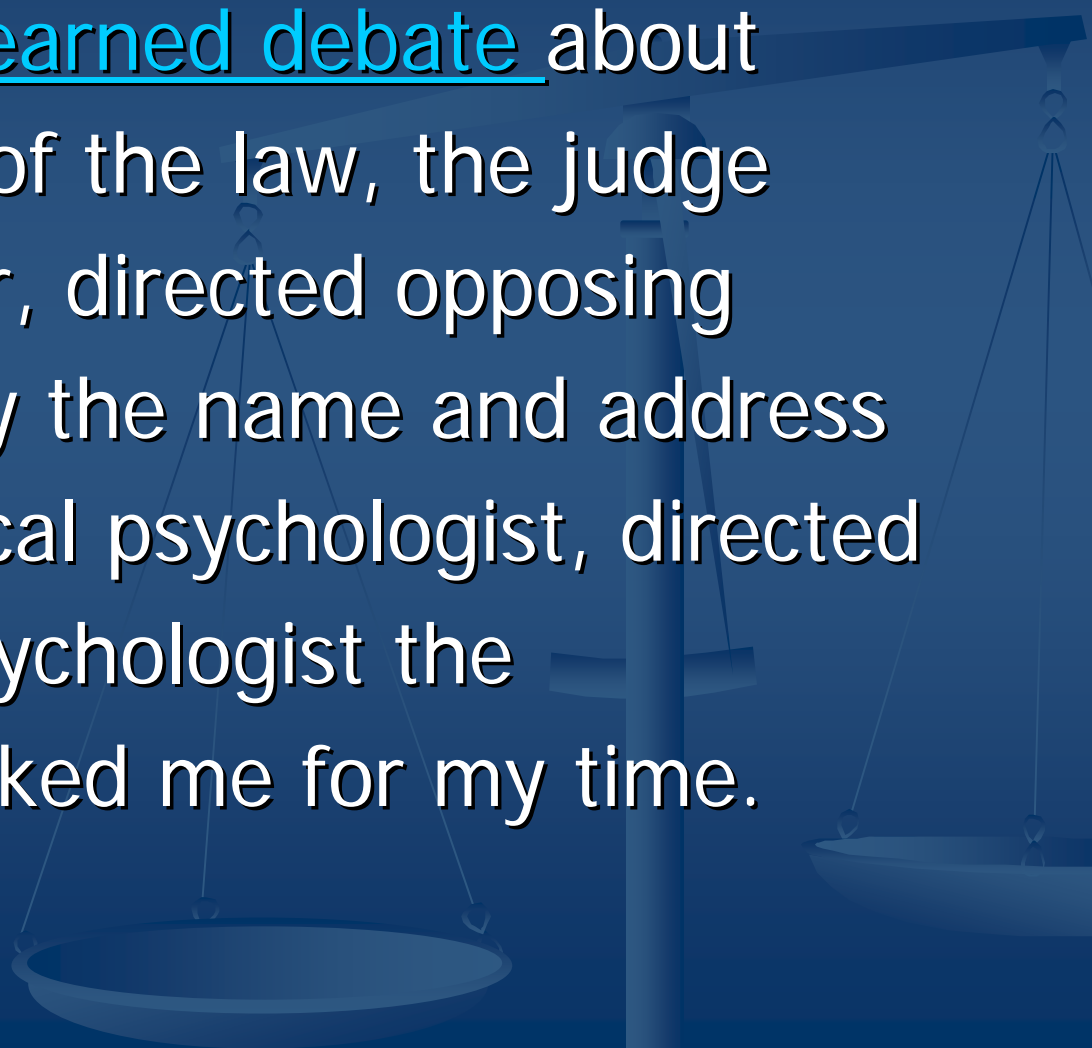
- DQ: So a lawyer could not review the information or material of what is involved with regard to his witness, in your opinion?
 - A: Unless, you are also a licensed clinical psychologist. Then I would have no reservation.
- 

Direct Examination by Judge

- JQ: What you are questioning on is just unique, personal to you, or is this something that is in a standardized form in psychology?
- A: This is a standard of practice in all of psychology.
- JQ: Are the questions the same? If he goes to another psychologist and this test is administered, is he going to get the same questions?
- A: He is going to get the exact same questions. That is the reason for the standardized procedures.
- JQ: So these are not questions you make up?
- A: No they are used by most clinical psychologists.

“Judge Decides”

After some very learned debate about different aspects of the law, the judge modified his order, directed opposing counsel to identify the name and address of a licensed clinical psychologist, directed me to mail the psychologist the material and thanked me for my time.

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

Plaintiff attorney response to bill

- “my client refuses to authorize the disbursements requested therein.”
- you have been my client since requesting notification...“costs beyond that normally associated with the standard of care or treatment... you will be paid promptly.”
- Failed to investigate the law.
- “Bad act” but paid in full.

Asserting privilege: lessons learned

- Clearly distinguish evaluating/treating clinician role from that of retained expert.
- Breadth and depth of record review.
- Clinician/expert conversion debate.
- Use a retention letter/contract that provides notification of records policy.
- Prompt replies to court orders/subpoenas.
- Affidavits are more effective than letters.

Preemptive E-mail notice

- I also received Mr. G's request that I bring "any material you have relating to D. K." To further clarify, the Illinois Confidentiality Act 740 ILCS 110 *et. seq.* applies to this question and record release will be executed in accordance with its provisions, in pertinent part, see
- § 110/3(c) Psychological test material whose disclosure would compromise the objectivity and fairness of the testing process...

Refer to legal argument

- If you would like further information on the application of the psychologist nondisclosure privilege, consider a recently published legal commentary, as follows: 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).

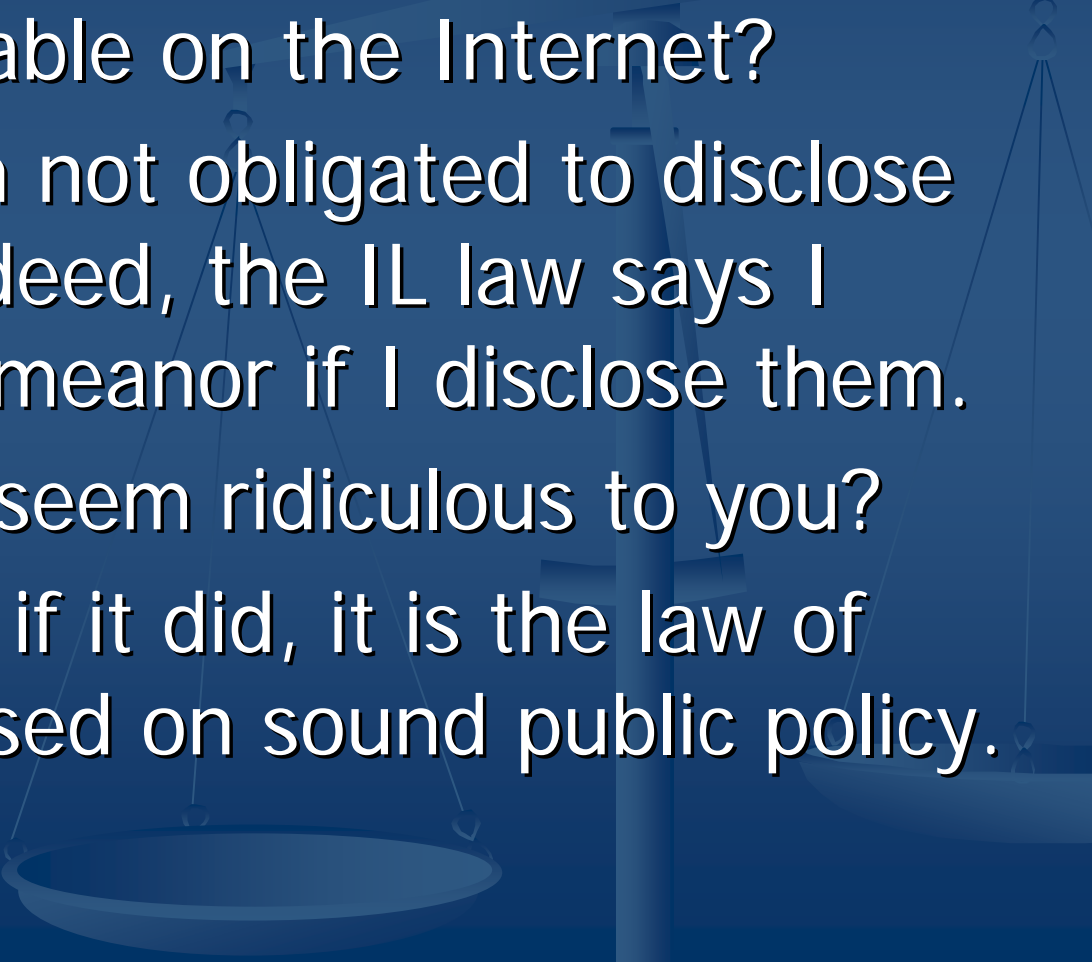
Assert Duty in Deposition

- Q: Give me an example of what you would ask and what he would say that led you to believe that he was exaggerating his memory profile.
- A: Before I answer, let me clarify that, under IL law, I cannot disclose specific items from psychological test materials. But I will give you a general sense of how this is done.
- Use example of memory performance below chance levels on forced choice procedures.

Nondisclosure in Deposition

- Q: Can you give me all the examples of the FBS scale where he gave a response that would be indicative of litigation?
- A: No, I cannot.
- Q: Why not?
- A: Because the FBS scale is on a standardized psychological test that I cannot disclose in any judicial, administrative, or legislative hearing, according to IL law.

...but what if the attorney asked?

- Q: Aren't MMPI FBS items printed in APA books and available on the Internet?
 - A: Yes, but I am not obligated to disclose them to you, indeed, the IL law says I commit a misdemeanor if I disclose them.
 - Q: Doesn't that seem ridiculous to you?
 - A: No, but even if it did, it is the law of the land and based on sound public policy.
- 

Clarifying Privilege

- Q: Your opinion that he has testing that is indicative of possible fabrication or exaggeration is all based upon test results that you cannot disclose?
- A: No.
- Q: Okay. Can you in general tell me what the FBS scale revealed?
- A: Yes. [reference appropriate literature] ...his pattern of responding fell in the range that is very commonly noted only when individuals are seeking compensation in litigation.

What about HIPAA?

- Legal commentary has a section HIPAA with references. IL advises that HIPAA does not preempt the psychologist nondisclosure privilege/duty contained in the IL Confidentiality Act. I am licensed in IL, the evaluation was conducted in IL, the case is being litigated in IL and I will be following the advice of IL regarding release of psychological test materials.
- For references in this matter, please refer to footnotes 234 and 235 of my legal commentary.

Statutory interpretation of HIPAA

Preemption Analysis: Do federal regulations preempt state laws?

- Generally, federal laws preempt state laws, and
- Newer laws preempt older laws, but
- More specific laws preempt more general laws

Stringency Analysis: Do state laws offer more stringent protection than HIPAA?

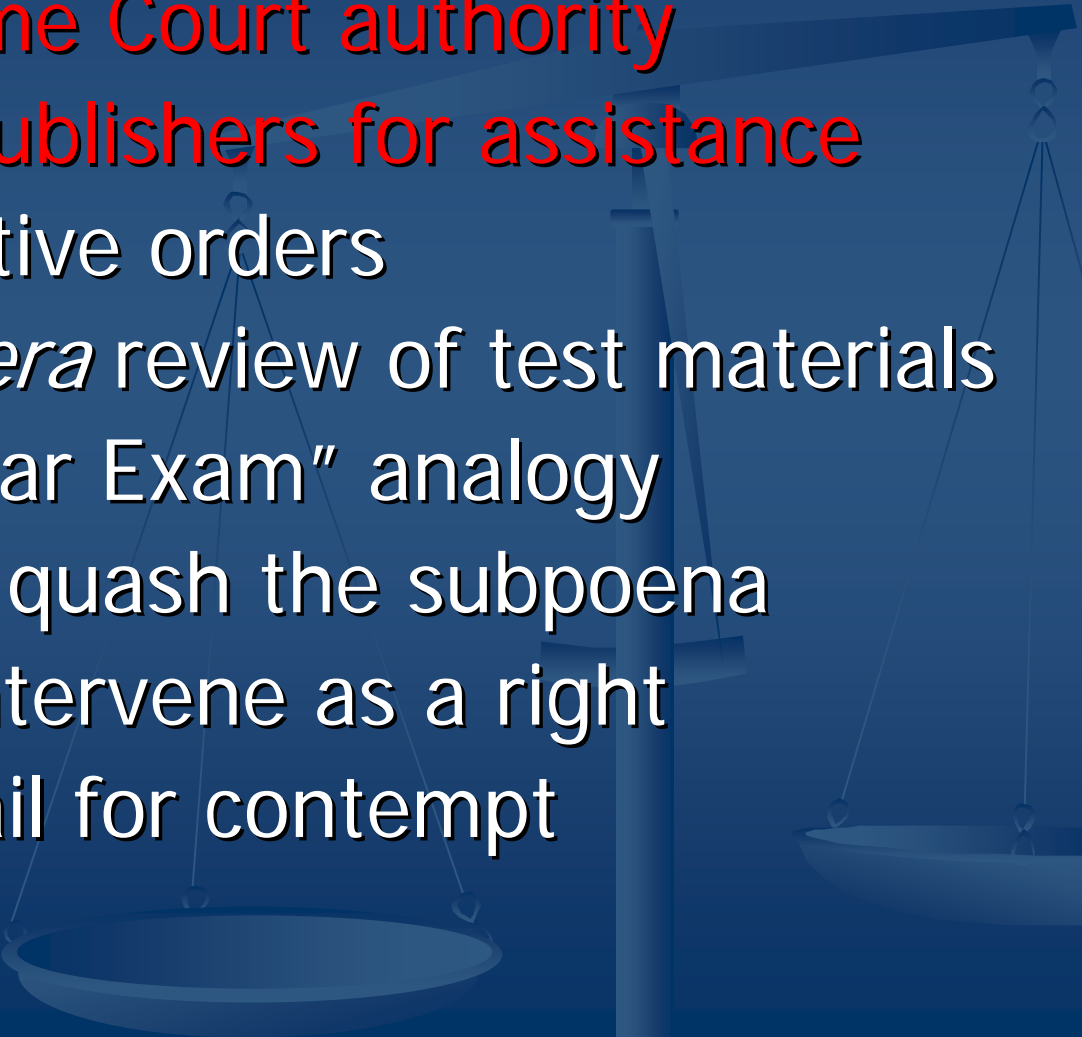
- Privacy protection of records
- Patient access to records remains to be litigated

Currently, IL recommends that HIPAA does not preempt the psychologist nondisclosure duty

HIPAA complaints/outcomes

- 19,420 complaints filed in past three years
- Of those, 14,000 ruled as no violation or dismissed with promise to fix problem
- HHS has yet to impose a single civil penalty and only two criminal convictions:
 - Credit card theft
 - Selling medical records
- “Phase in” enforcement
 - June 4, 2006 Rob Stein Washington Post

No state privilege law?

- Cite U.S. Supreme Court authority
 - Approach test publishers for assistance
 - Move for protective orders
 - Seek an *in camera* review of test materials
 - Try the “LSAT/Bar Exam” analogy
 - File a motion to quash the subpoena
 - File motion to intervene as a right
 - Do NOT go to jail for contempt
- 

Simple Solution 1

- I used the *Detroit Edison v NLRB* case to negotiate a solution with both sides.
- The defense now agrees to give up all their copies of the test record, and I do not have to produce mine to the attorneys - only to the other NP.
- Both sides now agree that the NPs will be the only ones with the test records.

Test Company Letter Usually not a Solution

- The testing materials which NCS Pearson distributes are, in almost all cases protected by trade secret and copyright law. In the case of the MMPI-2 test, the copyright is owned by the University of Minnesota. NCS Pearson does not waive its trade secret protection.
- Further, none of the exclusive rights accorded to a copyright owner by the United States Copyright Act, including, but not limited to, the exclusive right to reproduce and copy, distribute or publish, may be exercised with respect to copyrighted testing materials without the express written permission of NCS Pearson and/or the copyright holder.

Test Company Contacts

- NCS Pearson Intellectual Property (952) 681-3305
tracey.sheehan@pearson.com
- Harcourt Office of General Counsel (210) 339-5190
scottbarnes@harcourt.com
- MHS, Inc. Privacy Officer (800) 456-3003
rita.chadda@mhs.com
- PAR, Inc. Administrative Assistant (800) 331-8378
pdrexler@parinc.com
- IPAT, Inc. Marketing Manager (800) 225-4728
mkk@ipat.com (Kathi Keyes)

Court Appearance > Affidavit > Letter > Nothing

No state privilege law?

- Cite U.S. Supreme Court authority
- Approach test publishers for assistance
- **Move for protective orders**
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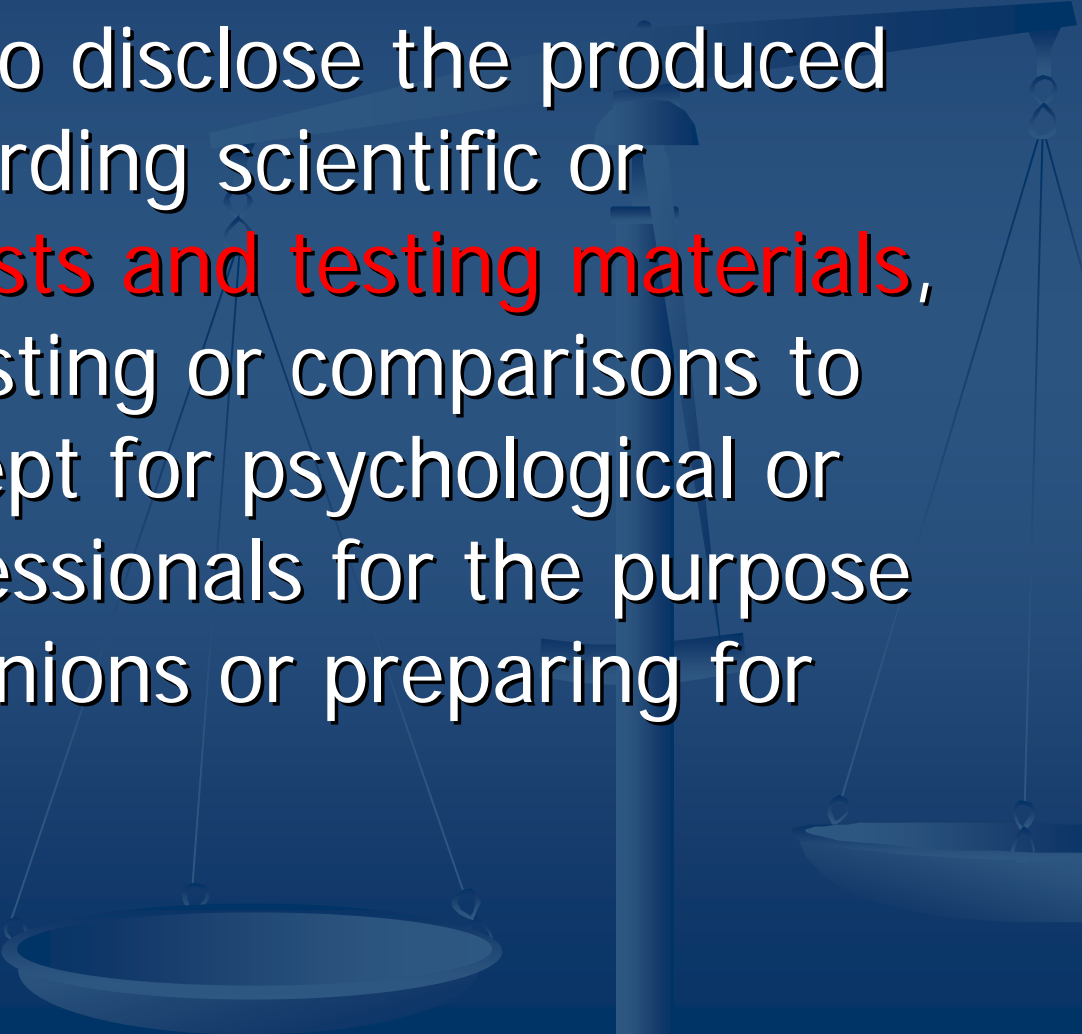
Trial Court Order

“...provide the following documents within in 10 days:

All reports, notes, statements, or other materials made or utilized in connection with this case, including, but not limited to, results of a mental examination, interview notes, scientific or **psychological tests and testing materials**, experiments, testing or comparisons made in connection with this case.”

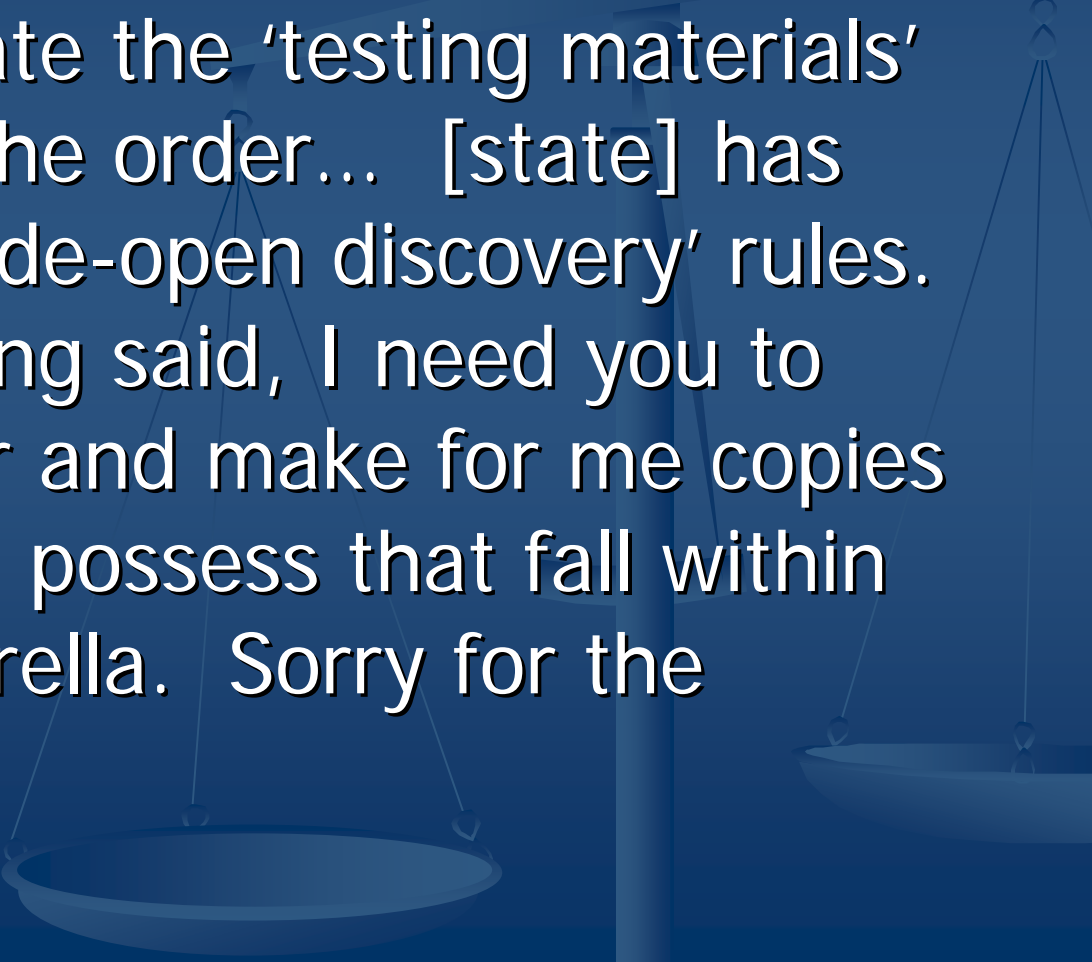
Protective Order – A Partial Solution

“The state is not to disclose the produced documents regarding scientific or **psychological tests and testing materials**, experiments, testing or comparisons to any person except for psychological or psychiatric professionals for the purpose of preparing opinions or preparing for trial.”



Attorney apology

"I am sorry I was not able to persuade the Judge to eliminate the 'testing materials' language from the order... [state] has pretty liberal 'wide-open discovery' rules. With all that being said, I need you to review the order and make for me copies of whatever you possess that fall within the order's umbrella. Sorry for the inconvenience."



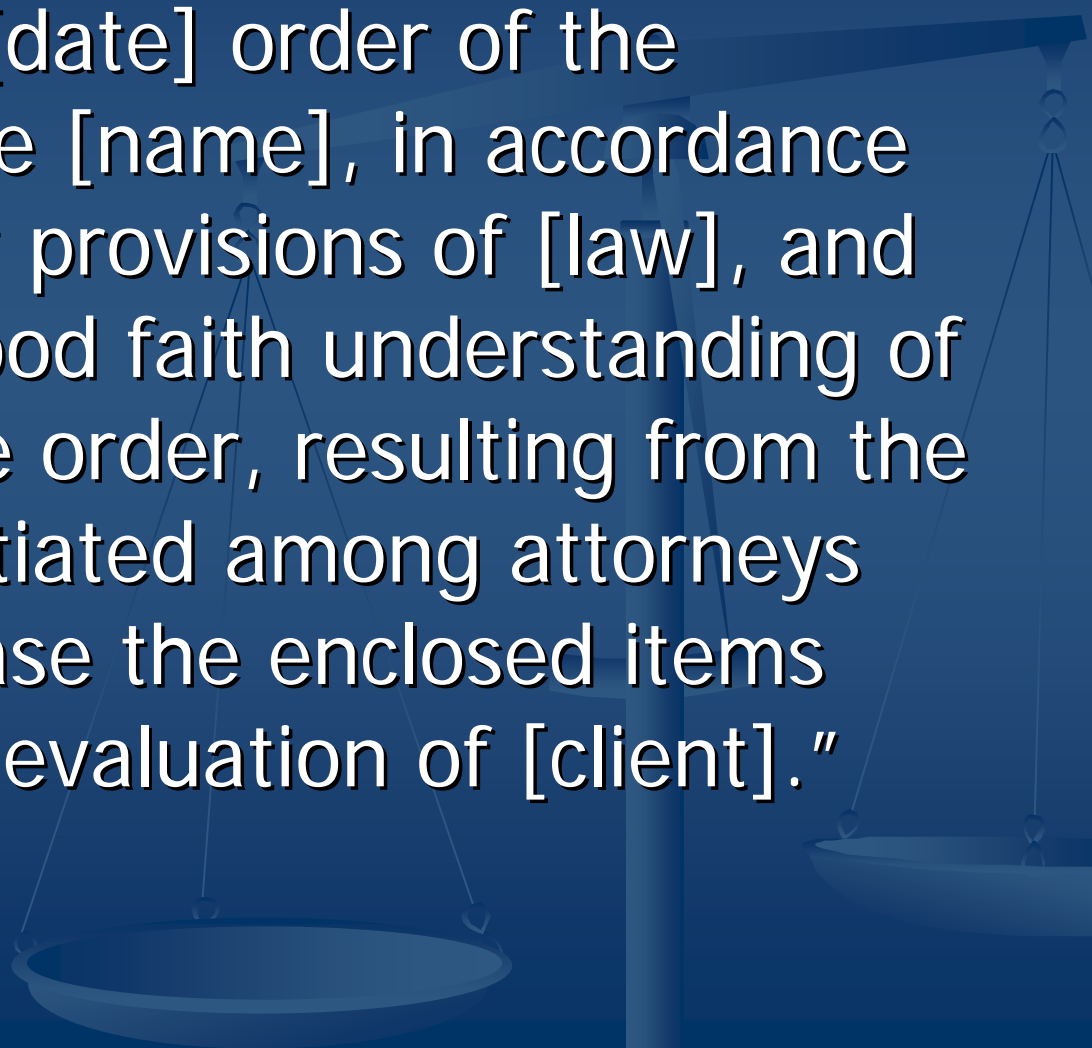
Attorney negotiations

“... the Order will cause them to violate not only their ethical duties, but also state regulations, and the intellectual property rights of various test publishers.”

“...rather than filing formal objections, we agreed my client need not produce at this time the objected to documents...”

Simple solution 2

“Pursuant to the [date] order of the Honorable Judge [name], in accordance with all relevant provisions of [law], and based on my good faith understanding of the scope of the order, resulting from the resolution negotiated among attorneys [names], I release the enclosed items from my [date] evaluation of [client].”

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No state privilege law?

- Cite U.S. Supreme Court authority
- Approach test publishers for assistance
- Move for protective orders
- **Seek an *in camera* review of test materials**
- **Try the "LSAT/Bar Exam" analogy**
- File a motion to quash the subpoena
- File motion to intervene as a right
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In Camera Review

Simple Solution 3

- Review of psychological test materials in judges chambers, not part of public record
- Opportunity to interact directly with the judge to explain why material should not be released.
- Provides nonpublic forum to deny motions or to craft narrow protective orders.
- Good time to assert “LSAT/Bar Exam” analogy

Do I need my own attorney?

Solution 4 – not so simple

- Depends upon level of familiarity with law and time available to invest in negotiation.
- May always represent self, *pro se*.
- Filing motion to quash a subpoena
- Filing motion to intervene as a right
- Access to attorney malpractice insurance
- Attorney is obligated to be reasonably informed and updated on changes in law.
- Avoid contempt charges

Change in state law?

- May 4, 2004 amendment to AZ ST § 12-2293.
- Deleting, "Psychologists are exempt from making available raw test data and psychometric test materials."
- Adding, " A health care provider may deny a request...if: The information is raw test data and psychometric testing materials and access is reasonably likely to endanger the life or physical safety of the patient or another person."
- Feedback from AZ psychologists.

Moving to a new state?

- **ASSESSMENT AND TREATMENT TECHNIQUES.** A psychologist shall make reasonable efforts to preclude misuse in the development, publication and utilization of psychological assessment techniques for use with clients. Unprofessional conduct includes but is not limited to:
 - 01 Failure, in reporting assessment results, to indicate any **serious concerns** or **special circumstances** that exist regarding validity or reliability because of the circumstances of the assessment or the inappropriateness of the norms for the person tested.
 - 04 Encouraging or promoting the use of psychological assessment techniques by **inadequately trained or otherwise unqualified persons** through teaching, sponsorship, or supervision.
 - 05 In presenting psychological information, failure to make reasonable efforts to **present such information objectively**, fully, and accurately.
 - 172 Neb. Admin. Code 156.010.01, 04, 05

Legislative Changes

- A Uniform Rule supported by ABA and APA
- Recognition Of Public Policy Underlying A Psychologist Nondisclosure Privilege
- Laws Distinguishing Between Psychotherapist-Patient And Psychologist Nondisclosure Privilege
- Access To Psychological Test Materials Restricted To Licensed Psychologists
- Psychological Test Materials Designated As Separate And Distinct From Medical Records

Legislative Changes

- Bar Patient Access To Test Materials With Penalties For Inappropriate Disclosure
- Patient Autonomy To Release Test Materials To Other Licensed Psychologists
- Psychological Test Materials Exception To HIPAA Access Requirements
- Adoption Of A Federal Common Law*
Psychologist Nondisclosure Privilege

* novel legal theory

Federal Common Law Psychologist Nondisclosure Privilege

- Psychologist refused to release raw data to a psychiatrist claiming the psychiatrist was incompetent to interpret raw data.
- Asserted privilege under *Detroit Edison*
- Issue became moot when a psychologist was hired to assist the psychiatrist.
- Federal privilege is an unresolved theory.
 - *Chiperas v. Rubin* (1998)

Piccolo (2007) concurring opinion

- “Piccolo's attorney did not establish that he had a genuine need to retain a copy of the videotape once the case was closed. On the other hand, DOT did show that the neuropsychologist had well-founded reasons for insisting on the return of the videotape after the litigation had been concluded.”
- “Many years ago, the **US Supreme Court recognized the psychological profession's legitimate interest** in preserving the security of test materials.”
- “I disagree with the majority's suggestion that this is unimportant because DOT can arrange for Piccolo to be examined by a professional from a different discipline.”

Detroit Edison Co. v. NLRB

Holdings – precedents of law

- NLRB abused its discretion for ordering employer's testing information to union.
- Employer's nondisclosure of test scores absent consent, not unfair labor practice.
- NONE regarding application of test security or right of psychologists to withhold psychological test materials when a valid consent is provided.

Detroit Edison Co. v. NLRB

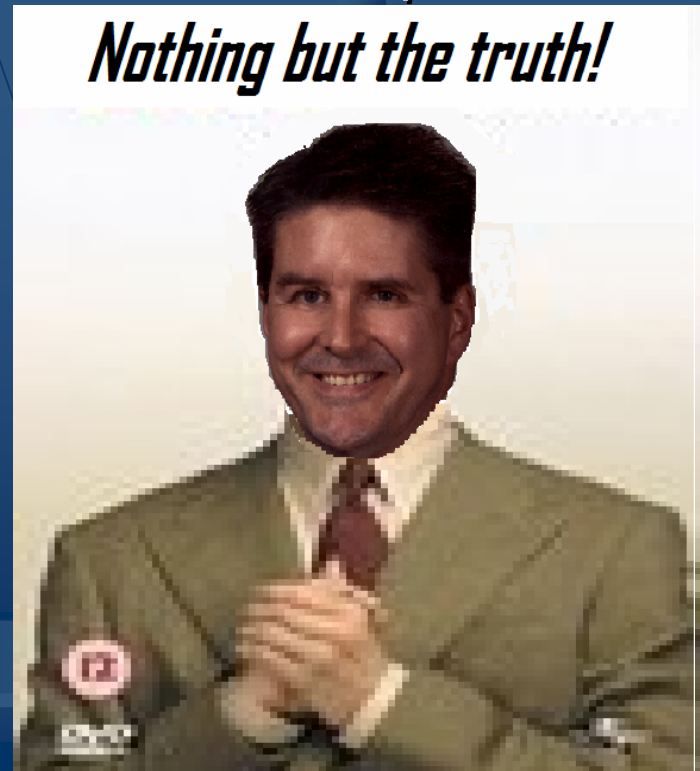
Dicta – nonbinding statements of the court

- “strong public policy” underlying test security and “against disclosure.”
- the reasonableness of the Company's concern for test secrecy was conceded.
- “Company's concern has been abundantly demonstrated”
 - “Empirical validity of the tests”
 - “Relationship between secrecy and test validity”

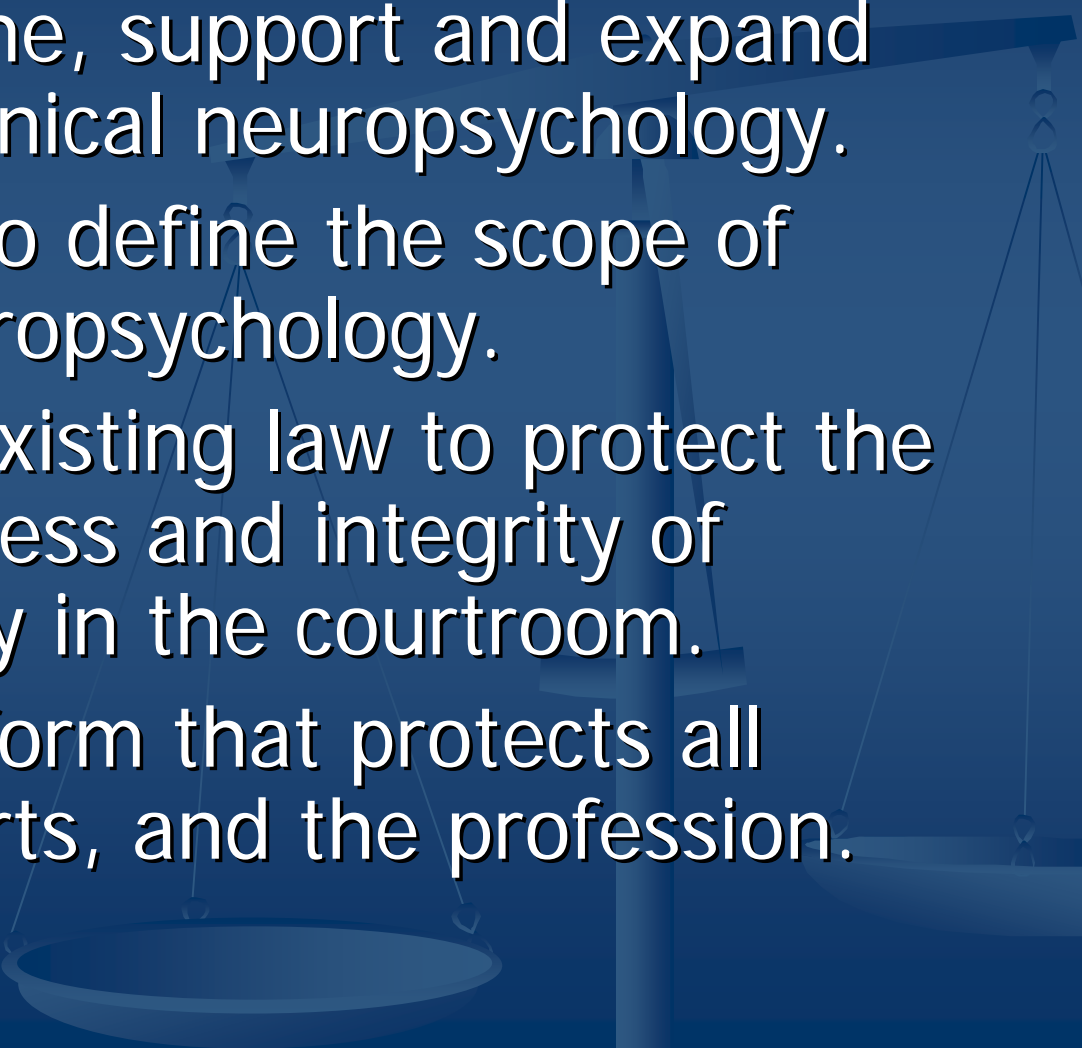
For your reading pleasure

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!](#)



Neuropsychology and Advocacy

- Draw a bright line, support and expand standards for clinical neuropsychology.
 - Use bright line to define the scope of practice for neuropsychology.
 - Know and use existing law to protect the objectivity, fairness and integrity of neuropsychology in the courtroom.
 - Advocate for reform that protects all consumers, courts, and the profession.
- 

Learning Objectives

The ethics training components of this Workshop presents evidentiary material from actual legal cases illustrating the application of the 2002 APA Ethics Code to dilemmas arising in forensic consultation. Standards 1.02, 2.01(f), 9.04, 9.07, 9.09, and 9.11 are presented, discussed and applied to dilemmas arising from court cases. Workshop participants have the opportunity to learn:

- Public policy – Competing public policies that arise when a psychologist is asked to disclose raw data and psychological test materials to nonpsychologists.
- Law – Relevant law and the proper weight of legal authority when:
a) responding to legal documents, b) weighing ethical dilemmas, and c) formulating policies in a professional forensic practice.
- Practices – Best practices for protecting the objectivity, fairness, and integrity of neuropsychological evaluations in litigation.

Parting shot across your bow

- Know your destination
 - Find your compass
 - Set your course
 - Unfurl your sails
 - Come about *hard alee!*
 - Don't be a scallywag
-
- Thank you for your attention, it has been my pleasure to present this Workshop to the Pacific Northwest Neuropsychological Society

Future Workshops of Interest

AACN Consensus Conference on response bias, effort, and malingering. June 19 – 21, 2008
Boston, MA (3 hours)

June 19 AACN Workshop legal analysis of pediatric neuropsychology practice, including informed consent, confidentiality, record keeping, disclosure demands, reporting requirements, scope of practice, conflicts of interest, and expert testimony. (3 hours)

APA Workshop “Legal requirements and ethical dilemmas for psychologists consulting in court”, August 13, 2008, Boston, MA (7 hours)