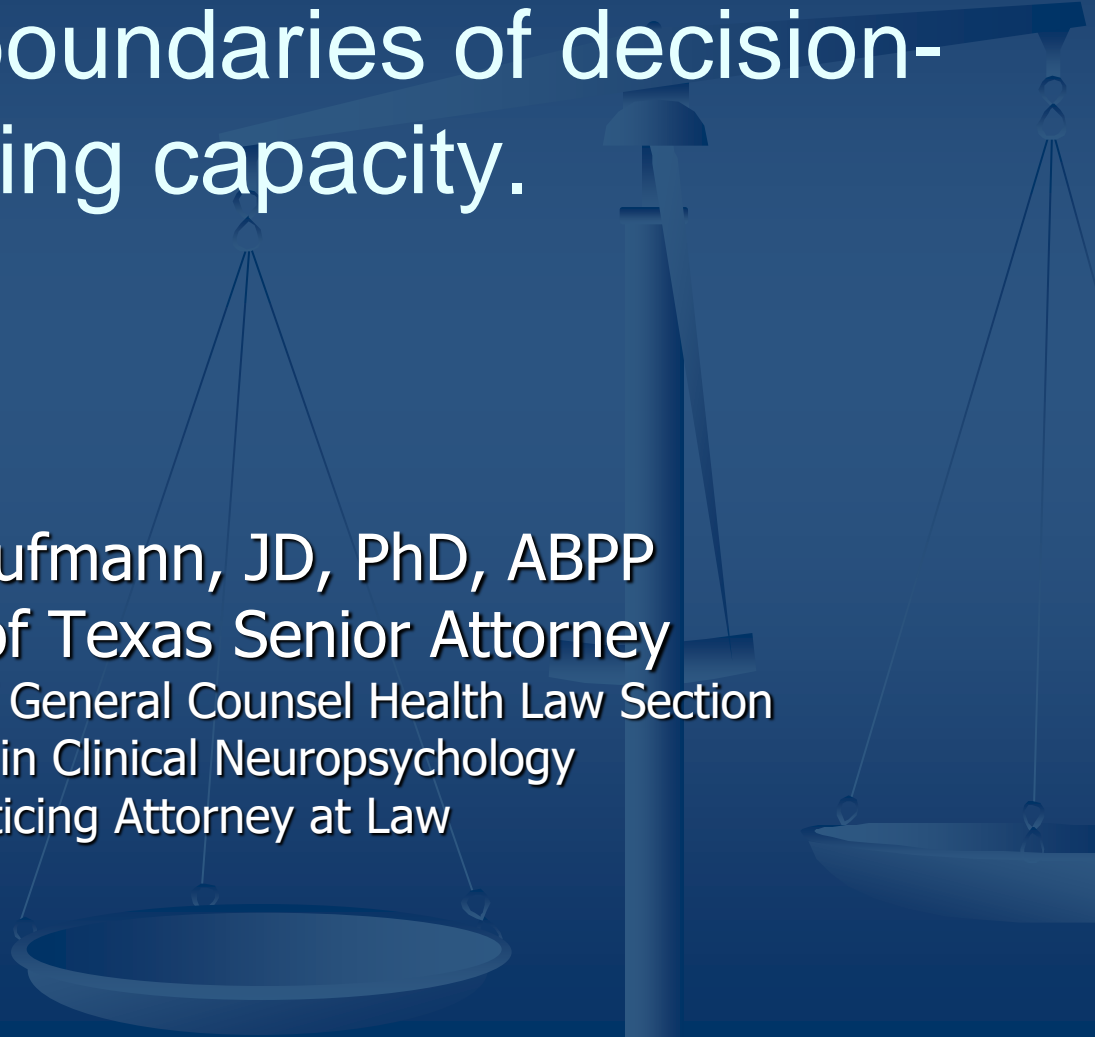


Adults are presumed competent: Charting the boundaries of decision- making capacity.



Paul M. Kaufmann, JD, PhD, ABPP
University of Texas Senior Attorney
UT System Office of General Counsel Health Law Section
Diplomate in Clinical Neuropsychology
Practicing Attorney at Law

Overview

- Expert testimony brief reminders
 - Key Court decisions
 - Rules of evidence
- Update on Forensic Neuropsychology utilization
- Orientation to relevant state law
- Application of law when evaluating civil capacity

Goal: Understand and describe the basic legal framework for determining adult decision-making capacity in the State of Washington and the role that neuropsychologists may play in providing evidence.

APA Ethics Standard

- 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.

Hopefully, you will become will become more reasonably familiar with judicial or administrative rules governing role.

Legal Requirements for Expert

- *Frye v. United States* (1923)
 - “General acceptance” of expert methods employed within the relevant scientific community.
 - Remains good law in 7 states (IL, MD, MN, NJ, NY, PA, WA).
 - In past 8 years, abandoned by FL, KS, AZ, AL, WI and DC.
- *Daubert v. Merrell Dow Pharm.* (1993)
 - Federal standard – Trial judge as gate keeper
 - Non-exclusive factors to evaluate expert methods
 - Frye’s “general acceptance” test
 - Subject to peer review
 - Testable; falsifiable
 - Known and acceptable error rate
 - Adopted in 38 states and DC.

Broad Judicial Discretion

- *General Electric v. Joiner* (1997)
 - Reversed on appeal, claiming admissibility is subject to a strict standard of review.
 - U.S. Supreme Court reversed stating that only an abuse of discretion reverses trial judge.
- *Khumo Tire v. Carmichael* (1999)
 - *Daubert* applies to all experts, not just science.
 - Relevant experience is enough for expert.
- Trial Court Judge has broad discretion

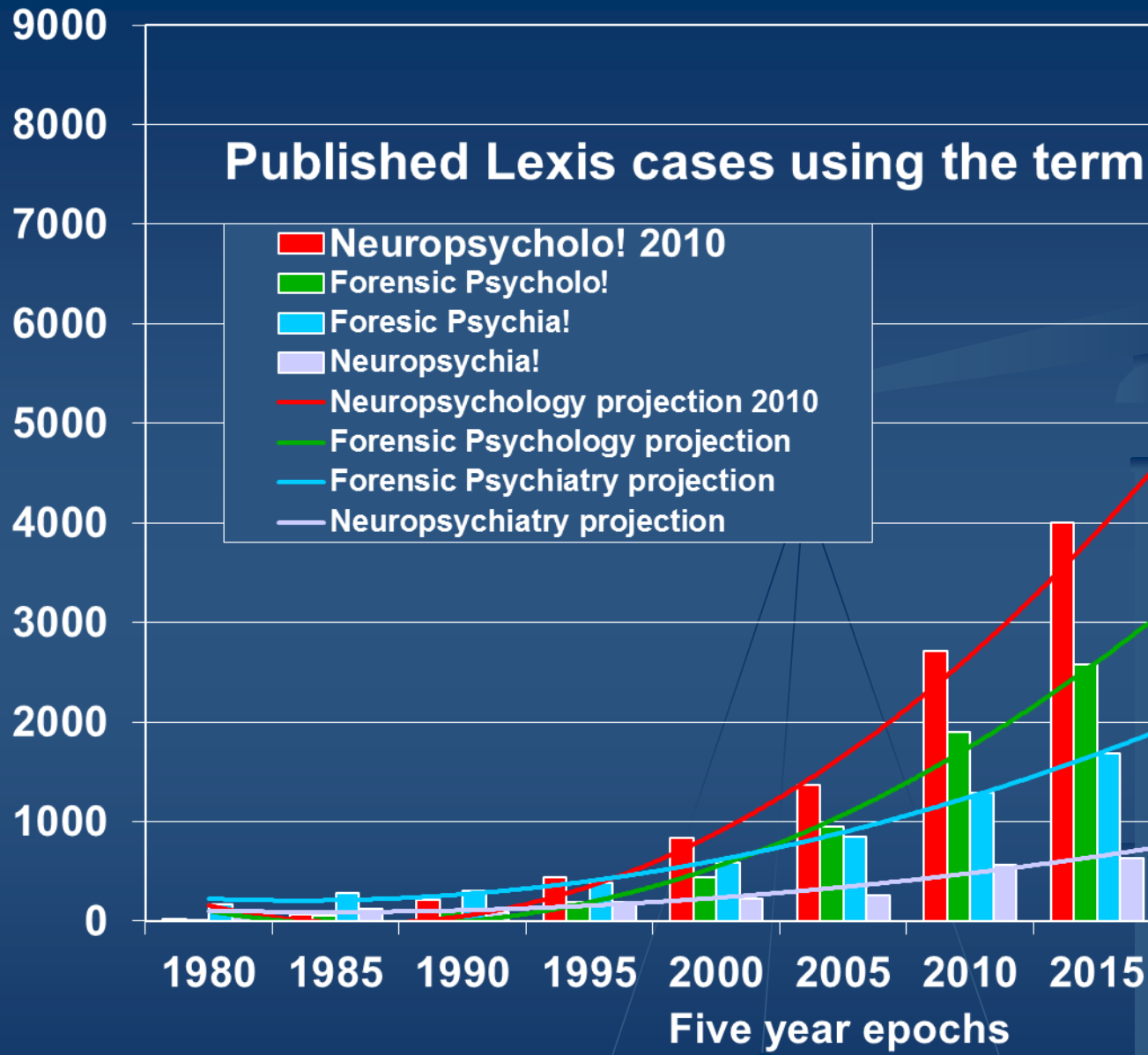
New Federal Rule

- *Fed. R. Evid. 702* (2002) codifies cases
 - “scientific, technical or other specialized knowledge” will assist the trier of fact.
 - Qualification of expert based on “knowledge, skill, training, experience, and education.”
- Courts recognize experts if testimony is:
 - Based on sufficient facts or data,
 - Product of reliable principles and methods, and
 - Appropriately applied to the facts of the case.

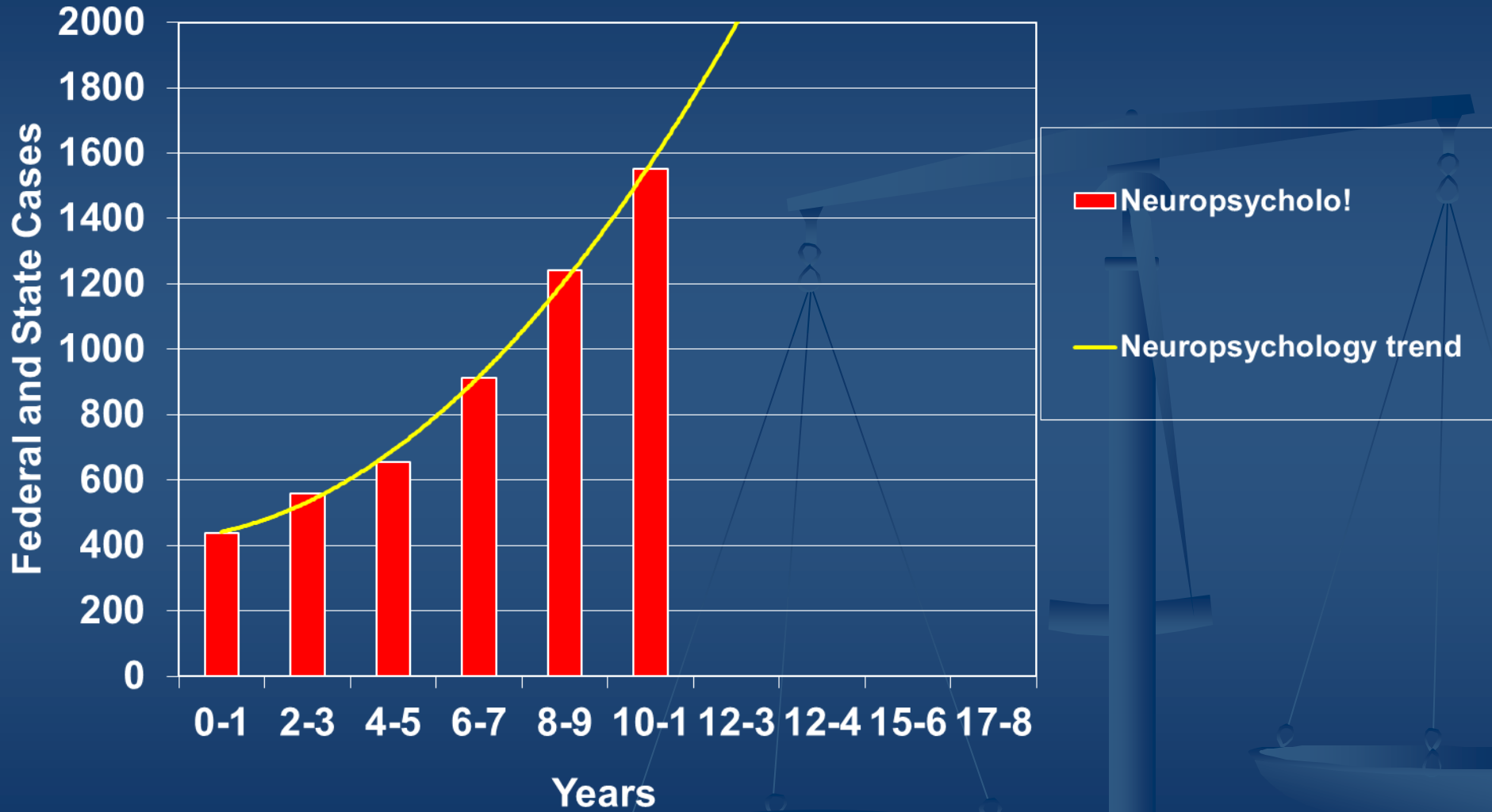
Published Lexis cases using the term

Federal and State Cases

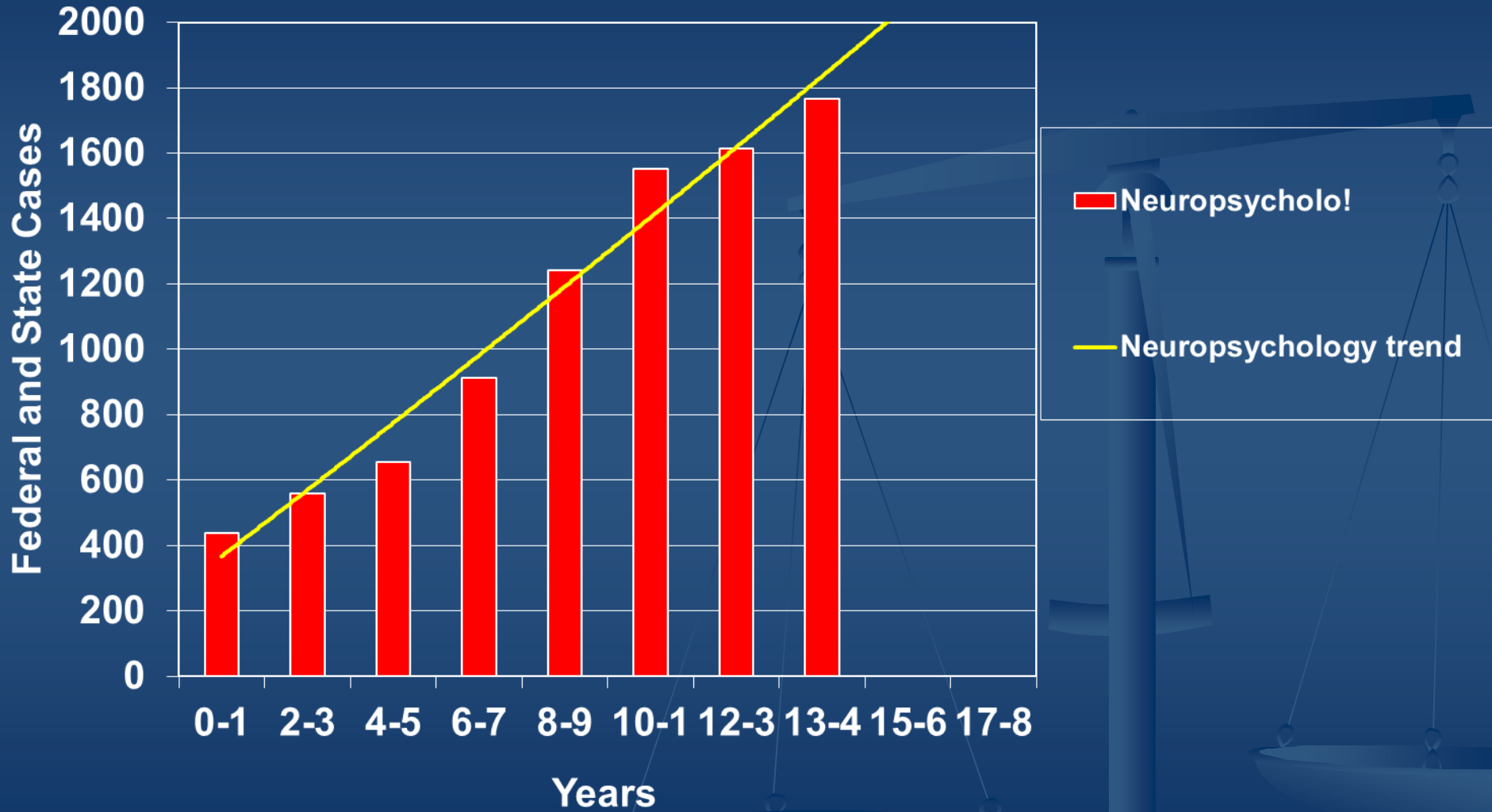
- Neuropsycholo! 2010
- Forensic Psycholo!
- Foresic Psychia!
- Neuropsychia!
- Neuropsychology projection 2010
- Forensic Psychology projection
- Forensic Psychiatry projection
- Neuropsychiatry projection



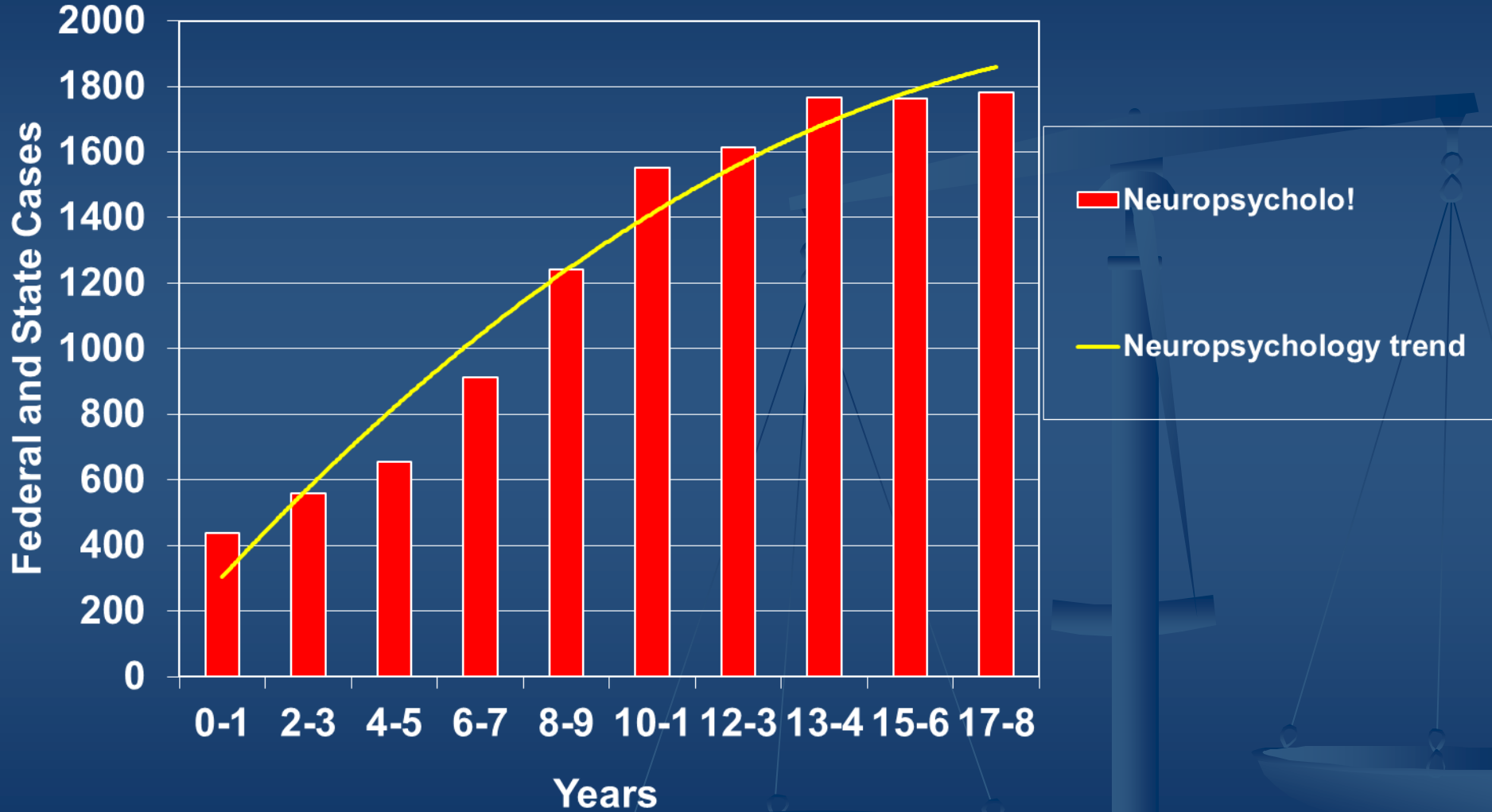
Published Lexis cases using terms



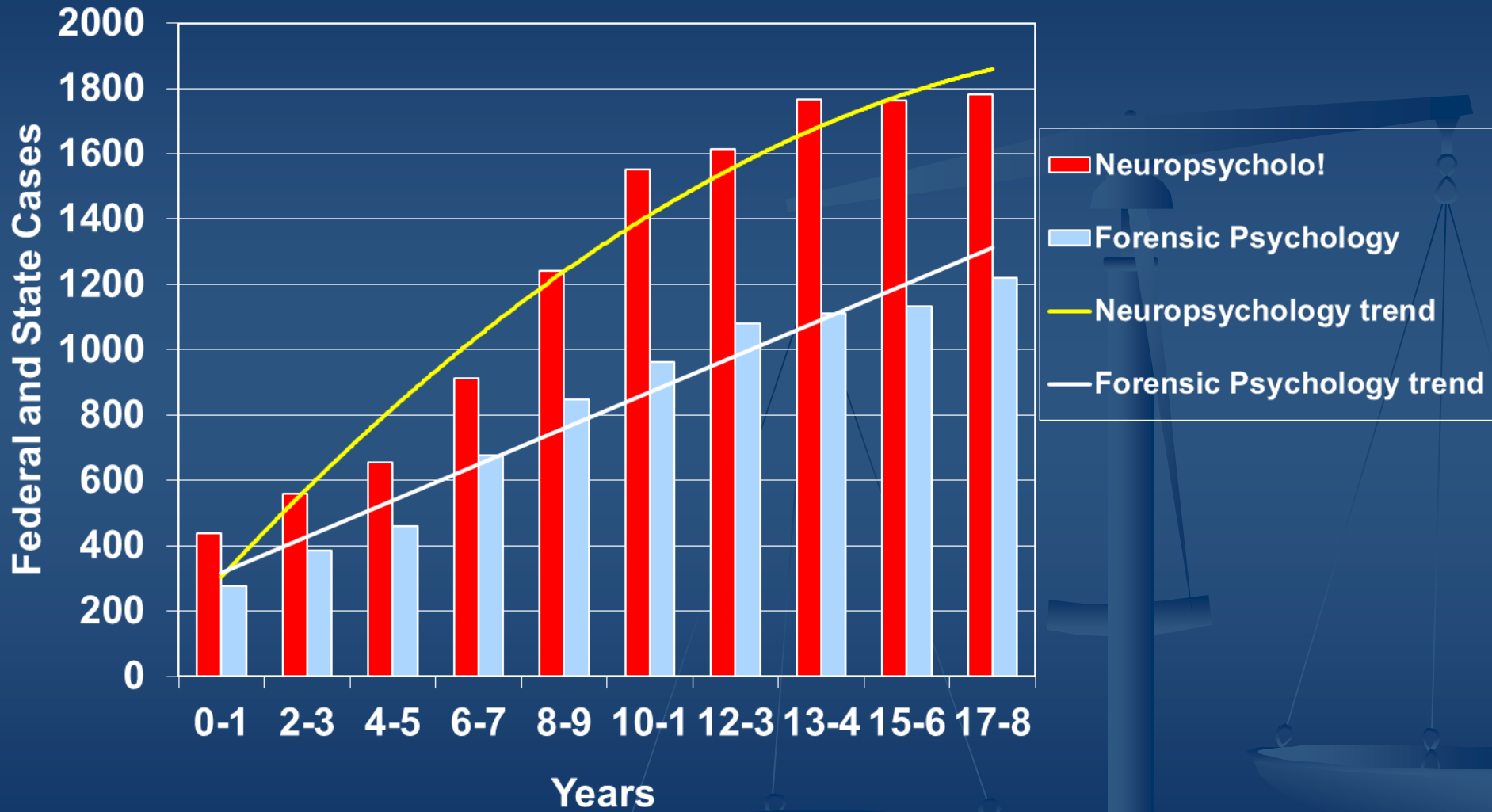
Published Lexis cases using terms



Published Lexis cases using terms



Published Lexis cases using terms

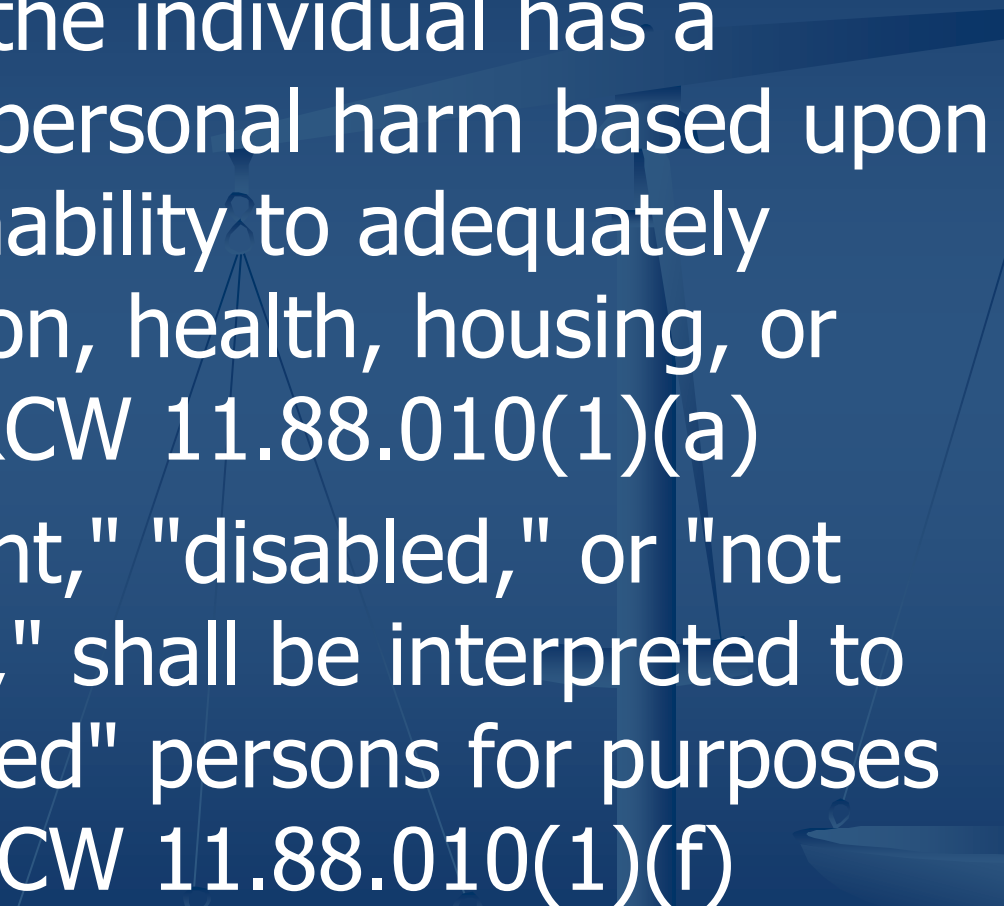


Legislative Intent

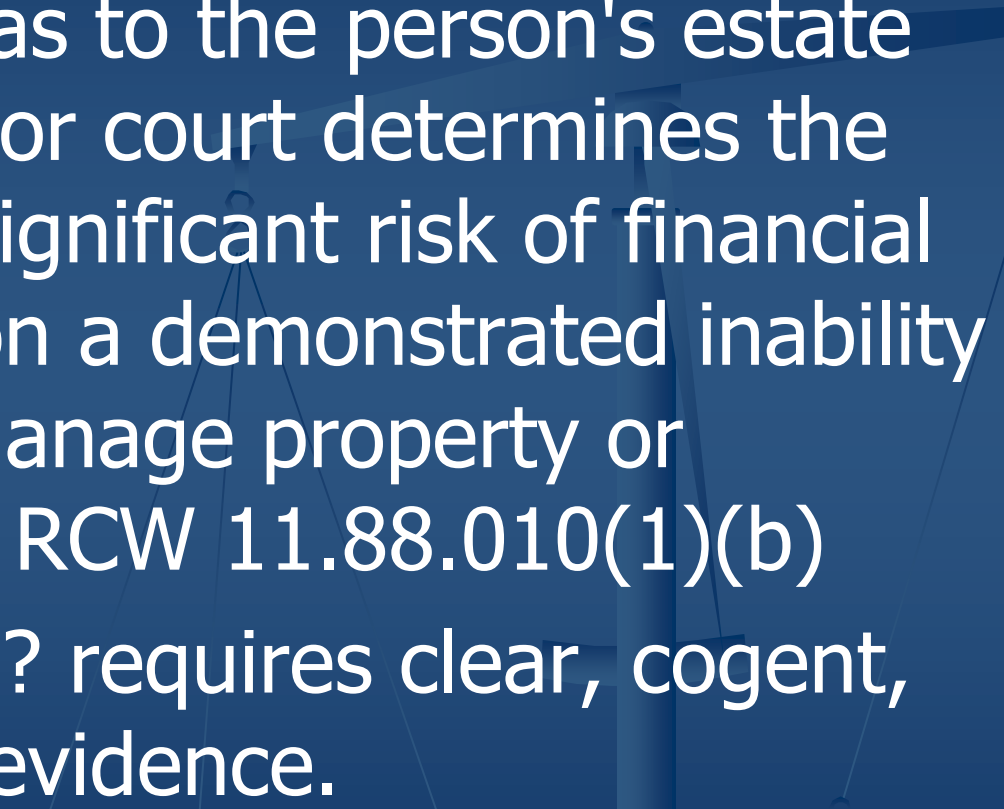
“...protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities **cannot** exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.” RCW 11.88.005

Definitions

Incapacitated person: when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. RCW 11.88.010(1)(a) terms "incompetent," "disabled," or "not legally competent," shall be interpreted to mean "incapacitated" persons for purposes of this chapter. RCW 11.88.010(1)(f)



Person's estate

- ...incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs. RCW 11.88.010(1)(b)
 - Undue influence? requires clear, cogent, and convincing evidence.
- 

Age of Majority



- A person may also be determined incapacitated if he or she is under the age of majority. RCW 11.88.010(1)(d)
- Exceptions:
 - Emancipated minors - 16
 - Right to sue – 14
 - Necessities
 - Health care
 - No parental notification

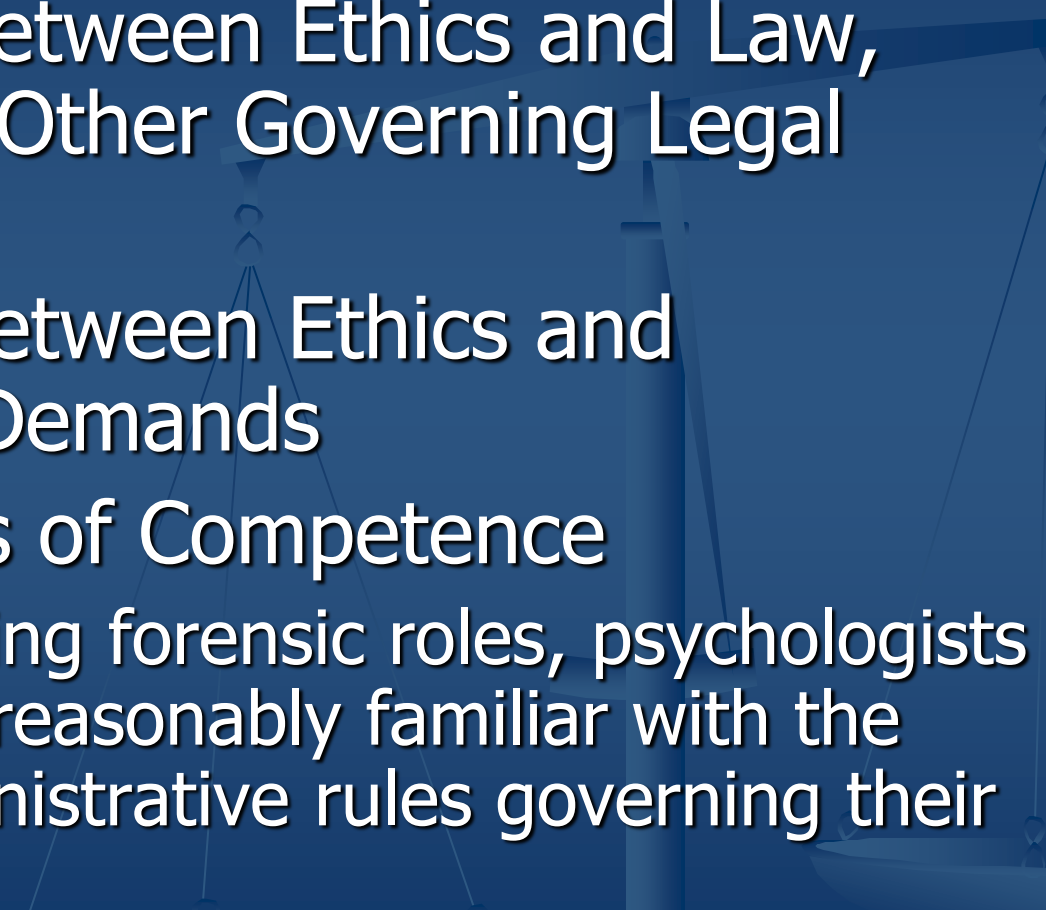
Capacity is a legal decision

- A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies **over time** in the area of person or estate.
- Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity. RCW 11.88.010(1)(c)

Health care informed consent

- an "incompetent" person is any person who is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.

Key APA Ethical Standards

- 1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority
 - 1.03 Conflicts between Ethics and Organizational Demands
 - 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.
- 
- 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 image is set against a dark blue gradient background.

Managing conflicts between Ethics and Legal Authority



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 clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.



1.03 Conflicts Between Ethics and Organizational Demands

If the demands of an organization with which psychologists are affiliated or for whom they are working are in conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

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