



Social, Legal and Ethical Issues

HDC 3600-02

George T. Davis, Ph.D. J.D

www.tennlegal.com

615-498-1014

Overview: Week 2



- Responding to subpoenas
- Confidentiality (con't)
 - *Kirchner v Mitsui*
 - *Jaffee*
 - Minor's records
 - Releasing Adolescent's records
 - *Shaw v Shaw*
- HIPPA
- Minor's sexuality
- Minor abuse decision tree, Child Sexual Abuse



SUBPOENA

Do I have to go?

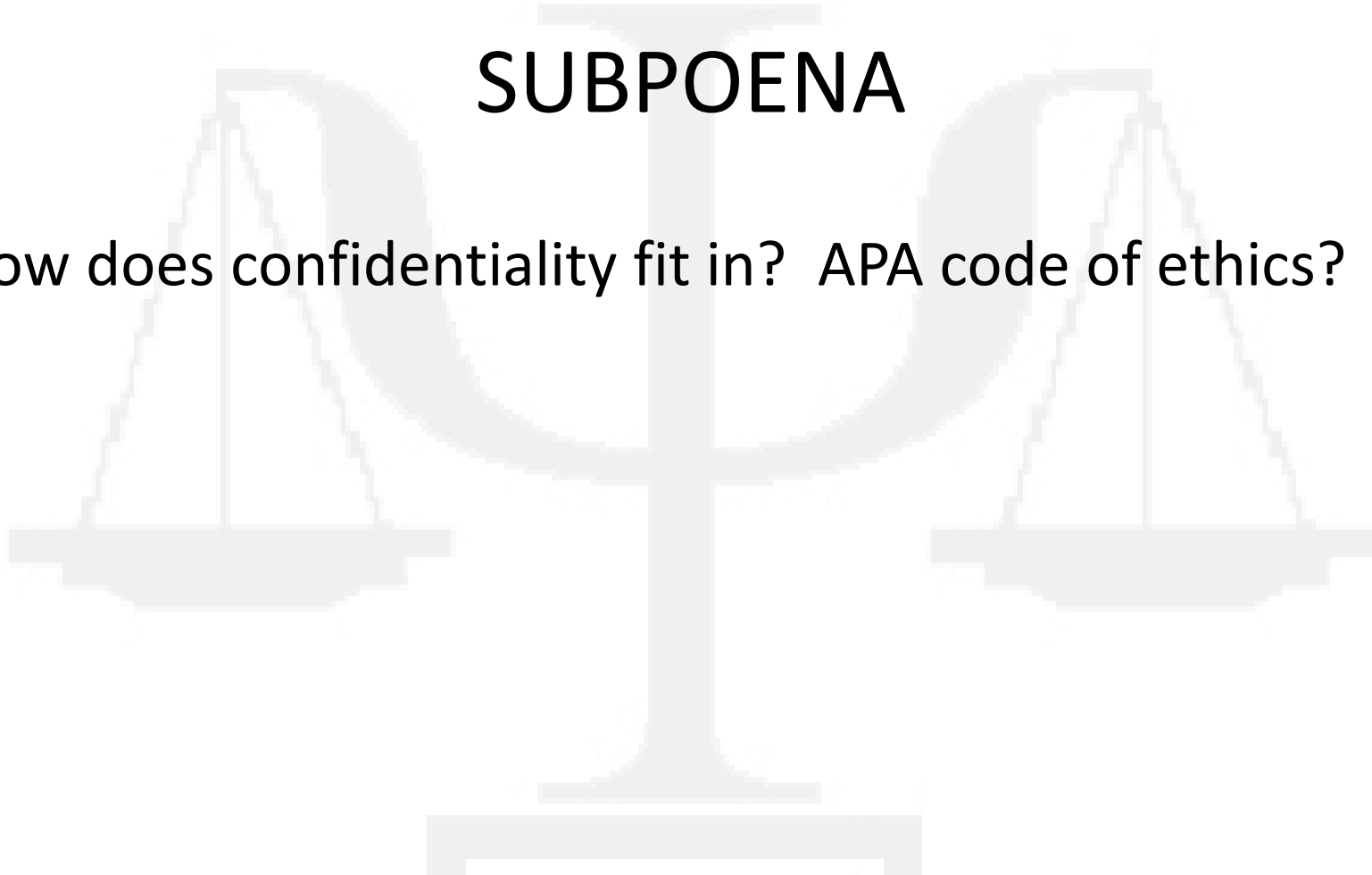
Is it valid?

What about the other spouse, do they have to give permission?

What about pay, do I have to go if I'm not paid?

SUBPOENA

How does confidentiality fit in? APA code of ethics?



SUBPOENA DEFINITION

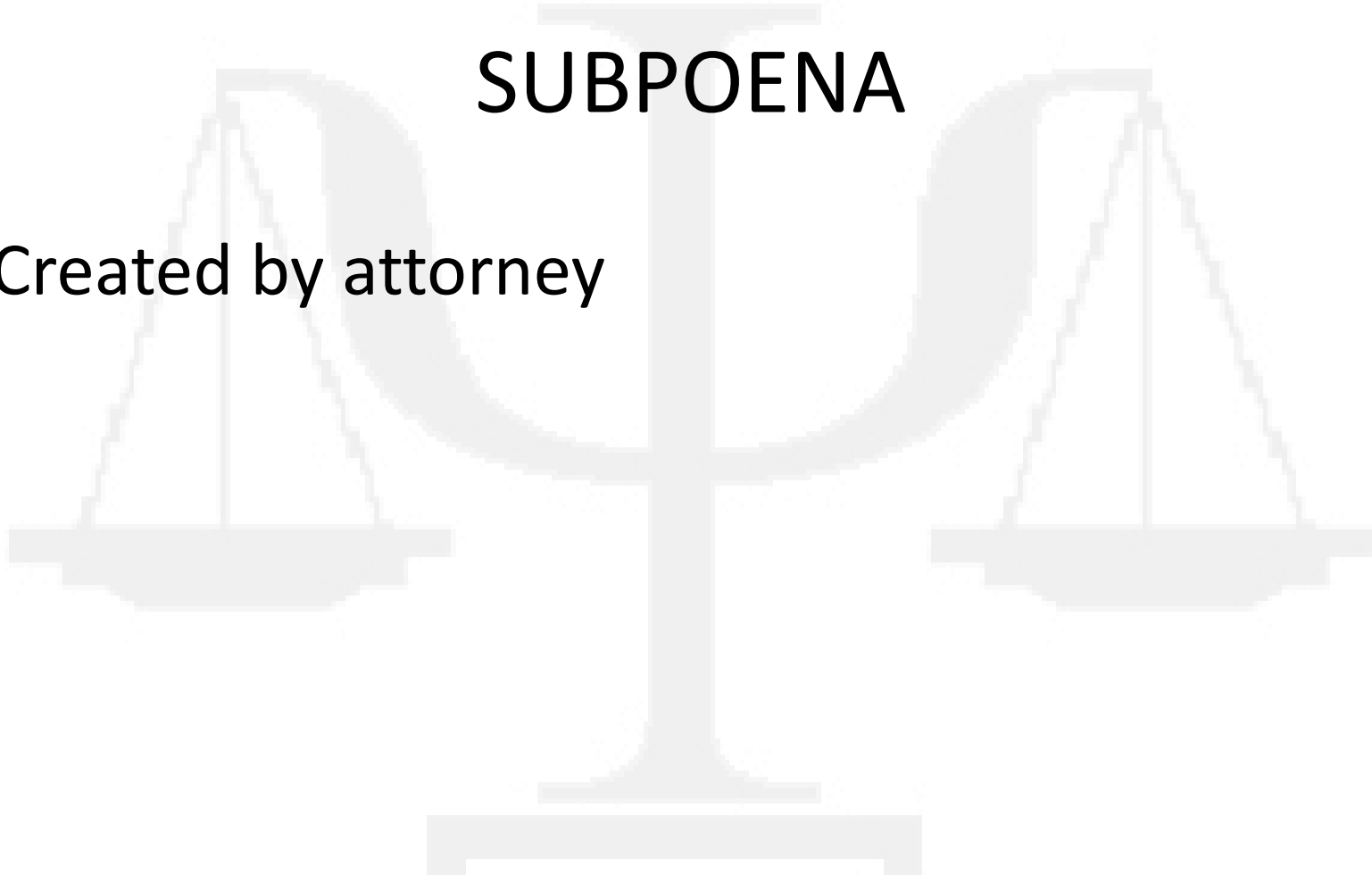
The obligation of the individual to attend the court as a witness is enforced by a process of the court, particular process being the subpoena ad testificandum, commonly called the subpoena in the United States. This writ, or form, commands the witness, under penalty, to appear at a trial to give testimony. Thus, the subpoena is the mechanism for compelling the attendance of a witness.

DUCES TECUM

“Bring with thee.” A writ commonly called a subpoena duces tecum, commanding the person to whom it is directed to bring with him some writings, papers, or other things therein specified and described, to a deposition, to counsel for litigants in an action, or before the court. In general, all relevant papers in the possession of the witness must be produced, but to this general rule there are exceptions. E.g., attorneys and solicitors who hold the papers of their clients cannot be compelled to produce them, unless the client could have been so compelled; neither can documents that are covered by the 5th Amendment's protection against self-incrimination.

SUBPOENA

- Created by attorney





SUBPOENA

- Created by attorney
- Signed by clerk



SUBPOENA

- Created by attorney
- Signed by clerk
- No judge input

SUBPOENA

Example





SUBPOENA

Is it valid?

- Signed by clerk
- Out of state... *International Shoe v Washington*
- To deposition or to trial?

SUBPOENA

International Shoe v Washington

The basic formulation is: a state may exercise personal jurisdiction over an out-of-state defendant, so long as that defendant has "sufficient minimum contacts" with the forum state, from which the complaint arises, such that the exercise of jurisdiction "will not offend traditional notions of fair play and substantial justice . . ."
See 326 U.S. 310 (1945).

If it is an out of state subpoena, you likely can ignore it unless you own land there.

TCA 24-9-101

24-9-101. Deponents exempt from subpoena to trial but subject to subpoena to deposition — Award of fees and expenses if court grants motion to quash. —

(a) Deponents exempt from subpoena to trial but subject to subpoena to a deposition are:

- (1)** An officer of the United States;
- (2)** An officer of this state;
- (3)** An officer of any court or municipality within the state;
- (4)** The clerk of any court of record other than that in which the suit is pending;
- (5)** A member of the general assembly while in session, or clerk or officer thereof;
- (6)** A practicing physician, psychologist, senior psychological examiner, chiropractor, dentist or attorney;
- (7)** A jailer or keeper of a public prison in any county other than that in which the suit is pending; and
- (8)** A custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures provided in title [68](#), chapter 11, part 4, for the production of hospital records pursuant to a subpoena duces tecum.

(b) If the court grants a motion to quash a subpoena issued pursuant to subsection (a), the court may award the party subpoenaed its reasonable attorney's fees and expenses incurred in defending against the subpoena.



SUBPOENA

Is it valid?

- Signed by clerk
- Out of state... *International Shoe v Washington*
- To deposition or to trial?
- Is there a privilege that applies? Confidentiality

TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP)

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party

TCA 63-11-213

63-11-213. Privileged communications. —

For the purpose of this chapter, the confidential relations and communications between licensed **psychologist** or, **psychological examiner** or, **senior psychological examiner** or certified psychological assistant and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

Privileged communications. —

63-22-114 marriage and family counselors, LPC,
pastoral counselors;

63-11-213 Psychologists;

63-23-107 Social Workers;

68-24-601-609 Drug and Alcohol Counselors

“are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed.”

TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP) 26

When a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection

How?



How?

Motion to Quash



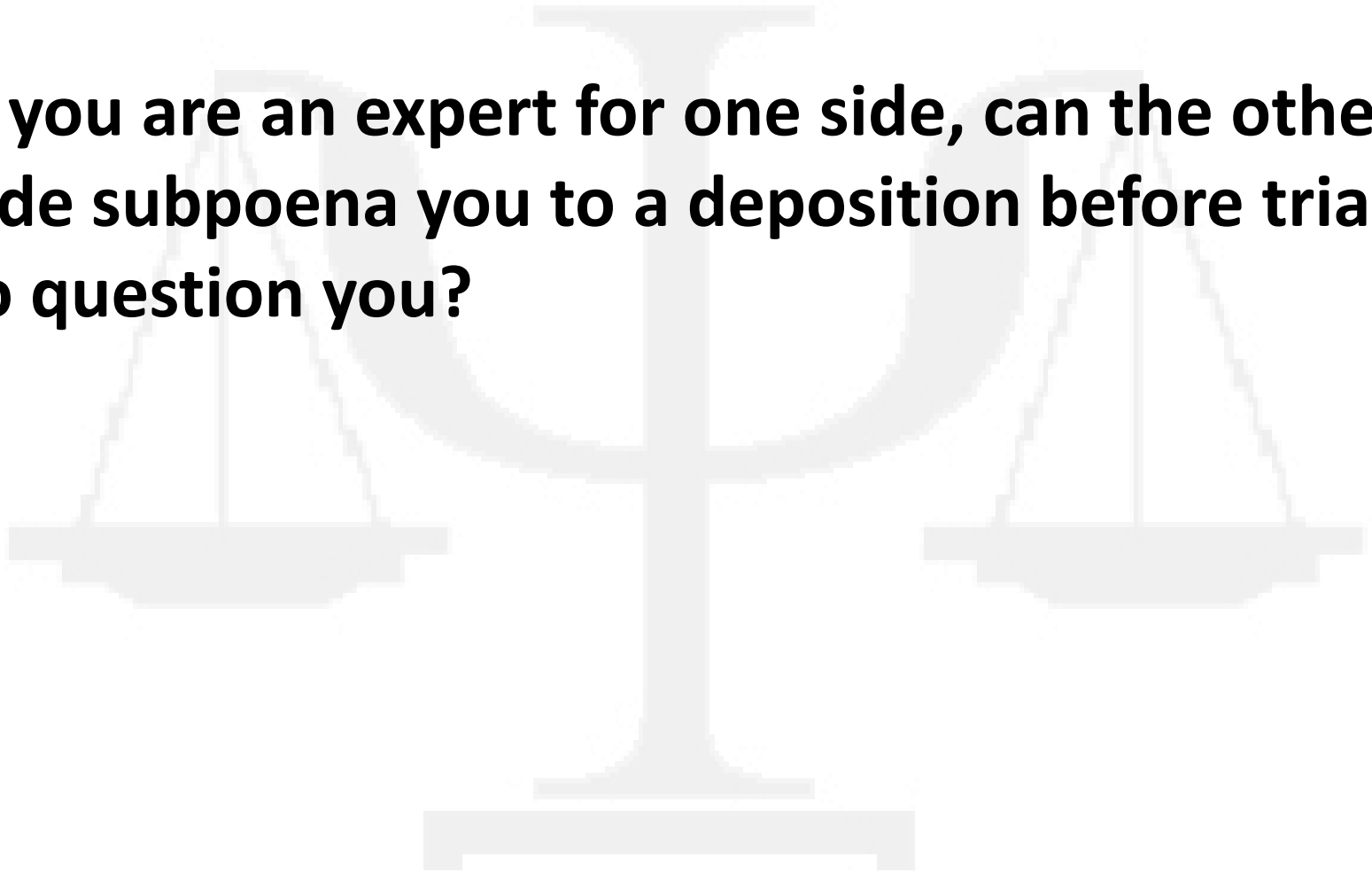
Who pays?



TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP)

Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this rule.

If you are an expert for one side, can the other side subpoena you to a deposition before trial to question you?



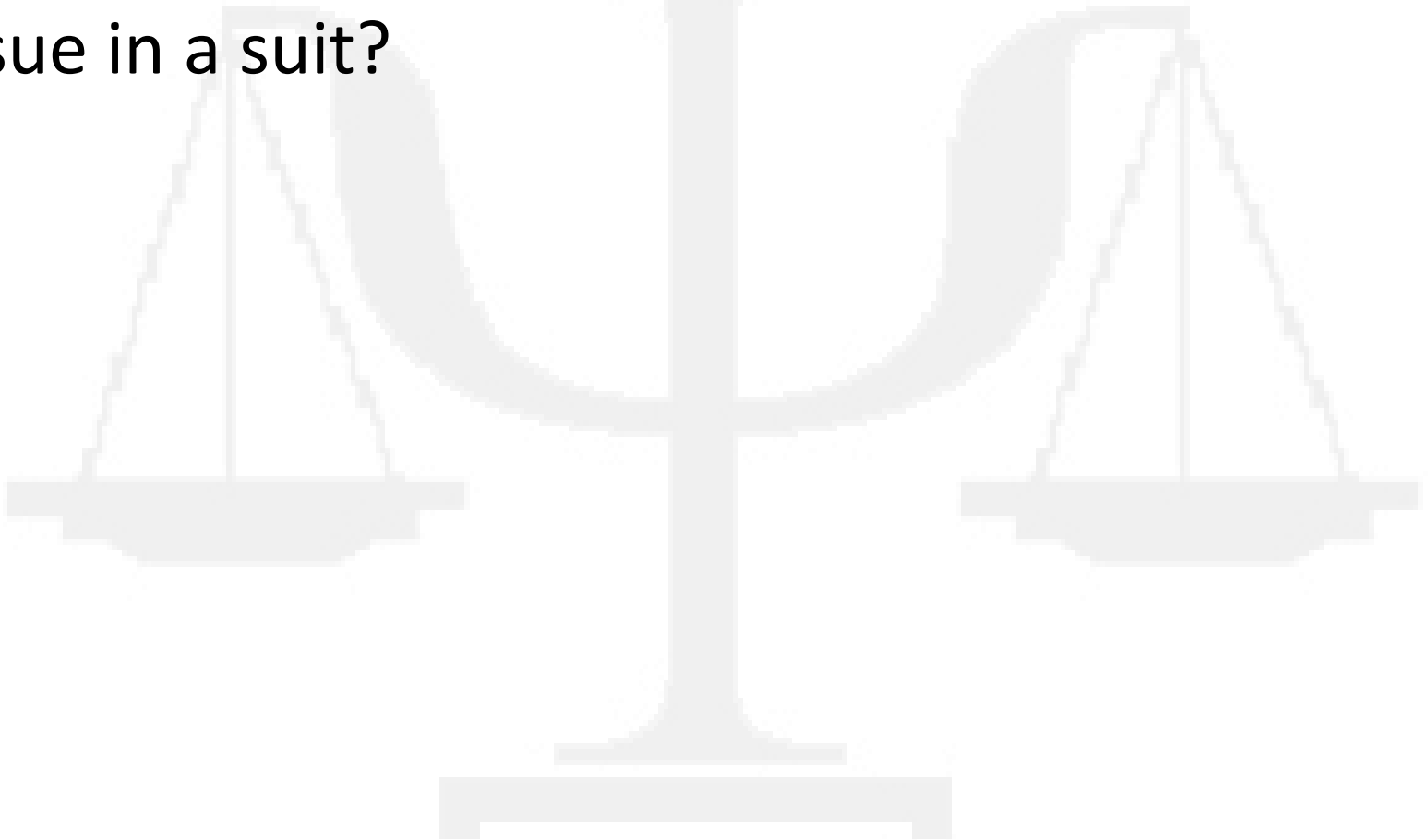
TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP)

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

...

(ii) A party may also depose any other party's expert witness expected to testify at trial.

Did your client put their emotional condition at issue in a suit?

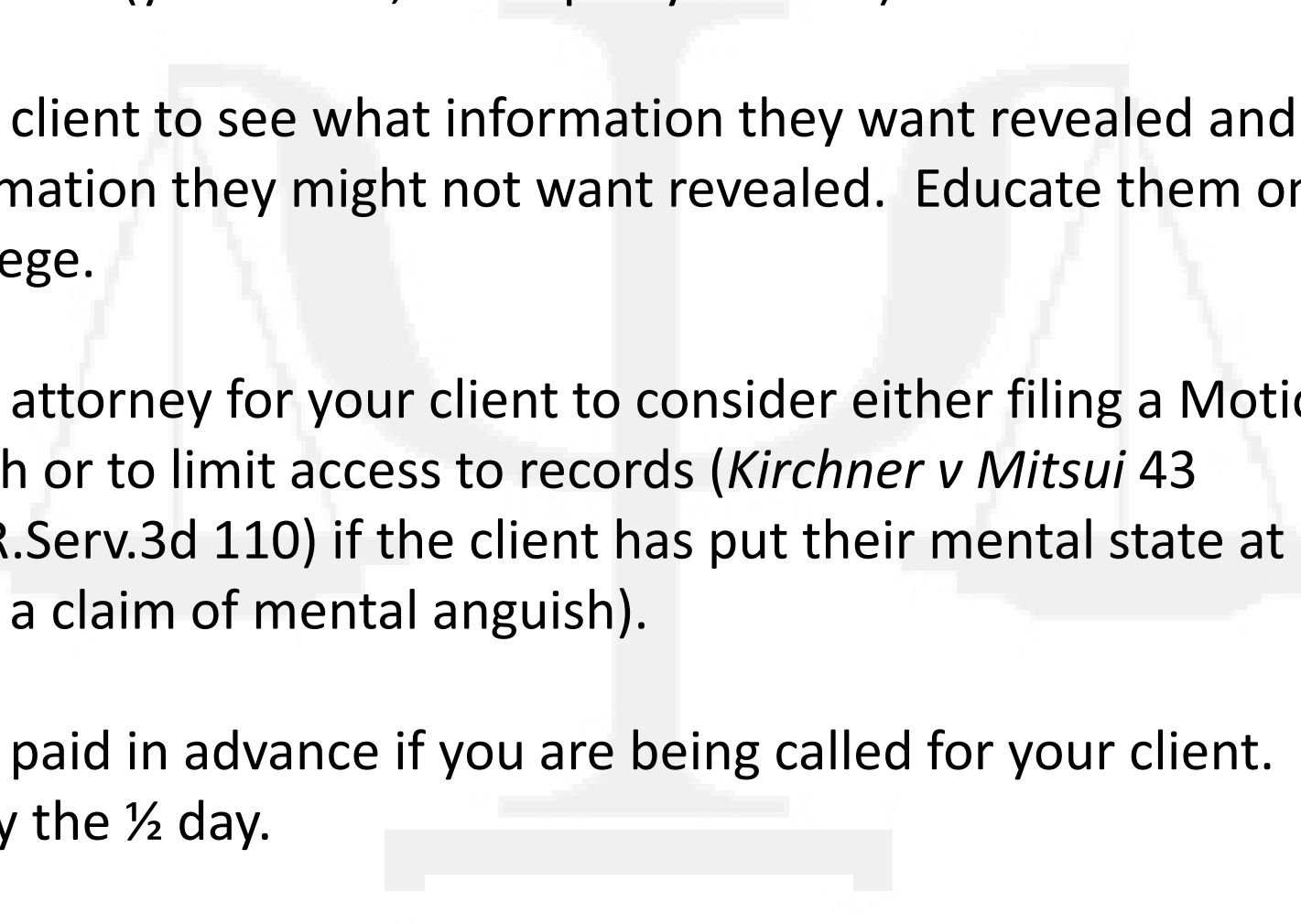


Did your client put their emotional condition at issue in a suit?

- If so you will want to meet with client to understand issues in suit and the benefits and risks of having your records in the proceedings
- Federal Court v Tennessee state courts
 - Does Jaffee apply? www.jaffee-redmond.org
- Consider a motion to quash or to limit access ([*Kirchner v Mitsui*](#) 43 Fed.R.Serv.3d 110)

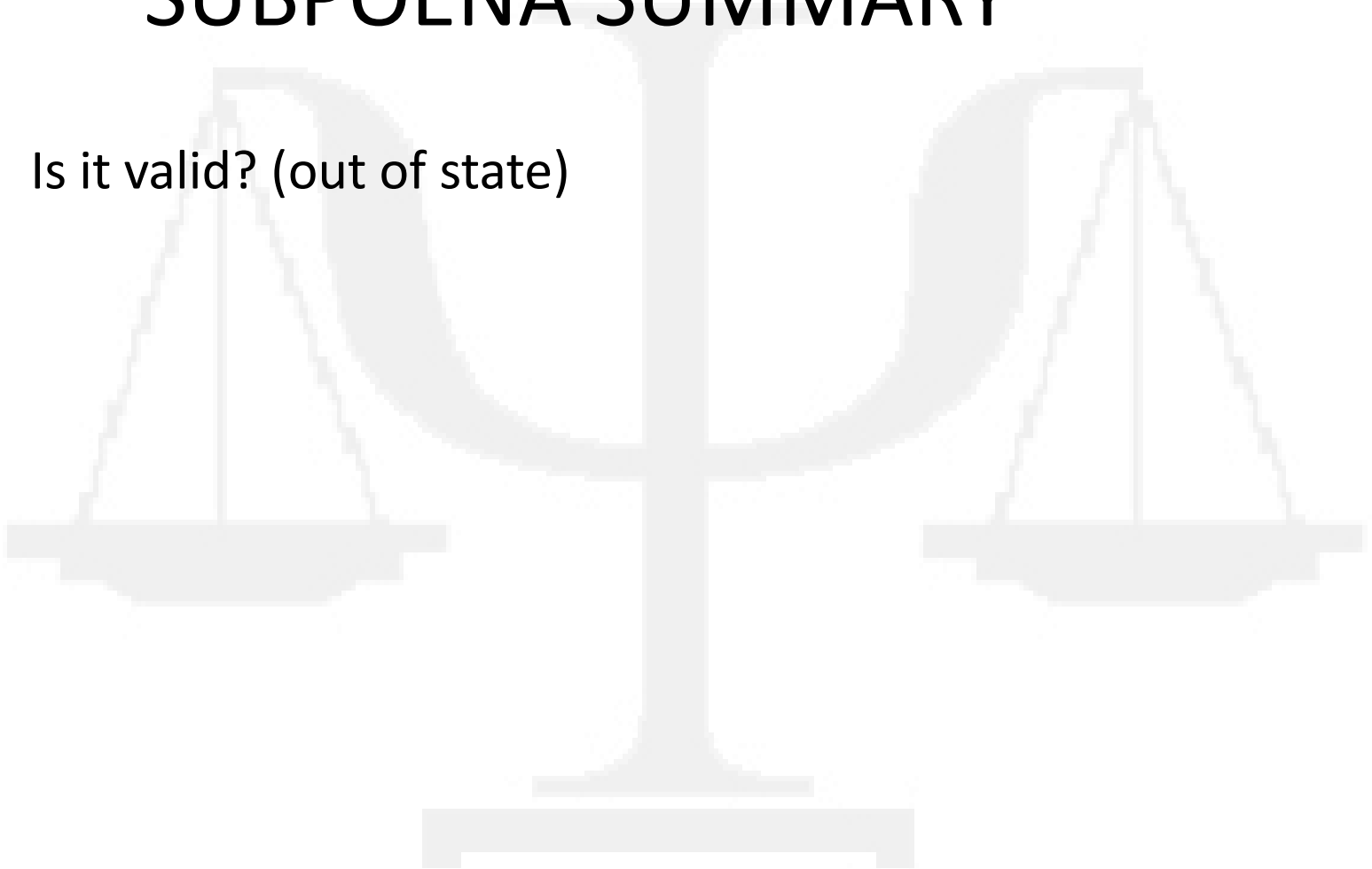
Are you subpoenaed by one spouse in a marital case?

- Discuss with both parties separately the benefit and risk of the evidence in your record/memory regarding them only (not spouse)
- If only one wants you to testify, do so only with careful practice to avoid all reference to the other party

- 
- Call attorney who subpoenaed you. Determine who they represent (your client, other party or both).
 - Call client to see what information they want revealed and what information they might not want revealed. Educate them on their privilege.
 - Call attorney for your client to consider either filing a Motion to Quash or to limit access to records (*Kirchner v Mitsui* 43 Fed.R.Serv.3d 110) if the client has put their mental state at issue (e.g., a claim of mental anguish).
 - Get paid in advance if you are being called for your client. Most bill by the ½ day.
 - If you don't want to go to court, tell them so citing TCA 24-9-101 and have them schedule a deposition. Don't show for the trial.

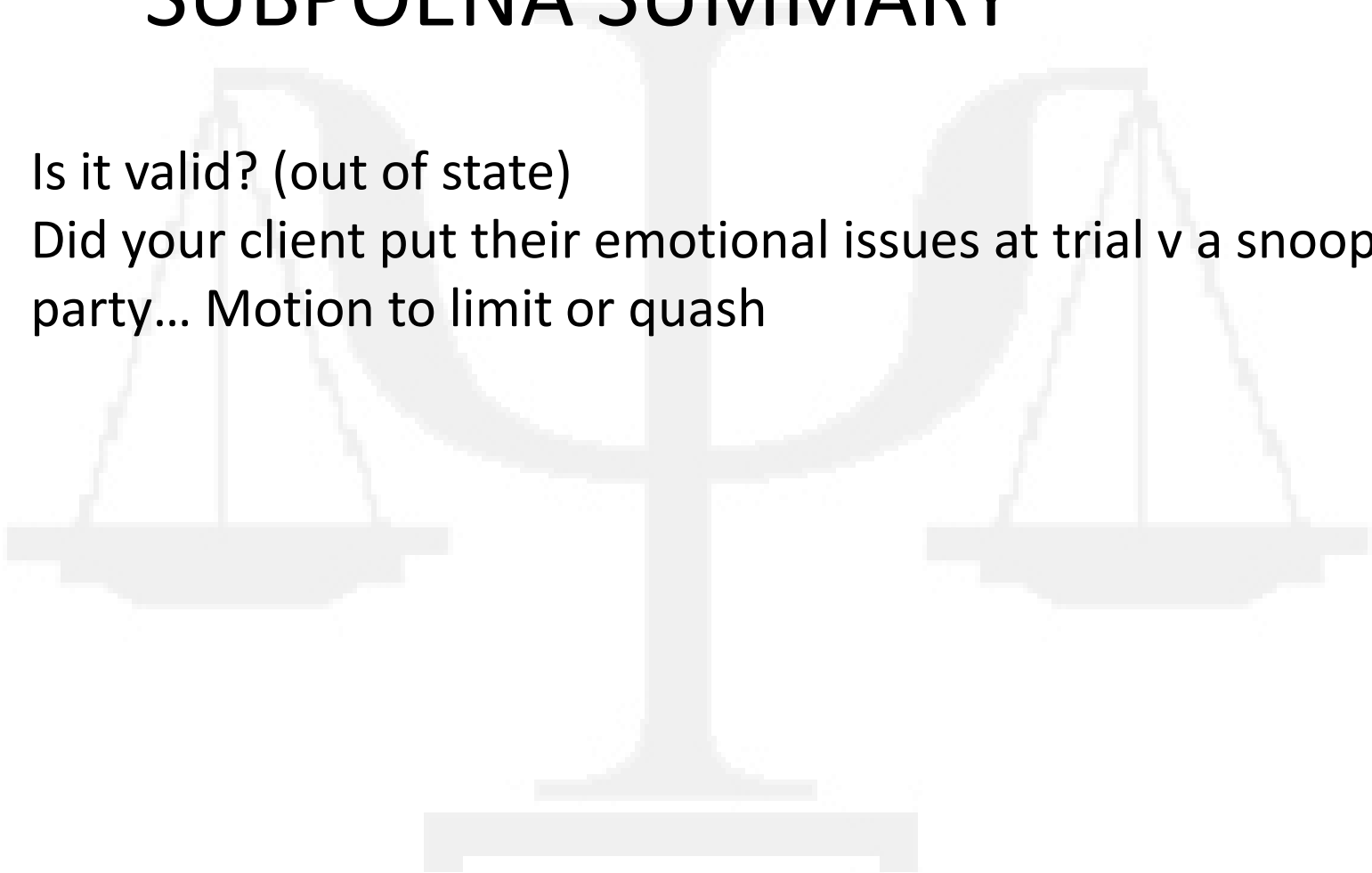
SUBPOENA SUMMARY

1. Is it valid? (out of state)



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2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash



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2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash
3. Does privileged communication apply.... Motion to Quash

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4. Is it for trial or for deposition... don't have to testify for trial (unless you are an expert)

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5. Educate client on Jaffee and future of Tennessee access to therapist records
6. Practice testimony if only one spouse grants permission.
7. Get paid for testimony, in advance!

Confidentiality

Jaffee

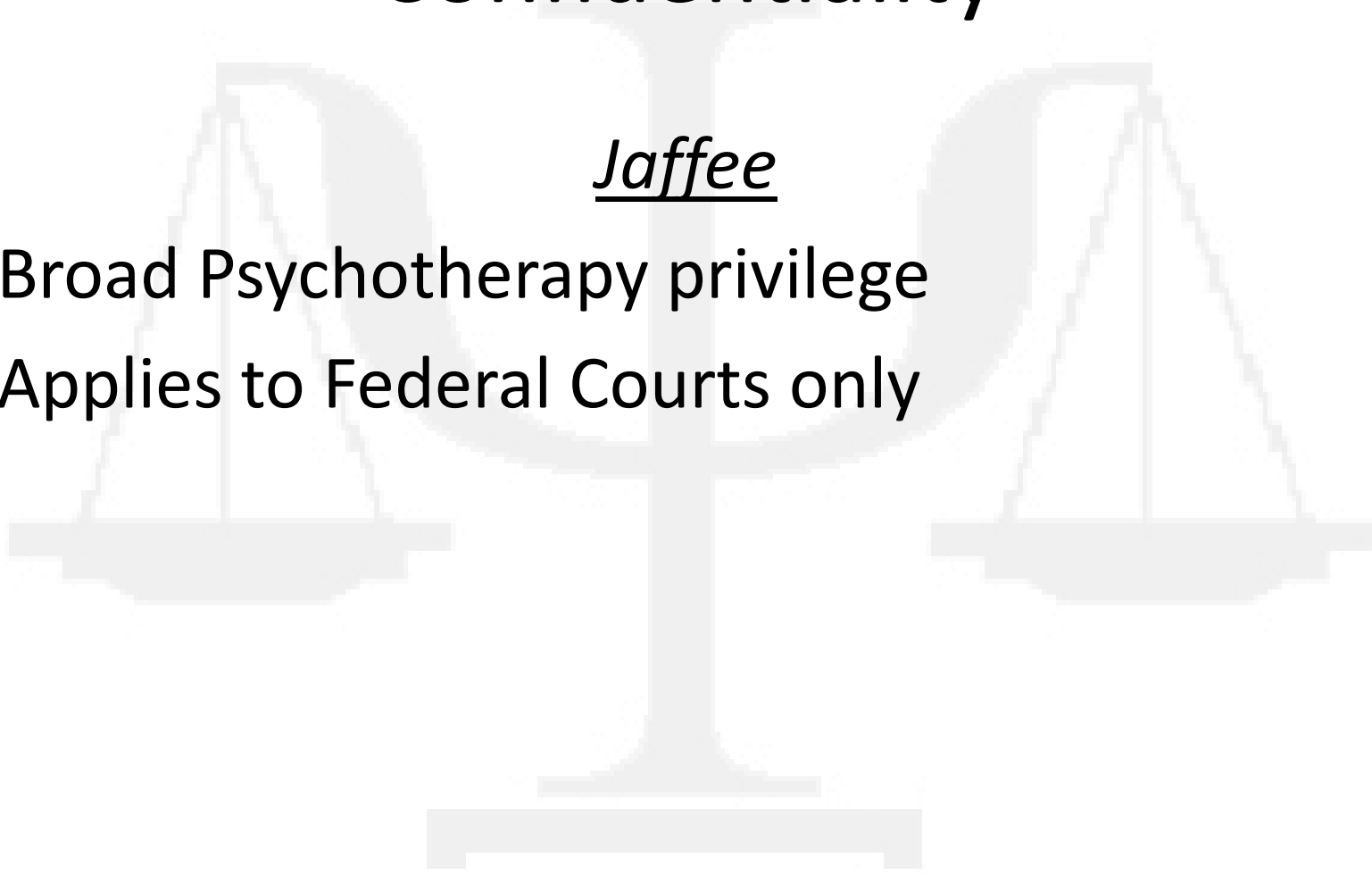
- Broad Psychotherapy privilege



Confidentiality

Jaffee

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- Applies to Federal Courts only



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Confidentiality

Jaffee

- Broad Psychotherapy privilege
- Applies to Federal Courts only
- Can be used in state courts to argue a new privilege in state courts ought to be created
- Can be used in state courts to argue that limitations on access to psychotherapy notes (selective redactions) should be granted

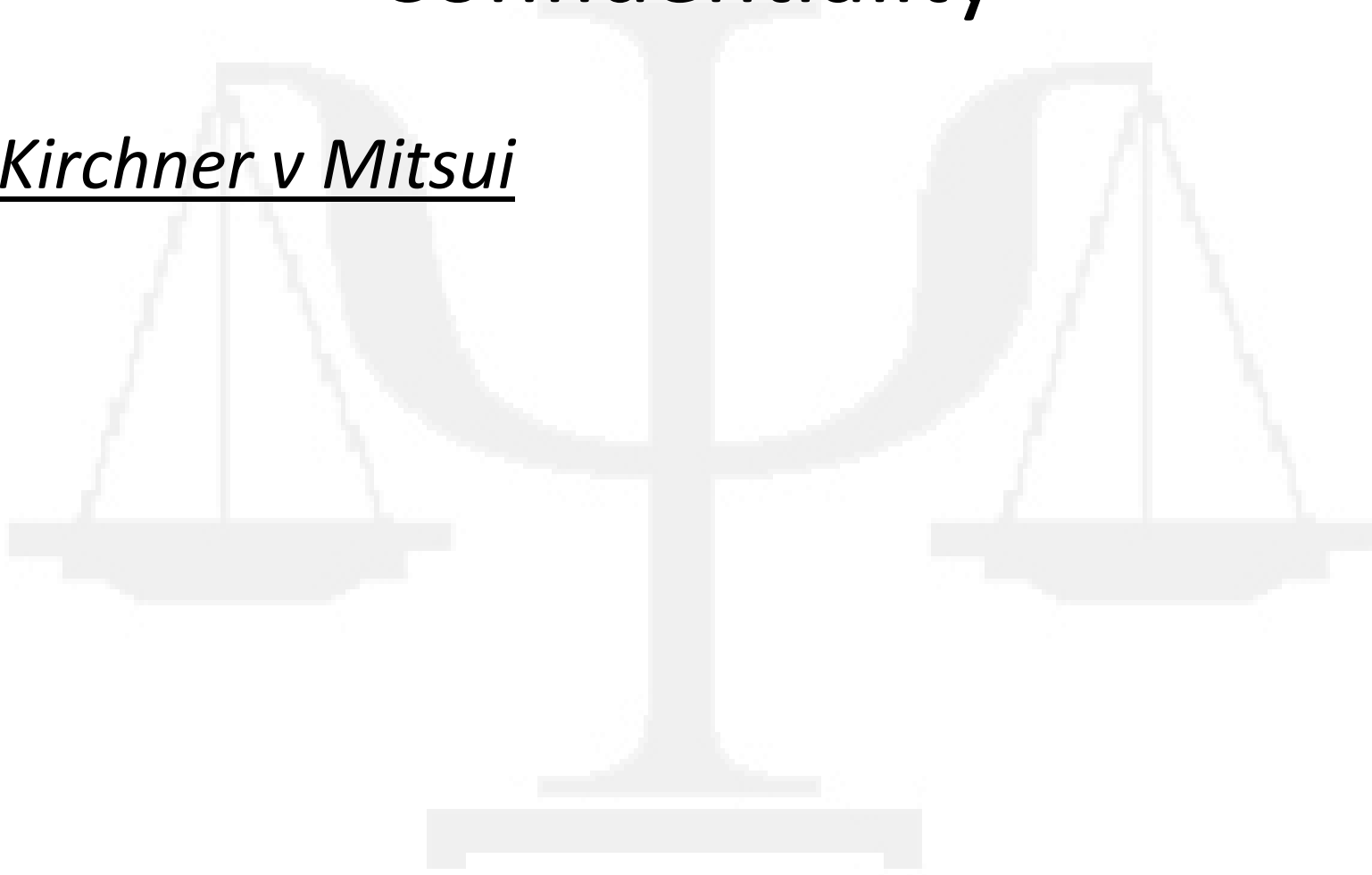
Confidentiality

- *Kirchner v Mitsui*



Confidentiality

- *Kirchner v Mitsui*



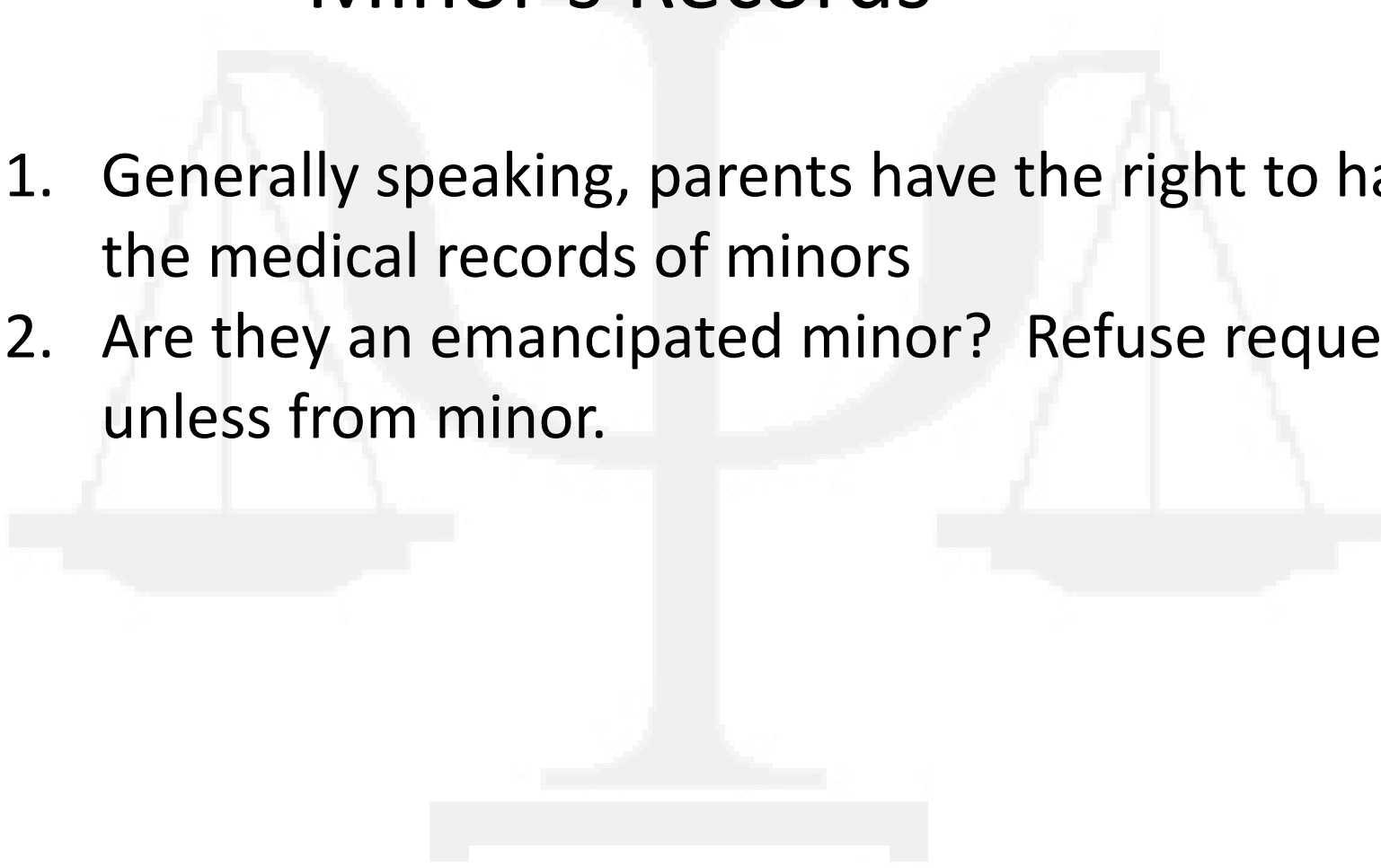
Minor's Records

1. Generally speaking, parents have the right to have the medical records of minors



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3. Is the requestor a “personal representative” (parent, legal guardian, guardian *ad litem*)

Minor's Records

1. Generally speaking, parents have the right to have the medical records of minors
2. Are they an emancipated minor? Refuse request unless from minor.
3. Is the requestor a “personal representative” (parent, legal guardian, guardian ad litem)
4. Not a HIPPA violation

Minor's Records

HIPPA violations #1: [45 CFR 164.502\(g\)](#)

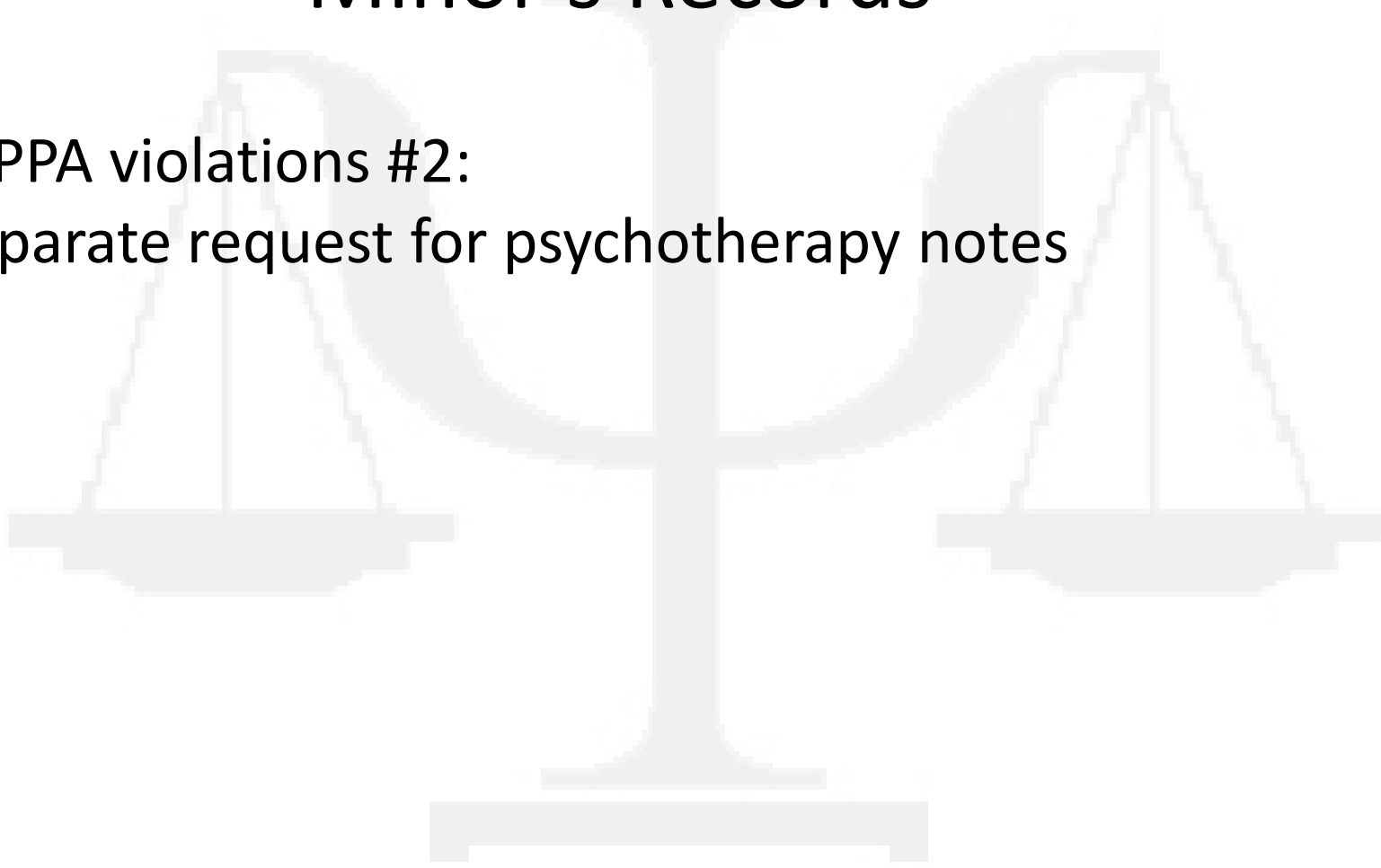
If (i or ii) and iii, then deny request

- i. If minor has or may be subject to domestic violence, abuse or neglect by same personal representative, or
- ii. Treating the requester as a personal representative could endanger the individual, and
- iii. Not in the best interests of minor to treat requester as a personal representative

Minor's Records

HIPPA violations #2:

Separate request for psychotherapy notes

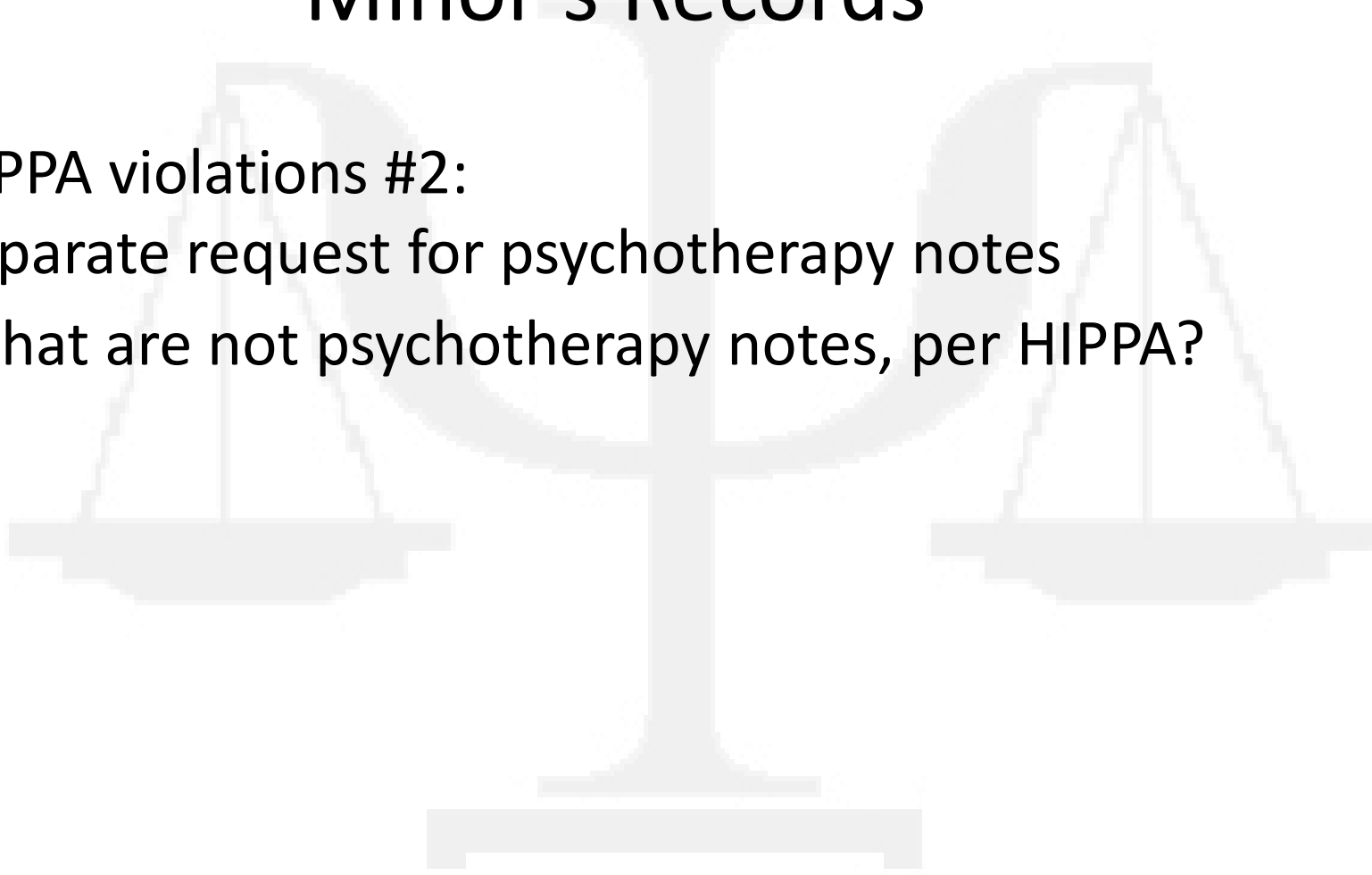


Minor's Records

HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?



Minor's Records



HIPPA violations #2:

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What are not psychotherapy notes, per HIPPA?

Date/time/length of treatment

Minor's Records



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Diagnosis, GAF, modality

Minor's Records



HIPPA violations #2:

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Minor's Records



HIPPA violations #2:

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What are not psychotherapy notes, per HIPPA?

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Clinical tests

Minor's Records



HIPPA violations #2:

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Clinical tests

Prognosis/progress

Minor's Records



HIPPA violations #2:

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Symptoms

Clinical tests

Prognosis/progress

Treatment plan

Minor's Records

“Should a Psychotherapist be Compelled to Release an Adolescent’s Treatment Records to a Parent in a Contested Custody Case?” Professional Psychology: Research and Practice, 2009, Vol. 40, No. 6, 557-563

APA Ethics Guide 1.02 “if psychologists’ ethical responsibilities conflict with law, regulations, or other legal governing authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict”

Cases: emphasize harm to child

[website](#)

Minor's Records

TCA 33-8-202 Rights of child sixteen (16) years of age or older. —

(a) If a child with serious emotional disturbance or mental illness is sixteen (16) years of age or older, the child has the same rights as an adult with respect to outpatient and inpatient mental health treatment, medication decisions, confidential information, and participation in conflict resolution procedures under this title except as provided in part 3 of this chapter, or as otherwise expressly provided in this title. If the child's parent, legal guardian, legal custodian, or treating professional believes that the child's decision to terminate treatment, other than a request for discharge under chapter 6, part 2 of this title, will have severe adverse effects on the child, the conflict resolution procedures under chapter 2, part 6 of this title shall be used. **(b)** An outpatient facility or professional may provide treatment and rehabilitation without obtaining the consent of the child's parent, legal guardian, or legal custodian.

Minor's Records



Summary:

Release records generally but not...

1. If minor is emancipated
2. or 16 years or older and suffering from a serious mental condition
3. If the minor would be harmed by the release (HIPPA)
4. If in a contested custody situation

Minor's Records

Shaw v Shaw



HIPAA

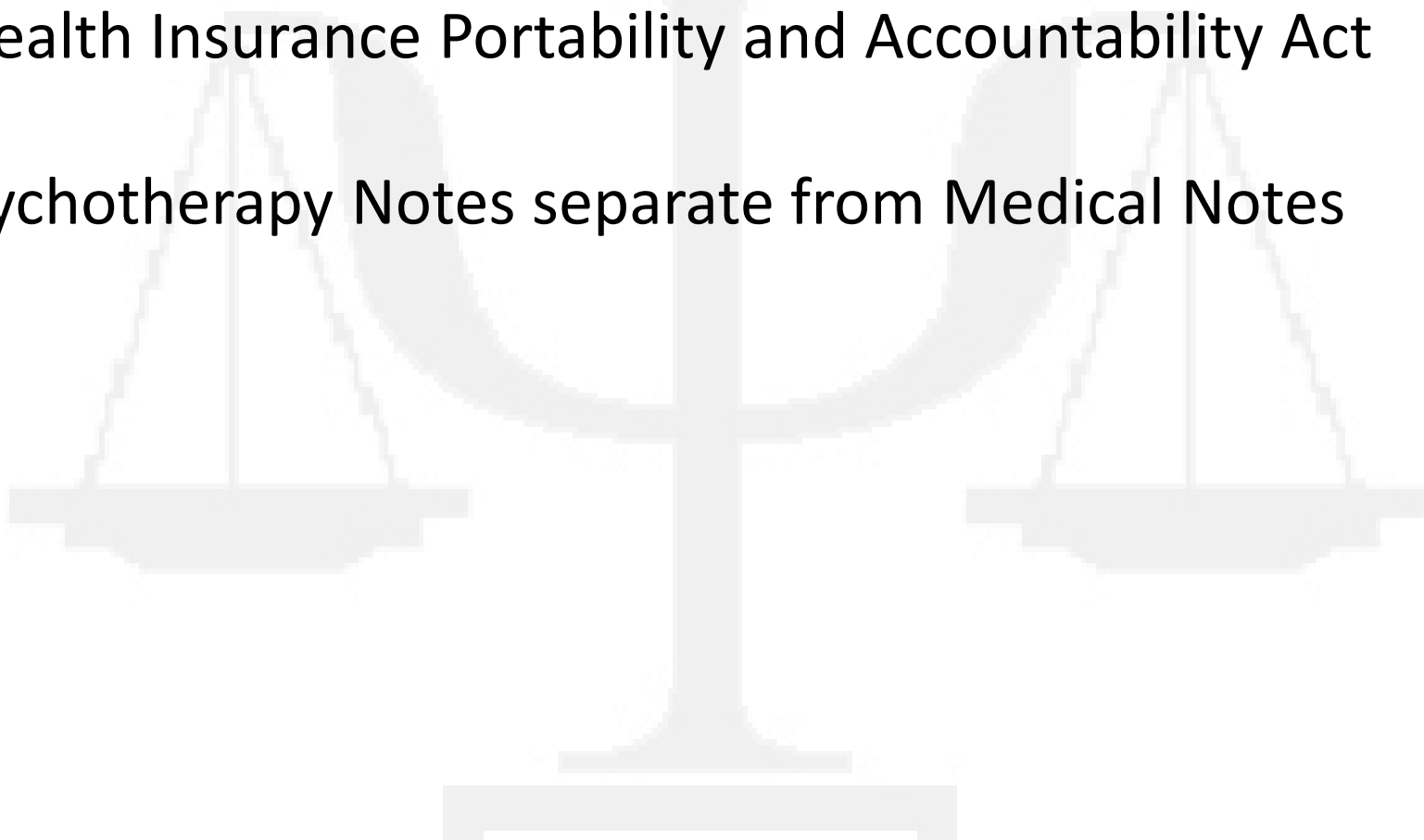
Health Insurance Portability and Accountability Act



HIPAA

Health Insurance Portability and Accountability Act

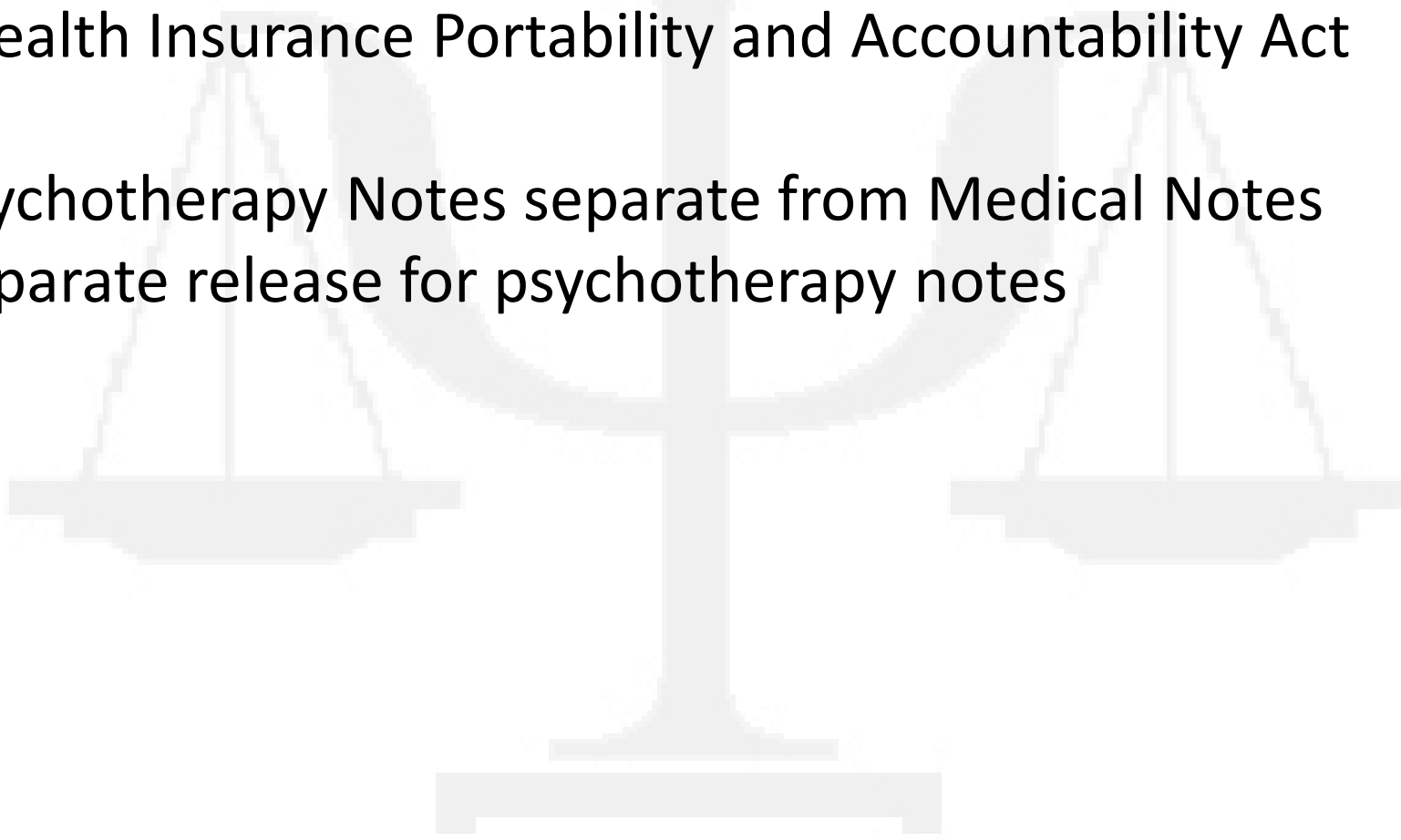
- Psychotherapy Notes separate from Medical Notes



HIPAA

Health Insurance Portability and Accountability Act

- Psychotherapy Notes separate from Medical Notes
- Separate release for psychotherapy notes



HIPAA



Health Insurance Portability and Accountability Act

- Psychotherapy Notes separate from Medical Notes
- Separate release for psychotherapy notes
- Minimal Disclosure

HIPAA



Health Insurance Portability and Accountability Act

- Psychotherapy Notes separate from Medical Notes
- Separate release for psychotherapy notes
- Minimal Disclosure
- Record Keeping of disclosures

HIPAA

Health Insurance Portability and Accountability Act

Psychotherapy notes exclude:

- a. RX
- b. start/stop times
- c. modality and frequency of treatment
- d. results of clinical tests
- e. diagnosis
- f. functional status (GAF)
- g. tx plan
- h. symptoms
- i. prognosis and progress to date

HIPAA

Health Insurance Portability and Accountability Act

[45 CFR 164.502\(g\)](#)

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Minor's Sexuality



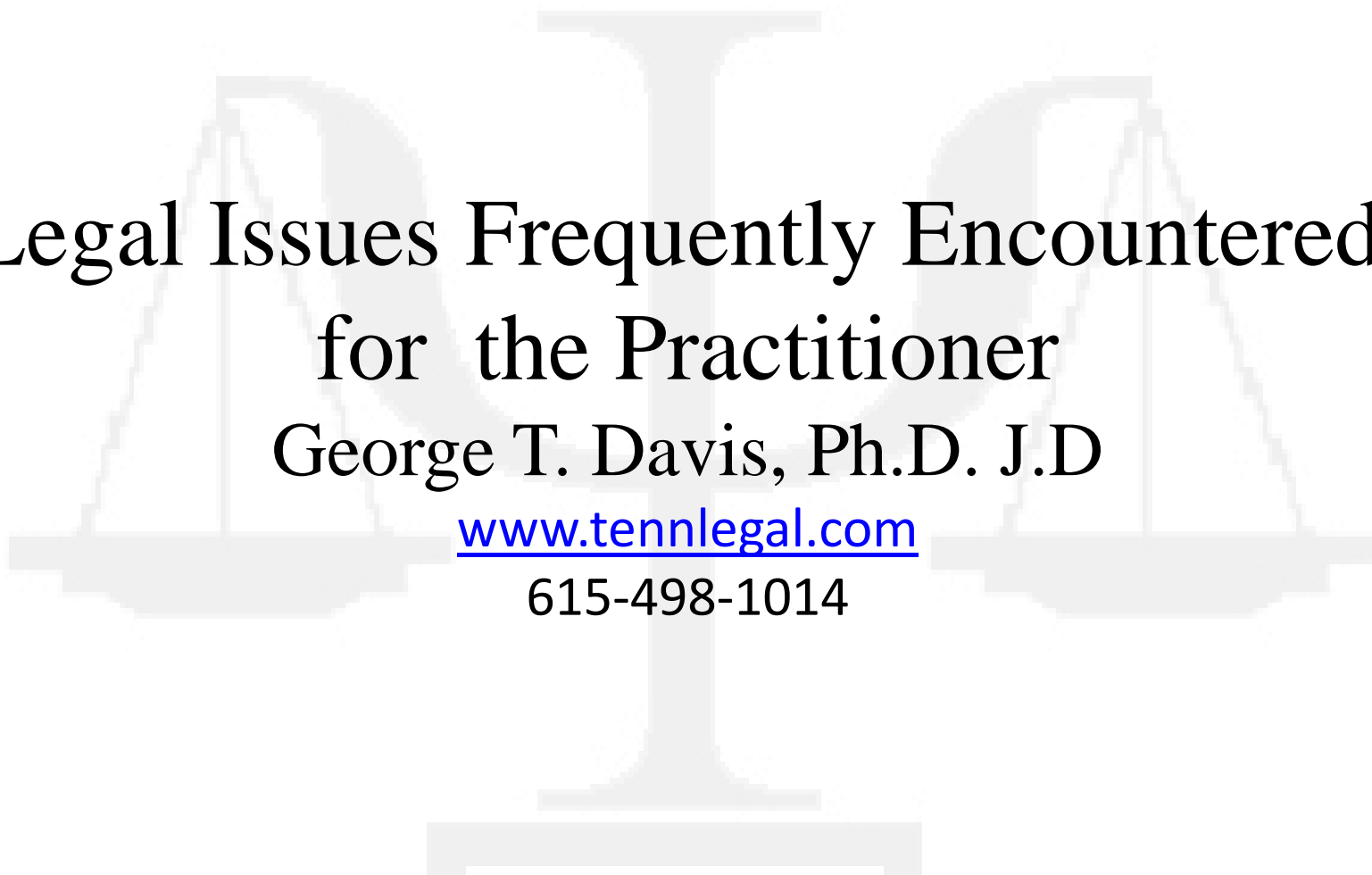
Minor's Decision Tree



Overview: Week 3



- Suicide
 - Risk factors, risk reduction, Cases
- Custody reports, PAS
 - *Ghayoumi v McMillan*
 - *Chaffin v Ellis*
- Electronic communications
 - E-risk Guidelines
 - AMA Guidelines Electronic Communication



Legal Issues Frequently Encountered for the Practitioner

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