



LEGAL ISSUES & CHALLENGES FACING TENNESSEE MENTAL HEALTH PRACTITIONERS

GEORGE T. DAVIS, PH.D. J.D.
NOVEMBER 1, 2012

Background



Ph.D. Clinical Psychology 1984

J.D. Law 1999

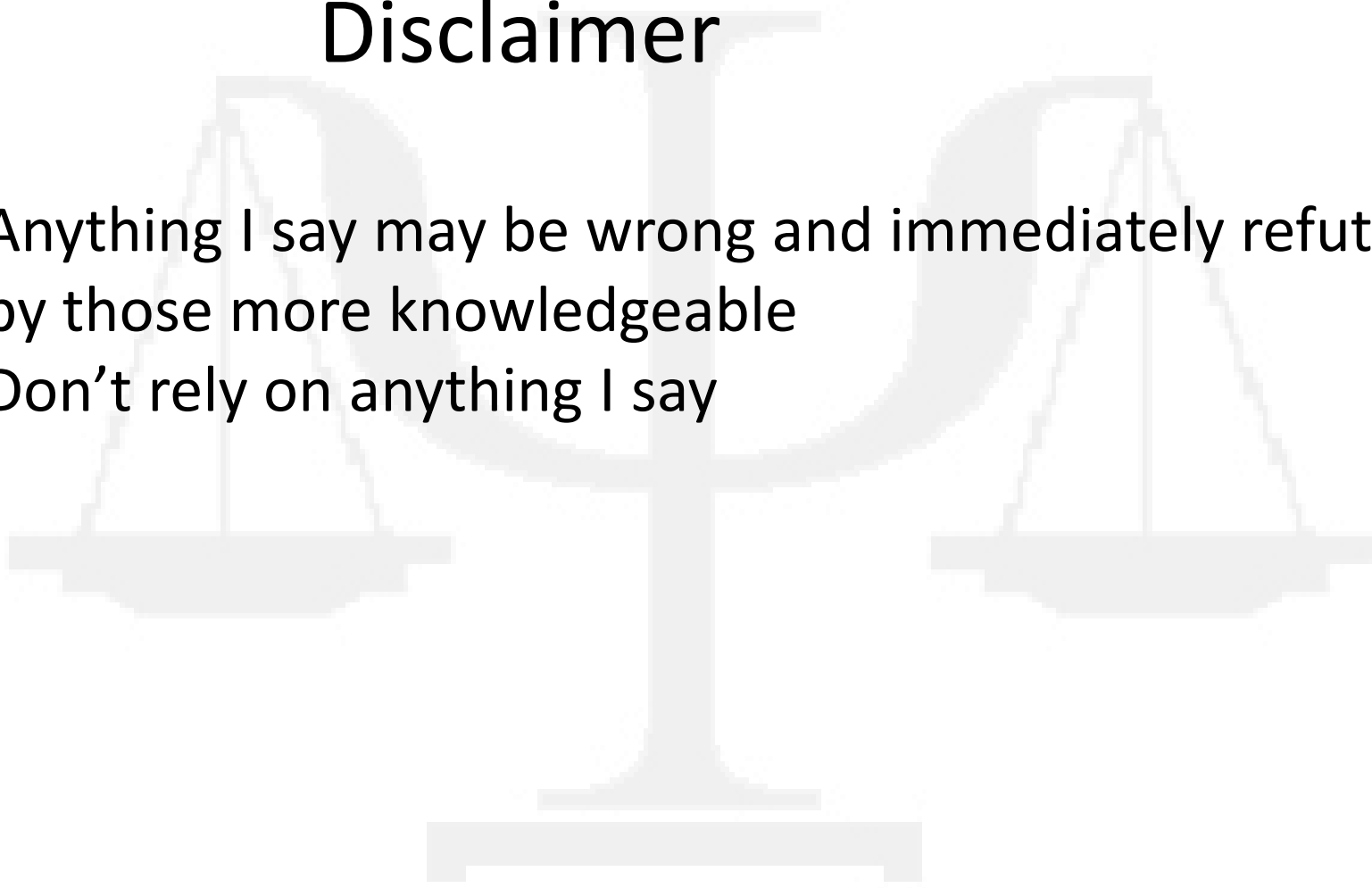
Consultant with SSA disability determination since 1986

Consultant with Office of Hearings and Adjudication
(FL, MS, KS, TN)

Adjunct Professor at Vanderbilt/Peabody Human
Development and Counseling Program since 2006

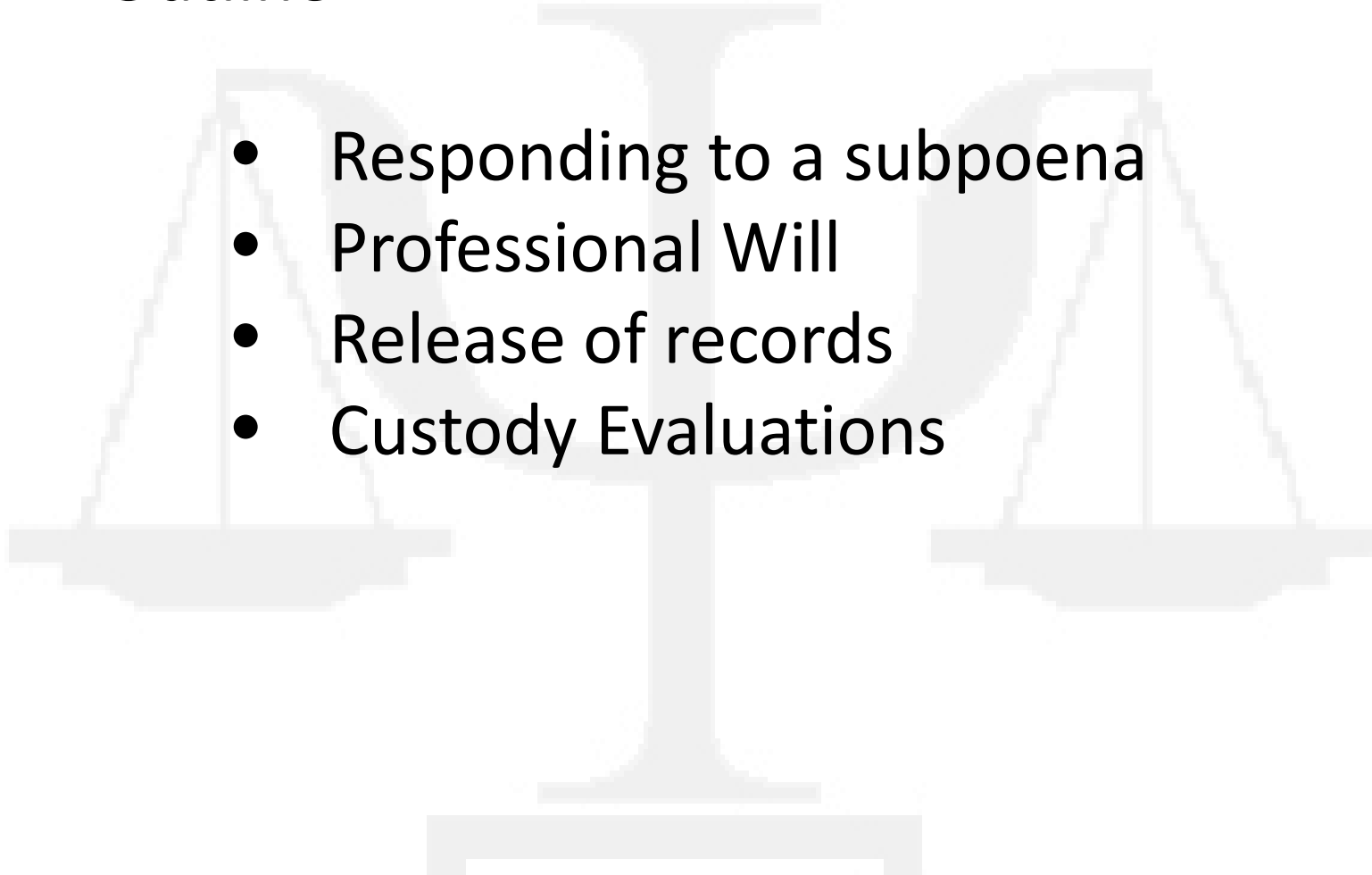
Disclaimer

- Anything I say may be wrong and immediately refuted by those more knowledgeable
- Don't rely on anything I say



Outline

- Responding to a subpoena
- Professional Will
- Release of records
- Custody Evaluations





SUBPOENA

Do I have to go?

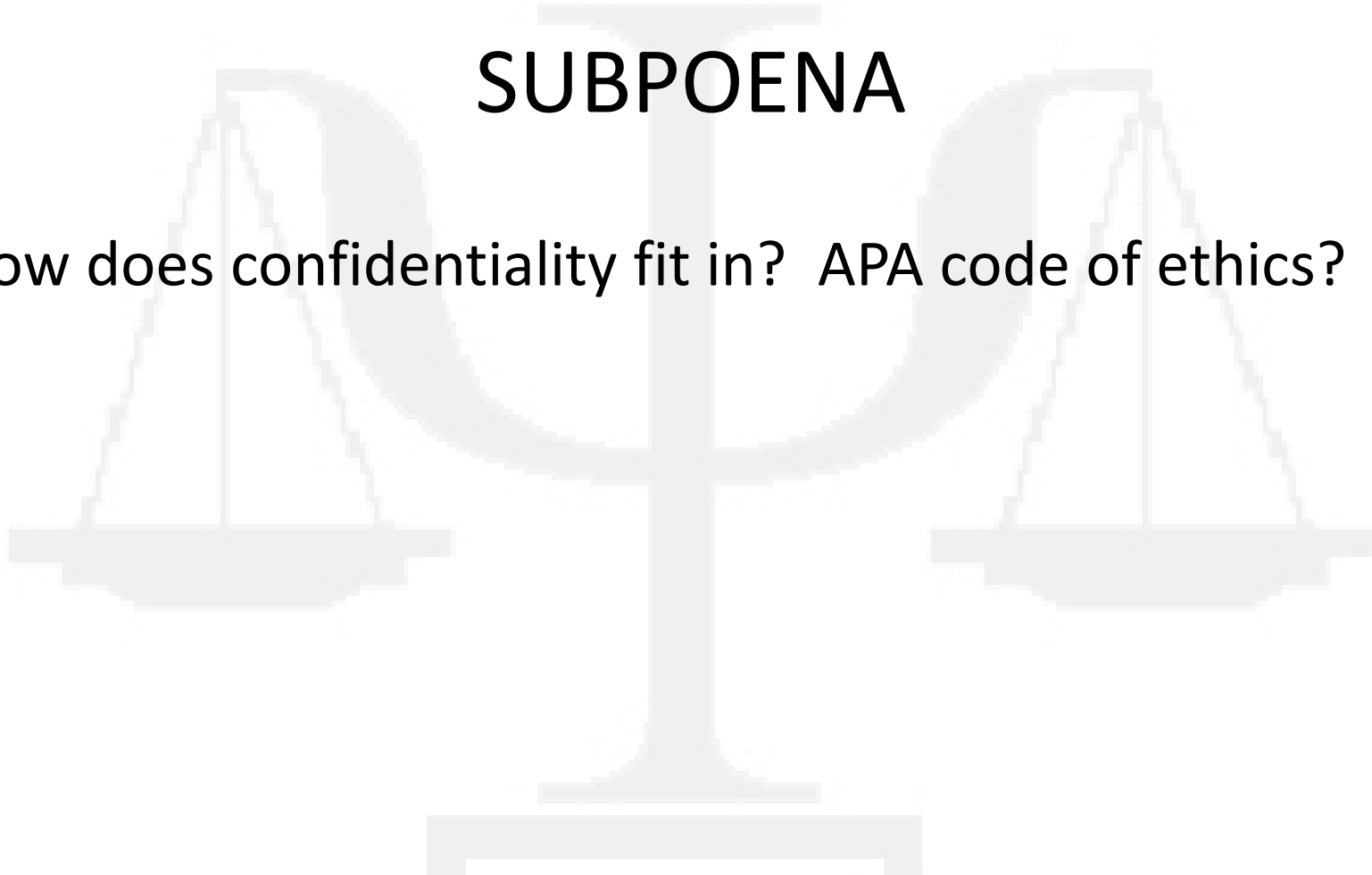
Is it valid?

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

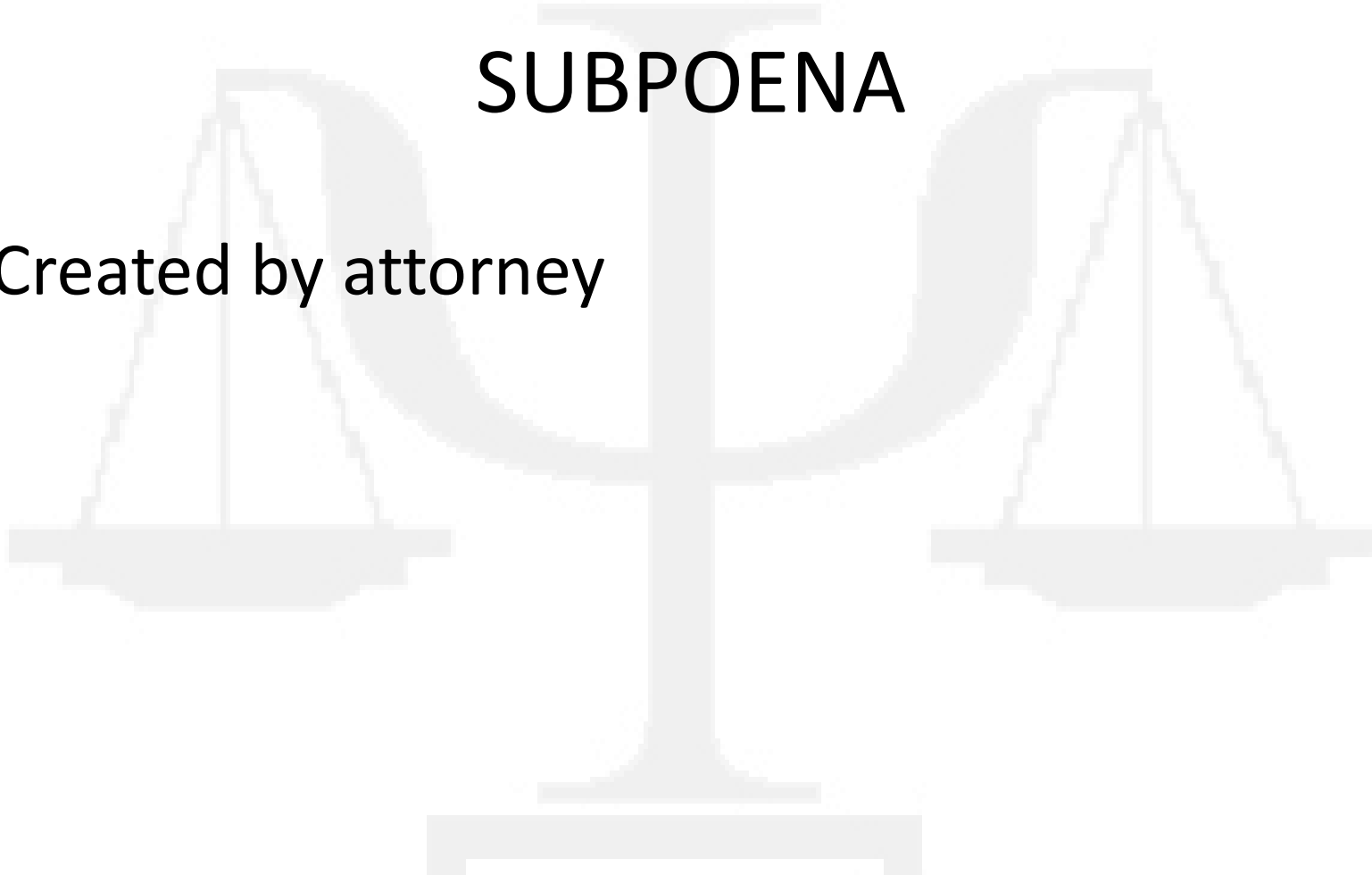
The obligation of the individual to attend the court as a witness is enforced by a process of the court, particular process being the subpoena ad testificandum, commonly called the subpoena in the United States. This writ, or form, commands the witness, under penalty, to appear at a trial to give testimony.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

STATE OF TENNESSEE DAVIDSON COUNTY Circuit Court	<h1 style="margin: 0;">SUBPOENA</h1>	CIVIL ACTION DOCKET NO. 9D-1234
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PLAINTIFF SMITH, BOB	DEFENDANT vs. SMITH, SALLY
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TO: (NAME, ADDRESS & TELEPHONE NUMBER OF WITNESS) George Davis, Ph.D. 6307 Ramsgate Court Brentwood, TN 37027 615-498-1014	Method of Service: <input type="checkbox"/> Davidson County Sheriff <input checked="" type="checkbox"/> Personal Service <input type="checkbox"/> Out of County Sheriff
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

You are hereby commanded to appear at the time, date and place specified for the purpose of giving testimony. In addition, if indicated, you are to bring the items listed. Failure to appear may result in contempt of court which could result in punishment by fine and/or imprisonment as provided by law.

TIME 11/15/12	DATE 9am	ITEMS TO BRING: all records, testing
PLACE Circuit Court Clerk 1 Public Square, Room 302 Nashville, TN 37201 (OR) Dewey, Cheatem & Howe 123 Main Street Nashville, TN 37219		<input type="checkbox"/> Additional List Attached

This subpoena is being issued on behalf of <input type="checkbox"/> PLAINTIFF <input checked="" type="checkbox"/> DEFENDANT	DATE ISSUED 11/1/12
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Attorney: (NAME, ADDRESS & TELEPHONE NUMBER) Attorney Dewey 123 Main Street Nashville, TN 37219	<u>RICHARD R. ROOKER</u> Circuit Court Clerk
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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



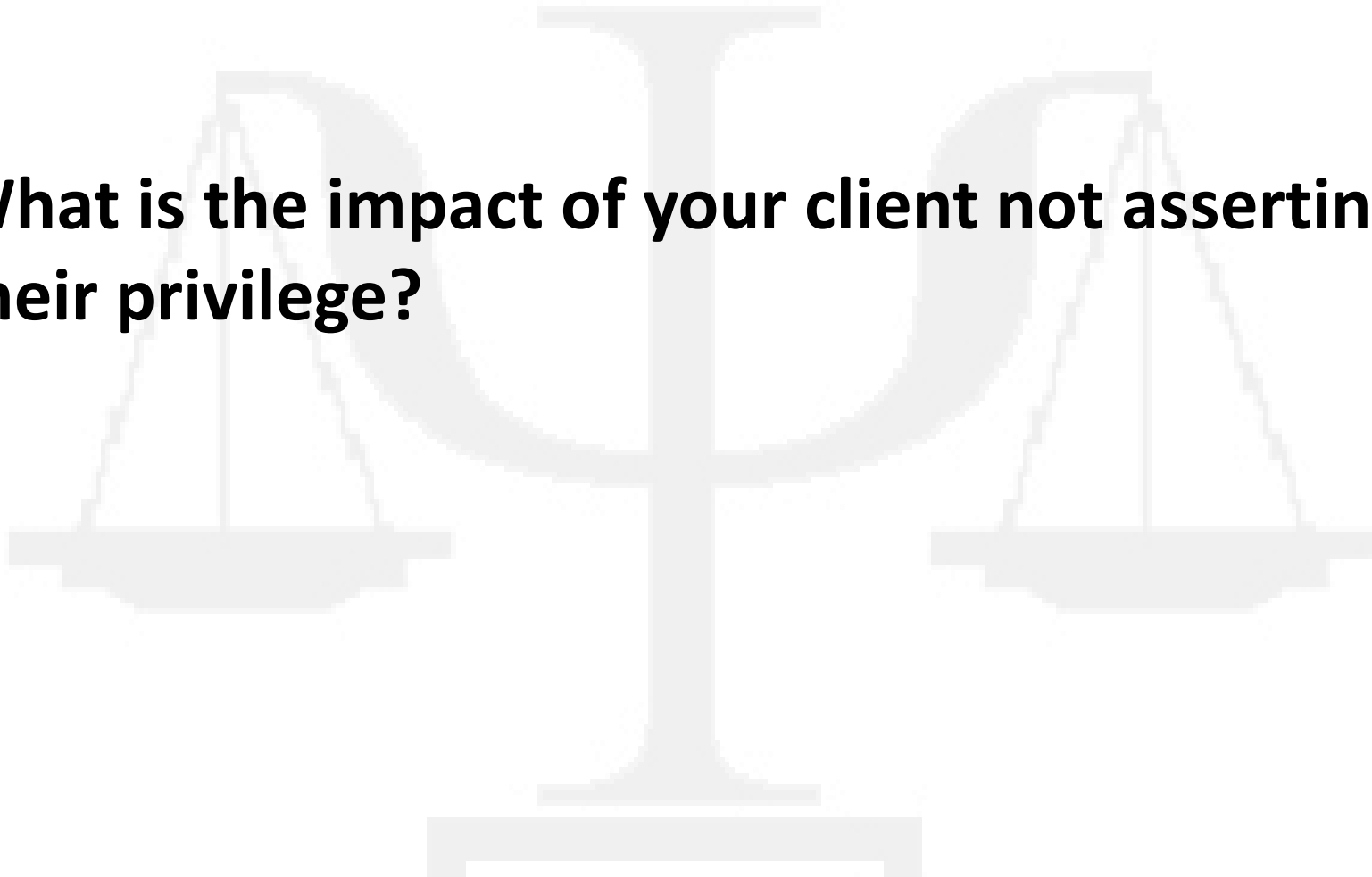
Who pays?



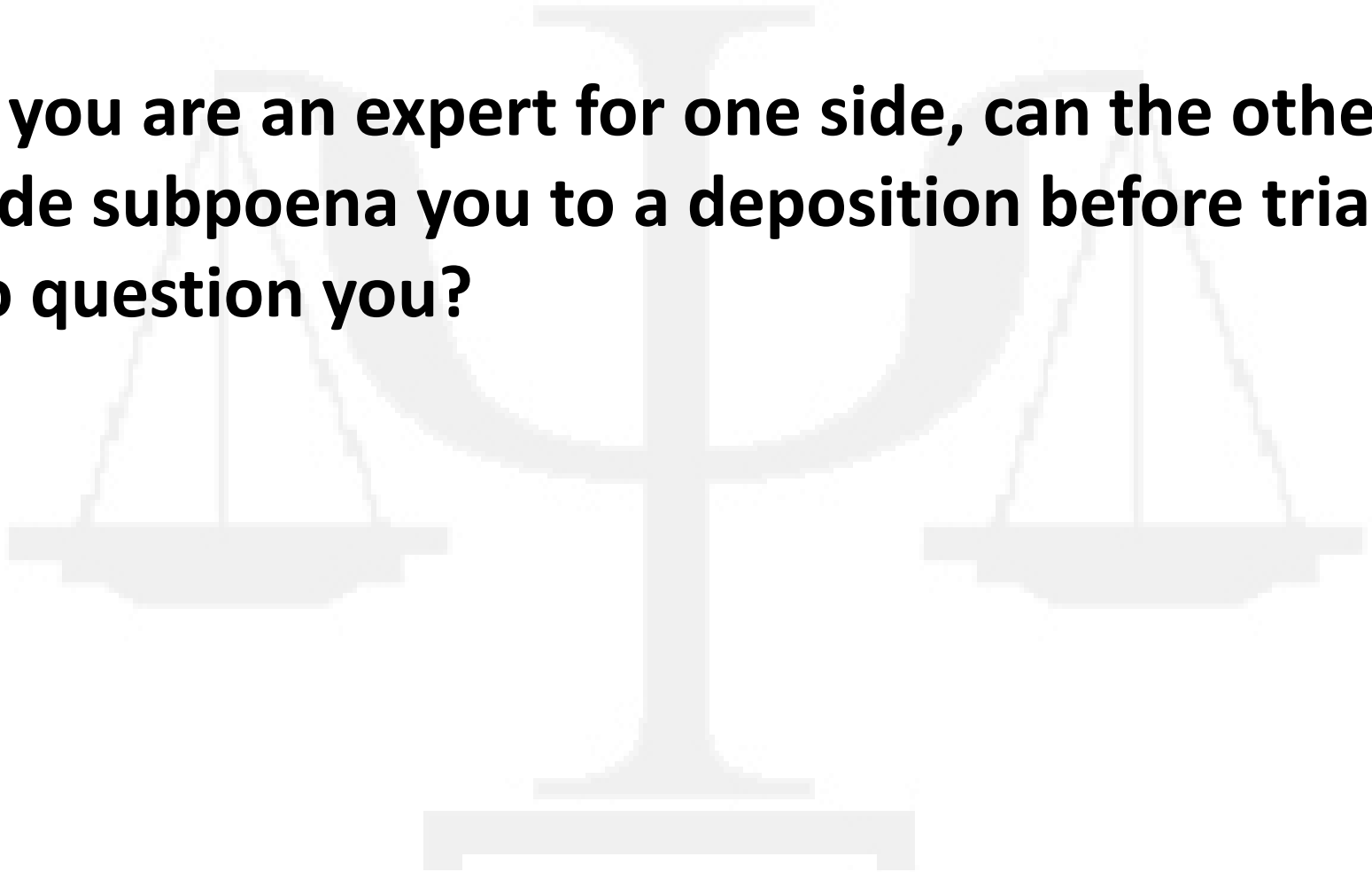
TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP)

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.

What is the impact of your client not asserting their privilege?



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). Give 7 working days to file objection; If no objection, the privilege is waived.
- Determine whether you are being called as a fact witness or expert witness
- Get paid in advance if you are being called for your client. Most bill by the ½ day if you are being called as an expert.

Expert Witness v. Fact Witness

Fact witness only tells what they heard, saw or experienced; they **cannot** give opinions.

An expert does not have to have any first hand experience with the parties. They testify based on professional standards and give opinions.

Expert Witness v. Fact Witness

Therapist as Expert Witness:

- Has to be qualified as an expert based on experience and training.
- In Federal Court must be listed ahead of time as expert.
- Has to be paid by those calling him/her to court based on prevailing rate/misplaced opportunity rate.
- Gives opinions regarding causation, future impairment
- Formulates opinions for trial/deposition
- Prepares for trial/deposition
- Should be objective, reporting on aspect for and against a case
- Paid by the other side to depose you

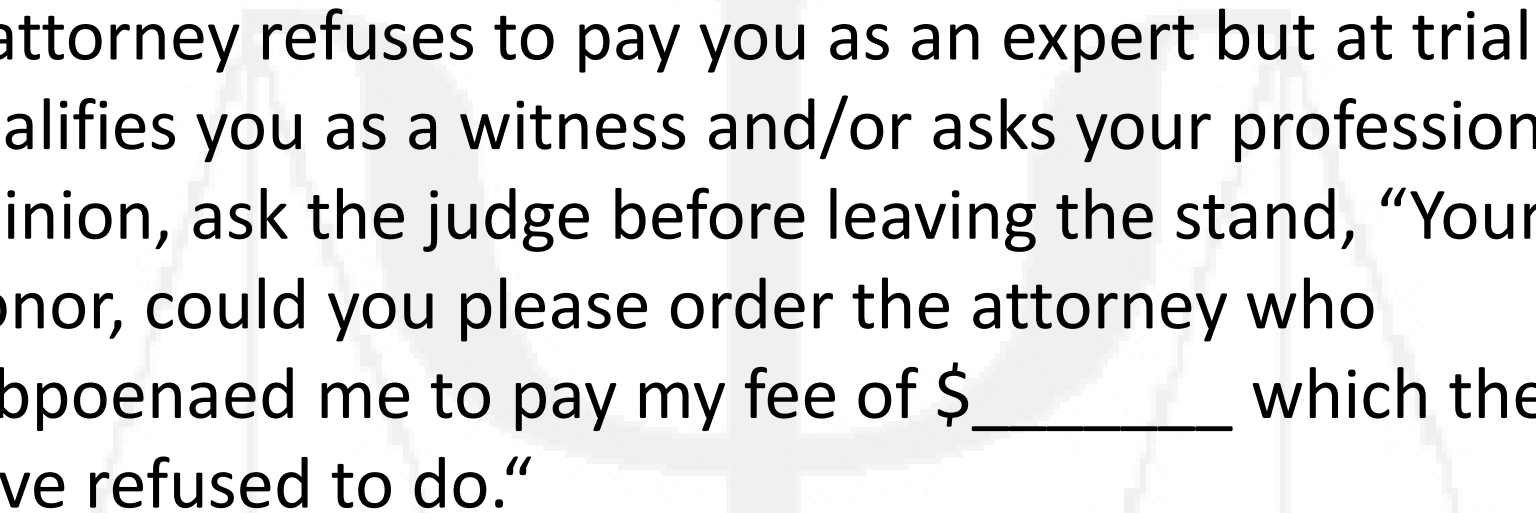
Expert Witness v. Fact Witness

Therapist as Fact Witness:

- Is not qualified as an expert based on experience and training.
- Is not listed ahead of time as expert.
- Is paid witness rate (\$40/day in Fed. Court) or not paid
- Only states what they know first hand, no opinions
- No preparation for trial/deposition
- Treating professional may form opinions during treatment, for the purposes of treatment. Cannot rely on specialized knowledge.
- Less objective, should acknowledge this to Court

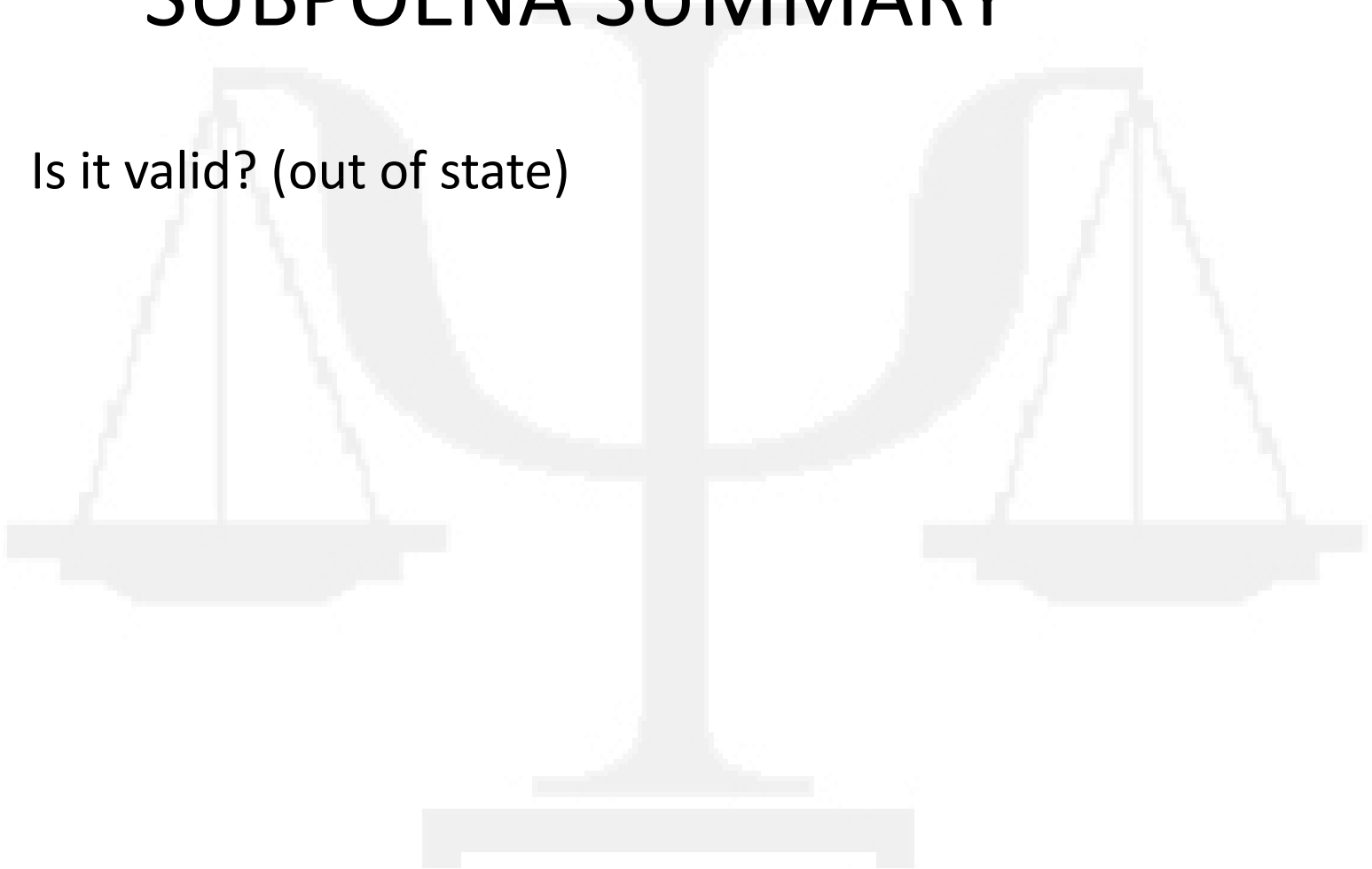
Therapist as Expert Witness

If attorney refuses to pay you as an expert but at trial qualifies you as a witness and/or asks your professional opinion, ask the judge before leaving the stand, “Your Honor, could you please order the attorney who subpoenaed me to pay my fee of \$_____ which they have refused to do.”



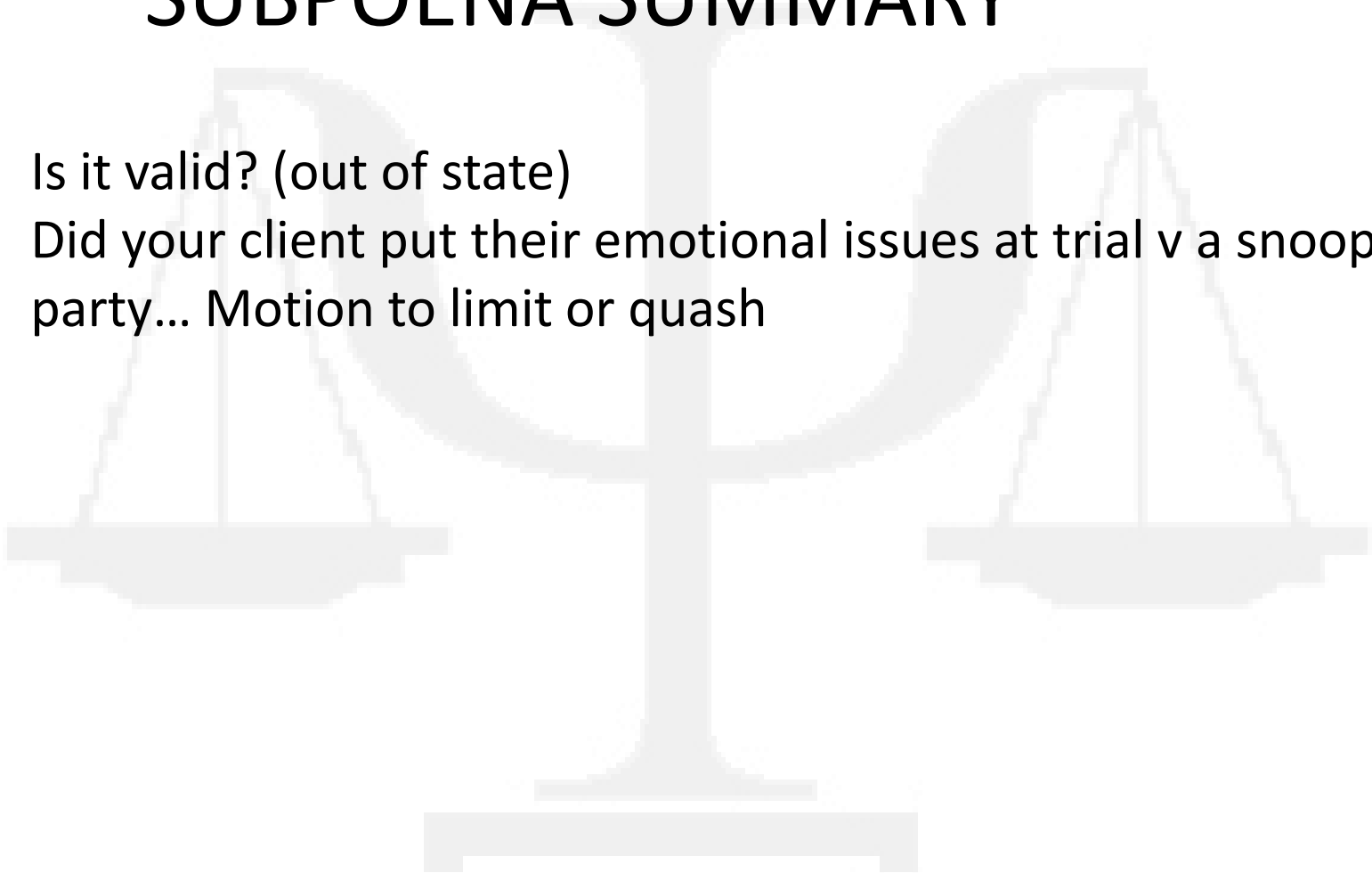
SUBPOENA SUMMARY

1. Is it valid? (out of state)



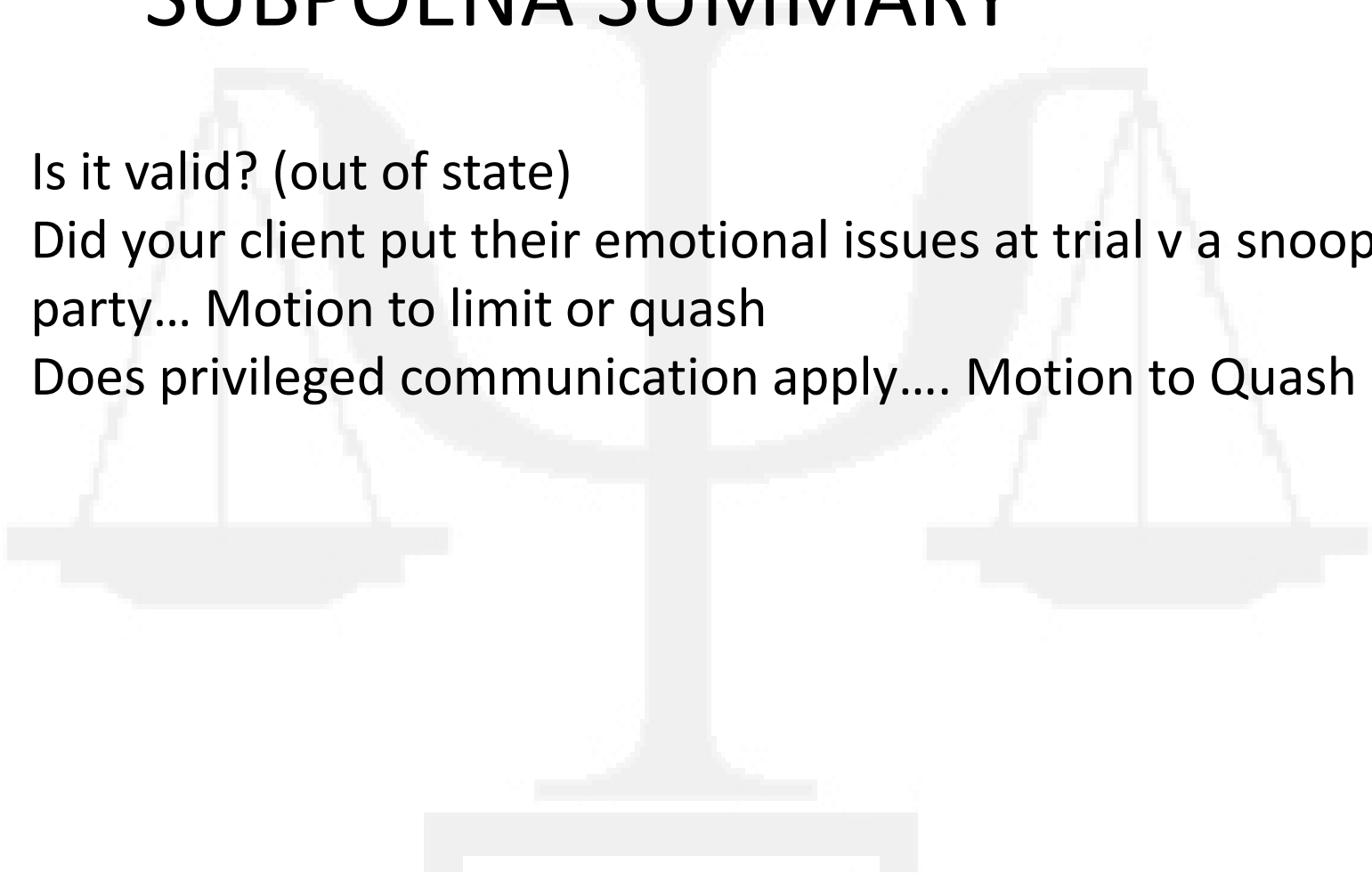
SUBPOENA SUMMARY

1. Is it valid? (out of state)
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



SUBPOENA SUMMARY



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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

SUBPOENA SUMMARY



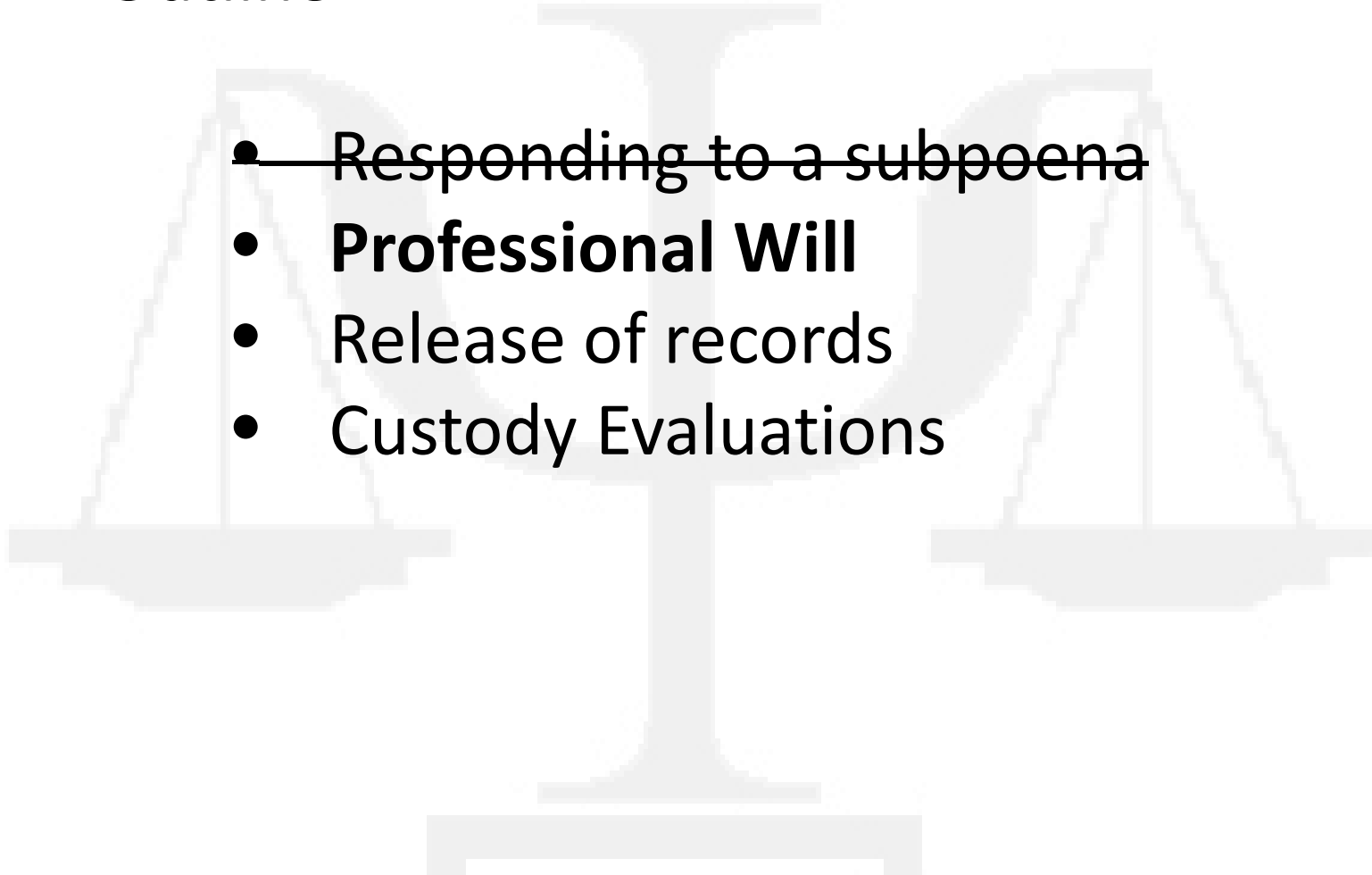
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6. Practice testimony if only one spouse grants permission.

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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
4. Is it for trial or for deposition... don't have to testify for trial (unless you are an expert)
5. Educate client on Jaffee and future of Tennessee access to therapist records
6. Practice testimony if only one spouse grants permission.
7. Clarify fact v. expert witness status
8. Get paid for testimony, in advance!

Outline

- ~~Responding to a subpoena~~
- **Professional Will**
- Release of records
- Custody Evaluations

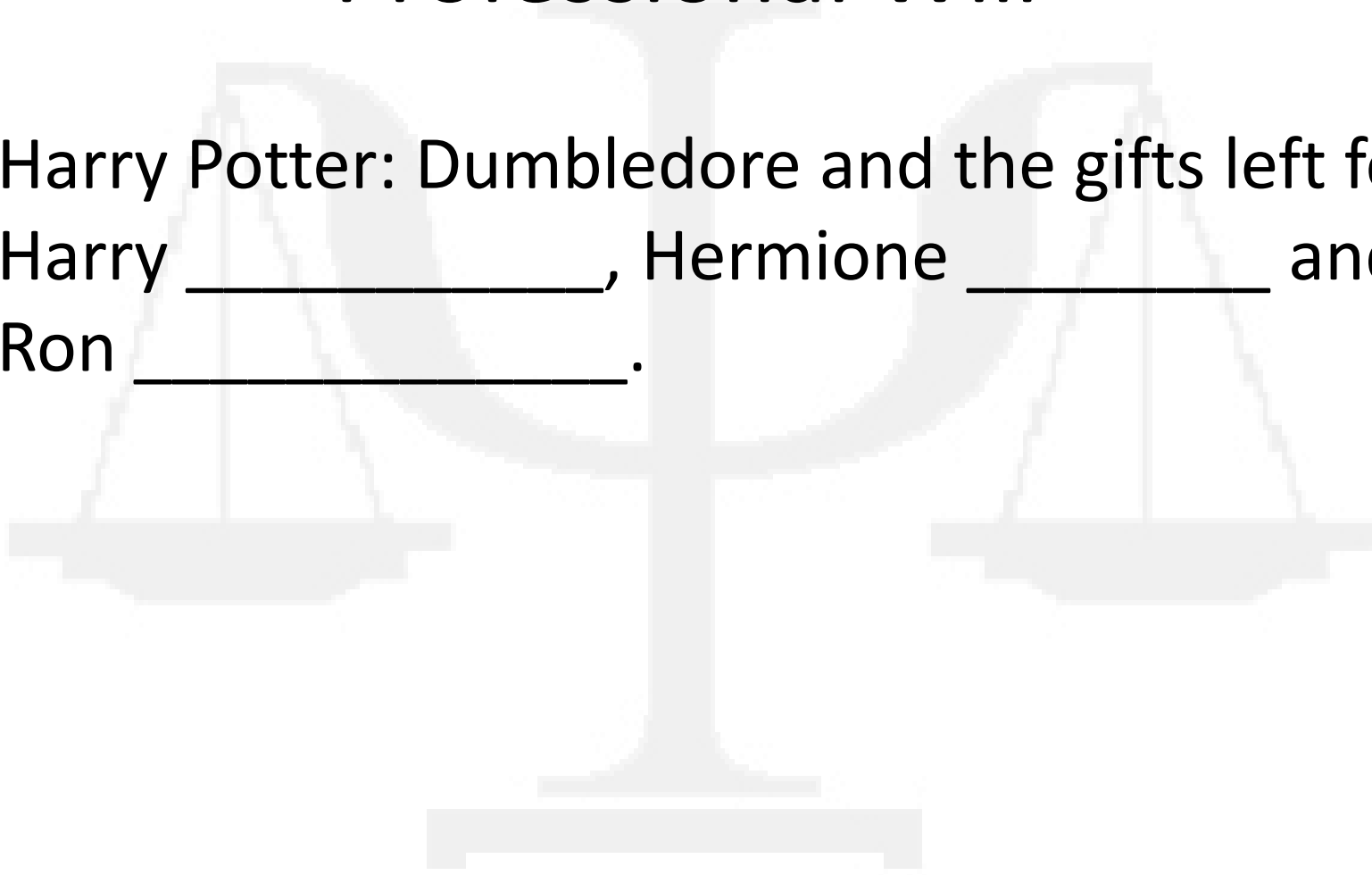


Professional Will

- Harry Potter: Dumbledore and the gifts left for Harry _____, Hermione _____ and Ron _____.
- Star Wars: Obi-Wan Kenobi in death leaves Luke Skywalker _____.
- Jesus, after his death and departure, leaves _____ for his disciples to follow.

Professional Will

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Professional Will



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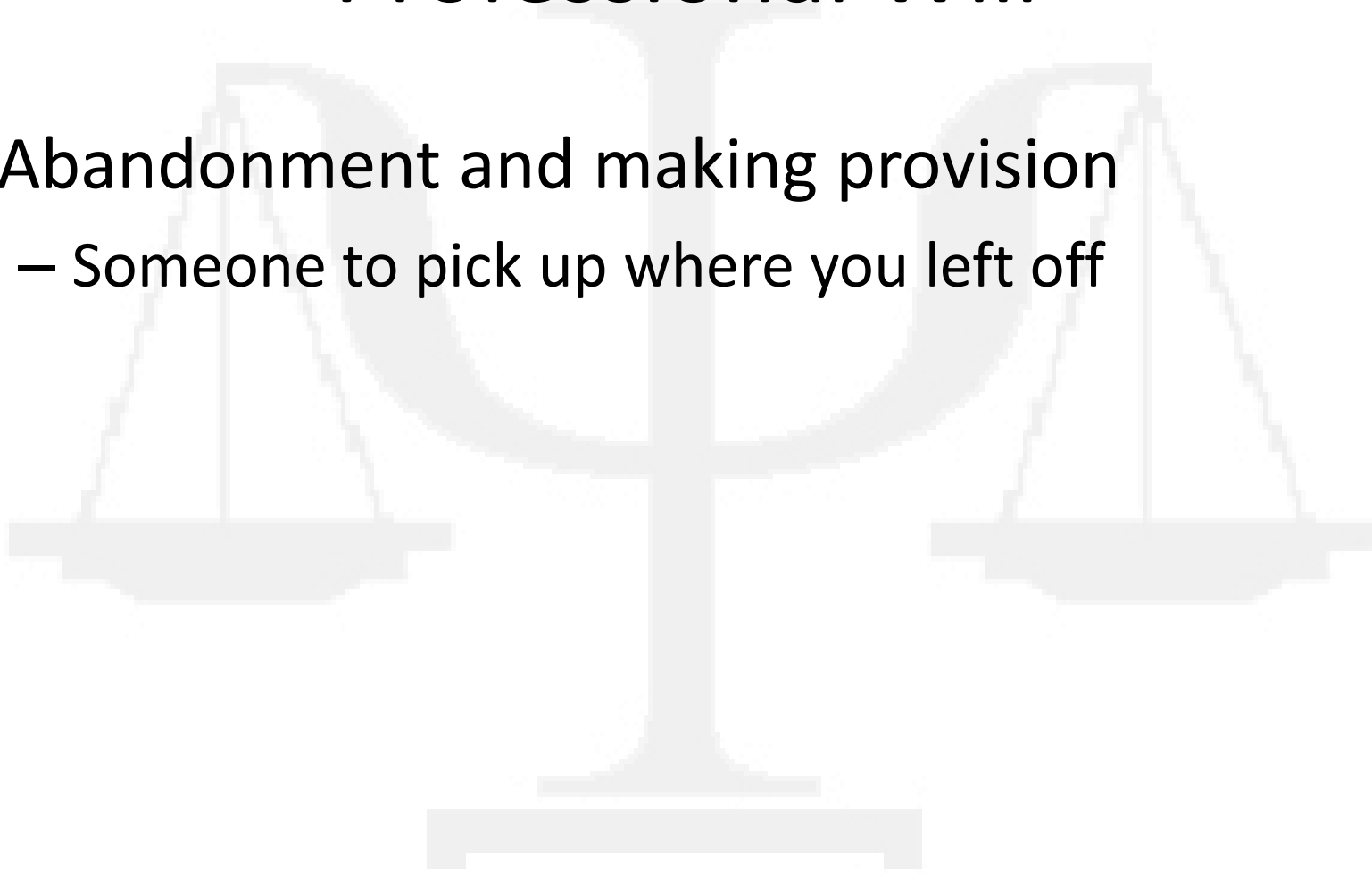
Professional Will

- Abandonment and making provision



Professional Will

- Abandonment and making provision
 - Someone to pick up where you left off



Professional Will



- Abandonment and making provision
 - Someone to pick up where you left off
 - Someone to guide your client in taking the next steps in their life

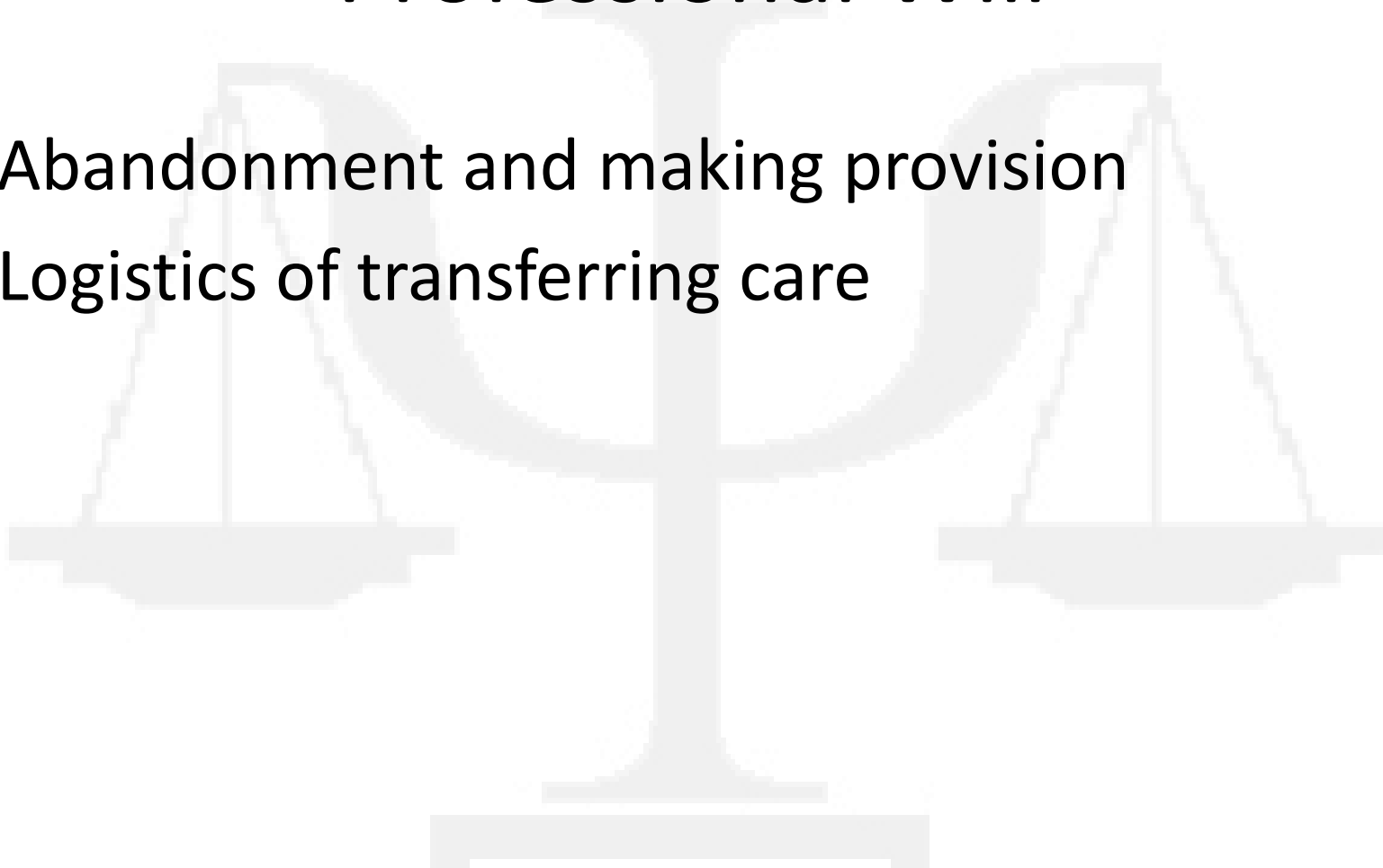
Professional Will



- Abandonment and making provision
 - Someone to pick up where you left off
 - Someone to guide your client in taking the next steps in their life
 - By example you show long-term, enduring commitment to the growth of your client

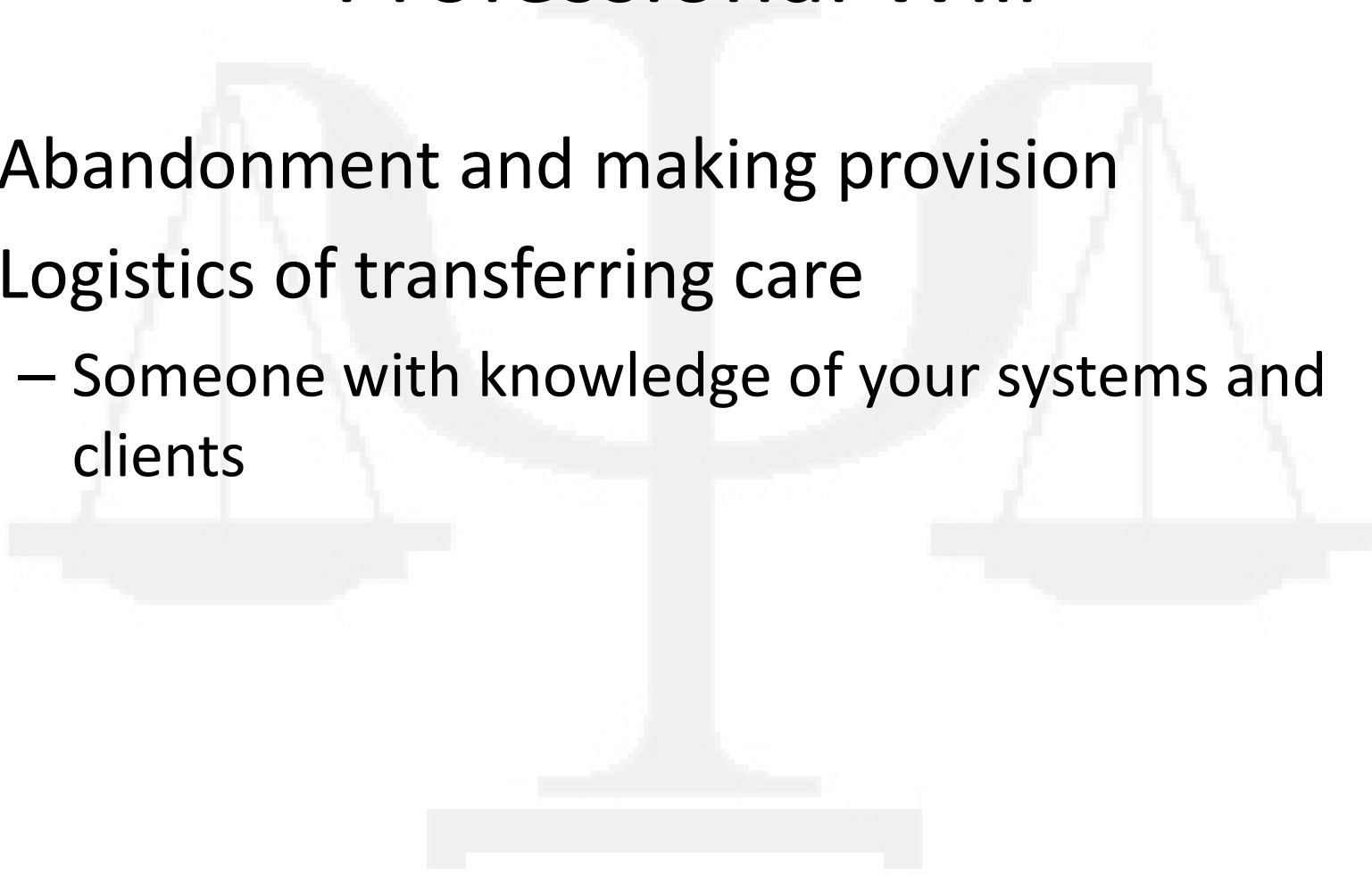
Professional Will

- Abandonment and making provision
- Logistics of transferring care



Professional Will

- Abandonment and making provision
- Logistics of transferring care
 - Someone with knowledge of your systems and clients



Professional Will



- Abandonment and making provision
- Logistics of transferring care
 - Someone with knowledge of your systems and clients
 - Someone to make the decision to act when necessary

Professional Will



- Abandonment and making provision
- Logistics of transferring care
 - Someone with knowledge of your systems and clients
 - Someone to make the decision to act when necessary
 - Someone to see your clients

Professional Will



- Abandonment and making provision
- Logistics of transferring care
 - Will/codicile, contract and power of attorney
 - Practice information data collected
 - Letters of introduction
 - Someone to act as Administrator

Professional Will



- Abandonment and making provision
- Logistics of transferring care
- Roles: Administrator, Practice Administrator, Referral Therapist

Professional Will



- Abandonment and making provision
- Logistics of transferring care
- Roles: Administrator, Practice Administrator, Referral Therapist
- Codicil v. contract

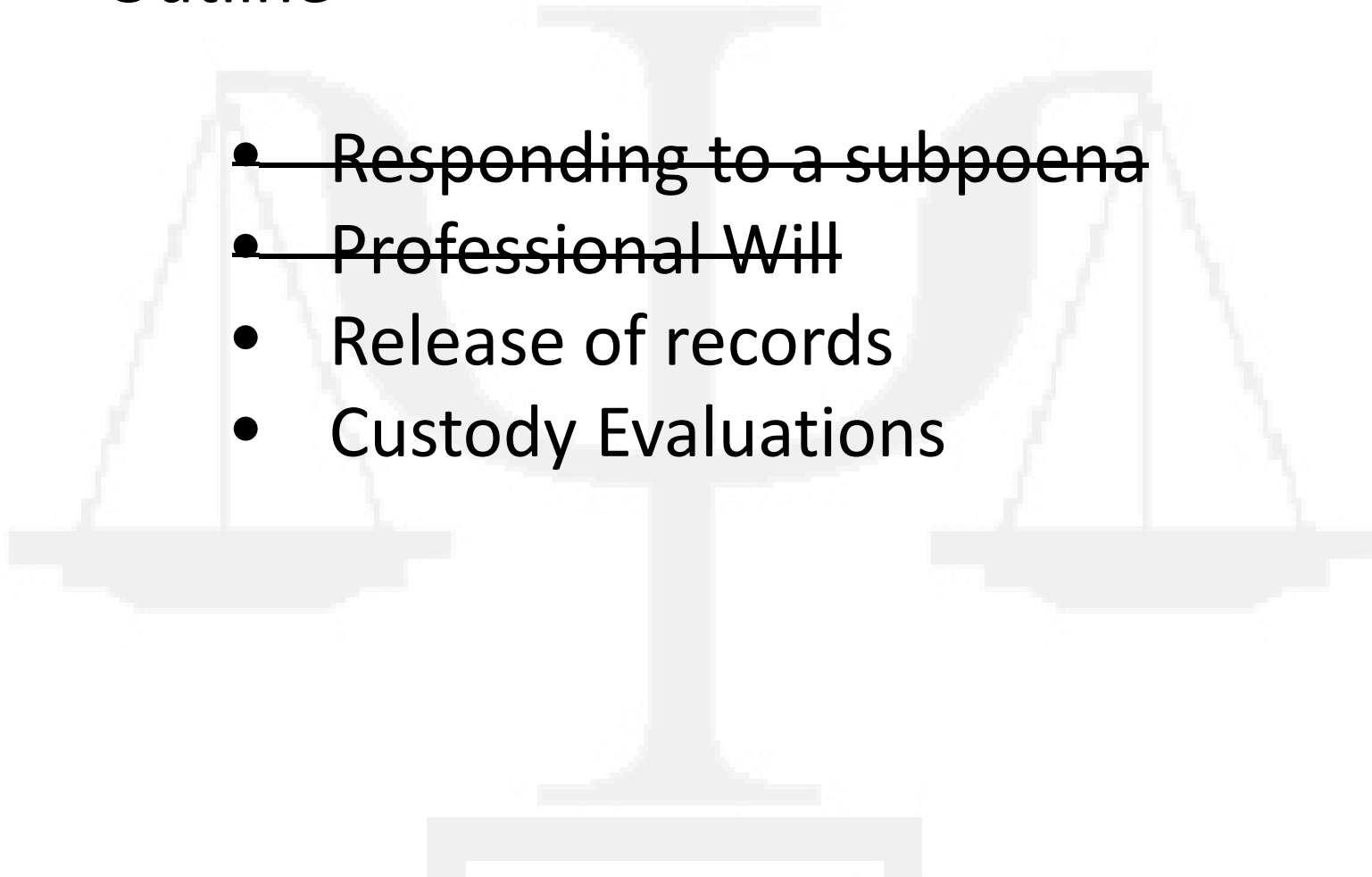
Professional Will



- Abandonment and making provision
- Logistics of transferring care
- Roles: Administrator, Practice Administrator, Referral Therapist
- Codicil v. contract
- Choosing a practice administrator

Outline

- ~~Responding to a subpoena~~
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Confidentiality

Jaffee

- Broad Psychotherapy privilege



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- Applies to Federal Courts only



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- Can be used in state courts to argue a new privilege in state courts ought to be created

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*



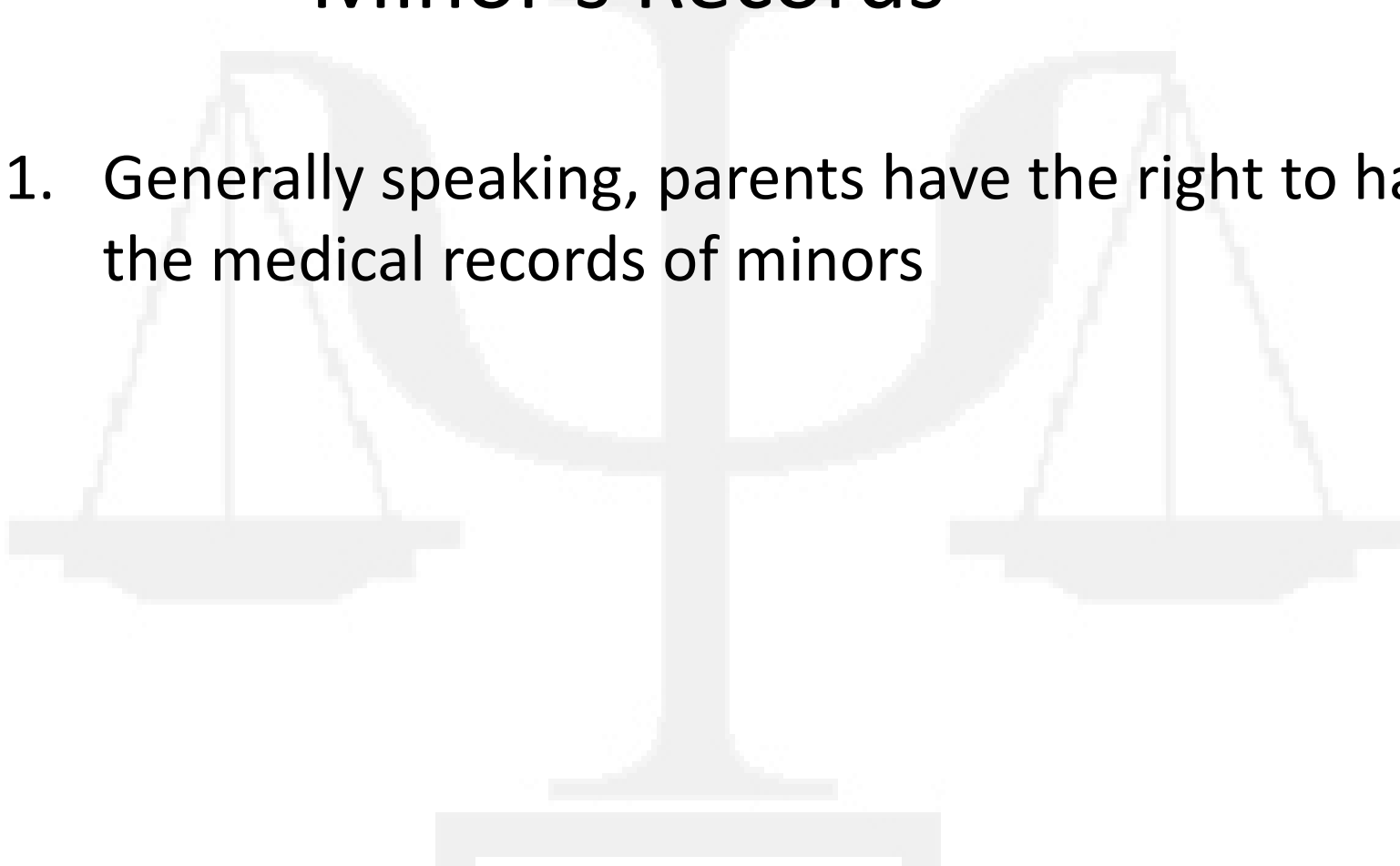
Confidentiality

- *Kirchner v Mitsui*



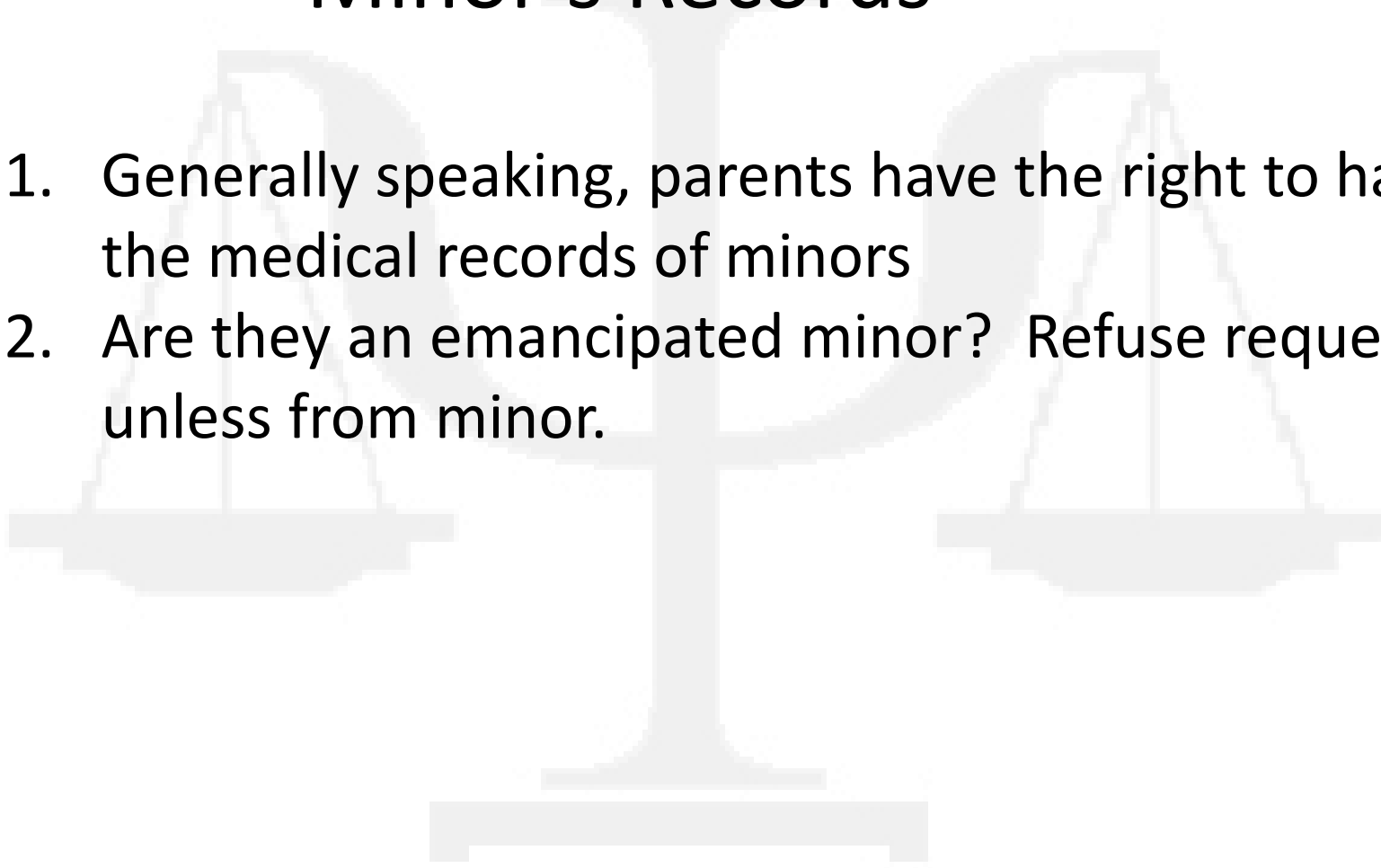
Minor's Records

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



Minor's Records

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2. Are they an emancipated minor? Refuse request unless from minor.



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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\(g\)](#)

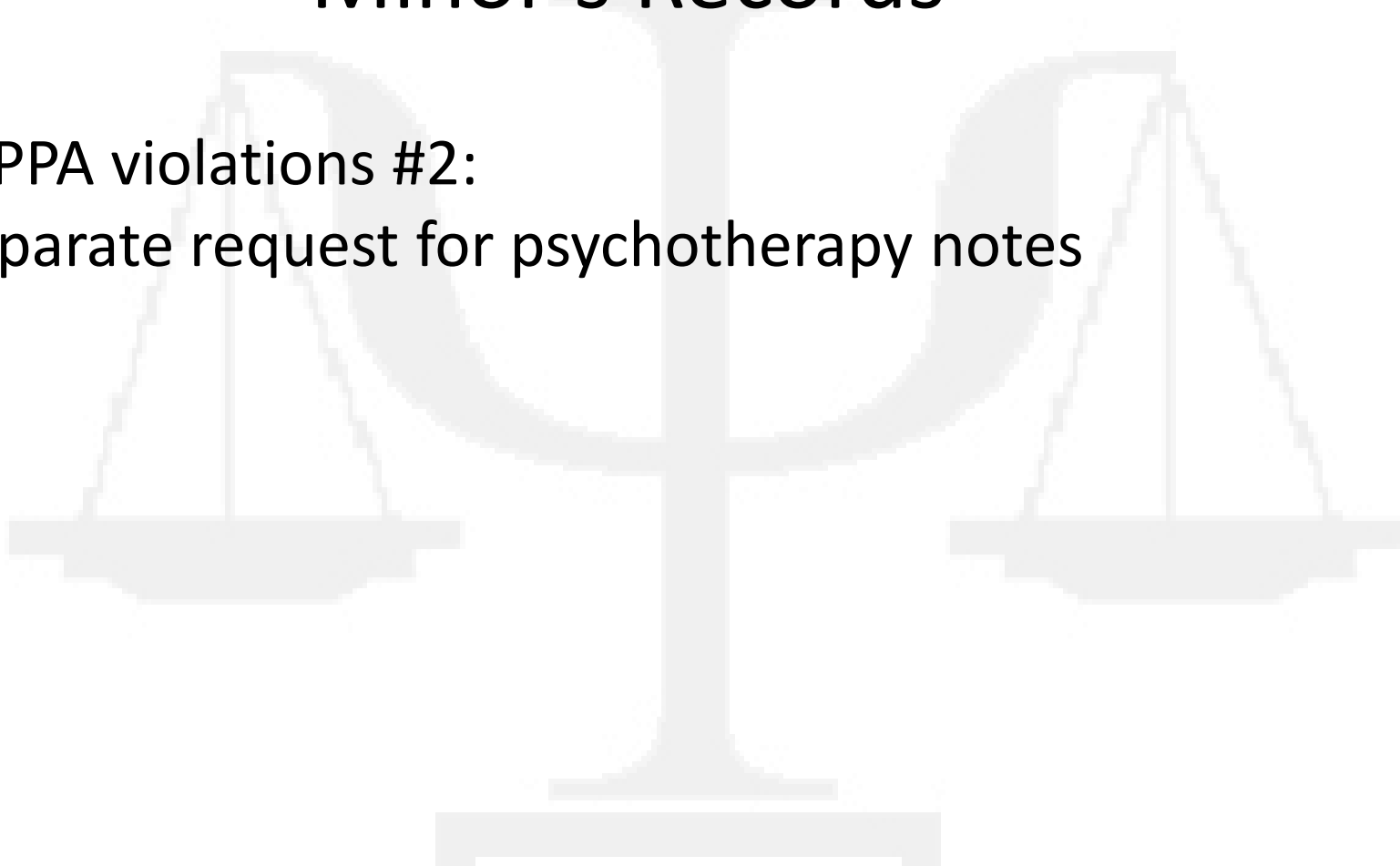
If (i or ii) and iii, then deny request

- 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

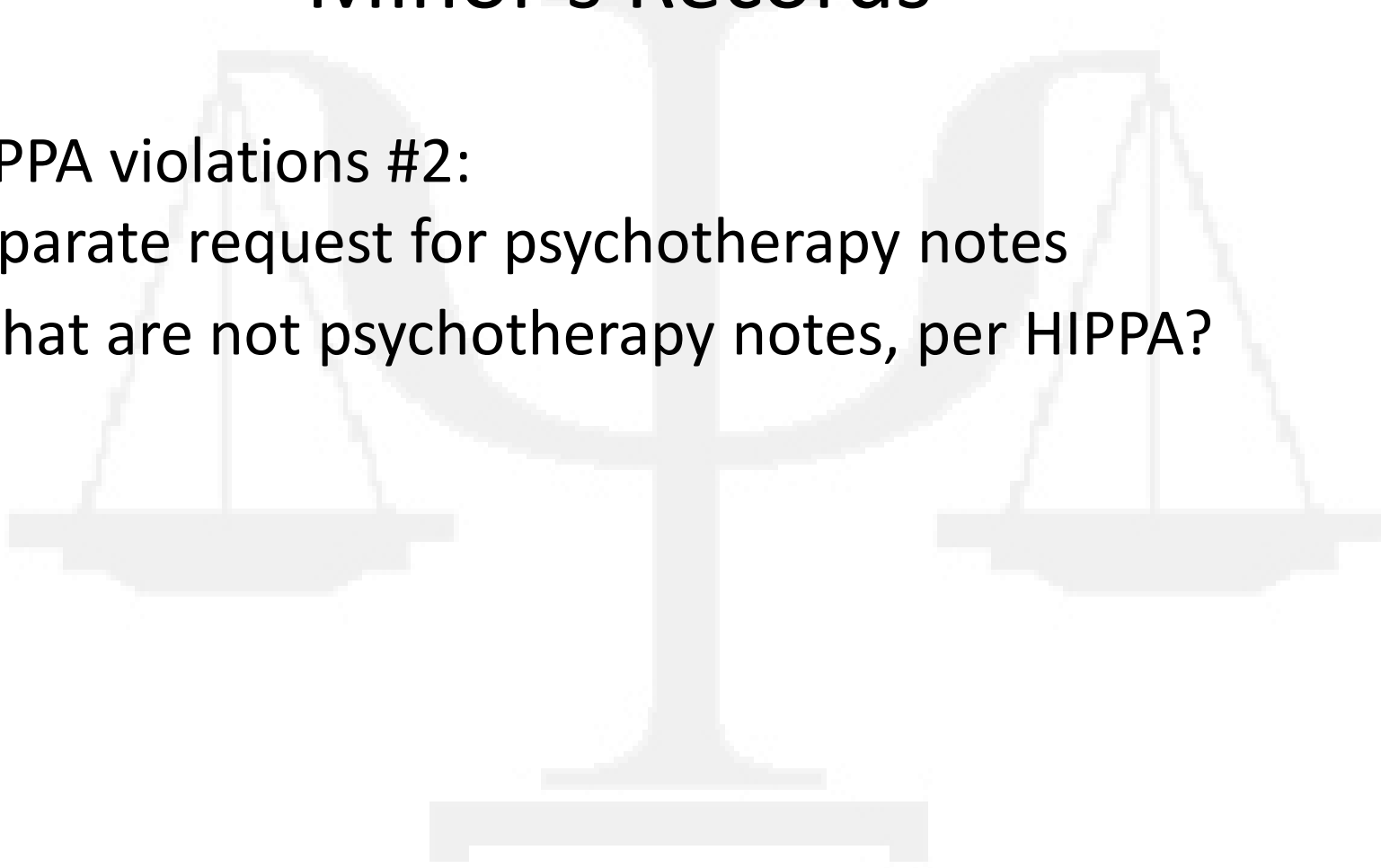


Minor's Records

HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?



Minor's Records



HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?

Date/time/length of treatment

Minor's Records



HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?

Date/time/length of treatment

Diagnosis, GAF, modality

Minor's Records



HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?

Date/time/length of treatment

Diagnosis, GAF, modality

Symptoms

Minor's Records



HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?

Date/time/length of treatment

Diagnosis, GAF, modality

Symptoms

Clinical tests

Minor's Records



HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?

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Diagnosis, GAF, modality

Symptoms

Clinical tests

Prognosis/progress

Minor's Records



HIPPA violations #2:

Separate request for psychotherapy notes

What are not psychotherapy notes, per HIPPA?

Date/time/length of treatment

Diagnosis, GAF, modality

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

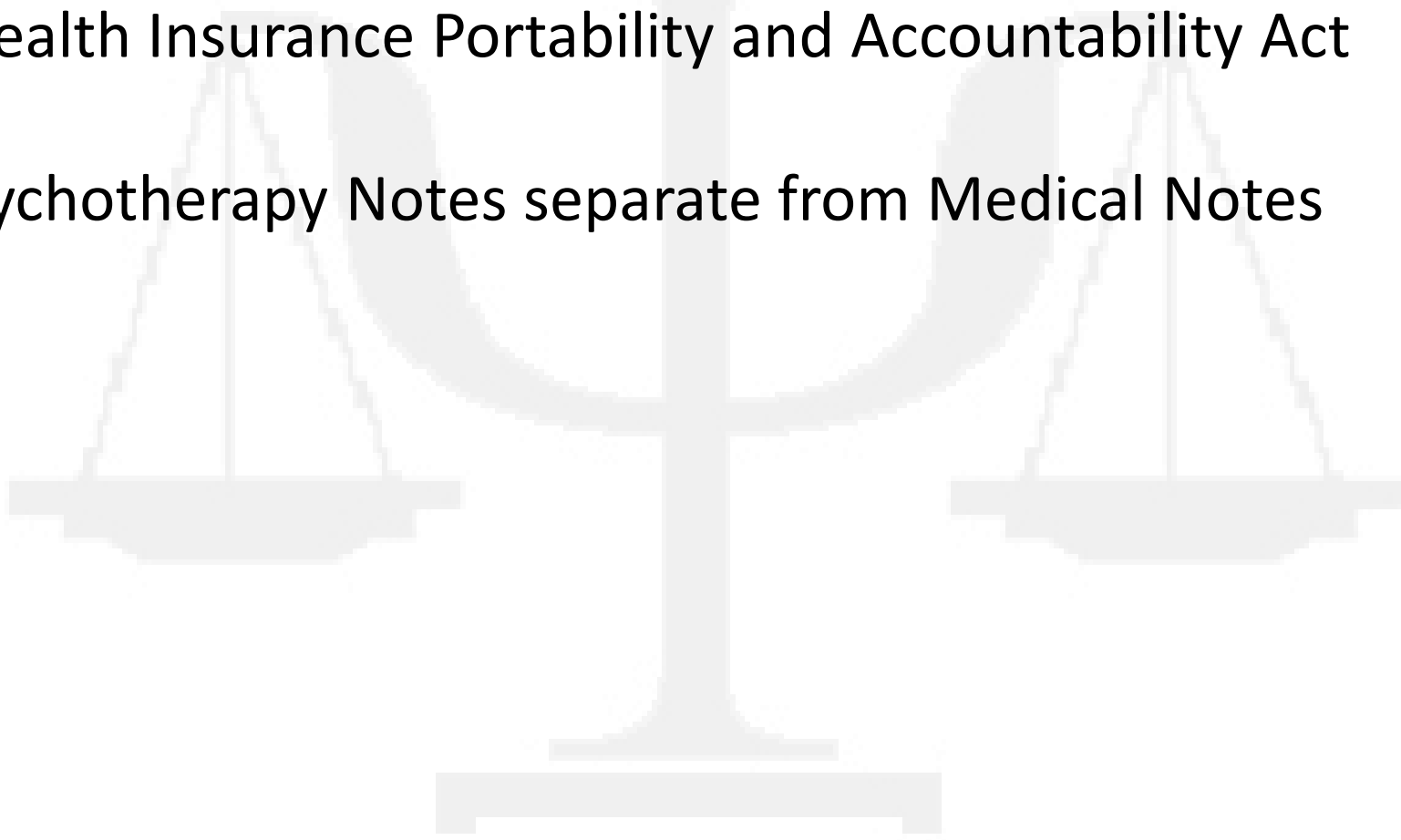
Health Insurance Portability and Accountability Act



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
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HIPAA



Health Insurance Portability and Accountability Act

- Psychotherapy Notes separate from Medical Notes
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- 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\(g\)](#)

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

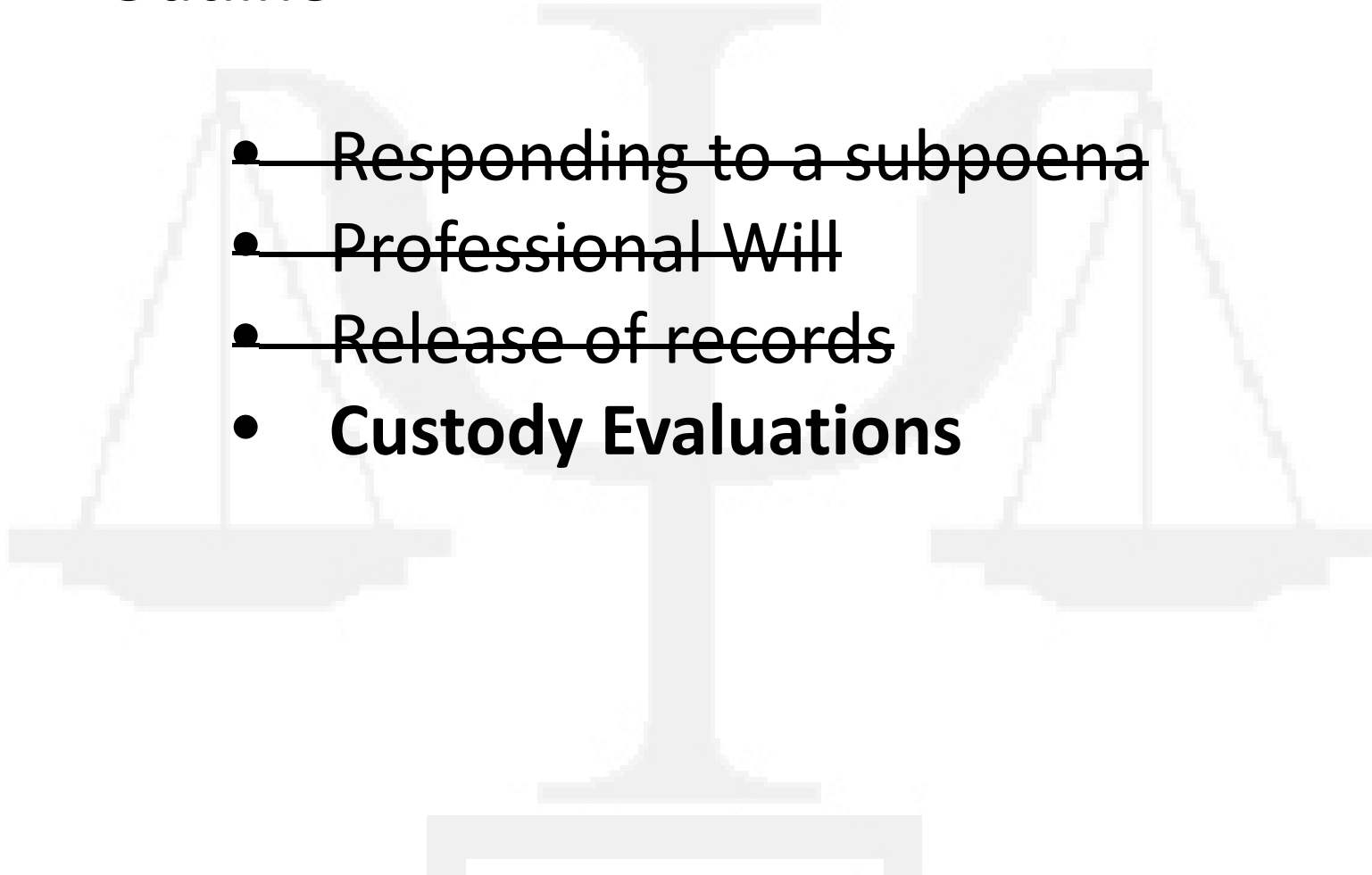
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- ii. Treating the requester as a personal representative could endanger the individual, and
- iii. Not in the best interests of minor to treat requester as a personal representative

Other 2012 Legal Issues

- **Herman v Herman**, Court of Appeals (2012)
 - Post divorce custody matter
 - Alleged Mother's deteriorating mental health
 - Court ordered her counseling records for in camera inspection
 - Appellate Court reversed ruling, Father must use Rule 35.01 that good cause exists to order a new mental health examination of Mother.

Outline

- ~~Responding to a subpoena~~
- ~~Professional Will~~
- ~~Release of records~~
- **Custody Evaluations**



Custody Evaluations



APA Guide Lines

Custody Report Criticism

Applying evaluation findings to Court Criteria

Ghayoumi v McMillan

Custody Evaluations

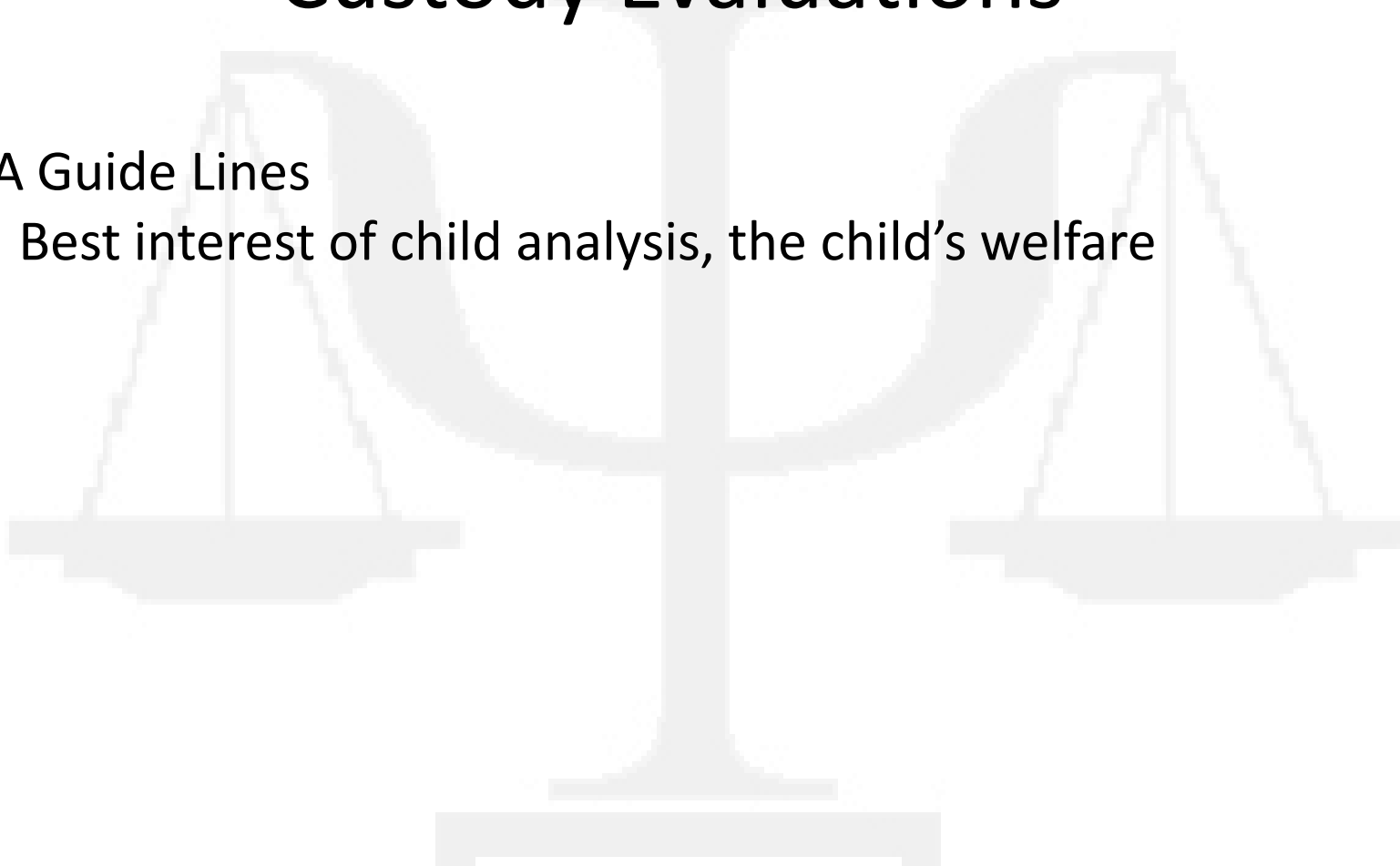
APA Guide Lines



Custody Evaluations

APA Guide Lines

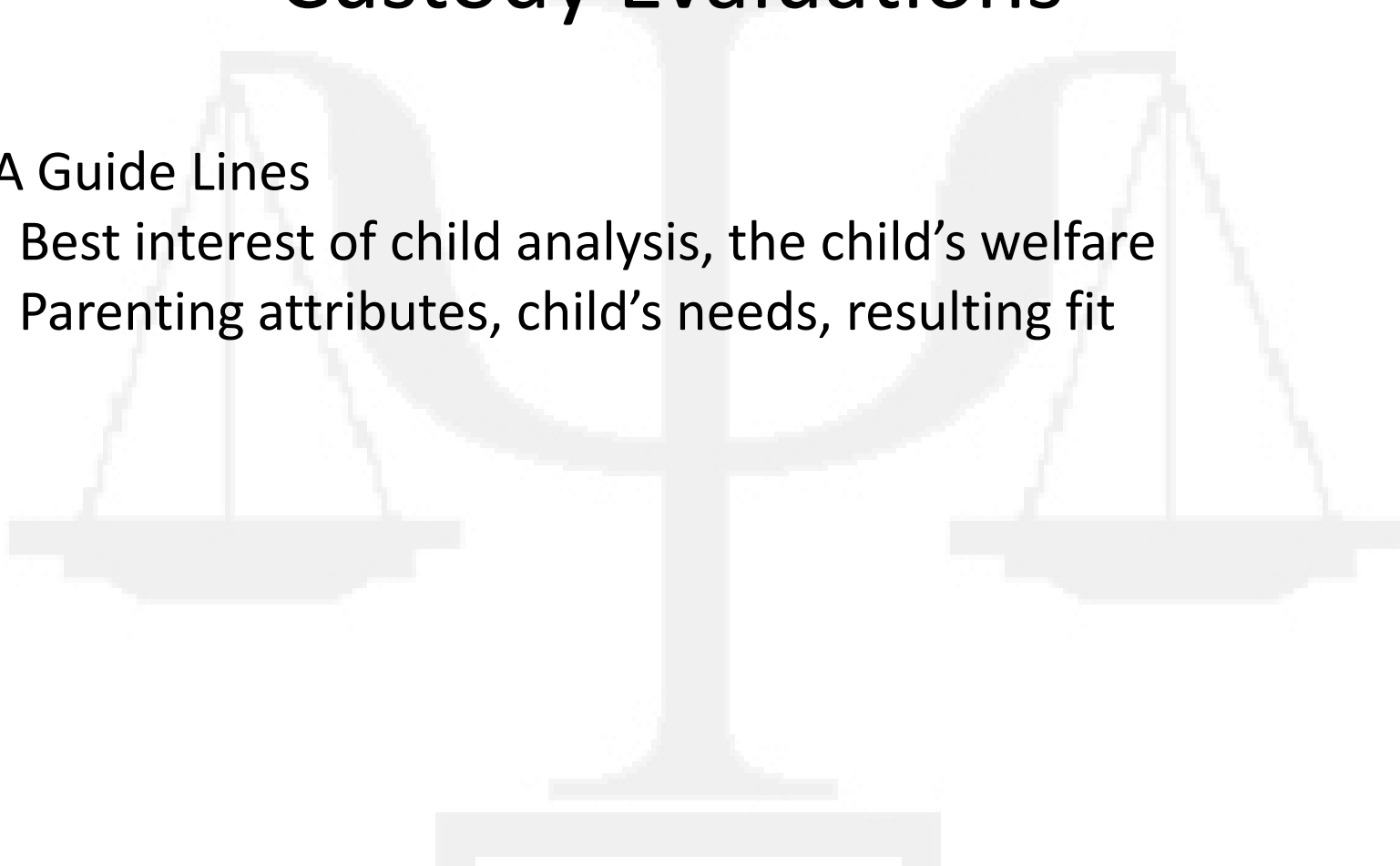
Best interest of child analysis, the child's welfare



Custody Evaluations

APA Guide Lines

Best interest of child analysis, the child's welfare
Parenting attributes, child's needs, resulting fit



Custody Evaluations



APA Guide Lines

Best interest of child analysis, the child's welfare
Parenting attributes, child's needs, resulting fit
Gain special competence

Custody Evaluations



APA Guide Lines

Best interest of child analysis, the child's welfare

Parenting attributes, child's needs, resulting fit

Gain special competence

Impartial evaluator

Custody Evaluations



APA Guide Lines

Best interest of child analysis, the child's welfare

Parenting attributes, child's needs, resulting fit

Gain special competence

Impartial evaluator

Culturally informed, nondiscriminatory

Custody Evaluations



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Avoid conflicts of interest and multiple relationships

Custody Evaluations



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Avoid conflicts of interest and multiple relationships

Timely work

Custody Evaluations



APA Guide Lines

Best interest of child analysis, the child's welfare

Parenting attributes, child's needs, resulting fit

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Timely work

Informed consent

Custody Evaluations



~~APA Guide Lines~~

Custody Report Criticism

Applying evaluation findings to Court Criteria

Ghayoumi v McMillan

Custody Evaluations

Custody Report Criticism



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Custody Report Criticism
Adult focused



Custody Evaluations



Custody Report Criticism

Adult focused

Predominately test-oriented

Evaluator functioned in multiple roles

Custody Evaluations



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Evaluator functioned in multiple roles

Lacked clinical description of the parties

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Adult focused

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Evaluator functioned in multiple roles

Lacked clinical description of the parties

Failed to review multiple documents

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Custody Report Criticism

Adult focused

Predominately test-oriented

Evaluator functioned in multiple roles

Lacked clinical description of the parties

Failed to review multiple documents

No collateral contacts made

Custody Evaluations



Custody Report Criticism

Adult focused

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Evaluator functioned in multiple roles

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Failed to review multiple documents

No collateral contacts made

Reports too long (ave. = 20 pages) and used psychological jargon

Custody Evaluations

[“Critical review of Child Custody Evaluation Reports”, Family Court Review Vol. 40 No 2, April 2002](#)

1. Most did classic report (83%) versus letter to judge or attorneys; Brief summary and detailed report.
2. Median 10 hours of work
3. 88% Court ordered
4. Interviewed parents, children, testing, collateral contacts (chart)
5. Observation of parent-child interaction (76%)
6. Reports too long and narrative doesn't fit the criteria

Custody Evaluations



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Custody Evaluations



Applying evaluation findings to Court Criteria:

Love, affection and emotional ties between caregivers and child

Disposition to provide food, clothing, medical care, education...

Importance of continuity

Character/behavior of other persons in home or frequenting home

Willingness to facilitate relationship with the other parent

Mental/physical health of parents

Home, school and community record

Preference of child if over 12 years of age

Evidence of physical or emotional abuse

TCA 36-6-106 divorce, separation

TCA 36-6-108 relocation

Custody Evaluations

[Chaffin v Ellis](#): (TN Court of Appeals, 2005) Williamson County Good read. Court appointed psychologist and Father also employed two psychologists; all did evaluations. Court-ordered psychologist did not testify at trial. Mother also hired a psychiatrist to testify about her emotional condition. Father sued judge, her attorney, the supervising entity, and court-ordered psychologist. Case dismissed but Father had to pay \$92,000 in attorney fees to the defendants.

Custody Evaluations



Ghayoumi v McMillan: (TN Court of Appeals, 2006)

Court-ordered evaluators have absolute judicial immunity from prosecution to “be free from intimidation and harassment by a dissatisfied litigant.”

Custody Evaluations

Burden v Burden: (TN Court of Appeals, 2007) Knoxville Case. Parties had a week-to-week arrangement. Here the Father selected psychologist and Mother consented. Psychologist evaluated the parties and submitted report but did not testify. No objection was made and no other expert testified. Evaluation favored the Mother. Court ignored it and left the visitation “as is.” Appeals Court took great exception to judge’s ignoring psychologist recommendations in the absence of an other expert and not citing evidence why.

Custody Evaluations

[Keller v Keller:](#) (TN Court of Appeals, 2008) Here the Father took the minor to a psychologist who testified that Mother's frequent moves was created a material change in circumstances. The trial court did not agree. The Mother did not provide expert testimony so the Appellant Court overruled the Trial Court.

Bottom line: better to have a court ordered evaluation, but don't go to court with only one side having an expert.

Custody Evaluations

[Adams v Adams](#): (TN Court of Appeals, 2008) Gibson County. Father sought change of custody. Psychologist evaluated mother, father and his new wife, the minor children, and conducted collateral interviews. 33-page report. Brickland Perceptual Scales to children to see how they perceived parents and stated results coincide with Court's opinion in 97% of time. While results favored mother, father was awarded the change in custody, with the psychologist not making a recommendation.

Bricklin Perceptual Scales™ (BPS™)

by Barry Bricklin, Ph.D.

Since its publication in 1984 the BPS has become the premier custody evaluation test in use today. It has been administered more than 50,000 times, used in all 50 states, and accepted and relied upon by courts throughout the United States and Canada.

This unique and efficient data-based test is widely used by professionals who must make decisions regarding child custody. The Bricklin Perceptual Scales (BPS) is designed primarily for children who are at least 6 years old. The test assesses the child's perception of his or her parents in four major areas: Competence, Follow-up Consistency, Supportiveness, and Possession of Admirable Personality Traits.

The child responds to two sets of parallel questions, 32 pertaining to the mother and 32 to the father. Each question is printed on a separate card. On the back of each card is a response continuum—a long black line with a “Very Well” printed at one end and “Not so Well” at the other. The examiner reads the question, and the child gives a spoken response. The examiner then asks the same question, worded a little differently, and the child answers by punching a hole in the card somewhere along the response continuum. This second response, considered the more important of the two, reflects the child's nonverbal assessment of the parent in question.

BPS results have been validated against the decisions of independent mental health professionals, opinions of courtroom judges, and scores on the Perception-of-Relationships Test.

Custody Evaluations



In re Madison N.J.M.: (TN Court of Appeals, 2008) Case where grandmother was the primary custodial parent d/t mother's neglect. Father instituted proceedings to gain more parenting time. Court order co-parenting therapy for the grandmother-Father "parents."

Custody Evaluations



[Covill v Covill](#): (TN Court of Appeals, 2009) Hamilton County. Court-ordered psychologist spent 19 hrs evaluating parties, utilized the ASPECT test. Father had been PRP and continuation of this was the recommendation. Mother hired psychologists to review the report. She attacked the ASPECT but the court agreed with the court-ordered psychologist.

Custody Evaluations

Everett v Everett: (TN Court of Appeals, 2009) Knoxville case. They utilize a Special Master who court-ordered a custody evaluation. The parties had filed exceptions to the Master's report. At trial, judge admitted he had not read the transcript of the Master's hearing, including the testimony of the psychologist. He did read report only. Trial court erred in not reading the testimony of the psychologist and merely relying on the report.

Custody Evaluations



Schroedel v Bumgarner: (TN Court of Appeals, 2010)

Mother sought more time with minor child and employed Sr. Psych Examiner to evaluate Mother and Stepfather who were accused of being abusive. MMPI, interviews (4 hrs), and called DCS re abuse allegations. Court didn't comment on evaluation but did not substantially change the parenting arrangement.

Custody Evaluations



Gentile v Gentile: (TN Court of Appeals, 2010) Court ordered on it's own a forensic parenting assessment which involved a psychiatrist and psychologist team. Father hired his own psychologists who did not meet with the parties or the minor. Court gave more credibility to the court-ordered evaluation.

Custody Evaluations

Cone v Cone: (TN Court of Appeals, 2010) Robertson County. Mother accused Father of sexual abuse on numerous occasions, all unfounded by DCS. Mother got a TRO based on new allegations. GAL ordered psych evaluation of all parties and minor. They found no sexual abuse. Mother employed psychologist who reviewed records. Court based decision on work of GAL-appointed evaluators.

Custody Evaluations



King v King: (TN Court of Appeals, 2010) Williamson County. Father and Mother participated in a court-ordered psychological evaluation. Tests were used but the actual test names were not disclosed. Testing did not favor either parent.

Custody Evaluations

O'Rourke v O'Rourke: (TN Court of Appeals, 2010) Williamson County.

Father employed James Walker, Ph.D. and William Bernet, MD both of Vanderbilt. Mother hired California psychologist, Robert Geffner. Dr. Geffner interviewed Mother and one child and testified that, due to domestic abuse, the testing evaluations by Walker/Bernet were unethical and should be reported to the boards. The Court rejected Geffner as an expert due to other the fact that in this case (as in others he had done) he failed to conduct an unbiased evaluation of both parties. Walker/Bernet found significant maladaptive personality traits in Mother that impacted parenting significantly.

Custody Evaluations

Malmquist v Malmquist: (TN Court of Appeals, 2011) Shelby County. Three psychologists testified and a fourth supplied a written report. One psychologist used the MMPI-2 and the Rorschach. Another employed the MMPI-2 and Millon Clinical Multiaxial Inventory-II. The first diagnosed severe pathology that was not found by the other three psychologists. The Court sided with the GAL and the first psychologist, citing details of the psychological findings.

Custody Evaluations



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Other 2012 Legal Issues

- **TCA 29-26-201ff Therapist Sexual Misconduct Victims Compensation Act**
 - Moves to 2 years statute of limitations
 - Puts requirements on employers to inquire about and previous employers of therapist for the previous 5 years
 - Provides for an array of damages (punitive, loss of wages, all therapy money paid, future counseling)



Legal Issues Frequently Encountered for the Practitioner

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