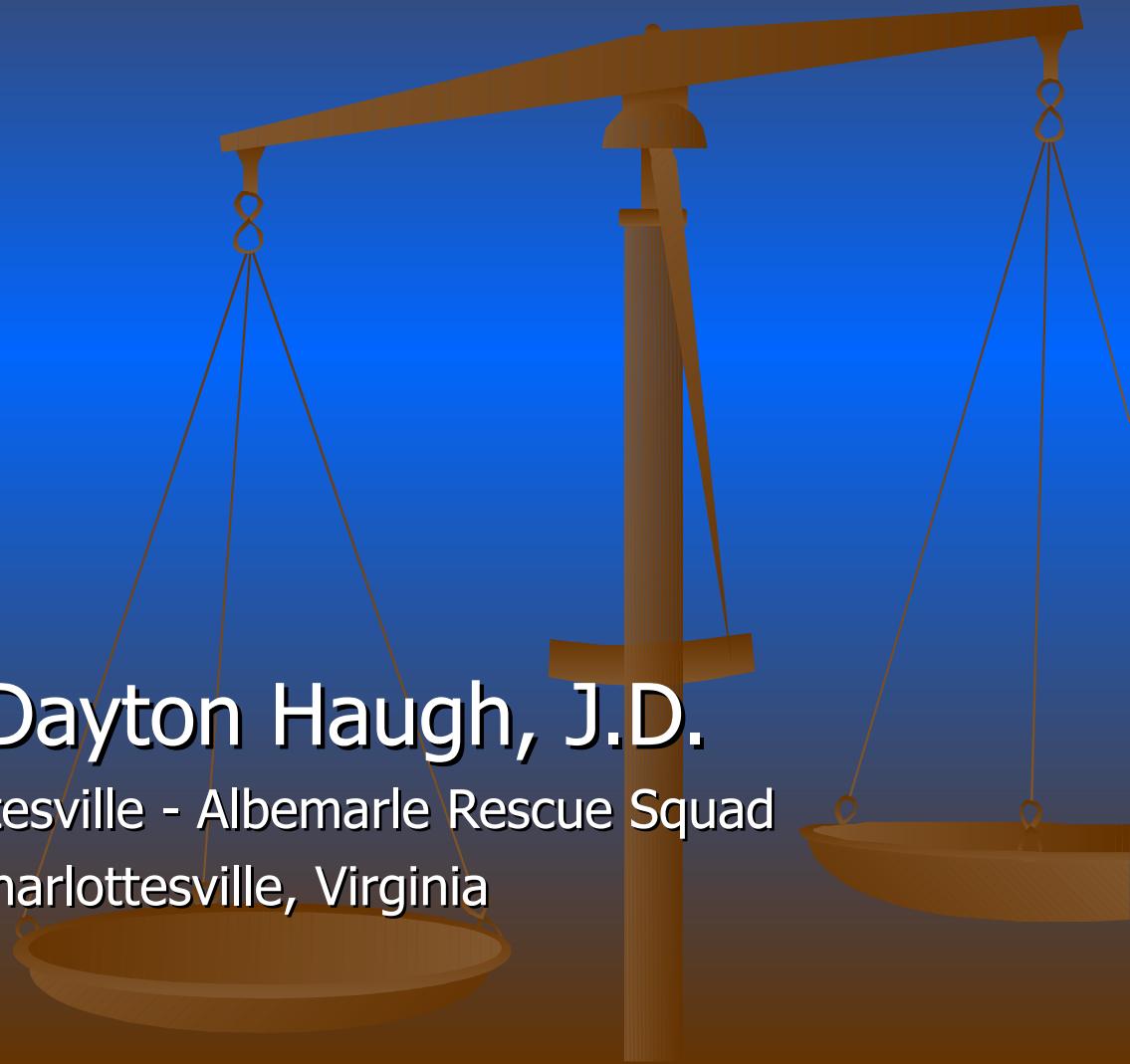


Anatomy of a Lawsuit

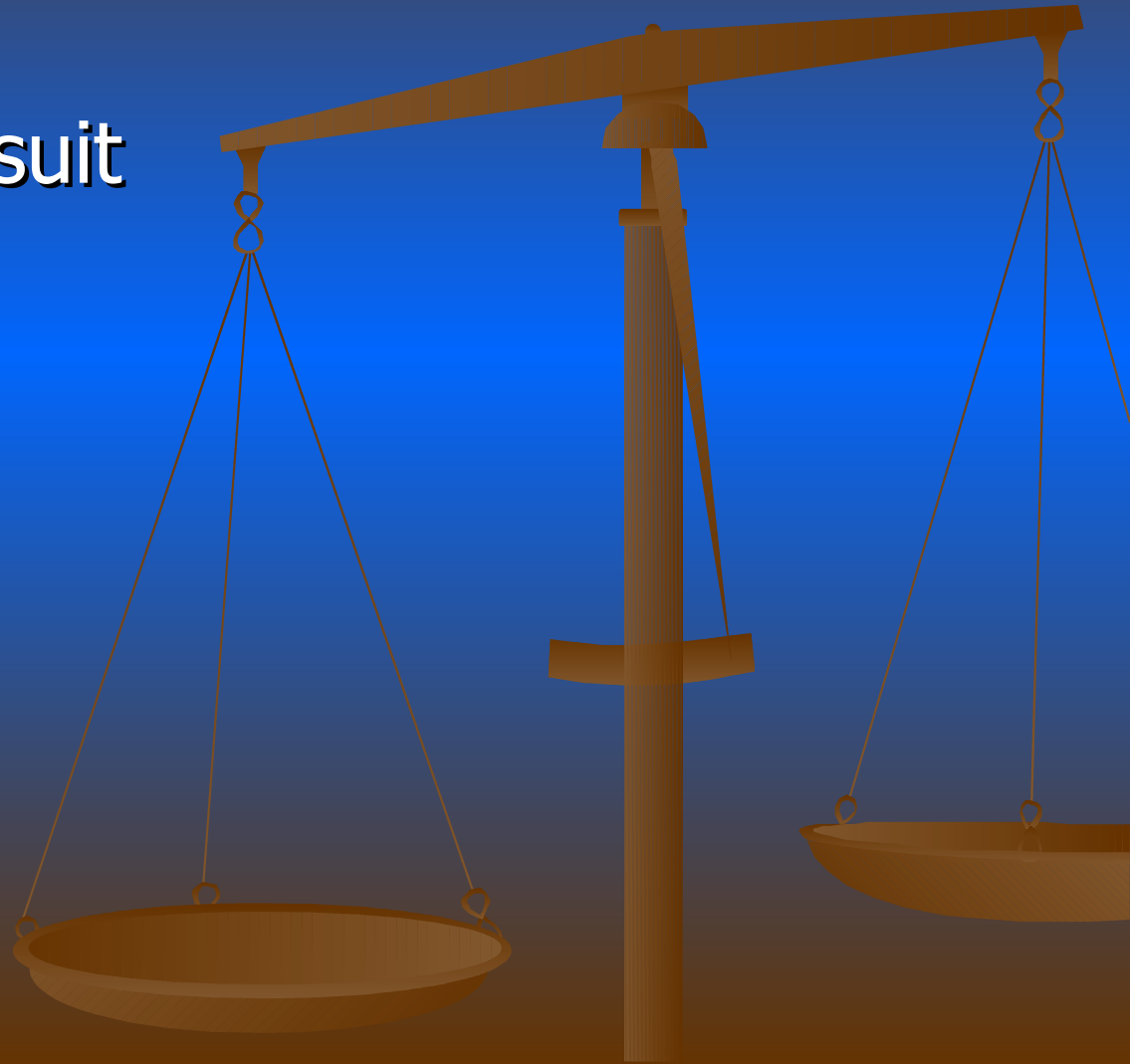
by L. Dayton Haugh, J.D.

Chief, Charlottesville - Albemarle Rescue Squad
Charlottesville, Virginia



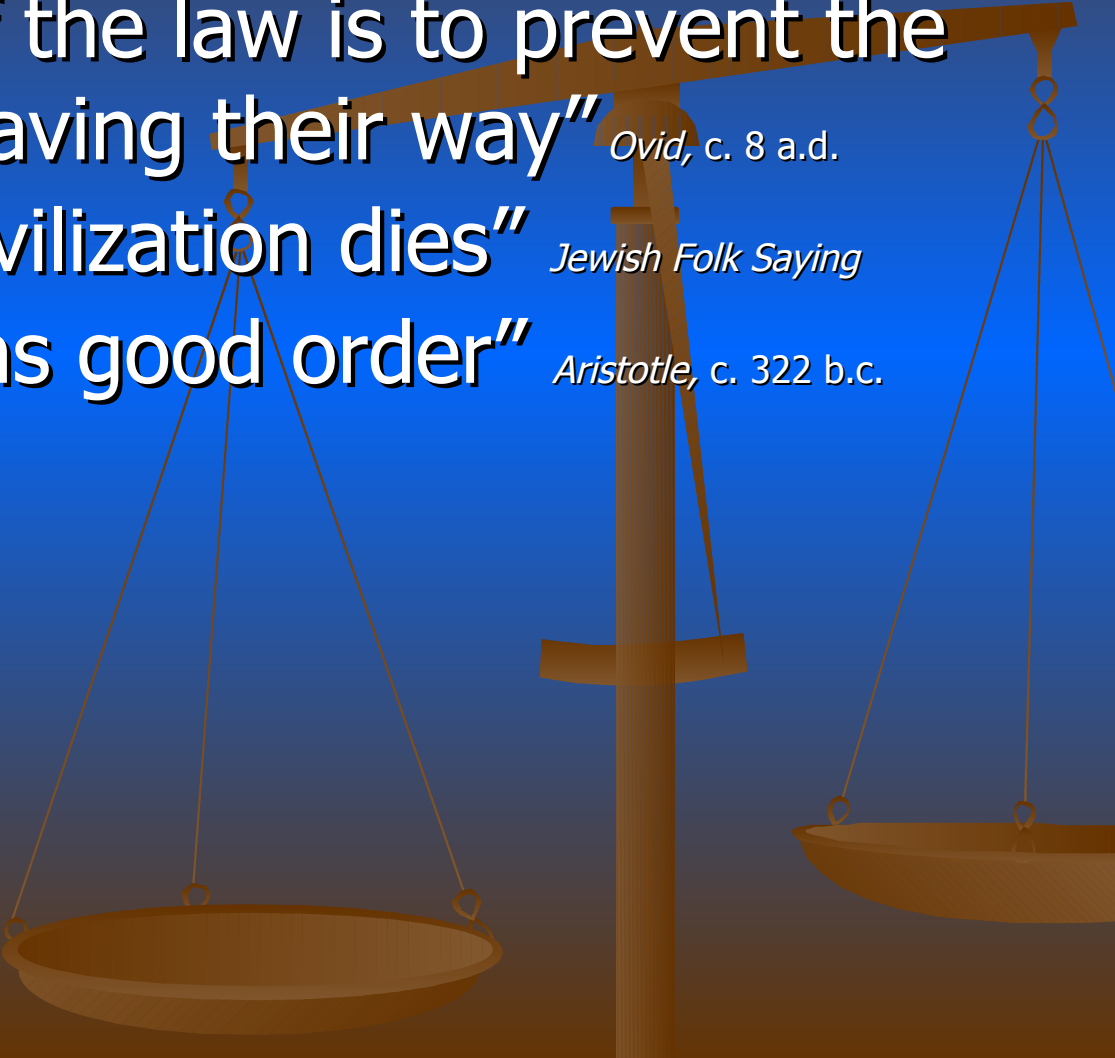
Topics

- “The Law”
- Phases of a lawsuit
- Evidence
- Being a witness



Why do we have laws?

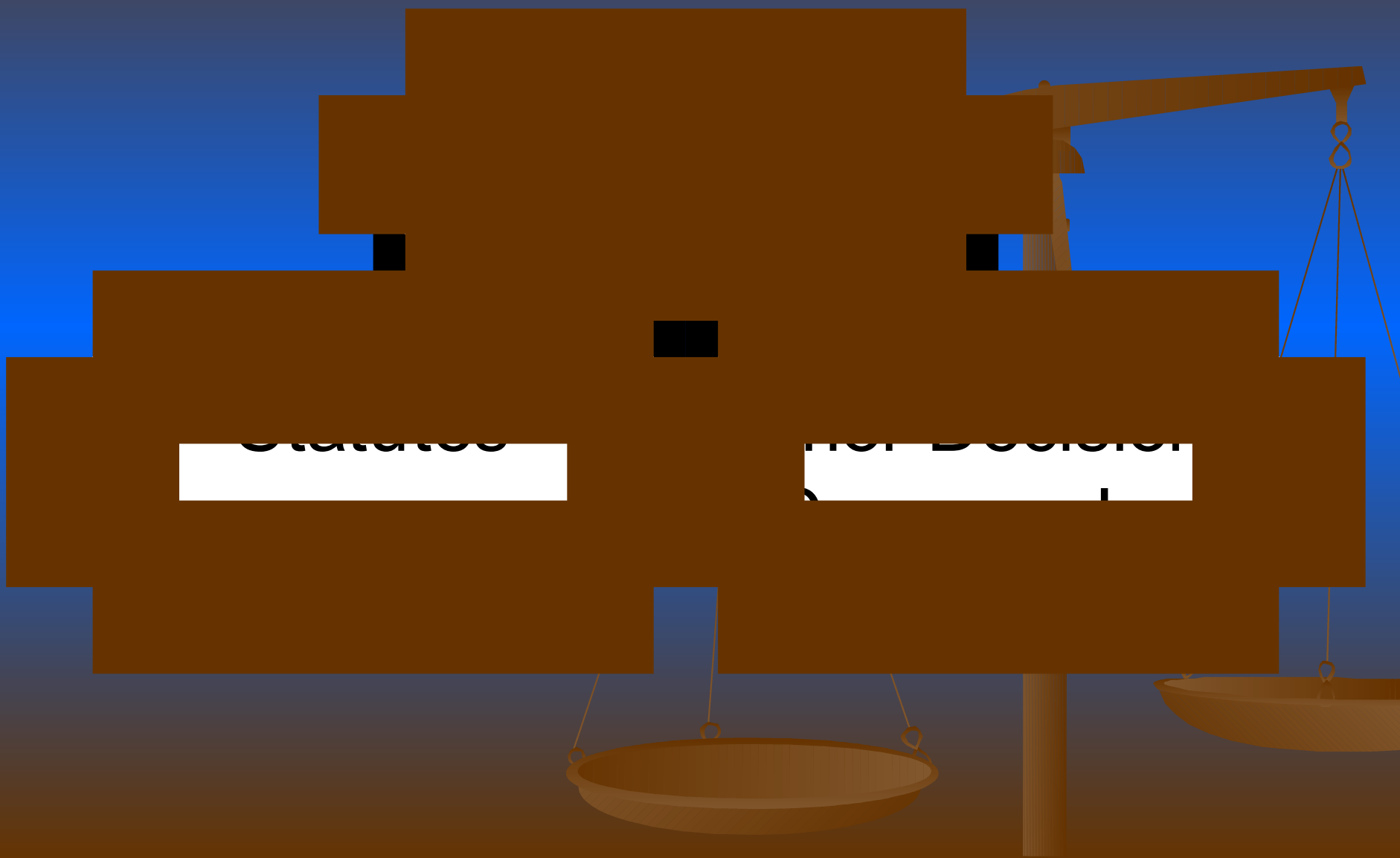


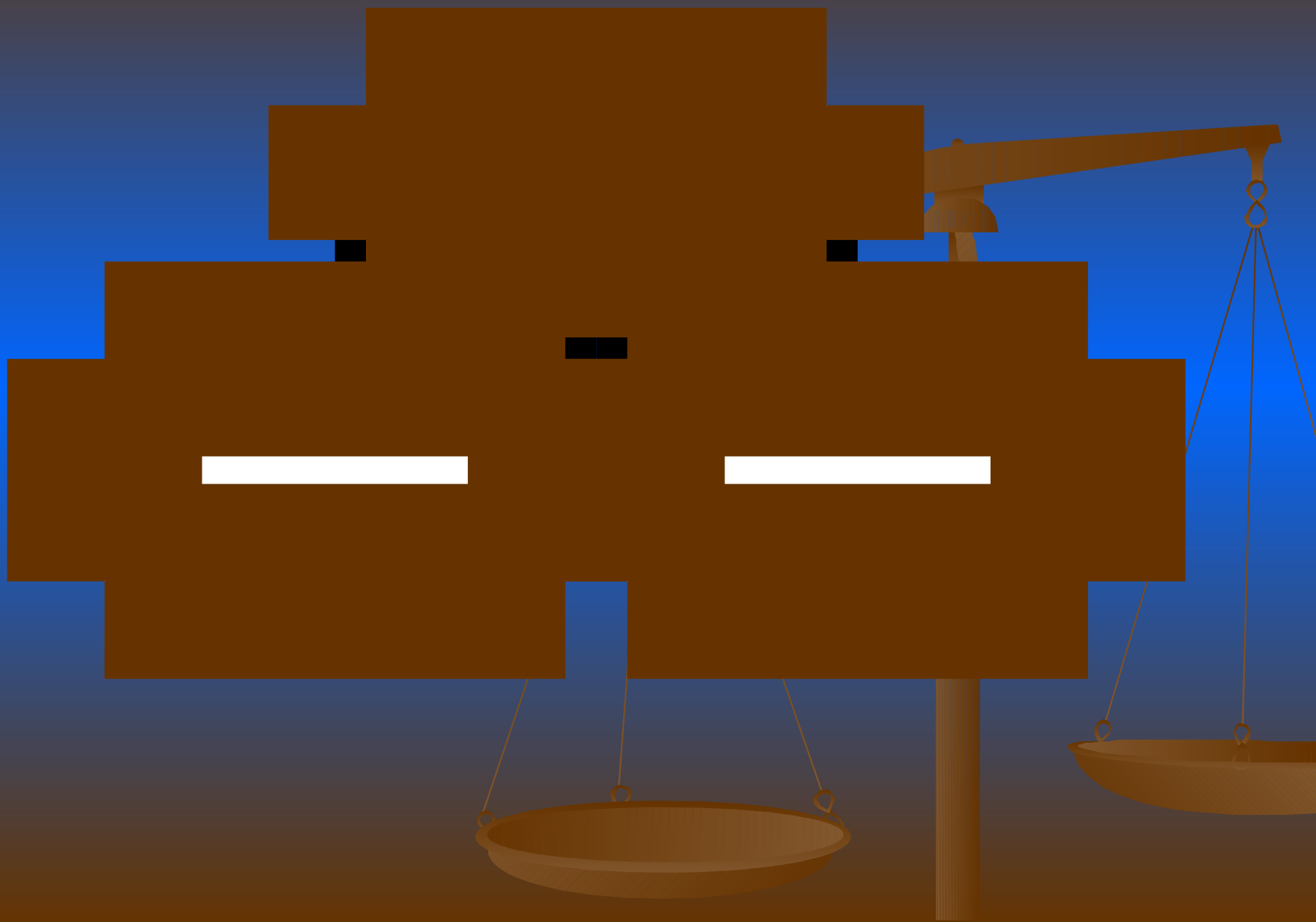
- 
- “The purpose of the law is to prevent the strong always having their way” *Ovid, c. 8 a.d.*
 - “Without law, civilization dies” *Jewish Folk Saying*
 - “Good law means good order” *Aristotle, c. 322 b.c.*

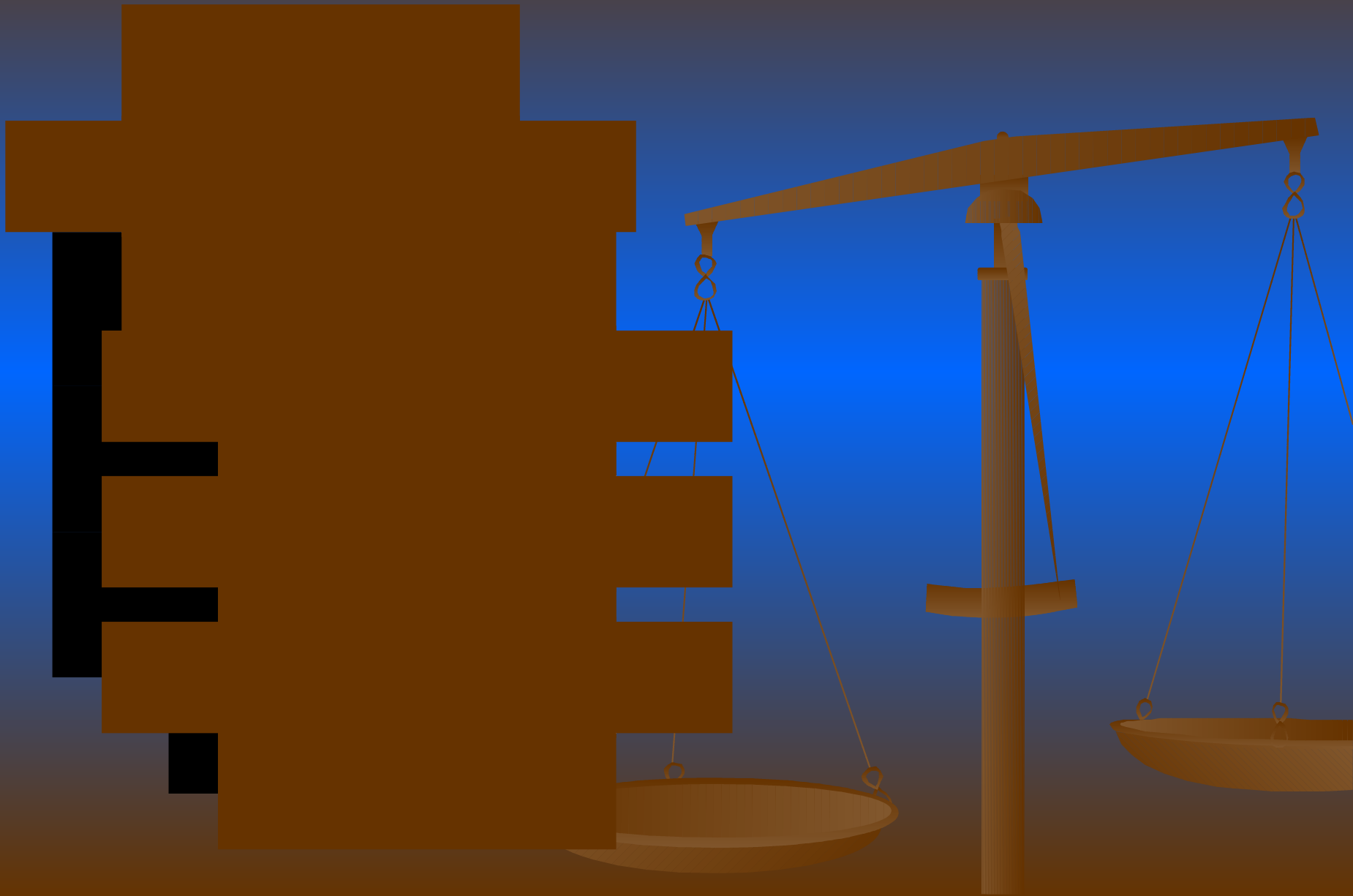
On the other hand...

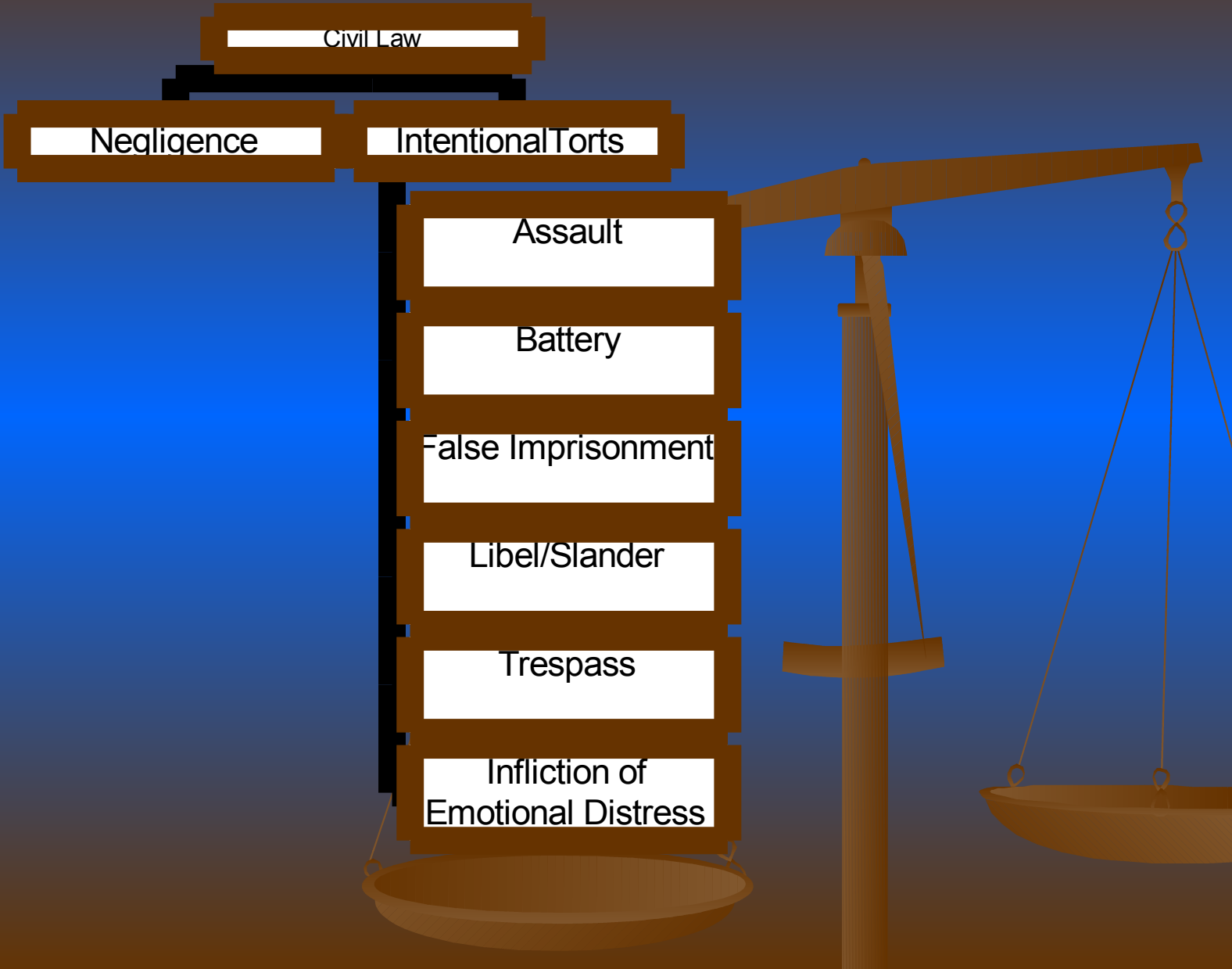
- "Laws are made by the conqueror, and accepted by the conquered" *H. L. Menken, 1946*
- "Law never made men a bit more just" *Thoreau, 1849*
- "If the law supposes that", said Mr. Bumble, "the law is a ass..." *Charles Dickens in Oliver Twist, 1838*











Civil Law

Negligence

Intentional Torts

Assault

Battery

False Imprisonment

Libel/Slander

Trespass

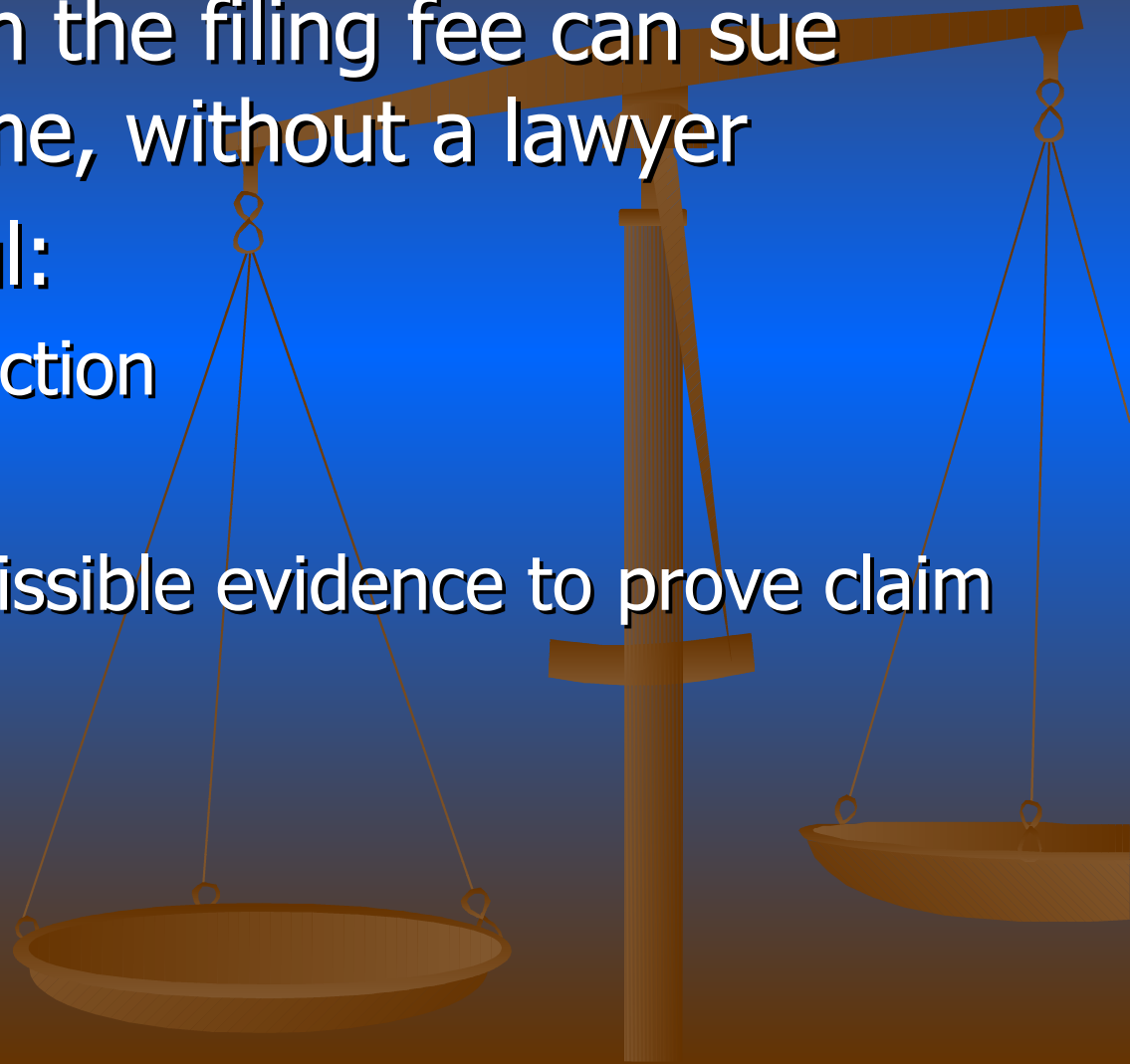
Infliction of
Emotional Distress

I'm Going to ***SUE YOU!***



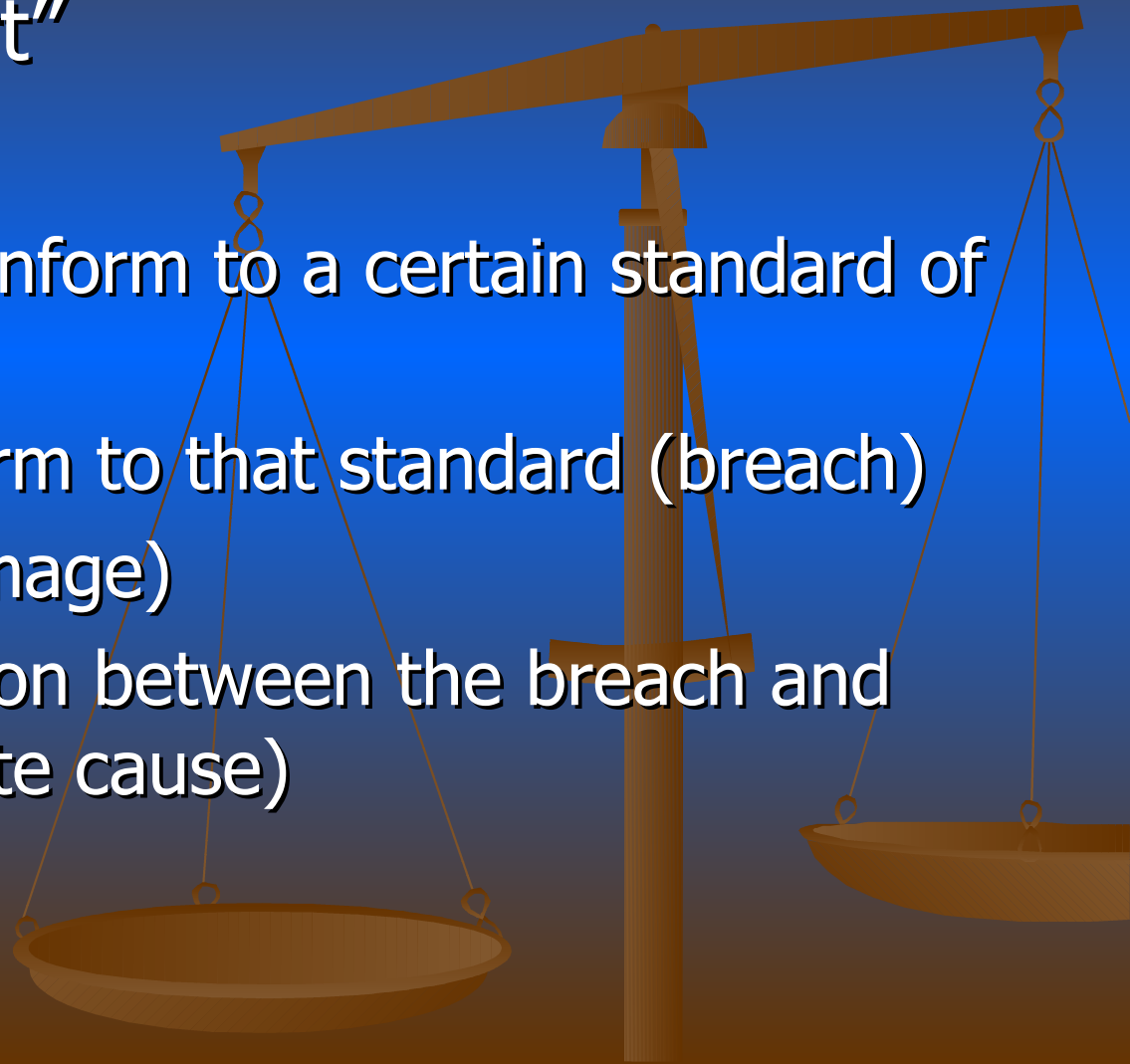
REMEMBER

- ANY person with the filing fee can sue anybody, anytime, without a lawyer
- To be successful:
 - valid cause of action
 - brought timely
 - must have admissible evidence to prove claim



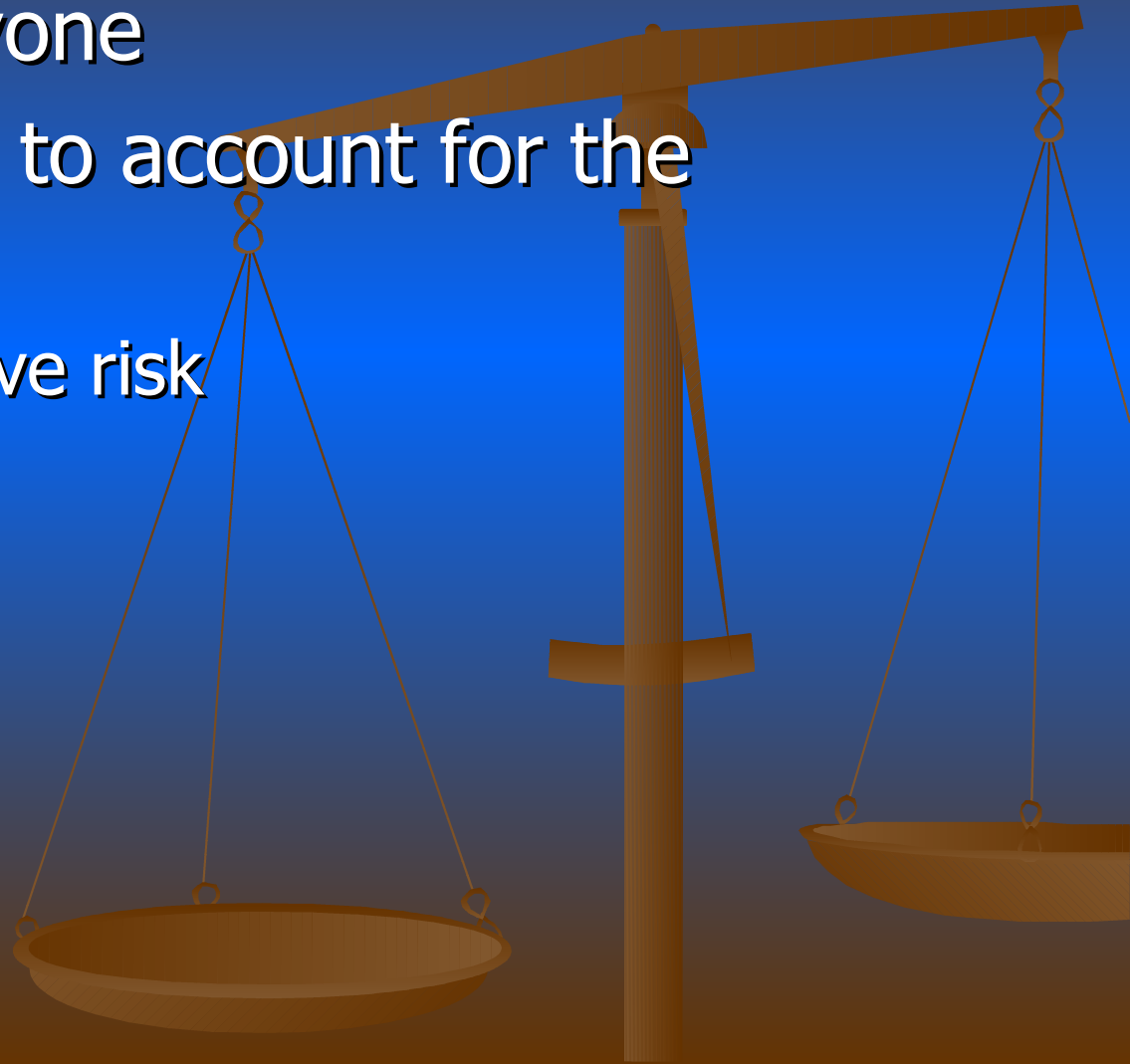
Negligence

- “Unintended tort”
- Elements
 - legal duty to conform to a certain standard of conduct (duty)
 - failure to conform to that standard (breach)
 - actual loss (damage)
 - causal connection between the breach and injury (proximate cause)



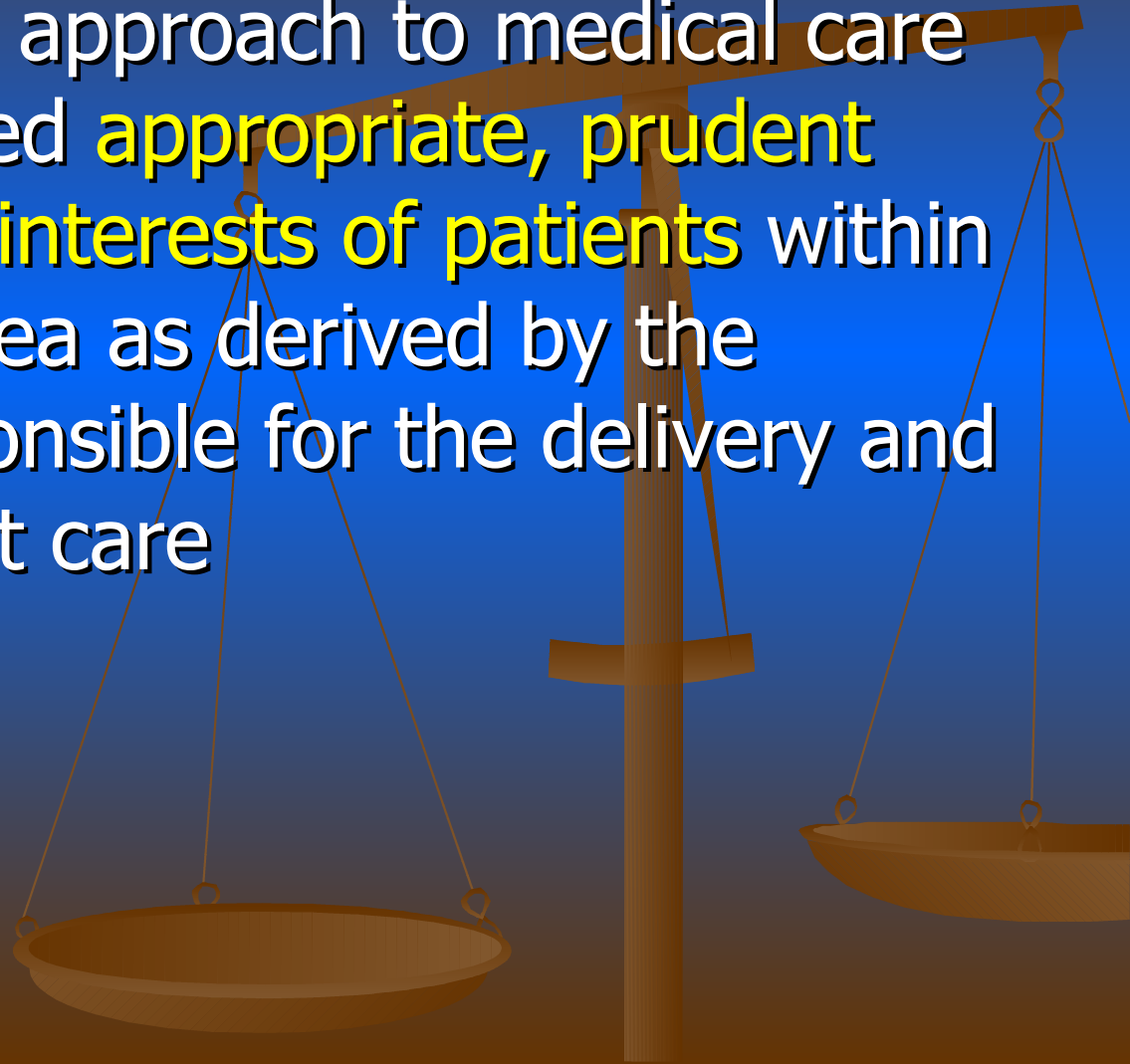
Standard of Care

- Applies to everyone
- Flexible enough to account for the individual
 - ability to perceive risk
 - ability to act
 - circumstances

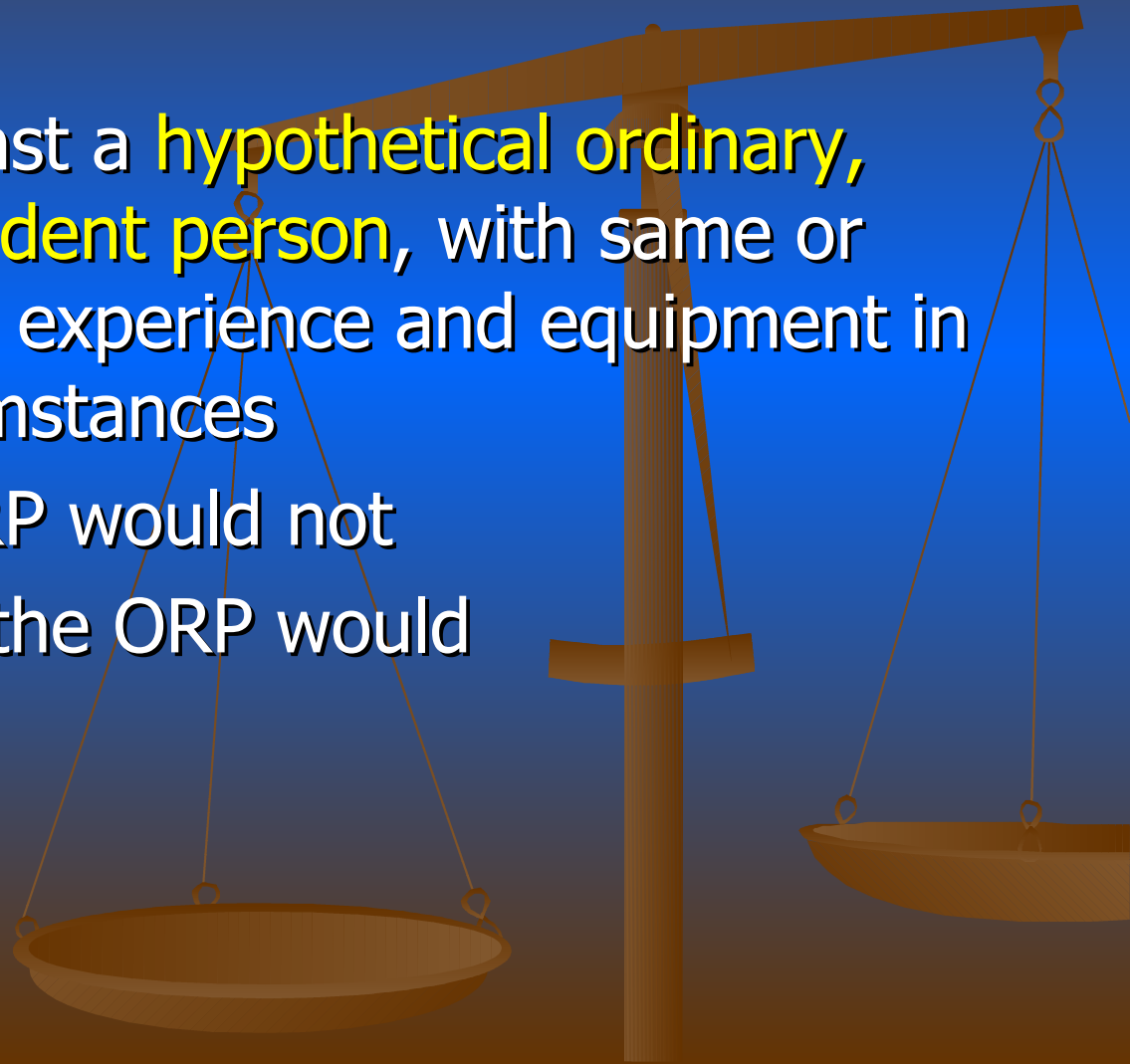


“Standard of Care”

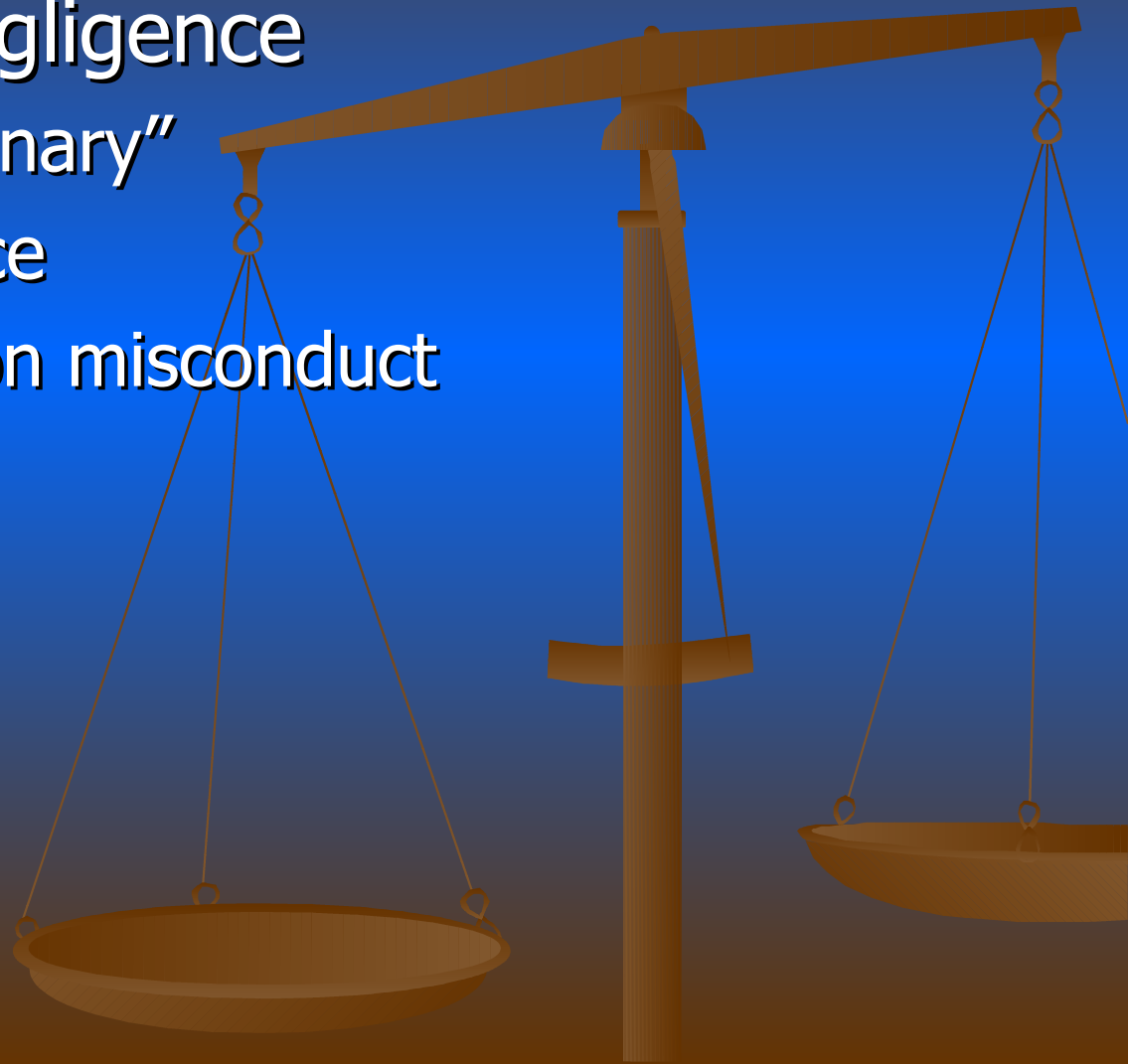
- The established approach to medical care that is considered **appropriate, prudent and in the best interests of patients** within a geographic area as derived by the physicians responsible for the delivery and oversight of that care



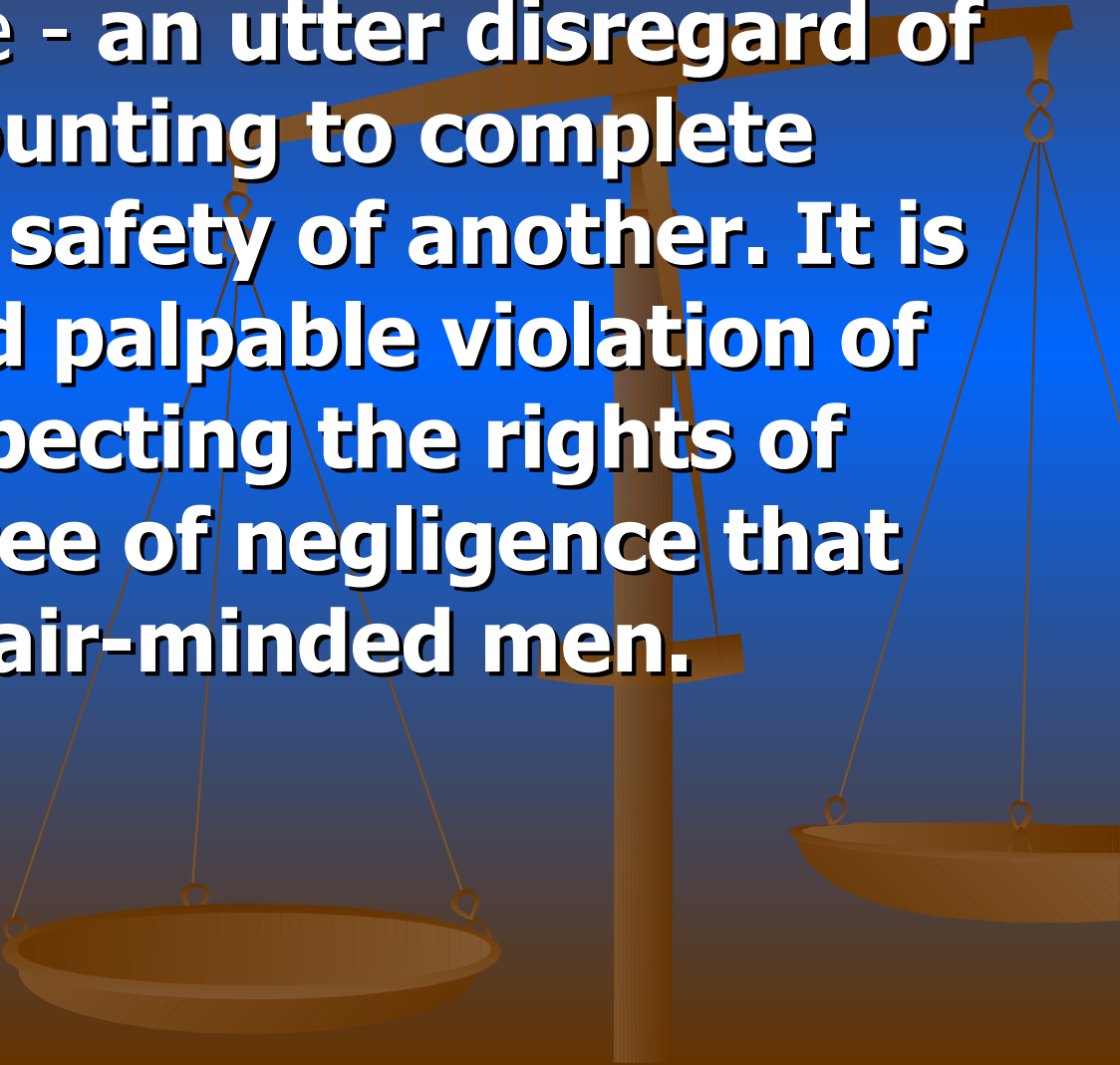
- measured against a **hypothetical ordinary, reasonable, prudent person**, with same or similar training, experience and equipment in the same circumstances
- do what the ORP would not
- fail to do what the ORP would



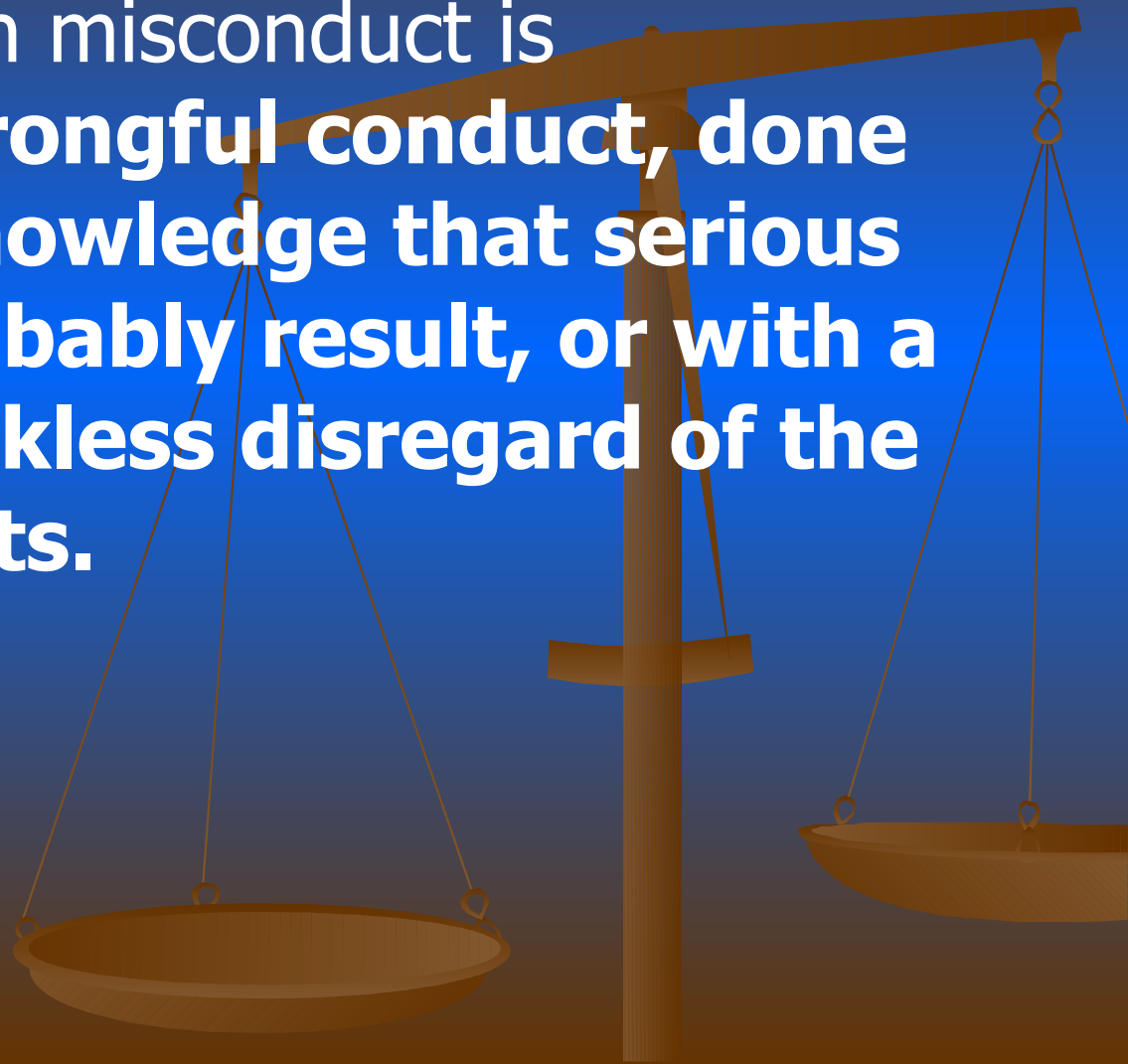
- 3 degrees of negligence
 - Simple, or “ordinary”
 - Gross negligence
 - Willful or wanton misconduct



Gross negligence - an utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others. A degree of negligence that would shock fair-minded men.

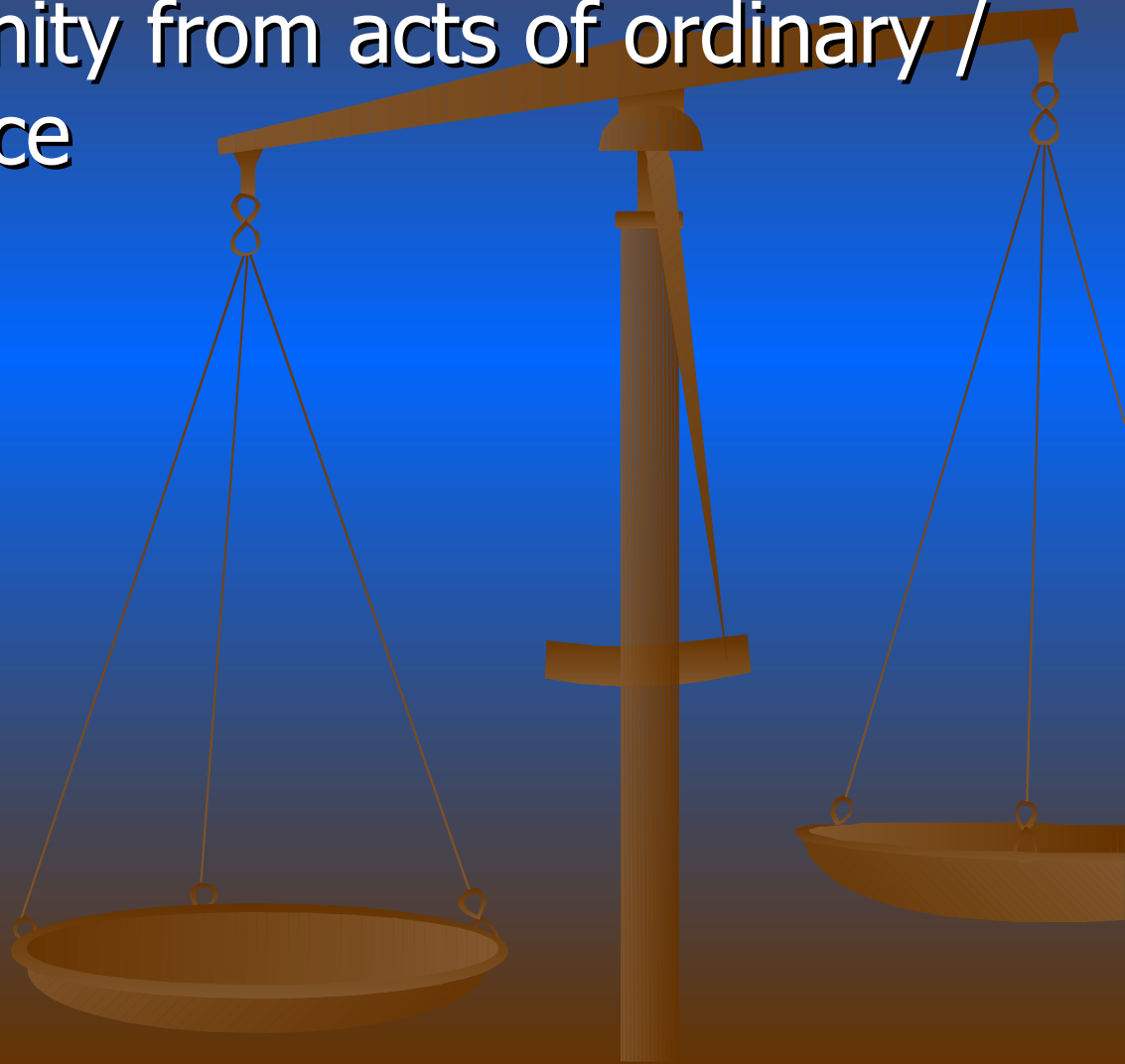


Willful or wanton misconduct is **intentional wrongful conduct, done either with knowledge that serious injury will probably result, or with a wanton or reckless disregard of the possible results.**



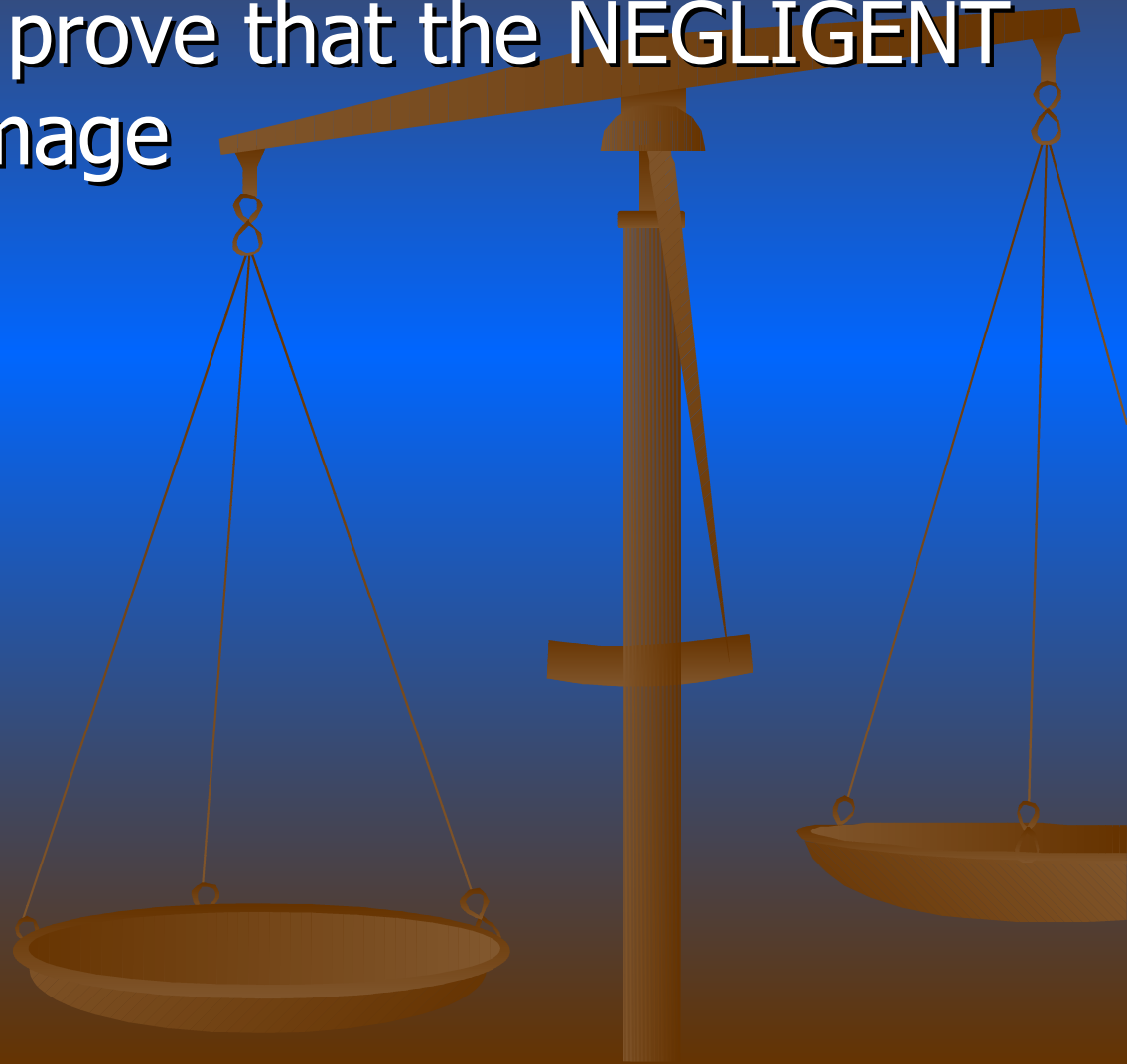
WHY does it matter?

Some have immunity from acts of ordinary /
simple negligence



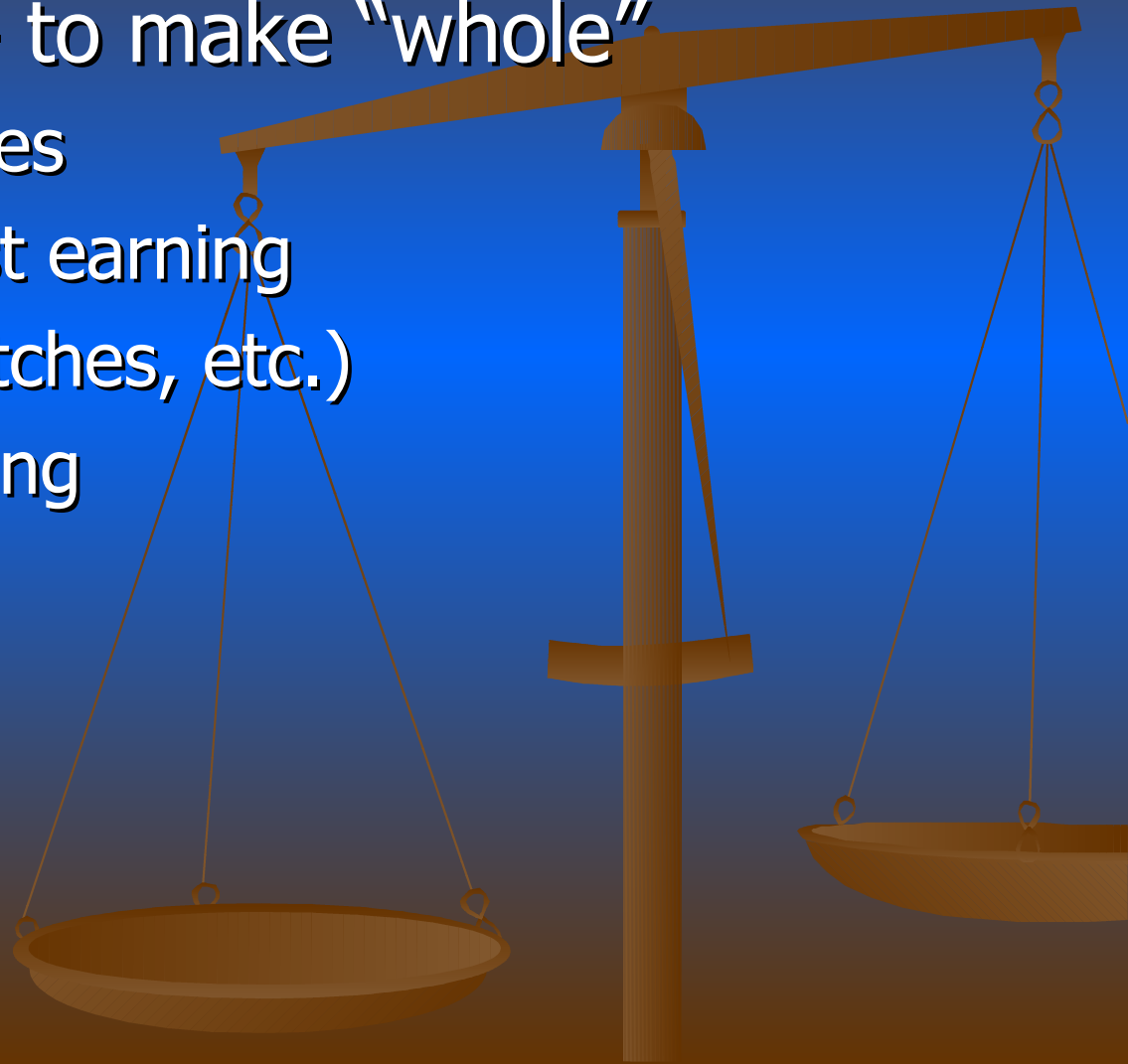
If negligence is proven....

You **STILL** must prove that the **NEGLIGENT**
ACT caused damage



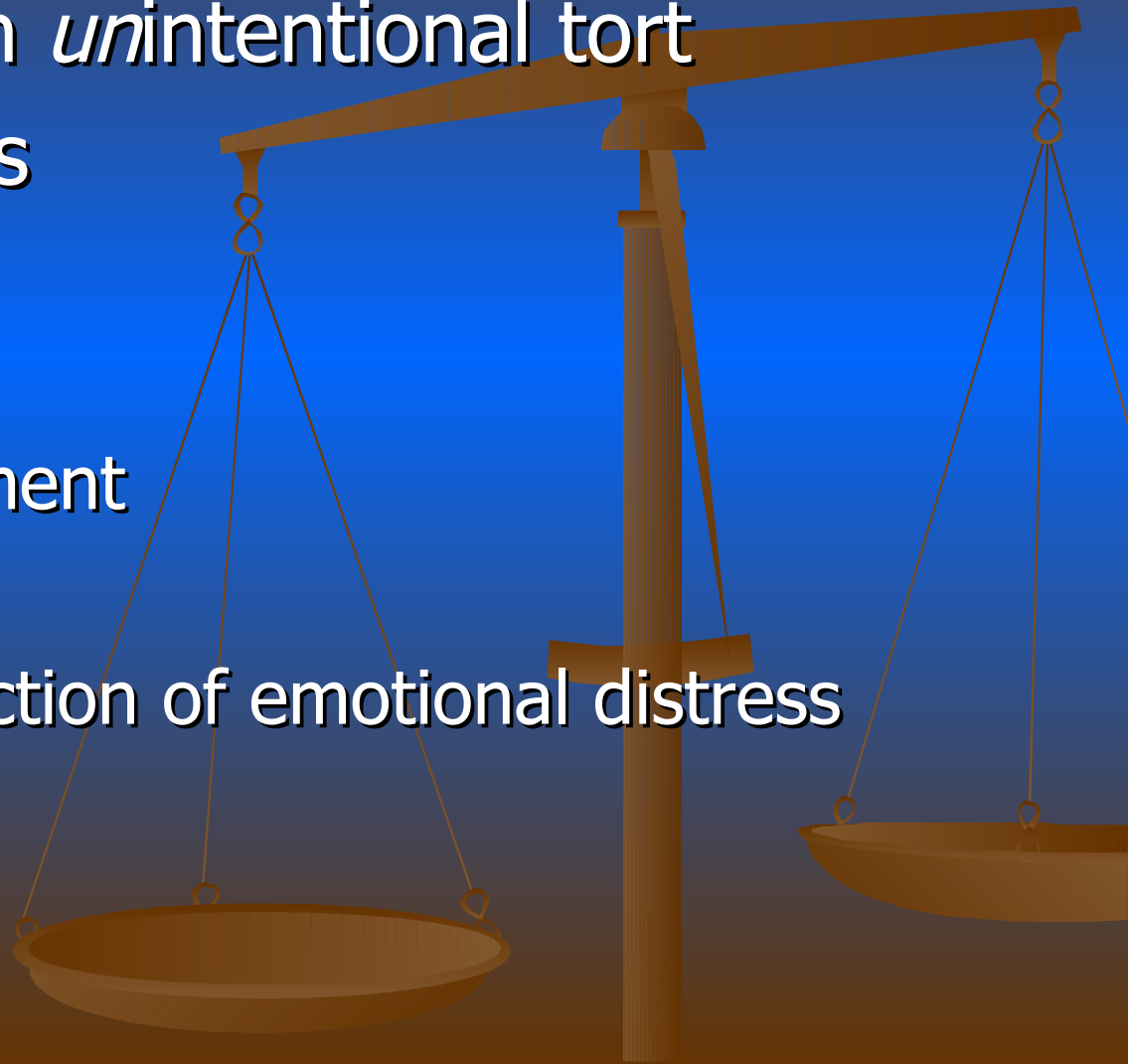
Damages

- Compensatory - to make “whole”
 - medical expenses
 - lost wages / lost earning
 - appliances (crutches, etc.)
 - pain and suffering



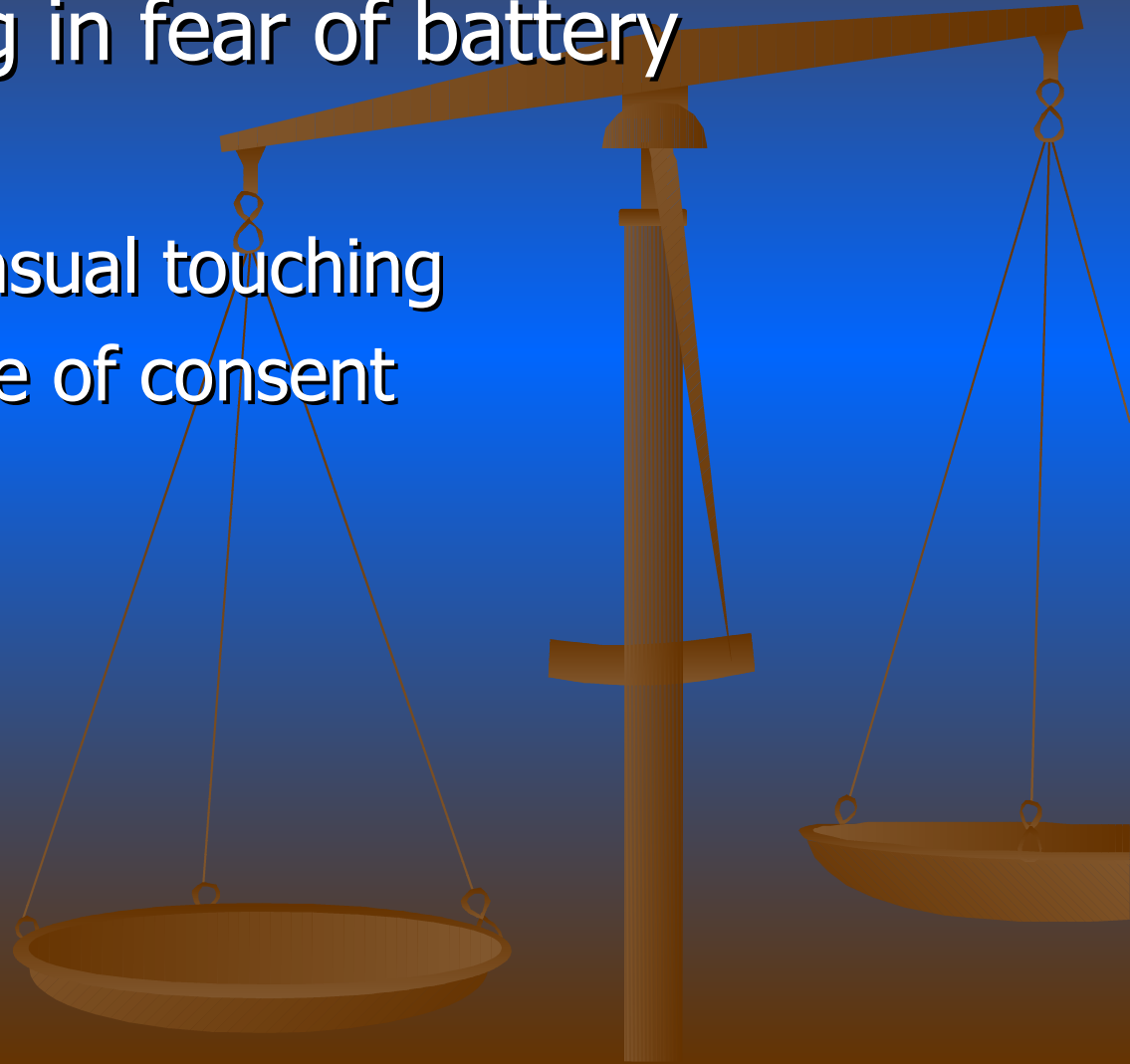
Reminder

- Negligence is an *unintentional* tort
- Intentional Torts
 - Assault
 - Battery
 - False imprisonment
 - Trespass
 - Intentional infliction of emotional distress



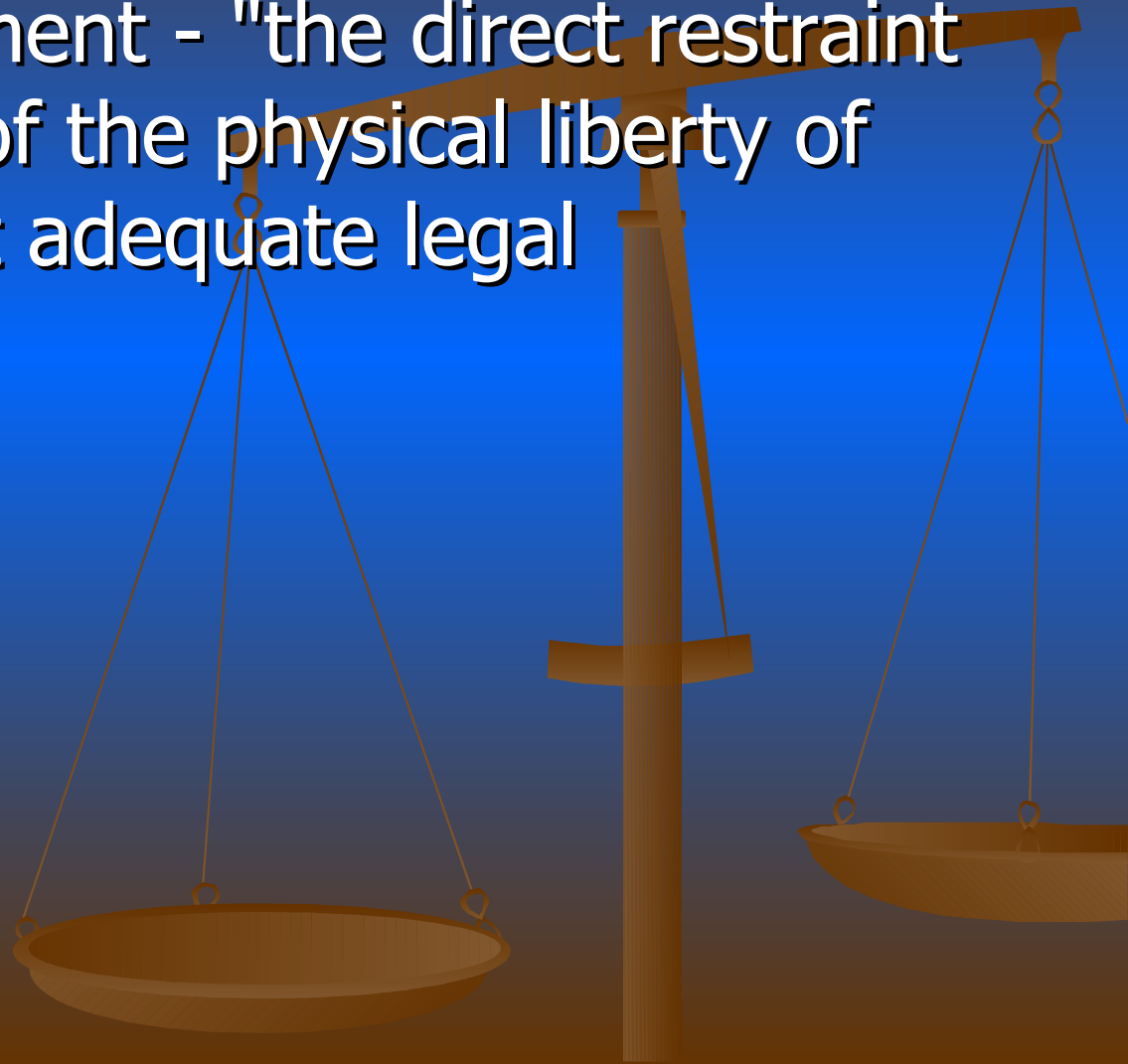
Intentional Torts

- Assault - placing in fear of battery
- Battery
 - any non-consensual touching
 - exceeding scope of consent



Intentional Torts

- False Imprisonment - "the direct restraint by one person of the physical liberty of another without adequate legal justification."



Damages

■ Compensatory

- nominal damage is presumed
- plaintiff is entitled to an award

■ Punitive

- punish for intentional misconduct or reckless behavior
- serve as an example to rest of society



Defenses to Intentional Torts

- Consent
- Necessity



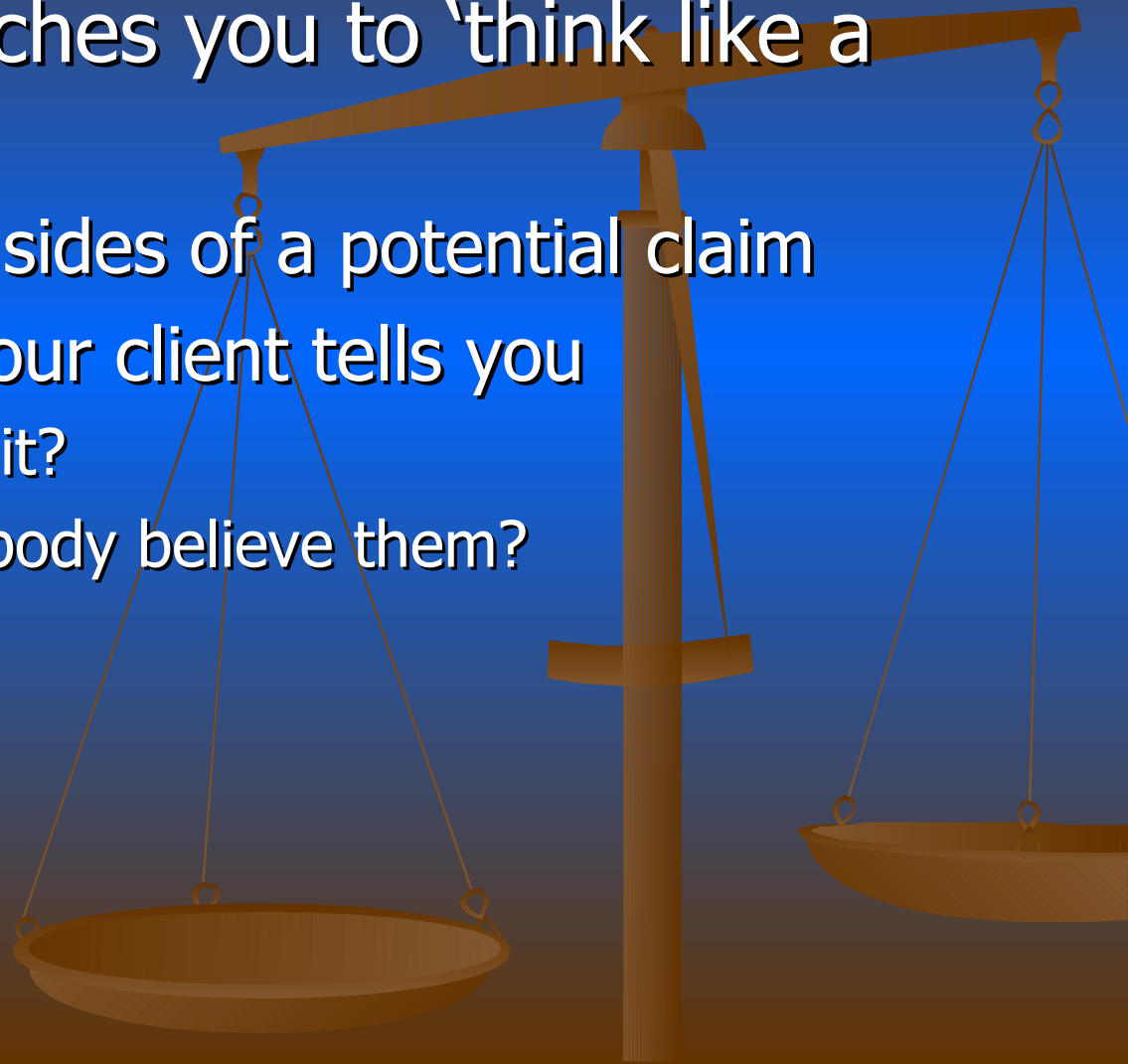
Phases of a Lawsuit

- Pre-filing
- Post-filing
- Trial
- Post-trial



What do lawyers do?

- Law school teaches you to 'think like a lawyer'
 - Evaluate BOTH sides of a potential claim
 - Distrust what your client tells you
 - Can you prove it?
 - If not, will anybody believe them?



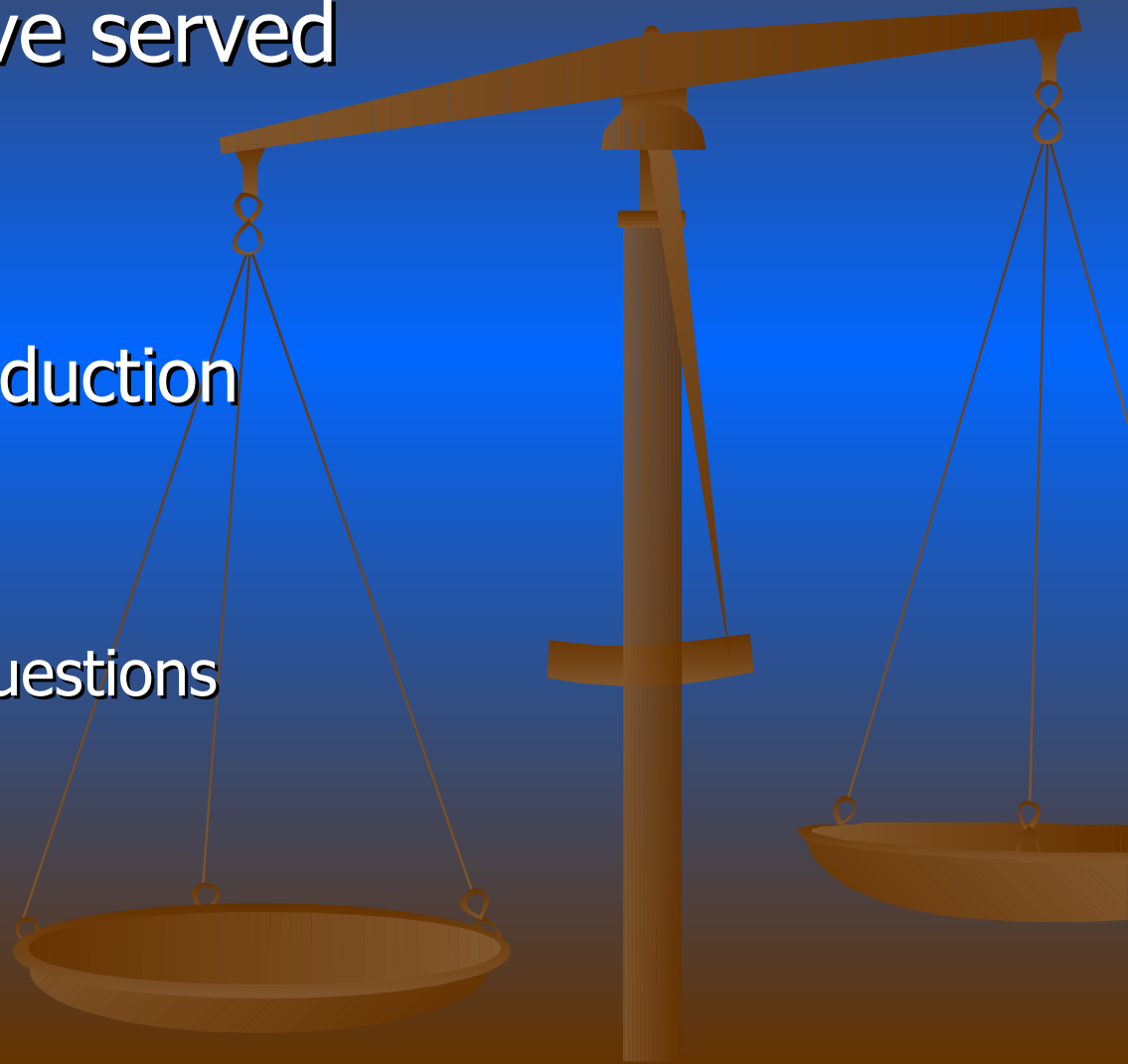
Pre-filing Phase

- Investigation of claim
 - interview witnesses
 - obtain medical records
 - identify potential defendants
- Demand letter
- Select venue



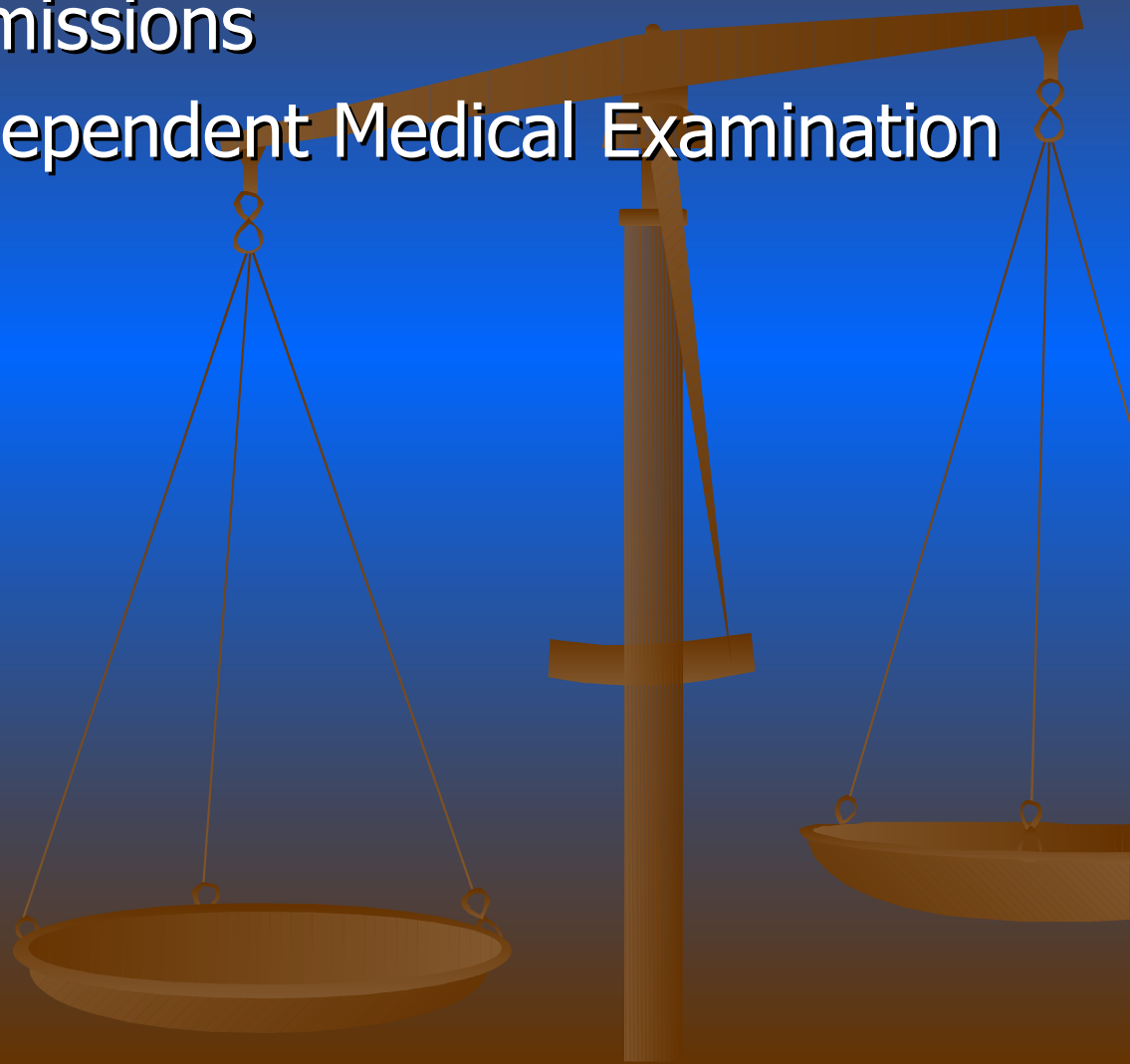
Post-filing Phase

- File suit and have served
- Discovery
 - Interrogatories
 - Request for Production
 - Depositions
 - oral
 - upon written questions



Post-filing Phase

- Request for Admissions
- Request for Independent Medical Examination



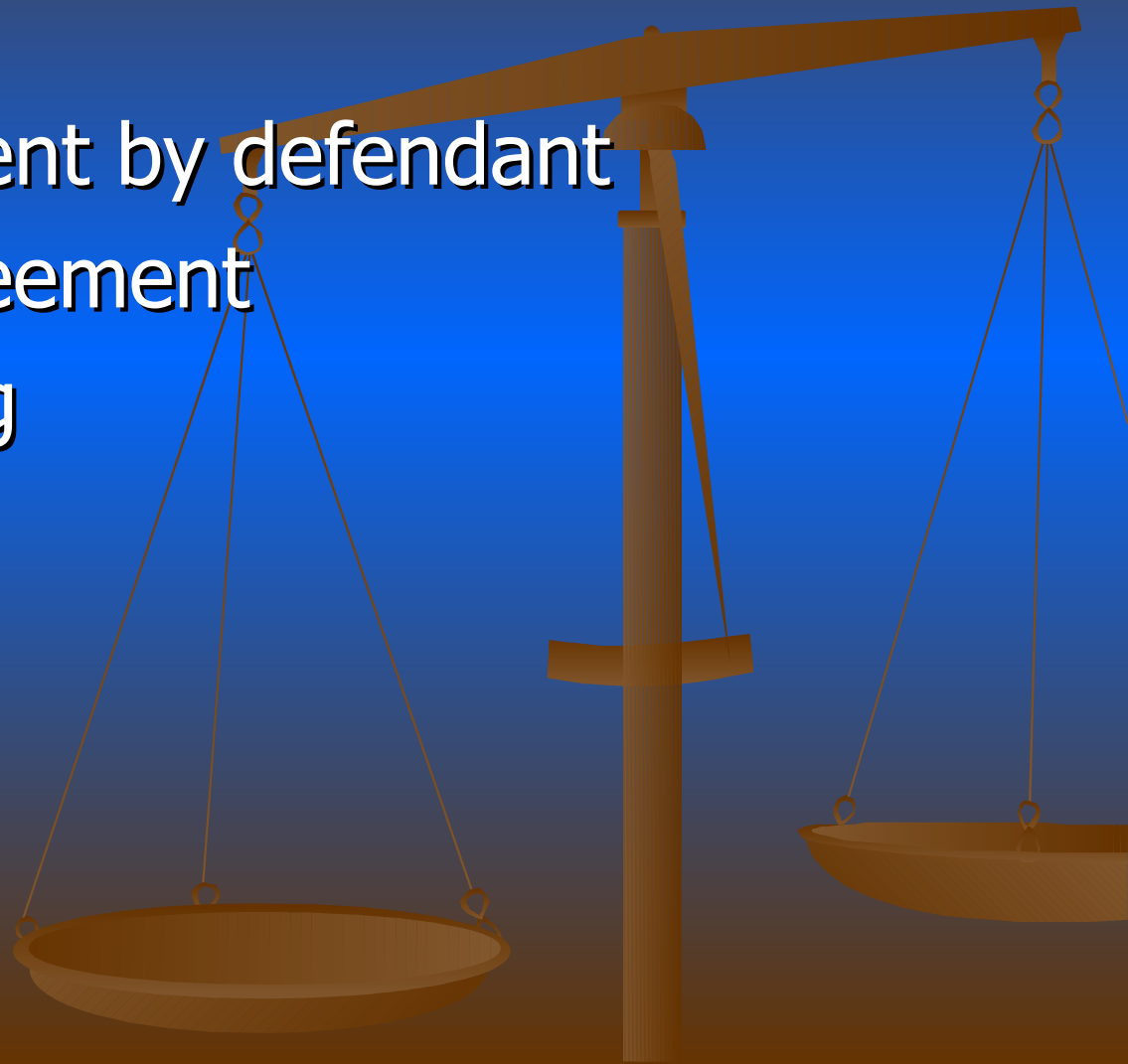
Post-filing Phase

- Pre-trial motions
 - Motion to Dismiss
 - Motions to Compel Discovery
 - Motion for Summary Judgment
 - Motions *in limine*



Post-filing Phase

- Negotiation
- Offer of Judgment by defendant
- High / Low Agreement
- Pre-trial Hearing



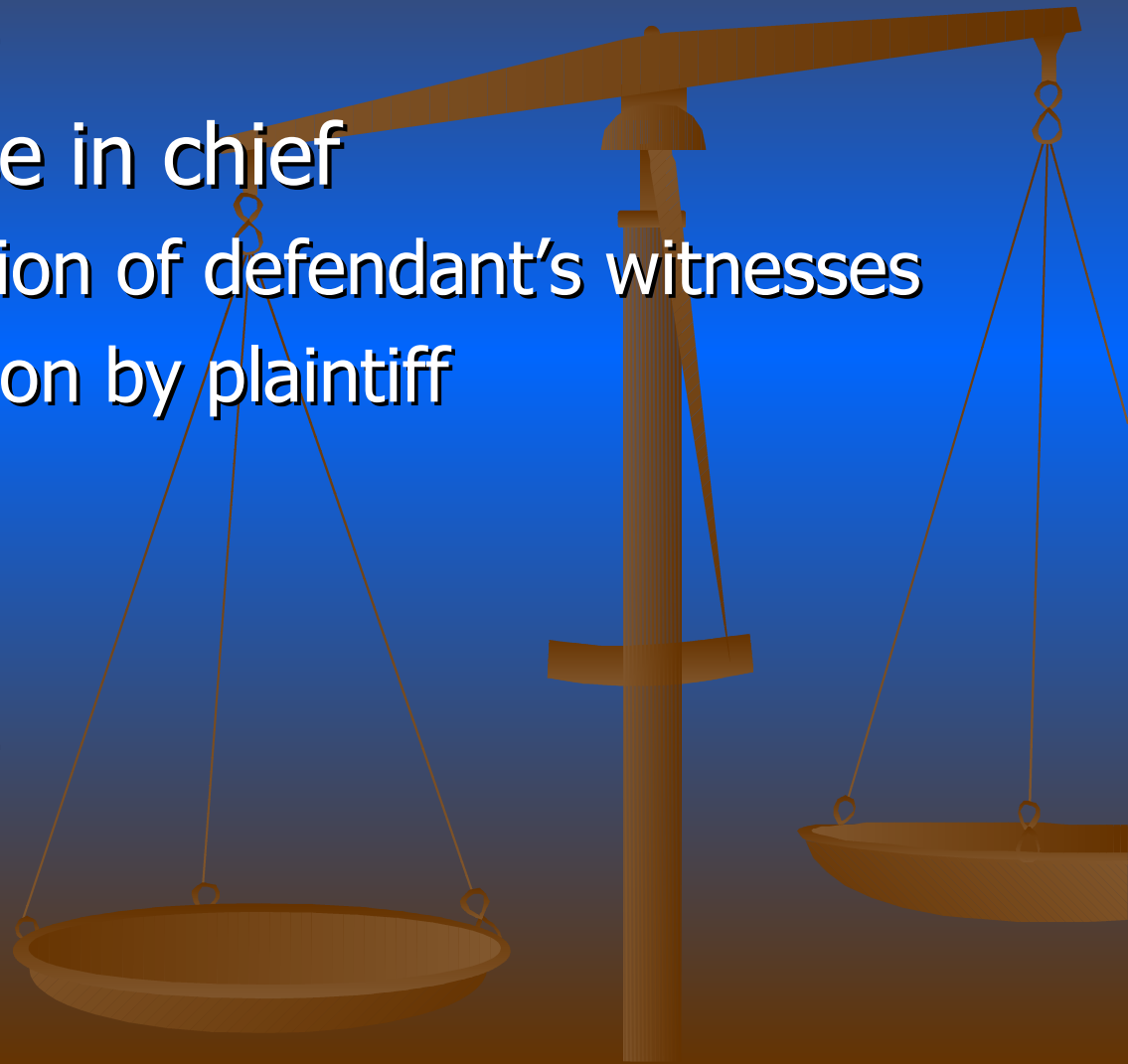
Trial Phase

- Jury selection
 - *voir dire*
 - "*striking*" the jury
- Opening statements
- Plaintiff's case in chief
 - direct examination of plaintiff's witnesses
 - cross-examination by defense



Trial Phase

- Motion to Strike
- Defendant's case in chief
 - direct examination of defendant's witnesses
 - cross-examination by plaintiff
- Rebuttal
- Surrebuttal
- Motion to Strike



Trial Phase

- Jury instructions
- Closing arguments
- Verdict



Post-trial Phase

- Motions
 - new trial
 - additur
 - remittitur



Post-trial Phase

- Appeal



Why do people sue?



■ Revenge



- Revenge
- Greed



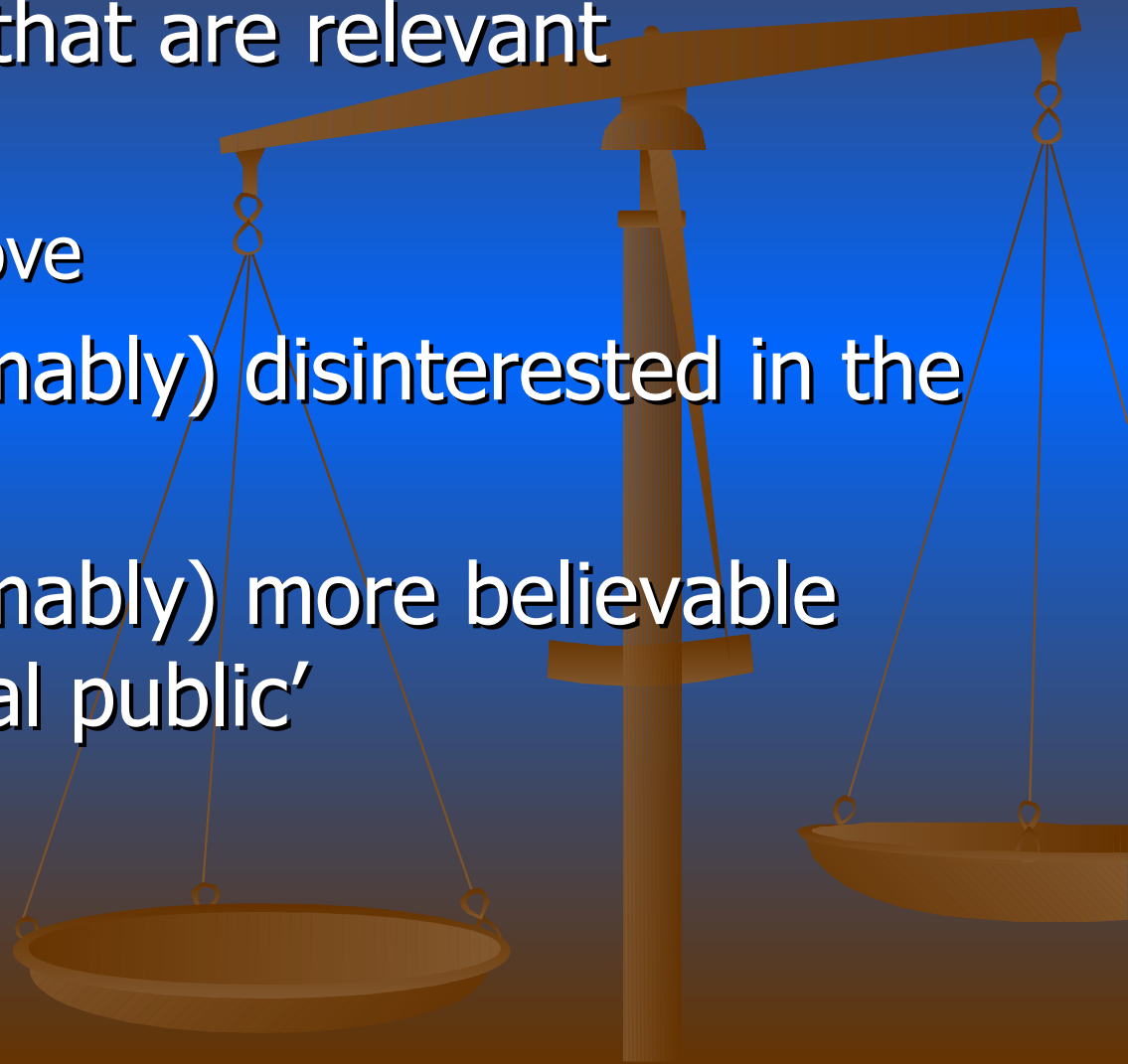
How Does This Affect ME?



How Does This Affect ME?



- You have facts that are relevant
 - May help prove
 - May help disprove
- You are (presumably) disinterested in the outcome
- You are (presumably) more believable than the 'general public'



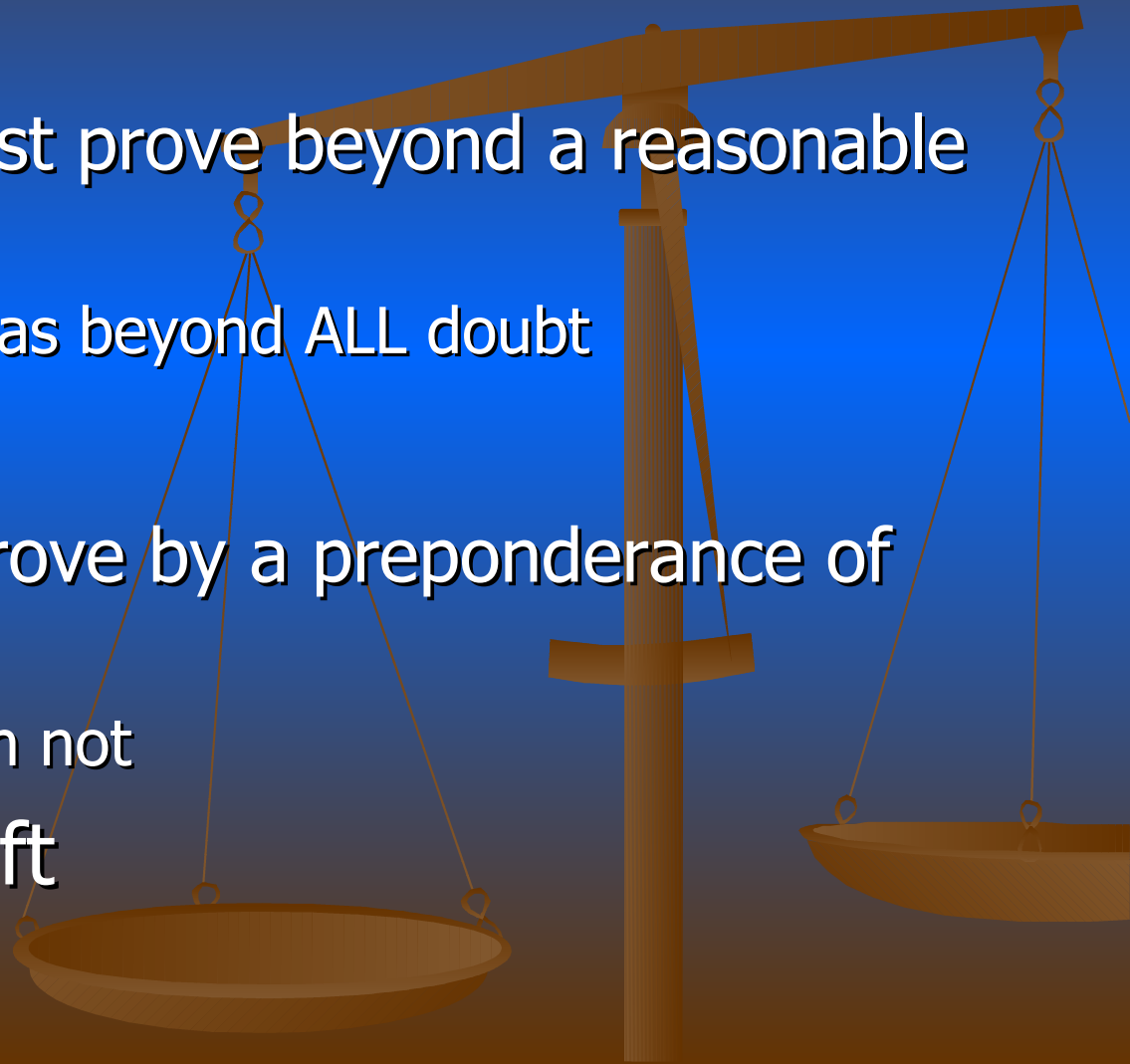
Your Testimony

- Deposition
- At trial



Who has to prove what?

- Criminal case
 - prosecution must prove beyond a reasonable doubt
 - NOT the same as beyond ALL doubt
- Civil case
 - plaintiff must prove by a preponderance of the evidence
 - More likely than not
- Burdens can shift

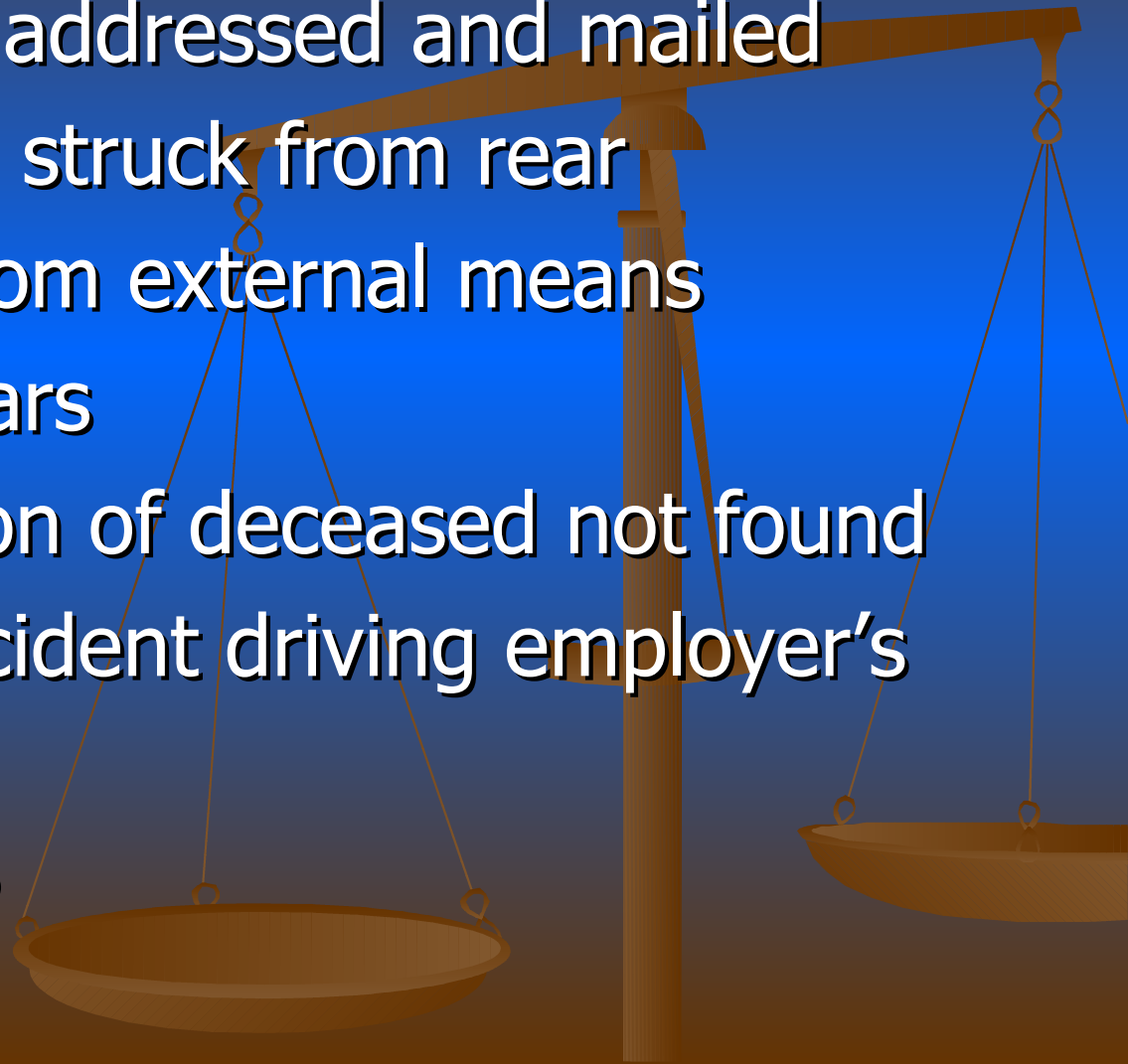


How do you prove your case?

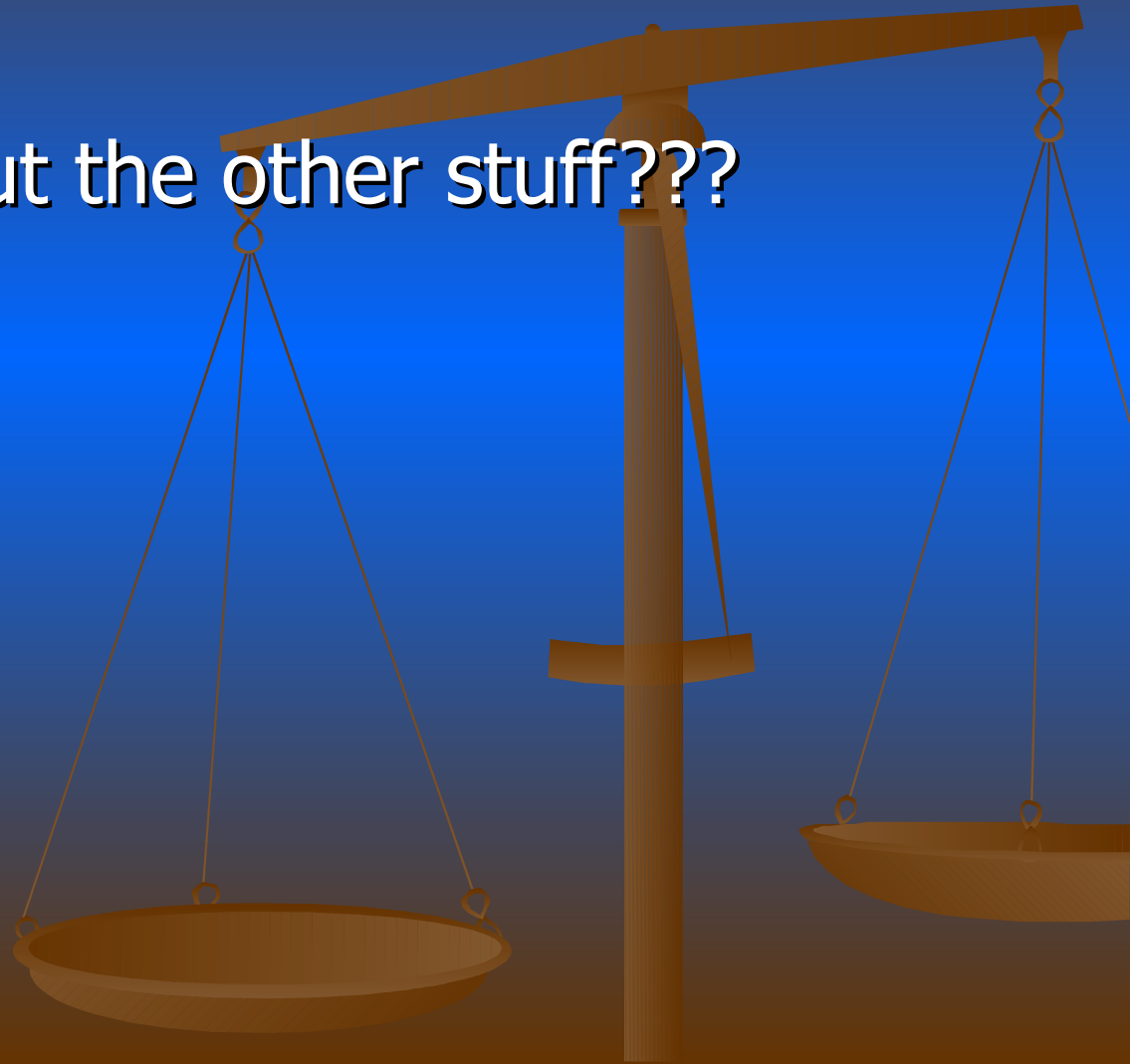


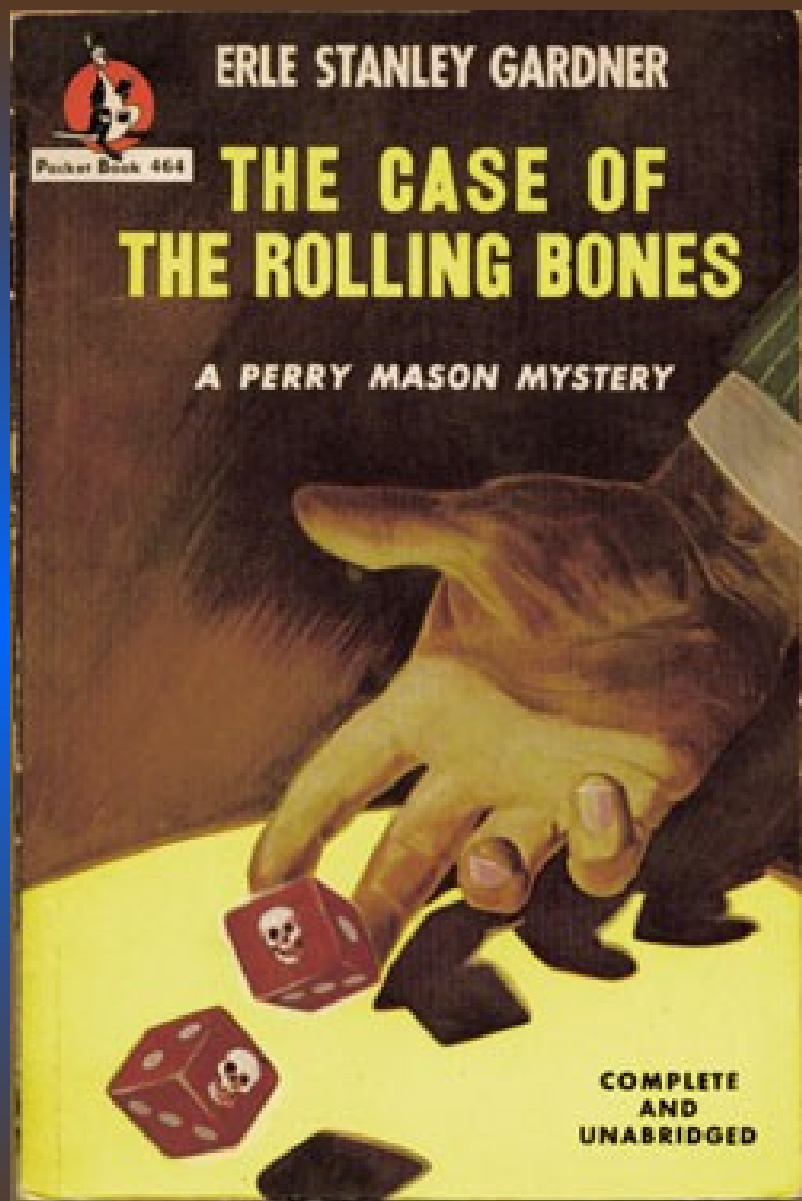
Presumptions

- Letter regularly addressed and mailed
- Vehicle stopped struck from rear
- Violent death from external means
- Absent for 7 years
- Will in possession of deceased not found
- Employee in accident driving employer's vehicle
- BAC above 0.08

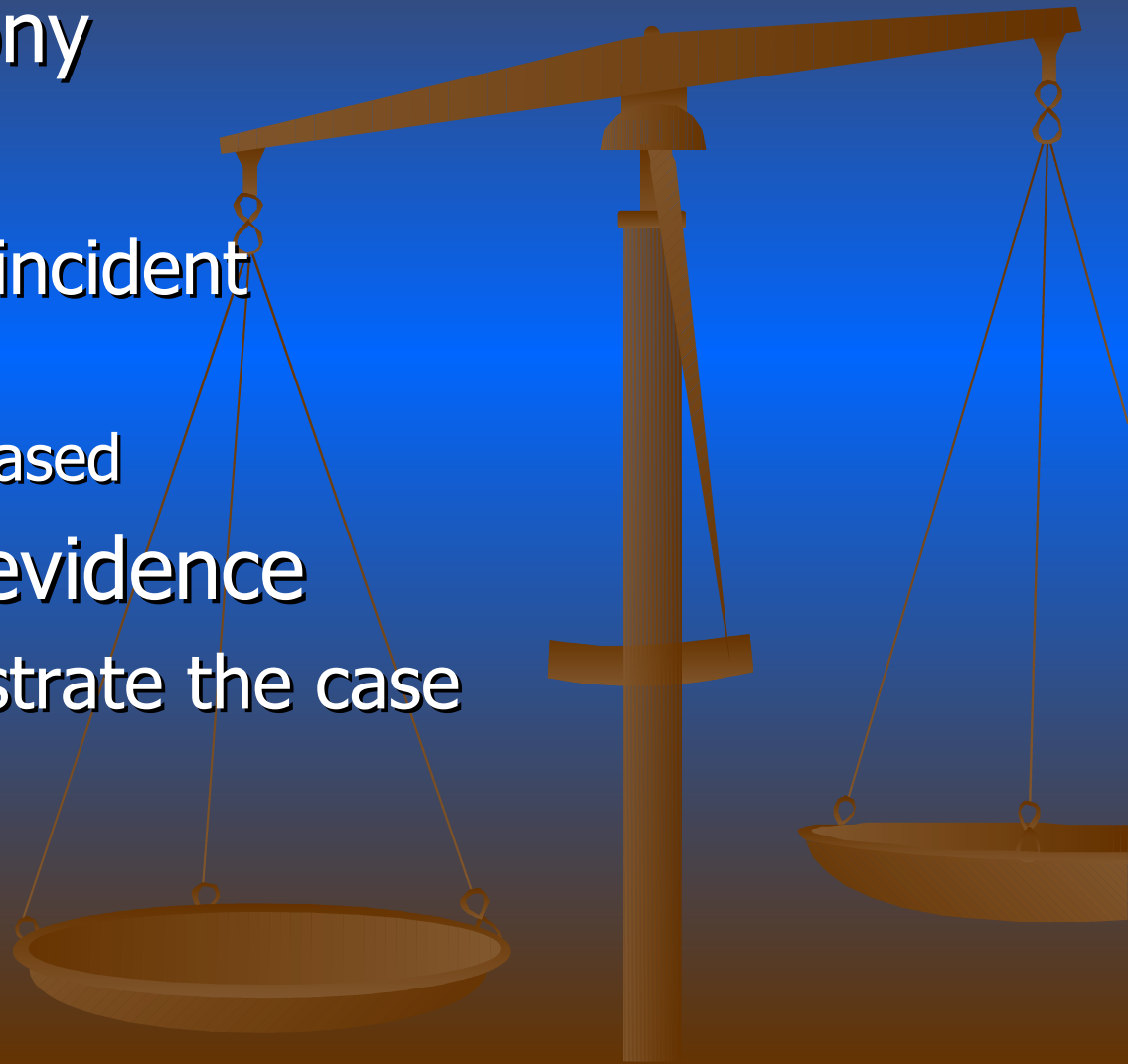


What about the other stuff???



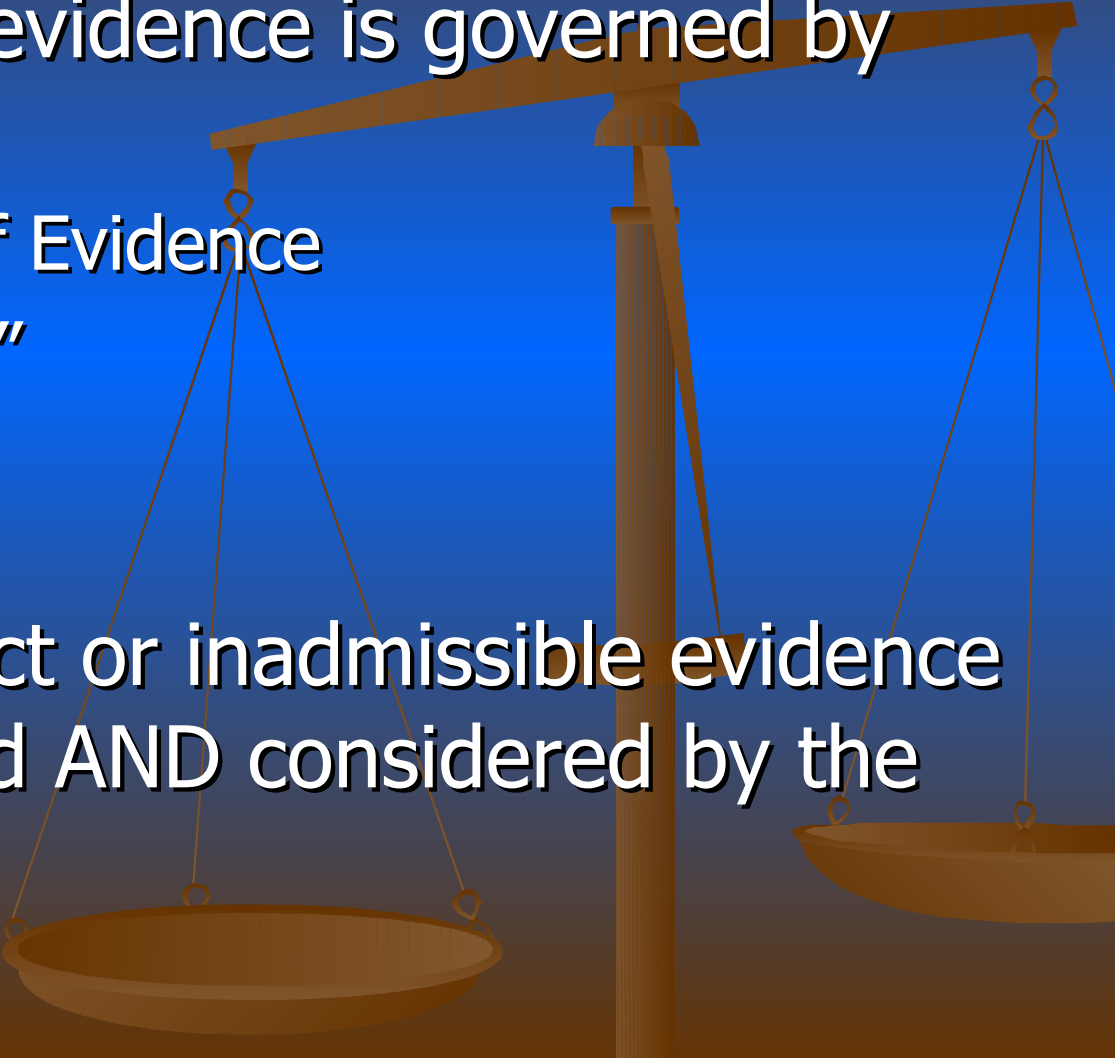


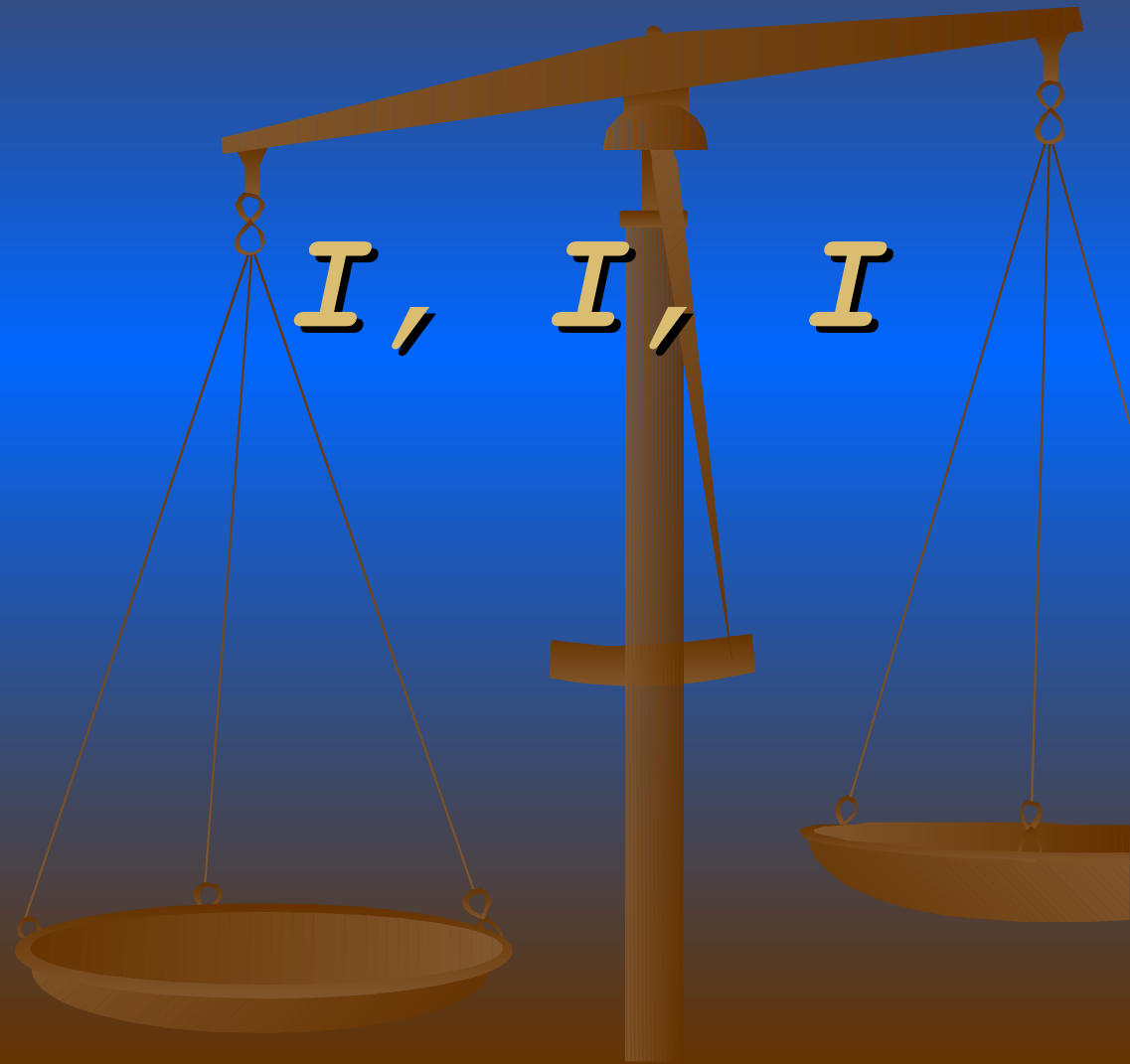
- Witness testimony
- Real evidence
 - involved in the incident
 - document
 - picture of deceased
- Demonstrative evidence
 - obtained to illustrate the case
 - models
 - diagrams



- There are limits to admissibility of evidence



- 
- Admissibility of evidence is governed by rules
 - Federal Rules of Evidence
 - State law “rules”
 - common law
 - some statutes
 - Party must object or inadmissible evidence may be admitted AND considered by the jury



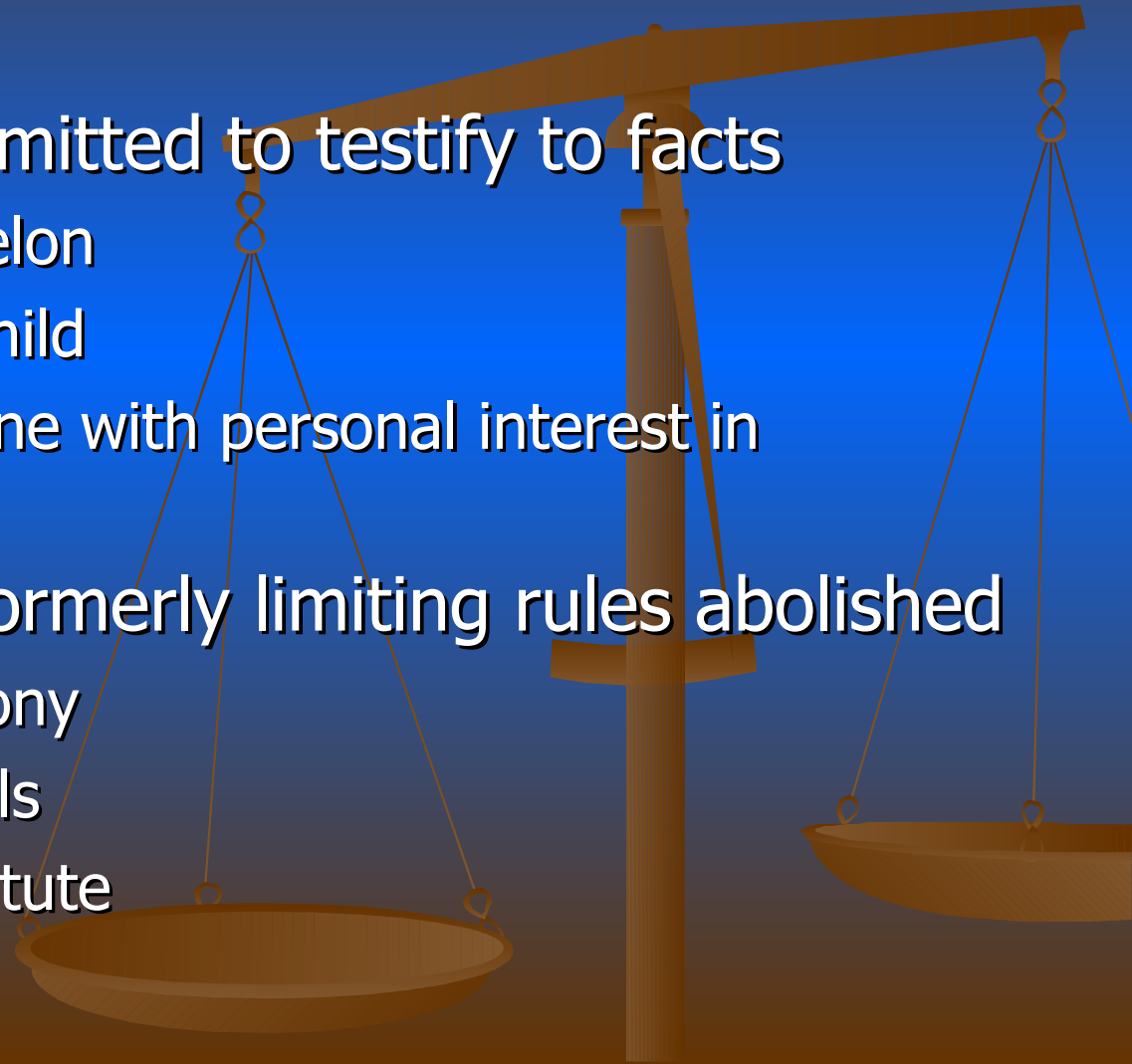
I, I, I

- Incompetent
- Irrelevant
- Immaterial



■ Incompetent

- witness not permitted to testify to facts
 - testimony by felon
 - testimony by child
 - testimony by one with personal interest in outcome
- TODAY: most formerly limiting rules abolished
 - spousal testimony
 - holographic wills
 - dead man's statute

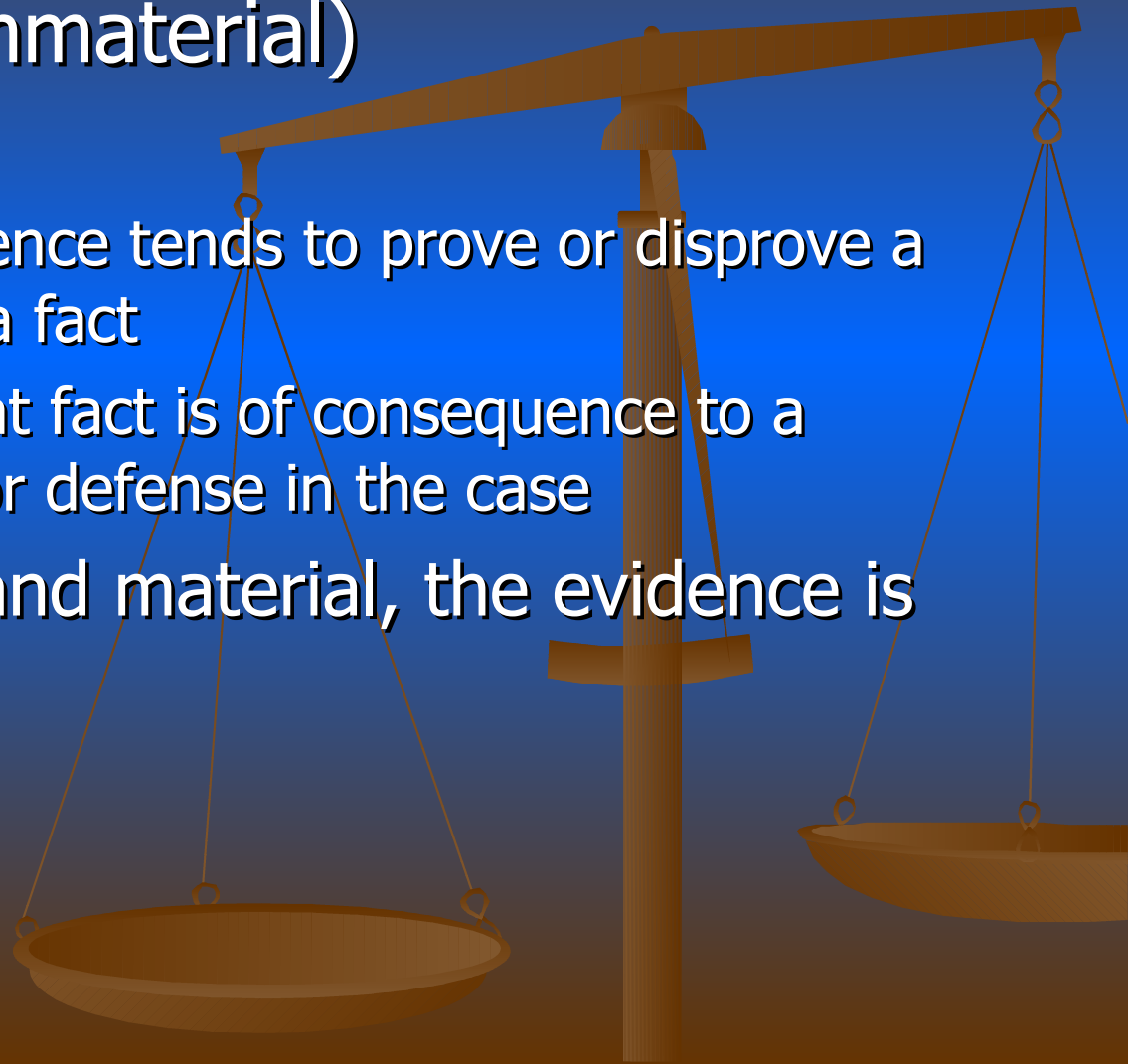


■ Irrelevant (or immaterial)

- interconnected

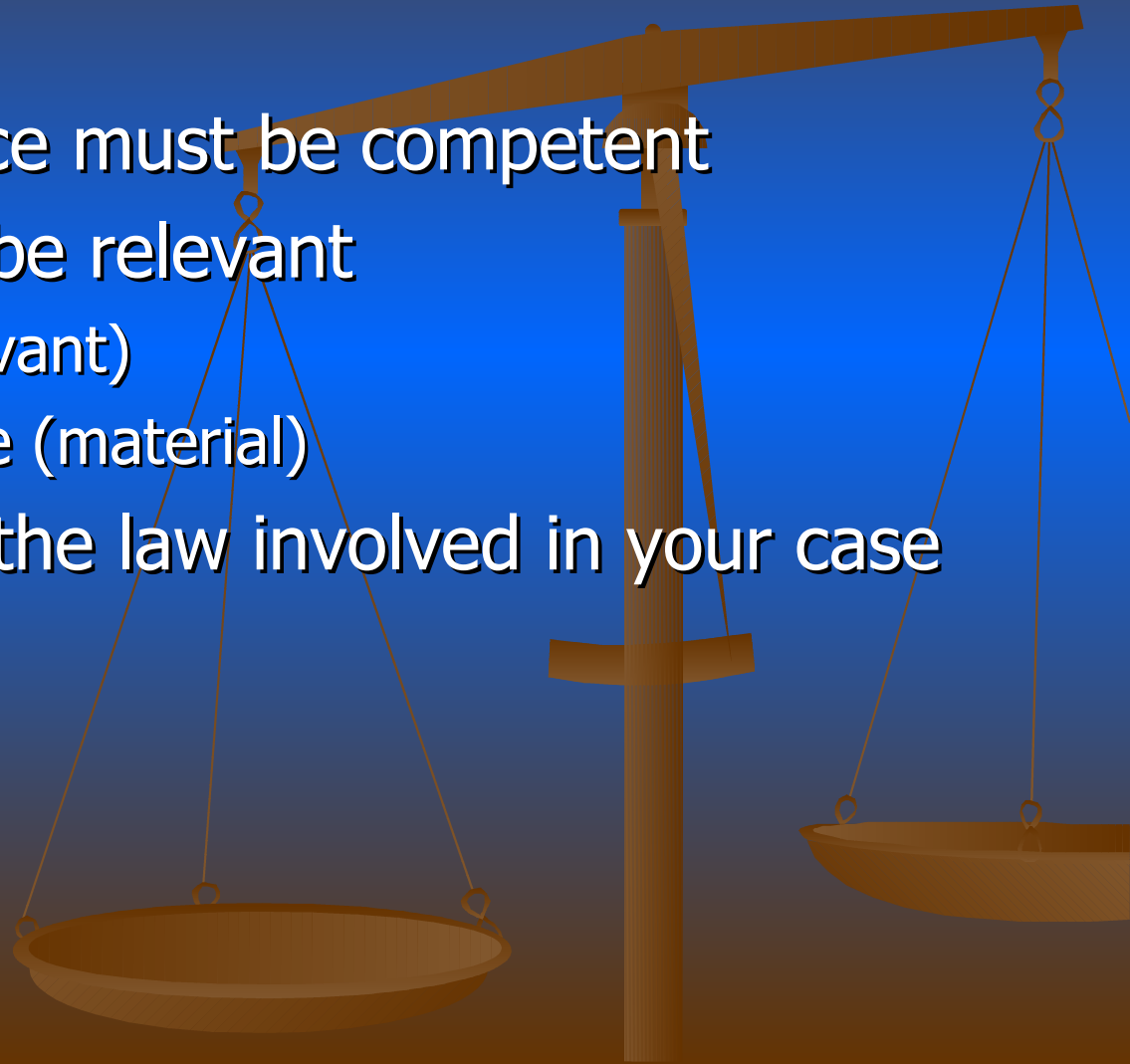
- *relevant* - evidence tends to prove or disprove a proposition of a fact
- *material* - if that fact is of consequence to a charge, claim or defense in the case

- if not relevant and material, the evidence is not admitted



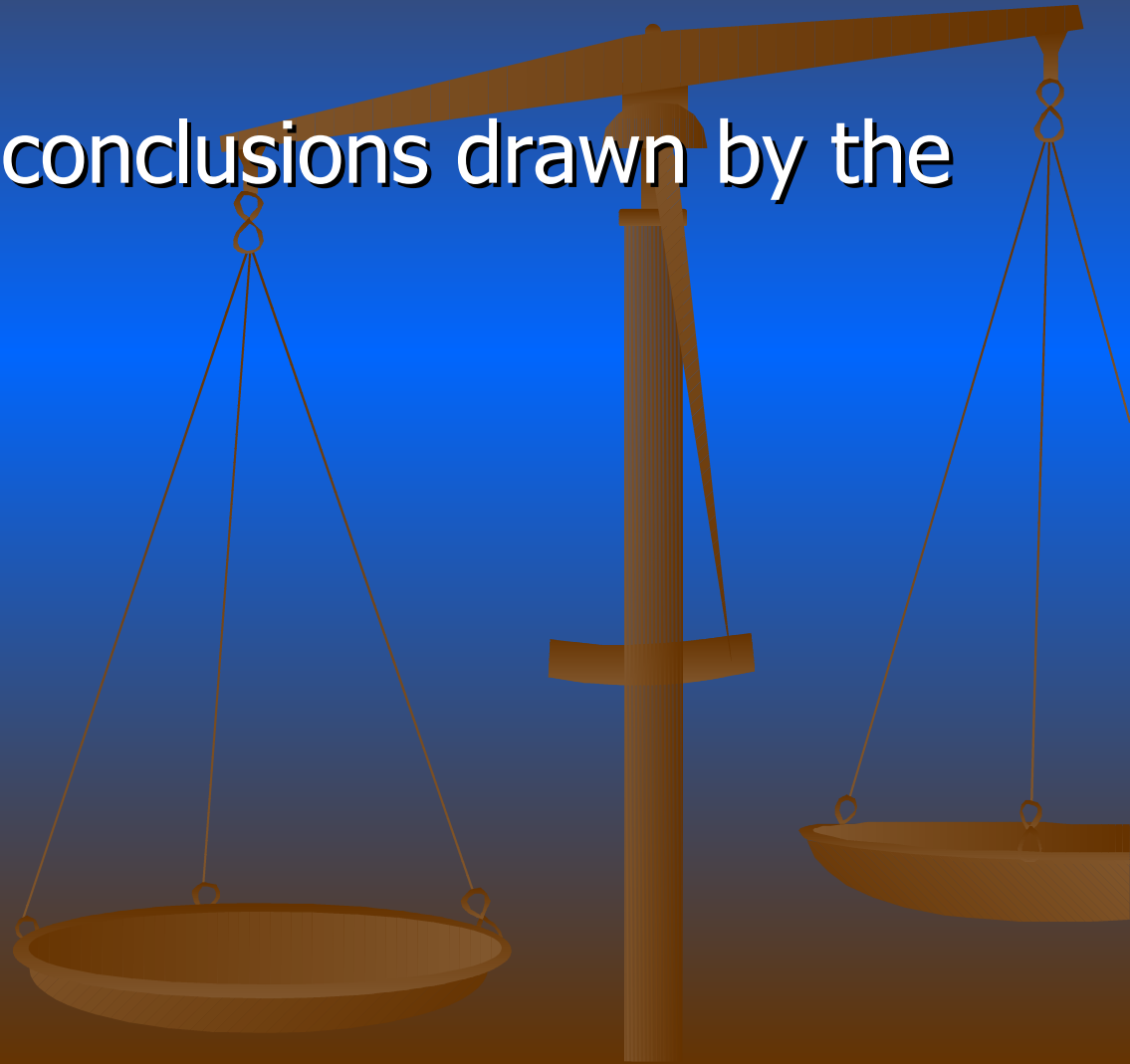
■ Modern Rule

- witness/evidence must be competent
- evidence must be relevant
 - probative (relevant)
 - of consequence (material)
- all depends on the law involved in your case



Types of Evidence

- Fact
- Opinion (or the conclusions drawn by the witness)
 - lay opinion
 - expert opinion



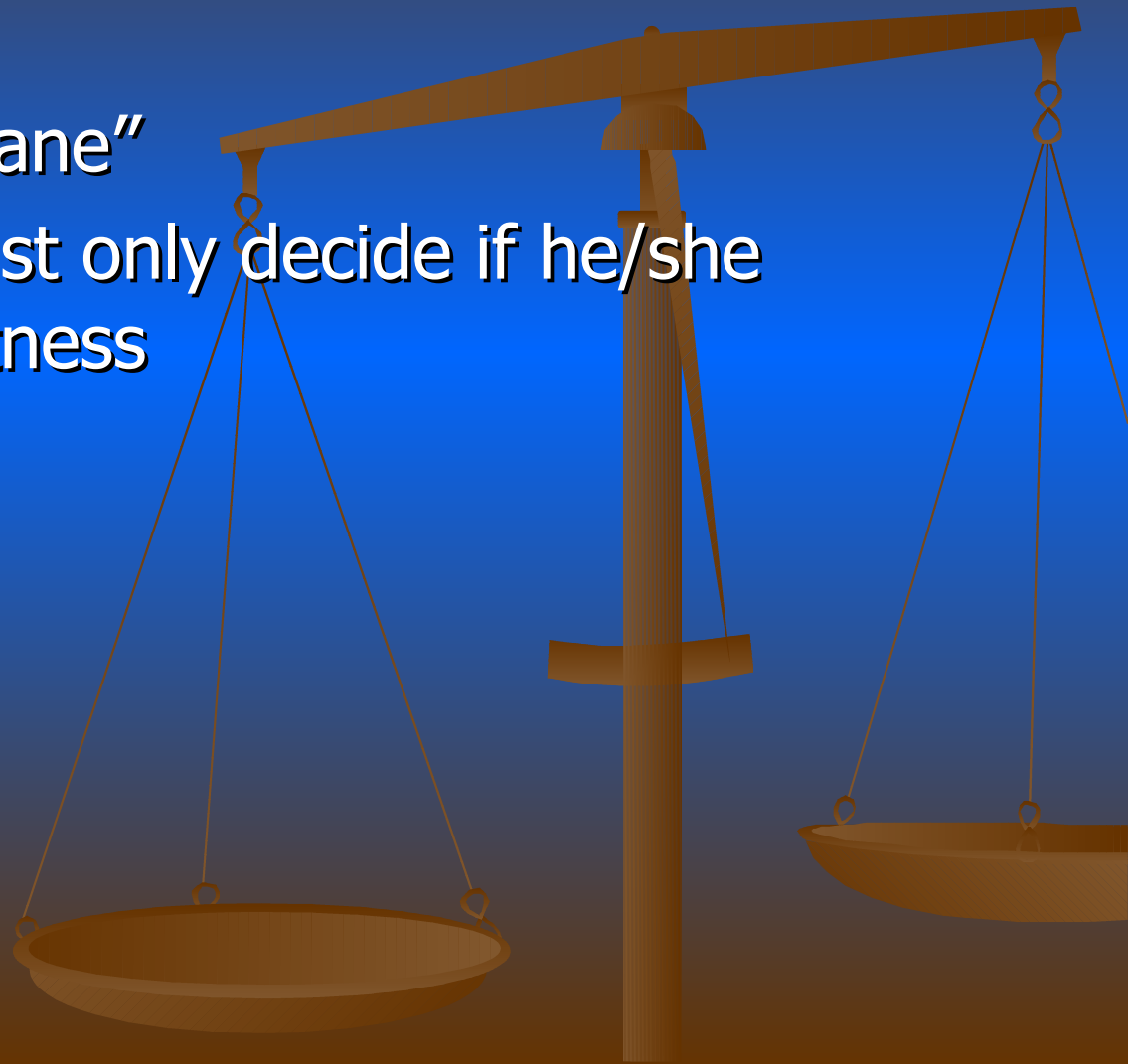
Types of Fact Evidence

- Direct
- Circumstantial



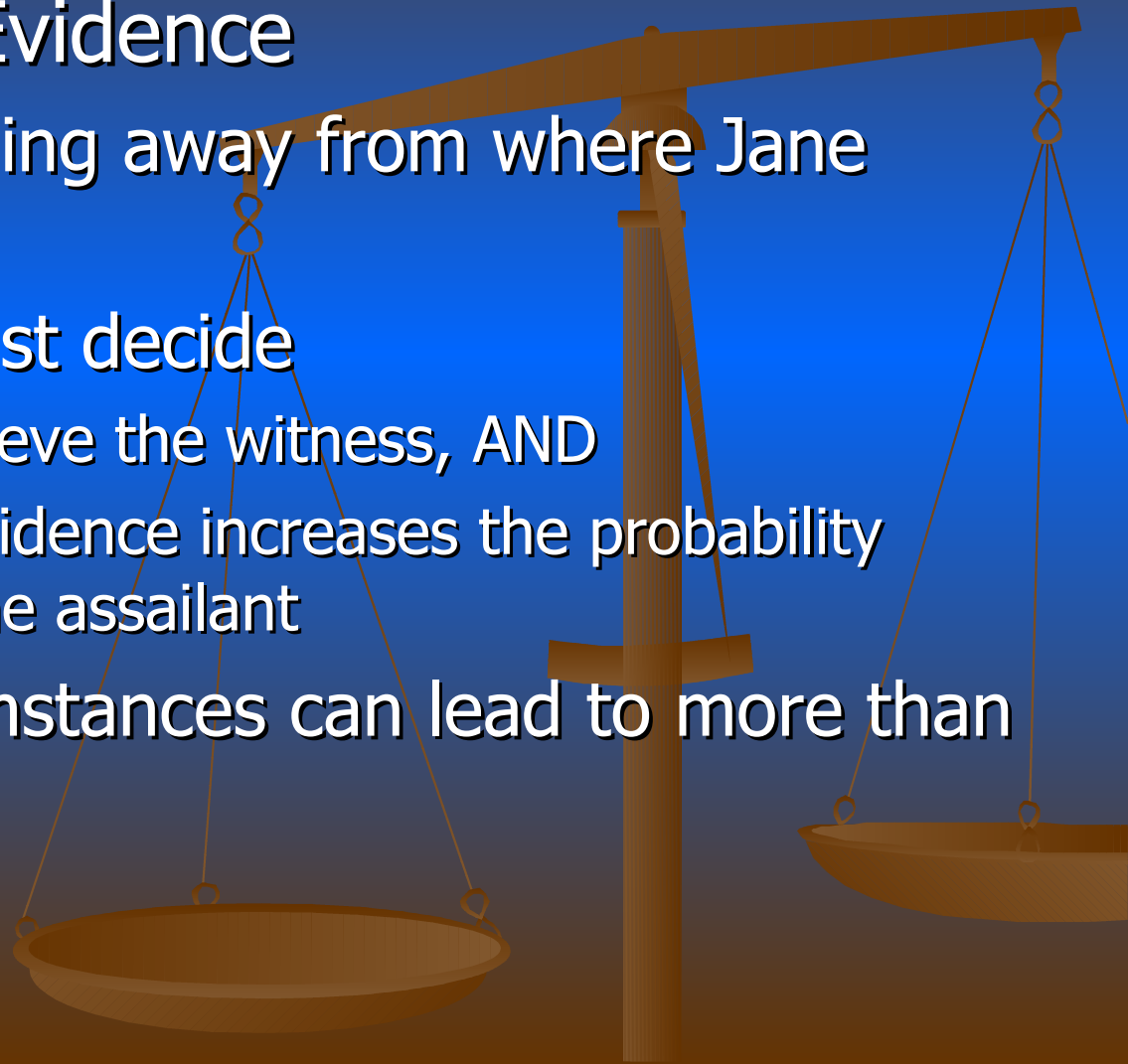
- Direct Evidence

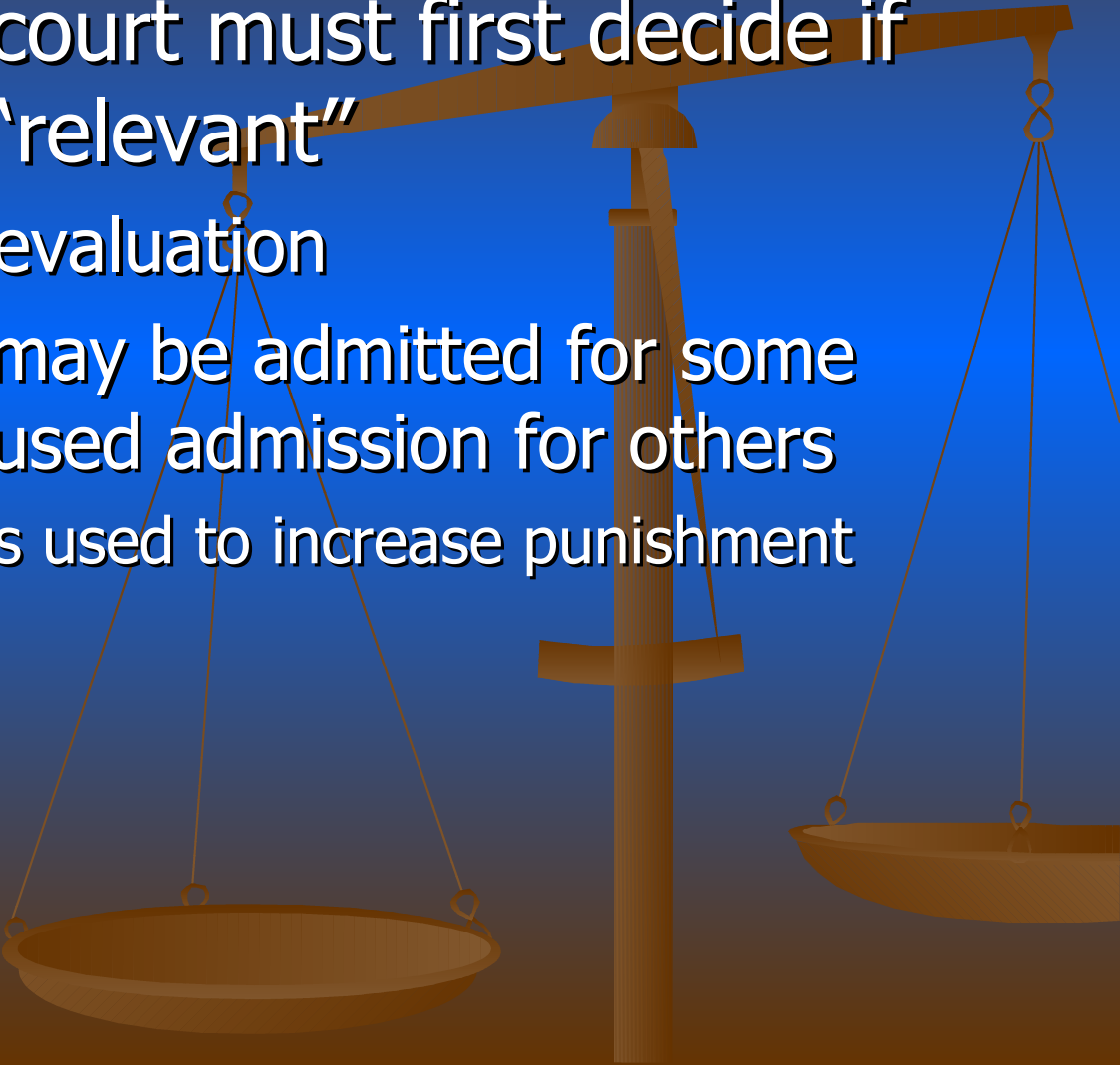
- “I saw Jay kill Jane”
- Trier of fact must only decide if he/she believes the witness



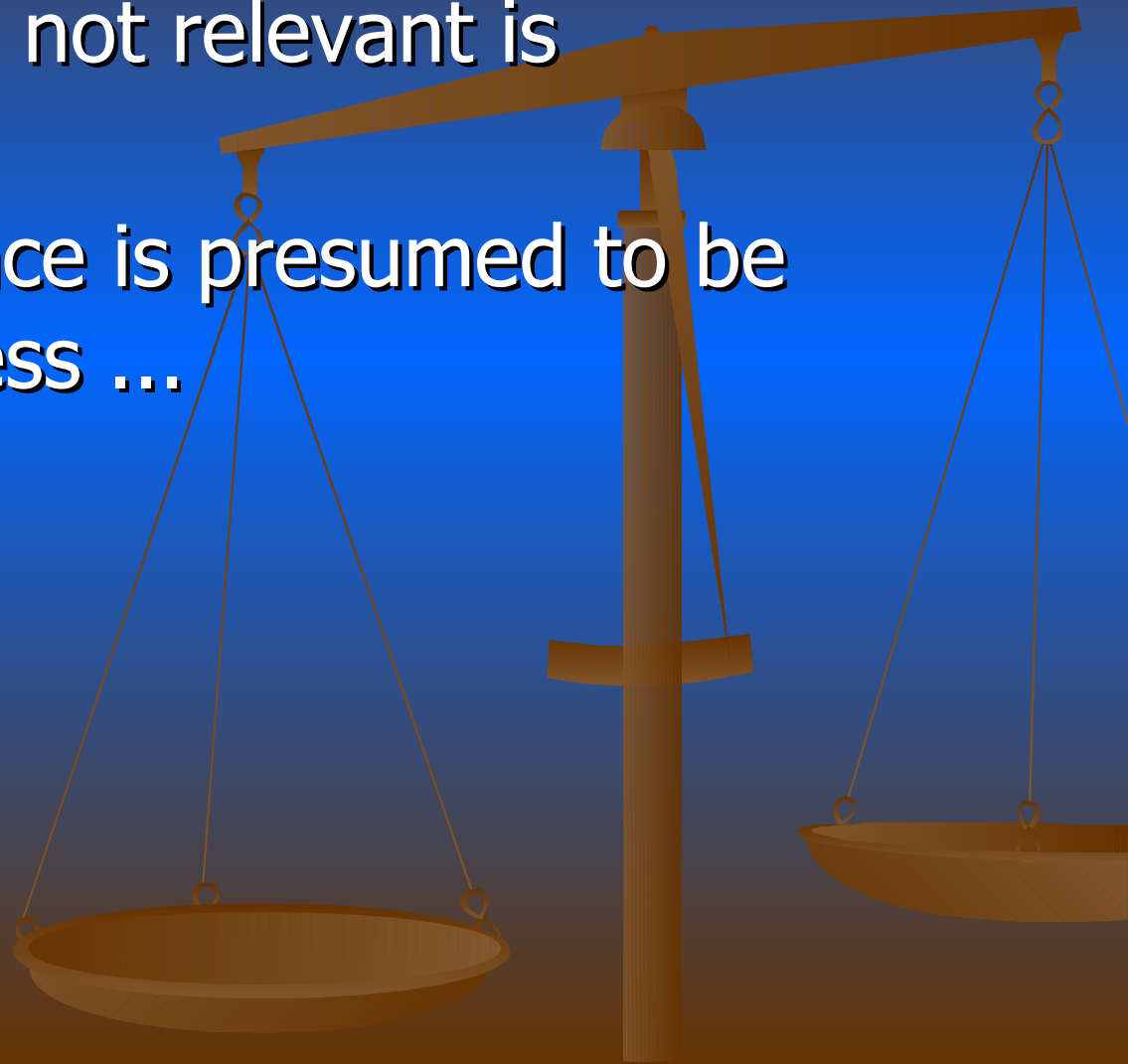
■ Circumstantial Evidence

- “I saw Jay running away from where Jane was killed”
- Trier of fact must decide
 - whether to believe the witness, AND
 - whether the evidence increases the probability that Jay was the assailant
- Problem: circumstances can lead to more than one conclusion



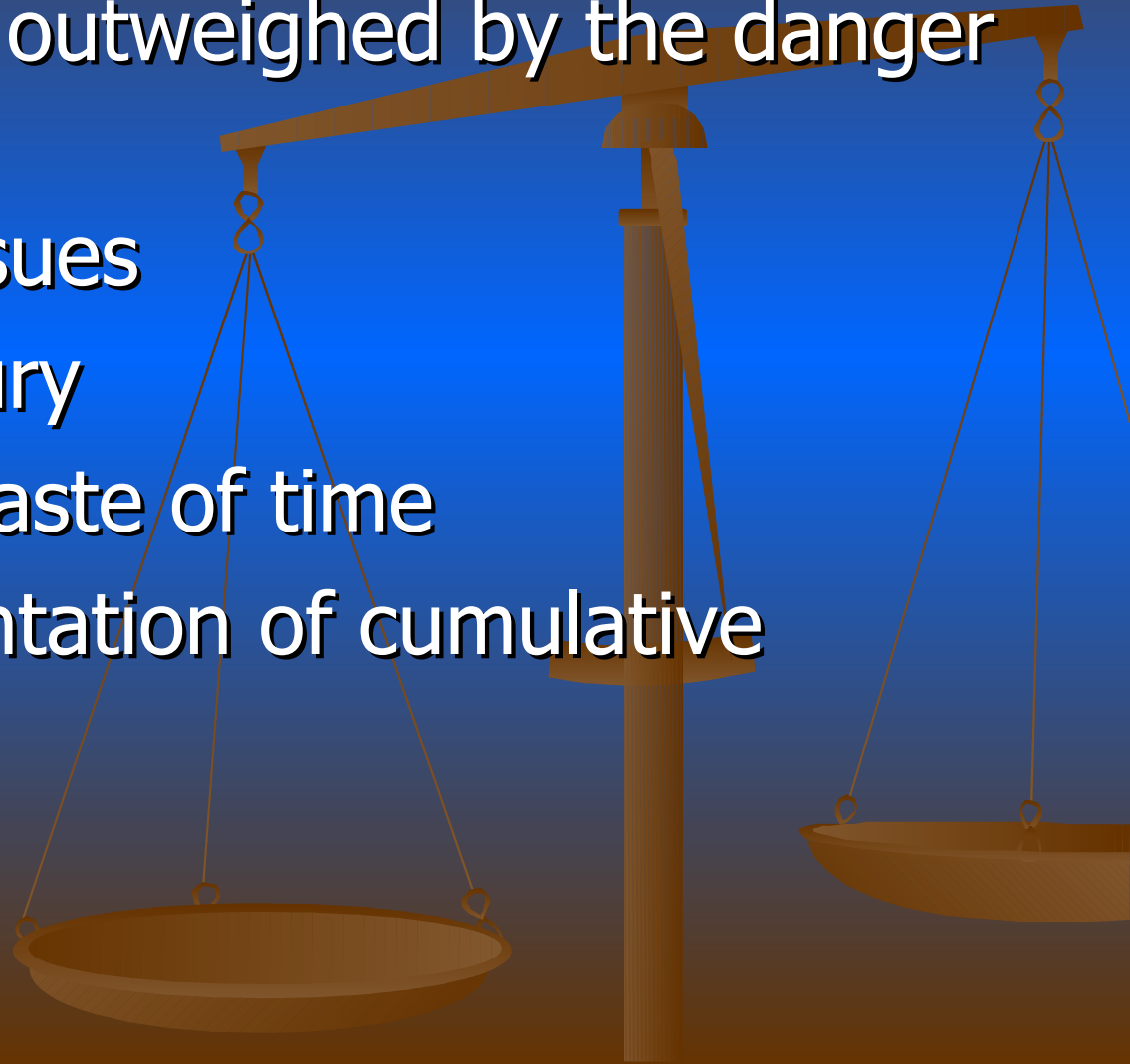
- 
- In all cases the court must first decide if the evidence is “relevant”
 - common sense evaluation
 - some evidence may be admitted for some reasons and refused admission for others
 - Prior convictions used to increase punishment

- Evidence that is not relevant is inadmissible
- Relevant evidence is presumed to be admissible, unless ...



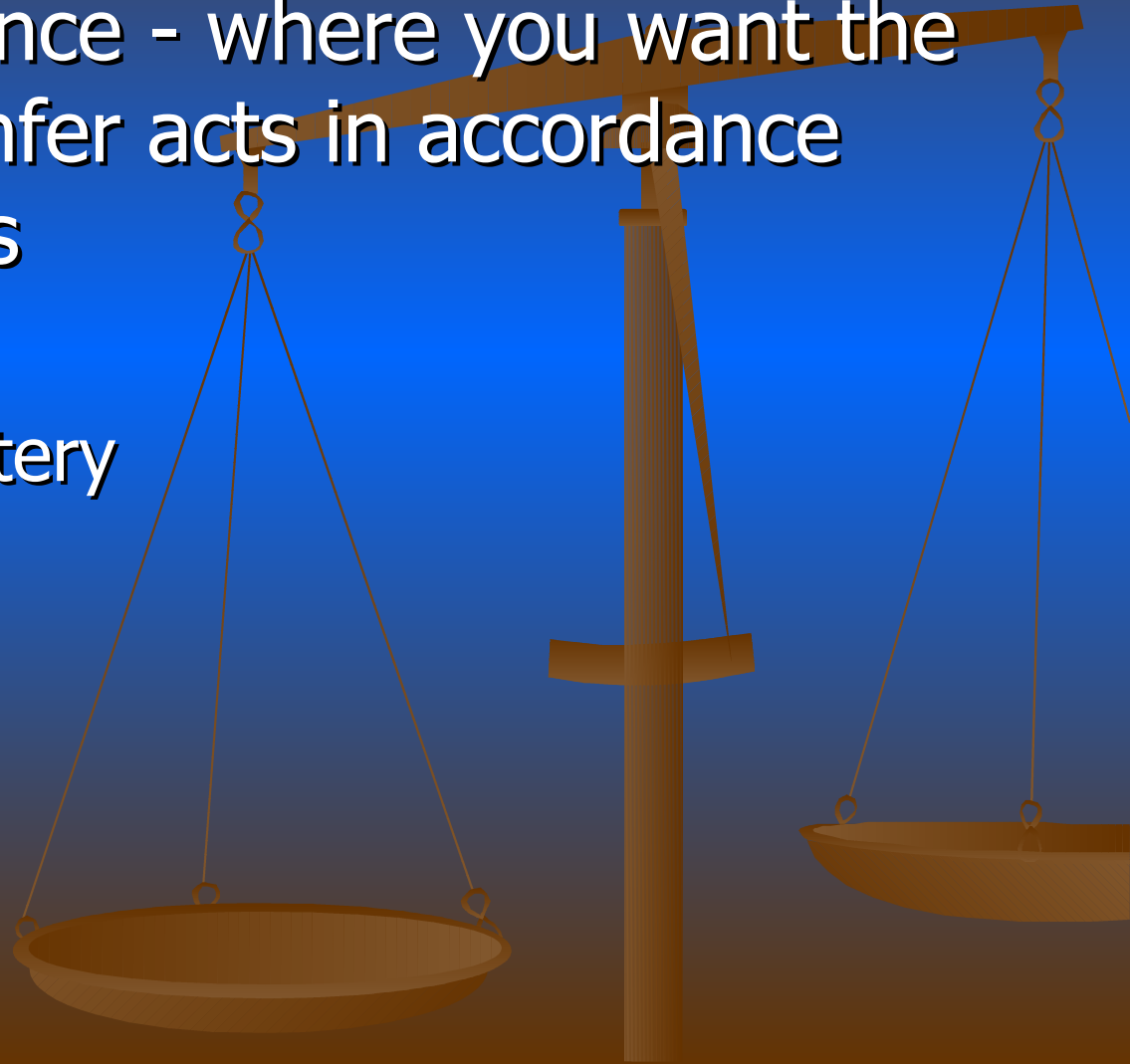
Grounds for Exclusion

- Probative value outweighed by the danger of prejudice
- Confusion of Issues
- Misleading to Jury
- Undue delay, waste of time
- Needless presentation of cumulative evidence



Limited Admissibility

- Character evidence - where you want the trier of fact to infer acts in accordance with past events
 - auto accident
 - assault and battery
 - larceny



Limited Admissibility

- Habit



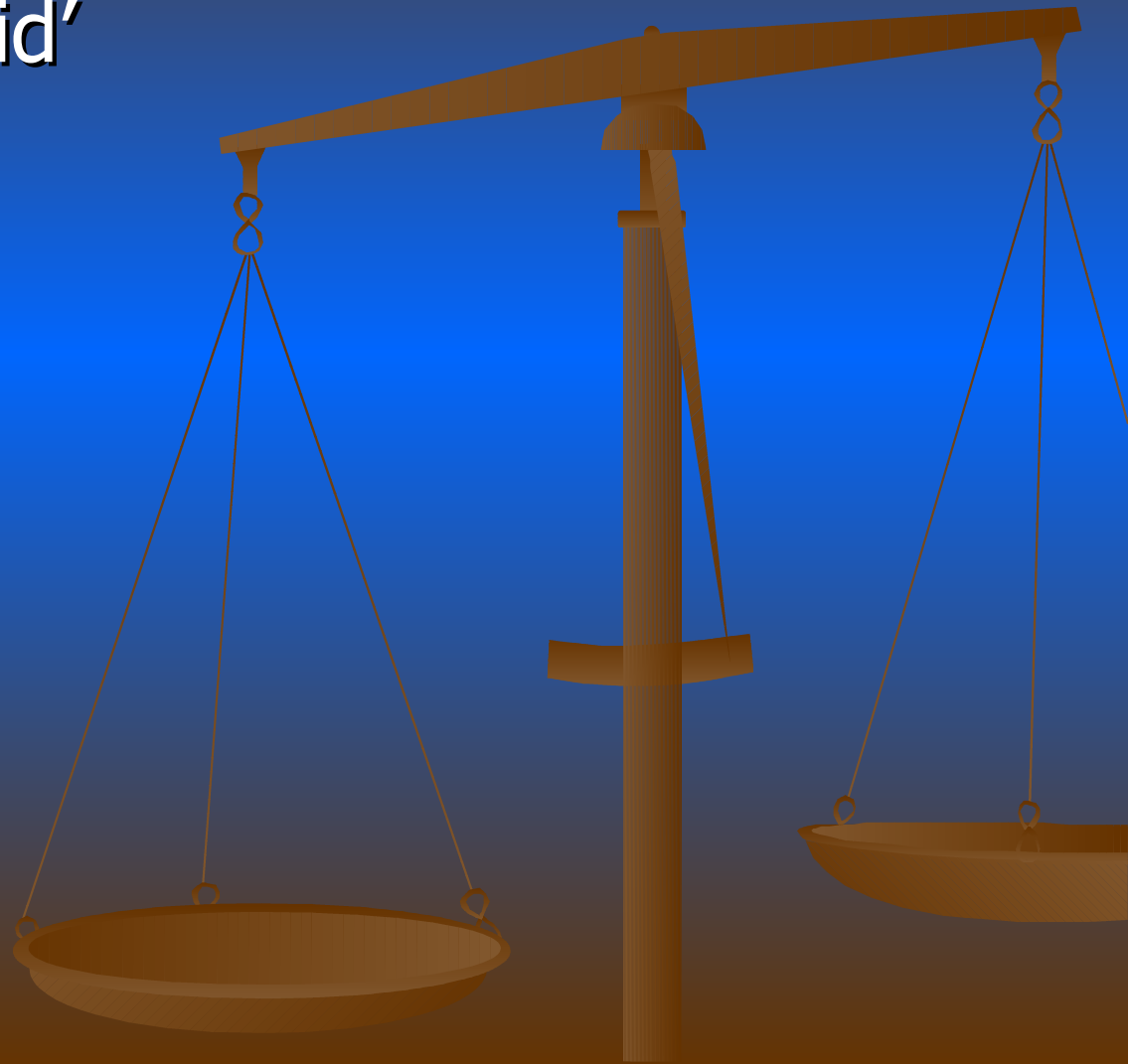
Limited Admissibility

- Other bad acts
- Other similar incidents
 - evidence of repairs



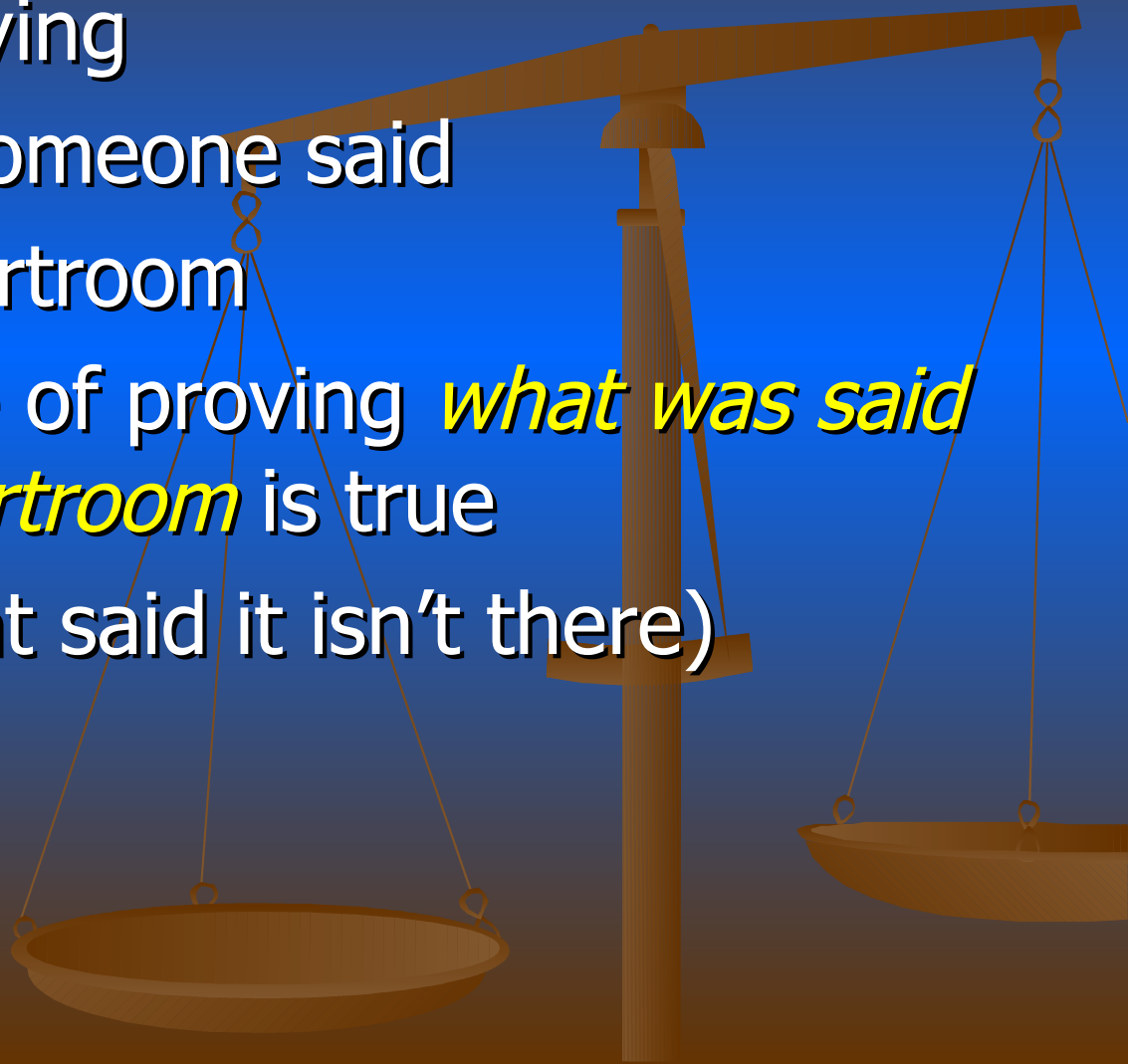
Hearsay

- 'He said, she said'
- NOT reliable



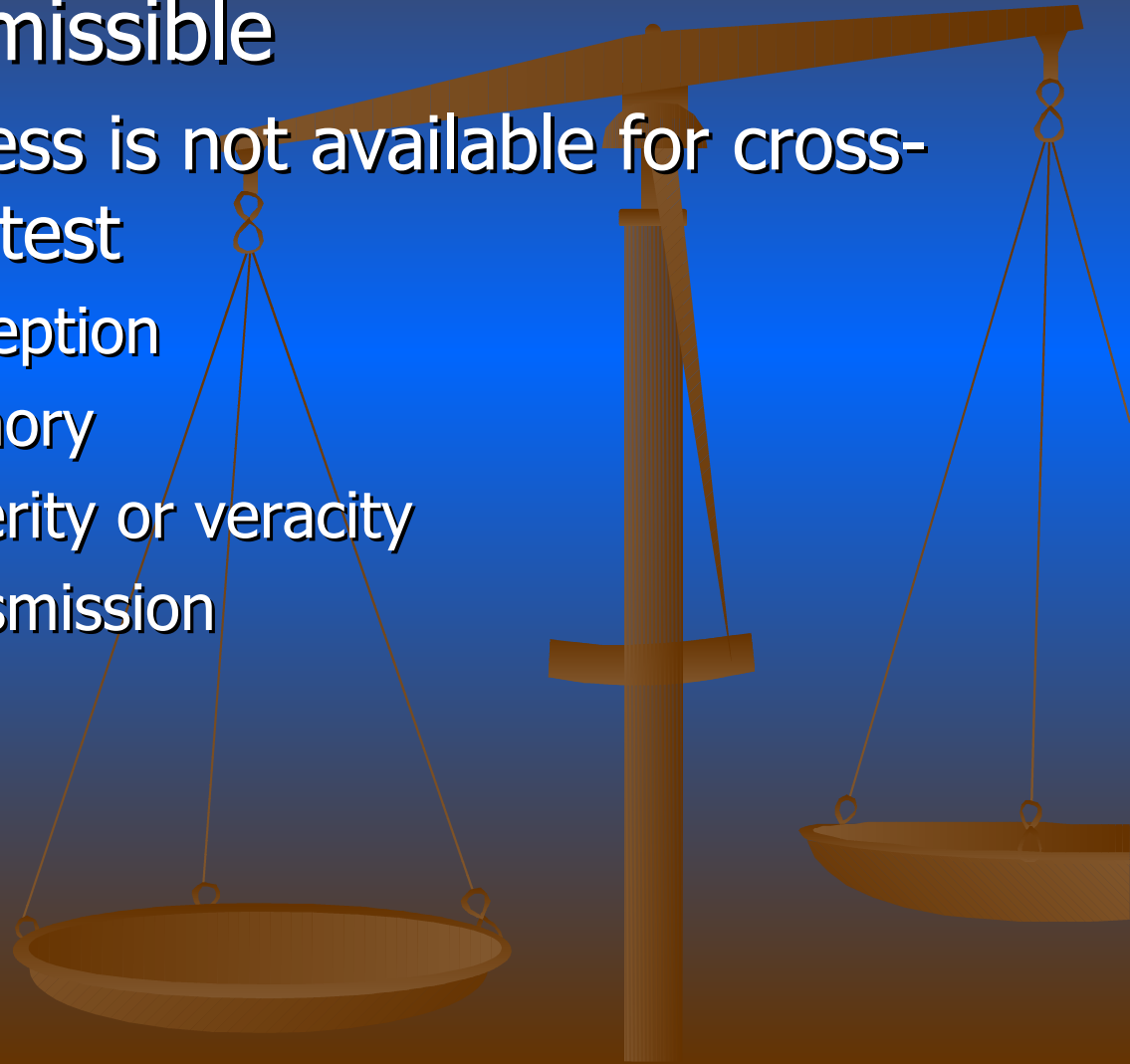
Hearsay

- A witness testifying
- Repeats what someone said
- Outside the courtroom
- For the purpose of proving *what was said outside the courtroom* is true
- (The person that said it isn't there)



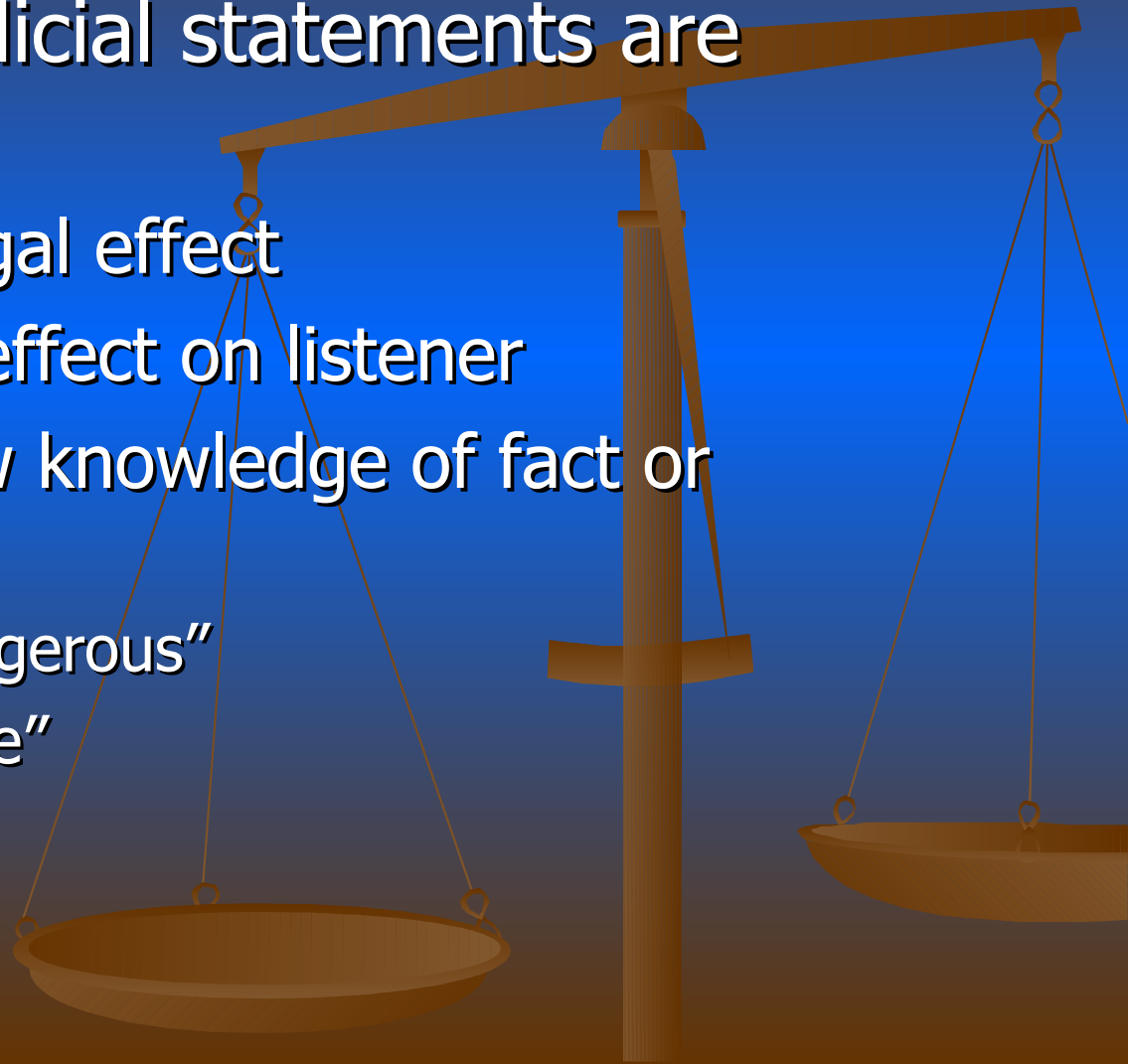
Hearsay

- Hearsay is inadmissible
 - The “real” witness is not available for cross-examination to test
 - defects in perception
 - defects in memory
 - defects in sincerity or veracity
 - defects in transmission



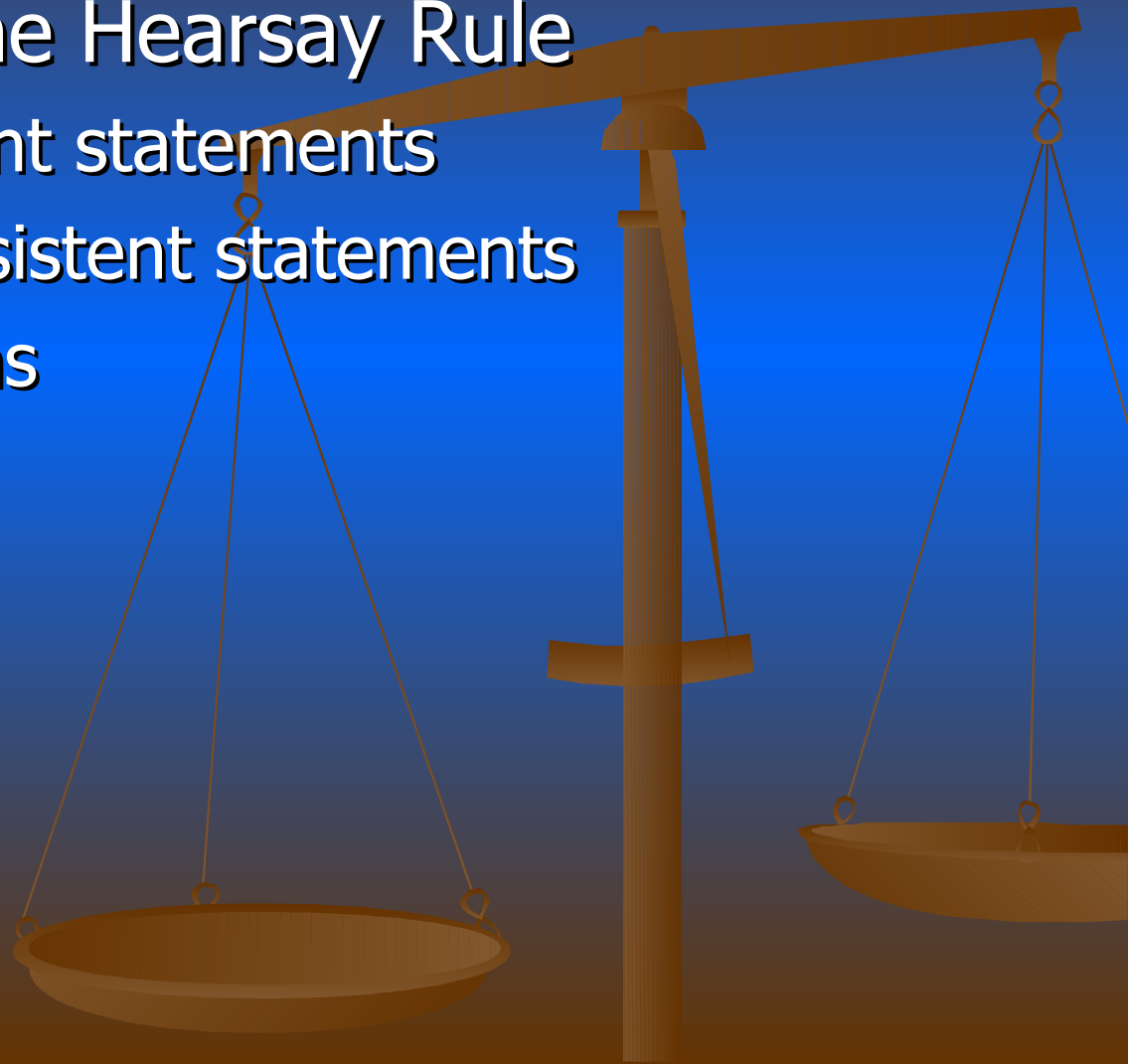
Hearsay

- Not all extra-judicial statements are hearsay
 - independent legal effect
 - those to show effect on listener
 - those that show knowledge of fact or condition
 - A - "That's dangerous"
 - B - "I don't care"
 - state of mind



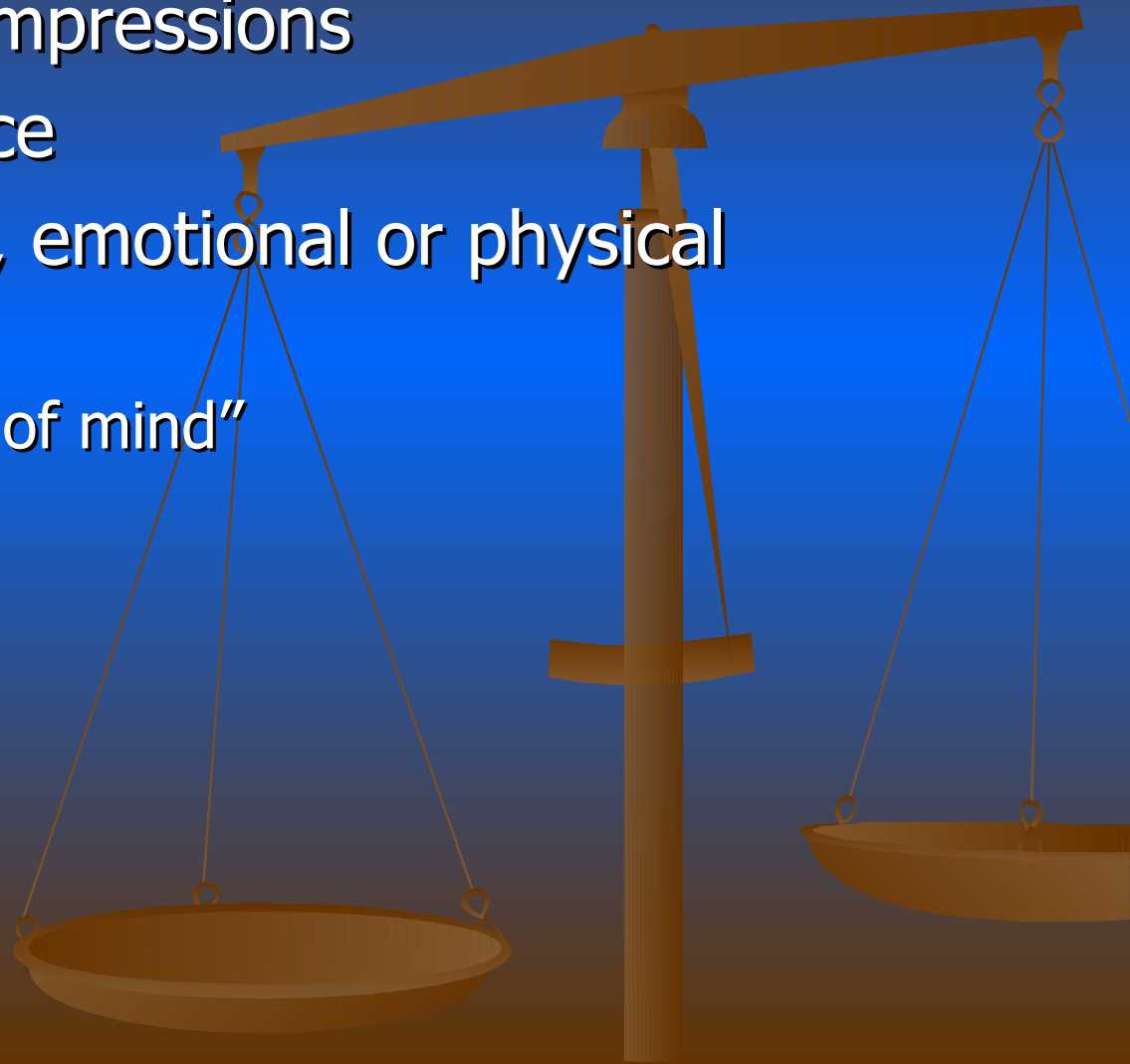
Hearsay Exceptions

- Exceptions to the Hearsay Rule
 - prior inconsistent statements
 - some prior consistent statements
 - party admissions
 - party conduct



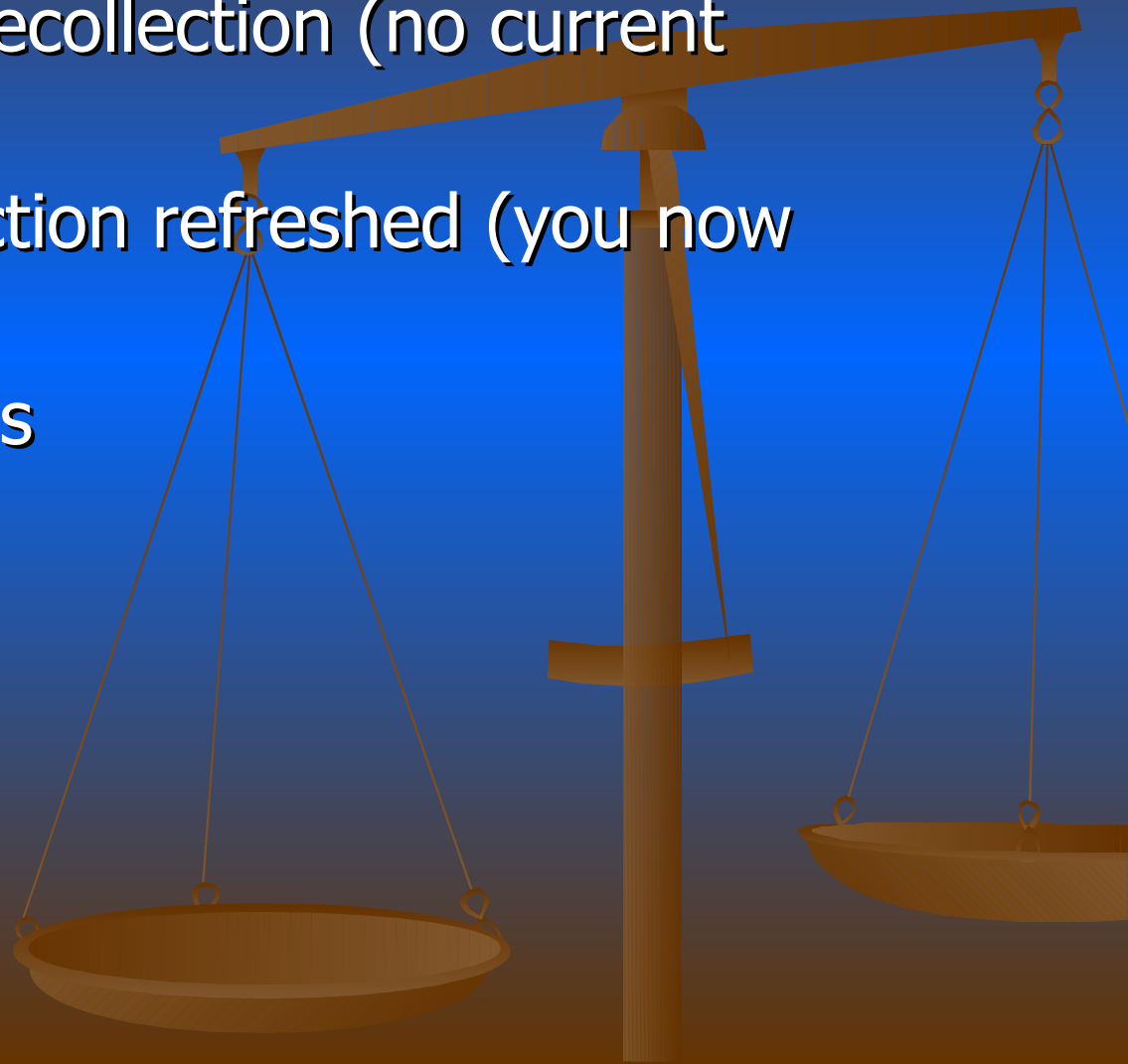
Hearsay Exceptions

- present sense impressions
- excited utterance
- existing mental, emotional or physical condition
 - includes “state of mind”



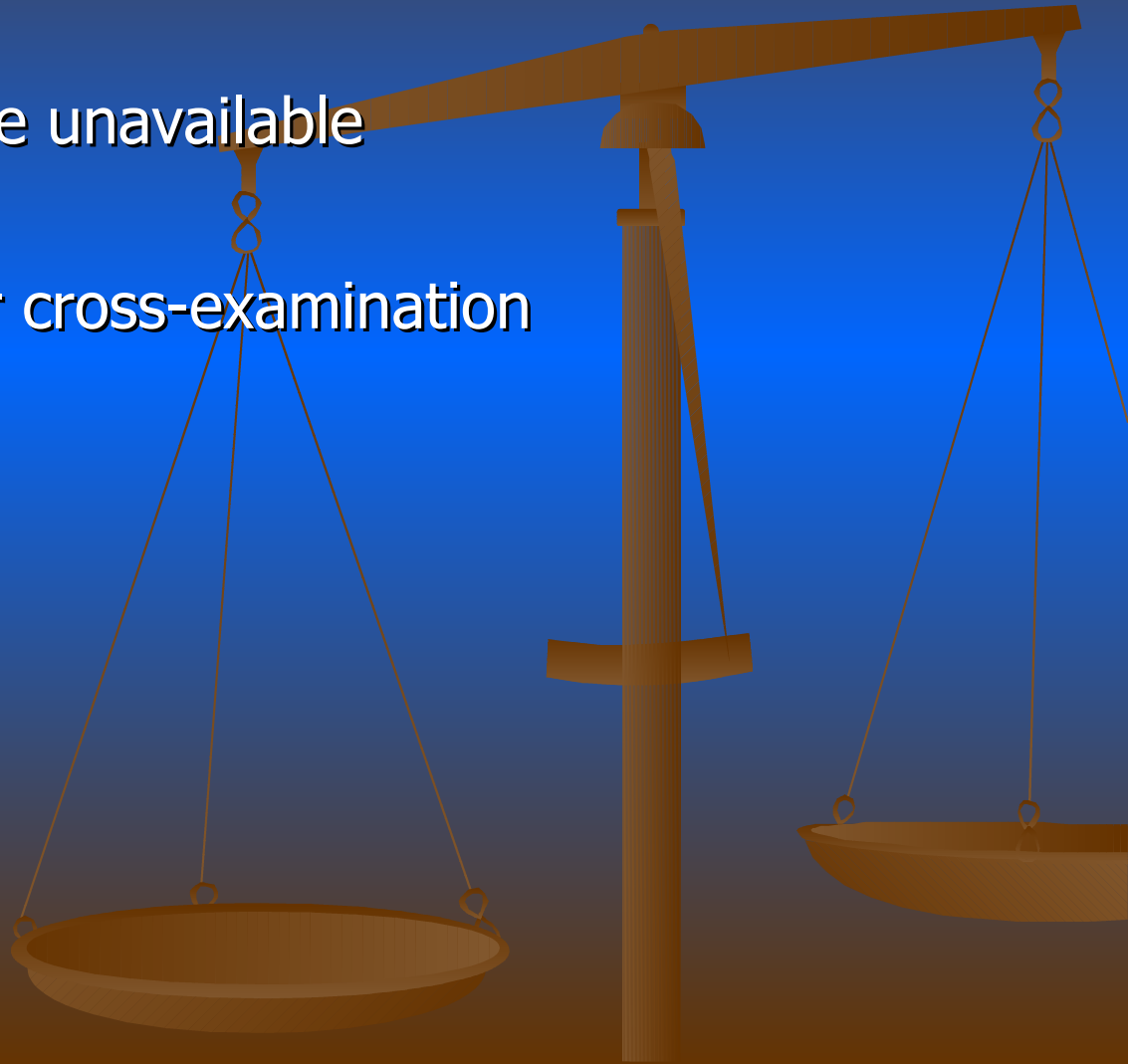
Hearsay Exceptions

- past recorded recollection (no current memory)
- present recollection refreshed (you now remember)
- business records
- public records



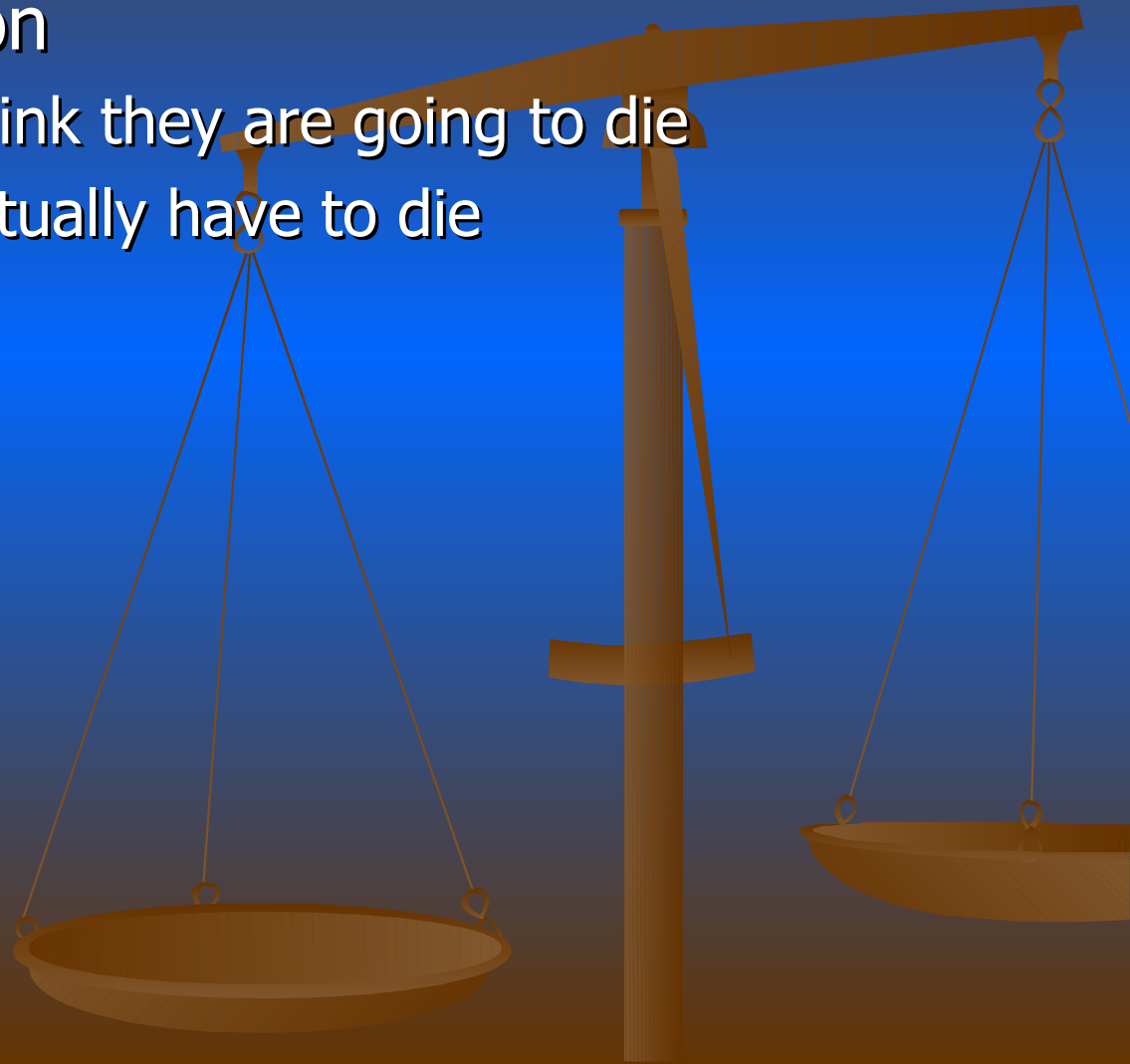
Hearsay Exceptions

- prior testimony
 - witness must be unavailable
 - Same parties
 - Opportunity for cross-examination



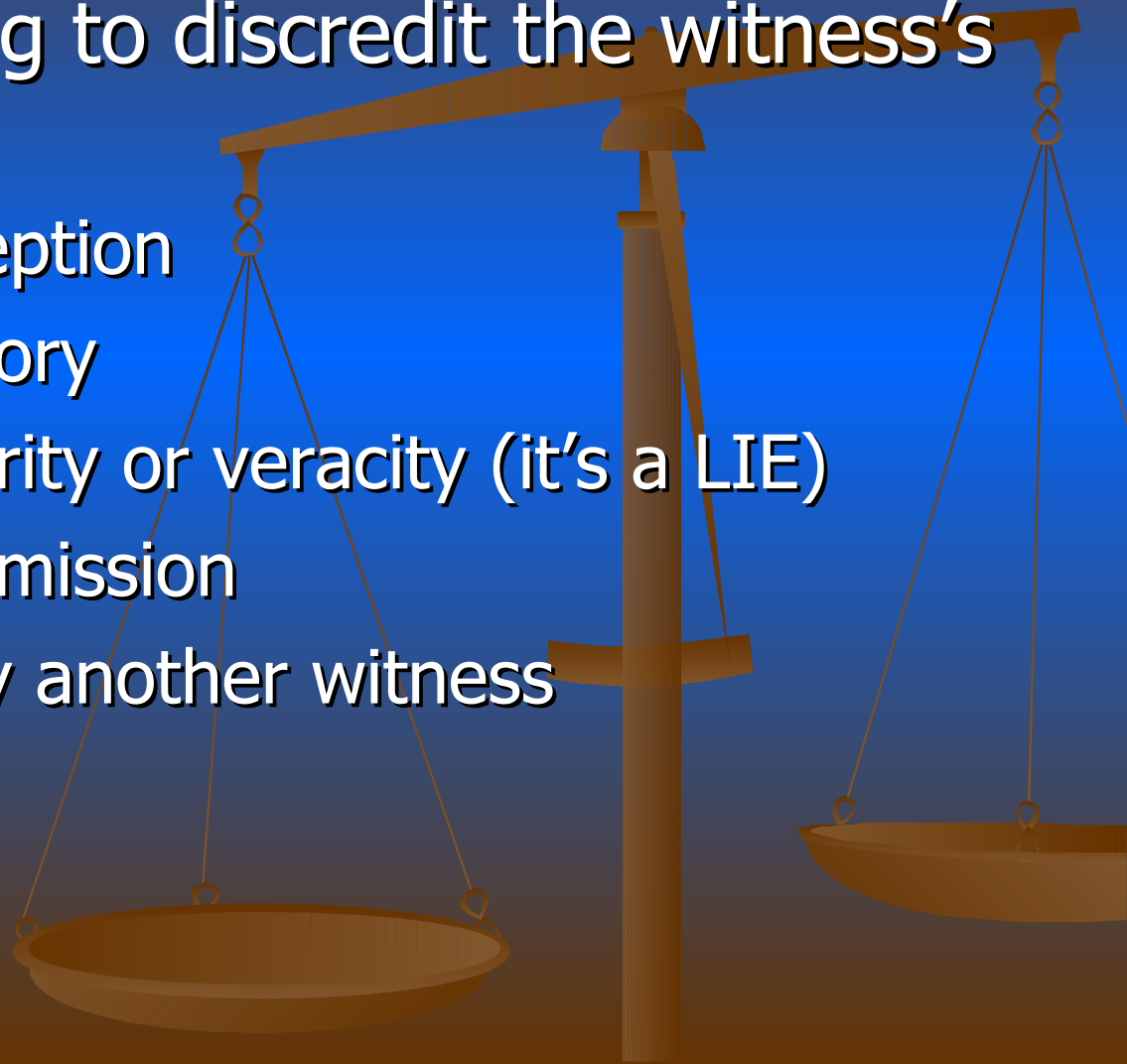
Hearsay Exceptions

- dying declaration
 - Person must think they are going to die
 - They do not actually have to die



Impeachment

- Evidence tending to discredit the witness's testimony
 - defects in perception
 - defects in memory
 - defects in sincerity or veracity (it's a LIE)
 - defects in transmission
 - contradiction by another witness



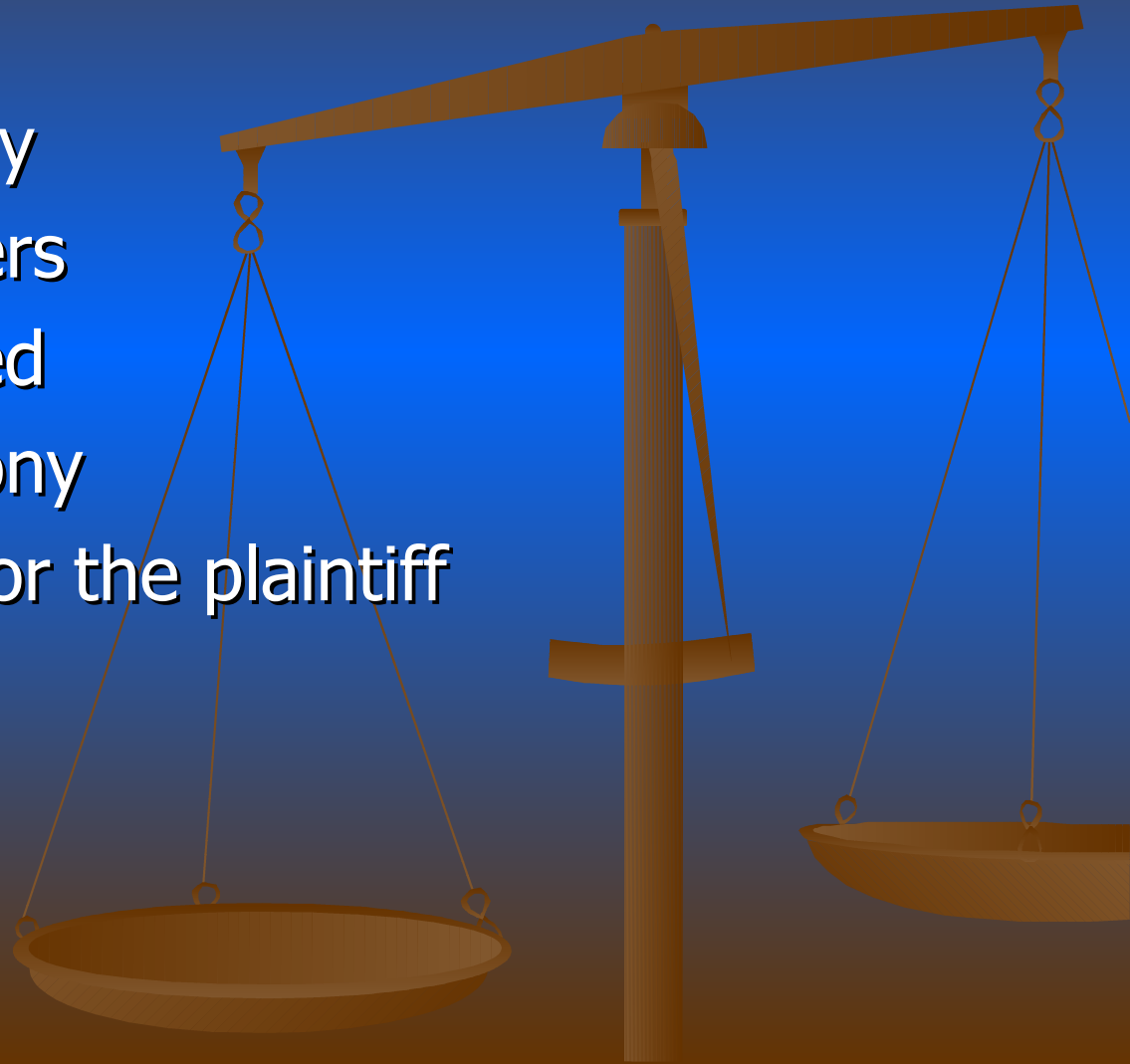
Impeachment Evidence

- Bad character or dishonesty
 - criminal conviction
 - prior dishonest act
 - bad reputation for truthfulness



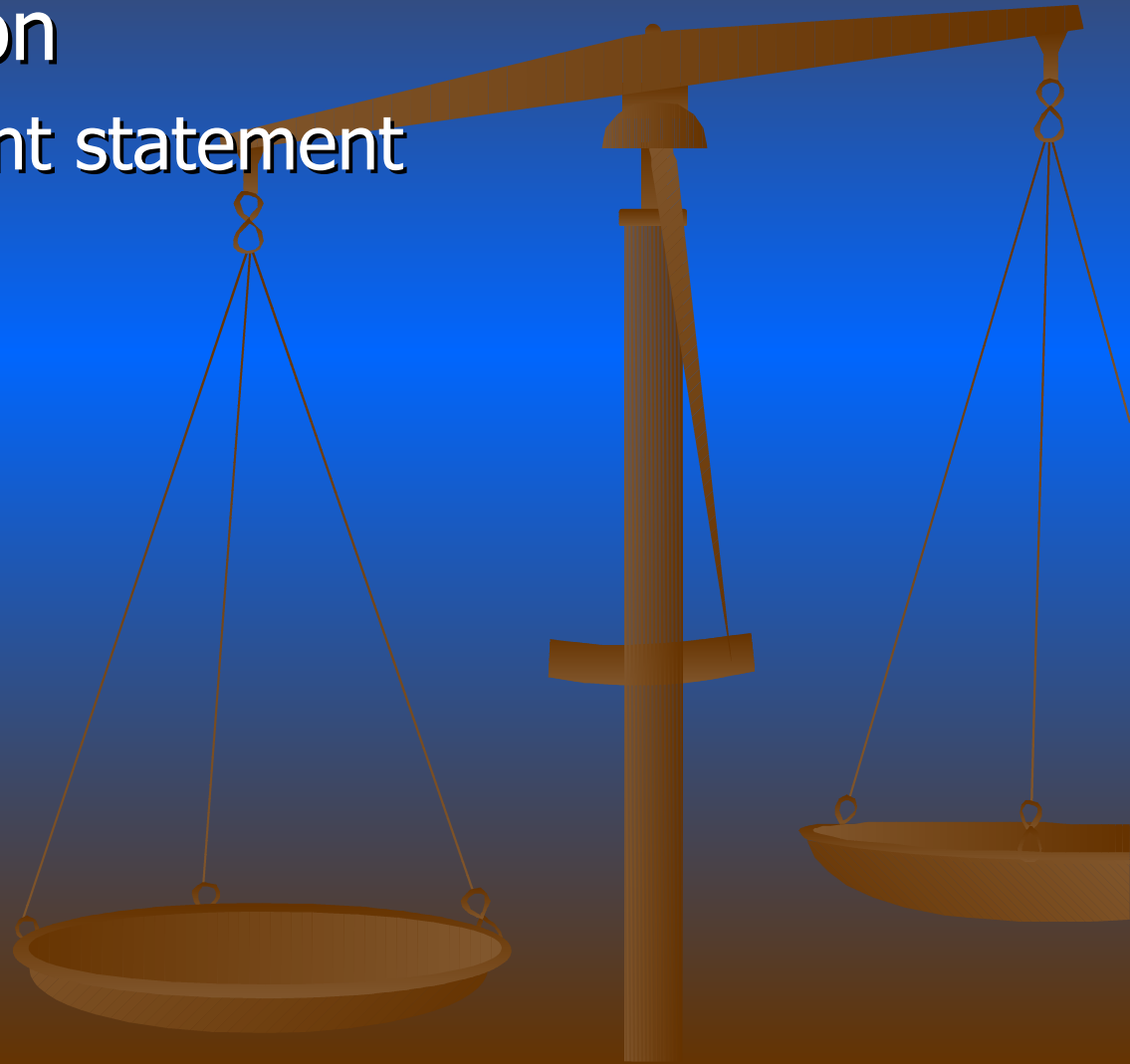
Impeachment Evidence

- Showing bias
 - Friends or family
 - Business partners
 - Similarly situated
 - Paid for testimony
 - Always testify for the plaintiff



Impeachment Evidence

- Self-contradiction
 - Prior inconsistent statement



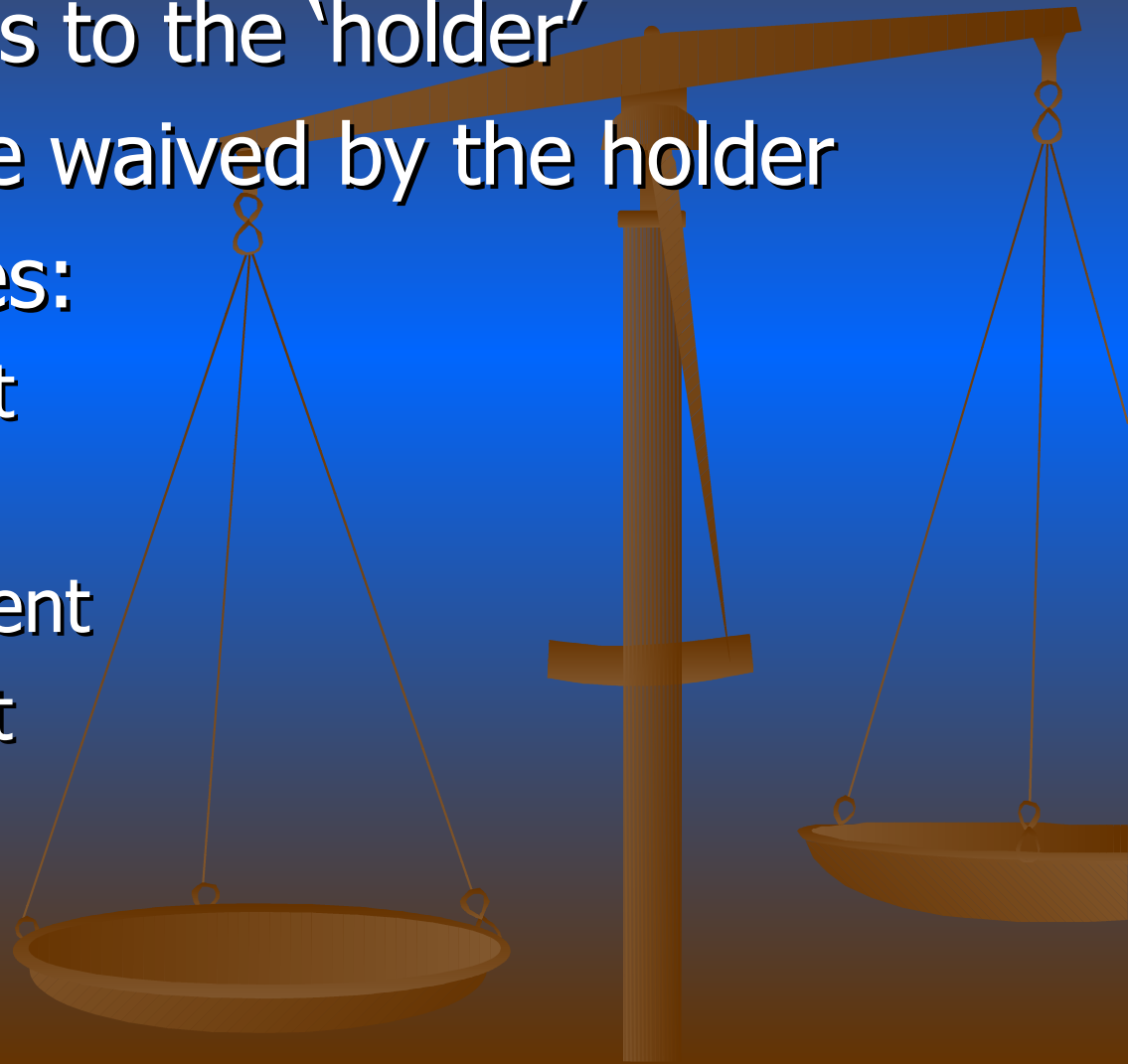
Privilege

- Privileged communications
 - May be **HIGHLY probative**
 - **Would absolutely prove the case**
 - **The best testimony**
 - Are excluded because society wishes to protect a principal or relationship
- Presence of third party negates the privilege



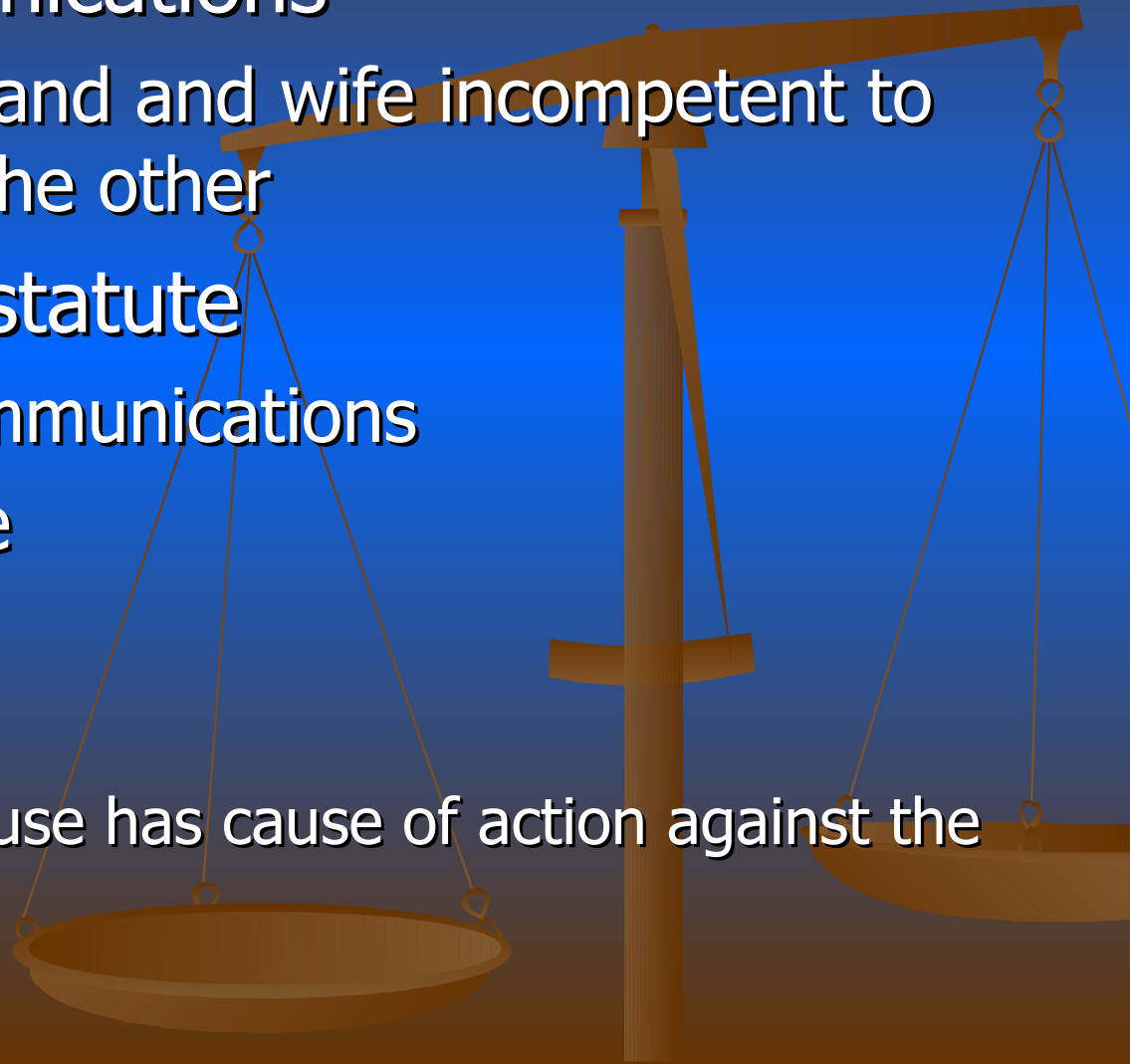
Privilege

- Privilege belongs to the 'holder'
- Privilege may be waived by the holder
- Typical privileges:
 - Attorney - client
 - spouse
 - physician - patient
 - priest - penitent



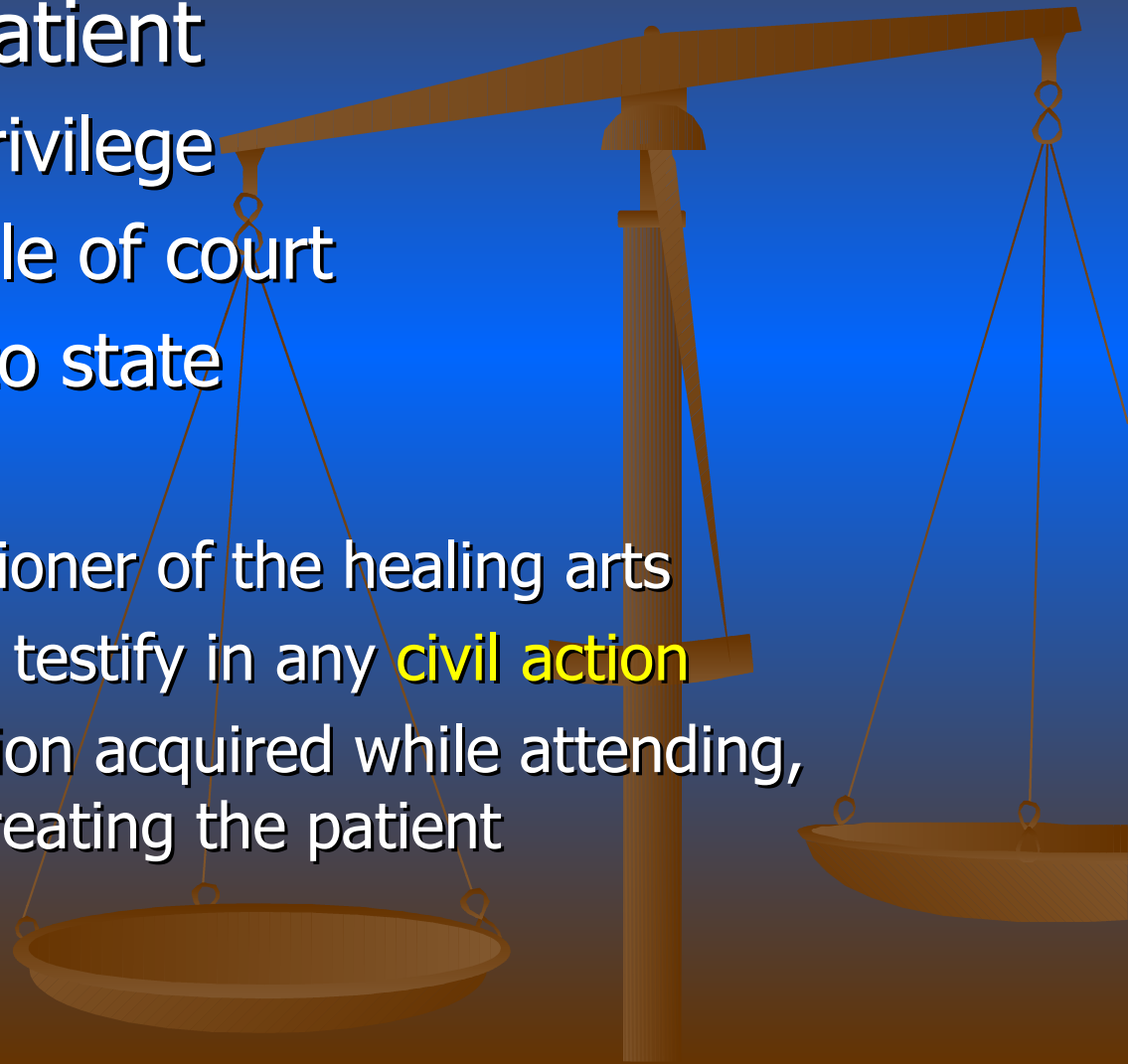
Privilege

- Spousal communications
 - old days - husband and wife incompetent to testify against the other
- now limited by statute
 - confidential communications
 - during marriage
 - does not apply
 - child abuse
 - where one spouse has cause of action against the other



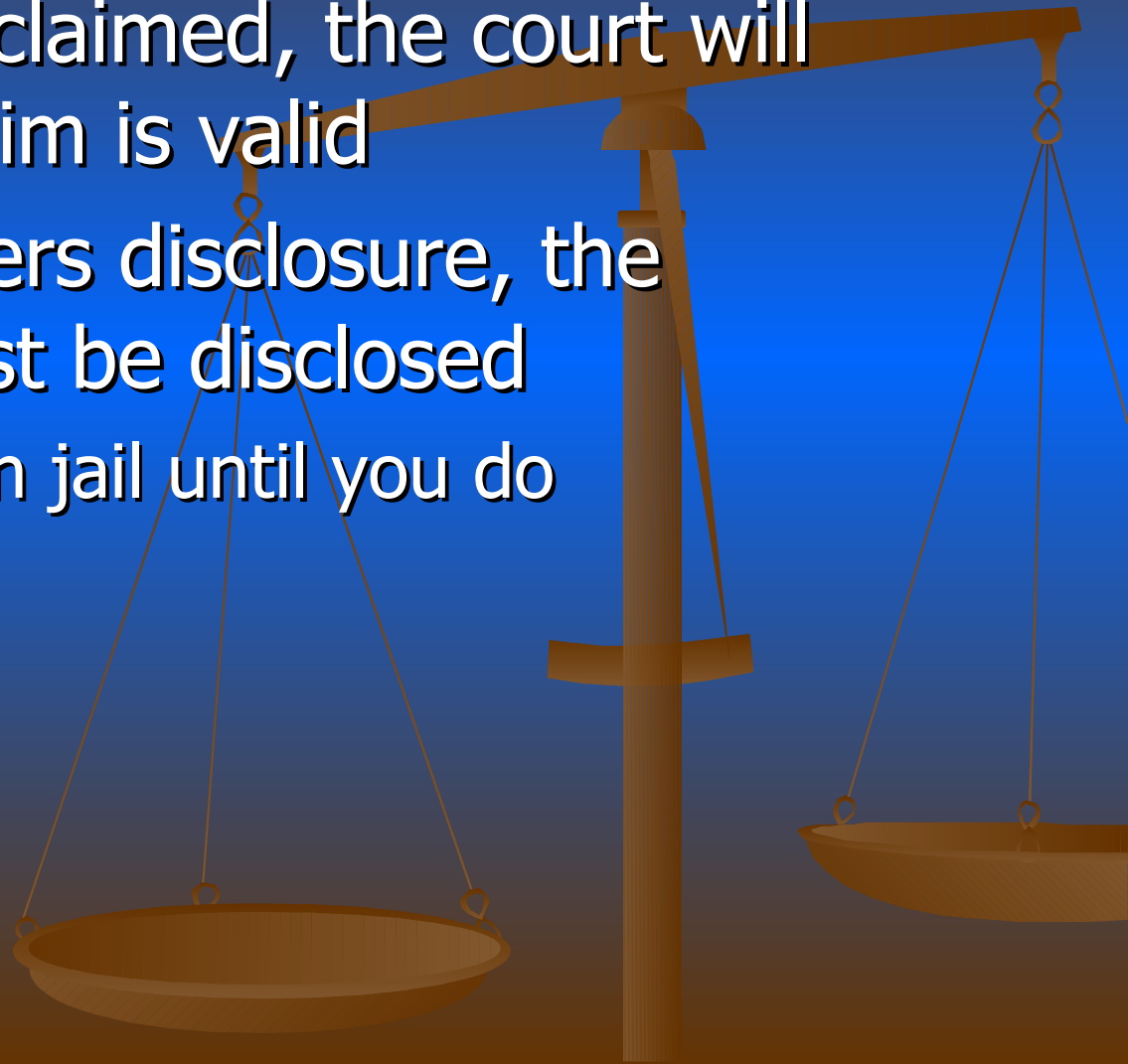
Privilege

- Physician and Patient
 - old days - no privilege
 - by statute or rule of court
 - different state to state
 - Virginia
 - licensed practitioner of the healing arts
 - not required to testify in any **civil action**
 - about information acquired while attending, examining or treating the patient



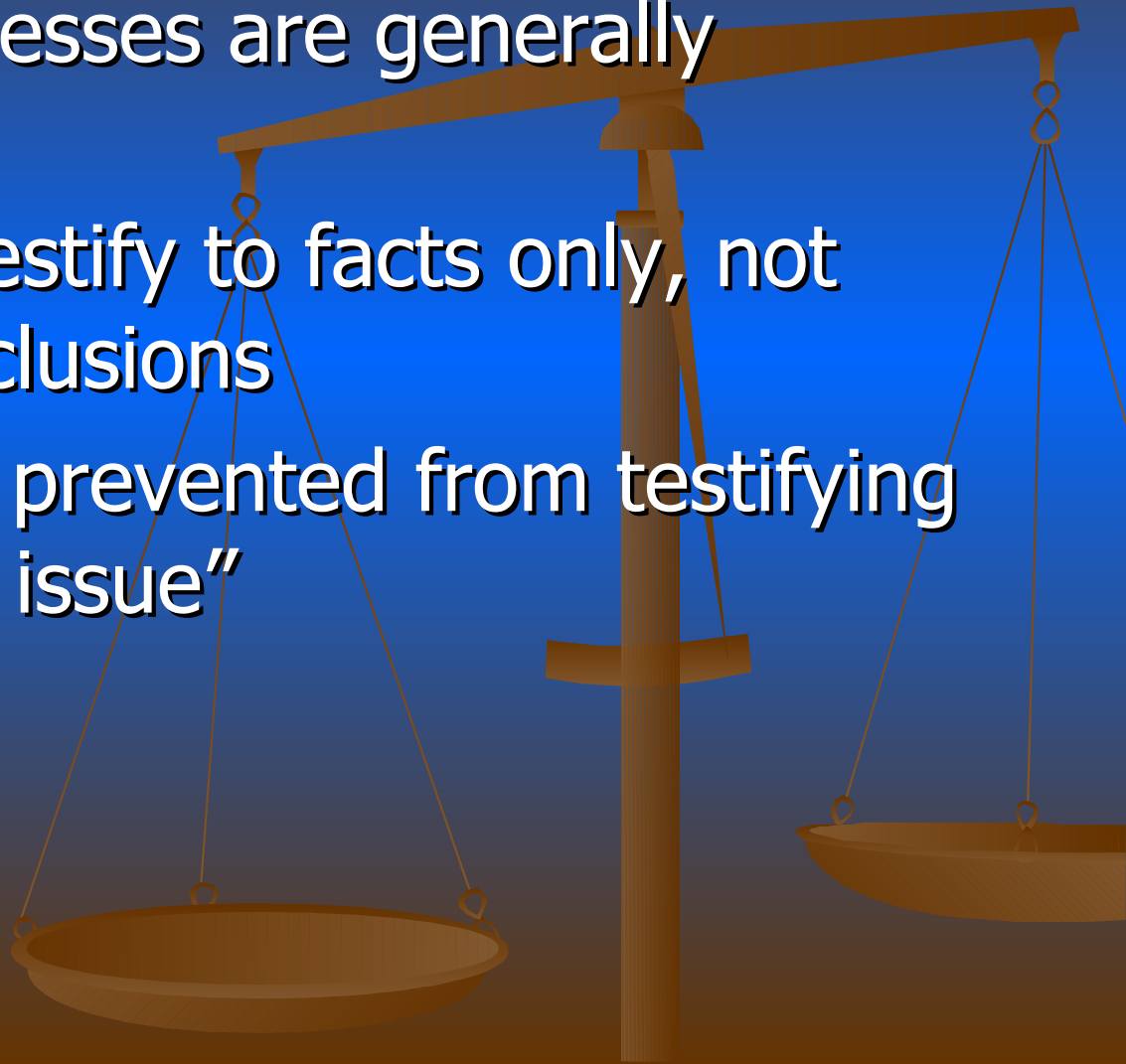
Privilege

- If a privilege is claimed, the court will decide if the claim is valid
- If the court orders disclosure, the information must be disclosed
 - Or you can sit in jail until you do



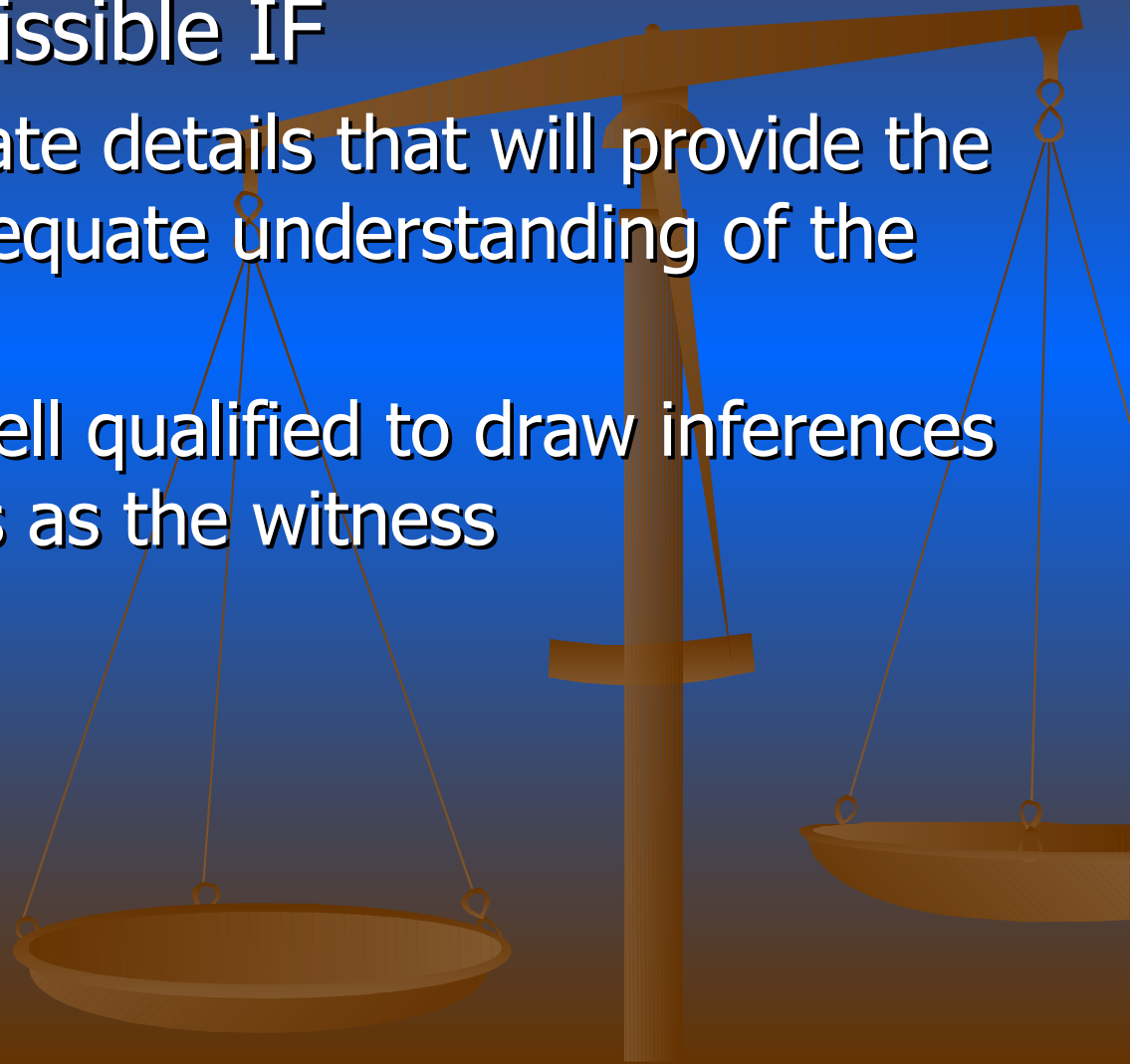
Opinion

- opinions of witnesses are generally inadmissible
- witnesses can testify to facts only, not opinions or conclusions
- witness may be prevented from testifying to the “ultimate issue”



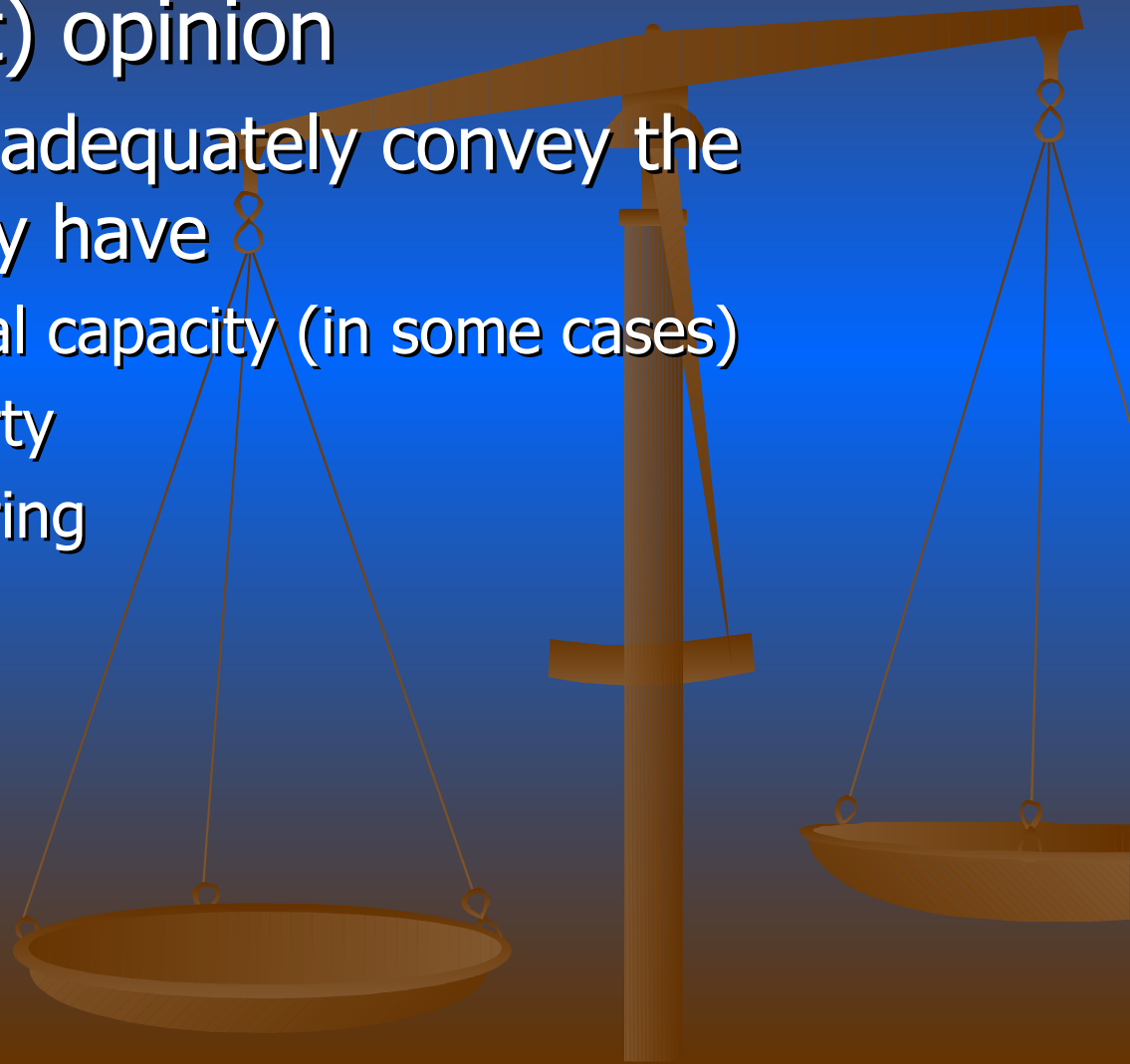
“Fact” vs. “Opinion”

- Evidence inadmissible IF
 - witness can relate details that will provide the jury with an adequate understanding of the matter, AND
 - the jury is as well qualified to draw inferences from the details as the witness



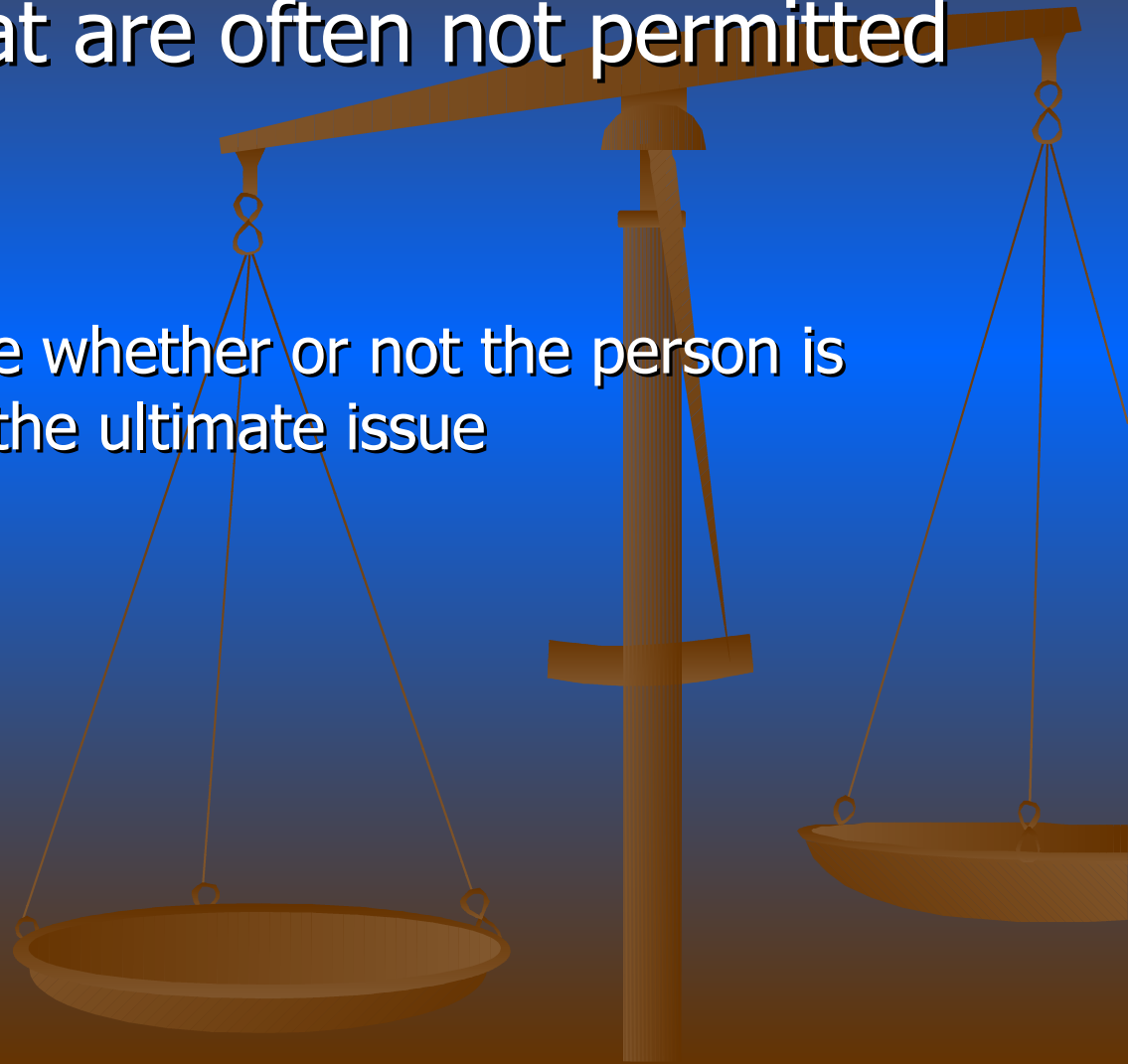
Opinion

- Lay (non-expert) opinion
 - witness cannot adequately convey the information they have
 - sanity or mental capacity (in some cases)
 - value of property
 - illness or suffering
 - speed
 - distance



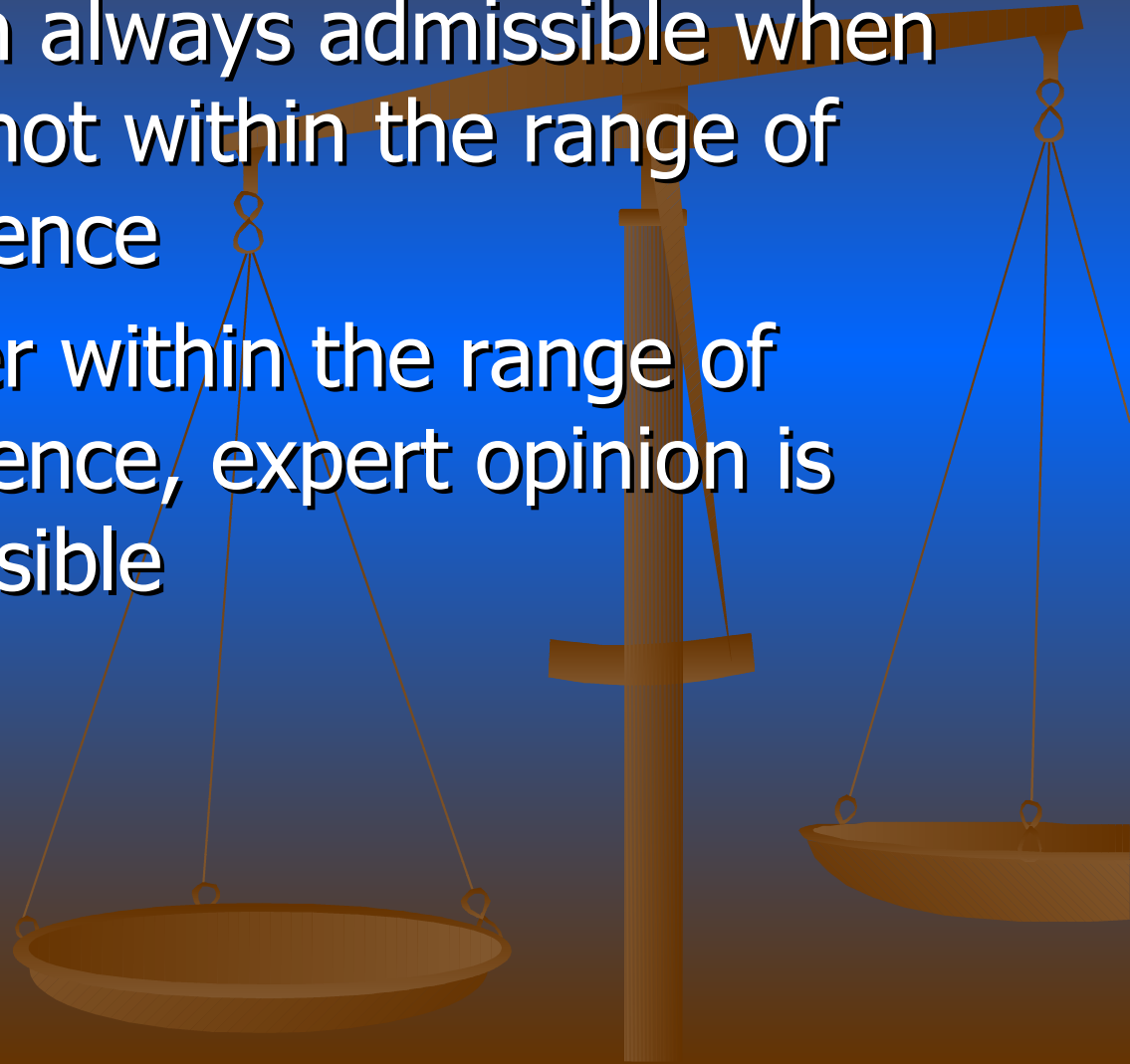
Opinion

- Lay opinions that are often not permitted
 - Age
 - Intoxication
 - Usually because whether or not the person is 'intoxicated' is the ultimate issue



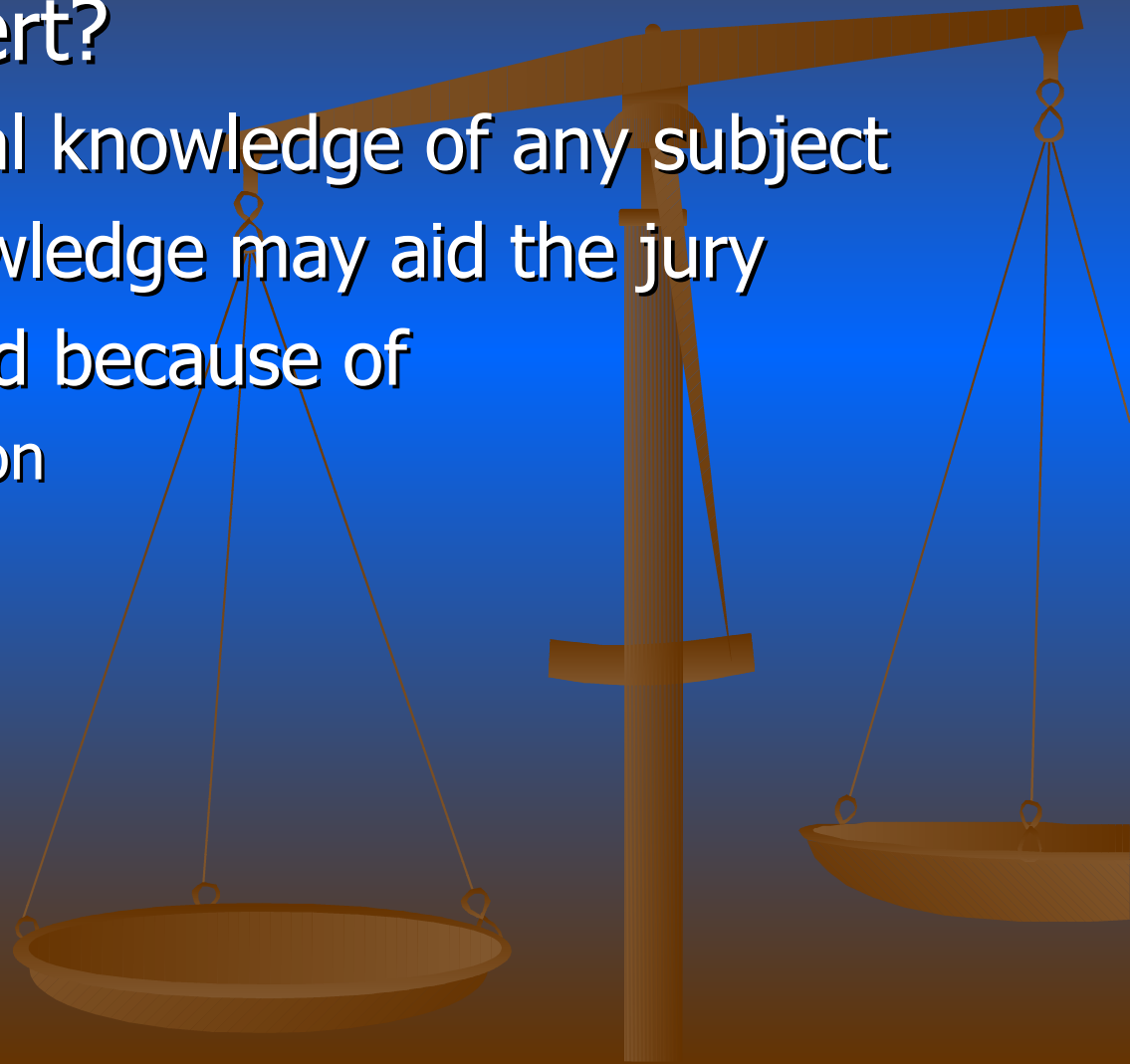
Opinion

- “Expert” opinion always admissible when subject matter not within the range of common experience
- If subject matter within the range of common experience, expert opinion is often not admissible
 - I.e., speed

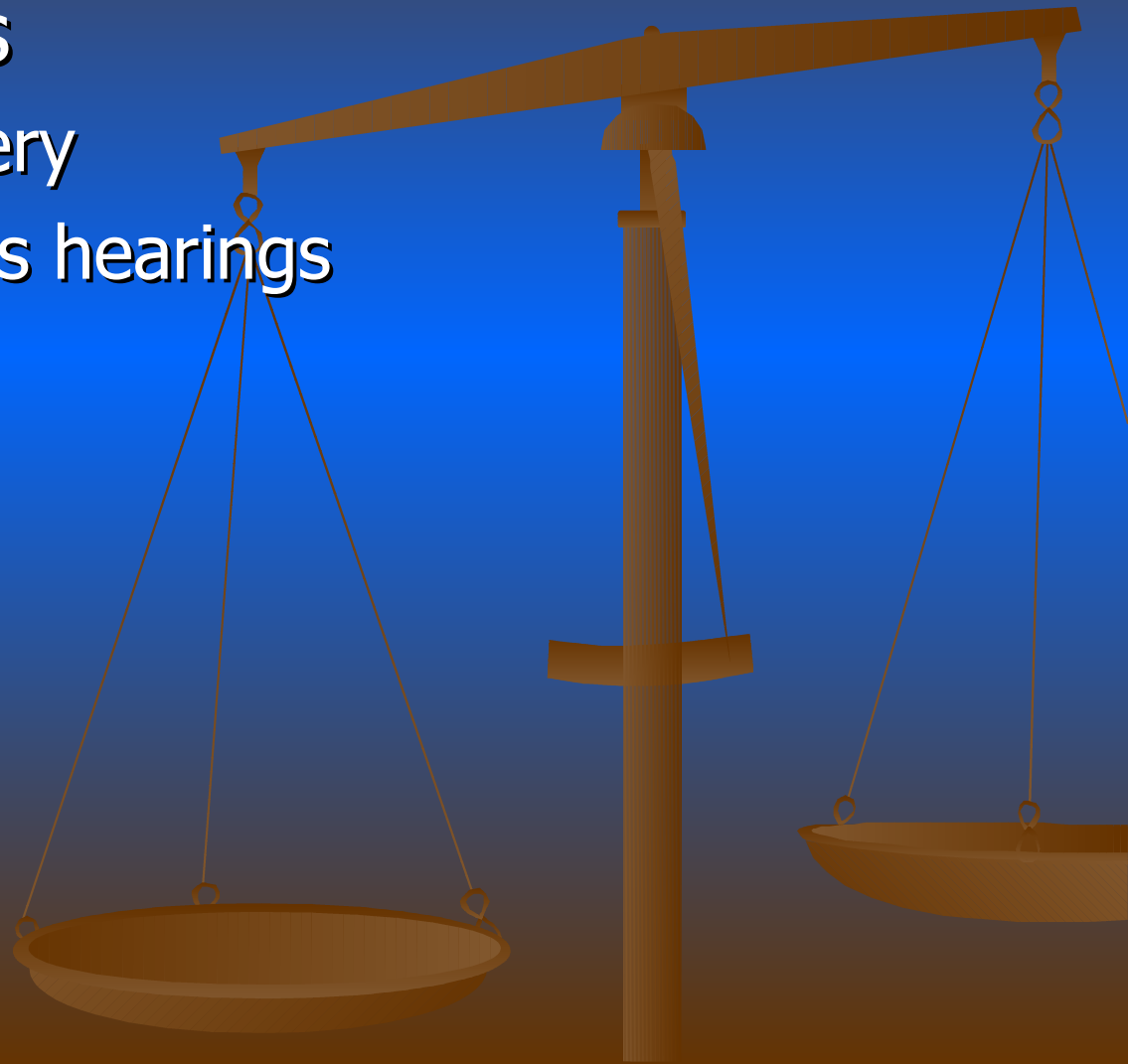


Opinion

- What is an expert?
 - One with special knowledge of any subject
 - When that knowledge may aid the jury
 - may be qualified because of
 - formal education
 - job experience
 - hobby

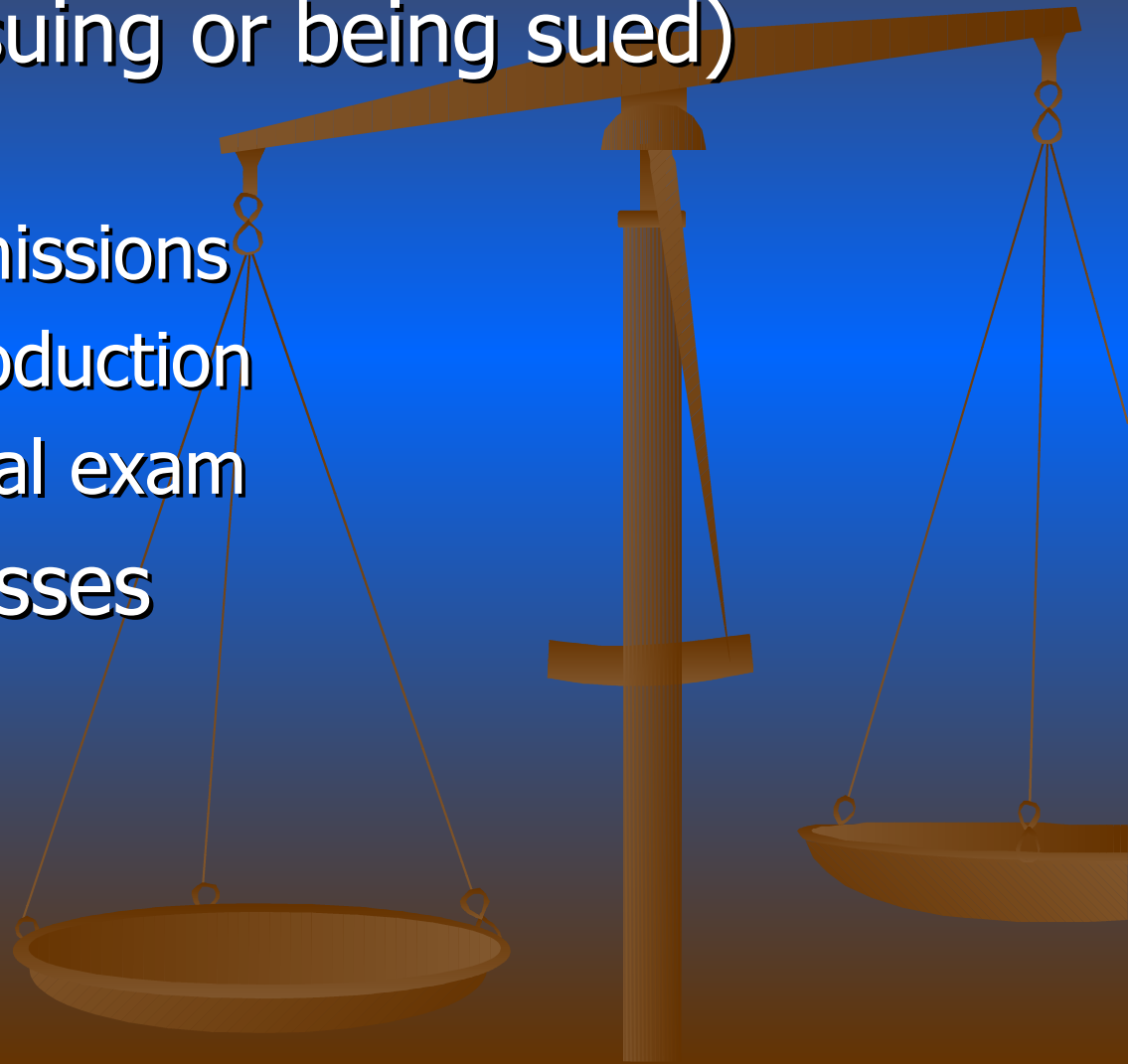


- “Live” witnesses
 - pre-trial discovery
 - pre-trial motions hearings
 - trial



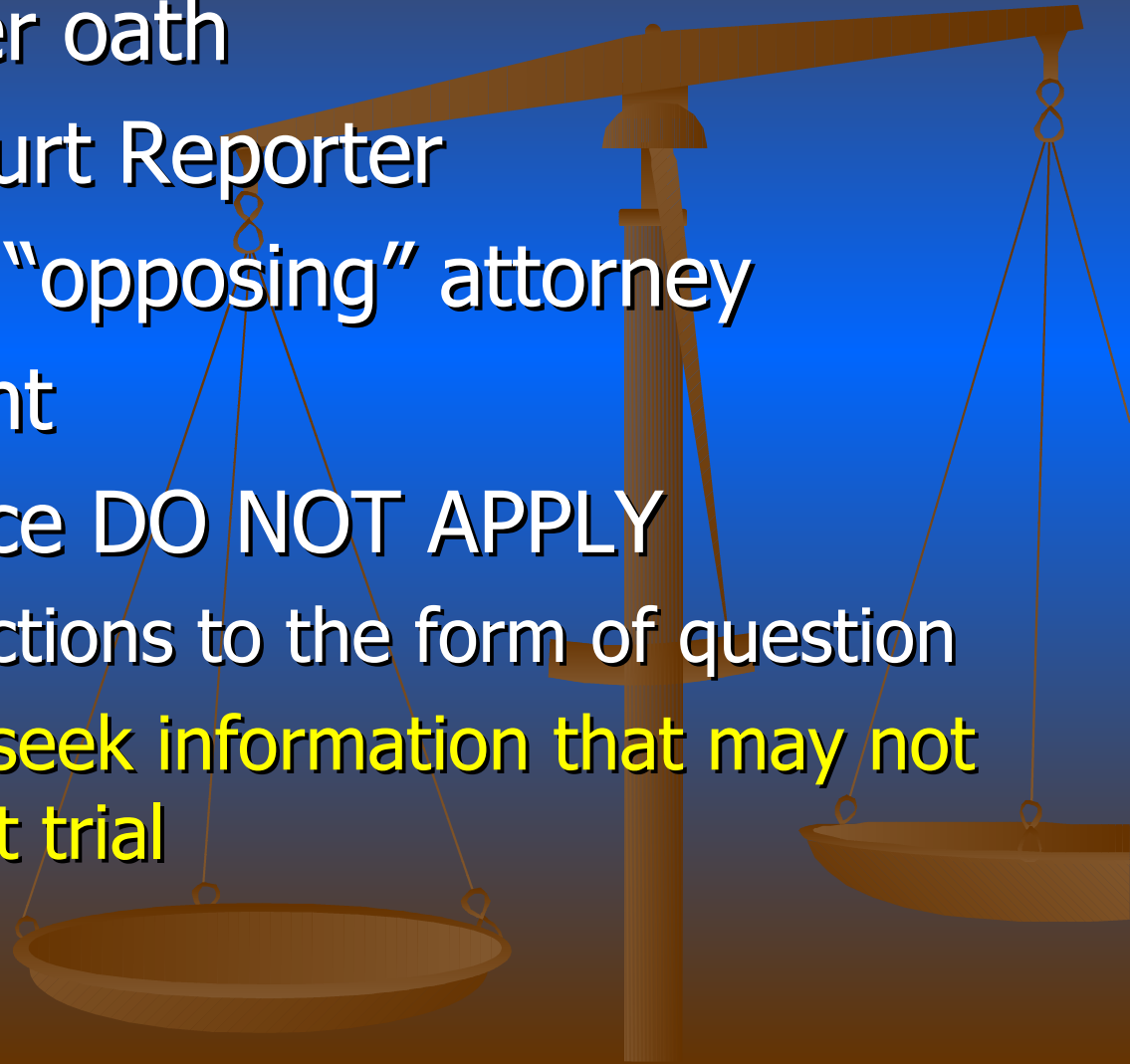
Pre-trial Discovery

- Party (you are suing or being sued)
 - interrogatories
 - request for admissions
 - requests for production
 - mental / physical exam
- Party and witnesses
 - deposition



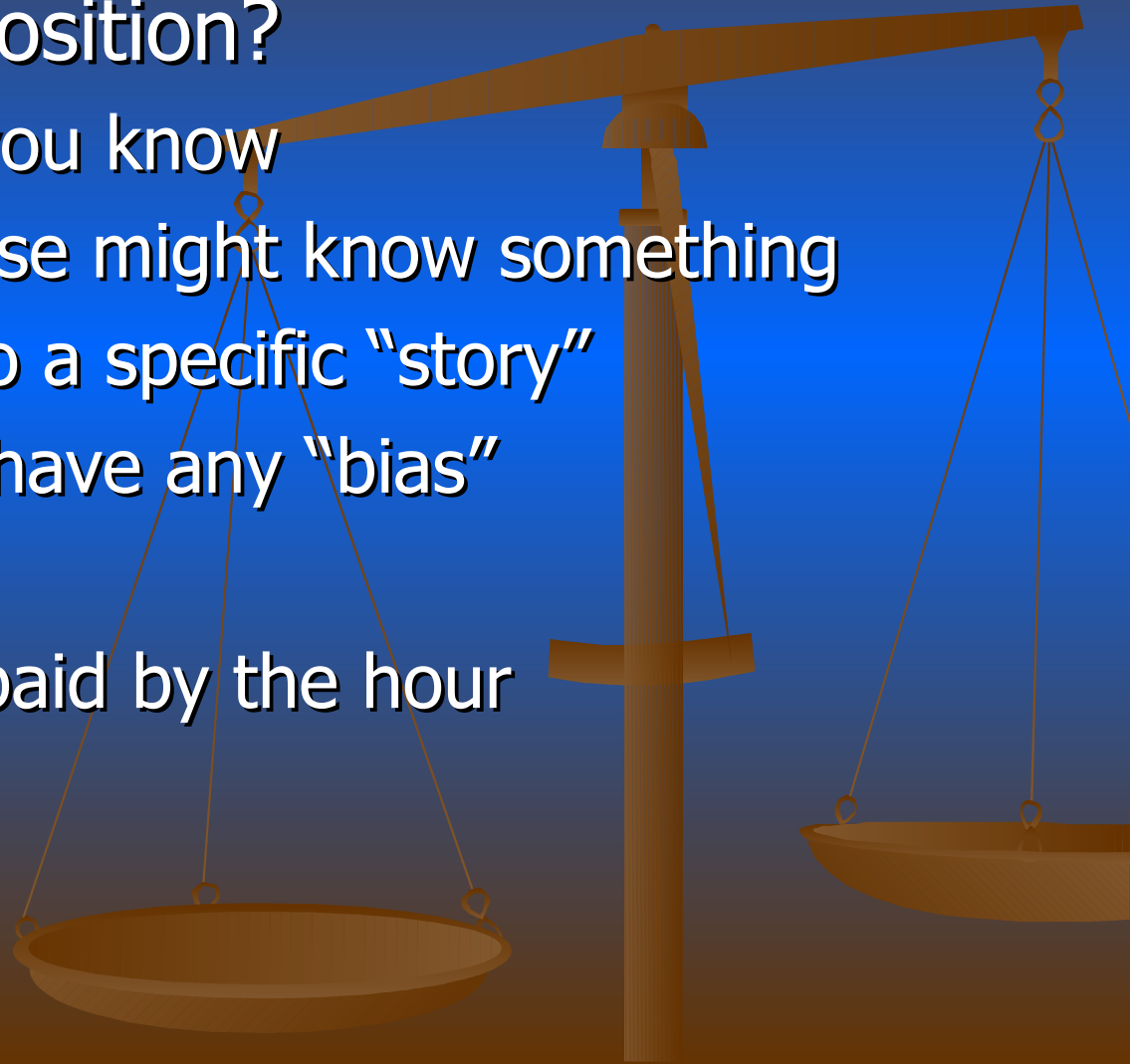
Deposition

- Testimony under oath
- In front of a Court Reporter
- Examination by “opposing” attorney
- No judge present
- Rules of evidence DO NOT APPLY
 - except for objections to the form of question
 - questions may seek information that may not be admissible at trial



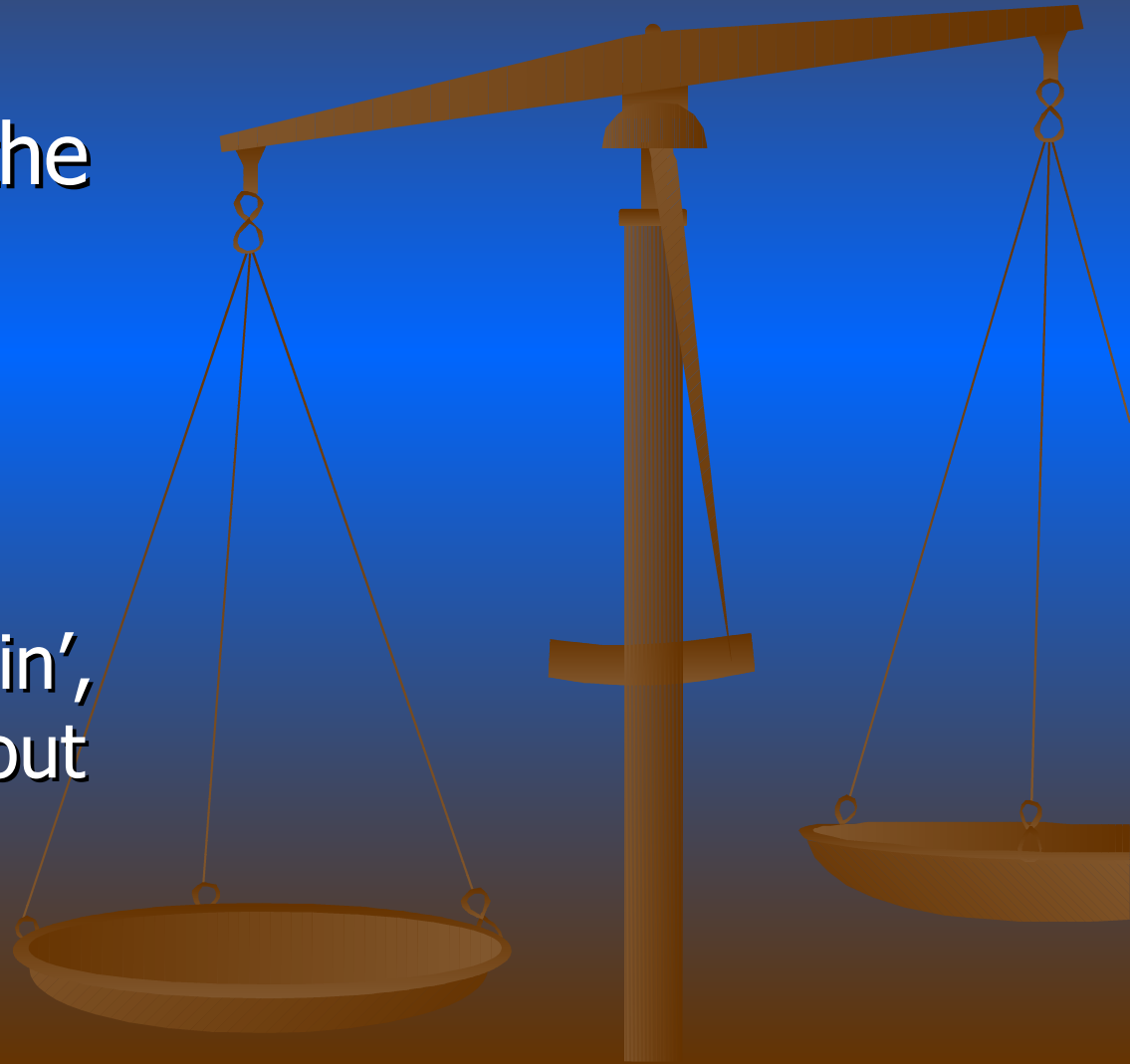
Deposition

- Why take a deposition?
 - Find out what you know
 - Find out who else might know something
 - Pin you down to a specific “story”
 - Find out if you have any “bias”
 - “Size you up”
 - You’re getting paid by the hour



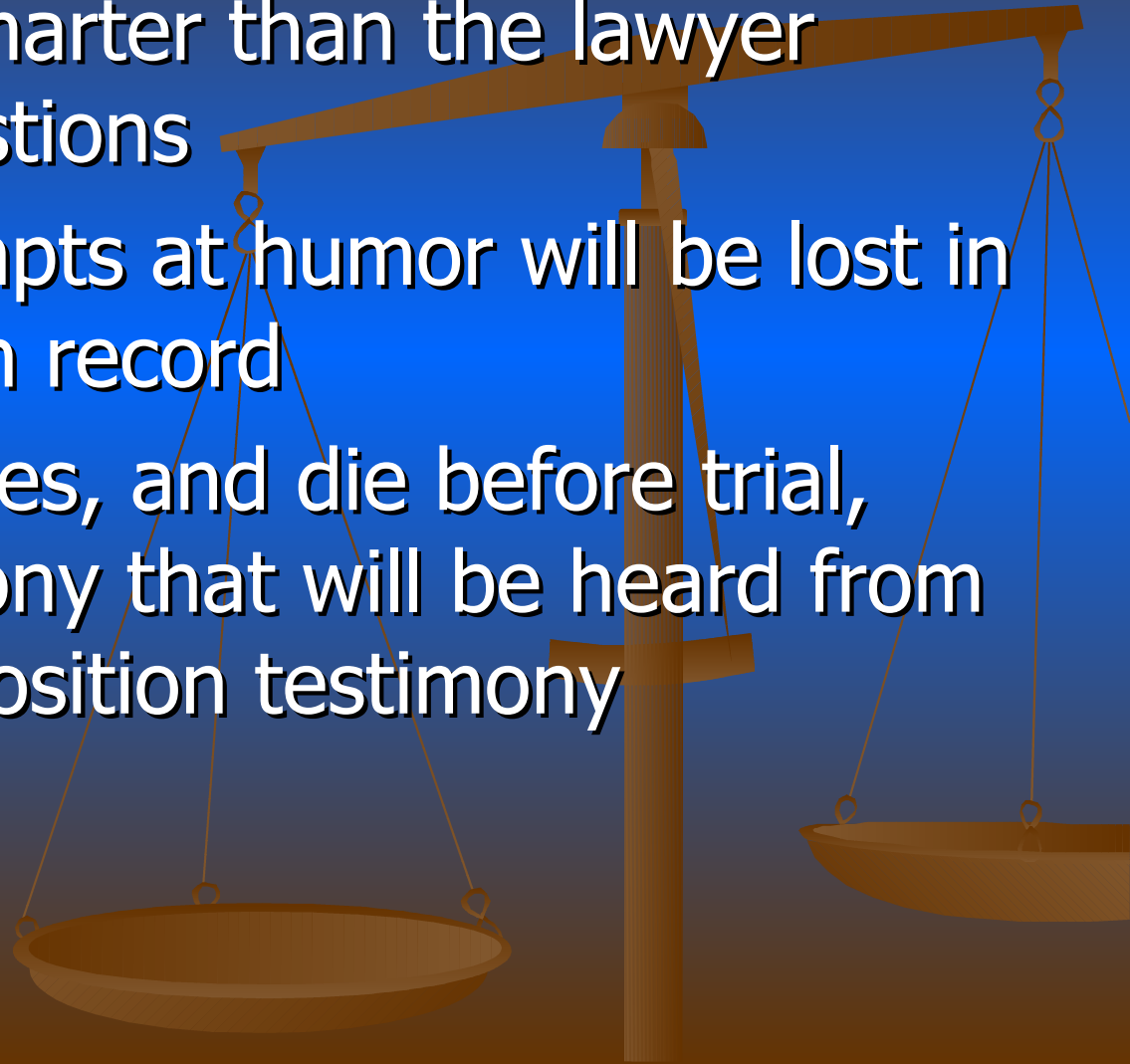
Deposition

- Attorneys and witnesses often underestimate the importance of preparing for a deposition
 - “if you don’t remember nuthin’, they can’t find out nuthin neither”



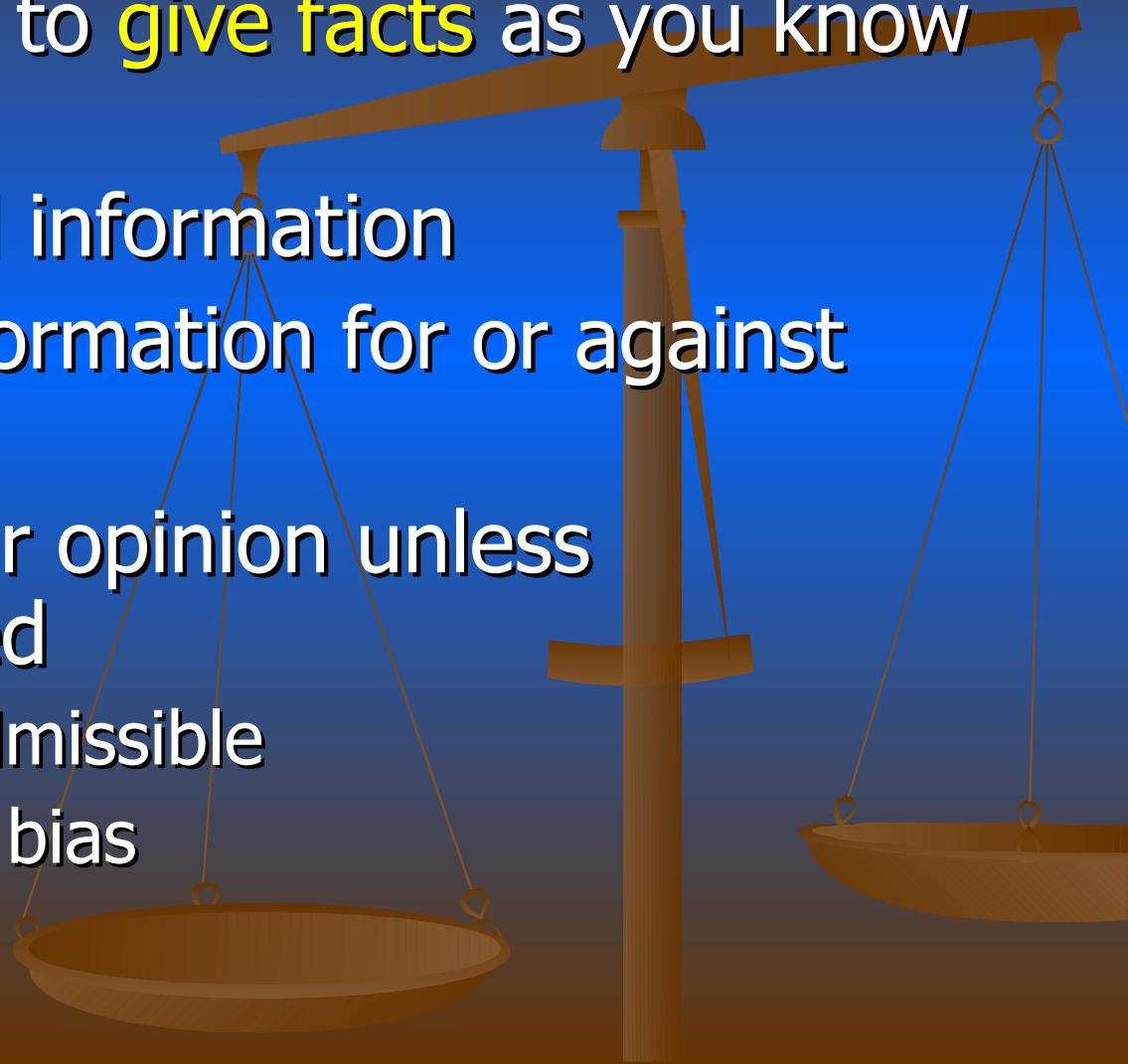
Danger Danger Danger

- You are NOT smarter than the lawyer asking you questions
- Any weak attempts at humor will be lost in the cold, written record
- If you play games, and die before trial, the only testimony that will be heard from you is your deposition testimony



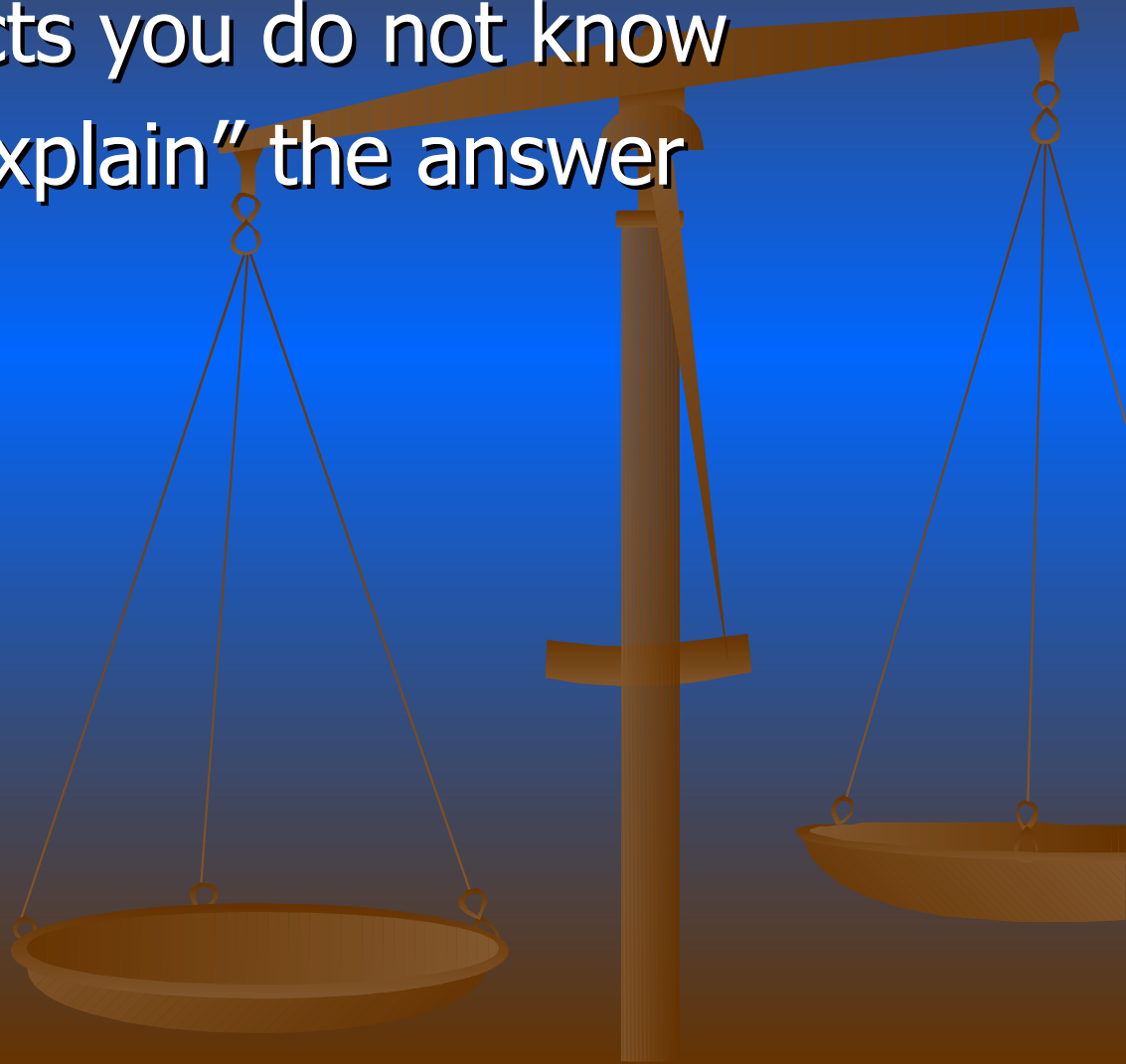
Deposition

- Your purpose is to **give facts** as you know them
- Do not withhold information
- Do not slant information for or against anyone
- Do not give your opinion unless specifically asked
 - Probably not admissible
 - May show your bias

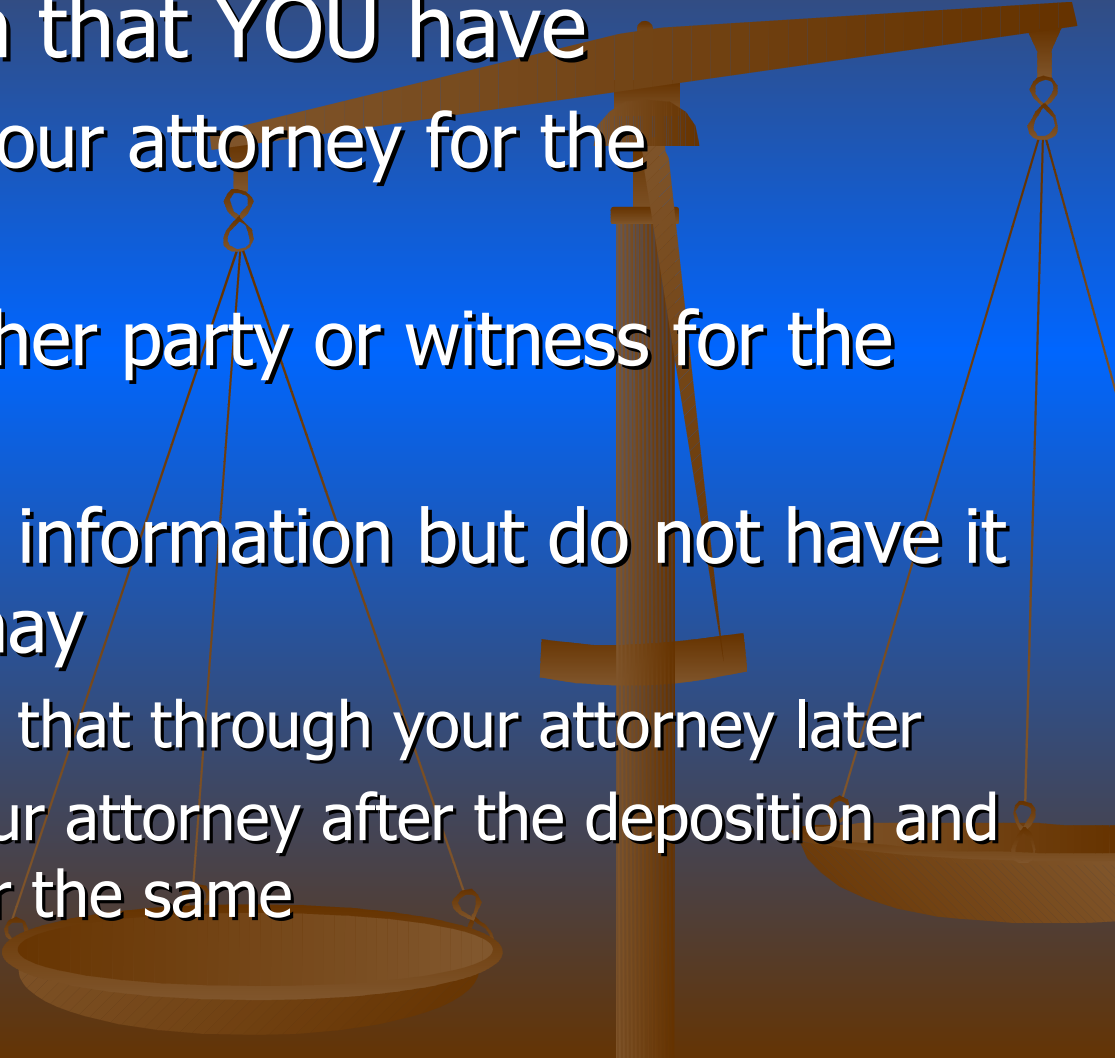


Deposition

- NEVER state facts you do not know
- Do not try to “explain” the answer
- “I don’t know”
- “I don’t recall”



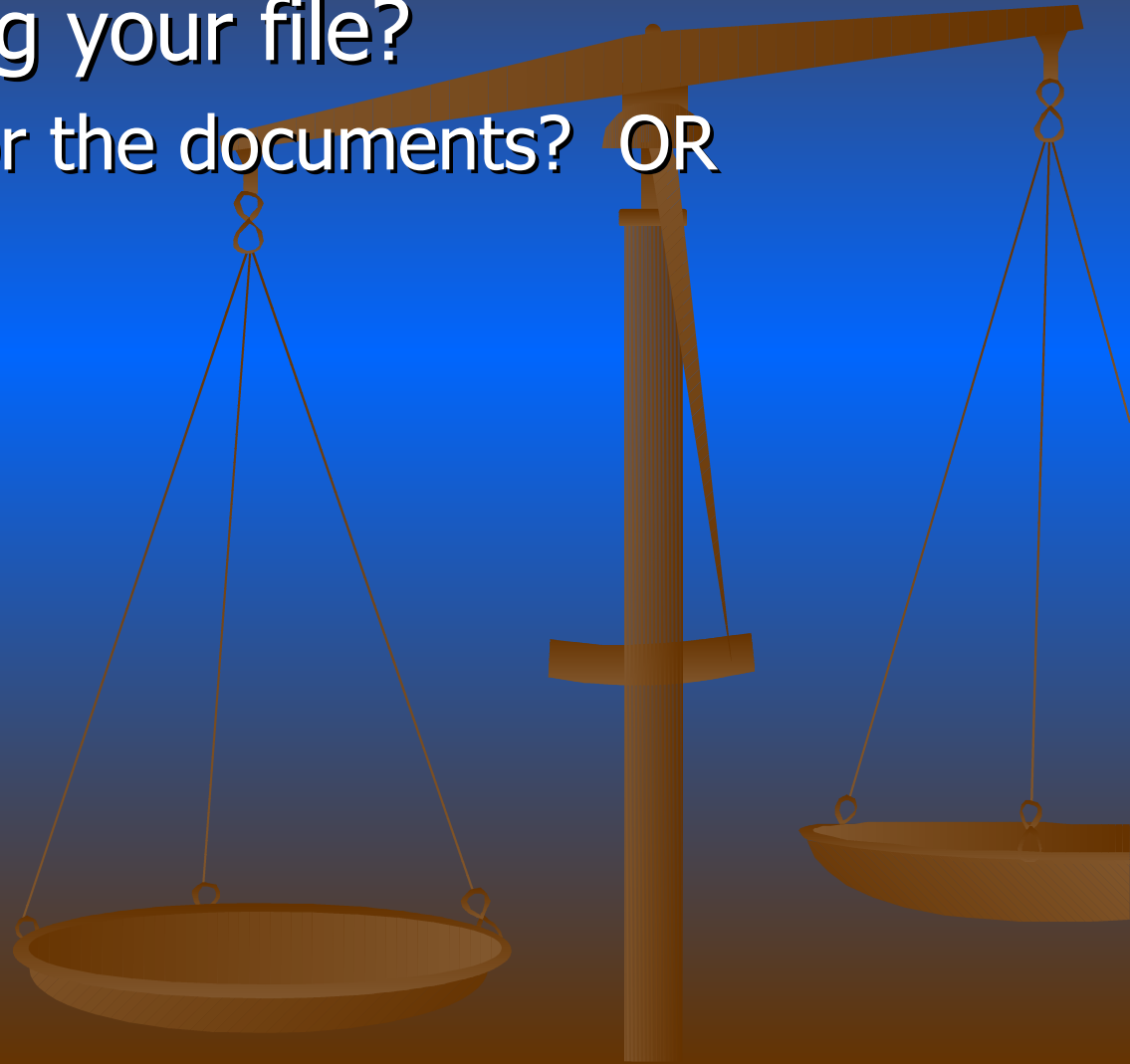
Deposition



- Give information that YOU have
 - do not turn to your attorney for the information
 - do not ask another party or witness for the information
 - IF you have the information but do not have it with you, you may
 - offer to provide that through your attorney later
 - consult with your attorney after the deposition and have them offer the same

Deposition

- Should you bring your file?
 - Let them ask for the documents? OR
 - Be prepared?

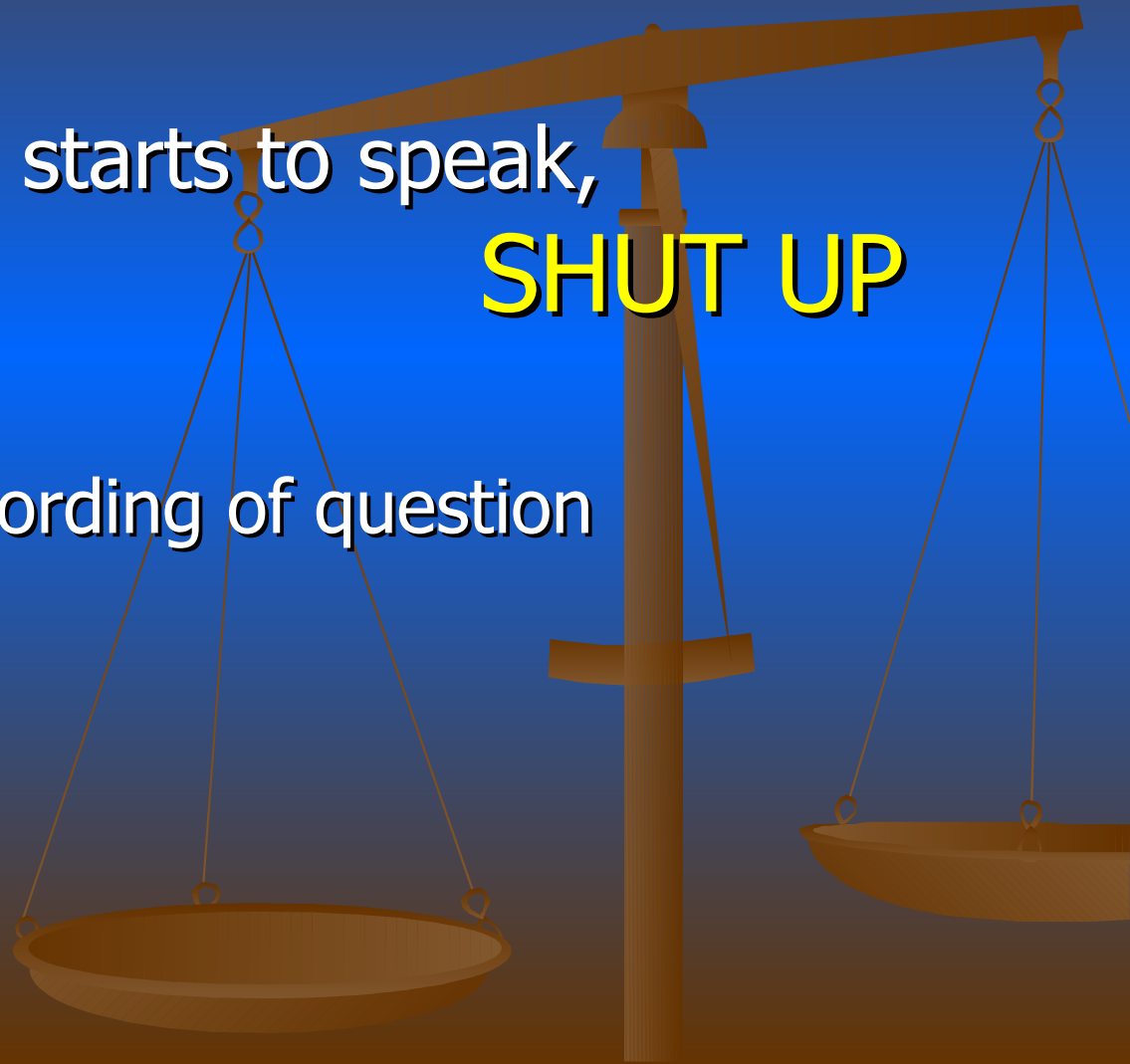


Deposition

- Don't get mad
- If your attorney starts to speak,

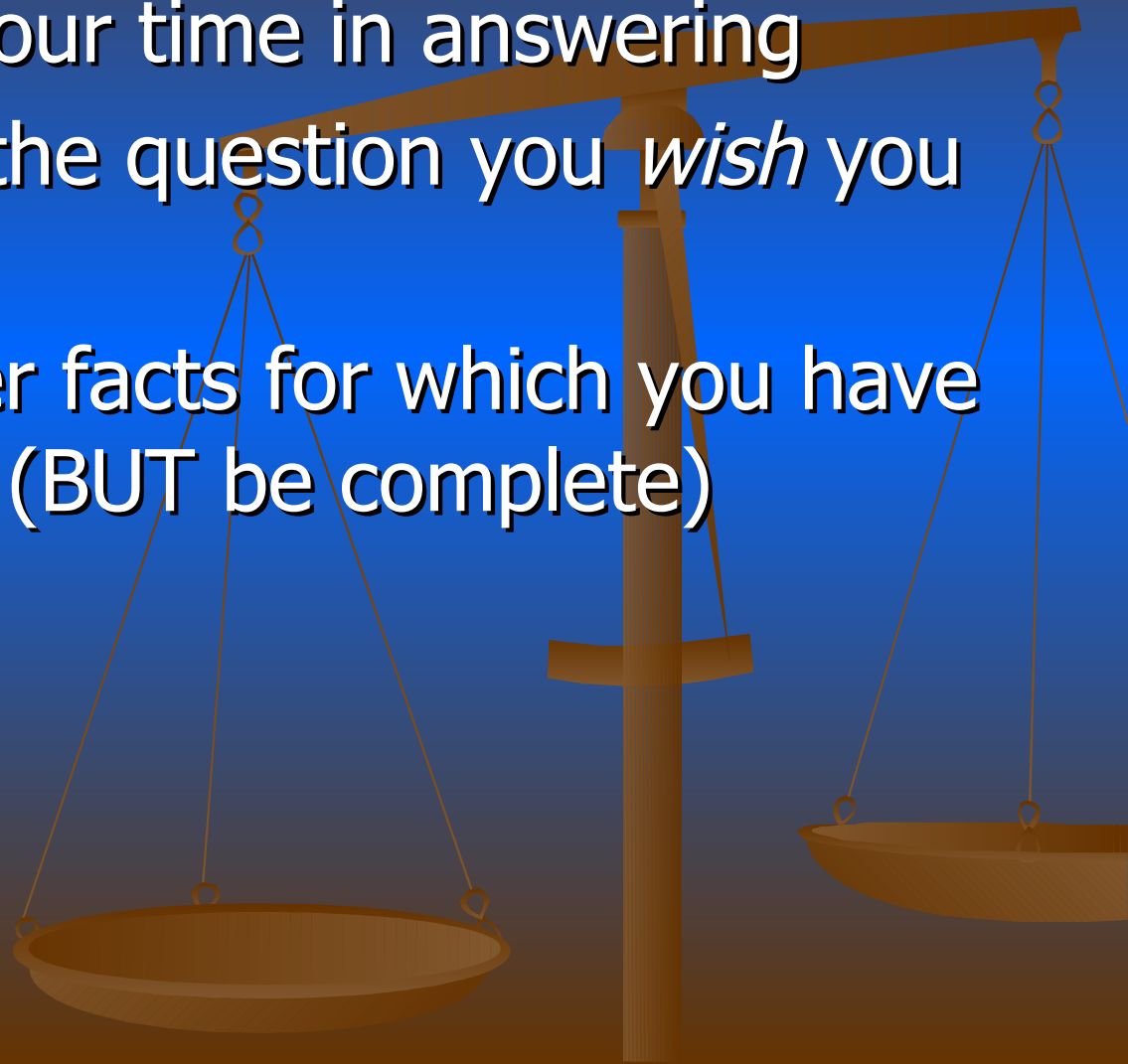
SHUT UP

- objection
- problem with wording of question
- privilege

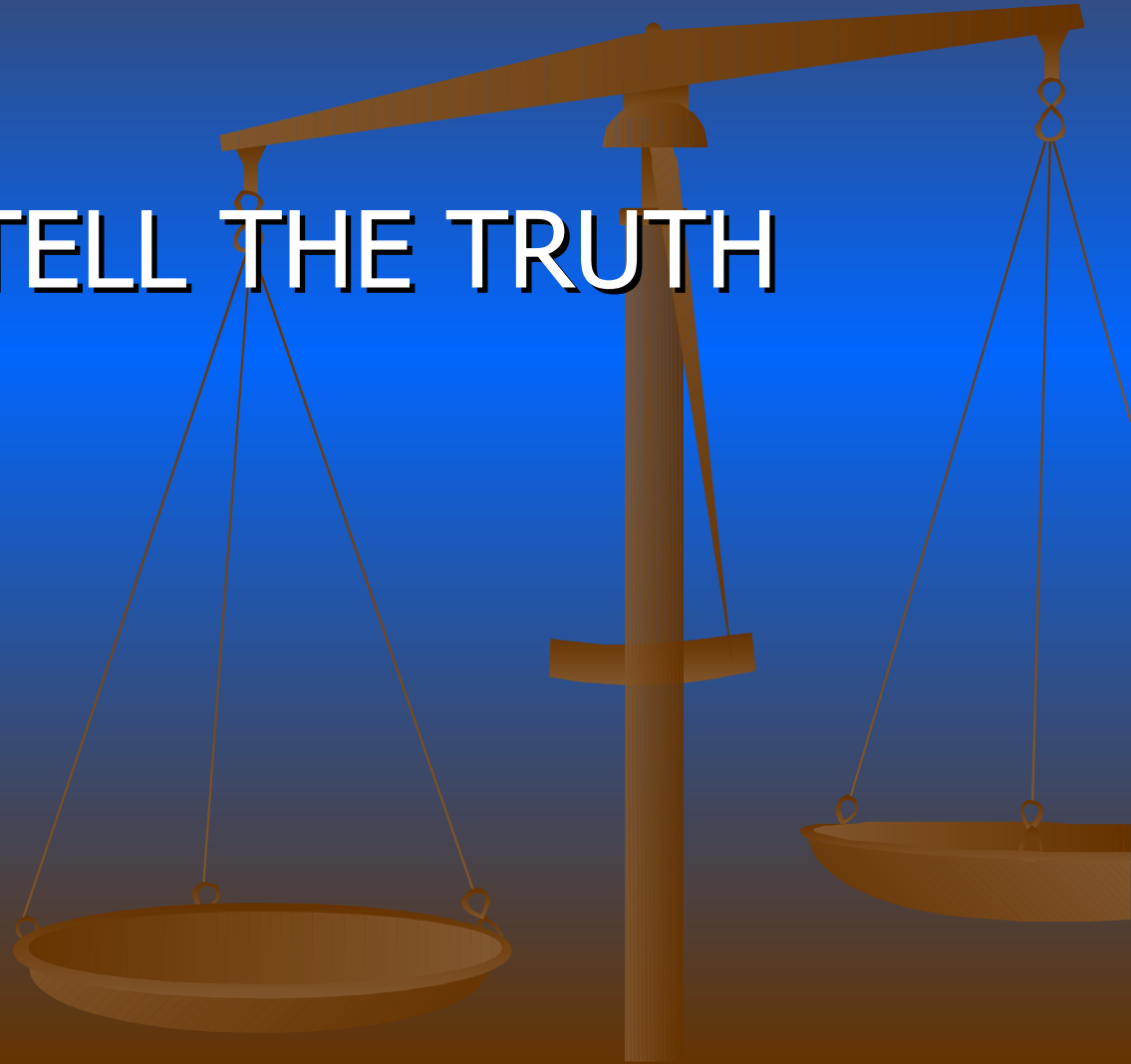


Deposition

- You may take your time in answering
- Do not answer the question you *wish* you had been asked
- Do not volunteer facts for which you have not been asked (BUT be complete)

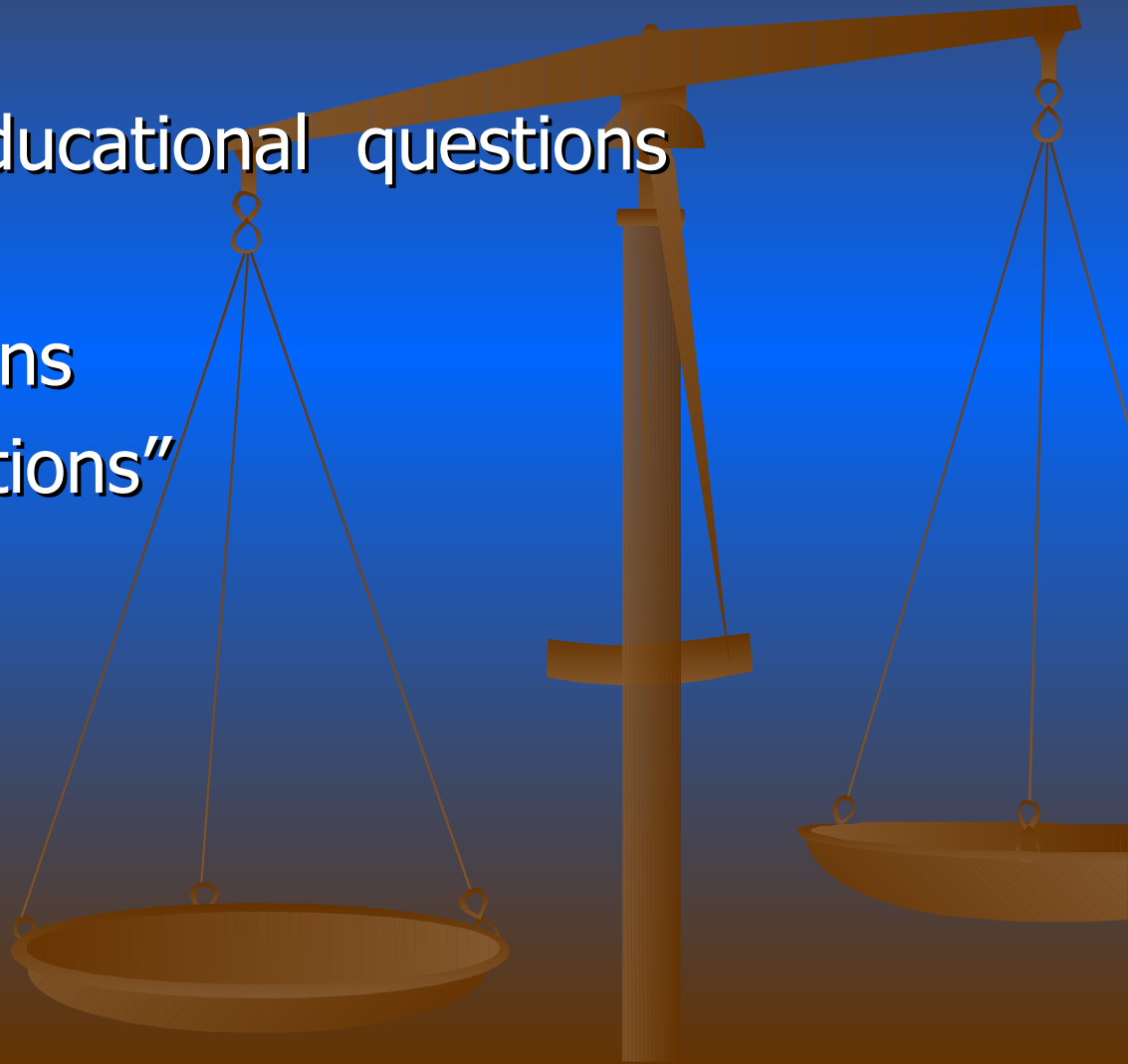


ALWAYS TELL THE TRUTH



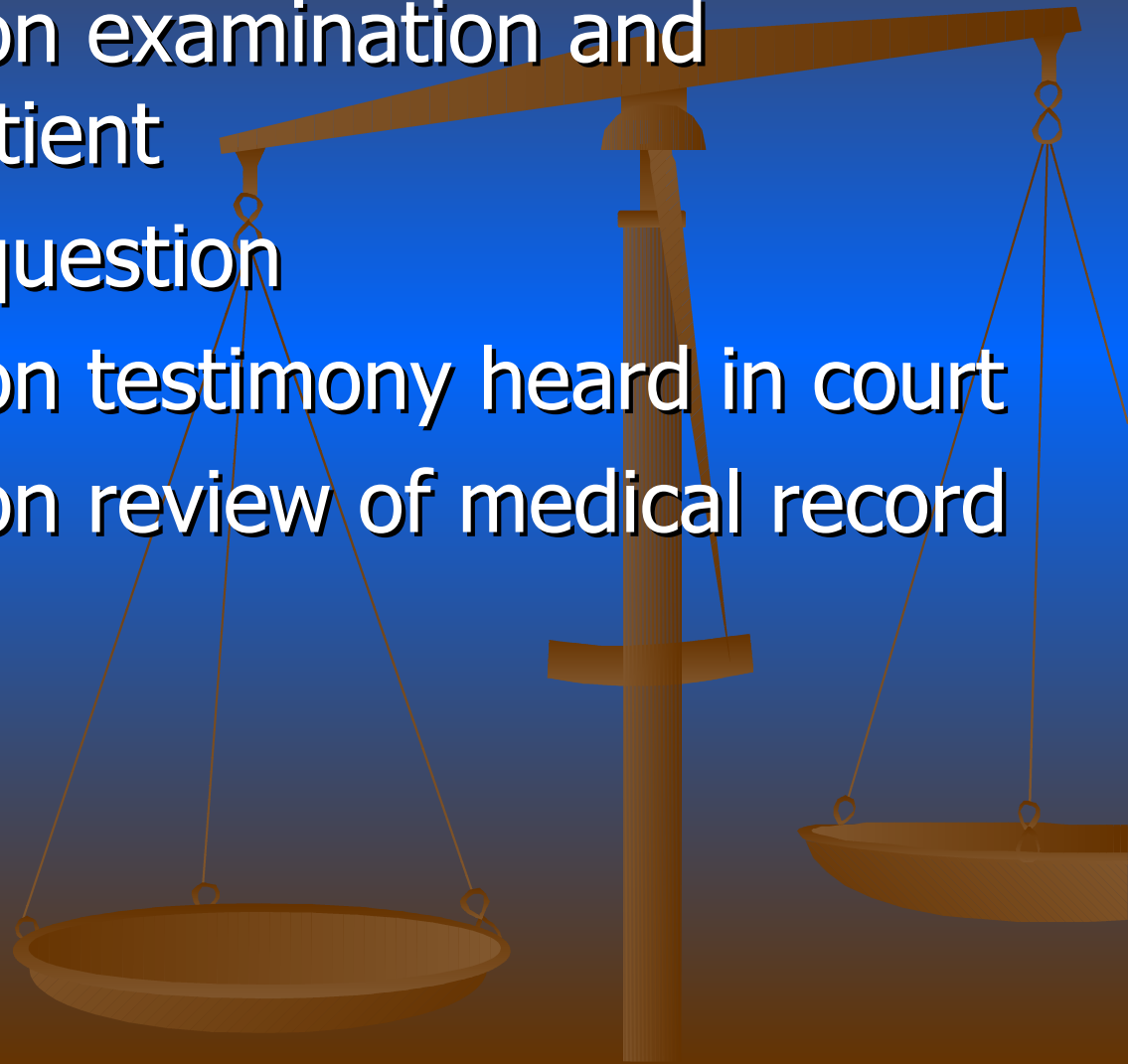
Deposition

- Expect
 - Biographical /educational questions
 - Fact questions
 - Opinion questions
 - “Fishing expeditions”



Opinion Questions

- Opinion based on examination and treatment of patient
- “Hypothetical” question
- Opinion based on testimony heard in court
- Opinion based on review of medical record

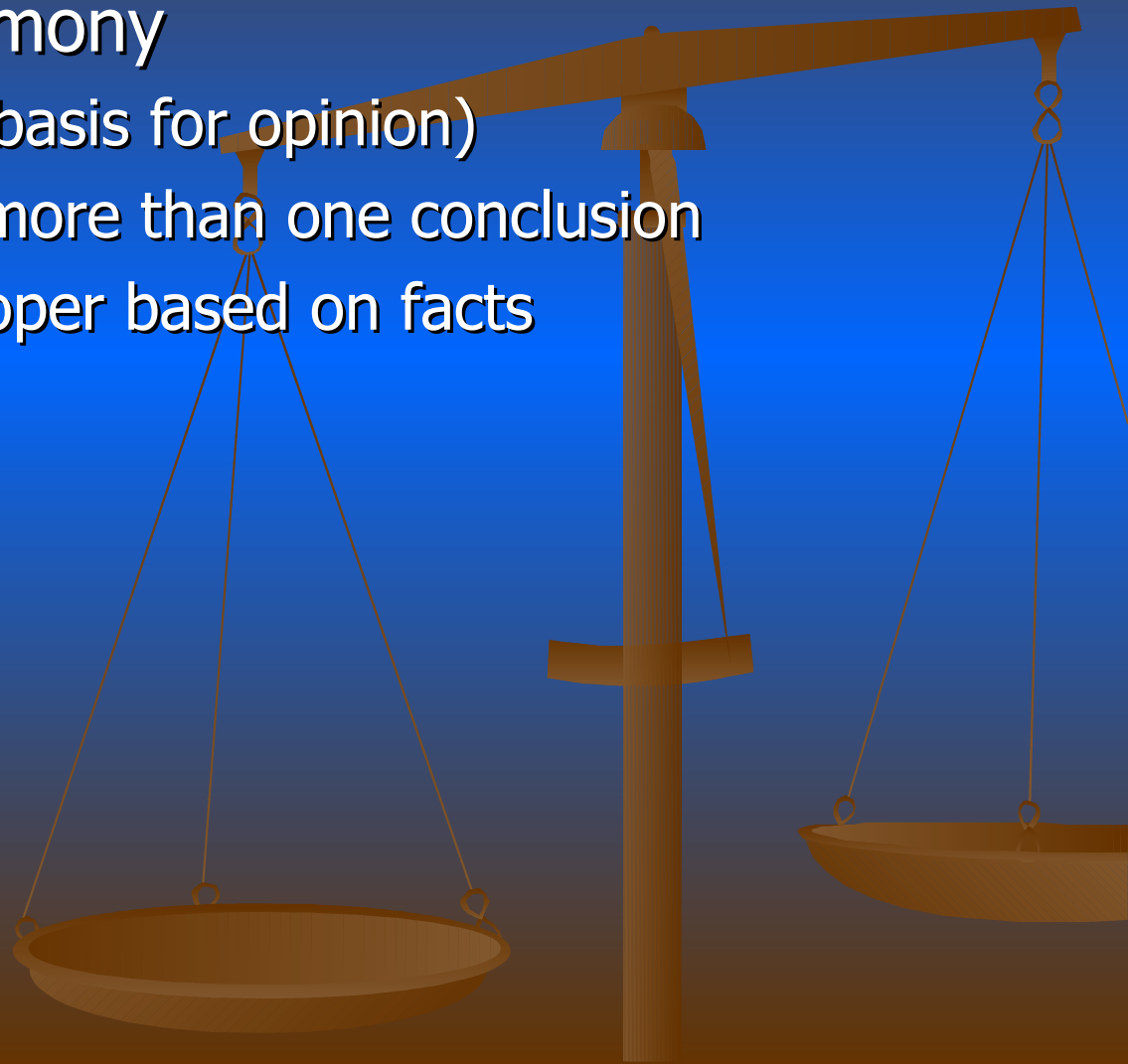


Opinion Questions

- Defending against “experts”
 - Prevent testimony
 - Attack the science
 - Disqualify the expert
 - Attack the “foundation”



- Attack the testimony
 - Facts in error (basis for opinion)
 - Basis leads to more than one conclusion
 - Opinion not proper based on facts



- Alter the opinion
 - change facts

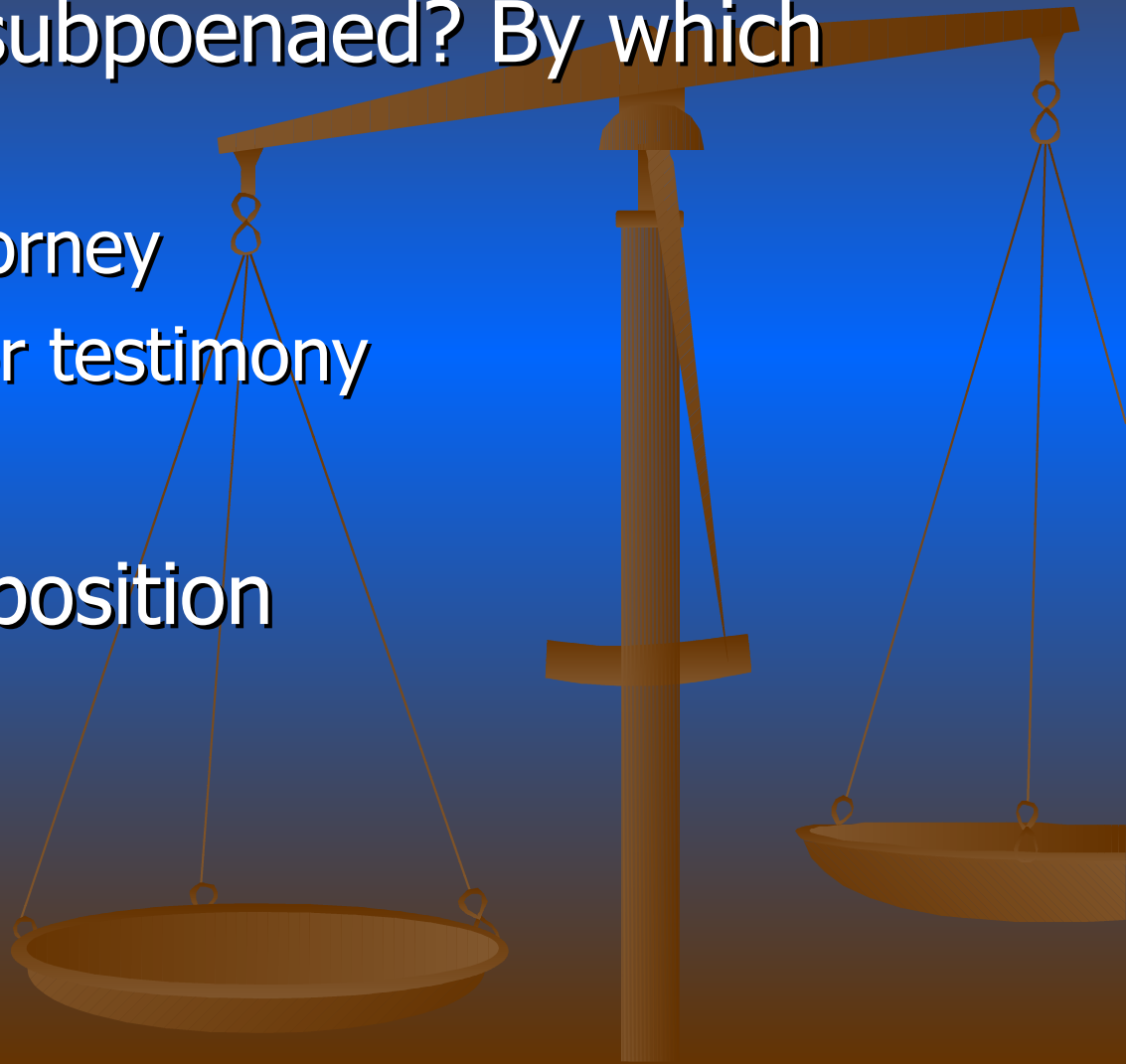


Trial????

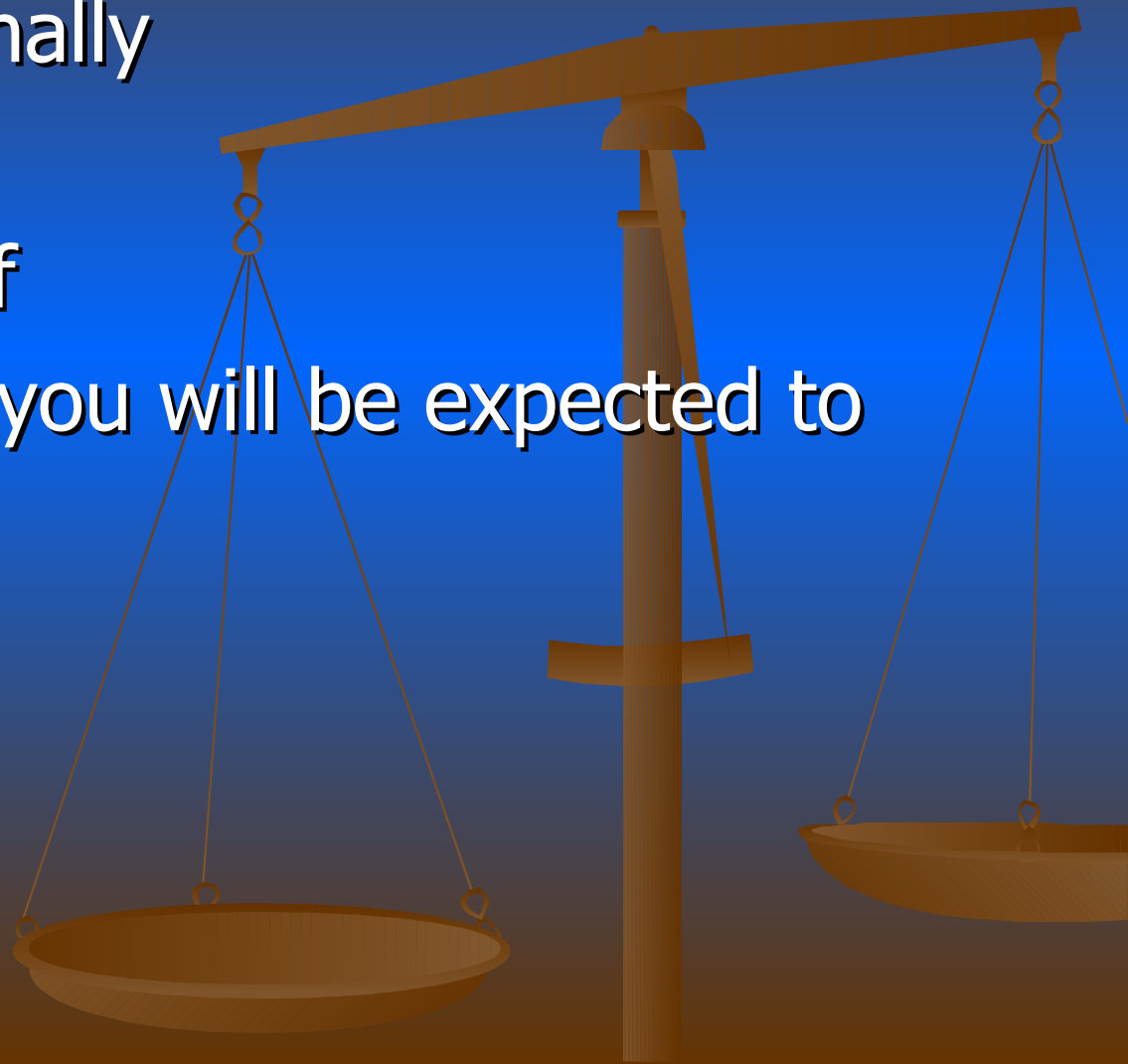


Trial

- Why were you subpoenaed? By which side?
 - Contact the attorney
 - Arrange time for testimony
- Bring your file
- Review your deposition

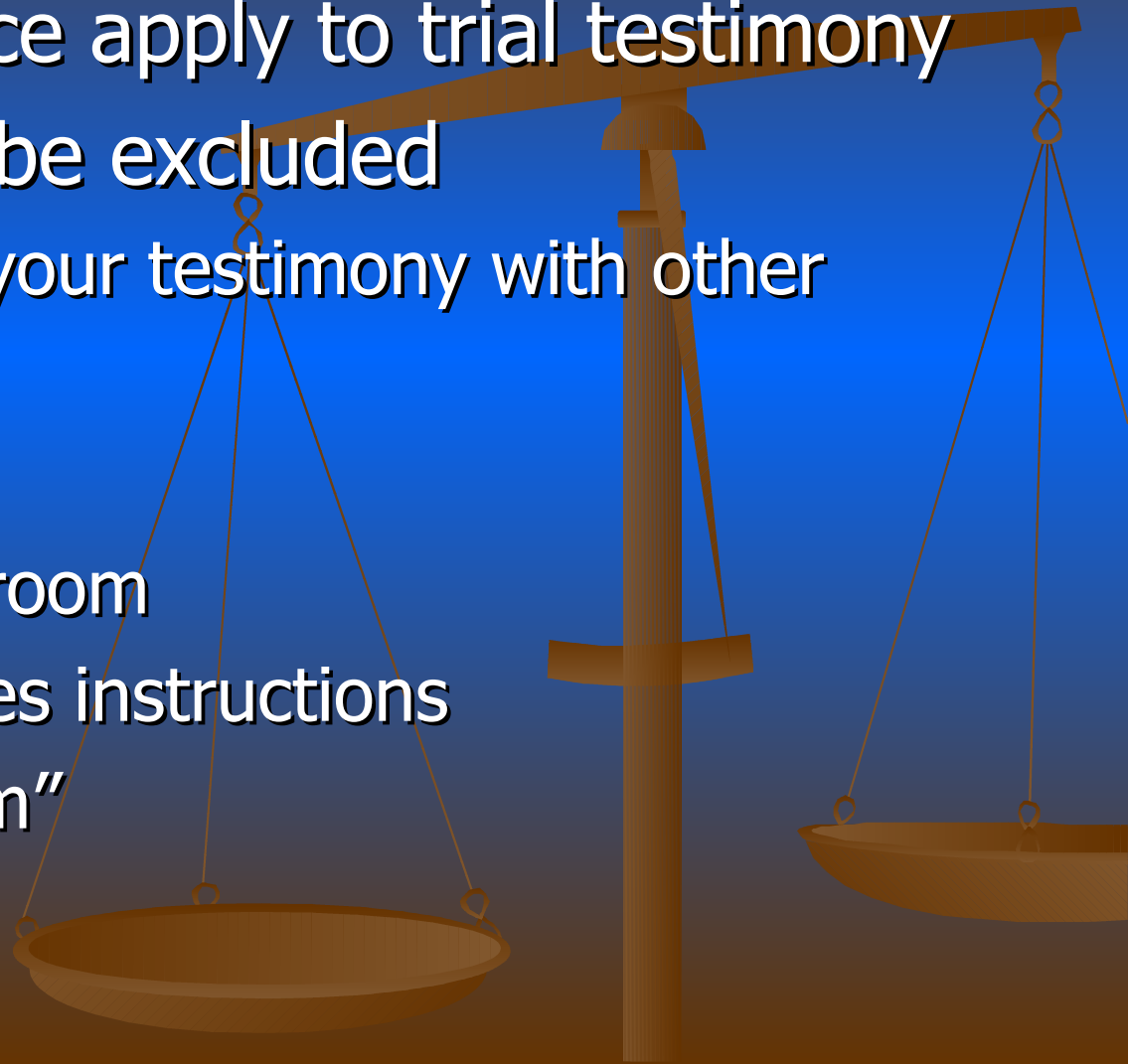


- Dress professionally
- Arrive early
- Identify yourself
- Look for where you will be expected to wait



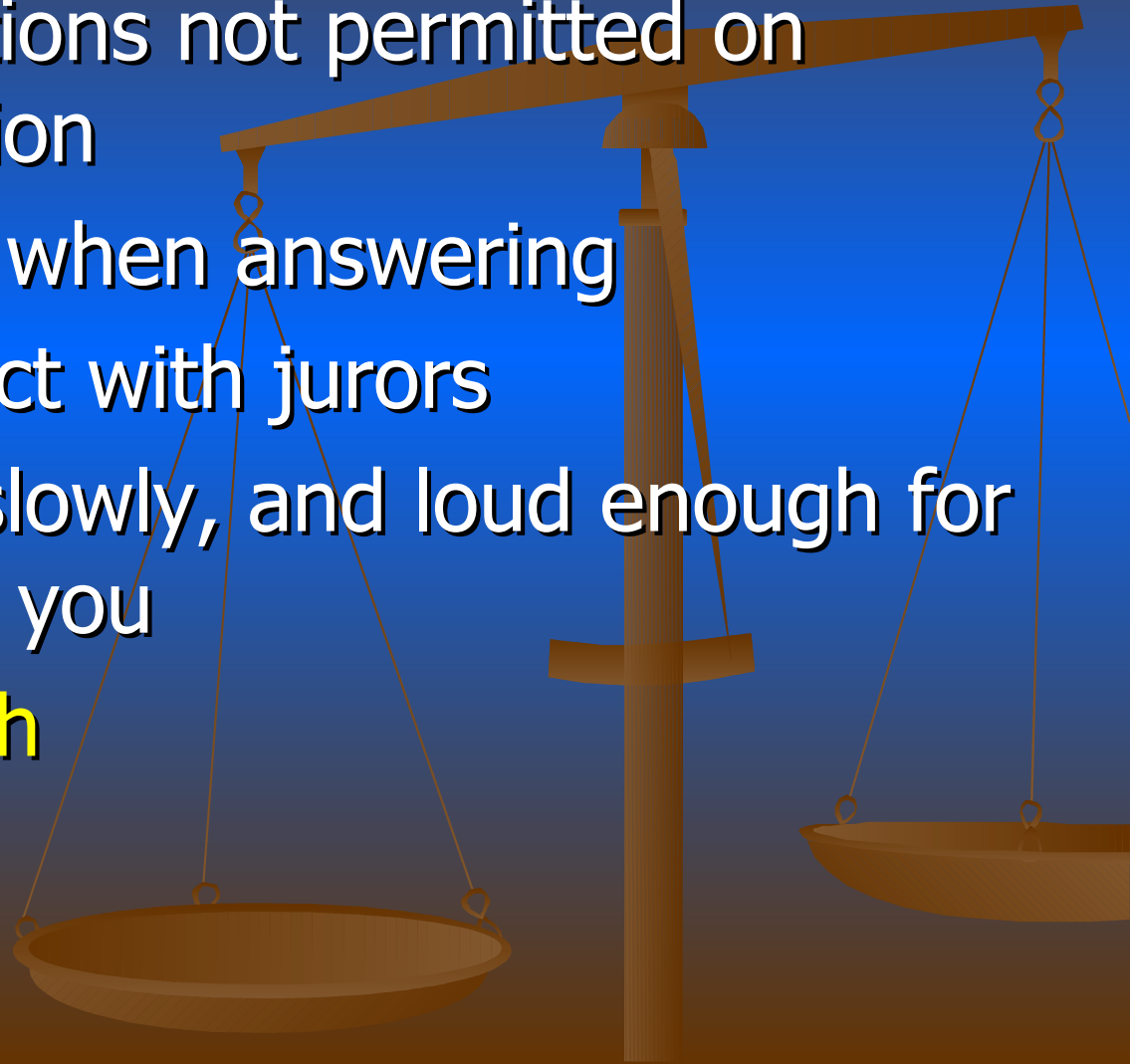
Trial

- Rules of evidence apply to trial testimony
- Witnesses may be excluded
 - do not discuss your testimony with other witnesses
- When called
 - enter the courtroom
 - follow the judges instructions
 - "Swear or Affirm"



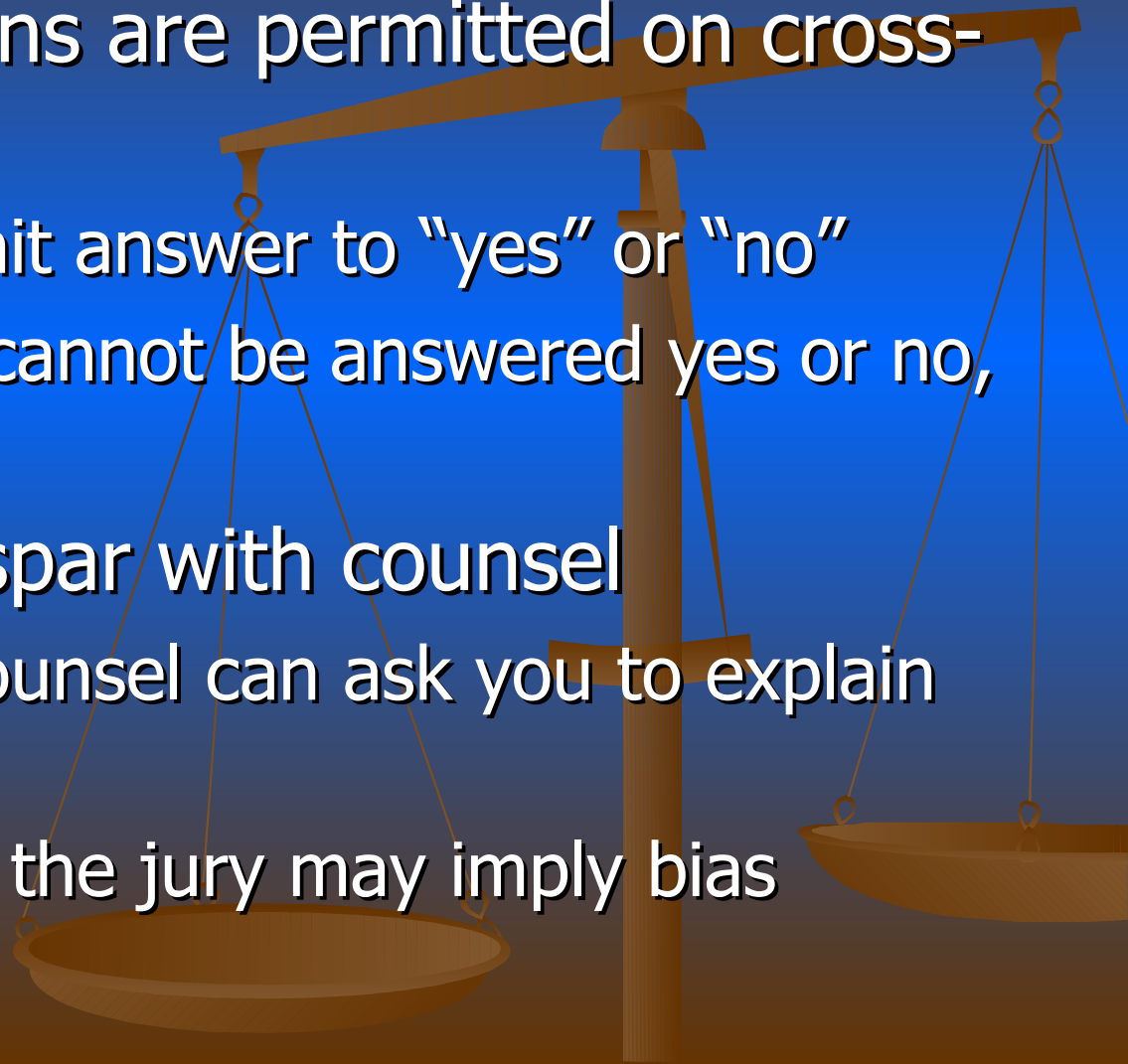
Trial

- “Leading” questions not permitted on direct examination
- Talk to the jury when answering
- Make eye contact with jurors
- SPEAK clearly, slowly, and loud enough for the jury to hear you
- Use plain English



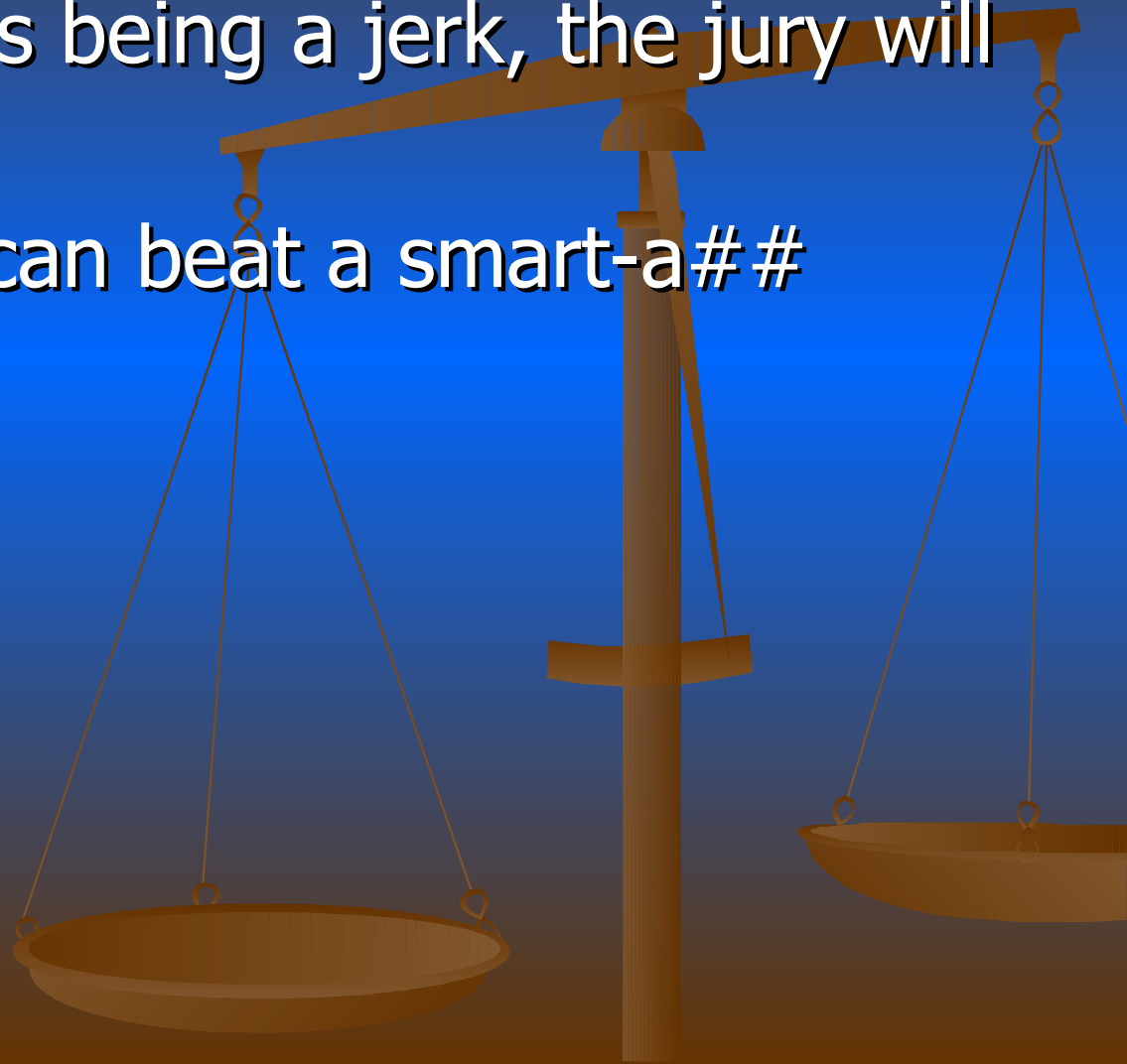
Trial

- Leading questions are permitted on cross-examination
 - purpose - to limit answer to "yes" or "no"
 - if the question cannot be answered yes or no, say so
- DO NOT try to spar with counsel
 - the opposing counsel can ask you to explain an answer
 - if you get mad, the jury may imply bias



Trial

- If the attorney is being a jerk, the jury will see it
- Every attorney can beat a smart-a## witness



Conclusion

- Look pretty
- Be prepared
- Tell the truth



Questions???

dayton@compuserve.com

