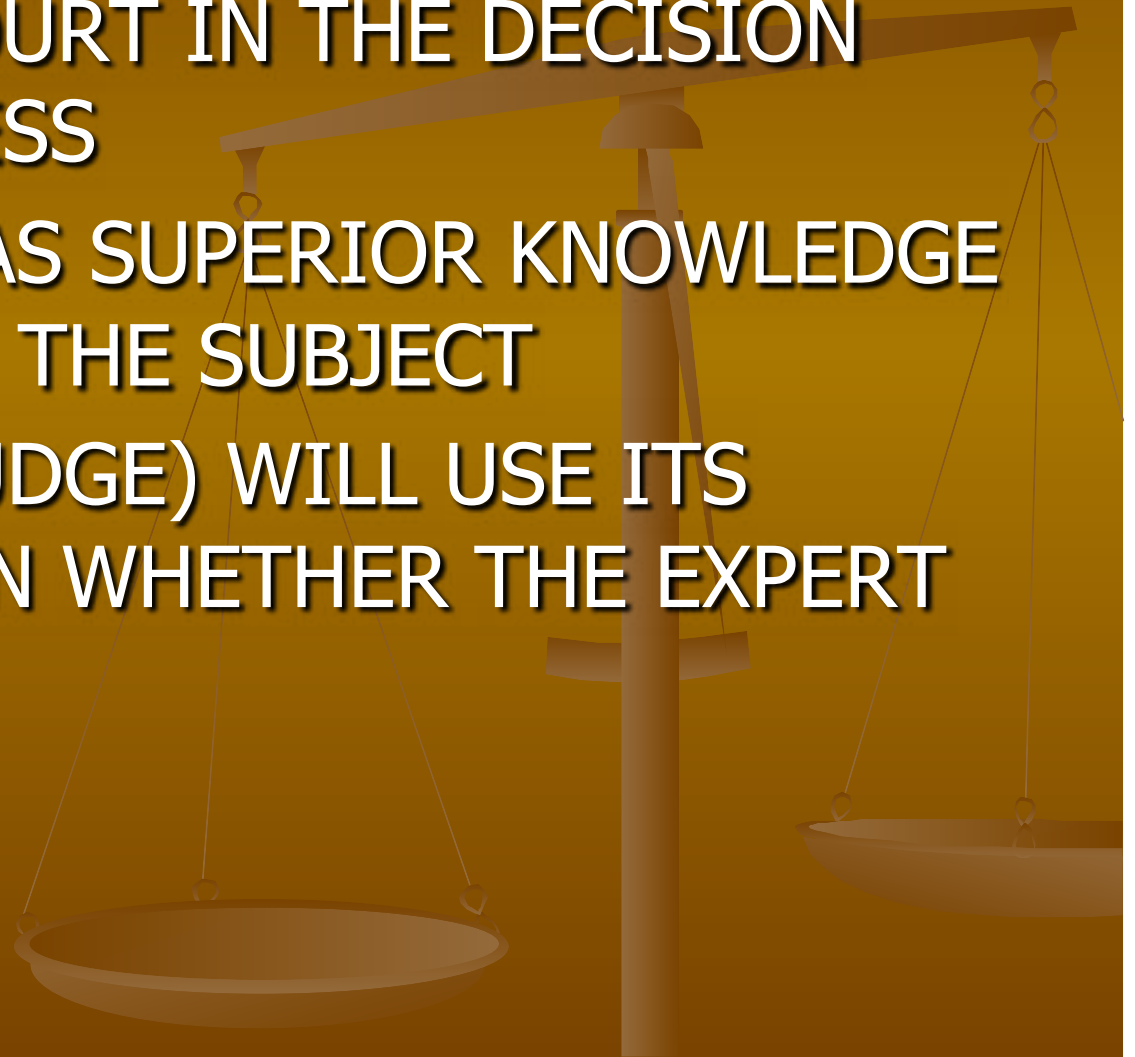


The Land Surveyor as an Expert Witness

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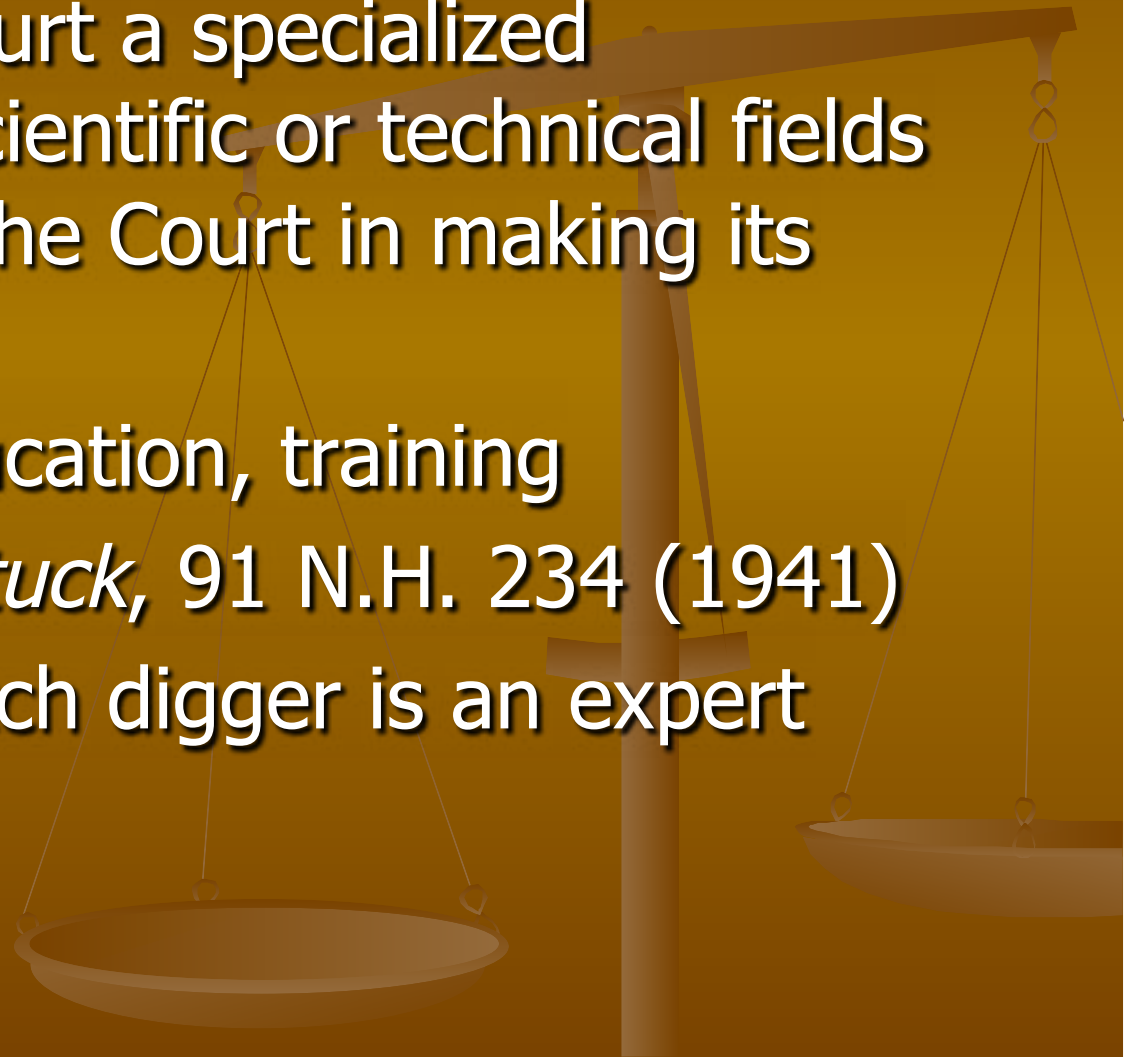
WHY EXPERT WITNESSES

- TO AID THE COURT IN THE DECISION MAKING PROCESS
- THE EXPERT HAS SUPERIOR KNOWLEDGE & TRAINING IN THE SUBJECT
- THE COURT (JUDGE) WILL USE ITS DISCRETION ON WHETHER THE EXPERT MAY TESTIFY



HOW IS THE EXPERT QUALIFIED?

- Prove to the Court a specialized knowledge in scientific or technical fields that will assist the Court in making its finding
- Experience, education, training
- *Dowling v Shattuck*, 91 N.H. 234 (1941)
- The illiterate ditch digger is an expert witness.

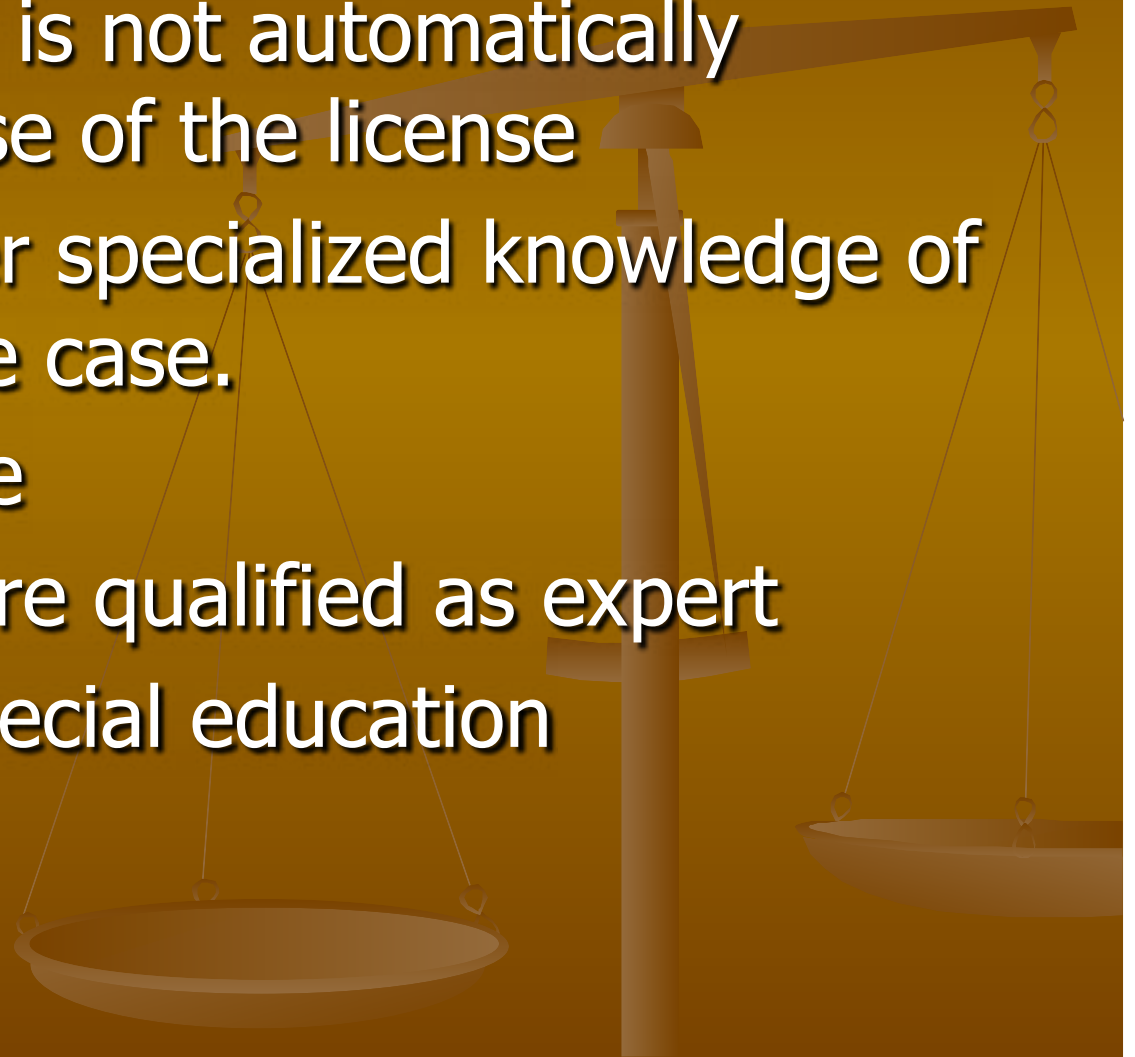


HOW IS THE EXPERT QUALIFIED?

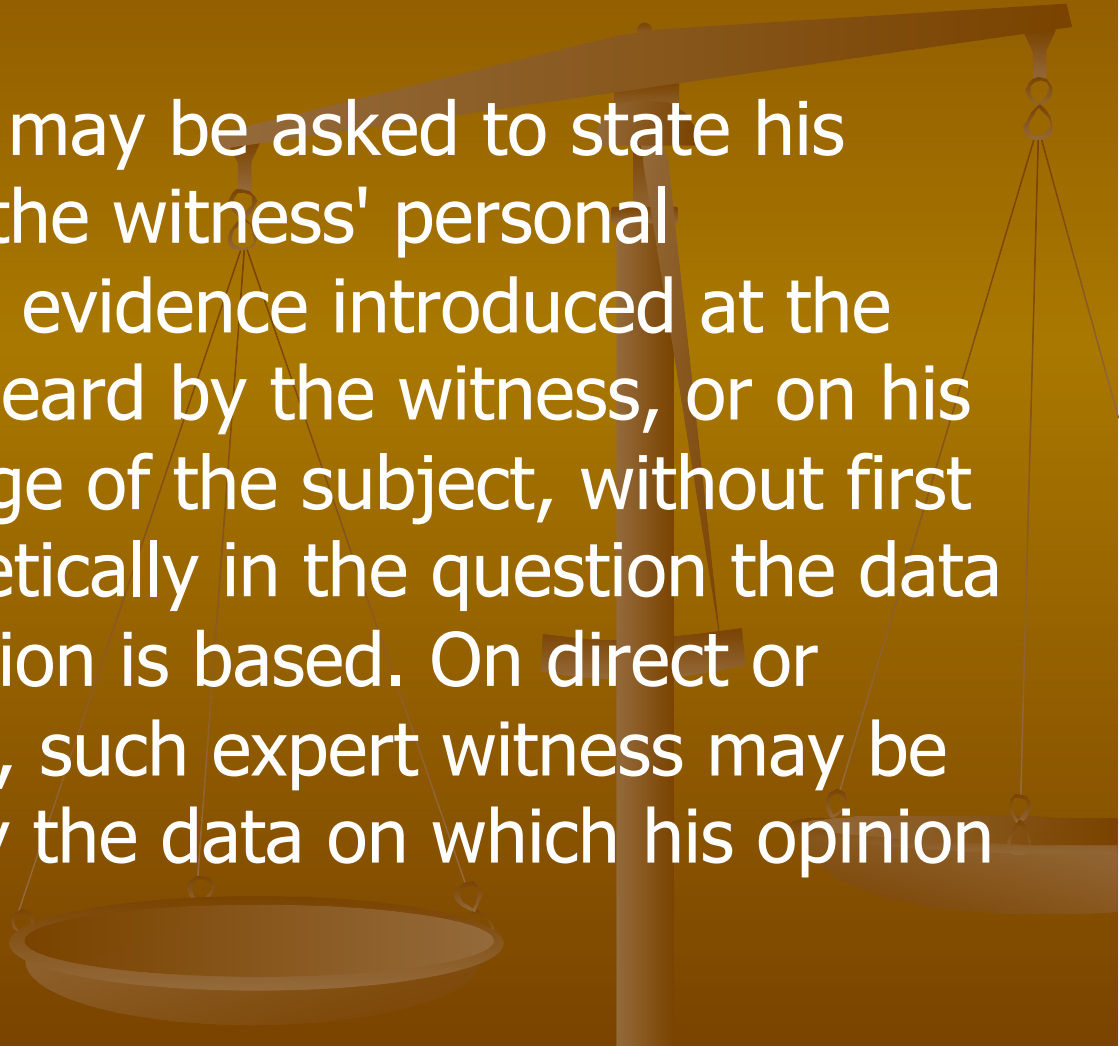
- The running of the logs in that stream, and through that bulkhead, was not a matter of common knowledge, The experience and observation of the plaintiff gave him the grounds and faculty of an opinion peculiar to himself, and not common to men who had no such experience or observation. In a substantial sense he may be regarded as an expert,
- *Douglass & Varnum v. Village of Morrisville*, 89 Vt. 393, 95 A. 810, (1915)

HOW IS THE EXPERT QUALIFIED?

- A land surveyor is not automatically qualified because of the license
- Must show other specialized knowledge of the issues in the case.
- Curriculum Vitae
- Prior cases where qualified as expert
- Experience – special education

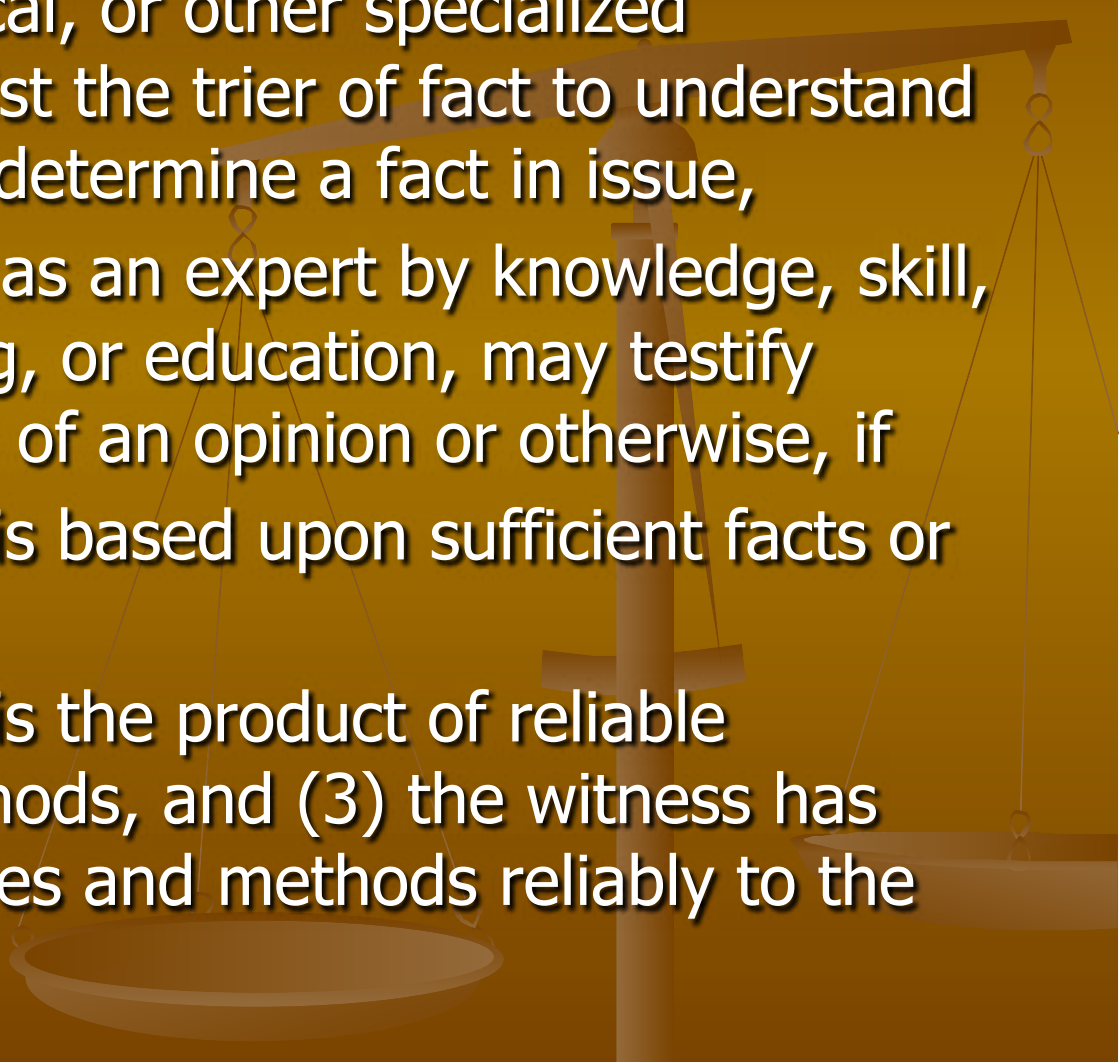


12 V.S.A. § 1643

- Expert witness:
 - An expert witness may be asked to state his opinion based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which this opinion is based. On direct or cross-examination, such expert witness may be required to specify the data on which his opinion is based.
- 

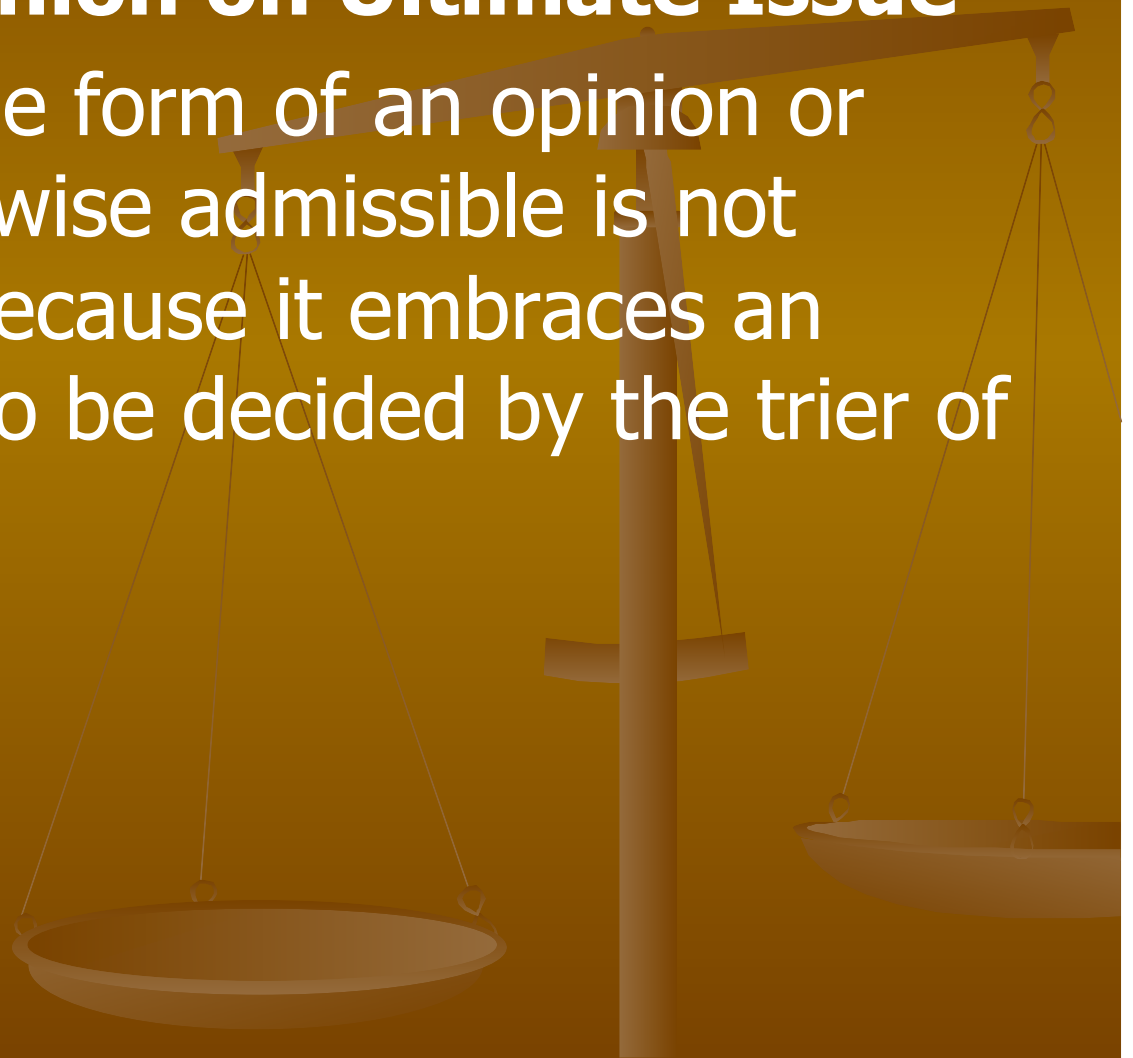
VT Rule of Evid 702

■ **Rule 702. Testimony by Experts**

- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,
 - a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
 - (1) the testimony is based upon sufficient facts or data,
 - (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
- 

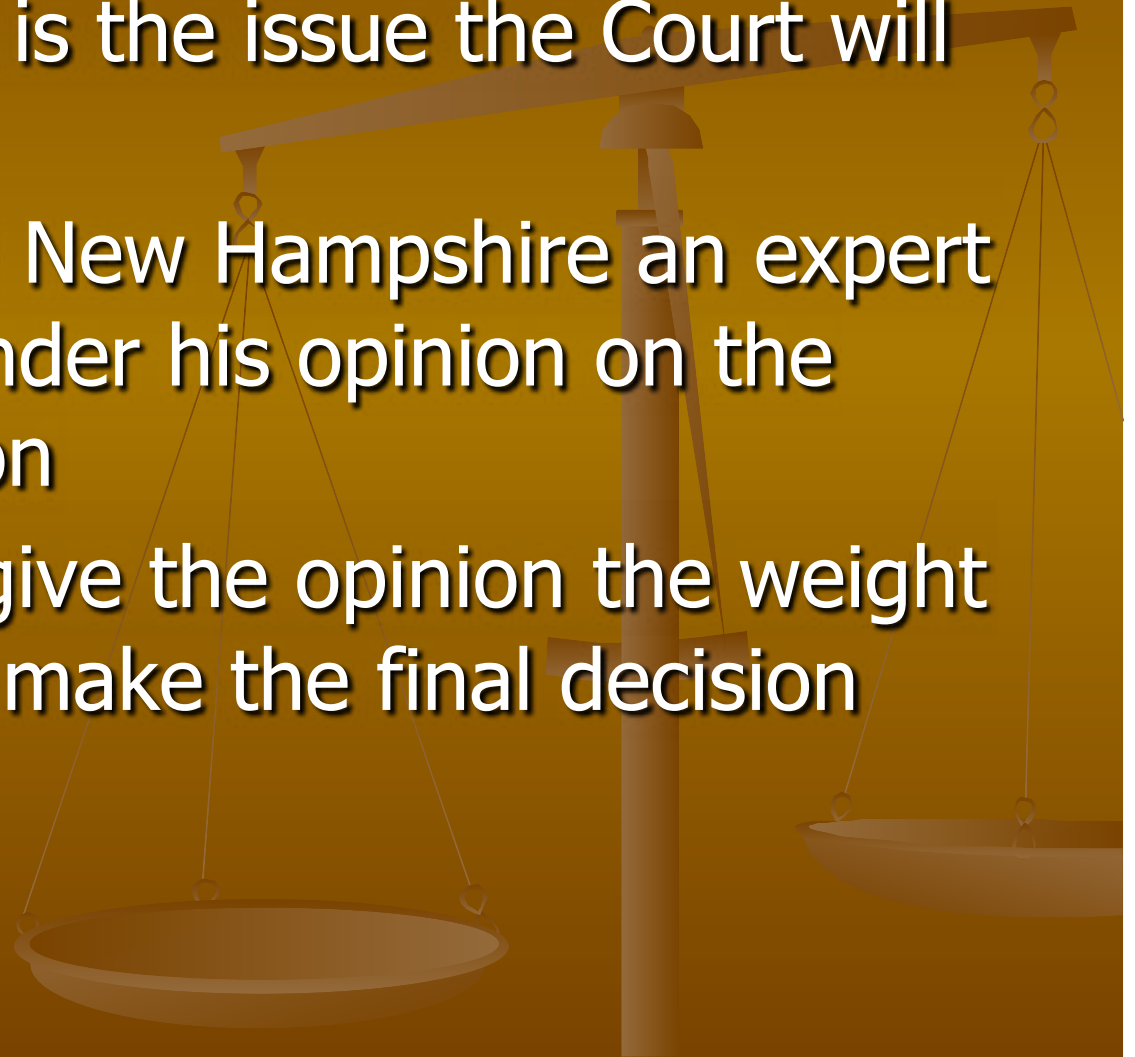
VT Rule of Evid 704

- **Rule 704. Opinion on Ultimate Issue**
- Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact



What is the Ultimate Question of the Case?

- Exactly that! It is the issue the Court will decide.
- In Vermont and New Hampshire an expert witness may render his opinion on the ultimate question
- The Judge will give the opinion the weight it deserves and make the final decision



VERMONT DEFINITION OF LAND SURVEYING

26 V.S.A. §2502 (4)

"Practice of land surveying" means providing, or offering to provide, professional services, including record research, reconnaissance, measurements, gathering parol evidence, analysis of evidence, mapping, planning, expert testimony, and consultation related to any of the following:

(A) locating, relocating, establishing, reestablishing, or retracing property lines or boundaries, or demarcating other legal rights or interests in any tract of land, road, right-of-way, or easement; ...

EXPERT DISCLOSURE

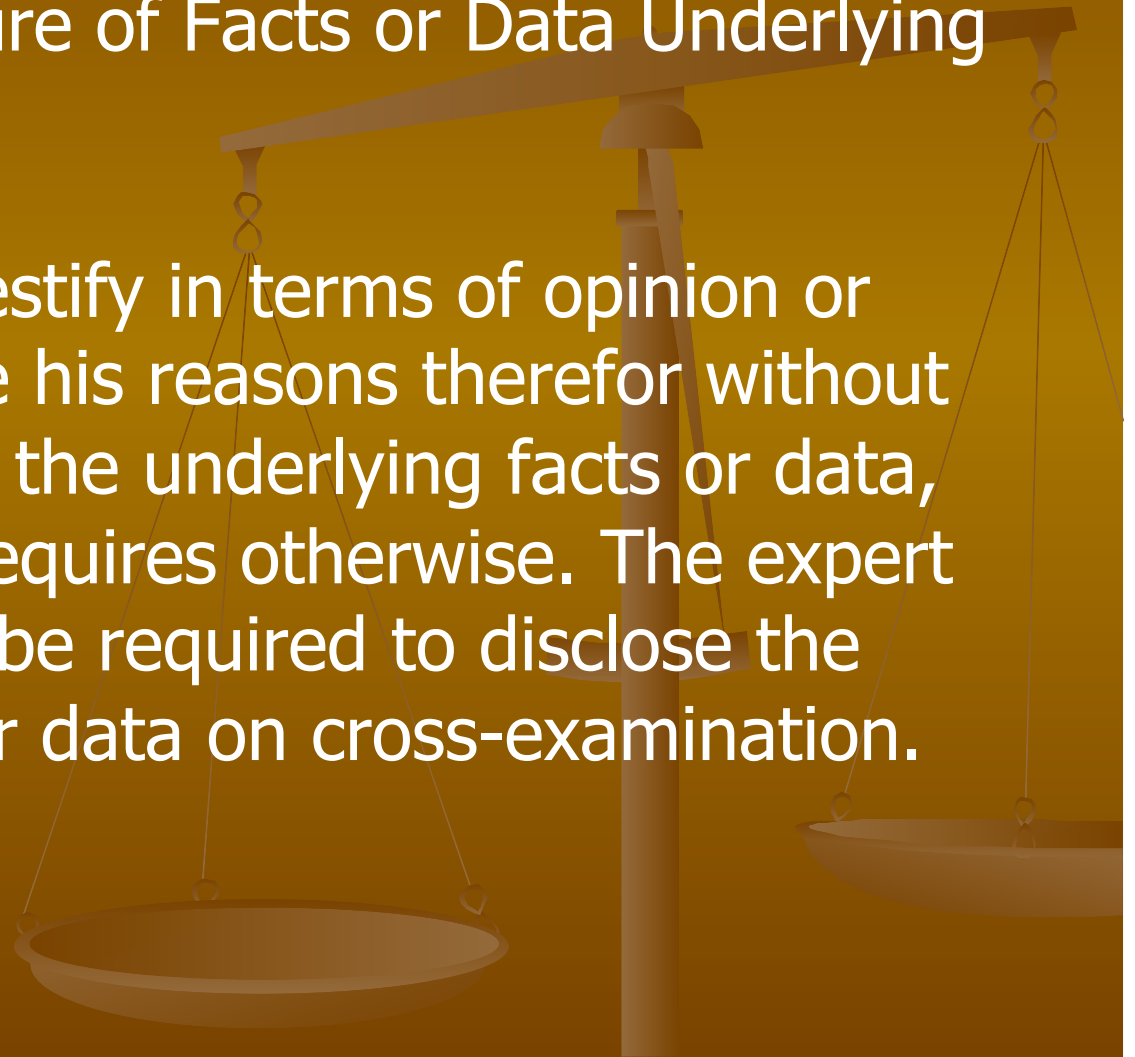


- The type and timing of disclosure is governed by the Case Structuring Order
- Ask the lawyer
 - When is the disclosure due?
 - What supporting evidence does the Court require to be disclosed?
 - What does the lawyer want disclosed
- You must know the answer to these questions before taking the job!

EXPERT DISCLOSURE

- Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

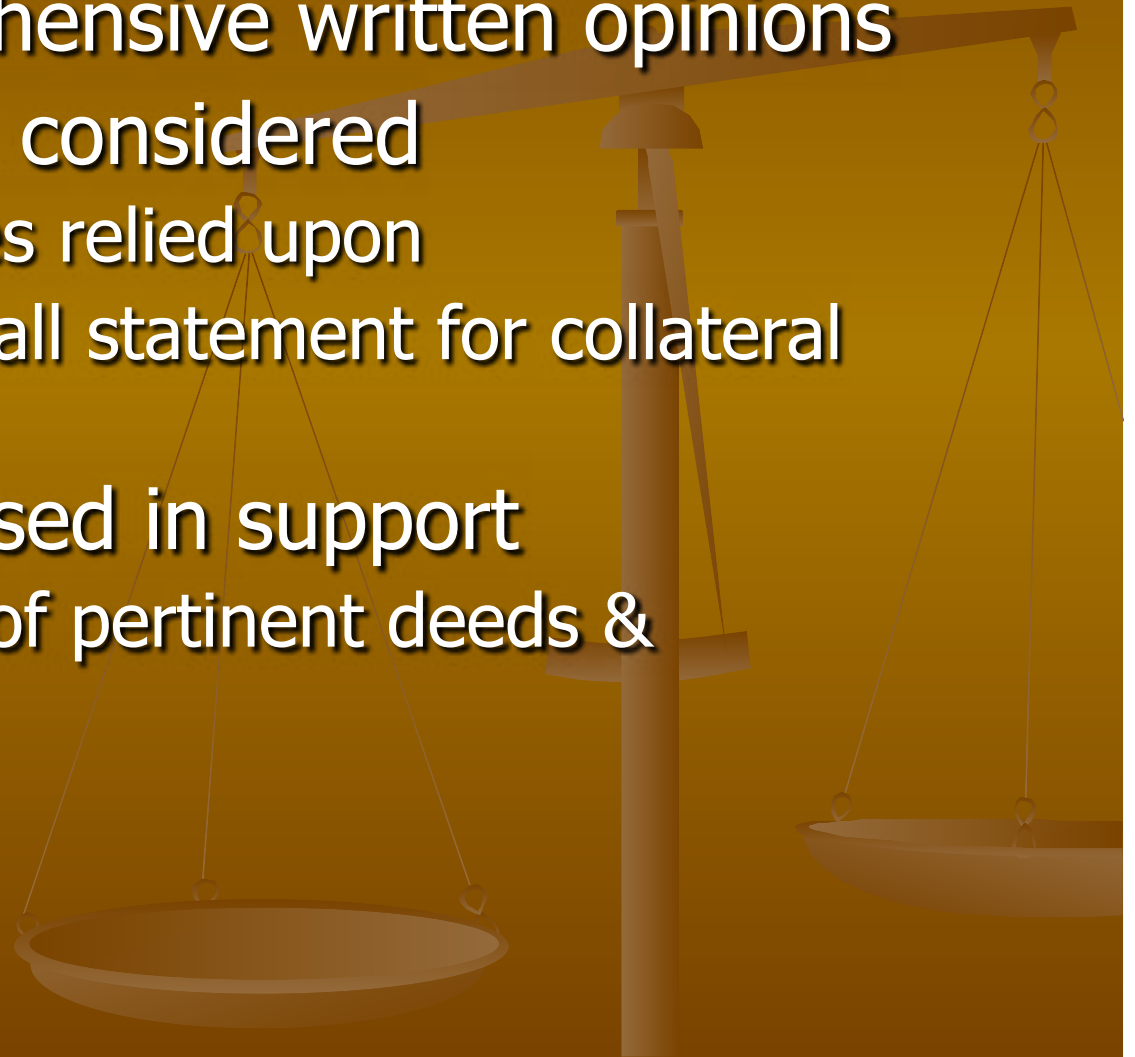
The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.



EXPERT DISCLOSURE

Statutory – NH RSA 516:29-b

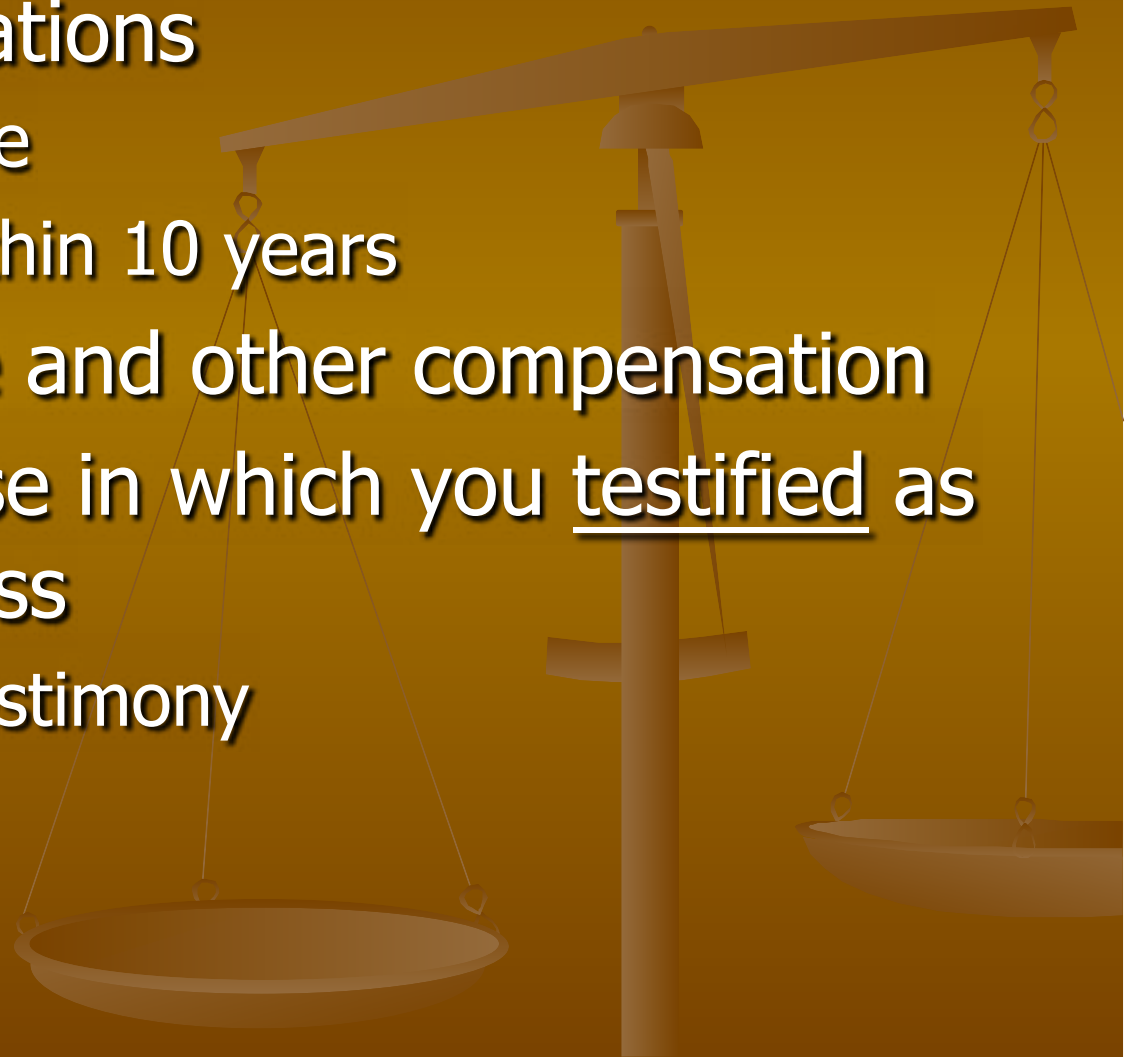
- Provide comprehensive written opinions
- All facts or data considered
 - List all resources relied upon
 - Include a catchall statement for collateral resources
- Exhibits to be used in support
 - Provide copies of pertinent deeds & information
- Cont' ...



EXPERT DISCLOSURE

Statutory – RSA 516:29-b

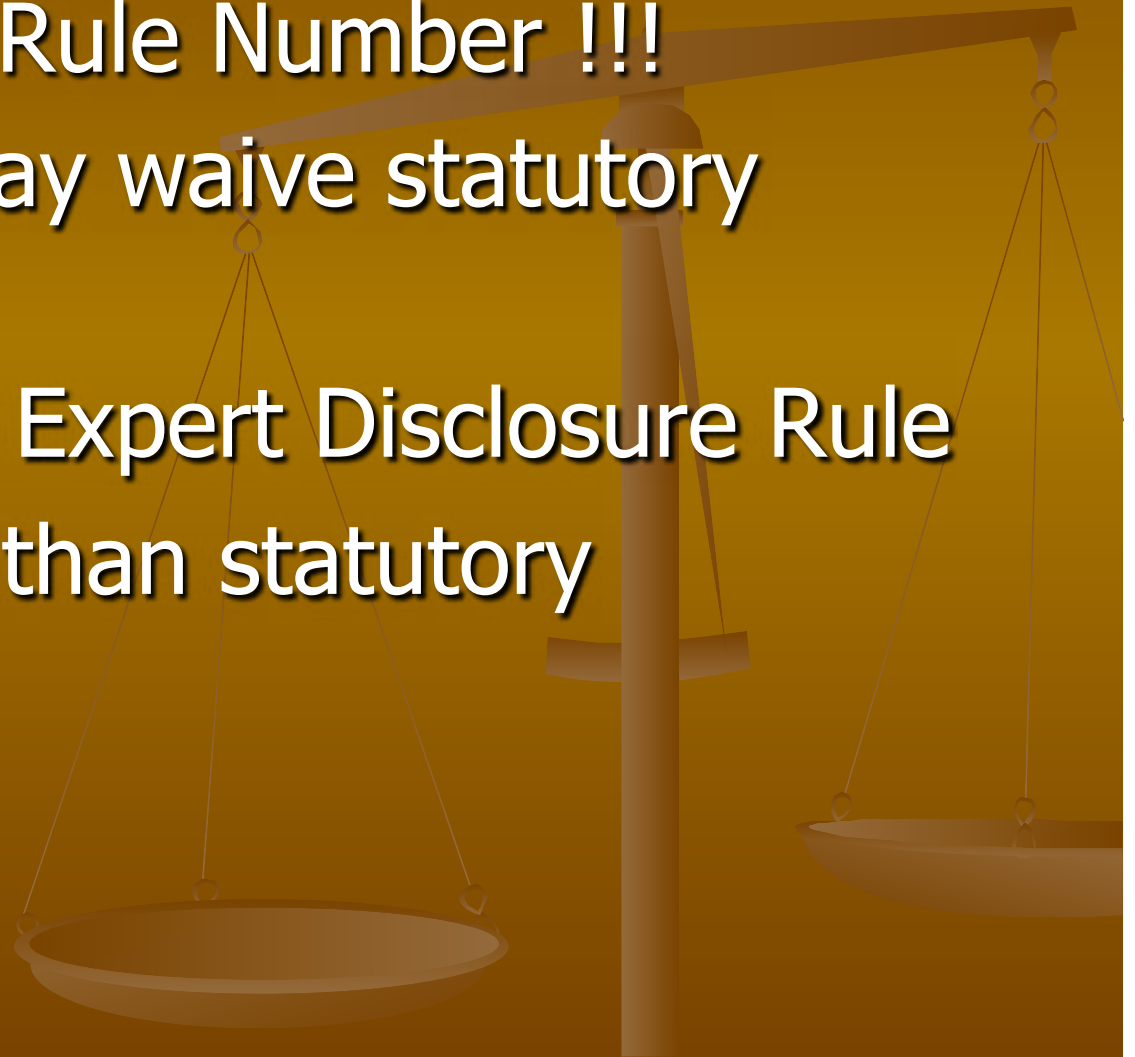
- Provide qualifications
 - Curriculum Vitae
 - Publications within 10 years
- Your billing rate and other compensation
- List of other case in which you testified as an expert witness
 - Deposition is testimony



EXPERT DISCLOSURE

NH Court Rule 27

- Note new NH Rule Number !!!
- The parties may waive statutory disclosure
- Rule 27 is the Expert Disclosure Rule
 - Less formal than statutory
- Cont'



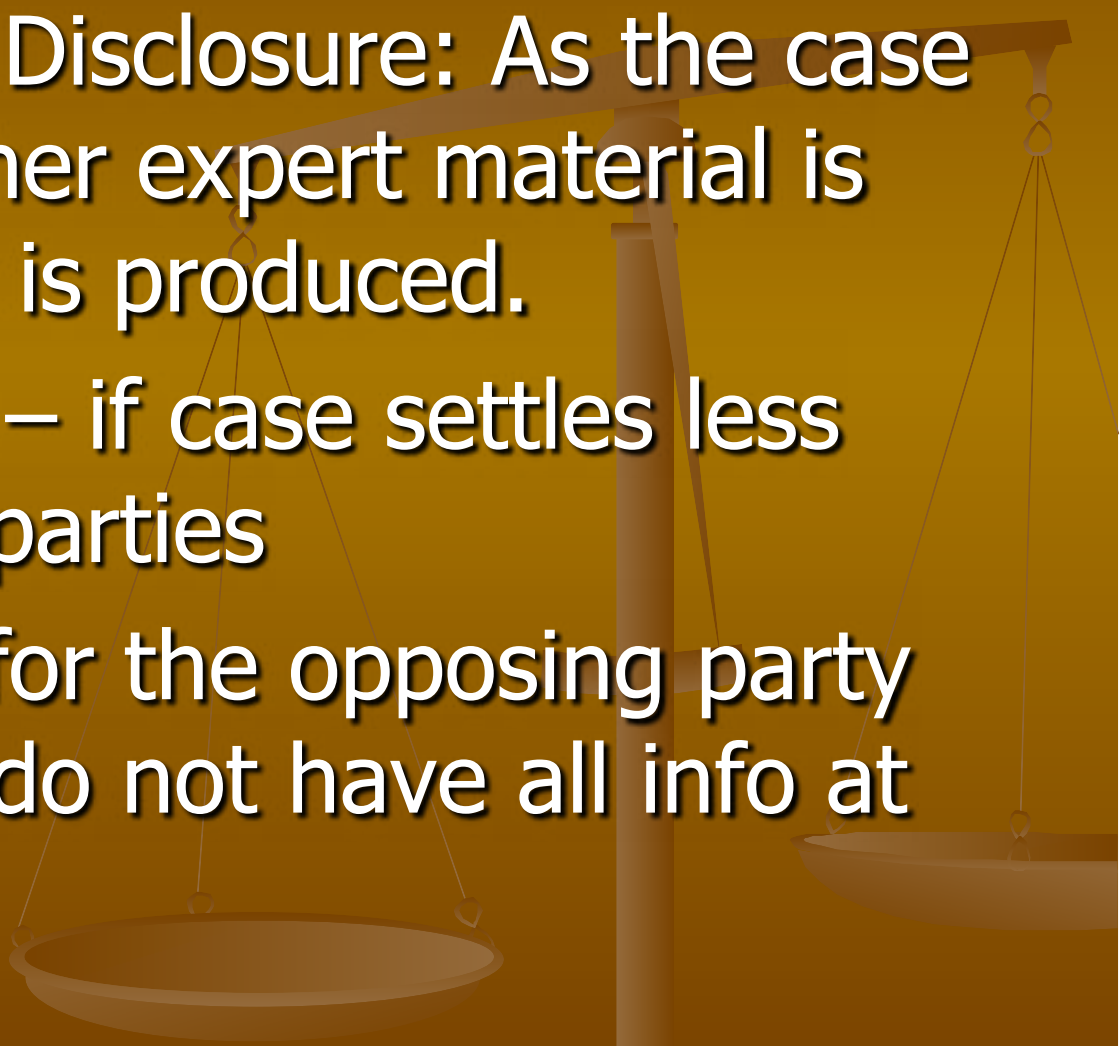
EXPERT DISCLOSURE

Court Rule 27

- Rules 21 & 22: Automatic Disclosure
- Rule 24: Production of Documents
- Rule 27: Experts are required to disclose what they have.
 - Does that require that the land surveyor prepare a comprehensive report when only a plan was prepared?
 - What about copies of the entire file?
 - Rule 24 allows other party to copy the file
 - Ask the lawyer – do not make this decision yourself
- Cont'

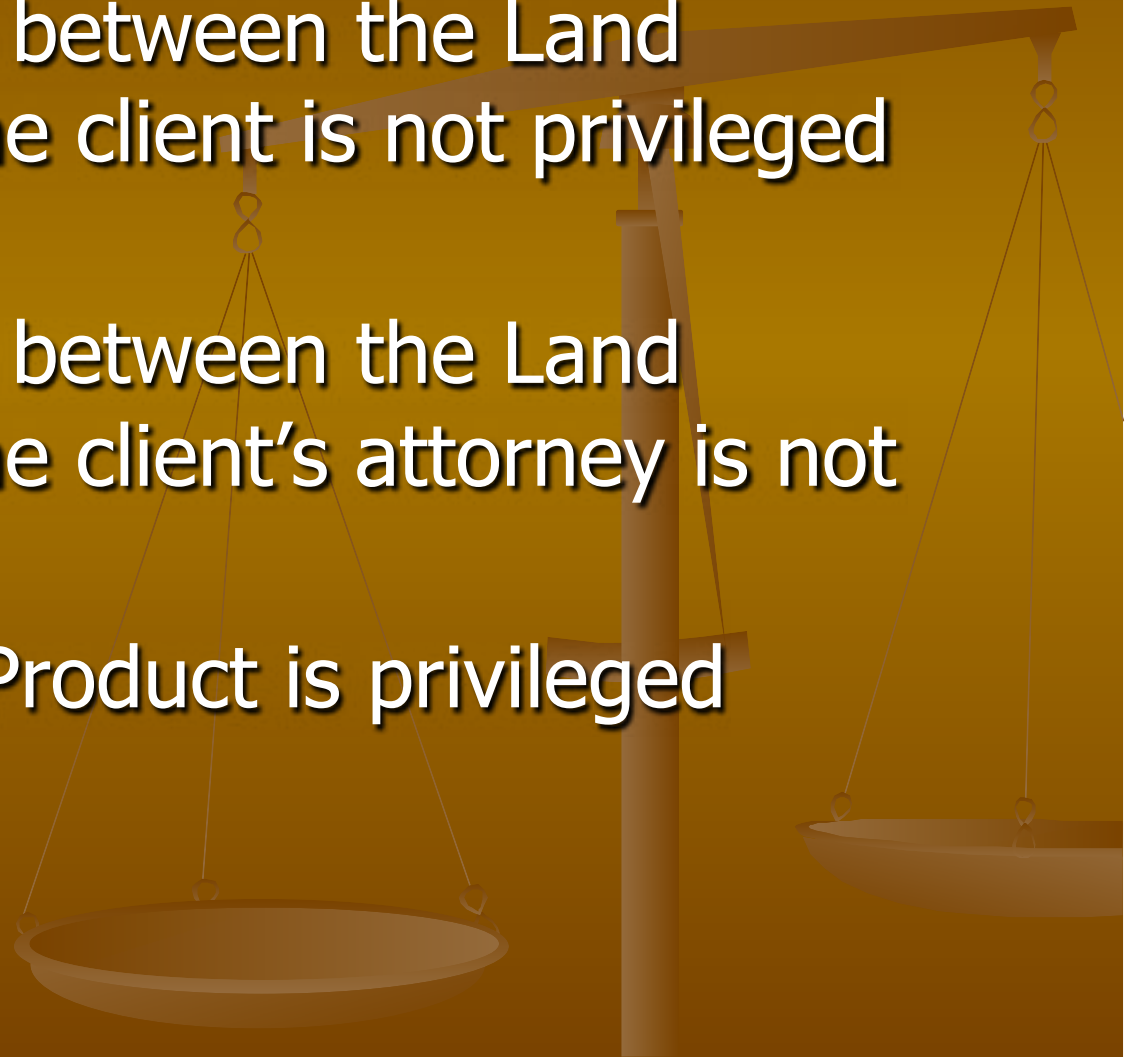
EXPERT DISCLOSURE

NH Court Rule 27

- Supplemental Disclosure: As the case progresses other expert material is disclosed as it is produced.
 - More efficient – if case settles less costly for the parties
 - Less efficient for the opposing party because they do not have all info at once
- 

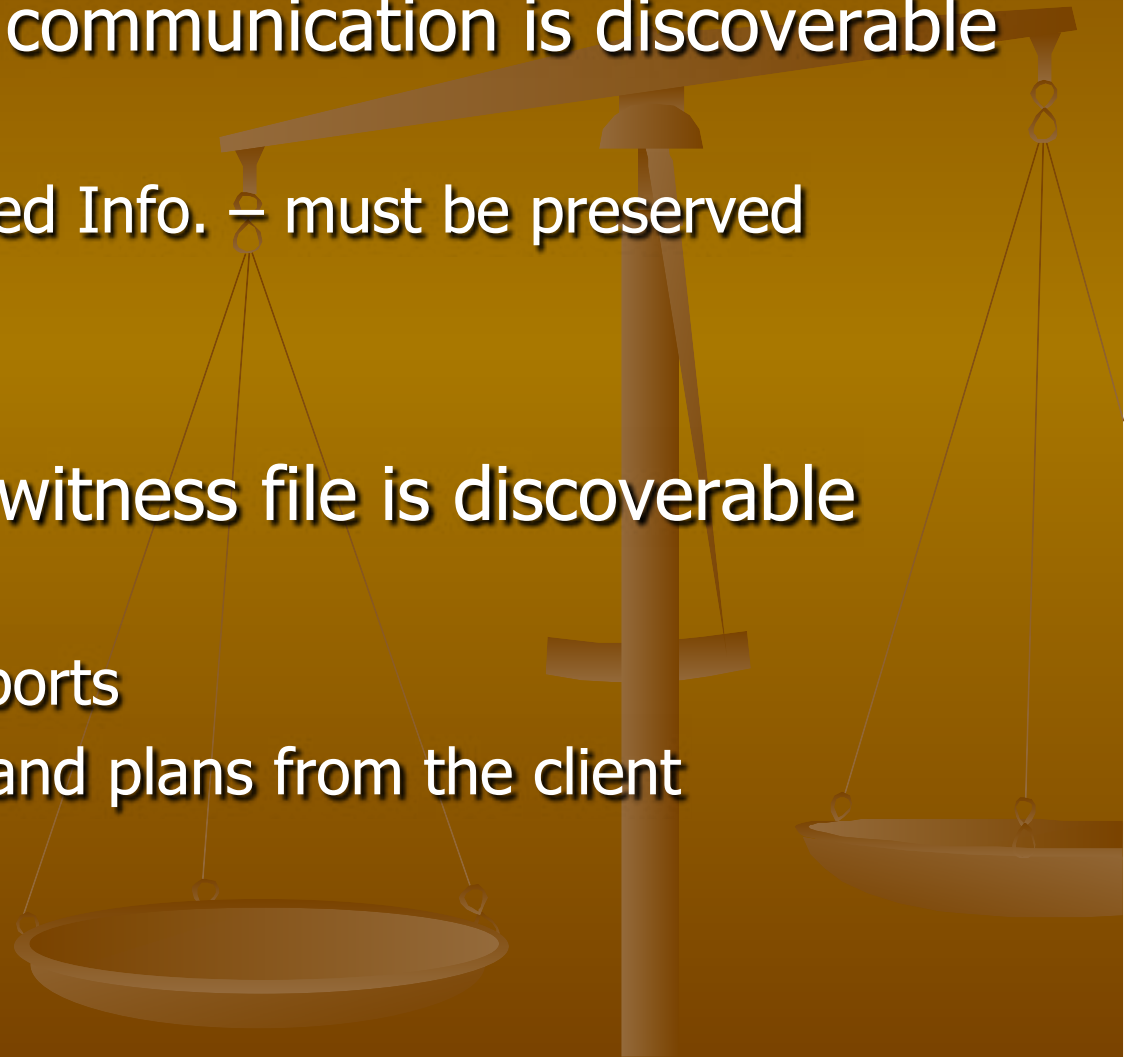
Other Discovery Issues

- Communication between the Land Surveyor and the client is not privileged
- Communication between the Land Surveyor and the client's attorney is not privileged
- Attorney Work Product is privileged



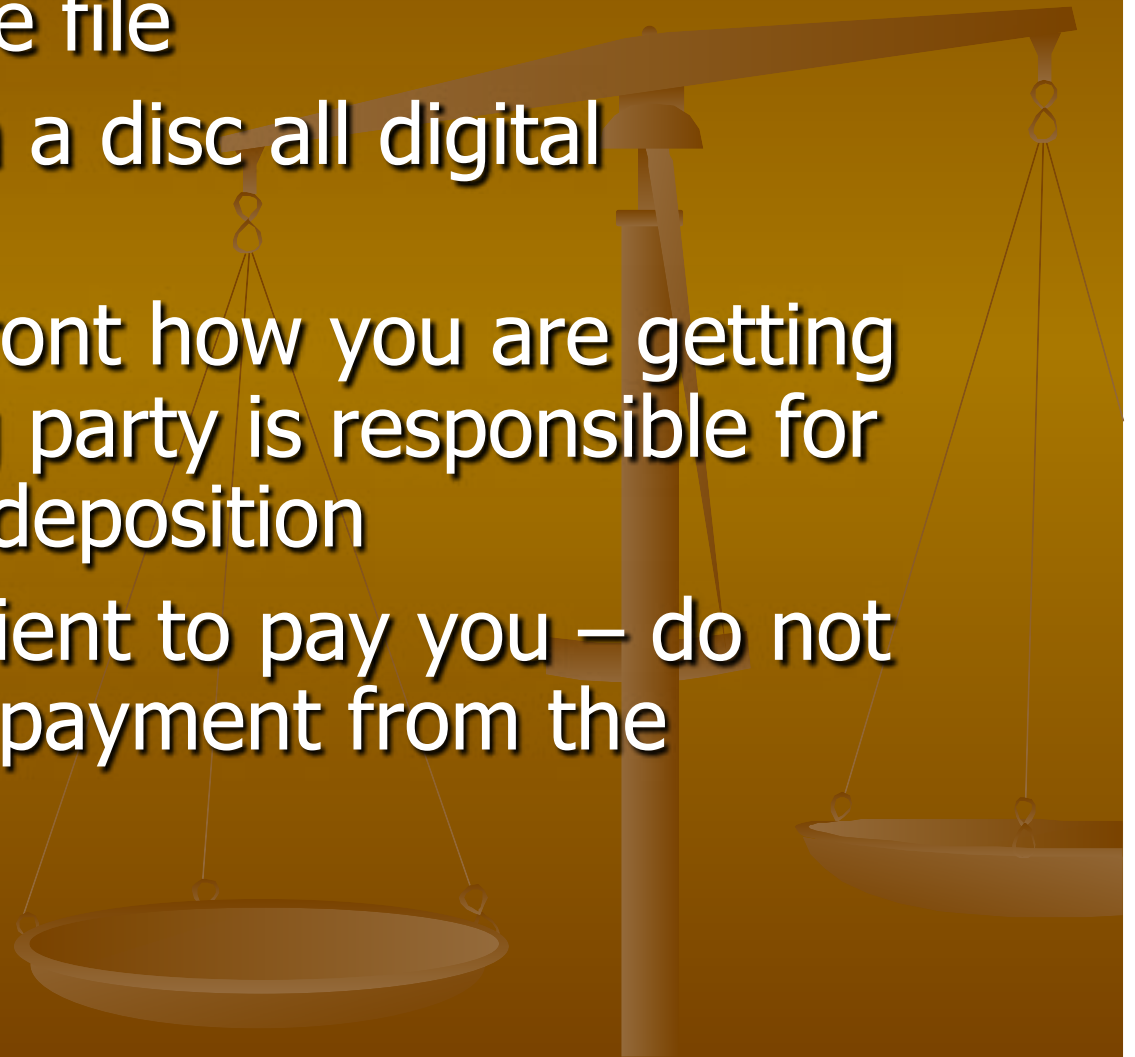
Other Discovery Issues

- All expert witness communication is discoverable
 - Emails
 - Rule 35 Elec. Stored Info. – must be preserved
 - Notes
 - Phone messages
- The entire expert witness file is discoverable
 - Research notes
 - Draft copies of reports
 - Annotated deeds and plans from the client



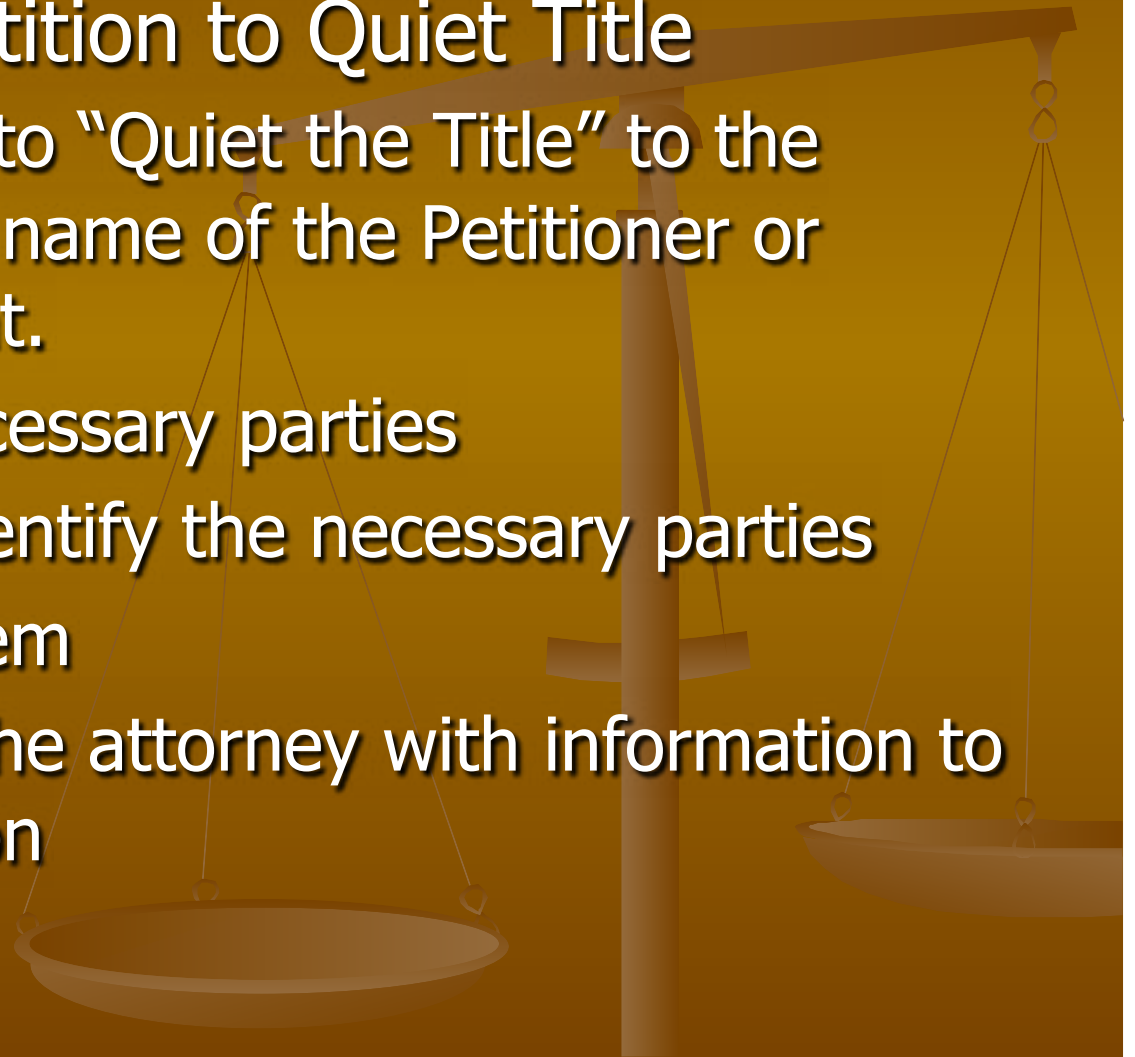
Depositions

- Bring your entire file
- Print or copy on a disc all digital information
- Determine up front how you are getting paid – opposing party is responsible for expert costs at deposition
- Contract with client to pay you – do not agree to future payment from the opposing party.



Petition to Quiet Title Declaratory Judgment Action

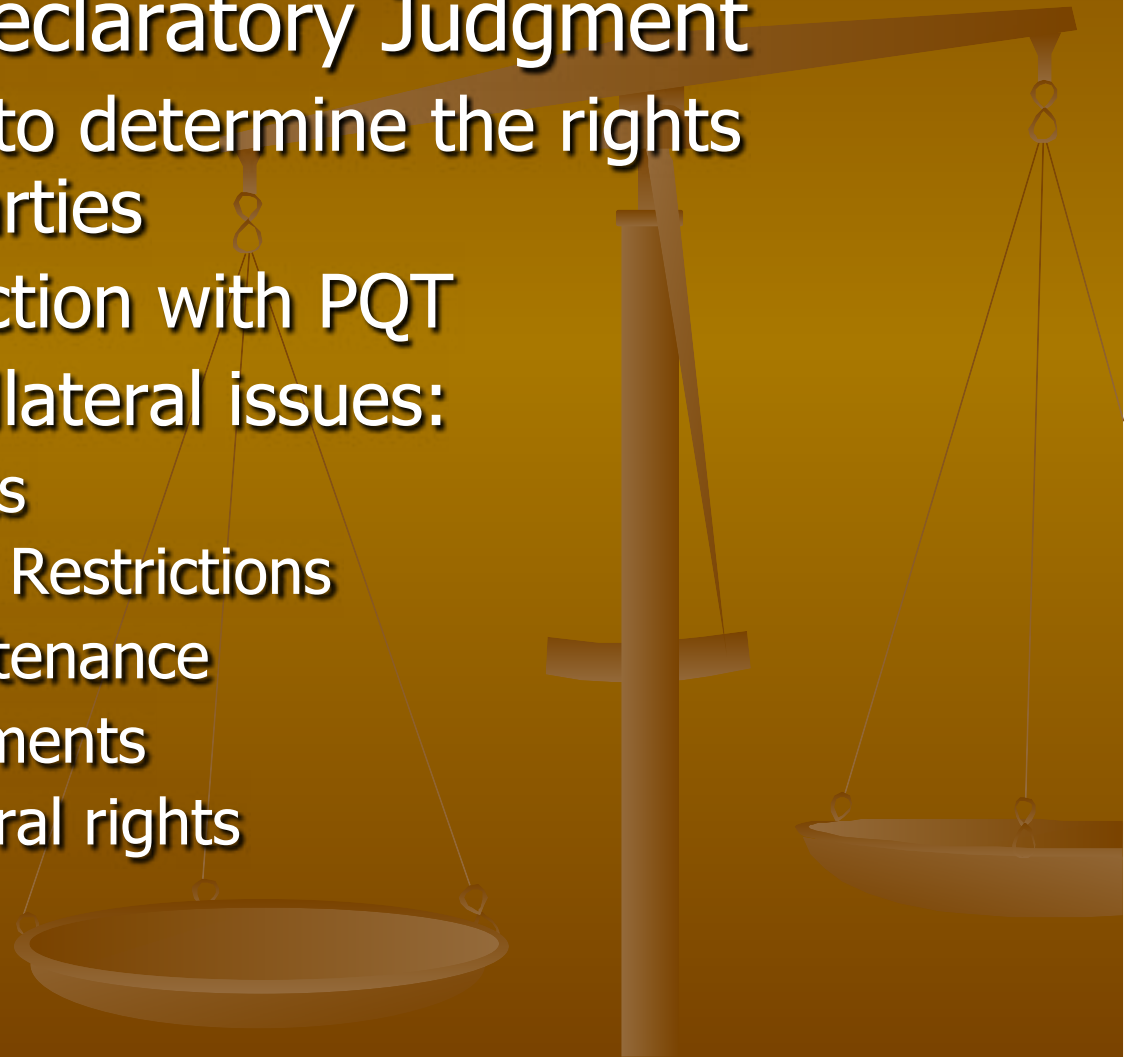
- RSA 498:5-a Petition to Quiet Title
 - Asks the Court to “Quiet the Title” to the property in the name of the Petitioner or Counterclaimant.
 - Requires all necessary parties
 - Expert helps identify the necessary parties
 - Guardian ad litem
 - Expert assists the attorney with information to draft the Petition



Petition to Quiet Title

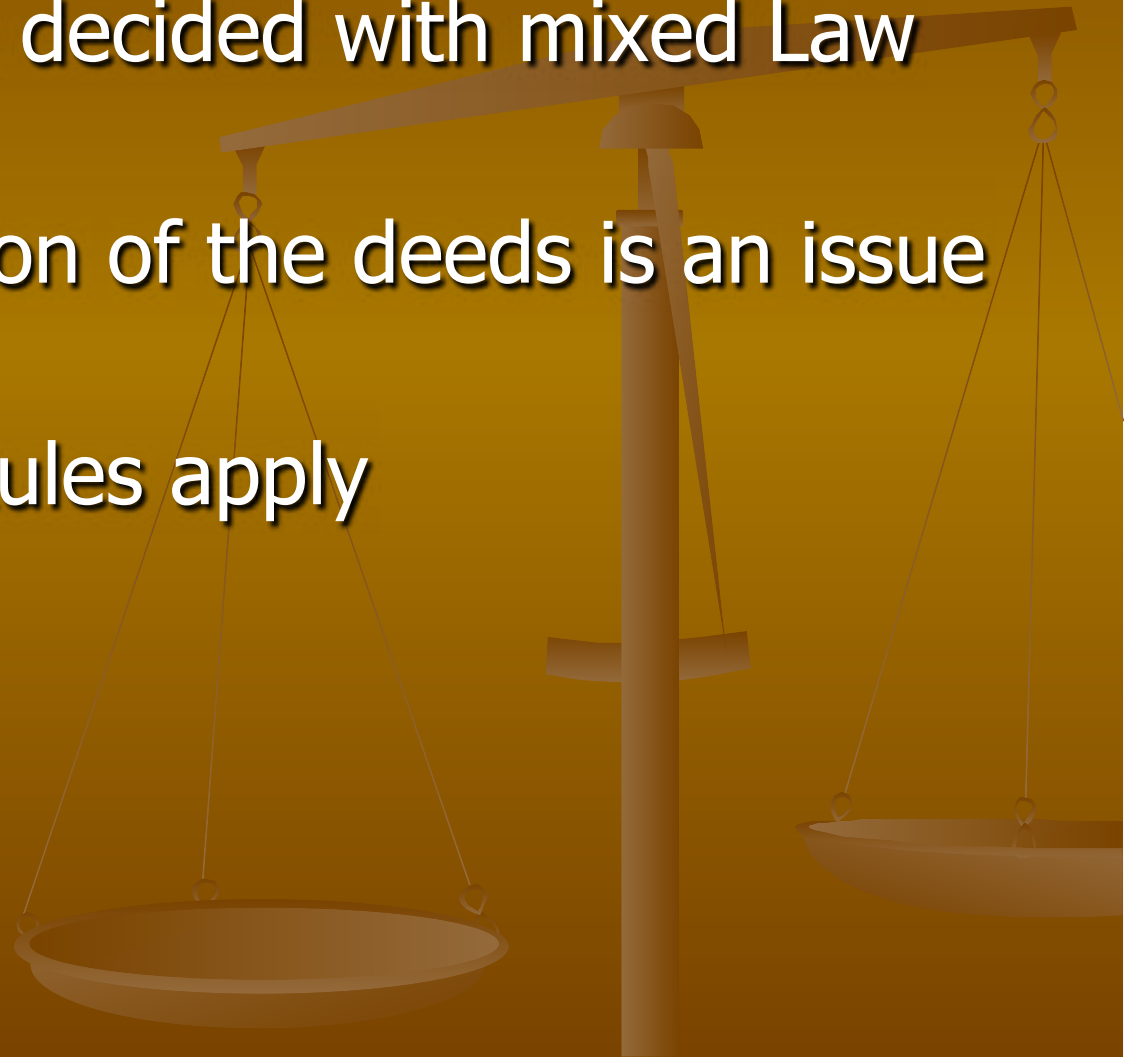
Declaratory Judgment Action

- RSA 491:22,I Declaratory Judgment
 - Asks the Court to determine the rights between the parties
 - Used in conjunction with PQT
 - Catch-all for collateral issues:
 - Easement rights
 - Covenants and Restrictions
 - Driveway maintenance
 - Tree encroachments
 - Conflicting littoral rights

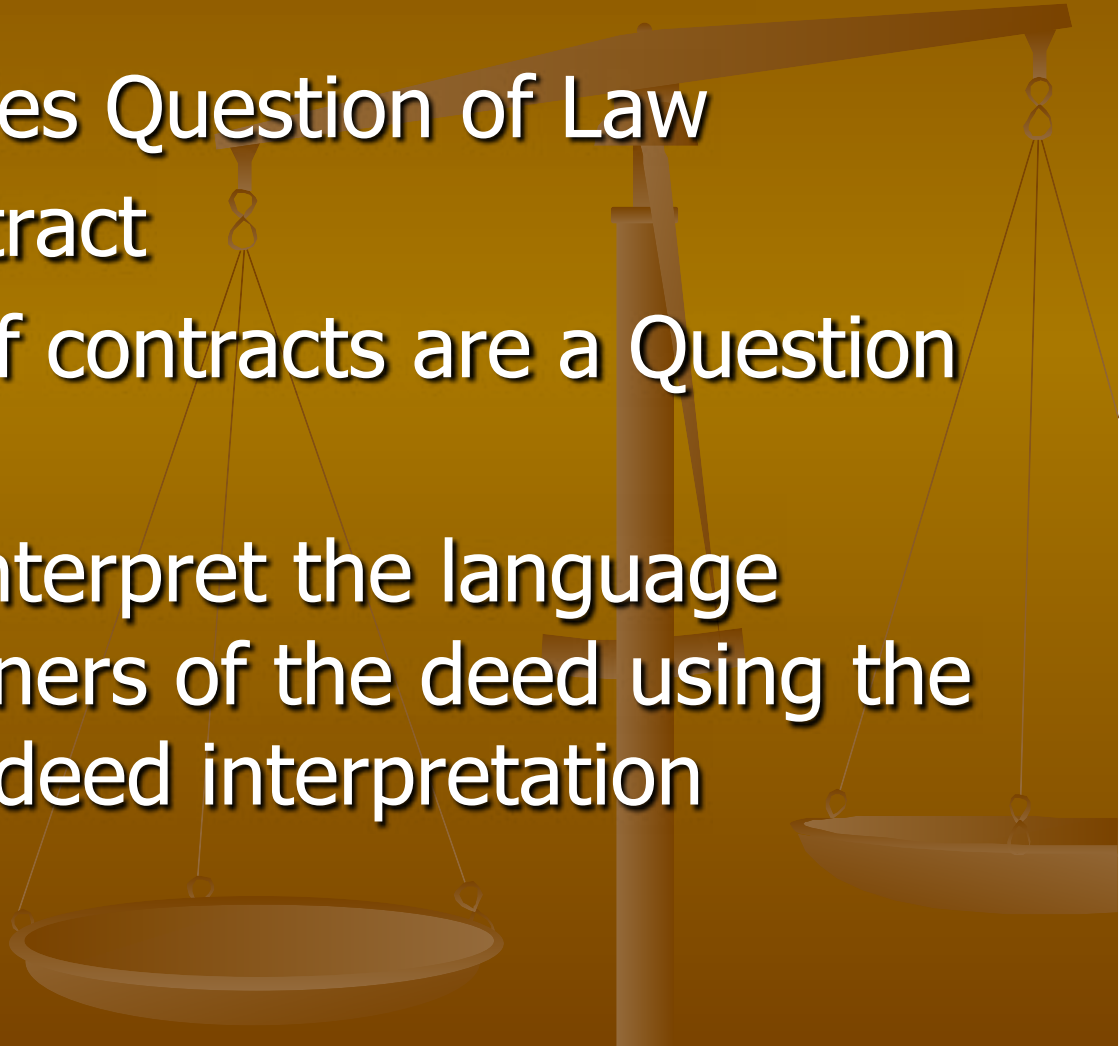


Law and Equity

- PQT and DJ are decided with mixed Law and Equity
- The interpretation of the deeds is an issue of Law
- Common Law Rules apply

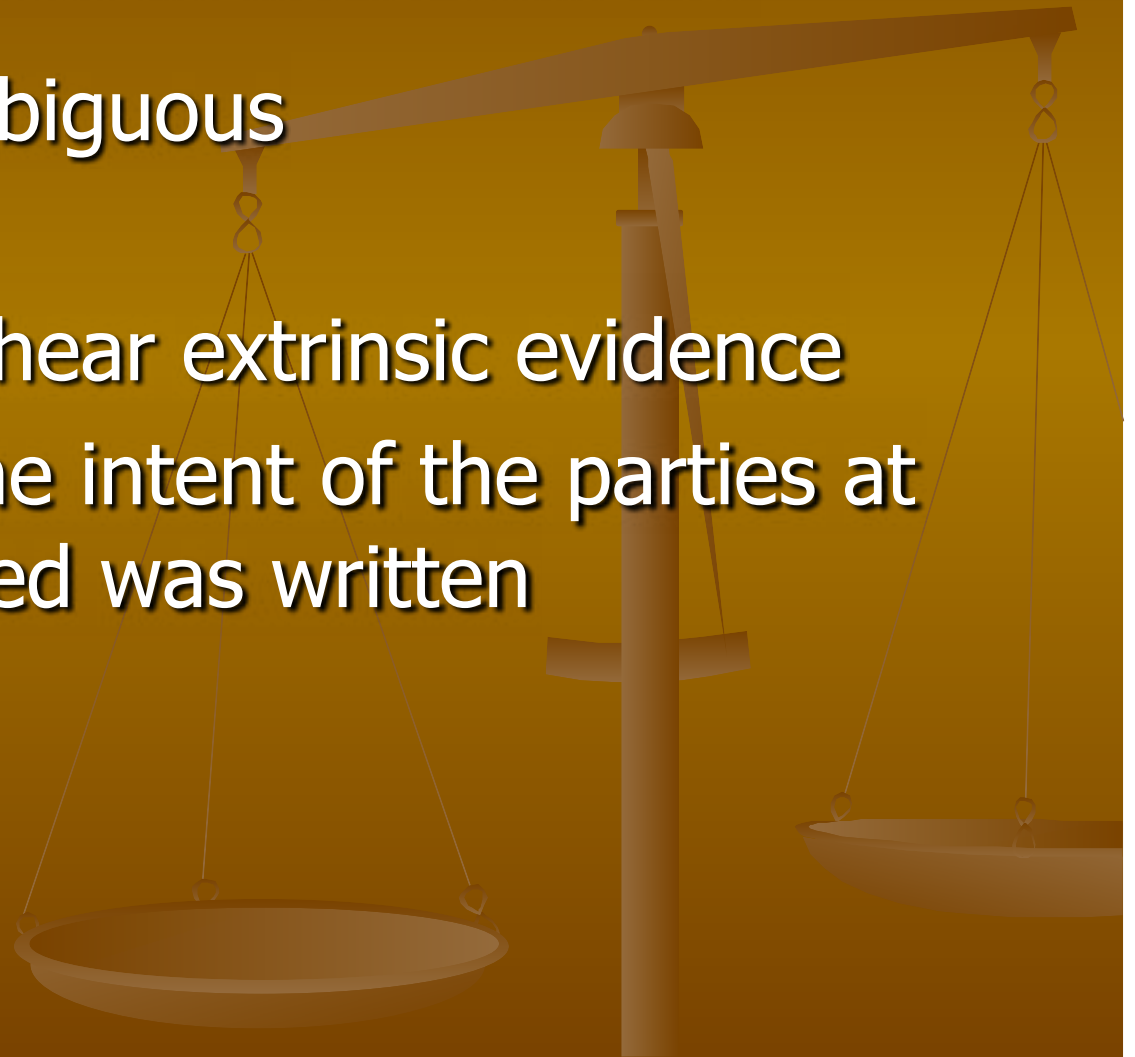


What Are Questions of Law For the Court to Decide?

- The Court decides Question of Law
 - A deed is a contract
 - Interpretation of contracts are a Question of Law.
 - The Court will interpret the language within the 4 corners of the deed using the rules of law for deed interpretation
 - Unless ...
- 

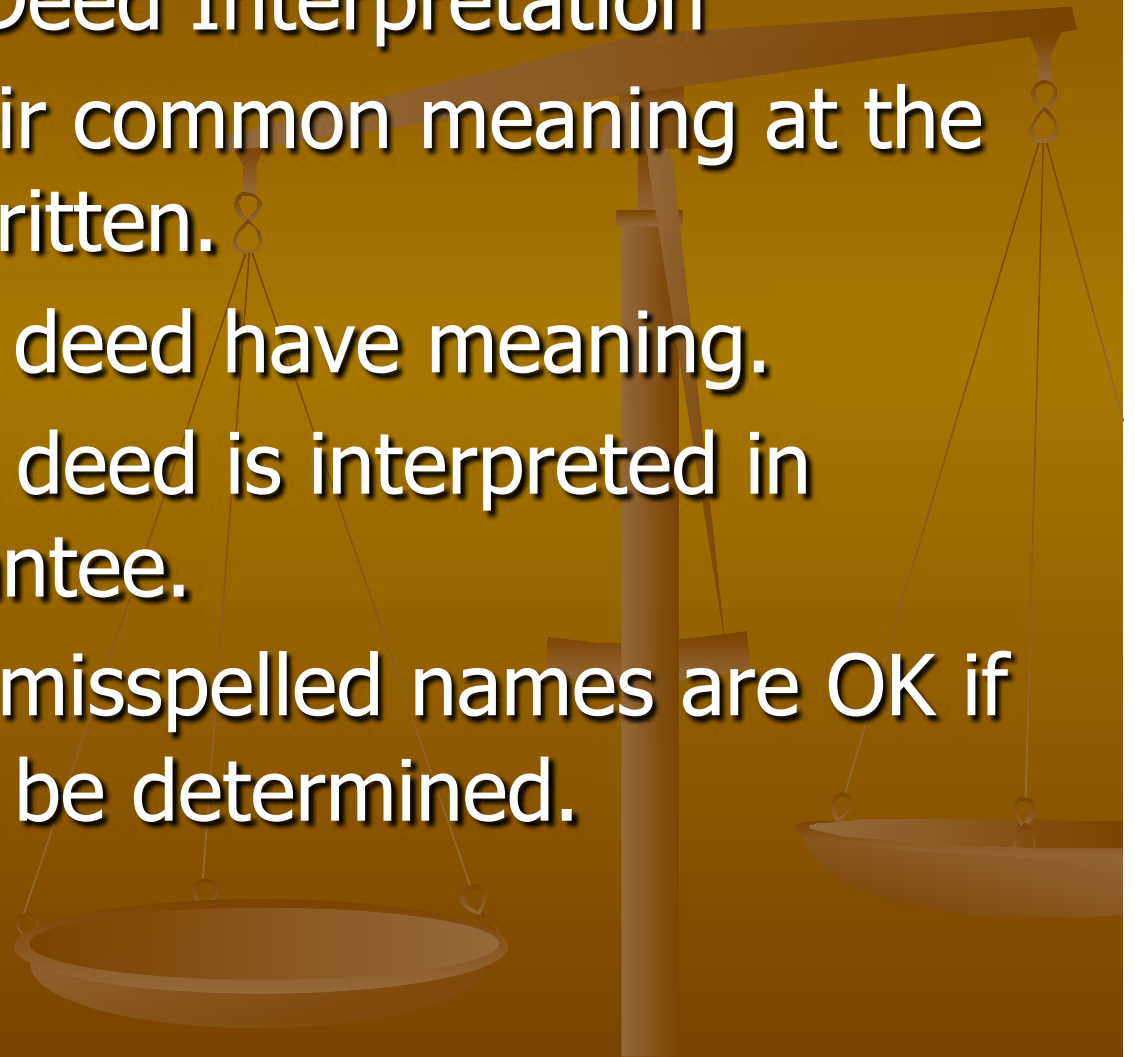
What Are Questions of Law For the Court to Decide?

- The Deed is ambiguous
- And then ...
- The Court may hear extrinsic evidence
- To determine the intent of the parties at the time the deed was written



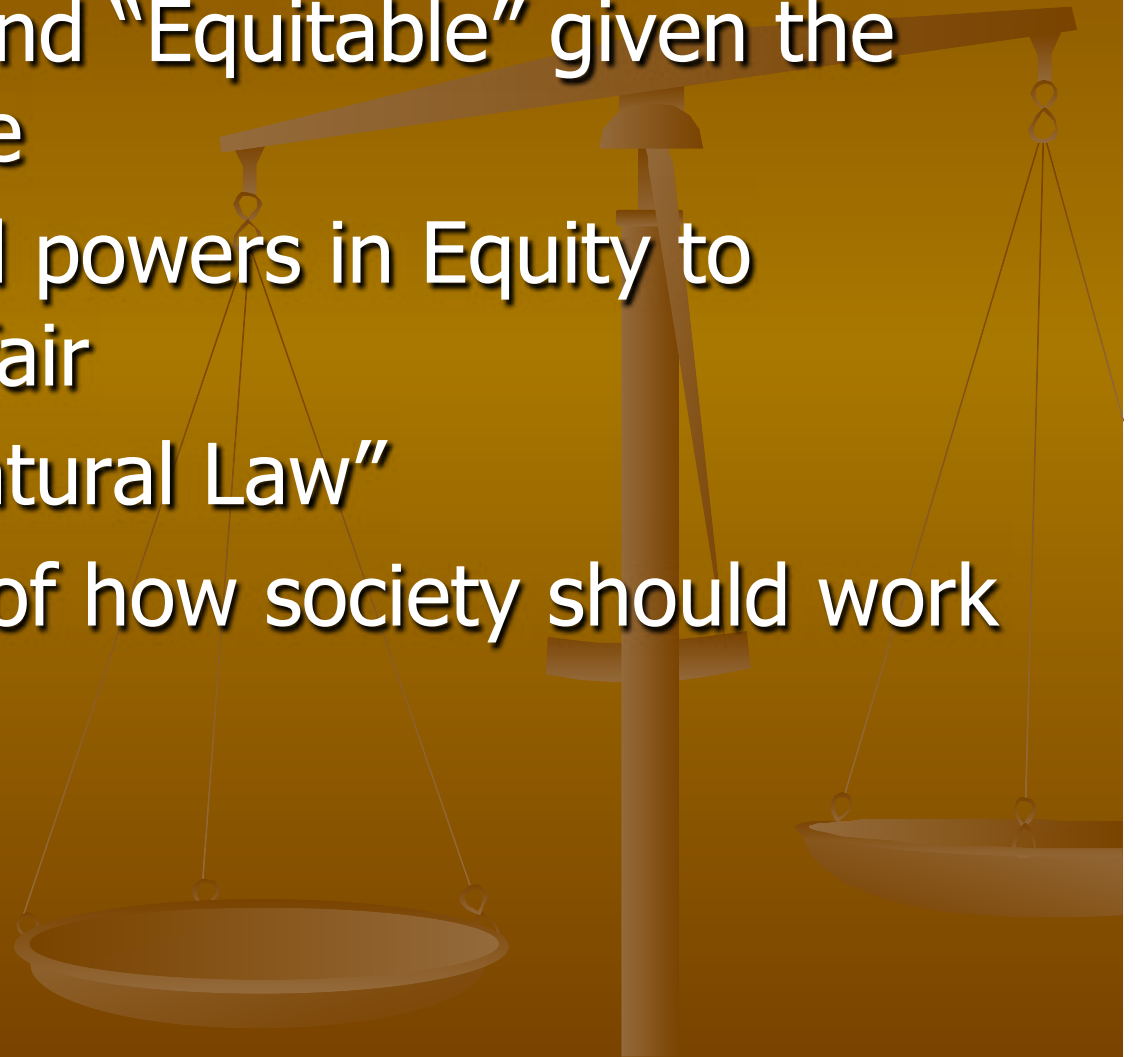
Some Rules of Deed Interpretation

- Some Rules of Deed Interpretation
- Words have their common meaning at the time they are written.
- All words in the deed have meaning.
- A conflict in the deed is interpreted in favor of the Grantee.
- Idem Sonans – misspelled names are OK if the identity can be determined.



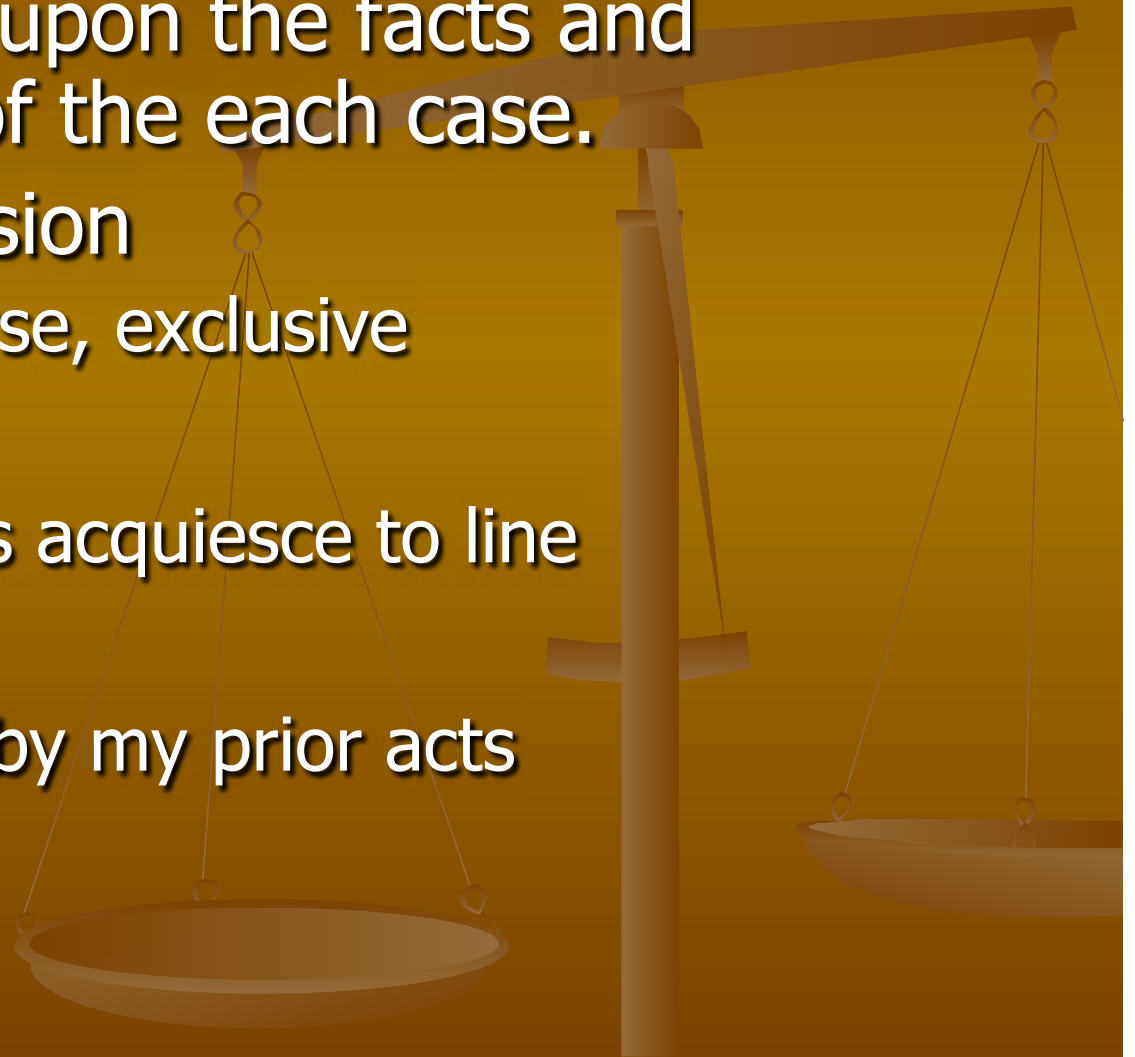
Equity Powers of Court

- What is “Fair” and “Equitable” given the facts of the case
- Court has broad powers in Equity to decide what is fair
- Based upon “Natural Law”
- The Moral Law of how society should work



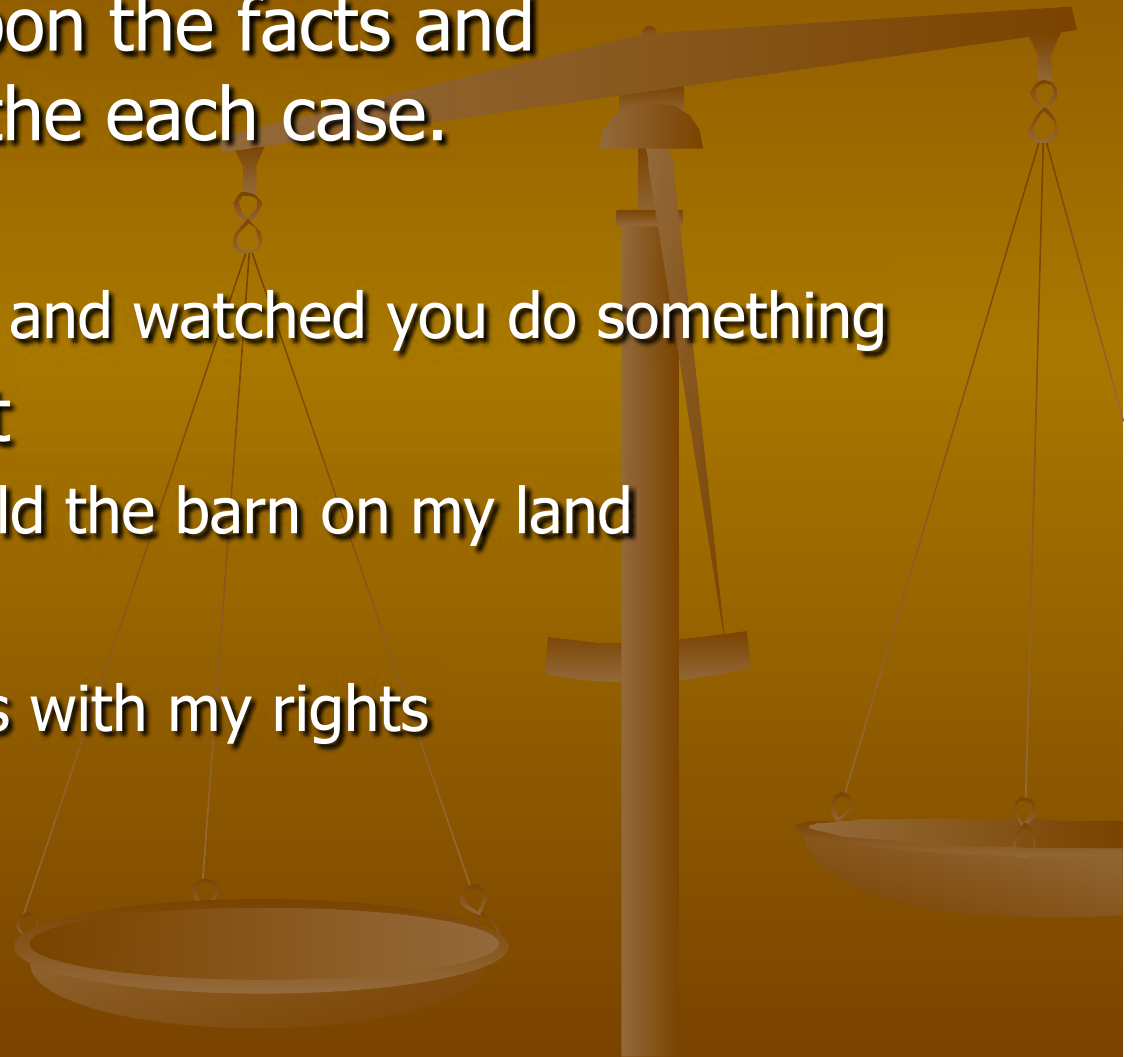
Equity Powers of Court

- Equity is based upon the facts and circumstances of the each case.
- Adverse Possession
 - 20 years, adverse, exclusive
- Acquiescence
 - 20 years parties acquiesce to line
- Estoppel
 - I am estopped by my prior acts
- Cont'



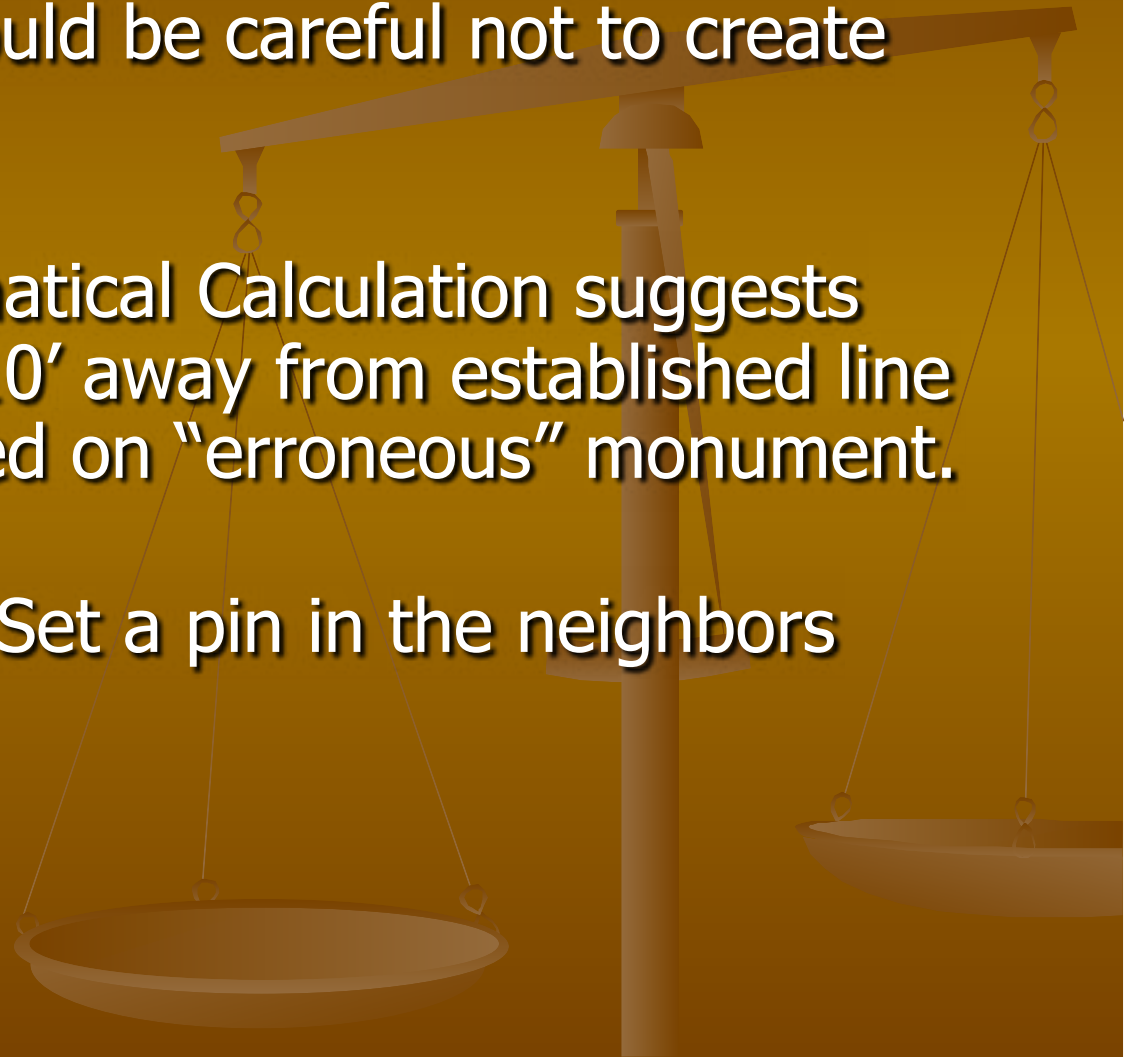
Equity Powers of Court

- Equity is based upon the facts and circumstances of the each case.
- Laches
 - I sat on my rights and watched you do something
- Unjust Enrichment
 - I watched you build the barn on my land
- Nuisance
 - Your act interferes with my rights
- Cont'



How Land Surveyor Gets Involved

- Hire by land owner before a problem is known
- Land Surveyor should be careful not to create the problem
- Example: Mathematical Calculation suggests corner should be 10' away from established line of occupation based on "erroneous" monument.
- What do you do? Set a pin in the neighbors yard?
- Cont'

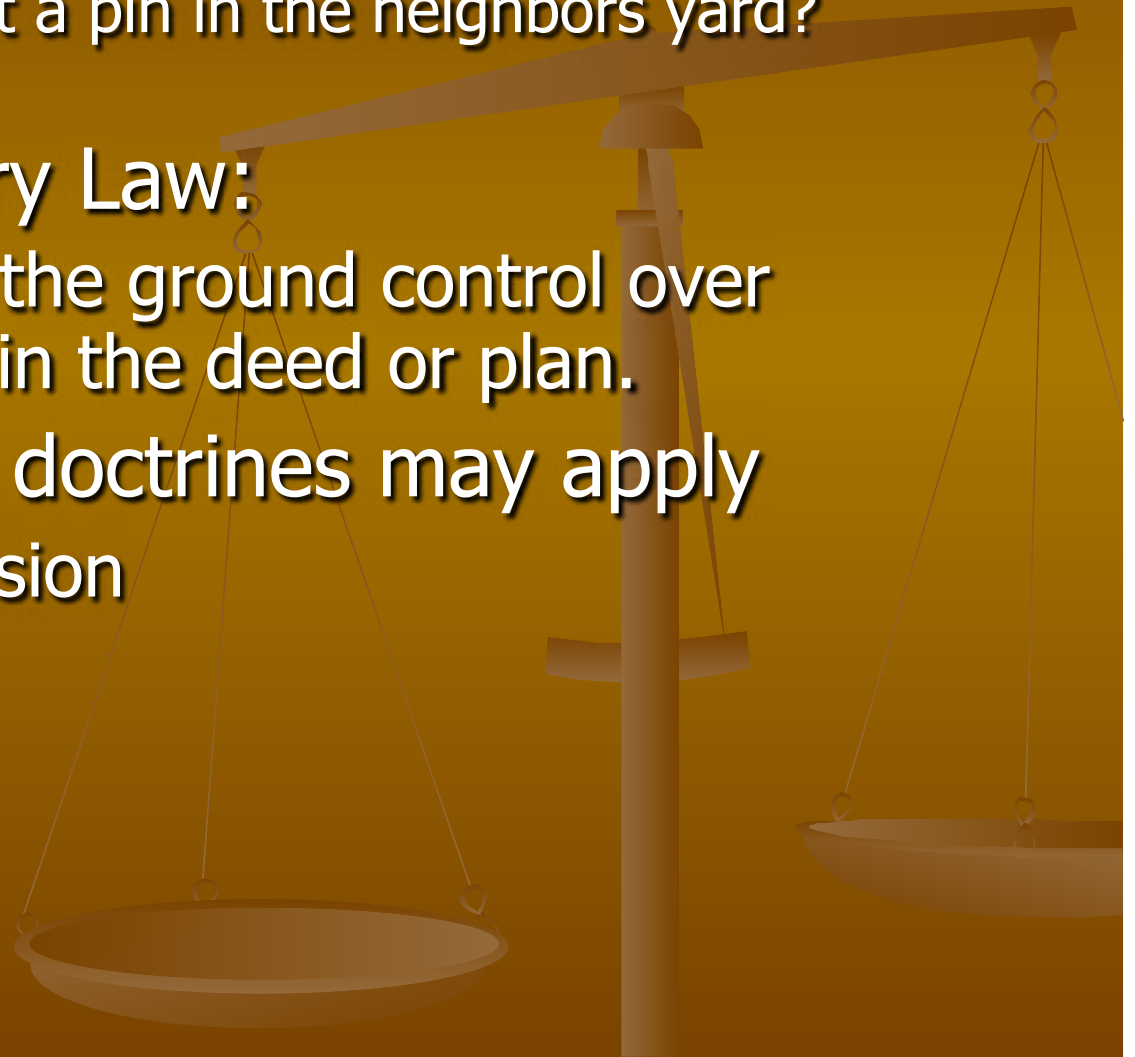


How Land Surveyor Gets Involved

- What do you do? Set a pin in the neighbors yard?
- Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State statute, disregard all evidences of occupation and claim of title and plunge whole neighborhoods into quarrels and litigation by assuming to "establish" corners at points with which the previous occupation cannot harmonize. ...
 - C.J. Thomas M. Cooley, *The Judicial Functions of Surveyors* (1881).

How Land Surveyor Gets Involved

- What do you do? Set a pin in the neighbors yard?
- Rule of Boundary Law:
 - Monuments on the ground control over measurements in the deed or plan.
- Other equitable doctrines may apply
 - Adverse Possession
 - Acquiescence
- Cont'

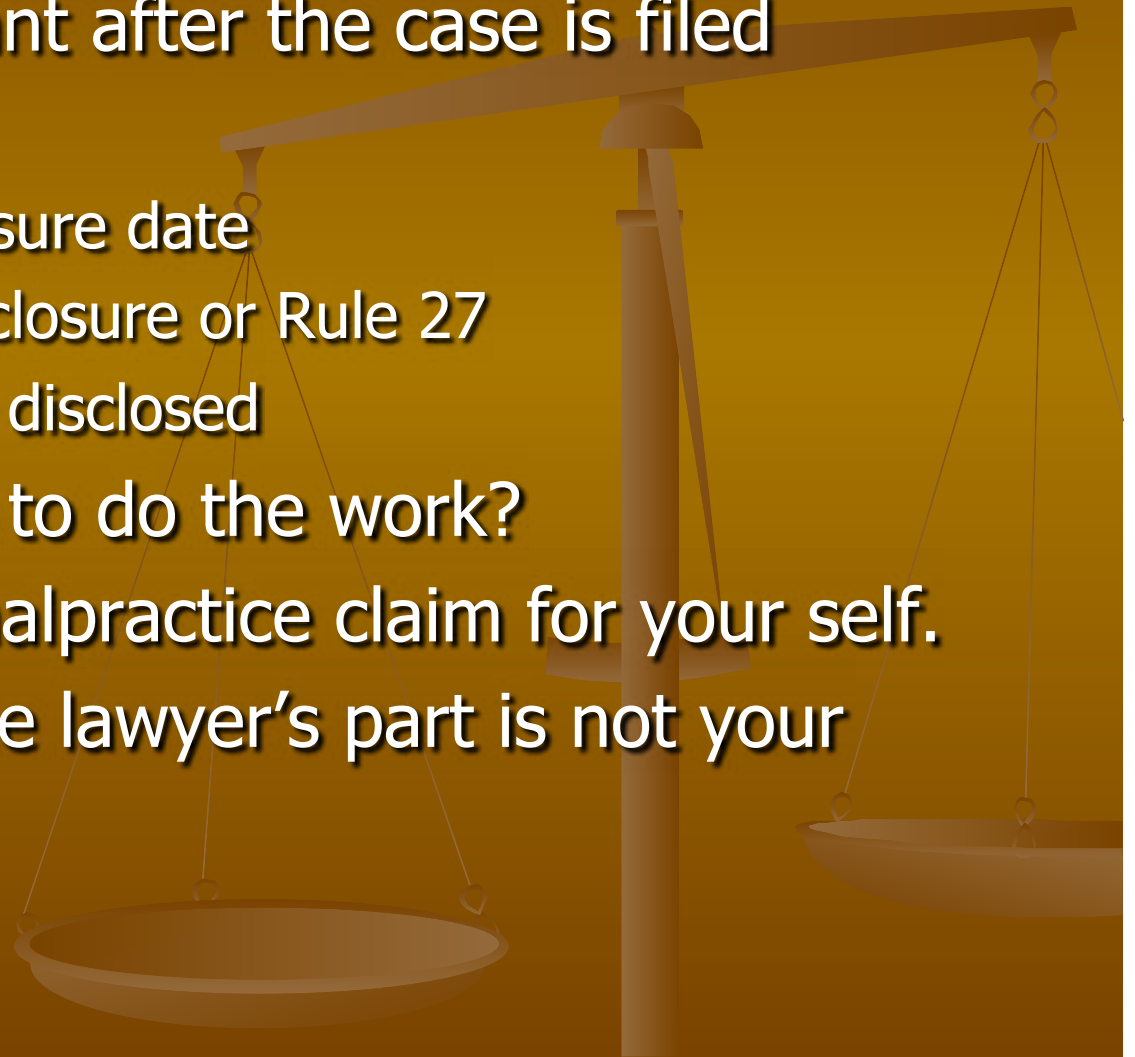


How Land Surveyor Gets Involved

- What do you do? Set a pin in the neighbors yard?
- Suggestion: Do not create litigation.
- Clearly depict the line of occupation and what the occupation is, and show the calculated line label as the line calculated from the record documents.
- Discuss the issue with the client and the client's attorney explaining the rules of boundary and equity.

How Land Surveyor Gets Involved

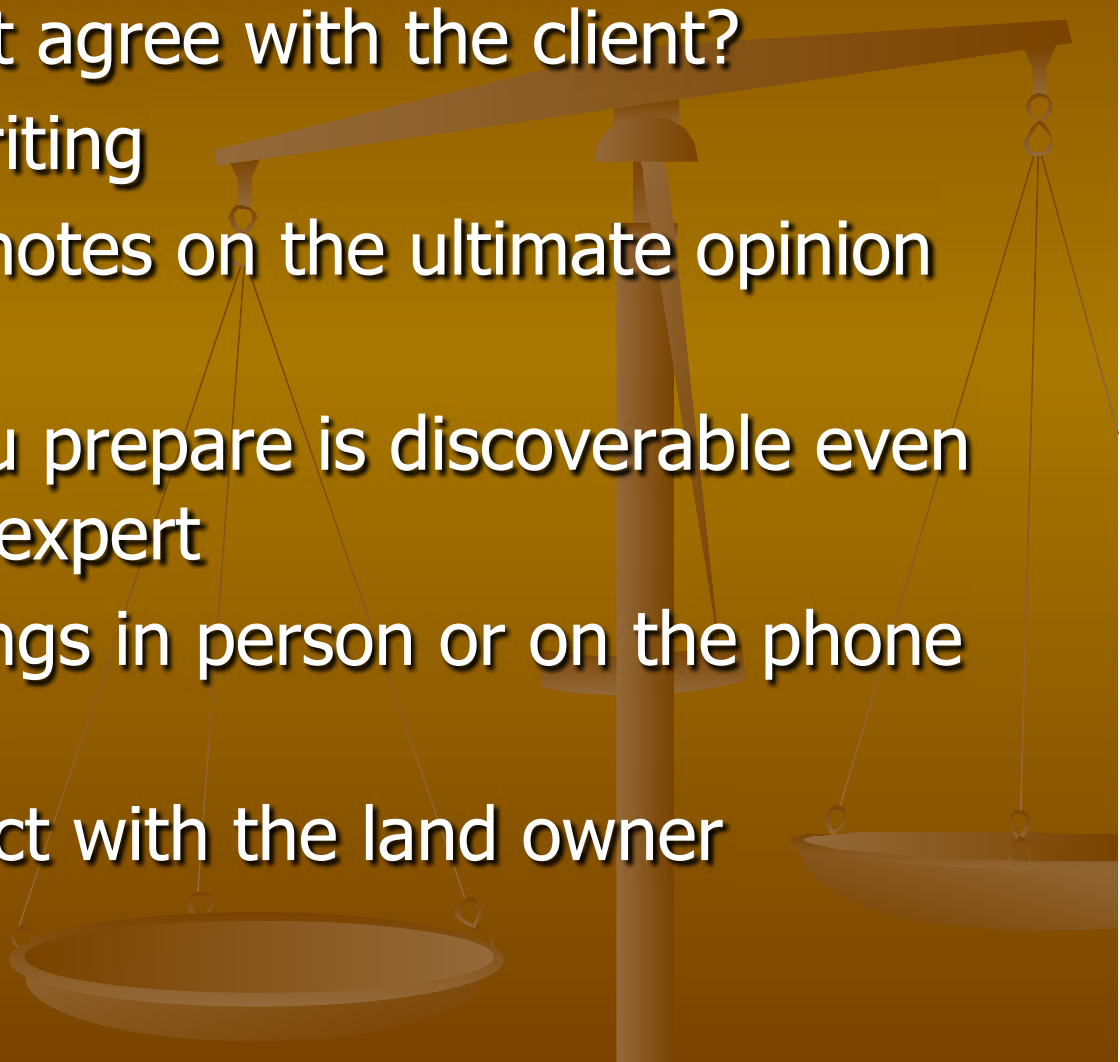
- Called by Defendant after the case is filed
- Ask up front
 - What is the disclosure date
 - Is it Statutory Disclosure or Rule 27
 - What needs to be disclosed
- Do you have time to do the work?
- Do not create a malpractice claim for your self.
- Lack of plan on the lawyer's part is not your problem



How Land Surveyor Gets Involved

- Called by Defendant after the case is filed
- Preliminary review of the documents
 - Pleadings,
 - Plaintiff's report and survey
 - Other available sources
 - Independent research
- Will you do a field survey or stipulate to the field location by the other surveyor
 - Is the issue one of interpretation v. field work.

How Land Surveyor Gets Involved

- What if you do not agree with the client?
 - Do not put it in writing
 - Keep preliminary notes on the ultimate opinion to a minimum
 - All information you prepare is discoverable even if you are not the expert
 - Discuss your findings in person or on the phone with the Attorney.
 - Avoid direct contact with the land owner
- 

The Land Surveyor Expert Witness

- Understand the Case
- You are there to assist the Judge in understanding the case & your opinio
- Know the rules of law that apply
- Understand the procedural process
- Maintain communication with the Attorney
- Understand that everything you produce is discoverable

