EVIDENCE AND DISCOVERY UPDATE

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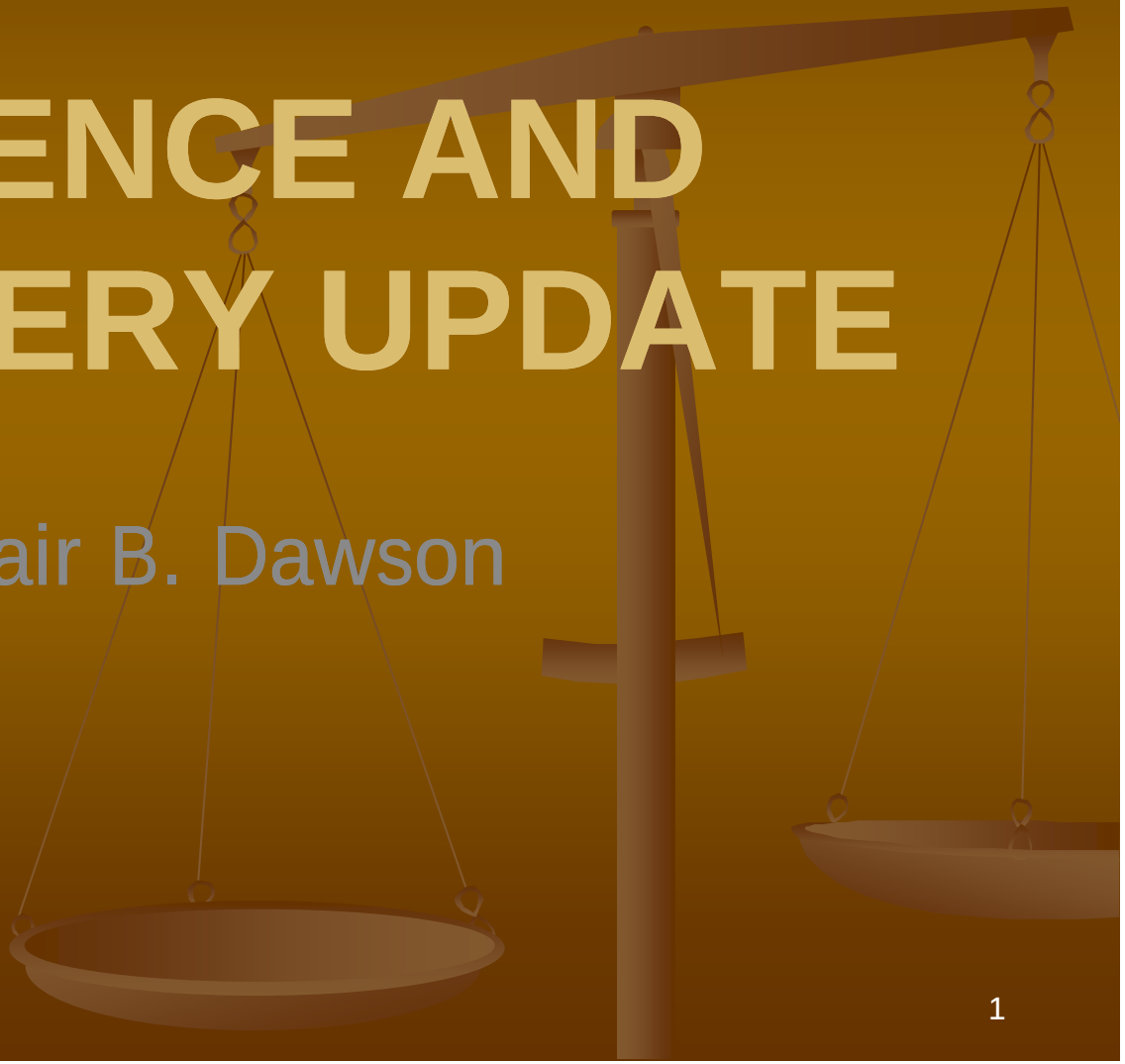


Background

- The Federal Rules of Civil Procedure adopted in 1938 encouraged full pre-trial disclosure (ream or reams of paper).
- Present day litigation must also deal with gigabytes (approx 75,000 pages) and terabytes (approx. 75 million pages).
- The inadvertent production of a privileged document could effect a waiver. Fear of waiver resulted in a great deal of money spent on pre-production review of documents.
- A recent Fulbright study of Litigation Trends revealed that 26% of respondents stated that pre-production privilege review consumed between 20 to 50% of their litigation budget.

Inadvertent Waiver

- Pre Rule 502 three distinct positions had been taken by the federal courts:
  - Strict accountability: almost always found waiver of privileges, even if production was inadvertent
  - Leniency: waiver required intentional and knowing relinquishment of the privilege; there is disclosure only if caused by gross negligence
  - Balancing analysis: case by case determination of whether the disclosure is excusable

Analysis by subdivision

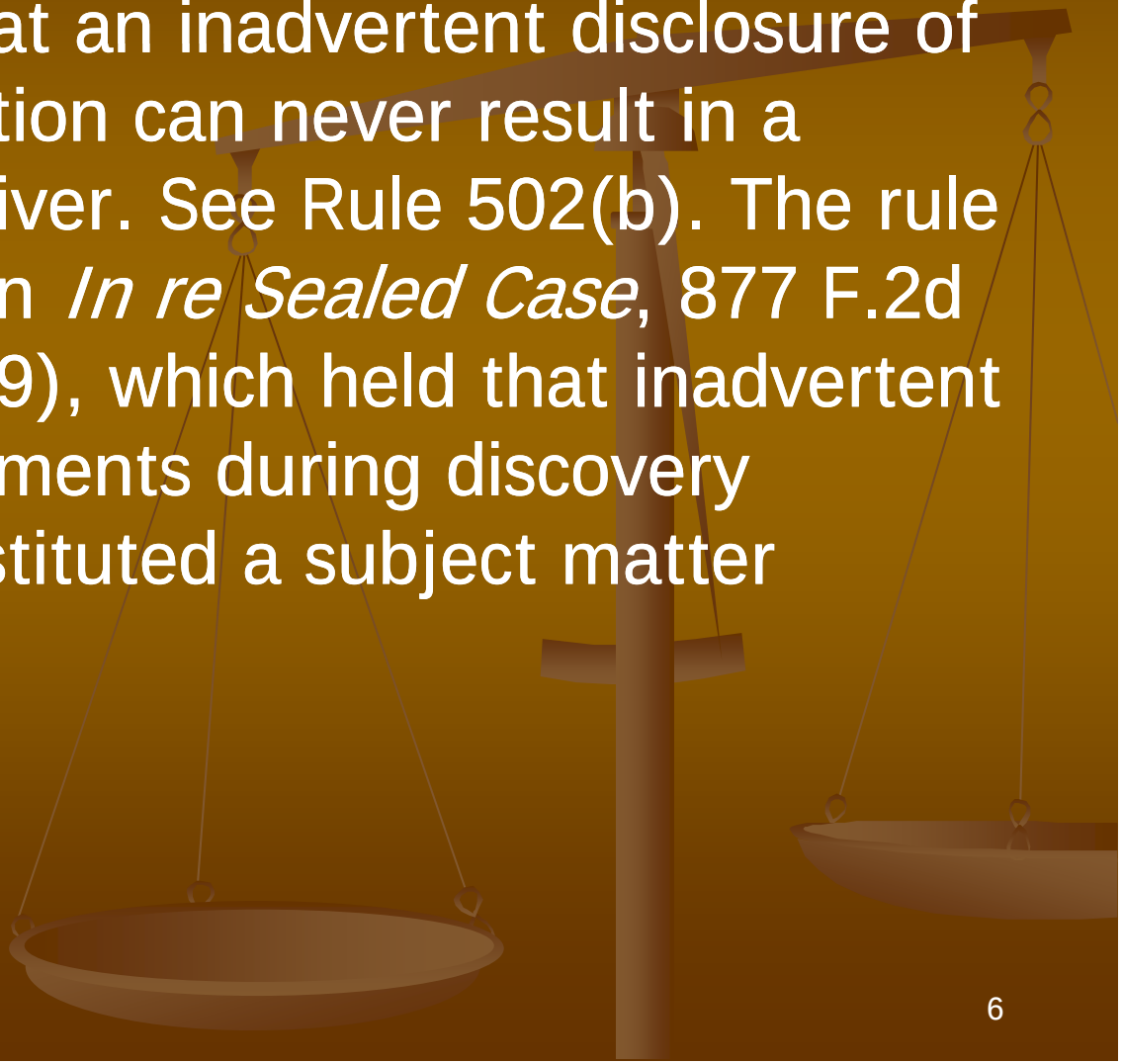
- "(a) DISCLOSURE MADE IN A FEDERAL PROCEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE OF A WAIVER.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or
- information concern the same subject matter; and
- (3) they ought in fairness to be considered together."

Subdivision (a)

- A subject matter waiver of either privilege or work product is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage).

Subdivision (a)

- Thus, it follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.



Subdivision (b)

- "(b) INADVERTENT DISCLOSURE.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- "(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Subdivision (b)

- As stated above, courts were in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver.
- The rule opts for the middle ground: inadvertent disclosure does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error.

What constitutes reasonable steps to prevent disclosure?

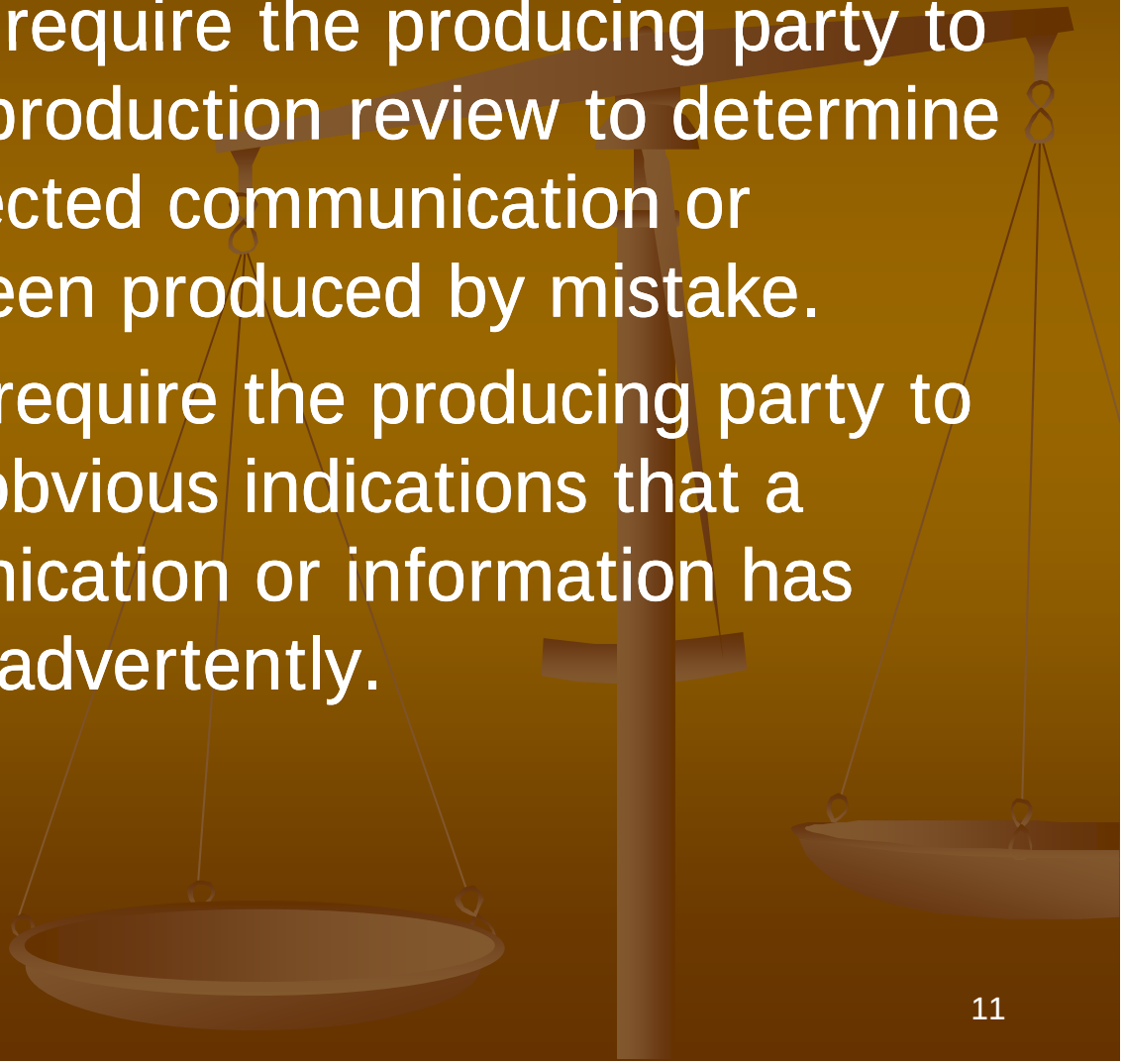
- Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D. N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver.
- The stated factors (none are dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness.

What constitutes reasonable steps to prevent disclosure?

- Other considerations bearing on “reasonable steps” include the number of documents to be reviewed and the time constraints for production.
- Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken “reasonable steps” to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

What constitutes “reasonable steps to rectify the error”

- The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.
- But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.



What constitutes "reasonable steps to rectify the error"- Compliance with Rule 26(b)(5)(B).

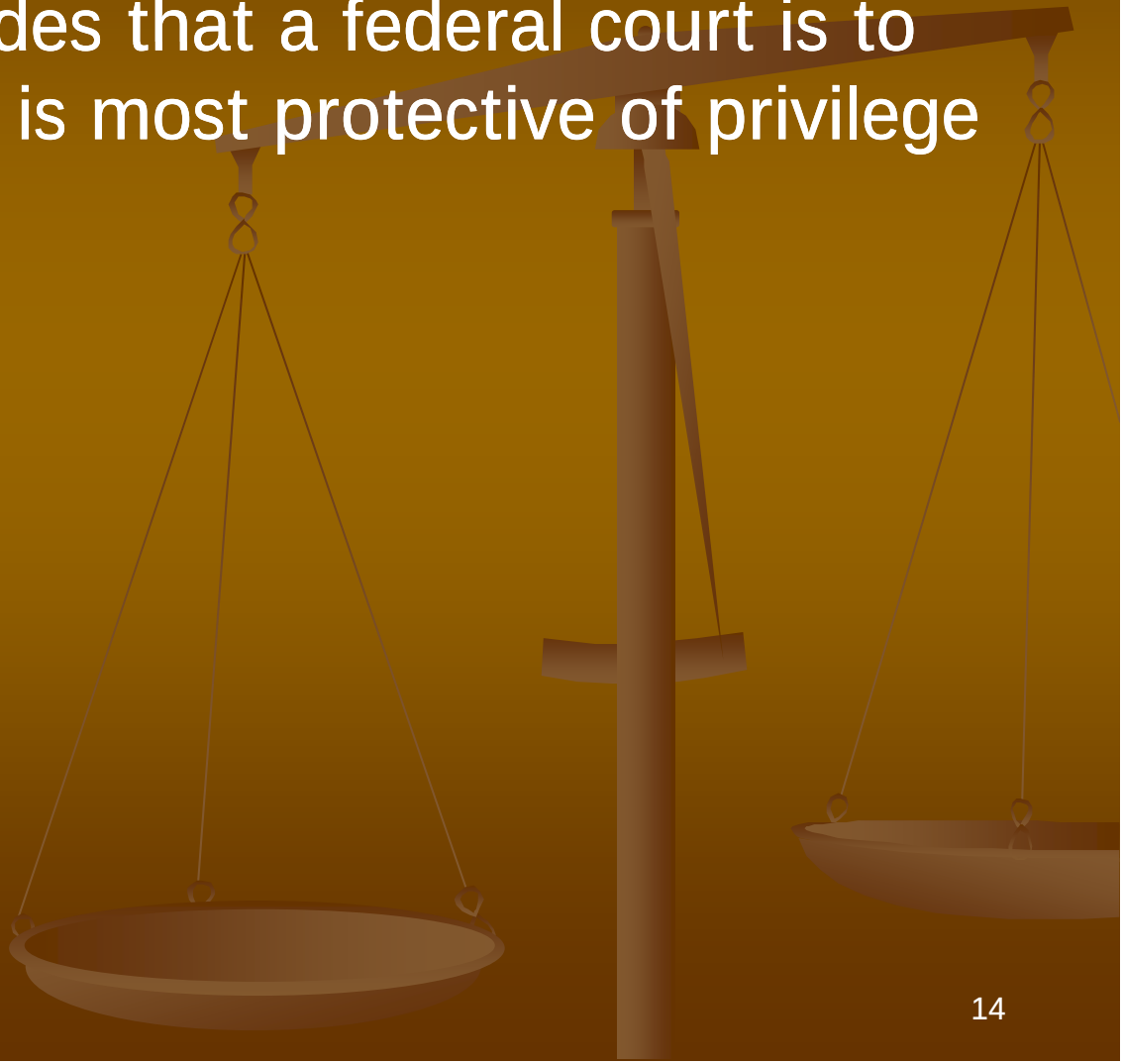
- "If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it.
- After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.
- The producing party must preserve the information until the claim is resolved."

Subdivision (c)

- "(c) DISCLOSURE MADE IN A STATE PROCEEDING.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:
- (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
- (2) is not a waiver under the law of the State where the disclosure occurred."

Subdivision (c)

- Rule 502(c) provides that a federal court is to apply the law that is most protective of privilege and work product.

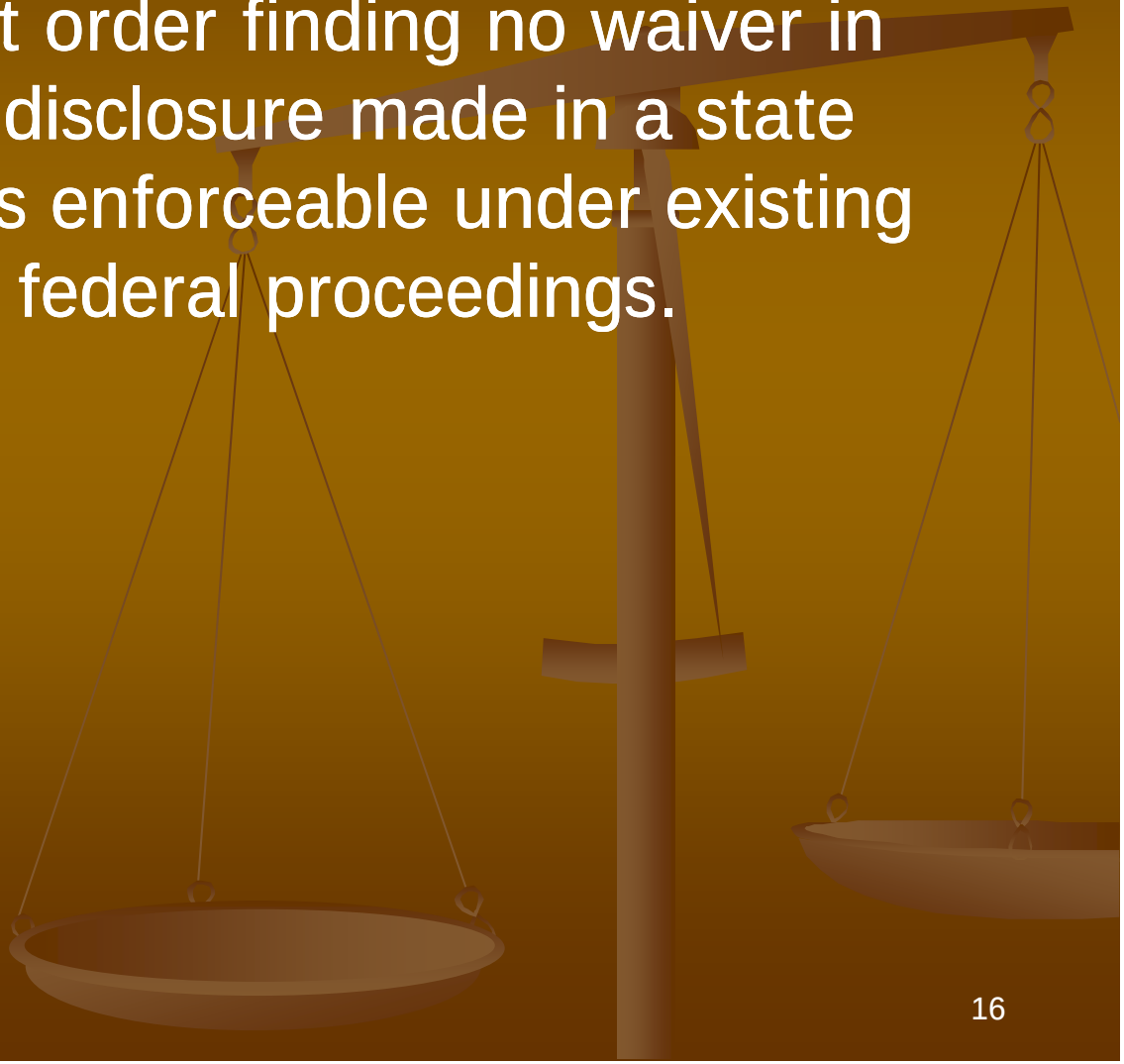


Subdivision (c)

- If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding.
- On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

Subdivision (c)

- Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

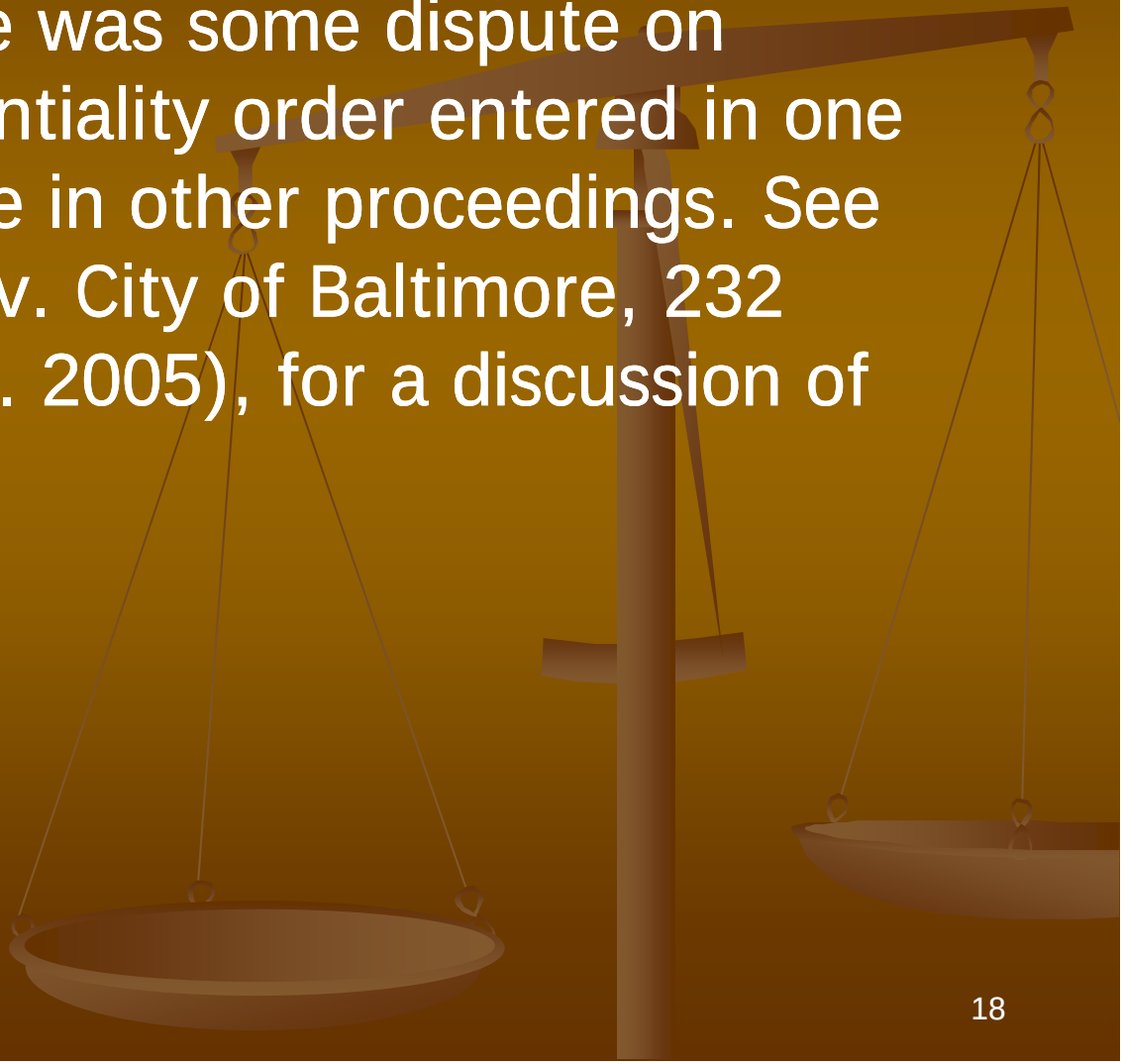


Subdivision (d)

- "(d) CONTROLLING EFFECT OF A COURT ORDER.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding."

Subdivision (d)

- Pre Rule 502 there was some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law.

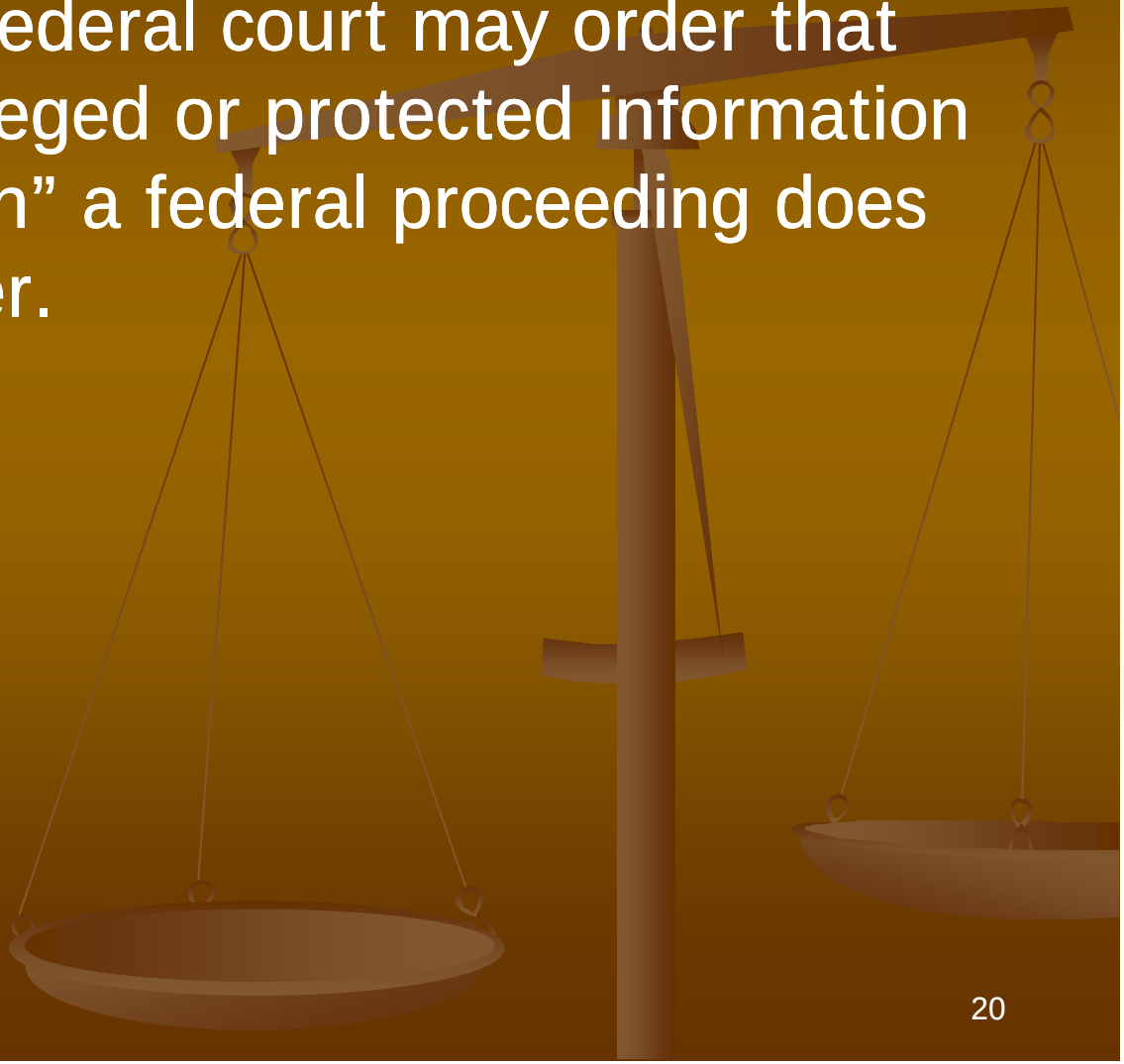


Subdivision (d)

- Rule 502(d) provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding.
- For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.

Subdivision (d)

- Under 502 (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver.



Subdivision (d)

- But 502(d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal.
- If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then 502 (d) is inapplicable. 502(c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Rule 502 Impact on Selective Waiver to Governmental Agencies

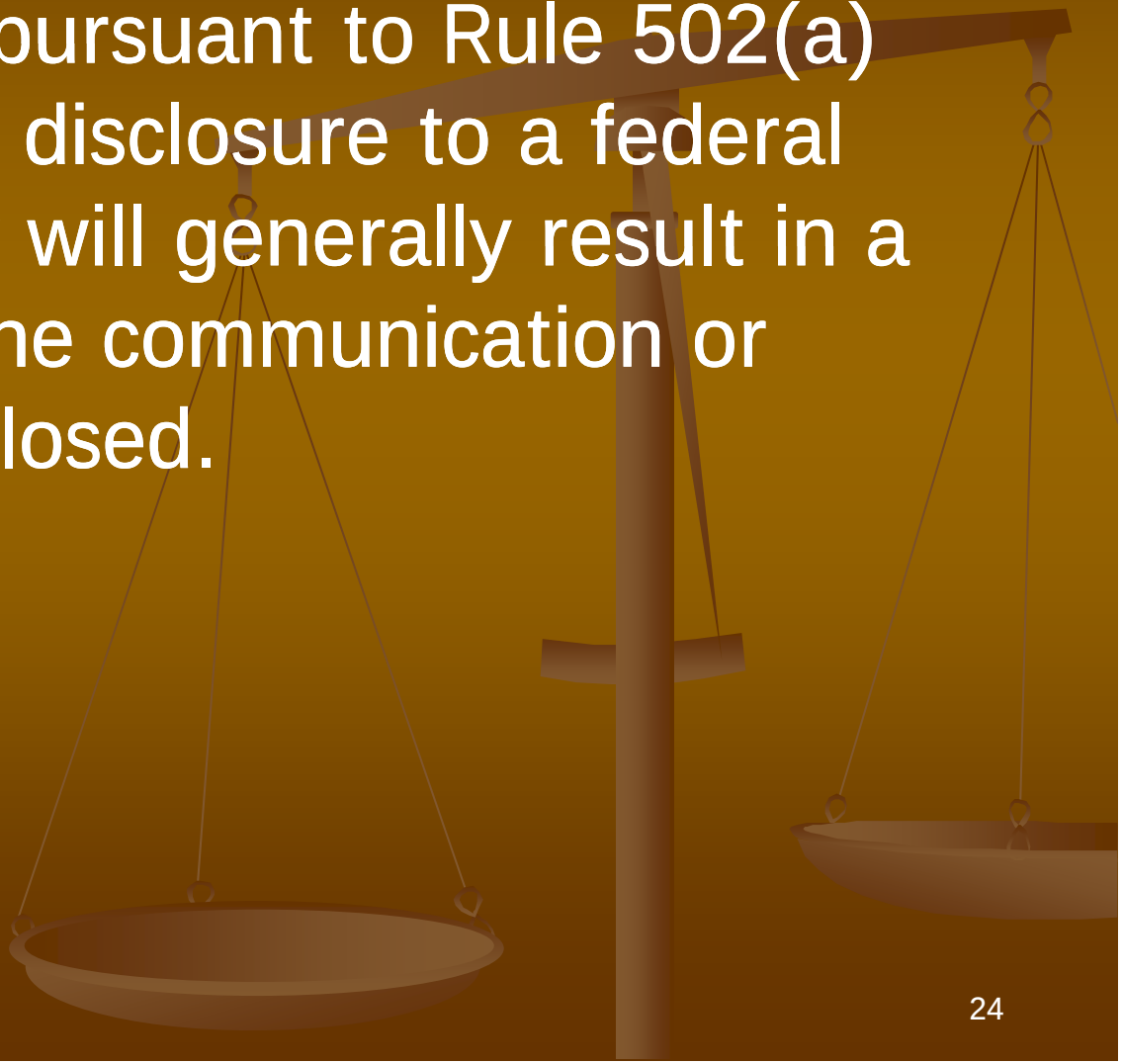
- Pre Rule 502 courts were in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed.
- Most courts rejected the concept of 'selective waiver,' holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991).

Rule 502 Impact on Selective Waiver to Governmental Agencies

- Other courts held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co., 521 F. Supp. 638 (S.D. N.Y. 1981).
- A few courts held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. See, e.g., Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

Rule 502 Impact on Selective Waiver to Governmental Agencies

- It appears that pursuant to Rule 502(a) that a voluntary disclosure to a federal office or agency will generally result in a waiver only of the communication or information disclosed.



Early Returns on Rule 502 – Avoiding Waiver

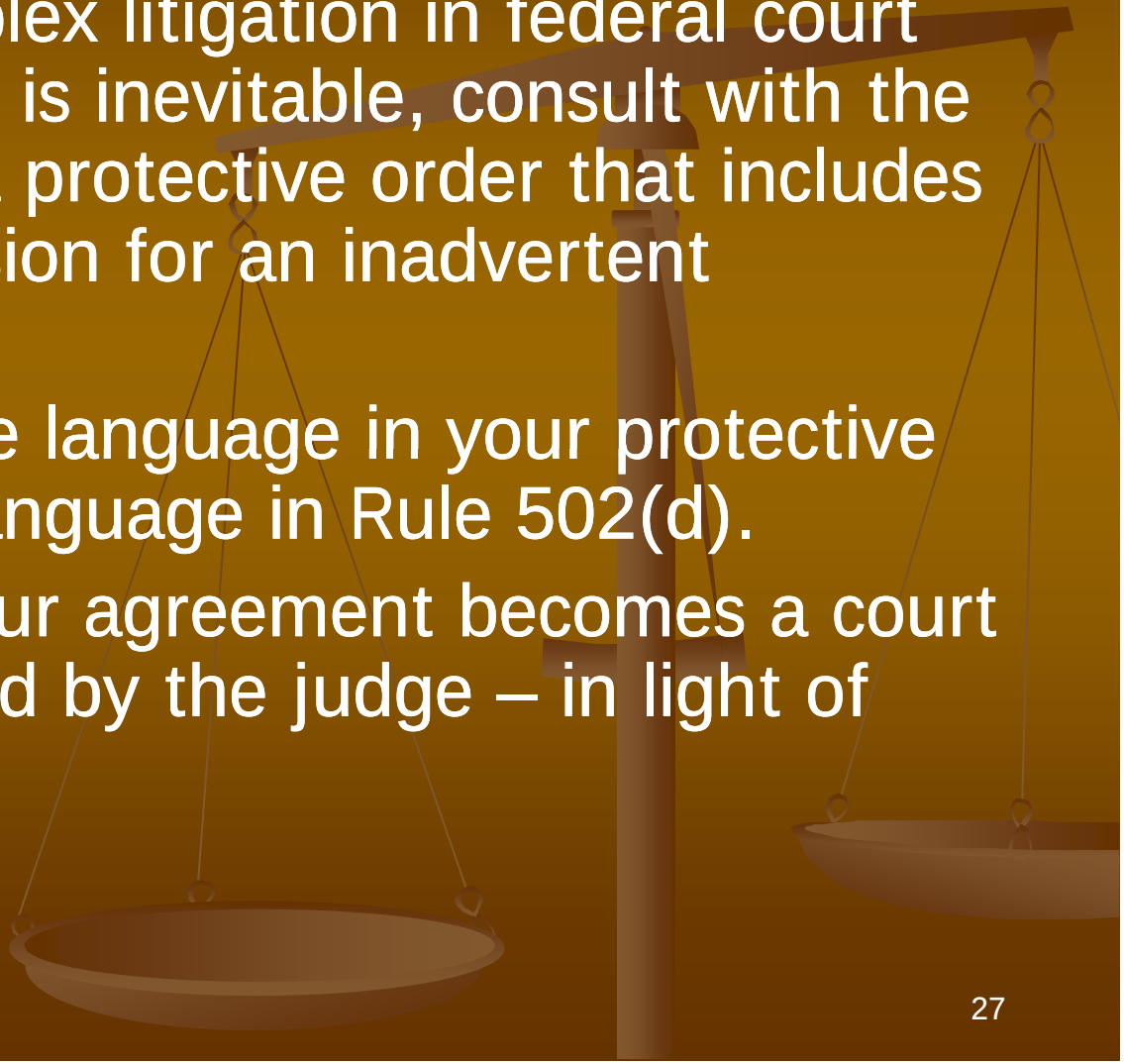
- *Rhoads Industries, Inc. v. Building Materials Corp. of America, 2008 WL 4916026* (E.D. Pa., Nov. 14, 2008)
- *Alcon Manufacturing, Ltd. v. Apotex, Inc., 2008 WL 5070465* (S.D. Ind. Nov. 26, 2008)
- *Containment Technologies Group, Inc. v. American Society of Health System Pharmacists*, 2008 WL 4545310 (S.D. Ind. Oct. 10, 2008)

Victor Stanley Inc. v. Creative Pipe, Inc., 2008 WL 2221841 (D. Md. May 29, 2008)

- Judge Grimm held that the defendants waived privilege, after applying the five reasonableness factors that were later codified by Rule 502. The Court was troubled by Defendants' inability to explain:
  1) the search methodology that they used in their keyword search.
  2) their rationale for the keywords that were used in their search,
  3) the qualifications of the search designers to implement an effective and reliable retrieval search,
  4) whether they had employed Boolean proximity operators as opposed to simple word searches, and
  5) any post-search assessments to ensure reliability and quality implementation.

E-Discovery Practice Pointers

- If you are in complex litigation in federal court where e-discovery is inevitable, consult with the other side about a protective order that includes a claw back provision for an inadvertent disclosure.
- Make sure that the language in your protective order tracks the language in Rule 502(d).
- Make sure that your agreement becomes a court order that is signed by the judge – in light of Rule 502(e).



E-Discovery Practice Pointers

- Follow the suggestions in the Sedona Conference commentary (as Judge Grimm strongly advised in *Victor Stanley*) when using keyword searches in privilege reviews.
- Formulate a search with reference to a specific legal context.
- Perform due diligence in choosing a search product
- Recognize that using an information retrieval tool does not guarantee that are responsive documents will be identified
- Make a good faith attempt to cooperate on choosing and implementing information retrieval
- Expect that your choice of methodology will need to be explained

Outsourcing Document Production/Review

- In light of the recent trend of international outsourcing of legal work and e-discovery management tasks (particularly to India), the Committee recommends that prior to outsourcing legal work, the lawyer should:
  - 1) conduct background checks on the provider,
  - 2) personally interview the principal actors that would be involved in the project,
  - 3) evaluate the security of the foreign provider's computers and premises,
  - 4) strongly consider a written confidentiality agreement with the provider,
  - 5) confirm that the provider does not also work for the adversary in your litigation or another adversary of your client,
  - 6) strongly consider obtaining the client's written consent to outsource the work.

Texas Case Law Update

Dealing With Evidence That is Objected to (But Overruled) Under Rule 403

- ***Coastal Oil & Gas Corp. v. Garza Energy Trust*** , 2008 WL 3991029, 14 (Tex. 2008)
- Lawyers do ***not*** waive a properly-made objection to the admissibility of a piece of evidence by addressing that evidence in closing argument.

Properly Preserving Error For Exclusion of Evidence under Rule 702

- ***Bobbora v. Unitrin Ins. Services***, 255 S.W.3d 331, 334–35 (Tex. App.—Dallas 2008, no pet. h.)
- To preserve error for the exclusion of evidence, lawyers must make an offer of proof and ensure that they obtain an adverse ruling from the court — the mere filing of a document with the court concerning that evidence is not enough.

Jury Charge —Dealing with an Omitted Question Under Rule 279

- ***DiGiuseppe v. Lawler***, 2008 WL 4605951, 1, 5–7 (Tex. 2008); ***Mangum v. Turner***, 255 S.W.3d 223, 227–29 (Tex. App.—Waco 2008, pet. filed).
- Carefully study the jury charge ahead of time to make sure that no questions are omitted. Lying behind the log will not help: if there is an omitted question, object to the charge and bring the error to the trial court's attention.

Pleadings — Asserting Defenses with Specificity

- ***In re P.D.D.***, 256 S.W.3d 834, 839–40 (Tex. App.—Texarkana 2008, no pet. h.)
- Don't leave anything to chance (or to inference) when asserting claims or defenses in your pleadings — to avoid an argument like the plaintiff's in *In re P.D.D.*, use enough specificity to leave no doubt about your client's claims or defenses.

Summary Judgment

- ***Mackey v. Great Lakes Investments, Inc.***, 255 S.W.3d 243, 252 (Tex. App.—San Antonio 2008, pet. denied); ***Cooper v. Circle Ten Council Boy Scouts of America***, 254 S.W.3d 689, 696–97 (Tex. App.—Dallas 2008, no pet. h.)
- Don't delay the bulk of your discovery until after your adversary moves for summary judgment. If additional discovery is needed, file an affidavit or verified motion and explain your hopefully diligent efforts to obtain the needed discovery prior to the hearing.

Lay Witness Opinion under Rule 701

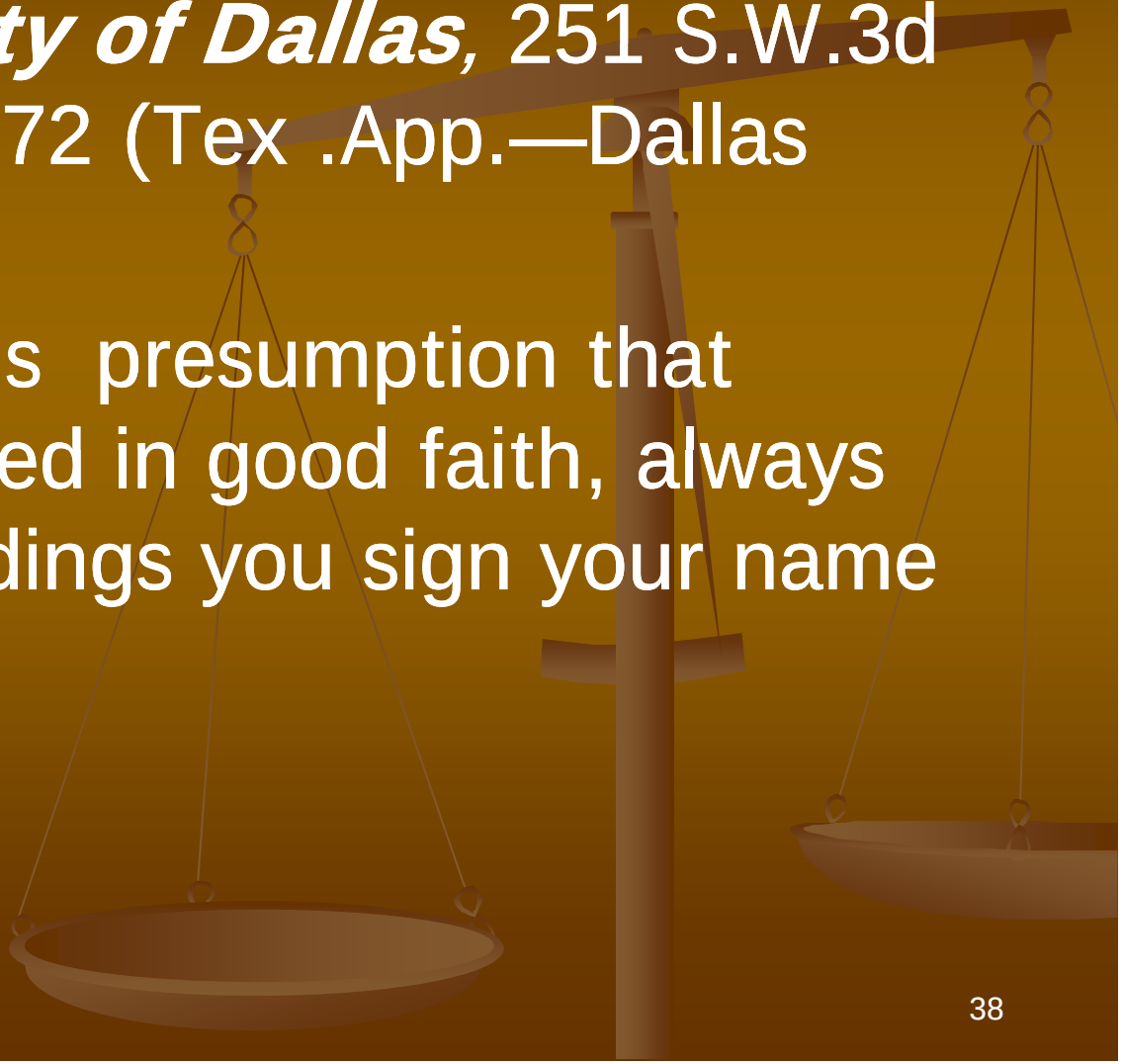
- ***Kirwan v. City of Waco***, 249 S.W.3d 544, 548 (Tex. App.—Waco 2008, pet. filed)
- Carefully consider if one of your witnesses may give opinion testimony that could be challenged as speculative or purported expert testimony. Make sure that your witness can testify based upon his own rational perception of events.

Rule 802 – Hearsay Exception for Business Records

- ***Martinez v. Midland Credit Management, Inc.***, 250 S.W.3d 481, 485 (Tex. App.— El Paso 2008, no pet. h.)
- Be sure that the affiant who authenticates a business record has the knowledge of record-keeping policies of the entity where the document was created — even if the document was created by a predecessor entity.

The Applicable Standard for Sanctions under Rule 13

- ***Shaw* v. *County of Dallas*,** 251 S.W.3d 165, 170—71, 172 (Tex .App.—Dallas 2008, pet. filed)
- Although there is presumption that pleadings are filed in good faith, always review the pleadings you sign your name to.



Special Exceptions

- ***Powell v. Texas Dept. of Criminal Justice,*** 251 S.W.3d 783, 787—89 (Tex. App.— Corpus Christi 2008, pet, filed)
- A petition need not include every detail of a plaintiff's case, but if a lawyer specially excepts, work with that lawyer to file a middle ground for an adequate amendment of the pleading to put the defendant on notice of the claims being asserted.

Jury Selection

- ***Murff v. Pass***, 2008 WL 820577, 2–3 (Tex. 2008)*; Urista v. Bed, Bath, & Beyond, Inc.*, 245 S.W.3d 591, 595—96 (Tex. App.—Houston [1st Dist.] 2007, no pet.)
- Be sure to make any objections promptly when a trial court grants a challenge to a potential juror for cause.