

Judicial Disqualification:

A Practical Guide for Insuring fairness and
impartiality in your case.

Presented by Group 4

September 26, 2013

American Inns of Court

James C. Adkins, Jr. Chapter



Overview:

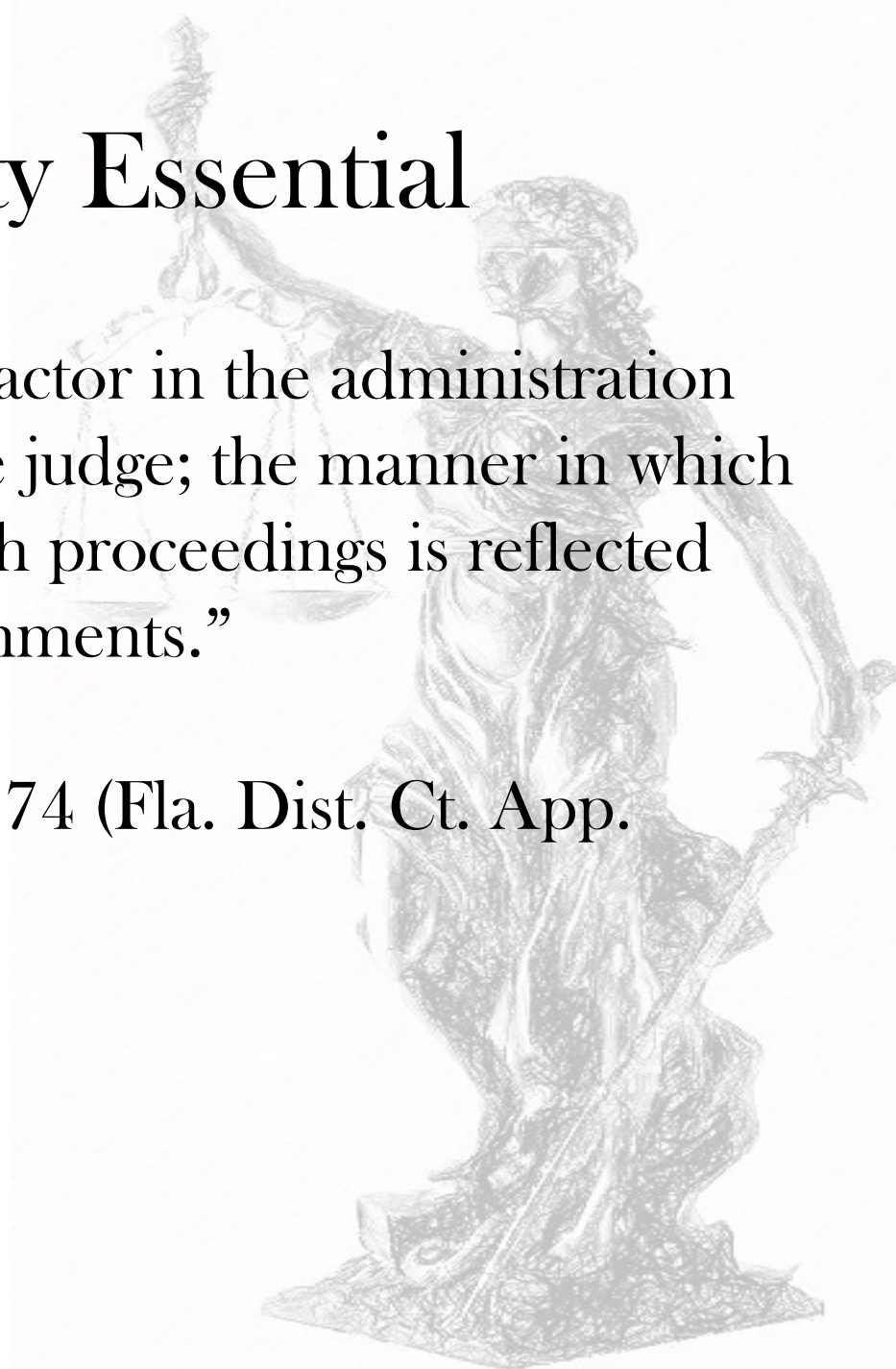
- Policy Behind Disqualification
- Statutory Basis for Disqualification
- Procedural Rules for Disqualification
- How to: Deadlines, Requirements & Other Practical Issues
- Group Discussion



Judicial Impartiality Essential

“The single most dominant factor in the administration of a trial is the conduct of the judge; the manner in which he exercises control over such proceedings is reflected through his remarks and comments.”

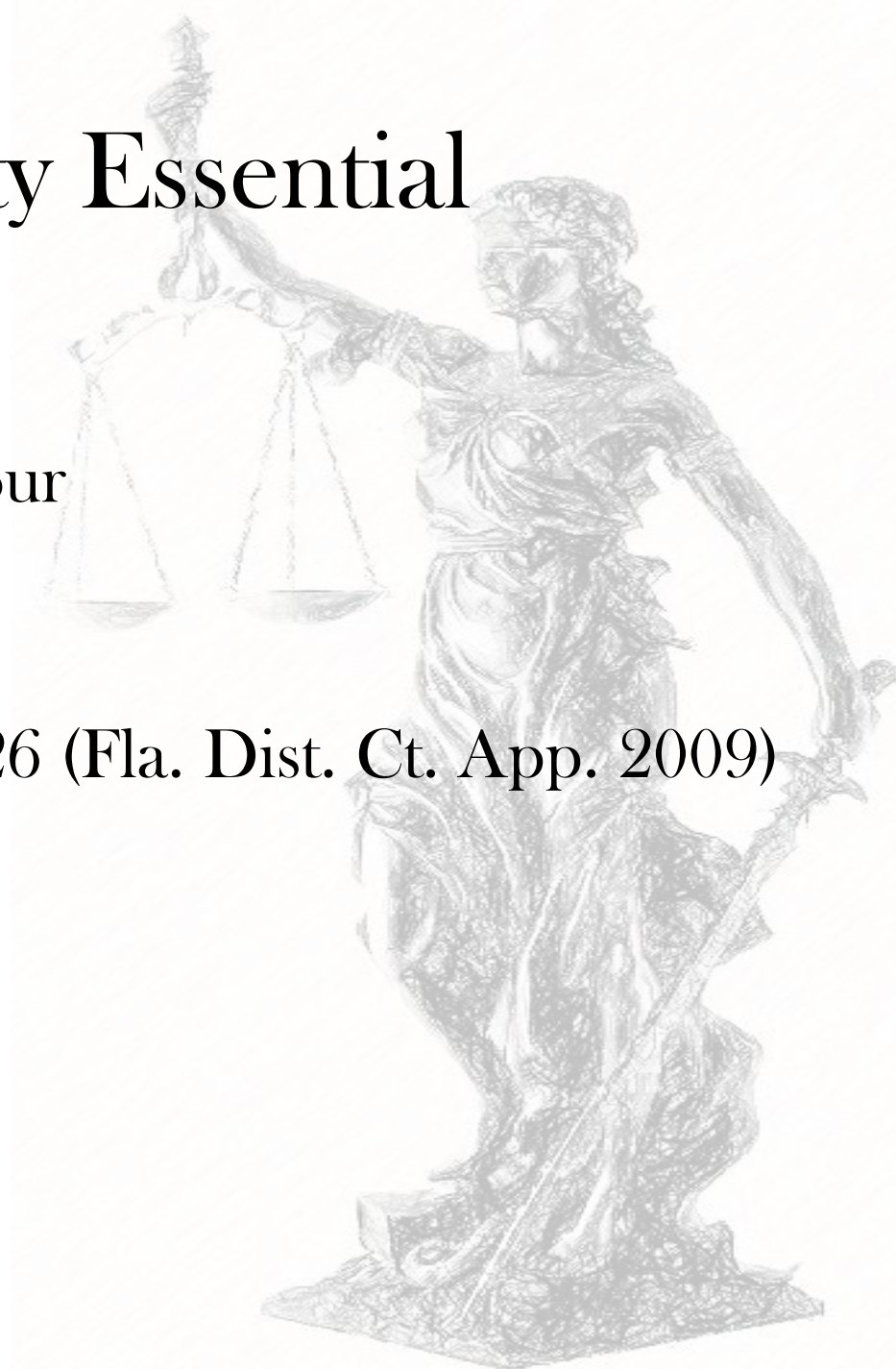
Hunter v. State, 314 So. 2d 174 (Fla. Dist. Ct. App. 1975)



Judicial Impartiality Essential

“The requirement of judicial impartiality is at the core of our system of criminal justice.”

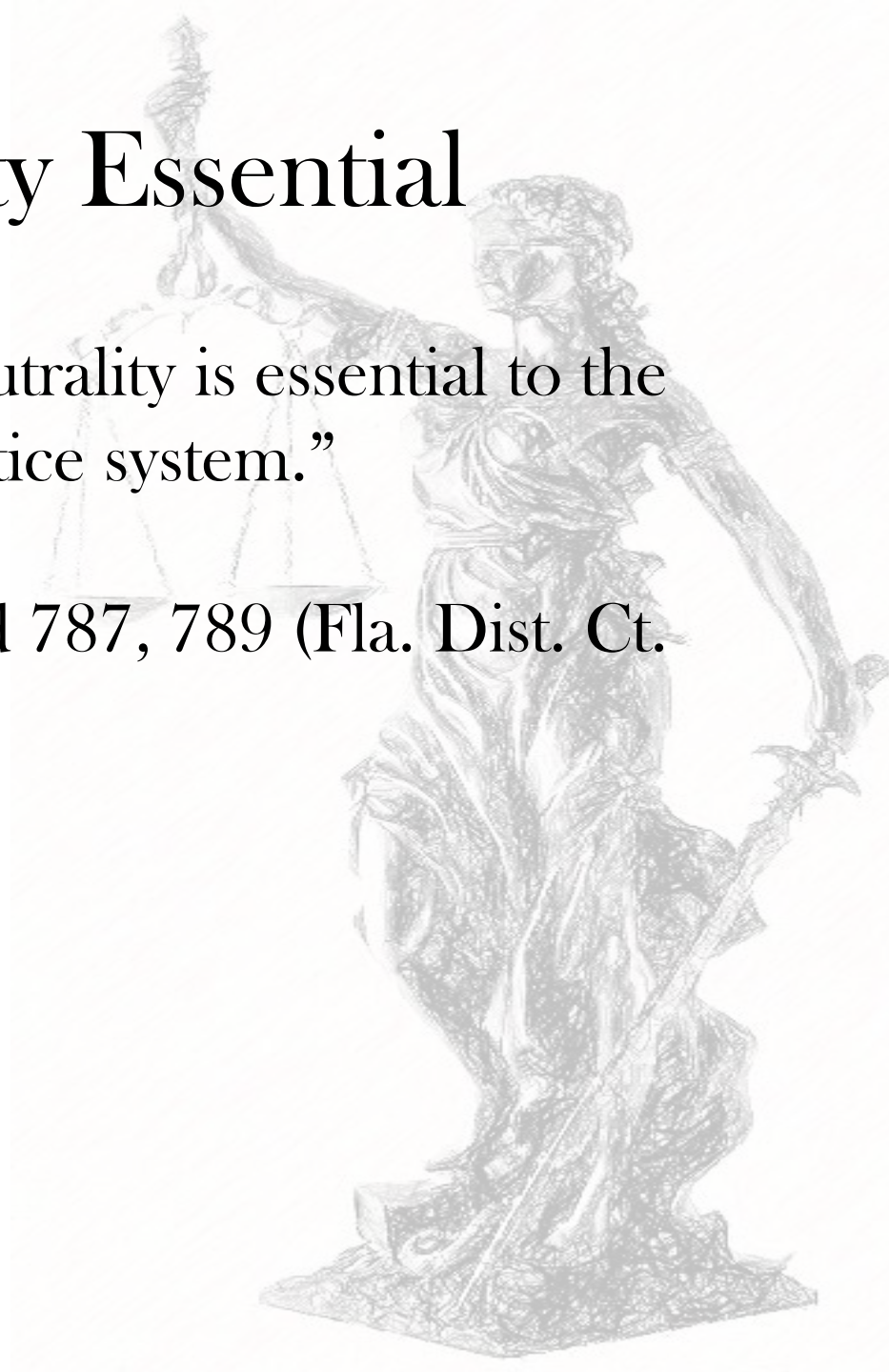
J.L.D. v. State, 4 So. 3d 24, 26 (Fla. Dist. Ct. App. 2009)



Judicial Impartiality Essential

“[T]he judge's position of neutrality is essential to the proper functioning of the justice system.”

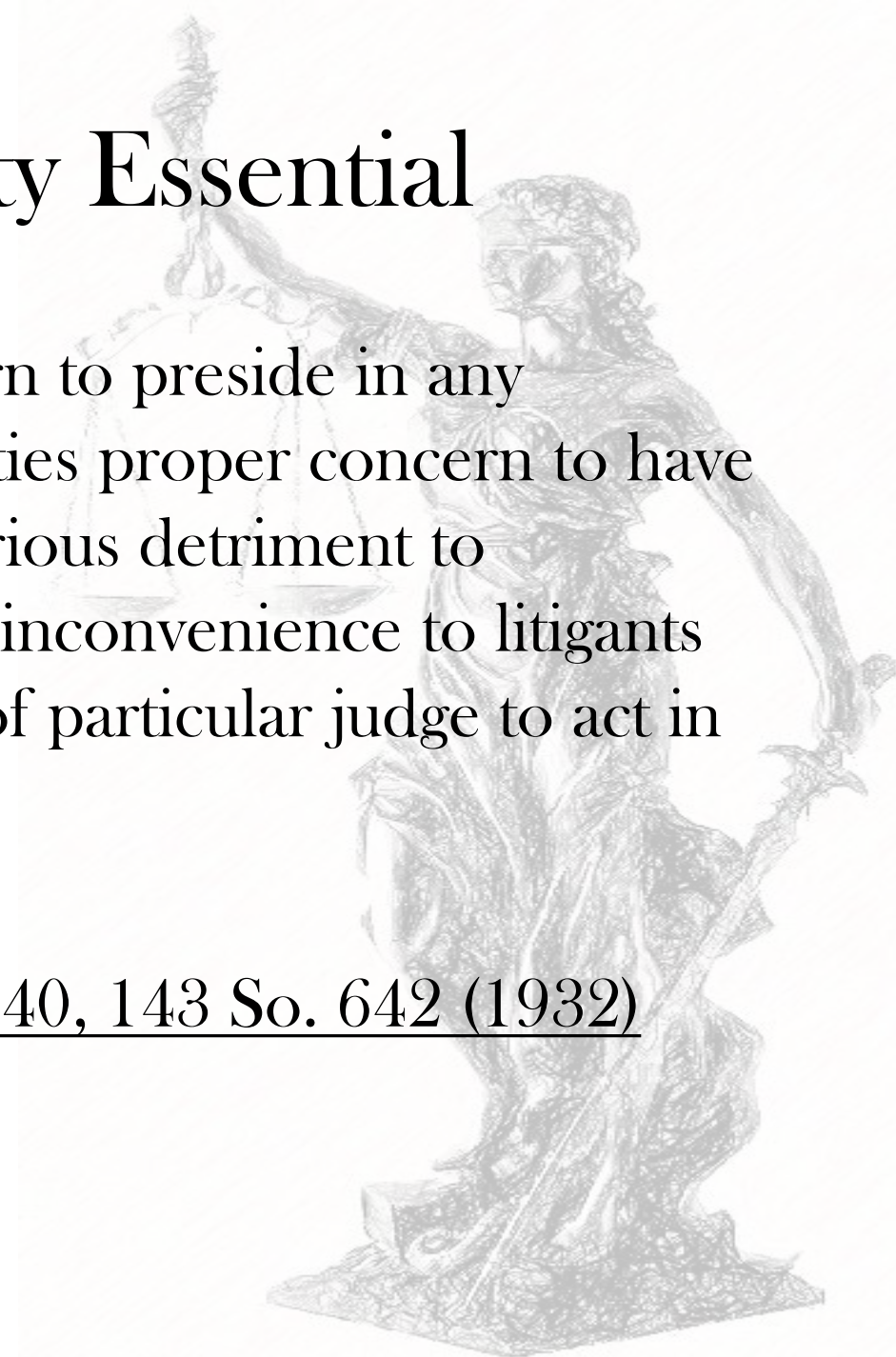
Simmons v. State, 803 So. 2d 787, 789 (Fla. Dist. Ct. App. 2001)



Judicial Impartiality Essential

“Judge has no proper concern to preside in any particular case, nor have parties proper concern to have him so preside, where no serious detriment to administration of justice nor inconvenience to litigants will ensue from declination of particular judge to act in particular case.”

Stearns v. Stearns, 106 Fla. 440, 143 So. 642 (1932)



Judicial Impartiality

Appearance of
neutrality important
for public perception.

theguardian

News | US | World | Sports | Comment | Culture | Business | Money

News > World news > George Zimmerman

George Zimmerman granted new judge on grounds of bias at bail hearing

Major legal victory as defence lawyer Mark O'Mara's motion approved to remove second judge in Trayvon Martin case

Richard Luscombe in Miami

theguardian.com, Wednesday 29 August 2012 23.00 EDT

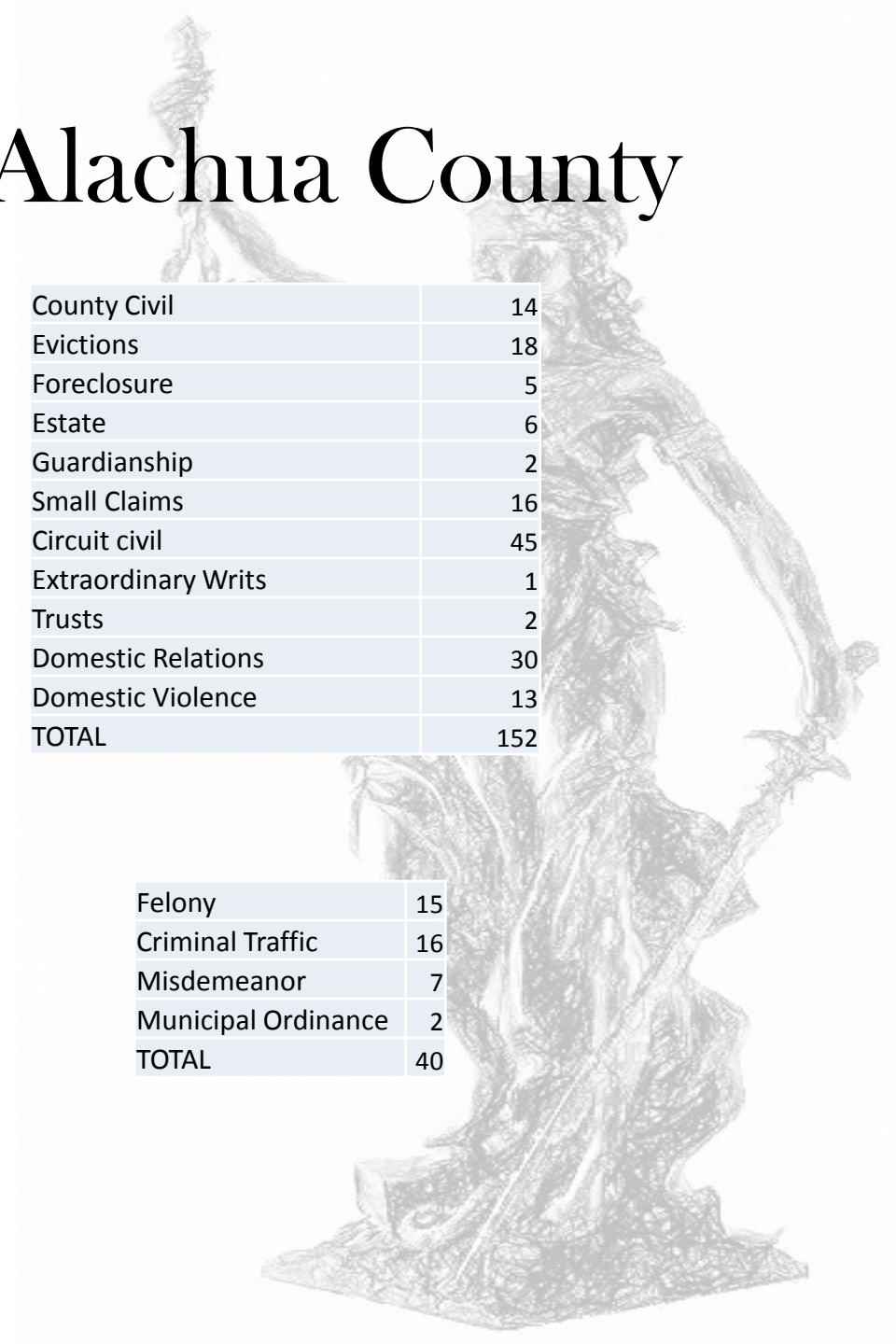


George Zimmerman, left, answers a question from attorney Mark O'Mara during a bond hearing in Sanford. Photograph: Gary W. Green/AP

Disqualifications: Alachua County

8/31/2010 to 9/6/2013

- Civil



County Civil	14
Evictions	18
Foreclosure	5
Estate	6
Guardianship	2
Small Claims	16
Circuit civil	45
Extraordinary Writs	1
Trusts	2
Domestic Relations	30
Domestic Violence	13
TOTAL	152

- Criminal

Felony	15
Criminal Traffic	16
Misdemeanor	7
Municipal Ordinance	2
TOTAL	40

Judicial Assignment

Judges have no say in assignment of specific cases.

Governed by Administrative Order 9.01 in the 8th Circuit

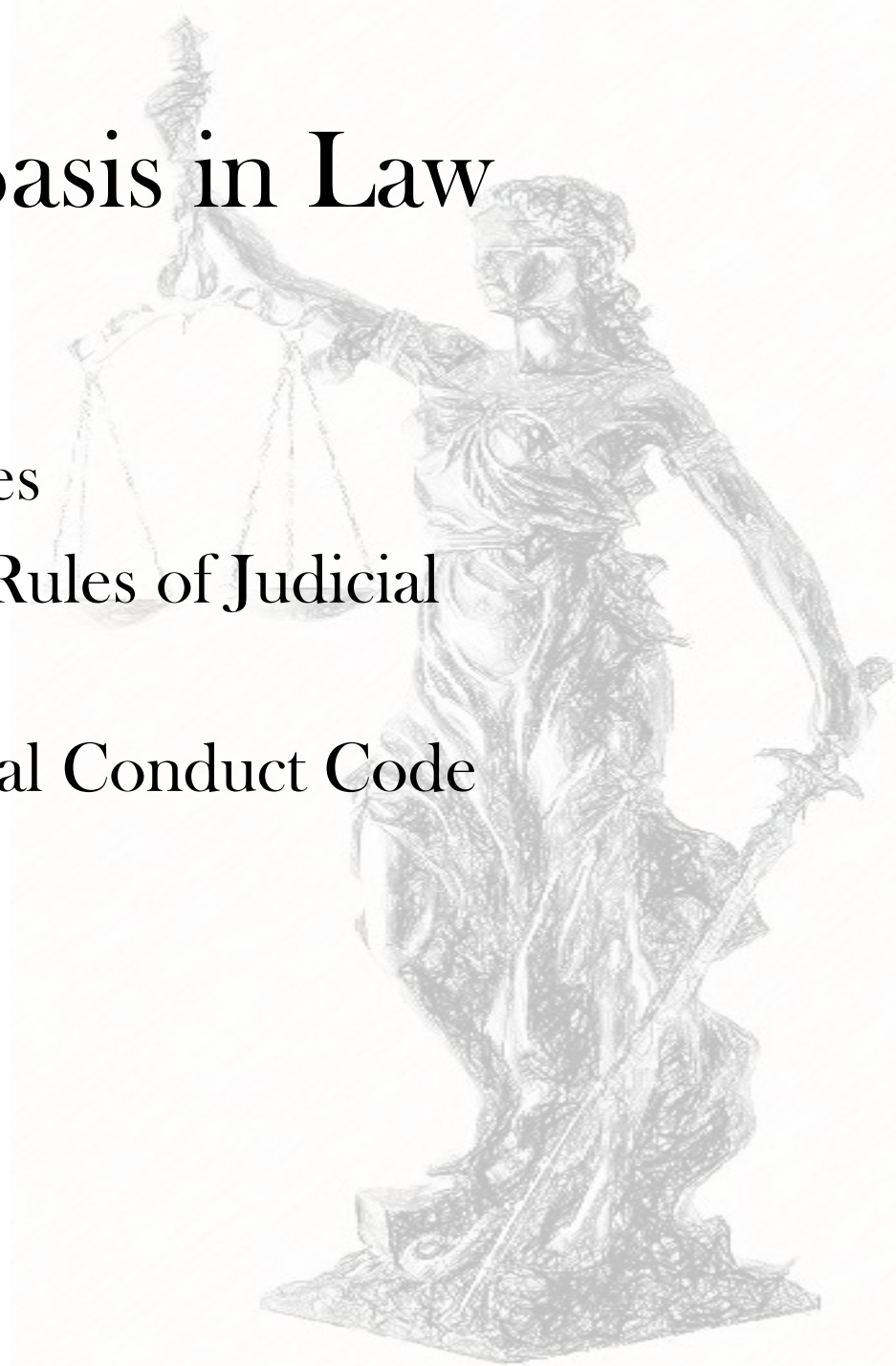
Creates divisions pursuant to Rule 2.215(b)(4)
of the Florida Rules of Judicial Administration.

Provides for judges to be assigned specific divisions
and to receive cases sorted by type in a “blind draw”

Disqualification- Basis in Law

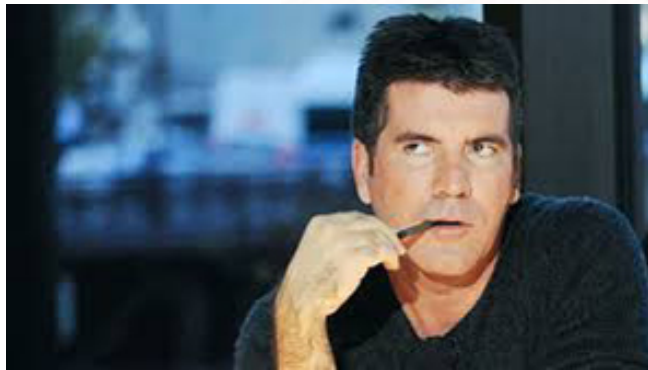
Governed by:

- Chapter 38, Florida Statutes
- Rule 2.330 of the Florida Rules of Judicial Administration
- Cannon 3E, Florida Judicial Conduct Code



Judicial Assignment

Litigants have no say in assignment of specific judge.



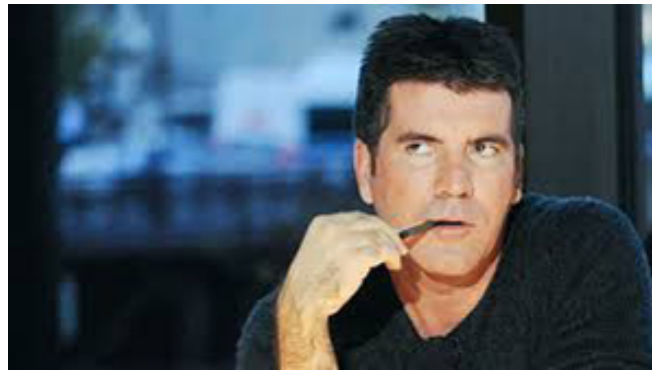
Judicial Assignment

Litigants have no say in assignment of specific judge.

“Litigants have no standing to enforce internal court policy and have no right to have any particular judge hear their case.”



Kruckenberg v. Powell, 422 So.2d 994, 996 (Fla. 5th DCA 1982)



Disqualification- Statutory Basis

Chapter 38, Fla. Statutes – Right to seek disqualification

- Party can ask for disqualification if reasonably believe they will not receive a fair trial
- Fla. Statute 38.02 “show by a suggestion filed in the cause that **the judge** before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a **party thereto**, or is **interested in the result thereof**, or that said **judge is related to an attorney** or counselor of record in said cause by consanguinity or affinity within the third degree, or that said **judge is a material witness** for or against one of the parties to said cause...”
- Other specific allegations showing Judge’s prejudice or bias

Disqualification- Voluntary Basis

Cannon 3E, Florida Judicial Conduct Code

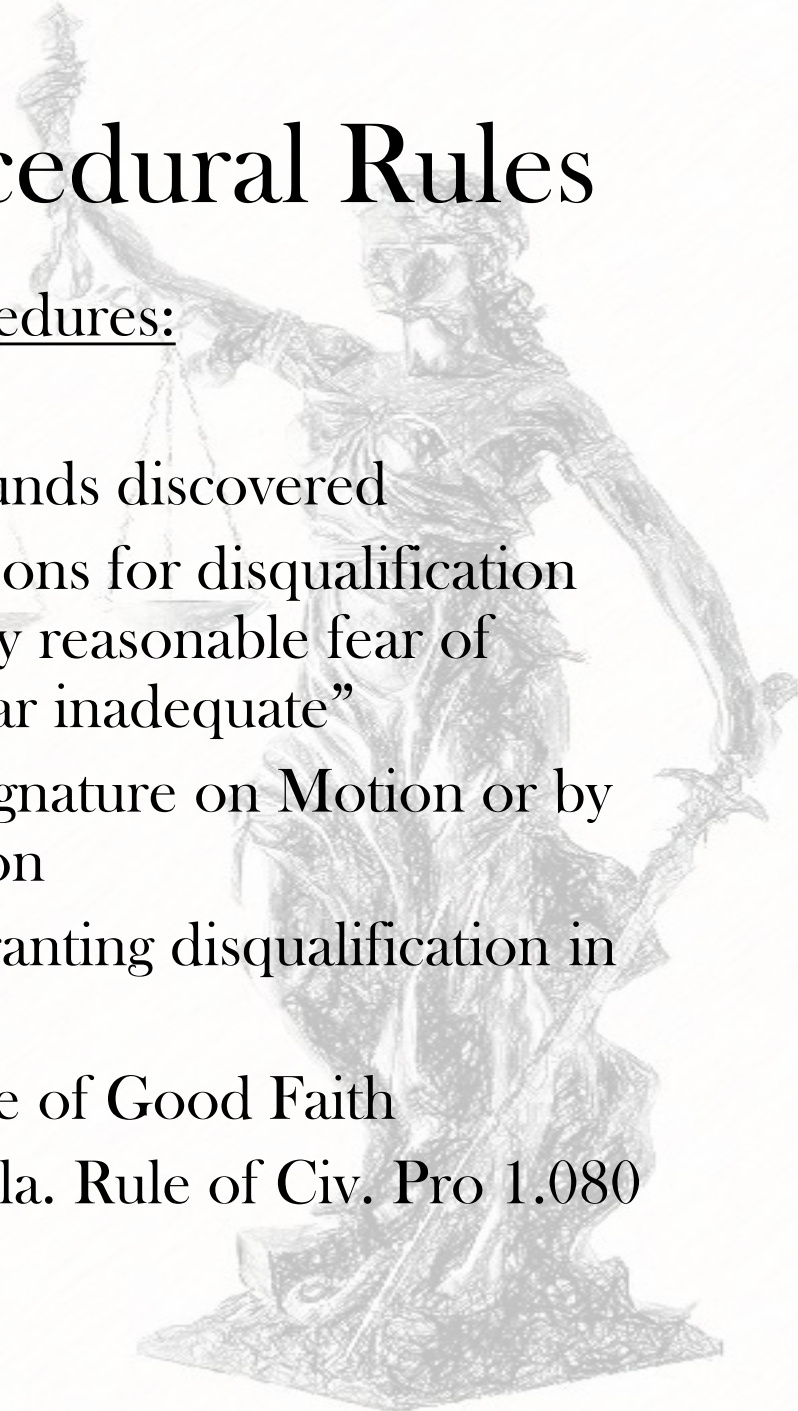
A Judge shall disqualify himself or herself where impartiality might reasonably be questioned:

1. Personal bias or prejudice regarding party or party's attorney or personal knowledge of disputed evidence
2. Judge served as lawyer, witness, was lower court Judge, or former law partner served as lawyer in matter.
3. Economic interest - Judge's Household
4. Familial Relationship 3rd Degree Rule
5. Public statements by Judge that take a position

Disqualification- Procedural Rules

Fla. R. Jud. Admin 2.330 governs procedures:

1. Motion must be in Writing
 - 10 days from date grounds discovered
2. Allege specific facts and reasons for disqualification
 - “Must meet objectively reasonable fear of prejudice...subjective fear inadequate”
3. Facts must be sworn to by signature on Motion or by separate Affidavit attached to the Motion
4. Must include prior orders granting disqualification in same case
5. Counsel must sign Certificate of Good Faith
6. Serve copy on Judge using Fla. Rule of Civ. Pro 1.080



Group Discussion!

Attorney Bob Butts
and Group 1



Disqualification based on
Relationships



Disqualification based on Relationships

- You are the attorney for a personal injury client who is suing a local company. Opposing counsel is married and his wife is very prominent in local politics. In the last 6 months, she played a vital role in the election of the trial judge in the case. While she had no official title in the campaign, she attended all campaign events, raised money for the judge and was pictured in the newspaper next to the judge during his acceptance speech and has a front row seat at his investiture. Does a basis for disqualification exist?

Disqualification based on Relationships

Answer:

- The answer depends on how long ago the campaign took place. The issue is how remote in time from the instant trial was the campaign involvement as well as the level of involvement. *Garcia v. Amer. Income Life Insur.*, 664 So 2d 301 (Fla. 3d 1995). Similar to the fact pattern above, in *Garcia*, the defense counsel's wife was the trial judge's campaign manager in the judge's last re-election campaign to the bench.
- This was not a sufficient ground for disqualification under the circumstances of *Garcia* because the campaign was four years prior to the motion to disqualify, and, thus, was too remote in time to engender a well-grounded fear by the plaintiffs that they would not receive a fair trial or hearing at the hands of the judge.

Disqualification based on Relationships

Answer continued:

- In Barber v. MacKenzie, 562 So.2d 755, 756 (Fla. 3d DCA 1990), rev. denied, 576 So.2d 288 (Fla.1991), the opposing council were members of the judge's re-election committee and the election was under way during the trial. The judge was disqualified from the case because of the close relationship with the attorneys.
- The court stated that a member of a campaign committee is not perpetually barred from appearing before the trial judge. The Committee on Standards of Conduct Governing Judges recommended disqualification "for a period of time, perhaps two years, until ... considering all the circumstances ..., your impartiality cannot reasonably be questioned."
Fla.Sup.Ct.Comm. on Stds. of Conduct Concerning Judges, Op. 84-23 (Oct. 26, 1984).

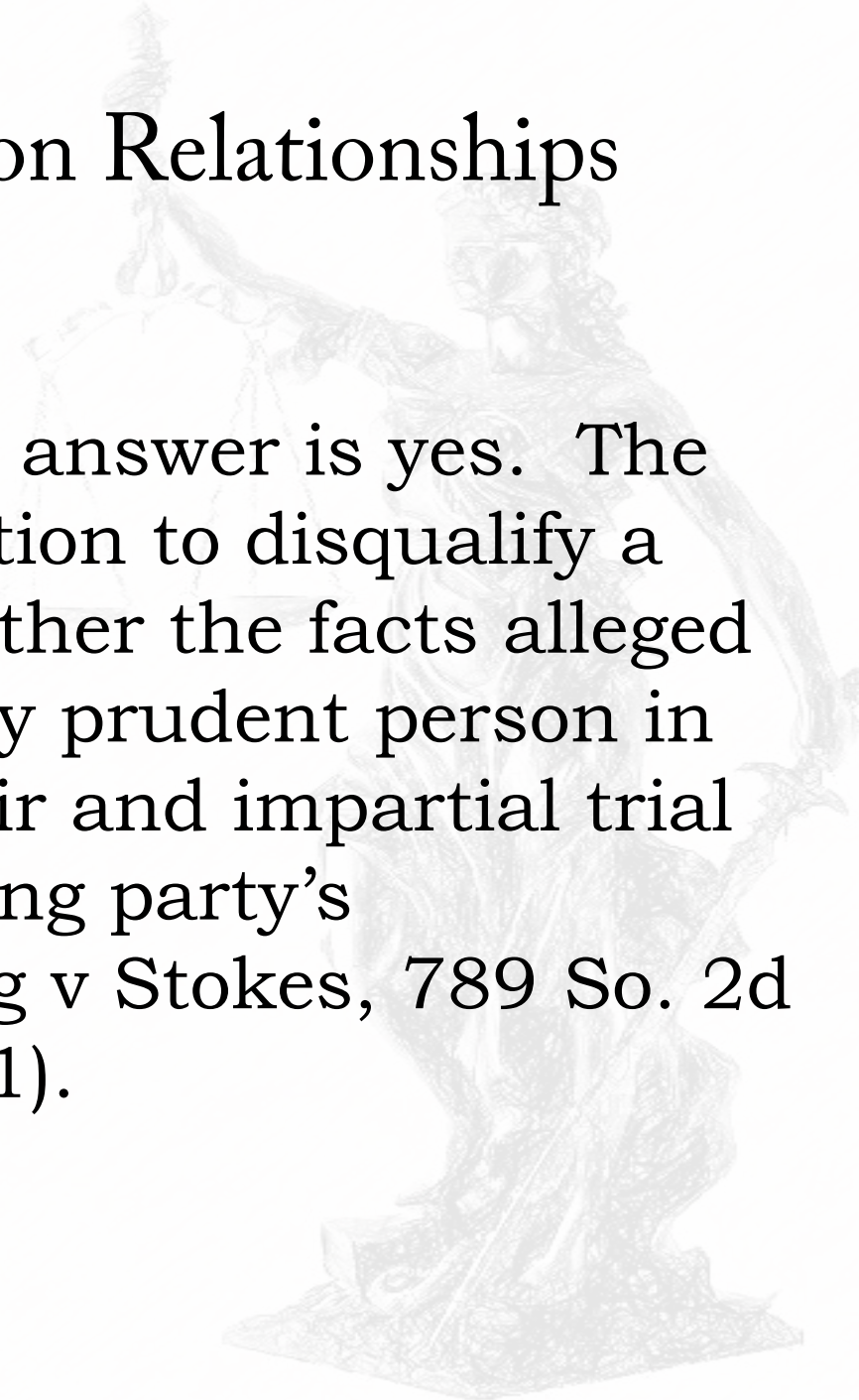
Disqualification based on Relationships

- You represent a client in a contract dispute with the Defendant. Defendant is represented by the largest firm in town. That firm also represents the Judge's Wife in an auto accident case where she is the Plaintiff. Does a basis for disqualification exist?
- You represent a client in a contract dispute with the Defendant. Defendant is represented by the largest firm in town. That firm also represented the Judge's Wife in an auto accident case where she is the Plaintiff. The case was settled in a confidential settlement about 18 months ago. No one knows the amount, but the judge used to drive a Honda and now he drives a gold plated Lamborghini. Does a basis for disqualification exist?
- You represent a client in a contract dispute with the Defendant. Defendant is represented by the largest firm in town. That firm also represented the Judge's Wife in an auto accident case where she is the Plaintiff. The case was settled in a confidential settlement about 18 months ago and it is largely known the judge and his wife were not happy with the result. Does a basis for disqualification exist by either party?

Disqualification based on Relationships

Answer:

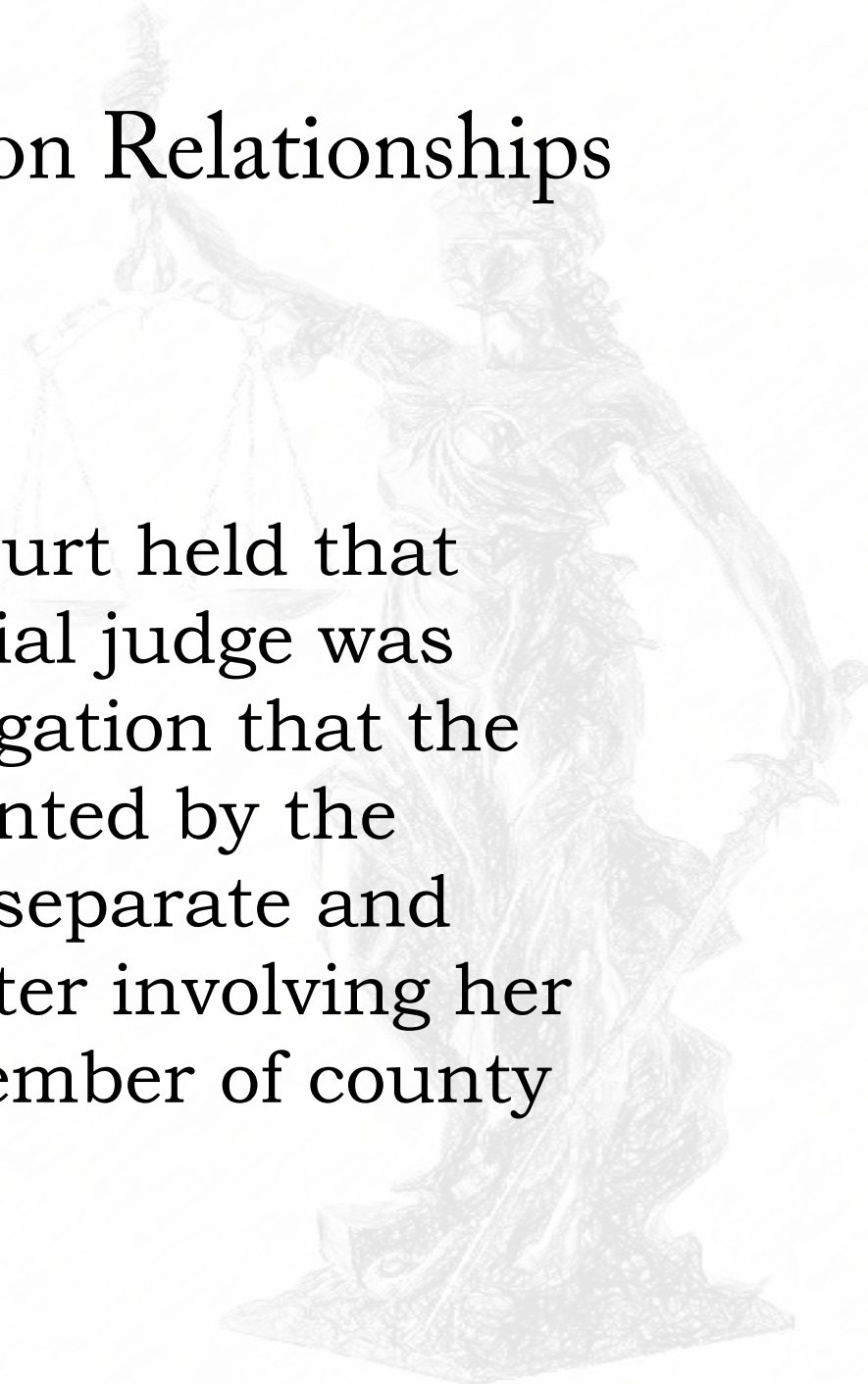
In each hypothetical the answer is yes. The legal sufficiency of a motion to disqualify a trial judge turns on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial as judged from the moving party's perspective. *J&J Towing v Stokes*, 789 So. 2d 1196 (Fla. 4th DCA 2001).



Disqualification based on Relationships

Answer continued:

In J&J, the appellate Court held that disqualification of the trial judge was warranted based on allegation that the judge's wife was represented by the opposing's counsel in a separate and apparently pending matter involving her individually and as a member of county school board.



Disqualification based on Relationships

Further examples of similar disqualifications are:

- *McQueen v. Roye*, 785 So.2d 512 (Fla. 3d DCA 2000) (motion for recusal should have been granted where plaintiff's counsel provided legal services and gave advice to judge's brother, recognizing that “recusal is appropriate where one of the parties or their counsel had dealings with a relative of the court”);
- *Lytle v. Rosado*, 711 So.2d 213 (Fla. 3d DCA 1998) (motion to disqualify should have been granted where the trial judge's stepson had a claim pending against the insurance company which had retained counsel to represent the defendant in the action);

Disqualification based on Relationships

Further examples of similar disqualifications are:

- *Marcotte v. Gloeckner*, 679 So.2d 1225 (Fla. 5th DCA 1996) (prior representation of judge by insurer's law firm required disqualification of judge even though judge may not have been biased as a matter of fact);
- *Atkinson Dredging Co. v. Henning*, 631 So.2d 1129 (Fla. 4th DCA 1994) (prohibition granted based on motion to disqualify when one of the parties' law firms was the same firm representing the trial judge and her husband in a separate, unrelated action).

Group Discussion!

Attorney Jessica Zissimopoulos
and Groups 2 & 3



Disqualification based on
Judge's Actions or Statements



Disqualification based Actions or Statements

Do the Judge's statements to the wife, specifically calling her an "alimony drone", constitute reason for disqualification?



Disqualification based on Actions or Statements

The Court: You are a volunteer without being paid?

Mrs. Valdes-Fauli: I'm not paid, no sir.

The Court: So if you want to continue those charitable pursuits in a voluntary position as opposed to being paid-

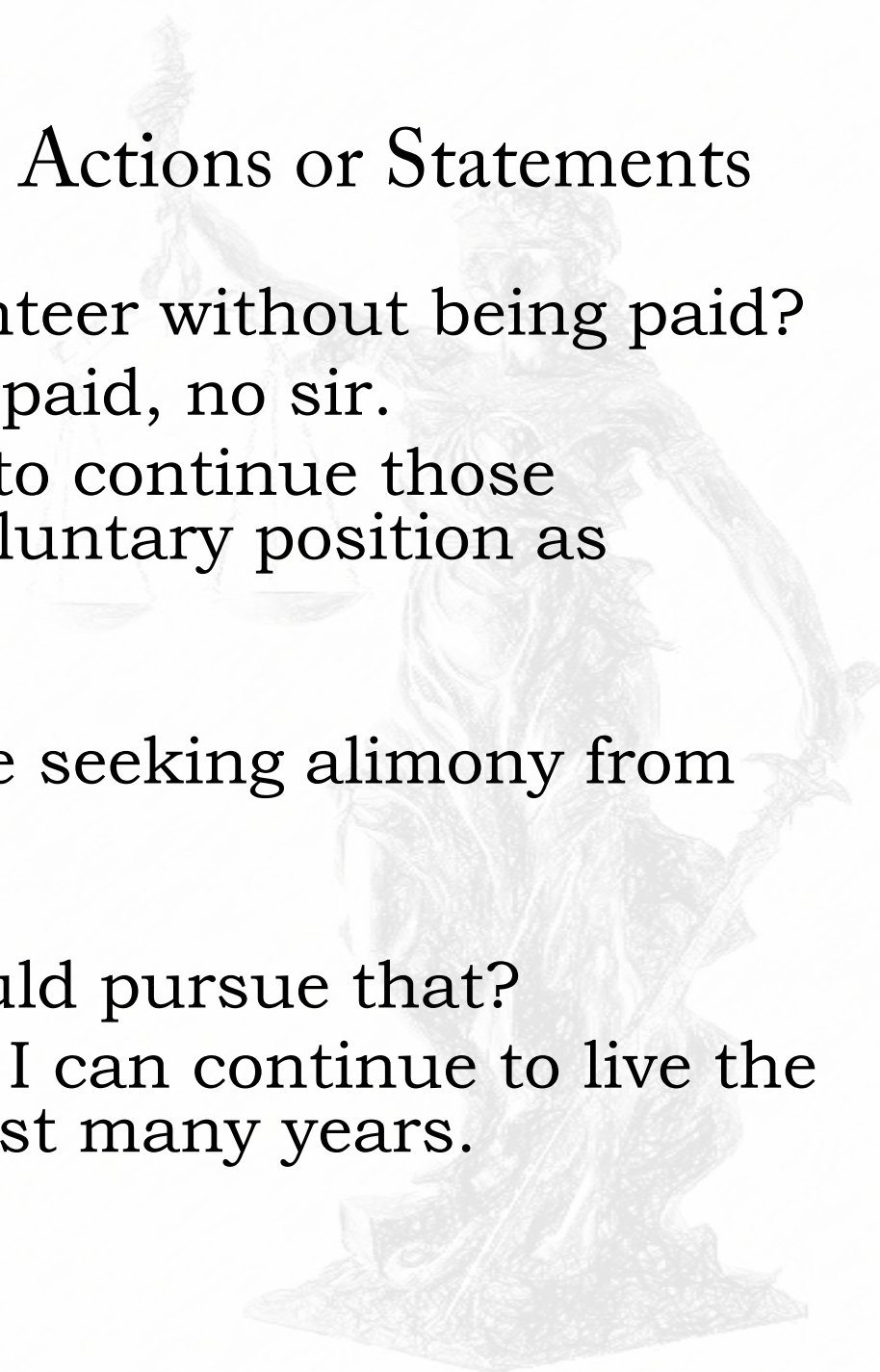
Mrs. Valdes-Fauli: Yes.

The Court: So then you are seeking alimony from your husband.

Mrs. Valdes-Fauli: Yes.

The Court: So that you could pursue that?

Mrs. Valdes-Fauli: So that I can continue to live the life that I've lived for the last many years.



Disqualification based on Actions or Statements

The Court: Right, which is what your lawyers have been telling you, is that right? I'm not asking specifically what they told you, but that is the standard that's in all of these books I've read. **So do you think you're going to end up being an alimony drone?**

Mrs. Valdes-Fauli: **I'm not sure what that means, sir.**

The Court: **Drone. Do you know what a drone is? A queen in a hive is a drone.**

Mrs. Valdes-Fauli: **You mean a worker?**

The Court: **No, because you don't want to be a worker, right?**

Mrs. Valdes-Fauli: **Sir, I don't want to have to go and get a job. I don't want to.**

Disqualification based on Actions or Statements

- In a case like this one where permanent alimony was a substantial issue to be decided, the trial court's “alimony drone” comment alone was sufficient to place the petitioner in fear that she will not receive a fair and impartial trial. It is not unreasonable to interpret that remark as demeaning. Valdes-Fauli v. Valdes-Fauli, 903 So.2d 214, 217 (Fla. 3DCA 2005).

Disqualification based on Actions or Statements

- The Judge goes on to call the wife a “woman scorned” and tells her that “closure was the last thing she was going to get if she persisted with her claims” and states that the husband was “getting eaten alive...”
- Whether taken separately or all together, the trial court's words and actions reasonably gave the wife a legitimate fear that she would not receive a fair trial in this matter. We are mindful of, and agree with, the view expressed by the dissent. However, because of the specific and personalized nature of the remarks made by the trial judge, we feel that this case is an exception to that view. The remarks, and the wife's legitimate fear, made the motion for disqualification legally sufficient. Valdes, 903 So.2d 214 at 218 (Fla. 3 DCA 2005).

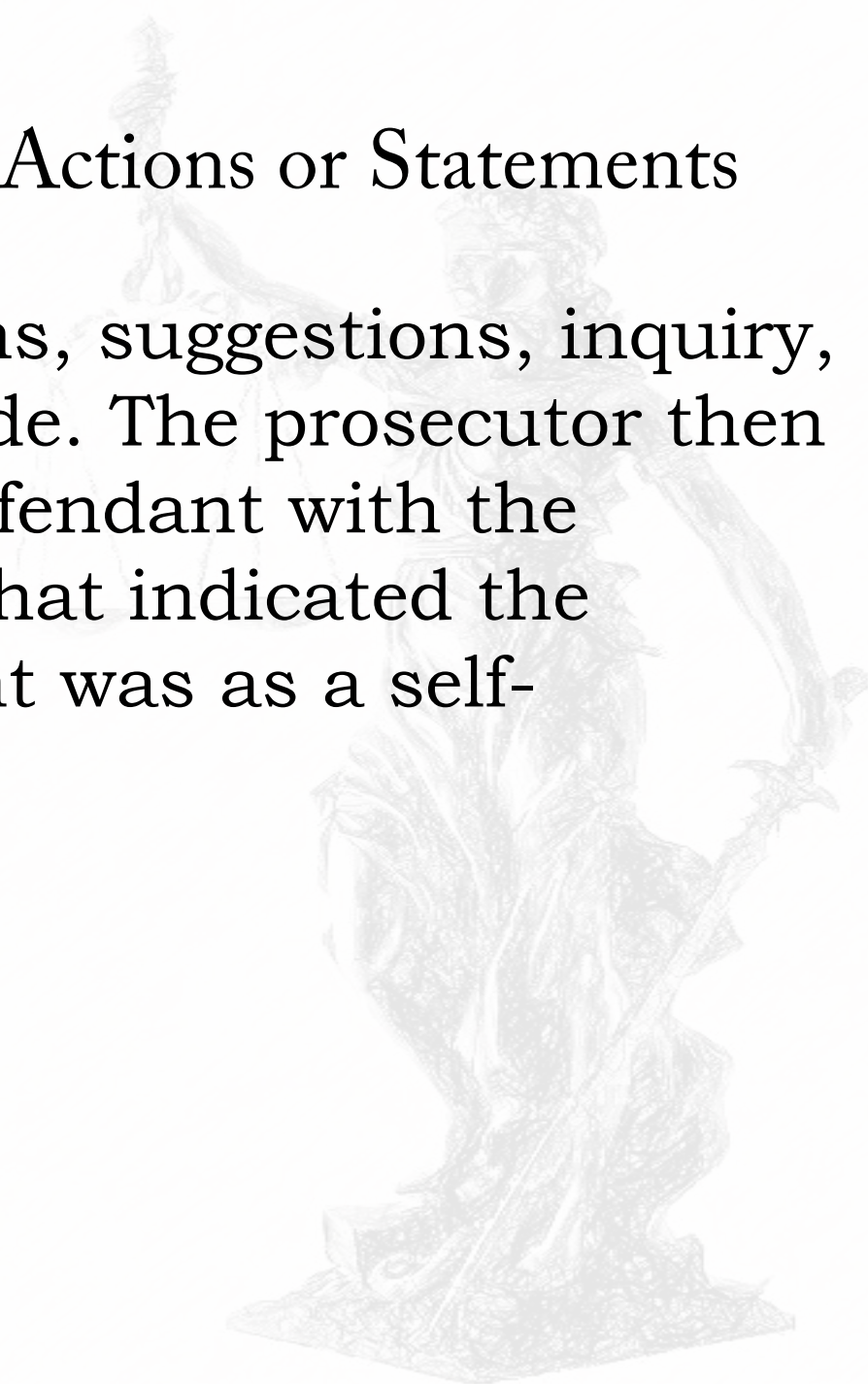
Disqualification based on Actions or Statements

- During the bench conference in a criminal trial, the Court pointed out to both trial counsel that the Defendant had completed an Affidavit of Insolvency with certain information that might have been contrary to his trial testimony.



Disqualification based on Actions or Statements

- No other representations, suggestions, inquiry, or statements were made. The prosecutor then tried to impeach the defendant with the affidavit of insolvency that indicated the defendant's employment was as a self-employed plumber.



Disqualification based on Actions or Statements

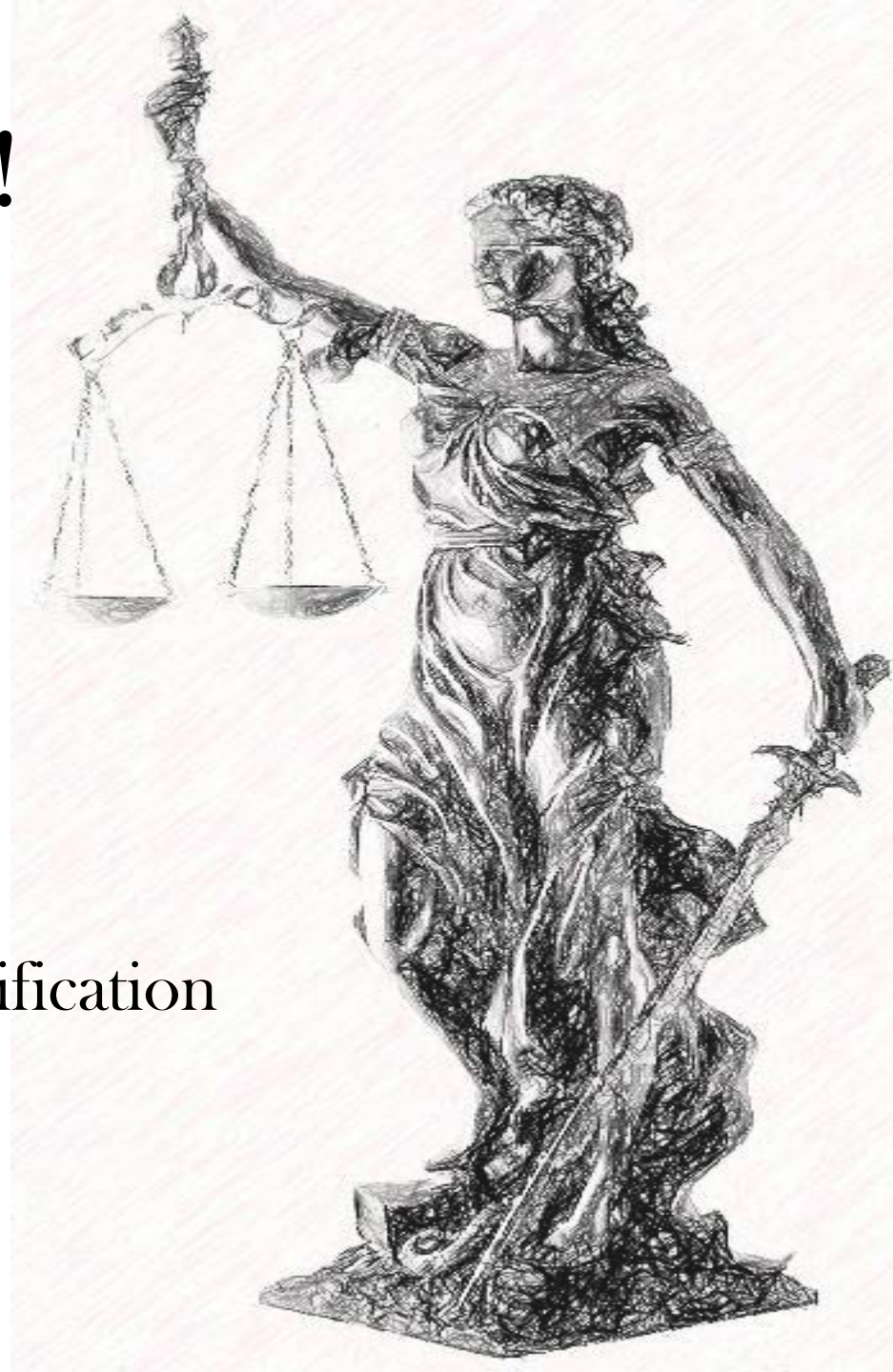
- The trial judge in this case assumed the role of prosecutor. Such conduct constitutes error. Court must then apply a harmless error analysis. In this example, the Court did not accept the State's argument that the error in this case is harmless.
Jimmy SPARKS v. STATE of Florida 740 So.2d 33, 37
(Fla. 1 DCA 1999)

Group Discussion!

Attorney Susan Seigle
and Groups 5 & 6



Procedural Issues of Disqualification



Procedural Issues of Disqualification

- Facts:

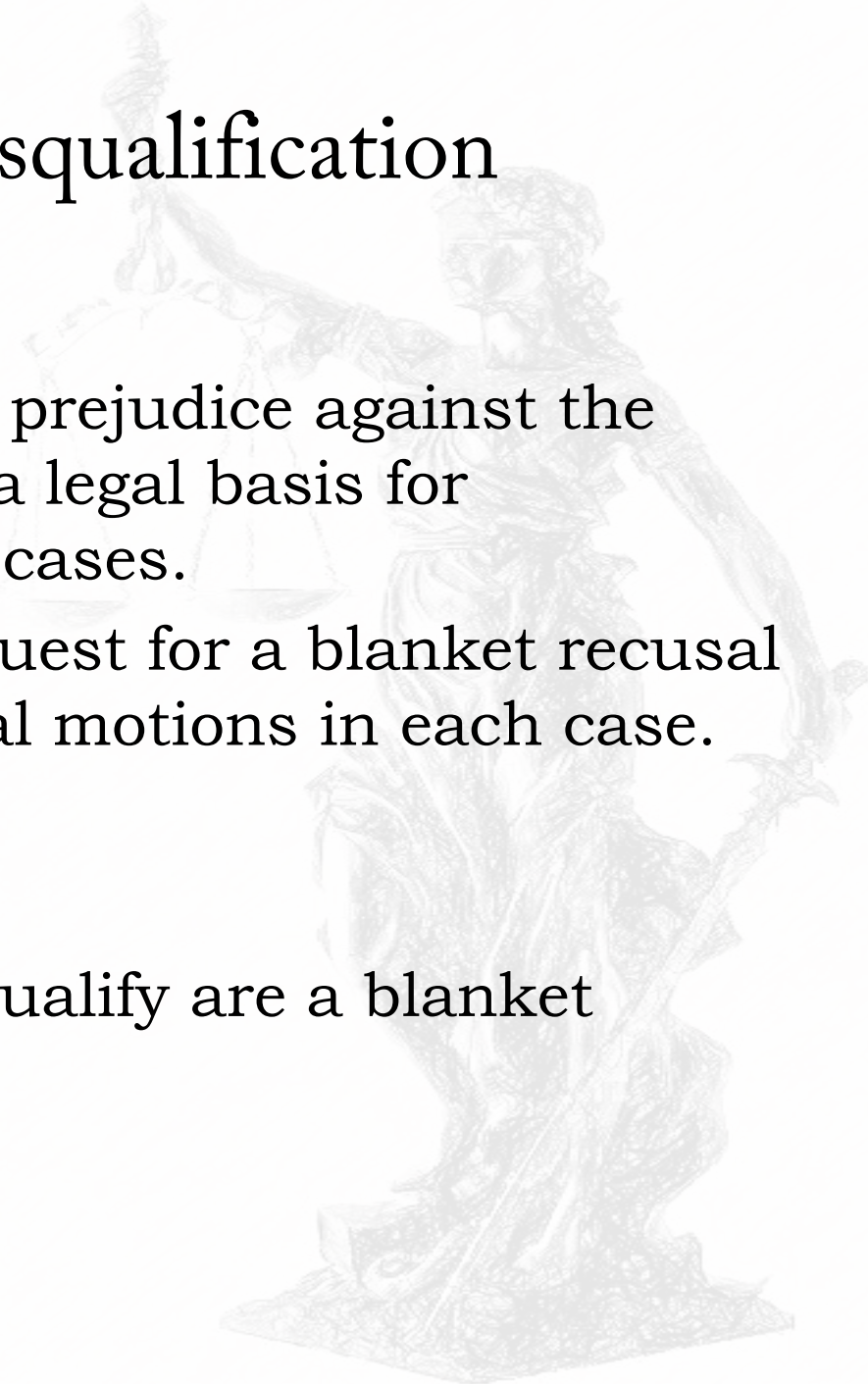
In a high profile case, the petitioner filed a motion to disqualify the judge on a case based upon comments the trial judge made concerning whether the petitioner or her attorneys contacted the media. After ruling on three other orders in the case, the judge issued an order of recusal. Thereafter, the attorney filed individual motions to disqualify the judge in sixteen other cases where they were counsel of record, asserting that the trial judge had shown bias and prejudice against the attorneys in the original case which presented a legal basis for disqualification in all other cases.

- Question:

Were the motions to disqualify in the other sixteen cases legally sufficient?

Procedural Issues of Disqualification

- Plaintiff's argument:
- The judge showed bias and prejudice against the attorneys which presented a legal basis for disqualification in all other cases.
- Their request was not a request for a blanket recusal because they filed individual motions in each case.
- Court's perspective:
- The sixteen motions to disqualify are a blanket request for recusal.



Procedural Issues of Disqualification

- Standard:
- Rule 2.330 requires a judge to enter an order granting disqualification if the motion to disqualify is “legally sufficient.”
- A motion is legally sufficient if it alleges facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. *See MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla.1990).
- The burden is on the party seeking disqualification to show a well-founded fear of not receiving a fair trial. *See Adkins v. Winkler*, 592 So.2d 357 (Fla. 1st DCA 1992).
- Courts look with disfavor on a blanket request for recusal. [Ginsberg v. Holt](#), 86 So.2d 650 (Fla.1956).

Procedural Issues of Disqualification

- In [Ginsberg](#), a lawyer filed a suit for an injunction to prevent a trial judge from considering any of his cases. The Florida Supreme Court affirmed a dismissal of the complaint, stating:

“There is no provision in the statutes or the decisions for a blanket decree restraining a particular judge from hearing all cases in which a particular attorney may appear in his professional capacity as an officer of the court and we unreservedly decline to introduce such a novel and revolutionary procedure.”

Procedural Issues of Disqualification

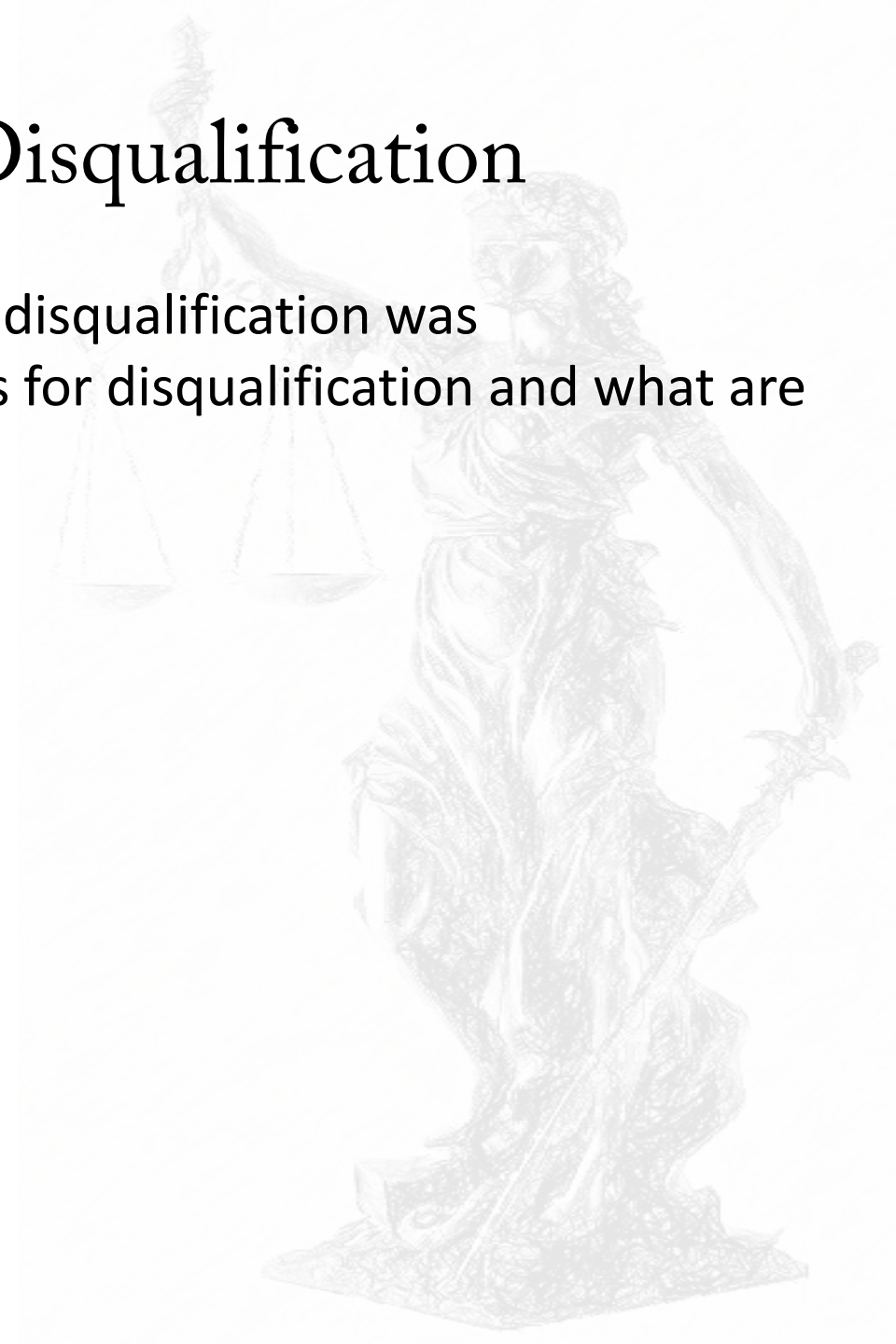
- The Florida Supreme Court restated that principle in [Livingston v. State, 441 So.2d 1083 \(Fla.1983\)](#), and emphasized the point with the categorical warning that “a lawyer's request for a general disqualification will not be granted.” [Id. at 1085.](#) Although petitioners' attorneys deny filing a blanket motion for recusal, that is in effect what has been done by filing a motion to recuse in every single pending case in which the trial judge is presiding and the attorneys are counsel of record.

Procedural Issues of Disqualification

- Petitioner Dominic filed an untimely motion (by two days) to disqualify the judge after he discovered the facts constituting the grounds for the motion. He also forgot to include the requisite good faith certification by the attorney. Two of the alleged facts in the motion included: (1) adverse legal rulings; and that the (2) judge sent emails about Dominic to all the other circuit court judges and the hearing officers in violation of a Judicial Canon.
- In his order, the trial judge commented on the validity of the facts asserted in the motion by stating that "there was substantial likelihood that the defendant's attorney committed a violation of the Rules Regulating The Florida Bar and took appropriate action as required by [the Code of Judicial Conduct]...."

Procedural Issues of Disqualification

- The appellate court found that disqualification was warranted. What was the basis for disqualification and what are the arguments against?



Procedural Issues of Disqualification

- *Basis for disqualification:* The disqualification was not based on the untimely, uncertified, and insufficient motion, but on the fact that the trial court commented on the truthfulness of the facts asserted in the motion since that created a new basis for disqualification that the court relied on. If the trial court had not commented, then motion would have been denied.
- *Argument denying motion for disqualification:* The motion did not follow Fla. R. Jud. Admin. 2.330 since it was untimely, insufficient, and uncertified. Adverse rulings and the grounds that the emails were sent all over the circuit court were held to be legally insufficient for disqualification. The dissent stated that the court should not have based the disqualification on the comment of truthfulness (which the judge believed was a weak argument), but should have simply stated that the motion was legally insufficient and denied the motion.

Group Discussion!

The Honorable Victor Hulslander
and Groups 7 & 8



Disqualification Orders, Appellate
Issues & Judicial Perspective



Trial vs. Appellate Judge Disqualification

- Judge Sunshine, a circuit court judge sitting in her capacity as a circuit court appellate judge, participated in an affirmance of a county court judgment against Rain, Inc., an insurance company in the amount of \$2,400. Rain, Inc. was unaware of which judges would comprise the appellate division until the day of the argument.
- It seems that years earlier, and while in private practice, Judge Sunshine signed a small claims complaint against Rain, Inc. Her husband and then partner at the time had also expressed an intention “to put Rain, Inc. out of business.” A few days after the argument, Rain, Inc. moved to disqualify Judge Sunshine.
- **What is the legal standard which Judge Sunshine must follow to resolve the motion to disqualify?**

Answer:

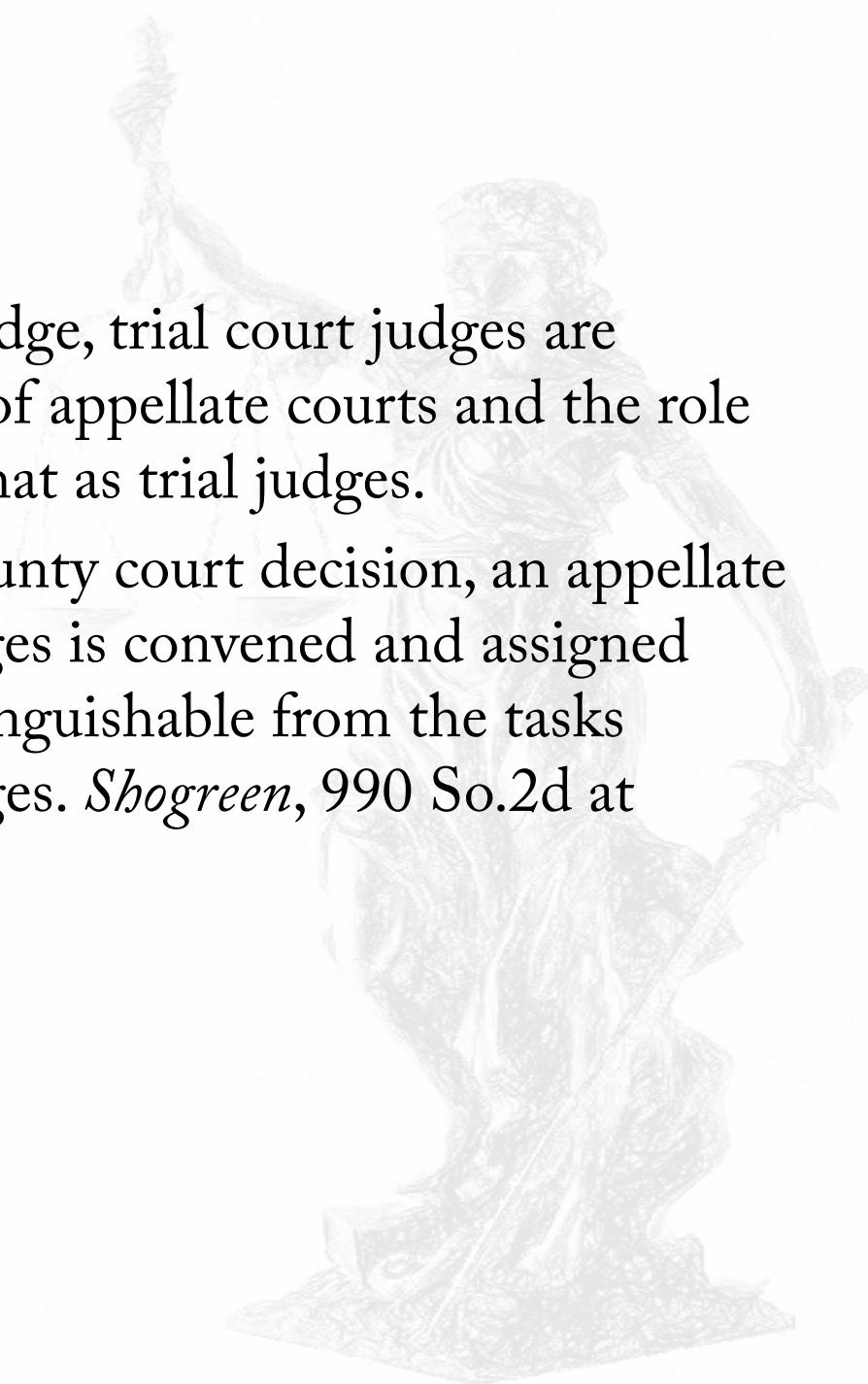
- Two Different Standards For Resolving Motions to Disqualify Circuit Judges Depending on the Judge's Status in the Case
 - **Trial Court** – A party seeking to disqualify a judge at the trial court level only needs to show “a well grounded fear” that he/she will not receive a fair trial at the hands of the judge. Judge can only determine if the motion is legally sufficient. If the motion is legally sufficient, judge must grant the motion. *See Clarendon National Insurance Company v. Shogreen*, 990 So.2d 1231 (Fla. 3d DCA 2008).
 - **Appellate Court** – Judge must determine for himself both the legal sufficiency of such a request seeking his disqualification and also the propriety of withdrawing in any particular circumstance; *In Re Estate of Carlton*, 378 So.2d 1212 (Fla. 1980).

Answer Continued:

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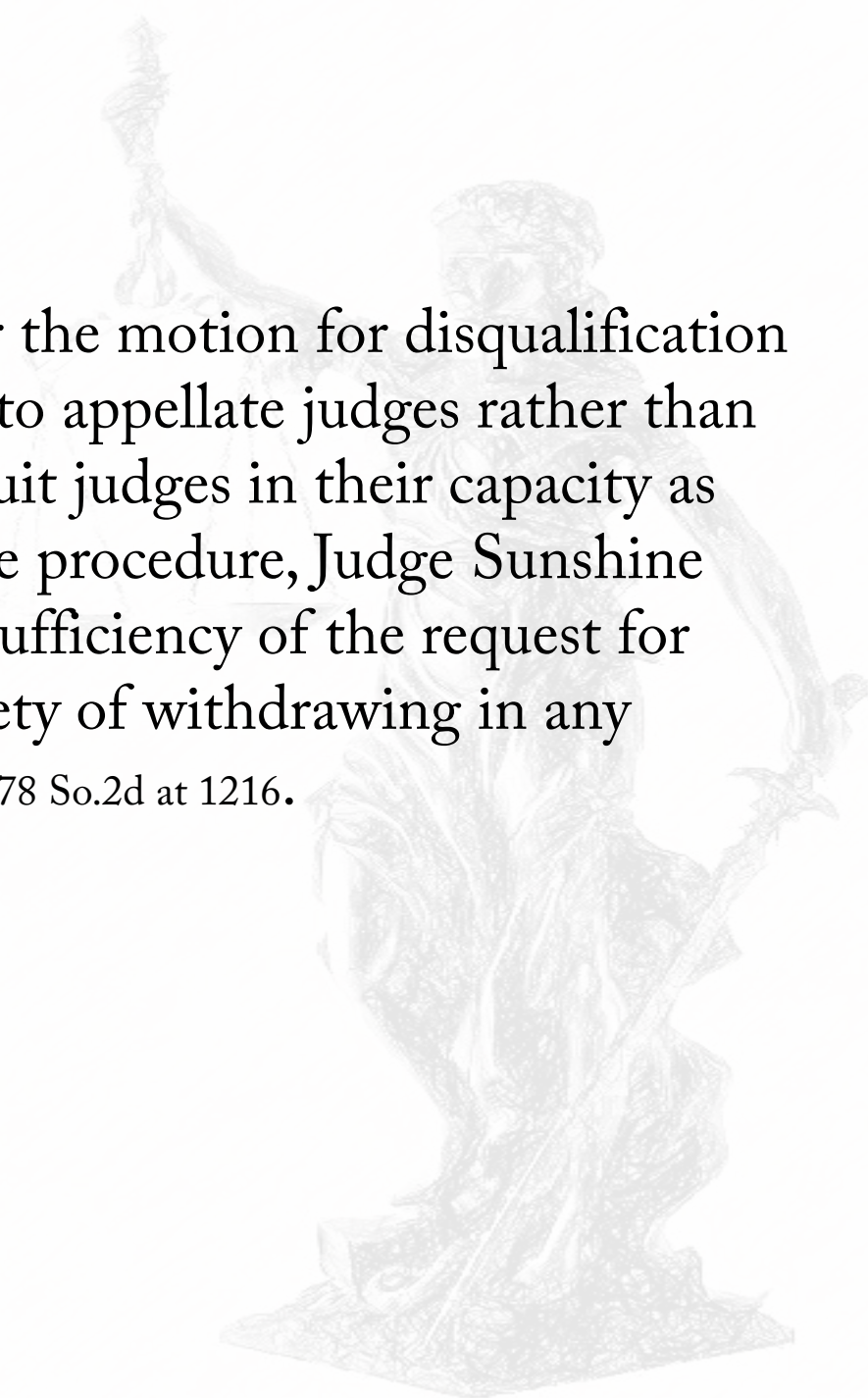
Answer Continued:

- While sitting as an appellate judge, trial court judges are subject to the procedural rules of appellate courts and the role they assume is different from that as trial judges.
- Furthermore, on review of a county court decision, an appellate panel of three circuit court judges is convened and assigned tasks which are virtually indistinguishable from the tasks assigned to other appellate judges. *Shogreen*, 990 So.2d at 1233.



Answer Continued:

- Judge Sunshine should consider the motion for disqualification under the procedure applicable to appellate judges rather than the procedure applicable to circuit judges in their capacity as trial judges. Under the appellate procedure, Judge Sunshine must determine both the legal sufficiency of the request for disqualification and “the propriety of withdrawing in any particular circumstance.” *Carlton*, 378 So.2d at 1216.



Emotional Components of Motions to Disqualify

- Lawyer Perspective

- Lawyer may feel hesitant to file such motions on judge before whom they practice regularly.
- Motion has nothing to do with opinion of lawyer as related to judge. Instead, motion is related to opinion of client as related to the judge.
- Lawyer's separate certification is that the motion and the **client's statements** are made in good faith. FLA. R. JUD. ADMIN. 2.330(c)(4).
- It is NOT the lawyer's statement that he/she believes the judge cannot be impartial; it is the **client's statement**. That's the difference between the client and the lawyer.

Emotional Components of Motions to Disqualify

- Judge's Perspective
 - Judge's may be offended when one of these motions is filed against them. Judge may take it personally but it is not a personal issue, and judge should not take it as such.
 - It is the client's belief that the Judge cannot be impartial and the lawyer is simply filing the motion on behalf of client.
 - Often, disqualification may be a relief to the judge.

