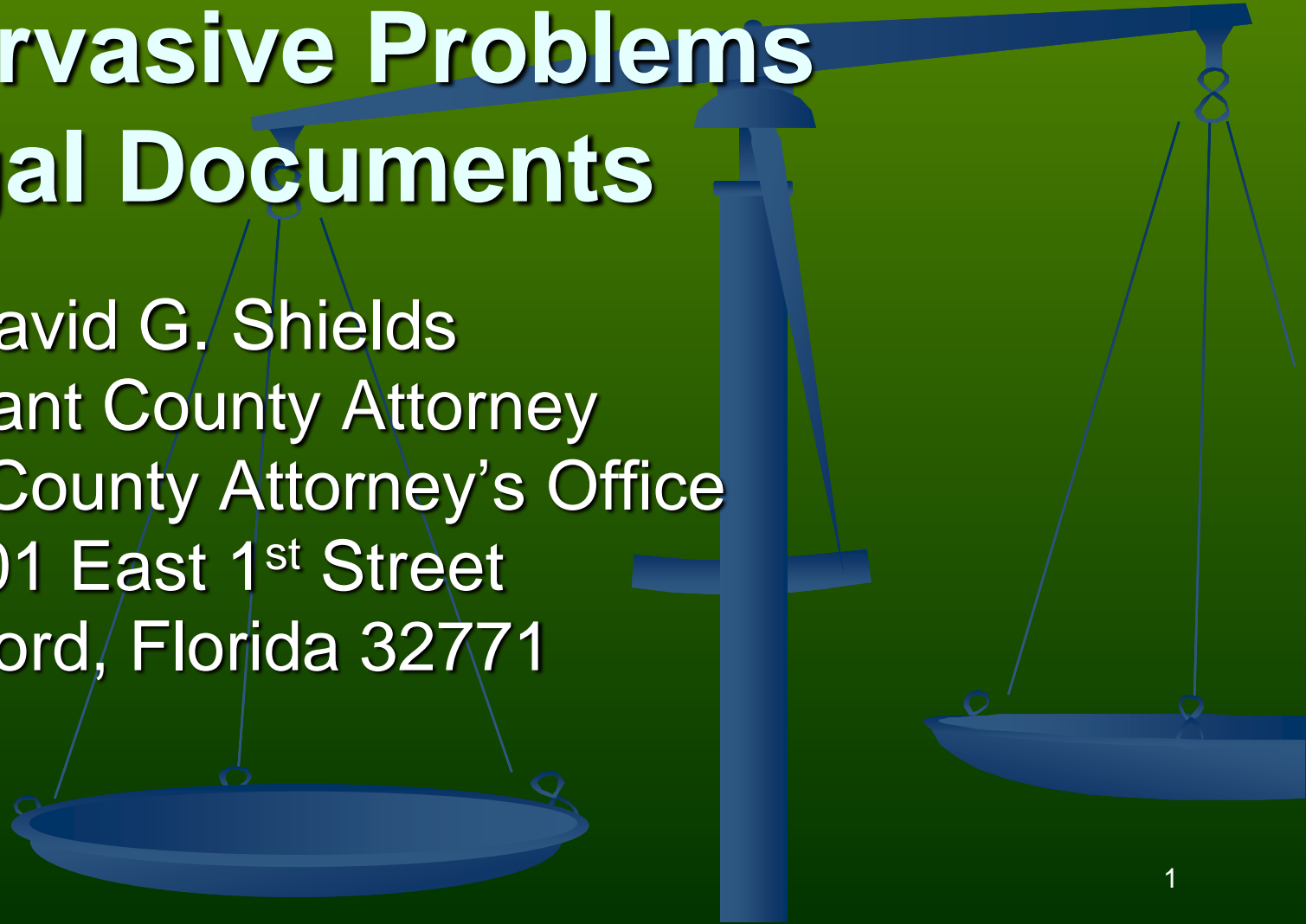


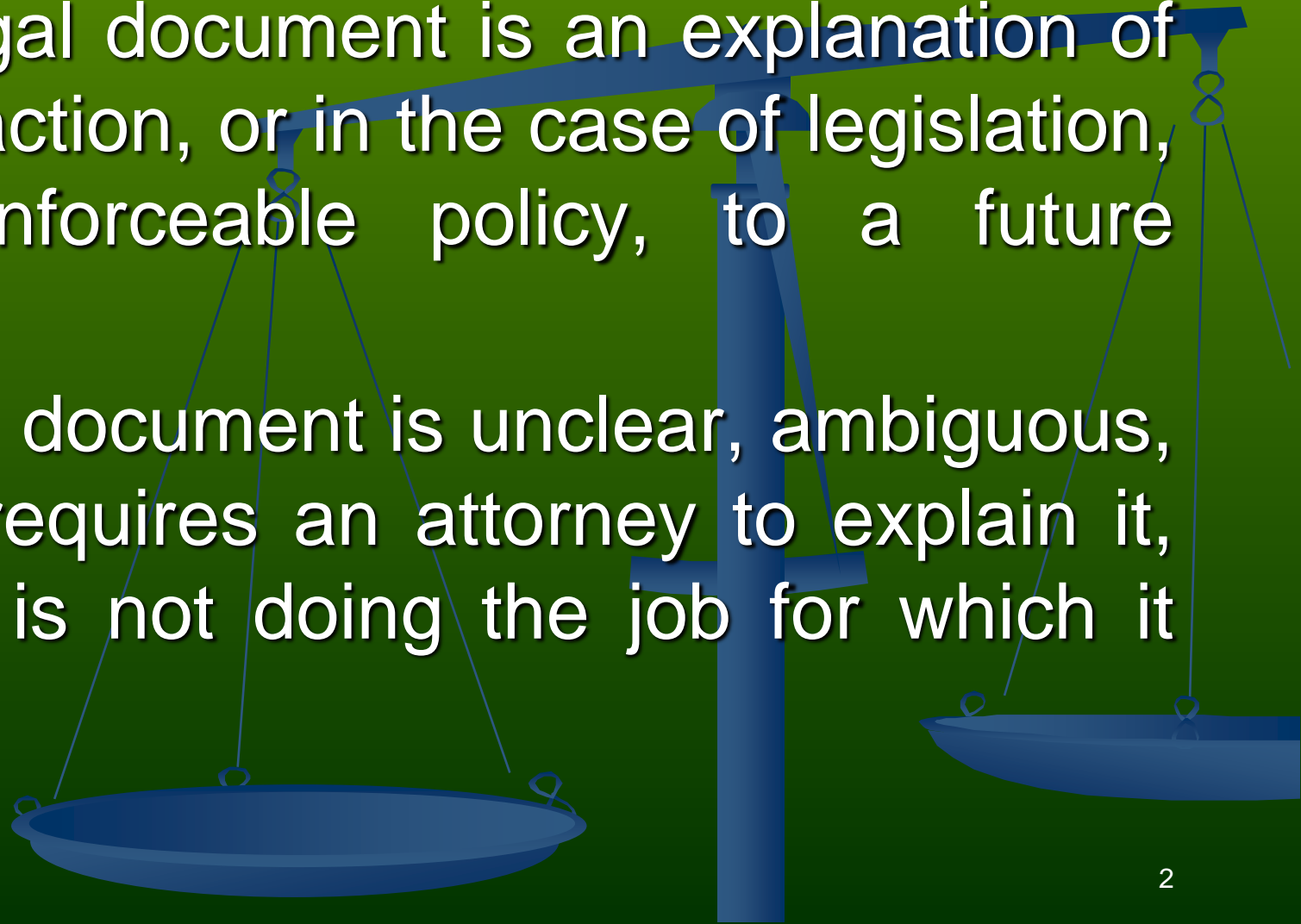
Clobber Bad Writing Fixing Pervasive Problems in Legal Documents

David G. Shields
Assistant County Attorney
Seminole County Attorney's Office
1101 East 1st Street
Sanford, Florida 32771



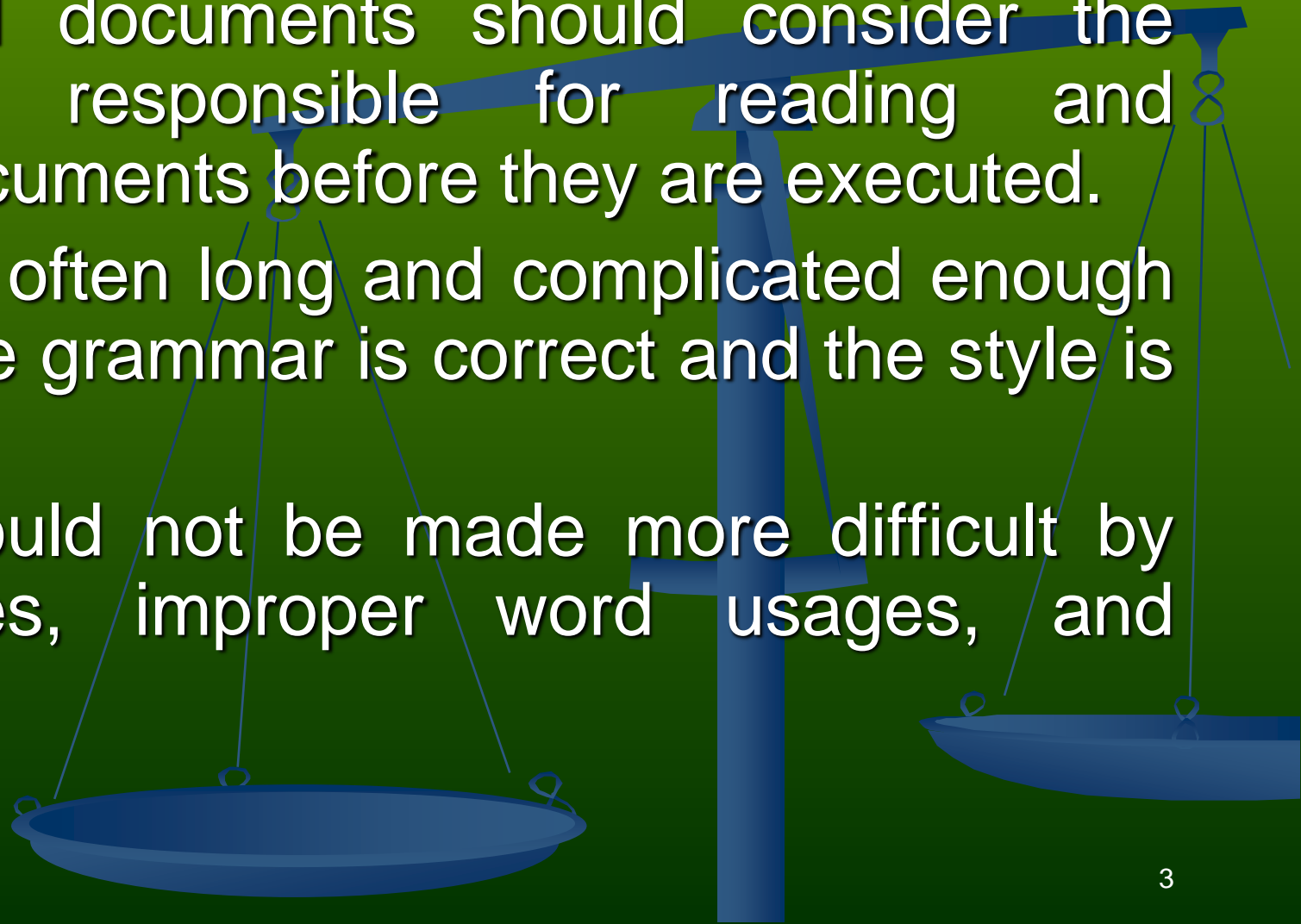
Why the Concern about Legal Drafting?

- At its essence, a legal document is an explanation of the terms of a transaction, or in the case of legislation, a statement of enforceable policy, to a future hypothetical judge.
- To the extent a legal document is unclear, ambiguous, difficult to read, or requires an attorney to explain it, the legal document is not doing the job for which it was intended.



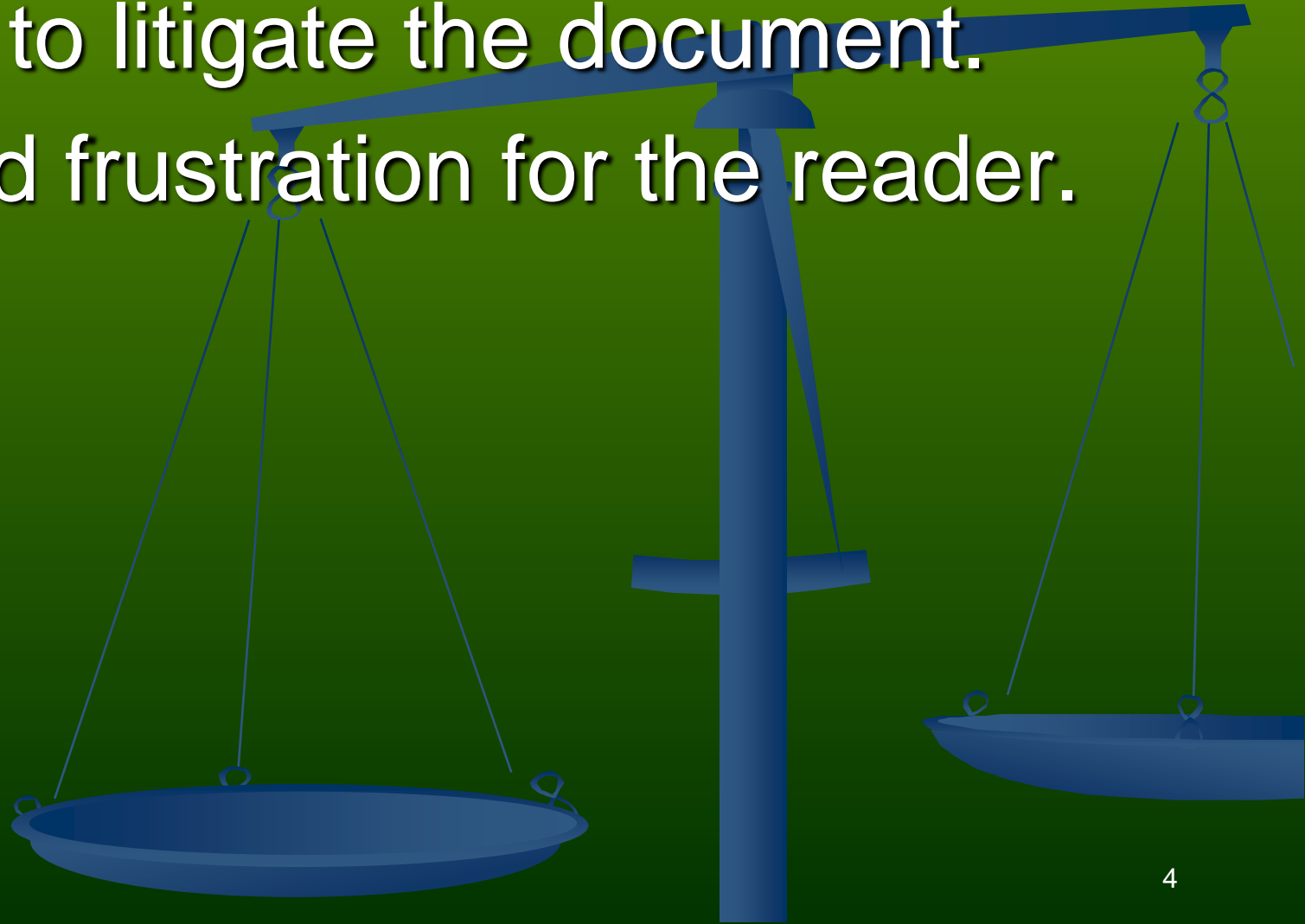
Why the Concern about Legal Drafting?

- The writers of legal documents should consider the persons who are responsible for reading and understanding the documents before they are executed.
- Legal documents are often long and complicated enough to read even when the grammar is correct and the style is polished.
- The reader's job should not be made more difficult by grammatical mistakes, improper word usages, and antiquated legalese.



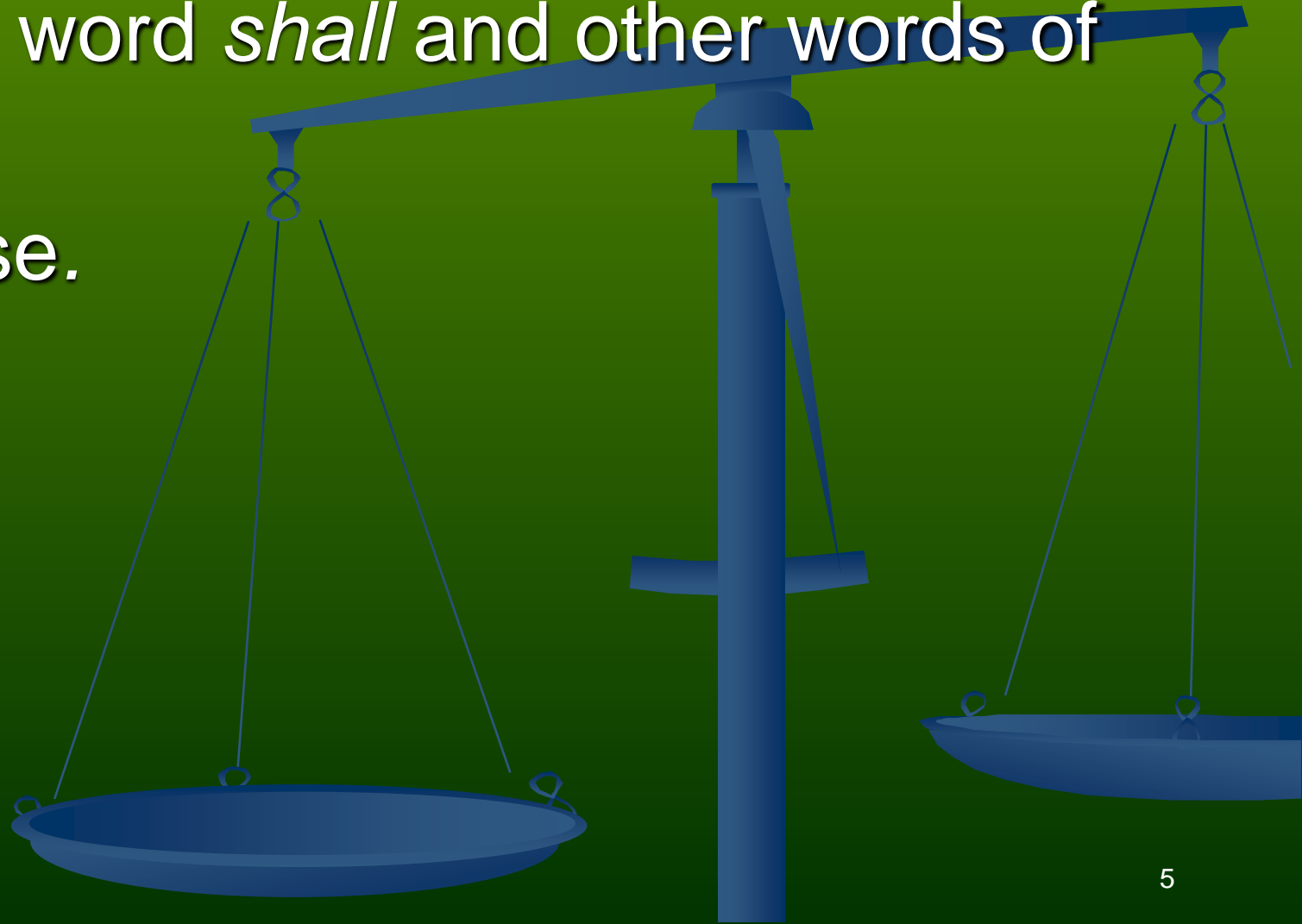
Why the Concern about Legal Drafting?

- To avoid having to litigate the document.
- To save time and frustration for the reader.



The Two Biggest Drafting Problems

- The misuse of the word *shall* and other words of authority.
- The use of legalese.



Part 1

Words of Authority



Shall, Will, and Must

A Subclass of Modal Auxiliary Verbs

Modal Auxiliary Verbs

- Modal auxiliary verbs are auxiliary verbs that provide information about the mood of the main verb that follows.
- This information about the mood of the main verb involves likelihood, ability, permission, and obligation.
- Examples of modal auxiliary verbs: *shall, will, must, can, may, should, would, could, might*.
- Historically, *shall* and *will* have also been used to indicate the future tense, but modality and tense are two different things.
- Thus, *shall* and *will* have been used interchangeably as either a modal auxiliary verb or to indicate the future tense.

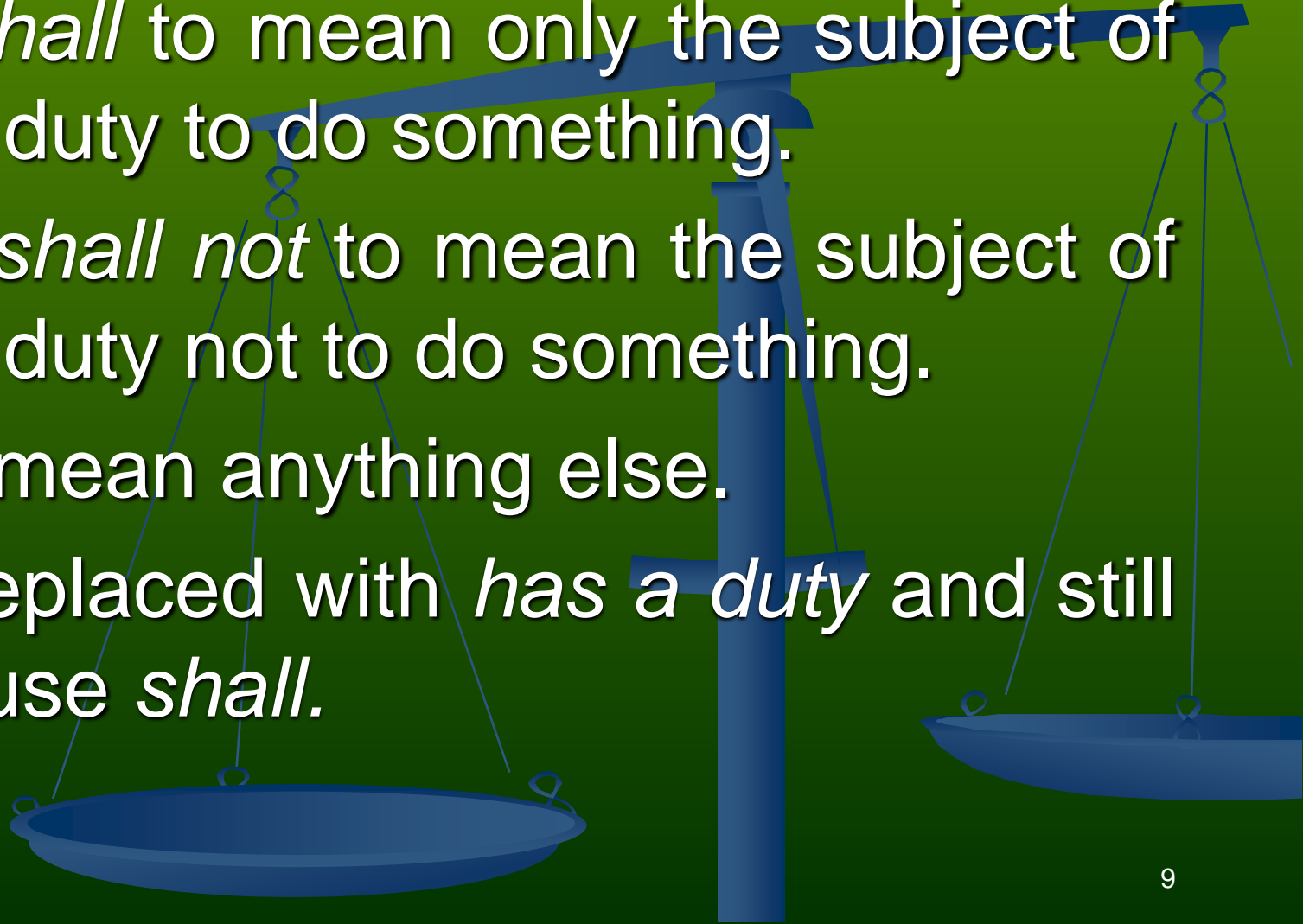
Bryan Garner on Words of Authority

“Few reforms would improve legal drafting more than if drafters were to begin paying closer attention to the modal verbs by which they set forth duties, rights, prohibitions, and entitlements. In the current state of common-law drafting, these verbs are a horrific muddle—and, what is even more surprising, few drafters even recognize this fact. The primary problem is the word *shall* . . .”

Garner’s Dictionary of Legal Usage 952 (3d ed. 2011)

The Best Solution for *Shall*

- Restrict the word *shall* to mean only the subject of the sentence has a duty to do something.
- Restrict the words *shall not* to mean the subject of the sentence has a duty not to do something.
- Do not use *shall* to mean anything else.
- If *shall* cannot be replaced with *has a duty* and still make sense, don't use *shall*.



Approaches to the Use of *Shall*

- The American Rule: Limit *shall* to mean “has a duty to.”
- The ABC Rule: Ban *shall* completely.
 - Examples: The Federal Rules of Civil Procedure, the Rules of the Florida Bar.
- Let *shall* run wild.
 - This approach leads to confusion and litigation.

Garner's Dictionary of Legal Usage

A Recent Example of the ABC Rule

(b) Minimum Hourly Continuing Legal Education Requirements. Each member ~~shall~~ must complete a minimum of ~~30~~ 33 credit hours of approved continuing legal education activity every 3 years. Five of the ~~30~~ 33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs and 3 of the 33 credit hours must be in approved technology programs . . .

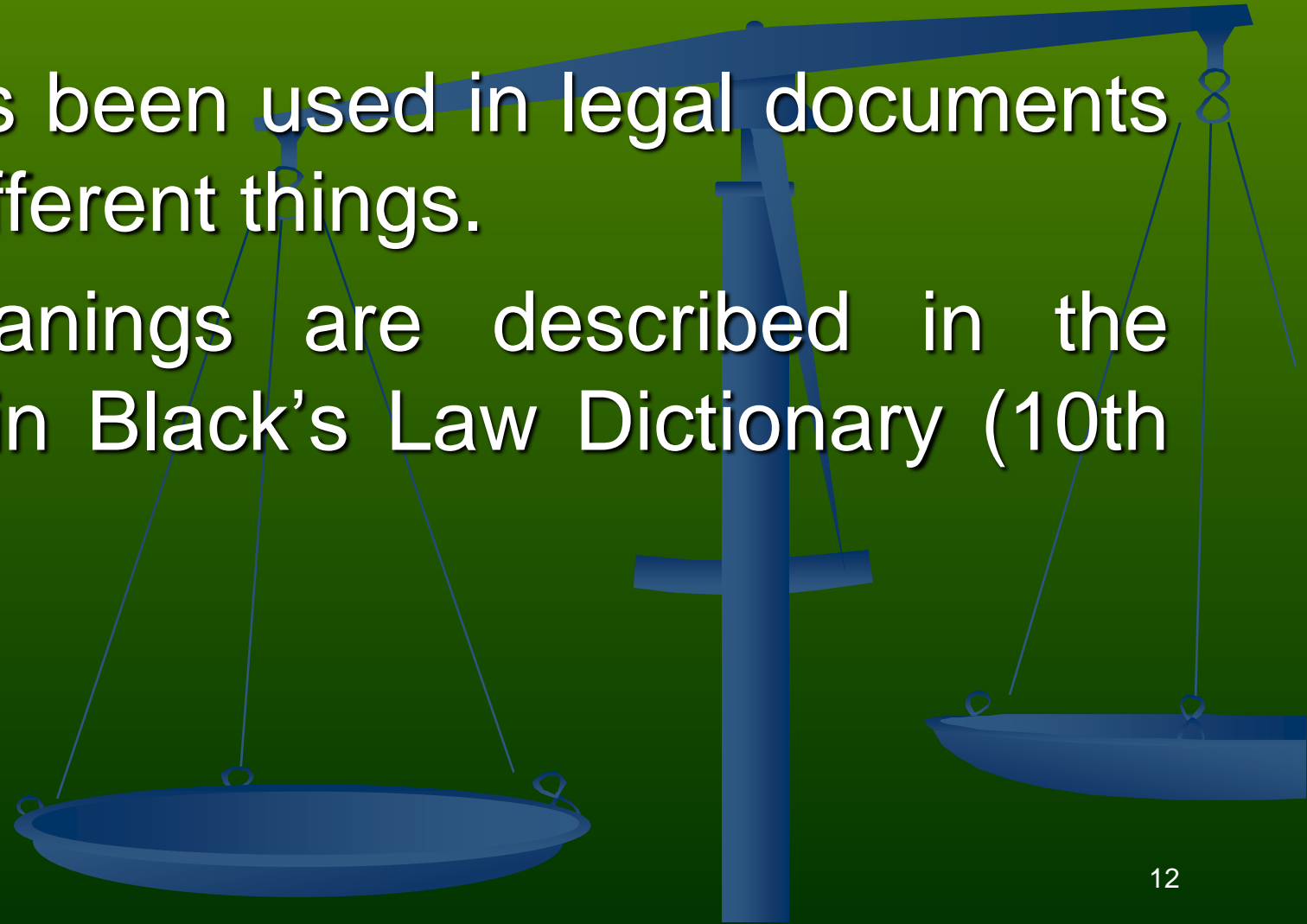
In re: Amendments to Rules Regulating the Fla. Bar 4-1.1 & 6-10.3, 200 So. 3d 1225, 1228 (Fla. 2016).

Under the American Rule, *shall* was completely acceptable in the second sentence.

Shall as Defined in Black's Law Dictionary

(10th ed. 2014)

- The word *shall* has been used in legal documents to mean several different things.
- All of these meanings are described in the definition of *shall* in Black's Law Dictionary (10th ed. 2014), but --

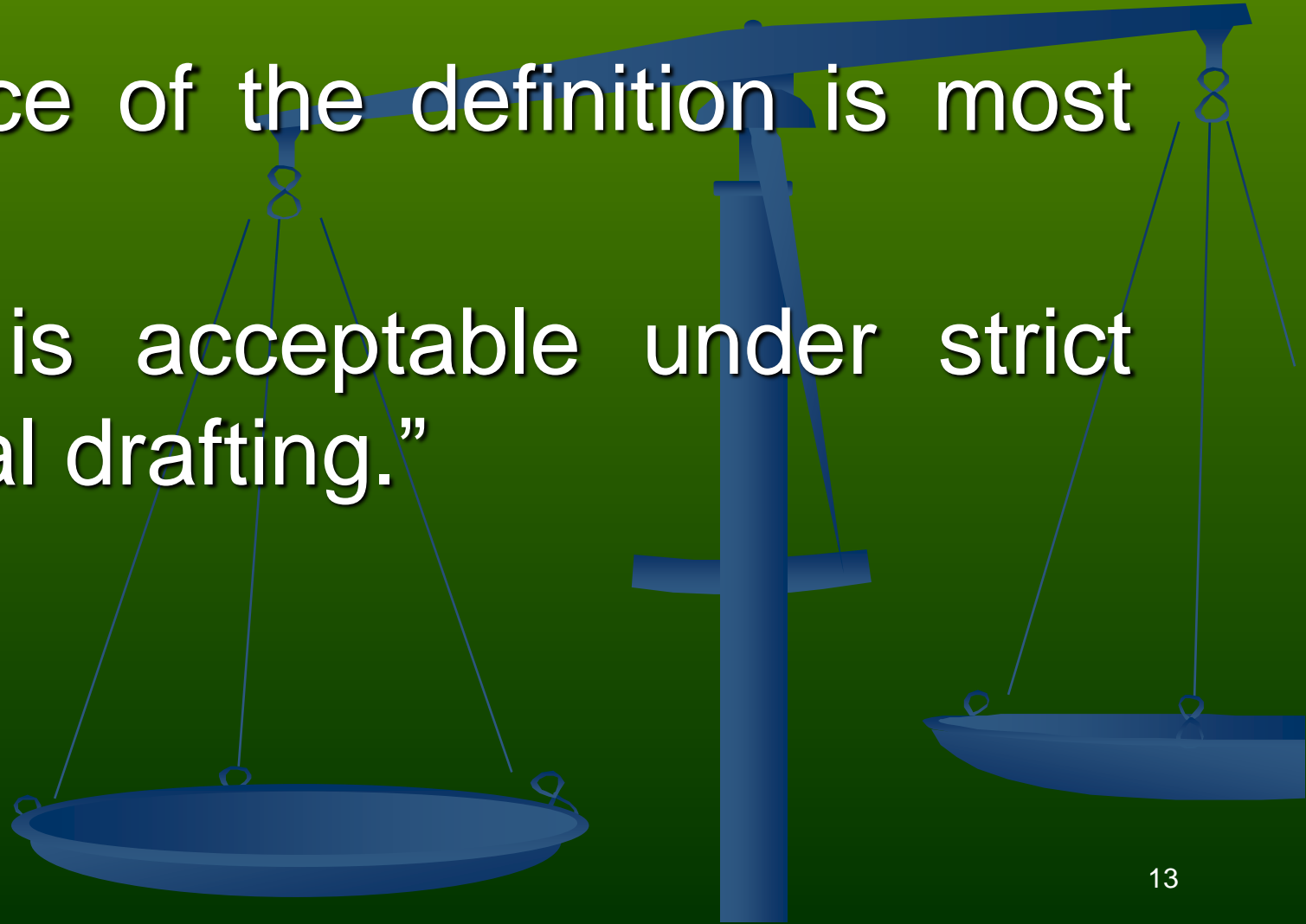


Shall as Defined in Black's Law Dictionary

(10th ed. 2014)

- The last sentence of the definition is most critical:

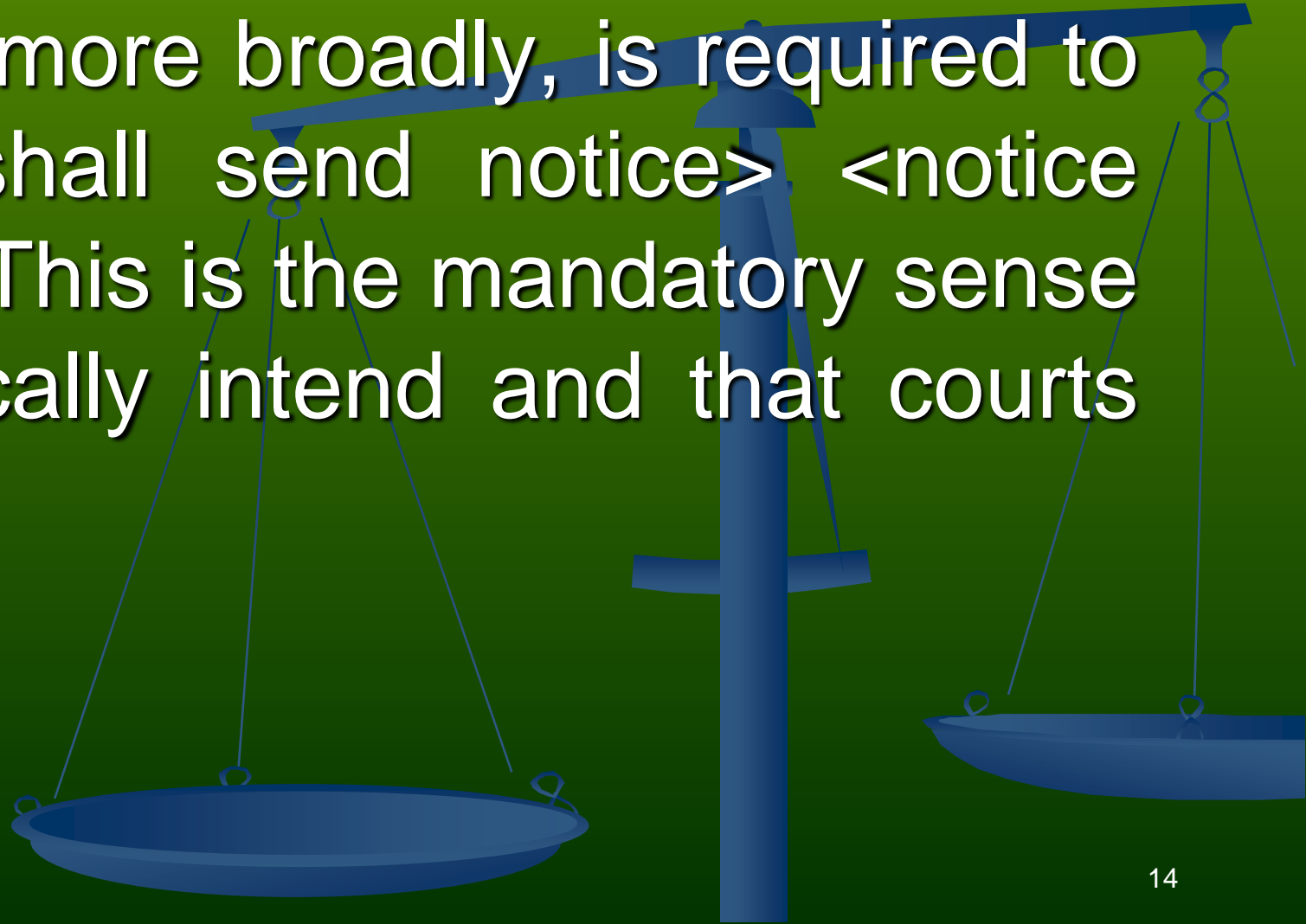
“Only sense 1 is acceptable under strict standards of legal drafting.”



Shall as Defined in Black's Law Dictionary

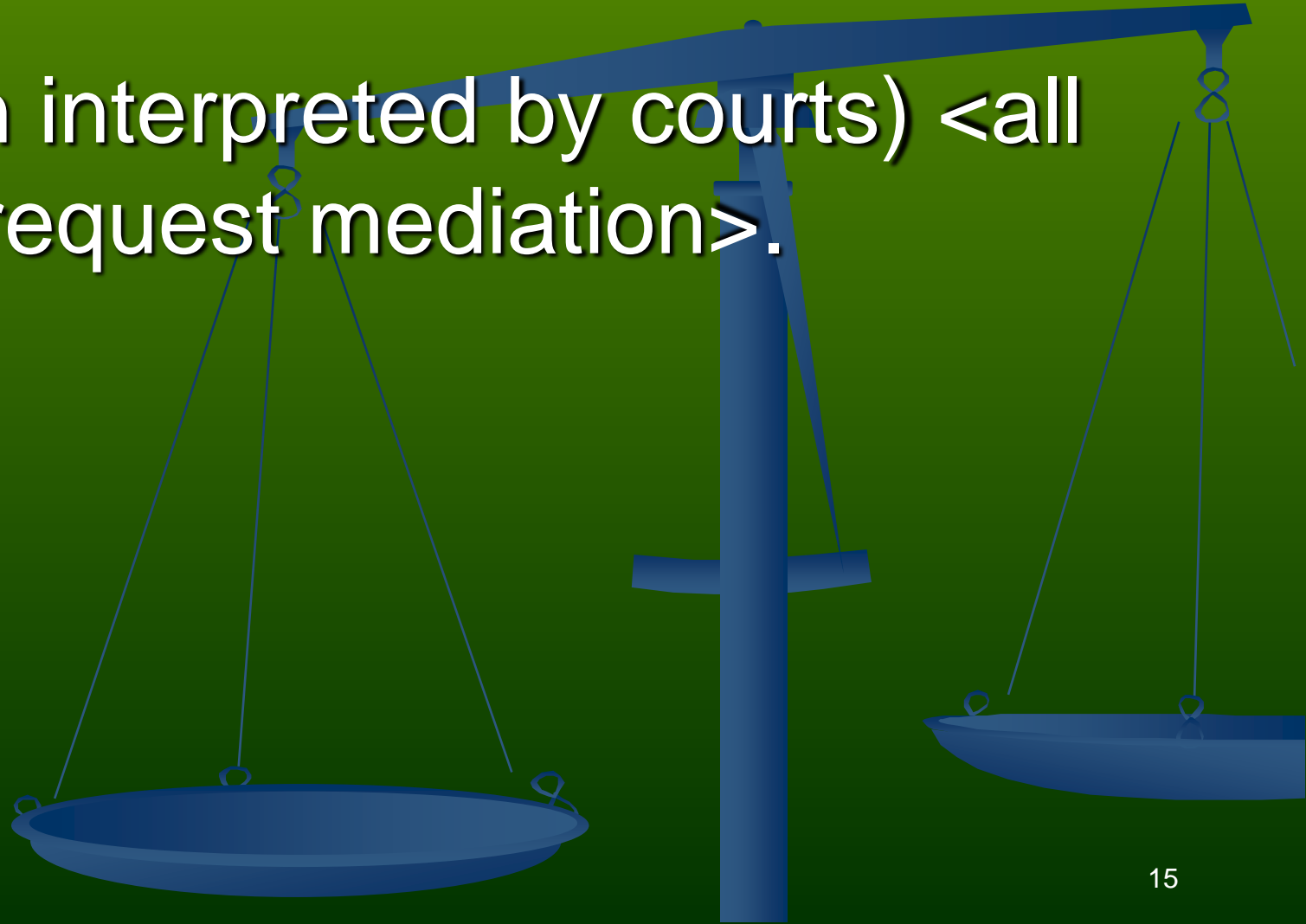
(10th ed. 2014)

1. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold.



Shall as Defined in Black's Law Dictionary (10th ed. 2014)

2. Should (as often interpreted by courts) <all claimants shall request mediation>.



Shall as Defined in Black's Law Dictionary

(10th ed. 2014)

3. May <no person shall enter the building without first signing the roster>. • When a negative word such as *not* or *no* precedes *shall* (as in the example in angle brackets), the word *shall* often means *may*. What is being negated is permission, not a requirement.

Shall as Defined in Black's Law Dictionary

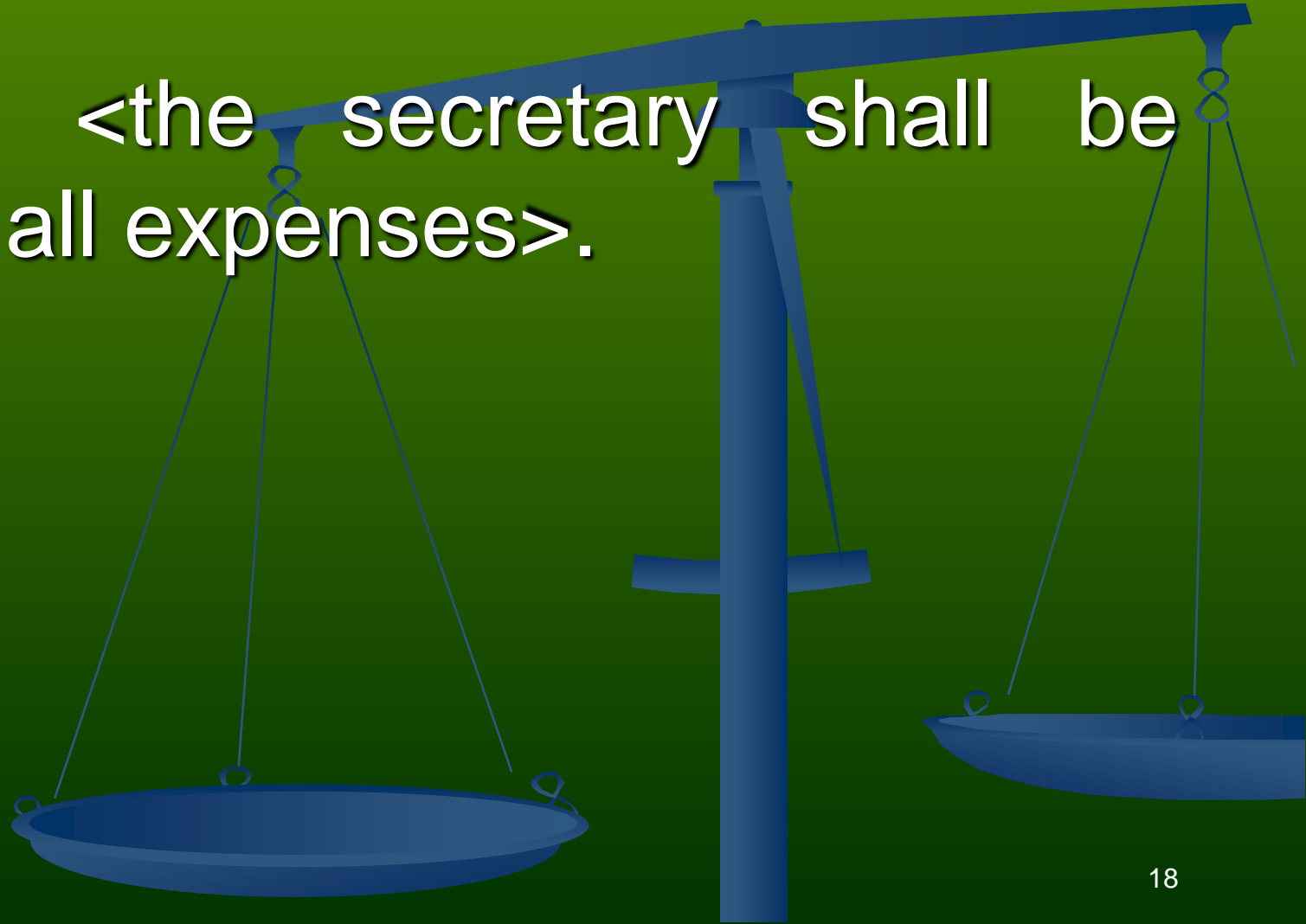
(10th ed. 2014)

4. Will (as a future-tense verb) <the corporation shall then have a period of 30 days to object>.



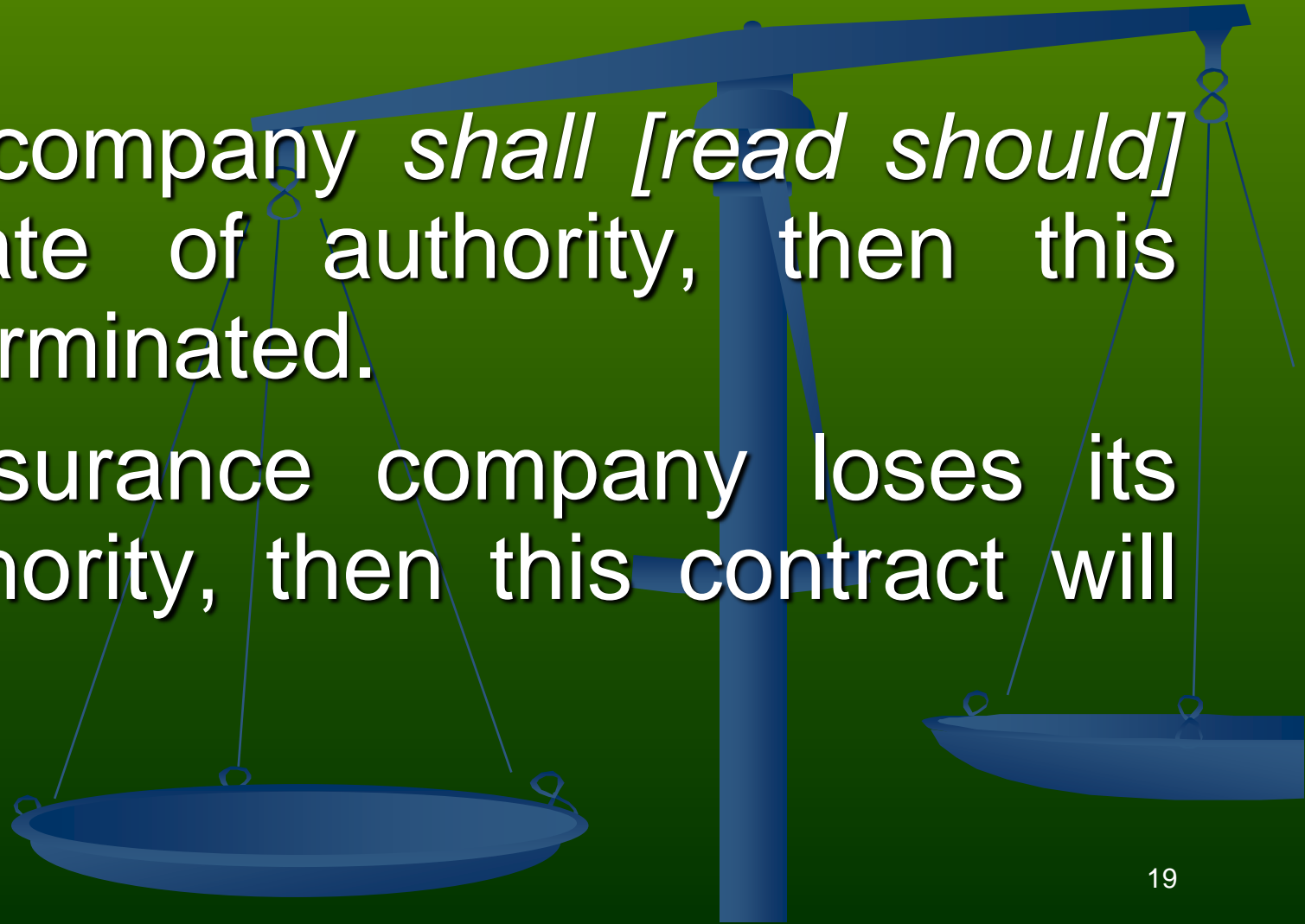
Shall as Defined in Black's Law Dictionary (10th ed. 2014)

5. Is entitled to <the secretary shall be reimbursed for all expenses>.



One Other Misuse of *Shall*

- As a conditional.
- If the insurance company *shall* [read *should*] lose its certificate of authority, then this contract will be terminated.
- Better: If the insurance company loses its certificate of authority, then this contract will be terminated.



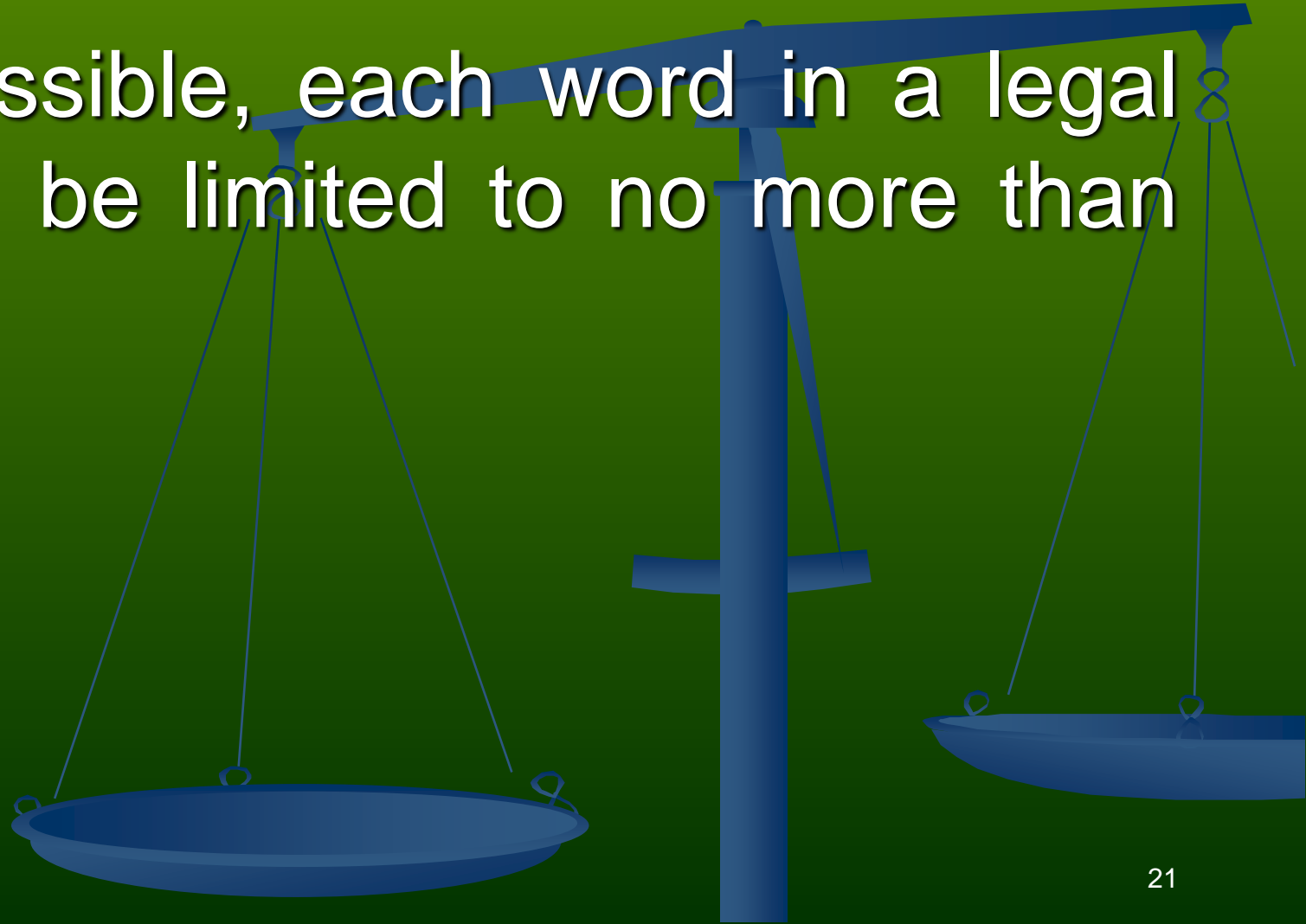
Summary of Possible Meanings for *Shall*

- Duty or obligation
- Recommendation (should)
- Permission (may)
- Future tense auxiliary verb (will)
- Entitlement
- Conditional



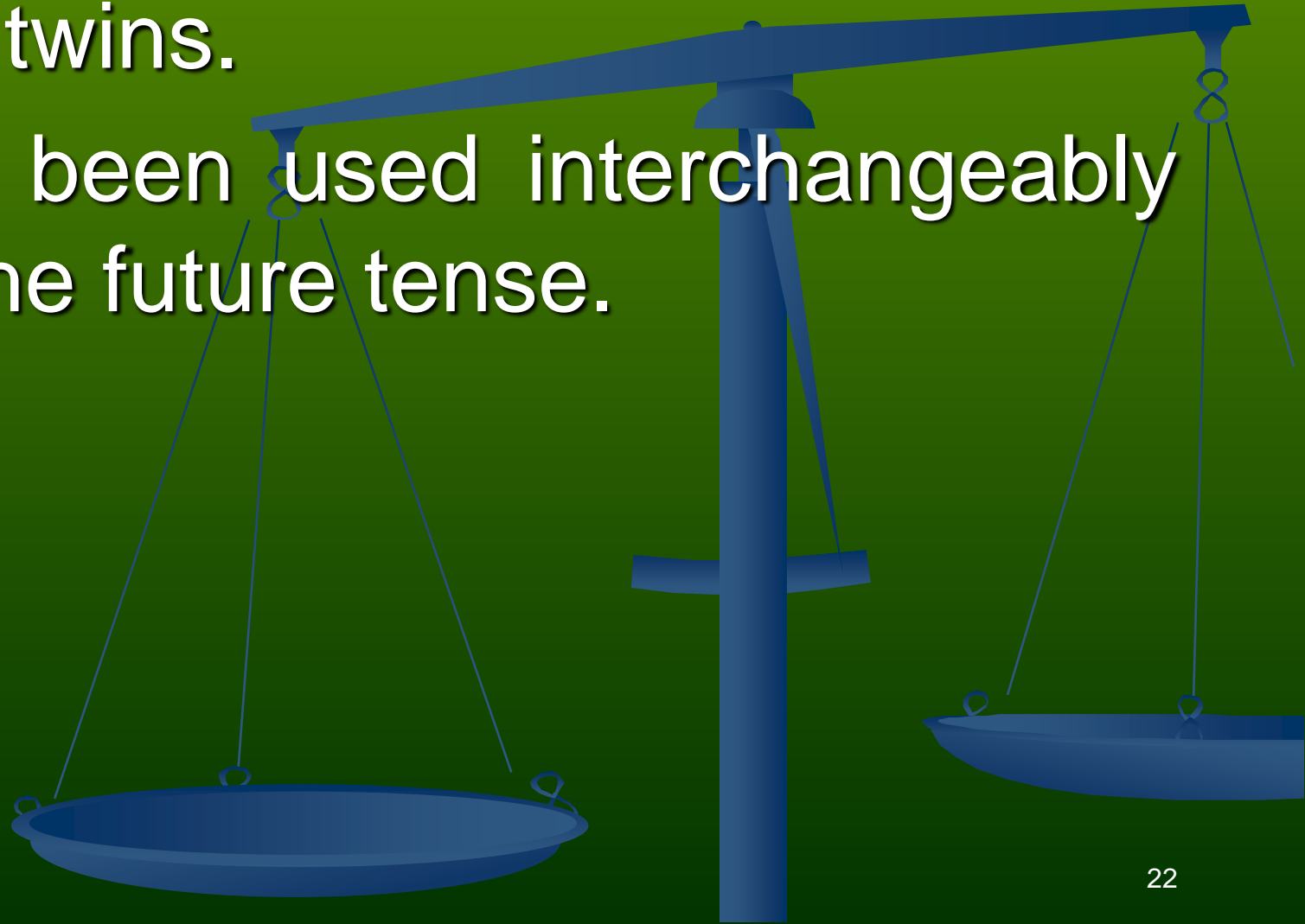
A Drafting Best Practice

- To the extent possible, each word in a legal document should be limited to no more than one meaning.



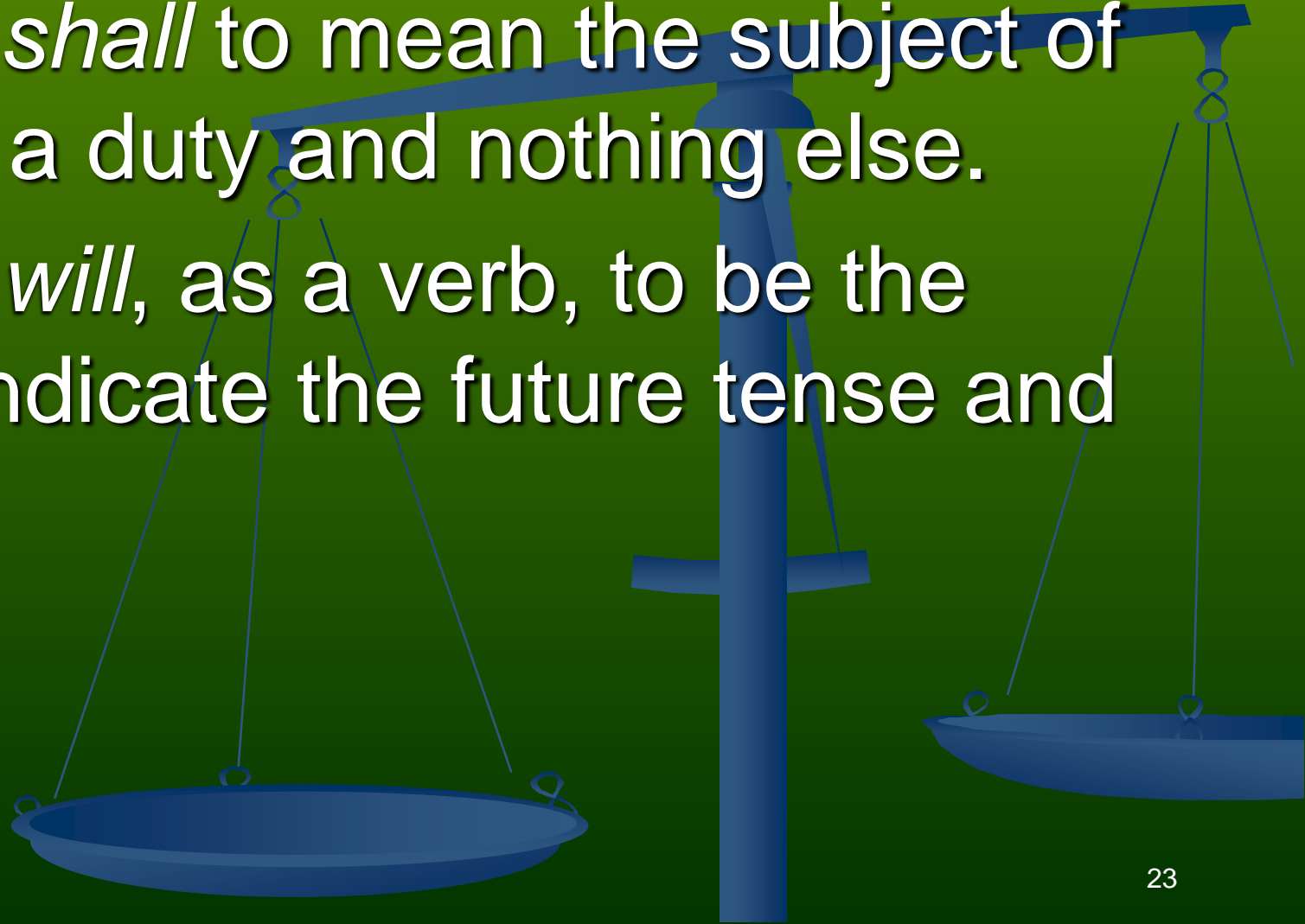
Shall and Will

- *Shall* and *will* are twins.
- They have often been used interchangeably to mean duty or the future tense.



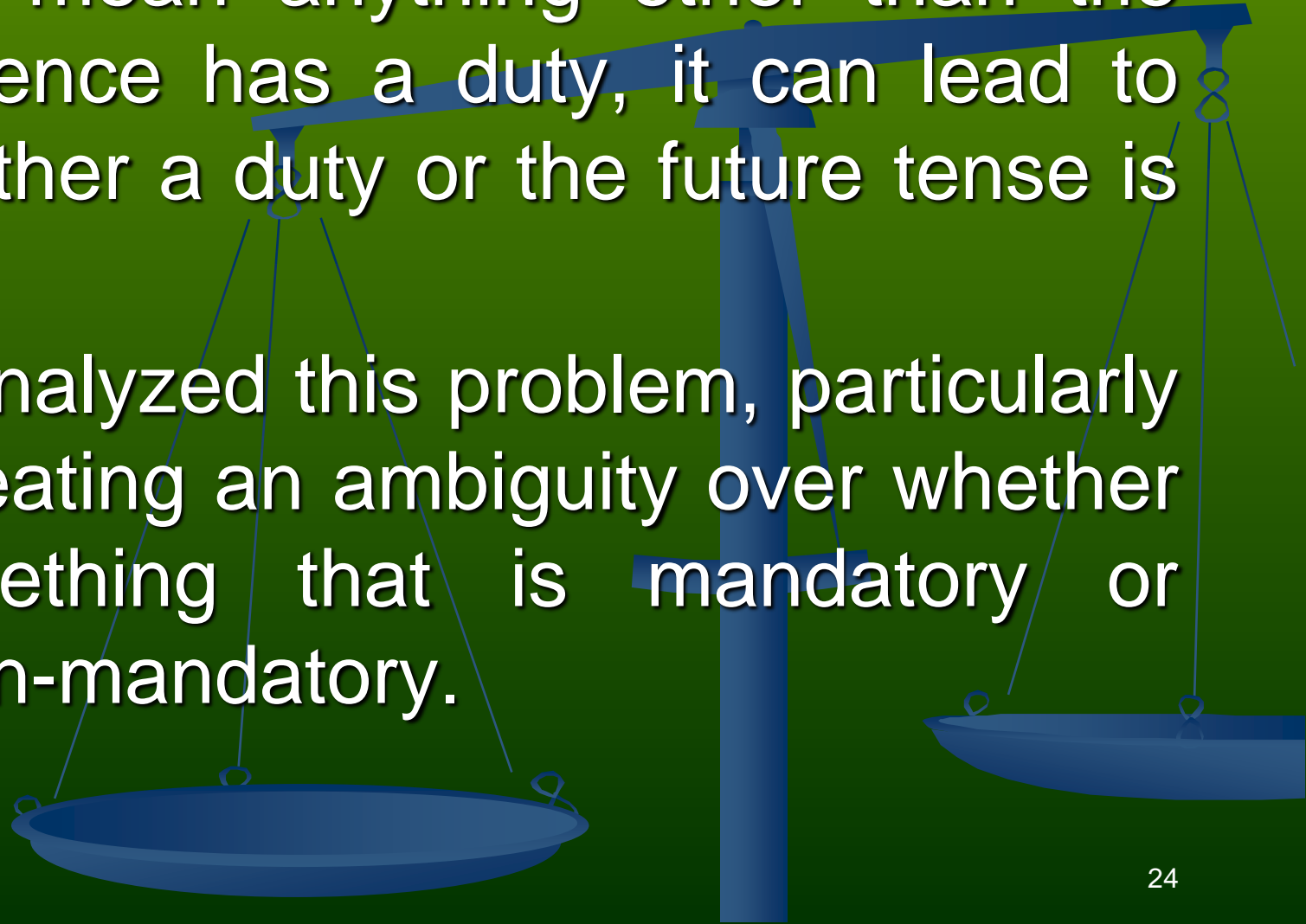
A Specific Drafting Best Practice

- Restrict the word *shall* to mean the subject of the sentence has a duty and nothing else.
- Restrict the word *will*, as a verb, to be the auxiliary verb to indicate the future tense and nothing else.



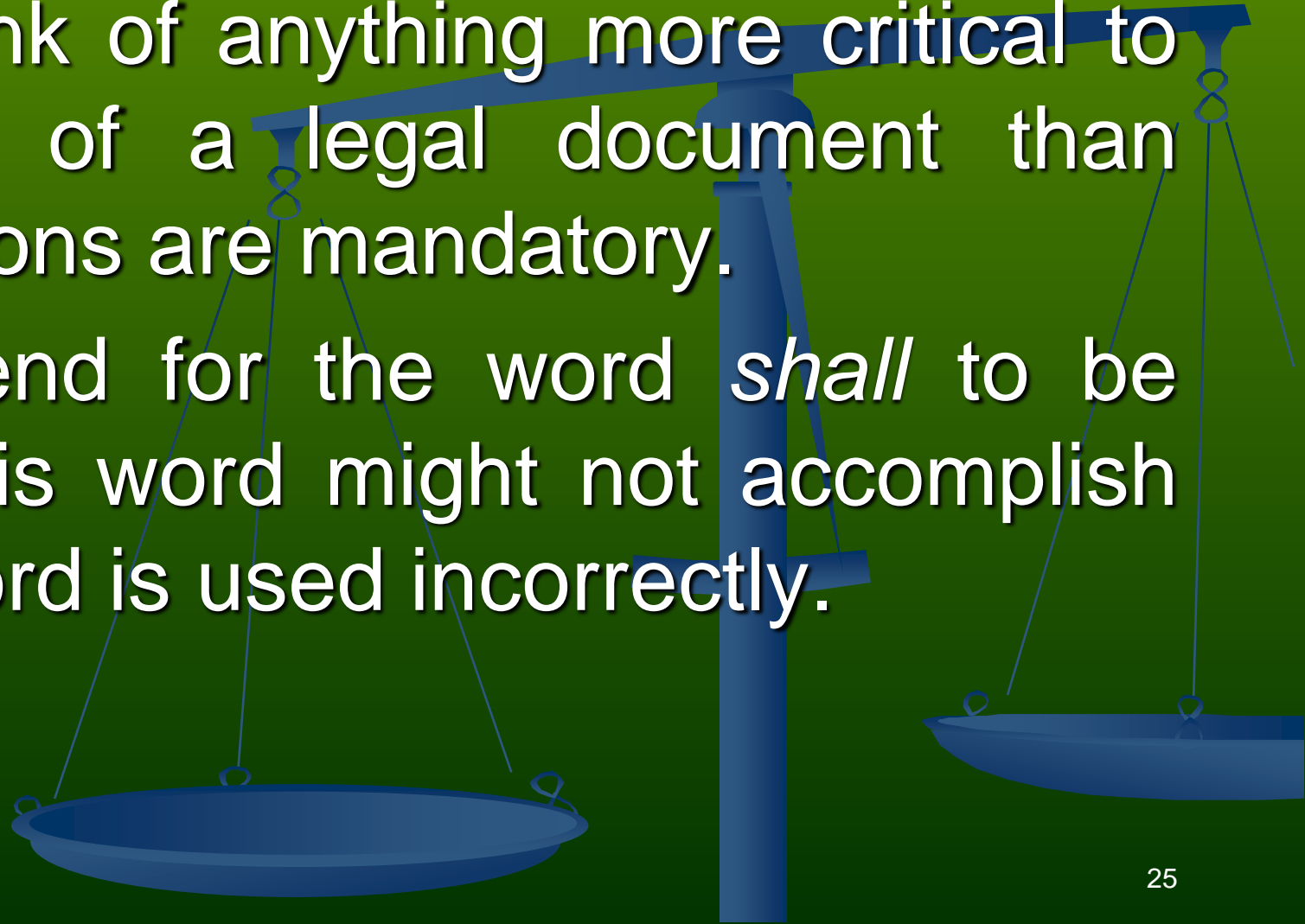
Shall and Will

- If *shall* is used to mean anything other than the subject of the sentence has a duty, it can lead to confusion over whether a duty or the future tense is intended.
- Court cases have analyzed this problem, particularly with statutes, as creating an ambiguity over whether *shall* means something that is mandatory or directory, that is, non-mandatory.



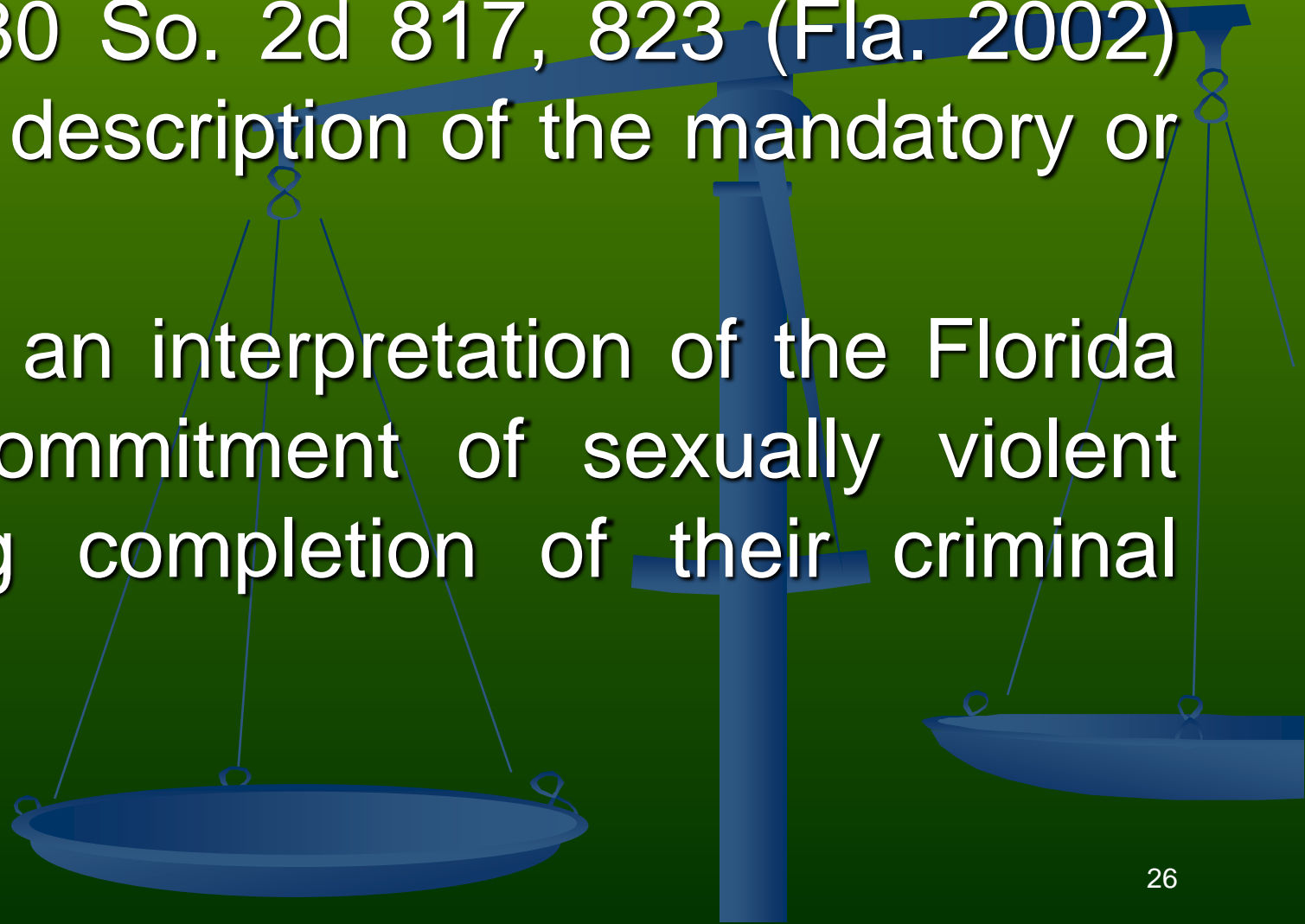
Mandatory or Directory

- It is difficult to think of anything more critical to the interpretation of a legal document than whether its provisions are mandatory.
- A writer may intend for the word *shall* to be mandatory, but this word might not accomplish this result if the word is used incorrectly.



Mandatory or Directory

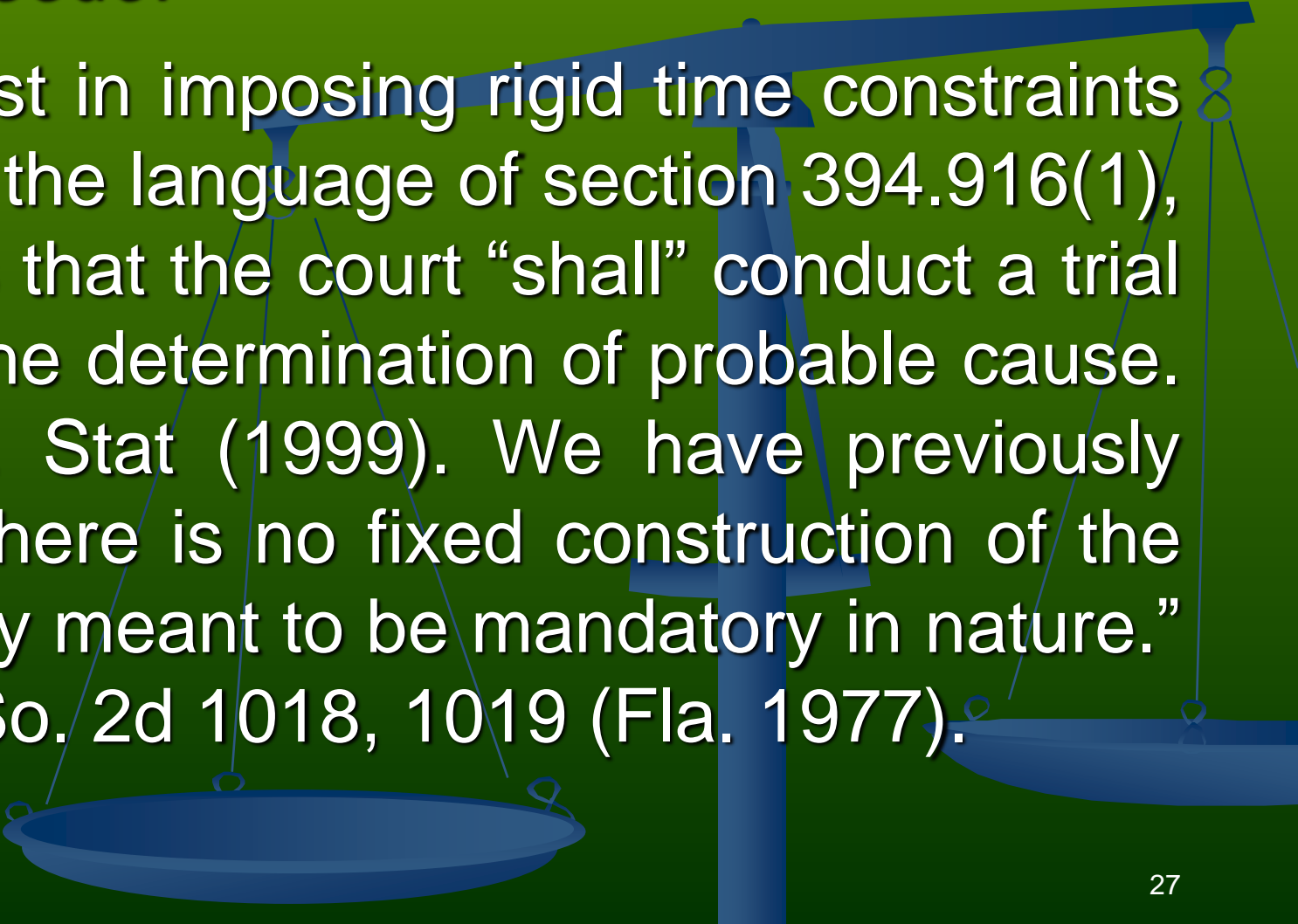
- *State v. Goode*, 830 So. 2d 817, 823 (Fla. 2002) provides a concise description of the mandatory or directory problem.
- This case involved an interpretation of the Florida Statute for civil commitment of sexually violent predators following completion of their criminal sentences.



Mandatory or Directory

Quoting from *State v. Goode*:

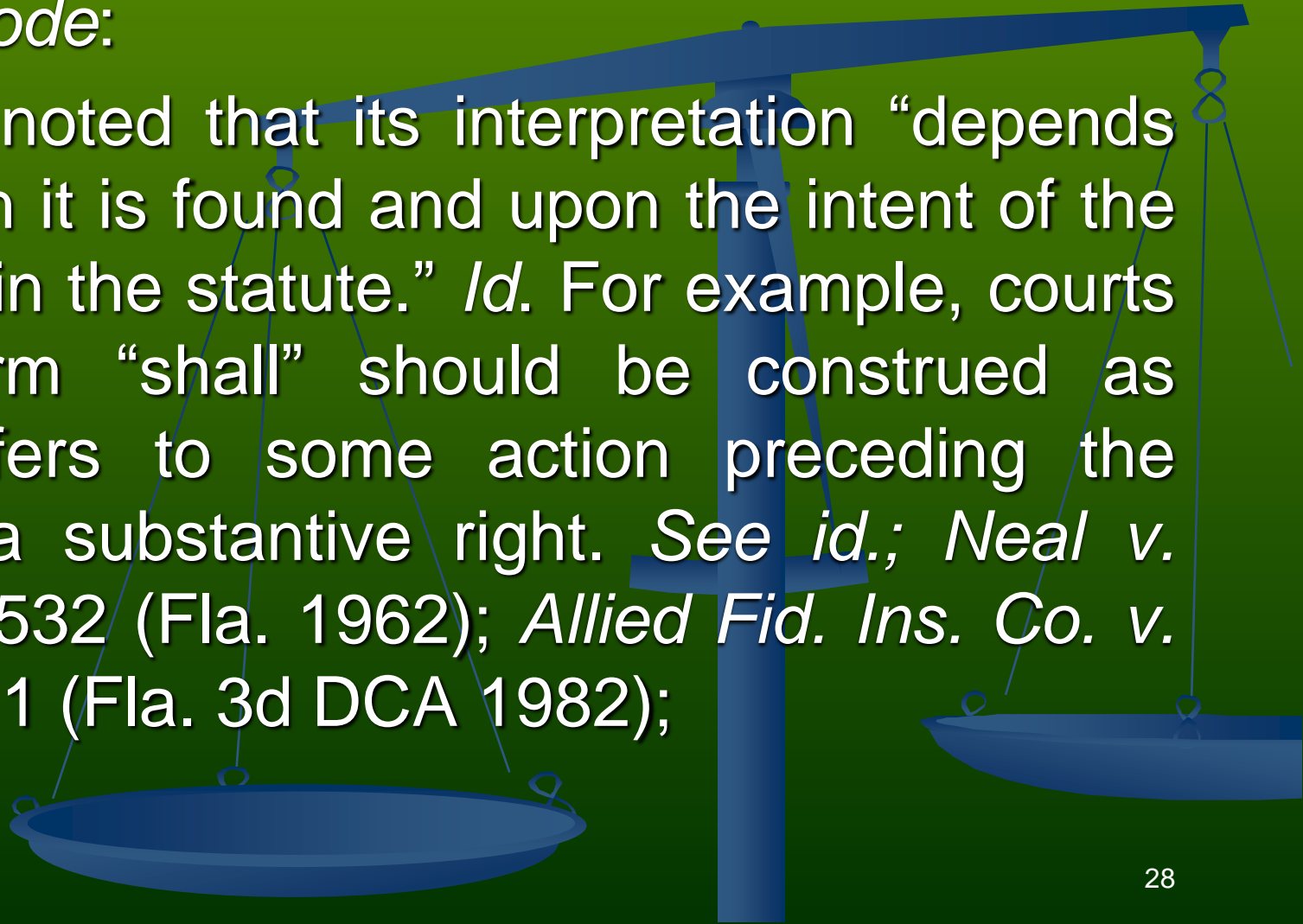
The Legislature's interest in imposing rigid time constraints is expressly reflected in the language of section 394.916(1), which specifically states that the court "shall" conduct a trial within thirty days after the determination of probable cause. See § 394.916(1), Fla. Stat (1999). We have previously stated that "[a]lthough there is no fixed construction of the word 'shall,' it is normally meant to be mandatory in nature." See *S.R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977).



Mandatory or Directory

Quoting from *State v. Goode*:

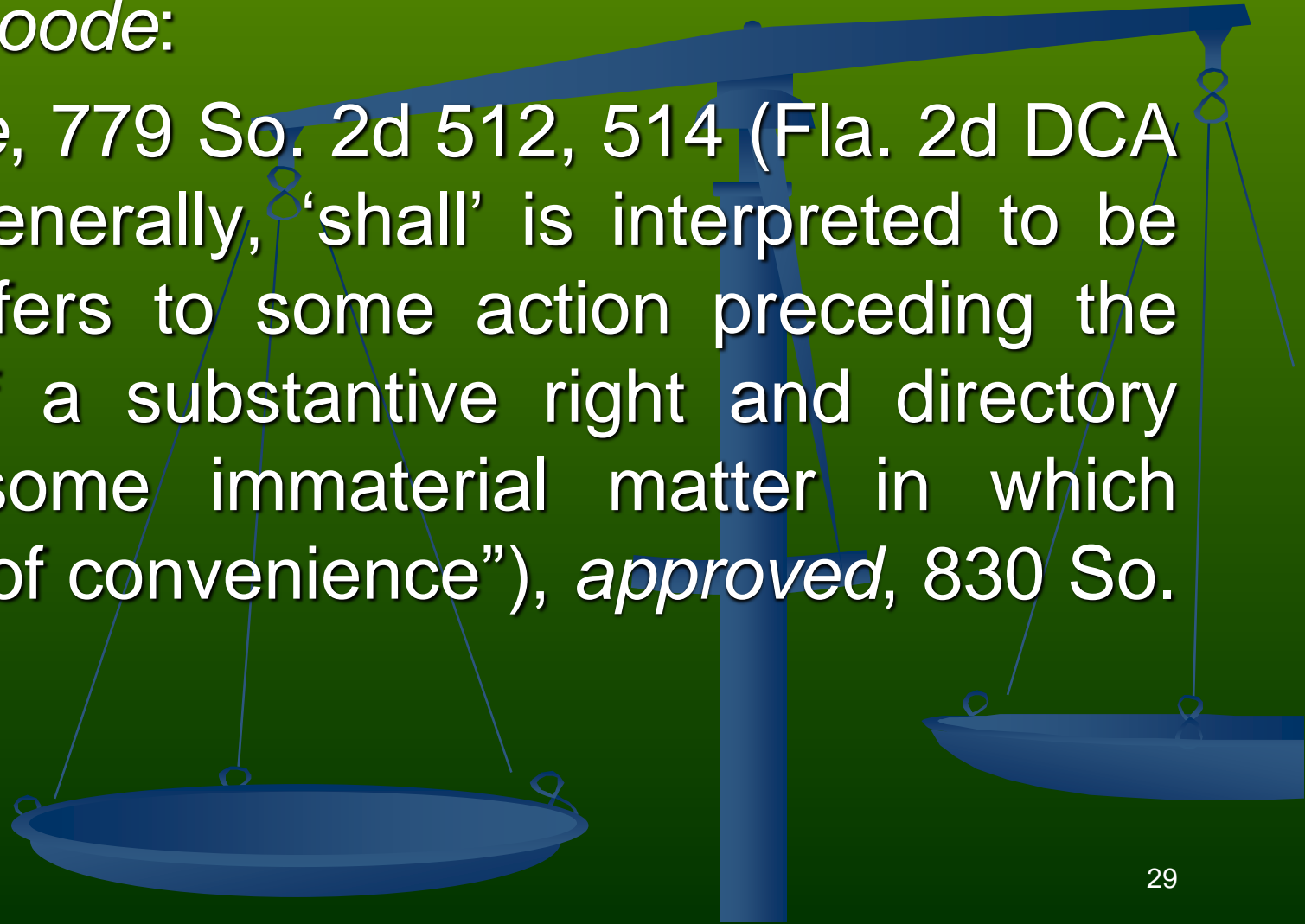
However, we have also noted that its interpretation “depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute.” *Id.* For example, courts have held that the term “shall” should be construed as mandatory where it refers to some action preceding the possible deprivation of a substantive right. See *id.*; *Neal v. Bryant*, 149 So. 2d 529, 532 (Fla. 1962); *Allied Fid. Ins. Co. v. State*, 415 So. 2d 109, 111 (Fla. 3d DCA 1982);



Mandatory or Directory

Quoting from *State v. Goode*:

see also *Kinder v. State*, 779 So. 2d 512, 514 (Fla. 2d DCA 2000) (stating that “[g]enerally, ‘shall’ is interpreted to be mandatory where it refers to some action preceding the possible deprivation of a substantive right and directory where it relates to some immaterial matter in which compliance is a matter of convenience”), *approved*, 830 So. 2d 832, (Fla.).

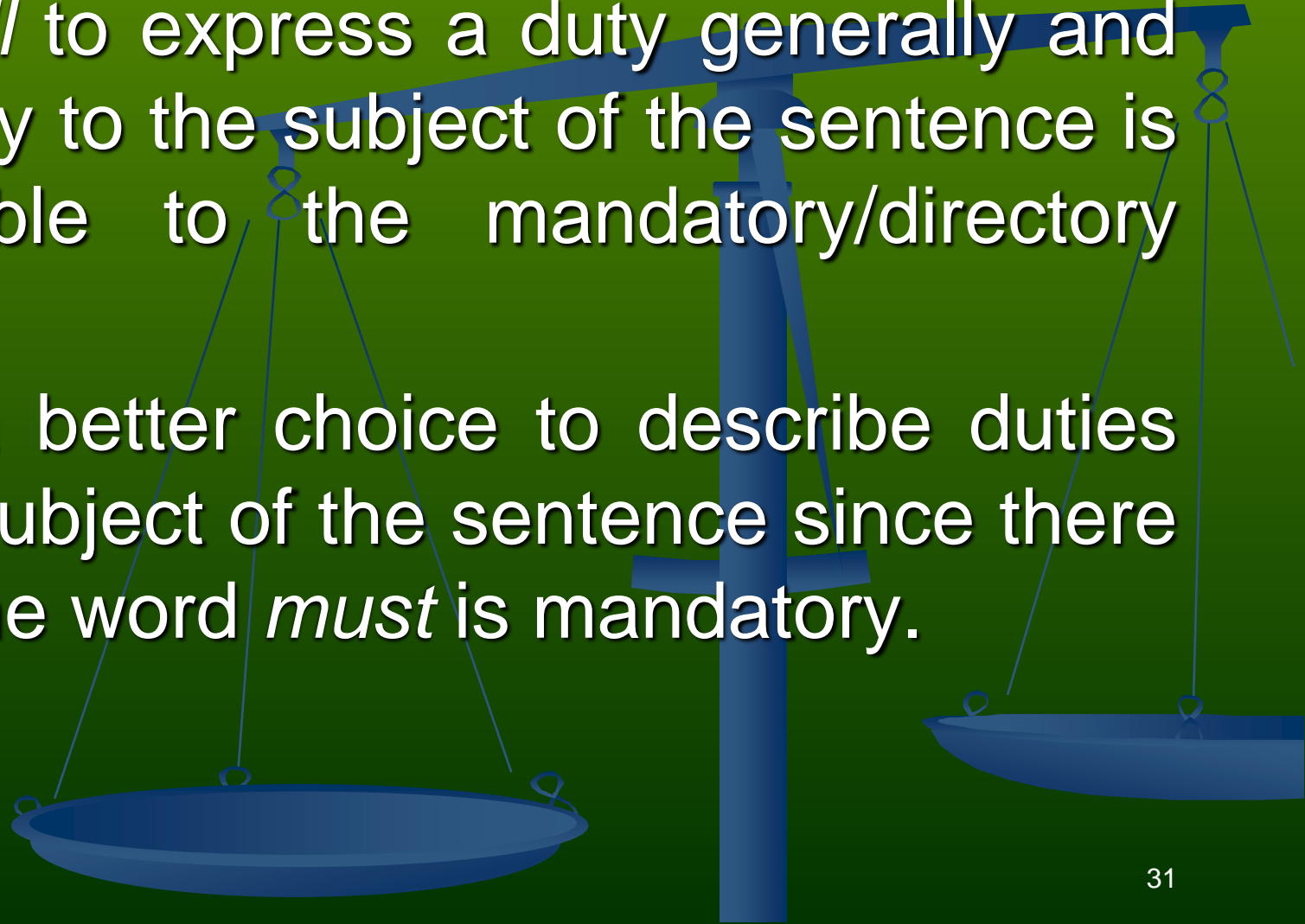


Mandatory or Directory

- An example applicable to County government, Section 125.66, Florida Statutes (2016)
- “(b) Certified copies of ordinances or amendments thereto enacted under this regular enactment procedure shall be filed with the Department of State by the clerk of the board of county commissioners within 10 days after enactment by said board and shall take effect upon filing with the Department of State.”
- Arguably, the first *shall* is meant to be directory.

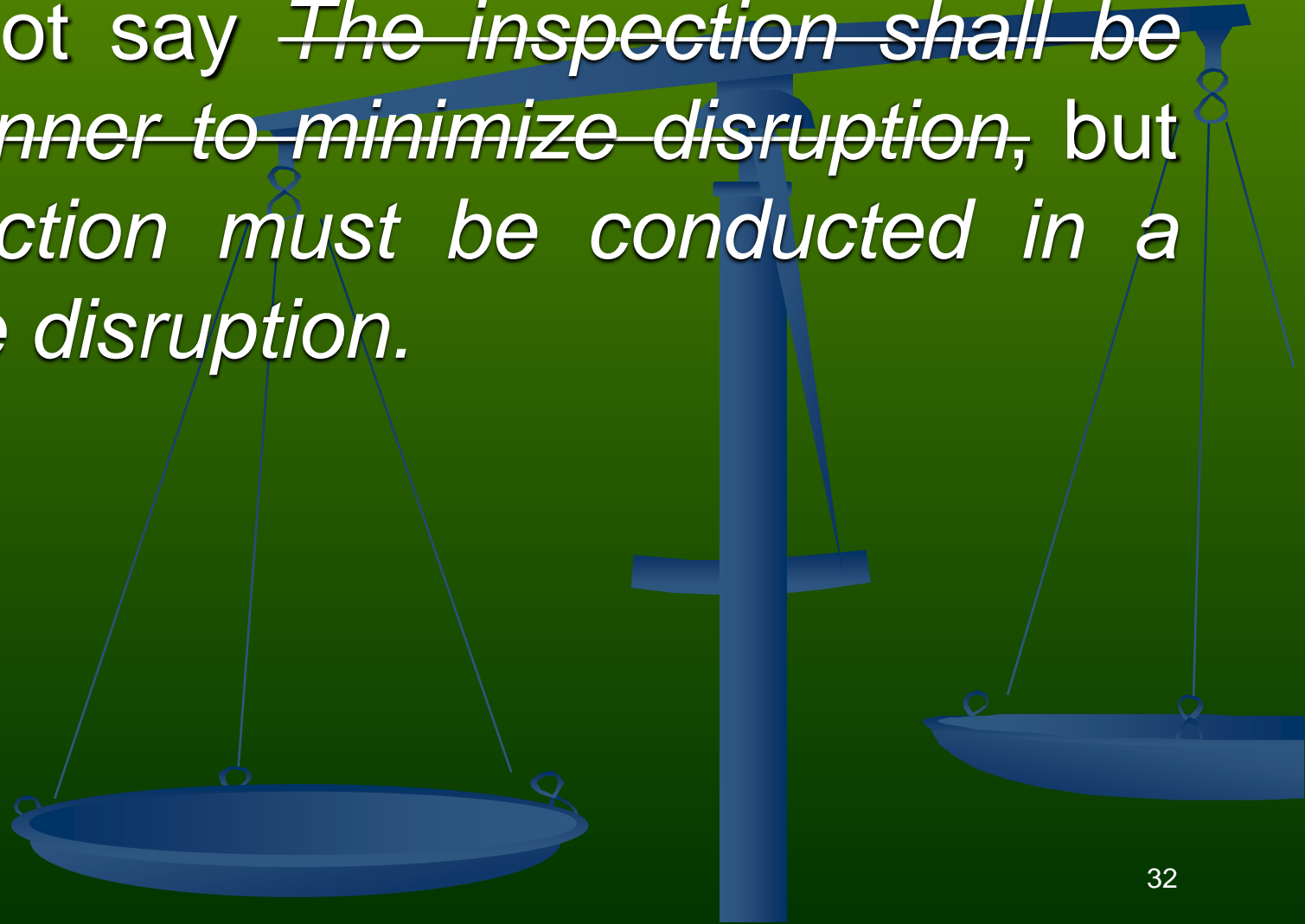
Shall and Must

- Using the word *shall* to express a duty generally and not ascribing the duty to the subject of the sentence is especially susceptible to the mandatory/directory problem.
- The word *must* is a better choice to describe duties not ascribed to the subject of the sentence since there is no question that the word *must* is mandatory.



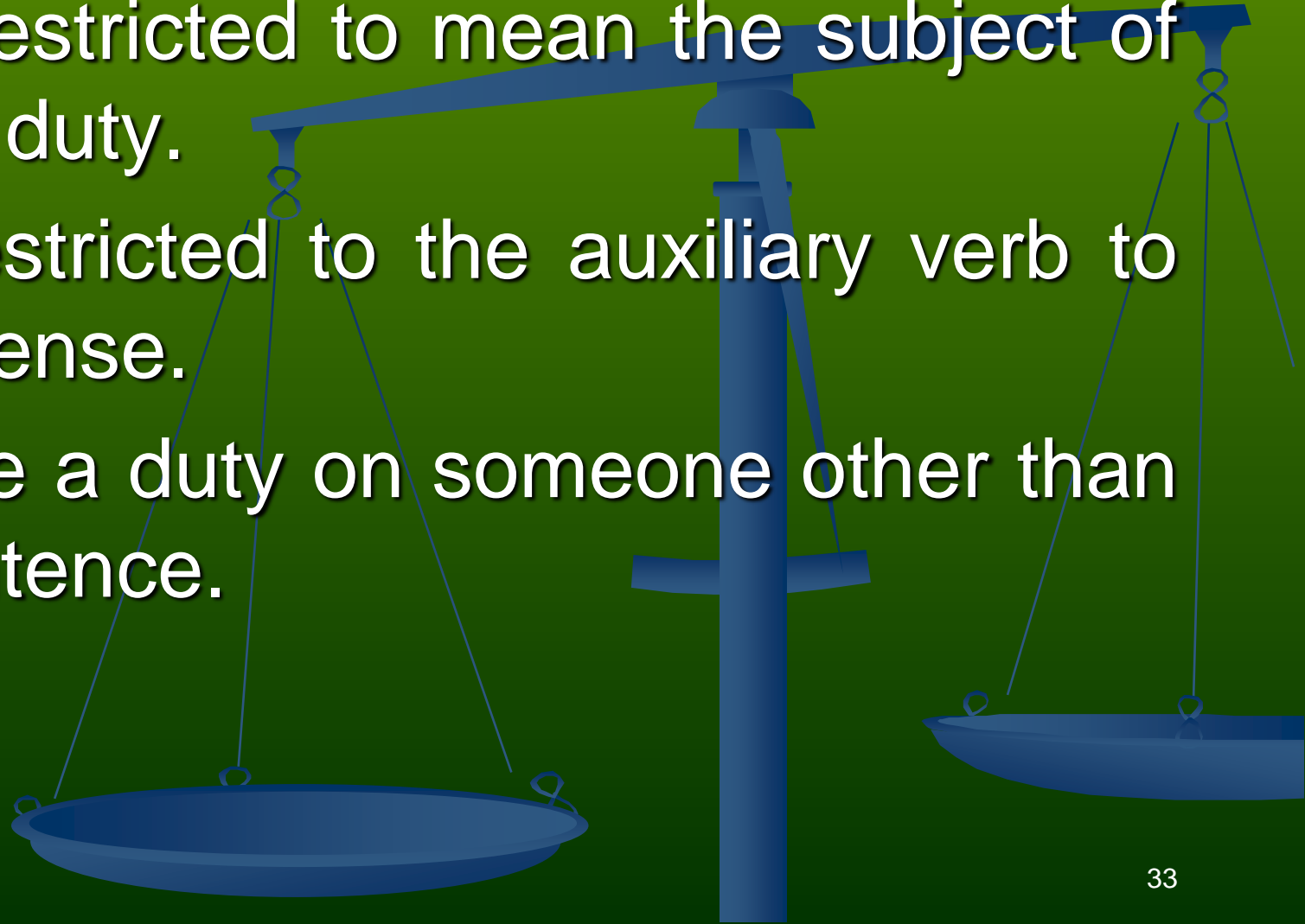
Shall and Must

- For example, do not say ~~*The inspection shall be conducted in a manner to minimize disruption,*~~ but instead *The inspection must be conducted in a manner to minimize disruption.*



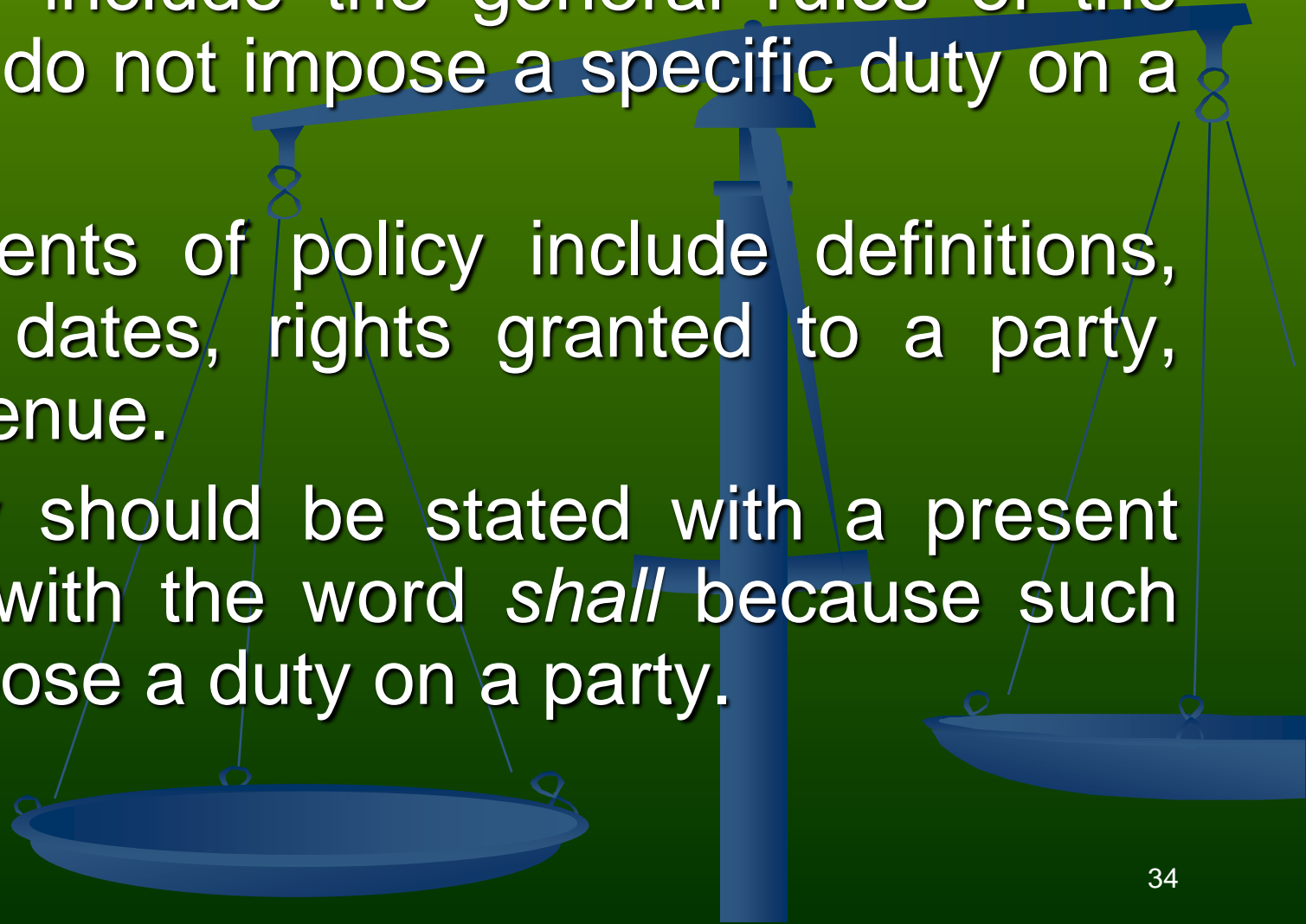
Shall, Will, and Must

- The word *shall* is restricted to mean the subject of the sentence has a duty.
- The word *will* is restricted to the auxiliary verb to indicate the future tense.
- Use *must* to impose a duty on someone other than the subject of a sentence.



Statements of Policy

- Statements of policy include the general rules of the document, rules that do not impose a specific duty on a party.
- Examples of statements of policy include definitions, starting and ending dates, rights granted to a party, governing law, and venue.
- Statements of policy should be stated with a present tense verb and not with the word *shall* because such provisions do not impose a duty on a party.



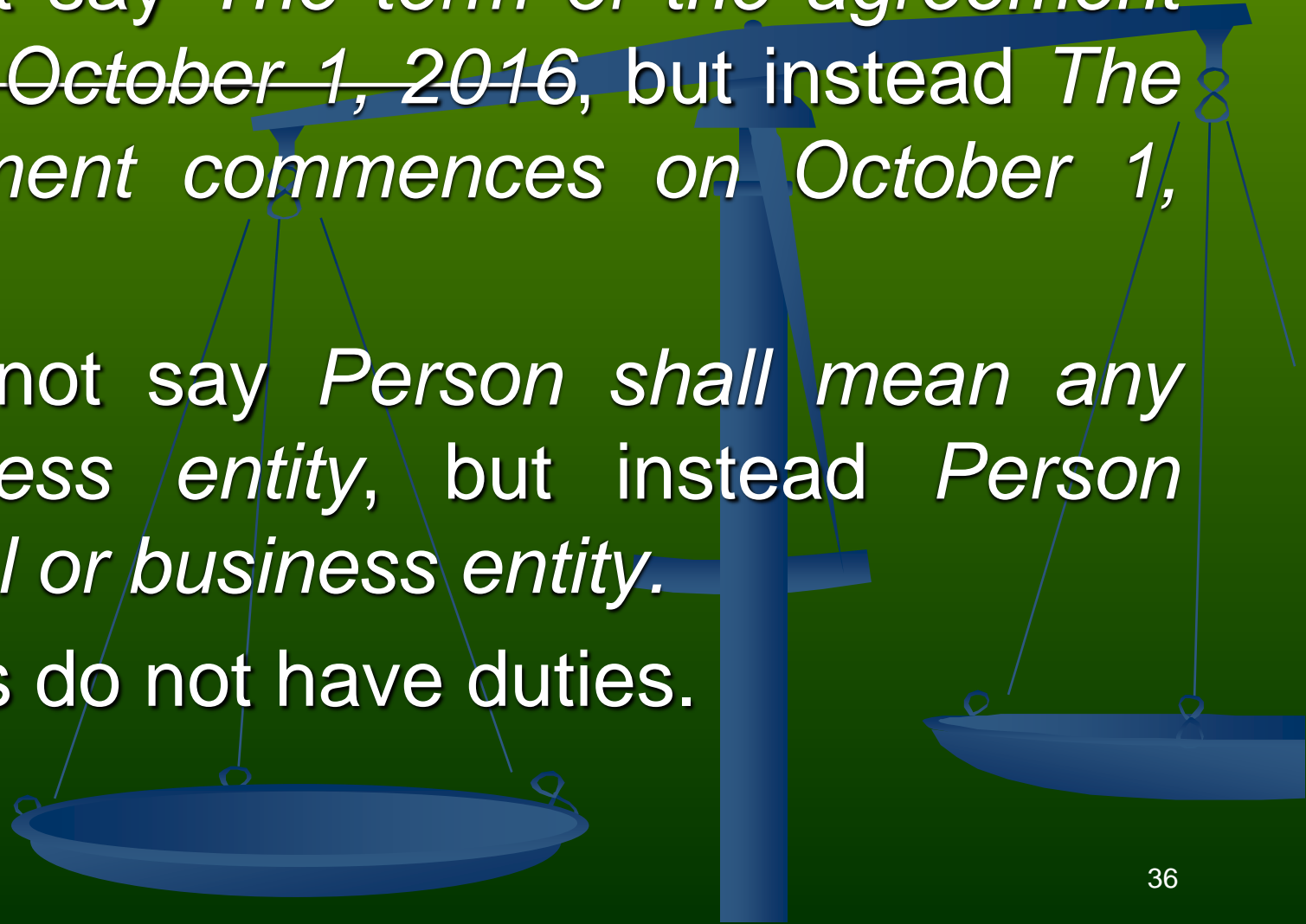
Statements of Policy

- In general, modal auxiliary verbs should not be used in statements of policy unless the modal auxiliary verb contributes to the statement of policy.
- For example, the modal auxiliary verb *will* is acceptable for a policy that may occur in the future based on a condition.

“The filing of a bankruptcy petition by the contractor will constitute a default under this agreement.”
- Inserting the word *shall* in statements of policy serves only to make the provision more difficult to read.

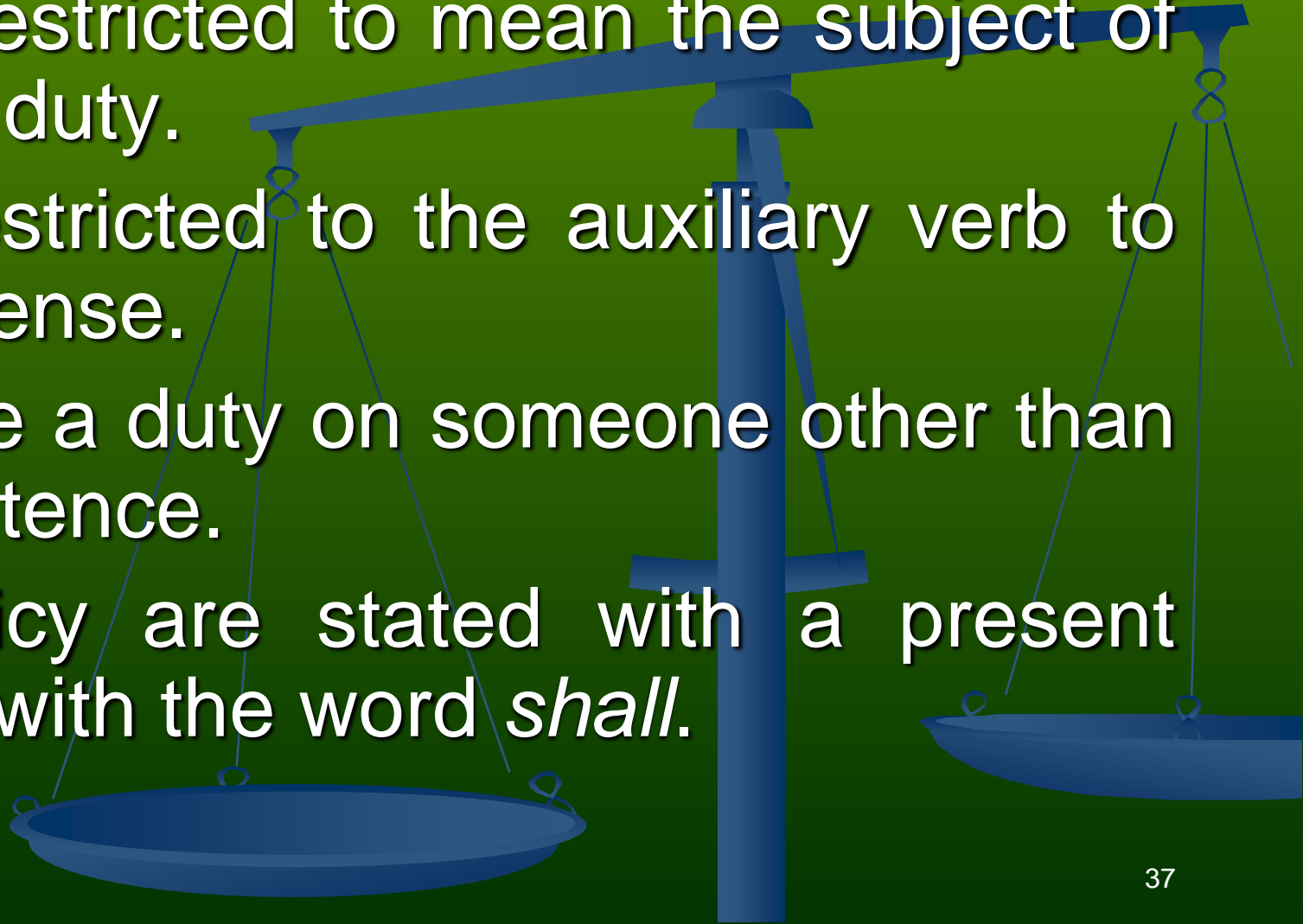
Statements of Policy

- For example, do not say ~~*The term of the agreement shall commence on October 1, 2016,*~~ but instead *The term of the agreement commences on October 1, 2016.*
- For definitions, do not say *Person shall mean any individual or business entity,* but instead *Person means any individual or business entity.*
- Dates and definitions do not have duties.



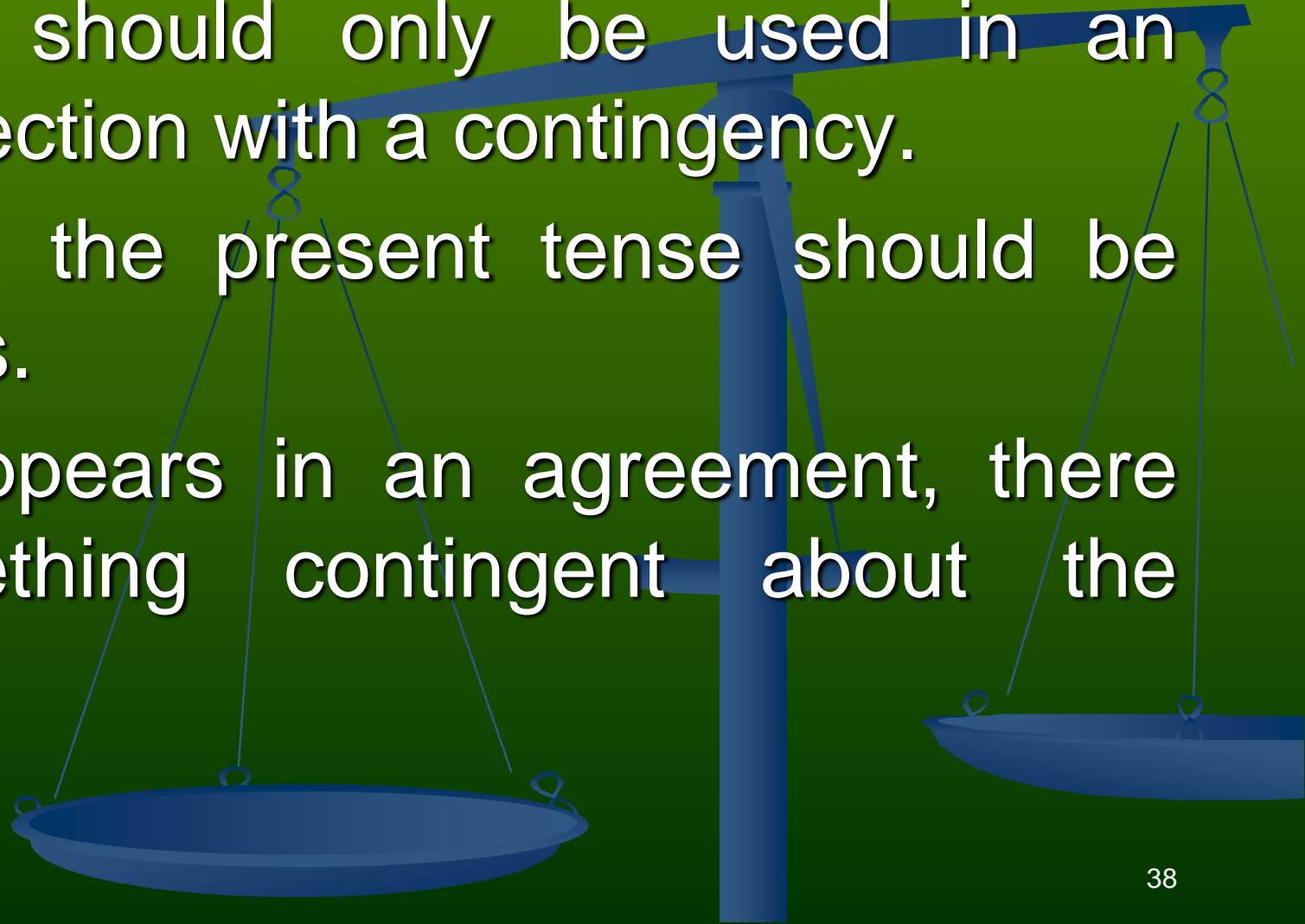
Four Rules on Words of Authority

- The word *shall* is restricted to mean the subject of the sentence has a duty.
- The word *will* is restricted to the auxiliary verb to indicate the future tense.
- Use *must* to impose a duty on someone other than the subject of a sentence.
- Statements of policy are stated with a present tense verb and not with the word *shall*.



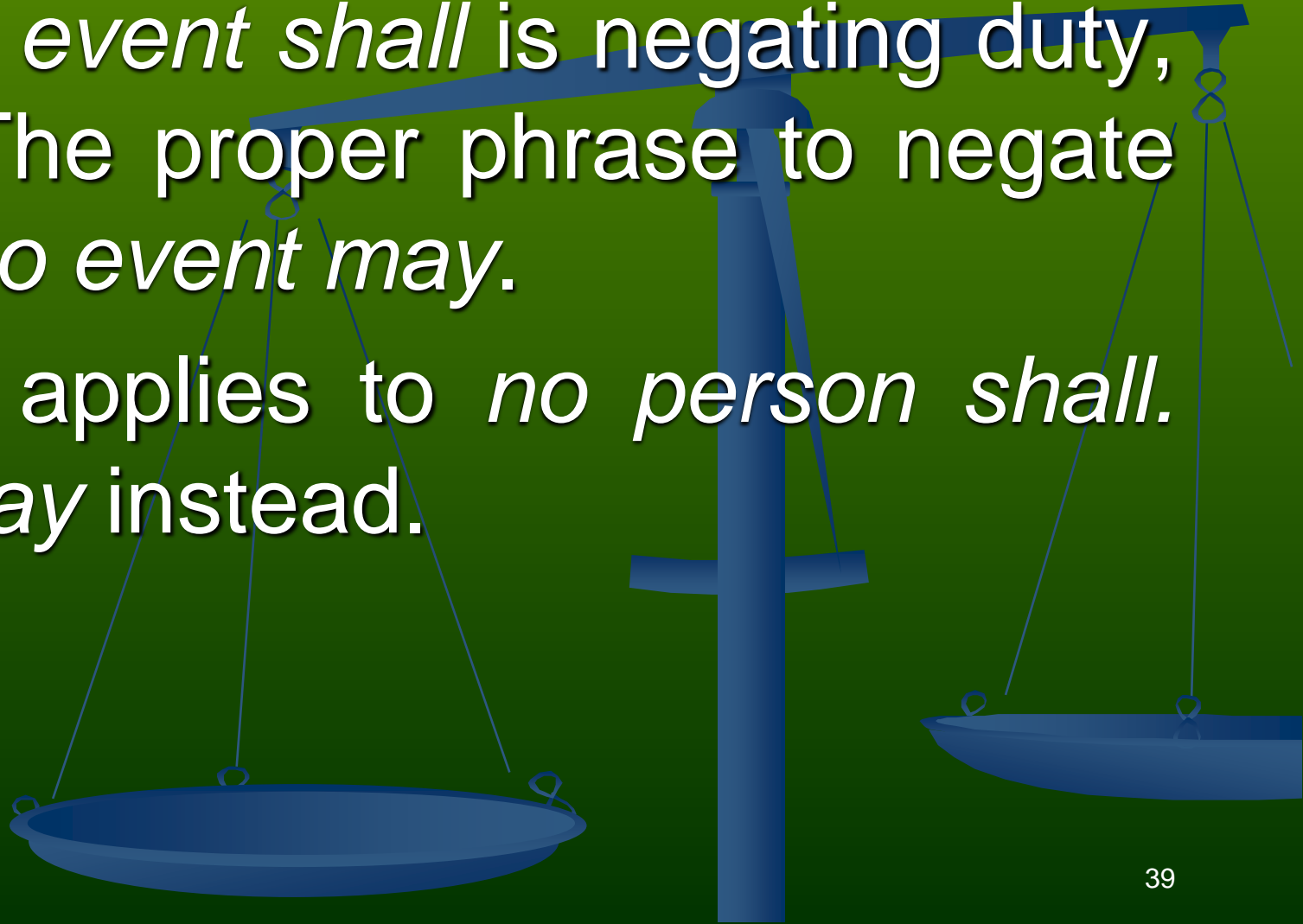
The Future Tense in Agreements

- The future tense should only be used in an agreement in connection with a contingency.
- In most instances, the present tense should be used in agreements.
- If the word *will* appears in an agreement, there should be something contingent about the statement.



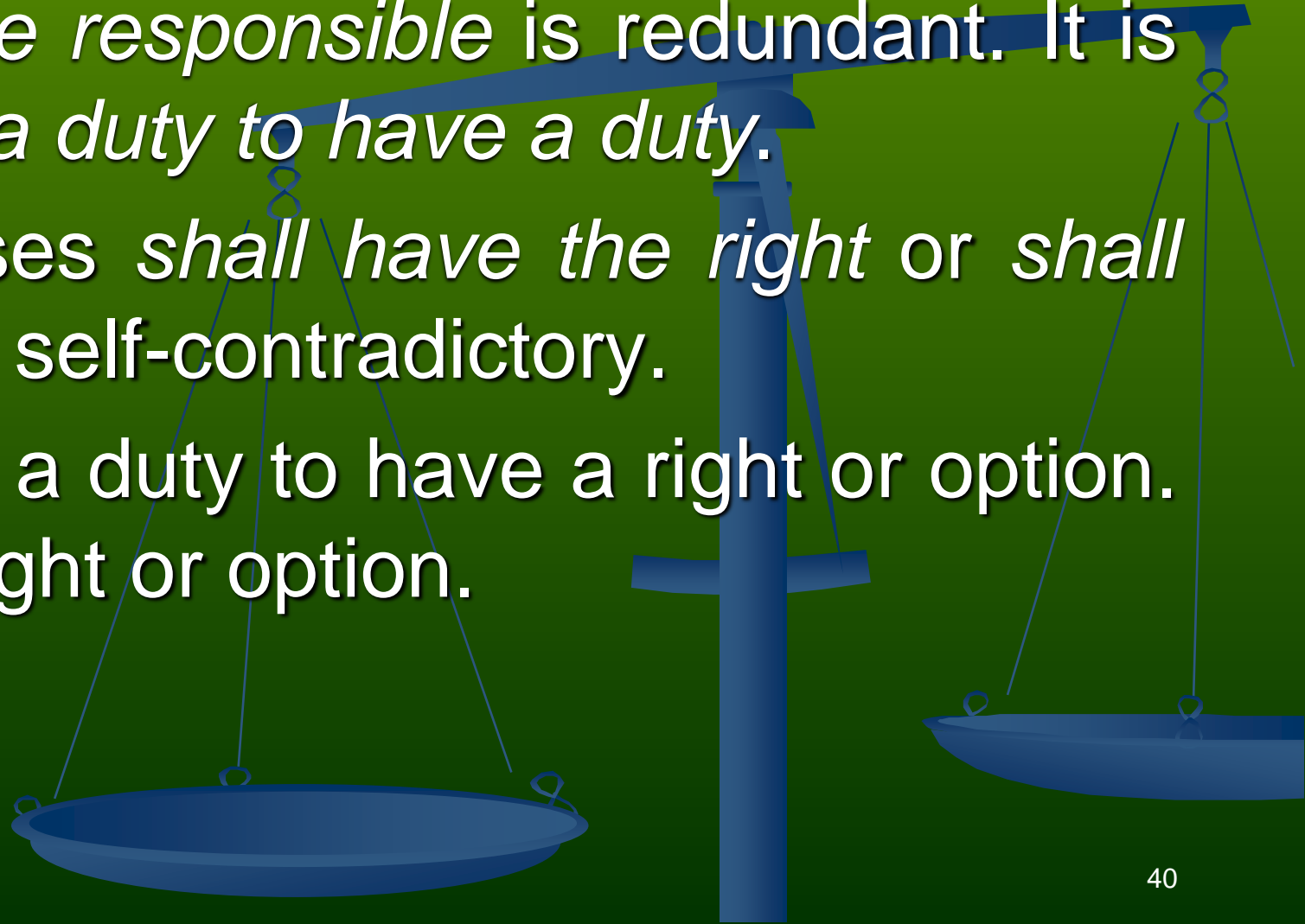
Negating Permission [*No . . . may*]

- The phrase *in no event shall* is negating duty, not permission. The proper phrase to negate permission is *in no event may*.
- The same issue applies to *no person shall*. Use *no person may* instead.



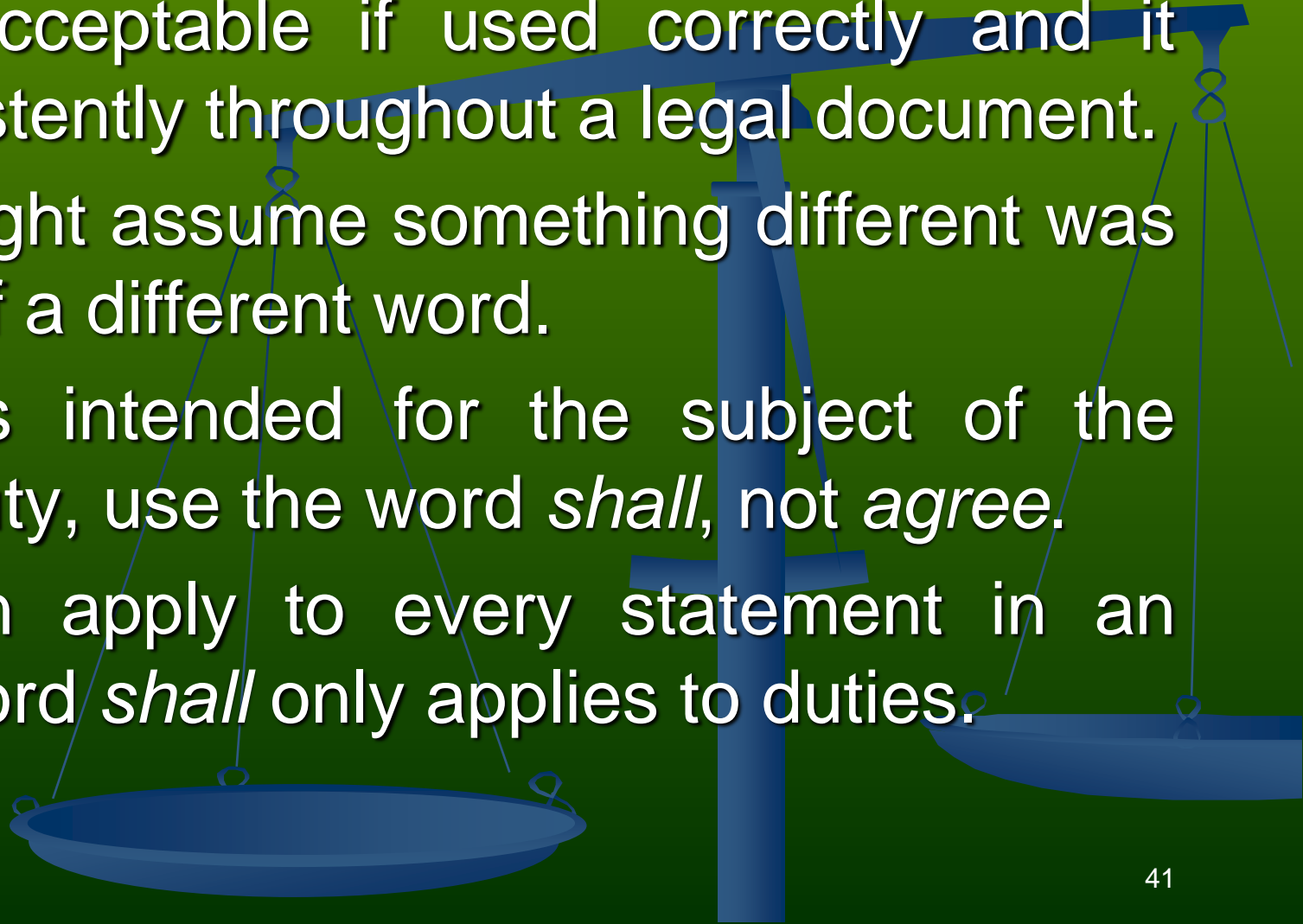
Misuses of *Shall*

- The phrase *shall be responsible* is redundant. It is literally saying *has a duty to have a duty*.
- Similarly, the phrases *shall have the right* or *shall have the option* are self-contradictory.
- One does not have a duty to have a right or option. One simply has a right or option.



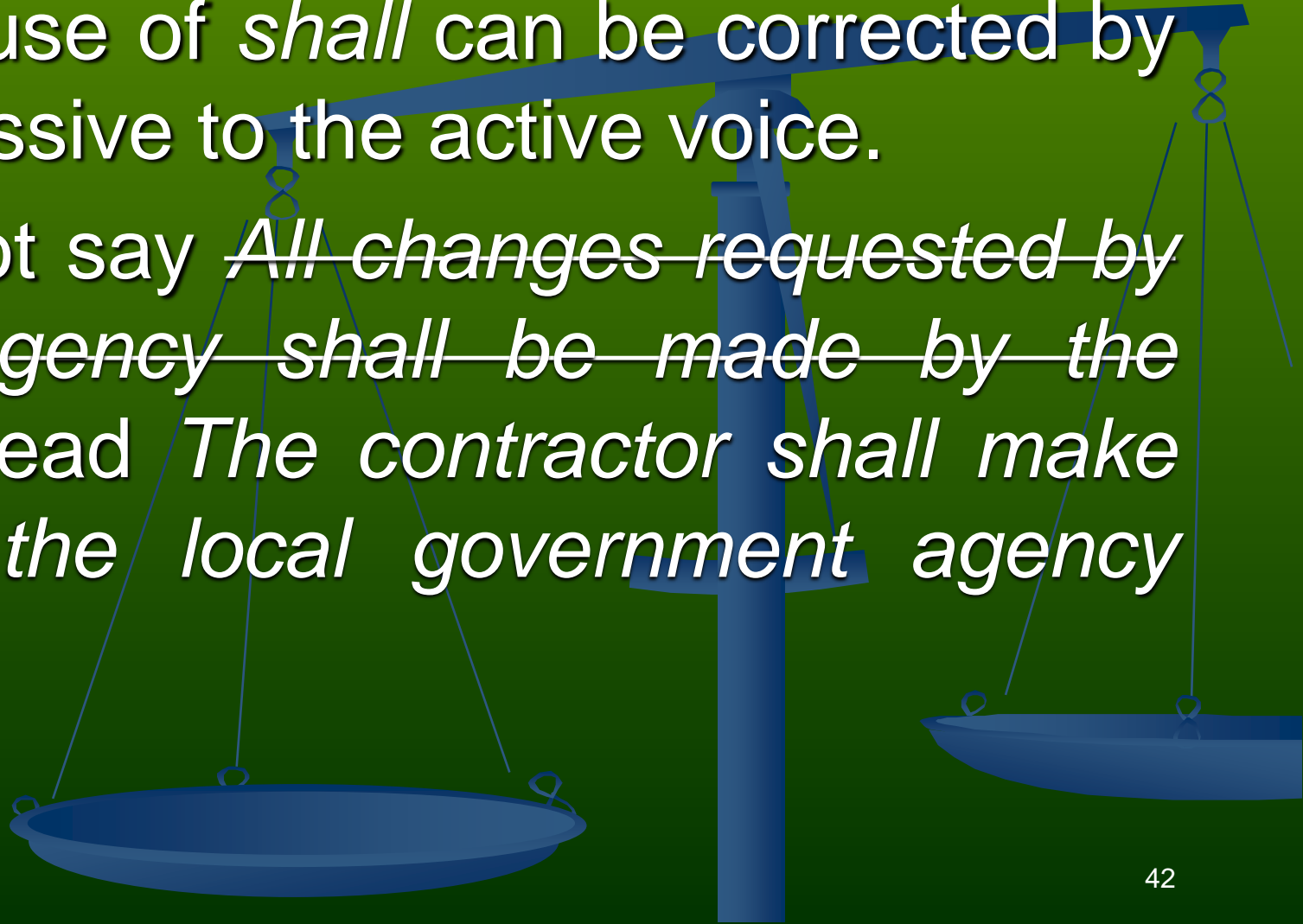
Don't Hesitate to Use *Shall* If Appropriate

- The word *shall* is acceptable if used correctly and it should be used consistently throughout a legal document.
- Otherwise, a court might assume something different was intended by the use of a different word.
- For example, if it is intended for the subject of the sentence to have a duty, use the word *shall*, not *agree*.
- The word *agree* can apply to every statement in an agreement, but the word *shall* only applies to duties.



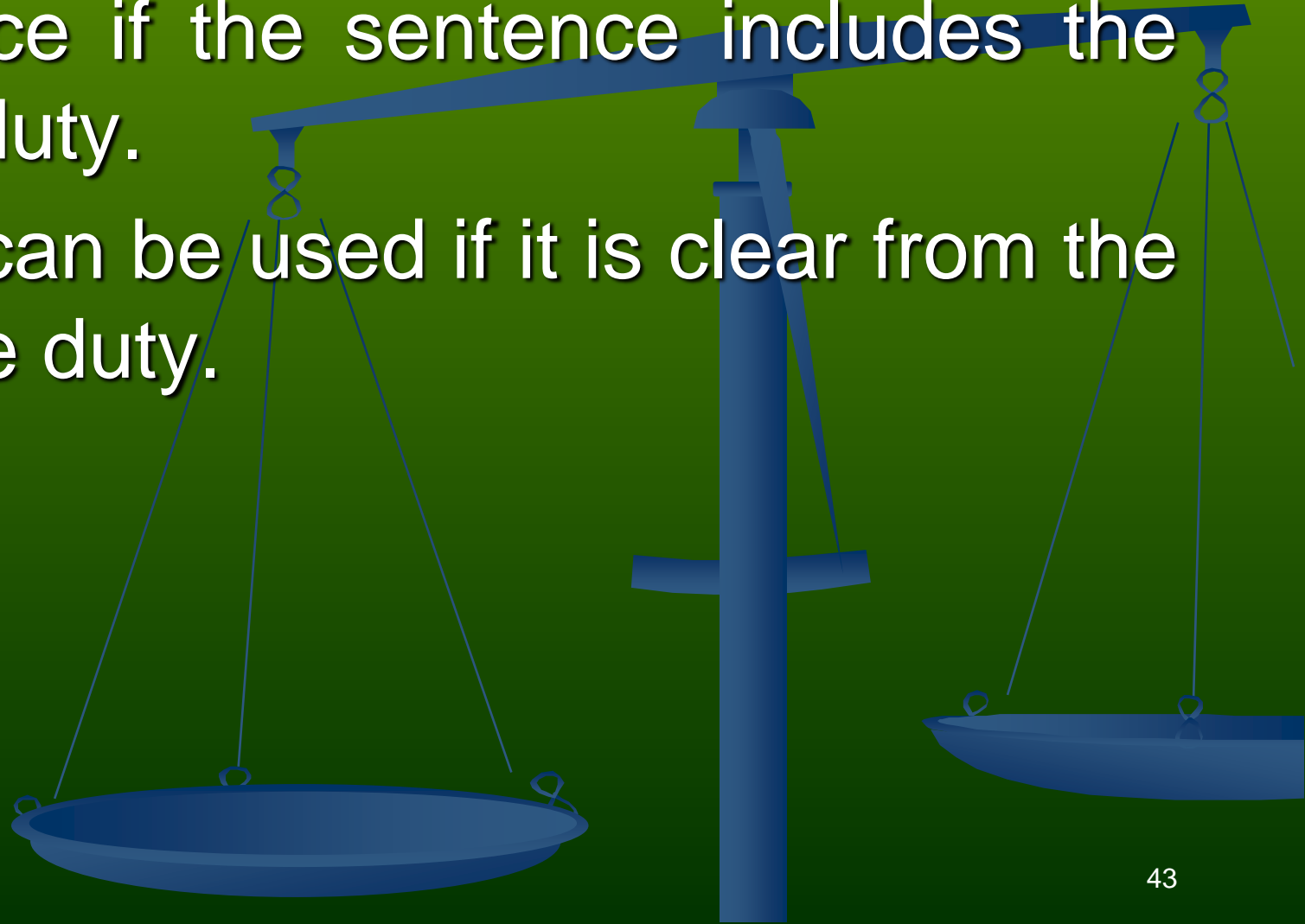
An Easy Fix for Many Misuses of *Shall*

- Often an incorrect use of *shall* can be corrected by shifting from the passive to the active voice.
- For example, do not say ~~All changes requested by the government agency shall be made by the contractor,~~ but instead *The contractor shall make all changes that the local government agency requests.*



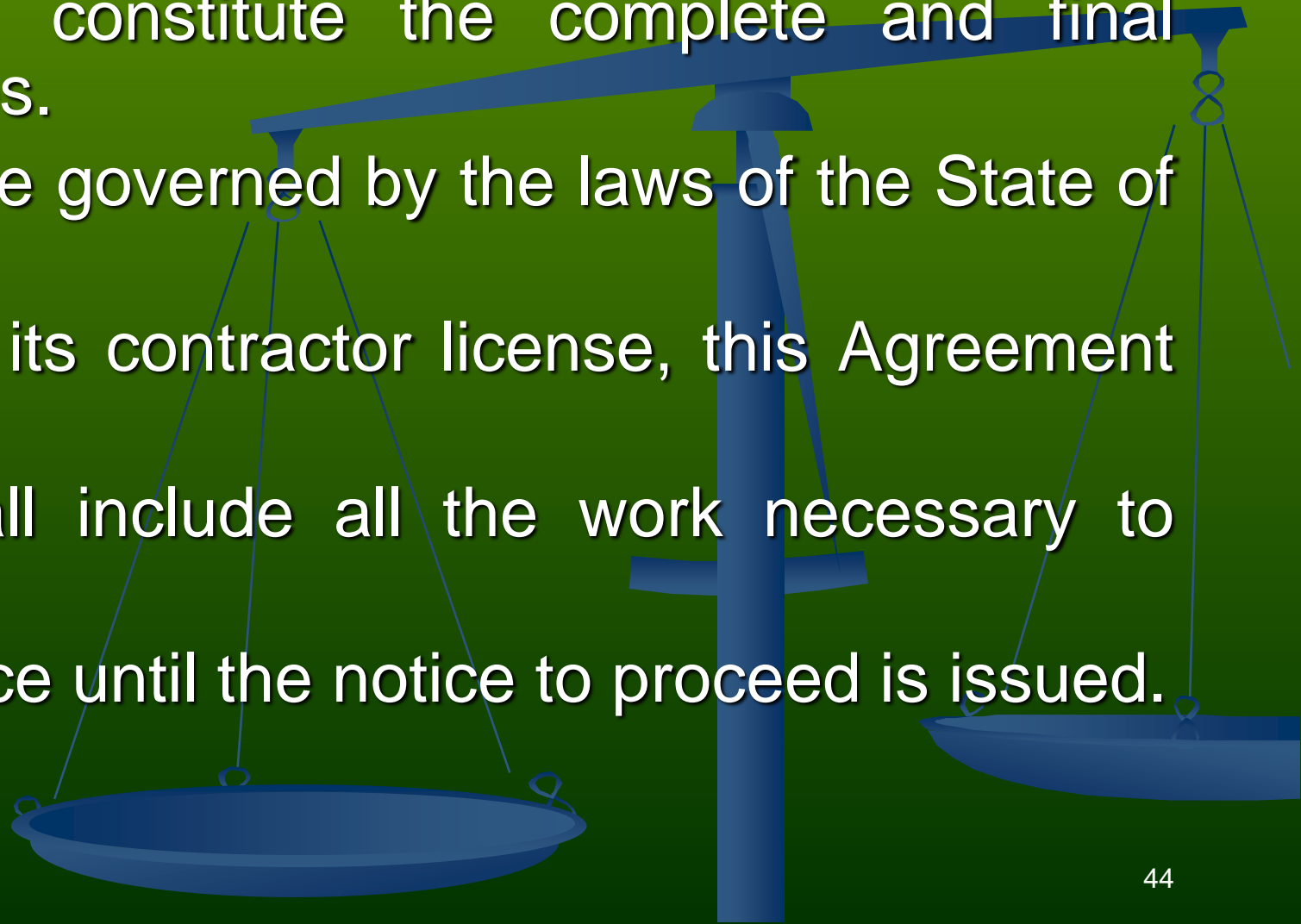
Active or Passive Voice and Duties

- Use the active voice if the sentence includes the person having the duty.
- The passive voice can be used if it is clear from the context who has the duty.



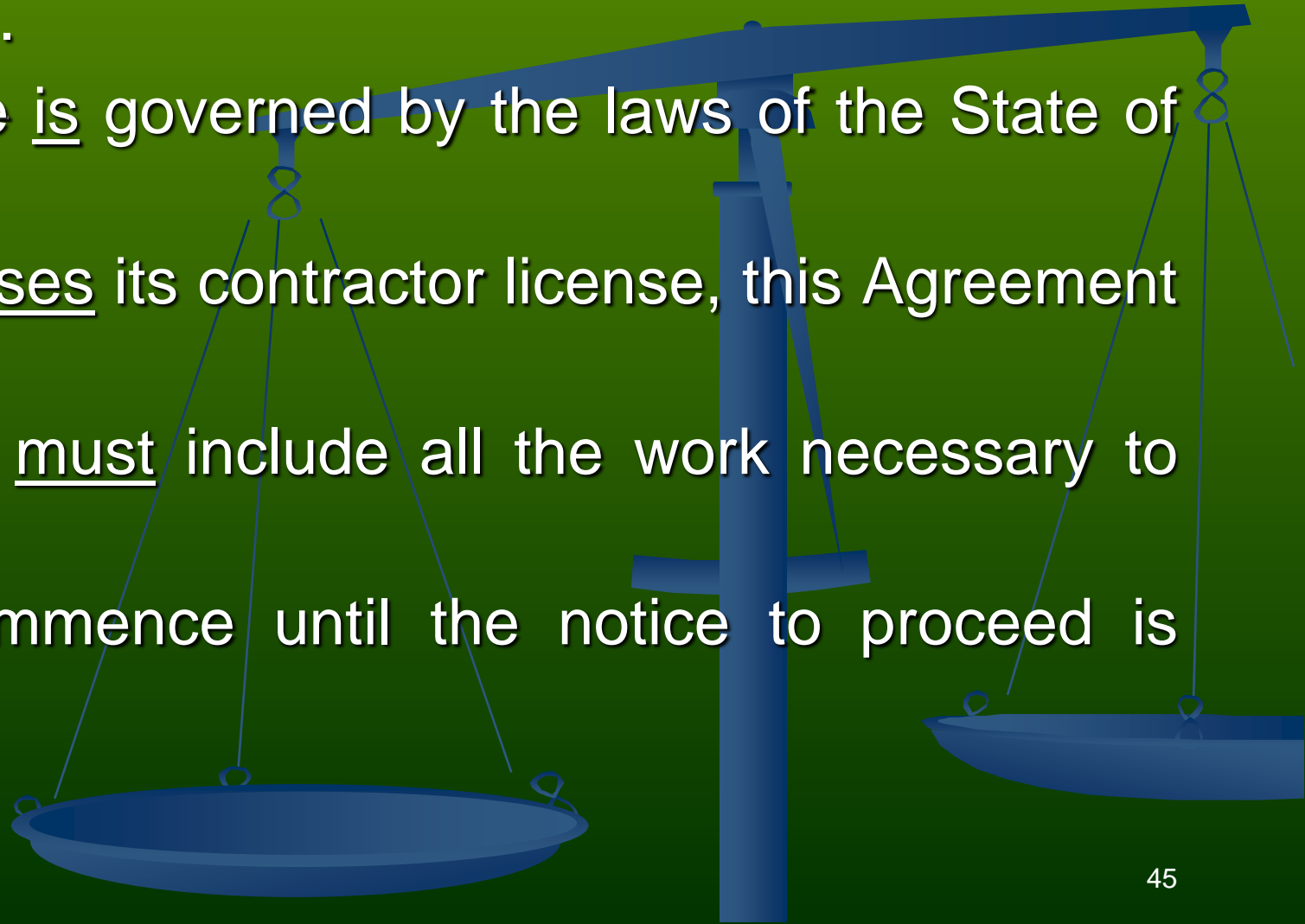
How Not to Use *Shall* (Muddled Modal Verbs)

- This Agreement shall constitute the complete and final expression of the parties.
- This Agreement shall be governed by the laws of the State of Florida.
- If contractor shall lose its contractor license, this Agreement shall be in default.
- The specifications shall include all the work necessary to complete the project.
- No work shall commence until the notice to proceed is issued.



Misuses of *Shall* Corrected

- This Agreement ~~shall constitute~~ constitutes the complete and final expression of the parties.
- This Agreement ~~shall be~~ is governed by the laws of the State of Florida.
- If contractor ~~shall lose~~ loses its contractor license, this Agreement ~~shall~~ will be in default.
- The specifications ~~shall~~ must include all the work necessary to complete the project.
- No work ~~shall~~ may commence until the notice to proceed is issued.



Part 2

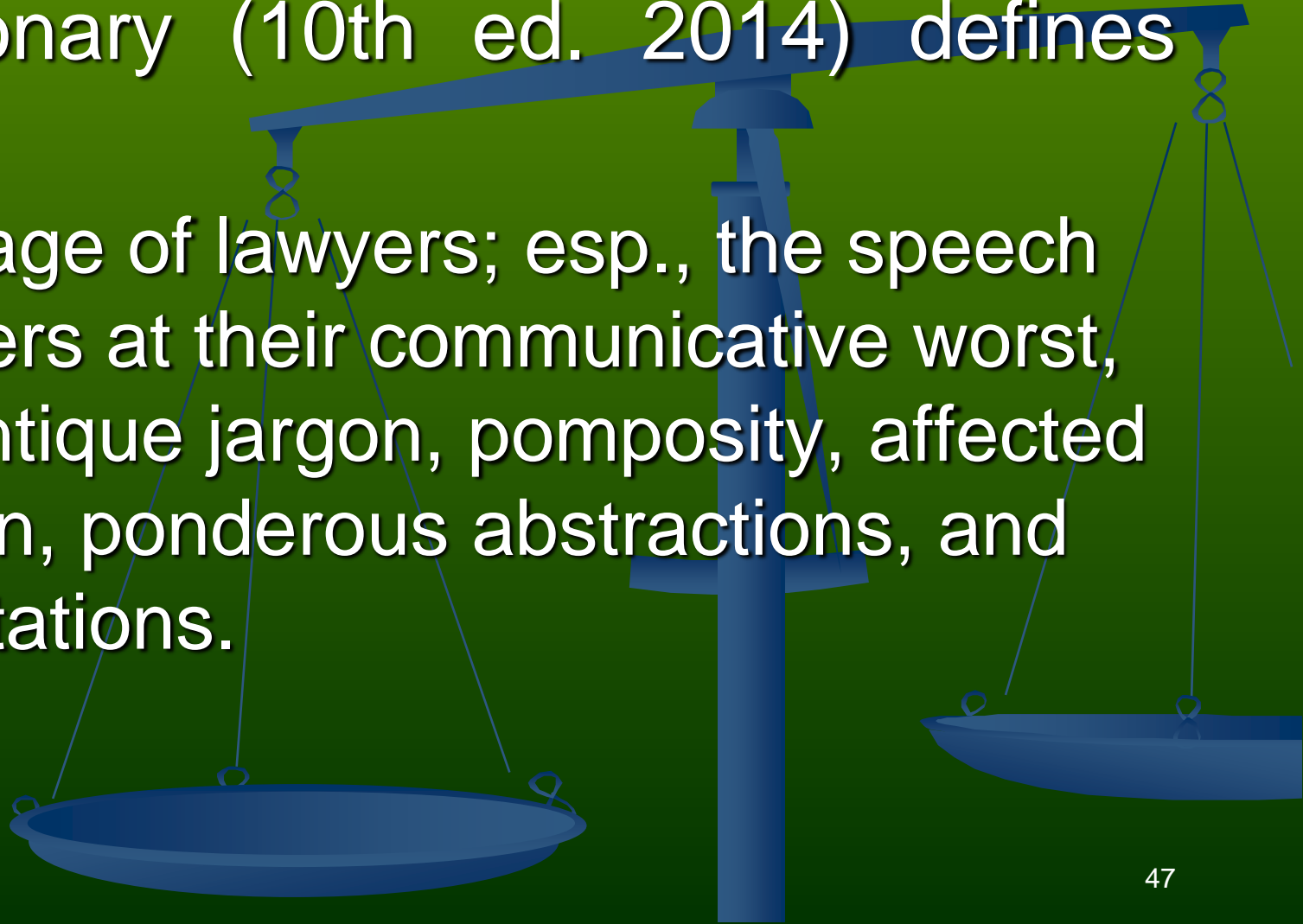
Legalese



Legalese

- Black's Law Dictionary (10th ed. 2014) defines *legalese* as follows:

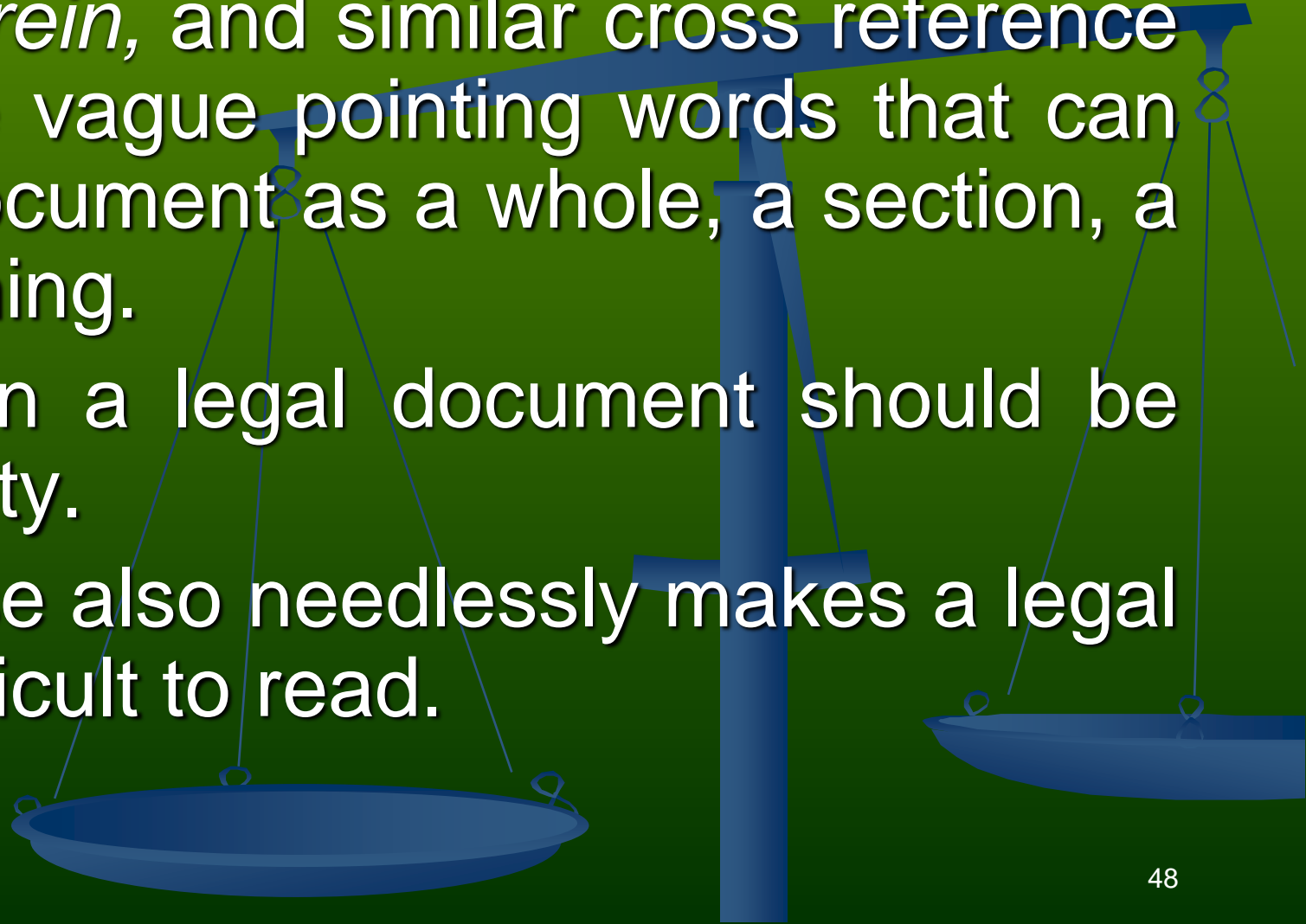
The peculiar language of lawyers; esp., the speech and writing of lawyers at their communicative worst, characterized by antique jargon, pomposity, affected displays of precision, ponderous abstractions, and hocus-pocus incantations.



Legalese Cross Reference Words

(*Here* and *There* Words)

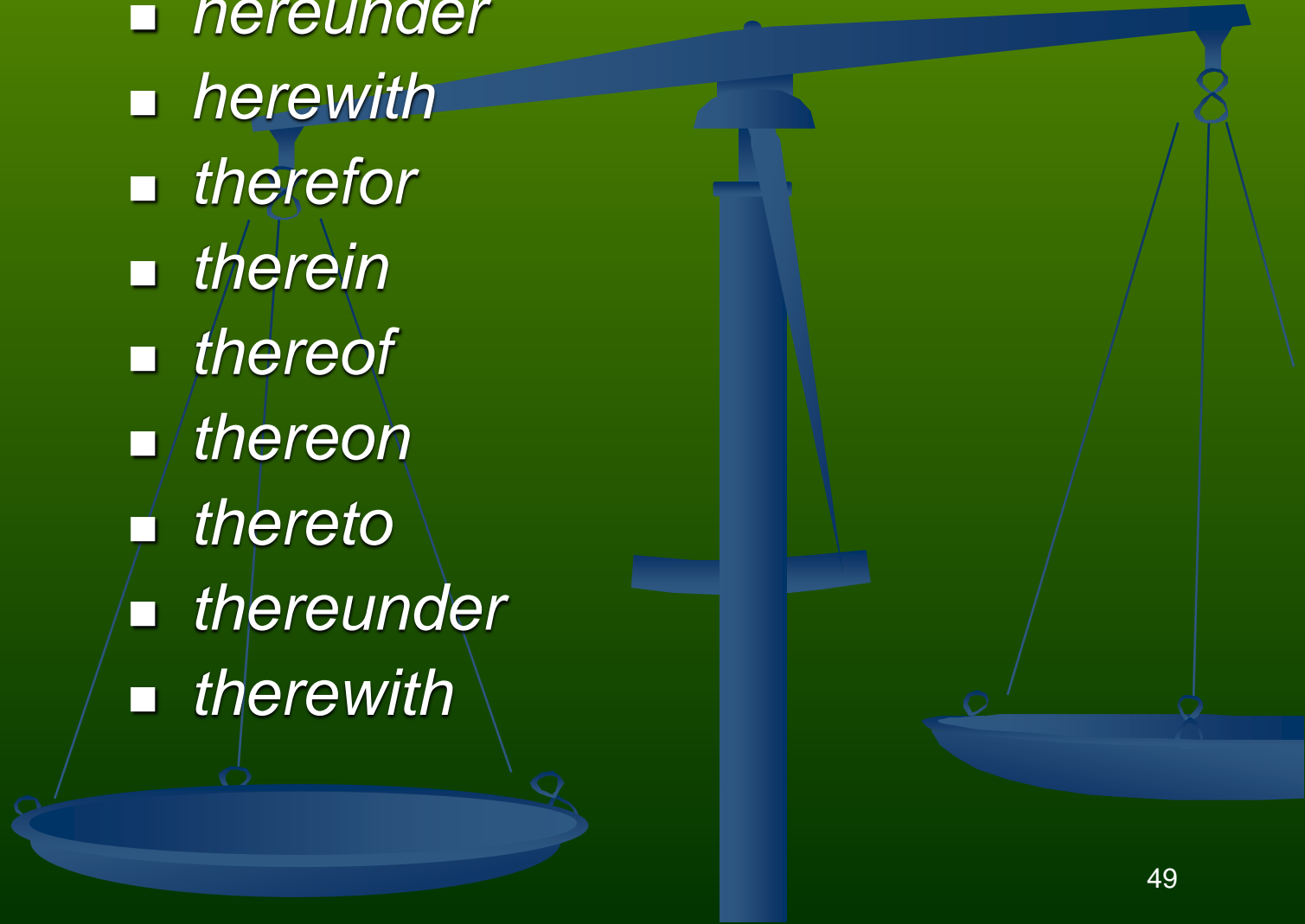
- *Hereto, thereto, herein*, and similar cross reference legalese words are vague pointing words that can refer to the legal document as a whole, a section, a paragraph, or anything.
- Cross references in a legal document should be stated with specificity.
- This type of legalese also needlessly makes a legal document more difficult to read.



Legalese Cross Reference Words

To the maximum extent possible, avoid these legalese referential words:

- *aforementioned*
- *aforesaid*
- *herein*
- *hereinabove*
- *hereinafter*
- *hereinbefore*
- *hereof*
- *hereto*
- *heretofore*
- *hereunder*
- *herewith*
- *therefor*
- *therein*
- *thereof*
- *thereon*
- *thereto*
- *thereunder*
- *therewith*

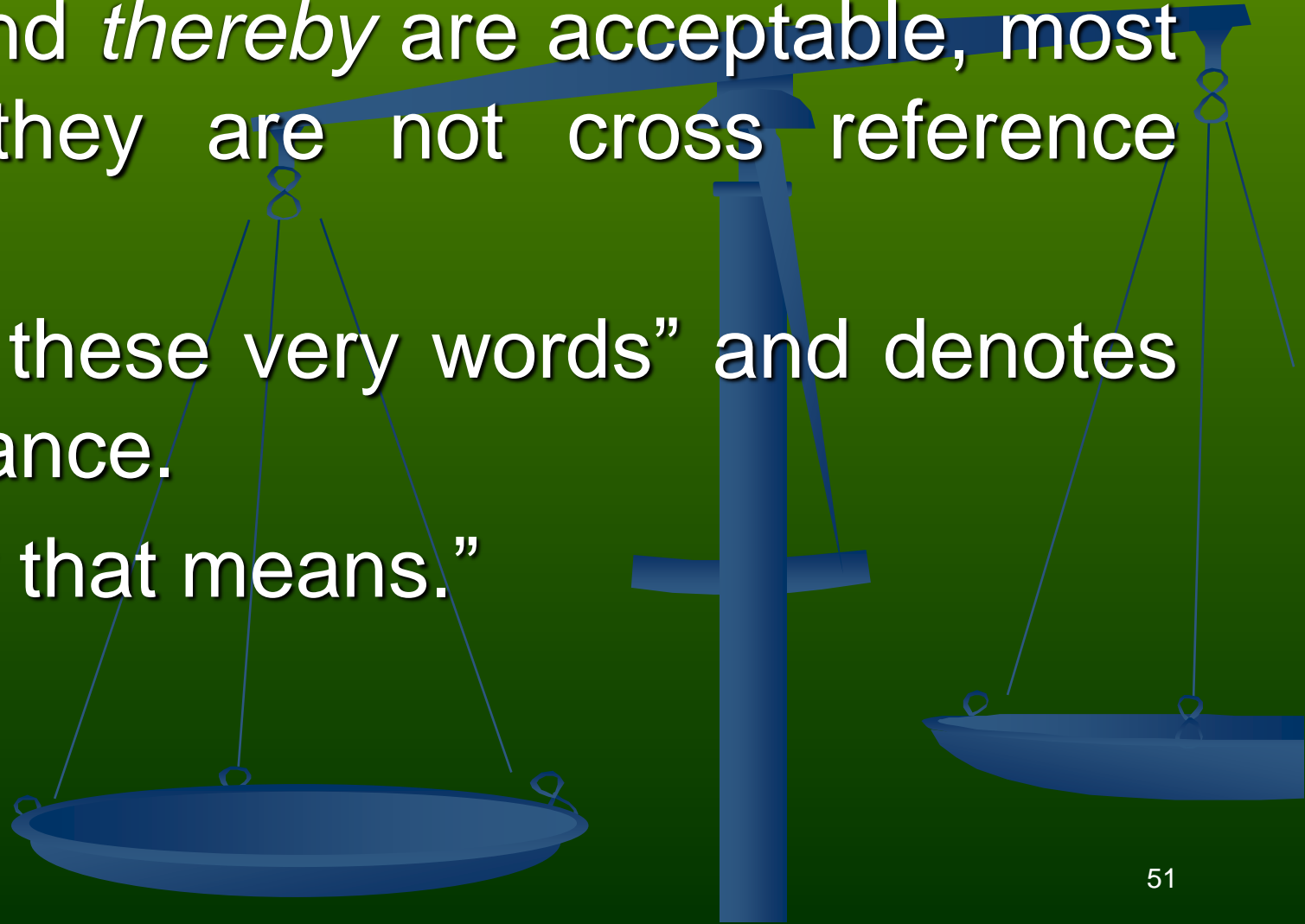


Legalese Cross Reference Words

- 
- 
- *also mentioned*
 - *afore said*
 - *herein*
 - *hereinabove*
 - *hereinafter*
 - *hereinbefore*
 - *hereof*
 - *here*
 - *hencefore*
 - *hereunder*
 - *herewith*
 - *herefor*
 - *therein*
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 - *thereon*
 - *hereto*
 - *thenceunder*
 - *therewith*

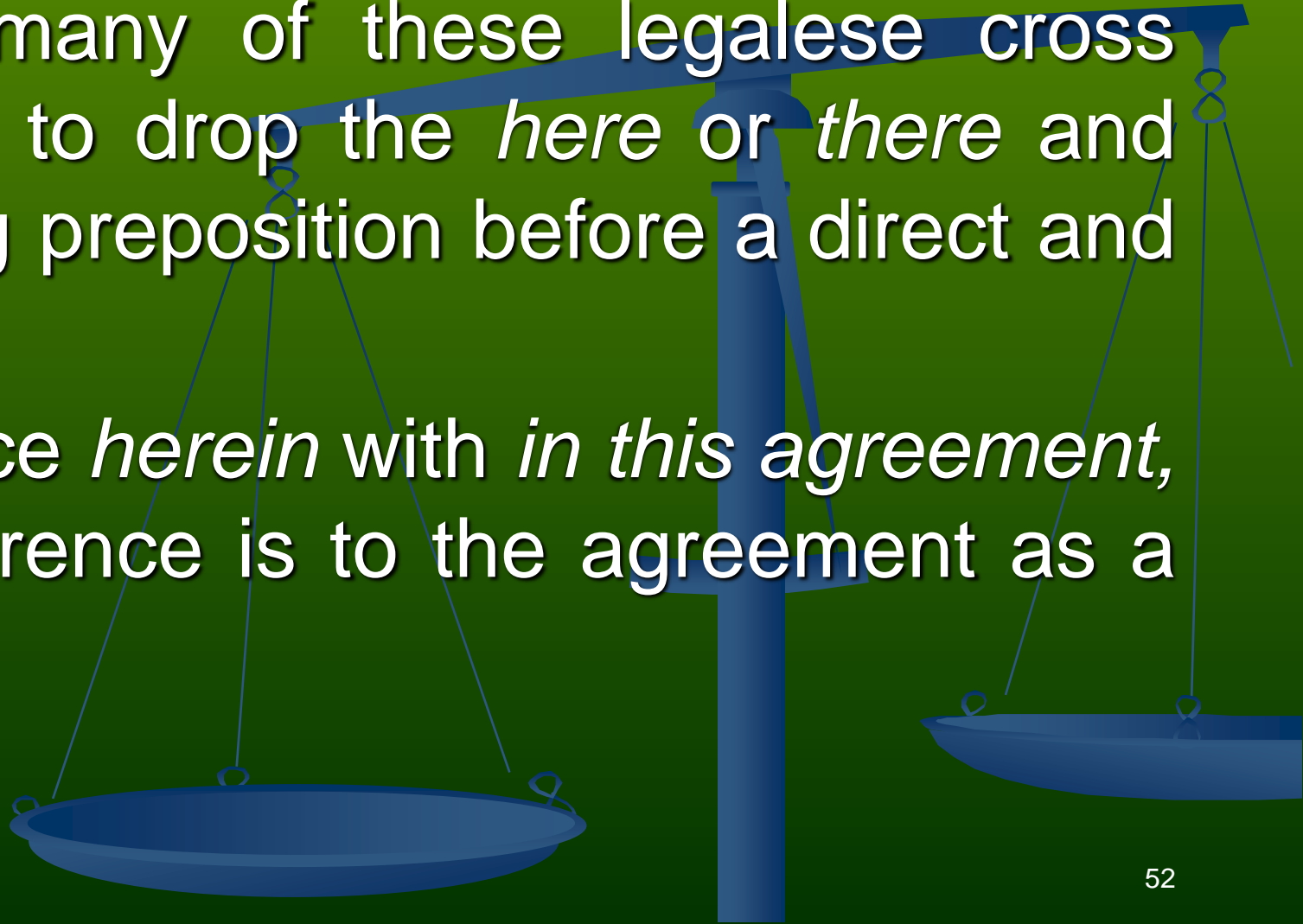
Hereby and *Thereby* Are Acceptable

- Note that *hereby* and *thereby* are acceptable, most notably because they are not cross reference words.
- *Hereby* means “by these very words” and denotes immediate performance.
- *Thereby* means “by that means.”



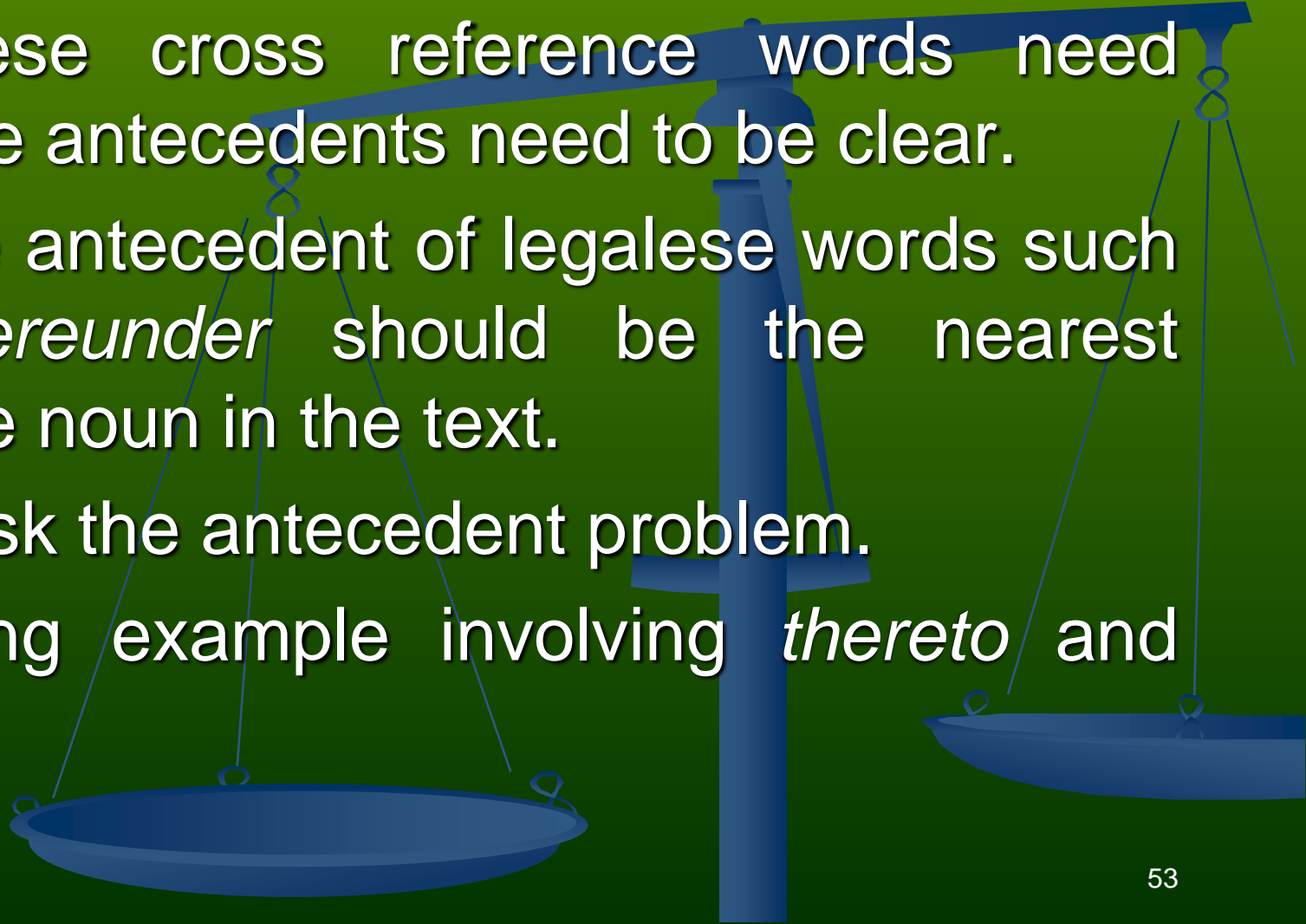
Legalese Cross Reference Words

- The easy fix for many of these legalese cross reference words is to drop the *here* or *there* and place the remaining preposition before a direct and specific reference.
- For example, replace *herein* with *in this agreement*, if the intended reference is to the agreement as a whole.



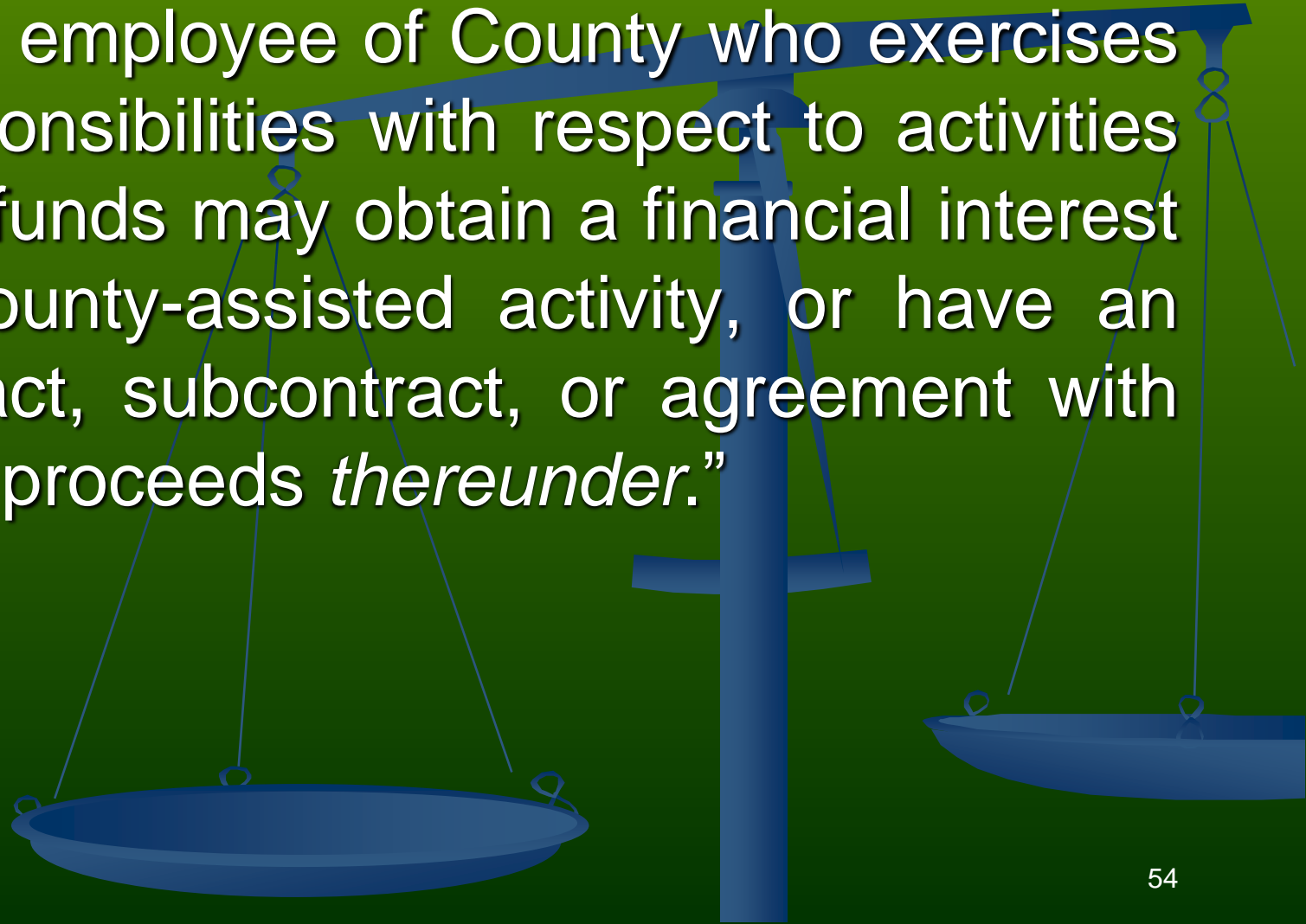
Legalese and Lost Antecedents

- Some of the legalese cross reference words need antecedents and these antecedents need to be clear.
- As with pronouns, the antecedent of legalese words such as *thereto* and *thereunder* should be the nearest reasonable descriptive noun in the text.
- Legalese tends to mask the antecedent problem.
- Consider the following example involving *thereto* and *thereunder*:



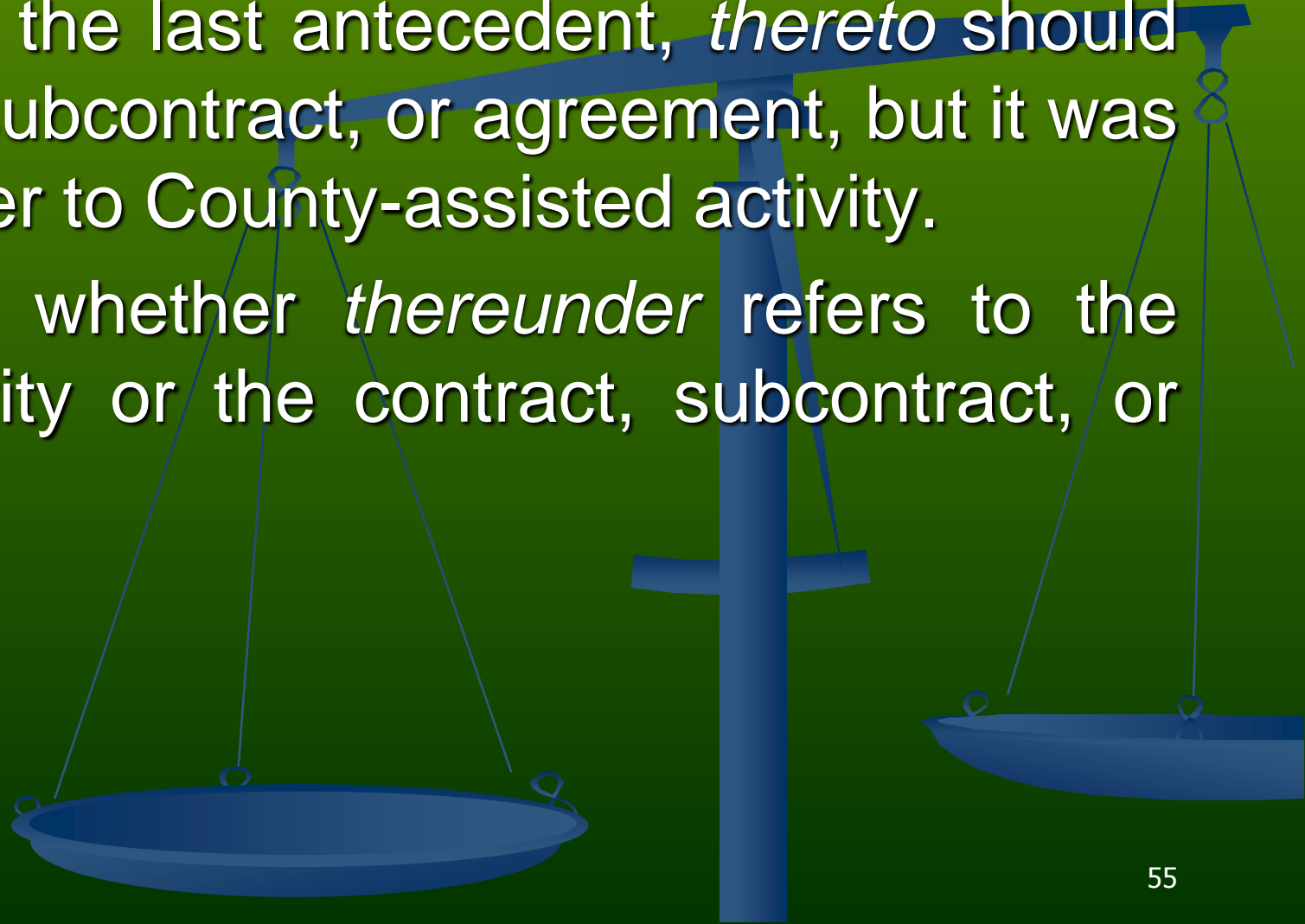
Legalese and Lost Antecedents

“No person who is an employee of County who exercises any functions or responsibilities with respect to activities assisted with County funds may obtain a financial interest or benefit from a County-assisted activity, or have an interest in any contract, subcontract, or agreement with respect *thereto* or the proceeds *thereunder*.”



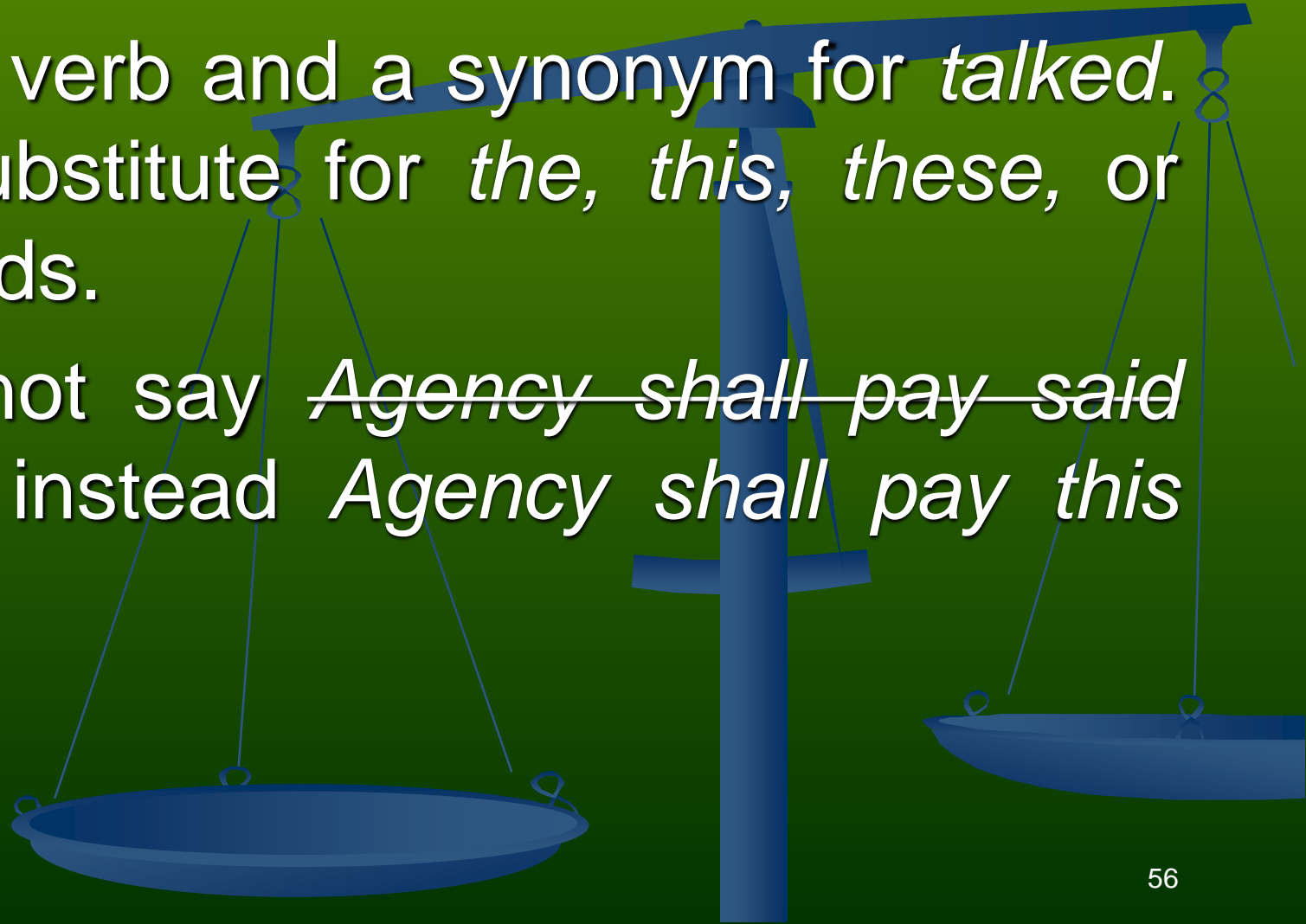
Legalese and Lost Antecedents

- Under the doctrine of the last antecedent, *thereto* should refer to the contract, subcontract, or agreement, but it was probably meant to refer to County-assisted activity.
- It is not at all clear whether *thereunder* refers to the County-assisted activity or the contract, subcontract, or agreement.



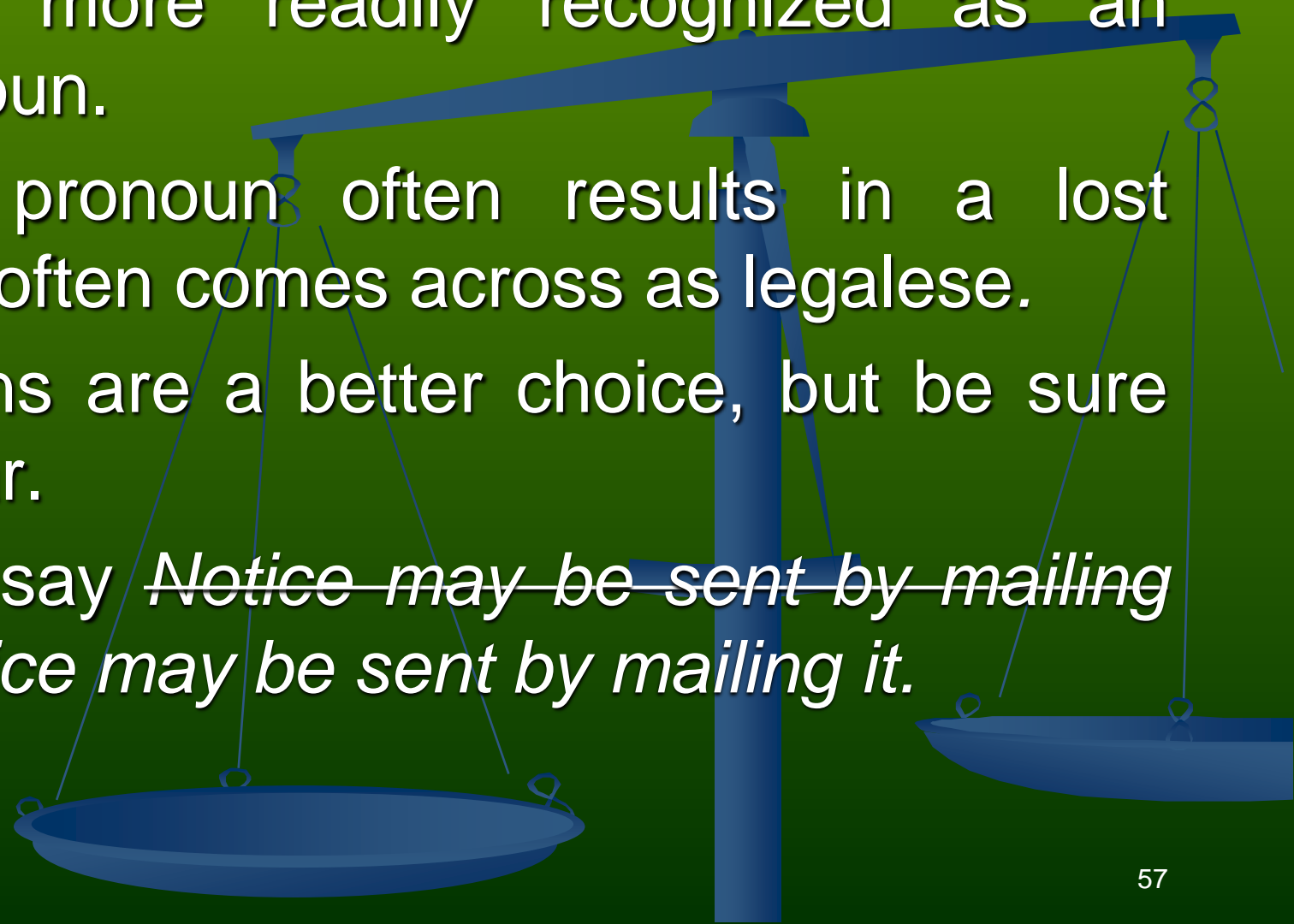
Said as Something Other Than a Verb

- The word *said* is a verb and a synonym for *talked*. It is not a valid substitute for *the*, *this*, *these*, or similar pointing words.
- For example, do not say ~~Agency shall pay said invoice timely~~ but instead *Agency shall pay this invoice timely*.



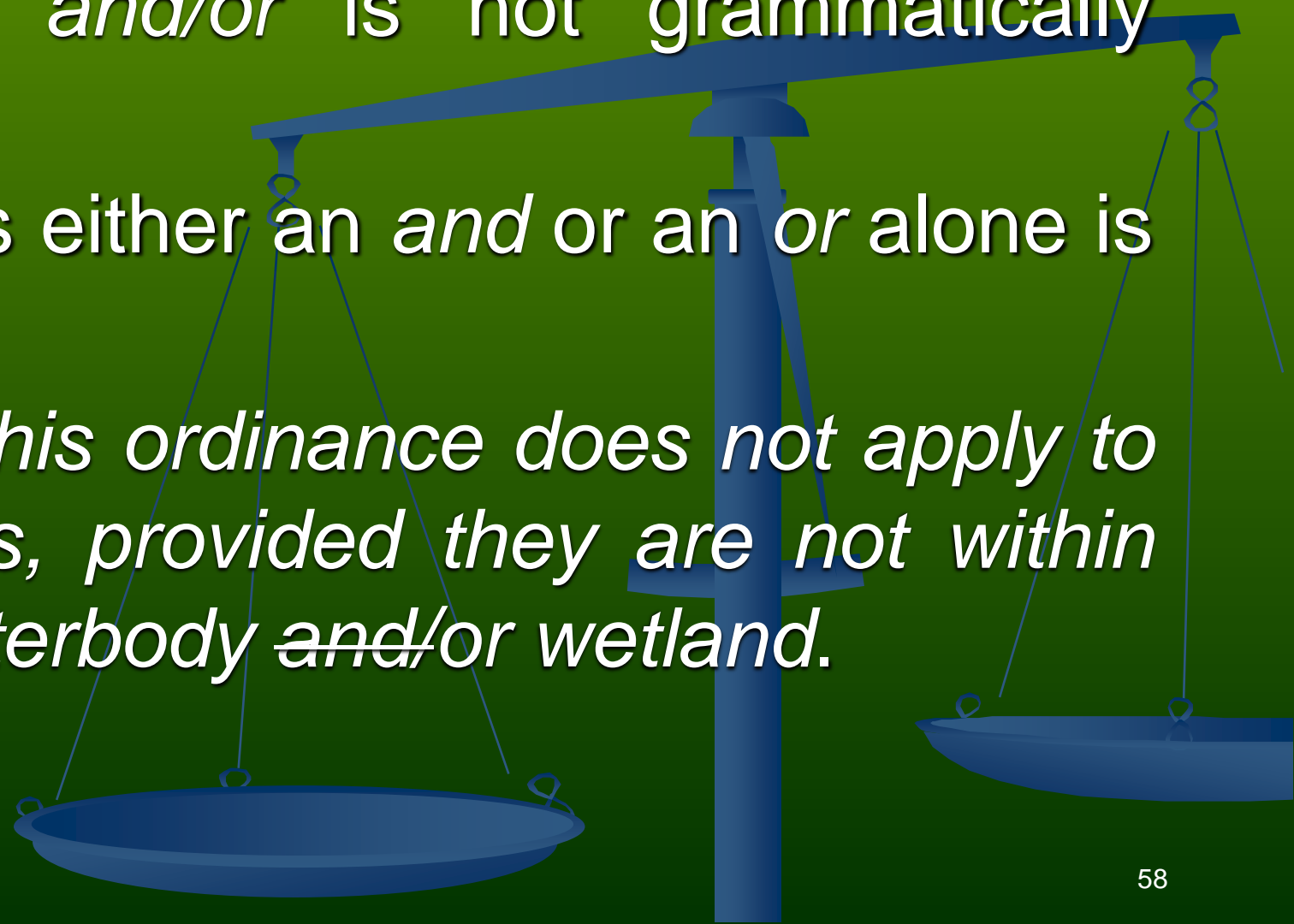
Same as Something Other Than an Adjective

- The word *same* is more readily recognized as an adjective than a pronoun.
- Using *same* as a pronoun often results in a lost antecedent and most often comes across as legalese.
- Conventional pronouns are a better choice, but be sure the antecedent is clear.
- For example, do not say ~~*Notice may be sent by mailing same*~~ but instead *Notice may be sent by mailing it*.



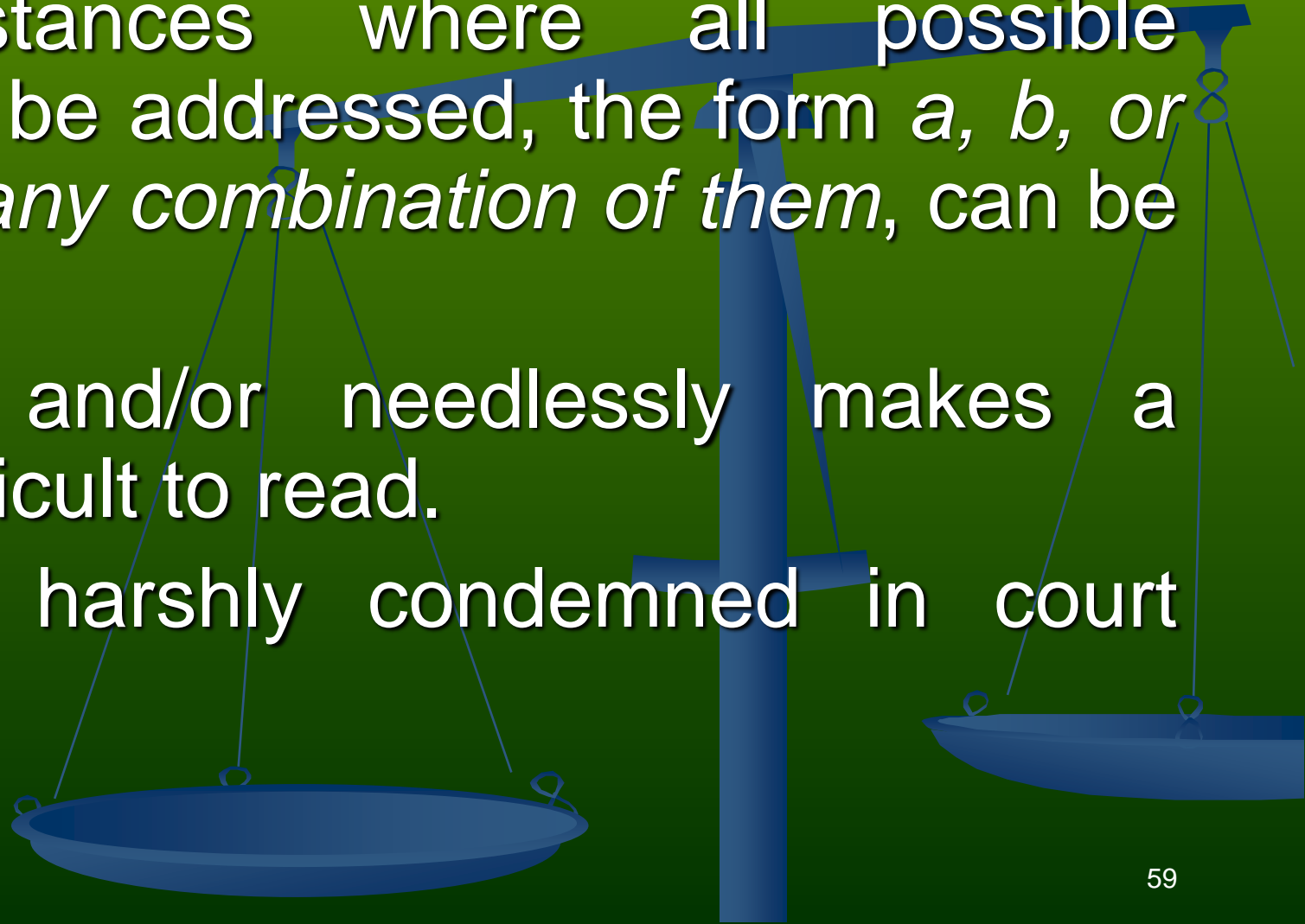
And/or

- The combination *and/or* is not grammatically acceptable.
- In almost all cases either an *and* or an *or* alone is appropriate.
- As an example: *This ordinance does not apply to vegetable gardens, provided they are not within ten feet of any waterbody ~~and/or~~ wetland.*



And/or

- In the few instances where all possible combinations must be addressed, the form *a, b, or both, or a, b, c, or any combination of them*, can be used.
- The combination *and/or* needlessly makes a document more difficult to read.
- *And/or* has been harshly condemned in court cases.



And/or and the Florida Third District

The confusion created by “and/or” in all areas of the law--contracts, criminal law, and otherwise--is certainly not a recent development or a contagion confined to Florida. Over 70 years ago, an obviously annoyed Justice of the Supreme Court of Wisconsin wrote:

[W]e are confronted with the task of first construing “and/or,” that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean,

And/or and the Florida Third District

... now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the “thing” in statutes, in the opinion of courts, and in statements in briefs of counsel, some learned and some not.

Aguilera v. State, 975 So. 2d 1270, 1274 (Fla. 3d DCA 2008) quoting *Employers' Mut. Ins. Co. v. Tollefsen*, 263 N.W. 376, 377, 219 Wis. 434 (Wis. 1935).

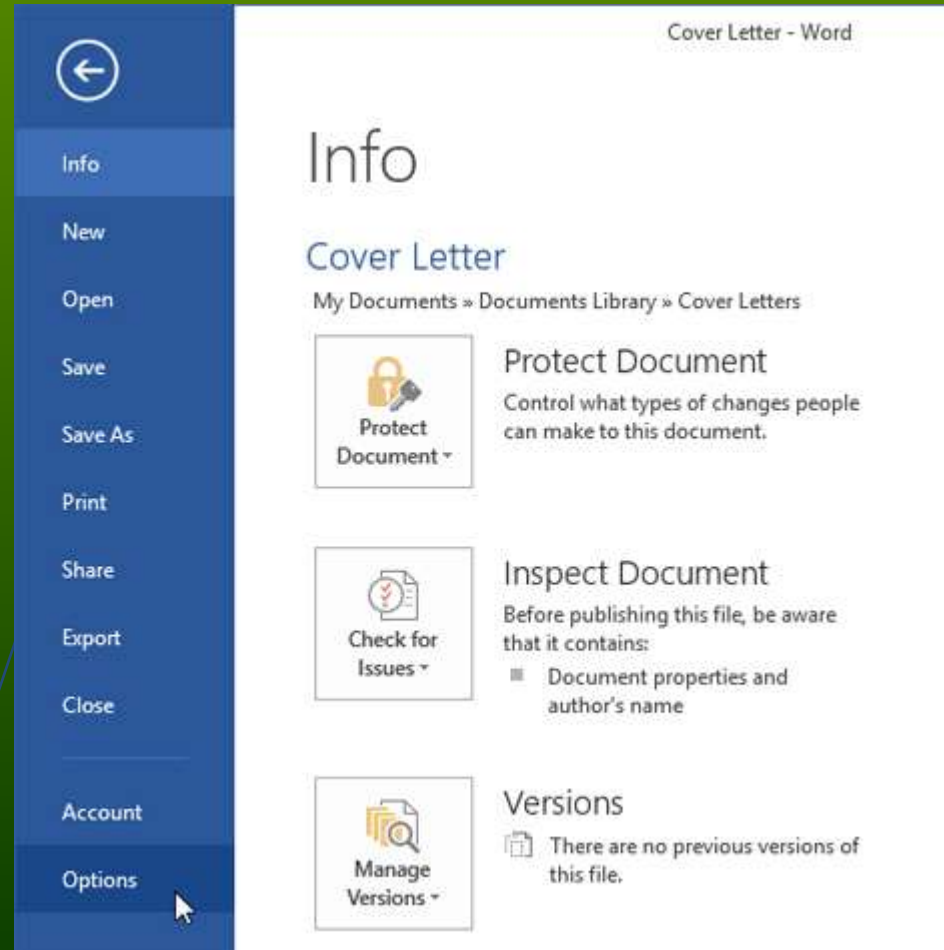
A blue balance scale is positioned on the right side of the frame against a green background. The scale's beam is tilted upwards towards the right, and its two pans are empty. The text 'Part 3' and 'Microsoft Word Tips' is overlaid on the left side of the scale.

Part 3

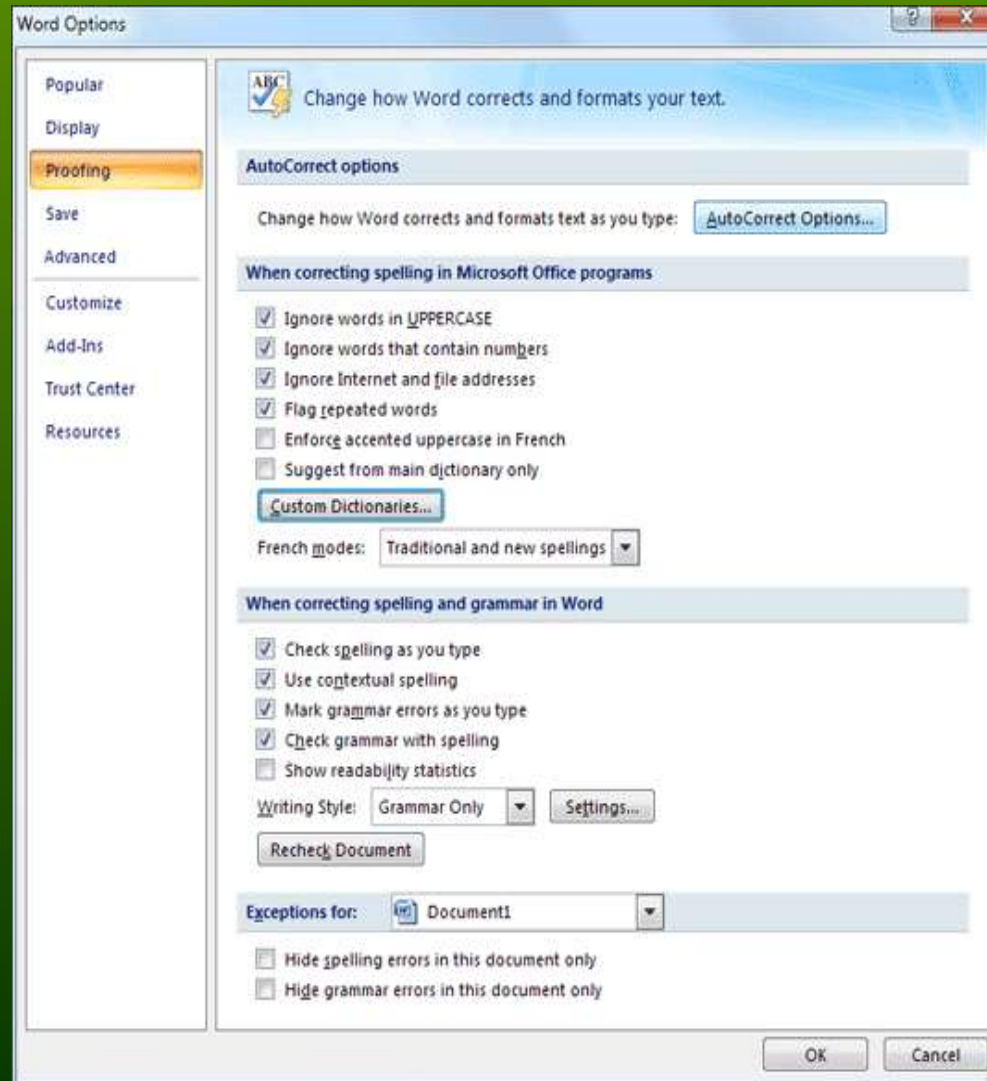
Microsoft Word Tips

Microsoft Word Tips

- Setting File Options
- File | Options

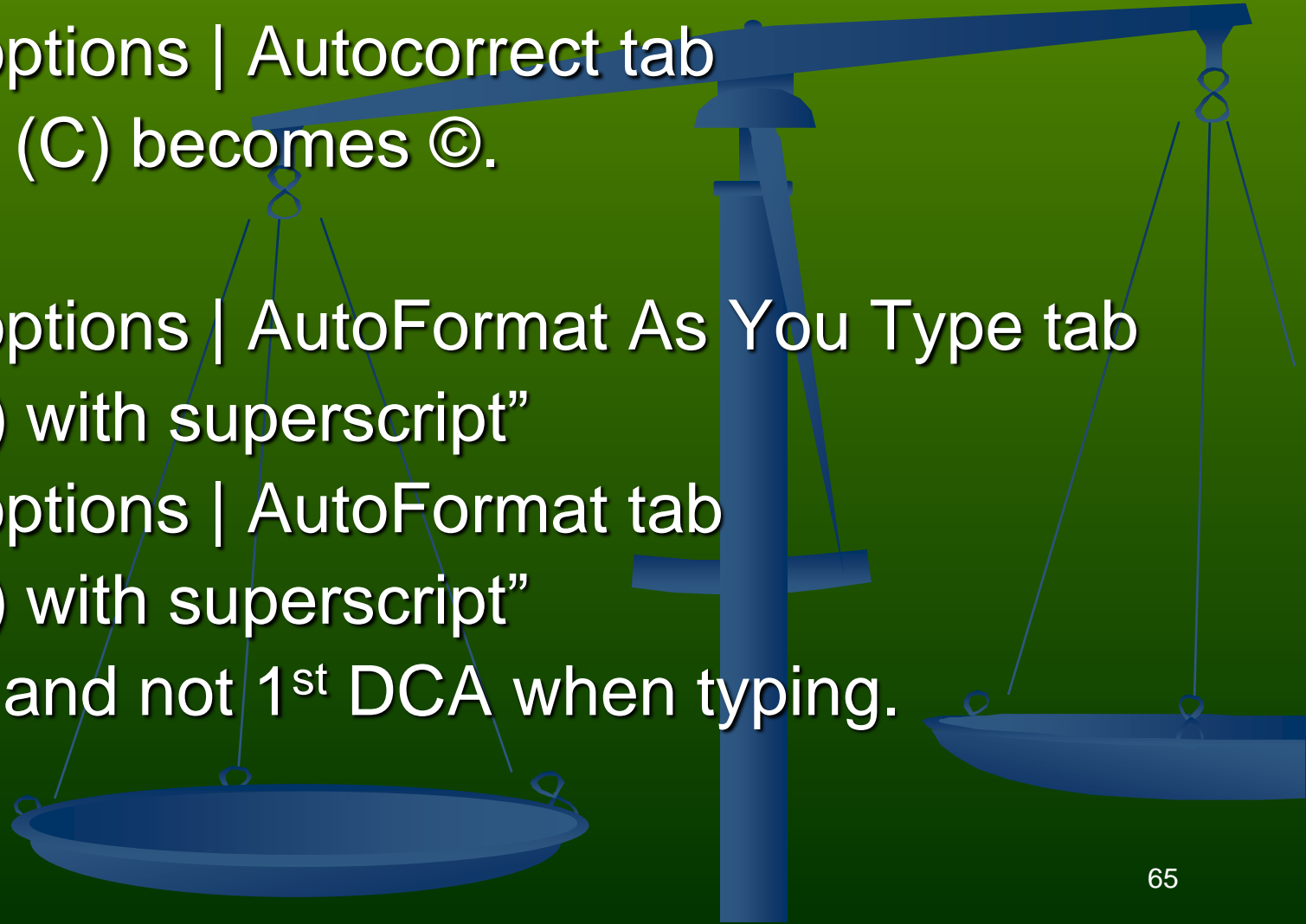


Microsoft Word Tips



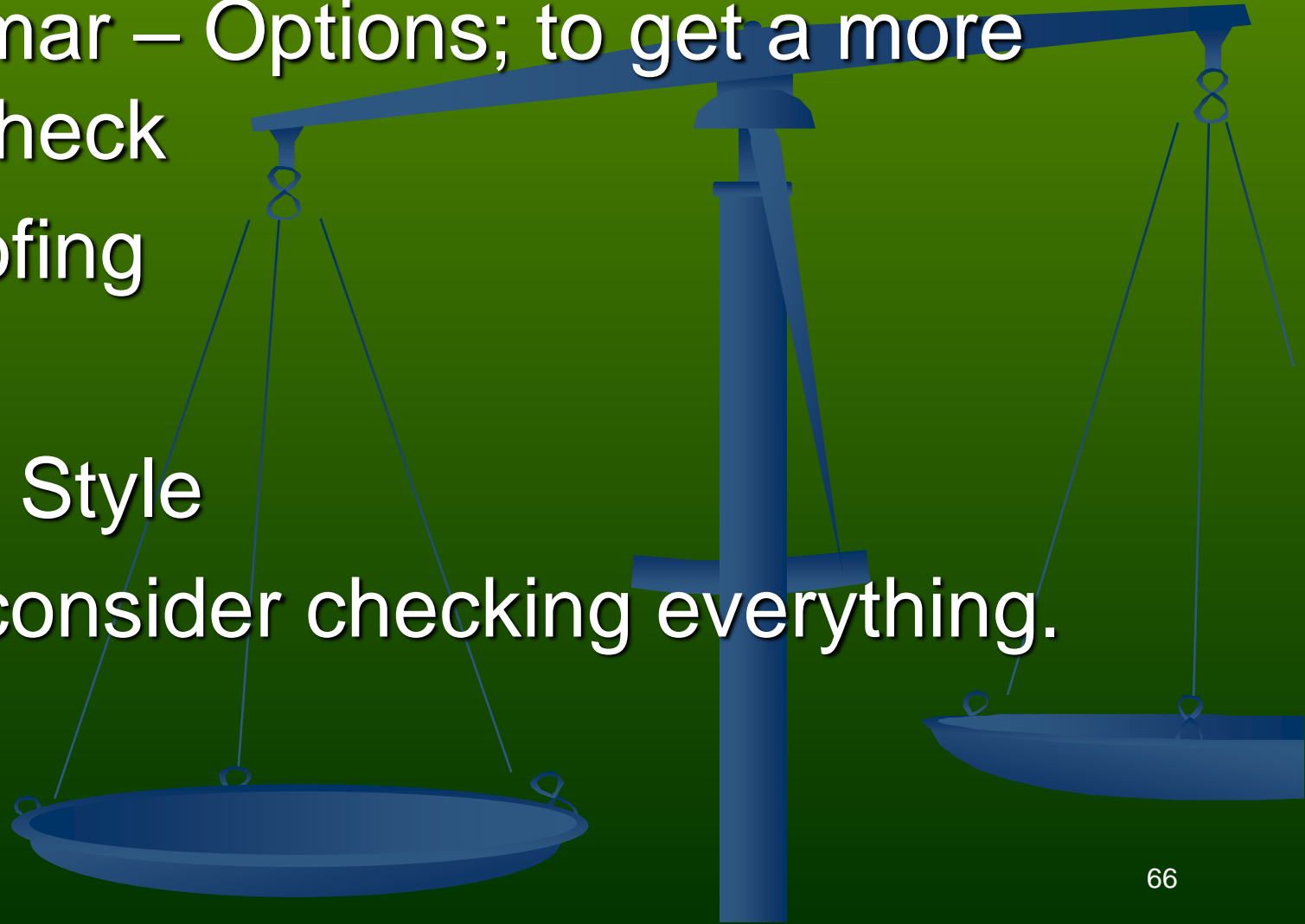
Microsoft Word Tips

- File | Options
- Proofing | Autocorrect options | Autocorrect tab
- Delete “(C)” ; otherwise (C) becomes ©.
- Proofing | Autocorrect options | AutoFormat As You Type tab
- Uncheck “Ordinals (1st) with superscript”
- Proofing | Autocorrect options | AutoFormat tab
- Uncheck “Ordinals (1st) with superscript”
- This results in 1st DCA and not 1st DCA when typing.



Microsoft Word Tips

- Spelling and Grammar – Options; to get a more detailed grammar check
- File | Options | Proofing
- Writing Style
- Click Grammar and Style
- Click Settings and consider checking everything.

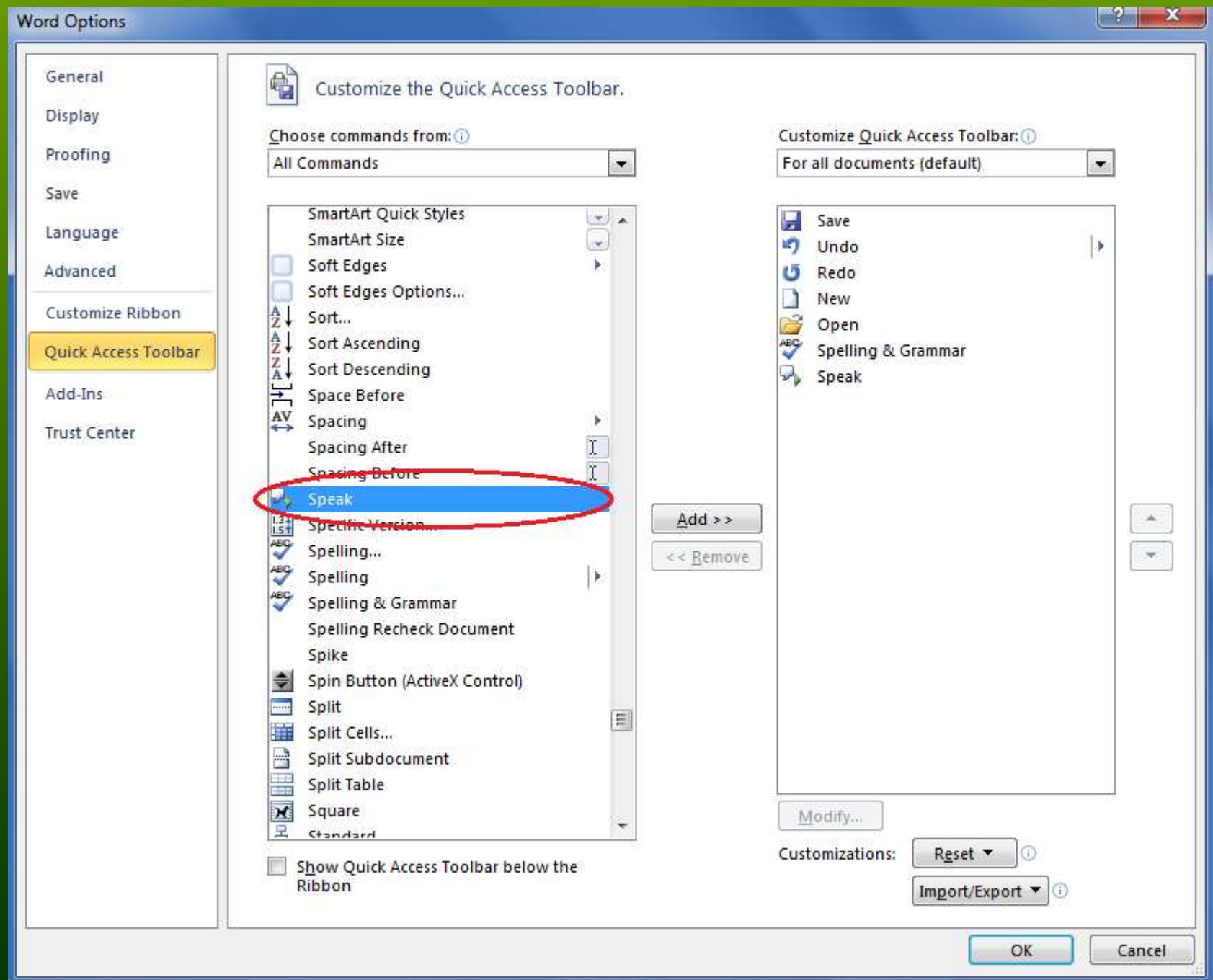


Microsoft Word Tips

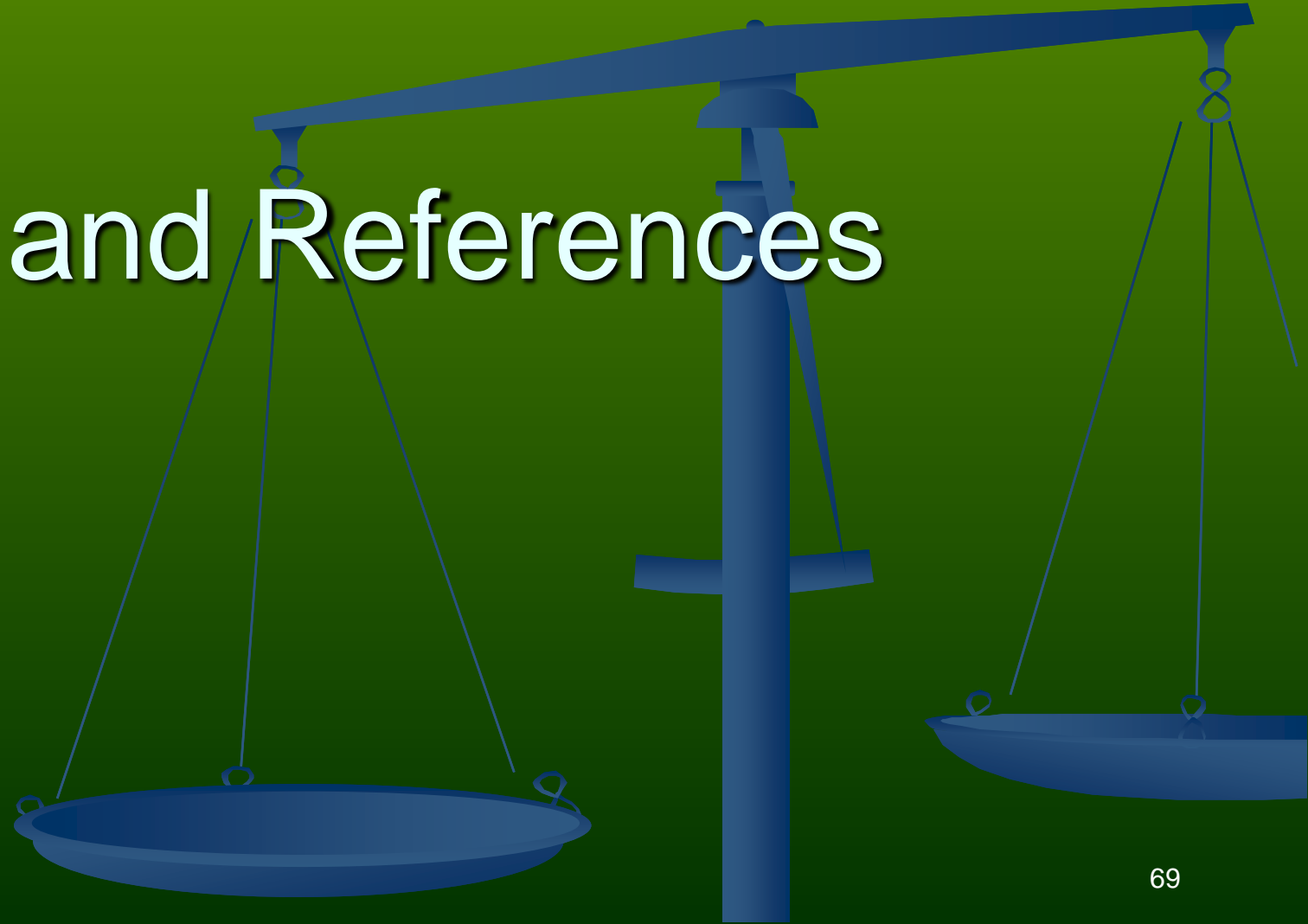
- Speak Selected Text Command
- This command will read the text, helping to spot errors.
- To Place on Quick Access Toolbar
- Click Customize Quick Access Toolbar →
- Click More Commands



- Click All Commands
- Look for and select “Speak”
- Click Add to add to Quick Access Toolbar

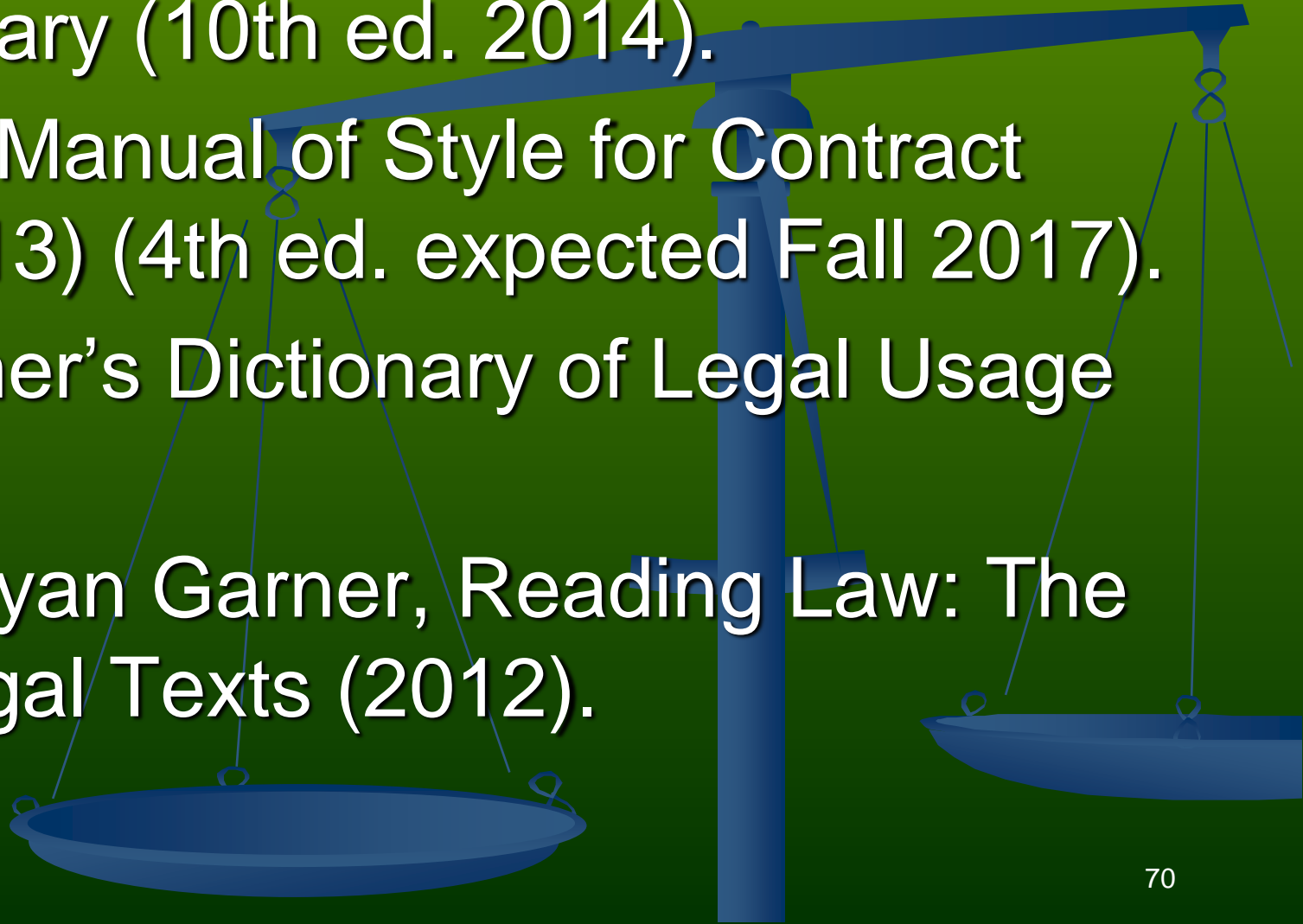


Sources and References



Sources

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- Kenneth Adams, A Manual of Style for Contract Drafting (3d ed. 2013) (4th ed. expected Fall 2017).
- Bryan Garner, Garner's Dictionary of Legal Usage (3d ed. 2011).
- Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012).



Blogs

- Adams on Contract Drafting

<http://www.adamsdrafting.com/blog/>

- LawProse

<http://www.lawprose.org/lawprose-blog/>

