The Miami Dade Bar, Monroe County Bar, and
Third DCA Historical Society present:

CHANGING MINDS AND NAVIGATING NEW FRONTIERS

May 9, 2025 (12:45 PM to 4:30PM)

Florida's Third District Court of Appeal

2001 SW 117th Ave, Maimi FL 33175

CHANGING MINDS AND NAVIGATING NEW FRONTIERS

Florida's Third District Court of Appeal

May 9, 2025

PANEL 1: EFFECTIVE METHODS FOR CHANGING MINDS

Hon. Judge Norma Lindsey

Hon. Fleur J. Lobree

Ben Kuehne, Esq. (Kuehne Davis)

Lauri Waldman Ross, Esq. (Lauri Waldman Ross, PA)

REHEARING UNDER RULE 9.330

Rule 9.330 governs timing, contents, & limitations

- Timing: within 15 days of the opinion
  - NOT jurisdictional; court can hear belated motions - Zielke v. State, 839 So. 2d 911 (Fla. 5th DCA 2003)
- Contents: "A motion for rehearing shall state with particularity **the points of law or fact that**, in the opinion of the movant, **the court has overlooked or misapprehended** in its order or decision. The motion shall not present issues not previously raised in the proceeding." Rule 9.330(a)(2)(A).
- Limitations: Only one motion for rehearing, clarification, written opinion, or rehearing en banc shall be filed. Rule 9.330(b).

WHAT A MOTION FOR REHEARING IS **NOT**

- "a vehicle for counsel or the party to continue its attempts at advocacy." Cleveland v. State, 887 So. 2d 362 (Fla. 5th DCA 2004)
- "a vehicle to reargue the merits of the court's decision or to express displeasure with its judgment." Dabbs v. State, 230 So. 3d 475 (Fla. 4th DCA 2017)
- "an open invitation for an unhappy litigant or attorney . . . to discuss the bottomless depth of the displeasure that one might feel toward this judicial body as a result of having unsuccessfully sought appellate relief." Ayala v. Gonzalez, 984 So. 3d 523 (Fla. 5th DCA 2008)

DON'T DO THIS

- Raise a new argument & cite several new cases (Cleveland v. State, 887 So. 2d 362 (Fla. 5th DCA 2004))
- Move for rehearing on a PCA (McDonnell v. Sanford Airport Auth., 200 So. 3d 83 (Fla. 5th DCA 2015)) – motion for written opinion more appropriate
- Try to raise an issue not raised in the trial court (Marriott Int'l, Inc. v. Perez-Melendez, 885 So. 2d 624 (Fla. 5th DCA 2003))
- Insult the court or denigrate its decision

SOME SUCCESSFUL MOTIONS FOR REHEARING

- Verde v. HSBC Bank USA, Nat'l Ass'n, 337 So. 3d 331 (Fla. 3d DCA 2022)
  - Granted and reversed due to intervening Page (Fla 2020)decision
- Health & Wellness Evolution Co. v. Infinity Auto Ins. Co., 394 So. 3d 712 (Fla. 3d DCA 2024)
  - Granted and reversed because Court's original reasoning applied to documents **created** by a business, not merely **received**

PRACTICE TIPS

- Reveal a problem **the Court** will want to address to be clear or consistent. "Motions for rehearing that merely reargue a point that was previously rejected are easily identified and promptly denied." (Padovano, Appellate Practice)
- Good opportunities: very recent rule or caselaw change, ruling with a different basis than the briefs
- Looser standard for rehearing in trial courts – you can raise new arguments (Fitchner, 88 So. 3d 269 (Fla. 1st DCA 2012)). Don't wait until you've lost your appeal!

THIRD DCA: INTERNAL OPERATING PROCEDURES ON REHEARING

- Third DCA: motion first considered by panel. Any judge except one who dissented can request OA
- Withdrawal/substantial revision by panel moots an accompanying motion for rehearing en banc
- If both motions and rehearing are denied, then en banc motion circulates to the entire conference
- En banc motion without a motion for rehearing will be treated as a motion for rehearing first

IOPS FROM OTHER DISTRICTS ON REHEARING

- First DCA: motions held to allow response. Rehearing considered by panel, while motion for REB is made available to whole court and any judge can move for hearing en banc
- Second DCA: both motions circulate to panel first, then motion for REB circulates to all judges. A majority of the conference must agree to hearing en banc or the motion for REB is denied and the panel decides on the motion for rehearing
- Fifth DCA: motion for rehearing "acted upon by merit panel"
- Fourth and Sixth DCA IOPs only address rehearing en banc

AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE

EFFECTIVE OCTOBER 1, 2024, JANUARY 1, 2025, MARCH 27, 2025 & JULY 1, 2025

EFFECTIVE METHODS FOR CHANGING MINDS

- **TRANSCRIPTS -** (d) Format of Filed Transcripts. All transcripts filed with the court must be in full-page format, unless condensed transcripts are authorized by the court. The Portable Document Format ("PDF") file(s) of all transcripts must be text searchable. (*See* Fla. R. Civ. P. 1.080).

- Aligns civil rules with the Florida Rules of Appellate Procedure, which require filing full-page format transcripts, including depositions, in all appellate courts. This rule does not prevent the use of condensed transcripts for other purposes.
- Effective October 1, 2024.

NO MINI TRANSCRIPTS!!!!

NON-FINAL APPEALS

- Fla. R. App. P. 9.130(a)(3)(I)

- (I) determine the entitlement of a party to arbitration, confirm or deny confirmation of an arbitration award or partial arbitration award, or modify, correct, or vacate an arbitration award.

- Effective July 1, 2024

NON-FINAL APPEALS

- Fla. R. App. P. 9.130(a)(3)(F)(iv)
- Denial of motion that asserts entitlement to immunity under section 776.032, Fla. Statutes

Effective July 1, 2025

- Not applicable in criminal cases where denial of a claim of immunity is still subject to review by writ of prohibition. In re Amendments to Fla. Rules of Appellate Procedure, No. SC2024-0317, 2025 WL 715788, at *2 (Fla. Mar. 6, 2025).

NON-FINAL APPEALS

- **Fla. R. App. P. 9.130(a)(3)(J)**
- Denial of motion under section 718.1224(5),720.304(4)(c), or 768.295(4), Florida Statutes (Anti-SLAPP statutes)
- Effective March 27, 2025
- Jurisdiction in cases pending on the effective date under review

UNIFORM CITATION SYSTEM - Fla. R. App. P. 9.800

- (d)(4) - Revises citations to administrative law reporters to conform to current publishing methods. Effective July 1, 2025.

DEATH PENALTY CASES

- Petitions Seeking Review of Non-Final Orders must be served on judge who issued order to be reviewed. Fla. R. App.P. 9.142(c)(3)(A)
- In appeals from summary denials - Fla. R. App. P. 9.142(a)(2)(D) initial and answer briefs must not exceed 20,000 words or 75 pages and reply briefs must not exceed uor 25 pages.

MINISTERIAL CHANGES

APPELLATE MEDIATION RULES UNCHANGED

- Court declined to accept proposals to amend mediation rules 9.700, 9.720, 9.730 & 9.740

- In Re: Amendments to Fla. Rules of App. P., 2024 WL 4864642, SC2024-0215 (Nov. 22, 2024).

UNIFORM CITATION SYSTEM - Fla. R. App. P. 9.800

- (d)(4) - Revises citations to administrative law reporters to conform to current publishing methods. Effective July 1, 2025.

DEATH PENALTY CASES

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MINISTERIAL CHANGES

REHEARING *EN BANC*

Rule 9.331, Fla. R.App.P.: There are only **two** authorized grounds:

(1) "that the case **or issue** is of exceptional importance;" Or

(2) "that such consideration is necessary to maintain uniformity in the court's decisions.

The rule has been amended to cure a defect identified by Judge Shepherd. See Univ. of Miami v. Wilson, 948 So. 2d 774, 787 (Fla.2007) (Shepherd, J. concurring in denial of rehearing *en banc* and/or certification) ("Nothing in the text of the rule suggests that *en banc* review may be considered based solely on **an issue** raised by the litigants."); In re Amendments to the Fla.Rules of Appellate Procedure, 183 So.3d 245, 263 (Fla. 2004) (adding "or issue" to the language of Rule 9.331(d)(1)).

- A motion based on any other grounds "shall be stricken."

"EXCEPTIONAL IMPORTANCE"

- This is a different standard than that required for Florida Supreme Court review.
- The Florida Supreme court "[m]ay review any decision of a district court that passes upon a **question** certified by it to be of **great public importance…**" Fla.Const.art.v,§3(b)(4). See R.C. v. Dept. of Agriculture & Consumer Servs., 323 So. 3d 366, 368 (Fla. 1st DCA 2021) (Long, J, concurring in denial of certification, explaining these distinctions);
- See also State v. Georgoudiou, 560 So. 2d 1241, 1246 (Fla. 5th DCA 1990) (Cowart, J, dissenting from *en banc* reconsideration) ("Exceptional importance cannot mean exceptionally important to the parties because every case is exceptionally important to the parties and counsel. 'Exceptional importance' surely does not mean any case in which the *en banc* majority disagrees with the reasoning or result of a panel majority. 'Exceptional importance' must be interpreted to mean a case exceptionally important to the jurisprudence of the state as a judicial precedent.").

"EXCEPTIONAL IMPORTANCE"

- **EXAMPLES:**

Academy for Positive Learning, Inc. v. School Board, 315 So. 3d 675 (Fla. 4th DCA 2021) (Validity of referendum approving levy for the operational needs of only non-charter district schools).

Baxter v. State, 389 So. 3d 803 (Fla. 5th DCA 2024) (application of the "plain smell" doctrine to evolving legalization of certain types of cannabis).

- Ortiz v. State, 24 So. 3d 596, 597 (Fla. 5th DCA 2009) (parameters of the exigent circumstances doctrine applied to police officers).

"NECESSARY TO MAINTAIN UNIFORMITY"

The Florida Supreme Court has no jurisdiction to resolve intra-district conflicts. See Bates v. Bates, 345 So. 3d 328, 345 (Fla. 3d DCA 2022) (Logue, J, concurring in denial of rehearing *en banc*) ("Properly understood, the *en banc* rule is designed to fill this narrow jurisdictional gap…").

In the event of a tie, the panel decision stands. Bates, supra; Leslie v. Carnival Corp., 22 So. 3d 567 (Fla. 3d DCA 2009).

- District courts are free to develop their own concept of decisional uniformity, and are not limited by the standard of "express, direct conflict" required for discretionary review by the Florida Supreme Court. Chase Fed. Sav. & Loan Ass'n v. Schreiber, 479 So.2d 90, 91 (Fla. 1985).

"NECESSARY TO MAINTAIN UNIFORMITY"

- **EXAMPLES:**
- Puga v. Suave Shoe Corp., 417 So. 2d 678 (Fla. 3d DCA 1981) (dismissal of appeal improper where notice of appeal incorrectly specified a non-appealable order denying post-trial motions, and was treated as though directed to a reviewable final judgment).

- A motion for clarification "shall state with particularity the points of law or facts that, in the opinion of the movant are in need of clarification." Fla.R.App.P. 9.330(a)(2)(B).

MOTION FOR CLARIFICATION

MOTION FOR CERTIFICATION

- Such motion "shall set forth the case[s] that expressly and directly conflicts with the order or decision or set forth the issue or question to be certified as one of great public importance." Fla.R.App.P. 9.330(a)(2)(C).
- A party is limited to one motion for rehearing, clarification, certification or written opinion per order or decision of the court. Fla.R.App.P. 9.330(b). This is subject to exception "when a court issues a new opinion which changes the entire basis for the ruling of the original opinion," Huggins v. Siegel, 336 So. 3d 58 (Fla. 1st DCA 2021): OR the court (on rehearing) issues a new opinion "that substantially change[s] the results or reasoning of the prior opinion." See DeBiasi v. Snaith, 732 So. 2d 14 (Fla. 4th DCA 1999).

Confronting and Adjusting Precedent:

Analysis of Case Law as Precedent.

The following passage from page 2 of Bryan Garner, *The Law of Judicial Precedent* (2016 ed.), is a useful starting point when analyzing case law precedent:

- [**R]eading case law differs fundamentally from reading statutes.** Judges often say that they construe or interpret a statute, which means they try to determine the meaning of its language. By contrast, judges and lawyers often say that they analyze a judicial precedent. Although analyzing an opinion involves delving into the judge's words, you must go beyond the judge's words—which in themselves are of no great significance, as opposed to what they denote.

- You must also understand the opinion's legal background, the facts of the case, and the relationship between those facts and the outcome.

Confronting and Adjusting Precedent:

- **How Precedential Is Precedent?**
- The impact and utility of precedent may be undergoing a sea change of jurisprudential application. Whether and to what extent courts and litigants will be bond by precedent is a fertile area for creative analysis and persuasion.
- Consider that some Florida appellate courts, at least in some judges, question the bedrock application of precedent. Significantly, District Judge Tanenbaum's concurrence in the denial of rehearing *en banc* in *Normandy Insurance Co. v. Bouayad*, 372 So. 3d 671, 694-671 (Fla. 1st DCA 2023), threatens to undo the entire concept of reliance on precedent.

Confronting and Adjusting Precedent:

How Precedential Is Precedent?

First, Judge Tanenbaum questions the binding effect of three-judge panel appellate decisions, at 699:

> Simply put, t*here is no constitutional or statutory basis for a district court panel to claim that it is "bound" by a prior panel decision.* No rule establishes this principle. The supreme court has never held this to be the rule, and its judicial opinions expressly point in the opposite direction.
>
> *One three-judge panel is no more bound by a prior three-judge panel than the current supreme court is bound by a decision of a "predecessor court."* In fact, the three-judge panel and the supreme court both are bound only by the jurisprudential considerations applied under the judicial policy of stare decisis. There is no doubt that the panel majority here hewed to those considerations.

Confronting and Adjusting Precedent:

- **How Precedential Is Precedent?**

Second, in Judge Tanenbaum's view, each appellate panel is constitutionally empowered to decide cases on their merits, without being beholden to a different panel's interpretation or analysis.

> For the process to make constitutional sense, it must be—in the view of the supreme court—that the judicial power always remains vested in the district court as an institution, but with the allowance that the district court may exercise that authority in an individual appeal through a majority vote of one of its three-judge panels. *See* Art. V, § 4(a), Fla. Const. ("Three judges shall consider each case and the concurrence of two shall be necessary to a decision."); *cf. Chase*, 479 So. 2d at 93 ("In holding the en banc process constitutional, we construed the 'three judges shall consider each case' language of article V, section 4, as not restricting the district courts from hearing cases *en banc*."); Fla. R. Gen. Prac. & Jud. Admin. 2.210(a)(1) (providing for the "Exercise of Powers and Jurisdiction" through three-judge panels).

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Confronting and Adjusting Precedent:

- **What Can an Appellate Specialist Do?**

Serious practitioners, in urging courts to change the direction of precedent, should be attentive to the textual, contextual, and historical parameters of precedent, and consider the precise factual situation involved in seemingly applicable prior rulings.

EFFECTIVE METHODS FOR CHANGING MINDS

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TUTORIAL 1: APPELLATE BOARD CERTIFICATION

Hon. Kansas Gooden & Jack Reiter, Esq. (Gray Robinson)

INITIAL CERTIFICATION

Practice of law for at least five years;

Substantial involvement in appellate practice — 30% percent or more during the three years immediately preceding application;

25 appellate actions during the five years immediately preceding application;

5 oral arguments during the five years immediately proceeding application;

45 hours of Appellate Boarded Certification CLE in the three years immediately preceding application;

Peer and Judicial review;

A written examination.

RECERTIFICATION

Substantial involvement in appellate practice — 30% percent or more;

15 appellate actions

3 oral arguments / 2 oral arguments

50 hours of Appellate Boarded Certification CLE

Peer and Judicial review;

TIPS TO ACHIEVE

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TUTORIAL 2: TRENDS FROM THE THIRD DCA'S DOCKET*

Hon. Kevin Emas

Hon. Ed. Scales

*Use of Times New Roman pays homage to the now-extinct font. See Fla. R. App. P. 9.045(b)

TOTAL FILINGS 2021-2024

(ALL APPEALS & PETITIONS)

2021	2022	2023	2024
2478	2243	2310	2332

APPEALS AND PETITIONS FOR CERTIORARI

	2021	2022	2023	2024
FROM CIRCUIT COURT	1394	1605	1497	1724
FROM COUNTY COURT	548	223	223	237

ORAL ARGUMENT

	2021	2022	2023	2024
O/A REQUESTED	410	354	324	333
O/A GRANTED	176	96	96	107
O/A GRANTED (BY %)	**42.9%**	**27.1%**	**29.6%**	**32.1%**

TRENDS ON THE THIRD DCA'S DOCKET

OPINIONS ISSUED

	2018	2019	2020	2021	2022	2023	2024
SIGNED & PER CURIAM	615	845	754	763	750	609	773
PCAs	811	691	464	426	395	346	365

MOTIONS FOR REHEARING

	2021	2022	2023	2024
M/RH FILED	336	383	375	316
M/RH GRANTED	**0***	**0***	**0***	**0***

***Estimates only: Florida Public Records Law does not require record-keeping for "unicorn" events**

OTHER NOTEWORTHY TRENDS

- Increase in punitive damage appeals-- amendment to rule 9.130
- Increase in fee motions because of increased use of PFS in trial court
- Decrease in PIP cases because of change in DCA jurisdiction
- Decrease (potential) in first-party property insurance cases-- repeal of unilateral fee statute and enactment of § 627.351(6)(*ll*)(authorizing Citizens to include DOAH dispute resolution in its policies)

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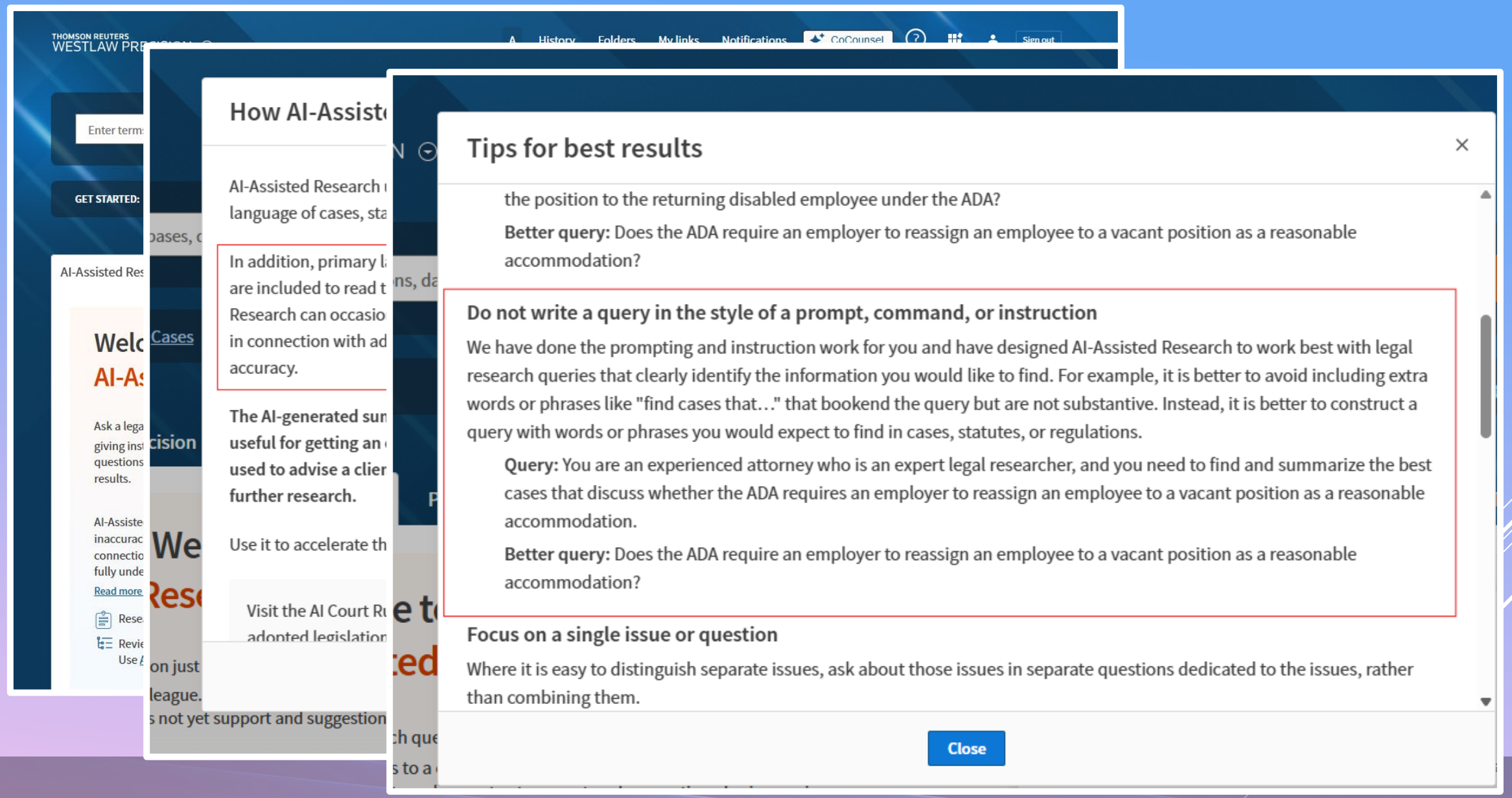
PANEL 2: THE INTERSECTION OF AI AND APPEALS

Hon. Ivan Fernandez

Hon. Alex Bokor

Nicholas Lynch, Esq. (Miami Dade Public Defender's Office)

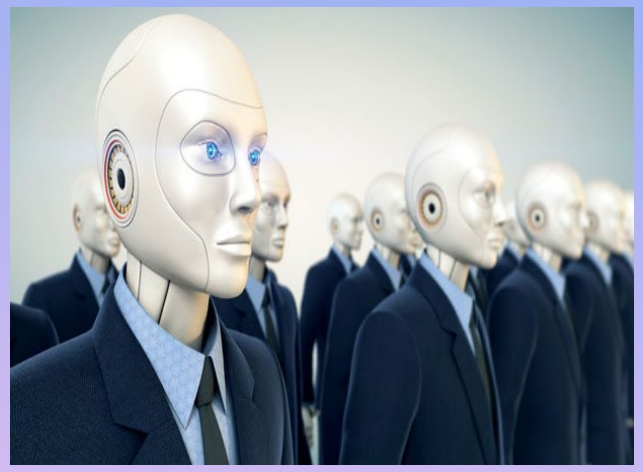
Professor Or Cohen Sasson (Director, Miami Law & AI Lab, University of Miami)



WESTLAW / LEXIS – AI TOOLS

AI IN APPELLATE ARGUMENT GONE WRONG (NY EDITION)

- https://www.youtube.com/watch?v=ZrMQzZKn1qU



- Would this ever be acceptable? When?
- How could this be handled better by the AI user…and by the court?

- **Start with clear context:** 'I need to analyze a commercial lease agreement for potential liability issues.'
- **Provide relevant background** information in separate sections:
  - Case/Matter Background: {brief overview of situation}
  - Specific Legal Question: {clearly defined legal question}
  - Jurisdiction: {specify applicable law, and paste into the prompt if possible}
- **Use triple quotes** (""") for input information, to separate legal text from your instructions:
  'The legal question you need to address…. Here is the text of the relevant clause: """{INPUT}""")'

PROMPT ENGINEERING FOR LEGAL PROFESSIONALS (1/3)

Dr. Or Cohen-Sasson, orcs@law.miami.edu
Miami Law & AI Lab, University of Miami School of Law

- **Be specific** about the output format you need:
  "Provide analysis in numbered paragraphs with relevant case citations."
  - Remember: More specific prompts yield more reliable legal analysis
- **Provide examples** of desired responses:

  'Here's an example of how I want you to analyze this contract clause: [example]'
- **Set the appropriate tone** for the context:

  'Draft a demand letter in formal legal language" vs "Explain this legal concept to a client'

PROMPT ENGINEERING FOR LEGAL PROFESSIONALS (2/3)

Dr. Or Cohen-Sasson, orcs@law.miami.edu
Miami Law & AI Lab, University of Miami School of Law

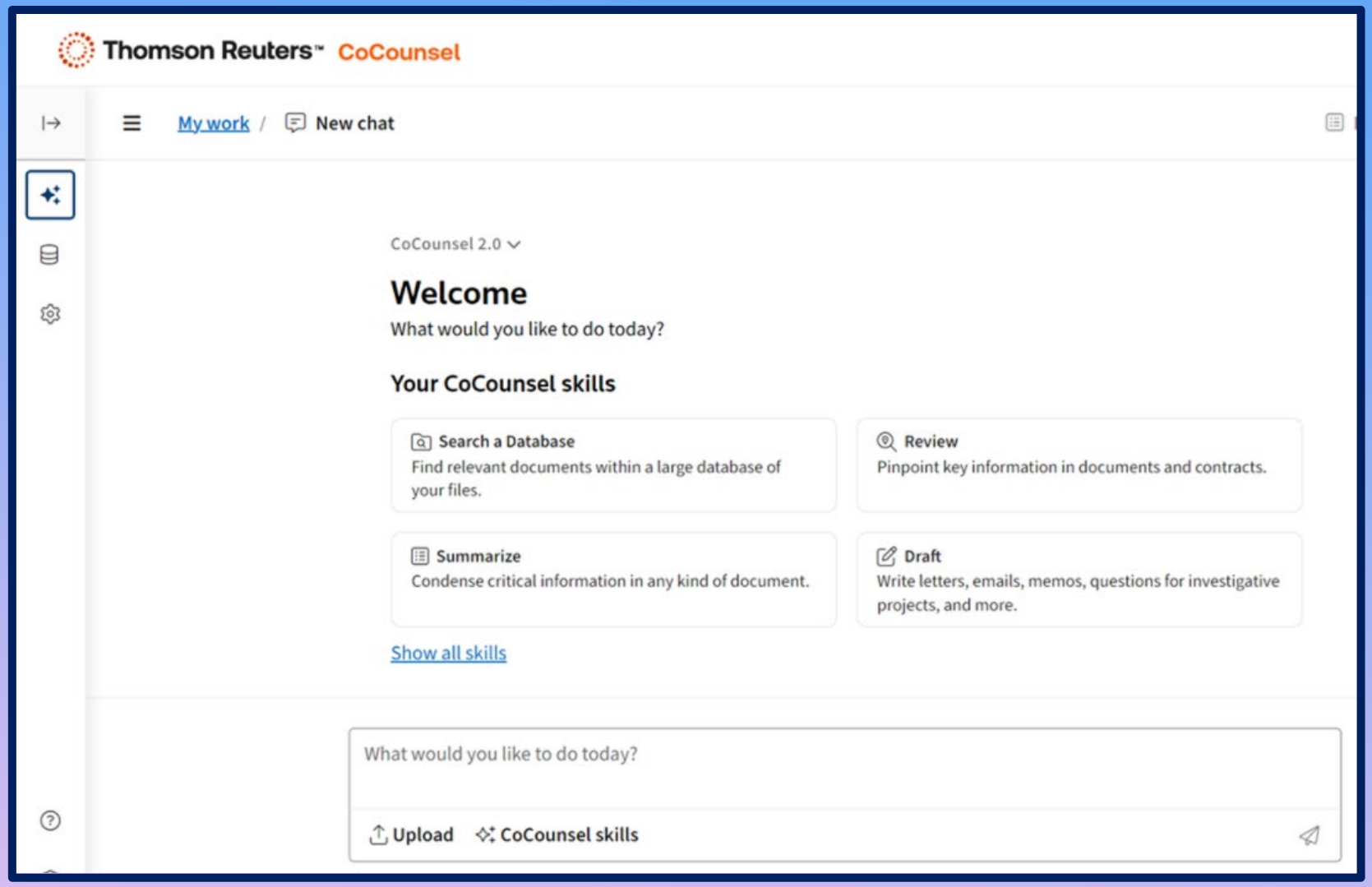
- For complex legal documents, use a "**one prompt-one task**" approach:

  First prompt: 'Identify all parties and their obligations.'

  Second prompt: 'Analyze liability provisions in sections 5-7.'
- **Create template prompts** for repeated legal tasks (contract review, case summarization)
- **Start a new chat** for each distinct legal matter to prevent 'context confusion' and reduce hallucinations

PROMPT ENGINEERING FOR LEGAL PROFESSIONALS (3/3)

Dr. Or Cohen-Sasson, orcs@law.miami.edu
Miami Law & AI Lab, University of Miami School of Law



AI PRACTICE TIPS

USE #1: (P)REVIEWING THE RECORD ON APPEAL

- Using the "Review Documents" skill in Cocounsel
- Can help you identify potential issues and which parts of the record to check determine whether those potential issues are preserved
- Example prompts:
  - "How many witnesses testified?"
  - "Summarize the testimony of each witness."
  - "Did the parties introduce any physical evidence?"
- NOT a substitute for personally reviewing the record

OTHER WAYS TO USE COCOUNSEL FOR APPEALS:

Help with briefing:

- Double checking the absence of a fact in the record/ using Cocounsel as a second set of eyes to confirm you did not overlook anything
- Suggesting alternative ways to write a sentence or paragraph you drafted
- Asking it to edit a brief for conciseness

Oral argument prep:

- Use Westlaw's Quickcheck feature to see if AI concludes that any of the briefs omitted any relevant authorities
- Upload the briefs to Cocounsel and ask it to generate questions the judges may ask at oral argument

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KEYNOTE ADDRESS: THE ROLE OF PRECEDENT

Justice John Couriel, Florida Supreme Court

The Miami Dade Bar, Monroe County Bar, and
Third DCA Historical Society present:

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