

Court of Appeals Update

By

Michael P. Gibbons

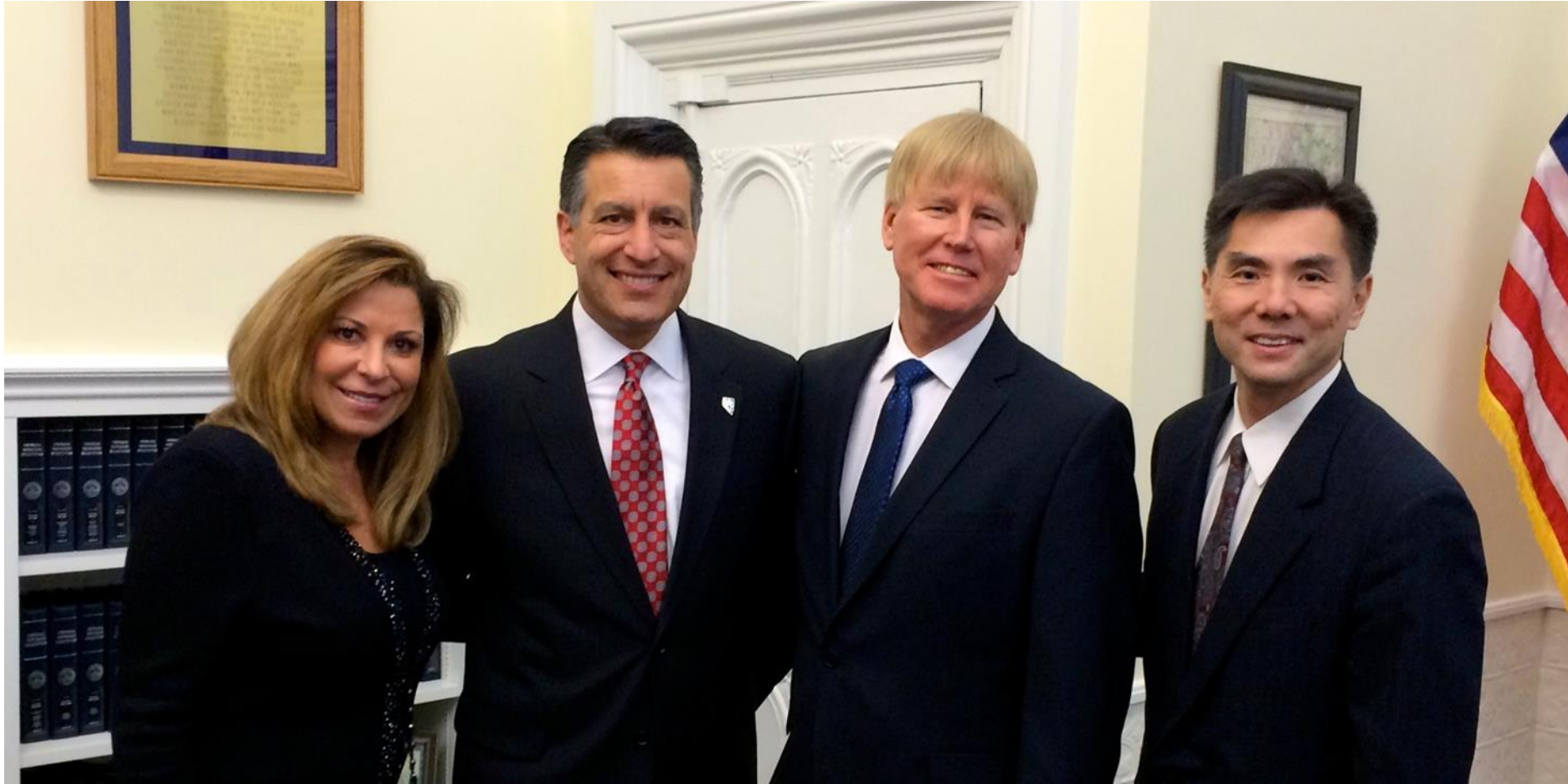
Chief Judge

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How cases end up in civil court.

History in the Making - 2015



Judge Abbi Silver, Governor Brian Sandoval, Chief Judge Michael P. Gibbons and Judge Jerome T. Tao

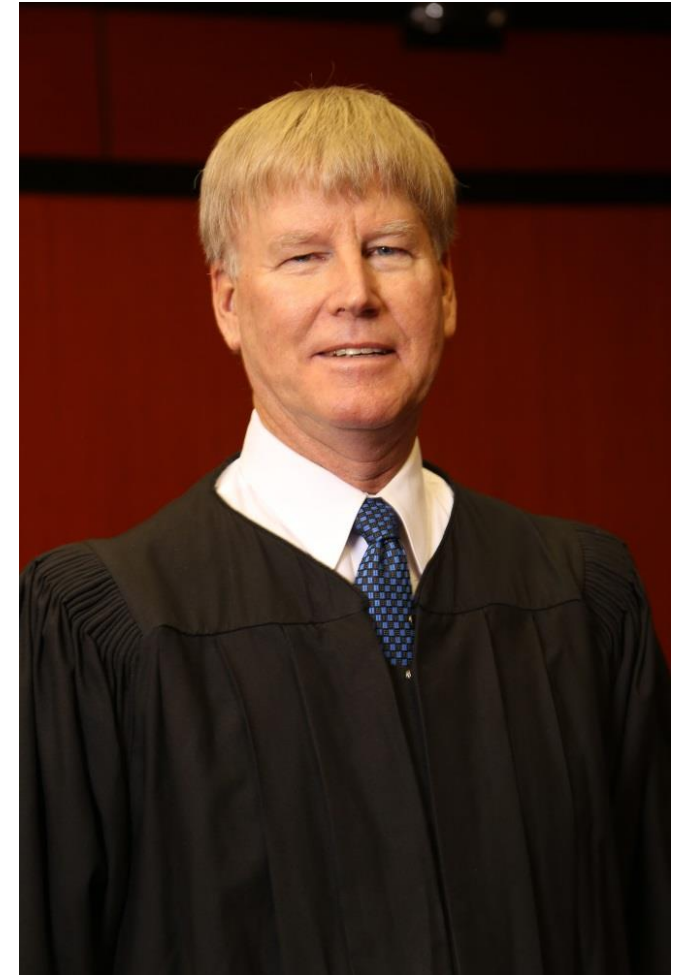
Court of Appeals Judges - 2019



Judge Bonnie Bulla, Judge Jerome T. Tao and Chief Judge Michael P. Gibbons

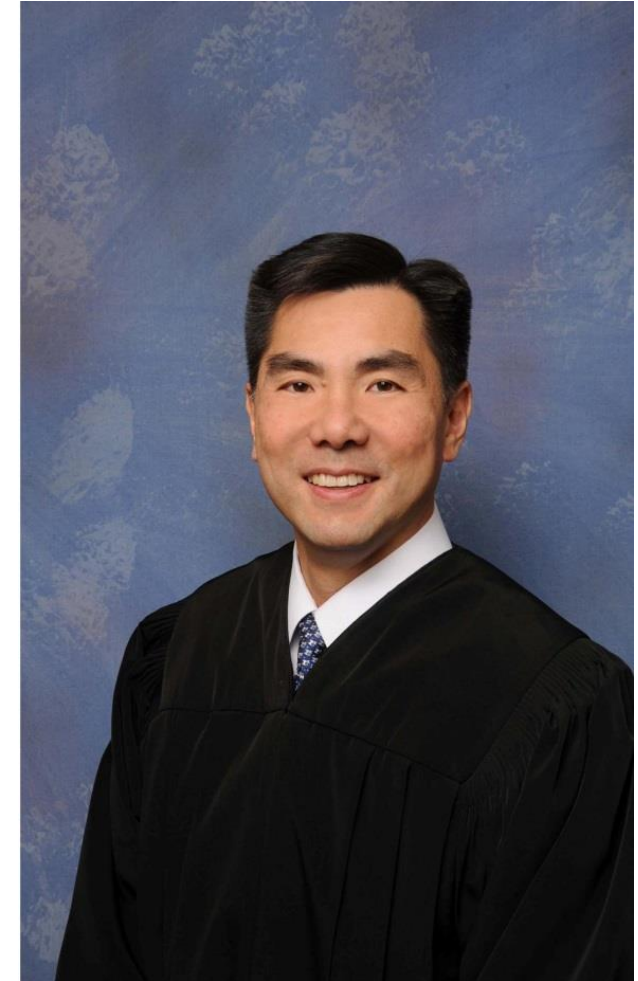
Chief Judge Michael P. Gibbons

- Ninth Judicial District Court Judge 20 years, presiding over civil, criminal, guardianship, probate, trusts, juvenile, and family cases. Elected 5 times
- Appointed as visiting judge in most Nevada districts including 9 times in Clark County and 2 appointments to the Nevada Supreme Court
- Elected President, Nevada District Judges' Association
- Douglas County Deputy and Chief Deputy District Attorney for 13 years; began career in Nevada as law clerk to Judge Howard D. McKibben



Judge Jerome T. Tao

- Appointed to the Eighth Judicial District Court in January 2011 by Governor Sandoval; re-elected in November 2012 and in 2014 with 67% of the Clark County vote
- Scored 86% retention rating in 2013 Las Vegas Review-Journal attorneys' poll (4th-highest among 32 Clark County District Court judges)
- Previously practiced civil litigation at Steptoe & Johnson; Chief Speechwriter to U.S. Senator Harry Reid; Clark County Deputy District Attorney; Clark County Chief Deputy Public Defender
- J.D., George Washington University; B.S., Cornell University



Judge Bonnie A. Bulla

- ▶ Eighth Judicial District Court Discovery Commissioner 12 years
- ▶ 19 years civil private practice, primarily in professional negligence defense
- ▶ AV rated attorney by Martindale-Hubbe
- ▶ Past President of Howard D. McKibben Chapter of the American Inns of Court; Past President of Southern Nevada Assoc. of Women Attorneys; Elected national Clerk and Speaker of the ABA Young Lawyer's Division
- ▶ Member of Nevada Supreme Court's committee which recently revised the NRC
- ▶ Awarded the 2018 Clark County Law Foundation Liberty Bell Award
- ▶ J.D., Arizona State University College of Law; B.S., Economics, Arizona State University (summa cum laude and Phi Beta Kappa)



In Memory of Tom Harris
Attorney/Administrator, Nevada Supreme Court, 2000 - 2014
Chief Assistant Court Clerk, Court of Appeals, 2015 - 2019

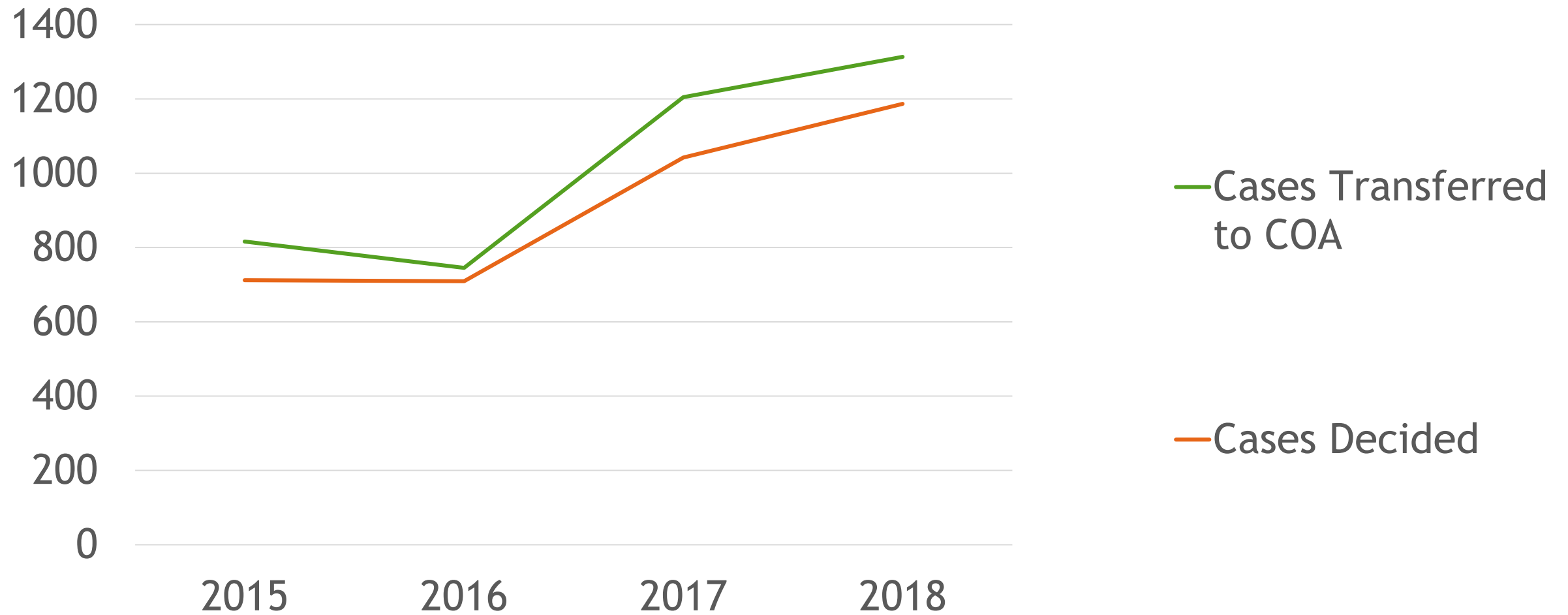


COA Workload

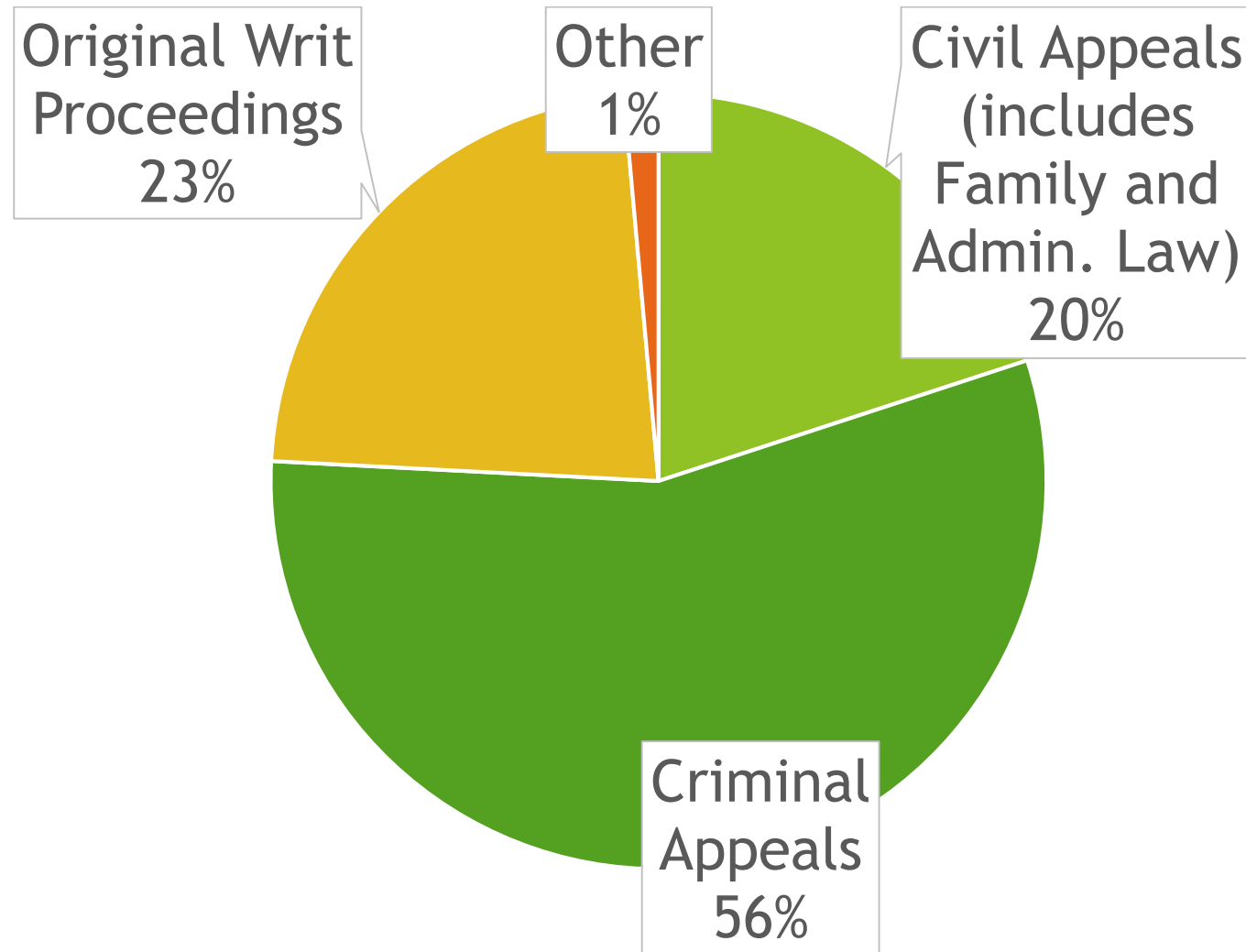
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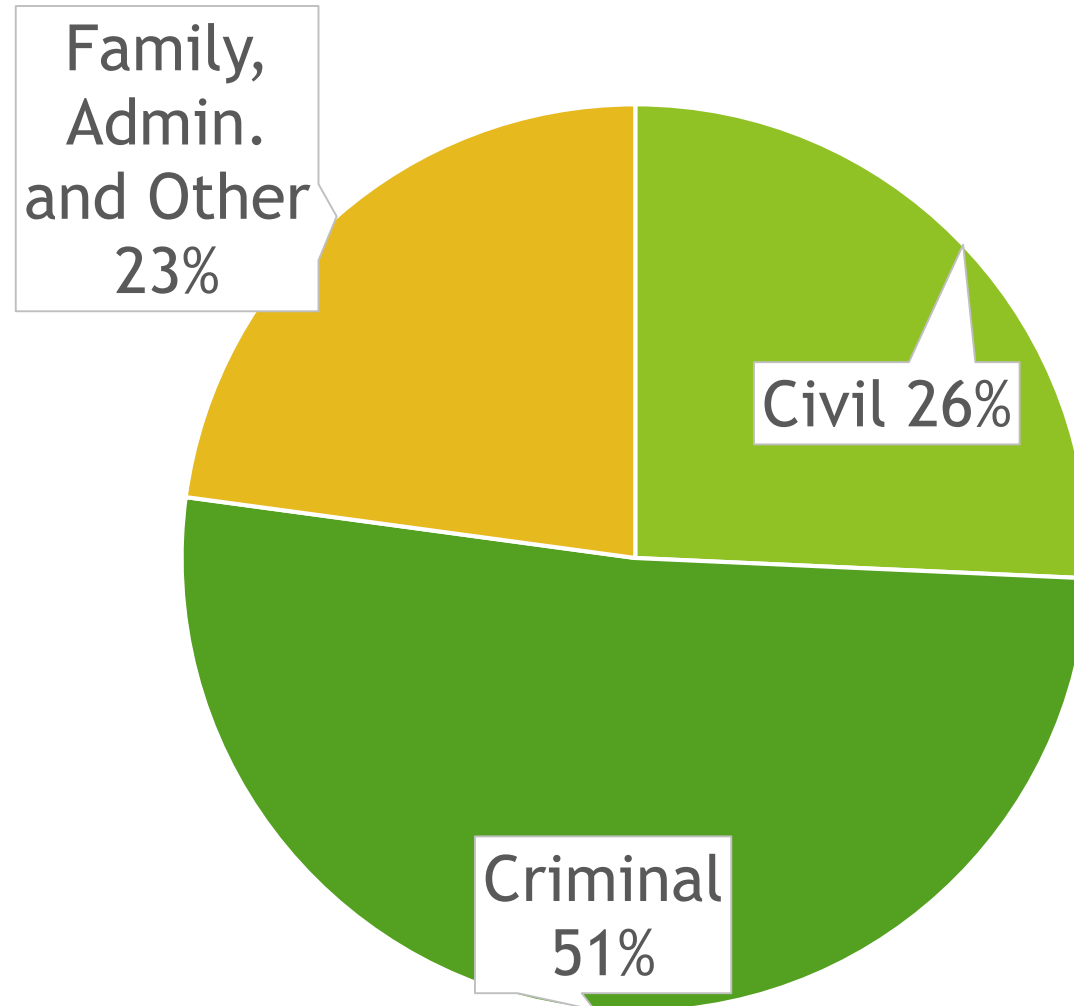
Cases Transferred In and Decided by COA



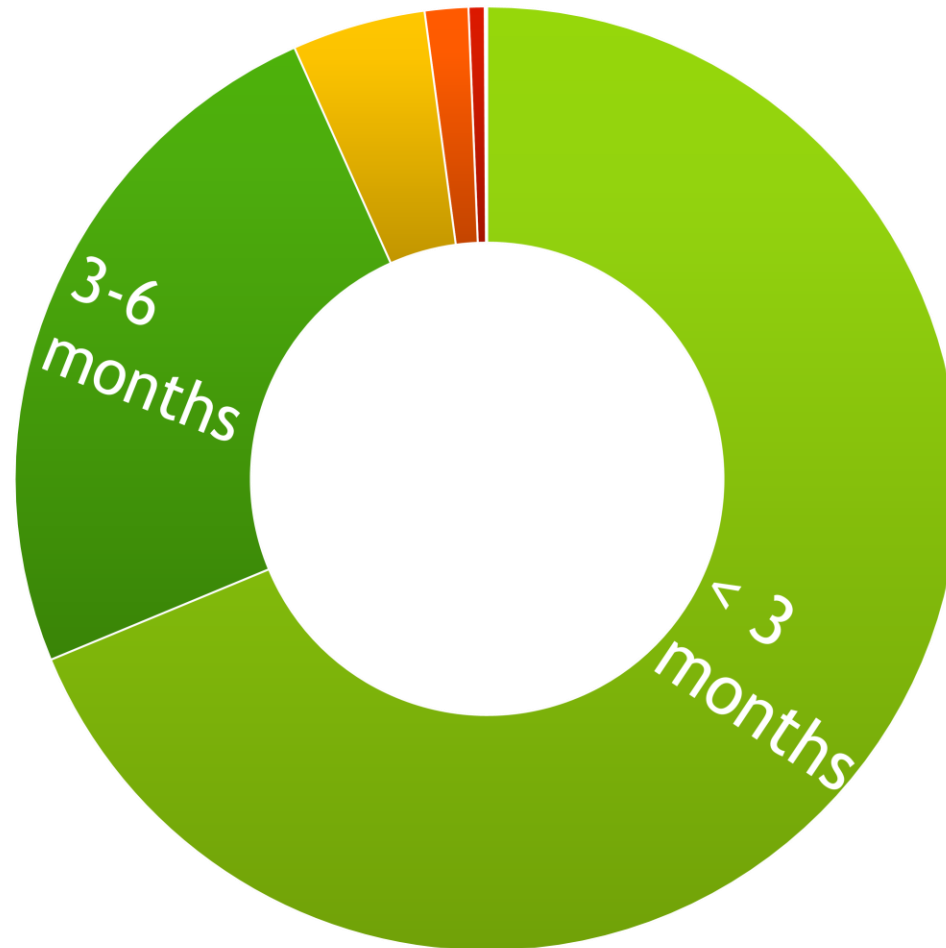
Types of Cases Decided - 2018



Court of Appeals Opinions 2015 - 2018



Time to Disposition After Case Transferred to COA



- < 3 months
- 3-6 months
- 6-9 months
- 9-12 months
- 12-18 months
- 18-24 months
- >= 24 months

COA Opinions 2015 - Present



“1964, reaching into the cookie jar, your mother confronts you. You lie. Tell us, sir, why the jury should believe you now.”

Opinions -Criminal

- ▶ Pitmon v. State
- ▶ Guitron v. State
- ▶ Gonzales v. State
- ▶ Johnson v. State
- ▶ Cassinelli v. State
- ▶ Merlino v. State
- ▶ Moultrie v. State
- ▶ Harris v. State
- ▶ Doolin v. State, NDOC
- ▶ Jackson v. State
- ▶ Jefferson v. State
- ▶ Lastine v. State
- ▶ Mooney v. State
- ▶ Starr v. State
- ▶ Natko v. State
- ▶ Branham v. Baca
- ▶ Sayedzada v. State
- ▶ Vickers v. Dzurenda



Opinions - Civil

- ▶ DeChambeau v. Balkenbush (expert reports, scheduling orders)
- ▶ Nutton v. Sunset Station (NRCP / personal injury)
- ▶ Sanders v. Sears-Page (personal injury / discovery / expert testimony)
- ▶ Frazier v. Drake (personal injury, including attorney fees and expert fees)
- ▶ Michaels v. Pentair Water Pool & Spa (attorney misconduct / product liability)
- ▶ O'Connell v. Wynn Las Vegas, LLC (attorney fees)
- ▶ In re Execution of Search Warrants (attorney fees)
- ▶ Hunter v. Gang (NRCP 41 / inherent power of courts)
- ▶ Berry v. Feil (prisoner civil rights)
- ▶ Craig v. Dr. Donnelly (prisoner civil rights)



Opinions - Family, Administrative and Other

- ▶ Mizrachi v. Mizrachi (family)
- ▶ Nance v. Ferraro (family)
- ▶ Goodwin v. Jones (administrative / unemployment benefits)
- ▶ Tom v. Innovative Home Systems (administrative / contractor's board)
- ▶ Palmieri v. Clark County (administrative warrants; immunity)
- ▶ Glover-Armont v. Cargile (governmental immunity)
- ▶ Soro v. District Court (non-NV antideficiency statutes)
- ▶ Sierra Pack'g v. Chief Admin. Officer of NOSHA (level of proof required for certain OSHA claims)
- ▶ Knickmeyer v. State (application of NRS 289 to courts and marshals)



Palmieri v. Clark County

131 Nev. 1028, 367 P.3d 442 (2015)

Facts:

- ▶ Palmieri had 29 dogs at her residence, some of which she was breeding for her pet store
- ▶ Complaint allegedly filed by Kaitlyn Nichols
- ▶ Animal Control Officer Stockman called and spoke to person identifying herself as Nichols
- ▶ Complainant signed affidavit as Nichols
- ▶ Stockman verified some of the facts in affidavit
- ▶ Palmieri alleged that someone using Nichols' name filed the complaint



Palmieri v. Clark County (Cont'd)

- ▶ Administrative warrant issued. 7 dogs removed
- ▶ Palmieri cited for various animal-related violations
- ▶ Nichols alleged she did not make the complaint
- ▶ Palmieri sued Stockman and Clark County alleging §1983 violations
- ▶ District court granted summary judgment for Clark County and Stockman
 - ▶ District court held Stockman had qualified immunity



Issue #1:

Whether Palmieri made a substantial showing that Stockman included the false identity knowingly and intentionally or with reckless disregard for the truth?

Palmieri v. Clark County (Cont'd)

Holding #1: No

Lessons Learned:

- ▶ *Franks v. Delaware*¹, applies to §1983 cases
- ▶ Methodology for §1983 cases:
 - ▶ Plaintiff must first establish
 - ▶ A substantial showing of a deliberate falsehood or reckless disregard; and
 - ▶ The judge would not have issued warrant but for the dishonestly included or omitted information



¹438 US 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)

Palmieri v. Clark County (Cont'd)

- ▶ If above established, only then does the fact-finder decide whether the conduct was intentional or reckless
- ▶ Here, do not need to decide whether there was a genuine issue of material fact because Palmieri did not meet the first prong of the test



Palmieri v. Clark County (Cont'd)

Issue #2:

Whether the warrant affidavit established probable cause?

Holding: Yes



Lessons Learned:

- ▶ If fail to establish affiant included false identity knowingly or recklessly, look at affidavit as written
- ▶ Administrative search warrants have a lesser showing of probable cause than criminal search warrants
- ▶ For administrative warrant, where there's a specific violation alleged, affidavit must show "specific evidence sufficient to support a reasonable suspicion" of the violation

Palmieri v. Clark County (Cont'd)

- ▶ Reasonable suspicion based on totality of the circumstances
 - ▶ Here, the complainant identified herself and gave contact information. Therefore, less corroboration needed for the warrant than if complainant had been anonymous.
- ▶ Complainant stated she had personal knowledge of the alleged violations
- ▶ Stockman verified Palmieri's address and previous health and welfare complaints
- ▶ Therefore, no genuine issue of material fact whether Stockman violated Palmieri's constitutional rights



Other Notable COA Cases

Cooper v. Eighth Judicial Dist. Court

2018 WL 3222743 (Nev. App. June 18, 2018)

Facts:

- ▶ Cooper was waitress in pool area at M Resort
- ▶ Waitresses were directed to change in a specific area
- ▶ Cooper saw a hidden surveillance camera pointed at women in dressing area
- ▶ Cooper moved camera so it did not view women changing and informed her supervisor



Cooper v. Eighth Judicial Dist. Court (Cont'd)

- ▶ Cooper terminated for interfering with surveillance equipment
- ▶ Cooper filed discrimination charge with EEOC, which denied her complaint
- ▶ Cooper filed complaint in district court alleging numerous torts
- ▶ District court granted partial summary judgment to M Resort
- ▶ Cooper filed petition for writ of mandamus

Cooper v. Eighth Judicial Dist. Court (Cont'd)

Issue # 1:

Did district court misapply the law regarding Cooper's right to sue after exhausting her remedies with the EEOC (but not filing with the NERC)?

Holding #1: Yes

Lesson Learned:

- ▶ In discrimination cases in Nevada, exhaustion of administrative remedies with either the NERC or the EEOC constitutes exhaustion with both entities

Cooper v. Eighth Judicial Dist. Court (Cont'd)

Issue #2:

Did the district court misapply the law by holding that Cooper could not pursue a negligence and an intentional tort claim simultaneously?

Holding #2 :Yes, plaintiff may plead alternative, even inconsistent theories

Lesson Learned:

- Ok to allege intentional conduct and both an intentional tort and a negligent tort cause of action



Cooper v. Eighth Judicial Dist. Court (Cont'd)

Issue #3:

Did the district court err by dismissing Cooper's intentional infliction of emotional distress claim because she did not seek treatment or have a resulting medical or physical condition?

Holding #3: Yes

Cooper v. Eighth Judicial Dist. Court (Cont'd)

Lessons Learned:

- ▶ For an IIED claim, whether conduct is extreme and outrageous is a jury question
- ▶ For an IIED claim, Nevada uses a “sliding scale” approach to determine when medical evidence is required
 - ▶ Testimony alone may be sufficient evidence to prove emotional distress
 - ▶ *Cf.* NIED claims - must have a physical impact or “proof of serious emotional distress causing physical injury or illness” (defense summary judgment is ok)

Bannister v. Eighth Judicial Dist. Court/SNRHA

2019 WL 720793 (Nev. App. Feb. 13, 2019)



Facts:

- ▶ Bannister lived in public housing (SNRHA) and received SNAP benefits
- ▶ Per lease & HUD, Bannister required to perform community service to maintain apartment unless exempt from that requirement
 - ▶ HUD issued notice in 2015 stating that benefits under a state-administered welfare program (e.g., SNAP) qualifies as an exemption
- ▶ Bannister evicted for not performing community service
- ▶ District court denied Bannister's appeal.
 - ▶ Order was a form stating that Bannister had not presented a legal defense; no reason given why Bannister was not exempt
- ▶ Bannister filed petition for writ of mandamus



Bannister v. Eighth Judicial Dist. Court/SNRHA (Cont'd)

Issue:

Did the district court act arbitrarily and capriciously by denying Bannister's appeal?

Holding: Yes

- ▶ Bannister presented his exemption defense at all stages of the eviction/appeals process; therefore finding that he did not present a defense was contrary to law
- ▶ District court did not explain why it did not consider Bannister's exemption status

Bannister v. Eighth Judicial Dist. Court/SNRHA (Cont'd)

- ▶ SNRHA's argument - that the notice changed the law - was contrary to established law
- ▶ Writ granted; district court to grant appeal and proceed pursuant to NRS 40.253 (full procedural rights as to unlawful detainer)

Lessons Learned:

- ▶ Look at whether the notice changed the law or merely clarified HUD's position. Here, it gave guidance and clarified HUD's position
 - ▶ Deference is given to an agency's interpretation of its own regulation
- ▶ Sometimes standardized form orders create issues; may not be appropriate for all situations



Top Mistakes to Avoid for an Appeal



Pre-Trial / Pre-Motion Practice Pointers

- ▶ What is the law the judge needs to apply?
- ▶ What is your legal strategy?
 - ▶ In general, if an issue is not argued below it is waived on appeal
- ▶ What evidence will you need?



Trial / Hearing Practice Pointers

- ▶ Preserve the issues for appeal
 - ▶ Make the arguments that you may want to use on appeal
 - ▶ Object on the record

Admit *evidence* on all relevant factors the court should / must consider

- ▶ Object on the record
- ▶ Attorney arguments are not evidence
- ▶ Swear in clients at motion hearings

Trial / Hearing Practice Pointers (Cont'd)

- ▶ Get clear rulings from the bench
- ▶ Make sure all issues before the court have been addressed
- ▶ Draft / obtain clear written orders
 - ▶ Findings of Fact
 - ▶ Legal Conclusions
- ▶ Motion for Reconsideration to cover defects in order

Appellate Briefs Practice Pointers

- ▶ Have lawyer not familiar with case read brief or fast track statement and provide feedback
 - ▶ If they don't understand the facts / arguments, the court might not either
- ▶ Know and use the correct standard of review

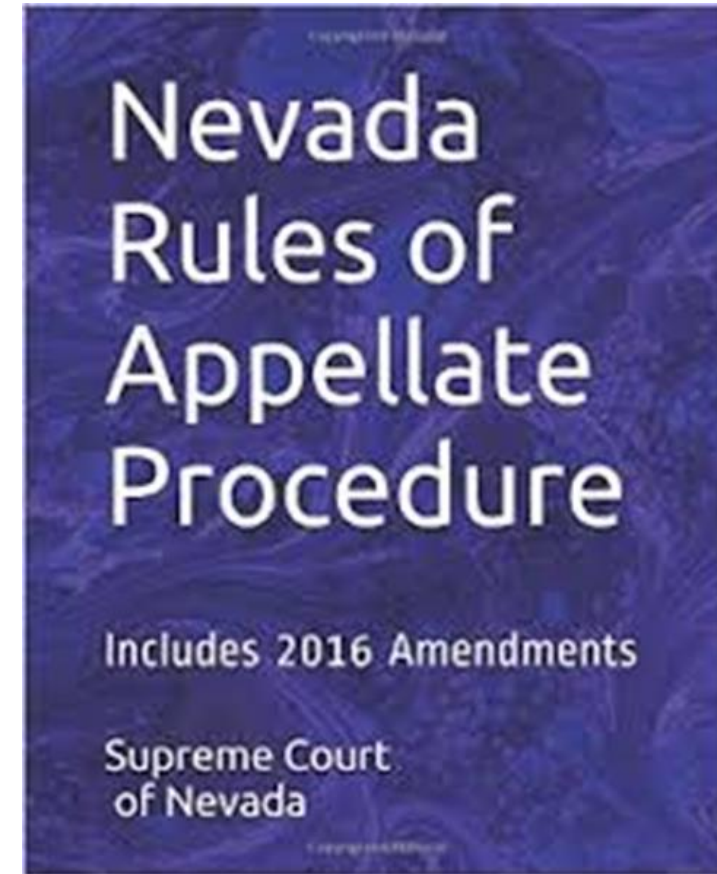


Appellate Briefs Practice Pointers (Cont'd)

- ▶ Clearly state your request
- ▶ Don't combine arguments or issues
- ▶ If respondent, respond to all arguments in appellant's brief
 - ▶ Do not merely state the district court made the correct decision

Appellate Briefs Practice Pointers (Cont'd)

- ▶ Accurately state the facts
- ▶ Cite to the record
- ▶ Accurately state the law
- ▶ Cite legal authority for each legal proposition and use pin cites



Appellate Briefs Practice Pointers (Cont'd)

- ▶ Clearly paginate appendix; make sure index is accurate
- ▶ Ensure record is legible (especially transcripts and exhibits)
- ▶ Include all necessary documents in appellate record
 - ▶ Motions, transcripts, orders, minutes, trial or evidentiary hearing exhibits, etc.

Appellate Oral Argument Practice Pointers

- ▶ Purpose of Oral Argument: Clarify points of law for court
- ▶ Know the law and facts of your case
- ▶ Listen to the questions - Are you focusing on what the court thinks is important?
- ▶ If appellant - reserve 5 minutes for rebuttal
- ▶ Practice, practice, practice!
 - ▶ Make the most important points first
 - ▶ Be prepared to be interrupted and thrown off track



What Went Wrong?



+ CONTEMPT CHARGES: INSIDE THE COURT



Where to Find Court of Appeals Orders and Opinions

Opinions:

http://nvcourts.gov/Supreme/Decisions/Advance_Opinions/

Unpublished Orders:

http://nvcourts.gov/Supreme/Decisions/Court_of_Appeals/Unpublished_Orders/

Advance Opinions and subscription link for RSS Feed:

<http://nvcourts.gov/OpinionsRSS.aspx>

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Questions?