

# **Court of Appeals Update**

By

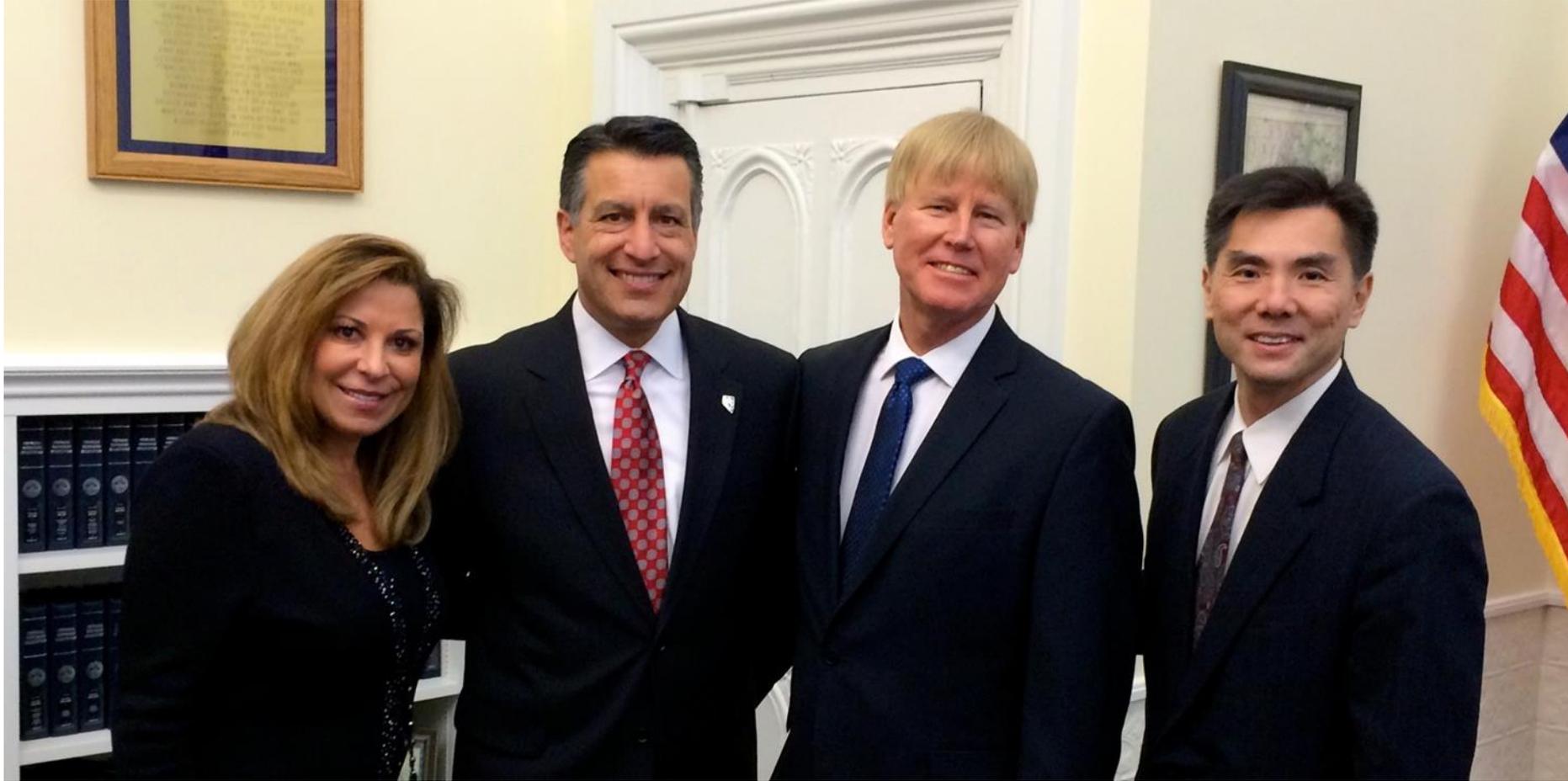
**Michael P. Gibbons**

**Chief Judge**



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

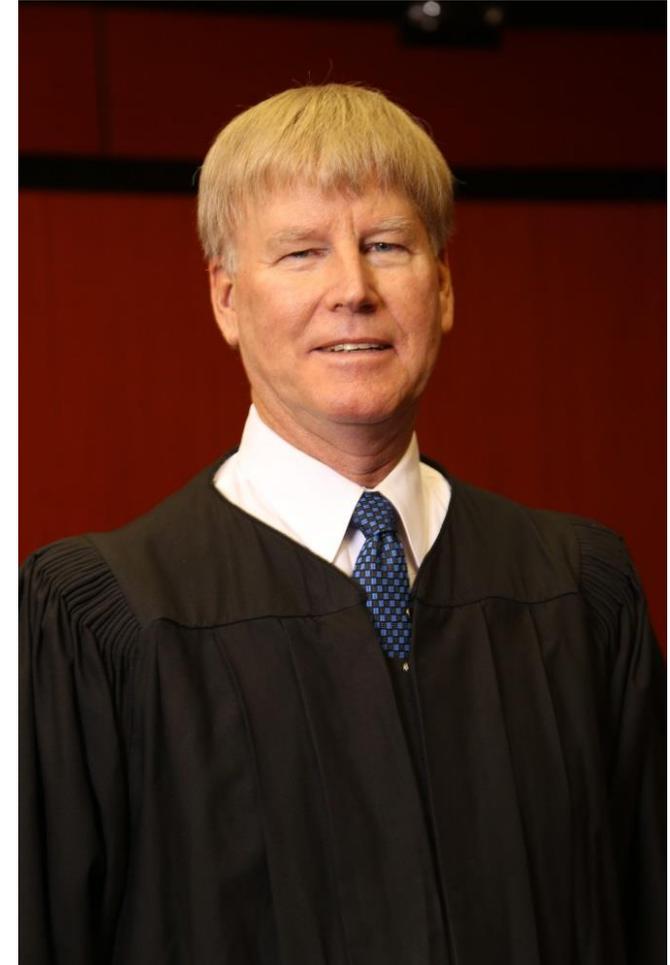
# Court of Appeals Judges - 2019



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

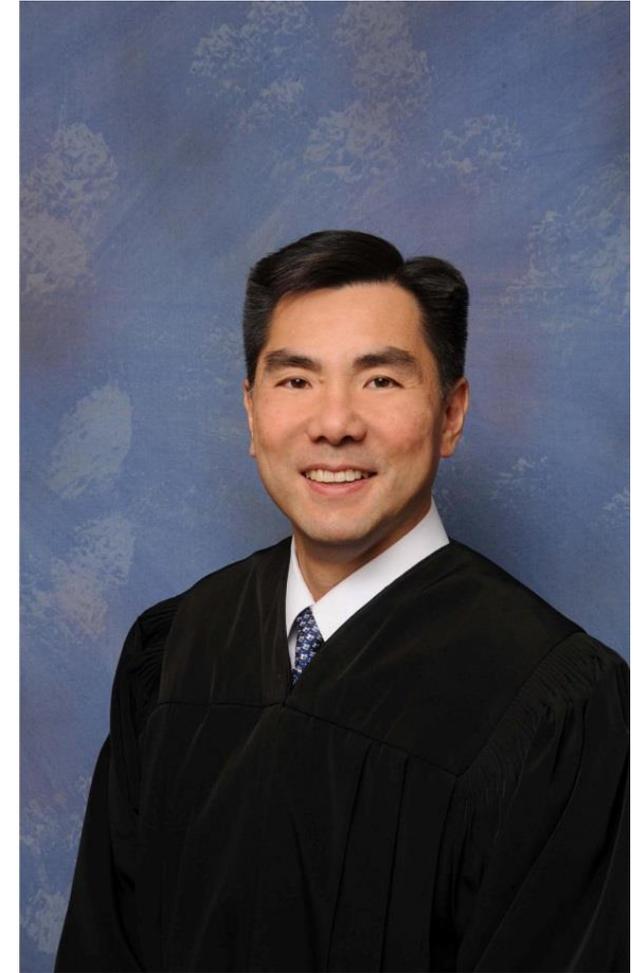
# Chief Judge Michael P. Gibbons

- 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 (4<sup>th</sup>-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**

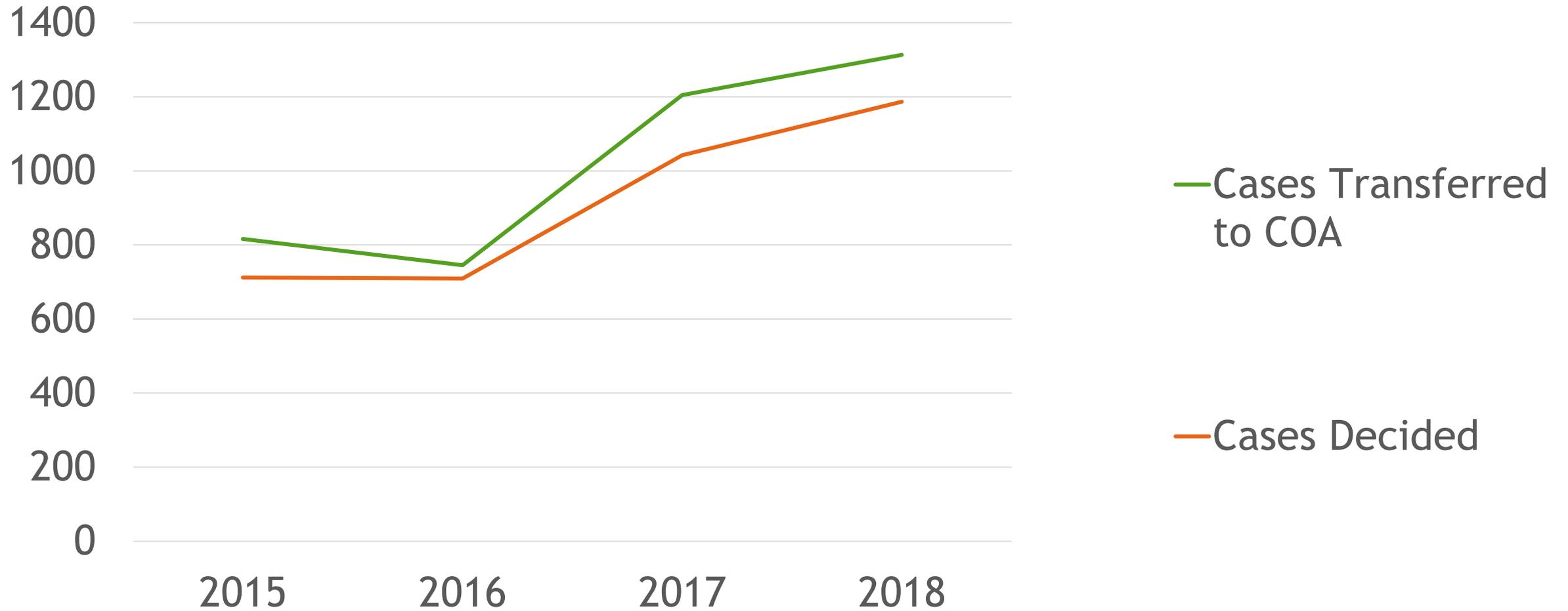


# COA Workload

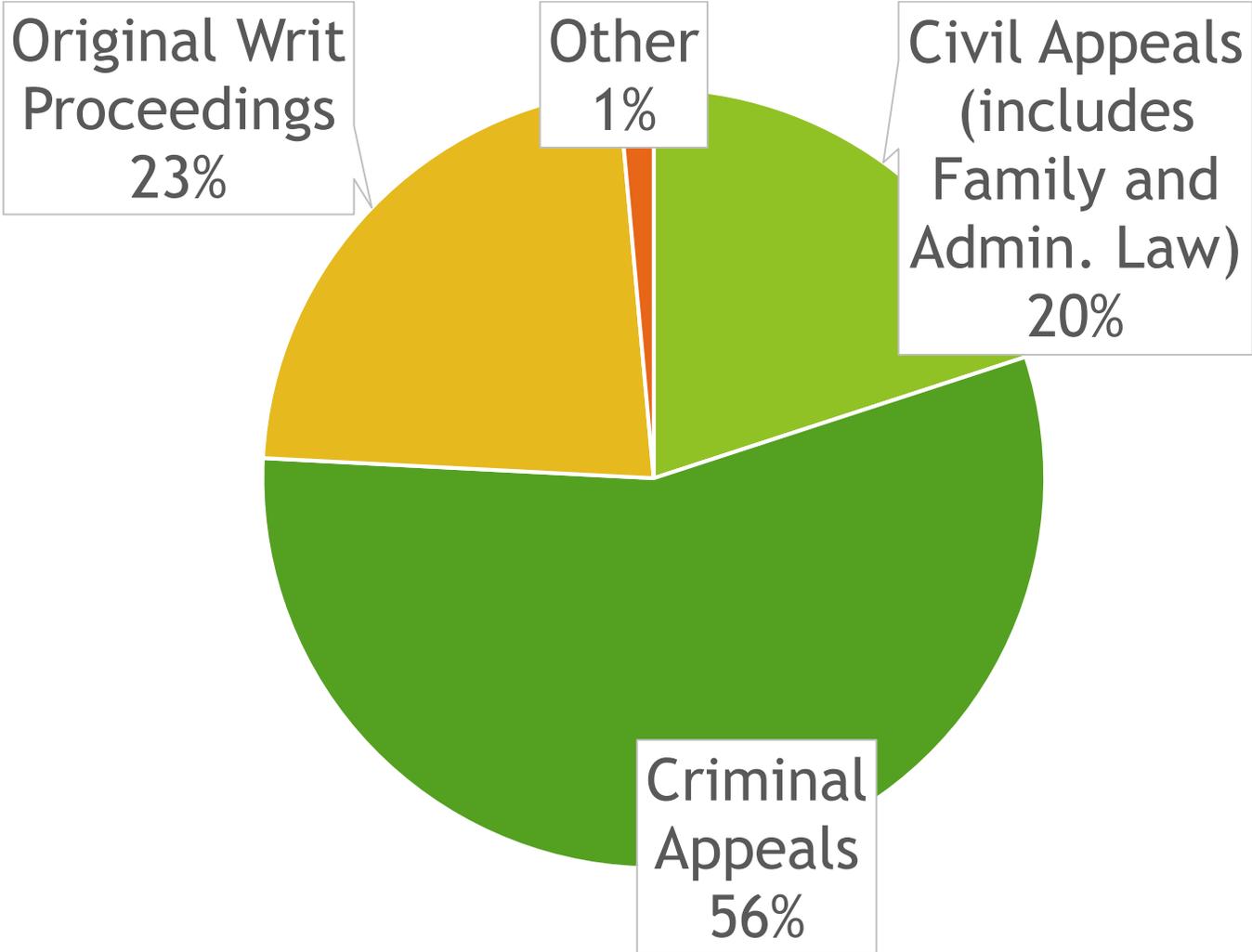
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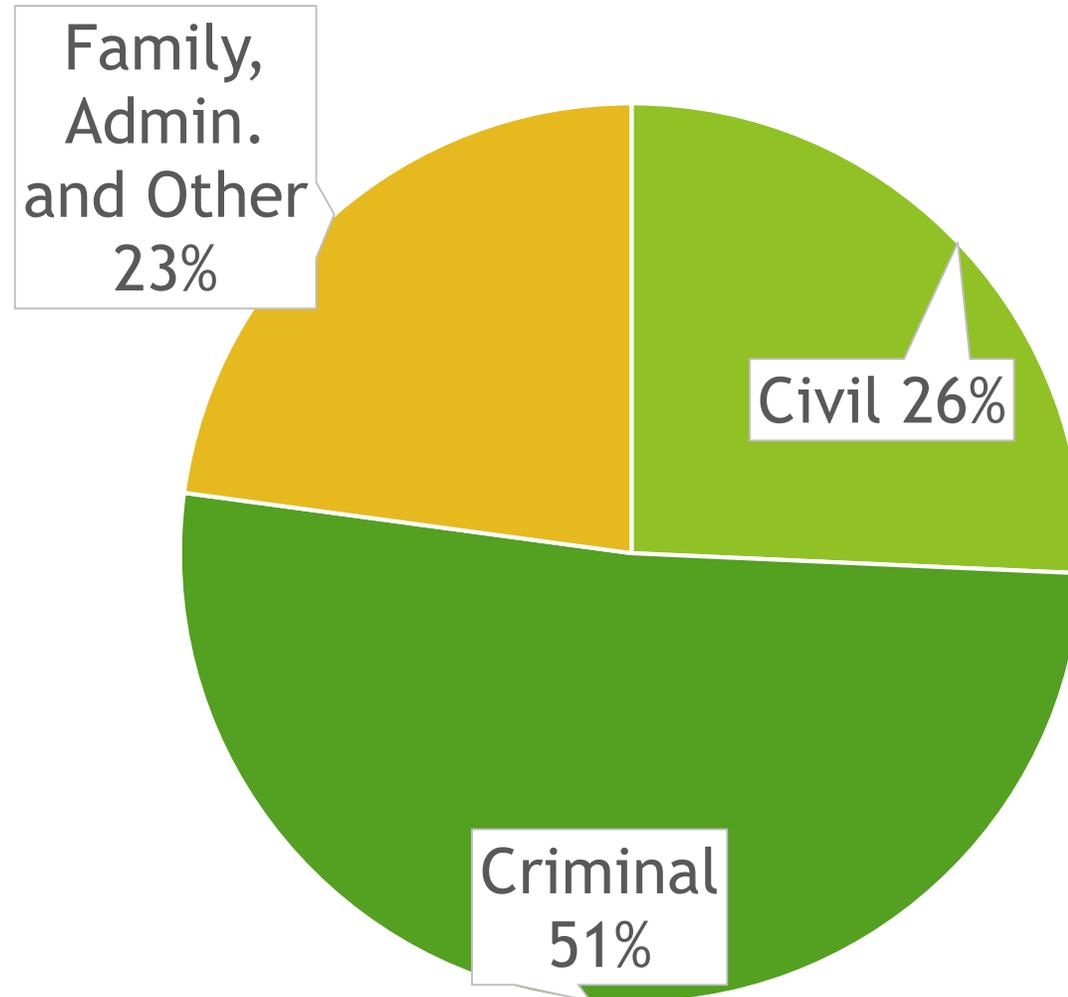
# Cases Transferred In and Decided by COA



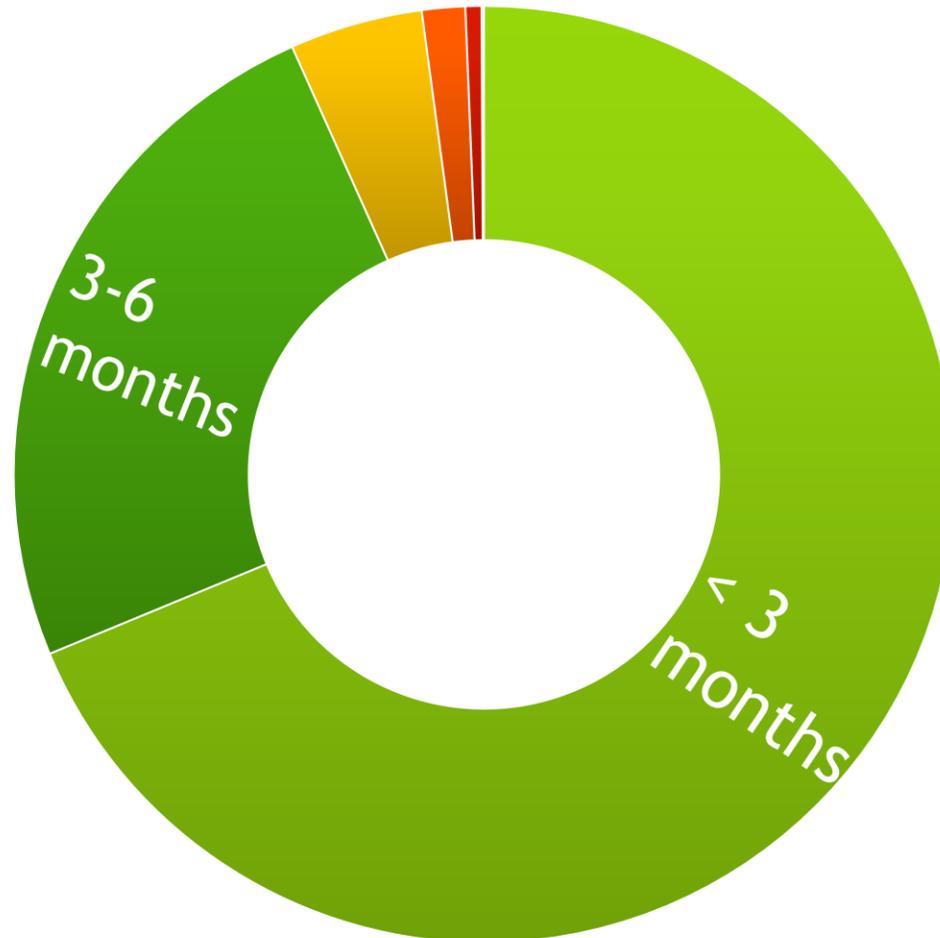
# Types of Cases Decided - 2018



# 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

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the right side of the slide, with some extending towards the center. The overall aesthetic is clean and modern.

# **COA Opinions 2015 - Present**



Search ID: mban189

“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*<sup>1</sup>, 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



<sup>1</sup>438 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



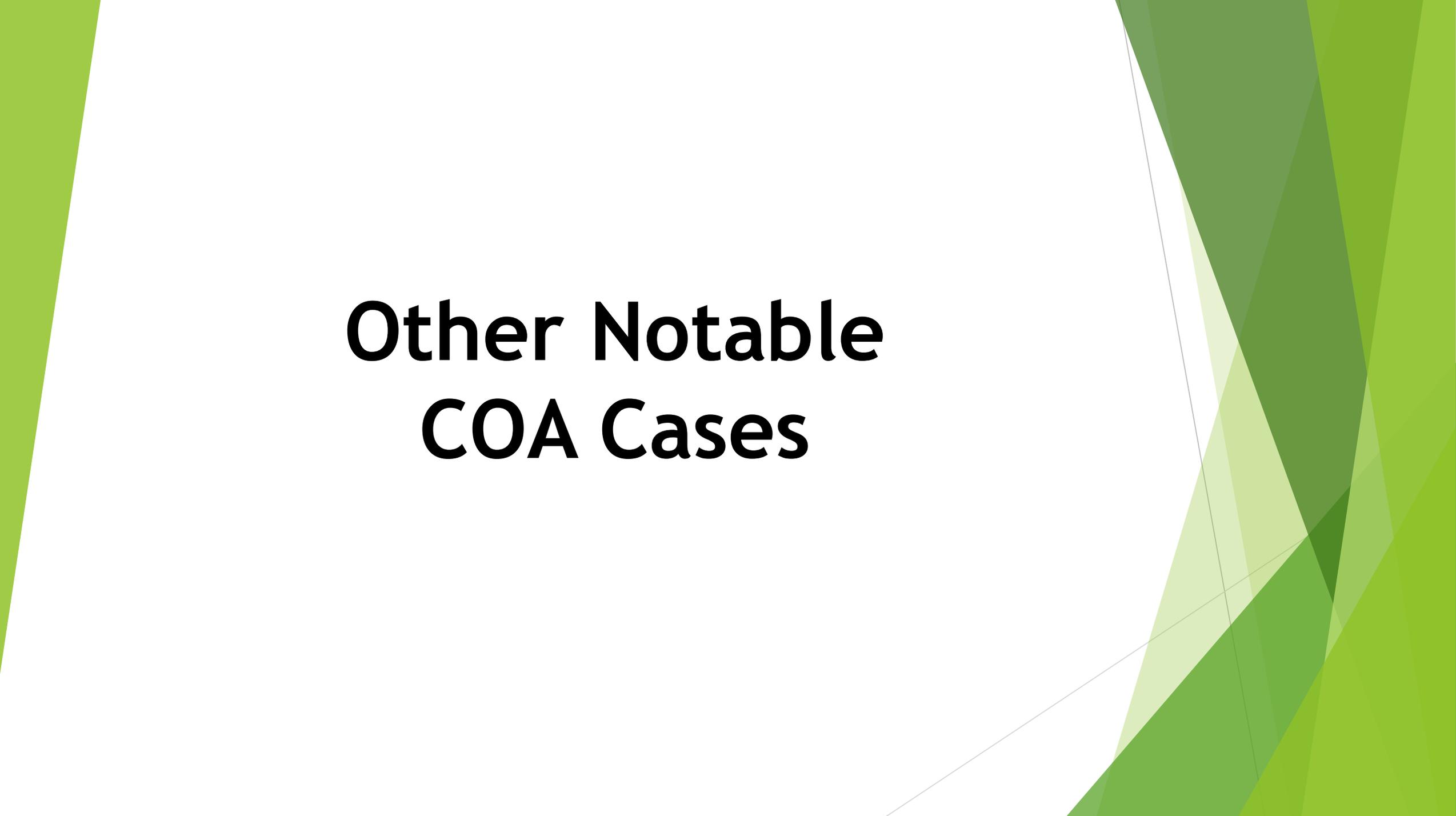
## Lessons Learned:

- ▶ 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

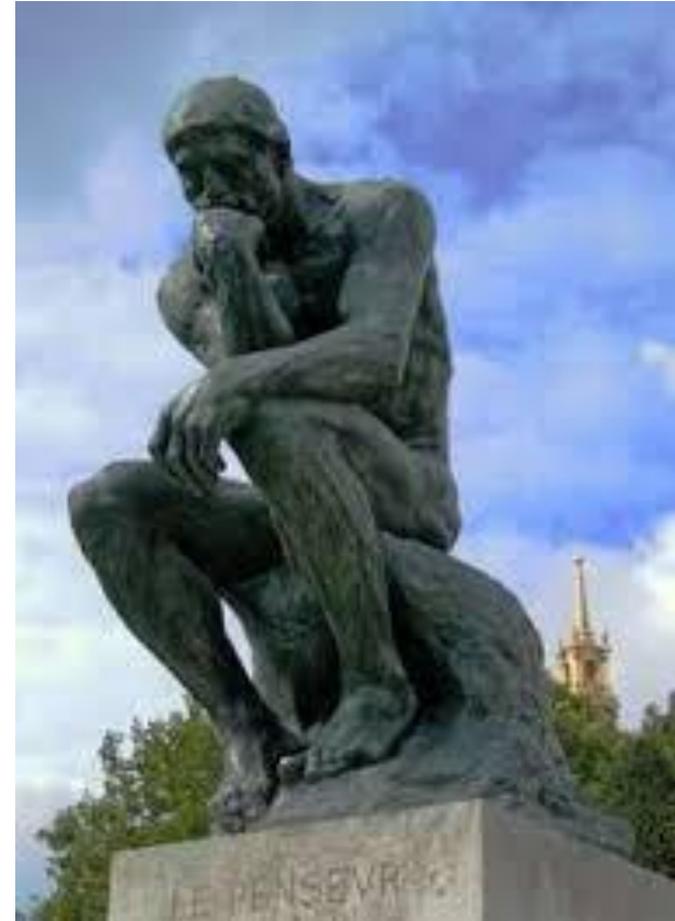


# Top Mistakes to Avoid for an Appeal



# 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

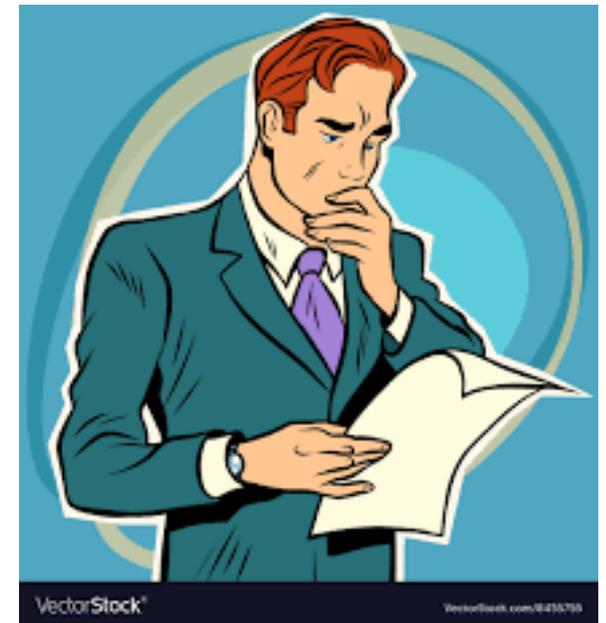
- ▶ Object on the record
- ▶ Attorney arguments are not evidence
- ▶ Swear in clients at motion hearings

# 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

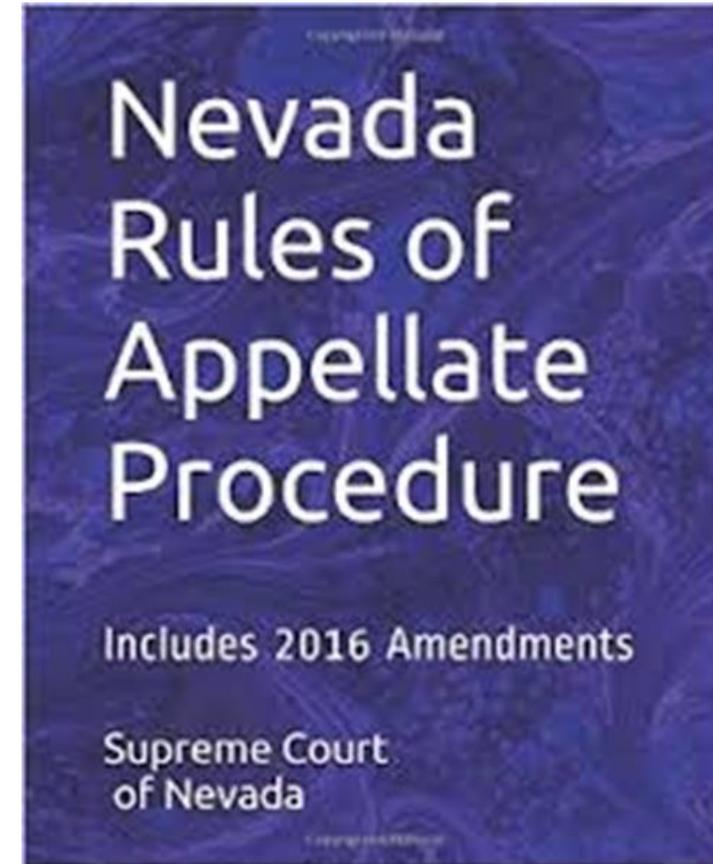


# Appellate Briefs Practice Pointers (Cont'd)

- ▶ 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?



# Where to Find Court of Appeals Orders and Opinions

## Opinions:

[http://nvcourts.gov/Supreme/Decisions/Advance\\_Opinions/](http://nvcourts.gov/Supreme/Decisions/Advance_Opinions/)

## Unpublished Orders:

[http://nvcourts.gov/Supreme/Decisions/Court\\_of\\_Appeals/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>

**Questions?**