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Lawyer Professional Responsibility in Litigation

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**LAWYER PROFESSIONAL RESPONSIBILITY IN LITIGATION
BY PROFESSOR JEFFREY W. STEMPEL**

A perennially-vexing litigation issue concerns the limits of permissible attorney argument. More than a few lawyers have been tripped up by the occasional fuzziness of the line between aggressive advocacy and improper appeals to passion or prejudice. See Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 Ohio N.U. L. Rev. 67 (2001-2002)(problem of violations results from lack of uniformity and clarity of ground rules as well as errors of counsel). In *Cohen v. Lioce*, 149 P.3d 916 (Nev. 2006) the Nevada Supreme Court both provided significant guidance in this area and also fired a metaphorical “warning shot” to counsel.

The implication of *Cohen v. Lioce* are particularly significant for personal injury defense counsel, who are often retained by insurers who may have an interest in pushing counsel to make arguments consistent with insurer public relations efforts to disparage lawsuits and the extent of plaintiff injuries in minor impact automobile accidents or other claims toward which insurers may take a particularly “hard line” regarding defense and settlement. Conversely, plaintiff’s counsel should realize that the court’s heightened interest in policing attorney conduct at trial logically limits use of appeals to juror sympathy, stereotypes about business or insurer defendants, or lawsuits as a means of wealth distribution or enhancement of social welfare. Distilled to its essence, *Cohen v. Lioce* provides cautionary warnings to trial counsel.

First, personal opinion and “vouching” for witnesses or facts is out-of-bounds, as has long been the case in Nevada and most jurisdictions (149 P.3d at 929). Second, attorney appeals for jury nullification are forbidden (149 P.3d at 928). The court adopted the *Black’s Law Dictionary* definition of jury nullification as a jury’s “knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.” See 149 P.3d at 928, quoting *Black’s* at 875 (8th ed. 2004). Similarly, a third lesson of *Cohen v. Lioce* is that references to material outside the record and characterizing the outside world in relation to the lawsuits can create problems for counsel, but standards in this area are not entirely clear.

Fourth, so-called “golden rule” arguments are forbidden (149 P.3d at 929-930). A golden rule argument is one that asks the jurors to imagine themselves in position similar to that of the plaintiff and to decide the case according to what they would have done or wanted in response to the situation (149 P.3d at 930). Ordinarily, golden rule arguments are used by plaintiff’s lawyers to ask for substantial pain-and-suffering damages or other relief by asking jurors to empathize with an injured victim. But in one of four cases consolidated for review by the court in the *Cohen v. Lioce* opinion, a defense attorney used the golden

rule tactic to ask jurors to put themselves in plaintiff's position and imagine themselves rejecting litigation on the ground that the incident was trivial or something for which another party could not reasonably be blamed.

Fifth, attorney misconduct during a closing may result in a new trial depending on the circumstances. Further, the presence or absence of an objection can be important. Where there is objection to closing argument, the party seeking a new trial must demonstrate "that the misconduct's harmful effect could not be removed through any sustained objection and admonishment." *See* 149 P.3d at 919. Where there is no objection, the trial court "may grant a motion for a new trial only if the misconduct amounted to plain error," meaning that in the absence of the misconduct, the verdict would have been different." *See* 149 P.3d at 919.

Sixth, trial counsel's improper closing argument may result not only in a new trial but also in disciplinary action. However, in *Cohen v. Lioce*, the court found counsel's "continued use and expansion" of "improper arguments" an indication that the misconduct was deliberate. *Id.* The court concluded that counsel's conduct in two cases "warrants monetary sanctions" and all four cases referred offending counsel to the state bar "for disciplinary proceedings." *See* 149 P.3d at 931-932.¹

In four personal injury cases (*Castro v. Cabrera*, *Seasholtz v. Wheeler*, *Lang v. Knippenberg*, and *Lioce v. Cohen*), three involving "minor" impact automobile collisions and one involving a dog biting an infant under the dog owner's care, defense lawyer Phillip Emerson was extraordinarily successful in obtaining defense verdicts,² using essentially the same closing argument in all four cases. Emerson's closing emphasized his personal view that the plaintiffs' claims were frivolous and that he had a "passion" for defending such cases because of their societal implications. He also suggested that such frivolous cases were common and presented a severe economic and social problem for the nation, state, and judicial system that jurors would help solve by ruling against the instant plaintiffs. *See* 149 P.3d at 918-22 (reproducing problematic portions of argument).³

The four losing plaintiffs sought new trials, which were granted in two of the cases. Appeals followed. The asserted grounds for a new trial focused on the alleged impropriety of Emerson's closing statements. The Supreme Court agreed that "because defense counsel's closing arguments encouraged the jurors to look beyond the law and the relevant facts in deciding the cases before them . . . they amounted to misconduct." *See* 149 P.3d at 919.

The "New" Law of Lawyer Closing Arguments: Standards, Objections, and Review

Lioce v. Cohen essentially establishes a two-track standard for reviewing claims of prejudicial attorney misconduct. If there is a timely objection to improper closing argument (or presumably to any other attorney misconduct at trial), the objecting party may use the misconduct as the basis for a new trial if it can demonstrate that the misconduct has a harmful effect that cannot be removed by the objection and court

remedial efforts such as an admonishment to counsel or a curative instruction. However, if there is no objection to an improper closing argument (or other misconduct of counsel), the party seeking a new trial must prove “plain error” in order to get a new trial. This means that the moving party must shoulder the burden to prove that without the misconduct, the jury’s verdict would have been different. In ruling upon these types of new trial motions, district courts must make express fact findings on these points so that the Supreme Court can evaluate the grant or denial of a new trial motion according to the standards set forth in *Cohen v. Lioce*. See 149 P.3d at 919.4

In the case of misconduct without objection, the party seeking a new trial “bears the burden of demonstrating that the misconduct is so extreme that the objection and admonishment could not remove the misconduct’s effect.” When objection and admonishment are “insufficient to remove the attorney misconduct’s effect, a new trial is warranted.” See 149 P.3d at 926. In cases where objection has been made:

the party moving for a new trial based on that purported attorney misconduct must first demonstrate that the district court erred by overruling the party’s objection. If the district court concludes that it erred by overruling the objection, the district must then consider whether an admonition to the jury would likely have affected the verdict in favor of the moving party. In this, the court must evaluate the evidence and the parties’ and attorneys’ demeanors to determine whether a party’s substantial rights were affected by the court’s failure to sustain the objection and admonish the jury.

See 149 P.3d at 926.

Cases of persistent attorney misconduct with repeated or continuing objection present “a more complex issue.”

[W]hen the district court decides a motion for a new trial based on repeated or persistent objected-to misconduct, the district court shall factor into its analysis the notion that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct. Therefore, the district court shall give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent.

See 149 P.3d at 927.

Cohen v. Lioce does not change the longstanding general rule that failure to object to improper closing argument (or most anything else at trial) normally constitutes a waiver by the party failing to object. However, in cases of “plain error,” the trial court may review the question of misconduct even absent objection. According to the Supreme Court:

[T]he proper standard for the district courts to use when deciding a motion for a new trial based on unobjected-to attorney misconduct is as follows: (1) the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as having been waived, unless plain error exists. In deciding whether there is plain error, the district court must then determine (2) whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error. In the context of unobjected-to attorney misconduct, irreparable and fundamental error is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.

See 149 P.3d at 927.

On review of a trial court decision regarding a new trial motion, the grant or denial of the motion is reviewed under an “abuse of discretion” standard. “Whether an attorney’s comments are misconduct is a question of law [which is reviewed] *de novo*” but with “deference to the district court’s factual findings and application of the standards to the facts.” *See* 149 P.3d at 928. “When ruling on a motion for a new trial based on attorney misconduct, district courts must make express factual findings” applying the above standards. *See* 149 P.3d at 919. The Court further noted that attorney misconduct need not be intentional to require a new trial. “The relevant inquiry is what impact the misconduct had on the trial, not whether the attorney intended the misconduct.” *See* 149 P.3d at 931.

Particular Problems to Avoid in Closing Argument

Jury Nullification

According to the court, there were several problems that qualified as impermissible summation and attorney misconduct. The court found the *Emerson* closing arguments constituted improper appeals for jury nullification because they:

[s]uggested to the jurors that, regardless of the evidence, if the jury found in the defendants’ favors, the jury could remedy the social ills of frivolous lawsuits. Essentially, Emerson asked the jury to “send a message” about frivolous lawsuits. His arguments were directed at causing the jurors to harbor disdain for the civil jury process— a defining, foundational characteristic of our legal system— and at perpetuating a misconception that most personal injury cases are unfounded and brought in bad faith by unscrupulous lawyers. These arguments are irrelevant to the cases at hand and improper in a court of law and constitute a clear attempt at jury nullification.

See 149 P.3d at 928.

The court did not develop the relevance point at length, characterizing the use of

references to material outside the case record (e.g, the prevalence of frivolous litigation, the volume of greedy plaintiffs, the costs to society, the rapaciousness and avarice of lawyers) as part of the jury nullification issue. However, one could re-characterize much of this problem with the Emerson closing arguments as a problem resulting from counsel's injection of extra-record material designed to prejudice the jury. One can view this impermissible reference to material outside the record as the crux of the problem with the Emerson summations. The law of limitations on this type of conduct should be more developed by Nevada courts. A dispute is supposed to be decided on the facts of record before the jury. Absent court supervision, juries are not permitted to visit accident sites or to conduct their own experiments attempting to recreate or test theories of causation and liability. Cases are decided on the merits of the particular dispute as determined by the evidence of record in court. When counsel asserts that there is a particular state of things outside the courtroom that should impact the jury's verdict, counsel is in effect urging the jury to decide the case based on the attorney's asserted extra-record facts about the outside world and society. Emerson's closing arguments can be viewed as asserting that, for the world at large, all minor impact, soft-tissue automobile injury cases were without merit and that improper-supervision-of-pets cases are simply strike suits by parents trying to cash in on a child's disfigurement. But Emerson presented no evidence that his purported state of the world was accurate. Indeed, we are all told in law school that attorney arguments are not evidence, much less admissible, persuasive evidence. Emerson was asking the jurors to reject the plaintiffs' claims on the ground that the world is full of baseless claims rather than because the particular claims before the court were without merit.

Consider if the shoe was on the other foot and a prominent plaintiff's attorney were to tell the jury during closing argument that outside the courtroom, on a regular basis, corporations were poisoning the environment or cooking the books or cheating the IRS. What if plaintiff's counsel asserted that insurance companies were united in stonewalling claimants in order to make more money, or that drug companies regularly hid adverse test results to gain FDA approval? This type of closing argument is improper because it seeks the jury's favor not on the basis of the instant litigants and the evidentiary record in the case, but instead seeks to win based on painting a picture of the outside world that may or may not be accurate and which may or may not be similar to the instant case. Just as sauce for the goose is sauce for the gander, plaintiff and defense lawyers alike should be prohibited from these kinds of prejudicial closing arguments or similar behavior at trial. Every plaintiff and each defendant is entitled to have the jury decide their dispute on the merits of the trial record, not upon a picture of the outside world painted by counsel or the media.

Attorney Personal Opinion

The *Cohen v. Lioce* Court then addressed the issue of the interjection of a lawyer's personal opinion in a case, which is somewhat different from the problem of a lawyer introducing extra-record material or attempting to assert a set of facts not established at trial. Noting that Nevada Rule of Professional Responsibility 3.4(e) forbids counsel from stating personal opinions about the merits of a case, witness credibility, or culpability, the

court-reviewed prior case law and noted that attorney statements of personal opinion are not only improper but may “amount to prejudicial misconduct necessitating a new trial.” See 149 P.3d at 929. Emerson’s closings met this standard because of his professed personal “passion” for the cases and his assertions that he was involved in a “personal crusade to defend his clients. By representing to the jury his personal opinion that the plaintiffs’ cases were worthless, Emerson not only violated his ethical duties, he also prejudiced the jury against the plaintiffs.” See 149 P.3d at 929.

Golden Rule Arguments

The court then addressed the “golden rule” objection to the Emerson summation made in *Lang v. Knippenberg*.

In *Lang*, Emerson asked the jury to consider whether, if the jurors’ children were injured at a slumber party, they would merely consider that an accident or see it as an opportunity to sue. Emerson impliedly asked the jurors to consider what remedies the jurors would pursue for the accident and inferred that the jurors would not consider litigation.

* * *

He invited the jurors to make a decision as if they and their children were involved in his hypothetical situation – a situation that somewhat paralleled the scenario of the Langs’ daughter’s injuries. This question indicated that the jury could make a decision based on the personal hypothetical, designed to trivialize the daughter’s injuries instead of deciding the case on negligence law and the evidence that the Langs and Knippenberg presented. Thus, Emerson’s comment amounted to an impermissible golden rule argument.

See 149 P.3d at 929-930.

Professor Jeffrey Stempel is a 1981 graduate of Yale Law School, where he was an editor of the Yale Law Journal and co-founder of the Yale Law and Policy Review. Before becoming a professor at Boyd School of Law he served on the faculty at Brooklyn Law School and the Florida State University College of Law. He has numerous publications to his credit, including books, treatise chapters and supplements, and law review articles. At Boyd he teaches Civil Procedure/Alternative Dispute Resolution, Evidence, Professional Responsibility and Insurance Law.

Lawyer Professional Responsibility in Litigation (footnotes)

1 Justice Paraguirre, concurring and dissenting in part, disagreed with “the scope of the sanctions imposed” in two of the cases. He would have addressed the sanctions issue by seeking more information through a trial court proceeding ordering counsel to “show cause why sanctions should not be

imposed.” *See* 149 P.3d at 932.

2 So extraordinarily successful that in one of the cases (*Seaholtz v. Wheeler*), the defendant had admitted liability and was contesting only the amount of damages. But after hearing Emerson’s summation, the jury rendered a total defense verdict of no liability and denied recovery even for medical bills that were not contested by the defendant. *See* 149 P.3d at 930.

3 According to Emerson,

[A]t some time, at some point we must say, enough is enough. People must take responsibility for their lives and not blame others for challenges and setbacks. People must stop wasting taxpayers’ money and jurors’ valuable time on cases like this.

See 149 P.3d at 923 (quoting Emerson summation in *Seasholtz v. Wheeler*). Emerson’s summation in *Lioce v. Cohen* was similar. *See* 149 P.3d at 912.

4 The Supreme Court had previously issued important opinions on attorney trial misconduct in *Barrett v. Baird*, 111 Nev. 1496, 908 P.2d 689 (Nev. 1995), *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459 (2000), and *Ringle v. Bruton*, 120 Nev. 82, 86 P.3d 1032 (Nev. 2004). After *Lioce v. Cohen*, all three of these cases must be viewed with caution or treated as superceded.

After reviewing our prior jurisprudence, we conclude that *Barrett*’s permeation rule is incomplete and that *DeJesus*’s “inflammatory quality and sheer quantity” test is unworkable. Accordingly, the rule and test in those opinions are overruled. While we approve of *Ringle*’s “plain error” test for unobjected-to misconduct, its application is limited to an examination of whether “no other reasonable explanation for the verdict exists” except for the misconduct.