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#### Recommended Citation

Nevada Law Journal, "Summary of Lioce v. Cohen, 124 Nev. Adv. Op. No. 1" (2008). *Nevada Supreme Court Summaries*. 462.

<https://scholars.law.unlv.edu/nvscs/462>

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## ***Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (Jan. 17, 2008)**

### **Civil Procedure – Motion for New Trial for Attorney Misconduct**

#### Summary

This is an en banc rehearing of *Lioce v. Cohen*.<sup>1</sup> This case involves the consolidated appeals of four district court orders, two granting new trials because of attorney misconduct and two denying new trials because of attorney misconduct.

#### Disposition/Outcome

The Court concluded that the District Court did not abuse its discretion by ordering two new trials because on attorney misconduct. The Court also vacated the District Court's denials of motions for new trial because of attorney misconduct and remanded the cases for new decisions consistent with the standards in the opinion.

The Court previously remanded two cases to calculate monetary sanctions for the attorney guilty of misconduct, but on rehearing declined to impose monetary sanctions instead referring the attorney to the Nevada State Bar.

#### Factual and Procedural History

The four consolidated appeals in this case are grouped together because all four defendants shared the same defense attorney, Phillip Emerson. The four cases were all personal injury proceedings and Mr. Emerson gave a similar closing argument in each case. The motions for a new trial because of attorney misconduct are based on the statements made in these closing arguments.

Mr. Emerson's closing arguments all contained similar arguments and statements reflecting his personal views on the cases and how the jury should decide the matters. In each proceeding, Mr. Emerson called the lawsuits frivolous and wastes of the taxpayers money. He further stated that lawsuits of this vein gave the legal profession and the American justice system a bad reputation. Mr. Emerson also gave his personal reasons for participating in cases such as these which included his personal mission to improve the public's view of the legal profession and to fight those who bring frivolous personal injury lawsuits.

The substance of the closing arguments was basically the same but the plaintiffs' counsel in each proceeding reacted differently.

In *Castro v. Cabrera*, the Cabreras' attorney did not object to Mr. Emerson's closing argument. The jury found in Castro's favor and the Cabreras moved for a new trial on the basis that Mr. Emerson's closing argument amounted to attorney misconduct. The District Court found that Mr. Emerson's closing argument constituted attorney misconduct and further found

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<sup>1</sup> *Lioce v. Cohen*, 122 Nev. Adv. Op. 115, 149 P.3d 916 (2006).

that it permeated the entire proceeding which called for a new trial. Castro appealed the decision.

In *Lioce v. Cohen*, Lioce's attorney did not object to Mr. Emerson's closing argument. After a verdict in favor of the defendant, Lioce moved for a directed verdict or a new trial because of attorney misconduct. The District Court denied both motions without stating its reasons or reporting the hearing on the motions.

In *Lang v. Knippenberg*, Mr. Emerson made the same closing argument, but the Langs objected multiple times throughout the discourse. The District Court sustained each objection but did not admonish Mr. Emerson for his conduct. After the closing argument, the Langs moved for a mistrial based on Mr. Emerson's closing argument which was denied because the objections to the closing argument had been sustained. After a jury verdict in favor of the defendant, the Langs moved for a new trial because of attorney misconduct but the District Court denied the motion. The District Court's reason for denial was that the attorney misconduct did not permeate the entire trial to an extent that a new trial would be warranted.

In *Seasholtz v. Wheeler*, Seasholtz stipulated liability for an auto accident and even so, Mr. Emerson gave the same closing argument. Wheeler's attorney did not object to Mr. Emerson's closing argument. After the jury found in favor of the defendant, Wheeler moved for a judgment notwithstanding the verdict or a new trial because of attorney misconduct. The District Court granted a new trial despite the lack of objection because it found that Mr. Emerson's closing argument amounted to attorney misconduct which was of such sinister influence that it constituted irreparable error.

The Nevada Supreme Court consolidated the four appeals that resulted from the foregoing cases and heard them in *Lioce v. Cohen*.<sup>2</sup> The Court revised the standards under which District Courts are to evaluate motions for new trials because of attorney misconduct. It then reversed the denials of new trials in *Lioce* and *Cohen* and remanded the cases to the District Court for further consideration consistent with the Court's opinion. The Court also affirmed the grants of new trials in *Castro* and *Seasholtz* and made the determination that Mr. Emerson's conduct in those cases amounted to attorney misconduct and should be evaluated for monetary sanctions. The Court also referred Mr. Emerson to the Nevada State Bar for disciplinary proceeding.

## Discussion

### A. *Prior Attorney Misconduct Jurisprudence*

The Nevada Supreme Court first evaluated attorney misconduct in *Barrett v. Baird*.<sup>3</sup> The Court stated that "[t]o warrant a new trial on grounds of attorney misconduct, the flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict."<sup>4</sup> Because the Nevada

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<sup>2</sup> *Lioce v. Cohen*, 122 Nev. Adv. Op. 115, 149 P.3d 916 (2006).

<sup>3</sup> *Barrett v. Baird*, 111 Nev. 1496 (1995)

<sup>4</sup> *Id.* at 1515.

Supreme Court never addressed the issue of objections to attorney misconduct, the *Barrett* rule implicitly applied to both objected-to and unobjected-to misconduct.

The next Nevada Supreme Court case addressing attorney misconduct is *DeJesus v. Flick*.<sup>5</sup> The issue on appeal was whether a party's failure to object to improper argument during trial foreclosed that party from raising the issue in the context of an appeal from an order denying a new trial with *Barrett* being the standard for the attorney's unobjected-to misconduct.<sup>6</sup> The majority recognized the general rule that states a failure to object to attorney misconduct precludes review.<sup>7</sup> However, it also held that an exception to the general rule should apply to prevent plain error that results from the "inflammatory quality and sheer quantity of misconduct" by the opposing party's attorney.<sup>8</sup> The *DeJesus* majority holding created a rule that unobjected to misconduct would only be reviewed to see if the exception applies.

The *DeJesus* dissent argued for a different standard than that used by the majority. This proposed rule would be that claims of attorney misconduct are generally entitled to no consideration unless a timely and proper objection and a request for admonishment has been made.<sup>9</sup> This rule would prevent unnecessary appellate review by allowing the trial court to make a ruling on the matter, but the dissent did recognize that the majority rule may be necessary in some extreme cases.<sup>10</sup>

The Nevada Supreme Court once again evaluated its standards on unobjected-to misconduct in *Ringle v. Bruton*.<sup>11</sup> The Court stated that counsel must timely and specifically object to instances of improper argument in order to preserve the issue for appeal.<sup>12</sup> The Court held that it would only consider "egregious but unobjected-to misconduct...only in those rare circumstances where the comments are of such sinister influence as to constitute irreparable and fundamental error."<sup>13</sup> This plain error rule means that the "irreparable and fundamental error" must be such that, if left uncorrected, "would result in a substantial miscarriage of justice or denial of fundamental rights."<sup>14</sup>

The Court concluded its historical analysis by stating that the *Ringle* Court's reliance on *DeJesus* for its plain error rule was improper and that this rule was misapplied in that case. The Court further announced that the *Barrett* permeation rule is incomplete and the *DeJesus* "inflammatory quality and sheer quantity" test is unworkable. It also limits the *Ringle* plain error test to situations where there is no other reasonable explanation for the verdict except for misconduct.

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<sup>5</sup> *DeJesus v. Flick*, 116 Nev. 812 (2000) (plurality opinion)

<sup>6</sup> *Id.* at 815-16.

<sup>7</sup> *Id.* at 816.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 826 (Rose, C.J., dissenting)

<sup>10</sup> *Id.* at 826-27.

<sup>11</sup> *Ringle v. Bruton*, 120 Nev. 82 (2004).

<sup>12</sup> *Id.* at 95.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

*B. New Standards for Evaluating Attorney Misconduct*

The Court followed its historical analysis of attorney misconduct standards by clarifying what the standards will be from this case forth. It began by stating that the *Barrett* rule for objected-to misconduct does not sufficiently consider and apply the salutary purposes of objection and for that reason is explicitly overruled. The language in *Barrett* that states a new trial is proper when attorney misconduct sufficiently permeates the proceedings remains good law.

*1. Objected-to and Admonished Attorney Misconduct*

The Court decided that the standard articulated in *DeJesus*' dissenting opinion is the correct rule for evaluating objected-to and admonished misconduct. In the case of objected-to and admonished misconduct, a party moving for a new trial bears the burden of showing that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect. When the district court finds that is the case then a new trial is warranted.

*2. Objected-to but not admonished Attorney Misconduct*

In the case where the district court overrules an objection to purported attorney misconduct and does not admonish the jury, the party moving for a new trial must first demonstrate that the district court erred in overruling the party's objection. If the district court concludes that the objection to attorney misconduct should have been sustained, then the district court must determine whether an admonition to the jury would likely have affected the verdict in favor of the moving party. The Court must evaluate both the evidence and the parties' and attorneys' demeanor to determine whether a party's substantial rights were affected by the court's failure to sustain the objection and admonish the jury. If this is so then a new trial because of attorney misconduct is warranted.

*3. Repeated or Continued Objected-to but not admonished Attorney Misconduct*

The Court noted that when an attorney must continuously object to repeated or persistent misconduct, the non-offending attorney is placed in a dilemma of having to make repeated objections before the trier of fact, which may cast a negative impression on the attorney and represented party, which in turn emphasizes the incorrect point. The Court's standard for these situations is that when the district court decides a motion for a new trial based on repeated objected-to misconduct, the district court shall factor into the analysis that the attorney has accepted the risk that the jury will be influenced by his misconduct by engaging in persistent attorney misconduct. The Court demands that great weight be given to the fact that single instances of improper attorney conduct that could have been cured by objection and admonishment may be incurable when that conduct is repeated.

#### 4. *Unobjected-to Attorney Misconduct*

The Court restates the rule in *Ringle* that a party must object to purportedly improper argument to preserve the issue for appeal.<sup>15</sup> However, in cases of plain error, the courts may still review allegations of unobjected-to attorney misconduct. As stated in *Ringle*, the party who moves for a new trial based on unobjected-to attorney misconduct must show that no other reasonable explanation for the verdict exists. The standard remains the district court must find “irreparable and fundamental error” that, if left uncorrected, “would result in a substantial miscarriage of justice or denial of fundamental rights.”

#### 5. *Mr. Emerson’s Alleged Attorney Misconduct*

The Court found that each of Mr. Emerson’s closing arguments constituted attorney misconduct. The arguments fell into three categories of misconduct: (1) jury nullification; (2) statements of personal opinion; and (3) golden rule arguments. Each of these types of argument utilized by Mr. Emerson was improper.

#### 6. *Disposition of the Appeals*

The final task for the court was to determine whether the district court erred in its decisions on the motions for new trials.

In the *Castro* case, the Court upheld the grant of a new trial based on attorney misconduct even though the Cabreras’ attorney did not object to the misconduct and district court applied the *Barrett* “sufficiently permeated the proceedings” standard. The district court found that Mr. Emerson’s arguments constituted repeated attorney misconduct egregious enough to warrant a new trial and the Court upheld its order for a new trial.

In *Seasholtz*, the district court found that Mr. Emerson’s argument amounted to irreparable and fundamental error and granted the motion for a new trial. The Court upheld the district court’s order even though it used the improper standard.

In *Lang*, the Court found that the district court improperly applied the *Barrett* and *DeJesus* standards when deciding the Langs’ motion for a new trial based on attorney misconduct. The Court vacated the district court’s denial of the motion for a new trial and remanded it to the district court to apply the correct standards.

In *Lioce*, the district court did not provide any reasoning for its denial of the motion for a new trial based on attorney misconduct. The Court concluded that it could not evaluate the district court’s decision so it vacated the order and remanded the matter for further consideration consistent with the new standards.

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<sup>15</sup> *Ringle*, 120 Nev. at 95.

## 7. *Sanctions for Mr. Emerson*

In the Court's opinion prior to rehearing, it imposed sanctions on Mr. Emerson for his conduct in the *Castro* and *Seasholt* cases. The Court now declines to impose sanctions on Mr. Emerson as such decisions are best left to the discretion of the district court. The Court referred Mr. Emerson to the Nevada State Bar for an investigation of potential violations of the Rules of Professional Conduct.

### Dissenting/Concurring Opinions

Justice Parraguirre wrote an opinion concurring in part with the majority's analysis of the standards for attorney misconduct and the refusal to impose monetary sanctions on Mr. Emerson and dissenting in part with the decision to refer Mr. Emerson to the Nevada State Bar. Justice Parraguirre would decline to refer Mr. Emerson to the Nevada State Bar without a finding of appellate abuse. Justice Maupin joins in Justice Parraguirre's opinion concurring in part and dissenting in part.

### Conclusion

In the four consolidated appeals heard in *Lioce v. Cohen*, the Court revised its standards for attorney misconduct jurisprudence. The Court further required that district courts make specific findings on the record and in their orders regarding these standards. The orders granting new trials based on attorney misconduct in *Castro* and *Seasholtz* are affirmed. The orders denying motions for new trials in *Lang* and *Lioce* are vacated and remanded to the district courts for decisions consistent with the standards set forth in this opinion.