

# **JUROR REACTIONS TO ATTORNEY COURTROOM BEHAVIOR**

**WARREN PLATT**  
**Snell & Wilmer**

**ROCK-SOLID LITIGATION MANAGEMENT**

**TRIAL ADVOCACY:  
DOES UNETHICAL COURTROOM  
BEHAVIOR AFFECT RESULTS?**

Warren Platt  
Snell & Wilmer  
Phoenix & Tucson, Arizona  
Costa Mesa, California  
Salt Lake City, Utah  
Las Vegas, Nevada



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**Applicable Ethical Rules**

**ABA Model Rules of Professional Conduct**



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**ABA Model Rules of Professional Conduct (2004)**

**Rule 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused



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**ABA Model Rules of Professional Conduct (2004)**

**Rule 3.3 Candor Toward the Tribunal**

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (3) offer evidence that the lawyer knows to be false.



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**ABA Model Rules of Professional Conduct (2004)**

**Rule 3.5 Impartiality and Decorum of the Tribunal**

- A lawyer shall not:
- (d) engage in conduct intended to disrupt a tribunal.



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**Recent Informative Decisions:  
THE MEDTRONIC CASE**

- October 2, 2008
- McDermott, Will & Emery and client Medtronic Inc. were ordered by a Colorado federal judge to pay \$4.3 million in attorneys fees as punishment for alleged "abuse of advocacy" in a patent case.
- In the sanctions order, Judge Matsch said the McDermott lawyers willfully ignored his rulings on claims construction in their arguments before a Colorado jury in 2005.
- Lawyers for McDermott argued that the court had an obligation to stop any litigation conduct that stepped over the line, according to the ruling.



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### Recent Informative Decisions: 30 Million Dollar Award Set Aside

- Last October, the Ohio Supreme Court overturned a \$30 million medical malpractice award, citing, among other courtroom misbehavior, a theatrical closing argument by the attorney representing the brain-injured plaintiff.
- The attorney's antics, including his assumption at closing of the persona of his client, when he allegedly was an oxygen-deprived baby during the delivery process.
- At one point, while in character as the baby, the attorney told the jury: "Doctors, nurses, I'm suffocating. Please help me to be born. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me."
- The justices also criticized the attorney for discourtesy, accusing witnesses of lying, and for his frequent interruptions of opposing lawyers. The Court also said the attorney misstated evidence, wrongfully accusing defendants of covering up evidence and inappropriately injecting race and poverty into the trial."



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### Findings in A Recent Study: The Prosecutorial Misconduct Study

- Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,017 cases. The conduct leading to the reversals and reduced sentences included:
- Making inappropriate or inflammatory comments in the presence of the jury;
- Introducing or attempting to introduce inadmissible, inappropriate or inflammatory evidence;
- Mischaracterizing the evidence or the facts of the case to the court or jury; committing violations pertaining to the selection of the jury; or making improper closing arguments);
- Using false or misleading evidence;
- Harassing or displaying bias toward the defendant or defendant's counsel



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### Some Examples of Courtroom Misconduct



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### Some Examples of Misconduct In Opening Statement

13 Now, Ford is going to come out and pull the  
14 old smoke and mirrors out in this trial, folks; the old  
10:02 15 smoke and mirrors. So be on your toes. They're going  
16 to show you tests of other SUVs tipping up in their  
17 hokey tests that their experts rigged. You're going to  
18 see evidence --  
19 MR. PLATT: Your Honor, this is improper.



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### Some Examples of Misconduct During Questioning of Witnesses

10 Q. This testing was rigged, wasn't it,  
11 Dr. Renfro?  
12 MR. PLATT: Objection, Your Honor.  
13 THE COURT: Sustained. Rephrase it.  
  
18 Q. Earlier we saw the documents regarding not  
19 delaying Job One and getting the product to market so  
11:40 20 that the Executives could start seeing a return on  
21 their half a billion dollar investment.  
22 MR. PLATT: Objection, Your Honor. This  
23 is closing argument.



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### Some Examples of Courtroom Misconduct: During Questioning of Witnesses

11 Q. Does the fact that there's been 700 million  
12 buckles that the auto industry shoved down the  
13 consumers' throat in this country change the fact that  
14 Ford decided to go back in time and put this buckle in  
11:27 15 the 1996 Ford Explorer --  
16 MR. PLATT: Objection --  
17 Q. (By Plaintiffs counsel) -- to save a dollar ninety?  
18 MR. PLATT: Objection, Your Honor. It's  
11:27 20 argumentative.  
21 THE COURT: It's argumentative.  
22 Sustained.



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**Some Examples of Courtroom Misconduct During Questioning of Witnesses**

3 Q. The seat belts were screwed together to get  
4 through a test; is that the testimony of the Engineers  
11:30 5 you've reviewed?  
6 A. Yes, it is.  
7 Q. They were trying to rig the test by using a  
8 screw; is that your testimony?  
9 MR. PLATT: Objection, Your Honor. It's  
11:30 10 the same improper question.  
11 THE COURT: Sustained. It's  
12 argumentative.



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**Some Examples of Courtroom Misconduct During Questioning of Witnesses**

Q. What was your salary when you were an Engineer  
10 for Ford Motor Company, at its highest?  
11 MR. PLATT: Your Honor, this is  
12 inappropriate.  
13 THE COURT: I'll sustain that objection.  
15 Q. (By Plaintiffs Counsel) Let me ask you how much you're  
16 making now, if I can.  
17 MR. PLATT: Your Honor, it's the same  
18 issue. It's completely inappropriate.



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**The Trial Judge's reaction to Courtroom Misconduct**

4 THE COURT:  
7 The first thing is Mark Lanier taught me was  
8 what an argumentative question is, so I've got -- and I  
9 could have sustained 500 objections, if Warren had made  
11:58 10 them, so don't do the argumentative questions. I don't  
11 think it moves the ball, and it's just -- you know, let  
12 the jury draw the conclusions, and you can argue when  
13 it's time to argue.



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### The Judge's response to Courtroom Misconduct

4 Your Honor, I move for a Mistrial  
5 because of the misconduct of Plaintiffs' counsel.  
6 THE COURT: Okay. Well, I've been in  
7 here, of course, and I fielded objections and made some  
8 admonishments to counsel at different times and watched  
9 the jury's reaction. And, if anything, I think the  
10 argumentative questions that have been made have  
11 resulted in prejudice in favor of the Defendant, in  
12 observing the jury.  
13 So I would say that if anybody needed to move  
14 for Mistrial, it would be the Plaintiffs. But I'm  
15 going to overrule the Defendants' Motion for Mistrial.



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### Jurors' Responses to Lawyer Misconduct



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### Jurors Responses to Misconduct

- His presentations were all about drama. He reminded me of a cartoon character. He would throw his arms in the air and rant and rave. He was never well prepared and seemed like he spent his evenings hanging out in bars instead of getting ready for the next day in court. He also accused the defense attorneys of lying, which was completely unwarranted.
- I felt so bad for the family. First, they're in a terrible accident, then they get a terrible lawyer. He was a complete ass \_\_\_\_\_. He was totally disorganized. He showed us a picture of the Explorer and claimed it was from the accident scene, but it was actually from the garage after the vehicle had been towed.
- While he was questioning one of the girls, he said, "Mr. Platt is going to call you a liar." Of course, Mr. Platt said nothing like that, but it just showed the complete lack of class that he had.



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### Jurors Responses to Misconduct

- Well, I would have fired him if I were the plaintiff. He had these little temper tantrums as if he were a little kid. He wasn't very organized and seemed to miss out on a lot of opportunities to raise good points for his side. He even admitted one day that he wasn't prepared to cross-examine Mr. Piziali, because he had spent the night before watching the St. Louis Cardinals in the World Series.
- During our deliberations, he was always hanging around. He followed us around during our breaks, and he finally approached one of the jurors and asked how things were going. I couldn't believe he did that. He seemed like he would be a likable guy if you knew him outside of court, but his antics got really old by the end of the trial.



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### Jurors Responses to Misconduct

- He's an ambulance chaser. I felt bad that the family had such a terrible lawyer. I wondered how many times he had to take the bar exam before he finally passed.
- We were laughing a lot during his case, and he seemed to think we were laughing with him, but we were laughing at him. He couldn't get the ELMO to work.



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### Appellate Review:

Comments made by a defense attorney in his closing arguments suggesting that jurors should be "skeptical" of personal injury claims amounted to misconduct that warrants sanctions, the Nevada Supreme Court held in December. The decision also revised the court's attorney misconduct (Lioce v. Cohen, 149 P.3d 916 (Nev. 2006) (en banc).)



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## Appellate Review: Lioce v. Cohen

In a case involving the same attorney, the lower court applied those standards and imposed sanctions on Phillip Emerson of Las Vegas. (*Rising v. Bautista*, No. CV03-04388 (Nev., Washoe Co. Dist. Jan. 25, 2007).)

Four personal injury cases were consolidated into Lioce. Emerson's closing arguments, which were "substantially the same" in each case, "encouraged the jurors to look beyond the law and relevant facts," wrote Justice James Hardesty for the majority. Five justices concurred; one concurred in part and dissented in part.

Emerson's arguments, such as "People must stop wasting taxpayers' money and jurors' valuable time on cases like this," amounted to encouraging jury nullification, the court held. Hardesty wrote that these 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."



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## Appellate Review: Lioce v. Cohen

The court set forth standards for new-trial requests based on attorney misconduct, saying these requests must be evaluated differently depending on whether counsel objects to the misconduct during trial. If counsel objects, the district court may grant a new trial if the moving party shows that sustained objection or admonishment could not remove the harmful effect of the misconduct. If counsel does not object, a new trial can be granted "only if the misconduct amounted to plain error, so that absent the misconduct, the verdict would have been different."



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## Conclusions

1. Abuse of advocacy during trial is becoming a common occurrence
2. Trial courts are reluctant to impose meaningful sanctions when abuse occurs, and will seldom grant a motion for mistrial, even when misconduct occurs on numerous occasions
3. Appellate courts are becoming increasingly likely to reverse verdicts when there has been a pattern of abuse in trial proceedings.
4. It is important to make timely objections to misconduct when it occurs if you expect action to be taken from an appellate court.



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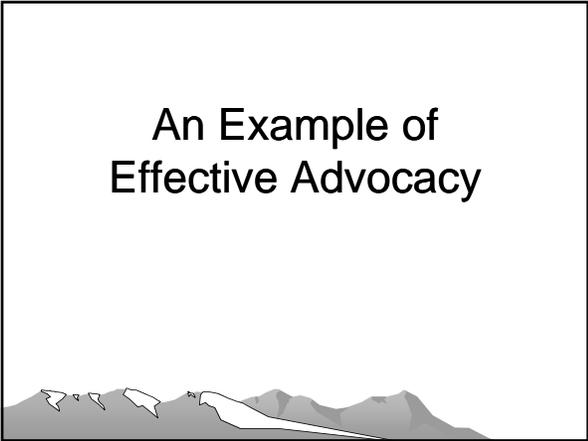
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Phoenix  
Orange County  
TEL: 602.382.6292 and  
714.427.7475  
wplatt@swlaw.com

## Warren E. Platt

Partner, Executive Committee Member

Warren Platt's practice is concentrated in civil litigation matters with principal emphasis on defense of major product liability suits for national and international manufacturers, complex commercial litigation, and defense of accounting malpractice litigation for national and regional public accounting firms. National and international representative clients include Ford Motor Company, Price Waterhouse Coopers, Emerson Electric Company, and Caterpillar Inc.

## Professional Memberships & Activities

American Bar Association  
Fellow: American College of Trial Lawyers  
Superior Court of Arizona Civil Rules Study Committee  
Superior Court of Arizona State Bar Civil Jury Instructions Committee  
Maricopa County, Arizona, Bar Association  
Director of the Maricopa County Legal Aid Society (1977-1978)  
President, Phoenix Association of Defense Counsel (1984-1985)

## Other Professional Experience

Speaker and panel participant before various professional groups, including:

American Bar Association  
Arizona State Bar Association  
Arizona Trial Lawyers Association  
Maricopa County Bar Association  
Virginia Association of Defense Counsel  
Wisconsin Corporate Practice Institute  
National Conference on Product Liability  
National Product Liability Symposium  
Practicing Law Institute  
Southern Methodist University School of Law

## Education

University of Arizona (J.D., 1969)  
Order of the Coif  
Managing Editor, *Arizona Law Review* (1968-1969)  
Graduated fifth in class of 183  
Michigan State University (B.A., 1965)

## Court Admissions

Supreme Courts of Arizona, California and Texas  
United States District Court, District of Arizona  
United States District Courts in Texas, California, Illinois, New York and other states  
United States Courts of Appeal, Seventh, Ninth and Tenth Circuits  
United States Supreme Court