

January 2009 Jury Tip: “Competitive and Cooperative Jurors”

On the surface, trials are supposed to be decided based on the evidence, and nothing more. Lucky for you that your suit, blouse, or tie doesn't matter, let alone your credibility, how sympathetic your client is, and the makeup of your jury. If you believed any of this, I doubt you would still be reading my jury tips after all these years.

We all know that credibility matters most to jurors, and that every juror's predispositions shape what and who they find credible. Jurors don't like complex explanations that sound unreasonable to them—even complex explanations that in reality may be the right ones. Common sense matters most to jurors, but every juror has their own definition of what makes sense. Evidence does matter, quite a lot, but your evidence has to be explained in a way that makes sense and has to be carefully presented to match your jurors' beliefs and values.

When you peel back the evidence and go beneath the surface of juror decision-making, trials are battles between competing systems of values. Jurors don't care what the evidence shows, because they will dismiss that evidence if it doesn't fit into what they already believe and what they value. Your success at trial usually boils down to how well you understand your jurors' values and how well you present your evidence to match those values.

Most employment trials boil down to how jurors feel about the fairness of at-will employment; is it unfair to prevent employers from having complete control of their business, or should employees have the right to job security as long as they fulfill their job requirements? Most personal injury trials boil down to how jurors feel about safety and responsibility; should people be cautious and wary on the roads, in the workplace, and when using seemingly safe products, or should we be allowed to trust that other drivers, product manufacturers, and others will do their part and keep our environment safe?

This month, let's discuss just one spectrum of juror values that shapes juror decision-making in nearly every case: the difference between competitive and cooperative jurors.

Almost every trial boils down to how jurors feel about self-interest; is it acceptable for everyone to look out only for ourselves, or should our conduct be bound by unspoken (or contractual) obligations of loyalty and fairness to others? The reality that jury verdicts vary widely in even the most similar trials is a testament to the fact that jurors have wildly varying values relating to self-interest.

Time and again, I've seen mock jurors in deliberations argue over a verdict even when they AGREE that the defendant (or plaintiff) did the very self-serving or unfair thing that they're being accused of. These jurors are not fighting over facts and evidence; they're fighting over values. I can't count the number of times I've seen mock jurors insist that a defendant had a right to do the very thing they're being sued for, or insist that the plaintiff should be blamed for being foolish or naïve enough to trust the defendant, for not exercising enough caution or self-preservation, or for "playing dumb" and pretending to be surprised when a defendant chose its own self-interest at the expense of the plaintiff's.

Think about two jurors on opposite sides of the self-interest spectrum. On one side, imagine a highly competitive champion of self-reliance who believes wholeheartedly in personal responsibility and cutthroat competition, like a dynamic salesperson or a self-employed business owner in a highly-competitive, win-at-all-costs industry. On the other side, imagine an empathetic, nurturing schoolteacher or social worker who believes in treating others with fairness and compassion. Imagine how differently the two jurors would view an unfair competition trial, or an intellectual property trial.

In my experience, how competitive a juror is will usually be the most telling sign of how a juror will make value judgments when evaluating what the litigants SHOULD have done.

Competitive jurors are perfectly comfortable with the reality that people, businesses, and all entities are focused first and foremost on their own self-interest. More importantly, most competitive jurors believe that anyone who doesn't recognize that everyone is looking out for themselves, especially those who blindly trust others, is foolish and naïve. As a result, competitive jurors defend aggressive conduct that may push the envelope of fair dealing and are much more willing to excuse competitive 'wrongdoing.'

On the other hand, cooperative jurors have a strict definition of wrongdoing. Cooperative jurors demand that people and entities have priorities beyond self-serving ones. They don't mind when corporations try to make money, but they are angered when corporations consciously choose profit over loyalty to employees, customer safety, the environment, and considerations that impact the rest of society beyond the stockholders. Unlike competitive jurors, cooperative jurors don't blame people and companies when they are victimized, even when they turn a blind eye to wrongdoing and don't take steps to protect themselves. Even more interesting, cooperative jurors don't just get angry when a defendant breaks a promise; they often believe in unspoken duties of fairness and cooperation that don't have to be written into a contract, a promise, or a law or guideline. In fact, cooperative jurors will insist that there are unspoken rules of fairness and cooperation even when there is NO contract, promise, rules, or fiduciary duty between parties, and they are equally outraged when a defendant who has never promised anything to a plaintiff makes a self-centered decision and causes harm.

During voir dire, distinguish between competitive and cooperative jurors by asking your jurors questions about their values, and the values they would hope to instill in their children. Should we be able to trust others to take care of our interests, or is trusting others foolish and naïve? Do you prefer to rely on others and work with teammates or partners, or do you prefer to rely on yourself? Would you prefer your children to be smart and successful or fair and honest? If your jurors coach youth sports, do they focus more on winning and developing skills or on teaching sportsmanship and making sure the kids have fun? Ask your jurors if they prefer competitive or cooperative work environments; would they prefer to be evaluated and paid independently—getting 100% of the credit and blame for their successes and failures—or would they prefer to be part of a team? Do they prefer being responsible only for themselves, or do they like to help co-workers or train, coach, or manage employees?

Before your next trial, take an honest look at more than just your evidence. Think about the values beneath the surface of your case. Are you defending ambitious (or downright selfish) conduct, or are you demanding fairness and loyalty? Decide for yourself if you'd be better off with competitive or cooperative jurors, and understand the values of every juror on your panel so that you can tailor your arguments to match what they already believe—and avoid making arguments that your jurors will never agree with.

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