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The Punishment Profile: Know the Situational Triggers

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From the time we were kids, most of us swiftly learned what was likely to get us punished: a spanking or — for more recent generations — a time out. Usually, that was brought out by something we did, or by the situation we found ourselves in. That frame of punishment plays a role in litigation. With or without the category of punitive damages, the motivation to punish (as opposed to the less dramatic motivation to merely compensate a party for its loss) can factor in to the way a jury, judge, or arbitrator makes their decisions. Their feelings might be focused as much or more on what the defendant ought to *lose* rather than on what the plaintiff ought to gain. That can put a sizable thumb on the scale, particularly when the damages categories are inherently subjective.

What invokes that frame of mind is something I'm calling the "Punishment Profile." Earlier, I wrote about the personal juror characteristics that predict this motive to punish, and in another post, I shared the research findings on the case factors that are associated with a more punitive

disposition. For this post, I'd like to add to that list by sharing a few elements of the trial narrative that, when present in the story or made salient in the telling, will add to the situational elements that draw out the motive to punish. The specific triggers will often be specific to the individual case (and that is a great reason to conduct mock trial research on your case), but broadly, I have noted three factors that can put decision-makers in a punitive frame of mind: calculation, denial, and deception.

Calculation

> The story might focus on a moment when a character — usually but not always the defendant — weighs the costs and benefits and chooses the wrong path. The classic example is the Ford Pinto situation where a product maker decides it is cheaper to just deal with the claims than it is to fix the flawed product and avoid the danger. The presence of cost-benefit-analysis then suggests to the jury that the verdict can correct the imbalance by weighing in on the "cost" side, and punishing that decision. The lesson for plaintiffs is not to skimp on this part of the story, even if specific motive or intent is not strictly relevant. And a lesson for defendants is to layout the full decision-making story since it is probably not simply a matter of allowing danger for greater profit. So combat the plaintiff's efforts to simplify by covering the many other factors.

Denial

> There may be a part of the story where a bad actor knew or should have known of a problem, but instead denied or failed to appreciate the problem. This might be the construction company, for example, that knew the materials could fail but decided to play down that possibility instead. The party might even be seen as having made an honest and good-faith decision, but still had blinders on their decision, or mistakenly thought it wasn't their role to worry about the problem. An overreliance on "informed consent," in medical or product cases, for example, puts all of the responsibility on the patient or product user, and can be seen as a failure to take responsibility for what was within your knowledge and control. Importantly, this can factor not just in the part of the story that led to the lawsuit, but also into the part of the story taking place today in court. That is, plaintiffs can leverage the idea that, "they denied it then, and now, with all their experts, they're still denying it today."

Deception

> Beyond just downplaying, there's also the story that hinges on an active deception. This is one factor we've noted over and over again in mock trials: Juries will often look for and key in on deception. In many cases it is not the danger, and it is not even the bad outcome, it is the perceived lie that happened before or after. It can be something hidden, not reported to

regulators, not shared with consumers, or with the public. For example, a generation of plaintiffs' attorneys did pretty well with tobacco lawsuits based, not on the dangers of smoking, but on companies *lying* about the dangers of smoking. And just as with denial, the dishonesty can make its most dramatic appearance in the form of false testimony: a dishonesty to jurors and to the court. Emphasizing that can help to pivot the case to being one that is not just about balancing the scales of justice, but about actively punishing wrongdoing.

Ultimately, one key fact to remember about stories is that they are fluid. Here is a great exercise: Ask every member of your trial team — attorneys, clients, paralegals, tech operators, secretaries, everyone — to separately write down what they see as the story of the case. You will end up with a bunch of pretty different stories. Yes, the facts do put a fence around the narrative you can convey in the courtroom. But in most litigation stories, there is room to play up or to play down many of the elements that make a story memorable and influential. Whether you're trying to leverage or to avoid the punishment motivation, one important piece of advice is to look to what you are framing as the story's key moments.

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