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COMMENTARY

# In Defense of War Stories

**By Michael Brooke Fisher**

I once read about a lawyer who prevailed on a motion, then gloatingly referred to his win as a "slam-dunk."

Use of such war stories sometimes is dismissed as unnecessary. Many times I attended a legal seminar where, during intermissions or at the conclusion, lawyers criticized the speaker for telling war stories. They failed to appreciate that these stories are instructive learning tools. Such anecdotes register in our subconscious — far better than a dry statement or principle — to be remembered and used when the need arises.

A story about a personal-injury trial over which I presided is an instructive example.

As usual, negligence was hotly contested. And there was a substantial damages issue because of the plaintiff's preexisting medical condition. The case was well-tried.

The defendants closed and then we heard from the plaintiff's attorney. To my surprise, after he made an excellent, cogent argument spelling out his factual and legal points, he went on to essentially tell the jurors he was not certain he did a good enough job presenting his client's case. He beseeched them not to hold that against his client. After that, I charged the jury and deliberations began.

When I listened to the plaintiff's attorney's closing, I thought he had masterfully argued his client's position, to the point that I was convinced the jury would render a verdict in his client's favor.

But I also thought his plea to the jury about his poor presentation set a jarringly false tone. I wondered whether the jury would react the same way. I also questioned the wisdom of saying — in front of his client, jurors and his colleagues — that he made an inadequate presentation. If things did not go well, those words could haunt him.

While the jury deliberated, the lawyers congregated in my chambers. Naturally, we all talked about the trial. I complimented all the attorneys, but when I complimented the plaintiff's attorney, I told him my negative reaction to his feigned, poor-job plea.

He responded by telling me he had attended a seminar where a nationally known trial lawyer told attendees that he made use of such a tactic in every case.

Apparently he was mesmerizing enough to convince the plaintiff's lawyer in the case before me, and I assume a host of others, to use this tactic.

As deliberations continued, the defendants became more concerned and made a high-low offer that the plaintiff accepted.

Soon after, the jury returned a verdict in favor of the plaintiff but substantially below the minimum agreed-to low.

Afterward, I spoke with the jurors to thank them for their service. They enjoyed their experience and were complimentary about all the lawyers, but it became clear that they, too, saw through the plaintiff's attorney's ruse of saying he had done a poor job. They felt pandered to, but to their credit they ignored it and rendered a fair and appropriate verdict on behalf of the plaintiff.

There are lessons here. One can argue that the tactic worked. Though neither the jury nor I liked it, the tactic may have been a factor in the defendants offering a high-low that was beneficial to the plaintiff and nonexistent before his attorney's closing argument.

Either way, I am using this tale to show that apparently there are very skilled lawyers out there advocating and using this tactic. Neither as a lawyer nor as a judge had I encountered it before. Maybe you have, but if you haven't, perhaps you will be informed by this tale.

At the least, you will not be surprised if you encounter this tactic. And perhaps during the next seminar you attend, you will pay careful attention to and have proper respect for war stories. ■

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