From the Trenches

BY JOI KUSH

"*Flectere si nequeo superos, Acheronta movebo.*"
(If I cannot bend the will of heaven, I will raise hell.)

— Virgil, *The Aeneid*

When I graduated from law school, I didn't plan on becoming a litigator. I presumed my legal career would be more transactional and not filled with objections, lengthy witness examinations, and verbal fights in front of a judge. My choice to skip the courtroom warrior path was based on my distaste for the adversarial mudslinging that I heard plagued the litigation scene.

Impacted by the poor job market of the Great Recession, however, I didn't have many options. My first job was as a plaintiff's attorney. Shortly thereafter, I transitioned to family law, where I remain, having zealously advocated for my clients in and out of the courtroom for over a decade now. What attracted me to family law was my somewhat misguided belief that creative problem-solving and strategic thinking could resolve any conflict. But as we all know, not all issues can be resolved without a person in a black robe deciding what is best. Despite my best efforts, all too often I find myself in a courtroom. Sometimes I win; sometimes I don't. That's the nature of litigation. No one wins them all. When I fail, I learn, and hopefully I never need to learn the same lesson twice.

Because of the risk involved, litigation is a big deal, win or lose. Every case is determined by a stranger or a group of strangers who have a micro-glimpse of the issues to resolve. The finality of the decision is what can make the process so overwhelming and all-consuming. There won't be more time to prepare tomorrow, and do-overs are few and far between. You must be ready and well-prepared for the curveballs that your opposing counsel (or worse, your client) throws at you during your presentation. You only have one chance to tell your client's story.

All litigators are storytellers; it's built into the job. Whether the audience is a judge or a

jury, when the case law supports a convincing argument for both sides and the facts are ambiguous, the best story might prove the winning edge. And for those who dedicate their careers to fighting the good fight, the rewards include a lifetime of stories to tell. Over the years, I've had the great pleasure of hearing and reading many tales of litigation. Some are a bit like fishing stories, where time and space have clouded memories and truths. But all of them are entertaining, and in this presidential message, I share just a few.

A Prosecutor and Defense Attorney Meet at a Bar

All litigators have a "nemesis," but most understand the value of leaving the fight in the courtroom and maintaining a professional relationship in the world at large. Former litigator David Griffith tells the story of a battle between a prosecutor and defense attorney that was part of his introduction to the practice of law, beginning in the early 1970s in the Colorado Springs Public Defender's Office:

"In one celebrated case, a local deputy district attorney prosecuted the defendant for driving under the influence. This prosecutor in trial became a terrier—restless, stiff necked, and red faced, showing his teeth under a brushy 70s mustache as he spoke to the jury in voir dire about the defendant's inexcusable conduct, and doing his best to cast defense counsel as a man with a hopeless task.

"But nothing is hopeless to an Irish American defense lawyer armed with wit and the gift of thinking on his feet. After voir dire, during his opening statement (which was as usual a model of Irish charm and wit with a smile and a wink for the ladies), defendant's counsel told the jury that he was sure of one thing: when the trial was over, the jury might or might not convict his client, but every person on that jury would like him a lot more than the prosecutor.

"This amused all of us in the courtroom, including the judge, but it angered the deputy DA. The trial proceeded and the evidence was very strong, causing the prosecutor to smile like a terrier with a rat in its teeth. When the jurors brought in their verdict, they had two verdicts to read. In the first, they found the defendant guilty as charged, and in the second, they gave defense counsel an Academy Award for his performance.

"The animosity between the defense bar and the prosecution bar in general was quite pronounced and obvious, but we still all drank together in the evenings, at the Stockyards and later the Teocalli Lounge and the New Tokyo Lounge. The defendant's lawyer managed his cases with good humor and brilliant Irish wit, and to this day his name is regarded with love and respect. Around the same time as the trial reported here, the prosecutor rose to the highest distinction in the DA's office, and both men often spent their weekday evenings, after court along with the other prosecutors and defense lawyers, drinking beer and telling jokes and settling cases."

Judge Tekavie Sets the Record Straight

A humble, scholarly, and professional judge who acts with tact and integrity is invaluable to the litigation process. In his second story, Griffith recounts a time when a well-respected lay judge did what was necessary to administer justice and uphold her oath:

"Our wonderful county judge in Teller County, Margaret Tekavie, was just so darn nice that the rough crowd of country people and old miners who attended her court always showed her respect, and she was absolutely fair and reasonable by nature. She was beyond middle age, not quite elderly, always dressed formally in or out of chambers, and always pleasant in her speech, in or out of court, held in the venerable Teller County Courthouse, where she'd been serving since the early '50s.

"I filed a motion to suppress evidence in a case in her court, and at the time of the hearing and after arguments, she seemed perplexed by my authorities, so she called the deputy district attorney and me into chambers so that we could explain the law to her before she ruled. When she finally got the sense of my contention, which was that there was a mistake in the body of the warrant that she had issued, and when the deputy DA indicated in the most polite way that I was right, and that it was material to the issue raised as to suppression of evidence, she then read the warrant again, very carefully. And then she read the cases I relied on, started crying, and asked for a tissue to dry her copious tears as she apologized for her mistake. She said that she never wanted to deprive a citizen of her county of any constitutional rights. The deputy DA and I spent a lot of time gently reassuring her that it was okay to make a mistake like that, and that even the district judges in the Springs made worse mistakes, and not to ever worry about it. Then she went into court and ruled in a business-like way that the motion was granted, and we all went home with no further comment at all.

"This example of civility in a near-pioneer environment (it was a trip back in time just to appear in that court) was a special moment for me as a lawyer."

Diversity and Inclusion Circa 1981

Litigation can also inspire change. From seatbelts to civil rights, well fought cases have created lasting and meaningful changes in our society. Unfortunately, the contra is true as well. It was a litigator who won *Plessy v. Ferguson*, another who won *Korematsu v. United States*. While all sides deserve representation, litigators must live with their choices.

Litigator Keith Killian shared his advocacy for LGBTQ+ rights in the military long before there was any serious consideration on how to create an inclusive US Armed Forces:

"George Floyd died ignominiously on May 25, 2020. His death sparked the specter of systemic discrimination in the various institutions of our society. This encouraged an introspective review by the Colorado Bar Association. While serving on the CBA-CLE Board of Directors, I have seen an effort to encourage diversity and inclusion in the selection of board members and the topics chosen for CLE presentations. When thinking about systemic discrimination, I was reminded of my service as an Air Force JAG Officer.

"The college deferment ended during the Nixon presidency. My draft number was 79. In my year of eligibility, the last numbers of 76 through 85 were included. I quickly joined the Boulder Army Reserve to avoid a two-year active duty assignment. However, being drafted eventually led to my becoming an Air Force JAG Officer.

"My first assignment was at Lowry Air Force Base in Denver. I presented evidence before court martial panels and boards convened to discharge members who failed to meet service qualifications. One case involved a man who underwent a (then novel) sex change surgery in Trinidad, Colorado. He was now a woman with a new name. Before the change, he had been promoted from major to lieutenant colonel. My boss, a colonel, gave me instructions to prepare a petition to discharge this officer.

"I asked a simple question: On what basis was I to attempt to discharge this officer? I was told to discharge her for being gay. This was long before the 'don't ask don't tell' era of the Clinton administration. Discharging her for being gay was illogical because, while a man, he was married to a woman. Furthermore, discharging her for being a lesbian was absurd because she was now a woman who professed to be attracted to men.

"After much agonizing, I briefed the issues and then engaged in the time-honored legal tradition of procrastination. Once I left for Turkey, I learned that the issue was punted upward to the Pentagon. The Air Force eventually chose not to proceed with the discharge of one of the first transgender service members. However, I would soon revisit institutionalized discrimination.

"I was selected to travel from Turkey to Iraklion Air Base in Athens where a gay male service member sought help from Greek authorities after being sexually assaulted. After learning of the incident and the man's sexual preference, the base commander convened a discharge board. My task looked hopeless because the base commander chose the five members of the discharge board. The presiding judge had gone so far as to tell me not to close the door to my client's quarters when I was preparing for the hearing.

"I learned my client had served 17 years and been instrumental in defending a US outpost in Greece against a terrorist attack. My final argument beseeched the all-male panel to do the right thing. I was seeking 'jury nullification,' despite the clear ban on homosexuality. I closed with, 'We need to be careful how we treat our heroes.'

"The panel refused to discharge my client. Under the circumstances, I was told to leave that night. The USAFE JAG, a brigadier general, detoured his assigned Air Force jet. However, he appeared to be pleased with the result. And while I was saddened by the marginalization of these service members, I was pleased with the results in both cases. I also found purpose in being a lawyer."

With or On It

So, what's my best litigation story? Sorry, I can't tell you—all the players are still playing and so are the umps. But I will share this: every time I head to court, my law partner, David Johnson, says to me, "With it or on it." This saying dates to the classical era and was purportedly said by the mothers of Spartan warriors headed to battle. The phrase refers to the Spartans' oversized shields. The meaning is harsh: come back victorious or be carried back dead—never give up, never run away, and never surrender. And that's what being a litigator is all about (maybe minus the death part). And after the battle is over, win or lose, we pick up our shield and move forward. There will be another fight sooner than we'd like. Litigation is tough, and only the strong survive. CL