

THE DAILY RECORD

Monday, July 1, 2019 / Volume III / Number 126 / \$2.00 • Western New York's trusted source for legal and real estate news

Trial by fire: My first jury trial

My First

Lawyers discuss a first in their career in this new feature in The Daily Record.



THOMAS F. KNAB

Many years and two law firms ago, my boss brought in a case for Tony, one of his best friends. Tony had purchased some property for his business that turned out to have subsurface petroleum contamination. The seller, a paving company that had used the property to store its equipment, had given Tony an indemnification agreement at closing, under which the seller agreed that if any contamination was discovered, it would pay the cost to clean up whatever contamination it had caused.

After the closing, Tony discovered contamination during the construction of a building on the property, and the DEC ordered him to remediate the contamination. Tony hired an environmental remediation company to excavate tons of contaminated soil, and then made a demand on the seller for indemnification. The seller denied that it caused

the contamination and refused to honor the indemnification agreement.

My boss assigned the case to one of the firm's environmental lawyers, and that lawyer commenced an action against the seller and started discovery. When that lawyer left the firm in the middle of the case, my boss had me take it over. I handled the depositions of the parties, made and won a summary judgment motion for an order that the seller had breached the indemnification agreement, and defeated the seller's appeal from that order. Following the appeal, the case was scheduled for a jury trial.

When I received the scheduling order, I told my boss that I would put together the case for him to try, as was our usual practice. My boss said that I would try the case. I reminded him that I had never done a jury trial. He said, "Don't worry, you'll be fine. Just don't tell Tony."

Although I had argued many motions and appeals, prepared many cases for trial and participated in those trials as second chair, and attended "trial school" at the National Institute for Trial Advocacy, I was a little nervous. Opposing counsel was an experienced trial lawyer. I found a book in the firm library called "Preparing for and Trying the Civil Lawsuit," edited by one of the firm's senior partners. I read it when I started trial preparations, and that book became my operating manual. I also had the help of the firm's best litigation paralegal.

As I dug into the file, I realized that the previous lawyer, who was not really a litigator, had done a poor job in developing

the necessary scientific proof, and the evidence showing that the seller (and not some other party) had caused that contamination was not quite as strong as I had been told. I had to play the hand I was dealt.

I retained two expert witnesses: an environmental engineer to testify that the seller had caused the contamination, and a commercial real estate appraiser to testify on the value of the property with and without the contamination. I subpoenaed the DEC's file on the contamination. I met with Tony and the other witnesses to prepare them for their direct testimony and cross-examination, and the paralegal and I put together our trial notebooks in the same way we had always done.

I read the rules, and re-read the chapter in the book, on jury selection the night before jury selection, but the jury selection process remained a metaphysical mystery to me. Nevertheless, we ended up with a decent jury. Every night, I re-read the chapter on the next phase of the trial (opening statement, direct examination, expert testimony, etc.) in order to be ready for the next day's events. Along the way, I anticipated, and defeated, an oral defense motion in limine based on an argument that one of our interrogatory answers (written by the previous lawyer) did not sufficiently articulate Tony's damages.

Once the trial started, I tried to act like I had been there before. I gave my opening statement. I got all my evidence in. I handled the direct and cross-examination. The seller's owners wore beauti-

fully tailored suits and were very smooth. When my questions on cross-examination cut too close to the bone, they pretended they did not understand English very well. I made objections and responded to objections, even when I was not exactly sure of the grounds.

I had the judge take judicial notice of the fact that unleaded gasoline was not even available for sale at the time the seller's owners testified that they had installed an unleaded gasoline tank on the property (that was important for some now-forgotten reason). I made it through with the help of the book and a great paralegal. Tony, the judge and opposing counsel never guessed that this was my first jury trial. But after I finished my closing argument, my paralegal asked me why I was fidgeting around so much in front of the jury.

When the jury retired to begin its deliberations, Tony said, "You did a great job." The jury came back and awarded Tony damages, but not as much as he wanted. When we went out for a drink afterwards, Tony said, "You did a good job."

I couldn't blame him for being disappointed but thought that sudden change of opinion was amusing. When I told my boss what Tony had said, he laughed and told me to get used to it.

Thomas F. Knab is a partner in Underberg & Kessler's Employment Practice Group and chair of the firm's Litigation Practice Group. He concentrates his practice in the areas of commercial law and litigation, and labor and employment litigation.