Making the case

Top lawyer STEVE SUSMAN talks to Brunswick's MIKE FRANCE about the media and his successful challenges to conventional wisdom

VERY FEW LAWYERS DESERVE TO BE called disrupters. Steve Susman is one. Today, he is among the litigators most feared by corporate defense lawyers, but he started off on their side, joining Fulbright & Jaworski after a clerkship with US Supreme Court Justice Hugo Black.

In 1980, Susman founded Susman Godfrey, a firm voted one of the top litigation boutiques by *American Lawyer*, the first time the magazine judged the field in 2005. Accolades have been piling up as the practice has grown to over 100 lawyers.

At the same time as he has been building an institution, Susman has been bucking the establishment. He pioneered creative billing arrangements, risk-sharing tactics and novel litigation strategies that have consistently defied the profession's conventional wisdom. In 2015, he made headlines with a $2 million donation to New York University Law School to study the demise of civil jury trials in the US through a variety of research and academic activities (see next page).

In a recent interview, Susman talked about the Civil Jury Project at NYU and his views on litigation communications.

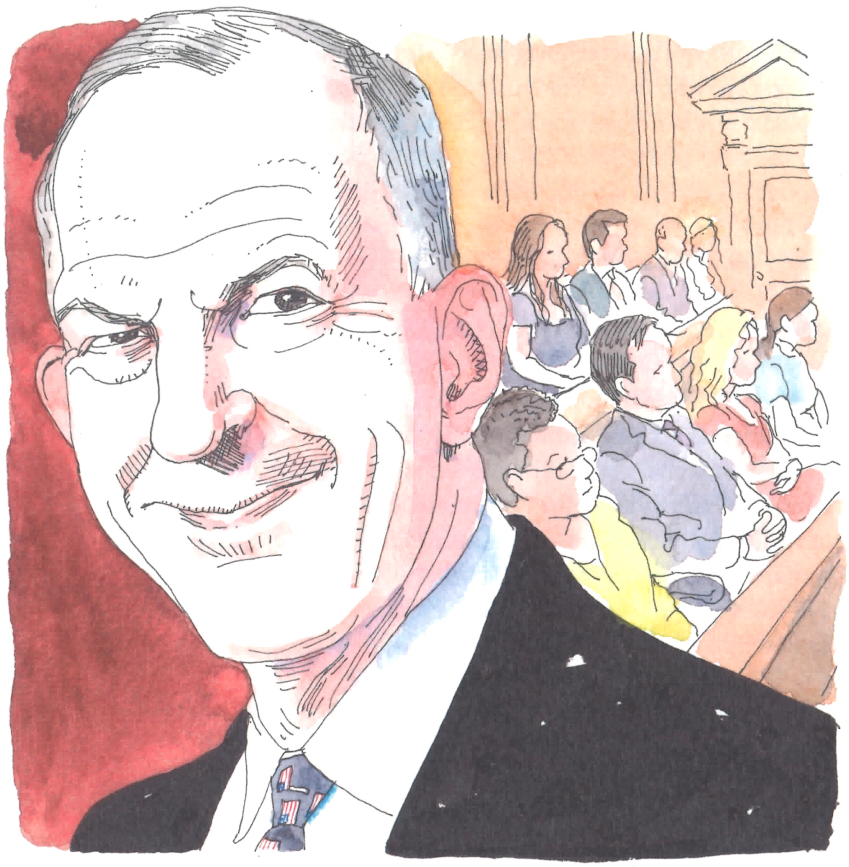

ILLUSTRATION: JOE CIARDIELLO

What is the central communications challenge in every lawsuit?

You have to ask yourself, "What are the 10 hardest questions in every case?" Whether you are a plaintiff or a defendant, every case basically boils down to no more than 10 hard questions. We believe in putting them in writing. When the clients tell us their answers, we critique them. We make them go back and do it again. We make them mad. It is a collaborative document, but we challenge them – and that's the point.

What are your views on the role of communications outside the courtroom?

It is a dangerous thing for a lawyer to do. You have to be very careful. Judges do not want you trying your cases in the press; they want you trying your cases in the courtroom. So I have to be extremely careful about talking to the media in a case. I frankly prefer that the client do it or that the client hire an outside firm to manage it.

> "Whether you are a plaintiff or a defendant, every case basically boils down to no more than 10 hard questions"

What is your opinion of plaintiffs' lawyers who seek high settlement values by exerting pressure in the media?

As a lawyer, I evaluate the case on the basis of merit. That's it. What is the judge going to say? What is the jury going to say?

I've had clients come and say, "You should take this case because the other side cannot afford to have any media attention. They will settle this case." That's the stupidest rationale I can think of. Taking a case on the belief that you can get quick settlement because the other side may be embarrassed is really ridiculous. You can't predict what the media reaction will be in any event, and you can't count on that.

How are creative fee structures important in your firm's work?

Lawyers who bill clients by the hour get paid for their work whether it produces a good result or not. So why would somebody tell a client that the case sucks? On the defense side, this is a very dangerous thing. Clients should hear the truth up front. "Well, you're never going to go to trial on this. It'll cost you a lot more. The risk is too high. You should pay now because you are going to have to pay the other side anyway." Lawyers don't say that enough. They don't communicate with the client because, if they're working by the hour, it's not in their self-interest to end their work.

Why did you start the New York University Civil Jury Project?

I was worried that the civil jury was disappearing and there was nothing getting done about it. The right to a civil jury really mattered to the Founding Fathers. It's in the Constitution, the Bill of Rights and the Declaration of Independence. It was one of the most important rights of all about 240 years ago; juries were the ultimate protection against a potentially tyrannical government.

It is surprising to read on the project's website that since 2005, less than 1 percent of federal civil cases have involved a jury.

The media has created a huge misperception. There are movies, books and articles about trials. We've seen a tremendous amount of publicity about the so-called "litigation explosion." Most people think, "There are too many trials." Yet last year the average federal judge tried only two civil jury cases and the same number on the criminal side.

Those figures are not talked about a lot, but I think they should be.

How can civil litigation be improved to preserve the role of the jury?

We have to try to create an environment where it's a pleasant experience for the jury so they can comprehend the case better. There are a lot of things that courts can do that will improve jury trials. Rules can be established that put short time limits on the trial. You could make lawyers put on their case in three days. You're talking about a day in court – not a week in court, or a month in court.

If you make trials shorter, you will attract better jurors. Too many people think that serving on a jury is a phenomenal waste of time.

Additionally, you could make sure that instructions that jurors receive are easier to understand and that jurors are allowed to ask more questions.

MIKE FRANCE is a former lawyer and Senior Editor at *BusinessWeek*, where he oversaw coverage of management issues and legal affairs. He is a Partner in Brunswick's New York office, specializing in litigation and crisis.

STEVE SUSMAN

Recognized as one of the most successful attorneys in the US, Steve Susman is a Founding Partner of Susman Godfrey. He has won some of the largest legal cases in US history, including the 1996 case *Samsung Electronics v. Texas Instruments*, and the 1980 antitrust class action involving Corrugated Container.

Susman Godfrey was founded in 1980 and is headquartered in Houston, Texas. It currently has over 100 lawyers in four offices in the US.

NYU CIVIL JURY PROJECT

The Seventh Amendment to the US Constitution, part of the Bill of Rights framed by the nation's Founding Fathers, is plain: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. ..." In theory, this guarantees citizens the right to a trial by jury in civil cases. However, the Supreme Court has stated that while the "substance" of the right is preserved, "mere matters of form or procedure" are not (*Baltimore & Carolina Line, Inc. v. Redman*, 1935). In practice, the number of federal civil cases heard by a jury has fallen below 1 percent.

The US is one of the few countries to guarantee a jury in civil cases. In the mid-18th century, juries allowed the American colonists a way to challenge hated British laws. In the years after independence, however, skepticism toward juries grew and their role in civil cases remains under debate.

50 PERCENT

The decline of juries in civil trials in the largest US counties from 1992 to 2005

Source: *Civil Justice Survey of State Courts, 2005*, Bureau of Justice Statistics

In 2015, Steve Susman donated $2 million to the New York University School of Law to launch a four-year Civil Jury Project to use empirical evidence to assess the causes and consequences of, and remedies for, the decline of jury trials.

Susman told *The Wall Street Journal* that, depending on the project results, "I'll either raise money or contribute my own for a center. Or if we conclude that it's too late or not worth it, I will have done the best I can."