

LAWYER LIMELIGHT: STEPHEN SUSMAN ON NYU LAW'S CIVIL JURY PROJECT

By Katrina Dewey | Lawyer Limelights | No Comments

September 9,
2015



Photo by Hugh Williams

To call **Steve Susman** legendary is like saying the sky is blue. Or Texas is big. Or the House always wins. Like, yeah, right, it's one of the givens in the somewhat exhausting discussion of the most superlative lawyers.

But though the discussion is tired, Susman sure as hell isn't. He's going stronger than ever at 74, and about to kick off his four-year residency with the New York University Law School **Civil Jury Project**, announced earlier this summer. The kickoff conference this Friday, Sept. 11, is drawing a who's who of lawyers and legal thinkers from throughout the country.

Let me illustrate why Susman matters with a game us legal geeks like to play. Think of the most elite, ultra-litigators practicing in the U.S. today. OK, I have mine. Now assign them playing cards for your winning hand. I've got Susman as Joker's Wild for a Royal Flush or just about any other game you'd like to play.

Why? He worked his way through Yale University shunning his original job of waiting tables for rich kids to become their concierge for a fee. EuroRail passes, annoying laundry – he figured out how to take fellow students' money and pay his way through school. He was Editor-in-Chief of the law review and had the highest GPA in school history at the **University of Texas Law School**, where his mother Helene also matriculated in 1934. (His father, Harry, was a Yale law graduate and successful Houston lawyer before dying suddenly when Steve was 8). He clerked for Judge John R. Brown of the 5th U.S. Circuit Court of Appeals and then U.S. Supreme Court Justice Hugo Black, where he was the first clerk Black trusted to draft opinions.

Returning to Texas, he joined Fulbright & Jaworski, becoming one of its first Jewish partners while his battle with conformity raged. After teaching at University of Texas Law School, his first wife, Karen, told him she did not see being the spouse of a law professor in her future, so he joined a commercial firm, Mandell & Wright, that offered a contingency practice. He shortly after that made his way into the corrugated box antitrust case, which he settled for more than \$400M, earning more than \$8M in attorney fees – more than enough to launch **Susman Godfrey**.

Since then, he's built and led one of the most profitable law practices in the U.S., which mandates its lawyers hold a serious legal pedigree (with one cowboy outlier). He was so far ahead of the pack in taking payment for results in commercial litigation (rather than choking clients on hourly fees) that private firms should probably just call it the Susman Model. He won \$1.1B for Texas Instruments, \$536M from a jury for GHR Energy on a counterclaim against El Paso Natural Gas and let's not forget that little trial in Los Angeles, after which Jamie McCourt accepted \$131M to be done with Frank and the LA Dodgers about two years before Frank sold them for a net of \$1.278B and related long-term contracts. Motion to reconsider denied.

We spoke in early August while the Jerusalem Fire raged North of his home in Napa.

Lawdragon: We could talk forever about your career. But today let's talk about the Civil Jury Project at NYU Law School you've just established with \$2M. Tell me a little about it.

Steve Susman: It's a four-year project and we'll be getting input from attorneys, judges and politicians. We're kicking it off with an inaugural conference in September. And we'll be asking whether civil jury trials still have a place in the justice system.

LD: What was the inspiration for the project?

SS: For many years now, I've had this website trialbyagreement.com – and the point of it is that it's hard to change court rules – quickly. There are too many conservative lawyers and judges that have stakes in any changes, so they're very slow coming. I learned a lot about this in the 1990s when I was a member of the Texas Supreme Court Advisory Committee and chaired the Discovery Subcommittee that rewrote Texas discovery rules.

I saw that any kind of law reform that depends on rules committees is doomed to happen at a glacial pace. But the easiest and quickest way for good lawyers to reduce the cost of litigation is to make their own rules for particular cases. So I came up with the concept of Trial By Agreement. At first it was pretrial agreements relating to discovery primarily and then that expanded to trial agreements, mostly related to improving jury comprehension. They are revised all the time and are on my website TrialByAgreement.com.

Reducing unnecessary disputes and expense is always on my mind because I do a lot of contingent-fee work. And when you have a case on your own nickel, you're much more cognizant of wasting time. The less I work, the more I make. Hourly work is the opposite. And I don't want to do a bunch of tasks unnecessarily. So I figured the way to do that is to get agreements with the other side.

LD: And I guess you've also seen the plummeting confidence in the legal system and the jury trial as part of that system?

SS: That's right, I began thinking how we can do something to restore confidence. I gave a speech at a jury summit the American Board of Trial Advocates held in Austin in 2013, and the incoming president asked me to co-chair a group looking at this issue.

Through those experiences, I recognized bar associations are unlikely to get anything done during my lifetime. They meet two or three times a year, are gung ho at meetings in the morning, play golf in the afternoon and totally forget about it the next week.

I felt if anything's going to be done, maybe I should do this personally. One, I don't want to have a boss so I can't work for an organization with a board of directors. And I wanted to do this at an academic center for credibility. Two, I did it with my own money so I don't have to go mooch money.

LD: So why now? You've done everything any lawyer could dream of in your career, have a wonderful life with your wife, Ellen, and your children and grandkids. You've got homes and offices of your firm all over the place, and are still doing trial work. Why take on what seems a pretty thankless task.

SS: Look, I'm 74. I have five or six more years, I don't know how long, to really make this work. It's set up as a four-year program, and if it's something after that it will be a permanent center at NYU like the Brennan Center. Or I'm not sure; maybe it's too late to save the jury system. Some say the ship has already left the dock.

LD: I see you've added noted scholars Samuel Isaacharoff and Catherine Sharkey to the center. And I know your firm is meticulous about academic pedigree. Why is scholarship important to the study of juries?

SS: We needed folks who understood the jury, its history, as an institution. There's considerable debate about where we got the jury, and why – the legal history. Why did England, which gave us the civil jury trial, abandon them so now civil cases are not tried to a jury in England at all, only libel cases. Is that applicable in the U.S.?

The first question you have to answer – if you were writing a constitution today, would you insert the 7th Amendment guaranteeing the right to a jury trial in civil cases? And I think the answer most non-trial lawyers would give is no, because in every democracy except the U.S. juries are not in use.

Why are we different? Why have jury trials declined? I think I have a lot of suppositions.

LD: Care to share any?

SS: When we first got juries, one of the reasons – the Federalists who wrote the Constitution did not insert a jury right in civil cases in the original Constitution. It was mentioned in the Declaration of Independence – but criminal juries were mentioned, not civil.

Why did it have to wait for the Bill of Rights? Federalists thought juries would be used to nullify in a way that would protect debtors from having to pay their debts. Before the Revolution, the people in the colonies incurred a lot of debt to fight the war, and during the war. Southern states particularly, which were poorer than the Eastern states, incurred the most debt.

How they were handling this debt after the U.S. became a country is they were printing money, currency. They may have borrowed \$100 in gold and paid it back with paper money that wasn't backed by anything. That was the predicament of the Southern states that borrowed from England and the New England states.

So in all the debates about ratifying the Constitution, you see the arguments in favor of having juries guaranteed by the Constitution and the Bill of Rights. The anti-Federalists wanted juries to protect them from unfair and unjust laws passed by a strong central government. They wanted protection for the little guy against the big creditor. But the Federalists argued we would never be a real country unless we honor our debts. And because juries would have a soft place for people with debt – and let them out of their debts – it would be bad for business and big government.

LD: That sounds a lot like the tensions we see today.

SS: That's right. Corporate America doesn't want juries because they have a soft spot for consumers, people who were injured, people with credit card debt – for everyone in the world the juries have sympathy for. And they are hostile to Corporate America and Wall Street. And frankly, I think, the corporations got the upper hand in the '80s with tort reform and lawsuit abuse reform. This whole notion let's protect Corporate America from having to face the consequences of screwing someone. We shouldn't force them to go to trial.

Courts have been very sympathetic to Corporate America, particularly appellate courts and the Supreme Court. Eight of the nine Supreme Court justices have never tried a civil trial – Justice Sonia Sotomayor is the only one who has. It wasn't always that way. I clerked for Hugo Black, who was a trial lawyer before he became a Senator and a Justice. He was from rural Alabama and a great believer that juries are the backbone of democracy.

LD: Are there other ways you believe our jury trial rights have been diminished?

SS: Corporate America also puts arbitration clauses in everything. You cannot buy anything today without giving up your right to any kind of trial whatsoever. So justice – dispute resolution – is being privatized.

I'm all for private schools but definitely think there's a role for public schools. I'm all for private, big companies doing business with each other that want to agree to resolve their disputes through arbitration or combat or casting lots, and I think that's their business.

You see this every day. I tried to download a song from iTunes and got a notice on my laptop to download the software to get a 99-cent song. There were new terms and conditions I needed to agree to and it was a 73-page contract – 73 pages long! No one can read that. But what are you going to say?

We all do it, we give up our rights. It would go a long way to saving the jury trial if we provided that certain types of contracts cannot force arbitration on people who don't really have any bargaining power. Which is, by the way, why most Americans don't think we're in danger of losing the jury trial: 99 percent of people with arbitration clauses in their contracts

don't even know they have them!

Whether you're going to the doctor's office or the hospital, you're going to sign something that provides if there's a dispute it's being arbitrated. That's the principal way they've taken away our jury-trial rights.

LD: There are so many arguments that have been made against jury trials – they cost too much, they're too expensive and time consuming. And lawyers have made many of these arguments! Are there other ways lawyers are complicit in this?

SS: Definitely. There are things we lawyers have done over time that make it difficult for people to trust juries. Think about how the jury system works, for example. You're instructed at the end rather than the beginning of the case. It's like having to put together a complicated piece of machinery without instructions. And the instructions are gobbledygook and just get longer and longer.

If the jury has a problem during deliberations, the judge will frequently tell them to just keep going and do their best. Can we hear some testimony back? No. Can we ask questions during trial? No. Can we have a copy of the instructions? In many courts, that, too, is a no.

And it goes on and on. And when it comes time to excuse people we let the professionals off and only unemployed and retired people can serve.

So yes, I think lawyers and judges have done a lot to make the jury system unworkable. We've got to change that.

LD: In deciding how to set up this project, how did you choose NYU?

SS: That's not where I went to school. But I wanted it to be in New York City, where I spend most of my time. NYU is close to the courts, and we have to get judges involved. It won't be successful without judges, who can make the changes and make lawyers change how they think. And I'll be teaching a course at the law school, two hours a week on how to try a jury case intelligently. I'm still going to try some cases, because I have to know what works and

what doesn't.

LD: What is so magic to you about juries?

SS: It's hard to point out particular cases. I look at the experience of juries in England, where they got rid of civil juries. They found new ways of selecting judges in the middle of the 19th century. Citizens of the Realm suggested the appointment of barristers at the top of their game to court. That has never happened in the U.S. Here two-thirds of our state court judges are elected, not appointed. Many of them have to run in partisan elections where they identify as Democrat or Republican. Many of them become state court judges because they can't make a living practicing law.

In federal court, you're appointed for life. I serve on the selection committee in Texas and the quality of those who apply is nothing like we should have in this country, and it's declined. Everyone knows that it takes two years to get through the confirmation process and most successful lawyers can't afford that kind of interruption of their careers.

There are some great federal judges on the bench now, but the next generation won't be that great unless we streamline the nomination and confirmation process.

So another reason I want to keep juries is to protect against judges who are less than brilliant legal scholars. I have a better chance with getting a bright person with a Ph.D. on a 12-person jury than I do with one single judge in a metropolitan area where there are many possible judges and a few bad apples.

Some judges are terrific, but you're not always going to get one. If you get one, maybe he or she dies or retires and you get a numbskull as a replacement. Having juries available to decide cases makes a better, more fair product.

LD: What cases are you working on now? And how do you find the time to do all this?

SS: I've got several substantial patent infringement cases. One is set for trial November 9th in Marshall, Texas. The judge will clearly limit the amount of time we have, which is what

they do in the Eastern District of Texas in patent cases. I've also got several antitrust cases and a breach-of-contract case in Chicago.

I told my partners I can't do everything, so I'm not going to do any hourly work any more. I'm limiting myself to plaintiff contingent-fee cases. If a good case comes along, I'll take it.

LD: In 10 years, what do you hope people say the Civil Jury Project accomplished?

SS: I tell people they're basically dealing with three audiences: the public in general; non-trial lawyers; and trial lawyers and judges.

The public has got to be told that jury trials are vanishing. If you look at an organization like the American Board of Trial Advocates, to get in you had to have tried 20 jury trials to verdict as first chair. Ten years ago, we couldn't get enough new members, so we reduced the number from 20 to 10. And even now it's impossible because there are just a handful of lawyers that have tried 10 cases to a verdict in the first chair. In my own firm – and we try more cases than any other firm in the country – we can't get members to put up.

No one denies the number of cases has declined. So we need to tell the public this is happening, primarily with commercial cases because you're likely to have signed away your right to a jury trial in an arbitration agreement.

The second audience is the 90 percent of lawyers who are not trial lawyers or trial judges. If you ask them whether we should preserve the right to a jury trial, they'd probably say no. That it's a quaint notion that's outlived its usefulness. And they'd point out it's not an institution in any other democracy on the face of the Earth. We inherited it from the British – as did Australia – and they got rid of it. So why go through all this trouble?

The third audience is trial judges and trial lawyers themselves. They know jury trials are important, and that they're disappearing. But they've not been able to get their act together to do anything about it. We've let it happen on our watch and we can't do things the same way anymore.



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