

Texas Business Litigation



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SOFIA ADROGUÉ, EDITOR
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TEXAS BUSINESS LITIGATION, 2022

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Any attorney who has been licensed for a few years should appreciate the fact, and any seasoned practitioner will agree, that the practice of law in the 21st century bears little resemblance to that of the 1900's and it is not entirely due to the technology age. To some degree, it requires almost a re-education process. There is no doubt that it requires a new approach.

The advent of new statutes and changing regulations requires constant vigilance and careful attention by those who appreciate the importance of staying current in their representation of clients. That is the beauty of this treatise. Almost no topic of interest, especially to those who have a litigation practice, has been overlooked. Each of the 25 topics has been covered in depth. It can be used as a handy reference as the need arises.

I predict this publication will be the quick "go to" work for those who "enjoy" an active practice, whatever the area.
—Hon. Ruby Kless Sondock

Modern complex business litigation presents a witches' brew of risks to both sides. Controlling legal standards vary across possible venues. Discovery costs are potentially exorbitant. The challenge of persuasively communicating to courts and juries on issues which are foreign to them requires great imagination and skill. Realistic assessment of settlement values is a critical and difficult art.

The Editors have assembled a galaxy of some of the best trial lawyers in the nation to address the myriad issues raised. This work will be an invaluable resource for both trial lawyers and corporate counsel.

—Harry Reasoner, Senior Partner, Vinson & Elkins LLP



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About this Book

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The advent of new statutes and changing regulations requires constant vigilance and careful attention by those who appreciate the importance of staying current in their representation of clients. That is the beauty of this treatise. Almost no topic of interest, especially to those who have a litigation practice, has been overlooked. Each of the 25 topics has been covered in depth. It can be used as a handy reference as the need arises.

I predict this publication will be the quick ‘go to’ work for those who ‘enjoy’ an active practice, whatever the area.”

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NAVIGATING COVID-19

The April 2020 Newsletter of Stephen D. Susman's brainchild and legacy, the Civil Jury Project at NYU School of Law, commenced with a few poignant and prescient remarks.

The Covid-19 pandemic has accelerated courts' turning to technology in order to deliver justice. Until our events start back up in autumn, we will be working on analyzing how a virtual trial would work. Are there any Constitutional concerns of having jurors deliberate remotely? Would this decrease or increase costs for an already burdened system? How would you pick a jury? Would a virtual trial deliver the same quality of justice? The list of considerations of moving from the physical courtroom to a courtroom in cyberspace is long.¹

No doubt, "the year 2020 will be remembered as a galvanizing moment in the maturity of legal systems across America."² And, not surprisingly, within our profession, COVID-19 has presented complex challenges to the American delivery of justice. Our industry, like many others, has been indelibly impacted and it is an open question whether this new "virtual reality" will be a long-term game changer. There has been a "sea change" in the practice of law—virtual meetings, depositions, and/or hearings are here to stay in one way, shape or form. There is no true "going back to the way things were before."

Texas Chief Justice Nathan L. Hecht, President of the Conference of Chief Justices and Co-Chair of the National Center for State

¹. Stephen D. Susman, *Opening Statement*, Civil Jury Project at NYU School of Law, Vol. 5 Issue 4 (Apr. 2020), available at <https://myemail.constantcontact.com/April-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=gdpEH5xV60Q>.

². Mitchell A. Chester, *The Dynamic Opportunities and Responsibilities of Virtual Jury Trials*, Civil Jury Project at NYU School of Law, Vol. 5 Issue 10 (Oct. 2020), available at <https://myemail.constantcontact.com/October-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=Kq-BgL3cTfQ> ("The year 2020 will be remembered as a galvanizing moment in the maturity of legal systems across America. How we deliver legal services and make court appearances will not be the same, nor should they remain mired within inefficient and outdated practices.").

Courts Pandemic Rapid Response Team, powerfully articulated the following.

Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff . . . and the public from the risks of disease. We are learning new technology and practices together.³

State courts are the heart of the American system of justice. Collectively we are working together to protect public health while also finding innovative ways to keep the courts open for business.⁴

A hallmark of our justice system is the right to a jury trial.⁵ The pandemic has challenged our ability to safely deliver on that promise, but through the efforts of many Texas judges, clerks, court staff, and attorneys over the past few months, today we have a roadmap to resuming those jury trials, even if that roadmap will be restricted to ensure the health and safety of the public.⁶

³. *Rapid Response Team: Pandemic Roadmap to Guide State Courts Forward*, State Justice System, available at <https://www.sji.gov/rapid-response-team-pandemic-roadmap-to-guide-state-courts-forward/> (“The Pandemic Rapid Response Team (RRT), a group of chief justices and state court administrators established in March 2020, has created a roadmap to help state courts move forward during the pandemic—and after it ends The RRT was created by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) and is supported by National Center for State Courts (NCSC). The State Justice Institute (SJI) is providing funding for this initiative.”).

⁴. *State courts lead national effort to maintain access to justice despite COVID-19 pandemic*, Apr. 2020, available at <https://www.ncsc.org/newsroom/news-releases/2020/state-courts-lead-national-effort-to-maintain-access-to-justice>. See also *Pandemic lessons learned*, Mar. 2021, available at <https://www.ncsc.org/newsroom/public-health-emergency/newsletters/pandemic-one-year-later>.

⁵. *Report details Texas jury trials during COVID-19 pandemic*, Aug. 31, 2020, available at <https://blog.texasbar.com/2020/08/articles/coronavirus/report-details-texas-jury-trials-during-covid-19-pandemic/>.

⁶. *Report details Texas jury trials during COVID-19 pandemic*, Aug. 31, 2020, available at <https://blog.texasbar.com/2020/08/articles/coronavirus/report-details-texas-jury-trials-during-covid-19-pandemic/>.

Chief Justice Hecht also predicted and pronounced that “[w]e’re going to be doing court business remotely forever.”⁷ Indeed, within our state, “[t]he Texas judiciary has led the country and world in developing methods to safely host in-person jury trials and conduct them effectively virtually.”⁸ Jury trials did, in fact, occur in counties such as Harris County, where extensive COVID protocols were put in place, voir dire was conducted at NRG Stadium with positive juror turnout, and trials were completed successfully at the courthouse.

However, despite all of the tremendous efforts, jury trials unquestionably were drastically affected. According to David Slayton, the Administrative Director of the Texas Office of Court Administration, as of August, 2020, there were only 1,554 civil jury trials and 2,695 criminal district court trials.⁹ Courts accepted the challenges presented by the pandemic and pivoted to innovative solutions such as virtual summary jury trials and virtual bench trials to seek to deliver justice safely.¹⁰

⁷ *The future of virtual court hearings – why are they going to stay?*, Mar. 15, 2021, available at <https://casedoc.com/future-virtual-court-hearings/>. See Dr. Ken Broda-Bahm, *The Virtual Trial: Be Conscious of What is Lost and What is Found*, Persuasive Litigator, Mar. 18, 2021, available at <https://www.persuasivelitigator.com/2021/03/the-virtual-trial-be-conscious-of-what-is-lost-and-what-is-found.html>. See also *Zoom courts will stick around as virus forces seismic change*, July 30, 2020, available at <https://www.ndcourts.gov/news/national/legal-issues/zoom-courts-will-stick-around-as-virus-forces-seismic-change> (“Courts forced to accelerate years of innovation into weeks may never go back to how they did business before the pandemic, according to interviews with more than 30 state and federal judges, lawyers and court staff in 16 U.S. states and the District of Columbia. The embrace of technology is a revolution for many courts that have historically resisted it.”).

⁸ David Slayton, Administrative Director of the Texas Office of Court Administration, *Preserving the Right to Jury Trial During a Pandemic: A Daunting Task*, *The Advocate*, Vol. 94, p. 9 (Spring 2021).

⁹ See Office of Court Administration, *Jury Trials During the COVID-19 Pandemic: Observations and Recommendations*, at p. 13 (Aug. 28, 2020), available at <https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf>. See also Sarah Jarvis, *Coronavirus: The Latest Court Closures And Restrictions*, *Law 360*, Apr. 15, 2021, available at https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions?nl_pk=83644f7e-3e9e-490e-b781-e09d36393c3d&utm_source=newsletter&utm_medium=email&utm_campaign=special.

¹⁰ David Slayton, Administrative Director of the Texas Office of Court Administration, *Preserving the Right to Jury Trial During a Pandemic: A Daunting Task*, *The Advocate*, Vol. 94, p. 11 (Spring 2021). See www.litigationsection.com.

Undoubtedly, during the pandemic, litigants, as well as courts (state and federal), continued to balance the various interests, including the extraordinary legal (constitutional, practical and ethical) issues that must be considered in moving a trial from a physical courtroom to a virtual courtroom. Such considerations include as follows: the permissibility and constitutionality of a jury trial by videoconference; potential reduction of ability to obtain an adequate spectrum of jurors (no access to the internet); commensurate technology costs; and whether a virtual trial delivers the same quality of justice (including ethical concerns about whether jurors will follow court instructions when they are attending trial remotely and whether witnesses will follow “The Rule” and how it can be enforced—in other words, how do you know “who’s in the room?”).

While virtual jury trials have been explored, there is a strong sense that safely and successfully returning to in-person jury trials is the overarching goal of courts, attorneys, and litigants. Jury trials by their very nature are “innately human experiences”¹¹ and those who have been participants in a jury trial—judges, lawyers, litigants, and jurors—understand and appreciate that often what is communicated in a courtroom non-verbally can be as important as (if not more important than) what is communicated verbally.¹² Many judges and practitioners have expressed concerns during the pandemic that “the remote, sterile, and disjointed reality of virtual proceedings,”¹³ as well as the “casualness” of Zoom, not only cannot “replicate the totality of the human experience”¹⁴ and guarantee the constitutional rights and protections afforded

¹¹ *The Jury Returns*, Nov. 24, 2020, available at <https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/> (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order).

¹² *The Jury Returns*, Nov. 24, 2020, available at <https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/> (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order). See also Quentin Brogdon, *Mandatory Online Jury Trials: An Idea Whose Time Has Not Come*, Texas Lawyer, Aug. 30, 2020.

¹³ *The Jury Returns*, Nov. 24, 2020, available at <https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/> (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order). See also Quentin Brogdon, *Mandatory Online Jury Trials: An Idea Whose Time Has Not Come*, Texas Lawyer, Aug. 30, 2020.

¹⁴ *The Jury Returns*, Nov. 24, 2020, available at <https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/> (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order).

by the Sixth and Seventh Amendments,¹⁵ but also virtual proceedings inevitably sacrifice the formality and solemnity in which court proceedings traditionally are and must be conducted.¹⁶

There has been serious debate as to whether virtual jury trials will or should continue post-pandemic, however, clearly lessons have been learned from trying to navigate trials during COVID-19.¹⁷

As we ideally transition into a post-pandemic world, it is evident that courts, lawyers, litigants, and jurors will continue to adjust to the “new normal”, all the while navigating and innovating in ways to ensure that justice is delivered in a safe and efficient manner, and that access to justice and access to participation in the process is protected. It is no small task, but our commitment to the Sixth and Seventh Amendments demands it; we will not waiver in facing the task and delivering.¹⁸

¹⁵ *The Jury Returns*, Nov. 24, 2020, available at <https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/> (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order). See also Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff. L. Rev. 1275 (2020), available at <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss5/1>.

¹⁶ See, e.g., Dr. Ken Broda-Bahm, *The Virtual Trial: Be Conscious of What is Lost and What is Found*, Persuasive Litigator, Mar. 18, 2021, available at <https://www.persuasivelitigator.com/2021/03/the-virtual-trial-be-conscious-of-what-is-lost-and-what-is-found.html>. See also Quentin Brogdon, *Mandatory Online Jury Trials: An Idea Whose Time Has Not Come*, Texas Lawyer, Aug. 30, 2020.

¹⁷ David Slayton posits as follows:

For instance, with the increased participation rate of virtual jury selection, should we consider the barriers to in-person jury service and retain this method of selection? Should we retain the increased flexibility for jurors provided through technology to alert the court of its issues to appearing for jury service? I believe the answer to these is yes, but more study is necessary before the final verdict is in.

David Slayton, Administrative Director of the Texas Office of Court Administration, *Preserving the Right to Jury Trial During a Pandemic: A Daunting Task*, The Advocate, Vol. 94, p. 12 (Spring 2021), available at www.litigationsection.com.

¹⁸ Jessica Arden Ettinger, David Gerger, & Barry J. Pollack, *Ain't Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?*, The Champion, 2020 National Association of Criminal Defense Lawyers®, Inc., available at <https://www.nacdl.org/Article/May2020-AintNothingLikeTheRealThingWillCoronavirus>. See also Richard Emery and Daniel Cooper, *COVID-19 Cannot Be the Death Knell for the American Jury Trial*, N.Y.L.J. (Apr. 20, 2020), available at <https://www.law.com/newyorklawjournal/2020/04/20/covid-19-cannot-be-the-death-knell-for-the-american-jury-trial/>.

DEDICATION

Stephen D. Susman—An Incomparable Innovator

**Epic/Warrior/Legendary/
Trailblazer & Trial Legend/
Visionary & Innovator/
Fearless/Peerless Texas
Pioneer/Egalitarian/
Entrepreneur/Charismatic &
Fun/Larger than Life with
a Heart of Gold/Hope
Diamond/Not a Man of Half-
Measures/Outsized Influence/
Advocate of High Risk/High
Reward/Susman Godfrey's
Founding Partner/Big
Daddy/Not "Mr. Susman"/
Institution-Builder/Not a Cult
Leader/Professor/Friend/
Son/Father/Grandfather/Papa &
Champion of the Civil Jury
System¹⁹**

¹⁹ Sofia Adrogué, *Litigating Through Crisis, The Sui Generis "Super Sus"—Stephen D. Susman*, *The Advocate*, Vol. 93, p. 45 (Winter 2020), available at www.litigationsection.com.

A Tribute to SDS - Veni, Vidi, Vici!

**So when a great man dies,
For Years beyond our ken,
The Light he leaves behind lies
Upon the paths of men²⁰**

This Fifth Edition of our *Texas Business Litigation* treatise is dedicated to Stephen D. Susman. Cognizant there are no words to describe the loss for many, personally and professionally, we sought to capture his irrepressible spirit via an amalgamation of descriptive words for truly a *sui generis* fellow lawyer. Further, we articulate below why his April 2020 inquiries about innovating, navigating and litigating through the novel COVID-19 virus in his Civil Jury Project at NYU School of Law Newsletter were the impetus for the special aspect added to this Edition—each contributing author’s assessment of the impact of the COVID-19 pandemic on their area of expertise. Moreover, we explore two select arenas, of the many others not feasible to address in this dedication, where Steve’s legacy and imprimatur are palpable and everlasting.

Sofia had the luxury of meeting Steve 30 years ago, working for and learning from him at Susman Godfrey, trying a case with him in federal court in Puerto Rico, having the honor of preparing with him as he participated in the Trial of Hamlet in federal court, and, most impactfully and unforgettably, benefitting from his encouragement and guidance in her role as she envisioned and serves as the Editor of this treatise, *Texas Business Litigation*, with fellow Co-Editor, Hon. Caroline Baker.

Caroline has had the honor and privilege of serving as a Judicial Advisor to the Civil Jury Project at NYU School of Law and working with Steve to fully develop another brainchild of his—the Young Lawyers in the Courtroom Program, which was designed to provide young lawyers meaningful and substantive speaking opportunities in the courtroom. Thankfully, Steve was able to see

²⁰. Hon. Mark A. Drummond (ret.), *Opening Statement*, Civil Jury Project at NYU School of Law, Vol. 5 Issue 8 (Aug. 2020), available at <https://myemail.constantcontact.com/August-Newsletter-of-the-Civil-Jury-Project.html?oid=1127815376566&aid=o0MI22a82UQ>.

this invaluable program come to fruition. The Young Lawyers in the Courtroom Program, in conjunction with the Houston Young Lawyers Association and with the full support of the Houston Bar Association, was implemented in the Harris County district courts in 2018.²¹

***Commercial Litigation in the 21st Century—
the Aftermath of the “Vanishing Trial”***

In paradigmatic Susman form, the legendary trial lawyer dedicated countless hours and commensurate resources to address why jury trials are vanishing. He sought to give fellow lawyers, the judiciary, and, indeed, society, a roadmap to keep jury trials from becoming extinct,²² aware of the numbers taking a precipitous decline across state and federal courts nationwide. In point of fact, during the last fiscal year, in Texas state courts, 0.11% or less of the cases were disposed of by jury trial.²³

Aware that litigation in the 21st century remains the subject of vigorous substantive debate and commensurate study, Steve envisioned, led and funded the Civil Jury Project in 2015 at NYU School of Law—a “collaborative effort between law students, lawyers, judges and political bodies across the nation” to “examine the factors leading to decline in civil jury trials and educate the legal community and the public on methods to revitalizing the dying system.”²⁴

To date, the Civil Jury Project at NYU School of Law has engaged over 335 Judicial Advisors, 67 Judicial Advisors Emeritus, 73 Academic Advisors, and 45 Jury Consultant Advisors, who are focusing on educating the public on their right to a jury trial; informing the public that jury trials are declining at an alarming rate; and advocating for the utilization of tools to reduce the costs

²¹ See, e.g., 2021 Civil Jury Project at NYU School of Law, *available at* <https://civiljuryproject.law.nyu.edu/young-lawyers-in-the-courtroom-program/>.

²² Sofia Adrogué & Hon. Caroline Baker, *Texas Business Litigation*, About this Book (2019 Ed.). See also generally <https://civiljuryproject.law.nyu.edu/>.

²³ See Office of Court Administration, *Jury Trials During the COVID-19 Pandemic: Observations and Recommendations* (Aug. 28, 2020), *available at* <https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf>.

²⁴ See <https://www.susmangodfrey.com/news-awards/sg-news/benchmark-litigation-names-three-susman-godfrey-attorneys-to-top-100-trial-lawyers-of-2016/>. See also generally <https://civiljuryproject.law.nyu.edu/> & <https://civiljuryproject.law.nyu.edu/about/directors/>.

About this Book

of trial such as time limits and jury innovations, including juror questions, early instructions to the jury, and interim arguments.

Of interest, Steve's commitment to addressing commercial litigation trial work in the 21st century and the aftermath of the vanishing trial was not new. He developed a set of Pretrial Agreements that his namesake firm, Susman Godfrey, proposed to opposing counsel.²⁵ Steve's initial inspiration merits repetition.

Because I was blessed by being involved only in complex commercial cases and with good opposing counsel, I was able to develop a set of Pretrial Agreements that my firm has been proposing to opposing counsel for over a decade

The key to the efficacy of such a Pretrial Agreement has always been to attempt to reach agreement on as many of these items as possible before discovery begins. Once you are in the heat of battle, what appears to be good for one side is often deemed to be bad for the other; therefore, it is hard to reach agreement at that point.²⁶

Steve's Pretrial Agreements were so effective that the concept continued to evolve and he created a list of possible Trial Agreements,²⁷ which culminated in a working website appropriately named Trial By Agreement,²⁸ where these agreements can be found and debated among trial lawyers. Trial by Agreement is a way of "reduc[ing] expense, stress and many of the uncertainties that are associated with pretrial rulings and jury trials."²⁹

²⁵ Sofia Adrogué & Hon. Caroline Baker, *Texas Business Litigation*, About This Book (2019 Ed.).

²⁶ See <https://trialbyagreement.com/category/pretrial-agreements/>. See also Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, The Training & The Experts—Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray & Stephen D. Susman*, *The Advocate*, Vol. 56, p. 16 (Fall 2011), available at www.litigationsection.com.

²⁷ See <https://trialbyagreement.com/agreements/trial-agreements-made-easy/>.

²⁸ See <https://trialbyagreement.com/>.

²⁹ See <https://trialbyagreement.com/about/about-trial-agreements/>.

Steve's approach to litigation was principled, competitive, and pragmatic.

I truly believe that Trial Agreements are worthy of full discussion among experienced trial lawyers and judges well in advance of pretrial. My attitude is to take whatever agreements I can get—the idea being that any such agreements advance the ball and make pretrial and trial more professional and efficient, not to mention making trial more understandable to the jury. Trial by Agreement is a way of reducing expense, stress and the uncertainty of pretrial rulings and a jury trial.³⁰

Training Young Lawyers in an Era of Fewer Jury Trials

Another arena of his imprimatur is the teaching and training of young lawyers; indeed, he mentored and sponsored even before such terms were in vogue. State-of-the-art programs like the Young Lawyers in the Courtroom Program perfectly demonstrate that, as always, what Steve promoted, he delivered—he walked his talk.

In this time of 'vanishing' trials, I feel like an old dinosaur hunter. There is no need to teach those skills to youngsters if there are no dinosaurs around. That said, I do think there are many opportunities for young lawyers to practice their litigation skills by participating in mock trials. We also have a rule at our firm that any lawyer that works on a case is entitled to stand-up time at the trial. We can only teach by sharing the limited trial experiences that we have. Jurors love to see a young lawyer get opportunities to question witnesses.³¹

³⁰. Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, The Training & The Experts—Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray & Stephen D. Susman*, *The Advocate*, Vol. 56, p. 16 (Fall 2011), available at www.litigationsection.com.

³¹. Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, The Training & The Experts—Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray & Stephen D. Susman*, *The Advocate*, Vol. 56, p. 16 (Fall 2011), available at www.litigationsection.com.

About this Book

Steve advanced the much debated and scrutinized “roadmap for reform”³² for our 21st century civil justice system. As his colleagues so poignantly noted in the August Newsletter of the Civil Jury Project at NYU School of Law, “[h]e crisscrossed the country at his own expense to talk to trial attorneys, trial judges, and most importantly, jurors.”³³ He “advanced jury innovations” and “was a champion of and a cheerleader for . . . ‘the purest, fairest, most inclusive and robust expression of direct democracy that the world has ever seen.’”³⁴

Aware of these enigmatic times, the April 2020 Newsletter of the Civil Jury Project at NYU School of Law, opened with Steve’s strikingly prophetic observations. “The Covid-19 pandemic has accelerated courts’ turning to technology in order to deliver justice. It will have far reaching effects for all of us—and for our justice system.” Steve also appropriately remarked that the list of considerations of “moving from the physical courtroom to a courtroom in cyberspace is long,” including the following brilliant Susmanesque inquiries: (i) constitutional concerns of having jurors deliberate remotely; (ii) would this decrease or increase costs for an already burdened system?; and (iii) would a virtual trial deliver the same quality of justice?

Steve vehemently believed that juries are the views of the community and sacrosanct; thus, he invited his team, including his Judicial Director Mark A. Drummond (ret.) to survey and analyze how a virtual trial would work. As a result, the Civil Jury Project at NYU School of Law, armed with several hundred judicial and academic advisors and Steve’s gravitas, turned the focus to best practices for virtual jury trials.

To be clear, a virtual trial for Steve, Judge Drummond and the Civil Jury Project at NYU School of Law, like for all of us, is not

³² Sofia Adrogué & Hon. Caroline Baker, *Texas Business Litigation*, About This Book (2019 Ed.).

³³ Hon. Mark A. Drummond (ret.), *Opening Statement*, Civil Jury Project at NYU School of Law, Vol. 5 Issue 8 (Aug. 2020), available at <https://myemail.constantcontact.com/August-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=o0MI22a82UQ>.

³⁴ Hon. Mark A. Drummond (ret.), *Opening Statement*, Civil Jury Project at NYU School of Law, Vol. 5 Issue 8 (Aug. 2020), available at <https://myemail.constantcontact.com/August-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=o0MI22a82UQ>.

the same as being there. Steve created his legacy being there; now the mission is to anticipate what is next and determine how best to move efficiently and safely through this global pandemic and beyond.

We have no other option. Preservation of the right to jury trial is the key. Regardless of how individual states decide to tackle the challenges of this new world, it is clear that proactive communication and consistent reassurance will be necessary to maintain public confidence and maximize participation in the jury process.

Here's to authentic, empathetic, realistic, belligerent optimism as we seek to navigate, innovate, and litigate in this "new normal" emulating the joie de vivre of Steve. Speaking about Susman Godfrey's democratic structure and culture as well as his professional legacy, Steve's words are immensely moving and spot on.

I want them to say. He was very fair. He was very honest. He loved to play . . . And he was very proud of doing things the right way. The moral way. The ethical way. And I have been. I have been.

Here's to our Super Sus, our *Sui Generis* Stephen D. Susman. He epitomized *Carpe Diem*.

May he rest in peace.

Sofia Adrogué, Editor & Caroline Baker, Co-Editor
July 2021

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TEXAS BUSINESS LITIGATION, 2022

SOFIA ADROGUÉ, EDITOR, CAROLINE BAKER, CO-EDITOR

Any attorney who has been licensed for a few years should appreciate the fact, and any seasoned practitioner will agree, that the practice of law in the 21st century bears little resemblance to that of the 1900's and it is not entirely due to the technology age. To some degree, it requires almost a re-education process. There is no doubt that it requires a new approach.

The advent of new statutes and changing regulations requires constant vigilance and careful attention by those who appreciate the importance of staying current in their representation of clients. That is the beauty of this treatise. Almost no topic of interest, especially to those who have a litigation practice, has been overlooked. Each of the 25 topics has been covered in depth. It can be used as a handy reference as the need arises.

I predict this publication will be the quick "go to" work for those who "enjoy" an active practice, whatever the area.
—Hon. Ruby Kless Sondock

Modern complex business litigation presents a witches' brew of risks to both sides. Controlling legal standards vary across possible venues. Discovery costs are potentially exorbitant. The challenge of persuasively communicating to courts and juries on issues which are foreign to them requires great imagination and skill. Realistic assessment of settlement values is a critical and difficult art.

The Editors have assembled a galaxy of some of the best trial lawyers in the nation to address the myriad issues raised. This work will be an invaluable resource for both trial lawyers and corporate counsel.

—Harry Reasoner, Senior Partner, Vinson & Elkins LLP



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