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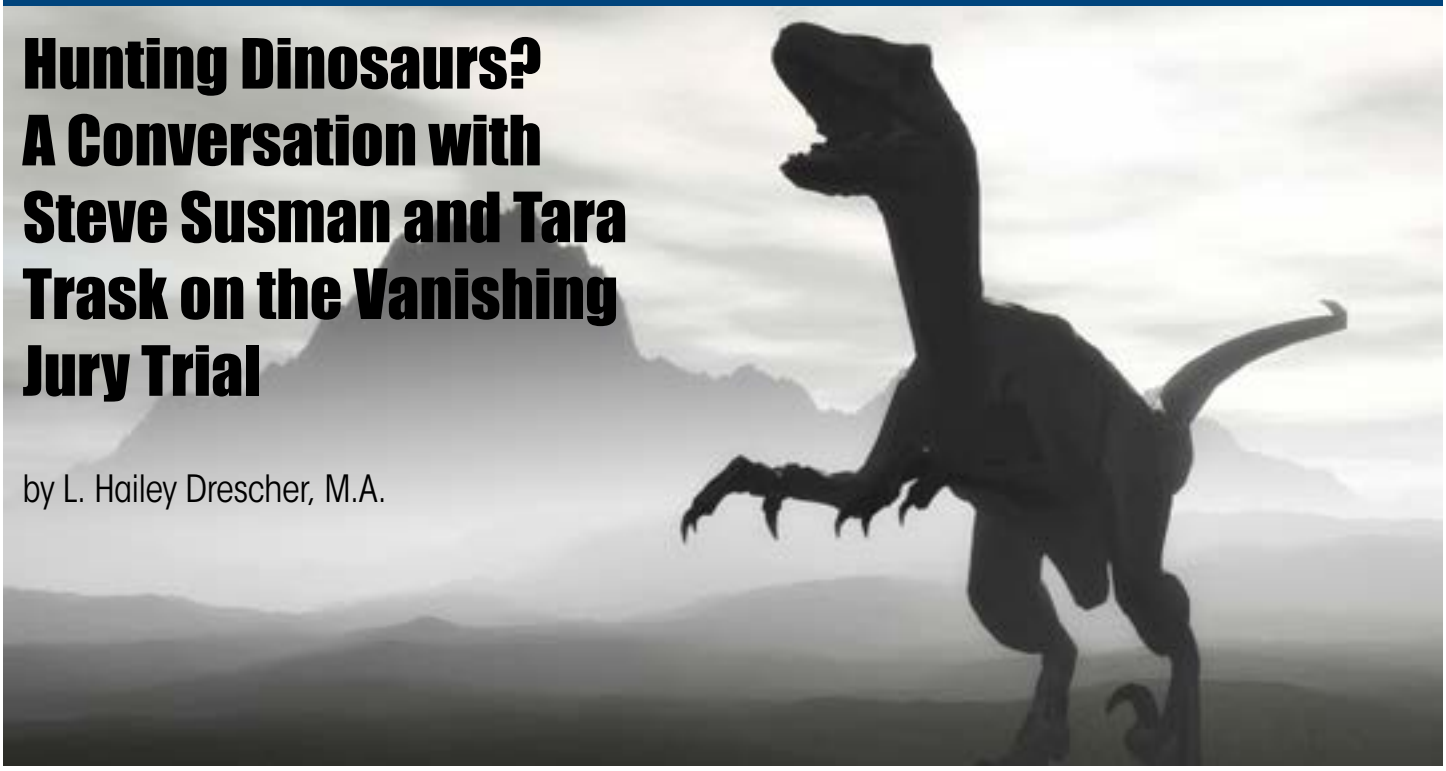
Hunting Dinosaurs? A Conversation with Steve Susman and Tara Trask on the Vanishing Jury Trial



by L. Hailey Drescher, M.A.

Editor Note: In response to the question of whether the civil jury trial is dying, we are proud to publish an interview about the new Civil Jury Project at New York University.

The empirical evidence is clear; the civil jury trial is vanishing. The Bureau of Justice Statistics reports that from 1992 to 2005, the number of jury trials fell from 22,451 to 10,813 in the 75 most populated cities nationwide. In 1962, jurors decided roughly 5.5 percent of the federal civil cases. That number plummeted to less than 1 percent in 2005. Steve Susman, a founding partner of the law firm Susman Godfrey and litigator of over 50 jury cases, is not standing idly by while the 7th amendment subsides quietly into the night. Instead, in partnership with NYU Law School, Mr. Susman established the Civil Jury Project (CJP). The project was conceptualized to study the decline of the civil jury trial and to determine what, if anything, may reduce its slip into extinction. The CJP combines the efforts of attorneys, academics, judges, and trial consultants to brainstorm, analyze, and conduct research, which might prove useful to reforming the system. As trial consultants, we have vested interest in the civil system, and the stakes are high. Tara Trask is the CEO of the trial consulting firm of Tara Trask and Associates and is a past President of the American Society of Trial Consultants, (ASTC, 2011-2012). Trask currently chairs the Civil Jury Project Jury Consultants Advisory Group and serves as the ASTC liaison to the project. This piece serves as a thought-provoking conversation between two allies: litigator, Steve Susman (SS) and practicing trial consultant, Tara Trask (TT).

Tara Trask: You donated two million dollars of your own money to underwrite this project initially. Where does your passion for this project originate?

Steve Susman: It really goes back to the mid 90's when I was the chair of the Texas Supreme Court Discovery Advisory Committee that met monthly in Austin, Texas. The big concern then was the expense of discovery. The biggest expense was the depositions. We debated and debated and we came up with a plan to limit the number of depositions. We thought we needed to limit the expense of pre-trial discovery because it was ridiculous. You couldn't afford to do a jury case. Through that experience,

I learned that the rule-making process is very slow. Everyone involved is concerned that it is going to be unfair for either the plaintiffs or the defense. That's where I came up with the idea of trial by agreement. Both sides make and agree to rules for their case, and then it works great. It's always been a concern of mine that we need to make things cheaper. At first, I proposed only "pretrial" agreements. Because they worked so well, I then proposed a list of "trial" agreements. These related mainly to how to expedite jury trials and make them more comprehensible to lay jurors. But it became apparent that the number of jury trials is vanishing. I have taught trial advocacy on CLE courses to future trial attorneys and I was thinking about doing the same as an adjunct law professor. However, it occurred to me that teaching those classes was like teaching people how to hunt dinosaurs. There are no dinosaurs left; so, why do you want to learn how to hunt them? I made a speech about it at Yale Law School. Then someone heard that and asked me speak at the 2013 ABOTA (American Board of Trial Advocates) Jury Trial Summit, and that led to me being appointed as co-chair of ABOTA's Save Our Juries Committee, a position I have now held for two years.

Unfortunately, bar associations are not good places for garnering attention on issues like this because they only meet three times a year, and they are gung-ho at those meetings, but then no one does anything in between. Trial lawyers are busy looking for a case to try, and that's understandable. Also, trial lawyers are viewed as having a big economic interest in saving the civil jury trial. I thought if I really wanted to get something done, I would have to devote a major part of my time and do something as part of an academic institution. To create a permanent center at a law school would cost five million dollars, and I didn't want to do that. At the end of four years, I will either put in my own money or raise money to continue, or declare that the civil jury trial is dead. I have to use my own money so I don't have to report to anyone, and I can do what I see fit. I've never worked for a boss, and I am at an age where I don't want to start now. I am not going to quit practicing law- I'm going to continue to do that. That's how the idea of setting up the Project came about. I did it at NYU because my home is in Houston and New York. I decided that NYU had the gravitas that a project like this needed. So, I chose NYU, and I've been working with the people there since.

TT: I do think that it's obvious, and others have voiced this in the CJP discussions I've been a part of—that it is the time and expense that it takes to go to trial that seems to be putting downward pressure on the number of cases that go to trial.

SS: We are selling a service called dispute resolution, and we are competing with arbitration in selling that service. And when we are seen as selling a service that is expensive, time consuming, unsafe and unpredictable, we will never win that war. It's like privatizing education. There is plenty of room for private schools- just not all schools should be private. There is room for alternative dispute resolution, but requiring everyone to give up their rights… like if you want to buy a 99 cent iTunes song, but to complete the purchase you have to click yes and give up your right to litigation, that's not right.

I believe both judges and lawyers have been at fault. Judges have gotten to be so managerial. They are trying to clear as many cases off their schedules as possible. They do it through granting summary judgment and Daubert motions, by compelling arbitration, by dismissing cases on the pleadings: there are so many ways to clear a docket other than trying cases. Meanwhile, attorneys are afraid of trying cases or want to do it the same way they have always done it. As co-chair of the ABOTA committee, I looked for academics that had written about juries. We found a lot of them, and we got them to join. Then I knew that we needed judges, they need to push the attorneys to try some of these innovations we're talking about. Most of the innovations that people are suggesting, they are not necessarily provided for by the rules, but they aren't denied either. The judge has tremendous power over the litigants to get them to do what she/he wants.

Then I wondered, where are the trial consultants? They have as much to lose as we do. Arbitration will leave you some work, but not the same. Jury consultants have a big stake in this. By conducting mock trials, they come the closest we can come to analyzing what happens in a real trial. The biggest innovation of all, which I learned through mock trials, is simply to set time limits. If you limit a trial to five or six days, you get high quality jurors rather than just retired people, and you present a better case. The fact that mock trials with time constraints are used shows us that they would reach about the same result that a long trial would reach. That's when I had the idea to get the jury consultants involved. They are natural allies.

TT: The time limits out in the Eastern District of Texas have been in place for 10-12 years. Limiting patent trials, jury selection, and opening statements can be very useful. I've heard jurors ask questions that were so sophisticated and so smart. It was clear they were following the attorney presentations and understanding well. I think time limits are important—if you can limit discovery and the time at a trial, those would make a big impact. Those address two big umbrella areas. But for people who haven't worked in venues with significant time limits, they tend to be skeptical that it can be done.

Like you mentioned, there is a feeling sometimes that a jury trial is unsafe or unpredictable. That's where I think that jury consultants have an interesting perspective that speaks to what companies, parties, and industries have put out there in the public arena and makes people and parties feel like the process is unsafe or unpredictable. Like the McDonald's hot coffee case. That always comes up during voir dire. What that highlights for me is that lots of people, including attorneys, think juries make crazy, unpredictable decisions, and I can't speak for my entire field, but I can say that is not the way most trial consultants view it.

SS: Of course all this tort reform focuses on the runaway jury, the verdict that is deemed to be crazy, and the Chamber of Commerce publishes the hot coffee case as the example. Although when you look at the facts of that case, the jury was very reasonable. Very few people read the specifics of the case. I would like the Civil Jury Project to establish some sort of calendar where we can keep track of where the significant civil trials are going on in the country. If you could know where the big cases are being deliberated, then you could monitor them. You could go and publicize information about how the jury got it right. I just read something this morning, there was a patent case where Judge Andrews in Delaware set aside a jury verdict. The article was called something like, "Why try a patent case to a jury in the first place if the judge is just going to throw it out." That's typical of the type of press we get. The bad verdicts get the attention, not the good ones.

TT: When there is a lot of press, it can seem largely one-sided. There was tort reform, and I hear a lot of that when talking to jurors in cases. I do a lot of intellectual property cases, and the anti-troll narrative is strong and goes largely unanswered. You don't hear a lot about the inventor that was unable to bring the product to market and instead got beaten out of the court system by massive companies. You do hear a lot about Apple and Google trying to fend off the trolls. Tort reform, press, and public opinion really permeate certain aspects of the culture and change the way that attorneys and parties look at litigation.

SS: I think it is important that the project phrases the question in an open kind of way- both for plaintiffs/defendants, conservatives/liberals, and therefore, I have to be careful. Of course I'm an advocate, but we have to phrase the question in a way where we maintain independence and the integrity. We're asking this question seriously: if you were writing a constitution today for a democracy, would you insert the 7th amendment? While my hunch is that most Americans would say yes- we don't like our rights being taken away when we feel they have already been established. But, I believe that attorneys and most appellate judges would say no. We no longer need juries. Commerce and laws have become so complex… Although, I think the opposite, that we need juries in civil case, I recognize that there is another side of the argument.

TT: I agree, and that's not just a self-serving view. That comes from listening to jurors. I'm so impressed by, whether for or against my client, how correct they are in whatever they determine. I do believe that what the framers intended was that we should not have conflicts resolved by one person. Not a king, or governor, or an elite body. I see very complicated trials resolved all the time by juries.

SS: How many times have you been able to produce a different result from a mock jury than you got in trial? I can't think of any. I'll have two panels against me in mock out of the three, and I'm going to lose that case at trial. It doesn't change.

TT: Sometimes if you still have discovery open, there are still things that you can tweak a bit. What I think is really amazing is when you put a shadow jury in a case. As social scientists, we don't like to say that it's predictive, and it's not, but I've never had one go 180 degrees from the actual jury. Not in 20 years. To me, that lends to the credibility of the jury. You put different people in there, and it goes largely the same direction.

What would a successful four years at the Civil Jury Project look like? What type of change or reforms do you envision stemming from a successful program?

SS: Here's what I hope it will look like in four years: General public awareness that jury trials are disappearing and outrage over this trend. The widespread judicial adoption of many of the innovations we are testing in order to make for better jury trials, principally short time limits on all civil jury trials and the streamlining of jury selection. And finally, the legislative adoption of restrictions on how consumers, patients and customers can waive the right to a jury trial, and the frequent use of private juries in disputes resolved by arbitration.

The inaugural CJP conference, The State and Future of Civil Jury Trials, will be held at NYU Law on September 11, 2015.

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