



CONTROLLING THE BATTLEFIELD: HOW TO PICK A WINNING JURY

Sawnie McEntire
Parsons McEntire McCleary (Dallas, TX)
214.237.4303 | smcentore@pmmlaw.com

Picking a Winning Jury

Sawnie A. McEntire

There are many elements that go into a successful jury trial: good lawyering, good facts, good law, a fair judge and an appealing client. However, it goes without saying a good jury is always important. Voir dire – the first stage of every trial – provides trial advocates with valuable opportunities to strike the first blow and pick a winning jury. This paper describes techniques to achieve this result -- picking a good jury in a way that starts winning the case at the start of the case.

Voir dire—which means to see, to speak—is used to expose bias that may render a potential juror unfit to serve in a particular case. However, voir dire is so much more. It is the first of only three occasions when a trial lawyer talks directly to jurors. This means it is an invaluable opportunity to make favorable first impressions and begin cultivating jury rapport. It is also an opportunity to present the client and case facts in a favorable light. The goal is to open strongly and seize momentum.

The Typical Panel

The venire panel may be large or small depending upon the number of parties, pre-trial publicity, and issues in the case. Regardless of size, however, a majority of panel members are likely stepping into a courtroom for the first time. Although there may be some panel members who have had prior jury service, it will be a new experience for most. Many panel members will be uncomfortable or anxious about the process because they dread the unknown. Accordingly, they may be hesitant, shy, or defensive. Efforts should be made to make these

newcomers more comfortable. They will appreciate the effort, and favorable rapport will be fostered.

Life teaches us that every panel member will have personality traits or quirks different from others – at least in some respects. An important purpose of voir dire is to identify and explore these differences, and then determine whether these special traits may adversely or positively impact your case. This is done by watching, observing, asking and listening.

Every juror will bring unique attitudes to the courtroom springing from widely divergent backgrounds and experiences. There will be both extroverts and introverts; there will be liberals and conservatives; there will be wealthy and not wealthy; there will be leaders and those with guarded personalities who follow the lead of others. There also will be those who are highly educated, and those with minimal education. Ultimately, a jury will consist of a combination of people of varying backgrounds and personalities. The goal is to empanel a jury with backgrounds and experiences most favorable to your case. Thus, it is important to understand and identify the attributes of a “favorable” juror and those of an “unfavorable” juror before voir dire begins. This process should start well in advance of trial, so the objectives are clearly defined when voir dire begins.

Every panel will typically include at least one person who is an eager “talker” or “volunteer”, i.e., those who answer questions at every opportunity. They always stand out. And, predictably, they are frequently struck because they share too much information. Invariably, one side of the case or the other will perceive these juror types as either favorable or unfavorable to their case. Thus, one effective

strategy is to identify a favorable “talker”, and ask him or her a number of questions to generate favorable answers for the entire panel to hear. This forces the opponent to use peremptory strikes.

Every panel also will include “quiet” jurors. They appear reticent when responding to questions, and they may avoid eye contact. There is a necessary warning here: some quiet panel members may be disguised time bombs. It is important to know what lies beneath the surface, and whether these seemingly quiet jurors are potentially hostile towards your case or your client. This means the trial lawyer should “leave no stone left unturned.” Every juror must be questioned to eliminate any surprises so their biases are fully unveiled before they are selected.

Striking a Jury

Simply put, voir dire involves a process of elimination. Some veteran trial lawyers describe the process as “striking” a jury. That is, jurors are not selected because of their positive attributes or responses, but de-selected through a process of exclusion—using strikes for cause and peremptory strikes. Some view this negatively, and argue that the result is a jury of least common denominators. There is some truth to this perception; however, every party has a right to explore and identify hostility and bias. Every party has a right to exclude jurors who are partial. De-selection is simply a legitimate, natural by-product of voir dire.

Information Needed Before Voir Dire

There will be differences in how and when jurisdictions provide juror information before voir dire begins. A first step is to always determine what the jurisdiction allows, and when the information can be obtained.

Most jurisdictions provide jury information sheets to the attorneys, including basic information relating to a juror’s address, marital status, employment status, education, age, and prior jury service. Other jurisdictions provide more detailed information, such as prior accident history and involvements in lawsuits. Juror information sheets are sometimes provided just moments before the panel arrives in the courtroom, and there is little time to evaluate the information. Some jurisdictions, however, make jury information sheets available well before voir dire.

Depending upon the complexity of your case, the court may allow a joint jury questionnaire to the panel before voir dire begins.¹ Clearly, a more detailed understanding

of each panel member’s background and experience is invaluable as part of the selection process. Undoubtedly, decision-making is always better informed with good, relevant information. Armed with detailed questionnaire responses, trial lawyers’ can better focus their questions to individual jurors and be more effective.

Local Procedures and Preferences

The trial lawyer should be familiar with local practices and procedures regarding the mechanics of voir dire. This includes an understanding of any time limits imposed by the court for jury selection and whether the court bifurcates the examination process—that is, whether general questions to the entire panel precede questions to individual jurors, or whether they are combined.

Some federal courts severely limit an attorney’s involvement; other federal judges have a more relaxed approach. Every effort should be made to fully understand the local rules or preferences of the court.

Similarly, every trial lawyer should be familiar with the number of allotted strikes, legal standards to establish cause, and legal standards for rehabilitating a favorable panel member from being struck for cause. The opposition will seek to exclude for cause as many jurors as possible who have displayed any favoritism or leanings to your case. In doing so, they preserve their peremptory strikes. It is important to know how to effectively rehabilitate these jurors.

Before voir dire begins, it is also useful to understand how the jury will be seated so appropriate charts for information gathering can be prepared. Another important variable is when strikes for cause will be exercised—whether at the end of voir dire or during the examination of the entire venire panel. The timing of such strikes will directly impact strategy during voir dire questioning. By way of example, most trial lawyers avoid questioning potentially volatile, hostile jurors who are likely struck for cause at the end.

Developing Jury Rapport

Every voir dire begins by educating potential panel members about positive aspects of your case. Your client should always be introduced. If the client is a business entity, some brief background concerning the company’s business and community involvement is helpful. Every client, including corporate clients, should be personalized.

If possible, avoid using the term “client,” and instead use seated in the courtroom before the voir dire begins.

¹ Some jurisdictions define the commencement of voir dire with the submission (and not the completion) of the jury questionnaires. This could be procedurally important for determining rights to shuffle a jury. Many jurisdictions allow one shuffle of the panel before voir dire begins. The decision to shuffle is made based upon the visual observation of the venire panel as it is

first and last names. If representing a corporation or other business entity, make sure to have a real person in the courtroom to serve as the company's representative. The panel will relate more positively to a real person. If your individual client or client representative is missing from the courtroom, the panel will likely form negative impressions. Members of the panel are being asked to sacrifice time away from their homes and jobs. Common sense suggests that the parties to a lawsuit should be expected to do the same.

Trial lawyers should use voir dire to present key facts of their case in a positive, credible, and empathetic manner. A presentation of key facts is needed to provide context from which more detailed questions are framed – it provides the relevance for the questions asked of individual jurors. To the extent the court allows, this factual presentation should be presented by the trial lawyer as an advocate. After all, a trial is nothing but a staged process of persuasion. Voir dire is the opening curtain to the drama.

It is important for panel members to like the client, the client's case, and the lawyer. Thus, trial lawyers should present themselves with confidence, sincerity, and credibility. The goal should be a mastery of the facts, and a straight forward presentation of the facts with confidence.

Jury Behavior and Body Language

Simple observations will yield valuable information. Every lawyer should watch jurors as they come and go from the courtroom, and as they are seated both before and during voir dire. They may be carrying magazines, books, or iPads that telegraph their interests and personalities. A juror may be reading *The Wall Street Journal*; another may be holding a romance novel. Yet another may be playing games on an iPad. Simple observations can lead to important data points concerning sophistication, education, and political leanings.

Another important signal is grooming and dress. Is the juror wearing sandals and dirty jeans, or is the witness more appropriately dressed? Does the juror appear unkempt? Personal grooming can reflect attitudes that may impact how they will perceive the facts of the case.

Another valuable observation is whether panel members group together in the hallway before or during intermissions. If allowed, some experienced lawyers visit the jury assembly room before voir dire to get a first look at prospective jurors and how they group together. As jurors socialize and become more familiar with each other, alliances and friendships will form, and some jurors

may hold sway over others. This may become very important in the jury deliberation room. Groupings can be very helpful or very dangerous depending upon the orientation of the group and its leader.

Some panel members will be loners, standing to the side and not interacting with others. They may be mavericks or they may be shy. Again, every juror should be examined to identify important personality traits that may impact jury deliberations. Are they leaders and potential forepersons? Are they followers? Are they extroverted or shy? Simple observations of behavior can generate valuable information.

Body language also is important.² Observation of simple body signals may yield significant insights. Does the juror avoid eye contact when you speak, and then make eye contact when your opposing counsel speaks? Does the juror have his or her arms crossed when you talk, but is more open or inviting when your adversary speaks? Does a juror appear comfortable or uncomfortable when answering your questions? Each of these observations will lead to conclusions about the juror, and how he or she perceives the lawyers, the facts, or the clients.

Jury Questionnaires

Jury questionnaires provide valuable information to a trial lawyer, who should use questionnaire responses to craft specific, targeted questions to individual panel members. Typically, jury questionnaires are prepared jointly by all parties to a case. Therefore, both the plaintiff and defendant will have the opportunity to design their own questions, but every effort should be made to keep the questions neutral. Ultimately, the questions should be tailored to determine if jurors have backgrounds or experiences that could influence how they perceive the witnesses and facts in the case.

Jury questionnaires can be either short or long, simple or detailed. This depends upon the nature and complexity of the case. Both direct questions and open-ended questions are used for different purposes. Open-ended questions seeking narrative responses tend to generate honest, candid answers reflecting the subtleties of a juror's biases or attitudes. When used in a jury questionnaire, there is no risk of embarrassment in front of the balance of the panel. As such, a panel member may be more at ease when disclosing personal information in response to a more private questionnaire.

Jury questionnaires also can include creative ways to

2 There is scientific debate concerning the significance of body language as a means of detecting the differences between truthful and false answers. See, e.g., John Tierney, At Airports, A Misplaced Faith in Body Language, N.Y. Times, March 23, 2004.

better understand a panel member's background, likes, and dislikes. Here are some examples:

- What is the last book you read?
- When did you last read a book?
- What is your favorite magazine?
- What do you do to have fun?
- How much TV do you watch each week?
- What is your favorite TV show? Do you watch the news?
- Do you read the newspaper? If so, which one?
- Who are the three people in history you admire most, and why?
- Who are the three people in history you admire least, and why?

Clearly, there are differences between individuals who read Reader's Digest and those who watch reality shows, in comparison to those who watch Fox News and/or read The Economist. Indeed, dramatic differences can be gleaned by whether they watch Fox News or MSNBC. Such basic information is important information.

Looking for Leaders

An important objective in voir dire is identification of potential leaders. These are the people who are candidates to serve as a foreperson. They may be either favorable or unfavorable to your case. Identifying each is equally important.

On the one hand, you should identify and seek to strike any panel member with a strong personality who is potentially adverse to your client or your case. On the other hand, you want to protect favorable leaders from being struck. That is one reason why it is important to fully understand the legal basis and burdens to exercise a strike for cause and the basis for rehabilitating a juror to prevent a successful strike for cause.

Leaders are identified in a variety of ways. A successful businessman or businesswoman are easily identified through a series of simple questions. Their job experience is another clue. Less educated individuals may be more deferential to more highly educated individuals. Jury information sheets and questionnaire responses also can facilitate identification of these individuals.

Most jurisdictions will indicate whether a juror has prior jury experience. In that instance, the juror can be asked whether he or she served as a foreperson and whether a verdict was reached during their prior jury service. Prior service as a foreperson is a quick indicator of leadership.

Using Favorable Jurors as Teaching Assistants

An often-used strategy involves identification of a favorable panel member who is then cultivated as an "assistant" to teach the balance of the panel. A panel member may have a unique job or experience particularly relevant to your case. Once you determine a juror is favorably inclined to your position, this juror can be asked a series of questions that elicit responses favorable to your side of the case thereby pre-conditioning other panel members. Here are some examples:

- A panel member with a medical background (doctor, nurse, physician assistant, etc.) can help explain the purpose and importance of warnings in a drug liability case;
- A CPA or bookkeeper can be used to describe the importance of accounting standards and principles in a financial fraud case involving balance sheets and other financial statements;
- An engineer can be used to explain a failure tree analysis and why certain products fail under stress; and
- A lawyer on the panel can be examined about the differences in the burden of proof in a civil case and how it differs from a criminal case; a plaintiff in a civil case may wish to exploit the opportunity to discuss the relaxed burden of proof in a civil case; the criminal defense lawyer may do the same and discuss the presumption of innocence and a heightened burden of proof in a criminal case.

Panel members who are elevated to the role of "teachers" are invariably struck by the opposing side. The opponent will sense the favoritism shown to your case, and will be forced to exclude that member from the jury box. Thus, two objectives are achieved - the entire panel is favorably educated by another panel member, and the other side is forced to use a peremptory strike.

Responding to Questions from the Panel

Some jurors will raise their hands and ask permission to ask questions. This is always a dangerous exercise. If indulged, the panel member may ask a difficult question that goes to the heart of your case. There is a risk that the answer could backfire and hurt your case in front of the entire panel. Clearly, incorrect answers or incomplete answers may come back to haunt you during the trial.

On the other hand, a question from a panel member may be benign. An obvious attempt to ignore or avoid the question may alienate the specific juror or alienate others on the panel. Here, the best advice is, "wade into the water slowly". A few qualifying questions are typically

used in these instances: the panel member can be asked if the question is about procedure or about facts. If procedural, then the risks are typically low. If substantive, then the panel member can be invited to the bench to ask his/her question depending upon the procedural rules of the court.

Using Jury Consultants and Jury Studies

Depending upon the complexity and financial stakes involved in a case, the use of jury consultants may be a prudent investment. Jury consultants are used to conduct focus groups and jury studies for several purposes, but one primary goal is to identify preferred juror types and unfavorable juror types for a specific case. Armed with this information, the trial lawyer is in a better position to hone his or her questions depending upon previously defined juror profiles. The voir dire is more efficient because questions are targeted to specific panel members. The trial advocate is better able to identify panel members who are more likely to provide favorable answers and, once this is confirmed, use these panel members as teachers for the entire panel. The trial lawyer is also better able to avoid questions with certain jurors who may be primed to provide inflammatory or harmful answers in the presence of the entire panel.

Jury consultants also provide an extra set of eyes and ears during voir dire. They are in an excellent position to observe juror behavior and reactions during the voir dire examination by all of the lawyers. They can observe body language, juror groupings and assist in interpreting specific responses to targeted questions. The net result is a better-informed decision when striking the jury.

Commitment Questions

Unveiling a panel member's bias or pre-disposition requires a reasonable introduction and discussion of the key facts, claims and defenses in the case. Questions to the panel require relevance, and a factual background is needed to provide this context. Since bias and predisposition are sometimes not readily apparent, many jurisdictions recognize that a trial advocate should be provided reasonably broad discretion in how the factual presentation is made and used as a foundation for specific voir dire questions. However, some lawyers take advantage of this opportunity and seek unqualified commitments from jurors based upon a set of highly selective, distorted facts in favor of their client. Many jurisdictions discourage this practice and will sustain objections to this tactic.

In one case, a court noted that an examining lawyer should have "the right to ascertain from the jury panel any bias or prejudice ... which would render it impossible or difficult for them to render a fair and impartial verdict based upon the evidence and the instructions of the court," but counsel does not have the right to "commit or pledge the jury to a certain verdict or amount thereof in advance of hearing all of the evidence." *Wright v. Chicago, Burlington & Quincy Railroad Co.*, 392 S.W.2d 401, 408 (Mo. 1965).

The lesson here is simple: listen carefully, and make sure these types of improper questions are not presented by the opposition without objection. No attorney wants a jury already committed to vote a certain way before the first piece evidence is introduced at trial.



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Sawnie McEntire

Parsons McEntire McCleary, PLLC

Diverse Personality Traits



Diverse Backgrounds / Experiences



Striking a Jury

Strikes for Cause

Inability to follow the law

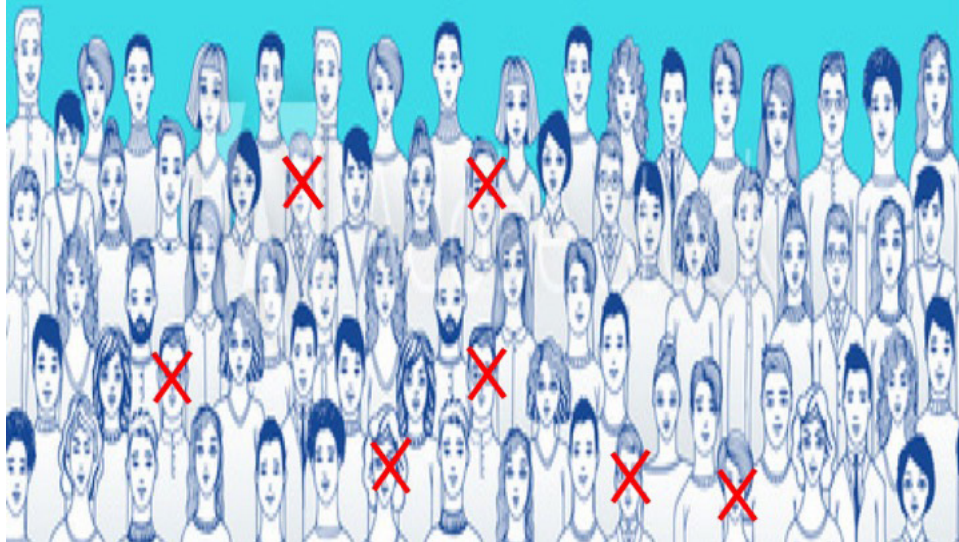
Peremptory Strikes

Discretionary

Key Objectives

- Strike jurors who may be unfavorable
- Strike jurors who present *risks* due to familiarity with the issues or similar issues
- Identify leaders who are favorable
- Identify “quiet” jurors who may be time bombs

Striking the Jury



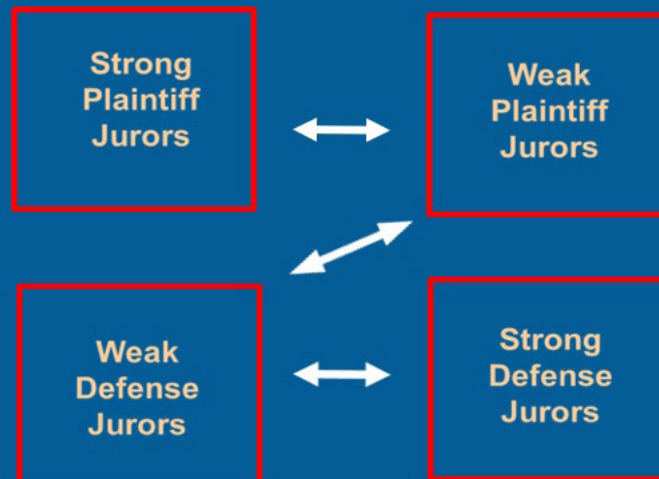
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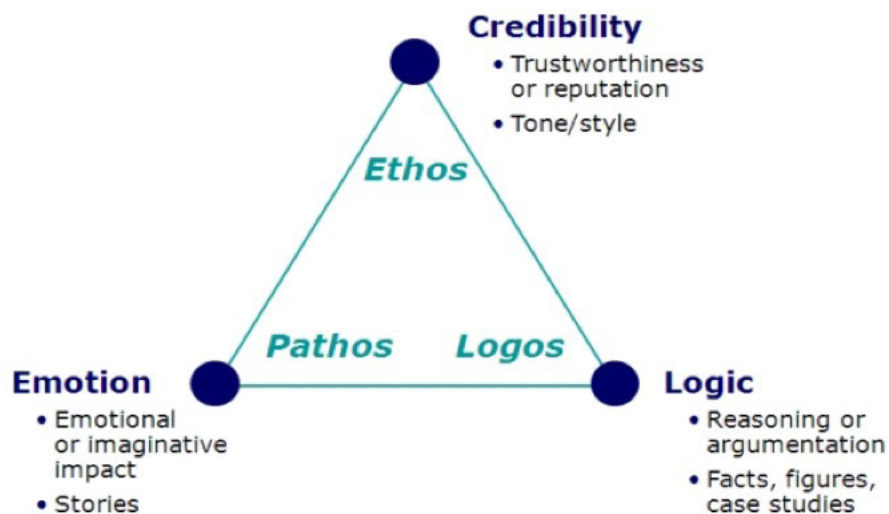
Juror Perceptions Ebb and Flow



Factual Presentation

- **Introductions**
- **Clients**
- **Lawyers**
- **Witnesses**
- **Explain purpose of Voir Dire**
- **Explain purpose of factual presentation**
- **Advocate trial themes**

Aristotle's 3 Cornerstones of Victory





Basic Techniques

- Watch, observe, listen
- Create effective data map
- Learn juror names
- Advocate your case
- Talk to all panel members
- Be aware of body language / attitude signals
- Use favorable jurors to teach the panel
- Avoid hostile jurors

Basic Topic Areas

- | | |
|--|------------------------------|
| • Knowledge of the parties / issues | • Prior lawsuits / claims |
| • Prior experience with issues / facts | • Prior jury service |
| • Familiarity with lawyers | • Prior service as foreman |
| • Familiarity with witnesses | • Zip Code / Residence |
| • Familiarity with other panel members | • Employment status |
| • Familiarity with witnesses | • Job experiences |
| | • Consumer experiences |
| | • Special areas of expertise |

Case Specific Inquiries

- | | |
|---|---|
| • Nursing / medical backgrounds | Medical cases / drug cases |
| • Accounting backgrounds | Financial or accounting fraud |
| • Engineering backgrounds | Product liability cases / failures |
| • Finance / investment expertise | Business or investment disputes |
| • Product usage backgrounds | Familiarity with products / risks |
| • Bad evidence inquiries | |

Jury Questionnaires



- What is the last book you read?
- What newspapers do you read?
- Do you watch CNN, Fox News or MSNBC?
- How much TV do you watch per week? What do you watch?
- Who are 3 people in history you most admire?
- Who are 3 people in history you least admire?
- Do you have any bumper stickers on your car?
- Are you on Facebook, Twitter, etc.?

Jury Map

1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3	1,2,3

Real Case Examples

Prior Experience – Raised Hands



Beware

**Answering
questions from the
panel ...**

**Avoid harmful
questions**

Prior Experience – Knowledge of the Facts



**Train derailment,
explosion and
fire**

Observation – What are they reading?



Pharmaceutical case

**Juror reading the
PDR**

Importance of warnings

Using Favorable Juror to “Teach”



Pharmaceutical Case

Risks of all medicines

**Penicillin allergy is rare with
the estimated frequency of
anaphylaxis at 1 to 5 per 10,000**

Knowledge of Other Panel Members



**Husband and
wife on the same
panel**

Knowledge of the Facts



Vehicle Rollover

Warning Label



SAWNIE A. MCENTIRE

Director and Shareholder

PARSONS MCENTIRE MCCLEARY (Dallas, TX)

214.237.4303 | smcentire@pmmlaw.com

Sawnie McEntire has over 40 years of experience handling complex civil matters in federal and state courts throughout Texas and across the United States. Sawnie has tried dozens of difficult cases to jury verdict on a variety of subject matters, such as commercial, products liability, pharmaceutical, and real estate claims. Sawnie has served as national, state-wide, and regional counsel for many of his clients, has received many national and local accolades for his advocacy accomplishments, and has authored several publications on advocacy skills.

Admission to Practice

- Texas, 1980
- U.S. District Courts for the Northern, Southern, Eastern, and Western Districts of Texas
- U.S. Courts of Appeals for the Fifth and Ninth Circuits

Memberships and Affiliations

- State Bar of Texas
- Texas General Counsel Forum (Dallas Chapter) – Director
- American, Dallas, and Houston Bar Associations
- Texas and Dallas Bar Foundations
- Federation of Defense and Corporate Counsel
- Dartmouth Lawyers Association – Life Member

Education

- Southern Methodist University Dedman School of Law; Dallas, Texas - J.D., 1980
- Dartmouth College; Hanover, New Hampshire - B.A., magna cum laude, 1976

