



PANEL DISCUSSION: UNDERSTANDING CHANGING JUROR DYNAMICS

Joe Ortego
Nixon Peabody (New York, NY)
212.940.3045 | jortego@nixonpeabody.com

Understanding Changing Juror Dynamics – Diving into the Deep End of the Jury Pool

Joseph J. Ortego and Christine Shang

After prolonged marital discord and alleged infidelities, Gwendolyn Hoyt decided she had enough. The Hoyts' collective troubles ended with a swing of a baseball bat, and in their place stood a defining moment in this country's history. During Gwendolyn's prosecution for murder, she argued for a representative sample of her peers – namely, that women be included on her jury panel as it was her belief that women would add a necessary and diverse viewpoint that would otherwise be lacking. Ultimately, it was a panel of six men that decided her fate. On November 20, 1961, a unanimous Supreme Court upheld Gwendolyn's conviction, ruling that it was constitutionally permissible for women to be relieved from jury service.¹

It would take almost 15 years for the Supreme Court to reverse its prior decision and conclude that women could not be excluded from jury service as it was within the realm of possibility that the factors which tend to influence the actions of women may differ from those that influence men, including those based on personality, background, and economic status.²

Afterwards, more than 10 years would pass before the Supreme Court would hold that racial discrimination in the selection of jurors was unconstitutional as it deprives the accused of important rights during a trial and serves to “undermine public confidence in the fairness of our

system of justice.”³

In the present day, one is qualified to serve on the jury as long as seven requirements are met, none of which distinguish based on gender or race.⁴ However, in an “equal” society where a jury may be comprised of a “representative” sample of the community, how does diversity actually affect jury decisions? Is it true, as the Supreme Court speculated, that individuals from different backgrounds may be influenced by different factors? Finally, are there any specific considerations when presenting a diverse trial team to the jury?

The Effects of a Diverse Jury.

Samuel R. Sommers is an American social psychologist best known for his research on implicit racial stereotyping and color-blind racism. In 2006, Sommers conducted a study which found that racially diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements when discussing the evidence than did all-white juries.

As Justice Thurgood Marshall articulated in an often overlooked Supreme Court opinion:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we

¹ Hoyt v. Florida, 368 U.S.57 (1961).

² Taylor v. Louisiana, 419 U.S. 522, 531-32 (1975).

³ Batson v. Kentucky, 476 U.S. 79, 87 (1986).

⁴ <https://www.uscourts.gov/services-forms/jury-service/juror-qualifications>.

do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.⁵

If it is clear that there is value in a diverse jury, the next question is how does one's background actually impact one's decisions?

A Conscious Evaluation of an Unconscious Thought.

Take a moment and step into the slightly worn out loafers of a member of the jury, and what do you see? The clock on the wall strikes 9:00am, and once again you're seated in a corralled off box in a drafty room filled with mahogany tables and mahogany chairs. One judge sits stationary upon the bench, a court reporter is furiously typing, and the person on your left appears to be sleeping. With little else as stimulation, you focus entirely on the active members in the room – the trial team who will spend the next several days seeking to validate months of hard work and the witnesses who will try to convince you to believe their story. What extraneous information have you taken with you into the courtroom that day? What have you concealed so well that even the metal detectors couldn't discover?

Gender Bias in the Courtroom.

When a juror becomes unmotivated, or in the alternative, overloaded with information, it is common for the juror to then base his or her decision on superficial or peripheral cues, such as the attractiveness of the source and presentation style. This results in an attorney's gender ultimately having an effect on a juror's perception of credibility and likeability.

A female attorney must tread lightly between societal stereotypes regarding feminine and masculine traits. For example, there have been many studies which have demonstrated that male jurors respond less favorably to aggressive female attorneys. As such, a female attorney may not gain the same advantages from a forthright witness examination as her male counterparts, especially if there are, and likely will be, male jurors on the panel. However, if a female attorney is too soft-spoken, she risks being perceived as weak. Additionally, women are often viewed as more competent in litigation involving family issues and less competent in litigation involving more technical issues. Therefore, in cases such as patent or asbestos litigation, even a minor mistake will undermine a female attorney's credibility with the jury.

Male attorneys are also subject to various negative stereotypes, though seemingly less so. For instance,

attractive male attorneys are particularly successful as they are perceived as "generally good" by jurors, which often leads to other positive associations. However, attractiveness may not be a positive attribute where a male attorney is examining a female witness, as jurors may believe that the male attorney is attempting to manipulate the witness.

Undoubtedly, while our justice system is constructed in a way where fairness is meant to be achieved regardless of an attorney's gender, it is clear that gender biases have consequences in the courtroom. As such, it is advised that a trial team maintain these considerations when devising their litigation strategy and presentation tactics.

Connections Between Implicit Biases and Race.

Social studies have also recently shed light on the impact of diversity in connection with jury dynamics. Extensive research shows a somewhat concerning result - we, as people, are not always fully aware of our biases and beliefs. Therefore, the concept of voir dire is an imperfect practice that is incapable of truly exposing whether any potential juror is biased and/or cannot fairly judge the issues in a given case.

Recent studies have shown there are implicit biases involving an attorney's race. For instance, in 2018, the American Bar Association published a paper containing empirical findings from an original study which tested mock jurors' views of attorneys. When choosing an attorney, Asian mock jurors preferred a Caucasian male attorney (followed by an Asian male attorney), while all other races preferred an attorney from their own race – almost irrespective of gender.⁶

Implicit biases may be attributed to social upbringing, as well as cultural stereotypes. These biases may also affect how a juror views the plaintiff or defendant. For instance, it has been found that African Americans and Hispanics are more likely to believe that conspiracies are prevalent in the United States, whereas Asians and Caucasians are more likely to believe that people search for opportunities to sue corporations and cities. Additionally, jurors are more likely to render guilty verdicts and recommend harsher sentences when defendants are accused of committing crimes that are stereotypically associated with their racial or ethnic group – i.e. white collar crimes for Caucasians and theft for African Americans.

There is also a phenomenon called the similarity-leniency effect or leniency bias whereby jurors make more favorable judgments for defendants from the same

⁵ Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

⁶ Cynthia Cohen, Implicit Bias and Explicit Views of Lawyers' Race and Gender, ABA Section of Litigation Annual Conference: Beating Bias in Hiring Lawyers and in Jury Trials (2018).

racial group and harsher judgments for defendants from different racial groups.

“Voir dire” is a French phrase, which means “to speak the truth.” However, it may be the case that the “truth” is not even explicitly known to the believer. Therefore, it may be beneficial to have a general understanding of the results from the numerous studies seeking to understand human nature from a scientific point of view.

Tokens – Not Just an Arcade Coin.

Merriam-Webster defines “tokenism” as “the policy or practice of making only a symbolic effort (as to desegregate).” This social concept existed as early as the 1960’s and is even mentioned in *Why We Can’t Wait*, a book by Martin Luther King Jr. on the nonviolent movement against racial segregation in the United States. This practice is still prevalent in today’s society and can be found in television, in the media, in politics, and relevant to this piece, in the courtroom.

In the last several years, minority enrollment in law schools has seen a significant increase, which has led to a more diverse representation in private practice. But even with the recent efforts of law firms to promote diversity, there remains a noticeable disparity in the number of minority and female attorneys practicing in larger law firms, which

only becomes even more prominent at the partner level.⁷

While gender and racial diversity is optimal for many reasons, it is not enough to simply add a woman or a diverse attorney to the trial team in an effort to exemplify a well-rounded team. The numbers for the sake of numbers tactic is overtly transparent, and counterproductive. Indeed, jurors will view a woman or a minority attorney who sits at a counsel table during trial, without a substantial role, as a token. Furthermore, a trial team must be conscious about the responsibilities assigned to each member of its team. For example, if a woman is only assigned to examine one witness while a male controls every other aspect of the trial, the primary message sent to the jury is that the one witness is not critical to the case.

A team will be the most successful when there are multiple members, diverse and non-diverse, who actively participate during the trial. While jurors may generally understand that more senior attorneys occupy a more principal role, they may still look unfavorably upon a composition that includes only one junior associate – a female or a diverse attorney.

Remember to take a moment to view the room from the jury box and be mindful of what you see.

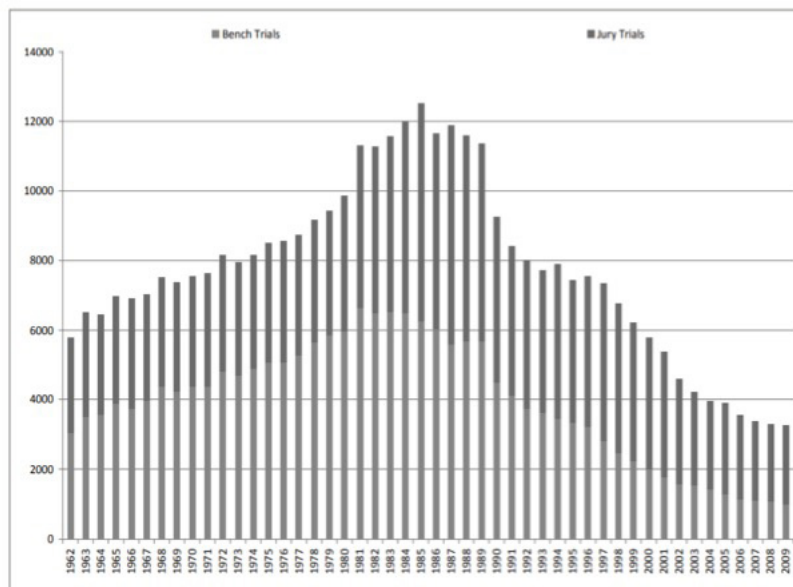
⁷ In late-2018, an international law firm posted a photo of its new partner class in a now-deleted post on LinkedIn. The image was dominated by white men, with only one white woman in the lower right-hand corner, sparking criticism on social media and generating negative publicity surrounding promotions at large firms.

Understanding Changing Juror Dynamics



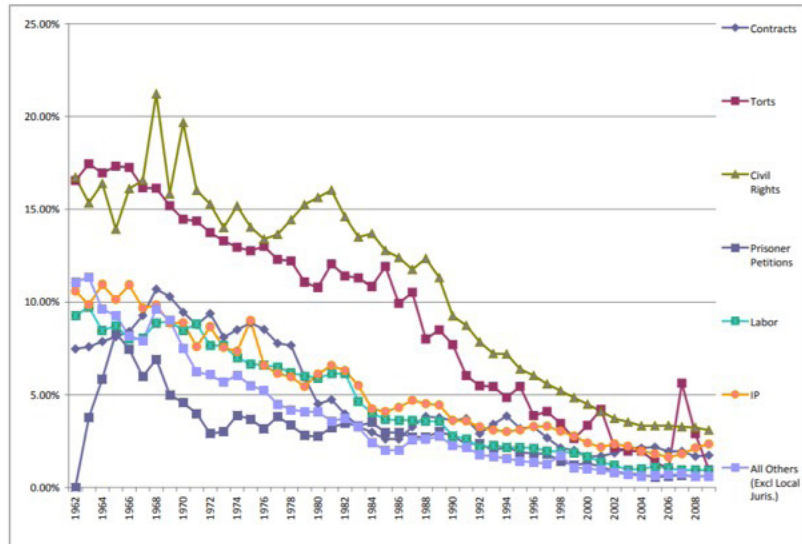
Presenters:
Joe Ortego | Terry Newby
Jessie Zeigler | Jerry Hashimura

The Majority of Cases **Settle**: Civil Trials in the U.S. District Courts (1962 - 2009)



www.uscourts.gov

Percentage of Civil Cases that Reach Trial by Case Category



www.uscourts.gov

Why Do Changing Jury Demographics Matter Then?

Population by Race and Ethnicity: Projections 2030 to 2060

The non-Hispanic White population is projected to shrink by 19 million people by 2060. (In thousands)

Characteristics	Population					
	2016		2030		2060	
	Number	Percent	Number	Percent	Number	Percent
Total population	323,128	100.0	354,840	100.0	403,697	100.0
One race						
White	248,503	76.9	263,302	74.2	274,576	68.0
Non-Hispanic White	197,970	61.3	197,888	55.8	178,884	44.3
Black or African American	43,001	13.3	48,934	13.8	60,471	15.0
American Indian and Alaska Native	4,055	1.3	4,657	1.3	5,567	1.4
Asian	18,319	5.7	24,382	6.9	36,778	9.1
Native Hawaiian and Other Pacific Islander	771	0.2	912	0.3	1,124	0.3
Two or More Races	8,480	2.6	12,652	3.6	25,181	6.2
Hispanic	57,470	17.8	74,751	21.1	111,022	27.5

www.census.gov

12 Angry Men (and Women?)

Taylor v. Louisiana, 419 U.S. 522 (1975)
Precluded systematic exclusion of women from jury service

Batson v. Kentucky, 476 U.S. 79 (1986)
Precluded the use of peremptory challenges to dismiss jurors based on their race

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)
Precluded the use of peremptory challenges to dismiss jurors based on their sex

SmithKline Beecham Corporation v. Abbott Laboratories,
740 F.3d 471 (9th Cir. 2014)
Precluded the use of peremptory challenges to dismiss jurors based on their sexual orientation



McCaleb v. Daher-Socata, et al.

Case No. 2015-014561(02)
Seventeenth Judicial Circuit,
Broward County, FL

DAHER-SOCATA

Producer
of general
aviation aircrafts

Headquartered
in France



The Facts

Single-engine,
propeller
aircraft

Accident
occurred in
Fayetteville,
Georgia

Plaintiffs:
husband (pilot)
& wife
(passenger)



Claims against Socata:
Negligence & products liability

The Crash

2014-Oct-05 12:54:04.202 PM (EDT)



The Crash



Damages

Mr. McCaleb

- Broken leg
- Head injury

Dr. McCaleb

- Traumatic brain injury
- Loss of future earning capacity

Punitive Damages

- Three prior similar incidents



Issues

1.
**Strict
liability**

2.
**Crash-
worthiness
of aircraft**

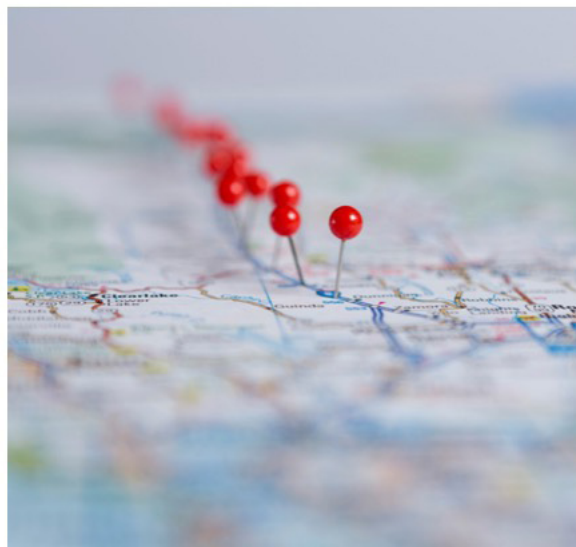
Does Venue Matter?

Venue determines the jurors that will ultimately decide a case



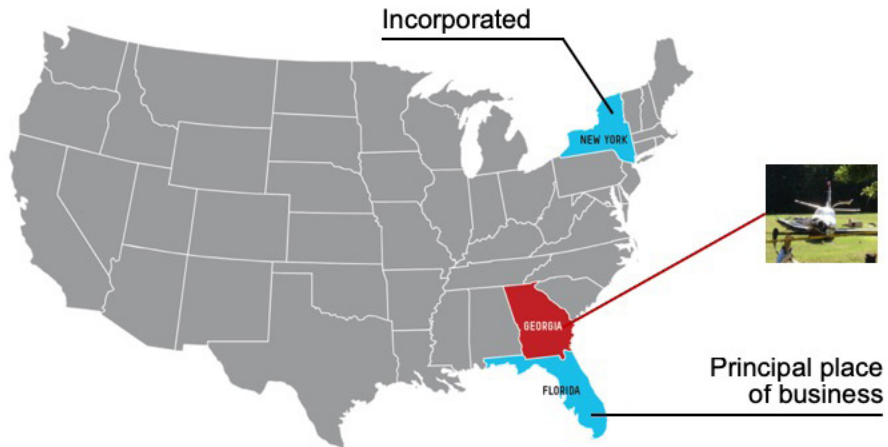
Venue Considerations

- Whether potential jurors in one area may view your case more favorably
- Whether a particular court seems “hostile” to claims such as yours



Potential Venues

SOCATA North America, Inc.
(American subsidiary of Daher-Socata)

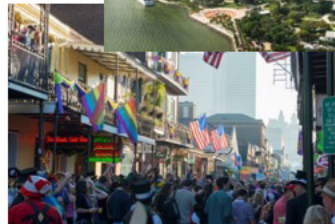
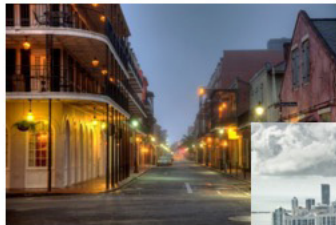


Differences in Juror Demographics

Would you
see a different
jury group in:

California
New Mexico
New York
Minnesota
Tennessee
Texas

Vs.



You've Chosen Your Venue



Now
what
?

Your Jury Has Been Selected

What
will your jury
focus on
during the
trial?

The Room?

The Judge?

The Attorneys?

The Witnesses?



Hiring a Jury Consultant



Is Justice Actually Blind?



Gender
bias

Implicit
biases

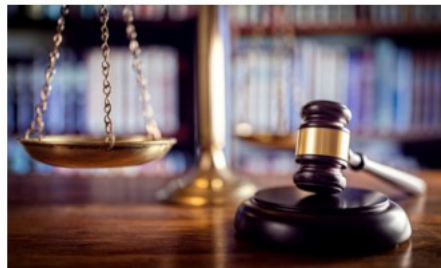
Racial
stereotypes

What Will Your Jury See?



Studies On Biases and Stereotypes

If an attractive male attorney is examining a female witness, jurors believe that the male attorney is **attempting to manipulate** the witness



If a female attorney is too soft-spoken, she is **perceived as weak**

What Are Your Immediate Impressions?



How Would A Jury View...



A Male Pilot?



A Female Doctor?



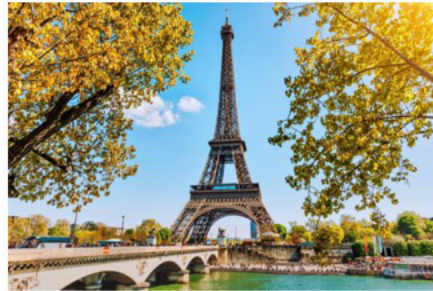
Studies On Biases and Stereotypes

Similarity-Leniency Effect:
jurors make more
favorable judgments
for defendants from the
same racial group



Jurors are more likely
to recommend
harsher sentences
when defendants are
accused of crimes
stereotypically
associated with their
racial or ethnic group

Views on Foreign Defendants and Witnesses



Trust In Government Organizations



National Transportation
Safety Board



Federal Aviation
Administration



National Highway Traffic
Safety Administration

Other Factors

Wealth
Education
Age



Women in the Law

Representation of United States Federal Court Women Judges

Type of Court	Total # of Seats	Women	% of Women
United States Supreme Court	9	3	33.3%
Circuit Court of Appeals (Active) ¹	160 (active)	59	36.8% ²
Federal District Court Judges (Active) in the U.S. ³	570 (active)	194	34% ⁴

Women in the Legal Profession



Representation of U.S. State Court Women Judges

% Women	% Women of Color
22	8

www.americanbar.org

Socata Trial: Female Judge

Judge Patti Englander Henning

- Civil Division Judge of the 17th Judicial Circuit Court in Florida
- Elected on September 4, 1984
- Cornell University, B.A.
- University of Florida School of Law, J.D.



Tokenism In Your Trial Team

The policy or practice of making only a symbolic effort (as to desegregate)



The Socata Trial Team

Socata Jury Composition:

1/3 Caucasian

1/3 African American

1/3 Hispanic

50 % male

50 % female

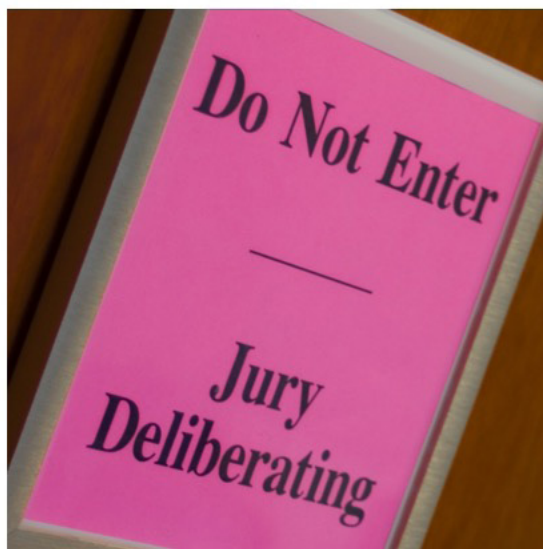


Jury Consultant: Mock Trial Research



	Pro-Plaintiff Jurors	Pro-Defense Jurors
Age	18-29 y.o.	50 y.o.+
Education	High school graduate or less	Master's degree or higher
Race/Ethnicity	Black/African-American	White/Caucasian
Political Views	Would not vote for Hillary Clinton or Donald Trump	Would vote for Donald Trump
Experience	Have never flown in a privately-owned small aircraft	Have flown in a privately-owned small aircraft
Attitudes	French companies are not as safety-conscious as U.S. companies	Relied more on gut instinct than statistical proof when making major decisions
	People do not seek to blame others for their problems	Belief in what a document says over a witness

How Do We Use This Information?



Lessons Learned



THANK YOU!

QUESTIONS?



Joe Ortego

Partner, Complex
Commercial Disputes

516-832-7564

jortego@nixonpeabody.com



This presentation contains images used under license. Retransmission, republication, redistribution, and downloading of this presentation, including any of the images as stand-alone files, is prohibited.
This presentation may be considered advertising under certain rules of professional conduct. The content should not be construed as legal advice, and readers should not act upon information in this publication without professional counsel.
©2019, Nixon Peabody LLP. All rights reserved.



JOSEPH J. ORTEGO

**Partner, Chief Diversity Officer, Vice-Chair of Litigation Department
NIXON PEABODY (New York, NY)**

212.940.3045 | jortego@nixonpeabody.com

Joseph Ortego is Nixon Peabody's chief diversity officer, overseeing the firm's strategy to attract, retain and promote talented people with exceptional ability from a broad range of backgrounds. Joseph also serves as the vice-chair of the firm's litigation department, chair of NP Trial®, an international team of the firm's most successful and experienced trial lawyers and chair of the firm's aviation practice. Representing major private and public corporations and their executives, he has tried over 100 cases to verdict in both federal and state courts throughout the country and has successfully represented clients before arbitration tribunals around the world.

With over thirty-five years of litigation and business experience, I help my clients, from Fortune 500 to startups, resolve their matters early, on their terms.

Areas of Practice

- Commercial Litigation
- Products Liability
- Insurance
- Class Actions

Publications and Presentations

- "Litigation's Unsung Hero: Glory to the Direct Examination of the Expert Witness," The Brief, Winter 2019, Vol. 48 No. 2, American Bar Association (Co-author)
- "Statistical Sampling: Latest on Using Statistical Techniques that Presume All Class Members are Identical; Proving Liability; and Damage Models, Calculations and Theories Used in Class Cases," American Conference Institute's Cross-Industry Interdisciplinary Summit on Defending and Managing Class Actions, New York, NY, April 2016
- "Direct and Cross-Examination of Expert Witnesses in Food Cases," ABA Food & Supplements Fifth Annual Workshop, Omaha, NE, June 9, 2015

Recognition

- Joe was selected by his peers for inclusion in The Best Lawyers in America© 2019 in the field of Product Liability Litigation - Defendants. Joe has been listed in Best Lawyers since 2012.
- Joe is also recognized by The Legal 500 United States 2017 editorial in the areas of Dispute resolution - Product liability, mass tort and class action: Toxic tort - Defense, and Industry focus - Transport: aviation and air travel; by Benchmark Litigation as a New York local litigation star; and by Martindale-Hubbell Peer Review Ratings in its highest category, AV Preeminent.
- Additionally, Joe is recognized by New York Metro Super Lawyers, LMG Life Sciences as a "Life Sciences Star" and Who's Who Legal in Life Sciences. In the New York Metro Super Lawyers' 2015 and 2017 edition, Joe was amongst the top 100 lawyers.

Education

- Boston University School of Law, J.D.
- Syracuse University, B.A., with honors

