

# MAKING MED MAL CASE ASSESSMENTS

## Are You Ready for the Realities of Defending Foreign-Born Physicians?

By J. Thaddeus Eckenrode

Any veteran defense counsel or claims professional knows that the same set of facts in two different medical malpractice cases will not always result in the same verdict or outcome. If a Harvard educated, board-certified general surgeon accidentally transects the common bile duct while performing a gall bladder removal, that case may be very defensible in a conservative jurisdiction, especially if the surgeon is honest, charismatic, and intelligent. In jurisdictions that tend to be more pro-plaintiff, however, that suit might warrant early settlement.

For this reason, in part, inexperienced claims professionals who follow any type of guidebook for assessing the value or defensibility of a medical claim and those who take a one-size-fits-all approach to evaluating claims likewise may misunderstand the significant role that a defendant physician's personality and attitude play in defending medical malpractice cases. Perhaps a subtler, but equally important, issue is how juries perceive and evaluate foreign-born physicians and how defending such individuals can present unique challenges to defense counsel and to claims professionals evaluating case risk. In the hypothetical gall bladder surgery complication, the defense may be more challenging if the surgeon defendant speaks with a strong accent, wears religious head garb, has darker skin, or has a name that sounds vaguely similar to one that pops up on the evening news in stories about terrorism.

### Jury Bias and Prejudice

Are jurors really prejudiced against

physicians who are not born in the U.S.? Undoubtedly, many are not. Just as much a truism, however, is the fact that some are. Every juror carries some type of bias, prejudice, or preconceived notion about something. That's what makes them human, and most counsel understand that.

The obvious goal of voir dire is to identify biases and prejudices so that those jurors whose beliefs may negatively impact the defense case can be removed. Likewise, few potential jurors want to admit in front of a large group of people that they have any type of prejudicial beliefs. One can imagine that if defense counsel simply asked, "Do any of you have any prejudices we should know about?" very few hands would be raised. But when representing a foreign-born physician, it is critical to explore the possible prejudices that some may have against your client and policyholder. It goes without saying that one should start by at least asking the jury about the defendant himself:

- "Dr. El-Malik was born in Iraq. Do any of you think that you couldn't be as fair to him as you would be if he had been born right here in [locale]?"
- "Dr. Singh has a very noticeable and strong accent that may make it hard to understand him since he was born in India. He came to the U.S. only eight years ago, and English is not his native language. Would that have any influence on your ability to give him a fair trial or influence how you evaluate his testimony?"

- "How would you feel about him if it takes him longer to formulate his answers here because of the fact that he has to think about the questions in his native language?"

General questions about foreign health care providers also should be asked:

- "Does anyone here go to physicians who weren't born in the U.S.? How do you like them?"
- "Have you ever gone to a doctor whom you had difficulty understanding because of his accent or language issues? Did you stay with that doctor or change? Did you think he was any less qualified as a doctor than others because of that communication difficulty?"

Sometimes you might want to ask direct questions about possible hidden beliefs, such as these:

- "Does anyone have any concerns about, problems with, or criticisms of a physician who was born in a foreign country coming to the U.S. to practice?"
- "Does anyone believe that a medical education obtained at a foreign medical school is inherently substandard compared to U.S. medical schools?"

However, this is where jurors are likely to clam up about their prejudices and be reluctant to give an affirmative answer that might paint them unfavorably in front of a large group. Instead, defense counsel should get them talking about the concepts:



- *"How do you feel about foreign-born doctors who come to the U.S. to practice medicine and leave their native countries?"*
- *"How do you feel the quality of foreign medical schools or a foreign medical education compares to that which one might receive in the U.S.?"*

If you can, get a few people talking about this, which could prompt or encourage others. There is often someone who will say that they think physicians who come here do so for the money or that a medical school whose name they can't pronounce is probably not as good as a U.S. medical school. Don't worry about someone with a negative comment tainting the jury. It's better to identify that person clearly than to have left him on the panel because nothing was said.

A more subtle prejudice may have to be explored differently. As an example, following the Gulf War, jurors often were asked if they or any family members had served during the conflict and, if so, what their thoughts and feelings were about the conflict and the Middle East in general. It wasn't that difficult to find people who harbored strong feelings of resentment or anger about Saddam Hussein and, therefore, shouldn't sit in judgment of a defendant born in the same area and with a similar Arabic-sounding name.

## Deposition and Trial Preparation

Unfortunately, not everyone with some

hidden bias will be identified during voir dire, and some of those feelings under the surface won't necessarily be stirred up until the defendant is on the witness stand. As such, preparing the foreign-born physician for his trial testimony (and prior to his deposition) is even more critical. No matter how calm, rational, and understandable he may be when meeting with defense counsel in his office, the physician may perform differently on the witness stand because it is a wholly different environment where he has no control and is completely unfamiliar. Nerves take over immediately, and what once sounded like a calm, relaxed explanation of his care during his private meeting with defense counsel now comes out sounding a lot different.

You can't change witnesses; they are who they are. You can't change a name, even if it is long, hard to pronounce for many, or sounds similar to that of some foreign dictator. You can't change skin tone or a pronounced accent. You can't change a person's religion. If the witness is a Sikh, as an example, you have to accept that he will wear a dastar (turban) and have a long beard. While we preach to our children to celebrate differences, defending a client who looks vastly different from the jury is not a time for celebration.

These differences between your defendant and your jurors can be managed and its impact minimized if you can control

the other factors that influence jurors' perceptions. As previously noted, jurors are only human and will dislike anyone who is cocky, arrogant, condescending, aloof, or combative whether he is wearing a turban or looks like Marcus Welby. Many foreign-born physicians may have a chip on their shoulders, having already encountered difficulties assimilating to new surroundings, feeling belittled (whether accurately or not), or simply because people don't understand their background, religion, or culture. They often take lawsuits filed against them as personal attacks.

For example, an Egyptian-born physician was convinced that a suit filed against him by a local Jewish attorney was a personal attack and directly related to the historical Arab-Israeli conflict. He was assured by counsel that this particular plaintiff's attorney was only interested in money and would have filed the lawsuit even if the doctor were a rabbi. Yet the physician's suspicion permeated throughout the pendency of the suit and made it very difficult for him to focus on preparation for his deposition and trial. His paranoia increased at any point of the litigation that put him face to face with plaintiff's counsel.

It is critical that defense counsel and the claims professional approach their dealings with a foreign-born physician carefully and establish a rapport and the trust of the client. They should start by recognizing that his background and culture may lead him to have a different perception of the legal process than other defendant physicians might have, and he might not be fully candid even with his own defense team, given underlying cultural differences that may exist. Defense counsel and the claims professional should themselves try to learn any nuances of the doctor's personal culture or background that could cause him to come off as aloof or arrogant on the witness stand so that they can work with him to minimize those issues.

The key problem in presenting the testimony of a foreign-born physician is the nature of the testimony itself. Even if you have selected a jury that harbors no ill will to the foreign defendant, his inability to communicate clearly can cause jurors to lose some faith in his honesty or, at the very least, to simply lose interest or focus when he gives his answers. English is not their native language, and answering



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questions in English requires a process of translating the question into their native language, formulating answers, and then trying to process and articulate responses in a secondary language. For the foreign-born doctor on the witness stand, the process is even more complex because of the subject matter, and opposing counsel may try to trip up the witness and make him say something stupid.

Claims professionals, including those who want to carefully manage loss adjustment expenses, should, nevertheless, recognize the critical importance of spending a lot of time working with a foreign-born doctor in both deposition and trial preparation. That may include doing a mock deposition with several attorneys from defense counsel's firm, retaining a well-qualified witness preparation specialist with significant experience assisting foreign doctors, and multiple practice sessions with the doctor to slowly and carefully smooth away the rough edges of the cultural differences and personality quirks that have the potential to be viewed negatively by some jurors.

These meetings should include a careful

explanation that you are not trying to change him or that there is anything wrong with his background or culture but rather why it is important to remain calm, take time to understand the questions posed, articulate a thoughtful response, and not get dragged into a rapid-fire debate with an attorney who has a better command of the language.

Videotaping some of the sessions of deposition and trial preparation with most witnesses can be beneficial, but you may opt not to do so for the first session or two in order to minimize the doctor's nervousness or suspicion of defense counsel and to help develop a trusting and close relationship. Once you start videotaping preparation sessions, play them back for the doctor and point out, in a non-condescending manner, how slightly different facial expressions, a different posture, a smile from time to time, better eye contact, and a calmer, slower pace will be viewed more positively by the jury.

It is even more important in preparation to have someone hit him with hard, aggressive cross-examination questions to help him prepare for the worst that he'll

see from opposing counsel. This will serve to reassure him that, when he stays calm and answers questions clearly, he won't get caught like a deer in the headlights. Preferably, the aggressive questioner would be someone other than his defense attorney whom he must continue to trust.

As much as we celebrate our cultural differences in these more enlightened and modern times, inherent prejudices still simmer beneath the surface. Defense counsel and claims professionals need to recognize that even slight differences between the defendant physician and the general makeup of the jury can place an additional burden on the defense team and make presenting the case more challenging. Never underestimate these subtle issues, as they sometimes can be enough to swing the balance in a close case. [CM](#)

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