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PERSPECTIVE

Representing the Asian Client

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The diversity of our nation is arguably its greatest strength. This country has been forged from the ingenuity, entrepreneurship and the hard work of immigrants of all descent, including Asians. Growing internationalism also has led to increased trade with Asia. It is not an overstatement to say that products from Asia permeate our everyday lives.

The growing Asian population and trade with Asia naturally have also led to increasing litigation involving Asian companies and individuals, both residents of the U.S. and abroad. The significance of the Asian legal business is partly illustrated by the establishment of Asian offices by many of the nation's top law firms.

There are nuances, however, in representing Asian clients, and these nuances are perhaps most prevalent in litigation. While it would be impossible to list all of them, here are some of the issues that a litigator representing an Asian client or witness should take into account.

It is important for the litigator to recognize that the U.S. court system may differ dramatically from the legal system in the client or witness' own country. For example, many Asian countries do not have a jury trial system. Instead, cases are tried to the courts through declarations, rather than by live testimony to the jury. These countries also may not share our system of discovery. For example, depositions, which are common in our legal system, are not allowed in certain Asian countries. Educating the client about these differences will aid in management of the litigation and enhance the lawyer's relationship with the client.

One method of educating the client about our court system is to have the client and the relevant witnesses view a trial in progress at a nearby courtroom, where they can see the process unfolding firsthand. Watching videotapes of prior depositions or having the client or witness attend a deposition in the case is also helpful. Regardless of the method chosen, these precautions can prevent setbacks due to a lack of understanding or familiarity about our adversarial litigation system.

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Cultural differences may affect the manner in which a particular witness gives testimony, and therefore affect that witness' credibility. For example, some cultures frown upon making eye contact, making direct assertions or touting one's own accomplishments. The Asian client should be advised of the different perceptions of such behavior in our culture.

Again, sitting in on a trial in court and dissecting the mannerisms observed with the client can be an effective educational tool. Videotaping the Asian witness during a practice session and reviewing the tape also may pay dividends. The litigator should not only critique the witness' performance but also proactively identify behaviors positively received by U.S. jurors.

It is possible that no amount of practice may change the habits of the witness, who has been molded by decades of cultural influence. When strategy dictates that the litigator present the incorrigible witness in court, the litigator may want to educate the jury about certain behaviors of the witness that are culturally different. The litigator may even ask for commitments from the jurors that they will not negatively judge the witness' testimony because of these differences.

Another aspect of representing Asian clients is the heavy use of and reliance upon interpreters. The interpreter arguably is the surrogate of your client or witness, since the interpreter is the person communicating to the jury. As such, they should be competent in interpreting and a good representative of the client or witness.

Practicing with the interpreter in advance is also critical to developing a positive rapport between the client and the surrogate. Such practice sessions may even reveal that a positive rapport is not possible due to conflicting personality traits. Unless caught and remedied in advance, such conflicts will be disastrous if debuted for the first time at trial. There have been occasions where the witness and interpreter have argued over a particular translation on the stand, which obviously leads to a less than favorable impression upon the jury.

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The interpreter should be given enough background about the case to ensure that the translation will be in context. In many languages, there are several ways a particular English word can be translated. Meeting with the interpreter in advance to discuss how he or she believes particular key words should be translated can be beneficial. Cases have been won and lost based upon a chosen translation that was linguistically correct, but which also caused the witness to react or respond in a certain way.

Even the best interpreters sometimes make mistakes, the results of which can dramatically affect the outcome of the case. Having someone on the litigation team who is fluent in both the relevant language and culture is highly preferable, especially if that person is also a lawyer "fluent" in the legal issues involved. The risk of potential translation errors may be a factor in deciding whether to audiotape or videotape depositions. Disputes over translations are better resolved when such electronic records exist.

Modern-day prejudices can be subtle. In this day and age, it is unlikely that jurors will admit to even themselves that they harbor an ethnic prejudice. Rather, prejudice is more likely to be manifested by their decision to discredit or give less weight to certain ethnic witnesses, and/or to hold the ethnic party to a higher burden of proof.

The voir dire process is intended to ferret out unfair prejudices that may unduly affect the outcome of the case. Given people's reluctance to admit ethnic prejudice openly (especially in court and in the face of another ethnic person who may be a party, a juror or even the judge presiding over the trial), the use of written questionnaires may be more productive; people tend to be more candid in writing than in a face-to-face conversation.

Moreover, voir dire questions should be fashioned innocuously to elicit the desired information. For example, rather than asking about prejudices towards Asians, it may be more productive to ask if the juror has ever visited a particular Asian country and, if not, would they like to visit such a country, why or why not. There also may be a benefit to asking the jury to promise not to hold your client's ethnicity (and behaviors common in your client's culture) as an influencing factor in their ultimate decision.

When most people think about anti-Asian prejudice, they may assume that the discussion centers on the prejudice entertained by non-Asians. In reality, the dangers of inter-Asian prejudice may be more significant. For example, lingering sentiments from years of Japanese colonization and occupation of Korea, China and other countries sometimes manifest in certain attitudes against the Japanese client by other Asian jurors, especially amongst the older population. While years of education and interaction with the many different Asian cultures in this country may have softened such prejudices, a litigator is well advised to be cognizant of such inter-Asian prejudices and take efforts to minimize their impact.

In this era of increased globalization, sensitivity and awareness of the many nuances in representing Asians are critical. Prudent litigation strategy should take into account the issues highlighted above which can significantly impact the outcome of the case.