

# Acknowledge and Prepare for Anti-Muslim Bias in the Courtroom

by Naveen Khan



## What Is Anti-Muslim Bias?

Imagine being a woman in your 70s bound to a wheel chair. You have just lost your husband. You are pleading with the justice system to enforce your rent control rights in an apartment where you have been paying rent, for over 20 years, You wear a scarf on your head. You are Iranian. Then, imagine being wheeled into a courtroom where a group of jurors stare at you and you immediately fear that they will be unable to look beyond your accent, scarf and Middle-Eastern name. This is the experience of many people seeking justice in U.S. courts after 9/11. This is what they face when they stand before a jury that is supposed to comprise their peers.

The case of the Iranian woman I happened to be involved with occurred in a large metropolitan area of the Western United States. The plaintiff was Persian (not Muslim)

and wore a head scarf. Anti-Muslim bias is so pervasive that many people in the U.S. do not distinguish between a woman from Iran wearing a Muslim head scarf (hijab) and a Christian woman from Iran wearing a head scarf. From my conversations with jurors it was apparent that their decisions were impacted by an anti-Muslim bias that affected the credibility of the plaintiff as well as jurors' perception of the facts and evidence in this case.

I have been on many cases where attorneys have been worried about their client's color, ethnicity, or religion. If they have a Hispanic client, they want Hispanic jurors. If they have an African American client, they want African American jurors. Picking a jury is never that simplistic. However, given that race and ethnicity can be significant in some cases, what do you do if you have a Muslim defendant or plaintiff? Or if you have a Middle Eastern client? Do jurors presume that they are Muslim? What if they had a Muslim name? What kind of impact does a party's real or presumed Muslim status have on jurors' perceptions and decisions? I will begin with exploring Muslim bias in America, then describe cognitive processes involved in discrimination and finally look at how to manage actual or perceived Muslim bias in court.

It is important to step back and see how mainstream institutions like the U.S. media and government have normalized and given permission for anti-Muslim bias in the guise of anti-terrorist preparedness and nationalist pride. In the national climate created by the Bush administration post-9/11, most U.S. residents with anti-Muslim feelings do not perceive their feelings as bias, but as a justifiable and rational response to danger. In cases with Middle Eastern clients, one is facing not only perceived religious bias but also national origin bias.

The demonization and vilification of Muslims and Middle-Eastern people have been the ideological pillars of America's "war on terror." Terms such as "Axis of evil", "rogue States," "failed nations," and "Islamic terrorists" have served as propaganda to separate Muslims and non-Muslims.

The battery of incidents, events and policy pointing to a systematic development of anti-Muslim bias is extensive. The extent of anti-Muslim prejudice became obvious during this year's presidential campaign, when opponents of President-elect Barack Obama spread rumors that he was a Muslim as a line of attack. The rumors also suggested that he was loyal to terrorists and that he was not really an American, showing the strong association between the Muslim faith, Arabic names, anti-Americanism, and terrorism. There have been many reports of hate-crimes and anti-Muslim bias in daily life such as the well-known "no-fly" lists that have been the source of long delays in immigration for many who have a Muslim name or look like a Muslim based on stereotypes or misleading information.

The Council on American-Islamic Relations reported that the primary factors triggering discrimination were an individual's ethnicity, religion or a "Muslim name." "Many acts of discrimination occur due to the perceived ethnicity or religion of the victim. Many Sikh Americans, who are neither Muslim nor Arab, have been targets of anti-Muslim bias due to their appearance."

A USA Today/Gallup Poll published in 2006 reports, "Nearly one quarter of Americans, 22%, say they would not like to have a Muslim as a neighbor" and "Nearly four in ten Americans (39%) say they do feel some prejudice" toward Muslims.

### **A Cognitive Explanation for Anti-Muslim Bias**

Stereotyping, affect, and social distancing are three theories of processes by which discrimination takes place.

#### 1) Stereotyping explains general anti-Muslim bias.

Stereotyping is powerful. It involves the attribution of a set of characteristics to a group of people. It is a fast and simple way for the mind to classify a person or groups of people and can be useful and positive. When information about the stereotype is consistent and visible, it is easier to label a group negatively or positively. Therefore, a hijab or kufi may automatically transfer negative connotations to the plaintiff or defendant and may trigger feelings of fear or distrust.



Changing a person's stereotypical evaluations and reactions is difficult even when contradictory evidence is presented. As our society stereotypes groups such as Muslims, they are both conceptually and actually pushed into an out-group. Symbolic activities (media stories, government notices, written policies that suggest ethnic profiling in security work) flag key markers such as the wearing of head scarves as signs of Muslim identity, terrorist inclination and danger and suggest that people who bear these markers are fundamentally different from you and I, who may not bear these markers. This conceptual work then becomes translated into concrete social behaviors such as avoidance of interaction with perceived Muslims, physically separating out perceived Muslims from others in public situations that require security screening, and public expressions of hatred or anger towards people perceived as Muslim. These activities are what create an in-group and an out-group. Identity and self-esteem through belonging is attached to the in-group so we form positive views of members

of the in-group and in turn assign preferential treatment. By comparison, people classified in the out-group are viewed and treated more negatively. This is the basis of racial inequality.

### 2) Affect and emotion contribute to bias as well.

Stereotyping can bias decisions-making, even for people who consciously do not want to be biased. Although stereotyping is useful in providing a framework to understand how jurors base their decision-making on pre-conceived notions of groups, it is helpful to examine how affect works in non-conscious discrimination and bias. Perception, affect and cognition involved in making preferences and discrimination involves a complex sequence of events. The resulting emotion is often difficult to verbalize as people may not know or understand exactly what they are feeling or be able to articulate what they are feeling accurately. Jurors are often not candid with attitudes about minorities.

### 3) Social distance separates many American jurors from Muslim litigants.

There are many pre-judgments and cognitive processes that have been put into motion, one of which is social distance. Social distance describes the [distance](#) that separates individuals psychically, and is distinguished from spatial distance. It is a useful tool to understand the degrees of closeness which define social relations generally and the difference that sets us apart in people's minds. The theory of social distance shows the origins of race consciousness that separates us from races who we do not fully understand. In a USA TODAY/ Gallup Poll (2006) of 1,007 Americans, 58% said they had never met a Muslim. And those who did know Muslims felt a lot better about them. An important question to ask a jury panel would be about their experience with Muslims.

## **Managing Anti-Muslim Bias or Perceived Muslim Bias In Trial**

The approach taken in voir dire, opening statement, witness preparation and closing argument will vary depending on the specific claims of the case. If the case is about discrimination there will be more broad inspection of juror bias. If the case involves a person who looks Muslim or is Muslim but is not related to discrimination, such as the case mentioned in the opening of this article, the potential discriminatory factors will be handled differently depending on the facts of the case. The approach will also change according to the client's position as plaintiff or defendant in the case.

### Use a Juror Questionnaire

If you have a Middle-Eastern client or a Muslim client raise with the court doing a juror questionnaire that will weed out the people with biases. Juror questionnaires can help to eliminate overtly biased jurors. Discover jurors' relevant attitudes and experiences and use carefully phrased questions to determine their contact and association with Islam and Muslims and/or the relevant ethnic group. The best way to do so is with a written juror questionnaire combined with follow up oral voir dire.

### Focus Your Voir dire

Identify and eliminate jurors with strong biases and stereotypes. Use effective cause challenges if you discover obvious prejudice. The discovery of these jurors will be just the tip of the ice-berg. During voir dire challenge jurors' assumptions that the specific plaintiff/defendant does not fulfill the stereotype. To challenge jurors' assumption, your client must be consistently different from the stereotype. Use examples of behavior that are

inconsistent with a known stereotype, not one that is not a recognized stereotype. If their impression is that Muslim women are oppressed, implicitly point to evidence that your client is not.

Due to bias, opinion and experience, it is difficult to challenge stereotypes and overcome them in the course of a trial. It is more powerful to gain access to jurors' core beliefs and create a contradiction between their core beliefs and their bias towards the actual client. Create themes that relate to the importance of justice for all in our system, the importance of fairness and the desire of each juror to experience fairness him or herself. It is important to identify a value or emotionally held idea that is as powerful as the jurors' bias, in order to counter their bias. In addition, ensure jurors commit to using facts and evidence to make their decision rather than stereotypes and feelings. Emphasize their belief and value in the legal system and belief in equality that is embedded in our system. Use jurors' nationalistic feelings *for* the client. Affirm commitment to the process so when jurors are in deliberations and any juror diverges from the facts and relies on bias or prejudice; others are able to override that tendency with a more powerful value.

### Frame Your Position In Opening Statement and Closing Argument

Set the framework for the trial. If the case is based on discrimination the strategy may include a more direct appeal to religion and/or national origin. When the situation is more oblique and the claims are not related to bias it may be important to be more implicit when addressing jurors because too much emphasis on religion/ethnicity may cause the jurors to unnecessarily pay negative attention to the plaintiff or defendant's character.

Encourage incremental changes to jurors' views by repeating information that is inconsistent with their stereotypical viewpoint. If your client is actually Christian, tactically mention that she attends Church. If the client is Muslim and has grown-up and attended college in America, talk about his fraternity experience. Find similarities between the jurors and client. Putting them together in time or space will help.

Present argument in your closing that challenges jurors' assumptions. Recall people to their own experiences to interrupt biases. Be aware of who is on your jury and their experiences. Carefully remind the jury of their experiences of discrimination; the history of Anti-Semitism for example. Ask them to trust in the justice system and law rather than stereotypes and presumptions about who your client may be.

Humanize your client and bridge the social distance. If your trial is related to Islam, subtly educate the jury about Islam in your opening. Explain how Islam goes hand in hand with the principles of democracy, that women in Islam had voting rights over a century ago and more broadly how the principles of Islam are based on education, peace and tolerance.

### Prepare Your Witnesses Carefully

Witness preparation is extremely important. Demonstrate similarities, especially if the plaintiff/defendant has outwardly expressed any such as changing his name to John from Jahn. Use pieces of information to which jurors can relate. For example, if the plaintiff or defendant is a father, talk about his experience as a parent. Plant pieces of information with the jury that may help them contradict the negative affect so they can alleviate any fears and bias feelings.

In order to bridge the social distance, make connections with the jury by illustrating similarities. Find characteristics that take away from the stereotype and emphasize the similarities.



Create an image that illustrates integration. This means, the witness should try and wear clothes that deemphasize the stereotype and speak clearly, et cetera. With most Americans not having even met a Muslim, jurors' initial feelings about your client will come from the first impression that your client makes. Clothes, demeanor, accent and other immediately visible characteristics that fulfill the stereotype will push them into the out-group and create or affirm a social distance that will not serve your case. Minimize the social distance jurors feel between themselves and your client so that they do not immediately see your client as a member of an "out-group" who does not deserve the same fair treatment and consideration as other citizens or residents.

In cases involving Middle-Eastern or Muslim plaintiffs or defendants, there may be potential jurors of the same culture or ethnicity who dislike their national origin. This could be seen as ethnic self-hatred, where ethnicities such as Arab-Americans dislike their own culture or the cultural baggage or dislike those who they perceive as not

having integrated into American society. Therefore, a Muslim name may be misleading for a lawyer who believes Muslims or Middle Eastern jurors would serve his Muslim client best.

### Concluding Thoughts

Muslim-bias in the courtroom is a complex topic and deserves more attention because of the struggle for people who are perceived as Middle Eastern or Muslim to be received by an unbiased jury in the current climate. Going to trial with a Muslim client involves a multi-faceted perspective to discrimination that includes a cultural awareness and an informed approach that is sensitive to the possibilities and pitfalls of selecting potential jurors and developing trial strategy.

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## Managing Patriotic Prejudice when Representing Arab, Muslim or Middle Eastern Clients

By Dennis C. Elias

Defense attorney Tom Martin<sup>1</sup> had five days left to prepare and finalize his voir dire for a high stakes medical malpractice case. After over twenty-eight months of preparation, Tom was ready to rock and roll.

“I’ve covered the bases on past medical experiences with illness or injury, sick and disabled at home, attitudes about doctors, quality and access to health care, bad or disappointing medical outcomes, volunteer organizations, charitable involvement... Everything I can think of that will find the sympathetic walking wounded, liberals and bleeding hearts. Can you think of anything else I should include?”

“Tell me about your client,” I said. “We’ll start there.”

The mandatory litany of education and training and other lines from his curriculum vitae followed. There was nothing of particular interest or concern in his description, so I asked a simple question.

“What can you tell me about him as a person? That’s always important to jurors.”

His answer was unassuming but critical to the case.

“Oh, he’s a nice guy... um... he has an accent, though.”

“Accent? Tell me more.”

“His name is Sa’ed Abdul Bazir<sup>2</sup>. He’s originally from Iraq. Got his medical degree there. He was a medical officer and surgeon in Saddam’s Iraqi Republican Guard, but he escaped and brought his family to America years ago.”



The red lights on my jury alarm began flashing: Patriotic prejudice; anti-Arab/Muslim bias. Houston, we have a problem.

## **Negative Stereotypes and Juror Devaluation**

Negative stereotypes lead to jurors short-circuiting the vetting process of a party or witness. Your client (or witness) can't get an even shake if jurors' first reaction is "terrorist", "Islamofascist", "suicide bomber", "9/11" or "a Hadji like the ones that set an IED and killed my buddies/son in Falujah".

If jurors feel your client or witness is not worthy of consideration they will devalue him or her. Some things can be changed or improved with most any party or witness, but race and ethnicity are not changeable or improvable features. Racial and ethnic bias and stereotypes carry a heavy toll and can convey attributes and characterizations that are insurmountable. You cannot change any juror's stereotyped beliefs and, paradoxically, you could further plant their feet by trying to change their stereotypes.

On the other hand, there are trial strategies that can identify concretized bias, attenuate social and cultural differences and enhance your client's unique positive personal, professional and familial characteristics. We address a few of those later in this article.

## **Bias against Arabs, Muslims, and Middle Easterners**

Negative stereotypes and prejudice against Arab, Middle Eastern or Muslim individuals is not a new phenomenon. While many think of 9/11 as a seminal point in anti-Arab/Muslim sentiments, the origins of these feelings can be traced back decades. American foreign policy and network news coverage of the Arab/Israeli conflicts over the Palestine issues in the 1960s and 1970s and ongoing conflict in the Middle East for the past thirty years have influenced juror perceptions. The Arab Oil Embargo of the early 1970s is another point where emerging petro-politics directly affected the psyche and wallets of United States citizens.

Today's anti-Arab/Muslim prejudice is simply an old resentment and distrust finding new expression in a more dire and dangerous fear. Dependency on Arab Oil now is co-mingled with fears of terrorism and with the reality of American deaths at home and over seas.

Generic prejudice relates to beliefs about certain classes or types of people that would affect the way a potential juror would view the evidence and parties in the case. For example, this might include the belief that all Arab-Muslims are murderers, have no regard for life or the rights of others, are demeaning of women, are religious fanatics, hate all Americans, reject democracy and Western values, and so on. It is generic prejudice that is most likely to be at work in cases where the defendants, parties or litigants are Arab and/or Muslim<sup>10</sup>.

How widespread and deep is anti-Arab/Muslim prejudice? In a paper<sup>3</sup> presented at the American Society of Trial Consultants Conference in Chicago, June 2008, Sonia Chopra, Ph.D. of the National Jury Project-West reports:

*"A recent Gallup poll reveals many Americans admit to holding negative views about people of the Muslim faith, with 39% saying they have at least some feelings of prejudice against Muslims<sup>4</sup>. Less than half of those polled (49%) believe that Muslims living in the U.S. are loyal to the United States and 34% believe that U.S. Muslims are sympathetic to Al-Qaeda. In addition, substantial minorities perceive Muslims as being overly committed to their religious beliefs, less than respectful of other religions and disrespectful towards women<sup>4</sup>. Nearly 4 in 10 Americans support stricter security measures for Muslims as compared to other U.S. citizens,*

*including requiring U.S. Muslims to carry special ID (39%), and to undergo differential security checks before being allowed to board airplanes in the U.S. (41%)*<sup>5</sup>

*People who do not personally know someone of the Muslim faith hold even more extreme negative views than those who have such an acquaintance. For instance, 31% of those who do not know a Muslim person would not want a Muslim as a neighbor, compared to just 10% of those who do know someone of the Muslim religion. Amongst poll respondents who did not know anyone who was Muslim, 38% said they would be nervous if a Muslim man was on the same flight as them*<sup>6</sup>. Age also plays a factor in attitudes towards Muslims, with those over 65 holding the most negative views<sup>7</sup>.

This pattern of bias speaks for itself: the prejudice is pervasive. In fact, more than pervasive. It may be “patriotic” to feel and express such feelings. The pervasive and perhaps patriotic expression of these feelings however, endangers the parties in litigation who may in fact bear these cultural and religious traits. A pattern of such zealously held beliefs may have been part of popular culture since the zenith of the “Red Menace” of the 1950s and 1960s, and the ubiquity of anti-Nazi/anti-Japanese propaganda during WWII. To hate and fear the “enemy” of all we hold dear is the highest order of protective communal feeling. It is “us” versus “them” at the highest order.

### **Identifying Bias**

When events or situations threaten our sense of individual and/or group security the result can be a stronger sense of in-group loyalty and increased hostility towards members of the out-group. For instance, agreement with the statement, “*It is clear which countries are enemies of the United States*” is a strong predictor of a reluctance to interact with Arab individuals<sup>8</sup>. More generally, the best predictor of anti-Arab attitudes is evidenced by a juror’s verbal affirmation that they are a patriotic “Loyal American” and their belief that they are vulnerable to personal risk of terrorist attack. True prejudicial or stereotypical beliefs against Arabs and/or Muslims are probably much stronger than people are willing to admit, particularly in a situation such as voir dire where they may be held accountable for their answers.

Some have used the Implicit Association Test<sup>9</sup> (IAT) to measure prejudicial attitudes by looking at automatic associations between group members and their personal attributes. Prejudiced individuals’ most common responses included references to terrorism and/or violence, followed by deep religiosity, discrimination against women, negative personality traits, and physical appearance. People who mentioned terrorism in their responses were more likely to demonstrate implicit bias against Arab-Muslims.

### **Dealing With Anti-Arab/Muslim Bias In Litigation**

If you have a case where your client happens to be of Middle Eastern origin, here are some tips and strategies to cope with anti-Arab-Muslim prejudice in the jury:

#### **1) Improve Your Jury Selection:**

- a) Request a Supplemental Juror Questionnaire and support its use by demonstrating potential bias in the venue.

Use well-known polls, surveys and evidence of prejudice gleaned from local news media such as: hate crimes, negative editorial comments, or frequency and availability of national and local news items portraying Arab-Muslims in a negative light. Educate the Court that compared to open court, many of us are more open about personal biases when responding privately in a written form.

- b) Ask for additional time to voir dire potential jurors on this specific issue.
- c) Create voir dire items specifically designed to elicit Anti Arab-Muslim bias.



Ask about Desert Storm, Serbia, Iraqi War military service, deaths and war-related injury, and servicemen in their family. Ask about discomfort when seeing apparently Arab people boarding your plane.

- d) Fully explore “worthiness” if damages are an issue.

For instance, “Would your discomfort or suspicion of someone Arab/Muslim make it even a little difficult for you compensate them with money for their injuries?”

- e) Follow up on the source and strength of prejudicial views in order to establish challenges for cause and to intelligently exercise peremptory challenges.
- f) Remember that even a small group of biased jurors can alter the verdict and/or damage award.
- g) Don’t assume that a Middle Eastern origin juror will automatically be on your side. Query them in voir dire as well.
- h) Remind jurors that their feelings about your client’s cultural or religious background may lead them astray if they don’t stay aware of their biases.

When jurors are not reminded or pressured by situational cues to avoid prejudice, they are more likely to let down their guard and demonstrate bias.



## 2) Actively Prepare Your Witnesses:

- a) Emphasize how your witness is similar to the jurors in order to minimize imposed or perceived differences.
- b) Practice attaining a relaxed conversational style in question response.
- c) Refine listening skills to overcome problems in understanding subtle nuance in meaning of questions which can result from both language and cultural barriers.
- d) Minimize accent or comprehension issues (if problematic) with mild self-deprecating responses.
- e) Work on the pace of verbal delivery to more closely match colloquial speakers in your region.
- f) Practice Direct Exam narrative in depth.
- g) Inoculate on likely Cross Examination effects by repeatedly exposing the witness to practice questions and ensuring each response achieves parity in style and delivery with responses to Direct Exam questions.

## 3) Refine Your Opening Statement:

- a) If true, point out that the evidence and testimony shows that your clients’ cultural or religious background is irrelevant to the alleged acts, omissions or damages.

- b) Remind jurors to stay aware of how their personal prejudices might affect the way they hear and use the evidence and testimony.

#### 4) **Credential Your Witness in Direct Examination:**

- a) Emphasize the similarities between your client and the local populace.

Values similarities are best expressed in the disclosure of tangible activities such as participation in family and family-related events, children's and parents' school and after-school involvement, social interests, community involvement, regular activities of profession, work, religious and home life, et cetera.

- b) Encourage honest and/or emotional disclosures.

Arab or Muslim plaintiffs may be embarrassed by their victimization and losses. Focus them on the necessity to accurately disclose their suffering, harms and losses in a way that also demonstrates their emotional experience of such losses.

- c) Engage juror empathy with sincere demonstration of feelings and explanation of your client's emotional experience of events.

Engage your client's colleagues, family and friends to vouch for his/her character. Try not to use your client as the main source of testimony about who they are and what they are like. Consider including non-Arab/non-Muslim witnesses who are personal friends of your client. This can further emphasize that your client is like the jurors and has friends who look like the jurors.

- d) Make your client as physically attractive as possible.
- e) Use stories and have witnesses give examples.
- f) Remember, the case is about what you spend the most time discussing.

If Arab or Muslim culture is not salient to the case, don't spend much, if any, time on it in your case in chief.

#### 5) **Protect Your Witness In Cross Examination:**

- a) Prepare your client to respond consistent with Direct Examination.

When bias creates a foundation for doubt and suspicion, your clients' credibility is the virtue to be protected and enhanced. Make sure that your Arab or Muslim client responds to the rigors of cross examination without rancor or defensiveness and with relative equanimity. [See recommendations under Witness Preparation.]

- b) Anticipate cultural barriers to effective responding.

Middle Eastern culture is patriarchal. Men with status of family or position are not used to being questioned. Make sure they understand that defending their honor by being confrontational defeats their purpose and allows the jury to see them in a negative (and stereotype-confirming) light.

#### 6) **Finish With a Strong Closing Argument:**

- a) Arm your juror advocates so they will not allow prejudice to influence deliberations.

Remind jurors that their feelings about your clients' cultural or religious background may lead them astray if they don't stay aware of their biases. Tell them how to go about dealing with such statements in the jury room and that they have the option of informing the judge if necessary.

- b) Clearly explain the relevant jury instructions and verdict forms.

Most jurors misunderstand the jury instructions. Explain the law and the verdict issue simply and in plain language. Make sure they are comfortable calling upon the judge for clarification.

c) Give jurors an “out” for their verdict decision.

Help jurors respond to friends who may be angry about the verdict rendered for prejudicial reasons. Give them a concise “one liner” to use when and if confronted about their verdict after the trial.

The fact that a juror says he believes something does not mean he believes it deeply. The fact that another juror says she does not believe something bears the same but converse condition. To confront ethnic, racial and cultural bias in the venire requires that first you recognize its often hidden, subtle and pervasive presence. Arm yourself, your client and your jury with the awareness, guidelines and responses necessary to cope with bias.

### References

<sup>1 & 2</sup> The names of the individuals in this article are fiction. No actual persons other than the author are referenced.

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## Happy New Year!

For *The Jury Expert*, it's especially good to turn the calendar year. In 2008, *TJE* went digital. We debuted in May, 2008 on the web in the form of downloadable PDF files. Now, especially for 2009, you can read *The Jury Expert* entirely on-line. You can still download and forward and print--everything you could do before. But now, you can read articles on-line in addition to downloading AND you can easily comment on what you're reading.

When we revamped this publication to be entirely on the web, our hope was to have your comments on articles published along-side the articles so that a dialogue could develop between litigators, consultants, academics, and other subscribers that would inform, challenge and stimulate us all. But first, we had to see if you liked where the [American Society of Trial Consultants](#) was going with this publication. (And you like us, you really like us!)

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So. Look around. Speak up! Comment. Interact. Tell us what you like and don't like. Even though it goes without saying--keep your comments professional and courteous even when/if you disagree. Happy 2009. Read on. Write in. And keep requesting article topics (we're hitting another requested topic this issue).

-- [Rita R. Handrich, PhD](#)



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