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LITIGATION

The Cultural Theory of Plane Crashes and Witness Disasters

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Special to the Legal

Picture this: An airplane is in a holding pattern over New York for more than one hour because of fog limiting arrivals into John F. Kennedy International Airport. During this hold, the aircraft was exhausting its reserve fuel supply, which would have allowed it to divert to its alternate, Boston.

The first officer of the plane informs the control tower that the plane is low on fuel, but he never directly tells the control tower that the plane is in an emergency situation. Minutes creep by. The plane is finally set to land. The fuel gauge drops to zero. The plane, with 158 people on board, doesn't make it. Seventy three passengers and crew died, while 85 survived with injuries. Terrifying, isn't it?

As Malcolm Gladwell explains in his book, *Outliers*, the crash of Colombian airline Avianca's Flight 52 in 1990 is not only terrifying in general, but is even more concerning because the crash was attributed to cultural differences in communication styles between the Colombian pilot and the American air traffic controller.

As a bit of background, Geert Hofstede is an academic theorist and researcher on national and organizational cultures. He espouses that there are particular values that become ingrained within a culture and direct the manner in which people communicate. A primary cultural value was coined by Hofstede as "power distance," which explains the manner in which different cultures communicate across hierarchical lines. Hofstede explains that power distance is "the extent to which less powerful members of institutions accept and expect that power is distributed unequally." High power distance cultures expect authority to protect the individual in exchange for complete loyalty. Therefore, people within high power distance cultures are more inclined to speak with deference to an authority figure, even



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in times of disagreement.

Hofstede also refers to the issue of individualism versus collectivism in the manner in which people communicate. As the terms suggest, a culture that values individualism is one in which people tend to look out for number one, i.e. take care of themselves. In contrast, for cultures that value collectivism, the group is more important than the individual.

In the plane crash scenario described above, the communicative barriers between two opposing cultures collided with disastrous results. The Colombian pilot, a member of a culture high in power distance, was communicating a dire situation to the American air traffic controller, a member of a culture low in power-distance. The result was that the Colombian pilot was too deferential to demand that the plane be permitted to land, even though he knew it was running out of fuel. The communication, in sync with the Colombian culture, did not reflect the urgency the air traffic controller would expect in such a dire situation. Therefore, the controller assumed that the plane was low on fuel, but fine to wait for landing for a few minutes longer.

So, what does this have to do with witness testimony? A lot. Specifically, the same cultural issues that lead to the Avianca Flight 52 disaster can have an analogous consequence at trial. Specifically, a witness' cultural issues can lead to communicative mishaps that have less to do with the actual



facts of a case and more to do with the way a particular witness' culture causes him to interact in the context of the courtroom.

The manner in which power distance manifests itself in the courtroom is not quite so simple, though. For example, courtroom power distance values are obviously high related to the position of the judge over the proceedings and how she is to be addressed. On the other hand, things get murky when considering power distance and the interaction between witness and attorney.

Specifically, during a questioning session, a witness is to answer the questions asked and only the questions asked, deferring to the questioner in that sense. On the other hand, the witness is not to show deference regarding the question's content, but is instead expected to state his account of events strongly and with conviction despite how the questioner tries to frame those events. In other words, the witness is to defer to the attorney through the process of questioning, but assert himself regarding the content. This can be confusing to anyone, especially a witness from a high power distance culture.

Needless to say, concern arises for witnesses when their cultural communication style interacts poorly with the cultural expectations of the American litigation system. Take the case of a Korean doctor, sued in a medical malpractice case. In the context of a lawsuit, he perceived his attorneys to be the authority, and so, according to his high power distance culture, was respectful and agreeable to them and everything they said. The trial team was thrilled to have such a cooperative witness, although concerned at the doctor's tendency to keep his head down in deference when communicating.

Unfortunately, it was later learned that this witness, in accordance with his culture, was not only cooperative with his own trial team, but also with opposing counsel. Congruent with his cultural upbringing, he nodded in agreement to the examiner in deposition, who he also saw as an authority figure. The result was a disastrous deposition in which he had conceded just about every accusation made and became very anxious and angry, not understanding how or why he would be attacked by authority in such a manner.

There is also the example of a Chinese employee of a successful, but small, financial institution. His company was being accused of committing fraud in its trading practices. This witness was one of the primary traders involved in the alleged fraudulent activities. The problem was that his anxiety was so

overwhelming in depositions, he simply froze. He could hardly communicate at all. Considering that he was born and raised in China, a high power distance and collectivist culture, the concern was about how he was reacting to the authority situation of giving testimony. Through probing questions, though, it turned out that the salient issue for him was less about the attorney asking questions and more about the CEO of the company for which he worked.

Because of his high power distance and collectivist values, this witness was paralyzed by thinking that he had done something in his trading that negatively affected the company for which he worked and the CEO he so respected. While confident that he had only traded within the strict rules of the trading platform he was using, his anxiety about being associated with something that was troubling for the group and for a central authority figure in his life was simply devastating. While we could not fix this anxiety for him, at least we knew that this was the central issue for him and so focused witness preparations on helping him understand how to feel confident in his communication that he was working for the good of the company using legitimate means. When he was able to give testimony through that framework, he showed substantial improvement.

While it is easy to peg these issues as primarily applicable to foreign witnesses, power distance issues are also important to understand with American witnesses. America is the melting pot of different cultures, is it not? While not as extreme, different people have different views of authority depending on their experiences and position within society, regardless of where they are from.

Take the example of a CEO of a powerful company. While he may respect hierarchy, he is used to being at the top of it, and will not react well to having to defer to anyone in any way. A natural inclination to take control, which could look a lot like disrespect for the procedure and authority in the courtroom, may cause him to come off as "above the rules" or a "bully." Understanding these cultural issues and how they interact with the communicative context at this end of the pendulum is just as critical as the other examples mentioned above at the other end.

The real issue here is that although not everyone from every culture communicates the same way, people are expected to squeeze themselves into the "round hole" of testifying communication rules, no

matter what the shape of their culture's communicative peg may be. Regardless, I see few, if any, attorneys address this issue head-on, even with foreign witnesses whose cultural communicative values are so very different than American values.

The first step is to identify the communicative values (not just style) of a particular witness so we can understand where the underlying troubles may be. Understanding where they are from geographically is the very first step. Talking directly about communication within that culture is the second, and talking directly about this specific witness' communication style and values is third. How does this person respond to authority (hint: beware of the witness who seems to agree with everything you say as opposed to engaging in dialogue). Is this a person who is generally quiet? Who does not like confrontation? Who is aggressive? What are the witness's fears about testifying? What are his expectations?

When you are working with your next witness, consider whether you are talking to the person or at her. It is all well and good to tell a witness what the process will look like and what she is supposed to do, but it is just as important, if not more so, for you to understand where those rules may come into conflict with the communicative values that have been ingrained in this person throughout her entire life, her parents' lives and grandparents' lives. No teaching session about the logistics of a deposition can overcome that. Addressing the core communication values and working through what that will mean in a testifying context may just avert a needless and unexpected witness disaster. •