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Attorney's Guide to Dealing With Hijackers in Mediation

Many of you will remember that many years ago there were repeated instances of hijacking of commercial airliners. According to one report, between 1968 and 1972 there were 130 hijackings of American commercial airliners. Now, thank goodness, they rarely happen due to heightened security and cabin door locks.

Lawyers and mediators will sometimes speak of an individual who hijacks the mediation. We see this most commonly among defendants where one or two individuals become the contact person in the litigation. Occasionally they have made a bad decision and now seem intent on pushing the corporation to litigate rather than settle for a variety of reasons (ego, settlement becomes an admission of fault, desire to justify a prior action). Sometimes they are a bully in the boardroom and effectively silence dissenting opinion. Some insurance policies contain "consent to settle" provisions requiring the organizational client to consent to a monetary offer by the carrier, and that is where the hijacker may cause problems for the lawyer.

Any settlement calls into question their stewardship of the organization. In some instances, the hijacker is not your litigation contact, but he surfaces weeks or months into the litigation as a "dissenter" at odds with the president or leadership. Sometimes he or she only surfaces during the mediation. These are the scenarios we need to avoid. The hijacker may be looking to use the litigation as leverage, as some kind of payback against another board member, or to address some other slight or inequity existing within the

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organization. He or she may just be clueless and have unrealistic expectations vis a vis the likely outcome of the litigation. A hijacker appears at different times, shrouded by the demands of the litigation, camouflaged and may take inconsistent positions regarding settlement over the course of the case.

The hijacker may want to make his or her agenda the corporate agenda, and he may urge others to refuse to settle to validate a prior decision or action that is now called into question by the litigation. To overcome the hijacker's objection to settlement, we need a plan. First, early discussions with the entire board regarding settlement are key. You have to make clear to the client all of the warts in the case. This seems obvious, but one of the problems you may face is that, in explaining the problems, you highlight the mistakes of one or more individuals. You have to guard against shielding one board member from criticism to the detriment of full disclosure of the facts and issues that are problematic.

Another tactic is to find voices willing to challenge the hijacker when the hijacker does surface during pre-mediation meetings and seems intent upon avoiding settlement. You may try to neutralize and single out the hijacker from the group in a private conversation, emphasizing your obligation to the whole board or company. By making clear that the corporate body is the client, not any individual, you implicitly rebut the hijacker's desire or goal that you do his or her bidding in front of the board. Do not let your lead litigation contact dictate what you do. You need to find the "will" and true voice of the whole board.

Remind everyone that the board's obligation is to mitigate risk and that rejecting a settlement may subject them to criticism by members or shareholders if the trial goes poorly.

Finally, try to give the hijacker an alternative narrative. For example, settlement is needed here because we cannot guarantee a favorable jury, or there is attorney's fee exposure if we lose. I have found charities are more likely to agree to a settlement despite a strong legal defense if you

remind them that press coverage related to a discrimination claim won't help donations. There are countless pressure points that might be employed to move the needle in the direction of settlement of a case that presents liability concerns.

You have to identify the leaders, followers, dissenters and odd-ball characters in advance of mediation as they will be difficult to manage in the thick of mediation. You may have to creatively give the hijacker a way to exit the conflict with some dignity. It is also important to remind board members that any conduct of the corporation was ultimately a product of group decision-making, so there is shared responsibility for the current plight. This deflects criticism away from one individual, which is usually helpful.

All of this takes time. With institutional clients or group decision-making, you must establish a level of trust that comes from in-person contact and demonstrate some core understanding of their organization and culture, not merely a knowledge of the facts and law. Sometimes the hijackers are not immediately apparent. Passive-aggressive board members stay silent and to maximize control, only protest on the eve of mediation or during the mediation session. Those surprises are no good. One way to flush them out is to schedule an in-person meeting and insist that all board members be present. Then you will have an opportunity to question each board member about their attitude toward settlement, as you might query potential jurors in the voir dire. The key is to not overlook a board member who is quiet and non-communicative during the early meetings. Once mediation has taken off, the attorney will find managing one or more hijackers in the fuselage of a private mediation caucus very difficult. Before attending mediation, make sure you have done at least some intellectual "pat down" of the board and attitudinal screening to identify would-be hijackers before departing for mediation.

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