Feature Article

The Value of Shared Responsibility:
A Litigator's Perspective

by Jonathan B. Frank

Nearly every case settles. One explanation is that litigants would rather not put a major decision in the hands of a judge, jury or arbitrator. As qualified as these decision-makers are, and as integral as they are to our legal system, they are necessarily one step removed from the dispute. Further, they are generally provided with limited, zero-sum choices for reaching a result. This explanation is sound; maintaining control through settlement, even though it involves compromise, is usually preferable to the "all or nothing" result obtained by third-party decision-making.

But there is another psychological factor at work. Over time, litigants may appreciate that they share responsibility for creation of the dispute, or possibly for its intensification. With this realization and acceptance of at least partial responsibility, they are in a better position to compromise.

Accepting responsibility is not easy. It is a natural human reaction, at least initially, to blame others and deflect blame from oneself. This is true for business as well as personal relationships. And not only is there a tendency to blame others, there is an additional tendency to create a "story" to thematically organize and reconcile random facts. Such a "story" can reinforce the initial tendency to deflect blame. And then, once created, this "story" can quickly assume unjustified significance. People prefer a consistent "story" to a set of disorganized, frequently inconsistent facts, and litigants often use such a "story" to justify their own behavior. Rarely does this "story" include any acceptance of responsibility, but as time passes, and the "story" can only make complete sense with the sharing of responsibility, litigants come to appreciate that blame can be spread among all parties.

Creation of stories is common in business litigation. For various reasons – including internal pressures to avoid responsibility, the ease with which poor outcomes can be blamed on external forces, and the corporate momentum generated by adoption of the story – businesses often develop convenient, if flawed, explanations for past events that solidify over time. A business seeking payment for services rendered or products delivered can quickly become self-convinced that its performance was perfect, and that its customer must be stubbornly looking for ways to slash liabilities. Conversely, a customer receiving unsatisfactory services or products will quickly assume that its demands and specifications were communicated flaw-

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lessly, and that any deviation is due entirely to its vendor's incompetence. Unhappy business partners often accuse the other of fraud and deception. Competitors often perceive intentional attempts at corporate sabotage. The list goes on. And litigation, with its warfare mentality, only exacerbates these tendencies.

So how should the concept of shared responsibility inform our role as attorneys?

First, it is critical to recognize situations where responsibility need not be shared, where one side is truly blameless. Disputes about money might fall into this category. Sometimes businesses just can't pay. And some cases simply shouldn't have been filed. Others shouldn't be defended. Such one-sided disputes are rarer than they might appear, however. Even a simple collection matter should include an assessment of the vendor's responsibility for extending credit.

Second, we must recognize that the process of accepting responsibility takes time. Litigants – business partners, for example – have frequently reached a point of intense conflict after weeks, months, or years of relatively smaller disagreements. It is impossible to reverse this inexorable march toward a dispute overnight. Forcing the acceptance of responsibility too early is problematic, and even counterproductive, making it difficult for the litigant to accept responsibility. Timing is everything. Litigants are unlikely to absorb advice that requires them to shoulder responsibility earlier than they are able to.

Third, accepting responsibility usually follows a thorough and accurate analysis of the nature of the dispute, the true "story" and possible outcomes. These are all the mainstays of a litigator's advice, and they are critical. My suggestion here is that litigants should understand from the beginning that the litigation process will, over time, allow both sides to evaluate the strengths and weaknesses of their positions. In addition, it is worthwhile to frankly explain to litigants that their case is most likely to be resolved through settlement, and not through third-party decision-making. Of course, the challenge for counsel is to present the concepts of shared responsibility and inevitable settlement to the client without creating the appearance of weakness. Clients justifiably expect their attorneys to be advocates and are suspicious of advice that seems to undermine the strength of their positions.

Fourth, it is critical that all parties reach the point of sharing responsibility at roughly the same time. If one party to a business dispute appreciates his company's responsibility in generating the dispute, that party is in a better position to compromise. But if that party reaches this realization before the other, there is an imbalance that

could make settlement difficult. Here, it may be necessary to candidly communicate with opposing counsel to increase the likelihood that the parties have complementary perceptions of their positions – one common outgrowth of such communication is an agreed-upon method for resolving disputed factual issues through a series of meetings between key players, or for resolving disputed legal issues through cross-motions for summary judgment.

Finally, we must recognize that acknowledging shared responsibility is an active method of dispute resolution. It will not happen spontaneously. Counsel should seek opportunities to explore acceptance of responsibility with their clients. Counsel should talk to each other. Judges and arbitrators can aid the process through settlement conferences. And a mediator may be in the best position to realistically and impartially promote the concept of shared responsibility. Indeed, a well-run mediation where parties acknowledge shared responsibility often focuses on realistically measuring degrees of responsibility and translating those into terms of a settlement. Therefore, because a litigant will rely heavily on counsel's advice and will respond more favorably to consistent, sound advice, it is often a mistake for counsel to focus entirely on winning, especially if winning means a complete deflection of responsibility. Providing comprehensive and valuable legal advice includes searching for opportunities to encourage shared responsibility from the outset of the case.

Contrary to popular belief, litigation is not warfare. It is society's "last-ditch effort" to resolve stubborn, often complicated disputes. Where meetings, lunches, phone calls, or e-mails fail, litigation succeeds – by focusing attention and issues; by raising the stakes; by making the dispute expensive, time-consuming, unpredictable and aggravating. In the crucible of the judicial system, we find solutions. As a replacement for a duel at 20 paces, litigation represents a significant improvement. But litigation is not usually won or lost. As the layers of the litigation onion are peeled back, litigants realize that somewhere in the range of outcomes between winning and losing is a result they can live with. And it is critical that as these outcomes are evaluated, litigants and their counsel understand that compromise naturally evolves from acceptance of responsibility.

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