Every Case Is a Winding Road

By Victoria Pynchon

I have a confession to make. I am about to become embroiled in litigation. Though I preach the religion of negotiated resolution, I've nevertheless hired litigation counsel to assert my rights and pursue my remedies.

This is one of those moments when the rubber of our ideology meets the road of personal circumstance, the moment we are called upon to decide to walk our talk or take the more familiar road.

For more than 30 years — first as paralegal, then as a law student and finally as a commercial litigator — I'd been swimming in the waters of legal rights and remedies. The adversarial ocean had become so familiar a habitat that it rarely occurred to me that I was under the surface. One day toward the end of my first year of mediation practice, a much more experienced friend hooked me by the cheek and threw me on the deck of his ship, where I was gasping for air.

He'd asked me to co-mediate a will contest without the benefit on my clergy — lawyers with experience in the field. The "fish out of water" conversation that ensued went something like this:

Joe Mediator: "The family doesn't want to hire a lawyer. They just want to mediate."

Vickie: "But I know absolutely nothing about wills, trusts and estates. The parties need to talk to a lawyer first to learn their rights and remedies."

Joe: "You still don't get it, do you?"

Vickie: "Get what?"

Joe: "It's not about rights and remedies. It's about interests."

Vickie: "But how can they evaluate their interests without knowing their rights and remedies?"

Joe: "Because they're not interested in what the law says — they want to do what they believe is right for them as a family under the circumstances."

These people wanted to resolve a legal dispute without knowing their legal rights? Were they nuts? I understood "interests" — they were all the rage in ADR circles — the desires, fears and needs of the parties that drove them to take legal positions. Sometimes those interests were non-economic — the need for revenge, the desire to be personally accountable, the fear of failure, the hope for forgiveness and reconciliation. Others, though economic, could not be remedied by way of damages — better access to foreign markets, for instance, or wider distribution chains; the acquisition of better manufacturing processes; or, the retention of executives with "pull" in Washington. But all of those matters were secondary to legal rights and remedies, weren't they? You had to know what your rights were.

I was stubborn in my refusal to "get it" until I recalled the divorce that ended my first marriage. I'd refused advice from my attorney colleagues, insisting that I could handle the matter myself ("a fool for a client"). Why? Because community property laws didn't govern our relationship, I said. No, we didn't have a pre-nuptial agreement. Yes, I did realize I was therefore entitled to half of the community property and probably spousal support, at least until I got back on my feet again. So why was I being so difficult?

I was being "difficult" because my husband and I had long ago agreed that he would use his own savings to put himself through graduate school (which he did) and I would use my savings to put myself through law school (which I did). This was part of a larger agreement to keep our finances separate even though we were married. We handled money differently — a lot differently — and unless one of us experienced a dramatic transformation, we believed that marrying our finances could destroy "us." Right or wrong, we kept our word until our marriage fell victim individual lives that were veering away from one another in unexpected directions.

Though well aware of my legal position, enforcing my rights didn't matter as much as keeping my promises and in having a resentment-free post-divorce relationship. Though we didn't have children, we did have mutual friends. We didn't want to divide them up between us as we fought for the stuff we'd acquired in seven years of marriage.

So, I rented furniture and moved to a one-bedroom apartment in a low-income community in South Sacramento. I was poor again for a time and emotionally bereft, of course.

But I hadn't added a legal dispute to my troubles. I felt as honorable as anyone ever can in severing a relationship that had contributed so much to the emotional strength I needed to prepare for, commence, and complete law school, as well as to begin legal practice.

I knew deep in my heart that I could not have accomplished any of these goals without my husband's love and his undeviating belief in my potential.

Those beliefs, those feelings, those moral obligations are not rights. They are interests.

So I did, after all, understand why the family with the will dispute did not want legal advice, or the pressure of a rights/remedies analysis, in resolving their highly personal and entirely unique conflict. If they wanted to pursue and satisfy their idiosyncratic needs, desires and fears rather than their rights and remedies, they deserved a mediator who could help them do so without interference or judgment.

Which takes me back to my own decision to pursue legal action and to the question whether pursuing my rights and remedies is at odds with the principles of dispute resolution I champion as a mediator.

My job as a mediator is not, after all, to diminish the importance of the law upon our contractual and personal relations. I believe in, support and defend with great ferocity the primacy of the rule of law in America. The parties' causes of action; denials and affirmative defenses, as well as the "facts" relevant to each, comprise a critical part of "dispute package" that attorneys and clients bring to me for assistance. I haven't abandoned the rich tradition, heritage and precedent of the law. What I have done is to expand my understanding of the conflicts every legal action presents. No longer constrained by "relevant" facts, I am able to open up the parties' dispute to explore the "irrelevant" factors that ignited it in the first instance; the communications or silences that flamed its embers; and, the activities that might reduce or even put out the conflagration.

I realize now, as I did at 30, that "irrelevant" facts and principles sometimes run contrary to the law. From four years of mediation practice, I've learned that these irrelevancies often lie at the heart of a client's insistence to pursue litigation that is not worth further expense; to reject an offer counsel believes to present a better opportunity than trial; or, to reject legal advice to put a significant percentage of litigation costs on the table.

They are the "key" to making a more rational decision when the parties' interests in ancillary goals — like revenge — prevent clear thinking.

As I sift through the relevant facts and applicable law of my own "justice" problem, I am mindful of my own and my family's non-monetary interests — the strain litigation would place on me, for instance, and the distraction it might be to more fruitful pursuits. Still, there are some wrongs that demand legal redress and wishing conflict away will not make it so.

For myself only, I first want to know my rights. Then I'll do what I think is right regardless of them.

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