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PERSPECTIVE

The Heisenberg effect in mediations

By John H. Sugiyama

A mediation seldom follows a script. An initial offer may be immediately accepted. Or, more often, offers and counter-offers may be repeatedly rejected. Experience suggests that the latter frustrating sequence, rather than the former serendipitous moment, will more likely occur. The attorney thus must be prepared for the possibility that a process of exchanging incremental concessions will not achieve settlement.

A party ultimately may decline to be the last to yield, to be the last casualty before the armistice. Whether the product of hubris or indecision, the result will be the same: impasse in the negotiations.

In this situation, any reformulation of previously presented legal arguments and factual assessments will not prompt resolution. Moreover, treatises about the art of negotiation will not reveal any new measures for overcoming a breakdown.

In a fanciful mood, the attorney may welcome guidance from any source that could be helpful. The Bible's lessons about the wisdom of Solomon may come to mind. Or Don Corleone's deathless line about making "an offer he can't refuse" more likely will be imagined. But the options preferred in biblical times or in the underworld are seldom available in contemporary mediations. A sword to split the difference or a revolver to project menace should, as a matter of common courtesy, be checked at the door rather than carried to the bargaining table.

The attorney consequently may need to look far beyond the legal profession for ways to achieve settlement. In endeavoring to do so, the attorney may find inspiration

in Werner Heisenberg's uncertainty principle. In its original discipline of quantum mechanics within the study of particle physics, this principle embodies layers of analytical complexity. But it has also found elegant linguistic application in diverse realms within the behavioral and social sciences. Through the latter transformation, it has been extended to mediation advocacy, often as an intuitively conceived measure without recognition of its lofty scientific origins.

Heisenberg's Uncertainty Principle

Heisenberg was a theoretical physicist who was awarded the Nobel Prize in Physics for, as termed by the Royal Swedish Academy of Sciences, "the creation of quantum physics." In a groundbreaking paper published in 1925, he set forth an exegesis on that area of physics in a mathematical description of the motion and the interaction of subatomic particles.

Following his initial pioneering work, Heisenberg published a paper in 1927 on what came to be known as the uncertainty principle. He established that, as a fundamental limit, the accuracy of the values that may be attributed to pairs of physical qualities of a subatomic particle cannot be determined simultaneously. For example, an electron may be detected through its interaction with a photon. But that contact with the photon will affect the electron, leading to uncertainty about either the latter's position or its momentum.

Over time, the uncertainty principle has found application, albeit without its mathematical structure, in areas of academic

study apart from physics. The latter formulation has come to be termed the Heisenberg effect or the Heisenberg observation principle. In the future, as envisioned in Star Trek, the effect or principle will be manifested through the Federation's Prime Directive.

The Heisenberg Effect

In its most general expression, the Heisenberg effect refers to situations in which the act of observation alters the subject under observation. Observers, by their presence alone, influence what they observe. The observed will change their behavior in ways that otherwise would not have occurred if they had remained unaware of their observers.

In the judicial context, the Heisenberg effect becomes apparent when an attorney interacts with opposing counsel or the court, or both. If the client is present, the attorney may make an argument in a particular way. If the client is not present, the attorney may make the same argument in a different way. The attorney may perceive that the client may have certain expectations about the presentation, as if it were a cinematic production. The attorney must then balance perceived client expectations against an awareness of the kind of presentation that may be most persuasive under the circumstances.

The Observer Effect in Mediations

Being sensitive to the effect that the observer may have on the observed could help prompt seemingly deadlocked negotiations toward resolution. In a mediation, any participant could at any time assume the role of an observer influencing the proceedings. Concurrently, any other participant

could be the one subject to behavior-altering observation. By changing the dynamics of observation and the corresponding intensity of observation, the mediator or an attorney could attempt to alter the setting so that previously unexplored proposals may more comfortably and productively be presented and discussed.

The proverbial walk around the park is a frequently invoked response to the Heisenberg effect. The mediator may separate the attorneys from their clients during a calculated recess, using the time to walk casually with the attorneys in tow, engaging one and then the other in conversation, eventually leaving the attorneys to talk between themselves. Stories abound about how, with paths

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explored together, attorneys with seemingly irreconcilable positions managed to resolve their disputes when given the opportunity to express themselves in amicable, private conversations.

The mediator's proposal is another response grounded in an awareness of the Heisenberg effect. Attorneys, or more particularly their clients, may at any moment during negotiations hesitate to accept a proposal offered by an opposing party. The client may perceive that the opposing party seeks some advantage, not directly ascertainable but nevertheless probable, by making the proposal. Thus, to avoid giving the opposing party that unascertained but probable advantage, the client may conclude that rejection is the safest response to the proposal.

The supercomputer in the now-classic movie "WarGames," starring Matthew Broderick and Ally Sheedy, voiced a similar view when confronted with a game simulation in which stalemate was the projected outcome. Ultimately unable to prevail in countless permutations of tic-tac-toe, the supercomputer intoned: "A strange game. The only winning move is not to play. How about a nice game of chess?"

In the same way, the participants in a mediation, eventually wary of conceding too much, may perceive that their best alternative is to decline further negotiation. Faced with such unwillingness to continue by at least one party, two variations of the mediator's proposal may be invoked.

Under a direct approach, the

mediator, having ascertained the divergent goals of the respective attorneys and parties, may propose a resolution that allows them to perceive that their interests have been achieved, with neither side gaining more than the other. Under an indirect approach, an attorney, having sensed the opposing party's reflexive rejection of anything offered by the other, may suggest that the mediator present a new proposal without attribution of its source.

For both approaches, the Heisenberg effect will remain operative due to the presence of the mediator and the other participants. Nevertheless, the sense of apprehension that the attorneys and parties may feel in being presented with any new proposal may be lessened if they believe

that it originated from a neutral source uninfluenced by adversarial considerations.

Experience, tempered by more experience, offers the surest guide to successful mediations. On occasion, however, parties may become entrenched in their respective positions, unwilling to advance or entertain any further proposals. To avoid the consequence of such intractability, the mediator and attorneys may seek guidance from previously unexplored sources to achieve resolution. Historical accounts and literary sources often inspire creative thought. Films and plays similarly animate the imagination. To these well-recognized founts of intellectual stimulation may be added the work of Werner Heisenberg and his uncertainty principle.