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PERSPECTIVE

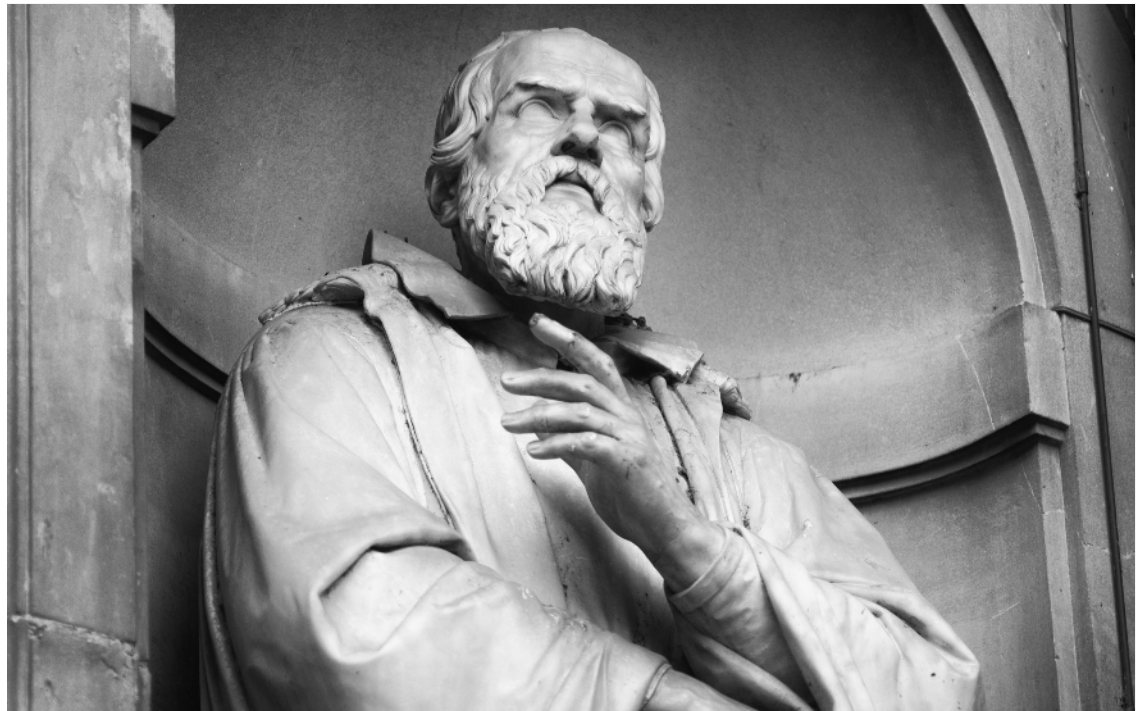
Eppur si muove

By Greg Derin

Although the date has been questioned, the historic utterance and context have not. Forced during the Inquisition to recant his claim that the earth moves around the sun, rather than the opposite, Galileo Galilei famously proclaimed *eppur si muove* – and yet it moves. Galileo coupled his recantation with a statement of fact, satisfying his Inquisitors, but preserving his honor.

Galileo had long been the subject of deep controversy, pitting science against religion. He was finally subjected to the Inquisitor's examination, likely around 1633. He had already published many of his most controversial theories. After he recanted, a period of house arrest followed, during which he published *Two New Sciences*, in which he summarized 40 years of his labor – a work credited by some as leading to his recognition as the 'father of modern physics.' Would the world have been different had Galileo not survived the Inquisition? Did his ambiguous and manipulative recantation help him escape and finish his life's mission?

There are times that conscience meets practicality. We rightly admire those who, by commitment and strength of character, do not waiver from principle and follow their conscience. The strength and sacrifices of modern leaders, such as the recently celebrated Rev. Dr. Martin Luther King, Jr., remind us that only through dedicated moral leadership is social progress achieved. But what lesson does Galileo's manipulation of his Inquisitors teach for the practical sciences?



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Eppur si muove – and yet it moves ... There are immutable realities in our lives, whether we are prepared to focus upon them or not. As a mediator of complex commercial disputes, I frequently see participants struggle with a recurring dilemma. As negotiation progresses, Party A takes a position to which Party B objects as challenging, perhaps unacceptable. As I probe, it becomes clear that the challenge is not that Party B would be harmed by accepting the proposal; rather, s/he or it is offended that Party A might profit by receiving something to which they are not perceived to be entitled. Whether it involves an insurer paying Party A 'too much,' or allowing Party A to claim ownership to something, albeit of no real value to Party B,

it just feels wrong. It offends the "conscience" of Party B, who does not wish to become complicit in allowing Party A to profit by their wrongdoing.

Good mediators will always work to achieve a "win-win." Rejecting the notion that a good settlement is one in which everyone feels some pain and walks away feeling unhappy, mediators attempt to 'expand the pie' so that everyone has more, rather than engage in a purely distributive bargain which carves up a fixed asset. But often that is not possible. The parties might not be interested in creative solutions, or the matter may not lend itself to integrative bargaining.

In such cases, after much back and forth in the negotiation, I am left to ask my Galileo question: does

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the earth not still move around the sun? Or as I would actually state the proposition: 'What is best for you, Party B? Regardless of the outcome for Party A, is this result acceptable for you to end this dispute, move on, and accomplish your goals (as Galileo did to the great benefit of society)?' It is at times a difficult conversation and a bitter pill to swallow. Steeped in litigation, there may be numerous variables to consider that impact the decision – the cost of litigation, jeopardizing insurance coverage, the risks of loss, public perceptions, business decisions, including with

respect to discouraging future lawsuits. But in its purest form, asking if it still moves, if the stars align for Party B regardless of the outcome for Party A, is asking Party B to focus on what *really* matters.

It takes courage to settle cases. Often parties must change course after confronting uncomfortable facts which differ from what they believed when they engaged in litigation. After incurring significant "sunk costs," which are not being recovered in a settlement, and are now understood to be unlikely to be recovered in the litigation, hard realities set in. Parties will look for

someone to blame, and the cast is large. One's adversary tops the list. But in retrospect, did someone make a mistake that led to this problem? Should insurance have been procured? Did counsel give questionable advice that resulted in the dispute, or that encouraged litigation which has not proceeded as anticipated?

When trying to help parties move beyond their conflicts and restore them to profitable and secure paths, mediators focus on the future, and try to avoid entrenchment in blame and recrimination. It is a rare mediation that ends in

reconciliation and forgiveness, but not at all rare to end with parties ecstatic to end their conflict and embrace the future. In 22 years of mediation, I have had my share of hugs and even adversaries resolving disputes by entering into new ventures together. But it all begins with each party focusing on what is right for them. To do so, they must each put aside what the other party gains, which may initially offend them.

Galileo was right. There are immutable certainties, but they need not blind one to securing one's future success.