

Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation

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ABSTRACT

Lawyers who represent their clients in mediation may often find themselves at odds with their mediators. The mediators may be trying to create new value for the parties, beyond a simple compromise of their legalistic claims and defenses. They may be seeking to repair or improve the parties' relationship, or they may wish to lead the parties to greater mutual understanding. Lawyers, on the other hand, are more likely to engage in adversarial, legalistic bargaining, looking only to gain the most, or to give up the least, through a process of compromise. As a result, the mediators' approaches clash with those of the lawyers. The tensions are more deeply rooted than a simple difference in goals, tactics, or techniques; they arise from the different cognitive frameworks about the nature of conflict and the ways to deal with it that mediators and lawyers bring to their meeting. These cognitive frameworks, often operating tacitly and without an actor's conscious awareness, create different and

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competing perceptions among mediators and lawyers about what is relevant for the process and what is appropriate for them to do. The mediation literature has articulated four different, if overlapping, cognitive frameworks for dealing with conflict in a mediation setting: distributive compromise, creating more value for all, changing relationships, and increasing the mutual understanding of the parties in conflict. Mediators may move through all four, though they might tend to identify themselves with one in particular. Lawyers, however, tend to be limited to the first: distributive compromise.

Understanding the cognitive frameworks shows how lawyers can operate congruently with mediators, rather than in opposition to them. The cognitive frameworks are versions of ways that people—lawyers included—ordinarily have available to deal with conflict. There is nothing inherent in “legal thinking” that prevents lawyers from shifting into non-adversarial frameworks in mediation. However, it is not easy to shift from one cognitive framework to another simply by wishing to do so. The different frameworks are characterized by different topics of conversation. Whether one talks about what happened in the past, what will happen in the future, the legal or moral meaning of the event, the parties’ feelings or their relationship, or how they intend to move into the future, the topic will suggest which particular cognitive framework is in use, and may influence the other participants to engage in the same framework.

INTRODUCTION

The growth of mediation has significantly challenged the lawyer’s craft of representing clients. What should a lawyer think and do while appearing with a client at a mediation session? The actions appropriate for a trial or similar adjudicatory hearing may be largely out of place before a mediator. In mediation, satisfaction of the client’s goals can only come about through voluntary agreement by the parties to the dispute, not through persuasion of a neutral decision-maker of the rightness of one’s cause.¹ Nor will the actions

1. Persuading the mediator of the rightness of the client’s cause can be part of satisfying the client’s goals, but only in an indirect manner. Despite her formal impartiality, a mediator who can see the correctness or virtue of the client’s claims may engage in a variety of actions

most appropriate for bilateral negotiation always serve the interests of the client. The presence of the mediator changes the dynamics of the negotiation process. His or her participation can neutralize the moves that might be most effective in simple bilateral negotiation. However, mediation is an opportunity as well as an obstacle. It gives the lawyer options that are unavailable in adjudication and rare in negotiation. Lawyers need to know how to seize these opportunities.

The mediation field is just beginning to articulate what lawyers should think and do while representing clients in mediation. We have lists of dos and don'ts, and a wide collection of war stories and suggestions.² Some scholars have developed systematic approaches to the problem, primarily focusing on using mediation to overcome various strategic, cognitive, and emotional barriers to negotiated agreement.³ Others urge lawyers to use mediation to develop enhanced settlement proposals that would serve the interests of the parties better than simple compromises of bargaining positions.⁴

that could influence the other party to come around to what the client wants. For instance, the mediator might subtly or not so subtly indicate her views on the legal merits of the client's claims, thereby inducing the other party to make some concessions in his bargaining positions. The mediator might indicate her views regarding the unfairness with which the other party treated the client, or the fairness of the settlement terms proposed by the client. Even without an explicit opinion, such views might be subtly conveyed through tone of voice, facial expressions, body language, and control of the agenda of discussion. As useful as such persuasion might be to the client, the lawyer's persuasion of the neutral mediator is still only one step in the process of persuading the other party to do what the client wants, not an end in itself.

2. For a recent and wide-ranging collection of advice to lawyers about mediation, see generally HANDBOOK ON MEDIATION (Thomas E. Carbonneau, Jeanette A. Jaeggi & Sandra K. Partridge eds., 2006), including, among others, articles such as Joel E. Davidson, *Successful Mediation: The Dos and Don'ts*, in HANDBOOK ON MEDIATION, *supra*, at 71; Karin S. Hobbs, *Attention Attorneys! How to Achieve the Best Results in Mediation*, in HANDBOOK ON MEDIATION, *supra*, at 177.

3. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 297–331 (1999) (reviewing recent cognitive science about negotiation and decision-making for insight into how lawyers representing clients in mediation can be more effective).

4. Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, 112–32 (2005); HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 13–65 (2004) (setting out the goals and methods a lawyer representing a client can use in mediation to capture opportunities for value-creating resolutions). For an approach to advocacy in mediation that is comprehensive and insightful, but perhaps somewhat less systematically conceptual, see generally JOHN W. COOLEY, *MEDIATION ADVOCACY* (1996). “[T]he role of the mediator

These are sound developments, but the field has not yet reached the stage of conceptual maturity. Trial practice has received a much more thorough treatment, effectively putting together both general concepts and advice about specific actions.⁵ Negotiation by lawyers, drawing on extensive and continuing research in economics and psychology, has also received extensive treatment that is both conceptual and pragmatic, and quite different from our models of trial practice.⁶ Representation of clients in mediation draws on both persuasive legal advocacy and artful negotiation, and yet does not fit well with either. It seems to be terrain in which the techniques of trial practice and the techniques of negotiation collide, producing a kind of conceptual fog.

It would be desirable to burn the fog away. This Article is a preliminary attempt to do so. The task is made more challenging by the fact that good mediation theory is not unitary; it does not set out a single description of effectiveness. Instead, it encompasses a seeming patchwork of distinctive approaches, sometimes overlapping and sometimes conflicting. Good legal representation requires the flexibility to deal with such a variety of mediators and approaches to mediation.

The varieties of mediation are neither random nor infinitely variable, however. The broad variation among mediation styles masks an underlying structure that arises from four qualitatively distinct ways in which we understand and deal with conflict. While they might be spelled out explicitly, I suggest that, for the most part, these four different concepts operate tacitly, without our conscious awareness or control. We might call them “cognitive frameworks” or “mental maps.” They automatically give the parties, mediators, and lawyers a coherent sense of what words and actions are appropriate. They might also be termed “rhetorical tropes,” different formulations

involves instinctive reactions, intuition, keen interpersonal skills, and sensitivity to subtle psychological and behavioral indicators,” as well as logic and rationality. *Id.* at 4.

5. See ROBERT P. BURNS, *A THEORY OF THE TRIAL* 4–5 (1999); THOMAS A. MAUET, *TRIAL TECHNIQUES* (4th ed. 1996); ALBERT J. MOORE ET AL., *TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES* (1996).

6. See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2004); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2d ed. 2006); *THE NEGOTIATOR'S FIELDBOOK* (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

of how people see the world and understand the appropriateness of certain actions. Conflicts arise between lawyers and mediators when they mediate using different cognitive frameworks.

Understanding that modes of mediation arise from different and potentially conflicting frameworks raises important questions for lawyers. Can lawyers move from framework to framework, or are they limited to a “lawyerly” framework that will remain in conflict with those that some mediators use? Beyond avoiding or managing conflict between lawyers and mediators, lawyers may benefit their clients by taking advantage of the various available frameworks. Precisely because mediation can provide such a rich variety of alternative frameworks for dealing with conflicts and disputes, it offers benefits to clients and to our system of disputing, beyond those that adversarial adjudication or even distributive, positional bargaining can provide.

I will discuss the frameworks in more detail in Part I. By way of introduction, I will briefly summarize them here and then illustrate them with some stories from mediations. In the first of the four, the participants use mediation as an opportunity for the parties to negotiate in a distributive, positional manner. I will call this a “Distributive” framework. It is by far the most familiar framework. It is also the most “lawyerly” one, the one in which most lawyers are inclined to work and the one that most lawyers would recognize. The second type of framework is not merely distributive. It uses mediation to uncover the parties’ underlying real world interests and needs, and uses those interests to craft agreements that will provide more tangible benefits to the parties than simple distributive negotiation. This is a “Value-creating” framework. The third type, a “Relationship” framework, treats the prime purpose of mediation quite differently; in this framework, mediation is an opportunity to repair or improve the parties’ relationship. I will call the fourth category “Understanding.” It uses mediation as an opportunity for the parties in conflict to increase their understanding of themselves and of those who are enmeshed in conflict with them. The parties use their increased understanding to decide what to do about their conflict. Whether they reach a specific agreement that resolves their dispute is less important than increasing their mutual understanding of it.

In Part II, I describe the concept of frameworks in more detail. I show how the conflict between the lawyers and the mediators depicted in the examples arises from the fact that they are using different frameworks. They are probably not “seeing” things in the way the others in the room do. Part II also compares these four frameworks with different conceptual taxonomies of conflict management that have been proposed and described by others.

Urging lawyers to inhabit these alternative frameworks raises the question of whether lawyers *can* think in the alternative frameworks in the first place. Their legal training and experience, their sense of role, and the logical and distributive nature of much legal work⁷ may make it mentally difficult, if not impossible, to embrace any of the alternative frameworks. In Part III.A, I discuss why legal reasoning and lawyers’ mental habits should not disable them from adopting one or more of the alternative frameworks.

In Part III.B, I discuss *how* lawyers can bring the alternative frameworks into the mediation room for themselves. Because frameworks are a form of tacit knowledge, operating often without conscious awareness or control, it may be difficult for lawyers to intentionally or knowingly put them on or take them off like a suit of clothes. I suggest a more accessible way for lawyers to enter different frameworks. The guideposts are the subject matters discussed during the mediation. Certain subject matters are more distinctly part of some frameworks than others. By observing the kinds of subject matters discussed in a mediation, a lawyer can key into which frameworks the other participants may be using. By bringing up certain critical subject matters herself, or by continuing to discuss those subject matters in more depth and breadth as a mediation progresses, a lawyer can influence the others to maintain or change their thinking, and either continue or shift the cognitive framework. I identify seven key topics of discussion. They are:

7. Legal reasoning and distributive, positional negotiation have analogous logical structures. Both involve categories with dividing lines between them. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 44 (1982) (providing a description of lawyers’ “philosophical map”); see also *infra* notes 78–79 and accompanying text.

1. What happened and what it meant;
2. What can or will happen in the future;
3. Law and legal rights;
4. Fairness and moral rights;
5. Relationship;
6. Feeling; and
7. What someone wants, what they can get, and how they can get it.

No subject matter belongs exclusively to one of the frameworks. Some can appear prominently in several, and the particular content that is discussed within a subject matter may vary in different frameworks. They are a suggestive diagnostic tool for identifying a framework in operation, not a definitive one. Similarly, if a lawyer or mediator were to move the discussion into one of these subject areas, or to continue talking in a subject area when the others seem ready to change the subject, it will not guarantee that the mediation or its participants will adhere to the particular framework associated with the subject matter. However, the subject areas do provide a reasonably accessible way for lawyers to try to guide the mediation and the other participants into a desired framework.

I. FOUR SCENES FROM A MEDIATION

To describe the ways in which lawyers can operate at cross purposes with mediators and mediation, I will set out four different mediation incidents, inspired by a recent book describing a variety of mediations.⁸ Each incident highlights a different model or framework of mediation, and each produces a different kind of conflict with a lawyer.

8. *See generally* JEFFREY KRIVIS, *IMPROVISATIONAL NEGOTIATION: A MEDIATOR'S STORIES OF CONFLICT ABOUT LOVE, MONEY, ANGER—AND THE STRATEGIES THAT RESOLVED THEM* (2006). I have used disputes and some of the negotiation dynamics described by Krivis, but I have imagined actions by lawyers in the mediation that Krivis does not describe. Krivis focuses on what mediators have done in the various situations he describes; I add the accounts of lawyers to change the focus to what lawyers can and should do in mediation.

Incident 1—The Automobile Accident

This dispute arose from an automobile accident that occurred when the defendant's car, turning left at an intersection, collided with the plaintiff's oncoming car. The plaintiff alleged that the defendant had negligently made the left turn without looking. The defendant alleged that the plaintiff had been speeding. The plaintiff suffered several broken ribs and some bruises and sprains and experienced some residual stiffness. He demanded \$1 million in damages. The defendant's lawyer, however, offered only \$3,000 to settle the personal injury claims, giving as reasons the following facts: under comparative negligence, the plaintiff was probably more than 50 percent responsible because of his speeding and thus entitled to nothing; the plaintiff's medical insurance had paid for the plaintiff's medical expenses; and the plaintiff's personal injury lawyer was known to make extreme demands in settlement negotiations, only to settle on the eve of trial after making huge concessions.

The mediator sought to deal with the huge gap by meeting with each side separately (commonly called caucusing) and expressing her opinion to each that their settlement positions were way out of line, were not supported by the facts, and did not reasonably reflect the likely outcome at trial. In her view, the extreme settlement positions were taken only as a hardball negotiating tactic of dubious effectiveness. Despite the mediator's interventions, the lawyers refused to change their settlement positions.⁹

Did the lawyers do the right thing? In this instance, they were negotiating with highly positional strategies within a distributive framework. The framework was distributive in that the lawyers were

9. See KRIVIS, *supra* note 8, at 147–55. In Krivis's story from which this account is adapted, the plaintiff's lawyer initially refused to disclose medical information showing that the defendant was legally blind. The defense lawyer was not yet aware of the information, and the plaintiff's lawyer wanted to save it for surprise at trial. The mediator persuaded the plaintiff's lawyer to disclose the information to the defense lawyer, thus substantially increasing the defendant's settlement offer. KRIVIS, *supra* note 8, at 154.

negotiating about a single issue: the dollar amount of the settlement payment to the plaintiff. That issue required a constant sum distribution: each dollar more to the plaintiff was an equivalent dollar less to the defendant's insurance company. The lawyers' strategies were positional in that their work consisted primarily of taking negotiation positions—\$1 million and \$3,000, respectively—with the aim of inducing large concessions from the other side while conceding as little as possible themselves. The lawyers seemed to embrace deadlines as a tactical negotiating tool; they expected that the other side would refrain from making the largest concession in their position until trial was upon them.¹⁰

The mediator was also operating in a distributive framework. She was treating the size of the settlement payment as the only issue to be negotiated, and she accepted that the settlement funds were to be distributed in accordance with the negotiating positions taken by the lawyers. Within that framework, she was trying to speed up the process of making mutual concessions to get to an agreed settlement number well before the eve of trial and wean the lawyers from their highly competitive positional tactics. The conflict between the mediator and the lawyers was about how to play the tactics of the positional, distributive game.

Incident 2—The Real Estate Purchase

A religious school negotiated to purchase a building. There was some written communication between the school and the building owner, but before a formal real estate sales contract was signed, the owner signed a sales contract for a higher price

10. See LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 34–35 (3d ed. 2005) (describing research showing that the rate of negotiation concessions increases as negotiators near their final deadlines, and that negotiators believe deadlines are a strategic weakness); see also William Zartman, *Timing and Ripeness*, in *THE NEGOTIATOR'S FIELDBOOK*, *supra* note 6, at 143, 143–44.

The lawyers in this example may well have been using the mediation primarily as a device to obtain information from the other side, a kind of free discovery, rather than as a strategic step towards immediate settlement. If so, they had little interest in reaching an agreement at the mediation itself. However, they were probably still operating in a distributive framework, using mediation to gather information so that they might seize the largest possible share (or give up the smallest possible share) when the matter is settled, as it probably will be, later and closer to trial.

with a commercial real estate buyer. The school's lawyer claimed that the school had a binding agreement to purchase the property. The owner's lawyer alleged that any communication between the school and the owner, whether oral or written, was no more than preliminary negotiation and was not legally binding.

At a mediation of the dispute attended by the school, the building owner, and the third party buyers, the mediator sought to find out what plans the third party buyer had for the property. The buyer's lawyer said that the plans were "private information" and told the buyer not to discuss them.¹¹

Did the buyer's lawyer act effectively? Like the lawyers in the first incident, the buyer's lawyer here was apparently operating in a distributive, positional framework. Within that framework, disclosure can be risky, and might be used by the other party for tactical advantage. Information about the buyer's plans might suggest that the buyer's expressed settlement position was a bluff, for instance, and could undermine the buyer's negotiating credibility. The disclosure of information might also give the school some extra bargaining leverage in ways not clearly foreseen.

Unlike the first incident, however, the mediator here was not simply trying to speed up the exchange of concessions. Instead, the mediator can be understood to have been operating in an entirely different framework: value-creating¹² or interest-based negotiation. This framework conceives of negotiation and mediation as opportunities to expand the pie, not just to distribute it.¹³ The

11. See KRIVIS, *supra* note 8, at 114–23. In the case that inspired this example, the school was a religious one and the mediator wore a kippah, even though he was not an observant Jew, so that he might elicit trust from the school's director. That effort seemed to work. The conflict was resolved by completing the sale of the property to the new buyer, who then leased the property to the school. *Id.* I have added the objection from the buyer's lawyer, which does not appear in Krivis's account. Such an objection is consistent with a distributive, positional approach to negotiation, rather than one based on the parties' underlying needs. In a positional, distributive approach, it is important to conceal information that could damage one's negotiating position.

12. DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 88–116 (1986).

13. *Id.* at 89.

mediator was looking for greater substantive efficiency, trying to find or invent exchanges that would make at least one party better off than they would have been with no agreement, while at the same time not diminishing the agreement's value to the others. The key is to identify interests of the parties that are complementary and not entirely in conflict. By understanding their underlying needs and interests, the parties can "invent options for mutual gain."¹⁴ The mediator in this instance asked about future plans to see if, in some way, the plans of the new owner might be satisfied without requiring the school to give up its needs.¹⁵

Incident 3—The Car Wash Loan

The plaintiff and the defendant had known each other for several years, attending the same church and seeing each other at their children's athletic events. The plaintiff loaned the defendant \$30,000 to purchase and operate a car wash. When the defendant failed to repay as provided in the loan agreement, the plaintiff brought suit.

At the mediation, the mediator began to ask about how the plaintiff and defendant came to know each other and what kind of contact they had apart from the loan. The plaintiff's lawyer intervened, stating that the questions were irrelevant to the case at hand. She asserted that the plaintiff had a strong case, that she—the lawyer—was hired to collect the debt, and that the

14. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* 56 (2d ed. 1991).

15. In the case from which this example is drawn, the new owner did not immediately need the building for another use. He was thus in a position to take title and then rent the property to the school. The new owner's delayed need could have been used by the school to drive a harder positional bargain; the new owner's demand for immediate possession could be seen as a bluff, giving the school less need to compromise any dollar settlement demand. But the complementary nature of the needs—the school wanted to use the property immediately, and the new owner only needed it later—opened the door to an agreement that capitalized on the difference. The interests of both parties were satisfied without having to decide or compromise on the issue of who was legally entitled to the property, or how many dollars would be required to get the school to drop its lawsuit. See KRIVIS, *supra* note 8, at 114–22.

mediator was just trying to get the plaintiff to make an unnecessary concession for the sake of “friendship.”¹⁶

Here, again, the lawyer was operating in a positional, distributive mode, looking to maximize the amount of the financial settlement. She expressed her concern that, out of friendship, her client would make a concession that was not required either by the legal strength of the case or by the negotiation dynamics. Was she acting appropriately for a mediation?

This mediator was operating in yet a different framework. Rather than attempting to speed up the positional negotiation dance or trying to create value by working with underlying needs and interests, the mediator was exploring the relationship between the parties. She could have been asking herself how it happened that two people with both a social and a business relationship ended up in a situation in which they could not resolve the issue of debt payment. Was there something about the way they related or communicated that caused or perpetuated the conflict? Looking forward, the parties would probably continue to have some kind of relationship, even if their business arrangements were terminated. Would that relationship be a satisfactory one, or would acrimony from their dispute unnecessarily poison it? Could the mediation be an opportunity for clarifying and improving the relationship between the disputants?

Incident 4—The Promotion

A fifty-two-year-old employee failed to get a promotion and a raise. She claimed that she was denied the promotion because of her age and because she had complained about certain company practices that she thought were immoral and possibly illegal. She also claimed that because of her age, her supervisor had failed to assign her work that would demonstrate her competence.

16. See KRIVIS, *supra* note 8, at 92–113. In Krivis’s story, the plaintiff’s lawyer objected to talking about relationships, but shrugged, gave in, and fell silent when the mediator interested the creditor in preserving his friendship with the debtor. The mediator moved to a Relationship framework by closing the lawyer out of the conversation, rather than having the lawyer participate. *Id.*

The company's lawyer and the head of its human resources department appeared at the mediation. The employee's supervisor did not. The mediator had asked the company to have the supervisor attend, but the company's lawyer refused, saying that this meeting was not going to be a group therapy session or an opportunity for the employee to get free discovery.¹⁷

The lawyer was operating in the familiar distributive, positional mode. Was this good lawyering? Information is a key element in positional negotiating. Each side seeks to obtain as much information about the other as it can, while concealing information that would undermine the credibility of its commitment to a negotiating position or give the other side additional negotiating leverage. If the supervisor had spoken in the mediation, she might have revealed information about herself or about what happened that might have shown the employee's legal case to be stronger than the employee's lawyer might otherwise have assumed. With a more optimistic view of the outcome of the case, the employee would have been less likely to settle for the small amount that the defendant would prefer. The mediation was not critical for the disclosure of information; if the matter had proceeded to pretrial discovery, the employee would have been able to take the supervisor's deposition and get some of the same information.¹⁸ However, depositions cost the employee money, and she could use any money saved to pay for other pretrial preparation or to avoid the demoralizing effect of incurring large expenses along the laborious road to trial.

The mediator, however, was using a fourth framework. Rather than focusing on information about the possible outcome of a trial,

17. *See id.* at 7–18. In Krivis's account of the mediation, the defendant, rather than the lawyer, objected to having the plaintiff talk about why the discharge had been so difficult for him, fearing that such discussion would make the proceeding a therapy session rather than a settlement. The defense lawyer was willing to hear the plaintiff, however, and the matter ultimately settled. *Id.*

18. The mediation might produce more information than a deposition because a deposition is limited to what is legally relevant. The matters discussed in the mediation are limited only by the will of the participants and the mediator. On the other hand, the mediation might also produce less information, since a witness is required to answer relevant, non-privileged questions in a deposition, but can refuse to speak in a mediation.

which would be used for positional jockeying, the mediator sought to learn how the participants understood what happened, how they understood the other parties to the conflict, and how they understood themselves. In what ways did the employee and the supervisor misunderstand the other? What did each expect from the other and from themselves that created the conflict in the first place? What were they expecting now that was preventing them from managing the conflict without litigation? By increasing understanding, the mediator aimed to help the parties develop their own more effective ways of dealing with others, themselves, and conflict situations. Although the conflict was most likely linked to a web of situational factors and the expectations of others, it initially arose between the employee and the supervisor. Dealing with the conflict in this fourth framework cannot be done without the direct participation of the people present at its inception.

The foregoing scenes pit mediators and lawyers against each other. In each scenario, the lawyer operated in a way that thwarted the methods used by the mediator. In the midst of a process designed to manage conflict and resolve disputes, mediators and lawyers found themselves engaged in a conflict about the process itself. Is this conflict inevitable? Is there something about the way that lawyers think and make decisions that inevitably keeps them in the positional, distributive mode? The conflict presents a normative question as well. Should lawyers and mediators work in conjunction with each other, rather than at cross purposes? And if so, how can a lawyer do it?

In my view, the conflict is neither necessary nor desirable. Lawyers representing clients in mediation can and should be able to work with the same focus and goals as mediators. They should work congruently, but not because conflict makes people uncomfortable or should be avoided. In fact, as many mediators know, conflict is not necessarily bad; it can be used to build better situations and encourage better outcomes. One could argue that the tension between lawyers and mediators is a good thing. Rubbing a lawyer's adversarial mode against a mediator's more collaborative one might

produce something that is better than cooperation.¹⁹ However, I think that it would be better for lawyers and mediators to work congruently. Mediation has benefits for people in conflict that are substantially different from and beyond what legal adjudication and the adversary process can provide. Lawyers who cut themselves and their clients off from those benefits by adhering only to the distributive, positional ways of settling disputes leave our dispute resolution system a poorer place.²⁰

To explore how lawyers can work congruently with mediators rather than in conflict with them, we need to understand more fully the nature of the conflicts exemplified by the incidents. In my view, the conflicts do not arise simply from personal or stylistic differences between specific mediators and lawyers. They do not result from mediators and lawyers each trying to seize personal control of the situation. Instead, they exemplify more fundamental mental frameworks or schemas of conflict.²¹ The incidents can arise from basic differences between the ways the lawyers and the mediators understand conflict and what to do about it. For lawyers and mediators to work in concert, each needs to share the mental frameworks and schemas of the other.

19. BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 248–79 (2004) (arguing that there is a place for adversarial lawyers in a good conflict management process, although it seems to require that lawyers direct their efforts somewhere other than the mediation room itself).

20. See generally Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *GEO. L.J.* 2663 (1995).

21. For a sobering description of how assumptions about litigation and mediation get in the way of satisfying client needs in medical malpractice litigation, see Tamara Relis, *Consequences of Power*, 12 *HARV. NEGOT. L. REV.* 445, 446–48 (2007) [hereinafter Relis, *Consequences of Power*] (arguing that pervasive and mistaken assumptions about litigation and related actions prevent parties from obtaining the benefits that they want and that mediation might be able to provide). One might see my arguments here as trying to articulate a path between litigation assumptions and those of mediation. The task is made particularly complex because, in my view, there is not one model of mediation, but several. See also TAMARA RELIS, *PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES* 8–12 (2009) [hereinafter RELIS, *PERCEPTIONS IN LITIGATION AND MEDIATION*].

II. THE MENTAL FRAMEWORKS OF MEDIATION

Mediation theory has exploded with a mind-boggling diversity of concepts and views. Is mediation bargaining or therapy?²² Do mediators only handle the narrow issues that the parties present to them, or do they address the broader range of issues, needs, and interests that drove the parties into the dispute?²³ Is the goal of mediation to bring the disputing parties to agreement, or just to enable them to understand the other party better and become more effective in handling their concerns themselves?²⁴

I think this welter of voices can be best understood in terms of four distinct mental models or cognitive frameworks of mediation:

1. Distributive negotiation through positional methods;
2. Value-creating negotiation through interest-based methods;
3. Relationship; and
4. Understanding, which encompasses a variety of methods or approaches that focus on increasing the parties' understanding of themselves, the others in the conflict, and the situation. For lack of a single term in the literature, I will call this fourth category Understanding, although it is not limited to the

22. See, e.g., Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7, 19–20 (1986).

23. See, e.g., Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17–18 (1996) [hereinafter Riskin, *Understanding Mediators' Orientations*] (noting that a mediator's interventions can be understood as choices between more facilitative or more evaluative interventions, and between a broader or narrower definition of the problem to be addressed); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 11–26 (2003) [hereinafter Riskin, *Decisionmaking in Mediation*] (suggesting a move away from the facilitative-evaluative spectrum in describing a mediator's intervention and replacing it with a spectrum that instead runs from directive to elicitive, with the "new, new grid" retaining the broad to narrow scale in describing a mediator's choices for how to understand and address the dispute or conflict).

24. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 53–59 (rev. ed. 2005). Bush and Folger describe the most important goal of mediation and mediators to be transformative rather than problem-solving. Under this approach, the mediator does not seek a resolution of the dispute, but instead focuses on increasing each party's "empowerment" to solve their problems more effectively on their own, and improving each party's "recognition" of the other party's situation, concerns, and perceptions. *Id.*

specific, so-named “Understanding” method developed by Gary Friedman and Jack Himmelstein.²⁵

Each of these models is exemplified by the mediator’s work in one of the incidents described above. In each incident, the conflict arose from the fact that the lawyer was operating in a Distributive framework with a highly positional method, while the mediator was operating in a different framework (as in the latter three incidents) or in the same framework but at a different pace (as in the first incident). The question for lawyers in mediation is whether, in their role as lawyers for clients, they can inhabit any or all of the various frameworks that mediators use, or whether they are limited to the Distributive framework and the competitive style that each lawyer exemplified in the incidents.

By mental frameworks, I mean something different from techniques or methods or even goals. The characteristics of the four frameworks—dividing the pie through distributive gamesmanship, enlarging the pie with new options, considering and trying to improve the relationship between the parties, or giving the parties greater perspective about each other—are familiar to mediators and students of mediation. But are these simply different techniques used by mediators in a haphazard fashion according to personal preference, self-conscious goals, or a habitual response? Do mediators pick them for instrumental reasons, such as focusing on relationships to soften a party’s resistance to concessions in their negotiating position? Are the techniques best understood as arrayed across one or two continuous scales, with a mediator picking and choosing along the scale as seems appropriate?²⁶

As I use the term, mental frameworks are more distinct than haphazard techniques ranged on a continuum. I treat each as a relatively coherent mental system. Each elicits from the person

25. GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING, at xxv–xxxv (2008).

26. Leonard Riskin’s grids—whether old, new old, or new new—conceptualize mediator choices of action as sliding along several continuous scales, with no obvious breaking points. His model of a 2 X 2 matrix along two scales tells us about differences in quantity, but does not help us decide whether mediators’ actions differ in quality, or when differences in quality occur. See Riskin, *Decisionmaking in Mediation*, *supra* note 23, *passim*.

operating within it—mediator, lawyer, or disputant—a particular set of questions, statements, and interactions that make sense.²⁷ Sometimes, the framework will be apparent to an actor who can then make a conscious decision to say or do something appropriate for the framework she intends to use. Someone using a Relationship framework, for instance, may say to herself that she needs to know more about the parties' relationship, and will consciously decide to seek relevant information. Much more often, however, the mental framework operates in a tacit, unarticulated way. Information about relationships will just seem more pertinent to an actor whose thinking is structured by the Relationship framework. The actor will want to seek out more information about relationships even without making a conscious decision to do so, and will perhaps not be even fully aware of what she wants to know or why. The Transformative approach fostered by Robert Baruch Bush and Joseph Folger,²⁸ a part of what I call the Understanding framework, is challenging to many mediators and lawyers precisely because it engages a different framework of thinking—one that is both explicit and tacit—than the Distributive framework that many mediators and most lawyers inhabit. The Understanding framework, as exemplified by the Transformative model, is qualitatively different from the Distributive, Value-creating, and Relationship frameworks.²⁹ Whether they consciously articulate it or not, it is obvious to transformative mediators that the terms of possible resolution are of minimal importance. At most, the terms become relevant late in the process, and arise from the parties' own decision to use their greater empowerment and recognition to structure a specific plan for what to do. For people operating in a

27. This kind of mental structure is sometimes called a "schema" or "script." For a study of mediator-like ombudspersons that uses the concept "Working Mental Model" to describe the schematic mental blueprints that practitioners use, see Kenneth Kressel & Howard Gadlin, *Mediating Among Scientists: A Mental Model of Expert Practice*, 2 NEGOT. & CONFLICT MGMT. RES. 308, 311–12 (2009).

28. See BUSH & FOLGER, *supra* note 24, at 45–59.

29. *Id.* at 45. "[W]e do not believe that [the different approaches to mediation] can be combined or integrated, at either the theoretical or practical levels. In effect, each of these theories represents a coherent viewpoint that guides one's view of both the meaning of conflict and the value of intervention." *Id.* The "coherent viewpoint" does more than guide the mediator's view of meaning and the value of intervention. It also guides, often tacitly, a mediator's specific actions and statements in the mediation itself.

Distributive mental framework, however, it is equally obvious that one needs to pay attention to possible terms of resolution from the very beginning of the process.

The four mental frameworks, as I describe them, are not watertight buckets, each excluding the contents of the other. Many specific statements or actions can appropriately appear in several of the frameworks, although they may not be used for the same purposes. For instance, as just noted, a mediator thinking in a Distributive framework may focus on the relationship of the parties because it might be useful to encourage them to modify their settlement positions and elicit more distributive concessions. However, a mediator thinking in a Relationship framework would focus on the parties' relationship for intrinsic reasons, not just because the focus is useful for other purposes. For such a mediator, the flaws in the parties' relationship and communication would be seen as the key issue.

The Distributive framework is well understood. One might even call it the default framework, the model of conflict and conflict resolution that first comes to mind when people think about the topic. It fits well with disputed legal claims, since legal claims primarily focus on whether one of the parties is entitled to take something from the other. The Value-creating framework is also well developed, both in the field of legal negotiation³⁰ and, more recently, in guidance for lawyers representing clients in mediation.³¹

The Relationship framework may be more difficult to see as a separate cognitive entity.³² By Relationship, I mean something more

30. For examples from the substantial literature available on this subject, see LAX & SEBENIUS, *supra* note 12, at 88–116; FISHER ET AL., *supra* note 14, at 56–57; MNOOKIN ET AL., *supra* note 6, at 173–82; SHELL, *supra* note 6, at 76–80.

31. See ABRAMSON, *supra* note 4, at 30–46; Sternlight, *supra* note 3, at 348–65.

32. To examine the role of repairing or improving relationships in actual mediations, Dwight Golann surveyed participants about relationship issues in their mediations. He found that relationship repair was articulated as one goal, but it was usually not achieved in practice. It became secondary to other issues and dynamics in the mediation. See Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 304–31 (2002). I suspect that relationship issues were shunted aside because the participants were operating in either a Distributive or a Value-creating framework and the relationship issues simply could not keep their place in the talk and decision-making that occurred. This remains a suspicion, since Golann's account does not, and

than whether the parties are friendly, cordial, or hostile to each other, or whether they have some formal bond, such as belonging to the same family or same organization. More generally, the concept encompasses issues of how people engage and communicate with each other, as well as what expectations they may have about how each should relate to the other. It can be an aspect of the latent causes of conflicts when parties' hostility and dysfunction arises from aspects of their communication and relationship that they do not perceive or understand. Relationship issues may be more difficult to understand as a separate cognitive framework because the parties' relationship can appear in Distributive, Value-creating and Understanding frameworks as well. A mediator working in a Distributive framework, for instance, may be concerned with how the parties are relating in the mediation itself; if they are more comfortable with each other or are communicating better, they should be better able to make the kind of reciprocal concessions required to find a mutually agreeable settlement position. Similarly, if the parties in a Value-creating framework are seeking to construct an ongoing arrangement that will benefit both, the quality and effectiveness of their future relationship will have an important bearing on the success of their agreement. In each of these, the relationship issues are understood as secondary to the dynamics of the primary framework, but are still considered instrumental to make the work in the primary framework more effective. The Relationship framework, by contrast, gives primacy to understanding and dealing with the parties' relationship. For example, a mediator who seeks to identify and resolve a latent conflict between the disputants is most likely working in a Relationship framework. The task of such a mediator is to reveal the latent conflict and resolve it,³³ not help the parties reach a

could not, provide the kind of detail about the mediations that would be necessary to examine this issue.

33. Psychologist Kenneth Kressel has described as "strategic" a style of mediation in which the mediator posits that the apparent conflict arises from a latent one, and makes it her task to bring the latent conflict to the surface and change the expectations the parties have of each other and the way they communicate. Kenneth Kressel, *The Strategic Style in Mediation*, 24 CONFLICT RESOL. Q. 251, 252 (2007) ("[T]he focus of the mediator's attention and activity [in the strategic style] is on ascertaining whether there is an underlying or latent cause that has fueled the parties' conflict."); *id.* at 257 ("The mediator's intervention [in a child custody dispute] hinged on surfacing a maladaptive communication pattern between the father and his

compromise position on distributing assets, or find new, mutually beneficial terms of agreement, or enhance mutual understanding.

Some might feel that I have improperly split a single varied mental concept of mediation into four distinct frameworks. Others may protest that I have improperly lumped together mediation styles that should be kept quite distinct.³⁴ This is particularly true for the fourth category; Understanding. Not only does that category include the Understanding model of Gary Friedman and Jack Himmelstein³⁵ and the Transformative model of Robert Baruch Bush and Joseph Folger,³⁶ it also includes such approaches as Narrative Mediation³⁷ and Insight Mediation.³⁸ Each of these models has features, goals, and operating assumptions that are different from the others.³⁹ However, for our purposes, they share a key conceptual feature that distinguishes them from the Distributive, Value-creating, and Relationship frameworks: an emphasis on improved reciprocal understanding between the parties. They treat this goal as an intrinsic one, not as an instrumental step to some other goal such as reaching an agreement. They view the parties' perception of the conflict as

children.”). Kressel does not categorize this style as drawing on a relationship framework, but I believe it appropriately fits within the Relationship framework I am describing here, which gives special attention to problems in the relationship, whether those problems are patent and known to the participants or latent and only suspected by the mediator.

34. The tension resulting from splitting apart things that should be kept together, or lumping together things that should be kept apart, hovers over any effort to classify. A modern example is bird taxonomy, which is undergoing substantial change; taxonomists are now splitting some bird species into several new species (enabling birders to add to the size of their life lists) and lumping together as one species groups of birds that had formerly been known as separate. See JONATHAN WEINER, *THE BEAK OF THE FINCH* 41 (1995) (“Taxonomists can be classified into splitters and lumpers.”); *Bird Taxonomy*, WILDBIRDS.COM, <http://www.wildbirds.com/dnn/IdentifyBirds/BirdTaxonomy/tabid/109/Default.aspx> (last visited Dec. 1, 2010).

35. See FRIEDMAN & HIMMELSTEIN, *supra* note 25, at xxv–xxxv.

36. See BUSH & FOLGER, *supra* note 24, at 45–59.

37. JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION passim* (2000) (describing conflict as growing out of the differing and competing stories, or narratives, that each party uses to explain to themselves and to others what has happened, and further describing the mediation of conflict as helping the parties develop a new narrative or story about themselves and the situation that will enable them to do something appropriate and effective about the conflict and move on).

38. Cheryl A. Picard & Kenneth R. Melchin, *Insight Mediation: A Learning-Centered Mediation Model*, 23 *NEGOT. J.* 35, 37–41 (2007) (describing a method in which one seeks to learn more about how the conflict threatens what is important to each party, thereby permitting a shift in attitudes and creating space for creative action).

39. *Id.* at 37.

malleable; through the mediation, the parties may come to understand their conflict in a different way, a way that comes from their own insight rather than from the insights of the mediator. These approaches also minimize the mediator's direct role in solving the dispute and maximize the opportunity and responsibility of the parties to develop their own resolution.⁴⁰ A Distributive mediator might unilaterally develop a compromise position and influence the parties to accept it. A Value-creating mediator might unilaterally see options for mutual gain that the parties have not yet recognized and use the mediation as an occasion to tell it to the parties. A Relationship mediator may understand the parties' latent conflict and show them what they need to do to resolve it. However, the mediators of the Understanding framework let the parties develop their own ideas for how to move to a better future, including deciding whether to resolve the dispute or not.⁴¹ The Understanding framework does have some important similarities to the Relationship framework. Those engaging in the Understanding approach see the conflict as arising in part from features of the parties' relationship, and the conflict itself contributes to distorted or partial communication. The problems with the relationship are not the key feature of the Understanding framework, however; for this framework, improving understanding will enable the parties to improve or reshape their relationship as they decide.

Beyond Reason, a recent book by Roger Fisher and Daniel Shapiro about handling emotions in negotiation, provides a vivid example of the difference between the Distributive, Value-creating and Understanding frameworks.⁴² It recounts the story of Fisher's advice to the buyer of a radio station who was stymied by the refusal of one of the co-owners to sell. Fisher asked the buyer what he knew about the recalcitrant co-owner. From the small amount of

40. *Id.* at 38–39.

41. See BUSH & FOLGER, *supra* note 24, at 53 (“[P]arties who come to mediators are looking for—and valuing—more than an efficient way to reach agreements on specific issues.”); WINSLADE & MONK, *supra* note 37, at 90 (At the end of the mediation process, “many people are in a stronger position to negotiate the details about settling the dispute themselves.”).

42. ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

information available—nobody had asked the co-owner—Fisher inferred that the co-owner had roots in the community, had a growing family, and wanted to continue his work. Fisher advised the buyer to offer the co-owner a position with the station after the sale, together with an enhanced sale price, because he needed to have the co-owner take a smaller share of the business. The co-owner accepted, and the deal went through. The buyer was pleased, and gleefully told Fisher that the seller “fell for” the negotiation move.⁴³ The buyer understood the deal as a distributive, positional one; he “won” by making the more clever positional move to induce the seller to agree. Fisher, however, understood the deal as a Value-creating one. Using underlying interests, he constructed terms—specifically, continued work at the station—that were high gain to the seller but low cost to the buyer and thus created more overall value than any single cash amount would have done. For someone in an Understanding framework, however, even this arrangement would not have been satisfactory. It would have “failed” because the buyer never “got” it. He never understood how the situation looked from the perspective of the seller. He never understood enough about the seller or enough about how his own bargaining style and viewpoint had kept him from being able to construct the appropriate sale terms. From an Understanding framework, the fact that the sale was successfully accomplished would be secondary to the increased understanding that permitted the parties to arrive there themselves.

A. The Origins and Implementation of Cognitive Frameworks

As with any theory that describes action through cognitive frameworks, this one must explain something about how a framework arises and how it persists. I assume that three different influences play a role. First, some of the framework is attributable to the automatic responses the actor has to conflict. These responses are those that the actor has from being a social creature in the world, interacting—and sometimes conflicting—with others. Second, some of the framework of automatic responses arises from the actor’s professional expertise, a set of cognitive understandings and

43. *Id.* at 126.

appropriate actions that the actor has learned by experience in the role. These are so well learned that they happen automatically, without the actor's conscious thought or choice.⁴⁴ The third important influence is conscious thought, an actor's explicit identification of possible choices of action and a self-aware choice of one path or another.

Readers may disagree as to how important each of these influences may be. I tend to think that the third, conscious choice, plays a relatively small role in the day-to-day behavior of professionals dealing with conflict. The psychologist Jonathan Haidt, for instance, likens the interplay between conscious and automatic reactions and decisions to someone riding an elephant. The rider—consciousness and intentionality—thinks he or she is in control, but in fact most of the action and reaction comes from the elephant.⁴⁵ A reader may disagree and think one's relationship with the unconscious is more like walking an obedient dog than riding an unruly elephant. In my view, most of what a mediator or a lawyer says and does in mediation is a combination of automatic reactions drawn from everyday, non-professional life and the automatic professional expertise that the mediator or lawyer has learned with experience.⁴⁶ The frameworks that come with professional expertise are layered on top of or next to the "civilian" ones, sometimes displacing them, sometimes amplifying them, and sometimes conflicting with them. Conscious awareness can become prominent when one is learning a new profession and the profession's cognitive frameworks have not yet become automatic, or when the automatic responses seem to create a problem or dilemma for which the tacit

44. Studies of expert thinking, for instance, show that experts often think in structurally different ways than novices. In the case of lawyers, experts and novices follow different mental pathways and notice different salient information. See Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1, 24–38 (1998). While the thinking process of the expert is different from the novice, it is equally automatic. The expert inhabits a mental framework that is different from that of a novice, and sees what is appropriate for the particular framework. Through experience and repetition, the expert has learned a different framework. *Id.*

45. JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* 4 (2006).

46. Without getting into a nature versus nurture debate, I think that most of the ordinary, everyday frameworks are also learned, being acquired as we grow up and act in our families and social world.

professional knowledge has no ready answer. However, for the most part, professionals do not experience much of their work as making carefully articulated, deliberate choices. Rather, their decisions and actions are guided more by their tacit, almost instantaneous sense of what they should pay attention to, and what actions are appropriate.

The claim that tacit cognitive frameworks play a larger role in mediation than conscious intentions is somewhat speculative. To the extent the frameworks operate automatically, it is difficult for those involved in the process or observers to identify when actions arise from tacit frameworks and when they arise from conscious intention. But the important role of such frameworks is suggested by the recent cognitive science demonstrating the substantial limits of our ability to be conscious of, and to control, what we think and do.⁴⁷

A recent empirical study of how mediators describe themselves and how they act supports the supposition that mediators' actions result to a large extent from something other than their conscious purposes or self-awareness.⁴⁸ If much of what people do in conflict is automatic, rather than consciously controlled, we might expect to see a discrepancy between what mediators say they are trying to do and what they actually do. When Lorig Charkoudian and her colleagues compared how mediators explicitly described their goals and methods with what the mediators were actually observed to do, they found that the connections were not strong; mediators often seemed to describe themselves one way but act another.⁴⁹ Thus, to understand the mental structure of a mediation, we need to attend closely to what the participants are doing and saying, not just how they explain themselves.

The recent work of linguist George Lakoff provides a more elaborate account of how cognitive frameworks might operate in mediation. Lakoff combines Gestalt psychology and contemporary neuroscience to explain how the mind operates through discrete

47. For a summary of psychological research along these lines, see HAITT, *supra* note 45; TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 15–16 (2002).

48. Lorig Charkoudian et al., *Mediation by Any Other Name Would Smell as Sweet—or Would It? The Struggle to Define Mediation and Its Various Approaches*, 26 CONFLICT RESOL. Q. 293, 308–13 (2009).

49. *Id.*

images, stories, and metaphors, often jumping from one to another.⁵⁰ A train of thought can have a kind of path dependence. Each metaphor or story opens the brain's pathway only to some limited set of other metaphors, stories, or judgments. Like the old Gestalt images, such as the one that is either a vase or two facial profiles, that the mind comprehends in one way or another, but not both at the same time,⁵¹ mental frameworks preclude certain perceptions while enabling others.⁵² If this account of mental functioning is correct, we can see how the words and metaphors that are appropriate for one mediation framework could elicit additional words, ideas, metaphors, and actions in that framework, keeping the participants in it. But the same words might inhibit awareness of other words, metaphors, ideas, and actions that are appropriate for a different framework, making it more difficult to shift from one framework to another that does not share words or metaphors. The Lakoff model, with its emphasis on word-based thinking such as metaphors and narratives, is also consistent with the argument in this Article that the way to understand and use the frameworks is to pay attention to words.

B. Other Cognitive Frameworks for Conflict and Mediation

Researchers and practitioners have developed numerous categorical systems for describing and explaining how people deal with conflict. In this section, I will describe several that may be most familiar to mediators and most relevant to mediation. Each bears some similarity to the four categories I describe in this Article.

1. The Thomas-Kilmann Model

Based on systematic studies questioning people about their responses to various conflict-related situations, Kenneth Thomas

50. George Lakoff, *The Neural Theory of Metaphor* (Univ. of Cal., Berkeley, Working Paper, 2009), available at <http://ssrn.com/abstract=1437794>.

51. The most famous of these images may be the Rubin's Vase, which can be seen as either a vase or as two faces in profile. See Jochen Braun, *Computational Neuroscience: Intimate Attention*, 408 NATURE 154, 154 fig.1 (2000), available at http://www.nature.com/nature/journal/v408/n6809/fig_tab/408154a0_F1.html#figure-title (providing an illustration of Rubin's Vase).

52. Lakoff, *supra* note 50.

finds that people's reactions tend to fall into one of five distinctive, identifiable styles of dealing with conflict.⁵³ They might try to avoid (Avoidance); focus on maximizing a result for themselves without concern for others (Competitive); readily give in to others' competitive demands (Accommodative); look for ways to share (Compromising); or look for ways to integrate the interests and desires of each without unnecessary compromise (Collaborative).⁵⁴ This scheme apparently derives from the work of Robert Blake and Jane Mouton,⁵⁵ who analyzed how people cope with conflict in employment situations. Their work treats concern for self and concern for others as independent tendencies that could be combined in a two-dimensional matrix, allowing for a variety of combinations of responses. This way of understanding how people deal with conflict has also been developed by others.⁵⁶

These categories are not co-extensive with the four I am analyzing here. The Competitive, Compromising, and Accommodating styles are consistent with a Distributive framework—all involve ways of gaining more at the expense of another or giving up something to another. The Collaborative style is part of the Value-creating framework; both seek to cope with conflict by finding ways to better satisfy the underlying interests of all the parties. The Relationship and Understanding frameworks of mediation do not have obvious correlates in the Thomas-Kilmann scheme.

Nevertheless, both the Thomas-Kilmann styles and the frameworks I discuss share a quality of automaticity. People find themselves in a style or a cognitive framework without thinking about it or planning for it. The Thomas-Kilmann styles and the frameworks described here also share a quality of variability. The Thomas-Kilmann styles are not fixed in one's personality, but can

53. Kenneth W. Thomas, *Making Conflict Management a Strategic Advantage*, CPP, 2–3, 7–8, https://www.cpp.com/Pdfs/conflict_whitepaper.pdf (last visited Nov. 30, 2009).

54. *Id.* at 2–3.

55. ROBERT R. BLAKE & JANE S. MOUTON, *THE MANAGERIAL GRID: KEY ORIENTATIONS FOR ACHIEVING PRODUCTION THROUGH PEOPLE* 8–15 (1964).

56. See, e.g., Afzalur Rahim & Thomas V. Bonoma, *Managing Organizational Conflict: A Model for Diagnosis and Intervention*, 44 *PSYCHOL. REP.* 1323, 1325–28 (1979) (using a five category model of dominating, obliging, avoiding, compromising, and integrating); SHELL, *supra* note 6, at 9–12 (using a scale similar to Thomas-Kilmann).

vary in the same individual over time and in different circumstances.⁵⁷ In a similar way, a person in a mediation may often find himself or herself shifting from framework to framework—for instance, from Understanding to Value-creation, to Distributive, to Relationship, back to Distributive, and so on—in different mediations, and even in the course of the same mediation.

2. Charles Tilly's Categories of Talk

The late sociologist Charles Tilly observed that when things go wrong, people need to explain why and show how to repair the situation.⁵⁸ They do this, he says, by talking in one of four modes: using Conventions, telling Stories, invoking Codes, or using Technical reasons.⁵⁹ Conventions are often brief, shorthand references to how things are or how they are to be done. Stories are lengthier, can have a narrative form, and often have a moral message. Codes and Technical modes of talk are relatively self-explanatory.⁶⁰

Tilly's categories bear a suggestive correspondence with the four mediation frameworks. A Distributive framework often operates as a Convention: the parties move through the process of making demands and concessions in a familiar and expected pattern. A party's refusal to participate appropriately in this process may lead a mediator to invoke the convention of reciprocal exchange to stimulate movement, asking each to make some concessions, as the mediator did in the first story described in Part I above. When parties or their lawyers invoke legal rights and legal standards in a mediation, Tilly's Code modality has appeared. The Relationship and Understanding frameworks that I describe in this Article are places for the category of talk Tilly calls Story. As with Story, disputants operating in a Relationship or Understanding framework speak in narratives; they describe who they are and what they think has happened. For Tilly, and for Relationship and Understanding

57. SHELL, *supra* note 6, at 243–46 (asserting that people can shift styles with the circumstances, but also noting some stability in a person's style, as based on anecdotal evidence).

58. CHARLES TILLY, *WHY?*, at ix, 8 (2006).

59. *Id.* at 15–19.

60. *Id.*

speakers, these more extended stories are laced with moral implications.⁶¹

Tilly's model shares several additional important features with the four mediation frameworks. Importantly, *all* the modes of talk are available to *everybody* in a situation in which some problem needs to be explained. In the course of a single discussion, the parties can shift among modes and often do so.⁶² The mediation frameworks operate in the same way. While some mediations may exhibit only one framework, particularly if the participants are thinking and talking in a highly distributive way, the mediator, the parties, and the lawyers can swing back and forth between different frameworks throughout their time together in a single mediation.⁶³

Second, Tilly's modes, and the swings between them, seem to happen rather automatically, without the goal-driven, conscious decision of the participants to change mode. The shifts have a tacit quality that I also find in the mediation frameworks.

Third, Tilly's modes act through words. The parties give life to the modes by the words that they say, which is also a key characteristic of the mediation frameworks. We can recognize a framework by listening to what the parties are saying. Additionally as discussed more fully below, lawyers (and mediators) can try to move a mediation from one framework to another by the subject matters they choose to discuss.

3. The Brett Categories of Negotiation Talk

Based on a study of what people actually say when they are negotiating, Jeanne Brett and her colleagues assert that participants'

61. "Stories . . . include strong imputations of responsibility, and thus lend themselves to moral evaluations." *Id.* at 16.

62. "The talk of baseball fans zigzags crazily among conventions, stories, codes, and technical accounts . . ." *Id.* at 22.

63. Malcolm Gladwell uses Tilly's categories to explain these shifts. Describing in great detail a mediation between the victims and the perpetrator of a low level crime, he shows how they abruptly move from an accusatory and defensive tone to a cooperative tone of mutual understanding and problem-solving, a shift which he persuasively attributes to a shift in the Tilly categories of talk that they use. Malcolm Gladwell, *Here's Why*, THE NEW YORKER, Apr. 10, 2006, at 80–82, available at http://www.newyorker.com/archive/2006/04/10/060410crbo_books.

talk often falls into one of three different categories: power, rights, and interests.⁶⁴ Participants may invoke whatever power they have at their disposal in an effort to elicit a concession from their negotiation counterparts. Instead of power, they may invoke rights as a source of persuasion. Third, they may refer to the parties' interests as the reason to move towards resolution.⁶⁵

As with the four mediation categories, these negotiation categories live through words. The subject matter of the words (power, rights, or interests) tells us which category is in play. A single negotiation in Brett's scheme may swing back and forth between power, rights, and interests as the words and subjects used in the negotiation shift. Mediations can exhibit the same variability, as different cognitive frameworks come to the fore or recede within the course of a single session. As with the mediation categories, the subject matters in Brett's typology often appear automatically as people draw on the category that seems most familiar, most comfortable, or most habitual to them. But people are not entirely subject to whatever automatic processes elicit particular subject matters. In Brett's description, they can exercise some conscious control over what they talk about, and thus exercise some control over the kind of negotiation that will occur.⁶⁶ If the four mediation categories are similarly tied to talk about subject matters,⁶⁷ then in the same manner mediators and lawyers can exercise some conscious control over the mediation frameworks by selecting subject matters to discuss.

Brett's negotiation categories overlap the four mediation frameworks that are the subject of this Article but do not completely track them. Negotiation that talks about power, or negotiation that invokes rights, seems most similar to a Distributive mediation framework. Power and rights are deployed to make the negotiation counterpart give up something the negotiator wants. Interests talk lies

64. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 3–19 (1988).

65. *Id.* Leigh Thompson provides a vivid description of the categories. If two drivers are disputing access to a parking space and one driver flips the other the bird, he is using power. If one claims the space is his because he saw it first, he is using a right. LEIGH THOMPSON, THE TRUTH ABOUT NEGOTIATIONS 153 (2008).

66. *See, e.g.*, URY ET AL., *supra* note 64, at 18.

67. *See infra* Part III.B.

at the heart of Value-creating negotiation, whether in Brett's typology or in the mediation frameworks; it is by understanding everyone's interests that the parties can find terms of agreement that increase the benefit of one party without correspondingly diminishing the benefit to the other party. However, Brett's typology does not have any categories that seem distinctively tied to either dealing with Relationships or creating greater mutual Understanding.

4. Riskin's Grid

Both practitioners and scholars in the mediation community have eagerly embraced Leonard Riskin's formulation of approaches to mediation.⁶⁸ The Riskin "grid" conceptualizes mediator actions as falling on a two-dimensional grid made up of two perpendicular scales, one that measures the degree to which the mediator acts in an "evaluative" or "facilitative" way, and one that measures how "broad" the subject matters of the mediation are.⁶⁹ Riskin has subsequently reformulated the evaluative-facilitative scale to measure the degree of directiveness that the mediator asserts in the mediation. The broad-narrow axis remains intact.⁷⁰

The broad-narrow scale is undifferentiated. It seems continuous—a mediator can try to broaden or narrow what is discussed continuously anywhere along the scale. Moreover, the scale provides no explanation of why a mediator would seek to broaden or narrow the mediation to include or exclude certain subject matters. The degree of breadth seems to depend on the whim or the personal predilections of the mediator.

The four-part cognitive framework scheme for mediation that we are considering fills in Riskin's scale. It suggests that the subject matters appropriate for a mediation are not continuous and undifferentiated. Instead, the subject matters are tied to the framework within which the mediator is thinking. As we saw in the examples at the start of this Article, mediators tried to introduce subject matters that were outside of, or broader than, the subject

68. See Riskin, *Decisionmaking in Mediation*, *supra* note 23, at 4–6.

69. *Id.*

70. *Id.* at 20–21.

matters that the objecting lawyer thought were appropriate. But the subject matters were not arbitrarily or randomly broader than what the lawyers thought appropriate. They were broader because they were appropriate for a different cognitive framework, and they were specific for that framework. The idea of cognitive frameworks tells us that the broader (or narrower) choice of subject matters along Riskin's scale depends on the framework.

III. LAWYERS AND THE MEDIATION FRAMEWORKS

We now are in a position to see what it would take for lawyers to do their work in concert with mediators, rather than in opposition to them. To return to the incidents with which we began the discussion, we can see how the lawyers could have entered into the framework used by the mediator and permitted or encouraged the exchange of information that was pertinent to that framework, rather than blocking it. The lawyer in the first example could seek to get through the exchange of concessions quickly and fairly, perhaps by using the mediator to indirectly signal to the adamant other lawyer that she was truly ready to make meaningful concessions, but only if they would be reciprocated. The lawyer in the second example could work assiduously to articulate the underlying needs and interests of both parties, and then work creatively to find ways to meet the needs of one without sacrificing the needs of the other. In the third example, the lawyer could welcome a fuller account of the parties' relationship, with an eye to understanding how repairing or improving the relationship might provide a path to resolution and a more satisfying future. Finally, in the fourth incident, the lawyer could endorse a face-to-face encounter between the employee and his or her immediate supervisor, under the guidance of a mediator working in the Understanding framework, to see if a change in the antagonists' narratives, mutual (mis)understanding, insight, or empowerment might release them from their conflict.

Suggesting that lawyers engage in these alternative frameworks creates some important questions. Can lawyers even do these things? Is it cognitively possible for lawyers who have been trained in the

rigorous forms of legal reasoning,⁷¹ and who think about their clients' problems that way every day, to work within these alternative mental frameworks as well? This question is particularly challenging because the frameworks are not simply points along a continuum, allowing a lawyer to slide up or down as one would tune a radio. Instead, each is qualitatively different from the other and therefore entails a different mindset. Moving from one to another might be more like an actor taking on diametrically different roles in separate acts of a single play, magnified by the fact that each role has to be played extemporaneously, without memorized lines. Some remarkable kind of shape-shifting seems to be called for. I will take up the question of whether a lawyer *can* work within these frameworks.

Second, we need to address the question of *how* lawyers can implement these mental frameworks in their work in the mediation room. The potential ability to do so will amount to little unless the lawyers can take actions that will bring the framework into the room. In the last section of the Article I discuss how this can be done, using the importance of language for making frameworks.

The prospect of lawyers acting in frameworks other than the familiar distributive/positional one may raise ethical questions as well. Do lawyers compromise their ethical obligation to act in their clients' interests if they shift from a Distributive framework to a Value-creating, Relationship, or Understanding one? Conversely, and perhaps more controversially, might lawyers actually have an ethical obligation to shift their way of thinking in a particular matter, at a particular time, to one of the other frameworks? I do not examine these issues in this Article,⁷² but will simply note my tentative

71. The Carnegie Foundation Report on legal education reiterates the common understanding that legal analysis, as practiced in first year law school classes, is a specialized and narrow kind of logic that turns nascent lawyers away from their pre-law ways of thinking and talking. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 77–78 (2007).

72. See generally Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 72–73 (2002) (“Lawyers, then, may serve as mediators of the social order, helping to achieve the bargained for, principled, and creative arrangements that cultivate peaceful co-existence, social harmony, social justice, and Pareto-optimality.”). While Menkel-Meadow’s article focuses more on the proper ethical stance of a lawyer in roles other

conclusions. I do not think that, in general, lawyers' ethical obligations to their clients require them to remain within the Distributive framework. The lawyer's primary ethical obligation to her client is to serve her client's interests. In many disputes, even in lawsuits for money damages, a client usually has an interest in finding or creating tangible value beyond what a strictly distributive agreement could provide. A client may well have an interest in clarifying or improving a relationship with the other people in the dispute, even if the relationship is not a continuing one but only involves how they deal with the process of resolving the dispute. Similarly, a client, as an ordinary person, will likely have an interest in understanding why the other party to the dispute has been acting in such an apparently unreasonable and harmful way, and may even have some interest in better understanding how they, themselves, figure into the conflict. To be sure, legal remedies usually do not explicitly address those issues, but that does not mean the issues are not relevant for the client. As long as the process is not hurting a client's interests, broadly understood, then there should be no ethical impediment to a lawyer moving into frameworks different from Distributive. Of course, it may often be the case that one framework carries risks for another. In the relationship mediation described above,⁷³ the lawyer feared that some aspect of the relationship might lead the client to sacrifice some otherwise obtainable dollars for the sake of the relationship, and thus resisted shifting from a Distributive framework to a Relationship one. But why should the lawyer privilege dollars over relationships?⁷⁴ Doing so may sacrifice the client's interest in a clearer and better relationship.⁷⁵

The relationship between the frameworks is complex. Not only may actions appropriate for one framework carry risks for another,

than the traditional representation of one party to a dispute or conflict, its standards and insights are equally helpful for the questions facing a lawyer who represents a client in mediation.

73. See *supra* text accompanying note 16.

74. If the lawyer's fee is being paid as a percentage of the dollar recovery, the lawyer has a self-interest in privileging a framework that produces more dollars. However, the lawyer's ethical obligation is to the client and the client's interests.

75. For an account of how medical malpractice lawyers can ignore their clients' interest in a relationship by focusing only on dollars, see RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION, *supra* note 21, at 36.

when we are standing on the cognitive island of one framework, it may be difficult even to see and appreciate the possibilities and benefits offered by another. How do we choose? It seems to me that neither the client nor the lawyer should have sole responsibility to choose a framework or to move from one to another. The frameworks operate as both ends and means; they sometimes serve as ends in themselves, such as when they yield clearer relationships or increased mutual understanding, and sometimes serve as means enabling further ends. Some kind of ongoing cooperation and dialogue between lawyer and client is required to dance through framework shifts. It is here that the lawyer's ethical obligation requires something more than simply identifying the client's framework and operating consistently with it. As a person with experience in the process of dispute resolution, and perhaps in the process of conflict management as well, the lawyer may understand how a client could find some satisfaction through adoption of a framework different than the one in which the client is operating. If the lawyer takes some responsibility for shifting a framework without the lead of the client, she runs the risk of inappropriate paternalism. However, staying only within the framework used by the client runs the converse risk of abandoning the full breadth of the client's interests for the sake of limiting the process to those means that are appropriate for the framework with which the client is thinking.⁷⁶

A. Can Lawyers Think Like Mediators in Alternative Frameworks?

We have many reasons to think that lawyers representing clients in an adversarial dispute cannot think or act in ways that will craft

76. Research on how lawyers actually deal with clients has focused on the ways in which lawyers subtly turn clients away from what the clients want and toward what the lawyers think is desirable, feasible, or what they believe the clients really want. *See, e.g.*, AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 20–21 (1995); RELIS, *PERCEPTIONS IN LITIGATION AND MEDIATION*, *supra* note 21, at 129–41. There is less reported on how lawyers accede to their clients' preferred ends and means, unless the preferred ends and means threaten such a palpable risk to others, to the lawyer, or to the rule of law that doing what the client wants becomes ethically troublesome to the lawyer. The unexamined extent of lawyer compliance with client wishes may arise from the strength of the idea that the lawyer is the client's agent; it is only deviations from that assumption that become interesting news.

new options for mutual gain, improve relationships, or enhance self-knowledge and knowledge of others. Some of these reasons relate to the cognitive and behavioral tools with which lawyers in particular do their work. Others relate to the ways many people deal with conflict much of the time.

At the beginning of our modern interest in mediation, Leonard Riskin reminded us that lawyers think differently from mediators, and the kind of thinking that mediators do remains invisible to most lawyers. They just do not see it.⁷⁷ The four mental frameworks I have described in this Article help us understand more clearly what it might mean that lawyers fail to see mediators' kinds of thinking. Legal reasoning is all about mutually exclusive categories. The doctrines of law articulate categories, enabling us to distinguish facts that impinge on legal rights from those that do not. If the defendant's actions and the plaintiff's situation fall within the category of a violation of the plaintiff's right, the plaintiff is entitled to a court-ordered remedy. If the actions and situations do not fall within that category, the defendant is free to proceed on her way with no more interference.

Because of its binary categorical nature, legal reasoning and legal proof bear a strong structural similarity to the distributive concept of negotiation. In litigation, if a legal claim is on the plaintiff's side of the divide, it cannot be owned by the defendant.⁷⁸ In distributive negotiation, if part of an asset is negotiated to the claimant's side, it has been lost by the other claimant. Consequently, in a negotiation or mediation, lawyers may have a difficult time understanding how their client could give something to the other side without losing an equivalent value. Conversely, they will find it difficult to understand how the other side could give their client something without creating an equivalent loss to the other side.⁷⁹

Charles Tilly's categories of conflict talk, described above,⁸⁰ suggest that lawyers are not adept at using categories other than the

77. Riskin, *supra* note 7, at 44–49.

78. *Id.* at 44.

79. See generally Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

80. See *infra* Part II.B.2.

one with which they are most familiar. According to Tilly, lawyers address problems through Codes,⁸¹ not through Conventions, Stories, or Technical talk. They rely on legal reasoning which, as Tilly describes it, is qualitatively different from Conventions and Stories.⁸² (In Tilly's analysis, doctors also use their Codes, such as codes about differential diagnosis, to handle the problems that face them.⁸³)

We can see a similar clash of types of talk in Jeff Kichaven's account of a mediation between a bank customer and a bank that had unwittingly destroyed the contents of the customer's safe deposit box, which may have included personal memorabilia such as love letters or a lock of hair. The customer's husband and co-renter of the box had died. The bank had been unable to locate his widow and considered his box abandoned.⁸⁴ As mediator, Kichaven suggested that the bank acknowledge the pain that the destruction of the box's contents had caused and apologize to the widow without admitting liability. The bank's lawyer would not do so. She stonily reiterated that the bank had no liability under the law.⁸⁵ Although Kichaven did not explain it this way, Tilly's categories of talk show us that Kichaven was trying to move the conversation from one form to another. While the lawyer was speaking in Code, Kichaven tried to turn the conversation to Conventions (such as, "The bank values its longtime customers and is distressed when things go wrong for them," or, "Unfortunately, things sometimes slip through the cracks in a bureaucratic organization, and we're sorry for that"), or maybe to Stories (such as explaining in some detail all the steps the bank took to keep this from happening and why its procedures, which are usually beneficial, caused an unforeseen loss in this circumstance). The lawyer would not move with him. In contrast, in Malcolm Gladwell's description of a mediation of a petty theft, there was no lawyer in the mediation room, and the parties were able to move from

81. TILLY, *supra* note 58, at 17, 96–101.

82. *Id.* at 17.

83. *Id.* at 108–14.

84. Jeff Kichaven, *Apology in Mediation: Sorry to Say, It's Much Overrated*, MEDIATE.COM, <http://www.mediate.com/articles/kichavenJ2.cfm> (last visited Oct. 30, 2010).

85. *Id.*

one kind of talk to another.⁸⁶ No one there was invested in explaining things through Codes.

In terms of the cognitive frameworks discussed in this Article, the bank's lawyer remained entirely within a Distributive framework, refusing to see the matter in any light other than a contest of legal rights for which a concession seemed unnecessary except to avoid the costs and risks of adjudication. Kichaven may have been operating in an Understanding framework, trying to help each side understand the other better, or a Relationship framework, where an apology readjusts power in a relationship that has become contentious and dysfunctional.

I agree that lawyers have a strong tendency to think and talk in the binary, either/or terms that are congenial to the Distributive framework, and to talk in Codes rather than Conventions or Stories. However, these attributes of lawyerly thinking do not bar lawyers from entering into the Value-creating, Relationship, or Understanding frameworks. First, Tilly notes that when we give explanations, we do not limit ourselves to one mode of talk. Several or all of the modes can be implemented throughout a single effort to explain, understand, and justify.⁸⁷ I will assume that when lawyers are acting in their personal roles rather than their professional ones, they use Conventions and Stories just as other people do. While their use of Conventions and Stories might be affected or reduced by their professional affinity for thinking in Codes, it is not eliminated. Lawyers may not want to use Conventions and Stories while acting as lawyers, but there is nothing about the modes of talk, as Tilly describes them, that would prevent them from doing so.

More importantly, Tilly's account of Codes may understate the degree to which lawyers actually use Conventions and Stories as part of their work as lawyers. When lawyers are assessing the scope and effect of a precedent, for instance, they may use Convention-like reasons to explain themselves, such as discounting a case because its author is a known judicial maverick whose opinions do not carry much weight. Similarly, negotiation talk, through which most cases are resolved, is filled with conventions about the negotiation process

86. See Gladwell, *supra* note 63.

87. See TILLY, *supra* note 58, at 22.

itself, even if the underlying legal issues need to be addressed with legalistic Code talk. For example, a lawyer may refuse to give a new settlement proposal because she does not want to “negotiate against herself.”

In addition to such conventions, stories and story-telling often play an important part in lawyers’ formal talk in the courtroom. Narratives are stories with beginnings, middles, and ends, with accounts of a trouble or disruption, and with moral implications about the trouble and the way to handle it. Effective trial lawyers use narratives in this form to present cases to juries, judges, and other adjudicators.⁸⁸ If anything, lawyers can explain “why”—in Tilly’s sense of the term—with greater facility and elaboration by using narratives than simply by using codes. Tilly’s categories help us understand the deep and qualitative differences that exist between the four cognitive frameworks of mediation, and thus shed light on why it may be difficult for lawyers to move beyond the Distributive framework. But Tilly’s categories do not establish that the mental arsenal of lawyers prevents them from using the frameworks that are needed for Value-creating, Relationship, and Understanding ways of mediating.

More importantly, these frameworks are not something that lawyers learned by becoming lawyers. Instead, they are cognitive frameworks for dealing with conflict that are available, to a greater or lesser degree, to all people. Lawyers knew them before they became lawyers, and still have them mentally available.

The Distributive framework is familiar for all kinds of disputes. Someone experiencing a conflict may wish that their opponents would give in to them. That response may often be the first and

88. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110–11 (2000) (“Law lives on narrative [T]he law is awash in storytelling. . . . [Q]uestions and the answers in . . . matters of ‘fact’ depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*.”); see also Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLINICAL L. REV. 195, 214–15 (2009) (describing how a defense lawyer in a bench trial of an assault claim by a mother against her adolescent daughter might have used a different narrative to persuade the judge to acquit). The narrative proposed by Holland sounds very much like a relationship narrative: the events are to be understood as part of the swirling conflict of adolescence, rather than an analytic legal narrative that matches facts to the elements of the governing legal standard.

strongest reaction to the conflict. The person needs the other's action to eliminate or at least assuage her own sense of conflict, threat, or loss. Most commonly, to obtain this result, the opponent would be required to come around to the actor's *position*. The position might be a tangible object, an amount of money, or the cessation of an action that the first person finds troublesome. This kind of goal is sought by distributive, positional bargaining; if you cannot obtain a complete concession from the other party, at least you can seek one that gives you as much of what you want as possible. It can also include nondivisible things, such as bringing the other party around to the understanding that you are right or that you deserve the thing in question, although total "victories" such as this may be less common than compromises.

Finding options for mutual gain is also familiar from the ordinary social world. A key question might be, "Why can't we both get what we want?" Almost everyone will instantly recognize that if one child loves the frosting much more than the cake, and another child loves the cake much more than the frosting, rather than try to cut the cake into even wedges, the helpful parent would do better to take a larger slice of cake, lay it on its side, and cut on the diagonal so that one child gets mostly frosting and the other gets mostly cake. Mary Parker Follett, one of the founders of our modern understanding of conflict management, asked this kind of question when she resolved a conflict about whether a library window should be open by opening a window in an adjacent room, thus giving the other library patron the fresh air he wanted but not subjecting herself to an unwanted draft.⁸⁹ The apparently competing interests of fresh air and avoiding a draft could both be satisfied. Why is this response so obvious when we see it? Because it has been elicited from a Value-creating mental framework.

The third kind of reaction focuses on relationship. Finding themselves in conflict about some object or action, people might be troubled by what the disagreement is doing to their relationship. Their goal would be to stabilize or repair the relationship. We recognize this often in family situations, including divorces,

89. MARY PARKER FOLLETT, *Constructive Conflict*, in *PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S*, at 67, 69 (Pauline Graham ed., 1995).

inheritance disputes, family businesses, and the like, as parties seek to move past the conflict for the sake of maintaining some form of relationship. We might expect to see it less often in workplace relationships or between people with a service relationship. We might see it even less frequently, if ever, in conflicts between strangers. But even between strangers, the parties may develop a relationship with regard to the conflict they perceive between themselves, and wish to relate to each other about it in a way that does not fan the flames.

Steven Hartwell's account of how we may move towards intensified conflict when faced with a social disruption provides an example of the relationship dimension. He notes that we might first respond to a disruption of social relationship with humor as a way to reestablish the relationship bond. If that is insufficient, anger may appear, followed by an invocation of rules and then the implementation of ritual—such as formal adjudication—to repair the breach.⁹⁰ Even if this actual progression does not appear in every dispute, or even in a majority of them, it persuasively depicts the breach of a proper relationship as an element of conflict. A mediator or lawyer working in a Relationship framework might even understand that the task of mediation could be to conceptually “rewind” the dispute to the point where the conflicting parties' relationship went bad—going back to where humor or some similar social interaction failed to do its job—and try to address the problem from that point, rather than from the later-developed legal and distributive claims. Concern about relationship can be a cognitive precursor, as well as a cognitive fellow traveler, of a dispute.

It is this disturbance of relationships that leads me to place apologies in the cognitive category of relationship issues. Apologies can involve reconstructing a relationship between people. One person acted in a way that caused harm and/or an affront to another. By making the apology, the harm-doer seeks to correct the imbalance between them that the conduct created. At their fullest, apologies recast the balance of power between the parties. By his offending action, the offender has exercised unwarranted power over the other. By offering an apology, the offender reverses the power relationship.

90. Steven Hartwell, *Humor, Anger, Rules, and Rituals*, 13 CLINICAL L. REV. 327 *passim* (2006).

The recipient of the offense now has power over the offender: the unconstrained power to decide whether to forgive.⁹¹ This relationship quality is most apparent in full apologies, which have been called “responsibility-accepting” apologies.⁹²

Finally, people in conflict might find themselves asking what could have gotten into the other person. What is wrong with them that they should have taken such offensive action? The person suffering from another’s actions might be mystified and frustrated by the fact that the other person in the conflict seems so unable to understand things from her perspective. She might even be a little surprised or disappointed by her own responses to the situation, such as a sense of helplessness, anger, or even stubbornness. Her goal in this context would be to have the other person understand her better; she might even want to better understand the other person, as well. At root, she seeks understanding.⁹³

This is not to say that it is easy for lawyers to shift from their familiar Distributive framework to one of the other frameworks. For example, negotiators have a difficult time implementing a Value-creating framework, even when the opportunity arises. Researchers have found that when negotiators were presented with problems that could be solved either by compromises, trade-offs, or contingent agreements that actually added value (by capitalizing on the contingencies), they tended to miss the contingent, value-adding agreements. They generally relied on negotiating for compromises unless they had first been given negotiation training using guided

91. See NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 35 (1991) (“Once the symbolic overture has been made [by offering an apology], the victim alone holds the keys of redemption and reconciliation.”); Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 *MEDIATION Q.* 265, 271–73 (2000) (providing an example of an apology serving to balance power in a mediation).

92. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 *MICH. L. REV.* 460, 506 (2003) (“Full apologies were seen as mitigating potential damage to the relationship . . .”).

93. For an example of parties using increased mutual understanding to improve functioning in a work setting, not limited to situations with a recognizable conflict, see generally ROBERT KEGAN & LISA LASKOW LAHEY, *HOW THE WAY WE TALK CAN CHANGE THE WAY WE WORK: SEVEN LANGUAGES FOR TRANSFORMATION* (2001) (explaining a systematic method of increasing understanding of both self and others so as to overcome interpersonal and intrapersonal obstacles to more satisfactory functioning).

analogies that demonstrated how to find more value through contingent agreements.⁹⁴ Other negotiation scholars have noted that people tend to negotiate in a value-creating way only when they have the expectation that strictly distributive bargaining will cost too much, or that value-creating negotiation will be more likely than distributive bargaining to produce a desirable result.⁹⁵ Lacking that expectation in a particular situation, they will tend to use a Distributive framework and positional methods instead.

But people are not doomed to be limited to a particular framework because of their personality or their professional training. As discussed above,⁹⁶ George Lakoff shows that mental schemas excluded from one's thoughts by the operation of a different schema are not necessarily missing from a person's arsenal of mental action.⁹⁷ They may flourish if the inhibiting one is no longer active.⁹⁸ The cognitive frameworks I describe may work like the schemas analyzed by Lakoff. They can inhibit each other. A lawyer gripped by the Distributive framework may be mentally unable to invoke the Understanding framework so long as she continues to see things in a distributive way. But even if frameworks inhibit each other, a framework dominates only as long as it remains active in the lawyer's mind. If and when the lawyer stops thinking in those terms, other frameworks can become active.

Thus, we cannot expect that lawyers will easily move away from the Distributive framework and bring themselves into collaboration with mediators who are operating in one of the other frameworks. However, the obstacles to their move do not arise from something distinctive about their lawyerly thinking. The obstacles are the same

94. Dedre Gentner et al., *Learning and Transfer: A General Role for Analogical Encoding*, 95 J. EDUC. PSYCHOL. 393, 401–02 (2003).

95. DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 48–50 (3d ed. 2004). Problem solving negotiation is more frequently used when it is perceived as more feasible. The perception of feasibility depends on a variety of factors, including whether the negotiator has faith in his own problem-solving ability, whether the negotiator is thinking in positive-sum terms rather than constant sum terms, and whether the other negotiator appears to be ready for problem solving. *Id.*

96. See *supra* notes 50–52 and accompanying text.

97. “[M]any people have [competing, mutually inhibiting] worldviews active in different areas of their lives, and can think of a given situation first from one worldview and then from the other. When one is activated, the other is inhibited.” Lakoff, *supra* note 50, at 4.

98. *Id.* at 3.

ones that anyone who reacts to conflict in a distributive manner would need to confront.

B. How Can Lawyers Use the Alternative Frameworks?

The tacit nature of the cognitive frameworks presents a challenge for lawyers seeking to take advantage of them. Because they are tacit, people implement them automatically, with little or no conscious choice or control. People need not even be aware of what they are doing. All they need to know is that some ideas—those that are consistent with the cognitive framework in which they are operating—make sense, and other ideas do not. Like everyone else, lawyers may have trouble identifying which framework is operating.

Moreover, their tacit character makes it difficult for a lawyer, a mediator, or anyone else to implement a particular framework. Once a framework is in operation, certain things seem appropriate, and others do not. Movement between frameworks can similarly occur automatically and without conscious thought. It can be more like diving into a pool than like deliberately walking, conscious step by conscious step, across a bridge. Moreover, mediations are interactive processes; what happens cannot depend on the will or action of a single participant, but must be shared to a degree. A particular framework will only work if a sufficient number of the mediation participants have become engaged in it.

We may find the markers of different frameworks in many incidents that occur in a mediation: what the participants say and how they say it; how they react to each other; what they feel and how they express what they feel; what their goals are; what they fear and what they hope for; and so on. To have some way to perceive and manage the frameworks, I suggest that we should focus on the first—what the participants actually say. The subject matter of their talk can provide a vivid indication of the framework in which they operate. In the four scenarios with which I began this Article, the disagreement between the lawyers and the mediators was, at its most straightforward level, a disagreement over what to talk about. Particularly in the last three scenarios, the mediator wanted to talk about things that were appropriate for the mediator's framework but inappropriate for the distributive, positional framework of the lawyers. The lawyers and

the mediators experienced the reality that some subject matters were particularly appropriate and natural-seeming for their frameworks, but not for others.

If subject matter areas form a kind of marker for the frameworks, as I think they do, then the task of identifying an operating framework can be somewhat simplified. If one pays attention to the subject matter of the mediation conversation, he or she can have a clue as to the framework that is operating for the people in the room. Moreover, the subject matter areas provide a way for a participant, including a lawyer, to influence a move into a particular framework. If one participant introduces a new subject matter that is a marker for a specific framework and the others pick up that subject area and continue the discussion in it, the cognitive framework may shift for those other participants too. If someone tries to introduce a subject matter that is inappropriate for the current cognitive framework, but the others resist and keep the discussion going in the preferred subject matter, then effort to invoke the alternative framework will fail. The subject matters signal the presence of a framework and at the same time are part of the creation and maintenance of the framework.

I do not think we yet have a systematic, verifiable understanding of how particular subject matters are linked to cognitive frameworks. The seven subject matter areas that I describe below might be best understood as a working hypothesis of the link between key subject matters and cognitive frameworks. I expect they will seem familiar to some mediators but quite strange to many lawyers. Attention to pertinent subject matters can help lawyers identify the framework that the other participants may be using and provide a way for the lawyer to try to direct the conversation to a place where the sought-after framework will blossom.

I list seven different categories of mediation talk that are significant to build or inhabit a framework. None of these subject areas belongs exclusively to any one of the frameworks. As will be seen, various subject areas can work within several different frameworks. Whether a particular subject area is best understood as part of a specific framework may depend on its context in the discussion, and on the metalanguage—such as tone of voice, facial expression, body movement, and emotion—that accompanies it.

Talking about a particular subject area may be necessary but not sufficient to enable the talkers to mentally inhabit a corresponding framework.

The seven distinctive subject matters are:

- What happened and what it meant;
- What can or will happen in the future;
- Law and legal rights;
- Fairness and moral rights;
- Relationship;
- Feeling;
- What someone wants, what they can get, and how they can get it.

1. *What happened and what it meant.* This kind of subject is strongly constitutive of a Distributive framework. In the mediation of legal disputes in this framework, the parties are concerned about historical events. The “meaning” of the events refers to their legal relevance. In the context of a litigated or potentially litigated matter, the alternative to agreement is the anticipated result of adjudication. That is key information for taking the positions and making the concessions that lie at the heart of the Distributive framework. The participants will use the discussion of what factually happened, and the legal meaning of those events, to clarify their own predictions of the adjudication and to influence the other participants’ predictions. They will seek to emphasize the facts and legal meaning that make their case seem stronger, and will wish to conceal the facts and legal meaning that make their case seem weaker. Discussion of what happened and what it meant is used in an instrumental way to try to shift the point at which the other party will agree to a preferred settlement.

What happened and what it meant can also constitute Understanding talk, but in a quite different way than in a Distributive framework. For Understanding, it is not necessarily important to

reach agreement or change the other's mind about what actually happened, either explicitly or tacitly.⁹⁹ Rather, in an Understanding framework, each side's perception of what happened must include an understanding of how things seemed to her *counterpart*, not just how things seemed to her. An accurate understanding of perceptions, not of a single "truth," is sufficient. The mutual understanding of perceptions becomes the material with which the parties can start to build a way to deal with their conflict or resolve their dispute.¹⁰⁰ The meaning of what happened is not limited to legal relevance. The important meaning is the meaning that each party gives to the past events, for whatever reason, regardless of its objective validity. What happened and its meaning are not simply instrumental for persuasion; they are intrinsically valuable.

Talk about what happened and its meaning might also be indicative of a Relationship framework, but only if the parties talk about what happened in terms of their relationship. For the sake of clarity, talk about relationship is better understood as an independent category. It should not be crammed into the topic of "what happened."¹⁰¹ If the participants are trying to persuade each other of the truth of a particular incident in the past and its legal significance, we can guess that they are in a Distributive framework. If they are talking about how they perceived what happened more generally, and about how they understand each other's perceptions, we can feel more confident that they are in an Understanding framework. However, if the talk concerns aspects of the disputants' past communication and relationship, without an overlay of legal significance, proving right and wrong, or trying to understand each

99. In a Distributive negotiation, a party might be persuaded that the other side's account of what happened or of the governing law is stronger than previously understood. That change would lead to a change in one's private assessment of when to settle, as well as a willingness to make more concessions in one's settlement position, but only if necessary. The party negotiating effectively in a Distributive manner would try to conceal any change in his judgment about the facts and law, however, so as to keep hidden from his opponent the possibility of a greater concession.

100. Talk about the past is often part of an Understanding framework. See Carrie J. Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97, 109–10 (2004) ("Without a full airing of our past sufferings, we cannot move on.")

101. See *infra* p. 60.

other's perceptions, it would be more appropriate to think of their subject matter—and perhaps their framework—as Relationship.

What happened in the past and its meaning are even less pertinent to a Value-creating framework. This framework tries to reveal the present and future interests of all parties in order to construct terms of agreement that will deliver the greatest satisfaction of those interests. As such, the past is of relatively little importance.

2. *What can or will happen in the future.* As just noted, when the subject matter of mediation discussions focuses on what can or will happen in the future, rather than what happened in the past, the participants may well be operating in a Value-creating framework. This is particularly true if talk about the future occurs in the context of the parties' interests.

Talk about the future can also be indicative of a Distributive framework if the talk concerns what will happen to the parties in the absence of an agreement. In a litigated matter, for instance, each side can try to bolster its own commitment to a settlement position or try to induce the other party to make concessions by painting a picture of what the court will decide. An important distinguishing characteristic between Value-creating and Distributive frameworks may be whether talk is about what the future would be like with an agreement, or about what the future would be like without one. A future with an agreement falls more within the province of a Value-creating framework: exploring the extra value that might be captured by an agreement.¹⁰² The future *without* an agreement is more pertinent to a Distributive framework: persuading the other side of the negative things that will happen to them if they do not agree.

Talk about what will happen in the future is less characteristic of Relationship and Understanding frameworks. If anything, attention to the future would tend to come at the end of mediations in those frameworks. Once the parties have developed a satisfactory understanding of each other, or have identified the latent conflicts

102. In his advice to negotiators operating in a Value-creating framework, William Ury, one of the most effective advocates of a Value-creating framework, tells his readers to ask, "What if?" WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 83 (rev. ed. 1993). The question helps the parties focus on creative ways to invent mutually beneficial agreements. "What if" is talk about what can or will happen in the future.

distorting their relationship, they might be able to develop plans for the future.¹⁰³

3. *Law and legal rights.* Talk about law and legal rights is most pertinent to the Distributive framework for the same reasons as talk about past events. It is a way to set the parameters for a distributive negotiation. A mediation characterized by such talk is most likely operating in a Distributive framework. Similarly, a lawyer who insists on this kind of talk is probably operating in such a framework and is trying to get the others to operate in it as well.

4. *Fairness and moral rights.* In conflict situations, claims of unfairness fill one's thoughts and often the air as well. While there may be a substantial overlap between talk about fairness and talk about law, fairness should be considered separately because ordinary, common-sense notions of fairness need not be limited to what the law requires, and fairness claims may fully express what the parties themselves want, even if their lawyers do not initially see beyond legal claims and dollar remedies. Fairness claims may also have the moral suasion to encourage—or to block—settlement.

All of the frameworks can include talk of fairness and moral rights. Fairness can be used as a sword or a shield in the battle of positions in the Distributive framework. Relationship issues are often entwined with perceptions about fair treatment; lack of communication, dismissive and high-handed treatment, lack of respect, and similar relationship issues are often perceived as forms of unfairness. Apologies, also part of a Relationship framework, are primarily about fairness and moral rights. Someone is only owed an apology because the other party violated his moral rights or treated him unfairly. Talk of fairness and moral rights is also critical for the Understanding framework. Increasing understanding of self and other, enhancing empowerment of self and recognition of the other, or changing the narrative that explains the conflict and the people often entails a shift in one's perception of what is fair and what moral rights require in a given situation.

Talk of fairness and moral rights probably appears least in a Value-creating framework. This framework sees the problem as

103. In the Understanding framework, it is essential for the parties to develop their own ideas of the future. In all the other frameworks, the mediator or lawyer could do it for them.

primarily concerning distribution of tangible goods, rather than restoration or reparation for some perceived wrong.¹⁰⁴

5. *Relationship*. Talk about the parties' relationship is, as the name implies, a distinctive characteristic of a Relationship framework. As noted above,¹⁰⁵ the Relationship framework includes a broad variety of relationship issues. Some of these issues look to the past, dealing with the ways in which the parties' relationship caused or intensified the conflict. Others are oriented to the present, examining how the parties are treating each other now, including how they behave and communicate during the mediation. Still others focus on the future, as when the participants discuss how the parties will communicate in the future regarding any differences or problems that may arise between them.

Talk about relationships can also occur instrumentally in other frameworks. For instance, if the participants in a Value-creating framework are developing a deal that will involve a continuing relationship, they may pay attention to how they will relate to each other in the future, so as to carry out their mutually beneficial agreement more effectively. In contrast, in a Relationship framework, talk about the parties' past, present, or future relationship has a more intrinsic value. It is an end in itself, rather than a step to another more monetary end. In mediation discussions, one should be able to notice whether the parties seem engaged in, and satisfied to continue with, talk about the relationship, or whether they explain and justify their talk about the relationship by reference to other goals, such as their possible deal.

6. *Feeling*. Mediation provides a forum for the expression of emotions that trials do not.¹⁰⁶ We should expect talk about the parties' feelings to play a larger role in mediations conducted in the Relationship and Understanding frameworks than in the Distributive

104. In a Value-creating framework, it is important, perhaps even necessary, that the participants see both the outcome and the process as fair. However, it need not be the focus of struggle or the subject of extended discussion, as it could be in the other frameworks.

105. See *supra* notes 32–33 and accompanying text.

106. What an injured party felt in the past, or is currently feeling, might be relevant in a case in which emotional distress is an allowable element of damages. The feelings of a witness might also be relevant for assessing the witness's credibility. In mediation, however, the expression of feelings is not limited to their relevance to the legal decision at hand.

or Value-creating ones. Expressing one's own feelings, as well as perceiving and acknowledging the feelings of the others in the conflict, is an important part of most of the Understanding approaches to mediation. Similarly, bad feelings often accompany hostile or difficult relationships; talking about the feelings becomes part of the effort to restructure the relationship.

When talk is about feelings, we can observe the familiar distinction between intrinsic and instrumental purposes. In Relationship and Understanding frameworks, descriptions and discussions of feelings can be intrinsically part of the subject matter. In Distributive and Value-creating frameworks, however, talk about feelings can be used instrumentally for ends that are pertinent to those frameworks. For example, anger, fear, and defensiveness can limit one's ability to think clearly about the risks of not making an agreement, or curb one's willingness to make a concession in a settlement position.¹⁰⁷ Similarly, strong feelings can interfere with one's willingness to disclose their underlying interests, which are the key building blocks for a Value-creating framework. Thus, talk about feelings, by itself, will not definitively indicate whether the speaker is operating in an Understanding or Relationship framework. Much will depend on what came before and what comes after. If there has been considerable discussion about settlement positions, for instance, and the exchange of concessions has ground to a halt, a discussion of feelings might indicate their instrumental use to induce further positional movement. If the discussion returns to positions after the expression of feelings has "cleared the air," then feelings have been relegated to an instrumental function rather than serving as an intrinsic good. But talk about feelings might indicate a turn in direction to a different framework. For instance, if talk about feelings leads to a more extended discussion about relationship issues associated with the feelings, then perhaps the participants have entered a Relationship framework. Alternately, if talk about feelings leads the parties to spend time voicing a greater understanding of the perceptions and motivations of each other, then the discussion of

107. See Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 21-22.

feelings may mark a shift from a Distributive framework to an Understanding one.

7. What someone wants, what they can get, and how they can get it. People operating in any of the frameworks should find themselves talking about what the parties want, what they can get, and how they can get it. What is wanted, what may be obtained, and what one should do to obtain the desired result, however, vary in the different frameworks. In the Distributive framework, each party wants the other side to accede to his or her position; each needs to consider what concessions the other side might make, and can then discuss negotiation tactics designed to elicit greater concessions. In a Value-creating framework, the participants will be aware of their underlying tangible needs and interests and will seek ways to meet those interests through an agreement with the other parties. Parties working in a Relationship framework want a more functional relationship or some kind of reparation for a failure of the relationship in the past. They will need to discuss what should be changed about the parties' expectations of each other and about their communication with one another. Like the Value-creating framework, an Understanding framework requires people to understand and express more clearly what they want and to understand more fully the perspectives of the other parties. However, unlike Value-creating, desires expressed in the Understanding framework can include more than tangible wants or specific outcomes.

Table 1 summarizes the relationship between the different subject matters of talk and the cognitive frameworks.

TABLE 1: A PROPOSED RELATIONSHIP BETWEEN COGNITIVE FRAMEWORKS AND SUBJECTS OF TALK IN MEDIATION

	DISTRIBUTIVE FRAMEWORK	VALUE- CREATING FRAMEWORK	RELATIONSHIP FRAMEWORK	UNDERSTANDING FRAMEWORK
WHAT HAPPENED AND WHAT IT MEANT	Higher frequency of use	Lower frequency of use	Lower to moderate frequency of use	Higher frequency of use
WHAT CAN OR WILL HAPPEN IN THE FUTURE	Moderate	Higher	Lower	Lower
LAW & LEGAL RIGHTS	Higher	Lower	Lower	Lower
FAIRNESS & MORAL RIGHTS	Moderate	Lower	Higher	Higher
RELATIONSHIP	Lower	Moderate	Higher	Higher
FEELINGS	Lower	Lower	Higher	Higher
WHAT SOMEONE WANTS, WHAT THEY CAN GET, AND HOW THEY CAN GET IT	Higher, with focus on concessions	Higher, with focus on future value	Higher, with focus on improvement of relationship	Higher, with focus on mutual understanding

For me, observing categories of talk in the moment is simpler than the typical way we approach mediation practice. We usually think of learning about and conducting mediation practice as form of deductive logic: theory comes first. We identify and embrace our general goals for mediation, we articulate our concepts about the nature of conflict and its management, and we consider our preferred values, and then we intentionally apply particular skill sets that we think will allow us to reach our goals. Focusing on the subject of what is said in mediation, without such elaborate mental work, is altogether less formal and less systematic. The foregoing categories of subject matters provide distinctive clues to the various tacit frameworks in which mediators and lawyers conduct themselves in mediation, but they do not rigorously chart a path to one's goal. They are more like a doorway to the tacit knowledge embodied in the frameworks; they invite entry into a more automatic way of thinking and speaking, in which the things that are perceived and said seem appropriate and worth pursuing because they fit within a framework.

This way of linking the subject matter of mediation talk to mediation frameworks differs somewhat from the recent proposal made by Leonard Riskin and Nancy Welsh.¹⁰⁸ To counteract the tendency of court-related mediations to focus narrowly on legal issues and distributive settlements, Riskin and Welsh suggest that, at the beginning of the mediation, mediators should pose a series of questions designed to discover whether the parties attach importance to other issues besides those directly related to the legal issues, such as needs and feelings.¹⁰⁹ Similarly, they ask the mediator to explicitly find out the kinds of resolutions that might be desired beyond a simple settlement, such as developing a feeling of peace or instituting changes in behavior. The answers help shape the understanding of the problem at hand and thereby guide the mediator's choice of what to address in the mediation.¹¹⁰

Each of these questions is important to avoid limiting a mediation to the legal dispute, narrowly understood, and the Distributive framework that legal issues so often elicit. But we should not rely solely on the content and timing of the questions to identify or influence a framework. First, we face the risk that the parties will answer in accordance with what they think is appropriate for the situation, which will probably appear to them to be largely legalistic and distributive, rather than respond as they might in another setting. That is, they may answer in accordance with what the context of the questions says to them, rather than answer the content of the questions themselves. Thinking in terms of a Distributive context, they may be less likely to see feelings, relationship, and understanding as part of the task at hand. They could honestly answer that other interests, relationships, feelings, or mutual understandings have nothing to do with the problem. That might be true at that

108. Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008).

109. *Id.* at 905–06.

110. Riskin and Welsh use the three dimensions of conflict suggested by Bernard Mayer to generate their questions. These three dimensions are behavioral, cognitive, and emotional. *Id.* at 881. Mayer argues that sound mediation must attend to all three. *See* BERNARD S. MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE* 41–46 (2000). These aspects of conflict refer to characteristics of the parties in conflict, not characterizations of the mediator or the lawyers. They thus differ from the idea that everyone in the mediation room is operating through a variety of tacit cognitive frameworks, although they do not conflict with that idea.

moment, but it would not necessarily mean that the other frameworks, and the topics appropriate to them, are not part of the problem.

Furthermore, one could make a mistake by using the statements made at the beginning of a mediation to fix the framework that will characterize the rest of the process. Frameworks shift. If they do, then the very things that the parties thought to be inappropriate when asked at the beginning could become very appropriate.

Nor can we rely on explicit questions and explicit answers to determine what subjects of discussion are appropriate and effective. Because the frameworks are largely tacit and automatic, they can operate without the participants being consciously aware of what framework they are in or why certain subjects seem relevant and others do not. Explicit questions and suggestions are certainly important to identify a framework or suggest a change to a different framework where other subjects become relevant. But other ways of eliciting alternative frameworks, such as simply raising a different subject matter, telling a story that fits within a different framework, or lightening the mood to reduce the risks of leaving one framework for another, can be equally or even more effective.

Moreover, the lawyers and the mediator can look to all of the participants, themselves included, to establish or shift a framework. Shifts in frameworks can be elicited and then maintained by the willingness of the participants to continue the discussion along subjects that are appropriate for a framework. A striking example of influence by continuation appears in one of the simulated mediations recorded by Douglas Frenkel and James Stark for their mediation text.¹¹¹ In a dispute between a contractor and a homeowner over the contractor's failure to finish remodeling the kitchen, the mediator in one of the recorded sessions gets the mediation to the point where the parties have tentatively agreed to resolve the problem by having the contractor finish the job, and they are discussing the details of how that will happen. On his own initiative, the contractor's lawyer suggests including a penalty provision in the settlement that would require the contractor to reduce the agreed settlement price if he does

111. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT*, at E-28 to -50 (2008).

not finish the work in the time promised.¹¹² This example demonstrates a Value-creating solution: it cost the contractor little, since he intended to finish in a timely manner, but it carried extra value for the homeowner, who needed to trust that the contractor would be good on his word this time. Why did the suggestion suddenly come from the lawyer, whom we would expect to be more inclined to protect his client from making such positional concessions? The other participants had shifted to a Value-creating framework, rather than simply trying to resolve the matter by taking positions and making concessions about dollar payments. They were talking about the future rather than the past, and about practical needs rather than rights and the risks of trial. During the mediation before this event, the parties had discussed facts relevant to their relationship, such as why the homeowner had been unable to contact the contractor and what that meant about how the contractor wanted to relate to the homeowner.¹¹³ The lawyer might have tried to derail that framework by turning the discussion back to subjects appropriate for positional and distributive bargaining, such as legal rights, the likely outcome of a trial, or the blame for the initial errors. Instead, his way of looking at the problem shifted as well.

Recognizing and distinguishing the seven subjects of talk as they occur in mediation does not require years of training. The frameworks are embedded in the thinking of all of us, novice and expert alike. The subjects are instances, or embodiments, of embedded frameworks, and can appear as a natural, unforced phenomenon to anyone willing to observe them. Learning about them does not have to precede the perception of them or the act of using them. Simple observation can be an effective first step.

I do not intend to demean expertise. Of course, mediation and negotiation are immensely more rich and complex than simply choosing between subjects to talk about. Carrying out a mediation within any framework, or within none at all, is endlessly challenging. The dynamics ebb and flow, information surfaces and submerges, the participants sometimes work at cross purposes and sometimes work together, all at the edge of, or slightly beyond, the control of any one

112. *Id.* at E-49.

113. *Id.* at E-32 to -33.

participant. By itself, the process of invoking frameworks and leading others to act within them simply by trying to lead the discussion into the appropriate subject matter category is rather superficial. However easy it may be for a novice to observe and identify the subject matters and invoke a particular framework, an expert practitioner will still perceive, understand, and perhaps influence the dynamics of the mediation with a power and degree of detail well beyond that of a less experienced participant. Noticing the framework-relevant subject matters of mediation talk, as I am urging lawyers to do, is not a substitute for developing expertise in representing parties in mediation. It is only one kind of step. However, I think it is a critical one, for without it lawyers will find it difficult to open the door to frameworks other than the Distributive one. Without waiting for some specialized training or “graduation” into expertise, by paying attention to the subject matters of talk in mediation, lawyers can bring themselves into congruence with mediators, or even influence mediators and the other participants to step into the framework that the lawyers are seeking to activate.

Nor is this advice a recipe for lawyers to seize control of mediations to the detriment of mediators. Effective implementation of a framework requires the collaboration of many, if not all, of the participants in the mediation. If only one participant is speaking in terms of subjects characteristic of a framework while the other participants are not, the mediation as a whole will probably not proceed within that framework.

CONCLUSION

Mediation presents substantial opportunities and challenges to lawyers representing clients. The opportunities include: speeding up the kind of positional negotiation that lawyers often use for settling their clients’ cases; finding mutually beneficial settlement terms that increase value for one side without imposing a corresponding loss on the other; repairing and improving tattered relationships; and increasing clients’ understanding of themselves, their real world situation, and the people with whom they find themselves in conflict. The challenges arise because lawyers in mediations too often cannot or do not act in ways that will facilitate these promising alternative

means. When lawyers use familiar forms of positional bargaining instead of the alternative cognitive frameworks for mediation, they cut their clients off from the benefits that mediation can provide.

Hindering mediation in this way is not necessary. Lawyers can properly do their jobs of representing clients in ways that enhance, rather than challenge, the benefits of mediation. To align themselves with the work of mediators, however, lawyers need to embrace the mental frameworks of mediation that are different from the positional negotiation of most legal disputing. Each of the four frameworks I describe—Distributive, Value-creating, Relationship, and Understanding—provides a different way of understanding the nature and content of the parties' conflict. Each provides a different set of goals and a different repertoire of talk to guide mediation. We might question whether lawyers can adopt such frameworks while representing clients in mediation. The frameworks seem substantially different from the ways in which lawyers think about legal matters. Lawyers can adopt the frameworks in a negotiation or mediation, even though they would be strikingly out of place in a courtroom or other adjudicatory hearing. There is nothing in the legal mind that would prevent lawyers from acting in terms of alternative, mediation-friendly mental frameworks.

The frameworks are not recipes or algorithmic guides, laying out a series of appropriate steps that one can take after adopting a general theory. Instead, they tend to operate tacitly, providing those who operate within them with a sense of which reactions, statements, and other mediation moves make the most sense in a particular context and at a particular moment. Words provide a way for practitioners to uncover the framework that is actually operating, or the frameworks that are competing with each other, at any given moment in a mediation. Different frameworks tend to focus on different subject matter areas. By paying attention to the subject matter *categories* that the participants are talking about, and not just to the substance of what is being said, lawyers can ascertain which frameworks they and the other participants seem to be using. Attending to how long and in what detail the discussion keeps to one of the seven frameworks can give a lawyer a sense of the framework(s) in which the others in the room are operating. The subject matters are not only descriptive. By trying to move the conversation into one of these subject areas, or by

trying to keep it there, a lawyer, like a mediator, can try to direct the mediation into a framework, or keep it in a framework, that will most benefit her client.