

# Kluwer Mediation Blog

## Truth. No longer useful?

Charlie Irvine (University of Strathclyde) · Monday, April 12th, 2021



I started mediating in my early 30s, surely old enough to know the difference between truth and fiction. Yet after a couple of years I began to say, first to myself then to my friends, that the concept of truth was 'no longer useful' in my work. What did I mean and how did I get there?

### Journey from certainty

The first challenge to certainty came from conducting family mediation 'intake' sessions: one to one conversations with both a screening and an information given/gathering function. I quickly realised people weren't interested in what I had to say about mediation; but they liked a mediator who'd listen.

First I would meet one parent. They'd often tell a tale of their difficult, unreliable and self-absorbed ex-partner. It would be utterly convincing, and I'd steel myself to meet this awkward individual. Then the second parent would turn out to be perfectly reasonable, even charming. Their story, a mirror image of the first, might select for emphasis the first person's failure to recognise their children's needs and self-centred unfairness.

A few months of this had an impact, particularly when combined with mediation practice. I became more sceptical of my ability read people and predict events. I learned that all is not what it seems. Sometimes the 'baddy' is the more wounded; and grief and loss can make perceptions extreme yet transient. My family and friends, having those conversations where you argue about who's to blame for a divorce, found me a disappointment. I couldn't join in. I was learning how little we know about other people's inner worlds.

One client told me: 'My wife's problem is that I'm a born-again Christian and I never lie.' I make no comment on his faith, but his approach to truth disturbed me and seemed to spell trouble for the forthcoming mediation (it didn't go well.) Decades later I'm still piecing together why. It now strikes me that he was making a truth claim. He was, in effect, saying that he possessed a superior claim to determine the accuracy of his wife's account. While she may tell stories, he spoke the truth. And he seemed to believe that these competing narratives would be determinative; that the outcome, and its ultimate justice or otherwise, would depend on who was believed.

### **Truth in practice**

Readers may say that mediation doesn't set out to be determinative 'in that way.' Helping people negotiate a practical and mutually acceptable resolution is not the same as establishing what is true and what is false. However, participants don't necessarily share our pragmatism. Allegations of lying are common. I recently heard a highly skilled community mediator explain that her only ground rule is to prohibit the terms 'liar' and 'lies.' She's learned how disastrous they are for our work.

What are mediators trying to do here? It's important to notice what I did not say. Recognising that the concept of truth was 'no longer useful' in my work is NOT the same as saying that truth no longer matters. I wasn't even saying that truth doesn't matter to mediators, nor that it cannot be known, nor that there is no such thing as truth and therefore no such thing as a lie. And the remark did not imply a commitment to relativism: you live your truth and I live mine.

With hindsight it seems that repeated exposure to competing truth claims drove me to ask the same questions as post-modern thinkers a generation or two earlier. Not 'what is true?' Rather 'who gets to decide?' Winslade and Monk's concise summary of social constructionist thought in '[Narrative Mediation](#)' asserts: 'we might hear people's stories of conflict as rhetoric' (p. 40). What I was trying to say, rather ineptly, was that people's attempts to convince me or the other party about their truth claims were unlikely to succeed. Worse than that, it would be oppressive to collude in a social encounter that enabled one person to close down the other's perspective.

### **Mediation in practice**

To be clear, truth does matter. But I'm not convinced that mediation is the best forum for its

determination. Mediators are often accused of litigation-bashing; instead I'm calling for mediator humility. Courts and evidential hearings are set up to establish the veracity of competing truth claims. To be sure, they do this imperfectly (see Menkel-Meadow, 2006, 'Peace and justice: Notes on the evolution and purposes of legal processes' *Georgetown Law Journal*, vol 94, 553-580), but it remains a key foundation of the justice system. Judges' decisions about 'law' rest on their assessment of 'fact.'

However, mediators are not decision-makers (a state of affairs often overlooked by allies and critics). Parties make the decisions, even when legally advised. They already know their own perspective and the other person's may or may not be influential. Montada and Maes argue: '*The aim of discourse in mediations is not the search for universal ethical truths, but the furthering of the insight that good reasons can be put forward not only for one's own normative views and claims, but equally for the opponent's views and claims*' ('Justice and Self-Interest' in Sabbagh and Schmidt, 2016, *The Handbook of Social Justice Theory and Research*, 109-125, 120).

They go on to suggest that rhetoric and persuasion be 'banned.' This is similar to my saying that the concept of truth is not useful in my work. Charlie Woods makes much the same point in his blog: '[Your Truth, My Truth and The Truth.](#)' We are all acknowledging that a non-adjudicative process is likely to make little progress on that question.

Mediators learn to shift the terrain. More useful are questions like 'what can you agree on?' or 'what needs to be dealt with here?' or, my favourite, 'what needs to happen?' Mediators work on the premise that parties are best-placed to evaluate outcomes. The criteria by which they conduct that evaluation is a discussion for another time, though I touch on it [here](#).

### **Truth in crisis**

These thoughts have taken nearly 30 years to marinate. I might have left well alone but for an electrifying presentation last October at an online conference on '[Presumptive ADR and Court Systems of the Future.](#)' The event marked the launch of presumptive (I'd say default) ADR in New York state. The most bracing ten minutes of an otherwise pretty positive day came from Prof James Coben, Senior Fellow at Mitchell Hamline Dispute Resolution Institute and one of my favourite mediation authors.

Speaking two weeks out from the US presidential election Prof Coben began: '*Given the delicate state of our democracy... the threat to the rule of law and decline in civil discourse... I don't think normal policy choices are called for.*' He explained that having lived through the four years of the Trump presidency he had become, in effect, a single-issue law teacher; actually not a 'single issue' but four issues. Before making curriculum decisions he interrogates them for their impact on: i) faith in public institutions and science, ii) surfacing and ending systemic racism, iii) the value, indeed necessity, of dissent and iv) helping citizens have conversations about acutely polarising issues dominating the body politic.

Space doesn't permit a discussion of this fascinating talk, but his words on mediation in a '*post-truth world*' caught my attention. I'm only an onlooker when it comes to US political discourse, but the overspill from its binary incivility washes across the world. Against that backdrop Prof Coben is not convinced that encouraging mediation meets his first criterion: restoring faith in public institutions and science. A self-confessed litigation romantic, he spoke of law's unique ability to sort out fact from fiction. He asked: '*Is it a social good to leave people to confront complexity by living their own truth?*'

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## Conclusion – truth still matters, but it’s still not useful in my work

These words from a highly principled and thoughtful scholar ought to worry us all. Rather than an attack on mediation I prefer to see them as the expression of a profound crisis of confidence. The ground on which he stands seems so shaky that only a return to the certainties of the positive law feels safe. If scientific truth is under assault, the last thing we need is the acceptance of competing truth claims.

I’ll also resist more litigation bashing (another of Prof Coben’s targets). As I said above, mediators need to develop more humility in acknowledging what we can’t do. While law can’t offer scientific truth, it has developed the philosophical construct of evidential fact – actually, for civil disputes, the balance of probabilities. Nonetheless it is, mostly, effective. We mediators do not exist to replace the law, or the courts, or the legal determination of contested matters. We operate in another domain, one I’d argue can be equally principled.

What we do is help people talk or, if you prefer, negotiate (see John Sturrock’s [recent blog](#) describing Anna Howard’s research on this). In our adversarial legal systems, up until the moment the courts are asked to make a decision, parties are completely at liberty to negotiate anything (lawful) they choose. What I realised all those years ago was that, rather than replace the courts, mediators have to stick to their guns and insist that they do something else. They don’t determine truth and falsehood. They support conversation and negotiation. Sometimes that is all that’s needed for resolution. Sometimes those negotiators require external determination. That should not be prevented.

I’ll continue to insist that mediation is not the right place to resolve competing truth claims, but will be more cautious about how I say it. Truth does matter. Who gets to decide matters too. I still view it as a social good to extend to ordinary people the faith that they can make wise choices. My hope is that the winds buffeting the US legal system won’t rob us of our faith in human capacity for justice.

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