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Case Analysis

Neutral, Biased, or Both? Discursive Construction of a Mediator's Dual Role

Jian Wang

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Abstract

Within a theoretical and methodological framework based on critical discourse analysis and the principle of the objective, and using recordings from a civil case concerning an inheritance dispute, this article explores how a mediator in China employed various discursive strategies to foster conflict resolution and construct a dual role. On the one hand, he tried to maintain an impartial stance, but on the other he violated neutrality by acting selectively against one party. I suggest that the mediator, influenced by social ideology and/or his own interests, appears to be “neutral” but is sometimes “biased,” resulting in the performance of dual roles that combine the functions of problem solver, judge, and mediator. This finding facilitates greater understanding of what Chinese

mediation is and how it operates.

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Introduction

Mediation, as an alternative method of dispute resolution, has become common in Western countries and in China as well (Grillo 1991 ; Huang 2005 ; Wang 2013).[1] For example, in the United States, most state and federal courts have an alternate dispute resolution program of some kind, and it is now common for litigators to consider engaging a mediator at some point in the litigation process (Hoffman 2002). In China, mediation is widely applied to all cases except administrative compensation cases (see Section 50 and 67 of *Administrative Procedure Law of the People's Republic of China*) and can be administered by a single judge or by a "collegial panel," which is typically a panel of three to seven judges who adjudicate individual cases, either prior to, or during, court trial.[2] In some cases, mediation is even mandatory or a prerequisite to judicial hearing.[3]

Two popular explanations for the wide acceptance of mediation are that the process is neutral and that it rests on a firm foundation of party autonomy: the parties own the dispute and are able to control the details of their disputing process (Menkel-Meadow 1995 ; Brunet et al. 2006). Although with the intervention of a mediator, the initial dispute dyad becomes a triad, disputing parties still retain their ability to decide whether or not to agree to or accept proposals for resolution regardless of who made the proposals (Rifkin 1984). As Scott Jacobs put it, according to the ideals of neutrality, mediators must resist the impulse to agree or disagree with one or the other party, to refute or support positions, to challenge and contradict, or to bolster and confirm (Jacobs 2002). In other words, the philosophy of mediation is that mediators should be neutral and should not take positions or decide the result of a case, that mediation is legitimate because the parties freely consent to the process, and that it is extralegal such that the mediators do not interpret the law or offer legal advice, but rather seek to facilitate a solution beyond the framework of legal rights and obligations.

As to whether mediators live up to those ideals in practice, scholars' opinions vary. For example, Orna Cohen, Naomi Dattner, and Ahron Luxenburg (1999) argue that mediators can advance broad conceptions of neutrality, that is, neutrality is not singular in nature; instead, it comprises several qualities, such as fairness, justice, and appropriateness. Conversely, Karen Tracy and Anna Spradlin (1994) found that mediators use various tactics to create the appearance of neutrality or fairness. Other researchers supported that finding: although mediators are influenced by competing demands and exhibit various complex and nonstraightforward ways of talking, they maintain an appearance of neutrality (Jacobs 2002) and try to be impartial and engage in displays of neutrality (Heisterkamp 2006).

Some scholars have argued that the ideals of mediation create a paradox for mediators (Rifkin, Millen, and Cobb 1991). Other scholars have noted several different challenges to neutrality: that it is not truly possible for human beings to be neutral (Folger and Jones 1994 ; Rothman 2014); that mediators sometimes use "selective facilitation" to steer clients in certain directions (Greatbatch and

Dingwall 1989); that they may offer legal advice just as attorneys do, which threatens the fairness of the process (Nernasconi-Osterwarlder, Johnson, and Marshall 2010); and that mediators often become less objective as the mediation progresses (Kolb and Kressel 1994). Lukas Wiget (2012) argued that in some circumstances mediation seems to be either unnecessary or pointless, or even causes a barrier to justice.

Although significant research has explored whether mediators are indeed neutral, the idea that mediators sometimes play a dual role by being simultaneously neutral and biased and how such a dual role is constructed has not been examined.

Based on the transcribed recording concerning an inheritance dispute in China, I have applied a critical discourse analysis to examine in detail how a judge serving as a mediator constructed a dual role by employing various discursive devices. In this article, I discuss how and why the mediator plays this dual role and consider this against the backdrop of Chinese interactional norms, Chinese institutional constraints, and Chinese cultural values.

Case Description

This mediation involved a dispute over an inheritance that took place in Sichuan Province in 2011. The disputants (these are not their real names) were

- Liu, the wife of the deceased Wu and the plaintiff in the case;
- Wu's three-year old son, whose mother is a different woman to whom the decedent was not married, referred to in this article as the “first defendant”; and
- Gu, the boy's mother and legal representative, referred to here as the “second defendant.”

Wu and Liu's children had previously relinquished their rights to their inheritance and were not involved in this dispute.

The community property acquired by Wu and Liu during their marriage comprised:

- four houses and two shops located in various places, worth about half a million yuan[4];
- a life insurance policy with the son listed as the beneficiary worth three hundred thousand yuan;
- a death pension of three hundred thousand yuan;
- a bank account in Wu's name worth one hundred thousand yuan; and
- thirty-five thousand yuan in cash.

The latest version of Wu's will, which was notarized, bequeathed all his property to his son and Gu. When Liu brought a case before the court, Gu and her son had taken possession of most of the property.

Liu alleged that the deceased had the right to dispose of his separate property, but only after the

community property was divided to give her her fair share. Because the community property was undivided when the will was made, she argued that the will was therefore not valid. She thus claimed her share of the community property and further argued that she was entitled to receive even more than that because Wu had mistreated her by having an extramarital affair and fathering an "illegitimate" child. (In China, courts will consider the grounds for a divorce, such as family violence, adultery, etc. when dividing marital property and may render a judgment in favor of the aggrieved party. This logic would apply to this case even though the decedent and his wife were not actually divorced at the time of his death.)[5]

Gu submitted a marriage certificate and a notarized will to the court, claiming that she was the lawfully wedded wife of the deceased and thus the owner of all the property. The court determined that the marriage certificate was a fake and that the notarized will had not been lawfully executed because the deceased had failed to divide the community property prior to writing the will. So the will was declared null and void, and the case that went to mediation involved the disposal of the deceased's entire estate.

The mediator had become a judge following service in the military.[6] At the time of this mediation, he had served as a judge for more than twenty years and had presided over approximately fifteen hundred complex civil cases. After reviewing the complaint and the response to the complaint, he decided to convene a mediation session prior to the trial in accordance with Section 14(1) of *Provisions of the Supreme People's Court on the Application of Summary Procedures in the Trial of Civil Cases* (2003).

Mediation is practiced somewhat differently in China than in the United States and most Western countries. In the United States, for example, judges do not typically serve as mediators until they have retired from the bench and even those judges who do engage in judicial mediation would not mediate cases for which they are the trial judge. In China, in cases in which compulsory mediation is a prerequisite before court trial (e.g., a divorce), a judge may both mediate and preside over a case simultaneously, a practice that has received some criticism (Wang **2014**).

Methodology

Beginning in February 2011, the court made four unsuccessful attempts to resolve the dispute via mediation. After a cooling-off period of four weeks, the court made one more attempt. At this time, both parties agreed to mediate (each was accompanied by friends). With the consent of the court and both parties, I attended and observed the fifth mediation session and audio-recorded it with an MP4 digital recorder. I recorded seventy-eight "turns" (separate utterances) in a session lasting eighty-four minutes. The language of the proceedings was Chinese (Mandarin), so I translated the transcription into English. I analyzed the data using the discourse analysis method.[7]

The Principle of the Objective

The "principle of the objective" is a concept somewhat similar to *teleology* , the doctrine that processes are designed to achieve a particular end. But its origin is actually earlier — the idea of the principle of

the objective can be traced back to *The Art of War* written by the Chinese General Sun Tzu two thousand years ago.[8] The principles of strategy embodied in *The Art of War* require that a person should decide in advance exactly what he or she seeks to accomplish (i.e., what exactly is the objective or goal). The principle, along with variants developed by Chinese scholars, has evolved over the centuries to have direct implications for and applications to strategic thinking, both for individuals and organizations.

Chinese scholar Gu Yue-guo (**1996**) has treated the principle of the objective as an important parameter in discourse analysis and pioneered the use of a "goal-analysis" approach to analyze interactions between Chinese doctors and patients. Another Chinese linguistic scholar Qian Guanlian (**1997**) articulated the "goal-intention principle," with "goal" referring to the overall or ultimate objective of a conversation, while "intention" consists of various specific intents or purposes that are derived from the goal and distributed in each turn of a conversation.

Hu Fanzhu (**2009**), the first Chinese scholar to apply discourse theories to language used in legal contexts, has argued that "a speech act is a component of a purposeful activity," according to what he calls "the principle of intentionalism." And scholar Liao Meizhen (**2005a** , **2005b**) further extended the concept to courtroom discourse and argued that any activity undertaken by a rational person is goal-oriented.

Discourse analysis approaches, although all share certain characteristics (e.g., analysis of naturally occurring, unedited text or talk, attention to the significance and structuring effects of language, a focus on discourse as social practice), vary in focus and approach. As Norman Fairclough and Ruth Wodak (**1997**) put it, critical approaches focus explicitly on how power relationships and structures of inequality, such as those related to class, race, and gender, are reproduced in discourse. Texts often provide discursive cues to these power relationships, and thus textual analysis may reveal the relationships between power and identity. In this article, I have used a critical approach in my discourse analysis of this mediation.

Mediation in Modern China

Based on the premise that participants in a conversation have goals, in this study I ask: what is the mediator's goal? And to what extent is that goal influenced by social or personal ideology?

In modern China, many lawsuits are resolved by mediation (see note 12), suggesting that the Chinese may prefer mediation to litigation, and one reason is perhaps that the traditional values of Confucianism, Taoism, and Buddhism that advocate the maintenance of harmonious interpersonal relationships still guide the Chinese approach to conflict resolution. Because China became more open and enacted reforms of its Communist system over the last forty years, the government has made greater efforts to encourage conflict settlement by rule of law judicially rather than by traditional mediation. (Traditionally, mediation in China was seen as essentially a political endeavor, whose purpose was quite different from that of contemporary mediation.) Nevertheless, the goal of maintaining harmony has never ceased to exert influence on mediation practice. Since the Hu-Wen Administration of Communist Party General Secretary Hu Jintao and Government Premier Wen Jiabao (2003–2013) established the goal of "building a harmonious socialist society" as state policy, this idea has become even more highly valued and has entered the mainstream of Chinese politics.[9] Some elites even advocate restoring the important role of the doctrines of Confucius and Mencius.

Accordingly, the principle that "harmony is of paramount importance" (in Chinese: *he wei gui*) has been embodied in recent standards of judicial practice: whether cases are resolved through mediation has become a key factor in the performance appraisal of judges, which provides considerable inducements to promote mediation.

The Construction of a Neutral Role

In mediation, decision-making authority regarding the outcome rests with the parties, which is considered to be one of its strengths. And if the parties believe that they have not voluntarily entered into agreement, they are less likely to honor the terms of the mediation agreement. Thus, the mediator's first task is to win the trust of the parties and convince them that he or she is neutral; typically, mediators achieve this by avoiding the appearance of partiality, by promoting honesty and candor, and by refraining from knowingly misrepresenting any material fact or circumstance in the course of the mediation (Waldman **2011**). Candor and transparency about the mediation process are seen by some scholars as particularly critical in creating trust (Moffitt **1997**).

In the following excerpt, we see the mediator's efforts to build trust by explaining the process and demonstrating his neutral role. In this and all excerpts, M = the mediator, P = the plaintiff, Liu; and D = Gu, the second defendant, the child's mother. (For explanation of the transcription marks, please see Appendix One.)

Excerpt One:

M: … (to both parties) *um, well* (2 s), *we are here to deal with this inheritance dispute. Are you willing to mediate?*

D: *Yes.*

P: *Yes.*

M: *Since you agree to mediate, let's start. You know, I will not take sides . I (2 s) we will try to help you reach a satisfying agreement on grounds of fairness and equality. … I have asked your counsels to make a detailed list of the properties in question. Next, let us deal with the items one by one. You may speak out what is on your mind as to how to divide the properties. …*

As the excerpt shows, the mediator displayed his stance overtly from the beginning: he only served as an impartial third person and the decision belonged to the parties. The mediator also displayed his neutrality with a change of "footing." *Footing*, also referred to as the position or alignment that an individual takes in uttering an expression, illustrates a speaker's stance toward an utterance, as well as toward other parties and events (Levinson **1988**). In excerpt one, the mediator first used "I," but replaced it with "we," a shift in footing intended to indicate that, as mediator, he represents the court, which seems designed to enhance his appearance of neutrality. Then, with the use of "let us," he shifted footing again, shifting responsibility solely from himself to include the other two parties,

suggesting that all parties would work *together* to resolve the dispute so that partiality and manipulation could be avoided.

In the next excerpt, however, the mediator's display of neutrality seems to briefly falter.

Excerpt Two:

P: *… The sum of money that you withdrew from your bank account the other day [is the very sum of money that you withdrew from the bank account of Wu]*

D: *[is earned by ▲ doing odd jobs!]*

M: ▼ *Stop quarreling about the attribution of said money, OK? We can go to the bank to have a check and sort it out. Or we can resort to recorded bank security camera images to find out the truth.*[10] *We will treat every one equally and fairly, and let justice be done, though the heavens may fall . …*

In this excerpt, the mediator interrupts the defendant. As a linguistic device, interruption is frequently used in institutional settings with negative connotations (Schiffrin **1994**); or to display a range of somewhat contradictory features such as neutrality, or power, or rapport (Goldberg **1990**); or to represent important interdiscursive and turn-taking mechanisms in institutional interaction (Bunt et al. **1980** ; Thomas **1990**). But the meaning of an interruption can be open to interpretation and not all observers will agree (Bennett **1981**). When the mediator in this case interrupted, his neutral stance could have been impaired because the interruption could have suggested to the defendant that he was on the plaintiff's side. Perhaps he realized this because he attempted to reassert his neutrality by selectively employing a collective pronoun “we” and uttering a legal quotation, “let justice be done, though the heavens may fall.”

In the third excerpt, below, we see that the mediator intervened to interpret the law. (Death pensions, as referred to below, are similar to life insurance policies — money payable by a deceased's former employer to the deceased's surviving spouse and/or children.)

Excerpt Three:

M: *… In respect of the distribution of the death pension, your views are much divided. This sum of money should be divided in accordance with law, i.e., among the surviving spouse, the children, and the mother of the deceased. I suggest Plaintiff have 60 percent of the pension, while Defendants and the deceased's mother have the residual 40 percent. The reasons are as follows: … What do you think? If you are not satisfied with the suggestion, there is much room for further negotiation .*

P: *Fine.*

D: *It's OK. …*

The mediator's reference to “in accordance with the law” is problematic because according to most

mediation codes of ethics, mediators should avoid giving unsolicited legal advice to disputants; although in this case, it seems that his interpretation of the law in the face of both parties' ignorance does not constitute giving legal advice to either particular party. In this case, his statement was directed toward both parties and thus did not create an attorney–client relationship. Then, when he proposed a possible solution to the dispute, he made it explicit that it was the disputants who had the final say on how to divide the death pension; so, if either party perceived that the split was unfair, they could have rejected his proposal.

For the most part in these first three excerpts, although he faltered briefly in this effort, the mediator clearly took steps to construct a neutral role.

The Construction of a Biased Role

Impartiality is based on the idea that an observer sees from an unacknowledged perspective (Minow **1987**). But inevitably that observer does indeed have his or her own perspective, so true neutrality is impossible. Judges, who are only human (Resnik **1988**), will inevitably have their own values, biases, and perspectives, which will influence how they interact with others. Even the most experienced mediators sometimes admit to developing biased or partisan feelings during a mediation (Delgado et al. **1985** ; Kolb and Kressel **1994**).

In his research, Neil Diamant (**2000**) found that mediators in China, from the beginning of the mediation session, are much more *active* in determining the outcome of a dispute than would be the case in other countries. They are more likely to engage in their own fact finding rather than relying on the disputants' statements and are more ready to criticize, challenge, counsel, scold, or advise disputants to an extent that would be unheard of among even the most active American mediators (Wall and Blum **1991**).

In this case, I also found that the mediator, apparently in an effort to resolve the dispute within a limited time period,[11] displayed bias against one party and violated neutrality, appealing to traditional Chinese tenets in his effort to resolve the dispute. This can be seen in excerpt four below.

Excerpt Four:

M: *(* to both parties *) Well, do you have any ideas as to the division of the three houses and two shops located in Town A* (note: a town where the plaintiff resides) *and the house located in Downtown B* (note: a city where the deceased had lived and where the defendants currently live)?

P: *I am entitled to all the houses and shops, for they were acquired by Wu and me through our labor. She wants to get possession of the property? Forget it!*

D: *I want to have the house located in Downtown B, and the houses and shops in Town A shall be divided equally between us.*

P: *The house located in Downtown B lies in the town center and is more expensive. You want to take the house located in Downtown B, meanwhile claim ownership to the houses located in Town A? You wish!*

D: *Then I have the houses located in Town A, and you have the house located in Downtown B.*

P: *If you have the houses located in my native land, I will feel humiliated and lose face. No way! Thanks to my employment certificate, the house located in Downtown B was distributed to Wu and me under a welfare-oriented public housing distribution system. You contributed nothing, so stay the hell out!*

D: *Then I have a house and a shop in Town A. This would be satisfying to you, eh? (*3 s*) After all, the kid needs a place to live. (beginning to sob bitterly)*

M: *(*10 s*) Well, let me say a few words. Town A is the native land of Liu [plaintiff], so, if Gu [defendant] has the houses there, Liu will surely feel embarrassed, which Liu has already mentioned. So I suggest Liu have the houses and shops located in Town A. (*5 s*) Given that Gu has a minor child, I suggest Gu have the house in Downtown B, for it's more convenient for the child to go to school in the city. In effect, the houses and shops in Town A and Downtown B are almost equally valued. Of course, this will count on Liu's compromise. (Turning to Liu) you have gained more than your share of cash, which can roughly compensate your compromise in house division. (To both) What do you think? (*3 s*) We should always stand in each other's shoes , shouldn't we ? …*

P: (60 s, consulting her friends). *It's ok.*

D: (to the mediator) *Many thanks.*

When dealing with the division of the real property, the defendant compromised time and again, but the plaintiff refused to make concessions, which risked deadlock. Having listened to the arguments from both parties, the mediator suggested that both parties compromise and stand in each other's shoes. Asking disputants to demonstrate self-restraint reflects a fundamental tenet of Chinese philosophy (Chen **2002**) and is characteristic of Chinese mediation practice. In this case, the mediator was successful.

In the next excerpt, we see that the mediator attempted to reformulate the disputants' statements.

Excerpt Five:

M: *In respect to the cash and deposit, your opinions were divided last time. Do you have any new idea as to how to distribute them this time?*

P: *She has gained so much cash … She collected ¥30,000 owed to Wu in business and the reimbursement of Wu hospital fees under Urban Health Insurance.* (5 s) *I don't know whether there are other debts owed to Wu in business …* (3 s) *I retained a lawyer to collect evidence; … and the court costs … cost me a large sum of money …* (4 s) *she collected two years' rent of the shops located in Town A in a lump sum … how cruel-hearted she is …* (4 s) *She promised to pay half of the funeral expenses, but didn't pay a penny. …*

M: *Then, what you mean is you intend to have all the ¥35,000 cash and the demand*

deposits of ¥100,000?

P: *Exactly.*

D: *No way! Otherwise – –* ▲

M: ▼*What she said is true, isn't it?*

D: *– – Otherwise, there won't be any money left for us to make a living, if she takes all the money. … (* beginning to sob *)*

M: *Don't cry, Ok? JUST TELL ME whether what she said is true or not.*

D: (in low voice) *It's true.*

M: *That's it. SO SHE IS ENTITLED TO SAID SUM OF MONEY, isn't she?*

D: (4 s) (in low voice) *Yes. …*

In the above interaction, plaintiff initially failed to reply to the mediator's question about her demands regarding the cash, instead describing more of her grievances against the defendant. But the mediator reformulated it to confirm her intention to claim the ¥35,000 cash and the demand deposit of ¥100,000.

A reformulation is a statement or remark formulated in a new way to simplify or clarify the original meaning, including symmetrical and asymmetrical paraphrases (Cordeiro, Gael, and Pavel **2007**). (An asymmetrical paraphrase is a pair of sentences in which at least one sentence is more general or contains more information than the other one, while in a symmetrical paraphrase, both sentences contain the same information.)

When mediators simply restate the original utterance using similar language, their neutrality is maintained. Reformulations, however, may allow subtle changes in the representation of positions (Arminen **1988**), which can have an impact on the mediation. This is the case in excerpt five, in which the mediator reformulated the plaintiff's statement to clarify her intention to claim all the money, although she did not initially express that intention explicitly. This reformulation suggests that the mediator had shifted toward the plaintiff's side and was consequently steering the mediation toward an outcome favorable to her.

Later, the mediator interrupted the defendant by asking “What she said is true, isn't it?” which is a “tag question.” Also known as “question tags” or “tail questions,” tag questions are declarative statements that are turned into questions by adding interrogative fragments. Questions are typically employed by legal professionals to elicit genuine information or to confirm their understanding of a particular situation. Confirmation-seeking questions are characterized by a request that the addressee confirm or negate a statement, but their potential function is to “force the addressee to confirm the pseudo-proposition contained therein” (Gibbons **2003** : 95).

In excerpt five, because the mediator already knew the facts of the case, the tag question appears to be a “confirmation-seeking question,” conveying the mediator's expectation that his belief would be confirmed, which it was. The mediator did not provide the defendant any opportunity to explain and seemed to deliberately ignore her attempt to explain, using a “yes-no” question to constrain her response.

The second tag question (“So she is entitled to said sum of money, isn't she?”) both raised a question and an accusation (i.e., the second defendant was to blame for transferring the money from the deceased's bank account to her account). The coercive force of this tag question is apparent: the second defendant's positive answer to the question is tantamount to saying that “I agree the plaintiff deserves the money.” The mediator's use of tag questions indicate that, in this part of the mediation, the mediator was no longer behaving as a neutral and was acting in support of the plaintiff.

In the next excerpt, we see additional evidence that the mediator's stance has shifted from neutrality to partisanship.

Excerpt Six:

P: *… In addition, she* (referring to the defendant) *must support financially Wu's mother … for she has obtained so much cash.*

M: (to the defendant) *What do you think?*

D: *Each pays half of her living expenditure.*

P: *You wish! No way!*

…

M: (to defendant) *Your child inherits all the property of Wu, doesn't he?*

D: (in low voice) *Yes.*

M: *Then what else did you expect? …*

Angela Garcia (**1995**) argues that mediators often abandon neutrality by supporting one particular disputant and acting as his or her agent against the other disputant, which enables them to engage in the negotiation and may create additional pressure to resolve the conflict. Excerpt six is an example of this phenomenon, in which the defendant suggested that each party pay half the living expenses of the deceased's mother, a suggestion rejected by the plaintiff, who argued that the defendant had already obtained substantial cash proceeds from the decedent's estate. Apparently, the mediator also failed to be persuaded by the defendant's argument, responding with another tag question: “Your child inherits all the property of Wu, doesn't he?” Apart from serving as confirmation seeking, this question also implies criticism: because the child inherited the deceased's property, he has also inherited the decedent's responsibilities, which the defendant apparently wishes to shirk. Thus, this tag question effectively refutes the defendant's suggestion that each party pay half of Wu's mother's living expenses.

In the seventh excerpt, the mediator intervenes on behalf of the plaintiff by interrogating the defendant and raising objections on the plaintiff's behalf.

Excerpt Seven:

M: (to both) … *you shall pay equally the court costs, for this case is resolved through mediation. Well, the court costs of ¥1,400 were prepaid by Liu. How would you sort it out?*

P: *Each pays half of the costs. Definitely* (3 s) *She* (Note: the second defendant) *must reimburse me ¥700.*

D: *I* (2 s) *have no money.*

M: (10 s) (to the second defendant) *Didn't you withdraw ¥35,000 from Wu's account the other day?* (2 s) *you EVEN don't want to pay the court costs?*

D: … (silent)

M: *You'd better pay half of the costs, otherwise this case couldn't be concluded.* (2 s) *Liu* (note: the plaintiff) *suggested that each pay half of the costs. She has already stepped aside …* (2 s) *WHAT ELSE DID YOU EXPECT?*

D: *Well, I agree to reimburse her ¥700.*

In this excerpt, we see evidence of what Kenneth Cloke has referred to as "omnipartiality" (Cloke **2001** : 13). When the second defendant said she had no money to pay the court costs, plaintiff raised no objection. But a few seconds later, the mediator intervened again to refute the second defendant's contention, pointing out that she had withdrawn a sum of money from the deceased's account the other day. His remarks indicate explicitly that he was acting as plaintiff's agent, but they also helped him attain his goal of finally concluding the dispute through mediation. Further, the way in which the mediator phrased the question, for example, "what else did you expect?" ("Ni hai xiang za yang" in Chinese), indicates that "you should be well-advised to do as she suggested" and implies criticism of the defendant's behavior and attitude. Ultimately, the defendant conceded, perhaps feeling a bit forced, and once again accepted plaintiff's suggestion.

Conclusion

James Wall and Michael Blum (**1991**) have argued that Chinese mediation differs from American mediation in that neutrality is not a concern for Chinese mediators while it is highly valued in the United States. Whereas, according to my analysis of this particular dispute, neutrality in mediation may play a greater role than it once did in Chinese mediation, in this case, at least, the mediator seems to have played a dual role.

In the beginning of the mediation, the mediator tried to exhibit neutrality by proclaiming overtly that he was neutral and that he would conduct the process in accordance with the law and on the basis of equity and equality; by employing such linguistic means as change of footing (from use of "I" to "we"); and by quoting legal sayings such as "let justice be done, though the heavens may fall." As mediation commenced, the mediator let the disputants make a detailed list of the matters in dispute, then encouraged the parties to negotiate each issue in the dispute, during which process he proclaimed that he was there merely to help reach an agreement satisfying to both parties. The inheritance dispute involved eight separate issues, of which three were resolved as the mediator suggested. He put forth those suggestions only when parties failed to achieve consensus. Clearly, the mediator attached importance to neutrality.

On the other hand, in an apparent effort to resolve a seemingly intractable conflict in a brief period of time, the mediator violated neutrality and demonstrated noteworthy bias. Although party autonomy is a vital principle of mediation and mediators are expected to resist their impulses to judge, the so-called "Hawthorne effect" (Bowling and Hoffman **2000**) is at work whenever a mediator sits at the table with the parties. (The Hawthorne effect, also referred to as the "observer effect," refers to a phenomenon in which individuals modify their behavior when they know they are being observed.) After all, mediators do not work in a vacuum; rather, they operate within national and regional dispute management cultures and according to various institutional rules and regulations. Mediation is not a universal process isolated from its context.

As the excerpts examined here illustrate, the Chinese legal context affects how mediation is practiced in China. "Building a harmonious society" has become a national policy, and mediation is seen as a process that builds harmony. The use of mediation has, in fact, become a key factor in the performance appraisal of judges. Consequently, judges and mediator-judges are expected to exert every effort to promote mediation and encourage peaceful dispute resolution. This expectation is clearly having an impact, as statistics provided by the Supreme People's Court of the People's Republic of China attest: of the civil cases brought to courts at various levels in the last four years, in 2009 62 percent of cases in the courts of first instance were concluded through mediation; in 2010 that figure was 65 percent, in 2011 it was 67 percent, and in 2012 it was 65 percent.[12]

Although mediators know that impartiality is an ethical expectation, they also know that if they do not intervene, disputants may not concede and the mediator risks failure. In the excerpts analyzed above, the mediator risked and/or violated neutrality in several ways:

- He asked disputants to practice self-restraint and self-discipline (e.g., "stand in each other's shoes"), calling on their sense of community identity and reflecting the values of China's collectivist culture.
- He raised questions that functioned as criticism of one of the disputant's behavior, in effect scolding her for behavior he found objectionable. In this way, he behaved more as a judge than a mediator, representing the "quasi arms of the law" (Wall and Blum **1991** : 18) with the right to comment on disputants' behavior and aggressively force the disputants to act in ways he deems desirable.
- He acted, consciously or not, as the *de facto* agent of one party, expressing her viewpoint, while denigrating the other party's perspective.

We see that the mediator played a dual role that combined the functions of mediator, judge, and active problem solver. In this way, his role is considerably different than that traditionally assigned to mediators in Western countries.

This research suggests that while Western ideas of neutrality are more explicitly influential in Chinese mediation than they once may have been, mediation practice in China may still be influenced by Chinese interactional norms, Chinese institutional constraints, and Chinese cultural values. The underlying reason is that the mediator as a judge is inevitably influenced by the national culture and his professional culture and role, and consequently a conflict of interest will surely arise: on the one hand, the mediator is supposed to be neutral and ensure that both parties are satisfied with the outcome and

treated fairly without bias, but on the other hand, as a judge, the mediator wants to fulfill his goal: to resolve the case in mediation — no matter what.

One way in which Western mediators seek to reinforce the autonomy and willing participation of the parties is to make it clear that the parties can leave the process at any time and that they are in charge of the outcomes. The parties in this case, however, did not seem to have those options: it was impossible or inappropriate for them to walk out on the judge because if the mediation had failed, he would have presided over the trial.

The conflict between the dominant Western view of what constitutes ethical professional alternative dispute resolution practice and the goals of the Chinese system seems obvious. But Chinese culture — and other non-Western cultures in general — may be comparatively more tolerant of this kind of conflict and more generally flexible about the dual role played by the mediator.

Notes

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1 In China, mediation was inspired by the Confucian idea of “nonlitigation” (focusing on the resolution of disputes by means other than litigation); it is still customary for people to avoid litigation when disputes arise.

2 The number of judges on the collegial panel must always be odd to avoid tie votes.

3 See Section 92 of *Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China* (1992) and Section 32 of *Marriage Law of the People's Republic of China*, etc.

4 Liu's name did not appear on the titles of these properties because it was customary to list only one spouse's name on the title before the Property Law came into effect.

5 See *Opinions of the Supreme People's Court on the Division of Marital Property in Divorce Cases (1993)*. When dividing marital property, the court shall consider whether one party is at fault for the divorce (e.g., family violence and adultery) and correspondingly render a judgment in favor of the aggrieved party.

6 In China, demobilized or retired soldiers typically receive preferential treatment in hiring.

7 The transcription is less detailed than may be typical of much discourse research (see Appendix

One): I noted only those linguistic phenomena that indicated power asymmetry or neutrality in communication, as well as other linguistic phenomena relevant to my analysis, such as the positioning of overlaps and interruptions, filler speech, vocalized pauses and silences, and voice stress patterns. I did not include those elements that seem meaningless for the purpose of discourse analysis, such as the nonverbal behavior of the participants, coughing, clearing of throat, and so on; these were absolutely ignored, so that the transcription is more readable.

8 General Sun Tzu, is also known as Sun Wu, was born around 544 B.C. He was active as a military strategist and author of the immensely influential *The Art of War*.

9 In 2006, at the Sixth Plenary Session, the Sixteenth Central Committee of the Communist Party of China released the *Resolution on Major Issues Regarding the Building of a Harmonious Socialist Society.* See: http://english.cri.cn/2946/2006/12/07/272@171886.htm.

10 Later, when the court intervened to collect evidence, the cash withdrawal record and the recorded bank security camera images revealed that the second defendant did withdraw a sum of money from the deceased's bank account.

11 Under the Rules of Civil Procedure of the P.R.C., civil cases shall be decided within six months of filing or three months for cases to which a summary procedure is applied. This provision is also applicable to cases resolved through mediation.

12 These statistics are available at http://news.qq.com/a/20120319/000681.htm; http://www.court.gov.cn/qwfb/sfsj/201105/t20110525_100996.htm; http://www.hdjwww.com/staticpages/20130322/newgx514bba89-361503.shtml; and http://www.court.gov.cn/xwzx/rdzt/2013qglh/wjbgao/201302/t20130225_182131.html.

Appendix: Appendix One: Transcription Convention

(4 s): a silence whose length is specified in seconds (here 4 seconds).

[ ]: speech that overlaps with that of another speaker.

– –: an interrupted utterance and its resumption, as in:

Plaintiff: *he said* – ▲

Judge: ▼*said what?*

Plaintiff: *– said he would not let me live happily after divorce*

CAPITALS: Loud speech.

▲▼: an interruption occurrence, as in:

Defendant: *Would you in my position* ▲

Judge: ▼ *I am not here to answer questions – you answer MY question.*

…: the rest of the information is omitted.

References