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Mediation and Legal Literacy

Elizabeth C. Tomlinson

This study uses fieldwork to investigate the sponsorship of legal literacy within a court mediation program. This examination of institutional involvement in literacy sponsorship demonstrates the ideological nature of literacy by showing the importance of context, investigating literacy-based relationships, and uncovering the intertwined nature of oral and written forms of discourse. Little research so far has examined the sponsor's perspective on literacy, and this study also examines how sponsors may accrue and distribute benefits. Further, the study explicates an approach to literacy sponsorship through mediation which, while still embedded with disparate power relations, may provide an equitable literacy sponsorship model for other community organizations.

This study recognizes the ideological nature of legal literacy and builds upon considerations of local literacies and the impact of institutions upon these literacies. I focus here on a mediation program within a county-level court as a "literacy sponsor" (Brandt, *Literacy*), and how the court and the program both regulate and assist in the socially contextualized development of one type of legal literacy. Deborah Brandt defines literacy sponsors as "any agents, local or distant, concrete or abstract, who enable, support, teach, and model, as well as recruit, regulate, suppress, or withhold, literacy—and gain advantage by it in some way" (*Literacy* 19). Much previous work, such as Brandt's and Victoria Purcell-Gates's, has centered on the role of those whose literacies have been sponsored through institutions. Ellen Cushman and colleagues note that literacy studies have typically engaged the bottom-up perspective, but they note the need for a better understanding of "macro-level, institutional structures" which they identify as promoting an "achievement gap" (207). Through the following research questions, I answer their call by shifting the lens to focus on an institution and its personnel's engagement in acts of sponsorship:

- In what ways does a county court's mediation program act as a legal literacy sponsor?
- What benefits are derived from these acts of sponsorship?

By investigating these questions, this study contributes to local literacies research and increases knowledge about institutional literacy sponsorship and legal literacy.

Legal literacy, in brief, involves understanding the appropriate channels of communication within the legal system, understanding the actions appropriate to request from the court, and knowing how to write and communicate properly about these actions within these prescribed channels. I will further elaborate on this definition shortly. Investigating the court's representations of its sponsorship behavior provides insight into how and why sponsorship of this particular type of literacy occurs, from the sponsor's perspective. This may, in turn, prove helpful for those seeking sponsorship. By understanding one's sponsor, one may more effectively pursue the offered good: in this case, a specialized form of legal literacy.

Tracing the Literacy Literature

This project originates from an ideological perspective on literacy. Literacy operates within specific socio-cultural contexts, and might better be called literacies – as Brian Street has noted (*Social Literacies*) – because of its protean, situation-dependent character. For this reason, many researchers in literacy no longer operationalize literacy according to an autonomous approach. Those employing an autonomous approach (e.g. Goody, Ong) view literacy instrumentally and imbue literacy itself with a great deal of power. Ellen Cushman and colleagues explain the limitations of the autonomous view: this “view is limited by its extrication of context, practice, and cultural values from use of tool, and thus it is limiting in its depiction of other practices of meaning making and tool use” (188). An ideological view of literacy more thoroughly incorporates the social context of literacy, as Street views it (*Literacy*). First, the ideological view resists the separation of oral and literate into discrete compartments. Instead, literacy and orality exist on a continuum within the ideological model. Second, the ideological perspective insists that literacy always exists contextually. As such, it often takes into account the relationships involved at personal, institutional, and societal levels in the acquisition of literacy (Brandt, 2001; Prendergast). Third, an ideological construction of literacy concentrates on the uses of literacy as opposed to its technology (Scribner and Cole).

More recently, scholars have been working to demonstrate institutional involvement in disseminating and regulating literacy. For example, Denny Taylor investigates bureaucratic texts as a form of “toxic literacy”. He argues, “What is written and not written recasts people's lives. Print is used quite literally to decide who lives and who dies.... None of this is true, of course, if you are privileged by society. If you have status—money to pay for a lawyer...then the ‘rules’ do not automatically apply. What

is written becomes open to interpretation and professional manipulation” (9). In this study, I investigate the possibility of turning a more helpful, auspicious lens onto legal literacy and the possibilities of sponsorship, as opposed to viewing it from a “toxic” perspective. While power differentials will remain clearly in view between the sponsored and the sponsor, the act of sponsorship can be re-envisioned in a manner more empowering to those of lesser status. Nonetheless, the literature has typically tended in the opposite direction.

Cornel West observes that critical race theorists have investigated the “edifice of contemporary legal thought and doctrine from the viewpoint of law’s role in the construction and maintenance of social domination and subordination” (*Critical Race Theory* xi). Randy Cauten identifies multiple scholars – such as Steven Stark, William O’Barr, and Susan Phillips – whose works suggest legal discourse is designed to both continue and enhance the court’s authority (*Black Letters*). Catherine Prendergast also shows how the court uses language to enhance its own authority. She employs critical race theory to depict the Supreme Court’s representation of literacy as White property (*Literacy and Racial Justice*). Critical theorists have begun to study the power of institutions as keepers of social goods, such as literacy. This essay focuses on how and why mediation and mediators can serve as sponsors of legal literacy, which in turn may allow those of lower status a better chance to advance their causes within the bureaucratic systems.

I build on Deborah Brandt’s scholarship on both sponsorship and her research on ghostwriting. Brandt’s ghostwriting study focuses on the transactions involved in ghostwriting—especially the “borrowing and lending of status” (“Who’s the President” 551), and she suggests that ghostwriting most often occurs because of scarcity of time, knowledge, and/or skill (559). Ghostwriters attempt to understand the minds of their clients in order to correctly convey what clients might actually have written for themselves. The ghostwriting process involves borrowing the persona of the client for whom one writes, and Brandt explains that the ghostwriter in return receives benefits such as “pleasure, status and growth” (555). Ghostwriters act as sponsors, imparting literacy and receiving benefits from doing so.

Brandt investigates ghostwriting in varied contexts, including ghostwriters who are hired to write for more powerful individuals such as politicians and CEOs, as well as a ghostwriter who helps fellow immigrants by invoking “the status of writing...to reroute power within organizations” (561). She considers the case of legal ghostwriting, focusing particularly on situations when law firms sell their writing abilities to otherwise pro se clients (563-4). She finds this particular form of ghostwriting potentially problematic, in that it may lead to misinterpretations of the litigants’ literacy level or to unfair advantages in the courtroom in some cases.

In other situations, she suggests it may lead to litigants being held to an inappropriately high standard as they may present a false impression of enhanced legal literacy (564). Brandt also describes the ways in which the ghostwriter may sometimes be viewed as controlling the author, for the author's own sake, which correlates to the ideas I address here.

However, there are also differences between Brandt's discussion of ghostwriting in the legal realm and the actual practices within this particular court. Brandt's ghostwriting research focuses on the transactional status of ghostwriting, and her sponsorship research focuses most intensively on individuals who act as receivers of sponsorship. This study, while using Brandt's terminology, focuses most intently on the sponsor, instead of the one being sponsored. The particular program being investigated acts as a producer and controller of one type of legal literacy, essentially controlling the dissemination of literacy as a social good. In addition, the mediator occasionally participates in ghostwriting-type activities. The court accrues benefits to itself through its public representations of its acts of sponsorship, but in other ways as well.

Situating the Court

I investigated the mediation program within a county Domestic Relations Court. The court studied is located in a northern Ohio county with a population of approximately 170,000 as of 2007 (Ohio Department of Development). The population is 97% White. Ninety-six percent of the families have incomes above the poverty level. The purview of the Domestic Relations Court consists of cases,

involving divorce, dissolution, the care and support of children and the protection of victims of domestic violence. The Court is obligated to help families in transition resolve their differences about finances and property, to ensure that the families' financial needs are met and, especially, to help families resolve disputes regarding their children. The Court is responsible for determining what is in the best interest of the children when their parents disagree. The Court is committed to resolving disputes and helping families evolve to their new family relationship. (County Domestic Relations Court, *Domestic Relations Court*)

In brief, the court functions primarily to deal with familial relationships needing legal intervention.

In 1997, the Supreme Court of Ohio initiated a program to provide start-up grants to courts, which provided temporary funding to hire an

on-staff mediator and clerical support (“Court-Connected Mediation”). In-house mediation is available in approximately forty-six of Ohio’s eighty-seven counties (“Court-Connected Mediation”).¹ The Supreme Court’s goal was to make free mediation available in every county by the end of 2005; however, this has not yet come to fruition. The Court recommends that courts offer free mediation services so that all citizens, regardless of income levels, will have access (County Domestic Relations Court, “Mediation: What You Should Know”). However, many Domestic Relations courts still maintain only a list of private mediators which disputants may hire, as opposed to offering in-house mediation at no charge to participants. This situation has recently become more difficult due to governmental budget cuts. Court personnel in several counties, such as Athens and Butler, noted that their grant funding had either expired or was in danger of doing so, which has led or may lead to discontinuation of in-house mediation services.

The in-house mediation program at this particular court began in 2001. Previously, the sitting judge retained a list of certified mediators. If the judge referred a case to mediation, the parties were responsible for paying mediator fees, typically in addition to attorneys’ fees. This changed because the current judge offered a new court sponsored mediation program as part of her campaign promises. When elected, she hired the mediation magistrate, Anne Kirby,² to set up an official program. This mediation program is offered without charge to participants. Magistrate Kirby has practiced law for over 25 years, is certified as a mediator, and has over a decade of experience with mediation and conflict management.

Methods

Prior familiarity with the concept of court-sponsored mediation led me to believe that this site might offer a fruitful site for the examination of how familial communication skills – and thus certain forms of legal literacy pertinent to this type of court setting – are taught. During an initial phone conversation with the mediation magistrate, I inquired about her willingness to participate in this IRB-approved study. She agreed to participate because she was interested in learning the results of this study and potentially using them to further improve the mediation program. I then began the process of acclimating to the field through several conversations with the magistrate, which led up to an in-depth two hour interview. Appendix A contains the interview questions. Follow-up questions were posed by email following observations. Although the informant interviews constitute a significant segment of the study, I accounted for potential biases and limitations inherent in interviews through a triangulation of sources.

As part of the triangulation, I observed four mediations and conducted follow-up interviews with the parties. When requesting

permission from individuals to observe their mediations, I noted my interest in learning about the educational aspects of mediation. Most were willing to allow my observation, although a few were uncomfortable with having an outside party present. During these times I observed other court functions (described later) which were open to the public. The mediations each lasted between one and a half and three hours. Due to their confidential nature, I was unable to gain permission to tape them; however, I kept careful notes throughout the proceedings, and then typed all notes and composed analytic memos following each observation.

The mediations observed included a settlement conference where attorneys for both parties were present, a post-decree³ child support issue, a preparation for marriage dissolution, and a never married pair discussing beginning visitation rights for the child's father. This mixture of mediations allowed me to see the program working in a variety of ways and for varied purposes, with couples in varying stages of relationships. I interviewed the participants following each of the mediations. After the second mediation, the parties needed to return to work, so they individually composed responses and returned these via postal mail. All other interviews were completed in person.

Due to my status as an outsider to the court, I also sought to further my understanding of more traditional court proceedings to assist in differentiating between them and mediation. To this end, I informally interviewed several other court personnel and observed proceedings which were open to the public: multiple dissolution hearings, including a couple whose mediation I had previously observed; three domestic violence proceedings; two pre-trials; and two post-decree hearings. This mixture of proceedings allowed me to view cases both during and after the finalization of the dissolutions or divorces of couples, as mediations can take place either pre- or post-decree. Several of these proceedings were conducted by the mediation magistrate acting as a traditional magistrate, which allowed me to see her in both roles. I also observed two other magistrates fulfilling traditional roles and a judge.

Both judges and traditional magistrates make orders for the parties involved, whereas in mediation the parties themselves are much more involved in the decision-making process. Seeing the other personnel allowed differentiation between individuals' personalities versus standard court protocol. The judge is differentiated from the magistrates as she is an elected official, whereas magistrates serve at the judge's pleasure. Magistrates are required to have the same minimum qualifications as a judge: at least 6 years in practice as a licensed attorney who holds a law degree and maintains good standing with the Supreme Court.

In addition, I examined multiple documents used within the court, and collected and catalogued all forms available at the site. For example,

I collected brochures describing the process of mediating, the court's functions, and other services offered. Forms collected included a Standard Parenting Schedule, definitional and instructional sheets, and explanations of filing processes for various types of cases. These will be discussed later in greater detail. Reviewing these documents allowed me to better understand the court's literacy expectations of litigants, as well as to investigate more fully the pathways the parties needed to negotiate.

My field notes also contain schematics of the office where mediations take place, as well as each of the courtrooms where I observed proceedings. I conducted these sorts of visual analyses of the physical sites because the physical layout of sites can either invite or deny access to educational resources to those entering the location. As sociologists Barney Glaser and Anselm Strauss observe, "Objects and physical spaces are of strategic importance as variables that help to control situations and people's behavior" (248). In addition, I examined the court's website. I focused my examination on the text of the site to see how the court used language to publicly represent and potentially promote itself as a sponsor.

Finally, a draft of this paper was shared with court personnel as a member check. The mediation magistrate expressed interest in learning how she might further improve her program by reading how an outside researcher understood and analyzed the proceedings. She provided suggestions to clarify several points.

Differentiating the Mediation Program from Traditional Proceedings

Mediation differs from traditional court proceedings in several important ways. First, the actual mediation process remains completely confidential between the parties and the magistrate. Unlike testimony and evidence given in trial, the issues discussed during mediations are not a matter of public record. When the magistrate takes notes during mediations, these remain confidential and may not be subpoenaed by any court. The magistrate explained she does file a short report following the mediation, but the information in the report is limited essentially to stating the parties appeared and mediated, whether or not they reached an agreement, and the terms of the agreement. It does not incorporate the process of reaching the agreement.

Second, the mediation process allows for a more open discussion of each party's concerns and issues than in a traditional courtroom setting where the judge must maintain judicial distance. This judicial distance is expressed both in the physical layout of the court and in the formal proceedings. The judge or magistrate remains clearly separated from the parties and is typically positioned in authority several feet above them on

the bench. He or she will not speak to either party without the other party present because all parties must have opportunities to respond (Kirby interview). Additionally, the parties speak to the presiding authority, not to each other. The judge observes and hears only what each side submits as evidence and testimony for the particular issue at hand. For example, during several hearings observed, a party would attempt to bring up an issue not included in the particular motion under discussion. In most cases, the magistrate, judge, or the attorneys would quickly stifle and redirect the parties. They were directed to file additional motions to discuss other issues, which may in turn lead to further legal fees.

Within the mediation program, however, the participants speak directly with each other and the mediator, Magistrate Kirby. In addition, the physical space layout differs. In the large office where these mediations take place, all parties are positioned on the same physical level. The mediating parties sit in chairs next to each other, turned slightly toward each other. The mediator sits across from them at her desk. While there is some physical separation due to the intervening desk, she is not seated at a higher level, and all parties in the room are in much closer physical proximity than in traditional proceedings. Regarding protocol, they are not as restricted in topics, and they can and do bring up any number of issues. The mediation magistrate does not actually make any rulings or decisions in the case, as these agreements are reached between the parties. Hence, the parties are free to disclose information that they would not want a “trier of fact” (a judge or magistrate serving in a traditional court-based role) to know, without concern that it will impact a judicial decision. Magistrate Kirby states, “My goal is to get everything aired out, get people to talk about these things, figure out where to go.” She encourages the parties to communicate openly and civilly.

Third, this court offers mediation free of charge to participants. Financial costs are only incurred if either of the parties wants a certified copy of the agreement or if either party hires an attorney to review the agreement. On the other hand, traditional court processes entail legal fees every time a document is filed, from the first motion through the entire case. An entire case may involve several hearings and multiple filings. Traditional proceedings also typically include attorney fees, whereas with mediation attorneys are not as likely to be involved.

About 75% of the parties involved in mediation within this particular program do reach either a partial or full resolution of their dispute (County Domestic Relations Court, “Mediation: What You Should Know”). If parties are unable to reach an agreement through mediation, the mediator sometimes explains how the court may view the situation. This may lead to better cooperation between the parties. If this still does not result in an agreement, the parties may proceed to traditional court proceedings, in

which case another magistrate or the presiding judge will make decisions for the parties.

Another important difference between mediation and traditional proceedings is the scheduling process. Trials in this Domestic Relations Court typically run about a day and a half in length, and trials for divorces with children typically schedule about eighteen months after the initial filing date (Kirby interview). Mediations, however, operate on a more flexible schedule and do not schedule as far out. This allows for the ready accomplishment of the dissolution of a marriage. Dissolutions resolve within ninety days of the initial filing because the parties themselves decide on the agreement and simply ask the court for formal approval. The parties often use mediation to aid in decision-making.

One particularly important similarity across court proceedings and mediations is the court's focus on the welfare of children involved. In dissolution hearings, the judge commended parties who worked together for their children's best interest. In post-decree hearings, the magistrates consistently reminded parties that despite the finalization of their divorce or dissolution, they needed to continue working together as parents. In the mediation program, the mediator frequently encouraged the parties to keep the children's best interest at the forefront of their discussions. The significant difference here is that within mediation parties decide together what is best for the children. In court proceedings, the magistrate or judge decides how the parties must parent together.

Legal Literacy

Legal discourse typically maintains its opacity through dense and even antiquated language. Randy Cauthen observes, "legal language is markedly conservative from top to bottom, with its lexicon and syntax often derived from medieval usage" (5). Despite the Plain English Movement, legal discourse ("legalese") continues to remain challenging, perhaps also due in part to its tendency toward abstraction (Cauthen). Conley and O'Barr suggest this opacity is at times deliberate. They state, "The conventional legal view is that when the law speaks authoritatively, it does not adopt the actual voices of its constituents or practitioners, but uses a voice of its own which is separate, distinct, and neutral" (169). Legal language often works to set those conveying and practicing the law over those being acted upon by the law.

Court documents, in this particular setting, employed both terminology and numerical computations which tended to obfuscate meaning and preserve the court's power as interpreter of discourse. For instance, the Standard Parenting Schedule is a nine page document containing rules, regulations, and standards which describe the parenting time available to non-custodial parents. Other forms, such as definitional

and instructional sheets, attempt to explain legal terms (e.g. *ex parte*, criminal temporary protection order, defendant) involved in domestic violence cases. However, these read somewhat like tax documents due to their density. Filing process sheets available include document checklists, which presume litigants' familiarity with various terms such as "Administrative Order Establishing Paternity," "Acknowledgement Affidavit," "Show Cause (Contempt)," and "Poverty Affidavit." The child support calculation worksheet is also dense and intimidating; the mediation magistrate noted that sometimes parties will just randomly pick numbers due to confusion about what the form requires. Although these forms are written with the intent to clarify and explain legal processes, they are text-heavy, sometimes obtuse, and presume a high-level of reading comprehension as well as an understanding of the terms and computations familiar to court personnel.

Legal literacy, like other literacies, exists on a continuum, not as an absolute. Parties have varying understanding and abilities to use the terms necessary in order to complete the paperwork for the particular actions they desire from the court. The parties also may enter the proceedings with variable awareness of the legality of particular end goals or accomplishments they hope to achieve.

For example, the mediation magistrate mentioned that sometimes the court receives filings from prison inmates which are written in "language that sounds very much like lawyers" (Kirby interview). However, the inmates do not necessarily ask for appropriate actions. According to Brandt, "justice is threatened when one appears more literate than one really is" ("Who's the President" 564). Indeed, this is borne out in this case, as according to the magistrate, the inmates often cannot receive the actions that they request. For instance, an inmate might demand that the other party be fined and jailed for not providing the inmate visitation rights; however, this is not a legal possibility. The inmates understand and can employ the discourse enough to participate in a literacy event but do not necessarily understand the "Discourse" within which the court operates (Gee, *Introduction*). For James Gee, Discourse (capital D) demonstrates the social context of language; he states, "Discourses are ways of behaving, interacting, valuing, thinking... that are accepted as instantiations of particular roles (or 'types of people') by specific groups of people" (*Social* viii); discourse, without the capital letter, refers to language use.⁴ The Discourse of the court, which incorporates restrictions imposed through the legal system, determines and specifies how the court responds to the particular desires of the parties.

To accomplish legal tasks, parties need to understand the Discourse of the court, or they need to retain an interpreter, such as an attorney. Understanding this Discourse constitutes a sort of legal literacy and involves several levels of understanding. One of the components of legal literacy

involves learning to recognize the appropriate processes and channels of the court; one must know whom to talk to about what issues and where to find and file forms. A second component involves comprehension of forms and legal documents. One must learn how to read the forms appropriately within this particular legal context and come to an understanding of what types of information are necessary to complete the forms. This, in turn, involves some awareness and comprehension of legal terminology. Finally, legal literacy also includes an awareness of what legal possibilities exist to solve one's problem. If, like the "jailhouse lawyers" described above, one asks for an inappropriate response to a particular issue – i.e. by making a legally-impossible request – then one will not receive the desired results.

This is where attorneys and the mediation magistrate may enter into the process. All of these components connected to legal literacy may be overwhelming to individuals entering the court system. Funds permitting, parties may hire an attorney to take care of their legal literacy issues. However, some parties want to work through these issues without involving an attorney, or they may not have the funds to pay for one. In this case, the mediation magistrate sometimes provides legal literacy sponsorship. She knows how to accomplish the tasks that the parties desire, such as composing, modifying, and filing documents for divorces or dissolutions. She also understands both the discourse and Discourse of the court, to employ Gee's distinction. In effect, the mediator is capable of acting as a ghostwriter. She works to involve the parties in reaching agreements by educating them about the process, as opposed to assuming complete control of the documents.

Even though the mediation program helps others in obtaining a basic level of legal literacy, the court simultaneously continues to promote its own power and usefulness. The mediator, for instance, possesses a high level of legal literacy which others need to access. Although the magistrate works to teach the parties, they continue to need help with composing the documents which reflect their agreements. For instance, parties often struggle with calculating child support payments. They also tend to struggle to understand how real estate and pensions need to be accounted for within the paperwork when dividing assets due to a marriage's end. In addition, the court engages in public promotion of its sponsorship acts for political reasons. Like other traditional magistrates and the judge, the mediator participates in the court as a discourse interpreter; however, she simultaneously encourages her litigants to advance along the legal literacy continuum, in ways that other court programs do not.

Mediation as a Literacy Practice

Mediations generally occur because parties are referred by judges, other magistrates, or social services. Parties can also request mediation themselves. With a few exceptions, attorneys are not involved in the actual mediation proceedings, although they may request mediation or sit in if the parties desire. Mediations in this court primarily include issues of visitation, custody, property division, and spousal/child support, as all of these may play into the process and/or aftereffects of legally dissolving a marriage. Magistrate Kirby explained that she uses a six phase approach to most mediations, which is delineated on a small laminated poster displayed in her office. Kirby noted that she became familiar with the process through mediation training sessions.

Phase One consists of Introductions wherein the mediator presents the Ground Rules and procedures. The Ground Rules are the following: respect each other, do not interrupt each other, and remain seated. Phase Two, referred to as Telling the Story, allows time for each party to tell what has happened in the past, as well as presenting their current concerns and issues. This phase requires actively listening as well as speaking. Listening especially is a skill many of the parties struggle with as they have often been embroiled in conflict so long that they have either forgotten or have never known what it is like to walk in the other party's shoes. The Discourse, or social context, of mediation requires them to gain this learning experience and to employ it as a literacy practice. In Phase Three, Understanding the Problem, the parties talk to each other about the issues they individually defined in the previous phase. During both Phase Two and Three, the participants are engaged in literacy practices—they are telling stories to each other and to the mediator to actively accomplish their goals. They are beginning to define and render their experiences in words, which then will be used to move toward documents in later phases.

Phase Four involves all parties in considering an Alternative Search; everyone brainstorms possible solutions. This phase might also be conceptualized as another literacy activity, more particularly an act of rhetorical invention wherein everyone works together to solve the now-defined issues. It builds from the literacy practices triggered during Phase Two and Three, as the give and take of conversation and careful listening are again required. During this phase, the mediator often maintains a teaching role, as she helps the parties determine whether the solutions they present are legal. In Phase Five, Resolution, the drafting of the agreement begins. If the parties are able to reach an agreement, the mediator then composes either a written memorandum for the parties' attorneys (if they have attorneys) or an agreed judgment entry. During this phase, we see a shift along the literacy continuum as the oral discussion becomes written text.

The mediator often provides assistance with legal terminology here as the parties create a legally-acceptable document. She may also aid in numerical calculations, such as child support. In Phase Six, Departure, the session ends.

Although these phases provide a basic framework, I observed that in actual mediations the stages were not as regimented as the poster suggests, and movement between stages seemed tailored to the specific needs and interests of the involved parties. If one party had a particular issue that she/he felt needed to be addressed at this time – such as a problem with the parenting schedule – the mediator would typically ensure time was provided for that topic. Parties can return for additional mediation sessions as their case changes and other issues arise or need to be revisited.

After Departure, the document is then mailed to each party. Magistrate Kirby explained that she does not have the parties sign documents during the mediation because she wants to allow them time to read over the documents independently. Also, this allows the parties to show the documents to others – such as attorneys or financial advisors – prior to making any commitments. This sending out of documents anticipates that the parties will be able to read the documents or will take the documents to someone else who will help them read the agreement. The parties then decide whether or not to sign the agreement and submit it to the court.

Several participants were pleased to be able to take a greater role in making decisions about their own lives through mediation. In one session, both parties were clearly nervous about the meeting, having not seen each other for several years prior.

Magistrate Kirby explained the origins of the use of mediation within Domestic Relations cases saying, “There’s been a realization over the years that family issues might better be resolved by the parties than by strangers, such as judges who don’t really know the family. The parties themselves might make better decisions that they could respect and follow if they were involved in the decision-making process.” Another court magistrate, not involved in the mediation program, made a similar comment during his interview when he suggested that parties are often more willing to abide by orders when they feel they have participated in the decision-

making process. This sentiment was further borne out in several of the interviews with mediation participants.

Several participants were pleased to be able to take a greater role in making decisions about their own lives through mediation. In one session, both parties were clearly nervous about the meeting, having not seen each other for several years prior. They had a child together, but had never married and had lost contact. Neither had participated in mediation processes before, and each was unsure what to expect from the other party. The mediator attempted to account for the long separation by encouraging them to engage in initial “catching up” conversation before moving into a deeper discussion of the issues at hand. Following this mediation, one participant stated, “I wasn’t sure what to expect. Even though it was mediation, I expected they’d say here’s what you’ll do. It was put on us. This was better than being in front of a judge and having him tell us.” Both parties expressed pleasure in the results of their mediation during their follow-up interviews. One noted, “I didn’t expect it to be this easy. We can talk like adults and do this on our own. I’m thrilled – surprised, but very happy about it.” The participant also said, “We were able to work on our own without all the crap other people go through—the way it should be.” Certainly, not all mediations are “easy” or turn out this well; however, this particular session demonstrated how well a mediation can work. Through their interactions, the couple began designing their own communication processes for extended use both in and outside the courtroom.

During another mediation, both participants engaged in a somewhat heated exchange which would likely have been shut down in a more traditional courtroom setting. In the follow-up interview, one of the two participants noted an appreciation for the opportunity to vent some of these emotions, commenting, “Sometimes words alone don’t present enough of your perspective on why you feel about the argument. This does add emotion. The two parties, it may be good or bad, but it’s a way to release it.” While the mediator occasionally re-directed the exchange toward the particular issues at hand, the parties themselves actively participated in the negotiations. In a traditional courtroom setting, the judge and the lawyers would have maintained most of the control. Following this session, one participant explained, “I do like it’s something I can participate in. I prefer a more proactive position. You can agree or disagree. In any other forum, I wouldn’t get the opportunity to present my side of it.” Although this participant noted there were still “lots of unresolved issues,” he also commented the mediation had allowed progress from a former stalemate.

This notion of “unresolved issues” permeated several of the post-mediation interviews. While mediation can set negotiations on the right path, participants are sometimes disappointed that not all issues can be solved in one session. This is further evidence of the notion of legal literacy

operating along a continuum. Magistrate Kirby suggested in her interview that mediating is part of an ongoing process—participants often return multiple times to work through the terms of their agreements, especially as their family situations evolve. As the parties learn the mediation process, they come to a stronger understanding of the possible options available to them through the legal system; however, most need continued assistance in pursuing those options and determining which are the best fit for all contenders in the case. Likewise, as mentioned above, mediation often brings emotions to the fore. While the magistrate encourages the parties to air these emotions, sometimes even that airing-out process does not allow parties to look beyond their wounds and focus solely on reaching an agreement.

Within the mediation program, legal literacy is clearly not separated into oral and written components. Rather, the parties are actively involved in learning techniques applicable across the literacy continuum. To be literate in this setting, one needs to know the proper approaches to verbal negotiations which point toward document writing, as well as understanding the terms and the documents themselves.

Literacy Sponsorship through Mediation

Mediation is a relational approach to literacy. Magistrate Kirby acts as a literacy sponsor by being a communication facilitator who helps rebuild and restructure relationships through both oral and written approaches. Her role includes explaining forms and processes, as well as producing and even sometimes ghostwriting documents. These documents cannot come to fruition without the other part of her job though – teaching the parties an appropriate means of oral communication. She models the Discourse of mediation, which is a much different approach than that of traditional court proceedings wherein parties speak only to the authority. In mediation, the act of successfully communicating in order to reach an agreement within this particular setting constitutes an understanding of a Discourse and leads toward a basic understanding of the legal literacy particular to mediation. The initial modeling is embedded in the literacy event and is a necessary happening before any document can be produced.

During interviews, several participants indirectly commented on the act of communication facilitation. One participant stated, “It benefits us greatly to have an independent party guide us through the conflict.” Another commented, “It was nice to talk without arguing.” The participants recognize the value of having an independent third party who is also familiar with the legal possibilities relevant to their cases.

Part of this communicative teaching process is depicted within Notes for My Mediation. This flyer (Appendix B), as well as the previously

discussed poster, encourages participants in mediation to understand some of the principles of mediation and conflict resolution. The flyer includes “I Will” statements such as these: “I will not allow my spouse to hurt or anger me by words or action,” “I will focus on the best possible outcome for our children,” and “I will work towards a fair agreement.” Despite encouraging the active involvement of the parties in reaching their own agreements, both documents also attempt to control the behavior of the participants. For example, the “I will” statements, as well as the requirement that parties remain seated, impose a disciplining force upon participants. These procedures are part of the teaching process for inculcating participants into the behavioral Discourse of the mediation situation.

During interviews, several mediation participants also noted an increased knowledge of both legal terms and concepts based on their

One woman commented on her frustration with the entire divorce process, noting that she was especially aggravated when discussions occurred between the attorneys and the judge without including her.

involvement with the program. One female explained to me that she had learned some new legal terms and possibilities. For instance, with the finalization of her dissolution, her ex-husband would now no longer be responsible for paying for her health insurance coverage.⁵ During the mediation session, she learned about other insurance coverage options she could pursue and how the potential cost could

be incorporated into the couple’s decision-making regarding child support payments. The mediation magistrate explained to her that while the court typically constructed child support payments and parenting time according to a particular formula, it was possible for the couple to develop their own deviation agreement. This would be based on a monetary figure they arrived at together through the mediation process. In a separate mediation, a male asked for and received clarification on the differences between a “market analysis” and a “market appraisal” – terms which were applicable to a monetary dispute between the mediating couple. Another male noted that he had learned new details about tax and pension concepts, and about new terms, such as “Qualified Orders,” which were applicable to his particular financial situation. He also learned about where resources could be obtained to help him make appropriate financial decisions related to the legal process.

In other court proceedings, a particular discourse is enforced, not necessarily taught. But this discourse does not typically involve communication between the parties. Instead, parties are expected to adhere to orders produced by the court. During dissolution hearings, while the judge went through a series of questions with each of the parties, the only response ever given by parties was “yes” to the judge’s queries. For example, the judge did ask if the parties understood the terms used by the court and the attorneys. Despite the cordiality of the judge, the expectation was that the parties would respond “yes”; this was not a teaching moment. The presumption is parties have made and understood all decisions and are willing to abide by the results. Despite this assumption, at several points outside the courtroom in the waiting area, I observed parties expressing confusion, frustration, and lack of understanding of various court processes and terms. One woman commented on her frustration with the entire divorce process, noting that she was especially aggravated when discussions occurred between the attorneys and the judge without including her.

However, this is not to say that education never happens in other court proceedings. For instance, one of the other magistrates instructed the parties about the difference between the terms “parenting” and “visitation,” pointing out the court’s preference for the term “parenting.” Both magistrates and the judge also occasionally told parties what the next steps were in the processes they were undertaking. However, the formality of court proceedings enforces a particular discourse designed primarily for behavioral control, as opposed to sponsorship acts within the mediation discourse, which takes a more educational approach as its overall aim.

Magistrate Kirby explained that part of the validation of the mediation program occurs when parties request further mediation services, and they arrive at their mediation appointment already aware of how they intend to work together to change their agreements. Of the mediations I observed, half had previously mediated through this program. This ability to work together comes, at least in part, through their improved communication skills. At this point, the parties generally need further help with the legal terminology and sometimes the mathematical calculations required for structuring the new agreement. The parties still need some assistance, and mediations do sometimes fail. The magistrate noted, however, that those who have participated several times in the mediation process tend to develop a greater facility with the legal terms and a greater awareness of how the legal system works. This was evidenced by one couple in particular, who had gone through multiple previous mediations. They came prepared, both with calculators and the appropriate paperwork, to enter fully into the discussion of child support. In this way, the program assists the parties involved in learning about the appropriate Discourse.

According to Magistrate Kirby, parties involved in mediation generally place a great value on this service because it provides them with a much cheaper, more time effective way of resolving their legal issues. The program also provides them with knowledge and human resources, such as the mediation magistrate, key to completing the appropriate court-required actions. During interviews several participants indicated they had initially pursued mediation because it was free.

Simultaneously, the program promotes its own continued existence as parties still need at least some assistance with legal terminology. The parties involved have acquired certain crucial elements of the Discourse, in that they now communicate with each other more appropriately and understand some of the components of reaching a legal agreement. Nonetheless, they need further assistance applying the discourse within written documents. In this respect then, sometimes the magistrate participates in a form of ghostwriting. I observed Kirby assisting the parties in composing documents that reflect the agreements that they developed through cooperative, civil communication.

This ghostwriting act was salient in the observed dissolution preparation mediation. The magistrate carefully walked the parties through the forms that they had begun preparing themselves. The parties had expressed confusion over a child support form and left it entirely blank, which caused the court to recommend them to mediation prior to the finalization of their dissolution. The male asked for and received definitional clarification on the terms "child support" and "alimony." The female asked for clarification on what would happen to child support if income changes. The mediator explained the various processes that could result from an income change. These included going through the child support agency, completing another mediation session, or participating in traditional court proceedings. Once the couple understood their situation more fully and the possible avenues open to them, they were able reach a mutually satisfactory decision about child support, which the mediator then recorded on the form. This was an act of ghostwriting in that the magistrate first had to understand the participants' goals, and then render them in legally-acceptable prose. The mediator then printed a draft for their review to ensure she had accurately represented their agreement.

In all mediations, the parties are actively involved in document composition; the literacy event takes place in their presence and with their input. The magistrate's particular role as a ghostwriter happens when she lends her expertise in composing the documents with the proper legal terminology and helps in understanding the technicalities of the law. The magistrate may continue her participation in the literacy event when she walks the parties through the steps required on the forms in order to record an agreement. At this juncture, the parties may decide to finish filling out

the paperwork independently, or they may rely on Magistrate Kirby for continued assistance with defining terms and completing documents.

Benefits Received Through Sponsorship

Brandt's definition of sponsorship reminds us that sponsors always receive benefits from their acts of sponsorship (*Literacy*); these benefits may accrue across varied levels. Magistrate Kirby, for example, receives remuneration for acting as a literacy sponsor. Her compensation is equivalent to that of other magistrates performing more traditional roles.

On a personal level, like Brandt's ghostwriters, Kirby expressed pleasure in her role. In particular, she enjoys teaching parties to communicate civilly. She stated, "I get a lot of satisfaction when I get people to an agreement and I get something written up that will work well for them. The most satisfying cases are those that sometimes have started out the most difficult. Sometimes I've mediated with people half a dozen times, and they finally get it. They've learned how to negotiate, how to communicate." She also noted that one of her most

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important and rewarding tasks is encouraging the parties to focus on the legal issues – such as custody plans – as opposed to dwelling on personal hurt felt due to the difficult nature of ending a relationship.

The court also receives significant benefits from its sponsorship, specifically in relation to time management. Mediation typically reduces the overall amount of time the parties will spend in the court. This eases the court docket, reduces the number of personnel needed, and tends to increase satisfaction of the parties involved (Ashtabula County Bar Association). Trial magistrates and judges can spend their time dealing with cases that are too complicated or too contentious for the parties to resolve in mediation. Mediation allows participants greater leeway in deciding their

own agreements, which may decrease the number of subsequent motions filed by the parties. As they may return to mediation at any time, they may take that route instead of clogging other court channels. The mediation program also assists with time management through its regulation of the types of legal literacy sponsored. This program provides written forms for participants, which specify the information needed. As a layperson, I found that some of these forms were still confusing, but the court personnel view them as a time-management tool which regulates the responses of the participants. The magistrate explained that prior to the development of this program, people would commonly fill out forms they had acquired elsewhere, such as through websites. By regulating the forms offered, the court ensures that it receives appropriate information instead of spending time sorting through unfamiliar paperwork and looking for additional missing information. Nonetheless, although court personnel are continuing to work on making the forms user-friendly, it is clearly an in-progress activity which still has some glitches and obfuscation.

The court is primarily interested in representing itself as a benevolent entity whose actions contribute to family well-being. Its public representation of the mediation program contributes to this goal while also demonstrating interest in allowing parties to reach their own decisions, which further enhances its beneficent image. This conceptualization of the court as benevolent may lead to political gains for the court, especially in elections. The court does not explicitly represent mediation as a literacy event and does not truly envision itself as a literacy sponsor; nonetheless, it may be viewed as such because of the oral-written Discourse and discourse, the terms and actions involved, and the initiation of parties into this Discourse by the mediation magistrate. The court's representational choices also help it accrue benefits by increasing the public's familiarity with the programs. The court and the mediation program publicize their beneficence in many ways such as on their website, by sending representatives to public events, and through public access television programming. When the mediation program is discussed, the emphasis is typically on the benefits the public may receive through this program.

The mediation program's focus on teaching the Discourse of polite familial communication and negotiation allows parties to more readily complete dissolutions, as opposed to necessarily needing divorces. This also yields benefits to the parties involved. The parties recognize the value of this literacy in that mediation allows them to save significant amounts of time and money while helping them learn relevant legal processes, without necessarily needing to retain an attorney. In turn, the court saves significant time and resources. As one mediation participant explained, "I believe in education, and if it helps, sure. It doesn't cost anything."

The public's recognition of mediation's value may enhance the judge's ability to retain office; this judge offered a free mediation program as part of her original election campaign. Developing positive associations with court programs may augment the judge's image and the likelihood of her retaining her office through upcoming elections. Although the judge herself does not participate directly in the mediation program, she still indirectly acts as a sponsor in that she both publicly promotes the program and receives benefits from it.

Closing Thoughts

This study demonstrates the sponsorship of a particular type of legal literacy within a court-situated mediation program. This program produces and controls legal literacy, a highly valuable asset for parties in the court system. In this setting, legal literacy entails knowledge of appropriate written and oral Discourse. Specifically, this means knowing what possibilities exist to solve one's legal issues, communicating successfully to reach agreements, being aware of the particular court processes needed to accomplish goals and requests, and understanding legal terms and calculations necessary to complete forms. While ghostwriting may sometimes take place within the mediation program, the programmatic emphasis remains on teaching the parties to participate actively in forming their own agreements.

This study furthers our understanding of how sponsorship occurs within local-level literacies while simultaneously depicting the ideological nature of legal literacy. I have alluded to the interrelatedness of the oral and the written components involved in legal literacy; the parties involved in mediation need to learn to communicate with each other orally in order to generate documents or to have the mediation magistrate generate the documents – an action which connects to Brandt's conceptualization of ghostwriting. In addition, this work demonstrates the particular context and relationships within which this type of literacy occurs.

Examining and unraveling webs of sponsorship provides a provocative means of studying the ways that the power of literacy is generated, controlled, and disseminated. The court's actions as a literacy sponsor benefit both the court and the involved parties. The court receives benefits related to time management and political reputation, while maintaining control over the dispersal of the good of legal literacy. The parties involved receive a free service which helps them understand relevant legal terminology and practices. Those who participate in mediation have the opportunity to improve their communicative skills, which can then lead to the drafting of documents agreeable to all parties involved, as opposed to traditional court proceedings wherein the results are determined by the judge or magistrate. The court also promotes itself as a beneficent entity in

multiple locations. This self-promotion occurs for the purpose of informing the public about the resources provided through mediation to further public identification of the court's services as benevolent.

In closing, the particular model of literacy practices described here as taught through court-based mediation, with its focus on educating the involved parties and encouraging them toward greater understanding of their legal situations, may be usefully employed in other community organizations. Mediation programs already exist in some other venues – such as victim-offender mediation, foreclosure mediation, and peer/community mediation. However, the particular emphasis within mediation on allowing parties to speak for themselves and develop a “win-win” situation deserves greater recognition and application. Our society too often constructs individuals as winners or losers. Based on the success rate of this particular program as well as the comments of the participants, it seems reasonable to suggest that an increasing emphasis on court-sponsored mediation, as opposed to litigation, may well provide the greater public with a lower cost, more efficient, and more participatory way to resolve disputes. Due to challenging fiscal times, programs like these which offer their services free to participants are often endangered when state budgets are cut. This leaves already financially-strapped citizens to either hire a mediator or cope with the traditional court system which often renders them voiceless. This study argues instead for the importance of continuing these programs, expanding them into other courts, and potentially employing the particular program model within other community venues as a means for educating citizens about their rights and allowing their voices to be heard.

Appendix A: Interview Questions

1. Please describe how the mediation program works.
2. What is the history behind this particular mediation program? And broader history?
3. What led to the development of this program?
4. What literary resources are available to the participants in this program?
5. What, if any, methods are used to help the participants understand these resources?
6. How is the public informed about the availability of resources?
7. In what ways does the court benefit from the mediation program?
8. What costs to the court are associated with the mediation program? How do these compare to traditional costs to the court?
9. What costs to the participants are associated with the mediation program? How do these compare to traditional court costs?

10. What sorts of reading activities do you participate in as a mediation magistrate?
11. What sorts of reading activities do your clients participate in as part of this program?
12. What sorts of writing activities do you do as a mediation magistrate?
13. What sorts of writing activities do your clients participate in as part of this program?
14. What (literacy) skills/knowledge, if any, do clients need to possess prior to participating in mediation?
15. Have you observed changes in the legal literacy skills of your clients through the mediation process? If so, please tell me about these changes.
16. A literacy sponsor is someone or something who provides literacy to someone and who receives some sort of benefits in return. In what ways do you think the mediation program acts as a literacy sponsor? How does the legal resource room act as a literacy sponsor?
17. What benefits does the court receive from this act of sponsorship? (i.e. political, monetary, scheduling-relief)
18. In what ways might you personally act as a literacy sponsor in your role as a magistrate within this program?
19. How do lawyers and judges view the mediation program?
20. Has offering a form of legal literacy to the public changed the value of that legal literacy?
21. Is there a way of assessing how successfully someone has participated in this program?
22. Is it possible to be legally literate without a law degree?
23. What is the history of the Legal Resource Center?
24. What do you see as the future for the mediation program? For the Legal Resource Center?
25. Do you know of any other examples of programs offered through the court that might act as literacy sponsors?

Appendix B: “Notes for my mediation” flyer

NOTES FOR MY MEDIATION

BREATHE, BREATHE DEEPLY.
STAY CENTERED, RELAXED, FOCUSED.
LOOK TO THE FUTURE.
THE PAST CANNOT BE CHANGED.
CONCENTRATE ON THE POSITIVE ASPECTS OF THIS PROCESS.
WE WILL GET THROUGH IT AND IT WILL END.
CHANGE IS DIFFICULT, IT REQUIRES PATIENCE AND PERSPECTIVE.
THE GREATER THE CHANGE, THE GREATER THE REQUIREMENTS.
THE OUTCOME WILL BE A GOOD ONE.
THIS PROCESS REQUIRES TOLERANCE, FORGIVENESS AND GOING THE EXTRA MILE.
I WILL CONTINUE TO BE RESPONSIBLE FOR MYSELF.
I CAN ONLY CONTROL MYSELF.
I WILL RESPOND TO MY SPOUSE’S ANGER WITH PERSPECTIVE AND FORGIVENESS.
I WILL NOT ALLOW MY SPOUSE TO HURT OR ANGER ME BY WORDS OR ACTION.
I WILL NOT REACT PERSONALLY OR NEGATIVELY TO MY SPOUSE.
I WILL CONTINUE TO ACT AFFIRMATIVELY WHENEVER POSSIBLE.
I WILL CONTINUE TO ACT WITH INTEGRITY AND SENSITIVITY.
I WILL FOCUS ON THE BEST POSSIBLE OUTCOME FOR OUR CHILDREN.
I WILL WORK TOWARDS A FAIR AGREEMENT.
I WILL COME OUT OF THIS A STRONGER, BETTER PERSON.

I HAVE CARRIED THIS BURDEN FOR A LONG TIME. I CAN CONTINUE TO CARRY IT FOR ANOTHER FEW WEEKS. I CAN KEEP GOING A LITTLE BIT LONGER. I KNOW THAT I HAVE DONE MY BEST. I WILL GET TO THE END AND START A NEW BEGINNING.

THERE WILL BE A TIME WITHIN THE NEXT YEAR WHEN I WILL CATCH MYSELF SMILING OR LAUGHING WITHOUT EVEN THINKING ABOUT IT.
I WILL WAKE UP WITH A MIND AND HEART CLEAR OF FEAR OF THE UNKNOWN AND THE UNANTICIPATED FINANCIAL AND EMOTIONAL THREATS THAT NOW BURDEN MY LIFE AND RELATIONSHIPS.
I WILL RETURN TO BEING AN INNATELY HAPPY PERSON WHO VALUES FAMILY, LIFE, AND RELATIONSHIPS.

Notes

1. When I contacted a Supreme Court of Ohio’s Dispute Resolution Section staff member, she indicated that currently exact numbers are unavailable, and that the quantity of programs remains in flux. The Dispute Resolution Section staff are in the process of developing an updated mediation directory, which they anticipate publishing online.

2. Names changed to protect confidentiality.

3. Post-decree signifies that the issue is being heard following the finalization of a divorce or dissolution.

4. Rebecca Rogers explains that the term discourse (lowercase d) correlates to a literacy event in that it refers to language use. David Barton, describing terms developed by Shirley Brice Heath, assists in the differentiation of literacy events and literacy practices: “Literacy *events* are the particular activities in which literacy has a role: they may be regular

repeated activities. Literacy *practices* are the general cultural ways of utilizing literacy that people draw upon in a literacy event” (Barton 5).

5. Parties are not allowed to discontinue paying insurance on each other until the marriage is completely dissolved.

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