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The Secret to Success: An Examination of New York State Mediation Related Litigation

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The Secret to Success: An Examination of New York State Mediation Related Litigation

Cover Page Footnote

Fordham University School of Law, J.D. expected 2008. Many thanks to Professor Beth Schwartz for her tireless assistance and helpful comments during the drafting stage of this Comment.

**THE SECRET TO SUCCESS:
AN EXAMINATION OF NEW YORK STATE
MEDIATION RELATED LITIGATION**

*Andrew N. Weisberg**

In October 2006, I conducted a voluntary mediation session in a small claims court in New York City. After more than an hour of mediating, including caucuses with each party, the two former business associates failed to settle their dispute. The case did not settle because the plaintiff sought unreasonable amounts of monetary and non-monetary compensation. Although I gain a sense of accomplishment when I help parties settle, I understand that not every case can reach a mediated settlement. I recognize that if I use a more forceful approach toward the parties I could likely settle more cases. Instead, I inform the parties that they are engaged in a voluntary mediation session and that I will facilitate a discussion between them, rather than render a decision in the case like an arbitrator or a judge. Ultimately, if the case is resolved through mediation, it will only occur if both parties agree to the terms of the settlement.

This is the correct approach for a mediator to adopt when acting as a court-appointed mediator in a voluntary court-annexed mediation program. If I were to offer my own opinion on the merits of each party's argument or use a more forceful approach and "bully" parties into settling their cases, I would run the risk of having parties sign an agreement with which they are not likely to comply. Adopting such an approach might result in two negative effects: (1) the approach defeats the purpose of mediation, namely party self-determination; and (2) the approach increases the likelihood of parties resorting to the courts to either request enforcement or to contest the validity of the mediated agreement. Thus, in a case such as the one involving former business associates, where it is evident that the parties would not likely comply with settlement terms, I am comfortable and frankly happy that the parties do not reach a mediated settlement and instead allow the court to decide their case. Forcing the parties to reach an agreement neither is

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likely to be satisfied with would leave the courts in the uncomfortable position of determining whether or not to enforce the mediated agreement.¹

INTRODUCTION

The implementation of forms of alternative dispute resolution (“ADR”) continues to increase as courts recognize the value of ADR as a means of lightening their caseload.² Unfortunately, not every attempt at alternative dispute resolution succeeds. While mediation often results in settlement, post-settlement issues occasionally arise over enforcement of the mediated agreement. When this occurs the court must determine whether it is proper to enforce the agreement. If, however, the central principle of mediation is self-determination by the parties, does court enforcement of mediated agreements defeat the purpose of mediation?

This Comment analyzes reported decisions of challenges to agreements reached through mediation. Specifically, the Comment addresses how often enforcement issues arise and the typical grounds on which parties rely when seeking to vacate or modify mediated agreements. Part I discusses the research conducted on New York state cases decided between January 1, 2004 and October 31, 2006. Part II describes research conducted by Hamline University School of Law Professors Coben and Thompson.³ This research analyzes decisions in cases involving mediation throughout the United States from 1999 through 2003. Part III compares the decisions of New York state courts to decisions in the United States generally and attempts to reconcile the differences. While Professors Coben and Thompson found a large percentage of decisions involving enforcement issues, the research for this Comment found a significantly lower percentage of decisions that addressed those issues in New York State. Part IV addresses whether it is

1. During the fall semester of 2006 I participated in the Mediation Clinic at Fordham Law School. The course, taught by Professor Beth Schwartz, trains students in mediation techniques and places students as court-appointed mediators in Small Claims Courts in various boroughs of New York City. I served as a mediator in Manhattan.

2. See Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 369 (2001); Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 59 (2001).

3. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

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proper for courts to hear requests to set aside or modify agreements reached in mediation.

I. REPORTED DECISIONS INVOLVING MEDIATED SETTLEMENTS IN NEW YORK STATE COURTS

Between January 1, 2004 and October 31, 2006, there were 57,407 reported decisions from the New York state courts.⁴ Of the nearly 60,000 decisions, only ninety-eight mentioned the word “mediate,” or any conjugation of the word.⁵ Further, only twelve of the ninety-eight decisions referenced a mediated settlement agreement.⁶ The eighty-six decisions which concerned mediation but did not mention a mediated settlement agreement involved an array of issues, resulting from various uses of the word “mediate” and its conjugations. Twenty-three cases referenced an unsuccessful mediation, typically included as background to the litigation.⁷

4. Based on a November 8, 2006, search on LexisNexis™ through the “NY State Cases, Combined” database. *See infra* tbl. 1.

5. Based on a November 6, 2006, search on LexisNexis™ through the “NY State Cases, Combined” database for the term “mediat!” in cases occurring between January 1, 2004, and October 31, 2006. The search occasionally produces only ninety-seven results. The ninety-eighth case, which appeared on the November 6, 2006 search, is *Shomron v. Fuks*, 2006 N.Y. Misc. LEXIS 2971 (Sup. Ct. Sept. 27, 2006). The decision is dated September 27, 2006. The identical case, which appears each time the search is conducted, is *Shomron v. Fuks*, 2006 N.Y. Misc. LEXIS 3068 (Sup. Ct. Sept. 25, 2006). The latter decision is dated September 25, 2006. If the former case citation is entered, LexisNexis™ instructs the user that “[t]he Opinion Previously Reported at this Citation is now Reported at: 2006 N.Y. Misc. LEXIS 3068, 2006 NY Slip Op 52047U; 236 N.Y.L.J. 74,” which is the citation for the latter case.

6. *Town of Southampton v. N.Y. Pub. Employment Relations Bd.*, 813 N.E.2d 602, 605 (N.Y. 2004); *Brown v. Governele*, 815 N.Y.S.2d 651, 652 (App. Div. 2006); *Frazier v. Penraat*, 822 N.Y.S.2d 21, 22, 25 (App. Div. 2006); 474431 *Assocs. v. AXA Global Risks U.S. Ins. Co.*, 795 N.Y.S.2d 626, 628 (App. Div. 2005); *Carney v. Carozza*, 792 N.Y.S.2d 642, 643-45 (App. Div. 2005); *Agostini-Knops v. Knops*, 783 N.Y.S.2d 328, 329 (App. Div. 2004); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908, 910 (Sup. Ct. 2006); *Rachel C.H. v. Timothy S.*, 2005 N.Y. Misc. LEXIS 1282 at *2 (Sup. Ct. June 28, 2005); *Gordon v. Roselli*, 2004 N.Y. Misc. LEXIS 1659, at *2 (Sup. Ct. June 29, 2004); *McLeod v. O’Brien*, 2004 N.Y. Misc. LEXIS 2733 (Fam. Ct. Dec. 1, 2004); *Frazier v. Penraat*, 2004 N.Y. Misc. LEXIS 2779, at *3, *9 (Fam. Ct. Dec. 16, 2004), *rev’d*, 822 N.Y.S.2d 21 (App. Div. 2006); *J.R.M. v. P.A.M.*, 2004 N.Y. Misc. LEXIS 1708, at *2, *3 (Fam. Ct. June 21, 2004).

7. *C.S.A. Contracting Corp. v. N.Y. Sch. Constr. Auth.*, 833 N.E.2d 266, 267 (N.Y. 2005); *Credit Suisse First Boston Corp. v. Pitofsky*, 824 N.E.2d 929, 931 (N.Y. 2005); *Schubert v. Schubert*, 823 N.Y.S.2d 282, 284 (App. Div. 2006); *SKR Design Group, Inc. v. Avidon*, 822 N.Y.S.2d 3, 4 (App. Div. 2006); *Duane Reade, Inc. v. Doe*, 818 N.Y.S.2d 208, 209 (App. Div. 2006); *Braun v. 941 Park Ave., Inc.*, 816 N.Y.S.2d 58, 60 (App. Div. 2006); *Piazza Bros., Inc. v. Bd. of Educ. of Mahopac Cent. Sch. Dist.*, 814 N.Y.S.2d 726, 726 (App. Div. 2006); *Mahopac Cent. Sch. Dist. v. Piazza Bros., Inc.*, 815 N.Y.S.2d 168, 169 (App. Div. 2006); *Locke v. Aston*, 814 N.Y.S.2d 38, 40 (App. Div. 2006); *Duane Reade v. Doe*, 805 N.Y.S.2d 52, 53 (App. Div. 2005),

Fifteen cases contained a discussion of a contract or agreement between the parties requiring mediation, and often arbitration.⁸ Six cases referred to a statute, set of rules, or procedures containing the word “mediation.”⁹ Six cases either cited a case whose name included the word “mediation” or “mediators,” or used the word “mediation” in discussing a case cited by the court.¹⁰ Four cases

vacated, 818 N.Y.S.2d 208 (App. Div. 2006); *Laratro v. City of N.Y.*, 808 N.Y.S.2d 145, 149 (App. Div. 2005); *Jakubowicz v. A.C. Green Elec. Contractors, Inc.*, 803 N.Y.S.2d 71, 73 (App. Div. 2005); *Griffin v. Anslow*, 793 N.Y.S.2d 615, 616 (App. Div. 2005); *Nunez v. Res. Warehousing & Consolidation*, 775 N.Y.S.2d 310, 311 (App. Div. 2004); *Sarigul v. N.Y. Tel. Co.*, 772 N.Y.S.2d 653, 657 (App. Div. 2004) (Mazzarelli, J., dissenting in part); *Citlak v. Nassau County Med. Ctr.*, 2006 N.Y. Misc. LEXIS 3179, at *8 (Sup. Ct. Oct. 3, 2006); *Andersen v. Weinroth*, 2006 N.Y. Misc. LEXIS 2333, at *14 (Sup. Ct. Sept. 5, 2006); *Connolly v. Han-Tsien Tuan*, 2006 N.Y. Misc. LEXIS 1548, at *2 (Sup. Ct. June 23, 2006); *Warren v. Giambra*, 813 N.Y.S.2d 892, 895 (Sup. Ct. 2006); *Springer v. Fensterstock & Partners, LLP*, 2006 N.Y. Misc. LEXIS 338, at *2 (Sup. Ct. Feb. 24, 2006); *Hughes v. UPS*, 798 N.Y.S.2d 344 (Sup. Ct. 2004); *Brendan N. v. Tina Marie R.*, 2006 N.Y. Misc. LEXIS 1074, at *4 (Fam. Ct. May 4, 2006); *Lakeside Family & Children’s Servs. v. Conchita*, 2005 N.Y. Misc. LEXIS 2827, at *49 (Fam. Ct. Dec. 7, 2005).

8. *Dhillon v. HealthNow N.Y., Inc.*, 821 N.Y.S.2d 703, 704 (App. Div. 2006); *Lakeland Fire Dist. v. E. Area Gen. Contractors, Inc.*, 791 N.Y.S.2d 594, 595-96 (App. Div. 2005); *Zach Assocs. v. Setauket Fire Dist.*, 783 N.Y.S.2d 827 (App. Div. 2004); *Muriel Siebert & Co. v. Intuit, Inc.*, 783 N.Y.S.2d 566, 567 (App. Div. 2004); *Morris v. Signorelli*, 779 N.Y.S.2d 786, 787 (App. Div. 2004); *Harmon v. Ivy Walk Inc.*, 2006 N.Y. Misc. LEXIS 3028, at *21 (Sup. Ct. Oct. 6, 2006); *Martian Entm’t, LLC v. Harris*, 2006 N.Y. Misc. LEXIS 2108, at *4 (Sup. Ct. July 5, 2006); *In re Spivak Architect P.C. v. Northside Tower Realty, LLC*, 2006 N.Y. Misc. LEXIS 2606 (Sup. Ct. June 7, 2006); *Biosynexus, Inc. v. Glaxo Group Ltd.*, 816 N.Y.S.2d 693 (Sup. Ct. 2006); *Barracks v. Metro N. Commuter R.R.*, 2005 N.Y. Misc. LEXIS 2847 (Sup. Ct. Nov. 23, 2005); *Globaldata Mgmt. Corp. v. Pfizer Inc.*, 2005 N.Y. Misc. LEXIS 2847 (Sup. Ct. Nov. 23, 2005); *ILM v. RM*, 2005 N.Y. Misc. LEXIS 2547, at *2 (Sup. Ct. Nov. 16, 2005); *MG v. EG*, 2005 N.Y. Misc. LEXIS 2367, 21 (Sup. Ct. Sept. 8, 2005); *Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 2004 N.Y. Misc. LEXIS 1052 (Sup. Ct. June 29, 2004); *Beckhard Richlan Szerbaty & Assocs., L.L.P. v. AMCC Corp.*, 2004 N.Y. Misc. LEXIS 1406 (Sup. Ct. May 25, 2004).

9. *Dalton v. Pataki*, 835 N.E.2d 1180, 1190, 1207 (N.Y. 2005) (referencing a statute containing the word “mediator”); *N.Y.C. Transit Auth. v. Transp. Workers Union*, 822 N.Y.S.2d 579, 593 (App. Div. 2006) (referencing a statute containing the word “mediation”); *N.Y. Cooling Towers, Inc. v. Goidel*, 805 N.Y.S.2d 779, 781 (Sup. Ct. 2005) (referencing the American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures); *Children’s Rights v. N.Y. Office of Children & Family Servs.*, 2005 N.Y. Misc. LEXIS 288, at *2 (Sup. Ct. Feb. 22, 2005) (discussing a Social Services’ Law exemption which applies to mediation plans); *CIT Project Fin., L.L.C. v. Credit Suisse First Boston, LLC*, 2004 N.Y. Misc. LEXIS 2738, at *5 (Sup. Ct. June 17, 2004) (referencing the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures); *Cambridge v. Allen*, 2005 N.Y. Misc. LEXIS 2434, at *2 (Civ. Ct. Nov. 1, 2005) (referencing the American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures).

10. *Muriel Siebert & Co. v. Intuit, Inc.*, 820 N.Y.S.2d 54, 56 (App. Div. 2006) (using the word “mediator” to discuss a distinguishable case presented by plaintiff);

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used the word but intended a meaning unrelated to alternative dispute resolution.¹¹ Four cases referred to a governmental agency containing the word “mediation” in its name.¹² Four cases discussed the rules of the New York State Fee Dispute Resolution Program.¹³ In three cases, the court ordered the parties to engage in mediation.¹⁴ The remaining twenty-one decisions used the word in various ways.¹⁵

Bahnken v. N.Y. City Fire Dep’t, 794 N.Y.S.2d 312, 316 (App. Div. 2005) (citing a case which includes the word “mediation”); *Keyspan-Ravenswood, Inc. v. Pub. Serv. Comm’n*, 776 N.Y.S.2d 143, 146 (App. Div. 2004) (citing a case which includes the word “mediation”); *Gordon v. Vill. of Bronxville*, 799 N.Y.S.2d 160 (Sup. Ct. 2004) (discussing two cases involving mediators); *Railworks Corp. v. Villafane Elec. Corp.*, 788 N.Y.S.2d 834, 836 (Sup. Ct. 2004) (discussing a case where the Court found that although parties used the word “mediate” in their agreement, they meant to use arbitrate); *Morgado Family Partners, LP v. Lipper*, 800 N.Y.S.2d 350 (Sup. Ct. 2004) (citing a case which includes the word “mediators”).

11. *Fraser v. 301-52 Townhouse Corp.*, 2006 N.Y. Misc. LEXIS 2704, 23, at *43, *64 (Sup. Ct. Sept. 27, 2006) (discussing a water-damaged apartment; used phrases including “release of inflammatory mediators” and “mycotoxin-mediated disease”); *Oneida County v. DiCastro*, 780 N.Y.S.2d 725 (Sup. Ct. 2004) (discussing a county’s responsibility when re-mediating a nuisance); *Haskins v. Allstate Ins.*, 798 N.Y.S.2d 344 (Sup. Ct. 2004) (referencing a concrete mediator while describing an automobile accident); *Kardas v. Union Carbide Corp.*, 2004 N.Y. Misc. LEXIS 240, at *3, *4, *10-13, *16 n.18 (Sup. Ct. Mar. 25, 2004) (using the phrase “male-mediated off-site exposure”), *appeal dismissed*, 801 N.Y.S.2d 916 (App. Div. 2005).

12. *Rubin v. Tax Appeals Tribunal of N.Y.*, 814 N.Y.S.2d 804, 805 (App. Div. 2006) (referencing the New York State Bureau of Conciliation and Mediation); *Fuchsberg & Fuchsberg v. Comm’r of Taxation & Fin.*, 786 N.Y.S.2d 257, 258 (App. Div. 2004) (mentioning the New York State Bureau of Conciliation and Mediation Services); *Harold Levinson Assocs., Inc. v. N.Y. State Dep’t of Taxation & Fin.*, 2005 N.Y. Misc. LEXIS 2931, at *2 (Sup. Ct. Dec. 23, 2005) (referencing the New York State Bureau of Conciliation and Mediation); *Goyer v. N.Y. State Dep’t of Envtl. Conservation*, 813 N.Y.S.2d 628, 631 (Sup. Ct. 2005) (referencing the Office of Hearings and Mediation Services).

13. *Wexler & Burkhart, LLP v. Grant*, 2006 N.Y. Misc. LEXIS 1316, at *1-2 (Sup. Ct. May 25, 2006); *Borah, Goldstein, Altschuler, Schwartz, & Nahins, PC v. Lubnitzki*, 822 N.Y.S.2d 425, 425-27 (Civ. Ct. 2006); *Calendar, P.C. v. Edwards*, 822 N.Y.S.2d 422, 424 (Civ. Ct. 2006); *Batshever v. Okin*, 827 N.Y.S.2d 545, 546 (Civ. Ct. 2006).

14. *Ruch v. Ivy Walk Constr. Co.*, 2005 N.Y. App. Div. LEXIS 13688, at *1 (App. Div. Dec. 1, 2005); *Allstate Ins. Co. v. Maloy Restoration, Inc.*, 2006 N.Y. Misc. LEXIS 2821, at *4 (Sup. Ct. July 12, 2006); *Olsen v. James Miller Marine Serv., Inc.*, 792 N.Y.S.2d 313, 314 (Sup. Ct. 2004) (ordering the parties to engage in mediation if necessary).

15. *People v. Patterson*, 833 N.E.2d 223, 224 (N.Y. 2005) (discussing the United States Supreme Court mediating between interests); *Indemini v. Beth Israel Med. Ctr.*, 823 N.E.2d 1271, 1273 (N.Y. 2005) (dismissing a claim for failure to exhaust administrative remedies); *Parker & Waichman v. Napoli*, 815 N.Y.S.2d 71, 73 (App. Div. 2006) (discussing the power of the court-appointed special master to mediate cases); *Parker & Waichman v. Napoli*, 806 N.Y.S.2d 19, 20 (App. Div. 2005) (discussing a court-appointed special master who possessed the power to mediate the case),

The discussion above offers an in-depth survey of the range of issues raised in New York state cases involving mediation over the specified thirty-four month span. As previously mentioned, this Comment focuses on enforcement of mediated settlements. Therefore, it is necessary to examine the twelve cases involving mediated settlements. In six of those decisions, enforcement was not an issue because the parties did not contest the validity of the mediated settlement.¹⁶ The other cases required the court to determine whether or not to enforce a mediated agreement.

vacated, 815 N.Y.S.2d 71 (App. Div. 2006); *People v. Russell*, 791 N.Y.S.2d 198, 200 (App. Div. 2005) (discussing a victim's attempt to act as a mediator); *Lewittes v. Lewittes*, 784 N.Y.S.2d 529, 530 (App. Div. 2004) (discussing defendant's right to mediate); *Martin v. Feltingoff*, 777 N.Y.S.2d 476, 477 (App. Div. 2004) (discussing which attorneys prepared the case for mediation); *Hoeffner v. Orrick, Herrington & Sutcliffe, LLP*, 2006 N.Y. Misc. LEXIS 3108, at *4 (Sup. Ct. Oct. 26, 2006) (discussing attorney-client communications about possible mediated settlements); *Shomron v. Fuks*, 2006 N.Y. Misc. LEXIS 2971, at *7 (Sup. Ct. 2006) (discussing witnesses' testimony about mediating a fight between the defendants); *Shomron v. Fuks*, 2006 N.Y. Misc. LEXIS 3068, at *7 (Sup. Ct. 2006) (discussing witnesses' testimony about mediating a fight between the defendants); *Delta Fin. Corp. v. Morrison*, 820 N.Y.S.2d 745, 747 (Sup. Ct. 2006) (referencing an attorney possessing the power to mediate discovery issues); *P.K. v. R.K.*, 2006 N.Y. Misc. LEXIS 1436, at *2 (Sup. Ct. June 2, 2006) (discussing how the parties ceased mediating their divorce settlement because they reconciled); *Campbell v. Campbell*, 2006 N.Y. Misc. LEXIS 1115, at *8 (Sup. Ct. Mar. 6, 2006) (referencing an attorney who acted as mediator, attorney, and financial advisor in a negotiation); *Pondview Corp. v. Russand, Inc.*, 2005 N.Y. Misc. LEXIS 2681, at *10 (Sup. Ct. Nov. 14, 2005) (encouraging parties to engage in mediation in lieu of a settlement conference); *LS v. LF*, 803 N.Y.S.2d 881, 889 (Sup. Ct. 2005) (discussing the roles of a parenting coordinator as including an educator, mediator, and therapist); *Gramieri v. City of N.Y.*, 806 N.Y.S.2d 444 (Sup. Ct. 2005) (referencing the Court's mediation and early case settlement programs); *Matrix Int'l Textiles, Inc. v. Jolie Intimates, Inc.*, 801 N.Y.S.2d 236 (Civ. Ct. 2005) (mentioning the plaintiff's communications stating that the company "is not in a position to mediate th[e] dispute"); *Cocolicchio v. Rizzo*, 800 N.Y.S.2d 344 (Sup. Ct. 2005) (referencing an ongoing mediation); *Borgus v. Marianetti*, 801 N.Y.S.2d 230 (City Ct. 2005) (referencing the mediation component of the Monroe County Bar Association's voluntary fee arbitration program); *In re Christine B.*, 799 N.Y.S.2d 159 (Fam. Ct. 2004) (discussing the victim's mother's attempts to mediate the situation with respondent's mother); *Linda W. v. Frank T.*, 799 N.Y.S.2d 161 (Fam. Ct. 2004) (noting a witness who served as a mediator between a divorced couple).

16. *Town of Southampton v. N.Y. Pub. Employment Relations Bd.*, 813 N.E.2d 602, 605 (N.Y. 2004) (discussing a mediated settlement to enter a new collective bargaining agreement within ninety days; the parties never executed a new agreement); *Brown v. Governele*, 815 N.Y.S.2d 651, 652 (App. Div. 2006) (deciding what portions of attorneys fees were owed to outgoing versus incoming attorneys in case resulting in a \$300,000 mediated settlement); 474431 *Assocs. v. AXA Global Risks U.S. Ins. Co.*, 795 N.Y.S.2d 626, 628 (App. Div. 2005) (describing a mediated settlement for \$130,000 that satisfied one of the plaintiff's claims); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908, 910 (Sup. Ct. 2006) (discussing issues not resolved through mediation); *Gordon v. Roselli*, 798 N.Y.S.2d 709 (Sup. Ct. 2004) (considering a claim for a dog bite where a woman mediated a dispute between plaintiff and building owner); *J.R.M.*

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In the first of the six enforcement cases, *Frazier v. Penraat*,¹⁷ the Family Court considered whether respondent should be liable to petitioner for child support. Petitioner raised numerous objections to the Magistrate Judge's finding that respondent was not liable for child support.¹⁸ Specifically, the petitioner argued that "more weight should have been given to the parties' mediated agreement . . . in which respondent agreed to provide child support."¹⁹ The court concluded that the respondent was not responsible for paying support to petitioner because the mediated agreement was subject to change.²⁰ The Appellate Division subsequently reversed the decision,²¹ insofar as the lower court had determined not to order compliance with the agreement. After reviewing the details of the mediated agreement,²² the court ordered the parties to comply with its terms.²³ The court noted that its decision was influenced by the impossibility of determining the respondent's income, and thus child support calculations could not be accurately computed under the Child Support Standards Act.²⁴ Therefore, it appears that if the respondent's income could have been accurately computed, the court may have ruled against enforcement of the agreement and instead calculated the support under the Child Support Standards Act. The court's decision to enforce a mediated agreement with an acknowledgment that the court might rule against enforcement in an appropriate scenario is a theme that emerges from the examined cases.

In *Agostini-Knops v. Knops*,²⁵ the Appellate Division considered a mediated separation agreement in a divorce action. The case centered on one component of a stipulation agreement, reached via mediation conducted by respondent.²⁶ The agreement stated

v. P.A.M., 798 N.Y.S.2d 710 (Fam. Ct. 2004) (affirming the disqualification of an attorney from representing a client who was a party in a mediation that the attorney mediated and resulted in settlement).

17. 799 N.Y.S.2d 163 (Fam. Ct. 2004), *rev'd*, 822 N.Y.S.2d 21 (App. Div. 2006).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Frazier v. Penraat*, 822 N.Y.S.2d 21 (App. Div. 2006).

22. *Id.* at 23. In an October 2001 mediated agreement, respondent agreed to pay petitioner \$600 per month toward a credit union loan for 18 months, and \$600 per month in child support. *Id.* Respondent ceased paying in March 2002, and in May 2002, petitioner filed a petition for child support. *Id.*

23. *Id.* at 25.

24. *Id.* Respondent was a self-employed businesswoman. *Id.* at 22.

25. 783 N.Y.S.2d 328, 329 (App. Div. 2004).

26. *Id.* Respondent was the wife's former attorney and also acted as a mediator in the divorce action.

that the husband would pay a \$21,000 legal fee the wife owed to respondent.²⁷ On appeal, the wife argued that the settlement should not be enforced and that the respondent should not be allowed to retain the fee.²⁸ The wife contended that that the fee was excessive and that respondent violated the Procedure for Attorneys in Domestic Relations Matters (“the Regulation”)²⁹ by failing to provide her with a Statement of Client’s Rights and Responsibilities or a written retainer agreement.³⁰ The court enforced the mediated agreement because the fee was not paid by the wife but by the husband, and he was not seeking its return.³¹ Although the court chose to enforce the mediated agreement, the court noted that the respondent did not substantially comply with the Regulation.³² The holding suggests that if the husband had contested the respondent’s retention of the fee, the court might not have enforced the agreement because of the mediator’s violation of the Regulation. The court’s decision to enforce a mediated agreement while mentioning a hypothetical wherein the court might rule otherwise is similar to the approach taken in *Frazier*.

In *Rachel C.H. v. Timothy S.*,³³ the New York state courts continued the trend of enforcing mediated agreements. The court ruled on five petitions filed in the matter.³⁴ The unmarried parties entered mediation, resulting in a mediated custody/visitation agreement.³⁵ The mediated agreement granted joint legal custody of the parties’ child to both parents, but the mother retained primary physical custody.³⁶ The court approved the agreement.³⁷ The judge enforced the mediated agreement and held that the father of the child violated the express terms of the mediated agreement.³⁸ The court based its decision on evidence that the father smashed a tape recorder in the presence of the child and, on another occasion,

27. *Id.*

28. *Id.*

29. N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.1.

30. *Agostini-Knops*, 783 N.Y.S.2d at 329. See N.Y. COMP CODES R. & REGS. tit. 22, § 1400.2-1400.3 (requiring the attorney to provide the client with a statement of client’s rights and responsibilities and with a written retainer agreement).

31. *Agostini-knops*, 783 N.Y.S.2d at 329. Further, the court noted that plaintiff failed to allege “frivolous conduct warranting imposition of sanctions pursuant to 22 NYCRR part 130.” *Id.*

32. *Id.*

33. 2005 N.Y. Misc LEXIS 1282 (Sup. Ct. June 28, 2005).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

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made vulgar statements about the child's mother in the child's presence.³⁹ The court denied the father's petition seeking custody of the child and refused to modify the mediated agreement⁴⁰ because it found that the father did not meet his burden to establish his right to custody of the child.⁴¹

Unlike the previous cases where a party argued against enforcement of an agreement and desired nullification of the agreement, in *Rachel C.H.* the father wanted the court to modify the agreement. Similarly, in *McLeod v. O'Brien*,⁴² the court addressed a parent's request for modification of a mediated custodial arrangement, and the court upheld the original agreement.⁴³ The divorced parents mediated an arrangement whereby the mother had primary custody of the children, but the father spent a few days each week with them.⁴⁴ The mother filed a petition requesting permission to modify the custodial arrangement and allow her to relocate to Oregon with the children.⁴⁵ The court considered the mother's argument that the move offered an opportunity for her to earn a larger income and improve the children's quality of life, but ultimately decided that the mother did not meet her burden of proof to merit relocation of the children.⁴⁶ Thus, the court continued the trend among the New York state courts of honoring the terms of mediated agreements.

Unlike the previous cases where one party sought permission from the court to vacate or modify a mediated agreement and in which child support and custody issues predominated, other cases involve parties contesting the enforceability of mediated agree-

39. *Id.* The mediated agreement provided that "[b]oth parties agree that neither parent will argue or fight or speak ill of each other, toward each other or to any third party while in the presence of the child." *Id.* Further that "[b]oth parties agree that neither parent will do or say anything that will hamper a peaceful exchange during any visitation drop off or pick up of their daughter." *Id.*

40. *Id.* The court also granted the mother's petition to change residence. *Id.* The mediated agreement did not prevent the mother from moving. *Id.* To accommodate the move, the court crafted new visitation arrangements to replace the arrangements agreed upon through mediation. *Id.* Although the new arrangement expressly vacated the terms of the previous agreement, some of the language from the mediated agreement was included in the new court-created agreement (e.g., "neither parent will argue or fight or speak ill of each other, toward each other or to any third party[] while in the presence of the child."). *Id.*

41. *Id.*

42. 2004 N.Y. Misc LEXIS 2733 (Fam. Ct. Dec. 1, 2004).

43. *Id.*

44. *Id.* The children also stayed with their father when their mother was away for business, and for a portion of summer vacation. *Id.*

45. *Id.*

46. *Id.*

ments based on one or more contract defenses. For example, in *Carney v. Carozza*,⁴⁷ the plaintiff brought an action against his former partners and their dental practice alleging that defendants wrongfully terminated his partnership interest in violation of the partnership agreement. After the denial of motions for summary judgment, the parties engaged in mediation,⁴⁸ but they never spoke to each other during the mediation.⁴⁹ Instead, the mediator spoke with the parties individually.⁵⁰ Plaintiff claimed that he specifically requested that a portion of the settlement amount reflect money to offset income tax liability that he might sustain from selling his partnership interest.⁵¹ Defendants agreed to increase the settlement amount to include a sum to cover this contingency.⁵² The parties signed the mediated agreement.⁵³ Days later, plaintiff said that he did not want to comply with the mediated agreement because he conditioned his acceptance of the agreement on beneficial tax liability and the agreement did not satisfy that need.⁵⁴ The defendants moved for summary judgment based on the defense of settlement and release.⁵⁵ The trial court granted the motion.⁵⁶

On appeal, the plaintiff raised two arguments to support his claim that the mediated agreement should not be enforced.⁵⁷ Before considering plaintiff's arguments, the court stated that a "stipulation of settlement is essentially a contract between the parties which must be enforced according to its terms."⁵⁸ Addressing plaintiff's first argument, that the mediated agreement was merely an "agreement to agree," the court said that an agreement to agree in the future is not enforceable.⁵⁹ Moreover, for a contract to be enforceable it must be definite as to all material terms.⁶⁰ The court found, contrary to plaintiff's argument, that the signed mediation agreement did contain all of the essential terms.⁶¹ After striking down the first argument, the court considered plaintiff's mutual

47. 792 N.Y.S.2d 642, 643 (App. Div. 2005).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 644.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (citations omitted).

59. *Id.* at 642 (citations omitted).

60. *Id.* (citations omitted).

61. *Id.*

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mistake of fact argument relating to the settlement's impact on plaintiff's tax liability.⁶² Setting forth the standard for mutual mistake of fact, the court stated that "[a] contract or stipulation entered into under a mutual mistake of fact is subject to rescission if such mutual mistake existed at the time the contract was entered into and is so substantial that the agreement does not represent a true meeting of the parties' minds."⁶³ The court also acknowledged the public policy supporting enforcement of settlement agreements.⁶⁴ The court found that the plaintiff had not offered clear and convincing evidence that either the agreement contained a reference to tax benefits or that the defendants had any knowledge that the alleged "condition" existed.⁶⁵ The court enforced the agreement,⁶⁶ continuing the trend of New York state courts that deny requests to set aside mediated agreements.

The discussion above details the enforcement issues courts faced during the examined period. One already mentioned theme is that New York state courts tend to enforce mediated agreements. In all but one of the six cases involving enforcement of a mediated agreement the court ruled in favor of enforcement.⁶⁷ Further, in all but two of the six decisions, the court ruled on enforcement issues in family law matters such as support, child custody, or visitation.⁶⁸ In those cases, the parties were not challenging the agreement at the time of its creation, but argued that circumstances changed after the agreement was formed, which required modification of terms. Of the two enforcement cases not involving a family law matter, only *Carney* challenged the validity of a mediated agreement. Part II discusses comparable research that involved all fifty states and a broader time period.

62. *Id.*

63. *Id.* (citations omitted).

64. *Id.*

65. *Id.* at 644-45.

66. *Id.*

67. Although subsequently reversed, the one decision where the court did not enforce an agreement was *Frazier v. Penraat*, 799 N.Y.S.2d 163 (Fam. Ct. 2004), *rev'd* 822 N.Y.S.2d 21 (App. Div. 2006).

68. New York courts only allow modification of custody arrangements when the party demonstrates a sufficient change in circumstances. *See Dintruff v. McGreevy*, 346 N.Y.S.2d 399 (App. Div. 1973) (quoting *Matter of Rondolfo v. Susan*, 322 N.Y.S.2d 338 (App. Div. 1971)).

II. ANALYSIS OF REPORTED UNITED STATES DECISIONS GENERALLY

The issues in *Carney*—agreements to agree and mutual mistake of fact—are two of the issues Professors James Coben and Peter Thompson identified in their 2006 Harvard Negotiation Law Review article, *Disputing Irony: A Systematic Look at Litigation About Mediation*.⁶⁹ Coben and Thompson, professors at Hamline University School of Law, analyzed all federal and state court decisions involving mediation available on Westlaw™ for the years 1999 through 2003.⁷⁰ This search produced 1223 decisions.⁷¹ Within those decisions, the issue courts most frequently addressed was whether to enforce a mediation agreement when faced with a challenge to the agreement.⁷² Specifically, 568 of the 1223 opinions dealt with enforcement issues.⁷³ In 362, or 63.7% of the 568 enforcement cases, courts upheld and enforced the challenged mediation agreement in whole or in part.⁷⁴

Before discussing the arguments raised in the enforcement cases, the authors hypothesized four different explanations for the high percentage of cases in which agreements were enforced.⁷⁵ First, unfairness in mediation is relatively uncommon, as demonstrated by studies finding high satisfaction among mediation participants.⁷⁶ Second, courts tend not to scrutinize the fairness of agreements because mediated settlements translate into fewer cases for the courts to resolve.⁷⁷ Third, confidentiality rules prevent judicial review of mediation processes, even if the processes are potentially unfair.⁷⁸ Finally, traditional contract law does not ensure “fairness” in mediations.⁷⁹

69. See generally Coben & Thompson, *supra* note 3.

70. *Id.* at 47. The professors searched the Westlaw™ databases “allstates” and “allfeds” for the term “mediat!”. *Id.* at 49.

71. *Id.* at 47.

72. *Id.* at 73.

73. *Id.* Other issues included confidentiality, conduct of participants, sanctions, fees, and costs. *Id.* at 57, 89, 112, 119.

74. *Id.* at 74. The court refused to enforce in ninety-two cases, and remanded the case in fifty-three cases. *Id.*

75. *Id.* at 74-75.

76. *Id.* at 74 (citing, for example, Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 886 (1998)).

77. *Id.* at 74-75 (citing, for example, Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 836 n.247 (2001)).

78. *Id.* at 75.

79. *Id.*

After offering their hypotheses for the high number of enforcement cases, Coben and Thompson analyzed the cases involving mediated agreements.⁸⁰ The authors found that the enforcement cases raised the following six traditional contract defenses: (1) no meeting of the minds/agreement to agree; (2) fraud/misrepresentation; (3) duress; (4) undue influence; (5) mistake; and (6) unconscionability.⁸¹ Addressing the first category, the authors noted that mediation is based on party self-determination, and any enforced agreement must be an agreement by the parties and not one imposed on them.⁸² Coben and Thompson contend that when determining whether an agreement should be enforced, “[t]raditional contract law centers on objective manifestation of assent—what the parties said.”⁸³ Addressing the type of situation raised in *Carney*, the authors explained that “where a party manifests agreement at the mediation but, free from the pressure of the mediation session, has a change of heart, the party has no recognized contract defense to an enforcement claim.”⁸⁴ Under this analysis, the *Carney* court was correct to exclusively consider the objective manifestations of the parties and enforce the mediated agreement. Some ADR scholars, however, disagree about whether mediation’s goal of self-determination is served by enforcing a settlement to which a party agrees during mediation, but immediately thereafter rejects.⁸⁵ These scholars would likely disagree with the *Carney* court. Nevertheless, the majority of courts continue to enforce agreements when a party requests rescission based upon a change of mind or a realization that they made a poor bargain.⁸⁶

Parties commonly allege fraud and misrepresentation as contract defenses when contesting enforcement of a mediated agreement.⁸⁷ According to Coben and Thompson, courts are willing to allow parties to enter into “bad bargains.” If it is a fraudulent statement, however, that causes a party to agree then the agreement should

80. *Id.* at 77-89.

81. *Id.* at 77-87. Two other categories for enforcement cases did not involve traditional contract defenses: technical defenses and other defenses. *Id.* at 87-89. Technical defenses include statute of limitations arguments and questions over whether the agreement was signed by the appropriate party. *Id.* at 87-88. Other defenses include issues of interpretation, performance, and changed circumstances. *Id.* at 88-89.

82. *Id.* at 77.

83. *Id.* at 78.

84. *Id.*

85. *Id.*

86. Welsh, *supra* note 2, at 78.

87. Coben & Thompson, *supra* note 3, at 80-81.

not be enforced.⁸⁸ In order to succeed with a fraud or misrepresentation claim, the party must prove the adverse party misrepresented a material fact that induced the agreement, and that it was reasonable to rely on the party's statement.⁸⁹

Duress, undue influence, and unconscionability are seldom raised in enforcement cases.⁹⁰ A successful duress argument requires establishing a wrongful threat, which deprived the party of free choice that resulted in an unfair agreement benefiting the party who made the threat.⁹¹ Courts nearly always reject a duress defense.⁹² In the decisions Coben and Thompson examined, not a single court found undue influence.⁹³ The few cases that addressed unconscionability typically rejected the defense without extensive analysis.⁹⁴ The consistent rejection of these defenses most likely contributes to the low number of new cases raising any of the defenses. This inference is supported by the lack of any of the examined New York state cases containing one of these defenses.

Mistake, the sixth and final category of traditional contract defenses, and a defense raised in *Carney*, rarely convinces a court to disregard a mediated agreement.⁹⁵ To establish a mistake defense, a plaintiff must demonstrate that the mistake is mutual and relates to a material fact that is basic to the agreement.⁹⁶ According to Coben and Thompson, to claim unilateral mistake the plaintiff must establish the basic elements of mutual mistake, and must show that the adverse party either had reason to know of or caused the mistake.⁹⁷ In *Carney*, the court determined the plaintiff failed to meet this burden.⁹⁸ The court determined that the plaintiff had not established the elements for a unilateral mistake claim, thus compelling the court to properly enforce the mediated agreement.⁹⁹

88. *Id.* at 80.

89. *Id.* at 81.

90. *Id.* at 81, 83, 86.

91. *Id.* at 82.

92. *Id.*

93. *Id.* at 84.

94. *Id.* at 86.

95. *Id.* at 85.

96. *Id.* at 84.

97. *Id.* at 84 (citing RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981)); see *Carney v. Carozza*, 792 N.Y.S.2d 642, 644-45 (App. Div. 2005). Further, regardless of whether the plaintiff is claiming mutual or unilateral mistake, the plaintiff cannot have assumed the risk. See Coben & Thompson, *supra* note 3, at 84.

98. See *Carney*, 792 N.Y.S.2d at 644.

99. *Id.* at 644-45.

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III. COMPARISON OF REPORTED NEW YORK STATE DECISIONS TO THE UNITED STATES GENERALLY

While Professors Coben and Thompson found that 568, or 46%, of the 1223 decisions involving mediation raised enforcement issues,¹⁰⁰ only six out of ninety-eight, or 6.1%, of the New York state mediation cases decided between January 1, 2004 and October 31, 2006 raised this issue. Six enforcement cases in the New York reported decisions over a thirty-four month span is an unexpectedly low number. Before discussing the significantly lower percentage of enforcement cases in New York compared to the United States more generally, it is necessary to note a few differences between the research conducted in this Comment and the research Coben and Thompson conducted.

There are three notable differences. First, there is a difference in the time periods considered. The Coben and Thompson study considered mediation cases from 1999 to 2003,¹⁰¹ whereas this research covered January 1, 2004 to October 31, 2006. Nevertheless, this difference should not result in a smaller number of enforcement decisions. On the contrary, based on the increased use of ADR throughout the United States and particularly in New York in recent years,¹⁰² the number of cases addressing enforcement should logically have increased. Second, Coben and Thompson analyzed both federal and state reported decisions,¹⁰³ whereas this research considered exclusively New York state cases. Finally, Coben and Thompson researched on WestlawTM,¹⁰⁴ while the research here utilized LexisNexisTM. However, this should not affect the results.

Regardless of the research differences, there must be an explanation for the small percentage of New York state mediation enforcement cases. Perhaps the disparity can be explained by a combination of three theories: (1) attorneys recognize the futility in challenging the validity of mediated agreements, (2) mediators in New York's court-annexed mediation programs are expected to utilize a facilitative approach, which would lessen the likelihood of parties challenging agreements, and (3) New York's use of volun-

100. See Coben & Thompson, *supra* note 3, at 73.

101. *Id.* at 47.

102. See OFFICE OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS, THE N.Y. STATE UNIFIED COURT SYS. DIV. OF COURT OPERATIONS, COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAMS 2004-2005 ANNUAL REPORT 1, <http://courts.state.ny.us/ip/adr/publications/annual-reports/ar04-05.pdf>.

103. See Coben & Thompson, *supra* note 3, at 47.

104. See *id.*

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tary mediations, as compared to a state with mandatory mediations, decreases the chances of enforcement litigation.

A. Hypothesis One: Futility of Traditional Contract Defenses

One hypothesis behind the small number of enforcement cases is that attorneys and parties recognize that challenges to mediated agreements are rarely successful when based on traditional contract defenses and, therefore, choose not to assert such theories when arguing against enforcement.¹⁰⁵ The recognition of the low likelihood of success of a traditional contract defense, however, is not specific to New York and does not fully explain why there are so few New York enforcement cases.

B. Hypothesis Two: New York's Facilitative Mediation

To better understand the small percentage of enforcement cases, it is necessary to understand how New York courts utilize mediation. Within the New York State Unified Court System there are four mediation programs: Statewide Community Dispute Resolution Centers, the Statewide Agricultural Mediation Program, New York City court-based programs, and court-based programs outside of New York City.¹⁰⁶

Community Dispute Resolution Centers exist in all sixty-two New York counties and are available through a partnership between the courts and local non-profit organizations.¹⁰⁷ The Agricultural Mediation Program, approved by the United States Department of Agriculture, also is available in every county in the state.¹⁰⁸ The Family Court,¹⁰⁹ Supreme Court,¹¹⁰ and the New

105. *See id.* at 49.

106. *See* New York State Unified Court System, Alternative Dispute Resolution Programs, <http://courts.state.ny.us/ip/adr/programs.shtml> (last visited Oct. 4, 2007). In addition, of course, some parties may mediate outside the context of a court-annexed program, and such a settlement could be subsequently litigated.

107. New York State Unified Court System, Community Dispute Resolution Centers, <http://courts.state.ny.us/ip/adr/cdrc.shtml> (last visited Oct. 4, 2007).

108. New York State Unified Court System, New York State Agricultural Mediation Program, <http://courts.state.ny.us/ip/adr/nysamp.shtml> (last visited Oct. 4, 2007).

109. New York State Unified Court System, New York City Family Court Mediation Services, <http://courts.state.ny.us/ip/adr/NYCFamily.shtml> (last visited Oct. 4, 2007). Also, in conjunction with Community Mediation Services, the Family Court Mediation Service handles child custody, visitation, juvenile delinquency, and person in need of supervision cases. The New York City Child Permanency Mediation Program handles child abuse and neglect matters. *Id.*

110. The Matrimonial Mediation Pilot Program offers mediations for divorcing couples with children about custody and visitation matters. New York State Unified

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York City Civil Court¹¹¹ offer New York City court-based mediation programs.¹¹² Outside of New York City, many judicial districts have court-annexed mediation programs for specific matters, including commercial cases, custody and visitation cases, and other matrimonial matters.¹¹³ Mediation is prevalent throughout the New York state courts in a variety of contexts. Between April 1, 2004 and March 31, 2005 Community Dispute Resolution Center mediators (“CDRCs”) conducted 15,025 mediations in New York.¹¹⁴ The following fiscal year, April 1, 2005 through March 31, 2006, CDRCs conducted 16,878 mediations—a 12.3% increase from the previous fiscal year.¹¹⁵

With an appreciation for the large number of cases mediated on a yearly basis, it is important to recognize the types of mediation models being utilized. New York’s apparent adoption of the facilitative model helps explain the low percentage of cases addressing enforcement of mediated agreements.¹¹⁶ The implementation of a facilitative, evaluative, bashing, or shuttle-diplomacy approach to mediation¹¹⁷ can impact the likelihood of enforcement issues arising. Evaluative mediators assume that the parties want “direction as to the appropriate grounds for settlement—based on

Court System, New York City Supreme Court ADR Programs, <http://courts.state.ny.us/ip/adr/NYCSupreme.shtml> (last visited Oct. 4, 2007).

111. Parties can mediate their small claims court or housing court matters. New York State Unified Court System, New York City Civil Court ADR Programs, <http://courts.state.ny.us/ip/adr/NYCCivil.shtml> (last visited Oct. 4, 2007).

112. New York State Unified Court System: ADR Programs in the New York City Courts, http://courts.state.ny.us/ip/adr/court_annexed_NYC.shtml (last visited Oct. 4, 2007).

113. New York State Unified Court System, Court-Based Programs Outside New York City, http://courts.state.ny.us/ip/adr/court_annexed_OutsideNYC.shtml (last visited Oct. 4, 2007).

114. OFFICE OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS, THE N.Y. STATE UNIFIED COURT SYS. DIV. OF COURT OPERATIONS, COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAMS 2004-2005 ANNUAL REPORT B2 tbl.1, <http://courts.state.ny.us/ip/adr/publications/annual-reports/ar04-05.pdf>. (This total was reached by combining all cases from the table that were mediated in any form, including Full Agreement, Partial Agreement, Verbal Agreement, and No Agreement.)

115. OFFICE OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS, THE N.Y. STATE UNIFIED COURT SYS. DIV. OF COURT OPERATIONS, COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAMS 2005-2006 ANNUAL REPORT B2 tbl.1, <http://courts.state.ny.us/ip/adr/publications/annual-reports/ar05-06.pdf>. (This total was reached by combining all cases from the table that were mediated in any form, including Full Agreement, Partial Agreement, Verbal Agreement, and No Agreement.)

116. *See infra* notes 143-46 and accompanying text.

117. Scholars have recognized more mediation models than the four discussed here. *See, e.g.,* Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 19-20 (1986) (discussing other bargaining and therapy mediation models).

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law, industry practice or technology.”¹¹⁸ Further, evaluative mediators urge parties to accept a particular settlement, predict court outcomes, and assess strengths and weaknesses of legal claims.¹¹⁹ Experienced attorneys and retired judges are the most common people to utilize an evaluative mediation approach.¹²⁰ As Leonard Riskin stated, mediators with too much subject-matter expertise, such as an experienced attorney, are inclined to adopt an evaluative approach.¹²¹ Evaluative mediation, however, is problematic because it reduces party self-determination,¹²² which is a primary principle of mediation. Evaluative mediators hinder the ability of the parties to develop their own solutions.¹²³ Without the ability to control the outcome of mediation, a party may feel that the mediation is unjust and subsequently object to settlement. Thus, evaluative mediations increase the chances of enforcement litigation.

The correlation between evaluative mediations and an increase in enforcement litigation can be seen in Florida. According to Professors Coben and Thompson, out of eighty-three mediation cases in Florida from 1999 through 2003,¹²⁴ fifty-six cases dealt with enforcement of a mediation agreement.¹²⁵ Until recently, Florida state courts conducted mediations almost exclusively through attorneys and retired judges.¹²⁶ Since attorneys and retired judges are the most likely to use evaluative mediation,¹²⁷ Florida’s use of these individuals leads to more evaluative mediation. In compari-

118. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques* 12 ALTERNATIVES 111 (1994).

119. See CARRIE MENKEL-MEADOW, LELA PORTER LOVE & ANDREA KUPFER SCHNEIDER, *MEDIATION: PRACTICE, POLICY, AND ETHICS* 280 (2006).

120. See LISA B. BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE* 13 (2003), http://www.businessofgovernment.org/pdfs/bingham_report.pdf.

121. See Riskin, *supra* note 118.

122. See Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 270 (2001).

123. See Riskin, *supra* note 118.

124. See Coben & Thompson, *supra* note 3, at 47 n.7.

125. *Id.*

126. See PETITION OF THE SUPREME COURT COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY 1-5, available at http://www.flcourts.org/gen_public/adr/bin/ADRPetition.pdf; see also James J. Alfani, *Symposium: Trashing, Bashing, and Hashing it Out: Is this the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 49 n.9 (1991).

127. See Bingham, *supra* note 120.

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son, mediators in New York are not required to be attorneys.¹²⁸ In the Coben and Thompson study there were only nineteen mediation cases in New York state courts, and only eight of those cases dealt with enforcement.¹²⁹ The consistent use of evaluative mediation logically leads to more enforcement litigation in Florida than a state such as New York which allows non-attorneys to serve as mediators¹³⁰ and adopt a facilitative model.¹³¹ The empirical evidence of Professors Coben and Thompson support these inferences.¹³² As referenced above, since August 1, 2006, the Florida Supreme Court has permitted non-attorneys to qualify as certified mediators.¹³³ To determine whether the use of evaluative mediation contributes to enforcement litigation, it would be beneficial to examine the mediation-related litigation in Florida state courts five years from now. Fewer enforcement cases would indicate that the attorneys' and retired judges' use of evaluative mediation contributed to the enforcement litigation. This subsequent study should also examine whether Florida has adopted a statewide mediation model.

Adopting a more aggressive approach than an evaluative mediator, a "bashing mediator" immediately focuses on the settlement offers raised by the parties and spends most of his or her time "bashing away at those initial offers in an attempt to get the parties to agree to a figure somewhere in between."¹³⁴ A "bashing mediator" envisions his or her role as someone "who guides" the parties to a decision.¹³⁵ However, the "bashing" approach is flawed because the mediator fails to "urge the parties to consider relevant

128. See New York State Standards and Requirements for Mediators and Mediation Trainers, http://www.nycourts.gov/ip/adr/Publications/Program%20Manual/Chapter%207%20Training%20_Updated%201%20January%202007_.pdf [hereinafter Standards]; OFFICE OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS, THE N.Y. STATE UNIFIED COURT SYS. DIV. OF COURT OPERATIONS, COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAMS 2005-2006 ANNUAL REPORT 6, <http://courts.state.ny.us/ip/adr/publications/annual-reports/ar05-06.pdf>. For example, during the fall of 2006, while enrolled in law school, I served as a court-appointed mediator.

129. Coben & Thompson, *supra* note 3, at 47 n.7.

130. Riskin, *supra* note 118. It should be noted that during the period Professors Coben and Thompson examined, the Florida courts utilized mandatory mediation in some circumstances. This factor likely influenced the number of enforcement cases during the examined period. See *infra* notes 142-57 and accompanying text.

131. See *infra* notes 134-37 and accompanying text.

132. See *supra* notes 120-23.

133. See How to Become a Florida Supreme Court Certified Mediator: Step by Step Guide, http://www.flcourts.org/gen_public/adr/bin/How%20To%20Become%20a%20Mediator.pdf

134. Alfini, *supra* note 126, at 69.

135. *Id.*

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law, weigh their own values, principles, and priorities, and develop an optimal outcome.”¹³⁶

Another mediation approach is “shuttle diplomacy.” The mediator meets with the parties individually through a series of caucuses until an agreement is reached.¹³⁷ This mediation approach is problematic because it does not afford parties the opportunity to listen to the perspectives and arguments of the opposing party. Ensuring that such an opportunity exists is one of the principal roles of a mediator.¹³⁸ The mediator in the *Carney* case utilized a “shuttle diplomacy” approach.¹³⁹ The mediator helped the parties reach an agreement without the parties ever speaking to each other during the mediation.¹⁴⁰ The absence of direct communication between the parties inhibited their ability to listen to each other’s perspectives and ultimately contributed to the enforcement litigation.

Unlike the aforementioned forms of mediation, a facilitative mediator’s mission is to enhance and clarify communication between the parties.¹⁴¹ A facilitative mediator does not offer an assessment of the parties’ positions for two reasons: (1) offering an opinion can impair the appearance of the mediator’s impartiality and thereby hamper the mediator’s effectiveness, and (2) the mediator may not know enough about the law or about the facts of the case to offer an informed opinion.¹⁴²

In New York, the organizations in charge of training individuals to participate in Community Dispute Resolution Centers (“CDRC”) and court-annexed mediation programs have developed training guidelines to ensure that the mediators are utilizing the facilitative method. For example, CDRC mediators are expected to utilize a facilitative approach to ensure that parties make voluntary decisions.¹⁴³ Specifically, the CDRC training curriculum

136. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939 (1997).

137. See Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 720 (1997).

138. See generally Love, *supra* note 136.

139. See *supra* notes 48-49 and accompanying text.

140. *Id.*

141. Riskin, *supra* note 118.

142. *Id.*

143. OFFICE OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS, THE N.Y. STATE UNIFIED COURT SYS. DIV OF COURT OPERATIONS, STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS 3 (2005), http://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct_CDRC_Mediators.pdf.

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guidelines instruct training programs to include materials that “explain how mediators can create opportunities for party empowerment and help mediators understand the importance of party self-determination.”¹⁴⁴ The guidelines also provide that the training materials should help mediators understand that parties’ communication skills may be enhanced during the mediation session and in the future as a result of the parties’ experience in mediation.¹⁴⁵ The training guidelines also explicitly direct trainers to discourage mediators from proposing and choosing solutions for parties.¹⁴⁶ This component demonstrates the CDRC’s commitment to avoiding evaluative mediations in New York. In addition, although not stated in any official report or publication that could be found, it is the understanding among individuals involved in New York state court-annexed mediation programs that mediators are encouraged to adopt the CDRC standards. Further, because of the absence of any other clearly articulated standards or guidelines, the CDRC guidelines are generally followed in all court-annexed programs.

The use of a facilitative mediation approach in New York benefits the courts because their dockets are not filled with contested agreements. More importantly, the use of the approach ensures that parties are able to reach a final resolution to their disputes through mediation and avoid subsequent litigation. As Professor Welsh noted, “[m]ediators who use facilitative techniques are more likely to build parties’ investment in and likely compliance with a settlement that the[] [parties] view as theirs.”¹⁴⁷ Further, noncompliance with a mediated agreement is more likely if the parties feel they were “coerced, pressured, or forced to reach an agreement.”¹⁴⁸

Accordingly, as a court-appointed mediator in the New York County Small Claims Court, I utilized a facilitative technique.¹⁴⁹ After I explained the mediation process to the parties and answered any questions, I gave each party a chance to voice their concerns. Rather than adopting an evaluative or bashing approach, I asked questions to enhance the communication between the parties, ensure the parties understood each other, and create an environment where the parties were in the best position possible to

144. Standards, *supra* note 128, at 9.

145. *Id.*

146. *Id.* at 11.

147. Welsh, *supra* note 2, at 91.

148. KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 213 (Thompson West 2003).

149. *See supra* note 1.

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decide how to proceed.¹⁵⁰ The parties settled their disputes in more than half of the cases I mediated during the Fall of 2006. More importantly, my use of a facilitative technique made it more likely that both parties left the mediation feeling satisfied with their agreement.

For example, in one case involving a dispute over a security deposit for an apartment, the defendant did not understand the rationale behind the amount the complainant sought. I asked the complainant to explain how he calculated the claimed sum, and the defendant then understood the reasoning. As a result, the defendant agreed to settle the case without feeling that the settlement amount was unjustified, which made it more likely that the defendant would not subsequently contest enforcement.

If New York mediators utilize a facilitative technique without evaluating the parties' positions or forcing the parties to agree, New York courts should hear few enforcement cases. Parties who settle after a facilitative mediation are more likely to feel satisfied with the result than in any other type of mediation.

C. Hypothesis Three: New York's Use of Voluntary Mediation

A third hypothesis to explain the significantly lower number of New York state enforcement of mediated agreement decisions is that New York offers mediation as a voluntary dispute resolution mechanism. Proponents of mandatory mediation argue that a mandatory process eliminates the concerns that a party may feel weak for suggesting mediation, eases the burden on court dockets, and offers an opportunity to educate parties about the benefits of mediation.¹⁵¹ Advocates also contend that mandatory mediation, which is nonbinding in most situations, is beneficial because parties are able to mediate and still have the opportunity to litigate their dispute if no mediated agreement is reached.¹⁵² This argument fails to recognize that parties who settle during mandatory mediation may do so only because they feel pressured to resolve their dispute.¹⁵³ Another problem with mandatory mediation is that it requires people to speak in a setting they did not choose.¹⁵⁴ Mandatory mediation also shifts control from the parties to the

150. See Riskin, *supra* note 118.

151. See MENKEL-MEADOW ET AL., *supra* note 119, at 286.

152. See Streeter-Schaefer, *supra* note 2, at 388.

153. See JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 91 (West Group 2001); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1582 (1991).

154. See Grillo, *supra* note 153, at 1549-50.

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courts for the sole purpose of reducing the dockets.¹⁵⁵ Additionally, mediation is typically described as a voluntary process that promotes party self-determination. Thus, mandatory mediation contradicts one of the core principles of mediation.¹⁵⁶

The use of mandatory mediation will lead to an increase in litigation.¹⁵⁷ Coben and Thompson's empirical data supports this argument. In California, a majority of court-annexed mediations are mandatory.¹⁵⁸ Mandatory mediations occur at both the appellate¹⁵⁹ and trial levels.¹⁶⁰ In comparison, in New York all mediations are voluntary. The training curriculum guidelines for CDRC mediators state that training materials should include a model opening statement that explains the voluntary nature of the process.¹⁶¹ The training guidelines explicitly refer to the voluntary nature of the process, indicating the commitment to voluntary mediations in New York. Moreover, in my own experience, before mediating a case I always explained to parties that they were participating in a voluntary mediation process and at any time could elect to withdraw from the process and appear before a judge to settle their dispute.¹⁶² Further, the mediations I conducted were not part of a CDRC program; rather, I participated through one of the New York City court-based programs. This demonstrates that the commitment to voluntary mediation in New York is not exclusive to CDRCs.

As referenced above, California's use of mandatory mediations contributes to an increase in enforcement litigation. Of the 1223 cases Coben and Thompson examined, 122 cases were from California state courts.¹⁶³ Fifty-one of the 122 California state cases

155. See Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85, 90-91 (1996).

156. See MENKEL-MEADOW ET AL., *supra* note 119, at 286.

157. See Streeter-Schaefer, *supra* note 2, at 388.

158. See JUDICIAL COUNCIL OF CALIFORNIA, 2006 ANNUAL REPORT: PROGRESS THROUGH UNITY 23, <http://www.courtinfo.ca.gov/reference/documents/ar2006.pdf>; MANDATORY MEDIATION IN THE FIRST APPELLATE DISTRICT OF THE COURT OF APPEAL REPORT AND RECOMMENDATIONS iii-iv, <http://www.courtinfo.ca.gov/reference/documents/mediation.pdf> (hereinafter MANDATORY MEDIATION); JUDICIAL COUNCIL OF CALIFORNIA, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS xix, <http://www.courtinfo.ca.gov/reference/documents/empprept.pdf> (hereinafter EARLY MEDIATION).

159. MANDATORY MEDIATION, *supra* note 158, at iii-iv.

160. EARLY MEDIATION, *supra* note 158, at xix.

161. Standards, *supra* note 128, at 10.

162. See *supra* note 1.

163. Coben & Thompson, *supra* note 3, at 47 n.7.

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raised an enforcement issue.¹⁶⁴ By comparison, only nineteen of the 1223 cases were from New York state courts.¹⁶⁵ Of those nineteen cases, only eight dealt with enforcement issues.¹⁶⁶ During the examined period, 1999 through 2003, New York courts only addressed eight enforcement cases, as compared to California's fifty-one cases.¹⁶⁷ While some of the disparity may be explained by the greater number of cases mediated in California, New York's use of voluntary mediations is unquestionably part of the explanation.

D. The Future of New York State Mediations

Although the amount of New York state enforcement cases that exist are low, it is important to reduce the number of enforcement of mediated agreement cases to ensure that the goals of mediation remain intact. Professor Nancy Welsh considered a few solutions and ultimately advocated for expanding the utilization of cooling-off periods during which parties can rescind an agreement.¹⁶⁸ The solutions Welsh considered, but ultimately rejected include: redefining "self-determination" in statutes, rules, and ethical guidelines; greater public education to ensure parties understand the mediation process; increased mediator education on techniques to ensure party self-determination; lowering the burden of proof required to demonstrate coercion to a probable cause standard; and revising the mediator code of ethics to prohibit undue influence.¹⁶⁹ In contrast to these proposals, allowing a three-day non-waiveable cooling-off period¹⁷⁰ is an ideal solution because it allows parties to decide what is in their best interests.¹⁷¹ Allowing a period of time to lapse before a mediated agreement becomes final ensures that parties are not coerced into settlement by an aggressive mediator,¹⁷² or by another party or a non-party. Some argue that the proposed solution is not perfect.¹⁷³ For example, according to Professors Coben and Thompson, issues of undiscovered fraud or

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *See* Welsh, *supra* note 2, at 79-92.

169. *See id.*

170. *See id.* at 87. Professor Welsh recognized that there would need to be exceptions to this practice for situations including mediation on the eve of trial and when parties desired to be bound immediately. *Id.* at 90-91.

171. *See* Coben & Thompson, *supra* note 3, at 136.

172. *See* Welsh, *supra* note 2, at 5-7.

173. *See* Coben & Thompson, *supra* note 3, at 136.

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mistake will remain.¹⁷⁴ If the other party can easily rescind the agreement, however, the first party would be less likely to engage in fraudulent conduct or allow a mistake to occur.¹⁷⁵ Regardless of any shortcomings, Welsh's proposal is the most effective way to ensure the goals of mediation are met and to aid parties in avoiding litigation over mediated settlements.¹⁷⁶

IV. THE PROPER ROLE FOR COURTS IN CONSIDERING WHETHER TO ENFORCE A MEDIATED AGREEMENT

Debate exists over whether the purpose of mediation is defeated when a court is forced to decide whether to enforce a mediated agreement.¹⁷⁷ Some judges have noted that they are not trained or qualified to understand the intricacies of the mediation process.¹⁷⁸ Moreover, confidentiality issues arise when a court decides whether to enforce an agreement.¹⁷⁹ Should mediation, intended to be a private process,¹⁸⁰ be brought within the adjudicative scope of the courts?

In weighing this dilemma it is pertinent to consider the differences between mediation and litigation, where the latter is a public process. Many ADR scholars have noted the advantages of mediation over litigation: mediation enhances communication, fosters collaboration, encourages problem solving, offers the ability to structure the future to build new opportunities, is efficient, and allows parties to craft acceptable solutions.¹⁸¹ In other words, as mentioned in this Comment, mediation offers party self-determination, which is the central feature of mediation.¹⁸² In contrast, litigation is prohibitively expensive, slow, does not provide party participation and control over the process, produces unsatisfactory

174. *See id.*

175. *See* Welsh, *supra* note 2, at 89.

176. *See* Coben & Thompson, *supra* note 3, at 136.

177. *See* KOVACH, *supra* note 148, at 140-43.

178. *See* Roland Beaudoin, *To Change is Simple, To Improve is Difficult (A Cautionary Note)*, 17 ME. B. J. 188, 190 (2002).

179. *See* Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 518-19 (2004).

180. *See generally* NOLAN-HALEY, *supra* note 153.

181. *See* MENKEL-MEADOW ET AL., *supra* note 119, at 92-93. *See also* Welsh, *supra* note 2, at 4.

182. *See* MENKEL-MEADOW ET AL., *supra* note 119, at 92. *See also* Welsh, *supra* note 2, at 4.

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outcomes, and is adversarial. Litigation lessens the chances of parties interacting positively in the future.¹⁸³

Despite the noted problems associated with litigation, one could argue that enforcement of mediation agreements produces positive results. In *Olam v. Congress Mortgage*,¹⁸⁴ United States Magistrate Judge Wayne Brazil stated that enforcing a mediated settlement would encourage parties interested in mediation to utilize the court's mediation program, ensure that parties in the future take mediations seriously, help parties understand that mediation is an opportunity to reach closure and avoid trial, and encourage parties to pay close attention to the terms of proposed mediated agreements.¹⁸⁵

Judge Brazil raised valid points about these positive results but these points assume that adjudication of disputed mediated settlements is appropriate. As Professors Coben and Thompson stated, "[g]iven the oft-expressed mediation objective of providing an alternative to the traditional adversarial system, the phenomenon of mediation litigation is a 'disputing irony' that warrants closer examination."¹⁸⁶ If the central feature of mediation is self-determination by the parties, the courts' involvement in the process appears to defeat the purpose of mediation.

CONCLUSION

New York courts, as compared to the rest of the United States, hear significantly fewer enforcement of mediated agreement cases. The hypotheses above explain possible reasons for this difference. Until an approach is adopted to eliminate enforcement litigation, the courts and other individuals involved in decision-making should consider whether court involvement in contested mediation agreements is appropriate. If decision-makers determine that the courts should not be involved, the next issue is how to resolve the contested agreements. This is a topic for a subsequent comment. For now, New York's approach to mediation is successful and should be considered by other states that are faced with high percentages of enforcement litigation.

183. See Welsh, *supra* note 2, at 93.

184. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

185. See *id.* at 1137.

186. Coben & Thompson, *supra* note 3, at 47 (citation omitted).

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TABLE 1

Total Number of New York State Reported Cases Between January 1, 2004 and October 31, 2006		
<i>Month</i>	<i>Year</i>	<i>Number of Cases</i>
January	2004	1186
February	2004	1655
March	2004	1949
April	2004	1801
May	2004	1665
June	2004	2436
July	2004	1185
August	2004	938
September	2004	1352
October	2004	1794
November	2004	1818
December	2004	2008
January	2005	1378
February	2005	1804
March	2005	1992
April	2005	1745
May	2005	1670
June	2005	2291
July	2005	1392
August	2005	1074
September	2005	1671
October	2005	1627
November	2005	1721
December	2005	1981
January	2006	1512
February	2006	1842
March	2006	2016
April	2006	1868
May	2006	1862
June	2006	2122
July	2006	1658
August	2006	1291
September	2006	1583
October	2006	1520
Total Number of Cases: 57407		

Total Number of New York State Cases (as reported by LexisNexis™ search on November 8, 2006 of 'NY State Cases, combined' database)

