

NOTES

OLD PROBLEM, NEW MEDIUM: DECEPTION IN COMPUTER-FACILITATED NEGOTIATION AND DISPUTE RESOLUTION

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I. INTRODUCTION

A famous 1993 cartoon in *The New Yorker* depicts two dogs sitting in front of a large computer screen in a corporate office.¹ One dog, in the midst of typing, turns to the other and remarks mischievously: “On the Internet, no one knows you’re a dog.” Peter Steiner’s incisive drawing was the product of the early days of the World Wide Web, when the technology was equal parts thrilling and threatening. But the fears the cartoon communicates—of deception, anonymity and accountability—remain very real concerns nearly two decades later.

These concerns are particularly relevant for businesspeople and individuals who increasingly negotiate with one another and resolve disputes over the Internet. In face-to-face negotiations, research has routinely shown that actors lie, mislead, or “puff” in conversations with opponents.² Common acts of deception range from issues of opinion (e.g., the reliability of a product) to issues of material fact (e.g., the fair market value of a service). Research shows that individuals are not particularly skilled at detecting such deception, even when standing right next to an opponent.³ As

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¹ Peter Steiner, “*On the Internet, no one knows you’re a dog*”, *NEW YORKER*, July 5, 1993, at 27; see also, Glenn Fleishman, *Cartoon Captures Spirit of the Internet*, *N.Y. TIMES*, Dec. 14, 2000, at C4.

² “Puffing” is an expression or exaggeration that presents opinions rather than facts and is usually not considered a legally binding promise. Such statements as “this car is in good shape” and “your wife will love this watch” constitute puffing. See ABA STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, Formal Op. 06-439 (2006).

³ Saul M. Kassin, *Symposium: Effective Screening for Truth Telling: Is it Possible? Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 *CARDOZO L. REV.* 809, 810 (2002).

more bargaining occurs through online dispute resolution (hereinafter “ODR”), the prospect of detection is even less likely.

This Note examines the largely unexplored intersection of two heavily explored topics in the field of dispute resolution: First, the prevalence of deception in face-to-face bargaining, and second, the increasing popularity of ODR to settle commercial and private disputes. What role does deception play—and what chance does a commercial actor have of overcoming it—in the emerging world of ODR?

Alternative dispute resolution (hereinafter, “ADR”) techniques are hardly new to the business community. ADR broadly encompasses three out-of-court procedures for resolving conflict: Negotiation, mediation and arbitration. Negotiation is a form of decision-making in which two or more independent parties communicate with one another to resolve their opposing interests and make joint decisions.⁴ Negotiations are pervasive in our society, existing between individuals, commercial entities, employers and employees, and citizens and governments.⁵ Mediation in the commercial context can be likened to a negotiation with the presence of a third-party neutral.⁶ The neutral’s role is to facilitate a conversation or negotiation between the parties.⁷ Finally, arbitration is an agreement by the parties to have their dispute settled by one or more third-party neutrals.⁸ Unlike mediators, arbitrators have authority to make a binding, often un-appealable decision on behalf of the parties. Taken together, these three modes of ADR have been hailed as more holistic and less expensive alternatives to litigation.⁹ In ADR, scholars note, parties can view each other not merely as opponents but also as collaborators in finding mutually

⁴ Ruth V. Washington, *Getting to Yes: Negotiating Agreement Without Giving In*, 48 BROOK. L. REV. 647, 651 (1982) (book review).

⁵ *Id.* at 647.

⁶ Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 17 (2000).

⁷ *Id.* at 18.

⁸ Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 7 (2010).

⁹ ALAN SCOTT RAU, EDWARD F. SHERMAN, SCOTT R. PEPPET & JOHN S. MURRAY, *NEGOTIATION* 153 (2d ed. 2002) (suggesting that many attorneys “fear that adopting a problem-solving strategy will sacrifice their clients’ interests in the name of cooperation”). See also Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

acceptable, even creative solutions to complex conflicts.¹⁰ This stands in contrast to litigation, where a non-interested judge will impose a solution on the parties based entirely on objective legal standards.

Despite these collaborative potentials, parties are not always so selfless in their approach. Scholars over the past decade have carefully examined deception in commercial negotiation and mediation, often with an eye towards practical advice for detecting and countering it.¹¹ Such research often examines the personal relationship between the individuals, body language, eye contact and tone of voice.¹²

Internet-based negotiations clearly complicate those self-help techniques. Caused partly by globalization and partly by increasing digital fluency, online negotiations, mediations and arbitrations have become less expensive ways of conducting business. Computer-facilitated bargaining occurs in essentially four ways: 1) Negotiations over open-form “messaging” tools including e-mail; 2) negotiations over facilitated messaging software designed specifically for ODR; 3) arbitration software that organizes submissions of arguments and documents for review by human arbitrators; and 4) mediations over advanced software that attempts to mediate between complex sets of interests—not just finding simple ‘median’ values in a monetary disputes but also building complex ‘packages’ of preferences to satisfy both parties.¹³

What is the character of deception in computer-facilitated dispute resolution, as compared to the types of deception that scholars have uncovered in face-to-face dispute resolution? And what self-help strategies might exist to mitigate online deception? The answers to these questions address unexplored potential pitfalls within a rapidly expanding platform of conflict resolution. The Note will begin with an overview of recent scholarship on deception in face-to-face ADR across the disciplines of law, business, psychology and public policy. It will then review the current ODR landscape, highlighting common and emerging technologies. Fi-

¹⁰ Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not to Be A Problem-Solving Negotiator*, 14 *Clinical L. Rev.* 253, 255 (2007).

¹¹ Robert J. Condlin, *Bargaining Without Law*, 56 *N.Y.L. SCH. L. REV.* 281, 282 (2012).

¹² *Id.*

¹³ A “simple” monetary negotiation, for example, would be between an employer who wants to pay \$60,000 and an employee who demands \$80,000. The “answer,” of course, would be a \$70,000 salary. Advanced software can handle not just straightforward averaging, but also more complex packages of preferences—including, perhaps, healthcare plans, the number of paid vacation days, and stock options.

nally, it will analyze the limited research that has been done on deception on computer-facilitated dispute resolution, and use that research to offer suggestions for practitioners and commercial actors.

II. DECEPTION IN FACE-TO-FACE NEGOTIATION

The past decade has seen increased attention to lying.¹⁴ The science of deception in relation to law and business has become part of the popular culture, for example in the television drama *Lie to Me*.¹⁵ In academia, too, there has been a renewed attention to deception in the context of commercial negotiation and mediation. Several particularly influential books and articles have shaped this conversation. This scholarship on deception detection and prevention has generally fallen into two categories: *relationship-based* approaches and *scientific* approaches.

A. Relationship-Based Approaches to Deception Detection & Prevention

Among the most prominent articles within the relationship-based area is Peter R. Reilly's *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*.¹⁶ Reilly offers an important summary of the consensus among ADR experts on the presence (and inevitability) of deception. He begins by noting that there are essentially two common categories: 1) A "lie" is a false statement made by one who knows its falsity and with the intent to deceive another as to the truth; 2) "deception" is any other method of concealing the truth, including silence.¹⁷ Deception can occur

¹⁴ See, e.g., Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299 (2010); Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 123 (2007); Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1, 90 (2007).

¹⁵ INTERNET MOVIE DATABASE, *Lie to Me*, <http://www.imdb.com/title/tt1235099/> (last visited Feb. 15, 2012). A 2009 television series focusing on Dr. Cal Lightman who is a psychologist employed by various private and public organizations in various investigations to determine whether suspects and opponents are lying.

¹⁶ Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 485 (2009).

¹⁷ *Id.* at 495.

“if one party, without making a false statement, nonetheless manages to create or preserve an impression in another where that impression is a) false, b) known to be so, and c) intended to conceal the truth.”¹⁸ As Reilly points out, commercial actors lie about all sorts of issues, including:

(1) the current or future value (including long-term performance claims) of whatever is being discussed in the negotiation (whether it be goods, services, or something else); (2) one’s goals, priorities or interests in the negotiation; (3) one’s reservation point; (4) one’s best alternative option if a deal is not agreed upon; (5) one’s willingness, ability, or authority to negotiate or to reduce the deal terms to contract form; (6) the existence of objective standards and how they might inform the negotiation; (7) one’s own opinions or the opinions of clients, outside experts, or others; (8) the existence of other offers or competing bidders; (9) one’s willingness or ability to go to trial; (10) promises (including commitments to future actions) or threats made during the negotiation to entice (or coerce) the other party into agreement; and (11) the substantive strengths of one’s lawsuit, or weaknesses of the other side’s lawsuit.¹⁹

A major difficulty, Reilly notes, is that while some lies (the price of a good or the quality of a service) can usually be proven false through independent research and objective standards, many lies (such as a party’s “priorities, underlying interests, or reservation point”) cannot be so easily detected.²⁰ Those can often be the most damaging.

The majority of law review articles addressing deception in commercial negotiation and mediation have argued, in one form or another, that liars and deceivers “could be successfully reined in and controlled if only the applicable ethics rules were strengthened, and if corresponding enforcement powers were sufficiently beefed up.”²¹ Reilly takes a different approach, arguing that American Bar Association (ABA) ethics rules will likely never be dramatically strengthened, and furthermore, that even if they were, they would be difficult to enforce in any meaningful way in the

¹⁸ Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 11 (1987).

¹⁹ Reilly, *supra* note 16, at 496.

²⁰ *Id.* at 497.

²¹ *Id.* at 482. *Contra* Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1, 29 (2005). Unlike Reilly, Bordone has proposed strengthening ABA ethics regulations and enforcement to prevent such conduct.

context of negotiation.²² After all most negotiations occur far from courtrooms, between private individuals in private settings.²³ Instead, he argues that lawyers, businesspeople, and government actors who engage in negotiation should learn how to “implement mindsets, strategies, and tactics” to defend themselves against others who lie and deceive.²⁴

Reilly gives two important pieces of “prescriptive advice for minimizing one’s risk of being exploited in a negotiation should other parties lie.”²⁵ First, a negotiating party should conduct as much background research as possible before the negotiation.²⁶ This background research should extend not just to the material facts of the negotiation—the fair market value of the product or the average time to render a particular service—but also to your opponent. If possible, one should speak with individuals who have previously worked with or negotiated with an opponent. Practitioners can develop reputations fairly quickly as being honest, dishonest, fair, or unfair in their dealing.²⁷

Second, Reilly recommends that whenever possible, negotiators should develop long-term relationships with likely opponents.²⁸ Research suggests that one of the clearest indicators of deception is a sudden change in behavior. By knowing an opponent over an extended period of time, one has a significant amount of data on their emotional and behavioral “baseline.”²⁹ For example, if a normally aggressive negotiator suddenly becomes more passive and soft spoken, it might be a clue that he or she is engaging in deceptive behavior.³⁰ This conclusion “underscores the importance of developing long-term relationships with potential negotiation partners, where baseline behaviors can be established, where changes in those normal behaviors can be observed, and where possible deception can thereby be detected.”³¹

²² Reilly, *supra* note 16, at 484.

²³ *Id.* at 496.

²⁴ *Id.* at 497.

²⁵ *Id.* at 499.

²⁶ *Id.* at 498.

²⁷ See HERB COHEN, *YOU CAN NEGOTIATE ANYTHING* (1980) (urging negotiators to gather information “[f]rom anyone who works with or for the person you will meet with during the event or anyone who has dealt with them in the past. This includes secretaries, clerks, engineers, janitors, spouses, technicians, or past customers”).

²⁸ Reilly, *supra* note 16, at 496.

²⁹ Samantha Mann, Aldert Vrij & Ray Bull, *Suspects, Lies, and Videotape: An Analysis of Authentic High-Stake Liars*, 26 L. & HUM. BEHAV. 365, 372 (2002).

³⁰ *Id.* at 370.

³¹ Reilly, *supra* note 16, at 499.

B. *Scientific Approaches to Deception Detection & Prevention*

While scholars like Reilly have focused on detecting and preventing deception by building relationships and encouraging objective standards, another set of scholars has focused on a more scientific approach. Contrary to popular misconception, liars do not constantly avert their eyes, speak quickly or shift posture.³² Yet there *are* important biological ‘tells’ that negotiators should consider. Two of the most prominent authors and frequent collaborators in this area are Paul Ekman, a psychologist, and Clark Freshman, a professor of law. Ekman in particular focuses on “microexpressions” to detect hidden emotions and deception.³³ Freshman’s recent article, *Lie Detection and the Negotiation Within*, describes the deceiver’s internal emotional reactions to deception.³⁴ When people deliberately try to conceal their emotions (or unconsciously repress their emotions), a very brief 1/15 to 1/25 of a second facial expression often occurs. The facial muscles triggered by seven basic emotions—amusement, contempt, embarrassment, excitement, guilt, pride, relief, satisfaction, pleasure, and shame—are essentially the same, regardless of language and culture. Thus these microexpressions are remarkably consistent for men and women, young and old, from the United States to Japan, Brazil to Papua New Guinea.³⁵ In addition, the expressions of emotion are involuntary; they are almost impossible to suppress or conceal.

Ekman and Freshman offer courses and web training to expose negotiators and law enforcement officials to key microexpressions. Scholars in this “scientific” school of deception detection might agree with scholars in the relationship-based school that developing prior relationships with opponents is important in order to gauge their baseline. But they focus far more on biology and involuntary shifts than on “softer” human tendencies.

³² Mann et al., *supra* note 29, at 370.

³³ PAUL EKMAN, *TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE* 2 (3d ed. 2001).

³⁴ Clark Freshman, *Lie Detection and the Negotiation Within*, 16 HARV. NEGOT. L. REV. 263 (2011).

³⁵ See generally EKMAN, *supra* note 33.

C. Ethical & Regulatory Schemes to Prevent Deception

What does the law have to say about a negotiator who engages in deception? The answer partly depends on whether the negotiating party is an attorney. Professional stereotypes aside,³⁶ state and federal bar associations do impose ethical standards on practicing lawyers who engage in negotiations or bargain on behalf of clients.³⁷

The American Bar Association (ABA) promulgates the Model Code of Professional Conduct, which aims to “provide a clear statement of lawyers’ professional responsibilities.”³⁸ Since its publication in 1983, forty-nine states have adopted some version of the Model Code as their professional code of conduct for lawyers, making them the “majority rule” in lawyer disciplinary matters.³⁹ Regulations of attorney negotiation behavior are found in Rule 4.1, and are reinforced by Rules 3.3(b) and 8.4(c).⁴⁰ The drafters of the Model Code assumed that lawyers would act as “partisan professionals” on behalf of clients and against the interests of third parties.⁴¹ Rule 4.1, titled “Truthfulness in Statements to Others,” specifically imposes limits on the deception lawyers can employ to that end. Rule 4.1 provides:

In the course of representing a client, a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁴²

The spirit of Rule 4.1 seems unmistakable: lawyers can act as advocates for their clients, but they must draw the line at lying. Still, Rule 4.1(a) includes a fair amount of ambiguity. Particularly, what

³⁶ L. Gino Marchetti, Jr., *Dispelling Stereotypes of Lawyers in Today's World*, 75 DEF. COUNS. J. 121 (2008).

³⁷ James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 5 AM. BAR FOUND. RES. J. 926, 927 (1980).

³⁸ Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 101 (2011).

³⁹ California is currently the only state without a code of professional conduct patterned after the Model Rules. AMERICAN BAR ASSOCIATION - CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Feb. 15, 2012).

⁴⁰ AM. BAR ASS'N, *Ethical Guidelines for Settlement Negotiations* § 2.3, at 3 (2002).

⁴¹ Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 500 (2005).

⁴² MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

qualifies as a “material” fact or law? The drafters of the Model Code fail to define the term “material,” instead explaining that what constitutes a material fact “depends on the circumstances.”⁴³ Rule 4.1(a) simply requires lawyers to “speak the truth as they understand it without engaging in any misrepresentations.”⁴⁴ But nothing prohibits a lawyer from making deliberate misrepresentations about non-material facts or law to anyone.⁴⁵ One can easily imagine circumstances where parties might disagree on what counts as a “material” issue in the circumstance—for example, a client’s true interests in a real estate purchase, or a client’s walk-away alternatives to a settlement.

Rule 4.1(b) is an exception to the general rule that lawyers have no duty to inform an opposing party of relevant facts when negotiating.⁴⁶ Lawyers must put aside that general rule when their silence would cause the lawyer to be complicit in a fraudulent misrepresentation by omission.⁴⁷ Note that Rule 4.1(b) provides that disclosure is proper only if it does not violate the duty of maintaining client confidentiality stated in Rule 1.6.⁴⁸ Rule 1.6 contains several exceptions “permitting disclosure with respect to criminal or fraudulent conduct in order to prevent, mitigate, or rectify injuries due to conduct for which the lawyer’s services have been unwittingly used.”⁴⁹ In Rule 4.1(b), too, the definition of materiality is the subject of debate.⁵⁰

Courts generally favor the role of attorneys as strong advocates for their clients, and are hesitant to apply strict interpretations of materiality.⁵¹ Few courts have questioned this loose interpretation of materiality, at least in published opinions. A Ma-

⁴³ MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (1983).

⁴⁴ Hinshaw & Alberts, *supra* note 38, at 101.

⁴⁵ *Id.* at 103.

⁴⁶ MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (1983). But once a lawyer provides information, the lawyer has a duty to provide the information truthfully under Rule 4.1(a). *Hansen v. Andersen, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 825 (Iowa 2001). Furthermore, when negotiating in the litigation context this duty may be affected by the parties’ disclosure obligations under the applicable rules of civil procedure. *See, e.g.*, Fed. R. Civ. P. 16.

⁴⁷ GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §§ 37.5 (3d ed. 2001).

⁴⁸ MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2), (3) (1983).

⁴⁹ Hinshaw & Alberts, *supra* note 38, at 103.

⁵⁰ *Id.*

⁵¹ Gary Tobias Lowenthal, *The Bar’s Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 445 (1988–89) (noting that the Rule is interpreted to allow “hardball” as the official standard of legal negotiation).

ryland district court is one notable exception, and recently bemoaned the general laxity of enforcement:

A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement. While the legal journals engage in some hand-wringing about the vagueness of this aspect of Rule 4.1, in reality, it seldom is a difficult task to determine whether a fact is material to a particular negotiation.⁵²

Moreover, although the Model Code applies whenever an attorney “acts as a partisan representative on behalf of their clients against the interests of third parties,”⁵³ some have questioned whether these requirements apply to *non-legal* negotiations—situations in which attorneys are hired by clients to negotiate particular aspects of an agreement that are not necessarily legal, such as salary.⁵⁴

If American law’s general attitude towards attorney deception seems loose, its control of non-attorney deception is even looser. Indeed, there is no general legal duty in the United States to tell the truth or to refrain from deception⁵⁵ except with regard to perjury, fraud and certain kinds of misrepresentation in the course of trade and commerce.⁵⁶

As to the third category, most relevant here in the context of commercial bargaining, the Uniform Commercial Code (hereinafter “UCC”) imposes a “duty of good faith”⁵⁷ on those (not just lawyers) engaged in commerce. Good faith is defined rather loosely as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁵⁸ Much like “materiality” in Rule 4.1, “honesty” is an imprecise term. Scholars have traditionally considered it to be *subjective*—that is, defined by what the negotiator subjectively believed to be true, rather than what may

⁵² *Aushman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002), aff’d 352 F.3d 896 (2003).

⁵³ MODEL RULES OF PROF’L CONDUCT R. 4.1 (1983).

⁵⁴ See, e.g., HAZARD & HODES, *supra* note 47, at §§ 1.11–1.13 (detailing the difficulties with the Model Rules of Professional Conduct).

⁵⁵ See *Advertising And Promotion Liability*, SR040 ALI-ABA 473, 480. For the purposes of this discussion, direct negotiations refer to negotiations directly between two parties, and not mass-advertising or marketing.

⁵⁶ Deborah Schmedemann, *Navigating the Murky Waters of Untruth in Negotiation: Lessons for Ethical Lawyers*, 12 CARDOZO J. CONFLICT RESOL. 83, 86 (2010).

⁵⁷ U.C.C. § 1-203 (2010).

⁵⁸ U.C.C. § 1-201 (2010).

have *objectively* been true.⁵⁹ But aside from a ban on outright lying about facts of a transaction, the UCC is silent as to more subtle forms of deception and puffery that, as Reilly and others have noted, are pervasive in commercial bargaining.

In short, the past few decades has seen a flurry of academic attention on deception in the context of commercial bargaining.⁶⁰ This attention in the academy has compelled many bar associations to increase ethical regulations for attorneys.⁶¹ Nevertheless, deception remains a difficult problem for local, state and federal bar associations to police effectively. The fact that most commercial negotiations do not even occur between attorneys makes the problem even more challenging. This has led many researchers to focus on the tactics of the deceivers themselves, or on self-help techniques for the parties to employ.⁶² As evident from the review of scholarship above, these strategies have often focused on the parties' relationship, as well as body language, eye movement and tone of voice.

During the same decade that this research has flourished, ironically, the setting of many negotiations and mediations has moved into cyberspace. In a largely text-based world, many of the coping mechanisms outlined—the relationship-based approach, the scientific approach, and traditional ethical guidelines—above have been rendered inapplicable.

III. ONLINE DISPUTE RESOLUTION: HISTORY AND TRENDS

A. *What is ODR?*

ODR encompasses dispute resolution mechanisms over the Internet ranging from simple e-mail and instant messaging to complex settlement software incorporating video and holograms.⁶³ ODR emerged in force between roughly 2001 and 2005 as a mecha-

⁵⁹ Martin Aronstein, *Good Faith Performance of Security Agreements: The Liability of Corporate Managers*, 120 U. PA. L. REV. 1, 31 (1971) ("Good faith [as] defined in § 1-201(19) . . . [has] been historically construed as applying only to the actor's subjective state of mind.")

⁶⁰ Craver, *supra* note 14, at 299.

⁶¹ Schmedemann, *supra* note 56, at 90.

⁶² Reilly, *supra* note 16, at 482.

⁶³ Susan Nauss Exon, *The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution*, 12 CARDOZO J. CONFLICT RESOL. 19 (2010).

nism for managing disputes that arose through e-commerce.⁶⁴ Now, many businesses and individuals are making use of these technologies to negotiate and resolve conflicts arising in the physical world, often instead of face-to-face ADR. ODR saves the inconvenience and expense of travel, hard document sharing, and jurisdictional issues. Moreover, market research has suggested that as people become increasingly comfortable displaying their personal information on the web, for example through social networking and online dating, ODR will feel increasingly natural.⁶⁵

While methods of ODR vary greatly, approaches generally fall into two categories: adjudicative and collaborative.⁶⁶ Adjudicative ODR is essentially an online version of standard commercial arbitration, whereby a third-party neutral—often an administrative judge or industry expert—considers facts and renders a binding decision.⁶⁷

Collaborative methods are more complex with more give and take between the parties and varying degrees of technological involvement.⁶⁸ There are two primary sub-types of collaborative ODR: automated and assisted. In *automated* bargaining, most appropriate for economic or distributive dyadic negotiations, the parties essentially make “bids” through software.⁶⁹ Only the software can see the offers by each party, making the process blind. The software will attempt to find middle ground between the bids, encouraging parties to compromise through multiple rounds of bidding. ODR technology can do far more than find the median of two numbers; advanced software helps to find attractive compromises in complex insurance claims,⁷⁰ healthcare disputes⁷¹ and

⁶⁴ David B. Lipsky & Ariel C. Avgar, *Online Dispute Resolution Through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model*, 38 U. TOL. L. REV. 47, 57 (2006).

⁶⁵ Even still, scholars of ADR fear that by physically separating parties, ODR has the potential to undermine what practitioners often consider to be the chief benefits of ADR—namely the possibility of out-of-the-box solutions and the chance for parties to empathize with one another, vent feelings and confront emotions. Some argue that this creativity and catharsis are equally important to fully resolving commercial disputes as interpersonal disputes. Dusty Bates Farned, *A New Automated Class of Online Dispute Resolution: Changing the Meaning of Computer-Mediated Communication*, 2 FAULKNER L. REV. 335, 342 (2011).

⁶⁶ Benjamin G. Davis, *Building the Seamless Dispute Resolution Web: A Status Report on the American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution*, 8 TEX. WESLEYAN L. REV. 529, 531 (2002).

⁶⁷ *Id.* at 532.

⁶⁸ *Id.* at 533.

⁶⁹ *Id.* at 531.

⁷⁰ Deth Sao et al., *Healthcare Disputes Across National Boundaries: The Potential for Arbitration*, 42 GEO. WASH. INT'L L. REV. 475 (2010).

⁷¹ *Id.* at 530.

shipping conflicts.⁷² Such software can help the parties reach a compromise on a variety of issues.

In *assisted* negotiation, by contrast, the software plays a role closer to a human mediator. This type of technology is typically more chat-based; the software establishes a conversation framework to help the parties communicate with one another.⁷³ In specific commercial disputes, the same sorts of issues arise time and again. Software can therefore divide disputes into different categories, structuring conversation and bargaining in a useful, issue-based way.⁷⁴ Assisted negotiations are often controlled by software, but are also frequently done using a human mediator communicating with the parties over the Internet.⁷⁵

B. *Brief History of ODR*

These many avenues of ODR are relatively recent developments. Indeed, the World Wide Web was not invented until 1989 and commercial activity was banned on the Internet until 1992.⁷⁶ Shortly after this ban was removed, disputes related to e-commerce began to surface. The idea for online dispute resolution emerged out of a “recognition that disputes would grow as the range of on-line activities grew.”⁷⁷

ODR expanded beginning in about 2001, as commercial websites created resources to resolve disputes arising from their online activities. The largest of these commercial sites, eBay, was the first to recognize the potentials of a large-scale ODR system.⁷⁸ An online auction site with over 200 million registered users around the world, eBay sought to increase consumer trust in its e-commerce services. It commissioned the University of Massachusetts to con-

⁷² Ethan Katsh et. al., *Is There an App for That? Electronic Health Records (Ehrs) and A New Environment of Conflict Prevention and Resolution*, 74 *LAW & CONTEMP. PROBS.* 31, 35 (2011).

⁷³ Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 *BAYLOR L. REV.* 178, 194 (2010).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You - Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Do-main Name System*, 79 *WASH. U. L. Q.* 113 (2001).

⁷⁷ Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code*, 49 *N.Y.L. SCH. L. REV.* 271, 277 (2004).

⁷⁸ Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 *HARV. NEGOT. L. REV.* 253, 255 (2006).

duct a pilot project “to test the viability of a dispute resolution process that would allow parties who could not resolve some problem themselves to receive expert assistance from a mediator.” This project resulted in the Internet startup SquareTrade.com. This site handled over 1.5 million disputes for eBay transactions in those four years.⁷⁹ In what was the first large-scale use of ODR, this pilot project handled over 200 disputes during a two-week period, satisfying both buyers and sellers.⁸⁰

At the conclusion of the pilot program, eBay chose SquareTrade to provide permanent ODR services. SquareTrade encouraged parties to resolve the dispute themselves using a chat platform before providing a human mediator.⁸¹ It became clear that most disputes on eBay fell into ten distinct categories. This allowed for the creation of generic “forms that the parties fill out . . . clarify[ing] and highlight[ing] both what is dividing the parties and what solutions are desired.”⁸² Standardized forms also “reduce the amount of free text complaining and demanding that is done, a result that appears to have the effect of lowering the amount of anger and hostility between the parties.” At the time, this approach was a particularly novel mix of negotiation and mediation. Negotiation, by definition, occurs between the parties themselves in absence of a third-party mediator to facilitate the dispute. SquareTrade’s online platform virtually frames the conversation through its forms.

SquareTrade’s foray into large-scale ODR quickly became the industry standard for e-commerce websites. As disputes generated by online activities began to grow over the first decade of the twenty-first century, companies quickly recognized that both litigation and traditional ADR were too inflexible, time-consuming and jurisdictionally complicated to meet the challenge. The same logic has propelled the use of ODR as a mechanism for negotiation and dispute resolution for commerce arising in the physical world, as well as commerce arising in the digital world.

⁷⁹ Katsh, *supra* note 77, at 273.

⁸⁰ Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law*, 15 OHIO ST. J. ON DISP. RESOL. 705, 709 (2000).

⁸¹ If Web-based negotiation fails, SquareTrade provides a human mediator for a fee of twenty dollars. The nominal fee discourages frivolous and low-value disputes. The conversation is facilitated over the Web platform by a human third party. Katsh, *supra* note 77, at 279.

⁸² *Id.* at 278.

C. Academic Analysis & Criticism

Academic attention to ODR has emerged slowly, mostly over the past five years. Legal scholars' attitudes range from skeptical and cautious to enthusiastic and hopeful. Many scholars, like Fred Galves of the University of the Pacific McGeorge School of Law, recognize the necessity of online dispute resolution to tackle certain disputes that arise from online activity.⁸³ Galves focuses on the growth of methods for addressing e-commerce disputes:

Despite all of the growth, convenience, and economic advantage that e-commerce offers, increased Internet sales activity also brings with it an increase in Internet legal disputes, as legal disputes arising out of typical business transactions have not disappeared merely because those transactions are made online. . . . These inevitable e-commerce disputes must be resolved efficiently, fairly, and securely so that online buyers and sellers can place full confidence in e-commerce markets. The Internet must be viewed as a trustworthy online global marketplace fully operating under the rule of law. For this to occur, the principles of fairness, accessibility, and equity available in most physical courts must also be within reach for disputes arising out of online transactions.⁸⁴

Many other scholars see real potential for expanding the use of ODR in commercial transactions beyond those arising in the digital world. Most notably Pablo Cortés of the University of Leicester School of Law has suggested the drafting of a European Regulation in the field of ODR that would set legal standards for mandatory ODR in "small value disputes" across the EU.⁸⁵ The proposed regulation "would create a pan-European trustmark that would be granted to those ODR providers that comply with its legal provisions."⁸⁶

Still, many scholars have critiqued ODR as removing human interaction and collaboration from dispute resolution processes.⁸⁷

⁸³ Fred Galves, *Virtual Justice As Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 1 U. ILL. J.L. TECH. & POL'Y 1 (Spring 2009).

⁸⁴ *Id.* at 3.

⁸⁵ Pablo Cortés, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, 19 INT'L J.L. & INFO. TECH. 1 (2011).

⁸⁶ *Id.* at 1.

⁸⁷ See generally Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 255 (2006); David B. Lipsky, *Online Dispute Resolution through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model*, 38 U. TOL. L. REV. 47 (2006).

These concerns have led other scholars to examine new cutting edge technologies that could mitigate some of the inherent deficiencies in ODR. Susan Nauss Exon, for example, has examined the use of holographs as a potential tool. Holography uses the transmission of light to beam a three dimensional person into another room; this essentially mimics the experience (and benefits) of a face-to-face negotiation, without the time and costs associated with travel.⁸⁸

Along a similar vein, David Allen Larson argues that “artificial intelligence devices. . . [could eventually] replace the humans who perform complex, interactive, interpersonal tasks such as dispute resolution.”⁸⁹ Larson points to studies indicating that “persuasive dialogues with computer agents [i.e. “avatars,” digitized versions of humans] can change attitudes.”⁹⁰ Simulations “suggest that avatars and robots acting as relational agents also are capable of behaviors that will facilitate dispute resolution and problem solving.”⁹¹ For this to be effective, engineers and computer scientists agree that artificial intelligence and aesthetic design must go hand-in-hand. Robots and avatars seem to be more accepted by humans if they both *think* and *look* like real people. This research has also been applied to prosthetic limbs.⁹² If individuals can learn to rely on artificial intelligence in the form of prosthetic technology, he reasons, “there is no reason why we cannot learn to rely on artificial intelligence to perform functions that are communicative in nature. The drive to develop more sophisticated prostheses is closely aligned to the desire to design social robots that can mimic the pace of human reaction and interaction.”⁹³ Although Larson admits that the science of artificial intelligence still requires further

⁸⁸ Nauss Exon, *supra* note 63, at 20.

⁸⁹ David Allen Larson, *Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator*, 25 OHIO ST. J. ON DISP. RESOL. 105, 105 (2010).

⁹⁰ *Id.* See generally Daniel Schulman & Timothy Bickmore, *Persuading Users Through Counseling Dialogue with a Conversational Agent*, Notes before the 2009 Proceedings of Persuasive Technology, available at <http://www.ccs.neu.edu/research/rag/publications/Persuasive09.pdf>.

⁹¹ Larson, *supra* note 89, at 111.

⁹² Larson notes that medical researchers are working to match the “sophisticated functionality” of prosthetic animatronics with “startlingly realistic coverings to create a more seamless appearance with the patient’s body and maximize the patient’s ability to control the limb.” *Id.* at 132–33. A new type of artificial skin, called cosmesis, utilizes artificial intelligence to “sense and react to physical contact with the limb.” This technology was developed to treat human patients, but can also be applied to the creation of more realistic robots. *Id.* at 133.

⁹³ *Id.* at 134.

development, he sees a future in which “a robot or avatar can act as a surrogate for a human mediator.”⁹⁴

In short, academics have reacted to ODR, a field that has greatly expanded since the early 2000s, with both optimism and skepticism. The academic consensus—if there can be such a thing—suggests that as technology improves, certain types of on-line conflict resolution will increasingly become an alternative to face-to-face ADR. But for now, many scholars remain uncertain that ODR allows for the depth, empathy and collaboration that have become hallmarks of dispute resolution compared to litigation. This Note adopts the same position. As the next section indicates, the potential for deception in most currently utilized forms of ODR should give potential parties pause.

D. *Contemporary Implementations of ODR*

Before considering the possibility of deception in ODR, it is worth examining several recent case studies in the successful implementation of online negotiation and conflict resolution. These case studies demonstrate the expanding prevalence of various forms of ODR, well beyond the early efforts of eBay and others to handle purely e-commerce-based disputes in the early 2000s. Private companies like Cybersettle, SettlementOnline and clickNsettle attempt to solve disputes through an array of online-solutions, ranging from instant messaging with a mediator, to generating numerical settlement packages that the parties can accept or reject.⁹⁵ Implementations of these types of mechanisms demonstrate the applicability of ODR models for resolving a wide variety of conflicts.

1. General Electric

In 2011, the Italian division of General Electric (hereinafter “GE”) Oil & Gas adopted a pioneering form of ODR with its vendors, with the aim of reaching fair and binding decisions in a more timely and cost-effective manner.⁹⁶ The company has over 2,000 supply and manufacturing partnerships in the country. The system resulted from the collaboration of GE, Cybersettle, and the Inter-

⁹⁴ *Id.* at 112.

⁹⁵ Cybersettle alone, for example, has handled over 200,000 transactions and facilitated over \$500 million in settlements, ranging from insurance claims to personnel disputes. Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25, 10 (2004).

⁹⁶ Vanessa O’Connell, *At GE, Robo-Lawyers*, WALL ST. J., Oct. 10, 2011, at D4.

national Centre for Dispute Resolution,⁹⁷ and targets disputes worth under €50,000 (roughly \$66,000).⁹⁸

To begin a claim, a party files its “statement of case” and supporting documents online, along with a \$500 registration fee. The responding party then files its defense within twelve days. Next comes another twelve-day period of negotiation in which each party sends a “blind” settlement offer (i.e., not seen by the other party) to a human administrator. If the offers overlap, a settlement is reached. If there is no overlap, the parties are notified (ideally prompting movement and compromise) and there are two further rounds of blind offers. If these rounds are unsuccessful, the claimant can move into arbitration at a cost of an additional \$1,000, which is refundable if the complaint is successful. No further documents are filed; the arbitrator decides the outcome based only on the statements already filed within thirty days.

According to Michael McIlwrath, Senior Counsel for GE’s Italian division, the system has been tremendously successful for the company, quickly resolving a large backlog of complaints.⁹⁹ He attributes this to the very limited number of written pleadings, as well as the total elimination of face-to-face hearings. Engineers and industry experts serve as the arbitrators rather than lawyers or judges, allowing the system to “[draw] upon the experience and expertise of suitably qualified individuals to resolve disputes that are typically technical, not legal, in nature.”¹⁰⁰ McIlwrath feels that “the very existence of the scheme has encouraged settlement before cases are even referred, with parties making realistic assessments of their case based on the documents which would be scrutinized by the arbitrator if the claim proceeded.”¹⁰¹ Based on the success of this system, GE aims to implement the ODR scheme in its other divisions and businesses outside of Italy.¹⁰²

⁹⁷ The ICDR is the international arm of the American Arbitration Association (AAA), one of the largest arbitration associations in the world and one of the most significant promulgators of industry standards. See STEVEN PLITT, JOSHUA D ROGERS, DANIEL MALDONADO, LEE R RUSS & THOMAS F SEGALLA, *COUCH ON INSURANCE* § 209:7 (3d 2012).

⁹⁸ Michael McIlwrath, *Is Arbitration Broken?; Summary of Cybersettle/ICDR program being piloted by GE Oil & Gas in Italy*, Mar. 30, 2010, www.pace.edu/lawschool/files/iicl/odr/McIlwrath.ppt.

⁹⁹ *Id.*

¹⁰⁰ Jamie Maples, *GE Oil & Gas - Putting the A into ADR*, *THE LAWYER* (Nov. 16, 2011), <http://www.thelawyer.com/ge-oil-and-gas-putting-the-a-into-adr/1010265.article>.

¹⁰¹ *Id.*

¹⁰² See generally McIlwrath, *supra* note 98.

2. Parking Tickets in the City of New York

In July 2007, the City of New York announced an innovative new program that allows individuals to dispute parking tickets online.¹⁰³ This pilot program, called One-Click Hearings, was expanded in March 2011. Tickets for parking violations are an important source of revenue for the City, bringing in about \$600 million each year.¹⁰⁴ The City issues about 10 million parking tickets each year; the recipients challenge 1.2 million of those. Of those that are challenged, about 48% actually get dismissed. This dispute process had historically been expensive for the City, bureaucratic for ticket recipients, and time-consuming overall.¹⁰⁵

A partnership with Cybersettle aimed to change this status quo. The online software allows individuals to describe their position on why they deserve a lesser fine or a cancellation of their ticket. In addition to text, they can upload digital photos and documents as supporting evidence. Administrative law judges review submissions and are able to ask questions about cases. Judges will then issue decisions by e-mail. Cybersettle boasts that 66% of claims are settled or decided within thirty days of submission.¹⁰⁶

City officials developed the system both to save administrative time and cost, and to make the dispute resolution process more convenient for citizens. The pilot program, which ran from 2007 to 2011, cost only \$50,000 to develop. The City's Comptroller estimated that the online arbitration system saved a total of \$70 million between 2004 and 2009 alone.¹⁰⁷ Mayor Michael Bloomberg also lauded the time saved, stating that it: “[also] means that you won’t have to zip out of work to contest a parking ticket on your lunch hour. You won’t have to spend time . . . on weekends . . . stapling documents to dispute your ticket by mail [or going] downtown to the Finance Department [to dispute your ticket in per-

¹⁰³ *NYC Expands Use Of ODR*, 62 DISP. RESOL. J. 6, 6 (2007).

¹⁰⁴ *Id.*

¹⁰⁵ David Allen Larson, “*Brother, Can You Spare A Dime?*” *Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes*, 11 NEV. L.J. 523, 537 (2011).

¹⁰⁶ *Id.* Until January 2011, the City also offered a program allowing disputants to essentially bargain online for a reduced ticket price rather than await an arbitral decision. This program was popular, but was cancelled as the City aimed to increase revenues during the recession. *New York City Office of the Comptroller*, CYBERSETTLE, http://www.cybersettle.com/pub/home/case_studies/nyc.aspx (last visited Aug. 16, 2012).

¹⁰⁷ *Cybersettle Saves the City of New York Time and Money*, CYBERSETTLE, <http://cybersettle.com/pub/76/section.aspx/25> (last visited Aug. 16, 2012).

son].”¹⁰⁸ The Comptroller also points to additional benefits in reduced caseloads for both for the New York City Law Department and for the New York State Court System.¹⁰⁹

New York is likely the first of many governments that will expand use of ODR. Professor Anita Ramasastry of University of Washington School of Law notes that “municipal ODR” is an area rife with potential, both in terms of cost-savings *and* increasing access to justice—usually two opposing goals.¹¹⁰ By expanding the paths through which citizens “can have claims involving the government adjudicated through ODR, one may ultimately expand access to justice by creating greater opportunities for citizens to interact with the state and to have their grievances resolved.”¹¹¹

3. ECODIR: Facilitated Negotiations & Mediations Online

The two previous examples represent *adjudicative* ODR—essentially online versions of commercial arbitration, where third-party neutrals make binding decisions for the parties.¹¹² In the case of GE, those third-parties are industry experts. In the case of New York City, the third-parties are usually the same administrative judges who would review such claims face-to-face. But the adjudicative method is only one manifestation of ODR.

Companies like ECODIR (hereinafter “Electronic Consumer Dispute Resolution”) provide *collaborative* ODR.¹¹³ Recall that collaborative ODR allows parties to resolve disputes and bargain in a manner closer to negotiation and mediation. ECODIR began as a university initiative supported by the Commission of the European Communities and the Irish government and has continued to provide mediation services beyond an initial pilot phase that ended in June 2003.¹¹⁴ ECODIR offers parties a three-step method for resolving conflicts: 1) negotiation, 2) mediation, and 3) recommendation.¹¹⁵ In the negotiation phase, the parties negotiate in text-form over the ECODIR platform. The platform includes refer-

¹⁰⁸ Javier C. Hernandez, *Go Online, Not Downtown, to Fight a Parking Ticket*, N.Y. TIMES, Mar. 21, 2011, at C2.

¹⁰⁹ NEW YORK CITY COMPTROLLER, *Key Projects Recently Completed*, http://www.comptroller.nyc.gov/bureaus/bis/recent_projects.shtm#a (last visited Feb. 16, 2012).

¹¹⁰ Anita Ramasastry, *Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry*, 79 WASH. L. REV. 159, 170 (2004).

¹¹¹ *Id.* at 170.

¹¹² *See supra* III.A.

¹¹³ ECODIR, <http://www.ecodir.org> (last visited Feb. 20, 2012).

¹¹⁴ ECODIR, http://www.ecodir.org/about_us/index.htm (last visited Feb. 20, 2012).

¹¹⁵ ECODIR, <http://www.ecodir.org/odrp/details.htm> (last visited Feb. 20, 2012).

ences to various standard terms and examples in different types of commercial transactions, and allows the negotiations to continue for eighteen days. If negotiations fail, the parties can move onto the second phase and bring in a third-party neutral provided by ECODIR. These mediation sessions occur over the same text-based platform. The third-party neutral will attempt to facilitate the conversation. If the dispute is still not resolved after fifteen additional days, the mediator can issue a recommendation based on his/her conversation with the parties and understanding of the underlying conflict. This recommendation is non-binding (unless they agree to be bound in a separate contractual agreement). The entire process is designed to be consensual and collaborative.¹¹⁶

ECODIR is just one of many companies that offer such services. Others such as Virtual Courthouse give parties even greater latitude in choosing whether they would like to begin with negotiation, facilitated negotiation, mediation, or an adjudicative arbitration.¹¹⁷ And beyond these types of commercial ODR companies, many individuals—particularly attorneys—are beginning to offer online mediation services.¹¹⁸ That is, parties can opt for mediated teleconferencing or text-based chatting with a human mediator over the Internet.

ODR is becoming an increasingly popular way for companies, governments and individuals to resolve conflict and bargain with one another. This is partially because people are spending more time online, and thus more of their actual conflicts develop in cyberspace.¹¹⁹ This makes online dispute resolution seem natural.¹²⁰ Still, there is scholarly consensus that ODR is somewhat limiting for many types of disputes and negotiations. Online processes and interactions, some argue, “cannot match the richness of the face-to-face sessions that are at the heart of offline mediation.”¹²¹ The more complex and personal the dispute, the less likely an online solution will be effective.¹²² Some scholars argue

¹¹⁶ Joseph W. Goodman, *The Advantages and Disadvantages of Online Dispute Resolution: An Assessment of Cyber-Mediation Web Sites*, 9 J. INTERNET L. 1, 12 (2006).

¹¹⁷ VIRTUAL COURTHOUSE, <http://www.virtualcourthouse.info/> (last visited Feb. 20, 2012).

¹¹⁸ See, e.g., CLEARVIEW DIVORCE, <http://clearviewdivorce.com/> (last visited Feb. 19, 2012); MEDIATING ATTORNEY, <http://www.mediatingattorney.com/Online-Mediation.html> (last visited Feb. 19, 2012). A simple web search for online mediation in a particular geographic region reveals numerous similar services.

¹¹⁹ Schmitz, *supra* note 73, at 178.

¹²⁰ *Id.* at 180.

¹²¹ Katsh, *supra* note 77, at 282.

¹²² *Id.*

that ODR lacks both the accountability of litigation *and* the interpersonal benefits of traditional face-to-face ADR, making it “the worst of all worlds.”¹²³ But as the above trends indicate, scholars are also beginning to realize that, for better or worse, ODR is quickly catching on among commercial actors.

IV. DECEPTION IN ONLINE NEGOTIATION AND DISPUTE RESOLUTION

How does the relatively rosy picture of the growing use of ODR comport with the well-documented risks of deception in face-to-face ADR? Analysis by scholars like Peter Reilly and Avnita Lakhani leave little doubt that “lying (or deception) is acknowledged [among practitioners] as a necessary and standard negotiation practice.”¹²⁴ As one scholar of deception notes, “[l]ying is not exceptional; it is normal, and more often spontaneous and unconscious than cynical and coldly analytical. Our minds and bodies secrete deceit.”¹²⁵ In short, lies, manipulation and puffing are—at least to some degree—inevitable.¹²⁶ Given that reality, it is no surprise that deception is alive and well in the online negotiating and dispute resolution space.

A. *Effects of Deception Online: Limited Scholarship*

There has been surprisingly limited research on the presence of deception in online bargaining. Most of the research that has been done has come not from legal scholars, but rather from scholars of business and social psychology. This section will analyze and

¹²³ *Id.*

¹²⁴ Avnita Lakhani, *The Truth About Lying as a Negotiation Tactic: Where Business, Ethics, and Law Collide. . . or Do They?*, 9 ADR BULLETIN 1, available at <http://epublications.bond.edu.au/adr/vol9/iss6/2>.

¹²⁵ DAVID L. SMITH, WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND 15 (2004). See also SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE xvii (1978) (suggesting that “in law and in journalism, in government and in the social sciences, deception is taken for granted when it is felt to be excusable by those who tell the lies and who tend also to make the rules”).

¹²⁶ See Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1, 90 (2007) (“All bargaining . . . is a lying game to some extent, and one in which adversarial behavior plays an inevitable role.”).

synthesize four particularly relevant pieces of research conducted over the past five years.

The first major study came in 2007 by George Giordano of Florida State University's College of Business. Giordano investigated the differences in mutual understanding for negotiators using computer-facilitated and face-to-face negotiations.¹²⁷ In a double-blind experiment, two groups of study participants were given background information on their clients' needs. Half of the negotiators were instructed to pursue "deception to achieve these hidden agendas"; the other half were instructed to negotiate honestly.¹²⁸ Each group was then divided into teams A and B, with team A bargaining via instant-messaging and team B bargaining face-to-face.¹²⁹

Several results were striking. First, individuals negotiating via instant messaging are more likely to use forceful language, experience more tension during bargaining, and have far lower deception detection accuracy than individuals negotiating face-to-face.¹³⁰ Overall, only 9% of the online negotiators correctly identified their partners as deceptive, compared to 24% of the face-to-face negotiators. This not only confirms the fact that people in general are not strong detectors of deception,¹³¹ but shows that this weakness is significantly magnified online.

Despite the difficulty of detecting text-based deception, some research suggests that a study of misleading text might offer valuable clues for lie-detection.¹³² A second important study by psychol-

¹²⁷ George Giordano et al., *The Influences of Deception and Computer-Mediation on Dyadic Negotiations*, 12 J. OF COMPUTER-MEDIATED COMMUNICATION (Dec. 10, 2011), available at <http://jcmc.indiana.edu/vol12/issue2/giordano.html>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Reilly, *supra* note 16, at 500.

¹³² Telephone interview with Clark Freshmen, Professor of Law at University of California-Hastings (Nov. 19, 2011) (notes on file with author). Freshman points to the potential for Criteria-Based Content Analysis (CBCA) as a tool to assess the veracity of written statements in online negotiations. CBCA is used as evidence in criminal courts in several countries. CBCA presumes "that (i) lying is cognitively more difficult than truth telling, and (ii) that liars are more concerned with the impression they make on others than truth tellers." Aldert Vrij & Samantha Mann, *Criteria-Based Content Analysis: An Empirical Test of Its Underlying Processes*, 12 PSYCHOL. CRIME & L. 337 (2006). In studies where participants are asked to tell either a true or false story, they completed a questionnaire measuring "cognitive load" and "tendency to control speech." Vrij et al., *supra* note 132. The interviews were transcribed and coded by trained CBCA raters. The truth tellers obtained higher scores than liars; the liars experienced more cognitive load than truth tellers, and also tried harder to control their speech. Vrij et al., *supra* note 132, at 337-49.

ogist J.T. Hancock, published in 2008, analyzed 242 transcripts of online chat-based negotiations.¹³³ Like in the Florida State study, here “liars” attempted to negotiate salary against opponents. Some were instructed to lie about previous job earnings and expectations. The results showed that “liars produced more words, more sense-based words (e.g., seeing, touching), and used fewer self-oriented but more other-oriented pronouns when lying than when telling the truth” (e.g. “you” more often than “I”).¹³⁴ Verbosity was another predictor of deception. Hancock put forth two hypotheses to explain this. First, because the communication was text-based, deceptive participants “may have taken more time to plan and edit their messages.”¹³⁵ Second, because it was a dialogue rather than a single monologue, the liars no longer had the incentive or option to limit their communication to avoid contradicting their account of the facts. Here the incentive was to provide as many arguments as possible to convince their opponents and to ensure that their opponents did not suspect duplicity. Liars “engaged in an interactive conversation may use more words to manage information flow, to enhance mutuality with their partner, and to decrease a conversational partner’s suspicion.”¹³⁶

The third important piece of research, published in *The Journal of Cross-Cultural Psychology* in 2011, not only confirms the findings of Giordano and Hancock, but also shows that these results are even more exaggerated when the online bargainers come from different cultures.¹³⁷ Ashleigh Shelby Rosette, a professor of business at Duke University, examined the implications of e-mail negotiation in distributive bargaining¹³⁸ for two negotiators: one from Hong Kong and the other from the United States. The study compared intra-cultural negotiations (control group) to inter-cultural negotiations. In particular, the research examined the relative aggressiveness of opening offers—the first offer made in

¹³³ J.T. Hancock et al., *On Lying and Being Lied To: A Linguistic Analysis of Deception*, <http://www.cs.columbia.edu/~julia/papers/Hancocketal08.pdf> (last visited Aug. 30, 2012).

¹³⁴ *Id.* at 1.

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

¹³⁷ Ashleigh S. Rosette et al., *When Cultures Clash Electronically: The Impact of Email and Social Norms on Negotiation Behavior and Outcomes*, 20 J. OF CROSS-CULTURAL PSYCHOL. 1 (2011).

¹³⁸ Distributive bargaining is a negotiation in which fixed resources are being divided between the parties. In its simplest form, a classic example would be dividing a pie between two individuals, where each desires as much as possible. One individual’s gain is the other’s loss. Menkel-Meadow, *supra* note 6, at 10.

distributive bargaining.¹³⁹ “Aggressive” here is defined not as hostility or antagonism, but rather as taking an initial distributive position that is “considered to be the extent to which the opening offer is high for the seller or low for the buyer compared to their reservation or walk-away price.”¹⁴⁰

The study took the form of a transactional negotiation exercise involving the sale of a television show by a major film company to an independent television station.¹⁴¹ The parties negotiated only the sales price per episode that the station would pay.¹⁴² The station (buyer) was privately given a bargaining range between \$30,000 and \$60,000, and the film company (seller) was privately given a range between \$35,000 and \$75,000.¹⁴³ There were no constraints placed on the opening offer amount, nor were there constraints placed on the agreed upon sales price. The participants were seventy-eight business students from Hong Kong and the United States, twenty-one men and eighteen women.¹⁴⁴ There were two versions of the inter-cultural simulation. In the first, the seller was an American company and the buyer was a Hong Kong company; in the other version, the seller was a Hong Kong company and the buyer was an American company.¹⁴⁵

Rosette’s study found many striking results. Inter-cultural negotiations over e-mail tended to display more competitive and risk-seeking negotiators. Hong Kong e-mail negotiators made more aggressive opening offers than their American counterparts, although both displayed more aggression when negotiating inter-culturally than they did in the intra-culturally control negotiation where the buyers and sellers were of the same nationality. As a result, Hong Kong negotiators generally won higher distributive outcomes—that is, the Hong Kong negotiators were able to achieve higher prices as the sellers and lower prices as the buyers than the U.S. negotiators.¹⁴⁶

Rosette also points to evidence of managers of companies with offices in both countries observing problems in e-mail comprehension across borders. She quotes Peter Boneparth, CEO of Jones

¹³⁹ Opening offers drive distributive outcomes because they serve as anchors—baselines by which future offers tend to be measured by the parties. *Id.*

¹⁴⁰ Rosette et al., *supra* note 137, at 9.

¹⁴¹ *Id.*

¹⁴² *Id.* at 10.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Rosette et al., *supra* note 137, at 13.

Apparel Group, saying that “one of the American-educated managers took me aside and said the staff was having problems with e-mail from the United States. [The Americans] were not picking up on the nuances in e-mail. As a result we decided to have more face-to-face meetings.”¹⁴⁷ She concludes that managers “need to understand these cultural differences if they are to capitalize and leverage them to their advantage . . . for negotiating [inter-culturally].”¹⁴⁸

Admittedly, this study examines merely one type of negotiation between just two nationalities, and does not take into account a more granular analysis of potential cultural differences between negotiators (e.g. gender, political affiliation, race, religion, socio-economic status, etc.). “Culture” is not monolithic. Rosette realizes this, arguing that the “growth of a global economy” makes this line of research particularly important for companies seeking to transition from face-to-face negotiation to online negotiation. The study notes that “the expense of international travel and the continuous demands placed on workers’ time . . . make face-to-face negotiations a luxury that many companies cannot afford.”¹⁴⁹ Commercial actors seeking to bargain or resolve disputes save travel time and money by simply using e-mail to make deals across national borders. However, “they are likely to incur significant communication costs because of the cultural differences in the way people negotiate.”¹⁵⁰

A fourth piece of research by Susan Nauss Exon of the University of La Verne College of Law suggests that the same difficulties prove true for online mediation.¹⁵¹ Because mediations, like the negotiations described in the studies above, are increasingly occurring in non-visual environments, mediators “must be particularly cognizant of fostering productive communication despite the lack of contextual cues such as eye contact, proximity, personal space, and demeanor. The written word is [therefore] paramount since it is the focal point of communication.”¹⁵² In particular, she focuses on the difficulty of developing trust online. A standard definition of trust in commercial mediations is “the willingness of a party to be vulnerable to the actions of another party based on the

¹⁴⁷ *Id.* at 12.

¹⁴⁸ *Id.* at 13.

¹⁴⁹ *Id.* at 15.

¹⁵⁰ *Id.*

¹⁵¹ Susan Nauss Exon, *Maximizing Technology to Establish Trust in an Online, Non-Visual Mediation Setting*, 33 U. LA VERNE L. REV. 27 (2011).

¹⁵² *Id.* at 33.

expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party.”¹⁵³ Trust is important to both online and face-to-face mediation. A disputing party must trust the mediator enough to share confidential information anticipating that the mediator will offer a neutral perspective, and must also trust the other party enough to participate in the process.

Because the mediator’s central role is to facilitate communication, one of his or her primary responsibilities is to create the necessary level of trust, which allows for “candid communication and good faith participation.”¹⁵⁴ Nauss Exon describes a number of challenges to developing trust in online commercial mediation: Challenges relate to “silence and how to interpret it, an inability to develop a personal or social relationship without contextual cues, the inability to interpret body language and tone . . . difficulty in asking for and receiving immediate feedback, and differences in geographic location . . . where immediacy of communication may be lacking.”¹⁵⁵

Nauss Exon compiles her research to put forward “Six Building Blocks of Trust” that virtual mediators should apply to commercial mediations. Mediators should 1) establish online reputations and credibility, through professional and seamlessly designed websites. Their sites should contain links to scholarly and professional resources to make prospective parties feel comfortable and familiar with the process. The website should also 2) “display high levels of social presence through pictures, photographs, and descriptive language.”¹⁵⁶ Videos of the mediator describing the services are also highly encouraged as a trust-building mechanism. From the very beginning and throughout the mediation, the mediator should 3) establish credibility and predictability. Nauss Exon suggests that online mediators must remember to introduce themselves and the process at the beginning of the mediation—a practice that is common when mediating face-to-face, but often forgotten when parties begin chatting online.¹⁵⁷ Mediators should also pay attention to Internet conventions for professional communication, avoiding capitalized words and using a professional

¹⁵³ Roger Mayer et al., *An Integrative Model of Organizational Trust*, 20 *ACAD. OF MGMT. REV.* 709, 712 (1995).

¹⁵⁴ Nauss Exon, *supra* note 151, at 9.

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Id.* at 12.

twelve-point Times or Arial font. Messages should be concise and focus on single issues. Prompt responses “create higher levels of trust and [accountability] for virtual teams.”¹⁵⁸

As for the substance of the discussion, mediators should 4) be optimistic and friendly, creating a positive environment conducive to parties productively solving problems. “Too often,” she believes, “e-mail and other web-based communications tend to focus on tasks and pure business.”¹⁵⁹ According to law professor Noam Ebner, e-mails lack the “schmooze factor.”¹⁶⁰ When preparing a text-response, Nauss Exon recommends writing out the formal response and then “go back and insert words to demonstrate friendliness, empathy, etc.,” including “Thanks for responding to my e-mail so quickly,” “I look forward to working with everyone,” and “I appreciate that everyone is working so hard and it’s wonderful to see the good faith efforts on both sides.”¹⁶¹ Virtual mediators, like face-to-face mediators, should 5) be able to identify and reframe emotions including “anger, hurt, distrust, hopelessness, frustration, fear, betrayal, and resentment.”¹⁶² This can be far more challenging in the text-based communications; mediators must be able to spot when parties are misperceiving one another or allowing unproductive emotions to take control of the dialogue. Mediators should “use different words to express the same thing, [neutralizing] negative emotion by reframing in neutral language and translating different words to help foster mutual understanding.”¹⁶³ Finally, mediators should 6) ensure that the online mediation platform is fast, easy for participants to use, and reliable.¹⁶⁴

Some of these Six Building Blocks of Trust seem more like mediators’ marketing than anything else. But Nauss Exon’s research demonstrates that these six, often-overlooked features are key to developing trust between professional commercial actors online. This is true regardless of whether the virtual mediator is a human participating in text-based discussions with the parties (as

¹⁵⁸ *Id.* at 15.

¹⁵⁹ *Id.* at 16.

¹⁶⁰ Noam Ebner et al., *You’ve Got Agreement: Negoti@ting via Email*, 31 *HAMLIN J. PUB. L. & POL’Y* 427, 442 (2010).

¹⁶¹ Nauss Exon, *supra* note 151, at 16.

¹⁶² *Id.*

¹⁶³ *Id.* at 17.

¹⁶⁴ *Id.*

with ECODIR) or is computer-facilitating software (as with CyberSettle).¹⁶⁵

In sum, the limited research that has examined online commercial negotiation and dispute resolution online has revealed troubling problems. Work by scholars like Giordano¹⁶⁶ and Hancock¹⁶⁷ reveal that human negotiators have a great deal of difficulty in determining honesty purely from text. Though careful textual analysis might be able to uncover deception, most commercial actors are unaware of these warning signs. Nauss Exon shows that trust is the bedrock of any successful mediation whether online or face-to-face. For a variety of reasons, such trust is less natural online and must be methodically and consciously developed by the online mediator (or mediation software platform) before true problem-solving. The arguments of these three scholars are confirmed by Rosette,¹⁶⁸ who further demonstrates that difficulties of mutual understanding increase dramatically in inter-cultural ODR.

These four pieces of recent research together suggest that the highly text-based approach of most forms of ODR should trouble those seeking to bargain and resolve disputes online. For all its potential benefits (e.g. savings in time and cost), text-based ODR risks a greater probability of deception and a lesser probability of mutual understanding.

B. *Can Traditional Coping Mechanisms on Deception Work in ODR?*

As outlined in Section II, most scholarship on face-to-face deception detection and coping mechanisms has focused on interpersonal contact. This includes both the so-called relationship-based and scientific-based approaches. Various scholars point to tone of voice, eye movement, body language, and building a forthcoming and honest relationship over time. The lack of interpersonal contact in online bargaining makes many of these coping mechanisms impracticable.

¹⁶⁵ *Id.* at 18. Obviously several of the building blocks (for example, inserting optimistic language) are more applicable to human virtual mediators.

¹⁶⁶ Giordano et al., *supra* note 127.

¹⁶⁷ Hancock & Curry, *supra* note 133, at 23.

¹⁶⁸ Rosette et al., *supra* note 137, at 14.

The scientific approaches to deception detection advanced by Clark¹⁶⁹ and Eckman¹⁷⁰ are clearly unworkable in purely text-based ODR. They require the ability to analyze voice and expression. Many of the relationship-based coping mechanisms, too, fall short. Online messaging—whether via e-mail or via software like ECODIR—sacrifices the opportunity to freely slip in what Reilly refers to as “why” questions.¹⁷¹ He posits that many times in a negotiation, simply asking “why?” can be a crucial means of getting at important information about parties’ underlying interests, and an important way of sniffing out deceptive practices. One can ask “Why?” in many different ways, including: “Could you say a little bit more about that?” or “That’s interesting, what do you mean by that?” or “How do you know that to be the case?”—basically, any statement, usually in the form of a question or request, that will force the other party to disclose additional information.¹⁷² Online chats, with their typed replies, are less free-form and conversational. This is particularly true of the structured commercial ODR software. Online formats thus sacrifice some chance of creating, “[a] cordial and supportive environment (i.e., one infused with sincerity, understanding, impartiality, empathy, and expressions of genuine concern for the other party).”¹⁷³ Research suggests that “such an environment can lead to individuals relaxing their defenses and providing information that may be used to secure the truth in the future.”¹⁷⁴

Not all traditional relationship-based coping mechanisms are unworkable, however. For example, many scholars recommend making reference to objective standards from the very beginning of a negotiation. Gary Goodpaster recommends asking questions such as: “What do you base that number on?” or “Is that according to industry standard?”¹⁷⁵ Opponents will be less likely to attempt to lie and deceive “if they know from the start of the negotiation that objective criteria and standards will constantly be sought, from other parties as well as outside sources.”¹⁷⁶ In online text-based

¹⁶⁹ Freshman, *supra* note 34.

¹⁷⁰ EKMAN, *supra* note 33.

¹⁷¹ Reilly, *supra* note 16, at 500.

¹⁷² *Id.* at 501.

¹⁷³ STEFAN H. KRIEGER & RICHARD K. NEUMANN, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 81 (2003).

¹⁷⁴ *Id.* at 80.

¹⁷⁵ Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 373 (1996).

¹⁷⁶ *Id.* at 374.

bargaining, this is certainly a workable option. Indeed, the online format might even make this simpler. One could request direct hyperlinks to objective standards, asking questions like, “Could you send me a few websites with that data?” Text-based bargaining and dispute resolution are also conducive to Reilly’s suggestion of thoughtfully preparing and carefully limiting the information you are willing to disclose.¹⁷⁷ A negotiator could literally copy and paste pre-written phrases and data in order to get the communication exactly right. By the same token, it is harder to evade direct questions when bargaining online. Subtle evasion techniques that might work in person (e.g., “ignoring the question; offering to return to the question later; answering only part of the question; answering a related but less intrusive, specific or direct question, etc.”) are far more obvious in a text-based format.¹⁷⁸ All of this suggests that *some* traditional relationship-based coping mechanisms can be applied to ODR.

New technology might also make the scientific-based approaches more applicable. Techniques like facial analysis, not surprisingly, require face-to-face interaction. But in the 21st century, this no longer requires that commercial actors be in the same room, or even the same country. Indeed, Freshmen acknowledges that incorporating video into ODR could suffice for an analysis of micro-expressions.¹⁷⁹ Other scholars endorse specific videoconferencing technologies, such as GoToMeeting, Adobe Connect, IOCOM Visimeet, AccuConference and Logitech LifeSize.¹⁸⁰ Although no research has empirically examined this issue, high quality audiovisual discussion might allow for increased detection of deception. Susan Nauss Exon advocates for the use of holographs in ODR. Holography “differs significantly from [text-based] ODR and other forms of technological communication because it enables the traditional in-person, three-dimensional face-to-face qualities of ADR to exist.”¹⁸¹ Not only is the spoken word heard complete with inflection and intonation, but parties can witness silence, body

¹⁷⁷ Reilly, *supra* note 16, at 542.

¹⁷⁸ Robert S. Adler, *Negotiating With Liars*, 70 SLOAN MGMT. REV. 48, 69–74 (2007) (“As viewers who watch politicians and public officials on Sunday morning interview shows can attest, there is a real art to responding to questions by changing the subject or answering questions that have not been asked.”).

¹⁷⁹ Interview with Clark Freshman (Nov. 19, 2011) (notes on file with author).

¹⁸⁰ Hon. Arthur M. Monty Ahalt & David W. Puckett, *Unleashing Creative Dispute Resolution by Enabling Neutrals’ Creativity*, THE PRACTICAL LAWYER, (Feb. 1, 2012), http://files.aliases.org/thumbs/datastorage/lacidoirep/articles/TPL1202_Ahalt_thumb.pdf.

¹⁸¹ Nauss Exon, *supra* note 63, at 19.

language, a reddening face, and perspiration. The traditional face-to-face communication “facilitates credibility and demeanor issues as parties attempt to resolve a dispute. Hence, holography enables traditional, physical qualities of ADR to exist in the spoken and unspoken contexts, and ensures the confidential nature of the dispute resolution process.”¹⁸²

Despite the limited applicability of relationship-based and science-based approaches to deception detection in ODR, some of the methods outlined by scholars do apply. Moreover, coping mechanisms become stronger when ODR incorporates voice and video technologies.

V. CONCLUSION

Scholarship and experience demonstrate that deception is an inevitable aspect of bargaining. Although there is an established stream of research on deception in face-to-face negotiation and dispute resolution, very little research has examined the influences of deception on online commercial relationships. The limited research that has been done, however, indicates that deception is equally pervasive but far more difficult to detect. As ODR becomes more popular—both through simple chat-based platforms, as well as through more elaborate ODR software—parties should be aware that certain types of ODR render useless many of the traditional techniques for coping with deception in face-to-face negotiations and dispute resolution. Moreover, the Internet alters the tone and strategies of negotiating parties, oftentimes increasing aggressiveness and decreasing collaboration, particularly across cultures. Many of the benefits of ADR, such as increased mutual understanding and creative compromise, are less likely when bargaining or resolving disputes online.

In short, businesses and individuals should proceed cautiously when engaging in ODR. They should be particularly mindful of who they are bargaining with (well-known business partners or wholly unknown parties) and the nature of the subject that is being discussed (simple distributive matters or complex interpersonal matters). If ODR with an unknown party or about a complex subject is necessary, parties would be wise to employ videoconferencing tools, or even the holographs advocated by Susan Nauss Exon.

¹⁸² *Id.* at 20.

As Peter Reilly warns, “[i]nformation is the lifeblood of any negotiation or mediation. At its core, [commercial negotiation] is about protecting sensitive information of one’s own while extracting information from other parties. . . . Simply put, lying can help one secure a larger share of the pie.”¹⁸³ While ODR presents an exciting and efficient alternative for commercial actors, the platform does not change the simple truth that deception is always lurking. It is human nature. As Peter Steiner’s notorious *New Yorker* dogs¹⁸⁴ remind us: Everybody lies.

¹⁸³ Reilly, *supra* note 16, at 533.

¹⁸⁴ Steiner, *supra* note 1.

