AN INFORMATION FLOW MODEL OF ONLINE MEDIATION: JEOPARDIZING PRIVACY AND AUTONOMY IN THE SHADOW OF INNOVATION

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Abstract

*Online mediation has developed significantly over the past decade, and increasingly so following the COVID-19 pandemic. Online mediation platforms are now integrated in both private and public settings, enabling mediation through diverse means—from videoconferencing software to dedicated platforms that use various procedural and technological tools, including AI-powered applications. The digital transformation of the mediation process introduces challenges and opportunities for mediators, parties and mediation platforms, many of which stem from new digital data-handling practices. This article explores how this digital transformation of mediation impacts parties’ rights to self-determination and privacy. Recognizing that both rights derive from the parties’ right to autonomy,* *the article argues that these rights can be construed in terms of the parties’ control over the flow of information in mediation. Parties exert their control over information communication (the transfer of information among disputing parties and the mediator) and information analysis (identification and analysis of relevant information to support informed decision-making). Accordingly, the proposed model conceptualizes mediation activities and associated risks using two axes: the information reveals axis, which captures the types of information revealed and generated in online mediation; and the information processing axis, which reflects the analytical operations that the parties, mediator and mediation platform perform on revealed information. Next, the article analyzes the norms that regulate participants’ control over the flow of information in the process: Mediation norms that protect the confidentiality of the process and parties’ self-determination; and privacy and data protection norms that govern parties’ control over their personal information. Subsequently, the article discusses how the involvement of digital platforms alters the flow of information in online mediation by creating new types of information and effectuating new ways of information processing that may undermine parties’ control over the decision-making process and outcome, parties privacy, and mediation confidentiality.*

Introduction

A quarter century has passed since the first commercial online mediation system was launched in 1999, designed to resolve disputes between sellers and buyers on eBay’s e-commerce platform.[[2]](#footnote-3) Originally, the project made very basic use of technology: the process began by filling out an online complaint form, which was then transferred to a mediator that attempted to resolve the dispute by communicating with the parties via e-mail.[[3]](#footnote-4)  Over the years, the field of online mediation has developed extensively. Nowadays, there are numerous online mediation platforms that rely on various technological and procedural models—synchronous and asynchronous, in writing and via videoconference, fully automated or facilitated by human mediators.[[4]](#footnote-5) The COVID-19 pandemic was a turning point in the field, as lockdowns and social distancing restrictions accelerated the adoption of online tools in mediation.[[5]](#footnote-6) As in many other professional contexts, conducting mediation sessions via video conferencing platforms like Zoom[[6]](#footnote-7) has become particularly common. Surveys of mediators, lawyers, and litigants[[7]](#footnote-8) indicated high levels of satisfaction with online mediation conducted through videoconference, and revelaed mediators’ strong inclination to continue using this tool in the future.[[8]](#footnote-9) At the same time, sepcialized mediation platforms continued to operate, relying primarily on text-based proceedings. The use of artificial intelligence (“AI”) applications in mediation is also expected to increase, automating tasks such as evaluating the BATNA (best alternative to a negoatiated agreement) by predictomg the expected outcome of legal proceedings and supporting informed decision-making through presentation of relevant information.[[9]](#footnote-10) Recent developments in generative AI enable integrating new applications into mediation proceedings, such as assisting the parties in drafting agreements and facilitaing constructive communication.[[10]](#footnote-11) These technological developments have prompted various efforts to create regulations, standards, and ethical principles to govern online dispute resolution (ODR), including online mediation.[[11]](#footnote-12) For example, professional organizations have drafted recommendations for online mediation,[[12]](#footnote-13) and scholars have begun to deal with the effect of digitization of the process on its quality, legitimacy, and fairness.[[13]](#footnote-14)

Within these debates, the issue of the parties’ rights to autonomy and privacy in online mediation has not received much dedicated scholarly attention.[[14]](#footnote-15) To be sure, the rise in online mediation during the pandemic has brought to the fore data security concerns[[15]](#footnote-16) and some discussion of immediate privacy risks, such as the exposure of parties’ personal space and intrusion of unauthorized participants in mediation sessions held via videoconference.[[16]](#footnote-17) However, online mediation entails many other risks to parties’ autonomy and privacy. Specifically, online mediation involves the digital transformation of the two core activities of mediation: communication and information analysis. When these activities are performed on a digital platform, or by a digital platform, the flow of information in the process is altered in ways that may violate the parties’ right to control it. This alteration may result in an infringement of the parties’ right to control the decion-making process and the outcome in mediation (self-determination), a breach of the confidentiality of the mediation, and a violation of parties’ right to privacy and protection of their personal information. All these harms can constitute a violation of the parties’ autonomy.

In this article, we examine how the digitization of mediation processes impacts parties’ right to self-determination and privacy. We present a novel model that conceptualizes mediation as a process based on the flow of information, which involves communicating infromation and analyzing information. Using the model, we evaluate how the digitization of mediation processes influences the infromation that is being revelaed, the processing of that information, the risks entailed in the process, and the norms that govern these activities and risks.[[17]](#footnote-18)

This Article consists of five parts. Part I reviews the current landscape of online mediation and different types of online mediation platforms. Part II proposes a model that conceptualizes the flow of information in online mediation at the interesection of two axes: the *information reveals* axis, which describes the types of information revealed in online mediations, and the *information processing* axis, which captures actions perfomred on the revealed information, such as its collection, use, and disclosure. Part III describes the norms that govern the flow of information in online mediation, considering meduiation norms, privacy norms and data protection norms. Part IV maps the risks to privacy and self-determination in online mediation using the information flow model. Part V proposes possible courses of action to deal with the identified risks. The article closes with a brief conclusion.

1. The Current Landscape of Online Mediation

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.[[18]](#footnote-19) The term “mediation process” covers various models, contexts, and styles. Still, one of the most common models is the “problem-solving” approach,[[19]](#footnote-20) in which the mediator helps the parties examine their primary interests and needs to formulate an agreed solution. As part of the performance of her role, the mediator performs various activities throughout the mediation process, which can be divided into different stages.[[20]](#footnote-21) Today, information technologies enable the carrying out of mediation activities in all stages of the mediation process. For this discussion, we propose to divide it into three stages: the planning and preparation stage, the execution stage, and the final product stage.

In the *planning and preparation* stage, information technologies allow mediation activities to be conducted, such as receiving a referral for mediation, obtaining the consent of the parties to participate in the mediation process,[[21]](#footnote-22) collecting background information about the parties and the conflict,[[22]](#footnote-23) initial diagnosis and identification of the problem and the issues of the conflict,[[23]](#footnote-24) assessing the suitability of the case for mediation, as well as an initial design of the process.[[24]](#footnote-25) During the *execution* stage, information technology can be used to present the opening statements of the parties[[25]](#footnote-26) as well as perform central mediation activities such as collecting additional information from the parties, identifying, and reframing the issues of the dispute, identifying the interests of the parties, presenting, and evaluating possible solutions, and of course direct or guided negotiations regarding solutions to the conflict. Information technologies can help draw up the mediation arrangement in the *final product* stage.

To analyze the risk to autonomy and following self-determination and privacy in mediation, we propose to refer to each of the different activities in the mediation process in terms of information flow in a way that their performance, either online or face-to-face, involves parties’ personal information processing, such as collecting, managing, using, and dissemination. Under this framework, the multiple activities in mediation can be classified into three types: *communication*, in which information is transferred among the disputing parties and mediator and collected; *Information Analysis*, which concerns filtering and identifying the relevant information, concluding, and making decisions; and *administrative*, such as payments, coordinating meetings, and storing the mediation file. Table 1 summarizes the various mediation activities carried out during the mediation process. In online mediation, these activities are carried out through digital platforms, i.e., websites and online applications (apps) that provide technological infrastructure and various services through which the mediation process is conducted. Later, we will illustrate how online mediation platforms differ from each other in the technologies they use, as well as in the stages and activities in which technological tools are integrated, and therefore, are differentiated in the way they process the parties’ information, and in the risks that arise from their use.

**Table 1: Mediation stages and some of the main mediation activities**

|  |  |  |
| --- | --- | --- |
| **Stage** | **Activities** | **Type of Activity** |
| Planning and preparation | Making initial contact with the parties and obtaining their consent to participate in the process | Communication |
| Collecting background information | Communication |
| Initial diagnosis and identification of the problem | Information analysis |
| Designing process plan | Information analysis |
| Execution | Presenting parties’ opening statements | Communication |
| Collecting additional information | Communication |
| Identifying and reframing the issues | Information analysis |
| Identifying parties’ interests | Information analysis |
| Option generating | Information analysis |
| Reality testing | Information analysis |
| Negotiation | Communication and Information Analysis |
| Final product | Drawing mediation agreement | Communication and Information Analysis |

For this discussion, we will emphasize the fundamental distinction between dedicated mediation platforms, which were designed for use in the mediation process and support the performance of all the mediation activities throughout its three stages, and generic platforms, which were intended for general use, but allow specific activities to be performed in one or more of the stages of the process. For example, generic video conferencing or e-mail platforms can be used for communication activities in each of the three stages of mediation.[[26]](#footnote-27) Similarly, mediators and parties can use generic artificial intelligence (AI) applications to analyze information. For example, the mediator can use AI tools that transcribe and summarize meetings[[27]](#footnote-28) or extract data from documents[[28]](#footnote-29) to identify and reframe the issues in the execution stage. Another example is that the mediator can use AI-powered paraphrasing tools[[29]](#footnote-30) for drawing mediation agreements in the final product stage. Unlike generic platforms, dedicated mediation platforms were designed as a digital arena for the mediation process in all its stages. Therefore, they usually combine various technological tools, including a case management system[[30]](#footnote-31) for *communication* and *administrative* activities, advisory and decision support tools[[31]](#footnote-32) for *Information Analysis* activities, and communication tools[[32]](#footnote-33) for *communication* activities. Dedicated mediation platforms can also offer drafting agreement tools,[[33]](#footnote-34) and plugins based on generative artificial intelligence applications like ChatGPT.[[34]](#footnote-35)

An example of a dedicated mediation platform is NextLevel Mediation.[[35]](#footnote-36) This platform is designed to help the parties and the mediator make decisions in the process while reducing biases through several innovative tools, such as AI questionnaires.[[36]](#footnote-37) These questionnaires are used to collect information from the parties; analyze and assess the interests of the parties, including risk analysis for a realistic assessment of the expected outcome of a legal proceeding and the financial cost of conducting a legal proceeding; and secure conferencing facilities for communication via text, audio, and video, as well as the option to integrate video calls through a generic platform for video conferencing.[[37]](#footnote-38)

One example of a dedicated platform incorporating algorithmic tools into the process is Smartsettle ONE,[[38]](#footnote-39) which collects information from the parties in a structured way and analyzes it using algorithms based on game theory to help the parties reach a compromise by optimizing their preferences. Another dedicated mediation platform, based on generative artificial intelligence, was developed and tested as part of a project of the Cyberjustice Lab at the University of Montreal to help the parties reformulate messages to reduce rivalry and increase cooperation.[[39]](#footnote-40)

Whether a dedicated or generic platform, the platform’s technological components may affect the preference of mediation activities and alter the flow of information in a way that affects the parties’ control over that flow and the process outcome.[[40]](#footnote-41) The influence of technology can be indirect, for example, when online communication affects how the parties and the mediator perceive non-verbal communication, such as body language and facial expressions, in a way that affects the building of trust between the parties and the mediator.[[41]](#footnote-42) The influence of the digital platform can also be direct, when the platform structures and even dictates how communication and information analysis activities are performed in the process.[[42]](#footnote-43) Artificial intelligence tools may also affect the process and its outcome, and raise ethical challenges.[[43]](#footnote-44)

This Article focuses on a specific aspect of managing the process in cyberspace: its effect on parties’ autonomy and their rights to self-determination, privacy, and personal information protection. This aspect is related to the information collection and processing practices used by online platforms, both for internal mediation purposes and for purposes external to mediation, such as creating profiles of users, targeting advertisements, and selling information to third parties[[44]](#footnote-45) or product development,[[45]](#footnote-46) which may affect the conduct of the parties to the mediation.

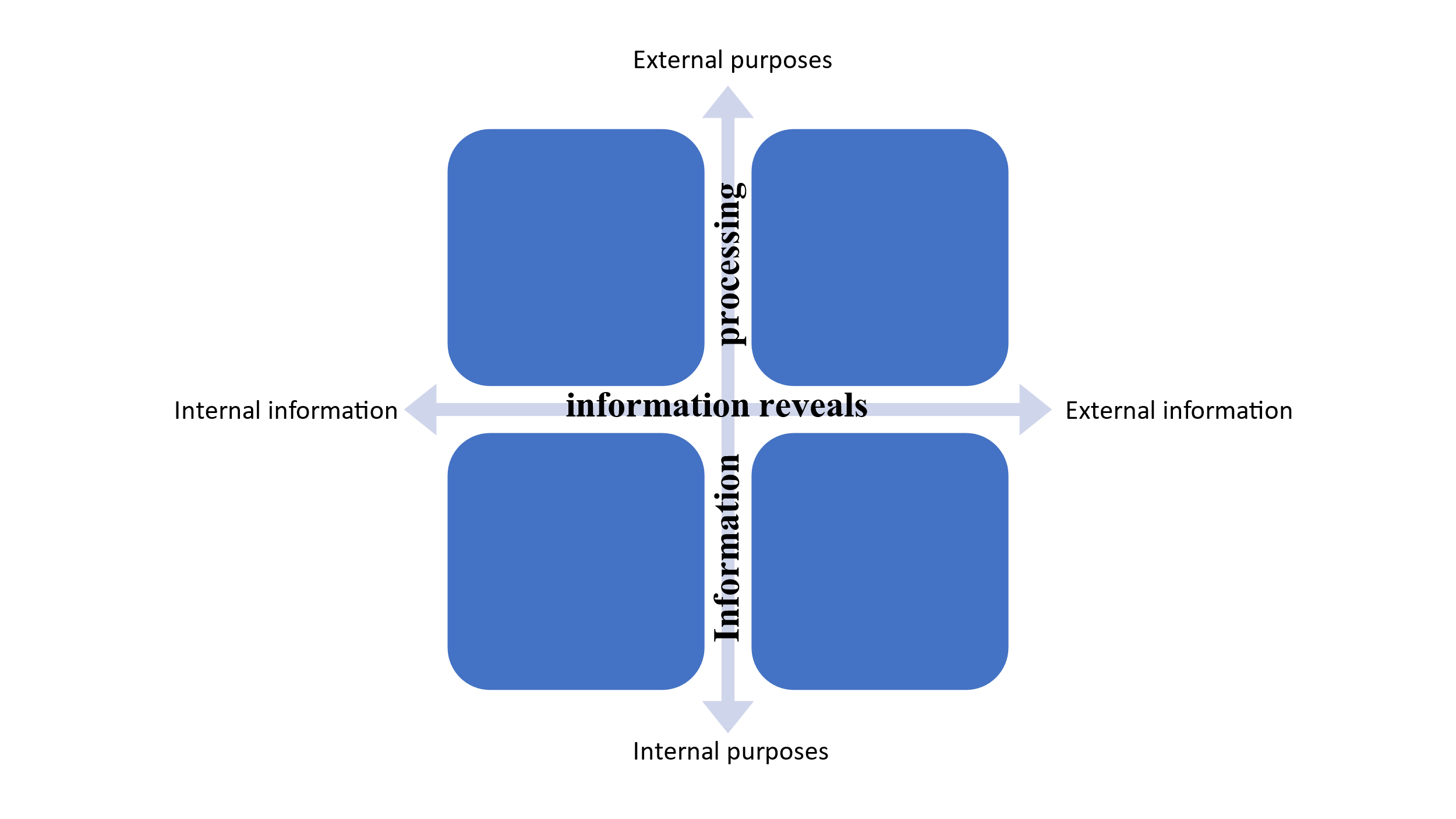
To understand the risks inherent in online mediation, considering the norms governing online mediation activities, the next chapter will propose an innovative model for describing the mediation process as an information flow process. This model will indicate how the entry of online platforms into the mediation process affects the flow of information in the process, both in terms of the types of information revealed and the use of information.

1. Online Mediation as an Information Flow Process

## Modeling the Flow of Information in Online Mediation

This Part presents an analytical model that traces a critical component common to mediation and privacy protection: information. This model describes the flow of information in online mediation in a way that shows how conducting mediation through digital platforms affects the participants’ right to autonomy and its legal equivalent—mediation self-determination—and privacy, which both can be understood as the parties’ right to control the flow of information in mediation. This model is built as a system of two axes: the axis of information reveals, and the axis of information processing. The horizontal axis, the information reveals axis, refers to the information types revealed and generated in online mediation. The vertical axis, the information processing axis, refers to the operations that are performed on the information revealed. Figure 1 illustrates the innovative model, described in detail below.

**Figure 1: Innovative model for describing the flow of information in online mediation**



### Information Reveals Axis

The information reveals axis refers to information types revealed and generated in the online mediation process. On one side of the axis is internal mediation information, i.e., information revealed by mediation communications.[[46]](#footnote-47) The internal information refers to the content of the dispute. On the other side of the axis is external information to mediation, i.e., information revealed and generated using the digital platform.

The term “internal mediation information” refers to information revealed by mediation communications and includes information about the dispute and potentially personal, and even sensitive, information of the participants. Internal information includes information related to the subject matter of the dispute, such as identifying details of the disputing parties, and their positions,[[47]](#footnote-48) interests, and needs[[48]](#footnote-49) the parties’ emotions and how they may influence the development and resolution of the conflict[[49]](#footnote-50) may also be included. Sometimes, internal information includes special categories of personal data that are given special protection under information privacy laws,[[50]](#footnote-51) such as the medical condition of the parties and information about their beliefs.[[51]](#footnote-52) It should be noted that sometimes internal information is visible only to some participants, for example, if revealed in a caucus.[[52]](#footnote-53) Using and disclosing internal information outside of the mediation may violate the parties’ control over the external flow of information, and constitutes a breach of mediation confidentiality and a violation of privacy.

The term “external information to mediation” refers to information revealed and generated using a digital platform in the mediation process and includes both information that the parties provide to the platform to create a user account and information generated using the online service. This information is not necessarily related to the content or subject matter of the dispute. External information may include personal information types like identifiers—such as name and email address—education, professional or employment information, internet activity information, geolocation data, and audio, electronic, and visual information. Digital platforms tend to collect and process such information to provide their services and for business purposes. They create the profiles of users, reflecting their preferences, characteristics, behavior, intelligence, abilities, and other personal and sensitive information.[[53]](#footnote-54) Another type of external information revealed when using video conferencing refers to visual content from the personal space from which the participants conduct the video call, including visual information reflecting living conditions, relationships, and personal preferences. This is either directly due to video of the participant’s private living environment[[54]](#footnote-55) or indirectly, for example, when information from the user’s monitor is reflected in their eyeglasses,[[55]](#footnote-56) generated from analyzing users’ typing-related body movements,[[56]](#footnote-57) or when information is revealed by access the microphone in mute mode.[[57]](#footnote-58)

As in the case of internal information, disclosing external information outside the mediation may violate the participants’ privacy and the mediation’s confidentiality.

### Information Processing Axis

Alongside the information reveals axis, which relates to the types of information revealed and generated in online mediation, the information processing axis describes the operations that are performed on the information revealed.[[58]](#footnote-59) On one side of the axis is information processing for internal mediation purposes, which refers to mediation activities. The internal processing is carried out by the mediator, the parties, and the digital platforms used in the mediation. On the other side of the axis is information processing for purposes external to mediation, which refers to operations such as collection, use, and disclosure of information outside of the mediation process. The external processing can be carried out by the parties and mediator but significantly intensifies when a digital platform is involved.

Processing information for internal purposes of mediation means collecting and using the information revealed in the mediation to further the overarching goal of the process: assisting the disputing parties in resolving their dispute.[[59]](#footnote-60) Communication and information analysis activities, which are applied to internal information, constitute information processing for internal purposes. Information analysis activities include common mediation practices such as identifying, clarifying, restating, and reframing[[60]](#footnote-61) the issues of the dispute;[[61]](#footnote-62) analyzing the positions and interests of the parties to find an area of agreement so they can move toward resolution;[[62]](#footnote-63) proposing and evaluating possible solutions; and drafting an agreement to end the dispute.[[63]](#footnote-64) An online process opens up the possibility that the digital platform will perform information analysis activities. In Chapter ‏2, we reviewed several examples of dedicated mediation platforms that perform information analysis activities, such as NextLevel Mediation and Smartsettle. We also demonstrated how mediators and parties can use generic AI applications for information analysis activities.

As the following discussion demonstrates, information analysis activities performed by the digital platform may infringe on the parties’ control over the flow of information in a way that may violate the parties’ autonomy in decision-making and mediation confidentiality.

Processing information for purposes external to mediation is a mirror image of information processing for internal purposes. It refers to operations such as collecting, using, and disclosing the information revealed in the mediation for purposes other than to serve the overarching goal of the mediation process. A classic example of an external purpose that is carried out by the parties is using mediation communications in later legal proceedings.

The entry of digital platforms into the mediation process adds another layer to the possibility of information processing for external purposes. The typical business models of digital platforms incentivize them to collect and process personal information for their business purposes, such as marketing, advertising, improving the service and the user experience, and training artificial intelligence models.[[64]](#footnote-65) In addition, dedicated mediation platforms are also expected to process information for external purposes, such as improving and developing their products and services.[[65]](#footnote-66) As the following discussion demonstrates, the processing of internal information for external purposes infringes the parties’ control over the flow of information in a way that may lead to a violation of privacy and breach of mediation confidentiality.

## Control Over the Flow of Information in Online Mediation

Control over the flow of information is a fundamental principle related to personal autonomy, both from the perspective of the mediation process and from the perspective of privacy and data protection. Therefore, we argue that undermining the parties’ control over the flow of information in mediation may impair their autonomy in mediation decision-making, mediation confidentiality, and privacy. Figure 2 illustrates the principle of control over the flow of information considering the mediation process and privacy.

**Figure 2: control over the flow of information**

A diagram of a company

Description automatically generated

Extensive writing sees autonomy, and its legal equivalent, the right of self-determination,[[66]](#footnote-67) as a central value in the mediation process,[[67]](#footnote-68) which is reflected in the right of the parties to control decision-making in mediation. Indeed, the Model Standards of Conduct for Mediators states, “[a] mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”[[68]](#footnote-69) Despite the centrality of this value, there is no agreement regarding the scope of its applicability, its meaning, and the mediator’s obligations derived from it.[[69]](#footnote-70) Some relate mainly to the party’s control over the outcome,[[70]](#footnote-71) some relate to control over the outcome and process,[[71]](#footnote-72) and some argue that the parties’ right to control also includes the right to maintain the confidentiality of mediation sessions.[[72]](#footnote-73) This expansive approach is reflected in confidentiality norms.[[73]](#footnote-74) Thus, regarding information flow, the parties’ autonomy in the mediation process implies the right to control the flow of information—*externally* (outside the mediation and for purposes external to mediation) and *internally* (among parties and mediator and for internal mediation purposes).

By this conceptualization, the confidentiality of mediation communications can be understood as controlling the “external flow of information.” When mediation communications are being disclosed outside of the process, for example, within legal proceedings or to the public, without the parties’ consent, their control over the external flow of information is impaired. In online mediation, this harm can occur due to information processing for external purposes by the digital platform.[[74]](#footnote-75) Similarly, the parties’ control over decision-making and the outcome in mediation can be understood as control over the “internal flow of information” since it involves communication and information analysis activities. Impairment of the parties’ control over the internal flow of information may occur within communication activities, for example, when the mediator uses the practice of caucus and conveys information that was obtained during the private session to another person without the consent of the disclosing person[[75]](#footnote-76) or when she selectively transfers information between the parties.[[76]](#footnote-77) Another example is when the mediator pressures the parties to provide information or compromise.[[77]](#footnote-78)

In online mediation, impairment of the parties’ control over the internal flow of information can occur in additional ways, which we discuss at length in Chapter 4. One example, regarding communication activities, occurs when permission is given to access information stored on the digital platform. This may allow a mediation party to view information collected from the other party without his consent in a way that impacts the process or its outcome. Another example, regarding information analysis activities, concerns automated information analysis carried out by the platform, which may affect the parties’ decision-making.

An individual’s control over the flow of information reflects a central principle not only in mediation but also in the field of privacy.[[78]](#footnote-79) This conceptualization of privacy, as the right of the individual to control information about himself, was introduced by the sociologist Alan W. Westin, who defined privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”[[79]](#footnote-80) Westin’s concept, which has also been widely adopted in the literature on information privacy and the law,[[80]](#footnote-81) identifies an individual’s control over personal information with personal autonomy.[[81]](#footnote-82) In the world of information technology, the principle of controlling the flow of information is not limited to the stage of transfer of information to others but also applies to all incarnations of information, from the collection of information through the use of information and the dissemination of information to the storage and even erasure of information.[[82]](#footnote-83) Therefore, the right to privacy is accompanied by a broad set of rights protecting personal information. The connection between privacy and personal autonomy is also evident in Helen Nissenbaum’s conception of privacy in the age of information technology as a concept dependent on context and social norms.[[83]](#footnote-84) She emphasizes the centrality of the individual in understanding the use of information about himself in a given context.

In conclusion, the encounter between the principle of control over the flow of information in the mediation process and in the privacy domain leads to the conclusion that an alteration of the parties’ control over the flow of personal information in the mediation process, constitutes an infringement of both the right to autonomy (self-determination) in mediation and the right to privacy. The transition to conducting mediation online through digital platforms raises new difficulties regarding the new types of information revealed and the processing of information for internal and external purposes. This is especially the case when the digital platform processes the information. Before discussing the specific risks in detail, the next chapter analyzes the norms governing the flow of information in online mediation, primarily mediation norms, and privacy and data protection norms, to point out regulatory gaps.

1. The Norms Governing the Flow of Information in Online Mediation

The flow of information in online mediation is governed by two main normative systems: initially, there are mediation norms, which include mediation laws,[[84]](#footnote-85) ethical codes for mediators, and contractual norms held in agreement to mediate and mediation arrangement; and secondly, there are norms relating to privacy and data protection, which include information privacy laws and contractual norms held in terms of service and privacy policy[[85]](#footnote-86) of the digital platforms. As we will see in the next chapter, the encounter between the two normative systems does not provide an adequate solution to the risks arising due to the alteration in the flow of information in online mediation. As described above, an impairment of the parties’ control over the internal flow of information to mediation constitutes a violation of their right to control decision-making in mediation and an infringement of their privacy. Both constitute an infringement of their autonomy. An impairment of the parties’ control over the external flow of information to mediation constitutes a violation of mediation confidentiality and an infringement of their privacy and autonomy. In addition, even voluntary standards that seek to regulate online dispute resolution (“ODR”) procedures specifically do not provide an exhaustive response to the difficulties that arise.[[86]](#footnote-87) Of the three leading players in an online mediation process—the parties, the mediator, and the digital platform[[87]](#footnote-88)—the digital platforms raise the most difficulties, and most of the discussion is devoted to them. My goal is not to exhaustively review all the norms that apply to online mediation but to lay a foundation that will demonstrate the difficulties and tensions that arise at the intersection of these two normative systems concerning regulating autonomy and privacy risks, as detailed in Chapter 5.

## The Flow of Information in Online Mediation Considering Mediation Norms

The starting point of the discussion concerns the limitations imposed by mediation norms on the two types of mediation activities: communication and information analysis. These limitations regulate the internal and external flow of information in the mediation process. In both cases, the parties’ autonomy is expressed in their right to control the flow of information in the process through the requirement to obtain their consent for the mediator’s activities and for the disclosure of the information in internal and external contexts. As we will show, a significant difficulty in applying these norms to digital platforms relates to the fact that their status in the process is not regulated within the normative system of mediation, alongside significant challenges stemming from the management of information on digital platforms.

1. Internal Information Flow

The internal flow of information in the mediation process mainly concerns communication and information analysis activities. To prevent infringement of the parties’ control over communication activities, mediation norms state that the mediator is prevented from conveying information obtained during a private session to the other party without the consent of the disclosing party.[[88]](#footnote-89) To avoid infringement of the parties’ control over information analysis activities, mediation norms refer to the mediator’s duty to conduct a mediation based on the principles of party self-determination along with the mediator’s neutrality, impartiality,[[89]](#footnote-90) and prohibition of conflict of interest.

Party self-determination and the right of the parties to control decision-making in mediation appears explicitly in the Model Standards,[[90]](#footnote-91) reinforced by the Uniform Mediation Act,[[91]](#footnote-92) which limits the potential for coercion of the parties to accept settlements[[92]](#footnote-93) and allows parties to have counsel or other support persons present during the mediation session to support their informed consent regarding any agreement that is reached.[[93]](#footnote-94) A mediator’s duty of neutrality and impartiality[[94]](#footnote-95) is a central concept[[95]](#footnote-96) and primary value[[96]](#footnote-97) of mediation. The Model Standards dictate that “[a] mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice.”[[97]](#footnote-98) The mediator’s neutrality is also related to whether she can give the parties legal information,[[98]](#footnote-99) information regarding settlement alternatives, and proposed resolution of the dispute. The Model Standards further state that “[a] mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.”[[99]](#footnote-100)

As we demonstrated in the previous chapter, the transition to conducting mediation online significantly affects the flow of information regarding the type of information revealed and the possibility of conducting communication and information analysis activities through the digital platform. For example, when a dedicated mediation platform analyzes the issues and parties’ interests or analyzes the potential outcome in legal proceedings, it performs information analysis activities. As we will show later, this raises difficulties. First, as we explain in Section B, currently, the norms that deal with the duty of the mediator to maintain the autonomy of the parties in decision-making and act impartially and neutrally do not apply to mediation platforms. Second, as we demonstrate at length in Chapter ‏5, mediation conducted via online user interfaces and technological tools, including algorithmic tools, entails risks to the parties’ autonomy, personal information, and privacy.

1. External Information Flow

The external flow of information occurs when mediation communications are disclosed outside the mediation process and by using internal information for external purposes to mediation. When it is done without the parties’ consent, their control over the external flow of information is impaired, and the confidentiality of the mediation and their privacy is violated. Mediation confidentiality is considered a central and essential value of the process, making it possible to advance the dispute resolution between the parties.[[100]](#footnote-101) Therefore, it is not surprising that mediation norms tend to give great weight to the confidentiality of the process. The basic assumption is that the confidentiality of mediation enables the parties to share important information as well as their interests and needs in a way that promotes free negotiation and dispute resolution[[101]](#footnote-102) by removing the fear that the information will be used against them in later legal proceedings,[[102]](#footnote-103) or that their privacy and the private nature of the process will be compromised.[[103]](#footnote-104) Some scholars link the confidentiality of the process to other benefits, including building trust between the parties and the mediator and perceiving her as neutral.[[104]](#footnote-105)

Mediation norms protects the confidentiality of the process through three fundamental means: evidentiary privilege,[[105]](#footnote-106) which protects mediation communications against disclosure in legal proceedings; ethical codes for mediators; and confidentiality provision, which protects mediation communications against general disclosure. The Model Standards state that “[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.”[[106]](#footnote-107) Confidentiality provisions in the agreement to mediate and settlement agreement are contractual means that ensure parties’’ control over the external flow of information. An agreement to mediate frequently includes confidentiality provisions, and in family and divorce mediation, the agreement to mediate should include provisions concerning confidentiality.[[107]](#footnote-108)

The information flow model presented in the previous part illustrates that the transition to online mediation creates new types of information. The model also shows that technological platforms tend to process information about the dispute and personal information regarding the participants. The purposes is external to mediation in ways that may breach mediation confidentiality and parties’ privacy.

* 1. *Applicability of Mediation Norms on Digital Platforms*

Half a century ago, academics identified the role of technology in ODR processes as a “fourth party,”[[108]](#footnote-109) which affected the conduct of the parties and the outcome of the process, however, to date, mediation norms do not regulate the obligations of a digital platform involved in the mediation process. There is ambiguity regarding their legal status in the process.[[109]](#footnote-110) A fundamental challenge is that under mediation norms, it is difficult to see the digital platform as a mediator, with all the obligations that this entails, because the definition of a mediator refers to a natural person. The Uniform Mediation Act defines a “Mediator” as “[an] individual who conducts a mediation.”[[110]](#footnote-111) The Model Standards do not define “Mediator” but state they “are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts.”[[111]](#footnote-112) In addition, a reading of the Standards in their entirety, shows that they refer to a mediator as a natural person.[[112]](#footnote-113) This excludes digital platforms from the definition of a mediator and, therefore, from the duties of mediators. It should be added that even advanced ODR standards or guidance do not impose information management and confidentiality obligations on digital platforms like those imposed on mediators. For example, ICODR standards regarding confidentiality[[113]](#footnote-114) do not impose specific obligations on ODR providers[[114]](#footnote-115) whereas the Model Standards do Another example is the obligation of the mediator to conduct a mediation based on the principle of party self-determination. ODR guidance does not impose this obligation on the ODR Provider or ODR System. Indeed, the Guidance for Online Dispute Resolution states that “they supplement, and do not replace or supersede, applicable technical standards or the legal and ethical principles that apply in face-to-face dispute resolution processes. For example, self-determination is a requirement in consensual ODR processes such as mediation.” But, as we have shown, the Model Standards apply to “persons mediating.” It is hard to see an “ODR System”[[115]](#footnote-116) or “ODR Provider”[[116]](#footnote-117) as an individual who conducts a mediation. Therefore, those ethical principles do not apply to ODR systems or providers.

Although it appears that mediation norms do not currently apply to digital platforms, they are subject to other norms that regulate the flow of information in the online process, primarily data protection and privacy laws.

## The Flow of Information in Online Mediation Considering Privacy and Data Protection Norms

Information privacy laws refer to legal frameworks regulating personal information processing such as collection, use, and dissemination information. Data protection and privacy laws vary considerably between jurisdictions. To demonstrate the argument, this paper discusses two advanced regulations that account for privacy and data protection risks in digital contexts, including specific risks stemming from the processing of personal data: the California Consumer Privacy Act (CCPA)[[117]](#footnote-118) and the European General Data Protection Regulation (“GDPR”).[[118]](#footnote-119) Although these regulations have a territorial scope, they can be excellent references for understanding the norms that govern the flow of information in online mediation from the perspective of privacy and data protection. The regulations impose obligations on those processing personal data[[119]](#footnote-120) and establish broader rights for the data subject.[[120]](#footnote-121) However, as we will show later, there is significant doubt as to whether the parties in online mediation exercise their control over the flow of information when they use a digital platform. Digital platforms that are used in online mediation (whether dedicated or generic) are subject to the CCPA, as businesses that collect personal information,[[121]](#footnote-122) and to the GDPR, as controllers[[122]](#footnote-123) or processors.[[123]](#footnote-124) As for the parties’ control over the flow of information in the online process, digital platforms are required to notify the parties of the types of personal information they are collecting, and the purpose for which they use the information.[[124]](#footnote-125) Privacy policies of digital platforms are the primary avenue for notifying and informing users about data processing. Privacy policies define the type of information collected and the purposes of processing. However, the notice does not ensure control over the flow of information due to the issue of consent.

There are two approaches to consent in privacy laws: the notice-and-choice approach (opt-out), and the express consent approach (opt-in).[[125]](#footnote-126) The CCPA, like other U.S. privacy laws, takes the notice-and-choice approach, which means that businesses must provide consumers a notice about information processing, and then consumers have the right to request to opt out of the sale or share the information.[[126]](#footnote-127) That is, the CCPA does not require mediation platforms to obtain consent before the collection and use of personal data. Failure to opt out is interpreted as consent to information processing. In practice, it is doubtful whether the average consumer exercises their right to opt out.[[127]](#footnote-128) In contrast, the GDPR takes the express consent approach, which means that consent is an opt-in requirement before the collection and use of personal data. But, under the GDPR, consent is only one of the legal bases required for the lawfulness of processing.[[128]](#footnote-129) Therefore, digital platforms can use one of the other legal bases for information processing instead of consent. Even when consent is required, in practice, due to various reasons discussed extensively in the literature,[[129]](#footnote-130) many users give their consent to privacy policies without having read them.[[130]](#footnote-131) Even if they have read the documents, their consent is not informed because it is doubtful whether the average user understands the many consequences of giving consent to collecting and processing information about them.[[131]](#footnote-132) Therefore, the concept that this consent exercises the individual’s autonomy and control over information has been called “The Biggest Lie on the Internet.”[[132]](#footnote-133)

Given the above, when using a digital platform in mediation, the parties will likely accept the practices of collecting and processing information detailed in the platform’s privacy policy. It should be noted that in the case of the use of a generic platform like Zoom, consent might have been given in the past and not at the point of conducting the mediation. When accepting the privacy policy, parties’ consent to disclosing mediation communications outside the mediation process and using internal information for external purposes without being aware of it. Their consent will qualify, in terms of information privacy laws, even if this breaches the confidentiality of the mediation process and violates their privacy.[[133]](#footnote-134) For example, Zoom’s privacy policy allows information processing that is not permitted in a typical mediation process.

In conclusion, the review of the norms that govern the flow of information in online mediation points to gaps between the two normative systems. First, norms from the field of mediation do not regulate the status of the digital platform and do not apply to them. Second, the norms in the field of information privacy allow mediation communication to be processed for external purposes if there is a legal or contractual basis for processing the information. A third aspect concerns regulating information processing for internal purposes. While norms from the field of mediation subject the mediator’s activities to the right of the parties to control the decision-making in mediation and to the obligations of impartiality and prohibition of conflict of interest, norms in the field of information privacy do not impose similar obligations on digital platforms that perform information analysis for the purposes of mediation.

1. Mapping the Risks to the Rights of Meditation Self-determination and Privacy In Online Mediation

The information flow model creates four quadrants that represent the combination of each of the two types of information (internal and external) with each of the two types of processing (internal purposes and external purposes). This section maps the risks to the parties’ rights to self-determination in mediation (control over decision-making and the outcome, and confidentiality) and to privacy and data protection, which characterize each quadrant in the model. The lower part of the model refers to risks in processing information for internal mediation purposes based on internal information (quadrant 1) or external information (quadrant 2). The upper part of the model refers to risks in processing information for external purposes for mediation based on internal information (quadrant 3) or external information (quadrant 4). In practice, some risks exist in more than one quadrant, but to avoid unnecessary repetition, they are indicated within the quadrant in which they are most significant. The risks are summarized in Figure 3. The discussion is dedicated to the new aspect that this article reviews, that is, the risks that arise due to the involvement of the digital platform as the “fourth party” in the mediation process.[[134]](#footnote-135) Risks inherent in processing information for internal mediation purposes are typical for dedicated mediation platforms that process information as part of the mediation service they provide, but also exist when generic platforms provide the mediator and participants with information analysis for internal purposes. Risks arising from the processing of information for external purposes are more typical for generic platforms but may also exist in dedicated mediation platforms that base their business model on this.

**Figure 3: mapping the risks to parties’ rights to self-determination in mediation and privacy and data protection.**

A diagram of a company

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## Risks in Processing Internal Information for Internal Mediation Purposes

* + 1. Violating the parties’ autonomy in decision-making in mediation

The management of the mediation process on an online platform is expected to affect the conduct of the parties and their choices in the process in various ways. This is a particular case of a broader phenomenon that Lawrence Lessig called “Code Is Law”:[[135]](#footnote-136) the digital environment, starting with the user interface and ending with a sophisticated artificial intelligence algorithm that influences user behavior in a way that is not neutral. In the context of online mediation, such an influence may lead to a violation of the autonomy of the parties in a process whose core rests on the parties’ control over decision-making and the outcome of the process.[[136]](#footnote-137)

The first risk concerns the effect of the design of the user interface of the system on the conduct of the parties in the mediation process, including the methods of collecting and analyzing the information. Extensive literature describes the way in which the architecture of the online interface structures the behavior of the users through digital nudges that create biases in decision-making and whose influence is not transparent to the users.[[137]](#footnote-138) Therefore, dedicated mediation platforms that collect information through electronic forms and structured questionnaires, may affect the communication activities and the information that the parties provide,[[138]](#footnote-139) and hence their opening statements and their positions.[[139]](#footnote-140) In particular, such a construction may make it difficult for the parties to present their point of view in an authentic and unmediated manner and even direct them to a discourse that does not allow full expression of their positions, interests, and feelings. Some argue that in the structured collection of information, there is even a certain degree of pressure or coercion that can lead the participants to provide information that they do not wish to provide.[[140]](#footnote-141) This has the effect of damaging the basic characteristics of the mediation process.

These difficulties are amplified when the collection and processing of information is done automatically—a practice that leads to several risks. First, automation of data collection may lead to errors and inaccuracies in the data collected,[[141]](#footnote-142) which will lead to incorrect and unfair decisions regarding those involved.[[142]](#footnote-143) In the context of the mediation process, such inaccuracies may result, for example, in the incorrect assessment of the expected outcome of a legal proceeding and result in the furnishing of an inappropriate or unfair proposal to resolve the conflict. This risk intensifies when the information is analyzed automatically. Dedicated mediation platforms use various automated tools to perform information analysis activities, including algorithms based on decision trees,[[143]](#footnote-144) game theory,[[144]](#footnote-145) and natural language processing.[[145]](#footnote-146) Therefore, two characteristics of algorithmic information analysis that may impair the parties’ control over decision-making and the outcome of the process must be avoided: statistical prediction and lack of transparency.[[146]](#footnote-147)

The first characteristic, statistical prediction, refers to the method of algorithmic analysis tools: relying on a large amount of data to predict human behavior.[[147]](#footnote-148) When decisions about humans are based on algorithms that predict people’s behavior, inaccuracies in the data sets or errors in predicting individual behavior can raise various concerns, including harm to autonomy.[[148]](#footnote-149) In the mediation process, errors in automated information analysis, such as identifying the parties’ interests, may affect their conduct in the process, such as their ability to find an area of agreement[[149]](#footnote-150) and a fair solution. This is especially the case when repeated or sophisticated players manipulate the information on which the conflict resolution algorithm is based.[[150]](#footnote-151) Added to this difficulty is the second characteristic of algorithmic information analysis: the lack of transparency regarding how the system works. The challenge in terms of the parties’ control over the internal flow of information concerns informed decision-making. When a human mediator performs information analysis activities, such as identifying issues and interests, the parties can ask questions and correct her when they think she is wrong or has misunderstood them. Such communication does not exist with the “black box” of the automated system, which is not accessible to users, so they will have difficulty understanding and controlling the quality of the information analysis and its consequences for them.

The concern of harming the parties’ autonomy in decision-making increases in the face of the “automation bias,”[[151]](#footnote-152) whereby people tend to evaluate automated processes as correct and accurate.[[152]](#footnote-153) This phenomenon has been documented in various contexts of artificial intelligence systems when it was found that people tend to act based on the suggestions of artificial intelligence because they attributed excess authority to them.[[153]](#footnote-154) Such a perception may lead to the parties’ over-reliance on information analysis performed by the platform without, for example, consulting with an attorney or others.

* + 1. Breach of mediation confidentiality and a violation of parties’ privacy

Using mediation communications for external purposes or disclosing mediation communications outside the mediation process constitutes a breach of mediation confidentiality and a violation of the privacy of the parties.[[154]](#footnote-155) Such harm may be caused when dedicated mediation platforms allow the use of external applications, such as plugins on the dedicated platform. For example, plugins like Chat GPT currently assist the mediator with communication and information analysis activities, such as designing questionnaires for the collection of information from the parties or reformulating inflammatory messages to promote resolution.[[155]](#footnote-156) This kind of use of artificial intelligence applications can promote the overarching goal of mediation, but it also involves the disclosure of internal information to external parties, who are expected to process it for purposes external to mediation, such as training their artificial intelligence models. In this way, confidential mediation communications can become public and be viewed by other users.[[156]](#footnote-157)

Mediation confidentiality and the parties’ privacy may be compromised due to failures in the access authorization process for information stored on a dedicated mediation platform. First, there is a risk of breaching the confidentiality of information obtained by the mediator during a private session in case the access authorization process accidentally allowed the other party to get access to the confidential information. Second, there is a risk that external parties, such as service providers or business partners of the digital platform, will gain broad access to internal information. Another risk concerns the platform’s ability to keep internal information for external purposes after the mediation process has ended, which is often vaguely defined in the platform’s privacy policy.[[157]](#footnote-158)

* 1. Risks in Processing External Information for Internal Mediation Purposes

This quadrant refers to the risks that arise from the processing of external information, revealed due to the use of the digital platform, for internal purposes of mediation. In the case of dedicated mediation platforms, the external information mainly refers to information generated following administrative activities, for example, the processing of identifiers (name, e-mail address, Internet Protocol address, etc.) for managing user accounts or collecting payments. Naturally, this quarter includes relatively limited privacy risks. Even though the information is apparently collected and processed for the administrative purposes of mediation, there is a risk of collecting more information than needed and processing the information for purposes external to mediation. These risks can arise from the lack of transparency about information collection and processing or from failures in the privacy policies of the digital platforms. The privacy policy is the main means by which digital platforms inform their users about the practices of collection, use, and disclosure of personal information.[[158]](#footnote-159) At the same time, there are some failures in privacy policies that may mislead users in relation to the collection and processing of personal information, such as vague wording, contradictions, and misleading statements.[[159]](#footnote-160)

According to the principle of “data minimization,” a data controller should limit the collection of personal information to what is directly relevant and necessary to accomplish a specified purpose. They should also retain the data only for as long as is necessary to fulfill that purpose.[[160]](#footnote-161) There is a risk that the digital platform will collect more information than needed for administrative activities and that information regarding the participants’ interaction with the platform will be collected and used for purposes external to mediation in a manner that is not transparent to them. For example, privacy policies might list the types of data collected in the form of an open list that allows them to collect more information than needed.[[161]](#footnote-162) Another example is a formulation of general and vague purposes, such as “to provide our service,” in a way that allows the digital platform to process information for external purposes that are not transparent to the parties. In these cases, the party’s control over the flow of information is impaired, and their right to privacy is violated.

* 1. Risks in Processing Internal Information for Purposes External to Mediation
     1. Trust transfer from the mediator to the digital platform

As described in the previous chapter, confidentiality in mediation is related to establishing trust between the parties and the mediator. The willingness of parties to share information during the mediation and to cooperate with the mediation activities is related to their trust in the mediator and the fact that she will maintain the confidentiality of their information. In online mediation, the parties also share personal information with the digital platform. Therefore, the willingness of the parties to provide information and allow its processing is expected to be affected by their perception of the trustworthiness of both the mediator and the digital platform. Various studies that examined why one party trusts another party consider the characteristics of the trustee, such as trustworthiness, expertise, professional competence, and integrity, and the expectation of how the trustee will behave based on his implicit and explicit statements.[[162]](#footnote-163) In professional relationships, the role and expertise of the professionals create power inequality and dependence between the professionals and their clients. This creates ethical duties that follow the client’s legitimate expectation that the professionals will not abuse their position of power[[163]](#footnote-164) and maintain confidentiality.[[164]](#footnote-165) In the context of the mediation process, it can be said that the parties trust the mediator due to her professional role and characteristics, and their expectations for maintaining the confidentiality of the mediation communication arise from the relationship of trust and the explanations and statements she gave them in her introductory remarks.[[165]](#footnote-166) This expectation is reinforced by confidentiality norms discussed in the previous chapter (IV(a)).

Other studies that have examined the willingness of individuals to share information argue that it is subject to a “privacy calculus,” i.e., a cost-benefit analysis, in which they disclose personal information in exchange for economic or social benefits, assessing that their personal information will be used fairly with no negative consequences.[[166]](#footnote-167) People tend to perceive information collection as safe when it is collected in a specific context and relationship, and they perceive that they can control information processing.[[167]](#footnote-168) In online mediation, parties provide information to the digital platform due to the use of the platform and by virtue of the terms of use and privacy policy. Due to consent issues discussed in the previous chapter (IV(c)), there is significant doubt as to whether the parties in online mediation can exercise a privacy calculus if they do not read the privacy policy and do not understand the many consequences of giving consent to collect and process information. When privacy calculus was examined in the context of e-commerce, it was found that the disclosure of personal information involves uncertainty regarding who has access to the information and how it is used,[[168]](#footnote-169) where one of the factors that balance the uncertainty is internet trust.[[169]](#footnote-170)  Therefore, in online mediation the willingness of the parties to share mediation communication with the digital platform is related to their trust in the platform.

Since the willingness of the parties to provide information in online mediation is connected to their trust in the mediator and the digital platform, we argue that there is a risk that the parties’ trust in the digital platform is affected by their trust in the mediator. In other words, that trust can be transferred from the mediator to the digital platform. For example, when the mediator chooses to use a generic platform like “Zoom,” she is usually the one who creates the link to the video call and invites the parties to join the meeting. Additionally, she is also the one who prepares the agreement to mediate, which may include confidentiality clauses. In such circumstances, it is possible that the parties will transfer their trust in the mediator to the digital platform.[[170]](#footnote-171) To the extent that the transfer of trust exists in online mediation, it raises concerns regarding parties’ control over the flow of information.

Trust in generic platforms regarding personal information processing, arising from the trust in the mediator, is an illusion. As discussed in Chapter IV(b), the normative system that applies to the mediator does not apply to the digital platform; the platform is not a party to the agreement to mediate and it is not bound by the confidentiality agreement. Therefore, the parties’ expectations that the mediator maintain the confidentiality of the mediation communication cannot be transferred to the digital platform. In fact, the platform can use and disclose mediation communication in accordance with its privacy policy, which may allow broad information processing that is prohibited according to mediation norms. Similarly, trust transfer may exist when using a dedicated platform for mediation. A second-order trust transfer may occur when the parties use a dedicated mediation platform that combines the use of a generic platform (for example, AI plugins). In such a case, the trust in the mediator is transferred to the dedicated platform, and the trust in the dedicated platform is transferred to the generic platform.

In conclusion, trust transfer infringes on parties’ control over the flow of information in the mediation process and causes a breach of confidentiality and violation of privacy.

* + 1. Breach of mediation confidentiality

Using internal information for external purposes may constitute a breach of the confidentiality of the mediation process. We will demonstrate the potential breach of confidentiality when using “Zoom” in mediation. Figure 4 shows the flow of information when using “Zoom” in mediation in accordance with its privacy statement.[[171]](#footnote-172)

**Figure 4: information handling by “Zoom”**

A diagram of informational text

Description automatically generated

Breach of mediation confidentiality happens in two stages. The first stage occurs when the mediator and the parties transfer information to “Zoom” with the use of the platform and by virtue of its terms of use and privacy policy. As can be seen in Figure 4, the mediator and the parties transfer internal information to “Zoom”: the content and context from meetings, messaging, and other collaborative features. As discussed in Part IV(a), in accordance with the mediation norms, the mediator must maintain the confidentiality of mediation communications and refrain from disclosing the information, Although it can be argued that the parties themselves transfer the information to “Zoom,” waiving the obligation of confidentiality, this argument raises concerns discussed in the previous section regarding trust transfer, in addition to the issues regarding giving informed consent to the privacy policy of the digital platform as discussed in Part IV(b).

The second stage occurs when “Zoom” uses information for external purposes of mediation, such as marketing and promotions, and when it discloses the information to other external parties, such as resellers and vendors.

* + 1. Information processing by external artificial intelligence applications

Today, online platforms offer to integrate plugins from external applications while using the platform. Among other things, the use of “bot” applications that perform automatic actions on information based on AI tools, such as transcribing the content of the meeting or scheduling meetings in the calendar, is increasing. An example of such an application is otter.ai,[[172]](#footnote-173) which is an AI meeting assistant that records audio, writes notes, captures action items, and generates summaries. It can automatically join and record meetings on Zoom and enables live transcripts, adding comments, highlighting key points, and assigning action items within meetings via video conferencing.[[173]](#footnote-174) In this way, the mediation communication becomes data that can be processed easily via the application, the digital platform, and those who receive the transcript. The software can also be connected to an online calendar, and in this way, it can automatically join the meetings, even without the presence of the user himself, and send the transcript of the meeting to all those invited to the meeting.

The use of software such as otter.ai in online mediation involves various risks to the confidentiality of the mediation and to the privacy of the participants. Cases have been reported where users were unaware that the software had joined an online meeting on their behalf, and users received a transcript of a meeting they were invited to even though they did not attend it.[[174]](#footnote-175) In this way, information from a mediation meeting transfers not only to Otter.ai but also to participants who were not supposed to be exposed to the entire content of the meeting, such as witnesses who were invited to the meeting. In addition, there is an issue with the lack of transparency of the application, because it does not inform the meeting participants it is joining the meeting and the automatic actions it will perform regarding the content of the meeting. In addition, the use of the application may constitute a violation of the confidentiality agreement when the parties have not agreed to record the mediation sessions.

* 1. Risks in Processing External Information for External Purposes

This quadrant refers to the processing of external information generated due to the use of the digital platform for external purposes of mediation. Since external information is mostly not directly related to the mediation process, and its processing is mainly regulated by data protection laws, the main risk in the context of the online mediation process concerns the integration between external and internal information for mediation. The problem with combining databases was called, by Daniel J. Solove, “aggregation.”[[175]](#footnote-176) The combination of many pieces of information makes it possible to create a profile of the person so that the whole becomes greater than the parts.[[176]](#footnote-177) A synergistic analysis of the collected information can reveal new facts about the person that the parties did not expect to be revealed when each piece of data was collected separately.[[177]](#footnote-178) The combination of external and internal information leads to the aggregation of information about the disputing parties by digital platforms.

When mediation is conducted face-to-face, the parties reveal personal information that can be sensitive, but it is within the context of the dispute. They do not reveal visual content from their personal space or their contact lists. The dispute is just one piece of their life. In online mediation, the parties share with the digital platform the content of the dispute and additional information generated using the platform, such as visual content from their personal space, information they submit while creating an account or registering to the platform, contact information, information about how they interact with the platform, and more. The content of the dispute is supposed to be confidential and would not have been revealed to the digital platform if the mediation had been conducted face-to-face. A digital platform that will process both types of information can discover new facts about the disputing parties that might not have been discovered separately. The analysis creates a profile about the parties from which different conclusions and decisions will be drawn, even in contexts outside the process, without the participant being aware of the content of the profile and the information that was used to create it. Thus, there is a significant risk of harming the privacy and autonomy of the participants of the process.[[178]](#footnote-179)

1. Proposal for Dealing with the Risks to Autonomy and Privacy in Online Mediation

The review of the norms governing the flow of information in online mediation pointed out some gaps between the two normative systems which affect the confidentiality of the process and the right of its participants to self-determination, privacy, and data protection. This Part presents complementary normative solutions to help address these risks. First, we will offer two complementary proposals in mediation norms: regulating the legal status of digital platforms used in the mediation process and their obligations; and regulating the mediators’ obligations when using digital platforms in mediation. We will then briefly show that expected changes in the general regulation of the activity of digital platforms regarding data protection and privacy, and the development and use of artificial intelligence applications, will naturally affect generic and dedicated mediation platforms.

## Regulating the Status of the Digital Platform used for Mediation

As discussed in Part III(A), today, the status of online mediation platforms is not regulated by mediation norms, and the mediation norms do not apply to them. Therefore, if the privacy policy allows it, mediation platforms can use information from the mediation for external purposes, transfer information from the mediation to external parties, and process information for internal purposes in ways that impair the parties’ control over decision-making and the outcome. This regulation gap may lead to a breach of the confidentiality of the mediation and a violation of the parties’ autonomy in decision-making and their privacy.

To address the gap, mediation norms should regulate the status of mediation platforms, distinguishing between dedicated mediation platforms and generic platforms. As for dedicated mediation platforms, mediation norms should define their role and duties regarding information processing for internal and external purposes. In addition to data protection obligations, such as “fair information practices” (“FIP”) (see Part V(C) below), mediation norms should require dedicated mediation platforms to conduct a mediation based on the principles of party self-determination, and that the parties should control the flow of information. Thus, mediation norms should limit dedicated mediation platforms from processing internal information for external purposes and prohibit the transfer of internal information outside the mediation without express permission from the parties, which should be received separately from the consent to the privacy policy.

Furthermore, mediation norms should require that dedicated mediation platforms avoid harming the autonomy of the parties in decision-making and the neutrality of the process through the design of the user interface, the implementation of algorithmic systems, or any other technological feature. In particular, dedicated mediation platforms must protect the autonomy of the parties in decision-making when automated activities or algorithmic insights are involved in communication and information analysis activities. To prevent non-transparent, biased, or manipulative uses of automated information processing tools that may affect the conduct of the parties and the outcome, the parties and the mediator must be informed about the method of information analysis so they can make an informed decision whether to rely on the automated tools.[[179]](#footnote-180) Among other things, dedicated mediation platforms should provide information regarding the information used for the automated analysis and the weight given to the various data, explanations regarding the method of the automated analysis, information regarding the validation of the system, and any additional information that promotes the parties’ understanding of the algorithmic operation that affects the process.[[180]](#footnote-181)

To promote and streamline the enforcement of the proposed rules regarding the control by parties over the flow of information and decision-making, it is desirable to develop an accreditation process for dedicated mediation platforms that will refer to these rules and their practices for handling information.[[181]](#footnote-182) This accreditation can be used by parties and mediators in choosing the platform, as well as institutions and courts that refer disputes to mediation. An alternative possibility is to reduce the limitation of liability of platforms,[[182]](#footnote-183) so that it does not apply where a dedicated mediation platform harms the neutrality of the process or the informed decision-making of the parties regarding the process and the outcome. This is due to the characteristics of the platform’s involvement in the process reviewed in Part IV(A), which may cause an unfair and non-transparent influence on the decision-making of the parties.

The use of generic platforms for mediation raises a unique series of challenges[[183]](#footnote-184) due to their design as platforms that provide general services such as communication and information analysis. It seems that an effective way to regulate their operation is through the application of duties on the mediator, as detailed in the next section. To this will be added, of course, the regulation in the field of data protection and privacy, as will be explained in section C below.

## Regulating the Obligations Applicable to Mediators Regarding the use of Digital Platforms

The widespread use of online mediation platforms and the risks that this entails for the autonomy, privacy, and data protection of the parties, as well as the confidentiality of the process, requires an adjustment of the duties applicable to mediators in online mediation. This is part of the trust relationship and their responsibility to ensure the neutrality and voluntariness of the process, especially in view of the concern that parties will transfer the trust of the mediator to the platform, as described in Part IV(c)(1). To the extent that my proposal to regulate dedicated platforms within the mediation norms is accepted, the obligations of the mediator will be more significant in the context of generic mediation platforms. It is critical that the training and qualification requirements for mediators and ethical codes for mediators include an obligation to become familiar with online mediation systems and the risks involved in using them.[[184]](#footnote-185) In addition, it is important to oblige the mediator to explain to the parties at the beginning of the process the risks that arise from the use of an online platform, and as much as possible, it should allow the parties to choose from the various technological-procedural alternatives.[[185]](#footnote-186) This requirement should be expanded where the platforms include automated tools for performing information analysis activities, and there is a concern of harming the autonomy of the parties in decision-making. In these cases, the mediator must disclose the use of automated tools and explain to the parties the risks involved in using them, while allowing the parties to have counsel or waive the use of these tools. At the end of the day, to the extent that dedicated platforms are subject to stricter regulation, it is assumed that mediators will be encouraged to use these platforms over generic platforms to minimize the risks to the parties.

## Adapting the Data Protection and Privacy Laws and the Regulation of Artificial Intelligence Applications to the Challenges of the Time

Some of the risks with online mediation that we have discussed are also characteristic of other instances where the use of digital platforms and AI-powered tools is prevalent. Therefore, it is assumed that they will be affected by expected changes in the regulation of data protection and privacy in the digital space. Indeed, the rapid development and wide influence of digital platforms and technologies based on big data and artificial intelligence have led many to recognize the need to expand the range of regulatory tools that will protect individual rights and individual autonomy in the information age.[[186]](#footnote-187) Among other things, these tools can bridge the gap that exists between the concept of the existing regulation, which is mainly based on the application of principles of FIP, and the challenges of the information age.[[187]](#footnote-188) The FIP, which also prevails in advanced data protection regulation, such as the GDPR, establishes rules that oblige those who collect and process personal data to act transparently and responsibly. Alongside this, the FIPs give the data subjects control over information through mechanisms of consent, purpose limitation, and a set of rights such as the right to access, delete, and have transparent information. This is the core of the regulation framework reviewed in Part III (C).

Recently, the recognition of the need to expand the regulatory framework has begun to be manifested in practice, the most prominent of which is the series of regulation initiatives of the European Union, under the title “A Europe Fit for the Digital Age.”[[188]](#footnote-189) Some of the regulation developments are also expected to have a direct impact on the operation of online mediation platforms and the risks discussed in this article. Due to the brevity of this paper, we will mention several relevant innovations from a bird’s eye view. For example, the Digital Services Act (“DSA”) imposes a series of new obligations on digital platforms, and it may apply to dedicated mediation platforms that also act as an arena for contracting between mediators and mediation parties.[[189]](#footnote-190) Among other things, the DSA requires the subject platforms to avoid manipulative interface design,[[190]](#footnote-191) ensure the readability of their terms and conditions,[[191]](#footnote-192) and display the main parameters used in their advertising and recommender systems.[[192]](#footnote-193) Another example is the Data Governance Act, which regulates a series of issues related to the transfer of information to third parties and between countries, as well as the operation of data intermediation services.[[193]](#footnote-194) Finally, we will also mention the Artificial Intelligence Act (“AI Act”), which recently reached a provisional agreement on the regulations and was published during the time that this article was written.[[194]](#footnote-195) The regulations aim to ensure that fundamental rights are protected from high-risk AI systems and force obligations on high-risk systems, such as impact assessment and transparency requirements. The assessment of the impact of this future normative framework on the activity of mediation platforms, and the risks inherent in their use, will have to be postponed to another article after the arrangements come into force and their impact is studied.

Conclusion

This Article examined how the digital transformation of the mediation process affects the rights of its participants that are related to the management of information in the process. This affects primarily the right to self-determination and to privacy and personal information protection, which rise from the right to personal autonomy. We presented an innovative model that conceptualized mediation as a process based on the flow of information, and demonstrated how the transition from face-to-face mediation to online mediation changes the flow of information in the process. We pointed out the ways in which the digitization of the process may harm the parties’ control over the flow of information and, hence, harm the confidentiality of the mediation, their control over the decision-making and the outcome, and their privacy. We also discussed the ways in which these risks increase when mediation platforms rely on artificial intelligence applications in performing information analysis activities, which are the core of mediation. Later, we showed that today, some of the risks are not properly addressed in the existing normative systems in the field of mediation and in the field of information privacy, and we proposed supplementary regulations that would reduce these risks. In view of the expansion of the use of the mediation process alongside the expansion of the use of digital platforms in mediation, it must be assumed that the trend of online mediation, which increased significantly during the COVID-19 pandemic, will continue to develop, and shape the face of the field in the coming years. We hope that the article will contribute to the promotion of proper regulation in the field and increase the awareness of mediators, disputing parties, and mediation institutions to the risks to autonomy, privacy, and data protection inherent in the online mediation process.

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2. For the pilot project, *see* Ethan Katsh et al., *E-commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “eBay Law”*, 15 Ohio St. J. Disput. Resol. 705, 707 (2000). [↑](#footnote-ref-3)
3. Email seemed to be the preferred online communication method for the parties. Katsh et al., *supra* note 1, at 710. [↑](#footnote-ref-4)
4. *See* Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends and Future Directions*, 21 Lewis Clark L. Rev. 633, 653–57 (2017) (discussing various models). [↑](#footnote-ref-5)
5. *See* Kristi J. Paulson, *Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?*, 51 Sw. L. Rev. 142, 142–43 (2021); *see also*, *National Survey of Members*, Nat’l Acad. Distinguished Neutrals (June 17, 2021), https://nadn.org/marketing/uploads/NADN-2021MemberSurvey-FinalReport.pdf [https://perma.cc/E8GM-3N98] (finding that 65.4% of members were limiting practice to Online only while 1.4% members were limiting practice to In-Person only). [↑](#footnote-ref-6)
6. *The heart of human connection*, Zoom, https://zoom.us/about/ [https://perma.cc/Z67T-JWRV] (last visited Apr. 12, 2024). [↑](#footnote-ref-7)
7. Sarah R. Cole & Amanda Spangler, *Virtual Mediation: The Only Door Needed in the Multi-Door Courthouse?*, 52 Stetson L. Rev. 477, 495–502 (2023); *see National Survey of Members*, *supra* note 4. [↑](#footnote-ref-8)
8. *See* Cole & Spangler *supra* note 6, at 492–502; *see also UK – CEDR Mediation Audit Results: The Post-Pandemic State of Civil Mediation*, Conventus L. (Feb. 21, 2023), https://conventuslaw.com/report/uk-cedr-mediation-audit-results-the-post-pandemic-state-of-civil-mediation/ [https://perma.cc/XHU9-A9SD]; James Claxton, *Mediators Like Online Mediation And Other Verifiable Facts*, Kluwer Mediation Blog (May 17, 2021), https://mediationblog.kluwerarbitration.com/2021/05/17/mediators-like-online-mediation-and-other-verifiable-facts/ [https://perma.cc/4M9L-WAXQ]. [↑](#footnote-ref-9)
9. Orna Rabinovich-Einy, *The Past, Present, and Future of Online Dispute Resolution*, 74 Current. Legal Probs. 1 (2021); Sela, *supra* note 3. [↑](#footnote-ref-10)
10. *See* Hannes Westermann et al., *LLMediator: GPT-4 Assisted Online Dispute Resolution*,Proceedings of the ICAILWorkshop on Artificial Intelligence for Access to Justice (July 27, 2023), https://doi.org/10.48550/arXiv.2307.16732 [https://perma.cc/ZS8G-QHDH]. [↑](#footnote-ref-11)
11. Leah Wing et al., *Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party*, 37 Negot. J. 1, 12 (2021). [↑](#footnote-ref-12)
12. *See* Forrest “Woody” Mosten & James C. Melamed, Paths Forward for Online Mediation: Final Report of the Mediate.com Online Mediation Training Task Force (2021). [↑](#footnote-ref-13)
13. Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts* 67 Am. U. L. Rev. 165 (2017); Jennifer Shack & Donna Shestowsky, *Access to Justice: Lessons for Designing Text-based Court-Connected ODR Programs* 29 Disp. Resol. Mag., Apr. 2023, at 29; Amy J. Schmitz, *Measuring ‘Access to Justice’ in the Rush to Digitize* 88 Fordham L. Rev. 2381 (2020); Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 Ohio St. J. Disp. Resol. 91 (2018). [↑](#footnote-ref-14)
14. There are some notable exceptions, *see e.g.* Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 Virginia J. L. Tech. 1 (2002). However, for the most part, scholars tend to mention privay in online mediation in general, while reviewing the challenges of online mediation. [↑](#footnote-ref-15)
15. Chris Draper, *Online Dispute Resolution Data Security*, *in* Online Dispute Resolution: Theory and Practice: A Treatise on Technology Dispute Resolution 181–228 (Daniel Rainey et al. eds., 2d ed. 2021). [↑](#footnote-ref-16)
16. *See* Tania Sourdin, *Mediating via Zoom*, 31 Australasian. Disp. Resol. J. 2, 9 (2021) (“For some, the zoom environment may mean that others intrude into the conversation . . .”); Greg Elmer et al., *Zoombombing During a Global Pandemic*, 7 Soc. Media + Soc. 1, 1 (2021). [↑](#footnote-ref-17)
17. The concept of “norms” has a different interpretation. For purposes of this paper, we use the term “norms” to refer to normative systems which include laws, regulation, standards, principles, and ethical codes. *See* Helen Fay Nissenbaum, Privacy in Context: Technology, Policy, and the Integrity of Social Life 140 (2010) As Nissenbaum explains, there are other at least “two robust interpretations of the term. According to one, norms are part of the larger category of rules that prescribe, mandate, or require that certain actions be performed; according to the other, norms are used merely descriptively to refer to behavioral, regularities, habits, or common practices, with no underlying expectation or prescription” ( *id.* at 138.) [↑](#footnote-ref-18)
18. This definition appears in The Model Standards of Conduct for Mediators(Am. Arb. Ass’n, A.B.A, & Ass’n for Conflict Resol. Preamble 2005) [hereinafter the Model Standards]. There are different definitions for the mediation process, with slightly different emphases. For criticism of the Model Standards definition, *see* Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 Marq. L. Rev. 81, 89 (2016) (“[t]he difficulty with the Model Standards’ definition of mediation is its description of the third party as impartial, thereby making impartiality a component of the process definition.”). The Uniform Mediation Act (“UMA”) defines mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” Unif. Mediation Act § 2.1 (Nat’l Conf. of Comm’ on Unif. State L. 2003). The Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, defines mediation as “a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.” For more definitions, *see* Kimberlee K. Kovach, Mediation: Principles and Practice 27–28 (3rd ed. 2004). [↑](#footnote-ref-19)
19. Roger Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In 12–14 (Bruce Patton, 3rd ed. 2011). [↑](#footnote-ref-20)
20. As with the different models and styles of the mediation process, there are also a variety of models concerning the structure of the process. Over the years, lawyers, mediators, and organizations engaged in teaching and training mediators have drawn a roadmap of the mediation process and described its various parts. Rogers and Salem divided mediation into five stages: pre-mediation, the opening of mediation, the parties’ opening presentation, mediation negotiation, and agreement. Stephen B. Goldberg, Dispute. Resolution.: Negotiation, Mediation, Arbitration, and Other Processes 123–27 (Frank E. A. Sander, et. al, 7th ed. 2020). Kovach describes nine stages with four optional: Preliminary arrangements, Mediator’s introduction, Opening remarks/Statements by parties, Venting (optional), Information gathering, Issue and interest identification, Agenda setting (optional), Caucus (optional), Option generation, Reality testing (optional), Bargaining and negotiation, Agreement, and Closure. Kimberlee K. Kovach, *Mediation*, *in* The Handbook of Dispute Resolution 304, 306–07 (Michael L. Moffitt & Robert C. Bordone eds., 2005). For another roadmap, *see* Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 186 (4th ed. 2014); Carrie Menkel-Meadow et al., Mediation: Practice, Policy, and Ethics 164–88 (3rd ed. 2020). [↑](#footnote-ref-21)
21. According to Rogers and Salem, “getting the parties to agree to mediation can be the most difficult part of the process…” Goldberg at 108. [↑](#footnote-ref-22)
22. For example, “Identifying the key people or parties involved in the dispute and the history and dynamics of their relationships” Moore *supra* note at 190. [↑](#footnote-ref-23)
23. For example, “Clarifying which issues and interests are likely to be the most important for parties to address, reach understandings on, or resolve.” *Id*. [↑](#footnote-ref-24)
24. Moore includes in this action the development of a plan for productive negotiations, the planning of specific steps, procedures, and activities for initiating mediation, and more. *Id*. at 193-97. [↑](#footnote-ref-25)
25. The opening statements are the time for the parties to provide their points of view on the case and listen to the other side's points of view. *See* Kovach, *supra* note 18, at 162-63. [↑](#footnote-ref-26)
26. For example, e-mail was used for the mediation process in the eBay pilot project. *See* Katsh et al. *supra* note 1. Videoconferencing is used for the mediation model of the AAA-ICDR®. *See AAA-ICDR® Model Order and Procedures for Mediation via Videoconference*, Am. Arb. Ass’n (2020). [↑](#footnote-ref-27)
27. *See*, *e.g.*, Tactiq, https://tactiq.io [https://perma.cc/23ET-UP4J] (last visited Apr. 14, 2024). [↑](#footnote-ref-28)
28. *See*, *e.g.*, Typeset.io, https://typeset.io/ [https://perma.cc/RQH2-UMVH] (last visited Apr. 14, 2024). [↑](#footnote-ref-29)
29. *See, e.g.*, Quillbot, https://quillbot.com/ [https://perma.cc/HFX5-LL9K] (last visited Apr. 14, 2024). [↑](#footnote-ref-30)
30. *See* Amy Schmitz & John Zeleznikow, *Intelligent Legal Tech to Empower Self-Represented Litigants*, 23 Sci. & Tech. L. Rev. 142, 175 (2022). [↑](#footnote-ref-31)
31. *Id.* at 175–76. [↑](#footnote-ref-32)
32. *Id.* at 176. [↑](#footnote-ref-33)
33. *Id.* at 176–77*.* [↑](#footnote-ref-34)
34. *ChatGPT*, ChatGPT, https://chat.openai.com/ (last visited Apr. 14, 2024). [↑](#footnote-ref-35)
35. *Next Level Mediation,* Next Level Mediation,https://nextlevelmediation.com/ [https://perma.cc/F6JX-549C] (last visited Apr. 13, 2024). [↑](#footnote-ref-36)
36. *Id*. *See* Bob Bergman, *ChatGPT in Next Level Mediation*, YouTube (Jan. 26, 2023), https://youtu.be/NEvaXy2V9\_E [https://perma.cc/T455-9XCK]. [↑](#footnote-ref-37)
37. *See* Colin Rule, *ICODR Member Meeting June 2021: Bob Bergman of Next Level Mediation*, YouTube (June 3, 2021), https://youtu.be/ervV4KHUcLQ [https://perma.cc/4BUS-SWQ5]. [↑](#footnote-ref-38)
38. *Smartsettle ONE,* Smartsettle ONE,https://www.smartsettle.com/smartsettle-one [https://perma.cc/8V52-J3XV] (last visited Apr. 14, 2024). [↑](#footnote-ref-39)
39. Westermann et al., *supra* note 9. [↑](#footnote-ref-40)
40. Ethan Katsh & Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace93-94 (2001). (“The "fourth party," the new presence "at the table," is the technology that works with the mediator or arbitrator. Just as the role of a third party can vary in different contexts, so can the role of the fourth party. It can, in different circumstances, be more or less relied upon and be more or less influential… The fourth party does not, except in a few well-defined instances such as blind bidding, replace the third party. But it can be considered to displace the third party in the sense that new skills, knowledge, and strategies may be needed by the third party. It may not be coequal in influence to the third party neutral, but it can be an ally, collaborator, and partner. It can assume responsibilities for various communications with the parties, and the manner in which the third and fourth parties interact with each other will affect many parts of the dispute resolution process.”). *See also* Colin Rule, *Online Dispute Resolution and the Future of Justice*, 16 Ann. Rev. L. & Soc. Sci. 277, 288 (2020). [↑](#footnote-ref-41)
41. Noam Ebner & Jeff Thompson, @*Face Value? Non-Verbal Communication & Trust Development in Online Video-Based Mediation*, 1 Int'l J. Online Disp. Resol. 1, 1 (2014). [↑](#footnote-ref-42)
42. Ayelet Sela, *e-Nudging Justice: The Role of Digital Choice Architecture in Online Courts*, 2019 J. Disp. Resol. 127, 133, 135–36 (2019). [↑](#footnote-ref-43)
43. Linda Foit, *Your Artificial Mediator Is Ready for You Now: The Role of Artificial Intelligence in Conflict Resolution*, 15 Am. J. Mediation 43, 53–60, 77 (2022); Sela, *supra* note 12, at 140, 142; David Allen Larson, *Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator*, 25 Ohio St. J. Disp. Resol. 105, 110, 127 (2010); John Zeleznikow, *Using Artificial Intelligence to provide Intelligent Dispute Resolution Support*, 30 Grp. Decision Negot. 789, 807 (2021). [↑](#footnote-ref-44)
44. Tarleton Gillespie, Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media 19 (2018); Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. Rev. 423, (2018). [↑](#footnote-ref-45)
45. Colin Rule, *Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace*, ACResolution Magazine, Fall 2008, at 10. (“An upside existed to the incredible volume of disputes coming through our systems. We knew an immense amount about the types of problems that occurred on the site because we had seen so many of them. We were rarely surprised by a wholly new kind of dispute. Such familiarity with the spectrum of disputes enabled us to design dedicated systems tailored specifically to each dispute type.”). [↑](#footnote-ref-46)
46. The Uniform Mediation Act defines “mediation communication” as “a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” Unif. Mediation Act *supra* note 18, at §2.2. [↑](#footnote-ref-47)
47. As it appears, for example, in the parties’ opening statements. *See* Kovach, *supra* note 18, at 36. [↑](#footnote-ref-48)
48. Fisher et al. define interests as “needs, desires, concerns, and fears” and basic human needs as “security, economic well-being, a sense of belonging, recognition, control over one’s life.” Fisher et al., *supra* note 19, at 42, 50. [↑](#footnote-ref-49)
49. Moore, *supra* note 20, at 192; Goldberg et al., *supra* note 20, at 110 (“[a]ware that people may need to deal with their feelings before they can discuss the situation clearly, some mediators provide a controlled forum for a limited venting of feelings early in the process on the theory that the expression and acknowledgment of hurts and frustrations helps to humanize the conflict, surface underlying issues that must be addressed in order to resolve the dispute and facilitate a rational discussion . . . ”). [↑](#footnote-ref-50)
50. *See* Article 9(1) of Regulation (EU) 2016/679, General Data Protection Regulation, 2016 O.J. (L119) 1 [hereinafter GDPR]. (“Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation shall be prohibited.”). [↑](#footnote-ref-51)
51. *Id*. [↑](#footnote-ref-52)
52. *See* Menkel-Meadow et al., *supra* note 20, at 184–85 (on the practice of using the caucus, i.e., when the mediator meets with each party separately). [↑](#footnote-ref-53)
53. Eran Toch et al., *Personalization and Privacy: A Survey of Privacy Risks and Remedies in Personalization-Based Systems*, 22 User Model User-Adap Inter 203, 206–09 (2012). [↑](#footnote-ref-54)
54. The transmission of visual content can occur even when using a virtual background that replaces the real environment. *See* Jan Malte Hilgefort et al., *Spying through Virtual Backgrounds of Video Calls*,Proceedings of the 14th ACM Workshop on Artificial Intelligence and Security 135, 135 (2021). [↑](#footnote-ref-55)
55. *See* Hassan Wasswa & Abdul Serwadda, *The Proof is in the Glare: On the Privacy Risk Posed by Eyeglasses in Video Calls*, Proceedings of the 2022 ACM on International Workshop on Security and Privacy Analytics 46, 46 (2022). [↑](#footnote-ref-56)
56. *See* Mohd Sabra et al., *Zoom on the Keystrokes: Exploiting Video Calls for Keystroke Inference Attacks*, Proceedings 2021 Network and Distributed System Security Symposium (2021). [↑](#footnote-ref-57)
57. *See* Yucheng Yang et al., *Are You Really Muted?: A Privacy Analysis of Mute Buttons in Video Conferencing Apps*, Proc. on Priv. Enhancing Tech. 1, 1(2022).

    [↑](#footnote-ref-58)
58. Mediation norms do not define the term “processing.” In general, processing in the context of information refers to various actions performed on information. A comprehensive definition of “processing” can be found in Article 4(2) of the GDPR, *supra* note 48 (“‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction . . .”). However, some separate the act of collecting from information processing, which concerns how data that has already been collected is handled. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 504 (2006). [↑](#footnote-ref-59)
59. *See* the definition of mediation, e.g. UMA, *supra* note 18. For the strategies and techniques, the mediator employs to achieve the mediation goal, *see* Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev 7, 24–34 (1996). [↑](#footnote-ref-60)
60. Kovach points out that “[r]estating what a party has said and reframing the way party has related a problem are two of the most effective tools the mediator uses to move parties away from inflexible positions.” Kovach, *supra* note 18, at 180–81. Reframing the issues can also promote creativity. *See* Menkel-Meadow et al, *supra* note 20, at 183. [↑](#footnote-ref-61)
61. Kovach describes the “issues” as “those items which both sides are willing to openly discuss as the predominant points of contention, and about which the negotiation has been initiated.” Kovach, *supra* note 18, at 179. [↑](#footnote-ref-62)
62. *Id*. at 187; Fisher & Ury point out, “In many negotiations, however, a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.” Fisher et al., *supra* note 19, at 43. [↑](#footnote-ref-63)
63. *See* Fisher & Ury *id.* at 58–83; Kovach, *supra* note 18, at 236–37. This is sometimes done in separate meetings of the mediator with each party to help the parties open, share confidential information, and collect additional and necessary information. *Id.* For image completeness, we note that alongside the communication and information analysis activities, the mediation process also includes administrative activities, such as collecting payment, which involves the processing of external information for internal purposes. [↑](#footnote-ref-64)
64. Just recently, Zoom updated its Terms of Service (in section 10.2) and Privacy Policy to confirm that “Zoom does not use any of your audio, video, chat, screen sharing, attachments or other communications-like Customer Content (such as poll results, whiteboard and reactions) to train Zoom or third-party artificial intelligence models.” *See* *Zoom Terms of Service*, Zoom, https://explore.zoom.us/en/terms/ [https://perma.cc/MT9X-CK7U] (last updated Aug. 11, 2023); Smita Hashim, *How Zoom’s terms of service and practices apply to AI features*, Zoom, https://www.zoom.com/en/blog/zooms-term-service-ai/ [https://perma.cc/3GFV-B82W] (last updated Feb. 7, 2024); *Zoom Privacy Statement*, Zoom, https://explore.zoom.us/en/privacy/ [https://perma.cc/55QK-3NAJ] (last updated March 17, 2024). [↑](#footnote-ref-65)
65. For example, NextLevel Mediation may use personal information (with consent) for external purposes, such as “data analysis, identifying usage trends, determining the effectiveness of our promotional campaigns and to evaluate and improve our Service, products, services, marketing and your experience.” *Privacy Policy*, NextLevel Mediation, https://nextlevelmediation.com/privacy-policy [https://perma.cc/JT3E-G42R] (last visited June 2, 2023). [↑](#footnote-ref-66)
66. Ruth R. Faden & Tom L. Beauchamp, A History and Theory of Informed Consent 120 (Tom L. Beauchamp & Nancy M. P. King eds., 1986) (“[I]n these cases . . . the consent requirement is justified through the right of self-determination, which is the legal equivalent of the moral principle of respect for autonomy.”). [↑](#footnote-ref-67)
67. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 Notre Dame L. Rev. 775, 776, 789 (1999). Literature sometimes uses the two concepts in a mixture. *See* Menkel-Meadow et al., *supra* note 20, at 66 (“[a] central value of mediation is self-determination.”). Michael L. Moffitt & Andrea Kupfer Schneider, Examples & Explanations for Dispute Resolution (4th ed. 2019) (“[s]elf-determination—the idea that parties voluntarily determine the elements of an agreement—is a hallmark of mediation . . . this autonomy is also one of mediation’s primary attractions.”). [↑](#footnote-ref-68)
68. Model Standards, *supra* note 18, at Standard I.A. [↑](#footnote-ref-69)
69. Omer Shapira, A Theory of Mediators’ Ethics: Foundations, Rationale, and Application 128 (2016). [↑](#footnote-ref-70)
70. *See* Nolan-Haley, *supra* note 65, at 791. [↑](#footnote-ref-71)
71. This approach has been adopted in the Model Standards, *supra* note 63. *See* Menkel-Meadow et al., *supra* note 20, at 66; Peter Reilly, *The Unfulfilled Promise of Self-Determination in Court-Connected Mediation* 50 Fla. St. U. L. Rev. 861, 862–63, 869 (2023). [↑](#footnote-ref-72)
72. Edward Brunet, Alternative Dispute Resolution: The Advocate’s Perspective 230 (Charles B. Craver ed., 2d ed. 2001) (“[t]he parties’ control over their own destiny in mediation extends to agreements to keep their sessions confidential.”). [↑](#footnote-ref-73)
73. An explicit expression of the parties’ control of mediation confidentiality can be found in Model Standards, *supra* note 18, Standard V.A. (“[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law”), and in the Unif. Mediation Act, *supra* note 18, Section 8 (“[u]nless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.”). [↑](#footnote-ref-74)
74. Harm can occur due to other reasons, such as data security risks that lead to information leakage outside the mediation and actions of the parties and the mediator. [↑](#footnote-ref-75)
75. *See* Model Standards, *supra* note 18, Standard V.A.(2). [↑](#footnote-ref-76)
76. Nolan-Haley, *supra* note 65, at 806. [↑](#footnote-ref-77)
77. *See* Shapira, *supra* note 67, at 147 (“[m]ediator pressure is inappropriate when it is designed to reduce party choice, for example, by pushing parties to agree to a particular option or outcome . . .”). [↑](#footnote-ref-78)
78. Nissenbaum, *supra* note 17, at 70. [↑](#footnote-ref-79)
79. Alan F. Westin, Privacy and Freedom 7 (1st ed. 1967). *See* *also* Gerald Dworkin, The Theory and Practice of Autonomy 103 (1988) (“[p]rivacy consists of the ability of an individual to maintain control of the information about himself that is available to others.”). [↑](#footnote-ref-80)
80. Nissenbaum, *supra* note 17, at 70–71. [↑](#footnote-ref-81)
81. Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970’s: Part I--The Current Impact of Surveillance on Privacy*, 66 Colum. L. Rev. 1003, 1022 (1966) (“[t]his analysis of the various states of privacy is useful in discussing the basic question of the functions privacy performs for individuals in democratic societies. These can also be grouped conveniently under four headings—personal autonomy, emotional release, self-evaluation and limited and protected communication.”). [↑](#footnote-ref-82)
82. *See* Daniel J. Solove, *supra* note 56, at 489 (solove taxonomy refers to “four basic groups of harmful activities: (1) information collection, (2) information processing, (3) information dissemination, and (4) invasion.”). [↑](#footnote-ref-83)
83. Nissenbaum, *supra* note 17, at 70–71. [↑](#footnote-ref-84)
84. It should be noted that in the United States there are “over 2,500 separate state statutes that affect mediation proceedings in some manner.” *The Uniform Mediation Act: A Summary*, Unif. L. Comm’n (Feb. 28, 2024), https://www.uniformlaws.org/viewdocument/enactment-kit-30?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110&tab=librarydocuments [https://perma.cc/P27R-MTP4]. Regarding mediation confidentiality, the sources of confidentiality also lean on evidence law (evidentiary exclusions, protective orders, and privilege). Moffitt & Kupfer Schneider, *supra* note 65, at 119. [↑](#footnote-ref-85)
85. There is no consensus on whether privacy policies are considered as a contract. *See* Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. Rev. 593 (2024) (“although privacy notices look similar to a contract, courts have still not yet held consistently that they are contracts, and to this day, it is notable how few cases directly address the issue.”). [↑](#footnote-ref-86)
86. *See* American Bar Association Section of Dispute Resolution Guidance for Online Dispute Resolution (ODR) (Aug. 6, 2022); *Standards*, Int’l Council for Online Disp. Resol.https://icodr.org/standards/ [https://perma.cc/DT2X-F96D] (last visited Apr. 14, 2024). [↑](#footnote-ref-87)
87. The mediation process sometimes involves additional participants such as representatives, experts, witnesses, etc. *See* Menkel-Meadow et al., *supra* note 20, at 165. [↑](#footnote-ref-88)
88. Model Standards, *supra* note 18, Standard V.B. (“A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.”). [↑](#footnote-ref-89)
89. Nolan-Haley, *supra* note 65, at 837; Kovach, *supra* note 18, at 211; Menkel-Meadow et al., *supra* note 20, at 206. The relationship between the autonomy of the parties and the neutrality of the mediator is reflected in the fact that the acceptability of the mediator by the parties may be based, among other things, on their perception of him as neutral, impartial, and independent in relation to the issues and parties in dispute. *See* Moore, *supra* note 20, at 20. [↑](#footnote-ref-90)
90. Model Standards, *supra* note 18. [↑](#footnote-ref-91)
91. Unif. Mediation Act, *supra* note 18, at §4(a). [↑](#footnote-ref-92)
92. *Id.* at §9(a). (“Before accepting a mediation, an individual who is requested to serve as a mediator shall: (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.”). As described in the comment of the act, “[s]uch disclosure fulfills the reasonable expectations of the parties, and furthers the Act’s core principles of party self-determination and informed consent by assuring the parties that they will have sufficient information about the mediator’s potential conflicts of interests to make the determination about whether that mediator is acceptable for the dispute at hand.” *Id*. at §9(a) cmt. 1.b. [↑](#footnote-ref-93)
93. *Id.* at § 10 (“an attorney or other individual designated by a party may accompany the party to and participate in a mediation.”). [↑](#footnote-ref-94)
94. The terms neutrality and impartiality are often used interchangeably. *See* Kovach, *supra* note 18, at 212 (“[n]eutrality is often used interchangeably with a variety of other words and phrases: *impartiality; free from prejudice or bias; not having a stake in the outcome;* and *free from conflict of interest*. Other synonyms include *unbiased, indifferent* and *independent*. There is dissension within the mediation community about whether all of these terms define neutrality, and somewhat surprisingly, whether all, or any, are appropriate characteristics for mediators.”). Moffitt & Kupfer Schneider, *supra* note 63, at 92 (“[t]he academic literature regarding mediation almost always includes some mention of the idea that the mediator is a third party who is impartial or neutral. Some use the terms impartial and neutral interchangeably. Others see the two terms as distinct and argue for one or the other as more accurately capturing this fundamental principle of mediation.”). [↑](#footnote-ref-95)
95. Kovach, *supra* note 18, at 211. [↑](#footnote-ref-96)
96. Nolan-Haley, *supra* note 65, at 837. [↑](#footnote-ref-97)
97. Model Standards, *supra* note 18, Standard II.A. The same way the Uniform Mediation Act states in Section 9(g) that “[a] mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.”. [↑](#footnote-ref-98)
98. Nolan-Haley, *supra* note 65, at 837. [↑](#footnote-ref-99)
99. Model Standards, supra note 18, Standard VI. A.(5). [↑](#footnote-ref-100)
100. Kovach, *supra* note 18, at 262; Menkel-Meadow et al., *supra* note 20, at 255; Brunet, *supra* note 70, at 229; the summary of the Uniform Mediation Act (“[O]ne of the most important factors promoting mediation as a means of dispute resolution, namely the parties’ ability to depend on the confidentiality of the proceeding . . .”). *The Uniform Mediation Act: A Summary, supra* note 84. [↑](#footnote-ref-101)
101. Kovach, *supra* note 18. [↑](#footnote-ref-102)
102. Goldberg et al., *supra* note 20, at 223 (“For example, the outcome of future mediations may depend on whether the parties are candid as they negotiate. Candor, in turn, may be more likely if they are confident that what is said in mediation will not be used in a court or administrative process. Absent confidentiality, a court-wise party may use mediation as an informal deposition of the unwary party. Some speculate that candor will be compromised if parties hear that mediators are testifying or even talking about their mediations.”); Brunet, *supra* note 70, at 229; under the Uniform Mediation Act, the ability of the parties to speak honestly is considered necessary for the success of the mediation and for the parties to reach a voluntary agreement, as indicated in the summary of the Act (“[t]he Act’s prime concern is keeping mediation communications confidential. Parties engaged in mediation, as well as non-party participants, must be able to speak with full candor for a mediation to be successful and for a settlement to be voluntary. For this reason, the central rule of the Act is that a mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding.”). WHERE IS THE PARENTHETICALS’ QUOTE FROM? *The Uniform Mediation Act: A Summary, supra* note 84*.* [↑](#footnote-ref-103)
103. Brunet, *supra* note 70, at 229. (“Moreover, the private nature of mediation requires confidentiality. Parties are drawn to mediation because of its secret, private nature. A disputant who seeks a private dispute resolution alternative wants to avoid publicity and seeks privacy. Mediation would be significantly less popular if it were conducted in public, free for all to observe.”) [↑](#footnote-ref-104)
104. Kovach, *supra* note 18, at 264; Moffitt & Kupfer Schneider, *supra* note 63, at 118; Menkel-Meadow et al., *supra* note 20, at 256. [↑](#footnote-ref-105)
105. *See* Unif. Mediation Act, *supra* note 18, §§ 4–6. [↑](#footnote-ref-106)
106. Model Standards, *supra* note 18, Standard V.A. In the same way, the Uniform Mediation Act states in Section 8, “Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.”. [↑](#footnote-ref-107)
107. *See* Standard VII. (A), Model Standards of Practice for Family and Divorce Mediation (Association of Family and Conciliation Courts 2000). [↑](#footnote-ref-108)
108. Katsh & Rifkin, *supra* note 36. [↑](#footnote-ref-109)
109. *See* Pablo Cortes, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, 19 Int’l J. Law Info. Tech. 1 (2011). [↑](#footnote-ref-110)
110. Unif. Mediation Act *supra* note 18, at §2.3.

     . [↑](#footnote-ref-111)
111. *See* Model Standards, *supra* note 18, at Preamble. [↑](#footnote-ref-112)
112. For example, Model Standards, *supra* note 18, Standard I.A.(2) (“A mediator cannot personally ensure”), Standard IV.A.(1) (“[a]ny person may be selected as a mediator . . . . A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.”). [↑](#footnote-ref-113)
113. “(ODR providers must make every genuine and reasonable effort to maintain the confidentiality of party communications in line with policies that must be articulated to the parties regarding i) who will see what data, ii) how and to what purposes that data can be used, iii) how data will be stored, iv) if, how, and when data will be destroyed or modified, and v) how disclosures of breaches will be communicated and the steps that will be taken to prevent reoccurrence.”). [↑](#footnote-ref-114)
114. compared to the Model Standards, *supra* note 18. [↑](#footnote-ref-115)
115. Which is defined as “All persons, entities, and technologies involved in making ODR available to end users.” [↑](#footnote-ref-116)
116. Which is defined as “A person or organization that “hosts‘‘ or makes an ODR system available to practitioners and end users.” [↑](#footnote-ref-117)
117. Cal. Civ. Code §§ 1798.100-1798.199.100 (West 2020) (California Consumer Privacy Act (CCPA)). [↑](#footnote-ref-118)
118. GDPR, *supra* note 48. [↑](#footnote-ref-119)
119. For example, the GDPR requires that personal data be processed lawfully, fairly, and transparently (Art. 5(1)(a)), and collected for specified, explicit, and legitimate purposes (Art. 5(1)(b)). *Id.* [↑](#footnote-ref-120)
120. For example, the right to erasure/delete the data (GDPR Art. 17, CCPA, 1798.105) and not to be subject to a decision based on automated processing (GDPR Art. 22(1)). [↑](#footnote-ref-121)
121. CCPA, 1798.140.(d)(1) defines Business as “a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers’ personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers’ personal information . . . .” [↑](#footnote-ref-122)
122. GDPR Art. 4 (7) defines ‘controller’ as a “natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data . . . .” [↑](#footnote-ref-123)
123. GDPR Art. 4 (8) defines ‘processor’ as a “natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.” [↑](#footnote-ref-124)
124. CCPA, 1798.100.(a)(1) (“A business that controls the collection of a consumer’s personal information shall, at or before the point of collection, inform consumers of the following: (1) The categories of personal information to be collected and the purposes for which the categories of personal information are collected or used and whether that information is sold or shared . . .”). GDPR Art. 13 (“[w]here personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing.”). [↑](#footnote-ref-125)
125. Solove, *supra* note 83. 81 [↑](#footnote-ref-126)
126. *See* CCPA, 1798.120. [↑](#footnote-ref-127)
127. *See* Solove, *supra* note 83 81 (“[h]ardly anyone reads privacy notices, those who try to read them struggle to understand them, the statements in privacy notices are often vague and lack much meaning, and the effort to read privacy notices does not scale because there are too many to read. The result is that a remarkably low percentage of people opt out . . .”). [↑](#footnote-ref-128)
128. *See* GDPR Art. 6(1)(a). [↑](#footnote-ref-129)
129. *See* Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users’ Understanding*, 30 Berkeley Tech. L. J. 39 (2015); Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies 2008 Privacy Year in Review*, 4 I/S J. L. Pol’y Info. Soc’y 543, 563 (2008); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. Rev. 2255 (2019). [↑](#footnote-ref-130)
130. Aleecia M. McDonald et al., *A Comparative Study of Online Privacy Policies and Formats*, 5672 LNCS 37–55 (2009). [↑](#footnote-ref-131)
131. Solove, *supra* note 83. [↑](#footnote-ref-132)
132. Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 Info. Comm. & Soc’y 128 (2018); *see also* Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 Wash. U. L. Rev. 1461 (2019). [↑](#footnote-ref-133)
133. Joseph Turow et al. *Americans Cannot Consent to Companies’ Use of Their Data*, 17 Int’l J. Comm. 4796, 4797 (2023) (“[t]hat is, as long as privacy policies reveal what the company is doing with consumers’ data, taking and using that data—and even selling it—is acceptable.”). [↑](#footnote-ref-134)
134. It should be noted that the mapping does not refer to the broad field of data security risks, which concern any activity in the digital space, *see* Elisa Bertino, *Data Security and Privacy: Concepts, Approaches, and Research Directions* IEEE 40th Annual Computer Software and Applications Conference (COMPSAC) 400 (2016), but these risks are relevant to every quadrant and deserve regulation in themselves. On data security risks in ODR processes, *see* Draper, *supra* note 15. [↑](#footnote-ref-135)
135. Lawrence Lessig, Code: And Other Laws of Cyberspace (1999). [↑](#footnote-ref-136)
136. The result of the violation of parties’ autonomy is not necessarily its complete cancellation; It may also exist at a low level (*see*, for example, the discussion on different levels of autonomy in mediation in Nolan-Haley, *supra* note 65, at 815–16; Shapira, *supra* note 67, at 138. [↑](#footnote-ref-137)
137. *See also* Shlomo Benartzi & Jonah Lehrer, The Smarter Screen: Surprising Ways to Influence and Improve Online Behavior (2015); Christoph Schneider et al., *Digital Nudging: Guiding Online User Choices Through Interface Design*, 61 Comm. ACM 67 (2018). [↑](#footnote-ref-138)
138. *See* Sela, *supra* note 38. [↑](#footnote-ref-139)
139. As compared to face-to-face mediation, in which the parties are invited to present their view of the conflict fully, in their own words, and without interruption. *See* Kovach, *supra* note 18, at 36. [↑](#footnote-ref-140)
140. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. Rev. 477 (2006). (“Interrogation is the pressuring of individuals to divulge information . . . [h]owever, interrogation can create harm. Part of this harm arises from the degree of coerciveness involved . . . [o]ne explanation may be that people still feel some degree of compulsion because not answering might create the impression that they have something to hide.”). [↑](#footnote-ref-141)
141. Tal Zarsky, *The Trouble with Algorithmic Decisions*, 41 Sci. Tech. Hum. Values 118, 121 (2016). [↑](#footnote-ref-142)
142. Daniel J. Solove, *The Limitations of Privacy Rights*, 98 Notre Dame L. Rev. 975, 1013 (2023). [↑](#footnote-ref-143)
143. Colin Rule, *Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace*, acresolution Mag., Fall 2008, at 10. [↑](#footnote-ref-144)
144. For example, the system of Smartsettle, *supra* note 34. [↑](#footnote-ref-145)
145. *See, e.g.*, the use of ChatGPT in NextLevel Mediation for questionnaires. [↑](#footnote-ref-146)
146. Zarsky, *supra* note 140. [↑](#footnote-ref-147)
147. *Id.* at 120. [↑](#footnote-ref-148)
148. *Id.* at 129. [↑](#footnote-ref-149)
149. Kovach, *supra* note 18, at 187. [↑](#footnote-ref-150)
150. *See, e.g.*, Russell Weiss, *Some Economic Musings on Cybersettle*, 38 U. Tol. L. Rev. 89 (2006). [↑](#footnote-ref-151)
151. Linda J. Skitka et al., *Automation Bias and Errors: Are Crews Better Than Individuals?*, 10 Int’l J. Aviation Psychol. 85 (2000). [↑](#footnote-ref-152)
152. Raja Parasuraman & Christopher A. Miller, *Trust and etiquette in high-criticality automated systems*, 47 Commc’ns ACM 51 (2004). [↑](#footnote-ref-153)
153. *See, e.g.*, Jennifer M Logg et al., *Algorithm Appreciation: People Prefer Algorithmic to Human Judgment,* 151 Organizational Behav. & Hum. Decision Processes 90 (2019); Theo Araujo et al., *In AI We Trust? Perceptions about Automated Decision-Making by Artificial Intelligence*, 35 AI & Soc’y 611 (2020). [↑](#footnote-ref-154)
154. *See* chapter X. [↑](#footnote-ref-155)
155. Westermann, *supra* note 9. [↑](#footnote-ref-156)
156. There are various ways in which attorneys’ use of Chat GPT can lead to the disclosure of client confidential information. *See* Sara Khan & Elizabeth Powers, *Efficiency, Ethics, and Algorithms: The Implications of AI on the Legal Profession and the ABA Model Rules*, SSRN (July 18, 2023) http://dx.doi.org/10.2139/ssrn.4461276 [**https://perma.cc/76D9-FZT2**]. [↑](#footnote-ref-157)
157. For example, the NextLevel Mediation Privacy Policy states, “[t]he Company will retain Your Personal Data only for as long as is necessary for the purposes agreed upon by your Mediator, Attorney or Consultant. We will retain and use Your Personal Data to the extent necessary to comply with our legal obligations (for example, if we are required to retain your data to comply with applicable laws), resolve disputes, and enforce our legal agreements and policies.” SOURCE? Supra note 61 [↑](#footnote-ref-158)
158. Benjamin Andow et al., *PolicyLint: Investigating Internal Privacy Policy Contradictions on Google Play*, 28th USENIX Sec. Symp. (2019), https://www.usenix.org/conference/usenixsecurity19/presentation/andow. [**https://perma.cc/4BFF-CKNQ].** <https://www.usenix.org/system/files/sec19-andow.pdf> [↑](#footnote-ref-159)
159. *Id.* (“[w]e use PolicyLint to analyze the policies of 11,430 apps and find that 14.2% of these policies contain contradictions that may be indicative of misleading statements.”). [↑](#footnote-ref-160)
160. *Glossary,* Eur. Data Prot. Supervisor, https://www.edps.europa.eu/data-protection/data-protection/glossary/d\_en#:~:text=Data%20minimization,necessary%20to%20fulfil%20that%20purpose. [**https://perma.cc/Y96X-AJ8Q] (last visited Apr. 26, 2024). T**he principle expressed in Article 5(1)(c) of the GDPR (“[p]ersonal data must be ‘adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed’.) SOURCE? [↑](#footnote-ref-161)
161. For example, NextLevel Mediation privacy policy states, “[w]hile using Our Service, we may ask You to provide Us with certain personally identifiable information that can be used to contact or identify You. Personally identifiable information may include, but is not limited to:” SOURCE? Supra note 61 [↑](#footnote-ref-162)
162. Roger C. Mayer et. al., *An Integrative Model of Organizational Trust*, 20 Acad. Manag. Rev. 709, 716 (1995). [↑](#footnote-ref-163)
163. Shapira, *supra* note 67, at 38–39. [↑](#footnote-ref-164)
164. *Id.* at 54–55. There are several reasons for this expectation: the disclosure of the information makes the client vulnerable; they share information based on a trust relationship, and confidentiality supports the client’s rights to privacy and control over information (self-determination). [↑](#footnote-ref-165)
165. Kovach, *supra* note 6, at 158–59 (“[t]he introduction is the primary vehicle through which the mediator begins to build trust with the participants. Trust must be established if the participants are to share information . . .”). In common opening statements, the mediator states that the mediation session is private and confidential. Menkel-Meadow et al., *supra* note 20, at 169. Moore notes that one of the mediator activities at the beginning of mediation is to “define and reach agreement on the limits of confidentiality, as appropriate, regarding communications that occur or documents that are shared in the mediation process.” And “clarify the limits of confidentiality of information shared in private meetings.” Moore, *supra* note 20, at 200. [↑](#footnote-ref-166)
166. Mary J Culnan & Pamela K Armstrong, *Information Privacy Concerns, Procedural Fairness, and Impersonal Trust: An Empirical Investigation*, 10 Organ. Sci. 104, 106 (1999). [↑](#footnote-ref-167)
167. *Id.* (“[i]n general, individuals are less likely to perceive information collection procedures as privacy-invasive when (a) information is collected in the context of an existing relationship, (b) they perceive that they have the ability to control future use of the information, (c) the information collected or used is relevant to the transaction, and (d) they believe the information will be used to draw reliable and valid inferences about them.”). [↑](#footnote-ref-168)
168. Tamara Dinev & Paul Hart, *An Extended Privacy Calculus Model for E-Commerce Transactions*, 17 Info. Sys. Res. 61, 65 (2006). [↑](#footnote-ref-169)
169. *Id.* [↑](#footnote-ref-170)
170. Of course, this argument deserves empirical examination but for comparison *see* Zhen Shao et al., *Understanding users’ trust transfer mechanism in a blockchain-enabled platform: A mixed methods study*, 155 Decision Support Sys. 113716 (2022). [↑](#footnote-ref-171)
171. *Zoom Privacy Statement*,Zoom, https://explore.zoom.us/en/privacy/ [**https://perma.cc/YQX4-DKE2]** (last updated Mar. 17 2024)**.** [↑](#footnote-ref-172)
172. *Introducing Meeting GenAi*,Otter.ai, https://otter.ai/ [**https://perma.cc/28AC-CK3M]** (last visit Feb. 13, 2024)**.** [↑](#footnote-ref-173)
173. *Id.* [↑](#footnote-ref-174)
174. For a discussion on the subject in the Zoom community, *see* Aila, *Stopping Users with Otter.ai from Joining Meeting*, Comment to *Stopping Users with Otter.ai from Joining Meeting*, Zoom Community (Apr. 7, 2023) https://community.zoom.com/t5/Meetings/Stopping-users-with-Otter-ai-from-joining-meeting/m-p/107411 [https://perma.cc/B2RZ-CRC7] (“[w]e have had a similar issue with Zoom meetings at the university. Apparently, research students have downloaded the program for transcription. They had no idea this program would remote into any meetings . . . .”). [↑](#footnote-ref-175)
175. Solove, *supra* note 7, at 506 (“[a]ggregation is the gathering together of information about a person.”). [↑](#footnote-ref-176)
176. *Id.* [↑](#footnote-ref-177)
177. *Id.* [↑](#footnote-ref-178)
178. *See* Karen Yeung, Commentary, *Five Fears about Mass Predictive Personalization in an Age of Surveillance Capitalism*, 8 Int’l Data Priv. L. 258 (2018). [↑](#footnote-ref-179)
179. This requirement is especially important in view of the “automation bias“ that leads people to over-rely on automatic information analysis, *see* *supra*, Part IV-A. [↑](#footnote-ref-180)
180. For more on the topic of explanation and models for the explainability of artificial intelligence, *see* Katie Atkinson et al., *Explanation in AI and Law: Past, Present and Future*, 289 A.I. 103387 (2020). [↑](#footnote-ref-181)
181. On the possibilities for accreditation of ODR service providers, *see* Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for Online Dispute Resolution*, 32 Negot. J. 297 (2016). [↑](#footnote-ref-182)
182. *See* *Terms of Use*, NextLevel Mediation, https://nextlevelmediation.com/terms [https://perma.cc/EMY6-9EFM] (last visited Feb. 13, 2024) (section titled “11.Limitation of Liability”). [↑](#footnote-ref-183)
183. *See* Ebner, *supra* note 176, at 315. [↑](#footnote-ref-184)
184. This is similar to developments in ethical codes in other professions, including lawyers and judges. *See, e.g.*, Model Rules of Pro. Conduct r. 1.1 cmt. 8 (Am. Bar Ass’n 1983) (“to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .”); Lessons Learnt and Challenges Faced by the Judiciary During and After the COVID-19 Pandemic, *Principle 6 (Training)*, Eur. Comm’n for the Efficiency of Just. (CEPEJ) (June 10, 2020), https://rm.coe.int/declaration-en/16809ea1e2 [https://perma.cc/M3WM-LFEE] (“[j]udicial training should adapt to the emerging needs, including the use of IT.”). [↑](#footnote-ref-185)
185. *See* the Model Standards, *supra* note 18, Standard No. I(A) (“[‘process design’ is part of self-determination.] Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.”). [↑](#footnote-ref-186)
186. *See* Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 Md. L. Rev. 952 (2017); Omer Tene, *Privacy Law’s Midlife Crisis: A Critical Assessment of the Second Wave of Global Privacy Laws*, 74 Ohio St. L. J. 1217, 1218–19 (2013); Alicia Solow-Niederman, *Information Privacy and the Inference Economy*, 117 Nw. U. L. Rev. 357 (2022). [↑](#footnote-ref-187)
187. Hartzog, *supra* note 185, at 953–56. [↑](#footnote-ref-188)
188. *A Europe Fit for the Digital Age*, Eur. Comm’n,https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age\_en[https://perma.cc/G3EP-HSF4] (last visited Mar. 21, 2024). [↑](#footnote-ref-189)
189. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1. [↑](#footnote-ref-190)
190. *Id.* art. 25(1) (“providers of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.”). [↑](#footnote-ref-191)
191. *Id.* art. 14(1) (“[i]t shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be publicly available in an easily accessible and machine-readable format.”). [↑](#footnote-ref-192)
192. *Id.* art. 26(1)(d) (“meaningful information directly and easily accessible from the advertisement about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters.”); art. 27(1) (“providers of online platforms that use recommender systems shall set out in their terms and conditions, in plain and intelligible language, the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters.”). [↑](#footnote-ref-193)
193. Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), 2022 O.J. (L 152) 1. [↑](#footnote-ref-194)
194. *Artificial Intelligence Act: Deal on Comprehensive Rules for Trustworthy AI*, Eur. Parliament (Dec. 9, 2023), https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai [https://perma.cc/4Y8T-LSDM]. [↑](#footnote-ref-195)