Hong Kong Bar Association's

Comments on the Guidelines for Disclosure of Mediation Communications under Section 8(2)(e) of the Mediation Ordinance ("Guidelines")

1. The Hong Kong Bar Association ("HKBA") is invited to submit the comments on the Guidelines.

Introduction

2. Section 8(1) of the Mediation Ordinance (Cap 620) ("**MO**") provides that a person must not disclose a mediation communication save for certain exceptions. In particular, section 8(2)(e) permits disclosure when it is made for research, evaluation or education purposes ("**Purposes**") without revealing or being likely to reveal the identity of the persons involved. The Steering Committee on Mediation has compiled the Guidelines to assist those who intend to rely on this exception.

3. Essentially, the Guidelines clarify that:

   (a) Section 8(2)(e) applies to any mediation communication made before, on or after the date of commencement of the MO;[1]

   (b) Disclosure under section 8(2)(e) should only be made to the extent that is necessary for furthering the Purposes, regardless of by whom and how the disclosure is made;[2]

   (c) The person making the disclosure must take into account all circumstances (e.g. publicity involved, timing of disclosure) in assessing the risk that the disclosure might indirectly identify those involved in the communication, and must decide accordingly whether a mediation communication should be disclosed at all and if so how should it be anonymized;[3] and,

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1 Paragraph 5 of the Guidelines
2 Paragraphs 6-7 of the Guidelines
3 Paragraphs 8-13 of the Guidelines

(d) While the Guidelines are not themselves a piece of legislation, a failure to comply with them may expose the person making the disclosure to civil and/or disciplinary actions.[4]

Summary of HKBA's View

4. The HKBA believes that the Guidelines provide a much-needed supplement to section 8(2)(e) of the MO. It is not uncommon that actual mediation cases are summarized and anonymized to facilitate such practice. While in principle permitted under section 8(2)(e) thereof, such summaries inevitably may give rise to a risk that they may indirectly identify those persons involved in the disputes, however small this risk might be. It is therefore crucial that practitioners do not regard section 8(2)(e) thereof as a blanket approval of academic disclosure, and always bear in mind their overriding duties to keep mediation communication confidential. The Guidelines have rightly made this clear.

5. On the other hand, The HKBA sees that the Guidelines may offer additional assistance on how one should assess the risk of indirect identification. The Guidelines may offer an objective standard to be adopted, as further elaborated below.

[4] Paragraphs 14-15 of the Guidelines

Risk of indirect identification

6. The HKBA is pleased to see and applauds the high standard of confidentiality set by the Guidelines. In particular, it demands information to be presented in such a manner that not only the public, but also a person who knows of the parties or the dispute ("**Insider**"), would be unable to identify the parties directly or indirectly based on any published facts of the case.[5]

7. Confidentiality is the bedrock of mediation. It is understandable for the Guidelines requiring a high degree of scrutiny. However, it will be even more helpful if the Guidelines could inform practitioners of how they should assess the risk of identification.

8. Currently, the Guidelines may appear to propound a somewhat loaded perspective of when circumstances would make it undesirable to disclose mediation communication; for example:

(a) in paragraph 12 thereof (e.g. "Hong Kong as a small community", "avid interest of the public", "media investigation" and "public materials"); and,

(b) in paragraph 13 thereof ("Insiders" and "high profile dispute").

9. In particular, it also requires disclosure not to be made if "the risk of identification...cannot be *eliminated*." (emphasis added)

10. However, practitioners are left with a question: how can the risk of identification ever be *eliminated*?

11. Since it is impossible to anticipate what knowledge an Insider might possess, there is always a risk of indirect identification by Insiders. In the absence of further direction, one could perhaps only hope making as much alteration to the mediation communication as possible would comply with the Guidelines. However, in such case the disclosure is no longer of the mediation communication *per se*, but of something of the author's own creation, which in

[5] Paragraphs 12(4)(A) and 13(2)(B) of the Guidelines

any event is outside of the ambit of the MO. Therefore, imposing an appropriately stringent level of disclosure guidelines with objective standards sufficiently clarified may be more conducive to the rationale behind section 8(2)(e) of the MO.

The UK's approach as a reference

12. Reference to the *Anonymisation: managing data protection risk code of practice* published by the Information Commissioner's Office of the United Kingdom offers a helpful reference[6] ("**UK Code**"). While the UK Code concerns the disclosure of personal data and not mediation communication, it deals with issues of direct and indirect identification that cut across both domains.

13. The UK Code first of all acknowledges the impossibility of having a risk-free disclosure:

> "The [Data Protection Act 1998] does not require anonymisation to be completely risk free – you must be able to mitigate the risk of identification *until it is remote*."[7] (emphasis added)

14. It then refers to *remoteness* rather than *elimination of risk*:

> "This means that, although it may not be possible to determine with absolute certainty that no individual will ever be identified as a result of the disclosure of anonymised data, this does not mean that personal data has been disclosed. The High Court in [*R v Information Commissioner* [2011] EWHC 1430 (Admin)] stated that *the risk of identification must be greater than remote* and reasonably likely for information to be classed as personal data under the [Data Protection Act 1998]."[8] (emphasis added)

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6 http://www.ico.org.uk/for_organisations/data_protection/topic_guides/anonymisation (accessed on 2/9/2013)

7 Page 6 of the UK Code

8 Page 16 of the UK Code

15. The UK Code also refers to the "motivated intruder test" for determining the risk of identification:

> "[A] useful test – and one used by the Information Commissioner and the Tribunal that hears [Data Protection Act 1998] and [Freedom of Information Act 2000] appeals – involves considering whether an 'intruder' would be able to achieve re-identification if motivated to attempt this…*The 'motivated intruder' is taken to be a person who starts without any prior knowledge but who wishes to identify the individual from whose personal data the anonymised data has been derived. This test is meant to assess whether the motivated intruder would be successful.*"[9] (emphasis added)

16. The risk of identification by Insiders is also addressed:

> "Re-identification problems can arise where one individual or group of individuals already knows a great deal about another individual, for example a family member, colleague, doctor, teacher or other professional.
>
> The risk of re-identification posed by making anonymised data available to those with particular personal knowledge cannot be ruled out, particularly where someone might learn something 'sensitive' about another individual – if only by having an existing suspicion confirmed. *However, the privacy risk posed could, in reality, be low where one individual would already require access to so much information about the other individual for re-identification to take place.*"[10] (emphasis added)

<u>Suggested amendments to the Guidelines</u>

17. Some practitioners may have reservations as to whether the risk of indirect identification can be *eliminated* if there is such a disclosure. Thus, it is suggested that paragraph 12(4)(D) of the Guidelines may be amended to:

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[9] Page 22 of the UK Code
[10] Pages 24-25 of the UK Code

"There may even be situations where the risk of identification of the person to whom the mediation communication relates *is greater than remote* even with the subject-matter and issues of the dispute and its underlying facts and circumstances changed for the purpose of disclosure. In such a case, disclosure should simply not be made." (added words in italics)

18. In order to clarify the meaning of "greater than remote", the Guidelines may consider adopting the "motivated intruder test".[11] That is, if a person without any prior knowledge who wishes to identify the persons from the anonymised information will likely succeed, then the risk of identification is greater than remote.

19. It is noted that the "motivated intruder test" does not use an Insider but a person without any prior knowledge as a reference point. This is different from the reference to "people who actually know of him and/or about the dispute" in paragraph 12(4)(A) of the Guideline. The Steering Committee may wish to consider whether the above explicit reference in paragraph 12(4)(A) is necessary or appropriate.

20. Lastly, there seems to be a reference inconsistency in paragraph 8.

21. The HKBA hopes that this submission will be, to a degree, of assistance to the Steering Committee on Mediation.

25th September 2013
Hong Kong Bar Association

[11] Paragraph 13 above