

Litigation Privilege v Without Prejudice Communications



Clients often ask us to explain the difference between the two concepts; litigation privilege and 'Without Prejudice' which are used interchangeably but have different meanings and application.

The law of privilege

Privilege entitles a party to withhold evidence (written or oral) from being given to a third party or the court. Once privilege has been established, a right to withhold the document in question arises and no adverse inference can be drawn by the court.

It enables a litigant or potential litigant to seek evidence and advice, without being obliged to disclose the result of their advice to their opponent.

For litigation privilege to apply, the material in question must be:

- a communication between the lawyer (acting in a professional capacity) and the client, or between either of them and a third party (or be a document created by or on behalf of the client or the client's lawyer);
- made for the dominant purpose of litigation;
- Relate to litigation which is pending, reasonably contemplated or existing; and
- Confidential.

The communication may be between:

- A lawyer (acting in a professional capacity) and the lawyer's client.



- A lawyer (acting in a professional capacity) and a third party.
- The client (or probably a litigant in person) and a third party.

Furthermore, confidential documents which are created by the lawyer, client/litigant or third party and which came into existence to enable legal advice to be sought or given in the litigation may be privileged, even if they are not actually communicated.

However, a word of caution, documents created with the dominant purpose of discussing a commercial settlement do not fall within the scope of litigation privilege, accordingly you should be aware that internal communications prepared to discuss settlement options may not be protected by privilege, therefore internal discussions regarding commercial settlement should be kept to a minimum and any written communication should avoid any admissions of liability.

Without Prejudice (Privilege) Communications

The 'Without Prejudice' rule prevents statements (whether written or oral) made in a genuine attempt to settle an existing dispute, from being put before the court as evidence of admissions. These statements do not need to be communicated by a lawyer.

A party's admissions against his own interest are generally, admissible against him. The 'Without Prejudice' rule is an exception to this and encourages parties in dispute to settle their issues out of court in the knowledge that they can speak freely and, any admissions made to try to settle the matter, may not be used against them should the settlement discussions fail and the dispute proceeds to trial.

Anybody who has engaged in litigation will appreciate the ability to talk openly with the objective of settling the dispute, especially if the prospects of success change during the course of the litigation, or the costs and/or time required may exceed what was anticipated at the outset.

One interesting point to note is that once a debtor has admitted a debt, any subsequent communications regarding repayment of the admitted debt, would not be considered without privileged communications despite them being marked as such.

How is 'Without Prejudice' privilege waived?

Without prejudice belongs, collectively, to the parties of such communication. Therefore, it can only be waived with the consent of all parties. Normally, if one party seeks to rely on Without Prejudice communications in evidence unilaterally, the other party can choose whether to apply to strike out the offending material or waive its privilege so that the material becomes admissible for the benefit (or detriment) of both parties.

Where the parties have agreed to put Without Prejudice communications before the court, the entirety of that communication, including all admissions, will be before the court. The parties cannot pick and choose between which admissions the court can take into account.

Where a party deliberately discloses Without Prejudice material to the court without the consent of the other parties, there may be a number of repercussions, including the possibility that the disclosing party will be penalised in costs and the possibility that the judge will decide to no longer reside over the dispute if a fair trial is no longer possible.



Conclusion

Both of these rules play an important part in the litigation process, whether enabling a party to take advice or by seeking to settle a matter without adverse consequences, if this strategy later fails. If you would like to know more about privilege generally or anything specifically mentioned in this article, please contact our [dispute resolution team](#).



[Justin McConville](#)

Managing Associate



[Ben Ashworth](#)

Partner