

**“Without Prejudice” Communications: Beware This Safe Harbour, it is Shallow**

It is a common misconception that marking a letter, email, or other correspondence with the expression “without prejudice”, makes the person using that expression immune from the content of what is written. Examples might include: “*without prejudice*, I admit I collided with your vessel and then left the scene, but it only happened because your anchor light was not visible”, or “I agree that I owe you the money, but without prejudice, you will never get a dime from me”, or “I admit I had been drinking all day but I was only at the helm for a few minutes while the skipper was down below in the head [the top of the page being marked ‘*without prejudice*’]”.

In each of these cases the phrase “without prejudice” does nothing to protect the person from the admission that they were in fact involved in the collision, they actually did owe money, or they had indeed been under the influence while operating the vessel – admissions that in many cases are at times unnecessary or unwise to make, whether they are true or not.

The objective of this month’s Legal desk is to educate mariners about when using the expression “without prejudice” will protect them, or provide safe harbour for what is being said, and when it will not.

**THE POLICY BEHIND THE EXPRESSION: SETTLEMENT PRIVILEGE**

Generally, what people expect the expression “without prejudice” will do is protect them from the fact the statement was made. This protection is commonly known as a type of “privilege”. When a statement is privileged it means, among other things, it is not admissible as evidence in court. If it is not admissible as evidence the statement cannot, ultimately, be used against the person who made it. Therefore, the real objective in using the expression “without prejudice” is to keep the statement privileged. The public policy behind maintaining privilege over settlement discussions is to encourage full disclosure and frank discussion in aid of settlement so that litigation can be avoided. However, as discussed below, the availability and extent of the privilege is limited by the nature of what is said.

## THE COMMON MISCONCEPTION: BLANKET PROTECTION

The expression "without prejudice" is often used before the person has sought the advice of a lawyer about what to say, and what not to say, when engaged in a dispute with another person. Its use is surprisingly common in communications between parties in the marine industries, and the rough examples above are only a very small portion of cases where I have seen the expression used to the detriment of the person relying on it.

The law varies from province to province, state to state, and country to country. A prominent American internet site on law defines the expression "without prejudice" as follows:

**Without prejudice:** A statement set onto a written document which qualifies the signatory as exempted from its content to the extent that they may be interpreted as containing admissions or other interpretations which could later be used against the person signing; or as otherwise affecting any legal rights of the person signing.

While this broad or blanket protection may or may not be the correct definition in the United States, it is entirely incorrect in British Columbia and most of Canada.

## THE CORRECT VIEW: TWO REQUIREMENTS FOR PRIVILEGE

Generally, the expression "without prejudice" will not qualify the signatory of the statement as exempted from the contents being interpreted as the author "admitting" what is said. In other words, the written statement can be used against the author in court as evidence that the facts in the statement are true and he has admitted them as such.

A common Canadian law site says this:

the term "without prejudice" is also used in the course of negotiations to indicate that a particular conversation or letter is not to be tendered as evidence in court. Such correspondences must be made in the course of negotiations and must be a genuine attempt to settle a dispute between the parties. It may not be used as a façade to conceal facts or evidence from the court and as such a document marked "without prejudice" that does not actually contain any offer of settlement can be submitted should the matter proceed to court. Courts may also decide to exclude from evidence communications not marked "without prejudice" which do contain offers of settlement

This is a correct version of the law on “without prejudice” statements in British Columbia and most of Canada. It highlights two important ingredients that are required in the statement in order for “without prejudice” to protect the author from what is said:

- there must be an active negotiation arising from an attempt to reach an agreement on some issue; and
- the statements must be a genuine attempt to settle the issue.

This view of the law has been confirmed by the B.C. Court of Appeal in the 1984 case of *Belanger v. Gilbert*, when it agreed with the following rule in the 1918 case of *Schetky v. Cochrane*:

In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation... This lays it down that before the privilege arises two conditions must exist, viz.: (a) a dispute or negotiation between two or more parties; and (b) in which terms are offered...

Examples of effective use of “without prejudice” might be: “without prejudice, I offer you \$5,000 for the damage to your boat in exchange for you agreeing not to sue me”, or “I agree that I owe you money, however, I am broke and can only give you \$500 to forgive the debt”. Each of these statements contains a genuine settlement offer in the context of a dispute and are therefore privileged, or not admissible against the person making the statement.

#### **THE SHALLOW HARBOUR OFFERS LIMITED PROTECTION**

Even if the two requirements of a statement marked “without prejudice” are met, caution should be had as to what portions of the communication are protected as privileged. Simply because part of a letter is privileged does not make all of the letter privileged. A letter marked “without prejudice” can be segmented into admissible and inadmissible portions and parts that do not relate to a genuine offer to settle the dispute can be used against you.

Another important point to consider is that simply because a communication is privileged as between two parties (the two persons that are party to the dispute) does not mean that the “without prejudice” communication cannot be used against the person making the statement if the statement falls into the hands of a third party. For example, a without prejudice settlement letter between a mariner and his insurance company may be inadmissible in a further dispute between the mariner and the insurance company, but would be admissible in a dispute between the mariner and his spouse in a divorce (for example, the mariner receives a \$500,000 insurance settlement that the ex-spouse then seeks a portion of).

#### **SUMMARY POINTS TO REMEMBER:**

The general rules are these:

- A communication that contains the expression “without prejudice” that does not relate to the settlement of a dispute between two or more parties will not be privileged, and therefore can be used against the person who made it;
- A communication that involves the settlement of a dispute between two or more parties is privileged, and therefore cannot be used against that person, whether it is marked “without prejudice” or not.

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