

CONFIDENTIALITY AND “WITHOUT PREJUDICE” IN MEDIATION

Mediation is a private and confidential process. In addition, the “without prejudice” privilege applies to communications made during mediation. This privilege prevents a party to a mediation from later producing in evidence any communication made by a party during mediation in an attempt to settle the dispute.

The distinction between the two concepts is that confidentiality prohibits publication to anyone, and the “without prejudice” privilege prohibits production of evidence in court.

This combination of confidentiality and the “without prejudice” privilege is one of the most important features of mediation. It allows parties to speak freely and to make concessions and consider compromises, in circumstances where that cannot be later used against the party.

There are some exceptions. Not everything said and done at mediation will always be protected, but these exceptions are limited, and include:

- Facts disclosed during the mediation can later be proved by objectively independent evidence i.e. evidence available from outside the mediation
- Section 57 of the Evidence Act 2006 applies to mediations. This allows a party to produce evidence of the existence and terms of a settlement agreement.
- A mediator may be obliged to disclose information regarding a threat to public safety or the health or life of an individual, or where there has been commission of a crime.

The limits of confidentiality are most commonly tested when a settlement agreement is called into question. This can occur in a number of different ways, including:

- Where there is a dispute about whether an oral settlement agreement was reached at mediation. This can occur even when there is a clause in the mediation agreement recording the parties intention that settlement agreements must be in writing.
- Where there is a dispute over the interpretation of a settlement agreement.
- Where one party seeks to resile from a settlement agreement, on grounds such as fraud or misrepresentation.

As the law stands at present, in each of the above situations a court may allow evidence to be given of what occurred at mediation, where it is directly relevant to the matter in issue.

If you require further information about the exceptions to confidentiality, then please consult a lawyer.

In attending mediation, the starting point remains that each party makes a contractual commitment to keep the process confidential. All people attending the mediation will give this commitment. Parties give this commitment in the mediation agreement. Non parties will be required to sign a confidentiality undertaking.