


The Basics: What does "without prejudice" mean and when do I need to use it?

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What does it mean if a letter or email you receive is marked "without prejudice" (WP) or if the other party to the dispute proposes a without prejudice discussion?

We set out the key points you need to know in relation to this principle, and how to use it effectively to protect your own position.

What do the words "without prejudice" mean?

Confidential interactions (both written and verbal) between parties that are making genuine attempts to resolve a dispute are often marked "without prejudice" (WP). This is effectively shorthand for saying: 'whilst I am **trying** to reach a settlement with you, I'm not admitting any part of the case or conceding or waiving any arguments or rights - so, my offers to achieve a commercial deal are without prejudice to my primary position that I'm right and you're wrong'.

In this scenario, correspondence and discussions are confidential and cannot be shown to the court or any other party, unless **all** parties to the communication have agreed to this (or one of the exceptions - as to which see below - applies).

By contrast, sometimes, parties can choose to negotiate openly (not confidentially) - in this case, any related notes, documents and correspondence will, in principle, be disclosable to the court and other parties.

What is the point of the "without prejudice" rule?

The WP rule is to encourage settlement discussions without parties weakening their position in the formal dispute. Basically, if this rule applies, people can speak and write openly without fear that what they are saying may be used against them in court or arbitration.

Where do I put the words "without prejudice" on a document or email?

There are no rules about this but generally, at the top of any document or in the subject line etc - so that it is instantly clear to the reader.

In any discussions or meetings, where relevant, it is best to mention this right at the outset - see the next section on this also - and to seek confirmation from the other party that they agree to the communication being without prejudice.

What if I forget to put "without prejudice" on my email - can it be shown to the court?

Not necessarily. It is the **content** of the email (or any other interaction) that is key - if it forms part of a genuine attempt to settle the dispute, then the WP (without prejudice) confidentiality may still apply, if all parties' conduct indicates that the correspondence/communication was intended to be WP (without prejudice).

The opposite applies as well - simply using the label "without prejudice" will not guarantee confidentiality - again it is the content and intent of the document/discussion that will be determinative.

Bear in mind however that forgetting to apply the WP (without prejudice) label can lead to a costly dispute as to the true basis of the communication (WP (without prejudice) or "open"), especially where one stance favours one party in particular. This is best avoided by obtaining confirmation from the other party that they agree to the communications being without prejudice.

In essence, it is a question of substance over form.

So, why bother putting "without prejudice" on at all?

If you forget to use the label WP (without prejudice) and an argument arises about confidentiality at a later stage, you will not necessarily lose as a result of not marking the email (say) WP (without prejudice), but it is likely to make it more difficult to persuade the court you are right.

Be cautious and use the WP (without prejudice) label appropriately when you are in negotiations or discussions.

Are there any exceptions to the "without prejudice" rule?

Yes. A court can allow WP (without prejudice) material to be used where the justice of the case requires it, although even then, that use would usually be limited to specific purposes only (as opposed to allowing the WP (without prejudice) material to be used generally).

The most important examples of when a court may decide that WP (without prejudice) material can be used include:

- Where there is a dispute as to whether or not there is a concluded settlement agreement between the parties;
- Where the material evidences fraud, undue influence, misrepresentation, perjury, blackmail or other clear impropriety;
- Where a statement in the WP (without prejudice) material may give rise to an estoppel;
- To explain delay;
- Where there is an issue relating to the reasonableness of a settlement.

This is not an exhaustive list, but indicates circumstances where a court may consider that WP (without prejudice) material can be used.

I've seen "without prejudice save as to costs" on a letter - what does it mean? Is it different to "without prejudice"?

- Yes. Marking correspondence "without prejudice save as to costs" (WPSATC) means that if the dispute is not resolved and judgment is finally given, then the document **can** be referred to when costs entitlements are being considered by the court. A WPSATC (without prejudice save as to costs) offer is also known as a Calderbank offer.
- What this means in practical terms is that correspondence marked WPSATC (without prejudice save as to costs) can in principle be used to try to persuade the court that a party has acted reasonably in trying to settle the dispute before a final decision (or another party has been unreasonable in refusing to settle) and so any costs orders should reflect this. There is no guaranteed outcome on costs when making a WPSATC (without prejudice save as to costs) offer, but the court will take it into account at the stage of costs consideration. (Compare the likely effect of a successful Part 36 offer - see below.)
- In terms of the difference between a WP (without prejudice) and a WPSATC (without prejudice save as to costs) letter, the words used in the label **will** be of key importance, i.e. if you use WP (without prejudice), then you won't be able to show the letter to the court on costs after the final decision, unless the other side agrees (which is unlikely). By contrast, marking the letter WPSATC (without prejudice save as to costs) means that you will be able to show the correspondence at the stage of costs consideration (i.e. after the final decision) without first getting the other side's consent.

N.B. In many cases where a WPSATC (without prejudice save as to costs) offer might be considered, it may be better to make a formal offer under Part 36 of the Civil Procedure Rules. See our separate note - What do I need to know about Part 36 offers to settle? - on this point.

The key point is to be aware that this WP (without prejudice) "protection" is potentially available in particular circumstances, and to know what it means, so you are able to protect your position during negotiations.