

Use of the term “without prejudice”



The “without prejudice” principle means statements made in a document marked “without prejudice” or made verbally on a “without prejudice” basis, in a genuine attempt to settle the dispute, will generally not be admissible in court as evidence against the person making the statement.

The rationale for this principle is that it is in the public interest to encourage parties to settle disputes and avoid litigation wherever possible. Therefore, if a party tries to settle a dispute under the cloak of without prejudice privilege, such communication cannot be used against the party when the matter becomes before the courts.

For example, if a Bank is owed a debt of €10,000 and legal proceedings have issued in respect of it (or are contemplated) and that Bank offers to accept a sum of €8,000 in a “without prejudice” letter, but the offer is rejected by the Customer, that Customer cannot subsequently produce the letter in court as evidence of a weakness in the Bank’s case, or as evidence of a claim that the Bank’s debt is truly only worth €8,000.

A concession made in the course of settlement negotiations or even the fact that an offer of compromise was made, cannot be disclosed, if made on a “without prejudice” basis.

N.B. In contemplation of litigation

The party relying on the “without prejudice” privilege must show that the dispute existed at the time of the communication and that either legal proceedings had commenced or that the communication was in contemplation of litigation. It is not enough that the communication concerns the matter in dispute for the privilege to be upheld - the communication must attempt to settle the dispute. This is very important. Just marking something “without prejudice” does not necessarily afford it protection. It is the substance of the document or correspondence that determines whether privilege attaches to it and so there has to be a genuine attempt to resolve a dispute.

When to use “without prejudice”

Legal communications (documents and discussions) should only be labelled “without prejudice”, when such communication is putting forward terms to try to settle the commercial dispute or shows a willingness to negotiate.

If communications are labelled “without prejudice” but are nothing to do with settlement negotiations, such communications will not necessarily be treated by the courts as privileged (i.e. they may be admitted as evidence in court).

Open correspondence

Sometimes a party might want to make an offer to settle or negotiate in “open communications”, for tactical purposes, usually to shift the costs’ risk of litigation. If so, they will intend that those communications (though attempts to settle a dispute) are to be admissible in court. A letter should expressly state that it is “open correspondence”, if that is the case.

Off the record

Labelling a communication (written or verbal) as “*off the record*” has no strict legal meaning and should not be relied upon.



Attribute to Jason Harte, Senior Associate, Mason Hayes+Curran.

Jason Harte is a senior associate in the [debt recovery](#) department of Mason Hayes+Curran. For more information, please contact Jason at jharte@mhc.ie or + 353 1 614 5246. The content of this article is provided for information purposes only and does not constitute legal or other advice. Mason Hayes+Curran (www.mhc.ie) is a leading business law firm with offices in Dublin, London and New York.

© Copyright Mason Hayes+Curran 2011. All rights reserved.