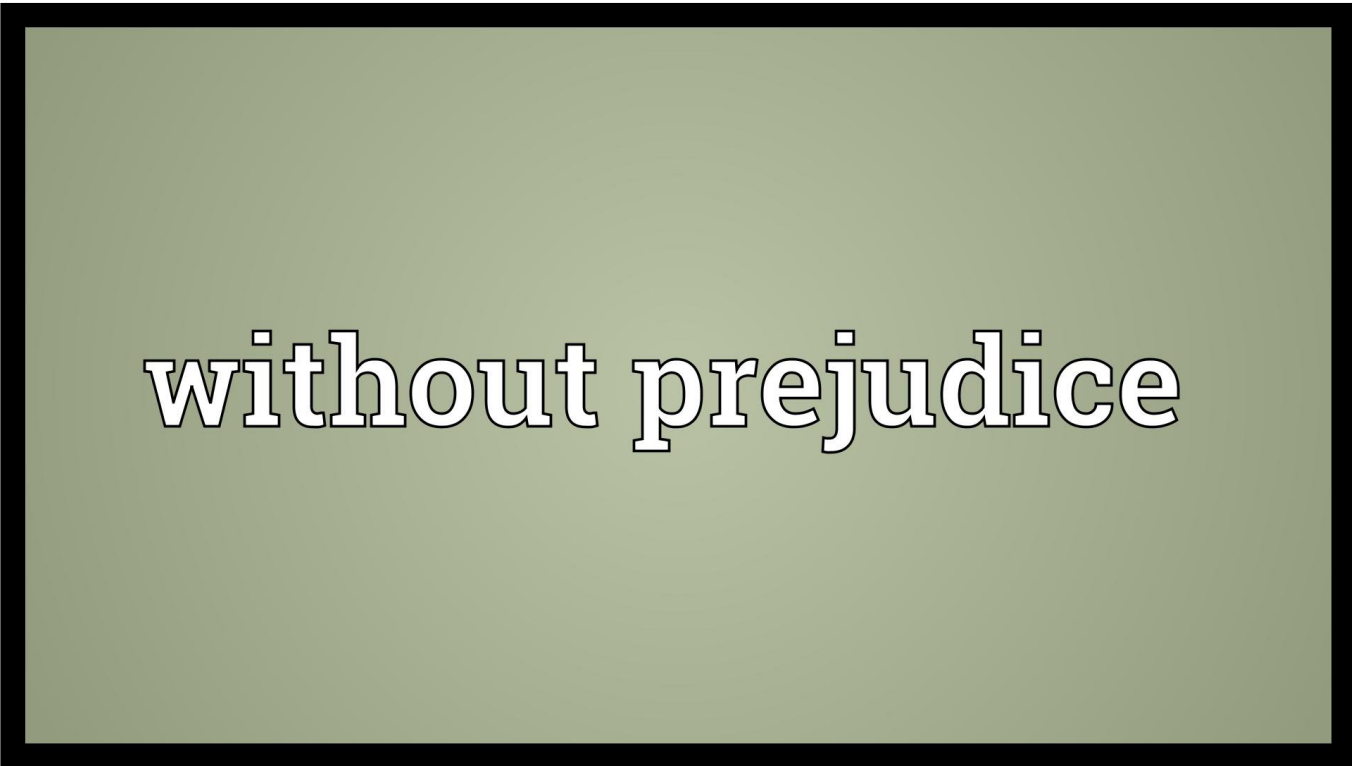


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With(out) prejudice



without prejudice

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By **HELEN WESTMAN** And **LAURA SCHLEBUSCH**

Topics Dispute Resolution

30 Jul 2021

What is the purpose of marking correspondence “without prejudice”?

The general position is that without prejudice correspondence is inadmissible in court. The term “without prejudice” means without the loss of rights. Ordinarily when parties attempt to settle a matter, such correspondence would be marked “without prejudice”. The purpose of this is to guard against an argument by one party that a concession made or offered in bona fide without prejudice negotiations constitutes a waiver of a right or an admission of liability by the other party.

It therefore affords parties to a dispute the opportunity to explore the possibility of settlement of a matter without the risk of such discussions (regarding possible concessions of liability or a party being prepared to pay a certain sum of money to the other) being placed before a court.

In instances where parties have not marked correspondence “without prejudice” but the purpose of the correspondence and the true intention behind such correspondence is to make a genuine attempt to settle a dispute, then such correspondence would not be admissible in court.

Can any correspondence or document be marked “without prejudice”?

No! Often lawyers and lay-people misconstrue the purpose of marking correspondence “without prejudice”. It is not uncommon to see confidential correspondence or correspondence that is simply related to legal proceedings marked “without prejudice” when it should not be. Unless such correspondence has been addressed in a legitimate attempt to settle a matter, simply marking correspondence as “without prejudice” does not guarantee that it cannot be placed before a court.

To this end there is case law from the former Appellate Division. It was held that “the purpose for which a party desires to adduce a “without prejudice” communication is all important, for in exceptional circumstances it may well be admitted in evidence despite the general rule in order to prove, for example, that it contains a threat, an act of insolvency, or possibly other matters that it would be contrary to public policy to protect it from being admissible.”

It follows that a party may not use “without prejudice” correspondence to attempt to conceal information from a court. Furthermore, privilege over that correspondence may be waived if, despite being marked “without prejudice” or a genuine attempt to settle a dispute it contains information that is: threatening; in the public interest; causes prescription to start running on a claim or amounts to an act of insolvency.

Written by: Letoya Francis, Associate [Eversheds Sutherland](#).

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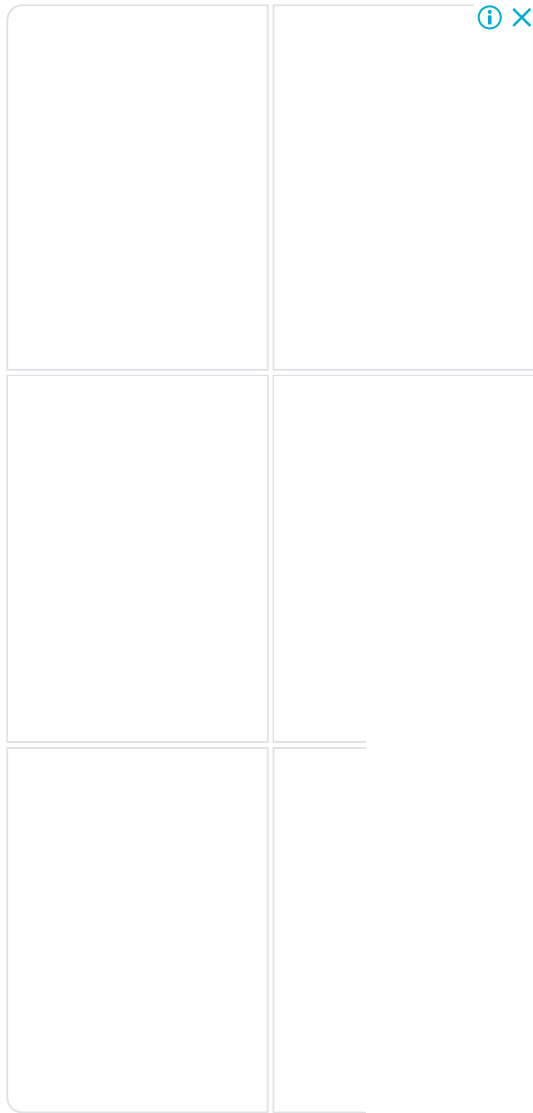
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