

## **A guide to dispute management and resolution**

This guide sets out the actions your business should take when a dispute or potential dispute arises. It applies to any dispute or incident, whether started by you or brought against you (for example, a dispute with a supplier, customer or employee).

### **Does your business really want to be involved in legal proceedings?**

It is very important to understand what your business is getting involved in. It is almost always better to find a commercial solution to a dispute. Your business should consider:

- The value of the claim, the costs involved and the commercial implications of success or failure. Even if your business wins, you will not recover all of the legal costs you have incurred.
- What your business is trying to achieve from the litigation process.
- The time, cost and management commitment involved, most of which is incurred early on in the process.
- How it will affect your ongoing commercial relationship.
- Whether the mere existence of a dispute will create difficulties in bidding for new business or otherwise adversely affect your business' reputation.
- Whether there is a commercial advantage to the dispute (for example, by showing that your business is serious about trademark infringement).
- What the effect will be for both parties if the dispute is made public.
- Whether the other party will be able to pay up if you win.
- All litigation is to some extent speculative (for example, how will the witnesses perform in the witness box?).

### **Is it possible to negotiate a settlement?**

- Your business should not consider it a sign of weakness to approach the other side to explore the chances of a settlement. This can be done at any time during the litigation process, even during a trial. Settlement negotiations facilitated by a neutral third party (known as mediation) are increasingly popular.
- Always take legal advice first to ensure the settlement discussions are conducted on a "without prejudice basis". This means that anything said about the dispute during the settlement negotiations or in any written settlement offer cannot be used later at the trial. This protection only applies to statements made purely in an attempt to settle the case.
- Consider who should handle any negotiations. It is generally advisable to appoint one person with overall responsibility.
- If an offer is made, your business should consider its present-day value, bearing in mind how long it will take to get to trial and the potential cost of litigation.

## **Practical steps to take when a dispute or potential claim arises**

- Your business should take legal advice as soon as possible after an incident occurs.
- If your business receives any formal documents requiring a response within a specified time, take legal advice immediately.
- Do not leave everything to the last minute. There are time limits your business needs to comply with. Ensure you:
  - know which time limits apply; and
  - have enough time to comply with them.
- Your business should not talk to the other party without having a lawyer present. You do not want to say something that may be used against you at a later date.
- Do not admit anything or agree to settle without taking legal advice. If your business is forced into a discussion without legal advice, you should not admit anything or agree to settle.
- Limit internal discussions to those with a real “need to know”. However, ensure that anyone within your business with day-to-day contact with the other party is aware that there is a potential dispute.
- Do not communicate with any external party (for example, a trade association) without taking legal advice. Do not send documents relevant to the case to external parties or ask them to send them to you without taking legal advice.

## **Do not destroy, delete or amend any relevant documentation**

- Your business should not destroy, delete or amend any documents or media containing information relevant to the case (for example, notes of conversations, diaries, e-mails, photographs or tapes).
- Suspend any routine destruction process that your business may have in place.
- Ensure everyone with access to information relevant to the case is immediately notified not to destroy it and to be careful when creating new documents.

## **Be careful when discussing a potential dispute or preparing a report on an incident**

Your business may have to show embarrassing or damaging documents to the other party or the investigating body as part of the legal proceedings. Therefore, be very careful what you write:

- Consider whether you need to create a written document.
- Think about what you are writing and how it would appear if it was read out in court. Take legal advice first if it is likely to contain confidential or sensitive material (for example, if you think you might be in breach of a duty owed to others).
- Never speculate, offer opinions or make critical remarks: simply stick to the facts.
- Remember that e-mails are documents, just like letters.
- Only send the document or e-mail to those who really need to see it.

Your business may have to implement improvements or changes in practices following an incident, implicitly showing your previous practice was flawed. Take legal advice to find the best way to do this without prejudicing any possible litigation.

### **Protected communications**

- Communications between your business and your legal advisers do not usually have to be shown to the other side or regulatory body. They are protected by the legal concept of privilege and the lawyer's general duty of client confidentiality.
- Some communications are not protected. For example, you should take legal advice before marking documents "privileged" or "confidential". Using these terms on a document or copying it to a lawyer does not, in itself, make it privileged or confidential.
- Privilege and confidentiality can be lost if the privileged or confidential information is distributed or copied too widely. Only circulate it on a real "need to know" basis and never copy it externally without taking legal advice beforehand.

### **Are you insured?**

Check your business' insurance policy to see if it is an insured claim. If it may be, notify your insurers immediately and follow their claims procedure, otherwise you could invalidate the insurance claim. Your business may need to seek the insurance company's consent before you take any action.

### **Establishing the case**

- **Evidence.** Locate and preserve any relevant materials as soon as possible.
- **Witnesses.** Identify anyone who may be relevant to the case and, therefore, may have to give evidence. Are they still employed by your business, if not, can they be traced? Tell your legal advisers immediately if there is any reason they might not be able or willing to give a statement (for example, if they were dismissed or are ill).
- **Other parties.** Tell your legal advisers if there is any other party who may be liable or should be involved in the case (for example, had you sub-contracted the disputed work?).
- **Assets.** Inform your legal advisers if you think the other party may dispose of its assets so that it cannot pay if you win. You may be able to obtain a court order to secure your claim. Also consider where the other party's assets are.
- **Management time.** Keep a record of management time taken by the case.
- **Case review.** Review how the case is going on a regular basis. Consult all areas of your business on which the dispute is likely to have an impact.

### **More information**

If you have any questions about the content of this guide, please contact Helen Essery, [helene@n-v.co.uk](mailto:helene@n-v.co.uk)