

THE ULTIMATE GUIDE TO HANDLING BUSINESS DISPUTES: HOW TO AVOID SHOOTING YOURSELF IN THE FOOT

Strategies and techniques sophisticated business owners use when a business conflict arises.

Have you ever experienced a dispute in your business? With a business partner? With an employee? With a customer? With a vendor?

If you're not dealing with a dispute right now, I'm sure one has come up in some form or another in the past – and likely will again in the future.

Being a business owner can sometimes feel like you have a target on your back.

How a business initially reacts to a dispute is crucial in determining the outcome. That reaction could be the difference between avoiding litigation altogether, early settlement, or the stress and expense of multi-year, protracted litigation.

As an attorney, I see business disputes play out differently every day. While I am not writing to offer legal advice, there are best practices that you can tailor to your business *before* a conflict arises – or, if you're in the middle of a conflict, there are things you can do to “right the ship.”¹

Inside this guide, you will discover how to:

- **Effectively communicate** when a business dispute first occurs, whether it be with a business partner, an employee, a customer, or a vendor;
- **Handle relevant documents** so you have all you need to defend your business;
- **Implement processes** that will protect your business; and
- **Evaluate the pros and cons** of litigation.

¹ The contents of this guide are intended to convey general information only and not to provide legal advice or opinions. This guide should not be construed as, and should not be relied upon, for legal advice in any particular circumstance or fact situation. The information contained in this guide may not reflect the most current legal developments. No action should be taken in reliance on the information contained in this guide and we disclaim all liability in respect to actions taken or not taken based on any or all of the contents of this guide to the fullest extent permitted by law. An attorney should be contacted for advice on specific legal issues.

Nothing in this guide is an offer to represent you, nor it is intended to create an attorney-client relationship. An attorney-client relationship may only be established through direct attorney-to-client communication that is confirmed by the execution of an engagement agreement.

This guide and the summaries contained herein are not intended to indicate or guarantee that any of the same or similar results can be achieved in future matters; the outcome of a matter depends upon a number of factors. This guide is intended only to provide general information.

Who Am I?



I'm Kevin James, Partner at Becker Nelson Center & James in Placerville, CA. Our firm provides a range of quality, tailored legal services to businesses and individuals. Personally, I regularly counsel businesses from start-up to dissolution and I've litigated hundreds of business-law related cases.

Through this experience, I've seen first-hand how a business's initial reaction to a dispute can dramatically change outcomes over the course of a case. Because the initial reaction is so critical, I've created this guide of basic, actionable steps to prepare yourself and your business for the next dispute. Minor adjustments in processes and procedures can translate to savings of tens, or even hundreds, of thousands of dollars in legal fees – and in some cases, avoidance of legal fees altogether. While there are no guaranteed results, merely having a process in place will ensure you are more prepared to handle a dispute in the best possible way.

Through this guide, my goal is to educate you on how to make **smart, informed** decisions BEFORE your next business dispute. Instead of merely reacting to a conflict, as businesses often do. This guide is designed to make you think more proactively about your processes and procedures in order to prepare for solutions NOW.

Because this guide is proactive rather than reactive, I believe it is more valuable than any legal advice you'll get after a dispute has already occurred. I hope you feel the same way.

I've built my practice on educating my clients. As always, if you have any questions, don't hesitate to contact me at **(530) 295-6400** or **kjames@bncj-law.com**.

Sincerely,

Kevin A. James

PRACTICAL STEPS: HOW TO REACT WHEN A DISPUTE OR INCIDENT FIRST OCCURS

“You don’t need the reflexes of a Formula One racecar driver, or Herculean muscles, or the brain of an Einstein, to get out of an impossible situation... you just need to know what to do.”

Take Great Care when Preparing a Report on the Incident

- ❖ Appropriate documentation is important. However, documents and electronic files that you create or modify, or information you gather **after** you are on notice of the dispute, are subject to disclosure to adverse parties in a case.
- ❖ Be accurate. Because you may have to show this information to an adverse or investigating body as part of legal proceedings, regardless of whether it is embarrassing, damaging, or confidential (although you may be able to protect confidentiality to some extent), take great care in what you write.
- ❖ **Before** creating a new document about the dispute:
 - Talk to a lawyer.
 - Consider whether preparing a written document is appropriate and warranted.
 - Beware of emails, text messages, and social media posts; like letters, they are documents and they exist forever.
 - Think about what you are writing and how it may sound if it was read out loud in court.
 - Never speculate, offer opinions, or make critical comments; stick to the facts.
 - Only send the document to those who really must see it.
 - Do not create, edit, or send a business document on a personal computer or using a personal email address. **This could result in your personal information being disclosed in a later lawsuit.**

- ❖ Assess practices **before** making changes. The company may decide to implement improvements or changes in practices following an incident, which could be used to show that a previous practice was flawed. Talk to a lawyer about the best way to do this without prejudicing the company's litigation position.

Inform Your Lawyer Immediately

- ❖ Contact your attorney even if you don't think the incident (including threats to breach an agreement, bring a lawsuit, or file a report with a regulator) is a major one. When in doubt, raise the issue.
- ❖ Always promptly notify your attorney if you receive a formal document (whether legal or not) or a document that requires a response within a specified time. This could be a demand letter, a letter from an attorney, a formal complaint, or subpoena.
- ❖ Try not to leave anything for the last minute, especially if there are time limits within which you must react. A rushed application or response won't do you any favors. It is critical that you give your legal advisor enough time to work with you and your team to develop a strategy. Changing course in the middle of a dispute because there wasn't enough time to develop a strategy upfront could undermine your position.

Do Not Communicate with Opposing Parties Without a Lawyer Present or a Full Briefing

- ❖ Avoid discussions with your adversary before first speaking with your legal advisor, even if you think what you have to say will deter a lawsuit.
 - ❖ Avoid **any** communications with counsel representing the opposition without your attorney present.
 - ❖ Talk to your lawyer before putting anything in writing, including an email. You do not want to say something that may be used against you or your business later.
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Do Not Admit Anything or Agree to Settle Without Legal Advice

- ❖ If you are forced into a discussion about a dispute without first having the opportunity to consult your attorney, do **not**:
 - admit anything;
 - agree to settle; or
 - apologize.
- ❖ Use phrases like...
 - “I appreciate you contacting me. I need some time to digest this information before getting back to you,” or;
 - “I need some time to discuss this with my attorney before getting back to you,” or;
 - “I need some time to review your proposal.”

All these phrases allow you to obtain information without agreeing to something while simultaneously giving you time to contact your lawyer.

- ❖ Talk to your lawyer immediately after any conversations with the other side.

Limit Internal and External Discussions to Folks with a Real Need to Know

- ❖ Protect privilege. Do not repeat conversations had with your attorney.
- ❖ Maintain confidentiality. Check with your lawyer before talking to internal employees or external third parties (for example, vendors, clients, suppliers, distributors, family, and friends) about a potential or active lawsuit.
- ❖ Do not communicate about the dispute in writing (including emails, instant messages, and text messages) with other employees or individuals outside your company, including family and friends.
- ❖ Ensure that anyone in your company who has day-to-day contact with the other party is aware of the dispute and does not discuss it with the other party.
- ❖ Do not mention the lawsuit on any social media sites, such as Facebook, LinkedIn, and Twitter, or blogs.

Do Not Talk to the Media or any External Party (For Example, a Trade Association) Without Legal Advice

- ❖ If you receive any media inquiries about the conflict, you can use one of the phrases discussed in the prior section or just say “we have no comment at this time.”
- ❖ Do not send documents relevant to the case to any external parties or ask them to send any to you without first getting approval from your lawyer.
- ❖ If you are approached by law enforcement, only say that the company is represented by counsel and that you were advised to refer all questions to him/her.

PRACTICAL STEPS: HOW TO HANDLE DOCUMENTS

Document Appropriately Before a Dispute

- ❖ Depending on the situation and your business practices, appropriate documentation of facts in the ordinary course of business may be helpful and, in some instances, required.

After a Dispute, Do Not Destroy, Delete, or Amend Documents

- ❖ Do not destroy, delete, or amend **any documents** or **any media** on which information relevant to the case is recorded. For example, emails, notes of conversations, notebooks, diaries, tapes, photographs, computer records, and designs, and even annotations or comments on documents, must not be destroyed.
- ❖ Suspend any routine document destruction process the company may have in place for which you control and do not rearrange your files.
- ❖ Ensure that, if there is a potential or active dispute, everyone who has access to information that may be relevant to the case is immediately notified not to destroy or alter it.
- ❖ Have employees notify your attorney before creating new documents that may be relevant to the dispute.
- ❖ If you are unsure about what documents and other information may be relevant to a particular dispute, check with your lawyer.

- ❖ For employees with relevant information that leave the company while the dispute is pending, ensure that all their documents have been properly preserved and that any information they possess outside of company property (for example, documents in their home files or saved electronically on their personal computer or mobile device) is returned to the company. Also make sure that you have their contact information if needed.

Correspondence Protected from Disclosure

- ❖ Communications between the company and its lawyers (both in-house and external counsel) may be legally withheld from the other side or a regulatory body if they are covered by the attorney-client privilege, work product doctrine, or some other recognized privilege or protection.
- ❖ Do not assume something is privileged or confidential. Call your lawyer before communicating with other company employees because some communications **are not protected**.
- ❖ Only mark documents “privileged” or “confidential” on the advice of your attorney. Marking a document privileged or confidential 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 revealed to anyone outside of counsel and client. Only circulate information on a real need-to-know basis and never copy externally (including sending a copy to a personal email account or saving it on a personal computer) without legal advice.

PRACTICAL STEPS: HOW TO EVALUATE THE PROS & CONS OF LITIGATION

Understand What Litigation Involves

It is almost always better to avoid a lawsuit, but sometimes conflict is unavoidable. Prior to engaging in litigation, it's important you consider:

- ❖ The value of the claim, the costs involved, and the commercial implications of succeeding or failing.
- ❖ The commitment of time, cost, and management, much of which is required early on.
- ❖ How this will affect the company's ongoing commercial relationships.
- ❖ What the effect will be, for both sides, if the dispute is made public.

- ❖ Whether there is a commercial advantage to the dispute (for example, by showing the company is serious about trademark infringement).
- ❖ Whether the other side is able to pay up if the company wins.
- ❖ Whether the company can prove the case. Be sure to assess honestly the strengths and weaknesses of the case.
- ❖ The unpredictability of litigation. Success in a lawsuit turns on several factors, many of which may not be in the company's control or apparent until the case has progressed for some time.

Can the Company Negotiate a Settlement?

- ❖ Settlement talks can take place at any time during the litigation process, even during a trial.
- ❖ Settlement negotiations undertaken by a neutral third party through mediation are increasingly popular and encouraged or even required by the courts in some jurisdictions.

Consult the Your Attorney if You Decide to Settle

Before engaging in settlement discussions on behalf of the company, always consult your attorney. You should not speak with counsel for the other side without a legal representative. Your attorney will be able to advise on various aspects of the settlement, including:

- ❖ Whether the proposed settlement agreement:
 - is enforceable; and
 - offers adequate protection to the company.
- ❖ Whether the settlement negotiations and terms will be protected from disclosure to third parties.
- ❖ How to draft a valid confidentiality agreement.
- ❖ The present-day value of the settlement, bearing in mind how long it may take to get to trial and the potential cost (and success) of the litigation.

PRACTICAL STEPS: HOW TO MAXIMIZE YOUR ROLE IN LEGAL PROCEEDINGS

Helping the Case

- ❖ **Evidence.** If asked by your attorney, you can help gather evidence by:
 - Locating and preserving all relevant materials (for example, contracts and emails), whether favorable or not, as soon as possible.
 - Making a list of all individuals (current and former employees and third parties) that may have relevant documents.
 - Contacting all current employees about preserving their documents.
 - Discussing with your attorney how to contact former employees.
- ❖ **Witnesses.** You can help identify favorable and unfavorable potential witnesses by:
 - Advising your attorney of anyone (including current and former employees and non-employees) who may be relevant to the case and therefore may have to testify at a deposition or at trial.
 - Telling your attorney immediately if you know of any reason why any potential witnesses may not be able or willing to give a statement (for example, their employment may have been terminated or they have become ill).
- ❖ Do not reach out to potential witnesses without authorization from your attorney.
- ❖ **Consider other parties.** Tell your attorney if there is any other party who may be liable or should be involved in the case (for example, if the disputed work was handled by a subcontractor).
- ❖ **Opposing Party's assets.** Tell your attorney immediately if you think that the other side may try to get rid of its assets so it cannot pay up if the company wins. The company may be able to get a court order to stop them.
- ❖ **Press coverage.** Avoid reading any press coverage about the dispute and encourage others to do the same. It may impact your recollection of the relevant facts.
- ❖ **Be aware.** Ask your attorney regularly how the case is going.

Insurance Coverage

- ❖ Your attorney is responsible for checking the company's insurance policy to see if the claims that form the basis of the lawsuit might be covered by the policy. If the claims are covered by the company's insurance policy, your attorney must notify the company's insurers immediately and follow their claims procedure. Otherwise, the insurer may decline coverage.
- ❖ It is important to report any potential claim immediately so that the insurer does not deny coverage.
- ❖ You should fully cooperate with your attorney and the insurer.
- ❖ If the claims are covered by the company's insurance policy, the company may need to seek the insurance company's consent before taking any action.

CONCLUSION

While you strive to provide the best possible service to your customers, employees, partners, and vendors... at some point you will have to deal with a business dispute. Whatever your process is, it is important that you have one for handling these conflicts. Thinking critically about (1) your initial reaction to the incident, (2) how you handle the relevant documents involved, (3) how you handle communications after the incident, and (4) when a lawsuit might make sense, will only improve your ability to resolve the situation. Advice from a professional early in the process can help immensely. As I said at the beginning, I've built my practice on educating my clients. If you have any questions at all about a current business dispute, or how to handle the next one, don't hesitate to contact me at **(530) 295-6400** or **kjames@bncj-law.com**.