The ABCs of NDAs

Seven Common Questions Answered for Constructing a **Non-Disclosure Agreement**

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Law Insider

Introduction

To draft a well-organized and comprehensive Non-Disclosure Agreement, the attorney should consider seven critical questions. As we explore the answers to each question, we will look at examples to illustrate the key ideas discussed.

A properly negotiated Non-Disclosure Agreement (NDA) is unique to every transaction between parties. Every transaction or business relationship is different. Parties and their counsel should view the NDA as a formal introduction to one another. The terms of the NDA and how the parties negotiate are often early indicators of how each party conducts business in general. If the other party is inflexible regarding the terms they propose for the NDA, a party and its counsel should take this as a sign that the other party may be inflexible in future negotiations. Successful NDAs take both parties' concerns and protection into consideration.

While this eBook focuses on what should be included, it is important to note at the outset what should not. It is this lawyer's view that an indemnification clause should not be included in an NDA. Shifting of risk is not appropriate at this stage, when the parties are simply starting a conversation that may or may not lead to future transactions, agreements, or business relationships. No monetary exchange is made at the signing of an NDA. If an NDA is breached, and it has been properly drafted, the wronged party has a remedy for that breach. A party can sue and collect damages, if such a breach is proven in court.

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1 What is an NDA?

An NDA is a legal document that is intended to protect confidential information of one party or both parties. NDAs can also be referred to as confidentiality agreements, confidential disclosure agreements, or proprietary information agreements.

An NDA is most commonly executed prior to the disclosure of confidential information by one party, the "Disclosing Party," to potential clients, investors, employees, partners, suppliers, or any other individual or company that needs access to that information in order to consider and negotiate a transaction.

NDAs are either unilateral or mutual. In unilateral NDAs, the disclosing party is conferring confidential information to the other party, the "Receiving Party." In mutual NDAs, both parties are disclosing confidential information and both the disclosing and receiving parties are held accountable for the confidentiality of the other party's information.

NDAs are the starting point of most transactions, for example when discussing the sale or licensing of a product or technology; presenting an offer to a potential investor; hiring an employee who will have access to their employer's confidential information; or any time there is important, proprietary information that may need to be shared between parties. NDAs protect the disclosing party from revealing its confidential information and the receiving party taking that information and using it to its own benefit or in a way that could negatively impact the disclosing party.

2 How Do I Define Confidential Information?

Confidential information should be specific to each transaction.

Therefore, clearly defining what is and what is not confidential information is important to both parties.

The disclosing party will want to define confidential information as broadly as possible. They will likely shy away from needing to mark information as confidential or stating that only written information should be considered confidential. On the other hand, the receiving party will negotiate for a narrow definition of confidential information, most often to lower the risk from potentially disclosing confidential information in the future.

EXAMPLE

A definition of confidential information for a technology company may read as follows: "Confidential Information includes, without limitation, identity, technical know-how, intellectual property, trade secrets, marketing and sales information, business plans, technical, financial, and other non-technical information (whether oral, documentary, electronic, or in any other form). For the avoidance of doubt, all such information shall be Confidential Information whether or not it is expressly stated or marked as confidential."

2 How Do I Define Confidential Information?

(continued)

What is excluded from the definition of confidential information is just as important as what is included.

Most business relations and transactions will include information that cannot reasonably be considered confidential. Exclusions often protect the parties any time the confidential information needs to be disclosed.

EXAMPLE

A clause that defines what is excluded as confidential information may read thus: "Except as required by applicable federal, state, or local law or regulation, the term "Confidential Information" as used in this Agreement shall not include information that: (i) at the time of disclosure is, or thereafter becomes, generally available to and known by the public other than as a result of, directly or indirectly, any violation of this Agreement by the Receiving Party or any of its representatives; (ii) at the time of disclosure is, or therefore becomes, available to the Receiving Party on a non-confidential basis from a third-party source, provided that, to the best knowledge of the Receiving Party, such third party is not and was not prohibited from disclosing such Confidential Information to the Receiving Party by a contractual obligation to the Disclosing Party or a third party."

3 What is an Appropriate Time Limit for an NDA?

All NDAs should have a term and a termination.

Most NDAs expire after a fixed period or by a nullification of the agreement because the information is no longer considered confidential. Some time periods are indefinite to protect trade secrets or may last as long as possible for other forms of intellectual property. Even if an NDA is terminated, the rights and obligations of each party should survive.

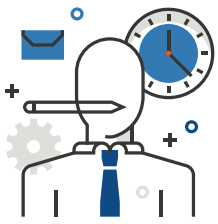
EXAMPLE

A term and termination clause could read as follows: "The term of this Agreement shall commence on the Effective Date and shall expire one year from the Effective Date, provided that either Party may terminate this Agreement at any time by providing written notice to the other Party. Notwithstanding anything to the contrary herein, each Party's rights and obligations under this Agreement shall survive any expiration or termination for a period of five years from the date of such expiration or termination, even after the return or destruction of Confidential Information by the Receiving Party, and provided further that the obligations of confidentiality and non-use shall continue as to all Confidential Information that constitute trade secrets for as long as such Confidential Information shall qualify as trade secrets."

4 When is Disclosure of Confidential Information Required?

There are exceptions to the non-disclosure rule of confidential information under an NDA, namely administrative or legal proceedings.

Applicable federal, state, or local law; regulation; or valid order issued by a court or government agency of competent jurisdiction would be considered a required disclosure. However, such disclosure may also require acts to protect the party whose confidential information is being sought through an administrative order.



EXAMPLE

Placing a burden on the disclosing party prior to any required disclosure of confidential information may read as follows: "Before making any such disclosure, the recipient shall make commercially reasonable efforts to provide the Disclosing Party with: (i) prompt, written notice of such requirement so that the Disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and (ii) reasonable assistance, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure."

5 Do I Have to Return or Destroy Confidential Information?

It's important to include a clause, defining how all of the confidential information exposed by either or both parties.

Some parties give the option to return or destroy the information. Others require a certificate or destruction. Yet others allow the receiving party to keep confidential information of the disclosing party in its computer systems as part of its regular backup procedures, until the information is released in the ordinary course of business. These clauses should note that while in such backup systems, the confidential information shall enjoy the appropriate protections set forth in the agreement.

EXAMPLE

An example of a destruction of confidential information might look like this: "The Receiving Party shall return or destroy all Confidential Information (including copies) that the Disclosing Party made available to the Receiving Party under this Agreement when (i) the purpose for disclosing the Confidential Information is completed or (ii) upon request by the Disclosing Party. Each Party may retain, subject to the terms of this Agreement, a copy of Confidential Information required for compliance with its internal recordkeeping requirements."

6 Does Jurisdiction or Governing Law Really Matter for an NDA?

Yes. The jurisdiction, governing law, and venue covering the NDA can be critical. The time and expense of traveling to a different state or country for any lawsuit can be overwhelming. Additionally, there is always something to be said for having home court advantage. Your chosen jurisdiction will likely have more favorable interpretations of particular clauses of your NDA.

EXAMPLE

A comprehensive clause addressing jurisdiction, governing law, and venue reads as follows: "This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction) that would cause the application of Laws of any jurisdiction other than those of the State of New York. Any legal suit, action, or proceeding arising out of or related to this Agreement or the matters contemplated hereunder shall be instituted exclusively in the federal courts of the United States or the courts of the State of New York, in each case located in the city of New York and County of New York, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding and waives any objection based on improper venue or forum non conveniens. Service of process, summons, notice, or other document by mail to such Party's address set out herein shall be effective service of process for any suit, action, or other proceeding brought in any such court. The prevailing party shall be entitled to reimbursement for its costs and reasonable attorneys' fees.

6 Does Jurisdiction or Governing Law Really Matter for an NDA?

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You must understand how your chosen jurisdiction, governing law, and venue will influence the interpretation and enforcement of the remedies clause in your NDA.

In the event one party breaches the NDA, the parties may have agreed to monetary damages or injunctive relief. Injunctive relief may be important too. For example, the cost of the breach could be difficult to ascertain for an artificial intelligence company with intellectual property and many patents pending.

EXAMPLE

An example of a remedies clause that would be enforced in and by your chosen jurisdiction, governing law, and venue should include the following: "Each Party acknowledges and agrees that money damages might not be a sufficient remedy for any breach or threatened breach of this Agreement by such Party or its Representatives. Therefore, in addition to all other remedies available at law (which neither Party waives by the exercise of any rights hereunder), the non-breaching Party shall be entitled to seek specific performance and injunctive and other equitable relief as a remedy for any such breach or threatened breach, and the Parties hereby waive any requirement for the securing or posting of any bond or the showing of actual monetary damages in connection with such claim."

7 Does Signing an NDA Mean I Have to Transact or Do Business with the Other Party?

Absolutely not! The NDA does not create any kind of relationship, joint venture, partnership, or requirement to enter a business transaction.

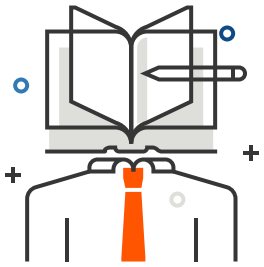
The parties should not be under any obligation to even continue negotiations. An NDA is not a binding agreement for a transaction.

EXAMPLE

Here is a way to communicate that the NDA does not require parties to do further business: "This NDA is not intended by the Parties to constitute or create a joint venture, limited liability company, pooling arrangement, partnership, or other formal business organization of any kind, and the rights and obligations of the Parties shall be only those expressly set forth herein. Nothing contained in this NDA shall grant to either Party the right to make commitments of any kind for or on behalf of the other Party without the prior, written consent of the other Party. Each Party shall bear all costs, expenses, risks, and liabilities incurred by it arising under requirements of this NDA. Neither Party shall have any right to any reimbursement, payment, or compensation of any kind under this NDA. The Parties agree that neither Party shall be under any legal obligation of any kind whatsoever or otherwise be obligated to enter any business or contractual relationship, investment, or transaction, by virtue of this Agreement, except for the matters specifically agreed to herein. Either Party may at any time, at its sole discretion with or without cause, terminate discussions and negotiations with the other Party in connection with the Purpose or otherwise."

Conclusion

NDAs are a critical component to beginning a business relationship or entering a transaction.



Every party has valuable information it discusses every day, which often includes the trade secrets, new ideas, and critical intellectual property that gives the party its competitive edge. Any time confidential information is disclosed to potential business parties, clients, customers, or investors, an agreement addressing how each party ought to treat the other's confidential information should be put in place. A properly drafted NDA not only deters theft of intellectual property, but it also allows both parties to build a relationship based on mutual trust and confidence.

ABOUT

Julie Grantham

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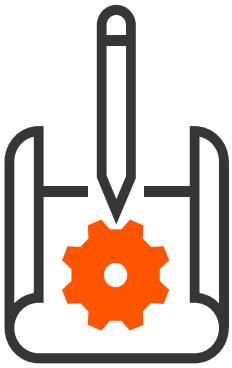

Julie Grantham holds over 18+ years of experience with a focus in corporate law including General Counsel for some of the nation's top, small businesses. Ms. Grantham has a proven track record for helping businesses create viable legal solutions and developing new in-house legal processes to support their growing organizations. Ms. Grantham also served as an Adjunct Professor at The University of Texas School of Law.

Ms. Grantham is a 1996 graduate of The University of Texas in Austin and a 1999 graduate of DePaul University College of Law. She is a member of the State Bar of Texas, the American Bar Association, and Association of Corporate Counsel.

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