

Forty-five Nondisclosure Agreement Review Tips

A NONDISCLOSURE AGREEMENT (NDA), ALSO CALLED A

confidential disclosure agreement, confidentiality agreement, or secrecy agreement, is a contract between at least two parties that outlines the exchange of confidential information or knowledge that is otherwise restricted from general use. In other words, it is a contract through which the parties agree not to disclose information covered by the agreement. An NDA creates a confidential relationship between the parties to protect nonpublic business information.¹

NDAs are perhaps the most important and widely used business agreement, but due to time constraints, many people quickly review an NDA and rush to put the agreement into place without a thorough examination. During my 30-year contracts career, I have gradually developed an NDA checklist of 45 tips that I routinely refer to before I either review or draft an NDA. Such a checklist aids in not overlooking important issues.

The contractual position that one takes on NDA issues often depends upon whether one is the discloser, recipient, or both discloser and recipient of confidential information. There are many aspects to consider—the most helpful of which are listed here.

1. Should the NDA be incoming, outgoing, or two-way (bilateral)?
2. Are the names, addresses, entity types, applicable affiliates, and jurisdictions of the parties correct?
3. Is the effective date (start date) of the NDA correct?
4. Is there a stated purpose of the NDA?
5. Does the NDA cover both nondisclosure and non-use by the recipient?
6. Does the NDA have a term during which confidential information is disclosed, and after that time no further disclosures or other uses are to be made?
7. Are there any specifically stated confidentiality safeguards?
8. Is it stated that the recipient personnel should have access on a need-to-know basis only?
9. Is there a termination for convenience provision with regard to the term (disclosure period) of the NDA (not the confidentiality period)?
10. What happens in the event of a breach?
11. Upon termination or expiration of the NDA, how is the return of confidential information or destruction of confidential information handled?
12. Should there be a provision for the recipient's legal counsel to have the right to retain one copy of the discloser's confidential information for archival or evidentiary purposes?
13. Is there a clearly stated confidentiality period?
14. Is the length of the confidentiality period appropriate for the useful life of the confidential information?
15. Should special protective provisions and a special confidentiality period be included for the discloser's "trade secret" information?
16. Is confidential information defined accurately?
17. How will verbal or visual confidential information be identified?
18. Is the NDA itself to be considered confidential?
19. What information is excluded from coverage of the NDA?
20. Is the allocation of intellectual property rights appropriately handled?
21. Does the NDA appropriately address derivative works of the discloser's confidential information created by the recipient?
22. Is there a "no implied license" clause?
23. Is there a requirement for the discloser to identify confidential information in writing (and to stamp it as confidential or proprietary) at the time of disclosure to the recipient?
24. Does the NDA have the following five carve-outs from confidentiality:
 - Publicly available;
 - Already in recipient's possession at the time of disclosure;
 - Rightfully received by recipient from a third party without confidentiality obligations;

- Independently developed by recipient without use or benefit of the confidential information; or
 - Disclosure required by law or regulation with reasonable opportunity for discloser to oppose disclosure?
25. Is there a “residual” clause that allows the recipient to use, in future products or services, all information retained in the memory of the recipient’s employees that was obtained from reviewing the discloser’s confidential information? If so, should the residual clause be included, modified, or deleted?
 26. Should there be a “no reverse engineering (no decompiling/ disassembling) clause” in the NDA?
 27. Is there an entirety (entire agreement between the parties) clause in the NDA?
 28. Are NDA modifications only to be made in writing and signed by the parties?
 29. Are warranties and disclaimers of warranties appropriately addressed regarding freedom of intellectual property infringement, accuracy, and completeness?
 30. Are indemnifications and disclaimers of indemnifications regarding general liability indemnifications and intellectual property infringement indemnifications appropriately addressed?
 31. Is the applicable state law and jurisdiction stated in the NDA?
 32. Is there a waiver of consequential (indirect) and incidental damages and is it appropriate?
 33. Is export compliance appropriately addressed?
 34. Is compliance with state and federal securities laws by the recipient regarding insider trading appropriately addressed?
 35. Is there a statement in the NDA that there is no obligation to proceed with any business transaction between the parties?
 36. Is there an acknowledgment that a temporary injunction or other injunctive relief may be a remedy?
 37. Should there be a provision stating that the prevailing party in any action to enforce the NDA shall be entitled to reasonable costs and attorney fees?
 38. Is there a severability/illegality clause?
 39. Is there a “no implied waiver” clause?
 40. Is there a statement that there is no joint venture or partnership to be

inferred from the NDA between the parties?

41. Will the NDA be superseded by the confidentiality provisions of a subsequent agreement between the parties?
42. Should there be language providing for protection against the recipient’s solicitation for employment of certain of the discloser’s employees for some amount of time?
43. Is the NDA appropriately set up for signature by the appropriate parties?
44. Don’t assume. What is missing?
45. Look for conflicts.

The next time you review an NDA, pull out this checklist to ensure you have captured all of the necessary items for your specific agreement. You will be surprised how many important issues it will generate for internal and external discussion and resolution. **CM**


Endnote

1. Wikipedia contributors, “Nondisclosure Agreement,” *Wikipedia, The Free Encyclopedia*, http://en.wikipedia.org/w/index.php?title=Non-disclosure_agreement&oldid=70236753 (accessed August 30, 2006).

About the Author

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