

Sorry, That's Confidential!

And to Keep It That Way, Businesses Can Make Use of the NDA

By Kenneth Albano, Esq.

In the legal world, we use the term 'attorney-client privilege,' while in the medical field, you may have heard the expression 'doctor-patient confidentiality.' Both terms are used in circumstances where a lawyer or doctor must maintain confidentiality to best protect a client or a patient.

In a business setting, the term 'confidential' can be used on many fronts, most notably in the context of a formal confidentiality/non-disclosure agreement, more commonly known as an NDA.

The use of an NDA can be seen in many different business scenarios, with the primary purpose being to protect confidential information from being revealed to the public or an unwanted third party, or from being used without the consent or knowledge of the first party.

Within the NDA document itself, the two parties are known as the 'disclosing party' and the 'receiving party.' The disclosing party is the person requesting that the receiving party sign the NDA, in order to protect the confidential information at stake.

For example, if an owner of a company were looking to retire and possibly sell the business to a competitor, he would not want to offer up proprietary information without protection. In a case like this, the retiring business owner might ask his purchaser or competitor to sign an NDA, which would protect the business owner while the two parties negotiated the terms for the sale of the business.

The content of an NDA can typically be broken down into five main components:

- **Define the parties.** This means laying out in clear terms who is the disclosing party and who is the receiving party. Typically the parties are individuals. Within the NDA document, the receiving party will be bound by numerous covenants or conditions associated with the protection of the confidential information being used or revealed.

- **Describe the nature of the transaction the NDA is governing.** For example, an NDA might be used to protect confidential information associated with the hiring of a new employee or executive, keeping business information private when working with independent contractors, preventing an idea or invention from being stolen or infringed upon, or protecting proprietary or secret

company information that might be disclosed during a potential sale of a business.

- **Include all the details.** Within the NDA, it is important to specifically define, in great detail, exactly what constitutes the confidential information to be protected. In our prior example of the sale of a business, the NDA might prevent the receiving party from



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revealing any information about the business — whether it were oral or written information concerning the company, technical information, proprietary sales and financial data, software products, marketing strategies, customer lists, personnel records, or any information supplied by the business to the receiving party by the company or its representatives.

In another example, if the NDA were being used for the purpose of hiring a new employee or executive, the definition of the confidential information might include various proprietary information belonging to the company, about which the new employee would become aware during his or her employment. This type of protective covenant regarding confidential information can also be found in a written employment agreement or non-compete agreement as well.

- **What information is allowed to be disclosed by the receiving party without violating the NDA?** Under normal circumstances, confidential information does not include (a) information generally available or known to the public; (b) information that was already known by or available to the receiving party; (c) information subsequently disclosed to the receiving party by a third person, under no obligation of confidentiality to the disclosing party; or (d) information required to be disclosed as part of a judicial process, government investigation, or legal proceeding.

This type of information would normally

be presented as a defense by the receiving party, if litigation alleging a violation or threatened violation of the NDA was commenced by the disclosing party.

- **Define the consequences of a violation.** If the receiving party breaches or violates the terms and covenants of the NDA, in most cases, the disclosing party can pursue a legal

remedy via the court system. Remedies may include but not be limited to preventing further disclosure or use of the confidential information, award of damages, or other equitable relief as may be provided under the law.

Other important elements of an NDA include the length of time the agreement is to be in effect (the 'term'), and also the governing law which would interpret the terms of the NDA should a conflict arise, and which is generally the state law for the state or commonwealth in which the disclosing party is doing business.

If your company is involved in a transaction where proprietary information could be disclosed to an independent third party, consider the use of an NDA. You have worked long and hard to develop and grow your business, and without the protection of an NDA, loss of information could have very real financial repercussions. ♦

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