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Key Issues on Non-Disclosure Agreements (NDA)

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Most NDAs arise either (a) between people who are evaluating whether to do a deal or (b) as part of a transaction to which the parties are already committed (legally, economically or otherwise). Which of these categories you fall into influences what types provisions your NDA should contain.

Similarly, most NDAs distinguish between the "Disclosing Party" and the "Receiving Party." The Disclosing Party is, of course, the party disclosing confidential information. Conversely, the Receiving Party is the party receiving the confidential information disclosed by the Disclosing Party.

Mutual vs. One-Way

NDAs can be either mutual or one way. A mutual NDA requires each party to protect the confidential information to the other party. A one-way NDA contemplates that only one party will be disclosing confidential information.

If you won't be disclosing any confidential information, then you may not need a mutual NDA. Conversely, if only you will disclosing confidential information, you may only want a one way NDA. Remember, receiving confidential information carries with it certain duties to the other party. If you are not prepared to comply with those duties, then you may not want the other party to disclose its confidential information to you.

Duration

Like all contracts, NDA's can have limited durations. Only you can evaluate whether this makes sense. If, for example, the confidential information has a limited shelf life, then it may be quite reasonable to limit the duration of the confidentiality obligation to a term of years. However, if the confidential information may remain confidential indefinitely, then the agreement should probably continue for as long as the confidential information remains confidential.

What's Covered?

Generally, if your confidential information is truly confidential, then you should be treating it that way. Among other things, all of you confidential information should be marked with a legend. However, companies frequently fail to observe these formalities. Consequently, such companies favor an approach whereby everything that is disclosed is treated as confidential. While this *appears* to be easy to administer, this approach has hidden problems.

As a practical matter, in any exchange of information, it is inevitable that some of the information exchanged will not be confidential. In most instances, the parties will be able to intuitively distinguish between information that is and is not confidential and will treat obviously non-confidential information as such. Relying on individual intuition, however, can be a dangerous thing. As a result, this course of dealing will result in a blurring of the line between truly confidential information and other non-confidential information despite the terms of the written agreement. It may not be apparent from the face of certain information as to whether it is confidential in nature. If the parties acquiesce in this course of conduct, it may be excusable for a party to fail to keep confidential information which, on its face, does not appear to be of a confidential nature. In short, this approach may ultimately weaken the strength of the NDA.

A preferred approach is to require that only materials which are labeled as confidential (or carry a similar designation) are obligated to be treated as confidential. For information disclosed orally, the Disclosing Party can orally advise the Receiving Party as to the confidential nature of the information and, to be safe, follow up the oral disclosure with a writing which carries such a confidentiality label.

What's Excluded?

There are four categories of information which are customarily excluded from any NDA. They are:

1. Information which is generally publicly available (through no fault of the Receiving Party);
2. Information which is previously known to a Receiving Party;
3. Information which later becomes known to a Receiving Party from a third party; and
4. Information which the Receiving Party developed independently.

Frequently Overlooked Risks

Third Party Inquiry. What happens if a third party (e.g., a litigant or governmental agency) requests, demands or subpoena's confidential information from a Receiving Party? Most NDA's deal with this possibility very generally. However, most NDA's fail to address the difference between a government agency request and a subpoena and fail to provide the Receiving Party with much guidance as to when it can and cannot disclose information and how much information is permitted to be disclosed. As a Receiving Party, it is important to clearly understand what your obligations are before these situations arise. As a Disclosing Party, it is important to understand how the recipient of your confidential information will respond in these cases.

Confidentiality vs. Use - All NDAs require the recipient to keep the Disclosing Party's confidential information secret. However, not all NDAs impose restrictions on the use of the confidential information. This is an important distinction. In many cases, it is not necessary to disclose confidential information in order to exploit it. For example, a competitor's customer list can be used internally to great advantage without ever disclosing it to a third party. If restricting use is important, you should make sure that the NDA expressly restricts use. An NDA used to allow two parties to evaluate a transaction should may require that the confidential information be used solely for the purpose of evaluating whether to enter into the transaction.

Change of Purpose. Frequently, companies sign a confidentiality agreement for one purpose, but make the mistake of relying on it for a different purposes. For example, consider two companies entering into an NDA to evaluate a possible transaction. When the transaction is consummated, a new NDA may be required since the initial NDA may have precluded the Receiving Party from using the confidential information for any purpose other than evaluating whether to enter into the transaction.

Return of All Documents. Many NDA's require that all documents be returned upon the termination of the NDA. While this might make sense for NDA's used for transaction evaluation purposes, this can be problematic for NDA's used as part of a consummated transaction. If parties exchange confidential information in connection with the conduct of business, then, even after the business is over, the parties may very well need to retain a copy of such information for evidentiary purposes. If either party is drawn into a law suit later, they may need to prove what information they received and what they did with it and why. For example, imagine that a software developer agrees that the source code it writes is the confidential information of the customer. After the code is written, the developer delivers it to the customer and deletes all copies of it. Later the customer claims that the source code didn't conform to the specifications. Without retaining a copy of the code, the developer cannot evaluate whether the code was modified after it was delivered to the customer.

Summary

While NDA's are common encountered, they are not all the same. In fact, they are as varied as the needs for which they are created in the first place. Companies are well advised to take a little time to think through the reasons why the NDA is needed in the first place and customize it to meet their specific needs.

This information is not to be construed as legal advice. If you have any questions please do not hesitate to contact the following attorney:

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