

Misconceptions of Non-Disclosure Agreements

By Brian Kirkpatrick

The name itself sounds so powerful: Non-Disclosure Agreement. How could anything be disclosed without repercussion if you have one of these? So you execute your NDA, and voila -- you're all protected and can hand over the farm without a worry. Not really. Before letting someone take free reign into your facility for information, consider a few misconceptions about NDA's:

1. My NDA is standard

Of course many NDA's have common clauses, but there are nuances that can be added or removed that can have a big impact. Sometimes, business owners will skip the dull parts like definitions, but how information is defined will often vary between NDA's. A definition that is too narrow can leave a business exposed to risk of out-of-scope information being left unprotected. A definition that is too broad can cause compliance headaches. Even a well-tailored definition of information may not be enough. Look for exceptions which can be riddled throughout an NDA, especially in areas that describe how information will be used.

2. Even irrelevant information is covered

You have a well-crafted information definition and have cared for exceptions, but you still need to stay on your toes. Realize that an NDA doesn't protect disclosure at all. The protection is up to you. An NDA will merely act as a tool to compensate you for a wrongful disclosure. Think about the fact that you hire the best employees, non-disclosures are signed, and codes of conduct are attested to, yet the doors and drawers stay locked in the HR and Accounting offices. Why? - Because information can be very sensitive. You should also consider whether you already have agreements with third parties to keep their information confidential. Covering your bases in an NDA is a great start, but it's still up to you to decide the sensitivity of information, what other agreements may conflict with your new NDA, and what the recipient ultimately receives.

3. It doesn't matter how information is provided

Now that you're settled on what the recipient can access, think about how you'll make your information available. If you're presenting a business idea, you can tell a great conceptual story without giving away the secret sauce. A software demo can be given without the source code like a tasty sample can be given without the recipe. So, if you must grant access to your information, ask whether the information can be delivered remotely so that other information is out of reach. Also consider whether a summary of the information makes more sense than providing raw data.

Consulting an attorney before signing, or asking someone to sign, a non-disclosure agreement can help ensure that your information is communicated by the most appropriate means.



About the author Brian Kirkpatrick:

Brian practices exclusively in intellectual property and technology law. He has drafted and negotiated hundreds of software contracts with a wide breadth of complexity including large-scale master services agreements (MSA's), software as a service (SaaS) agreements, and End-User License Agreements (EULA's). Before entering the legal profession, Brian was a licensed securities representative and Vice President level middle-market commercial banker.

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