



## **What Flavor is Your NDA?**

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Ah, the conundrums of a child's summer: butterscotch, or strawberry? Mint chocolate chip, or triple fudge? Cone or cup? Businesses have their less-tasty choices, but they are still there: what flavor is your non-disclosure agreement? There are almost as many options for NDAs as there are at your local ice-cream store.

NDAs are not one-size fits all. They need to be tailored to the situation. Here are some questions to ask about an NDA:

- Who is covered? If someone presents an NDA to you, does it cover only the other's sides secrets, or does it cover yours as well? If you off-handedly mention the secret of your competitive advantage, while the other side is discussing theirs, you don't want your secret exposed, while theirs is protected.
- What secrets are being covered? Is it about a specific type of information, like formulations, or financial data, or is it broader, so that anything you see, hear, taste, or feel is protected? If you walk across the production line and notice that they are using machinery in a unique way, are you prevented from using what you noticed?
- Is there a duty to return or destroy information? If you are giving out information, you probably don't want it lying around in the other side's files and computers forever. If the information is to be destroyed, it is usually not enough to assume that the other side will do it; there ought to be a positive representation that the information no longer exists, and was not copied.
- How long does the non-disclosure last? The NDA should identify how long it lasts, recognizing that different information has different periods of potency. Manufacturing methods can be useful for a very long time; customer research may be valueless after 12 months. If you are asking the other side to promise not to disclose matters, you want something that will last long enough that there will be no competitive advantage.



- Is there a geographic limitation to the information? Is it banned in one area, but not another?
- Who is obligated to protect information? Does the NDA cover subsidiaries, parent companies, or joint venturers? Is there a specific competitor you want to make sure does not get the information, even if it buys the other side later? Are there specific individuals on the other side that you want to be the only ones to see the information? If so, that needs to be in the NDA.
- What happens if the NDA's provisions are violated? Is there a mandatory damage provision that lawyers call "liquidated damages?" How and where is a violation proven – in a court of law, or in mandatory arbitration? Does the loser have to pay the winner's attorneys' fees? Often, the question of attorneys' fees controls the decision whether to take it to court.

One of the delights of the ice cream shop is selecting your serving size and flavor. No one goes in to get whatever the kid behind the counter is willing to give. The same should be true for an NDA – it should be based upon your selections, not on what is given to you. While no NDA could taste as delicious as a double scoop of strawberry ice cream on a sweltering day, the sensation of getting what you want can be just as pleasant.