

## ***Non-Disclosure Agreements***

While discussing your new business idea at the dinner table, your father tells you "Better protect yourself with a non-disclosure agreement before you meet with that investor." You nod your head like a good son, pretend like you know what he's talking about, and continue munching on your chicken.

Lots of people throw out the terminology – confidentiality agreement, confidential disclosure agreement, or non-disclosure agreement. Call it any of these, but what is it and when should you use one?

An example of when to use one is the above case; a new business idea that you need to present to a prospective investor or business partner. You may need or want to tell them your idea so they can evaluate how they might work with you, but you want them to promise not to tell anyone else.

Technically speaking, a confidentiality agreement or non-disclosure agreement (NDA) is a promise made by one party to another not to tell anyone else what the other party tells them in confidence. You use it to protect your ideas, trade secrets, inventions, designs and the like. It is usually embodied in the form of a written, signed contract. If the other party breaks the terms of the contract, you may have some recourse against him or her in a breach of contract claim.

From an employer's perspective, your employees are required to protect your confidential information, but you should have third parties such as potential buyers, licensees, and manufacturers sign NDA's, as should outside bookkeepers, marketing firms and others that have access to your confidential data.

A good NDA introduces the parties and describes their relationship and intentions. Is this an individual looking for someone to prototype an invention? Or is this someone with company trade secrets that is looking to sell the business? Very different situations that require very different agreements. The reason why the other party would be willing to bind itself in this fashion should be apparent from the agreement. People don't make serious promises for nothing. In legalese, it is called consideration.

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The NDA should explain, in some detail, the subject matter of the agreement. Could be a client list, manufacturing process, or a novel knife sharpener - there should be some description disclosed. You have to tell 'em what you are going to tell 'em in confidence, so you can tell the judge if you need to, what you told them that they told someone else. Got it?

The duration of the NDA should be stated, along with the terms of the confidentiality – typically prohibiting unauthorized disclosure and use. If there is an exchange of documents, files, or hardware, the NDA should explain how and when the materials are returned. Note – all materials should be explicitly marked "CONFIDENTIAL".

The other party to the agreement is also trying not to get handcuffed by the NDA on current or future projects. Some companies have policies where they refuse to sign any type of NDA. This policy exists because companies were tired of being sued because they signed an NDA for a product that was already in their designs but not yet released.

Thus, there usually is a section in the NDA that carves out some room for those trade secrets already in their possession, materials or information that is common knowledge, and those confidential or proprietary data that falls into their lap innocently through a third party.

The NDA is enforced under contract law, which is governed by state law. In some cases, you may be able to select your home state law as controlling. This could be beneficial if the other party is on the West Coast or in an unfriendly jurisdiction.

Finally, the parties should sign the NDA, and print name and title. Nothing worse than looking at a signed NDA and not being able to decipher who signed it. The document should be kept in a safe place for storage and future use, should the need arise.

Go to any search engine and you will find all sorts of NDA forms for examples. Most people seem to think a one-page "universal" NDA form will be perfect – but it just does not exist. Every agreement should be reviewed closely to determine if it really protects your interests or merely provide a false sense of security.

Besides an NDA, you can also file patent, trademark, and copyright applications, if applicable, to obtain legal control of the information and provide another line of defense against improper or unauthorized use by the other party, or anyone else as well.

Build a wall around your confidential information and enjoy your dinner.

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