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Best in Law: How to Keep Business Secrets Secret

Partner D. Brian Reider Writes About NDAs for the *Press-Enterprise*



By D. Brian Reider

Sooner or later, every business encounters the same problem: A situation arises where vital, confidential information must be disclosed to someone outside the company. It may be the result of a negotiation over the

possible sale of the business, or because a contract requires that the other party be given secret information so that an agreement can be reached. In a worst-case scenario, the information has to be shared with a competitor, who could use it against the other party if the deal falls through.

When business secrets get out, the results can be devastating. Fortunately, there is a way to allow disclosures to occur and deals to get done without a ruinous consequence. Before any disclosures happen, all parties should enter into a non-disclosure agreement for their mutual protection.

Commonly referred to as an “NDA,” a well-drafted agreement can accomplish multiple goals:

- 1.) It affirms that the reason for the NDA is to allow the parties to negotiate openly and in good faith regarding a business transaction.
- 2.) It defines what is secret information, usually by making it clear that it is any non-public information that a business considers private.
- 3.) It provides a mechanism to allow for the exchange of the secret information with an agreement that it be kept strictly confidential between the parties, and perhaps their respective consultants.
- 4.) It provides that the confidential information cannot be used for any purpose other than in the business transaction being negotiated.
- 5.) It provides a plan for what will happen if a deal is not reached, including a

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provision for the return or destruction of all secret information.

An NDA can also have other related provisions, depending upon the particular concerns of the parties. It may provide, for example, that each party agrees to abstain from soliciting each other's employees for a certain period of time if a transaction does not occur.

The next step is often missed or mishandled. Even through there is an NDA, it is vital that steps be taken to make it known that the information being shared is confidential and trade secret. While a good NDA will always say that all information is confidential whether labeled as such or not, labeling document as "Confidential – Trade Secret" is much more persuasive. Seeing that on, for example, a price list, always makes it crystal clear that this is information must not be shared.

Also, because an NDA typically does not apply if the information (regardless of how it is labeled) is available by other means, care must be taken to consistently label confidential information any time it is shared with anyone outside the company. Every company should maintain a checklist of what is confidential information and whether anyone else has received it, so there is no doubt later as to what was given.

If the negotiations done under an NDA result in a contract being drafted, the contract should always include the same confidentiality provisions. A simple way to make this assurance is to refer to the previously signed NDA and incorporate it into the contract — to be in force as long as the contract is in force. Finally, when the contract ends (or if no contract results), a business should request confidential information be returned or destroyed immediately without any copies being retained.

These steps are extremely effective, particularly when it later appears that some of the confidential, trade secret information is being misappropriated. Having clear documentation will allow legal counsel to make an unequivocal demand that the conduct cease, and will strongly support a legal action to stop the misappropriation (and recover damages) if necessary.

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