

How Confidentiality Agreements
Protect You and Your Business
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I am often asked by clients how to protect their ideas. The best way, of course, is to keep them secret. Any facetiousness aside, it is a sincere recommendation. Often people talk about their ideas to brag, to brain storm, and to make themselves feel as if they are adding to discussions. These are not good reasons to disclose information you want kept confidential. However, barring total secrecy, having a Confidentiality Agreement can help protect your ideas.¹

Be Wise About When, How Much and to Whom You Disclose

When to Disclose Information

Disclose information in increasing amounts as the deal progresses. Be sure that the balance of power in the deal remains relatively even in terms of oral commitments, commitments through information disclosure, money or contracts. The information disclosure should start with general concepts and progress to detail at the contract stage. Be sure to keep careful notes on what, when and where information was disclosed and who else was present at the meetings. These records can be extremely helpful if you ever end up in court.

How Much to Disclose

Always disclose the minimum necessary to close the deal, without being fraudulent or misleading. This allows you maintain the most control over your product or idea, as well as protecting your options for changing the timeline or details later if needed. Once the deal is closed and the contract is signed, both parties should be more committed to the process and protecting information.

However, saying the minimum needed does not mean withholding material information that substantially affects the deal. For example, if your idea requires FDA approval, does not have it, and no one brings this up, it would be wiser to disclose this up front rather than to wait for this bomb to blow up after the deal has progressed. If a party feels angry or misled then trust is broken, and, contract or not, it will be hard to proceed productively.

To Whom to Disclose

Consider who you are talking to about your product or information. Is the party a competitor who would greatly benefit from the stealing the idea or product, a customer who will be helped by the idea or product, or a partner whose own business would be complemented by your success? The other party's interests should always be kept in mind. Also, be aware of who at the company you are dealing with. Dealing with the CEO is entirely different than

¹ Readers are cautioned not to rely on this article as legal advice as it is no substitution for a with an attorney in your state. Based on jurisdiction and time, the law varies and changes.

dealing with a programmer or sales person. Remember to also consider the employee's personal interests in having the information. For example, the head of product of development might think she would get a promotion if she presented your idea to the company as her own for a new product line.

Risks of Exchanging Information

Confidentiality agreements can help protect the parties both receiving and disclosing information and are available as legal forms by the author for purchase [here](#).

Receiving Information

A surprising fact is that the party receiving information is often taking a greater risk than the party disclosing information.

A good example of this risk is a movie studio. Script writers are dismayed to discover that studios not only refuse to sign a confidentiality agreement, but typically make the submitter sign an agreement stating that if the studio later develops something that looks like his or her idea, the submitter agrees not to challenge this.

Consider the studio's perspective. Studios are in the business of coming up with ideas and making them into movies. Every time the studio receiving a script or a pitch, it is receiving an idea. If a studio were to agree to keep this information confidential and that the submitter owned the idea, the studio would be subjecting itself to potential law suits for every idea submitted, even those already developed by employees who have never seen or heard of the submission. In court, the studio would have the burden of showing that despite the receipt of the submission, its employees who developed the similar idea never saw or received any information from the submission. This would be virtually impossible for the studio to prove and costly when multiplied by the huge number of submissions received. For studios, venture capitalists and other groups that work with large numbers of ideas, it may simply be too risky for them to sign a confidentiality agreement. Remember that in these circumstances you are usually the less powerful party and thus the other side forces you to assume more risk.

Be sensitive to these considerations when you are disclosing to a competitor, by signing the confidentiality agreement you present, a competitor is risking a law suit from you even if it already knows, or has in development, what you are about to tell them.

Disclosing Information

For the disclosing party, the risks can also be great.

The disclosing party risks (a) disclosure of such information to its competitors; (b) disclosure of the information to the public; and/or (c) use of such information to compete or gain market advantage against the disclosing party.

How Confidentiality Agreements Can Help

Legal Remedies

Confidentiality Agreements give a contractual legal remedy for disclosure or misuse of information. Depending on the information discussed, you may also have other legal remedies available, such as under the trade secret or copyright law. Trade secrets are ideas or information which the creator used financial resources to create and made efforts to keep secret. Trade secrets are protected by both state and federal laws. If you have disclosed written information or source code, copyright can often help if the other party's disclosure or misuse involved making a copy of the information. These remedies may be in addition to the contractual remedy in a Confidentiality Agreement.

Use the Right Agreement for the Circumstances

It is important to use varying Confidentiality Agreements, depending on whether you are the receiving or disclosing party. A set of agreements for receipt, disclosure and mutual disclosure of confidential information are available for purchase [here](#) from the author.

Receiving Information

If you are the party receiving information, the following clauses help restrict your company's future development as little as possible:

- A narrow definition of "confidential information" so that as little information as possible is covered by the agreement
- Defining confidential information in the agreement or as items labeled "confidential" in writing, so that what information is covered by the agreement and what is disclosed is more easily proven.
- Exceptions to the definition of "confidential information" which include necessary disclosure to the government if required (SEC filings, investigations, etc.); information developed by your employees without reference to the disclosed information; information already publicly known (it's posted on the internet, has been already issued in a press release, etc.), and others.
- A "residual knowledge" clause which states that anything your employees remember in their heads, they can use. This is based on the presumption that it is impossible for people to entirely keep straight in their minds what information came from where.

Disclosing Information

If you are the party disclosing information, the following clauses help ensure the protection of your information:

- As broad a definition of confidential information as possible, without any restrictions or exceptions.
- A clause stating to whom, when and how, disclosure and/or use is permitted.
- A clause stating that the information must always be kept confidential.
- Clauses regarding destruction of the information, return of the information, legal remedies for disclosure, and others.

Conclusion

If both parties understand the above issues well, a lot of debate and unhappiness about the wording of Confidentiality Agreements may ensue. This is the unfortunate nature of this beast since how to get information back into Pandora's Box has been plaguing man for many years. It serves both parties well to be wise about how, what and to whom they disclose, and to keep records of such disclosures.

If tough negotiations occur, try to consider how great the risk really is. Would the costs of litigation be greater than the value of the idea so that breach of the agreement is irrelevant? Will the information be of any value in six months? Are lots of other parties working on the same ideas so that six months from now, there will be many ways to accomplish what the information seeks to solve? Will the information be available from your company or from other sources six months from now?

Confidentiality Agreement legal forms are available for purchase from the author [here](#).