



THINGS YOU SHOULD NEVER MISS OUT IN AN NDA



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Introduction[1]:

Sharing information is a common part of business transactions between entities. However, this sharing may cause harm to business entities if information is shared without any protection especially with potential collaborators who could be competitors as well. To avoid these type of situations, Non-Disclosure Agreements (NDAs) are executed. An NDA is a legal document that protects your confidential information and trade secrets from vendors, employees, and third parties.

Imagine a startup brimming with innovative ideas, poised to revolutionize and reshape its industry. But what happens when a competitor gets wind of those groundbreaking concepts?

This makes NDA a crucial document. From the start-ups to corporate giants, NDAs serve as the foundation of legal contracts for safeguarding confidential information and a climate of trust and innovation.

This article explores the critical considerations when drafting or signing an NDA, ensuring that your confidential information, intellectual property and sensitive data remain secure while encouraging collaboration and growth.



[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.



1. What is NDA?

Non-Disclosure Agreements (NDAs) are essential legal tools that protect valuable intellectual property. By clearly defining confidential information and outlining obligations for its protection, NDAs establish a framework for trust and collaboration. Whether you are a startup sharing proprietary technology with a potential investor or a large corporation entering into a partnership, NDAs ensure that your sensitive information remains secure.

2. Importance of specificity in defining the Confidential Information:

Consider two companies, Creative Adventures Inc., an advertising agency and Coding craft Solutions Ltd., a software development firm. While both companies rely on NDAs to protect their intellectual property, their specific confidentiality needs to differ significantly.

For instance, Creative Concepts Inc., might prioritize protecting ideas, creative concepts, designs, copyrights, and specific business strategies. A well-drafted NDA for this company should comprise of clear identification and inclusion these elements to be recognised as confidential information for ensuring confidentiality of the same.. Tech Solutions Ltd., on the other hand, would likely focus on safeguarding software code, algorithms, inventions, techniques, and proprietary technology. The NDA for this company should explicitly address these aspects to prevent unauthorized disclosure or misuse.

The takeaway: NDAs are not one-size-fits-all contracts. To effectively protect your intellectual property, it's crucial to tailor the confidentiality clause to your specific business needs. By doing so, you can establish a solid foundation for collaboration and innovation while safeguarding your competitive advantage.



3. Defining Usage of Confidential Information:

This clause is important in an NDA because it establishes the boundaries of how the confidential information can be used and shared.

Key aspects of this clause:

- **Limited disclosure:** This clause ensures that the information is only shared with individuals who have legitimate need to know, further safeguarding its confidentiality.
- **Disclaimer:** This clause also helps prevent misunderstandings and disputes by stating that the information shared is on "AS IS BASIS" without any warranties or guarantees of accuracy, completeness, or suitability for a particular purpose.
- A well drafted restrictive clause for **Reverse Engineering** prevents the recipient from trying to figure out how the confidential information works by breaking it down into parts. This helps protect the company's secrets.

4. Surviving Confidentiality: A Post-Agreement Obligation:

A crucial aspect of confidentiality clause is the "survival period," which specifies how long the confidentiality obligation continues after the termination or expiration of the agreement. This clause ensures that sensitive information remains protected even after the formal relationship between the parties got concluded. While most of the times parties to the agreement agree for a specified survival period, ideally the obligation shall survive till the time the information remains confidential.

5. Exceptions to Confidentiality Obligations: When Confidentiality Doesn't Apply:

While NDAs are designed to protect confidential information, there are specific circumstances where the disclosure of information may not constitute a breach of the confidentiality agreement.

- × **Publicly Available Information:** If the information was already publicly known or available at the time of disclosure, it is generally not considered confidential.
- × **Prior Possession:** If the receiving party already had access to the information before receiving it from the disclosing party, it is not subject to the NDA's protections.
- × **Disclosure by a Third Party:** If the information was disclosed to the receiving party by a third party, and not by the disclosing party, it is generally not covered by the NDA.
- × **Independent Development:** If the receiving party developed the information independently, without relying on or referring to the confidential information disclosed in the NDA, it is not subject to the NDA's protections.
- × **Court orders:** If a court or government agency requires the receiving party to disclose the information, it is not subject to the NDA's protections.





6. Injunctive Relief:

Injunctive Relief is a critical clause in an NDA that provides a legal remedy in the event of breach. It essentially allows a Court to order a party to stop doing something (or to do something) to prevent further harm. In the context of NDA, this typically means preventing the disclosure of confidential information.

Imagine a beverage company, like Coca-Cola or Pepsi, where the secret formula for their drinks is a closely guarded trade secret. The success of these companies depend on maintaining the exclusivity of this formula. If the recipe gets leaked in the market, it could lead to significant financial loss and damage to their brand reputation. **If company safeguards against such a scenario in an NDA with a strong injunctive relief clause** then the company could seek a court order to **immediately stop** the dissemination of this sensitive information. This swift action would help prevent further harm and protect the company's proprietary rights.

Key Takeaway: Injunctive relief is a swift and effective way to halt dissemination of sensitive information. This clause is crucial in preventing irreparable damage to a business's reputation, competitive advantage, or intellectual property.



7. Last but not the least, Jurisdiction and governing laws:

Jurisdiction and governing laws are crucial elements of an NDA. They determine the legal framework that governs the agreement which includes:

- **Which court has the authority to resolve disputes arising from the NDA.**

- **The laws that apply to the agreement.**

By clearly specifying jurisdiction and governing laws, parties can avoid uncertainties and potential legal complications in case of disputes.

Case Study: E-merge Tech Global Services v. M.R. Vindhyasagar [2]

This real-world case highlights the importance of carefully drafting and adhering to NDAs.

E-merge Tech, a knowledge processing company, sued its former employee, M.R. Vindhyasagar, and his new company, Datasolve Analytics, for violating the NDA and successfully obtained the interim orders and also the decree, as the Defendants chose not to appear in the matter.

E-merge Tech alleged that Vindhyasagar, while employed at E-merge Tech, had access to confidential information. After leaving the company, Vindhyasagar established Datasolve Analytics, a competing business. E-merge Tech claimed that Vindhyasagar used this confidential information to solicit a major client that had previously been a significant customer of E-merge Tech.

[2] E_Merge_Tech_Global_Services_P_Ltd_vs_M_R_Vidhyasagar_on_24_April_2024.PDF



Vindhyaasagar never appeared or contested the matter. The court ruled in favor of E-merge Tech and awarded damages to the tune of 2 crore and also issued permanent injunctions prohibiting the disclosure of confidential information and the solicitation of E-merge Tech's clients. This case serves as a cautionary example for businesses and individuals entering into NDAs. By understanding the potential consequences of violating an NDA, parties can take proactive measures to protect their confidential information and mitigate risks.

Conclusion:

The essence of confidentiality obligation is that a person who has obtained information in confidence is not allowed to use it as a spring board for activities detrimental to the person who made or disclosed such confidential communication[3]. Thus, it is important to define the terms of protecting one's confidential information properly in NDAs. NDA's serve as essential tool of business for all sizes for protecting confidential information. By carefully considering and drafting above factors, one can ensure that the NDA provides adequate protection for your business's valuable information.

[3]Dr. Sudipta Banerjee Vs. L.S. Davar & Company & Ors. FMAT 735 of 2021 (Calcutta High Court)

For any feedback or response on this article, the authors can be reached on shravani.joshi@ynzgroup.co.in and Ayushi.Kalelkar@ynzgroup.co.in

Author: Shravani Joshi

Shravani is Law intern at YNZ legal. She is currently pursuing LLB from Vivekanand College. She has completed her Bachelor of Commerce from Mumbai University.



Co-author: Ayushi Kalelkar

Ayushi is experienced in corporate legal and heads the investment and deal advisory at YNZ Legal. She is also a member of Bar Council of Maharashtra & Goa. By qualification she is a Master in Commerce and Bachelor of Law from Mumbai University.

