



# The Nondisclosure Agreement

## It helps safeguard your proprietary information

by: Greg Goldberg, BTA General Counsel

Each month, the BTA Legal Hotline receives dozens of inquiries from members across the country seeking information and advice on a broad range of subjects. One day, a member from California will email about an urgent employment matter. The next, a member from Florida will request feedback on an OEM agreement. When multiple members reach out about the same legal issue, it is almost always a good topic for a column. Chances are it means there are many other members with similar questions. This month, Legal Perspective takes a deep dive into a topic that has come up in many recent dealer inquiries: the nondisclosure agreement (NDA).

An NDA is a contract that places restrictions on the use of confidential information. NDAs are extremely common. Two companies considering entering into a transaction, like a merger or acquisition, may execute NDAs to prevent information about the deal — or even the fact that a transaction is being considered — from reaching the public domain. NDAs help safeguard proprietary information, such as trade secrets, algorithms and computer code. Famously, Coca-Cola Co. uses NDAs to protect the recipe for its signature soft drink because seeking a patent would require public disclosure of the 133-year-old formula. Organizations that rely heavily on sales utilize NDAs to protect customer lists and customer leads. Very often, NDAs are a component of legal settlements, particularly with respect to financial terms.

An NDA is effective when it satisfies two fundamental criteria. First, an NDA must prohibit the use of confidential information to obtain a competitive advantage. Second, an NDA must forbid the disclosure of confidential information to unauthorized parties. It is relatively easy to understand why. Suppose, for example, an employee at Apple Inc. becomes aware of the engineering specifications for a new iPhone that will not be released for several more months. Absent an NDA, the employee could share those specifications with manufacturers of smartphone cases or other peripherals so they could be first to market with new products ahead of the competition.

Whether an NDA is enforceable depends on careful drafting and precise language. Most importantly, an NDA must clearly define what information is considered confidential. Vague terms like “trade secrets” or “proprietary information” are more difficult for courts to interpret than straightforward terms like “internal financial data” or “sales strategies.” The duration of an NDA should be tailored to the confidential information that is being protected. Terms lasting between two and 10 years are



the most common, although in some cases it may be reasonable for an NDA to continue in perpetuity. An NDA should be fundamentally fair — in other words, it should set forth obligations for all parties involved, not just one. Finally, an NDA must comply with the law. If an NDA states it is governed by New York law, then a New York attorney familiar with those laws should confirm the NDA complies with those standards.

The breach of an NDA can be highly damaging. The fact is, once confidential information becomes public, it is impossible to recover. If one party to an NDA suspects another party is in violation, there are several enforcement options. First, the enforcing party should send a formal written notice (i.e., a demand letter) to the violating party. The letter should identify the breach and specify the steps necessary to reestablish compliance.

If a formal notice from the enforcing party to the violating party is ineffective or an injury to the enforcing party is too severe, a lawsuit may be necessary. In litigation, the enforcing party may seek monetary damages to compensate for a loss or injunctive relief preventing further violations. Although parties may be tempted to include penalty clauses in NDAs to discourage violations, courts will likely decline to enforce those provisions if the penalty amounts are purely punitive.

If you have questions about NDAs, take advantage of the BTA Legal Hotline or the members-only templates available at [www.bta.org/LegalDocuments](http://www.bta.org/LegalDocuments). ■

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