

### NDA OR CONFIDENTIALITY AGREEMENT – THE BUILDING BLOCKS

*You work with, or are considering working with, various vendors, suppliers, partners and other third-parties in bringing more value to your customers and expanding the services you deliver. You are sharing information with other businesses in evaluating various ventures. These, and many other scenarios, require you to reveal to a third party, and receive from a third party, confidential information. While you want to proceed with the evaluation, you also want to protect your business from disclosure of any confidential information that can be detrimental to your strategy.*

*Prior to turning over sensitive or confidential information, it is a good idea to get an NDA (Non-Disclosure Agreement) or Confidentiality Agreement in place. This article addresses some basic “building block” topics you should think about in drafting such an agreement.*

Before you turn over or share information, you know you want the information used only for the purpose of the evaluation at hand and you want to protect yourself from the disclosure of the information to anyone other than who you designate. The building blocks to maintain the confidentiality of your information are:

**Mutual or One-Sided?** Will you be sharing information or will only one of you be delivering the information? The receiver of the information is the one that needs to commit to keep the other party's information confidential. If you're exchanging information, you will want the agreement to be mutual; both parties committing to the various requirements of maintaining confidentiality of the other party's information.

**Type of Information.** Will you be delivering financial, pricing, salaries or other monetary-related information? Will you be delivering strategic or tactical information such as customer or prospect information, market analysis or profitability analysis? Knowing the type of information that you will be delivering helps you: (1) properly describe the information in the agreement (without revealing the information itself); and (2) think through how it needs to be protected.

**Format of Information.** Will the information be in printed form? Will it be electronic? Will some of the information be verbal (such as interviews with you or other members of management)? You will want to assure that the format of the information is consistent with your intentions. If you intend to provide all information in printed form and later discover that it was more convenient for one of your employees to deliver a portion of the information via email, the inconsistency can be to your detriment.

**Definition of Confidential Information.** Once you've identified the type and format of the information that you will deliver, you can define the “Confidential Information” that you will deliver. *All* information may be considered confidential (unless it meets one of the

exceptions) or only that information that is clearly marked as “confidential.”

**Purpose for Delivering Information.** Why are you delivering information to someone outside your company? Outline the purpose for disclosing, making it clear that such purpose is the *only* purpose -- provides the basis for the *use* of the information.

**Use of Information.** Consistent with the *purpose* for delivering the information is the use of Information. The receiving party is to commit to only use the Confidential Information for the stated purpose in the agreement *and not for any other purpose*. Further, stating that use by the other party for any other purpose, or in any other way, is a violation of the agreement clearly identifies that use outside of the stated purpose is a violation of the agreement.

**Elements of Consideration.** Applying basic contract law, the agreement is to state that, in agreement for agreeing to keep the Confidential Information confidential, the recipient has the right to receive the Confidential Information.

**No Disclosure.** This is the commitment from the receiving party to not disclose the information to third parties. This commitment can be as simple as “agree not to disclose.” However, often it is appropriate to state that the receiving party will:

1. limit access to those within its organization that “need to know” in order to complete the purpose of getting to see the information;
2. specifically identify the individuals that will have access to the Confidential Information;
3. maintain the confidentiality at least in accordance with thereceiving party's procedures formaintaining the confidentiality of itsown information (assuming such procedures are acceptable);
4. notify you prior to any possible or required

disclosure to a governmental agency or pursuant to a court order in order for you to contest or otherwise assess the handling of such disclosure or court order; and

5. require all individuals within the organization that will have access to the information, to acknowledge that they understand a confidentiality agreement is in place and that they will maintain the confidentiality of the information.

**Limit on What is Confidential Information.** Virtually every NDA will have certain information that will not be deemed

Confidential Information. This includes information:

1. already known prior to your disclosure;
2. which had previously been disclosed or to the extent it is eventually disclosed by a third party that is not under an obligation to you to maintain its confidentiality; or
3. in the public domain.

There are a host of mitigating features you can place on each of these exceptions.

**Term.** How long should the obligation on confidentiality last? To the extent that you keep it confidential, then the recipient should be obligated to continue maintaining confidentiality.

**Other Features.** In addition to the areas outlined, circumstances may warrant addressing areas such as:

1. all remaining portions of the agreement to stay in place even if a portion of the agreement is found unenforceable;
2. the return of all information following its use or at your request at any time;

3. that measuring damages is difficult and that injunctive relief to stop any disclosure in violation of the agreement is appropriate;

4. acknowledgement from the recipient that you are the owner of the information;

5. identifying the applicable state law and courts for venue (or requiring arbitration) in connection with any disputes;

6. the obligations under the agreement are binding upon the successors and assigns of the recipient; and

7. concerns over the hiring or soliciting of employees or customers.

**Summary.** Growing your business will require you to share information outside of your company. The value of going through the NDA process is significant since it gets you focused on disclosing only what is really needed and getting a commitment on confidentiality from the recipient. However, where the recipient is or could be a competitor, remember to limit the information to that which the recipient itself could not directly use against you (i.e., don't disclose specific customers and operating results or sales figures attributable to such customers). Regardless of the commitment of confidentiality, there are some types of information that you won't ever turn over to a competitor.

Confidentiality agreements with third-parties such as a prospective venture partner, vendor, investor or acquirer can be assembled by following the steps above. Confidentiality agreements with employees have additional considerations such as the employees right to earn a living and are more focused on protecting your trade secrets rather than on a specific purpose. As in any agreement you want to address all relevant points as succinctly and directly as possible.