

CONTRACTS

Non-Disclosure Agreements

When an NDA is worth having, mutual versus one-way, and the clauses that do the real work.

What an NDA does

A non-disclosure agreement, or NDA, is a contract in which one or both parties promise to keep certain information confidential. It is used when information is shared before or during a business relationship: a sale or investment discussion, a joint venture, a supplier or software evaluation, or a contractor's introduction to the business.

Information can be protected in law even without an NDA, if it has the quality of confidence and was shared in circumstances that imply an obligation. But that protection is uncertain and hard to prove. An NDA makes the obligation explicit, defines what is covered and sets the remedies.

When an NDA is worth having

- the information is valuable and not already public: pricing, client lists, source code, financial results, plans
- the other side needs the information to decide or perform
- there is no existing contract that already covers confidentiality
- you want a clear, quick record of what was shared

An NDA is less useful for general chat, for information that is already public, or where the other side will refuse to sign and you need the deal anyway. In that case, share less.

One-way or mutual

A one-way NDA protects one party's information, for example a seller sharing accounts with a prospective buyer. A mutual NDA protects both, and is usually fairer where both sides disclose. Start mutual if it keeps things moving. Check that each side's obligations match, and that you can live with what you promise to protect.

Before you sign anyone else's NDA

Read what you are agreeing to. Check that the definition of confidential information is not so wide that it captures your own business information. Look at the duration, the remedies and the governing law. A clause that makes you liable for what staff or advisers do is common, so brief them. Ask for changes where a term is unreasonable, and keep a record of what you agree.

Key points

- An NDA makes the duty of confidence explicit.
- Define what is confidential, and what is not.
- Limit use as well as disclosure.
- Set a sensible term, and longer for trade secrets.
- Cannot stop lawful whistleblowing or reports to regulators.
- Share only what is needed.

The clauses that do the real work

- **Definition of confidential information.** Broad enough to cover what matters, but not so broad that it captures everything. Include information marked confidential, and information that is confidential by its nature.
- **Exclusions.** Information that is public, already known to the recipient, independently developed or received from a third party. Courts expect them, and a clause without them may be unreasonable.
- **Purpose.** The recipient may use the information only for a stated purpose, such as evaluating the deal.
- **Who may see it.** Limited to people who need to know, who are themselves bound by confidentiality, and the recipient is responsible for their compliance.
- **Compelled disclosure.** If the law or a regulator requires disclosure, the recipient should tell the other party first, where lawful.
- **Return or destruction.** On request or when the discussions end, with a written confirmation.
- **Duration.** A fixed period for general business information, and no end date for genuine trade secrets.
- **No licence, no warranty.** Sharing does not give rights in the information, and the discloser does not promise it is accurate.
- **Remedies.** Damages may not be enough, so allow the discloser to seek an injunction.
- **Governing law and jurisdiction.**

Before you start

- What is being shared, and why?
- Is it one-way or mutual?
- How long should it last?
- Who needs to see it?
- Are there any legal carve-outs needed?
- Is an NDA the right tool?

What an NDA cannot do

An NDA cannot lawfully prevent a person from making a protected disclosure about wrongdoing, or from speaking to the police or a regulator. There are also growing restrictions on using confidentiality terms to silence victims of harassment or crime. Keep the wording carve-outs in the agreement.

Practical steps

Sign before sharing, not after. Keep a record of what was disclosed and when. Mark documents as confidential. If you share a lot, use a data room and track access. If the NDA is breached, act quickly, since delay can affect an injunction.

Protecting what you share

An NDA is only as good as the way you handle information. Share in stages, giving the most sensitive material last and only to people who need it. Use a secure data room where you can see who has accessed what. Keep a log of disclosures. For highly sensitive material, consider whether it needs to be shared at all, or whether a summary will do.

How MTM can help

0161 835 2080
client@mtmlp.co.uk

We prepare and review non-disclosure agreements for practices and their clients, one-way or mutual, and keep a short template for routine use. For sales and investment, we coordinate the NDA with the wider transaction documents.