



# Confidentiality Agreement (“NDA”) Guide

The basic keys to understanding Confidentiality Agreements can be broken down to a few simple elements. This Guide will help you structure your review of these documents so that you can quickly focus on your obligations and track them going forward:

**What’s in a Name?** Confidentiality agreements can also be titled secrecy agreements, proprietary information agreements, and non-disclosure agreements (“NDAs”) – all can seek to accomplish similar goals and contain similar provisions.

**Who are the Parties?** Take a moment to confirm that the parties are correctly identified and to understand which party is the recipient and which the discloser in a unilateral arrangement. Many NDAs are drafted as mutual or reciprocal obligations.

**Three Key Questions:** Once you have made an initial assessment of the parties and determined if the NDA is unilateral or mutual (reciprocal), then you can focus on three simple questions:

- 1. What is the Scope / Purpose?** In order to track your obligations you need to be able to identify the subject matter and/or purpose of your obligations. A narrow description of the subject matter or purpose will help to limit your exposure to a possible breach of your obligations. A marking requirement can also narrow your exposure.
- 2. Are the Standard Exceptions present?** You should see either three or four “standard exceptions” that narrow your obligations by excluding certain information. The exact wording of the standard exceptions will vary (example below):
  - (a) *is or becomes generally known or available to the public through no fault of Recipient;*
  - (b) *is rightfully in the Recipient's possession, or known by it, free of any obligation of confidence, prior to the Company's communication thereof to Recipient;*
  - (c) *is rightfully obtained by Recipient from a third party authorized to make such disclosure without restriction; or*
  - (d) *is developed by the Recipient independently of and without reference to any of the*

*Company's Confidential Information or other information that the Company disclosed in confidence to any third party.*

- 3. What are the Term and the Time limits?** Best practice is to include a reasonable time limit on your obligations. Most mutual NDAs contain time limits but many unilateral NDAs do not. The **term** of the agreement is not the same as the **time** limit on the obligations. The term limit is the time period within which confidential information may be disclosed. The time limit is the duration of the recipient’s confidentiality obligation with respect to that information.

## Other Issues to Consider:

- NDAs don’t have to include provisions regarding ownership of IP developed as a result of disclosure of confidential information.
- NDAs should allow for disclosure (on notice) in the event of court order or legal process.
- Mutual NDAs are usually more reasonable than unilateral agreements as the drafter is also taking on the obligations outlined in the document.
- NDAs are an essential part of a program designed to protect patentable intellectual property.

## Recordkeeping Pays Off:

- Maintain separate files for NDAs.
- Create a database to record parties and three key issues.
- Use prior executed NDAs to avoid re-inventing the wheel.

## Best Defense:

- Maintaining confidential information received under an NDA in accordance with the same good and reasonable methods you should use to protect your own information is often a strong defense to an alleged breach.
- Mistakes happen even with good intentions and systems.
- Develop a culture of compliance.