Kill the NDA!

Commercial and Contracts

Compliance and Ethics

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Like most in-house lawyers, I run a legal shop of one. So while my title is chief legal officer, I am also the most junior attorney and paralegal. That means I deal with simple contracts like non-disclosure/confidentiality rights agreements (NDAs).

And I have just about had it! It wouldn't be so bad if all NDAs contained the same legal terms without controversy. But too often they are not mutual NDAs. So the NDA, rather than being the door opener for business discussions and a potential deal, becomes an unnecessary hurdle to even starting the conversation.

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By the end of this article, I will argue for doing away with NDAs altogether. (After all, federal, state, and common law already protect confidential and proprietary information, raising the question of why we even need NDAs in the first place.) But let me start with a list of all-too common provisions that none of us should ever request, let alone agree to.

My list of unreasonable NDA provisions:

- *Unilateral NDAs*. I have yet to hear one persuasive argument for why a party should expect its information to be treated as confidential while not be willing to reciprocate to the counterparty. Even if only one party will be disclosing, there is still no harm in the other party agreeing to a mutual NDA. And the "we are so big that whatever you tell us we are likely to already know" is specious — if it's known, it isn't confidential.

- *Overly broad (defining everything as confidential)*. That is simply wrong as a matter of law. The information needs to actually be proprietary or confidential to qualify. It's fine to list the standard categories — although a full laundry list is overkill, in my view — followed up with a reasonableness standard. It is confidential if a reasonable person would consider the information confidential under the circumstances.

- *Unreasonable designation requirements*. Requiring everything a party wants to be considered confidential to be stamped "Confidential" or "Proprietary" is impractical. Most information is disseminated by businesspeople, including at mid-junior levels, so expecting them to mark all documents with the appropriate footers and disclaimers is wishful thinking. Nor is the requirement that anything not marked confidential be reduced to writing post disclosure a viable solution. In more than 20 years of in-house practice, in multiple industries, I have never once seen a meeting followed up with such a request. If you define confidential information reasonably (see above), then there is no need to worry about the physical or oral designation.

- *Limited survival*. The obligations to protect confidential information should survive as long as the information is confidential or proprietary. Or at least have a reasonable tail; anything less than three years seems unreasonable. At a minimum, the obligations to protect trade secrets, as defined under federal statute, should continue for as long as the information remains a trade secret.

- *Representations and warranties*. They don't belong at the NDA stage — other than that a party has the right to disclose the information. (Also, no individual should be asked to represent that they have the authority to sign the NDA. Representations should be made by companies, not their officers or employees. Similarly, no employee should be required to sign NDAs in their individual capacities.)

- *Non-solicitation or other competitive restrictions*. Leave these for the definitive agreement, if appropriate at all. At the pre-deal stage, there is no quid pro quo. So don't try to restrict my business before demonstrating that there is even a relationship to be had.

- *Arcane notice provisions*. Notice by certified mail, return receipt requested — virtually no one does this anymore. Email is how folks communicate — for which you can require a read receipt to validate. And fellow in-house counsel, please take two minutes to remove the fax reference from your notice provisions. Seriously, when did you last use a fax machine? (And if you are using an online fax service, why? You have email!)

- *Exclusive jurisdiction*. The most important remedy for a potential violation of a confidentiality agreement is injunctive relief — to stop the disclosure before it occurs. This requires speed. Say the NDA provides exclusive jurisdiction in New York. That means that if you are threatening to release my confidential information in California, I must first go to a New York court to obtain the injunction, and then I have to go to a California court to get the injunction enforced. Well, by this point, the confidentiality has likely already been breached. The protective remedy thus becomes a barrier to protection.

- *Legal order to disclose*. The obligation to inform the discloser of a governmental order to disclose needs to include the simple proviso "to the extent legally permissible." That may seem like a given: If the lawful order prohibits Company A from informing Company B of the request, then Company A has to comply with the governmental order. However, not including the proviso could still provide Company B with a contractual claim.

- *Wet signatures*. Printing, signing with ink, scanning, uploading… I can refinance my mortgage entirely online with e-signatures. Or consummate a billion-dollar acquisition. Use digital or e-signatures; they are more secure, faster, and create a more readable document. Plus, they save trees.

While I have focused here on NDAs, many of the above contractually flawed provisions proliferate throughout legal agreements. Fixing them across the board would be a valuable contribution to commercial contracting. But I have chosen to start with NDAs. The remedy is simple, as we should be able to agree on a uniform mutual NDA — a project for a committee under the ACC.

Once we get broad agreement that NDAs should be uniform — and create the **Model NDA**, then I think we can easily take the next step. And do away with them altogether. By creating a **Proprietary Rights Certification Badge**. Companies sign on to adhere to the **Uniform Confidentiality and Propriety Rights Agreement**, place the badge on their website, and voila! As long as both companies are signatories, they don't need an NDA. No battle of the forms, no redlining, no signatures required, no delay in the businesses exchanging information. Which would let us in-house lawyers get back to more substantive matters, including negotiating the terms of the actual business arrangement, if one develops.

I know there is a money making opportunity here, but that just creates a barrier to wide adoption. Let all ACC member companies sign-on for free. And let non-member companies sign up as well (often, they don't have in-house counsel, further compounding the challenge of getting past the NDA).

No more NDAs. They should be replaced by a simple **Proprietary Rights Certification Badge** signaling a company's commitment to abide by the **Uniform Confidentiality and Propriety Rights Agreement**.

Who's with me?

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