

# ON THE MARK



## The Importance of Tailored NDAs

Scouring the Internet for a non-disclosure agreement is risky.

### Non-Disclosure Agreements

You may have heard of a non-disclosure agreement or NDA for short. An NDA is an agreement that allows parties to share confidential information with each other with restricted access by outsiders.

NDAs are vital in forming sound business relationships, but the use of non-tailored, general NDAs found on the Internet can have a devastating effect on businesses and their intellectual property. NDAs are legally enforceable contracts and, as with any contract, you should understand each provision and its purpose in the agreement. You should have your NDA specifically tailored to reflect your unique goals and intentions before entering into this binding agreement.

### Subpoenas and Outside Requests

For most people, the possibility of their confidential information being subpoenaed by a third party or the government never crosses their mind. Yet, judicial demand for this information occurs more often than one might think.

Considering the recent popularity of NDAs and the emergence of a technological society based on creative intellectual property, subpoenas are not only possible; they are foreseeable. A standard NDA one might find on the Internet probably doesn't discuss this issue, and if it does, it will likely be a general provision that may even run contrary to your state's governing law.

Does your NDA include a procedure for responding to a third party request for the information? Does it address the

difference between third party requests and legal demands? Each party must know their obligations if the confidential information is ever requested in a legal forum. Only a properly tailored NDA developed with the help of competent legal counsel can adequately protect your ideas and your business. ■



### *Customization is key.*

*Without a specific agreement tailored to your unique situation and goals, you're undoubtedly missing key points that shouldn't be left out of your non-disclosure agreement.*

# Encryption

*Encryption is the process of encoding data into a protected form that can be accessed only by authorized people. Encryption cannot be overlooked in an NDA.*

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## Encryption is the new norm

We are living in an age where data is easily hacked, stolen, and sold to the highest bidder. Typically an NDA dictates how confidential information will be “delivered” to the receiving party. Yet most standardized NDAs on the Internet leave out the issue of encryption.

This is a glaring mistake. Encryption is a method of protecting data stored in digital form from being compromised. It essentially encodes data into a form that allows only authorized parties to access it (ie. with a password or decryption tool). Certain levels of data encryption are almost impossible to crack.

Encryption is becoming increasingly popular in the world of desktop and mobile security, as people are beginning

to realize the extent of the dangers of cyber-terrorism and identity theft. Considering how precious and vulnerable intellectual property can be, your NDA should include provisions for requiring encryption of your sensitive data.

You may wish to require the receiving party to keep your confidential information only on encrypted hard drives for extra protection. Additionally, you’ll want to know exactly which of the receiving party’s computers or devices will be accessing your data and whether they are encrypted or otherwise reasonably protected against cyber-threats and attacks. Finally, you’ll need sound procedures in place in the unfortunate event that the confidential information is targeted and/or stolen.

Encryption is a great way to protect your data when disclosing it to a third party under the terms of an NDA. At a time when even the largest companies are vulnerable, encryption needs to be on everyone’s mind and in everyone’s NDA. It could mean the difference between protecting and losing your precious IP. ■

## WHY ENCRYPTION MATTERS

*Without encryption, your confidential data is vulnerable to theft and easy access. If your data is encrypted and is later hacked, it is unlikely that a thief will be able to decrypt the data to see your confidential information because modern encryption software is very difficult to breach. Including encryption requirements in your NDA can protect your data from being compromised while in the hands of another party. It’s also a great way to show others what specific information must remain secret.*



# Which Law Governs?

*You found an NDA template online and used it for your IP. Chances are at least a few provisions in your agreement violate the state law that governs it.*

Attorneys like to use “choice of law” provisions in contractual agreements including NDAs. A choice of law provision essentially states that a specific jurisdiction’s law will govern a particular agreement. For instance, an NDA between two Delaware parties will typically be governed by Delaware law, but it might not always be governed by Delaware law depending on the circumstances of the agreement.

Searching for a template online or buying one from an “online legal document provider” is not the same as receiving expert legal advice from an attorney licensed in your particular jurisdiction. Use caution and make an informed choice.

## **Can’t I just change the choice of law provision myself?**

A client once came to me with a contract she found online and asked me, “Can’t I just change the choice of law provision to say that *my* state law governs this agreement?” Doing this is dangerous for two reasons.

First, the choice of law provision is specific to the subject matter of each contract. Your situation will be very different from the situation described in template NDAs. Creating an enforceable agreement that makes sense for your situation requires a specific analysis of *your* situation and your intellectual property involved.

Second, if the contract is controlled by state law that’s different from your own state law, chances are the contract also includes one or more provisions that may not be enforceable in your own state. The law of contracts is governed by the states, not the federal government. This means that your contract is governed by each state’s individual laws which vary among the states. Provisions that are enforceable

in one state may be unenforceable or even illegal in your own state.

## **Attorney Competence Matters**

An NDA is legally binding on all parties involved. Whenever legal rights and intellectual property are involved, the most responsible thing to do is hire a trusted attorney with the IT background necessary to protect your rights and IP.

Although attorneys are generally expected to keep abreast of changes in technology, you should hire an attorney that also understands the tech and business side of IP as well. Such an attorney will be able to properly tailor your NDA so that it protects your unique rights in *your* own jurisdiction.

## **So What Should I Do?**

Create, invent, make life better for all and find a technologically competent attorney to take care of the legal side. Don’t use an online template. Let an attorney handle your NDA properly the first time and business will be a lot easier down the road. ■



## **ABOUT THE AUTHOR**

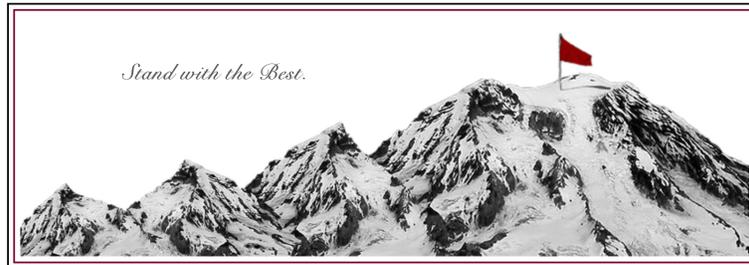
*Benjamin Gichner, Esq. is currently licensed to practice law in Delaware. His expertise in Information Technology (IT) and electronic evidence makes him invaluable to entrepreneurs, start-ups and small businesses looking to protect their ideas and their companies. He is a member of the American Intellectual Property Law Association (AIPLA) and his past legal work includes civil rights, personal injury, estate planning, and real estate.*

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