Key Considerations for Multiparty Nondisclosure Agreements

By Daniel Cronin

A client calls and asks you to email a boilerplate nondisclosure agreement (NDA) for a new project she is considering cooperating on with two other companies. You already have a great form document for two parties. Is it as easy as inserting all three companies and changing a few defined terms?

This article highlights a few key issues to consider when drafting an NDA for more than two parties and suggests solutions involving intake, drafting, and client instruction to minimize your client's exposure.

An NDA is a written contract between parties that establishes a framework to facilitate the sharing of confidential information while exploring a potential transaction.[1] Information covered by an NDA can be broader than that which fits the definition of a "trade secret" under Michigan law.[2] The heart of an NDA is a prohibition on the disclosure of the other party's confidential information to third parties or the use of the other party's confidential information for any purpose aside from the potential transaction being discussed.[3] NDAs are a must whenever confidential information needs to be shared.

Multiparty NDAs

In my experience, NDAs are typically between two parties and are either mutual (both parties' information is protected) or unilateral (only one party's information is protected). When considering an NDA with more than two parties, certain risks arise.

If party A shares something with B, is B always permitted to share it with C? This is particularly critical when some of the parties are already working together on separate matters. As discussed below, the risk of oversharing must be discussed with your clients so they understand their important role in mitigation.

What will the potential business transaction look like? Clients should be cautioned that NDAs are used simply to facilitate sharing of information. Concerns regarding inadvertently collaborating (on the creation of intellectual property or a joint venture, for instance) are magnified when multiple parties are involved.

Are any of the parties industry competitors? Antitrust concerns (such as price sharing) should be considered if sharing with a competitor. The advisability of sharing particularly valuable information should also be carefully considered whenever information could be shared with competitors. If manufacturers in the same industry are jointly cooperating with a shared-services provider, the manufacturers should think long and hard before disclosing their proprietary information to the services company under a multiparty NDA.

Some of these risks can be minimized with three basic strategies: intake, drafting, and instruction.

Intake

As with all agreements, discussing what the parties intend to do is of paramount importance. Is a multiparty NDA even needed? If information will never actually be shared by all three parties, individual NDAs (while slightly more burdensome) may be a smarter approach. By probing the scope of the proposed transaction, potential missteps can be avoided.

Drafting

Clearly define the potential transaction in the recital. This will allow the NDA to specify that confidential information can only be used for purposes of the transaction. Moreover, sometimes the parties' representatives have surprisingly different concepts of what the transaction looks like; by forcing the parties to define things on the front end, you will avoid confusion once information starts flowing.

Instruction

Ensure your client understands his or her critical role in protecting confidential information. An NDA should not be treated as a blank check for sharing. Only information necessary to explore the transaction should be shared. Keeping your client focused on the transaction is especially important when the client is also separately engaged with one of the parties. Party representatives should try to share information directly with the party that needs it rather than employ a "shotgun" approach; by sharing information needed only by C with C directly, A can ensure that only the correct information is shared with C. Make sure your client is aware of project stages; an NDA is entered into to facilitate information sharing, and the client must negotiate additional definitive agreement(s) if the

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project progresses beyond mere dialogue (such as supply agreements).[4]

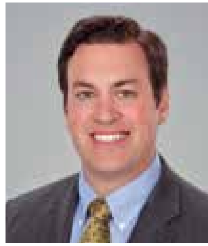
Don't forget the basics

When drafting a multiparty NDA with an eye toward the above complexities, don't forget some of the basic considerations that arise with all NDAs:

- Is the NDA mutual or unilateral? Don't get caught as the unprotected party in a unilateral NDA.
- Does the definition of confidential information capture what the parties will be sharing? Does it require information to be marked "confidential"? If so, careful discussion with your client is required to ensure information is treated appropriately.
- Is the term of the NDA appropriate? Ensure that the term matches the timeframe in which the disclosures will be made.[5] If information with a long shelf life is being shared, ensure that restrictions on use and disclosure survive the NDA's expiration.[6]
- Are the standard exceptions to confidentiality listed, such as information already in the recipient's possession, independently developed, publicly available, or provided by a third party without restriction?[7] Clearly secure the ability to appropriately use the other party's information.
- When defining the parties, consider whether information will need to be shared with any of the parties' affiliates.
- Remember to include language governing the return/destruction and compelled disclosure of confidential information.[8] These provisions (sometimes glossed over as "boilerplate") can be extremely important.

Conclusion

When your client asks for a multiparty NDA, you can offer great value by considering the above issues and using some of the proposed solutions. ■



Daniel Cronin is corporate counsel with Amcor Rigid Packaging USA, LLC. This article represents the author's opinion and is in no way endorsed or approved by his employer.

ENDNOTES

1. *Rockwell Med, Inc v Yocum*, 76 F Supp 3d 636, 647 (ED Mich, 2014) and *Electronic Planroom, Inc v McGraw-Hill Cos*, 135 F Supp 2d 805, 820 (ED Mich, 2001).
2. MCL 445.1901 *et seq.* and *Indus Control Repair, Inc v McBroom Electric Co*, unpublished per curiam opinion of the Court of Appeals, issued October 10, 2013 (Docket No. 302240), p 7 (briefly outlining this distinction).
3. *Innovation Ventures, LLC v Liquid Mfg, LLC*, 499 Mich 491, 499; 885 NW2d 861 (2016) and *Johns v Wixom Builders Supply, Inc*, unpublished per curiam opinion of the Court of Appeals, issued September 4, 2012 (Docket No. 299542), p 5.
4. *Nagler v Garcia*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2012 (Docket No. 301815), p 1 (an NDA did not lead to a definitive agreement).
5. *Veteran Med Prod v Bionix Dev Corp*, unpublished opinion of the US District Court for the Western District of Michigan, issued March 13, 2008 (Case No. 1:05-cv-655), p 9 (the court inferred an intent to not protect information disclosed after the NDA expired).
6. *Rainbow Nails Enterprises, Inc v Maybelline, Inc*, 93 F Supp 2d 808, 834 (ED Mich, 2000) (an NDA should expressly state that restrictions survive beyond the term of the agreement or else parties may be free to use disclosed information after the NDA expires).
7. Compare *Innovation Ventures, LLC*, 499 Mich at 520 n 3 (where legally compelled disclosure is erroneously listed as an exception to confidentiality) with *Rainbow Nails Enterprises, Inc*, 93 F Supp 2d at 826 (where independently developed information is not listed as a confidentiality exception).
8. *O'Hara & Assocs, LLC v Winzeler, Inc*, unpublished opinion of the US District Court for the Eastern District of Michigan, issued August 4, 2017 (Case No. 16-11708), p 2 (a "private non-disclosure agreement cannot limit a court's ability to order discovery of relevant evidence.").

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