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From Start-Up to Exit and Everything in Between

How NDAs Became Offensive

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Non-Disclosure Agreements (NDAs) should be benign documents to begin a discussion of a business transaction allowing one party to tell the other party confidential information, without fear of disclosure. Over the years, however, a number of offensive provisions have crept into "big company" NDAs.

Typically, SmallCo approaches BigCo to consider a business transaction. SmallCo offers its standard benign NDA. BigCo rejects that NDA and insists on their "standard" NDA. SmallCo is anxious to start the discussion, so it signs the BigCo NDA without legal review. Often that is a mistake.

As the disclosing party, you want the NDA to:

* Limit use of the disclosed information to the potential transaction

* Not grant any license

* Not make any representations or warranties about the information provided

* Be assignable in any subsequent sale or restructuring of your business

You don't want to fight to prove the information was in fact confidential, lose any rights to the information or learn later that BigCo's use of your information was permitted by a loophole.

Well, many BigCo NDAs pervert these goals by:

* Not having an explicit provision that no license is granted

* Not proclaiming that the information is presented "as is"

* Not having an exception for a transfer of the business in the non-assignment clause

These offensive provisions are not new, but need to be addressed. Recently new offensive provisions have come into play in many BigCo NDAs.

Confidential information is often defined by what is not considered confidential: information "in the public domain", "acquired from a third party, without knowledge of a breach" or "developed internally". But, beware of these **3 new offensive clauses**!

1st Offensive Provision: An exception **for "information disclosed to any third party without a confidentiality obligation."** You sue to enforce the NDA, defendant's counsel sends a discovery request: "list all people to whom the confidential information has been disclosed and a copy of each document binding each of those parties to confidentiality". There will always be someone who received the information without a confidentiality agreement (for example, a VC of other financing source).

2nd Offensive provision: "Any suggestions made by the recipient during the evaluation belongs to the recipient, rather than the disclosing party." We saw BigCo try to snatch a patent from SmallCo based on this offensive provision.

3rd Offensive Provision: The **"residual clause": recipient will not be considered to have breached the agreement if the information used was retained in the unaided memory of an employee who reviewed the confidential information".** This is the newest clause being added. BigCo says: "we can't make them forget what they learned". Of course, this offensive provision guts the "non-disclosure" concept and places the burden on SmallCo's counsel to prove the offending development was not based on unaided memory of an employee.

And, as a bonus, some BigCo NDAs now have **"non-hiring"** clauses!

Takeaway, have your NDAs reviewed by legal counsel ensuring you are protected, or at least, know your risks from the disclosure.

To discuss the specifics of your business and legal needs, please contact us at:

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Please do not provide any confidential details regarding your business or legal matters in an email or on a phone message until we speak with you and we form an attorney-client relationship.