

Ownership of Confidential Information. The disclosing party should also require the recipient to acknowledge that the confidential information is the property of the disclosing party and that the disclosure of the information does not convey any right, title, or license in the information to the recipient. This is necessary to prevent ambiguity as to what rights, if any, the recipient has in the confidential information. Typically, the transfer of rights would not be the subject of a confidentiality agreement, but rather a development or joint venture agreement should the parties determine to work together using the confidential information. Even then, however, it may not be in the best interest of the owner of the confidential information to transfer any portion of its ownership rights in the confidential information.

Term. The confidentiality agreement must also specify the time period during which confidential information will be disclosed and the time period during which the confidentiality of the information is to be maintained. These periods may or may not be the same, and they need not be specified by exact dates (years, months, weeks, etc.). For example, the Sample One-Sided Confidentiality Agreement form and Sample Mutual Confidentiality Agreement form provide that disclosure will occur for so long as the parties are discussing a possible business relationship, but the obligation of confidentiality survives until an exception to the obligation of maintaining confidentiality arises. Other agreements may quantify the time periods and, for example, provide that the disclosure period is for one year and the obligation to maintain the confidentiality of the information is for a two-year period thereafter. If the disclosure period is quantified, the disclosing party should require that the agreement provide for termination by either party at any time prior to the end of the term, subject to reasonable notice as negotiated by the parties. This allows the disclosing party to terminate its obligation to disclose confidential information if it does not wish to proceed with working with the recipient.

Miscellaneous Provisions. After spending considerable time negotiating and defining what constitutes confidential information and the obligations to keep the information confidential, it is often easy for parties to neglect the miscellaneous provisions that one typically finds at the end of the agreement. The parties should always pay careful attention to what law will govern the agreement, how disputes will be resolved, and the assignability of the rights and obligations under the agreement.

Consequences of Breaching a Confidentiality Agreement

When a confidant breaches his or her obligations under a confidentiality agreement, he or she is subject to remedies available to the disclosing party. These remedies may include equitable relief and monetary damages. An injunction against the breaching confidant helps prevent any further breach of the agreement. The court may also award monetary damages if damages can be quantified.

It is often difficult and expensive to enforce a confidentiality agreement even though the agreement, on its face, is detailed as to what is confidential information and what constitutes a breach of the obligation of confidentiality. This is so because of the proof necessary to demonstrate a breach by the other party. Also, while an injunction prohibits future dissemination of the confidential information, it is difficult to contain the information once it has been disclosed and it is difficult to quantify monetary damages. Because of the enforcement issues, the sound advice is to not enter into a confidentiality agreement or share confidential information with a party you do not trust to keep the information confidential.

... and justice for all

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