

# IIT Office of General Counsel Education Program

## Non-Disclosure/Confidentiality Agreements

## Definition of a NDA

A Non-Disclosure Agreement (NDA), also called a Confidentiality Agreement, is a legal contract between two or more parties identifying confidential materials or knowledge that they wish to share with one another for certain limited purposes but wish to restrict from generalized use or disclosure.

In short, it is a contract through which the parties agree not to disclose information covered by the NDA.

## Purpose

A NDA is commonly entered into when two or more parties are considering doing business together and need to disclose proprietary information to one another in order for each to evaluate the potential business relationship.

## Types

NDAs can be "mutual", meaning both parties are restricted in their use of the materials provided, or they can only restrict a single party.

As a general rule, IIT will only enter into a mutual NDA with another party.

## Important Elements of an NDA

### Stated Purpose.

- The NDA should clearly and narrowly define the purpose for entering into the NDA and define this as the “Stated Purpose”.
- The NDA should state that Confidential Information can only be used for the Stated Purpose.

## Important Elements of an NDA

### Definition of Confidential Information.

- General laundry lists or “information that a party should know the other wishes to keep confidential” should be avoided.
- The following definition should be used:

Data and information that a party wishes to have deemed “Confidential Information” shall be treated as such provided (i) if in a tangible format, it is labeled or marked as “confidential” or “proprietary”, and (ii) if not in tangible format, such as oral or visual disclosures, it is identified as Confidential Information at the time of the disclosure and that identification is confirmed in a writing within twenty (20) days after the disclosure.

## Important Elements of an NDA

**Exceptions.** The following should be excluded from the definition of Confidential Information: Information which

- is or becomes public knowledge, provided that it has not become public knowledge due to the fault of the receiving party;
- is made available to the receiving party by an independent third party that is not obligated to keep such information confidential;
- is in the receiving party's possession at the time of receipt from the disclosing party, provided such prior possession can be demonstrated by the receiving party;

## Important Elements of an NDA

### Exceptions (continued)

- is or was independently developed by the receiving party without reference to the information, as evidenced by its written records; or
- is required by law, regulation, rule, act, or order of any governmental authority or agency to be disclosed.



## Important Elements of an NDA

### Terms.

- The actual NDA must have a term, which should be short, not more than a year.
- In addition, the NDA should set forth a specific period of time after termination during which the parties agree to maintain the confidence of Confidential Information.
  - Perpetuity should be avoided at all costs.
  - 3 – 5 years is reasonable.

## Important Elements of an NDA

### Rights in Information/Future Rights.

- The NDA should explicitly state that it is not granting any license or right in or to the Confidential information.
- The NDA should explicitly state that the parties have no obligation to enter into any future agreements.

## Important Elements of an NDA

### Disclaimer of Warranty.

The NDA should explicitly state that the parties are not making any representations or warranties with respect to the accuracy or usefulness of any disclosed Confidential Information.

## Important Elements of an NDA

### Remedy for Breach.

The NDA should allow, in the event of breach, the affected party to be able to seek equitable relief by way of injunction or otherwise without the need to post a bond or any such security.

## Important Elements of an NDA

### Miscellaneous Terms.

- The NDA should limit disclosure to only those officers, employees and agents of a party with a need to know the Confidential Information in order for it to satisfy the Stated Purpose.
- The NDA should explicitly state that the terms and provisions of the NDA applies to all such officers, employees and agents.

# Important Elements of an NDA

## Miscellaneous Terms.

- The NDA should require a party to notify the other of any breach.
- Illinois is the preferred governing law and Cook County the preferred venue. The next best option is silence. Any agreement to accept the governing law of or venue in another state should be run by the General Counsel's Office in advance.

## EXECUTION OF NDA

A NDA should be signed by both the Director of the Office of Sponsored Research & Projects And the lead party (principal investigator) to the discussions.

## Form NDA

A form Mutual NDA is available on the GC's website under Forms at <http://www.iit.edu/~ogc/forms/Mutual%20NDA.pdf>.