

NON DISCLOSURE AGREEMENTS THE DEVIL'S IN THE DETAILS

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**Presentation for
SABPA Entrepreneur Club**



How Not To Get Fired



False Mutuality

Who's Disclosing ?	Only CLIENT Discloses	CLIENT Mostly Discloses	CLIENT and Partner Disclose Equally	CLIENT Mostly Receives	CLIENT Only Receives
How Common?	Common:	More Common	Unusual	More Common	Less common.
Circumstances	Deals with Vendors for goods and consultants for off the shelf services	Development agreements Out-licenses Consulting and services agreements where CLIENT is client.	Strategic Alliances Mergers Marketing agreements joint development joint ventures	Acquisitions, Investments Development agreements In-Licenses Consulting and services where CLIENT is consultant	Some customer sales deals. Some investments and acquisitions
What form?	One Way NDA (CLIENT Discloses)	Mutual MNDA should include special discloser clauses.	Completely Balanced Mutual NDA	Mutual MNDA should include pro recipient special clauses	One Way NDA (CLIENT Receives)

Common Clauses



What's "Confidential"?

- "Confidential Information" includes
 - Previously
 - presently or subsequently disclosed by Discloser
 - either directly or indirectly
 - in writing,
 - orally or by inspection of tangible objects
 - regardless of whether such Information is specifically designated as confidential

The Discussions Themselves



Lists

- Information relating to
 - matters of a **technical nature**
 - matters of a **business or financial nature**
 - matters of a **human resources nature**
- information disclosed to a disclosing party by third parties;
- [other information of a similar nature not generally disclosed by Discloser to the public, or which, under the circumstances surrounding the disclosure, should be treated as confidential;]
- [any of Recipient's derivatives, notes, reflections, summaries, knowledge or information or other materials derived or to be derived by Recipient's inspection or evaluation of any Confidential Information.]

Helps Disclosers

Confidential Marking

- identified as
- [conspicuously designated as]
- [marked]
 - at the time disclosed.



Helps Recipients

Oral Disclosures Identified

- Any of Discloser's information disclosed orally **[or visually]**
 - [identified as such at the time of disclosure]
 - [reduced to writing and a copy marked "Confidential" is provided to Recipient]



Helps Recipients

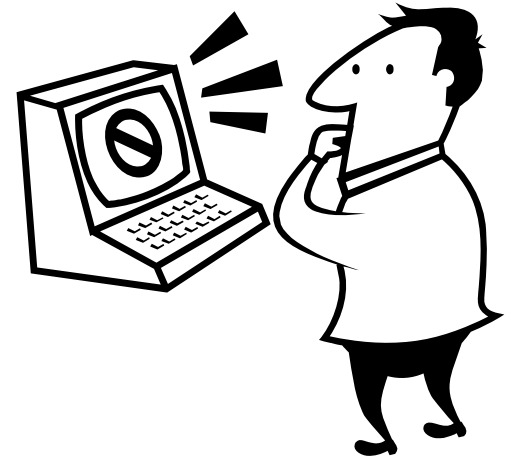
4 or 5 Exceptions to Confidential Treatment

- generally available to the public
- was in Recipient's possession or known by Recipient prior to receipt from Discloser
- was rightfully disclosed to Recipient by a third party without restriction
- is developed **independently of** and **without reference to** Information received from Discloser **[by persons who have not had access to the Confidential Information]**.

Helps Recipients

Who Gets Access?

- Affiliates
- employees
- consultants
- advisors or representatives
 - having a [legitimate] need to know
 - who have signed confidentiality agreements



Helps Disclosers

Confidentiality Efforts

- best efforts
- all reasonable efforts
- **Not Disclose**
- prevent unauthorized access
- protect such Confidential Information as Recipient employs with respect to its confidential materials.
- any other reasonable security measures requested by Discloser.

Helps Disclosers

Restrictions on Use

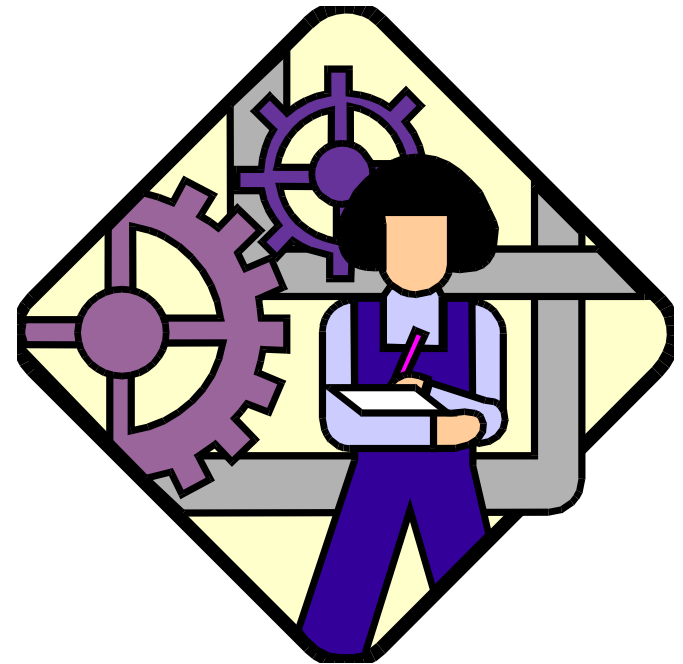
- Recipient will not make any use whatsoever at any time of such Confidential Information
 - **Except for the “Purpose”**
 - **for the benefit of anyone other than Discloser**
 - **Except evaluating the Confidential Information**



Helps Disclosers

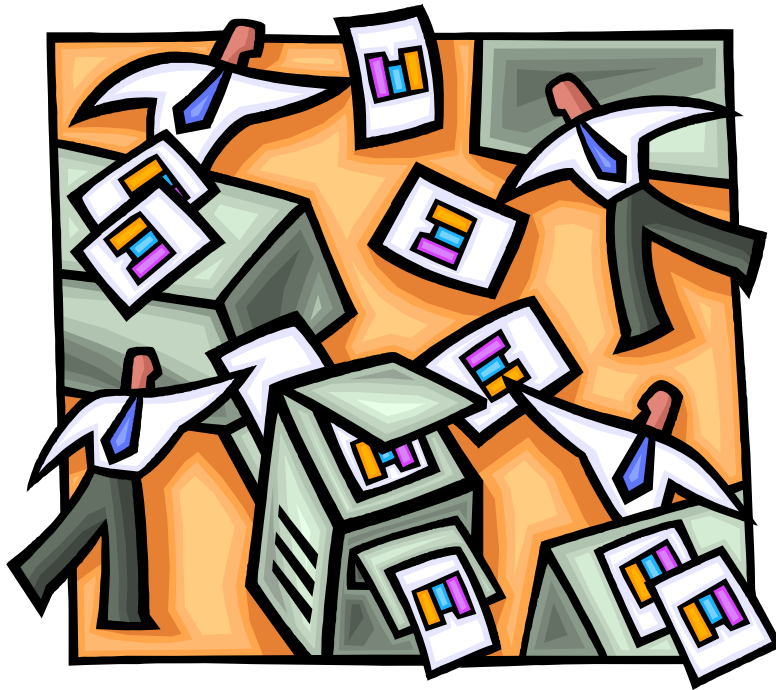
Prohibition of Reverse Engineering

- Recipient will not reverse engineer, decompile, disassemble or attempt to derive the composition or underlying information, structure or ideas of any software, firmware or other technology contained in or embodying the Confidential Information.



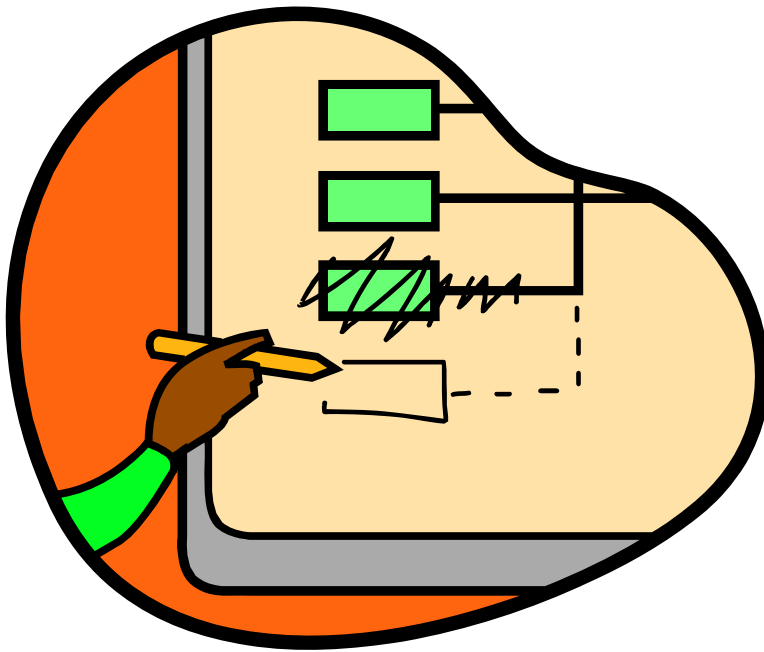
Helps Disclosers

Restrictions on Copying



Helps Disclosers

Prohibition on Alterations & Modifications



Helps Disclosers

Clauses Related to Subsequent Developments by Recipient

- Disclosure of Recipient's Developments to Discloser
- Discloser Owns Recipient's Developments.
- Work For Hire
- Competing Developments



**Help
Disclosers**

Term: How Long does it have to remain secret?

- [as long a period as Recipient is in possession of any of the Confidential Information]
- [three (3)] years after the date of
 - [of this Agreement]
 - [receipt]
 - [disclosure] of such Confidential Information.]

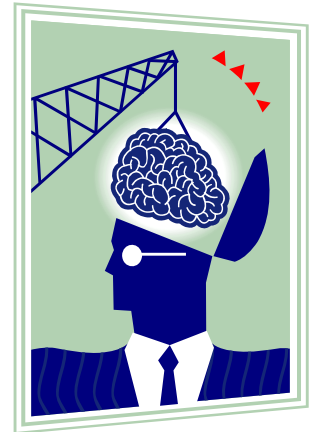


Return of Copies and Materials

- Upon
 - Termination/expiration
 - request by Discloser
- **[immediately][promptly][within __ days]**
- cease all use
- return to Discloser all documents, media, papers, files, records, drawings, specifications, data, film, tape, disks, and other tangible materials containing Confidential Information, together with all copies
- **[or extracts or summaries]**
- **[with a letter confirming that the Information has in no way been reproduced or copied or that all copies have been returned].**

Helps Disclosers

Residuals



- Recipient may use or disclose Residuals for any purpose, including without limitation, use in development, manufacture, promotion, sale and maintenance of any products or services, including competing products and services, and nothing in this Agreement will require Recipient to pay royalties for the use of Residuals. **The term “Residuals” means** any Confidential Information and any ideas, concepts, know-how and techniques contained therein **[in intangible form]** retained in the **[unaided]** memories of any of Recipient’s representatives who have had **[authorized]** access to Confidential Information. **[A person’s memory is unaided if the person has not intentionally memorized the relevant information for the purpose of retaining and subsequently using or disclosing it for purposes unrelated to the Discloser’s purpose in disclosing it.]**

Helps Recipients

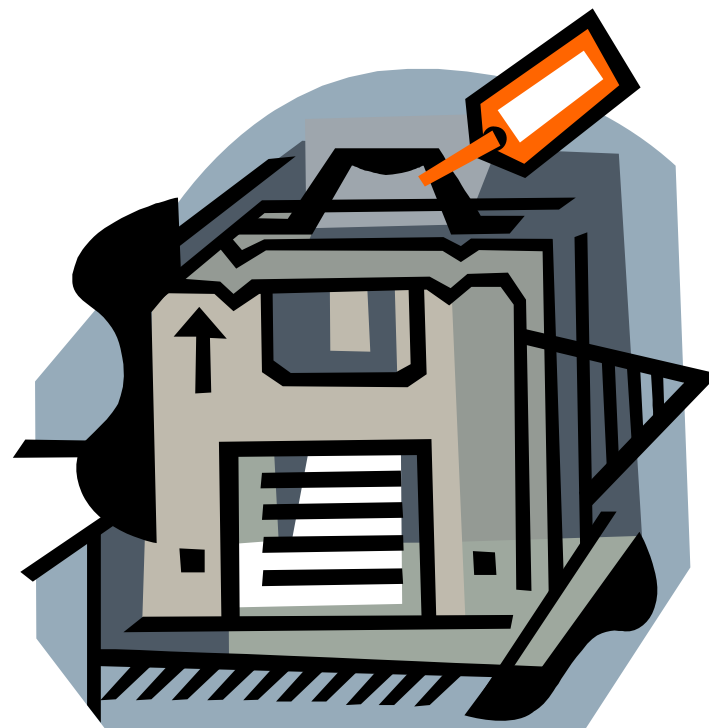
Stuff You're Not Doing

- No Licenses
- No Obligation to Proceed
- Non-Exclusivity



Lawyer Clauses

- Subpoenas
- Discovery
 - Protective Order
- Archive Copies
- Governing Law
- Venue
- Arbitration
- Attorneys Fees
- Injunctive Relief



Your “Take Aways”:

- For trade secrets, it’s all “prevention”. There is no “cure.”
- Need to closely scrutinize NDAs!
- Need to call Broberg!

