

Confidentiality and Confidential Disclosure Agreements (CDA)



Confidentiality

Are you an inventor trying to contact a potential manufacturer, financial backer or other partner? Or perhaps you are just thinking about sharing your ideas with someone about a new product or process you have developed - for example in planning to start a business. If so, have you thought about confidential disclosure agreements and how these could help you? Read on...

Sharing new knowledge and original work which you intend to use commercially requires a high degree of mutual trust.

For example, to get a patent an invention must be new, in the sense of not having previously been available to the public. If you tell even one person about your invention before a patent application has been filed then this may invalidate any patent granted and leave you with no rights, unless the disclosure was made “in confidence”.

This is why it is critically important to consider confidentiality before you approach another company or individual when seeking to develop your ideas. In addition to any inventions you may wish to patent, unpatented but confidential ideas (known as “trade-secrets”) can be an equally important intellectual property asset. Trade secrets can be difficult to protect but Confidential Disclosure Agreements can help.

Confidential Disclosure Agreements (CDAs), also known as Non-Disclosure Agreements (NDAs), are legally-binding documents that enable you to record the terms under which



you exchange secret information. You are strongly advised to consider using one if you are going to disclose the details of your secret technical idea to another party. That is not to say that a duty of confidence cannot arise even in the absence of such a contract. But recording the duty in a written agreement gives added legal certainty.

The other party to the agreement can be any person or an organization. For example, it may include not only potential business partners but also your own associates, contractors, employees or even your family or friends. Normally confidentiality clauses will form part of a broader agreement, such as a contract of employment. But for new companies it's important to consider what may happen in the event that associates/contractors or employees do not, for one reason or another, actually sign up to a contract.

Thus if you intend to communicate your idea to another party an important point to consider before doing so is: do I need to use a CDA? Having a signed CDA means you will be able to tell a potential partner more about your invention with more safety. Also, without one you may not be able to tell them enough to get them interested.

But do you always need to use a CDA? There will be some companies who, for perfectly valid business reasons, do not wish to sign a CDA; this doesn't mean that they are dishonest but simply that they may not wish to receive any confidential information: for example, because they want to avoid conflict with areas they may already be working on. So, on meeting another company for the first time you may only need to outline



the commercial benefits of your invention without having to tell them about its technical features. If you can explain what your idea does, but not how it functions or how it's made, that may be enough to excite interest at a first meeting. Thus, you might just say something along the lines of: "my new product costs ten times less to produce and lasts for twice as long as those on sale in the supermarkets".

Nevertheless you should still think about the risk of not having a CDA in place. Indeed when entering into discussions with potential collaborators or partners it is good practice to discuss confidential disclosure requirements.

Points to consider when using CDAs

- It is highly recommended that you consult a solicitor or a patent agent about how to protect your ideas and the risks of communicating these ideas to someone else.
- Ask the person/company you are communicating with if they have a CDA they may wish to use that serves both of your interests - but read it carefully and consider taking legal advice.

and/or

- Have a CDA prepared and send it to the other party for them to consider.



- Make some sort of record of what was disclosed at a meeting. For example, you could ask the other party to acknowledge a paper copy of a computer presentation, or drawings etc. that describe the technical details of your idea and the date on which you first showed it to them, in whatever form (eg. paper, an email attachment or an internet video streaming player).
- There is no “one-fits-all” CDA. The following is an example of a CDA that shows the types of clauses that are often found in these documents. This typical agreement is merely an example and therefore may not apply directly to your particular circumstances.



An Example of a Confidential Disclosure Agreement (CDA)

There's no set formula for a CDA. They come in all shapes and sizes, from the short and simple to the long and legalistic. This one falls somewhere in the middle and is, in our experience, the sort that people can most readily be persuaded to sign.

CONFIDENTIAL DISCLOSURE AGREEMENT

Between:

[Company name and address]

and

[Your name and address]

1. On the understanding that both parties are interested in meeting to consider possible collaboration in developments arising from [your name]'s intellectual property it is agreed that all information, whether oral, written or otherwise, that is supplied in the course or as a result of so meeting shall be treated as confidential by the receiving party.

2. The receiving party undertakes not to use the information for any purpose, other than for the purpose of considering the said collaboration, without obtaining the written agreement of the disclosing party.



3. This Agreement applies to both technical and commercial information communicated by either party.

4. This Agreement does not apply to any information in the public domain or which the receiving party can show was either already lawfully in their possession prior to its disclosure by the other party or acquired without the involvement, either directly or indirectly, of the disclosing party.

5. Either party to this Agreement shall on request from the other return any documents or items connected with the disclosure and shall not retain any unauthorized copies or likenesses.

6. This Agreement, or the supply of information referred to in paragraph 1, does not create any licence, title or interest in respect of any Intellectual Property Rights of the disclosing party.

7. After X [numerals] years from the date hereof each party shall be relieved of all obligations under this Agreement.



Signed [Your signature]

For [Your business/trading name if relevant]

Date

Signed [Company representative's signature]

For [Company name]

Date



For paragraph 7 you should consider how long you wish the CDA to provide protection for. Typically CDAs have terms of about two to five years.

You don't have to follow this model, word for word. Whatever you do write remember that your main objective is to get people to sign it - something they'll never be eager to do. A shorter document may be more user-friendly but will be full of dangerous loopholes for all parties if too much is left unspecified, while a longer one bristling with restrictive clauses and legal jargon will scare people off.

The person or company you want to talk to may also want you to sign their own CDA, as it may be difficult for them to discuss your product fully without disclosing sensitive information about their own business. Check any such document carefully before signing, to make sure it doesn't unreasonably restrict your own future activities. If you want to show willing, send a short covering letter with a couple of paragraphs along these lines:

"As you will appreciate, it is important that all exchanges of information should at this stage be in confidence. I have therefore drafted a confidential disclosure agreement which I hope you will find acceptable. A copy is enclosed.

For my own part, I shall be happy to sign your own confidential disclosure agreement, assuming its conditions are broadly similar to mine."



Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 08459 500 505
Minicom: 08459 222 250
Fax: 01633 817777

www.ipo.gov.uk

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