

PBPA Podcast Transcript
Episode 17: Non Disclosure Agreements (NDAs) for Nonprofits
(20:48 minutes)



Sireesha ([00:03](#)):

Your nonprofit has valuable information such as donor lists and programming ideas that it probably wants to keep confidential. However, sometimes it's necessary to share that information with individuals outside your organization. How can you do that safely? What is an NDA and what can it do for your nonprofit in these situations? Dan Hart will answer that question, and more, in this episode of the PBPA Podcast.

Sireesha ([00:35](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:47](#)):

Dan Hart is a partner with the law firm of Seyfarth Shaw and a dedicated PBPA volunteer. As a litigator who helps companies protect their confidential information, he has a lot of insight to answer our questions today. Thank you so much for being here, Dan.

Dan ([02:02](#)):

Well, good morning, and it's pleasure to be here with you today and to be able to talk about this important topic.

Sireesha ([02:08](#)):

Let's start off, Dan, with talking about "What is an NDA"?

Dan ([02:13](#)):

An NDA is an abbreviation for "non disclosure agreement". It's essentially just an agreement to keep certain information confidential. It's usually used to protect commercially sensitive information, such as trade secrets or other confidential business information. But it can also be used to protect information that needs to remain confidential, such as private information or personal information. That could include social security numbers, personal health information or financial account information.

I should note that for a lot of these kinds of information, the law might already require you to keep the information confidential, even without an NDA. For example, personal health information is protected under a federal law called HIPAA. Trade secrets are protected under laws in all states. They're also

protected under an important federal statute called the Defend Trade Secrets Act. And in these cases, NDAs really are in addition to what's already required by the law.

I should note that NDAs can sometimes include other promises to refrain from engaging in certain activities for a period of time. In addition to confidentiality, these are sometimes called restrictive covenants and they can take a lot of different forms. Some of the most common restrictive covenants are covenants not to compete for a period of time where covenants not to solicit customers or employees of the other party. These other kinds of restrictive covenants are a lot more complicated than simple confidentiality covenants. And they're subject to a host of other legal requirements that simply don't apply to mere confidentiality covenants. They could be the topic of an entirely different podcast. And so when I'm referring to an NDA today, I'm referring specifically to confidentiality covenants and not to these other kinds of restrictive covenants.

Sireesha ([04:14](#)):

Okay. You give us lots of options here for an organization that needs to protect its confidential information. When does it make sense to sign an NDA?

Dan ([04:25](#)):

No, there could be a lot of different situations where it makes sense for a nonprofit to sign an NDA. You might be interested in merging with another nonprofit or maybe entering into some other transaction with another profit non-profit or a for-profit company. In the course of negotiations, both parties probably will need to disclose confidential information about their employees, their financials, their operations, and maybe other things as well. In a transaction like that, both parties will want to keep their information confidential and it makes sense to have an NDA. In fact, I think it would be imprudent not to have one, if you're going to be exchanging confidential information like that.

You might also be entering into a partnership or some other arrangement with another nonprofit or a for-profit company where you regularly receive some kind of confidential information from the other party. For example, maybe there's another organization that has a similar mission and you enter into some arrangement where they're going to share information with you about their donor list or about where research that they've conducted or about the fundraising opportunities that they have identified. It's understandable that that other party would want to keep that information confidential. And they would probably ask your organization to sign an NDA. You know, a few other situations are fairly common.

You know, there could be a situation where another has an obligation to keep certain confidential information confidential. And in order to fulfill its obligations to someone else, they need you to sign an NDA. So for example, maybe your organization is a subcontractor to another organization and that other organization receives funding from a government agency. And maybe in that scenario, as a subcontractor, you'll receive some personal health information about people who are served by the general contractor. You know, I mentioned a couple of minutes ago that personal health information is protected by HIPAA, and so that other organization might need to get you as the subcontractor to sign an NDA because it needs to fulfill its obligations under its own contract with the government agency. These are just a few examples. There could be a lot of other situations where an NDA is appropriate.

Sireesha ([06:57](#)):

That is a great lesson. Thank you for those examples for when an NDA might be appropriate. Are there situations where a nonprofit might want to require another party to sign an NDA?

Dan ([07:09](#)):

The answer is yes. In all the situations I just mentioned. You might want to ask another party to sign an NDA. You might be the general contractor under an agreement with a government agency or some other entity. And if you bring on a subcontractor, you might want to have the subcontractor sign, an NDA. You know, as I mentioned, you might be entering into an acquisition or another deal with another non-profit or a for-profit company. And it might make sense in that situation for both parties to have the benefit of an NDA. You know, some nonprofits conduct very sophisticated research and that research could be commercially available. If this is the case with you, uh, with your organization, you might need an NDA. This is often the case, for example, with nonprofits that are researching cures for diseases.

If your organization develops some kind of information like that, that's commercially valuable, you might want to protect your ownership of that information, even though you're a not-for-profit organization, because you reasonably don't want other businesses to profit off of your hard work, without you getting some return on your investment. You might work with contractors who in the course of providing services to you will receive some confidential information that you want to keep confidential. For example, you might hire a web developer to build a website that interacts with your donor database. You'll want to keep your donors information private, and it's completely reasonable for you to want to ask the web developer, to sign an NDA, to protect that information. And you might ask your own employees to sign NDAs, and that's especially the case if they'll have access to confidential information about your donors, your clients, or other employees.

Sireesha ([09:04](#)):

Okay. So those are situations where you would want to have another party sign an NDA. Are there situations where nonprofits themselves should not sign a non-disclosure agreement?

Dan ([09:17](#)):

You know, you'll need to look at each situation and determine if an NDA is appropriate. In general, you'll want to make sure that an NDA doesn't prevent you from disclosing information that either should be disclosed or that you're required to disclose. In the last several years, state and federal government agencies have been cracking down on companies, including nonprofits that require other parties to enter into NDAs that keep people from disclosing information about possible violations of law. So, the SEC, the EEOC, the DOL and the NLRB National Labor Relations Board have all gone after companies for this practice over the past several years. And nobody wants to be the target of government investigation because they signed an NDA that was too broad.

You know, another development that's happened over the past few years has come in the wake of the hashtag me too movement. And in light of that, a lot of courts and state and federal government agencies have been concerned about agreements in which people agree that they're not going to disclose instances of sexual harassment that they experienced. You know, sometimes people talk about these kinds of agreements as "bad NDAs" because those kinds of agreements try to hush hush things that really should not be kept secret. In contrast, everyone generally agrees that NDAs are good. If they're protecting information that should remain a secret. And so I think the task for an organization is, is being able to distinguish between what's a "good NDA" and what's a "bad NDA". It's very helpful here to seek the assistance of a lawyer when you're reviewing or drafting these kinds of agreements.

If you're entering into an NDA with an individual such as an employee or an independent contractor, it's a good idea to include language saying that the agreement doesn't prevent the person from disclosing information that's legally required to be disclosed or from exercising their rights to engage in legally protected activities. And I mentioned it earlier, a federal statute called the Defend Trade Secrets Act.

That actually requires agreements with individuals to disclose to people the rights that they have as whistleblowers or an anti-retaliation lawsuits. And a lawyer who's familiar with this area of the law can assist you with either reviewing the language or drafting the language to make sure that it's legally compliant.

Sireesha ([11:56](#)):

Okay. So we've talked about "good NDAs" and "bad NDAs", um, very legal terms there. Now let's talk about mutual and one-sided NDAs. Sometimes our clients come to us with a one-sided NDA. Sometimes it's a mutual NDA. Does it matter which one they enter into?

Dan ([12:15](#)):

Well, it doesn't matter for enforceability. As I mentioned earlier, there are situations where you'll want an agreement to be mutual, but it doesn't have to be mutual in order to be legally enforceable. As long as one party gives something of value in exchange for the promise to keep information confidential, that's sufficient for it to be enforceable. This is a legal concept called "consideration". And in most cases, simply providing access to the information that needs to be protected is enough consideration for an NDA to be enforceable.

Now, I said, it doesn't matter for enforceability, but it does matter, practically speaking, whether an agreement is mutual or one sided. If both parties are providing the other with confidential information, it really should be mutual. And you'll need to look at the agreement to ensure that it's mutual because not all NDAs are written to be mutual, even if they should be. And

Sireesha ([13:17](#)):

Can you tell us a little more about what are some of the other important terms of an NDA

Dan ([13:22](#)):

You want to look at all the terms of the agreement to make sure there's something, um, the terms are something that you can live with, but you should especially pay attention to some key terms. And the first is the parties, you know, who's bound by this agreement. If you're signing on behalf of your organization, you're ensuring that the organization as a whole will honor the agreement. And as a practical matter, that means that you need to make sure that you're policing your employees so that they comply with the agreement. If you're receiving confidential information from another party, you should consider only providing the information that you receive to employees who have a legitimate business need for the information.

And you should also take common sense measures to protect the information that could include securing information and lock filing cabinets, using passwords and user names in your IT Systems. Maybe following other IT security measures like encryption or other things. And an NDA might even require you to implement such measures if they aren't already in place.

Now, another key term of an NDA is the definition of confidential information. You'll want to look carefully at the kind of information that's protected by the agreement. As a rule of thumb, as I mentioned earlier, the agreement should only protect information that legitimately should be protected so that you're not signing one of those "bad NDAs", legal term of art, that I mentioned earlier. And at any rate, you'll need to know what specific information you're promising to keep confidential, so that you can implement appropriate measures in order to fulfill your obligations.

You know, another important term of an NDA is what the duration or the term of the agreement is. You'll want to understand how long your obligations will remain in place.

Dan ([15:17](#)):

You know, I mentioned earlier, there are some kinds of information that are protected by the law, regardless of whether you're bound by an NDA, such as trade secrets and personal health information. It's very common for NDAs to have an open-ended duration and to remain in place, as long as the information in question remains confidential.

You'll also want to understand if there's anything you're required to do when your agreement with the other party comes to an end or your relationship with the other party comes to an end. For example, sometimes when companies sign NDAs, because they're exploring a possible corporate transaction, the agreement might require the parties to return confidential information at the end of the due diligence period. If they decide not to go forward with the deal and you'll need to understand what obligations you have to return information, if that's laid out in the NDA.

You know, the bottom line I think is as with any contracts, you really should understand what you're signing before you signed the agreement. And if you have any concerns or uncertainties about the terms, you should resolve those before you signed the agreement.

Sireesha ([16:29](#)):

So, Dan, you just listed some of the key terms of an NDA. And if a nonprofit is reviewing the agreement and they don't like one of the terms, what should they do?

Dan ([16:41](#)):

Well, you can always ask the other party to change it. And maybe you can mark through what you don't like, make handwritten edits and initial your change. And if your changes are significant, you might need to go back to the other side and ask them to send a clean revised draft, incorporating your revisions.

Now, I should mention that a lot of times companies will use a template NDA that either their outside counsel or their in-house legal team developed, if they have an in-house legal team. You know, don't be surprised if you get some pushback from the other party. You're probably not going to be dealing with their lawyers, but with the business folks who have the template that they use. And the other party might give you some pushback about revising their agreement. But you can always ask, I don't think there's any harm in doing that. And at the end of the day, if you're not comfortable with the terms and the agreement, it's not something you can live with, and the other party doesn't want to change them. You might decide not to go forward with the relationship with the other party.

Sireesha ([17:46](#)):

This is a very good point. Um, oftentimes I've also found that the parties, our clients work with might just grab the NDA off the internet. So the parties may not even know what is in the NDA that they sent out. So you're right. It never hurts to ask for changes. My last question Dan is what happens if a nonprofit ends up violating a term of the NDA?

Dan ([18:09](#)):

Well, that the consequences could be really significant. And the fact that a company is a nonprofit, as opposed to a for-profit company, really doesn't make any difference. You know, the company, nonprofit, might have to pay damages to the other side, for whatever damages the other side suffers

because of the loss of their confidential information. And you can envision situations where, you know, the damage actually caused by the disclosure of information could be really significant. Maybe they'd lose a contract with some other party. So it's not a, not a small amount at issue. You could have a court issue, an injunction against you that prevents you from using or disclosing the information that you're required to keep confidential.

You know, all this assumes that you're sued and simply dealing with the lawsuit means you're going to have to pay your own attorney's fees and the cost of litigation. And you could have to pay the other side's fees and costs of litigation if they win and if the agreement has a provision requiring the loser to pay the winners' costs and fees. And I think anybody who has been through this process can realize or realizes what a significant burden this is in our organization. And when you're dealing with a nonprofit, with limited resources, this really could completely end the nonprofit's existence.

So, you know, huge, huge stakes involved here. And this is all the more reason to get the assistance of a lawyer, before you enter into an NDA. If you have any questions or uncertainties about the agreement that you're asked to sign, you should resolve these beforehand, and a lawyer can help you with any of the questions that you might have.

Sireesha ([19:57](#)):

Excellent point, Dan. Thank you so much for sharing your expertise with us and answering our questions. Really appreciate it.

Dan ([20:04](#)):

My pleasure.

Sireesha ([20:06](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.