

## Your NDA Likely Won't Protect You



### | Why?

At the end of the day, an NDA is basically a ticket to a courtroom when a confidence is broken. By then the damage is usually done. Given the resources of a large company, that often means they can litigate to death even fairly clear breaches.

### | What Can You Do?

Rule #1 here is be careful about picking your partners and Rules #2 and #3 (perhaps more) are see Rule #1.

### | What Else Can You Do?

**1** **Get Patents**  
Trade secrets are a difficult form of IP to enforce. At the cost of disclosure, patents are more easily enforceable and more powerful (for example, they can be used to stop the importation of infringing goods).

**2** **Have a Disclosure Process**  
Don't overshare on the "first date." Especially initially, share the minimum required to get to the next step and increase over time as trust builds. Have a strategy for a phased approach, with the crown jewels being disclosed only when you are very confident that the transaction will occur.

**3** **Limit the Disclosure Circle**  
Many NDA's limit disclosure to those with a "need to know." For really important information, go a step further and require the recipient to identify recipients by name and if it is really sensitive information, consider requiring individual recipients to acknowledge in writing their receipt of the information and its confidential nature.

**4** **Turn to the Court of Public Opinion**  
If you are going to allege infringement, consider making it very public. The PR hit may be the strongest deterrence - especially in markets with high reputational risk.

**5** **Add an Arbitration Clause**  
Adding an arbitration clause with expedited discovery procedures would significantly reduce the ability of a deep-pocketed company to adopt a strategy of litigating to death claims of trade secret theft.

**6** **Track and Intelligently Mark Documents**  
Many companies slather confidential markings on every document and communication including lunch invitations. Conversely, companies are usually poor about documenting oral disclosures as most NDA's require. A more focused strategy of marking what is truly confidential and rigorously documenting oral disclosures, sends a strong message that you are an entity that takes trade secret protection seriously. Companies should closely track these disclosures - including dates and people who received the information. As a side benefit, it is also gives you a much better paper trail if you do take the matter to court.

**7** **Be Paranoid**  
Especially when meeting with potential competitors, maintain a healthy dose of paranoia. Look out for questions that seem like fishing expeditions or seem like attempts to obtain enabling know how or competitive intelligence. In many ways, it is best to function as if the NDA was not in place and ask yourself what you would be comfortable disclosing and how.