



# The dos and don'ts of NDAs

## Design Professional

Signing an owner's nondisclosure agreement may be an accepted part of doing business, but some of the terms owners seek to impose on designers are just plain unacceptable.

While many people might associate nondisclosure agreements, or NDAs, with Silicon Valley startups or Hollywood studios that don't want their next big ideas made public, there are also many reasons why project owners request that design professionals sign NDAs: to keep proprietary information out of competitors' hands; to keep deliberations over various means, methods or solutions secret; or to prevent others from learning about an entity's overall strategy until absolutely necessary.

Typically, an owner will request that a designer sign an NDA before negotiating or finalizing a contract in an attempt to keep the project details—or even its existence—secret, whether or not the designer ends up participating in the project.

AXA XL's Design Professional team cautions design professionals to regard NDAs as they do contracts, i.e., read them carefully before signing. We've seen cases in which the A/E has signed an NDA without fully understanding its implications.

"Some architects or engineers willingly sign NDAs without examining the language and comprehending the penalties they are accepting, including agreeing to penalties without proof of a breach," says Nancy Rigassio, Executive Claims Counsel for AXA XL's Design Professional team. "My guess is that when owners propose confidentiality agreements while the parties work out the

professional services agreement, many design professionals see the confidentiality agreement as a preliminary—and temporary—step in the process."

While most designers might not intentionally divulge confidential information, there are plenty of situations in which someone might unintentionally let the cat out of the bag. For example, let's say you were invited to discuss the building of a new big-box store in a town that has traditionally patronized local businesses. After your meeting, someone overhears you and your colleagues discussing the project in a nearby restaurant. Even worse, one of your junior staff members, after hearing about this potential feather in your firm's cap, decides to post the news on social media. Before you know it, local merchants have formed an organization to protest the project.

Another possible scenario is that your firm might suffer a data breach. In such a case, the owner's confidential material could be stolen and, once the theft was discovered, you would have to notify the owner of the breach as required by law. Since the owner would likely accuse you of violating the NDA, you'd find yourself in the most difficult position of having to prove that the owner's confidential material was not stolen.

## What's "confidential"?

The problem with many, if not most, of these owner-written NDAs is that they're so broad in scope that a designer of any tenure would have a tough time not violating the terms, no matter how careful the designer, because everything about the project could be deemed confidential.

Rather than precisely limit the information the owner wants to be kept confidential, these troublesome NDAs cast as wide a net as possible. Consider, for example, the following passage from an NDA a designer was asked to sign:

*...Confidential Information is defined as all data and information relating to the Owner's activities, operations, practices, or customers that the Consultant learns during its interactions with the Owner...shall include but is not limited to the following...financial plans and data; product development; trade secrets; business plans; operational methods; marketing plans or strategies; pricing information; customer files; material and product specifications; personnel and compensation policies...and other similar information.*

At least this NDA sets forth a definition of what is to be deemed confidential—most NDAs don't. But note the use of "other similar information." That only adds to this clause's already-too-expansive definition of "confidential information."

"Owners deliberately want a very broad definition to include information not even contemplated at the early phase of the project," Rigassio says. "But defining confidential information as broadly as possible places an unfair burden on the designer."

It's up to you to revise the agreement to define confidential information as that information the owner specifically designates to you as confidential.

## Public responsibility

As a licensed design professional, you have an ethical obligation to protect public health and safety, a duty which overrides any obligation to the owner. However, if you were to discover something, or if the owner were to ask you to do something, that you believed would be contrary to the ethical code, and you decided to report it, you could find yourself in violation of the NDA.

## Potential costs

In this next clause, a different owner's proposed NDA describes the consequences of disclosing what the owner subjectively considers confidential information:

*In the event of any breach of this Agreement by Consultant, Consultant shall pay the Company liquidated damages equal to \$25,000 for each such breach. The Parties hereby agree that in the event of such a breach, actual damages would be impractical or impossible to ascertain, such liquidated damages*

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*represent a reasonable estimate of the breach's actual damages to the Company, and such amount represents liquidated damages and not a penalty.*

The attempt to impose an arbitrary amount of damages makes an assumption that the disclosure of information caused the owner irreparable harm, and improperly shifts the burden of proof from the owner to the designer. This shift will require the designer to carry the burden of, in effect, proving a negative—that the disclosure did not involve information that was confidential, and that the disclosure did not cause harm to the owner.

According to Rigassio, "Owners don't want the burden of having to prove the elements of causation or damages. They just want the A/E to concede, 'Yes, our actions have caused you irreparable harm and the damages would be so severe they're impossible to determine, so we will agree to your imposition of damages in the amount of \$X per breach.'"

Under these terms, if your intended lead designer on the proposed project disclosed confidential information on Monday and your intended project manager disclosed different confidential information on Tuesday, you'd already owe \$50,000 (a sum that may not be covered by your professional liability insurance policy). And you may not even win the project!

## Managing your risk

One thing to keep in mind is that NDAs, like contracts and so many other aspects of a designer's services, are negotiable. "There's nothing wrong with signing an NDA," Rigassio says, "What can get you into trouble is signing one that fails to require the owner to specifically identify what information is confidential, and allows the owner to take a shortcut around proving the elements of causation and damages." To that end, AXA XL offers the following loss prevention advice:

- Read the non-disclosure agreement word-for-word. Just because it looks like a standard agreement, don't be fooled into complacency. That "fine print" you may be tempted to ignore (particularly if you're asked to sign the agreement at the beginning of a meeting, while everyone's waiting) is exactly where the owner may have tucked the right to obtain injunctive relief without having to carry the burden of proof, or the liquidated damages remedy.

When reviewing, keep an eye out for language such as "any and all data and information," "other similar information," or other

language that is so broad that it covers a disclosure of practically anything.

- Include language that obligates the owner to specifically designate the information deemed confidential. The owner should be able to tell you which information you can't disclose and which you can.
- Make sure the agreement places the burden on the owner to prove the elements of a cause of action, including the existence of irreparable harm to the owner and the monetary value. Some NDAs will define confidential information as "information not generally known by the public." That means if you disclose something you believe is public information and the owner cries foul, then the burden will be on you to prove that it isn't confidential, which can be difficult and time-consuming.
- Make sure you have NDAs with your subconsultants. You don't want to get into a situation in which it's alleged that you inappropriately shared confidential information with an HVAC engineer that never executed an NDA with you.
- To avoid violating the NDA by reporting a public health and safety-endangering request from the owner, include a public responsibility provision in the NDA. In effect, the clause should read that the owner will not ask you to take any action that conflicts with your professional code of ethics and that, should the owner do so, it is agreed that if you report the request to the appropriate parties, the owner will not pursue legal action against you for violating the NDA.

- If you sign an NDA and want to protect yourself against the risk of a data breach resulting in the owner's confidential information being made public, you'll want to consider obtaining cyber insurance coverage. Speak to an AXA XL broker or agent to learn about our Cyber Suite for Design Professionals enhancement to your existing AXA XL policy or our standalone cyber risk coverage.

Nondisclosure agreements play an important role in the relationship between owners and design professionals. In some ways, they help protect not just the owner, but also the designer, by underlining the importance of keeping certain information confidential to promote the project objectives. The key is to become fully aware of what you're signing and its implications and to negotiate fair terms that reflect what the law requires.

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