

## Confidentiality Agreements

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When a possible transaction begins, the first step often consists of signing a confidentiality agreement. It's a transactional ritual, serving a purpose, though not necessarily its primary apparent purpose.

A confidentiality agreement starts, of course, by saying the parties will keep things confidential. That's a good start. If you don't make it clear that you want something kept confidential, then you can't object when someone else shares it. To help prevent that, you can place on the record that you really do expect the information recipient to preserve confidentiality.

You may also want to try to stop the information recipient from doing other things with the information – such as buying the mortgage on the property offered for sale.

Often these agreements go a lot further, though, with requirements for specific measures an information recipient is supposed to take to preserve confidentiality. And these agreements often include the word “indemnify,” and add elaborate language consenting to injunctions and other extreme remedies. That's where they start to give me a headache.

If someone violates a confidentiality agreement, it's unlikely the victim will file suit or a court will do much about the violation. It will be too late anyway. So, once you've signed a confidentiality agreement, you've gotten most of the value the agreement will ever produce: a recognition that you want to keep information confidential. For any responsible information recipient, that should do it. More legalese just makes it more complex without producing much more practical value. The same comment actually applies to a lot of documents.

A confidentiality agreement may give you a preview into the negotiation style and mindset of your contemplated counterparties. Are they practical? Are they overly legalistic? Do they nitpick? Make silly comments? Do the lawyers run the show or the business people? Do they worry about their shadow?

By helping to answer questions like these, a confidentiality agreement may give useful insights, serving a purpose independent of confidentiality. If someone serves up a confidentiality agreement to sign, you can gain similar insights the other way around. Of course, once the transaction moves to deal documents, it may involve different people and a different approach.

Asking a prospective counterparty to sign a confidentiality agreement can help determine if they are minimally serious. They'll usually realize they need to have a lawyer take a look at it. That often costs money. So your mere request for a signed confidentiality

agreement filters out possible counterparties who don't take the transaction seriously enough to incur a small legal bill. Of course, they might have ultimately taken the transaction seriously enough to submit the highest bid. You don't want your draft confidentiality agreement to scare away too many people.

The most important piece of any confidentiality agreement has nothing to do with confidentiality. Instead, it seeks to prevent claims that there was a binding deal when there actually wasn't. So any confidentiality agreement usually makes very clear that no one can become legally obligated to close a transaction unless the parties agree on documents and then execute and exchange them.

Today's negotiations and deal discussions often proceed by email and in fits and starts. But they also have a level of detail and occasional enthusiasm that can sound like a commitment to proceed. These communications carry the power of the written word without being written by lawyers.

Absent protective language, it can be perilous for anyone to discuss a possible transaction, in emails or otherwise. If one party thinks they “had a deal” but the other party doesn't agree, then the disappointed party is perfectly happy to go to court, and often does. The judges who hear those claims rarely know much about real estate negotiations and what industry participants expect when they discuss deals. Judges can and do find binding agreements when the other party didn't really anticipate one. And sometimes when you “go to the email,” there's enough there to support whatever conclusion a judge wants to reach.

A confidentiality agreement will try to prevent that problem. It will also try to immunize the seller (or other party) from possible claims arising from the transaction process itself, such as a claim that someone was supposed to get a “last look” or the seller had some obligation to conduct an auction in a certain way. It can also prevent claims that a counterparty “relied on” anything the seller said – a variation on the idea that no one has any liability unless the parties actually negotiate and sign final documents.

These last few considerations don't have much to do with confidentiality. But they show that a good confidentiality agreement can act as an insurance policy against litigation and claims. And it can do that without huge amounts of fierce legal boilerplate.

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