As featured in **Seattle Business**

LANE POWELL

Keeping It Confidential

How to build a better nondisclosure agreement.

OVER THE LAST FEW YEARS, the standard form of nondisclosure agreement (NDA) has undergone a revolution. The revolution has occurred in part because scientists and engineers are more savvy about protecting ideas and new technologies. It has also occurred because smaller companies are finding more and better ways to create synergies with larger companies. The best NDAs strike a balance between encouraging the parties to share while also protecting the information from unauthorized use. To strike this balance better, it helps to have a few tricks up your sleeve.

One misconception is that NDAs must contain certain exclusions as to what constitutes confidential information. Although these exclusions commonly appear in most forms of NDAs, no law or rule requires they be part of the agreement.

> Trade secret laws in the United States are essentially intended to act as a floor. The parties are free to enter an agreement that, as between them, contains stricter obligations of confidentiality.

The four basic exclusions occur when (1) the disclosed information is already generally known to the public, later becomes generally known or otherwise is in the public domain; (2) the receiving party already lawfully possessed the disclosed information; (3) the receiving party already had received the disclosure from a third party without an obligation of confidentiality; and/or (4) the receiving party independently develops the information without using the disclosing party's information.

Trade secret laws in the United States are essentially intended to act as a floor. In other words, the parties are free to enter an agreement that, as between them, contains stricter obligations of confidentiality. The exclusions, of course, tend to favor the receiving party. This is because the receiving party no longer has to treat the covered disclosure as confidential. In contrast, an NDA that does not contain any of the four exclusions would, arguably, favor the disclosing party. The next time you draft or review an NDA, consider whether you need one or more of the four exclusions. Your approach may vary depending on the relative leverage of the parties, whether you wish to favor the party disclosing or receiving the information, and whether you anticipate seeking injunctive relief, damages or both should a breach occur.

Consider the following uncommon but helpful provisions for your next NDA. If you are the disclosing party, try pushing for a "thou shalt not design around" provision. This provision states that the receiving party may not reverse engineer or design around any of the confidential disclosures. The prohibition against designing around may later prove to be a strong incentive for the receiving party to do business with the disclosing party.

If you are seeking a more equitable approach, consider including a "feedback" clause. This clause allows either party to provide the other with feedback voluntarily and it disclaims any confidentiality obligations for the party receiving the feedback, absent a separate written agreement. Either party is free to use the feedback however it likes.

As yet another deceptively simple example, consider an attorneys' fees clause if you are primarily in the disclosing position. This clause usually favors the disclosing party because that party is the one most likely to sue under the agreement when the receiving party breaches it.

You will always be in better shape if you think about whether any particular provision in an NDA favors the disclosing or receiving party. Consider real-world scenarios that may occur if the receiving party breaches the agreement. Remain mindful of the purpose of the NDA and strike the balance that works best for your company or your client.

STEVEN B. WINTERS is a shareholder at Lane Powell. He leads the firm's intellectual property transactional practice. Reach him at winterss@lanepowell.com or 206.223.7740.