



## Business Ethics: Non-Disclosure Agreements

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### 1. Matthew Literovich, *Equitable remedy provisions in NDA's: The empty clause*, lexpert.ca

In today's information economy, one of the most valuable assets a business can protect is its intellectual property. Executing a confidentiality agreement prior to disclosing information – whether in a stand-alone non-disclosure agreement (NDA) or as a restrictive clause within a larger transactional agreement – is one of the best ways to protect such information, binding the parties to preserve confidentiality.

The definition of confidential information will vary from clause to clause, but in the absence of clear guidance, courts will consider whether the information is:

- Generally unknown to others;
- Known to others within the specific industry or others connected to the business;
- Capable of being acquired elsewhere by those outside the business entity; and
- Unique, original, or novel in some way, amongst other factors.

Examples of confidential information include (but aren't limited to) financial data, pricing matrices, business strategies, and even trade secrets (which are subject to their own protections). Confidential information may include something stamped as confidential or orally indicated to be confidential, even if it doesn't meet the above criteria.

So what does a confidentiality clause look like? Here's an example:

*Both parties agree to endeavor to take all reasonable measures to keep in confidence the execution, terms and conditions as well as performance of this Agreement, and the confidential data and information of any party that another party may know or access during performance of this Agreement (hereinafter referred to as "Confidential Information"), and shall not disclose, make available or assign such Confidential Information to any third party without the prior written consent of the party providing the information.*

### 2. Shane Dingman, *Ontario moves to ban use of non-disclosure agreements in real estate transactions*, Globe and Mail, March 1 '23

Confidentiality clauses, or non-disclosure agreements, are increasingly found in all manner of legal agreements Canadians enter into, but as of April 1, 2023, Ontario real estate professionals will be restricted from using them when settling a dispute with a client.

To advocates pushing for an end to the widespread use of non-disclosure agreements (NDAs) the changes are welcome, but for an industry where reputation is a valuable currency it could raise the stakes for realtors facing complaints or business disputes.

"One of the main reason [any party] wants to settle is they don't want their dirty laundry in public," said Gosia Bawolska of Cadence Law. Ms. Bawolska said she can see both sides of the issue. "[As a homebuyer], I wouldn't want to hire a realtor with six settlements ... but if I were the lawyer acting for [a realtor] I would still want to have the ability to use a confidentiality clause."

## Cases

1> Chonein Daat is a company developing large language modules for commercial applications. The company recruits Susan, a talented graduate student in Computer Science, and they present her with a non-disclosure agreement (NDA) stipulating that all confidential information they provide, as well as all intellectual property, marketing and development information, computer code, and "any and all sensitive information" related to her work, other than that which is known generally in the industry, will remain in the exclusive property of the employer throughout the term of her employment and for an additional three years. Susan has never been employed before, and she is confused as to her rights to her work. Would Jewish law or ethics support Chonein Daat's claim to her work?

2> Susan tells Chonein Daat that she is willing to sign an NDA that lasts for one year after her employment, and that allows her to use her computer code in areas that will not compete with Chonein Daat. But the company is insistent, and they offer her a large bonus to induce her to sign. They also hint that refusal to sign a three-year NDA could lead them to rescind her job offer. Would Jewish ethics permit an employer to use financial inducements to pressure an employee to sign an NDA?

- 3> Susan decides not to work at Chonein Daat, and instead she is hired by their competitor, Machinethink. Late one night, Anthony, the veteran manager of Susan's division, texts her with an explicit request for sexual activity. Unsure what to do, Susan replies by email, requesting that Anthony not send her any such communications in the future. He apologizes and explains that he had sent the text to her by accident – but three months later, during a long holiday weekend, Anthony sends her further explicit texts, including photos of himself and overt requests which address her by name. On Monday morning Susan shows the communications to the Machinethink HR department; by the end of the day a Machinethink vice president comes to her desk with an offer of a \$50,000 bonus for her hard work, and an NDA prohibiting disclosure of Anthony's actions. The vice president is sympathetic, even hinting that this is not the first problem with Anthony and that she has been looking for an opportunity to investigate him. However, she explains that signing the NDA is required in order for Machinethink to begin investigating. Susan does not want to sign. Would an NDA signed under this form of pressure be valid within Jewish law?
- 4> Susan signs the NDA. Three weeks later, Anthony leaves the company; Susan is told he left rather than face the results of the investigation. Two months after that, Susan learns that Anthony has found a managerial position at another company, where he supervises a friend of hers. Under Jewish law, would Susan be allowed to tell her friend anything about her experiences with Anthony?

### Case #1: The right to an employee's intellectual property

#### 3. Rabbi Yitzchak Alfasi (11<sup>th</sup> century Morocco/Spain), Responsum 133

שאלה. א' מן התלמידים גנב ספרי פרושין לחבירו וכשתבעו ממנו נשבע שבועה חמורה שלא יחזירם לו עד שיעתיק אותם ויש מי שהורה שמותר לגנבן. תשובה: הגונב והמורה כלם טעו, שלא כדין עשו. שזה שהורה שמותר לעשות כן דומה לו משום שמתלמד דברי תורה שהיא מצוה היא וטעה משום שאמר לולב הגזול והיבש פסול ואתמר עלה משום דמצוה הבאה בעבירה המקום שונאה...

Question: One of the students stole another person's books of commentaries. When he demanded it back, [the thief] swore a severe oath that he would not return them before copying them. Someone ruled that he could steal them.

Answer: The thief and the one who ruled are both mistaken, and acted improperly. The one who ruled that this is permitted thinks that since he is learning Torah this is a mitzvah, but he is wrong, since [the Talmud] says, "A stolen or dried out lulav is disqualified," and we learn regarding this that Gd hates a mitzvah performed via transgression...

#### 4. A Brief History of the Origins of Jewish Intellectual Property Law

<https://www.yutorah.org/lectures/lecture.cfm/840101/>

#### 5. Rabbi Moshe Isserles (16<sup>th</sup> century Poland), Shulchan Aruch Choshen Mishpat 369:11

לא אמרינן דינא דמלכותא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה, אבל לא שידונו בדיני עובדי כוכבים, דאם כן בטלו כל דיני ישראל

We do not recognize government law other than in matters that benefit the king, or that benefit the citizenry, but not to judge by the laws of idolaters; that would cancel all of the laws of Israel.

#### 6. Rabbi Yitzchak Schmelkes (19<sup>th</sup> century Galicia), Beit Yitzchak 75:5

אמנם מצד דינא דמלכותא אסור במדינתנו להדפיס, וכת"ה שאל אם נאמר בכגון דא דינא דמלכותא דינא הואיל שסותר לד"ת. הנה בהל' אבדה ס' רנ"ט מבואר דמציל מזוטו של ים צריך להחזיר מצד דינא דמלכותא, ובס' ש"ו מבואר דצריך להחזיר מכה דינא דמלכותא דהכי נהיגי. וכ' הש"ך דמצד המנהג חייב להחזיר. ולפ"ז י"ל ה"ה בזה שכבר נהגו שלא להדפיס מיראת המלכות חייב להחזיק בדינא דמלכותא. בשגם ש"ל...

But in our land, by government law one may not publish it. His honour asked of "the law of the monarchy is the law" applies in such a case, since it contradicts the Torah. But in Choshen Mishpat 259 it is clear that one who saves an item from the sea must return it due to government law, and in Choshen Mishpat 356 it is clear that one must return it because it is government law to act thus. And Rabbi Shabbtai haKohen wrote that one must return because that is the custom. Based on this, one could say that the same applies when the practice is not to publish out of fear of the government, one must view it as government law. Also, one could say...

#### 7. Tosafot (12<sup>th</sup>-13<sup>th</sup> century Western Europe), Bava Kama 20b **הא**

אפילו למ"ד בפ"ק דב"ב (דף יב:) כופין אותו על מדת סדום... שאני הכא שהיה יכול למונעו מתחילה מלדור בביתו. Even within the view (Bava Batra 12b) that we compel people not to act as Sdom... this case is different, for one may prevent others from dwelling in his home.

8. Rabbi Moshe Isserles (16<sup>th</sup> century Poland), Code of Jewish Law Choshen Mishpat 363:6

אף על פי דכופין על מדת סדום במקום שזה נהנה וזה אינו חסר, הני מילי בדבר דאי בעי ליהנות לא יוכל ליהנות. אבל בכי האי גוונא דאי בעי בעל חצר ליהנות ולהרויח להשכיר חצירו היה יכול, אלא שאינו רוצה, אין כופין אותו לעשות בחנם

We compel people not to act as Sdom where one benefits and the other does not lose, but that is only where the proprietor has no means of making profit, even if he wished to do so. However, in this case, the owner of the yard could profit, renting out his yard; he just doesn't wish to do so. We do not compel him to let it be used for free.

9. Rabbi Yosef Haviva (14<sup>th</sup> century Spain), Nimukei Yosef to Bava Kama 8b-9a b'dapei haRif

כתב הרא"ה ז"ל "אף על גב דקי"ל בעלמא דזה נהנה וזה אינו חסר כופין אותו על מדת סדום, הני מילי בקרקע של שניהם שאין משתמש בשלו כלל אלא שיכול לכופו ממדת הדין שלא לעשותו, וכגון הבונה כנגד חלונו של חבירו והלה מעכב עליו שלא לסתום אורה שלו והלה רוצה לעשות לו חלונות במקום אחר שלא יפסיד מן האורה כלל, כגון זה אמרינן כופין. אבל להשתמש בשלו כלל לא אמרו, שאם אי אתה אומר כן אין לך אדם שלא יכוף את חברו על כרחו."

Rabbi Aharon haLevi (13<sup>th</sup> century Spain) wrote: "Even though we generally say that where one party benefits and the other party does not lose, we compel not to act as Sdom, that is where both of them own land, and one is not using his at all but can legally prevent the other one from using his own. For example, this is where one wishes to build opposite another person's window, and the other person prevents him from blocking his light even though the builder wishes to provide windows in another way, such that there would be no loss of light whatsoever. In such a case, we compel. But they never said one must allow another to use his property; if you were to say this, everyone would compel each other!"

10. Tosafot (12<sup>th</sup>-13<sup>th</sup> century Western Europe), Bava Kama 20b **טעמא**

וא"ת ואי זה נהנה וזה לא חסר פטור, אפילו עמד ניקף נמי וי"ל שאני עמד ניקף דגלי אדעתיה דניחא ליה בהוצאה ולא דמי לדר בחצר חבירו דלא גלי אדעתיה אלא בחנם.

You might ask: When one party benefits and the other party does not lose, the beneficiary is exempt from paying, and so even where the inner party initiates [the fourth side] he should be exempt [from paying for the first three]! One could answer that where the inner party initiates, it is different; he has demonstrated that he is happy with that expenditure. It is not like squatting in another person's yard, where he has not demonstrated [a willingness to pay]; he wants to do that for free.

11. Rabbi Malkiel Zvi Tannenbaum (19<sup>th</sup> century Poland), Divrei Malkiel 3:157

י"ל דה"ה בנ"ד דכיון שמדפיס העטיקעטין כמו של פלוני הרי חזינן דניחא לו בהוצאה וממילא יתחייב לשלם חלק בהוצאות הראשון על הרשיון.

One could say that the same is true in our case; since he prints the *etiketen* like this person's *etiketen*, we see that he is happy with that expenditure, and so he will be obligated to pay part of the money spent by the first party for the license.

12. Rabbi Yaakov Yeshayah Blau (21<sup>st</sup> century Israel), Pitchei Choshen V 9:11

ובראה שכל המצאה או חידוש באומנות או במלאכה (כגון פטנט) יש בו משום השגת גבול.

It seems that every discovery or invention in a craft or form of work (like a patent) is subject to the rule against invading a boundary.

13. Rabbi Malkiel Zvi Tannenbaum (19<sup>th</sup> century Poland), Divrei Malkiel 3:157

בנ"ד מחסרו במה שמוכר סחורה זו. כי לולא הוא היה יכול למכור יותר. וגם מזיקו במה שמגדיל את מסחרו בעיני אנשי העולם ויוסיפו עליו מסים וכדומה... וגם לפעמים יעשה הלה הסחורה שלא כהוגן ויתלו החסרון בסחורתו.

In our case, selling this merchandise harms him. If not for this person, the licensed party could sell more. Further, he harms him by enlarging his business in the eyes of the world, subjecting him to more taxes and the like... And sometimes he will make inferior merchandise, and people will associate the deficiency with his merchandise.

#### Case #2: Coercing an NDA with a financial inducement

14. Rabbi Yosef Karo (16<sup>th</sup> century Israel), Code of Jewish Law Choshen Mishpat 359:10

כל החומד עבדו או אמתו או ביתו או כליו של חבירו או כל דבר שאיפשר שיקנהו ממנו, והכביד עליו רעים והפציר בו עד שלקחו ממנו, הרי זה עובר בלא תחמוד (שמות כ, יד).

One who desires another's servant, maid, home or implement, or anything he can purchase from him, and who weighs him down with third parties and badgers him until he can buy it, violates "You shall not desire."

15. Rabbi Yaakov Yeshayah Blau (21<sup>st</sup> century Israel), Pitchei Choshen V 1 footnote 26

ראיתי מי שכתב שהוא הדין הכופה את חבירו לקנות ממנו, יש בזה משום איסור המס, ונראין דבריו...

I have seen one who wrote that the same applies for one who pushes another person to buy from him; this involves the prohibition against *chamas*. His words appear to be correct...

#### Case #3: NDA entered under duress or undue influence

16. Rabbi Yosef Karo (16<sup>th</sup> century Israel), Code of Jewish Law Choshen Mishpat 242:1

הנותן מתנה מחמת אונס שאנסוהו ליתן אינה מתנה, ואפילו קיבל עליו אחריות נכסים בשטר, ואפילו אם אינו מוסר מודעא, אי ידעין באונס אינה מתנה.  
One who gives a gift due to compulsion, having been compelled to give it, it is not a gift. Even if he accepted replacement responsibility in a document, and even if he does not give a *moda'a*, if we know there was compulsion it is not a gift.

17. R' Yosef Karo, R' Moshe Isserless (16<sup>th</sup> century Israel/Poland), Code of Jewish Law Choshen Mishpat 205:7

אחד האונס את חבירו בשהכהו או תלאו עד שמכר, או שהפחידו בדבר שאפשר לו לעשות

הגה: בין אונס הגוף בין אונס ממון. מיהו יש חולקין וסבירא להו דאם הפחידו לאו כלום הוא, דעביד אנס דגזים ולא עביד (מהרי"ק שורש קפ"ו)

R' Karo: Whether one compels another by striking or hanging him until he sells, or he threatens him with something he could do.

R' Isserless: Whether he compels physically or by destroying his property. But some disagree [with Rabbi Karo's position] and believe that threats are nothing, for bandits threaten emptyly.

18. Talmud, Bava Batra 47b

אמר רב הונא: תליוהו וזבין, זביניה זביני. מ"ט? כל דמזבין איניש אי לאו דאניס לא הוה מזבין ואפילו הכי זביניה זביני.

Rav Huna said: If one hangs someone and he sells, the sale is valid. Why? Any time someone sells, he wouldn't sell unless he were forced, and yet his sale is valid.

19. Rabbi Yaakov Yeshayah Blau (21<sup>st</sup> century Israel), Pitchei Choshen VIII 22:7-8, 12, 14

ז. אף על פי שנתבאר שהמוכר מתוך אונס מכירתו מכירה, יש לו תקנה ע"י שימסור מודעא בפני עדים קודם שימכור, ואומר להם "דעו שאני מוכר חפץ פלוני או שדה פלונית לפלוני מפני אונס," ואז המכר בטל...

ח. עדי המודעא צריכים לידע שהוא מוכר מפני האונס, וגם צריכים לידע שהוא באמת אונס, וצריכים לכתוב כן בשטר המודעא...

יב. המודעא צריכה להיות קודם המכירה...

יד. אפילו אמר המוכר בפני האנס שמוכר ברצונו, המודעא קיימת.

7: Even though it has been made clear that sales due to compulsion are valid sales, one can fix this by presenting a *moda'a* before witnesses before selling, saying, "Know that I am selling X object or Y Field to so-and-so due to compulsion." Then the sale is void...

8: Witnesses to the *moda'a* must know that the sale is due to compulsion, and they must also know that this is truly compelled, and they must write this in the *moda'a* document...

12: The *moda'a* must be before the sale...

14: Even if the seller says before the bandit that he is selling willingly, the *moda'a* is valid.

#### Case #4: Mandatory disclosure

20. Chartered Professional Accountants of Ontario Act, 2017, S.O. 2017, c.8, Sched. 3

60 (1) Every person engaged in the administration of this Act and the by-laws shall preserve secrecy respecting information or material that comes to his or her knowledge or possession in the course of his or her duties under this Act, a predecessor Act or the *Public Accounting Act, 2004*, and shall not disclose any such information or material to any person except...

(e) if there are reasonable grounds for believing that there is a significant risk of harm to any person if the disclosure is not made and that making the disclosure is likely to reduce the risk; or

21. Talmud, Sanhedrin 73a

מניין לרואה את חבירו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו תלמוד לומר לא תעמד על דם רעך

How do we know that one who sees another drowning in a river or being dragged by a beast or being beset by bandits must act to save him? The Torah says: You shall not stand by as your peer's blood is shed.

22. Rabbi Ovadia Yosef (20<sup>th</sup> century Egypt, Israel), Yechaveh Daat 4:60

יש לפרש גם כן כוונת הפסוק, "לא תלך רכיל בעמך, לא תעמוד על דם רעך", שאף על פי שאסור לך להיות רכיל, ולגלות סוד חבירך... מכל מקום "לא תעמוד על דם רעך", ועליך להודיע לחבירך כדי שישמר מנזק וסכנה.

One should also explain thus the meaning of the verse, "Do not go as a peddler among your nation, do not stand by as the blood of your peer is shed." Even though you may not be a peddler and reveal your peer's secret... still, "Do not stand by as the blood of your peer is shed," and you must inform your peer so that he might avoid harm and danger.

23. Rabbi Eliezer Waldenberg (20<sup>th</sup> century Israel), Tzitz Eliezer 13:81:2

ובודאי הברור שמותר וגם חייב למסור על מחלתו לשלטונות

It is of the greatest certainty, one is permitted and also obligated to inform the authorities of this person's illness!

24. Rabbi Yisrael Meir Kagan (19<sup>th</sup>-20<sup>th</sup> century Poland), Chafetz Chaim, Lashon HaRa 10:2

- Only report personal experience or a verified account;
- Don't jump to conclusions about what happened, and what laws were broken;
- See if there is another way to avoid harm besides public disclosure;
- Stick to the facts; do not magnify the crime beyond its true nature and circumstances;
- There must be no personal agenda, only the altruistic goal of protecting the community and righting the wrong;
- Make sure the harm you cause to the subject is commensurate with the wrongdoing