

Speaker 1 ([00:03](#)):

Welcome to the Vandennack Weaver legal visionaries podcast with your host, Mary Vandennack.

Speaker 2 ([00:14](#)):

Welcome to episode of Vandennack Weaver, legal visionaries, a weekly podcast discussing updated legal news, as well as evolving methods of providing legal service. I am Mary Vandennack founder and managing partner at Vandennack Weaver, LLC. I will be your host. As we talk to experts about closely held businesses, tax trusts, estates, legal technology, law, firm, leadership and wellbeing for lawyers on today's episode, I have Mike Weaver, who's my partner at Vandennack Weaver as my guest. And we're going to discuss non-disclosure agreements. We've been talking about business, exit planning and a variety of episodes, and we've been asked some questions and one of them was, you know, what is a non-disclosure agreement and how does it play into the exit planning? So, thanks for being here today, Mike, thanks for having me, Mary.

Speaker 3 ([01:14](#)):

Can you tell us just what is like generally, what is a nondisclosure agreement when you think nondisclosure Agreement? I think what most people think about is confidentiality agreement and that's really what it is. It's just a document between the parties that says, you know, this information is going to be considered confidential and it can't be disclosed to anybody, uh, within the parameters of the agreement. And, you know, it's typically will be used when a buyer approaches someone who's a business owner, who's looking to sell their business. And the buyer's interested in getting some more information, but, you know, as the business owner, before you start just giving out your information, you'd like to know that they're not just going to turn around and use it however they want and give it to whoever they want.

Speaker 2 ([01:51](#)):

So, because they're wanting to find the information to determine whether this is a viable purchase opportunity, which is going to include financials and details about how the business operates, possibly trade secrets.

Speaker 3 ([02:05](#)):

You'll have, you know, anybody to come in and anybody coming in and doing their due diligence is going to want a fair amount of information on the company, detailed financial information, detailed information about your customers, your suppliers, all that stuff about your processes. If you're, for example, if you're a manufacturing facility, or if you're a technology company D what patents might you have out there, you know, things like that. So all of that stuff is proprietary to the, to the business owner or to the business. And before you just start giving that information to anybody, you want to know the, how you want to know that it's protected.

Speaker 2 ([02:45](#)):

So if I'm a business owner, do I have to have a potential buyer sign, a nondisclosure agreement?

Speaker 3 ([02:50](#)):

No, you don't have to have a, they're not, it's not a requirement or it's not a legal requirement or anything like that. It's just advisable. I think for anybody that's selling their business, before they give out

a lot of information to request that the buyer or the potential buyer, enter into that agreement. And again, it's designed to protect the business owner and the information.

Speaker 2 ([03:12](#)):

So what specifically does an NDA non-disclosure agreement cover and does it vary from business to business? So if I'm a hair salon, does it differ from if I'm a cosmeceuticals company,

Speaker 3 ([03:27](#)):

It can, it can vary widely depending on the type of business that's being sold, how, how long you've been in existence and there is no magic.

Speaker 2 ([03:36](#)):

Why does, how long I've been in existence make a difference?

Speaker 3 ([03:39](#)):

Well, if you've, if you've got processes that have been around that, that, that have been around for a long time, you know, let's say you're somebody like Coca-Cola where you've got a process that, that you've, that you've worked your entire, existence of the company to keep secret. I mean, you just kind of want to make sure that the language might just specifically refer to that particular process and not using more general terms. I mean, it just depends on, on what's at the older, the company is the more, the more, the specific items that you might want to identify, becomes more relevant.

Speaker 2 ([04:18](#)):

Isn't an NDA, it's not just a template that you can just hand to anybody and say, use this.

Speaker 3 ([04:23](#)):

I would, I would prefer that people don't do that.

Speaker 2 ([04:27](#)):

Why cause like, right, I can like Google non-disclosure agreement and find one on the internet and I don't want to really pay you to draft me one. So why would I like see you rather than just using this form on the internet

Speaker 3 ([04:39](#)):

Parts of the form that, that you might, that you may or may not understand the implications of what you're signing? Not only the definition of what is the confidential information, which is where you're laying out, what the document covers again, if the information that you're disclosing to the potential buyer isn't covered by the confidentiality or by the nondisclosure agreement, then they're free to do whatever they want with it. So you do want to look at make sure that the definition of confidential information as well-defined, and that's just one of the things in a nondisclosure agreement that you're, that you're going to want to make sure is carefully drafted. You want to, you're going to want to you know, I think we're going to talk about the term and all the other things that go into a company into a nondisclosure agreement. And those are all things that if you don't do it right, your, your non-disclosure agreement could be invalidated.

Speaker 2 ([05:33](#)):

So there's risks. If I have a nondisclosure agreement, even if I have a nondisclosure agreement in place, if I haven't don't have all the things I need in that agreement, I have risks. Correct. Is it going to make the non-disclosure invalid or it's just not going to cover everything I need to have covered. So let's say if I have a nondescript disclosure agreement that has some general provisions about can't financial information, but there's some other things that aren't right. I at least have at least prohibited prevented the prospective buyer from disclosing the financial information, or does the whole agreement get thrown out?

Speaker 3 ([06:14](#)):

I hate to say it depends, but it depends on what jurisdiction you're in.

Speaker 2 ([06:18](#)):

So Nebraska might have a different world from New York, which might have a different world from Nevada or California. And so you really do have to know what state you're in. And that's one of the reasons not to just pull a form off the internet, right? Somebody might've put that form up that, and that was for Iowa and you're in Texas. And so would, the liberals are different. So there's some federal rules in this area. Then there's some state rules. It's one of those situations where we have different applicable laws. Isn't that?

Speaker 3 ([06:47](#)):

That's exactly right. So you ha you just, you have to be careful when you're signing one of these things what's in it and what the terms are because different jurisdictions will handle them differently.

Speaker 2 ([06:58](#)):

And if I do no non-disclosure agreement at all, and I provide somebody, all my financials, can they scan them and upload them to the internet?

Speaker 3 ([07:07](#)):

There may be the answer to that is probably yes, there may be some, there may be some, there may be some state laws and federal laws trade secret laws. If you can get the information that you're disclosing to be classified as a trade secret. And again, not every not all information, you just can't call it a trade secret. Um, there may be ways to protect that, but there's no guarantee that you can.

Speaker 2 ([07:35](#)):

So the nondisclosure agreements to save is because the bottom line is if I don't have one and I give somebody a whole bunch of information about my business, they have no obligation not to disclose it unless I can find some other law, which means I have to go hire somebody, pay them, figure out how to chase the person for what they uploaded to the internet, prove that they damaged me by doing so. And that was a legal violation. I could have prevented that with a nondisclosure agreement. Correct. So, is there anything else that should be considered to be included in a non-disclosure agreement?

Speaker 3 ([08:06](#)):

Well, usually what you're the, the, the typical nondisclosure agreement is it's going to identify, you know, the parties, obviously, but it's also going to usually will identify the purpose for which, you know,

the information is going to be used. So we're talking about a sale of a business or a potential transaction using it to put that in the, in the documents so that it basically gives the disclosure of the information context and what it can be used for. You might be looking at not just a sale, but you might be looking at entering a, having somebody come in and do a study of your plant and your facility, let's say. And so you would want to put that in that, in that we want to have that information in the, in the document so that you know, that the disclosure is based on that and how that impacts it is. If there is a, if there is a claimed, violation of the agreement, then often the court's gonna look at well, what was the purpose of the agreement? What were you trying to protect? And we were trying to protect a business sale. We were trying to protect this study or whatever.

Speaker 2 ([09:08](#)):

So it's really important to be clear about what you're trying to protect so that we also didn't get into being having an overly broad agreement that doesn't really apply to anything. Correct. So how long does a typical nondisclosure agreement last? So if you come in, I'm trying to sell my business. We enter into a non-disclosure agreement 10 years later, I still haven't sold my business is a nondisclosure agreement with you still in place, or can you start sharing information?

Speaker 3 ([09:34](#)):

Now there's a nondisclosure agreement, we'll have a term and it's important that, and this is one of the things that it does kind of depend on the jurisdiction. You can't just have a nondisclosure agreement go on forever. There must be a term to it, and it must be a reasonable term. And what is reasonable will depend on the jurisdiction you're in and loss will depend on the type of information that you're disclosing. If it's just strictly financial information, most non-disclosure agreements are three to five years on that type of information. So after three to five years, that that information is considered stale and really no longer of use to somebody. So that might be something a term or three to five years would apply to that customer list and supplier lists that's similar, three to five years. Um, I said, how

Speaker 2 ([10:32](#)):

It's only three to five years? Like, let's say I've been representing a lot of my clients for 27 years. So if I gave somebody my client list, then they can start disclosing all my client relationships after a few years where even disclosing my client list, I had confidentiality obligations, right. I can't even disclose who my clients are. Right. So, if somebody else can aren't, I violated my ethical rules.

Speaker 3 ([10:58](#)):

Yes, that would be a particular type of information that you could have. It would be reasonable to have a longer period of time associated with that type of information. And that's something that you would want to address in the agreement.

Speaker 2 ([11:10](#)):

So that's where you need to think through exactly what information that you're going to disclose, how long it needs to be protected and why, because you might have obligations other than I'm the same thing in the medical world, right. We're going to disclose our patient lists. And all of a sudden, some prospective buyer is out there publishing patient information on the internet. Right. So, well, any other comments on non-disclosure agreements?

Speaker 3 ([11:37](#)):

Well I think just again, when we're talking about the term and when it expires, if you just have a nondisclosure agreement that says that it, everything, you know, it expires in three years or expires in five years, that may be, may not be the best thing based on the information that you're disclosing. Not only for example, the customer list that you brought up, but there are trade secrets that you may be, maybe disclosing as part of the, of the information and trade secrets have kind of their own, their own air, their own terms, if you will, there's federal laws that protect trade secrets, there's state laws that protect, protect, trade secrets. And those can usually end in those can be protected for as long as they're, as long as it is considered a trade secret. So you might want to make sure that you're specifically carving out for any term. You know, if I say the agreement's going to terminate in three years, but for trade secrets, that's going to continue for as long as it's a trade secret. So, you do need to, you're not just going to have a blanket term on a lot of these types of things.

Speaker 2 ([12:46](#)):

Again, the reason not to use a template and just hand it to the buyer. Well, Mike, thanks so much for joining me today. That's all for now. Thanks for listening to today's episode and stay tuned for our weekly releases,

Speaker 4 ([13:06](#)):

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