Can You Keep Your Confidentiality Agreement?

The use of Confidentiality Agreements (aka Non-Disclosure Agreements, so we'll call then NDAs here) is quite commonplace. They are frequently used in employment relationships, proposed business purchases, energy industry transactions, software development, and in many other settings. The intent of course is to keep trade secrets and confidential information secret and confidential.

So what usually happens? The person or entity disclosing the valuable information (the "Discloser") persuades (or accepts the offer of) the person or entity receiving the valuable information (the "Recipient") to sign the NDA. Then the Discloser sticks the NDA away in a drawer or computer file, secure in the knowledge that the trade secrets remain protected.

But is that true? The answer in most cases is "no." The statutory definition of trade secrets in Michigan requires that the information be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." MCL 445.1902(d)(ii). This requirement has been adopted by Michigan courts as one factor in a six factor text used to define a trade secret.

At least one Federal court in Michigan has cited with approval the proposition that an agreement to keep information confidential does not, by itself, turn that information into a trade secret. *Raymond James & Associates v. Leonard & Co.*, 411 F. Supp. 2d 689, 696 (ED MI 2006).

The court in *Raymond James* treats as a virtual given the proposition that an employer who allows a former employee to take the alleged trade secrets with him after quitting has not properly protected those trade secrets.

The Discloser in a case applying Illinois law also failed this test because no protective steps were taken beyond the mere signing of the NDA. The Court specifically noted that the Discloser could have but did not (a) mark the proprietary information as confidential when it was disclosed (b) keep that information under lock and key; (c) keep the information on a computer with limited access; or (d) require individuals who accessed the information to sign additional NDAs. The Discloser's failure to take these reasonable steps caused the NDA to be unenforceable. *nClosures Inc. v. Block and Company, Inc.*, 770 F.3d 598, 602 (7th Cir. 2014).

These rulings run counter to the deference courts usually extend to contracting parties; the typical ruling is that courts will enforce contracts as written. As demonstrated above, a Discloser cannot count on this judicial "good will" when it comes to disclosing trade secrets. The best practice is to not tempt fate. The Discloser should interpose common sense measures to protect confidential information *after* signing the NDA; some of those measures are recited by the court in *nClosures, supra*.

One dubious practice is to state in the NDA that *all* information provided by the Discloser is confidential. This clause is frequently found in NDAs. While that declaration can be helpful in some cases, it may not suffice, particularly when the Discloser transmits copious quantities of information which is clearly not confidential. This subsequent careless practice could easily override the confidentiality provision in the Contract. Using a "Confidential" stamp or at least sending periodic reminders about confidentiality is the better practice.

Continued diligence is the key element. The Discloser should implement measures which keeps the prized information under "lock and key" – password protections, limited access and in some limited cases, encryption. Obtain a written commitment from non-employees who are not parties to the NDA.

The trickiest measures involve monitoring the other party. The Discloser is trying to establish or maintain a business relationship with the Receiver, so there is of course no desire to antagonize that party. Nonetheless, continued vigilant measures could prove vital to protecting the information, and most Receiver parties will understand at some level that the Discloser needs to undertake customary measures. A protective protocol which avoids unnecessarily burdening the Receiver is the goal. While this is easy to say and sometimes difficult to do, the effort is nonetheless necessary to protect the Discloser's confidential information and trade secrets.