

# Creating Tomorrow's Commercial Lawyers Toolkits

*Disclaimer: This toolkit describes the law in general terms. It is not intended to provide legal advice on specific situations and should not be relied upon as a source of legal advice.*

**This toolkit provides a general understanding of what confidential information is and its legal importance. It outlines the requirements for a duty of confidentiality to arise and discusses the nature of confidentiality under English law. Finally, the toolkit discusses non-disclosure agreements and cases of breach of confidence.**

## INTRODUCTION

Confidentiality is an essential element that allows people to feel safe in sharing their ideas or concerns whilst also asking for help. Confidentiality is important when sharing ideas, communicating with others, and conducting business. Under English law, there are certain circumstances in which a 'duty of confidentiality' exists. This duty of confidentiality refers to the idea that by law, information shared between a client and a legal professional is expected to be respected and not shared amongst outside parties without the consent of the client. There are no exceptions to this duty and its remit has been developed through case law. In circumstances where there is no inherent legal duty of confidentiality, a person can contractually create obligations of confidentiality.

This toolkit will discuss the integral aspects of confidentiality including the use of non-disclosure agreements.

## CONFIDENTIALITY IN ENGLISH LAW

There is a general principle which states that... "a duty of confidence arises when confidential information comes to the knowledge of a person in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others..."

The main sources from which such a duty of confidence arises are:

- **By contract**

A contractual agreement creating an obligation between the parties to it to keep information that is shared between them confidential.

The requirement to keep information confidential is usually a specific clause in a contract. A confidentiality clause can help a prospective claimant to prove that a duty of confidentiality and/or other contractual obligations existed to maintain confidentiality between the parties.

- **By nature of the relationship between the parties**

Even when there is no contractual obligation between the parties, there are several circumstances that can give rise to an obligation of confidence.

In fiduciary relationships, one person (the fiduciary) will owe a duty to act in the other party's best interests. Determining whether a relationship is of a fiduciary character is important because certain consequences flow from its existence. These consequences take the form of obligations placed on the fiduciary.

It is possible to distinguish several types of fiduciary relationships. For example, common ones are between a solicitor and their client, a doctor and their patient, or an employer and his or her employee during the course of employment. In all these cases the fiduciary receives the confidence or trust of the person on whose behalf he or she acts and is therefore obliged to act in a way to ensure respect of all confidential information disclosed.

- **The manner of communication**

In addition to having a contractual relationship or a fiduciary relationship, under certain circumstances a duty of confidentiality is implied because of the circumstances of the disclosure.

In order to assess if such an obligation exists, the circumstances of the disclosure must be considered. "[I]f the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this will suffice to impose upon him the obligation of confidence".

## **NON-DISCLOSURE (CONFIDENTIALITY) AGREEMENTS**

A non-disclosure agreement is a vital tool that should be used when an individual decides to disclose information that is intended to be confidential. These agreements can either be one-way or mutual. A one-way NDA is used if only one party is disclosing information and a mutual NDA is used when both parties are disclosing information. A non-disclosure agreement is essentially a legal contract that protects the confidential information by creating a legal relationship between the parties. Furthermore, a confidentiality agreement has the purpose of providing:

- Explicit awareness to the parties about the nature of the shared information;
- A legal obligation against unauthorised use or disclosure of information; and
- A basis for legal action against a party breaching the agreement.

Written confidentiality agreements, also known as non-disclosure agreements, constitute the basic means for safeguarding confidential information. They are the most convenient and certain way of ensuring that information is disclosed in circumstances imposing an obligation of confidence. Non-disclosure agreements record conditions under which information of a confidential nature can and cannot be disclosed by the signatory parties to third parties. It is strongly advised to sign such an agreement prior to disclosure of any ideas that have to be kept confidential. If confidential information is released, the idea it seeks to protect might be seriously endangered, especially if it relates to a company's intellectual property.

It is also important to note that when one drafts a non-disclosure agreement, the individual must state its purpose to the other party. This is called the permitted purpose. The purpose of disclosing the information must also be legitimate and for specific reasons.

A working template for a non-disclosure agreement is provided by the UK's Intellectual Property Office and can be found online at <http://www.ipo.gov.uk/nda-mutualagreement.pdf>.

## BREACH OF CONFIDENCE

If a party to a non-disclosure agreement discloses confidential information there may be a legal basis for action/remedy against them. The breach may be established:

- When a person who has received information in confidence discloses it **without first obtaining consent from the disclosing party**;
- When a person who has received information in confidence makes use of it **for an unauthorised purpose**. In such cases, a person may be guilty of an infringement of the rights of the other party.

A Court can offer several remedies in cases of breach of confidence:

- **Damages** for incurred losses caused by the disclosure of the confidential information.
- An **Injunction Order** (i.e. the court forces the offending party to stop using the confidential information and/or to give it back to its owner).
- In some cases, where it is determined that normal contractual remedies are not adequate, **an entitlement to any profits** the offending party has earned making use of the confidential information.

On a practical note, it is worth remembering that judicial services are costly and time consuming and non-disclosure agreements act as a general deterrent to unauthorised disclosure. For this reason, suing for an alleged breach of an implied duty of confidence should be considered a last resort.



## Useful References

Saltman v Campbell [1948] 65 RPC 203

Coco v A.N. Clark (Engineers) Ltd [1969] RPC 41

Attorney-General v Guardian Newspapers (No 2) [1990] 1 AC 109

Vercoe & Others v Rutland Fund Management Ltd & others [2010] EWHC 424 (Ch)

Commercial Law and Practice, Basics of the law of confidential information p.235

<http://www.ipo.gov.uk/nda.pdf>

<http://www.ipo.gov.uk/nda-mutualagreement.pdf>

<http://www.ipo.gov.uk/types/copy/c-manage/c-useenforce/c-use/c-devices.htm>

<http://www.ipo.gov.uk/types/patent/p-applying/p-apply/p-cda.htm>

<http://www.ipo.gov.uk/types/otherprotect.htm>

<http://confidential.oxfordradcliffe.net/DPA>

<https://www.gov.uk/government/publications/non-disclosure-agreements/non-disclosure-agreements>

<http://www.elht.nhs.uk/data-protection-and-confidentiality.htm>

<http://www.lawcentreni.org/data-protection.html>

[http://ico.org.uk/for\\_organisations/data\\_protection](http://ico.org.uk/for_organisations/data_protection)

<http://www.scie.org.uk/care-act-2014/safeguarding-adults/sharing-information/what-does-the-law-say.asp>

<https://www.health-ni.gov.uk/articles/common-law-duty-confidentiality>