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The 7 Deadly Sins of NDAs

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7 Deadly Sins of Non-Disclosure Agreements

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Although the classic Seven Deadly Sins[3] do not ordinarily impact the process of drafting a non-disclosure agreement ("NDA"), the dramatic title is appropriate since this paper will focus on seven issues that arise in the negotiation of NDAs that can present significant difficulties for practitioners and their clients. An NDA can appear in many types of transactions from a settlement agreement, to a divorce decree, to the initial talks in a merger. An NDA can appear in a variety of formats, ranging from one paragraph ("let's not disclose the terms of this contract") to a 25-page long-form preferred by competitors who are circling each other to discuss a joint venture. In short, an NDA can be just a term in another agreement, or it can be a stand-alone transaction in and of itself.

Often, an NDA may be included in (i) a non–circumvention agreement; (ii) a confidentiality agreement; (iii) a "no reverse engineering" agreement; or (iv) a non-competition agreement between business partners. This paper will focus on the "non-disclosure" elements of an NDA.

Specifically, this paper will address seven topics regarding NDAs that may assist the drafter in improving the effectiveness, predictability, and coverage of the agreement.

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[3] Wrath, greed, sloth, pride, lust, envy, and gluttony.

CAVEAT:

This paper is NOT a discussion of the law or drafting suggestions for covenants not to compete or NDAs between an employee and employer. That topic requires a separate article.

RECENT DEVELOPMENTS:

On May 4, 2012, the Delaware Chancery Court issued an opinion in the case of Martin Marietta Materials, Inc. v. Vulcan Materials Co., C.A. 7102-CS, 2012 WL 1605146 (Del. Ch. May 4, 2012) focusing on the interpretation of an NDA. While the opinion is dependent in large part upon the facts and circumstances of the relationship between the parties, there are several drafting lessons that can be drawn from this case. Considering the relative dearth of case law centering on the interpretation of NDAs, the Martin Marietta opinion is instructive as to many of the subjects (or "sins") addressed in this paper.

On July 10, 2012 the Supreme Court of Delaware delivered its opinion upholding the upheld the Chancery Court's ruling. See Martin Marietta Materials, Inc. v. Vulcan Materials Co., 2012 WL 2783101 (Del. July 10, 2012).

Sin #1

The Sin of Imprecision

A key issue in drafting any NDA is describing with clarity the information covered by the restrictions of the non-disclosure obligations. An attentive drafter will give due regard to the language used in the definition of "Confidential Information." A standard definition might have the following terms:

> *"Confidential Information" of DELIVERING PARTY ("DP") means any nonpublic, proprietary information or technology used in the plans, projections, development, designs or business, and any materials evidencing the same (specifically, including, without limitation, technical data or know-how relating to products, product development plans, services, customers, markets, engineering, inventions (whether patentable or not), processes, designs, drawings, research, developments, chemical compounds, strategies, marketing and/or financial information). Confidential Information includes the terms of this Agreement.* ***All information and data, received by RECEIVING PARTY ("RP") from DP in any form or format, is conclusively deemed to be Confidential Information, unless expressly excluded from Confidential Information by the specific terms of this Agreement.*** *Confidential Information of DP includes the Confidential Information of any entity controlling, controlled by, or under common control with DP. Confidential Information shall not include information or data previously disclosed to any person or entity by DP, unless that information or data is the subject of an enforceable obligation of confidentiality or non-*

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