

Next up, we're going to talk about why you should sign a confidentiality agreement or an NDA in the context of an acquisition.

Clint: Help me understand this. Before, we weren't supposed to sign NDAs and now you're recommending that we do?

Brad: If you remember in the context of a financing, a VC will rarely or never sign an NDA. However, when you're doing an acquisition, the public company acquirer or the private company acquirer will almost always want to sign a mutual NDA. That's an NDA where whatever they tell you, you promise to keep secret, and whatever you tell them, they promise to keep secret.

In this context, it's actually in both of your interests because you are going to be disclosing to each other very sensitive information about your companies. And in addition to the actual information that you're exchanging being important to be kept confidential, the overall fact that you're talking about doing a transaction is also important to keep confidential.

Clint: Say more about that. Why is this so important to keep confidential?

Brad: Well, let's start with a private company to private company transaction. In those cases, while you may not be competitors, that company that is looking to acquire you may have competitors that they don't want the information they share with you to get to, and vice versa. You have competitors that you don't want the information you share with the buyer to. So having a confidentiality agreement in place, even if it's never exercised from a legal perspective, generates an expectation that the information that is shared back and forth is not disclosed.

This is even more important in a public company case because a public company has many rules and laws about what is disclosed and not disclosed. In this situation, there is actually significant liability if these kinds of documents aren't put in place and then adhered to.

Clint: So how should an entrepreneur interpret an NDA that they get from a potential acquirer where they basically say, "You have to keep all our stuff secret but we are really not going to keep your stuff secret"?

Brad: You should reject that. As the entrepreneur, you should insist on a mutual NDA. Essentially, whatever the company is asking you to sign in terms of confidentiality, they should be willing to sign as well. It's rare that there's real contention around this. Every now and then there is but it's usually more in the category of misunderstanding and lawyers pretending to be better than each

other versus rational minds just saying, “Look, we’ll sign whatever you want to sign as long as you sign it too.”