

CONFIDENTIALITY AGREEMENTS

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CONFIDENTIALITY AGREEMENTS

At some point, an oil and gas lawyer will be asked to draft a confidentiality agreement

The confidentiality agreement is needed when a landman/geologist/promoter has found what he believes to be a prospect

- Landman/geologist is now going to show that data/work product to a possible investor or industry partner
- Typically a non-circumvention agreement is included.

Likely also presented before a farmout is entered into.

CONFIDENTIALITY AGREEMENTS (CONTINUED)

The confidentiality agreement may part of the sales process - A company trying to see prospects on the open market may require a confidentiality agreement as part of the negotiation process.

Confidentiality agreements are used to ensure that the investment banker does not sell that information to some of its other clients.

CONFIDENTIALITY AGREEMENTS (CONTINUED)

The Workbook includes

- an investment banker form
- a traditional confidentiality agreement for a prospect sale
- a check list for confidentiality agreements
- An example set of confidentiality agreements

TRADE SECRETS

The legal basis for Confidentiality Agreement is Trade Secret.

- A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. * * *
- A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article.
- The American Law Institute's Restatement of the Law regarding the recognized cause of action for unauthorized disclosure of trade secrets: One who discloses or uses another's trade secrets, without a privilege to do so, is liable to the other if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. * * *
- When we speak of "confidential information" in the context of oil and gas contracts -- seismic data, prospect development, negotiations – is really "trade secrets."

The Requirement of Secrecy

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- The subject matter of a trade secret must be secret.
 - Tests of Secrecy. Whether the holder or developer of a trade secret has maintained its confidentiality tends to be tested by the courts through a process of elimination. Therefore, if the information is generally known in the industry,“ there is no legally recognizable trade secret.
 - Information which can be obtained by examination of a nonpatented product cannot be the subject of a confidentiality restriction.
 - Rule is that if the information in question is generally available to the public, if it is developed through independent means or if it becomes available to the public as the result of a failure to take "reasonable precautions to maintain its secrecy, then it will not be considered a trade secret.

The Requirement of Secrecy (Continued)

- 2. Example -- Secrecy Not Maintained.

- Whether certain information should be accorded "trade" secret" status, courts will look at what efforts have been employed by the party seeking such status to preserve the confidentiality of such information. In the case of Lamons Metal Gasket Co. v. Traylor, the court held that a former employee could not be restrained from divulging information learned during employment because such information was not secret.
- The court noted that an "employee's only" sign was posted on the door to the plant but the evidence indicated its purpose was to eliminate interference with the work of employees and to minimize the danger of accidental injuries.
- Tours of the facility were held where the machines were demonstrated and their operation explained.

The Requirement of Secrecy (Continued)

- 3 . Example Secrecy Maintained; Theft of Trade Secrets.

- An example of an incident where the efforts of the party seeking to maintain the trade secret status of the information in question were rewarded may be found in the case of Leonard v. state.
- This appeals court decision was the result of a "theft of trade secrets" felony prosecution. Under that statute, a person commits a third degree felony, if, without the owner's effective consent, he knowingly: (a) steals a trade secret~ (b) makes a copy of an article representing a trade secret~ or (c) communicates or transmits a trade secret.
- Leonard v. state was the result of the departure from Texas Instruments of a number of employees working on voice recognition technology, their immediate hire by another Dallas company and the allegation that some had stolen trade secrets from TI in the process.
- The court upheld the lower court's finding sufficient measures had been taken to protect the confidentiality of the information; the appellate court cited.
 - All employees signed nondisclosure agreements when hired.
 - Identification badges were provided to all employees.
 - Different levels of security were applied to different areas and the badges carried features to delineate whether a particular employee was cleared for a particular area.
 - Security guards were on the premises to enforce the restrictions.
 - Entry to the speech laboratory was limited, and was isolated with security doors from other area.

Confidential Relationships

C. Confidential Relationships.

- The availability of a cause of action based upon the breach of a confidential relationship is a powerful weapon because it can arise either in tort or contract, and because such a relationship can exist between a principal and his agent, an employer and his employee, partners, joint adventurers, and between parties in the course of negotiations involving the disclosure of trade secrets.
- The Reading & Bates case involves the misappropriation of horizontal drilling technology which at the time was described as being of primary benefit in drilling.
- In this case former employees left to form a subsidiary of Baker Energy Resources company.
- Reading & Bates filed suit to enjoin the former employees from divulging trade secrets acquired during their tenure with R&B.
- The case states that even in the absence of an employment contract prohibiting competition/disclosure, a former employee may not breach a confidential relationship and disclose trade secrets.
- An employee may always use the general skills, knowledge and experience which he has acquired.
- Distinguishing trade secrets from general skills is a problem.
- Whether an employee enjoys a confidential relationship with his employer as to particular information will depend upon the facts of each case; generally, with increasing trust/responsibility given to the employee, the greater the likelihood that a confidential relationship exists.

PSA Confidentiality Agreement

Confidentiality Agreement Needed for Purchase/Sale Bid Process

Description of the Information

- What is included
 - General description "production/geological data relating to the wells described on Exhibit 1".
 - The description might refer to information contained in seller's data room.
- What is not included
 - information in the public domain
 - information already in the possession of the buyer
- Permitted Uses of the Information
 - Information to be used only for the evaluation of the properties.
- Permitted Users of the Information
 - State any limitations on the use of the information by the buyer.
 - Use another is to be specifically authorized - engineers, geologists, accountants and lawyers.

PSA Confidentiality Agreement (Continued)

Confidentiality Agreement

- Term of the Agreement – Should be effective and “reasonable”
- Disclaimer of Accuracy or Use - The seller will many times wish to insert a provision disclaiming the accuracy of any of the information provided.

NEGOTIATION OF JOINT VENTURES

Negotiation of Joint Ventures

- Vortt Exploration Company, Inc. v. Chevron U. S. A. Inc.,
- Under this case, any time a potential joint venture "partner" brings something to negotiations which can be appropriated by the other side, if a deal is not struck, then the possibility for a suit exists.
- Protective Measures -
- The only sure way to avoid a Vortt type claim is to make the execution of a waiver a precondition to negotiations regarding a possible joint venture.
- Advisable when dealing with individuals, small operations or businesses with which your client is unfamiliar.

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