

How to Protect Your “Great Ideas” During Business Negotiations

By Paul D. Swanson

Every creative person with a great idea for some new product or service—but without the financial means or business resources to bring the idea to fruition—faces an unsettling dilemma: who can I trust with my baby?

We all know that lawyers are bound by ethical rules to maintain the confidentiality of the matters disclosed to them. But what are the baseline rules in a business negotiation? Can one simply assume that what one tells a prospective manufacturer, financier or other interested party will be kept in confidence and not exploited by others, after you’ve left the negotiating table?

Washington law provides a direct and clear answer: a gratuitous, unsolicited disclosure of information does *not* impose upon a recipient of the information a contractual or fiduciary obligation not to disclose it. See Machen, Inc. v. Aircraft Design, Inc., 65 Wn.App. 319, 329, 828 P.2d 73 (1992)(dismissal of trade secret claim affirmed in the absence of evidence establishing the confidentiality of the information disclosed).

To protect your idea from being misappropriated by the person you may be looking to help your “idea” grow into a new product or service, you must take some action to protect the confidentiality of your idea. It is not automatic. A leading Washington appellate court case states the ground rules:

Where information is transmitted pursuant to contract in circumstances where the originator knows or should know that the recipient has a legitimate business use for the information, the originator *must secure confidentiality* by express or implied provision; absent such provision, he is not entitled to equitable relief.

The originator of information cannot claim a property right in it as against one to whom he has disclosed it without bringing to the latter’s attention his expectation that the information will be held in confidence and not used in competition. In contrast, disclosure of information transmitted subject to an explicit restriction that no part of the information can be used or adopted except by special arrangement renders the disclosing party liable for damages.

Pacific Title, Inc. v. Pioneer National Title Ins. Co., 33 Wn.App. 874, 879-80, 658 P.2d 684 (1983)(emphasis added; citations omitted).

Just how do you go about securing confidentiality? A typical means is for the negotiating parties to enter into what is generally labeled a confidentiality and non-disclosure agreement. While these written agreements can be varied to suit individual needs, they usually contain provisions that:

- Define the confidential information subject to protection from disclosure or use
- State that the confidential information will only be used to evaluate the business opportunity under consideration
- Promise that the party receiving the information will not disclose or use it
- Limit the duty of non-disclosure if the information is in the public domain, or is already known to the receiving party
- Require a return of any confidential materials at the conclusion of the review of the business opportunity or proposal
- Outline the remedies that will be available in the event of breach of the agreement

Not all business negotiations will warrant the preparation of a confidentiality and non-disclosure agreements. Indeed, companies that routinely entertain “pitches” for new ideas may reject them on principle, because of their potential for misuse and spurious litigation.

Whatever the situation you are facing, the ground rules will remain the same. If you have not taken steps to secure the confidentiality of your great idea, you may lose it as you walk out at that proverbial meeting room door.