



American College of Gastroenterology

PSAs: Perfect Solutions to Affiliations?

Key Situations Every PSA Should Address

By Ann Bittinger, Attorney, The Bittinger Law Firm

Template Legal Contract Language for PSAs

The College commissioned Ann Bittinger, Esq. to draft a white paper on Professional Services Agreements (PSA) as a resource for our members. In addition to guidance and perspective, Ms. Bittinger also provides template legal contract language that will be helpful to ACG members negotiating a PSA with a health system. You can download this language for your use.

Sample Agreement Terms. Although every PSA must be tailored to the specific facts and circumstances, groups should pay particular attention to these terms:

1. [Duties](#) - Click here for examples of contract language when negotiating duties related to your PSA
2. [Term](#) - Click here for contract language examples related to terminations
3. [Exclusivity](#) - Click here for a sample contract provisions related to exclusivity
4. [Non-compete \(Confidentiality\)](#) - If the system suggests a non-compete in its letter of intent or PSA, click here to review suggested language that you can counter with during your negotiation

Click here to read the full text of Attorney Ann Bittinger's white paper, "[PSAs: Perfect Solutions to Affiliations? Key Situations Every PSA Should Address](#)"

DUTIES

GI Group Duties.

- A. **General.** *The Facility hereby appoints GI GROUP, and GI GROUP accepts such appointment, to provide the Management Services for and on behalf of the Facility commencing on the Commencement Date and continuing through the Term of this Agreement. Specifically, Facility grants to GI GROUP the authority and responsibility to conduct, supervise, and manage the operations of the Service Line, exclusive of [billing, scheduling of procedures, collection of revenues, disbursement of funds, obtaining supplies, utilities, and services, negotiation of managed care agreements for hospital services, and employing staff members, surgical techs, assistants, and nurses who assist in surgery and treatments.] GI GROUP shall carry out its duties at the direction of Facility and keep Facility informed as to all major policy matters affecting the Service Line. GI GROUP shall have all reasonable discretion in the operations of the Service Line and shall exercise its reasonable judgment in the management and operation thereof in the absence of direction from the Facility. The Clinical Duties are specifically described in section X below.*
- B. **Operational and Budgetary Improvements.** *GI GROUP shall, in providing the Management Services, endeavor to make certain operational and budgetary improvements with respect to the Facility's Service Line as set forth on Schedule A. GI GROUP shall assist Facility in management of the Service Line in such a way as to realize certain operational efficiencies with respect to scheduling, on-time commencement of designated scheduled surgical procedures, operating and procedure room turn-around time and clinical hours per procedure in the endoscopy center. With respect to the Service Line, GI GROUP shall provide services and expertise to (i) create and update necessary operating room and other Facility protocols; (ii) address transitions of care in the patient population; (iii) establish best practices for the Service Line and develop benchmarks to evaluate whether such best practices have been met; (iv) provide ongoing direction of the Service Line using standards to enhance quality and efficiency; (v) assist in strategic, financial and operational planning; (vi) develop clinical guidelines and (vii) address error reduction and adverse events.*
- C. **Quality.** *GI GROUP shall aid and assist Facility and the medical staff in the conduct of quality assurance and utilization review functions in the Service Line as required of the Facility to support the Facility's continuing compliance with regulatory, accreditation and insurance requirements. GI GROUP shall endeavor to manage the Facility's Service Line in such a way as to enhance the quality and satisfaction of patients with respect to such services. GI GROUP also shall endeavor to improve the completeness of preadmission screenings, tests and pre-procedure preparation of patients. GI GROUP will provide account managers who will solicit and receive feedback on outcomes post-surgery.*
- a. **Metrics and Targets.** *The quality metrics and target levels for measuring such quality improvements are set forth in Schedule X attached hereto.*

b. **Work Plans.** *Within the first ninety (90) days of its engagement, GI GROUP shall develop and begin to implement detailed work plans for each quality improvement standard set forth on Schedule C. Such work plans shall be submitted to the Facility for its approval in advance of their implementation, such approval not to be unreasonably withheld. At a minimum, each work plan shall address the following requirements of GI GROUP, to:*

- i. *Participate in medical staff activities intended to enhance the quality of care provided by the Service Line, including, without limitation, quality improvement; utilization review; risk management programs; medical records and charting assessments; environmental assessments and maintenance; ancillary services coordination (e.g., lab, radiology, pharmacy, dietary and internal medicine services); review of policies and procedures; and medication administration, storage and record keeping.*
- ii. *Appoint a physician to serve on such committees as reasonably may be requested by Facility or the medical staff, from time to time.*
- iii. *Participate in and cooperate with on-going monitoring activities, such as audits, as reasonably requested by Facility or medical staff, from time to time.*
- iv. *Present reports to Facility administration and the Executive Committee of the medical staff periodically and upon request regarding the foregoing activities.*
- v. *Present reports to Facility's Quality Assurance Committee, as appropriate, appoint a physician to serve a liaison among Facility administrative departments and committees and medical staff*
- vi. *Work with the Medical Director to respond to patient, physician and Facility staff complaints about Service Line services.*

c. **Surveys.** *GI GROUP shall conduct surveys to gauge patient satisfaction and obtain outcome data, in order to allow the Facility to judge how this arrangement is working.*

D. **Policies and Procedures.** *GI GROUP shall provide services and expertise to establish and update policies and procedures of the Facility with respect to the Service Line.*

E. **Accreditation.** *GI GROUP shall assist the Facility in complying with the standards and requirements of accrediting agencies, including JCAHO and shall participate in the preparation for and conduct of accrediting surveys and other similar activities.*

- F. **Training and Education.** GI GROUP shall provide, at Facility's cost, and / or arrange for education and training opportunities for the physicians other than those contracted with GI GROUP, medical professionals and staff involved in the provision of Service Line Services. Such education and training opportunities shall be related to and foster improvements in the overall quality, efficiency and effectiveness of the Facility's Service Line. A schedule of the programs and associated attendance shall be maintained by GI GROUP and approved by the Facility.*
- G. **Physician Recruitment.** GI GROUP shall recruit sufficiently trained, board certified gastroenterologists, in sufficient numbers to meet patient demand, in GI GROUP's sole discretion, to perform the Service Line Services involving patient care, surgeries, diagnosis and other medical services. Facility shall have no financial responsibility for the salary or other compensation for the GI GROUP Physicians.*
- H. **Research.** GI GROUP will attempt to participate in research studies related to the Service Line Services.*
- I. **Intellectual Property.** GI GROUP grants Facility a nonexclusive license ("License") to use GI GROUP's intellectual property for patient information, patient education and in advertisements during this Agreement's Term. The intellectual property may consist of service marks, trade names, websites, advertisements, confidential technology, market research lists, fee schedules, physician lists, along with other documents in connection with marketing and promotional materials, including but not limited to print, photographic and video formats.*

TERM

Termination. *In addition to such termination rights specified elsewhere in this Agreement, this Agreement may be terminated during the initial or any renewal terms as follows:*

- (A) *By either party effective immediately if the other party (the “defaulting party”) is in default of any of its respective obligations or duties under this Agreement, and such default shall have continued unremedied for a period of thirty (30) days following written notice of such default given by the non-defaulting party to the defaulting party.*
- (B) *By GI Group immediately if FACILITY defaults on its payment obligations under this Agreement.*
- (C) *By either party, effective immediately on written notice to the other party in the event FACILITY becomes legally unable to provide the services contemplated herein, or GI GROUP becomes legally unable to provide medical services.*
- (D) *By either party, effective immediately on written notice to the other party, if the other party is adjudicated bankrupt, becomes insolvent, voluntarily or involuntarily commences liquidation, if a receiver (temporary or permanent) for its property or a part thereof is appointed by a court of competent jurisdiction and not dismissed within thirty (30) days after appointment, if it makes a general assignment for the benefit of creditors, or if execution is levied against substantially all of its property or which would have an adverse effect on the operation of its business and is not removed within thirty (30) days.*
- (E) *In accordance with the terms of the Business Associate Addendum.*

EXCLUSIVITY

Exclusivity. Except as otherwise expressly provided in this Agreement, and for so long as GI GROUP is in compliance with the material terms of the Agreement, the Facility shall not retain, hire, employ or permit any entity or individual other than GI GROUP and the Professionals to render Service Line Services at the Facility Premises. The Facility's exclusive engagement of GI GROUP is based upon formal and independent consideration of all factors relating to the operation of the Department, the Facility's need for Service Line Professional Services and Management Services. The Facility is entering into this exclusive contractual arrangement with GI GROUP in order to: (a) encourage the provision of high-quality Professional Services by assuring that highly-trained and skilled gastroenterologists are available to furnish the Services at the Facility, that said gastroenterologists have incentive to maintain and upgrade their professional skills and knowledge, and that such physicians are effectively subject to the quality assurance standards of the Facility; (b) ensure the efficient and effective management and utilization of Facility equipment, facilities and personnel dedicated to the Department; (c) promote clinical consistency and standardization of the Professional Services at the Facility using evidence-based "best practices;" (d) promote better supervision and supplement training of Facility personnel; (f) promote a cohesive and productive working relationship among personnel within the Department; and (g) enhance patient care at the Facility.

NON-COMPETE (Confidentiality)

Facility Confidential Material. Except as otherwise provided in this Agreement, all software, Facility, file layouts, operating and procedures utilized in the delivery of services shall be deemed Facility Confidential Material. Such Facility Confidential Material constitutes trade secrets of Facility and shall remain the property of Facility during and after termination of this Agreement. Nothing in this Agreement shall be interpreted or construed as granting GI GROUP access or rights to any of the Facility Confidential Material. GI GROUP agrees that GI GROUP and its employees, agents and representatives shall maintain as confidential and shall not acquire, nor attempt to acquire for its own use or the use of any other entity, any Facility trade secret, information pertaining to the business practices of Facility, or any other information deemed by Facility to be confidential. GI GROUP shall, upon termination of this Agreement or at any earlier time upon the request of Facility, immediately return all Facility Confidential Material received from Facility, and all information developed therefrom and copies thereof, to Facility, and shall retain none for its files, unless otherwise agreed to in writing and signed by GI GROUP and Facility.

GI GROUP agrees that it will not disclose to third parties the software and resulting or related processes or documentation of the proprietary software employed by Facility to provide the Services or any information about Facility's fees, operations, business methods or strategies, except as required by law.

GI GROUP shall refrain from duplicating or from reverse engineering, tampering with or otherwise attempting to determine the structure and operational details of the Facility Confidential Material.

All patent and intellectual property rights to the Facility Confidential Material both domestic and foreign belong to Facility exclusively and GI GROUP shall have no rights whatsoever with respect to such patent and intellectual property rights.

Group Confidential Material. All information provided by GI GROUP, including but not limited to all original data, notes, orders, change orders, physician billing or coding reports, bills submitted to payors, books, records, reports and documents, as manipulated, processed or produced by Facility under this Agreement shall be deemed GI GROUP Confidential Material and shall be subject to the confidentiality and non-competition provisions of this Section.

Facility shall not disclose, permit to be disclosed, or use for its own benefit (except in accordance with the terms of this Agreement and the Business Associate Addendum) any GI GROUP Confidential Material or information developed there from except for disclosure to those officers, employees or agents of Facility necessary to complete Facility's duties under this Agreement. Facility agrees not to disclose to anyone other than GI GROUP any information about GI GROUP's fee structure, internal compensation, managed care or facility contracting strategies, or similar business information that would commonly be understood to be confidential or any confidential medical information regarding GI GROUP's patients received in the course of performing the Services, except as required to bill charges, as legally required or as otherwise provided herein or in the Business Associate Addendum. Facility acknowledges for the purposes of this Agreement that all GI GROUP Confidential Material is owned solely by

GI GROUP, shall remain the exclusive property of GI GROUP, constitutes valuable trade secrets of GI GROUP, and that the unauthorized disclosure or use of GI GROUP Confidential Material by Facility shall cause irreparable harm to GI GROUP. Facility shall use or cause GI GROUP Confidential Material to be used only in a manner consistent with the terms and conditions of this Agreement, including the Business Associate Addendum.

Facility shall, upon termination of this Agreement or at any earlier time upon the request of GI GROUP, immediately return all GI GROUP Confidential Material received from GI GROUP, and all information developed there from and copies thereof, to GI GROUP, and shall retain none for its files, unless otherwise agreed to in writing and signed by GI GROUP and Facility or otherwise specified in the Business Associate Addendum.

American College of Gastroenterology

Full Text including Template Legal Contract Language for PSAs

PSAs: Perfect Solutions to Affiliations?

Key Situations Every PSA Should Address

By Ann Bittinger, Attorney, The Bittinger Law Firm

The rainstorm that started around 2010 in favor of consolidation in the healthcare industry continues to flood the market, with creative, mutually-beneficial arrangements between hospitals and physicians taking the form of every color of the post-storm rainbow. One form, Professional Services Agreements (“PSAs”), continue to be quite common among hospitals and gastroenterology groups where the system has not yet employed the gastroenterologists.

Background. A PSA is simply a contract by which physicians in a physician group provide services to a hospital or health system. They take many shapes and sizes. One physician can enter into a PSA with a system for a few hours of defined work. Or, on the other end of the spectrum, a GI group with dozens of gastroenterologists can contract through a PSA to manage the GI service line at a system, much like what we used to call a co-management agreement. There is no one-size-fits-all PSA, but there are key terms that should appear in any PSA, and those terms should be tailored to the specific facts and circumstances following negotiation of a robust letter of intent.

When a group sells its practice to a system, the group’s company is usually dissolved. The physicians no longer own the company for which they work and they become W-2 employees of the hospital system, usually of its physician enterprise subsidiary. The closeness of the affiliation in a PSA, however, is one or more steps shy of full employment; how close is up to the terms of the PSA.

For most PSAs, the gastroenterologists typically still bill and collect for clinical services. As such, the health system is paying the group for administrative and management services only. In other PSAs, however, all of the gastroenterologists work under the tax ID number and payer contracts of the health system. (In other words, the GI group still employs all the physicians and assigns all of them via a PSA to work under the hospital system’s payer contracts). In those situations, the payment to the group compensates it not only for administrative services but also for the costs of salaries the group incurs in providing a full spectrum of gastrologists to provide services to the hospital. Because the hospital bills and collects for physician services, the hospital pays the group to pay the physicians’ salaries and benefits.

The Law. It is illegal for a hospital to pay a physician group other than fair market value. The hospital can only pay physicians rates that do not vary based on the volume or value of referrals, for commercially reasonable services. Payments above fair market value or for work that is not commercially reasonable can be construed by prosecutors as kickbacks that violate the Federal Anti-Kickback Statute. This is a criminal law, so if violated, the physicians and system executives who offered, solicited, paid, or received payment can face prison time.

Fair market value is a range, not a number. And the range should not be based solely on third-party data. To use third party data properly, the facts surrounding the proposed relationship have to be shared with the consultant. That way, the consultant can ensure that he or she is comparing the industry information correctly to the facts at hand. Although it's not advisable to blatantly negotiate what is considered fair market value, there is absolutely nothing wrong with providing supporting documentation about the facts at hand in response to a draft report from a valuation consultant. Typically, in a fair process, the consultant will interview both the physician group and the hospital and ask for non-biased, fair information relating to the valuation job. A consultant may share the draft report with both parties, soliciting feedback, before finalizing it, to insure the integrity of the assumptions and conclusions the consultant makes.

Sample Agreement Terms. Although every PSA must be tailored to the specific facts and circumstances, groups should pay particular attention to these terms:

5. Duties
6. Term
7. Exclusivity
8. Non-compete (Confidentiality)

DUTIES

What are you doing? Because the most important compliance issue in a PSA is to demonstrate commercial reasonableness and fair market value, it is essential that the contract accurately and robustly describe the work that is being performed by the physician group for the benefit of the system. Is it specifically for call coverage, for example, or only for endoscopy coverage for the hospital? Valuation consultants, not lawyers, opine on fair market value, but before you call a valuation consultant you need an accurate description of services that will be provided.

Sometimes PSAs are casually referred to as “medical director agreements on steroids.” Some level of medical direction or administrative oversight is part of all PSAs (other than agreements for call coverage only), but what else are you doing? Here are some sample duties provisions for consideration.

GI Group Duties.

- J. **General.** The Facility hereby appoints GI GROUP, and GI GROUP accepts such appointment, to provide the Management Services for and on behalf of the Facility commencing on the Commencement Date and continuing through the Term of this Agreement. Specifically, Facility grants to GI GROUP the authority and responsibility to conduct, supervise, and manage the operations of the Service Line, exclusive of [billing, scheduling of procedures, collection of revenues, disbursement of funds, obtaining supplies, utilities, and services, negotiation of managed care agreements for hospital services, and employing staff members, surgical techs, assistants, and nurses who assist in surgery and treatments.] GI GROUP shall carry out its duties at the direction of Facility and keep Facility informed as to all major policy matters affecting the Service Line. GI GROUP shall have all reasonable discretion in the operations of the Service Line and shall exercise its reasonable*

judgment in the management and operation thereof in the absence of direction from the Facility. The Clinical Duties are specifically described in section X below.

- K. Operational and Budgetary Improvements.** *GI GROUP shall, in providing the Management Services, endeavor to make certain operational and budgetary improvements with respect to the Facility's Service Line as set forth on Schedule A. GI GROUP shall assist Facility in management of the Service Line in such a way as to realize certain operational efficiencies with respect to scheduling, on-time commencement of designated scheduled surgical procedures, operating and procedure room turn-around time and clinical hours per procedure in the endoscopy center. With respect to the Service Line, GI GROUP shall provide services and expertise to (i) create and update necessary operating room and other Facility protocols; (ii) address transitions of care in the patient population; (iii) establish best practices for the Service Line and develop benchmarks to evaluate whether such best practices have been met; (iv) provide ongoing direction of the Service Line using standards to enhance quality and efficiency; (v) assist in strategic, financial and operational planning; (vi) develop clinical guidelines and (vii) address error reduction and adverse events.*
- L. Quality.** *GI GROUP shall aid and assist Facility and the medical staff in the conduct of quality assurance and utilization review functions in the Service Line as required of the Facility to support the Facility's continuing compliance with regulatory, accreditation and insurance requirements. GI GROUP shall endeavor to manage the Facility's Service Line in such a way as to enhance the quality and satisfaction of patients with respect to such services. GI GROUP also shall endeavor to improve the completeness of preadmission screenings, tests and pre-procedure preparation of patients. GI GROUP will provide account managers who will solicit and receive feedback on outcomes post-surgery.*
- a. Metrics and Targets.** *The quality metrics and target levels for measuring such quality improvements are set forth in Schedule X attached hereto.*
- b. Work Plans.** *Within the first ninety (90) days of its engagement, GI GROUP shall develop and begin to implement detailed work plans for each quality improvement standard set forth on Schedule C. Such work plans shall be submitted to the Facility for its approval in advance of their implementation, such approval not to be unreasonably withheld. At a minimum, each work plan shall address the following requirements of GI GROUP, to:*
- i.** *Participate in medical staff activities intended to enhance the quality of care provided by the Service Line, including, without limitation, quality improvement; utilization review; risk management programs; medical records and charting assessments; environmental assessments and maintenance; ancillary services coordination (e.g., lab, radiology, pharmacy, dietary and internal medicine services); review of policies*

and procedures; and medication administration, storage and record keeping.

- ii. Appoint a physician to serve on such committees as reasonably may be requested by Facility or the medical staff, from time to time.*
- iii. Participate in and cooperate with on-going monitoring activities, such as audits, as reasonably requested by Facility or medical staff, from time to time.*
- iv. Present reports to Facility administration and the Executive Committee of the medical staff periodically and upon request regarding the foregoing activities.*
- v. Present reports to Facility's Quality Assurance Committee, as appropriate, appoint a physician to serve a liaison among Facility administrative departments and committees and medical staff*
- vi. Work with the Medical Director to respond to patient, physician and Facility staff complaints about Service Line services.*

*c. **Surveys.** GI GROUP shall conduct surveys to gauge patient satisfaction and obtain outcome data, in order to allow the Facility to judge how this arrangement is working.*

*M. **Policies and Procedures.** GI GROUP shall provide services and expertise to establish and update policies and procedures of the Facility with respect to the Service Line.*

*N. **Accreditation.** GI GROUP shall assist the Facility in complying with the standards and requirements of accrediting agencies, including JCAHO and shall participate in the preparation for and conduct of accrediting surveys and other similar activities.*

*O. **Training and Education.** GI GROUP shall provide, at Facility's cost, and / or arrange for education and training opportunities for the physicians other than those contracted with GI GROUP, medical professionals and staff involved in the provision of Service Line Services. Such education and training opportunities shall be related to and foster improvements in the overall quality, efficiency and effectiveness of the Facility's Service Line. A schedule of the programs and associated attendance shall be maintained by GI GROUP and approved by the Facility.*

*P. **Physician Recruitment.** GI GROUP shall recruit sufficiently trained, board certified gastroenterologists, in sufficient numbers to meet patient demand, in GI GROUP's sole discretion, to perform the Service Line Services involving patient care, surgeries, diagnosis and other medical services. Facility shall have no financial responsibility for the salary or other compensation for the GI GROUP Physicians.*

*Q. **Research.** GI GROUP will attempt to participate in research studies related to the Service Line Services.*

*R. **Intellectual Property.** GI GROUP grants Facility a nonexclusive license (“License”) to use GI GROUP’s intellectual property for patient information, patient education and in advertisements during this Agreement’s Term. The intellectual property may consist of service marks, trade names, websites, advertisements, confidential technology, market research lists, fee schedules, physician lists, along with other documents in connection with marketing and promotional materials, including but not limited to print, photographic and video formats.*

As to the schedule containing the metrics and targets, a model is beyond the scope of this paper, but be sure that the targets and metrics are tailored to your service. Do they make sense from a cooperative standpoint as items that both the hospital and group want to improve upon? Is there a fair way to track and document progress on those targets? Does the group get to review the documentation before it is finalized? Metrics should be flexible or provide multiple options. The practice will change over time, so the effectiveness of the measures need to change in tandem.

As to physician recruitment, consider including in the PSA that if the staffing of the group falls below X number of physicians, then the hospital will agree to subsidize the income of a new hire subject to a recruiting agreement that complies with the Stark Law and Anti-Kickback Statute. This agreement typically mandates that the recruit stay in the community for 2-3 years in addition to a subsidy paid to the group to allow the group to pay him regardless of his collections or productivity. The recruiting agreement is separate from the PSA, but a provision in the PSA that would mandate a subsidy, under to-be-determined terms, is helpful to physician groups. Another option is to mandate a needs assessment periodically, so that at a minimum a discussion about recruiting is built in to the PSA.

As to call coverage obligations, be wary of how heavy the beeper is. By this, I mean incorporate a cap or some other limit on the extend of your call obligations per shift. It’s not reasonable for a gastroenterologist to have to manage 30 inpatient and emergency department patients a night. Also as to call obligations, explore the medical staff bylaws and PSA terms to ascertain whether an extender can be used in addition to, or in lieu of, a physician on call. For example, a call coverage provision might say that the group will provide call coverage 10 nights a month for \$1000 a night, but in the event that the census for patients seen by the group on call in the hospital (inpatient and ED) in the last six weeks exceeds 20, then the fee will increase going forward to \$1750 a night to support a second provider on the shift or an extender. The heaviness of the beeper should definitely be considered by the valuation consultant to determine the fair market value of the pay for call coverage.

TERM

One of the pros of a PSA as opposed to an acquisition/employment model is that PSAs are easy to unwind, as the physician group entity remains in place. (That being said, an unwind can be difficult if the PSA includes the hospital hiring the non-physician staff and administration. In those cases, the PSA should allow for the re-hire of staff upon an unwind). But easy termination can also be one of the cons. It is not uncommon for a PSA to have a longer-than-normal term, of three to five years for example, with no without-cause termination provision by either party. They are, in a way, a short-term marriage between group and hospital. Locking in a longer term may be more valuable than negotiating higher compensation. It's hard to get things done if you know the agreement is subject to expire in year term. If you negotiate favorable control rights and exclusivity, you want to lock that in for a while. Additionally, PSAs usually have minimal for-cause termination provisions. Here's an example:

Termination. *In addition to such termination rights specified elsewhere in this Agreement, this Agreement may be terminated during the initial or any renewal terms as follows:*

- (A) By either party effective immediately if the other party (the "defaulting party") is in default of any of its respective obligations or duties under this Agreement, and such default shall have continued unremedied for a period of thirty (30) days following written notice of such default given by the non-defaulting party to the defaulting party.*
- (C) By GI Group immediately if FACILITY defaults on its payment obligations under this Agreement.*
- (C) By either party, effective immediately on written notice to the other party in the event FACILITY becomes legally unable to provide the services contemplated herein, or GI GROUP becomes legally unable to provide medical services.*
- (D) By either party, effective immediately on written notice to the other party, if the other party is adjudicated bankrupt, becomes insolvent, voluntarily or involuntarily commences liquidation, if a receiver (temporary or permanent) for its property or a part thereof is appointed by a court of competent jurisdiction and not dismissed within thirty (30) days after appointment, if it makes a general assignment for the benefit of creditors, or if execution is levied against substantially all of its property or which would have an adverse effect on the operation of its business and is not removed within thirty (30) days.*
- (E) In accordance with the terms of the Business Associate Addendum.*

EXCLUSIVITY

When negotiating PSAs with hospitals, groups sometimes focus on the compensation and duties without paying attention to the value of intangibles, like exclusivity. An exclusive agreement means that you are the only entity or person providing the services defined in the agreement. If your group has an exclusive contract to handle call coverage, then only your group can take call

(so long as there's no conflict with the medical staff bylaws). If your group has an exclusive contract to manage the GI service line at the hospital and to oversee GI quality assurance and utilization review, then your group and your group alone maintains control of that. Having this intangible in your pocket prevents other groups from taking control of the department. An exclusivity term also makes clear the line of demarcation between what the hospital's administrators do and what the physician group does. Here's a sample provision:

Exclusivity. *Except as otherwise expressly provided in this Agreement, and for so long as GI GROUP is in compliance with the material terms of the Agreement, the Facility shall not retain, hire, employ or permit any entity or individual other than GI GROUP and the Professionals to render Service Line Services at the Facility Premises. The Facility's exclusive engagement of GI GROUP is based upon formal and independent consideration of all factors relating to the operation of the Department, the Facility's need for Service Line Professional Services and Management Services. The Facility is entering into this exclusive contractual arrangement with GI GROUP in order to: (a) encourage the provision of high-quality Professional Services by assuring that highly-trained and skilled gastroenterologists are available to furnish the Services at the Facility, that said gastroenterologists have incentive to maintain and upgrade their professional skills and knowledge, and that such physicians are effectively subject to the quality assurance standards of the Facility; (b) ensure the efficient and effective management and utilization of Facility equipment, facilities and personnel dedicated to the Department; (c) promote clinical consistency and standardization of the Professional Services at the Facility using evidence-based "best practices;" (d) promote better supervision and supplement training of Facility personnel; (f) promote a cohesive and productive working relationship among personnel within the Department; and (g) enhance patient care at the Facility.*

NON-COMPETE (Confidentiality)

One remnant topic from employment agreement drafting that hospital systems like to make a part of a PSA is a non-compete. Hospital counsel argues that if the hospital is going to associate so closely with the GI Group, sharing information and collaborating so closely and perhaps exclusively, then the group has to agree not to take that information and use it competitively. Non-competes lock groups in, preventing them from leaving and associating with a system that competes with the system. Agreeing to a non-compete sacrifices significant leverage. The point of pursuing a PSA rather than an employment model is to allow for an easy out if the Group is not happy. That easy out isn't much of an out if the PSA includes a non-compete.

If the hospital system is sincerely worried about a group taking the system's confidential information and using it elsewhere, then the group should argue that a Non-Disclosure or Confidentiality Agreement (not a non-compete) is the more appropriate contractual tool to protect the hospital's interests. After all, the physician group has its own intellectual property and experience that it is bringing to the PSA. Any restrictions on use of information should be mutual. It's not like the group is an employee who is being trained to work for an employer and who should, therefore, be subject to a non-compete post-termination. If the system suggests a non-compete in its letter of intent or PSA, counter with this:

Facility Confidential Material. Except as otherwise provided in this Agreement, all software, Facility, file layouts, operating and procedures utilized in the delivery of services shall be deemed Facility Confidential Material. Such Facility Confidential Material constitutes trade secrets of Facility and shall remain the property of Facility during and after termination of this Agreement. Nothing in this Agreement shall be interpreted or construed as granting GI GROUP access or rights to any of the Facility Confidential Material. GI GROUP agrees that GI GROUP and its employees, agents and representatives shall maintain as confidential and shall not acquire, nor attempt to acquire for its own use or the use of any other entity, any Facility trade secret, information pertaining to the business practices of Facility, or any other information deemed by Facility to be confidential. GI GROUP shall, upon termination of this Agreement or at any earlier time upon the request of Facility, immediately return all Facility Confidential Material received from Facility, and all information developed therefrom and copies thereof, to Facility, and shall retain none for its files, unless otherwise agreed to in writing and signed by GI GROUP and Facility.

GI GROUP agrees that it will not disclose to third parties the software and resulting or related processes or documentation of the proprietary software employed by Facility to provide the Services or any information about Facility's fees, operations, business methods or strategies, except as required by law.

GI GROUP shall refrain from duplicating or from reverse engineering, tampering with or otherwise attempting to determine the structure and operational details of the Facility Confidential Material.

All patent and intellectual property rights to the Facility Confidential Material both domestic and foreign belong to Facility exclusively and GI GROUP shall have no rights whatsoever with respect to such patent and intellectual property rights.

Group Confidential Material. All information provided by GI GROUP, including but not limited to all original data, notes, orders, change orders, physician billing or coding reports, bills submitted to payors, books, records, reports and documents, as manipulated, processed or produced by Facility under this Agreement shall be deemed GI GROUP Confidential Material and shall be subject to the confidentiality and non-competition provisions of this Section.

Facility shall not disclose, permit to be disclosed, or use for its own benefit (except in accordance with the terms of this Agreement and the Business Associate Addendum) any GI GROUP Confidential Material or information developed there from except for disclosure to those officers, employees or agents of Facility necessary to complete Facility's duties under this Agreement. Facility agrees not to disclose to anyone other than GI GROUP any information about GI GROUP's fee structure, internal compensation, managed care or facility contracting strategies, or similar business information that would commonly be understood to be confidential or any confidential medical information regarding GI GROUP's patients received in the course of performing the Services, except as required to bill charges, as legally required or as otherwise provided herein or in the Business Associate Addendum. Facility acknowledges for the purposes of this Agreement that all GI GROUP Confidential Material is owned solely by GI GROUP, shall remain the exclusive property of GI GROUP, constitutes valuable trade

secrets of GI GROUP, and that the unauthorized disclosure or use of GI GROUP Confidential Material by Facility shall cause irreparable harm to GI GROUP. Facility shall use or cause GI GROUP Confidential Material to be used only in a manner consistent with the terms and conditions of this Agreement, including the Business Associate Addendum.

Facility shall, upon termination of this Agreement or at any earlier time upon the request of GI GROUP, immediately return all GI GROUP Confidential Material received from GI GROUP, and all information developed there from and copies thereof, to GI GROUP, and shall retain none for its files, unless otherwise agreed to in writing and signed by GI GROUP and Facility or otherwise specified in the Business Associate Addendum.

When negotiating your letter of intent before entering into the PSA, don't focus on compensation to the detriment of other important provisions. Be sure to keep in mind topics that could carry great intangible value: termination and term, confidentiality-versus-non-compete, and exclusivity. Doing so could help your group more strategically align its future course and help it survive well into the 2020s. Spend significant time outlining exactly what duties the group will provide, as there's no better way to assure a group's demise than to come under the scrutiny of a United States Attorney who thinks a hospital is paying a group a kickback for referrals. Careful counsel and detail-oriented executives for the group and hospital system should negotiate at arm's length a PSA that reflects the true nature of services and protects what is important to each side.