Private Equity Investment in Medical Practices Series: Buying or Selling a Medical Practice - STEP 1 - The Nondisclosure Agreement

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The first step in most medical practice or health facility sale discussions (including those with private equity) is the negotiation and execution of a Non-Disclosure Agreement, also commonly referred to as an NDA or Confidentiality Agreement. An NDA is one of the more "boilerplate" documents in any transaction, but it should be carefully considered, as it can sometimes omit important concepts or overreach in its scope.

An NDA controls how the parties will treat the information they obtain from each other, more typically information the practice will provide to others. A broker or private equity buyer is not likely sharing much, if any, sensitive information, so the NDA may practically only cover the information coming from the practice even if it is designed to be mutual and apply to both parties. Confidential information is likely to include payor contracts, employee information such as wages (including physician compensation arrangements), pending litigation, compliance concerns, 3 to 5 years of historical financial statements, etc.

Each of the following should be considered with respect to an NDA:

1. **Parties** – Be sure to have the full legal name of each party, not just their commonly used names.

2. **Scope** – Describe the particular project with precision. Because the NDA will only allow use of confidential information for the stated purpose, the NDA should be narrow enough in scope not to cover arrangements outside the currently contemplated arrangement. Also consider whether oral information should be included, and whether the agreement needs to "look back" and cover information previously provided before the NDA was executed.

3. **Exceptions** – Standard exceptions to confidentiality include: (a) information that is publicly available (as long as it is through no fault of the receiving party); (b) information that is learned from another party who had no obligation to keep it confidential; (c) information developed independently; and (d) information otherwise already known.

4. **Accuracy** – There should be no promise or obligation that the provided information is 100% perfect. Reasonable best efforts to provide accurate information should be sufficient for an NDA. More stringent accuracy requirements will come later if the parties move forward with a sale agreement.

5. **Term** – How long is the NDA effective? When it ends, how long is the information protected? The practice or facility may want the confidentiality obligation to be indefinite. The broker or prospective buyer will want the restriction to end within no more than 2 years and more likely 12 months. Any

trade secrets that are disclosed should be protected indefinitely.

6. Ownership – The NDA should state that party providing the information retains ownership of the information and that the receiving party does not receive a license or other rights to use the information.

7. Standard of Care – The NDA should provide that the party receiving the information will treat it with at least the same level of care as they treat their own confidential information, and no less than a commercially reasonable level of care.

8. Representatives – The receiving party will likely want the ability to share your confidential information with third party representatives like affiliates and third party advisors. Because you will likely not have a separate agreement with each of these third parties, it is important for the other party to the NDA to agree to be responsible for the acts of its representatives.

9. Exclusivity – Although not a required term and often instead included in a letter of intent or term sheet, the other side may demand an exclusivity provision, which restricts you from sharing information and considering a transaction with other suitors. This obligation can last many months after the NDA signed. This ensures the buyer has a chance to make an offer and that you are not shopping it simultaneously to multiple parties. Be careful, because even casual conversations can be considered a breach and you may even be required to report if you are contacted by another potential suitor. This is one of the most important contract terms to consider, as it can tie you up with a bad broker or buyer.

10. Non-Solicitation – Because producing the information will often involve extensive contact with your administrative team, you should also consider a “no hire” provision, which prohibits the other side from hiring your current employees and anyone who has worked for you in prior 6 months.

11. Stamps – Try and avoid requirements that you mark something “confidential” for it to qualify for confidential treatment. Such a “stamp,” watermark, or label often gets inadvertently omitted. Instead, the default should be that anything you provide is deemed confidential.

12. Data Room – Consider using (or having your attorney use) an electronic “data room.” This is simply a more secure version of a “Drop Box.” This allows you to specifically track what information was provided and at what time. This is especially important when the NDA ends and you want to make sure you know what was provided. Any “boilerplate” confidentiality provisions used by these data rooms should not reduce or eliminate the protections you receive under the negotiated NDA.

13. Remedy – What happens if there is a breach? Consider including money damages and the right to go to court and demand a third party stop using the information, known as an injunction.

NDA should take no more than an hour to review. Negotiation depends on the parties, but another few hours is usually sufficient, with the total process take a day or two to complete. It is important to review every document you receive and consider negotiating its provisions, even if it is from a “friendly” party like your broker. Once it is signed, it is too late. Spend a little time up front to get it right.

For any questions about an NDA generally or your specific NDA or transaction, contact **Thomas N. Hutchinson**, **Brian M. Heaton**, or your usual Krieg DeVault attorney.

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