

**COUNTY OF MARIN**  
**PROFESSIONAL SERVICES CONTRACT**  
**2010 - Edition 1**

**THIS AGREEMENT** is made and entered into this day July 1, 2010 by and between the COUNTY OF MARIN, hereinafter referred to as "County" and **JAMES E. POINTER, M.D.**, hereinafter referred to as "Contractor."

**RECITALS:**

**WHEREAS**, County desires to retain a person or firm to provide the following services: Provision of medical direction and oversight.; and

**WHEREAS**, Contractor warrants that it is qualified and competent to render the aforesaid services;

**NOW, THEREFORE**, for and in consideration of the agreement made, and the payments to be made by County, the parties agree to the following:

**1. SCOPE OF SERVICES:**

Contractor agrees to provide all of the services described in **Exhibit A** attached hereto and by this reference made a part hereof.

**2. FURNISHED SERVICES:**

The County agrees to:

- A. Guarantee access to and make provisions for the Contractor to enter upon public and private lands as required to perform their work.
- B. Make available all pertinent data and records for review.
- C. Provide general bid and contract forms and special provisions format when needed.

**3. FEES AND PAYMENT SCHEDULE:**

The fees and payment schedule for furnishing services under this Contract shall be based on the rate schedule which is attached hereto as **Exhibit B** and by this reference incorporated herein. Said fees shall remain in effect for the entire term of the Contract.

Contractor shall provide County with his/her/its Federal Tax I.D. number prior to submitting the first invoice.

**4. MAXIMUM COST TO COUNTY:**

In no event will the cost to County for the services to be provided herein exceed the maximum sum of **\$59,500** including direct non-salary expenses. As set forth in paragraph 14 of this Contract, should the funding source for this contract be reduced, Contractor agrees that this maximum cost to County may be amended by written notice from County to reflect that reduction.

**5. TIME OF AGREEMENT:**

This Agreement shall commence on **July 1, 2010**, and shall terminate on **June 30, 2011**. Certificate(s) of Insurance must be current on day Contract commences and if scheduled to lapse prior to termination date, must be automatically updated before final payment may be made to Contractor. The final invoice must be submitted within 30 days of completion of the stated scope of services.

**6. INSURANCE:**

All required insurance coverages shall be substantiated with a certificate of insurance and must be signed by the insurer or its representative evidencing such insurance to County. The general liability policy shall be endorsed naming the County of Marin as an additional insured. The certificate(s) of insurance and required endorsement shall be furnished to the County prior to commencement of work. Each certificate shall provide for thirty (30) days advance notice to County of any cancellation in coverage. Said policies shall remain in force through the life of this Contract and shall be payable on a per occurrence basis only, except those required by paragraph 6.4 which may be provided on a claims-made basis consistent with the criteria noted therein.

Nothing herein shall be construed as a limitation of Contractor's liability, and Contractor shall indemnify and hold the County, its employees, officers, and agents, harmless and defend the County against any and all claims, damages, losses and expense that may arise by reason of the Contractor's negligent actions or omissions. County agrees to timely notify Contractor of any negligence claim.

Failure to provide and maintain the insurance required by this Contract will constitute a material breach of the agreement. In addition to any other available remedies, County may suspend payment to the Contractor for any services provided during any time that insurance was not in effect and until such time as the Contractor provides adequate evidence that Contractor has obtained the required coverage.

A request for a waiver of any of the following insurance requirements must be set forth on **Exhibit C** attached hereto. A waiver must address reduced amounts of coverage or the type of coverage waived entirely.

### **6.1 GENERAL LIABILITY**

The Contractor shall maintain a commercial general liability insurance policy in an amount of no less than one million dollars (\$1,000,000) with a two million dollar (\$2,000,000) aggregate limit. The County shall be named as an additional insured on the commercial general liability policy and the Certificate of Insurance shall include an additional endorsement page. (see sample form: ISO - CG 20 10 11 85).

X ☐ Insurance Reduction or Waiver of Coverage Requested (Exhibit C)

### **6.2 AUTO LIABILITY**

Where the services to be provided under this Contract involve or require the use of any type of vehicle by Contractor in order to perform said services, Contractor shall also provide comprehensive business or commercial automobile liability coverage including non-owned and hired automobile liability in the amount of one million dollars combined single limit (\$1,000,000.00).

X ☐ Insurance Reduction or Waiver of Coverage Requested (Exhibit C)

### **6.3 WORKERS' COMPENSATION**

The Contractor acknowledges the State of California requires every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of the Labor Code. If Contractor has employees, a copy of the certificate evidencing such insurance or a copy of the Certificate of Consent to Self-Insure shall be provided to County prior to commencement of work.

X ☐ Insurance Reduction or Waiver of Coverage Requested (Exhibit C)

### **6.4 PROFESSIONAL LIABILITY INSURANCE**

Contractor is required to maintain appropriate liability and/or errors and omissions insurance coverage(s) for the duration of the term of his contract with a minimum limit of \$1,000,000 per claim. All terms and conditions of this insurance coverage are the responsibility of the contractor and his broker/insurer. The County of Marin provides no oversight of the process, the coverage or the policy and is not responsible for its content, purchase or renewal.

The contractor will be reimbursed the cost of the required insurance (not to exceed \$4000 per annual contract term) as part of his fee for services and that amount shall be included in the value of this contract. The County's medical malpractice policy does not cover the required duties of the contractor under this contract.

### **7. ANTI DISCRIMINATION AND ANTI HARASSMENT:**

Contractor and/or any subcontractor shall not unlawfully discriminate against or harass any individual including, but not limited to, any employee or volunteer of the County of Marin based on race, color, religion, nationality, sex, sexual orientation, age or condition of disability. Contractor and/or any subcontractor understands and agrees that Contractor and/or any subcontractor is bound by and will comply with the anti discrimination and anti harassment mandates of all Federal, State and local statutes, regulations and ordinances including, but not limited to, County of Marin Personnel Management Regulation (PMR) 21.

### **8. SUBCONTRACTING:**

The Contractor shall not subcontract nor assign any portion of the work required by this Contract without prior written approval of the County except for any subcontract work identified herein. If Contractor hires a subcontractor under this Agreement, Contractor shall require subcontractor to provide and maintain insurance coverage(s) identical to what is required of Contractor under this Agreement and shall require subcontractor to name Contractor as additional insured under this Agreement. It shall be Contractor's responsibility to collect and maintain current evidence of insurance provided by its subcontractors and shall forward to the County evidence of same.

### **9. ASSIGNMENT:**

The rights, responsibilities and duties under this Contract are personal to the Contractor and may not be transferred or assigned without the express prior written consent of the County.

### **10. LICENSING AND PERMITS:**

The Contractor shall maintain the appropriate licenses throughout the life of this Contract. Contractor shall also obtain any and all permits which might be required by the work to be performed herein.

**11. BOOKS OF RECORD AND AUDIT PROVISION:**

Contractor shall maintain on a current basis complete books and records relating to this Contract. Such records shall include, but not be limited to, documents supporting all bids, all income and all expenditures. The books and records shall be original entry books with a general ledger itemizing all debits and credits for the work on this Contract. In addition, Contractor shall maintain detailed payroll records including all subsistence, travel and field expenses, and canceled checks, receipts and invoices for all items. These documents and records shall be retained for at least five years from the completion of this Contract. Contractor will permit County to audit all books, accounts or records relating to this Contract or all books, accounts or records of any business entities controlled by Contractor who participated in this Contract in any way. Any audit may be conducted on Contractor's premises or, at County's option, Contractor shall provide all books and records within a maximum of fifteen (15) days upon receipt of written notice from County. Contractor shall refund any monies erroneously charged.

**12. WORK PRODUCT/PRE-EXISTING WORK PRODUCT OF CONSULTANT:**

Any and all work product resulting from this agreement is commissioned by the County of Marin as a work for hire. The County of Marin shall be considered, for all purposes, the author of the work product and shall have all rights of authorship to the work, including, but not limited to, the exclusive right to use, publish, reproduce, copy and make derivative use of, the work product or otherwise grant others limited rights to use the work product.

To the extent Consultant incorporates into the work product any pre-existing work product owned by Consultant, Consultant hereby acknowledges and agrees that ownership of such work product shall be transferred to the County of Marin.

**13. TERMINATION:**

- A. If the Contractor fails to provide in any manner the services required under this Contract or otherwise fails to comply with the terms of this Contract or violates any ordinance, regulation or other law which applies to its performance herein, the County may terminate this Contract by giving five (5) calendar days written notice to the party involved.
- B. The Contractor shall be excused for failure to perform services herein if such services are prevented by acts of God, strikes, labor disputes or other forces over which the Contractor has no control.
- C. Either party hereto may terminate this Contract for any reason by giving thirty (30) calendar days written notice to the other parties. Notice of termination shall be by written notice to the other parties and be sent by registered mail.
- D. In the event of termination not the fault of the Contractor, the Contractor shall be paid for services performed to the date of termination in accordance with the terms of this Contract so long as proof of required insurance is provided for the periods covered in the Contract or Amendment(s).

**14. APPROPRIATIONS:**

The County's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Marin County Board of Supervisors, the State of California or other third party. Should the funds not be appropriated County may terminate this agreement with respect to those payments for which such funds are not appropriated. County will give Contractor thirty (30) days' written notice of such termination. All obligations of County to make payments after the termination date will cease.

Where the funding source for this Agreement is contingent upon an annual appropriation or grant from the Marin County Board of Supervisors, the State of California or other third party, County's performance and obligation to pay under this Agreement is limited by the availability of those funds. Should the funding source for this Agreement be eliminated or reduced, upon written notice to Contractor, County may reduce the Maximum Cost to County identified in Paragraph 4 to reflect that elimination or reduction.

**15. RELATIONSHIP BETWEEN THE PARTIES:**

It is expressly understood that in the performances of the services herein, the Contractor, and the agents and employees thereof, shall act in an independent capacity and as an independent contractor and not as officers, employees or agents of the County. Contractor shall be solely responsible to pay all required taxes, including but not limited to, all withholding social security, and workers' compensation.

**16. AMENDMENT:**

This Contract may be amended or modified only by written agreement of all parties.

**17. ASSIGNMENT OF PERSONNEL:**

The Contractor shall not substitute any personnel for those specifically named in its proposal unless personnel with substantially equal or better qualifications and experience are provided, acceptable to County, as is evidenced in writing.

**18. JURISDICTION AND VENUE:**

This Contract shall be construed in accordance with the laws of the State of California and the parties hereto agree that venue shall be in Marin County, California.

**19. INDEMNIFICATION:**

Contractor agrees to indemnify, defend, and hold County, its employees, officers, and agents, harmless from any and all liabilities including, but not limited to, litigation costs and attorney's fees arising from any and all claims and losses to anyone who may be injured or damaged by reason of Contractor's negligence, recklessness or willful misconduct in the performance of this contract.

**20. COMPLIANCE WITH APPLICABLE LAWS:**

The Contractor shall comply with any and all Federal, State and local laws and resolutions (including, but not limited to the County of Marin Nuclear Free Zone, Living Wage Ordinance, and Resolution #2005-97 of the Board of Supervisors prohibiting the off-shoring of professional services involving employee/retiree medical and financial data) affecting services covered by this Contract. Copies of any of the above-referenced local laws and resolutions may be secured from the County's contact person referenced in paragraph 21. NOTICES below.

**21. NOTICES**

This Contract shall be managed and administered on County's behalf by the Department Contract Manager named below. All invoices shall be submitted and approved by this Department and all notices shall be given to County at the following location:

Contract Manager: Ken Massucco  
Dept./Location: Fire  
33 Castlerock Ave. Woodacre, CA 94973  
Telephone No.: 415-499-6717

Notices shall be given to Contractor at the following address:

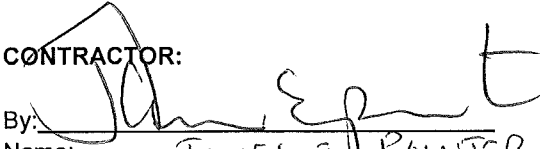
Contractor: James E. Pointer, M.D.  
Address: 19 Presidio Drive  
Novato, CA 94949  
Telephone No.: 415-734-6591

**22. ACKNOWLEDGEMENT OF EXHIBITS**

	<input checked="" type="checkbox"/> <u>Check applicable Exhibits</u>	<u>CONTRACTOR'S INITIALS</u>
<u>EXHIBIT A.</u>	Scope of Services	
<u>EXHIBIT B.</u>	Fees and Payment	
<u>EXHIBIT C.</u>	Insurance Reduction/Waiver	

IN WITNESS WHEREOF, the parties have executed this Contract on the date first above written.

APPROVED BY  
COUNTY OF MARIN:

CONTRACTOR:  
By:   
Name: JAMES E. POINTER  
Telephone No.: 415.734.6591

By: \_\_\_\_\_

COUNTY COUNSEL REVIEW AND APPROVAL (Only required if any of the noted reason(s) applies)

REASON(S) REVIEW:

- ☐ Standard Short Form Content Has Been Modified  
☐ Optional Review by County Counsel at Department's Request

County Counsel: \_\_\_\_\_ Date: \_\_\_\_\_

**EXHIBIT "A"**  
**SCOPE OF SERVICES (required)**

**A.1 SCOPE OF SERVICES AND DUTIES.**

Contractor is responsible for reviewing and providing input into the development of all operational policies and procedures that directly impact pre-hospital patient care, and shall provide the following services:

- (1) Perform the requirements and responsibilities of EMT – Defibrillation Medical Director as defined in the Marin County Emergency Medical Services System Policy 4102.
- (2) Provide medical control and oversight to the Southern Marin Emergency Medical Paramedic System (hereinafter referred to as "SMEmps"), the Ross Valley Paramedic Authority (hereinafter referred to as "RVPA"), and the Marin County Fire Department (hereinafter referred to as "MCFD"), including but not limited to:
  - a. Maintaining the highest standard of care.
  - b. Evaluating the effectiveness of the program.
  - c. Insuring ongoing compliance
  - d. Modifying the program as needed.
  - e. Promoting continuing education
  - f. Provision of medical direction for the dispensing of controlled substances
- (3) Evaluate operational policies and procedures to determine if they may have any negative impact on patient care or expose the organization to unreasonable risk or medical malpractice; recommend the suspension of any operational policy or procedure that has not been reviewed and approved by the Program Director and poses a risk to patients or personnel.
- (4) Provide input into the development of capital and operating budgets, staff scheduling and deployment of systems resources, and dispatch management.
- (5) Administer a comprehensive Continuous Quality Improvement (CQI) program that monitors and corrects clinical and operational variance. Working with the CQI Program Coordinator, the Contractor shall be responsible for determining:
  - a. That newly hired personnel have appropriate levels of medical training to ensure medical competence in both field and telecommunications capacities.
  - b. That existing and proposed County and agency-based concurrent field and telecommunications evaluation processes are capable of identifying sub-optimal performance.
  - c. That existing and proposed County and agency-based continuing medical education programs address agency needs for medical and operational training for both telecommunications and field personnel.
  - d. That existing and proposed County and agency-based retrospective review processes are capable of determining the delivery of appropriate pre-hospital medical care that is consistent with County and agency-based protocols and procedures.
- (6) Provide recommendations regarding the adequacy of paramedic training program and in-house continuing education (CE) activities and content. Assist the design and implementation of the CE program in response to education and training needs. The Contractor will be used as an expert resource in the development of CE programs and ensures consistency with emerging pre-hospital "standards of practice."
- (7) Propose bio-medical equipment enhancements and recommend equipment changes to ensure that the Fire Departments remain in compliance with County requirements and are providing care that is consistent with national prevailing "standards of practice."
- (8) Advise SMEmps, RVPA, and Marin County Fire in all matters related to the design and development of EMS quality management programs at the regional and county level.
- (9) Provide input on appropriate employee performance standards for actions that have medical considerations.
- (10) Meet routinely with the medical community to ensure that the practices of the SMEmps, RVPA, Marin County Fire, and its personnel are satisfactorily meeting their needs relative to treatment and operational policies.
- (11) Assume medical command role in patient treatment sector of disasters or mass casualty situation (when available to respond).
- (12) Provide opportunity for Hands on Training and Face-to-Face communication to all Paramedics.
- (13) Contractor shall provide County with timely advice of all significant developments arising during performance of its services hereunder, orally or in writing, as Contractor deems appropriate.

Contractor shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary for the satisfactory performance of Contractor's obligations pursuant to this Agreement. Neither party shall be considered in default of this

Agreement to the extent performance is prevented or delayed by any cause, present or future, which is beyond the reasonable control of the party.

(14) AUTHORIZATION REQUIRED. Services performed by CONTRACTOR and not authorized in this Agreement shall not be paid for by COUNTY. Payment for additional services shall be made to CONTRACTOR by COUNTY if, and only if, this Agreement is amended by both parties in advance of performing additional services.

A.2. FACILITIES FURNISHED BY COUNTY  
N/A

A.3. OUTSIDE AGENCY MEDICAL DIRECTION

Contractor agrees to provide specific medical direction as outlined below to the Marin Municipal Water District and the following West Marin fire agencies:

Muir Beach Volunteer Fire Department  
Stinson Beach Volunteer Fire Department  
Bollinas Volunteer Fire Department  
Nicasio Volunteer Fire Department  
Skywalker Ranch Fire Brigade  
Inverness Volunteer Fire Department  
Tomaes Volunteer Fire Department

Contractor will act as the AED medical director as outlined in the current Marin County EMS Agency Policy 4112 (Defibrillation Medical Director) or any revised version of Policy 4112. Contractor will perform all tasks required of a medical director as outlined in Policy 4112 or any revised version of Policy 4112. Contractor will also provide authorization for the purchase of certain medical devices, supplies and medications.

Contractor shall be compensated \$1,500.00 annually for the provision of medical director services to the MMWD.

**EXHIBIT "B"**  
**FEES AND PAYMENT SCHEDULE (required)**

COUNTY shall pay CONTRACTOR as follows:

(1) **BASE CONTRACT FEE.** COUNTY shall pay CONTRACTOR a contract fee of \$18,000.00 per year as a fee for the scope of services outlined in Exhibit A. Both parties agree that this \$18,000.00 shall be the total amount of compensation for the performance of services outlined in Exhibit A.

Additionally, COUNTY shall pay CONTRACTOR \$150.00 per hour for services performed above and beyond the scope of services outlined in Exhibit A. However, CONTRACTOR must follow specific guidelines outlined in Exhibit D in order to receive compensation for these above and beyond services. COUNTY'S authorized representative for this purpose shall be Mike Giannini, Fire Emergency Medical Officer or his designee. With respect to these additional services, CONTRACTOR shall submit requests for payment on a monthly basis following provision of services. In no event shall total compensation paid to CONTRACTOR for services above and beyond the scope of services outlined in Exhibit C exceed \$36,000.00 without an amendment to this Agreement approved in writing by COUNTY.

Thus, the maximum amount payable under this Agreement shall be \$59,500.00 [\$18,000.00 for services outlined in Exhibit A and \$36,000.00 for services that are authorized by COUNTY and termed "Additional Activities" outlined in Exhibit D and 1,500.00 for services deemed "Outside Agency Medical Direction" also outlined in Exhibit A and \$4,000 for Professional Liability Insurance as outlined in Section 6.4.

COUNTY shall pay CONTRACTOR the \$18,000.00 for the performance of services outlined in Exhibit A in twelve monthly payments of \$1,500.00 each beginning July 1st and ending June 30<sup>th</sup>. Contractor will submit an invoice each month. The final invoice must be submitted within 30 days of completion of the stated scope of services.

# EXHIBIT "C"

## INSURANCE REDUCTION/WAIVER (if applicable)

CONTRACTOR: James E. Pointer, M.D.

### CONTRACT TITLE:

Provision of medical direction and oversight

This statement shall accompany all requests for a reduction/waiver of insurance requirements. Please check the box if a waiver is requested or fill in the reduced coverage(s) where indicated below:

	Check Where Applicable	Requested Limit Amount	CAO Use Only
General Liability Insurance	<input type="checkbox"/>	\$	
Automobile Liability Insurance	<input type="checkbox"/>	\$	
Workers' Compensation Insurance	<input type="checkbox"/>		
Professional Liability Deductible	<input type="checkbox"/>	\$	

Please set forth the reasons for the requested reductions or waiver.

General Liability – Contractor is not required to provide this coverage

Automobile Liability Insurance – Contractor will provide \$1,000,000 of liability insurance. This is not comprehensive business or commercial coverage.

Workers' Compensation Insurance – There are no employees.

Professional Liability Deductible – See section 6.4

Contract Manager Signature:

Date:

Extension:

Approved by Risk Manager:

Date:

**EXHIBIT "D"**  
**DOCUMENTATION FOR REIMBURSEMENT**  
**OF ADDITIONAL ACTIVITIES**

The following example must be completed and submitted within thirty days of the last day of the month the activities were provided in order to receive compensation for Additional Activities. One form should be completed per activity day or per Responsible Agency. This will allow for proper tracking of activities and allow for proper billing to the responsible agency. Additional Activity costs shall be limited to the following: S MEMPS - \$16,800.00; RVPA - \$6,000.00; Marin County Fire - \$13,200.00

**INVOICE FOR MULTI-AGENCY ACTIVITIES**

**ALS ACTIVITY DOCUMENTATION:**

**MONTH:**

DATE	ACTIVITY CATEGORY	ACTIVITY DESCRIPTION	PERSONNEL INVOLVED	HOURS OF ACTIVITY	MCFD SHARE	S MEMPS SHARE	RVPA SHARE
				0	0	0	0
				0	0	0	0
				0	0	0	0
				<b>TOTAL HOURS:</b>	0	0	0
<b>COST: \$150.00/HOUR</b>				<b>TOTAL COST:</b>	0	0	0

Activities should be identified in the following categories:

\* Visitation of Paramedics in the station-Up to Eight Hours per month

\*\* Case Investigation with Paramedic Contact - Up to Four Hours per month

\*\*

\* Other Activities- Up to Fifty Six Hours per year

Average is: S MEMPS & County Fire=3.52

\* hours/mo, RVPA=.96 hour/mo

Average is: S MEMPS & County Fire=1.76

\*\* hours/mo, RVPA=.48 hour/mo

Average is: S MEMPS & County Fire=2.05

\*\*\* hours/mo, RVPA=.55 hour/mo

**EXHIBIT E:  
BUSINESS ASSOCIATE AGREEMENT  
TERMS AND CONDITIONS**

To the extent Contractor is a business associate as defined under the Federal Health Insurance Portability and Accountability Act (HIPAA) and the HITECH Act, Contractor shall comply with the additional terms and conditions set forth in this Exhibit ("E") to the Professional Services Agreement. This Business Associate Agreement Exhibit "E" supplements and is made a part of the Professional Services Agreement ("Agreement") by and between the County of Marin, referred to herein as Covered Entity ("CE"), and James E. Pointer, M.D., referred to herein as Business Associate ("BA"), to which this Exhibit "E" is an incorporated attachment.

**RECITALS**

CE and BA have entered into a business relationship through which BA may receive Protected Health Information ("PHI") (defined below) from CE or create, collect, transmit, retain, process or otherwise use PHI on behalf of CE pursuant to the terms of the Agreement

CE and BA intend to protect the privacy and provide for the security of PHI disclosed to, created by, or in any manner used by, BA pursuant to the Agreement in compliance with the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA"), the Health Information Technology for Economic and Clinical Health Act, Public Law 111-005 ("the HITECH Act"), and regulations promulgated thereunder by the U.S. Department of Health and Human Services (the "HIPAA Regulations") and other applicable laws.

As part of the HIPAA Regulations, the Privacy Rule and the Security Rule (defined below) require CE to enter into a contract containing specific requirements with BA prior to the disclosure of PHI, as set forth in, but not limited to, Title 45, Sections 164.314(a), 164.502(e) and 164.504(e) of the Code of Federal Regulations ("C.F.R.") and contained in this Exhibit "E".

In consideration of the mutual promises below and the exchange of information pursuant to this Exhibit "E", the parties agree as follows:

**1. Definitions**

- a. **Breach** shall have the meaning given to such term under the HITECH Act [42 U.S.C. Section 17921].
- b. **Business Associate** shall have the meaning given to such term under the Privacy Rule, the Security Rule, and the HITECH Act, including but not limited to, 42 U.S.C. Section 17938 and 45 C.F.R. Section 160.103. For purposes of this Exhibit "E", use of the term Business Associate includes all Contractor agents, employees, contractors or other associates providing services or assistance to Contractor under the Agreement.
- c. **Covered Entity** shall have the meaning given to such term under the Privacy Rule and the Security Rule, including, but not limited to, 45 C.F.R. Section 160.103. For purposes of this Agreement, this term is intended to mean the County of Marin.
- d. **Data Aggregation** shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501.
- e. **Designated Record Set** shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501.
- f. **DHHS Secretary** shall mean the Secretary of the U.S. Department of Health and Human Services.
- g. **Electronic Health Record** shall have the meaning given to such term in the HITECH Act, including, but not limited to, 42 U.S.C. Section 17921.
- h. **Electronic Protected Health Information** means Protected Health Information that is maintained in or transmitted by electronic media.
- i. **Health Care Operations** shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501.
- j. **Individual** shall have the meaning given to such term under the Privacy Rule and the Security Rule, including, but not limited to, 45 C.F.R. Section 160.103.
- k. **Privacy Rule** shall mean the HIPAA Regulation that is codified at 45 C.F.R. Parts 160 and 164, Subparts A and E.
- l. **Protected Health Information or PHI** means any information, whether oral or recorded in any form or medium: (i) that relates to the past, present or future physical or mental condition of an Individual; the provision of health care to an Individual; or the past, present or future payment for the provision of health care to an Individual; and (ii) that identifies the Individual or with respect to which there is a reasonable basis to believe the information can be used to identify the Individual, and shall have the meaning given to such term under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.501. Protected Health Information includes Electronic Protected Health Information [45 C.F.R. Sections 160.103, 164.501].
- m. **Protected Information** shall mean PHI provided by CE to BA or created or received by BA on CE's behalf.

- n. **Security Rule** shall mean the HIPAA Regulation that is codified at 45 C.F.R. Parts 160 and 164, Subparts A and C.
- o. **Unsecured PHI** shall have the meaning given to such term under the HITECH Act and any guidance issued pursuant to such Act including, but not limited to, 42 U.S.C. Section 17932(h).

## 2. Obligations of Business Associate

- a. **Permitted Uses.** BA shall not use Protected Information except for the purpose of performing BA's obligations under the Agreement and as permitted under the Agreement and this Exhibit "E". Further, and notwithstanding anything to the contrary above, BA shall not use Protected Information in any manner that would constitute a violation of the Privacy Rule or the HITECH Act if so used by CE. However, BA may use Protected Information (i) for the proper management and administration of BA, (ii) to carry out the legal responsibilities of BA, or (iii) for Data Aggregation purposes for the Health Care Operations of CE [45 C.F.R. Sections 164.504(e)(2)(ii)(A) and 164.504(e)(4)(i)].
- b. **Permitted Disclosures.** BA shall not disclose Protected Information except for the purpose of performing BA's obligations under the Agreement and as permitted under the Agreement and this Exhibit "E". Further, and notwithstanding anything to the contrary above, BA shall not disclose Protected Information in any manner that would constitute a violation of the Privacy Rule or the HITECH Act if so disclosed by CE. However, BA may disclose Protected Information (i) for the proper management and administration of BA; (ii) to carry out the legal responsibilities of BA; (iii) as required by law; or (iv) for Data Aggregation purposes for the Health Care Operations of CE. If BA discloses Protected Information to a third party, BA must obtain, prior to making any such disclosure, (i) reasonable written assurances from such third party that such Protected Information will be held confidential as provided pursuant to this Exhibit "E" and only disclosed as required by law or for the purposes for which it was disclosed to such third party, and (ii) a written agreement from such third party to immediately notify BA of any breaches of confidentiality of the Protected Information, to the extent it has obtained knowledge of such breach [42 U.S.C. Section 17932; 45 C.F.R. Sections 164.504(e)(2)(i), 164.504(e)(2)(i)(B), 164.504(e)(2)(ii)(A) and 164.504(e)(4)(ii)].
- c. **Prohibited Uses and Disclosures.** BA shall not use or disclose Protected Information for fundraising or marketing purposes. BA shall not disclose Protected Information to a health plan for payment or health care operations purposes if the patient has requested this special restriction, and has paid out of pocket in full for the health care item or service to which the PHI solely relates 42 U.S.C. Section 17935(a). BA shall not directly or indirectly receive remuneration in exchange for Protected Information, except with the prior written consent of CE and as permitted by the HITECH Act, 42 U.S.C. section 17935(d)(2); however, this prohibition shall not affect payment by CE to BA for services provided pursuant to the Agreement.
- d. **Appropriate Safeguards.** BA shall implement appropriate administrative, physical and technical safeguards as are necessary to prevent the use or disclosure of Protected Information otherwise than as permitted by the Agreement that reasonably and appropriately protect the confidentiality, integrity and availability of the Protected Information, in accordance with 45 C.F.R. Sections 164.308, 164.310, and 164.312. [45 C.F.R. Section 164.504(e)(2)(ii)(B); 45 C.F.R. Section 164.308(b)]. BA shall comply with the policies and procedures and documentation requirements of the HIPAA Security Rule, including, but not limited to, 45 C.F.R. Section 164.316. [42 U.S.C. Section 17931]
- e. **Reporting of Improper Access, Use or Disclosure.** Unless stricter reporting requirements apply in accordance with federal or state laws or regulations, other provisions of the Agreement, or this Exhibit "E", BA shall report to CE in writing of any access, use or disclosure of Protected Information not permitted by the Agreement and this Exhibit "E", and any Breach of Unsecured PHI of which it becomes aware without unreasonable delay and in no case later than 5 business days after discovery [42 U.S.C. Section 17921; 45 C.F.R. Section 164.504(e)(2)(ii)(C); 45 C.F.R. Section 164.308(b)].
- f. **Business Associate's Agents.** BA shall ensure that any agents, including subcontractors, to whom it provides Protected Information, agree in writing to the same restrictions and conditions that apply to BA with respect to such PHI and implement the safeguards required by paragraph d above with respect to PHI [45 C.F.R. Section 164.504(e)(2)(ii)(D); 45 C.F.R. Section 164.308(b)]. BA shall implement and maintain sanctions against agents and subcontractors that violate such restrictions and conditions and shall mitigate the effects of any such violation (see 45 C.F.R. Sections 164.530(f) and 164.530(e)(1)).
- g. **Access to Protected Information.** BA shall make Protected Information maintained by BA or its agents or subcontractors in Designated Record Sets available to CE for inspection and copying within ten (10) business days of a request by CE to enable CE to fulfill its obligations under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.524 [45 C.F.R. Section 164.504(e)(2)(ii)(E)]. If BA maintains an Electronic Health Record, BA shall provide such information in electronic format to enable CE to fulfill its obligations under the HITECH Act, including, but not limited to, 42 U.S.C. Section 17935(e). If any Individual requests access to Protected Information directly from BA or its agents or subcontractors, BA shall further conform with and meet all of the requirements of 45 C.F.R. Section 164.524 and other applicable laws, including the HITECH Act and related regulations.
- h. **Amendment of PHI.** Within ten (10) business days of receipt of a request from CE for an amendment of Protected Information or a record about an Individual contained in a Designated Record Set, BA or its agents or subcontractors shall make such Protected Information available to CE for amendment and incorporate any such amendment to enable CE to fulfill its obligations under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.526. If any Individual requests an amendment of Protected Information directly from BA or its agents or subcontractors, BA must notify CE in writing within five (5) business days of the request. Any approval or denial of amendment of Protected Information maintained by BA or its agents or subcontractors shall be the responsibility of CE [45 C.F.R. Section 164.504(e)(2)(ii)(F)].

- i. **Accounting Rights.** Within ten (10) business days of notice by CE of a request for an accounting of disclosures of Protected Information, BA and its agents or subcontractors shall make available to CE the information required to provide an accounting of disclosures to enable CE to fulfill its obligations under the Privacy Rule, including, but not limited to, 45 C.F.R. Section 164.528, and the HITECH Act, including but not limited to 42 U.S.C. Section 17935(c), as determined by CE. BA agrees to implement a process that allows for an accounting to be collected and maintained by BA and its agents or subcontractors for at least six (6) years prior to the request. However, accounting of disclosures from an Electronic Health Record for treatment, payment or health care operations purposes are required to be collected and maintained for only three (3) years prior to the request, and only to the extent that BA maintains an Electronic Health Record and is subject to this requirement. At a minimum, the information collected and maintained shall include: (i) the date of disclosure; (ii) the name of the entity or person who received Protected Information and, if known, the address of the entity or person; (iii) a brief description of Protected Information disclosed and (iv) a brief statement of purpose of the disclosure that reasonably informs the Individual of the basis for the disclosure, or a copy of the Individuals' authorization, or a copy of the written request for disclosure. In the event that the request for an accounting is delivered directly to BA or its agents or subcontractors, BA shall within five (5) business days of a request forward it to CE in writing. However, it shall be BA's responsibility to prepare and deliver any such accounting requested and to do so in accordance with law. BA shall not disclose any Protected Information except as set forth in Sections 2.b. of this Exhibit "E" [45 C.F.R. Sections 164.504(e)(2)(ii)(G) and 165.528].
- j. **Governmental Access to Records.** BA shall make its internal practices, books and records relating to the use, disclosure and privacy protection of Protected Information available to CE and to the DHHS Secretary for purposes of determining BA's compliance with the Privacy Rule [45 C.F.R. Section 164.504(e)(2)(ii)(H)]. BA shall provide to CE a copy of any Protected Information that BA provides to the DHHS Secretary concurrently with providing such Protected Information to the DHHS Secretary.
- k. **Minimum Necessary.** BA and its agents or subcontractors shall request, use and disclose only the minimum amount of Protected Information necessary to accomplish the purpose of the request, use, or disclosure. [42 U.S.C. Section 17935(b); 45 C.F.R. Section 164.514(d)(3)] BA understands and agrees that the definition of "minimum necessary" is in flux and shall keep itself informed of guidance issued by the DHHS Secretary with respect to what constitutes "minimum necessary."
- l. **Data Ownership.** BA acknowledges that BA has no ownership rights with respect to the Protected Information.
- m. **Notification of Breach.** Unless stricter reporting requirements apply in accordance with federal or state laws or regulations, other provisions of the Agreement, or this Exhibit "E", BA shall notify CE within twenty-four (24) hours of any suspected or actual breach of security, intrusion or unauthorized use or disclosure of PHI of which BA becomes aware and/or any actual or suspected use or disclosure of data in violation of any applicable federal or state laws or regulations. Unless CE provides BA with written notice that it will undertake such obligations on behalf of BA, BA shall take (i) prompt corrective action to cure any such deficiencies and (ii) any action pertaining to such unauthorized disclosure required by applicable federal and state laws and regulations. The parties agree that CE has the sole discretion to determine whether or not it will undertake such obligations on behalf of BA and that, if it does, CE has the right to require BA to pay for any or all costs associated therewith.
- n. **Breach Pattern or Practice by Covered Entity.** Pursuant to 42 U.S.C. Section 17934(b), if the BA knows of a pattern of activity or practice of the CE that constitutes a material breach or violation of the CE's obligations under the Agreement or this Exhibit "E" or other arrangement, the BA must take reasonable steps to cure the breach or end the violation. If the steps are unsuccessful, the BA must terminate the Agreement or other arrangement if feasible, or if termination is not feasible, report the problem to the DHHS Secretary. BA shall provide written notice to CE of any pattern of activity or practice of the CE that BA believes constitutes a material breach or violation of the CE's obligations under the Agreement or this Exhibit "E" or other arrangement within five (5) business days of discovery and shall meet with CE to discuss and attempt to resolve the problem as one of the reasonable steps to cure the breach or end the violation.
- o. **Audits, Inspection and Enforcement.** Within ten (10) days of a written request by CE, BA and its agents or subcontractors shall allow CE to conduct a reasonable inspection of the facilities, systems, books, records, agreements, policies and procedures relating to the use or disclosure of Protected Information pursuant to this Exhibit "E" for the purpose of determining whether BA has complied with this Exhibit; provided, however, that (i) BA and CE shall mutually agree in advance upon the scope, timing and location of such an inspection, (ii) CE shall protect the confidentiality of all confidential and proprietary information of BA to which CE has access during the course of such inspection; and (iii) CE shall execute a nondisclosure agreement, upon terms mutually agreed upon by the parties, if requested by BA. The fact that CE inspects, or fails to inspect, or has the right to inspect, BA's facilities, systems, books, records, agreements, policies and procedures does not relieve BA of its responsibility to comply with this Exhibit "E", nor does CE's (i) failure to detect or (ii) detection, but failure to notify BA or require BA's remediation of any unsatisfactory practices, constitute acceptance of such practice or a waiver of CE's enforcement rights under the Agreement or this Exhibit "E". BA shall notify CE within ten (10) business days of learning that BA has become the subject of an audit, compliance review, or complaint investigation by the Office for Civil Rights.

### 3. Termination of Agreement

- a. **Material Breach.** A breach by BA of any provision of this Exhibit "E", as determined by CE, shall constitute a material breach of the Agreement and shall provide grounds for immediate termination of the Agreement, any provision in the Agreement to the contrary notwithstanding. [45 C.F.R. Section 164.504(e)(2)(iii)].

- b. **Judicial or Administrative Proceedings.** Notwithstanding any provision in the Agreement to the contrary, CE may terminate the Agreement, effective immediately, if (i) BA is named as a defendant in a criminal proceeding for a violation of HIPAA, the HITECH Act, the HIPAA Regulations or other security or privacy laws or (ii) a finding or stipulation that the BA has violated any standard or requirement of HIPAA, the HITECH Act, the HIPAA Regulations or other security or privacy laws is made in any administrative or civil proceeding in which the party has been joined.
- c. **Effect of Termination.** Upon termination of the Agreement for any reason, BA shall, at the option of CE, return or destroy all Protected Information that BA or its agents or subcontractors still maintain in any form, and shall retain no copies of such Protected Information. If return or destruction is not feasible, as determined by CE, BA shall continue to extend the protections of Section 2 of this Exhibit "E" to such information, and limit further use of such PHI to those purposes that make the return or destruction of such PHI infeasible. [45 C.F.R. Section 164.504(e)(ii)(2)(I)]. If CE elects destruction of the PHI, BA shall certify in writing to CE that such PHI has been destroyed.

#### 4. Indemnification

In addition to any other indemnification and defense obligation under the Agreement, BA has a separate and additional obligation to indemnify and defend CE against any claims or suits arising from BA's breach of its obligations under the terms and conditions of this Exhibit "E".

#### 5. Limitation of Liability

Notwithstanding any limitation of liability provision that may exist in the Agreement or this Exhibit "E", BA is solely liable for any damages related to a breach of the BA's privacy or security obligations under the terms of this Exhibit "E".

#### 6. Disclaimer

CE makes no warranty or representation that compliance by BA with this Exhibit "E", HIPAA, the HITECH Act, or the HIPAA Regulations will be adequate or satisfactory for BA's own purposes. BA is solely responsible for all decisions made by BA regarding the safeguarding of PHI.

#### 7. Certification

To the extent that CE determines that such examination is necessary to comply with CE's legal obligations pursuant to HIPAA relating to certification of its security practices, CE or its authorized agents or contractors, may, at CE's expense, examine BA's facilities, systems, procedures and records as may be necessary for such agents or contractors to certify to CE the extent to which BA's security safeguards comply with HIPAA, the HITECH Act, the HIPAA Regulations or this Addendum.

#### 8. Amendment

- a. **Amendment to Comply with Law.** The parties acknowledge that state and federal laws relating to data security and privacy are rapidly evolving and that amendment of the Agreement or this Exhibit "E" may be required to provide for procedures to ensure compliance with such developments. The parties specifically agree to take such action as is necessary to implement the standards and requirements of HIPAA, the HITECH Act, the Privacy Rule, the Security Rule and other applicable laws relating to the security or confidentiality of PHI. The parties understand and agree that CE must receive satisfactory written assurance from BA that BA will adequately safeguard all Protected Information. Upon the request of either party, the other party agrees to promptly enter into negotiations concerning the terms of an amendment to this Exhibit "E" embodying written assurances consistent with the standards and requirements of HIPAA, the HITECH Act, the Privacy Rule, the Security Rule or other applicable laws. CE may terminate the Agreement upon thirty (30) days written notice in the event (i) BA does not promptly enter into negotiations to amend the Agreement or this Exhibit "E" when requested by CE pursuant to this Section or (ii) BA does not enter into an amendment to the Agreement or this Exhibit "E" providing assurances regarding the safeguarding of PHI that CE, in its sole discretion, deems sufficient to satisfy the standards and requirements of applicable laws.
- b. **Amendment of Exhibit "E".** This Exhibit "E" may be modified or amended at any time without amendment of the Agreement, but only by written agreement of the parties.

#### 9. Assistance in Litigation of Administrative Proceedings

BA shall make itself, and any subcontractors, employees or agents assisting BA in the performance of its obligations under the Agreement, available to CE, at no cost to CE, to testify as witnesses, or otherwise, in the event of litigation or administrative proceedings being commenced against CE, its directors, officers or employees based upon a claimed violation of HIPAA, the HITECH Act, the Privacy Rule, the Security Rule, or other laws relating to security and privacy, except where BA or its subcontractor, employee or agent is a named adverse party.

#### **10. No Third-Party Beneficiaries**

Nothing express or implied in the Agreement or this Exhibit "E" is intended to confer, nor shall anything herein confer, upon any person other than CE, BA and their respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.

#### **11. Effect on Agreement**

Except as specifically required to implement the purposes of this Exhibit "E", or to the extent inconsistent with this Exhibit "E", all other terms of the Agreement shall remain in force and effect.

#### **12. Interpretation**

The provisions of this Exhibit "E" shall prevail over any provisions in the Agreement that may conflict or appear inconsistent with any provision in this Exhibit "E". This Exhibit "E" and the Agreement shall be interpreted as broadly as necessary to implement and comply with HIPAA, the HITECH Act, the Privacy Rule and the Security Rule. The parties agree that any ambiguity in this Exhibit "E" shall be resolved in favor of a meaning that complies and is consistent with HIPAA, the HITECH Act, the Privacy Rule and the Security Rule.

#### **13. Survival of Provisions**

Excepting only the provisions regarding BA's use or disclosure of Protected Information for the purpose of performing BA's obligations under the Agreement, the terms of this Exhibit "E" shall survive the termination of the Agreement so long as PHI obtained or generated during the term of the Agreement is retained by BA.