What's Lurking in Your Industry Contracts?

Factors to consider before signing your next consulting agreement.

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Invitations to join scientific advisory boards, consult, or otherwise work for a medical device company are usually quite polite, highly deferential, and very flattering. They usually end with words such as these:

Attached is our standard agreement. Please sign and return it at your earliest convenience.

These agreements form the basis of every physician-industry relationship. They can run many pages, be relatively dense, use small type, and include arcane language that can be overwhelming to physicians with little time and no legal training. Most physicians follow these instructions and sign on the dotted line. Don't fall into that trap.

Knowing the impact of contract provisions is important. By not fully comprehending the terms, physicians can violate their own hospital employment policies or even restrict what they can do in their areas of expertise. Additionally, physicians can unwittingly give up new and valuable ideas without proper consideration.

This article describes some of the more important provisions in medical consulting agreements. Be aware that this article is not intended to provide legal advice or to replace a review by counsel, which we would advise in every situation.

SIGNING YOUR IP AWAY

Most agreements have a provision on intellectual property (IP). IP is the lifeblood of device and pharma companies, and protecting inventions is of paramount concern to them. However, the language of IP provisions is often too broad given the scope of the relationship. Here is a sample of the language we often see:

The Consultant hereby agrees to assign all right, title, and interest to all inventions relating to the Company's products made or conceived during the term.

There are several problems with this language. First, the assignment applies to all discoveries during the term of the relationship, regardless of whether they occur while providing services. Even if a physician would agree to such an expansive provision, the language likely conflicts with hospital policies on IP (which are often written broadly, too). A more appropriately drafted provision would be limited to just the inventions conceived while providing services or even while using the company's confidential information.

Next, the provision applies to all company products. In the case of multinationals, the product suites of these companies span across many aspects of health care. When reviewing these agreements, physicians should limit IP assignment to those products for which their services are being provided.

The last issue is more of a fundamental question for a physician consultant. Does the pay and the structure of the relationship merit the assignment of all IP developed during the relationship? In other words, is the physician getting enough from the relationship to sign over all of her ideas relating to a particular space?

To answer these questions, a physician should look at the relationship in a couple ways. First, will the physician be generating lots of new IP? For instance, is the relationship focused on participation in a scientific advisory board or medical education in which the product is already developed? In those cases, physician input may be less about the basic science of the product and more about applicability and clinical use. While the advice is valuable, there may be less IP, and an hourly rate structure may be fine.

Alternatively, does the relationship involve early stage bench or animal work that requires a physician to answer fundamental questions? Such relationships often result in creation of significant IP. In these cases, some form of royalty for inventions should be considered. While companies may balk at paying royalties (since IP creation is only the first in a long series of steps to value creation), physicians need to be comfortable that they are being compensated fairly for their contributions.

BEING SIDELINED BY NON-COMPETES

In a surprising number of cases, we see agreements that restrict the ability of physicians to work with other companies offering competitive products. Although sometimes limited to a specific product, we often see these restrictions applying to a broad "field of use," which has the effect of covering many products.

We believe that these provisions are entirely inappropriate for physician-industry collaborations. Physicians are normally engaged as hourly consultants, so companies have no obligation to use them for any amount of time or to pay them any minimum amount. As a result, by signing a non-compete, a physician could be excluded from working in her area of expertise for many years with no guarantee of compensation.

As an aside, we often see non-compete provisions included in contracts from California companies. Non-competes are against public policy in California for employees, but companies try to apply these restrictions to hourly consultants. Obviously, a strong pushback here is appropriate.

There are certain rare situations in which a physician might consider a non-compete provision. When the physician is an inventor and critical participant in a new company, investors may require a non-compete as a condition to investment. In those cases, a narrowly tailored provision may be appropriate. Also, companies may look to engage with a physician in a deep and long-term relationship regarding a particular issue. Depending on the scope and structure of the relationship, some sort of limited restriction may be appropriate, along with due compensation for giving up other opportunities.

In all other cases, physicians should reject these provisions. Instead, physicians (and the companies with which they work) should be comfortable agreeing to a standard conflict-of-interest provision along with an obligation of confidentiality.

WHAT DOES "INDEMNIFICATION" MEAN, AND WHY SHOULD PHYSICIANS CARE?

One sure way to make physicians' eyes glaze over is to discuss indemnity provisions. However, we would ask for attention to exactly this for a few sentences. In a consulting contract, an indemnity provision means that a physician is agreeing to make the company "whole," that is, pay for losses that arise in certain situations. We have seen provisions where this obligation arises in a range of cases, including:

- physician willful misconduct or gross negligence (OK);
- simple negligence or breaches of the agreement (not OK);
- all liabilities or losses arises from the services (really not OK!).

We work very hard to exclude these provisions from all agreements. First, these provisions put physicians' personal assets at risk (often without limit). The relatively modest compensation of most industry collaborations does not warrant risking physicians' net worth, no matter how remote the possibility. Next, the personal assets of most physicians (even those in the top 1%) would not have material impact on a major claim suffered by a multibillion-dollar company, so the provision offers no real benefit to the company. Finally, in this highly regulated environment, there are lots of risks that physicians simply cannot control.

MOVING TO STANDARDIZED AGREEMENTS

In the current state of the industry, most every company has its own form of agreement with nuanced language and "pet" provisions from the legal department. While no doubt much effort and expertise has been applied to craft agreements that protect the interests of their clients (the companies), we believe that most specialized provisions add little extra value and simply create complexity and increase cost in the market. Smart hospitals are looking to simplify agreements and push for a more standardized approach.

WHAT ELSE SHOULD PHYSICIANS KNOW?

Hospitals' legal departments often review all contracts presented to their physicians. Almost always, their lawyers work on behalf of the hospitals and, as a result, do not and cannot represent a physician's interests! In our experience, most legal departments go to pains to clearly communicate that their client is the hospital and not the physician.

Physicians need to understand this message and not get lulled into a sense of security about the legal work being done. In the end, physicians need to take responsibility for understanding the provisions of their contracts and only enter into agreements that work in their best interests. ■

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