Processing and Negotiating Clinical Trial Agreements

Anne Clark, J.D.
Associate Director, Industry Contracts & Agreements
Boston University Office of Sponsored Programs
February 19, 2014

About Me and OSP

- Team: Industry Contracts & Agreements (ICA) in the Office of Sponsored Programs
- Negotiate all agreements relating to funding from industry sponsors, clinical and non-clinical
- Review and negotiate legal terms and budget; submit to ROSA for account set-up
- From there, accounts and money transfers in and out are handled by PAFO
  - We are always here to assist

Preliminary Step: CDA/NDA

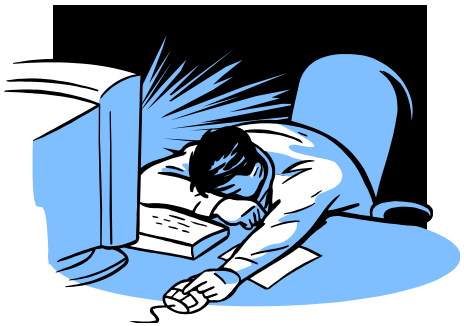
- Signatory sometimes is PI, not Institution
- More flexible than CDA with general business purpose
- No marking requirement necessary

Process

- CDA is executed: Alert that Study is coming down the pike
- Agreement, budget, ancillary documents sent to ICA
- Agreement, budget, IRB submission processed in tandem – maximize efficiency
- Sometimes negotiate through CRO
- Multiple rounds of comments exchanged; process greatly expedited if have Master CTA
- Largely not trial-specific

Process, continued

- Agreement signed when terms and budget final. Can take many months.
- IRB: Protect rights and welfare of human subjects participating as subjects in the Study. Approval may come before or after FEA. Cannot commence study without approval, but sign agreement so can collect start-up costs if study abandoned or cannot proceed for some other reason.

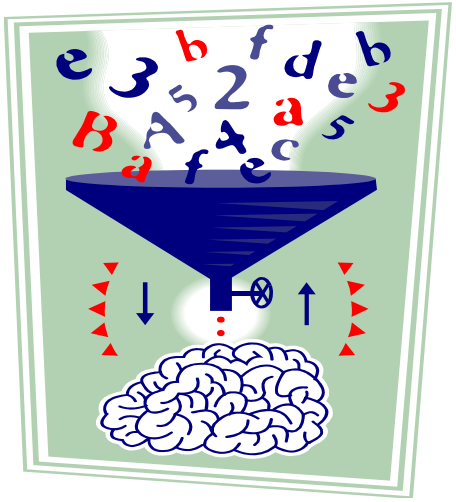


Key Negotiation Points

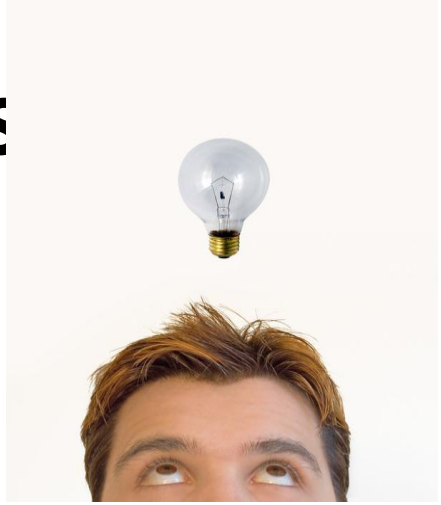
- Similar to non-clinical research agreements we negotiate, but outcomes are different
- Data/Results, IP, Publication, Confidentiality, Indemnification
- Regulatory
- Subject Injury (CTA; WIRB vs. IRB)
- Budget

Ownership of Data

- Company owns Study Results/Data, but we own medical records and other original source documentation (other than CRFs)
- Right to use research results/data for internal research and teaching purposes



Ownership of Inventions



- Sponsor-initiated: Sponsor owns IP relating to study drug/device, its CI, and Protocol; we own everything else (preferred outcome). Can give internal use license plus option to negotiate exclusive.
- Investigator-initiated: We own all IP and offer option to negotiate exclusive commercial license (like SRA).
- Assist Sponsor as reasonable to secure Sponsor's IP rights, but with reimbursement for time spent and expenses incurred.

Publication

- Retain right to publish, but in multi-site trial, typically may not publish independently until earlier of (a) multi-site publication and (b) 18 months following completion of Study at all sites. May not have right to publish independently at all – data from single site not considered adequate from scientific/statistical perspective.

- 30-day review period for Sponsor to identify Confidential Information or Invention. Will agree to delete Confidential Information, but not Study Results.

Confidentiality

- CI generally includes *all* information provided by Sponsor to Institution
- Marking requirement: Only 4 out of 21 MCTAs, and one is qualified (likely not an issue as most CI will be contained in Protocol, which we are already bound to keep confidential via earlier CDA in most cases)
- Time-limited: 5 years typical; may go up to 7 or 10
- Definition of CI includes Study Results; critical to carve out right to publish

No Warranties/Limitation of Liability

- Warranties: Include “No warranties” language. No promises regarding results.
- Limitation of Liability: No liability for consequential/indirect damages (but remember to carve out indemnification obligations if mutual!)

Indemnification

- Must be shielded from liability by Sponsor – template language preferred; can carve out for our negligence, etc. We prefer not to indemnify, but will for negligence or willful misconduct, failure to conduct study in accordance with protocol, applicable laws, breach of rep's and warranties, etc. (50% of MCTAs)

- Sponsor responsible for carrying clinical trial insurance. VERY IMPORTANT. Covers any claims stemming from the trial – including Institutional/PI negligence. Should name BU as additional insured.
- BU will rep. to general liability coverage: $1MM limit/occurrence; $3MM aggregate
- Per MA law, PI shall maintain medical professional liability insurance with limits of at least $1,000,000 per incident and $3,000,000 aggregate

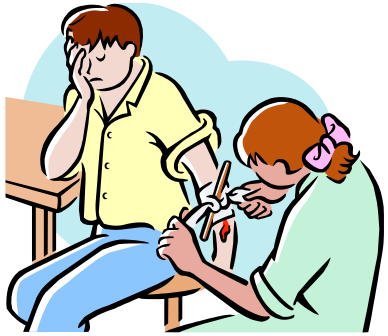
Regulatory

- Good Clinical Practice (FDA regulations)
- Informed consent/HIPAA authorization: Advise subject of key facts of trial so they can make informed decision as to whether or not to participate; establish permitted use and disclosure of PHI gathered in the trial (required by Privacy Rule established by HHS under HIPAA)
  - Often is subject of much back-and-forth – will we or won't we disclose PHI? Can be tricky to be definitive before ICF has been approved by IRB.
- Debarment (by FDA; may not submit or assist with submission of drug application): Rep/warrant that no one on study has been debarred. Notify Sponsor of future debarment only if Institution ha awareness/knowledge"
- Audit by Sponsor
- Governmental Inspection
- Registration on clinicaltrials.gov

Termination

- Typically, only Sponsor may terminate at will
- We may terminate upon Sponsor's breach (uncured w/in 30 days)
- Recover costs incurred and non-cancelable commitments through termination date
- Continued treatment of subjects (at Sponsor's expense) if medically necessary or prudent in opinion of PI

Subject Injury



- IRB: If BU's preferred language agreed to by Sponsor, goes to WIRB. If changes required by Sponsor, must go through local IRB. I usually discuss with Sponsor first.
- Agreement: No longer necessary that Agreement match ICF. Carve-out for negligence on part of Institution/PI and failure to abide by Protocol is acceptable. Tantamount to implied indemnification by Institution.
- Carve-out for Subject negligence: Prefer not to have in either ICF *or* Agreement. Could be considered exculpatory; deter Subject from seeking compensation. But flexibility here increasing.

Questions for YOU

- Most of the negotiation happens “behind closed doors” and PI/DA/CTC need not be involved
- I may require confirmation of certain elements, e.g.:
  - Can PI abide by certain requirements, e.g., timetable for turning in CRFs?
  - Are timetable, anticipated number of subjects, etc. correct?

Budget

- Negotiated by Liz Alcock, Senior Contracts Budget Specialist
- Key Points:
  - Overhead on EVERYTHING (30%)
  - IRB Fees (pref.: “Paid upon invoice”)
  - Number of subjects (often unknown, so total budget is “guesstimate”)
  - Tests administered
- Process:
  - Consult BMC re: hospital charges
  - Work with Pharmacy re: drug storage fees
- Input into KCRM and SAP by ROSA/PAFO
- Always shows as $1 obligated in SAP


The End!