JOURNAL OF CLINICAL RESEARCH BEST PRACTICES

Vol. 4, No. 5, May 2008 "Can You Handle the Truth?"

Confidentiality Challenges in Clinical Trials

By Norman M. Goldfarb

Industry-sponsored clinical trials require pharmaceutical, biotech and medical device companies to divulge proprietary information to research investigators and study personnel. Information in protocols, investigator brochures, informed consent forms, and other study documents, as well as verbal communications, can be very interesting to competitors. Information like results from previous studies, eligibility criteria, and clinical endpoints has obvious importance, but even the study sponsor may not know what specific information may have commercial value. Disclosure of the intention to conduct a study may cause a competitor to accelerate its plans. Study sponsors thus require research sites to sign confidential disclosure agreements (CDAs) prior to sending out even summary information and include confidentiality terms in clinical trial agreements (CTAs). Research sites may also ask study sponsors to accept reciprocal confidentiality obligations, but that is beyond the scope of this article.

Confidentiality agreements serve four purposes:

- Educate research sites about their obligations to protect the sponsor's information.
- Demonstrate reasonable care in protecting the information so it does not inadvertently enter the public domain.
- Support legal action to stop further disclosures with injunctive relief.
- Provide the basis for litigation to recover damages.

Preventing disclosures is, by far, the superior outcome for the owner of confidential information.

Challenges

It is difficult to accomplish the educational objective for a number of reasons. To start with, there are two types of sites. In the first type of site, the principal investigator or study coordinator has primary responsibility for contractual matters. Neither of them is likely to read the confidentiality language with any care, especially after the first few studies. In the second type of site, professional contract personnel and/or lawyers may carefully review and negotiate the language, but, again, the investigators and study coordinators are unlikely to focus on the language. As a result, at either type of site, the people most likely to make problematic disclosures – investigators and study coordinators – will probably understand the gist of their obligations but will be unaware of the niceties of the sponsor's carefully drafted language.

The second challenge is that confidentiality language is normally written by attorneys who care more about the precision than the understandability of the language.

The third challenge to the educational objective is that it is very difficult for investigators and study personnel to know what information is confidential. Conduct of the study requires the disclosure of information that may appear to be confidential. If a site can hand out informed consent forms to potential study subjects, how is that information so different than the information in the protocol? If a potential subject asks about study procedures or safety risks, what information in the protocol and investigator's brochure can be disclosed? Both documents are probably marked confidential, so what is the significance of that marking?

Study subjects do not sign confidentiality agreements. Informed consent forms, even if they were to include confidentiality language, are nonbinding on study subjects. They need the freedom to discuss the study with their family, friends and physicians, who may be in the pocket of the competition.

The fourth challenge is that it is impractical to educate all of the people at the research site who may obtain confidential information. Clinical personnel may treat some study information like non-confidential vendor information, and other information like patient information. The latter category is normally kept confidential, with a huge exception when the specific patient/subject is not identified. It is probably common for investigators to hand out protocols and even investigator's brochures to potential subinvestigators and referring physicians without obligation of confidentiality.

The CTA may require the site to protect the sponsor's confidential information with at least the same care as it protects its own confidential information of a comparable nature, but that may be very poor protection indeed, especially at a site that prizes academic freedom and may freely disclose its own "confidential information of a comparable nature." Non-academic sites probably do not have any comparable information to set the standard.

The fifth challenge is that various circumstances may make otherwise confidential information non-confidential. These circumstances may include releases of information that:

- is in the public domain at the time of disclosure by the site to a third-party, through no breach of confidentiality by the site
- was lawfully in the site's possession prior to disclosure to the site by the sponsor, as shown by written records
- was lawfully disclosed to the site by a third-party that the site reasonably believed was not under an obligation to keep such information confidential
- is lawfully developed independently by the site, as evidenced by contemporaneous written documentation
- is required to be disclosed in a government inspection, or by a government order, order by a court of competent jurisdiction, or other legal requirement
- is required from a study subject by a third-party payor
- is required to answer a study subject's reasonable questions during the informed consent process
- is required for medical treatment or counseling of a study subject, including by a third-party physician
- is required by the site to defend itself in subject injury litigation, subject to prior written notification to the sponsor and right of the sponsor to seek a protective order from a court of competent jurisdiction[1]

CTAs generally include a "publicity and use of name" section that permits disclosure of the investigator's participation in a study, including the name of the sponsor, name of the study, protocol number, and funding amount. Permitted uses might include by law, court order, or state regulation; or in investigator CVs; research site websites; industry directories; brochures and marketing materials; internal reports; publications and presentations; grant applications to government funding sources; government reports and filings; and conflict-of-interest reports.[1] Except for the funding amount, this information is not confidential because it is disclosed to third-parties in non-confidential informed consent forms.

The sixth challenge relates to the publication and presentation of scientific results. If a study generates results suitable for a scientific publication, disclosure of confidential information about the sponsor's intellectual property and inventions becomes necessary. CTAs set forth

the rules for publication. Writing and interpreting these rules, even the basic definitions, may be complicated. MAGI's Model Clinical Trial Agreement defines intellectual property as "expressions of ideas, discoveries, devices, data, mechanisms, substances, works, trade secrets, know-how, formulae and methods, including improvements, whether or not protectable by patent, copyright or other intellectual property rights." It defines inventions as "any Intellectual Property conceived, reduced to practice, made or developed, in whole or in part, by Site pursuant to its conduct of the Study or derived from Sponsor Confidential Information, that relates in any way to the Study Drug, Device or Biologic, including its administration or use, alone or in combination with any other drug or device, and any related assay." [1]

CTAs normally give sponsors the right to review scientific papers prior to publication, but what about presentations at scientific meetings? The sponsor can give the investigator guidance based on the slides but cannot review the investigator's verbal remarks, which may be spontaneous at the meeting. What about internal "brown bag" presentations at the research site? The investigator may not be aware that confidentiality restrictions apply to internal academic meetings. The investigator may not know what information is confidential or want to soil the academic environment by talking about confidentiality. After all, how will the sponsor even know? Furthermore, students are not employees of the institution, so they are not bound by confidentiality requirements in the CDA or CTA. They may not even be aware that research information might be confidential.

Solutions

One reason that investigators and study personnel do not memorize the fine points of each CDA is that each sponsor's document is different. Do sponsors expect site personnel to carry around the complete set for handy reference? The use of standardized language, e.g., that developed by MAGI, the Model Agreement Group Initiative, would justify the time investment to become familiar with the requirements.

Another approach is to make sure that site personnel understand that (a) study information may be confidential and (b) they should ask an expert when a question arises. Again, standardized language makes this consultation more practical.

Study protocols may be marked confidential, but if the investigator gives the document to a potential subinvestigator or colleague for referrals, the details of the confidentiality agreement are lost. Packaging the protocol with a simple, one-page confidentiality agreement avoids this problem.

These approaches work best if sponsors work with investigators that have the resources to implement training programs, the time to employ their good judgment, and the motivation to employ their good will.

Reference

1. Quoted or adapted from MAGI's Model Clinical Trial Agreement, available at http://www.firstclinical.com/magi/

Author

Norman M. Goldfarb is Managing Director of First Clinical Research LLC, a provider of clinical research best practices information, consulting and training services. Contact him at 1.650.465.0119 or ngoldfarb@firstclinical.com.

