

University of Colorado Denver School of Medicine

ASSIGNMENT OF MEDICAL-LEGAL, CLINICAL AND CONSULTING INCOME TO UPI

CASE STUDIES

September, 2009

Steven R. Lowenstein
Professor and Associate Dean for
Faculty Affairs

Lilly Marks
Senior Associate Dean for Finance and
Administration and Executive Director,
University Physicians, Inc.

Steve Zweck-Bronner
Senior Associate University Counsel

BACKGROUND

All full-time (≥ 0.5 FTE) faculty members at the University of Colorado Denver School of Medicine, including clinicians and basic scientists, are required to sign a University Physicians, Inc. (UPI) Member Practice Agreement (MPA).¹ Signing the MPA is required by the Board of Regents as a condition of employment. The MPA specifies the types of consulting income, honoraria and other fees collected by faculty members that must be assigned to UPI. Under the MPA:

1. The faculty member "hereby assigns to UPI, for the purposes of billing, collection, administration and distribution ... all Service Income ... earned at any time during the term of this agreement, including vacation." "Service Income" includes all compensation for professional, clinical, consulting, product development, advising, administrative, teaching, lecturing, training and medical-legal services --- excluding Exempt Honoraria and editorial work (as defined below). Note: "Assigning" income to UPI does not mean that the faculty member may not receive it; it simply means that the income must be billed, collected and processed by UPI.²

2. Exceptions

- a. *Editorial Activities* - Royalties, licensing fees and other income from editorial work and publications are exempt from these requirements; that is, they do not have to be remitted to UPI. Of course, faculty members must still comply with University policies on intellectual property.
- b. *Exempt Honoraria* - UPI also makes a specific exclusion for "Exempt Honoraria," as defined by the School of Medicine (and amended from time to time). Currently, "Exempt Honoraria" are defined as modest, one-time payments for lectures, articles, visiting professorships, NIH study sections and single-occurrence services on boards. The term "modest" is not defined in dollar terms; however, in all cases, the size of the payments must represent "fair market compensation" for the expertise of the faculty member and the work performed. Income meeting this definition of "exempt honoraria" need not be contracted through, or assigned to, UPI.

Any honoraria or service income not meeting these two definitions must be reviewed by the faculty member's department chair and the Dean of the SOM, in order to be classified as exempt.

It is important to understand that *all full-time faculty members* --- physicians and non-physicians alike --- are required to sign and abide by the Member Practice Agreement. "Full-time faculty members" include all those employed by the University of Colorado whose appointments are 0.5 FTE or greater.³

It is also important to understand that the requirement to remit professional income to UPI is not limited to income earned during a faculty member's assigned working hours. The phrase "including vacation" means that all Service Income (clinical and consulting) must be remitted to UPI, even if the income is earned during vacations, weekends or other "off hours." For a faculty member whose appointment is less than 1.0 FTE (for example, .75), the UPI agreement covers all professional services rendered by the faculty *at any time during the week*. Thus, the MPA mandates that all professional income (not including editorial fees and exempt honoraria) be assigned to UPI, regardless of the percent effort.

All SOM faculty members must understand their obligations under the UPI Member Practice Agreement. Failure to remit clinical, consulting, medical-legal and other professional service income to UPI may result in immediate termination of employment and legal actions to recover moneys paid to the faculty member. With respect to clinical services: If a physician faculty member has an independent or other health care practice in addition to his or her University responsibilities --- for example,

moonlighting --- the University of Colorado Malpractice Trust does not cover that moonlighting activity; nor does the Trust provide medical malpractice insurance coverage for care provided by that faculty member at the University.

Amendment 41

Honoraria paid to faculty members must also meet the requirements of Amendment 41, the constitutional amendment passed by Colorado Voters in 2006. Amendment 41 prohibits faculty members and other state employees from accepting honoraria that exceed \$50. According to preliminary guidance issued by the Colorado Independent Ethics Commission in October, 2008 and legal opinions rendered by University Counsel, honoraria above the \$50 limit are permissible if: a) the honorarium represents fair-market compensation for work that is performed (that is, the honorarium is “reasonably related to the services the public employee is asked to perform”); and b) there is a letter or other agreement from the sponsor of the activity, written in advance, that outlines the scope of work to be performed and the honorarium that will be paid.

Consulting and Medical-Legal Work is Not Prohibited

The Board of Regents has designated UPI as the exclusive billing agent for School of Medicine faculty members. However, UPI does not seek to discourage or prohibit consultative work by faculty members. Indeed, industry collaborations, lectures, visiting professorships, editorial activities and service to non-profit organizations and government scientific panels are “desirable and legitimate” academic activities, are rewarded at the time of promotion and tenure, bring prestige to the faculty member’s department and School and are consistent with Regent-approved faculty roles and responsibilities.⁴

The MPA mandates that consulting income must be billed, collected and remitted to UPI, but it does not mean that faculty members may not be compensated. The faculty member is entitled to receive up to \$15,000 annually from medical-legal and consulting activities --- and up to \$20,000 annually with the department chair’s approval.⁵ These funds are paid in addition to the faculty member’s University Base and Supplement salary and independent of the departmental incentive formulas and distributions. Consulting income in excess of these amounts may also be paid to the faculty member as additional compensation, in accordance with the respective department’s approved incentive plan. Typically, to receive consulting incentives in excess of \$20,000, the faculty member must first demonstrate that he or she has met his or her salary obligations and has fulfilled all teaching, clinical, research and other academic responsibilities. The SOM recognizes that conflicts of commitment can arise and has determined that individual departments should monitor faculty consulting fees and honoraria.

Disclosures

Faculty members should also be aware that consulting agreements, contracts and honoraria, even if exempt from assignment to UPI, may be subject to the University’s policies governing disclosures. Under this policy, faculty members who receive payments from outside sources must report that activity to the University.⁶

The One-Sixth Rule

It is important to note that while faculty in many other schools and colleges in the University of Colorado System are eligible for the 1/6th rule, the SOM has been excluded from this consulting arrangement by the Board of Regents since the mid-1940s.⁷ Thus, there is no legal way for faculty to be reimbursed for consulting activities apart from channeling their fees through UPI. UPI seeks to provide a favorable substitute for the 1/6th rule. The faculty member gives up some flexibility and pays the administrative “taxes” outlined in footnote #4. In exchange: the faculty member is permitted to engage in consulting activities as part of the scope of his or her professional duties; the University provides legal protection to the faculty member; the University strengthens the faculty member’s control over intellectual property; and, because the faculty member receives compensation via a University paycheck, the University pays additional retirement benefits on these amounts.

CASE STUDIES

1. *Dr. Paul Smith is a faculty member in the Department of Pediatrics. He has just accepted a request to edit a new textbook on adolescent sports injuries, to be published by Medical Press International. According to a contract he has signed with the publisher, he will be paid \$10,000 for his work as editor; he will be paid additional royalties in the next three years, based on sales of the textbook.*

Questions: Can Dr. Smith accept the payments and royalties described above? Must Dr. Smith assign the billing and collections to UPI?

Answers: Yes, Dr. Smith is free to accept these reimbursements from Medical Press International. He is *not* required to remit the fees or royalties to UPI or to the SOM. The Member Practice Agreement specifically excludes editorial work from income that must be assigned to UPI. Of course, Dr. Smith must be in compliance with University policies on intellectual property. He should also be mindful that, under Amendment 41, income earned for editorial activities, like all honoraria, must be “in exchange for reasonable services performed.” Furthermore, the amount paid must be agreed to in advance of the editorial activity, in writing, between the sponsoring entity and the faculty member.

2. *Josephina Matson, Ph.D. is a molecular geneticist in the Department of Dermatology. She is not involved in any patient care. She has been approached by a new Bio-Tech company, Immune-Wise, and has agreed to join their scientific advisory board. She will be paid \$2,500 each calendar quarter, in exchange for her services on the board. She will also be paid at a rate of \$125 per hour for additional "research and consultations" as agreed to by Dr. Matson and the company. Dr. Matson was told repeatedly by various colleagues and administrators that she does not need to assign her consulting income to UPI. In fact, she has been told that, as a non-clinician, she is not required to sign a UPI Member Practice Agreement.*

Questions: Does Dr. Matson have to sign a UPI Member Practice Agreement? Must she assign the consulting income to UPI? If so, how can Dr. Matson be compensated for her work as a scientific consultant to Immune-Wise?

Answer: Yes, Dr. Matson, like all regular SOM faculty members, is required to sign a MPA and to abide by its rules. She is required to remit the consulting income paid by Immune-Wise to UPI. Dr. Matson must contact UPI, which will review the contract with Immune-Wise; UPI will take charge of all billing and collections. Dr. Matson is not expected to forfeit this consulting income. She is entitled to receive the first \$15,000 of consulting income (and up to \$20,000, with permission of her chair) directly from UPI, after the 2.5% UPI administrative fee and 10% Dean's Tax are subtracted. If she is fulfilling all of her departmental commitments and salary obligations, she can also receive additional reimbursements under the contract with Immune-Wise, in accordance with the provisions of her department's approved UPI Incentive Plan.⁸ Dr. Matson must also report all income received from Immune-Wise on her annual University Disclosure Form.

3. *Dr. Mary Freeman is an Associate Professor in the Department of Surgery. In March, 2009 she served as a Visiting Professor at the University of Florida. In exchange for presenting a research conference and Surgery Grand Rounds and meeting with faculty and residents, she was paid \$3,000. She was also reimbursed for her travel expenses.*

Question: Is Dr. Freeman entitled to keep the \$3,000 she received from the University of Florida, without assigning it to UPI?

Answer: Yes, Dr. Freeman is entitled to receive the \$3,000 directly from the University of Florida. She does not have to involve UPI. The income she earned by serving as a Visiting Professor fits under the SOM definition of "Exempt Honoraria," which are defined as *one-time, modest payments which are provided in exchange for*

presentations by accomplished faculty who have achieved a level of expertise sought by others outside the University. Honoraria include one-time payments for lectures, articles, visiting professorships, NIH study sections and service on boards for non-profit corporations." Sometimes it may be difficult to determine whether professional income falls under the definition of "Exempt Honoraria." In general, exempt honoraria are one-time payments for single-occurrence services. Where it is not clear whether honoraria meet these requirements, they must be reviewed by the Department Chair and the Dean of the School of Medicine to be classified as exempt.

4. *Christopher Allen, M.D., Ph.D. is a faculty member in the Department of Anesthesiology. For more than 4 years, he has held a .80 FTE appointment. Beginning next year, he hopes to engage in non-clinical consulting services for an established medical device manufacturer, Air Exchange Devices. He will provide consulting services only during his "off time" --- that is, during the 20 percent time (approximately one day per week) that he is not paid by the University. Dr. Allen has prepared a detailed memorandum that outlines the manner in which he will separate his University duties from his work for Air Exchange Devices. He intends to meet all of his teaching, clinical and other academic responsibilities to the Department of Anesthesiology.*

Question: As a "part-time" faculty member, can Dr. Allen perform consulting services for Air Exchange Devices during his unpaid, "private" time?

Answer: No. Dr. Allen holds a *full-time, not a part-time appointment*. All SOM faculty members who hold benefits-eligible appointments (that is, greater than 0.5 FTE) are considered "full-time," regardless of the percent effort. Therefore, Dr. Allen must sign a regular Member Practice Agreement and must assign and remit all professional income to UPI. The income must be assigned to UPI, even though it is not related to direct patient care, and even though it is earned during Dr. Allen's unpaid (.20 FTE) time. The UPI MPA states clearly that "Members hereby assign to UPI ... all Service Income ... earned at any time during the term of this agreement, including vacation." Regular faculty members must assign all professional income to UPI, even that which is earned during vacations, evenings, weekends or other "off hours." The only exceptions are services performed that are not related to the scope of duties and professional expertise of the faculty member. Thus, a faculty member is not required to assign income to UPI that is derived from mowing lawns or giving music lessons, since these activities have no connection to the faculty member's professional responsibilities in medicine or science. As noted earlier, Dr. Allen will receive the first \$15,000 (\$20,000 with the chair's approval) of all consulting income paid directly to him. Additional revenues may be paid to him in accordance with the department's approved incentive plan.

5. *Bill Reynolds, M.D., Ph.D., is a clinician-scientist and Professor in the Department of Neurology. He has signed a consulting contract with a new Bio-Tech company to provide scientific advice and marketing information. Dr. Reynolds has also agreed to provide three lectures per year as a member of the company's speakers' bureau. Dr. Reynolds will receive stock options instead of cash as payment for his services.*

Question 1: Is Dr. Reynolds permitted to serve on a speakers' bureau for this Bio-Tech company under the UPI Conflict-of-Interest Policy?

Answer: UPI does not have a "Conflict-of-Interest Policy." The Member Practice Agreement does not seek to define permissible or impermissible consulting activities, nor does it monitor or regulate interactions between faculty members and industry. In June, 2008 the SOM (not UPI) approved a Conflict-of-Interest Policy that limits interactions with pharmaceutical, bio-tech and medical device companies; faculty members must adhere to these rules.⁹

Faculty participation on speakers' bureaus may be permissible under the SOM COI policy, if strict conflict-of-interest and disclosure standards are met and if the lectures, slides and handout materials are deemed free of industry influence. When permitted, speakers' bureau income would generally be assignable to UPI; such income would not be considered "Exempt Honoraria," since it is usually not a "single occurrence" service.

Question 2: In exchange for his consulting and speaking services, Dr. Reynolds will receive company stock options in place of cash payments. Is Dr. Reynolds required to assign his stock options to UPI? If so, will they be "taxed" by the Dean or UPI?

Answer: Yes, Dr. Reynolds must remit his stock options, which were received in exchange for Professional Services, to UPI. According to the Member Practice Agreement, "all medical legal and consulting income must be billed, collected and remitted to UPI. Such income includes cash, checks, deferred compensation, warrants, phantom stock, stock option plans or arrangements and any other compensation or benefit plans or arrangements." In lieu of the tax normally applied to consulting income, the outside company is asked to issue 10% of the stock options in the name of UPI and the Academic Enrichment Fund; the remaining 90% is issued in the faculty member's name.

6. *Dr. Joanna Johnson is a full-time SOM faculty member. She was asked to participate on a pharmaceutical advisory board that will meet in conjunction with a spring 2010 scientific meeting. This is a one-time event, for which she will be paid a \$2,500 fee. The agreement she has signed applies only to participation on this one stand-alone advisory board; the agreement does not mention any ongoing consulting arrangements.*

Question: Since Dr. Johnson's contract does not call for recurring payments, shouldn't the \$2,500 payment be considered an "Exempt Honorarium?"

Answer: Yes. This is a one-time payment for a single-occurrence event. The SOM's definition of "Exempt Honoraria" includes *one-time payments for lectures, articles, visiting professorships, NIH study sections and service on boards.* Dr. Johnson will not have to assign this consulting income to UPI.

7. *Mark Masters is a new faculty member in Cell and Developmental Biology (CDB). For the past 4 years, he has been teaching a full-semester on-line, Masters-level course at the University of San Diego. As a faculty member at the SOM, he would like to continue to teach this course, and be reimbursed. His responsibilities would not include travel and would be limited to monitoring on-line graduate student discussions, grading examinations and providing additional references and resources to students.*

Question: Is this allowed?

Answer: Certainly, Dr. Masters is permitted to teach a distance-learning course; he is also entitled to be compensated for his work. However, a continuing "course" is not a one-time lecture or visiting professorship, and it would not qualify as an Exempt Honorarium. Ongoing lectures, talks and courses are considered assignable Service Income, even if the reimbursement amounts are small. Therefore, the income must be assigned to UPI. Dr. Masters is entitled to receive these reimbursements from CDB, in accordance with the department's incentive plan. The department chair is responsible for ensuring that Dr. Masters is meeting all of his salary obligations and academic commitments. As another option, the University of San Diego could be asked to send payments directly to Dr. Masters' primary department (to reimburse the department for his time). A final point: Dr. Masters cannot be an employee of the University of San Diego while he is performing this distance-learning work, as he is a full-time employee of the University of Colorado. He cannot simultaneously be an employee of two institutions.

8. *Dr. June Osler, a faculty member in the Department of Psychiatry, is a well-known expert in geriatric mental health. She is frequently asked to deliver Continuing Medical Education (CME) lectures to University of Colorado Denver (UCD) audiences. She also frequently accepts invitations to give CME talks for outside entities, which may include another university, a non-profit organization or a CME company. Finally, last year she was invited to present lectures to undergraduate students at the UCD downtown campus and to graduate students at the new Colorado School of Public Health. Dr. Osler gladly accepts honoraria (typically \$100 – 250) for these talks.*

Questions: Which of Dr. Osler’s speaking and teaching honoraria are allowed by UPI or University policies? Are the payments for these lectures all considered “Exempt Honoraria,” or must Dr. Osler assign the income to UPI?

Answer: In each of the situations mentioned above, the payments are modest, one-time payments for single-occurrence lectures; therefore, they are Exempt Honoraria and need not be remitted to UPI. However, the University’s fiscal policies place some additional restrictions on the ability of faculty members to receive “extra pay for teaching:”

- The lectures delivered to non-University of Colorado audiences are clearly permissible, and reimbursement is allowed.
- In contrast, reimbursements for providing lectures on the downtown campus may not be permitted under the fiscal policies of the University. Regent Policy 5.D. and the University of Colorado Denver’s Fiscal Policy on Faculty Compensation” do not permit direct payments to faculty members for any teaching activities within the University of Colorado Denver.
- Reimbursement to the faculty member’s primary department is permitted, but only in limited circumstances. Specifically, additional pay for extra teaching is permissible “only when an unusual amount of time is required outside the faculty member’s regular duties.” Thus, reimbursement is permissible for “teaching overload” --- for example, leading a semester-long course or providing lectures on a frequent, ongoing basis. In all cases, payments for teaching overload must be paid to the faculty member’s home department, for salary offsets or distribution to the faculty member for professional development or other “legitimate purposes.” Income may not be distributed to the faculty member.
- Payments for single lectures or talks to UCD audiences are not permitted under any circumstances; single lectures are considered “ordinary” faculty responsibilities, and reimbursement is not allowed.

Notes

1. As of November 17, 2009, employees of DHHA are no longer required to sign Associate Member Practice Agreements and are therefore not UPI members.
2. When income is “assigned” to UPI, the revenues are placed in the account of the faculty member’s home department; these revenues are designated as earned by that faculty member.
3. According to the Rules of the School of Medicine, “Regular faculty members hold full-time appointments (0.5 FTE or greater) and do not have any independent or other health care practice.” Faculty members holding such appointments (0.5 FTE or greater) receive University benefits, are members of the CU System-wide Faculty Senate and the SOM Executive Faculty, may be elected to the SOM Faculty Senate, are eligible for promotion and tenure awards and, after promotion to Associate Professor, are eligible for sabbaticals.
4. Laws of the Regents. Article 5 (Faculty). Section 5.B.3(D).
5. Medical-legal and consulting revenues are assessed a 10% Academic Enrichment (Dean’s) Tax. In addition, UPI assesses a 2.5% administrative fee, which covers the costs of billing, collecting, reporting and managing these consulting contracts. The remainder is paid to the faculty member as a lump sum, after income tax (but not benefits) withholding.
6. The University of Colorado’s comprehensive policy on Conflicts-of-Interest and Conflicts-of-Commitment is posted at https://www.cusys.edu/policies/policies/A_Conflict-of-Interest.html. The requirements for disclosure are in Section III.1. The University of Colorado Denver’s procedures for evaluating and managing potential conflicts of interest are described in a separate document, posted at: http://www.uchsc.edu/regcomp/coi/documents/COI_Evaluation.pdf.
7. UPI does not establish any policies with respect to the One-Sixth Rule. UPI adheres to policies established by the Board of Regents and the School of Medicine. Consistent with those policies, UPI attempts to facilitate the ability of SOM faculty members to pursue and receive compensation for consulting activities.
8. Please note: Department incentive plans must be reviewed and approved by a majority vote of departmental faculty at least once every five years. Changes to departmental incentive plans must be approved by a majority vote of the faculty.
9. The COI policy is available at: <http://www.uchsc.edu/som/faculty/faculty/PharmSchoolInteractionsFinalVersionMay27.pdf>. The University of Colorado Denver Office of Regulatory Compliance has also published a Frequently Asked Questions document that includes background helpful guidelines and faculty case studies. The FAQ is posted at <http://www.uchsc.edu/som/faculty/document/FAQs.pdf>.