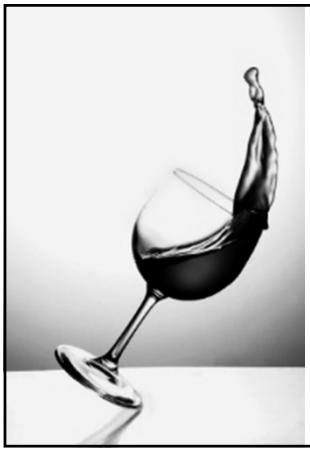
ANATOMY OF A RESEARCH MISCONDUCT ISSUE - WHEN THE FOUNDATION CRUMBLES

Juliann Tenney, JD, CHRC



Resveratrol – Ingredient in red wine shown to have potential to improve health

145 instances/7 yrs. in which data "fabricated, falsified and manipulated" – U Conn.

U Conn. subsequently turned down $890K in federal grants; notified 11 journals

Three year review of six years' work
Anonymous tip to ORI

Source: Stephanie Reitz, AP; 01/12/12

- Anil Potti
  - Potential Consequences:
    - Repayment (False Claims Act)
    - Retraction
    - Tarnished reputation of institution and research associates
    - Impaired ability to attract subjects
    - Potential liability to subjects for therapeutic choices
    - Responsibility for graduate students, post docs
    - "60 Minutes …" w/ Walt and Julie Jacobs

Case Summary: Kornak, Paul H.

(Edited for Presentation)

- Findings of Research Misconduct and Administrative Actions

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary
Debarment

Paul H. Kornak, Stratton VA Medical Center, Albany, New York: Upon recommendations from the Office of Research Integrity (ORI), et al. that were based on the criminal convictions of making and using a materially false statement … and criminally negligent homicide, … the HHS debarring official has permanently debarred Mr. Paul Kornak, former research coordinator at the Stratton VA Medical Center.

Of the 48 criminal charges contained in his Indictment, Paul Kornak pled guilty to the three criminal charges listed above. In addition to the 71-month term of imprisonment imposed, Mr. Kornak was directed to pay restitution to two pharmaceutical companies and the VA in the amount of approximately $639,000.

As part of his guilty plea, Mr. Kornak admitted to the following facts:

From May 14, 1999, to July 10, 2002, in connection with the above protocols, Mr. Kornak participated in a scheme to defraud the sponsors of the clinical studies in that "he would and repeatedly did submit false documentation regarding patients and study subjects and enroll and cause to be enrolled persons as study subjects who did not qualify under the particular study protocol."

Mr. Kornak caused the death of a study subject when he "failed to perceive a substantial and unjustifiable risk that death would occur when he knowingly and willfully made and used documents falsely stating and representing the results of [the study subject's] blood chemistry analysis, which false documents purported that [the study subject] met the inclusion and exclusion criteria for participation in [study title] when the actual results did not meet the inclusion and exclusion criteria and showed impaired kidney and liver function, and [the study subject] thus was administered the chemotherapeutic drugs … and died as a result thereof on or about June 11, 2001."

Mr. Kornak admitted to a dishonest handling of the research records and demonstrated a complete disregard for the well-being of vulnerable human subjects under his care. In pleading guilty to criminally negligent homicide, Mr. Kornak admitted that a reasonable person would have perceived a substantial and unjustifiable risk of death if an ineligible subject were enrolled in the cancer study in question and that his failure to perceive such a risk in enrolling the ineligible subject constituted a gross deviation from the standard of care.

A lifetime debarment of Mr. Kornak is necessary to protect the public interest overall. …

Source URL: http://ori.hhs.gov/content/case-summary-kornak-paul-h

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

****

UNITED STATES OF AMERICA

v.

Criminal Action No.
03-CR-436 (FJS)

PAUL H. KORNAK,

Defendant.

PLEA (AND COOPERATION)
AGREEMENT

****

GLENN T. SUDDABY, United States Attorney for the Northern District of New York (by Grant C. Jaquith, Supervisory Assistant U.S. Attorney, appearing) and PAUL H. KORNAK (with E. Stewart Jones, Esq., appearing) hereby enter into the following Plea Agreement regarding the disposition of certain criminal charges against the Defendant:

1. In return for the consideration described below, PAUL H. KORNAK agrees as follows:

a. The Defendant will withdraw his previous pleas of "Not Guilty" and enter pleas of "Guilty" to Counts 1, 15, and 48 of Indictment 03-CR-436. Count 1 charges the defendant with making and using a materially false statement, in violation of 18 U.S.C. § 1001(a)(3); Count 15 charges the defendant with mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346; and Count 48 charges the defendant with criminally negligent homicide, in violation of 18 U.S.C. § 3 and New York Penal Law § 125.10.

Signed on January 18, 2005

Legal Framework for Scientific Misconduct

- Scientific Misconduct: (PHS) 42 CFR 93, (NSF) 45 CFR 689

- Fabrication (making up data or results and recording or reporting them),
- falsification (manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record),
- plagiarism (appropriation of another person's ideas, processes, results, or words without giving appropriate credit),
- or other practices that seriously deviate from those that are commonly accepted within the scientific community for proposing, conducting, or reporting research. It does not include honest error or honest differences in interpretations or judgments of data.
  - Note, misconduct must be committed intentionally, knowingly or recklessly and
  - allegation proven by a preponderance of the evidence.

Legal Framework … History

- Public Health Service Policies on Research Misconduct
  - Went into effect May 17, 2005
  - Requires that institutions receiving funds from the Office of Public Health and Science (PHS) have in place adequate policies to 1) inquire and then, if necessary 2) investigate misconduct allegations ("Assurance")
  - Timely reports results must be made to the HHS Office of Research Integrity (ORI)
- Note: administrative action may be taken against the researcher, or the institution, or both – and, agencies ***will*** collaborate
- National Science Foundation
  - Went into effect March 18, 2002
  - NSF Office of Inspector General handles misconduct
- Note differences in timelines

It can (and probably will) happen to YOU

The phone rings …

The voice on the other end of the line asks if he can be assured of confidentiality.

You (the compliance official) say, "Yes, of course."

The voice says that the pressure to enroll subjects into a clinical trial that he supports is enormous. If patients don't meet inclusion criteria detailed in the protocol, the staff is "encouraged" to "check those values again," and reminded that jobs are dependent upon grant support.

The caller says that he doesn't want you to do anything, he just had to tell someone – he does not identify the study or the investigator.

Weeks later you receive an anonymous call from a person describing herself as a monitor for a sponsor. She advises you that she believes subject records she has reviewed have been altered to satisfy study inclusion criteria.

She says she will let you know if she is able to confirm her suspicions.

A week later a man walks into your office and complains to you that he has been fired from his job as a study nurse and coordinator. He says that the reason given was that he was "insubordinate" for challenging his boss, the principal investigator, when he was asked to run tests until the subject's values "qualified" for the trial.

He says that everyone who works with this PI feels "bullied," but will likely not complain because they do not want to jeopardize their futures both at this institution and as researchers.

Is there an institutional "ombuds?"

Ombuds role, reporting responsibilities

Are *YOU* the Institutional Research Integrity Officer (RIO)?

What will you do?

Stages of Review:
Allegation/Notice, Inquiry, Investigation, Reporting, Appeals

- Allegation: fielding or receiving of complaint, initial review with complainant, developing plan re going forward
- Inquiry: information gathering and initial fact finding to determine whether an allegation or apparent instance of misconduct warrants an ***investigation***; must commence "immediately" following allegation of scientific misconduct and be completed within 60 days of its initiation unless circumstances clearly warrant a longer time period
- Investigations: should be undertaken within 30 days of the completion of the inquiry, if findings from the Inquiry provide a sufficient basis for conducting an investigation

Your Action Plan:

- Review your institutional policy!
- Develop templates to standardize approach (assures fairness, similar situations addressed in same way)
- Get all the facts you can, in writing if possible, including names of others who may be involved with conduct; consider the culture of the environment from which the allegation arose as well as the culture and training of the complainant
- Review the applicable protocol
- Determine what course the complainant wishes to follow: will s/he come forward or remain anonymous. Can you assure confidentiality?
- Acquaint the complainant with institutional policies on research integrity—including nonretaliation

What Comes Next?

- You have obtained a complete preliminary statement from the complainant. Who else knows?
- Review the protocol, other study records
- Review
  - Institutional policy on research integrity to be certain you know how to proceed
  - Confidentially notify (by telephone)
    - Legal counsel
    - Departmental chair or dean
    - Other institutional officials
- Determine . . .
  - Would the charges, if true, constitute research misconduct under your policy?
  - Are other policies applicable?
- Identify all the issues presented by the facts as you understand them: Human Resource, HIPAA, Billing, Gifts, etc.

Possible Missteps

- Some official (chair, dean, etc.) will want to call the senior professor/departmental chair in for a talk . . . "There must be a reasonable explanation"
- Someone may inform the PI about the charges without your knowledge or consent
- Organizations can't keep secrets. You must act quickly

Remember:

- In your role, you cannot give legal advice
- You must advise that communications between with you are not privileged
- You should generally have the institutional/university attorney communicate with the parties' attorneys

Your Position: Assume Nothing

- You do not know all the facts
- There are two sides (or more) to every story
- The PI has not been confronted with the charges
- No one (to your knowledge) has interviewed the complainant or others associated with the study
- No other expert (scientific or forensic) has reviewed the study records

Would the Charges, if True, Constitute Misconduct Under Your Policy?

- How will you notify the respondent?
- How will you safeguard evidence?
- How will you be certain the rights of both the complainant and the respondent (the PI) are protected?*
- How will you maintain confidentiality? Remember, several careers may be at stake
- Consider relationships with sponsors (commercial, nonprofit, governmental) other collaborating institutions

*Sticky wicket issue: "reminding" PI of nonretaliation policy may raise suspicions – best approach is to reinforce through regularly required training, emphasized by leadership.

Notifying the PI (now, Respondent)

- Meet with the PI at her/his office or lab. Do not explain the purpose of the meeting ahead of time.
- Arrive with a team that might include some or all of: research integrity officer, legal counsel, campus police, IT professionals, moving crew, substantive expert in the field of study
- Give the respondent a copy of your policy. Discuss his/her rights to continue work, retaining a private attorney, etc.

Protecting Evidence

- You must take possession of all the evidence immediately
- Evidence includes study records, computer hard drives, lab books, working papers, correspondence, rough drafts
- The respondent is innocent until proven guilty. ***You must make it possible for him/her to continue working while your review is underway***

Your Role is Sensitive

- You represent ***the institution*** - you are not a prosecutor
- Your role is
  - to be certain that the institution's policy is followed precisely
  - to safeguard the rights of everyone involved
  - to facilitate a fair and complete inquiry and investigation before a competent committee of peers
- The Institutional role is to make a determination of scientific misconduct based on the Inquiry and Investigation
- The legal standard is "preponderance of the evidence" (more than 50%)

Stages of Review: Managing the Inquiry

- Who appoints inquiry team members?
- Will your office provide them with staff support?
- Can you arrange for IT professionals to "ghost" electronic documents?
- Can you obtain resources (scientific expertise, software, etc.) that can help you sort out authorship, data origination? – Whom can you recruit/enlist to help?
- Will you keep the complainant (now, possibly, "whistleblower" or "relator") informed? Remember that though the complainant is not a party to the inquiry he will likely have a keen interest in its progress.

Managing the Inquiry Process

- Do you use court reporters to record inquiry proceedings?
- How do you (or your institutional attorney) "prep" the chair of the inquiry team on due process?
- Do you allow attorneys to speak at the inquiry?
- Who schedules witnesses?
- Will you provide staff support to help prepare the inquiry final report?

The Inquiry Report

- The Inquiry is analogous to a grand jury. The purpose is not to determine guilt or innocence, but to determine whether there is sufficient credible evidence to warrant a full investigation
- A recommendation against proceeding to an investigation is not necessarily the same as a finding of "innocence"
- Must state what evidence was reviewed
- Summarizes relevant interviews
- Includes the conclusions of the Inquiry
- The individuals against whom the allegation was made shall be given a copy of the report inquiry—their comments may be part of the record
- The individuals may be given longer than 60 days to complete their responses
- The Inquiry is NOT intended to reach a final conclusion
- Legal standard: Preponderance of the evidence to go forward

If the Inquiry Recommends <u>No</u> Investigation

- Who makes the final decision?
- How do you notify the respondent?
- How do you notify the complainant?
- How do you handle/protect records? Consider record retention, HR policies
- How do you protect confidentiality?
- How do you protect the complainant from retribution?

If the Inquiry Recommends an Investigation

- Who makes the final decision?
- What are your next steps?
- Who appoints the investigation team?
- Do you have reporting requirements?
- How do you notify the respondent?
- How do you notify the complainant?

Initiating an Investigation

- Investigations should be undertaken within 30 days of the completion of the inquiry, if findings from the Inquiry provide a sufficient basis for conducting an investigation
- Must be reported to ORI on the date the investigation is started
- Notification should include: name of person against whom the allegation is made, the nature of the allegation, PHS application or grant number
- The Investigation will include:
  - Examination of all documentation
  - Interviews should be conducted with all individuals involved including those who made the allegation, those against whom the allegation is made
  - Complete summaries of these interviews should be prepared and provided to the interviewed party for comment or revision, as part of the investigative file
  - Those involved in the Investigation must be free of conflicts of interest

Your Role Changes

- Investigations are more formal
- Your university counsel will probably take the lead in orchestrating the procedures – your role may become analogous to "project manager"
- You will be providing staff support, including identifying, locating and scheduling witnesses, in collaboration with counsel and investigation "chair"
- Also note potential need to identify, recruit scientific and/or forensic "expert" witnesses, auditors

Consequences

- Careers and reputations are at stake
- Those found guilty of research misconduct are normally terminated from the institution
- Guilty parties may be debarred from receiving federal funding and there may be "false claims" implications, including reimbursements and fines
- Additional civil or criminal action may await (consider breach of contract if commercial sponsor involved)
- Sponsor and journal notifications: retractions; additional notifications to licensing and certifying bodies, law enforcement agencies including the DOJ and OIG, and other researchers
- Institutions who fail to follow this process or fail to have the required policies and procedures may be subject to enforcement action including loss of funding and an ORI investigation of the institution

Working with ORI

- The Office of Research Integrity can be a valuable ally and consultant
- ORI can provide some forensic services and recommend experts for highly technical forensic work
- However, ORI represents the interests of the federal government—those interests may differ greatly from the interests of the Institution

The Investigation is Complete

- The Institution makes a determination of scientific misconduct based on the Inquiry and Investigation
- If federal funding is involved, the Research Integrity Officer must notify ORI of the outcome of the investigation and forward a copy of the report
- ORI may accept the decision, ask additional questions, or conduct its own investigation
- The Institution must also notify OHRP if there is a threat to human subjects/participants
- Normal institutional appeal procedures will come into play if the president/dean/provost institutes personnel action against a party determined to be guilty
- You must still maintain confidentiality if the respondent was not found guilty. This is a critical responsibility. No matter who else "knows," you may not comment
- Research subject notification issues – IRB role (choice of trial vs other therapy)

After the Investigation

- All PHS funds must be protected
- If the allegations have been substantiated, sanctions must be imposed on the offending parties
- Timeliness: An investigation should be concluded within 120 days of its initiation—but extensions may be granted by ORI
- If Possible Criminal Violations: ORI must be notified within 24 hours of obtaining and "reasonable indication" of possible criminal violations so that ORI may notify the DHHS OIG

Examples of Scientific Misconduct-Integrity Risk Areas

- Collaboration – lack of "research agreement"
- Intellectual Property – origination/creation/ownership disputes
- Data Acquisition, Management and Access
- Mentor-trainee Issues
- Publication and Authorship (watch for inequities between contributors of different stature)
- Suppression of Data
- Peer Review
- Falsification, fabrication, exaggeration and plagiarism
- Conflict of Interest
- Pressure to publish, succeed, receive funding for research

What Happens After ORI Makes Its Decision?

- The matter goes to PHS (the Asst. Sec. Of Health) who may accept or reject ORI's decision
- If the decision is accepted, ORI sends the respondent a copy of the decision along with how an appeal may be made (HHS Dept. of Appeals Board - DAB)
- If no appeal is made, the decision is final and published in various places including the FR

Appeals

- If the DAB rules against a respondent, s/he may appeal the decision to Federal District Court
- The standard the District Court uses is the "substantial evidence" standard

Compliance with ORI's Standards

- Institutions conducting research must develop and implement the required policies and procedures related to scientific misconduct
- Training with all researchers must be done to ensure a thorough understanding of the requirements
- The Institutional Assurance must be filed and compliance maintained therewith at all times
- If an allegation of Scientific Misconduct is made, follow the required process
- Annual web-based reporting obligation

Document Retention Requirements

- All work papers related to an Inquiry or Investigation must be maintained in a secure location for at least 7 years after the Inquiry is closed – Note, your institution or other governing authority (state government, sponsor) may have a policy requiring more lengthy retention
- If Inquiry does not advance to Investigation, determine how to destroy all but minimum necessary records

U.S. v. Kornak
(covered earlier)

- Plea and Cooperation Agreement Signed January, 2005
- Defendant was a research assistant at Stratton VA Medical Center
- Defendant helped manage studies in which payments were made by sponsors based on enrollment
- Defendant sent a Case Report Form to the sponsor (Aventis) which indicated that a participant met the study criteria and the participant was enrolled in the study
- Participant died
- The Defendant was prosecuted under criminal and civil proceedings and the Defendant … jail time

U.S. v. Poehlman

- Defendant was a researcher employed by University of Vermont
- Government alleged that defendant falsified data in federal grant applications
- Since defendant was principal investigator, was found to have violated False Claims Act
- Settled in March, 2005

Research vs. Scientific Misconduct

•Scientific misconduct (FF & P) allegation(s) may be "trojan horse" delivering notice of broader compliance issues

•Are there ways to anticipate/prevent the evolution of problems?
- Monitoring/Auditing
- Where can personnel "take" concerns?
- Consider level of formality and attendant reporting responsibilities
  - Role of Ombuds – can help sort things out
- Counseling re relationships/management (coaching?)

But what about peer review and reproduceability?

But wait …

- What about privately sponsored "research?"
  - Upon whom is the product tested?
  - Is there an IRB providing oversight?
  - How was the study designed?
  - Who can review the analysis, conclusion?
  - If there are losses or fraud, who prosecutes?
  - Consider "Sugar studies"

Advance Planning Will Yield Benefits

- Become familiar with the ORI website and available resources: http://ori.dhhs.gov/
- Subscribe to e-newsletters
- Consider "Boot Camp"
- Explore apprenticing yourself to a seasoned RIO and observe the process
- Ensure leadership understands budgetary/resource impact of inquiry & investigation
- Make sure your institution's policies/procedures are consistent with the applicable regulations and easily accessible

Resources

- https://www.youtube.com/watch?v=j9YyxdjdLa8
- ori.hhs.gov

Questions/Comments

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Thank you!