Investigation Outline

by

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The following outline summarizes topics that will be addressed in the Practicum. It is provided to assist in following the discussion and as an aid for notetaking.

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Part II: INVESTIGATION

A. Introduction and Overview

An investigation into allegations of scientific misconduct is conducted when an initial inquiry has determined that something may be amiss and a thorough investigation is warranted. While the investigation usually takes longer than the inquiry, is more complex, and calls for significantly more logistical support, at least the initial direction should have been set by the inquiry. By the time an investigation begins, some of the most difficult aspects of responding to an allegation should have been addressed, including the notification of the subject(s) of the inquiry, sequestration of data and analysis of the applicable regulations. While these issues may recur throughout the investigation, their subsequent reappearances ought to be aided by the initial determinations made during the earlier phase of the proceedings.

The outcome of an investigation can have career-long effects for the participants in the process. For the individuals involved—subject(s), witnesses, panel members, and staff alike—the process will be stressful and difficult. For the institution, managing the investigation efficiently, credibly and cost-effectively should be a high priority, because a mishandled process will expose the institution to significant financial and legal liabilities and to a damaged reputation. Those responsible for conducting the institution’s investigation should be as informed as possible about the requirements and dynamics of the process, know how to call upon appropriate resources when faced with potential problems, and have access to the necessary support throughout the investigation: in other words, handle the investigation professionally.

The likelihood is high that an investigation into allegations of scientific misconduct will require interactions with and accountability to federal funding agencies. Even where this is not the case, the procedures adopted by most universities are based upon federal regulations in these areas. Thus, a thorough understanding of the application of those regulations is an absolute necessity.

Beyond the tangible requirements of the federal regulations, however, are a variety of intangible factors that will also affect the investigation. The current national environment in which investigations into allegations of scientific misconduct are conducted is dynamic and can cause confusion. The very definition of scientific misconduct is controversial, the role of the federal government is evolving, and interactions with the legal system are without sufficient precedents to be predictable.

In such an environment, it is critical that the institution have a solid approach to its investigations that will withstand reasonable challenge and review. Well in advance of the need for an investigation, the questions addressed in the following sections should be reviewed internally and outstanding issues should be resolved. In other words, plan ahead!

The entire investigation should be structured and conducted under the assumption that it could become public. This is not an idle possibility; a quick review of the popular and scientific press in recent years shows national coverage of a number of institutional misconduct investigations. Once one or more parties begin “litigating in the press,” the process becomes even more difficult than it was before. However, it is possible to conduct an investigation without attracting media attention, given a modicum of good luck and a lot of institutional planning and thought. And should you get a call from the media, the advance planning advocated in these pages should help prepare you for responding thoughtfully and thus contribute to minimizing damaging publicity.
The process must also be structured to withstand scrutiny by federal oversight agencies; familiarization with the requirements of officials in those agencies is also a wise investment of time.

B. Moving from Inquiry to Investigation

Before the substantive aspects of the investigation begin, a whole series of procedural and logistical questions must be addressed and resolved. Ideally, the institution’s policy or practices are settled (or at least have been considered) before the first investigation arises.

Roles and Responsibilities of Participants

The first category of questions—who is responsible for what—should be resolved by the institution’s misconduct policy. If they are not, the top priority must be to develop a policy that does address these matters. See Beyond the “Framework”: Institutional Considerations in Managing Allegations of Misconduct in Research, published by the Association of American Medical Colleges (in back pocket of notebook) for guidance on these issues.

Questions for which answers should be determined in advance include:

- Who is responsible for initiating the investigation?
- Who appoints panel members?
- What other roles does this person play in the process?
- What is the role of legal counsel (for the accuser, the subject, the institution, the panel) in the process? Who “prosecutes” the case?
- Who is responsible for procedural compliance throughout the process? For logistical support of the investigation?
- What information should be made available to whom throughout the process?

Comment: The investigator/panel should be shielded during the process from ex parte communications from any of the participants. Every party should be cautioned not to interact outside of the process with the panel on the topic of their review; this will protect the panel members and will assist in maintaining the integrity of the review process.

The panel should have access to legal advice both upon request and to help avoid undue liability, but how this is to be structured will depend in large measure on how “legalistic” the proceedings are intended to be and what other roles the institution’s counsel may be called upon to play.

Given how strongly the participants (especially the person who raised the concern or lodged the allegation and the subject(s) of the investigation) will feel about the process, the more the investigation can be “institutionalized” and their roles clearly delineated, the stronger the resulting process. While it is critical to have sufficient input from the accuser, do not allow the accuser to become a prosecutor. The investigation should not be treated as a contest between the complainant and the subject!
The official who appoints the panel and to whom it will report may want periodic updates on the process. Whether this should be done depends in large measure upon the participants and their relationships. Such information can be helpful in assuring that the official is not blind-sided by developments and has sufficient confidence in the panel and process to be supportive of it. On the other hand, such communications can also undermine an otherwise solid process by creating an appearance of bias or suggesting that the institution (or the official) seeks a predetermined outcome. In addition, if that official has a role in the adjudication of the charges after the investigation closes, it can jeopardize the later aspects of the process if that official has a role in the fact-finding process as well.

At the University of Illinois, no line officer has a role in the investigation; the department head and dean are kept informed, and may be interviewed by the panel, but they do not have a formal role in the investigation. This separation of duties is another factor that can contribute to the credibility of the process.

- Does the subject of the investigation have an obligation to cooperate?
- What should be done if the subject refuses to cooperate?

**Comment:** Non-participation of the subject (sometimes also known as the respondent) can present many difficulties. Ideally, the misconduct policies of institutions should address the obligation of employees to cooperate, and provide an appropriate response when they do not. Whenever possible, moral persuasion (which can be powerful) should be applied. In any event, this question should be reviewed with your institution’s legal staff.

- How can the cooperation of other significant individuals be facilitated?
- Should counsel for any of the parties play a role in the investigation process? If so, what role?
- Who is designated to make initial contact with and maintain communication with the federal agency?

**Comment:** Because the lawyers for various participants can have an important effect on the investigation, the roles of various counsel should be well developed and clearly set forth in your institution’s misconduct policy and procedures.

- If a panel is used, and must be selected, how many members should there be?

**Comment:** The University of Illinois uses a three-member investigation panel. One individual is appointed from the department in which the subject holds his or her primary appointment or in which the activity in question has been conducted, one individual from elsewhere in the university, and one from outside the University entirely. The outside member is essential to the credibility and rigor of the process.

There have been several occasions where it was not feasible to have a member from within the subject’s department serve on the panel, for reasons ranging from the small size of the department to personal considerations that could have resulted in a biased panel.
There are some indications that the Office of Research Integrity (ORI) believes that faculty members from the subject’s department should not be included on a panel because of the conflicts of interest this can introduce. While the participation of such individuals can have this effect, it can also be very helpful and illuminating—if the panel members are selected with the potential for bias and conflict in mind, and if the panel also includes an individual (or individuals) with different perspectives for balance. Potential panel members should be asked to declare any conflicts of interest in advance to determine eligibility.

- Should a person who participated in the inquiry process serve on the investigation panel?

Comment: Generally not. If the inquiry process had problems, this will contaminate the investigation process with the same problems. A clean start will add to the credibility of the investigation, which will already have the inquiry report from which to work.

- What criteria should be used for the selection of members?

- Are the criteria for panel membership primarily scholarly or primarily personal (e.g., personal integrity and good judgment)?

- What if the respondent is a student or technician?

Comment: University of Illinois panel members are chosen for both scholarly standing (e.g., quality of achievement) and personal integrity. If the subject is a faculty member, at least one member of the panel must be a faculty member. Typically, all three members are if the subject is a faculty member.

It is important to appoint panel members whose professional status is comparable with that of the subject of the investigation. (If the subject is a full professor or a member of the National Academy, for example, at least one member of the panel should have equivalent status.) If the respondent is a graduate student, there must be at least one graduate student on the panel.

Note also that if the respondent is a student, careful examination of the interaction of your institution’s student discipline codes with federal regulations will be required. Federal officials will expect that the institution’s assurance on matters of misconduct in science and engineering will be followed. Your student discipline code may have provisions that are inconsistent. This is a matter to be examined early and modified in your policies and procedures, if necessary.

- Should the subject of the investigation be allowed to challenge the membership of the panel?

- On what grounds can a challenge be mounted?

- How soon should this challenge be required?

- Can bias on the part of a panel member be alleged after the process has started? (Could a panel member develop a bias after the process has started?)

- Who determines whether or not to replace a panel member?
• Should the investigation panel be the same as the inquiry panel?

Comment: Fairness requires that the subject of the investigation has an opportunity to point out potential bias or conflicts of proposed panel members. The timing of how to handle such challenges, and the question of how to handle charges of bias arising after the investigation is already underway are very complicated, and must be carefully considered in light of the institution's policy. In every instance, the subject's objections must become part of the record of the proceeding.

What if the Inquiry was a Mess?
Under ideal circumstances, the beginning of an investigation will follow an orderly inquiry that adhered to the institution's policy and procedures in all respects, as well as to relevant federal guidelines. However, occasionally, an investigation will follow an inquiry that had problems of one sort or another: procedural challenges, restive panel members and/or a split panel recommendation, challenges to the composition or objectivity of the inquiry process, disputed inquiry scope or subject matter, findings that are inconsistent with the cited evidence. In those circumstances, the investigation and what follows may be endlessly complicated. For example, what if the inquiry didn't recommend an investigation, but institutional officials decide one is required anyway? Or federal agency officials require an investigation? Issues to consider:

• State of the evidence: were data and other relevant evidence sequestered for the inquiry?

• Employment status and possible ultimate motives of participants in process.

• Preservation of information gathered by the inquiry.

• Procedural/legal exposure of institution due to treatment of participants in the bungled inquiry.

Options for regrouping and moving forward include:

• legal advice (essential!);

• consultation with officials at federal oversight agency;

• performing a fresh inquiry;

• trying to start the investigation as if there is a clean break with the inquiry (absolutely required: a clear scope and procedures); and/or

• deferring to the federal agency (usually undesirable).

The first step is to involve the institution's legal counsel in every decision, and have legal review of every written document. The second step is to consider conferring with federal officials. Depending upon the agency involved and the particular problems of the inquiry, this may or may not make sense for the institution, but it must be considered.

Skipping an Investigation, Even if Recommended by an Inquiry
Sometimes, the subject of an investigation will suggest that he or she will stipulate to certain facts in exchange for termination of the misconduct proceedings. Such a course requires examination of a number of considerations:
• How can you be sure that there are no other instances of possible misconduct in addition to those that are the subject of the stipulation?
• What are the relationships among the parties involved in the process and who would be affected by the stipulation?
• What federal reporting obligations does the institution have, and how will the stipulations affect them?
• How will you deal with the federal agency if federal funds are involved?

Note that an institutional settlement cannot bind the government, and a federal agency with responsibility for oversight is not likely to consider the matter resolved if a settlement has been reached without consultation and involvement of agency officials.

Concerns of the Subject of the Investigation
The subject of an investigation will, of course, be even more concerned than during the inquiry. If the following issues did not arise before, they may well at this stage:

• Who brought the allegations? What precisely were they?
• What will be the charge to the investigation panel?
• What will be the roles of witnesses, lawyers, etc., in the process?
• Who will be notified of the process?
• Will ongoing research be affected?

Some individual must be designated to deal with these and other concerns and to serve as a central point of contact for the subject (and his or her attorney).

Preventing Retaliation
During every phase of responding to allegations of research misconduct, the institution is responsible for preventing retaliation against any of the participants in the process. This should be a proactive effort, warning those who hold supervisory roles relative to various participants that no employment or disciplinary actions may be taken against any individuals because of their involvement in the process. It is often useful to require one or more levels of administrative review and approval for personnel or other actions that may become necessary while the process is underway to assure that they are not motivated by retaliation.
C. The Investigation Begins

An investigation usually has one of two beginnings: it follows an inquiry conducted by
the institution that recommends an investigation, or the institution receives a referral
from a federal agency. In the latter event, the federal agency is effectively
postponing (perhaps forever, if the institutional process is adequately vigorous) its own
right to investigate to the institution, so the agency may consider that an inquiry has
already occurred and request the immediate initiation of an investigation. This may be
procedurally difficult depending upon the institution’s policy governing misconduct
procedures; it is worth considering when adopting or revising a misconduct policy.

The goal of an investigation should be to assemble, examine and weigh the evidence, to
determine the facts, draw conclusions based on these facts and prepare a report is clear
enough that an informed and objective reviewer can understand why the investigation
reached its conclusions based on the evidence presented. Whether or not the results of
the investigation are submitted to a federal agency, a committed and disgruntled
whistleblower has other forms of recourse ranging from the media and the courts to
political influence. Indeed, the whistleblower, unlike the institution or the subject of the
investigation, may have little to lose at this point. A thorough and well-documented
investigation report marshaling all the evidence is the best protection for all participants
in an investigative process, including the subject, the panel members and the
whistleblower.

How to Know when the Inquiry is Over

For a variety of reasons, institutions often prolong the inquiry beyond what is expected
by federal regulations. Indeed, there are a number of incentives for doing so: once the
process moves to the investigation, federal agency notifications are required, and the
intensity of the process increases. There is often internal pressure to contain or limit the
process, and these pressures can work to extend the inquiry.

Despite these factors, however, the best practice is to restrict the inquiry to its intended
function: determination of whether there is sufficient merit to the allegations under
review to warrant a formal investigation. NSF has stated that it considers that an
inquiry has three questions to address (and, by implication, three questions only):

- is there any substance to the allegation?
- if so, is this a matter falling under the definition of misconduct?
- is there any federal agency involvement?

This means that if an inquiry determines that published data are discrepant from
primary data, or if it finds that words are repeated from one document to another
without citation or attribution, the inquiry should end and the investigation process
should begin. Put another way, if the inquiry is examining multiple allegations, and
finds that the third in the list has sufficient merit to warrant an investigation, then the
inquiry should end with that finding, and the whole case turned over to the investigation
process. An inquiry can be exhaustive when it is dismissing allegations as unfounded
(and, indeed, it must be to make such a dismissal), but any careful examination of issues
once evidence suggesting possible misconduct arises should occur in the context of an
investigation.

The following advice from an article written by an official at the National Science
Foundation may be pertinent:
Historically, the formal method was introduced because of outstanding failures in the informal method. The informal method has failed by not treating some misconduct cases seriously enough. It also does not secure the rights of the individuals involved.¹

The article goes on to provide a compilation of some of the negative things seen in University investigations by the Office of Inspector General:

... the university’s misconduct in science regulations may be used, but in a way that really perpetuates the informal method. For example, sometimes a university receives an allegation from a complainant and performs an inquiry as its regulations require, but then settles the case at the inquiry stage even though the case deserves a full investigation. The inquiry may be drawn out so long that it practically serves the purpose of an investigation, and then no formal investigation may be held because university officials find that there are no longer any facts in dispute. By not doing an investigation, the university avoids having to notify the funding agency about the case.

At the end of the inquiry, university officials may propose a settlement to the subject that will close the case without a formal investigation and notification of the agency. We often hear of cases that were closed after the inquiry with some sort of penalty being imposed on the subject. This does not accord with regulations, since inquiries are not supposed to [be] making findings of misconduct. If there is no finding of misconduct, there should be no penalty, but often the penalties are labeled as remedial.¹

Another way to look at this is to examine the following statement provided by the Office of Research Integrity (ORI) about the purpose of an investigation:

The purpose of the investigation is to explore in detail the allegations, to examine the evidence in depth, and to determine specifically whether misconduct has been committed, by whom, and to what extent. The investigation will also determine whether there are additional instances of possible misconduct that would justify broadening the scope beyond the initial allegations. This is particularly important where the alleged misconduct involves clinical trials or potential harm to human subjects or the general public or if it affects research that forms the basis for public policy, clinical practice, or public health practice. The finding of the investigation will be set forth in an Investigation Report.²

Meeting Federal Requirements
The National Science Foundation and the Public Health Service impose uniform obligations on the institution with respect to beginning an investigation: *you must notify the agency before initiating the investigation*. If the inquiry arose internally (that is, it was not referred to the university by one of the federal oversight agencies), until the decision is made to conduct an investigation, no federal notifications are required.

The Public Health Service Policy states that:

An institution's decision to initiate an investigation must be reported in writing to the Director [ORI], on or before the date the investigation begins. At a minimum, the notification should include the name of the person(s) against whom the allegations have been made, the general nature of the allegation, and the PHS application or grant number(s) involved.

42 C.F.R. 50.104

The NSF policy states that an the agency expects an awardee institution to:

Inform NSF immediately if an initial inquiry supports an investigation... even before deciding to initiate an investigation ... (i) If the seriousness of apparent misconduct warrants; (ii) If immediate health hazards are involved; (iii) If NSF's resources, reputation or other interests need protecting; (iv) If Federal action may be needed to protect the interests of a subject of the investigation or of others potentially affected; or (v) If the scientific community or the public should be informed.

45 C.F.R. 689

Structure of the Investigation

Most institutions use committees or panels of qualified individuals to perform investigations. Some, however, delegate this responsibility to a single individual. Some institutions allow for appeals to hearing boards, others have the hearing boards conduct the investigation. The investigation may be exclusively a fact-finding process, or it may roll all into one process fact-finding, adjudication and discipline, or be some hybrid of all these elements. This makes it difficult to generalize about the process. Each structure has advantages and disadvantages, some of which will be discussed below.

Because investigation panels are the most commonly used structure, however, and because the use of panels raises many complex issues, that model is most discussed below. Many of the considerations that arise with panels apply equally to other investigation structures as well. The adoption of one model over another should have been considered during the development of the institution's misconduct policy. Many of the considerations can be reviewed in Beyond the "Framework": Institutional Considerations in Managing Allegations of Misconduct in Research, published by the Association of American Medical Colleges (in back pocket of notebook). See also the article by Herman et. al. in the May/June 1994 issue of the Journal of Higher Education, "Investigating Misconduct in Science: The NSF Model." (See Other Materials section). Foremost among those considerations is finding a process that allows for and separates the multiple functions necessary in investigations: fact-finding from adjudication and substantive judgments from logistical requirements.

Selecting a Panel

Members of investigation panels must not have any significant personal connections with the individuals or the research under investigation. They should receive a direct statement of disqualifying conditions, personal or professional. Questions to address include:

- Has the prospective panel member served as a reviewer of the respondent’s work in a way that might impart the appearance of bias?
- Has he or she engaged in any collaborations that don’t appear on the CV?
- Are there publications in press with co-authorship?
• Are there any other professional relationships (e.g., mentor, mentee, co-PI, etc.)?

• Are there any family or personal connections not apparent from the professional record?

Other issues to assess in assembling a committee:

• Personal qualities;
• Role within institution (e.g., reporting and supervisory relationships);
• Professional status (e.g., scholarly achievement, field of specialization; employment status);
• Institutional affiliation;
• Generational, racial and gender issues; and
• Remuneration (especially for outside experts and non-institutional committee members).

Procedure for Selection: Generally, the process of identifying a panel member or expert and securing his or her service should involve:

1) Identification of criteria for service and individuals who meet them;
2) Initial contact with prospects to determine their ability and willingness to serve;
3) If willing to serve, request a copy of the CV;
4) Opportunity for subject to challenge, if provided by institution’s policy;
5) Second contact with panel member in which name of respondent is revealed (with another check for conflicts of interest) and confirmation of final arrangements for service.

You may get questions from potential panel members about legal liabilities stemming from service on the panel. This should be addressed by institutional policies, but in general, panel members must be fully indemnified by the institution.

Charging the Panel: Scope of the Investigation
The charge letter will be a pivotal document throughout the investigation, and should be drafted with care. The specific charge to the panel and any questions posed in it will guide the panel’s work throughout the investigation, and will be especially important as the panel begins to draft its report.

It is likely that the report will follow the structure of the charge and that the final report will follow that structure closely. Indeed for legal reasons, the panel may be advised to address itself only to those matters specifically raised in the charge, unless information they gather in the course of their work has broadened the scope of the investigation, in which case there is likely to be a document detailing the broadened charge. Unfortunately, it is difficult to draft a charge that provides a good structure for reporting the results of the investigation in advance of knowledge of the facts the investigation is to uncover! Thus we come to the art of charge-drafting.

Issues charge letters must address:
• the policies and regulations that govern the panel’s work;
• the time frame in which the task should be completed;
• to whom the report should be submitted;
• leadership/chaair of panel;
• confidentiality;
• staff/resources for panel;
• relationship to prior procedures, including access to records of those procedures;
• what evidence to seek and how to seek it;
• requirements for responding to additional allegations or other matters that surface during the investigation;
• legal status of panel members (e.g., indemnification, relationship to institution, role in later proceedings, if any);
• sufficient specificity as to substance of their work that the subject can defend against the charges, including special topics that must be addressed (i.e., malice in bringing charges, pattern of conduct, etc.);
• general structure of the report sought.

Materials To Provide in Advance of First Meeting
In most cases, it is efficient to provide the panel with various documentation about the case before their first meeting. This usually includes, at minimum, the charge letter, a copy of all regulations governing the investigation, and an orientation to the investigation process. If available and if there are no other arguments against the step, it can also be useful to send the following items before the first meeting: a copy of the inquiry report and any reply to it made by the respondent, and relevant documentary evidence, including any publications at issue and written statements submitted during the inquiry. See also section on Organizing Evidence for the Panel.

Orienting the Panel
At the first meeting, the panel—no matter how experienced its members—should receive an orientation about the role of the panel, the applicable regulations and ground rules for the investigation (including their own legal status during it and after the process concludes), the importance of an objective and thorough investigation, and cautions about maintaining the confidentiality of the process. Some of this material will be a repetition of information in the panel orientation document (See Casebook section). Repeat it anyway.

At this or a later meeting, the panel should receive an example of what an investigation report looks like, so they will know to what end they are working. There are many ways to go about structuring a report, and the panel will have plenty of room to follow its own instincts, but presentation of some examples can help the panel to understand the level of rigor to which they should aspire.

Other items to consider addressing in first meeting:
• a discussion of the dynamics of the investigation process;
• requirements for a fair and balanced process;
• need for rigor and objectivity;
• distinction between presentation and substance in interviews;
• confidentiality obligations;
• avoiding *ex parte* communications with any participants;
• the role of panel members in relation to other participants in the process (e.g., staff, institutional officials, etc.);
• who is responsible for dealing with the press, the subject, the federal agency and the lawyers associated with the process, and what protocols apply to others in the process who are not designated in those roles; and
• what happens to their report when it is finished.

**Developing an Investigation Plan**
At the first or second meeting, the panel should sketch out a plan for their investigation. Consciously developing an investigation plan professionalizes, depersonalizes and intellectualizes the process.

Elements to be addressed:

• information needed to answer the questions posed by the charge letter.
• what information is needed and who has it;
• what evidence must be collected;
• how information presented by various witnesses will be captured for the record of the investigation;
• how interviews will be conducted;
• access to/need for specialized expertise outside that of panel members;
• attendance at meetings;
• rights of the accused;
• review of roles of staff, legal counsel, etc.;
• how panel members will communicate with staff and each other;
• how decisions will be reached (voting vs. consensus, majority/minority opinions, etc.);

Institutional policy or procedures may stipulate how matters of this nature are to be handled; there may be a “misconduct officer” who supports the panel and can provide such information or the panel chair may propose procedures on a number of these points. Whatever the precise details, panel members should leave the first meeting(s) with a basic understanding of the process and their role in it.

If your institution includes a hearing process as part of the investigation, there are some additional considerations to be addressed as part of the investigation plan. The following questions are taken from *Beyond the “Framework”: Institutional Considerations*
in Managing Allegations of Misconduct in Research, published by the Association of American Medical Colleges (in back pocket of notebook):

- Would a hearing be a routine element of the institutional review process?
- What are the elements of a hearing?
- Should the hearing be open to the public?
- How should the hearing report be prepared?
- Are multiple hearings possible?

If your institution uses a hearing as an appeal or adjudicatory mechanism rather than as a mechanism to assist with fact-finding during the investigation, then it is not necessary to address these questions as part of the investigation plan.

Putting the Plan into Effect
As the investigation plan is implemented and various information gathered, the investigation plan should be reassessed. Questions to be asked include:

- Are there other items necessary for coming to well-founded conclusions?
- Has the scope of the investigation been altered by any of the evidence? (Sometimes, it may be necessary to seek an expansion of the scope of the investigation.)
- Have others been identified who should be viewed as subjects?
- Is different expertise required than initially anticipated for the evaluation of the available evidence?

A conscious periodic re-examination can be very helpful in keeping the investigation on track and within its prescribed bounds.

One of the most important considerations in implementing the plan is keeping the subject of the investigation notified of the progress of the investigation. The process will be stressful (and investigations always take longer than seems possible to any of the participants), so some plan for periodic notifications of the stage of the proceedings is helpful. As much of the investigation plan as possible should be shared with the subject, as well. There are items that can and should not be shared with the respondent (e.g., particular questions to be asked of witnesses under certain circumstances), but even a broad-brush notion describing the various steps can be helpful in assuaging anxiety. For example, the subject could be told that the panel will be spending time seeking or performing various analyses of data, following which witnesses will be interviewed, all of which will take place before the panel begins to prepare its report.

If some aspects of the charge can be separated from others and definitively resolved, letting the subject know that can be appropriate. For example, if exculpatory evidence on a charge that is distinct surfaces, which in the view of the panel closes out that issue, notifying the subject of that while other items are examined can be helpful in lowering the subject's level of stress, contribute to focusing the rest of the investigation and is only fair. Such a step should not be undertaken lightly: if there is any chance the panel may change its mind, this notification is obviously inappropriate.
Another difficult, and often controversial topic, is how to deal with the complainant throughout the process. It is essential not to allow (or require) the complainant to become the prosecutor; a clear understanding of the role of that individual throughout the process will be essential to a sensible and credible investigation. The process belongs to the institution, not to the complainant!

D. Investigation Panel Meetings

In addition to keeping and organizing all documentary evidence (discussed below), record should be kept of each date the panel meets, those present, and the times of the meeting. In keeping a record of the investigation (necessary for subsequent appeals and reviews), make clear distinctions between fact-finding and deliberative elements of the process. Records of fact-finding interviews and meetings should be kept. Under no circumstances should panel deliberations be recorded; the only record of the panel’s deliberations should be the final report. The report should fully explain all reasoning used to develop the conclusions, as well as all evidence on which the conclusions are based.

Interviews

There is no one right way to record information provided through interviews, but it must be recorded in some fashion so the subject of the investigation has an opportunity to respond to it and so later reviewers of the investigation can know what information was provided by whom. Common options for memorializing interviews include:

- tape-recording the entire session;
- using a court reporter for interviews;
- summarizing testimony and having each witness review and correct/approve a written summary of his or her testimony.

The investigation plan should address how the panel will go about its interviews. Items that should be included are who will start off the meeting, and what information about the process will be shared with those being interviewed. One sample statement with alternative paragraphs for various uses can be found in the Casebook section.

Order of Interviews: Usually, the first interview is with the respondent. Other candidates for early interviews can include the whistleblower, if any, and key witnesses. It is desirable for these interviews to occur in close proximity to each other. For example, if there are one or two main witnesses or complainants, these people should be interviewed, if at all possible, on the same day the panel first meets with the respondent.

Seeing people with opposing views on the events in question in close proximity to each other will help highlight the areas of disagreement and ought to give the panel insight into the information it will need to come to its own view of the matters before it. It also provides competing narratives for the panel to test throughout the process. Because a story is almost always more compelling when hearing only one side, if the panel hears only from the respondent (or the complainant) in the course of a meeting, and then does not receive contrasting views of the events for several days or weeks, the work of the panel may be considerably complicated.

If scheduling difficulties make it impossible to have divergent views presented to the panel in close proximity to each other, members of the panel will need to be cautioned about accepting any story at its face value, and to be reminded that they will hear other
versions in due course. Nonetheless, if at all feasible, it is important to juxtapose competing perspectives as closely together as possible.

**Interview Protocols:** It can be helpful to provide witnesses with a list of questions or topics in advance of the meeting. If this technique is adopted, the witness should be cautioned that the list represents only a starting point for discussion, and that other questions will be asked during the meeting. The list should not include questions to which the witness’s first reaction is important, nor questions for which the witness might construct post hoc answers (and accompanying evidence) that could distort the investigation. That is, there are circumstances in which telegraphing the panel’s interests could invite destruction or manufacture of evidence: it is simply unwise to set up such a situation by providing the questions in advance. But where there are introductory questions for which little such danger exists, provision of these questions in advance can significantly reduce the anxiety of a witness before the meeting.

Providing a list in advance can also bring focus to the meeting, and allow it to progress more efficiently. Finally, for witnesses who are not especially articulate or quick on their feet, or those for whom communicating in writing is more comfortable than oral interactions, the list allows them to prepare for the meeting and have answers and relevant documents for the panel. A sample list and disclaimer about the additional questions that may be asked can be found in the Casebook section.

If the panel decides not to provide in advance questions to the witnesses (and there are circumstances in which it is neither feasible nor appropriate to do so, such as when the danger is too high that evidence might be manufactured or destroyed), the panel should still prepare a list of initial questions for each witness and designate which panel members will ask certain questions. This organizes the panel—and the meeting with the witness—and improves the quality of information obtained. If the panel has talked about possible directions the testimony might go, it can sharpen the panel’s attention to what the witness does say (and does not say). On the other hand, a list of questions developed in advance should not prevent the panel from following up on information provided or developing that the panel did not anticipate. The function of the list should be to provide a check at or near the end of the interview that all relevant topics have been explored; it should not be used as a rigid template which must be followed regardless of the answers to preceding questions.

The investigation plan should have addressed the conduct of interviews, including whether the panel performs all interviewing or whether some witnesses and/or topics are assigned to staff or to subsets of the committee. In general, witnesses whose credibility and/or testimony are central to the disposition of the case should be heard by all panel members in the same fashion: if staff are performing interviews, all panel members should receive the same report of the interviews (i.e., either a transcript or a signed statement from the witness). If panel members are to perform the interview, all members should be present if at all possible. The level of information provided by an in-person interaction is much higher than that provided through a written or oral record. It is highly desirable for all panel members to be working from the same level of information.

**Truth and Misdirections:** One of the biggest problems with panels of academics is that they are generally simply unprepared for witnesses to lie to them. The article by Donald Buzzelli cited above makes the following comment:

Another problem is that university investigators may not be willing to consider the possibility that anyone is lying or giving testimony that is
untrue for any reason. We sometimes notice that they take the explanations that the subject gives at face value. If that person’s story could be checked by examining more documents or interviewing more witnesses, that sometimes is not done. Similarly, there may be a reluctance to go to the individual’s office and examine files.³

A different category of problem arises when a panel wishes to circumscribe their interviews on the grounds that multiple interviews will spread the word about the investigation too broadly. (This happens more commonly than you might think!) The panel has a clear duty to pursue all evidence relevant to the work it is charged with examining. This impulse to limit the scope of the investigation to avoid reputational damage must be discussed forthrightly in light of the panel’s responsibilities. These issues must be addressed and resolved in favor of compiling as thorough as possible a record of the relevant evidence.

E. Special Problems

Jurisdiction Over Witnesses / Securing Testimony
Occasionally, problems with cooperation in an investigation arise. Questions like the following are not infrequent:

- What if a witness within the institution refuses to be interviewed?
- What if the witness is from another institution?

Comment: Your institution’s policy should include a clear statement about the obligation employees to participate in these procedures. If relevant witnesses are at other institutions, seek assistance from that institution’s officials in securing cooperation and from appropriate funding agencies. On the rare occasions when there is no official channel to provide assistance or the individual refuses to cooperate even after such intervention is sought, panels typically have little further recourse than to note the non-participation and the inferences the panel draws from that behavior.

Definitions of Misconduct
One of the most difficult issues will be defining the standards for judging the conduct being evaluated. Very few institutional policies define the conduct they proscribe, and federal regulations also fail to provide definitions. Be prepared to answer the following questions:

- what is plagiarism?
- what is fabrication?
- what is falsification?
- what are the standards of the discipline?
- how are answers to these questions established?

For investigations falling under the jurisdiction of the National Science Foundation, you will be expected to provide answers to the following questions:

1) Did the alleged actions happen?

2) If they did, do they deviate from the ethical norms of the relevant scientific community?

3) If so, is the deviation serious?

Seriousness: NSF will expect the institution to make a judgment as to whether what happened is a serious deviation from professional standards; this is a topic the panel should address in its report. Some panels address this question by invoking the category of “questionable practices” defined in the report on Responsible Science issued by the National Academy of Sciences.

The following notes were contributed by Donald E. Buzzelli on this topic:

University committees investigating misconduct allegations sometimes make use of the category “questionable research practices” that appears in the report Responsible Science issued by the National Academy of Sciences. Questionable research practices are “actions that violate traditional values of the research enterprise and that may be detrimental to the research process. However, there is at present neither broad agreement as to the seriousness of these actions nor any consensus on standards for behavior in such matters.” Thus, the report states that such actions are not misconduct in science and should not be subject to regulation by the government. The report provides a list of examples of questionable research practices. While this list is helpful, university investigators should not assume that the practices listed can never be misconduct in science.

NSF’s regulation defines misconduct in science, fundamentally, as “serious deviation from accepted practices” in the scientific community. This definition requires alleged acts of misconduct to be assessed in terms of whether they are sufficiently serious deviations from accepted practices to be misconduct in science. The standard for what counts as serious ultimately is the judgment of the relevant community of scientists. Many actions by NSF grant applicants or grantees may be undesirable, but still may fail to meet the test of seriousness. Such actions may call for remedial actions by the perpetrator’s institution, but it would not be appropriate to treat them as misconduct in science under agency regulations.

Hence, a classification like “questionable research practices” is needed for actions that are not serious enough to be treated as misconduct in science. As the Responsible Science report suggests, seriousness is the appropriate standard for distinguishing between misconduct in science and a questionable research practice, and the criterion for deciding which has occurred is the “broad agreement” or “consensus” of the relevant community of scientists.

However, the assessment of seriousness must be made on a case-by-case basis. Although the practices in the report’s list would usually not be misconduct in science, it is not possible to say that those activities could never be misconduct in science. For example, NSF has dealt with an instance of exploiting subordinates, one of the items on the report’s list of questionable research practices,” that was so egregious that it had to be treated as misconduct in science.

When dealing with any allegation of misconduct in science, an institution has to determine whether the alleged action occurred and, if so, whether it was serious deviation from accepted practices in the eyes of the relevant
community of scientists. It may be difficult to make the latter assessment, but making it is an important part of the institution’s responsibility in dealing with a misconduct case. Lists of questionable practices can be useful, but they do not replace this exercise of professional judgment.4

Since 1994 or so, the Public Health Service does not enforce the “serious deviations” portion of the federal definition of misconduct in science, so the question of seriousness is not likely to arise.

Plagiarism Cases: If an inquiry has determined the existence of words in a publication by the respondent that come from another source without attribution or citation (i.e., plagiarism), a common charge for an investigation is to determine whether there is a pattern of such problems in the work of the respondent. There are sophisticated computer-based tools available for detecting such patterns, which assist only in comparing already-identified documents. That is, they require the panel to make assessments about the body of literature against which to compare the subject’s publications and to review all output for the purposes of making appropriate professional judgments.

One useful source that a panel should consider in adopting a definition of plagiarism for judging the work of subject of a misconduct investigation is the standard your institution uses for judging the work of its students. Many university codes of conducts have extensive and clear definitions of plagiarism. If the panel concludes that a lesser standard applies to faculty members, this is an item their report should address. NSF will use the “serious deviation from accepted practices” standard.

Fabrication and Falsification Cases: If the issue is falsification or fabrication of data, the specific work or works in question should be referenced, and questions about those work(s) raised. For example, if there has been difficulty in confirming the work or particular data have been called into question, those should be listed in the charge letter. A meaningful decision about fabrication and/or falsification will require that the original effort to secure data from the laboratory of the subject was thorough and well-documented. It is exceedingly difficult to draw conclusions without such evidence, and the failure to do so will reflect very poorly on the institution in question. Fabrication and falsification cases frequently require reanalyses of specimens. Panel members may not be well situated to perform these analyses themselves, for a variety of reasons. The institution should provide assistance with locating, contracting with and expediting experts to assist with this task.

The Role of Intent
Assigning an appropriate role to intent for conduct revealed in an investigation is one of the most difficult aspects of the investigation process for university panels, and is the one that most compromises their reports. Many academics are uncomfortable imputing intent, the standard approach to this problem in legal proceedings. Instead, panel reports all too frequently say, in one form or another, “the subject said he didn’t mean to plagiarize; plagiarism requires intent; therefore this is not plagiarism.” This is not an adequate treatment of the matter of intent. Intent is relevant to virtually every case: accepting this and dealing with it head-on will make your life infinitely easier than attempting to avoid the question and having to deal with it after-the-fact in fielding queries from federal agencies or other challenges to the report.

4Personal communication from the author, November 1, 1994.
The Office of Research Integrity seems to be requiring proof of intent to deceive to make a finding of misconduct in science, following the rulings of the Departmental Appeals Board in the Popovic and Sharma cases (referenced in bibliography).

NSF standards are slightly different. The following comments from the Office of the Inspector General at the National Science Foundation may prove useful. The core of the passage is that there are two elements required for a finding of misconduct: the commission of a "bad" act (through omission or commission), and enough intent that it is appropriate to take action against the subject. Specifically:

Establishing a subject's level of intent must be accomplished indirectly, because there is no direct means of probing a person's thoughts. ...

One may infer that a subject is aware of the natural and probable consequences of acts knowingly done or omitted. Such an inference does not, and must not, shift the burden of proof, which is at all times on the party attempting to establish that misconduct occurred.

Some acts that can constitute misconduct in science are of a nature that allows the natural inference that they were done with at least the subject's knowledge because it is extremely unlikely that the act could have been committed unwittingly. For example, it is highly unlikely that two people writing a substantial passage on the same subject would use the exact same words....

Evidence reviewed for assessing level of intent may also include evidence of other acts, including other acts of misconduct in science.... a finding of misconduct in science may be based on reckless action. Thus, a subject may be found to have committed misconduct even though the subject did not intend to deceive—if it is determined that the subject acted in a way that was a serious deviation from the way a reasonable person in the circumstances would have acted.5

See also the letter of referral to an institution used by the Office of the Inspector General that can be found in the Federal Regulations and Documents section.

Note the following comment: "an institution dealing with a misconduct case cannot simply decide the task is impossible and decline to make a determination about the level of intent—and thus conclude that no misconduct occurred."6 (emphasis added)

Finding a pattern of acts is one of the cleanest ways for academic panels to terms with the difficulty of imputing intent: this requires, however, that the fact-finding process be rigorous and thorough enough to detect and establish a pattern of conduct. In particular, it means that a panel must examine all relevant evidence in its investigative work. Federal agencies reviewing institutional reports will examine both the quality of the fact-finding and the rigor of a discussion about intent.

Not infrequently, a panel will find that the work in question was 'shoddy' but not bad enough to rise of the level of misconduct in science. Put another way, the question in such a case is whether the subject has displayed a level of negligence that exceeds the standards the scientific community would expect of a reasonable scientist. Note that

6ibid.
negligence can be above or below the level needed for a finding of misconduct according to federal oversight agencies. Defining the lines between incompetence, inadvertence, and misconduct is a chore the investigation panel must assume.

The following items will provide support for reaching a decision in a structured and meaningful way:

- a rigorous evidentiary record;
- clear guidance on the standard of evidence being applied;
- help with applicable definitions;
- an understanding of how intent is to be assessed and factored into the decision;
- someone chairing the panel with skills at running meetings.

**Standard of Proof**
Federal agencies use a "preponderance of the evidence" as the standard of proof for findings of misconduct.

- what standard of proof does the institutional policy use?
- how do panel members apply that standard?
- who assesses the evidence according to the agency standard, if it is different from that of the institution?

If your institution uses a higher standard than the federal agencies, and your report must be submitted to an agency for review, your process should include a step that re-assesses the evidence in light of the federal standard of proof.

**Litigation in the Midst of an Institutional Process**
If litigation arises during the midst of an institutional process, all decisions about continuing or halting the investigation must be deferred to the institution's lawyers. This occurs occasionally, with widely varying results. Courts often decline to intervene in an institutional process that is not complete, but this is not the universal rule. Similarly, if the Department of Justice or an individual citizen is pursuing a *qui tam* action under the False Claims Act, the institutional process may be brought to a complete stop.

Needless to say, if legal action can be avoided while the process is underway, that is desirable. One prophylactic action that can help is to assure that any outside attorney involved with the process has an institutional attorney with whom to interact. Neither an investigation panel or university staff should be dealing with outside lawyers in the absence of institutional legal support.

**Multi-Institutional Investigations**
Investigations involving multiple institutions can be very complicated; there is little useful generalized advice to be offered. Some principles apply: get institutional officials with corresponding responsibilities in contact with each other as early as possible; involve federal agencies if required to establish jurisdiction and the responsibilities at each institution; establish and maintain the best possible communication between institutions that the legal staff will permit.
F. Developing the Report

There must be a written report of an investigation. Both NSF and PHS require copies of written reports, and the institution will need one as well. One issue that must be acknowledged and addressed fairly early is the fact that institutional and agency needs may differ. (See section on Special Problems.)

Federal Requirements
The requirements of federal agencies for investigation reports are contained in federal regulations and explained in various ancillary documents. Please note that federal agencies will expect an unequivocal statement of whether the institutional investigation made a finding of misconduct in science. The agencies will also seek information on the actions taken by the institution in response to the investigation report. (Copies of the regulations and related documents can be found in the Federal Regulations and Documents section)

For example, the Dear Colleague letter of the Office of Inspector General at the NSF explains NSF requirements for an investigation report. These reports must be submitted (or an extension sought) within 180 days of the initiation of the investigation.

The report must include:

- a description of the allegations investigated,
- a list of the individuals responsible for conducting the investigation,
- the methods and procedures used to gather information and evaluate the allegation,
- a summary of the records compiled,
- a statement of the findings with reasoning supporting those conclusions, and
- a description and explanation of any sanctions recommended and/or imposed by the institution.

"Dear Colleague" Letter, August 16, 1991, National Science Foundation, Office of Inspector General

The regulations of the Public Health Service require submission of a report within 120 days of the initiation of the investigation, unless an extension is granted. They require a report to include:

- the policies and procedures under which the investigation was conducted;
- how and from whom information was obtained relevant to the investigation;
- a summary of the testimony of witnesses;
- the findings, and the basis for the findings, including the actual text or an accurate summary of the views of any individual found to have engaged in misconduct;
- any sanctions taken by the institution.

42 C.F.R. § 50.104 (c)(4)
As stated above, NSF will seek a discussion of intent, a discussion of scientific community standards relevant to the conduct in question (including whether those standards have been violated by the conduct under examination), and a discussion of the seriousness of such violation.

**Organization of the Report:** The report should generally have sections addressing each of the following topics:

- the authority under which the panel operated (policy, procedure, regulation);
- the definitions applied;
- the history of the matter (i.e., the allegation & inquiry);
- the charge;
- particular findings for each element of the charge;
- discussion and weighing of the evidence;
- conclusions;
- recommended response to the conduct described and/or sanctions, if institutional policy provides for panel to formulate recommendations.

**Review of the Report:** Beyond the “Framework”: *Institutional Considerations in Managing Allegations of Misconduct in Research*, published by the Association of American Medical Colleges (in the back pocket of the notebook) raises the following questions:

- Should respondents receive a copy of the report before it is finalized? Should they have a chance to respond in writing? Should any such response be included in the record transmitted to third parties or off campus?
- Should a complainant be given an opportunity to read and comment on a preliminary report?
- Should a complainant be permitted to read and retain a copy of any final report?
- What is the importance of the report to future action?
- Should the report’s conclusions be in the form of a recommendation from the misconduct review committee to other campus authorities or be presented as a final decision?

At the University of Illinois, we routinely allow the subject of the investigation to review and comment upon the factual accuracy of the final draft of the report. We usually deliver the report with a request that the subject comment upon the factual accuracy. We ask the subject to indicate passages he or she believes are in error, along with the submission of or reference to evidence supporting the contention of error. This works to eliminate misunderstandings or errors before the panel completes its work. In addition, a pre-submission review allows the subject of the investigation ample opportunity for making the best possible case for his or her view of the situation. This practice not only strengthens the final report, but strengthens the fairness (and the perceived fairness) of the investigation.
Note: If your institution has not accorded the subject of the investigation an opportunity to comment upon the report either before or after its submission, the federal agency will do so.

We do not allow the complainant to review the report. Neither do we routinely provide the complainant with a copy of the final report.

Audiences for the Report
One difficulty in preparing an investigation report is that it serves several different audiences simultaneously. In theory, this should not pose a problem, but this is not always the case in practice. For example, the subject of the investigation (and his or her attorney) will read and have an opportunity to respond to the report. At the same time, institutional officials who must act upon the report by imposing sanctions or closing the case must be satisfied with it, the institution’s lawyers must feel comfortable defending the report if it is challenged legally, and federal oversight agencies will be using the report to assess whether the institution’s investigation meets their standards. Especially if the subject of the investigation is a compelling individual, there will be temptations on the part of the report writers to soften its language and/or make extended explanations of findings. This, however, may lead to difficulties with the attorneys, who will seek as short and clear a report as possible and with federal agencies, who will be testing the rigor of the report. Whatever balance is ultimately struck, every statement in the report should be rigorously tested against the available evidence and facts.

There are different models for development of the report. The basic ones are:

- members of the investigation panel write the report themselves;
- staff to the panel prepare drafts, following instructions from panel members;
- the panel’s assigned attorneys prepare the report.

Each has strengths and weaknesses, and it is not necessary that only one approach be followed for the entire report.

It is essential that those responsible for procedural compliance and the institution’s lawyers review the report before anyone outside the investigation panel receives a copy.

After a draft of the report has been developed, let it rest for a few days, and then ask the panel to review it as they would a publication in their professional field: if it meets their professional standards when viewed in this light, proceed to the next step. If not, seek appropriate revisions. Particularly to be avoided are inflammatory language, unsubstantiated claims and unfounded inferences.

Federal Review of Institutional Reports
The periodic publications of both the Office of Inspector General at the National Science Foundation and the Office of Research Integrity for the Public Health Service discuss the elements of the federal review repeatedly, and in some detail (see a sampling of these statements in the Federal Regulations and Documents section).

In essence, staff at federal oversight agencies will look for compliance with specific requirements of federal regulations, for completeness, fairness, and the quality of the logic in the ultimate conclusions of the report. Weak arguments about intent or bad
exculpatory arguments ("he said he didn't mean it, so the requisite level of intent was not present") are likely to serve as special red flags.

Federal agency officials will review institutional reports to determine whether they conform to agency requirements. If they do not, there are three possible outcomes: the agency will accept the institution's report and findings; the agency will query the institution on its findings; or the agency will reject the institution's report/findings as inadequate and initiate its own independent investigation. Either of the latter two outcomes can take years to reach conclusion. This reinforces the importance of doing as thorough a job as possible at the institution, to avoid either of these outcomes!

- When does the report become “final”?
- What happens if the subject appeals the decision (inside the institution and outside the institution)?

Comment: The completion of the institution's investigation process is determined by institutional policies. This may not be much consolation if a federal agency intervenes or the federal appeals process is invoked. The institution may or may not be prevented from taking action based on its completed process, depending upon the nature of the external action underway. Seek legal advice.

G. Sanctions

If a finding of misconduct is reached, the following items must be considered when developing the institutional response:

- whether the conduct at issue was an isolated incident or part of a larger pattern;
- the seriousness of the conduct;
- the institution's view of the subject's truthfulness;
- the extent to which the subject takes responsibility for the conduct;
- the degree to which remediation and/or rehabilitation is possible or likely;
- the larger consequences of the conduct and the message sent by the institution's response to it;
- the tools available within the institution for applying sanctions.

If a finding of misconduct has been reached, the next question to arise is how to structure an appropriate response. For faculty members, the range of sanctions is generally: letter of reprimand, restrictions or limitations imposed on various freedoms (these freedoms include supervision of graduate students or trainees, submission of grant applications, access to certain facilities, graduate faculty status, etc.), suspension with or without pay for various periods, dismissal. The exact range will depend on the institution's governing structure and contractual agreements with faculty and other and other staff members. You may find especially helpful the article by Eleanor Shore included in the Other Materials section on this topic: "Sanctions and Remediation for Research Misconduct: Differential Diagnosis, Treatment and Prevention." (Academic Medicine Special Supplement, 1993).
For students, one option is always revocation of a degree or degrees granted by the institution.

If there is no finding of misconduct, there may still be questions of unethical or unacceptable conduct the panel or the institution wishes to address. The ability to do so will again be guided by the institution’s policy and legal staff. Actions most frequently considered in this arena include the assigned development of laboratory practices manuals and/or development of courses on the ethical conduct of research.

H. After the Investigation Ends

Frequently, an attorney representing the subject of an investigation, or the subject acting on his or her own behalf will propose a settlement in lieu of a finding of misconduct. Often, the offer is that the subject will resign if the institution will withdraw the finding and/or refrain from making its findings public. The institution’s freedom of action in this situation is affected by its interactions, if any, with a federal agency. If a federal agency has jurisdiction over the investigation, the institution obviously cannot bind the agency, so a settlement may not achieve the goal sought by the subject. Because the institution’s settlement cannot bind a federal agency, the agency may require that the institution conduct an investigation anyway, or the agency may proceed on its own to conduct or extend an investigation. The settlement cannot excuse the institution from its responsibility to inform the agency of the outcome of its investigation, to provide a thorough investigation report, and to cooperate with any agency review. Especially, a settlement should not attempt to prevent parties from providing information to a federal agency.

If a settlement is possible, the following factors should be considered:

- who to bind by a settlement document, and who to exclude;
- the duration of any agreement;
- any exceptions to the institution’s ability to comment on the events (e.g., what the institution may say to prospective employers about the subject);
- financial agreements, including affect on benefits and retirement status.

As a matter of principle, a number of commenters have made the point that public revelation of findings of misconduct is a very important practice for the health of the overall academic/research community. Any agreement to withhold information on documented misconduct should be reached only after consideration of the institution’s responsibilities in this larger context, and with full recognition of the consequences of disclosure of the agreement by others (e.g., whistleblowers).

Notifications

Certain notifications may be required and/or necessary at the end of an investigation. If there is no finding of misconduct, the subject should be consulted about the form and content of notifications to all those interviewed and those who otherwise became aware of the investigation.

If there is a finding of misconduct, beyond required notifications of federal agencies, there are questions of journals and retractions to consider, as well as collaborators who were not directly involved in the case.
For cases involving funding from the Public Health Service, a finding of misconduct will lead to publication of the finding in the Federal Register as well as the ORI newsletters, and entry into the PHS Alert system.

**Record-Keeping**

All investigation records should be kept at minimum until any federal oversight agency has completed its own review of the case. In addition, investigation reports fall under regulations requiring record-keeping related to grant funding such that institutions are obliged to keep the records for three to five years after the grant providing federal funds has expired. Specifics should be explored with your legal counsel.

Whatever the outcome of an investigation, a thorough record of its conduct must be retained in central files while certain materials must be retrieved, including all distributions to panel members. (The respondent should not be affected by this process.) If the outcome of the investigation was a finding of no misconduct, good practice is to offer to seal the records of the investigation under clearly defined rules so that the subject can recover from the process to the greatest extent possible without unsubstantiated allegations contaminating his or her institutional life. However, it is critical that adequate documentation of the proceedings is retained in the sealed record: it is always possible that a funding agency will disagree with the institution’s findings and direct that an investigation be conducted, or that subsequent litigation will call for the records of the investigation.

It is important that documents kept in the enduring file be examined to ensure that an innocent individual cannot be harmed or embarrassed by inadvertent disclosure. This is particularly important when clinical research is involved. At all stages of document retention, expunge the names of patients (or other persons) when they are not relevant to the detailed analysis of the alleged misconduct.

Just as every inquiry or investigation begins with concerns raised by an individual who is dissatisfied and often upset, so too the resolution of allegations raised results in one or more equally distressed individual(s). The likelihood of complaints, including possible litigation, against the resolution/inquiry/investigation process and against administrative staff is high. However, it is simply not possible to retain certain kinds of research materials that were germane to the conclusion. Detailed descriptions of these materials, written so as to be meaningful to a scientist familiar with the area of research, can be substituted, just as descriptions or opinions written by expert witnesses serve as proxies for non-paper exhibits in the judicial system.

Remember that most misconduct procedures are disruptive to the ongoing research and scholarship of the affected laboratory. In some cases, parties distinct from the subject may not be able to pursue their research because needed research materials were secured. It is imperative to reduce this collateral damage as soon as possible.

Finally, when a record is sealed, give some consideration to its shelf life. That is, it may be asking for trouble to keep these records for too many or too few years following the resolution of a case. Seek legal advice on this matter.