Ethical Evaluation of Misconduct Cases

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The policies governing the actions of the Ethics Committee at the University of Hawaii were developed during the late 80's when the dominant paradigm for Ethics investigations was the "whistleblower" model. In this model a person of relatively low power in the academic hierarchy complains of scientific or ethical misconduct perpetrated by a person of higher rank and/or power, typically within their own academic unit.

For such cases to be handled in an appropriate manner (and to ensure that whistleblowers feel free to come forward) the confidentiality of the complainant must be carefully protected. Administrative procedures should minimise the chances that the accused person can use his/her academic power: a) to have the complaint disregarded without adequate investigation and/or, b) to instigate reprisals against the whistleblower. However, innocent faculty also need to be protected from frivolous or malicious complaints. Thus, an initial Inquiry (Phase 1) was required, during which the existence of the complaint is withheld from the accused, with the accused being informed and interviewed only after the complainant has convinced the Review Panel that a thorough investigation is justified. At that point, a full Investigation (Phase 2) is initiated, the accused is informed of the complaint while his/her lab notebooks, computer files and other pertinent sources of information are immediately sequestered. The accused then has the opportunity to present detailed rebuttal. If the evidence in support of this rebuttal seems inadequate, then the committee so reports to the Administration and a more formal Phase 3 Hearing is set up. It is only after the innocence of the accused has been reasonably established (typically following the completion of Phase 2) that more difficult issues may be considered, such as the possibility that the complaint was motivated by envy or by malice. Furthermore, to conclude that the complaint is malicious requires the committee to assess the motivations of the accuser at the time the accusation was made. Thus, even if strong suspicions exist, it is not likely that sufficient evidence will be uncovered to confirm suspicions of malicious intent.

Despite the even-handed principles involved in this approach, the Inquiry Phase of such investigations is necessarily limited to evidence provided by the complainant. And, more significantly, both Phase 1 and Phase 2 primarily address the guilt or innocence of the accused. While we understand that this sharp focus is appropriate in some situations, our experience suggests that this is *not* necessarily a "one size fits all" model. This committee has experienced scientific misconduct cases in which this approach prevented a fair and balanced Inquiry. We suggest that specific circumstances exist in which policies based on this model may need to be modified to ensure an appropriately ethical analysis of the complainant's case.

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Year	Complaint	Outcome	Whistleblower protections	Collaboration Breakdown	$$ issues
92	Intel. Prop. Theft	Sustained	Required	No	No
92	Plagiarism	Sustained	Required	No	No
93	Plagiarism	Dismissed	Required	No	No
93	Admin. Miscon.	Dismissed	No	No	No
94	Plagiarism	Sustained	Required	No	No
95	Authorship	Dismissed	No	Yes	No
96	Intel. Prop. Theft	Dismissed	No	Yes	No
96	Intel. Prop. Theft	Dismissed	No	Yes	No
97	Intel. Prop. Theft	Negotiated	No	Yes	No
98	Misapp. of funds	Reimbursed	Required	No	Yes
99	Theft/fabrication	Dismissed	No	Yes	Yes
99	Intel. Prop. Theft	Dismissed	No	Yes	Yes
99	Intel. Prop. Theft	Sustained	No	Yes	Yes
99	Sci. Miscond	Sustained	No	Yes	Yes
00	Hum Subj. issue	Sustained	No	No	No

Table 1. Analysis of cases presented to the University Ethics Committee from 1992 to 2000

Results

Despite the many high-profile cases, nationally, which seemed to fit the whistleblower model during the 80's and early 90's, we have noted significant changes in the nature of the complaints coming before our committee over the last five years (see Table 1). As shown in this Table, six of the nine cases occurring after 1995 involved issues of intellectual property. Before this time, however, only one case out of six involved a clear intellectual property dispute. Seven out of the nine cases since 1995, but only one out of the six earlier cases, involved breakdowns in scientific collaborations. Similarly, five out of the nine post-1995 cases involved high financial stakes, whereas none of the earlier cases seem to have been primarily motivated by financial considerations. Finally, whereas four out of the six early cases required whistleblower protections to protect the identity of a junior complainant, only one complaint out of nine cases since 1995 benefited from such protections. Thus, whistleblower protections are still needed, although cases that fit that specific model are no longer a major part of our workload.

Discussion

Ethics Evaluations in A Changing World

Two nation-wide trends may well have been responsible for these changing patterns. First, changes in funding patterns have increased the payoff for collaborations between potentially competing laboratories. Second, as scientific information has become increasingly regarded as potentially marketable intellectual property, it is inevitable that disputes will arise as to the ownership of that property. The stakes are further raised when University Administrators suggest that returns to research units from the marketing of such intellectual property should become a significant component of the budgets of academic research units. In apparent response to these trends, our recent cases have been motivated primarily by disputes over the ownership of potentially valuable intellectual property. These situations are not consistent with the whistleblower model on which our Ethics policies and procedures are based - making them difficult to evaluate. However, these cases cannot be dismissed as being merely "authorship disputes" beneath the level of interest of those whose duty it is to evaluate true scientific misconduct issues, in view of the very high stakes which may be involved. Finally, we have seen such cases start at the level of an authorship dispute, only to later expand into full-scale accusations of data fabrication.

Nevertheless, our university's policies as well as the general awareness of the scientific community remain tuned to the whistleblower

model. So, as one might well expect, our cases continue to be presented in the "approved" whistleblower format, promising to reveal significant instances of scientific misconduct.

If one fails to understand their origins, such cases can be difficult to evaluate. In one such instance we were unable even to conclude that a valid case existed under our restrictive rules for Phase 1 Inquiries. What does one do when Phase 1 of a "denial of authorship" complaint leads to the complainant eventually submitting letters from the accused in which the accused pleads with the complainant to accept authorship on the paper in question? Should the accused have been interviewed during Phase 1, in this case, so as to gain additional understanding of the background against which the complaint was made? The initial decision that there was no case to pursue, precipitated a seemingly endless series of requests for external intervention and/or re-evaluation of our committee's policies. We need to do better than that.

Similarly, other recent cases before our committee have seemed to involve inherent conflicts between the superficial appearance and the underlying realities of each case. The stage now seems set for continuing problems arising, in part, from our evaluative approaches. Perhaps, significant changes should be proposed in both the published procedures and investigative approaches so as to permit effective evaluation of cases that do not fit the whistleblower paradigm. However, these cases raise arguments for modifications of our procedures that might, if implemented, remove key protections for more classic whistleblowers.

This seems a potentially dangerous situation in which it would be all too easy for university faculties and administrations to make serious mistakes while acting from the highest ethical motivations. To address these concerns recent cases have been re-evaluated to search for potentially generalizable patterns within what had seemed to be "property disputes". Such a pattern could provide the theoretical grounding from which a more systematic approach could be developed towards this different class of misconduct complaints.

Excluding situations involving "priority of discovery" issues, or situations of outright theft (none of which we have yet seen), when two groups feel that they both have valid claims to some piece of the same pie this is probably a pie they baked together. In other words, the majority of such disputes seem to arise from the breakdown of formerly effective collaborations. And, since most collaborations collapse from personality conflicts, it is hardly surprising that such breakdowns lead to disputes over the custody of intellectual property. The comparison with that other graveyard of failed collaborations, the divorce courts, is inescapable. The level of acrimony over rights to intellectual property seems fuelled by these underlying personal issues, just as rights to child custody may become the focus of a parent's sense of violation in a divorce situation. An Ethics Committee that must stick its head into a "scientific divorce" needs to be well aware just how high the emotional stakes may have become for the individual contestants regardless of the monetary worth of the objective data.

The committee will need to remember that not all fights are about money. Some fights are incomprehensible from any other motive than to humiliate the opponent. And they will need to recognise that when it takes at least two people to bake such a pie, it often takes two to spill it on the floor. Of course, the participants in this "divorce" may not have behaved equally badly, but the party most wronged is not necessarily the one who complains the most loudly. This is dangerous territory for an investigative committee, where the most fundamental assumptions of the whistleblower model may no longer be valid.

Formulating a working hypothesis

The essence of the issue is this: whereas the whistleblower model appropriately evaluates the validity of the complaint, in a "scientific divorce" it cannot be assumed that the substance of the complaint is valid. Furthermore, it was clear that our case load in Hawaii would not be sufficient to permit even a minimally rigorous prospective study of such cases - which is why we are presenting our ideas to this meeting. If analysis of our experience resonates with the experience of other similar committees, perhaps they will also take up this issue.

"Scientific divorces" may need to be evaluated by different procedures. In these cases one should not focus on the guilt or innocence of the accused, but rather survey the ethical landscape in which the breakdown of collaboration occurred. Specifically, it is not appropriate to assume that the complaint is valid or that the complainant is not a material

contributor to the situation under investigation. To support this approach, the preliminary instructions given to our Review Panels were changed. When the initial complaint indicated that either an intellectual property dispute, or a breakdown in collaboration, was involved, it was suggested that both the complainant and the "accused" needed to be interviewed during Phase 1. In other words, it may be impossible to determine whether or not misconduct is likely to have occurred unless both parties are interviewed. In a situation of this kind, however, the committee needs to be aware that the complainant will have had time to purge any files that might prove embarrassing, although the accused may well have been taken by surprise.

Additionally, even in Phase 2 of the investigation, we suggested that the Review Panel delay considering whether the accused might be guilty or innocent of misconduct. First, they should focus their attention on a different question: "What happened to create the present conflict?". However, they should be prepared to take as much detailed testimony as necessary to answer that very simple question. Only when the committee has reached a clear consensus as to "what happened", should they attempt to consider which actions taken by each participant might rise to the level of scientific misconduct. The danger here is that such open-ended investigation can get out of hand – the Chair of the Review Panel may need to remind its members that focus should be maintained on immediately relevant events.

These instructions appear to have substantially facilitated the appropriate ethical evaluation of difficult cases. Our Review Panels have been models of good committee interactions where all decisions have been unanimous following considerable discussion but without significant disputes. This surprising degree of agreement resulted from a comprehensive consensus as to "what really happened" – committee members have all felt comfortable that "blame", where blame has been needed, was fairly assigned. Finally, shared understanding of the underlying issues allowed them to make some very tough calls in potentially explosive cases. Even in these hard cases, committees appear to have appropriately surveyed each situation without bias and to have resolved the issue appropriately.

Next steps

The most effective method needs to be explored by which to merge this "Ethical Landscape model" into policies written to protect whistleblowers. We would like to avoid a triaging mechanism which would separate cases into, for example: intellectual property cases, misconduct cases and "harm/rights" cases with different guidelines (as in the the separate courts of our legal system). Instead, we have hoped to find some way to treat all our cases from an ethical perspective, while at the same time preserving our protections for whistleblowers. We now believe that ALL cases can be addressed from this ethical approach in which we do not ask "is the accused guilty?" but instead ask "what really happened?" Once the Panel can answer that question, then they can consider the extent to which each participant has behaved in an ethical or unethical manner - and we are ready to ask whether any of these behaviors rise to the level of scientific misconduct. By contrast, Phase 3 of the investigation (when this is necessary), should be the point at which standard legal models are introduced.

Fortunately, only one small change in our policies is required to implement this approach. The Review Panel **needs the discretion to interview the accused during Phase 1,** should they conclude that this can be carried out without threat to the complainant. Given that freedom, the Panel can then adopt either the "standard" approach to Phase 1, or the "ethical landscape" approach, as seems most fitting to the case under investigation.

Nevertheless, the open-ended investigational approach advocated here can lead to unusual situations. For example, in one recent case the Committee's final report to the University Administration recommended censure not only for the accused but also for the complainant (whose actions contributed to the wrongdoing), as well as for a third party who facilitated the situation to his own benefit. To have reported only on the guilt of the accused would have seemed a violation of our Committee's ethical duty in this instance.

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