SCIENTIFIC MISCONDUCT

A Costly Settlement Ends Whistle-Blower Suit

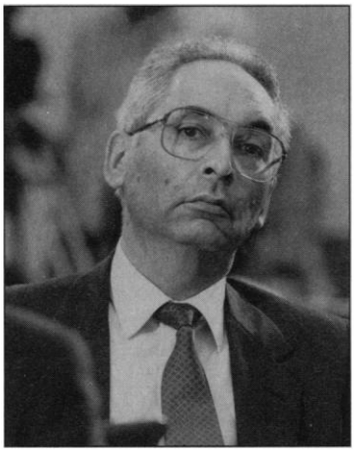
Everywhere, it seems, lawyers are stepping into the arena of scientific misconduct and taking charge. Late last year, several misconduct cases brought by the Office of Research Integrity (ORI), notably one against AIDS researcher Robert Gallo, ended abruptly when lawyers on a government appeals board insisted on higher standards of proof. And now, after 10 years of inconclusive university investigations, the case of former University of Utah burn researcher John Ninnemann has been closed —by lawyers, who negotiated a $1.6 million settlement in a suit filed by a whistle-blower and later joined by the Justice Department.

The agreement, announced on 10 January, 2 weeks before the case was scheduled to go to trial, does more than buttress the role of the legal system in scientific misconduct. It also marks the first time scientific misconduct has led to a successful claim for recovery of federal grant money under the False Claims Act, which allows private citizens who suspect fraud in contracts with the government to file suit on its behalf (*Science*, 16 February 1990, p. 802). The outcome may also change incentives for both whistle-blowers and universities sponsoring research.

That's because the $1.6 million will be paid not by Ninnemann himself but by the institutions where he did the disputed work: the University of Utah and the University of California, San Diego (UCSD). "For the first time in history," notes Suzanne Hadley, former acting director of NIH's Office of Scientific Integrity (OSI), "universities may be held legally accountable for signing on the front of a grant application that all statements are true and complete." And while much of the settlement will go to the U.S. government, an undisclosed amount will be awarded to the whistle-blower, J. Thomas Condie, a former technician in Ninnemann's lab, who filed the suit in 1989 after pressing the case for 6 years through other channels.

In 1983, when Condie first accused Ninnemann of misrepresenting his data on how the human immune system responds to severe burns in presentations about his work, Utah responded with two informal inquiries. The first, by Ninnemann's department of surgery, exonerated him and led to Condie's forced resignation. When Condie persisted, a second ad hoc committee met and, in a one-page report, agreed that Ninnemann had falsified data. Utah did not proceed with a formal investigation, however. Instead, it reprimanded Ninnemann, requesting that he withdraw two submitted papers and send a letter of correction to the *Journal of Trauma*, which had published a Ninnemann paper with disputed data. Ninnemann then moved back to UCSD, where he had been in the late 1970s, and the National Institutes of Health (NIH) agreed to transfer his grant provided UCSD administrators keep an eye on his work. (Ninnemann, who maintains his innocence, now teaches biology at Adams State College in Alamosa, Colorado.)

In 1987, Condie filed a Freedom of Information Act request and reported his findings to NIH, claiming that Ninnemann had misrepresented data in grant applications at UCSD as well as in the letter to the *Journal of Trauma*. NIH then requested that both Utah and UCSD convene formal investigations.



Doubter. Friedman thinks misconduct cases don't belong in court.

The Utah investigation resulted in a finding that Ninnemann "intentionally and repeatedly misrepresented scientific data"; it also concluded that the university had handled the case poorly in its earlier investigations. A blue-ribbon panel at UCSD, on the other hand, found that although Ninnemann's work at San Diego had occasionally been "presented in a misleading or improper manner," there was no "intent to misrepresent data." Not satisfied with the outcome, Condie filed his False Claims suit in 1989. Under the act, the government can join such suits, and the next year, after an OSI review of the case, the Justice Department stepped in.

Condie and the government alleged that the two universities had failed in their oversight obligations and thus were responsible for the progress reports and grant applications that Condie claimed were based on falsified data. Under the False Claims Act, Utah and UCSD could have ended up paying penalties triple the $1.2 million value of Ninnemann's NIH grants if they had lost in court. Instead, the universities agreed to a pre-trial settlement, in which Utah would pay $950,000 in penalties and UCSD $650,000.

In statements released after the agreement to settle had been reached, both universities denied wrong-doing. (Because the details of the settlement have yet to be worked out, neither Ninnemann nor the Department of Justice would speak publicly about the case.) The decision to settle was not an admission of fault, says Richard Koehn, Utah's vice president of research. "It came down to a matter of money. It was probably cheaper to pay than to fight. The general feeling of ourselves and UCSD was that this is the simplest and easiest way out of here. And nobody wants to be in the news on science fraud."

Whatever the merits of the case, the settlement is sparking debate about whether litigation under the False Claims Act is an appropriate way to pursue scientific misconduct. Condie and his lawyer, Richard Hill of San Francisco, argue that the litigation probed Ninnemann's record more effectively than the university investigations had. "You need some kind of pointed organized method of inquiry to get at the truth of these things," says Hill. "The adversary civil justice system did work in application for this case. It finally brought about a situation where Ninnemann was put under oath and examined closely about the substance of his work. We did get at the truth of it, and were close enough to the truth of it where a settlement resulted."

To Paul Friedman, the dean for academic affairs at the UCSD School of Medicine and an expert in the field of misconduct, however, the 4-year litigation proves that misconduct cases do not belong in court. "Unfortunately," he said, "this case demonstrates that the False Claims Act and the judicial system are an expensive, time-consuming and ineffective mechanism for evaluating allegations of scientific fraud. The federal government spent more taxpayer money preparing for this case than the original amount of Ninnemann's research grant."

Barbara Mishkin, a Washington-based lawyer who specializes in misconduct cases, agrees. She points out that universities confronted with misconduct allegations are now required to hold an inquiry, and if necessary an investigation. If the Public Health Service's ORI (OSI's successor) disagrees with the university's finding, the government may launch its own investigation or ask the university to start over. These processes, says Mishkin, are expensive enough already. "If you then have yet another forum to bring the same accusations," she says, "this one even more costly, the thing has spiraled out of control. There has got to be some end point."

–Gary Taubes