Moderator
JEFFREY P. KAHN, PhD, MPH
Maas Family Chair in Bioethics and
Director, Center for Bioethics,
University of Minnesota, Minneapolis, MN

Panelists
BERNARD A. SCHWETZ, DVM, PhD
Director, Office for Human Research Protections,
US Department of Health and Human Services,
Washington, DC

JAMES G. SHEEHAN
Associate US Attorney, US Attorney's Office,
US Department of Justice, Philadelphia, PA

Panel discussion

Conflicts, compliance, and enforcement: Government priorities and initiatives

WHO IS RESPONSIBLE FOR ENSURING ETHICAL BEHAVIOR?

Dr. Kahn: Much has been said today about where responsibility lies for ethical problems that may arise in research. We know that institutional review boards (IRBs) are overburdened and already take a long time to do their work. Where else do we turn?

Dr. Schwetz: There isn't one entity that can adequately be responsible for every issue that may arise in research. While the Office for Human Research Protections (OHRP) deals most directly with the IRBs, institutions are also held responsible. A signatory official must provide assurance that the institution will comply with regulations in order to receive Department of Health and Human Services (DHHS) funds, such as from the National Institutes of Health or the Centers for Disease Control and Prevention. This official is sometimes referred to as the designated "go-to-jail person." Joking aside, responsibility is definitely shared between the institutional official, the IRB, and the investigators.

The government must also be accountable for its actions. For example, if we hear from the research community that our guidance is widely misinterpreted, we must step in to correct it, especially if subjects may be put at risk as a result.

Finally, we must also consider the degree to which subjects must be responsible when participating in research. Who is to blame if they are injured for not following study directions clearly provided to them?

THE IRB AS A LAWSUIT TARGET

Mr. Sheehan: It's important to look at where the IRB enterprise is going from a legal perspective. As Marshall McLuhan said, lawyers drive into the future by looking in the rearview mirror. So whenever we see a good idea behind us, we try to apply it going forward. Over the past 10 years, corporate governance has become a popular model—the Sarbanes-Oxley Act, signing certifications, etc. So now IRBs are being discussed in the legal literature the way that corporate boards are. This is despite key differences between the two: unlike IRBs, corporate boards have legions of advisors, are allotted substantial funds to manage, and are often are paid very well for very little work.

Alan Milstein is an active lawyer in the area of liability of researchers, IRBs, and research institutions. He has some very aggressive theories and strategies, some of which have been successful in obtaining significant settlements. In the case of Jesse Gelsinger, who died from taking part in a gene therapy study at the University of Pennsylvania, Milstein brought a private action and sued every member of the IRB. I disagree with this as a governmental strategy, as it dissuades people from serving on IRBs, but this may be the direction in which private law is heading.

Question from audience: As far as I know, Alan Milstein and his aggressive tactics of suing IRB members have not been successful so far in court. Is that true?

Mr. Sheehan: Milstein has brought a number of cases and has succeeded in blocking some motions to dismiss and in bringing about some settlements. He pursues cases in which patient outcomes are poor and he alleges bad conduct on the part of the IRB, the principal investigator, or the institution. The institutions are not prepared to defend themselves because the underlying facts can be complex. Experience shows that, to some extent, the law evolves out of an approach like this, and only several years later is there real analysis of the opinions by the court about whether the law is reasonable. This issue is much discussed in the legal literature, but so far I haven't seen opinions that support the full implications of Milstein's approach. However, some very large settlements have been granted, which suggests that IRBs may be held liable in the future.

Drs. Kahn and Schwetz reported that they have no financial interests, relationships, or affiliations that pose a potential conflict of interest with this article; Mr. Sheehan reported no such interests, relationships, or affiliations apart from his salary from the US Department of Justice.

IDENTIFYING PROBLEM INVESTIGATORS

Question from audience: The California Medical Association did a study about 30 years ago to try to define the kind of doctor who is most likely to be sued for malpractice. They came up with a profile of an arrogant, uncaring, uncommunicative person. Has anyone done a similar study to predict who is likely to commit fraud, to help identify them before they cause trouble?

Mr. Sheehan: I am not aware of any such study of fraud perpetrators. The malpractice suit study that you mention tried to determine if the doctors who got into trouble did so because they made a mistake or because they had personality disorders. The researchers found that problem personalities were more often to blame. However, if we assumed that the findings of this malpractice study extend to researchers as well, how would we know that some of these traits don't reflect traits of researchers? I've noticed that many of the people I've investigated are incredibly confident of their ability to get the right answers. This is probably the same type of person who is successful in research.

Comment from audience: One study I've seen showed that people who are more likely to get in trouble with state medical boards for various violations are also more likely to have been cited for dishonesty or to have been in trouble in some other way when they were medical students. Perhaps we should focus on enhancing professionalism during medical school and start to identify students who are likely to get in trouble later.

Dr. Kahn: A recent national study that looked at questionable research practices among scientists deliberately included a large subsample of early-career scientists,[1] so there is definitely an interest in how early in one's professional life this behavior might start.

Dr. Schwetz: I have asked IRB chairs if, among the investigators who submit protocols for review, there are perhaps two or three people who make them nervous because of their interaction with the IRB. Perhaps they are intractable or unwilling to listen to advice about how to get their protocol approved. The IRB chairs invariably can immediately think of some, but when asked what they can do about it, they answer, "Nothing; we have to wait for something to happen."

Mr. Sheehan: Researchers in the compliance field have developed theories for how poor behavior arises. The "personal failure" explanation says that bad people are the ones who do bad things. The "sociological" explanation says that most people inherently have about an average proclivity to do something wrong and that their conduct is guided by what they see around them in their organizations. If one accepts the sociological explanation, it is incumbent upon the institution to create a culture of compliance in which poor behavior is not supported or encouraged.

NOVEL SURGICAL TECHNIQUES: BEYOND THE REACH OF OVERSIGHT?

Comment from audience: I am a colorectal surgeon and I remember watching a procedure with a group of observers in the operating room at Cleveland Clinic many years ago, in which a prominent surgeon performed something that none of us had ever seen before. Someone asked the surgeon if he had always done the procedure that way, and he said he had. Here he was doing something very different from normal operating procedure, and I'm sure the thought of running it through the IRB never crossed his mind.

While the use of new devices and drugs must go through rigorous IRB review, in the operating room surgeons are quite free to invent new procedures and promote them to others. Yet the potential of severe harm to patients from this kind of experimentation is very high.

Mr. Sheehan: This subject really merits an entire conference by itself. The practice of medicine is not regulated by the federal government but by the states, and generally they give physicians a wide berth to practice in a manner they feel is appropriate.

In such situations the line between treatment and research can be blurred. Surgeons try new techniques all the time, and that is desirable, to some extent. These new methods are unlikely to be submitted to the IRBs or to involve the federal government.

Three questions can help determine whether a new technique is justified for use: (1) Is use of the technique a knowing breach of the standard of good faith and fair dealing, as understood in the community? (2) Has the patient been advised of the risks and benefits? (3) Does the surgeon believe that the technique is most likely to get the best result?

Dr. Schwetz: I am occasionally alerted to such situations, and some do fall under the jurisdiction of the OHRP, although this example would not unless funding came from DHHS. I have discussed this question of whether and how to oversee novel surgical techniques with David Korn of the Association of American Medical Colleges, and I know that organization is looking into it.

REFERENCES

1. **Martinson BC, Anderson MS, de Vries R.** Scientists behaving badly. Nature 2005; 435:737–738.