

# Correcting the Literature and Reducing Litigation Risk

**MODERATOR:**
**Emma Shumeyko**

The National Academies of Sciences, Engineering, and Medicine

**REPORTER:**
**Ruth Isaacson**

Genetics Society of America

**SPEAKERS:**
**Debra Parrish**

Parrish Law

When taking action to address research misconduct (e.g., publishing expressions of concerns, retracting published papers), journals may find themselves the target of litigation. In this CSE 2024 Annual Meeting session, Debra Parrish of Parrish Law Offices shared examples of legal threats and theories that can be used against a journal and provided tips journals can take to reduce their vulnerability to litigation.

## Common Litigation Theories

When initiating litigation, a respondent will apply 1 or several “theories” to their claim against the journal. These theories are typically first communicated by letter to the journal. In this legal threat, the respondent’s attorney lays out the reasons why the journal is incorrect in their actions (theory), explains how the respondent is being wronged or was never in the wrong, calls for action by the journal, and threatens further actions if the journal does not comply. These theories include:

- Defamation
- Intentional infliction of emotional distress
- Tortious interference with prospective economic advantage/business relationships
- False light/invasion of privacy
- Fraud and conspiracy to defraud (for publishing a plagiarized article)
- Coercion, fraud, and conspiracy to defraud (for not correcting)
- Dereliction of duty/negligence
- Lanham Act violation
- Sherman Act violation
- Breach of contract

The Figure lists cases where these theories were used in claims against the journals that addressed instances of research misconduct.

In *Saad v. ADA*, Mario Saad sued the American Diabetes Association for defamation and damage to his reputation. As publisher of *Diabetes*, the ADA had published an expression of concern (EoC) over 4 of Saad’s papers. In the EoC, the ADA outlined only the facts and made no claim that the data used in Saad’s research was not reliable. The EoC served only to alert readers to their concerns about the data’s reliability and noted that the investigation was ongoing. Because the EoC relied only on proven facts and statements, the court found that the ADA’s statement was not actionable for defamation and was “measured and professional in its tenor.”<sup>1</sup> The lawsuit was dismissed.

In *Harris v. AAA*,<sup>2</sup> the plaintiff, David Harris, brought a claim for unfair competition against the American Accounting Association and other defendants (authors) using the theory of tortious interference with prospective economic advantage/business relationship. Harris claimed that several other authors had published his research as theirs and that the publication had caused financial and professional injuries to him by destroying the value of his original paper, preventing him from publishing his paper in any other journal, and causing a loss of increase in his salary. A prime example of the endurance of these cases, this case went as far as the Supreme Court of New York before eventually being dismissed.

Finally, in *Reddy v. JBC*, Parish shared how journals need to be aware of the varying quality of institutional investigations and the financial implications of litigation. The plaintiffs,

Saad vs ADA	Joseph v. Springer
Andela v. AACR	Nature
Hall vs AAA	Reddy v. JBC
Tang v. Journal of Clinical Nutrition	Sewell v. Elsevier
Harris vs. AAA	Singh v. PLOS



**Figure.** Cases against journals: Correcting the literature and reducing litigation risk (from Debra Parrish’s CSE 2024 Annual Meeting presentation).

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Raju Reddy and Aravind Reddy Targu, sued the *Journal of Biological Chemistry* and its publisher, the American Society of Biochemistry and Molecular Biology, for defamation.<sup>3</sup> An allegation of figure reuse was made, and 2 institutions conducted separate investigations. Although 1 institution determined that no misconduct occurred, the other institution found evidence of misconduct. Given the different outcomes, JBC conducted their own investigation of the figures and concluded that they had been reused and thus retracted the paper. The authors brought litigation. The courts concluded that they could not order the retraction of a retraction. The publisher stipulated settlement with the authors, which left the retraction in place. In some instances, the steep cost and protracted process for litigation may mean that it makes more sense to negotiate a settlement acceptable to both parties.

### How Journals Can Protect Themselves

Journals can protect themselves from allegations by providing clearly published policies and procedures regarding research misconduct. Their policies should note whether authors are required to cooperate in an investigation and whether they must notify the journal in the event of an institutional research misconduct investigation. Journals should also define "research misconduct." Although the U.S. Office of Research Integrity defines research misconduct as "fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results,"<sup>4</sup> definitions at many institutions and countries also contain an "other practices" clause, which can include anything from animal care violations to sexual misconduct violations. Journal policies should also detail how long the publishers or authors are required to retain original data in case it is needed for an investigation and indicate whether specific guidelines are followed (the Committee on Publication Ethics [COPE],

for example). Finally, journals should indicate who is allowed to correct, retract, or withdraw a published paper. This could include the institution, journal/publisher, or the authors (first/last corresponding/any author/majority). Allowing the journal or publisher to retract is important in the case where no author will respond to communications from the journal.

If allegations of research misconduct are made, it's important to remember that the assessment process will take time. Not all institutional investigations are equal. Thus, the outcome of these investigations should be a factor in the publisher's decision, but not dispositive. Journals should first give authors a chance to withdraw their article because an author who agrees to withdraw has diminished ability to sue the journal, while still accomplishing the end goal of removing faulty information from the literature. When a correction or retraction occurs, journals should take a neutral tone (e.g., "the authors agree there was an error in X and have agreed to retract...") and only state facts. For example, a statement could say that there is "significant text overlap" rather than saying "plagiarism." Or the statement could note that the university found research misconduct, rather than saying that the journal determined research misconduct occurred. Finally, in all cases in the case of a legal challenge, the publisher should check their insurance carefully. Their policy may contain stipulations about which counsel can be used and if there are discounted rates available.

### References and Links

1. <https://retractionwatch.com/2015/08/19/judge-dismisses-defamation-suit-against-diabetes-journal/>
2. <https://law.justia.com/cases/federal/district-courts/new-york/nyndce/5:2020cv01057/125700/55/>
3. <https://retractionwatch.com/2019/12/02/pitt-researchers-sue-journal-for-defamation-following-retraction/>
4. <https://ori.hhs.gov/definition-research-misconduct>