

# **Tried and True Tips for Determining the Truth: How to Find the Truth in Internal Investigations**

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## I. INTRODUCTION

- A. Overview of the internal investigations process
  - 1. Deciding whether to initiate an internal investigation
  - 2. Staffing the investigation
  - 3. Defining the scope of the investigation and developing an action plan
  - 4. Gathering documents
  - 5. Interviewing witnesses
  - 6. Preparing a report of the investigation
  - 7. Taking corrective action based on the investigation
- B. Purpose
  - 1. To provide tips and strategies to increase the effectiveness of internal investigations.
  - 2. Two types of investigations (Katherine Lauer, Cheryl Wagonhurst, Frank Sheeder & Michael Silhol, 10 Things You Wanted to Know About Internal Investigations but Were Afraid to Ask, Health Lawyers News, May 2006, at 4.)
    - a. Investigation of errors
    - b. Investigation of intentional or fraudulent conduct.
- C. Impediments
  - 1. Fear
  - 2. Conflicting interests
  - 3. Company culture
  - 4. No way to immunize individuals
- D. Effectiveness or "Is it possible and/or necessary to discover the whole truth?"
  - 1. Approximate truth
  - 2. Absolute truth

## **II. DIFFERENT APPROACHES**

- A. Plan of investigation
  - 1. Level of detail
  - 2. Documentation
- B. Soft v. Hard
- C. Documents or interviews first
  - 1. Documents should be collected first to avoid the destruction of relevant information.
  - 2. Interviews should be conducted first to identify relevant documents.
  - 3. Document collection and interviews should be conducted concurrently to expedite the investigation process and to slow down the dissemination of information.
- D. Different goals
- E. Promises that can be made
- F. Confidentiality
- G. Credibility of questionnaires
- H. Consequence for refusing to cooperate
- I. Interviewing of counsel
- J. Outside-in or inside-out
- K. Documents and emails
  - 1. Send “do not destroy documents” orders
  - 2. Identify relevant documents
  - 3. Gather documents
  - 4. Obtain electronic documents

## **III. TEXTBOOK METHODS**

- A. Federal criminal method

- B. Bank Fraud department
- C. Using a polygrapher – an agency approach
  - 1. Employee Polygraph Protection Act
    - a. The Act prohibits employers from requiring an employee or prospective employee to submit to a polygraph test. 29 U.S.C. §§ 2001–2009 (2000).
    - b. The Act provides several exemptions, the most relevant of which are listed below:
      - i. All governmental employers are exempted from the application of the Act, including the U.S. government, state or local governments, and any “political subdivisions of a State or local government.” 29 U.S.C. § 2006(a). In Hossaini v. Western Missouri Medical Center, 140 F.3d 1140 (8th Cir. 1998), a county hospital that was neither operated nor supervised day-to-day by the county was found to be a political subdivision and thereby exempted from the EPPA.
      - ii. A private employer may utilize a polygraph test if the test is administered in “connection with an ongoing investigation involving economic loss or injury to the employer’s business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage.” 29 U.S.C. § 2006(d)(1). The employee must have “access to the property that is the subject of the investigation and the employer must have ‘reasonable suspicion’ that the employee was a cause of the loss.” Id. § 2006(d)(2)–(3). Lastly, the employer must provide the employee with notice of the investigation, the date and time of the test, and the basis for the reasonable suspicion. Id. § 2006(d)(4). The employer has the burden of proof to show that he or she fulfilled all the requirements of the Act. See, e.g., Albin v. Cosmetics Plus N.Y., Ltd., 13 I.E.R. Cas. 847 (BNA) (S.D.N.Y. 1997); Mennen v. Easter Stores, 951 F. Supp. 838 (N.D. Iowa 1997).
- D. Company’s compliance department (Katherine Lauer, Cheryl Wagonhurst, Frank Sheeder & Michael Silhol, 10 Things You Wanted to Know About Internal Investigations but Were Afraid to Ask, Health Lawyers News, May 2006, at 4, 7.)
  - 1. Determine whether counsel or the compliance department, or both, should conduct the investigation.

2. If the compliance department is one part of the organization that is being investigated, it should not participate in the investigation.

#### **IV. BEHAVIORAL CONSIDERATIONS**

- A. Open v. closed
- B. Disclose information or not
- C. Setting
  1. Place
  2. Lighting
  3. Number of persons interviewing
  4. Participants (i.e., counsel or compliance officer)
- D. Confession
- E. Truth seeking
- F. Behavior studies to detect lying
  1. How to Detect Lies: Become a Lie Detector,  
<http://www.blifaloo.com/info/lies.php> (last visited June 1, 2006).
    - a. Body language
      - i. Physical expression will be limited and stiff, with few arm and hand movements. Hand, arm and leg movement are toward their own body the liar takes up less space.
      - ii. A person who is lying to you will avoid making eye contact.
      - iii. Hands touching their face, throat & mouth. Touching or scratching the nose or behind their ear. Not likely to touch his chest/heart with an open hand.
    - b. Emotional Gestures & Contradiction
      - i. Timing and duration of emotional gestures and emotions are off a normal pace. The display of emotion is delayed, stays longer than it would stay naturally, then stops suddenly.

- ii. Timing is off between emotions gestures/expressions and words.
- iii. Gestures/expressions don't match the verbal statement.
- iv. Expressions are limited to mouth movements when someone is faking emotions instead of the whole face.
- c. Interactions and Reactions
  - i. A guilty person gets defensive. An innocent person will often go on the defensive.
  - ii. A liar is uncomfortable facing his questioner/accuser and may turn his head or body away.
  - iii. A liar might unconsciously place objects between themselves and you.
- d. Verbal Clues
  - i. Repetition of the question
  - ii. Selective memory
  - iii. Oaths
  - iv. Character testimony
  - v. Answering with a question
  - vi. Overuse of respect
  - vii. Avoidance of emotive words

## **V. COMMON MISTAKES**

- A. Disclosing information
- B. Confirming information
- C. Incorrect or ineffective order
- D. Not securing the "crime scene"
- E. Failing to appreciate that it may be a "crime scene"
- F. Calling counsel after the fact

1. Benefits to involving counsel at the beginning of the investigation

- a. The attorney-client privilege “protects confidential communications between lawyer and client.” Katherine Lauer, Cheryl Wagonhurst, Frank Sheeder & Michael Silhol, 10 Things You Wanted to Know About Internal Investigations but Were Afraid to Ask, Health Lawyers News, May 2006, at 4.

To establish the privilege, [] counsel should:

- i. Make sure an attorney—and no one else in the organization—engages experts and consultants;
- ii. Ensure that counsel directs the investigation and the investigative team’s tasks in writing;
- iii. Use internal Delegations of Authority to cover the work of internal personnel done at the request of counsel;
- iv. Control the flow of information and documents so that an inadvertent disclosure to a third party is not made; and
- v. Stamp documents generated in the investigation as “Privileged and Confidential: Attorney-Client Communication and/or Attorney Work Product.”

Id. at 6.

- b. “The [attorney work product] doctrine protects writings of an attorney’s factual investigations, research, impressions, opinions, and conclusions in anticipation of litigation.” Id.

VI. Question & Answer