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

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## Introduction

- Purpose
  - Discuss behavioral considerations important to internal investigations
  - Provide tips and strategies to increase the effectiveness of internal investigations
    - What tools you have
    - When you use the tougher tools
    - When to consider using a polygrapher as part of the investigation process



## Introduction

- Impediments to learning the whole story during an internal investigation
  - Fear
  - Conflicting interests
  - Company culture
  - Larger concerns about what government enforcement officials may do
  - No way to immunize individuals



## Behavioral Considerations

“Situational honesty is illustrated in a classic parable by philosopher Immanuel Kant, who described how he might react if he encountered a suspected robber on a lonely road. ‘(He) asks me, “Have you any money on you?” If I fail to reply, he will conclude that I have; if I reply in the affirmative, he will take it from me; if I reply in the negating, I will tell a lie. What am I to do?’”

Joseph T. Wells, [A Fish Story --- Or Not?](http://www.aicpa.org/pubs/jofa/nov2001/wells.htm), The Fraud Beat, Journal of Accountancy, Nov. 2001, <http://www.aicpa.org/pubs/jofa/nov2001/wells.htm>.



## Behavioral Considerations (cont.)

- Open v. Closed
- Disclose information or not
- Setting
- Confession
- Truth Seeking



## Behavioral Considerations (cont.)

- Behavior studies to detect lying
  - Body language
  - Emotional gestures and contradiction
  - Interactions and reactions



## Behavioral Considerations (cont.)

- Behavior studies to detect lying
  - Verbal Clues
    - Repetition of the question
    - Selective memory
    - Oaths



## Behavioral Considerations (cont'd)

- Behavior studies to detect lying
  - Verbal Clues
    - Character testimony
    - Answering with a question
    - Overuse of respect
    - Avoidance of emotive words



## Questions & Answers

- Questions about these behavioral considerations?



## Application of Behavioral Issues to Internal Investigations

- Early decisions impact later behavioral issues
- First steps are important
- Legal parameters (Del. law e.g.) relevant
- Early decisions that need to be made
  - Deciding whether to initiate an internal investigation
  - Staffing the investigation
    - Using internal people
    - Using outsiders – lawyers or accountants



## Application of Behavioral Issues to Internal Investigations

- Tone: Merits of a softer tone:
  - “More with honey than vinegar”
  - Viewed as more open minded
  - Interested in the truth
  - Trustworthy
  - May be easier to convince counsel representing executives and key personnel to agree to let their clients speak to the special committee or investigators



## Application of Behavioral Issues to Internal Investigations

- Tone: Merits of a harder tone:
  - Sells well to an exterior audience
  - Avoids the look of a whitewash
  - Simple to run
  - May end up breaking some key persons and learning more of what happened
  - Fear is a powerful tool
  - Easier to “lop off” heads
  - Can be used to announce a change in company culture and change of direction
- Behavioral impacts from choice of tone

## Deciding How To Staff The Investigation

- Company's Compliance Department
  - Determine whether counsel or the compliance department, or both, should conduct the investigation.
  - If the compliance department is one part of the organization that is being investigated, it should not participate in the investigation.

## Carrying Through On The Choice of Approach

- Each of the steps impacted by behavioral issues
- Early decisions impact how internal investigations unfolds
  - Defining the scope of the investigation and developing an action plan
  - Gathering documents
  - Interviewing witnesses
  - Preparing a report of the investigation
  - Taking corrective action based on the investigation



## Different Approaches

- Plan of investigation
  - Level of detail
  - Documentation
- Soft v. Hard
- Documents or interviews first
- Different goals
- Promises that can be made



## Different Approaches (cont.)

- Confidentiality
- Credibility of questionnaires
- Consequence for refusing to cooperate
- Interviewing of counsel
- Outside-in or inside-out
- Collection of documents and emails



## Textbook Methods

- Federal Criminal Method
- Bank Fraud Department



## Polygraphs

- Basics about polygraphs
  - Employee Polygraph Protection Act (29 U.S.C. 2001)
    - Basic rule – prohibited – can't even ask
    - Can't fire someone without an "exception" under the act
    - Exceptions – when permitted
      - **Governmental employers**
      - **Private: need the polygraph warning to have been pre-posted in the work place**
      - **Private employers** 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.
  - Qualified polygrapher: state licensed and APA member



## Polygraphs

- Tips:
  - Get legal counsel involved **before** even mentioning "polygraph" to the employee
    - Act is technical, but can fire someone if result of polygraph is not "sole basis" for discharge
    - Civil liability if you get it wrong
    - Need to have "pre-posted" the notice so need to check the coffee room's bulletin board
  - Use it when you've got a solid suspect in an embezzlement and you think others may be involved



## Common Mistakes

- Disclosing information
- Confirming information
- Incorrect or ineffective order
- Not securing the “crime scene”
- Failing to appreciate that it may be a “crime scene”
- Calling counsel after the fact
  - Attorney-client privilege
  - Attorney work product doctrine



# Q & A

