

CEP Magazine – April 2018 The perils of investigative report writing, Part 2

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Part 1 of this article appeared in the March 2018 issue of *Compliance & Ethics Professional*.

In last month's article, we spent time considering standards for investigative reports and evaluating the first lesson we learned from the Wells Report: the critical nature of staying objective. This month we'll conclude with the remaining lessons to learn.

Lesson #2: Assessing the reliability of experts and science

Some of the more reliable and objective evidence one can obtain during an investigation is that which is measurable in some way, and scientific evidence is some of the best. In this case, much stock is placed in the science of the Ideal Gas Law.^[1] The beauty of the laws of physics is that, given the required measurements are reliable and controlled, the results will be the same every time. Their dependability is unparalleled, their memory does not fail them, and they do not see things from different perspectives. Beware the measurement though. If there is any question about the methodology or the tools used to take measurements, you are going to have trouble with scientific evidence. Such is the case with the Wells Report.

The war of experts

The same is true of so-called experts. I have been involved in numerous "war of the experts" debacles, and what I learned is, they are hired guns. You can find an expert who will say just about anything, and before long, an academic wrestling match ensues with no clear answers. It is true that from a legal standpoint, ideally you will find an expert whose credentials outdo those on the other side, but what do you do when each side's experts are equally as impressive? Here again the Wells Report is problematic.

First, when using an expert, it is wise to do research on their background, which of course speaks to their credibility. Any chink in that armor may prove fatal. Exponent, the expert firm hired by the Wells team, certainly appeared to have an all-star résumé, but it quickly surfaced that some of their previous conclusions were suspect. A *New York Times* article points out Exponent was "...a consulting firm with dubious bona fides, having disputed the dangers of secondhand smoke and asbestos."^[2] The Exponent report has been shredded by acclaimed scientists from divergent places like Boston College, Carnegie Mellon, Stanford, MIT, the University of Chicago, University of California–Berkeley, Rockefeller University, the University of Michigan, the University of Illinois, Purdue University, University of Southern California, University of Pennsylvania—and others. There was even a group of 21 scientists from around the country who filed an amicus brief related to Tom Brady's legal proceedings that did so based solely in the interest of getting the science right.^[3] All of them disputed Exponent's findings, independently coming to exactly the opposite conclusion.

The accuracy of measurements

Perhaps the first mistake of the Wells team with respect to the scientific aspect was to rely too heavily on highly suspect measurements. There were multiple issues affecting the reliability of any outcome—a point Exponent hedged their findings on and which the Wells Report acknowledged, stating, “Our scientific consultants ultimately informed us that the data alone did not provide a basis for them to determine with absolute certainty whether there was or was not tampering” (pg. 112).^[4]

Consider that there were at least two uncertified, off-the-shelf measurement devices that, when tested, had material variances in pressure readings. Nobody could remember which device was used on which balls. As previously mentioned, the original pre-game measurements were not recorded. There are complications in that the NFL apparently did not realize or understand that the temperature fluctuation from the 72-degree locker room to the 40-degree playing surface, and the rain, would have an impact on a football’s air pressure. There was further imprecision in that at halftime, all the Patriots’ balls were checked immediately, while the Colts’ balls were allowed to warm and dry during the time they were checking the Patriots’ balls (estimated at 13 minutes)—a factor that could account for the comparative difference with the Patriots’ balls. Further, only four of the Colts’ balls were checked, because they ran out of time, so parity and consistency in testing are further obstacles.

Where scientific evidence is available, it can be amazing, independent, and often incontrovertible evidence. Because of this, investigators may unconsciously force something that isn’t there. Of course, the very heart of this investigation was whether any factor other than human intervention could be the cause of the air pressure drops. Built into that question is the presumption that the original measurements taken in the field were reliable from start to finish. The entire premise of the “violation” rests on imprecise measurements that were irrelevant enough that they were unrecorded on the front end. In my opinion, there are so many methodological problems with how the original spot checks were done that serious doubt exists as to whether any scientific evidence or computations are useful to the investigation. The Wells team should have recognized this.

We are left with a report groping for a violation to investigate. The credible, respectable science in this case establishes more than enough reason to doubt that an intentional release of air occurred. Without a violation, there is no conspiracy to prove. Nevertheless, let’s assume for the moment that physics works toward the hypothesis that a violation did occur. What is the case based on testimony and physical evidence?

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