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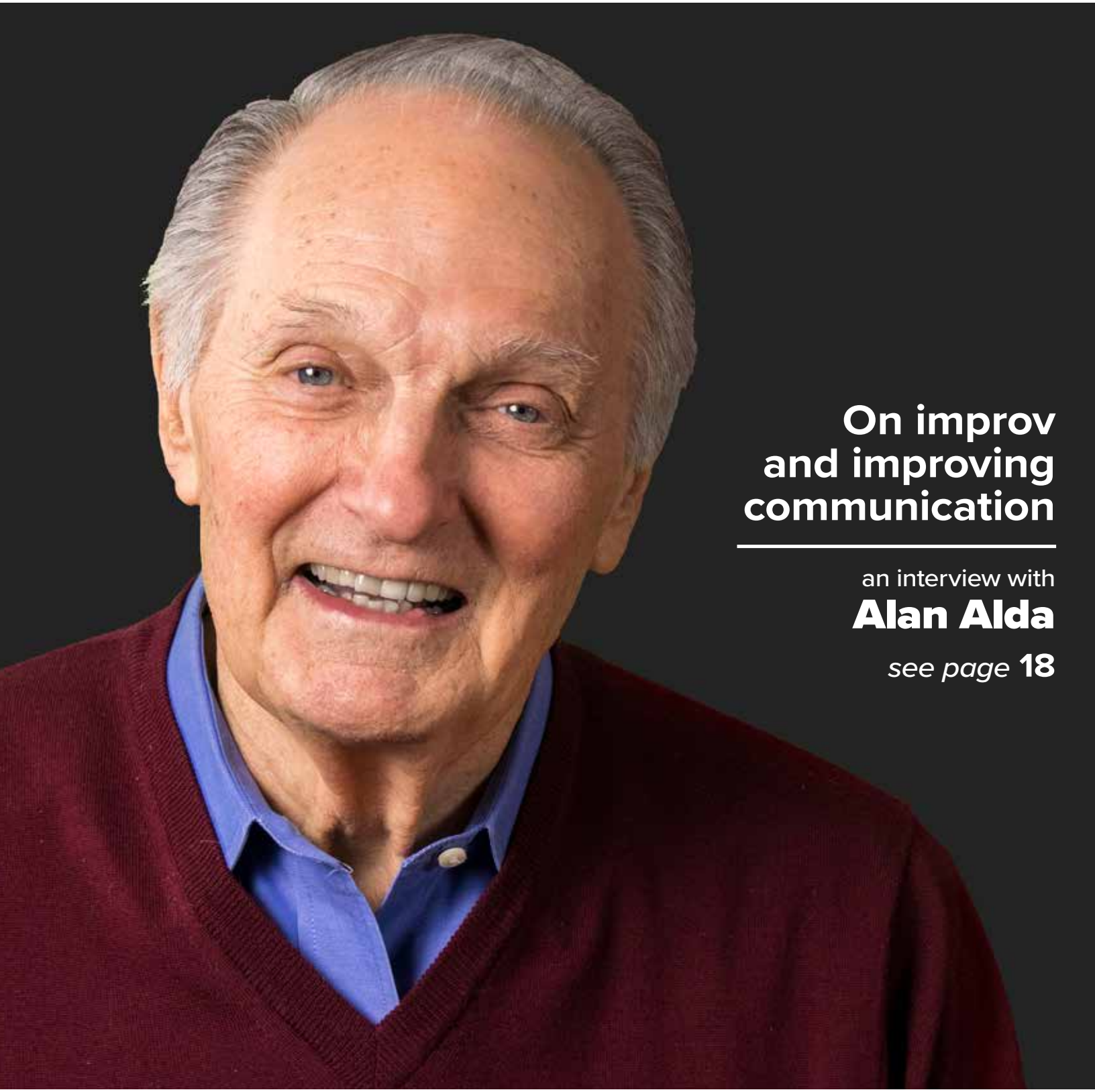

On improv and improving communication

an interview with
Alan Alda

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by Daniel Coney, CCEP, CFE, CFCS

The perils of investigative report writing, Part 1

» Investigative results have real consequences, some of which can reach epic proportions in the lives of real people.

» A "just the facts" approach has evolved into a customer expectation that investigative reports draw objective, substantiated conclusions and root cause analyses.

» No one standard exists for investigative report writing.

» The NFL's Deflategate report, otherwise known as the Wells Report, presents opportunities to learn about the pitfalls in using this new approach.

» The aftermath of the Wells Report offers us at least four lessons learned: Objectiveness, overreliance on experts, being complete, and expecting your work to be scrutinized.

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Rare is the occasion that a public spectacle results in a compliance-oriented investigative report for the world to read. Most investigative efforts are shrouded in confidentiality, with limited public exposure. The National Football League's (NFL) "Deflategate" controversy is a golden opportunity for compliance professionals to evaluate how that very public investigative report can inform us… and teach us.

Coney

Background

Admittedly, though an NFL football fan, I found Deflategate rather uninteresting and did not follow it much. For those who may know little about this topic, allow me a short discourse to set the stage. The NFL reports about $13 billion in annual revenues. It is the largest professional sports league in the world, and as a corporate entity, it has a market cap that surpasses companies such as Netflix, United Airlines, Time Warner Cable, and CBS television. One of the storied teams that make up the NFL is the New England Patriots—a team that has won five championships since 2002 and been to the Big Game 10 times since 1986, more than any other team. The last eight Super Bowls were quarterbacked by Tom Brady, who some would argue is the best quarterback in NFL history.

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During the course of the 2014/2015 season, the Patriots advanced to the Conference championship game, the winner of which moves on to the Super Bowl. That game, against the Indianapolis Colts, was played on a cold, rainy day in Massachusetts. The rules of the game dictate that game footballs must be inflated to between 12½ and 13½ pounds per square inch of air pressure. Shortly before

halftime of the game, the Colts intercepted a Tom Brady pass and thus had possession of one of the game footballs in play by the Patriots. The Colts sideline measured the air pressure after feeling that the ball was "soft," discovering a pressure reading below the 12½-psi mark. This resulted in an unusual step for the NFL to measure game balls during halftime. According to this measurement process, all of the Patriot's footballs were below league minimums, but the Colts balls were all within the required parameters. Thus, Deflategate was born, and Tom Brady was branded a cheater.

Just in case you think compliance investigations don't matter much, consider this: Deflategate cost the NFL at least $14.7 million, including the $2.5 million it paid for the Wells Report. The union that represents NFL players spent $7.1 million. It cost the Patriots at least $750,000 in legal expenses. Beyond that, the NFL levied harsh punishments against both Brady and the Patriots team. The team lost two major draft picks (a big deal in football, worth an indeterminable amount of money) and levied a monster fine of $1 million, the largest in NFL history.

Brady's four-game suspension had muted financial consequences because of some fancy footwork by the NFL quarterback. By appealing the initial suspension decision for a season, he was able to restructure his contract in the offseason. Because his base salary was $8 million before the restructuring, Brady would have lost $2.1 million in game checks for the four-game suspension. After restructuring, his base salary was a mere $1 million, so the suspension personally cost him around $235,000. We can assume he likely spent at least that much on his own attorneys. No one can quantify the damage to the reputation of those involved (including the NFL), what endorsements it might have cost, and how over the course of history people will "asterisk" the accomplishments. The takeaway ought to be that investigative results have real consequences, some of which can reach epic proportions in the lives of real people. Investigations, and how they are reported, matter.

Limitations and disclosures

First, I am a Broncos fan. I live in the Denver area, think John Elway was one of the best quarterbacks of all time, and believe the sunrises are orange and blue because God is a Broncos fan. All jesting aside, my point is I have no allegiance to either the Patriots or Tom Brady.

Neither do I picture the NFL through rose-colored glasses. They are a business first, with personalities that no doubt have agendas. They chose to carry out compliance activities in this instance by hiring outside counsel to conduct the investigation, which was led by Theodore V. Wells, Jr., a partner in a law firm. Mr. Wells has an impeccable résumé, including a couple of Harvard degrees, an impressive clerkship, and a list of successful legal defenses for names we would all recognize. The law firm itself lists a plethora of practice areas. Notable in both Mr. Wells' and the firm's list of many specialty areas is the lack of a compliance background, though they do list "internal investigations." All of the eight people on Mr. Wells' team have similar Ivy League educations and substantial credentials as litigators, but not as compliance professionals. Perhaps this is obvious, but bearing the moniker of attorney does not make one a professional investigator or compliance expert any more than having a motor vehicle license qualifies one to race an Indy car. Although I do not know if the Wells Report intended to meet any particular standards that are recognized in the compliance or investigative world,

I nevertheless offer some key standards to consider in this article.

A new frontier

The Wells Report is different, but not surprising. It is an example of a quiet foundational shift that has occurred in investigative report writing. This change is best expressed on two strata: a distinction in the audience of the report and whether conclusions are made in the report.

I recall my frustration as a young agent when I would recount all the facts derived from an investigation, but the decision maker wouldn't "get it." The law enforcement standard has long been that an investigator is forbidden from adding opinion, drawing conclusions, or inserting personal or impartial monologue. Countless times, technical issues or convoluted fraud schemes were beyond the comprehension of readers of the report, but I was powerless to help them connect the dots. Although prosecutors were savvy enough to understand those nuances, administrative decision makers often were not—nor did they want to be. Where the criminal burden of proof fell short, we had to rely on the C-suite to take appropriate disciplinary action against the offending employee—something that frequently did not happen.

This left Inspectors General (IG) in the unenviable position of trying to explain to Congress how investigative and audit findings were regularly ignored. Over time, I think this dynamic (and probably others) resulted in an environment that demanded accountability by the management of these agencies. It is now common to see distinctions made between a report written for a prosecutor and one aimed at an administrative resolution.

An IG investigation frequently has end users that include management officials, political appointees, licensing boards, suspension and debarment officials, administrative law judges, members of Congress and their staffers, the president's staff, ethics offices, watchdog groups, and the public. In fact, over time, the primary customer has become this diverse group. Although traditional law enforcement organizations such as the FBI are strictly criminal investigators, the IGs have far greater authority to holistically review and investigate, and that means criminal, civil, and administrative resolutions are all on the table. IGs are further expected to make recommendations designed to promote economy, efficiency, and effectiveness—and prevent and detect fraud and abuse—in agency programs and operations.

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Thus, in these "non-judicial" style reports, the drive has been to demonstrate impact and accountability, and to do that, more and more the expectation is for an investigative report to contain clear, actionable conclusions and recommendations. This quickly evolved into a customer expectation that report writers draw objective, substantiated conclusions and root cause analyses as part of a comprehensive compliance package.

Let me give that some time to sink in. For some of you, your mind is currently in revolt, because what I am talking about is inconsistent with the way it has always been done. I'm here to tell you this is a new frontier. These so-called non-judicial reports are here to stay, and the more I see it and deal with it as a manager, I can see how and why it is supposed to work. But there are pitfalls, as illustrated in the Wells Report. Therein lies the title for my piece. It is a practice fraught with perils.

Standards

As with any good investigative report, there must be a rule, a law, or a standard that compares an action to that measure. There is no one-stop shop for investigative report–writing excellence. Arguably, there are universally recognized principles, but no one body promulgates an agreed-upon standard. *The Complete Compliance and Ethics Manual 2016*, published by the Society of Corporate Compliance and Ethics (SCCE), has a chapter that generally addresses investigative report writing without establishing any standards. However, the SCCE consistently teaches that compliance efforts are intended to provide information to management for them to make informed decisions. It is not the role of the compliance officer to make those decisions or conclusions on behalf of management.

For some, a manual published by the Association of Certified Fraud Examiners (ACFE) is useful. ACFE's guiding principle is the "judicial proceeding standard," which asks, "Would I be able to defend this report in a judicial proceeding?" Though indicating the majority of investigative reports will never get to a judicial authority, ACFE espouses the better-safe-than-sorry approach to assuming a report will need to withstand judicial scrutiny. Already you no doubt see the juxtaposition between that concept and the non-judicial style report.

Nevertheless, ACFE's standard makes room for the new breed of report. The ACFE manual says:

> …no conclusions or opinions should be released *until [the investigator] has accumulated sufficient evidence to meet the preponderance of the evidence burden of proof* (or established that doing so is not feasible), thoroughly addressed, analyzed, and documented that all probable alternative explanations have been considered and excluded as likely explanations that would affect his conclusions or opinions, [and] accumulated sufficient evidence to identify all material matters which, if omitted, could cause a distortion of the facts. (emphasis added)

The question then becomes an application of determining when evidence is sufficient to make conclusions. The ACFE manual goes on to say elsewhere, "only convey objective facts (i.e., unbiased evidence that is not influenced by personal feelings, interpretations, or prejudice); do not editorialize or opine on guilt or innocence."

With respect to expert reports, ACFE counsels:

> In the context of expert reports, the purpose of such reports is not to 'win' cases…The fraud examiner may be an advocate for the credibility and reliability of the expert conclusions and opinions and the related supportive basis in reporting or testifying; however, he must not become, or even appear to become, an advocate for one party or the other.

The ACFE Code of Professional Ethics says the investigator should reveal all material matters discovered during an investigation that, if omitted, could cause a distortion of the facts. Notable is the comment:

> …the fraud examiner should be careful not to include any statement or opinion as to the integrity or veracity of any witness even if the fraud examiner is convinced that the witness is being untruthful. Truthfulness, or lack thereof, can be demonstrated through conflicting statements by the witness or suspect.

The CFE manual contrasts conclusions based on *observations* of the evidence with opinions, which call for an *interpretation* of the facts. The investigator is to be "very circumspect about drawing conclusions" and attend to whether an expert witness has employed intellectual rigor in adequately accounting for alternative explanations. Overall, ACFE's standards are consistent with the idea that one can draw supportable conclusions in a report, so long as they can be defended in a judicial proceeding.

The Inspector General community subscribes to standards of the statutorily established Council of the Inspectors General on Integrity and Efficiency (CIGIE), which "develop[s] policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General." CIGIE publishes quality standards that in my opinion are one of the best benchmarks that a compliance-oriented function could look to for report writing and investigation standards, precisely because they address issues that are near and dear to the compliance profession, such as independence.

As expected, there are a number of similarities between CIGIE's Quality Standards for Investigations (QSI) and ACFE's guidance. The QSIs are built around general standards concerning qualifications of investigators, independence, and due professional care. Those are supplemented by qualitative standards that include planning, execution, reporting, and managing investigative information. The reporting standard simply states, "Reports (oral and written) must thoroughly address all relevant aspects of the investigation and be accurate, clear, complete, concise, logically organized, timely, and objective." Further clarification points out the importance of impartiality in the report—that is, there is no appearance of bias. Statements in the report must be supported by evidence, and perhaps unique to investigative standards, the QSI calls for systemic weaknesses or management problems that undergird any violation to be reported to the organization's management.

Reports (oral and written) must thoroughly address all relevant aspects of the investigation and be accurate, clear, complete, concise, logically organized, timely, and objective.

The challenge of the newer reporting expectations, in which the report makes clearer conclusions in a non-judicial context,

is to balance these quality standards with customer expectations. It is evident that the standards mentioned above strain to keep pace with the change, but the new style still meets the standards.

The Wells Report is truly an exceptional opportunity to compare it to these standards, learn what pitfalls we might avoid, and maybe even establish a few best practices. Since I edit and approve investigative reports for a living, and have been involved with hundreds of such reports from the mundane to the high profile, I offer some observations that might help.

Lesson #1: The critical nature of objectiveness

Based on more than 60 witness interviews; reviewing video evidence; analysis of electronic text messages, phone logs, and emails; consulting weather, temperature, and other available data sources; and obtaining expert scientific analysis, the Wells Report said:

> …it is more probable than not that New England Patriots personnel participated in violations of the Playing Rules and were involved in a deliberate effort to circumvent the rules. In particular, we have concluded that it is more probable than not that Jim McNally (the Officials Locker Room attendant for the Patriots) and John Jastremski (an equipment assistant for the Patriots) participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee. Based on the evidence, it also is our view that it is more probable than not that Tom Brady (the quarterback of the Patriots) was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.

This is a breathtakingly unequivocal statement. I have seen such bold statements about a condition or event taking place, but few times is attribution made about a person's intent. The conclusion is written to meet a "preponderance of the evidence" standard, which is often explained as the 51% rule—if the evidence tends to ever so slightly tip the scales toward one outcome, then the standard has been met.

Typically, investigative reports convey facts, supported by evidence, that allow the reader of the report (a decision maker of some kind) to draw the conclusion that the preponderance burden has been met. An investigator may conclude that various pieces of evidence together are relevant to report in a way that makes those connections obvious, but making a conclusion on guilt is another thing entirely. These are treacherous waters to navigate and maintain that you, as an investigator, have remained objective and unbiased. I know because I've seen it: When you are a hammer, everything looks like a nail. It is human nature that once we believe one narrative, all evidence appears to point in that direction, and it is very easy to ignore evidence that is inconsistent with our narrative.

The conclusions about deliberation and general awareness of improper acts cited in this one paragraph of the Wells Report are stunning. As a regular writer and editor of such reports, I expected such a strong statement to be supported by overwhelming evidence at multiple levels. Instead, a lackluster collection of circumstances was the only offering. My observations concerning objectiveness includes that the Wells Report:

- made a "conclusion" of some kind at least 29 times;
- judged that it was "more probable than not" that something was true or false at least 13 times;

- stated "we believe" 37 different times in making some judgment or conclusion about a set of circumstances, with a consistent bias toward a view of guilt;
- assessed a set of facts using the terminology "in our view" four times, for instance, "…in our view, a contrary conclusion requires the acceptance of an implausible number of communications and events as benign coincidences," and all of them infer nefarious intent;
- contended nine times that something is "implausible" in their estimation;
- admitted that they accepted "uncertain information" and assumptions as the "mostly likely" circumstance at a given point in making their conclusions;
- assumed that an uptick in the frequency of Brady's text and voice contact with Jastremski and McNally, after it was known the NFL was investigating, was evidence of knowledge of some scheme to deflate footballs;
- read meaning into text messages between Brady, McNally, and Jastremski;
- inexplicably assigned bad motives for otherwise innocuous events, including:
  - that Brady was a proponent of a rule change 10 years earlier that allowed teams to inflate balls to their quarterback's preference;
  - that Brady happened to ask Jastremski into a space he had never previously been invited into;
  - that a superstar with a superstar model wife didn't turn his private cell phone over for inspection;
  - describing Brady as having "complained angrily" about the inflation level of the ball during a game in 2014, ascribing a value to a feeling that they had no ability to divine;
- on several occasions gave credence to one person's statement over a contradicting statement by another without any stated basis or corroborating evidence.

The first lesson we can learn is to stay in our lane. We cannot let a client's pre-determined desire for a particular outcome, nor our own prejudices, bias the independent, objective truth we discover. Nor can we write in such a way that it gives the appearance we are biased by how we report or what conclusions we make. There are times when evidence allows you to make a conclusion. For instance, if there is documentary and physical evidence, together with a confession and corroborating statements, then the investigator is safe to state a reasonable finding. But where weak, inconclusive, or circumstantial evidence is all there is, it is not the investigator's job to conclude whether the evidence meets a particular burden of proof. Otherwise objective investigations are ruined by reports that overstep boundaries.

I'll leave you wanting more. Next month we'll conclude with the last three lessons we can learn from the Wells Report. ✳

The opinions in this article are the author's and do not necessarily represent the position of any government agency.

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