

*Fox Rothschild Podcast*

**The Presumption of Innocence Podcast Series: Episode 7**

**Investigative Insights:  
A Conversation with a Former FBI Agent**

*Featuring Matthew Adams of Fox Rothschild LLP and Mark Calnan, retired FBI agent*

**Adams:** Hi everyone. Welcome to “The Presumption of Innocence,” a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice Group at Fox Rothschild. My name is Matthew Adams. I'll be your host today, and I'm one of the Co-Chairs of the Practice Group.

I have the pleasure of being joined by Mark Calnan, who is a retired FBI agent. Today, we're going to take a deep dive inside the mind of a federal criminal investigator. Mark served as an FBI special agent for nearly 25 years in Minneapolis, New York and Newark. His work in the FBI focused on organized crime, white-collar crime, drug trafficking and money laundering. These days, he's a licensed private investigator and a principal with the forensics and valuation services team at Withum, a traditional accounting firm that has morphed into a national powerhouse in an array of tax advisory and litigation support services over the last several years.

Mark, let's just jump right into it. I think it's seldom that we actually have the opportunity to understand the thinking of a federal criminal investigator. With your experience in the FBI, I'm going to take full advantage of that opportunity today. Talk to us for a moment about how cases were initiated when you were at the FBI.

**Calnan:** Thank you, Matt. It's good to be with you. First of all, before we start going down that road, let me just say, in the spirit of full disclosure, that everything I'm about to say is just my opinion, my view of things that I experienced during my time in the bureau, and what I see even post my Bureau career.

**Adams:** A disclosure that all you government types like to hear.

**Calnan:** Exactly. This is not the official view of the FBI or the Department of Justice of the United States of America. It's just me.

We talked about initiation of cases. I actually like to even take it a step prior to the initiation of cases. What is the typical spark that even initiates an initiation? That's something I learned years ago, and I think is an interesting point.

**Adams:** What's that?

**Calnan:** I think the best way to explain it is ... I can take you back in time to 1984. I was a brand new FBI agent at the FBI academy in Quantico. From day one, every instructor who stood in front of the class said the same thing. They all said, “You're going to make cases based on two things: On informants and wires.” I said, “Okay.”

Then the next instructor would come in the next day and he'd say, "You're gonna make cases based on two things, informants and wires." I heard this for four months at Quantico, every day. Then I spent 24 years, three months and 10 days as an agent working white-collar crime, organized crime, terrorism and international heroin trafficking, and I can tell you every case that we made was based on informants and wires. So, what I learned in Quantico – I should've just gone there for one day. Because I learned that the first day, and that was true throughout my entire career. Those tend to be the sparks that lead to initiation. Then from there, things get formalized.

**Adams:** Let's unpack that for a minute: Informants and wires. I find that fairly fascinating because I think in a lot of respects, people don't think about that. What type of information flows from informants and wires that forms the sparks for an investigation, as you put it? Then what happens?

**Calnan:** I like to think of it as a combination. It's not a silo, where there's wires or there's informants. In today's world, of course everything is a lot more complicated, but it's basically the same thing that's going on. So, when they say informants and wires, really what they mean is: On the informant side, it's just human intelligence. That means somebody is going to be giving us information. Wires used to be the basic wiretap, which is, of course, now a lot more complicated. But it's the same idea, that there's some kind of technical electronic surveillance going on.

It's a combination of the two. It's the perfect combination of somebody telling you something, but you're able to support that allegation through technology.

**Adams:** That's pretty fascinating in light of what we face today in our society. The way that we live, work and play has really dramatically become dependent almost exclusively on technology. Just think about the types of cell phones that we carry in our pockets. These cell phones have more computing power than the computers that launched the mission to the moon. In 2022, as we sit here – and I recognize that you've been retired from the bureau for a while – is what you're saying that most cases are built around technology? I get that it's evolved from the wiretaps in the 80s, when you started with the Bureau, to fit today's electronic communications, but am I correct in summarizing what you're saying that most cases are built off of that kind of data?

**Calnan:** My short answer is yes, but I don't think any really good case can be based just off technology. It should be a combination of the two. Even today, look at whistleblowers. Whistleblowers are people who are coming in with information. You add on human intelligence, or let's say in today's world, whistleblower information, which is basically the same as what informant information was back in the 80s with drug cases. It's the same idea.

You started saying about the advancement in technology. Think of me in 1984, coming out of Quantico. Today, FBI agents are all given smartphones and laptops, the whole shebang. In 1984, there were no smartphones. There was no internet. I couldn't Google somebody. There was no such thing. I feel like I was speaking on both sides of my mouth when I'm saying it is amazing how much things have changed as far as technology, but on the other side of my mouth, I'm also saying that in some ways nothing has changed. It's still based on technology and human intelligence. Without both of them, generally speaking, you have a weaker case. With both of them, you have a strong case. You have a nice case.

**Adams:** It sounds to me like you're saying it's the same method, but new tools.

**Calnan:** Exactly. I think that those FBI agents in the three-piece suits and the wing tip shoes who were standing in front of me back in Quantico in 1984 are probably still laughing, saying, “See kid, what I told you then is still true, isn't it?”

Generally, it is still true. Things have just progressed a little bit, but basically the things are the same.

**Adams:** So, you identify these informants and wires – the human intelligence, coupled with the more concrete, the more tangible electronic intercept or communication. In today's world, that means an email, text or, or something of that variety. Certainly, the Bureau relies on Title III wiretaps like it did back in the 80s still. But to such a greater extent, our electronic communication has really evolved. If that's the spark, as you call it, to the investigative process, where does the investigative process go next? Which cases actually get opened and why?

**Calnan:** You know what Matt, I like to think of it as – imagine some young FBI agent. Like for me, I was in Minneapolis, Minnesota, sitting at my little desk and over my head is a gigantic funnel. That funnel is the funnel that everybody is throwing referrals to: cases, potential cases, leads. Referrals come from a lot of people. I don't think most people understand this, but referrals come from so many sources. They come with more sources today than they did back then. But in today's world, especially if you take a look at a government fraud, there's so much surveillance going on, electronic surveillance, that is producing an intelligence. That then results in referrals coming to the FBI and from other FBI offices, from other agencies, from other law enforcement, from regulatory agencies, from private industries, still from private citizens, still from whistleblowers. You have all these different sources of information, all throwing information into this gigantic funnel. From there, everything gets sifted down. For something to make it all the way through that funnel to end up on an FBI agent's desk is quite a process.

**Adams:** Let's talk about that process a little bit. How much in your experience does public policy – and that shifts like the wind blows – and politics – which also has a bit of a shifting dynamic associated with it – how much do those variables play into what makes its way through the funnel and lands on an FBI agent's desk?

**Calnan:** It's funny because I think that we all love to say, “Oh, it's the Department of Justice. We're all above politics and above public opinion.” But I think that anybody who believes that also believes in the Easter Bunny. That's just impossible. That's not the world we live in, and frankly, it never has been. A lot of people like to think that that's just a new situation with politics and public opinion. But if you think of it, one of the first really big FBI cases was in 1932, the Lindbergh kidnapping. And guess what? That was all about public opinion. The public wanted that baby found. They brought in the FBI, and J. Edgar Hoover jumped into it with both feet.

So, public opinion means a lot and politics mean a lot on priorities. For example, each FBI office has different branches. They have a white-collar branch, they have a criminal gangs branch, violent crime branch, organized crime, securities fraud, government fraud, mail fraud, bank fraud, bank robberies fraud, on and on and on. So, when cases come down to an office, everybody wants their piece of the pie. Everybody wants to have certain cases. So that's all part of it, too. The funnel kind of works both ways. An FBI office can only take so many cases in so many different areas.

**Adams:** I'm glad to hear you acknowledge that the policy and the politics and the public opinion weigh into which cases actually get open. Because I think seldomly do we actually hear the government say that, until like yourself, there's an opportunity to be more candid when you're no

longer associated with the agency. But just as recently as a couple of weeks ago, we heard President Biden indicate that there was going to be a policy shift. A policy emphasis, I guess, is a better way of saying it, on pandemic-related fraud. That is the modern, 2022 version of the Lindbergh baby kidnapping, right?

**Calnan:** Exactly. It's a number one news item. It's something everybody's talking about. So that's when it becomes a high priority. The FBI doesn't work in a vacuum. Outsized forces have an effect on the Bureau and, ultimately, they have an effect on what cases actually get worked. I can tell you that, as sure as I'm sitting here.

**Adams:** Mark, you mentioned the funnel and you mentioned the variables that play into what brings the potential case down through the funnel. Why and how does the case actually get opened? Why and how does the U.S. Attorney's Office say, "All right, this is something we're going to pursue."

**Calnan:** It's a sifting process, and there's all sorts of hurdles that a case has to get over. In a typical white-collar case... here's a good example:

The threshold to open a case in Manhattan is a hell of a lot different than the threshold to open a case in Iowa City, Iowa. That's just the nature of the beast. A case that would be a huge case in Iowa City might not ever get opened in Manhattan. So, geographic location plays a part in it.

Also, the squads that are working in a certain violation can't work a hundred cases. They have to take the top cases that have the best potential for prosecution, that would have the best impact and that are more likely to be successful. So, it's kind of like the low hanging fruit: You don't want to waste resources on a case where the chances of success are minimal. You want to go for the cases that you think would have the biggest impact and the best chances for success.

If you think about it, there's like a million variables all in play at once. All of that is part of that sifting process for those cases that get thrown in the top of the funnel to finally come out the bottom side and end up on somebody's desk.

**Adams:** It seems to me, then, that there would be a constant evaluation of the strengths of your proofs. At the end of the day, proof beyond a reasonable doubt is the highest quantum of evidence of any legal system in history. So, that is the assessment, correct, that there is a constant self-reflection at the part of the federal agencies? And in particular, the investigators like you were looking into their own proofs to see if strength is there or not?

**Calnan:** Oh, absolutely. It's funny because the name of this show is "Presumption of Innocence," and I understand what that means. But if you're the FBI agent – again, speaking just for myself – if I'm the FBI agent who gets the lead to my desk of a potential case that has been reviewed by the Department of Justice, they've talked to the U.S. Attorney's Office about it, it's gone through FBI management and it's worked its way down to me. On one hand, I totally understand that presumption of innocence, but you can understand that I have a presumption too. My presumption is, there's probably some credibility to this allegation, because it wouldn't have made it to my desk if it hadn't passed the scrutiny of everybody along the line until it finally got to me.

It didn't matter what kind of case I was working. I worked at an awful lot of drug cases, but when the information came to my desk, I tended to have a very high level of confidence that there was, more likely than not, some credibility to this allegation. I never went into a case thinking that this was probably just a weak case. I almost always felt that it was probably going to be a strong case.

**Adams:** Can you remember a point in your career where you encountered evidence that countered that presumption? That presumption you had in your mind that this had worked its way through the funnel and therefore there's got to be something there? Can you recall a scenario where you found evidence that negated that presumption in your own mind?

**Calnan:** Yes, and I can't tell you the actual details, but I'll tell you what would happen. Every once in a while, something would come to your desk. As the years went on, you could kind of smell it a mile away. It would come to your desk and you'd read it. I wouldn't know this in my first couple of years in the Bureau, but after 15, 16, 18, 20 years, you start to figure out something's not right. You read something and you might say, "What is with this case? Something doesn't add up. It doesn't seem strong. It seems like we're reaching." Then I might ask about it: "How did it end up here?" I would find that somebody had a special interest in the case, somebody was doing a favor for somebody because they had worked the case for us, and now they're asking us to work this case for them.

Again, it's outside influence. But I'm the guy who has to work the case. So, to answer your question, did it ever happen? Yes, it happened. I didn't appreciate it because I didn't have time for nonsense and to be given lousy cases. I was working in Manhattan most of my career and we had so many great cases. Why would you take a weak case that was a bit of a stretch? I didn't appreciate that.

**Adams:** I find that fascinating, and obviously appreciate your candor, Mark, because in my role as a defense lawyer, I'm frequently in the position of trying to convince the government that what they have is a weak case. The beauty of white-collar investigations is, it's not reactionary. Often, you get involved as the investigation is unfolding. You understand that there's an active investigation and the government, to its credit, allows a defense lawyer like me to engage with them and try to convince them that their case might not be as good as maybe somebody thought along that process.

When you start to be met with proofs that suggest innocence, or at least suggest that the government's theory is not ironclad, internally in the behind-the-scenes aspects of the government, what occurs?

**Calnan:** Well, again, speaking for myself: What I learned over the years was the television show "Law & Order." It's been on forever.

**Adams:** Of course, of course.

**Calnan:** Well, "Law & Order" is a television show. It's not real life. I think it's a great example, though, for any investigator. "Law & Order" is an hour show. The first 30 minutes is the investigation by the NYPD. The second 30 minutes is the prosecution by the Manhattan DA's Office. It's as if the guys doing the investigation are in their silo and the guys doing their prosecution are in their silo. There's not a whole lot of interplay between the two. I think that's a disaster for a successful investigation.

So, to answer your question about what do you do in a situation like that? What I learned very early in my career, and I did it through my entire career, was: I had an incredibly close relationship with the U.S. Attorney's Office, because that's where the rubber meets the road if you're an investigator. If you have a weak case, they're going to pick up on it. So, I'd just as soon get them on board with me as quickly as possible, have them take a look at it.

So, if I was going to tell my bosses, "I don't think this was a very good case and I think it's weak and there's holes in it. I don't think we should waste a lot of time in it." For me to say that was one thing,

but for me to say, “I spoke with the U.S. Attorney's Office, and the same assistant United States attorney (AUSA) who I've been working with for years is not crazy about this case and pointed out these weaknesses.” Well, now I have a leg to stand on.

**Adams:** What's that look like, Mark? You literally walk into the U.S. Attorney's Office, sit down in a conference room and say, “Here's the evidence that either doesn't exist tying this person to a crime,” or “Here's the information that I've been able to develop that negates their guilt.”

What does that look like?

**Calnan:** I found it, frankly, probably the most satisfying part of my career. And that was working with the U.S. Attorney's Office.

We're working in the Southern District of New York, but mostly in the Eastern District in Brooklyn. Our office is at 26 Federal Plaza, so to get the Eastern District, I just had to go over the Brooklyn Bridge a mile away. To go the Southern District, I just had to cross the street. So, our relationships with the two Districts were huge. What I found was, a lot of agents end up having kind of bad relations with the U.S. Attorney's Office. They don't trust each other and there's no cooperation. The suspicion is that they're following the “Law & Order” kind of model: “I'm doing the investigation, you handle the prosecution.” What I found is, if you work a case with somebody, an AUSA in the Eastern District for example, and it goes well, the next time you have a case you go to that AUSA. You don't go shopping around. If it ain't broke, don't fix it.

I have AUSAs who I worked with in the early 90s who are now, of course, in private practice and guess what? I'm still doing cases with them. The reason I'm doing cases with them is because I've proven myself with them. I trust them, and they trust me.

So, I go back to an AUSA who I've been working with in the Eastern District and I say, “I've got this new case and I want to see what you think about it.” I'm not going to BS them. I'm going to tell them the truth. I'm going to tell them where I have concerns, where I think the case is strong and where I think it's weak. Because, if I'm going to do this case successfully, I have to have them on board with me. I can't be like “Law & Order.” They have to be supporting of it.

I always tell young FBI agents, “Doing an investigation is fine, but the whole point of the investigation is to get a prosecution.” You can't have a successful investigation if the prosecution wasn't successful. That's why working with the U.S. Attorney's office was incredibly important. It's a great defense from when you get in a weak case that you don't have to prove that it's weak. The U.S. Attorney's Office is telling you they're not interested because they don't think there's enough probable cause there. Or, it's just a weak case and they're not going to go up on wires and you're not going to get a search warrant. All the negative stuff that hurts the case, then there's no point going forward. It's a waste of time.

**Adams:** Well, from where I sit on the defense side, Mark, that sort of validates a pretty significant portion of what we do every day. That is, engage with the government before charges are made and try to convince them that there's more beneath the surface than what meets the eye. I think that's fascinating to hear from you.

Let's go full circle now. We've talked a significant amount about your time with the FBI and some of the internal dynamics and the mindset of an FBI agent. I'm so grateful for your sharing that with us, but let's go full circle.

You're now in the private sector. We mentioned at the outset, you're a private investigator. You're working with Withum now in their forensics and valuation services team. You work with guys like me, who, rather than trying to convict people are trying to preserve the presumption of innocence. How do FBI investigations, of the type that you've described throughout our time today, compare with the type of defense investigations that you're now working on with lawyers like me?

**Calnan:** Well, it's funny, I get asked that a lot actually. I think that there's always the expectation that after 24 years in the FBI and then to go to work... I've been retired for 14 years, 14 years I've been doing investigations in private industry. I think what people expect us to hear that has been this incredible change for me. That I went from being on one side of this battle to being on the other side of the battle. To be perfectly frank with you, I don't feel that way at all. I do recognize the fact that when I was in the FBI I felt like a knight carrying a sword. That sword was to go after the bad actors and to go after a misconduct, and to do damage.

When I got out of the FBI, I went to work for Fidelity Investments. By the way, a fantastic company. I was doing an anti-money laundering investigations, I'm writing Suspicious Activity Reporting (SAR) reports, which I used to read every day. When I went to Fidelity and I had to shift, put my sword down. I felt like I was picking up a shield. I put the sword down and now I have a shield, and that shield that I'm using at that point was to protect Fidelity from bad actors within Fidelity, from outside Fidelity. Also, to keep Fidelity protected, that they would be doing their proper due diligence, that they would be in compliance.

So, I didn't see it as that big of a shift. The skill set that I used in the Bureau was the exact same skill set that I was using when I was working to protect Fidelity or doing the cases that I'm doing today. It was still about doing investigations. I didn't feel some big shift of working for the FBI, as opposed to now working on for defense attorneys. It doesn't affect me in any way, to tell you the truth. I feel totally comfortable with it, and I'm proud of the work I do.

**Adams:** Is that because you follow the facts, Mark?

**Calnan:** Exactly, and it is what it is. I feel like I'm a witness to the truth. If I can give you information, and that helps you, well, that's great. But if I give them information, that I find information that maybe you wish didn't exist, guess what? You're still better off having that. You want to know what's really out there. You want to know the truth.

So, getting to the truth, to me, it's easy. There's no conflict with that. You follow the path to where it takes you. You don't have an agenda. The agenda is to get it right. I was very proud of my career in the Bureau, but I swear to you, I'm equally proud of what I've done since then. These past 14 years have been amazing. My approach has been consistent, and I try to do things honestly, with integrity, and use the skills that I have. It's been very, very rewarding.

**Adams:** Well, that's tremendous to hear, Mark. As we wind down in our time together today, can you share some recommendations – having been with the FBI for as long as you were – that you might have for criminal defense teams as they embark upon their work to defend corporations and individuals that might find themselves in the cross hairs or otherwise mixed into a federal criminal investigation?

**Calnan:** We were talking about all the new technology. I think if the white-collar criminal defense attorney asked me what they should be aware of, I think the number one thing I would say is, "You better evaluate your awareness and your capability relative to regulatory and governmental oversight

utilizing digital technology and human intelligence.” If the government is using all this technology to make cases, defense attorneys better be aware of that and better have knowledge about that, because you can't fight a battle if you don't know what you're dealing with.

I think a really good defense attorney today better be aware of how the government is using digital technology against them. I was reading some studies recently about all this business about digital technology and about how it's being utilized for oversight on government fraud and stuff. But guess what? There's still a huge amount of people calling whistleblowers, calling up with information. And so that's still continues.

**Adams:** It all goes back to informants and wires, my friend.

**Calnan:** Oh, exactly. I never thought I'd be saying that, though, if you think about it, when I was at Quantico that was 38 years ago. So, it's a new world, but is it really?

**Adams:** Same methods, new tools. I think your insights today, from your perspective as a retired FBI agent, letting us peel back a few layers and getting into your mind as a retired criminal investigator, is just something remarkable, and I'm really happy to have had you on the program. Thank you so much for being with us.

**Calnan:** My pleasure. Thank you, Matt.