

Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 12

Internal Investigations

Featuring Matthew Adams, Charles DeMonaco and Jana Volante Walshak of Fox Rothschild LLP

Adams: Hi everyone and welcome back to "The Presumption of Innocence," a podcast brought to you by the [White-Collar Criminal Defense and Regulatory Compliance Practice](#) at Fox Rothschild. I'm your host, [Matt Adams](#), a partner in the practice and also the Co-Chair of our practice group.

Today, I am joined by two of my partners. First we have [Chuck DeMonaco](#), who is the Co-Chair Emeritus of this practice group, a former AUSA, state prosecutor and Assistant Chief in the Environmental Crimes Section at "Main Justice," DOJ headquarters, in Washington, DC.

I'm also joined today by [Jana Volante Walshak](#), who is another one of our partners in the White-Collar Criminal Defense and Regulatory Compliance Practice. She brings an extensive background in business and serves as outside general counsel to a number of our clients. In that capacity, she is frequently called upon to conduct internal investigations.

That's the very topic that we're going to unpack today: The why and how of internal investigations. I'm going to start with you, Chuck. For our audience, why don't you just frame the issue out? What exactly is an internal investigation?

DeMonaco: Thank you, Matt. It's a pleasure to be here with both of you. Jana, and I, of course, work very closely together on just about all of our matters in the firm, and we do quite a bit with internal investigations.

So, what is an internal investigation? Well, an internal investigation can take many shapes and sizes. For example, an internal investigation can be done by an organization itself, through its office of general counsel, through its corporate compliance officer and the like. At times, it's a little more serious, where outside counsel is engaged.

Let me just describe just briefly what the internal investigation is. Back in around 1990, the [Corporate Sentencing Guidelines](#) went into effect. The sentencing guidelines had seven criteria. I was in the Justice Department in Washington, DC at the time when they did go into effect. I have experience in that area based upon my role in DOJ.

As a result, the internal investigation really is focused on identifying whether there is misconduct, whether there's any indication that there was a violation of laws, rules, regulations. As a result, we engage experts to work with us in an internal investigation to identify any potential wrongdoing, and then take appropriate action.

Adams: Jana, this one's for you. What are some of the telltale signs that an entity has concerns that there's going to be misconduct or some other triggering event that would lead to the internal investigation concept that Chuck just laid out for us?

Walshak: An organization could get a complaint made anonymously to its hotline. Corporations sometimes get anonymous letters. Someone could complain to their supervisor that they're concerned that there's misconduct going on. There could be an audit by an accounting firm that doesn't come back clean and that shows some concerns. Or the entity could get a grand jury subpoena or a civil investigative demand from the government and all of those things could trigger the need for an internal investigation.

Adams: Jana, is it like Justice Potter Stewart said of obscenity? You know it when you see it? Is that pretty apt? It doesn't sound to me like there's a black and white set of criteria then, right?

Walshak: You're right. There's no black and white criteria, necessarily. If there's a concern that something might be wrong, that they're maybe missing funds or that someone may be violating policies, violating laws or engaging in other misconduct, that should be investigated and followed up on.

Adams: I think this gets us into maybe the "why." Chuck, you started to talk a little bit about DOJ's corporate sentencing policy. As I've seen the evolution – at least in recent times, because we're now going on a year into the Biden administration – we came off of four years in the Trump administration, and I think most of us would acknowledge that the executive branch sets the policy for DOJ.

Back last fall, Deputy Attorney General Lisa Monaco appeared at the ABA White-Collar Crime Symposium in Miami and delivered what was then considered a fairly significant speech, wherein she addressed a policy shift at DOJ back to Obama-era policies about corporate responsibility. It seemingly at the time marked a shift from then-Deputy Attorney General Rod Rosenstein's policy memoranda under the Trump administration, where they de-emphasized that individual responsibility in connection with corporate investigations.

So, my question to you is, what's the interplay, the intersection, if you will, between an internal investigation and these shifting DOJ policies?

DeMonaco: That's an excellent question, Matt. It really goes back to the Corporate Sentencing Guidelines of 1990. That is really what set the seven minimum criteria. That's when most organizations realized they needed to have an effective corporate compliance program. If they didn't have one, and if there was any criminal charge that would be brought against the organization, they would have to implement a corporate compliance program that would be under the control and monitorship of the court. It was an evolution from 1990 until where we are today, in 2022. As you correctly pointed out, there are different administrations, different Attorneys General, different policies.

The current policy is to emphasize that they are going to be held responsible, both individuals and corporations, for any misconduct. It's not going to be one or the other. It's going to be both. How does that tie into an internal investigation? If it is a good organization and has an effective corporate compliance program, then there is going to be some identification of potential misconduct.

The internal investigation will identify the facts as they relate to that misconduct, will take corrective action. It may make the disclosure to the government or be able to respond to the government, as Jana mentioned, if there is a Criminal Investigation Division (CID) or a grand jury subpoena.

Then, when it comes time to have charges brought, there may in fact be a charge brought against your organization, but it will be mitigated by the effective corporate compliance program and the

thorough internal investigation. As far as the individual is concerned, that is going to be an individual who's going to have exposure and may very well suffer the possibility of indictment and conviction.

Adams: When we think about corporate governance, Jana, we think a lot about the unintended consequences of punishing an entire corporation for the acts of a few. I think that's the driving force behind some of the policy shifts that we're starting to talk about: Individual accountability. Because we have shareholders, we have innocent employees who rely on going to work every day and punching a clock to sustain their families, as well as innocent shareholders who may have their life savings invested.

How do you go about identifying the individuals who might be responsible, while trying to parse through some of the individuals who, as outside counsel, could be very well directing your internal investigation itself? How do you navigate that minefield of potential conflicts?

Walshak: I think it's very important for the investigation to be comprehensive. You can't necessarily let one or two people within the organization set the investigative plan. As you're talking to employees, witnesses, as you're reviewing documents, I think you have to be flexible, and potentially expand or change the scope of the investigation as you're finding things out.

Adams: Jana, you do a lot of this work. Does that involve close contact with the board of directors?

Walshak: It can. Sometimes it's with the board itself, sometimes it's with a committee of the board, the audit committee, perhaps, or a special subcommittee of the board that's formed just for purposes of the internal investigation. We frequently report to the board. If it's a company that doesn't have a board, we may be working with the company's compliance officer or with its CEO, or if it's a closely held company, with the owners.

Adams: Chuck, I have to go back to you because we started framing this issue with this discussion of policy. Oftentimes a corporation, albeit recognized as a legal person, a legal entity, is an amalgamation or a combination if you will, of its individuals. When we talk about corporate malfeasance, there are frequently executives who might be in the mix. How do you navigate that?

DeMonaco: That's a very important point, and it's essential to navigate that. You're absolutely right, a corporation is a collection. It's made up of individuals. It only acts because its executives and the other people who, under the executives, of course, they work under the board. So, the board sets the mission and closely oversees the executives. But in spite of that, some conflict could be issues that the executives cause.

It all goes back to there being an effective corporate compliance program. The effective corporate compliance program is to prevent and detect violations. But that doesn't mean there's some immunity for the organization, in not having a problem, where there could be some violation of laws or rules or regulations.

That's, of course, the internal investigation, where then we put together an investigative plan. We hire investigators who could help us pursue this investigation. We protect everything under the attorney-client privilege. We report directly to the board as appropriate, as well as to the general counsel, to the extent that there is a general counsel in the organization.

Sometimes, we identify that there is an executive who created the issue, who engaged in misconduct. Once we identify that, we make recommendations to the board on taking some corrective action, maybe suspending that individual with or without pay. At that point, that individual

is going to need his own or her own counsel and will not really be part of the investigation going forward.

At the end of the day, what's the purpose of all of this? It's to make the organization better. It's to make it stronger. It's to be a good corporate steward. In addition, there may be obligations then to report to the government. If so, you're going to make a request to the government that there'd be some leniency for the organization, but there may not be.

I'm sure we'll get into this discussion as this goes forward, but then there could be some avenue, some work around, so to speak, for your organization based upon the internal investigation that it conducted.

Adams: Chuck, your client is the corporation, right? It's not any of the executives.

DeMonaco: We make it very clear when we interview anybody, we make it absolutely clear through, Upjohn –

Adams: We're going to go there soon.

DeMonaco: And not to get too far ahead of ourselves, but we make it very clear that we represent only the organization, we don't represent any individual. In the event that there's any individual exposure or liability, then that's not part of our role.

That's part of the corporate counsel who is going to represent that individual. Not us, we report to the board, that's our client.

Adams: Now Jana, we at the firm do enough of this work. I know you in particular do a lot of this work. Have you encountered that scenario that I was just discussing with Chuck, where maybe you've identified as you start to roll into the investigation that there are actually executives who you ordinarily might be interacting with in your capacity as outside counsel who really have themselves ensnared in the very issues that you're investigating?

Walshak: We absolutely have. When that happens, we have a duty to inform the board that that's what we've found. Those executives will need their own counsel, first of all, if they don't already have counsel. We may also need to take disciplinary action against them, to the extent that they've engaged in misconduct.

Adams: Chuck, we started to discuss the "how" of the internal investigation, the way that it launches. I'd imagine conducting an internal investigation is quite different than the investigations you conducted when you were a prosecutor.

DeMonaco: You're right, but there are some similarities. For example, I call upon my experience as a former Assistant U.S. Attorney, and a lawyer in DOJ as well as in the District Attorney's Office, in putting together and helping put together an investigative plan. We normally engage an investigator who's a former law enforcement agent. Jana and I generally use a former federal law enforcement agent. We put together an investigative plan. The investigative plan is to interview witnesses. It's to review documents. It's to gather other information that will help inform us as to whether or not there was a violation of law, rules or regulations.

So, we have to conduct it that way, and we have to do it in a way where we're not rigid. For example, if we get information through the internal investigation, we may have to modify the investigative plan.

We may have to expand it. We may have to go in a different direction. We do all of that, and that's how a good investigation is conducted internally. Because at the end of the day, we want to have a report, and we want that report to be comprehensive, as Jana mentioned, and we want it to be thorough. The only way you accomplish that is counsel spearheading the internal investigation with a very experienced investigator and forensic accountants, as many of the issues are financial in nature. And then, we're confident at the end of that process that we report to the organization and to the board that this is what we found. Then of course, there's going to be some recommendations that follow up.

Adams: Now, all of this is done under the attorney-client privilege. We spent a little bit at the outset talking about this delicate balance that has to be struck because the company's really a legal fiction, but that's the client.

Jana, Chuck touched upon it a little while ago, but why don't you walk us through this concept of an Upjohn warning, and how in practical terms, conducting an internal investigation, you deal with the requirements of the Upjohn decision.

Walshak: An Upjohn warning is a warning given to employees of the corporation, usually at the time that they're being interviewed as part of the internal investigation. It lets them know that the corporation is our client and that while we appreciate them speaking with us and being interviewed by us, the corporation ultimately holds the attorney-client privilege. Whatever they tell us, we may need to later reveal to law enforcement, to the board of directors. That's the corporation's decision to allow us to do that and to ultimately waive the attorney-client privilege. That's really the substance of the Upjohn warning and when possible, we try to do that in writing to make things as clear as possible for the employees.

Adams: With all that privilege and the expertise of outside help that you might need, that Chuck mentioned, whether it be forensic accountants or investigators, we bring them in with a Kovel arrangement.

Walshak: We communicate directly with the investigators or the forensic accountants, and they do their work at our direction so that their work can be part of our protected attorney work product.

Adams: We've talked a little bit or a lot, about the mechanics of why and how this process unfolds. Chuck, let's talk for a minute, if we can, about what happens once you get the information? You may set out to find X and find Y or Z, as opposed to what you thought you were going to find when you first started in this process. We can reflect, probably on a number of high-profile incidences, where an investigation has gone down a path of looking at one thing and something else has overshadowed the original target of the investigation.

If you find there's no wrongdoing, great. I want to shout that from the rooftops, if I'm working for the company. But in the circumstance where you have uncovered wrongdoing of some kind, an act or an omission that would run afoul of the law, how does the calculation go about reporting that to the government?

DeMonaco: What we do, Matt, is we coordinate very closely with the board, and we seek our direction from the board. We of course make recommendations to the board, but they're the ones in control, so to speak, of our work product. Do they want us to prepare a written report and give it to the board? Do they want us just to submit an oral report to the board? Do they want us to talk to the audit committee? All of those can be a direction that we receive from the board. But then at the end

of the day, if the recommendation is to make a report to the government ... they may not necessarily need to do that, but on the other hand, it all depends on how this investigation began.

Jana touched on it earlier on when she mentioned maybe there was a grand jury subpoena. That means the government already knew that there was possible misconduct at this organization. They're investigating and so you're investigating to determine what, if anything, went wrong. If it's on the civil side with the civil investigative demand, likewise, the government is aware of it.

There are situations where the government is not aware of it. It comes to the corporate compliance officer. It comes through, as Jana mentioned, an internal audit of some sort. At that point, you've identified that the misconduct occurred. What is the best thing for the organization to do? Not for the individual, but for the organization? The organization is going to want to cooperate at that point, probably with the government, because it's possible the government will find out that very thing that you just investigated.

Maybe the organization is then in a position to seek some sort of a victim status. They are not going to be in the crosshairs of the prosecutor. Maybe it's more serious than that. Maybe there's a need for a deferred prosecution agreement. Because we know with the deferred prosecution agreement, that's going to require some form of cooperation and turning in the individuals. That's all going to be through the direction of the board, but those are all the options we will then be laying out for the board so they can make an informed and appropriate decision.

Adams: I'm going to build on that, Chuck, and I want to give you a bit of a hypothetical. Let's, for the purposes of our conversation here, assume that your investigation substantiates some form of illegality. Let's assume it's criminal wrongdoing. Give me an example of a circumstance that you've encountered where you don't report that to the government. You may just handle it internally, with internal mitigation, rather than hand up an individual on a silver platter.

DeMonaco: That's going to be up to the board. The board may decide that it's in their best interest to handle this internally, if an investigation ensues by the government, then to cooperate at that point in time. But it's up to the organization. Your organization may make a decision to say we want to rid ourselves of whoever might have involved in improper conduct and go no further than that.

At the end of the day, there's exposure to the company. To the extent that the government does begin an investigation ... Why didn't you make the report? Why didn't you cooperate more? That's not in the corporation's best interest. The recommendation generally from counsel will be to make the report.

If you identify the criminal while doing this, make a report. The government may not care too much about this finding and may not do anything on it. But maybe it will. In any event, the corporation did what it needs to do. Number one, it has a good corporate compliance program. Number two, it's diligently enforced. Number three, when they find the situation, there may be some violation of law, there are obligations to prevent it, detect it, then do an internal investigation and then, of course, follow-up findings to the board as to whether or not it should be reported or not. Those are difficult decisions for the board to make, as you can imagine.

Walshak: I think to the extent that it is reported, to the extent that you do report the findings of the internal investigation to the government, you may want to emphasize all of the corrective action that you've taken in response to the internal investigation. Were responsible employees that engaged in misconduct disciplined? Was your corporate compliance program improved to mitigate the risk of

misconduct like this occurring again? Was there an attempt to recover funds, maybe through civil actions, funds that were misappropriated? Was there some attempt to recover them?

I think all of those things can be emphasized to the government as well, to show that not only did we discover this misconduct and not only are we reporting it to you, but we've really sought to correct it and make sure that it doesn't happen again.

Adams: I can think of a scenario where the board is really managing risk. I like to tell my clients, corporate clients particularly, that there's no real black and white in some of these areas. Yes, if you find gross misconduct, that's a pretty clear example of, you have to go and report it.

But isn't it really a spectrum, Chuck? Isn't it really how risk-averse a particular board is? You can give a board all of the guidance that you want until you're blue in the face, but at the end of the day, they have to assume what risk they're willing to assume, or not.

DeMonaco: That's absolutely right. All of our conversations with the board are protected by the attorney-client privilege.

We provide them the facts, the advice that we gathered from the internal investigation. At the end of the day, it's up to the board. We would review with the board the benefits of a voluntary disclosure if this isn't something that has already been identified by the government. As we know, there are many policies in the government that encourage voluntary disclosure as well.

You only make a voluntary disclosure if you've done an effective internal investigation, which is in one of the options to the board. If you make the voluntary disclosure, you could ask for leniency for the organization, you can ask that it not be prosecuted, or if it is prosecuted, maybe deferred prosecution, with the voluntary disclosure plus the cooperation.

As Jana mentioned, obviously when you make a disclosure like that, you want to identify all the things you accomplished from the internal investigation, including the corrective action, the kind of enhancements or revisions of the corporate compliance program, maybe additional resources that have been identified to be part of the organization. All of that is very helpful in our discussions with the government. Of course, as we've identified early on here, our clients are corporations, not the individuals. They could be sacrificing individuals for a deferred prosecution agreement. They will be. For most voluntary disclosures, they will be. For most cooperation with government investigations, you will be. That's one of the consequences, but our clients are the organization. We're the ones doing the internal investigations. You're right. It's a matter of risk tolerance by the board. What do they want to do based upon the advice you provide?

Adams: Now, Jana, as we're talking through this spectrum of the risk tolerance of the board -- who is really ultimately who you are responsible to in this dynamic -- how do you decide whether to memorialize the findings of your internal investigation in a written form or not?

Walshak: I think again, that's the board's decision, whether or not they want something in writing.

I think the concern can be that maybe that written report would be discoverable later. Particularly, if that written report is produced to the government and the government ends up prosecuting someone, that report could become discoverable. I think the board has to weigh that as well, whether they'd like our report to them just to be verbal and to be, therefore, protected by the attorney-client privilege. Or, whether they'd like something more formal, knowing that could be discoverable under certain circumstances.



Adams: So it's not a one size fits all kind of thing? You make that decision based on the facts and circumstances presented?

Walshak: Exactly. That's another area where we would advise the board and lay out the pros and cons of a verbal report versus a written report. Ultimately, they would make the decision.

Adams: I'm afraid that's all the time we have for today. It's been a lot of fun unpacking this very relevant, and perhaps, in light of recent guidance from the Department of Justice, even more pressing of an issue than ever before about internal investigations, why and how they're conducted. I can't thank two pros enough, my partners, Chuck and Jana.

Until next time, ladies and gentlemen, on "The Presumption of Innocence." My name's Matt Adams. See you then.