Cahill

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Sixth Circuit Strengthens Privilege and Work-Product Protections for Internal Investigation Materials

In *In re FirstEnergy Corporation*,[1] the Sixth Circuit Court of Appeals overturned a district court order requiring FirstEnergy to produce to securities class action plaintiffs materials resulting from a company's internal investigations following accusations that a senior executive of the company participated in a bribery scandal involving an Ohio lawmaker. In a rare grant of mandamus relief, the Sixth Circuit held that materials prepared by the company's outside counsel as part of the internal investigation were protected by the attorney-client privilege and work-product doctrine, even if they were also later used for adjacent business purposes, such as SEC reporting or HR/PR decisions. As the Sixth Circuit's decision explains: "[w]hat matters under the attorney-client privilege is whether a company seeks legal advice … not what it later does with that advice."[2] The court also joined other circuits in holding that disclosures to auditors do not waive work-product protection as long as the auditor relationship is non-adversarial. The decision, and the Sixth Circuit's subsequent denial for rehearing in panel or *en banc*,[3] reaffirms bedrock protections afforded under the attorney-client privilege and work-product doctrine in the context of corporate internal investigations led by outside counsel.

I. Background

In July of 2020, the federal government charged Larry Householder, a member of the Ohio House of Representatives, with violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO").[4] The complaint alleged that an unnamed company and its executives laundered millions of dollars through nonprofits and into the campaign funds of Ohio legislators to ensure the passage of House Bill 6, a $1.3 billion bailout for two nuclear power plants owned and run by FirstEnergy Corporation.[5] The unnamed company was understood to be FirstEnergy, to whom subpoenas were simultaneously served.[6] The company's stock fell 45% the next day.[7]

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[1] 154 F.4th 431 (6th Cir. 2025).

[2] *Id.*

[3] Order, *In re FirstEnergy Corp.*, No. 24-3654 (6th Cir. 2025), ECF No. 41 (Order denying petition for rehearing in panel); Order, *In re FirstEnergy Corp.*, No. 24-3654 (6th Cir. 2025), ECF No. 44 (Order denying petition for rehearing *en banc*).

[4] *Id.* at 435.

[5] *Id.*

[6] *Id.*

[7] *Id.*

Within a week, FirstEnergy and an independent committee of its board retained separate outside counsel to conduct internal investigations, advise on responses to the DOJ subpoenas, and assess potential criminal and civil exposure.[8] Multiple state and federal agencies, including the SEC, the Ohio Attorney General, and the Public Utilities Commission of Ohio, opened investigations, and at least eight civil suits followed.[9] As discovery progressed, plaintiffs moved to compel "all previously withheld documents" related to the internal investigations and sought to force witnesses to answer questions about investigative findings.[10] A special master recommended wholesale production; the district court adopted that recommendation and denied interlocutory review, prompting FirstEnergy's petition for mandamus.[11]

The district court's order rested on two connected conclusions. First, it treated the investigations as predominately business-oriented because FirstEnergy later used counsel's advice to make an SEC disclosure, and employment and capital-markets decisions.[12] Second, it excluded a board director's declaration describing the investigations' legal purpose because the declaration omitted two words from the statutory form, an exclusion the Sixth Circuit described as a scrivener's error.[13] The court also faulted FirstEnergy for not logging investigation communications, notwithstanding the parties' stipulation excusing privilege logs for post-complaint, outside-counsel materials concerning the Householder matter.

II. The Sixth's Ciruit's decision

The Sixth Circuit granted mandamus and vacated the production order, concluding that the district court committed clear legal error and that immediate relief was necessary to avoid irreparable loss of core protections and the risk of substantial uncertainty for corporations regarding privilege and work-product standards.[14]

First, the court held that the attorney-client privilege applies because FirstEnergy and its board engaged outside counsel to obtain legal advice regarding potential criminal and civil wrongdoing and to guide the company's response to active federal and state investigations.[15] Echoing the Supreme Court in *Upjohn Co.* v. *United States*,[16] the panel emphasized that the "full and frank" fact-gathering necessary to render legal advice remains privileged, even when the resulting advice informs corporate decisions.[17] The court expressly rejected the notion that later use of legal advice for business purposes converts legal communications into non-legal ones.[18] In the corporate setting—particularly amid parallel criminal, civil, and regulatory risk—legal and business considerations often intertwine, and that overlap does not impair claims of privilege where the purpose of the communications is to secure legal advice.[19]

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 436.

[11] *Id.*

[12] *Id.* at 438.

[13] *Id.* at 439.

[14] *Id.* at 435, 441-42.

[15] *Id.* at 436-38.

[16] 449 U.S. 383, 389 (1981).

[17] *In re FirstEnergy Corporation*, 154 F.4th at 441.

[18] *Id.* at 438-39.

[19] *Id.* at 439.

Second, the court held that the work-product doctrine protects the investigation materials created "because of" actual and anticipated litigation and enforcement activity.[20] The unsealing of the DOJ subpoenas against Householder was found sufficient for FirstEnergy and its board to anticipate that the company "would face government investigations, civil litigation, and regulatory proceedings."[21] Similarly, the significant decline in FirstEnergy's stock the following day provided a sufficient basis to anticipate the wave of shareholder suits that followed.[22] In these circumstances, the court found, the "intensely practical" work-product standard was plainly satisfied.[23]

Third, the court rejected the district court's procedural rulings as untenable.[24] The exclusion of a FirstEnergy director's declaration because it stated that the declaration was made "under penalty of perjury" but did not explicitly state that the contents were "true and correct," ignores that it "substantially" met the requirements of 28 U.S.C. § 1746.[25] And the absence of a privilege log did not support compelled production, where the parties had stipulated to forgo logging post-complaint, outside-counsel communications about the very investigations at issue and where plaintiffs' requests were framed in undifferentiated, categorical terms as plaintiffs had sought "'all previously withheld documents.'"[26]

The panel also rejected the plaintiffs' arguments that FirstEnergy's disclosures in other proceedings and to its auditors of portions of information from the internal investigation amounted to a waiver of the attorney-client privilege or work-product protection as to the requested communications.[27] In rejecting plaintiffs' waiver arguments, the Sixth Circuit stressed that the bulk of the information FirstEnergy disclosed to the government as part of its deferred prosecution agreement was not privileged and already discoverable to plaintiffs, and that the rest of the disclosures "tended to be bare conclusions from the investigation, not 'the substance of the attorney's advice.'"[28] With respect to the disclosures to FirstEnergy's external independent auditor, the court noted that the auditor's own memoranda indicated that responsive privileged materials had been withheld from the auditor. The court also declined to infer any waiver from privileged materials that had been disclosed to the auditor, noting that work-product protections were still applicable because "[o]nly disclosures to an adversary will waive work-product protection."[29]

III. Implications

The Sixth Circuit's decision in *FirstEnergy* is significant because it reaffirms that the strong protections provided by the attorney-client privilege and work-product doctrine remain intact in the context of internal corporate investigations, even where information and materials from those investigations are later used by companies for adjacent business purposes. The Sixth Circuit's decision adds to an area of law that remains in flux following the Supreme Court's January 23, 2023 denial of a petition for a writ of certiorari from the Ninth Circuit in a case where the Supreme Court declined to consider the appropriate test for evaluating privilege and work-product issues for "dual purpose"

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[20] *Id.* at 437.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 438 (citing *United States* v. *Nobles*, 422 U.S. 225 (1975)).

[24] *Id.* at 439.

[25] *Id.*

[26] *Id.* at 440.

[27] *Id.* at 442-43.

[28] *Id.* at 443 (quoting *In re Grand Jury Proc. Oct. 12, 1995*, 78 F.3d 251, 254 (6th Cir. 1996), and collecting similar cases).

[29] *Id.*

documents prepared during internal investigations.[30] While the Sixth Circuit's decision is a step toward clarity in this area, companies, their boards, and their respective counsel should proceed with care in how they structure and conduct internal investigations, so as to best protect their privilege and work-product defenses. Key measures that practitioners should take in this space, where possible, include clearly documenting where investigations are conducted for the purpose of providing legal advice, closely guarding privileged communications from disclosure in connection with communications with third parties, including external auditors, and exercising care when making limited disclosures of factual findings to government regulators.

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If you have any questions about the issues addressed in this alert, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (partner) at 212.701.3120 or jkurtzberg@cahill.com; Ivan Torres (counsel) at 212.701.3104 or itorres@cahill.com; or Ryan McMullen (associate) at 212.701.3150 or rmcmullen@cahill.com; or email publicationscommittee@cahill.com.

[30] 598 U.S. ---- (2023).