

6th Circ. FirstEnergy Ruling Protects Key Legal Privileges

By **Andrew Goldstein and Matthew Kutcher** (October 15, 2025)

In a closely watched case, the U.S. Court of Appeals for the Sixth Circuit recently held that the attorney-client privilege and the work-product doctrine protect materials created during internal investigations.

On Oct. 3, in *In re: First Energy Corp.*, the Sixth Circuit granted a mandamus petition and vacated an order from the U.S. District Court for the Southern District of Ohio compelling the production of documents generated by outside counsel during internal investigations.[1]

The court found it appropriate to grant the "'extraordinary' [mandamus relief] [b]ecause 'predictable and certain' privilege and work-product standards are essential" for litigants.

The opinion followed an earlier Sixth Circuit decision in August granting a stay of the district court's production order. In that prior decision, the Sixth Circuit remarked on the "strong public interest in preserving the attorney-client privilege and work-product doctrine," as evidenced "by the numerous amici" that filed briefs supporting the company, including a consortium of 39 law firms.



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Background

This case arose from a high-profile scandal involving FirstEnergy and former Ohio House Speaker Larry Householder, who was convicted of bribery charges and sentenced to 20 years in prison. Early in the investigation, in response to a U.S. Department of Justice grand jury subpoena, FirstEnergy and its board hired two outside law firms, Squire Patton Boggs LLP and Jones Day, to conduct internal investigations.

Following the DOJ investigation, several other state and federal regulators launched investigations relating to the bribery allegations, and FirstEnergy shareholders filed a securities class action, *In re: FirstEnergy Corp. Securities Litigation*. [2] During discovery in the class action, the plaintiffs moved to compel FirstEnergy to produce all materials related to the internal investigations, claiming that those materials were not entitled to attorney-client privilege or work-product protection because they were meant to serve business purposes.

The district court — affirming a special master's conclusions — granted the plaintiffs' motion to compel. According to the district court, "an internal investigation's predominant purpose must be legal for the attorney-client privilege to apply." The district court held that "pointing to impending lawsuits does not establish that individual communications and documents are privileged because within those materials, attorneys could be acting as business or human resources advisors and not as legal advisors."

As to the work-product doctrine, the district court held that "FirstEnergy had not shown the internal investigation was conducted because of litigation, and not because of employment decisions and business concerns," such as satisfying its auditor and evaluating which

executives should be terminated.

As a result, the district court held that neither the attorney-client privilege nor the work-product doctrine applied.

FirstEnergy filed a mandamus petition before the Sixth Circuit seeking to overturn the district court's decision, and also moved to stay the discovery order pending resolution of the mandamus petition. FirstEnergy emphasized that "[w]ithout predictability in the application of both the attorney-client privilege and the work-product doctrine, businesses in this Circuit will be 'less likely to disclose facts to their attorneys and seek legal advice,' and thus less able to evaluate misconduct allegations and respond appropriately."

With respect to the attorney-client privilege, FirstEnergy argued that the district court applied the wrong test by focusing on the "motivations behind conducting an internal investigation." FirstEnergy further argued that the district court's ruling would "eviscerate the attorney-client privilege in the business setting," given that "[c]ompanies frequently seek legal advice for a business 'motive,' whether an IPO, merger, or terminating an executive."

As to the work-product doctrine, FirstEnergy argued that the district court erred by focusing on the company's "eventual business uses of the investigations," rather than "why those investigations were originally commenced — in response to government investigations and private litigation."

FirstEnergy argued that the district court's "reasoning would preclude application of work-product protection in most corporate investigations," because companies often use the information obtained through an internal investigation "to address the business implications."

Sixth Circuit Grant of Mandamus Petition

In a significant victory for FirstEnergy, the Sixth Circuit granted the company's mandamus petition. The decision is highly relevant for companies concerned about the disclosure of privileged materials.

The Sixth Circuit held that FirstEnergy demonstrated that the internal investigation materials are privileged under the framework set forth by the U.S. Supreme Court in its 1981 decision in *Upjohn Co. v. U.S.*

The court found that the requested communications, which included attorneys' "analyses about what acts occurred, whether those acts were illegal, and what criminal and civil consequences might ensue[,] all involved requested legal advice." The court rejected the plaintiffs' argument that the internal investigations merely conveyed facts gathered from other sources, reasoning that the law firms provided "legal analyses[] and assessments of potential criminal and civil liability" based on those facts.

The court also rejected the plaintiffs' argument that FirstEnergy waived privilege by sharing its internal investigation with its auditor, finding that FirstEnergy did not share any privileged information, and that it could still claim work-product protection even if it had.

Similarly, the court rejected the district court's focus on the motivations behind the communications, holding that what "matters under the attorney-client privilege is whether a company seeks legal advice, ... not what it later does with that advice." The fact that

FirstEnergy later used the legal advice it received to make business decisions did not "transform[] the communications and legal work into something other than legal advice." As the court pointed out in its prior stay order, "a corporation could hardly justify expending resources on legal advice that wasn't business-related."

The Sixth Circuit also held that the internal investigation materials were protected by the work-product doctrine. The court stated that work-product protection turns on whether documents were created "'because of' a party's 'reasonable' anticipation of litigation, as opposed to its ordinary business purposes." The court held that FirstEnergy's internal investigation materials met this standard in light of the government investigations and civil litigation coming out of the bribery allegations.

The Sixth Circuit rejected the district court's conclusion that "employment decision and business concerns" — rather than the anticipation of litigation — prompted the investigations, finding that such reasoning ignores the "onslaught of legal and regulatory action" that FirstEnergy faced.

Lastly, the Sixth Circuit explained why it granted the "drastic and extraordinary remedy" of mandamus in this case. The court found that FirstEnergy had no other alternatives — defying the district court's order would potentially subject it to a criminal contempt citation, and complying with the order would require disclosing the privileged materials, damaging the attorney-client relationship. As the court put it, "[t]here is no way to unring those disclosure bells."

Implications

The opinion confirms that the Sixth Circuit will continue to allow attorney-client privilege and work-product protections to apply to documents and communications generated during an internal investigation. That is critical for clients who are faced with potential compliance concerns and need to conduct a thorough investigation in order to stop and remediate wrongdoing.

Internal investigations play a critical role in corporate compliance and governance. Many companies need to maintain compliance programs requiring such investigations whenever issues arise. The DOJ and other regulatory agencies also offer incentives to companies for voluntarily self-disclosing wrongdoing, which may be uncovered during internal investigations. In some cases, conducting a robust internal investigation to stave off an indictment can be a matter of corporate survival.

If the Sixth Circuit upheld the district court decision, companies and their counsel would not be able to conduct appropriate investigations because, as the Sixth Circuit noted, "'full and frank communication' between companies and their attorneys" is essential to competent investigations.

Without strong attorney-client privilege and work-product protections, clients might be discouraged from disclosing potentially damaging information, precluding their counsel from providing well-informed advice. In turn, this could impede the clients' ability to remediate the wrongdoing or cooperate with government authorities.

The Sixth Circuit's opinion does provide a few caveats. For one, communications of mere facts gathered from other sources are not privileged. However, the court emphasized that this rule did not apply here because the internal "investigations involved legal advice," and outside counsel "gathered facts closely related to that legal analysis."

Secondly, the court cautioned that voluntary disclosure of privileged communications to a third party — including a company's auditor — "generally waives the attorney-client privilege as to those communications." Despite FirstEnergy's disclosure of some of the internal investigation information to its auditor, no waiver occurred here because the disclosure only involved nonprivileged information.

As such, companies and their counsel should ensure fact-gathering is closely tied to legal analysis, and they should limit any necessary auditor disclosures to nonprivileged information.

By confirming that the attorney-client privilege and work-product protections apply to internal investigation materials, the Sixth Circuit's order ultimately advances the public interest by fostering an environment in which companies and their counsel can effectively investigate and address potential wrongdoing — thereby promoting transparency, accountability and sound corporate governance.

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Disclosure: Cooley joined the amicus brief filed by 39 law firms in In re: First Energy Corp.

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[1] <https://www.opn.ca6.uscourts.gov/opinions.pdf/25a0272p-06.pdf>.

[2] In re: FirstEnergy Corp. Securities Litigation, No. 2:20-cv-03785.