

Sixth Circuit Finds Privilege Applicable to Internal Investigation

October 9, 2025

On October 3, 2025, the U.S. Court of Appeals for the Sixth Circuit held the attorney-client privilege and work product doctrine applicable to a company's internal investigation conducted by outside counsel. In *In re: FirstEnergy Corp.*, the court held that materials prepared by outside counsel in the course of internal investigations of FirstEnergy Corporation ("FirstEnergy" or the "Company") were protected from disclosure in civil litigation.¹ This significant ruling reinforces that internal investigations can benefit from broad privilege protections provided that companies and their counsel take certain critical precautions.

Bribery Scandal Prompts FirstEnergy to Retain Counsel to Investigate. In July 2020, Larry Householder, the then-speaker of the Ohio House of Representatives, was charged with—and subsequently convicted of—accepting bribes from FirstEnergy in exchange for his support of legislation favorable to the Company. Immediately following his arrest, FirstEnergy retained outside counsel and initiated an internal investigation into the alleged wrongdoing. An independent committee of FirstEnergy's board retained separate counsel to conduct its own investigation.

The scandal led to numerous civil lawsuits against FirstEnergy, including a securities fraud class action in which the plaintiffs demanded access to outside counsel's internal investigation materials. The district court ordered FirstEnergy to produce the materials, finding that neither the attorney-client privilege nor work product doctrine protected them from disclosure. The Sixth Circuit reversed on both grounds.

Court Finds Investigative Materials Protected by Attorney-Client Privilege Because FirstEnergy Retained Counsel for Legal Advice. The Sixth Circuit held that the internal investigations into FirstEnergy's potential criminal and civil wrongdoing were protected by the attorney-client privilege because they were conducted for the purpose of providing legal advice. The court noted that FirstEnergy and its board each hired outside counsel to secure legal advice following DOJ arresting Householder and issuing subpoenas to FirstEnergy. The court found that, in seeking outside counsel's analysis

¹ No. 24-3654 (6th Cir. Oct. 3, 2025).

about the underlying events and advice about what to do, the Company “clearly sought legal advice” about “what to do in response to the very significant legal risk it suddenly faced[.]” The court also found that FirstEnergy received legal advice. Counsel’s “communications—including outside counsels’ 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 district court’s view that the investigations were primarily “business” activities, emphasizing that what matters is “whether a company seeks legal advice” through an internal investigation—not how the company later uses that advice. “That FirstEnergy made business decisions based on this legal advice does not change matters,” the court explained.

The opinion reinforced the Supreme Court’s landmark decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which established that the attorney-client privilege covers investigative communications when made to secure legal advice for a corporation. In *Upjohn*, the Supreme Court held that internal investigations led by counsel are protected activities that facilitate “full and frank communication between companies and their attorneys when investigating their own wrongdoing.” The Sixth Circuit expressly reaffirmed those principles, stating that “what was true for *Upjohn* is true for FirstEnergy.”

Court Finds Investigative Materials Protected by Work Product Doctrine Because Prepared in Anticipation of Litigation. The Sixth Circuit held that the materials were protected from disclosure based also on the work product doctrine, again overruling the district court. The work product doctrine protects materials prepared by lawyers (or their agents) in anticipation of litigation, including counsel’s mental impressions, legal theories, and strategies.

The court held that outside counsel’s investigation files were protected work product because they were prepared as a result of the “civil and criminal litigation crisis FirstEnergy faced.” The court focused on “the realities of litigation,” noting that immediately upon being subpoenaed by DOJ, FirstEnergy faced a myriad of probes that pointed toward potential litigation. The court also highlighted that, in the weeks that followed, “numerous civil lawsuits and multiple federal and state regulatory actions” were filed against FirstEnergy. Further, the court cited the plaintiffs’ concession that “no internal investigations would have taken place but for the DOJ investigation,” which underscored the direct link between the pending legal threats to the Company and the purpose of the work product.

Finally, the court rejected arguments that FirstEnergy waived work product protection by sharing certain information with its independent auditor, finding that it only disclosed non-privileged information.

Key Measures to Protect Privilege in Internal Investigations. In light of the *FirstEnergy* decision, and recognizing that this area of law remains in flux, we recommend the following to preserve privilege in internal investigations:

- Document clearly that outside counsel is being retained to provide legal advice and not for business reasons. It is fine (and typical) for outside counsel to investigate facts and prepare factual summaries and other such documents, but counsel also should evaluate and advise on how those facts impact the company's legal exposure and legal strategy.
- The primary audience for outside counsel's work product should be the person or group within a company that retained the counsel for legal advice (often the legal or compliance department). It may be perfectly fine to share counsel's work product with members of the business, but counsel should be involved in considering who else should receive the materials and subject to what conditions.
- Since the work product doctrine applies to materials prepared in anticipation of litigation, companies and counsel should clearly label documents when such litigation becomes reasonably anticipated. It can also be good practice to memorialize the determination that litigation is anticipated and the basis for that view.
- To avoid potential arguments about waiver and ambiguity as to the legal or business purpose of counsel's advice, controls or guidelines should be put in place as to how privileged materials can be shared outside a core group like the legal department. Counsel can help to ensure that, when appropriate to share materials more broadly, the transmittal makes clear that the materials were created for the purpose of providing legal advice and must be kept confidential—or can, if appropriate, create non-privileged versions that can be shared with reduced risk. Particular care must be taken when sharing information from an internal investigation with a government regulator or an outside auditor as disclosures of more than purely factual information may create a risk of a privilege waiver.

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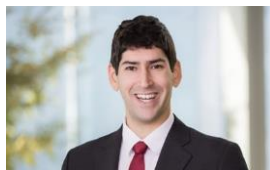
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