Utilizing 6th Circ.'s Expanded Internal Investigation Protection

By **Greg Brower and Adam Lyons** (September 26, 2025)

Greg Brower

Adam Lyons

A recent federal appellate court decision demonstrates one way that businesses can use a very limited showing to protect internal investigations from discovery in commercial litigation.

In reversing a district court decision to force disclosure, a unanimous U.S. Court of Appeals for the Sixth Circuit panel led by Chief U.S. Circuit Judge Jeffrey Sutton in In re: FirstEnergy Corp. observed on Aug. 7 that "[w]hat matters for attorney-client privilege is not what a company does with its legal advice, but simply whether a company seeks legal advice." Similarly, the court found work-product protection based only on circumstantial evidence of anticipated litigation.

Savvy clients looking to protect internal investigations can use this precedent to their advantage, while those looking to force production will need to employ a carefully calibrated approach.

Background

This political corruption scandal, likely the biggest in Ohio history, involved the state's electric utility, FirstEnergy, and then-Speaker of the Ohio House of Representatives Larry Householder.

In July 2020, Householder and four others were charged in a bribery scheme involving the payment of some $60 million from a FirstEnergy affiliate to an organization controlled by Householder, who then used the money to both fund various efforts to support legislation favorable to FirstEnergy and fund certain of Householder's personal expenses.

In 2023, Householder was convicted and sentenced to prison. FirstEnergy admitted to conspiring with Householder and others and, in 2021, reached a deferred prosecution agreement with the U.S. Department of Justice that required it to pay a $230 million fine.

When FirstEnergy was implicated in the scheme, it engaged outside counsel to investigate its involvement. In one part of the ensuing litigation, a securities class action, the plaintiffs' counsel sought production of materials from FirstEnergy's internal investigations. FirstEnergy resisted, arguing that those materials were protected from disclosure by the attorney-client privilege and work-product doctrine.

In opposition to the production, FirstEnergy attempted to rely upon the declaration of one of its board members to prove the factual basis to support its protection claims. The declaration was defective, however, and the U.S. District Court for the Southern District of Ohio did not consider it.

In light of that fact and the plaintiffs' evidence that the subject investigation related to the "business and human resources/public relations arena, even if those same issues also logically overlap with anticipated litigation," the district court held that the discovery sought was not protected by the attorney-client privilege or work-product doctrine.

FirstEnergy sought a stay from the Sixth Circuit, which found that the materials were likely protected and granted the stay.

Takeaways

The decision creates additional room to assert a privilege claim.

The Sixth Circuit rejected the district court's determination that the documents were not protected by the attorney-client privilege because they were used for a business purpose, and found that going to counsel, regardless of the reason, is enough. That reading of the privilege all but dismisses any consideration of whether the purpose for seeking the materials was the provision of legal advice.

Understanding the opinion to create a broad protection seems by design: The court flatly stated that "it is the rare company faced with such criminal and civil allegations that would not have a business-related reason for seeking such critical and essential legal advice." In other words, a business is expected to have a business-related reason for seeking legal advice.

Thus, the Sixth Circuit's reading of the law appears to be that evidencing a mixed purpose for the communication will not defeat the privilege. Instead, where the business can show that it did in fact go to counsel, regardless of whether the purpose of the inquiry was for legal reasons or for business purposes, the protection can be upheld.

Surrounding circumstances can be used to prove work-product protection.

As for the work-product question, the court determined that evidence of the circumstances in which the documents were created was sufficient to show the purpose behind the creation of the documents.

By the Sixth Circuit's reasoning, the timeline of when litigation could have been anticipated, when the investigation occurred and how quickly litigation followed demonstrated that the company conducted the investigations in anticipation of litigation. Facing an onslaught of external investigations, FirstEnergy was entitled to a de facto presumption that it initiated its internal investigation in anticipation of litigation.

Under this precedent, the relative timing and significance of oncoming litigation can be sufficient to demonstrate the applicability of the work-product doctrine. Challenges to work product based on the fact of a mixed purpose in seeking advice are unlikely to succeed.

Clients should consider whether their discovery practices may be creating risk.

Two specific aspects of the plaintiffs' litigation strategy influenced the opinion in instructive ways.

The class used a broad discovery request, seeking "production of all previously withheld documents … related to the internal investigation." Additionally, the class agreed that FirstEnergy did not need to provide a privilege log for any documents exchanged with outside counsel that the investigators created after the arrest of an elected official involved in the case.

Those practices are common in litigation, but they were used here to defend the protections.

The class argued that FirstEnergy's failure to provide details supporting its claims of protection defeated its claims of privilege. The Sixth Circuit, however, excused the failure to provide details because (1) the class had agreed that no privilege log need be provided for postlitigation communications; and (2) of the broad request: "FirstEnergy's failure to identify any specific documents as privileged matched the plaintiffs' broad and undifferentiated request for 'all previously withheld documents … related to the internal investigation.'"

At the same time, had FirstEnergy submitted an effective declaration, much of this dispute may never have occurred. Savvy clients should keep these points in mind.

Suggestions for Best Practices

The FirstEnergy decision raises several important points for consideration in defending or attacking attorney-client privilege and work-product claims.

First, it seems no longer necessary to prove that a communication was made for the purpose of seeking legal advice. Instead, the fact of seeking legal counsel seems sufficient to establish the attorney-client privilege.

That seems at odds with the long-standing principles that required establishing that the communication was for the purpose of seeking legal advice.[1] Alternatively, it could be viewed as a presumption that communications to counsel are always made for the purpose of seeking legal advice.

Either way, as a practical matter, communications made to in-house counsel, seeking business advice, would be protected under the FirstEnergy standard. Challenges to privilege claims based on the dual role of counsel in various circumstances will need far stronger proof to show that the privilege does not apply.

Second, a party can support its claim that a document was prepared in anticipation of litigation solely through evidence of the circumstances surrounding the creation of the document.

FirstEnergy initially tried to prove the anticipation of litigation through a declaration, as is widely done in litigation. Because the declaration was excluded from evidence, FirstEnergy relied on the circumstances to prove it anticipated litigation.

On the one hand, this appears to be a lowering of the evidentiary requirements to prove the work-product protection. If circumstances could prove the claim, however, savvy litigants might be able to rely on circumstances to challenge a claim, asserting that those circumstances in another claim show that sworn testimony asserting the anticipation of litigation should not be accepted.

Third, common discovery practices can have a substantive impact on a privilege claim. It is fairly standard to agree that there is no need to log privileged documents that were created after litigation began, but that practice was used to help defend FirstEnergy's failure to provide details in support of its claims.

In many cases, the parties have no need to look into their opponent's communications with counsel. In cases similar to FirstEnergy, however, where one's litigation is only a part of a larger dispute and actions taken in response to that larger dispute are relevant, it is worth

considering whether there are key communications that may be with counsel but which are important to one's case. In those circumstances, general practices regarding privilege logs may need to be reevaluated to avoid losing the opportunity to gain the information.

Fourth, and finally, counsel who are aware of these points can make use of them to the client's best advantage. Wise counsel plans from the beginning of the case for all the steps that are necessary to secure relief for their client. Thinking through whether examination of attorney-client privilege or work-production protection claims is necessary at the beginning of the case, and then taking the appropriate steps to avoid losing that opportunity, would seem to be the best practice.

As these four points show, there are positives and negatives to be seen in each aspect of this decision. Through foresight and sound advice, companies can use the principles announced in FirstEnergy to help protect internal investigations or develop precise strategies to go after such materials where they are being withheld.

Greg Brower is a shareholder at Brownstein Hyatt Farber Schreck LLP. He previously served as assistant director and deputy general counsel at the FBI, Nevada state senator, and U.S. Attorney for the U.S. Attorney's Office for the District of Nevada.

Adam Lyons is a shareholder at the firm. He previously served as assistant deputy enforcement director at the Consumer Financial Protection Bureau and assistant director at the DOJ.

[1] See, e.g., Fisher v. United States (S. Ct. 1976).