Sixth Circuit Underscores Importance of Attorney Oversight to Maintain Privilege Over Internal Investigations

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A recent decision of the Sixth Circuit Court of Appeals, *In re FirstEnergy Corporation, No. 24-3654* (Oct. 3, 2025), confirms that an internal investigation must be afforded privilege protection when it is directed by counsel for a clear legal purpose (even if it also serves a business purpose).

In *FirstEnergy*, the Sixth Circuit intervened in a securities class action and vacated the lower court's order compelling production of internal investigation materials. The lower court had determined that documents from FirstEnergy's internal investigation were not privileged and should be produced. It reasoned that FirstEnergy "initiated the investigations for business advice, not legal advice," based on its observation that FirstEnergy "later used the fruits of the investigations for business decisions." The Sixth Circuit granted *mandamus* and vacated the order, criticizing the lower court for making "substantial departures from bedrock privilege and work-product principles[.]" In particular, the Sixth Circuit observed that the lower court's order contradicted "nearly a half century . . . of jurisprudence concerning the scope of the attorney-client privilege and work-product doctrine" and would have a chilling effect upon "full and frank communication between companies and their attorneys when investigating their own wrongdoing." (Citations and quotations omitted.)

Outside counsel's leadership and close involvement in the investigation was central to the Sixth Circuit's decision to uphold FirstEnergy's claim of privilege over the investigation. The decision offered three key lessons:

1. To maintain the attorney-client privilege (which protects attorney-client communications for the purpose of giving/receiving legal advice), it was sufficient that the company had retained counsel to obtain legal advice about a significant legal risk. The fact that the investigation also served a business purpose did not defeat attorney-client privilege. The Sixth Circuit noted that "[i]n the context of . . . high-stakes criminal and civil allegations . . . it will be the rare company that will not also have business purposes for seeking essential legal advice."

2. To maintain attorney work-product privilege (which protects documents prepared by or at the direction of counsel in anticipation of litigation), it was important that the company retained counsel and initiated an investigation "because of actual, not merely anticipated, legal and regulatory threats"—including pending criminal and civil government investigations and regulatory action.

3. A company does not waive privilege by making limited disclosures to (i) government investigators or regulators for the purpose of securing a deferred prosecution agreement, and/or (ii) the company's auditors, so long as the material disclosed was not privileged, was already discoverable, or consisted of the factual findings of the investigation as opposed to counsel's advice about those facts.

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The *FirstEnergy* decision is a reminder to companies of the need to promptly retain experienced counsel when legal exposure arises, to thoughtfully structure investigations around a legal purpose, to clearly document that purpose and to prevent disclosure of privileged information to the government and auditors.

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