Proskauer

# Privilege Planning in the New Era

**Minding Your Business** on **March 19, 2026**

At the end of 2025, amendments were made to the Federal Rules of Civil Procedure that fundamentally change when and how litigators must address privilege issues in federal court. These amendments followed an important decision in the Sixth Circuit in *In re FirstEnergy Corp.*, 154 F.4th 431 (6th Cir. 2025), which provided practitioners fresh guidance for protecting privileged materials early in the litigation. Understanding these developments and beginning to plan around privilege at the outset of a case is essential for anyone litigating in federal court today.

### 1. The New Framework: Amendments to Federal Rules 16 and 26

Effective December 1, 2025, amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) require parties to address privilege logging earlier than ever before. Under the revised Rule 26(f), parties must now include in their discovery plan their "views and proposals" on the timing and method for asserting privilege, including how privilege logs will be prepared and exchanged. Courts may then incorporate these agreements—or resolve disputes—in the scheduling order under amended Rule 16(b).

These amendments represent a significant departure from prior practice. Historically, privilege logging was often an afterthought, addressed late in discovery or only when disputes arose. The amendments suggest that early planning may help to reduce costs, minimize disputes, and promote more efficient case management. Litigators who wait until document production is underway to consider their privilege strategy now risk being caught flat-footed at the Rule 26(f) conference.

### 2. The *FirstEnergy* Decision: A Roadmap for Protecting Privileged Materials

Less than two months before the amendments to the Federal Rules, the Sixth Circuit provided critical guidance on protecting attorney-client privilege and work product in the context of internal investigations—a frequent source of privilege disputes in complex litigation.

The Sixth Circuit's decision in *In re FirstEnergy Corp.* emphasized several key principles regarding the privilege doctrine in federal courts. *First*, the court reaffirmed that for attorney-client privilege to attach, the primary purpose of the communication must be to obtain or provide legal advice, not merely business guidance. Companies cannot shield documents simply by copying counsel on correspondence or labeling materials as privileged. *Second*, the court provided important guidance on the work product doctrine, holding that materials prepared in anticipation of litigation retain protection even when they serve dual purposes, so long as litigation was a substantial factor in their creation. *Third*, the court underscored the importance of maintaining clear documentation of when and why legal counsel was engaged, particularly in investigations that may later become the subject of discovery requests.

**3. Practical Implications for Federal Practitioners**

These developments in federal privilege law create both challenges and opportunities for litigators. On the one hand, practitioners must now be prepared to discuss privilege strategies at the outset of litigation, often before they have fully assessed the scope of potentially privileged materials. This requires closer coordination between litigation counsel and clients from day one.

On the other hand, early privilege planning allows parties to negotiate favorable logging protocols, secure Federal Rule of Evidence 502(d) orders to protect against inadvertent waiver, and establish clear expectations that reduce later disputes.

Practitioners can take several steps to adapt to this new landscape. At the Rule 26(f) conference, practitioners should come prepared with specific proposals on privilege log format, whether categorical or document-by-document logging is appropriate, what metadata fields will be included, and the timing for log exchanges. Seek a Rule 502(d) order early, as these orders provide court-ordered protection against privilege waiver for inadvertently produced documents.

For matters involving internal investigations, as described in the *FirstEnergy* case, practitioners should document the legal purpose of the investigation clearly from the outset, ensure communications with counsel are structured to emphasize legal advice rather than business guidance, and maintain separation between factual investigation materials and legal analysis where possible. Finally, build privilege review into your document collection and review workflow from the beginning, rather than treating it as a final-stage task.

The 2025 FRCP amendments and the *FirstEnergy* decision together signal a new era of privilege practice in federal courts. Litigators who embrace early privilege planning and follow the roadmap provided by recent case law will be better positioned to protect their clients' interests and avoid costly disputes.

**Related Professionals**

- **Elizabeth C. Shrieves**
  Associate