



Fox Rothschild Podcast

The Presumption of Innocence

Episode 72: Beyond the Headlines: Unpacking a Pivotal Case on Privilege Protections

Featuring Matt Adams of Fox Rothschild and Roy Strom

Matt: Welcome back to another edition of "The Presumption of Innocence" podcast, brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild.

My guest today is a reporter covering the global business of the world's largest and most profitable law firms. He writes a weekly reporting of challenges facing law firm leaders. He's a graduate of the University of Missouri Journalism School, and he has been writing about the legal industry since 2011, winning multiple regional and national awards for his reporting. He is Roy Strom and he is from *Bloomberg Law*. And he also hosts a podcast called "Big Law Business."

Roy, welcome to the program. How are you?

Roy: I'm great, Matt. Thank you so much for having me. I'm excited.

Matt: Yeah. So you cover the business of the practice of law, but in so doing, you have recently, at the end of last month, reported on sort of this little known case that was creeping through federal appeals court related to a bribery scandal, and the impact that that is going to have on what a lot of the people in my profession do, which is internal investigations for very large companies when things happen within the organization that might raise legal scrutiny later. So why don't you tell us a little bit about the backdrop of what the lower court had ruled in this case before we get to the appellate ruling, which ultimately, I think as your headline in the article read, will give a sigh of relief to folks like me, guiding clients through internal investigations.

Roy: Yeah, sure. Well, it all traces back to, like you said, this corruption scandal in Ohio surrounding an energy company, FirstEnergy, whose executives had been charged with racketeering. I think they paid something close to \$60 million --or were alleged to have paid something close to \$60 million -- to a political nonprofit that benefited the former Ohio Speaker of the House, a guy named Larry Householder. And at the end of the day, the company was basically trying to get a subsidy for some of its older power plants to keep those online. And, naturally, the discovery of this scheme led to all sorts of investigations, right, criminal investigations. The company paid a settlement to the Securities and Exchange Commission. State energy regulator has been investigating them. So the company hired two big law firms, and those firms did what I imagine you and your colleagues do, right? An investigation.



Matt: Every day and twice on Sunday, we conduct the internal investigation to ascertain-- and we talked about it on this program, what we do as white-collar lawyers in the course of an internal investigation-- but we are engaged to essentially go in and understand if any wrongdoing was committed and then if there was, to deal with it. And so that's what these very lawyers were doing, something as run-of-the-mill for a practice like ours that then, you know, getting up and brushing your teeth in the morning.

Roy: Right, right. So naturally these investigations, they get to the facts, they tell a story about what happened, and they are presumably valuable to a sort of opponent in litigation, right? So, that's why there is these protections, attorney-client privilege and the work product doctrine, which basically say you don't have to just hand this over to anybody who comes asking for it. But they do get fought over in litigation all the time.

Matt: Tried-and-true principles of law that are the reason that lawyers have to come in and do these investigations in the first place, is because we need to have a confidential communication with our clients, with our clients' employees, and have our work product protected in such a way that allows us to... the sanctity of that cannot be understated because it's at the core of our mission when we engage in these types of internal investigations. But this particular court, this federal court, decided to really turn that on its head at the lower court level.

Roy: Yeah, so at the lower court level --and in litigation brought by shareholders-- the judge ruled that the company did have to turn some of this over to the plaintiff's lawyers. And the judge basically said the reason for that was because the investigations were not done necessarily to respond to litigation, they were done to help the company's business, almost as if the lawyers were kind of doing some business analysis or some strategy work, not really a legal purpose.

I mean, that's a bit further than how far the judge went, but I think that was kind of the concern. And it scared a lot of law firms because I think they felt this could dampen the incentives that these companies have to hire law firms to do these investigations. And if it becomes very easy for opponents to get the work, to get the reports they make, to get the notes, even of the reports they make, that the lawyers would be basically doing the work for the other side. They wouldn't be trusted by the company. They'd be seen perhaps as a threat to the company trying to resolve a problem.

Matt: Well, let me get this straight then: So in the course of your reporting, you dig into this and go and read the decisions of the federal court at the lower level, and they're trying to recharacterize the work that the lawyers are actually doing as somehow business in furtherance of the business, rather than in furtherance of legal guidance?

Is there anything in particular about this case-- you know, the old saying is, bad facts, bad law, right? Is there anything in particular about the type of investigation that these lawyers were doing that presented even the remote ability to mischaracterize their investigation in such a way, or did this judge just not get it at the lower level?



Roy: Well, ultimately the judge was overturned, so the judge kind of got it wrong, I guess according to the appeals court. I don't think there was much specific to the investigation that indicated it was for some sort of business purpose. I think it mostly had to do with timing. The argument or the decision sort of seemed to justify itself on the basis that litigation maybe hadn't been presented yet, or it wasn't already ongoing. And so that was this business purpose rather than like some response to litigation. But that was overturned, so the appeals court saw it much differently.

Matt: I mean, I have to stop and just highlight how ridiculous that argument is because at the end of the day, good companies, good entrepreneurs, they constantly seek proactive legal advice so that they can conform themselves to the strictures of the law, especially in highly regulated fields. So the idea of just merely the timing somehow, dictating the purpose of the exercise and the idea that, you know, just because litigation, we're not responding to litigation per se at this point.

The fact that they can't cloak that with the privilege and the work product seems crazy. But I'm glad that the Sixth Circuit got it ultimately right. And that's the feature of your reporting late last month, and the headline that you aptly wrote, "Big Law White Collar Teams Breathe Easy After Key Privacy Ruling."

So talk to us about the Sixth Circuit's decision.

Roy: So, the lower court ruling got a lot of attention. And there was this filing by I think 39 law firms who basically wrote a letter to the judge saying, we know a lot about this area, we don't think this ruling is accurate or necessarily helpful for the work that companies need done when they're investigating a scandal or wrongdoing or potential wrongdoing. And the appeals court agreed with them and said, more or less, it doesn't matter. And I guess it should, I should say that that part of the argument was, even if this was done before some specific litigation or before shareholders brought a case, it was inherently responsive to litigation we anticipated. We understand what happened, we started to see what happened, it's pretty obvious there's going to be a big, plenty of fights over this, plenty of problems in court over this. And, of course there were, like I said, I mean, it's almost harder to find a regulator involved in FirstEnergy that's not investigating this right now than otherwise. So the appeals court laid that out and basically said the purpose for hiring lawyers is less important than the fact that you did hire lawyers. And this is what lawyers do. And the lawyers and their work need these protections in order to be effective. You know, the cases that create those protections aren't particularly, controversial. Most people agree--

Matt: Well, well settled.

Roy: Well settled, you know the legal language better than I do, but well settled is what I was looking for.

Matt: So in the case of your reporting, I think you have an opportunity working with *Bloomberg Law* to interview a lot of lawyers and law professors. Was there anybody that was actually coming to the defense of this wild decision by the lower court before it was overturned? Could you, in the course of your reporting, find anybody that would agree with it?



Roy: I didn't come across somebody. I should say, that wasn't necessarily what I was strictly focused on. I wasn't, you know, trying to go out and find someone like both sides of this issue, as you might hear journalists say. What brought me to it was the amicus brief that the law firms filed, I thought was interesting. Anytime I see like a dozen or more, you know, a group of law firms arguing the same point, that's interesting to me.

I view it like they're protecting the law, but in a way, they're also standing up for their business. Because their business, in a way, relies on the way the law is structured such that companies have an incentive to do these investigations. And so that was kind of what I was looking into and trying to learn more about.

But no, I didn't find somebody being like, we need this lower court ruling to stick around.

Matt: Yeah, no, 'cause it just turns the entire structure that is supposed to govern these investigations on its head. You're supposed to be able to hire a lawyer. You're supposed to be able to have confidential communications. You're supposed to be able to rely on the legal advice you get from your lawyer without worrying about it being opened up in some other litigation and being used against you as a sword. And I'm delighted to hear that the Sixth Circuit reversed this ridiculous lower court ruling.

I'd imagine the title of your piece, "Big Law White Collar Teams Breathe Easy After Key Privacy Ruling" really intimates that you did speak with some folks that were super in favor of the Sixth Circuit's ruling, even if you couldn't find anyone that would agree with the lower court's ridiculous proposition previous.

What kind of reaction did you get from the legal community about the Sixth Circuit coming in and correcting this?

Roy: Well, they were thrilled. I think, I mean, if you, there's 39 of them saying, please do this, so, the court did pretty much what they were asking. It doesn't take a whole lot of prying to get them to say, we're glad, so that, that was pretty obvious. I mean, the other thing that I was trying to write about in that story was this idea of how the structure of the law underpins this business. And you know, that story goes back into a couple other rulings that, developed the incentives that is, that has allowed the white-collar and an internal investigation specifically, to become sort of as prominent as they are or to occur as regularly as they do.

And, like for instance, there was a ruling that directors' and officers' insurance will cover the legal fees of corporate executives who are defending against litigation as a result of their work for the company. And so, that's one of the parts of the sort of structure in this field that makes it, you know, for lack of a better word, a good business for law firms, for lawyers. And so, that was part of the story, which was just to say there's kind of a series, a compounding series of rulings that have developed this area of law such that companies rely on lawyers more. And, that's really grown this into a massive part of large law firms' business models.

Matt: Yeah. And beyond the business, right, beyond the business as just a matter of good outcomes.



Roy: Mm-hmm.

Matt: In the last 15 years, Department of Justice policy has been directed around an environment of self-disclosure, an environment of cooperation credit for diligently rooting out problems within an organizational structure. And it's made it a legal imperative to have these types of investigations. It's not just a good business. Yeah, sure, that's one perspective, right? Law firms make money doing this.

Roy: Mm-hmm.

Matt: But at the end of the day, our professional obligations rest in outcomes for our clients. And we are being told by the people who have the control over those outcomes, the prosecutors, that if you don't undertake these investigations, that if you don't self-disclose the problem areas that you find, that if you don't come to us before we find you, you're not going to get cooperator credit. Those very outcomes are in jeopardy if we have a disincentive for the process to unfold the way it traditionally has. And I just can't fathom exactly how this lower court, federal district court judge rationalized the decision that they made other than to think that they just didn't have a background at all sufficient to let them understand what this practice is all about.

And you know, I think that is a microcosm for a bigger issue in the legal industry, especially when it comes to litigating the attorney-client privilege, which I've done in my career on a number of occasions. There are just some judges who don't get it. And in out there, doing your research for this piece, do you see that as perhaps as a pervasive issue? Or is that something that you would be interested to find it more about?

Roy: Yeah, I mean, I think if there was another case or if there's more cases where judges are coming down on that side of the issue, I'd certainly be interested in it. I think what made this interesting was that it's probably not a pervasive issue. It kind of stood out, right?

Matt: It's an outlier, really.

Roy: Yeah. It was an outlier. And to your point about litigating attorney-client privilege. I mean, I was almost joking about it, I mean, even with some of the interviews, because lawyers constantly write these, here's what you need to know about protecting attorney-client privilege, right? It's like probably the most written lawyer client note that I've seen. I get these in my inbox all the time. It just feels like beating a dead horse to some degree, like as an outsider, right? I'm not a lawyer. But to me, I think that signals that for people like you and the work that you do, it must be incredibly important signal to clients that, I get this, I know this is an important issue, I know how to do it. And it's kind of like table stakes, right? Or something that you can't take for granted. It's an issue that I think lawyers understand they need to get right. They need their clients to trust them, that they will get it right. Because if you don't, it's a big problem.

And so I think that was like, you know, I was talking to a law professor and I said, why do they always write these notes, like no one knows how to protect attorney-client privilege? It seems to me that's like everyone does, you know? Is it like, are they, is it like--



Matt: Because it's just that important, Roy, it's just that important.

Roy: Right, right. So, you know, the questions I was asking was like, is this part of like a marketing or sales? And you know, I think nobody in the legal profession likes those words, marketing and sales. And to your point, the client outcome is what's important to lawyers. I believe that from my experience with them.

But I think it's also true that it's important, it seems to me to be important messaging to clients from lawyers that they understand this issue, and they take it seriously. So, I don't think there's like a whole host of judges who don't get it. I think that for lawyers it really perks up their ears when even one of them seems to come down on the wrong side of the issue for them.

Matt: Yeah. And in particular, it's funny you should say that you see all this academic work being done on protecting the privilege by lawyers. Without it, we don't have anything, right? Without it, we're just, you know, your friend or your colleague that can bounce things off of. What makes our profession what it is, is the ability to have that confidential communication, that confidential work product where you truly can tell somebody everything, the good, the bad and the ugly.

Roy: Mm-hmm.

Matt: And get real reasoned advice. And my experience-- I want to pivot over to something that you mentioned a bit ago but really revisit it. My experience is when the attorney-client privilege comes under attack that lawyers unite behind this common goal of preserving, protecting and defending that confidential relationship that is memorialized by the privilege and the work product doctrine in particular. And that comes from having been in this cases both as amicus and and bringing amicus in.

Based on your reporting, what's your journalistic perspective on the role of amicus? Does it really sway these judges in the manner that we all hope it does? Because you pinged on something just a bit earlier in our discussion where you said, as a journalist, I think you said, my ears kind of perk up when I see a bunch of lawyers all saying the same thing.

Roy: Mm-hmm.

Matt: That maybe there's an inherent legal principle that we're trying to protect here. And is there other examples from your reporting where you can kind of perhaps point to as examples where that has been successful as a strategy? Because oftentimes we have these novel issues and we wonder whether we should go out and wrangle up some amici as they're called in the plural, or amici, whatever you want to call it.

But, is that as powerful as we might hope it is, to have sort of a unified voice on some of these really critical threshold issues?

Roy: Yeah, I mean, it's a good question. I think it doesn't happen all that often, but it did happen, recently. But, when the law firms get together, it does perk my ears up. And to your point about protecting sort of common interest in the attorney-client privilege world, like, I'm sympathetic to it as



a journalist because we provide similar protections to sources, right? Like, I have to be able to tell a source, if you can tell me information on background or on off the record, not for attribution, I can protect you from that, you know, if people come knocking on my door and say, who said that? I don't have to tell 'em. And so that's an important part of information gathering, whether it be journalism, or sounds like, investigations work that lawyers do. I think there's similarities there.

Matt: Yeah. We're talking with Roy Strom, a reporter from *Bloomberg Law* about his coverage of a, sort of shocking decision, that has now thankfully been overturned by the Sixth Circuit.

I want to shift gears, Roy, just generally speaking. We've spent a lot of time on this program talking about the shifting landscape of the white-collar field, and I am struck by your reporting and what you're seeing as sort of the new and emerging trends in the white-collar space from a journalist's perspective.

We've got a new administration. New priorities. New announced enforcement mandates. We've got some major sea changes underway by all accounts. And in your coverage of the legal profession, are you seeing the same thing that we're seeing or has it not caught up yet?

Roy: You know, it's funny, I was talking to the leader of a very large law firm just yesterday, and I'm working on a story about litigation practices broadly over the past, like year and a half, being very consistent, strong, good performers, sort of across the law firm landscape. And I just mentioned that to this person. And, they said, well, it depends on where you're looking in litigation because white-collar, has fallen off a cliff, in a lot of ways, at least for this person.

You know, you have an administration that I think one of the earliest things they did was say they were going to pause any sort of Foreign Corrupt Practices Act investigations. That was another one of these examples where I think a lot of lawyers thought that might not be a great idea. And, that wasn't in a courtroom, so you're not going to see 39 law firms sign on to an amicus brief, but certainly, there was a lot of concern by attorneys that policy decision wouldn't be helpful to, not just what they do, but I think, you know, good business practices. I don't know the latest about what they've decided to do there. I think they were going to take a pause and look at what they wanted to do. Seemed like they might've wanted to refocus the FCPA investigations on things like drug cartels, which, frankly, I'd be thrilled to learn about how that works. But that's what stands out.

I think to your point, it certainly feels like shifting ground in the white-collar practice. And anytime there's new administrations, you know, you, you've typically seen, you know, like health care fraud becomes a big point of emphasis. But I don't know that there's been a sea change maybe this big.

I'd be more eager to hear your views on that. I mean, you're in it every day.

Matt: Yeah, well, I can tell you that there has been a sea change. I wouldn't say that it's fallen off a cliff. My experience would be to the opposite, in fact. I think that, we're busier now than we've ever been on these cases. It's just the types of cases are different, I think. And I think that the priorities are different. And in some instances, who's bringing the cases are different, because we've got state prosecutorial agencies and regulators doing a fair amount of gap filling for where their federal



counterparts may have left off. And where the new prioritization may have changed the landscape at the federal level.

So I won't be as stark as the individual you were talking to that you spoke of, because that's just not our experience. We are as busy as ever.

Roy: Mm-hmm.

Matt: But it's different work.

Roy: Yeah, yeah, yeah.

Matt: It's different types of priorities. And I think one of the areas that is kind of flying under the radar, but needs to be talked about as a shifting part of the white-collar landscape is the increased number of politically charged corruption prosecutions-- or, and investigations, I should say-- surrounding political figures with allegations of wrongdoing. And there is a palpable dynamic out there that they feel politically motivated.

Roy: Mm-hmm.

Matt: And, whether that has been said overtly --as has been in the case in some instances --or not, there's certainly a feel that that's an emerging area of white-collar practice that we're going to need to keep an eye on.

Roy: Yeah. I mean, I think all you have to do is look at a couple of the president's most recent statements on the internet. He's called for investigations into certain political opponents.

Matt: We're running out of, time together today, Roy. I wanted to end on one note: If there was one piece of advice that you could give to the legal community as it relates to their interactions with journalists, what would it be? And it should be critical. It shouldn't be just some flowery stuff, right?

Roy: Mm-hmm.

Matt: What do you think that the legal community does wrong when it interacts with journalists like you?

Roy: I would say that if I was an attorney in any kind of high-profile practice, a white-collar practice, I would be looking to develop a relationship with a reporter who I trusted, who I understood their objectives, motivations and reason for doing what they do. Such that when I have something that would benefit from public understanding, I can go to that person and figure out how to get news coverage, or how to insert what I want into the public discussion with someone who I trust and someone who I understand how they work.

That's responsive, I'd say, to a potential criticism of lawyers, which is that they sometimes expect news coverage to appear sort of like out of thin air, or they can just, you know, pop up one day and they've got something important to say. But it's much easier to get something across the finish line



or to be included in coverage if you've spent time getting to know a journalist and developing a relationship with that person such that there's a back and forth, there's information sharing. It makes my job much easier when I'm able to call someone who I know and say, hey, this is what I'm thinking about, this is what's interesting to me, is there any there there, or does it have legs or what don't I know? Who should I speak with? Or, you know, just having a question that isn't going to necessarily lead to someone's name and a good quote in an article.

Certainly there's opportunities where that's what I need from people. And, a lot of the time if I know someone and they've helped me out, helped me understand things already, then that's who I'm going to look to when the deadline hits. So, that's really the only advice I have, is to make an effort to find a reporter who's influential in the line of work that you do or in the practice area that you work in and spend a little time, you know, whatever it is, educating that person, trying to understand what that person needs. And I think that's beneficial to both parties there, the journalist and the lawyer.

Matt: Well, Roy Strom, the business and practice reporter and columnist from *Bloomberg Law*. His morning newsletter, *Business and Practice* is available from *Bloomberg Law*.

He's also out there on the podcast circuit, "Big Law Business." Roy, I can't thank you enough for giving us your really interesting perspectives. It's seldom that we get to look at our, practice in the way that it's being observed as sort of a part of an industry. And that's what you've allowed us to do today by talking a little bit about how some of these really impactful cases that you've covered-- which we might think of as sort of black letter law-- are being viewed by the public writ large.

Because it does provide an interesting perspective. And certainly your commentaries on the shifting landscape that you're seeing in white-collar space in addition to some of your other observations from the journalist perspective are really great. And, I would call them invaluable to a more thorough understanding of how our system fits into the broader landscape of society and our economy.

So, thanks so much, Roy. It's really been a pleasure to have you on the program today. And until next time, this is "The Presumption of Innocence." I'm your host, Matt Adams. We'll see you then. Take care.