

In-House Advisory

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Practical Impact of Recent Cases on In-House Privilege

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Below are two recent cases that involve issues of in-house privilege. In particular, they concern discovery disputes: the first, an attempt to claw back an allegedly privileged document, and the second, an executive's attempt to avoid a deposition.

Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR (N.D. Cal. Apr. 28, 2021):

- Epic Games filed a lawsuit against Apple alleging it violated antitrust laws after Apple removed its game, Fortnite, from the app store. Apple requires developers to accept commissions for in-app payments and prohibits direct app purchases of digital content. Epic tried to implement a direct payments option and Apple removed the Fortnite app from its App Store. (The trial between Epic and Apple is wrapping up after three weeks.)
- At the end of last month, the court refused to allow Apple to claw back three documents that Apple had produced to Epic but claimed were privileged.
- The first document was an email conversation between non-attorneys about a proposed idea for the App Store. An attorney was included on the email chain. While Apple claimed it sent the email to an attorney to offer legal advice, the court determined “[t]his is a clear example of business people including a lawyer in an email chain in the incorrect belief that doing so makes the email privileged. It does not.” The second document, an email, was similar.
- The third document was a draft presentation that Apple claimed two attorneys reviewed and revised. The court again rejected the idea that this made the document privileged. Only “communications between attorney and client involved in the drafting of those documents, such as emails with redlined documents reflecting legal advice or oral conversations giving legal advice” would be privileged.
- **Tips:** Advise your in-house clients that, if they intend to seek your legal advice in an email, make that clear in the email. We recommend that they

write “request for legal advice” or something similar in the email. Do not just copy counsel. Also, counsel’s edits to documents should be marked with redlines or comments.

Palmisano v. Paragon 28, Inc., No. 0:21-cv-60447-WPD (S.D. Fla. Apr. 7, 2021):

- Robert Palmisano was the CEO of Wright Medical Technology, Inc. at the time it filed a lawsuit against Paragon 28, Inc., claiming Paragon infringed various patents. He subsequently retired.
- Paragon sought to depose Palmisano concerning the factual basis for allegations in the complaint, because Palmisano authorized it, and his rationale for the timing of the lawsuit.
- Wright and Palmisano argued that any knowledge Palmisano had was protected by the attorney-client privilege because his knowledge was derived from communications with counsel following an investigation into Paragon’s activities.
- The court explained that the attorney-client privilege applies only to communications, not underlying facts, but the privilege does extend to facts learned from counsel if disclosure would reveal counsel’s advice.
- For Palmisano’s deposition, that meant Paragon could seek Palmisano’s knowledge about the basis for statements in the complaint but not his knowledge about the basis for the legal allegations or his rationale for the timing of the lawsuit, which would reflect legal advice.
- **Tips:** Executives should be prepared to testify about the underlying factual allegations in a complaint. They should also be prepared to claim attorney-client privilege over any decisions they were advised by counsel to make.

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