Courts React Differently to Litigants' Failure to Properly Log Withheld Documents

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In his June 3, 2015 “Privilege Points” release, Tom Spahn discusses the requirement of a privilege log:

The Federal Rules of Civil Procedure do not require privilege logs, but most courts require one in their local rules, or at least expect one. Courts can react in widely varying ways to litigants’ failure to prepare any log, or failure to prepare an adequate log. Four decisions highlight the spectrum of courts’ possible remedies.

In Apple Inc. v. Samsung Electronics Co., the court condemned defendant Samsung’s privilege log as having provided "only generic statements" supported by a "'vague declaration'" — but explained that he had earlier "granted in camera review" rather than ordering the documents produced. Case No. 5:11-cv-01846-LHK-PSG, 2015 U.S. Dist. LEXIS 45386, at *59-60 (N.D. Cal. Apr. 3, 2015) (citation omitted). In Thermoset Corp. v. Building Materials Corp. of America, the court noted that defendant did not provide a supplemental privilege log until 38 days after producing responsive documents, but declined to find a waiver despite the tardiness — relying on a "'holistic reasonableness analysis.'" Case No. 14-60268-CIV-COHN/SELTZER, 2015 U.S. Dist. LEXIS 45924, at *19 (S.D. Fla. Apr. 8, 2015) (citation omitted). In United States v. Biberstein, the court criticized respondent's privilege log as providing "little help to the Court" — because it lacked pertinent dates and contained only "boilerplate language." No. 7:14-CV-175-BO, 2015 U.S. Dist. LEXIS 55139, at *4-5 (E.D.N.C. Mar. 23, 2015). Noting that respondent "had numerous opportunities to meet his burden to demonstrate that the documents are privileged" (id.), the court ordered defendant to produce all the withheld documents (declining respondent's offer to allow the court's in camera review). In Swoboda v. Manders, the court condemned plaintiff's failure to prepare a log — bluntly ordering plaintiff to produce "any documents related to allegations in the plaintiff's complaint" (apparently even including "communications with counsel that [took] place after the filing of a law suit"). Civ. A. No. 14-19-SCR, 2015 U.S. Dist. LEXIS 54329, at *11-12 (M.D. La. Apr. 27, 2015).

Given the unpredictability of courts' reactions to nonexistent, tardy, or insufficient privilege logs, litigants should comply with local rules and customs — and familiarize themselves with the presiding judge's likely approach.