Roger Clemens Strikes Out on Privilege Assertions Because of a Bad Log

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his June 18, 2014 “Privilege Points” release, Tom Spahn discusses privilege logs and compliance with discovery rules:

Most courts offer a second chance to litigants who have withheld arguably protected documents, but who prepare a tardy or inadequate privilege log. However, courts quickly lose patience with litigants who seem to flout the rules.

In McNamee v. Clemens, former New York Yankees pitcher and defamation defendant Roger Clemens withheld documents, but relied "on a one-sentence assertion of privilege" rather than supplying the required privilege log. No. 09 CV 1647 (SJ) (CLP), 2014 U.S. Dist. LEXIS 46338, at *12 (E.D.N.Y. Apr. 2, 2014). The Magistrate Judge had (1) reminded Clemens of the log requirement; (2) invited Clemens to provide a further showing to support his withholding (which Clemens "was only able to do so with respect to one document"); and (3) "took the extraordinary step of reviewing each and every document that Defendant claimed was privileged." Id. at *14 n.6. The District Judge upheld the Magistrate Judge's finding that Clemens had waived any privilege or work product protection. Several weeks later, the court denied Clemens' motion for a stay pending his petition for a writ of mandamus to the Second Circuit. In McNamee v. Clemens, No. 09 CV 1647 (SJ) (CLP), 2014 U.S. Dist. LEXIS 58829, at *5 (E.D.N.Y. Apr. 28, 2014), the court criticized Clemens' motion "as being a veritable hodgepodge of identical sentences" from his earlier pleadings. The court also rejected Clemens' argument that preparing a detailed log could be too difficult. The court sarcastically noted that "it would be curious if [Clemens] did argue that a document-by-document listing was too onerous for counsel to perform, seeing as he has now several times over caused the Court to conduct such a review." Id. at *6.

Litigants withholding documents often receive second and even third chances to prepare proper logs, as long as they try their best to comply with federal rules and to meet the court's expectations. However, litigants running afoul of either usually lose their privilege fights and anger frustrated courts.