Courts Implicitly Acknowledge the Wisdom of Litigants Revising and Supplementing Their Privilege Logs

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In his December 26, 2012 “Privilege Points” release, Tom Spahn discusses revised and supplemented privilege logs:

Some courts essentially allow adversaries to play "gotcha" with a litigant's privilege log – finding the log inadequate and not giving the litigant another chance. However, many courts acknowledge both the fairness and practical advantages of allowing litigants to revise and supplement their privilege logs.

In re Denture Cream Products Liability Litigation, Case No. 09-2051-MD-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 151014 (S.D. Fla. Oct. 18, 2012), the court approved descriptions on Proctor & Gamble's privilege log. The court pointed out that Proctor & Gamble had the log descriptions "supplemented after a meet and confer held in October of 2011, and again after a meet and confer held in March of 2012." Id. at *48. The next day, the Southern District of Ohio noted that plaintiffs challenged defendants' withholding of documents "under the first privilege log, even though Defendants have since revised their privilege log for a second time." Wilkinson v. Greater Dayton Reg'l Transit Auth., Case No. 3:11cv00247, 2012 U.S. Dist. LEXIS 150579, at *5 (S.D. Ohio Oct. 19, 2012). The court chastised plaintiffs for not complying with the local rule requiring parties to exhaust all extra-judicial means of resolving discovery disputes before seeking judicial intervention. The court complained that the plaintiffs were asking it to "overlook or ignore the further revisions Defendants have made in the second revised privilege log" – ultimately holding that the new log "effectively supercedes [sic] [defendants'] first revised privilege log and moots the parties' dispute." Id. at *7-8.

Although revising or supplementing a privilege log might serve as an acknowledgment that the withholding litigant was not as careful as it should have been the first time around, in most courts such a move will enhance the odds of successfully withholding protected documents.