Decision Highlights Courts' Differing Privilege Log Requirements

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 April 9, 2014 “Privilege Points” release, Tom Spahn discusses the requirements for privilege logs:

Although Fed. R. Civ. P. 26 does not require privilege logs, most courts expect them – and many courts specifically require them. However, courts take widely varying approaches to log requirements.

In *Khasin v. Hershey Co.*, Case No. 5:12-cv-01862-EJD-PSG, 2014 U.S. Dist. LEXIS 23886 (N.D. Cal. Feb. 21, 2014), plaintiff challenged defendant Hershey's privilege log. The court rejected Khasin's argument that Hershey's log improperly "failed to provide the organizational positions of senders and recipients." *Id.* at *12. The court noted that plaintiff's arguments "are based on an incorrect recitation of the requirements for a privilege log" – because plaintiff relied on the Second Circuit's "test for a sufficient privilege log [that] requires a greater degree of specificity than the one required by the Ninth Circuit." *Id.* at *12-13. The court pointedly noted that "the Ninth Circuit's test does not require a privilege log to provide the organizational positions of senders and recipients." *Id.* at *14.

As in so many other areas, litigants must check the pertinent court's specific approach to both the substance and the logistics of privilege claims.


