Courts Decline to Conduct an In Camera Review of Withheld Documents

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In his December 19, 2012 “Privilege Points” release, Tom Spahn discusses courts’ discretion on whether to conduct an in camera review to determine whether work product protection is warranted:

Although in many situations courts conduct an in camera review of withheld documents to determine the validity of a privilege or work product claim, courts can decline to conduct an in camera review for a number of reasons.

In Bozella v. County of Dutchess, No. 10 Civ. 4917 (CS) (GAY), 2012 U.S. Dist. LEXIS 149586, at *5 (S.D.N.Y. Oct. 17, 2012), Magistrate Judge Yanthis did "not see any need for an in camera review" of emails between co-counsel which were clearly prepared in anticipation of litigation. Eight days later, the Kentucky Supreme Court recognized that conducting an in camera review falls within the trial court's "sound discretion." Collins v. Braden, No. 2011-SC-000770-MR, 2012 Ky. LEXIS 180, at *28 (Ky. Oct. 25, 2012). The court noted that an in camera review "can have its limitations," in part because such a review "can overly burden a trial court." Id. at *27.

In some situations, an in camera review does not provide the trial court with the information it needs. For instance, the withheld document itself might not indicate that it was shared with some third party – which might have waived a protection. As in other aspects of courts’ dealing with privilege claims, there is really no "one size fits all" process.