Does the Privilege Protect a Lawyer's Draft Document?

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In his June 26, 2013 “Privilege Points” release, Tom Spahn discusses protection of drafts transmitted between lawyers and clients:

Most courts recognize the abstract principle that lawyers' communications to their clients deserve privilege protection only if the communication contains or otherwise reflects client confidences. For example, the privilege normally does not protect a lawyer's verbatim transmittal to a client of what the lawyer learned from some government official or other third party.

How does this basic principle apply to draft documents a lawyer prepares? Most courts protect such draft documents, explaining, for example, that "[d]rafting legal documents is a core activity of lawyers, and obtaining information and feedback from clients is a necessary party of the process." *Diversey U.S. Holdings, Inc. v. Sara Lee Corp.*, No. 91 C 6234, 1994 U.S. Dist. LEXIS 2554, at *4 (N.D. Ill. Mar. 3, 1994). However, some courts take a narrower approach. In *Earthworks v. United States Dep’t of Interior*, the court held that "the lawyer's draft, transmitted to [clients], does not yield any confidential communication from them." Civ. A. No. 09-1972 (HHK/JMF), 2013 U.S. Dist. LEXIS 49873, at *5 (D.D.C. Apr. 2, 2013). Fortunately, the court acknowledged that this approach would apply "particularly . . . in a governmental situation," in which "the lawyer may be the chief draftsperson of the particular document which she then sends to her co-workers for their views and thoughts." *Id.*

Most lawyers would be surprised to hear that the privilege does not protect all draft documents they prepare for their client's review. While most courts do apply the privilege that broadly, lawyers should remember that the privilege exists primarily to protect what their clients tell them.