

F. JAMES SENSENBRENNER, JR., Wisconsin
CHAIRMAN

JOHN CONYERS, JR., Michigan
RANKING MINORITY MEMBER

ONE HUNDRED NINTH CONGRESS

Congress of the United States House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

January 23, 2006

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
WILLIAM T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SANCHEZ, California
ADAM SMITH, Washington
CHRIS VAN HOLLEN, Maryland

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL ISSA, California
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOMMERT, Texas

COPIES TO
JAN 23 2006
11 48 AM '06
U.S. COURTS
FEDERAL JUDICIAL CENTER
WASHINGTON, DC 20544

Mr. ~~Conrad~~ Ralph Mecham
Director
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ralph:

I write to request that the U.S. Judicial Conference initiate a rule-making on forfeiture of privileges.

I am informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process. I therefore urge the Judicial Conference to proceed with a rule-making that would –

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

The expense in reviewing an enormous volume of papers, electronic files, and other materials in intensive discovery cases can represent a major component of litigation costs, which continue to rise. Lawyers are often compelled to expend countless hours screening vast quantities of documents to guarantee that any document produced in response to a discovery request does not include a privileged document for fear that the disclosure will waive the privilege for all other documents dealing with the same subject matter.

Parties occasionally try to facilitate the discovery process by agreeing to make discovery without forfeiting privileges so that any claim of privilege can be selectively asserted at a later date. Sometimes these agreements are approved by court order. Yet these agreements, even with a court

CNG-717

The Honorable Leonidas Ralph Meham
January 23, 2006
PAGE TWO

order, do not provide adequate assurances that the privilege will not be deemed waived in other proceedings or in other fora. The same difficulties can arise when disclosure is made voluntarily to a regulatory or governmental agency.

I understand that implementation of such a rule would require approval by an act of Congress in accordance with the Rules Enabling Act. Separate legislation would also be needed to extend the rule's protection to subsequent litigation in state court.

A federal rule protecting parties against forfeiture of privileges in these circumstances could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants. My Committee looks forward to working with the Judicial Conference on this important matter.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/bsm

cc: Chief Judge David F. Levi