



September 4, 2009

Mr. Michael Sullivan
Levine Sullivan et al
1050 Seventeenth Street, N.W., Suite 800
Washington, DC 20036-5514

Re: *Stepnes et al v. Ritschel et al* (08-vb-5296 (ADM/JJK))

Dear CBS counsel:

I am writing in response to your letter dated September 3, 2009, and in hopes of resolving “discovery” issues before the “spoliation” motion set for September 24, 2009. We can certainly meet and confer the afternoon of September 8, 2009.

1. Litigation “hold” email of July 16, 2008.

Your clients are claiming attorney-client privilege, and it is true that the July 16, 2008 email from CBS inside counsel was listed on CBS’ amended privilege log. Plaintiffs are at the obvious disadvantage that they do not know what the email says. I guess that we have been presuming that it was a type of “litigation hold” communication. Perhaps you can answer whether we are right – because if we are not, then that would end the discussion.

If it is a litigation-hold communication, Plaintiffs contend that it is both discoverable, and can be reviewed by the Court in deciding the spoliation motion. You have asked for a case cite. Please consider, Major Tours, Inc. v. Colorel, 2009 WL 2413631 (D.N.J. 2009) and the cases cited therein. We draw your attention to the discussion of when and why hold letters are obtainable. We decided, to preserve judicial resources, not to bring 2 motions (one on “discoverability” of the “hold letter” and one on spoliation), particularly in light of the fact that Plaintiffs are focusing on a very specific piece of evidence (the video interview of Stepnes and his attorney (“Interview”)) which CBS has already admitted no longer exists.

Of course, Plaintiffs have also supplied CBS with evidence in discovery, that they specifically requested retention of the Interview, one day following the broadcast, and yet it was still destroyed. This is not a close case on the issue of whether there is a showing of spoliation. Therefore, we have scheduled the spoliation motion.

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We have suggested that the Magistrate Judge would benefit from the information. Of course, the Court can order the information, but Plaintiffs believe that it is a better use of judicial resources to request this information up front from CBS counsel.

Further, we leave open the possibility that the July 16, 2008 email contains more than one category of information. For example, it might contain a first paragraph of “hold letter” information – which we assert is discoverable (or the Court can order it as part of its consideration of spoliation). And a second paragraph that is pure legal advice from attorney to client. Since we don’t know what the email says, it is difficult for us to analyze this. Now knowing more of how Plaintiffs are analyzing this issue (and how the Major Tours court analyzed the issue), perhaps CBS can provide some further input.

Finally, we pose as a compromise, that CBS disclose whether or not the July 16, 2008 email specifically instructed WCCO to preserve the Interview, and if so, what CBS counsel did to monitor to make sure that that preservation had occurred. This is the thrust of what Plaintiffs are seeking, anyway. This compromise may well preserve other attorney-client privileged information in that email, while providing Plaintiffs (and the Court) the information it needs to decide the spoliation motion. Further, it would deal with any concerns articulated by the Gibson Court (see inside cite in *Major Tours*), and Note in the Major Tours case, that counsel have an affirmative duty to preserve. It is highly relevant in the Court’s upcoming decision, whether CBS inside counsel adequately instructed the client to preserve the Interview.

2. Libel review.

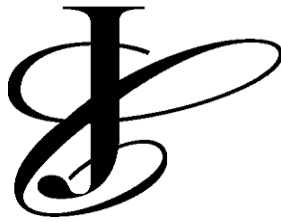
Thank you for your discussion of this issue. It is difficult for us to analyze this issue further, however, without the script that you have offered to provide. Would you be so kind as to email a scan of that script to me before our meet and confer on Tuesday?

Stated another way, what scripts were sent for review? It is possible that you agree with Plaintiffs that the physical object that was reviewed (the script) is discoverable, just not the commentary about it between attorney and client. We would urge that interpretation, at a minimum, and request that CBS inform us whether all portions of the script as read on the air (as first produced to Plaintiffs in discovery) were sent for pre-publication review.

It seems that we need to receive the additional script before knowing whether we can go forward at this time with other portions of this motion/analysis.

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3. **All versions of the script.**

Thank you for your review of the scripts, and your agreement to produce one more version. Could you please let us know, the versions that are not being disclosed, is the advice from counsel marginalia, or something that could be redacted? Since I don't know the document you are referencing, it is difficult for me to conceive and therefore analyze.

Please do not hesitate to contact me if you have any questions.

Sincerely,

s/jillclark

Jill Clark

JEC/slf

C: Clients; other opposing counsel (Lathrop; Borger).

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