

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Paul C. Stepnes; Pete Girard;	)	File No. 08 CV 5296
Jan Girard; David B. Holland;	)	(ADM/JJK)
Terry Yzaguirre; Ray Neset;	)	
Bennett Ross Taylor, Jr.; and	)	
Judith Wallen Taylor;	)	Saint Paul, Minnesota
	)	September 24, 2009
Plaintiffs,	)	10:00 a.m.
	)	
vs.	)	
	)	
Peter Ritschel, individual	)	
capacity; Jane Moore,	)	
individual capacity; City of	)	
Minneapolis; CBS Broadcasting,	)	
Inc., a foreign corporation;	)	
and Esme Murphy, individual;	)	
	)	
	)	
Defendants.	)	

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BEFORE THE HONORABLE JEFFREY J. KEYES  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**(MOTIONS HEARING)**

APPEARANCES

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I N D E X

WITNESSES:  
None

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HEARING EXHIBITS

REC'D

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Exhibit A

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**P R O C E E D I N G S****I N O P E N C O U R T**

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3  
4 THE COURT: This is Stepnes versus Ritschel, et  
5 al, 8-5296. Counsel, would you state your appearances,  
6 please, starting with you, Ms. Clark.

7 MS. CLARK: Thank you, your Honor. Good morning.  
8 Jill Clark appearing on behalf of all of the Plaintiffs.  
9 And with me in the courtroom today, your Honor, is Paul  
10 Stepnes, Jan and Pete Girard, and Mr. Taylor. I always call  
11 him by his nickname.

12 THE COURT: Thank you. For the Defendant.

13 MR. MOORE: Jim Moore, Assistant Minneapolis City  
14 Attorney, appearing on behalf of Defendants. Also with me  
15 in the courtroom is my colleague Sara Lathrop.

16 MR. SULLIVAN: Good morning, your Honor. Michael  
17 Sullivan appears on behalf of the CBS Defendants, WCCO and  
18 Esme Murphy. And with me is my colleague John Borger from  
19 Faegre & Benson.

20 THE COURT: Here is the way I want to proceed.  
21 We'll start with the first of Ms. Clark's motions, the  
22 attorney-client issue. Let's have -- we'll fully cover that  
23 one with responses before we turn then to the spoliation  
24 motion; and then we'll do the outstanding discovery dispute  
25 last. So, Ms. Clark, if you could proceed, please, on the

1 attorney-client.

2 MS. CLARK: Thank you, your Honor.

3 THE COURT: I'm quite familiar with the materials  
4 as a result of the good time I had last night with them.  
5 And so if you could, probably the best -- probably the  
6 best -- the thing that would be most helpful for me would be  
7 if you could walk through in a chronological order, kind of  
8 step-by-step, the key events that you see that relates to  
9 the attorney-client motion. And as I said, I think I'm  
10 pretty familiar with it but it would be helpful if you could  
11 give me that kind of -- I work better with dates and I think  
12 in a chronological way. So if you could start with what  
13 happened with Judge Porter's order and then march through as  
14 you see the significant steps as we go through, that would  
15 probably be the best way to prompt any questions that I have  
16 of you.

17 MS. CLARK: All right. Be happy to do that.

18 The first date, the first incident that commenced  
19 this action and the action in front of Judge Porter was a  
20 May 28, 2008 arrest of Paul Stepnes. He was released in a  
21 couple of hours but then on May 29th, 2008, one day later --

22 THE COURT: The 28th was the arrest, and then the  
23 next day they did the search?

24 MS. CLARK: Correct. The next day Sergeant  
25 Ritschel with some other officers executed a search warrant

1 at the Irving address, this is May 29th, 2008, and that was  
2 a Thursday. Sometimes it helps me to figure out where the  
3 weekend falls.

4 THE COURT: Yes, yes.

5 MS. CLARK: That afternoon literally from my car I  
6 called the District Court and asked for a hearing and was  
7 assigned to Judge Porter. By the next day, May 30, Friday,  
8 at about 1:00 in the afternoon, we were in court having a  
9 hearing. Christopher Dixon appeared for the City of  
10 Minneapolis. Sergeant Ritschel was present in the  
11 courtroom. I saw him myself, and I believe Mr. Stepnes is  
12 in the record that he saw him there as well.

13 Judge Porter that day remarked in response to some  
14 written motion papers a couple of things that we find  
15 relevant. One, that he saw it as an emergency motion. He  
16 thought that Stepnes had a right to an emergency hearing.  
17 And, two, remarked that the police had made no provision to  
18 deal with the attorney-client privilege when they seized two  
19 computers. Christopher Dixon on behalf of the City  
20 requested the weekend to prepare further for the hearing,  
21 and Judge Porter granted that.

22 Over the weekend, Sergeant Ritschel apparently  
23 created a property inventory list of what had been seized.  
24 It's our position that's not a complete list but clearly  
25 some time was spent that weekend doing that, creating some

1 police reports for the first time. And then when we came to  
2 court on --

3 THE COURT: Monday.

4 MS. CLARK: Monday.

5 THE COURT: June 2nd.

6 MS. CLARK: Well, except that now I'm confused  
7 because there's 31 days in May. But I know that we came to  
8 court then Monday. And on that day, June 2nd, Judge Porter  
9 ruled from the bench and I can't be verbatim with it but it  
10 was something akin to the ruling then on the issue raised by  
11 Mr. Stepnes about the attorney-client privilege in his  
12 laptops was that the laptops had to be returned to  
13 Mr. Stepnes, and then that they could be imaged. The  
14 attorney for the City said, Well, we might be able to  
15 develop a criminal case here; and so Judge Porter indicated  
16 that the laptops could be imaged before they were physically  
17 returned, but that those should be given to him.

18 Now, my reading of that is that it did not  
19 authorize copies to remain in the police department. There  
20 was approximately --

21 THE COURT: What about there's the issue of  
22 imaging what was on the laptop. Then there was also  
23 reference to a hard drive. And I'm not -- I'm probably the  
24 least computer savvy probably in this room, maybe anywhere.  
25 Explain to me what the issue was with respect to there

1 was -- you say there was imaging but I also know that there  
2 was reference to a hard drive and what was going to be done  
3 with the hard drive.

4 MS. CLARK: And I'm happy to walk through that.

5 I would say I'm about medium level of tech savvy.  
6 There's a point at which my knowledge ends. Here is what I  
7 understand. Each of the laptops had a physical hard drive  
8 that stored data, and the imaging essentially just means  
9 copying.

10 THE COURT: Is there more than one laptop?

11 MS. CLARK: Two laptops. Each had a hard drive.  
12 Each had electronic data on the hard drive which is the, you  
13 know, the storage space on the laptop.

14 THE COURT: Right.

15 MS. CLARK: That what Judge Porter authorized by  
16 saying you could image them was to essentially say you can  
17 make a copy of the hard drives. I had originally thought  
18 that that might end up being a disk. There are some limits  
19 to disk storage capacity and so now I learn later that what  
20 happened was the City saved the hard drive data, two hard  
21 drives, two hard drives' data onto an external hard drive  
22 which is just like these little flash drives you have. It's  
23 just a bigger version of that. It can get plugged in  
24 externally and just like a portable hard drive that they  
25 saved it onto that.

1           I, frankly, as I stand here don't know how many  
2 copies flow from that. I don't know if that physical hard  
3 drive went to Judge Porter or if they then made disks from  
4 the hard drive. Now days there are some very high-capacity  
5 disks depending on if they compress the file and it's likely  
6 that they could have created disks that went to Judge  
7 Porter. I don't have factual knowledge of that.

8           But it's my understanding that -- I mean, it  
9 appears to me based on having been there and now reviewed  
10 the transcript that what Judge Porter meant that the  
11 prophylactic that he was putting in place was you give me --  
12 you can make a copy. You can do the technical work, but  
13 give it to me and it has to go through me.

14           THE COURT: Well, he says, Judge Porter said if  
15 there's something on the hard drives, that's why I want to  
16 look at them in camera before they look at them.

17           MS. CLARK: Yes.

18           THE COURT: And so it would appear to me that  
19 would have been very clear that he was saying don't look at  
20 anything until I review this information with respect to  
21 in -- in camera, with respect to determination about  
22 privileged documents.

23           MS. CLARK: Correct. And that is my  
24 understanding.

25           THE COURT: Maybe some ambiguity, though, you say,

1 and I think that's maybe right. Maybe some ambiguity about  
2 whether that gave the City the right to keep in its  
3 possession either any sort of hard drive or this data. So  
4 that may be vague but I think that Judge Porter's order is  
5 quite clear that he is to be -- he is to do the review of  
6 all of this data for the privilege issue before they look at  
7 them.

8 MS. CLARK: Yes.

9 THE COURT: And so I think that's kind of the  
10 first factor we have here that doesn't appear to be in  
11 dispute.

12 MS. CLARK: I think that that's right. And that  
13 is what gave Stepnes peace of mind.

14 THE COURT: Was Ritschel there that day?

15 MS. CLARK: We just don't know. No one who was  
16 physically there in the courtroom remembers whether he was  
17 there. But we did note in our papers that Christopher Dixon  
18 repeated the order back to Judge Porter and said let me make  
19 sure I understand it and repeated it back to Judge Porter.  
20 And obviously there's some duty flowing there to Sergeant  
21 Ritschel. At least that would be our position.

22 It was -- and I can find the date if you believe  
23 it's important but maybe a week or so later -- oh, Judge  
24 Porter also on June 2nd said to me: "Ms. Clark, you give me  
25 a list of attorneys' names that I should be looking for."

1 Because he realized if he is going to be doing an in-camera  
2 review, he has to be searching for some particular thing.

3 THE COURT: I see that Mr. Dixon, after Judge  
4 Porter said he wanted to look at them first, Mr. Dixon said:  
5 "Timing, your Honor, can we have 48 hours to make copies?"  
6 And again, this is end of business at 3 o'clock now and the  
7 Court said: "Yeah, you can have it, Wednesday, close of  
8 business." So that would appear to indicate that there was  
9 an anticipation that the City would at least be keeping  
10 the -- a copy of the information.

11 MS. CLARK: I don't know if that's a safe  
12 assumption for this reason. There's two hard drives, two  
13 copies minimum. So copies of the hard drives is just  
14 another interpretation.

15 THE COURT: All right.

16 MS. CLARK: It is, obviously, though, what gave  
17 Mr. Stepnes the peace of mind that before anyone did  
18 anything with the data, that the review would happen by  
19 Judge Porter. Within approximately a week I requested --  
20 oh, and this was the next step. Judge Porter said on June  
21 2nd to me: "Ms. Clark, you give me a list of the names of  
22 attorneys you think could be on here." I e-mailed the clerk  
23 approximately a week later and said, "Can I provide that in  
24 camera?" We did not think that the City was necessarily  
25 entitled to that and I was given permission to provide that

1 list in camera.

2 I have now disclosed it in this action for obvious  
3 reasons. It was approximately a month later, your Honor, I  
4 believe it was the end of June, 2008, that I received an  
5 e-mail from the clerk -- well, I think it was probably  
6 copied to me, e-mailed to Mr. Dixon being copied to me, from  
7 Judge Porter's clerk Katie indicating that it would not be  
8 appropriate for police to assist Judge Porter in reviewing  
9 the data and that they needed to get Court IT staff the  
10 appropriate hardware and software, whatever that meant, so  
11 that Judge Porter could review the disks because he could  
12 not review them in their current format.

13 I did not know until recently that there had been  
14 other communications. Mr. Dixon had not copied me on his  
15 various e-mails. And I'm not in any way suggesting that  
16 Katie in Judge Porter's office did anything wrong. I'm just  
17 saying that I lacked the knowledge to know what I know now  
18 which is police, Sergeant Ritschel, had apparently offered  
19 to come sit with Judge Porter as he was doing the review.  
20 Obviously it was not acceptable to us. It was moot because  
21 it was not acceptable to Judge Porter.

22 THE COURT: Well, is it Sergeant Ritschel who  
23 would have sat with him or somebody from IT or don't we  
24 know?

25 MS. CLARK: Just my recollection from reading

1 those e-mails recently, and those came in that big batch of  
2 52 e-mails that I got just before I filed my motion, but I  
3 just had this recollection that Sergeant Ritschel was  
4 willing to bring it over. Maybe it was Dale Hanson.

5 THE COURT: It might be Hanson.

6 MS. CLARK: It could have been Hanson, who was the  
7 police IT expert in their crime lab. The e-mail at that  
8 point did indicate that failure by the City to promptly or  
9 timely, something like that, provide Judge Porter with what  
10 he needed to review the data would be a violation of his  
11 order, and then I heard nothing else for some time.

12 It -- I certainly assumed that if Judge Porter  
13 ruled, he would let us know. And I also knew that it was  
14 probably quite a time-consuming task, and so it really  
15 wasn't disturbing to me that a number of months went by and  
16 we didn't hear anything. The other thing I think is that  
17 only Judge Porter would know what is too long, you know, how  
18 long is too long, in providing him software and hardware  
19 such that it would violate his order. I didn't think I  
20 could speak to that.

21 So the next that I heard anything about it, I  
22 believe, was the end of April of '09. We had commenced this  
23 action. Unbeknownst to us in December '08 there had been  
24 this forensic review. And what I saw was -- we had shot out  
25 discovery requests very early. Plaintiffs were the first --

1 THE COURT: When did you commence the suit?

2 MS. CLARK: I believe we filed it in October and  
3 we served it in January.

4 THE COURT: Apparently it was filed September  
5 30th.

6 MS. CLARK: Okay.

7 THE COURT: But they had -- they got -- it was  
8 served in January of '09.

9 MS. CLARK: Correct. But it's likely that they  
10 knew that it was filed because there was media coverage on  
11 it.

12 We had --

13 THE COURT: Which gives us evidence that even at  
14 the time that Mr. Stepnes was arrested, from that point  
15 forward he had said you're going to be sued and you were  
16 involved early on.

17 MS. CLARK: Correct.

18 THE COURT: Doesn't seem like the suit was any  
19 surprise.

20 MS. CLARK: I hardly think that it was and in fact  
21 that's right. I didn't want to slurp over into spoliation  
22 but, yes, July 16th, 2008, I called CBS counsel in New York  
23 and said anticipate litigation. So this was not a surprise.  
24 And the City even knew and we were talking about possible  
25 mediation even in the summer so this is not a surprise to

1 anybody.

2 We had I think a Rule 16 with your Honor around  
3 February of '09 and I don't remember my precise date but I  
4 remember issuing interrogatories before anyone else had in  
5 the case, interrogatories and document requests. It took  
6 the City some time to respond to those. Literally months  
7 went by. You know how those go. You don't want to just go  
8 to an instant Motion to Compel. That's not appropriate.  
9 And Ms. Lathrop had kind of apologized for being late on  
10 some things and we did eventually get her responses around  
11 the end of April; and that was when I read a police report,  
12 and I believe it would be the one filed by Dale Hanson,  
13 which informed me, number one, is there had been this  
14 forensic review of the hard drives. And number two, that  
15 the police had read e-mails between Jill Clark and Paul  
16 Stepnes and decided for themselves that they were not  
17 privileged. Both of those things were disturbing, and I  
18 walked through in some detail --

19 THE COURT: E-mails between whom?

20 MS. CLARK: The police had reviewed e-mails  
21 between Jill Clark and Paul Stepnes.

22 THE COURT: Gotcha.

23 MS. CLARK: And decided for themselves that they  
24 were not attorney-client privileged.

25 I communicated with Ms. Lathrop. There were a

1 couple of e-mails between she and I from that end of April  
2 to the end of May timeframe. I raised numerous red flags in  
3 numerous ways and then at the end of May she e-mailed me the  
4 representation that Judge Porter had reviewed the disks and  
5 released them to the police. And I don't --

6 THE COURT: May of '09?

7 MS. CLARK: Correct. That is not verbatim but  
8 that is certainly what was presented to me.

9 And, you know, part of what was going on in my  
10 mind was -- I have kind of been a detractor of some  
11 informality of orders at Hennepin County courthouse. It's  
12 preferable to me that things be in writing or at least that  
13 I'm notified in some formal way; but far be it from me to  
14 tell a judge how to rule on a case. In other words, I kind  
15 of thought, well, maybe, you know, an e-mail went and  
16 somehow either it didn't get to my inbox or I inadvertently  
17 wasn't copied on it and I just thought, well, I just,  
18 frankly, your Honor, couldn't imagine that Ms. Lathrop was  
19 telling me something that was not accurate or for which she  
20 had no basis. And I knew that it was certainly possible  
21 that I had been a little bit out of the loop in this whole  
22 get-the-software-and-hardware-to-Judge-Porter process.

23 THE COURT: Apparently she said to you in May,  
24 just so we have it precise, she said: "Judge Porter  
25 reviewed the hard drive in camera. Then gave approval to

1 have it examined by the forensic examiner. Judge Porter was  
2 reviewing to see if there was any privileged information  
3 before releasing it to be examined."

4 MS. CLARK: Correct. And obviously she's an  
5 officer of the court and I assumed that somehow I didn't get  
6 the word and, you know, I didn't necessarily agree with the  
7 ruling. I thought that there probably was attorney-client  
8 privileged data on those disks. But number one, if you lose  
9 a ruling you lose a ruling. Number two, there was a deficit  
10 in our team because when the police returned the physical  
11 laptops to Stepnes, they were physically damaged on the  
12 outside almost as if they had been kicked or dropped and he  
13 had terrible difficulty accessing any data on the hard drive  
14 itself. That was communicated in two different ways at two  
15 different times to the attorneys in this case. We did  
16 finally get one of them working on September 5, 2009. So  
17 the problem was we didn't know what they knew.

18 There were e-mails we now have going back to 2006.  
19 Who can remember every e-mail they have sent in a matter of  
20 years. So I guess that if I had known what I know now, I  
21 might have acted differently but then I did not know.

22 The next significant event was June of 2009.  
23 After I had already raised red flags to Ms. Lathrop and  
24 after she sent me the e-mail that your Honor just read,  
25 Ms. Lathrop issued a supplemental 26(a)(1) report. I don't

1 know if I've ever gotten a supplemental 26(a)(1) report from  
2 the City.

3           Knowing what we know now, we're concerned that the  
4 CBS attorneys knew that the City had these hard drives, had  
5 this forensic report, and the quickest way for them to get  
6 it were for her to produce it as part of a 26(a)(1) report,  
7 not require them to serve any kind of document requests on  
8 the City. That we do not know. We're just concerned about  
9 that at this time. And I want to say --

10           THE COURT: Describe this forensic report that was  
11 done. Did -- as I understand it, correct me, I haven't seen  
12 the forensic report and I don't think I need to see it for  
13 these purposes. But as I understand it, what it included  
14 was it was a -- it says it's a report, but as I understand  
15 it it's something where it's set up so that the person who  
16 is reviewing the report can click onto various links and  
17 actually get access to the various attorney-client  
18 privileged documents that you're referring to, including all  
19 of your e-mails. So it's not a report in the sense of some  
20 type of summary. It is a -- it's some type of a setup so  
21 that the data can be accessed by whoever has the report. Is  
22 that correct?

23           MS. CLARK: Yes.

24           THE COURT: All right.

25           MS. CLARK: They can go right to the raw data.

1           THE COURT: Other than e-mails between you and  
2 Mr. Stepnes, or communications between you and Mr. Stepnes,  
3 are there other materials that you are aware of that are  
4 included in this information that are attorney-client  
5 privileged communications?

6           MS. CLARK: Yes, very much. And I have -- if I  
7 could just have a little drawing I just made here.

8           THE COURT: Do you want to put it on the ELMO?

9           MS. CLARK: Sure.

10          THE COURT: I guess all we have to do is have our  
11 IT expert turn on the ELMO. I think I turn on the doc  
12 camera.

13          MS. CLARK: I don't have a control. I usually put  
14 the freeze on before I move the page.

15          THE COURT: I have a freeze.

16          MS. CLARK: What I've done here is I've just shown  
17 really it's like a little website on a disk. And on the  
18 left-hand side just like you would go to the home page of a  
19 website there are little blue hot links that take you to  
20 certain featured parts of the report. And right on the  
21 left-hand bar is e-mails between Jill Clark and Paul Stepnes  
22 pulled out. In fact, I think there's two of them, which  
23 seems a bit ironic under the circumstances.

24                 But here is what we also found and there's  
25 obviously various ways to view the data and there's various

1 filters through which to review the data. So if you were to  
2 click in some of these, you might see the e-mails more as  
3 you would see them on your computer, the way they show to  
4 the user. But there's also something which the forensic  
5 police officer called the M box. M as in Mary. And the M  
6 box is the raw e-mail data as it came into that computer in  
7 the first place and it contains some computer code, but you  
8 just ignore the code and there's the e-mail.

9 That M box is divided into three files. The top  
10 file is extremely large. That's the one where when we  
11 imported it into Word we received approximately 50,000 pages  
12 of data. This -- we call that Papa Bear; this medium-sized  
13 one we call Mama Bear. It's an intermediate size of raw  
14 code e-mails. And then we call this Baby Bear, and this is  
15 a much, much smaller file.

16 We spent about 12 hours going through these 50,000  
17 pages and the problem is, of course, even if you can read  
18 the e-mails, going through 50,000 pages takes a huge amount  
19 of time. So the only way we could effectively review it was  
20 to keyword search. So we are not sure that we have located  
21 all of the attorney-client privileged e-mails in the M box  
22 but we know we found upwards of 60. Mr. Stepnes reviewed  
23 them, I reviewed them with him; and they are, in our  
24 opinion, seeking legal advice and getting legal advice from  
25 attorneys.

1           Not only that, Ralph Mitchell, one of his  
2           attorneys in a legal proceeding that would be covered by  
3           interrogatory and document requests served by CBS, had at  
4           the bottom of his e-mail signature that he was with the Lapp  
5           Libra law firm, as well as Priscilla Faris who represented  
6           Mr. Stepnes in a legal proceedings, and that has been  
7           requested in discovery. You know, documents of which have  
8           been requested in discovery by CBS. Had at the bottom of  
9           her e-mails "Faris & Faris Law Firm," and even something  
10          like "Making a difference one client at a time," something  
11          of that nature.

12           THE COURT: So there were -- those would be  
13          attorney-client communications with Mr. Stepnes about  
14          matters unrelated -- some of them may have been unrelated to  
15          this lawsuit, but they were attorney-client communications.  
16          And then some of them, I take it from what you're saying, is  
17          that they were communications with lawyers about issues that  
18          are relevant here such as the application of gambling laws  
19          or something like that.

20           MS. CLARK: I would refine it a little bit more to  
21          say this. And I don't want to --

22           THE COURT: And I understand you don't want to do  
23          anything here that's going to waive the attorney-client  
24          privilege.

25           MS. CLARK: Yes, thank you.

1           THE COURT: I know it's very difficult to go  
2 through the shoals here of these various places where one  
3 could get tripped up.

4           MS. CLARK: Right.

5           THE COURT: So everyone be careful when they  
6 answer questions that I have that they have to take that  
7 into account.

8           MS. CLARK: And I think that there's a couple of  
9 categories, and obviously I do want to be careful not to  
10 waive, but there are a couple of categories. There was some  
11 legal advice sought for things that had nothing to do with  
12 the case. Nothing to do.

13           There's an intermediate gray zone which I in some  
14 ways find most disturbing which is attorney-client  
15 communication privileged e-mails that relate to cases that  
16 because the CBS attorneys have asked for Stepnes to disclose  
17 all civil, criminal, anything its ever been in, any legal  
18 proceedings he's ever been in, would have been requested by  
19 the CBS attorneys. In other words, they are not about this  
20 case but they were in this zone of some proceedings that  
21 they wanted access to. And it seems to us inappropriate for  
22 them to get the documents filed in court but then also to  
23 get attorney-client communications about those matters.  
24 Those were in the M box.

25           Now, we've focused a lot of our time in this M box

1 in part because what we understand, we can't get into Dale  
2 Hanson's mind, but based on everything that we've read, it  
3 appears that Papa Bear is the origin of many of these links  
4 here on the side. In other words, it's the raw data from  
5 which e-mails that are highlighted for people in this  
6 left-hand bar flowed.

7 THE COURT: So one of the files that he created to  
8 put in the left-hand bar was the Jill Clark e-mails?

9 MS. CLARK: Yes.

10 THE COURT: Did -- on the left-hand bar were there  
11 any other, I'll call them files, maybe they are folders, but  
12 whatever, in the left-hand side, were there any others that  
13 were directly related to attorney-client privileged  
14 materials?

15 MS. CLARK: There was no Priscilla Faris bar.  
16 There was no Ralph Mitchell bar.

17 THE COURT: Have you seen what bars -- what are on  
18 those bars?

19 MS. CLARK: Yes.

20 THE COURT: What would be an example of other bars  
21 on there? Were they about subjects?

22 MS. CLARK: One of them is "noted e-mails". These  
23 are apparently e-mails that Dale Hanson either with or  
24 without Ritschel pulled out of we believe Papa Bear and put  
25 for easy access for anyone who might want to review them.

1 THE COURT: I see.

2 MS. CLARK: And we believe that the Paul Simonson  
3 e-mail is in "noted e-mails" but that doesn't mean that it's  
4 not in Papa Bear or one of the other files.

5 THE COURT: Paul Simonson was the whistle lawyer  
6 who -- he is the disbarred lawyer?

7 MS. CLARK: He is. He was disbarred some time ago  
8 and is an accountant now.

9 THE COURT: Okay.

10 MS. CLARK: And the reason that we included that,  
11 number one, was to show that we can tell the CBS attorneys  
12 have to have been through the forensic report which we  
13 believe would have been prohibited by Judge Porter's order;  
14 but also to show that Paul Stepnes, what he was denied was  
15 any opportunity to have an attorney review that e-mail first  
16 and decide whether or not to claim attorney-client  
17 privilege. And I did some research on this notion that one  
18 of the most important factors in assessing whether this is  
19 privileged is the subjective belief of the client. And I'm  
20 not saying we would win that motion. I don't know. I  
21 didn't take it to that level. It was just to show that we  
22 were denied that.

23 Now, some of the other things on the left-hand  
24 bar, your Honor, are the intake photos, as Dale Hanson calls  
25 them. He was just taking physical photographs, digital

1 photographs of hardware essentially as it's received by him.  
2 Then he has a forensic report which is similar to but not  
3 exactly identical to his police supplement which has been  
4 filed in the record by a couple of the parties. And then  
5 there are a couple of different ways of views of the data.

6 So the supplemental 26(a)(1) report that Sara  
7 Lathrop served in the case -- a couple of the points about  
8 it were that it indicated there was this forensic report.  
9 And I called it that just as a shorthand. It's -- we're  
10 talking about this way of accessing the data, accessing the  
11 e-mails.

12 Oh, and I'm sorry. Another one of these was some  
13 documents. There had been some actual Word documents on the  
14 computer that was searched.

15 THE COURT: We obviously know that Officer Hanson  
16 went through and reviewed attorney-client privileged  
17 material. Do we know whether Officer Sergeant Ritschel, who  
18 is a Defendant here, do we know whether he reviewed any of  
19 the -- any of these subject attorney-client e-mails or  
20 documents?

21 MS. CLARK: Here's what I know so far. Sara  
22 Lathrop disclosed to me after September 1 of this year that  
23 Sergeant Ritschel has a disk. He has the forensic report  
24 disk. We don't know what he has done with it. Has he put  
25 it on his computers? Has he taken e-mails off of it and

1 sent it around city hall? We don't know. We have no idea.

2 THE COURT: Has he testified in this case yet?

3 MS. CLARK: No, he has not. And we also know that  
4 he didn't file an affidavit as to his knowledge. So at that  
5 point that's one of the reasons that we thought that there  
6 should be some further process because you're right, he is a  
7 Defendant in this action and he was involved from day one.  
8 So even if he wasn't in court on June 2 with Judge Porter,  
9 he was in court on the day that Judge Porter was, frankly,  
10 outraged at the way that they, the police, had handled the  
11 attorney-client privilege or failed to make a provision for  
12 it.

13 So back to the supplemental 26(a)(1), by that  
14 document Sara Lathrop indicated that this forensic report  
15 that's on the ELMO could be viewed in her office. Now,  
16 looking back I'm disturbed by that because all other disks  
17 had been copied and mailed to the parties in this  
18 litigation. CBS was doing it, Plaintiffs were doing it,  
19 Sara Lathrop mailed me a copy of some radio dispatch data or  
20 MECC data. That was put on a disk and mailed to me. This  
21 disk, we're told, has to be viewed in Sara Lathrop's office.

22 I almost immediately e-mailed Ms. Lathrop and  
23 indicated that I thought this was a problem. I think I  
24 might have even copied the CBS attorneys on that e-mail.  
25 But very soon they also knew that I viewed this as a problem

1 and that I was asserting the attorney-client privilege and  
2 that no one should look at anything until I look at it  
3 first.

4 Unbeknownst to me --

5 THE COURT: Now, at this point in time, though,  
6 you were still operating under the representation that Judge  
7 Porter had reviewed the information and had -- had  
8 authorized the police to go forward because he had -- he had  
9 released it?

10 MS. CLARK: That's right. I also thought,  
11 however, that it was prudent of me to assert the privilege  
12 in case there was a way I could or should take further  
13 action to assert the privilege.

14 Instead of waiting for me to review it, instead of  
15 sending me a copy of the disk, and unbeknownst to me -- and,  
16 you know, there's only one of me and I think there's at  
17 least five lawyers on the other side, maybe more, and any  
18 number of legal assistants. It's very difficult for me to  
19 find a whole day to go review something at Ms. Lathrop's  
20 office. Leita Walker, who is apparently a junior associate  
21 at Faegre, without announcement to me, went over to review  
22 the data at Sara Lathrop's office. And then we only learned  
23 in response to this motion apparently was allowed to put it  
24 on her laptop and leave with it.

25 Now, no one ever e-mailed me and said, Jill, you

1 can send a legal assistant down with a laptop and get it.  
2 And if they had, I could have done that. I was told I had  
3 to physically show up. So that built delay into the  
4 process.

5 We now know from Leita Walker's affidavit that she  
6 then sent the -- it appears, and I can't speak for her,  
7 obviously, but it appears from reading her affidavit that  
8 she sent the entire forensic report on a disk to Washington  
9 to the Levine Sullivan firm, and then she also spent some  
10 time going through the report.

11 THE COURT: Who is the Levine Sullivan?

12 MS. CLARK: Levine Sullivan is a Washington, D.C.  
13 firm which also represents CBS in this case. Mr. Sullivan  
14 here today is from Levine Sullivan firm. It's my  
15 understanding that they are lead counsel in this case.

16 THE COURT: He looked like he was from Faegre &  
17 Benson.

18 MR. SULLIVAN: I'll consider that a compliment.

19 THE COURT: It is.

20 MS. CLARK: There is also in Washington, but not  
21 here today, a lawyer by the name of Jeanette Bead, B-E-A-D.  
22 And it's my understanding that Leita Walker from Faegre sent  
23 Jeanette Bead the entire forensic report as it would be on  
24 this disk, easily copied onto a disk, that's clear. And  
25 that Leita Walker also spent some time plowing through the

1 forensic report and created her own sub-file called "key  
2 documents" which was a separate file also sent to Levine  
3 Sullivan in Washington.

4 And after receiving the papers from the CBS  
5 Defendants in this case, there's this -- there are some  
6 disturbing representations. Leita Walker apparently does  
7 not recall if she saw attorney-client privileged e-mails  
8 when she did this review. But Levine Sullivan in a footnote  
9 that it dropped, and I want to come back to it in a moment,  
10 too, but in a footnote that Levine Sullivan dropped in its  
11 memorandum says that apparently even after this motion was  
12 filed, your Honor, the Levine Sullivan firm reviewed product  
13 from the forensic report, specifically reviewed e-mails  
14 between Paul Stepnes and Jill Clark and specifically  
15 reviewed an e-mail between Paul Stepnes and Priscilla Faris,  
16 and are now taking the position that they are not  
17 attorney-client privileged. There is a particular e-mail I  
18 want to make reference to.

19 By the way, the footnote that I'm talking about is  
20 footnote 12, page 36 of the Levine Sullivan memorandum.  
21 They reviewed the -- it's hard to know who because I don't  
22 notice an affidavit accompanying it, but apparently they  
23 reviewed an e-mail between Priscilla Faris and Paul Stepnes  
24 that had something to do with a "rubber type area rug." So  
25 I did a little search of the M box this morning, your Honor,

1 and that e-mail is in the M box. It's in Papa Bear. So  
2 whatever review Leita Walker did, there's certainly evidence  
3 that she reviewed the M box.

4 We also note that there are no affidavits from any  
5 Levine Sullivan attorney about what they did or did not look  
6 at. But it seems that this one particular e-mail is  
7 evidence.

8 THE COURT: So it least from your standpoint it  
9 would appear that Levine Sullivan looked at these  
10 attorney-client privileged documents and is arguing that at  
11 least some of them are really not privileged, but they don't  
12 say what ones they examined that they concluded  
13 were privileged.

14 MS. CLARK: That's right. They don't say that.  
15 But I think even more importantly that after representing to  
16 me and then to the Court that they weren't going to review  
17 the forensic report disk they'd received from Ms. Lathrop  
18 pending this motion, they apparently, mincing words,  
19 reviewed paper copies, specifically on notice now that  
20 Priscilla Faris is Mr. Stepnes' attorney, reviewed an e-mail  
21 between Priscilla Faris and Mr. Stepnes.

22 Now, I don't know if the Court would ultimately  
23 decide it was attorney-client privileged. I wasn't there at  
24 the time. I would have to interview my client to figure out  
25 what they were talking about that involved a rubber type

1 area rug. I don't know. But it's very disturbing to us  
2 that even with this motion pending they are still reviewing  
3 the forensic report, they are still reviewing e-mails  
4 between me and my client, and they're still reviewing  
5 e-mails -- now they have broadened their detail search to  
6 include e-mails between Mr. Stepnes and other people they  
7 know to be his attorneys.

8 The e-mail that I was referring to closes with  
9 Priscilla Lord Faris, Faris & Faris Law Office, address,  
10 phone number, "Making a difference client by client." I  
11 mean, they had to know that this was sent from his attorney.

12 And one of the most disturbing things that we have  
13 encountered in this is this notion that somehow that the  
14 Defendants are entitled to first review of information  
15 before me, and then make an argument to me about whether  
16 they are privileged. This to us seems entirely backwards.  
17 The police did it. They reviewed e-mails between Paul  
18 Stepnes and myself and then claimed that they weren't  
19 privileged. That's backwards. Then Sara Lathrop proposed  
20 that the way we meet and confer on this issue before court  
21 is to review all of the e-mails together and argue together  
22 about whether they are attorney-client privileged. That was  
23 just -- I mean, these things are just astounding to us. And  
24 then to have Levine Sullivan review an e-mail with Priscilla  
25 Faris with this motion pending is extremely, extremely

1 disturbing to us.

2 But if you want me to go back and pick up the  
3 chronology, this forensic report reviewed by Leita Walker  
4 goes to Levine Sullivan firm in digital format. No one  
5 tells me that. Not one person. Not Sara Lathrop. No one  
6 from Levine Sullivan. And I continued to try -- I started  
7 to have funnier and funnier feelings about what was going  
8 on. And when we were together at a deposition in August,  
9 and I believe that's the date that Mr. Sullivan had asked my  
10 client Pete Girard about some e-mail from Paul Simonson to  
11 Paul Stepnes from May '08 and it said blah, blah, blah. At  
12 that point I asked Ms. Lathrop, you know, you still haven't  
13 shown me anything to prove to me that Judge Porter ruled on  
14 this. I thought I would get an e-mail and find out somehow  
15 I was inadvertently not copied. Nothing. At this point I  
16 sill have nothing.

17 And I -- then she said to me, Well, it was a  
18 verbal order. At that point now my hackles are up because  
19 that does not seem to me like Judge Porter. I just don't  
20 think he is going to make a verbal order. So I pretty much  
21 said if you don't get me something in writing it the near  
22 future, I'm going to go back to Judge Porter and ask him  
23 what he did.

24 And then also unbeknownst to me, and this would  
25 have been August 31, 2009, Sara Lathrop calls the clerk in a

1 case that's not even her case, Chris Dixon was the attorney  
2 for the City, doesn't tell me she's calling, doesn't  
3 conference me in, doesn't include me in an e-mail, doesn't  
4 tell me she's doing it, calls Judge Porter's clerk and it  
5 appears learned that no, Judge Porter never reviewed the  
6 disks and never ruled. Still doesn't tell me she has talked  
7 to Judge Porter's clerk and I have, of course, no record of  
8 the conversation. All we have right now is Sara Lathrop's  
9 affidavit about what the clerk said.

10 The next thing I know -- and I'm gathering now at  
11 this point e-mails to kind of refresh the judge's  
12 recollection of where we were when I was last involved to  
13 attach to a letter to send to him to ask him what is going  
14 on. The next thing I know I get a signed written order from  
15 Judge Porter, which you have, which essentially says, no, I  
16 never reviewed the disks, never ruled on it, and dismissing  
17 the case without prejudice.

18 THE COURT: What date is that?

19 MS. CLARK: I want to say September 1.

20 THE COURT: It must be shortly after August 31.

21 MS. CLARK: It was. It was maybe even that day,  
22 your Honor. I think I maybe got it. I think I got it on --

23 THE COURT: I think it is dated August 31.

24 MS. CLARK: Okay. So maybe Sara Lathrop called on  
25 the 28th and he sent it on August 31. I received it, you

1 know, just based on how my assistant gets mail.

2 THE COURT: Actually it's dated. Judge Porter  
3 signed it August 28th.

4 MS. CLARK: Oh, the very day she called. Okay.  
5 And then it must have gone out -- I think the City must have  
6 received -- I know Ms. Lathrop has a letter dated August 31.  
7 I think what happened was late in the day August 31 I  
8 returned back to the office, was made aware of it. By the  
9 next morning around early I had an e-mail out to counsel  
10 indicating that we now know that Judge Porter never cleared  
11 access and that really began the ramp up to this motion.

12 And one of the things in my mind, once I heard  
13 this disturbing thing about Judge Porter ruled verbally, and  
14 also, you know, and I want to be respectful to everyone but  
15 it's just honest to this Court that I just felt like people  
16 weren't being forthcoming with me and I can't say it better  
17 than that. It was a sense that Ms. Lathrop wasn't telling  
18 me everything. I never heard anything about some county  
19 sheriff being involved ever, ever. And you know what, if I  
20 had been told that, I would have been in there day one  
21 saying I want -- Todd Turpitt from the Sheriff's Department?  
22 I mean, who was it?

23 THE COURT: Who is he and how is he involved?

24 MS. CLARK: I don't know who was involved exactly.  
25 But I can tell from accessing this, something called a case

1       audit report that Todd Turpitt of the Hennepin County  
2       Sheriff's Department accessed the police report in this case  
3       about the time that the sheriff's office was asked to help  
4       Judge Porter reviewing the hard drive. My office has sued  
5       Todd Turpitt. I don't exactly want Todd Turpitt helping  
6       with an attorney-client privilege review.

7               THE COURT: What happened with that? It was after  
8       August 31 then that Ms. Lathrop told you that there was a  
9       change in what had happened. That Officer Sergeant Ritschel  
10      had made a mistake?

11             MS. CLARK: Yeah. And that the chronology here  
12      gets murky only in the sense that she sent me a letter. She  
13      wrote a letter August 31 which I received after my September  
14      1 e-mail. So the first thing I do is I say September 1, we  
15      got a big problem here now. And I started shooting out  
16      e-mails like, "Nobody access this." "Ms. Lathrop, collect  
17      all the disks in your office," things like that.

18             I received after that, later that day I received  
19      an August 31 letter from Sara Lathrop stating that she was  
20      mistaken as to why or what Sergeant Ritschel told her and  
21      claiming that his version was something like -- and this I'm  
22      not going to do verbatim either -- but it was something  
23      like, well, gee, I thought that Judge Porter said that if he  
24      affirmatively told me there was attorney-client privilege I  
25      couldn't review it, and when I hadn't heard from him in a

1 while I decided it was okay to go ahead.

2 This letter was obviously disturbing on a number  
3 of levels, not the least of which it caused us to wonder the  
4 involvement of Sergeant Ritschel. We believe there's an  
5 argument that it waived the attorney-client privilege  
6 between Sergeant Ritschel and Sara Lathrop on this topic.  
7 We've never said the entire privilege is waived.

8 And part of what was going on in my mind as well,  
9 your Honor, when I was dealing with this sense that I had, I  
10 realized I didn't want to get into a jurisdictional fight.  
11 I didn't want to come to this court and have someone say,  
12 well, you should be in Judge Porter. When he sua sponte  
13 dismissed the case without prejudice, it seemed clear that  
14 the issue was up. Now, is he going to rule on some piece of  
15 this? I don't know. I, frankly, am still kind of deciding  
16 about processing some of those things. But we knew that we  
17 needed to come to this court as soon as possible for a  
18 couple of reasons.

19 One is I just thought that it was my duty to let  
20 the court know. Secondly, we already had scheduled a motion  
21 for today on the spoliation issue, and I got permission to  
22 add this. But as I thought of it, I intuitively came to the  
23 same place that the Dorsey attorneys came to in the *Cargill*  
24 case and that that was we need some process here.

25 THE COURT: Let me ask you this before I ask you

1 to sit down and turn to the City. How were you harmed by  
2 what went on here, assuming that there was access to and  
3 there was review of these attorney-client -- of some  
4 attorney-client privileged materials?

5 MS. CLARK: We are harmed in a number of different  
6 ways. We are playing catch up now with our own data. They  
7 had our data before us. It's clear that there has been a  
8 review -- it's clear to us that there's been a review of the  
9 M box. And, for example, a deposition has already come and  
10 gone in this case of Deborah Everson at which Ms. Lathrop  
11 asked about names that come from e-mails in the M box. I  
12 was at that deposition. She's a third-party witness. We  
13 had to pay to subpoena her to get her there, work through  
14 her attorney. We had her once. And Ms. Lathrop was using  
15 the M box information to her benefit and we could not.

16 We were harmed because we have been unable to  
17 review and make argument about what is attorney-client  
18 privileged. And part of what is not substantively in this  
19 section but I think is appropriate for analogy is that the  
20 CBS attorneys are taking -- we see them as two very, very  
21 strained interpretations of some documents being  
22 attorney-client privileged in this case. One is this July  
23 16, 2008 e-mail that went from Scott Libin, a client, not an  
24 attorney, to Esme Murphy, a client, not an attorney; and  
25 they have blocked that e-mail from flowing in this case.

1 And whether this Court eventually grants us access to see it  
2 or not, they have for months, since the beginning of the  
3 case, blocked us from seeing a relevant document because  
4 they are claiming privilege.

5 It's also possible we will win that motion. The  
6 Court will find it is not privileged under the  
7 circumstances. I was denied any opportunity to even make  
8 that review or argument for Mr. Stepnes.

9 And there's an area of harm that is very, very  
10 hard to get a handle on, and that we have kind of called the  
11 taint. Because if they reviewed e-mails with Paul Mitchell  
12 about some legal proceeding and thereby formed even mental  
13 impressions that tell them where to go, what to look at,  
14 what else to seek, and here is one example. There's a  
15 gentleman by the name of Bill Kling, prominent member of the  
16 community. His name is in the M box. It's not in these --  
17 in this noted e-mails box, for example.

18 If they have already called him, interviewed him,  
19 he's given them five other names of people and they have  
20 called them and interviewed them, all of that of course  
21 being their work product at this time, how will we ever know  
22 what information they gained access to through the  
23 attorney-client privileged e-mails? In other words, even if  
24 the Court says you can't use anything between Paul Stepnes  
25 and his attorneys, the taint goes farther than that into

1 their thought processes, which is, you know, we asked them  
2 to preserve their work product notes; into subpoenas that  
3 they have issued. They have now issued a number of  
4 subpoenas in the case.

5 I haven't had time to go back and look at every  
6 single document in the case to determine if in fact it could  
7 have -- the knowledge could have flowed from the taint of  
8 the forensic report. But that we think is one of the most  
9 difficult areas. You know, this is the area where it's very  
10 hard to un-ring the bell.

11 Mr. Stepnes has been harmed because data far  
12 outside the timeframe in this case has been disclosed. Data  
13 that would not be relevant at all in this case is now in the  
14 hands of the attorneys for the Defendants.

15 THE COURT: Are you claiming that -- are you  
16 claiming that any of these materials that you say were  
17 privileged, that they had access to, revealed strategies or  
18 mental impressions or anything about the -- about your  
19 advice that would somehow prejudice? I haven't heard you  
20 say anything along those lines. Maybe you don't even know  
21 what's in all of those documents. But the -- I was  
22 wondering if you are making that claim or not making it?

23 MS. CLARK: Well, and here of course is where I  
24 butt up against, you know, my duty to protect the privilege.  
25 But the hard drives were obtained May 29, 2008. So unless

1 there's something we don't know about, they don't have  
2 e-mails after then between my client and I about this case.

3 There were communications between Mr. Stepnes and  
4 I after his arrest and before his -- the seizure of the hard  
5 drives, yes, there were.

6 THE COURT: Okay. All right.

7 MS. CLARK: And we do believe that that is -- I  
8 mean, again, it's hard for me to make the privileged  
9 argument without disclosing what's in the e-mails. But  
10 there were also communications with other attorneys, and I  
11 haven't -- I'm not sure I found all of them yet even in the  
12 M box in the 50,000 pages. I mean, it's just a mammoth  
13 undertaking. But the ones that I reviewed are -- are very  
14 much about strategies and planning what to do. And I'm not  
15 sure if I'm allowed to say more than that.

16 THE COURT: Okay. All right. I would like to  
17 turn to the City and give them a chance to respond.

18 MS. CLARK: Would you like me to leave this up or  
19 take it down?

20 THE COURT: Why don't you leave it there.

21 Counsel, what is your name again?

22 MR. MOORE: Jim Moore, your Honor.

23 THE COURT: Yes, sir.

24 MR. MOORE: Your Honor, as you can tell from the  
25 pleadings I'm relatively new to this case. I have not

1 reviewed the forensic report, for example, in any way,  
2 shape, or form other than to see a disk that purports to  
3 contain it. I've never looked at it. As someone relatively  
4 new to the case and looking at this motion, I want to start  
5 with one point of agreement with Ms. Clark. She said  
6 earlier that the current motion she brought because she  
7 thinks we need a process, and I think that's correct. We --  
8 the Court knows the history of how the forensic report was  
9 created. Ms. Clark just described that in great detail.

10 The question is what do we do in this litigation  
11 now. It seems to me that there are sort of two parts to  
12 that question. There's the bigger question of how did we  
13 get here. Did the Defendant Ritschel do something wrong,  
14 and should he be somehow sanctioned for that. But that's  
15 not the issue that's before the Court today. What I  
16 understand this motion to be is how do we move forward to  
17 address that question of how did we get here. And so the  
18 question is what do we do from this point to address that  
19 larger question.

20 THE COURT: What do you suggest?

21 MR. MOORE: I would suggest that looking at this  
22 it seems to me that although the circumstances are certainly  
23 different, this is akin to the production of privileged  
24 documents and electronic discovery when the parties have  
25 agreed to a clawback provision in a protective order.

1 That's getting to be a common thing. The clawback provision  
2 would provide that the Defendants, having received something  
3 that the Plaintiff claims is privileged or identifying it  
4 themselves and saying, hey, this looks like it's privileged,  
5 will agree to return the data and not use it in the  
6 litigation. And it seems to me in this context, because it  
7 didn't come as an inadvertent discovery, that the burden  
8 would then be on the Plaintiff to actually answer discovery  
9 claiming and protecting the privilege of the documents.

10 But I think the approach that we need to move  
11 forward with then is akin to a clawback provision.  
12 Obviously we don't -- it's a distinguishable fact situation  
13 but how we move forward from here in the litigation, that  
14 seems to be the appropriate thing. Collect all copies,  
15 provide them back to the Plaintiff, let the Plaintiff answer  
16 the discovery that's out there. Plaintiff claims that he  
17 couldn't have done that earlier because of damage to the  
18 computers. He will now have the data that was on his hard  
19 drive so he would be in a position to answer.

20 THE COURT: Let me tell you what I think. I think  
21 this situation is somewhat different than the ordinary  
22 clawback type of problem where millions of documents are  
23 produced and it turns out that some -- inadvertently some  
24 attorney-client privileged documents are produced. The  
25 producer finds that out and says give me back my privileged

1 documents and then that's done.

2           The problem I have here is this. And I think that  
3 the materials that the City submitted here lay this out is  
4 that -- and I'll let you respond to this -- but it appears  
5 to me that at a minimum what we have is that we have a  
6 direct violation of Judge Porter's order. We have that that  
7 occurred at a point in time after it was apparent to  
8 everybody that this litigation was going to -- if it hadn't  
9 commenced, that this was going to be some serious litigation  
10 for the City. And that you had Sergeant Ritschel, who was  
11 obviously in the gun sights here of this, you have -- the  
12 record that I have is that he sometime apparently in  
13 September of '08 says go ahead. Do the review of these  
14 documents. In my mind at least there's an inference there  
15 that he was doing this in direct violation of Judge Porter's  
16 order and he was doing it for purposes of, perhaps, of  
17 getting some advantage for the City in this upcoming  
18 litigation.

19           That's a whole different kettle of fish than the  
20 type of situation where you have the ordinary clawback type  
21 of problem. And then you have it compounded by the fact  
22 that unlike the ordinary clawback problem, I've got in your  
23 memorandum it states that Officer Hanson, who does this then  
24 review of the documents and issues the report in December of  
25 '08, he's going through the documents and making a

1 determination about whether or not documents are  
2 attorney-client privileged. A police officer who apparently  
3 is a computer expert, somehow, apparently from somebody's  
4 direction, I don't know whose, takes it upon himself after  
5 Judge Porter's order to go through documents and read them  
6 to make some type of a determination about what's  
7 privileged.

8 And I look at these facts, and you can certainly  
9 respond to me, but I got to tell you, I look at this and I  
10 think most judges would react the same way. I'm shocked by  
11 it, I'm upset by it, I'm angry by it and, you know, I've got  
12 to -- I have to hear more by way of a suggested remedy than,  
13 you know, let's treat it like an innocent clawback.

14 MR. MOORE: And I understand where the Court is  
15 coming from on all of that. What I -- what we're talking  
16 about here, one of the remedies that the Plaintiff seeks is  
17 deposition of Ritschel. That would have been taken in this  
18 case anyway. Certainly that's going to happen. It's the  
19 appropriate thing to do. Whether we stay other discovery  
20 until we hammer out the facts of this issue is the question.  
21 So for today's purposes the question is how do we move  
22 forward to address that bigger question that the Court is  
23 rightfully concerned about.

24 And so our response to the motion, and Ms. Clark's  
25 presentation of the motion, creates for the Court here today

1 just the narrow issue what do we do right now to address  
2 that bigger issue.

3 THE COURT: Well, the way I look at this, there is  
4 several different potential harms and I don't know what they  
5 are here. Some of them are my concerns, some of them are  
6 not. I think that there is clearly here an issue of Judge  
7 Porter's order being violated. And that is a harm to --  
8 potential harm to the Hennepin County District Court and an  
9 issue that I assume may be taken up by the party -- by a  
10 party to this case with Judge Porter. I wouldn't in any  
11 way, shape, or form attempt to try to suggest to Judge  
12 Porter anything with respect to whether there was a  
13 violation of his order or what he should do about it.  
14 Obviously, that's something for him to deal with in terms of  
15 that potential harm to the Hennepin County District Court.

16 But there's also potential harm that arises in  
17 this litigation because we do have now -- we do have at  
18 least the basic fact that in what appears to be a violation  
19 of his order, that the employees of the City, the police,  
20 went through attorney-client privileged material and we  
21 don't know what happened with it but we certainly know that  
22 they reviewed it.

23 Now, it may turn out that there is no -- so the  
24 second area of harm is that we have an issue of potential  
25 harm to our litigation. Clearly when we weigh all of these

1 type of things we always look at the harm to the -- in this  
2 case to Stepnes with respect to this happening. It may turn  
3 out that even though there was a violation, there was no  
4 harm at all because they didn't learn anything that was  
5 abuse. They didn't communicate. Whoever looked at it  
6 didn't communicate anything about it, and that we can deal  
7 with it in a way that will put a fence around it so that  
8 there is no harm to Stepnes and his attorneys in this  
9 litigation.

10 But that's really where I'm focused on is the harm  
11 in this litigation and that's why I asked Ms. Clark those  
12 questions. So I think that that's what I need to do in  
13 terms of trying to fashion a remedy here is to make sure  
14 that there is no harm that flows from what happened. And,  
15 you know, there may be -- in connection therewith, there may  
16 be penalties that will flow in terms of attorneys fees  
17 awards or something of that sort because of the necessity of  
18 doing this. But my main concern is making sure that right  
19 now we don't have any harm that flows as a result of what  
20 clearly was a violation of the order.

21 MR. MOORE: I understand that, your Honor, and  
22 that's what I was focused on as well is the harm to this  
23 litigation and how do we deal with this litigation. First  
24 we have to answer this question. Has there been harm and  
25 that, I think, will have to be targeted discovery on those

1 issues. And what we said in our memorandum is --

2 THE COURT: It's very hard to do that, too,  
3 because as Ms. Clark pointed out, it's very hard to get a  
4 handle on some of this without -- without creating the harm  
5 itself. And so we have to find -- I have some ideas about  
6 how we're going to do it, but we've got to do it in a way  
7 that protects everybody's rights but doesn't in the process  
8 then create more harm than good by our seeking a remedy.

9 MR. MOORE: Absolutely. I should note for the  
10 record that I think that some of the representations in the  
11 arguments of counsel for Plaintiff as to the facts about  
12 which portion of this forensic report information comes out  
13 of, the affidavits of the counsel for Defendants, both sets  
14 of Defendants, set forth that although they opened the M  
15 drive, they recognized it as computer code. They did not --  
16 neither side looked -- neither Defendant looked at that in  
17 any length. They closed it and that the names that they  
18 asked about in depositions, and Ms. Lathrop specifically  
19 from my office, the names that she asked about in  
20 depositions are in the other e-mails that are alongside.

21 So I think we have already, just as to the scope  
22 of the potential damage, I think that officers of the court  
23 have represented to this Court, we don't have to be worried  
24 about the M drive because nothing came out of that. But  
25 we'll have to focus the issues on what are those other links

1 and what was in there and whether any of that was  
2 privileged. I don't know and I trust the Court does not  
3 know as we sit here. I think we need to address that issue.

4 THE COURT: Okay. All right. That's all -- if  
5 you don't have anything else, I would like to hear on this  
6 issue from CBS.

7 MR. MOORE: That's all I've got.

8 THE COURT: Mr. Sullivan.

9 MR. SULLIVAN: Thank you, your Honor. I would  
10 like you to be extremely clear on what we did, when we did  
11 it.

12 THE COURT: I would like to be clear on that, too.

13 MR. SULLIVAN: And why we did what we did. For  
14 us, your Honor, it is our position that we have not reviewed  
15 any privileged communications between Mr. Stepnes and his  
16 counsel. For our purposes, for CBS, this all starts for us  
17 in June of 2009. At that point the City filed its Rule 26  
18 disclosures, filed a supplemental disclosure, and informed  
19 the parties that there was a forensic report which included  
20 one or more folders of e-mail that might contain  
21 attorney-client privileged communications, and the City  
22 informed us that this material was available for review at  
23 the City Attorney's office.

24 What we decided, CBS counsel, myself and  
25 Mr. Borger and our colleagues, we said, Look, what we are

1 gonna do is we are going to steer completely clear of any of  
2 these folders that contain attorney-client privileged  
3 material. So on June 23rd, John's colleague Leita Walker  
4 goes over to the City Defendants' counsel's office to review  
5 that report. And Leita, Ms. Walker, clearly understood that  
6 in reviewing that forensic report she would not access any  
7 potentially privileged e-mail folders. Ms. Walker spoke to  
8 Sara Lathrop about the location of these potential e-mail  
9 sub folders that could contain e-mail between Stepnes's  
10 counsel and Mr. Stepnes. And as instructed she did not  
11 review any of those folders. She steered clear of those.

12 THE COURT: You're talking about the folders or  
13 are you talking about the links that are on the left-hand  
14 side of our -- Ms. Clark's drawing?

15 MR. SULLIVAN: Let me say, your Honor, I'm like a  
16 fellow who's in a dark room groping at what I'm told is an  
17 elephant.

18 THE COURT: You're right behind me.

19 MR. SULLIVAN: You and I are in the same boat. I  
20 have never opened the disk. I have never accessed it. The  
21 only person on the defense counsel's team who has seen this  
22 with her own eyes is Ms. Walker. But it was my  
23 understanding, putting together what I've heard and now  
24 seeing the description offered by Ms. Clark, that there is  
25 some folders there on the left that would be these

1 potentially privileged folders; and if you click on that you  
2 would access that material. But like I say, I'm putting two  
3 and two together and maybe getting five.

4 But at any rate, what Ms. Walker did is she went  
5 into a folder titled "converted M box messages". And from  
6 that she created a "key documents" folder on her laptop.  
7 All right? The converted M box messages appear like normal  
8 e-mails. This -- what Ms. Clark has described as the  
9 so-called Papa Bear folder has got all this stuff that  
10 Ms. Walker accessed to see what it was, and it looked like  
11 it was, A, huge; and B, had all this computer code so it's  
12 not user friendly. So she wasn't going to spend, frankly,  
13 our client's money looking through a bunch of material that  
14 would be difficult to review. Instead she went to the  
15 converted M box messages folder and reviewed them in a  
16 sensible fashion. That's what she did.

17 She copied on her laptop, she made a copy of the  
18 forensic --

19 THE COURT: How did she know whether or not the  
20 converted M box messages folder file contained  
21 attorney-client privileged material?

22 MR. SULLIVAN: Because it was her understanding  
23 that those had been segregated out in that other file that  
24 she wasn't even going to go near. Okay?

25 THE COURT: All right.

1 MR. SULLIVAN: That is her understanding.

2 Now, no CBS counsel other than Ms. Walker have  
3 reviewed anything other than the key documents. What she  
4 did is she reviewed the stuff in the converted folder. She  
5 saw stuff that she believed was pertinent to the case,  
6 copied it into this key documents folder. She also, just so  
7 you understand, she copied the forensic report minus these  
8 folders that were supposed to be the privileged materials,  
9 copied that as well.

10 The relief that Plaintiff seeks here against CBS  
11 is completely unwarranted because they haven't demonstrated  
12 that CBS counsel reviewed any privileged communications.  
13 The e-mail that Walker placed in the key documents folder  
14 was, as I say, located in that converted M box messages  
15 folder. And Plaintiffs have not asserted that any e-mails  
16 in that folder are privileged. They talk a lot about Papa  
17 Bear but they don't say that in this one little Baby Bear  
18 folder that we're talking about privileged e-mail.

19 THE COURT: You have saved some place the  
20 converted M box messages file? Is that one that a person  
21 can now look at to verify your statement that there were no  
22 attorney-client privileged material in the M box messages  
23 file?

24 MR. SULLIVAN: I believe so, your Honor, in this  
25 sense. We were produced -- what was produced in discovery

1 after Ms. Clark demanded that the City produce copies of  
2 this material, a complete disk was provided to us. When  
3 Ms. Clark raised an objection, we then told her that we  
4 would put that disk in a secure drawer and maintain it  
5 there. So we've not -- as I say, we've not looked at any of  
6 this stuff.

7 What I will tell you, your Honor --

8 THE COURT: And the other thing that you have in  
9 addition to having the entire converted M box messages file,  
10 then you also have from that, you have what were chosen by  
11 Ms. Walker as key documents from that file?

12 MR. SULLIVAN: Precisely, your Honor. And that  
13 stack of material, just so the Court knows, is about yea  
14 thick (indicating).

15 THE COURT: About half an inch thick in paper?

16 MR. SULLIVAN: In paper. I would say it's more  
17 like three-quarters of an inch, just so you know. Your  
18 Honor, that is the only subset of documents that anyone  
19 other than Ms. Walker on our defense team has laid eyes on.  
20 Okay. I've reviewed that folder.

21 THE COURT: Well, she did lay eyes on the rest of  
22 the converted M box messages file because she went through  
23 that to create the key docs from that file.

24 MR. SULLIVAN: That's what I'm saying. Other than  
25 Ms. Walker. What I'm telling you is all of the rest of our

1 team have only spent our time looking at these so-called key  
2 documents.

3 THE COURT: Do you have any objection to turning  
4 over those -- that key documents disks to the Plaintiff so  
5 they can see what is on those key documents?

6 MR. SULLIVAN: I would prefer to turn it over in  
7 the first instance to the Court and trust to the Court's  
8 discretion whether they thought it made sense to then convey  
9 that to the Plaintiff.

10 THE COURT: No, I have no -- I get into these  
11 situations where somebody thinks it's a real good idea that  
12 I look at lots of documents in camera and the boxes build up  
13 in my chambers. I have a great deal of understanding of  
14 what Judge Porter went through and put himself through. So  
15 no thank you. Under these circumstances it is -- obviously  
16 you could technically I think raise the issue of saying, you  
17 know, the documents that we chose out of that might indicate  
18 something about our strategies, etcetera. But I think that  
19 under the circumstances of this case, I would like to find a  
20 way to try to make sure that we get at the bottom of this  
21 without having to have any counsel deposed. And if you are  
22 willing to turn that over so that we can -- as the next step  
23 so that Ms. Clark can just check to see that --

24 MR. SULLIVAN: Exactly.

25 THE COURT: -- that these key documents do not

1 contain any privileged materials, that will go a long way  
2 towards helping you out on this part of the mess. And then  
3 obviously she has access to the converted M box messages  
4 file from which those are drawn to be able to determine  
5 whether there was anything in there that at least Ms. Walker  
6 would have had access to.

7 MR. SULLIVAN: Fine, your Honor. That would be  
8 perfectly acceptable to us. I got to tell you, there are no  
9 state secrets in the materials that we have in that little  
10 stack like that, and we would be happy to share those.

11 I would like to speak to one other issue that  
12 Ms. Clark raised and that is our review of that key  
13 documents folder in preparation for this hearing. I was  
14 prepared to say in our papers, and to say to your Honor in  
15 person, that we have reviewed -- I felt you were owed  
16 knowing whether we reviewed any privileged materials. And  
17 so since I had already reviewed the key documents folder,  
18 all right, and I didn't see any privileged materials in  
19 there, I thought it was incumbent upon me to go back and do  
20 another review and I did that.

21 What I found upon that subsequent review is that  
22 indeed there are three e-mail messages between Mr. Stepnes  
23 and persons identified by Ms. Clark in her papers as being  
24 Stepnes's counsel. All right. Two of those e-mail messages  
25 are between Mr. Stepnes and Mr. Clark regarding setting up a

1 party.

2 THE COURT: This is in the key documents?

3 MR. SULLIVAN: This is in the key documents. They  
4 are about setting up some party and they are copied to third  
5 parties.

6 THE COURT: Why on earth did Ms. Walker think that  
7 that was a key document?

8 MR. SULLIVAN: Your Honor, I don't know the answer  
9 to that question. I don't know. But the other document  
10 that Ms. Clark mentioned is an e-mail between Mr. Stepnes  
11 and this person Priscilla Faris regarding questions about "a  
12 rubber type area rug" for a porch.

13 THE COURT: And that was also in the key  
14 documents?

15 MR. SULLIVAN: That is in this collection that we  
16 have.

17 THE COURT: The collection chosen by Ms. Walker?

18 MR. SULLIVAN: Precisely. Precisely. That e-mail  
19 also talked about some idea that Mr. Stepnes had relating to  
20 the contest about perhaps using keys that you would, like,  
21 try to unlock a door and if you unlocked the door you would  
22 get some kind of a prize or something like that.

23 THE COURT: This was an e-mail between Priscilla  
24 Faris and Mr. Stepnes?

25 MR. SULLIVAN: Yes, your Honor. She sends him an

1 e-mail saying, hey, do you recall we saw some kind of a  
2 rubber type area rug that would be suitable for a porch.

3 THE COURT: Well, presumably Ms. Walker wasn't all  
4 excited about the area rug; but then the e-mail went on and  
5 said something about the contest?

6 MR. SULLIVAN: No, no, your Honor. It's kind of a  
7 non sequitur here. Her e-mail speaks about a rug. He  
8 e-mails her back shortly thereafter and he then mentions the  
9 contest. Hey, listen, I was thinking about doing this thing  
10 with some keys where you would open the door. I have copies  
11 of these e-mails --

12 THE COURT: All right.

13 MR. SULLIVAN: -- should the Court wish to see  
14 those three little e-mails.

15 But my point is, under any construction of the  
16 attorney-client privilege of which I am familiar, these  
17 aren't privileged communications. There's no -- didn't even  
18 relate to any legal advice. And that was the only --

19 THE COURT: This is exactly the problem we have  
20 here. What you're telling me is that, you know, after all  
21 of this, you're telling me that Ms. Walker goes through  
22 these documents. She finds a document that clearly is a  
23 communication between an attorney and Mr. Stepnes. She  
24 takes it out of the large range of documents. Maybe she  
25 makes the decision that she decides that it's not

1 privileged, who knows, and she segregates it out, sends it  
2 to your firm, and all of this goes on without the Plaintiff  
3 ever having a chance to protect the attorney-client  
4 privilege.

5 MR. SULLIVAN: Well, your Honor, let's speak to  
6 that for a minute as well. I think when you -- you  
7 mentioned that you like to look at things and explore them  
8 in a chronological fashion. What happened here is we are  
9 told there are materials that are being produced in this  
10 litigation on June 12th. Ms. Clark sends off an e-mail  
11 saying there may be materials there that are subject to the  
12 attorney-client privilege. We say fair enough. We will  
13 avoid like the plague, or at least attempt to, those files.  
14 That's what we do.

15 The next thing we hear about this from Ms. Clark  
16 is September 5. By my count that's the passage of almost 13  
17 weeks when she comes in and now she says there's been all of  
18 this horrible stuff that's gone on. We're told documents  
19 are produced. There's an issue that may be potentially  
20 privileged, we try to avoid that, and then we're found that  
21 now there's all these claims that we've done something  
22 horrible and heinous. I think that had she been serious  
23 about those concerns, that she could have acted with a much  
24 greater degree of dispatch. And certainly as to us, we  
25 don't know what the heck was there. You know, to say that

1 we have engaged in some awful conduct I think is, frankly,  
2 unfair.

3 THE COURT: Well, no one has said that yet, except  
4 Ms. Clark.

5 I think that, though, the one factor here that is  
6 important is that in a sense it goes to both -- it goes to  
7 explain something with respect to what Ms. Clark did but  
8 also it to some extent goes to what happened with you.  
9 Ms. Clark was operating under the representation from Sara  
10 Lathrop that Judge Porter had ruled that all of this  
11 material could be turned over; that he had conducted his in  
12 camera review and in a sense had released it. So that for  
13 whatever reason she was operating under -- for the reason  
14 Sara Lathrop told her that, I think Ms. Clark could  
15 certainly rely upon that. And so that it's not -- I think  
16 that that's -- I consider that to be somewhat of a factor  
17 here. It doesn't explain -- perhaps she should have been  
18 more diligent in double checking things.

19 But -- and also when Ms. Walker initially I think  
20 when she was reviewing these -- this material, that was  
21 still the operative message out there that was being  
22 conveyed by the City was that all of this had been released  
23 by Judge Porter. Now that changed after August 31, but at  
24 least at that time there was some -- there was at least some  
25 explanation or cover there that I think does in a sense

1 benefit your client. But, anyway, anything further you want  
2 to say?

3 MR. SULLIVAN: No, your Honor.

4 THE COURT: All right.

5 MR. SULLIVAN: The only other thing I was going to  
6 say is if you wanted to talk about that Simonson e-mail was  
7 the only other thing that pertained to us. And as  
8 Mr. Stepnes even said in his papers, he knew that Simonson  
9 was disbarred. And as he states in his affidavit, it's not  
10 something he knew; that he was not suggesting that Simonson  
11 was doing any kind of legal work.

12 THE COURT: All right.

13 MR. SULLIVAN: Thank you, your Honor.

14 THE COURT: Ms. Clark, do you have anything new to  
15 say?

16 MS. CLARK: I just want to make clear to the Court  
17 that Plaintiff team has not had an opportunity to do a full  
18 review of the forensic report.

19 THE COURT: All right. Here is what I'm going to  
20 do about this issue, and it's a -- basically I'm going to  
21 take this in some steps and try and fashion a remedy that is  
22 along the lines of what Mr. Moore initially referred to.

23 I am going to -- we're going to have the  
24 depositions of Mr. Hanson and Mr. -- and Officer Ritschel  
25 specifically on the issue of this -- of these

1 attorney-client privileged documents that were in the  
2 materials that were seized by the police. And those two  
3 depositions are going to be held in my courtroom. And I  
4 expect them to be, because this is going to be on this  
5 discrete issue with respect to what happened with respect to  
6 these attorney-client privileged materials.

7 I want to and I will allow Ms. Clark in that  
8 deposition to explore what -- what Mr. Hanson reviewed, what  
9 he learned in those e-mails. The same with respect to  
10 Mr. Ritschel. I want to know did Mr. Ritschel look at any  
11 of the materials or did he find out about any of the  
12 materials.

13 I expect both of those depositions on this  
14 discrete subject that will take place with me present to be  
15 short. If you -- if any of the civil lawyers here need a  
16 lesson in how to conduct a short and to-the-point  
17 examination, come to court some day when the criminal  
18 defense lawyers are conducting a suppression hearing and  
19 they can teach you how to get to the point quickly and to  
20 get what you need to know. So I see -- this will not  
21 foreclose any -- the further depositions of Mr. Ritschel or,  
22 if necessary, Mr. Hanson on subjects that are not related to  
23 this discrete subject.

24 The City is to be responsible for providing the  
25 court reporter for those depositions that will take place,

1 as I said, in this courtroom.

2 The reason I am -- I'm going to do that here,  
3 which is an unusual type of remedy, is that I expect that it  
4 is likely that given the nature of the attorney-client  
5 issues that are involved here, is that it's likely that  
6 there will be quite a bit of maybe objections or at least  
7 problems of trying to sort through how we get that  
8 information without, as I said before, throwing the baby out  
9 with the bath water. So we'll work through it and find a  
10 solution to it but I think it will be much faster if I am  
11 present and we get that testimony.

12 Now, in addition to that, I am going to require  
13 the City, before we have those two depositions, I am going  
14 to require the City to turn over all notes, documents,  
15 e-mails, or any other communications that the City has that  
16 relates to the subject of these attorney-client privileged  
17 materials that are in these disks documents, etcetera. And  
18 that includes any notes that the attorneys for the City have  
19 with respect to the attorney-client privileged documents or  
20 anything about them. It includes all communications which  
21 the attorneys for the City have had with the police officers  
22 or any other employees, limited to the subject of these  
23 attorney-client privileged documents that are in this  
24 material.

25 The reason why I am ordering that is that I

1 consider it to be -- I consider that the City has waived its  
2 own attorney-client privilege on the discrete subject matter  
3 of these attorney-client privileged documents because of the  
4 fact that Ms. Lathrop has disclosed her communications with  
5 Officer Ritschel in her presentation in the papers that were  
6 submitted where she, and I think in a very good-faith  
7 manner, attempted to exonerate herself from any wrongdoing  
8 on this matter, and in the process got permission from and  
9 did disclose some of the communications with city employees  
10 on the subject, but obviously not all of them. But having  
11 opened that door, I want to -- I want to see what other  
12 communications there were. And in particular, obviously,  
13 I'm interested in finding out if Ritschel, Hanson, or anyone  
14 else was discussing or disclosing contents of the  
15 attorney-client privileged documents.

16 Now, let me be very clear. This is limited to  
17 communications about or documents that contain notes about  
18 these attorney-client privileged materials only. I'm not  
19 interested in and there should not be any disclosure of  
20 anything else that would be covered by the privilege.

21 And those documents should be turned over to  
22 Ms. Clark within seven days because I'm going to set those  
23 depositions very briefly. I don't want this whole issue to  
24 become a sideshow which swamps this litigation. We want to  
25 get at the heart of this and get it done quickly and that's

1 why I'm proceeding this way.

2 As far as CBS is concerned, at this point I'm not  
3 going to -- I'm not going to require any additional remedy.  
4 I want to hear what Ritschel and what Hanson have to say,  
5 examine that issue, and then I'll decide whether there's  
6 anything further that needs to be done with respect to CBS's  
7 review of the attorney-client privileged materials.

8 The -- and I will also, after we have those brief  
9 depositions, I will then at that point take up the issue  
10 with respect to any -- any application for attorneys fees  
11 from Ms. Clark by way of a sanction that would be necessary.

12 The other thing that I am going to -- given the  
13 circumstances here of what occurred, the other thing that  
14 I'm going to -- I'm going to -- when I have those  
15 depositions, the other thing I'm going to be looking at at  
16 that time is that I may require that all of these documents  
17 and disks and whatever format contains the data that  
18 contains these documents, including not only the  
19 attorney-client privilege but everything else, be turned  
20 over to Ms. Clark and then she can go through and decide  
21 what needs to be reproduced as being relevant and proper in  
22 discovery in this litigation. But I'm going to hold off on  
23 that until I hear what Ritschel and Hanson have to say to  
24 get a better handle on this. But obviously in the meantime,  
25 I certainly don't want to hear that there has been any

1 review of any of the attorney-client privileged materials  
2 that are contained in any of those documents, data,  
3 etcetera.

4 Now, as far as dates for those depositions. And  
5 like I say, my anticipation is that each of this testimony  
6 should be done in a short period of time.

7 Okay. We'll do that on Monday, October 5 starting  
8 at 1:30 p.m. and, as I indicated, the City should have a  
9 court reporter for that day. We'll do that in this  
10 courtroom.

11 And, Ms. Clark, who would you like to start with  
12 first, Hanson or Ritschel?

13 MS. CLARK: I think probably Officer Hanson.

14 THE COURT: Okay. We'll start with Officer Hanson  
15 first. And I am going -- under the circumstances with  
16 respect to what I saw here, I am going to want Officer  
17 Ritschel sequestered. Okay. Any questions?

18 We will start at 1:30 on that date. And let's  
19 take a break now and then we'll turn to the spoliation  
20 motion.

21 MS. CLARK: Your Honor, I have just a question  
22 about your order of what the City has to produce. I have  
23 three questions. One is when you indicated the City should  
24 disclose all communications, would that include  
25 communications with the CBS attorneys?

1           THE COURT: All communications with the CBS  
2 attorneys solely on the issue of these attorney-client  
3 privileged materials.

4           MS. CLARK: And the second question is my guess is  
5 there will be some argument about how narrow or broad that  
6 is, attorney-client privileged materials. We would  
7 obviously want it to be broader. In other words, not  
8 specifically using the words "attorney-client" but not that  
9 narrow, but that it should be about the review of the hard  
10 drives.

11           THE COURT: Well, it is about the review of the  
12 hard drives to the extent that it involves the  
13 attorney-client privileged material. I don't want, for  
14 example, I wouldn't require the City or CBS, if they have --  
15 if they have a joint defense agreement and they are  
16 communicating about information that was on the hard drives  
17 that's unrelated to this attorney-client privilege issue but  
18 they are saying, look, here is something about the defense  
19 where somebody said something that's unrelated to  
20 attorney-client, I'm certainly not going to order them to be  
21 producing that just because it happens to be somehow related  
22 to the hard drive.

23           MS. CLARK: And I think the rub is that, for  
24 example, when Mr. Sullivan got up just now and argued that  
25 Paul Stepnes sending an e-mail to his attorney about

1 something that he might do with a contest, I would have made  
2 a privileged claim on that basis of what I heard here in  
3 court. And I just raise it for the Court because I think it  
4 may come up.

5 THE COURT: Well, I don't think that has anything  
6 to do with these. That's the type of thing we will be  
7 looking into.

8 And specifically, as I said, remember, that in  
9 terms of ultimately how we come out here, I am very focused  
10 on two things. Obviously, as I've expressed here, I am  
11 upset about the fact that a court order was violated. But I  
12 also have to be very focused on the fact of when I -- what  
13 we do here also has to be a reasonable remedy. And I'm  
14 going to be looking specifically at the issue of harm so  
15 that I make sure that simply because there may have been  
16 some conduct that may violate an order of Judge Porter, I'm  
17 not going to allow that to be used; then to -- for there to  
18 be some type of a draconian remedy that doesn't fit within  
19 the proper bounds of this case. Because my main goal here  
20 is to make sure that there is -- we do everything we can to  
21 cure any real harm that has occurred as a result of these  
22 materials being exposed.

23 MS. CLARK: The last thing I have to say is my  
24 understanding from practicing criminal law in Minnesota is  
25 there is no privilege between a police officer and a

1 prosecutor. Christopher Dixon, who is the person who  
2 appeared in Judge Porter's courtroom, is a prosecutor. So  
3 we would argue that there never was a privilege, but also  
4 e-mails have been produced to me already between Christopher  
5 Dixon and Sergeant Ritschel and Dale Hanson. And so even  
6 though I understand the Court's limiting to this issue on  
7 what should be produced, we would just ask that that would  
8 not apply to communications between anyone in the police  
9 department and the prosecutor, you know, the criminal side  
10 of the City Attorney's office.

11 THE COURT: My order was very clear and that is  
12 that I want all communications about these attorney-client  
13 privileged materials that are between city employees. And  
14 if there's any problem with that, obviously bring it to my  
15 attention. And, for example, if something real arises with  
16 respect to somehow invading into a criminal investigation,  
17 obviously let me know about that. But I think that this  
18 is -- I think if everybody can operate here in good faith, I  
19 think you understand what I want to achieve here and make  
20 sure that -- make sure that you turn over just those  
21 materials that relate to discussions about what was in those  
22 attorney-client materials or discussion about the  
23 attorney-client materials. That's what we're interested in  
24 here.

25 We're going to take a short break and we'll turn

1 to the spoliation motion next. Let's do this. On the  
2 spoliation side of the motion, one issue -- why don't you  
3 come back at 11:45. Take a break and we'll come back at  
4 11:45 to do the spoliation motion. I may be -- come into  
5 the courtroom. I may be finishing up a criminal matter.  
6 Just depends on how long it goes. But we'll take -- we'll  
7 do the spoliation motion right there after before lunch.  
8 Okay.

9 (Recess taken from 10:45 a.m. to 11:47 a.m.)

10 THE COURT: Back on the record. We'll turn now to  
11 the spoliation motion, Ms. Clark.

12 MS. CLARK: Thank you, your Honor.

13 THE COURT: Ms. Clark, I think the key issue here  
14 is the -- whether you have made out an appropriate showing  
15 of bad faith, intentional conduct, and harm. So if you  
16 could address that specifically, that's what I'm most  
17 interested in.

18 MS. CLARK: If you'd allow me, your Honor, we do  
19 think CBS is wrong on the law.

20 THE COURT: And that would be also very useful if  
21 you want to start with that, tell me what you think they are  
22 wrong about.

23 MS. CLARK: Thank you.

24 The burden of proof in a spoliation motion depends  
25 on the relief requested. So the higher the level of relief,

1 the higher the burden. We cited at the beginning of our  
2 argument some text from Judge Magnuson's opinion in a  
3 spoliation case that it does not apply to intentional  
4 conduct. And here is how I break it out for purposes of  
5 this motion.

6 Really what's going on in spoliation motions is  
7 the Court's inherent power and there is what I would call a  
8 thumb on the scale of justice, otherwise known as an adverse  
9 inference instruction. I've also seen the language  
10 unfavorable inference instruction. That in spoliation law  
11 ranks right below dispositive remedy. So we have not asked  
12 to strike the answer but we have asked for the next relief  
13 down. For that specific type of remedy, your Honor, that's  
14 where the intent is required. But the Court is allowed to  
15 employ all different kinds of relief below the adverse  
16 inference instruction.

17 THE COURT: So on adverse inferences you're saying  
18 we would be required to find bad faith or intentional  
19 conduct just as we would be, obviously, for dismissal?

20 MS. CLARK: Correct.

21 THE COURT: Okay.

22 MS. CLARK: And I think the reason for that is,  
23 and I've seen all different variety of adverse inference  
24 instructions, but it really is the judge at the close of  
25 evidence of the trial saying this impairs -- this changes

1 the level of proof required. That's why so much evidence is  
2 required in order to achieve it. In some adverse inference  
3 instructions it's the Court talking to the jury saying you  
4 can consider that they didn't, you know, protect this  
5 information and you can -- so it's a very, very powerful  
6 remedy. But below that there's all kinds of other remedies  
7 including, but not limited to, evidentiary suppression,  
8 award of attorney's fees, and all kinds of things and we've  
9 tried to give a list.

10 The CBS Defendants cited a case of mine in which  
11 we did not prevail on the spoliation motion, but I have here  
12 today -- and I gave a copy to the CBS attorneys before the  
13 break thinking they could use some reading material  
14 anyway -- but I have here today, if the Court will accept  
15 it, this is Magistrate Judge Mayeron's order granting  
16 spoliation sanctions in a case against the City of  
17 Minneapolis and very specifically describing the different  
18 levels of proof needed.

19 THE COURT: Do you have a copy of that for me?

20 MS. CLARK: I do. May I approach?

21 THE COURT: Yes.

22 MS. CLARK: And the discussion I'm talking about  
23 begins at page 11 of her order with standard of review.

24 And so what we did in approaching the argument was  
25 to look at both levels. If we want an adverse inference

1 instruction, and by the way if you read through the cases  
2 cited by CBS you will eventually end up in an adverse  
3 inference instruction. I think what happens sometimes is  
4 the Court will shorthand a little bit what they are talking  
5 about, but the internal cites, all of those cases are  
6 adverse inference cases. For example, *Bakhtiari* cites to  
7 *Greyhound Lines*. That's an adverse inference case.

8 THE COURT: Was the *Bakhtiari* an adverse inference  
9 case or was that dismissal?

10 MS. CLARK: Um, I can't remember the remedy that  
11 they were seeking. Move for sanctions for spoliation  
12 evidence is what I see right here.

13 THE COURT: As I recall, *Bakhtiari* was pretty  
14 clear that there had to be bad faith or intentional conduct,  
15 wasn't it?

16 MS. CLARK: They got that from *Greyhound Lines*  
17 which is an adverse inference case, correct. The seminal  
18 case is really *Stevenson* which we did cite for the  
19 proposition that you can achieve an adverse inference. And  
20 that is the case that set forth the level of the quantum of  
21 proof required. And *Stevenson* also makes clear that a  
22 finding of bad faith is not always necessary to the Court's  
23 exercise of its inherent power to impose sanctions. And I'm  
24 reading now from page 11 of Magistrate Judge Mayeron's order  
25 in the Jenkins case.

1           What I would call the next level down from adverse  
2           inference, your Honor, is a showing that the information was  
3           not preserved and that that prejudiced the moving party.  
4           It's really pretty much that simple.

5           So we try to talk about it in both of those ways.  
6           I would like to start with the intentional, the evidence of  
7           intent. And I think that it can be viewed and should be  
8           viewed with parts A and B.

9           THE COURT: Let's presume that it was a showing  
10          that it was not preserved and that that prejudiced the  
11          moving party. Then what would the remedy be short of an  
12          adverse inference or dismissal that you would suggest?

13          MS. CLARK: Okay. We have asked for a suppression  
14          of evidence remedy. That at trial CBS not be allowed to  
15          offer any evidence of what occurred during the interview of  
16          Paul Stepnes and his attorney. I'm not sure that's enough  
17          for the reason that -- I guess part of the prejudice would  
18          be that if I would have to withdraw and become a witness.  
19          We did discuss that as a prejudice. We did think that there  
20          was enough for the bad faith for intent. Did the Court not  
21          want me to address that?

22          THE COURT: I do want you to. I wanted to first  
23          get the law kind of clear.

24          MS. CLARK: Sure.

25          THE COURT: And I want to go back, and I

1 understand that you're not -- you're certainly going to  
2 argue that there was bad faith but I wanted to get clear  
3 what the consequences would be if we determined there was  
4 not bad faith or intent and what standard we would apply and  
5 what the remedy would be.

6 MS. CLARK: Okay, and I'm sorry if I was confused.

7 The -- if there's a showing of failure to  
8 preserve, and obviously the Court knows all the things that  
9 go into that. Did they know litigation was anticipated?  
10 Could they have predicted that this would be relevant or  
11 requested in discovery and things like that, which I think  
12 is not argued in this situation. And then there's the  
13 showing of prejudice and the types of relief, and we did set  
14 a number of these out, but the types of relief would include  
15 evidentiary suppression. That's what Magistrate Judge  
16 Mayeron did decide to do in her case. Essentially if you  
17 can't meet a certain argument, you know, for example if Esme  
18 Murphy gets up and says no, Paul Stepnes didn't say that.  
19 Well, our best impeachment would be to play video or bring  
20 out a transcript of the video or something which we can't do  
21 now, and so we would be hamstrung in the he said/she said  
22 testimony at trial. And so an appropriate remedy would be  
23 to suppress CBS's ability to create the factual dispute at  
24 trial and allow only Plaintiff to put on evidence of what  
25 occurred during the interview.

1 THE COURT: Do we currently know whether there is  
2 any such dispute?

3 MS. CLARK: We do.

4 THE COURT: And is there a dispute about --

5 MS. CLARK: Yes.

6 THE COURT: -- what was said --

7 MS. CLARK: Yes.

8 THE COURT: -- during the interview?

9 MS. CLARK: Yes.

10 THE COURT: And is it anything that's material?

11 MS. CLARK: Well, I think -- yes, I think it is.

12 THE COURT: Okay.

13 MS. CLARK: There are a couple of disputes that  
14 come to mind. One of the ways in which CBS or WCCO  
15 presented what Paul Stepnes was doing with the contest was  
16 that he was doing it only for charity. And I'm summarizing  
17 when I say that. Or that more appropriately that he was  
18 defrauding people by pretending he was doing it for charity  
19 and instead he was doing it with some attempt to, I don't  
20 know, have a front and then gain the money or something.

21 During the interview Paul Stepnes said to Esme  
22 Murphy, "This is a business." More than once, "This is a  
23 business." In other words, it's not a -- it was direct  
24 information to her that it was not -- that there was no  
25 attempt to make it be a charity.

1 THE COURT: And does she deny that Stepnes said  
2 that, "This is a business"?

3 MS. CLARK: I don't remember if she denied or if  
4 she just didn't recall it. But either way, now part of the  
5 he said/she said will be about whether he said, "This is a  
6 business."

7 Another important discussion was the role of this  
8 foundation in the process. Esme Murphy's piece really  
9 presented to the public that Paul Stepnes was attempting to  
10 do charitable gambling in which the charity offers the  
11 gambling enterprise to the public and then the money is  
12 supposed to flow to charity. Murphy and I had more than one  
13 exchange about the role of the foundation in which it was  
14 explained to her in non-lawyer terms, in other words, you  
15 didn't have to be a lawyer to understand it, very clearly,  
16 more than once, the only role of the foundation would be to  
17 accept a portion of the proceeds at the back end of the  
18 business and then philanthropically donate.

19 That's very, very different from being the front  
20 end of the business offering "charitable gambling". And  
21 it's different for a number of reasons. Charitable  
22 gambling, it seems, was part of the alleged criminal  
23 allegations that CBS, WCCO was trying to make Stepnes look  
24 guilty of. So it behooves their version of the story to  
25 present Stepnes as being investigated for charitable

1 gambling or somehow doing charitable gambling.

2 She was told more than once it wasn't an intake  
3 valve. It was an exit valve. She denied hearing that  
4 explanation. She said she recalled some of the words. It  
5 wasn't understandable, it was very confusing, things like  
6 that.

7 She also denied being told during this interview,  
8 when she was talking about the police during the interview,  
9 that I said to her, Well, when the police told you about  
10 this case, did they tell you there had been proceedings in  
11 Judge Porter's court? And, you know, Murphy said something  
12 about, Well, no, they didn't tell me that. Murphy denied  
13 that that occurred during the interview. Those are three  
14 off the top of my head.

15 THE COURT: Okay. Go on.

16 MS. CLARK: So there are other parts, of course,  
17 that are prejudicial by not having the interview. Obviously  
18 part of what we lose is the transcript and the ability to,  
19 first of all, depose Murphy on it, what she was told; but  
20 also then at trial to impeach her with what she said or was  
21 told during the interview.

22 But what's also lost, of course, and I think CBS  
23 has taken this position that there is other evidence in the  
24 form of witnesses, but what's lost is the sound track, the  
25 way it sounds. You know, the audio, the way the people said

1 the words; and the video of how the faces looked while they  
2 were saying them. I mean, Paul Stepnes's credibility is  
3 very much at issue in this case and pretty much the only  
4 section of the interview that ran of him in the broadcast  
5 was a big close-up of his eyes, which is a trick they can do  
6 with television cameras. They can make anybody look guilty  
7 if they do a close-up of the eyes. So the visual, the  
8 audio, and the transcript, those being missing are all  
9 prejudicial to Stepnes.

10 On the issue of intent and bad faith, there are  
11 two ways to look at it. CBS ignores its affirmative duty.  
12 It has an affirmative duty to prevent the destruction. I'm  
13 not sure that I know of a case in which the defense was on  
14 more notice than this one. Not only that litigation was  
15 anticipated and not only that raw footage should be  
16 preserved, but that very specifically this videotape of this  
17 interview should be preserved. And that was stated over and  
18 over and over to CBS and WCCO on July 16, 2008.

19 CBS knew -- and we briefed this, it's in the  
20 depositions -- they knew that tapes evaporated during the  
21 week. They are the ones who created that structure. They  
22 know that it happens. To be on direct notice to the head of  
23 the litigation department at CBS Corporate, Andy Siegel at  
24 CBS Corporate, Judy Scott at CBS Corporate, and someone in  
25 some communications department at the WCCO station

1 specifically that this interview was sought and not to  
2 preserve it is evidence of bad faith. They let it be  
3 destroyed.

4 THE COURT: They did put a litigation hold on it  
5 as I recall; isn't that right?

6 MS. CLARK: Well, part of the problem there is we  
7 have not seen this July 16th e-mail so we don't know what  
8 was said, your Honor.

9 THE COURT: Why haven't you seen that?

10 MS. CLARK: Because they won't produce it to us  
11 because they are claiming it's attorney-client privilege.  
12 It's one of the issues that we have asked the Court to rule  
13 on, whether or not in fact that is privileged.

14 But CBS's first version of what happened is that  
15 they kind of gleaned there might be litigation on July 18.  
16 Later the attorneys from the Sullivan firm did confirm to me  
17 they had found some communications on the 16th. One of the  
18 things they disclosed was this transcript of my voicemail to  
19 Andy Siegel made by Andy Siegel's office.

20 THE COURT: Go back. I was distracted by deciding  
21 who I was going to fine for the phone ringing. Sometimes I  
22 do that and then I get worried that it's my own phone. I  
23 have to be careful about it without jumping too quickly. Go  
24 ahead. Repeat that one, please.

25 MS. CLARK: Yes. Trying to remember what the

1 question was. Oh, did they put a litigation hold on it.

2 Two points about that. First of all, we don't  
3 know what they did but what they did wasn't sufficient. And  
4 the law is clear. Corporate counsel has a duty not just to  
5 send out a letter and then fold his hands and wait, but to  
6 follow up to make sure that the evidence is preserved.  
7 There is no evidence that that was done here. One of the  
8 things glaringly missing from the CBS papers is any  
9 affidavit from Andy Siegel about what he did to preserve  
10 evidence or Anthony Bonjourno, the head of the litigation  
11 department at CBS Legal, nothing from them at all. They are  
12 just not mentioned, your Honor, by CBS.

13 There was an e-mail sent July 16, 2008, as I  
14 understand it, from Scott Libin, who is not an attorney but  
15 the head of the newsroom at WCCO local, to Esme Murphy the  
16 reporter, and some other people were in the distribution.  
17 That one of the cc's on the e-mail was Andy Siegel at CBS  
18 Corporate. And all we know is that CBS describes the "re"  
19 line as "save your tapes".

20 We know that Andy Siegel was specifically told to  
21 save the interview. Specifically. Anthony Bonjourno was  
22 specifically told to save the interview. WCCO local was  
23 specifically told to save the interview. Nobody saved the  
24 interview.

25 What we don't know, the gap in our information and

1 the reason we've asked the Court to compel production of the  
2 July 16 e-mail, is we can't really tell what happened on  
3 that crucial day because of this, you know, the  
4 attorney-client privilege bar. And we have cited a case,  
5 the *Major Tours* case, for the proposition that if there is a  
6 prima facie showing of spoliation, that even attorney to  
7 client litigation hold letters can be ordered disclosed by  
8 the Court. And we would suggest that in the *Major Tours*  
9 case there was a much less showing than what we've made  
10 here.

11 And so obviously, your Honor, one thing the Court  
12 could do today is to order disclosure of that e-mail, allow  
13 minimal additional briefing by the other side before the  
14 record is closed on the issue. And let me give you some  
15 examples of why that e-mail is so important. If the July 16  
16 e-mail from Libin to Murphy says make sure you get rid of  
17 that interview tape, obviously that's a smoking gun and we  
18 don't need to go much further. If it says save all the  
19 tapes and make sure, absolutely sure, you save the interview  
20 tape, I think there would be one argument about that. If it  
21 says Andy Siegel called me from New York, litigation is  
22 anticipated, and said tell your guys to save stuff, then the  
23 failure is with CBS counsel where the law is very, very  
24 clear that they must affirmatively come forward with a  
25 litigation hold letter.

1           THE COURT: While I'm listening to your argument,  
2 Mr. Sullivan, why don't you think about whether that e-mail  
3 can be produced or whether it can be produced, for example,  
4 by redacting any mental impressions or opinions or whether  
5 it can be -- whether that one e-mail can be provided to me  
6 in camera to see what is redacted out of it. So why don't  
7 you just -- while we're listening, why don't you just think  
8 about that because obviously I'm going to ask you about that  
9 when you get up.

10           MS. CLARK: Or one further thing. If it said --  
11 if Scott Libin says Andy Siegel says find that interview  
12 tape and mail it to him in New York by overnight mail  
13 because he wants to see it, well, then it means that we have  
14 been looking in the wrong place because we have been looking  
15 at WCCO and it means a completely different type of  
16 argument.

17           But we would argue that -- I think the *Major Tours*  
18 case uses the term "gross negligence". In other words,  
19 there's a real difference, your Honor, between a case where  
20 a year after an incident or two years, you know some of  
21 these personal injury cases you don't even know what the  
22 damage is until the body heals. But years later someone  
23 comes back and says, Oh, you should have predicted the  
24 future and saved this. I think courts are much more lenient  
25 in that situation because the attorneys are expected to

1 anticipate litigation and anticipate what the other side  
2 might ask for.

3 THE COURT: Ms. Clark, it looked to me like in  
4 reading your materials that all of the notice that you  
5 provided, and I realize there were quite a few telephone  
6 calls, but it was all telephone calls. Did you ever write  
7 them any letter at that time or send any e-mail or anything  
8 in writing in addition to the telephone calls?

9 MS. CLARK: On the specific issue of the  
10 interview?

11 THE COURT: Right, on your demand that they not  
12 dispose of the tapes.

13 MS. CLARK: No. We did have by the 18th, two days  
14 later, I was in communications with one of the CBS inside  
15 counsel on a number of things. But we know that the phone  
16 messages were received by Andy Siegel because of the  
17 transcript of the voicemail.

18 The day that I was doing this I was not in my  
19 office. Had I been in my office, I probably would have sent  
20 an e-mail. Had I had the iPhone I have now, I probably  
21 would have sent an e-mail. But at the time what I had  
22 available to me was a telephone and I happened to have a  
23 tape recorder with me and I'm very glad that I preserved it,  
24 first of all, because I'm less likely to become a witness on  
25 the issue but also because the last thing we would need is a

1 he said/she said argument about what was said in those  
2 conversations. But we did not send a letter that day, no.

3 The law is I think in this case very clear that  
4 the duty fell to corporate counsel. Not just to send a  
5 letter, but to follow up. That's the way the case law is  
6 going and I think the policy reason is obvious. It's too  
7 easy for a large corporation that really wants something to  
8 disappear to have their attorneys send a letter and then,  
9 gee, oh, shucks, later.

10 And that's really what happened here. All the  
11 attorneys knew it should be preserved. They knew what it  
12 was, they knew where it was. And we did go into much  
13 detail, your Honor, in what this Bill Kruskop did and what  
14 he didn't do in collecting the tapes. He is heralded as  
15 this very experienced photojournalist. Scott Libin even  
16 said, Well, of course he would know that he should speak to  
17 the photojournalist and find out what the universe of tapes  
18 is, but he didn't do it. I mean, how do you possibly know  
19 that you preserved all the tapes if you don't know how many  
20 there were to start with? He just didn't even go to square  
21 one in looking for things.

22 And we have seen no evidence that Andy Siegel  
23 followed up within the week. And that's vital, within the  
24 week, to make sure that those tapes had been preserved  
25 because Andy Siegel probably knew, like the rest of them

1       seemed to know, that within seven days everything was  
2       turning into a pumpkin.

3               The *Major Tours* case uses the term "gross  
4       negligence". I don't see that in some of the other cases.  
5       Whether gross negligence is bad faith, I'm not sure. It may  
6       be close but not quite bad faith. But what we have here is  
7       a situation where everybody knew what was being requested.  
8       It was easy. It wasn't as if we were saying save, you know,  
9       15 railroad cars of something. We were saying save this one  
10      videotape, and it was not done in the timeframe.

11              The failure to follow up, the failure to do  
12      anything effective, knowing they themselves had created the  
13      short document destruction policy, it seems to us is  
14      sufficient to show bad faith.

15              But there is another level with some more  
16      disturbing evidence that came out in the depositions that we  
17      believe also shows intent. We deposed Kris Berg, the  
18      photojournalist. Now, we're just looking at this point to  
19      figure out what happened. Did not even really target these  
20      questions for this area, but he kind of spontaneously at one  
21      point started talking about, Oh, this here, this is my  
22      camera work. I know this is my camera work on this tape.  
23      He talked about the date that he did the camera work. The  
24      date that he did the camera work, which was the date of the  
25      interview with Paul Stepnes.

1           Walking him through the chronology of that day, he  
2 confirmed under oath that during a break waiting for the  
3 attorney to arrive he went outside, he shot these specific  
4 scenes of the exterior. And then on that same tape he went  
5 in the house and shot the interview. Then they came out  
6 again and he shot the stand ups of Esme Murphy standing  
7 outside of the house.

8           He himself brought to our attention that there was  
9 an abrupt change in the videotape at a certain point.

10           THE COURT: Who is -- Skinner is another  
11 photographer?

12           MS. CLARK: Yep.

13           THE COURT: And was Skinner present that day?

14           MS. CLARK: No.

15           THE COURT: When did Skinner do his photo shoot?

16           MS. CLARK: Esme Murphy could not pin it down but  
17 she was pretty sure it was the previous week. She doesn't  
18 work Fridays and she said that she had been there to accept  
19 a tape from Skinner, so she assumed it would have been  
20 Thursday or before.

21           THE COURT: Well, I looked at that -- I did look  
22 at that tape and the -- I think I've looked at the right  
23 tape, but it's one that starts with Skinner's name on it.  
24 At the very beginning of the tape it says "Skinner". And  
25 what is -- what's the allegation that -- that Skinner taped

1 over Berg's tape or -- I was frankly confused by that.

2 MS. CLARK: Sure.

3 THE COURT: Not having any expert analysis of what  
4 was going on here, I was confused by exactly who taped what  
5 and when, and what the allegation was or who taped over  
6 what.

7 MS. CLARK: Right. The information that we got  
8 came from this Kris Berg. Here is how I understand it.  
9 That -- and unfortunately the information came to us in a  
10 couple of different ways so that we took our first  
11 depositions without the benefit of having ever seen the  
12 original videotapes.

13 THE COURT: Right.

14 MS. CLARK: Then we got access to the original  
15 videotapes but there's only so much a human mind can  
16 remember; and even notes of an attorney that are detailed,  
17 you just can't remember everything. Then we asked CBS to  
18 clear up some discovery deficiencies and we got photocopies  
19 of the labels on the tapes. Then we went back for some more  
20 depositions.

21 We ended up taking -- oh, and then -- and I don't  
22 remember the exact date, but when we -- I went over to WCCO  
23 and I took with me a private investigator and another  
24 attorney just in case there was somebody to witness about,  
25 but at that point they didn't even want to show us what else

1 was on those tapes. Just this little sections of these  
2 original tapes because they were confidential or something.  
3 Finally we kind of busted through that and we looked at the  
4 whole tapes. But it was sometime later that CBS produced to  
5 us these other video files that had more of the video than  
6 what we had originally been given. And I can run through  
7 any of this again if I'm being confusing.

8 So we're taking the deposition of Kris Berg and  
9 we're asking him about this tape. We're using a video  
10 segment provided to us by CBS. And he says, "I can tell my  
11 own camera work. I shot these exteriors." He's the one  
12 then who testifies he would have taken that same tape, left  
13 it in his camera, gone inside, shot the interview, come  
14 outside, shot Murphy doing the stand ups, went back to the  
15 studio to edit.

16 What it certainly appears from his testimony, and  
17 obviously we weren't there when these things happened, but  
18 what it certainly appears is that at the point that he  
19 identified that there was an abrupt change, someone, I'm not  
20 saying it was Skinner, someone recorded over a portion of  
21 his tape with another tape shot by Skinner.

22 THE COURT: Do we have the tape here, the Skinner  
23 tape? What is the label on the tape you're talking about?  
24 What's it called?

25 MS. CLARK: Are you talking about the name of the

1 video segment or our tapes were at Exhibit 12 and 13.

2 THE COURT: Counsel, do you have it there?

3 MR. SULLIVAN: Yes, your Honor.

4 THE COURT: Do you mind if we play that tape?

5 MR. SULLIVAN: Not at all.

6 THE COURT: Brian is working on his IT  
7 credentials.

8 MS. CLARK: You need to be IT to be an attorney  
9 these days.

10 Do you want me to continue while he's setting that  
11 up?

12 THE COURT: Why don't you.

13 MS. CLARK: So as we understand it, and I even  
14 knew as I was briefing this, it's very hard because we were  
15 looking at the video when we were talking in the deposition  
16 and that's hard to replicate. But in fact Skinner says that  
17 he is -- and I don't want to put it on the ELMO to interfere  
18 with what he's doing -- but if Skinner says he knows he shot  
19 these outside exteriors, went inside and shot the interview,  
20 and then the stand ups were shot, and that was all on the  
21 same tape, that's what we would expect to find on the  
22 interview tape.

23 By the way, all of this is now missing. This is  
24 the spot. This is the spot where Kris Berg himself said  
25 there's an abrupt change in the tape. It certainly appears

1 that what could have happened is that someone taped over,  
2 and Berg himself said there's 28 people in the station who  
3 could do this. They do it every day, in other words.  
4 Someone kept this exteriors part and taped over this.

5 Let me just do this. So it was from Kris Berg  
6 that we got this idea that at this point where he says  
7 there's an abrupt change, which is something you certainly  
8 might see of videos plopped on top of another video, that a  
9 different tape was laid over the top of this. Okay. It  
10 seems that what CBS is now saying is, look, on a different  
11 version of that there are some color bars here. And the  
12 color bars say "Skinner". We have two comments about that.

13 First of all, if this did happen -- and by the  
14 way, your Honor, in his second deposition made necessary  
15 because we got things at this staggered rate, and we think  
16 that was prejudicial to our investigation, too easy for  
17 people to confer after these depositions -- the second  
18 deposition of Kruskop when I finally had the labels and I  
19 was going tape by tape, where did you find this tape, where  
20 did you find that tape, he admitted that he found six of the  
21 tapes where they would be expected to be and one of them in  
22 an editing booth. And, gee, he couldn't remember which one  
23 he found in the editing booth.

24 So if in fact this was done, it was clearly done  
25 intentionally. Someone taped over. There's no reason they

1       couldn't have put these bars in the beginning. The  
2       affidavit from Skinner says sometimes I put the bars at the  
3       beginning. And one of the things, and I'm sorry if I wasn't  
4       clear enough in my letter, but one of the things that we  
5       would have wanted to file as a kind of reply brief, so to  
6       speak, is in this very case the only other Skinner version  
7       we have, which was his interview on a different day, I think  
8       he interviewed Ritschel, he did the photography of  
9       interviewing Ritschel, has no Skinner color bars at the  
10      beginning of it. So in the universe of two videos in this  
11      case, one has no Skinner bars at the beginning, and I'm  
12      happy to file that with the Court and would like to, and yet  
13      this one does. And all Skinner says is sometimes I do and  
14      sometimes I don't.

15                So obviously there's more fact finding that could  
16      happen and, frankly, your Honor, we came to the point where  
17      we didn't know how much further we should go without that  
18      July 16th e-mail and, you know, we didn't want the tail to  
19      wag the dog. You know, at some point we needed to make our  
20      motion and get on with focusing discovery on the merits of  
21      the case. We could have taken Skinner's deposition. But we  
22      did take this Kris Berg deposition. I don't know that we  
23      would ever be able to pin down the exact person who did the  
24      editing if that's what occurred, but we did take Kris Berg's  
25      deposition; only in the papers here, now his corporate

1 employer has asked him to sign an affidavit, he's recanted.  
2 Well, you can't change deposition testimony with a later  
3 affidavit and I think CBS knows that. We haven't had an  
4 opportunity to go back and depose him on his affidavit but  
5 that would be the never-ending process.

6 THE COURT: Is the abrupt change that, as you say,  
7 Berg was talking about, was it an abrupt change in the audio  
8 or was it an abrupt change in the video?

9 MS. CLARK: Both. And he, in fact, commented on  
10 that. He said that he had been filming the exteriors by  
11 himself and there were only ambient noises. And then all of  
12 a sudden, boom, and you can hear someone talking and it's a  
13 different -- you know, the video is now up on the porch.

14 And I think if you read the depositions you can  
15 see this really sprung forth with him. It's not as if we  
16 went in to try to prove this theory. During exploratory  
17 discovery on this issue, he came forward with this. And he  
18 was quite sure and he said, you know, he had been a  
19 photographer for, I forget what it is, but something like 20  
20 years. He was very sure that the shots at the beginning  
21 were his work because he recognized his steady hand. It was  
22 his style. He said I can tell my work from another  
23 photojournalist's work. Skinner is more sloppy. I tend to  
24 turn the camera off before I change to a different scene.  
25 He tends to kind of move it over which causes fuzziness. So

1 it was very, very clear, detailed in his professional  
2 opinion he said those were his exterior shots. That was the  
3 tape he used to do the interviews.

4 And obviously if someone, I mean, first of all,  
5 we're talking about a television station where they have  
6 equipment to do this. They do it on a regular basis and  
7 they do very complex versions of it, many, many people with  
8 that training. We are not talking about someone who didn't  
9 know how to do it. So there were obviously opportunities.

10 THE COURT: Do the -- is it your understanding of  
11 what Berg's testimony was, was that after the color bar that  
12 had the word "Skinner" on it, that then at the start of the  
13 video it was Berg's -- it was Berg's video --

14 MS. CLARK: Right.

15 THE COURT: -- of the exterior of the house?

16 MS. CLARK: Right.

17 THE COURT: And then at some point in time when  
18 there is a switch, that it then -- that you claim something  
19 is then -- there was a switch to -- is it a switch to  
20 Skinner's?

21 MS. CLARK: Yes.

22 THE COURT: Then videoing?

23 MS. CLARK: Yes.

24 THE COURT: Until the end of that -- of the  
25 portion of the video that relates to the subject matter?

1 MS. CLARK: Correct.

2 THE COURT: Because then next there's some flowers  
3 there that are unrelated?

4 MS. CLARK: That's right. And I asked him  
5 specifically if he saw any of his camera work later after  
6 that switch point and he said no.

7 Now, I didn't specifically say -- I didn't  
8 specifically phrase it --

9 THE COURT: At the switch point are you saying  
10 that there was -- not only was there a switch to a new  
11 video, but there was also a change in the audio?

12 MS. CLARK: Correct.

13 THE COURT: Have you had the -- has any audio  
14 specialist looked at this to try to determine whether that's  
15 the case?

16 MS. CLARK: We have not had any forensic review of  
17 the original tapes.

18 THE COURT: All right.

19 MS. CLARK: I'm not saying we would never do that.  
20 Maybe we would do that for trial. Obviously that's a very  
21 expensive venture, and I guess as counsel sometimes you have  
22 to make a judgment call. With a sophisticated -- if in fact  
23 this happened, someone very sophisticated did it. And the  
24 ability to discern that is, you know, you get a reducing  
25 rate of returns. And even though this Kris Berg did not

1 have digital editing capabilities, other people there did.

2 And it just gets harder and harder to prove it.

3 I just want to make clear that I didn't form my  
4 question to him after the color bars. The particular video  
5 I was showing him was something produced to us by CBS that  
6 had these -- I think there were all seven tapes on one disk.  
7 That was the version that I was showing him. And I think  
8 CBS suggested that somehow by not showing him that, that he  
9 would have come to a different conclusion. I think that's  
10 essentially their argument, which doesn't make any sense if  
11 you read his testimony because he says, That's my work.  
12 That is my camera work. And then from then on the rest of  
13 it came out.

14 That, coupled with the fact that one video was  
15 found by Kruskop in an editing room when the normal place  
16 for these tapes after they are used is in the room with the  
17 "today" shelf and with the "daily" bins, those facts  
18 together are, we think, sufficient to show intent when  
19 coupled with the rest of the evidence.

20 And I think this is a time to get back to the law.  
21 *Greyhound Lines* makes clear that intent can be proven by  
22 circumstantial evidence. You know, it's just like a  
23 criminal case. It's very rare to get someone up on the  
24 stand who says, Yeah, I did it. And I think CBS almost  
25 suggests that unless someone says, Yes, I did it, that we

1 haven't proved intent. And that's just not true. Intent is  
2 almost always proved with circumstantial evidence and if in  
3 fact if more than one person was involved, then those sort  
4 of things are almost always proved with circumstantial  
5 evidence.

6 And it seems to us that the courts, in using their  
7 discretion, take a look at all of the facts when lined up  
8 together, is that sufficient to show that there was intent  
9 or at least bad faith to suppress the truth. I mean,  
10 clearly if this happened, this is an attempt to suppress the  
11 truth. And we would suggest that there probably is no  
12 better way of getting rid of video than covering it over  
13 with other video. Because if someone had thrown it in a  
14 wastebasket, it could have turned up later. Now, obviously  
15 they could have put it in the Mississippi River. I guess  
16 we'll never know if that happened.

17 I want to correct the record on one point. I want  
18 to correct something in my affidavit because there's a  
19 little error that I found. I indicated that --

20 THE COURT: Just a minute.

21 MS. CLARK: I'm sorry.

22 (Pause in proceedings.)

23 THE COURT: There we go. All right. Let's watch  
24 it. Is this -- this is before the bars?

25 THE LAW CLERK: Yeah.

1 THE COURT: Let the record reflect that we are now  
2 going to watch the video that CBS's counsel provided us.  
3 Mr. Sullivan, you provided this for use here in court. Is  
4 this the exhibit that we are talking about?

5 MR. SULLIVAN: This, your Honor, is the full  
6 version of that tape. You will start with those bars.

7 THE COURT: And this is the same one that was  
8 shown to Mr. Berg at the deposition?

9 MR. SULLIVAN: That, your Honor, is -- that would  
10 be Exhibit 14 to my Declaration.

11 THE COURT: Exhibit 14 was shown to Mr. Berg?

12 MR. SULLIVAN: Precisely.

13 THE COURT: And -- well, then what are we looking  
14 at? If we're not looking at Exhibit 14, what are we looking  
15 at here?

16 MR. SULLIVAN: I thought you wanted to see the  
17 material of the exteriors. I didn't know if you wanted the  
18 one with the bars or without the bars.

19 THE COURT: I would like to see the one that  
20 Mr. Berg was testifying about that he was watching during  
21 the deposition where he said that -- where at least he  
22 allegedly said that he saw an abrupt change.

23 I have been told, Ms. Clark, that you have a  
24 play-pause-stop button there. So the point in time if you  
25 would like to stop to show me what you're talking about,

1 that would be fine.

2 MS. CLARK: First I have to navigate up, I think.

3 There we go.

4 (Videotape played.)

5 THE COURT: Is there a volume?

6 MS. CLARK: Yeah, except there's nothing going on  
7 so I'm afraid it will be really loud when we come in.

8 THE COURT: That's all right. Let's have it loud  
9 when we come in.

10 MS. CLARK: All right. It will be louder when the  
11 noise comes in.

12 THE COURT: So you're saying now we're at the  
13 portion that Mr. Berg is supposedly said, "This is my work."

14 MS. CLARK: Correct.

15 THE COURT: Again, this is -- Berg said this was  
16 his work?

17 MS. CLARK: Correct.

18 (Videotape played.)

19 MS. CLARK: That's the abrupt change.

20 THE COURT: I see. So it's right there when we  
21 hear other noise there?

22 MS. CLARK: Correct.

23 (Videotape played.)

24 THE COURT: Do we know whose voice that was?

25 MS. CLARK: I think he said that was Skinner.

1 There was one male voice he couldn't identify, but he did  
2 recognize Skinner's voice.

3 THE COURT: So the claim now is that we're  
4 watching what Skinner did a week before?

5 MS. CLARK: Approximately, yes. And even there  
6 you can see that the camera kind of -- the camera operator  
7 turned and pulled back and there was I think what he would  
8 call "slop".

9 (Videotape played to end.)

10 THE COURT: Who was talking there at the end when  
11 there was talk, "Are you going to get arrested again?"

12 "I don't think so."

13 Do you know?

14 MS. CLARK: I don't know.

15 THE COURT: All right. Thank you.

16 MS. CLARK: Um-hum. Did I correct my affidavit?  
17 Let me do that. I realized that I made a misstatement in  
18 the affidavit I filed. It's in paragraph 6. I said July  
19 2008 and it should read August 2008. It was in August 2008  
20 that I sent Judge Porter's order to the CBS attorneys, and I  
21 just wanted to make sure that I did that today, your Honor.

22 THE COURT: That will be so reflected.

23 MS. CLARK: Thank you.

24 THE COURT: Thank you.

25 Mr. Sullivan.

1 MR. SULLIVAN: Thank you, your Honor.

2 THE COURT: Mr. Sullivan, do you have any  
3 objection if we mark this particular tape as our Hearing  
4 Exhibit Number 1 and I retain that, this particular disk?

5 MR. SULLIVAN: Not at all, your Honor.

6 THE COURT: Okay. Thank you. We can do that  
7 after your argument.

8 MR. SULLIVAN: Okay. And I'll have one other  
9 piece of DVD material to show you as well. You may want to  
10 hold onto that as well, lest there be any confusion.

11 THE COURT: Okay.

12 MR. SULLIVAN: Your Honor, I'll start here at the  
13 beginning back on the law. It's our understanding that in  
14 the Eighth Circuit the courts employ a two-point test to  
15 determine whether spoliation sanctions are warranted.

16 First, the spoliation sanction requires a finding  
17 that the party intentionally destroyed evidence with a  
18 desire to suppress the truth. The courts have made clear  
19 that finding of bad faith is necessary. As Judge Montgomery  
20 recently explained, "In this circuit there is a high  
21 standard of intentional destruction and bad faith necessary  
22 to prove spoliation." Here there is simply no evidence to  
23 meet that standard.

24 THE COURT: Have you cited Judge Montgomery's case  
25 in your brief?

1 MR. SULLIVAN: We have, your Honor.

2 Instead, the evidence shows here when you look at  
3 the material, and there have been extensive excerpts from  
4 depositions submitted to the Court, these various videotapes  
5 and what have you, when you go through all of that you will  
6 see that the evidence shows that WCCO made good-faith  
7 efforts to preserve the videotapes in this case by promptly  
8 collecting what appeared to be a complete set of these  
9 materials from the places where they are typically stored.

10 In fact, your Honor, the testimony shows that when  
11 litigation was threatened, and this is the day after the  
12 piece aired, all right, when the litigation was threatened,  
13 WCCO's chief photojournalist promptly collected from  
14 newsroom shelves and bins what he believed to be all the  
15 videotapes of the raw footage that had been used to prepare  
16 this story and he preserved those materials.

17 THE COURT: Who is that?

18 MR. SULLIVAN: That gentlemen is named Bill  
19 Kruskop.

20 Now, Plaintiffs advance a tale to this Court of  
21 nefarious conduct, the story about supposed intentional  
22 taping over the tape that contained the Stepnes-Clark  
23 interview. Your Honor, we submit that that has no basis in  
24 the record. When you go and you look at these tapes, well,  
25 first it starts off with some deposition testimony of Kris

1 Berg. Your Honor has now had the opportunity to look at the  
2 material that was shown to Kris Berg at his deposition.  
3 He's asked, Does that look like your work? And you should  
4 look at his testimony closely. What he says is, This is  
5 shot in my style. And he goes on to explain that he has a  
6 very -- what he calls a solid style. He holds very steady,  
7 he doesn't move, there's not a lot of camera movement and  
8 what have you.

9 So Ms. Clark is playing the excerpt we have here,  
10 exterior draw from a document. When it was produced in this  
11 litigation was it was WCCO-001. That's the manner in which  
12 we originally produced it. So she shows him that. He's  
13 looking at it. It could be my work. It's shot in my style.  
14 As you see the so-called abrupt change, he is shooting and  
15 there's no background noise other than birds chirping and  
16 what have you.

17 And then they go to the front door of the home at  
18 which point you hear people talking. When he hears that, he  
19 hears the voice of his colleague Sean Skinner, not  
20 surprisingly, and says in his deposition that he is  
21 beginning to question whether indeed this is his work. And  
22 that testimony has been provided to the Court.

23 What happened in this case, the way this matter  
24 developed, Plaintiffs' counsel, before she took Mr. Berg's  
25 deposition, she wanted to come over and review the original

1 tapes. We made a viewing facility, you have to have special  
2 equipment to do that. Mr. Kruskop was there. John's  
3 colleague Leita Walker was there for this viewing.  
4 Plaintiff came with her private eye and another lawyer, and  
5 they viewed these materials to their hearts' content.

6 THE COURT: Before Berg's deposition?

7 MR. SULLIVAN: The day before, your Honor.

8 We then, because all of this had become a big  
9 issue -- and I must tell you, I've done these cases for 30  
10 years. I have never been down into the weeds like this on  
11 these kind of issues. But because --

12 THE COURT: Welcome to my world.

13 MR. SULLIVAN: I guess. My condolences, I must  
14 say.

15 But, your Honor, I tell you what. When all of  
16 this comes up about these tapes, we then said, okay. When  
17 Plaintiff said discovery deficiencies, we were never asked  
18 for copies of the physical labels on the tapes. When she  
19 asked, we promptly got her those copies. All right?

20 We thought the prudent thing to do, now that she  
21 has reviewed the original tapes, what the heck, let's just  
22 produce a DVD with each of these materials on separate DVDs.  
23 So you have a DVD that corresponds precisely with each of  
24 these tapes that had been preserved by WCCO.

25 THE COURT: These tapes, are they microcassette

1 tapes that are used inside a video camera?

2 MR. SULLIVAN: Yeah. They are not like a VHS  
3 tapes, they are little guys. Kind of like a Hi8 tape.

4 So at any rate, so what we decided, prudent thing  
5 to do was produce a DVD that contained all the contents,  
6 whether pertinent or not, on each of these tapes and that's  
7 what we did. That's what I would like to show you now, the  
8 one that I had offered before. I thought this is the one  
9 you wanted to see with the color bars in it.

10 THE COURT: Okay. Now, what, so Exhibit Number 1  
11 that we already looked at, we looked at something that was  
12 on a DVD, Number 1. And it started with a -- it says  
13 "Stepnes broadcast and footage". When was this DVD made?

14 MR. SULLIVAN: At the outset of the case. This  
15 was produced in the initial production as soon as the  
16 protective order was in place.

17 THE COURT: All right. And this was a collection  
18 of various pieces of -- from the raw footage micro -- I'll  
19 call it the microcassette tapes that you put together and  
20 put on a DVD at the beginning of the case?

21 MR. SULLIVAN: Precisely.

22 THE COURT: And then subsequent to that, preparing  
23 for Berg's deposition, Ms. Clark comes over and she looks at  
24 WCCO, she looks at the microcassette tapes?

25 MR. SULLIVAN: In the viewer.

1 THE COURT: Or at that time or the day after that,  
2 you give her now another DVD?

3 MR. SULLIVAN: That is not correct, your Honor.

4 THE COURT: Okay.

5 MR. SULLIVAN: Not the day after. She came  
6 over -- my recollection is she came over on July 2nd, took  
7 the deposition on July 3rd. We produced the actual DVD  
8 copies a couple weeks later.

9 THE COURT: The one you're -- but you had produced  
10 Exhibit Number 1 before that?

11 MR. SULLIVAN: Oh, yes, at the outset, yes,  
12 indeed.

13 THE COURT: So now what you're going to show me is  
14 something that you produced after Berg's deposition?

15 MR. SULLIVAN: Precisely. Precisely.

16 THE COURT: Okay. And while you're getting that  
17 up and running, could you give Hearing Exhibit Number 1 to  
18 my clerk and we'll mark that as Hearing Exhibit Number 1.  
19 You may just put a Post-It on it for now.

20 Okay. Now we're going to have -- we're looking at  
21 what we're going to mark as Hearing Exhibit Number 2?

22 MR. SULLIVAN: Yes, sir.

23 THE COURT: While that's warming up, let's be  
24 clear. It was Exhibit Number 1 that was shown to Berg  
25 during his deposition?

1 MR. SULLIVAN: Precisely.

2 THE COURT: Except for the initial bar with  
3 "Skinner" on it, so far is Exhibit Number 2 the same as  
4 Exhibit Number 1?

5 MR. SULLIVAN: It is. It's identical except for  
6 the color bars.

7 (Videotape played.)

8 THE COURT: Is that light on on the porch?

9 MR. SULLIVAN: I cannot tell.

10 (Videotape played.)

11 MR. SULLIVAN: Now, your Honor, the rest of the  
12 material on that tape is relating to other stories. But,  
13 again, so that there be no question, we produced the tape in  
14 its entirety just as it existed in the one that's been  
15 stored, the little microcassette. But you see the point  
16 being there are color bars at the beginning and there are  
17 color bars at the end laid down by Sean Skinner's camera  
18 that say "Skinner" on the bottom.

19 What we did, lest there be any doubt, when all of  
20 this issue came up in the Plaintiffs' papers, we went back  
21 to Sean Skinner, had him look at this tape, asked him did  
22 you shoot this tape, to which as you know from his affidavit  
23 he said indeed.

24 And then to be completely safe we went to Kris  
25 Berg and showed him this and said, Kris, when you saw it at

1 your deposition you didn't see it with the color bars. Now  
2 that you see it with the color bars and you've had a chance  
3 to review it, is this your work? And he says, No, obviously  
4 it's Sean Skinner's work. This whole notion of this  
5 incredible complicated plot to lay down tape over other  
6 tape, there is no evidence in the record to support that.  
7 It's supposition, it's wild accusation, but it is not  
8 evidence, your Honor.

9 THE COURT: Why wasn't the color bar with  
10 Skinner's name on it on Exhibit Number 1?

11 MR. SULLIVAN: Because when the initial materials  
12 were assembled, what the station tried to do, as it does in  
13 all of these kind of cases, most folks what they want is the  
14 substantive tape that shows your sources talking; that  
15 shows, you know, the whole repertory process, if you will.  
16 That's what I said to you earlier. You don't get down in  
17 the weeds on color bars and ambient sounds. And most folks  
18 in a defamation case is you said something about me that  
19 wasn't true. What have you got? We give them what we got.  
20 It is as simple as that. We thought the prudent course when  
21 we got into all of this detail, which I will tell you is  
22 rather unusual, okay, let's then, you know, give everything.  
23 And that's what we did.

24 And my only point, your Honor, is when you review  
25 the totality of what is there, there is absolutely no

1 evidentiary basis in the record for these wild claims about  
2 people doing all of these nefarious deeds. And why would  
3 there be? She said if you had just thrown it in the trash  
4 can it could be found so you lay down tape over another  
5 tape? Well, who did such a thing? You can't -- it doesn't  
6 pass, well, to say they got 24 people that are skilled in  
7 using editing equipment, I don't think that passes for  
8 evidence.

9 Your Honor, the other thing here is the fact that  
10 WCCO took good-faith efforts to preserve this material the  
11 day after they learned that there may be a claim in the  
12 offing, that alone defeats Plaintiffs' claim for spoliation.

13 The second part of it, your Honor, is that in the  
14 Eighth Circuit law --

15 THE COURT: Part of the problem there is that you  
16 haven't provided the litigation hold memo which I think  
17 you're relying on that they did take those good-faith  
18 efforts. What's your position on that?

19 MR. SULLIVAN: Well, let me go to that and I'll  
20 come back to prejudice in a minute. The point on that, your  
21 Honor, is the testimony again is quite clear, which you have  
22 before you. There's an e-mail that was sent out on July 16,  
23 2008. It was sent from WCCO-TV news director to Scott Libin  
24 to Esme Murphy, and it was copied to WCCO station TV manager  
25 and the news managers as well as in-house counsel in New

1 York. We have indeed withheld that document on the basis of  
2 the attorney-client privilege. The "re" line of that e-mail  
3 was "House raffle. SAVE YOUR TAPES." Save your tapes being  
4 in all capitals. And this document was included on our  
5 privilege log. As we explained to Plaintiffs' counsel, this  
6 e-mail was sent at the direction of in-house counsel and  
7 does reflect attorney-client communications.

8 Here, Plaintiffs have failed to demonstrate  
9 spoliation, much less make a prima facie showing of attorney  
10 involvement sufficient to justify an in camera review for an  
11 application of the so-called crime fraud exception to the  
12 attorney-client privilege. She hasn't come close to doing  
13 that. She cites to the Court this *Major Tours* case.

14 And if your Honor looks at the *Major Tours* case,  
15 it couldn't be more different than what we have here.  
16 There, there was a finding, the Court had made a preliminary  
17 finding of spoliation; but more to the point, the privilege  
18 was overcome in terms of being required to cough up this  
19 challenged communication. Why? Because there was a  
20 question whether or not preservation had actually been  
21 ordered for 21 months. The material that went missing, you  
22 had a 21-month lapse. That's why the Court was concerned.  
23 They said, Okay, let's see the preservation communication.  
24 Here --

25 THE COURT: Counsel, is it the basis of your

1 privilege claim that the memo that was sent out on July  
2 16th, the litigation hold memo, because it was sent out at  
3 the direction of the legal counsel, in-house legal counsel,  
4 even though it wasn't sent by the legal counsel himself,  
5 because it was sent at the direction of legal counsel, that  
6 makes it a privileged communication?

7 MR. SULLIVAN: It's twofold, your Honor. There is  
8 that aspect of it. But more importantly, or as importantly,  
9 the communication itself contains -- the substance of the  
10 e-mail contains and reflects the communications between  
11 counsel and Mr. Libin. All right? In the body of the  
12 communication you have the substance of what the attorney  
13 was telling his client. And we submit, your Honor, that  
14 this case is quite different from the case that the  
15 Plaintiff relies on, this *Major Tours* thing. This is apples  
16 and oranges and it does not provide her the support for the  
17 remedy that she seeks. So that is our position on that.

18 You had asked me earlier to think about whether we  
19 would be prepared to share that with the Court for in camera  
20 review. I think under the case law it's not appropriate  
21 unless you think there's some issue here perhaps, you know,  
22 kind of like in that *Major Tours* case, a crime fraud issue,  
23 which I think there's no basis for that. So I think it's  
24 unnecessary at this juncture.

25 THE COURT: Well, it seems to me that -- I mean, I

1 would be glad to certainly take a look at that and reflect  
2 on it further. But it seems to me that one of the things  
3 that you are relying upon here is that to show that there  
4 was no spoliation and the first instance was that your  
5 client was in good faith and sent out a litigation hold.  
6 And it seems to me that if you're going to rely upon that,  
7 then you should provide a -- the full text of that  
8 litigation hold and what direction was in there. Obviously,  
9 there are -- it always could be subject to the fact that if  
10 within those directions about what to do there also was  
11 included some type of opinion or mental impressions that  
12 were from the lawyer, then it would certainly be appropriate  
13 to exclude those, to redact those.

14 But it strikes me that it seems like it's very --  
15 it just strikes me on the face of it -- that it may be the  
16 case -- but it certainly strikes me on the face of it, it  
17 certainly doesn't make a lot of sense to me, that the entire  
18 directions memo would be a conveyance of legal advice that  
19 was being sent when the memo is titled "House raffle, SAVE  
20 YOUR TAPES."

21 So I will let you decide what you're going to do  
22 about it. Obviously I'm going to take a further look at it  
23 because counsel has quite properly put it on your privilege  
24 log and you have labeled it as privileged and I'll take a  
25 further look at it. But I think at a minimum I think that I

1 have to tell you that it does weaken your argument about the  
2 good faith if that's the position you're going to take.

3 MR. SULLIVAN: Well, the other thing I would call  
4 to your Honor's attention is this. There is no dispute in  
5 terms of what happened after that e-mail was sent. Within  
6 an hour of that e-mail being sent, Mr. Kruskop testifies  
7 that he goes out and begins the process that is reflected in  
8 the sworn testimony of assembling these various materials  
9 and preserving them. So it's not like we got to do a whole  
10 lot of head scratching. You know what I mean? That is  
11 undisputed, that he went out one hour after receiving that  
12 e-mail and assembled these materials, number one.

13 Number two, Plaintiff has like offered all --  
14 again, all manner of speculation in terms of what could be  
15 in the e-mail, what if the e-mail said destroy the tape of  
16 the interview, you know, blah, blah, blah, all this kind of  
17 stuff. Your Honor, she also says to you that she made clear  
18 in her communications with Mr. Bonjourno, the New York  
19 lawyers, and Mr. Siegel that she was after this interview  
20 tape. If you actually look at those transcripts you'll see  
21 she mentioned all of the various tapes of which she was  
22 aware. There was an interview with a contestant, there was  
23 an interview with her client, there was an interview with  
24 Police Officer Ritschel. It was not like she just said,  
25 Hey, hey, big item. It's that Stepnes tape that we're

1 worried about. And not surprisingly, communicating that to  
2 the folks at CBS, what do they say? They say, Hold the  
3 tapes. Not surprisingly, you got potential litigation, save  
4 everything you can get your hands on.

5 But on your point about the in camera review, I  
6 will consider that further and get back to you specifically  
7 on that.

8 THE COURT: You might want to do that before I  
9 issue my order.

10 MR. SULLIVAN: Okay.

11 All right. Your Honor, the second thing I was  
12 about to discuss is the whole issue of prejudice. Even if  
13 the Plaintiff could demonstrate bad faith, which as you know  
14 we take the position obviously that they cannot, sanctions  
15 are only appropriate if the moving party has been  
16 prejudiced. Here, Plaintiffs cannot possibly prove  
17 prejudice. The missing tape contained footage of an  
18 interview with the Plaintiff witnessed by several people,  
19 including his own lawyer. Stepnes and his counsel know  
20 quite well what happened during that interview because they  
21 were there. They were present.

22 In their amended complaint, in direct  
23 contradiction of what they tell the Court today, what they  
24 tell your Honor now, Plaintiffs claimed that the key images  
25 from that interview were the supposedly stricken facial

1 expressions of Esme Murphy which were not captured on the  
2 tape because this is a one-shot interview. It's not a  
3 two-shot where you have the reporter on tape. So they say  
4 what was key was seeing that Esme Murphy, hearing  
5 information from the Plaintiffs, that she showed all these  
6 doubts about her story.

7 THE COURT: I know they said that but I think now  
8 they have also made reference to the fact that they want to  
9 use the expression on Mr. Stepnes' face to show that the --  
10 that by their description that they did this -- they made  
11 him look bad on the video by only showing his eyes and they  
12 only show the rest of his expression during the interview.  
13 At least that's what I heard Ms. Clark argue today.

14 MR. SULLIVAN: She did indeed assert that.

15 Your Honor, before they knew that the interview  
16 tape was missing, they downplayed the significance of that  
17 tape and emphasized that the only two witnesses, because of  
18 the way the WCCO people were positioned in the room, the  
19 only two witnesses to what Murphy's face looked like during  
20 that interview, again, were Stepnes and his attorney. They  
21 called Ms. Clark a witness in their amended complaint. Now,  
22 one of the things they found problematic is that Ms. Clark  
23 may have to testify. They kind of identified themselves in  
24 that capacity previously.

25 THE COURT: Let me tell you one of the things I

1 have a problem with, and maybe this is addressing Ms. Clark,  
2 and that we're very early on in this suit now and it's very  
3 difficult for me, and I think certainly at this stage, to be  
4 making decisions, trial decisions, about evidence that  
5 should be excluded or stricken during the trial or to  
6 make -- to be saying that there are going to be adverse  
7 instructions to the jury at this stage of the proceedings.  
8 And so I have -- I have some concern about that in -- before  
9 we are too far along here, making that type of a  
10 determination. I suppose that I could at this early stage,  
11 if I concluded it was appropriate, make some type of a  
12 finding about spoliation and then whatever consequences  
13 would follow would follow. But, frankly, I am -- I'm not  
14 saying I'm going to do that, but I'm just trying to think  
15 through what would be appropriate at this stage of the  
16 litigation.

17 MR. SULLIVAN: I agree and I think we had a  
18 footnote in our brief that made that very point. And that  
19 was that even if your Honor were to conclude, which we  
20 submit obviously you should not, but even if you were to  
21 conclude that there had been spoliation, we are way too  
22 premature to determine what would be an appropriate  
23 sanction.

24 For example, on the whole issue of prejudice,  
25 Plaintiff says that, Oh, there are these disputes between

1 Mr. Stepnes and Esme Murphy about what was said. I don't  
2 know that that's indeed accurate. Number one, we haven't  
3 yet taken Mr. Stepnes's deposition so we don't know what  
4 he's going to say. Number two, and more particularly, your  
5 Honor, some of these things that Ms. Clark offers like this  
6 intake valve, outtake valve explanation, Esme Murphy indeed  
7 testified about that. She didn't testify that it was not  
8 said. She said basically that it made no sense to her so  
9 she wasn't about to include that in her piece because she  
10 didn't think it would make any sense to her readers either.

11 That, your Honor, on that the law couldn't be  
12 clearer. What these are complaints about are editorial  
13 judgments that were made by Esme Murphy a reporter and the  
14 TV station. Those are squarely within the province. The  
15 First Amendment places it within the province of editors.  
16 Plaintiffs don't come in and wrestle around on that stuff.  
17 That doesn't constitute prejudice.

18 So, your Honor, basically our position is there's  
19 no evidence, no evidence whatsoever, that WCCO intentionally  
20 destroyed that tape and there has been no prejudice to  
21 Plaintiffs, in any event, that would require or make  
22 spoliation sanctions appropriate in this case.

23 THE COURT: Thank you, Mr. Sullivan.

24 Mr. Moore, do you have a dog in this?

25 MR. MOORE: We do not.

1 THE COURT: Would you like some reply?

2 MS. CLARK: Yes, your Honor. Thank you.

3 Actually, during the break we were wondering if  
4 the Court wanted to mark what was on the ELMO during the  
5 first session as a Court Exhibit?

6 THE COURT: Why don't you mark it, so we have it,  
7 why don't you mark that as Exhibit A.

8 MS. CLARK: Should I give it to your clerk?

9 THE COURT: Yes, please. Let the record reflect  
10 that we have marked as Hearing Exhibit A the drawing that  
11 Ms. Clark made in connection with the attorney-client motion  
12 that was argued earlier.

13 MS. CLARK: On the timing issue, we talked about  
14 this a little bit at the Rule 16. Plaintiffs were already  
15 disclosing that we thought that this was the issue. And my  
16 recollection was that your Honor thought it would be better  
17 to bring it earlier rather than later. And we were kind  
18 of -- that's what we were planning.

19 Now, I do agree that there is a little bit of  
20 overlap between what is appropriate for the -- for a judge  
21 to do at this time and what's appropriate for the trial  
22 judge to do. And I think it would look something like this.  
23 That this Court could rule, just as an example, that there's  
24 evidence of spoliation. If an adverse inference instruction  
25 is appropriate, that the Court says -- deem that an adverse

1 inference instruction is appropriate. Precisely what that  
2 adverse inference instruction is may be the purview of the  
3 trial judge just before the trial. But at least we don't  
4 have to in motions in limine, your Honor, have a really  
5 almost summary judgment volume worth of evidence that we're  
6 putting before the Article III Judge.

7 What Judge Mayeron did was in the non-dispositive  
8 motion some distance before the trial, she ordered the  
9 suppression of evidence, and that we then settled that case  
10 so we didn't have a trial so we didn't see how that played  
11 out. But she did make that ruling as a Magistrate Judge.  
12 It's obviously not dispositive relief. She was -- I think  
13 Mr. Moore was in that case with me. She was pretty specific  
14 on what could not be put into evidence by the City at trial.

15 Obviously the Article III Judge might have to  
16 grapple with that at trial. You know, we always have the  
17 devil in the details and maybe questions being asked of a  
18 witness and the judge has to rule on it, but Judge Mayeron  
19 was pretty detailed.

20 It does seem, however, that if either -- and by  
21 the way, we did ask in a Meet and Confer posture whether a  
22 redacted version of the July 16 e-mail would be produced to  
23 us and it was not. So we did try kind of that path method.  
24 But if in fact the Court orders that the July 16 e-mail be  
25 produced, or if CBS counsel, upon consideration, gives it

1 either to Plaintiff or to the Court, it's possible also that  
2 that could change some of the outcome. And to that extent  
3 we would -- we understand the Court wondering if the record  
4 is actually complete at this time. Obviously, if the e-mail  
5 said something like make sure you send that e-mail or that  
6 tape of the interview out here to New York, then maybe the  
7 record isn't complete.

8 One of the arguments made by Mr. Sullivan just now  
9 is that the only thing at issue with regard to the factual  
10 dispute between what Clark said to Murphy about this whole  
11 intake valve/exit valve issue is, according to CBS, is she  
12 didn't think it would make sense by her listeners. She  
13 should be able to be impeached by the tape itself. If it's  
14 played to the jury and the jury hears it and they understand  
15 it, that they could go, Boy, she did not put this on the air  
16 because it wasn't understandable to people like us? She  
17 didn't put it on the air because she didn't want to show  
18 that side of the story. We don't have that evidence to do  
19 that for the jury now.

20 Obviously we disagree that we ever downplayed the  
21 importance of that interview. When I drafted the complaint  
22 I assumed it would flow in discovery. That we would have  
23 the tape. So there's no point in putting down details about  
24 what occurred in that session. But because of case law,  
25 important in broadcast defamation cases about whether or not

1 the reporter doubted her version of the facts, that's why we  
2 talked about Murphy's face. In other words, it was legally  
3 relevant in the complaint. It had nothing to do -- we  
4 assumed that we would get the video in discovery.

5 We do not agree, there is a dispute that within an  
6 hour of the July 16th e-mail that Bill Kruskop started to  
7 collect tapes. Kruskop testified that after Libin told him  
8 to collect the tapes he started to do that, but he couldn't  
9 remember how he was told or when he was told. So this  
10 notion that now -- and by the way, I didn't even know there  
11 was a July 16th e-mail until I was standing in the hall one  
12 minute before Scott Libin's deposition.

13 We would argue as well that there really isn't any  
14 evidence in the record of a litigation hold by counsel.  
15 That that's really missing. And we also made the argument  
16 in Meet and Confer some version of -- it's not really fair  
17 to hold out the July 16 e-mail as the litigation hold and  
18 yet never let us get behind that and look and be able to  
19 argue the other side of it.

20 Very much like the *Major Tours* case, therefore,  
21 really what's being questioned is whether or not the CBS  
22 legal counsel in New York ever did a litigation hold which  
23 would put us squarely within *Major Tours*. We are not  
24 alleging that there was conspiracy to commit a crime but we  
25 are talking about the spoliation only.

1           And where I'll end, is I think the Court did  
2       ferret this out, that really what we've got with waves of  
3       these spoliation pieces of evidence, and it was disturbing  
4       to later get different versions of things. But there's a  
5       point -- I mean, I didn't really see any percentage in  
6       attempting to argue that something might have been on to the  
7       tape after it was given. I didn't really want to go there.  
8       We kind of left that be.

9           But I'm not sure how many times I'm supposed to be  
10      taking these people's depositions. I had to take Kruskop's  
11      twice, I had to take Murphy's twice. Am I now expected to  
12      have taken Berg twice? Are they really suggesting that?  
13      You know, it seems just like it's too much burden on us when  
14      originally the burden should have been on them to preserve  
15      it. Thank you.

16           THE COURT: Why don't you stay up there. We have  
17      one final matter to discuss and that is the Motion to Compel  
18      by CBS Defendants which you indicated that you -- I couldn't  
19      quite understand whether you were agreeing to produce the  
20      documents in answer to the interrogatories or not. So would  
21      you address that, please? Do we have a problem or not?

22           MS. CLARK: I don't think we do.

23           THE COURT: Okay.

24           MS. CLARK: We had agreed by the 10th to produce.  
25      The only problem that we saw is then was the process, the

1 special proceeding about the attorney-client privilege going  
2 to interfere. We had actually asked to stay normal  
3 discovery and actually the City did not oppose that. And so  
4 I didn't want to look like I was duping somebody by saying,  
5 Oh, yeah, we're going give it to you but we're going to try  
6 to suspend discovery. So we're going to try to produce  
7 those things.

8 THE COURT: That would be, as I have here, that is  
9 producing the documents in response to document requests  
10 number 30, number 31, number 38, number 39, number 40,  
11 number 41, 42, number 8 and number 9, and answering  
12 interrogatory number 12.

13 MS. CLARK: I don't have those off the top of my  
14 head but I did go through their memorandum and we had agreed  
15 to produce those.

16 The one area that I tried to allude to earlier is  
17 there are some documents responsive to that that would be  
18 about litigation for which there are attorney-client e-mails  
19 in the M box.

20 THE COURT: That's what we call a hall of mirrors  
21 so we'll work that one out.

22 Anything further, Mr. Sullivan?

23 MR. SULLIVAN: Your Honor, just this. I will get  
24 to the Court -- I don't have a clean copy of that e-mail  
25 that you would like to see, the July 16 e-mail -- but I will

1 get that to the Court promptly so that you can consider that  
2 in -- this is for in camera review.

3 THE COURT: Well, I'll consider that in  
4 conjunction with then the issue of whether the  
5 attorney-client privilege applies to it.

6 MR. SULLIVAN: Fair enough, your Honor.

7 And the last thing is on this last matter about  
8 the discovery, does the Court intend to enter an order to  
9 that effect.

10 THE COURT: I do because they have withdrawn any  
11 objection to it. And since you made the motion, I will  
12 state that in our order that the -- that it is granted on  
13 the basis of the Plaintiffs' withdrawal of any objection.

14 MR. SULLIVAN: Thank you, your Honor.

15 THE COURT: All right. I think that that exhausts  
16 us all. Thank you. We will stand adjourned.

17 (Court adjourned at 1:14 p.m.)

18 \* \* \*

19 I, Carla R. Bebault, certify that the foregoing is  
20 a correct transcript from the record of proceedings in the  
21 above-entitled matter.

22  
23  
24 Certified by: s/Carla R. Bebault  
25 Carla R. Bebault, RPR, CSR