
SENATOR MITCH MCCONNELL VS. FEDERAL ELECTION COMMISSION

LUKE P. McLOUGHLIN - 9/10/02

CONCORDANCE AND CONDENSED TRANSCRIPT
PREPARED BY:

Ellen Grauer


National & International

Court Reporting Co.

133 East 58th Street, Suite 1201, New York, New York 10022

Phone: (212) 750-6434 Fax: (212) 750-1097

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(1)
(2) IN THE UNITED STATES DISTRICT COURT
(3) FOR THE DISTRICT OF COLUMBIA
(4) - - -
(5) SENATOR MITCH McCONNELL, et al. : CIVIL ACTION
Plaintiffs, :
(6) :
vs. : Case No.
(7) : 02-582
FEDERAL ELECTION COMMISSION, :
(8) et al. :
Defendants. :
(9)
(10) - - -
Philadelphia, Pennsylvania
(11) Tuesday, September 10, 2002
(12) - - -
(13) Deposition of LUKE P. McLOUGHLIN, taken
(14) pursuant to notice, at the law offices of
(15) Hoyle, Moris & Kerr, 4900 One Liberty Place,
(16) 1650 Market Street, on the above date,
(17) beginning at approximately 9:10 a.m., before
(18) Michele L. Murphy, RPR-Notary Public.
(19) - - -
(20)
(21)
(22)
(23) ELLEN GRAUER COURT REPORTING, CO.
133 East 58th Street, Suite 1201
(24) New York, New York 10022
212-750-6434
(25) Ref: 46011

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(1)
(2)
(3) FLOYD ABRAMS, ESQUIRE
TAMMY L. ROY, ESQUIRE
(4) Cahil Gordon & Reindel
80 Pine Street
(5) New York, NY 10005
(6) Counsel for Plaintiff
(7)

(8) CHRISTOPHER J. PAOLELLA, ESQUIRE
Cravath, Swaine & Moore
Worldwide Plaza
(9) 825 Eighth Avenue
New York, NY 10019-7475

(10) Counsel for Defendant

(11)
(12) - - -
(13)
(14)
(15) (It was stipulated by and between counsel
(16) that signing, sealing, filing and certification
(17) be waived; and that all objections, except as to
(18) the form of the question, are reserved until the
(19) time of trial.)
(20) - - -
(21)
(22)
(23)
(24)
(25) (INDEX at end of transcript)

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(1)
(2) ... LUKE P. McLOUGHLIN, after having
(3) been duly sworn, was examined and testified as
(4) follows:
(5) BY MR. ABRAMS:
(6) Q. Mr. McLoughlin, I'm Floyd Abrams and I
(7) represent Senator Mitch McConnell in a litigation
(8) against the Federal Election Commission and other
(9) defendants relating to the constitutionality of the
(10) bipartisan campaign format of 2002.
(11) I'll be asking you some questions this
(12) morning and perhaps this afternoon.
(13) Have you ever attended a deposition?
(14) A. Yes.
(15) Q. Have you ever given a deposition?
(16) A. No.
(17) Q. Well, I'll be asking you questions. If any
(18) of them are unclear, please let me know and I'll try
(19) to clarify them, and allow us to proceed from there.
(20) Are you the person who was listed on the
(21) cover of a study called Buying Time 2000 as a
(22) co-author of that study?
(23) A. I'm not sure that's entirely accurate.
(24) Q. You're not listed on the cover of the study
(25) as a co-author?

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(1)
(2) A. I believe I'm listed on the cover of the
(3) study.
(4) Q. That's what I asked you.
(5) And you're described inside the study as
(6) a co-author also; are you not?
(7) A. I don't specifically recall.
(8) Q. I'd like to pass you a document previously
(9) marked as Holman Exhibit-1.
(10) MR. PAOLELLA: Would you mind re-marking
(11) these as McLoughlin exhibits. I just found that it
(12) makes it a little bit easier to keep track.
(13) (Exhibit McLoughlin-1 marked for
(14) identification.)
(15) MR. ABRAMS: Sure. I'll mark then as
(16) McLoughlin Exhibit-1 a copy of a document entitled
(17) Buying Time 2000. On the bottom of the cover it
(18) says "Television advertising in the 2000 Federal
(19) Elections, by Craig B. Holman and Luke P.
(20) McLoughlin." And I direct your attention,
(21) Mr. McLoughlin, to Page 6, which I'll put before
(22) you.
(23) Does that refresh your recollection that
(24) you are described as one of the two authors of this
(25) study in the study?

Page 5

- (1)
- (2) **THE WITNESS:** Could you read the
- (3) question back.
- (4) **(The court reporter read back as**
- (5) **requested.)**
- (6) **THE WITNESS:** Yes.
- (7) **BY MR. ABRAMS:**
- (8) **Q.** You graduated from Harvard University in
- (9) 2000?
- (10) **A.** True.
- (11) **Q.** With a BA?
- (12) **A.** True.
- (13) **Q.** And you are now a first-year law student at
- (14) the University of Pennsylvania?
- (15) **A.** That is correct.
- (16) **Q.** When did you begin working at the Brennan
- (17) Center?
- (18) **A.** July 6, 2000.
- (19) **Q.** Who hired you to work there?
- (20) **A.** The person I was interacting with when I was
- (21) interviewing for the Brennan Center was a woman by
- (22) the name of Deborah Goldberg. She was the one who
- (23) informed me that I had been hired.
- (24) **Q.** Now, at some time did you read a study called
- (25) Buying Time 1998?

Page 6

- (1)
- (2) **A.** Yes.
- (3) **Q.** And was that out by the time you started work
- (4) at the Brennan Center?
- (5) **A.** I believe it was.
- (6) **Q.** And did you read it before you began work
- (7) there or after?
- (8) **A.** I believe I read it after.
- (9) **Q.** When did you cease working at the Brennan
- (10) Center?
- (11) **A.** May 31st, 2002.
- (12) **Q.** Have you read the entirety of Buying Time
- (13) 2000?
- (14) **A.** Not recently.
- (15) **Q.** But at one time you read it?
- (16) **A.** True.
- (17) **Q.** And did you prepare drafts of certain
- (18) portions of it?
- (19) **A.** I did do that.
- (20) **Q.** I notice that at various times in the -- in
- (21) Buying Time 2000 the words, quote, sham issue ads,
- (22) unquote, appear. Is that correct?
- (23) **A.** I don't specifically recall.
- (24) **Q.** Did you have an understanding, as of the time
- (25) you were working at the Brennan Center, as to what a

Page 7

- (1)
- (2) sham issue ad was?
- (3) **A.** Generally speaking. That is a term that I
- (4) had read and I believe I understood its meaning.
- (5) **Q.** And what was your understanding?
- (6) **A.** Basically synonymous with electioneering
- (7) issue ad.
- (8) **Q.** And what is an electioneering issue ad?
- (9) **A.** An ad that by law is treated for contribution
- (10) and disclosure purposes as issue advocacy, where, in
- (11) fact, it bears all the hallmarks of an ad designed
- (12) to promote or defeat a candidate.
- (13) **Q.** In other words, I have seen in Buying Time
- (14) 2000 the words, quote, magic words, unquote. Do you
- (15) recall those words appearing in the study?
- (16) **A.** Absolutely.
- (17) **Q.** And what was your understanding as to what
- (18) those words meant?
- (19) **A.** Those words refer to specific examples laid
- (20) out in Buckley, Footnote 52.
- (21) **Q.** That's the Supreme Court ruling of Buckley
- (22) versus Valeo?
- (23) **A.** Yes.
- (24) **Q.** And do you recall, did the Supreme Court use
- (25) the words "magic words"?

Page 8

- (1)
- (2) **A.** I don't specifically recall.
- (3) **Q.** I want to mark separately a document which is
- (4) the last few pages of Buying Time 2000 but for
- (5) convenience's sake, we'll deal with it separately.
- (6) It's already been marked as Holman Exhibit-5.
- (7) **MR. ABRAMS:** Off the record.
- (8) **(Discussion held off the record.)**
- (9) **MR. ABRAMS:** And I will mark it today as
- (10) McLoughlin Exhibit-2.
- (11) **(Exhibit McLoughlin-2 marked for**
- (12) **identification.)**
- (13) **BY MR. ABRAMS:**
- (14) **Q.** Can you have a look at that and then after
- (15) you look at it, tell me what it is?
- (16) **A.** These are Appendix C and Appendix D of Buying
- (17) Time 2000.
- (18) **Q.** What is the nature of the appendix? What
- (19) does it contain?
- (20) **A.** Which one?
- (21) **Q.** The entirety of the document called Coding
- (22) the Commercials.
- (23) **A.** I'm sorry. I'm looking at one that has
- (24) Appendix C and Appendix D in it.
- (25) **Q.** Both of them together. Why don't we start

Page 9

- (1)
- (2) with Appendix C.
- (3) A. Appendix C is a coding protocol.
- (4) Q. And what does that mean, "a coding protocol"?
- (5) A. A questionnaire presented to the student
- (6) coders for their aspect of the study.
- (7) Q. And who presented this to the student coders?
- (8) A. I'm not sure I understand.
- (9) Q. You say that Appendix C is a document which
- (10) was presented to the student coders. I'm asking you
- (11) who gave it to the coders?
- (12) A. Well, the word I used, presented, may not
- (13) have been correct. It was the ad -- excuse me. It
- (14) was the questionnaire used by the coders in coding
- (15) the ads.
- (16) Q. And do you know who wrote Appendix C?
- (17) A. I do not. I do not specifically recall.
- (18) Q. Did you make one or more visits to Wisconsin
- (19) to meet with a professor there who was working on
- (20) this study?
- (21) A. I made one visit.
- (22) Q. And who was the professor?
- (23) A. Ken Goldstein.
- (24) Q. And can you tell us when that was, to the
- (25) best of your recollection?

Page 10

- (1)
- (2) A. Somewhere around the end of October of 2000.
- (3) Q. And what was the purpose of your visit?
- (4) A. The purpose of the visit was to become better
- (5) acquainted with SPSS and to assist in whatever way
- (6) Ken needed me.
- (7) Q. What is SPSS?
- (8) A. SPSS is a statistical program useful in
- (9) creating tables of large amounts of data -- with
- (10) large amounts of data. Excuse me.
- (11) Q. And was that used in the preparation of data
- (12) that was ultimately used in Buying Time 2000?
- (13) A. Yes.
- (14) Q. Was it essentially a learning trip for you,
- (15) to understand how it worked?
- (16) A. That was definitely one element of the trip.
- (17) Q. What else was involved?
- (18) A. The -- the trip involved attempting to
- (19) retrieve Ken's assistance in working with some of
- (20) the figures for clarification purposes.
- (21) Q. Had you received certain figures earlier
- (22) which you thought it would be helpful to have
- (23) clarification about?
- (24) A. There was a question pending from Rick Hasen,
- (25) that I was asked to see if Ken, using the database,

Page 11

- (1)
- (2) could help us answer.
- (3) Q. And what was that question?
- (4) A. I believe it was a question regarding ads and
- (5) the 60-day rule.
- (6) Q. Who is Rick Hasen?
- (7) A. A professor in California.
- (8) Q. And what was he doing which had anything to
- (9) do with what became Buying Time 2000?
- (10) A. He was preparing an article.
- (11) Q. And do you know on whose behalf he was
- (12) preparing it on? Was he doing it for himself? Was
- (13) he doing it for the Brennan Center? Was he doing it
- (14) for someone, or something else?
- (15) A. I don't specifically recall.
- (16) Q. And how did you come to speak with Professor
- (17) Hasen?
- (18) A. I don't specifically recall how it began.
- (19) MR. ABRAMS: I'll mark as McLoughlin
- (20) Exhibit-3 an e-mail to Mr. McLoughlin from E. Joshua
- (21) Rosenkranz.
- (22) MR. PAOLELLA: Off the record a second.
- (23) (Discussion held off the record.)
- (24) (Exhibit McLoughlin-3 marked for
- (25) identification.)

Page 12

- (1)
- (2) BY MR. ABRAMS:
- (3) Q. Do you recall seeing this document before?
- (4) A. I don't specifically recall this e-mail.
- (5) Q. Did you learn at some point that Professor
- (6) Hasen had been commissioned by the Brennan Center to
- (7) do an op-ed and a scholarly study based on its CMAG
- (8) data?
- (9) A. I don't specifically recall.
- (10) Q. Did a time come when you sought to obtain
- (11) copies of storyboards from 1998 of independent
- (12) groups?
- (13) A. Yes.
- (14) Q. And at whose request, if you recall, did you
- (15) do that?
- (16) A. As part of the work we were doing for Rick.
- (17) Q. Do you recall who asked you to do that?
- (18) A. I don't specifically recall.
- (19) Q. Returning to Exhibit-3 entitled Coding the
- (20) Commercials --
- (21) MR. PAOLELLA: Exhibit-2?
- (22) MR. ABRAMS: Exhibit-2. Excuse me.
- (23) BY MR. ABRAMS:
- (24) Q. You pointed out to me correctly that that's
- (25) comprised of two appendices, one titled C and one

Page 13

- (1)
- (2) titled D. With respect to Appendix D, can you tell
- (3) me first who wrote the text on Page 102, if you
- (4) know?
- (5) **A. I don't recall if it was me or Craig.**
- (6) **Q. Craig Holman?**
- (7) **A. Yes.**
- (8) **Q. Now, it states that, quote, A sample**
- (9) **storyboard is presented here to demonstrate what the**
- (10) **undergraduate students had available to them when**
- (11) **coding the ads. Students utilized the coding**
- (12) **protocol displayed in Appendix C to analyze the**
- (13) **storyboards. The storyboard contains the full ad**
- (14) **script and ad visuals captured every four to five**
- (15) **seconds, end quote.**
- (16) **Was that your understanding at the time**
- (17) **you worked on Buying Time 2000?**
- (18) **A. Yes, it was.**
- (19) **Q. Directing your attention to the sample**
- (20) **storyboard that is the next to Appendix D. Can you**
- (21) **tell me first who wrote the material on the top of**
- (22) **that document, all that material about brand, title**
- (23) **and the like?**
- (24) **A. I believe that comes from CMAG.**
- (25) **Q. And what is CMAG?**

Page 14

- (1)
- (2) **A. The private company that the study worked**
- (3) **with to get the storyboards on the data.**
- (4) **Q. Now, was this storyboard a storyboard**
- (5) **reflecting an ad that was broadcast at some point in**
- (6) **the 2000 campaign?**
- (7) **A. I believe it was an ad that aired in the 2000**
- (8) **campaign.**
- (9) **Q. Was this the sort of ad you were referring to**
- (10) **earlier when you used the words "sham issue ads"?**
- (11) **A. I do not believe so.**
- (12) **Q. Do you believe that this is a, quote,**
- (13) **genuine, unquote, issue ad?**
- (14) **A. Yes.**
- (15) **Q. And why is that?**
- (16) **A. The focus of the ad is on the issue. The**
- (17) **reference to candidate is far more incidental than**
- (18) **in a typical 30-second campaign ad -- I should just**
- (19) **say 30-second political commercial.**
- (20) **Q. Do you have a view as to whether this**
- (21) **advertisement was more favorable or more unfavorable**
- (22) **to Vice-President Gore?**
- (23) **A. I'm not sure. I haven't really thought about**
- (24) **that question.**
- (25) **Q. Can you tell by just looking at the document?**

Page 15

- (1)
- (2) **A. In my subjective opinion, it might be**
- (3) **considered pro Gore.**
- (4) **Q. And why is that?**
- (5) **A. It refers to a public issue more closely**
- (6) **associated with the Gore campaign.**
- (7) **Q. Do you know if this ad was broadcast within**
- (8) **60 days of the conclusion of the 2000 campaign?**
- (9) **A. I don't specifically recall.**
- (10) **Q. Do you recall sending to Professor Hasen**
- (11) **storyboards reflecting advertisements shown in the**
- (12) **last 60 days of the 1998 campaign?**
- (13) **A. I do recall that.**
- (14) **Q. I'd like to show you a document previously**
- (15) **marked as Holman Exhibit-6, which I will now mark as**
- (16) **McLoughlin Exhibit-4.**
- (17) **(Exhibit McLoughlin-4 marked for**
- (18) **identification.)**
- (19) **BY MR. ABRAMS:**
- (20) **Q. Is this a letter that you sent? Is this a**
- (21) **copy of a letter that you sent?**
- (22) **A. Yes, it is.**
- (23) **Q. And are the circles around the numbers on**
- (24) **Page 2 of the document written by you?**
- (25) **A. No, I believe they are not.**

Page 16

- (1)
- (2) **Q. And is the handwriting above those numbers on**
- (3) **Page 2 your handwriting?**
- (4) **A. No, they are not.**
- (5) **Q. Do the numbers on Page 2 conform to certain**
- (6) **numbers that were written on storyboards which were**
- (7) **prepared during the 1998 campaign?**
- (8) **A. They do.**
- (9) **Q. On Page 1, when you said that there were,**
- (10) **quote, two genuine ads, Ad No. 12 and Ad No. 318,**
- (11) **unquote, did that refer to storyboards that contain**
- (12) **those numbers on them?**
- (13) **A. Yes, that were marked with that number, each**
- (14) **of those numbers.**
- (15) **MR. ABRAMS: I want to mark as**
- (16) **McLoughlin Exhibit-5 a document that has previously**
- (17) **been marked as Holman Exhibit-7.**
- (18) **(Exhibit McLoughlin-5 marked for**
- (19) **identification.)**
- (20) **BY MR. ABRAMS:**
- (21) **Q. Was this one of the two storyboards that you**
- (22) **sent which reflected a genuine ad from the 1998**
- (23) **campaign?**
- (24) **MR. PAOLELLA: Objection.**
- (25) **THE WITNESS: It was one of the two**

Page 17

- (1)
- (2) storyboards I sent that had been coded as genuine,
- (3) yes.
- (4) **BY MR. ABRAMS:**
- (5) **Q.** Now, how did you know? What process did you
- (6) have to engage in to determine that that ad had been
- (7) coded as genuine?
- (8) **A.** Using SPSS and the 1998 database, asking it a
- (9) series of queries.
- (10) **Q.** And from that, you determined that Ad No. 12
- (11) and Ad 318 had been coded as genuine ads?
- (12) **A.** From that, the database reflected -- or I
- (13) should say the database contained codes for genuine
- (14) for those two ads.
- (15) **Q.** And if you know, who had made that decision,
- (16) that these two ads were to be treated as genuine
- (17) issue ads?
- (18) **A.** Other than the coders?
- (19) **Q.** Well, including the coders.
- (20) **A.** I believe just the coders in Wisconsin -- or,
- (21) excuse me, in Arizona, and then the data was then --
- (22) those questionnaires were compiled into data form.
- (23) **Q.** I want to mark as McLoughlin Exhibit-6 an
- (24) e-mail written from Rick Hasen to you dated January
- (25) 12, 2001.

Page 18

- (1)
- (2) (Exhibit McLoughlin-6 marked for
- (3) identification.)
- (4) **BY MR. ABRAMS:**
- (5) **Q.** Could you have a look at this, please.
- (6) **A.** (Witness complies.)
- (7) **Q.** Were these e-mails back and forth between you
- (8) and Professor Hasen referring, in part, to
- (9) Exhibit-7?
- (10) **A.** Yes.
- (11) **Q.** And did you write to Professor Hasen that,
- (12) quote, The reason that it is not an attack ad on
- (13) Coats is that it is a cookie-cutter ad, with the
- (14) almost identical ad being run against Snowe and
- (15) others, end quote.
- (16) Can you explain what that meant?
- (17) **A.** The ad known as Ad 12 referred to a specific
- (18) bill number before the Senate. This advertisement
- (19) was part of a series of advertisements targeting
- (20) senators regarding that bill.
- (21) **Q.** And what do you mean by "cookie-cutter ad"?
- (22) **A.** The -- there were multiple ads airing in
- (23) different areas which were identical but for the
- (24) specific candidate they referred to in the final
- (25) clip of the ad.

Page 19

- (1)
- (2) **Q.** And why did you conclude that because it was
- (3) a cookie-cutter ad, that it was not an attack ad?
- (4) **A.** That is not something I concluded.
- (5) **Q.** When you said, "The reason that it is not an
- (6) attack ad on Coats is that it is a cookie-cutter ad
- (7) with the almost identical ad being run against Snowe
- (8) and others," what did you mean?
- (9) **A.** I believe that one sentence was, you know,
- (10) part of a larger e-mail and series of e-mails
- (11) attempting to explain to Rick the information
- (12) contained in Buying Time '98 regarding these two
- (13) particular ads.
- (14) **Q.** Well, was it your understanding that if an ad
- (15) was a cookie-cutter ad that it was more likely to be
- (16) a genuine issue ad rather than a sham issue ad?
- (17) **A.** No.
- (18) **Q.** What conclusions, if any, did you reach from
- (19) the fact that it was a cookie-cutter ad?
- (20) **A.** I didn't -- I wasn't attempting to reach any
- (21) conclusions about the 1998 data. The 1998 data
- (22) spoke for itself.
- (23) **Q.** And when Professor Hasen wrote back to you
- (24) saying that it turned out, after he did some
- (25) research, that the ad was not trying to get Coats

Page 20

- (1)
- (2) defeated for reelection, it says he was retiring
- (3) from the Senate, had you known that before?
- (4) **A.** I did not.
- (5) **Q.** And when he wrote to you that the question
- (6) was why the AF of L ran the ad and that Professor
- (7) Hasen was asking whether the AF of L was trying to
- (8) get action on the bill or was trying simply to set
- (9) forth an attack on Republicans as a group, did you
- (10) respond to him?
- (11) **A.** I don't specifically recall.
- (12) **Q.** Do you know if he ever told you if he found
- (13) out the answers to those questions?
- (14) **A.** No, I don't believe he did. I don't have any
- (15) specific recollection about that.
- (16) **Q.** He wrote in the last line, quote, In other
- (17) words, was it genuine issue advocacy, or, if not
- (18) sham issue advocacy (b/c it is not targeted at a
- (19) particular candidate) electioneering aimed at
- (20) dissing the Republican party, unquote.
- (21) Did you understand or think you
- (22) understood what he was saying?
- (23) **A.** I believe I did.
- (24) **Q.** What is the essence of what was communicated
- (25) to you?

Page 21

- (1)
- (2) **A. I understood that Rick was attempting to get**
- (3) **more information about this particular set of ads.**
- (4) **Q. He used the term here "genuine issue**
- (5) **advocacy" and that term also recurs in Buying Time**
- (6) **2000. What was your understanding as to what was**
- (7) **meant by "genuine issue advocacy"?**
- (8) **A. Loosely speaking, genuine issue advocacy**
- (9) **refers to advertisements by -- usually by**
- (10) **independent groups that attempt to provide**
- (11) **information or build support for a particular public**
- (12) **issue or bill, not promote or defeat a specific**
- (13) **candidate.**
- (14) **Q. And was genuine issue advocacy, in your view,**
- (15) **limited to providing support or information about**
- (16) **particular legislation --**
- (17) **A. No.**
- (18) **Q. -- as opposed to particular issues?**
- (19) **A. No.**
- (20) **Q. In your review of storyboards from 1998 and**
- (21) **2000, did you find any that appeared to you to have**
- (22) **characteristics of both genuine issue ads and what**
- (23) **you referred to as electioneering ads?**
- (24) **Let me be clearer. Were there some ads**
- (25) **that dealt simultaneously with public issues and**

Page 22

- (1)
- (2) **seemed to be urging the viewer/reader to support a**
- (3) **candidate in an election?**
- (4) **A. Some ads -- some electioneering ads mentioned**
- (5) **policy issues.**
- (6) **Q. And did some policy ads mention individuals**
- (7) **who were running for office?**
- (8) **A. There were some ads like that.**
- (9) **MR. ABRAMS: I want to mark now as**
- (10) **McLoughlin Exhibit-7 a storyboard with the number**
- (11) **318 on the side of it.**
- (12) **(Exhibit McLoughlin-7 marked for**
- (13) **identification.)**
- (14) **BY MR. ABRAMS:**
- (15) **Q. This is also Holman Exhibit-8.**
- (16) **And is it your understanding that this**
- (17) **advertisement was from the 1998 campaign and had**
- (18) **been coded as a genuine issue ad?**
- (19) **A. It was from the 1998 study, yes.**
- (20) **Q. And had it been coded as a genuine issue ad**
- (21) **in 1998?**
- (22) **A. I believe it had.**
- (23) **Q. Do you know why it had been so coded?**
- (24) **MR. PAOLELLA: Objection.**
- (25) **Go ahead and answer.**

Page 23

- (1)
- (2) **THE WITNESS: I believe it was the**
- (3) **coding process that took place.**
- (4) **BY MR. ABRAMS:**
- (5) **Q. Would you have coded it as a genuine issue**
- (6) **ad?**
- (7) **A. Yes.**
- (8) **Q. Why?**
- (9) **A. The ad's focus is on taxes. It explicitly**
- (10) **does not show a preference for either of the two**
- (11) **Nevada candidates for Senate.**
- (12) **Q. And had the ad been about taxes but indicated**
- (13) **some preference for one of the candidates, would you**
- (14) **have then viewed it as a sham issue ad?**
- (15) **A. I'm not sure how to answer that hypothetical.**
- (16) **Q. You're unable to answer?**
- (17) **A. I'm not sure I understand what you're -- how**
- (18) **you would change this ad to have me answer**
- (19) **differently.**
- (20) **Q. Suppose the ad did not contain the name of**
- (21) **both candidates, but it simply said call Harry Reid**
- (22) **and left Ensign's name off entirely. Would that**
- (23) **have made any difference in your coding if you had**
- (24) **been involved in that?**
- (25) **So it would be very specific. Suppose**

Page 24

- (1)
- (2) **the next-to-last line had been, Call Harry Reid and**
- (3) **tell him no matter who goes to Washington, you want**
- (4) **them to cut your taxes. Otherwise they'll be**
- (5) **nothing left but the crumbs.**
- (6) **Would that have changed your view as to**
- (7) **whether this was or was not a genuine issue ad?**
- (8) **A. So it mentions Harry Reid, but explicitly**
- (9) **tells the voter no matter who goes to Washington?**
- (10) **Q. Correct.**
- (11) **A. I might still be inclined to call that a**
- (12) **genuine issue ad.**
- (13) **Q. Would that be a close call for you in coding**
- (14) **it?**
- (15) **A. Well, once it's coded, it's either genuine or**
- (16) **it's an electioneering --**
- (17) **Q. But in the process of deciding how to code**
- (18) **it, would that have been a close call?**
- (19) **A. I'm not sure I can answer that hypothetical,**
- (20) **having seen this ad so many times, trying to think**
- (21) **of it differently with one line different. I'm not**
- (22) **sure how I can answer that.**
- (23) **Q. Let's take a document which had been marked**
- (24) **as Holman Exhibit-10 and which I will now mark as**
- (25) **McLoughlin Exhibit-8.**

Page 25

(1)

(2) (Exhibit McLoughlin-8 marked for
(3) identification.)

(4) BY MR. ABRAMS:

(5) Q. Now, this is one that was coded in 1998 as a
(6) sham issue ad, correct?

(7) A. I don't specifically recall.

(8) Q. Was this on the list of ads that you advertised
(9) to to Professor Hasen in the document we marked
(10) earlier as Exhibit-4? Why don't you put that in
(11) front of you.

(12) Is this one of the ones referred to on
(13) Page 2 of Exhibit-4?

(14) A. I believe it is.

(15) Q. And that tells us, doesn't it, that this was
(16) coded as a sham issue ad, correct?

(17) A. Yes.

(18) Q. And my question to you now is, would you code
(19) it as that?

(20) A. I would still call it an electioneering issue
(21) ad.

(22) Q. And the words "electioneering issue ad" are
(23) words which refer to what some people sometimes call
(24) sham issue ads?

(25) A. Yes.

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(1)

(2) Q. Why would you so characterize it?

(3) A. The -- excuse me. There is no specific bill
(4) number mentioned or it's focusing around the
(5) Republican Congress and Northup.

(6) Q. Is she a Republican?

(7) A. I believe she is.

(8) Q. Do you think the coders were told whether she
(9) was a Republican or not?

(10) MR. PAOLELLA: Objection.

(11) THE WITNESS: I doubt it. I don't have
(12) a specific recollection about what the coders were
(13) told.

(14) BY MR. ABRAMS:

(15) Q. You don't believe, do you, that the coders
(16) were told the political party of people listed in
(17) any of these ads, do you?

(18) MR. PAOLELLA: Objection.

(19) THE WITNESS: I would doubt that they
(20) were told.

(21) BY MR. ABRAMS:

(22) Q. Is there something in the ad itself that
(23) tells us that she's a Republican?

(24) A. Nothing explicitly, no.

(25) Q. Is there something implicitly?

Page 27

(1)

(2) A. That's hard for me to answer. I just dealt
(3) with that particular congresswoman in terms of
(4) seeing that name with an R next to it, just knowing
(5) about politics. I'm not sure how I would answer the
(6) implicit question.

(7) Q. Knowing that she is a Republican, tell us why
(8) you believe this ad should be viewed as what you've
(9) called an electioneering ad.

(10) A. It's -- the focus of the ad is Northup and
(11) her relationship with this Republican Congress and
(12) extremely negatively defined plan. The tone of the
(13) ad to me associates Northup with this picture of
(14) Gingrich, the headline. There is a strong element
(15) of Northup being on the wrong end, according to the
(16) advertiser.

(17) Q. Is this an ad which deals with an issue of
(18) public importance other than who to elect?

(19) A. I don't recall if at the time that was a live
(20) plan in 1998.

(21) Q. Was the treatment of Social Security and the
(22) utilization of Social Security funds a live issue
(23) then?

(24) A. I don't specifically recall within the 60
(25) days of that election. It may have; it may not have

Page 28

(1)

(2) been.

(3) Q. Is that a relevant factor to you in
(4) determining whether this is what you consider a
(5) genuine issue ad or an electioneering ad?

(6) A. I believe it is relevant in the legislative
(7) context.

(8) Q. I'm not sure what you mean by the end of your
(9) answer. I asked whether it was relevant to you in
(10) making a determination as to how to view the ad, and
(11) you told me it's relevant in the legislative
(12) context. Is it relevant in a coding context?

(13) A. I'm not sure how I would answer that. I'm
(14) not sure I understand your question.

(15) Q. Was it relevant for you in determining that
(16) this was what you've called an electioneering ad to
(17) know that Congresswoman Northup was a Republican?

(18) A. I don't -- I'm not sure I'm following what
(19) your question is regarding to.

(20) Q. What I'm trying to explore with you is what
(21) it is you need to know to pass an appropriate
(22) judgment, as you view it, as to whether an
(23) advertisement should be treated as what you've
(24) called an electioneering ad or what you've called a
(25) genuine issue ad. So I've asked you about certain

Page 29

- (1)
- (2) factors, to ask if they were relevant or not. One
- (3) of them was was it relevant for you to know that she
- (4) was a Republican.
- (5) **A. Again, I'm not sure how to answer that**
- (6) **knowing -- if you were to have me see the ad and not**
- (7) **knowing and then tell me to see it again after**
- (8) **informing me that she was, I might be able to give**
- (9) **you a better answer.**
- (10) **Q. Would it be relevant for you to know the**
- (11) **answer to the question that you posed to me earlier**
- (12) **about whether the application of Social Security**
- (13) **funds was indeed a live issue in the last 60 days of**
- (14) **the 1998 campaign? Is that a relevant thing for you**
- (15) **to know?**
- (16) **A. I'm not -- I'm really not sure I'm following**
- (17) **you.**
- (18) **Q. When this ad says, quote, Call Congresswoman**
- (19) **Northup and tell her no on this scheme, tell Northup**
- (20) **to put Social Security first, unquote, and when the**
- (21) **last frame on television says, in writing, Put**
- (22) **Social Security first, my question is, is it your**
- (23) **view that this is not an ad about putting Social**
- (24) **Security first?**
- (25) **A. I believe it is an electioneering issue ad.**

Page 30

- (1)
- (2) **Q. And, therefore, is the answer to my question**
- (3) **no?**
- (4) **MR. PAOLELLA: Objection.**
- (5) **THE WITNESS: I'm attempting to give you**
- (6) **the best answer to your question. And I would say**
- (7) **that putting Social Security first does not, to me,**
- (8) **appear to be the primary focus of this ad.**
- (9) **BY MR. ABRAMS:**
- (10) **Q. Is it a focus of the ad?**
- (11) **A. Putting Social Security first is clearly**
- (12) **mentioned.**
- (13) **Q. Is it one of the messages that you take from**
- (14) **the ad, that Social Security should be put first?**
- (15) **A. That's one of the messages that I take.**
- (16) **Q. By the way, did you see any of these ads in**
- (17) **preparation for your testimony today?**
- (18) **MR. PAOLELLA: Objection. I'm**
- (19) **instructing the witness not to answer. That**
- (20) **encroaches on confidential communications between**
- (21) **the attorney and the client.**
- (22) **BY MR. ABRAMS:**
- (23) **Q. Did you speak to anyone at the Brennan**
- (24) **Center, excluding your outside counsel for the**
- (25) **Cravath firm, about your testimony at any time**

Page 31

- (1)
- (2) between August 15th and today?
- (3) **A. I believe I did.**
- (4) **Q. Who was that?**
- (5) **A. I spoke with the communications director,**
- (6) **Scott Schell.**
- (7) **Q. Anyone else?**
- (8) **A. I spoke with Nancy Northup.**
- (9) **Q. Anyone else?**
- (10) **A. Not that I can recall.**
- (11) **Q. Did you speak to Mr. Holman at all?**
- (12) **A. No.**
- (13) **Q. Mr. Rosenkranz?**
- (14) **A. No.**
- (15) **Q. And when did you speak to Mr. Schell?**
- (16) **A. I spoke with him perhaps a week ago. It was**
- (17) **primarily a social call. He said -- he said**
- (18) **something along the lines that he heard I was going**
- (19) **to be deposed soon.**
- (20) **Q. Did he say anything about the substance of**
- (21) **what you might be asked?**
- (22) **A. Not that I can recall.**
- (23) **Q. Apart from social interchange, did you talk**
- (24) **with him about anything else other than his**
- (25) **statement to you that he'd heard that you were going**

Page 32

- (1)
- (2) to be deposed?
- (3) **A. He -- we spoke -- he spoke about some**
- (4) **pressing queries he had been receiving now that the**
- (5) **case is accelerating. He discussed the -- he**
- (6) **discussed the -- he discussed his tasks he was**
- (7) **facing with a heavy workload in the next upcoming**
- (8) **months.**
- (9) **Q. What did you say to him?**
- (10) **A. I wished him luck.**
- (11) **Q. Did you say anything about this case?**
- (12) **A. It was clear that the workload had a lot to**
- (13) **do with McCain-Feingold.**
- (14) **Q. Did you say anything about this case?**
- (15) **A. It was clear that much of that, a large chunk**
- (16) **of it, had to do with the McCain-Feingold**
- (17) **litigation.**
- (18) **Q. Did you say anything about this case?**
- (19) **A. Oh, I'm sorry. I'm not hearing you properly.**
- (20) **Not that I can specifically recall,**
- (21) **other than upcoming deposition.**
- (22) **Q. Did you wish him well in the case?**
- (23) **A. I don't believe I did.**
- (24) **Q. Did you say anything about the Buying Time**
- (25) **2000?**

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- (1)
- (2) **A. Not that I can specifically recall.**
- (3) **Q. Well, this wasn't very long ago, right? This**
- (4) **was a few weeks ago?**
- (5) **A. Yeah, about a week ago.**
- (6) **Q. Try and recall it generally. Did you say**
- (7) **anything about Buying Time 2000?**
- (8) **A. The words "Buying Time" may have been**
- (9) **mentioned in saying, I'm going to be deposed**
- (10) **regarding something having to do with Buying Time.**
- (11) **Q. Do you recall saying anything else to him,**
- (12) **other than social things?**
- (13) **A. No, I do not.**
- (14) **Q. What about Ms. Northup? When did you talk to**
- (15) **her?**
- (16) **A. Friday.**
- (17) **Q. Was that after Judge Pauley had ordered you**
- (18) **to testify, if you recall?**
- (19) **A. I believe it was. I was under the impression**
- (20) **that I was going to testify.**
- (21) **Q. And what did you say to Ms. Northup and what**
- (22) **did she say to you?**
- (23) **A. Again, mostly just polite exchange. She**
- (24) **asked how law school was.**
- (25) **Q. Anything about the case?**

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- (1)
- (2) **A. She told me that Craig was being deposed that**
- (3) **day.**
- (4) **Q. Anything else?**
- (5) **A. I told her that I was going to be deposed on**
- (6) **Tuesday.**
- (7) **Q. Was anything else said?**
- (8) **A. Nothing beyond catching up about asking about**
- (9) **her kids, people she worked with.**
- (10) **MR. ABRAMS: I want to mark now a**
- (11) **document that's previously been marked as Holman**
- (12) **Exhibit-12 which I will mark as McLoughlin**
- (13) **Exhibit-9.**
- (14) **(Exhibit McLoughlin-9 marked for**
- (15) **identification.)**
- (16) **BY MR. ABRAMS:**
- (17) **Q. Was this one of the storyboards that you sent**
- (18) **to Professor Hasen and told him that it had been**
- (19) **deemed to be sham issue advertising in 1998?**
- (20) **A. I don't specifically recall. If you'd like**
- (21) **me to look at that memo again, that might refresh my**
- (22) **memory.**
- (23) **Q. Why don't you do that.**
- (24) **A. It appears to be one of the ones.**
- (25) **Q. Is this an ad that you would have coded to**

Page 35

- (1)
- (2) **reflect that it was a sham issue ad?**
- (3) **A. Yes, or electioneering issue ad, same term.**
- (4) **Q. Tell us why.**
- (5) **A. Check mark next to Molly Bordonaro, the**
- (6) **attempt to distinguish two current candidates for**
- (7) **office with the focus on casting one candidate in a**
- (8) **negative light.**
- (9) **Q. Does this ad urge David Wu to sign U.S. Term**
- (10) **Limits Pledge?**
- (11) **A. It doesn't directly say -- directly address**
- (12) **David Wu, no.**
- (13) **Q. When it says in the last line, quote, Call**
- (14) **David Wu and tell him to sign the U.S. Term Limits**
- (15) **Pledge, unquote, doesn't it directly address David**
- (16) **Wu?**
- (17) **A. I mean, it appears to be urging a voter to**
- (18) **call a particular candidate.**
- (19) **Q. And to say what?**
- (20) **A. The ad reads "to sign the U.S. Term Limits**
- (21) **Pledge."**
- (22) **Q. Now, when you read the ad, do you conclude**
- (23) **that the group that put this ad out, the Americans**
- (24) **for Limited Terms, did not really want David Wu to**
- (25) **sign the U.S. Term Limits Pledge?**

Page 36

- (1)
- (2) **MR. PAOLELLA: Objection.**
- (3) **THE WITNESS: Could you read the**
- (4) **question back.**
- (5) **BY MR. ABRAMS:**
- (6) **Q. I'll do it again.**
- (7) **When you read the ad, do you conclude**
- (8) **that the people that put this ad out, the Americans**
- (9) **for Limited Terms, did not want David Wu to sign the**
- (10) **U.S. Term Limits Pledge?**
- (11) **MR. PAOLELLA: Objection.**
- (12) **THE WITNESS: I don't believe that was**
- (13) **the primary focus of the ad.**
- (14) **BY MR. ABRAMS:**
- (15) **Q. Was it one focus?**
- (16) **A. The language of the ad appears to make it a**
- (17) **focus.**
- (18) **Q. And in the last frame on television it said,**
- (19) **did it not, Call David Wu, tell him to sign the U.S.**
- (20) **Term Limits Pledge, unquote; is that correct?**
- (21) **A. That's what the CMAG storyboard appears to**
- (22) **reflect, that that is the last frame of the ad. I**
- (23) **should add that there's no phone number for Mr. Wu.**
- (24) **Q. Is it written some place that there has to be**
- (25) **a phone number for an ad to be an issue ad?**

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- (1)
- (2) **MR. PAOLELLA:** Objection.
- (3) **THE WITNESS:** I don't believe that's
- (4) written anywhere in anything I read.
- (5) **BY MR. ABRAMS:**
- (6) **Q.** Is that a standard that you used in
- (7) determining whether an ad was what you called a
- (8) genuine issue ad or an electioneering ad?
- (9) **MR. PAOLELLA:** Objection.
- (10) **THE WITNESS:** I believe some statistics
- (11) were done regarding whether or not actual toll-free
- (12) numbers were included and whether or not the
- (13) exhortation was coupled with one of those numbers.
- (14) **MR. ABRAMS:** I move to strike the
- (15) answer.
- (16) Could you repeat the question, please.
- (17) (The court reporter read back as
- (18) requested.)
- (19) **THE WITNESS:** In looking at this ad
- (20) right now, in my own subjective opinion?
- (21) **BY MR. ABRAMS:**
- (22) **Q.** Yes.
- (23) **A.** That would be a factor.
- (24) **Q.** You say in your own subjective opinion. What
- (25) do you mean by that?

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- (1)
- (2) **A.** I was just attempting to clarify between what
- (3) you were asking in terms of my opinion on an ad
- (4) versus what the data had borne out on the ad.
- (5) **Q.** Is this a subjective judgment that you are
- (6) obliged to make when you determine for yourself
- (7) whether an ad is an electioneering ad as opposed to
- (8) a genuine issue ad?
- (9) **A.** I believe that there is subjectivity involved
- (10) there.
- (11) **MR. ABRAMS:** I'd like to mark as
- (12) McLoughlin Exhibit-10 a storyboard with the number
- (13) 22 on it.
- (14) (Exhibit McLoughlin-10 marked for
- (15) identification.)
- (16) **BY MR. ABRAMS:**
- (17) **Q.** Now, this too was one of the ads that you
- (18) sent to Professor Hasen which had been determined in
- (19) 1998 to be sham issue advocacy or electioneering
- (20) advocacy, correct?
- (21) **A.** Yes. That's what Exhibit-4 seems to reflect.
- (22) **Q.** And do you agree that this ad is sham issue
- (23) advocacy?
- (24) **A.** I agree with the coders on this one.
- (25) **Q.** Why is that?

Page 39

- (1)
- (2) **A.** The focus is casting Ryan in a negative
- (3) light, likening him to overcooked pasta. It seems
- (4) the focus is detracting from Ryan's persona.
- (5) **Q.** Isn't this ad about Ryan's position on term
- (6) limits?
- (7) **A.** I think the ad is about Ryan's position on
- (8) term limits or his refusal to sign a pledge or
- (9) broken promise, something along those lines.
- (10) **Q.** And you don't doubt that the Americans for
- (11) Term Limits cares a lot about that issue, do you?
- (12) **MR. PAOLELLA:** Objection.
- (13) **THE WITNESS:** It seems to be an issue
- (14) that they are in favor of.
- (15) **BY MR. ABRAMS:**
- (16) **Q.** This ad has a telephone number. Does that
- (17) make any difference to you in your assessment?
- (18) **A.** It might make a slight difference.
- (19) **Q.** In which direction?
- (20) **A.** If the ad -- excuse me. It might make it
- (21) appear to be more of a genuine issue ad.
- (22) **Q.** Does it make it more likely that it is a
- (23) genuine issue ad because it has a phone number?
- (24) **A.** It depends.
- (25) **Q.** What does it depend upon?

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- (1)
- (2) **A.** Well, it depends on the overall context of
- (3) the ad, whether or not it's toll free, how visible
- (4) it is, how quickly it's shown.
- (5) **Q.** Is this pretty visible here?
- (6) **A.** It is pretty visible.
- (7) **Q.** Is it toll free?
- (8) **A.** No, it is not.
- (9) **Q.** Do you take into account then in deciding
- (10) whether an ad like this falls on the electioneering
- (11) side or the genuine issue ad side such factors as
- (12) whether there is a telephone number, whether the
- (13) telephone number is toll free, whether the telephone
- (14) number is visible?
- (15) **MR. PAOLELLA:** Object to the form of the
- (16) question.
- (17) **BY MR. ABRAMS:**
- (18) **Q.** Are all those factors that you take into
- (19) account?
- (20) **A.** I'm not sure if consciously all those are at
- (21) once itemized for scanning an ad.
- (22) **Q.** Well, if you were looking at it now and doing
- (23) your very best to give us your best answer, with
- (24) enough time to think about it and testifying under
- (25) oath in a deposition, are those all matters that

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- (1)
- (2) play some role in your decision?
- (3) **A. I believe that they all play some role.**
- (4) **Q. I'd like to mark now as McLoughlin Exhibit-11**
- (5) **a document marked as Holman Exhibit-13. It is an**
- (6) **advertisement that ran in 1998 and in 2000.**
- (7) **Therefore, we have a better copy of it for 2000, as**
- (8) **we have better copies for all 2000 ads. So we've**
- (9) **put them both in a single composite document, and**
- (10) **I'll pass it to you.**
- (11) **(Exhibit McLoughlin-11 marked for**
- (12) **identification.)**
- (13) **BY MR. ABRAMS:**
- (14) **Q. I'd suggest you may want to look at the**
- (15) **clearer version on Page 3.**
- (16) **A. Thank you.**
- (17) **Q. Now, this ad too was coded as a sham or**
- (18) **electioneering issue ad in 1998; was it not?**
- (19) **A. Yes, it was.**
- (20) **Q. And this ad too appeared in the last 60 days**
- (21) **of the campaign in 1998, correct?**
- (22) **A. That's what Exhibit-4 seems to reflect, yes.**
- (23) **Q. Do you agree with that coding?**
- (24) **A. As to its genuine or electioneering issue**
- (25) **advocacy status?**

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- (1)
- (2) **Q. Correct.**
- (3) **A. No, I don't.**
- (4) **Q. What is your view?**
- (5) **A. That it is a genuine issue ad.**
- (6) **Q. And why is that?**
- (7) **A. Several reasons. The ad's focus is primarily**
- (8) **on the issue of partial birth abortion. The ad is**
- (9) **so long as to make the mention of the senators**
- (10) **appear in the bottom half of this minute-long**
- (11) **commercial. The ad refers to two senators, not just**
- (12) **one up for reelection.**
- (13) **Q. Why does it make a difference to you that it**
- (14) **refers to two senators, not just one?**
- (15) **A. It appears to -- it makes the ad appear as if**
- (16) **it has less to do with a specific live current**
- (17) **political campaign in progress.**
- (18) **Q. Would it make any difference one way or the**
- (19) **other if I told you that this ad in identical**
- (20) **language had appeared also in the 2000 campaign in**
- (21) **the State of Virginia and that Senator Robb's name**
- (22) **and picture was inserted in the same places that**
- (23) **Senator Feingold and Kohl's names are in the ad you**
- (24) **have in front of you?**
- (25) **MR. PAOLELLA: Asking if it would make a**

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- (1)
- (2) difference in his evaluation of this ad?
- (3) **MR. ABRAMS: Yes.**
- (4) **THE WITNESS: Who is featured in the**
- (5) **Virginia ad?**
- (6) **BY MR. ABRAMS:**
- (7) **Q. In the Virginia ad you will see the identical**
- (8) **ad, but instead of saying your senators, Russ**
- (9) **Feingold and Herb Kohl, it says your senator,**
- (10) **Charles Robb, and then thereafter Senator Robb's**
- (11) **picture is contained there rather than the two**
- (12) **senators on the exhibit that you have in front of**
- (13) **you.**
- (14) **A. Could you repeat the question?**
- (15) **Q. Sure. I'm just asking you if it would be a**
- (16) **relevant factor for you to know that this ad**
- (17) **appeared elsewhere in the country with reference to**
- (18) **a different senator?**
- (19) **A. Within 60 days?**
- (20) **Q. Yes.**
- (21) **A. That might make me more inclined to think of**
- (22) **it as an electioneering ad, but I haven't really**
- (23) **thought about it at length.**
- (24) **Q. Do you recall how this ad was treated in**
- (25) **2000?**

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- (1)
- (2) **A. I believe if we opened up the database now,**
- (3) **it would show as an electioneering issue ad.**
- (4) **Q. Do you recall if this ad was initially coded**
- (5) **as a genuine issue ad and that Professor Goldstein**
- (6) **then determined that it should be treated as an**
- (7) **electioneering ad?**
- (8) **A. As best as I can recall, there was some**
- (9) **question over how it was initially coded by the**
- (10) **coders.**
- (11) **Q. I'm sorry. I don't follow when you say**
- (12) **"there was some question." What do you mean?**
- (13) **A. I remember there being a discussion over if**
- (14) **there had been coder unanimity on this ad.**
- (15) **Q. Do you recall if you told anyone at the**
- (16) **Brennan Center or elsewhere during the time you**
- (17) **worked at the Brennan Center that you believed that**
- (18) **this ad should have been coded as a genuine issue**
- (19) **ad?**
- (20) **A. I am aware that I sent an e-mail or letter to**
- (21) **that effect at some point while at the Brennan**
- (22) **Center.**
- (23) **Q. I'll mark now as McLoughlin Exhibit-12 an**
- (24) **e-mail from you to Rick Hasen, with copies to other**
- (25) **people.**

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- (1)
- (2) (Exhibit McLoughlin-12 marked for
- (3) identification.)
- (4) BY MR. ABRAMS:
- (5) Q. Is this the document that you had in mind?
- (6) A. Yes.
- (7) Q. Do you recall what response, if any, you got?
- (8) A. I don't recall the specific response from
- (9) Rick.
- (10) Q. I see that you sent the e-mail also to
- (11) Mr. Rosenkranz and Mr. Holman. Do you recall any
- (12) responses from them?
- (13) A. Not specifically, no.
- (14) Q. Did you ever do any numerical tests to see
- (15) how the inclusion of this advertisement as a genuine
- (16) issue ad in 2000 would have affected the
- (17) calculations that you did for that year?
- (18) A. I don't specifically recall doing that for
- (19) that ad.
- (20) Q. Do you recall doing it for some other ad?
- (21) A. Well, I guess I should say we -- as questions
- (22) like this would get resolved, the database would be
- (23) updated, so there would be updated tables.
- (24) Q. I'll mark as Exhibit-13 an e-mail from you to
- (25) Mr. Holman dated March 9, 2001, I believe.

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- (1)
- (2) (Exhibit McLoughlin-13 marked for
- (3) identification.)
- (4) BY MR. ABRAMS:
- (5) Q. I refer you to No. 2 in your e-mail. First,
- (6) can you tell us what it says under No. 2 and what it
- (7) means?
- (8) A. It says -- would you like me to read it?
- (9) Q. Sure.
- (10) A. Or just explain it?
- (11) Q. Well, why don't you read it first.
- (12) A. 2), NPLA, quote, Feingold Kohl, K-O-H-L, end
- (13) quote, adcode, A-D-C-O-D-E, 2107 so Q11 equals
- (14) generating support/opposition.
- (15) Below that, Right now Q-11 equals
- (16) providing information.
- (17) Q. Can you tell us what that means?
- (18) A. I believe that is making a suggestion to
- (19) Craig for how to make the adjustment regarding the
- (20) Feingold-Kohl ad that we've just been discussing.
- (21) Q. And I do understand it correctly that -- let
- (22) me start again.
- (23) Does the language, quote, generating
- (24) support/opposition, unquote, and, quote, providing
- (25) information, unquote, come from the coding document?

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- (1)
- (2) A. Yes. That's a loose reference to the coding
- (3) protocol. I should say it would be something along
- (4) the lines of generating opposition or support for a
- (5) candidate.
- (6) Q. And does this mean that right now, when you
- (7) wrote the e-mail, this ad was coded as providing
- (8) information and that it was to be recoded so that it
- (9) appeared under the heading, quote, generating
- (10) support or opposition, unquote?
- (11) A. Could you repeat it?
- (12) Q. Sure. I just want to understand where you
- (13) were starting and where you were winding up --
- (14) A. Sure.
- (15) Q. -- when you do the coding. I read this to
- (16) mean that, quote, right now, unquote, this ad was
- (17) coded as one which provided information and,
- (18) therefore, was a, quote, genuine issue ad, unquote,
- (19) and that it was to be changed to, quote, generating
- (20) support/opposition for a candidate and, therefore,
- (21) an electioneering ad.
- (22) A. Yes.
- (23) Q. Is that correct?
- (24) A. Yes.
- (25) Q. And why was that done?

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- (1)
- (2) A. I don't specifically recall what the original
- (3) coding for the Feingold-Kohl ad 2000 was, if it was
- (4) generating support/opposition for a candidate or
- (5) providing information on issue -- if it was coded as
- (6) genuine issue advocacy or electioneering advocacy,
- (7) but at least at this stage, there had been a
- (8) decision that the Q11 should be changed in whatever
- (9) current edition of that database we were talking
- (10) about.
- (11) Q. And Q11 is the question on the coding form
- (12) which asks the coders to answer the question, quote,
- (13) In your opinion, is the purpose of the ad to provide
- (14) information about or urge action on a bill or issue,
- (15) or is it to generate support or opposition for a
- (16) particular candidate, unquote. Right?
- (17) A. That's the Q11 that we're referring to.
- (18) Q. Now, at the bottom of Exhibit-13 is an e-mail
- (19) from you to Rick Hasen, correct?
- (20) A. Mm-hmm. Yes.
- (21) Q. And do I understand this correctly that as
- (22) regards the Question 2, which was, How many total
- (23) airings were coded as providing information versus
- (24) the total 60-day issue ad, featuring-candidate
- (25) universe, unquote, that you had deducted certain

Page 49

- (1)
- (2) airings from the advertisement that we were just
- (3) talking about to reach your ultimate conclusion of
- (4) 1.6 percent?
- (5) **MR. PAOLELLA:** Sorry. Could you read
- (6) that back again.
- (7) **(The court reporter read back as**
- (8) **requested.)**
- (9) **THE WITNESS:** Point No. 2 does -- it
- (10) appears to give the most up-to-date information we
- (11) have to Rick regarding the 60-day window. I'm not
- (12) sure if it contains the changes above in Exhibit-13,
- (13) but it appears to.
- (14) Would it be all right to take a restroom
- (15) break for five minutes?
- (16) **MR. ABRAMS:** Yes, absolutely.
- (17) **(Short recess.)**
- (18) **(Exhibit McLoughlin-14 marked for**
- (19) **identification.)**
- (20) **BY MR. ABRAMS:**
- (21) **Q.** Do you recall participating with Craig Holman
- (22) in writing a letter to Steve Weissman at Public
- (23) Citizen summarizing some of the data from the 1998
- (24) and 2000 studies?
- (25) **A.** I do.

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- (1)
- (2) **Q.** I'd like to hand you a document which was
- (3) marked as Holman Exhibit-16 and will now be marked
- (4) as McLoughlin Exhibit-14, and ask you if this is one
- (5) of those articles, one of those letters. Do you
- (6) recall who wrote this document?
- (7) **A.** I believe I wrote a draft of it for Craig to
- (8) look at.
- (9) **Q.** The Re line is, quote, The two election ads
- (10) that would have been unfairly caught by
- (11) Snowe-Jeffords, period, end quote.
- (12) First, what is Snowe-Jeffords?
- (13) **A.** Snowe-Jeffords is a short term for the 60-day
- (14) issue ad restriction.
- (15) **Q.** And what did you mean by saying ads having
- (16) been, quote, unfairly caught, unquote?
- (17) **A.** Those would refer to ads that were captured
- (18) under the electioneering provision but were, in
- (19) fact, genuine issue ads.
- (20) **Q.** Now, the ads mentioned here are the same ads
- (21) that we went over earlier, correct?
- (22) **A.** Ad 12 and Ad 318, yes.
- (23) **Q.** Yes. Why did you send this to Mr. Weissman?
- (24) **A.** I believe it was in connection with
- (25) something, some request from Craig. Craig, I think,

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- (1)
- (2) received a phone call or an e-mail from him and
- (3) wanted some information before their Hill efforts.
- (4) **Q.** And did you participate in writing a similar
- (5) letter with respect to the 2000 data?
- (6) **A.** I may have. I don't remember.
- (7) **MR. ABRAMS:** I'll mark as McLoughlin
- (8) Exhibit-15 a document that had been marked as Holman
- (9) Exhibit-17.
- (10) **(Exhibit McLoughlin-15 marked for**
- (11) **identification.)**
- (12) **BY MR. ABRAMS:**
- (13) **Q.** Can you tell us what this document is?
- (14) **A.** This is a similar memo based on some data we
- (15) had at the time involving the effectiveness of --
- (16) regarding one of the efforts of Snowe-Jeffords.
- (17) **Q.** And in this memo you mention two ads, did you
- (18) not, one from Citizens for Better Medicare and one
- (19) from the Republican Political Ideas Committee,
- (20) right?
- (21) **A.** Yes, I do refer to those in the memo.
- (22) **Q.** And isn't it true that neither of those was
- (23) finally counted as a genuine issue ad?
- (24) **MR. PAOLELLA:** Objection.
- (25) **THE WITNESS:** I don't believe the

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- (1)
- (2) Citizens for Better Medicare one was. I don't
- (3) recall about the RIPC ad. I believe it was not, but
- (4) I don't remember.
- (5) **BY MR. ABRAMS:**
- (6) **Q.** Do you remember why the Citizens for Better
- (7) Medicare ad was not ultimately treated as a genuine
- (8) issue ad in your 2000 study?
- (9) **A.** I remember getting word after a conference
- (10) call between Craig and Ken that this is -- was going
- (11) to be how we were going to code it, and that was
- (12) just what we did from then on.
- (13) **Q.** I didn't hear the end of what you said.
- (14) **A.** I'm sorry. That that was just what we were
- (15) going to do from then on.
- (16) **Q.** And is what you heard that all CBM ads were
- (17) going to be treated as electioneering ads regardless
- (18) of how they had been previously coded?
- (19) **A.** I don't recall.
- (20) **Q.** Would it be accurate to say that CBM had
- (21) spent approximately \$6 million on their ads in the
- (22) 2000 campaign, if you remember?
- (23) **A.** I don't -- I don't remember their ad purchase
- (24) figures.
- (25) **MR. ABRAMS:** I'll mark as McLoughlin

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- (1)
- (2) Exhibit-16 a document that was marked as Holman
- (3) Exhibit-19.
- (4) (Exhibit McLoughlin-16 marked for
- (5) identification.)
- (6) BY MR. ABRAMS:
- (7) Q. Did you write this document?
- (8) A. Yes, I did.
- (9) Q. Do you recall why you wrote it?
- (10) A. No, I don't recall why.
- (11) Q. Now, this document states that CBM House had
- (12) spent \$5,971,666 on advertisements; is that correct?
- (13) A. Right.
- (14) Q. In the 2000 campaign?
- (15) A. That's what the e-mail says.
- (16) Q. And could you direct your attention now to
- (17) the next three lines, which I will read into the
- (18) record. Quote, Note: CBM spending has been both on
- (19) legitimate, genuine issue ads, as well as thinly
- (20) veiled Republican-candidate-promoting sham issue
- (21) ads. Ken says it would be an arduous task to
- (22) separate the spending out at this point, period,
- (23) unquote.
- (24) On what basis did you conclude that CBM
- (25) spending had been, in part, on legitimate, genuine

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- (1)
- (2) issue ads?
- (3) A. I don't remember.
- (4) Q. Do you remember if it was based on how it had
- (5) been coded?
- (6) Excuse me. Do you remember if it was
- (7) based on how they had been coded?
- (8) A. It may have been. I don't remember. It
- (9) may -- I may have seen data regarding it or it may
- (10) have been told to me by Ken or it may have been
- (11) something else. I don't recall.
- (12) Q. And when it says, quote, Ken says it would be
- (13) an arduous task to separate the spending out at this
- (14) point, unquote, do you remember that?
- (15) A. I'm reading it now.
- (16) Q. Do you remember that it happened?
- (17) A. Not -- I don't remember that.
- (18) Q. You don't doubt, though, that that's what he
- (19) said to you?
- (20) A. I don't doubt it.
- (21) Q. I want to show you next a document previously
- (22) marked as Holman Exhibit-20, which I will mark as
- (23) McLoughlin Exhibit-17.
- (24) (Exhibit McLoughlin-17 marked for
- (25) identification.)

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- (1)
- (2) THE WITNESS: Okay.
- (3) BY MR. ABRAMS:
- (4) Q. Is this an e-mail that you sent?
- (5) A. Yes.
- (6) Q. It says in the second paragraph, quote, The
- (7) CBM ads have been determined by Ken Goldstein at
- (8) Wisconsin to be election ads, period, end quote.
- (9) Do you recall at all why Dr. Goldstein
- (10) made that determination?
- (11) A. I think there -- my recollection is that
- (12) there was some differences within the coders as to
- (13) Q11 with respect to some of the CBM ads and that it
- (14) was now resolved.
- (15) Q. Were there differences with respect to the
- (16) same ads or different CBM ads?
- (17) A. I don't remember.
- (18) Q. Do you know how many coders coded a single
- (19) ad?
- (20) A. No.
- (21) Q. Do you know if it was more than one?
- (22) A. Oh, I believe that there was -- that at least
- (23) two coders viewed most, if not all, of the ads.
- (24) Q. So at least two coders viewed all 2800 ads or
- (25) at least two coders looked at each ad? I'm not

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- (1)
- (2) being clear.
- (3) How many ads were there all together
- (4) that were looked at?
- (5) A. Distinct ads?
- (6) Q. Yes, distinct ads.
- (7) A. I don't recall the specific number.
- (8) Somewhere in the neighborhood of 2,000 or 3,000.
- (9) Q. And did any coder code all of them?
- (10) A. I guess you'd have to ask Ken that.
- (11) Q. And do you know if as regards any one ad
- (12) whether more than one coder did the coding?
- (13) A. Again, I guess you'd have to ask Ken.
- (14) Q. You don't know?
- (15) A. I don't have firsthand knowledge of that, no.
- (16) Q. Well, what is your understanding?
- (17) A. That there were instances where there were
- (18) disputes between coders on a particular ad and thus
- (19) more than one person must have looked at it.
- (20) Q. Could you look at the first storyboard
- (21) contained here. This is a CBM ad which is given the
- (22) title, quote, Plan for Seniors 60, end quote. And
- (23) can you look at this ad and tell me how you would
- (24) have coded it?
- (25) A. I would have coded it as an electioneering

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- (1)
- (2) ad.
- (3) Q. And why is that?
- (4) A. The focus appears to be on Congressman
- (5) Sherwood's record, Congressman Sherwood's work that
- (6) he's doing in Congress.
- (7) Q. I want to show you now a few storyboards.
- (8) These, I think, will be the last I'll be showing
- (9) you, which I've previously marked as Holman
- (10) Exhibit-41 and which I will mark now as
- (11) McLoughlin-18.
- (12) These are storyboards which I believe
- (13) all appeared in the last 60 days of the 2000
- (14) campaign. I'm going to ask you to assume that for
- (15) the purpose of your answer.
- (16) A. Okay.
- (17) (Exhibit McLoughlin-18 marked for
- (18) identification.)
- (19) BY MR. ABRAMS:
- (20) Q. Why don't you have a look first on the one on
- (21) top relating to Congressman Dooley and tell me first
- (22) how you would characterize that ad as a coder?
- (23) A. My subjective opinion is that it's an
- (24) electioneering ad.
- (25) Q. Is it an electioneering ad which deals with a

Page 58

- (1)
- (2) particular subject or topic as to which Congressman
- (3) Dooley is being judged by the ad?
- (4) A. Could you read that back?
- (5) Q. Sure. Is this an ad that relates to a
- (6) particular subject or topic which the ad is offering
- (7) a judgment about Congressman Dooley?
- (8) A. Yes. It uses evidence to attempt to further
- (9) its detraction of Cal Dooley.
- (10) Q. Of what?
- (11) A. Of Cal Dooley.
- (12) Q. Well, when you say "to further its detraction
- (13) of Cal Dooley," is another way to say that, that you
- (14) would agree with, that it criticizes Congressman
- (15) Dooley for insensitivity to the Hispanic community?
- (16) A. Yes, it does criticize the congressman for
- (17) insensitivity.
- (18) Q. Could you look at the second ad in this
- (19) series. It's a two-page document, so take your
- (20) time.
- (21) Now, this too is an ad that you view as
- (22) an electioneering ad, isn't it?
- (23) A. Sure.
- (24) Q. This too is an ad that deals with a specific
- (25) issue that Mr. Nelson is being criticized about; is

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- (1)
- (2) it not?
- (3) A. I'm sorry?
- (4) Q. Does this ad deal with and criticize
- (5) Mr. Nelson for his position with respect to a
- (6) particular issue relating to unions?
- (7) A. Yes.
- (8) Q. And when it winds up and says, referring to
- (9) Mr. Nelson, now Senator Nelson, quote, Tell him to
- (10) renounce his forced dues support and insist that he
- (11) publicly pledge support for right to work, unquote,
- (12) and it then says that it was paid for by the
- (13) National Right to Work Committee, do you have any
- (14) reason to doubt that the National Right to Work
- (15) Committee really wanted him to publicly pledge
- (16) support for right to work?
- (17) MR. PAOLELLA: Objection.
- (18) THE WITNESS: I'm sure that it would
- (19) have pleased that group if the candidate that they
- (20) were attacking changed his mind. I don't doubt
- (21) that.
- (22) BY MR. ABRAMS:
- (23) Q. Could you turn to the next ad, please. Now,
- (24) this ad relating to now Senator Stabenow is one that
- (25) you also view as an electioneering ad; do you not?

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- (1)
- (2) A. I do.
- (3) Q. Is that right?
- (4) A. I'm sorry?
- (5) Q. Am I correct that you view this ad also as an
- (6) electioneering ad?
- (7) A. Yes, I do.
- (8) Q. Why?
- (9) A. Stabenow is taking the task for her voting
- (10) record. It loosely refers to the Death Tax issue,
- (11) but there's no specific bill. The closest it comes
- (12) to referring to an issue is a mention of telling
- (13) Stabenow that working families need a break. The
- (14) overall tone is about Stabenow, not the issue.
- (15) Q. Is this ad one that is significantly about
- (16) the Death Tax?
- (17) MR. PAOLELLA: Objection.
- (18) THE WITNESS: The ad mentions the Death
- (19) Tax in its attempt to create an opinion one way or
- (20) the other about Stabenow.
- (21) BY MR. ABRAMS:
- (22) Q. Now, when it says, quote, Because of the
- (23) Death Tax, people like Melanie are always at risk of
- (24) losing family businesses. Debbie Stabenow voted
- (25) twice against getting rid of the Death Tax, unquote,

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- (1)
- (2) doesn't it do more than just mention the Death Tax?
- (3) **MR. PAOLELLA:** Objection.
- (4) **THE WITNESS:** I think, as I stated, it
- (5) mentions her prior voting record.
- (6) **BY MR. ABRAMS:**
- (7) **Q.** On the Death Tax, correct?
- (8) **A.** True.
- (9) **Q.** And it criticizes her for that voting record,
- (10) doesn't it?
- (11) **A.** Yes.
- (12) **Q.** I'll have a look at the next one, which also
- (13) relates to Debbie Stabenow, and tell us if you
- (14) believe that that is an electioneering ad.
- (15) **A.** Yes, it's an electioneering issue ad, in my
- (16) opinion.
- (17) **Q.** Now, when this ad says, quote, Tell Debbie
- (18) Stabenow to end the Death Tax, unquote, is it your
- (19) view that the ad is not urging her to do just that?
- (20) **MR. PAOLELLA:** Objection.
- (21) **THE WITNESS:** Urging the voter to tell
- (22) Debbie that?
- (23) **BY MR. ABRAMS:**
- (24) **Q.** Yes.
- (25) **A.** I mean, it's certainly the tag line of this

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- (1)
- (2) ad. It's certainly the words that conclude this ad.
- (3) **Q.** Doesn't this ad, from beginning to end, from
- (4) the very first frame and from the very first words,
- (5) relate to the Death Tax as well as to Debbie
- (6) Stabenow's record with respect to the Death Tax?
- (7) **A.** Yes. It relates to that or refers to it as a
- (8) general issue.
- (9) **Q.** Throughout the ad, correct?
- (10) **A.** Yes. It's mentioned at different points in
- (11) the 30-second ad.
- (12) **Q.** Turn to the next ad about Congressman
- (13) Bilbray.
- (14) Do you view this ad to be an
- (15) electioneering ad?
- (16) **A.** Yes, electioneering issue ad.
- (17) **Q.** And does this ad deal, from beginning to end,
- (18) with respect to Congressman Bilbray's position on a
- (19) woman's right to choose?
- (20) **A.** Yes. It seems to discuss a variety of votes
- (21) he's taken on that issue involving the general issue
- (22) of choice.
- (23) **Q.** From the very start to the end of the ad,
- (24) correct?
- (25) **A.** That's the -- that is the topic mentioned in

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- (1)
- (2) attacking Bilbray.
- (3) **Q.** From the start to the finish, correct?
- (4) **MR. PAOLELLA:** Objection.
- (5) **THE WITNESS:** Yes.
- (6) **BY MR. ABRAMS:**
- (7) **Q.** I'm sorry. Did you answer?
- (8) **A.** Yes.
- (9) **Q.** Could you turn to the next ad, which
- (10) relates -- which is titled, quote, Robb Big
- (11) Government RX Plan, unquote, titled by CMAG, right?
- (12) **A.** Yes.
- (13) **Q.** Is that an electioneering ad, in your view?
- (14) **A.** Yes, electioneering issue ad.
- (15) **Q.** And is this an ad which, from beginning to
- (16) end, deals with Senator Robb's position with respect
- (17) to prescription drug regulation?
- (18) **A.** Yes, it does mention that.
- (19) **Q.** It does more than mention it, doesn't it?
- (20) **A.** It discusses his support of a big government
- (21) prescription drug plan and discusses it -- discusses
- (22) the implications of that plan.
- (23) **Q.** And it criticizes him for that, correct?
- (24) **A.** Yes. It tells him to stop scaring seniors.
- (25) **Q.** And it tells him to stop, quote -- or, quote,

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- (1)
- (2) stop supporting a big government prescription drug
- (3) plan, unquote, correct?
- (4) **A.** It does.
- (5) **Q.** How about the next ad by the NAACP; is that
- (6) an election ad, in your view?
- (7) **A.** Yes, electioneering issue ad.
- (8) **Q.** And that ad as well, does it not, deals with
- (9) a significant public legislative issue?
- (10) **A.** Yes. It refers to Hate Crimes legislation,
- (11) which I would consider a general public or
- (12) legislative issue.
- (13) **Q.** And it deals with that throughout the ad,
- (14) doesn't it?
- (15) **A.** It begins -- it seems to begin with an
- (16) instance that would somehow have been related to
- (17) Hate Crimes legislation. So I'd say yes. It's
- (18) mentioned throughout the ad.
- (19) **Q.** And, finally, an AF of L ad which refers to
- (20) Congressman Fletcher. Is that an electioneering ad?
- (21) **A.** Yes, electioneering issue ad.
- (22) **Q.** And that too is an ad, is it not, that deals,
- (23) from beginning to end, with the absence of
- (24) legislation holding HMOs accountable for withholding
- (25) care and which criticizes Congressman Fletcher for

Page 65

- (1)
- (2) his position about that issue; is that right?
- (3) **A. Yes.**
- (4) **Q.** I want to turn next to a different topic and
- (5) first to show you an e-mail that your name is not on
- (6) and ask you if you've seen it before. It was marked
- (7) as Holman Exhibit-21 and we will mark it as
- (8) McLoughlin Exhibit-19.
- (9) **(Exhibit McLoughlin-19 marked for**
- (10) **identification.)**
- (11) **BY MR. ABRAMS:**
- (12) **Q.** And my first question is, do you recall
- (13) seeing this document before?
- (14) **A. No.**
- (15) **Q.** Referring to the second paragraph, Mr. Holman
- (16) wrote that, quote, Most of the recodes are
- (17) straightforward objective changes that we caught
- (18) because Luke and I have been going through the
- (19) storyboards relevant to ads in the last 60 days of
- (20) the election. The one big change, of course, is as
- (21) we discussed last week on the conference call:
- (22) moving the large CBM ad out of the genuine issue
- (23) advocacy category and back into the electioneering
- (24) category coded for all other CBM ads, unquote.
- (25) My question is, seeing this document,

Page 66

- (1)
- (2) does it refresh your recollection any more about the
- (3) reason given by Dr. Goldstein for recharacterizing
- (4) the CBM ad?
- (5) **A. No.**
- (6) **Q.** We'll mark next as McLoughlin Exhibit-20 an
- (7) e-mail from you dated -- a document which includes
- (8) e-mails from you dated January 8, 2001.
- (9) **(Exhibit McLoughlin-20 marked for**
- (10) **identification.)**
- (11) **MR. PAOLELLA:** Why don't you take a
- (12) minute to review it and figure out who is sending
- (13) what to who.
- (14) **MR. ABRAMS:** Right.
- (15) **THE WITNESS:** Okay.
- (16) **BY MR. ABRAMS:**
- (17) **Q.** Could we start with the very last e-mail
- (18) reflected here, which appears to be dated September
- (19) 27, 2000 from Rick Hasen to you --
- (20) **MR. PAOLELLA:** October 27th.
- (21) **MR. ABRAMS:** I'm sorry.
- (22) **BY MR. ABRAMS:**
- (23) **Q.** October 27, 2000, which appears to be from
- (24) Rick Hasen to you and Josh Rosenkranz, and I refer
- (25) to the next-to-last paragraph, which is contained on

Page 67

- (1)
- (2) Page 3, where it states, quote, Josh gave me figures
- (3) on Wednesday suggesting that 7.9 percent of total
- (4) non-candidate ad airings run within 60 days of the
- (5) election and featuring clearly identified candidates
- (6) were genuine issue ads. But Luke gives me a figure
- (7) of 38.4 percent within 60 days (though only 6.9
- (8) percent within 30 days), period.
- (9) Do you recall giving Professor Hasen a
- (10) figure of 38.4 percent?
- (11) **A. Yes.**
- (12) **Q.** And what was that about?
- (13) **A. That was an attempt to give information**
- (14) **regarding how many -- what percent of the ads that**
- (15) **would have been captured under Snowe-Jeffords in**
- (16) **1998 were genuine issue ads.**
- (17) **Q.** And what did you do to come up with that
- (18) number, if you remember?
- (19) **A. I went to Ken's office and I explained the**
- (20) **question to Ken that we were trying to resolve, and**
- (21) **he used SPSS to come up with the number.**
- (22) **Q.** Ken's office in Wisconsin?
- (23) **A. Yes.**
- (24) **Q.** Was this the one trip that you referred to
- (25) earlier?

Page 68

- (1)
- (2) **A. Yes. I believe that's the first -- yes,**
- (3) **dated 10/27. Yes, I was still in Wisconsin then.**
- (4) **Q.** And on Page 1 of the document, there appears
- (5) to be an e-mail from you to Josh and Rick which
- (6) showed, in dealing with 60-day data on how many sham
- (7) issue ads were broadcast within 60 days of the 2000
- (8) election, you wrote, quote, Josh, I don't have the
- (9) numbers necessary for answering your question about
- (10) the total ads that meet the criteria you laid out.
- (11) I believe that we used the correct criteria in
- (12) getting the 38 percent number but clearly it would
- (13) be good at some point to go back in and try to
- (14) resolve this question, unquote.
- (15) What was it, if you recall, that Josh
- (16) was asking you to do to which the answer was 38
- (17) percent?
- (18) **A. Determine the amount of issue ads that would**
- (19) **be -- let me start over.**
- (20) To come up with the figures on what
- (21) percent of the electioneering issue ads captured
- (22) under Snowe-Jeffords hadn't been in place in 1998
- (23) would have been coded as genuine issue ads.
- (24) **Q.** And is this the same sort of inquiry that you
- (25) were answering in the earlier memos I showed you

Page 69

- (1)
- (2) where you used the words, quote, unfairly caught,
- (3) unquote, by Snowe-Jeffords?
- (4) **MR. PAOLELLA:** Objection.
- (5) **THE WITNESS:** Those would loosely refer
- (6) to similar things.
- (7) **BY MR. ABRAMS:**
- (8) **Q.** Is this sometimes referred to as false
- (9) positives?
- (10) **A.** Again, loosely referred to same or similar
- (11) figures about the impact on genuine issue ads.
- (12) **Q.** Of Snowe-Jeffords, right?
- (13) **A.** The impact of Snowe-Jeffords on --
- (14) **Q.** On genuine issue ads?
- (15) **A.** On -- in genuine issue ads, yes.
- (16) **Q.** I'd like to mark now as McLoughlin Exhibit-21
- (17) what has been marked as Holman-27, which is an
- (18) e-mail from Mr. Holman to Josh Rosenkranz, Nancy
- (19) Northup, Deborah Goldberg and you. The date is
- (20) January 11, 2001.
- (21) (Exhibit McLoughlin-21 marked for
- (22) identification.)
- (23) **BY MR. ABRAMS:**
- (24) **Q.** Is this a document that you helped Mr. Holman
- (25) to create?

Page 70

- (1)
- (2) **A.** No.
- (3) **Q.** Do you recall receiving it?
- (4) **A.** I don't recall, but if my name is on there, I
- (5) very likely did receive it.
- (6) **Q.** What is your understanding as to what
- (7) Mr. Holman was saying about the 7 percent issue?
- (8) Let me rephrase it. What is it that he
- (9) was saying could be, quote, a little misleading,
- (10) unquote?
- (11) **A.** I think reading Craig's e-mail he seems to
- (12) think that the 7 percent should refer to distinct
- (13) ads and not to airings.
- (14) **Q.** Isn't he saying that the 7 percent did refer
- (15) to unique issue ads as opposed to airings?
- (16) **MR. PAOLELLA:** Objection.
- (17) **THE WITNESS:** Sorry?
- (18) **BY MR. ABRAMS:**
- (19) **Q.** Yes. What I want to understand is this: He
- (20) is saying, isn't he, that the 7 percent figure which
- (21) was in -- let me start over.
- (22) Buying Time 1998 used a 7 percent figure
- (23) at some point; did it not?
- (24) **A.** Yes, it did.
- (25) **Q.** And this is about what that means, isn't it?

Page 71

- (1)
- (2) **A.** Generally speaking, yes.
- (3) **Q.** And Craig Holman is saying in this e-mail,
- (4) isn't he, that the 7 percent really refers to unique
- (5) issue ads, not to airings of genuine issue ads?
- (6) **A.** Yes. I think I answered that.
- (7) **Q.** And he is saying at this time that according
- (8) to the 1998 database, about 40 percent of genuine
- (9) issue ads would be deemed electioneering within 60
- (10) days of the election, right?
- (11) **MR. PAOLELLA:** Objection.
- (12) **THE WITNESS:** No. I mean, that wording
- (13) is --
- (14) **BY MR. ABRAMS:**
- (15) **Q.** Well, you tell me how you understand what is
- (16) communicated by this.
- (17) **A.** The belief I think Craig had when he wrote
- (18) this e-mail was that 7 percent figure referred to in
- (19) '98 matched up with his figures for '98 when looking
- (20) at distinct ads, and that when looking at airings,
- (21) the amount of the percent of issue ads which would
- (22) have been captured by Snowe-Jeffords in 1998 and
- (23) deemed genuine issue ads would have been 40 percent.
- (24) **Q.** I'll mark now as McLoughlin Exhibit-22 an
- (25) e-mail of Josh Rosenkranz to Craig Holman, Nancy

Page 72

- (1)
- (2) Northup, Deborah Goldberg, you and Scott Schell
- (3) dated January 11, 2001.
- (4) (Exhibit McLoughlin-22 marked for
- (5) identification.)
- (6) **BY MR. ABRAMS:**
- (7) **Q.** Do you remember receiving this e-mail?
- (8) **A.** Not specifically, but I'm positive I did.
- (9) **Q.** And do you remember that a time came when
- (10) Josh Rosenkranz said, in substance, that the 1998
- (11) findings relating to the 7 percent figure were,
- (12) quote, not just misleading, unquote, but, quote,
- (13) flat out false, unquote?
- (14) **MR. PAOLELLA:** Objection. I think it's
- (15) important that you include sort of the full quote,
- (16) which reads, are not just misleading as I read them,
- (17) they are flat out false, unquote.
- (18) **MR. ABRAMS:** Sure. Let me ask it again.
- (19) **BY MR. ABRAMS:**
- (20) **Q.** Do you recall that, whether or not you
- (21) remember specifically receiving this e-mail, that
- (22) Mr. Rosenkranz communicated to you and others that
- (23) as of January 11, or thereabouts, 2001 he believed
- (24) that the Brennan Center, quote, findings are not
- (25) just misleading, semicolon, as I read them, they are

Page 73

- (1)
- (2) flat out false, unquote? Do you remember that?
- (3) **A.** I remember a discussion about confusion about
- (4) those numbers and that at that point in time, it
- (5) appeared that they were flat out false or very
- (6) misleading or poorly worded.
- (7) **Q.** And you responded to this memo, didn't you?
- (8) **A.** I did.
- (9) **Q.** What's your recollection as to what you said?
- (10) **A.** I think, as best I can recall, I agreed that
- (11) there was some confusion and that the wording that
- (12) we were dealing with with '98 was not very helpful.
- (13) That's as best as I remember.
- (14) **MR. ABRAMS:** I'll mark as McLoughlin
- (15) Exhibit-23 what has been marked as Holman
- (16) Exhibit-29.
- (17) (Exhibit McLoughlin-23 marked for
- (18) Identification.)
- (19) **THE WITNESS:** Okay.
- (20) **BY MR. ABRAMS:**
- (21) **Q.** And here on January 12 you were saying you
- (22) thought that, quote, misstatements on Page 8 of,
- (23) quote, 5 New Ideas, unquote, and on Page 109 of
- (24) Buying Time are either false or so vague as to
- (25) mislead the reader, period, end quote.

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- (1)
- (2) And that's what you thought then,
- (3) correct?
- (4) **A.** I did, but --
- (5) **Q.** And a time came later on when you had
- (6) different views about that?
- (7) **A.** In looking over some of the documents
- (8) yesterday, I have a better understanding of what was
- (9) going on with the wording in '98.
- (10) **Q.** We'll come to that.
- (11) As of January 2001, though, what was
- (12) your concern about what had been said in 5 New Ideas
- (13) and in Buying Time 1998?
- (14) **A.** The way I read the 7 percent number in the
- (15) Buying Time '98 and 5 New Ideas was that it did not
- (16) refer to the percent -- the percent of the entire
- (17) universe of genuine issue ads that fell within 60
- (18) days, but rather that it referred to the percent of
- (19) issue ads that would have been captured under
- (20) Snowe-Jeffords had it been in place in '98 as being
- (21) 7 percent. It would have been classified as genuine
- (22) and --
- (23) **Q.** And -- go on.
- (24) **A.** -- in attempting to confirm that 7 percent
- (25) figure as I then understood, it came up with this 40

Page 75

- (1)
- (2) percent figure. The database gave us this 40
- (3) percent figure that seemed at odds with what we had
- (4) originally thought.
- (5) **Q.** The 40 percent figure seemed at odds with the
- (6) 7 percent figure, correct?
- (7) **A.** Under the understanding I had at that time,
- (8) yes.
- (9) **Q.** In the last line of your e-mail, you wrote,
- (10) quote, On an optimistic note, the airings result (40
- (11) percent) is almost exactly what the result was that
- (12) Ken came up with when we first asked him this
- (13) question while I was in Wisconsin, which means that
- (14) their database out there is not producing results
- (15) inconsistent with ours, unquote.
- (16) What was the question that you'd asked
- (17) Ken then?
- (18) **A.** Well, it's the same question we were handling
- (19) with Rick Hasen that initially gave us that 38.4
- (20) percent figure regarding the impact of
- (21) Snowe-Jeffords, and that was the same question that
- (22) was -- that was the result we first -- when we first
- (23) asked him in October, and that appeared to be the
- (24) similar result we had in January.
- (25) **Q.** So do I understand correctly that Ken

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- (1)
- (2) Goldstein came up with a number around 40 percent
- (3) when you were out there in Wisconsin talking with
- (4) him?
- (5) **A.** True.
- (6) **Q.** I'll mark next what had been marked as Holman
- (7) Exhibit-30 and will, for this deposition, will be
- (8) marked as McLoughlin Exhibit-24, an e-mail from
- (9) Mr. Holman to a number of people, including
- (10) yourself.
- (11) (Exhibit McLoughlin-24 marked for
- (12) Identification.)
- (13) **THE WITNESS:** Okay.
- (14) **BY MR. ABRAMS:**
- (15) **Q.** Do you recall seeing this at or around the
- (16) time it was written?
- (17) **A.** Yes.
- (18) **Q.** After saying that the revised presentation
- (19) was somewhat troubling, Mr. Holman said that, quote,
- (20) I have known about it for a while and decided that
- (21) since Buying Time is already published and
- (22) distributed, I am going to focus my efforts on the
- (23) 2000 database and not rekindle the issue. I asked
- (24) Luke not to volunteer the reassessment to Rick but
- (25) to provide it to Rick if Rick asked (and I suspected

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- (1)
- (2) he would - and he did) period, end quote.
- (3) Did Craig Holman ask you not to
- (4) volunteer that reassessment to Rick?
- (5) **A. He did, but Rick already knew about it, so it**
- (6) **was moot.**
- (7) **Q. What did you say, if anything, when he asked**
- (8) **you not to volunteer that information to Rick?**
- (9) **A. I think my recollection is something along**
- (10) **the lines of, He already knows about it, we've been**
- (11) **dealing with this for months or, We dealt with it a**
- (12) **couple months ago. It wouldn't be a surprise to**
- (13) **him.**
- (14) **Q. The next line in his e-mail says, quote,**
- (15) **There is no mistake in the reassessment. Luke and I**
- (16) **have run over it many, many times, period, unquote.**
- (17) **Was it true that he and you had gone**
- (18) **over that reassessment and those numbers many, many**
- (19) **times?**
- (20) **A. Well, it seems like he's talking about the**
- (21) **distinct ad number. And I think we had the distinct**
- (22) **ad number right, but we hadn't talked to Daniel. We**
- (23) **hadn't gotten communication yet with Daniel Seltz**
- (24) **about that 40 percent number.**
- (25) **MR. ABRAMS: I'll mark now as McLoughlin**

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- (1)
- (2) Exhibit-25 a document, the first line of which says
- (3) "Luke McLoughlin, 3:26 p.m., January 16, 2001."
- (4) Why don't you take your time and read
- (5) through the entire paper.
- (6) **(Exhibit McLoughlin-25 marked for**
- (7) **identification.)**
- (8) **THE WITNESS: Okay.**
- (9) **BY MR. ABRAMS:**
- (10) **Q. Looking first at Josh Rosenkranz's e-mail of**
- (11) **January 14, 2001 and specifically with respect to**
- (12) **the second paragraph, he refers to Chart 4.22.**
- (13) **That's a chart in the 1998 Buying Time, correct?**
- (14) **A. Correct.**
- (15) **Q. And he says that he continues to have his**
- (16) **doubts as to exactly what the chart means, quote,**
- (17) **especially in light of Daniel's response to Luke,**
- (18) **period, end quote.**
- (19) **That was Daniel Seltz?**
- (20) **A. Yes.**
- (21) **Q. What did he tell you?**
- (22) **A. I don't remember.**
- (23) **Q. By the way, have you spoken with him since**
- (24) **August 15th?**
- (25) **A. Yup, I have.**

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- (1)
- (2) **Q. When was that?**
- (3) **A. Friday.**
- (4) **Q. Have you spoken with Jonathan Krasno as of**
- (5) **August 15th?**
- (6) **A. I've never spoken with him.**
- (7) **Q. Can you explain to me what you were**
- (8) **responding to in your e-mail to Josh on this**
- (9) **document?**
- (10) **A. It seems to reflect that I got an e-mail from**
- (11) **Daniel explaining that the AFL-CIO numbers, as we**
- (12) **were coming out with them, were not correct because**
- (13) **we were failing to note objective criteria**
- (14) **distinguishing a candidate from an office holder and**
- (15) **that if we were to take that into account, at that**
- (16) **time we believed that we would come up with a 7**
- (17) **percent figure, which we believed then was**
- (18) **confirming the 1998 figures.**
- (19) **Q. And you went through a process, didn't you,**
- (20) **of analyzing the state by state where the AF of L ad**
- (21) **had been shown?**
- (22) **A. I did do that.**
- (23) **Q. And that was the process that ultimately led**
- (24) **you to a 13.8 percent figure?**
- (25) **A. That process and conversations with Daniel**

Page 80

- (1)
- (2) **about as we got more information -- I'm not sure**
- (3) **conversations is accurate. Exchanges probably over**
- (4) **e-mail with Daniel regarding which states had**
- (5) **candidates as opposed to just office holders:**
- (6) **Q. We'll mark next as McLoughlin Exhibit-26 what**
- (7) **has been marked as Holman Exhibit-31, which is an**
- (8) **e-mail from you to Josh Rosenkranz of January 16,**
- (9) **2001.**
- (10) **(Exhibit McLoughlin-26 marked for**
- (11) **identification.)**
- (12) **THE WITNESS: Okay.**
- (13) **BY MR. ABRAMS:**
- (14) **Q. You wrote this e-mail?**
- (15) **A. Yes.**
- (16) **Q. What were you talking about when you talked**
- (17) **about running the numbers, quote, using what Daniel**
- (18) **told us, unquote? Tell us again what Daniel had**
- (19) **told you.**
- (20) **A. Quoting from my own e-mail here, that**
- (21) **according to Daniel's e-mail, only the**
- (22) **Raleigh-Durham and Pittsburgh markets were pertinent**
- (23) **markets, because, as he represented to us, only**
- (24) **Arlen Specter and Louch Faircloth were running for**
- (25) **office in '98.**

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- (1)
- (2) Q. That was false, wasn't it?
- (3) MR. PAOLELLA: Objection.
- (4) THE WITNESS: Whether they were the only
- (5) senators in the country running for office?
- (6) BY MR. ABRAMS:
- (7) Q. No; whether they were the only senators
- (8) running in districts in which the AF of L ads were
- (9) running and named them.
- (10) A. I don't recall. They may be the only
- (11) Republican senators. I don't recall.
- (12) Q. Do you know why Daniel had not included
- (13) Greensboro in his description to you of where the AF
- (14) of L ad ran?
- (15) A. I'm not sure. I don't have Daniel's e-mail
- (16) in front of me, so I'm not sure what it had
- (17) originally said.
- (18) Q. Well, what you say here, according to
- (19) Daniel's e-mail, only Raleigh-Durham and Pittsburgh
- (20) markets were pertinent markets?
- (21) A. Well, I don't have Daniel's e-mail in front
- (22) of me. I'm not sure if that's what he did say.
- (23) There may --
- (24) Q. You're not sure you said what he said he
- (25) said?

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- (1)
- (2) A. Well, again, I don't have Daniel's e-mail.
- (3) Perhaps the e-mail said only the markets for Specter
- (4) and Faircloth are at issue.
- (5) Q. Do you know if you ever had to redo the
- (6) numbers to include Greensboro?
- (7) A. Sure.
- (8) Q. Yes, you did?
- (9) A. I believe I did include them.
- (10) Q. Do you know if there were any airings in St.
- (11) Louis of this AF of L ad referring to Senator Bond
- (12) who was then running for reelection?
- (13) A. I don't recall.
- (14) Q. And then explain to us the computation that
- (15) you did which led you to the figure of 11.38
- (16) percent, which is the beginning of Page 2 --
- (17) A. I did a computation totalling the number of
- (18) airings at this point just from Pittsburgh and
- (19) Raleigh-Durham, adding it to the number of airings
- (20) for Reid-Ensign. This gave us the numerator, at the
- (21) time what we considered to be the number of
- (22) airings -- number of genuine issue airings within 60
- (23) days, and then we divided that by a denominator of
- (24) all group issue ads aired within 60 days.
- (25) Q. And you wound up with 11.38 percent?

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- (1)
- (2) A. We did at that time.
- (3) Q. And what was your understanding as to what
- (4) the 11.38 percent reflected? What did that number
- (5) tell you as you then understood it?
- (6) A. 11.8 percent reflects the percent of all ads
- (7) captured by Snowe-Jeffords, had Snowe-Jeffords been
- (8) in place in 1998, that were coded as genuine issue
- (9) ads.
- (10) Q. And at that point, you thought the number was
- (11) 11.38 percent, right?
- (12) A. At that time, as of January 16, 2001.
- (13) Q. Now, I'll mark as Exhibit-27 a document which
- (14) does contain material from Daniel Seltz and various
- (15) responses, and this was previously marked as Holman
- (16) Exhibit-32.
- (17) (Exhibit McLoughlin-27 marked for
- (18) Identification.)
- (19) THE WITNESS: Okay.
- (20) BY MR. ABRAMS:
- (21) Q. Now, is the e-mail that appears to have been
- (22) written on January 12, 2001 one written by Daniel
- (23) Seltz?
- (24) A. No. It's one -- well --
- (25) Q. Who wrote that e-mail which begins at the

Page 84

- (1)
- (2) bottom of the first page of this exhibit?
- (3) A. This is an e-mail from Daniel to me. The
- (4) manner he's responding is to intersperse his
- (5) responses in between my paragraphs that I've
- (6) written.
- (7) Q. And then your response is contained in the
- (8) middle of Page 1 of this exhibit, correct?
- (9) A. True.
- (10) Q. And then his response to you is contained at
- (11) the top, right?
- (12) A. Yes.
- (13) Q. Now, had you filled Daniel in on why you were
- (14) asking him for more information?
- (15) A. I think I set it out pretty straightforwardly
- (16) in the e-mail of January 12th about explaining the
- (17) queries on the dataset.
- (18) Q. And that's where you wrote that, quote, We've
- (19) been doing some queries on the dataset and are
- (20) looking at the percentage of genuine issue ads which
- (21) were aired within 60 days of the election and
- (22) mention or feature a candidate, period, end quote.
- (23) And you went on from there, right?
- (24) A. Yes, and gave him the specific question we
- (25) were trying to answer with regards to the 7 percent.

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- (1)
- (2) Q. Now, what was his answer to that?
- (3) A. His answer was as I've stated, the objective
- (4) criteria of candidate versus office holder has to be
- (5) taken into account. We weren't doing that in our
- (6) attempts to confirm the number, and he suggested we
- (7) take that into account with respect to the
- (8) particular media markets.
- (9) Q. And it was by doing that, is it not, that the
- (10) figure of around 40 percent was reduced to a figure
- (11) around 13 percent, correct?
- (12) A. It was.
- (13) Q. Did Daniel say anything else to you about the
- (14) 7 percent figure?
- (15) A. This e-mail, he makes some reference to the
- (16) distinct ads question, but I think --
- (17) Q. That was a different question, wasn't it, a
- (18) distinct ads vis-a-vis airings, right?
- (19) A. Right.
- (20) Q. But putting that aside, did he say to you in
- (21) any e-mail the 7 percent figure is correct?
- (22) A. I mean, he didn't express doubt about his own
- (23) number from the '98 study, but clearly we were not
- (24) communicating properly by what we were talking
- (25) about.

Page 86

- (1)
- (2) Q. Did he express doubt at that time about the
- (3) 13.8 percent, or thereabouts, numbers you were
- (4) working with from the information he gave you?
- (5) A. I'm not sure if he ever -- if he ever
- (6) discussed with me 13.8 percent.
- (7) Q. Or any figure around 13 percent, right?
- (8) A. Yeah. I don't recall discussing anything
- (9) beyond the 40 percent.
- (10) Q. And you don't recall, do you, him saying
- (11) anything in substance about your inquiries other
- (12) than is reflected in this e-mail?
- (13) A. I can't recall anything other in substance,
- (14) no.
- (15) MR. ABRAMS: I'll mark what has been
- (16) marked as Holman Exhibit-33 as McLoughlin-28.
- (17) (Exhibit McLoughlin-28 marked for
- (18) identification.)
- (19) BY MR. ABRAMS:
- (20) Q. Is this an e-mail that you wrote?
- (21) A. It is.
- (22) Q. And in writing this e-mail, you took account,
- (23) did you not, of the AF of L ad showing in
- (24) Greensboro, Pittsburgh and Raleigh-Durham, right?
- (25) A. True.

Page 87

- (1)
- (2) Q. And taking that into account, you came up
- (3) with a number of 13.4 percent of genuine issue ads
- (4) that would be caught unfairly by a 60-day rule,
- (5) right?
- (6) A. True.
- (7) MR. ABRAMS: I'd like to mark now what
- (8) had been marked as Holman Exhibit-35 and that I'll
- (9) now mark as McLoughlin Exhibit-29.
- (10) (Exhibit McLoughlin-29 marked for
- (11) identification.)
- (12) BY MR. ABRAMS:
- (13) Q. Do you recall receiving this e-mail?
- (14) A. I don't specifically recall this e-mail, but
- (15) if my name is on it, I'm sure I did receive it.
- (16) Q. And in this e-mail Rick Hasen comes out with
- (17) a figure of 13.8 percent based on his calculations;
- (18) does he not?
- (19) A. It appears that's the number he gets using a
- (20) different denominator -- or numerator.
- (21) Q. Now, in the fourth paragraph he states that,
- (22) quote, In order to get to these numbers, unquote,
- (23) referring to the numbers set forth above, quote, you
- (24) needed to make a guess that 2476/2905 of the AF of L
- (25) ads featured office holders, not a candidate for

Page 88

- (1)
- (2) office in 1998, period. You are guessing because no
- (3) one has the individual versions of the cookie cutter
- (4) ads, unquote. And then he goes on to ask whether
- (5) you had more to go on.
- (6) My question to you is, what was the
- (7) basis for coming up with the precise numbers of how
- (8) often the AF of L ads ran and where they ran?
- (9) A. The exchange with Daniel.
- (10) Q. And was that you and Daniel or someone else
- (11) and Daniel?
- (12) A. Myself and Daniel and perhaps Craig and
- (13) Daniel as well. Clearly there's an e-mail where
- (14) Josh, I think, writes back to Daniel and the rest of
- (15) us, if I'm recalling correctly. I'm not sure.
- (16) Q. Were the numbers speculative in nature?
- (17) A. Of course not.
- (18) Q. And where did they come from?
- (19) A. We were working off Daniel's experience with
- (20) the dataset, the 1998 dataset, and the procedures
- (21) and steps taken to address this specific question.
- (22) Q. And to your knowledge, where did Daniel get
- (23) the information that he provided you with which is
- (24) reflected here?
- (25) A. I don't recall.

Page 89

- (1)
- (2) Q. Do you recall if he got it from CMAG?
- (3) A. That's possible. That would be one likely
- (4) source.
- (5) Q. Do you know if he called the AF of L?
- (6) A. I don't recall. I don't know.
- (7) MR. ABRAMS: I'd like to mark what has
- (8) been marked as Holman Exhibit-37 as McLoughlin
- (9) Exhibit-30.
- (10) (Exhibit McLoughlin-30 marked for
- (11) identification.)
- (12) BY MR. ABRAMS:
- (13) Q. And ask you if you wrote that.
- (14) A. Yes, I did.
- (15) Q. And here you wind up with a percent of false
- (16) positives of 13.8 percent, correct?
- (17) A. Yes, I do.
- (18) Q. Now, this is the last document that we have
- (19) seen from the files of the Brennan Center from you
- (20) setting forth any number answering the question
- (21) we've been talking about.
- (22) Do you recall if you wrote anything by
- (23) way of e-mail or otherwise at any point after
- (24) writing Exhibit-30 and prior to your being
- (25) subpoenaed to testify here today about this subject?

Page 90

- (1)
- (2) MR. PAOLELLA: I'm going to object to
- (3) that question. Exhibit-30, as far as I can tell, is
- (4) undated, so it's impossible for the witness to place
- (5) it in any kind of time frame whereby he can discuss
- (6) what he wrote prior to or after that document.
- (7) BY MR. ABRAMS:
- (8) Q. Is that true? Is it impossible for you to
- (9) place it vis-a-vis the other documents I've shown
- (10) you?
- (11) A. I could hazard a guess. That's probably the
- (12) best I could do.
- (13) Q. Do you believe that the 13.8 percent number
- (14) was written by you after earlier e-mails reflecting
- (15) a 13.4 percent number?
- (16) A. That, I don't know.
- (17) Q. Did you ever write anything while you were at
- (18) the Brennan Center after you wrote e-mails
- (19) containing numbers in the order of 13.4 percent and
- (20) 13.8 percent addressing this issue?
- (21) MR. PAOLELLA: Objection.
- (22) THE WITNESS: Not that I can recall.
- (23) Once the Hasen piece came out, the subject was
- (24) closed.
- (25) BY MR. ABRAMS:

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- (1)
- (2) Q. Once the what came out?
- (3) A. The Rick Hasen piece came out, the subject
- (4) was closed.
- (5) Q. And the Rick Hasen piece had a 13.8 percent
- (6) number in it; did it not?
- (7) A. I don't remember.
- (8) Q. As of the time you left the Brennan Center,
- (9) was it your understanding that the correct number
- (10) was something in the order of 13.8 percent?
- (11) MR. PAOLELLA: Objection. What do you
- (12) mean by "the correct number"?
- (13) THE WITNESS: I don't remember.
- (14) BY MR. ABRAMS:
- (15) Q. I want to show you now a document previously
- (16) marked as Holman Exhibit-36, which will be
- (17) McLoughlin Exhibit-31.
- (18) (Exhibit McLoughlin-31 marked for
- (19) identification.)
- (20) BY MR. ABRAMS:
- (21) Q. This is an e-mail from Craig Holman to Rick
- (22) Hasen, which I will represent to you he testified
- (23) was based, in good part, on the previous exhibit
- (24) which we've just gone over, which is your
- (25) Exhibit-30. My question is, have you seen this

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- (1)
- (2) before?
- (3) A. I don't remember.
- (4) Q. In the third paragraph Mr. Holman wrote that
- (5) the reassessed figure of 41.3 percent of all ads
- (6) aired within 60 days that could have been captured
- (7) by the new statute, quote, was sent to Daniel Seltz
- (8) who worked on the 1998 database along with your
- (9) request for all the storyboards, unquote.
- (10) It then says, quote, Daniel has
- (11) explained that while the 7 percent figure referred
- (12) to in some sections of the report (e.g. Page 109)
- (13) may have referred to the two unique ads of 30 unique
- (14) ads, that some discussions in other sections of the
- (15) report (i.e. Chart 4.22) refer to all ads aired, but
- (16) broken down by market segment, period, unquote. And
- (17) then he goes on from there.
- (18) Is that, in substance, what Daniel Seltz
- (19) had told you, the information contained here?
- (20) A. I'm not sure if he told me that the 7 percent
- (21) referred to only unique ads. That's very possible.
- (22) We did obviously discuss a lot about making sure we
- (23) had correct subjective criteria about candidate
- (24) versus office holder in specific markets.
- (25) Q. Then Mr. Holman concluded here that by

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- (1)
- (2) limiting the analysis to just North Carolina and
- (3) Pennsylvania with respect to the AF of L ads and
- (4) adjusting for another ad, that the percentage of
- (5) total genuine issue ads which mentioned a candidate
- (6) and which would be captured by the 60-day
- (7) bright-line test drops to 13.8 percent.
- (8) And my question is, did a time ever
- (9) come, after you saw this e-mail and before August
- (10) 15, that you thought that the correct number was
- (11) anything but a number in the order of 13.4 percent
- (12) or 13.8 percent?
- (13) **MR. PAOLELLA:** Objection.
- (14) **THE WITNESS:** One more time.
- (15) **BY MR. ABRAMS:**
- (16) **Q.** Sure. The number that Mr. Holman offers in
- (17) this e-mail is 13.8 percent?
- (18) **A.** True.
- (19) **Q.** The same number as in your e-mail to him?
- (20) **A.** True.
- (21) **Q.** My question is, at any time before you left
- (22) the Brennan Center did you ever conclude that the
- (23) actual number was anything less than 13.4 percent or
- (24) 13.8 percent?
- (25) **A.** No, I don't recall concluding anything like

Page 94

- (1)
- (2) that.
- (3) **Q.** Now, you spoke last Friday to Daniel-Seltz?
- (4) **A.** True.
- (5) **Q.** What did he tell you then?
- (6) **A.** Ran into him on the street in New York, said
- (7) have you gone yet or something to that effect or are
- (8) you being deposed, something like that. I said yes.
- (9) Are you being deposed, have you gone yet, something
- (10) to that effect. And then just chatted about law
- (11) school, his second year, my first year.
- (12) **MR. ABRAMS:** I'd like to take a
- (13) ten-minute break and then I think I can finish in
- (14) the next few minutes so we can adjourn by 1:00.
- (15) **MR. PAOLELLA:** That's fine.
- (16) **MR. ABRAMS:** At least my questioning.
- (17) **MR. PAOLELLA:** That's fine. Depending
- (18) on your questions, I may have a little bit of
- (19) followup, but I don't think it will be anything that
- (20) extensive.
- (21) (Short recess.)
- (22) **BY MR. ABRAMS:**
- (23) **Q.** Mr. McLoughlin, I asked you some questions
- (24) earlier about the decision made by Professor
- (25) Goldstein to treat CBM ads as election or sham issue

Page 95

- (1)
- (2) ads rather than, quote, genuine, unquote, issue ads.
- (3) Do you recall our discussion about that?
- (4) **A.** I recall that.
- (5) **Q.** I want to mark now as McLoughlin Exhibit-32 a
- (6) document written by you on March 13, 2001.
- (7) (Exhibit McLoughlin-32 marked for
- (8) identification.)
- (9) **THE WITNESS:** Okay.
- (10) **BY MR. ABRAMS:**
- (11) **Q.** Did you write the document?
- (12) **A.** I did.
- (13) **Q.** This is a document, is it not, that offers
- (14) alternative analyses based on how one treats the CBM
- (15) ads as to the consequences of Snowe-Jeffords within
- (16) 30 or 60 days of an election; is that right?
- (17) **A.** I believe it is.
- (18) **Q.** And your conclusion, was it not, was that if
- (19) you don't count the CBM ads or if you treat them as
- (20) electioneering ads, that the 60-day figure with
- (21) respect to airings is 0.5 percent, correct?
- (22) **A.** Yes.
- (23) **Q.** And that the 30-day figure with respect to
- (24) airings is 0.2 percent, right?
- (25) **A.** Yes.

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- (1)
- (2) **Q.** And those figures are contained in Buying
- (3) Time 2000, are they not, in substance?
- (4) **MR. PAOLELLA:** Objection.
- (5) **THE WITNESS:** I don't recall.
- (6) **BY MR. ABRAMS:**
- (7) **Q.** Are figures in the order of 1 percent or less
- (8) set forth in Buying Time 2000, if you recall, with
- (9) respect to the impact within 30 and 60 days of
- (10) Snowe-Jeffords?
- (11) **A.** We didn't really do the impact of 30 days in
- (12) Buying Time 2000, but as to 60 days, around the 0.5
- (13) or 1 percent figure.
- (14) **Q.** And you concluded in this memo, did you not,
- (15) that if the CBM ads had been included, in terms of
- (16) distinct ads, the figure would be 5 percent and in
- (17) terms of airings, the figure would be 5.3 percent,
- (18) correct?
- (19) **A.** That's what this e-mail says. I'm not
- (20) convinced it's accurate, but...
- (21) **Q.** Did you do any later e-mails or analysis
- (22) while you were at the Brennan Center with respect to
- (23) this topic which resulted in different numbers?
- (24) **A.** No, but, I mean, just looking at the document
- (25) now, it appears that there's a number that got

Page 97

- (1)
- (2) switched that --
- (3) Q. Which number is that?
- (4) A. In the section "With CBM."
- (5) Q. Yes.
- (6) A. Point 2 where it says "out of a total of
- (7) 39,018," I think that should actually correspond
- (8) with 60-day Non-CBM where it says "51,491 airings."
- (9) But that's just --
- (10) Q. And then will the number still be 5.3
- (11) percent?
- (12) A. No. I believe the number would be lower.
- (13) But that's just eyeballing it. I haven't gone over
- (14) these numbers at all.
- (15) Q. And the number that you came out with when
- (16) you did this analysis with respect to 30 days with
- (17) CBM was that in terms of distinct ads, the figure
- (18) would be 4 percent and in terms of airings, 3.5
- (19) percent, correct?
- (20) A. True.
- (21) Q. Why did you do this study?
- (22) A. I don't recall. I believe Rick had his
- (23) own -- Rick was going to agree or disagree -- Rick
- (24) was going to agree or disagree based on his own
- (25) opinion of the ads. He wanted to look at the ads

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- (1)
- (2) themselves, and this was probably in response to
- (3) some request to run it differently given his own
- (4) examination of the boards, and I provided that for
- (5) him.
- (6) MR. ABRAMS: Then I want to mark what
- (7) has been marked as Holman Exhibit-42 as McLoughlin
- (8) Exhibit-33.
- (9) (Exhibit McLoughlin-33 marked for
- (10) identification.)
- (11) BY MR. ABRAMS:
- (12) Q. Is this exhibit, Buckley versus Valeo, a
- (13) document that you wrote?
- (14) A. Yes. It's an e-mail I wrote to Craig and to
- (15) Glenn.
- (16) Q. And what year was this? I can't tell from
- (17) the date on top.
- (18) A. Well --
- (19) Q. You were only there on one September 24th,
- (20) right?
- (21) A. No, that's not true.
- (22) Q. All right. Go on. What year was this?
- (23) A. I believe it was 2001, because Craig had not
- (24) been working at the Brennan Center in September of
- (25) 2000.

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- (1)
- (2) Q. Thank you.
- (3) MR. ABRAMS: I have no further
- (4) questions.
- (5) MR. PAOLELLA: Off the record for a
- (6) second.
- (7) (Discussion held off the record.)
- (8) (Short recess.)
- (9) BY MR. PAOLELLA:
- (10) Q. I just have a few follow-up questions for
- (11) you, Mr. McLoughlin.
- (12) MR. ABRAMS: Could I ask you on whose
- (13) behalf you're asking these questions.
- (14) MR. PAOLELLA: I'm asking them on behalf
- (15) of the witness.
- (16) MR. ABRAMS: Of the witness himself?
- (17) MR. PAOLELLA: Yes. I'm entitled to
- (18) cross-examination.
- (19) MR. ABRAMS: Well, I object to the
- (20) cross-examination on behalf of the witness.
- (21) Proceed.
- (22) BY MR. PAOLELLA:
- (23) Q. Mr. McLoughlin, do you recall testifying that
- (24) in the course of performing analyses on the Buying
- (25) Time 1998 database, at one point you came upon a

Page 100

- (1)
- (2) number of 13.8 percent?
- (3) A. I do.
- (4) Q. And is it correct that that 13.8 percent
- (5) number represented the percentage of issue ads that
- (6) would be caught by the Snowe-Jeffords amendment that
- (7) were coded as genuine issue ads?
- (8) A. That is right.
- (9) Q. And that measurement is one way of measuring
- (10) the impact that the Snowe-Jeffords amendment would
- (11) have on issue ads aired by groups; isn't that
- (12) correct?
- (13) A. Yes, that's true.
- (14) Q. Now, it's true, isn't it, that there are
- (15) other ways to measure the impact of the
- (16) Snowe-Jeffords amendment on group-run issue ads?
- (17) A. That's true.
- (18) Q. And one way, one alternative way, of
- (19) measuring that impact would be to measure the
- (20) percentage of genuine issue ads run by groups over
- (21) the course of the entire year that were caught by
- (22) the Snowe-Jeffords amendment?
- (23) A. Absolutely.
- (24) Q. Did you ever perform the analysis that I just
- (25) laid out?

Page 101

- (1)
- (2) **A. Yes, I did.**
- (3) **Q. I'm going to ask you to take a look at what's**
- (4) **been previously marked as McLoughlin Exhibit-30.**
- (5) **Mr. McLoughlin, could you turn to Page 2 of this**
- (6) **document. Could you read me the sentence that**
- (7) **appears after the Numeral 3?**
- (8) **A. "Number of group issue ads which were**
- (9) **coded" --**
- (10) **Q. I'm sorry. The bold face.**
- (11) **A. I'm sorry. "Percent of total genuine issue**
- (12) **ads that would have been unfairly caught by a 60-day**
- (13) **test."**
- (14) **Q. And can you continue.**
- (15) **A. "Number of group issue ads which were coded**
- (16) **as providing information in the entire election**
- (17) **cycle equals," and then there's a computational**
- (18) **formula and it offers the result as being 685 ads**
- (19) **were genuine issue ads featuring a candidate within**
- (20) **60 days, and this was out of a total of 9,763 ads,**
- (21) **or 7 percent.**
- (22) **Q. Does that equation that you just read to me**
- (23) **measure the percentage of the total genuine issue**
- (24) **ads run by groups over the course of the entire year**
- (25) **that would have been caught by the Snowe-Jeffords**

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- (1)
- (2) **amendment?**
- (3) **A. If I'm hearing your question, yes, it does.**
- (4) **It measures the number of -- the percent of genuine**
- (5) **issue ads in terms of airings run by groups over the**
- (6) **course of the election that would have been caught**
- (7) **within the 60-day window.**
- (8) **Q. And your conclusion as to that number was 7**
- (9) **percent; is that correct?**
- (10) **A. That's true.**
- (11) **Q. I'm going to ask you to take a look at what's**
- (12) **been previously marked as McLoughlin Exhibit-14.**
- (13) **Towards the center of the page there's a sentence**
- (14) **beginning with "762 spots." Could you please read**
- (15) **that sentence into the record for us?**
- (16) **A. Yes. I think it's "672 spots" --**
- (17) **Q. Pardon me, yes.**
- (18) **A. -- "are 7 percent of the 9,763 total genuine**
- (19) **issue ad spots in the election."**
- (20) **Q. And is that the same computation that you**
- (21) **just performed a moment ago?**
- (22) **A. It's roughly the same. It's roughly the same**
- (23) **computation, yes. The denominator is the same and**
- (24) **the numerator had slightly changed, but it's the**
- (25) **exact percentage output.**

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- (1)
- (2) **Q. And your conclusion there also reached a**
- (3) **number of 7 percent; is that correct?**
- (4) **A. Yes, it did.**
- (5) **Q. I'm going to ask that the court reporter mark**
- (6) **as McLoughlin Exhibit-34 a publication of the**
- (7) **Brennan Center entitled Five New Ideas to Deal with**
- (8) **the Problems Posed by Campaign Appeals Masquerading**
- (9) **as Issue Advocacy. This document was previously**
- (10) **marked as an exhibit in the Holman deposition.**
- (11) **(Exhibit McLoughlin-34 marked for**
- (12) **identification.)**
- (13) **BY MR. PAOLELLA:**
- (14) **Q. Mr. McLoughlin, I ask that you turn your**
- (15) **attention to the page on which the heading**
- (16) **Recommendation No. 4: Adjusts the Bright-Line Test**
- (17) **appears, and I'd ask you to take a look at the text**
- (18) **above that heading, beginning with the sentence**
- (19) **"Examination of 1998's ads."**
- (20) **A. Okay.**
- (21) **Q. I ask you to read that sentence into the**
- (22) **record.**
- (23) **MR. ABRAMS: Excuse me. What page are**
- (24) **you on?**
- (25) **MR. PAOLELLA: I don't have a page**

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- (1)
- (2) **number on this. I can point it out for you.**
- (3) **MR. ABRAMS: Oh, the Recommendation 4?**
- (4) **MR. PAOLELLA: Yes. It's two paragraphs**
- (5) **above that.**
- (6) **MR. ABRAMS: Yes.**
- (7) **THE WITNESS: The first sentence reads,**
- (8) **"Examination of 1998's ads shows that 82 percent of**
- (9) **the total airings of ads regarded by coders as**
- (10) **electioneering would have been captured under a**
- (11) **bright-line 60-day approach, and only 7 percent of**
- (12) **the total airings regarded by coders as genuine**
- (13) **issue ads would have been similarly captured."**
- (14) **BY MR. PAOLELLA:**
- (15) **Q. Now, Mr. McLoughlin, do you believe that what**
- (16) **is being measured in that sentence refers to the**
- (17) **percentage of total genuine issue ads run over the**
- (18) **course of the year that would be caught by the**
- (19) **Snowe-Jeffords test?**
- (20) **A. That's what the 7 percent refers to in that**
- (21) **statement, yes.**
- (22) **Q. And the 7 percent figure in that statement is**
- (23) **the same result as the 7 percent result that you**
- (24) **reached in the two memos that I just showed you; is**
- (25) **that correct?**

Page 105

- (1)
- (2) **A. Yes, it's the exact same result.**
- (3) **Q.** Mr. McLoughlin, have you ever had the
- (4) opportunity to review the document in front of you
- (5) right now, the Five New Ideas document?
- (6) **A.** I've seen it when I was working at the
- (7) Brennan Center, and we were clearly working with it
- (8) when we were trying to sort out some of this issue
- (9) regarding the 7 percent and the 40 percent. So,
- (10) yes, I'm familiar with it.
- (11) **Q.** Is it your understanding that the
- (12) computations and the figures contained in the Five
- (13) New Ideas document were based on the data analyzed
- (14) pursuant to the Buying Time 1998 study?
- (15) **A. Yes.**
- (16) **MR. PAOLELLA:** I'm going to mark as next
- (17) in line a copy of a document entitled Buying Time,
- (18) Television Advertising in the 1998 Congressional
- (19) Elections. I believe this document also was
- (20) previously marked as an exhibit in the Holman
- (21) deposition. I believe it was Exhibit-2.
- (22) (Exhibit McLoughlin-35 marked for
- (23) identification.)
- (24) **BY MR. PAOLELLA:**
- (25) **Q.** Mr. McLoughlin, are you familiar with the

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- (1)
- (2) document in front of you right now?
- (3) **A. Yes, I am.**
- (4) **Q.** Is this the Buying Time 1998 study that we
- (5) just referred to a moment ago?
- (6) **A. Yes, it is.**
- (7) **Q.** I'd ask you to turn to Page 109 of that
- (8) document.
- (9) **A. (Witness complies.)**
- (10) **Q.** If you could read to me, please, the
- (11) paragraph on that page, beginning "Figures 4.22a."
- (12) **A. "Figures 4.22a and 4.22b display the results**
- (13) **of our examination. Issue ads were divided into two**
- (14) **groups, commercials that the coders saw as**
- (15) **generating support or opposition for a candidate and**
- (16) **commercials coders saw as providing information or**
- (17) **urging action on bill (see Appendix A, question No.**
- (18) **6).**
- (19) "Figure 4.22a shows the percentage of
- (20) each class of ads that fell within different time
- (21) periods before the election, the 60-day period in
- (22) many of these bills as well as two shorter time
- (23) spans.
- (24) "Figure 4.22b adds the second criterion
- (25) of the bright-line test to the analysis, further

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- (1)
- (2) categorizing ads by whether a candidate is mentioned
- (3) or not.
- (4) "The results show that while 41 percent
- (5) of issue ads that provide information or urge action
- (6) appeared within 60 days of the fall election, just 7
- (7) percent of those ads (consisting of just two spots)
- (8) appeared within 60 days and referred to a
- (9) candidate."
- (10) **Q.** Mr. McLoughlin, with regards to a portion of
- (11) that text reading, quote, just 7 percent of those
- (12) ads (consisting of just two spots) appeared within
- (13) 60 days and referred to a candidate, is it your
- (14) understanding that the 7 percent figure cited there
- (15) refers to the percentage of total genuine issue ads
- (16) aired over the course of the entire year that would
- (17) be caught by the Snowe-Jeffords 60-day bright-line
- (18) test?
- (19) **A. That is what it refers to. I know now that**
- (20) **that is what it refers to.**
- (21) **Q.** I'm sorry?
- (22) **A. I know now that that is what the 7 percent**
- (23) **refers to.**
- (24) **Q.** Is it your understanding that that's what the
- (25) 7 percent refers to?

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- (1)
- (2) **A. Yes.**
- (3) **MR. PAOLELLA:** I have no further
- (4) questions.
- (5) **BY MR. ABRAMS:**
- (6) **Q.** Mr. McLoughlin, when you say "I know now that
- (7) that is what it refers to," when did you first
- (8) understand it to mean that?
- (9) **A. I believe sometime in the course of this**
- (10) **litigation.**
- (11) **Q.** How recently?
- (12) **A. Within the past -- within the time that I've**
- (13) **been subpoenaed.**
- (14) **Q.** At some point after August 15th?
- (15) **A. Yes.**
- (16) **Q.** Could you refer to Exhibit-23, which is an
- (17) e-mail from you, Holman Exhibit-29.
- (18) **A. Okay.**
- (19) **Q.** Now, this is the e-mail you wrote to Josh
- (20) Rosenkranz on January 12, 2001 in which you said,
- (21) quote, I agree the statements on Page 8 of 5 New
- (22) Ideas and on Page 109 of Buying Time are either
- (23) false or so vague as to mislead the reader, unquote.
- (24) You've just read to us, have you not,
- (25) from the relevant passage in Five New Ideas?

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- (1)
- (2) **A. Yes, and on Buying Time.**
- (3) **Q.** And you've read to us from Page 109 in Buying
- (4) Time?
- (5) **A. Yup.**
- (6) **Q.** And those were the very passages that you
- (7) thought before this litigation were either false or
- (8) so vague as to mislead the reader, correct?
- (9) **A. Yes. They clearly misled me.**
- (10) **MR. ABRAMS:** I have no further
- (11) questions.
- (12) **MR. PAOLELLA:** I have none.
- (13) **(Witness excused.)**
- (14) **(Deposition concluded at 1:20 p.m.)**
- (15) ---
- (16)
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(15)

RPR-Notary Public

(16)

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I HEREBY CERTIFY that the proceedings,
evidence and objections are contained fully and
accurately in the stenographic notes taken by me
upon the foregoing matter on September 10, 2002,
and that this is a true and correct transcript of
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Concordance Report

Unique Words: 1,507

Total Occurrences: 6,764

Noise Words: 384

Total Words In File:
17,896

Single File Concordance

Case Insensitive

Noise Word List(s):

NOISE.NOI

Cover Pages = 0

Includes ALL Text
Occurrences

Dates ON

Includes Pure Numbers

Possessive Forms ON

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