

to help identify the station's ascertainment efforts through the meetings and interviews in which these individuals had participated. SH36 at 5.

28. Mr. Kleiner and Ms. Velleggia gave Ms. Barr their calendars. SH36 at 5. Ms. Barr subsequently met with Mr. Kleiner and Ms. Velleggia and reviewed their respective calendars with each of them, eventually using the information that she obtained in preparing Attachment E. SH36 at 5.

29. Mrs. Covington had retired from WMAR-TV at the end of 1991, and was no longer an employee of the station when she was contacted by Ms. Barr in the summer of 1992. SH38 at 38.⁴ Mrs. Covington had taken her 1991 calendar with her when she left the station. SH38 at 36. When Ms. Barr contacted Mrs. Covington, Mrs. Covington stated that she did not know whether she still had her 1991 calendar, but she would look for it. SH36 at 5-6. Mrs. Covington subsequently found her 1991 calendar, and telephoned Ms. Barr to clarify why Ms. Barr needed it. SH36 at 6; SH38 at 38. Ms. Barr explained that she was compiling information about ascertainment contacts that had taken place in the summer of 1991, and Ms. Barr asked Mrs. Covington to lend her the calendar. SH36 at 6; SH38 at 38.

30. Mrs. Covington responded that instead of lending Ms. Barr her 1991 calendar, she would write out notes for Ms. Barr of

⁴ Mrs. Covington's deposition testimony of August 17, 1994, was admitted into evidence in this proceeding as Scripps Howard Exhibit 38 in lieu of live testimony by Mrs. Covington. See Memorandum Opinion and Order, FCC 94M-512 (released Sept. 7, 1994); T. at 1578.

the meetings she had attended, using the calendar to refresh her recollection. SH36 at 6. Mrs. Covington stated, as Ms. Barr knew from having worked with Mrs. Covington, that she kept her calendar in such a way that it would be difficult for anyone other than Mrs. Covington to read or understand. SH36 at 6; SH38 at 39. Specifically, Mrs. Covington testified at her deposition that

I didn't give her my calendar because she couldn't have ferreted it out, you know, my kind of shorthand, but I went through the calendar and with a yellow or white legal pad I wrote down, you know, the information and the date and then I, you know, got that to her.

SH38 at 39-40. When questioned further by Four Jacks' counsel as to why her calendar would not have been helpful to Ms. Barr, Mrs. Covington added:

I might just have it in my calendar the time and this place and the name and that would be all, and that wouldn't mean anything to anybody. They wouldn't know what had transpired or what I was doing here. I just needed enough to know where I was going and that's what was in my calendar.

SH38 at 42. There is nothing in the record suggesting that Mrs. Covington's belief that Ms. Barr would not be able to understand the calendar was unreasonable or insincere.

31. Ms. Barr accepted Mrs. Covington's offer to write out the details and asked her to include the date of each meeting, the people with whom she met, and, to the extent her memory would allow, the subjects discussed. SH36 at 6. Mrs. Covington subsequently prepared the notes she had promised and provided them to Ms. Barr. SH36 at 6. Mrs. Covington did not make a copy

of the notes for herself, nor was a copy made for her. SH38 at 54.

32. The notes were handwritten in pencil. SH36 at 6; SH37. Ms. Barr later called Mrs. Covington to thank her for the notes and asked her to stop by during her next visit to the station so that they could review the notes together. SH36 at 6.

33. Ms. Barr and Mrs. Covington discussed the 1992 notes in person on at least one occasion. SH36 at 6. In addition, Ms. Barr spoke to Mrs. Covington on the telephone quite often about a wide variety of subjects in the months after Mrs. Covington gave the notes to Ms. Barr, and Ms. Barr testified that she may have asked Mrs. Covington additional questions about the notes during one or more of those conversations. SH36 at 6-7. Mrs. Covington does not recall discussing the notes with Ms. Barr either in person or by telephone, but she testified:

Specifically I do not remember conversations that we're talking about a couple of years later. I cannot recall that. But I can tell you had Emily asked me anything I would have answered her. If she needed clarification I would have given it to her.

SH38 at 48.

34. After receiving Mrs. Covington's 1992 notes, Ms. Barr made several marks on the notes to reflect which entries she considered appropriate for inclusion in the ascertainment exhibit that she was preparing. SH36 at 7; SH37. Ms. Barr checked off the items that she considered appropriate and omitted from consideration those that she did not believe were pertinent or contained insufficient information. SH36 at 7; SH37. Ms. Barr

also wrote on one page, as a note to herself, the phrase "Consumer Information Center." SH36 at 7; SH37.

35. Ms. Barr sent several drafts of Attachment E to Baker & Hostetler over the course of the next few months, and worked with Baker & Hostetler to finalize the Attachment. SH36 at 7.

36. After Ms. Barr completed Attachment E, she left the materials that she had used in preparing it, including Mrs. Covington's notes and the calendars of herself, Mr. Kleiner, and Ms. Velleggia, in a pile on the floor of her office. SH36 at 7. Ms. Barr eventually returned Mr. Kleiner and Ms. Velleggia's calendars to those individuals, but she later retrieved them after Baker & Hostetler told her she would need them. SH36 at 7.

37. Sometime in 1993, Ms. Barr obtained a file cabinet to store the material related to this case. SH36 at 7. She does not recall specifically placing Mrs. Covington's notes or the calendars of herself, Mr. Kleiner, and Ms. Velleggia in the file cabinet, although she did create a file for personal calendars, and she knows from her subsequent review of the files that the calendars were there. SH36 at 7-8. By late 1993 or early 1994, the documents related to this case were too numerous to store in the file cabinet, and Ms. Barr obtained a larger file cabinet. SH36 at 8.

38. At the request of Baker & Hostetler in the spring or summer of 1993, Ms. Barr began to review her files for the purpose of producing documents to Four Jacks. SH36 at 8. She was instructed to turn over to Baker & Hostetler all documents

that she considered to be potentially responsive to the Motion for Production of Documents filed by Four Jacks on June 11, 1993, and she provided Baker & Hostetler with all of the documents that she considered relevant at that time. SH36 at 8.

39. Thereafter, Baker & Hostetler requested that Ms. Barr forward the calendars of herself, Mr. Kleiner, Ms. Velleggia, and Mrs. Covington. SH36 at 8. Ms. Barr informed Baker & Hostetler that she had not used Mrs. Covington's calendar in preparing Attachment E, and that she had used handwritten notes that Mrs. Covington had prepared in 1992 and provided to Ms. Barr. SH36 at 8. On June 25, 1993, Ms. Barr forwarded the calendars of herself, Mr. Kleiner, and Ms. Velleggia to Baker & Hostetler as she had been instructed. SH36 at 8; T. at 1607. On cross-examination, Ms. Barr testified that on the same day, she attached the 1992 Covington notes to the same cover memorandum as was used for the calendars, and forwarded the notes to Baker & Hostetler. T. at 1608.

40. With respect to the 1992 Covington notes, Ms. Barr testified:

I do not recall sending Ms. Covington's 1992 notes to Baker & Hostetler, although I now know that I sent them, also. I kept copies of the calendars of myself, Mr. Kleiner, and Ms. Velleggia. I do not recall ever making a copy of Ms. Covington's notes or requesting that my secretary make a copy of them, although I now know that one was made at WMAR-TV.

SH36 at 8. During cross-examination, Ms. Barr reiterated her testimony that she could not recollect sending the 1992 Covington notes to counsel or copying them. T. at 1600, 1609.

41. In addition, in the spring or summer of 1993, Baker & Hostetler requested that Ms. Barr obtain Mrs. Covington's 1991 calendar from her. SH36 at 8. When Ms. Barr asked Mrs. Covington for her 1991 calendar, Mrs. Covington told Ms. Barr that she and her husband had recently moved some of their belongings in the process of cleaning their condominium, and that she did not believe that she knew where the calendar was. SH36 at 8-9.

42. Ms. Barr told Mrs. Covington that she needed the calendar and asked her to look for it. SH36 at 9; SH38 at 45. At her deposition, Mrs. Covington described her efforts to locate the calendar:

I looked around. It wasn't in the file and I couldn't find it in the piles and I looked, you know, I looked through everything and what I assume is that it got thrown out because I was--in that same period I was going through a lot of the boxes and things and tossing stuff and having piles of things on the cedar chest or the bed and--or in a, you know, toss box trying to decide what to keep and cleaning them out, and I looked, I looked high and low for it and it was--and it's embarrassing when you're that messy and you can't find something like that but I looked every place and I couldn't find it, so I can only assume it got thrown down the trash chute with some of the, you know, other stacks of papers and files that got thrown out because I didn't put it right back after I'd used it obviously.

SH38 at 55.

43. Mrs. Covington subsequently called Ms. Barr back and told her she had been unable to locate her calendar. SH36 at 9. At the request of Baker & Hostetler, Ms. Barr later asked Mrs. Covington a second time to look for the calendar, but Mrs. Covington told Ms. Barr she still was unable to locate it. SH36

at 9. Mrs. Covington no longer has her 1991 calendar, and the record evidence supports her assumption that it was accidentally discarded after the 1992 notes were prepared. SH38 at 38.

44. During the November 1993 hearing in this proceeding, Ms. Barr believed that she had discarded the 1992 Covington notes. SH36 at 12. Her belief was expressed clearly during her testimony at that hearing, when she stated during cross-examination:

I know I threw away a lot of paper during that period of time, that a lot of it was handwritten notes and things of that nature and, and I also recall filing a lot of paper. I don't specifically recall throwing away those notes, but I generally recall that I was getting rid of what I thought was unnecessary information.

SH36 at 12. Ms. Barr believed this statement to be accurate at the time it was made. SH36 at 12.

b. Scripps Howard Has Explained the Subsequent Discovery of the 1992 Covington Notes

45. On February 9, 1994, Ms. Barr had a meeting with Stephanie S. Abrutyn, an attorney with Baker & Hostetler. SH36 at 9. At one point during the meeting, Ms. Barr went through her files to retrieve a memorandum that she had sent to Baker & Hostetler in order to refresh her recollection so that she could answer one of Ms. Abrutyn's questions. SH36 at 9. Ms. Barr reached for the file entitled "MEMOS TO B & H," located in the top drawer of the file cabinet containing materials relating to this case, to look for the memorandum. SH36 at 9.

46. While looking in the "MEMOS TO B & H" file on February 9, 1994, Ms. Barr discovered a memorandum prepared by her and

dated June 25, 1993. SH36 at 9; see also FJ31. Attached to the June 25, 1993, memorandum was a photocopy of the 1992 notes that Mrs. Covington had prepared and given to Ms. Barr. SH36 at 10. The copy of the 1992 Covington notes that Ms. Barr discovered also contained a cover sheet, which was a photocopy of a "post-it" note that she had written. SH36 at 10; see also FJ32 Ex. 3. The copy of the 1992 Covington notes that Ms. Barr discovered also contained notations made by her on the original notes while she was transferring the original notes to the format provided to her by Baker & Hostetler, which eventually became Attachment E. SH36 at 10; see also SH37.

47. When she examined the "MEMOS TO B & H" file, Ms. Barr was not looking for the 1992 Covington notes or anything that might help her locate the 1992 Covington notes, because at the time, she believed that she had thrown away the 1992 notes and not retained any copies of them. SH36 at 10. As Ms. Barr explained under cross-examination:

Q. And look--it was not your purpose in looking at the "MEMOS TO B & H" file to look for the '92 Covington notes or anything that might help you find those notes?

A. Right. Because I did not believe that the notes existed, so there would have been no reason for me to look for anything relating to them, because I believed at that time and at that moment that they did not--and up to that moment that they did not exist.

Q. What was the purpose of looking at the "MEMOS TO B & H" file?

A. I said earlier and I stated in my direct testimony, I went in, as near as I can recollect, to refresh my memory as to the date that I had sent something. I just don't remember what it was that I was looking specifically for. I remember Ms. Abrutyn

asked me a question. I said: let me see if I can remember when I sent that to you, meaning to counsel. And, and then I, you know, discovered this memo with these notes attached. And, frankly, at that point, you know, that sort of superseded anything I was looking for.

T. at 1652-53.

48. With respect to her not having previously discovered the copy of the 1992 Covington notes, Ms. Barr testified:

I never discovered the copy of the 1992 Covington notes previously because in the course of my assorted previous searches of my files for documents requested by Baker & Hostetler, I never looked in the "MEMOS TO B & H" file. The only things that I had personally placed in the "MEMOS TO B & H" file were copies of memoranda that Mr. Kleiner or I had written to Baker & Hostetler, without attachments. Any attachments to the memoranda were filed separately by subject matter in different files. Because these memoranda already had been sent to counsel, there would be no reason for any of the documents for which I was looking to have been in the "MEMOS TO B & H" file and therefore there was no reason for me to have searched that file.

SH36 at 10-11.

49. Ms. Barr neither recalls making a copy of the 1992 Covington notes nor knows how the copy that she discovered ended up in the "MEMOS TO B & H" file. SH36 at 11. Ms. Barr has no recollection of either writing the June 25 memorandum or placing it in the file cabinet. SH36 at 11. Until she discovered the copy on February 9, Ms. Barr believed that she had discarded the 1992 Covington notes and that no copies of the notes had been made or retained. SH36 at 11.

50. Although most of the items in the file cabinet were placed there by Ms. Barr personally, Desiree Pilachowski, who was Ms. Barr's secretary at the time, occasionally placed items in

the file cabinet for her. SH36 at 11. Ms. Barr never instructed Ms. Pilachowski to place any documents in the "MEMOS TO B & H" file other than copies of memoranda, without attachments; nor did Ms. Barr instruct Ms. Pilachowski to place any attachments in that file. SH36 at 11. Ms. Pilachowski left WMAR-TV in July 1993. SH36 at 11.

51. With respect to the retention of the copy of the 1992 Covington notes, Ms. Barr testified:

I have attempted to recall how the copy could have been made or retained without my knowledge. As for the existence of the copy, I had asked Ms. Pilachowski to copy all documents that were forwarded to Baker & Hostetler. I also assume that, at some point, the copy of the 1992 Covington notes must have been misfiled in the "MEMOS TO B & H" file rather than the proper file containing copies of the original calendars used in this proceeding, a file that I had reviewed.

SH36 at 11.

52. Ms. Barr turned over more than 10,000 pages of documents to Baker & Hostetler in connection with this matter, including immense volumes of exhibits. SH36 at 12. She had and continues to have no recollection of having sent the 1992 Covington notes to Baker & Hostetler. SH36 at 12. Having previously examined the file in which she would have expected the notes to have been retained--the file with the personal calendars--without seeing the 1992 notes or a copy of them, Ms. Barr assumed she had discarded them. SH36 at 12. For this reason, Ms. Barr does not recall ever searching her files specifically for the 1992 Covington notes. SH36 at 12.

53. After her discovery of the copy of the 1992 Covington notes, Ms. Barr gave the copy to Ms. Abrutyn. SH36 at 12.

54. On February 10, 1994, Brett W. Kilbourne, a legal assistant at Baker & Hostetler, undertook a search of all of the original documents that Baker & Hostetler had received from WMAR-TV in connection with this proceeding for the original 1992 Covington notes and the accompanying memorandum from Ms. Barr. FJ29; T. at 1539. Mr. Kilbourne located both documents in a box labeled "Documents sent by station but not produced because outside time period or because work product." FJ29; T. at 1542, 1547. Shortly thereafter, Baker & Hostetler informed Ms. Barr that Mrs. Covington's original 1992 notes had been found in their files. SH36 at 12. Once Baker & Hostetler located the 1992 Covington notes, Baker & Hostetler the same day sent copies of them to all parties and to the Presiding Judge. T. at 1743.

c. The Contents of the 1992 Covington Notes Are Consistent With Scripps Howard's Ascertainment Exhibit

55. The 1992 Covington notes comprise nine handwritten pages listing ascertainment contacts Mrs. Covington had between June and September of 1991. SH37. These notes contain more than 70 entries setting forth the dates, times, locations, and descriptions of Mrs. Covington's ascertainment contacts during this period, many of which also are included in Attachment E to Ms. Barr's September 13, 1993, testimony. SH37; SH3 at 0225-0338. Four Jacks questioned Mrs. Covington in detail at her deposition about a number of specific entries in the 1992 Covington notes. SH38 at 59-81.

56. For example, the 1992 Covington notes list the following for August 1: "Afram Luncheon (pgm in Promotion file)." SH37. AFRAM is an African-American festival that was held in Baltimore in 1991. SH3 at 31. The organizers of the festival were featured on the July 28-29, 1991, edition of "Front Page," one of WMAR-TV's locally produced public affairs programs. SH3 at 31, 0344. Mrs. Covington testified that her calendar would have reflected that an AFRAM luncheon was held on August 1, but the mention of a luncheon program in the promotion file probably came from her own recollection and was added to direct Ms. Barr to any additional information she might need about the luncheon. SH38 at 59-60. Minority concerns were identified on WMAR-TV's third quarter issues and programs list as being of significant concern to the community, SH3 at 0339, and Mrs. Covington's attendance at the AFRAM luncheon was identified as an ascertainment contact in Attachment E. SH3 at 0289.

57. The following entry is listed for June 3: "11AM-- Rebecca Warren--script Mfume & Cardin for Humanitarian Dinner." SH37. The purpose of this meeting was to prepare a script for the humanitarian dinner, a fund raising event for the Fuel Fund of Central Maryland. SH38 at 67. The Fuel Fund of Central Maryland is an organization dedicated to assisting the underprivileged with their basic need for a heated home. SH38 at 69. Public service announcements for the dinner, which honored U.S. Representatives Kweisi Mfume and Benjamin Cardin, were aired on WMAR-TV from May 1 through June 6, 1991. SH3 at 0226. Mrs.

Covington's attendance at the June 3 meeting was identified as an ascertainment contact in Attachment E. SH3 at 0226.

58. Mrs. Covington listed the following for June 6:
"Victorine Q. Adams Humanitarian Award Dinner--Recipients Kwesi [sic] Mfume and Ben Cardin. Beverly Burke Emcee--Conducted by Fuel Fund Cent. Md., Janet Covington, president." SH37. This entry referred to her attendance at the humanitarian dinner itself. SH38 at 70. The dinner received coverage on the 11 p.m. news on June 6. SH3 at 0235. Mrs. Covington's attendance at the dinner was identified as an ascertainment contact in Attachment E. SH3 at 0235.

59. The 1992 Covington notes also list the following entry on August 1, 1991: "4:30--Peter Coleman [sic]--Center Stage." SH37. Ms. Barr, Mrs. Covington, and Ms. Velleggia conducted an ascertainment interview with Peter Culman, Executive Director of Center Stage, to discuss the need for greater funds for performing arts, which was identified on WMAR-TV's third quarter issues and programs list as being of significant concern to the community. SH3 at 0290, 0339. WMAR-TV broadcast programming responsive to this issue in the form of public service announcements that aired in September 1992, and also agreed to sponsor Theater Day. SH3 at 0290. The meeting with Mr. Culman was identified as an ascertainment contact in Attachment E. SH3 at 0290.

60. For August 12, the notes describe a "Lunch with Elizabeth Appel--Lung Association to discuss PSAs & Project

possibilities." SH37. Mrs. Covington conducted an ascertainment interview with Elizabeth Appel, Marketing Director for the Lung Association of Maryland, to discuss that organization's need for public service announcements and fund raising. SH3 at 0297. Health was identified on WMAR-TV's third quarter issues and programs list as being of significant concern to the community. SH3 at 0339. Mrs. Covington described this meeting as a "strategy meeting" to discuss publicity for the association's future projects. SH38 at 76. In response to the issues identified during this interview, WMAR-TV broadcast ongoing public service announcements. SH3 at 0297, 0380, 0389. Mrs. Covington's meeting with Ms. Appel was identified as an ascertainment contact in Attachment E. SH3 at 0297.

61. The notes list the following entry for August 23: "9 AM--Phone planning with Tru Ginsburg of Metropolitan Education Coalition's 9/28 Saturday seminar (I was panelist at mtg)." SH37. Mrs. Covington testified that the purpose of this discussion was to prepare for the referenced seminar and Mrs. Covington's participation on a media panel at the seminar. SH38 at 77-78. The seminar itself is listed in the notes as well:

Sept. 28--9:30-4:30--Attended Metropolitan Education Coalition's day long Saturday seminar--on educational concerns & funding. Representatives from all counties there and roster of excellent, challenging speakers for the all-attendee presentations. Additionally series of workshops held. I served on the panel that addressed accessing the media.

SH37. Education was identified on WMAR-TV's third quarter issues and programs list as being of significant concern to the

community. SH3 at 0339. WMAR-TV provided ongoing news coverage responsive to the issues identified during both the interview and the seminar, and both were identified as ascertainment contacts in Attachment E. SH3 at 0306; SH3-0338.

62. The following entries are listed for September 12:

7:30--Minority Business Association breakfast (in conjunction with Md. Chamber of Commerce)--Andy Young speaker--workshops between b'fast and

1200 Minority Business Assoc. Luncheon--Channel 2 had tables to both breakfast & lunch.

SH37. Mrs. Covington attended both the breakfast and the luncheon as well as the workshops. SH38 at 79. The program received coverage on the 5:00 p.m. news on September 12, and public service announcements were aired in response to the program. SH3 at 0323. The luncheon was identified as an ascertainment contact in Attachment E. SH3 at 0323.

63. Of the extent to which the information in the 1992 Covington notes came from her 1991 calendar, Mrs. Covington testified:

Everything is . . . based on recollection. I mean in the calendar, I think I told you, I just had the date and the name of a person or whatever was needed for me to keep the meeting, so that all of the notes were based, I think, on recall and what happened in the meeting.

SH38 at 120.

d. Ms. Barr Did Not Review the July 13, 1993 Letter to Martin Leader

64. On July 13, 1993, a letter signed by Mr. Howard to Martin Leader, Four Jacks' counsel, included a statement that implied that Mrs. Covington had prepared her notes in 1991,

rather than 1992. FJ30. Ms. Barr testified that this implication was incorrect and that she does not believe she saw the letter before it was sent because it also identifies Mrs. Covington as the "former public relations director" of WMAR-TV, rather than the former director of public affairs. SH36 at 13; T. at 1587-88. Ms. Barr testified that she believes she would have corrected the "obvious" error in Mrs. Covington's title had she reviewed the letter prior to its being sent to Mr. Leader. SH36 at 13. There is no evidence in the record that Ms. Barr reviewed the July 13, 1993, letter until the issue of its accuracy was raised by Four Jacks after the initial hearing.

e. The Incorrect Statement in Footnote 6 of Ms. Barr's 1993 Direct Testimony Was Not Intended to Mislead

65. At Ms. Barr's deposition on July 29, 1994, she was directed to footnote six of her September 13, 1993, written direct testimony. SH36 at 13. That footnote contained an incorrect statement that Mrs. Covington "kept these notes in her possession when she left the station." SH36 at 13. In fact, the notes were not created by Mrs. Covington until 1992. SH36 at 13. She kept her 1991 calendar in her possession when she left the station. SH36 at 13. Ms. Barr testified that this misstatement in her September 13, 1993, testimony was accidental and not intended to mislead. SH36 at 13.

B. PROPOSED CONCLUSIONS OF LAW

1. Evidence of Deceptive Intent is a Prerequisite to a Finding of Misrepresentation

66. The burden of proceeding and the burden of proof in this matter have been assigned to Scripps Howard. Memorandum Opinion and Order, FCC 94M-50 (released Feb. 1, 1994), at 8.

67. At the same time, however, it is well established that any finding of misrepresentation or lack of candor is dependent on a showing of intent to deceive the Commission. See, e.g., Calvary Educ. Broadcasting Network, Inc., FCC 94R-17 (released Nov. 2, 1994), at 24. "Unless there is evidence showing 'deceptive intent,' we will not be able to find that misrepresentation or lack of candor has occurred." MCI Telecommunications Corp., 3 F.C.C. Rcd 509, 512 (1988). Therefore, absent evidence of deceptive intent on the part of Scripps Howard, no misrepresentation or lack of candor can be found.

2. The Testimony of Ms. Barr and Mrs. Covington Are Accepted As Credible

68. The testimony of Emily Barr is accepted as credible. To the extent that there were errors in Ms. Barr's testimony, they were understandable mistakes with regard to matters on which she had no motive to deceive. Under cross-examination by Four Jacks' counsel, Ms. Barr was forthright and candid in her responses, and her testimony was not significantly impeached in any way.

69. While due to circumstances, the Presiding Judge was unable to hear testimony from Janet Covington, her deposition testimony is accepted as credible. Mrs. Covington also was forthright and candid in her responses to questioning from Four Jacks' counsel, and to the extent that her testimony was at all inconsistent with Ms. Barr's testimony, such inconsistencies are minor and understandable given that Mrs. Covington was testifying for the first time two years after the subject events occurred, and more than two and one-half years after her retirement from WMAR-TV.

3. Scripps Howard Did Not Commit Misrepresentation or Lack Candor With Respect to the NBC Facsimiles

70. Ms. Barr testified without contradiction that she did not consider the facsimile she sent to NBC to be a "document" relating to ascertainment programming, but simply a request for information. SH36 at 3. For this reason, she testified, she did not give further thought to its possible existence after her initial deposition in 1993. SH36 at 3.

71. Scripps Howard also presented the undisputed testimony of Ms. Barr that when she stated at her 1993 deposition that she had not retained copies of the facsimiles, she believed in good faith that her statement was true and accurate. SH36 at 3. Ms. Barr's uncontradicted testimony that she ultimately found the facsimiles "stuck in between some pieces of paper" explains why previous examinations of her files might well have failed to



72. Furthermore, given that Ms. Barr copied and forwarded to Baker & Hostetler more than two thousand pages of documents relating to the substance of NBC programming, it is understandable, if not predictable, that Ms. Barr would have no specific recollection of retaining two facsimiles created in the process of obtaining the substantive information. SH36 at 3.

73. Two additional factors suggest that Scripps Howard did not intentionally deceive anyone with respect to the NBC facsimiles. First, Four Jacks has not suggested, nor can the Presiding Judge conceive of, any plausible motive for Scripps Howard or Ms. Barr to conceal the existence of the NBC facsimiles. Absence of motive to deceive is a key indication of the absence of deceptive intent. See MCI, 3 F.C.C. Rcd at 513. The documents themselves show that the facsimiles were simply a request for information and a preliminary response and were not themselves documentation of WMAR-TV's 1991 ascertainment or programming. SH36 at 17-18. Moreover, given that Scripps Howard had timely produced all the voluminous NBC programming documents on which it would rely in preparing the issues-responsive programming exhibit it ultimately submitted to the Commission, it was readily apparent from the earliest stage of discovery that Scripps Howard had contacted NBC for information. Additionally, Ms. Barr testified at her initial deposition in 1993 that she had corresponded by facsimile with NBC, and she provided an accurate description of the contents of that facsimile to NBC. T. at 1741-42. Finally, the contents of the facsimiles themselves

reveal no material facts that Scripps Howard had not previously disclosed. SH36 at 17-18. Accordingly, Scripps Howard had nothing to gain by failing to produce the facsimiles.

74. It also is relevant that Scripps Howard eventually and voluntarily did disclose and then produce the NBC facsimiles all within 24 hours after they were discovered by Ms. Barr. T. at 410-15.⁵ The voluntary bringing of a mistake to the attention of the tribunal ordinarily will bolster the erring party's assertion that it lacked deceptive intent. See MCI, 3 F.C.C. Rcd at 513. Had Scripps Howard's failure to produce the facsimiles initially been intentional, the same motives that led to the initial concealment of the facsimiles presumably would have triggered their continued concealment.⁶

75. Because the failure to produce these facsimiles is understandable even under the broader reading of the Four Jacks discovery request adopted by the Presiding Judge; because there is no plausible motive for Scripps Howard or Ms. Barr to have intentionally withheld these facsimiles; and because the facsimiles' existence was voluntarily revealed and the documents produced in advance of the initial hearing, the Presiding Judge finds that Scripps Howard's initial failure to produce the NBC

⁵ Scripps Howard's counsel did ask that the Presiding Judge direct Scripps Howard to turn over the documents only because of counsel's expressed concern that this disclosure not constitute a waiver of work product. T. at 412-15.

⁶ Significantly, the Presiding Judge already had rejected Four Jacks' request to subpoena the facsimiles from NBC when Scripps Howard provided them. See Order, 93M-672 (released Oct. 22, 1993).

facsimiles and Ms. Barr's representation that the facsimiles had not been retained do not constitute misrepresentation or lack of candor. All of the evidence points, without contradiction, to the conclusion that Scripps Howard's assumption that the facsimiles no longer existed was nothing more than an honest mistake that was corrected with no resulting harm to Four Jacks' ability to present its case. Accordingly, the Presiding Judge declines to find misrepresentation or lack of candor with respect to the issue added concerning the NBC facsimiles.

4. Scripps Howard Did Not Commit Misrepresentation or Lack Candor With Respect to the 1992 Covington Notes

76. Ms. Barr and Mrs. Covington both testified that in lieu of lending Ms. Barr her 1991 personal calendar, Mrs. Covington prepared notes in 1992 describing in more detail her ascertainment contacts from June through September of 1991. SH36 at 6; SH38 at 39. These notes were based on the notations in her 1991 calendar and on Mrs. Covington's own recollection. SH36 at 6; SH38 at 39-42. Mrs. Covington also testified at her deposition that she was unable to locate her 1991 calendar when Ms. Barr again asked her for it. SH38 at 55. None of these statements has been disputed.

77. Ms. Barr's 1994 testimony explains how her erroneous assumption during the 1993 hearing that she had discarded the 1992 notes occurred. Ms. Barr did not recall sending the 1992 notes to counsel and her review of the appropriate files in her office did not reveal them; therefore, she assumed that she had discarded them. SH36 at 12. Her testimony further explains that

the copy of the notes retained at WMAR-TV was misfiled, perhaps by her secretary, in a file intended only for copies of communications between Scripps Howard and Baker & Hostetler, without any attachments. SH36 at 10-11. Had this file been properly limited in scope, as Ms. Barr believed it was, it would not have contained the copy of Mrs. Covington's notes, which Ms. Barr believed were wholly absent from her files. SH36 at 11-12.

78. The record does indicate some confusion in correspondence from Scripps Howard's counsel and in Emily Barr's written testimony between (1) the notations in Mrs. Covington's 1991 calendar, which she made contemporaneously with the conduct of her duties at WMAR-TV and kept with her when she left the station, but subsequently lost prior to Four Jacks' initial discovery request, and (2) the notes Mrs. Covington prepared in 1992, which listed and expanded upon those calendar notations and which were misplaced until February 1994. Scripps Howard's errors, however, including its failure to produce the 1992 Covington notes on a timely basis, plainly resulted from mistake rather than deceptive intent, and Four Jacks has now been provided a full opportunity to cross-examine Ms. Barr and Mrs. Covington with respect to these notes.

79. The absence of any deceptive intent on the part of Scripps Howard with respect to the 1992 Covington notes is particularly apparent in light of Four Jacks' failure to propose any plausible explanation to the contrary. Scripps Howard could not rationally have intended to prevent the notes from coming to

light, and Ms. Barr testified accurately about their content at the 1993 hearing. T. at 661. Nothing in the 1992 Covington notes incriminates either Scripps Howard's ascertainment efforts or its representations of those efforts anywhere in the proceeding; on the contrary, the notes provide written confirmation of Mrs. Covington's extensive ascertainment activities during the four-month period at issue, and their timely production would have bolstered Scripps Howard's ascertainment documentation from the outset. SH37.

80. It is particularly noteworthy that nothing in the 1992 Covington notes is inconsistent with or casts any doubt on the accuracy of Attachment E to Ms. Barr's testimony. Indeed, during Ms. Barr's cross-examination at the September 8, 1994 hearing, counsel for Four Jacks were unable to identify a single inconsistency between the notes and Attachment E about which to cross-examine Ms. Barr. In short, Scripps Howard had no motive to conceal the existence of the 1992 Covington notes. See MCI, 3 F.C.C. Rcd at 513.

81. Furthermore, as with the NBC facsimiles, it is significant that Scripps Howard itself eventually located the 1992 Covington notes and immediately brought them to the Presiding Judge's and the parties' attention. These actions undercut any suggestion that it intended to keep the notes concealed. See MCI, 3 F.C.C. Rcd at 513.

82. For the same reasons, the misstatements in the July 13, 1993, letter to Mr. Leader and Ms. Barr's September 13, 1993,

direct testimony, which suggested that Mrs. Covington prepared her handwritten notes prior to her retirement at the end of 1991, cannot be found to have arisen out of any intent to deceive. Both misstatements obviously reflect mistakes by Scripps Howard's counsel that were not caught by Ms. Barr and that held no potential benefit for Scripps Howard. Accordingly, the Presiding Judge finds that these errors do not constitute misrepresentation or lack of candor. Even if these errors were deemed to be significant,

[i]naccurate information resulting from carelessness, exaggeration, faulty recollection, or merely falling short of the punctilio normally required by the Commission falls short of the deceptive intent normally required for disqualification.

Calvary Educ. Broadcasting Network, FCC 94R-17, at 24.

5. Disqualification Against Scripps Howard Is Not Warranted

83. It is established that

The bare existence of a mistake in a license renewal application, without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation, or raise a substantial and material question of fact.

Kaye-Smith Enterprises, 71 F.C.C.2d 1402, 1415 (1979),

reconsideration denied, 46 R.R.2d 1583 (1980). Scripps Howard

has presented undisputed and credible evidence that any transgressions it made were, indeed, mistakes. Logic and common sense support this evidence, and Four Jacks has not presented any evidence to the contrary.

84. For the reasons stated above, the Presiding Judge declines to find misrepresentation or lack of candor on the part

of Scripps Howard in this proceeding, and the three qualifying issues added by FCC 94M-50 are all RESOLVED in favor of Scripps Howard Broadcasting Company.

III. MISREPRESENTATION ISSUES PENDING AGAINST FOUR JACKS

A. PROPOSED FINDINGS OF FACT

1. Business Holdings

a. Four Jacks

85. Four Jacks is a Maryland corporation that was incorporated on August 28, 1991. FJ1 at 1; SH 29. The company has 100 shares of voting stock. David D. Smith, Robert E. Smith, Frederick G. Smith, and J. Duncan Smith, all of whom are brothers (the "Smith brothers" or the "four Smiths"), each own 25% of Four Jacks' stock. FJ1 at 1. David Smith is President and a Director of Four Jacks; Robert Smith is Vice President, Treasurer and a Director; Frederick Smith is Vice President, Assistant Treasurer and a Director; and Duncan Smith is Vice President, Secretary and a Director. FJ1 at 1.

86. Four Jacks has no ownership interest in or control over any medium of mass communication. FJ1 at 1. The principals of Four Jacks hold various media interests, apart from its pending Application for WMAR-TV in Baltimore, as set forth below.

b. Sinclair Broadcast Group, Inc.

87. The principals of Four Jacks wholly own Sinclair Broadcast Group, Inc. ("Sinclair" or "SBG"), which in turn has ownership interests in and control over various media of mass communication. Sinclair is a corporation organized under the