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Court Administrator

STATE OF MINNESOTA  
COUNTY OF RAMSEY

JAN 15 2009  
By *CW* Deputy

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

In the Matter of the Contest of  
General Election held on November 4, 2008  
for the purpose of electing a United States  
Senator from the State of Minnesota,

Case No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**CONTESTEE'S REPLY IN SUPPORT OF  
MOTION TO ESTABLISH PRETRIAL  
SCHEDULING ORDER, OPPOSITION  
TO CONTESTANTS' PROPOSED  
SCHEDULE, AND URGENT REQUEST  
FOR ENTRY OF SCHEDULING ORDER**

**INTRODUCTION**

On January 9, 2009, a few days after the Notice of Contest was filed, Contestee Al Franken moved for an order establishing pretrial deadlines and expedited discovery necessary to meet the statutorily-mandated trial date of January 26, 2009. Four days after Franken's proposal and a full week after their Notice of Contest, Contestants Cullen Sheehan and Norm Coleman (collectively, "Coleman") submitted their own proposed scheduling order without even acknowledging Franken's urgent proposal. Coleman does not even ask the Court to address scheduling until next week, days before the trial must start.

Coleman's proposed order is deeply flawed. For four reasons, the Court should reject Coleman's proposed schedule and enter a modified version of Franken's schedule, modified to reflect the passage of time since the schedule was proposed and the possibly useful elements of Coleman's schedule. And contrary to Coleman's request that no scheduling order issue before

January 20, the Court should enter the order as soon as it possibly can, optimally by Friday, so as to give the parties the guidance they need to move the contest toward the January 26 trial.

Despite its basic flaws, there are some useful elements in Coleman’s proposal. Franken does agree that the trial in this matter should take a maximum of three weeks, or less if Coleman is limited to the issues he has specifically identified to date. And Franken agrees that Coleman generally is free to put his case on in the order he deems best, so long as there is advance disclosure of witnesses to allow Franken to prepare; but that hardly justifies trifurcation and the burdens that would impose on election officials and Franken’s lawyers, all of whom Coleman expects to simultaneously participate in discovery and trial.

After discussing the basic defects in Coleman’s proposed schedule, Franken proposes below a revised version of the Franken schedule from last week.

## ANALYSIS

### **I. COLEMAN’S PROPOSED SCHEDULE STARTS TOO LATE AND WITH THE WRONG ISSUES, TAKES TOO LONG, IS BURDENSOME AND INEFFICIENT, AND DOES NOT INCLUDE NECESSARY PRETRIAL DISCLOSURES.**

#### **A. Coleman’s Proposed Trial Dates Each Violate Minnesota Law.**

The first and most fundamental flaw in Coleman’s proposal is that he asks the Court to deliberately violate the deadline set by Minnesota law for the contest trial—January 26. Under the unequivocal mandate of Minn. Stat. § 209.065, “[t]he contest proceedings *must* be brought on for trial . . . as soon as practicable within 20 days after the filing of the notice of contest.” The jurisdictional boundary for starting trial is January 26. If Coleman needed more time to prepare, he should have delayed filing his notice until the notice deadline. By filing it when he did, he represented under the statute that he had identified and was specifying real problems with the recount and was ready to go to trial on those issues on January 26. If he cannot meet the strict statutory deadline, he should dismiss his notice of contest.

The deadline is not just jurisdictional but wise. Chapter 209 mandates the rapid resolution of election contests because of the “paramount interest of the public welfare that election contests be settled speedily in order that the duties of public office shall not go unperformed for any appreciable length of time because of prolonged uncertainty as to the rightfully elected incumbent.” *Hunt v. Roloff*, 28 N.W.2d 771, 776 (Minn. 1947). The risk of an empty position does not just loom but has arrived. Coleman had the entire two month canvassing and recount process to identify his claims and marshal his evidence. Now, with the new Senate addressing the Nation’s urgent business, Coleman still is not entirely sure what his case is about, so he proposes multiple trials that would begin on February 2, 9, and 16.

As a matter of clear law, and to ensure that Minnesotans obtain full representation in the United States Senate as expeditiously as possible, the trial in this contest must commence on January 26. On that day, opening statements, if any, should be made, and Coleman should call his first witness and proceed in order through all his witnesses.

**B. Coleman’s Proposal Requires the Court to Adjudicate Issues in Violation of Minnesota Law.**

As is equally clear from the face of Minn. Stat. § 209.12, and as discussed in Franken’s Memorandum in Support of Motion to Dismiss, Coleman’s alleged “irregularities” not only have no bearing on which candidate is to receive the certificate of election, but the Court has no jurisdiction to do more than take evidence on irregularities. Therefore, the Court cannot properly resolve and determine the effect of a category of irregularity before moving onto the next one. Coleman cannot fish in closed waters.

**C. Coleman’s Proposal Creates Intolerable Delay and Inefficiency in Resolution of the Contest and Particularly Its Key Issue.**

The second defect in Coleman’s approach is that the trial must not just start on time but must proceed expeditiously. “[T]he whole [election contest] system [is] intended to

expeditiously dispose of election contests . . . . [T]he general idea inherent in the statute [is] that there may be a speedy determination of these matters . . . .” *Franson v. Carlson*, 137 N.W.2d 835, 840 (Minn. 1965). The schedule must be, as Franken’s is and Coleman’s is not, consistent with the “strict procedural requirements and time limitations” of Chapter 209, which requires “a rule of strict compliance” so that contests are “expeditiously resolved,” *O’Loughlin v. Otis*, 276 N.W.2d 38, 40 (Minn. 1979); *see also Hunt v. Roloff*, 28 N.W.2d at 776 (Matson, J., concurring) (“The legislature has wisely provided a summary and strict procedure to avoid intolerable delay in the adjudication of election contests.”).

If the Court determines, despite the motion to dismiss, that Coleman has sufficiently pleaded a basis for a re-recanvassing, then the trial schedule should provide for that as the first, not last, order of business in the trial. The Court should determine which candidate should receive credit for each vote that the State Canvassing Board has already counted and certified in the precincts selected by each side. At that point, the Court can determine which candidate received the most votes and order the certificate of election to issue. The parties can then, and with somewhat less time pressure, present evidence regarding all other purported errors, illegalities, or other irregularities, which the Court will preserve for consideration by the United States Senate, as required by Minn. Stat. § 209.12.

Beyond that, Coleman’s proposed schedule is a recipe for delay and inefficiency. Coleman proposes at best an overlapping series of fishing expeditions, with the last one covering everything “remaining,” and still unidentified. His one asserted concession to efficiency and expedition is to suggest that each of the subsequent trials would be conditioned on his catching his limit of fish the week before. But he will not identify that limit in advance, an essential step were the proposal really intended to expedite resolution of the contest (and if the Court had

jurisdiction to resolve the initial irregularity issues). Further, by seeking to bring his proposed topic-specific schedule on for hearing the day before the Court addresses Franken's motion to dismiss, he ignores the likelihood that his contest will be narrowed and made concrete, if it is not dismissed completely. The trial schedule should not assume the survival of particular topics.

And unlike Franken's proposal, Coleman's proposed schedule fails to impose deadlines for the disclosures needed to get to trial promptly and efficiently, and to allow Franken a fair opportunity to prepare and respond.

First, Coleman must at last identify the precincts and ballots as to each of the irregularity categories that he proposes to bring to trial. Franken can hardly move for summary judgment on any of Coleman's claims if Coleman has not even identified which ballots he claims were counted or left uncounted in error. Indeed, Coleman nonsensically contemplates that discovery *will not be completed* until the summary judgment deadline has already passed. Apparently Coleman would only allow Franken to move for summary judgment regarding Coleman's rejected absentee ballot claims, and makes Franken's ability to do so "contingent" on Coleman's undefined "prompt" receipt of the documents he has subpoenaed from counties and municipalities. This process is patently unfair to Franken, and is an invitation for Franken, local elections officials, and the Court to waste time while Coleman airs meritless claims.

Second, Coleman should not be allowed to worsen the lack of specificity in his Notice by creating a new and undefined "remaining issues" catch-all. The proposed schedule amply demonstrates that firm judicial management is required to make Coleman narrow his scattershot Notice of Contest and identify the serious issues, if any, in this case, and provide pretrial disclosures. The proposed schedule is silent on what constitutes "remaining issues," and says nothing about the myriad vague, undifferentiated complaints mentioned in the Notice of Contest:

(1) “found” ballots, ¶ 12(b); (2) ballots which were “mutilated, defaced, [or] obliterated,” ¶ 13; (3) ballots in which “voters did not comply with all the requirements of the Minnesota Election Law, ¶ 14; (4) ballots cast by “unqualified and ineligible persons,” ¶ 15; (5) ballots cast by persons who “voted more than once,” ¶ 16; (6) ballots that were not initialed by election judges, ¶ 18; (7) obvious errors not detected and corrected by the State Canvassing Board and local canvassing boards, ¶¶ 19-20; and (8) a further cavalcade of unspecified “irregularities,” “material errors,” and “mistakes” in the conduct of the election and the counting, tallying, recording, adding, returning, canvassing, recanvassing, and recount of the ballots, ¶¶ 9(a)-(d). At present, Franken cannot determine which of these claims are “remaining issues,” and which, if any, of these claims Coleman has abandoned. Franken can hardly serve discovery on local election officials seeking “all documents relevant to ‘remaining issues.’”

By failing to propose that the Court first hear the only matter that this Court can decide by statute, and by failing to propose an expeditious discovery, disclosure, and trial schedule, Coleman ensures that Minnesotans will, for months, be without full representation in the United States Senate during a moment of undisputed urgency for our nation.

**D. Coleman’s Proposed Trio of Trials is Burdensome and Inefficient.**

Even if the Court had authority to adjudicate the irregularity topics identified by Coleman, his multiple trial approach would impose grave burdens on local officials, Franken, and the Court. For example, Coleman’s Notice of Contest complains of various issues in Minneapolis, including (1) wrongfully rejected absentee ballots; (2) so-called “double-counted” duplicate ballots; (3) missing ballots; and (4) (presumably) undefined “remaining issues.” According to Coleman, evidence on these issues should be taken in three separate trials. Largely the same cast of witnesses from Minneapolis will testify, repeatedly, and be cross-examined, repeatedly. Coleman will presumably subject Minneapolis’ Elections Director to examination

regarding absentee ballots rejected in Minneapolis precincts (Notice of Contest Ex. B), missing ballots from Minneapolis Ward 3, Precinct 1 (Notice of Contest Ex. G), and “double votes” (Notice of Contest Ex. C). But while she testifies regarding one issue, discovery on the other issues will be proceeding apace. While the Elections Director is testifying at trial regarding alleged rejected absentee ballots during the week of February 9, she would also be responding to discovery requests regarding Coleman’s “remaining issues,” which have a proposed discovery cutoff of February 16. Her predicament will be repeated throughout the state, forcing many local election officials to travel multiple times during the dead of winter. The Court should require Coleman to ask all his questions of a witness the first time he calls her to the stand.

Moreover, Coleman’s approach would be a nightmare for the lawyers and the Court. It would make it impossible for the same core lawyers for Franken to participate in discovery, summary judgment, and trial because discovery and summary judgment would overlap with trial. The impact would also fall on the Court, as lawyers appear at or return to trial who have no idea what went on in their absence, including procedural understandings or what evidence was already introduced.

## **II. REVISED PROPOSED SCHEDULE.**

Franken modifies his proposal in accord with the useful parts of Coleman’s, and in light of the time that has passed, as follows:

1. Coleman shall disclose by 4:30 p.m. on January 19:
  - A. Coleman’s responses to Franken’s discovery requests;
  - B. Coleman’s expert witnesses, if any, and the substance of their testimony;
  - C. Coleman’s answer to the counterclaims;
  - D. Specific identification of:

- i. Each claim Coleman intends to prove at trial, including for each such claim identification of each county, precinct, and voter at issue;
  - ii. All witnesses that Coleman intends to present at trial, including identification of the name, address, and telephone number of each;
  - iii. Each exhibit that Coleman intends to present at trial, including a copy of each.
2. Franken shall disclose by 4:30 p.m. on January 26:
  - A. Franken's expert witnesses, if any, and the substance of their testimony;
  - B. Specific identification of:
    - i. Each claim Franken intends to prove at trial, including for each such claim identification of each county, precinct, and voter at issue;
    - ii. All witnesses that Franken intends to present at trial, including identification of the name, address, and telephone number of each;
    - iii. Each exhibit that Franken intends to present at trial, including a copy of each.
3. Trial briefs, if any, shall be filed by both parties by January 23 at 4:30 p.m.
4. The trial will commence January 26 and last fifteen (15) trial days, with each side having seven and a half trial days for its case.
5. Any reconvening will be the first order of business at trial. Coleman will identify precincts to be reconvened by 4:30 p.m. on January 19, and Franken will identify his list of such precincts by 4:30 p.m. on January 21.
6. Coleman may organize his case around categories and shall identify each specific category in order by January 21, but once he calls a witness must ask that witness all of his questions.

7. During trial, each side will identify the witnesses it intends to call and exhibits it intends to introduce by 9 a.m. of the day before it intends to call the witness or introduce the exhibit.

**CONCLUSION**

For the reasons set forth above and in his Memorandum in Support of Motion to Establish a Pretrial Scheduling Order and For Expedited Discovery, Franken respectfully requests that the Court adopt by January 16 the schedule set forth above.

Dated: January 15, 2009.

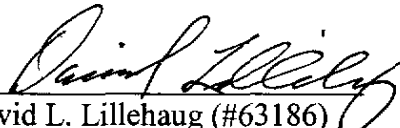
Respectfully submitted,

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*Application for Admission Pro Hac  
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Applicants acknowledge that sanctions may be imposed under Minn. Stat. §549.211.



