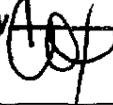


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Court Administrator

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STATE OF MINNESOTA  
COUNTY OF RAMSEY

FEB 20 2009

By  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,

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**MEMORANDUM OF LAW  
REGARDING FORM AND LEVEL  
OF SPECIFICITY REQUIRED  
IN AN OFFER OF PROOF**

A question has been raised regarding the form and specificity required for an offer of proof when the Court excludes evidence. Contestee Al Franken provides the following legal authority and argument to assist the Court. At the outset it should be noted that the purpose of an offer of proof is to create a record on which the trial court can make a ruling and to create and preserve a record upon which an appellate court may review lower court decisions. Thus, this Court certainly may and should allow Contestants to make an appropriate written or oral offer of proof for the purposes of creating a record for appellate court review, but it most assuredly has no duty whatsoever to allow, assist or facilitate the creation of a record to assist Contestants in a collateral attack on this Court, its decisions to date in this matter, or Minnesota's electoral system more generally. The suggestion that somehow different standards should be applied to an offer of proof on account of Contestants' apparent intention to file federal court litigation attacking this

Court's decisions in this matter is seriously misplaced, misapprehends the purposes of an offer of proof and misstates applicable law.

Under settled Minnesota law, the purpose of an offer of proof is to provide a basis on which the trial court can make an evidentiary ruling and to create a record for any appeal of that ruling. *See Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002) ("[A]n offer of proof provides the court with an opportunity to ascertain the admissibility of the proffered evidence and provides a record for a reviewing court to determine whether the lower court ruling was correct."); *see also State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003) ("Where a defendant complains that the exclusion of evidence was error, an offer of proof provides the evidentiary basis for a trial court's decision."); Minn. R. Evid. 103(a).<sup>1</sup>

Given this purpose, an offer of proof under settled Minnesota law need not take the form of admissible evidence or consist of the testimony sought to be admitted. Instead, "an attorney can tell the court what the proposed testimony of the witness will be." *Santiago*, 644 N.W.2d at 442. "In practice, Minnesota courts permit an attorney to make a proffer by informing the court of a witness's expected testimony." *Id.* An offer by the attorney can be in oral or written form. *E.g., Shorter v. State*, 511 N.W.2d 743, 745-46 (Minn. 1994) (attorney made oral summary of expected testimony); *Dunshee v. Douglas*, 255 N.W.2d 42, 47 (Minn. 1977) (memorandum prepared by attorney summarizing expected testimony was a sufficient proffer).

A summary by the attorney "constitutes a sufficient offer of proof 'if it is sufficiently specific and there is nothing in the record to indicate a want of good faith or inability to produce the proof.'" *Santiago*, 644 N.W.2d at 442 (quoting John W. Strong, ed., *McCormick on Evidence*

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<sup>1</sup> Manifestly, the purpose is not to create a record of "evidence" to be used in a different proceeding in a different court, such as a subsequent federal case.

220 (5th ed. 1999) (citations omitted)). Whether this standard is met is within the discretion of the trial court. *See id.* (trial court has "discretion as to the method of the proffer").

An objection is preserved, and an offer of proof is not required at all, in two circumstances. When the "substance of the evidence [sought to be admitted] [is] apparent from the context within which questions were asked," no offer of proof is necessary. Minn. R. Evid. 103(a)(2). In addition, "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error." *Id.* 103(a).

An offer of proof is assuredly not designed to allow a party to create a record for the purposes of attacking the very proceedings at issue in a collateral forum. Thus, the suggestion that a different or more specific level of detail or specific form is required because Contestants wish to attack this Court, its decisionmaking, or the Minnesota electoral system should be rejected out of hand. But even if somehow such an intention were relevant, the standards applicable under federal law are no different. Indeed, federal law in the Eighth Circuit is largely the same as the Minnesota law described herein. *See* Fed. R. Evid. 103; *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103, 1104-05 (8th Cir.1988) ("A party offering proof which is excluded at trial preserves the record on appeal by telling the court what the evidence will tend to prove, and *Estes* told the District Court enough for us to tell what was being excluded."), *overruled in part on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), *as recognized in Foster v. Univ. of Ark.*, 938 F.2d 111, 115-16 (8th Cir. 1991).

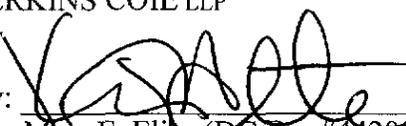
The Court properly may require that an offer of proof be in the form of an oral or written summary by the attorney, rather than the testimony sought to be adduced. To avoid further waste

of this Court's time, delay in the conclusion of this process and the seating of Minnesota's second United States Senator, and further cumulative testimony apparently designed to undermine the legitimacy of this election and this Court's process, Contestee respectfully submits that Contestants should be directed to make a written offer of proof, in whatever level of specificity they would like, but no further testimony should be entertained with respect to Contestants' dismissed equal protection claims.

Dated: February 18, 2009.

PERKINS COIE LLP

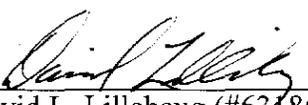
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**ACKNOWLEDGMENT**

Applicants acknowledge that sanctions may be imposed under Minn. Stat. § 549.211.

  
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