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**STATE OF MINNESOTA
COUNTY OF RAMSEY**

**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 for the State of
Minnesota

District Court File No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

ORDER

Contestants,

**FILED
Court Administrator**

vs.

FEB 26 2009

Al Franken,

By [Signature] Deputy

Contestee,

Pursuant to an order issued from the bench during trial on February 25, 2009, the Court enters the following:

ORDER:

1. The Court's order of February 25, 2009 striking the testimony of Pamela Howell is vacated.
2. The attached Memorandum is incorporated as if fully set forth herein.

Dated: February 26, 2009

[Signature]
Elizabeth A. Hayden
Judge, District Court

[Signature]
Kurt J. Marben
Judge, District Court

[Signature]
Denise D. Reilly
Judge, District Court

MEMORANDUM

On January 9, prior to the beginning of trial in this election contest, Contestee served both interrogatories and document requests upon Contestants requesting disclosure of documents and information relating to Contestants' claims in this proceeding. Contestant provided responses to these discovery requests on January 19. On February 3, the Court, in response to complaints from Contestee regarding the sufficiency of Contestants' responses, reminded Contestants of their continuing obligations under the Rules of Civil Procedure to provide updated answers to interrogatories and supplement them as necessary. *See* Minn. R. Civ. P. 26.05. That same day, the Court agreed to allow Contestee to serve supplemental discovery requests upon Contestants and Contestants agreed to provide responses by February 6. On February 9, Contestee again objected to Contestants' failure to provide complete responses to discovery requests. The Court again underscored to the parties the critical importance of ensuring that discovery responses were supplemented and accurate.

On February 25, 2009, during the cross-examination of Pamela Howell by Contestee, Contestee's counsel discovered for the first time that Ms. Howell had provided a document to Contestants' counsel that had never been disclosed to Contestee in response to his discovery requests. Contestants' counsel acknowledged that Contestants had received the document prior to trial but had failed to disclose it to Contestee. After hearing argument from both parties, the Court ruled from the bench striking Ms. Howell's testimony.

Minnesota Rule of Civil Procedure 37.02 permits the Court to issue "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence. . . ." Minn. R. Civ. P. 37.02(b)(2). The choice of sanctions for failure to comply with discovery is within trial court's discretion.

Przymus v. Comm'r of Pub. Safety, 488 N.W.2d 829, 832 (Minn. Ct. App. 1992). Attorneys have an ethical duty to cooperate in the discovery process and obey court orders. *Higgins v. Lufi*, 353 N.W.2d 150, 155 (Minn. Ct. App. 1984). However, the general rule in Minnesota is that although testimony may be suppressed for failure to make a timely disclosure, "courts should consider alternative methods short of exclusion for preventing prejudice." *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977).

This Court has previously observed that an election contest pursuant to Minnesota Statute Chapter 209 is an expedited process. The strict time limits in Chapter 209 are in line with Minnesota's "strong public policy in favor of finality in elections." *McNamara v. Office of Strategic & Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001) (citing *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Court. App. 1986)). Accordingly, this Court is mindful of the need to avoid needless delay in the presentation of evidence in these proceedings. Delay necessarily ensues when a party only learns of the existence of documents during cross-examination, forcing the cross-examiner to either request a recess to examine the new information or to attempt a comprehensive initial review of the information on the record. The Court has repeatedly underscored the primary importance of supplementing discovery responses in light of the expedited nature of these proceedings. By failing to disclose the document provided to their counsel by the witness, Contestants deprived Contestee of an opportunity to review relevant evidence in advance of trial and prepare for cross examination. *Cf. Gale v. County of Hennepin*, 609 N.W.2d 887, 891 (Minn. 2000) ("The objective of our rules of discovery is to encourage the exchange of relevant information by the parties prior to trial and to discourage and prevent unjust surprise and prejudice at trial . . .").

By failing to disclose the existence of a document provided to them by the witness, Contestants have failed to comply with orders from this Court directing parties to ensure that their discovery responses are complete, accurate, and up-to-date. The Court recognizes that striking testimony is a severe sanction but notes that this trial has been underway for five weeks and that the parties have been repeatedly instructed of the need to supplement discovery responses. The Court believes this sanction was within its discretion in light of Contestants' repeated failures to adhere to their discovery obligations under the Minnesota Rules of Civil Procedure. Nonetheless, the Court recognizes that the judicial process is an attempt to seek the truth and that courts "should not unduly hamper that search by excluding relevant evidence where other means are available to protect a party from the effects of an inadvertent failure to disclose." *Cornfeldt*, 262 N.W.2d at 697. The Court has the discretion to exclude testimony, but "the exercise of that discretion should be tempered by an effort to seek a solution short of exclusion that will accommodate the competing interests inherent in the discovery rules and the adjudicative process itself." *Id.*

The record reflects that Contestants' failure to disclose the document was inadvertent and not in bad faith. Contestee has now had an opportunity to review the document and prepare a proper cross-examination. Contestee will not be substantially prejudiced by permitting Ms. Howell to conclude her testimony. Accordingly, the Court now reconsiders its ruling of February 25 and vacates its order to strike Howell's testimony.