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Court Administrator
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By Deputy

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	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,

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestee.

ORDER ON CONTESTEE'S MOTION TO STRIKE

Ct. File No. 62-CV-09-56

The above-entitled matter came before the Court upon Contestee's Motion to Strike. Counsel noted their appearances on the record. The Court having heard and read the arguments of counsel, and the files, records, and proceedings herein, makes the following:

ORDER

1. Contestee's Motion to Strike is DENIED.
2. Contestants are hereby ORDERED to pay costs in the amount of $7,500 pursuant to Rule 37.02 of the Minnesota Rules of Civil Procedure, payable to the Court within three (3) days of this Order.
3. The Court's Memorandum, filed herewith, is incorporated herein.
4. Any other relief not specifically ordered herein is DENIED.

BY THE COURT:

Elizabeth A. Hayden
Judge of District Court

Kurt J. Marben
Judge of District Court

Denise D. Reilly
Judge of District Court

Dated this 2 day of March, 2009.

MEMORANDUM

On February 25, 2009, Contestants called Minneapolis election judge Pamela Howell to testify on Contestants' claim that certain ballots were counted twice during the recount due to such ballots not having been marked as "duplicates." (*See* Notice 12(a).) During cross-examination, Contestee elicited testimony from Howell that she had provided a document to Contestants' counsel that had not been disclosed to Contestee during discovery. Contestee moved to strike Howell's testimony. Ruling from the bench, the Court excused Howell and agreed that her testimony should be stricken.

On February 26, 2009, the Court reconsidered its ruling of February 25, 2009, and vacated its order to strike Howell's testimony based on a finding that Contestants' failure to disclose Howell's statement was inadvertent and not in bad faith and that Contestee would not be substantially prejudiced by allowing Howell to testify. (Order February 26, 2009.) Howell was re-called to the witness stand on February 27, 2009 and her testimony reinstated. On cross-examination, Howell began testifying about email communications between herself and Contestants' counsel. Howell's statement was specifically referenced in emails dated January 6, 2009 and January 28, 2009. Contestee renewed his motion to strike Howell's testimony and further moved to strike the underlying claim to which her testimony relates.

Rule 37.02 authorizes the Court to issue an order "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence" or "striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient

party...." Minn. R. Civ. P. 37.02(b)(2) & (3). The Court is invested with broad discretion to issue discovery orders and will be reversed on appeal only upon a showing of abuse of discretion. *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 811 (Minn. 2006). Consequently, "[t]he choice of a sanction for failure to comply with a discovery order" is within the Court's discretion. *Bowman v. Bowman*, 493 N.W.2d 141, 145 (Minn. Ct. App. 1992).

The Court considers this failure to disclose to be a serious violation of the rules of discovery. The Court has been direct and unequivocal about the conduct it expects from the parties with respect to discovery. As to Howell, Contestants' counsel have failed. The Court found Contestants' failure to produce Howell's written statement was inadvertent and not in bad faith, but again reiterated the "importance of supplementing discovery responses in light of the expedited nature of these proceedings." (Order February 26, 2009, p. 3.) There is no question that the emails between Howell and Contestants' counsel should have been produced before trial and before her testimony began.

The Court recognizes that excluding or striking the testimony of a witness is a "harsh penalty" for failing to comply with discovery rules and Court orders. *In re Conservatorship of Smith*, 655 N.W.2d 814, 821 (Minn. Ct. App. 2003). However, even when the Court has other avenues open to it, "the availability of other sanctions does not render the exclusion of testimony an abuse of discretion." (*Id.*) When a court excludes a witness's testimony as a sanction for disobeying discovery orders, any resulting dismissal of the case or claim is not itself a sanction, but only the "inevitable consequence" of the party's inability, without sufficient evidence, to prove his case. *Patton v. Newmar Corp.*,

538 N.W.2d 116, 118 (Minn. 1995)(*cited by Clark v. Fontana*, WL 5137116, 3 (Minn. Ct. App. 2008).) Dismissal may be appropriate when a party to litigation "wilfully and without justification or excuse refused to comply with discovery orders and deliberately and in bad faith, with the intent to delay the trial, continued to refuse to cooperate with the court and [opposing] counsel to bring the case to a prompt and expeditious conclusion[.]" *Breza v. Schmitz*, 248 N.W.2d 921, 922 (Minn. 1977).

Contestants' counsels' disregard of the Court's Order and the Rules of Civil Procedure warrants a strong sanction.[1] The Court must carefully balance the need to enforce its Orders and the relevant law guiding this election contest without diluting the Court's essential truth-finding function. The primary objective of the law is to dispose of cases on the merits. *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 228 (Minn. 2007). Dismissal operates as an adjudication on the merits and "is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court[.]" *Firoved v. General Motors Corp.*, 152 N.W.2d 364, 368 (Minn. 1967). "It should therefore be granted only under exceptional circumstances." (*Id.*) Under ordinary circumstances, the Court would be entirely within its discretion to strike the testimony of this witness and the claim to which her testimony relates. However, the Court is mindful of the special circumstances of this election contest. Minnesota has been without a Senator for two months. As the Court has previously recognized, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of

[1] Attorney Joseph Friedberg represented to the Court that he was unaware of the existence of these emails and had endeavored to disclose everything he possessed to Contestee's counsel. Mr. Friedberg was not informed that other of Contestants' attorneys had communicated with Howell through email. The Court appreciates Mr. Friedberg's willingness to admit that a mistake was made and to take responsibility for that mistake. The Court considers Mr. Friedberg to be an honest and candid attorney and takes his representations as true. Nevertheless, poor communication between and among Contestants' counsel cannot excuse the failure to disclose relevant evidence.

our participatory democracy," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), and there is a "strong public policy in favor of finality in elections." *McNamara v. Office of Strategic and Long Range Planning*, 628 N.W.2d 620, 631 (Minn. Ct. App. 2001)(citing *Greenly v. Independent Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Ct. App. 1986)). Of further concern to the Court are Contestants' allegations of double-counting.

In light of the foregoing, the Court declines to strike Howell's testimony or Contestants' claim of double-counting as a sanction because to do so would impede the truth-finding function of this Court. Nevertheless, the Court cannot ignore Contestants' disregard of the rules of discovery and the Orders of this Court. Accordingly, Contestants' counsel are ordered to pay the reasonable expenses incurred by the Court as a result of counsels' failure to abide by their discovery obligations as set forth by the Court. Rule 37.02 provides that:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Minn. R. Civ. P. 37.02.

In lieu of striking the witness's testimony or the underlying claim, the Court hereby imposes upon Contestants' counsel the obligation to pay the court costs incurred over the three trial days during which the Court addressed the issue of Howell's testimony. Contestants had an ongoing duty to abide by the discovery rules, as the Court has discussed both on the record and in its previous orders. (Order February 26, 2009). Contestants' counsel were not "substantially justified" in withholding Howell's statement or the emails referencing the same and the award of expenses is not "unjust" under these

circumstances. *See* Minn. R. Civ. P. 37.02. Due to the seriousness of the violation, the Court imposes costs associated with the delay caused by this non-disclosure, including the expenditures for personnel, lodging, mileage, parking, per diem meals, building security, space/rent, and other expenses, for a total fine of $7,500, payable to the Court.[2] In the event this sanction fails to deter future conduct on the part of Contestants' counsel, the Court will not hesitate to impose harsher sanctions, up to and including dismissal.

[2] Attorneys' fees incurred by Contestee are not awarded as part of this Order. If Contestants do not prevail in this election contest, the statute provides that Contestants must pay the fees and costs associated with this proceeding. If Contestants prevail in this election contest, then the Court will consider awarding Contestee's attorneys' fees and costs associated with the delay caused by Contestants' non-disclosure.