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STATE OF MINNESOTA  
COUNTY OF RAMSEY

FILED  
Court Administrator

DISTRICT COURT

FEB 27 2009  
By  Deputy

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.

**CONTESTEE'S MEMORANDUM IN  
RESPONSE TO CITY OF DULUTH'S  
MOTION TO QUASH SUBPOENA**

Al Franken,

Contestee.

**INTRODUCTION**

Over the course of the last five weeks, this Court has heard testimony from a variety of state, county and municipal election officials from across the state, from the smallest of counties to the most senior election officials, pored over thousands of documents, and heard from citizens who have appeared pursuant to subpoenas, all in an effort to fulfill its statutory responsibilities to declare which candidate for the United States Senate received the "highest number of votes" in the November 4, 2008, general election. Appearing before this Court has been, it is fair to say, an inconvenient, but critically important, duty of the election officials charged with the responsibility for conducting this election (just as conducting the recount itself was an inconvenient but critically important duty). Those officials, however, have appeared without complaint, often in inclement weather, from far flung locations, and awaited the call to provide testimony and evidence before this Court.

In anticipation of the commencement of Contestee's case early next week, Contestee issued several subpoenas seeking testimony from election officials from several large counties, including Hennepin County, Ramsey County, and St. Louis County, and from the City of Duluth. In each instance, Contestee tendered to the witness the appropriate witness fee and mileage allowance required by statute.

Jeffrey Cox, the City Clerk for the City of Duluth, objected to the subpoena seeking, in addition to the statutory witness fee and mileage, advance payment of an hourly charge of \$60 per hour for his time, *to be charged on a 24-hour a day basis*, with a minimum \$1,000 advance payment. When Contestee refused to make these additional payments, Cox filed the motion at bar seeking to quash the subpoena unless and until Contestee make advance payments in excess of \$1,100. The motion is without foundation and Contestee respectfully requests that the Court deny the motion. Minnesota law does not require payment of additional sums, over and above the statutory fees, to a public election official who is required to provide testimony in a statutory election contest, much less hourly fees charged on a 24-hour basis. Appearing before this Court imposes no greater burden on Mr. Cox than the burden imposed on auditors from Crow Wing, Lyon, Becker, or Beltrami counties, all of whom appeared in this Court without complaint, as did the highest ranking election officials in the state.

The motion, Contestee respectfully submits, should be denied.

#### **BACKGROUND**

After learning on Monday, February 23, 2009, that Contestants were planning to rest their case as early as Wednesday, Contestee's counsel prepared trial subpoenas for election officials for the City of Duluth, St. Louis County, Hennepin County, and Ramsey County to ensure that witnesses would be available if Contestee's case began Thursday, February 26, 2009.

Contestee's counsel prepared a trial subpoena for the chief election official for the City of Duluth, Jeffrey Cox. The subpoena was e-mailed to him and to the Duluth City Attorney that evening with a request that they consent to service by e-mail. Snyder Aff. Exh. A. The next day, despite repeated telephone calls to both Mr. Cox and to the City Attorney, the Mr. Cox refused to consent to service by e-mail and stated that personal service was required. Lutterman Aff. Exh. 1. Mr. Cox also demanded compensation in excess of \$1,100 before he would consent to appear at the trial in this matter. *Id.* Mr. Cox calculated the value of his time at \$60 per hour, which apparently included the "value of his time away from his family." Memorandum of Law by Cox and the City of Duluth Supporting Their Motion to Quash the Subpoena of Jeffrey Cox ("Motion to Quash"), at 3. Mr. Cox later dropped his demand to \$600 plus mileage and expenses if Mr. Cox could complete his testimony in one day, a goal that is certainly hoped for but hardly can be guaranteed to any witness. Snyder Aff. When Contestee declined to provide Mr. Cox with compensation in excess of the statutory witness fee and mileage, Mr. Cox and the City of Duluth filed the present motion seeking to quash the outstanding subpoena.

### **DISCUSSION**

As a general rule, of course, every citizen owes a duty to appear to provide relevant testimony in court proceedings upon the issuance and service of an appropriate subpoena. The Legislature has fixed a statutory fee for witnesses, and a mileage rate for travel costs: Minn. Stat. §357.22 provides that a witnesses required to provide testimony at a trial shall be paid a fee of \$20 for each day and 28 cents per mile for travel to and from the court. These statutory fees were tendered to Mr. Cox when the subpoena was personally served upon him.

Mr. Cox's demands for additional compensation, beyond the statutory fees required by §357.22, appear to be based upon an ambitious reading of Minn. R. Civ. P. 45.03(d). No case law exists in Minnesota, however, applying Rule 45.03(d) to election officials, charged with the

responsibility for administering an election and – as a result – who have personal knowledge of facts relevant to a statutory election contest.<sup>1</sup> In ordinary civil cases involving private disputes between private parties, the compensation requirement of Rule 45.03(b) plays a common sense role to protect a specific class of non-party witnesses. It protects non-parties “who have acquired some expertise or specialized information as a result of business activities . . . [and] find themselves repeatedly responding to subpoenas and spending inordinate amounts of time or incurring expenses in preparing for and complying with subpoenas.” 1A Herr & Haydock, MINNESOTA PRACTICE: CIVIL RULES ANNOTATED §45.14. However, even in civil litigation involving private disputes, compensation is not mandatory. “Other non-parties who have to respond to a single subpoena or who incur nominal expenses need not be compensated.” *Id.*

Statutory election contests under Chapter 209 are, by their very nature, not private disputes between private parties. Instead Chapter 209 proceedings involve the most public of proceedings and the most fundamental issues of public concern. Few issues invoke the public interest more directly than the issue of the validity or correctness of a statewide election result over the election of a United States Senator. Election contests may, as this case has demonstrated, require testimony from large numbers of election officials from around the State. An election official testifying in a contest proceeding is fulfilling one of the core responsibilities of his or her job -- defending the integrity and correctness of the election processes that he supervised. It is a public obligation imposed by the very nature of the office held by such public officers.

In this case, Mr. Cox is a salaried employee who will not be out of pocket for any sums incurred in having to testify in this contest action. While a certain amount of inconvenience and

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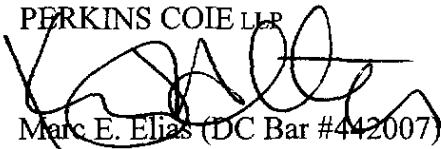
<sup>1</sup> *Cf Howard v. City of St. Louis Park*, 466 N.W.2d 759 (Minn. Ct. App. 1991) (holding that fees under an earlier version of Rule 45 were not required to be paid to city employees testifying in a statutory proceeding).

disruption is involved, that is part of the cost of this type of proceeding, and is a cost that all of the other public officials who have testified in this case have borne, from far flung county officials to the highest ranking election officials. The burden on Mr. Cox is no more and no less.<sup>2</sup> His motion to quash should be denied.

Dated: February 26, 2009

Respectfully submitted,

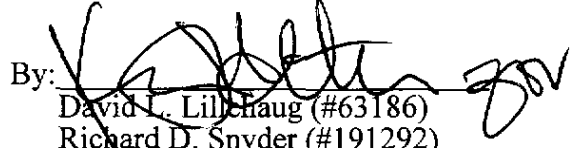
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*Admitted Pro Hac Vice*

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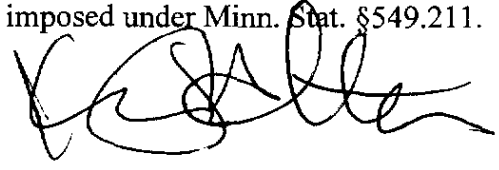


By: David L. Liljehaug (#63186)  
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*Attorneys for Contestee Al Franken*

**ACKNOWLEDGMENT**

Contestee acknowledges that sanctions may be imposed under Minn. Stat. §549.211.



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<sup>2</sup> Contestee will certainly do all he can to conveniently schedule Mr. Cox's testimony before this Court and to minimize the disruption of his personal and professional obligations. Contestee seeks nothing more from Mr. Cox than has been sought from every election official who has testified in these proceedings over the last five weeks: specific, admissible, and relevant testimony relating to the matters before this Court.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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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,

**DECLARATION OF RICHARD D. SNYDER**

v.

Al Franken,

Contestee.

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Richard D. Snyder declares as follows:

1. I am one of the attorneys representing the Contestee in this matter.
2. After learning on Monday, February 23, 2009, that Contestant was planning to rest his case as early as Wednesday, I prepared trial subpoenas for election officials from the City of Duluth, Hennepin County, Ramsey County and St. Louis County to ensure that witnesses would be available for the beginning of Contestee's case as early as Thursday, February 26, 2009.
3. Regarding the City of Duluth, the trial subpoena was directed to the City's chief election official, Jeffrey Cox. I called the City Attorney's office on February 23 to provide notice that the subpoena was on its way and to request that the City agree to accept service by e-mail. Because he was unavailable, I left a voicemail message with the City Attorney. I then sent the trial subpoena, via e-mail, to both Mr. Cox and the City Attorney requesting that they

waive personal service and agree to accept service by email. True and correct copies of the e-mail and trial subpoena are attached hereto.

4. The next day, Tuesday February 24, I called the City Attorney's office three times to inquire about the subpoena and each time left a voicemail message. I also called Mr. Cox twice times during the day and left voicemail messages. Mr. Cox and the City Attorney failed to return any of my calls.

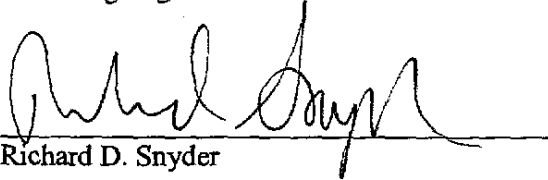
5. At approximately 4:00 p.m. on February 24, I received, by e-mail, a letter from Deputy City Attorney Lutterman stating that Mr. Cox would not agree to accept service of the trial subpoena via e-mail. The letter also stated that "Mr. Cox's reimbursement requirements" before he would agree to appear at the trial were \$60 per hour billed on a 24-hour basis, a minimum advance of \$1000 before he would initiate travel, mileage reimbursement at almost twice the statutory rate for witnesses, and payment of all other expenses incurred.

6. Because Mr. Cox refused to consent to service of the subpoena by e-mail, I arranged to have the trial subpoena personally served on Mr. Cox, which occurred on Wednesday, February 25, 2009. As required by Minn. Stat. § 357.22, Mr. Cox was tendered the statutory witness fee of \$20 plus mileage at the statutory rate of 28 cents per mile.

7. I spoke with Ms. Lutterman on Wednesday, February 25, 2009. She indicated that if Mr. Cox's testimony was scheduled to begin in the afternoon of one of the trial days, his compensation demand might be as low as \$600, plus mileage at 50 cents per mile, plus expenses for lunch, dinner and parking. This was conditional upon his testimony and all travel being completed in a single day.

8. None of the other election officials that were served with trial subpoenas have demanded compensation to appear to testify at trial.

I declare under penalty of perjury that the foregoing is true and correct.

  
Richard D. Snyder

4517999\_1



**Snyder, Richard**

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**From:** Snyder, Richard  
**Sent:** Monday, February 23, 2009 5:05 PM  
**To:** jcox@duluthmn.gov; gjohnson@duluthmn.gov  
**Attachments:** Subpoena to Jeff Cox.pdf

Dear Mr. Cox and Mr. Johnson,

As I indicated in a voicemail message to the City Attorney's office, attached is a trial subpoena for the attendance of Mr. Cox at the election contest trial scheduled for Thursday February 26, 2009 at 9:00 a.m. To avoid unnecessary costs and burdens, I would appreciate it if you would agree to accept service of the subpoena by email (a courtesy copy is also being sent by fax). Please confirm that you agree to accept service in this manner. If not I will arrange for personal service. Also, we agree to tender any applicable witness fees at the time of your appearance.

The timing for your actual appearance will depend on various factors including when the Contestant's case actually concludes. Therefore, I or someone else on behalf of Contestee will contact you in advance of Thursday to coordinate the time you will actually need to be present. We will do our best to minimize the inconvenience to you while still meeting the court's own schedule for this case, and believe we should be able to accommodate any scheduling issues you may have.

Thank you in advance for your cooperation. I look forward to receiving your acknowledgement of the service and we will then be in touch with you. It would be helpful if you could provide a cell phone number or other number where you can be easily reached.

**Richard D. Snyder**  
Fredrikson & Byron, P.A.  
200 South Sixth Street, Suite 4000  
Minneapolis, MN 55402-1425  
(612) 492-7145

[rsnyder@fredlaw.com](mailto:rsnyder@fredlaw.com)

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*This is a transmission from the law firm of Fredrikson & Byron, P.A. This message contains privileged and confidential information. IF IT WAS SENT TO YOU BY MISTAKE, DO NOT READ IT. Instead, please notify the sender by reply e-mail, and delete this e-mail. Unauthorized dissemination, forwarding or copying of this e-mail is strictly prohibited.*  
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2/26/2009

**State of Minnesota**

County of Ramsey

**District Court**

|                    |                          |
|--------------------|--------------------------|
| Judicial District: | Second Judicial District |
| Court File Number: | 62-CV-09-56              |
| Case Type:         | Civil                    |

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

**SUBPOENA IN A CIVIL CASE**

Cullen Sheehan and Norm Coleman,  
Contestants

v.

Al Franken  
Contestee

TO: Jeff Cox  
City Clerk  
c/o Gunnar Johnson, City Attorney  
City Attorney's Office  
411 West First Street, Room 410  
Duluth, MN 55802

You are commanded to appear as a witness in the district court to give testimony at the place, date, and time specified below.

|   |   |
|---|---|
| Place of Testimony:<br>Minnesota Judicial Center<br>25 Rev. Dr. Martin Luther King Jr. Boulevard<br>St. Paul, Minnesota 55155 | Courtroom<br>300                                |
|   | Date and Time<br>February 26, 2009 at 9:00 a.m. |

You are commanded to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

|                     |               |
|---------------------|---------------|
| Place of Deposition | Date and Time |
|---------------------|---------------|

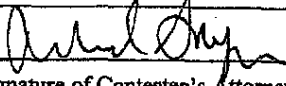
You are commanded to produce and permit inspection and copying of the listed documents or objects at the place, date and time specified below (attach list of documents or objects if necessary):

|        |               |
|--------|---------------|
| Place: | Date and Time |
|--------|---------------|

You are commanded to permit inspection of the following premises at the date and time specified below.

|          |               |
|----------|---------------|
| Premises | Date and Time |
|----------|---------------|

**NOTE: FAILURE TO OBEY A SUBPOENA WITHOUT BEING EXCUSED IS A CONTEMPT OF COURT.**

|   |  |
|---|--|
| <br>Signature of Contestee's Attorney  | February 23, 2009<br>Date                |
| Richard D. Snyder, Esq.<br>Fredrikson & Byron, P.A.<br>200 South Sixth Street, Suite 4000<br>Minneapolis, MN 55402<br>(612) 492-7000<br>Name, Address and Phone Number (if issued by Attorney as an Officer of the Court) | SEAL (if issued by Court Administration) |

RETURN OF SERVICE

State of Minnesota

County of \_\_\_\_\_

I hereby certify and return that on \_\_\_\_\_ I served a copy of this subpoena upon the person named thereon. Service was made by:

- personally handing to and leaving with him or her a true and correct copy; or
- leaving a true and correct copy at his or her usual place of residence

Address \_\_\_\_\_

with \_\_\_\_\_ a person of suitable age and discretion.  
Name of Person

NOTARY STAMP, SIGNATURE AND DATE

Subscribed and Sworn/Affirmed to before me on

\_\_\_\_\_, 20\_\_\_\_

Date \_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_

NOTE: If served by someone other than a Law Enforcement Officer, signature must be notarized.

Rule 45, Minnesota Rules of Civil Procedure, provides that:

- A subpoena may be served by any person who is not a party and is not less than 18 years of age.
- Service of a subpoena shall be made by delivering a copy to the person named in the subpoena or by leaving a copy at the person's usual place of abode with some person of suitable age and discretion who resides there.
- A witness who is not a party to the action or an employee of a party (except a person appointed pursuant to Rule 30.02(f)) and who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents and is entitled to have the amount of those expenses determined prior to complying with the subpoena.
- A person is not obligated to attend as a witness in a civil case unless one day's attendance and travel fees are paid or tendered in advance (see fees below), unless the subpoena is issued on behalf of the state of Minnesota, or the state's officer or agent.

Fees to be paid to witnesses shall be as follows (Minn. Stat. § 357.22):

- For attending in any action or proceeding in any court of record or before any officer, person or board authorized the take examination of witnesses, \$20 for each day.
- For roundtrip travel estimated from the witness's residence at 28 cents per mile. If a witness lives outside the state, travel costs shall be estimated from the boundary line of the state where the witness crossed into Minnesota at 28 cents per mile. (Additional fees may be available for out of state witnesses).

In any proceeding where a parent or guardian attends the proceeding with a minor witness and the parent or guardian is not a witness, one parent or guardian shall be compensated in those cases where witness compensation is mandatory under Minn. State. § 357.22, and may be compensated when compensation is discretionary under those sections. No more than a combined total of \$60 may be awarded to the parent or guardian and minor witness. Minn. Stat. § 357.242.