FILED
Court Administrator

JAN 29 2009

By _____ Deputy

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 from the State of Minnesota,

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

CONTESTEE'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF KING BANAIAN

MOTION

In Contestants' opening statement, they announced that they would *not* be calling a social scientist to testify to alleged statistical differences between counties. Now they have changed their mind and wish to call Prof. King Banaian, an economics professor and political commentator. They were right before, and wrong now. Contestee moves to exclude the testimony of Prof. Banaian

GROUNDS FOR MOTION

A. Legal Standard.

A court's evidentiary ruling on the admissibility of expert opinion rests within the sound discretion of the trial court. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998); *Benson v. Northern Gopher Enter., Inc.*, 455 N.W.2d 444, 445-6 (Minn. 1990) (finding no abuse of discretion by trial court in excluding expert testimony).

To be admissible, expert testimony first must pertain to an issue that requires specialized knowledge. Minnesota Rule of Evidence 702 provides:

> If scientific, technical or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact in issue, a witness qualified as an expert by knowledge, skills, experience, training or education, may testify thereto, in the form of an opinion or otherwise.

If, by contrast, the testimony addresses "issues of common knowledge so that the trier of fact is in as good a position to reach a decision as the expert," then the evidence "would be of little assistance to the trier of fact and should not be admissible." 11 P. Thompson, Minnesota Practice Series § 702.02 (3d. ed. 2001).

Second, the opinions must be offered by an individual qualified to offer expert opinions on the issue in question. An advanced degree does not make a person an expert on all matters.

Third, as Rule 702 makes clear, to be admissible, the expert's testimony must actually assist the trier of fact on an issue that is relevant to the outcome of the case.

Fourth, expert testimony must be excluded if not based on a reliable foundation. "[E]xperts must base their opinion on facts sufficient to form an adequate foundation for the opinion and should not be allowed to speculate." *Kwapien v. Starr*, 400 N.W.2d 179, 183 (Minn. Ct. App. 1987).

Finally, expert opinions must be excluded if it is not disclosed in a timely manner. It is well within the court's broad discretion to exclude untimely opinions. *Norwest Bank Midland v. Shinick*, 402 N.W.2d 818, 823 (Minn. Ct. App. 1987).

B. Analysis.

Prof. Banaian should be excluded for a number of reasons. First is timeliness. The proposed witness was first contacted by Contestants on January 20 (Banaian Dep. at 29, line 6) (attached to Snyder Affidavit). He did not reach "any type of conclusion" until January 22 (*id.* at 26, line 19), a day after the expert disclosure deadline imposed by the Court, and he was not

made available for deposition until after trial had already started, despite his earlier availability. *Id.* at 79, line 11, to 80, line 4. The court is within its discretion to exclude the witness for this reason alone.

Banaian has not qualified himself as an expert on the issue he presents. He admits that he is not necessarily an "expert" in statistics, *id.* at 36, line 21, through page 37, line 17, but he "picked the right test of those offered by Excel." *Id.* at 37, line18 though page 38, 24.

Q. What do you consider your areas of expertise?
A. I'm trained as an economist. I have a Ph.D. in economics. I teach Business Forecasting, I teach Macroeconomics, Money and Banking, and Economics in Developing Countries.
Q. Do you consider yourself an expert in statistical analysis?
A. I consider myself a practitioner of statistical analysis. Expert, I believe -- I have difficulty with that word.
Q. Why is that?
A. I have -- I have taken several courses in statistics. There are, obviously, people who have degrees in statistics, Ph.D.s even in statistics. It's fair to say that they will call themselves experts.
I -- I call myself a long-time practitioner of -- of statistical analysis. I provide data analysis for the St. Cloud community, and I teach data analysis to my students.
Q. As I understand it, as long as I picked the right test of those offered by Excel, even somebody as unschooled as myself could have, basically, replicated what you've done in Exhibit 2?
A. If you picked the right test.
Q. And the binomial approach is about the most basic of statistical tests, is it not?
A. Am I being asked my opinion?
Q. Yes.
A. In my opinion, most people by default go to the normal distribution. The bell curve is the most well-known distribution in statistics.

Q. But measuring confidence intervals using binomial is a fairly basic statistical approach, is it not?
MR. RALPH: Objection to form.
BY MR. BURMAN:
Q. You can answer.
A. Yes. It's -- it's something that I -- when I -- when I've taught statistics, I've taught the binomial distribution even in the first introductory class.
Q. And I think you said the book that you referred to that first night is the basic text that you learned out of when you were an undergraduate?
A. That is correct.
Q. The same book that you just kept in your library all that time?
A. That is correct.

Similarly, his opinions are not on a subject matter requiring expert testimony. He opines on the rejection rates of absentee ballots in 87 counties. The rejection rates are known facts, ascertainable by a simple calculation. Expert testimony is not required on that factual issue, and the only reason Contestants want to have Prof. Banaian testify is to suggest that there is something behind the variations even though he does not have the expertise and has not even attempted to do the analysis to suggest that.

In that regard, and most importantly, his opinions: simply are not relevant or helpful to the trier of fact on a relevant issue, and the foundation is lacking. His conclusion is simply "that there are many, in some cases 21 counties of the 87 that at the 95 percent confidence level appear to have rejected more ballots, absentee ballots than one would expect based on the statewide rate." *Id.* at 27, lines 3-7. Such testimony, while blessedly brief, would add nothing to this proceeding. It tells us nothing about why the variations exist or whether any of the rejected absentee ballots were rejected erroneously. As demonstrated by Banaian's testimony set out below, his opinion is irrelevant and lacks a foundation, because it does not even attempt to identify, much less rule out, other causes for differing rejection rates of absentee ballots:

Page 12, line 20, through page 13, line 15 (emphasis added):

Now, as I understand it from the formal disclosure of your testimony that's been provided by counsel for Mr. Coleman, your testimony is going to be about, as I think you just said, variations in rejection rates of absentee ballots, correct?

A. Yes.

Q. Is there any other topic that you expect to testify or that you've been asked to examine for a contestant?

A. No.

Q. You have not, for example, been asked to look at differences in the rates or other factors related to acceptance of absentee ballots?

A. No.

Q. And you've not been asked to examine what might explain the differences among counties in terms of rejection of absentee ballots?

A. No.

Page 14, lines 1 though 15 (emphasis added):

Q. Your testimony is about differences in the rates of rejection, but some rejections are proper, correct?

MR. RALPH: Objection, foundation.

THE WITNESS: Yes. Some will be rejected for reasons stated by the law.

BY MR. BURMAN:

Q. And you haven't been asked to determine whether any were rejected improperly for reasons not stated by the law?

A. No.

Q. And you haven't been asked to quantify how many have been rejected incorrectly, if any?

A. No.

Page 17, lines 15 through 18:

Q. And what else besides random fluctuations might explain the variation? Did

you examine that at all?
A. No, I did not.

Page 19, line 3, though page 20, line 7 (emphasis added):

Q. So but for random variations, you would expect each county to have roughly the same average rejection rate as the state as a whole?
A. Right.
Q. And if there are factors that might affect rejection rate that do vary by county, then, this particular statistical test doesn't rule that out?
A. Yes, that's correct.
Q. And even if the only variations that you would expect would be random, using the 5 percent test, basically, means that 5 times out of 100 you might get that result just due to random variation?
A. Yes, that's right.
Q. So if you had 100 counties and they were homogeneous and you rolled the dice in each one as to rejection rates, 5 of them might well be outside of the 95 percent confidence level?
A. Yes, that -- yes.
Q. And since we have 80 some counties, you'd expect to see some that would show up as significant using that test?
A. Yes.
Q. And did you do or have you done any test that looks at the state as a whole and says that the variation that is shown for the state as a whole is outside of what you would expect due to random variation?
A. No, I did not.

Page 31, lines 3 through 6:

Q. But as I understand it, you haven't determined the reason behind any differences in variations?
A. That is correct.

Page 44, line 24, to page 45, line 8:

Q. And what none of these tests do is tell us what caused the variation, correct?

A. That is correct.
Q. So there may be factors that explain the variation, but at least for these pairs, random selection is not a likely explanation?
A. For these pairs, the difference in the rejection rate is significant. What causes it I can say nothing about.

Page 50, line 14, though Page 51, line 6 (emphasis added):

Q. So other than that question of the amount of data or the amount of instances in which your reject/accept dichotomy occurs, *you can't from any of these tests determine anything about causation of the differences; is that correct?*
A. Yes.
Q. And you haven't been asked to try to determine what caused the variations?
A. No, I have not.
Q. And based on the generally accepted standards of the social sciences, from the data you have, it would not be possible to reach any conclusions as to the causes of the differences?
MR. RALPH: Objection, form.
BY MR. BURMAN:
Q. Is that correct?
A. I -- *that's correct.*

Page 52, lines 9 though 17:

Q. And based upon the standards of using statistics in the social sciences, you can't reach any conclusions from this data as to whether those variations result from counties applying different standards from one another, correct?
MR. RALPH: Objection, form.
THE WITNESS: I -- I cannot tell -- there's no evidence in this on causation.

Page 53, lines 1 through 20:

Q. And have you given some thought to

possible causes of the variation other than random distribution? And I should say as part of your expert analysis as opposed to what you might do in your spare time?

A. In the course of this particular investigation, I have not investigated at any time what might be the cause of these variations.

Q. And sitting here today, we both could speculate about different factors that might explain the variations, but you haven't tried to determine which of those factors are responsible?

MR. RALPH: Objection, asked and answered.

THE WITNESS: We may speculate on any number of things, but there's nothing here in this analysis that would allow us to make any determination among those. They would be only speculative.

Page 59, line 14, through page 60, line 9:

Q. So at least using this data there were between 15 and 23 counties where there seemed to be differences that couldn't be explained by random variation?

A. That's correct.

Q. But we don't know what caused those?

A. Yes, that's correct.

Q. Might be that they had a disproportionate number of people who were blind or didn't see very well and didn't sign in the right place?

MR. RALPH: Objection, form.

BY MR. BURMAN:

Q. That's a possible explanation for those counties?

A. It's possible, yes.

Q. And nothing that you've done tells us whether or not the excess rejections were contrary to law or incorrect in any way?

A. No.

Page 62, line 22, through page 64, line 6:

Q. Is it reasonable to assume that there are some variations by county in the composition of the consumers of the privilege of using absentee ballots?

MR. RALPH: Objection, foundation.

THE WITNESS: I don't have any way to know that.

BY MR. BURMAN:

Q. I mean, there are variations among humans in their ability to follow instructions, wouldn't you agree?

MR. RALPH: Objection, foundation.

THE WITNESS: As a professor, I've observed that.

BY MR. BURMAN:

Q. Mr. Friedberg in his opening suggested that the average IQ in every county in Minnesota is the same from county to county. Would you expect that to be the case?

MR. RALPH: Objection, foundation, form.

THE WITNESS: I have never looked at IQ data from county to county. I have no way to form an opinion on that.

BY MR. BURMAN:

Q. Have you had any reason to study other demographic or socioeconomic differences from county to county that might relate to success in meeting the standards necessary to get your absentee ballot accepted?

A. I have experience in working with county level data looking at socioeconomic factors, not taking any time to consider what they might imply for the ability of someone to fill out an absentee ballot.

Page 65, line 7, through page 67, line 7 (emphasis added):

Q. Until you start looking at those factors that might explain the variation between counties in rejection rates, there is no way, is there, to rule out the possibility that the variation is explained, at least in part, by variation in the composition of voters from county to county who take advantage of the absentee ballot privilege?

MR. RALPH: Same objections.

THE WITNESS: *As best -- as best I*

can tell, I have no data on the socioeconomic quali -- characteristics of people who fill out absentee ballots. I, therefore, wouldn't know how to test your hypothesis.

BY MR. BURMAN:

Q. One factor, for example, might be how many people were using absentee ballots for the first time, that might explain a higher level of rejection of their ballots, correct?

MR. RALPH: Objection, form and foundation.

THE WITNESS: *I could -- I could only speculate about that.*

BY MR. BURMAN:

Q. I mean, the fact is without doing more than you've been able to do, attributing any cause to this variation would be speculation, correct?

MR. RALPH: Objection, form and foundation.

THE WITNESS: There are a variety of potential sources of variation, one of which could be election officials. We are not saying here that that's the only one.

BY MR. BURMAN:

Q. And, in fact, you haven't done anything that would determine whether that was even a factor that helps explain this, correct?

MR. RALPH: Objection, form, and asked and answered.

THE WITNESS: I -- *I believe that what we have established with this test is simply the differences in rejection rates. We have not made any attempt to say where that comes from.*

BY MR. BURMAN:

Q. And could not on this data that we have for this purpose today, correct?

A. On the basis of this spreadsheet, no.

Q. No, you could not?

A. No, I could not. Yeah.

Page 78, line 11, through page 79, line 4:

Q. What does the term confounding mean in statistical analysis?

A. In statistical analysis,

confounding means that there's some third fact, some extra factor that is interfering with the relationship between two variables.

Q. And how would that be applied to this situation, if at all?

A. If there was -- if there was a third factor somewhere that led us to see differences in rejection rates, you might conclude that, in fact, it -- once correcting for the confounding factor, that the differences no longer appear.

Q. Or at least would no longer be as large?

A. Would not be -- not be as large, may not even be -- it may not even meet standard significance levels.

For these reasons, the Court should exclude the untimely and irrelevant testimony of Prof. Banaian.

Dated: January 29, 2009

Respectfully submitted,

PERKINS COIE LLP

Marc E. Elias (DC Bar #442007)
Kevin J. Hamilton (Wash. Bar #15648)
David J. Burman (Wash. Bar #10611)
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 2005-2011
Telephone: (202) 628-6600

Admitted Pro Hac Vice

FREDRIKSON & BYRON, P.A.

By: _____
David L. Lillehaug (#6[illegible]186)
Richard D. Snyder (#191292)
200 South Sixth Street
Suite 4000
Minneapolis, Minnesota 55402
Telephone: (612) 492-7000

Attorneys for Contestee Al Franken

ACKNOWLEDGMENT

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

_____

4500220_1.DOC