

April 29, 2008

By Fax: 612-348-9712

U.S. Mail to Follow

Michael O. Freeman
Hennepin County Attorney
C-2000 Government Center
Minneapolis, MN 55487

Dear Mike:

We write to you today out of great concern for comments you recently made in defense of Al Franken published in the Saturday, April 26, 2008 edition of the *Star Tribune*. Responding to reports that Franken paid a \$25,000 fine to the State of New York for failing to file workers' compensation taxes and that he failed to file income tax returns in California for the taxable years 2003 to 2007, you are quoted as saying:

It appears to me that this is some carelessness in his personal business. Nothing criminal, nothing malicious, nothing nasty. I'm guessing most people have something [similar] in their life, where they forgot to pay their property taxes or workers' comp.

As former federal prosecutors who have extensive experience in investigating, prosecuting and defending criminal tax cases, we believe your comments were ill-advised and inappropriate.

Every prosecutor knows that the starting point for determining whether someone has committed a crime begins with an analysis of the elements that must be proved in court. To establish the crime of willful failure to file a tax return under California law, each of the following elements must be proved beyond a reasonable doubt:

1. That a person was required to file a tax return with the State of California;
2. That person failed to file the tax return within the time required;
3. This failure to file the tax return within the time required was done with the specific intent to evade a tax;
4. That person acted voluntarily and in an intentional violation of a known legal duty; and
5. That person had a tax deficiency, that is, actually had some amount of tax that was due and owing. (Standard California Criminal Jury Instruction 7.66)

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It is clear that there is insufficient evidence on the public record for anyone to draw a definitive conclusion as to whether these elements could be proved. However, the public record suggests that elements 1, 2 and 5 exist, *i.e.*, that Al Franken earned income in California, failed to file income tax returns for five years, and a tax may be due and owing. You have offered an opinion that the other elements, knowledge and intent, will not be established. Repeatedly failing to file returns for an extended period of time is a bad fact for a taxpayer who claims inadvertent lapse of memory.

Generally, these cases rise and fall on the intent of the taxpayer. There are many questions that must be answered before anyone can give a meaningful opinion on Franken's intent or his legal liability. Let us be clear, we are not offering an opinion that Al Franken violated California law. There are simply not enough facts on the record to offer an informed opinion. We believe it was irresponsible for you to do so.

We also believe it was a misuse of your office to offer your opinion in the heat of this political contest. We note that you did not say you were speaking as a private citizen. Instead, by using your title as Hennepin County Attorney, it appears that you were endeavoring to lend the prestige and authority of your office to provide political cover for a fellow Democrat under siege.

Prosecutors generally are prohibited from offering personal opinions regarding the guilt or innocence of an accused, or to vouch for the credibility of a witness. When that happens during the course of a jury trial, the prosecutor's remarks are often deemed sufficiently prejudicial to constitute reversible error entitling the defendant to a new trial. Indeed, some states broadly prohibit prosecutors from asserting personal opinions about the guilt or innocence of an accused at any time. Although Minnesota is not one of those states, and you have not technically violated Minnesota ethical rules, prosecutors must operate pursuant to a higher ethical standard and should avoid even the appearance of impropriety.

As Hennepin County's chief prosecutor, we believe you should not be commenting on the guilt or innocence of a potential target of a criminal prosecution, such statements not only raise ethical questions they also undermine the ability to conduct effective prosecution. This is especially true in cases such as this since your office has the duty to prosecute tax law violations in Hennepin County. We note that your predecessor, current Senator Amy Klobuchar, gained considerable recognition prosecuting a number of Northwest Airlines pilots who failed to pay income taxes in Minnesota. We are further aware that your office has an open tax prosecution filed on April 1, 2008, charging Steven Allen Schleif with 15 felony and gross misdemeanor counts for tax evasion and failing to pay taxes over a five-year period. Do you suppose that Mr. Schleif's attorney will bring to the attention of the jury your comment that "I'm guessing that most people have something [similar] in their life, where they forgot to pay their property taxes or workers' comp?" Furthermore, if your office is faced with investigating a politician charged

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with a Fair Campaign Act violation in the upcoming election, do you think anyone will call into question your ability to make a fair and unbiased charging decision?

We hereby ask you to retract your comments and refrain from further comment on this issue. If you have any questions, please do not hesitate to call: (Doug 612.371.9090; Tom 612.339.7121).

Sincerely,


Douglas A. Kelley


Thomas B. Heffelfinger

p.s. Since your comments were intended for, and indeed achieved, wide circulation, we feel obliged to release this letter to the *Star Tribune* reporters who wrote the story.

cc: Kevin Duchschere
Patricia Lopez