Redistricting Litigation

An Overview of Legal, Statistical, and Case-Management Issues

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Federal Judicial Center
2002

III. Case-Management Issues in Redistricting Litigation

This chapter focuses on case-management issues in redistricting cases, including cases in which 28 U.S.C. § 2284 (1994) requires a three-judge district court.

Redistricting litigation is complex and time-consuming, and thus many of the case-management techniques used by judges in handling complex civil cases are applicable in the redistricting context. *See Manual for Complex Litigation, Third* (Federal Judicial Center 1995). But redistricting cases also are characterized by unique features that require appropriate management responses. The suggestions presented in this chapter are based on Center staff's conversations with a sampling of district and appellate judges who have recent experience handling redistricting cases.

A. Managing Voting Rights Act and Equal Protection Clause Cases

1. Schedule the case with pending election dates in mind

In most cases plaintiffs will be asking the court to remedy an alleged violation before the next election in the challenged district. If the case is filed shortly before an election, plaintiffs may ask the court to enjoin the election until a new redistricting plan is developed. One of the first things the court must do upon receiving the case is find out when the next election will be held. It should then work back in time from that date, identifying earlier dates that establish deadlines for other significant aspects of the election process, such as the date by which candidates are required to file and the date when ballots must be ready. The court should then work back in time from the earliest relevant date in the election process to establish a final date by which the case must be resolved in order to permit the election to proceed. Although the election at issue may seem far away at the time the case is filed, the time frame for deciding the case may actually be much shorter, because there may be a need to develop and order implementation of a new districting plan months in advance of the election.

Given that election-related dates drive redistricting litigation, the court should meet with attorneys in the case early on, in order to become aware of all dates relevant to the pending election. It may also be helpful to meet with other stakeholders in the election process, such as election

officials and other representatives of the state, in order to obtain information about election dates and procedures.

2. Manage the case aggressively

Several judges expressed the opinion that redistricting cases need aggressive case management. One reason for this is that these cases are likely to involve multiple parties and many lawyers. Indeed, because it takes a good deal of resources to litigate a redistricting case, plaintiffs sometimes bring in large law firms on a pro bono basis to help them with the discovery and expert costs involved in the litigation. Moreover, the number of parties and lawyers may increase as the case proceeds. For example, a case that starts out as a vote dilution case may later become a racial gerrymandering case as well, increasing the number of parties to the point where ten or more attorneys may be present at routine status hearings.

Redistricting cases also generate a substantial amount of paperwork, including lengthy expert reports based on statistical evidence. Thus, the court should oversee the case carefully, making sure to meet with the parties regularly and review the case file frequently. As a practical, time-saving matter, the court should consider requiring executive summaries of all expert reports.

3. Consider using special masters or court-appointed experts

Some judges have used special masters or court-appointed experts under Federal Rule of Evidence 706 to assist them with particularly complex aspects of redistricting cases. In *Dillard v. City of Greensboro*, 956 F. Supp. 1576 (M.D. Ala. 1997), the court appointed a special master to draft a remedial redistricting plan and provided the special master "with explicit instructions on the legal standards and criteria to be used in drawing up a redistricting plan and directed the special master to adhere closely to those instructions." *Id.* at 1577.

Similarly, in *Anthony v. Michigan*, 35 F. Supp. 2d 989 (E.D. Mich. 1999), the court appointed a law professor pursuant to Federal Rule of Evidence 706 to serve as an independent expert and directed the professor to evaluate the statistical evidence on racial bloc voting proffered by the parties in the reports of their experts. The court's expert was directed to "express an opinion in the form of a written report as to whether there is a genuine issue as to any material fact with respect to plaintiffs' claim[ed section 2 violation.]" *Id.* at 1000.

4. Make detailed findings of fact and fully explain conclusions of law

Appellate courts have required detailed findings of fact in redistricting cases. As the Fifth Circuit stated with respect to vote dilution cases in *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989):

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning. Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts.

Id. at 1203 (quotation marks and quotation history omitted).

Thus, courts of appeals have remanded vote dilution cases when they were dismissed by the district court without written findings of fact or conclusions of law, *Westwego Citizens*, 872 F.2d at 1204, and when the district court failed to take note of substantial evidence contrary to the evidence supporting its conclusions, *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984). *See also Overton v. City of Austin*, 871 F.2d 529, 530–31 (5th Cir. 1989) (district court must perform a "searching and practical evaluation of past and present reality.")

B. Managing Three-Judge District Courts Convened Pursuant to 28 U.S.C. § 2284

Title 28, section 2284(a) of the United States Code requires that a three-judge district court be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" (1994).

1. Statutory requirements

The initial responsibilities of the district judge receiving a request for a three-judge court, as well as those of the chief judge of the circuit, are stated in 28 U.S.C. § 2284(b):

> In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composi-

tion . . . of the court shall be as follows:

> (1) Upon filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

As the statute makes clear, the district judge initially receiving the case should determine whether a three-judge court is required, and upon deciding that one is required, must "immediately" notify the chief judge of the circuit. This can be done by personal notice and by forwarding a copy of the complaint to the chief judge. Given that three-judge court cases are relatively rare, and that one of the purposes of the legislation creating such courts was to expedite important litigation, *see Swift v. Wickham*, 382 U.S. 111, 119–20 (1965) (direct review by the Supreme Court accelerates final determination on the merits), procedures should be in place to flag these cases in the district court clerk's office so that they are not given routine treatment.

2. Compose the three-judge court with the partisan nature of redistricting cases in mind

The statute assigns the chief judge of the circuit the duty of selecting the circuit judge and the third judge who will sit on the panel in a redistricting case, but does not place any restrictions on the chief judge's discretion in this regard. That discretion may be exercised with a view toward limiting the forum shopping that often occurs in redistricting cases. The parties are often political partisans, representatives of political parties or candidates for office, and their efforts to gain what they perceive as an advantage in the litigation may result in multiple filings on the federal level in addition to competing state court filings. Thus, for example, if Party A files a case in a given district on the assumption that there is a strong chance of obtaining a judge who is considered to be sympathetic to the Republican Party, Party B may well file a case in a district in which there is deemed to be a strong chance of obtaining a judge considered to be sympathetic to the Democratic Party. Rules designating the district that receives the first filing as the forum may solve the forum-

shopping problem, but if they do not, the chief circuit judge can also resolve it in the way he or she composes the three-judge court. For example, forum-shopping incentives may be reduced if the chief judge in the above example assigns the same two judges to both panels.

In composing three-judge panels, chief judges also have opportunities to insulate assigned judges from the politics of the state in which they are sitting. Thus, a district judge assigned to the case need not be from the same district as the judge who initially received it, and a circuit judge assigned to the case need not be from the same state as the district court in which the case was originally filed.

3. Schedule the case with the requirements of parallel state court proceedings in mind

Title 28, section 2284(a) of the United States Code requires the convening of a three-judge court when "the constitutionality of the apportionment of congressional districts or the apportionment of any statewide body" is challenged. Thus, a request for a three-judge district court often occurs when there is litigation in the state court on the same subject. In addition, the state legislature may be involved in the process of the redistricting plan at issue. Three-judge district courts should therefore manage their cases with federalism and comity concerns in mind.

In scheduling the case, for example, three-judge courts should be mindful of the teaching of *Growe v. Emison,* 507 U.S. 25, 32–34 (1993), that when parallel redistricting litigation is under way in both state and federal courts, the federal court must defer to the timely efforts of the state, including its courts, to redraw legislative districts. In *Growe,* the three-judge district court stayed all proceedings in a parallel Minnesota state court proceeding shortly before the state court issued its own redistricting plan. *Id.* at 30. The district court later issued an order adopting its own legislative and congressional districting plans and permanently enjoining interference with implementation of those plans. *Id.* at 31. Its justification for doing so was that, in its view, the state court's modification of the state legislature's plan failed to cure an alleged violation of the VRA. *Id.* On appeal, the Supreme Court held that the district court had erred in not deferring to the state court proceedings. *Id.* at 32. Citing *Scott v. Germano,* 381 U.S. 407 (1965), the Supreme Court reiterated that "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that

highly political task itself." *Growe*, 507 U.S. at 33. The *Growe* Court noted that the principles expressed in *Germano* derive from a recognition that the Constitution gives the states primary responsibility for apportionment of their federal congressional and state legislative districts. "[T]he doctrine of *Germano* prefers ***both*** state branches [legislative and judicial] to federal courts as agents of apportionment." *Growe*, 507 U.S. at 34.

In *Germano,* the Supreme Court had remanded the case with directions that the district court enter an order fixing a reasonable time within which the appropriate agencies of the state, including its highest court, might validly accomplish the redistricting and still leave ample time to permit the redistricting plan to be used in the next election. 381 U.S. at 409. The *Growe* Court quoted these directions with approval, 507 U.S. at 35, and thus the implications for scheduling three-judge court cases are clear.

When there is parallel state litigation, at the first pretrial conference, the district court should arrive at a date by which the matter must be resolved in the state in order to allow for potential litigation in federal court if the state does not successfully resolve the matter. The court should, without dismissing the case, defer to the state during this period of time. Since the possibility remains that the state will not be able to resolve the matter, scheduling should also allow time for the three-judge court to recommence active consideration of the case and resolve any federal questions, and permit state officials to implement the federal court decision and begin the election process in a timely fashion. The notion is to find and set workable final dates for conclusion of state activity in the case and ultimate resolution of the case in federal court if need be. This should be done early in the case, in order to avoid having to postpone the election. The court might also consider requiring the parties to file a copy of every pleading filed in state court during the period in which it is deferring to state court proceedings, so that it remains aware of developments in the case.

4. Decide which judge will take the lead in managing the case

Once the three judges are selected, they—not the chief circuit judge—should decide who will take the lead in managing the case. One judge experienced in these matters suggests that the district judge initially assigned the case should take the lead. The judge who takes the lead should handle routine pretrial matters; the three judges should con-

vene only for such matters as dispositive motions and the final pretrial conference. Nevertheless, coordination among the three judges on the panel will be important, and thus the lead judge should require the parties to file their pleadings with all judges on the court. Work schedules of circuit and district court judges are different, and coordination will require ongoing communication between members of the court.

5. Require judges and parties to use the same computer program

The parties in redistricting cases ordinarily make use of computer programs in drawing district lines and gathering demographic data, and those programs and data are likely to be admitted as evidence and reviewed by the court. *See, e.g., Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (discussing REDAPPL software). It is therefore important to agree on a common computer program early in the case—perhaps at the first pretrial conference. Of course, if questions about the reliability and admissibility of competing computer programs are involved in the litigation, this may not be possible.

It also is important to ensure that the court has access to the computer program when it needs it. Access to the program must be secure, so that the data are confidential and so that the parties or other interested persons cannot alter the data. To avoid the appearance of impropriety, the program used by the court and the parties should, if at all possible, not be the same as that used by any state politicians likely to be affected by the outcome of the case.

6. Decide which judge will preside at trial

Members of the three-judge court should also decide early on who will preside at trial in the case. If the judge initially assigned to the case takes the lead in managing it, it may make sense for that judge to handle the trial as well. Redistricting cases are bench trials replete with data and expert witnesses. One appellate judge observed that although such cases are somewhat more informal than jury trials, they are best handled by an experienced trial judge.

There is no statutory presumption that a circuit judge will preside at trial in a three-judge redistricting case. Although there is nothing wrong with having a circuit judge preside over the trial, is it not uncommon for a circuit judge to defer to an experienced trial judge on the panel.

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