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The Voting Rights Act And Its Impact

On Local Legislatures After the 2010 Census

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A. INTRODUCTION

In about 15 months the country will embark on its 22nd decennial census. Obviously the population has grown dramatically since 1790 with the total United States Population at about 300,000,000. Not only has the country increased in population, but the diversity of that population has also exploded. By the next decade the European white majority will be replaced by a majority of non-whites. This sociological transformation, in conjunction with anti-discrimination laws, has and will continue to change the fabric of our local, state and national governments. This great influx and internal migration has been experienced throughout the country.

The question presented then is, how will these demographic changes be reflected in the electoral practices and policies of our local and state governments and what role will the Voting Rights Act play in this dynamic? We must also address the question of what should local governments do now to reduce a district court judge's influence on how local legislators are selected.

These "how to" issues are what we will discuss today in order to provide a frame work for you to begin to engage in an objective, intensive review of the electoral process in your communities before either the Justice Department or a private plaintiff institutes a lawsuit challenging the method of election already in place. If changes will ultimately be required, it is better to make the changes now before a lawsuit is brought when the courts will exercise more control over the system of election that ultimately will be adopted.

For the most part each local legislature, whether for a village, town, city or county, elects its representative by either single member districts, at-large or a combination of the two. The vehicle for challenging whatever system is in place is either Section 2 of the Voting Rights Act or the 14th and 15th Amendments to the United States Constitution.

Communities that already utilize the single member district ("SMD") methodology can usually avoid a challenge between censuses. However, when new census data is released, SMD's are as vulnerable as at-large systems or combination systems, because after each census, where and how the lines are drawn or re-drawn becomes an issue. New lines must reflect the demographic changes in that community since the previous census.

At-large electoral systems or combination systems are vulnerable when challenged. Especially if the relevant minority community consists of significant numbers, are concentrated in one or more geographic areas, and have been significantly unsuccessful at the polls, or nearly so. However, when an at-large system is challenged, courts are careful to note that at-large electoral plans are not per se unconstitutional. *Jameson v. Tupelo,* 471 F. Supp. 2d 706, 708 (N.D. Miss. 2007); *U.S. v. City of Euclid*, 2008 WL 1775282*5 (N.D. Ohio); *NAACP v. City of Thomasville,* 401 F. Supp. 2d 489, 497 (M.D.N.C. 2005).

B. THE VOTING RIGHTS ACT OF 1965

As mentioned above, a system of election can be challenged either via the Voting Rights Act or the U.S. Constitution. Because a plaintiff's burden of proof under the VRA is easier to meet, that is the preferred method of challenge. To prove a constitutional violation a plaintiff must prove intent (*Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 97 S. Ct. 555 (1977)); however under the VRA a plaintiff need only prove that the challenged system has the effect of denying the minority group the ability to elect candidates of their choice. *U.S. v. Osceola County*, 475 F. Supp. 2d 1220, 1229 (M.D. Fla. 2006). We will only address how a local municipality can defend itself from a challenge under the VRA.

Section 2 of the Voting Rights Act ("VRA") provides that:

> "no voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color ….."

42 U.S.C. § 1973.

The Act was subsequently amended to include language minorities which lead to a requirement that governments provide bi-lingual information and/or help in the voting process.

Part (b) of Section 2 provides as follows:

> "(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political

> subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

Although Part (b) of Section 2 specifically provides that the VRA does not establish a right to have members of a protected class elected in numbers equal to their proportion in the population, in reality the courts closely scrutinize electoral systems that can, but do not, provide near proportionate representation. *Thornburg v. Gingles*, 478 U.S. 30, 36, 106 S. Ct. 2752, 2764 (1986); *Buchanon v. City of Jackson*, 683 F. Supp. 1515, 1521 (W.D. Tenn. 1988); *Jameson v. Tupelo, Miss.*, 471 F. Supp. 2d 706, 708 (N.D. Miss. 2007); but see *U.S. v. City of Euclid*, 2008 WL 1775282*22 (N.D. Ohio) (the lack of proportionality, racial bloc voting and the failure to elect minorities, overwhelm those factors that may favor defendants).

In evaluating whether a particular system of election violates the Voting Rights Act, a plaintiff must first establish each of the so-called *Gingles* pre-conditions. They are:

(1) the racial group must be sufficiently large and geographically compact to constitute a majority in a single member district;

(2) the racial group is politically cohesive;

(3) the majority votes sufficiently as a bloc to enable it in the absence of special circumstances usually to defeat the minority preferred candidate. *Thornberg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986); *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 942 (D.S.D. 2007); *U.S. v. City of Euclid*, 2008 WL 1775282*7 (N.D. Ohio); *Wilson v. Huckabee*, 2008 WL 360617 *2 (E.D. Ark.); *U.S. v. Village of Port Chester*, 2008 WL 190502*2 (S.D.N.Y.); *U.S. v. Osceola County*, 475 F. Supp. 2d at 1227-8; *Jameson v. Tupelo, Mississippi*, 471 F. Supp. 2d at 708-9.

Many circuits have acknowledged that it would be the very unusual case in which plaintiffs can establish the existence of the three *Gingles* pre-conditions but still have failed to establish a violation of Section 2 under the Totality of the Circumstances. *U.S. v Village of Port Chester*, 2008 WL 190502 *2 (S.D.N.Y.); *NAACP V. City of Niagara Falls*, 65 F. 3d 1002, 1019 n. 21 (2d Cir. 1995); *Thompson v Glades County Bd. of County Commissioners*, 493 F. 3d 1253, 1261 (11th Cir. 2007); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F. 3d 1103, 1116 n. 6 (3rd Cir. 1993); *U.S. v. City of Euclid*, 2008 WL 1775282*7 (N.D. Ohio); *Clark v. Calhoun County*, 121 F. 3d 92, 97 (5th Cir. 1994); *Teague v. Attala County*, 92 F. 3d 283, 293 (5th Cir. 1996).

However, failure to meet any one of the *Gingles* pre-conditions will result in dismissal of the lawsuit. *Overton v. City of Austin*, 863 F. 2d 538 (5th Cir. 1989); *Gomez v City of Wattsonville*, 863 F. 2d 1407, 1413 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct 1534 (1989); *McNeil v. Springfield Park District*, 851 F. 2d 937 (7th Cir.

1988), *cert. denied*, 490 U.S. 1031, 109 S. Ct. 1769 (1989); *Dillard v. Baldwin County Commissioners,* 376 F. 3d 1260, 1265 (11th Cir. 2004).

In addition to establishing each of the three *Gingles* pre-conditions a court must conduct an analysis of seven additional factors frequently referred to as the "Senate Factors" and two additional factors. They are:

1. The extent of historical, official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that might enhance the opportunity for discrimination against the minority group;
4. If there is a candidate-slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination - in such areas as education, employment, and health – which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by racial appeals;
7. The extent to which members of a minority group have been elected to public office in the jurisdiction;

The two additional factors are:

8. Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

9. Whether the policy underlying the state or political subdivision's use of voting qualification, prerequisite to voting, or standard practice or procedure is tenuous.

Senate Report at 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-7; *City of Euclid*, 2008 WL 1775282*16-23; *Tupelo*, 471 F. Supp. 2d at 713-15; *Osceola*, 475 F. Supp. 2d at 1228-0; *Village of Port Chester*, 2008 WL 190502*16-23.

However, it should be noted that this list is not comprehensive or exclusive and that there is no requirement that any particular number of factors be proven, or that a majority of these point one way or another. Rather, courts are to engage in a searching, practical evaluation of the past and present reality and take a functional view of the political process. *Gingles*, 478 U.S. at 45; *U.S. v. Osceola County*, 475 F. Supp. 2d at 1228; *U.S. v. City of Port Chester*, 2008 WL 190502*3; *U.S. v. City of Euclid*, 2008 WL 1775282*5.

C. AN ANALYSIS OF THE GINGLES PRE-CONDITIONS

1. **The minority must be sufficiently large and geographically compact enough to constitute a majority in a single member district.**

If the relevant minority cannot meet this requirement as in the case where the minority population is too small or they are substantially integrated in the community, the challenged system (usually at-large) cannot be responsible for minority voters'

inability to elect its candidates of choice. *U.S. v. Osceola County*, 475 F. Supp. 2d at 1227-1228. To satisfy this requirement one must first determine what the relevant minority is. In some cases it would be African-Americans only, in other communities it would involve Hispanics only, and still in others it could be a combination of African-Americans and Hispanics. In a few communities the relevant minority would be American Indians or Asians.

The next inquiry is what percentage of the total population, voting age population and citizen voting age population are white and what percentage are the relevant minority. Also relevant is what percentage of the total registration are white and what percentage are the relevant minority community.

Finally, one must try to determine where the minority community resides. African- Americans tend to be more concentrated and Hispanics tend to be more disbursed.

Question: What data do you use to determine the statistics necessary to analyze whether a minority is sufficiently large and geographically compact to satisfy the first *Gingles* pre-condition? Clearly the voting age population as refined by citizenship set forth in the latest census data is the most reliable, particularly if the census data is less than four years old. *U.S. v. Village of Port Chester,* 2008 WL 190502 *8 (S.D.N.Y.); *U.S. v. Osceola County* 475 F. Supp. 2d at 1229. In addition to census data, registration data can be used if the district court is satisfied that such data are sufficiently reliable. Registration data is frequently used in conjunction with census data particularly where the challenge to the electoral system is brought more than four years after the census. See, *U.S. v. Osceola County*, 475 F. Supp. 2d at 1230; *U.S. v. Village of Port Chester*,

2008 WL 190502*7; *Johnson v. DeSoto County Bd. of Comm.*, 204 F. 3d 1335, 1341-2 (11th Cir. 2000).

Once the relevant statistics have been established the plaintiff and defendant must determine what percentage of the minority community must be included within a single member district to satisfy the first *Gingles* pre-condition. Where the Hispanic community is the relevant minority, citizenship becomes an issue, more so than when the minority community consists of blacks. Where the Hispanic population migrates from Puerto Rico citizenship is not an issue.

Generally, the minority must constitute an "effective" voting majority in a theoretical single-member district. *Osceola County*, 475 F. Supp. 2d at 1230. However, in the City of Euclid case, the district court appears to hold that a plaintiff's burden to satisfy the first *Gingles* pre-condition is met by simply preparing a hypothetical district where the relevant minority constitutes a simple, voting age majority, leaving the effectiveness of that majority to elect a candidate of choice to another inquiry. *City of Euclid*, 2008 WL 1775282 *8.

Notwithstanding the comment made by the court in the *City of Euclid*, municipalities and plaintiffs must, as a practical matter determine what would constitute an "effective" majority in their community. In *Gonzales v. City of Aurora*, 2006 WL 681048 *3 (N.D. Ill.), the court held that the "precise number of minorities required to create an effective majority district, i.e. a district in which the minority population has a fair chance of electing the candidate of its choice depends on a variety of factors, including: the residents' political attitudes and behaviors, the characteristics of the candidates and the details of the campaigns." Also in *Gonzales*, the court recognized that

if Hispanics can constitute 65% of total population that would be a fair benchmark to ensure that such a district would provide Hispanics a fair opportunity to elect a candidate of choice. *Id*. In *Cottier v. City of Martin,* 475 F. Supp. 2d 932, 938 (D.S.D. 2007) the court concluded that a proposed district of 60% voting age population of the minority community would constitute an effective majority.

In *Solomon v. Liberty County,* 865 F. 2d 1566, 1574 (11th Cir. 1988) the court was satisfied that a minority district that was 51% black voting age population was sufficient because of anticipated white cross-over voting.

This analysis of the first *Gingles* pre-condition would be applicable regardless of the minority involved, with one caveat. Where the relevant minority is Hispanic, the issue of citizenship may become relevant. If so, the percentage required for an effective majority may be closer to the 65% rule of thumb than a bare majority.

To determine if the two groups, blacks and Hispanics, can be combined to determine if the first *Gingles* pre-condition can be met, requires a four-part test:

(1) whether the members have similar socio-economic backgrounds resulting in common social disabilities and exclusion;

(2) whether the members have similar attitudes toward significant issues affecting the challenged entity;

(3) whether the members have consistently voted for the same candidates;

(4) whether the minorities consider themselves united, even in situations in which they could benefit independently. *Nixon v. Kent County,* 790 F. Supp. 738, 743-4 (W.D. Mich. 1992); *LULAC v. Midland Independent School Dist.,* 812 F. 2d 1494, 1500-1 (5th Cir. 1987); *Romero v. City of Pomona,* 665 F. Supp. 853, 857 (C.D. Cal.

1987); *Campos v. City of Baytown,* 840 F. 2d 1240 (5th Cir. 1988), *cert denied,* 490 U.S. 905, 109 5. Ct. 3213 (1989).

Where blacks and Hispanics are not a politically cohesive group, they must be separated when analyzing compactness in a district plan. *Romeo,* 665 F. Supp. at 864; *Aldasoro v. Kennerson,* 922 F. Supp. 339, 375 (S.D. Cal. 1995).

The next topic relevant to the first *Gingles* pre-condition addresses the question, what size legislature must be used to determine if the relevant minority can create at least one district wherein they could constitute an effective majority. The short answer is that the analysis must be based on a district plan with the same number of legislators as presently exists. For example, if the county commission maintains an at-large system of seven commissioners, the court must use seven districts to determine if the first Gingles pre-condition has been met.

Finally, in deciding whether the first *Gingles* pre-condition has been satisfied, the court must determine if the theoretical district is "compact." If in order to create a majority minority district a plaintiff must violate all rules concerning compactness and contiguality, the proposed district should be rejected and the first *Gingles* pre-condition not satisfied.

This aspect of the first *Gingles* pre-condition would also impact on any potential remedy once a violation has been found. If no remedy can be fashioned, plaintiff loses even though, theoretically, each of the *Gingles* pre-conditions has been met. See, *Marylanders For Fair Representation, Inc. v. Schaefer,* 849 F. Supp. 1022, 1052-3 (D. Md. 1994).

In determining whether the First *Gingles* pre-condition has been satisfied, a proposed theoretical district must also satisfy the one-person-one vote requirement and avoid "packing" minorities into one district or "cracking" the minority community. *U.S. v. Village of Port Chester*, 2008 WL 190502 *4. "Packing" involves forcing as many minorities as possible into a single district to limit their potential clout. "Cracking" a minority community involves spreading the minority community to limit the group's ability to elect a candidate of its choice. *Id.*

In *U.S. v. City of Euclid*, 2008 WL 177528*7, the court condemned using unduly large, strangely configured, non-contiguous districts, or mixes racially diverse constituents, to satisfy the first *Gingles* pre-condition.

2. and 3. Whether the minority community and white community engage in racially polarized voting that would "usually" defeat a minority preferred candidate.

Rather than concentrate on the technical aspects of establishing the existence of racially polarized voting, we will address the more procedural aspects of establishing these two *Gingles* pre-conditions. A showing that a significant number of minority group members usually vote for the same candidate is one way of proving the political cohesiveness necessary to a vote dilution claim and consequently establishes minority bloc voting within the context of Section 2. *Gingles*, 106 5. Ct. at 2769-70.

The first issue to resolve is what elections are to be reviewed to determine whether racial polarized voting exists. Local elections, i.e., for the relevant village, town, city or county, in which a member of the minority community is a candidate, would be of primary relevance. These elections are referred to as "endogenous/interracial" elections.

(*Jamison v. Tupelo,* 471 F. Supp. 2d at 710)); and while they may be deemed more probative of racial polarized voting, "exogenous" elections, i.e. those not involving the relevant municipality, where a minority candidate ran, do have some probative value. *Id.*; see also, *U.S. v. Village of Port Chester,* 2008 WL 190502*13; *U.S. v. City of Euclid,* 2008 WL 1775282*9.

In *NAACP v. City of Thomasville,* 401 F. Supp. 2d 489, 497 (M.D.N.C. 2005) the court held that the elections to be reviewed should be limited to those elections in which a minority candidate was on the ballot, and should include a sample of elections large enough to enable the court to determine whether minority voters have had success in electing representatives of their choice.

Next the court must determine the degree of success by minority candidates, or do white voters "usually" defeat minority preferred candidates. What "usually" happens must be determined on a case-by-case basis. In *City of Thomasville,* the court noted that when the candidates of choice of black voters were black, the candidate won three out of eight times. When a second candidate of choice was identified in that same election, that candidate won four out of five elections. 401 F. Supp. at 499. Under these circumstances, the court noted, the use of at-large elections does not "usually" result in the candidates of choice of black voters losing. *Id.*

Although there was no apparent consensus in *Gingles* concerning the issue of "causation", i.e. why voters voted the way they did, Justice O'Connor and three other Justices stated that while "causal factors" may not be relevant to the existence of racially polarized voting, they should be admitted on the question whether white bloc voting will consistently or usually defeat minority candidates. *Gingles,* 114 5. Ct. at 2792. In *City of*

Euclid, the court rejected the City's argument that the reason for the minority group's lack of success at the polls was due to apathy and low voter turnout. 2008 WL 1775282 *15. In *Reed v. Town of Babylon*, 914 F. Supp. 843, 877-8 (E.D.N.Y. 1986), the court rejected defendant's argument that minority losses was due to partisan voting rather than racial basis. See also, *Goosby v. Town of Hempstead*, 180 F. 3d 476 (2d Cir. 1999); *City of Tupelo*, 471 F. Supp. 2d at 713-714. In the *City of Holyoke* case, 72 F. 3d 973 (1st Cir. 1995), the court held that plaintiff's cannot prevail on a Section 2 case if there is significant prevalent evidence that whites voted as a block for reasons wholly unrelated to racial animus. However, the court cautioned that if partisan affiliation is nothing more than a proxy for illegitimate racial considerations, the argument will fail.

D. THE SEVEN SENATE FACTORS

Once each of the three *Gingles* pre-conditions have been met a plaintiff must be prepared to address each of the seven Senate Factors and two additional factors. However, as noted above, there is no requirement that plaintiffs satisfy each factor; nor is it clear what degree of proof would be required. For our purposes we will discuss each Factor in light of the evidence usually proffered by plaintiffs. *Gonzales v. City of Aurora*, 2006 WL 681048*5; *U.S. v. City of Euclid*, 2008 WL 1775282*5.

FACTORS 2 and 7. These factors address the extent to which voting is racially polarized (Factor 2), and the extent to which members of the minority group have been elected to public office (Factor 7). The issue of racially polarized voting (Factor 2) is included in an analysis of the Second and Third *Gingles* pre-conditions as is Factor 7. The courts have universally held that the Second and Seventh Senate Factors are the most

important Factors in a Section 2 Vote Dilution case. The remaining Senate Factors are supportive of, but not essential to a minority voter's claim. *Gingles,* 478 U.S. at 48 n. 15; *U.S. v. City of Euclid,* 2008 WL 1775282*16; *U.S. v. Osceola County,* 475 F. Supp. 2d at 1232; *Gomez v. City of Watsonville,* 863 F. 1407, 1412 (9th Cir. 1988), *cert denied,* 489 U.S. 1080, 109 5. Ct. 1534 (1989); *Goosby v. Town of Hempstead,* 180 F. 3d 476 (2d Cir. 1999); *Gonzales v. City of Aurora,* 2006 WL 681048*7 (N.D. Ill.); *U.S. v. Charlston County,* 365 F. 3d 341, 345 (4th Cir. 2004).

In *City of Aurora*, the court noted that Hispanic citizen voting age population was 18.9% of the City's total and had two of 12 aldermen, one elected and one appointed. Although Hispanics have not been elected to office in direct proportion to the citizen voting age population, they have not been shut out of office. *Id* at *8.

Although no group has a right to proportionate representation, if it has elected representatives at a rate proportionate to its numbers, that would generally nullify any attempt to declare an electoral system violative of Section 2. *Buchanon v. City of Jackson,* 683 F. Supp. 1515, 15221 (W.D. Tenn. 1988); *Collins v. City of Norfolk,* 679 F. Supp. 551, 562 (E.D. Va. 1988).

However, even where there is minority success at the polls, that does not necessarily negate other evidence that racial polarized voting does exist. For example, when a successful minority ran as an incumbent or unopposed or if elected after the institution of litigation or when there were less white candidates than the number of seats to be filled thus guaranteeing a minority to be elected, those successes are less persuasive than a head-to-head contest between a minority and white in which the minority candidate prevails with sufficient support from all races. *Gingles* 5.Ct. at 2779-80. A key

element in the analysis is "sustained" success of minority candidates "over time" resulting in "nearly proportionate representation" *Id* at 2779.

FACTOR 1.

> The extent of historical, official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise participate in the democratic process.

The history of discrimination in any given community can be established by an analysis of several factors.

They would include a review of prior litigation in which it was alleged there was discrimination in housing and education. For example, in *City of Euclid* , in 1976 (20 years before the filing of this Voting Rights Act case), the United States Department of Housing and Urban Development informed city officials that Euclid was not in compliance with Title 8 of the 1968 Civil Rights Act, which prohibited racial discrimination in the sale or rental of housing units. *City of Euclid*, 2008 WL 1775282* 16. The court also noted that private organizations filed a lawsuit against the City for its failure to comply with the fair housing requirements of federal law. *Id.* As part of the settlement of that case, in 1981 the City agreed to retain the services of the Cuyahoga Plan of Ohio, which is a fair housing group, to investigate unfair real estate practices in Euclid. *Id*. Audit testing of that group revealed that Euclid continued to experience a significant level of racial steering. *Id* at *17. In addition, there was evidence that many citizens and city officials complained about "block-busting", i.e., efforts of realtors to urge white homeowners in a particular area of the City to sell their property quickly because blacks were moving into the neighborhood. *Id.*

The court in *City of Euclid* also heard testimony on the degree of racial segregation in the City that lead to racial segregation in the City's schools. *Id* at * 17-18.

In the 2006 VRA case brought against the City of Port Chester the court referenced a 2005 Consent Decree between the U.S. and Westchester County pertaining to language assistance at the polls. 2008 WL 190502*16. The court also considered the 1985 City of Yonkers housing and desegregation case as evidence of a history of discrimination against minorities in the County. *Id.* Plaintiff's expert also testified that Port Chester failed to provide sufficient Spanish language assistance at polling places in the City during the period 2001-2006. *Id.*

Other examples of a history of discrimination in Port Chester included testimony that Hispanic voters were treated differently from white voters; that there were no Spanish speaking employees at city hall who would be able to take a complaint from a Spanish speaking voter; in a 1991 campaign for a seat on the school board, more than 40 Hispanic voters were turned away from the polls during the election because of poll workers' inability to locate their names on voter lists.

In *U.S. v. Osceola County,* 475 F. Supp. 2d 1220, 1235 (M.D. Fla. 2006), the court took note of problems with registering Hispanic voters because information was not available in Spanish and there were no Spanish speaking workers available to answer questions or provide assistance; and the election process in the 1990's was conducted in English, with ballots, voter guides, signs and forms available only in English and no effort had been made to recruit bilingual poll workers or have bilingual elections staff. During the 2000 elections, Hispanics suffered from discrimination at the polls when they were turned away without being allowed to vote, refused assistance, forbidden to use

their own interpreters, asked for multiple forms of identification (unlike non-Hispanic voters) and treated in a hostile manner by poll workers. *Id.*

The court also made note of the fact that in 2002 the County signed a consent decree to provide information and assistance to voters in Spanish. *Id.*

FACTOR 3.

> The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that might enhance the opportunity for discrimination against the minority group.

Although the courts have recognized that at-large methods of electing local legislators is not per se unconstitutional or a violation of the VRA, at-large elections coupled with other practices or procedures does impact on a minority's ability to elect their candidates of choice. *NAACP v. City of Thomasville*, 401 F. Supp. 2d 489, 497 (M.D.N.C. 2005).

In *U.S. v. Osceola County* the court found Factor 3 was present because the County Commissioners were elected to staggered terms and are based on residency districts or numbered posts. This practice, in essence, imposes majority vote requirements which are one-on-one elections for each available seat, a system which makes it very difficult, if not impossible, for a minority to elect its preferred candidate. 475 F. Supp 2d at 1233-34. The court's suggestion was for all commissioners to run at once without numbered posts, so that a minority group could all vote cohesively for a single candidate, and if the non-minority split their votes among various candidates, the minority would have a reasonable chance to elect its preferred candidate. *Id.* at 1234.

The court was also critical of the requirement for run-off elections for primary elections, which allows non-minorities to run more than one candidate in the primary election, and then, in the run-off, to solidify their votes to defeat the minority candidate. *Id.* According to the court, the solution to the problem would be a single member district plan. *Id.*

In *Village of Port Chester,* the court was concerned with Village elections being held in March, rather than November. 2008 WL 190502*18.

In *City of Euclid,* the court found fault with the at-large system in conjunction with a numbered post system because it deprives minority voters of the opportunity to elect a candidate by single-shot voting. 2008 WL 1775282*18*;* see also *City of Rome v. U.S.,* 446 U.S. 156, 184 n. 19, 185 n. 21 (1980); *Collins v. City of Norfolk,* 679 F. Supp. 557, 564 (E.D. Va. 1988).

FACTOR 4.

> If there is a candidate-slating process, whether the members of the minority group have been denied access to that process.

The salient question for purposes of Senate Factor 4 is, where there is an influential official or unofficial slating organization, what is the ability of minorities to participate in that slating organization and to receive its endorsement. *City of Euclid,* 2008 WL 1775282*19; *Village of Port Chester,* 2008 WL 190502*18-19.

FACTOR 5.

> The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination – in such areas as education, employment, and health – which hinder their ability to participate effectively in the political process.

Statistically minorities, whether Hispanic or African-American have a lower socio-economic level than whites, whether in education, home ownership or any of the other statistics maintained by the census bureau.

For the most part, courts have determined that it is not necessary for a plaintiff to demonstrate that these disparities have been the proximate cause of low minority participation and success. In fact, low turnout and success is presumed to be exacerbated by these socio-economic disparities. *Buckanaga v. Sisseton Indep. School District No. 54-5,* 804 F. 2d 469 (11th Cir. 1986); *U.S. v. Osceola County,* 475 F. Supp. 2d at 1233; *U.S. v. City of Euclid,* 2008 WL 1775282*20. In *U.S. v.* Village of Port Chester, 2008 WL 190502*19-20, plaintiff's expert acknowledged that, although lower socio-economic status leads to lower levels of political participation, he agreed that the fact that the Hispanic community is on average younger and more recently arrived in the United States, that could contribute to lower Hispanic voter turnout. See also, *Jamison v. Tupelo,* 471 F. Supp. 2d at 715 (voter turnout is affected by socio-economic status); *Gonzales v. City of Aurora,* 2006 WL 681048*8-9.

FACTOR 6.

Whether political campaigns have been characterized by racial appeals.

There is usually very little described of racial appeals in court decisions. Plaintiffs will usually retain an expert historian who would pursue decades of newspaper articles and campaign literature to find any hint of a racial appeal within a given campaign or community. See *Gonzales v. City of Aurora,* 2006 WL 681048*9.

Racial appeals have taken the following forms: using photographs of African-American opponents in their campaign literature; using campaign literature that preyed on fears that African-American students would be bussed to town schools and warning that urban encroachment from New York City would occur. *U.S. v. City of Euclid,* 2008 WL 1775282*21; *Goosby,* 956 F. Supp. At 342; *U.S. v. Village of Port Chester,* 2008 WL 190502*20-22.

In addition to the seven Senate Factors, courts will generally review two other issues, i.e. whether the majority community is responsive to the needs of and complaints of the minority community and the tenuousness of utilizing and at-large method of elections.

E. OTHER FACTORS

FACTOR 8. Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

FACTOR 9. Whether the policy underlying the state or political subdivision's use of voting qualification, prerequisite to voting, or standard practice or procedure is tenuous.

In *Gonzales* the court rejected plaintiff's claim that whites were unresponsive to Hispanics needs when there was only one example of one alderman's behavior was demonstrably indifferent to the minority groups concerns. 2006 WL 681948*10.

The significance of the responsiveness/non-responsiveness issue is really up to the plaintiff to raise. Defendants can always proffer evidence that the community is responsive to the needs of the minority community but responsiveness will not trump a defendant's failure to prevail on the seven Senate Factors. See *Village of Port Chester*, 2008 WL 190502*30.

In Tupelo, Mississippi the defendants had created a bi-racial committee to address the needs of the minority community. However, the fact that this committee was created two weeks before trial negated its value on the issue of responsiveness. 471 F. Supp. 2d at 715.

In *City of Euclid*, the court found the defendant unresponsive to the minority community on housing issues, and the absence of minority participation in employment by the City. The court found that where blacks were employed by the City they were consigned to locker and toilet facilities. 2008 WL 1775282*22.

The last issue to be addressed is the tenuousness of adopting and maintaining the at-large system. This issue is often given short shrift by the courts. Furthermore, this issue is more relevant to the issue of intent rather than impact or effect, which is the standard of proof under the VRA. However, tenuousness may be relevant to an inquiry as to whether the existing policy is unfair. *Houston v. Haley*, 663 F. Supp. 346,

355-6 (N.D. Miss. 1987). There are also circumstances where state policy mandates a particular electoral system.

In *Buchanan v. City of Jackson,* 683 F. Supp. 1515, 1536 (W.D. Tenn. 1988) the court acknowledged that at-large elections are a necessary consequence of a commission form of government and therefore their use is not tenuous.

F. REMEDY

Assuming the court concluded that an at-large system of election had a dilutive effect on a minority group's ability to elect candidates of choice, the next question is, what would be an appropriate remedy. The short answer would be a single member district plan. However, that may be easier said than done.

The first question asked is who has the initial obligation to develop a plan that would correct a Section 2 violation? Generally, the courts give the municipal defendant the first opportunity to develop a plan which would then be reviewed by the court. *Cottier v. City of Martin,* 475 F. Supp. 2d 932, 935 (D.S.D. 2007). If a defendant refuses to propose a plan, or fails to prepare a plan that remedies a Section 2 violation, then the court must do so. *Id.* See also, *Williams v. City of Texarkana,* 32 F. 3d 1265, 1268 (8th Cir. 1994).

If the court develops a plan it is generally obligated to use a strict SMD plan. However, a defendant can prepare a combination system as long as the proposed remedy does in fact remedy the violation.

In *City of Martin,* the court adopted an at-large plan using cumulative voting. The City would have six city council members elected in a staggered cycle of 3

and 3. Furthermore there would be no designated positions or numbered posts and candidates could be from any part of the City. 475 F. Supp. 2d at 936. Under a cumulative voting scheme each voter will have up to three votes which can be cast for one, two, or three candidates. Id. The winners would be the three candidates with the highest number of votes. *Id.*

In *City of Euclid,* the district court also acknowledged that the defendant should have the first opportunity to prepare a remedial plan. (523 F. Supp. 2d 641, 644 (N.D. Ohio 2007); *Reynolds v. Sims,* 377 U.S. 533, 586, 84 S. Ct. 1362 (1964)) but that plan must correct the Section 2 violation. See also, *Bone Shirt v. Hazeltine,* 461 F. 3d 1011, 1022-23 (8th Cir. 2006).

In *City of Euclid,* a single member district plan was adopted by the court. To create a SMD plan, the court or defendant must ensure that there are sufficient members of the minority community within a district and roughly match the minority group's percentage of the electorate. *City of Euclid,* 523 F. Supp. 2d at 644-45; *Cottier,* 475 F. Supp. 2d at 938. Furthermore, the plan must comply with the Fourteenth Amendment's one-person-one-vote requirement. *Cottier*, 475 F. Supp. 2d at 939. That requires that a deviation from the largest district to the smallest be less than 10%. *Gaffney v. Cummings,* 412 U.S. 735, 93 5 Ct. 2321 (1973); *Voinovich v. Quilter,* 507 U.S. 146, 113 5 Ct. 1146 (1993); *Marylanders For Fair Representation, Inc. v. Schaefer,* 849 F. Supp. 1022, 1030-33 (M.D. Md. 1994).

Finally, any proposed SMD plan proposed by the defendant should reflect county lines, natural boundaries and precinct lines, to the extent possible.

G. CONCLUSION

We have attempted to provide a broad outline of the issues that will be raised in a Section 2 case. Although these generalities are helpful as a starting point, each case is fact specific to that community. And what may result in a Section 2 violation in one community may not in another. It is the combination of factors that are most dispositive of a Voting Rights Act case.