Thinking About Records
From A Litigation Perspective

Presented By:
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Legislative Redistricting Plans Are Likely To Be Challenged In Court

- The executive director of the Pennsylvania Legislative Reapportionment Commission speaks of defending against 27 lawsuits.

- The 2001 Texas Legislative Redistricting Board plan faced at least 17 lawsuits.
Legislative Redistricting Plans Are Likely To Be Challenged In Court

- It’s important to beware that what you say or write may be evidence in court
- Assume that every thing you say and every thing you write will end up in the newspaper or in court
- Without regard to open records laws or discovery in litigation, statements made in the legislative process tend to become public
- There are few secrets in the legislature
Think about the redistricting process as a means of developing a record that will bolster the defense of the bill in court.

Or, if you are in the minority and are opposing the bill, that will assist in a challenge to the bill.

It’s a good idea to talk to legal counsel at the beginning of the process to learn what the critical issues are likely to be and what will help or hurt the chances of prevailing on those issues in any court challenge.
The Texas 2003 Congressional Redistricting Was Among The Most Contentious In History

- It resulted in a net gain of twelve seats for Republicans in the U.S. Congress (six Democratic seats switched to Republican)

- In the regular session 52 Democratic House members left the state for five days to prevent the House from passing a redistricting bill until it was no longer procedurally possible under the rules.
The Texas 2003 Congressional Redistricting Was Among The Most Contentious In History

- In the special session, eleven Democratic senators stayed for almost 40 days in New Mexico to prevent the Senate from acting on redistricting.
- When the bill was considered, both sides tried to build a record that would support their position in court.
A Good Example Of Using The Process To Build A Record Is Found In Chen v. City of Houston, 206 F3d 502 (5th Cir. 2000)

★ The city redrew its council districts after annexing 40,000 persons in an area called Kingwood.

★ Kingwood’s population was overwhelmingly Anglo.

★ The closest council district was predominantly African-American.
A Good Example Of Using The Process To Build A Record Is Found In *Chen v.City of Houston*, 206 F3d 502 (5th Cir. 2000)

★ The second closest was predominantly Hispanic.

★ If the city placed Kingwood in either of those districts it faced serious problems under both sections 2 and 5 of the Voting Rights Act.
1995 City of Houston City Council Districts

Kingwood Annex. Population 40,834

Average District Size: 183,855

- 92% Anglo
- 61% Black
- 66% Anglo
- 58% Hispanic
- 53% Hispanic
- 51% Anglo
A Good Example Of Using The Process To Build A Record Is Found In *Chen v. City of Houston*, 206 F3d 502 (5th Cir. 2000)

- The solution was to put it in a more distant predominantly Anglo district, although this was almost certain to result in a suit raising *Shaw v. Reno* issues
City of Houston
1997 Plan for
1998-1999 City Council Districts

Legend
Council
A
B
C
D
E
F
G
H
I

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Kingwood Annexation in Houston

★ The city wanted to show that Kingwood shared a community of interest with District E but not with Districts B and I.
★ The council received reports comparing the districts on socio-economic features and other factors relevant to city council issues.
★ The council discussed these issues before any vote was taken.
★ The city used the record as the basis for its successful summary judgment motion.
Steps To Take Before Redistricting

★ Be briefed by legal counsel on the issues and learn what issues courts will be considering

★ Learn what will help or hurt your case

★ Keep this in mind when preparing, considering, and discussing any legislation
The Legislative Privilege

- Courts recognize a legislative privilege to protect persons acting in a legislative capacity from liability for actions taken in a legislative capacity and from being compelled to testify.

- The doctrine is not so much to protect individual legislators but is rather to serve the public interest.
The Legislative Privilege

★ If public officials are threatened with suit they may act with an excess of caution or make their decisions with less than full fidelity to objective and independent criteria. (Forrester v. White—U.S. Supreme Court 1988)

★ The privilege applies to staff as well as legislators.
The Legislative Privilege

- The privilege applies to persons acting in a legislative capacity even though they may not be members of the Legislature—e.g., executive officials serving on a redistricting commission, courts when acting in a legislative capacity.

- Legislative immunity is personal to the legislator and may be waived.

- If a legislator chooses to testify, he or she will be able to be deposed.
Summary

★ Expect that what you say or write will be public

★ Anticipate litigation

★ Be aware of what effect your comments are writings will have on your position in court

★ Legislative privilege should be available to you
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