



THE MIDDLE GROUND

Federal Bar Association - Middle District of North Carolina Chapter

Volume 7, Issue 2 – October 2017

In This Issue:

President's Message	1
Clerk's Corner	2
Unity Enrichment Committee Hosts Its Inaugural Diversity Symposium	2
Focus on Federal Practice: Getting to Know Carlyle Sherrill	3
What is Website Accessibility and Why Does It Matter?	4
Supreme Court Considering Whether to Limit the "Business of Rigging Elections"	7

MDNC Chapter Officers

President

Honorable Joi Elizabeth Peake
U.S. Magistrate Judge, M.D.N.C.

Immediate Past President

John J. Korzen
Wake Forest Univ. School of Law

Secretary

D.J. O'Brien
Brooks, Pierce, McLendon, Humphrey & Leonard LLP

Treasurer

Eric Placke
First Assistant Federal Public Defender

Membership Chair

Stephen Inman
Assistant U.S. Attorney

National Delegate

Cassie Crawford
Nelson Mullins Riley & Scarborough, LLP

Younger Lawyers' Chair

Jamie Dean
Womble Carlyle Sandridge & Rice LLP

President's Message

*By The Honorable Joi Elizabeth Peake
U.S. Magistrate Judge, M.D.N.C.*

I am pleased to have the opportunity to serve this year as President of our Middle District of North Carolina Chapter of the Federal Bar Association. From the beginning, the mission of this chapter has been to foster and preserve the collegiality and professionalism that have long distinguished our district and provide a forum for CLE programs and other services for federal practitioners. Our chapter continues to advance that mission in several ways, and will focus in particular on two endeavors this year.

First, our chapter will continue the traditional fall and spring CLE programs. These programs are designed to provide interesting and relevant CLE for federal practitioners, and also provide an opportunity to gather and visit together. The fall CLE this year will be on Monday, October 23, and will feature a View from the Bench with Judge Eagles, as well as an update on the civil rules, a criminal law update, and a panel discussion highlighting federal pro bono opportunities. We will follow this full afternoon of CLE with a cocktail hour and dinner featuring Chief Judge Osteen as our keynote speaker. As always, all chapter events are open to all MDNC practitioners, regardless of whether you choose to join the FBA, and I hope to see you next Monday.

Second, our chapter will also continue to support the civics initiative launched by the FBA at the national level in coordination with the Administrative Office of the Courts. This initiative is designed to increase civics education by getting lawyers into classrooms and by getting middle and high school students into courthouses to expose them to the courts, the judicial system, and its role in our system of government. In the Middle District, the Court has established a program to allow educators to set up court visits. For example, a group of students may visit the federal courthouse to watch a mock initial appearance, bond hearing, and sentencing, and then talk about what they have seen and hear from judges, assistant U.S. attorneys, assistant federal public defenders, probation and pretrial officers, and members of law enforcement. What can MDNC practitioners do to help support this program? First, get the word out to teachers or principals who might be interested in participating in a courthouse visit. Second, go visit a classroom yourself, and take advantage of all of the educational materials designed by the Administrative Office of the Courts. These programs require less than 30 minutes of preparation and can help engage students in various simulated exercises. A package of AO programs and resources specifically for the FBA is available on the FBA website. In addition, more information and materials are available on the Court's website at www.ncmd.uscourts.gov/mdnc-civics-initiative.

In addition to these local endeavors, the FBA at the national level is also coordinating efforts to assist federal practitioners in areas recovering from recent natural disasters, particularly FBA members in Puerto Rico. If you are interested in helping, visit the FBA website for more information.

Thanks for your support and involvement in these endeavors. We are looking forward to another great year. ■

Clerk's Corner: An Update from the Clerk of Court for the United States District Court for the Middle District of North Carolina

By *John S. Brubaker*

Greetings to all. Please find the following suggestions and updates from the Clerk's Office for the Middle District of North Carolina.

Revised Word Count. Effective October 13, 2017, the 9,000 and 4,500 word counts used in Local Civil Rules 7.3(d), 40.1(c), 56.1(c) and 72.4 were changed to 6,250 and 3,125. Please refer to the Court's Local Rules and Orders page for further information.

Motions to Compel Discovery. On May 1, 2017, Rule 37.1 of the Local Rules of Civil Procedure was modified to shorten the response period for motions to compel discovery from 21 to 14 days and shorten the related reply period from 14 to 7 days. Accordingly, new CM/ECF events were added for Motions to Compel Discovery and Responses to Motions to Compel Discovery. For further information, please refer to section 10 of the CM/ECF User's Manual.

Interpleader Actions. If an interpleader action is filed under 28 U.S.C. § 1335, please refer to Local Civil Rule 67.1 and the Court's Court Registry Investment System (C.R.I.S.) web page at <http://www.ncmd.uscourts.gov/court-registry-investment-system-cris>. The page explains how interpleader fund deposits are handled and the importance of using the proper docketing event when filing a Motion to Deposit Interpleader Funds for cases filed pursuant to 28 U.S.C. § 1335; in all other instances, the Motion to Deposit Funds event should be used to docket the motion.

CM/ECF Tips. For further suggestions for filing documents in CM/ECF, you can visit the Court's CM/ECF Tips page at:

<http://www.ncmd.uscourts.gov/news/cmecf-filing-tips> ■

Unity Enrichment Committee Hosts Its Inaugural Diversity Symposium

By *Katherine Blass Asaro*

UEC Chair, Law Clerk to The Honorable N. Carlton Tilley, Jr.

On Friday, September 29th, the Unity Enrichment Committee (UEC) hosted its inaugural Diversity Symposium at the Federal Courthouse in Greensboro. The Unity Enrichment Committee was created two years ago with the mission of dedication to a culture of inclusiveness that considers our unique experiences and varied backgrounds in order to enhance our contributions as members of the court family and the community. The UEC is made up of representatives from Probation, US Marshals, Federal Public Defenders, Bankruptcy, Clerks' office, and Judges' chambers. The Diversity Symposium was the brainchild of Desdemona Faison, Supervisory Probation Officer, who chaired the event, and our former Chief Deputy Clerk, Tammi Hellwig. The event was over a year in planning and culminated with the Symposium.

The Symposium began with an introduction by Desdemona and then a panel discussion moderated by Dr. Omar Ali, Dean of the Lloyd International Honors College at UNCG. Panelists included Mo Green, Executive Director of the Z. Smith Reynolds Foundation (and former MDNC clerk), Dr. Jane Fernandes, President of Guilford College, Dr. Leigh-Anne Royster, Director of Inclusive Community Wellbeing at Elon University, and Monica Walker, Diversity Officer for Guilford County Schools. The panel portion was done in a question and answer format with Dr. Ali and then went to questions from the audience. Questions ranged from thoughts on kneeling during NFL games to resources the public could use to further their understanding of the issues presented. The event finished with refreshments and conversation for everyone in attendance. The hallway was

filled with audience members talking to panelists – one of the goals of the UEC in putting the Symposium together.

The response to the Diversity Symposium was overwhelmingly positive and the UEC plans to host future events to continue such discussion. One UEC member put it this way, “We spend so much time with the same people, who usually share the similar views to yours -- it's nice to hear from people who are open minded and don't think just like you do. My perspective of things (with particular reference to the NFL/national anthem segment) definitely changed.” Another audience member told us, “I loved the event. The speakers were great. They were very thoughtful in their responses. And I especially liked the discussion around ‘it's ok to be uncomfortable and ask hard questions.’”

Thanks to all who joined us in making our inaugural Diversity Symposium a smashing success. We are sincerely grateful to the MDNC family for helping us further our mission and look forward to many more opportunities to “ask the hard questions” in the future. ■

Focus on Federal Practice: Getting to Know Carlyle Sherrill

By *Jamie A. Dean*

Womble Carlyle Sandridge & Rice, LLP

Carlyle Sherrill is a civil and criminal law practitioner with more than three decades of experience in the Middle District. After attending Davidson College and the University of Baltimore School of Law, Mr. Sherrill began his legal career with a clerkship at the United States Court of Appeals for the Fourth Circuit with the Honorable Sam J. Ervin, III. He now practices law in the Salisbury area as a partner of Sherrill & Cameron, PLLC. Mr. Sherrill kindly agreed to answer questions about his experience and the lessons learned during his long and successful career:

Q: You spent a year as a clerk at the Fourth Circuit Court of Appeals before beginning your practice. How has that affected your career? What would you say to young attorneys considering whether to seek a clerkship?

A: A clerkship is a valuable experience. You get to observe how judges make decisions, you get to observe numerous attorneys and their style of practice and argument. But most of all, the clerkship gives you confidence. I remember watching attorneys argue in front of the court and thinking to myself “I can do that.”

Q: What is it like to practice criminal law in the Middle District? How does that differ from other courts where you practice?

A: The difference is summed up in one word: “efficiency.” In the Middle District, when your client is arraigned he is given a schedule that gives dates for when motions are to be filed; when plea agreements are to be filed; when motions are to be heard; when there is to be a change of plea hearing, and when the jury trial will be held, if it is to be a jury trial. All of that happens within a month. Unless there are exceptional circumstances, there is strict adherence to that schedule. Other courts have a tendency to allow repeated continuances and delay the resolution of matters. I have one criminal case that has been pending in state Superior Court for ten years without resolution.

Q: As a criminal law practitioner, you encounter the same opposing counsel on a more frequent basis than most civil law attorneys. How does that change your approach to litigation? What is it like working with the same prosecutor on multiple cases?

A: It is a great advantage to be familiar with Assistant U.S. Attorneys. When you get a case with a particular Assistant U.S. Attorney, you know what to expect from your prior experiences. You build a trust with the attorney from your prior experiences and you can go into the case with more confidence about how the other attorney is going to act.

Q: Middle District attorneys often say that our

District has a strong tradition and culture of professionalism. Do you believe that is accurate? Have the tradition and culture changed during your career?

A: Most certainly the Middle District has strong traditional and cultural professionalism. It has been that way all the way back to my first two jury trials with Judge Richard Erwin, both of which were not guilty verdicts. It is the judges who set the tone for professionalism, and they have set a high standard.

Q: If you were speaking with newly-admitted attorneys hoping to practice in our District, what one piece of advice would you give them?

A: Establish a reputation for honesty and reliability among your fellow attorneys and judges. It's amazing how well the system works when people know they can trust you.

Thank you again to Mr. Sherrill for sharing his insights! ■

What is Website Accessibility and Why Does It Matter?

By Elizabeth Troutman and Jamie Dean

Brooks, Pierce, McLendon, Humphrey & Leonard LLP and Womble Carlyle Sandridge & Rice, LLP, respectively

If you're anything like us, a discussion that turns to the topic of software coding elicits panic— "are they going to want my legal opinion about this? Oh no! There's a reason I didn't take the patent bar – all those science courses – I can't even fix the ice maker!"

For many lawyers, the topic of website accessibility conjures a similar response. But here's why it shouldn't. Website accessibility is simply an umbrella term used to describe how people with disabilities access the internet. For blind and visually impaired people, the internet has opened a whole world of information that was previously closed - we can manage our finances, buy groceries, and even order our kids' Halloween costumes without having to overcome the obstacle of going to a physical place. There is software that reads the text on screen aloud, increases the font size, changes the contrast colors, and allows us to move about using key strokes instead of a mouse. To do these things though, the information must have been properly coded and labeled when it was originally put on the website.

As hundreds of private businesses and public institutions are learning, the failure to make one's website accessible can give rise to private litigation or government enforcement actions. Even if such matters are resolved voluntarily, the costs can be significant. And, in the business context, there are no easy ways to prevent the litigation from being repeated. As a result, website accessibility is a growing area of interest that is not likely to diminish in the near future.

Conflict in the Courts -

Title III of the Americans with Disabilities Act prohibits discrimination on the basis of disability in places of Public Accommodation and requires those places to provide reasonable accommodations to individuals with disabilities if necessary to access their services. (42 U.S.C. § 12181 or "Title III"). This is the same law that requires new buildings to be accessible for people with physical disabilities.

While the issue has not been addressed in the Fourth Circuit, many other courts have debated whether the term "public accommodation" as used in Title 3 covers more than physical locations. *Compare Earll v. eBay, Inc.*, 599 F. App'x. 695, 696 (9th Cir. 2015) (holding that, in order to be a "public accommodation," a website must have a sufficient connection with a physical place), *with Morgan v. Joint Admin. Bd., Retirement Plan of the Pillsbury, Co., and others*, 268 F.3d 456, 459 (7th Cir. 2001) (rejecting argument that "public accommodation" refers only to a physical site). District courts across the country have grappled with this question specifically with respect to websites. *Compare Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1320 (S.D. Fla. Mar. 15, 2017) (holding ADA applies to a website with a sufficient nexus to a physical location) *with Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196,

200–02 (D. Mass. June 19, 2012) (holding the ADA applied to Netflix online streaming service though services were delivered primarily at users’ homes). Importantly, the Department of Justice, which is responsible for enforcing the ADA, has taken the more expansive view, arguing that the ADA applies to websites even without any connection to a brick and mortar location.

Lack of Relevant Standards –

Compounding the ambiguity in the law is uncertainty about what criteria makes a website “accessible.” If a business is sued concerning the alleged inaccessibility of its parking spaces or bathrooms, in most instances it can evaluate those allegations with a copy of the Department of Justice’s regulations and a tape measure. If a business is accused of having an inaccessible website, however, there is no clear standard or tool to analyze its liability. Nor can most businesses undertake an accessibility analysis without retaining outside help. Despite aggressively enforcing the ADA, including intervening in private suits concerning website accessibility, the Department of Justice has yet to issue any web access regulations. In fact, during the summer of 2017, the Department moved website accessibility rulemaking to its “inactive” list, meaning no such regulations are likely to be issued in the near future.

The vacuum created by the lack of government regulations is frequently filled by nonbinding, aspirational standards promulgated by the World Wide Web Consortium (“W3C”), an unincorporated organization that issues protocols and standards for various aspects of web development. The W3C’s accessibility guidelines, known as Web Content Accessibility Guidelines 2.0 (“WCAG 2.0”) have been gaining prominence as a best practice in web design. They require that websites are understandable, robust, perceivable, and operable to people with disabilities, including visual, hearing, cognitive, and physical impairments. The WCAG 2.0 criteria include three different levels of compliance: A, AA, and AAA. Level A is considered baseline, whereas level AAA is considered aspirational. From the litigation perspective, the WCAG 2.0 AA criteria are commonly treated as a de facto standard by plaintiffs’ lawyers, despite the lack of any government sanction for those criteria, or any determinative court ruling that they should be the standard.

Lawsuits Abound -

Seizing on the ambiguity in the law, plaintiffs’ attorneys in Pennsylvania, Florida, California, and New York have issued demand letters and filed suits in the hundreds, including against many businesses headquartered in North Carolina. These actions contend that the plaintiff, usually a blind person, was unable to access the defendant’s website and, as a result, that the defendant has violated the ADA. Retailers, financial institutions, and insurers have all been targeted. Typical allegations include that the website contains unlabeled graphics (i.e. images with no descriptions) and lacks links or other structures to assist a blind person in navigating the site (i.e. a “skip to main content” link at the top of each page). Because these issues typically occur throughout a website, the process of eliminating accessibility barriers can be daunting.

Resolving these suits is tricky. In the absence of class certification, settlement might not protect a business against repeat suits by different plaintiffs. Even a consent order or judgment could be ineffective for this purpose, because doctrines like *res judicata* require privity among plaintiffs. Additionally, settlements will often require a business to comply with the WCAG 2.0 guidelines, but that could expose the company to differing obligations if and when the Department of Justice issues its own rules. Finally, a settlement could subject the business to ongoing accessibility audits by a firm of the plaintiff’s choosing, which undermines the certainty and finality of any resolution, especially given the fact that web content, by its very nature, changes constantly.

On the other hand, a business that elects to litigate the dispute should also proceed with caution. As grocer Winn-Dixie recently learned, the Department of Justice is willing to intervene to protect its view of the ADA. Statement of Interest (Doc. 23), *Gil v. Winn Dixie Stores, Inc.*, No. 16-CV-23020-RNS (S.D. Fla.). In a motion for judgment on the pleadings in that case, Winn-Dixie argued that the ADA only applies to physical locations. *Id.* At Doc. 15. The Department of Justice filed a statement of interest arguing that the ADA covered Winn-Dixie’s website and that the ADA would still apply even if Winn-Dixie had no physical stores. *Id.* at Doc. 23. The case ultimately proceeded to

a bench trial, at which the plaintiff prevailed. *Gil v. Winn Dixie Stores, Inc.*, --- F. Supp. 3d ----, 2017 WL 2547242 (S.D. Fla. June 12, 2017). In addition to injunctive relief, the plaintiff's prolific web access lawyers were awarded \$100,000 in fees. Order (Doc. 76), *Gil v. Winn-Dixie Stores, Inc.*, No. 16-CV-23020-RNS (S.D. Fla.). Winn-Dixie is appealing the verdict, which is believed to be the first of its kind.

The Office of Civil Rights' Crusade –

The tale of website accessibility law has a different twist for educational institutions. Title II of the ADA (42 U.S.C. § 12131, et. Seq.) applies to public entities and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) applies to entities receiving federal financial assistance. Both laws prohibit discrimination on the basis of disability and require that entities provide access to benefits, programs, and activities to persons with disabilities. Though regulations have not been promulgated under either law specifically describing website accessibility standards, the ADA Title II regulations do state that communications with persons with disabilities must be as effective as communications with others. (28 C.F.R. § 35.160(a)(1)).

The Office of Civil Rights of the U.S. Department of Education (“OCR”), which has authority to enforce these laws as they apply to educational institutions, has taken on the issue of website accessibility with vigor. Because OCR operates under different laws, judicial interpretations of Title III do not apply. And in fact, there is little to no argument to be made that website accessibility should not be required of educational institutions: the programs and activities offered by these institutions are offered online now – from admissions materials to athletics schedules to academic programming itself. (*See* 29 U.S.C. § 794(b) defining “programs and activities” very broadly).

OCR has opened over 400 investigations into website accessibility for educational institutions. Because OCR can monitor websites easily without conducting interviews or digging into documentation, educational institutions should assume that an investigation could be opened at any time. OCR does not rely solely on a simple determination of accessibility from an automatic scan of the website. OCR attorneys actually go to the key pages and test for themselves whether they are accessible. In addition to the accessibility of the actual website, OCR also looks at an institution's (1) policies governing accessibility, particularly as technology evolves, (2) training of employees who create content, and (3) online non-discrimination statements communicating how to make complaints about access issues.

Rather than filing suit, OCR generally allows institutions to bring an offending website into WCAG 2.0 compliance in a short time frame or enter into joint resolution agreements whereby OCR will continue to monitor the institution's website, policies, and procedures. Likewise, most educational institutions have chosen not to fight OCR in courts, perhaps realizing that between the potential public backlash and lack of federal funding, it's just easier to make a website accessible.

That said, when private individuals or groups sue education institutions, the Department of Justice sometimes intervenes. As in a recent case involving the University of Miami (Ohio), this intervention can dramatically expand the scope of the litigation and result in a consent decree requiring broad accessibility changes. Even without litigation, the process of making an institution's website accessible can be onerous. The University of California at Berkeley made news earlier this year when it decided to simply remove thousands of videos from its website rather than take on the challenge of making them accessible. Berkeley contended this decision only affected free content for use by the general public and not materials relied upon by its enrolled students. This expedient would not be available to an institution with inaccessible media or PDF content that is used as part of its course offerings. In those circumstances, the institution would have to elect between shouldering the burden of making materials accessible or limiting course content.

Conclusion –

The push for greater web accessibility is a logical step in our increasingly digital world. Indeed, for the blind and visually-impaired, increasing access to online information can have a profoundly positive impact. Yet, the lack of

formal website accessibility regulations makes the progression to a world of universal web access fraught with problems for businesses and institutions. Until the ADA's scope is finally determined and concrete guidelines are put into place, these problems promise to persist. ■

Elizabeth Troutman is an education attorney and litigator in the Greensboro office of Brooks, Pierce, McLendon, Humphrey & Leonard LLP. Jamie Dean is a business litigator in the Winston-Salem office of Womble Carlyle Sandridge & Rice, LLP. Both are blind and both regularly advise clients including private businesses and education institutions on web accessibility, including responding to private suits and OCR investigations.

Supreme Court Considering Whether to Limit the “Business of Rigging Elections”

By Ryan Niland

Womble Carlyle Sandridge & Rice, LLP

On January 27, 1998, the Winston-Salem Journal featured an article discussing the lack of competitive Congressional races in North Carolina. John Hoeffel, *Six Incumbents Are a Week Away From Easy Election*, Winston-Salem Journal, Jan. 27, 1998, at B1. The article noted that more than half of North Carolina's incumbent representatives were currently running unopposed in the upcoming election. *Id.* “You have virtually no competition anywhere across the state,” observed State Senator Mark McDaniel. *Id.* McDaniel, who had voted against the General Assembly's latest redistricting plan, complained that the General Assembly was “in the business of rigging elections.” *Id.*

Gerrymandering has a long and colorful history in the United States. Most observers agree that partisan gerrymandering is, as Justice Alito recently observed, “distasteful.” But although federal courts have long limited the states' ability to draw district lines in ways that disadvantage racial groups, they have been hesitant to limit the states' ability to fashion districts that advantage one political party over another.

A case currently pending before the Supreme Court could test the limits of that deference. *Gil v. Whitford* involves a challenge to Wisconsin's state legislative maps, under which Republicans have won more seats than their overall share of the statewide vote would suggest. For example, Republican candidates won 60 of the state's 99 Assembly seats in 2012 despite receiving 48.6% of the statewide vote. *See Whitford v. Gil*, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016). The Court's decision in *Gil* could set a new standard for evaluating partisan gerrymander claims and have a significant impact on American politics.

Background on Gerrymandering Claims

In the United States, the practice of manipulating district lines to promote a desired electoral outcome is nearly as old as the Constitution itself. Patrick Henry reportedly drew Virginia's district lines in an unsuccessful effort to keep James Madison out of the first United States Congress. The word “gerrymander” was coined in 1812 after Massachusetts Governor Elbridge Gerry approved a salamander-shaped district that was drawn to benefit his party. In light of this historical pedigree and federalism concerns, federal courts have generally been reluctant to impose limitations on a state's ability to fashion its own legislative maps.

In the mid-twentieth century, however, the Supreme Court began to recognize some restrictions on a state's discretion in drawing legislative maps. In 1964, the Court held that the Fourteenth Amendment's Equal Protection Clause requires states to apportion districts on a population basis according to the one-person, one-vote principle. *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964). Under this principle, states may not dilute the voting power of citizens by grossly overpopulating a district. *Id.* The Court has also recognized that both the Constitution and the Voting Rights Act of 1965 prohibit states from using single or multimember districts that have the effect of diluting the voting power of racial groups. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 80 (1986). Although there have been many cases defining the boundaries of these principles, there is little debate that overpopulated districts and racial gerrymanders are unconstitutional.

In contrast with malapportionment and race, the Court has had difficulty articulating an approach to partisan gerrymanders. In *Davis v. Bandemer*, a divided Court rejected a challenge to Indiana's state legislative districts. 478 U.S. 109 (1986). Six of the nine justices agreed that partisan gerrymandering claims are justiciable under the Equal Protection Clause. But these justices were unable to muster a majority as to the proper standard for evaluating such challenges, particularly as to whether the results of a single election could be sufficient to establish that a particular map had a discriminatory effect on voters of a particular party. As a result, the plaintiffs' claims were dismissed without a clear standard from the Court.

Nearly two decades later, the justices were still unable to reach a consensus. In *Vieth v. Jubelirer*, the Court rejected a challenge to Pennsylvania's legislative districts. 541 U.S. 267 (2004). Four justices proposed various standards to apply to the Equal Protection approach endorsed in *Bandemer*, while four others wrote that *Bandemer* should be overruled. Believing that no workable standard had yet been proposed, Justice Kennedy cast his tiebreaking vote in favor of the state. But Justice Kennedy also argued that partisan gerrymandering claims were justiciable under the Equal Protection Clause, and he suggested that a law that "has the purpose and effect of subjecting a group of voters to disfavored treatment by reason of their views" could also violate the First Amendment. *Id.* at 314 (Kennedy, J., concurring in the judgment). Justice Kennedy added, "Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Id.* at 315 (Kennedy, J., concurring in the judgment).

The *Gil* Case

The plaintiffs in *Gil* purport to answer Justice Kennedy's call for a "manageable standard by which to measure the effect of apportionment." Drawing on the work of various political scientists, the plaintiffs proffer at least three different statistical methods designed to quantify the degree to which legislative maps advantage certain political parties. One such method estimates the total number of seats a political party would expect to win if the statewide vote were split evenly between two parties. Another method

looks to the difference between a party's mean or average vote share and the share it received in the median district. By far, however, the metric that has received the most attention is the so-called "efficiency gap," which compares the number of votes each party "wastes" in a given election. The efficiency gap starts from the premise that the purpose of every vote is to win a legislative seat. Under this logic, a vote is "wasted" if (1) it was cast in favor of a losing candidate; or (2) it was cast in favor of a winning candidate who already had enough votes to win that district. The efficiency gap compares each party's wasted votes to determine the degree to which one party benefitted from the drawing of district lines.

Although these techniques differ in their specifics, all seek to evaluate a state's political map as a whole, rather than assessing the partisan tilt of any particular district in isolation. As a result, they represent a different approach than that taken in the Court's one-person, one-vote and racial gerrymandering cases. In those cases, the Court has required voters to challenge the boundaries of specific districts, rather than relying on the overall effect of the map as a whole. *See, e.g., Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015).

Perhaps for this reason, much of the oral arguments in *Gil* focused on defining the right at issue. Echoing Justice Kennedy's concurrence in *Vieth*, the plaintiffs argue that, in addition to the Equal Protection Clause, partisan gerrymanders also implicate the First Amendment right to freedom of association. Justice Ginsburg suggested that partisan gerrymanders implicate "the previous right to vote." Justice Gorsuch argued that partisan gerrymandering claims arise under Article IV, Section 4 of the Constitution, which requires the federal government to "guarantee to every State in this Union a Republican Form of Government," and which the Court has long dismissed as giving rise only to non-justiciable political questions. *See, e.g., Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

The Court's choice of framework is particularly important in because of the conceptual difficulties that statewide partisan gerrymandering presents. The first of these issues relates to a legislature's intent. As with race, the Court has long acknowledged that political considerations, such as the protection of incumbents and the grouping of "communities of interest," are legitimate considerations that legislatures

may take into account when drawing districts. *See, e.g., League of United Latin American Citizens v. Perry*, 548 U.S. 399, 434, 440–41 (2006). In fact, the Court rejected a racial gerrymandering claim from North Carolina after concluding that the district’s boundaries were drawn on the basis of partisanship, rather than race. *See Easley v. Cromartie*, 532 U.S. 234, 257 (2001). If the Court recognizes a partisan gerrymander in *Gil*, it may need to more clearly differentiate between permissible political intent, such as the “protection of incumbents” or the desire to group “communities of interest” together, and impermissible political intent, such as the desire to “subject[] a group of voters to disfavored treatment by reason of their views.”

Another conceptual difficulty relates to the degree to which a map must be biased in order to establish a partisan gerrymandering claim. The Court has rejected the idea that the Equal Protection Clause guarantees a right to proportional representation, either in terms of race or partisan affiliation. *See, e.g., City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 75–76 (1980); *Vieth* 541 U.S. at 287–88. If the Court sustains the challenge in *Gil*, it may need to articulate some method or test—statistical or otherwise—for determining how much partisanship is too much for constitutional purposes.

This task is especially difficult because political geography can produce partisan bias results in the absence of intentional gerrymandering. As the populations of urban and rural areas grow more polarized, the odds increase that a particular map may naturally favor one party over another. In *Gil*, for example, the plaintiffs proffered an expert report with information about the seventeen legislative maps across the country that exhibit the most partisan bias; ten of those maps were drawn by courts, bipartisan

committees, or purportedly neutral redistricting commissions.

Finally, *Gil* raises the issue of how enduring a partisan bias must be in order to support a partisan gerrymandering claim. In *Bandemer*, the plurality rejected plaintiff’s argument that a single election cycle is sufficient to show discriminatory impact on members of a political party. 478 U.S. at 135. In *Gil*, the plaintiffs produced evidence showing a similar impact across two election cycles. *See* 218 F. Supp. 3d at 853. On one hand, there is no obvious reason why two elections over a two-year period should be considered qualitatively different than a single election. On the other hand, a rule that requires many election results could effectively negate the utility of a partisan gerrymandering claim because most legislative maps are redrawn every ten years in response to the decennial Census.

Conclusion

The Court’s decision in *Gil* comes at an interesting period in American politics. Although gerrymandering is nearly as old as the country itself, improvements in technology have made it easier to divide the population into demographic groups with reasonably predictable voting behavior. And because state legislative and Congressional maps stand to be redrawn after the 2020 census, a decision for or against the plaintiffs in *Gil* will soon be felt nationwide. ■

Ryan Niland is a business litigator in the Winston-Salem Office of Womble Carlyle Sandridge & Rice, LLP. Before joining Womble Carlyle, he served as a law clerk to the Honorable Thomas D. Schroeder.



We hope to see you all at the annual CLE event and Banquet on Monday, October 23 at the Embassy Suites in Greensboro. A copy of the agenda and registration form is attached.



CONTINUING LEGAL EDUCATION – AGENDA

[applying for 4.0 hours of CLE, including 1.0 Ethics hour]

- 1:00 p.m. Overview of *Pro Bono* Opportunities in M.D.N.C.
Introduction: John Korzen, WFU School of Law
Brief Discussion of Area-Specific Opportunities: Appellate Litigation (John Korzen), Hague Convention on the Civil Aspects of International Child Abduction (Jennifer Lyday, Waldrep LLP), Immigration Law (Helen Parsonage, Elliot Morgan Parsonage PLLC).
Panel Discussion, M.D.N.C. Civil Pro Bono Pilot Project: Kevin Williams, Bell Davis Pitt, D.J. O'Brien, Brooks Pierce, and (tentatively) Kim Marston, Brooks Pierce; Cassie Crawford, Nelson Mullins (moderator)
- 2:00-2:10 p.m. Break
- 2:10 p.m. Criminal Law Update
Acting United States Attorney Sandra Hairston and Assistant United States Attorney Stephen Inman will discuss the legal and policy considerations that help determine which criminal offenses are prosecuted in federal court versus state court, as well as current federal prosecution priorities and policies
- 3:10-3:20 p.m. Break
- 3:20 p.m. Civil Rules Update
Jamie Dean and Ryan Niland of Womble Carlyle Sandridge & Rice, LLP will review changes to the Middle District's Local Civil Rules and provide an update on treatment of the Federal Rules following the significant amendments of 2015
- 4:20-4:30 p.m. Break
- 4:30 p.m. View from the Bench
The Honorable Catherine C. Eagles, District Judge, will provide a view from the bench on "Open Courts and Transparent Justice," with a focus on the issues raised when the interest of the public in open courts collides with other issues in civil and criminal cases, and with some discussion of how these issues play out in procedural or practical application

Registration Form

Registration Deadline is Monday,
October 16, 2017

FBA, MDNC Chapter
c/o Eric Placke
First Assistant Public Defender
Middle District of North Carolina
301 N. Elm St., Ste. 410
Greensboro, NC 27401

Conference Name: 2017 Fall CLE and Banquet

Conference Date: Monday, October 23, 2017

Conference Time: Registration 12:30 p.m.
CLE 1:00 p.m.
Reception 5:30 p.m.
Banquet 6:30 p.m.

Conference Location: Embassy Suites (Airport)
204 Centreport Drive
Greensboro, NC 27409

To register, please remit this form and payment by check, payable to "FBA MDNC Chapter," by mail to Eric Placke at the address above.

Attendee Information	
Name:	
Firm:	
Address:	
City, State, Zip:	
Email:	
Phone:	
State Bar Number:	

Registration

CLE Registration Fee -- \$35

Reception and Banquet Fee -- \$45

TOTAL: