Render Unto Caesar:
Candy Canes, Cheerleaders, and the Ten
Lessons I Have Learned in Religious Liberty Litigation

by: Thomas P. Brandt

Life's lessons are usually learned the hard way. That is certainly true for me and the lessons I have learned during the course of many years of religious liberty litigation. With the hopes that you will not have to learn them the hard way, I provide you with a list of a few of the lessons I have learned. I hope you find these helpful.

Lesson No. 1: Common Ground Is Not So Common

Recently I moderated a panel discussion on religious liberty. On one side of me sat a lawyer from an organization which advocated "scrubbing government clean of religion." On the other side sat a lawyer from an organization which advocated for the rights of religious believers. As a lawyer who represents school districts, I, of course, sat in the middle. After a full hour of discussion two things were clear to me. First, if there was any common ground to be found between the two opposing camps it was very narrow and difficult to find. Second, governmental entities and public officials should brace themselves for litigation for years to come.

Lesson No. 2: Reasonable Minds Can Differ and Unreasonable Minds Can Differ More

Reasonable people continue to disagree, at times fiercely, about the appropriate role of religion in American public life. Some believe that our public institutions, including our public elementary schools, should leave ample room for religious speech. Others believe that governmental institutions, and especially public schools, should be predominantly or even exclusively secular. Still, others strive to find that elusive middle ground between these positions. Too often, though, reasonable minds seem to be in short supply. One example comes immediately to mind.

Many years ago, in one of my earliest forays into the religious liberty fight, I was asked to represent a school district which had been sued by a religious rights organization. The organization represented a high school senior whose proposed prayer had been edited by the school district general counsel. The school district's general counsel was a good Christian man who tried diligently to follow the law as it existed at the time. At that time, the Fifth Circuit had opined that prayers could be said but that they must not be "sectarian or proselytizing." This admonition from the Fifth Circuit, which came before *Santa Fe ISD v. Doe*, 530 U.S. 290 (2000), meant that, as a practical matter, someone from the school district had to act as an editor of the prayer. This task fell to the man who served as the school's general counsel. This good Christian lawyer, fulfilling his duty to obey the law, edited the prayer. He took the girl's handwritten prayer and struck through a number of words such as "Jesus" and "Our Heavenly Father." The hand written prayer with the name "Jesus" crossed out naturally became Plaintiff's exhibit No.1. [Note to self: Do not cross out the name of Jesus].

With the creation of the exhibit by the school district's general counsel completed, the litigation quickly followed. At that point I was contacted. I was called to attend a Thursday night school board meeting to meet with the board in executive session before I was to attend the TRO in federal court on Friday morning.

I met with the school board, all of whom were Christians. Without revealing what was discussed, I left the meeting with a clear idea of how to reasonably resolve the case. I was going to let the girl pray.

The next morning I showed up bright eyed and bushy tailed to deliver my good news to the Plaintiff's lawyer. I knew that this would resolve the case and we would all go home happy. Boy was I wrong! I remember this like it was yesterday.

I greeted the Plaintiff's lawyers with a smile and a firm handshake. I looked them straight in the eye and told them "I've got good news; We're going to let your girl pray!" To this day, I am amazed at the reaction I received. They were crestfallen. They physically wilted as if I had just punched them in the gut. I was dumb-founded. I told them "Guys, this is a good thing. We are letting your girl pray. This means you win." They stumbled around for a moment until they found their words. In that unguarded moment they spoke the truth which I will never forget. "Tom," they said, "we look hard to find plaintiffs who are willing to sue in these cases, we have been trying hard to get a case to the Supreme Court so that we can change the law." I told them that I understood all that but that I was surrendering – that they were winning.

At that point, they asked to have some time to speak with their client. I said "Of course." I thought to myself "How long can this take?" I imagined the brief conversation they would be having. I thought it would go something like this:

Lawyer: "They gave up. We win!"

Client: "Great! Thanks!"

As the minutes ticked by, the school district's general counsel and I waited in the federal court clerk's office. I remember him telling me that he was a committed Christian. We continued to shoot the breeze. Fifteen minutes went by. "What could be taking so long?" we said to each other. We kept chatting and waiting. Thirty minutes went by. "Gee whiz, what is taking so long?" we said to each other. Finally, after about forty five minutes, the Plaintiff's lawyers returned with a strange smile on their face. Something was definitely up but I couldn't for the life of me figure out what it was.

The first real clue about what was going on came when they asked me if the school board's written policy was going to be changed. Keep in mind that they were referring to a

school district *legal* policy which simply codified the current rule from the Fifth Circuit which effectively required the prayed to be edited in the way the general counsel had done. Of course, I responded that we would not be able to eliminate that legal policy since it was merely a reflection of the Fifth Circuit's most recent ruling on the issue. They smiled.

At this point, they said essentially this: "Well, you see, our client is a Christian and according to her faith she must obey legitimate authority, and since the school board's written policy is legitimate authority she believes that she must obey it. So even though you are telling her that she can pray, the written policy is telling her she cannot. So, you see, she doesn't know what to do. Her First Amendment rights have been chilled by the written policy." After I picked my jaw up from the floor, I said "You have got to be kidding me!"

I told them "Guys, this is like a traffic cop at an intersection where the lights are all stuck on red. The copy whistles and motions for you to proceed through the red light and you are telling me that you are just going to sit there and not move because the light is red? I cannot believe this."

They smiled and did not respond. They did not win either. But the point is that as difficult as this area is to litigate, sometimes it is impossible to settle. Those are the situations when fighting is the only option.

Lesson No. 3: Media Coverage is to a Lawsuit as Gasoline is to a Fire

I recently had the distinct honor of encountering an adversary in a religious liberty case who was not interested in trying his case in the press. I have great hopes that we will be able to work together to fashion a reasonable resolution that will be beneficial to all concerned. Unfortunately, my good experience with this honorable lawyer is the exception, not the rule.

Media coverage in religious liberty cases comes with the territory. Religious liberty is an interesting topic and mass media outlets try to cover subjects that interest people. In one sense, then, the media is sort of like the weather: everyone complains about it but no one does anything about it. Straight forward and honest reporting is to be expected and applauded. The problem comes when the story is manipulated.

Lesson No. 4: We Didn't Start the Fire

It is important to remember that issues and difficulties of church-state relations started long before us and will, without doubt, continue long after we are gone. When Christ stated "Render unto Caesar what is Caesar's and to God what is God's," he was establishing the essence of the Christian approach to church state relations. Other religions have other approaches. The Taliban may want to establish a theocracy but that is not the goal of most main stream religions in America.

The solution is not, as one atheist group representative recently stated "to scrub government clean of religion." That is ominous language. It implies that religion is a dirty stain on government. Nothing could be more foreign to our history and our culture. Our national motto is "In God we trust." Our oaths of office end in "so help me God." My own alma mater, the University of Texas at Austin, has carved in huge letter across the front of the main building "You shall know the truth and the truth shall set you free." This, of course, is a Biblical quotation referring to Jesus Christ ("the way, the truth and the life"). Our Supreme Court has acknowledged that "we are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Both the efforts to establish a theocracy and the efforts to "scrub the government clean of religion" are equally foreign to our history and culture as a nation. We should have no part of

the establishment of a particular religion as our national religion, nor should we either implicitly or explicitly establish atheism as our national "religion."

The goal should be a healthy church state relationship in which each has respect for the contributions the other makes to society. Those who want to "scrub religion away" are making an illegitimate proposal to make religious believers second class citizens. The marketplace of ideas should not be made into a marketplace of all but religious ideas.

Lesson No. 5: Holy Wars Are Not Always Holy

It is often said that truth is the first casualty of war. The same could be said of litigation. In religious liberty litigation, though, this tragedy can be particularly poignant. Too often religious liberty cases can veer off into situations in which one side perceives itself to be the spokesperson for God. If one perceives themselves as on God's team then all those opposing them must be on Satan's team. There really is no room for compromise when the case is perceived that way. To make matters worse, the members of "God's team" are sometimes tempted to act as if the end justifies the means, opening the door for questionable actions. Add a healthy dose of publicity, the call for donations and the lure of attorney's fees and the result can sometimes be a recipe for protracted litigation and a case that is anything but holy.

LESSON No. 6: Some Things Are Worth Fighting For

Even though religious liberty litigation can get messy and can sometimes appear to be an unholy endeavor, there are some things that are definitely worth fighting for. The law in this area is sometimes rife with confusion and contradiction; it needs to be clarified. Strong, effective advocacy on both sides can serve to bring about clarity in the law which, hopefully, in the long run will help prevent additional litigation. When people, in good faith, believe their religious liberty has been violated they have every right to assert their claim. By the same token,

when a public official acts in good faith in this difficult area of the law, that official ought to be afforded the protection of the law as well.

Lesson No. 7: Neutrality in Theory Can Be Perceived as Hostility in Fact

It is easy for nine Justices in robes to instruct local government to remain neutral on issues of religion; it is very difficult, though, to take that theoretical and general admonition and put it into practice in the myriad of circumstances which present themselves to local governments in real life. The essentially impossible theoretical goal of neutrality can oftentimes be perceived as hostility in fact. Efforts of local governmental entities to avoid running afoul of the Establishment Clause can easily be characterized as "viewpoint discrimination" (a term whose elements are not entirely clear), or simply hostility to religion. The solution, of course, is to clarify the law, which brings us back to the nine Justices in robes.

Lesson No. 8: Prepare To Be Hated

Many people have very strong feelings about religion, both pro and con. If you are involved in religious liberty litigation, prepare to be hated. You can be a believer. You can operate in good faith with the best of intentions. You can follow all the rules, all the policies and the advice of lawyers and you can still be sued – and hated. Public officials who go home to celebrate Christmas with their families unfortunately find out that in the court of public opinion and sometimes in the courts of law they are unjustly branded as soldiers fighting a war against Christmas. That may generate donations for some but it is certainly not fair to all.

Lesson No. 9: The Promise of Qualified Immunity may be Elusive

The promise of qualified immunity is very much like the promise of technology. When you unwrap your latest, newest electronic gadget you have this vague sense that suddenly your life is going to be like one of those commercials that convinced you to buy the gadget. You will

be the master of a brave new digital world! Everything is at your fingertips! The world is your oyster! At some point you slowly awaken from this marketing-induced dream to realize that, hey, it's really just a gadget.

Qualified immunity is a lot like that. It promises you protection, it promises you a quick exit from your legal troubles. Years into your lawsuit and no dismissal in sight, you begin to think that your lawyer who explained the many benefits of qualified immunity to you oh so many years ago must have gotten his law degree from a cereal box. You think to yourself "If this is protection and a quick exit, then I hate to think what my lawyer thinks is exposure and protracted litigation.

The truth about qualified immunity calls to mind what Churchill said about democracy – "it is the worst form of government except all the others." Qualified immunity is definitely worth keeping but it can always use improving. One of the most difficult aspects to explain to clients results when qualified immunity is asserted in a motion to dismiss. In that situation, the factual allegations are taken as true even if they are not true. The court opinions which take the facts as true sometimes appear to be reporting the facts as proven as opposed to simply alleged. This effort at an early exit from litigation can sometimes lead to the unfortunate public perception that the alleged (and disputed) facts are the true and adjudicated facts. The other choice, though, is also not easy, namely, to endure discovery and depositions in a very expensive effort to set the record straight. As powerful as the defense of qualified immunity is, it sometimes can come at a high price.

Lesson No. 10: Life is Not Fair

The final lesson is one we should all know by now: Life is not fair.

Kevin Weldon, the former superintendent of Kountze ISD, the center of the Kountze

cheerleader controversy and a good, law-abiding, Christian man has been sued individually even though he followed the advice of, not one, but two separate lawyers. He did what he was told the law required. He did not want to do it but he did it anyway believing, on the advice of two separate lawyers, that it was his legal duty. For that he was sued individually. Life is not fair.

Lynn Swanson and Jackie Bomchill, two good Christian women who obeyed the school policy, the instructions of supervisors and advice of lawyers in the famous "Candy Cane" case have had to endure enormous torment. Portraying these women as protagonists in a "war against Christmas" is not simply wrong, it is dead wrong. Radio talk show hosts who whip up their listeners into a lather with such lies and who give out these women's phone numbers so that cranks can leave hateful messages on their answering machines will one day answer to their maker. In Him we trust.