

WilmerHale's Matthew Martens on Religious Liberty, More Hours and 'Drowning in Email' During COVID-19

The former SEC litigator discusses Judge Justin Walker's ruling for a Kentucky church's Easter services and what happens when your dog interrupts your Zoom client call.

BY JACQUELINE THOMSEN

Wilmer Cutler Pickering Hale and Dorr partner Matthew Martens is no stranger to quick turnarounds for religious liberty cases: He once got a call at 9 p.m. asking for his help filing a brief by 10 a.m. the next day on behalf of a Jewish Chabad organization ahead of Yom Kippur and managed to meet the deadline.

That experience in religious liberty litigation came to Martens' advantage in recent weeks as he, joined by WilmerHale senior associate Kevin Gallagher and associates Hyun-Soo Lim and Andrew Miller, worked with the First Liberty Institute and others to challenge restrictions to church services during the COVID-19 pandemic.

In Kentucky, U.S. District Judge Justin Walker—recently **nominated** for the U.S. Court of Appeals for the D.C. Circuit—this week approved a **settled order** between the On Fire Christian Center and Louisville officials that allows the church to hold drive-in church services, in line with CDC guidelines. Walker granted a temporary restraining order to the church in favor of holding drive-in services on Easter Sunday, but his fiery opinion in the case drew some criticism.

The WilmerHale team also helped file a **complaint** against Greenville, Mississippi, Mayor Erick Simmons over an apparent ban on drive-in services there. First Liberty Institute later said in a **statement** that officials clarified those services are allowed.

Martens spoke from his home in Vienna, Virginia, where he's staying with his family, about his experience. This has been edited for length and clarity.

Q: You've now worked on a couple of cases with the First Liberty Institute, challenging local restrictions on religious services. How did you get involved in these cases and why do you think it's important to protect these kinds of liberties during a time of crisis?

A: I've been working with First Liberty for probably five or six years now, I got introduced to them when I joined the firm. I always appreciate that they have vetted the cases they've come to me with, so they don't come with problematic plaintiffs or fringe theories. We're really trying to hit it down the center of the fairway on religious liberty, both in terms of who we represent and arguments we make.



Matthew Martens of WilmerHale.

I've worked with First Liberty in representing several Jewish Chabads in Southern California in litigation over a Yom Kippur ceremony called Kapparot, which involves a ritual slaughter of a chicken. On this matter in Louisville, the general counsel **Hiram Sasser** called me out of the blue and asked me if I would help on this the Wednesday before Easter.

Q: So things came together pretty quickly on that case then?

A: When I got involved in the chicken cases, Hiram called me on a Monday night—I was watching

“Monday Night Football,” so I remember it—and he said, ‘We need to file a brief by 10 a.m. tomorrow, for a TRO before sundown on Yom Kippur which is on Wednesday. Can you do it?’ I was like, ‘OK, it’s like 9 o’clock at night. I’ve got to run conflicts check, I’ve got to get pro bono committee clearance, I’ve got to find some associates who want to stay up all night for this.’ We pulled it together, filed a brief at 10 a.m.

This Kentucky case was not any different. We wrote a letter to the mayor and sent it out Thursday morning. We didn’t hear anything. We started writing the brief on Thursday night, worked all night—mainly the team worked all night, I was up till 1 a.m. reviewing drafts and getting edits, I was back up first thing in the morning to review the next turn to the brief they had done.

Q: In that case in Kentucky, Judge Justin Walker granted the order in your favor but also drew some criticism over the opinion. The mayor later said he wasn’t planning on enforcing the order. What was your reaction, both to Walker’s opinion and the mayor later saying they weren’t necessarily planning on enforcing the order?

A: There was no reason to read the mayor’s comments previously to say that. He said drive-in church was not allowed. He said you’d be violating the governor’s order, which carries misdemeanor criminal penalties. I can’t read a subjective intent; all I can tell you is what my client heard and what I heard from what he said was it wasn’t going to be allowed and there was a risk of enforcement. If he wanted to clarify, we would have been happy to hear that. We didn’t get a response to the letter.



(Photo: Diego M. Radzinski/ALM)

We were left with a record that posed a real threat to whether my client would be violating criminal law if they held service on Sunday. We really didn’t have any other option at that point but to file for a TRO.

In terms of the judge’s opinion, we’re happy to win. Far be it for me to comment on judges’ opinions. At the end of the day we won and he ruled in our favor, and we were happy for that. And we felt he got it right.

Q: It’s unclear exactly how long this pandemic is going to last, or at least how long the social distancing measures will be in place. Do you anticipate more of these religious liberty cases coming forward, if we continue to see these kinds of restrictions in place in the coming months? How do you think Americans should strike the balance between exercising their religious freedoms and public health and safety concerns?

A: The judge said in his opinion that the Constitution is not a suicide pact. I certainly believe that, my clients agreed with that, my clients were very concerned about making sure people stayed safe. But to say you can’t meet poses a real problem. I think our client is

concerned that it’s not good for the folks spiritually, it’s not good for the church financially. There comes a point you have to say, “We’ve got to look for a solution everyone can live with.”

Our client was genuinely looking for a solution that would keep people safe, but would allow the church to function with some semblance of what a church looks like. We were looking for some middle ground. I don’t want to still be litigating this six months from now on if we’re still in this extreme social distancing scenario. I hope that people can look at this as a model for how the government and the churches can work together on this.

Q: Speaking of government and churches working together, the Department of Justice has indicated it’s also going to go forward and defend religious liberty rights. You were in the Justice Department, what role do you see the department playing in these kinds of cases? How can they also toe the line between the public health regulations from their own administration and also these individual rights that they’re trying to protect?

A: This time we’re facing now is not a time with easy answers.

Maybe in the short term there was an easy answer of everybody just hunker down, but if this is a long-term problem, there's going to be complex solutions that have to be worked out—solutions that balance physical safety and health, and religious and civil liberties generally, and business and people's livelihoods. These are all complex issues that require a balancing of a lot of different factors.

I think what the Justice Department was saying is, as people sworn to uphold the law and U.S. Constitution, they want to make sure other governmental entities are thinking about the religious liberty aspect and looking for ways to balance it with all the competing interests. I think you see Attorney General William Barr made **statements** more generally about civil liberties of other types, and some of these lockdowns. I think that this is just one aspect of it, making sure that religion isn't being pushed aside as something nonessential, because that's not how the people practicing view it.

Q: What has work from home life been like for you during the pandemic? Have you picked up any new hobbies or activities to pass the time with your family?

A: What's weird is I've been billing more time in the last month than before. Maybe because there's not clear beginnings and endings to the day, and I think everybody's experiencing that—you kind of just keep working on to the night. That's not even counting all the other pro bono work I've been doing in addition to this religious liberty litigation. I've also been counseling a number of nonprofits

and small businesses on how to think about the assistance available to them, including thinking about religious liberty issues there. We were involved in working with the administration on some of the guidelines they ultimately put out on that.

I don't love not seeing people. I don't know if everyone else has experienced this, but I feel like email has exploded exponentially. Maybe because people can't just walk down the hall and stick their head in. I feel like I'm drowning in email. As somebody who likes the social interaction at work, I feel very disconnected. As much as you try to stay connected, it's hard.

Q: Going back to what you mentioned about working with the administration on guidelines, was that on what kind of nonprofits can receive certain loans or funding?

A: There's religious liberty issues bound up in what are the strings attached with the taking of funds. Various religious groups have concerns about how their beliefs might mesh with those. And so ultimately the administration put out some guidance on that, but I was involved in a lot of counseling of organizations, religious organizations in the run-up to that, before there was guidance on the eve of the loan program opening. It was an endless stream of requests and friends of friends looking for guidance and help on this.

Q: Has the firm done anything in particular to try to keep people connected, trying to set up virtual happy hours or anything like that?

A: The firm and different groups have been doing a lot. But all of it's hard when you're trying to do

it from home and you've got kids and family. How many times have I been in my office on a Zoom or Webex call, sometimes with the government or the client, and the door in my office opens and then my dog jumps up on the couch behind me. You're trying to have professional interactions with everybody having strange noises in the background of their calls. I was on a call the other day where there was this deep snoring, and finally somebody fessed up that it was their bulldog. I think we're all dealing right now with strange background noises and learning to be flexible and understanding in the process because we're all going through it.

Q: Once social distancing restrictions are lifted, do you have one place in mind where you'd really like to go first?

A: We were hoping to go to Switzerland for vacation this summer before my daughter, my second child, went to college. I think that is out of the question. We're supposed to go to Hawaii to see the Maui Invitational basketball tournament over Thanksgiving. I'm not holding out any hope that I'm going to get anywhere before that, but given that my alma mater UNC is in the tournament this year—fingers crossed, I'm holding my breath that I can make it for the Maui Invitational in November. I'll be happy even if I make nothing between here and there.

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