

## Mayer Brown Looks For Same-Sex Marriage Win At 7th Circ.

By **Andrew Strickler**



*Law360, New York (August 29, 2014, 5:48 PM ET)* -- Given Mayer Brown LLP's long history of pro bono support for same-sex marriage advocates, a call to help challenge Wisconsin's constitutional ban on gay marriage was naturally met with enthusiasm.

The firm decided to join the American Civil Liberties Union this year in representing four same-sex couples who were arguing that such bans discriminate against people based on their sexual orientation and adversely affect the families of same-sex couples.

The case struck an emotional chord for lawyers and had the immediate backing of the partnership, said Mayer Brown litigation partner Hans Germann.

"The case has important constitutional issues, and certainly for those of us working on the case, there was an understanding that [the gay marriage ban] affected the rights of a great many people," he said.

After a district court win in June, the team was buoyed by an appeals hearing Aug. 26 at the Seventh Circuit, which was receptive to arguments made by the firm, the American Civil Liberties Union, the Lambda Legal Defense and Education Fund Inc. and Kirkland & Ellis LLP. Kirkland represented challengers to the same-sex marriage ban in Indiana, a case consolidated at the Seventh Circuit with the Wisconsin appeal.

"It went better than I think we could have expected," Mayer Brown litigation associate Frank "Chip" Dickerson said Friday.

At oral arguments, the attorneys for the states argued that regulating marriage encourages couples to stay together and care for children, a concern not shared by same-sex couples.

The argument appeared to fall flat with Judge Richard Posner, who pointed to the "psychological health and well-being" of tens of thousands of children adopted by same-sex couples, as well as tax and other benefits conferred by marriage.

"Wouldn't it be better for these adopted children if their same-sex parents were married?" Posner asked Indiana's solicitor general.

In questioning attorneys for Wisconsin and Indiana, Posner noted that both states allow first cousins to marry after the age of 65. In Wisconsin, first cousins can marry earlier if they get verification of sterility

from a doctor.

“With all these incestuous cousins running around Wisconsin, I don’t get it. You’re not worried about that,” but you’re worried about same-sex marriage, Posner said.

Dickerson said Posner’s opening question about the potential harm of gay marriage bans on the children of same-sex couples “was pretty excellent from our perspective.”

Circuit Judge David F. Hamilton also called the procreation argument an “artificial rationale,” particularly in light of the number of children in the state born to unmarried parents.

The judge appeared focused on the issue of a ban on same-sex marriage as a form of sex discrimination, an issue raised in plaintiffs’ briefs in Wisconsin and elsewhere, Dickerson said.

Mayer Brown previously provided pro bono counsel to the ACLU in a similar same-sex case in Illinois, but that effort ended in 2013 when the state adopted same-sex marriage via legislation.

Last year, the firm also filed an amicus brief on behalf of 172 members of the U.S. House of Representatives and 40 U.S. senators in *U.S. v. Edith Schlain Windsor* and the challenge to the Defense of Marriage Act.

The firm notched a win in the case in June, when U.S. District Judge Barbara B. Crabb for the Western District of Wisconsin struck down the ban and blocked the state law by injunction as a violation of due process and discriminatory on the basis of sexual orientation.

Judge Crabb put arguments on both sides into a cultural, historical and legal context.

“Under these circumstances, personal beliefs, anxiety about change and discomfort about an unfamiliar way of life must give way to a respect for the constitutional rights of individuals, just as those concerns had to give way for the right of Amish people to educate their children according to their own values ... for Jehovah’s Witnesses to exercise their religion freely, and for interracial couples to marry the person they believed was irreplaceable,” the judge wrote.

In striking down same-sex marriage bans, “courts do not ‘endorse’ marriage between same-sex couples, but merely affirm that those couples have rights to liberty and equality under the Constitution, just as heterosexual couples do,” Judge Crabb wrote.

Mayer Brown joined the case in January at the request of John Knight of the American Civil Liberties Union of Illinois.

The Wisconsin plaintiffs are represented by Knight, James Esseks and Laurence Dupuis of the ACLU, with Esseks handling oral arguments in the Seventh Circuit.

In addition to Germann and Dickerson, former Mayer Brown associate Gretchen Helfrich is also representing the Wisconsin clients, with advisory support of Chicago appellate partner Timothy Bishop.

Other plaintiffs in the Seventh Circuit cases are represented by Paul Castillo and Camilla Taylor of Lambda Legal Defense and Education Fund Inc. and a Kirkland & Ellis LLP pro bono team that includes Jordan Heinz, Brent Ray, Dmitriy Tishyevich and Scott Lerner.

*Pro Bono Spotlight is a recurring Law360 series profiling law firm pro bono efforts.*

--Editing by Brian Baresch.

---

All Content © 2003-2014, Portfolio Media, Inc.