

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

APPELLATE CASE NO. 3D08-3044

TRIAL COURT CASE NO. 06-033881 FC 04

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES,

APPELLANT,

v.

IN RE: MATTER OF ADOPTION
OF X.X.G. AND N.R.G.,

APPELLEE.

AMICUS BRIEF OF PERRY W. HODGES, JR., ESQUIRE,
DISSENTING MEMBER OF THE FAMILY LAW SECTION OF THE
FLORIDA BAR

H. COLLINS FORMAN, JR., P.A.
Florida Bar No. 612219
1323 Southeast Third Avenue
Fort Lauderdale, FL 33316
(954) 764-0005 Telephone
(954) 765-1478 Facsimile
Attorneys for Perry W. Hodges, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF PERRY HODGES, ESQUIRE 1

SUMMARY OF ARGUMENT 3

LEGAL ARGUMENT 4

 I. THE FAMILY LAW SECTION’S BRIEF VIOLATES THE
 AMICUS’ RIGHTS UNDER THE FIRST AND
 FOURTEENTH AMENDMENTS OF THE UNITED STATES
 CONSTITUTION THROUGH ITS EXPENDITURES AND
 ACTIVITIES. 4

 II. THE FAMILY LAW SECTION’S BRIEF VIOLATES THE
 PROVISIONS OF *ABOOD, KELLER, AND GIBSON*, AS
 WELL AS ITS OWN RULES WHICH GOVERN THE
 EXPENDITURES AND ACTIVITIES OF INTEGRATED
 BAR ASSOCIATIONS, SUCH AS THE FLORIDA BAR. . .10

CONCLUSION. 13

CERTIFICATE OF SERVICE 15

CERTIFICATE OF COMPLIANCE 16

TABLE OF AUTHORITIES

<i>Abood, et al. v. Detroit Board of Education, et al.</i> , 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed. 2d 267 (1970)	3, 4, 8, 9, 13
<i>Robert E. Gibson v The Florida Bar</i> , 798 F. 2d 1564 (11 th Cir. 1986)	3, 9, 13
<i>Eddie Keller v. State Bar of California, et al.</i> , 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1, (1990)	3, 5, 7, 8, 9, 13
<i>Petition of Florida State Bar Association</i> , 40 So.2d 902 (Fla. 1949) (en banc)	3
<i>The Florida Bar re : Schwarz</i> , 552 So.2d 1094 (Fla. 198).	3, 5, 9
<i>The Florida Bar re: Frankel</i> , 581 So.2d 1294 (Fla. 1991).	3, 5, 8, 9, 12, 13

INTEREST OF PERRY W. HODGES, JR., ESQUIRE

Perry W. Hodges, Jr., is a member in good standing of the Florida Bar and a member in good standing of the Family Law Section of the Florida Bar.

Based upon information and belief which Perry W. Hodges, Jr. has obtained from the Florida Bar website, the Family Law Section website, as well as information published in the Florida Bar News, and contained within newspapers of general circulation, he has a good-faith belief that the Family Law Section of the Florida Bar is poised to file its amicus brief in the instant case seeking to uphold the decision of the Honorable Cindy Ledermen declaring Florida Statute section 63.042(3) unconstitutional. Florida Statute section 63.042(3) is a statutory prohibition upon adoption by homosexuals.¹

Prior to the filing of this Brief, Perry W. Hodges, Jr., through his undersigned counsel, wrote to the parties in this case seeking their permission to file an amicus brief herein. Subsequent to the mailing of those letters, Perry W. Hodges, Jr. filed a Motion for Leave to File Amicus Brief in the instant case.

¹ For the purposes of this Brief and for brevity's sake, Amicus will presume that the amicus brief of the Family Law Section of the Florida Bar has been or will soon be filed.

Because of his membership in the Family Law Section, Perry W. Hodges, Jr. is being compelled against his conscience to be positively identified with and in support of Judge Lederman's decision, which is a violation of his First and Fourteenth Amendment Rights under the U.S. Constitution. Similarly, he will be positively identified with political views and/or ideological causes with which he does not agree. Such political views and/or ideological causes are not incidental to the stated purposes of the Florida Bar, to-wit: "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." See Rules Regulating the Florida Bar, Rule 1-2, Purpose ("Bar Rules").

The filing of the amicus brief by the Family Law Section of the Florida Bar, and the use of Amicus' voluntary Section dues, together with a portion of Amicus' required integrated bar dues, is violative of his First and Fourteenth Amendment rights under the United States Constitution and the controlling case law interpreting it.

Because this issue of homosexual adoption is such a divisive one, Perry W. Hodges, Jr. has respectfully dissented from the actions of the Family Law Section. He seeks permission to appear as Amicus in this case so that it is clear that the brief being filed on behalf of the Family Law

Section does not speak for all members of the Florida Bar. He requests therefore that the Section's brief be disregarded by this Court due to its divisive nature.

SUMMARY OF ARGUMENT

The purpose of the Florida Bar is to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence. *Id.* The Florida Bar is an integrated bar pursuant to *Petition of Florida State Bar Association*, 40 So.2d 902 (Fla. 1949) (en banc). Pursuant to *Eddie Keller v. State Bar of California, et al.*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1, (1990), a State Bar may constitutionally fund only such activities consistent with its purpose and may not fund activities of an ideological nature which fall outside these areas of activity. See also, *Robert E. Gibson v The Florida Bar*, 798 F. 2d 1564 (11th Cir. 1986) and *Abood, et al. v. Detroit Board of Education, et al.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed. 2d 267 (1970). The Florida Supreme Court has also spoken decisively against Bar involvement in ideological issues. *The Florida Bar re: Schwarz*, 552 So.2d 1094 (Fla. 1989); *The Florida Bar re: Frankel*, 581 So.2d 1294 (Fla. 1991). Therefore, this Court should disregard the brief of the Family Law Section in that such brief is not consistent with the Bar's stated purposes, and because it is in

support of an issue of an ideological nature which has the potential of causing deep philosophical or emotional divisions among Bar members. Further, said brief does not accurately represent the beliefs and sentiments of all of the members of the Family Law Section of the Florida Bar.

LEGAL ARGUMENT

I. THE FAMILY LAW SECTION'S BRIEF VIOLATES THE AMICUS' RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION THROUGH ITS EXPENDITURES AND ACTIVITIES.

Thomas Jefferson is quoted as saying, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood, et al. v. Detroit Board of Education, et al.*, 431 U.S. 209, at 234, 235 n. 31 (quoting I. Brandt, "James Madison: The Nationalist" 354 (1948)).

Every practicing attorney in Florida is compelled, as one of the conditions precedent to her practicing law in this state, to join the Florida Bar ("The Bar") and to pay the dues promulgated by it. Failure to pay such dues exposes an attorney to sanctions, including suspending her ability to practice law.

Settled law concerning integrated bar associations and labor unions requires that they may not expend a dissenting individual's dues for ideological activities not germane to the purpose for which compelled

association was justified. See *Keller*, 496 U.S. 1, at 14; *Schwarz*, 552 So.2d at 1095; *Frankel*, 581 So.2d at 1298. Further, the Florida Bar's stated policy on this question has been to avoid taking positions that have the potential of causing deep philosophical or emotional divisions among its members. See President's Page, by Alan Bookman, (80-FEB Fla. B.J. 6).

Bar Rule 1-4.5 Sections, states:

The Board of Governors may create and abolish Sections that they consider necessary or desirable to accomplish the purposes and serve the interest of the Florida Bar and of the Sections and shall prescribe the powers and duties of such Sections. The By-Laws of any Section shall be subject to approval of the Board of Governors.

Based upon the plain wording of the above-quoted Bar Rule 1-4.5, the Family Law Section of the Florida Bar (the "Section" or the "Family Law Section") was created by the Bar to accomplish the greater purposes of the Bar itself. The Florida Bar also maintains plenary control over the Section, its activities and its governance.

The Family Law Section was created pursuant to the Bar's by-laws.

Pursuant to its own Section by-laws, it exists for the following purposes:

- a) To provide an organization within the Florida Bar open to all individuals having an interest in the field of family law;
- b) To provide a forum for discussion and exchange of ideas leading to the improvement of the practice and substance of family law throughout Florida;

- c) To assist the courts in establishing methods for the more consistent, fair, and expeditious administration of justice in family law proceedings;
To advise and recommend to the Florida Legislature substantive changes in the law:
- d) To encourage and promote a consideration of the interests and the needs of children affected by family court proceedings by all lawyers during their counseling of and advocacy on behalf of clients; as well as by judges and magistrates when called upon to resolve contested actions or approve settlements in uncontested actions within the framework of the family court system.
- e) To advise the Supreme Court of Florida concerning modification relating to The Family Law Rules of Procedure;
- f) To foster a high standard of ethical conduct on the part of all lawyers, judges and magistrates who participate in the family court system;
- g) To prepare and organize educational programs relating to the family law; and
- h) To instill in attorneys who practice family law a desire to increase their effectiveness both inside and outside the courtroom with a goal of better representation for their clients and the professional administration of the cause of justice.

By-Laws of the Family Law Section, Section 2, Purposes.

Based upon the plain wording of Section 2 of the Family Section's own by-laws, the Section is not permitted to advocate political or ideological ideas outside of its stated areas of activity, including the filing of an amicus brief in support of a circuit court judge's ruling that the statutory prohibition against homosexual adoption is unconstitutional.

Bar Rule 2-7.2 Duties, states:

It is the duty of each Section and Division as an integral part of the Florida Bar to work in cooperation with the Board of Governors and under its supervision toward the accomplishment of the aims and purposes of the Florida Bar of that Section or Division. (emphasis supplied).

Based upon the plain wording of Rule 2-7.2, the Family Law Section is a part of the Florida Bar. Therefore, the Bar is also prohibited from advocating political or ideological ideas not consistent with its stated purposes.

The United States Supreme Court has said that “compulsory dues may [not] be expended to endorse or advance a gun control or nuclear weapons freeze initiative.” *Keller*, 496 U.S. at 16. Other divisive issues which might be prohibited for compulsory dues expenditures are prayer in school, abortion rights, stem cell research, and the words, “under God” in the pledge of allegiance. Given the current state of politics in Florida, the Section’s support of the ruling that Florida Statute section 63.042(3) is unconstitutional is divisive.

Forcing Amicus to be associated with the Bar which is advancing beliefs and ideas with which he does not agree is repugnant to the First and Fourteenth Amendments of the U.S. Constitution. If the price of his Florida Bar membership is the relinquishment of his constitutional rights of free speech and free association, Amicus, and all other members of the Florida

Bar, are truly impoverished. The right of free association contains the right to refrain from associating, as in this case.

The U.S. Supreme Court has held that a labor union may not require any of its members to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher. *Abood*, 431 U.S. 209, at 235. In adopting the reasoning in *Abood*, the *Keller* court held:

The State Bar may therefore constitutionally fund activities germane to those goals [regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such a manner fund activities of an ideological nature which fall outside of those areas of activity.

Keller, 496 U.S. 1, at 14.

Considering the same type of factual scenario, the Eleventh Circuit has held “you may safely transpose the *Abood* holding to the facts presented in this appeal as follows:

The Florida Bar may use compulsory Bar dues to finance its legislative program, only to the extent that it assumes a political or ideological position on matters that are germane to the Bar’s stated purposes.

Gibson, 798 F. 2d 1564, at 1569.

In *Frankel*, the Florida Supreme Court found that the Board of Governors’ adoption of the Commission for Children’s lobbying positions

on expansion of the women, infants, and children program; extension of Medicaid coverage for pregnant women; full immunization for children; establishing children's services councils; family life and sex education/teen pregnancy; increasing aid to families with dependent children; enhanced child-care funding and standards; and creation of a children's needs consensus estimating conference was impermissible under *Schwarz and Keller. Frankel*, 581 So.2d at 1298.

Pursuant to *Abood*, supra, *Keller*, supra, *Frankel*, supra, and *Gibson*, supra, the Florida Bar has adopted a position consistent with the pronouncements of the United States Supreme Court. In February of 2006, then Florida Bar President, Alan D. Bookman, wrote:

Sections may not take a legislative position that has the potential of causing deep philosophical or emotional divisions among Bar members. A prime example of this -- which illustrates some of the misconceptions about Bar legislative activities -- came last year when the Family Law Section asked to support a bill to repeal the State's ban against homosexual couples adopting children. Many Bar members saw this as the Bar endorsing or opposing homosexual adoption -- which actually was never the question. The Board of Governors acted only to review the request of one of its Sections which wanted to take a controversial position. While the pros and cons of that position were debated, the Board concluded (reluctantly on the part of many Bar members) that the Section's request had to be rejected, not based on the merits, but because it caused a deep philosophical and emotional divide among Bar members.

Just as it was in February, 2006, the issue of the constitutionality of Florida Statute section 63.042(3), which prohibits homosexual adoptions in the State of Florida, remains one of those issues which has a potential of causing deep philosophical and emotional divisions among the Bar members. Therefore, the Brief being submitted by the Family Law Section should be disregarded.

II. THE FAMILY LAW SECTION'S BRIEF VIOLATES THE PROVISIONS OF *ABOOD, KELLER, GIBSON, AND FRANKEL*, AS WELL AS ITS OWN RULES WHICH GOVERN THE EXPENDITURES AND ACTIVITIES OF INTEGRATED BAR ASSOCIATIONS, SUCH AS THE FLORIDA BAR.

The argument that the Family Law Section is independent, both in governance and in funding, from the integrated bar, is not supportable on the facts. As stated above, the Family Law Section is a section of the Florida Bar. Florida Rule 2-7.2, states that "Each section, including the Family Law Section, is an integral part of the Florida Bar" (emphasis supplied).

In support of this, Amicus points out that the Family Law Section is a sanctioned section of the Florida Bar. It is supported indirectly by general Bar dues in such things as being listed on the Florida Bar's website and by having its funding facilitated by the collection of Section dues at the same time that annual Bar dues statements are sent out. The Family Law Section's budget is prepared by an individual at the Florida Bar. Its mail is

processed by staff at the Florida Bar, and its administrator, (Summer Hall), is an employee of the Florida Bar whose office is at the Florida Bar's office in Tallahassee. Its membership mailing, such as committee preference forms, are prepared on Florida Bar computers and mailed out the the Florida Bar.

The Family Law Section receives benefits by being under the auspices of and by being an official part of the Florida Bar. Its by-laws are approved by the Florida Bar, and its existence is purely dependent upon the whim of the Bar's Board of Governors. The Family Law Section webpage is linked to and listed on the Florida Bar website. The Family Law Section uses the Florida Bar's addresses and facilities. It requires its members to be lawyers who are members in good standing of the Florida Bar. The Family Law Section is not an independently organized entity, but a Section of the Bar within the larger organization. The Florida Bar runs a council of delegates at its own expense, and its executive counsel members, which includes members of the Family Law Section, are listed on the Florida Bar website as apparent Florida Bar officials.

Furthermore, the name, "Family Law Section of the Florida Bar," dispels the idea that it is completely independent.

All publications of the Family Law Section bear the official logo and seal of the Florida Bar. Its meetings are held during the Florida Bar meetings, and it is given space without cost at locations in which the Florida Bar meetings are held for its own Section meetings. It is permitted to use the Florida Bar's logo on its own website.

The Family Law Section is supporting Judge Cindy Ledermen's ruling that Florida Statute section 63.042(3) is unconstitutional. As detailed above, it expends integrated bar dues to do so, and it creates the impression that the Florida Bar also supports her decision. Such is repugnant to Amicus and is prohibited by *Abood*, supra, *Keller*, supra, *Gibson*, supra, and *Frankel*, supra.

Finally, the Family Law Section's amicus brief will have to be shared with the Florida Bar Board of Governors for further review before being submitted to this Court. Such consideration of these matters by the Bar shows that the Family Law Section is not acting independently of the Bar. Because the issue of homosexual adoption, like gun control, school prayer, nuclear proliferation, and the like, is one that has the potential of creating deep philosophical or emotional division among members, the brief of the Family Law Section of the Florida Bar should be disregarded.

CONCLUSION

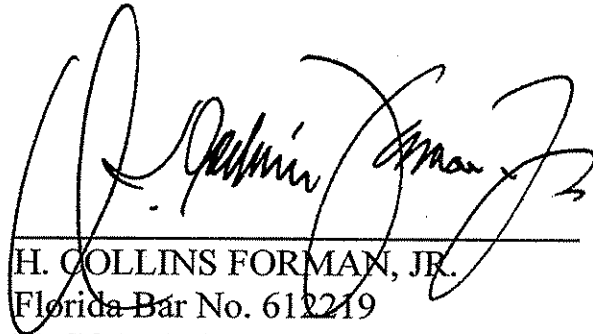
The Florida Bar's stated purpose is to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence. The Family Law Section's brief in the instant case will promote none of these stated purposes.

Amicus does not agree with the position being taken by the Family Law Section, yet as a member, he is being positively identified with and as being in support of the Section's brief. In addition, the portion of Amicus's compulsory integrated bar dues have been and are being used to put forth an ideological and philosophical argument with which he disagrees.

The Florida Bar's position, taken through its Family Law Section, violates Amicus's rights of free speech and free association guaranteed under the First and Fourteenth Amendments of the U.S. Constitution.

Similarly, the use of Amicus's compulsory bar dues, however incidental, violates the protections of *Abood*, supra, *Keller*, supra, *Gibson*, supra, and *Frankel*, supra. Accordingly, this Court should disregard the Family Law Section's brief in support of the Honorable Cindy Lederman's judgment that Florida Statute section 63.042(3) is unconstitutional.

Dated: March 5, 2009

A handwritten signature in black ink, appearing to read "H. Collins Forman, Jr.", written over a horizontal line.

H. COLLINS FORMAN, JR.

Florida Bar No. 612219

H. COLLINS FORMAN P.A.

1323 S.E. Third Avenue

Fort Lauderdale, FL 33316

Tel : (954) 764-0005

Fax : (954) 764-1478

Attorneys for Perry W. Hodges, Jr.

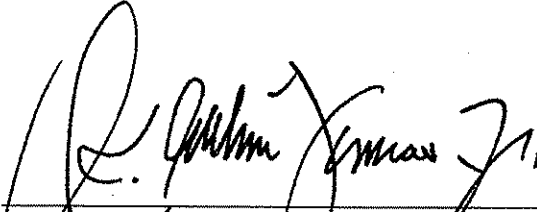
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished via U.S. mail this the 5th day of March, 2009, to the following:

Hilarie Bass, Esquire
Greenberg, Traurig, P.A.
1221 Brickell Avenue
Miami, FL 33131

Timothy Osterhaus, Esquire
Office of the Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399-1050

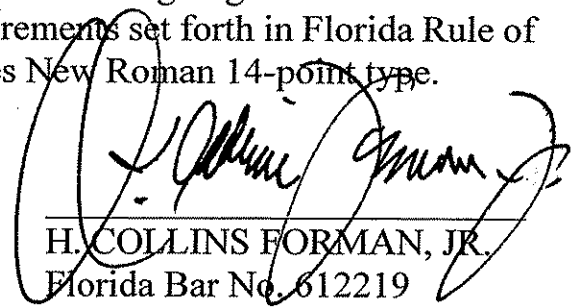
Robert F. Rosenwald, Esquire
ACLU
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137



H. COLLINS FORMAN, JR.
Florida Bar No. 612219

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Amicus Brief complies with the font and type size requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point type.



H. COLLINS FORMAN, JR.
Florida Bar No. 612219

APPENDIX

INDEX TO APPENDIX

President's Page, by Alan Bookman, (80-FEB Fla. B.J. 6)

Westlaw.

80-FEB FLBJ 6
80-FEB Fla. B.J. 6
(Cite as: 80-FEB Fla. B.J. 6)

Page 1

Florida Bar Journal
February, 2006

Column
President's Page
***6 OUR LEGISLATIVE ROLE**
Alan B. Bookman

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Our 2005 survey of Bar membership showed that 74 percent of our members rate our legislative efforts as desirable or highly desirable. That ranked about in the middle of Bar programs and five percent better than the 2003 survey.

As the legislature gets set to begin its 2006 regular session in March, it is critical to remember the important role the Bar's legislative activities play for both the profession and the legal system.

One of our primary tasks will be working with the legislature as it looks at ways to amend the state constitution. The Bar has offered technical assistance for that work, and taken the position that future amendments should solely affect an existing provision of the constitution, deal with the basic rights of citizens, or the structure of government in articles II, III, IV, and V.

The legislature is also engaged in a constitutional streamlining effort, which could see some constitutional provisions, with voter approval, converted into statutes.

We constantly monitor all filed bills for those that could affect the legal system and our profession.

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broader, but not unlimited, legislative authority.

Unlike the Bar, which uses members' mandatory annual fees to support its legislative activities, sections are voluntary organizations and use their own money. Sections may not take a position that opposes a Bar position, but they may take a position on a substantive matter in opposition to another section (as has happened a few times).

Sections also may not take a legislative position that has the potential of causing deep philosophical or emotional divisions among Bar members.

A prime example of this -- which also illustrates some of the misconceptions about Bar legislative activities -- came last year when the Family Law Section asked to support a bill to repeal the state's ban against homosexual couples adopting children.

Many Bar members saw this as the Bar endorsing or opposing homosexual adoption -- which actually was never the question. The Board of Governors acted only to review the request of one of its sections which wanted to take a controversial position. And while the pros and cons of that position were debated, the board concluded (reluctantly on the part of many board members) that the section's request had to be rejected, not based on the merits, but because it caused a deep philosophical and emotional divide among Bar members.

The Florida Bar and your Board of Governors take their legislative duties very seriously. The board's very active Legislation Committee reviews all Bar and section legislative position requests and monitors bills that are filed and legislative meetings.

A complete list of all Bar, section, and committee legislative positions are listed on the Bar's Web site, floridabar.org. On the left side menu, click "Legislative Activity" for more information, including ongoing reports on filed bills of interest to the legal profession. Remember, we are all in this together.

We'll be listing those bills on the Bar's Web site for your review and action.

As always, a major challenge will be defending the independence of the judiciary, a process that often is educational rather than adversarial. With term limits, each legislative biennium brings many new faces and fresh ideas. But it also requires that the Bar educate these well-meaning individuals -- many of whom have had little contact with the legal system -- about the third branch of government, the legal profession, and the independence of the judiciary.

It is common for new lawmakers who were initially hostile to courts or the Bar to become strong supporters after Bar representatives meet with them, answer their questions, and offer to be a resource in their legislative endeavors. And it isn't just the Bar's formal legislative program in Tallahassee that does this. Our Key Contact program that has hometown lawyers contact their lawmakers has been a vital part in this education and communication effort. The key contact program involves you. If you have a good working relationship with any member of the legislature, please let us know so we can further contact you to engage in discussion with your legislator on matters of importance to the legal profession. Your participation in the legislative process is extremely important.

The Bar offered its assistance to the executive and legislative branches of government on the DNA issue, and has offered technical help on a variety of other matters. It has taken strong positions to preserve the independence of the judiciary and maintain the Supreme Court's oversight of the legal profession. The Bar also helped secure \$5 million in funding last year from legislators for the Civil Legal Assistance Act (which had received between \$1 and \$2 million the previous three years). Unfortunately, that was vetoed by the governor, but we will be working with both the legislature and governor's office to reinstate that funding this year.

Many of our members do not understand that, because of our unified nature, the Bar can only take general legislative positions *8 dealing with such issues as adequate funding for the courts, third branch independence, preserving public access to the courts, and the like. Legislative limitations have been spelled out in U.S. and Florida Supreme Court rulings and incorporated in our rules and policies. Much of the heavy lifting and more detailed work is done by the sections, which have

80-FEB FLBJ 6
80-FEB Fla. B.J. 6
(Cite as: 80-FEB Fla. B.J. 6)

Page 4

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