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Board rejects gay adoption lobbying

By Gary Blankenship
Senior Editor

Although no one defended the law, the Bar Board of Governors has said three sections cannot lobby to repeal a state law banning homosexuals from adopting because it is too divisive among Bar members.

The board voted 31-13 at its December 10 meeting in Naples to accept the recommendation of the Legislative Committee and deny the request of the Family Law, Equal Opportunities Law, and Public Interest Law sections to seek to change the law. The three sections wanted to substitute a best-interest-of-the-child standard for the gay adoption ban.

The board devoted almost two hours of debate to the issue.

"No matter how you feel about this, pro or con, some things are obvious," said board member Harold Melville. "This is a highly emotional issue. It's a deeply philosophical issue and we are dealing with a [Bar] rule. That rule says if the issue carries the potential for deep philosophical or emotional division among a substantial segment of the membership, the section cannot be allowed to lobby for it.

"The divisiveness [of the issue] is not a potential divisiveness; there is in fact a deep emotional and philosophical division among the members of the Bar. . . . We're not talking about whether we think this is a good law or a bad law. We're looking at our rules, and our rules say where there is the potential for deep division, the section must be prohibited from lobbying on it."

Board member Steve Chaykin disagreed. "This is as bigoted and repugnant a law as there is," he said, adding if the term homosexual was replaced in the law with any ethnic, gender, or religious group there would be no question that the sections would be allowed to act. The issue, he said, is fair and equal access to the courts.

"I am told that the argument [against the sections] is that the clause dealing with deep philosophical and emotional differences . . . is designed to protect the Bar from a structural integrity standpoint and to protect the Bar from its enemies," Chaykin said. "But in the process, if we undermine the core values of this organization, . . . then what are we protecting other than a simple shell of what we believe is a core value of this organization? . . . I do not want this organization to simply stand by and say nothing."

He added that if it were a Bar position, he would agree taking action using mandatory Bar dues would be improper. But he said the voluntary sections, using their own money and not Bar money, should be able to act.

Evan Marks, chair of the Family Law Section, and board member Nancy Gregoire, liaison to the section, presented the three sections' arguments to the board as they had the day before to the Legislative Committee.

"What I'm bringing to you is not a request to endorse homosexual adoption," Marks said. "We're asking for you to allow us . . . to lobby against a discriminatory law that says if you are a homosexual you cannot go into court and ask to adopt."

The state already pays homosexuals to be foster parents, and Florida is the only state with an outright prohibition against gay adoptions, he said.

He and Gregoire said only about 50 letters had been received against the sections' proposed action, and that wasn't enough to constitute a substantial segment of the Bar to meet the divisive standard. Gregoire said the opposition fell into two categories: those who think the issue is divisive and those who have a moral opposition to gay adoptions.

"This is a legal issue, and the reason we have the right to address it is the right of children to have access to the courts," she said. "Why does not that child have a right to go to a judge and say, 'You, the judge, decide if this is in my best interest.?'"

Gregoire also argued those who have opposed the sections for moral reasons have in fact forced the Bar into a moral position. "Don't make us muzzled because those few folks want us to be," she said.

The board heard that the three sections were being supported by the Elder Law Section and by the Florida Association for Women Lawyers. But the Trial Lawyers Section and the Real Property, Probate and Trust Law Section both discussed the issue and declined to take a stance. And the Young Lawyers Division Board of Governors debated the issue and recommended that the three sections be turned down because of the divisiveness.

YLD President Mike Faehner told the board there was no better example of the emotion and divisiveness of the issue than the reaction to the YLD's review. Although the YLD based its advice on a rigorous and neutral analysis of the law and Bar policies, he was called a Nazi and homophobe by other lawyers who contacted him after the vote.

"I didn't think this was an emotional debate," Faehner said. "I was wrong."

Opponents of the sections said many legislators and even many Bar members do not understand the difference between the Bar as a whole and sections taking a position, and would see the sections as representing the entire Bar. They also said regardless of personal feelings about the law, it was wrong to nullify the Bar's procedures and rules.

Board member Ervin Gonzalez said he asked hundreds of lawyers about the issue and was overwhelmingly told the Bar should not get involved. He noted the rules might have prevented the Bar 50 years ago from taking a stance on *Brown v. Board of Education*, but said probably a majority of the board would have individually supported it. Section members can still do that without any board action, he added.

"I'm saying please stand and fight this discriminatory law and do not allow The Florida Bar's silence on this to be a mandate for you," Gonzalez said. "Do not ask The Florida Bar to take a position that it cannot take because of our internal rules and bylaws."

Board members Jesse Diner and David Rothman said they intended to take Gonzalez' advice and contribute time and money to repeal the law, but added they felt compelled to obey Bar rules.

While the adoption ban is bad, "If we don't follow the law in changing the law, are we any better?" Rothman asked. "I'm going to vote against their proposal, but I will contribute and go to Tallahassee to argue for the repeal of that law. There will be a time when we can say it's not divisive."

"I don't like the [divisiveness] rule and I abhor that this statute is on the books," Diner said. "I live in a neighborhood with a large gay population, and I hate that I have to tell them I voted against this. But I don't have the right to nullify this rule."

Supporters argued the real issue is not divisiveness but about equal access to the courts which should not be a controversial issue to Bar members. They also questioned whether the Bar can avoid the issue.

Board member Chris Lombardo noted the Bar, in rule 4-8.4, prohibits discrimination by lawyers on a variety of grounds, including sexual orientation. He said that could make a lawyer liable to discipline if he or she went to court to oppose an adoption because a would-be parent is gay.

"We're already in this fight; we're already there," Lombardo said. "A gay person who is married to a straight person and is a parent can divorce and get custody. How do you square that with the ban on gay adoption?"

"This law is improper. It's not a question of morality; it's a question of what's right. We do not support discrimination in any form. We need to take a position and get it over."

Board member Henry Latimer said he's heard the divisiveness argument used before, as justification for not taking action on gender and racial discrimination issues.

"I take no position on the right to adopt or not to have the right not to adopt, but the right to speak out against it is something that should be inviolate," he said. "The time is always right to do the right thing. What is morally right takes precedence over something that's ambiguous. . . . We should have the courage to protect that right and not use the technical definition of not addressing issues because they're divisive."

The board vote approved the motion of the Legislative Committee, which had voted unanimously to reject the sections' requests. But the committee also specified in its motion that the sole reason for the rejection was of the Bar policy prohibiting sections from engaging in legislative activities that have the potential to cause deep emotional and philosophical division among a significant portion of the Bar's membership.

Under court rulings and Bar rules and policies, the Bar, because of its mandatory membership, is limited in what political positions it can take. Those are generally limited to items related to improving the delivery of legal services and the oversight and regulation of the legal profession.

Sections, which have a voluntary membership, are given a wider latitude in lobbying positions, although they must use only section money and no Bar funds. Sections generally can lobby on any issue as long as it does not conflict with a Bar-wide position, falls within the section's purview, and does not violate the divisive standard.

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