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ARTICLES

Merit Selection for Trial Judges:
Opportunity Lost, or Lesson Learned?

Hon. Mark M. Klingensmith 473

Many proposals have been considered to improve the Florida judiciary. These have included proposals for term limits for judges, as well as changes to the selection and retention methods for trial court judges. But identifying the optimal method of judicial selection to obtain the highest quality occupants for judicial office has always been elusive. Benchmarks to identify the characteristics required to be a “good” judge involve a degree of subjectivity that is difficult to measure and, to the extent that they can be quantitatively evaluated, have their own series of limitations.

Consistent with the method of judicial selection historically employed by the states, Florida has a long history of electing its trial court judges. In 1998 Florida adopted the “merit selection” local option in both counties and judicial circuits. The question considered by this paper is whether the preference for one method over another (election v. selection and retention) has ideological undertones, and what other factors may influence the adoption of a selection method, including the role of the judiciary in the debate, as well as what issues must be addressed if merit selection should ever be presented to Florida voters again in the future. From this, the future viability of implementing a merit selection process for trial judges in Florida can be considered.

Florida’s Non-Statutory, De Facto DUI/DWI Diversion Programs:
Diverting Justice for Judicial and Prosecutorial Expediency?

Hon. Karl B. Grube 547

In this Article, Senior Judge Karl B. Grube, who serves in both the County and Circuit Courts of Florida, explores shortcomings and serious concerns in the operation of Florida’s de facto, non-statutory DUI/DWI diversion programs. The Article reviews the history of these diversion programs, their effectiveness with respect to their impact on public safety, on deterrence, and on the fair, effective, and efficient delivery of justice. Attention is drawn to the role of prosecutors and judges who support such programs and the effect of these programs in reducing enforcement, conviction rates, and pending caseloads. The Author is a member of the Florida Impaired Driving Coalition and has contributed his services as a researcher and has authored various Coalition papers. The Author’s positions, opinions, and recommendations in this Article, however, are solely his own and not those of the State of Florida or its constituent Departments.

The Intersection of Intellectual Property
and Government Law

*William R. Brees, Brittany J. Maxey-Fisher
& Alexandra (Taylor) Devine* 597

Although some intellectual property issues transcend sectors, public-sector intellectual property brings unique issues and challenges not found in the private sector, in part due to its heavy basis in statute. Relevant subjects include local governments’ ownership and enforcement in Florida, contracts involving intellectual property, and immunity for infringement. This Article begins by discussing different types of intellectual property: patent, trademark, copyright, and trade secret. It moves to local governments’ ownership and enforcement in Florida, sometimes contrasting with the rights private applicants enjoy. Major ownership

issues include the difference between inventorship and ownership for patents; trademarks' dependence on statute; limitations of copyright; and the importance of trade secrets to states. Regarding enforcement, the Article covers the importance of awareness and standing to assert enforcement rights. As for contractual issues, the Article focuses on employment contract issues, honing in on patents. Assignment of ownership rights follows a general rule subject to exception, but determining ownership right as between an employer or an employee depends on factor-based tests in certain circumstances. Independent contractor status may complicate things; agency law, possible fiduciary duties, and other factors may come into play. Finally, infringement is much different in the public sector than in the private. As decided in a controversial case, the United States Supreme Court determined that states are immune to suit for intellectual property infringement without their consent.

STUDENT WORKS

The New Uniform Debate: *McCall v. Scott* and the Constitutional Status of the Florida Tax Credit Scholarship Program

Kelley Thompson 625

This Case Note addresses the constitutional status of the Florida Tax Credit Scholarship Program (FTCSP) under Florida's Uniform Education Provision in the wake of *McCall v. Scott*. The purpose of this Case Note is to give a comprehensive overview of the Program's status post-*McCall*. *McCall* is a case out of Florida's First District Court of Appeals, in which the Plaintiffs challenged the constitutionality of the FTCSP. In that case, which was dismissed on standing grounds, the Plaintiffs argued that the FTCSP was unconstitutional. This paper discusses some relevant Florida law leading up to *McCall*, lays out the Court's discussion of standing, and then argues, like the *McCall* Plaintiffs do, that in light of Florida precedent, the FTCSP is unconstitutional. This paper further argues that should the constitutionality of the program be challenged again, courts should find the FTCSP unconstitutional. Furthermore, it posits an amendment to the Uniform Education Provision under which the FTCSP would be constitutional and suggests that supporters of the scholarship program should pursue such an amendment if they wish to ensure constitutionality of the FTCSP.

From Category 4B to Category 2: How Local Stakeholders in the Tampa Bay Nitrogen Management Consortium Battled Nutrient Pollution to Improve the Bay

Travis M. Hearne 647

Regulating the discharge of nutrients such as nitrogen has proven a difficult and complex task for both state and federal environmental regulators. Nitrogen-rich runoff emanates from agricultural operations, stormwater, and other nonpoint sources, making it difficult to control using conventional forms of regulation governing point sources of pollution. But the participants in the Tampa Bay Estuary Program's Nitrogen Management Consortium have worked within the contours of federal and state law to regulate nitrogen pollution at the local level on a voluntary basis by engaging stakeholders and regulators in a collaborative and participatory process by which public and private participants agree to limit their nitrogen discharges in accordance with a plan drafted by the participants and submitted to state regulators once every five years. The plans also include methodology for monitoring water quality in Tampa Bay. This program has contributed significantly to a drastic improvement in water quality in Tampa Bay over the last decades as formerly depleted seagrass acreage has been restored dramatically, showcasing the promise of local, stakeholder-driven regulatory programs to reduce pollution and improve environmental conditions.

Each year, *Stetson Law Review* publishes a selection of student-authored digests of major local-government cases decided in Florida over the past year. Each digest provides a concise, detailed summary of a case representing a significant recent development in a field related to local government law, along with references to additional research on the case's primary topics. These digests are intended to highlight the practical application of legal doctrine concerning subjects that may not have been addressed in our other articles, as well as to provide a useful research reference for practitioners, judges, academics, or any lawyer interested in Florida local government law.