

University of Nevada, Reno

**Peremptory Excusal of Judges in New Mexico:
Substantive Right, Procedural Right, Both, or Does It Matter?**

A thesis submitted in partial fulfillment of the
requirements for the degree of

Master of Judicial Studies

by

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Abstract

The New Mexico Supreme Court recently announced its opinion in *Quality Automotive Center, LLC v. Arrieta*, 2013-NMSC-041. The case involved the peremptory challenge to excuse a judge found at § 38-3-9, NMSA 1978. The Supreme Court announced that the right embodied in the statute was procedural in nature and therefore the Court could amend or abolish the right. The Court then proposed new rules of procedure which limited a litigant's ability to exercise § 38-3-9.

This article traces the history of judicial disqualification statutes in New Mexico from territorial days through early statehood to the present as well as the evolution of judicial rule-making as a function of the legislative branch and the judicial branch of government. This article argues that the legislature and judiciary reached a compromise on the peremptory excusal of judges in 1985 that the judiciary now seeks to withdraw from. This article questions the need for the modification of the status quo and finds that the proposed new rules will unnecessarily create new problems while inadequately dealing with the problems the Court perceives to exist.

Finally this article argues that the legislature does have a role to play in judicial rule-making. The Supreme Court should address its concerns about § 38-3-9 along with its recommended solution to the legislature and allow the legislature to remedy the problem or alternatively recognize that § 38-3-9 contains a substantive right to excuse a judge along with the procedural aspects which the Supreme Court now seeks to amend.

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Introduction

New Mexico affords litigants in its courts the ability to change the judge hearing their case. The New Mexico Supreme Court in *In re Eastburn*¹ proclaimed, “Beginning with the first territorial legislature in 1851, the laws of New Mexico have provided for the peremptory disqualification of the district judge before whom an action is to be tried . . . Disqualification statutes have been peremptory in nature in that the legislature has required no allegation or proof of facts to support disqualification.”²

The author’s study of the history of the disqualification of a district judge in New Mexico and Section 38-3-9, NMSA 1978, finds that the peremptory³ right to change judges is not of that ancient origin and is in fact of rather recent vintage. The current statute, § 38-3-9, NMSA 1978, is the result of a contentious confrontation and then a negotiated compromise between the New Mexico Legislature and Supreme Court.

The New Mexico Supreme Court revisited § 38-3-9 in *Quality Automotive Center, LLC v. Arrieta*⁴ and has proposed new procedural rules⁵ which reflect its Opinion. This article traces the historical development of changing a judge in New Mexico. It begins by tracing the statutory right in territorial days and early statehood to change the venue of a trial which had the practical effect of changing the trial judge. It subsequently examines the statutory right, created by the legislature, which allowed a litigant to peremptorily disqualify the trial judge without affecting venue.

¹ *In re Eastburn, Dist. Judge, Eleventh Jud. Dist Ct, N.M.*, 121 N.M. 531, 914 P.2d 1028 (1996).

² *Id.* at 533.

³ *See* Peremptory: self determined; arbitrary; not requiring any cause be shown. Black’s Law Dictionary, 1023 (5th ed. 1979).

⁴ 2013 NMSC 041.

⁵ New Mexico Bar Bulletin, Vol. 52, No. 37, 20-22 (2013).

This article then examines the evolution of judicial rule-making which occurred over this same extended period which ended with the judicial branch declaring exclusivity in this area.

The development of these two areas, the statutory right to peremptorily excuse a judge created by the legislature and the judiciary's declaration that judicial rule-making was the judiciary's exclusive province, led to a constitutional confrontation in the 1980s between the legislature and the courts over the existence and use of the ability to disqualify judges without cause. This article describes how that confrontation came about, how it came to a head and what resulted in the Compromise of 1985.

This article then looks at two major tests in the Supreme Court in which the Court upheld the Compromise. It also traces the development of court rules which made § 38-3-9 more effective and easier to use.

The 2013 Supreme Court Opinion *Quality Automotive Center, LLC v. Arrieta* is then examined. This case allowed the trial judge to limit party's ability to exercise a peremptory excusal and transformed § 38-3-9 from a substantive right to a procedural privilege. The rules of procedure proposed by the Supreme Court in the wake of the *Arrieta* opinion are then examined, how the proposed rules will be applied in cases is considered, and the article anticipates the unintended consequences that the proposed rules may generate.

Finally, the article then proposes that the Supreme Court commission a statistical analysis to determine just what type of abuses of the current system actually occur, their frequency, and their impact. The judiciary is urged to consider New Mexico's history of legislative involvement in judicial rulemaking, the Compromise of 1985, and to return to

shared involvement with the legislature. Alternatively the Supreme Court should recognize § 38-3-9 does include a substantive right to excuse a judge and should then adopt reasonable procedures for its use.

Territorial Days

In New Mexico Territory, the jurisprudence for the excusal or disqualification of a judge for cause developed in terms of changing the venue of a trial.⁶

The earliest embodiment of New Mexican Law under the authority of the United States was the Kearney Code,⁷ adopted in 1846. It created a court system that served as the model for territorial New Mexico. The Kearney Code had no provision for the change of a judge presiding over a case or establishing rules of procedure for the court system it wanted.⁸

The Organic Act Establishing the Territory of New Mexico was enacted in 1850.⁹ The Organic Act, like the Kearney Code, contained no provision for changing the trial

⁶ *State ex rel. Hannah v. Armijo*, 38 N.M. 73, 74, 28 P.2d 511, ___ (1933).

⁷ General Stephen W. Kearney commanded the United States Army that invaded what became New Mexico Territory during the Mexican War (1846-1848). He was under orders to establish a civil government in the conquered land. After occupying Santa Fe in 1846, he did so by authoring what became known as the Kearney Code which was largely based on the laws of Missouri, Texas, and in part, on laws of Mexico. See M.B. Browde & M. E. Occhialino, *Separation of Powers and the Judicial Rulemaking Power In New Mexico*, 15 N.M.L.Rev. 407, 412 (1985).

⁸ See 1 N.M. Stat. Ann., Kearney Code of Laws, (1846) Ch. 6, Courts & Judicial Powers §§1-26, 1846 (1978).

⁹ Act of Sept. 9, 1850, 9 United States Statutes At Large 446, Ch. 49. New Mexico Territory in 1850 was much larger than the present day state. It included all of present day New Mexico, all of what is present day Arizona, part of southern present day Nevada (including what is present day Las Vegas), and a portion of the southern part of present day Colorado. Colorado Territory was established by the Colorado Organic Act of Feb. 28, 1861. The Arizona Organic Act of Feb. 24, 1863, removed all lands west of the 109th Meridian leaving New Mexico Territory with boundaries identical to the eventual State of New Mexico.

judge.¹⁰ It contained limited provision for establishing rules of procedure for the territorial courts.¹¹

The Organic Act provided that there were three federally appointed justices assigned to New Mexico. They constituted the Supreme Court of the Territory of New Mexico. Accordingly, the territory was divided into three judicial circuits with a justice assigned to each.¹² The Territorial Justices had original trial court jurisdiction in their assigned districts as well as appellate jurisdiction when sitting *en banc* in Santa Fe as the Supreme Court. Ironically, it was common for a territorial justice to sit on the appellate review of a case over which he had presided at trial.¹³ Affirmance was common.¹⁴

New Mexico's first Territorial Legislature met in the summer of 1851 in Santa Fe. It passed an act defining judicial districts, assigning judges and defining times and places to hold court.¹⁵

The first Territorial Legislature also enacted "An Act regulating the practice in the District and Supreme Courts of the Territory of New Mexico."¹⁶ Section 17 of this Act addressed change of venue.¹⁷ Each party was allowed to change venue twice.¹⁸

¹⁰ See *supra* Organic Act, n. 9.

¹¹ *Id.* §10.

¹² *Id.*

¹³ See *Bustamento v. Analla*, 1 N.M. 255, 256 (1857).

¹⁴ *Id.* at 262.

¹⁵ Act of July 10, 1851, Terr.L.N.M. (1851). The Central Circuit was headquartered at Santa Fe, and the Chief Justice generally presided over trials in the Central Circuit. This later became the First Judicial District. The Southeastern Circuit was headquartered in Bernalillo and was presided over by an Associate Justice. This later became the Second Judicial District. The Northern Circuit was initially headquartered in Taos, and it also was presided over by an Associate Justice. It later became the Third Judicial District and was moved to Las Cruces in 1860. In 1887, the Fourth District, headquartered at Las Vegas, was created, and in 1889 the Fifth District, headquartered at Socorro, was added. This increased the New Mexico Supreme Court to five.

¹⁶ Act of July 12, 1851, Terr.L.N.M. (1851).

"The venue shall be changed in all cases, both civil and criminal, to the nearest county free from exceptions, when the judge is interested, or when the party moving for a change shall make oath that he cannot have justice done him in the county in which the suit is then pending, setting forth

Section 17 is hardly the peremptory challenge that the *Eastburn* Court¹⁹ declared to have existed. The interest of the judge or the inability of a party to receive justice in the current venue must be asserted as grounds. The party must then identify the cause of the inability to receive a fair trial (under oath) and support that claim with the sworn testimony of two “disinterested persons.” The language of §17 refers to a “party moving for a change” which clearly implies that whether the grounds asserted are a judge’s “interest” or the inability to “have justice done,” the grounds must be raised by motion. Section 17 makes no provision that the matter be heard anywhere other than the trial court, before the assigned trial judge. By the very nature of the adversarial process of justice, such a motion could be contested by the opposing party, thus invoking a ruling from the court. Section 17 was later codified.²⁰

In 1882, the Territorial Legislature re-addressed the issue when it passed Chapter 9, Laws 1882.²¹ It stated that venue shall be changed to a county free from exception, “whenever the judge is interested in the result of such case.”²²

The section is silent as to how the change of venue precipitated by the trial judge’s interest in the result of the trial is to be raised, what proof is required, or who makes the decision. The section continued to provide additional grounds to allow a change of venue if it is proved to the satisfaction of the judge that a “party cannot have justice done him at a trial in the county where such case is then pending or for any other

the cause of such obstruction of justice; which oath must be supported by the additional oaths of at least two disinterested persons.” *Id.*

¹⁸ *Id.*

¹⁹ *In re Eastburn, supra* n. 1.

²⁰ Art. 12, ch. 27, § 17 N.M.R.S. 1865.

²¹ It was codified at Art. 12, ch. 27, § 17 N.M.R.S. 1865 and was later recodified at § 1833 of New Mexico’s Compiled Laws of 1884.

²² *Id.*

proper cause satisfactory to the judge before whom the motion is made.”²³ Deleted is the requirement of affidavit supported by two disinterested affidavits.²⁴ Since no alternative procedure is proposed or authorized in the statute, it must be assumed that these discretionary grounds must be asserted by motion to the trial court.²⁵

In 1889, the Territorial Legislature again visited the topic of change of venue.²⁶ Additional grounds were provided by which a judge was disqualified to hear a case stating that venue “shall be changed whenever the judge is interested in the result, or is related to, or has been counsel for either party.”²⁷

Section 1 goes on to outline a procedure for a party to change venue by filing an affidavit stating that the party cannot get a fair trial because of the opposing party’s undue influence over the minds of the inhabitants of the county, local prejudice against the movant, public excitement, or the inability to obtain an impartial jury. The affidavit had to be supported upon oath by two disinterested persons attesting that they believed the facts in the affidavit were true.²⁸ Section 2 provided that the affidavit was to be presented in support of a motion to change venue.²⁹ Section 3 stated that if the change of venue was ordered upon any grounds related to the judge, the case was to be removed to the next nearest district or a county thereof.³⁰ Although Chapter 77 provides that change of venue on grounds relating to the judge will be by order, it is silent on how that order is

²³ *Id.*

²⁴ *Id.*

²⁵ See generally *Midwest Royalties v. Simmons*, 61 N.M. 399, 402, 301 P.2d 334, ___ (1956) (a litigant is required to do some act to call the grounds of disqualification of the judge to the court’s attention and demand a ruling thereon)

²⁶ Ch. 9, Laws 1882 was not changed.

²⁷ Ch. 77, § 1, Laws 1889.

²⁸ *Id.*

²⁹ Ch. 77, § 2, Laws 1889.

³⁰ Ch. 77, § 3, Laws 1889.

to be obtained and from whom. Again, unless the trial judge raises the issue *sua sponte* admitting the grounds, how else can the matter be raised other than the litigant filing a motion in the trial court or seeking a writ of prohibition from the Territorial Supreme Court?³¹

Early Statehood

In 1912, New Mexico was admitted to the Union³² becoming the 47th state.³³ New Mexico had adopted its Constitution in 1911.³⁴ Article VI, Section 18 was entitled “Disqualification of Judges.” This is the first time that the word “disqualification” appeared in New Mexico Statutes or case law to describe the prohibition of a New Mexico judge to preside over a case.³⁵

Section 18,³⁶ which closely resembled prior existing law, continued to prohibit a judge from presiding over a case in which he had an interest.³⁷ Additionally, it provided that a judge could not preside over any case involving a party who was related to the judge by blood or marriage within the degree of first cousin or a case in which he was formerly counsel to a party. Finally, a judge was not allowed to participate in the appellate review of a case over which he presided over in an inferior court.³⁸ The latter is

³¹ *See supra* n. 24.

³² Proclamation of January 6, 1912, 37 Stat. 1723 (1912).

³³ Upon statehood, there were eight judicial districts with eight district judges. The Supreme Court was reduced to three justices.

³⁴ Adopted January 21, 1911.

³⁵ N.M. Const. art VI, § 18.

³⁶ *Id.*

³⁷ *See generally* § 2879, C.L.N.M. (1897).

³⁸ N.M. Const. art. VI, § 18.

an obvious reaction to the Territorial Justices' questionable practice of sitting on the appellate review of cases they presided over as trial judges.³⁹

After statehood in 1912, New Mexico recodified its statutes as the New Mexico Statutes, Codification of 1915.⁴⁰ They were carried forward *verbatim* from the Compiled Laws of 1897.

In 1929, the New Mexico Legislature addressed the change of venue issue by enacting Chapter 60, Laws 1929.⁴¹ The new enactment carried forward language from former law. It continued to provide for a mandatory change of venue when the judge was interested in the result of the case⁴² or is related to a party or has been counsel for either party.⁴³ The 1929 revision continued the ability of counsel to ask for a change of venue by filing an affidavit alleging the belief that a fair trial cannot be obtained because of the influence of the opposing party, pretrial prejudice against a party, undue excitement of the populace, or local prejudice on the issues involved in the case.⁴⁴ The 1929 enactment dispensed with the requirement that the affidavit of counsel had to be supported by the oath of two disinterested persons.⁴⁵ Additionally, the 1929 revision removed limitations

³⁹ This feature had been criticized as early as the Constitutional Convention of 1849 where Judge Joab Houghton proposed a constitutional provision (art. III, § 2) to provide that “the judge who tried the case shall not be allowed to sit in this appellate court.” Although this unsatisfactory arrangement was called to the attention of Washington authorities, it was never satisfactorily resolved until statehood. Arie W. Poldervaart, *Black-Robed Justice*, 4-7 (1948).

⁴⁰ Ch. 9, § 1, Laws 1897 became § 5571; Ch. 77, § 1, Laws 1897 became § 5573; Ch. 77, § 2, Laws 1897 became § 5575 of the N.M. Stat. Cod. 1915. They were carried forward *verbatim*. Ch. 77, § 1 had been the subject of a few appellate cases but none involving claims relating to a judge.

⁴¹ Codified as § 147-105, C.S. 1929.

⁴² Ch. 9, § 1, Laws 1882; Ch. 60, § 1, Laws 1929.

⁴³ Ch. 77, § 1, Laws 1889; Ch. 60, § 1, Laws 1929.

⁴⁴ *Id.*

⁴⁵ Ch. 60, § 1, Laws 1929.

on what could be raised in the affidavit of counsel alleging unfairness by allowing a change of venue “for any other cause stated in such affidavit.”⁴⁶

Importantly, the 1929 revision provided procedural direction on how the issue was to be brought before the court. The issue was to be raised “upon motion” which was to be filed on or before the first day of the term of court and required that five days advance notice of the presentment of the motion to the Court.⁴⁷

Probably more importantly, it allowed, but did not require, the Court to require evidence in support of a motion to change venue.⁴⁸ This was not limited to any particular allegation. By its language, this includes a motion alleging prejudice on the part of the trial judge. The statute does not provide for a hearing before a different judge if the motion relates to a reason concerning the trial judge.⁴⁹ It does require the trial court to make findings and either grant or overrule the motion.⁵⁰ The 1929 enactment did not affect the county to which the cause was to be removed if a change of venue was granted.⁵¹

Events Leading To the Compromise of 1985

The Statutory Evolution of § 38-3-9, NMSA 1978

In 1933, the New Mexico Legislature enacted Chapter 184, Laws 1933.⁵² It set forth the statutory scheme to provide for the disqualification of a District Judge from

⁴⁶ *Id.*

⁴⁷ *Id.* § 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See* § 147-108 N.M.S.C. (1929).

⁵² Ch. 184, Laws 1933 evolved into § 38-3-9, NMSA 1978 as it came to exist in 1984 and as it exists today.

presiding over the trial of a civil or criminal case.⁵³ Any party to the cause could file an affidavit stating that the party believes that the judge cannot preside over the case with impartiality.⁵⁴ It provided that once such an affidavit was filed, the District Judge could proceed no longer and a new judge was to be assigned.⁵⁵ The law provided for no hearing on the validity of the litigants' belief. The proceeding simply stopped until a new judge was assigned either by agreement of the parties or by designation by the Chief Justice of the Supreme Court.⁵⁶ This involved bringing in a judge from a different judicial district.⁵⁷ The only limitation on filing such an affidavit was that it had to be filed not less than 10 days before the beginning of the term of court if the case was at issue.⁵⁸

Later in 1933, in *Hannah v. Armijo*,⁵⁹ the New Mexico Supreme Court held that Chapter 184, Laws 1933 was not an unconstitutional infringement by the Legislature into the powers of the Judicial Branch.⁶⁰ It was during the 1930s that two important principles regarding the exercise of a peremptory challenge of judges began to take shape. First, the filing of a proper affidavit was mandatory and absolute. If properly filed, the judge

⁵³ Ch. 184, § 1, Laws 1933. Chapter 184 made its way through the legislature as Senate Bill 156. It was introduced by Senator Clarence F. Vogel, a democrat from Gallup elected in 1933. He is probably best remembered for events which occurred in the aftermath of the Gallup Coal Strike of 1933. There was much violence, and Governor Seligman declared Gallup under martial law for four months. In 1934, Gamerico Coal Co. sold Senator Vogel the surface rights to a place called Chihuahuaito where the striking miners (who were largely Mexican immigrants) lived in a shanty town. Senator Vogel had them evicted, sparking the Gallup Riots of 1935 which resulted in more deaths including the Sheriff. Vogel's actions eventually broke the union. Vogel was not returned to the Senate in 1937. For a well-researched historical novel, see Gary L. Stuart, *The Gallup 14*, UNM Press (2000); See also *St v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937).

⁵⁴ Ch. 184, Laws 1933.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* Aside from the plain language of the statute, in 1933, New Mexico had nine judicial districts and each had only one judge.

⁵⁸ *Id.* § 2.

⁵⁹ *State ex rel. Hannah v. Armijo*, 38 N.M. 73, 29 P.2 511 (1933).

⁶⁰ *Id.* at 83, ____.

against whom the affidavit was filed had no discretion and could proceed no further.⁶¹

Second, a party who had invoked a ruling of the court on a controverted question could not later disqualify the judge.⁶²

Chapter 184, Laws 1933 was recodified in the 1941 Compilation of the Laws of New Mexico at §19-508. It was amended to provide that the statute had no application in “actions or proceedings for constructive and direct contempt.”⁶³

Section 19-508 was amended again to allow the preemptory challenge of a judge “whether he be the resident judge or a judge designated by such resident judge, except by consent of the parties or their counsel.”⁶⁴

In 1953, §19-508 was recodified as § 21-5-8 of the New Mexico Statutes, 1953 Recompilation. In 1965, its applicability was expanded to include proceedings for “indirect and direct criminal contempt arising out of oral or written publications” while excluding from its purview cases involving “other indirect contempt.”⁶⁵ The statute continued to require that if the parties could not agree on a successor judge and it was left to the Chief Justice of the Supreme Court to make the selection. The designation was to be judge “of some other district” to preside over the case.⁶⁶ By 1965, many judicial districts had more than one district judge.⁶⁷

⁶¹ *Id.* at 76, ____.

⁶² *Hill v. Patton*, 43 N.M. 21, 23, 85 P.2d 75, ____ (1938).

⁶³ Ch. 67, Laws 1941.

⁶⁴ Ch. 81, Laws 1947. This was at least in part a reaction to *State ex rel. Armijo v. Lujan*, 45 N.M. 103, 111 P.2d 541 (1941) where the Supreme Court held that litigant could not use §19-508 to disqualify a judge sitting at the request of the presiding judge of the local district when the latter had disqualified himself under N.M. Const., art. VI, § 18.

⁶⁵ Ch. 165, § 2, Laws 1965. Minor stylistic and punctuation changes were made to the last sentence dealing with how a successor judge was to be designated.

⁶⁶ *Id.*

⁶⁷ These included the First, Second, Third, Fifth, and Eleventh Judicial Districts.

In 1971, § 21-5-9 NMSA 1953, which governed the time for filing an affidavit of disqualification, was amended.⁶⁸ “Term of Court” was deleted and the deadline for filing the affidavit was within 10 days after the case was at issue or within 10 days after the time for filing a jury demand had expired, whichever was later.⁶⁹

The 1977 Legislature amended both § 21-5-8 and § 25-5-9.⁷⁰ The Legislature for the first time addressed the issue of parties which are technically distinct but have common interests. Although limiting its application to Workman Compensation cases, the Legislature decreed that the employer and the employer’s compensation carrier shall be treated as one party for purposes of disqualification of a judge.⁷¹

The Legislature also expanded some parties’ right to disqualify the assigned judge. It provided that in all cases filed in the second judicial district, a party may disqualify three judges.⁷² The Legislature further expanded the time during which a party had the ability to disqualify a judge.⁷³ The existing wording of § 25-5-9 was brought forward intact. Language was added that allowed a party to exercise a peremptory challenge of the assigned judge within ten days after the judge sought to be disqualified was assigned to the case.⁷⁴

⁶⁸ Ch. 123, Laws 1971.

⁶⁹ *Id.* By the 1970s, most judicial districts had multiple district judges. The language “term of court” had become archaic and was without the defined meaning that it had in prior years.

⁷⁰ Ch. 228, Laws 1977. All of § 21-5-8 (as amended in 1965) was preserved intact. § 21-5-8(A) was expanded.

⁷¹ Ch. 228, § 1, Laws 1977.

⁷² *Id.*

⁷³ *Id.* § 2.

⁷⁴ *Id.*

The Advent of Judicial Rulemaking

To fully understand the events which led to the Compromise of 1985 and the 1985 amendment to § 38-3-9,⁷⁵ one must go back to the events of 1933, the year Chapter 184 was enacted, and even before. During the late nineteenth century and into the first part of the twentieth century, the executive and legislative branches of state government were fairly well developed. The same could not be said for the judicial branch.⁷⁶

In early New Mexico, the rules of procedure for the courts were creations passed by the legislature.⁷⁷ Judicial rulemaking was accepted as a proper activity for the legislature.⁷⁸ When the first Territorial Legislature met in Santa Fe in 1851, it enacted the legislation, which unquestionably sets forth the rules of procedure for the courts of territorial New Mexico.⁷⁹ The legislature declared the courts to be open to the public,⁸⁰ authorized the court to maintain decorum and authorized its power of contempt,⁸¹ authorized the seal of the court,⁸² established jurisdiction,⁸³ abolished the distinction between courts of chancery and law,⁸⁴ established courts of general jurisdiction,⁸⁵

⁷⁵ Ch. 184, § 1, Laws 1933, as amended.

⁷⁶ The author posits this was a natural and normal evolution. The Executive and Legislative branches tend to be proactive and cause events to occur. The Judiciary is normally reactive and responds only to issues as they are brought before it.

⁷⁷ See e.g. AN ACT defining the several judicial districts of the Territory of New Mexico, assigning the several judges to their respective districts, and also defining the times and places of holding courts; Approved July 10, 1851; AN ACT regulating the practice in the District and Supreme Courts of the Territory of New Mexico, Approved July 12, 1851; AN ACT to provide for the taking of by interrogations, Approved July 12, 1851. Terr.L.N.M. (1851)

⁷⁸ *Id.*; see also Browde & Occhialino, at 418, *supra* n 7.

⁷⁹ See *supra* n. 77.

⁸⁰ AN ACT regulating practice in the District & Supreme Courts of the Territory of New Mexico, Approved July 12, 1851, § 1, Terr. L. N.M. (1851).

⁸¹ *Id.* § 2.

⁸² *Id.* § 3.

⁸³ *Id.* § 4.

⁸⁴ *Id.* § 5.

⁸⁵ *Id.* §§ 5, 6.

established venue,⁸⁶ defined parties,⁸⁷ provided for the survival of actions,⁸⁸ set notice requirements,⁸⁹ adopted rules of procedure and common law in criminal and civil cases,⁹⁰ established rules of pleading,⁹¹ described the duties of the clerk of the court,⁹² allowed motion practice,⁹³ and defined the duties of the judge.⁹⁴ Finally it allowed for the free process and access to the courts for those too poor to pay costs.⁹⁵

The Act⁹⁶ further provided “That, the Supreme Court may from time to time adopt such rules for its own government, and that of the district courts, not inconsistent with the laws of the territory, as it may deem appropriate.”⁹⁷

The Territorial Legislature thereby adopted the rules of procedure for the judiciary but authorized the Supreme Court to adopt rules of governance for the judicial branch so long as such were not in conflict with the laws that the Territorial Legislature had enacted. It is clear that the Territorial Legislature considered making procedural rules for the courts to be within its province but was willing to delegate partial authority so long as the legislature’s supremacy was understood.⁹⁸

As the twentieth century entered its teens, voices across the United States began to suggest that judicial rules would be more properly addressed if they were enacted by

⁸⁶ *Id.* § 7.

⁸⁷ *Id.* §§ 7, 8.

⁸⁸ *Id.* §§ 12-14.

⁸⁹ *Id.* § 15.

⁹⁰ *Id.* §§ 18, 19.

⁹¹ *Id.* e.g. § 20-23.

⁹² *Id.* §§ 34-36, 41, 42.

⁹³ *Id.* § 41.

⁹⁴ *Id.* §§ 16, 24.

⁹⁵ *Id.* § 48.

⁹⁶ *Id.*

⁹⁷ The Act of July 12, 1851 (*supra* n. 87) was later codified as art. 12, ch. 27, §§ 1-48, N.M. R.S. (1865).

⁹⁸ *See supra* n. 77.

the judicial branch itself rather than by the legislature.⁹⁹ This view was advanced by Dean Roscoe Pound among others¹⁰⁰ and became stronger as the United States entered the 1920s.¹⁰¹ Even though Dean Pound advocated that the judicial branch should author rules of procedure for the courts, he never advocated that the legislature had no role to play in judicial rulemaking or that the judicial branch was the exclusive authoritative source of court rules and procedure.¹⁰²

It was with this concept and understanding (that the authority to author judicial rules and procedures was shared between the legislative and judicial branches) that in 1933, the New Mexico Legislature authorized the Supreme Court to promulgate rules of pleading, practice and procedure as long as it did not abridge any existing rights of any litigant.¹⁰³

The judiciary of the 1930s was quite comfortable with the Legislature having the ability to statutorily enact rules of procedure for the courts. In *Hannah v. Armijo*,¹⁰⁴ the Supreme Court acknowledged the Legislature's ability to enact statutory rules of procedure for the disqualification of a judge and thereby maintain impartial legal tribunals.¹⁰⁵ In a concurring opinion, Chief Justice Watson noted that in his opinion the disqualification statute was very broad and threatened the speedy, efficient and economical administration of justice. The Chief Justice then observed that if this came about, the legislature was fully competent to remedy the situation without the advice of

⁹⁹ For an excellent discussion of this dialogue and subject, See Browde & Occhialino, *Separation of Powers*, 15 N.M.L.Rev. 407, 420-425 (1985).

¹⁰⁰ *Id.* at 421.

¹⁰¹ *Id.*

¹⁰² *Id.* at 425.

¹⁰³ Ch 84, Laws 1933.

¹⁰⁴ 38 N.M. 73, 28 P.2d 511 (1933). (holding that the Legislature did not violate the doctrine of separation of powers when it enacted Ch. 184.)

¹⁰⁵ *Id.* at 83,

the court.¹⁰⁶ He invited action by the legislature to add additional safeguards against abuse.¹⁰⁷ Although the judiciary through court decisions addressed and thereby shaped the breadth and application of judicial disqualification through the 1930s and 1940s, the Supreme Court did not enact a formal rule of procedure covering the subject until 1949.¹⁰⁸

The constitutionality of the developing trial court rules was upheld in *State v. Roy*¹⁰⁹ in 1936. The appellant defendant, Roy, asserted that the power to provide rules of pleading and practice were peculiarly and intrinsically vested in the legislature and therefore Chapter 84, Laws of 1933 was unconstitutional. The state advanced two arguments. First, the power to provide rules of pleading and practice is a power granted exclusively to the judiciary. Alternatively, if the judiciary did not have the constitutional power, the legislature was within its province to delegate rulemaking authority to the judiciary because the constitution did not vest the power to make court rules exclusively with the legislature.¹¹⁰

The Supreme Court held that Chapter 84 was constitutional because it did not attempt to delegate exclusively legislative powers to the judiciary.¹¹¹ The Court acknowledged that there were many overlapping areas of governance between the three

¹⁰⁶ *Id.* (Watson, C.J., concurring).

¹⁰⁷ *Id.*

¹⁰⁸ N.M.R.Civ. P. 88 (1949). It created a procedure for selecting a new judge to preside over the case when a party had disqualified the prior judge and the parties were unable to agree on a new judge within seven days of the filing of the affidavit of disqualification referred to in the statute. In such cases, the Clerk of the District Court was to certify the fact to the Chief Justice of the Supreme Court who would then designate another judge to sit in the case.

¹⁰⁹ 40 N.M. 397, 60 P.2d 646 (1936).

¹¹⁰ *Id.* at 417, ____.

¹¹¹ *Id.* at 418, ____.

branches of government observing that courts make rules of procedure which, in many instances, might be prescribed by the legislature.¹¹²

The Supreme Court further held that its power to prescribe rules was not by virtue of the legislature's delegation of such power. The Court held that the rules of pleading, practice, and procedure were promulgated by the Court as an exercise of its inherent power to prescribe such rules.¹¹³

The Court expressly declined to decide whether the power to make rules of procedure was the exclusive right of the Court over which the legislature had no control. The Court observed that such a determination was not necessary because there existed “no conflict at the present time between any rule promulgated by the Court and any law of the legislature.”¹¹⁴ It must be assumed that “any law” included Chapter 184, Laws 1933 which it had construed in *Hannah v. Armijo*¹¹⁵ just three years earlier.

The *Roy* Court finally held that the New Mexico Constitution gave the Supreme Court the power to provide rules of pleading, practice, and procedure for the district courts.¹¹⁶ Relying on Article VI, § 3 which grants to it “. . . superintending control over all inferior courts . . .” the Court held while the district courts could enact local rules regulating minor matters . . .

The powers essential to the functioning of the courts, in the absence of the clearest language to the contrary in the constitution, are to be taken as committed

¹¹² *Id.* The Court also observed that courts may make rules of pleading and procedure and it was contended that the legislature could do the same without the intervention of the courts. *Id.*

¹¹³ *Id.* at 420, ____.

¹¹⁴ *Id.*

¹¹⁵ *See supra* n. 104.

¹¹⁶ *Roy* at 420, _____. Historically, this was accomplished by the Supreme Court through its authority to issue writs to inferior courts. N.M. Const. art VI, § 3.

solely to us to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice.¹¹⁷

This language in *Roy* declares that the rulemaking power of the Supreme Court is clearly superior to any rulemaking ability of the district courts. The *Roy* Court did not assert that its superintending control over inferior courts translated to the constitutional exclusion of the legislature from the rulemaking arena.¹¹⁸

Through the 1950s and into the 1960s, the judiciary continued to explore its rulemaking authority but continued to recognize that the legislature had a legitimate role to play in regulating judicial procedure. In *State ex rel. Bliss v. Greenwood*,¹¹⁹ a case that dealt with legislative regulation of the judicial power to hold a litigant in contempt of court, the Supreme Court observed that “separation of power was never intended to be complete.”¹²⁰ The Supreme Court concluded that the legislature could exercise reasonable regulation, even on matters within the inherent power of the court, so long as that regulation still allowed the court sufficient power to protect itself and to efficiently administer its judicial functions.¹²¹

In the late 1960s, this sharing of rulemaking authority between the legislature and the judiciary had begun to erode.¹²² In *State ex rel. Anaya v. McBride*,¹²³ and *Ammerman*

¹¹⁷ *Id.* at 421, ____.

¹¹⁸ *Id.* at 420-3, ____.

¹¹⁹ 63 N.M. 156, 315 P.2d 223 (1957).

¹²⁰ *Id.* at 162, ____.

¹²¹ *Id.* at 162, ____.

¹²² See *Southwest Underwriters v. Montoya*, 80 N.M. 107, 109-110, 452 P.2d 176, ____ (1969). Noting that some procedural areas so closely border on substantive rights and remedies that some legislative enactments with respect thereto may be proper but holding that the statute in question changed a procedure and infringed on the court’s exercise of its constitutional duties.

¹²³ 88 N.M. 244, 246, 539 P.2d 1006, ____ (1975). Holding that the legislature lacks the power to prescribe by statute rules of practice and procedure although it has attempted to do so in the past. Such statutes are not binding because the constitutional power is vested exclusively in the judiciary.

v. Hubbard Broadcasting, Inc.,¹²⁴ the Supreme Court boldly declared exclusivity in matters of procedure and practice in the courts. In *Ammerman*, the Court held that as a matter of constitutional law, the legislature lacks the power to proscribe by statute rules of evidence and procedure and declared those powers vested exclusively in the judiciary and that “statutes purporting to regulate practice and procedure in the courts cannot be binding.”¹²⁵

In 1982 the Supreme Court addressed the procedural application of § 38-3-9 in criminal matters by adopting Rule 34.1.¹²⁶ Rule 34.1 provided a time limit for the exercise of the statutory right to disqualify a judge¹²⁷ and also required a judge to recuse if the judge was sitting in an action where the judge’s impartiality might be reasonably questioned.¹²⁸ Rule 34.1 also provided for the provisional disqualification of judges who could possibly be assigned to hear the case if the initially assigned judge was disqualified.¹²⁹

Additionally, Rule 34.1’s language was softened.¹³⁰ The operative document by which the statutory right was exercised was called a “Notice of Peremptory Disqualification” which the Committee Commentary found preferable to the traditional “Affidavit of Disqualification” or “Affidavit of Prejudice.” The Committee reasoned that since the statutory right to disqualify a judge did not require “prejudice” by the judge as a

¹²⁴ 89 N.M. 307, 312 (1976).

¹²⁵ *Id.* at 312, citing *Anaya v. McBride*, *supra* n. 123.

¹²⁶ N.M.R.Crim. P.34.1 (1982 Cum. Sup.) Prior to the adoption of this rule, the only rules of procedure superseding the statutory procedure were local rules. Committee Commentary. The Supreme Court upheld a judicial district’s ability to establish procedural rules dealing with § 38-3-9 in *Gray v. Sanchez*, 86 N.M. 146, 148, 520 P.2d 1091, ___ (1974).

¹²⁷ Rule 34.1 ¶ A, N.M.R.Crim. P. (1982 Cum. Sup.).

¹²⁸ *Id.* at ¶ C.

¹²⁹ *Id.* at ¶ B.

¹³⁰ Rule 34.1, Committee Commentary.

condition precedent, the exercise of the right was in the nature of a right to “excuse” the judge.¹³¹ The Commentary noted that the terms “excused” and “disqualify” could be used interchangeably in Rule 34.1. Finally, the Commentary noted that the plain language of Rule 34.1 and form approved by the Supreme Court indicated that the party’s attorney could exercise the statutory excusal on their behalf and sign the Notice of Excusal.¹³²

The Confrontation

In the early 1980s, the New Mexico Legislature was confronted by what many members considered an overly aggressive Judiciary.¹³³ The Supreme Court in *Hicks v. State*,¹³⁴ abolished the doctrine of sovereign immunity as a defense by the state or political subdivision in tort actions. In *Scott v. Rizzo*,¹³⁵ the Supreme Court abolished the absolute defense of contributory negligence and adopted comparative negligence as a matter of the judicially created common law of New Mexico. In *Bartlett v. New Mexico Welding Supply, Inc.*,¹³⁶ the Court of Appeals altered joint and several liability among co-tortfeasors, applying comparative fault principles. The Supreme Court recognized Dram Shop liability in *Lopez v. Macy*,¹³⁷ and recognized the tort of negligent infliction of emotional distress in *Ramirez v. Armstrong*.¹³⁸ Additionally, *Ammerman v. Hubbard*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Interview with Raymond G. Sanchez, former member New Mexico House of Representative (1971-2001), Former Speaker of the New Mexico House of Representatives (1983-4, 1987-2001) in Santa Fe, N.M. (Jan. 29, 2014).

¹³⁴ 88 N.M. 588, 590, 544 P.2d 1153, ___ (1975).

¹³⁵ 96 N.M. 682, 683, 634 P.2d 1234, ___ (1981). (This was particularly stinging in that the adoption of comparative fault had been rejected six times by the Legislature before the Judiciary made it the law of New Mexico.)

¹³⁶ 98 N.M. 152, 159, 646 P.2d 579, ___ (Ct. App. 1982).

¹³⁷ 98 N.M. 625, 632, 651 P.2d 1269, ___ (1982).

¹³⁸ 100 N.M. 538, 543, 673 P.2d 822, ___ (1983).

Broadcasting, Inc., dealing with the substantive versus procedural dichotomy relating to the separation of constitutional powers had been decided in 1976.¹³⁹

In 1984, against this backdrop arose *State ex rel. Galvan v. Gesswein*,¹⁴⁰ which focused on Rule 34.1 and § 38-3-9. This was a criminal case where the State sought to disqualify a judge by filing a peremptory challenge pursuant to Rule 34.1. The State did not file an affidavit of prejudice or allege any grounds for disqualification. The Judge refused to step aside contending that § 38-3-9 was procedural law and that the Supreme Court could modify it or suspend it by court rule.¹⁴¹ The *Gesswein* Court revisited *Hannah v. Armijo*, stating that “the reasoning of the *Hannah* court . . . must now be reviewed in light of present day circumstances.”¹⁴²

The *Gesswein* Court cited a line of cases which recognized the right to disqualify a judge as a substantive right of either a constitutional or a legislative matter¹⁴³ and noted that later cases denoted the statutory disqualification provision as a substantive right.¹⁴⁴ It also recognized a line of cases which referred to the procedural aspects of § 38-3-9 noting that the section provided a means¹⁴⁵ or method¹⁴⁶ to disqualify a judge.

The *Gesswein* Court noted that prior to the enactment of § 38-3-9 in 1933, there were no rules of procedure for disqualifying a judge and it was open to the parties to adopt any appropriate procedure.¹⁴⁷ Relying on *Ammerman*, the Court found that § 38-3-9

¹³⁹ See *supra* n. 122-125 and accompanying text.

¹⁴⁰ 100 N.M. 769, 676 P.2d 1334 (1984).

¹⁴¹ *Id.* at 772, 1336.

¹⁴² *Id.*

¹⁴³ *Id.* at 772, 1337, citing *Beall v. Reidy*, 80 N.M. 444, 457 P.2d 376 (1969).

¹⁴⁴ *Id.* citing *Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978).

¹⁴⁵ *Id.* citing *Moruzzi v. Fed. Life & Caus. Co.*, 42 N.M. 35, 44, 75 P.2d 320, 325 (1938).

¹⁴⁶ *Id.* citing *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980); *Martinez v. Carmona*, 95 N.M. 545, 549, 624 P.2d 54, 58 (Ct. App. 1980).

¹⁴⁷ *Id.* at 771, 1336.

provided a method of disqualification which was procedural in nature and was therefore “a prerogative of this Court.”¹⁴⁸ The Court held that “this Court can adopt a rule of procedure when the operation of the court is involved and the existing process has created a problem.”¹⁴⁹ The Court found that the current procedure as found in Rule 34.1 permitted abuses.¹⁵⁰ The Court declared that “Rule 34.1 is inappropriate and is hereby retracted.”¹⁵¹

It was Rule 34.1 that the Supreme Court in *Gesswein* held created an unreasonable burden on the judicial system, permitted abuse, was inappropriate, and should be withdrawn.¹⁵² The Supreme Court then announced that it would “promulgate proper rules governing disqualification.”¹⁵³ It was the promulgation of these rules that set the stage for the Court’s clash with the Legislature in 1985.

The amended Rule 34.1¹⁵⁴ became effective March 5, 1984, five days after *Gesswein* was announced and the prior Rule 34.1 was “retracted.” If the Court’s concern with the previous Rule 34.1 was that the statutory right to change judges too easily exercised, the amended Rule 34.1 remedied that concern. First, amended Rule 34.1 limited who had the right to file an affidavit of disqualification to the defendant, the District Attorney, and the Attorney General. Assistant district attorneys, assistant attorney generals, and the defendant’s attorney were prohibited from such filing.¹⁵⁵ The amended

¹⁴⁸ *Id.* at 772, 1337.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 773, 1338.

¹⁵¹ *Id.*

¹⁵² *Id.* at 772, 1336. The *Gesswein* Court did not rule § 38-3-9 to be unconstitutional or void.

¹⁵³ *Id.* at 773, 1338.

¹⁵⁴ N.M.R.Crim. P. 34.1 (1984 Cum. Sup.).

¹⁵⁵ *Id.* ¶ a.

Rule 34.1 continued the procedure of exercising provisional disqualifications¹⁵⁶ and providing that judges whose impartiality may be reasonably questioned on constitutional or Code of Judicial Conduct grounds must recuse themselves from the case.¹⁵⁷

The amended Rule 34.1 required that the affidavit of disqualification state sufficient facts showing the bias, prejudice, or interest of the judge being disqualified.¹⁵⁸ It required a certificate of counsel “executed subject to disciplinary sanctions and the sanctions of Rule 11” certifying that the facts contained in the affidavit are true and correct to the best of counsel’s knowledge information, and belief.¹⁵⁹ It further goes on to implicitly provide for a review of the affidavit, presumably by the judge sought to be disqualified, and if the facts alleged are insufficient to show bias, prejudice or interest, the disqualification is ineffective.¹⁶⁰

In addition to amending Rule 34.1, the Supreme Court adopted Rule 34.2 “Designation of Judge”¹⁶¹ on the same day. It dealt with how a new judge would be assigned to a recusal or disqualification case.¹⁶²

The Supreme Court had declined to declare § 38-3-9 unconstitutional as being violative of the Separation of Powers Clause in *Gesswein*. By amending Rule 34.1, the

¹⁵⁶ *Id.* ¶ c.

¹⁵⁷ *Id.* ¶ f.

¹⁵⁸ *Id.* ¶ g.

¹⁵⁹ *Id.* ¶ g.

¹⁶⁰ *Id.* ¶ g.

¹⁶¹ N.M.R.Crim. P.34.2 (1984 Cum Sup.).

¹⁶² Neither of these rules appears to be the product of the usual rulemaking process whereby the contemplated rule is reviewed by the appropriate rules committee. Neither the amended nor adopted rule was published with a Committee Commentary. The Supreme Court’s haste to promulgate new rules may be evidenced by the fact that Rule 34.2 contains a subdivision (c)(1) but no subdivision (c)(2).

Supreme Court made the statutory right to disqualify a judge virtually impossible to exercise procedurally.¹⁶³

The changes made to the Rules of Criminal Procedure were mirrored in changes made to the Rules of Civil Procedure, made effective the same day. An amended Civil Rule 88¹⁶⁴ which contained identical language to Criminal Rule 34.2 was adopted. A new Civil Rule 88.1 was adopted.¹⁶⁵ It tracked the language of amended Rule 34.1.¹⁶⁶

The Compromise of 1985

Now, with the Supreme Court's decision in *Gesswein*, many legislators believed that the Supreme Court's next step would be to declare § 38-3-9 unconstitutional.¹⁶⁷ The legislative leadership made several attempts to draft legislation to define what aspects of a law were procedural and what was substantive.¹⁶⁸ The legislators could never draft or pass a definitional bill.¹⁶⁹

Galvan v. Gesswein was especially disturbing to the legislature as being violative of the doctrine of separation of powers.¹⁷⁰ Separation of powers in New Mexico is not absolute. Other provisions of the Constitution may allow one branch to exercise powers

¹⁶³ An informal survey of practitioners in the Second Judicial District failed to reveal any successful disqualifications of judges pursuant to § 38-3-9 in the nine months following the amendment to Rule 34.1. Browde & Occhialino, *supra* n. 316.

¹⁶⁴ N.M.R.Civ. P.88 (1984 Cum. Sup.).

¹⁶⁵ N.M.R.Civ. P.88.1 (1984 Cum. Sup.)

¹⁶⁶ Paragraphs B through G are essentially identical. Only Paragraph A of amended Rule 34.1 which defined "Parties" in a criminal case context was not made part of the amended Civil Rule 88.1.

¹⁶⁷ Interview with Richard C. "Dick" Minzner, former member New Mexico House of Representatives (1981-1990), Majority Leader New Mexico House of Representatives (1985-6). Telephonic (Dec. 12, 2013), in person Santa Fe, NM (Jan. 29, 2014).

¹⁶⁸ Sanchez Interview.

¹⁶⁹ *Id.*

¹⁷⁰ Minzner interview. The constitutional analysis and argument which appears in the text which accompanies *infra* n. 171 through n. 191 was constructed by Minzner. The author suggests that if the Supreme Court was delineating the constitutional powers of any agency other than itself, the Court would have made short work of any countervailing arguments.

properly belonging to another.¹⁷¹ The legislature believed that making court rules was not a power exclusively belonging to the judicial branch.¹⁷²

The New Mexico Constitution exclusively confers upon the legislature the power to regulate its own internal affairs and internal procedure.¹⁷³ The New Mexico Constitution does not confer the authority to make rules of court procedure or evidence on the judicial branch. In fact, the New Mexico Constitution, by way of limitation, implies that the legislative branch, by legislative enactment, proscribes rules and procedure in court cases.¹⁷⁴ The legislature is expressly prohibited from changing rules of evidence or procedure in any pending case.¹⁷⁵ The legislators reasoned that this allowed them to enact rules of evidence and procedure for non-pending cases.¹⁷⁶ Further, the Constitution¹⁷⁷ forbids the Legislature to enact local¹⁷⁸ or special¹⁷⁹ laws¹⁸⁰ “regulating . . . district affairs;”¹⁸¹ the jurisdiction and duties of justices of the peace (now magistrate judges);¹⁸² “the practice in courts of justice;”¹⁸³ the summoning and impaneling of

¹⁷¹ The Separation of Powers Clause provides:

The Powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or allowed.

N.M. Const. art. III, § 1.

¹⁷² Minzner interview.

¹⁷³ “Each house may determine the rules of its procedure, punish its members or others for contempt or disorderly behavior in its presence . . .” N.M. Const. art. IV § 11.

¹⁷⁴ “No act of the legislature shall affect the right or remedy of either party or change the rules of evidence or procedure in any pending case.” N.M. Const. art. IV § 34.

¹⁷⁵ *Id.*

¹⁷⁶ Minzner interview.

¹⁷⁷ N.M. Const. art. IV, § 24.

¹⁷⁸ Local law: a law which operates over a particular locality instead of over the whole state. Black’s Law Dictionary, 846 (5th ed. 1979).

¹⁷⁹ Special law: a law relating to particular persons or things within a larger class. 1971 Op. Att’y Gen. No. 71-74.

¹⁸⁰ N.M. Const. art. IV, § 24.

¹⁸¹ *Id.*

¹⁸² *Id.*

jurors;¹⁸⁴ the change of venue in civil or criminal cases;¹⁸⁵ and changing the rules of evidence in any trial or inquiry.¹⁸⁶ It was clear to the legislators that there was no constitutional prohibition to enacting a general law¹⁸⁷ concerning these matters.¹⁸⁸

The Legislature refrained from challenging what recent court decisions had done up to that point in other areas.¹⁸⁹ The Legislature did want to stop the judiciary from proclaiming that rules and procedure were its exclusive province to the exclusion of the legislature.¹⁹⁰ The Legislature believed that the judiciary's position of exclusivity in rulemaking authority was cut from whole cloth while the legislature's position of shared rulemaking authority had sound constitutional underpinning.¹⁹¹

A brief comparison of the rulemaking process by which New Mexico and the United States approach judicial rulemaking is instructive. Chapter 84, Laws 1933, New Mexico's Rules Enabling Act provides that the Supreme Court shall promulgate rules of pleading, practice, and procedure for all courts of New Mexico. It provides that "such rules shall not abridge, enlarge or modify the substantive rights of any litigants."¹⁹²

The Federal Rules Enabling Act, 28 U.S. Code § 2071, similarly provides that the United States Supreme Court shall have the power to prescribe rules of procedure and

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ General law: a law that relates to a subject of a general nature, or that affects all the people of the state or all of a particular class. *State v. Atchison T. & S.F. Ry.*, 20 N.M. 562, 151 P. 305 (1915).

¹⁸⁸ Minzner Interview.

¹⁸⁹ *Id.*

¹⁹⁰ Minzner Interview. Actually a number of legislators, including Minzner, wanted to confront the broader issue but could not see how it could be done effectively. For this reason, Minzner's HB20 was crafted to draw upon the judiciary's distinction between substance and procedure and called the right to disqualify a judge a "substantive" right. Minzner believed then and believes now that even if the statute was "procedural" it was within the legislature's authority to enact.

¹⁹¹ Minzner Interview.

¹⁹² The normal process for rulemaking involves a new rule being proposed to (or proposed by) the Supreme Court where it is adopted, modified, or rejected.

evidence. In language almost identical to New Mexico's Act, it continues that "such rules shall not abridge, enlarge or modify any substantive right." However, this entire authority is subject to 28 U.S. Code § 2071 (a) which provides that "Such rules shall be consistent with Acts of Congress" As a result, the Federal Rules of Procedure do not control over a competing federal statute under any circumstances.¹⁹³ To the author's knowledge, the United States Supreme Court has not, in modern times, asserted that it has the inherent power to enact rules without complying with 28 U.S. Code § 2071 and securing the approval of Congress before the rule becomes effective.

The Legislature reacted to *Galvan v. Gesswein*. In the first session of the 37th Legislature (1985) Representative Richard C. "Dick" Minzner, the House Majority Leader, introduced House Bill 20, "An Act Relating to Judicial Disqualification; Creating A Substantive In Certain Cases." HB 20 proposed repealing § 38-3-9 and enacting a new § 38-3-9 in its place.¹⁹⁴ It declared that the Legislature found "that it must create a substantive right of disqualification in certain circumstances and therefore confers a right upon any party . . . to disqualify up to ten percent of the judges in the judicial district, with a majority being counted as a whole, or one judge whichever is greater" ¹⁹⁵ HB20 left the designation of the new judge to the agreement of counselor in such manner as the Supreme Court may decide. Minzner's bill continued the existing § 38-3-9's concept of party alignment as a factor limiting the number of times that disqualification could be exercised stating that in Workman Compensation cases, "the employer and the

¹⁹³ The typical federal rulemaking scheme is that the United States Supreme Court proposes new rules of procedure (and evidence) to Congress which, if such is acceptable, enacts them into law.

¹⁹⁴ House Bill 20, 37th Leg., 1st Sess. (N.M. 1985).

¹⁹⁵ *Id.*

insurance carrier shall be treated as one party.”¹⁹⁶ HB20 made no provision for how the right was to be exercised or how the issue was to be raised. It made no reference to any grounds required, no affidavit to be filed, and had no requirement to allege anything. It simply created a substantive right to disqualify a judge a true peremptory challenge as a matter of right; the method of exercise was left to the Supreme Court.¹⁹⁷

HB20 became the subject of direct negotiations between members of the Legislature and members of the Supreme Court.¹⁹⁸ There were multiple direct meetings between Legislators and Justices.¹⁹⁹ Neither side wanted the impasse that had developed. Neither side wanted it to escalate to a full-blown constitutional crisis. The Legislature perhaps was the more determined not to yield further on the issue.²⁰⁰

Both sides had issues which they felt strongly about. Two members of the Court²⁰¹ were former trial judges who had been the subject of disqualification. They viewed disqualification as personal affronts to their judicial integrity and wanted to do away with it by Court Rule.²⁰² The justices were affronted that the document filed to facilitate disqualification was called an “Affidavit of Bias” or “Affidavit of Prejudice.”²⁰³ Judges in the 1980s were elected in partisan elections, and a judge’s political opponents would use the fact that parties had filed such affidavits against a sitting judge as evidence

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*, Minzner Interview.

¹⁹⁸ Minzner Interview; Sanchez Interview; Interview with Justice Charles Daniels, New Mexico Supreme Court, in Santa Fe, N.M. (Jan. 17, 2014).

¹⁹⁹ Minzner Interview; Sanchez Interview. Sanchez recalls being “summoned” to the Supreme Court Building. Subsequent meetings occurred at other venues.

²⁰⁰ Minzner Interview; Sanchez Interview..

²⁰¹ The Supreme Court at the time of the confrontation and compromise included Chief Justice William Federici, Justice Daniel Sosa, Justice William Riordan, Justice Harry Stowers, and Justice Mary Walters. Justices Riordan and Stowers were former district judges from Bernalillo County.

²⁰² Minzner Interview; Sanchez Interview.

²⁰³ Minzner Interview; Daniels Interview.

that the judge was unfair and that voters should vote against such an unfair judge.²⁰⁴ The justices were also concerned about the Legislature's 1977 amendment to § 38-3-9 which allowed a litigant to disqualify three judges if the case was filed in the Second District (Bernalillo County).²⁰⁵ In general, the Judiciary viewed the entire disqualification issue as a disparaging reflection on its fairness and integrity.²⁰⁶

The Legislators viewed the disqualification issue differently. Several legislators were lawyers.²⁰⁷ Judges were elected in partisan political races in 1985, and lawyers were very politically active in those elections, both influentially and financially. Lawyers viewed disqualification as necessary if opposing counsel was a heavy backer of the trial judge.²⁰⁸ In New Mexico, attorneys practice over large areas, even statewide; lawyers were concerned about getting “home-towned” by being from a different area and trying the case against a local lawyer, before a local judge, and to a local jury.²⁰⁹

Minzner's HB20 was held up in the House Judiciary Committee²¹⁰ while negotiations between the legislators and justices drug on.²¹¹ Once the compromise²¹² was

²⁰⁴ Daniels Interview.

²⁰⁵ Minzner Interview.

²⁰⁶ Minzner Interview; Daniels Interview. Interview with Harold D. “Hal” Stratton, Jr., former member of the New Mexico House of Representatives (1979-1986), Chairman of the House Judiciary Committee (1985-1986), New Mexico Attorney General (1987-1990), telephonic (April 9, 2014). Stratton recalls in 1983 or 1984, Justice William Riordon appeared before the Senate Judiciary Committee and asked for the abolition of the peremptory excusal of judges arguing that such were unnecessary in light of art. IV, §18 of the New Mexico Constitution. The Committee was not moved to action.

²⁰⁷ Minzner Interview; Sanchez Interview; Daniels Interview; Interview with Les Houston, Esq., former member New Mexico Senate (1977-1992), former President Pro Tempory of the Senate, telephonic (April 21, 2014).

²⁰⁸ *Id.*

²⁰⁹ Minzner Interview; Stratton Interview.

²¹⁰ Procedural History, HB20, 37 Leg., 1st Sess. (N.M. 1985); Minzner Interview.

²¹¹ Minzner Interview; Sanchez Interview; Stratton Interview; Interview with Victor Marshall, former member New Mexico Senate (1985-1992), telephonic (April 8, 2014); Interview with John Budagher, former member New Mexico Senate (1980-8), Chairman of the Senate Judiciary Committee (1985-7), telephonic (April 9, 2014).

reached, HB20 was given a “do-not-pass” recommendation by the House Judiciary Committee and a Committee Substitute For House Bill 20 was introduced²¹³ in its place. The language of HB20 as it had been introduced was removed in its entirety from the Substitute Bill. The language of the previously enacted § 38-3-9 was restated in the Substitute HB20, but with some changes. The Substitute Bill retitled the section as “38-3-9, Peremptory Challenge to A District Judge.” In the proposed legislation, all references to “disqualification” were removed. The term did not appear. The requirement that a party file an affidavit alleging that the judge cannot preside impartially was removed.²¹⁴ Finally, Section B which allowed three disqualifications if the case was filed in the

All interviewees agree that the negotiations were civil, courteous, frank and firm. Minzner recalled that he and Sanchez were careful not to broach the subject of judicial appropriations although they acknowledge both sides were very aware that the legislature controlled the purse strings.

Stratton and Marshall recall that Chief Justice William Federici was the main contact for the judiciary.

Marshall related to the author the details of the pivotal point of the negotiations. In 1985, Marshall was a first year senator assigned to the Senate Judiciary Committee. Budagher, also a lawyer, was the chairperson. Marshall said he clearly recalled an incident during the 1985 Legislature. Marshall, Budagher, and Chief Justice Federici (and perhaps one other person) were standing in a hallway on the second floor of the Roundhouse. They were discussing the legislature's desire to continue the statutory right to excuse a judge (HB20). The discussion was very courteous, very frank, and got to the point very quickly. It unfolded along these lines:

Budagher: The legislature likes excusal and wants to keep it as a statutory right.

Federici: The Supreme Court has decided to do away with it.

Budagher: We don't agree and want to keep it.

Federici: We have the power to do away with it and we are going to.

Budagher: We are having the Senate Finance Committee hearings on your budget next week. We will discuss it again then.

Marshall said that at this point, Federici became visibly pale. After a long pause . . .

Federici: Maybe we can work this out.

Marshall said there was more discussion which concluded . . .

Federici: We can avoid a confrontation between the judiciary and the legislation. We'll pass a rule that is just like your statute.

That is what happened.

Budagher stated that while he did not clearly recall this particular meeting, “that was exactly how it would have happened.” He said that the only point of true leverage that the legislature has is the power to appropriate or not appropriate. He said that if that leverage is not timely applied it is lost and the issue of the peremptory excusal of a judge was very important to him and other lawyers/legislators. While he did not clearly recall this particular incident, he had said those exact words on other occasions.

²¹² Sanchez Interview; Stratton Interview; Minzner Interview.

²¹³ House Judiciary Committee Substitute for House Bill 20, 37th Leg., 1st Sess. (N.M. 1985).

²¹⁴ *Id.*

Second Judicial District was removed.²¹⁵ The section included new language that a party “. . . shall have the right to exercise a peremptory challenge to the district judge . . .” before whom the action is to tried.²¹⁶ It provided “After the exercise of a peremptory challenge” the judge shall proceed no further.²¹⁷ It permitted each party to “excuse” one district judge.²¹⁸ Almost unnoticed, it carried forward the 1977 amendment that treated an employer and the employer’s workman’s compensation carrier as one party for purposes of the peremptory challenge of a judge.²¹⁹ It also provided that “the right created by this section is in addition to any arising under Article 6 of the Constitution of New Mexico.”²²⁰ In other words, the section was intended to create a new substantive right separate and apart from the Constitution.²²¹ The section is silent as to how or when the peremptory challenge is to be raised or exercised.²²²

The Committee Substitute HB20 received a “do-pass” recommendation by the House Judiciary Committee and was passed without amendment by the entire House 61 to 1.²²³ In the Senate, the Substitute HB20 was given a do pass recommendation by the Senate Judiciary Committee. It was passed without amendment by the Senate 36 to 0.²²⁴

Substitute HB20 contained an Emergency Clause stating the act would take effect immediately being necessary for the public peace, health, and safety.²²⁵ Governor Toney

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*; Minzner Interview; Sanchez Interview.

²²² *Id.*; Minzner Interview.

²²³ Procedural History, HJCS/HB20, 37th Leg., 1st Sess. (N.M. 1985).

²²⁴ *Id.*

²²⁵ HJCS/HB20, 37th Leg., 1st Sess. (N.M. 1985).

Anaya signed the bill on April 1, 1985, and the bill took effect that day.²²⁶ The Legislature had done its part.²²⁷

It is beyond coincidence that on that same day, April 1, 1985, the Supreme Court acted by promulgating new rules of both criminal and civil procedure to effectuate § 38-3-9 as amended.²²⁸ Like amended § 38-3-9, the terms “disqualified” or “disqualification” appeared nowhere in the amended Rules 88 and 88.1²²⁹ (civil) and Rule 34.1²³⁰ (criminal). The amended rules follow § 38-3-9’s use of terms such as “excuse” and “peremptory election to excuse.” The Judiciary specifically recognized that a party had a “statutory right to excuse the district judge before whom the case was pending.”²³¹ Rule 88 as amended and new Rule 34.2 deleted the former section B relating to multi-judge districts.²³² Amended Rules 88.1 and 34.1 set forth the procedure for a party to use to excuse a judge. All a party had to do was to timely file a “peremptory election to excuse” with the clerk. Deleted was the necessity of filing an affidavit of disqualification, alleging grounds and facts in support thereof or stating any reason or cause whatsoever. The exercise of the statutory right to excuse the trial judge was not without limits. No judge could be excused from hearing preliminary matters prior to trial.²³³ The true peremptory challenge to the trial judge had come to fruition in New Mexico.

The procedure to be used to excuse the trial judge in Rule 88.1 and Rule 34.1 are virtually identical. Each party plaintiff had to file its peremptory election within 10 days

²²⁶ Ch. 91, Laws 1985.

²²⁷ Minzner Interview; Sanchez Interview.

²²⁸ Minzner Interview; Sanchez Interview; Daniels Interview.

²²⁹ N.M.R.Civ.P. (1985 Cum Supp.).

²³⁰ N.M.R.Crim.P. (1985 Cum. Supp.).

²³¹ N.M.R.Civ. P.88.1 ¶ b, c (1985 Repl. Supp.); N.M.Crim. P.34.1 ¶ c, d (1985 Cum. Supp.)

²³² N.M.R.Civ. P.88 (1985 Cum. Supp.); N.M.R.Crim. P.34.2 (1985 Cum. Supp.).

²³³ N.M.R.Civ. P.88.1 (1985 Cum. Supp.); N.M.R.Crim. P.34.1 ¶ b (1985 Cum. Supp.)

of the complaint being filed.²³⁴ A defendant (or any other party) could timely exercise its statutory right by filing a peremptory election within 10 days after entering an appearance or filing a pleading.²³⁵ In an interesting twist, if any party exercised an excusal, then any other party who had not already exercised an excusal had ten days to exercise a “provisional” excusal whereby the party could name and excuse any other judge who might be assigned to try the case.²³⁶

The amended Rules 88.1 and 34.1 carried forward language providing that a judge shall recuse from any action in which his impartiality might reasonably be questioned under the New Mexico Constitution or Code of Judicial Conduct.²³⁷

The Judiciary had completed the agreement.²³⁸

After the Compromise: The Era of Good Feeling and the Compromise Holds

The New Mexico Legislature has not revisited the statutory right to have a different judge assigned since amended § 38-3-9 was passed in 1985.²³⁹ The Judiciary has revised the procedures by which the statutory right to excuse a judge is exercised several times since the Compromise of 1985.²⁴⁰ Addressing the procedure used in civil cases more often than criminal cases, the Court has actually made the excusal of judges easier and more meaningful for New Mexicans.

²³⁴ N.M.R.Civ. P.88.1 (1985 Cum. Supp.); N.M.R.Civ. P.34.1 ¶ c (1985 Cum. Supp.).

²³⁵ *Id.*

²³⁶ *Id.* ¶ c; *Id.* ¶ d

²³⁷ *Id.* ¶ d; *Id.* ¶ e.

²³⁸ Minzner Interview; Sanchez Interview; Stratton Interview; Budagher Interview; Marshall Interview.

²³⁹ Only Chapter 77, Laws 1889 has endured unamended longer (1989-1929) although the constitutional right to disqualification of a judge was created when New Mexico’s Constitution was adopted in 1911.

²⁴⁰ Rule 1-088 was amended in 2000 and 2009; Rule 1-088.1 was amended in 1988, 1995, 2007, 2008, and 2013; Rule 5-106 was amended in 1989, 1990, 1984, and 2008.

By 1988, Civil Rule 88.1 had become Rule 1-088.1.²⁴¹ The Supreme Court amended the rule and broadened its application. The amendment eliminated the prohibition against excusing a judge from hearing preliminary matters prior to trial.²⁴² The amendment made it clear that the excusal could be made effective as early in the action as a party desired, before the judge may have ruled on important pretrial matters which could be termed as “preliminary matters.”²⁴³

The 1988 amendment eliminated the practice of filing provisional notices of election to excuse in cases where the initially designated judge was excused and although a successor judge had not been assigned, the remaining parties could provisionally excuse other judges who “could” be assigned.²⁴⁴ The 1988 amendment to Rule 1-088.1 allowed litigants to exercise their right of excusal more intelligently and put plaintiffs and defendants on a more equal footing. The amended rule said that if the initially assigned judge was excused, the remaining parties could wait to see which judge was actually assigned to hear the case. Such parties then had 10 days from the clerk’s notice of reassignment of the case to exercise their right to excuse the new judge. If an excusal occurred, then the clerk would again reassign the case to yet another judge who was subject to excuse by the remaining parties.²⁴⁵ As with prior rules, no party could excuse more than one judge pursuant to § 38-3-9.²⁴⁶

²⁴¹ 1-088.1, NMRA 1988.

²⁴² *Id.* ¶ a.

²⁴³ *Id.*

²⁴⁴ *Id.* ¶ B. This procedure had existed in prior Rule 88.1 before and after the compromise. It required the parties and their lawyers who had not exercised their peremptory challenge to essentially “shoot blindly” excusing judges who could possibly become assigned to the case.

²⁴⁵ 1-088 ¶ B & C, NMRA 1985.

²⁴⁶ 1-088 ¶ D, NMRA 1985.

One year later, in 1989, the Supreme Court addressed the provisions of Criminal Rules 5-106.²⁴⁷ The amendment eliminated language which prohibited excusing a judge from hearing preliminary matters prior to trial.²⁴⁸ It provided that no judge could be excused from setting conditions of release but was otherwise silent about how early in the case could a party excuse a judge.²⁴⁹ The amendment, like its amended civil counterpart,²⁵⁰ did away with practice of filing provisional elections to excuse possible successor judges if the initially assigned judge was excused. In doing so, the amended rules established new “trigger” dates for the exercise of the right thus putting the parties on more equal footing. The right had to be exercised by either side within 10 days of arraignment (or notice of the waiver thereof).²⁵¹ If the initial judge was excused, the remaining parties had 10 days from the notice of reassignment to peremptorily excuse the successor judge.²⁵² The 1989 amendment made Rule 5-106 easier to exercise in that it eliminated earlier language which forbids an assistant district attorney or an assistant attorney general from filing an election to excuse.²⁵³ The 1989 amendment also added provisions dealing with a judge’s Disability During Trial²⁵⁴ and Disability After Verdict or Finding of Guilt.²⁵⁵ Although peremptory excusal is not discussed in the text of those paragraphs, it appears clear from the plain reading of the rest of amended Rule 5-106 that

²⁴⁷ 5-106, NMRA 1989. Rule 5-106 was formerly N.M.R.Crim. P.34.1 (1985 Cum. Supp.).

²⁴⁸ 5-106 ¶ B, NMRA 1989.

²⁴⁹ *Id.*

²⁵⁰ 1-088.1, NMRA 1985.

²⁵¹ 5-106 ¶ C, NMRA 1989.

²⁵² *Id.* Again, each party that elected to excuse a judge was excusing the judge who was actually assigned to the case, not who might be assigned.

²⁵³ 5-106 ¶ A, NMRA 1989.

²⁵⁴ 5-106 ¶ F, NMRA 1989.

²⁵⁵ 5-106 ¶ G, NMRA 1989.

upon the new judge's assignment to the case, that any party who has not previously exercised a peremptory excusal in the case may, in a timely manner, do so.²⁵⁶

The Supreme Court readdressed Rule 5-106 in 1990 when it left all of the text of 5-106 unchanged except for paragraph B to make clear in which circumstances a judge could not be excused pursuant to § 38-3-9.²⁵⁷ The 1990 amendment provided that a judge could not be excused from conducting an arraignment or first appearance or setting initial conditions of release.²⁵⁸

The Supreme Court next revisited Rule 5-106 in 1994. It continued to ease the procedural constraints on a party's right to exercise the statutory excusal of a judge by expanding the definition of a "party" to mean "a defendant, the state or an attorney representing the defendant or the state."²⁵⁹

The New Mexico Supreme Court's fidelity to the compromise was tested in 1992 in *JMB Retail Properties Company v. Eastburn*.²⁶⁰ In *JMB*, the parties stipulated to an extension of time for JMB to answer. District Judge Benjamin Eastburn entered an agreed order granting the extension. Ten days later, JMB filed a peremptory election to excuse Judge Eastburn. Judge Eastburn entered an order denying the excusal. JMB petitioned the Supreme Court for a writ of superintending control, prohibition or mandamus requiring Judge Eastburn to recognize the excusal.²⁶¹

²⁵⁶ 5-106, NMRA 1989.

²⁵⁷ 5-106, NMRA 1989.

²⁵⁸ *Id.*

²⁵⁹ 5-106 ¶ A, NMRA 1994.

²⁶⁰ 114 N.M.115, 835 P.2d 831 (1992).

²⁶¹ *Id.* at 117, ____.

In denying JMB's motion to recognize its peremptory election to excuse, Judge Eastburn declared § 38-3-9 and Rule 1-088.1 unconstitutional.²⁶² Eastburn found that "there is nothing more necessary and incidental to the functions of the District Court of New Mexico than its internal assignment of cases to its judges."²⁶³ Because Eastburn considered judge assignment an essential judicial power, he found that § 38-3-9 violated the New Mexico Constitution²⁶⁴ and held § 38-3-9 to be unconstitutional.²⁶⁵

Judge Eastburn further found that Article VI of the Constitution makes no specific grant of authority to the Supreme Court to promulgate Rule 1-088.1 which he characterized as establishing peremptory challenges. Therefore, Rule 1-088.1 was unconstitutional also.²⁶⁶ The constitutional issues were fully briefed by the parties and *amici curiae*.²⁶⁷

The Supreme Court before the Compromise could have easily used *Gesswein* as authority to constitutionally finish off § 38-3-9. Instead the Supreme Court cited *Gesswein*, in *dicta*, to legitimize the Compromise.²⁶⁸ The Supreme Court announced its decision from the bench. It referenced JMB's argument that the Supreme Court has consistently found the statutory peremptory right to excuse a judge to be constitutional

²⁶² *Id.* at 116, ____.

²⁶³ *Id.*

²⁶⁴ N.M. Const. art III § 1 (the "Separation of Powers" Clause).

²⁶⁵ *JMB* at 116, ____.

²⁶⁶ *Id.*

²⁶⁷ *Amici* included both the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association. Both lawyer groups argued that both § 38-3-9 and Rule 1-088.1 were constitutional, urging that statutes affecting the essential powers of the judiciary are unconstitutional only to the extent that they conflict with a validly enacted judicial rule. *JMB* at 117, _____. According to the Hon. Carl J. Butkus who authored the Defense Lawyer's *amicus* brief, this was the first time that both N.M. Trial Lawyers and the N.M. Defense Lawyers endorsed and joined in each other's brief. Both groups opposed Judge Eastburn's position.

²⁶⁸ *JMB* at 117, ____.

subject to the court's ability to promulgate appropriate procedure for its excise.²⁶⁹ Having set forth in detail both parties' positions on the constitutional issues raised by Judge Eastburn and *JMB*, the Court declared it was "not constrained to reach those issues" and decided the matter on precedent from the 1930s²⁷⁰ which dealt with the invocation of a ruling by the judge.²⁷¹ The Court held that the trial court's entry of the stipulation to extend time was a discretionary act and that New Mexico law was well settled that a judge cannot be challenged under § 38-3-9 after a party has invoked the discretion of the court.²⁷²

It was no accident that the *JMB* Court devoted half of the opinion to setting forth the constitutional issues that Judge Eastburn raised and then answering them with (and tacitly adopting) the countervailing arguments of *JMB* and the *amici* lawyer groups. The Court made it clear that in not deciding the case on the constitutional grounds urged by Judge Eastburn's position, the Court was withdrawing from the brinkmanship of 1984 and articulating (*in dicta*) how the Judiciary could coexist with the Legislature (and the lawyers).²⁷³ The Judiciary had moved in the direction of *Bliss v. Greenwood*.²⁷⁴

After *JMB*, the Supreme Court amended Rule 1-088.1 to reflect its decision in the case. In 1995, it added that a party may not excuse a judge after the party had requested a discretionary act be performed other than an order of free process or a determination of indigence.²⁷⁵ It also followed its trend favoring ease of use by allowing a party or party's

²⁶⁹ *Id.*

²⁷⁰ *State ex rel. Shufeldt v. Armijo*, 39 N.M. 502, 506, 50 P.2d 852, ____ (1935).

²⁷¹ *JMB* at 118, ____.

²⁷² *Id.*

²⁷³ *JMB* at 116-7, ____.

²⁷⁴ *See supra* n. 119-121 and accompanying text.

²⁷⁵ 1-088.1 ¶ A, NMRA 1995.

attorney to sign the peremptory election to excuse.²⁷⁶ In 1997, the Supreme Court further clarified the matter by eliminating the requirement that the requested act be a “discretionary act.” The language was changed to “any act.”²⁷⁷

The post-compromise Supreme Court’s most ringing ratification of a litigant’s statutory right to change the judge hearing a case came in *The Matter of Benjamin Eastburn, District Judge*.²⁷⁸ It had been eleven years since the compromise and the entire membership of the Court had turned over since 1985.²⁷⁹ While the Supreme Court had embraced the compromise and the creation of a true peremptory challenge forcing a change of judge, there was much angst (and outright resistance) among the trial bench.²⁸⁰

In re Eastburn was a disciplinary action.²⁸¹ The Supreme Court, while acknowledging Judge Eastburn’s vehement (and colorful) denunciation of the New Mexico judicial system,²⁸² found the peremptory disqualification of judges to be to the sole focus of his concern.²⁸³

²⁷⁶ 1-088.1 ¶ B(1), NMRA 1995.

²⁷⁷ 1-088.1 ¶ A, NMRA 1997.

²⁷⁸ *In the Matter of Hon. Benjamin S. Eastburn, District Judge, Eleventh Judicial District Court, State of New Mexico*, 121 N.M. 531, 914 P.2d 1028 (1996).

²⁷⁹ *See supra* n. 201; the Supreme Court that decided *In re Eastburn* included Chief Justice Joseph Baca, Justice Richard Ransom, Justice Gene Francini, Justice Stanley Frost, and Justice Pamela Minzner. Justices Francini, Frost, and Chief Justice Baca were former District Court Judges.

²⁸⁰ *See generally In re Eastburn*; The author has attended each annual Judicial Conclave since 1997. The existence and exercise of peremptory challenges has been the topic of lively and intense discussion and protest at each of them. It continues to be a very current topic of debate.

²⁸¹ Whereby Judge Benjamin Eastburn was suspended from the bench for one year (11 months probated) for his continued refusal to obey the Supreme Court’s Writ of Mandamus ordering him to preside over cases assigned to him after the peremptory challenge of another judge. This was just a part of a long running battle between Judge Eastburn and the New Mexico Appellate Courts, which eventually led to Judge Eastburn’s removal from the bench.

²⁸² *In re Eastburn* at 534-6 ____.

²⁸³ *Id.* at 532, ____.

The Supreme Court began its analysis with a look at law of peremptory excusal.²⁸⁴ Citing *Hannah v. Armijo* as authority, the Supreme Court declared “beginning with the first territorial legislature in 1851, the laws of New Mexico have provided for the peremptory disqualification of the district judge before whom an action or proceeding is to be tried or heard . . . Disqualification statutes have been peremptory in nature in that the legislature has no allegation or proof of facts to support disqualification.”²⁸⁵ As in *JMB*, the Supreme Court brushed aside Judge Eastburn’s separation of powers argument that § 38-3-9 was unconstitutional²⁸⁶ and entered its decision on the contempt issue. The Supreme Court held him in direct contempt for refusing to obey the Court’s writ.²⁸⁷ By doing so, in a case involving compliance with §38-3-9, the Supreme Court sent a clear message to the trial bench that it intended to honor the compromise the Judiciary had reached with the Legislature. Trial judges were expected to fall in line.²⁸⁸

The Supreme Court made its position even clearer when it amended Rule 1-088.1 in 2007. It added new language to provide that after the filing of a timely and correct exercise of a peremptory challenge, that the district judge shall proceed no further.²⁸⁹

In 2008, both Rule 1-088.1²⁹⁰ and Rule 5-106²⁹¹ were again amended to provide procedural guidance in the “mass reassignment” of cases.²⁹²

²⁸⁴ *Id.* at 533, ____.

²⁸⁵ *Id.*; As prior sections of this Article indicate, this statement is not factually accurate. It does, however, clearly show the Supreme Court’s acceptance and approval of the concept and the statutory right to exercise a peremptory excusal of a judge.

²⁸⁶ *Citing without comment Hannah v. Armijo and JMB Retail Properties Co v. Eastburn.*

²⁸⁷ *Id.* at 538-9, _____. The author observes that Judge Eastburn’s commentary expressing his view of the judiciary probably did not help his position.

²⁸⁸ *In re Eastburn.*

²⁸⁹ 1-088.1 ¶ D, NMRA 2007.

²⁹⁰ 1-088.1 ¶ B & D, NMRA 2008.

²⁹¹ 5-106 ¶ C & E, NMRA 2008.

Rule 1-088.1 went further. It expanded those who could not excuse a judge to include “a party who has attended a hearing.”²⁹³ The 2008 amendment of Rule 1-088.1 also provided that in actions seeking to enforce, set aside or modify a judgment or order and the case has been reassigned to another judge after the entry of the order at issue then either party may file a peremptory excusal to the reassigned judge.²⁹⁴

Other Jurisdictions

The ability of a litigant as a matter of right to change the judge of a case is a minority position among the states.²⁹⁵ At least 18 states, including New Mexico, all predominately located in the western United States with a few in the mid-west recognize this right²⁹⁶ through either legislative enactment or by court rule. Along with New Mexico, these include Alaska,²⁹⁷ Arizona,²⁹⁸ California,²⁹⁹ Idaho,³⁰⁰ Illinois,³⁰¹ Indiana,³⁰²

²⁹² This was defined as being the contemporaneous reassignment of 100 or more pending cases. The number of district judges had increased over time and many judicial districts were developing or had developed specialized divisions of court within the district. Many judges, particularly in the Second Judicial District, were periodically transferred from one division to another. Their old caseload stayed with their old division to be reassigned to a successor judge and they assumed the existing caseload of the judge they had replaced. Both Rules were amended to provide procedure to provide notice to the parties of the mass reassignment by publishing notice of the reassignment in the Bar Bulletin for four consecutive weeks. A party who had not previously exercised a peremptory excusal, and wished to do so, had to file its excusal within 10 days of last date of publication.

²⁹³ 1-088.1, NMRA 2008.

²⁹⁴ 1-088.1 ¶ C(3), NMRA 2008. This must be done by the movant within 10 days of the filing of the motion to reopen or by the nonmovant within 10 days after service of the motion. Although the added section does not address the subject, it is implicit that the right to excuse a judge in a reopened case would be limited to those parties who have not previously exercised a peremptory excusal earlier in the case,

²⁹⁵ American Bar Association, Standing Committee on Judicial Independence, Report of the Judicial Disqualification Project, 11-12, Oct. 8, 2010.

²⁹⁶ *Id.*

²⁹⁷ Alaska Stat. § 22.20.022; Alaska R.Civ.P.42(c); Alaska P.Crim.P. 25(d).

²⁹⁸ Ariz. Rev. Stat. §12-411; Ariz. R.Civ.P. 42(f); Ariz. R.Crim.P.10.2.

²⁹⁹ Cal.Civ.Proc. Code § 170.6(a).

³⁰⁰ Idaho R.Civ.P. 40(d)1; Idaho Crim.R. 25(a).

³⁰¹ 735 Ill. Comp. Stat. 5/2-1001 (civil); 725 Ill. Comp. Stat. 5/114-5 (Criminal).

³⁰² Ind. R. Trial P. 75(B) (Civil); Ind. R. Crim.P. 12(B).

Minnesota,³⁰³ Missouri,³⁰⁴ Montana,³⁰⁵ Nevada,³⁰⁶ North Dakota,³⁰⁷ Oregon,³⁰⁸ South Dakota,³⁰⁹ Texas,³¹⁰ Washington,³¹¹ Wisconsin,³¹² and Wyoming.³¹³ None of these states require that the alleged grounds for change of judge, if even required to be stated, must be proven or even supported by fact.³¹⁴

The procedure by which the right to change a judge is exercised varies among such states, but generally falls into two groups. One group requires the litigant to file what might generally be called an allegation or affidavit of bias or prejudice stating that the party or attorney believes that the judge is biased or prejudiced against the party or attorney and a fair trial cannot be had. Other than the general allegation of bias, no specific grounds need be stated, no specific facts need be stated in support, and no hearing is provided for. Once the document is timely filed, the judge can proceed no further and a new judge will be assigned. This is the procedure in California, Illinois, Montana, South Dakota, and Washington.

In the other states, a party or attorney simply files a document or pleading without stating any cause or belief or reason called a Notice to Change Judge (Alaska and

³⁰³ Minn.R.Civ.P. 63.03; Minn.R.Crim.P. 26.03(24)(4).

³⁰⁴ Mo. Sup.Ct.R. 51.05 (Civil); Mo.Sup. Cr.R. 32.07 (Criminal).

³⁰⁵ Mont. Code Ann. § 3-1-804. (Civil & Criminal).

³⁰⁶ Nev. Sup.Ct. R. 48.1 (Civil).

³⁰⁷ N.D. Cent. Code §29-15-21. (Civil & Criminal).

³⁰⁸ Or. Rev. Stat. §14.2250; Or. Rev. Stat. § 14.260; Or. Rev. Stat. §14.270. (Civil & Criminal).

³⁰⁹ S.D. Stat. Ch. 15-21. (Civil & Criminal).

³¹⁰ Tex. Gov't Code §74.053. (Civil).

³¹¹ Wash. Rev. Code Ann. 4.12.050; C.R.R. 8.9 (Civil & Criminal).

³¹² Wis. Stat. Ann. §801.88 (Civil); Wis. Stat. Ann. §971.20 (Criminal).

³¹³ Wyo.R.Civ.P. 40.1(b) (Civil). (Criminal Rule (Wyo.R.Crim.P.21.1) has been suspended by order of the Wyo. S. Ct. (Dec. 4, 2012).

³¹⁴ The author has not included Utah among this group. Utah has a procedure in both civil and criminal cases which allow a change of judge “without cause” upon the unanimous agreement of all parties. The notice of change of judge must be signed by all parties and state that no other persons are expected to be named as parties. This is not available in actions with only one party. Because one party can decline to sign the notice and thereby defeat the change of judge, the ABA Report (*supra* n. 295) does not consider this to be a right of peremptory excusal. Utah R.Civ.P.53A; Utah R.Crim. P.2d A.

Arizona), Motion to Disqualify a Judge (Idaho and South Dakota), Motion for Substitution of Judge (Wisconsin), Application for Change of Judge (Indiana and Missouri), Notice to Remove Judge (Minnesota), Demand for Change of Judge (North Dakota), Peremptory Challenge to Judge (Nevada, New Mexico, and Wyoming), or Objection to Judge (Texas).

Some states that allow the peremptory challenge of judges afford that right to each individual party or their attorney.³¹⁵ They limit its exercise to one challenge per party per case³¹⁶ although Oregon affords a party to exercise two peremptory challenges per case.³¹⁷

Most states take a more restrictive view of the number of peremptory challenges allowed to be exercised in a case. Missouri, in civil actions, divides the parties into classes (*e.g.* plaintiffs, defendants, third party plaintiffs, third party defendants, interveners) and affords one change of judge per class.³¹⁸ Idaho, Montana, South Dakota, Texas, and Wisconsin look solely at the adversity or alignment of the interests of parties to determine if multiple litigants are to be treated as one party for peremptory challenge purposes. Idaho affords a “motion to disqualify” to each party.³¹⁹ In cases with multiple plaintiffs or multiple defendants, the trial court will examine whether such co-parties have sufficient interests in common to require them to join in the motion or whether their

³¹⁵ This group includes Illinois (*supra* n. 301); Indiana (*supra* n. 302), Minnesota (*supra* n. 303), North Dakota (*supra* n. 307), Washington (*supra* n. 311), Wyoming (*supra* n. 313). This group also includes New Mexico.

³¹⁶ See *supra* n. 297-307, 309-313.

³¹⁷ See *supra* n. 308.

³¹⁸ Mo. Sup. Ct.R. 51/05(d) (Civil).

³¹⁹ Idaho R.Civ.P. 4(d)(1).

interests are so adverse to entitle each to file their own separate motion.³²⁰ Co-defendants in criminal cases are handled in the same manner.³²¹ Montana affords “each adverse party” a substitution.³²² South Dakota affords one peremptory challenge to “parties who are united in interest” and requires such parties to “unite” in the filing of the challenge. A filing by one is deemed to be a filing by all.³²³ Texas allows each party one objection. A “party” includes multiple parties who are “aligned” as determined by the presiding judge.³²⁴ Wisconsin considers parties united in interest and pleading to be a single party but does not allow to consent to a peremptory challenge “by one of such party.”³²⁵

The remaining states which allow peremptory excusal of judges look at the parties to an action as being on a “side” and use that as a starting point to allow a peremptory challenge for each “side.” Alaska treats two or more parties aligned on the same side of an action as a single party which is allowed one challenge. In civil cases, the presiding judge may allow additional challenges to parties on that “side” that are not so aligned.³²⁶ The same is true in criminal cases but the prosecution gets the same number of challenges as all the defendants combined.³²⁷

³²⁰ Id. ¶ (d)(1)(c).

³²¹ Idaho R.Crim. P. 25(a)(3).

³²² Mont. Code Ann. §3-1-804(1).

³²³ S.D. Stat. Ch. 15-12-23.

³²⁴ Tex. Gov’t. Code §74.053(g). In 1975, the Texas Legislature attempted to enact a much broader peremptory challenge to a judge which was exercised by filing an affidavit of bias and/or prejudice. *See Tex. H.B. 970, 64th Leg. (1975)*. The Texas Governor vetoed the bill noting that “the establishment of disqualification by merely filing an affidavit under this bill with no type of hearing or judicial determination, is questionable under the American concept of due process. *See Proclamation 42-1553, June 21, 1975, see generally* Baron, Roger, *A Proposal For the Use of a Judicial Peremptory Challenge in Texas*, 40 Baylor L.Rev. 49 (1988).

³²⁵ Wis. Stat. Ann § 801.58(3).

³²⁶ Alaska R.Civ.Pro. 42(c)(1).

³²⁷ Alaska R.Crim.Pro 25(d)(1).

Arizona treats a civil action as having only two sides and each side is entitled to one change of judge.³²⁸ If the parties are adverse, the presiding judge has discretion to allow additional excusals provided however that each side shall have the same number of challenges.³²⁹ The same is true in criminal actions but there is no requirement that both sides have an equal number of challenges.³³⁰

California's Civil Procedure Code limits a party (or attorney) to one peremptory challenge per action and in actions involving multiple plaintiffs and/or defendants, limits challenges to one from each side.³³¹ However, California case law has found that while one motion (peremptory challenge) for "each" side is permitted, where co-plaintiffs or co-defendants have substantially adverse interests, it is proper to conclude that there are more than two sides to the case.³³² This reasoning has also been applied to criminal prosecutions.³³³

Perhaps the most restrictive limits on the use of peremptory challenges to change are found in Nevada.³³⁴ Each action, whether single or consolidated, is treated as having only two sides. If one of two or more parties on one side of an action files a peremptory challenge, no other party on that side may file a separate challenge.³³⁵ There is no provision which allows that trial judge to examine adversity among co-plaintiffs or co-

³²⁸ Ariz. R.Civ.P. 42(f)(1)(A).

³²⁹ *Id.*

³³⁰ Ariz. R.Crim.P. 10.2(a).

³³¹ Cal. Civ. Proc. Code § 170.6(a)(4).

³³² *Johnson v. Superior Court In & For Los Angeles County*, 50 Cal.2d 693, 700, ___ P.2d ___, ___ (1958).

³³³ *Pappa v. Superior Court of Los Angeles County*, 54 Cal.2d 350, 353-4, ___ P.2d ___, ___ (1960).

³³⁴ Nev. Sup.Ct.R. 48.1.

³³⁵ *Id.*

defendants and exercise discretion to afford additional peremptory challenges. No case law has “amended” the rule to provide for such as is in the case in California.³³⁶

The only theme common to the various state procedures is that the matter be raised in good faith and raised in a timely manner (which varies greatly between the states). South Dakota even requires that before an Affidavit to Disqualify can be filed, the party’s attorney must go to the judge informally and ask the judge to recuse voluntarily from the case. Most of those states which have a right to change a judge without cause apply the right in both civil and criminal cases but Indiana, Nevada, Texas, and Wyoming recognize the right in civil cases only.

Quality Automotive Center, LLC v. Arrieta

In August, 2013, the Supreme Court announced its opinion in *Quality Automotive Center, LLC v. Arrieta*³³⁷ which marked a change of course of the Court regarding § 38-3-9 and Rule 1-088.1. Since the Compromise, the Court had amended Rule 1-088.1 to make the procedure to peremptorily excuse a judge easier and more intelligently exercised.³³⁸ The Court had strongly emphasized that once a peremptory excusal was filed against a judge that judge shall proceed no further.³³⁹ *Arrieta* retreated from that bright line interpretation and held that a district judge has the authority to determine whether a peremptory challenge is both timely and correct.³⁴⁰ In making that

³³⁶ See *supra* n. 332 and 333 and accompanying text.

³³⁷ 2013-NMSC-041.

³³⁸ See generally *supra* n. 247-266 & 282-284 and accompanying text.

³³⁹ See generally *supra* n. 268-279 & accompanying text.

³⁴⁰ *Quality Automotive Center, LLC v. Arrieta*, 2013-NMSC-041, ¶ 1.

determination, *Arrieta* held that a judge may examine whether the challenging litigant is entitled to assert its own peremptory excusal under Rule 1.088.1.³⁴¹

If the Supreme Court was waiting for a case which fulfilled Chief Justice Watson's prophecy in *Hannah v. Armijo*,³⁴² the fact pattern in *Arrieta* rose to the occasion. *Arrieta* was a wrongful death action filed against Quality Tire & Service, which, by virtue of a sales receipt, was claimed to have negligently installed oversized tires and wheels on a vehicle which led to a fatal car crash. The case was assigned to District Judge Manuel Arrieta.³⁴³ The defendants, Quality Tire & Service, its claimed owners Arnoldo and Laura Chavez and Oscar Chavez (their nephew) were all represented by attorney Raul Carrillo. Carrillo filed a motion to dismiss on behalf of all defendants. It was heard by Judge Arrieta as were discovery disputes. After much discovery maneuvering which mainly centered around a shell game of "who is the proper defendant?" the plaintiff was allowed to amend its complaint to name Quality Automotive Center, LLC as a defendant. Quality Automotive Center, LLC was solely owned and operated by Oscar Chavez, one of the original named defendants. It had been formed by attorney Carrillo for Oscar Chavez after the original complaint had been filed. Attorney Carrillo then entered his appearance on behalf of Quality Automotive Center, LLC as well and filed a Notice of Peremptory Excusal on its behalf to remove Judge Arrieta from the case pursuant to Rule 1-088.1.³⁴⁴ At a subsequent hearing before Judge Arrieta, the propriety of the excusal filed by Carrillo on behalf of Quality Automotive Center, LLC was considered. The Judge noted the history of the case, Carrillo's

³⁴¹ *Id.*

³⁴² 38 N.M. 73, 83, 28 P.2d 511, ____ (1933) (Watson, C.J., concurring).

³⁴³ *Arrieta*, ¶ 5.

³⁴⁴ *Id.* ¶ 2-11.

representation of the Chavezes and the various business entities, and that the Chavezes had appeared in court and asked for a discretionary ruling from Judge Arrieta. Attorney Carrillo, on behalf of Quality Automotive Center, LLC, stated that it had a statutory right to the excusal without cause.³⁴⁵

Judge Arrieta questioned whether defendant Oscar Chavez, who was represented by the Carrillo Law Firm, (who had attended hearings and who had created a new business entity subsequent to being served with summons) could now exercise a peremptory challenge to the judge through his newly formed LLC? Attorney Carrillo responded that Oscar Chavez and the LLC were two distinct and separate entities and that Oscar Chavez's failure to file a peremptory challenge did not affect the LLC's right to do so.³⁴⁶ The Plaintiff argued that Oscar Chavez and the LLC were one and the same under a theory of derivative liability or that they should be treated as having a single interest just as § 38-3-9 provides that in an action brought under the Workman's Compensation Act, the employer and its insurance carrier are treated as one party when excusing a judge.³⁴⁷

Judge Arrieta requested supplemental briefing on the issue. Before he could issue a ruling, Quality Automotive Center, LLC petitioned the Supreme Court for an emergency writ of mandamus to force Judge Arrieta to recuse himself based on its statutory right to peremptory excusal.³⁴⁸

Quality Automotive Center, LLC argued that the writ should issue to forbid Judge Arrieta from presiding further in the case because he had exceeded his statutory authority by attempting to determine the propriety of the peremptory excusal Quality Automotive

³⁴⁵ *Id.* ¶ 12-14.

³⁴⁶ *Id.* ¶ 14.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

Center, LLC had filed.³⁴⁹ The Supreme Court refused to exercise mandamus determining that Judge Arrieta, under Rule 1-088.1 had the authority to decide whether the peremptory challenge was “both timely and correct.”³⁵⁰ The Supreme Court opined that the determination would necessarily depend upon whether Quality Automotive Center, LLC had sufficient diversity of interest from the other defendants, its sole owner Oscar Chavez in particular, thereby entitling it to exercise its own separate peremptory challenge by Judge Arrieta.³⁵¹

Quality Automotive Center, LLC argued to the Supreme Court that since it was a separate and distinct from the other defendants, and as a separately named party in the lawsuit, it had a right under § 38-3-9 to exercise a peremptory challenge to Judge Arrieta.³⁵² It noted that the statute granted “each party to an action” the right of one peremptory challenge to remove a district judge.³⁵³ Therefore, it argued, after the peremptory challenge is filed, both statute and rule state that the “Judge shall proceed no further.” Quality Automotive Center, LLC concluded that Judge Arrieta was without jurisdiction to do anything except recuse from the case.³⁵⁴

The Supreme Court rejected this argument by noting that § 38-3-9 and Rule 1-088.1 was not to be as broadly read as Quality Automotive Service, LLC asserted.³⁵⁵ It opined that the prohibition against further action by a judge was premised on “. . . the filing of a timely and correct exercise of a peremptory challenge . . .” The Supreme

³⁴⁹ *Id.* ¶ 18.

³⁵⁰ *Id.* ¶ 24.

³⁵¹ *Id.* ¶ 24-26.

³⁵² *Id.* ¶ 22.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* ¶ 23.

Court reasoned that the Rule's use of the term "timely and correct" authorized the judge before whom the case was pending to decide whether the peremptory excusal was in fact timely and correct. It is only after that determination is affirmatively made that the judge shall proceed no further in the case.³⁵⁶

The Supreme Court recognized that the trial judge's examination and decision of whether a peremptory challenge is both timely and correct necessarily requires inquiring into whether the party seeking to exercise the challenge is entitled to do so. Finding that neither § 38-3-9 nor Rule 1-088.1 defines the term "party," the Supreme Court, without citing authority, proceeded to supply one.³⁵⁷ The Court interpreted "party" to mean "a litigant with a sufficient diversity of interest from that of other parties in the case."³⁵⁸ It went on to reason that it is only the existence of such diversity of interest that entitles a party to the "right to exercise an independent right of excusal without cause."³⁵⁹

The Supreme Court stated *in dicta* that the factors that a trial judge may consider when analyzing diversity of interest among several parties were essentially the same factors that a trial judge would consider in determining whether the interests of multiple parties were diverse in the exercise of peremptory challenges of jurors.³⁶⁰ The Court observed that if parties do share similarity of interest, then allowing each named party the right to exercise separate peremptory challenges will "very likely" result in

³⁵⁶ *Id.* ¶ 24.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* ¶ 25.

gamesmanship or judge shopping.³⁶¹ The case was then remanded to Judge Arrieta to conduct his hearing on Quality Automotive Center, LLC's peremptory challenge.³⁶²

The *Arrieta* opinion continues *in dicta* to call for the amendment of Rule 1-088.1.³⁶³ Having criticized the shortcomings of Rule 1-088.1 as it is currently written, the Supreme Court observed that for the rule to be effective, it must be amended to balance litigants' rights to a fair and unbiased tribunal with the judiciary's need for effective and efficient administration of justice in its courts.³⁶⁴ The Court reviewed the constitutional underpinnings of the right to a fair and impartial tribunal as well as other mechanisms which effectuate that right, including the right to excuse a judge without cause, embodied in § 38-3-9 and Rule 1-088.1.³⁶⁵ It said that a party's right to excusal under § 38-3-9 is a procedural right meant to effectuate the substantive right of a fair and impartial tribunal recognized by the New Mexico constitution citing *Gesswein*.³⁶⁶ Further relying on *Gesswein*, the Court found that § 38-3-9 provides a method of disqualification, a method procedural in nature and "a prerogative of this court."³⁶⁷ While recognizing the constitutional right of a litigant to remove a judge for cause, the Court questioned whether the existing procedural mechanism, which enabled parties with similar interests to remove multiple successive judges from cases without stating a reason, was necessary

³⁶¹ *Id.*

³⁶² *Id.* ¶ 26. Upon remand from the Supreme Court, on Aug. 9, 2011, Judge Arrieta entered an Order Denying Defendant Quality Automotive Center, LLC's Notice of Peremptory Excusal. Interview with Manuel I. Arrieta, Esq., District Judge, New Mexico, telephonic Las Cruces, New Mexico (March 24, 2014.)

³⁶³ *Id.* Part B ¶ 28-35.

³⁶⁴ *Id.* ¶ 28.

³⁶⁵ *Id.* ¶ 29-30.

³⁶⁶ *Id.* ¶ 31.

³⁶⁷ *Id.*

to preserve the litigants' constitutional rights.³⁶⁸ The Court observed that justice must be administered not only fairly but effectively³⁶⁹ and that the right to excuse a judge without a stated reason "should not exist without some limitation."³⁷⁰

In *Arrieta*'s call for an amendment of Rule 1-088.1,³⁷¹ the Supreme Court was careful not to refer to § 38-3-9 as creating a statutory right to excuse a judge. § 38-3-9 was referred to as only one of "several procedural mechanisms."³⁷² The Section's efficacy was further reduced when the right to excuse it embodies is equated to a procedural right meant to effectuate the constitutional right to a fair trial.³⁷³ By restating *Gesswein*'s language that § 38-3-9 was a prerogative of the Court,³⁷⁴ the Court returned to the Pre-Compromise position of the Supreme Court of 1984.

Proposed Rules

In September, 2013, almost contemporaneous with its announcement of the *Arrieta* opinion, the Supreme Court proposed new rules of procedure in civil, criminal, and children's court cases which deal with the peremptory excusal of the judge.³⁷⁵

A thoughtful reading of the entire *Arrieta* opinion and consideration of the new rules of procedure proposed by the Supreme Court to govern the peremptory excusal of judges leads the author to an unavoidable conclusion: The Supreme Court is doing what it

³⁶⁸ *Id.* ¶ 32.

³⁶⁹ *Id.*

³⁷⁰ *Id.* ¶ 33.

³⁷¹ *Id.*, Part B.

³⁷² *Id.* ¶ 31.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ Proposed revisions to the District Court Peremptory Excusal Rules for Civil, Criminal, and Children's Court Cases, N.M. Bar Bul., Vol. 52, No. 37, pg 19-22 (Sept. 11, 2013). These were not the product of the normal rulemaking process which utilizes the appropriate rules committee to author and amend rules of procedure. These were authored by the Supreme Court itself. Although they have been proposed, they have not been adopted. In each of these proposed rules, all reference to the *statutory* right of excusal is removed.

declined to do in *Hannah v. Armijo*³⁷⁶ and *Gesswein v. Galvan*.³⁷⁷ It very subtly, very quietly, and very effectively seeks to render the substantive right created in § 38-3-9 a nullity.

The proposed amended Rule 1-088.1 severely restricts the ability of litigants to excuse a judge. Section 38-3-9 affords a statutory right to each party to excuse a judge. The amended rule does away with that right. The proposed rule states that each case shall be treated as having two sides and that the collective parties on each side have the ability to exercise one peremptory excusal.³⁷⁸ There is no procedure whereby the alignment or adversity of interest among parties on a “side” is examined to determine if additional excusals should be allowed in the interest of fairness. If any party on a side files an excusal then no other party on that side may excuse a judge.³⁷⁹ Throughout the remainder of the proposed rule, stylistic changes emphasize the shift from “any party” to a “a party on either side.”³⁸⁰

The proposed rule affects the timelines of filing a peremptory excusal. It provides that if a party attends a hearing³⁸¹ then no party on that side can excuse the judge. It shortens the time in which a peremptory excusal must be exercised. A party initiating a case must exercise its challenge within 10 days after the service of the notice of judge assigned to the case.³⁸² Any other party must file a peremptory excusal within 10 days of its counsel’s entry of appearance or when the party files its first pleading or motion

³⁷⁶ *Supra* n. 59.

³⁷⁷ *Supra* n. 140.

³⁷⁸ Proposed Rule 1-088.1(A).

³⁷⁹ *Id.*

³⁸⁰ Proposed Rule 1-088.1.

³⁸¹ *Id.* ¶ (A).

³⁸² *Id.* ¶ (C)(1).

pursuant to Rule 1-012³⁸³ whichever is earlier.³⁸⁴ Finally, a party on either side may file a peremptory excusal within 10 days of the clerk serving notice of judge reassignment or the completion of publication of a notice of mass case reassignment.³⁸⁵

The proposed rule provides for an ultimate deadline for filing peremptory excusals in a case. No party may excuse the judge if the case has been at issue before the judge sought to be excused for more than 90 days.³⁸⁶ This includes both original parties and later added parties, even those parties brought in after the 90 days have expired.

The holding of *Arrieta* is incorporated into the proposed rule providing authority for the assigned judge to review the peremptory challenge before recusing from the case.³⁸⁷ The trial judge can review the challenge for timelines or validity.³⁸⁸ The objection to the peremptory challenge may be raised by any party, without reference to side, or by the court *sua sponte*.³⁸⁹ The proposed rule requires that the challenged judge initially rule on the timelines or validity of any such objection.³⁹⁰ If the challenged judge determines that the challenge conforms to the “procedural and legal requirements in this rule,” the judge shall proceed no further.³⁹¹ If the judge determines that it does not, the judge may proceed to preside over the case.³⁹²

The proposed Rule 1-088.1 includes a section to address perceived misuse of the peremptory excusal procedure when their exercise is used to hinder, delay, or obstruct the

³⁸³ 1-012, NMSA 2014.

³⁸⁴ Proposed Rule 1-088.1(C)(1).

³⁸⁵ *Id.* ¶ (C)(2).

³⁸⁶ *Id.* ¶ (C)(4).

³⁸⁷ *Id.* ¶ (G).

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ The proposed rule does not provide for any time frame in which an objection to a peremptory challenge must be filed.

³⁹¹ Proposed Rule 1-088.1(G).

³⁹² *Id.*

administration of justice.³⁹³ If peremptory excusals are being used for improper purposes or with such frequency as to impede the administration of justice then the chief judge of the district shall notify the Chief Justice of such. The Chief Justice may take appropriate action to deal with any abuse of the procedure. This even allows the Chief Justice to suspend the right of such attorneys to utilize the peremptory excusal procedure.³⁹⁴ The proposed language “attorney or group of attorneys”³⁹⁵ is broad enough to include “institutional excusals” where groups of lawyers such as a particular law firm, the civil plaintiffs or defense bar or a state agency such as Child Support Enforcement or Child Protective Services to uniformly excuse a particular judge to the point that it results in an excessive imbalance in caseload among the various judges of a district. Proposed Rule 5-106 dealing with Criminal Procedure includes identical language to deal with blanket excusals of a judge by institutions like a district attorney’s office or a public defender’s office.³⁹⁶

The proposed amendment allows the Chief Justice to suspend an attorney’s ability to excuse a judge. This emphasizes the Supreme Court’s pronouncement in *Arrieta* that the peremptory challenge of a judge no longer a substantive right conferred by legislative enactment on a litigant. It is simply a procedural privilege granted or suspended by the Supreme Court.³⁹⁷

³⁹³ *Id.* ¶ (D).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ Proposed Rule 5-106(E).

³⁹⁷ *Arrieta* ¶ 31.

Considered Criticism

Did the Supreme Court go too far in declaring §38-3-9 in its entirety to be procedural in nature? Did the Supreme Court in *Arrieta's dicta* read *Gesswein* too broadly? *Gesswein* cited two lines of cases interpreting § 38-3-9.³⁹⁸ One line of cases denominated the right to disqualify a judge in §38-3-9 as a substantive right.³⁹⁹ The other line of cases referred to the procedural aspects of §38-3-9 as to how this right of judicial disqualification was to be exercised.⁴⁰⁰ *Gesswein* did not overrule either line of cases. Instead, *Gesswein* focused on the procedural application of § 38-3-9 and withdrew its then current court rule.⁴⁰¹

Gesswein did not overrule *Hannah v. Armijo* or its progeny, nor did not declare § 38-3-9 unconstitutional. Does the Supreme Court go too far in disregarding the plain language of § 38-3-9 . . . “A party . . . shall have the right to exercise a peremptory challenge to the district judge before whom the action . . . is to be tried . . .” continuing “. . . The rights created by this section are in addition to any arising under article 6 (*sic*) of the Constitution of New Mexico.”⁴⁰²

The author questions why it is necessary for the Judiciary to withdraw from the compromise it reached with the Legislature in 1985. The Supreme Court should have ended its opinion in *Arrieta* at the conclusion of Section A.⁴⁰³ It had decided the question presented in the case before it.⁴⁰⁴

³⁹⁸ *Gesswein* at 772, 1337.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* 772-3, 1337-8.

⁴⁰² § 38-3-9 NMSA 1978.

⁴⁰³ *Arrieta* ¶ 1-27.

⁴⁰⁴ *Id.* ¶ 27.

The proposed amendment to Rule 1-088.1 would have no impact on current practice in simple cases of one plaintiff versus one defendant. Each party is afforded an excusal. Problems arise when multiple parties are involved. How are the “sides” to be determined? What if the parties on a “side” are adverse to each other? Often in multi-party negligence suits, the real fight is among the plaintiffs or among the defendants themselves, yet the rule affords that side only one peremptory excusal. The same would be true if a defendant and their insurance carrier are in a coverage dispute. Would not it be a better way to look at the commonality or adversity of interest among parties and allow peremptory excusals based upon those factors?

The proposed amended rule embraces the old adage that “the race is to the swift.” Whoever files their challenge first is afforded the excusal for their side. Quite often in civil litigation, it takes a period of time to get multiple defendants served. If the policy consideration which supports peremptory excusal is the right to have a fair and impartial judge,⁴⁰⁵ is it fair to deny a peremptory excusal to a later served party because an earlier served party has already exercised the procedural right for their side? The same can be said for later identified and added parties. Is the policy supporting peremptory excusal less applicable to them as opposed to original parties?

Perhaps the most troubling abuse of the peremptory challenge as it is currently available is the collective exercise of excusal by a group of attorneys against a particular judge in a particular class of cases. The author’s experience is that this practice produces its greatest disruptive effect in the criminal docket. If the state or defense initiates an institutional or blanket excusal policy against a criminal division judge, this can result in

⁴⁰⁵ *Id.* ¶ 29-32.

a huge caseload imbalance and can impede the administration of justice. The same result occurs if Children, Youth and Families Department does the same to a Children's Court Judge. The proposed amended Rule 5-106 allows the Chief Justice to suspend their right to file peremptory excusals. But what if the attorney or group of attorneys believes, in good faith, that their challenges are in the best interests of their clients? If the Chief Justice disagrees with the good faith judgment of those attorneys, are those attorneys' future clients deprived of their ability to excuse a judge?

The Supreme Court has proposed new, virtually identical rules in civil,⁴⁰⁶ criminal,⁴⁰⁷ and children's court cases.⁴⁰⁸ Each of these case categories presents unique features which render the "only two sides" approach questionable. Consider a criminal case with multiple defendants. If all of the defendants are lumped together, only one will be afforded a peremptory challenge. This will likely be the first one to be arraigned. If this occurs, are not the remaining defendants denied due process and equal protection? One defendant was allowed to excuse a judge to its advantage, while the rest were denied the opportunity.

Consider the Children's Court Rules⁴⁰⁹ in child abuse cases. Normally, these actions involve the Department of Children, Youth & Families, appearing through the Children's Court Attorney, multiple respondents, each of whom has a right to counsel, and the children involved who appear through their guardian ad litem / youth attorney. The Department is generally adverse to the respondents. The respondents, as a rule, are adverse to each other as well as to the Department. Factor in the guardian / youth attorney

⁴⁰⁶ Proposed Rule 1-088.1.

⁴⁰⁷ Proposed Rule 5-106.

⁴⁰⁸ Proposed Rule 10-162.

⁴⁰⁹ *Id.*

whose ward's interests may be completely different from the interests of the Department and each of the respondents. How is such a configuration to be treated as "having only two (2) sides?"⁴¹⁰ It does not require much ponderance to realize that there are more than "only two (2) sides" to multi-party law suits.

Finally, and most importantly, the Supreme Court advances no statistical information or justification for its proposed new rules. It anecdotally lists some reasons for rule changes in its comments⁴¹¹ but advances no data to support its position that the present state of the law fosters delay, difficulty and undue expense through abuse of the peremptory challenge of judges.⁴¹² How much delay is caused, how often are peremptory challenges used, how much additional expense is incurred? Judges, generally, do not like peremptory excusals but is that counter balanced by the public's expectation of being able to have their case heard by a tribunal that the public believes to be unbiased? This lack of statistical justification suggests that the fact pattern detailed in *Arrieta* was a rare aberration and the trial judge handled it properly without needing new rules. In short, the author suggests that the Supreme Court, in perceiving a tempest in a teapot, has proposed amended rules which unnecessarily restrict litigants' ability to appear before what they perceive to be an unbiased judge.

A Thoughtful Solution

This author suggests that the Supreme Court reconsider the *dicta* of *Arrieta*,⁴¹³ which it asserts to justify its proposed amended rules. The Court should consider the long

⁴¹⁰ *Id.*

⁴¹¹ *Arrieta* ¶ 33.

⁴¹² *Id.*

⁴¹³ *Arrieta* ¶ 28-35.

evolution of the excusal of judges in New Mexico, the Judicial / Legislative Compromise of 1985, and whether the situation it wishes to confront is really as great a problem as the Supreme Court perceives it to be. The people of New Mexico, through their elected representatives, have conferred upon themselves a substantive right.⁴¹⁴ The Judicial Branch, the least democratic branch of government,⁴¹⁵ should not take away that right because the Court finds it to be “inefficient.”⁴¹⁶ The rights of the people make the operation of government less effective and efficient⁴¹⁷ by their very existence.

The Supreme Court, through its Administrative Office of the Courts and Judicial Information Division, should commission a statistical study to determine if the right to the peremptory excusal of a judge is actually being abused to the extent and frequency which the Court asserts anecdotally. This information should be distributed to the State Bar of New Mexico for distribution to its members. This, if statistically valid reasons exist and are made public, this will generate support among the lawyers and public for change.

The Supreme Court should withdraw from its claim that all things procedural are within its exclusive province and acknowledge that both historically and as a matter of constitutional law, judicial rulemaking is a power shared between the Legislative Branch and the Judiciary. The Court should approach the legislature with its concerns with § 38-3-9 (along with the evidence thereof) and allow the legislature to amend the statute to remedy the Court’s concerns through the democratic process of legislation.

⁴¹⁴ “All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.” N.M. Const. art. II, § 2.

⁴¹⁵ Daniels Interview.

⁴¹⁶ *Arrieta* § 28.

⁴¹⁷ *Id.*

Should the Supreme Court be unable to accept the legislature as a participant in procedural rulemaking, the Court, at the very least, should acknowledge that § 38-3-9 contains both substantive and procedural aspects. Section 38-3-9 clearly confers a substantive right for each party to exercise a peremptory challenge to excuse a judge. That is what the legislature intended and what the judiciary agreed to in 1985. Section 38-3-9 also has procedural aspects. These may be within the Judiciary's realm.

The Supreme Court needs only to examine § 38-3-9 itself to find the solution to the Court's perceived problem. The legislature looked at the alignment of the interests of litigants when it declared that "the employer and the insurance carrier of the employer shall be treated as one party" in Worker Compensation cases. Courts routinely examine the alignment of litigants in the procedural exercise of peremptory challenges to jurors. Section 38-3-9 already recognizes the alignment of interest between employers and insurance carriers as limiting the number of peremptory excusals available in a case.

Of the eighteen jurisdictions which allow peremptory challenges to judge,⁴¹⁸ eleven procedurally limit by whom a challenge may be exercised. Of these jurisdictions, five examine the alignment of and adversity among parties to determine the availability of peremptory challenges to litigants. Of the four states which divide the litigants into two "sides," three states afford the trial judge discretion to examine adversity between parties on a "side." Only Nevada does not give that discretion to the trial judge. Nevada's approach appears to be the model that the Supreme Court has chosen for New Mexico.

⁴¹⁸ *See generally supra.*

Conclusion

The author concludes that the Supreme Court should withdraw its proposed amended rules and retreat from its *dicta* in *Arrieta*. New Mexico should continue to recognize § 38-3-9 as creating a substantive right to exercise a peremptory challenge to excuse a judge. The Supreme Court, through its Administrative Office of the Courts, should commission a statistical study to determine if the peremptory excusal rule is actually being abused to the extent and frequency which the Supreme Court asserts anecdotally. If such is the case and revised rules of procedure are necessary, the Supreme Court should allow the Legislature to address the matter through the democratic process. If the Court is unable to concede that authority to the legislature, the Court should address the matter by following the lead of the legislature. The trial judge should examine the alignment and adversity of the litigants to determine whether they should be treated as one or multiple parties and in that way determine by whom and in what number peremptory challenges may be exercised. That is what District Judge Manuel Arrieta did in resolving the abuse that he confronted in *Quality Automotive Center, LLC v. Arrieta*. The Supreme Court approved of this approach when it affirmed his actions.

Proceeding in the manner suggested would address the concerns raised in *Arrieta*. It would preserve a statutory, substantive right which is important to New Mexicans. It would maintain fidelity to the Compromise to which the Judiciary was a party. Most importantly, it would continue to promote the public's confidence in the fairness and impartiality of the New Mexico Judiciary by allowing New Mexicans some say about which judge will preside over their cases.

Bibliography

Books & Articles

American Bar Assoc. Standing Committee on Judicial Independence: Report of the Judicial Disqualification Project (Oct. 8, 2010).

Black's Law Dictionary (5th ed. 1979).

New Mexico Bar Bulletin, Vol. 52, No. 37 (Sept. 11, 2013).

New Mexico Bar Bulletin, Vol. 52, No. 37 (2013).

Poldervaart, Arie, *Black-Robed Justice*, Historical Society of New Mexico (1948).

Stuart, Gary L., *The Gallup 14*, Univ. of New Mexico Press (2000).

Interviews

Arrieta, Manual I., Esq., District Judge, Third Judicial District, New Mexico, trial judge of *Ramos v. Quality Tire and Service* and Respondent in *Quality Automotive Service, LLC v. Arrieta*. (Telephonic, Las Cruces, New Mexico, March 24, 2014).

Budagher, John, Esq., former New Mexico State Senator, former Chairman of Senate Judiciary Committee. (Telephonic, Albuquerque, New Mexico, April 9, 2014).

Butkus, Carl J., Esq., District Judge, New Mexico. Santa Fe, New Mexico, March 11, 2014).

Daniels, Charles, Esq., Justice of the New Mexico Supreme Court, former Chief Justice. (Santa Fe, New Mexico, January 14, 2014).

Houston, Les, Esq., former New Mexico State Senator, former President Pro Tempory of the Senate. (Telephonic, Albuquerque, New Mexico, April 21, 2014).

Marshall, Victor R., Esq., former New Mexico State Senator. (Telephonic and correspondence, Albuquerque, New Mexico, April 8 and April 12, 2014).

Minzner, Richard C. "Dick," Esq., former New Mexico State Representative, former Majority Leader of the House of Representatives. (Santa Fe, New Mexico, January 29, 2014; telephonic, Albuquerque, New Mexico, December 12, 2013 and April 3, 2014; correspondence, December 2013 through May, 2014).

Sanchez, Raymond G., Esq., former New Mexico State Representative, former Speaker of the House of Representatives. (Santa Fe, New Mexico, January 29, 2014).

Stratton, Harold “Hal,” Esq., former New Mexico State Representative, former Chairman of the House Judiciary Committee, former New Mexico Attorney General. (Telephonic, Albuquerque, New Mexico, April 9, 2014).

Law Review Articles

Baron, Roger M., *A Proposal For the Use of a Judicial Peremptory Challenge System in Texas*, 40 Baylor L. Rev. 49 (1988).

Browde, Michael B. and Occhialino, M.E., *Separation of Powers and Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L.Rev. 407 (1985).

Table of New Mexico Attorney General Opinions, Constitutional References and Legislative Bills

N.M. Atty. Gen. Op. No. 71-74 (1971).

N.M. Const. art. II, § 2.

N.M. Const. art. III, § 1 (as adopted Jan. 21, 1911).

N.M. Const. art. IV, § 11.

N.M. Const. art. IV, § 24.

N.M. Const. art. IV, § 34.

N.M. Const. art. VI, § 3.

N.M. Const. art., VI § 18 (as adopted Jan. 21, 1911; amended Nov. 8, 1966).

N.M. House bill 20, 37th Leg., 1st Sess. (1985).

N.M. House Judiciary Committee Substitute for House Bill 20, 37th Leg., 1st Sess. (1985).

Table of Cases

Ammerman, et al, v. Hubbard Broadcasting, Inc., et al., 89 N.M. 307, 551 P.2d 1354 (1976).

Bustamento v. Analla, 1 N.M. 255 (1857).

- Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.1982).
- Beall v. Reidy*, 80 N.M. 444, 457 P.2d 376 (1969).
- Gerety v. Demers*, 92 N.M. 396, 589 P.2d 180 (1978).
- Gray v. Sanchez*, 86 N.M. 146, 520 P.2d 1091 (1974).
- Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975).
- Hill v. Patton*, 43 N.M. 21, 85 P.2d 75 (1938).
- In re Eastburn*, 121 N.M. 531, 914 P.2d 1028 (1996).
- JMB Retail Properties Company v. Eastburn*, 114 N.M. 115, 835 P.2d 831 (1992).
- Johnson v. Superior Court In & For Los Angeles County*, 50 Cal. 2d 693, ____ P.2d ____ (1958).
- Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982).
- Midwest Royalties, Inc. v. Simmons*, 61 N.M. 399, 301 P.2d 334 (1956).
- Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980).
- Moruzzi v. Fed. Life & Caus. Co.*, 42 N.M. 35, 75 P.2d 320 (1938).
- Pappa v. Superior Court of Los Angeles County*, 54 Cal 2d 350, ____ P.2d ____ (1960).
- Quality Automotive Center, LLC, v. Arrieta*, 2013-NMSC-041 (2013).
- Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983).
- Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).
- Southwest Underwriters, et al, v. Montoya*, 80 N.M. 107, 452 P.2d 176 (1969).
- State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 410 P.2d 732 (1966).
- State ex rel. Armijo v. Lujan*, 45 N.M. 103, 111 P.2d 541 (1941).
- State ex rel. Anaya v. McBride*, 88 N.M. 244, 539 P.2d 1006 (1975).
- State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957).

State ex rel. Gesswein v. Galvan, 100 N.N. 769, 676 P.2d 1334 (1984).

State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

State ex rel. Schufeldt v. Armijo, 39 N.M. 502, 50 P.2d 852 (1935).

State ex rel. Simpson v. Armijo, 38 N.M. 280, 31 P.2d 703 (1934).

State v. Atchison T. & S.F. Ry., 20 N.M. 562, 151 P. 305, (1915).

State v. Ochoa, 41 N.M. 589, 72 P.2d 609 (1937).

State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980).

Table of Rules: New Mexico

N.M. Rules: Children's Court

Rule 10-162 N.M.R.A. (Amended Aug. 1, 1989; amended July 1, 1995; amended Jan. 15, 2009; amended Sept. 9, 2011).

Rule 10-162 N.M.R.A. (Proposed Aug. 29, 2013).

N.M. Rules: Civil

Rule 88, N.M.R.Civ.P. (Adopted May 23, 1949; amended Mar. 5, 1984; amended April 1, 1985).

Rule 88.1, N.M.R.Civ.P. (Adopted Mar. 5, 1984; amended Apr. 1, 1985; amended Aug. 1, 1988).

Rule 1-102 N.M.R.A. (2013).

Rule 1-088 N.M.R.A. (Amended Mar. 1, 2000; amended Apr. 8, 2009).

Rule 1-088.1 N.M.R.A. (Amended Jan. 1, 1995; amended Mar. 15, 2007; amended Dec. 15, 2008; amended Jan. 7, 2013).

Rule 1-088.1 N.M.R.A. (Proposed Aug. 29, 2013).

N.M. Rules: Criminal

Rule 34.1, N.M.R.Crim.P. (Adopted July 1, 1982; Amended Mar. 5, 1984; amended Apr. 1, 1985).

Rule 34.2 N.M.R.Crim.P. (Adopted Mar. 5, 1984; amended Apr. 1, 1985).

Rule 5-105 N.M.R.A. (Amended Nov. 15, 2000).

Rule 5-106 N.M.R.A. (Amended Aug. 1, 1989; Sept. 1, 1990; amended Dec. 15, 2008).

Rule 5-106 N.M.R.A. (Proposed Aug. 29, 2013).

Table of Statutes: State of New Mexico

§§ 5571, 5573, 5575 N.M.S.C. (1915).

§§ 147-105 through 147-109 N.M.S.C. (1929).

Ch. 60, Laws 1929.

Ch. 84, Laws 1933.

Ch. 184, Laws 1933.

Ch. 67, Laws 1941.

§ 19-508 C.L.N.M. (1941).

Ch. 81, Laws 1947.

§ 21-5-8 R.S.N.M. 1953.

§ 21-5-9 R.S.N.M. 1953.

Ch. 165, Laws 1965.

Ch. 123, Laws 1971.

Ch. 228, Laws 1977.

Ch. 91, Laws 1985.

§ 38-3-9 N.M.S.A. 1978.

Table of Statutes: Territory of New Mexico

Kearny Code of Laws, 1 N.M.S.A. 1978 Ch. 6, §§ 1-43.

Territorial Laws of New Mexico (1851).

AN ACT defining the several judicial districts of the Territory of New Mexico, assigning the several judges to their respective districts and also defining the times and places of holding courts. Approved July 10, 1851. Terr.L.N.M. (1851).

AN ACT regulating practice in the District and Supreme Courts of the Territory of New Mexico. Approved July 12, 1851. Terr.L.N.M. (1851).

AN ACT to provide for the taking of testimony by interrogations. Approved July 12, 1851. Terr.L.N.M. (1851).

Art. 12, Ch. 27, §§ 1-48 N.M.R.S. (1865).

Ch. 9, Laws 1882.

§§ 528, 1833 C.L.N.M. (1884).

Ch. 77, Laws 1889.

§§ 2879-2884 C.L.N.M. (1897).

Table of Statutes and Rules of Other States

Alaska Stat. § 22.20.022; Alaska R.Civ.P.42(c); Alaska PCrim.P. 25(d).

Ariz. Rev. Stat. §12-411; Ariz. R.Civ.P. 42(f); Ariz. R.Crim.P.10.2.
Cal.Civ.Proc. Code § 170.6(a).

Idaho R.Civ.P. 40(d)1); Idaho Crim.R. 25(a).

735 Ill. Comp. Stat. 5/2-1001 (civil); 725 Ill. Comp. Stat. 5/114-5 (Criminal). Ind. R.
Trial P. 75(B) (Civil); Ind. R. Crim.P. 12(B).

Minn.R.Civ.P. 63.03; Minn.R.Crim.P. 26.03(24)(4).

Mo. Sup.Ct.R. 51.05 (Civil); Mo.Sup. Cr.R. 32.07 (Criminal).

Mont. Code Ann. § 3-1-804. (Civil & Criminal).

Nev. Sup.Ct. R. 48.1 (Civil).

N.D. Cent. Code §29-15-21. (Civil & Criminal).

Or. Rev. Stat. § 14.2250; Or. Rev. Stat. § 14.260; Or. Rev. Stat. § 14.270. (Civil &
Criminal).

S.D. Stat. Ch. 15-21. (Civil & Criminal).

Tex. Gov't Code §74.053. (Civil).

Wash. Rev. Code Ann. 4.12.050; C.R.R.8.9 (Civil & Criminal).

Wis. Stat. Ann. §801.88 (Civil); Wis. Stat. Ann. § 971.20 (Criminal).

Wyo.R.Civ.P. 40.1(b) (Civil). (Criminal Rule (Wyo.R.Crim.P.21.1) has been suspended by order of the Wyo. S. Ct. (Dec. 4, 2012)).

Utah R.Civ.P.53A; Utah R.Crim. P.2d A.

Table of Statutes: United States

28 U.S. Code § 2071.

Organic Act Establishing the Territory of Arizona (Feb. 24, 1863).

Organic Act Establishing the Territory of Colorado (Sept. 28, 1861).

Organic Act Establishing the Territory of New Mexico, 9 Stat. 446, ch. 49 (Sept. 9, 1850).

Proclamation Admitting New Mexico into the Union, 37 Stat. 1723 (Jan. 6, 1912).