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## A Clash of Branches: The History of New Mexico's Judicial Peremptory Excusal Statute and a Review of the Impact and Aftermath of *Quality Automotive Center, LLC v. Arrieta*

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# **A CLASH OF BRANCHES: THE HISTORY OF NEW MEXICO'S JUDICIAL PEREMPTORY EXCUSAL STATUTE AND A REVIEW OF THE IMPACT AND AFTERMATH OF *QUALITY AUTOMOTIVE CENTER, LLC V. ARRIETA***

The Honorable Gary L. Clingman\*

## **ABSTRACT**

The New Mexico Supreme Court opinion in *Quality Automotive Center, LLC v. Arrieta*, 2013-NMSC-041, involved the peremptory challenge to excuse a judge found at NMSA 1978, Section 38-3-9 (1985). 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 Section 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 then demonstrates that the Legislature and judiciary reached a compromise on the peremptory excusal of judges in 1985 that the judiciary sought to withdraw from in 2013. This article further examines the problems those Proposed Rules of 2013 would have created, the bar members' reaction to the proposed rules, and the Judiciary's solution by enacting newly proposed rules in 2015.

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 Section 38-3-9 along with its recommended solution to the Legislature and allow the Legislature to remedy the problem or alternatively recognize that Section 38-3-9 contains a substantive right to excuse a judge along with the procedural aspects which the Supreme Court now seeks to amend.

## **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*<sup>1</sup> proclaimed, "Beginning with the first territorial legislature in 1851, the laws of New Mexico have

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1. 1996-NMSC-011, 914 P.2d 1028.

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.”<sup>2</sup>

A study of the history of the disqualification of a district judge in New Mexico and Section 38-3-9, NMSA 1978, finds that the peremptory<sup>3</sup> right to change judges is not of that ancient origin and is in fact of rather recent vintage. The current statute, Section 38-3-9, is the result of a contentious confrontation and then a negotiated compromise between the New Mexico Legislature and Supreme Court. Recently, the New Mexico Supreme Court revisited Section 38-3-9 in *Quality Automotive Center, LLC v. Arrieta*<sup>4</sup> and proposed new procedural rules<sup>5</sup> to restrict the right to peremptorily excuse a judge. This fostered a strong reaction from attorneys, which resulted in the Court retreating to a more moderate position.

This article traces the historical development of changing a judge in New Mexico. It begins in territorial days and early statehood by tracing the statutory right 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.

This article then examines the evolution of judicial rule-making that 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 further traces the development of court rules which made Section 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 a party’s ability to exercise a peremptory excusal and attempted to transform Section 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 *Quality Automotive* opinion are then examined as well as the bar’s reaction to them. The Supreme Court then withdrew its proposed rule and adopted new, less restrictive rules.

Finally, the article proposes that the Supreme Court commission a statistical analysis to determine just what types 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,

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2. *Id.* ¶ 4.

3. See *Peremptory*, BLACK’S LAW DICTIONARY (5th ed. 1979) (defining peremptory as “[s]elf-determined; arbitrary; not requiring any cause be shown”).

4. 2013-NMSC-041, 309 P.3d 80.

5. *Proposed Revisions to the District Court Peremptory Excusal Rules for Civil, Criminal, and Children’s Court Cases*, vol. 52 no. 37 N.M. B. BULL. 20, 20–22 (2013).

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

## I. STATUTORY AND JUDICIAL HISTORY OF EXCUSAL

### A. 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.<sup>6</sup>

The earliest embodiment of New Mexican Law under the authority of the United States was the Kearney Code,<sup>7</sup> 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.<sup>8</sup>

Similarly, the Organic Act establishing the Territory of New Mexico, enacted in 1850,<sup>9</sup> contained no provision for changing the trial judge,<sup>10</sup> and it contained limited provision for establishing rules of procedure for the territorial courts.<sup>11</sup> The Organic Act provided for 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.<sup>12</sup> 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.<sup>13</sup> Affirmance was common.<sup>14</sup>

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6. See *State ex rel. Hannah v. Armijo*, 1933-NMSC-087, 28 P.2d 511.

7. General Stephen W. Kearney commanded the United States Army that invaded what became New Mexico Territory during the Mexican War (1846–48). 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 Michael B. Browde & M. E. Occhialino, *Separation of Powers and the Judicial Rulemaking Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407, 412 n.20 (1985).

8. See N.M. TERR. LAWS, Kearney Code, ch. 6, Courts & Judicial Powers, §§ 1–26 (1846).

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

10. See Organic Act Establishing the Territory of New Mexico, ch. 49.

11. *Id.* § 10.

12. *Id.*

13. See *Bustamento v. Analla*, 1857-NMSC-014, ¶ 2, 1 N.M. 255.

14. *Id.* ¶ 8.

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.<sup>15</sup>

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

However, Section 17 is hardly the peremptory challenge that the *Eastburn* Court<sup>19</sup> 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.<sup>20</sup>

In 1882, the Territorial Legislature re-addressed the issue when it passed Chapter 9, Laws 1882.<sup>21</sup> It stated that venue shall be changed to a county free from exception, "whenever the judge is interested in the result of such case."<sup>22</sup>

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 proper cause satisfactory to the judge before whom the motion is made."<sup>23</sup>

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15. Act of July 10, 1851, 1851 N.M. Terr. L. 119. 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, § 17, 1851 N.M. Terr. L. 141, 144.

17 "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 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*, 1996-NMSC-011, 914 P.2d 1028.

20. N.M. REV. STAT. art. 12, ch. 27, § 17 (1865).

21. Act of Feb. 4, 1882, ch. 9, § 1, 1882 N.M. Terr. L. 25, 25 (amending N.M. REV. STAT. art. 12, ch. 27, § 17 (1865)). Chapter 9 was later re-codified at Section 1833 of New Mexico's Compiled Laws of 1884.

22. N.M. COMP. L. tit. 33, ch. 1, § 1833 (1884).

23. *Id.*

Deleted is the requirement of affidavit supported by two disinterested affidavits.<sup>24</sup> 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.<sup>25</sup>

In 1889, the Territorial Legislature again visited the topic of change of venue.<sup>26</sup> 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.”<sup>27</sup>

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.<sup>28</sup> Section 2 provided that the affidavit was to be presented in support of a motion to change venue.<sup>29</sup> 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.<sup>30</sup> 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 to be obtained and from whom. Again, unless the trial judge raises the issue sua sponte admitting the grounds, the matter cannot be raised other than by the litigant filing a motion in the trial court or seeking a writ of prohibition from the Territorial Supreme Court.<sup>31</sup>

## B. Early Statehood

In 1912, New Mexico was admitted to the Union,<sup>32</sup> becoming the 47th state.<sup>33</sup> New Mexico had adopted its Constitution in 1911.<sup>34</sup> 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.<sup>35</sup>

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24. *Id.*

25. See generally *Midwest Royalties, Inc. v. Simmons*, 1956-NMSC-084, ¶ 8, 301 P.2d 334 (holding that 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” (quoting *Tharp v. Massengill*, 1933-NMSC-105, ¶ 54, 28 P.2d 502)).

26. See Act of Feb. 22, 1889, ch. 77, § 1, 1889 N.M. Terr. L. 183, 183–84 (1882 laws were not changed).

27. *Id.*

28. *Id.*

29. *Id.* § 2.

30. *Id.* § 3.

31. See Act of Feb. 4, 1882, ch. 9, § 1, 1882 N.M. Terr. L. 25, 25.

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. See Official Roster, 1912 N.M. Laws.

34. See N.M. CONST. (adopted January 21, 1911).

35. N.M. CONST. art. VI, § 18.

Section 18,<sup>36</sup> which closely resembled prior existing law, continued to prohibit a judge from presiding over a case in which he had an interest.<sup>37</sup> 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 in an inferior court.<sup>38</sup> The latter is an obvious reaction to the Territorial Justices' questionable practice of sitting on the appellate review of cases they presided over as trial judges.<sup>39</sup>

After statehood in 1912, New Mexico recodified its statutes as the New Mexico Statutes, Codification of 1915.<sup>40</sup> The change of venue provisions 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.<sup>41</sup> 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 case<sup>42</sup> or was related to a party or had been counsel for either party.<sup>43</sup> 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 could not 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.<sup>44</sup> The 1929 enactment dispensed with the requirement that the affidavit of counsel had to be supported by the oath of two disinterested persons.<sup>45</sup> Additionally, the 1929 revision removed limitations 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."<sup>46</sup>

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,"

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36. *Id.*

37. See generally N.M. COMP. L. § 2879 (1897).

38. N.M. CONST. art. VI, § 18.

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*, HIST. SOC'Y OF N.M., Sept. 1948, at 4-7.

40. Act of Feb. 4, 1882, ch. 4, § 1, 1882 N.M. Laws 25, 25 became N.M. STAT. ANN. § 5571 (1915); Act of Feb. 22, 1889, ch. 77, § 1, 1889 N.M. Laws 183, 183-84 became N.M. STAT. ANN. § 5573 (1915); Act of Feb. 22, 1889, ch. 77, § 3, 1889 N.M. Laws 184, 184 became N.M. STAT. ANN. § 5575 (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 N.M. STAT. ANN. § 147-105 (1929).

42. Act of Feb. 4, 1882, ch. 9, § 1, 1882 N.M. Terr. L. 25, 25; Act of Mar. 11, 1929, ch. 60, § 1, 1929 N.M. Laws 85, 85-86.

43. Act of Feb. 22, 1889, ch. 77, § 1; Act of Mar. 11, 1929, ch. 60, § 1.

44. Act of Mar. 11, 1929, ch. 60, § 1.

45. *Id.*

46. *Id.*

which was to be filed on or before the first day of the term of court and required five days advance notice of the presentment of the motion to the Court.<sup>47</sup>

Probably more importantly, it allowed, but did not require, the Court to require evidence in support of a motion to change venue.<sup>48</sup> 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.<sup>49</sup> It does require the trial court to make findings and either grant or overrule the motion.<sup>50</sup> The 1929 enactment did not affect the county to which the cause was to be removed if a change of venue was granted.<sup>51</sup>

### C. Events Leading To the Compromise of 1985

#### 1. *The Statutory Evolution of NMSA 1978, Section 38-3-9*

In 1933, the New Mexico Legislature enacted Chapter 184, Laws 1933.<sup>52</sup> It set forth the statutory scheme to provide for the disqualification of a District Judge from presiding over the trial of a civil or criminal case.<sup>53</sup> Any party to the cause could file an affidavit stating that the party believes that the judge cannot preside over the case with impartiality.<sup>54</sup> It provided that once such an affidavit was filed, the District Judge could proceed no longer and a new judge was to be assigned.<sup>55</sup> 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.<sup>56</sup> This involved bringing in a judge from a different judicial district.<sup>57</sup> 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

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47. *Id.* § 2.

48. *Id.*

49. *Id.*

50. *Id.*

51. See N.M. STAT. ANN. § 147-108 (1929).

52. Act of Mar. 17, 1933, ch. 184, 1933 N.M. Laws 502 evolved into N.M. STAT. ANN. § 38-3-9 (1978) as it came to exist in 1984 and as it exists today.

53. Act of Mar. 17, 1933, ch. 184, § 1. 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, Gameric Coal Co. sold Senator Vogel the surface rights to a place called Chihuahuaquito 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: A NOVEL*, at vii (2000); see also *State v. Ochoa*, 1937-NMSC-051, 72 P.2d 609.

54. Act of Mar. 17, 1933, ch. 184, § 1, 1933 N.M. Laws 502, 502.

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. See Official Roster, 1933 N.M. Laws.



term of court if the case was at issue.<sup>58</sup> Later in 1933, in *Hannah v. Armijo*,<sup>59</sup> 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.<sup>60</sup>

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 against whom the affidavit was filed had no discretion and could proceed no further.<sup>61</sup> Second, a party who had invoked a ruling of the court on a controverted question could not later disqualify the judge.<sup>62</sup>

Chapter 184, Laws 1933 was recodified in the 1941 Compilation of the Laws of New Mexico at Section 19-508. It was amended to provide that the statute had no application in “actions or proceedings for constructive and direct contempt.”<sup>63</sup> Section 19-508 was amended again to allow the peremptory 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.”<sup>64</sup> In 1953, Section 19-508 was recodified as Section 21-5-8 of the New Mexico Statutes, 1953 Recompile. 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.”<sup>65</sup> The statute continued to require that if the parties could not agree on a successor judge, 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.<sup>66</sup> By 1965, many judicial districts had more than one district judge.<sup>67</sup>

In 1971, NMSA 1953, Section 21-5-9, which governed the time for filing an affidavit of disqualification, was amended.<sup>68</sup> “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

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58. Act of Mar. 17, 1933, ch. 184, § 2.

59. *State ex rel. Hannah v. Armijo*, 1933-NMSC-087, 29 P.2d 511.

60. *Id.* ¶¶ 37–38.

61. *Id.* ¶ 6.

62. *Hill v. Patton*, 1938-NMSC-068, ¶ 3, 85 P.2d 75 (citing *State ex rel. Gandert v. Armijo*, 1936-NMSC-070, ¶ 4, 63 P.2d 1037).

63. Act of Apr. 14, 1941, ch. 67, § 1, 1941 N.M. Laws 93, 93.

64. Act of Mar. 13, 1947, ch. 81, § 1, 1947 N.M. Laws 118, 118. This was at least in part a reaction to *State ex rel. Armijo v. Lujan*, 1941-NMSC-009, 111 P.2d 541, 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 Article VI, § 18 of the New Mexico Constitution.

65. Act of Mar. 25, 1965, ch. 165, § 2, 1965 N.M. Laws 426, 426–27. Minor stylistic and punctuation changes were made to the last sentence dealing with how a successor judge was to be designated.

66. *Id.*

67. Official Roster, 1965 N.M. Laws. These included the First, Second, Third, Fifth, and Eleventh Judicial Districts.

68. Act of Mar. 17, 1971, ch. 123, § 1, 1971 N.M. Laws 343 (codified as amended at N.M. STAT. ANN. § 21-5-9 (1953)).

later.<sup>69</sup> The 1977 Legislature amended both Section 21-5-8 and Section 25-5-9.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup> The Legislature further expanded the time during which a party had the ability to disqualify a judge.<sup>73</sup> 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.<sup>74</sup>

## 2. *The Advent of Judicial Rulemaking*

To fully understand the events which led to the Compromise of 1985 and the 1985 amendment to Section 38-3-9,<sup>75</sup> 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.<sup>76</sup>

In early New Mexico, the rules of procedure for the courts were creations passed by the Legislature.<sup>77</sup> Judicial rulemaking was accepted as a proper activity for the Legislature.<sup>78</sup> 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.<sup>79</sup> The Legislature declared the courts to be open

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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. Act of Apr. 6, 1977, ch. 228, § 1, 1977 N.M. Laws 875, 875-76 (codified as amended in 1965 at N.M. STAT. ANN. § 21-5-8 (1953)) (preserving § 21-5-8 intact and expanding § 21-5-8(A)).

71. *Id.*

72. *Id.*

73. *Id.* § 2.

74. *Id.*

75. Act of Mar. 17, 1933, ch. 184, § 1, 1933 N.M. Laws 502, 502.

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., Act of July 10, 1851, 1851 N.M. Terr. L. 119 (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); Act of July 12, 1851, 1851 N.M. Terr. L. 141 (regulating the practice in the District and Supreme Courts of the Territory of New Mexico); Act of July 12, 1851, 1851 N.M. Terr. L. 185 (providing for the taking of testimony by interrogations).

78. 1851 N.M. Terr. L. 141 (regulating the practice in the District and Supreme Courts of the Territory of New Mexico); see also Browde & Occhialino, *supra* note 7, at 413.

79. See 1851 N.M. Terr. L. 141 (regulating the practice in the District and Supreme Courts of the Territory of New Mexico).

to the public,<sup>80</sup> authorized the court to maintain decorum and authorized its power of contempt,<sup>81</sup> authorized the seal of the court,<sup>82</sup> established jurisdiction,<sup>83</sup> abolished the distinction between courts of chancery and law,<sup>84</sup> established courts of general jurisdiction,<sup>85</sup> established venue,<sup>86</sup> defined parties,<sup>87</sup> provided for the survival of actions,<sup>88</sup> set notice requirements,<sup>89</sup> adopted rules of procedure and common law in criminal and civil cases,<sup>90</sup> established rules of pleading,<sup>91</sup> described the duties of the clerk of the court,<sup>92</sup> allowed motion practice,<sup>93</sup> and defined the duties of the judge.<sup>94</sup> Finally it allowed for the free process and access to the courts for those too poor to pay costs.<sup>95</sup>

The Act<sup>96</sup> 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 proper.”<sup>97</sup>

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.<sup>98</sup>

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 the judicial branch itself rather than by the Legislature.<sup>99</sup> This view was advanced by Dean Roscoe Pound among others<sup>100</sup> and became stronger as the United States entered the 1920s.<sup>101</sup> Even though Dean Pound advocated that the judicial branch should author rules of procedure for the courts, he never advocated that the

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80. *See id.* § 1.

81. *See id.* § 2.

82. *See id.* § 3.

83. *See id.* § 4.

84. *See id.* § 5.

85. *See id.* §§ 5, 6.

86. *See id.* § 7.

87. *See id.* §§ 7, 8.

88. *See id.* §§ 12–14.

89. *See id.* § 15.

90. *See id.* §§ 18, 19.

91. *See, e.g., id.* §§ 20–23.

92. *See id.* §§ 34–36, 41, 42.

93. *See id.* § 41.

94. *See id.* §§ 16, 24.

95. *See id.* § 48.

96. 1851 N.M. Terr. L. 141.

97. Section 19, 1851 N.M. Terr. L. 141 was later codified as N.M. R.S. art. 12, ch. 27, §§ 1–48 (1865).

98. *See supra* note 77.

99. For an excellent discussion of this dialogue and subject, *see* Browde & Occhialino, *supra* note 7, at 420–25.

100. *Id.* at 421.

101. *Id.*

Legislature had no role to play in judicial rulemaking or that the judicial branch was the exclusive authoritative source of court rules and procedure.<sup>102</sup>

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.<sup>103</sup>

The judiciary of the 1930s was quite comfortable with the Legislature having the ability to statutorily enact rules of procedure for the courts. In *State ex rel. Hannah v. Armijo*,<sup>104</sup> 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.<sup>105</sup> 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 the court.<sup>106</sup> He invited action by the Legislature to add additional safeguards against abuse.<sup>107</sup> Although the judiciary through court decisions addressed and thereby shaped the breadth and application of judicial disqualification through the 1930s and 1940s, the New Mexico Supreme Court did not enact a formal rule of procedure covering the subject until 1949.<sup>108</sup>

The constitutionality of the developing trial court rules was upheld in *State v. Roy*<sup>109</sup> 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, which authorized the judiciary to promulgate rules of pleading, practice, and procedure, 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.<sup>110</sup>

The New Mexico Supreme Court held that Chapter 84 was constitutional because it did not attempt to delegate exclusively legislative powers to the

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102. *Id.* at 425.

103. Act of Mar. 13, 1933, ch. 84, 1933 N.M. Laws 147, 147–48 (relating to the rules of pleading, practice and procedure in the courts of the state of New Mexico).

104. 1933-NMSC-087, ¶¶ 9, 10, 28 P.2d 511 (holding that the Legislature did not violate the doctrine of separation of powers when it enacted Ch. 184).

105. *Id.* ¶ 10.

106. *Id.* ¶ 42 (Watson, C.J., concurring).

107. *Id.* ¶ 43.

108. N.M. R. CIV. P. 88 (1949 Cum. Supp.). 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. 1936-NMSC-048, ¶ 71, 60 P.2d 646.

110. *Id.* ¶ 70.

judiciary.<sup>111</sup> The court acknowledged that there were many overlapping areas of governance between the three branches of government observing that courts make rules of procedure which, in many instances, might be prescribed by the Legislature.<sup>112</sup> The supreme court further held that its power to prescribe rules was not by virtue of the Legislature's delegation of such power and that the rules of pleading, practice, and procedure were promulgated by the Court as an exercise of its inherent power to prescribe such rules.<sup>113</sup>

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 this court with any law enacted by the Legislature."<sup>114</sup> It must be assumed that "any law" included Chapter 184, Laws 1933 which it had construed in *State ex rel. Hannah v. Armijo*<sup>115</sup> 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.<sup>116</sup> Relying on Article VI, Section 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 solely to us to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice."<sup>117</sup>

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.<sup>118</sup>

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*,<sup>119</sup> 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."<sup>120</sup> The Supreme Court concluded that the Legislature could exercise reasonable regulation, even on matters within the inherent power of

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111. *Id.* ¶ 71.

112. *Id.* ¶¶ 77–82 (observing that courts may make rules of pleading and procedure and contending that the Legislature could do the same without the intervention of the courts).

113. *Id.* ¶ 82.

114. *Id.* ¶ 83.

115. 1933-NMSC-087, 28 P.2d 511.

116. *Roy*, 1936-NMSC-048, ¶ 71. Historically, this was accomplished by the Supreme Court through its authority to issue writs to inferior courts. N.M. CONST. art VI, § 3.

117. *Roy*, 1936-NMSC-048, ¶ 90.

118. *Id.* ¶¶ 92–96.

119. 1957-NMSC-071, 315 P.2d 223.

120. *Id.* ¶ 18.

the court, so long as that regulation still allowed the court sufficient power to protect itself and to efficiently administer its judicial functions.<sup>121</sup>

In the late 1960s, this sharing of rulemaking authority between the Legislature and the judiciary had begun to erode.<sup>122</sup> In *State ex rel. Anaya v. McBride*,<sup>123</sup> and *Ammerman v. Hubbard Broadcasting, Inc.*,<sup>124</sup> 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.”<sup>125</sup>

In 1982, the Supreme Court addressed the procedural application of Section 38-3-9 in criminal matters by adopting Rule 34.1.<sup>126</sup> Rule 34.1 provided a time limit for the exercise of the statutory right to disqualify a judge<sup>127</sup> and also required a judge to recuse if the judge was sitting in an action where the judge’s impartiality might be reasonably questioned.<sup>128</sup> 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.<sup>129</sup>

Additionally, Rule 34.1’s language was softened.<sup>130</sup> 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 condition precedent, the exercise of the right was in the nature of a right to “excuse” the judge.<sup>131</sup> 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.<sup>132</sup>

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121. *Id.* ¶¶ 18, 19.

122. *See* *Sw. Underwriters v. Montoya*, 1969-NMSC-027, ¶¶ 11, 12, 452 P.2d 176 (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. 1975-NMSC-032, ¶ 11, 539 P.2d 1006 (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 and that such statutes are not binding because the constitutional power is vested exclusively in the judiciary).

124. 1976-NMSC-031, ¶ 15, 551 P.2d 1354.

125. *Id.* (citing *Anaya v. McBride*, 1975-NMSC-032, 539 P.2d 1006).

126. N.M. R. CRIM. P. 34.1 (1982 Cum. Supp.). Prior to the adoption of this rule, the only rules of procedure superseding the statutory procedure were local rules. *Id.* at Committee Commentary. The Supreme Court upheld a judicial district’s ability to establish procedural rules dealing with § 38-3-9 in *Gray v. Sanchez*, 1974-NMSC-011, 148, 520 P.2d 1091.

127. N.M. R. CRIM. P. 34.1(a) (1982 Cum. Supp.).

128. *Id.* at 34.1(c).

129. *Id.* at 34.1(b).

130. *Id.* at Committee Commentary.

131. *Id.*

132. *Id.* at 34.1.

### 3. *The Confrontation*

In the early 1980s, the New Mexico Legislature was confronted by what many members considered an overly aggressive Judiciary.<sup>133</sup> The Supreme Court in *Hicks v. State*,<sup>134</sup> abolished the doctrine of sovereign immunity as a defense by the state or political subdivision in tort actions. In *Scott v. Rizzo*,<sup>135</sup> 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.*,<sup>136</sup> 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. Maez*,<sup>137</sup> and recognized the tort of negligent infliction of emotional distress in *Ramirez v. Armstrong*.<sup>138</sup> Additionally, *Ammerman v. Hubbard Broadcasting, Inc.*, dealing with the substantive versus procedural dichotomy relating to the separation of constitutional powers, had been decided in 1976.<sup>139</sup>

In 1984, against this backdrop arose *State ex rel. Galvan v. Gesswein*,<sup>140</sup> which focused on Rule 34.1 and Section 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.<sup>141</sup> The *Gesswein* Court revisited *State ex rel. Hannah v. Armijo*, stating that “the reasoning of the *Hannah* court . . . must be reviewed in light of present day circumstances.”<sup>142</sup>

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 matter<sup>143</sup> and noted that later cases denoted the statutory disqualification provision as a substantive right.<sup>144</sup> It also recognized a line of cases which referred to the

133. Interview with Raymond G. Sanchez, former member N.M. House of Representative (1971–2001), Former Speaker of the N.M. House of Representatives (1983–84, 1987–2001), in Santa Fe, N.M. (Jan. 29, 2014).

134. 1975-NMSC-056, ¶ 9, 544 P.2d 1153.

135. 1981-NMSC-021, ¶ 5, 634 P.2d 1234. The court’s decision in *Scott* 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. *Id.* ¶ 12.

136. 1982-NMCA-048, ¶ 33, 646 P.2d 579.

137. 1982-NMSC-103, ¶ 14, 651 P.2d 1269.

138. 1983-NMSC-104, ¶ 17, 673 P.2d 822.

139. 1976-NMSC-031, ¶ 17, 551 P.2d 1354 (holding that the Legislature lacks the power to proscribe rules of evidence and procedure and declaring those powers vested exclusively in the judiciary).

140. 1984-NMSC-025, 676 P.2d 1334.

141. *Id.* ¶ 8.

142. *Id.* ¶ 9.

143. *Id.* ¶ 13 (citing *Beall v. Reidy*, 1969-NMSC-092, 457 P.2d 376).

144. *Id.* (citing *Gerety v. Demers*, 1978-NMSC-097, 589 P.2d 180).

procedural aspects of Section 38-3-9 noting that the section provided a means<sup>145</sup> or method<sup>146</sup> to disqualify a judge.

The *Gesswein* Court noted that prior to the enactment of Section 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.”<sup>147</sup> Relying on *Ammerman*, the Court found that Section 38-3-9 provided a method of disqualification which was procedural in nature and was therefore “a prerogative of this Court.”<sup>148</sup> 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.”<sup>149</sup> The Court found that the current procedure as found in Rule 34.1 permitted abuses.<sup>150</sup> The Court declared that “Rule 34.1 is inappropriate and is hereby retracted.”<sup>151</sup>

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.<sup>152</sup> The Supreme Court then announced that it would “promulgate proper rules governing disqualification.”<sup>153</sup> It was the promulgation of these rules that set the stage for the Court’s clash with the Legislature in 1985.

The amended Rule 34.1<sup>154</sup> 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 was 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.<sup>155</sup> The amended Rule 34.1 continued the procedure of exercising provisional disqualifications<sup>156</sup> and providing that judges whose impartiality may be reasonably questioned on constitutional or Code of Judicial Conduct grounds must recuse themselves from the case.<sup>157</sup>

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.<sup>158</sup> It required a certificate of counsel “executed subject to disciplinary sanctions and the sanctions of Rule 11” certifying that the facts contained in the

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145. *Id.* ¶ 14 (citing *Moruzzi v. Fed. Life & Caus. Co.*, 1938-NMSC-002, ¶ 17, 75 P.2d 320).

146. *Id.* (citing *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, 629 P.2d 231; *Martinez v. Carmona*, 1980-NMCA-139, ¶ 12, 624 P.2d 54).

147. *Id.* ¶ 10 (quoting *State ex rel. Hannah v. Armijo*, 1933-NMSC-087, ¶ 40, 28 P.2d 511).

148. *Id.* ¶ 16.

149. *Id.*

150. *Id.* ¶ 19.

151. *Id.*

152. *Id.* ¶¶ 18–19. The *Gesswein* Court did not rule Section 38-3-9 to be unconstitutional or void. *Id.* ¶¶ 9–16.

153. *Id.* ¶ 19.

154. N.M. R. CRIM. P. 34.1 (1984 Cum. Supp.).

155. *Id.* at 34.1(a).

156. *Id.* at 34.1(e).

157. *Id.* at 34.1(f).

158. *Id.* at 34.1(g).



affidavit are true and correct to the best of counsel's knowledge, information, and belief.<sup>159</sup> 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.<sup>160</sup>

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

The Supreme Court had declined to declare Section 38-3-9 unconstitutional as being violative of the Separation of Powers Clause in *Gesswein*. By amending Rule 34.1, the Supreme Court made the statutory right to disqualify a judge virtually impossible to exercise procedurally.<sup>163</sup>

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 88<sup>164</sup> which contained identical language to Criminal Rule 34.2 was adopted. A new Civil Rule 88.1 was adopted.<sup>165</sup> It tracked the language of amended Rule 34.1.<sup>166</sup>

#### 4. *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 Section 38-3-9 unconstitutional.<sup>167</sup> The legislative leadership made several attempts to draft legislation to define what aspects of a law were procedural and what was substantive.<sup>168</sup> The legislators could never draft or pass a definitional bill.<sup>169</sup>

*Galvan v. Gesswein* was especially disturbing to the Legislature as violating the doctrine of separation of powers.<sup>170</sup> Separation of powers in New Mexico is not

159. *Id.*

160. *Id.*

161. N.M. R. CRIM. P. 34.2 (1984 Cum. Supp.).

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). *Id.*

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. See Browde & Occhialino, *supra* note 7, at 461 n.316.

164. N.M. R. CIV. P. 88 (1984 Cum. Supp.).

165. N.M. R. CIV. P. 88.1 (1984 Cum. Supp.).

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. Compare N.M. R. CIV. P. 88 (1984 Cum. Supp.), and N.M. R. CIV. P. 88.1 (1984 Cum. Supp.), with N.M. R. CRIM. P. 34.1 (1984 Cum. Supp.), and N.M. R. CRIM. P. 34.2 (1984 Cum. Supp.).

167. Telephone Interview with Richard C. "Dick" Minzner, former member N.M. House of Representatives (1981-90), Majority Leader N.M. House of Representatives (1985-86) (Dec. 12, 2013); Interview with Richard C. "Dick" Minzner, former member N.M. House of Representatives (1981-90), Majority Leader N.M. House of Representatives (1985-86), in Santa Fe, N.M. (Jan. 29, 2014).

168. Interview with Sanchez, *supra* note 133.

169. *Id.*

170. Interview with Minzner, *supra* note 167. The constitutional analysis and argument which appears in the text accompanying *infra* notes 171-91 was constructed by Minzner. Interview with Minzner, *supra*

absolute. Other provisions of the Constitution may allow one branch to exercise powers properly belonging to another.<sup>171</sup> The Legislature believed that making court rules was not a power exclusively belonging to the judicial branch.<sup>172</sup>

The New Mexico Constitution exclusively confers upon the Legislature the power to regulate its own internal affairs and internal procedure.<sup>173</sup> 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.<sup>174</sup> The Legislature is expressly prohibited from changing rules of evidence or procedure in any pending case.<sup>175</sup> The legislators reasoned that this allowed them to enact rules of evidence and procedure for non-pending cases.<sup>176</sup> Further, the Constitution<sup>177</sup> forbids the Legislature to enact local<sup>178</sup> or special<sup>179</sup> laws<sup>180</sup> “regulating . . . district affairs;”<sup>181</sup> the jurisdiction and duties of justices of the peace (now magistrate judges);<sup>182</sup> “the practice in courts of justice;”<sup>183</sup> the summoning and impaneling of jurors;<sup>184</sup> the change of venue in civil or criminal cases;<sup>185</sup> and changing the rules of evidence in any trial or inquiry.<sup>186</sup> It was clear to the legislators that there was no constitutional prohibition to enacting a general law<sup>187</sup> concerning these matters.<sup>188</sup>

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note 167. 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.

171. See N.M. CONST. art. III, § 1 (“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.”).

172. Interview with Minzner, *supra* note 167.

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

174. See N.M. CONST. art. IV, § 34 (“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.”).

175. *Id.*

176. Interview with Minzner, *supra* note 167.

177. N.M. CONST. art. IV, § 24.

178. Local law: a law which operates over a particular locality instead of over the whole state. *Local Law*, BLACK’S LAW DICTIONARY (5th ed. 1979).

179. Special law: a law relating to particular persons or things within a larger class. Does Chapter 311, New Mexico Laws of 1971 Violate the New Mexico Constitution, No. 71-74, Op. Att’y Gen. (June 9, 1971).

180. N.M. CONST. art. IV, § 24.

181. *Id.*

182. *Id.*

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.*, 1915-NMSC-062, ¶ 5, 151 P. 305.

188. Interview with Minzner, *supra* note 167.

The Legislature refrained from challenging what recent court decisions had done up to that point in other areas.<sup>189</sup> The Legislature did want to stop the judiciary from proclaiming that rules and procedure were its exclusive province to the exclusion of the Legislature.<sup>190</sup> 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.<sup>191</sup>

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."<sup>192</sup>

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 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.<sup>193</sup> 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." HB20 proposed repealing Section 38-3-9 and enacting a new Section 38-3-9 in its place.<sup>194</sup> 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 . . . ." <sup>195</sup> 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

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189. *Id.*

190. *Id.* 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. *Id.*

191. *Id.*

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.

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. H.B. 20, 37th Leg., 1st Sess. (N.M. 1985).

195. *Id.*

alignment as a factor limiting the number of times that disqualification could be exercised stating that in Workman Compensation cases, “the employer and the insurance carrier shall be treated as one party.”<sup>196</sup> 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.<sup>197</sup>

HB20 became the subject of direct negotiations between members of the Legislature and members of the Supreme Court.<sup>198</sup> There were multiple direct meetings between Legislators and Justices.<sup>199</sup> 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.<sup>200</sup>

Both sides had issues which they felt strongly about. Two members of the Court<sup>201</sup> 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.<sup>202</sup> The justices were affronted that the document filed to facilitate disqualification was called an “Affidavit of Bias” or “Affidavit of Prejudice.”<sup>203</sup> 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 that the judge was unfair and that voters should vote against such an unfair judge.<sup>204</sup> The justices were also concerned about the Legislature’s 1977 amendment to Section 38-3-9 which allowed a litigant to disqualify three judges if the case was filed in the Second District (Bernalillo County).<sup>205</sup> In general, the Judiciary viewed the entire disqualification issue as a disparaging reflection on its fairness and integrity.<sup>206</sup>

The Legislators viewed the disqualification issue differently. Several

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196. *Id.*

197. *Id.*; Interview with Minzner, *supra* note 167.

198. Interview with Justice Charles Daniels, N.M. Supreme Court, in Santa Fe, N.M. (Jan. 17, 2014); Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

199. Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133. Sanchez recalls being “summoned” to the Supreme Court Building. Subsequent meetings occurred at other venues. *Id.*

200. Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

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. Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

203. Interview with Daniels, *supra* note 198; Interview with Minzner, *supra* note 167.

204. Interview with Daniels, *supra* note 198.

205. Interview with Minzner, *supra* note 167.

206. Interview with Daniels, *supra* note 198; Interview with Minzner, *supra* note 167; Telephone Interview with Harold D. “Hal” Stratton, Jr., former member of the N.M. House of Representatives (1979–86), Chairman of the House Judiciary Committee (1985–86), N.M. Attorney Gen. (1987–90) (April 9, 2014) (recalling that in 1983 or 1984, Justice William Riordan 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.).

legislators were lawyers.<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup>

Minzner’s HB20 was held up in the House Judiciary Committee<sup>210</sup> while negotiations between the legislators and justices drug on.<sup>211</sup> Once the compromise<sup>212</sup>

207. Interview with Daniels, *supra* note 198; Telephone Interview with Les Houston, Esquire, former member of the N.M. Senate (1977–92), former President Pro Tempore of the Senate (April 21, 2014); Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

208. Interview with Daniels, *supra* note 198; Interview with Houston, *supra* note 207; Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

209. Interview with Minzner, *supra* note 167; Interview with Stratton, *supra* note 206.

210. Procedural History, H.B. 20, 37 Leg., 1st Sess. (N.M. 1985); Interview with Minzner, *supra* note 167.

211. Telephone Interview with John Budagher, former member N.M. Senate (1980–88), Chairman of the Senate Judiciary Committee (1985–87) (April 9, 2014); Telephone Interview with Victor Marshall, former member N.M. Senate (1985–92) (April 8, 2014); Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133; Interview with Stratton, *supra* note 206.

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. Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133; Interview with Stratton, *supra* note 206.

was reached, HB20 was given a “do-not-pass” recommendation by the House Judiciary Committee and a Committee Substitute For House Bill 20 was introduced<sup>213</sup> 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 Section 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.<sup>214</sup> Finally, Section B which allowed three disqualifications if the case was filed in the Second Judicial District was removed.<sup>215</sup> 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 be tried.<sup>216</sup> It provided “After the exercise of a peremptory challenge” the judge shall proceed no further.<sup>217</sup> It permitted each party to “excuse” one district judge.<sup>218</sup> 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.<sup>219</sup> 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.”<sup>220</sup> In other words, the section was intended to create a new substantive right separate and apart from the Constitution.<sup>221</sup> The section is silent as to how or when the peremptory challenge is to be raised or exercised.<sup>222</sup>

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.<sup>223</sup> 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.<sup>224</sup>

Substitute HB20 contained an Emergency Clause stating the act would take effect immediately being necessary for the public peace, health, and safety.<sup>225</sup> Governor Toney Anaya signed the bill on April 1, 1985, and the bill took effect that day.<sup>226</sup> The Legislature had done its part.<sup>227</sup>

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

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213. H. Judiciary Comm. Substitute for H.B. 20, 37th Leg., 1st Sess. (N.M. 1985).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*; Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

222. H. Judiciary Comm. Substitute for H.B. 20; Interview with Minzner, *supra* note 167.

223. Procedural History, H. Judiciary Comm. Substitute for H.B. 20, 37th Leg., 1st Sess. (N.M. 1985).

224. *Id.*

225. H. Judiciary Comm. Substitute for H.B. 20.

226. Act of Apr. 1, 1985, ch. 91, 1985 N.M. Laws 549.

227. Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

effectuate Section 38-3-9 as amended.<sup>228</sup> Like amended Section 38-3-9, the terms “disqualified” or “disqualification” appeared nowhere in the amended Rules 88 and 88.1<sup>229</sup> (civil) and Rule 34.1<sup>230</sup> (criminal). The amended rules follow Section 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.”<sup>231</sup> Rule 88 as amended and new Rule 34.2 deleted the former section B relating to multi-judge districts.<sup>232</sup> 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. Removed 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.<sup>233</sup> 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 of the complaint being filed.<sup>234</sup> 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.<sup>235</sup> 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.<sup>236</sup>

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.<sup>237</sup> The Judiciary had completed the agreement.<sup>238</sup>

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228. Interview with Daniels, *supra* note 198; Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133.

229. N.M. R. CIV. P. 88 (1985 Cum. Supp.); N.M. R. CIV. P. 88.1 (1985 Cum. Supp.).

230. N.M. R. CRIM. P. 34.1 (1985 Cum. Supp.).

231. N.M. R. CIV. P. 88.1(b), (c) (1985 Cum. Supp.); N.M. R. 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(a) (1985 Cum. Supp.); N.M. R. CRIM. P. 34.1(b) (1985 Cum. Supp.).

234. N.M. R. CIV. P. 88.1 (1985 Cum. Supp.); N.M. R. CRIM. P. 34.1(c) (1985 Cum. Supp.).

235. N.M. R. CIV. P. 88.1 (1985 Cum. Supp.); N.M. R. CRIM. P. 34.1(c) (1985 Cum. Supp.).

236. N.M. R. CIV. P. 88.1(c) (1985 Cum. Supp.); N.M. R. CRIM. P. 34.1(d) (Cum. Supp.).

237. N.M. R. CIV. P. 88.1(d) (Cum. Supp.); N.M. R. CRIM. P. 34.1(e) (Cum. Supp.).

238. Interview with Budagher, *supra* note 211; Interview with Marshall, *supra* note 211; Interview with Minzner, *supra* note 167; Interview with Sanchez, *supra* note 133; Interview with Stratton, *supra* note 206.

#### **D. 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 Section 38-3-9 was passed in 1985.<sup>239</sup> The Judiciary has revised the procedures by which the statutory right to excuse a judge is exercised several times since the Compromise of 1985.<sup>240</sup> 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.

By 1988, Civil Rule 88.1 had become Rule 1-088.1.<sup>241</sup> 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.<sup>242</sup> 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.”<sup>243</sup>

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.<sup>244</sup> 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.<sup>245</sup> As with prior rules, no party could excuse more than one judge pursuant to Section 38-3-9.<sup>246</sup>

One year later, in 1989, the Supreme Court addressed the provisions of Criminal Rules 5-106.<sup>247</sup> The amendment eliminated language which prohibited excusing a judge from hearing preliminary matters prior to trial.<sup>248</sup> It provided that no judge could be excused from setting conditions of release but was otherwise silent

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239. N.M. Const. art. VI, § 18 (Only Chapter 77, N.M. Terr. L. 1889 has endured unamended longer (1889–1929), 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, N.M. RULES ANN. § 1-088; Rule 1-088.1 was amended in 1988, 1995, 2007, 2008, and 2013, N.M. RULES ANN. § 1-088.1; Rule 5-106 was amended in 1989, 1990, 1984, and 2008, N.M. RULES ANN. § 5-106.

241. N.M. RULES ANN. § 1-088.1 (1989 Cum. Supp.).

242. *Id.* § 1-088.1(A).

243. *Id.*

244. *Id.* § 1-088.1(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. *Id.* §§ 1-088.1(B), (C).

246. *Id.* § 1-088.1(D).

247. N.M. RULES ANN. § 5-106 (1989 Cum. Supp.). Rule 5-106 was formerly N.M. R. CRIM. P. 34.1 (1985 Cum. Supp.).

248. N.M. RULES ANN. § 5-106(B) (1989 Cum. Supp.).



about how early in the case could a party excuse a judge.<sup>249</sup> The amendment, like its amended civil counterpart,<sup>250</sup> 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).<sup>251</sup> If the initial judge was excused, the remaining parties had 10 days from the notice of reassignment to peremptorily excuse the successor judge.<sup>252</sup> 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.<sup>253</sup> The 1989 amendment also added provisions dealing with a judge’s Disability During Trial<sup>254</sup> and Disability After Verdict or Finding of Guilt.<sup>255</sup> 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 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.<sup>256</sup>

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 Section 38-3-9.<sup>257</sup> The 1990 amendment provided that a judge could not be excused from conducting an arraignment or first appearance or setting initial conditions of release.<sup>258</sup>

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.”<sup>259</sup>

The New Mexico Supreme Court’s fidelity to the compromise was tested in 1992 in *JMB Retail Properties Company v. Eastburn*.<sup>260</sup> 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.<sup>261</sup>

249. *Id.*

250. N.M. R. CIV. P. 88.1 (1985 Cum. Supp.).

251. N.M. RULES ANN. § 5-106(C) (1989 Cum. Supp.).

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. *Id.* § 5-106(A).

254. *Id.* § 5-106(F).

255. *Id.* § 5-106(G).

256. *Id.* § 5-106.

257. *Id.*

258. *Id.*

259. N.M. RULES ANN. § 5-106(G) (1994 Cum. Supp.).

260. 1992-NMSC-045, 835 P.2d 831.

261. *Id.* ¶ 7.

In denying JMB's motion to recognize its peremptory election to excuse, Judge Eastburn declared Section 38-3-9 and Rule 1-088.1 unconstitutional.<sup>262</sup> 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."<sup>263</sup> Because Eastburn considered judge assignment an essential judicial power, he found that Section 38-3-9 violated the New Mexico Constitution<sup>264</sup> and held Section 38-3-9 to be unconstitutional.<sup>265</sup>

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.<sup>266</sup> The constitutional issues were fully briefed by the parties and *amici curiae*.<sup>267</sup>

The Supreme Court before the Compromise could have easily used *Gesswein* as authority to constitutionally finish off Section 38-3-9. Instead the Supreme Court cited *Gesswein*, in dicta, to legitimize the Compromise.<sup>268</sup> 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 subject to the court's ability to promulgate appropriate procedure for its excise.<sup>269</sup> 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 1930s<sup>270</sup> which dealt with the invocation of a ruling by the judge.<sup>271</sup> 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 Section 38-3-9 after a party has invoked the discretion of the court.<sup>272</sup>

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

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262. *Id.* ¶ 3.

263. *Id.* ¶ 2.

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

265. *JMB*, 1992-NMSC-045, ¶ 2.

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 Section 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. *Id.* According to the Hon. Carl J. Butkus, in an April 22, 2014, interview, the author of 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. See *JMB*, 1992-NMSC-045, ¶ 2.

269. *Id.*

270. *State ex. rel. Shufeldt v. Armijo*, 1935-NMSC-078, ¶ 14, 50 P.2d 852.

271. *JMB*, 1992-NMSC-045, ¶¶ 6, 11.

272. *Id.* ¶ 8.

withdrawing from the brinkmanship of 1984 and articulating (in dicta) how the Judiciary could coexist with the Legislature (and the lawyers).<sup>273</sup> The Judiciary had moved in the direction of *Bliss v. Greenwood*.<sup>274</sup>

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.<sup>275</sup> It also followed its trend favoring ease of use by allowing a party or party's attorney to sign the peremptory election to excuse.<sup>276</sup> 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."<sup>277</sup>

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*.<sup>278</sup> It had been eleven years since the compromise and the entire membership of the Court had turned over since 1985.<sup>279</sup> 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.<sup>280</sup>

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

The Supreme Court began its analysis with a look at law of peremptory excusal.<sup>284</sup> Citing *State ex rel. 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

273. *Id.* ¶¶ 6, 12.

274. See *supra* notes 119–21 and accompanying text.

275. N.M. RULES ANN. § 1-088.1(A) (1995 Cum. Supp.).

276. *Id.* § 1-088.1(B)(1).

277. N.M. RULES ANN. § 1-088.1(A) (2007 Cum. Supp.).

278. 1996-NMSC-011, 914 P.2d 1028.

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

280. See *In re Eastburn*, 1996-NMSC-011. 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. 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. *Id.* ¶ 1. 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. *Id.* ¶ 3.

283. *Id.*

284. *Id.* ¶ 4.

facts to support disqualification.”<sup>285</sup> As in *JMB*, the Supreme Court brushed aside Judge Eastburn’s separation of powers argument that § 38-3-9 was unconstitutional<sup>286</sup> and entered its decision on the contempt issue. The Supreme Court held him in direct contempt for refusing to obey the Court’s writ.<sup>287</sup> 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.<sup>288</sup>

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, the district judge shall proceed no further.<sup>289</sup>

In 2008, both Rule 1-088.1<sup>290</sup> and Rule 5-106<sup>291</sup> were again amended to provide procedural guidance in the “mass reassignment” of cases.<sup>292</sup>

Rule 1-088.1 went further. It expanded those who could not excuse a judge to include “a party who has attended a hearing.”<sup>293</sup> 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.<sup>294</sup>

## II. OTHER JURISDICTIONS

The right of a litigant to peremptorily excuse the judge of a case is a minority position among the states.<sup>295</sup> It is a noticeably regional phenomenon. At

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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. *See id.* ¶ 7; *JMB Retail Props. Co. v. Eastburn*, 1992-NMSC-045, ¶ 6, 835 P.2d 831.

287. *In re Eastburn*, 1996-NMSC-011, ¶ 24. The author observes that Judge Eastburn’s commentary expressing his view of the judiciary probably did not help his position.

288. *See id.* ¶¶ 23–24.

289. N.M. RULES ANN. § 1-088.1(D) (2007 Cum. Supp.).

290. N.M. RULES ANN. §§ 1-088.1(B), (D) (2008 Cum. Supp.).

291. *Id.* § 5-106(C), (E).

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 ten days of last date of publication.

293. N.M. RULES ANN. § 1-088.1(A) (2008 Cum. Supp.).

294. *Id.* § 1-088.1(C)(3). 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. AM. BAR. ASS’N, STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 11–12 (Oct. 8, 2010), <http://www.americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/JDPReportOct82010.authcheckdam.pdf>.

least 18 states predominately located in the western United States (with a few in the mid-west) recognize this right<sup>296</sup> through either legislative enactment or by court rule. Along with New Mexico, these include Alaska,<sup>297</sup> Arizona,<sup>298</sup> California,<sup>299</sup> Idaho,<sup>300</sup> Illinois,<sup>301</sup> Indiana,<sup>302</sup> Minnesota,<sup>303</sup> Missouri,<sup>304</sup> Montana,<sup>305</sup> Nevada,<sup>306</sup> North Dakota,<sup>307</sup> Oregon,<sup>308</sup> South Dakota,<sup>309</sup> Texas,<sup>310</sup> Washington,<sup>311</sup> Wisconsin,<sup>312</sup> and Wyoming.<sup>313</sup> 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.<sup>314</sup>

The procedure by which the right to change a judge is exercised varies among these 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 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

296. *Id.*

297. ALASKA STAT. § 22.20.022 (2015); ALASKA R. CIV. P. 42(c); ALASKA R. CRIM. P. 25(d).

298. ARIZ. REV. STAT. ANN. § 12-411 (2016); ARIZ. R. CIV. P. 42(f); ARIZ. R. CRIM. P. 10.2.

299. CAL. CIV. PROC. CODE § 170.6(a) (West 2016).

300. IDAHO R. CIV. P. 40(d)(1); IDAHO R. CRIM. P. 25(a).

301. 735 ILL. COMP. STAT. ANN. 5/2-1001 (West 2016) (civil); 725 ILL. COMP. STAT. ANN. 5/114-5 (West 2016) (criminal).

302. IND. R. TRIAL P. 76(B) (civil); IND. R. CRIM. P. 12(B) (criminal).

303. MINN. R. CIV. P. 63.03; MINN. R. CRIM. P. 26.03(14)(4).

304. MO. SUP. CT. R. 51.05 (civil); MO. SUP. CT. R. 32.07 (criminal).

305. MONT. CODE ANN. § 3-1-804 (West 2015) (civil & criminal).

306. NEV. SUP. CT. R. 48.1 (civil).

307. N.D. CENT. CODE § 29-15-21 (2015) (civil & criminal).

308. OR. REV. STAT. ANN. § 14.250 (West 2016); OR. REV. STAT. ANN. § 14.260 (West 2016); OR. REV. STAT. ANN. § 14.270 (West 2016) (civil & criminal).

309. S.D. CODIFIED LAWS §§ 15-12-19 to -37 (civil & criminal).

310. TEX. GOV'T CODE ANN. § 74.053 (West 2015) (civil).

311. WASH. REV. CODE ANN. § 4.12.050 (West 2016) (civil); WASH. SUPERIOR CT. CRIM. R. 8.9 (criminal).

312. WIS. STAT. ANN. § 801.58 (West 2016) (civil); WIS. STAT. ANN. § 971.20 (West 2016) (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 Wyoming Supreme Court. (Dec. 4, 2012)).

314. The author has not included Utah among this group. Utah has a procedure in both civil and criminal cases which allows a change of judge “without cause” upon the unanimous agreement of all parties. *See* UTAH R. CIV. P. 63A; UTAH R. CRIM. P. 29A. 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* note 295) does not consider this to be a right of peremptory excusal.

(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.<sup>315</sup> They limit its exercise to one challenge per party per case<sup>316</sup> although Oregon affords a party to exercise two peremptory challenges per case.<sup>317</sup>

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.<sup>318</sup> 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.<sup>319</sup> 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 interests are so adverse to entitle each to file their own separate motion.<sup>320</sup> Co-defendants in criminal cases are handled in the same manner.<sup>321</sup> Montana affords “each adverse party” a substitution.<sup>322</sup> 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.<sup>323</sup> Texas allows each party one objection. A “party” includes multiple parties who are “aligned” as determined by the presiding judge.<sup>324</sup> 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.”<sup>325</sup>

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

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

316. See supra notes 297–307, 309–313.

317. See supra note 308.

318. MO. SUP. CT. R. 51.05(d).

319. IDAHO R. CIV. P. 40(d)(1)(a).

320. *Id.* at 40(d)(1)(c).

321. IDAHO R. CRIM. P. 25(a)(3).

322. MONT. CODE ANN. § 3-1-804(1) (West 2015).

323. S.D. CODIFIED LAWS § 15-12-23 (2016).

324. TEX. GOV'T. CODE ANN. § 74.053(g) (West 2015). 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 H.B. 970, 64<sup>th</sup> Leg., Reg. Sess. (Tex. 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 Dolph Briscoe, Governor, State of Tex., Proclamation 42-1553 (June 21, 1975); see generally Roger Baron, *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) (West 2016).

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.<sup>326</sup> The same is true in criminal cases but the prosecution gets the same number of challenges as all the defendants combined.<sup>327</sup>

Arizona treats a civil action as having only two sides and each side is entitled to one change of judge.<sup>328</sup> 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.<sup>329</sup> The same is true in criminal actions but there is no requirement that both sides have an equal number of challenges.<sup>330</sup>

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.<sup>331</sup> 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.<sup>332</sup> This reasoning has also been applied to criminal prosecutions.<sup>333</sup>

Perhaps the most restrictive limits on the use of peremptory challenges to change are found in Nevada.<sup>334</sup> 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.<sup>335</sup> There is no provision which allows that trial judge to examine adversity among co-plaintiffs or co-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.<sup>336</sup>

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.

A New Mexican's right to peremptorily excuse a judge, as it existed in the summer of 2013, was arguably the most broadly applicable and easiest to exercise among the states. It was given to any party, in any case, and required no reason. It was a true peremptory challenge to a judge. However, things were about to change in New Mexico.

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326. ALASKA R. CIV. P. 42(c)(1).

327. ALASKA R. CRIM. P. 25(d)(1).

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) (West 2011).

332. *Johnson v. Super. Ct. in & for L.A. Cty.*, 329 P.2d 5, 10 (Cal. 1958).

333. *Pappa v. Super. Ct. of L.A. Cty.*, 353 P.2d 311, 313 (Cal. 1960).

334. NEV. SUP. CT. R. 48.1.

335. *Id.*

336. *See supra* notes 332–33 and accompanying text.

### III. *QUALITY AUTOMOTIVE CENTER, LLC V. ARRIETA*

In August, 2013, the Supreme Court announced its opinion in *Quality Automotive Center, LLC v. Arrieta*<sup>337</sup> which marked a change of course of the Court regarding Section 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.<sup>338</sup> The Court had strongly emphasized that once a peremptory excusal was filed against a judge that judge shall proceed no further.<sup>339</sup> *Quality Automotive* 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.<sup>340</sup> In making that determination, *Quality Automotive* held that a judge may examine whether the challenging litigant is entitled to assert its own peremptory excusal under Rule 1.088.1.<sup>341</sup>

If the Supreme Court was waiting for a case which fulfilled Chief Justice Watson's prophecy in *State ex rel. Hannah v. Armijo*,<sup>342</sup> the fact pattern in *Quality Automotive* rose to the occasion. *Quality Automotive* 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.<sup>343</sup> 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 that 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 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.<sup>344</sup> 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 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.<sup>345</sup>

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337. 2013-NMSC-041, 309 P.3d 80.

338. See generally *supra* notes 247–66, 282–84 and accompanying text.

339. See generally *supra* notes 268–79 and accompanying text.

340. *Quality Auto.*, 2013-NMSC-041, ¶ 1.

341. *Id.*

342. 1933-NMSC-087, ¶ 43, 28 P.2d 511 (Watson, C.J., concurring).

343. *Quality Auto.*, 2013-NMSC-041, ¶ 5.

344. *Id.* ¶¶ 5–11.

345. *Id.* ¶¶ 12–14.



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 argued 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.<sup>346</sup> 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 Section 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.<sup>347</sup>

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.<sup>348</sup>

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 Center, LLC had filed.<sup>349</sup> 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."<sup>350</sup> The 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.<sup>351</sup>

Quality Automotive Center, LLC argued to the Supreme Court that since it was separate and distinct from the other defendants, and as a separately named party in the lawsuit, it had a right under Section 38-3-9 to exercise a peremptory challenge to Judge Arrieta.<sup>352</sup> It noted that the statute granted "each party to an action" the right of one peremptory challenge to remove a district judge.<sup>353</sup> 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.<sup>354</sup>

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

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346. *Id.* ¶¶ 13–14.

347. *Id.* ¶ 14.

348. *Id.*

349. *Id.* ¶ 18.

350. *Id.*

351. *Id.* ¶¶ 24–26.

352. *Id.* ¶ 22.

353. *Id.*

354. *Id.*

355. *Id.* ¶ 23.

challenge. . .” The Supreme 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.<sup>356</sup>

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 Section 38-3-9 nor Rule 1-088.1 defines the term “party,” the Supreme Court, without citing authority, proceeded to supply one.<sup>357</sup> The Court interpreted “party” to mean “a litigant with a sufficient diversity of interest from that of other parties in the case.”<sup>358</sup> 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.”<sup>359</sup>

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.<sup>360</sup> 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 gamesmanship or judge shopping.<sup>361</sup> The case was then remanded to Judge Arrieta to conduct his hearing on Quality Automotive Center, LLC’s peremptory challenge.<sup>362</sup>

The *Quality Automotive* opinion continues *in dicta* to call for the amendment of Rule 1-088.1.<sup>363</sup> 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.<sup>364</sup> 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 Section 38-3-9 and Rule 1-088.1.<sup>365</sup> It said that a party’s right to excusal under Section 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*.<sup>366</sup> Further

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356. *Id.* ¶¶ 23–24.

357. *Id.* ¶ 24.

358. *Id.*

359. *Id.*

360. *Id.* ¶ 25.

361. *Id.*

362. *Id.* ¶ 26. Upon remand from the Supreme Court on August 9, 2011, Judge Arrieta entered an Order Denying Defendant Quality Automotive Center, LLC’s Notice of Peremptory Excusal. Telephone interview with Manuel I. Arrieta, Esquire, N.M. District Judge (March 24, 2014).

363. *Quality Auto.*, 2013-NMSC-041, ¶¶ 28–35.

364. *Id.* ¶ 28.

365. *Id.* ¶¶ 29–30.

366. *Id.* ¶ 31.

relying on *Gesswein*, the Court found that Section 38-3-9 provides a method of disqualification, a method procedural in nature and “a prerogative of this Court.”<sup>367</sup> 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 to preserve the litigants’ constitutional rights.<sup>368</sup> The Court observed that justice must be administered not only fairly but effectively<sup>369</sup> and that the right to excuse a judge without a stated reason “should not exist without some limitation.”<sup>370</sup>

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

#### IV. AFTER QUALITY AUTOMOTIVE

##### A. Proposed Rules of 2013

###### 1. The Proposals

In September, 2013, almost contemporaneous with its announcement of the *Quality Automotive* 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 and severely restrict the rights of litigants to excuse a judge.<sup>375</sup> In each of these proposed rules all reference to a “statutory right” of excusal was removed.

A thoughtful reading of the entire *Quality Automotive* opinion and consideration of the new rules of procedure proposed by the Supreme Court to govern the peremptory excusal of judges lead to the unavoidable conclusion: The Supreme Court was doing what it declined to do in *State ex rel. Hannah v. Armijo*<sup>376</sup> and *Gesswein v. Galvan*.<sup>377</sup> It very subtly, very quietly, and very effectively sought to render the substantive right created in Section 38-3-9 a nullity.

367. *Id.* (quoting *Gesswein v. Galvan*, 1984-NMSC-025, ¶ 16, 676 P.2d 1334).

368. *Id.* ¶ 32.

369. *Id.*

370. *Id.* ¶ 33.

371. *Id.* ¶¶ 28–33.

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*, vol. 52 no. 37 N.M. B. BULL., 19, 19–22 (2013). These proposed revisions were not the product of the normal rulemaking process that utilizes the appropriate rules committee to author and amend rules of procedure. These were authored by the Supreme Court itself. *See id.*

376. 1933-NMSC-087, 29 P.2d 511.

377. 1984-NMSC-025, 676 P.2d 1334.

Revised Rule 1-088.1, as proposed in 2013, severely restricted the ability of litigants to excuse a judge. Section 38-3-9 afforded a statutory right to each party to excuse a judge. The revised rule did away with that right. The proposed rule stated that each case shall be treated as having two sides and that the collective parties on each side had the ability to exercise one peremptory excusal.<sup>378</sup> There is no procedure whereby the alignment or adversity of interest among parties on a “side” was examined to determine if additional excusals should be allowed in the interest of fairness. If any party on a side filed an excusal then no other party on that side could excuse a judge.<sup>379</sup> Throughout the remainder of the proposed rule, stylistic changes emphasized the shift from “any party” to a “a party on either side.”<sup>380</sup>

The proposed rule affected the timelines of filing a peremptory excusal. It provided that if a party attended a hearing then no party on that side could excuse the judge.<sup>381</sup> It shortened the time in which a peremptory excusal must be exercised. The party initiating a case must exercise its challenge within 10 days after the service of the notice of judge assigned to the case.<sup>382</sup> 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 pursuant to Rule 1-012,<sup>383</sup> whichever is earlier.<sup>384</sup> Finally, a party on either side could 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.<sup>385</sup>

Proposed Rule 1-088.1 (2013) provided for an ultimate deadline for filing peremptory excusals in a case. No party could excuse the judge if the case has been at issue before the judge sought to be excused for more than 90 days.<sup>386</sup> This included both original parties and later added parties, even those parties brought in after the 90 days had expired.

The holding of *Quality Automotive* was incorporated into the proposed revision providing authority for the assigned judge to review the peremptory challenge before recusing from the case.<sup>387</sup> The trial judge could review the challenge for timelines or validity.<sup>388</sup> An objection to a peremptory challenge could be raised by any party, without reference to side, or by the court *sua sponte*.<sup>389</sup> The proposed rule required that the challenged judge initially rule on the timelines or validity of any such objection.<sup>390</sup> If the challenged judge determined that the challenge conformed to the “procedural and legal requirements in this rule,” the judge could

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378. N.M. RULES ANN. § 1-088.1(A) (proposed 2013).

379. *Id.*

380. *Id.* § 1-088.1.

381. *Id.* § 1-088.1(A).

382. *Id.* § 1-088.1(C)(1).

383. N.M. RULES ANN. § 1-012.

384. N.M. RULES ANN. § 1-088.1(C)(1) (proposed 2013).

385. *Id.* § 1-088.1(C)(2).

386. *Id.* § 1-088.1(C)(4).

387. *Id.* § 1-088.1(G).

388. *Id.*

389. *Id.*

390. *Id.* The proposed rule did not provide for any time frame in which an objection to a peremptory challenge must be filed. *See id.* § 1-088.1.

proceed no further.<sup>391</sup> If the judge determined that it did not, the judge could proceed to preside over the case.<sup>392</sup>

Proposed Rule 1-088.1 (2013) included a section to address perceived misuse of the peremptory excusal procedure when its exercise was used to hinder, delay, or obstruct the administration of justice.<sup>393</sup> If peremptory excusals were being used for improper purposes or with such frequency as to impede the administration of justice then the chief judge of the district was to notify the Chief Justice of such. The Chief Justice could take appropriate action to deal with any abuse of the procedure. It even allowed the Chief Justice to suspend the right of such attorneys to utilize the peremptory excusal procedure.<sup>394</sup> The proposed language “attorney or group of attorneys”<sup>395</sup> was 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 could uniformly excuse a particular judge to the point that it resulted in an excessive imbalance in caseload among the various judges of a district. Proposed Rule 5-106 (2013) dealing with Criminal Procedure included identical language to deal with blanket excusals of a judge by institutions like a district attorney’s office or a public defender’s office.<sup>396</sup>

The proposed amendment allowed the Chief Justice to suspend an attorney’s ability to excuse a judge. This emphasized the Supreme Court’s pronouncement in *Quality Automotive* that the peremptory challenge of a judge was no longer a substantive right conferred by legislative enactment on a litigant. It was simply a procedural privilege granted or suspended by the Supreme Court.<sup>397</sup>

## 2. Considered Criticism of the Proposed Rules of 2013

The Supreme Court decision in *Quality Automotive* was overly broad and signaled an unnecessary move away from the Compromise of 1985. The Supreme Court in *Quality Automotive*’s dicta read *Gesswein* too broadly; *Gesswein* cited two lines of cases interpreting Section 38-3-9.<sup>398</sup> One line of cases denominated the right to disqualify a judge in Section 38-3-9 as a substantive right.<sup>399</sup> The other line of cases referred to the procedural aspects of Section 38-3-9 as to how this right of judicial disqualification was to be exercised.<sup>400</sup> *Gesswein* did not overrule either line of cases. Instead, *Gesswein* focused on the procedural application of Section 38-3-9 and withdrew its then current court rule.<sup>401</sup>

*Gesswein* did not overrule *State ex rel. Hannah v. Armijo* or its progeny, nor did not declare Section 38-3-9 unconstitutional. The Supreme Court went too far

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391. *Id.* § 1-088.1(G).

392. *Id.*

393. *Id.* § 1-088.1(D).

394. *Id.*

395. *Id.*

396. N.M. RULES ANN. § 5-106(E) (proposed 2013).

397. *Quality Auto. Ctr., LLC v. Arrieta*, 2013-NMSC-041, ¶ 31, 309 P.3d 80.

398. *Gesswein v. Galvan*, 1984-NMSC-025, ¶ 13, 676 P.2d 1334.

399. *Id.* ¶ 13.

400. *Id.* ¶ 14.

401. *Id.* ¶¶ 16, 19.

in disregarding the plain language of Section 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.”<sup>402</sup>

The Supreme Court had moved away from the Compromise of 1985 unnecessarily. It could have ended its opinion in *Quality Automotive* at the conclusion of Section A.<sup>403</sup> It had decided the question presented in the case before it.<sup>404</sup>

The proposed amendment to Rule 1-088.1 (2013) would have had no impact on current practice in simple cases of one plaintiff verses one defendant. Each party is afforded an excusal. Problems arise when multiple parties are involved. There are many possible situations that raise questions as to its application, such as: How were the “sides” to be determined? What if the parties on a “side” were 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 afforded 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 1-088.1 (2013) embraced the old adage that “the race is to the swift.” Whoever filed their challenge first was to be 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,<sup>405</sup> 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. 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 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. Each of the revised rules proposed in 2013 provided that the Chief Justice may suspend an attorney’s right to file peremptory excusals. But what if the attorney or group of attorneys believes, in good faith, that their excusals are in the best interests of their clients? If the Chief Justice disagrees with the good faith judgment of those attorneys, are those attorneys’ clients deprived of their ability to excuse a judge?

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402. N.M. STAT. ANN. § 38-3-9 (1978).

403. *Quality Auto. Ctr., LLC. v. Arrieta*, 2013-NMSC-041, ¶¶ 1–27, 309 P.3d 80.

404. *Id.* ¶ 27.

405. *Id.* ¶¶ 29–32.

The Supreme Court in 2013 proposed new, virtually identical rules in civil,<sup>406</sup> criminal,<sup>407</sup> and children's court cases.<sup>408</sup> Each of these case categories presents unique features which rendered 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 Rules<sup>409</sup> 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 may be adverse to each other as well as to the Department. Factor in the guardian/youth attorney whose ward's interests may be completely different from the interests of the Department and each of the respondents. How was such a configuration to be treated as "having only two (2) sides?"<sup>410</sup> It does not require much thought to realize that there are more than "only two (2) sides" to multi-party law suits.

As importantly, the Supreme Court advanced no statistical information or justification for its proposed new rules. It anecdotally listed some reasons for rule changes in its comments<sup>411</sup> but cited 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.<sup>412</sup> How much delay was 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 suggested that the fact pattern detailed in *Quality Automotive* was a rare aberration and the trial judge handled it properly without needing new rules. In short, Supreme Court, in perceiving a tempest in a teapot, had proposed amended rules which unnecessarily restricted litigants' ability to appear before a judge they perceived as unbiased.

### 3. Bar Membership Reaction

The New Mexico Bar membership's reaction to the 2013 Proposed Amendments to Rules 1-085.1, 5-106 and 10-162 was thunderous.<sup>413</sup> During the

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406. N.M. RULES ANN. § 1-088.1 (proposed 2013).

407. N.M. RULES ANN. § 5-106 (proposed 2013).

408. N.M. RULES ANN. § 10-162 (proposed 2013).

409. *Id.*

410. *Id.*

411. *Quality Auto. Ctr., LLC v. Arrieta*, 2013-NMSC-041, ¶ 33, 309 P.3d 80.

412. *Id.* ¶ 33.

413. Telephone Interview with Joey D. Moya, Law Clerk, N.M. Supreme Court (Mar. 24, 2015) (reporting that he observed this response to be extremely high compared to other proposed rule amendments).

Proposed Rule Change Commentary period, the Supreme Court received 67 comments totaling 114 pages.<sup>414</sup>

Fifty-four of the comments (81%) opposed the proposed amendments.<sup>415</sup> The reasons stated in opposition were many, but after review several themes emerged. Many responders said the use of any peremptory excusal was the result of proper use of the rule because the excused judge was in fact or perceived to be biased, incompetent, or not suited to preside over the case.<sup>416</sup> Both criminal and civil responders asserted that the proposed amendments were unfair to defendants. Criminal lawyers observed that criminal defendants' interests are rarely aligned with co-defendants. Civil practitioners opined that the "two sides only"<sup>417</sup> approach was too simplistic and the proposed civil rule abandoned the "alignment of interest" approach discussed in *Quality Automotive*.<sup>418</sup> Both groups argued that the allotment of one peremptory excusal to each "side" in multiple defendant cases would precipitate a race to the courthouse to exercise that excusal.<sup>419</sup>

Proposed Rule 1-088.1 C(4) which limited the exercise of a peremptory excusal to within 90 days of the case being placed "at issue" before the judge sought to be excused caused considerable concerns to the civil attorneys responding. There was much discussion of what was meant by "at issue" for the purposes of triggering the 90-day limit.<sup>420</sup> There was great concern that the 90 day limit was unfair to parties who were brought late as third party defendants or that a plaintiff may file a suit, wait for the case to be "at issue" for 90 days and then amend its complaint to bring in additional defendants after the 90 day time limit had expired.<sup>421</sup>

While the civil attorneys voiced no concern about the Chief Justice's ability to suspend an attorney's right to excuse a judge for perceived abuse, the criminal law practitioners had much to say about the issue. They asserted that such action would likely be aimed toward district attorneys and public defenders because they would most likely be viewed as exercising institutional or blanket excusals against a particular judge. It was argued that they had an ethical duty to advise their clients about the propensities of a judge to exercise their professional judgment to the best advantage of their client. Another concern was that an attorney's ability to exercise a peremptory excusal could be put at risk because of the actions of other lawyers in the "group."<sup>422</sup>

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414. Proposed Rule Change Comments, filed in the Supreme Court of N.M. (Sept. 9–27, 2013).

415. *Id.* It is noteworthy that these comments in opposition came not only from individual lawyers but also on behalf of the three largest civil law firms in New Mexico (Rodey, Dickason, Sloan, Akin & Robb, P.A.; Modrell, Sperling, Roehl, Harris & Sisk, P.A.; Miller Stratvert, P.A.), the Greater Albuquerque Chamber of Commerce, the New Mexico Association of Commerce & Industry, the New Mexico Medical Society, the New Mexico Defense Lawyers Association, the New Mexico Criminal Defense Lawyers Association, the New Mexico Public Defenders Commission, the New Mexico Public Defenders Department, the Bernalillo County Felony Contract Attorneys as well as many other organizations.

416. *Id.*

417. *Id.*

418. *Quality Auto. Ctr., LLC. v. Arrieta*, 2013-NMSC-041, ¶¶ 25–26, 309 P.3d 80.

419. *Supra* note 414.

420. *Id.*

421. *Id.*

422. *Id.* It is noteworthy that the Supreme Court's Rules of Criminal Procedure for the District Courts Committee commented that none of the proposed rules had been submitted to or reviewed by the relevant



The Supreme Court had proposed virtually identical rules in civil,<sup>423</sup> criminal,<sup>424</sup> and Children's Court cases.<sup>425</sup> The comments of the Bar clearly pointed out that each of these case categories presented unique features which rendered the "only two sides" approach unworkable and questioned the fairness of the disparate treatment of parties served with process or brought into the litigation after the case was "at issue" for ninety days.

Ultimately, the Supreme Court did not adopt any of the amendments to Rules 1-088.2, 5-106 and 10-162 NMRA as proposed in September, 2013. After an extensive review of comments from the bench, bar and public, the Supreme Court withdrew the proposed amendments in March, 2015.<sup>426</sup> The Compromise of 1985 had withstood yet another test.

## B. Proposed Rules of 2015

### 1. *A More Measured Approach*

In March, 2015, the Supreme Court proposed newly revised Rule 1-088.1<sup>427</sup> as part of its newly adopted annual rule making process.<sup>428</sup> The Court did not publish new proposals for Rules 5-106 and 10-162 but noted that the newly proposed Rule 1-088.1 may serve as a model for future revisions relating to other types of cases.<sup>429</sup> This more focused approach did generate comments from civil practitioners but did not draw opposition from the criminal law bar as had occurred when proposed Rule 5-106 was published for comment in 2013.<sup>430</sup> As with the previously proposed rule, the new proposed Rule 1-088.1 was written by the New Mexico Supreme Court with no input or review from the Court's Rules of Civil Procedure for the District Court Committee.<sup>431</sup>

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Rules Committee. The Criminal Rules Committee offered to review proposed Rule 5-106. It reminded the Supreme Court that in 2009, a rule change related to "blanket" peremptory excusals by public defenders and district attorneys was proposed. The Criminal Rules Committee unanimously recommended against pursuing such a rule change. Letter from Max Minzner, Chair, Rules of Criminal Procedure Comm., to Chief Justice Petra Jimenez Maes, N.M. Supreme Court (Sept. 27, 2013) (in Proposed Rule Change Comments, filed in the Supreme Court of N.M.); Letter from Hon. Michael E. Vigil, District Judge, to Chief Justice Edward L. Chavez, N.M. Supreme Court (Oct. 27, 2009) (in Proposed Rule Change Comments, filed in the Supreme Court of N.M.).

423. N.M. RULES ANN. § 1-088.1 (proposed 2013).

424. N.M. RULES ANN. § 5-106 (proposed 2013).

425. N.M. RULES ANN. § 10-162 (proposed 2013).

426. *Notice of Publication for Comment, Proposed Amendments to Supreme Court Rules of Practice and Procedure, Proposal 36-Peremptory Excusal Rule for Civil Cases in District Court [Rule 1-088.1 NMRA]*, vol. 54 no. 11 N.M. B. BULL. 19 (2015).

427. *Id.* The Supreme Court characterized it as a more narrowly tailored proposal intended to address on the most serious abuses of the peremptory excusal rule.

428. N.M. RULES ANN. § 23-106.

429. *Id.*

430. Fifteen Comments were received by the Supreme Court in response to its call for comment to Proposal 36. Of these, two were from judges; the rest were from civil law practitioners and dealt with the proposal's effect on civil practice. No comments were received from the criminal law bar. Proposed Rule Change Comments, filed in the Supreme Court of N.M. (Mar. 17–Apr. 15, 2015).

431. Telephone Interview with Kristina Bogardus, Chairman, Member, N.M. Court Rules of Civil Procedure for the District Courts Committee (Mar. 23, 2015).

The Supreme Court abandoned its “only two sides” approach to limit the number of peremptory challenges available.<sup>432</sup> Instead, the Court returned to the approach of Section 38-3-9 whereby each party was afforded one peremptory excusal.<sup>433</sup> The Court then drew upon Section 38-3-9 to deal with the problem that arose in *Quality Automotive*. Just as the Legislative had declared that in certain actions “the employer and the insurance carrier of the employer shall be treated as one party,”<sup>434</sup> the Supreme Court extended that reasoning in the newly proposed Rule 1-088.1 by defining “party” to include all co-plaintiffs or co-defendants who fall into any of five situations:

- 1) The parties are represented by the same lawyer or law firm;
- 2) The parties have filed joint pleadings;
- 3) The parties are related to each other as spouse, parent, child, or sibling;
- 4) The parties consist of a business entity or other organization and its owners, parents, subsidiaries, officers, directors or major shareholders; or
- 5) The parties consist of a government agency and its subordinate agencies, boards or personnel.<sup>435</sup>

The court had shifted its focus from which side of the “v” a party was named to what the interests of a party were *vis-à-vis* any other party on the same side of the “v.” Four of the thirteen lawyer-generated comments addressed this section generally positing that there could be circumstances where co-parties, even though falling into one of these categories, could have very real adversity to each other, and the newly proposed rule does not allow any flexibility in its application.<sup>436</sup>

Paragraph C(4) of the newly proposed Rule 1-088.1 dispensed with the case being “at issue” trigger date of the prior proposed rule (which had caused considerable debate) and used the more ascertainable date on which a case was assigned to a particular judge. The revised C(4) also extended the time limit for the exercise of a peremptory excusal from the prior proposed rule from 90 days to 120 days. This provision drew the most ire of those attorneys who commented. They reiterated that the time limit treated later joined parties differently than original parties by denying them the ability to exercise a peremptory excusal.<sup>437</sup>

The newly proposed Rule 1-088.1F, “Misuse of Peremptory Excusal Procedure,” was identical to what had been proposed in 2013 except for two interesting changes. It added that peremptory excusals were made “without cause” but went on to state that they were “intended to allow litigants an expeditious method of avoiding assignment to a judge whom the party has a good faith basis for believing will be unfair to one side or the other.”<sup>438</sup> It is hard to discern why the Supreme Court included this language in the 2015 proposal other than it is a sort of “scout’s honor” certification by the attorney that the excusal is based solely upon perceived bias by the judge and not some other reason such as a judge’s strict adherence to the Rules

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432. N.M. RULES ANN. § 1-088.1(A) (proposed 2015).

433. *Id.*

434. Act of Apr. 6, 1977, ch. 228, § 1, 1977 N.M. Laws 875.

435. N.M. RULES ANN. § 1-088.1(A) (proposed 2015).

436. Proposed Rule Change Comments, filed in the Supreme Court of N.M. (Mar. 17–Apr. 15, 2015).

437. N.M. RULES ANN. § 1-088.1(C)(4) (proposed 2015).

438. *Id.* § 1-088.1(F).

of Evidence, Rules of Procedure, scheduling orders, courtroom decorum, etc., or perhaps, the lack of such adherence.

The procedure for determining the validity of a peremptory challenge, as set forth in the 2013 proposal<sup>439</sup> was brought forward unchanged in the newly proposed Rule 1-088.1.<sup>440</sup> It set forth in rule the holding of *Quality Automotive* that the challenged judge was to rule on the timeliness and validity of the peremptory excusal. If it has met the procedural and legal requirements, the challenged judge shall proceed no further.<sup>441</sup>

## 2. Adoption of the 2015 Rules

On November 4, 2015, the Supreme Court announced<sup>442</sup> that an amended Rule 1-088.1 NMRA would become effective for all cases pending as of December 31, 2015.<sup>443</sup> The amended Rule 1-088.1 was identical to what was proposed and subject to comment as Proposal 36<sup>444</sup> with the exception of paragraph F, “Misuse of Peremptory Excusal Procedure.” The Supreme Court addressed concerns about fundamental due process by requiring that should a judicial district’s Chief Judge complain to the Chief Justice about a lawyer or group of lawyers’ use of peremptory excusals, that complaint must be made by way of a written notice and the Chief Judge must send a copy of the written notice to the attorney or attorneys at issue.<sup>445</sup> Although not explicitly stated in the amended rule, due process would afford the complained of attorney an opportunity to be heard on the matter.

It was also announced at the same time<sup>446</sup> that Rule 5-106 NMRA and Rule 10-162 NMRA would be amended effective December 31, 2015 as well.<sup>447</sup> These amendments were again drafted by the Supreme Court without involving the New Mexico Supreme Court’s Rules of Criminal Procedure for the District Courts or its Children’s Court Rules Committee. As far as is known, the final drafts of these rules were not published for comment anywhere prior to their adoption.<sup>448</sup>

The only change to Rule 5-106 NMRA was that the language of paragraph F of Rule 1-088.1 dealing with misuse of peremptory excusals was inserted into the criminal rule as paragraph G.<sup>449</sup> The addition of the same language was made to Rule

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439. N.M. RULES ANN. § 1-088.1(D) (proposed 2013).

440. N.M. RULES ANN. § 1-088.1(H) (proposed 2015).

441. *Id.*

442. *The Supreme Court of New Mexico Announces 2015 Year-End Rule Amendment, Peremptory Excusal Rule [Rule 1-088.1 NMRA]*, vol. 54 no. 44 N.M. B. BULL. 20 (2015).

443. N.M. Supreme Court, Order No. 15-8300-19.

444. N.M. B. BULL., *supra* note 426.

445. N.M. RULES ANN. § 1-088.1(F) (proposed 2015).

446. N.M. B. BULL., *supra* note 442.

447. N.M. B. BULL., *supra* note 442, at 18, 20.

448. It should be remembered that when Proposal 36 (affecting Rule 1-088.1) was published for comment in March, 2015, the Proposal stated that even though the proposal focused solely on civil cases, it may serve as a model for future revisions to the peremptory excusal rules in other types of cases as informed by comments about Proposal 36. No comments were received from attorneys dealing with either criminal or children’s law.

449. N.M. Rules Ann. § 5-106(G).

10-162 NMRA at paragraph D.<sup>450</sup> No other substantive changes were made to either rule.

After nearly two-and-a-half years of controversy and uproar, the Supreme Court's bid to transform New Mexicans' right of peremptory excusal of a judge from a statutory right to a procedural privilege had ended. The civil rule had been changed to follow the Legislature's lead and declare by court rule that in certain limited circumstances the interests among co-parties were so aligned that the co-parties should be considered one party,<sup>451</sup> and a "back stop" had been set to establish how deeply an assigned judge could be involved in a case and then be excused.<sup>452</sup> Finally, a provision whereby the Chief Justice could address perceived abuses of the right was placed in each amended rule.<sup>453</sup>

The most important consequence of the rules adopted December 30, 2015, is what these rules do not do. They do not do away with peremptory excusal of a judge as being a statutory right. Each of the newly adopted rules carried forth text declaring "the statutory right to excuse" the judge.<sup>454</sup> Language referring to this ability as "statutory right" has been in every version of each rule since the Compromise of 1985.<sup>455</sup> The Commentary which accompanied the proposed rules of 2013 devoted considerable text to the Court's confirmation and justification of its ability to declare peremptory excusal a procedural privilege whose existence and exercise was within the prerogative of the Supreme Court.<sup>456</sup> No such reference was made in the Supreme Court's Commentary when the newly revised rules were actually adopted in 2015.<sup>457</sup>

Every decision has unanticipated consequences. The Supreme Court's adoption of the 2015 revisions of the peremptory excusal rules is no different. It is probable that there will be an increase in challenges alleging actual cause. New Mexico lawyers are an innovative lot. Should a party find that it is without a right to peremptorily challenge a judge that a party believes may be predisposed against that party's position, it is foreseeable that an attorney or a group of attorneys would investigate a judge's professional record or private life to create issues which could be asserted to support a challenge for cause. Judges often complain about "living in a fishbowl." With money or freedom at stake, that "fishbowl" may soon come under a constant, investigatory magnifying glass. Should this occur, the judiciary may well rue its enmity of peremptory challenges.

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450. N.M. Rules Ann. § 10-162(D).

451. N.M. Rules Ann. § 1-088.1(A).

452. N.M. RULES ANN. § 5-106(D).

453. *See e.g.*, N.M. RULES ANN. § 1-088(F); N.M. RULES ANN. § 5-106(G); N.M. RULES ANN. § 10-162(D).

454. N.M. RULES ANN. § 1-088.1(C); N.M. RULES ANN. § 5-106(D); N.M. RULES ANN. § 10-162(B).

455. N.M. R. CIV. P. 88.1(b), (c) (1985 Cum. Supp.); N.M. R. CRIM. P. 34.1(c), (d) (1985 Cum. Supp.).

456. Proposed Revisions to the District Court Peremptory Excusal Rules For Civil, Criminal and Children's Court Cases, Commentary of the Supreme Court, vol. 52 no. 37 N.M. B. BULL. 19 (2013).

457. N.M. RULES ANN. § 1-088.1, Commentary from the Supreme Court; N.M. RULES ANN. § 5-106, Commentary from the Supreme Court; N.M. RULES ANN. § 10-162, Commentary from the Supreme Court.

## CONCLUSION

The Supreme Court reconsidered the dicta of *Quality Automotive*,<sup>458</sup> which it asserted to justify its proposed amended rules in 2013. The Court had obviously considered the long evolution of the excusal of judges in New Mexico, the Judicial / Legislative Compromise of 1985, and whether the statutory right of peremptory excusal of judges was really as great a problem as the Supreme Court perceived it to be. The court abandoned its “two sides only” approach of allowing peremptory challenges and focused on the aligned interests of the parties. By its choice of language in the 2015 revisions, the Supreme Court recognized that the peremptory excusal of judges was a right created by statute. The people of New Mexico, through their elected representatives, have conferred upon themselves this substantive right.<sup>459</sup> The Judicial Branch, the least democratic branch of government,<sup>460</sup> should not take away that right because the Court found it to be “inefficient.”<sup>461</sup> The rights of the people, by their very existence, make the operation of government less effective and efficient.<sup>462</sup> The New Mexico Supreme Court had correctly deferred to the will of the citizens.

The Supreme Court, through its Administrative Office of the Courts and Judicial Information Division, should commission a statistical study to determine if the statutory right to the peremptory excusal of a judge is actually being abused to the extent and frequency which the Court asserted anecdotally. This information should be distributed to the State Bar of New Mexico for distribution to its members. 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 by the Judiciary with the Legislative Branch. The Court should approach the Legislature with its concerns with Section 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.

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 Section 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 sphere of control.

Proceeding in the manner suggested would address the concerns raised in *Quality Automotive*. It would preserve a statutory, substantive right which is

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458. *Quality Auto. Ctr., LLC v. Arrieta*, 2013-NMSC-041, ¶¶ 28–35, 309 P.3d 80.

459. N.M. CONST. art. II, § 2 (“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.”).

460. Interview with Daniels, *supra* note 198.

461. *Quality Auto.*, 2013-NMSC-041, ¶ 28.

462. *Id.* ¶ 28.

important to New Mexicans. It would maintain fidelity to the Compromise of 1985 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 case.