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HOW ONE LAW REVIEW ARTICLE TRANSFORMED THE LAW OF NEW MEXICO FOREVER (NOT!)

TED OCCHIALINO*

INTRODUCTION

I consider myself to be a fine teacher and a mediocre scholar. Returning to one of my law review articles, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*,¹ twenty-five years after its publication, largely confirms the latter self-assessment, at least in the eyes of the judges and fellow academics who have only occasionally cited the article. Nonetheless, the substantial effort that went into the article was worth the effort. The article has played an important role in shaping my teaching and in my work as a member of the New Mexico Supreme Court's Rules of Civil Procedure Committee.

I. WRITING THE ARTICLE

New Mexico is a small state with only one law school. If the University of New Mexico School of Law faculty does not research and write about New Mexico law, it is unlikely that serious scholarship concerning New Mexico law will occur. With this in mind, in 1985 my colleague, Michael Browde, and I identified an intriguing issue that touched upon both civil procedure, which I teach, and constitutional law, which Michael taught. In 1976, in *Ammerman v. Hubbard Broadcasting, Inc.*,² the New Mexico Supreme Court boldly declared that the court not only had an inherent right to write rules of procedure for the courts but also that this power was exclusively a judicial power.³ We were aware that the New Mexico Constitution contains an explicit separation of powers provision⁴ but were also vaguely aware that the New Mexico Legislature had often taken the lead in providing judicial "rules" in statutory form,⁵ which the courts had applied without objection. We decided to write an article⁶ that would focus on the *Ammerman* opinion and would explore the relationship of the court and the legislature in the creation of procedural rules of civil procedure.⁷

Almost immediately, the core structure of the article became clear, though we still did not know the content that would fill in the structure. The article would have three parts. First, it would survey the history of distribution of the rule-making power between the legislature and the judiciary from territorial days to *Ammerman*. Second, it would dissect the *Ammerman* opinion in light of that history,

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

2. 89 N.M. 307, 551 P.2d 1354 (1976).

3. *Id.* at 312, 551 P.2d at 1359 ("under our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested exclusively in this court"). The *Ammerman* ruling was foreshadowed in *State ex. rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975).

4. "[N]o person . . . charged with the exercise of powers properly belonging to one of [the] departments, shall exercise any powers properly belonging to either of the others. . . ." N.M. CONST. art. III, § 1.

5. *See, e.g.*, Act of July 12, 1851, 1851 N.M. Laws 141.

6. Browde & Occhialino, *supra* note 1.

7. Because neither of us had a teaching or research interest in criminal law, the article focused on the rules of civil procedure.

determine its holding, and evaluate its reasoning. Third, the article would contain our suggestions for how the courts and legislature should proceed to resolve potential conflicts in the future and how our suggestions could be implemented in the post-*Ammerman* era. In addition, the article would contain an appendix, identifying and categorizing the separation of powers provisions in other states' constitutions.

The first step was to learn the history of the rule-making power in New Mexico. We used to tease our colleague, Professor Chris Fritz, who teaches courses in legal history, by suggesting that he get his nose out of the history books and into twentieth century legal problems and solutions. No more. The historical research was both fascinating and critical to the development of our thesis and our ultimate proposals.

For twenty-six pages and with 172 footnotes, the "Historical Perspective" portion of the article traced the original source of New Mexico's procedural rules, the changes in the rules over time, and whether the source of those changes was the judiciary or the legislature.⁸ The foundational law of New Mexico is the "Kearney Code,"⁹ unilaterally imposed by General Kearney in 1846 following the American occupation of Santa Fe during the Mexican War.¹⁰ The Code contained extensive rules of judicial procedure,¹¹ though it also delegated some rule-making authority to the courts.¹² Until the 1930s there was a clear pattern of legislative primacy in rule-making, which was softened by a delegation from the legislature to the courts of authority to participate in some aspects of the rule-making power.¹³ This changed in 1933 when the legislature, influenced, we surmise, by the writings of Roscoe Pound,¹⁴ adopted a statute¹⁵ which purported to delegate to the courts the entirety of the legislative prerogative to write rules of procedure.¹⁶ The New Mexico Supreme Court quickly acted "subsequent to and consequent upon" the act to do so,¹⁷ but in *State v. Roy*, declared that the newly enacted, judicially established rules were created in the exercise of an inherent power rather than being sourced in a delegation of power by the legislature in the 1933 act.¹⁸ The *Roy* court pointedly declined to address the question of whether the inherent judicial power to write procedure rules also was a power exclusively within the realm of the judiciary because there was "no conflict at the present time" between a statutory and a judicial procedural rule¹⁹ and because "[a] constitutional question, and one so con-

8. See Browde & Occhialino, *supra* note 1, at 411-37.

9. See Kearney Code of Laws (1846), reprinted in NMSA 1978, Pamphlet 3: Territorial Laws and Treaties 4-71.

10. See generally *id.* at 3.

11. A section of the Code, for example, is entitled "Practice at Law in Civil Suits." *Id.* at 48-51, §§ 1-17.

12. E.g., *id.* at 51, § 14. ("[Certain] pleadings shall be filed under oath, and in such time as the court shall prescribe.")

13. See Browde & Occhialino, *supra* note 1, at 413-20.

14. See *id.* at 425-27.

15. Act of Mar. 13, 1933, 1933 Laws 147, ch. 84.

16. See *id.* The 1933 act also provided that all existing statutes dealing with procedure should be deemed rules of court subject to modification or suspension by the Court. See *id.*

17. *State v. Roy*, 40 N.M. 397, 420, 60 P.2d 646, 660 (1936).

18. *Id.*

19. *Id.*

troversial, should not be determined in advance of necessity.”²⁰ These broad hints in *Roy* that the New Mexico Supreme Court might someday assert that the rule-making power was exclusively delegated to it by the New Mexico Constitution set the stage for the *Ammerman* case.

Our lengthy historical review predisposed us to be critical of any holding in *Ammerman* that the rule-making power was exclusively delegated to the New Mexico Supreme Court by the separation of powers provision of the New Mexico Constitution.²¹ It also aided us in shaping our ultimate recommendations, which were premised on the existence of a shared rule-making power with ultimate authority in the judiciary when conflicts arose.

The survey, and the appendix sorting out the separation of powers provisions of the state constitutions, also inadvertently provided us with our main claim to a measure of one standard of academic success—citations to our article in other academic journals. In preparing this retrospective piece, I did a Westlaw search to determine if the article had been cited in journals. I was initially quite impressed to learn that there were twenty citations. While ten of those were in the *New Mexico Law Review*,²² as one would expect for a New Mexico-oriented article, ten were in an array of other journals, including one with the magisterial word “Harvard” in the title.²³ To my dismay, though, the references in the national journals without exception were of the “see generally” type, mostly using our appendix as a means to avoid having to do independent research surveying state constitutional provisions as we had done.²⁴ When another article referenced our specific New Mexico history, it typically was in a single sentence or parenthetical to a footnote.²⁵

Armed with the historical record, we were now prepared to mount an assault on the *Ammerman* opinion, which seemed to contradict the historical record by claiming an exclusive power in the judiciary to provide procedural rules for the courts. But the grand confrontation never took place. *Ammerman*’s broad assertion of exclusive judicial power was tempered by the court’s suggestion that judicial power was not necessarily exclusive, but only that “statutes purporting to regulate practice and procedure in the courts cannot be binding.”²⁶ The court had both declared its exclusive power and at the same time had left an opening for the later assertion that rule-making power was shared with the legislature, with the court’s rules taking precedence if there were conflicts between a statutory and a judicial procedural

20. *Id.*

21. We also were convinced that another provision of the New Mexico Constitution, providing that “[n]o act of the legislature shall . . . change the rules of evidence or procedure, in any pending case,” N.M. CONST. art. IV, § 34, provided indisputable proof that the Constitution anticipated a role for the legislature in the creation of rules governing judicial procedure.

22. Most of these citations were of the “see generally” variety, for example, William P. Lynch, *Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience*, 32 N.M. L. REV. 181 (2002), and in none of the articles was there an extended discussion of the merits of our position.

23. Alas, it was not the famed *Harvard Law Review*, but the *Harvard Journal on Legislation*. See Christopher P. Lu, *The Role of State Courts in Narrowing Overbroad Speech Laws after Osborne v. Ohio*, 28 HARV. J. ON LEGIS. 253, 264 n.63 (1991).

24. See, e.g., *id.* (using our appendix as a means of avoiding independent research surveying state constitutional provisions).

25. See, e.g., Neil C. McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 184 n.59 (1989) (citing the article as having conducted a “thorough review of conflict between legislature and judiciary over rule-making power”).

26. *Ammerman v. Hubbard Broad., Inc.*, 89 N.M. 307, 312, 551 P.2d 1354, 1359 (1976).

rule. What for us was to be a bold criticism of the exclusivity ruling in *Ammerman* became, instead, an acknowledgement that the opinion itself contained the support for our thesis. We were not exposing the *Ammerman* apostasy; we were confirming that it contained the seeds of orthodoxy and could be read as consistent with the historical record and with our construction of the New Mexico Constitution.

We then concluded the article with “Some Prudential Guidelines for the Future.”²⁷ They were modest proposals: abandonment of any claim for exclusivity; return to shared authority with ultimate authority in the courts where clashes occur; and exercise of that ultimate judicial authority with restraint because legislative initiatives in rule-making could prove to be sound and appropriate. Finally, we urged that the standing committees that advise the court on rule changes were the preferred forums for considering whether to accept or reject newly adopted statutes that might have provisions affecting civil procedure.

II. IMPACT (OR NOT) ON NEW MEXICO LAW

While we did not expect that the article would have significant impact outside of New Mexico, we were hopeful, if not confident, that the New Mexico Supreme Court would use it as the centerpiece for all future cases raising the separation of powers issue in rule-making disputes. It was not to be. Though the court largely has followed the course we proposed, it has cited the article only six times, and the article never became the focal point of a majority opinion.

The first reference was in a dissenting opinion, the justice noting simply that “*Ammerman* has been criticized by scholars,” followed by citations to a national treatise, our article, and a student note in another law journal.²⁸ In *Lovelace Medical Center v. Mendez*,²⁹ Justice Montgomery exercised constraint in the face of an apparent conflict between statute and rule as the article had recommended, supporting his construction of the statute so as not to conflict with the rule, with the sentence: “In recent years, this doctrine [of exclusive judicial power over rule-making] has come under sharp attack as representing a departure from coordinate rulemaking power shared by the legislature and the judiciary.”³⁰

The high-water mark (and the only identifiable mark) of our direct influence on controlling New Mexico case law³¹ came in 2005 in *Albuquerque Rape Crisis Center*

27. See Browde & Occhialino, *supra* note 1, at 462–73.

28. Sw. Cmty. Health Servs. v. Smith, 107 N.M. 196, 202, 755 P.2d 40, 46 (1988) (Scarborough, C.J., dissenting).

29. 111 N.M. 336, 805 P.2d 603 (1991).

30. *Id.* at 339, 805 P.2d at 606 (citing Browde & Occhialino, *supra* note 1).

31. The article’s most extensive discussion in a New Mexico Supreme Court opinion occurred in a dissenting opinion. In *State v. Maples*, 110 N.M. 34, 791 P.2d 788 (1990), Justice Montgomery’s dissenting opinion cited the article for proof that administrative proceedings were outside the scope of the rule-making power, *see id.* at 42, 791 P.2d at 796, and that the traditional distinction between substance and procedure is too imprecise to clearly mark the boundary between legislative and judicial functions, *see id.* at 40–41, 791 P.2d at 794–95. He also approved of the article’s rejection of *Ammerman*’s claim that the rule-making power was exclusively for the courts. *See id.* at 38, 791 P.2d at 792. Justice Montgomery’s intriguing central theme, never adopted by the court, went beyond that of the article, implicitly criticizing the article as not being sufficiently deferential to the role of the legislature. Where we would honor statutory procedure provisions only until they conflicted with a procedural rule of court, Justice Montgomery would permit statutes affecting the judicial process to control even in the presence of an inconsistent rule under some circumstances: “In resolving an issue as to whether a statute or a court rule should prevail, this Court should focus on the purpose and effect of the statute and whether it does or does not trench upon the ability of courts to discharge their constitutional

v. Blackmer.³² Justice Chavez, writing for the majority, demonstrated a delicate touch in upholding a statute that seemingly provided for a statutory evidentiary privilege that would have been contrary to the *Ammerman* holding that any statutory privilege must yield to a contrary rule of evidence—in this case the rule of evidence that provides that only constitutionally mandated or court-adopted privileges are applicable in judicial proceedings.³³ Justice Chavez premised his opinion on the rejection of the assertion that *Ammerman* gave exclusive rule-making power to the judiciary and cited the article in support of that premise.³⁴ He concluded that the statutory “privilege” was sufficiently analogous to an existing judicially created privilege³⁵ such that it was fairly incorporated into the court’s rule creating that privilege.³⁶

Writing in dissent, Justice Bosson acknowledged that the article urged a less confrontational approach to the separation of powers question,³⁷ but concluded that even if that approach were followed, the statute must yield to the contrary rule of evidence barring legislative privileges.³⁸ He suggested that the appropriate method for considering whether to accommodate the legislative goal was for the Rules Committee to evaluate the statute and adopt a new privilege rule if the purpose of the legislation was sound.³⁹

In retrospect, the article suffered the fate of most law review articles. It had miniscule influence on the work of other scholars and did not have a profound influence on New Mexico jurisprudence. The central premise of the article—that *Ammerman*’s assertion of exclusive rule-making power in the judiciary was ahistoric, unwise, and dictum—was certainly correct but probably would have been recognized as such by the New Mexico Supreme Court on its own in the course of resolving post-*Ammerman* issues. Our recommended “prudential constraints” in resolving apparent conflicts are still sound and are being applied by the court,

duties.” *Id.* at 40, 791 P.2d at 794. Citing *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 162, 315 P.2d 223, 227 (1957), Justice Montgomery apparently would not void a statute that “implements a legislative policy external to the functioning of the courts” unless the legislation would undercut the court’s “ability to perform its essential functions,” or would “interfere with the effective and efficient operation of the courts.” *Maples*, 110 N.M. at 40, 791 P.2d at 794 (citing *Bliss*, 63 N.M. at 161–62, 315 P.2d at 227).

32. See 2005-NMSC-032, ¶ 5, 120 P.3d 820, 822.

33. See Rule 11-501 NMRA; *Blackmer*, 2005-NMSC-032, ¶ 1, 120 P.3d at 821.

34. *Blackmer*, 2005-NMSC-032, ¶ 5, 120 P.3d at 822 (“While this Court has ultimate rule-making authority, the analysis in *Ammerman* and subsequent cases which interpret legislative enactments concerning practice and procedure do not support the broad statement that our rule-making authority is exclusive.” (citing Browde & Occhialino, *supra* note 6, at 437 (“A careful reading of the cases and subsequent decisions applying them suggests, however, that the supreme court intended not to exclude the legislature from the rule-making process but only intended to assure judicial supremacy in any clash between legislative and judicial rules of procedure.”))).

35. Rule 11-504 NMRA (concerning the physician-patient and psychotherapist-patient privileges).

36. *Blackmer*, 2005-NMSC-032, ¶¶ 14–17, 120 P.3d at 825–26.

37. *Id.* ¶ 32, 120 P.3d at 829 (Bosson, C.J., dissenting). In a recent opinion dealing with the power of the judiciary to grant use immunity in criminal cases, Justice Bosson acknowledged that the article urges a restrained approach to legislative and judicial clashes in the rule-making arena, but pointedly noted that, even so, the article can be viewed as “charting an increasingly court-centered power over rules of procedure and pleading.” *State v. Belanger*, 2009-NMSC-025, ¶ 34, 210 P.3d 783, 792.

38. See *Blackmer*, 2005-NMSC-032, ¶ 38, 120 P.3d at 830 (Bosson, C.J., dissenting). This preferred resolution is consistent with a proposal in the article. See Browde & Occhialino, *supra* note 6, at 472–73.

39. See *Blackmer*, 2005-NMSC-032, ¶ 33, 120 P.3d at 829.

though Justice Bosson has expressed the view that *Ammerman* held that the creation of evidentiary privileges, at least, is exclusively for the court.⁴⁰

III. UNFORESEEN ISSUES

There were some issues we did not see when we wrote the article that later surfaced. We did not explore the ramifications of the fact that the jurisdictional limits of some courts are the proper subject of legislation and the different analysis of legislative/judicial conflicts that arise in this context.⁴¹ We did not anticipate that courts might conclude that a procedural rule that did not contradict a procedural statute, but merely was silent on a matter that was the subject of a procedural statute, could create a conflict with the statute by its silence, thus voiding the statute.⁴² Finally, we never anticipated that a procedural statute would be valid because not inconsistent with a rule, but that the court would assert an inherent power to excuse non-compliance with the statutory command in individual cases even in the absence of a statutory provision authorizing exceptions.⁴³

In sum, I can say about the article what professors sometimes say about average exam answers: "It's not great, but at least it did not detract from the sum total of human knowledge."

IV. THE ARTICLE IMPACTED ME

Nonetheless, the article has had significant influence on me if not on fellow academicians or the judicial opinions of New Mexico courts.⁴⁴ I prepare and use my own materials in my civil procedure courses. The first chapter used to consist of the standard "Forum Selection" jurisdictional materials. Now I open with a full chapter titled "The Rule-Making Power." It starts with an analysis of the source of the rule-making power in the federal system, which evolved along very different lines from that of New Mexico, and which provides that while the Congress and Supreme Court have shared rule-making power it is the legislature and not the Court that has the final say.⁴⁵ The chapter then contrasts the New Mexico approach, focusing on *Ammerman* and the post-*Ammerman* cases. For this reason, I am prepared to agree with the oft-repeated statement that writing law review articles can provide insights that enhance one's teaching.

As a longtime member of the New Mexico Supreme Court Rules of Civil Procedure for the District Courts Committee, I also have had numerous occasions to

40. *Id.* ¶ 27, 120 P.3d at 828 ("[I]n *Ammerman* . . . [w]e overturned the Legislature's privilege, not because we disagreed with it or found it inconsistent, but because the legislature was overstepping its constitutional boundaries and intruding into an area in which power was vested 'exclusively' in the Court.").

41. See *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 339, 805 P.2d 603, 606 (1991); *Maples v. State*, 110 N.M. 34, 36-37, 791 P.2d 788, 790-91 (1990); Seth D. Montgomery & Andrew S. Montgomery, *Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico*, 36 N.M. L. REV. 215 (2006).

42. See *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶¶ 11-13, 168 P.3d 99, 102-03.

43. *Mendez*, 111 N.M. at 339, 805 P.2d at 606 (stating that the "legislative adoption of a housekeeping rule to assist the courts with the management of their cases [is] to have effect unless and until waiver by a court in a particular case" or changed by an inconsistent rule of court).

44. On a personal note, writing the article with Michael Browde forged a personal friendship and a professional relationship that has survived for twenty-five years. That alone justifies the effort that went into the article.

45. See, e.g., *Jackson v. Stinnett*, 102 F.3d 132, 134 (5th Cir. 1996).

practice what we preached in the article about using rules committees as the most appropriate forums for resolving potential or actual conflicts between the legislative and judicial branches over the rule-making power. The Committee has been assiduous in searching out areas of potential conflict and seeking to resolve them through accommodation if possible⁴⁶ and when that is not possible, explaining the reasoning that led the Committee to recommend that a procedural rule be adopted that preempts the procedural statute.⁴⁷

46. *See, e.g.*, Rule 1-068(C) NMRA (providing that costs can be awarded either pursuant to the rule or consistent with a similar statute, but not both).

47. *See, e.g.*, Rule 1.054.1 NMRA, 2006 Committee Comment (explaining reasons for superseding portion of section 39-1-1 of the New Mexico Statutes Annotated, which provided that any post-judgment motion made in trial court was deemed denied if not granted within thirty days).

