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Courts—Number of Justices Concurring in Opinion—Some Dangers of New Mexico's "Three-Judge Court"

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COURTS—NUMBER OF JUSTICES CONCURRING IN OPINION—SOME DANGERS OF NEW MEXICO'S "THREE-JUDGE COURT"—In 1960, the New Mexico Supreme Court, influenced by the pressures of an ever-mounting case load, began the practice of utilizing three-judge panels for the disposition of cases brought before it. Initially all five judges were present at the hearing, but if firm agreement were reached only three participated in the opinion and statement of decision.¹ The practice was soon modified, however, to provide that hearings would also be presented to three justices. The announcement of this change and a description of the rules of operation were presented by Justice Carmody to the New Mexico State Bar Association. His address was published as a featured article in the August 1961 issue of the *State Bar of New Mexico Journal*. Justice Carmody said:

[W]e have now decided that we will go to what may be roughly termed as a '3-judge court.' It will work this way: In all cases, other than those of serious public nature, or those involving serious constitutional questions, we will have only three justices participating in the opinion. . . . *It is our rule that the other two Justices must concur in the opinion as written in order for it to go down*; if one of the Judges who is to participate disagrees or wishes to dissent, then the other two members of the Court are called in and it becomes a five-man case.² [Emphasis added.]

Since the adoption of this practice by the court, a great majority of cases brought before it have been decided by such a "three-judge court." In 1964, the court disposed of 163 cases by written opinion,³ and 133 of these were three-judge decisions.⁴ A substantial saving in the work load imposed upon the justices has been achieved.⁵

No decision or judgment has received the concurrence of less than the constitutionally required three members of the court.⁶ However, despite the clear statement of policy by Justice Carmody, *supra*, a number of opinions have been published that have not received the full support of the other two justices. In those cases where the

1. 1964 Annual Report of the Director of the Administrative Office of the Courts, State of New Mexico 13 [hereinafter cited as 1964 Ann. Rep.].

2. Carmody, *Observations of a Justice*, 1 N.M. State Bar J. 3, 6 (1961).

3. 1964 Ann. Rep. 19.

4. Figure based upon actual count made of 1964 published opinions.

5. 1964 Ann. Rep. 19: "Experience reveals that the plan reduces the work load of the five justices by 25%."

6. N.M. Const. art. 6, § 5.

third justice has "concurred in result only" without an opinion, the published opinion has no validity as precedent under the rule of stare decisis.⁷ In those cases where a specially concurring opinion is filed, there may be some limited or partial value as precedent.⁸ Whether or not the delivery of opinions of questionable or no value as precedent is an inherent danger in the three-judge court is the concern of this Comment.

To make it possible for non-participating justices to "hear" oral arguments presented before three justices only, it is the practice of the New Mexico court to record the presentations on tape. Should dissent or disagreement arise among the three justices participating, necessitating referral to the remaining justices, the tapes are played for their consideration. Some disadvantage is necessarily present in this type of "hearing" because the effect of gestures, demonstrations, and "presence" is diminished. Questions to counsel by non-participating justices are precluded. The New Mexico court is of the opinion, however, that this replay of the tape recording, accompanied by the perusal of the briefs, is a proper "hearing" by the non-participating justices.

7. *Alaska v. Troy*, 258 U.S. 101, 111 (1922); *United States v. Pink*, 315 U.S. 203 (1942); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *Wilcox v. Coons*, 359 Mo. 52, 220 S.W.2d 15 (1949); *LeVasseur v. Allen Elec. Co.*, 338 Mich. 121, 61 N.W.2d 93 (1953). The following quotation from 14 Am. Jur. *Courts* § 81 (1938) is accurately descriptive of the New Mexico situations:

[T]he doctrine of stare decisis does not apply to a case which was heard by only three of the five judges of a court where, of these three, one judge delivered an opinion in which one of the other judges concurred but the third judge concurred in result only.

This statement is based upon the holding in *Whiting v. West Point*, 88 Va. 905, 14 S.E. 698, 15 L.R.A. 860 (1892).

In the New Mexico case of *Primus v. Clark*, 48 N.M. 240, 149 P.2d 535 (1944), an opinion was written by one justice and concurred in by another, while the remaining three justices concurred in result only. Of that opinion the New Mexico Supreme Court said in a later case involving the same disputants: "[I]t is scarcely accurate to choose given passages from that opinion and characterize them as reflecting the views of the court." *Primus v. Clark*, 58 N.M. 588, 595, 273 P. 2d 963, 967 (1954).

8. The New Mexico case of *Pettes v. Jones*, 41 N.M. 167, 66 P.2d 967 (1937), was decided by a divided court, one justice concurring in the opinion, one concurring specially with opinion, one dissenting and the fifth concurring in the dissent. In refusing to follow a viewpoint expressed in the *Pettes* opinion, *supra*, the court, in a later case, said:

This view was not concurred in by Mr. Justice Zinn in his specially concurring opinion and so had not the sanction of a majority of the court. *Crocker v. Johnston*, 43 N.M. 469, 485, 95 P.2d 214, 224 (1939). Other points in the opinion with which the specially concurring opinion agreed were considered to be the view of the majority of the court. An old and unchallenged approval of so reading opinions written by Chief Justice Marshall is contained in *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 348 (1832).

Should one of the three justices who originally concurred in an opinion wish to later withdraw his concurrence, retention of the tapes would be of crucial significance. The tapes are therefore retained as long as there appears to be any possibility of disagreement, and for a reasonable time thereafter.

Admittedly, the withdrawal of concurrence by a justice at any appreciable time after it has once been given is a rare occurrence. Nevertheless, *Cordova v. City of Albuquerque*,⁹ decided on November 1, 1962, is just such a case. When the motion for rehearing was denied by the court, nearly five months after the decision,¹⁰ Justice Carmody withdrew his concurrence to the opinion as written and substituted a concurrence in result only.¹¹ The case was not referred to the remaining justices, and the opinion as published has the approval of only two members of the court. Recurrence of such a situation seems to be impossible, however, as the adoption of rule 18(8) on rehearings prevents it.¹² This minority opinion will nevertheless remain on the record as a monument to an unforeseen danger of the "three-judge court."

Two other cases in which all three of the participating justices did not concur in the opinion as written are *Davies v. Boyd*¹³ and *Srader v. Pecos Construction Co.*¹⁴ In both cases, Justice Moise concurred specially, with an opinion, but neither case was referred to the remaining justices.

In the *Davies* case the specially concurring opinion differs sharply with the opinion as written, arriving at the same decision only through the use of a different line of reasoning.¹⁵ It is difficult to find, in a reading of the two opinions in this case, any agreement upon points of law that would establish the "sanction of the majority of the court."¹⁶ Although not a certainty, the referral of the case to the remaining justices would most probably have resulted in the approval of one or the other of the opinions by a majority of the court. The failure to refer is unexplained.

In the *Srader* case the specially concurring opinion agrees with

9. 71 N.M. 491, 495, 379 P.2d 781, 784 (1962).

10. *Id.* at 491, 379 P.2d 781. Rehearing was denied on March 22, 1963.

11. Dissenting to denial of the motion for rehearing, Justice Carmody forcefully recommended that the decision was not a proper one for a "three-judge court" and should have been considered by the full court. *Id.* at 495, 379 P.2d at 784.

12. *Id.* at 495, 379 P.2d at 783.

13. 73 N.M. 85, 385 P.2d 950 (1963).

14. 71 N.M. 320, 378 P.2d 364 (1963).

15. *Davies v. Boyd*, 73 N.M. 85, 90, 385 P.2d 950, 953 (1963).

16. See note 8 *supra*.

the majority, at least by inference, with respect to the points of law concerning the grant of summary judgments, but goes so far as to say that a substantial portion of the opinion as written "does not appear to have been within the matters raised . . . and we should express no opinion on it."¹⁷ Many substantial points of law in the "plurality" opinion do not receive support in the concurring opinion, and do not have the sanction of the majority of the court. The result is, of course, that the opinion has only partial validity. Nevertheless, and despite its recent origin, the case has been cited several times in support of the agreed upon points of law.¹⁸ Like the *Davies* case, the *Strader* case was not referred to the remaining justices.

As demonstrated by the *Strader* case and its use in subsequent citations, a specially concurring opinion may establish some points of majority agreement, valid as precedent. But the nagging question remains: If the other members of the court had participated, would the points of disagreement also become the majority view? The answer must remain speculative.

A more distressing type of three-judge opinion is exemplified by the case of *Jernigan v. New Amsterdam Casualty Co.*¹⁹ In the *Jernigan* case, heard before three justices, one justice concurred in the opinion as written, while the remaining justice concurred in result only, without opinion. The published opinion, then, is clearly a "two-judge" opinion; no explanation is known for failure to refer the case to the remaining justices. Perhaps the court felt that no substantial points of law were contained in the opinion, and the time and effort of referral to other justices would not be justified. If such a conjecture is the explanation, it would seem that the purpose for which the three-judge hearings were established—saving work—could have been better served by a decision without opinion at all. Such a solution is most strongly supported in the recent case of *Danielson v. Miller*²⁰ in the specially concurring opinion. Although Justice Moise agrees with both the result and with the reasoning in the case, he does not concur in the opinion simply because he feels that no opinion is necessary.²¹ The opinion in the *Danielson*

17. *Strader v. Pecos Construction Co.*, 71 N.M. 320, 328, 378 P.2d 364, 370 (1963).

18. *Cervantes v. Forbis*, 73 N.M. 445, 447, 389 P.2d 210, 212 (1964); *Boggs v. Anderson*, 72 N.M. 136, 141, 381 P.2d 419, 422 (1963); *Hubbard v. Mathis*, 72 N.M. 270, 272, 383 P.2d 240, 242 (1963); *Stake v. Woman's Division of Christian Service*, 73 N.M. 303, 305, 387 P.2d 871, 872 (1963).

19. 74 N.M. 37, 390 P.2d 278 (1964).

20. 402 P.2d 153 (N.M. 1965).

21. *Id.* at 156.

case is another of the "two-man" variety, and no referral to the remaining justices was made.

The "three-judge court" has been a valuable aid to the New Mexico Supreme Court in reducing the work load of the justices. Its acceptance by the members of the New Mexico bar, and by the electorate, should not be jeopardized by allowing opinions of doubtful, partial, or no validity to be published, unless they are written after consideration by all available members of the court. Two-judge opinions, in the absence of a showing that no better solution could have been secured by the entire court, are less than satisfactory.²² They are not, however, an inherent danger of the "three-judge court"—they can be eliminated. The appropriate use of memorandum decisions and other decisions without opinion, combined with the absolute referral of the case to the full court whenever disagreement regarding either the decision or the opinion arises, will prevent the publication of such opinions. On September 28, 1965, the voters of New Mexico approved an amendment to the state constitution which authorizes establishment of a New Mexico Court of Appeals. Creation of this intermediate appellate court may result in a sufficient reduction of cases pending before the supreme court to justify complete elimination of the "three-judge court," permitting a return to the practice of hearings by the full court in all cases. In view of the benefits to the supreme court provided by the three-judge system, this solution seems doubtful. Rather, it can be expected that three-judge hearings will be drastically reduced. In any event, the publication of two-judge opinions which do not have the consideration of the full court can be and should be stopped.

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22. Fryer & Benson, *Cases and Materials on Legal Method and Legal System* 20-21 (1950). The authors, discussing a problem confronting all lawyers—that of predicting how a particular court will respond to a later case—emphasize the help to be found in extra opinions, whether of concurrence or dissent. The difference in emphasis and selection of facts, and acceptance or rejection of different lines of argument are most useful to the lawyer. Thus, opinions indicating the presence of divergence of opinion, but not including reasons for such divergence, are certainly not wholly satisfactory to the lawyer who must, to some degree, predict the attitude of the court.