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Civil Procedure - Determining When a Party Gives up the Right to Disqualify a Judge by Invoking the Discretion of a Court: JMB Retail Properties Co. v. Eastburn

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CIVIL PROCEDURE—Determining When a Party Gives Up the Right to Disqualify a Judge by Invoking the Discretion of a Court: *JMB Retail Properties Co. v. Eastburn*

"A Snappier Opening"[1]

The case had started out simple enough. Her client, "Slim" Jim McDonald,[2] was being sued by the Animals Are People Too Foundation for psychic injury caused in connection with habitual molestation of small, woodland creatures.[3] "No problem," she thought. She specialized in habitual molestation of small, woodland creatures.[4] She then pushed the complaint aside, and didn't give it another thought until approximately 29-1/2 days later when her client showed up to discuss the case. When she asked her assistant for his file, her assistant reminded her that no answer had been filed yet and she had about half a day left to file one or have a default judgment entered against McDonald. "Damn. I'll have to file a motion to extend," she said. "Who's hearing the case?" "Steelbottom, your favorite," came the answer.

Her heart nearly stopped beating. Steelbottom! God how she hated that man! Time and time again he had humiliated her in courtrooms, asking outrageous questions that he knew she couldn't possible answer just for the sake of watching her squirm in front of a jury. He'd never give her an extension, because he never gave anyone any breaks. Well she'd had enough of his antics, and she wasn't going to give him the chance to embarrass her again. She knew that under New Mexico law, she had the right to excuse Steelbottom for whatever reason she wanted—no questions asked.[5] She'd boot him off the case faster than he could say [some weird Latin legal phrase]. "Call his office," she said to her assistant, "and tell him I'm coming over to ask him for an extension in person."

As she walked with her client over to Steelbottom's office to present the challenge in person, she laughed to herself. He would think that she was coming over to beg him for more time, but the joke would be on him. She had the power! She saw him as she entered his clerk's office; his eyes got that merry little twinkle that they always did when he thought

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1. Because the Survey Editor kept bugging me to come up with one.

2. His real name is "Slim" Jim *Mac*Donald, but it has been changed for this article to protect his anonymity.

3. N.M. STAT. ANN. § 182-768-347(A)(1)(a)(xxxviii) (Cum. Supp. 1994). Under this statute, "small woodland creatures" includes, but are not limited to bunnies, badgers, chipmunks, wolf puppies, squirrels, and other such furry fauna. Foundation members claim they can hear the cries of the animals for help and it is driving them crazy, because "inside every animal is a human being trying to get out."

4. Meaning, in that type of defense work, of course.

5. This is called a "peremptory challenge." *See* N.M. STAT. ANN. § 38-3-9 (Repl. Pamp. 1987).

he would be able to put her through the wringer. "Come in, counselor, come in," he said. She saw that grin start to spread across his face and it steeled her resolve to get rid of him even more.

When she and her client were directly in front of him, however, she suffered a violent sneezing attack. Viscous mucous splattered all over her, her brief case, and her client. The judge burst out laughing while she tried to remove the foreign matter from her client's face. "Would you at least give me your damned handkerchief to clean him up with?!" she hissed at him. The judge stopped for a second and thought about it intently. "YES!" he said in a voice loud enough for all to hear, and he handed her a tattered old piece of cloth.

"Thank you," she said, her voice dripping with venom, "and for your information, you're off this case, because my client is exercising his peremptory challenge, so HA HA!"

"Oh I don't think so, counselor," he managed to choke out between laughs. "By asking for the use of my handkerchief, you posed a question to me on which I could answer 'yes' or 'no'; thus, you have invoked my discretion on a matter involving your client, and your peremptory challenge is properly denied. You obviously haven't read *JMB Retail Properties Co. v. Eastburn*; otherwise, you would know better. Now, about that extension, I really think you've had plenty of time already . . . ."

I. INTRODUCTION

Under current New Mexico law, each party to an action has the right to excuse one judge from hearing that action through the use of a peremptory challenge.[6] A peremptory challenge does not need to be supported by any particular justification for the disqualification that party might have. It is a fairly recent addition as a mechanism of judicial disqualification, replacing the earlier system which required a party to file an affidavit stating the reasons for the disqualification of a judge.

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6. N.M. STAT. ANN. § 38-3-9 (Repl. Pamp. 1987) provides in part:
A party to an action or proceeding, civil or criminal . . . shall have the right to exercise a peremptory challenge to the district judge before whom the action or proceeding is to be tried and heard . . . . After the exercise of a peremptory challenge, that district judge shall proceed no further . . . . Each party . . . may excuse only one district judge.

N.M. R. CIV. P. § 1-088.1 provides in part:
B. Procedure for excusing a district judge. The statutory right to excuse the district court judge before whom the case is pending must be exercised:
(1) by each party plaintiff by filing a peremptory election to excuse with the clerk of the district court within ten (10) days after the latter of:
(a) the filing of the complaint; or
(b) mailing by the clerk of notice of assignment or reassignment of the case to a judge; and
(2) by the defendant or any other party by filing a peremptory election to excuse within ten (10) days after the latter of the filing of the first pleading or motion pursuant to Rule 1-012 by that party or of mailing by the clerk of notice of assignment or reassignment of the case to a judge.

Both methods raise a common question, however, which the New Mexico Supreme Court was recently asked to answer: at what point in a proceeding is it too late for a party to disqualify a judge? The court held in *JMB Retail Properties Company v. Eastburn*[7] that a party may not disqualify a judge if that party has submitted any matter, whether contested or not, to the court for determination. In doing so, the court scrutinized procedural law promulgated both by itself and by the New Mexico State Legislature dealing with the disqualification of judges by peremptory challenge. Before *JMB Retail*, a party could not disqualify a judge after the party had submitted a litigated or contested matter to the court for determination, having thus "invoked" that court's discretion.[8] This Note examines the evolution of the standard used to decide when a party invokes a court's discretion, and the ramifications of the *JMB Retail* decision upon that standard.

This Note also briefly examines several constitutional arguments presented in *JMB Retail* which the court declined to answer. These arguments deal mainly with the question of where the power to promulgate rules regarding disqualification of judges resides under the provisions of the New Mexico Constitution.

II. STATEMENT OF THE CASE

JMB Retail Properties Company (JMB) owned a private shopping mall at which it refused to allow a political party to conduct various political activities.[9] The political party sued JMB, seeking a court injunction to prohibit the owners of the mall from forbidding the party's activities at the mall. The case was assigned to Judge Benjamin S. Eastburn in San Juan County District Court.[10]

On April 6, 1992, JMB entered its appearance.[11] On April 8 and again on April 13, JMB's counsel filed motions to extend its time to answer the complaint or plead otherwise. Opposing counsel agreed to both motions, and on April 17, Judge Eastburn granted the second motion. Ten days later, on April 27, JMB filed a peremptory challenge to disqualify Judge Eastburn, along with a Motion to Dismiss for failure to state a

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7. 114 N.M. 115, 835 P.2d 831 (1992).

8. *Id.* at 118, 835 P.2d at 834 (citing Smith v. Martinez, 96 N.M. 440, 442, 631 P.2d 1308, 1310 (1981)).

9. Brief of the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association, Amici Curiae at 1, JMB Retail Properties Company v. Eastburn, 114 N.M. 115, 835 P.2d 831 (1992) (No. 20,594). On the merits, the arguments forwarded in this case raised the question of whether the free speech provisions of a state constitution give broader protection than does the 1st Amendment of the U.S. Constitution. *See generally* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) for a discussion of this question.

10. Brief of the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association, Amici Curiae at 1, JMB Retail Properties Company v. Eastburn, 114 N.M. 115, 835 P.2d 831 (1992) (No. 20,594).

11. *JMB Retail*, 114 N.M. at 117, 835 P.2d at 833. This cite applies to all of the facts set forth in this paragraph.

claim. On April 28, the court clerk gave the parties notice of no action on JMB's peremptory challenge.[12]

Judge Eastburn declined to give JMB's peremptory challenge effect.[13] He cited two reasons for his decision: (1) JMB failed to file the peremptory challenge in a timely manner; and (2) even if the challenge had been timely, it was ineffective because both the statute and the rule authorizing peremptory challenges to judges were unconstitutional. JMB petitioned the supreme court for a writ of superintending control, prohibition, or mandamus to require Judge Eastburn to recognize its peremptory challenge.

At oral argument, the supreme court ruled from the bench that JMB had invoked the discretion of the trial court by requesting an extension of time within which to answer or plead otherwise.[14] Because of this invocation, JMB was prohibited from exercising its peremptory challenge, and the supreme court denied JMB's petition.[15]

III. EFFECT OF PRIOR JUDICIAL ACTIONS ON THE RIGHT TO DISQUALIFY A JUDGE—A BRIEF HISTORY OF TIMING

"New Mexico law is well settled that a judge may not be statutorily disqualified . . . after a party has invoked the discretion of the court."[16] What is not well settled, however, is what actions form an invocation of a court's discretion. Adding to the confusion is the fact that the statute governing such disqualifications has undergone several changes over the years since its inception.

To examine properly made disqualifications more closely, two changes in particular should be noted. First, the early version of the disqualification statute required a party to file an affidavit stating that the judge scheduled to hear a case could not do so with impartiality.[17] In 1985, however, the statute was amended, replacing the affidavit requirement by providing for a peremptory challenge which does not require an affidavit.[18] This change effectively streamlined the disqualification system by removing the chance for a judge to challenge an affidavit, which would possibly require a hearing on the matter, thus causing delay on hearing the merits of a case.

Second, the timing within which the disqualification must be made has changed. The 1933 statute provided that an affidavit of disqualification had to be filed "not less than ten (10) days before the beginning of the

12. Because JMB filed its peremptory challenge more than ten days after filing its first motion to extend, according to the court clerk, the statutory time period within which a party must file a peremptory challenge had expired. *Id.*

13. *Id.* at 116, 835 P.2d at 832. This cite applies to all of the facts set forth in this paragraph.

14. *Id.*

15. *Id.*

16. Smith v. Martinez, 96 N.M. 440, 442, 631 P.2d 1308, 1310 (1981) (citing N.M. STAT. ANN. § 38-3-9 (Repl. Pamp. 1987)).

17. 1933 N.M. Laws ch. 184, § 1.

18. 1985 N.M. Laws ch. 91.

term of Court, if said case is *at issue*."[19] The statute was amended in 1971 to read that an affidavit had to be filed "within ten days after the cause is *at issue* or within ten days after the time for filing a demand for jury trial has expired, whichever is later."[20] A 1977 amendment provided that an affidavit must be filed "within ten days after the cause is *at issue* or within ten days after the time for filing a demand for jury trial has expired, or within 10 days after the judge sought to be disqualified is assigned to the case, whichever is the later."[21] Again, the statute and subsequent amendments shed little on the question of what the legislature intended by the phrase "at issue." Courts have focused on this question, however, in deciding at what point a judicial disqualification will or will not be honored.

A. Disqualification Before Adverse Judicial Determination of a Contested Matter: The "Testing the Waters" Standard

An early judicial attempt at establishing a criterion to decide when a matter was "at issue" resulted in the "testing the waters" standard, forbidding a party from disqualifying a judge after the judge had made an adverse ruling on a contested matter. This standard was first articulated in *State ex rel. Shufeldt v. Armijo*,[22] in which the judge opposed his disqualification by affidavit because "certain important issues had been, prior thereto, submitted to and decided by the judge either upon stipulation or without the objection of" the party seeking disqualification.[23] The *Shufeldt* court looked at how far the case had already progressed: first, the plaintiff had filed a complaint asking for an injunction, order, temporary injunction, and order to show cause; second, the judge had entered an order regarding the stipulation of the parties to continue the hearing subject to setting a hearing date upon notice served on the opposing party; and finally, the judge then entered another order continuing the hearing agreed upon by all parties.[24]

The *Shufeldt* court declared that disqualification must be "filed and called to the attention of the court before it made any ruling on any litigated matter or contested matter. . . ."[25] This principle was necessary, according to the court, because the court "cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge."[26]

Because the motions filed before the disqualification were agreed upon by both parties, the *Shufeldt* court decided that "[a]t no time was the

19. 1933 N.M. Laws ch. 184 § 2 (emphasis added).
20. 1971 N.M. Laws ch. 123 (emphasis added).
21. 1977 N.M. Laws ch. 228, § 2 (emphasis added).
22. 39 N.M. 502, 50 P.2d 852 (1935).
23. *Id.* at 503, 50 P.2d at 853.
24. *Id.* at 504, 50 P.2d at 854.
25. *Id.* at 505, 50 P.2d at 855.
26. *Id.*

[lower] court called upon to judicially determine any contested matter in the case. . . ."[27] Thus, the court upheld the disqualification because there had not been a testing of the judicial waters for adverse rulings.[28]

B. "Testing the Waters," Favorable Rulings, and Judicial Economy

The *Shufeldt* standard was reaffirmed by the supreme court in *State ex rel. Gandert et al. v. Armijo*,[29] although in *Gandert*, the judge ruled favorably on a matter raised by the parties seeking the judge's subsequent disqualification. Those parties had petitioned the district court for a recount of votes cast in a general election in Mora County. Finding the petition legally sufficient, the judge signed and entered an order setting a date for a recount, over which he was to preside.[30] The petitioners then sought to disqualify the judge on the belief that he could not preside over the recount impartially.

The *Gandert* court decided that the act of testing the sufficiency of the petition, thus determining whether the petitioners had a legal right to a recount, was a judicial determination of the most important issue in the case.[31] The only act that remained to be done was to actually recount the votes. Applying the *Shufeldt* standard, the *Gandert* court held that because the only important issue in the case had been submitted for judicial determination, the petitioners could not disqualify the judge from presiding over the recount.[32]

C. Invoking Discretion and Statutorily Mandated Judicial Actions

The *Shufeldt* standard was later applied where a judge performed a duty for a party in a proceeding required by law, and the party then attempted to disqualify the judge. In *Smith v. Martinez*,[33] the judge selected and appointed an attorney for a minor in a Children's Court proceeding, and claimed that by doing so, his actions invoked the discretion of the court and thus he could not be disqualified.[34] The judge did not, however, perform this action at the request of the State or its representative; he did so pursuant to a statutorily imposed duty. In proceedings of the nature involved in this case, New Mexico law mandated that a judge appoint counsel for the child when the right to counsel for the child is not waived.[35] "The fact that the [judge] may have authority to determine who the appointed counsel will be is not the exercising of

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27. *Id.* at 508, 50 P.2d at 856.
28. *Id.*
29. 41 N.M. 38, 63 P.2d 1037 (1936).
30. *Id.*
31. *Id.* at 39, 63 P.2d at 1037-38.
32. *Id.*
33. 96 N.M. 440, 631 P.2d 1308 (1981).
34. *Id.* at 442, 631 P.2d at 1310.
35. N.M. STAT. ANN. §§ 32A-1-16, 32A-2-14 (Repl. Pamp. 1993) (at the time this case arose, the statute was numbered 32-1-27(E)).

a discretionary act at the request of the State."[36] Therefore, the reviewing court held the disqualification of the judge proper.[37]

D. *Clarifying the "At Issue" Issue*

A recent refinement of the *Shufeldt* standard came in *Pueblo of Laguna v. Cillessen & Sons*,[38] which, like *Shufeldt* and *Gandert*, involved the issue of timely filing of an affidavit of disqualification. The plaintiff in *Cillessen* filed a petition to consolidate two arbitration proceedings, but the petition had to be amended twice in order to correct serious defects.[39] The applicable statute provided that an affidavit of disqualification could not be filed more than ten days after the case is at issue.[40] The *Cillessen* court ruled that "[a] case is deemed 'at issue' when an answer is filed [by a defendant] which requires *no further pleadings* by plaintiff."[41] Because the plaintiff did not have a sufficient petition until it was amended a second time, the case was not "at issue" until that second amended petition was filed.[42] Furthermore, until the plaintiff's petition in *Cillessen* was sufficient to enjoin all the necessary parties to arbitration, the court was not in a position to exercise its discretion over the consolidation of the arbitration proceedings.[43]

The *Cillessen* court's interpretation of the statutory language moved the time to file a peremptory challenge ahead of that required under *Shufeldt*. *Cillessen* required filing an affidavit of disqualification *before* a case is "at issue," rather than the *Shufeldt* requirement of filing before a court makes a ruling on any "litigated" or "contested" matter. Nevertheless, the main intention of the *Shufeldt* standard remained. The right of disqualification had to be exercised before a court exercised discretion on a matter disputed by the parties.

IV. ANALYSIS OF THE COURT'S DECISION

The *JMB Retail* court discarded the *Shufeldt* standard along with its refinements and adopted what it termed a "bright-line" standard, "under which the determinative issue is whether the party has invoked the discretion of the court. If so, that party may not excuse the judge."[44] This new standard might be more appropriately called a "use-it-or-lose-it" standard, as any time a pleading or motion is made on which a judge can answer "yes" or "no" before a peremptory challenge is filed, the

36. *Smith*, 96 N.M. at 442, 631 P.2d at 1310.
37. *Id.*
38. 101 N.M. 341, 682 P.2d 197 (1984).
39. *Id.* at 342, 682 P.2d at 198.
40. N.M. STAT. ANN. § 38-3-10 (1978).
41. *Id.* at 342, 682 P.2d at 198 (citing Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971)) (emphasis added).
42. *Cillessen*, 101 N.M. at 342, 682 P.2d at 198.
43. *Id.*
44. JMB Retail Properties Company v. Eastburn, 114 N.M. 115, 118, 835 P.2d 831, 834 (1992).

filing party loses its right to a peremptory challenge. Whether a court actually rules on that matter is immaterial: "The rule . . . depends . . . not upon whether the court in fact exercised discretion, but depends upon whether the response of the court was subject to discretion."[45]

The key to the *Shufeldt* standard was that the challenge be used before a court made a ruling on any litigated matter or contested matter in a case.[46] "Litigate" is defined as "the act of carrying on a lawsuit in a court of law . . . hence, any controversy that must be decided upon evidence in a court of law."[47] In *JMB Retail*, no matter had been raised that needed resolving by evidentiary weighing at the point of the attempted disqualification, nor had any matter been contested by the parties at that point. JMB had not filed an answer to the request for an injunction, so there was no dispute of the facts in the case to that point. Therefore, under the *Shufeldt* standard, it would seem that JMB's peremptory challenge would have been valid at the time it was made.

The *JMB Retail* court's new "bright-line" standard, however, yields a very different result due to a lack of qualification of the type of motion or pleading filed as opposed to the *Shufeldt* test. *Shufeldt* required disqualification of a judge before any "litigated" or "contested" matter arose; *JMB Retail* simply requires that *any* motion or pleading be filed. Unless performing an act mandated by statute,[48] almost anything a court does is an exercise of discretion, despite whether a submitted motion or pleading concerns the most important matter in a case or the most minor matter imaginable. The result is the same, however: the submitting party has given up its right to a peremptory challenge.

The court in *JMB Retail* apparently sought to alleviate any uncertainty on the issue of when a party invokes the discretion of the court: "We are loath to engage in speculation on whether a ruling is 'important' or 'adverse' or the like. In many cases such characterizations often lie in the eye of the beholder . . . . The dispositive issue . . . is whether [a] motion filed invoked the discretion of the judge."[49]

In *JMB Retail*, opposing counsel agreed to both of the motions made by defendant JMB to extend the time to file an answer. Thus, at that point, there was no dispute or issue to be resolved by the court, as JMB had yet to have filed an answer to the arguments presented against it by the plaintiff. However, the dispositive factor was that JMB had filed its motions upon which the judge had the opportunity to rule. Therefore, under *JMB Retail*, a peremptory challenge should be the very first order of business an attorney tends to before making any other motion or

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45. *Id.*

46. State *ex rel.* Shufeldt v. Armijo, 39 N.M. 502, 506, 50 P.2d 852, 855 (1935).

47. BLACK'S LAW DICTIONARY 934 (6th ed. 1990).

48. *See* Smith v. Martinez, 96 N.M. 440, 442, 631 P.2d 1308, 1310 (1981) (party on whose behalf Judge performs action mandated by law is not invoking the discretion of the court and thus precluded from exercising peremptory challenge).

49. *JMB Retail*, 114 N.M. at 118, 835 P.2d at 834.

pleading in a suit or it is very likely that the right to excuse a judge will be lost.[50]

V. CONSTITUTIONAL DISPUTES OVER PEREMPTORY CHALLENGES

The lower court judge in *JMB Retail* not only denied effect to JMB's peremptory challenge, he declared both the statute and civil procedure rule dealing with peremptory challenges unconstitutional.[51] However, the supreme court declined to rule on the constitutional questions because its ruling on the dispositive issue of the validity of JMB's peremptory challenge upheld Judge Eastburn's refusal to honor that challenge.[52]

The court did, however, take the opportunity to express some arguments presented by the parties. The dispute centered mainly around where the origin of the power to regulate the disqualification of judges resides: in the legislature, in the judiciary, in both, or perhaps in neither. The main points of these arguments are briefly presented in this Note because while the court declined to rule under this particular set of facts, the arguments do raise some interesting questions that might require an answer under different circumstances.

A. Judge Eastburn's Arguments

Judge Eastburn first focused on what he perceived to be the interference of the peremptory challenge statute with the power of the district courts to regulate the distribution of cases that come under their jurisdictions. Declaring the statute unconstitutional, Judge Eastburn stated, "[T]here is nothing more necessary and incidental to the functions of the District Court of New Mexico than the internal assignment of cases to its judges."[53] He also asserted that judges are "Constitutional officers selected by a process ordained by the people of New Mexico."[54] Judge Eastburn viewed the power to assign judges to be an essential element of judicial power, and thus, an attempt by the legislature to regulate in this core judicial area clearly violates the separation of powers clause of the New Mexico Constitution.[55]

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50. *But see* Saavedra v. Thompson, 114 N.M. 718, 845 P.2d 812 (1992) (litigant's agreement not to oppose an opponent's motion for an extension of time in which to file a brief is not a request for discretionary ruling, such as would preclude a litigant from later using it's peremptory challenge against a judge).

51. *JMB Retail*, 114 N.M. at 116, 835 P.2d at 832 (citing N.M. STAT. ANN. § 38-3-9 and N.M. R. CIV. P. § 1-088.1). *See supra* note 6 for the relevant text of these provisions.

52. *JMB Retail*, 114 N.M. at 117, 835 P.2d at 833 ("We follow the general and well-established rule that issues of constitutionality are not to be determined unless absolutely necessary to the merits of the suit in which constitutionality has been drawn in question.").

53. *Id.* at 116, 835 P.2d at 832.

54. *Id.*

55. *Id.* Article III, section 1 of the New Mexico Constitution provides:

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

Nor could Judge Eastburn find a specific grant of authority to the supreme court to promulgate a peremptory challenge rule.[56] Under the election and retention process in New Mexico, judges must "run against their record[s], i.e., their continuance in public employment is dependent on the manner in which they execute their office."[57] Judge Eastburn maintained that the peremptory challenge rule is "antithetical to Judicial Reform . . . . It allows lawyers and special-interest litigants to . . . thwart the public will by insulating the judge's performance, or lack thereof, from the people in the retention process."[58] This argument seems to be that only the voters should have the power to bar a judge from fulfilling his or her duty. Therefore, regardless of any alleged inability of that judge to rule upon a matter in an impartial or unbiased manner perceived by a single or even several parties, the voting majority has spoken, and its will should be carried out.

B. JMB and Amici's Answer

JMB and Amici responded with four arguments which dealt directly with the constitutional challenges raised by Judge Eastburn.[59] The first point is that New Mexico law recognizes a "coordinate" rule-making power shared by the legislature and the judiciary, especially where procedural matters are concerned.[60] JMB argued that "statutes affecting the exclusive power of the judiciary are unconstitutional only to the extent they conflict with a valid rule of the court."[61]

The New Mexico Supreme Court has also indicated that this "shared" rule-making power particularly applies where the legislature passes an act for the "convenience" of the courts. In *Lovelace Medical Center v. Mendez*,[62] the New Mexico Legislature had passed a law providing that an application for an interlocutory appeal not acted upon by the court of appeals within twenty days of its filing would be deemed denied.[63] The *Mendez* court decided that the legislature merely intended to provide

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56. *JMB Retail*, 114 N.M. at 116, 835 P.2d at 832. *But see* N.M. CONST. art. VI, § 3 ("The supreme court . . . shall have a superintending control over all inferior courts . . . .").

57. *JMB Retail*, 114 N.M. at 116, 835 P.2d at 832.

58. *Id.* at 117, 835 P.2d at 833.

59. JMB also raised the argument that regardless of whether its motion invoked the discretion of the court, it had never *waived* its right to exercise a peremptory challenge within the statutory time period. *Id.* at 118, 835 P.2d at 834. The *JMB Retail* court was not receptive to the argument, stating, "[A]n absolute application of the rule [forbidding disqualification of judges after a party has invoked the discretion of the court] is . . . of greater import than . . . intentional waiver . . . ." *Id.*

60. *See generally* 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).

61. *JMB Retail*, 114 N.M. at 116, 835 P.2d at 833. *See also* Alexander v. Delgado, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973) ("This court has no quarrel with . . . statutory arrangements which seem reasonable and workable and has not seen fit to change it by rule."); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); State *ex rel.* McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

62. 111 N.M. 336, 805 P.2d 603 (1991).

63. *Id.* at 338, 805 P.2d at 605.

the judiciary system with a "mechanism" by which district courts could be certain when to resume a case in which an interlocutory appeal had been made, thus speeding up the entire process.[64] In such circumstances, the *Mendez* court held that the supreme court will uphold statutes that regulate judicial procedure "unless and until . . . modified by a rule of this court."[65]

Second, Amici noted that the peremptory challenge by statute and rule has a substantial historical basis in New Mexico.[66] The issue of the propriety of peremptory challenges under statute and rule had itself been ruled upon favorably in a criminal law setting in *State ex rel. Gesswein v. Galvan*.[67] In *Gesswein*, the State filed a peremptory challenge under a rule promulgated by the legislature.[68] The rule did away with the need to file an affidavit of bias or prejudice to disqualify a judge from hearing a criminal case, as does the current civil rule. The judge declined to recognize the validity of the rule or the State's peremptory challenge, and the State filed for a writ of prohibition.[69]

The *Gesswein* court held the legislative rule to be valid until it conflicted with a rule promulgated by the supreme court.[70] The *Gesswein* court noted that the peremptory challenge is based in the federal and state constitutionally guaranteed right to a fair and impartial tribunal.[71] The right to disqualify judges for issues of impartiality existed before the legislature passed laws defining how to go about such disqualifications.[72] Thus, a statute that merely gave procedural power to a right already in existence is "a prerogative of [the supreme] court."[73]

Third, in order to counter Judge Eastburn's arguments about the validity of Rule 1-088.1, JMB contended that Judge Eastburn was confused over "the concept of qualification for judicial office . . . with that of selection of the presiding judge for an individual case."[74] In support, Amici cited *State ex rel. Oliver v. Crookham* which held that legislation regarding removal from judicial office and election of judges "'deal[s] with matters

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64. *Id.*

65. *Id.* at 339, 805 P.2d at 606. The *Mendez* court based its holding in part on American Farm Lines v. Black Ball Freight Services, 397 U.S. 532 (1970), which "noted the general principle that it is always within the discretion of a court . . . to relax or modify its procedural rules adopted for the orderly transaction of business when . . . [the] ends of justice require it." (quoting NLRB v. Monsanto Chem. Co., 205 F.2d 763 (8th Cir. 1953)).

66. Brief of the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association, Amici Curiae at 5, JMB Retail Properties Co. v. Eastburn, 114 N.M. 115, 835 P.2d at 831 (1992) (No. 20,594).

67. 100 N.M. 769, 676 P.2d 1334 (1984).

68. *Id.* at 770, 676 P.2d at 1335; *see* N.M. R. CRIM. P. 34.1.

69. *Id.* at 770, 676 P.2d at 1335.

70. *Id.* at 772, 676 P.2d at 1337.

71. *Id.* at 770, 676 P.2d at 1335 (citing U.S. CONST. amend. V & amend. XIV; N.M. CONST. art. II, § 14 (Cum. Supp. 1983), art. II, § 18, & art. VI, § 18).

72. *Id.* at 771, 676 P.2d at 1336.

73. *Id.* at 772, 676 P.2d at 1337. The *Gesswein* court went on to invalidate the rule: "[T]he increasing number of disqualifications indicates that the current procedure as found in Rule 34.1 is inappropriate and is hereby retracted. This Court will promulgate proper rules governing disqualification." *Id.*

74. JMB Retail Properties Co. v. Eastburn, 114 N.M. 115, 117, 835 P.2d 831, 833 (1992).

different from those' governed by disqualification statutes, and the former in no way supersedes or impliedly repeals the latter."[75]

Finally, Amici asserted that Rule 1-088.1 should be retained because of the important values it serves. Referring to the joint procedural rule-making system of the legislature and the judiciary, Amici wrote that the current system of simply filing a peremptory challenge with the court and thereby excusing a judge "helps speed the [justice system] process by eliminating the need for litigation over the difficult and sensitive questions that surround the issue of fairness."[76] Further, the current system "saves judges the embarrassment and difficulty that [would] necessarily surround litigation concerning judgment of one's own possible bias or prejudice in a given case."[77]

Thus, according to Amici, the present statute/rule system not only prevents increased litigation that would "unnecessarily consume valuable judicial time," the system also prevents the "inexorably undermin[ing]" effect that such litigation would have on the "public confidence in the integrity of our judicial institutions."[78]

C. *Some Potential Questions Regarding Peremptory Challenges*

Because the constitutional arguments presented in *JMB Retail* went unanswered, interesting questions about the propriety of peremptory challenges remain.[79] The original disqualification statute required that a party file an affidavit stating that a judge could not rule impartially or was biased in some way on a matter.[80] Because the affidavit could be challenged, it had to be justified: actual bias or prejudice, not some theoretical or remote interest, was required in order for a disqualification to be constitutionally valid.[81]

On the other hand, the peremptory challenge requires no such justification.[82] Under this system, a judge can be disqualified for any number of reasons, not one of which must be a valid consideration of a judge's ability to fairly and impartially carry out his or her duties. For example,

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75. Brief of the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association, Amici Curiae at 4, JMB Retail Property Co. v. Eastburn, 114 N.M. 115, 835 P.2d 831 (1992) (No. 20,594) (citing State *ex rel.* Oliver v. Crookham, 731 P.2d 1018, 1022 (Or. 1987)).

76. *Id.* at 7.

77. *Id.* at 8.

78. *Id.*

79. Much more detailed arguments regarding these and other hypothetical questions were raised in the briefs of parties in El Paso Natural Gas Co. v. Eastburn, No. 20,685 (N.M. 1992). This case involved a peremptory challenge to the same judge as in *JMB Retail* and substantially the same procedural and constitutional issues, and was filed shortly after *JMB Retail* was. In an unpublished opinion, the Supreme Court again did not answer the constitutional issues.

80. 1933 N.M. Laws ch. 184, § 1.

81. State *ex rel.* Gesswein v. Galvan, 100 N.M. 769, 770, 676 P.2d 1334, 1335 (1984) (citing Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966)).

82. *See supra* note 6 for the relevant parts of the legislative rule and the judiciary rule.

peremptory challenges could be based solely on race or sex, with the challenging party required to give no explanation therefore.

Institutional, "blanket" disqualification could be another improper use of the peremptory challenge. For example, assume a district attorney's or a public defender's office is displeased with the way a judge rules on certain matters, even though those rulings are arguably correct as a matter of law. Regardless, the attorney files a standing peremptory challenge, effective any time a case is assigned to that judge. By such action, the attorney could effectively frustrate the will of the majority of voters in that district by preventing their elected official from carrying out the duties of his or her office.

The effects of blanket disqualifications would be especially pronounced in smaller judicial districts. Imagine a district with only two judges, Judge A and Judge B. The lawyers practicing in the district decide that they do not like Judge A, and for the most part, they all file standing peremptory challenges against Judge A. This blanket challenge would cause the same frustration of voter will as would occur as in the scenario above. Worse yet, Judge B now has a substantially larger caseload than Judge A, and the district is plunged into judicial gridlock, one of the very problems the peremptory challenge system was intended to combat.[83]

These are but a few examples of the problems that use of the peremptory challenge as a method of disqualification can raise. One can imagine many such situations, but the power to prevent these occurrences ultimately rests in the rule-making power of the supreme court.

V. CONCLUSION

A. Effect of Judicial Discretionary Act on Peremptory Challenges

The *JMB Retail* decision changed the standard used to determine when a party invokes the discretion of a court, after which a party may not

83. Consider the following disqualification patterns under the affidavit system from a few smaller New Mexico judicial districts from July 1981 through June 1982 (the last year such statistics were reported in the New Mexico Judicial Department annual reports), comparing the number of individual disqualifications for each judge in that particular district against the total number of cases decided in that district:

DISTRICT	JUDGES	NUMBER OF DISQUALIFICATIONS	NUMBER OF CASES DECIDED
4	Angel Martinez	16 237	1152
6	Hodges Hughes	8 179	1627
9	Nieves Hensley	3 42	2372
11	Musgrave DePauli Brown	13 2 154	3735

(SOURCE: 1981-1982 NEW MEXICO JUDICIAL DEPARTMENT ANNUAL REPORT 27, 30-31.)

use its peremptory challenge to excuse a judge pursuant to section 38-3-9 of the New Mexico Statutes and the New Mexico Rule of Civil Procedure 1-088.1. Under *JMB Retail*'s "bright-line" standard, any time a party submits any pleading or motion upon which a judge may rule, notwithstanding the degree of importance of that pleading or motion, that party invokes the discretion of the court at that time. Regardless of whether the judge actually rules upon the motion or pleading, the party loses its right to disqualify the judge in that action.

B. Constitutional Issues Not Reached

The parties in *JMB Retail* also raised several arguments regarding peremptory challenges, mainly dealing with where the authority to promulgate such procedural rules is found under the New Mexico Constitution: in the legislature or in the judiciary. The court, however, declined to rule on those arguments.

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