Opinion No. 63-124

September 23, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Ethan K. Stevens Assistant District Attorney Eighth Judicial District Clayton, New Mexico

QUESTION

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1. If a defendant in justice of the peace court requests a continuance from the justice of the peace, may the defendant thereafter file an affidavit disqualifying the justice under the statutory disqualification procedure?

2. If a defendant in justice of the peace court requests a continuance from the justice of the peace and this request is opposed by the plaintiff but granted by the justice, may the defendant thereafter file an affidavit disqualifying the justice under the statutory disqualification procedure?

CONCLUSIONS

1. No.

2. No.

OPINION

*{*281}* **ANALYSIS**

We are not here concerned with the constitutional disqualification procedure under Article VI, Section 18 of the New Mexico Constitution. Rather, we are concerned with the **statutory** procedures for the disqualification of judges.

In this jurisdiction we have two separate statutes setting forth the procedure for disqualifying two types of judges. **State v. Chavez,** 70 N.M. 289, 373 P.2d 533. Section 21-5-8, N.M.S.A., 1953 Compilation, provides for the disqualification of district judges, and Section 21-5-9, N.M.S.A., 1953 Compilation, provides that the affidavit of disqualification must be filed not less than ten days before the beginning of the term of court, if the case is at issue.

Section 36-3-11, N.M.S.A., 1953 Compilation, specifically provides for the disqualification of justices of the peace, and a companion measure, § 36-3-14,

authorizes such disqualification "at any time after the service of process and before the trial in such cause."

The disqualification of judges being a legislative matter (**State v. Chavez,** supra), disqualification of a justice of the peace at any time after the service of process and before the trial is timely **unless** prior to filing the affidavit of disqualification the party has "tested the mind" of the court.

The question then is whether a request for a continuance constitutes such mind testing. Our Supreme Court has held that the granting or denying of a continuance rests within the sound discretion of the court. **Houston Fire & Casualty Insurance Co. v. Falls,** 67 N.M. 189, 354 P.2d 127. Our Court has also noted that the court's ruling on a request for a continuance is a judicial, not ministerial, act. **State v. Hester,** 70 N.M. 301, 373 P.2d 541. Accordingly, the court ruled that an affidavit for the disqualification of a district judge filed after a request for a continuance is untimely. Under this rationale, the same thing *{*282}* is true when an attempt is made to disqualify a justice of the peace after a request has been made to that justice for a continuance. Having "tested the mind" of the court "to allow him to thereafter disqualify the judge is not in accordance with our decisions." **State v. Hester,** supra.

By: Oliver E. Payne

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