IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JESUS C. TUDELA, ADMINISTRATOR OF ESTATE OF ANGEL MALITE,
Petitioner,

v.

THE SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Respondent,

ROSA MALITE, LOURDES M. RANGAMAR, ROMBERT M. SINOUNOU, JIMMY SABLAN, and ANGEL TAMAN.
Respondents-Real Parties in Interest.

SUPREME COURT NOS. 2007-SCC-0030-PET
SUPERIOR COURT NO. 97-0369

Cite as: 2010 MP 6

Decided May 12, 2010

Antonio M. Atalig and Reynaldo O. Yana, Saipan, Commonwealth of the Northern Mariana Islands, for Petitioner.
BEFORE: JOHN A. MANGLONA, Associate Justice; ROBERT J. TORRES, Justice Pro Tem; HERBERT D. SOLL, Justice Pro Tem.

PER CURIAM:

¶ 1 A petition for writ of prohibition was filed by Jesus C. Tudela, administrator for the estate of Angel Malite, through his attorneys Antonio M. Atalig and Reynaldo O. Yana, seeking to restrain Presiding Judge Robert C. Naraja and Judge Kenneth L. Govendo from participating in further proceedings involving the estate. Petitioner argues that Presiding Judge Naraja erred by: (1) not referring a disqualification motion directed at him to another judge for decision; and (2) not recusing himself because of personal bias or prejudice or because his impartiality might reasonably be questioned. A judge challenged for personal bias or prejudice may, before referring the challenge to another judge, determine whether a disqualification motion satisfies procedural requirements. Moreover, under established Commonwealth and federal practice, a judge has the discretion to rule on a disqualification motion alleging that the judge's "impartiality might reasonably be questioned" under 1 CMC § 3308(a). Presiding Judge Naraja therefore did not commit error in determining that Petitioner's disqualification motion and accompanying affidavit did not satisfy procedural requirements. Moreover, on the facts in this case, Presiding Judge Naraja's decision to deny the disqualification motion alleging that his impartiality might reasonably be questioned was also not clearly erroneous. Accordingly, insofar as the petition for writ of prohibition concerns these issues, it is DENIED.[1]

I

¶ 2 The petition arises from this Court's decision in *Malite v. Tudela*, 2007 MP 3, wherein certain heirs to the Malite estate ("Heirs") sought a writ of mandamus in connection with the trial court's approval of attorney fees to Atalig and Yana, counsel for the Malite estate. The Heirs claimed that the fees were improperly awarded, and asked this Court to order the attorneys to return the funds and to order the probate court to conduct an accounting to determine the appropriate amount of attorney fees. The Court ruled that the Heirs had not met the burden for a writ of mandamus, but, after converting the matter to an interlocutory appeal, found that the probate court erred in failing to conduct an independent review of attorney fees. The Court subsequently reversed and remanded the matter "to the probate court for a hearing on the propriety of the attorney fees which should be awarded in the civil proceeding." *Malite*, 2007 MP 3 ¶ 37.

¶ 3 After the case was remanded the Heirs renewed a motion in the trial court, asking it to order Atalig and Yana to disgorge the awarded attorney fees. Presiding Judge Naraja subsequently assigned the

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[1] The petition also questions whether Judge Govendo should have been disqualified from presiding over the *Malite* proceedings. We find that additional briefing on this issue is necessary and we will address this portion of the petition separately in the pending appeal of *In re the Estate of Angel Malite*. *See In re the Estate of Angel Malite*, Civ. No. 2009-SCC-0036-CIV (NMI Sup. Ct. May 12, 2010) (Order to File Supplemental Briefs).

Malite probate case to Judge Wiseman.[2] Judge Wiseman then held a status conference to address a July 17, 2006 letter to Presiding Judge Naraja, from Judge Lizama, which alleged that Judge Wiseman had stated during an in-chambers conversation with Judge Lizama that Atalig and Yana did not deserve attorney fees. Judge Wiseman said the letter mischaracterized his conversation with Judge Lizama, but to avoid the appearance of partiality, Judge Wiseman recused himself from the case.

¶ 4 The case was subsequently assigned to Judge Govendo. Due in part to comments made by Judge Govendo during a hearing held in June, Tudela[3] filed a motion to disqualify Judge Govendo from presiding over the *Malite* case. After Judge Govendo referred the disqualification motion to Presiding Judge Naraja, Tudela filed a motion to disqualify Presiding Judge Naraja from determining whether Judge Govendo should be disqualified.[4] Presiding Judge Naraja denied both motions and ordered Atalig and Yana to appear before the court to show cause for why they should not be sanctioned. Tudela then filed the instant petition for writ of prohibition with this Court.[5]

¶ 5 Petitioner raises three issues for the Court to consider. First, whether Presiding Judge Naraja committed clear error by ruling on the disqualification motion – filed to prevent him from ruling on the motion to disqualify Judge Govendo – instead of referring the motion to another judge. Second, whether Presiding Judge Naraja should be disqualified from assuming any role in the *Malite* case due to his refusal to recuse himself from ruling on the disqualification motion concerning Judge Govendo. Third, whether

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[2] Judge Lizama was previously assigned to handle the case, but was disqualified on March 20, 2007. Judge Wiseman issued the disqualification order.

[3] This motion, like many other documents in this case, was filed by Atalig and Yana in their capacity as attorneys for Tudela. It is unusual – and generally improper – for attorneys to list themselves in the caption of documents filed with this Court, and it is unclear whether Atalig and Yana sought to be considered petitioners or real parties in interest and if so on what basis. While we need not reach this issue to resolve the instant petition, for purposes of this opinion, the documents filed in this case will be attributed to Tudela as the Petitioner.

[4] This motion requested that Judge Naraja recuse himself, or alternatively, for the matter to be referred to another judge to conduct a disqualification hearing. Motion for Recusal and/or to Disqualify Presiding Judge Robert C. Naraja to Hear the Proceedings in the Estate of Angel Malite ("Motion to Recuse/Disqualify Judge Naraja") at 1 (Attached to Petition for Writ of Prohibition as Exhibit G).

[5] Following the filing of the petition, Judge Govendo did not halt the *Malite* proceedings. On November 6, 2007, he granted the Heirs' motion, ordering Atalig and Yana to disgorge attorney fees by December 7, 2007. When Atalig and Yana failed to comply with the order they were ultimately held in civil contempt, and on March 25, 2008, Judge Govendo ordered that they be incarcerated until they disgorged a portion of the awarded fees. In the months that followed Atalig and Yana filed a series of motions in this Court to stay the trial court's judgment imprisoning them for civil contempt. On December 23, 2009, the Court granted Atalig and Yana's motion to stay the trial court's judgment. *In the Matter of the Estate of Angel Malite*, No. 2009-SCC-0036-CIV (NMI Sup. Ct. Dec. 23, 2009). At that time each attorney had spent approximately eighteen months in jail.

While Petitioner's writ petition has remained unanswered, the issues raised therein remain relevant as our answers implicate not only the contempt finding being contested on appeal in *In re the Estate of Angel Malite*, Civ. No. 2009-SCC-0036-CIV, but also the role that Presiding Judge Naraja and Judge Govendo can assume in any subsequent *Malite* proceedings.

Judge Govendo should have been disqualified from presiding over the Malite proceedings. In this opinion, we address only the first two issues.[6] We first examine whether it was appropriate for Presiding Judge Naraja to evaluate whether the disqualification motion satisfied the procedural requirements and if so, we then must determine if his decision to deny Petitioner's motion seeking his recusal and/or disqualification was clearly erroneous.

II

¶ 6 This Court has jurisdiction to issue extraordinary writs pursuant to its general supervisory powers. *Taimanao v. Superior Ct.*, 4 NMI 94, 96 (citing 1 CMC § 3102(b) and *Tenorio v. Superior Ct.*, 1 NMI 1, 7 (1989)). "The remedy of prohibition, like that of mandamus, 'is a drastic one, to be invoked only in extraordinary situations.'" *Id.* at 97 (quoting *Sablan v. Superior Ct.*, 2 NMI 165, 168 (1991)). This Court applies the same guidelines for ruling on petitions for writs of prohibition and for writs of mandamus. *Id.* These are: (1) the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the lower court's order is clearly erroneous as a matter of law; (4) the lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and (5) the lower court's order raises new and important problems or issues of law of first impression. *Tenorio*, 1 NMI at 9-10. In applying these guidelines to a particular case there will not always be a "bright-line distinction" and "proper disposition will often require a balancing of conflicting indicators." *Id.* at 10.

A. Application of First and Second Tenorio Factors

¶ 7 Turning to the first *Tenorio* factor, this Court examines whether "the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired." *Id.* While Petitioner states that this factor is satisfied, he fails to make any legal argument or cite any case law whatsoever in support of this position. Instead, he argues that relief is warranted because Atalig and Yana "may be subject to improper sanctions including imprisonment." Petition for Writ of Prohibition at 14.

¶ 8 This Court has not examined the circumstances in which mandamus[7] may be an appropriate remedy in cases involving judge disqualification or recusal.[8] Since the language at issue in 1 CMC §

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[6] Additional briefing has been ordered on this third issue. *Supra* note 1.

[7] While the filed petition seeks a writ of prohibition, cases involving writs of mandamus are equally applicable. *See Calderon v. U.S. Dist. Ct.*, 134 F.3d 981, 984 n.3 (9th Cir. 1998) ("The writ of prohibition is the 'fraternal twin' of its more familiar sibling, the writ of mandamus. [Citations omitted]. The two are evaluated under an identical standard.").

[8] A related issue was addressed in *Tudela v. Commonwealth*, 2007 MP 18, which involved the same parties as the instant petition. In *Tudela*, after Judge Wiseman recused himself, Petitioner sought mandamus asking this Court to vacate Judge Wiseman's prior order disqualifying Judge Lizama, who had previously presided over the case, and to order reinstatement of Judge Lizama. *Id.* ¶¶ 2-3; *see supra* note 2. This Court held that mandamus was not appropriate, reasoning that since the case had been reassigned, Petitioners' remedy was to seek review of Judge

3308 – the statute governing disqualification and recusal of judges – is nearly identical to that in 28 U.S.C. § 455, we look to federal case law for guidance. *Commonwealth v. Caja*, 2001 MP 6 ¶ 18. Federal precedent is nearly unanimous in establishing that a judge's denial of a motion seeking disqualification or recusal can be contested either through direct appeal or a petition for mandamus. *See, e.g, In re Cargill, Inc.*, 66 F.3d 1256, 1262 (1st Cir. 1995) (stating that mandamus is appropriate where actual judge bias is alleged); *United States v. Cooley*, 1 F.3d 985, 996 n.9 (10th Cir. 1993) ("a district judge's refusal to disqualify under § 455(a) may be challenged on direct appeal following conviction as well as by use of mandamus"); *In re Sch. of Asbestos Litig.*, 977 F.2d 764, 778 (3d Cir. 1992) ("Interlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear, and virtually every circuit has so held."); *United States v. Hemphill*, 369 F.2d 539 (4th Cir. 1966). The Ninth Circuit Court of Appeals has ruled similarly. *See United States v. Washington*, 98 F.3d 1159, 1164 (9th Cir. 1996) (Kozinski, J., concurring) (Citing Ninth Circuit cases supporting his statement that a "judge's failure to recuse himself can also be raised on direct appeal . . . or by petition for mandamus.").[9]

¶ 9 Relying on the above authority, we find that challenges to judge recusal or disqualification may be raised either by mandamus or on direct appeal. However, this does not answer the question of whether mandamus is appropriate in the instant case. The first *Tenorio* factor applies only when "no other adequate means" exist. *Tenorio*, 1 NMI at 9. This issue is linked to the second *Tenorio* factor – whether the parties will be "damaged or prejudiced in a way not correctable on appeal" – and thus the first two *Tenorio* factors may be considered together. *Id.*; *Commonwealth v. Superior Ct.*, 2008 MP 11 ¶ 11. The primary harm in this case – imprisonment of Atalig and Yana – combined with the overwhelming number of federal jurisdictions that have found mandamus relief appropriate in cases involving judge recusal or disqualification, weigh in favor of this Court considering the merits of the petition by examining *Tenorio* factor three. While *Tenorio* factors one and two help determine whether a case involves the type of

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Wiseman's disqualification order by the newly assigned judge, and if the order was vacated, a rehearing on the motion to disqualify. *Id.* ¶ 10. That case is therefore readily distinguishable, as the instant petition involves review of a judge's decision to not recuse himself, and not the effect of orders issued by a subsequently disqualified judge.

[9] Only the Seventh Circuit has held that a judge's decision regarding recusal or disqualification *must* be asserted by mandamus or it is waived. *See United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985) ("when a judge denies a motion to disqualify himself under § 455(a), the moving party's sole recourse is to apply to this court immediately for a writ of mandamus."). While the Sixth Circuit previously held that relief can *only* be sought on appeal, the court has since distanced itself from this position. *Compare In re the City of Detroit*, 828 F.2d 1160, 1165-67 (6th Cir. 1987) (stating that recusal decision is reviewable only after final judgment is entered), *with In Re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) ("we hold, along with all other circuits that have ruled on the question, that we will . . . review on its merits the petition for mandamus.").

controversy where extraordinary relief is potentially appropriate, we apply factor three to determine whether the lower court actually erred, and thus whether the extraordinary relief sought is warranted.

B. Application of Third Tenorio Factor

¶ 10 While the first two *Tenorio* factors weigh in favor of considering the merits of the petition, factor three is critical to determining whether to grant the extraordinary relief sought. Factor three states that mandamus may be appropriate if "the lower court's order is clearly erroneous as a matter of law." *Tenorio*, 1 NMI at 9-10. Petitioner stresses the importance of this factor. Petition for Writ of Prohibition at 14 ("Third, and more importantly, the Superior Court's alleged order is clearly erroneous as a matter of law."). Many courts have recognized the critical role of the lower court's decision in deciding whether mandamus is appropriate. *See, e.g.*, *Hemphill*, 369 F.2d at 543 ("We hold instead that any litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance to show cause why he should not be held in contempt of court when the underlying order of the Court is clearly erroneous and the refusal to comply with it has been both formal and respectful."); *King v. U.S. Dist. Ct.*, 16 F.3d 992, 993 (9th Cir. 1994) (denying writ of mandamus after concluding that it could not deem "the district court's refusal to recuse itself . . . clearly erroneous."). Thus, while *Tenorio* factors one and two are relevant and favor substantive consideration of the writ petition, in deciding whether mandamus is appropriate we must ultimately determine whether the lower court's decision was clearly erroneous. Petitioners argue that Presiding Judge Naraja's actions meet this heightened standard.

i. Whether Presiding Judge Naraja was Required to Refer the Motion Seeking his Disqualification or Recusal

¶ 11 Petitioner argues that Presiding Judge Naraja's refusal to recuse himself from ruling on the disqualification motion concerning Judge Govendo was clearly erroneous as a matter of law. Petitioner argues that Presiding Judge Naraja committed clear error by ruling on his own disqualification motion and not referring the motion to another judge. Tudela argues further that Presiding Judge Naraja should have certified the disqualification motion to the Supreme Court pursuant to 1 CMC § 3305(g),[10] so that another judge could hear it.[11] Instead, Presiding Judge Naraja "took it upon himself and heard the motion

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[10] This subsection reads:

> When in the discretion of the Presiding Judge of the Superior Court the proper and efficient dispatch of the business of the Superior Court requires the service of a special Commonwealth judge, the Presiding Judge of the Superior Court shall present the Chief Justice of the Commonwealth with a certificate of necessity and the Chief Justice shall thereupon designate one or more special Commonwealth judges to sit and hold court in the Superior Court of the Commonwealth.

[11] Petitioner also argues that this issue is one of first impression and therefore implicates the fifth *Tenorio* factor.

for his recusal or disqualification without appointing another judge to hear his disqualification motion," which Petitioner asserts was clear error. Petition for Writ of Prohibition at 16.

¶ 12 The procedures governing the recusal and disqualification of judges are laid out in 1 CMC § 3309.[12] Under 1 CMC § 3309(a), governing recusal, "[w]henever a justice or judge of the Commonwealth believes that there are grounds for his or her disqualification, he or she shall, on his or her own initiative, recuse himself or herself . . . ." Subsection 3309(b) governs disqualification, and states that "[w]henever a party to any proceeding in a court of the Commonwealth believes that there are grounds for disqualification of the justice of judge before whom the matter is pending, that party may move for disqualification of the justice or judge, stating specifically the grounds for such disqualification." However, § 3309(b) does not elaborate on the actual process used to determine whether a judge should be disqualified or who must rule on the disqualification motion.

¶ 13 The statutory grounds for recusal and disqualification are set forth in 1 CMC § 3308. Section 3308(a), is a waivable catch-all provision which requires disqualification "in any proceeding in which [the judge or justice's] impartiality might reasonably be questioned." Subsection 3308(b), which is not waivable, lists several specific grounds requiring recusal or disqualification. As pertinent to this case, § 3308(b)(1) states that a judge "shall disqualify himself . . . [w]here [he] has a personal bias or prejudice concerning a party . . . ." When § 3308(b)(1) is the basis for disqualification, Canon 3(D)(c) of the Commonwealth Code of Judicial Conduct establishes the procedure that must be followed – which includes filing an affidavit and having a separate judge determine whether disqualification is warranted.[13]

¶ 14 A motion brought under 1 CMC § 3309(b) can be based on grounds stated in § 3308(a) or (b). *See Saipan Lau Lau Dev., Inc. v. Superior Ct. (San Nicolas)*, 2000 MP 12 ¶ 6 (discussing "litigant mov[ing] for recusal under § 3308(a)"); *Bank of Saipan v. Superior Ct. (Disqualification of Lamorena)*, 2002 MP 17 ¶¶ 14-18 (discussing motion brought to disqualify based on § 3308(b)(1)). However, the basis for

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[12] As acknowledged by the trial court, the terms "recusal" and "disqualification" are often used interchangeably in the Commonwealth Code and in this Court's prior opinions. As used in this opinion, "recusal" refers to a judge's decision to remove himself or herself from a case, whereas "disqualification" refers to when, upon motion by a party, another judge or justice decides whether to remove a challenged judge from hearing a case.

[13] Canon 3(D)(c) reads:

> If the ground for disqualification is that the justice or judge has a personal bias or prejudice against or in favor of any party, an affidavit shall accompany the motion. Such justice or judge shall proceed no further therein but another justice or judge shall be assigned to hear such motion.
>
> The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and the motion and affidavit shall be filed in sufficient time not to delay any proceedings unless the moving party can show he or she had no reason to previously question the justice's or judge's bias or prejudice or the proceeding was just recently assigned to the justice of judge.
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> A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating it is made in good faith.

disqualification is significant because different grounds grant challenged judges varying levels of authority to decide the challenge. In his motion to disqualify Presiding Judge Naraja, Petitioner alleges violations of § 3308(a) and Canon 3(D)(c). Motion to Recuse/Disqualify Judge Naraja at 1. Petitioner – without citing § 3308(b)(1) directly – apparently believes that disqualification was warranted because Presiding Judge Naraja has a personal bias or prejudice and also that his impartiality might reasonably be questioned because of this alleged bias or prejudice.

¶ 15 A critical distinction between §§ 3308(a) and (b)(1) is that a motion to disqualify brought under (b)(1) – alleging personal bias or prejudice – is subject to the affidavit requirements listed in Canon 3(D)(c), while a motion brought under § 3308(a) is not. *See Bank of Saipan*, 2002 MP 17 ¶ 18 ("the affidavit requirement does not apply to motions citing the 'partiality' ground of" 1 CMC § 3308(a)); *see also Bank of Saipan v. Superior Ct. (Disqualification of Castro)*, 2002 MP 16 ¶ 25 ("even assuming the one affidavit requirement had been violated . . . such violation would only preclude a review of a motion to disqualify under section 3308(b)(1) and not section 3308(a)"); *Saipan Lau Lau Dev., Inc.*,. 2000 MP 12 ¶¶ 4-5. This position reflects a strict interpretation of Canon 3(D)(c), which refers only to "personal bias or prejudice," and makes no mention of a motion based on the *appearance* of partiality. *See Bank of Saipan*, 2002 MP 17 ¶ 18 ("Because the affidavit requirement is only specifically applicable to motions citing 'bias or prejudice,' then under a plain reading of the statute, the affidavit requirement does not apply to motions citing the 'partiality' ground of section 3308(a)"). We are thus faced with two distinct issues – we must examine Presiding Judge Naraja's actions insofar as they concerned the challenge alleging personal bias or prejudice in violation of § 3308(b)(1) and Canon 3(D)(c), and must separately examine his conduct involving the challenge under § 3308(a).

¶ 16 To the extent that Petitioner's motion alleges personal bias or prejudice in violation of Canon 3(D)(c), Presiding Judge Naraja denied the motion on the ground that it did not conform to procedural requirements listed therein.[14] In essence, Presiding Judge Naraja found that the motion "was not accompanied by the requisite party affidavit," and even if the requisite affidavit had been filed it would violate the one-affidavit rule. Judge Naraja Disqualification Order at 3-4. He also noted that the Administrator's attorneys "failed to certify that the motion to disqualify was brought in good faith." *Id.* at 4.

¶ 17 Commonwealth precedent firmly establishes that the procedural requirements of Canon 3(D)(c) must be fully complied with when a judge is challenged on the basis of personal bias or prejudice. *See Saipan Lau Lau Dev., Inc. v. Superior Ct. (San Nicolas)*, 2000 MP 15 ¶ 4 n.6; *see also Bank of Saipan*,

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[14] *In Re: Estate of Angel Malite*, Civ. No. 97-0369 (NMI Super. Ct. Sept. 19, 2007) (Order Denying Administrator's Motion to Disqualify and/or To Recuse Judge Robert C. Naraja and Requiring Counsel for Administrator to Show Cause Why They Should Not Be Sanctioned ["Judge Naraja Disqualification Order"] at 3).

2002 MP 17 ¶ 15 ("[t]he affidavit requirement under Canon 3(D)(c) must be strictly and fully complied with."). These procedural requirements include that (1) the motion be brought at the earliest possible date; (2) the motion be accompanied by a party affidavit setting forth facts and reasons supporting a charge of bias; and (3) the movant's attorney file a separate certificate of good faith. *See Saipan Lau Lau Dev., Inc.*, 2000 MP 15 ¶ 11; *see also Saipan Lau Lau Dev., Inc.*, 2000 MP 12 ¶ 4. Canon 3(D)(c) states that if the basis for disqualification "is that the justice or judge has a personal bias or prejudice against or in favor of any party, an affidavit shall accompany the motion. Such justice of judge shall proceed no further therein but another justice of judge shall be assigned to hear such motion." The question before us is whether a challenged judge is permitted to rule on whether Canon 3(D)(c)'s procedural requirements are met before the duty to "proceed no further" is imposed. Relying on both Commonwealth and federal precedent, we hold that when a party files a motion for disqualification under § 3308(b)(1) alleging bias or prejudice, the challenged judge may indeed rule on whether procedural requirements are met.

¶ 18 While this Court has not directly confronted the issue, Commonwealth precedent supports granting a challenged judge this authority. We have cited with approval the position that when "an affidavit does not meet the requirements imposed by law, the judge has an obligation not to disqualify himself." *Bank of Saipan*, 2002 MP 17 ¶ 15 (quoting *United States v. Anderson*, 433 F.2d 856, 860 (8th Cir. 1970)). This position assumes that the challenged judge performs *some* function to ensure that the affidavit – and more generally, the disqualification motion – meets the "requirements imposed by law." *Id.* As it is well-settled that a judge challenged for personal bias or prejudice cannot evaluate the truth of averments made in the affidavit, *Saipan Lau Lau Dev. Inc.*, 2000 MP 12 ¶ 4 n.6, this initial review naturally encompasses assessing whether the filed documents comply with basic procedural requirements. This commonsense position is not only supported by extra-jurisdictional precedent, but practically ensures that limited judicial resources are not expended by transferring a procedurally defective disqualification motion or affidavit to another judge for review.

¶ 19 As noted above, granting a challenged judge this authority is also consistent with overwhelming federal precedent. Commonwealth statutes governing recusal and disqualification have federal counterparts. Specifically, 1 CMC § 3308(a) tracks language in 28 U.S.C. § 455(a), while 1 CMC § 3308(b)(1) is substantively identical to 28 U.S.C. § 455(b)(1). The disqualification procedures set forth in Canon 3(D)(c) derive from 28 U.S.C. § 144. Given these similarities, this Court "may therefore look to federal cases interpreting equivalent provisions of federal law to determine the issues raised" in a given case. *Saipan Lau Lau Dev. Inc.*, 2000 MP 12 ¶ 3; *see also Bank of Saipan*, 2002 MP 16 ¶ 7 ("Canon 3(D)(c) models the affidavit procedure for disqualification set forth in 28 U.S.C.[] § 144. [Citations omitted]. Therefore, federal cases interpreting these sections may be relied upon...").

¶ 20 Federal precedent firmly establishes a challenged judge's authority to determine whether a disqualification motion conforms to procedural requirements. *See, e.g., United States v. Sykes*, 7 F.3d 1331, 1340 (7th Cir. 1993) (upholding district court's denial of motion to recuse under 28 U.S.C. § 144 on the basis of **"**procedural and substantive shortcomings" in affidavit); *Lindsey ex rel. Lindsey v. City of Beaufort***,** 911 F. Supp. 962, 966 (D.S.C. 1995) (**"**a disqualification affidavit unaccompanied by a certificate of good faith, signed by counsel of record admitted to practice before the court, is not legally sufficient and it will not support a [28 U.S.C.] § 144 motion to recuse"); *United States v. Occhipinti*, 851 F. Supp. 523, 526 (S.D.N.Y. 1993) (finding recusal not warranted when defendant failed to strictly comply with statutory procedures); *Selfridge v. Gynecol, Inc.*, 564 F. Supp. 57, 58 (D. Mass 1983) ("Upon the filing of an affidavit by a party documenting personal judicial bias or prejudice against that party or in favor of an adverse party, the court's inquiry is limited to determining whether the affidavit is both procedurally correct and legally sufficient to compel disqualification."). Such jurisprudence supports our conclusion that Presiding Judge Naraja had authority to deny the motion – insofar as it involved a challenge brought pursuant to §3308(b)(1) and Canon 3(D)(c) – for failure to strictly comply with procedural requirements.[15] Petitioners do not challenge Presiding Judge Naraja's determination that their motion and accompanying affidavit failed to conform to procedural requirements – only that he should not have ruled on the procedural sufficiency. Thus, further examination of this issue is unnecessary.

¶ 21 Petitioner also asserts that Presiding Judge Naraja clearly erred in deciding himself the portion of the disqualification motion alleging that his impartiality might reasonably be questioned under 1 CMC § 3308(a). In contrast to § 3308(b)(1), strict procedural requirements do not apply to a motion to disqualify based on § 3308(a). *See Saipan Lau Lau Dev. Inc.*, 2000 MP 12 ¶ 6. It is well-established that motions brought under § 455(a) – the federal equivalent to § 3308(a) – can be decided by the challenged judge. *See, e.g., Bernard v. Coyne*, 31 F.3d 842, 843 (9th Cir. 1994) (stating that a disqualification motion brought under § 455 "must be decided by, the very judge whose impartiality is being questioned" and noting that "[b]y contrast, if a party files an affidavit properly alleging prejudice on the part of a district judge under 28 U.S.C. § 144, the judge must turn the matter over to a colleague"); *Schurz Communs. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992) ("Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge.") (Posner, J.) (citation omitted); *Cohee v. McDade*, 472 F. Supp. 2d 1082, 1084 (S.D. Ill. 2006) ("as a rule, a motion to

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[15] Whether a motion to disqualify and accompanying affidavit are procedurally correct or legally sufficient are two separate but related inquiries. *See People v. Johnny*, 2006 Guam 10 ¶ 1 (addressing these issues separately, and holding that "Superior Court judges may strike a statement of objection that is procedurally defective without referring the matter to another judge."). Judge Naraja denied Tudela's disqualification motion due to its procedural deficiencies, and our holding in this case recognizes his power to make this decision. Accordingly, we are not asked to decide whether a judge challenged for personal bias or prejudice may assess the legal sufficiency of a party affidavit before referring the matter to another judge.

disqualify a district judge under 28 U.S.C. § 455 must be decided by the judge whose disqualification is sought").

¶ 22 The federal position is consistent with the position adopted by the Commonwealth Superior Court – that a challenged judge can determine whether to recuse himself or herself when the basis for disqualification is 1 CMC § 3308(a). *See, e.g.*, *Hofschneider v. Demapan-Castro*, Civ. No. 04-0523 (NMI Super. Ct. June 22, 2005) (Order Concerning Defendant MPLA's Motion for the Recusal of Judge Kenneth L. Govendo at 2 n.1) ("Therefore, the Court concludes that a judge faced with a recusal motion based merely on the appearance of bias, 1 CMC § 3308(a), probably may hear and decide the motion himself or herself. No referral to another judge is necessary."); *D.C. Saipan Ltd., v. Sekisui House, Ltd.*, Civ. No. 95-0830 (NMI Super. Ct. Sept. 26, 1997) (Memorandum Decision and Order on 1) Defendant's Motion to Disqualify Judge Bellas; 2) Defendant's Motion to Disqualify Judge Castro at 5) ("it is entirely proper for a judge challenged under [1 CMC § 3308(a)] to rule upon the recusal motion without referring it to another judge and to dispute the factual basis asserted in any affidavit that may be filed . . . .") (internal citation omitted).[16] While these trial court decisions are not binding precedent, we see no reason, and indeed Petitioner has made no compelling argument, to depart from this established Commonwealth and federal practice under the facts of this case.

¶ 23 To summarize, when a litigant seeks to prevent a particular judge from participating in a proceeding because the judge's impartiality might reasonably be questioned under § 3308(a), the challenged judge has the discretion to evaluate and rule on the litigant's motion for disqualification. When a motion to disqualify a judge is brought on grounds stated in § 3308(b)(1) and Canon 3(D)(c), the challenged judge may rule on whether the motion strictly complies with procedural requirements established therein.[17] Accordingly Presiding Judge Naraja's decisions to deny the challenge involving Canon 3(D)(c) due to procedural defects, and to consider the merits of the motion involving § 3308(a) were not clearly erroneous.

ii. Presiding Judge Naraja Properly Refused to Recuse Himself

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[16] In certain other Commonwealth cases, motions brought under § 3308(a) have been heard by a judge other than the challenged judge. *See, e.g.*, *Commonwealth v. Sablan Sys. Corp.*, Civ. No. 01-0442A (NMI Super. Ct. March 31, 2004) (Order Granting Motion for Disqualification) (granting motion to disqualify Judge Lizama, where motion was decided by Judge Manglona); *Commonwealth v. Dowai*, Crim. No. 99-072D (NMI Super. Ct. April 19, 1999) (Order Granting Defendant's Motion for Disqualification of Associate Judge John A. Manglona) (granting motion to disqualify Judge Manglona under § 3308(a) for grounds stated in 3308(b)(5)(i)-(iii)). However, such cases do not discuss why the disqualification motion was heard by another judge. We find that these cases merely reflect that a trial judge is afforded discretion to determine whether to rule on a challenge based on § 3308(a), or to refer the matter to another judge. Put another way, although a judge is permitted to rule on a disqualification motion brought under 3308(a), a judge has the discretion to instead refer the motion to another judge if he or she chooses.

[17] Of course, a party who is aggrieved by an order denying a judicial disqualification motion has avenues available whereby the court's disqualification decision may be meaningfully reviewed.

¶ 24 Having established that Presiding Judge Naraja was permitted to decide whether to recuse himself under § 3308(a), it is now necessary to turn to the merits of Petitioner's disqualification motion. Tudela argues that Presiding Judge Naraja should have recused himself based on prior conduct in this and other cases. First, Petitioner argues that Presiding Judge Naraja improperly assigned the *Malite* case to Judge Wiseman, after a letter from Judge Lizama to Presiding Judge Naraja raised questions concerning Judge Wiseman's impartiality on the subject of attorney fees. Second, Petitioner appears to argue that Presiding Judge Naraja should have recused himself because in a series of cases involving adoption ("adoption cases") – unrelated to the *Malite* case – he denied motions to disqualify Judge Govendo. These motions were filed by Yana and alleged bias and prejudice against Filipinos and litigants of other nationalities. Petitioner argues that together the above acts raise "serious questions of impartiality under 1 CMC § 3308(a) and Canon 3D(c) of the Code of Judicial Conduct."[18] Petition for Writ of Prohibition at 8.

¶ 25 Under 1 CMC § 3308(a), a "justice or judge of the Commonwealth shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned." The writ petition expends considerable effort arguing that this is an objective standard; however, such exertions were unnecessary since this position is already well-established in the Commonwealth. For example, in *Commonwealth v. Caja*, 2001 MP 6 ¶ 18, this Court noted that the language in 1 CMC § 3308(a) and Canon 3(C)(a) is nearly identical to the federal disqualification statute – 28 U.S.C. § 455(a) – and the Court looked to federal case law for guidance on the issue. In so doing, the Court noted that the "standard under the federal statute is an objective one . . . ." *Id.* ¶ 19; *see also Saipan Lau Lau Dev. Inc.*, 2000 MP 12 ¶ 5 ("[A] trial judge is required to recuse himself or herself when 'a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might be questioned."). Under *Tenorio* factor three, the question before this Court is whether Presiding Judge Naraja's conclusion that he did not need to recuse himself was clearly erroneous.

¶ 26 Petitioner has failed to cite to any factually analogous cases supporting his argument, and instead relies on readily distinguishable cases. The cited cases deal with a trial judge who had business dealings with an attorney,[19] a close friendship with the prosecutor,[20] and a financial interest in the outcome of the case.[21] Other than providing useful background on the legal underpinnings of 28 U.S.C. § 455(a), these

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[18] The petition cites to the wrong provision of the Code of Judicial Conduct. Specifically, the petition states that "1 CMC § 3308(a) and Canon 3(D)(c) Code of the Judicial Conduct states [sic]: A justice or judge of the Commonwealth shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned." Petition for Writ of Prohibition at 8-9. However, this provision is stated in Canon 3(C)(a), not 3(D)(c).

[19] *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980).

[20] *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

cases offer little of value as the bases for disqualification in the cited cases are unrelated to the grounds asserted in the present case.

¶ 27 Setting aside the lack of applicable legal support, the facts asserted by Petitioner are insufficient to warrant a finding that Presiding Judge Naraja's refusal to recuse himself was clearly erroneous. With respect to the adoption cases, Petitioner argues that a decision by Presiding Judge Naraja not to disqualify Judge Govendo in these unrelated cases creates an appearance of partiality warranting recusal in the present case. The denial of the disqualification motion in the adoption cases was not appealed. Judge Naraja Disqualification Order at 9. Thus, Petitioner appears to argue that denial of a disqualification motion in a prior case forms a sufficient basis to warrant recusal in a subsequent unrelated case. However, contrary to Petitioner's apparent position, an appearance of partiality is not created simply by a judge's ruling that a party finds disagreeable. *Cf. Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 565 (Tenn. 2001) ("the mere fact that a judge has ruled adversely to a party or witness in a prior judicial proceeding is not grounds for recusal."). Moreover, and perhaps even more significantly, it appears that Yana may have conceded that Presiding Judge Naraja's actions in the adoption cases were irrelevant to the *Malite* proceedings.[22]

¶ 28 With regard to Judge Lizama's letter, Petitioner argues that Presiding Judge Naraja "knew or should have known about the opinion shared" in the letter concerning attorney fees, and that "[d]espite the letter, the case was still referred to Judge Wiseman." Petition for Writ of Prohibition at 12, 14. In his Order dated September 19, 2007 – before the instant petition for writ of prohibition was filed – Presiding Judge Naraja stated that the letter "was not received until after assignment" of the case to Judge Wiseman had taken place. Judge Naraja Disqualification Order at 8. Given this fact, and the lack of further elaboration by Petitioner on his argument, this Court is left to guess at how a letter which was not received until after the assignment took place creates an appearance of partiality sufficient to justify recusal.

¶ 29 There is no need for us to engage in such speculation, as the only proffered evidence that Presiding Judge Naraja's impartiality can reasonably be questioned are derived from the adoption cases

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[21] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

[22] Judge Naraja discussed this issue while responding to Petitioner's argument that Judge Govendo's comments in the adoption cases warranted his disqualification from the *Malite* proceedings. *In re: Estate of Angel Malite*, Civ. No. 97-0369 (NMI Super. Ct. Sept. 19, 2007) (Order Denying Administrator's Motion to Disqualify Judge Kenneth L. Govendo and Requiring Counsel for Administrator to Show Cause Why They Should Not Be Sanctioned at 10 n.11) ("In response to Court's question regarding Counsel's racial allegations against Judge Govendo with respect to Filipinos in the adoption cases, [Yana] said the following, '[the] only reason we put it in is because ahh because ahh ahh we we wanted to ask you [Judge Naraja] to recuse yourself. But ahh in ahh separately in this Malite case the adoption cases had nothing to do with it."). Counsel then withdrew their argument. *Id.* This admission makes Petitioner's argument tenuous at best.

and the letter from Judge Lizama, which simply falls short of the evidence needed to declare Presiding Judge Naraja's refusal to recuse himself clearly erroneous. Accordingly, we find that Presiding Judge Naraja was permitted to rule on the motion filed to disqualify Judge Govendo. Petitioner has not alleged sufficient facts to warrant mandamus.

III

¶ 30 For the forgoing reasons, we find that under the test enunciated in *Tenorio*, the extraordinary relief sought is not warranted.[23] Presiding Judge Naraja's actions were not clearly erroneous, as he was permitted to deny the disqualification motion on procedural grounds and deny on substantive grounds the portion alleging a violation of 1 CMC § 3308(a). Accordingly, insofar as the petition for writ of prohibition concerns these issues, it is DENIED.

SO ORDERED this 12th day of May 2010

/s/_____
JOHN A. MANGLONA
Associate Justice

/s/_____
ROBERT J. TORRES
Justice Pro Tem

/s/_____
HERBERT D. SOLL
Justice Pro Tem

[23] Because we find that none of Petitioner's claims satisfy *Tenorio* factor three, we need not consider *Tenorio* factors four and five. *See Malite v. Tudela*, 2007 MP 3 ¶ 19 ("Because we find the first and second *Tenorio* factors wanting, we need not discuss the remaining factors.").