IN THE SUPREME COURT OF GUAM

FREDDY VAN DOX,
Petitioner,

v.

SUPERIOR COURT OF GUAM,
Respondent,

DAVID ALCORN,
Real Party in Interest.

Supreme Court Case No.: WRP06-003
Superior Court Case No.: SP0056-06

OPINION

Cite as: 2008 Guam 7

Petition for Writ or Prohibition from Superior Court of Guam
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.[1]

TORRES, J.:

[1] This matter comes before the court pursuant to a Writ of Prohibition and, or, Writ of Mandamus (the "Petition") filed by Petitioner Freddy Van Dox seeking to command the Respondent Superior Court of Guam to vacate the order issued by Judge Steven S. Unpingco dismissing Van Dox's disqualification motion, and to reassign the case to another Judge of the Superior Court or, in the alternative, to transfer the issue of Judge Unpingco's disqualification to another judge who will rule on the merits of Van Dox's disqualification request.

[2] Because the statement of objection contained at least some facts supporting disqualification, we find that Judge Unpingco abused his discretion when he ruled that the statement was legally insufficient. We also find that the statement of objection was timely. We therefore grant the Petition.[2]

I.

[3] The law firm of Lujan, Aguigui & Perez ("the Lujan firm") has requested on several occasions that Judge Unpingco be disqualified from matters in which the Lujan firm has served as counsel. In some cases involving the Lujan firm, Judge Unpingco has voluntarily disqualified

[1] After this matter was submitted, but prior to the issuance of this opinion, Justice Robert J. Torres was sworn in as Chief Justice, and Justice F. Philip Carbullido assumed the role of Associate Justice.

[2] This opinion supersedes the court's December 6, 2007 Order denying the Petition. Because of the significance of the issue of judicial disqualification in this jurisdiction, the court determined that it would be prudent to convert the order into an opinion that would provide further guidance on the issue. In the course of converting the order into a full opinion, the court performed additional legal research and additional analysis of the voluminous record, which led the court to conclude that its original order articulated and applied an erroneous legal standard and reached an incorrect result.

himself,[3] in some cases another judge has ruled that he should be disqualified,[4] and in other cases the request for disqualification has been denied.[5]

[4] Judge Unpingco's brother was a managing partner at the Lujan firm. During that time, Superior Court Judge Barrett-Anderson held that Judge Unpingco should be recused in a case where his brother's firm represented parties in a matter pending before Judge Unpingco, even though an ethical wall existed, and even though the parties before the court were not material clients of the judge's brother. Decision & Order, *Guam Mem'l Hosp. Auth. v. Gov't of Guam*, No. SP0171-04 (Guam Super. Ct. Feb. 4, 2005). Judge Unpingco subsequently disqualified himself in cases involving the Lujan firm "not by choice but in deference to the rule of law, pursuant to Judge Barrett-Anderson's decision in *GMHA*." Petition, Ex. 2(A)(2), Answer to Yingling's Objection & Mot. for Recusal, *People v. Yingling*, No. CF0454-03, at 12 (Guam Super. Ct. Mar. 21, 2005). Judge Unpingco's brother has since left the Lujan firm.

[5] The Lujan firm represented Judge Unpingco's parents in a prior case and a close relative in a sealed case. In response to a request for disqualification in another case, Judge Unpingco stated that he "was compelled to ask my brother John about them. . . . According to John Unpingco, he holds the files for these cases, not the Lujan firm. The representation of my parents was regarding a landlord-tenant unlawful detainer situation, and the representation of a

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[3] *See, e.g.*, Petition, Ex. 2(A)(4), Mem. from J. Unpingco to Presiding J. Lamorena (Mar. 17, 2004); Petition, Ex. 2(A)(2), Answer to Yingling's Objection & Mot. For Recusal, *People v. Yingling*, No. CF0454-03, at 12 (Guam Super. Ct. Mar. 21, 2005) ("I disqualified myself in other cases [involving the Lujan firm] not by choice but in deference to the rule of law, pursuant to Judge Barrett-Anderson's decision in *GMHA v. Government of Guam*, SP0171-04).

[4] *See, e.g.*, Petition, Ex. 2(A)(3), Decision & Order Recusing Judge Steven S. Unpingco, *Yingling*, No. CF454-03, at 9 (June 15, 2005); Decision & Order, *Guam Mem'l Hosp. Auth.*, SP0171-04 (Guam Super. Ct. Feb. 4, 2005).

[5] *See, e.g.*, *People v. Johnny*, 2006 Guam 10 ¶ 3; Petition, Ex. 1, Decision & Order, *In re Arbitration Between Alcorn & Van Dox*, No. SP0056-06, at 6 (Guam Super. Ct. Sept. 6, 2006).

relative was in a domestic case." Petition, Ex. 2(A)(5), Decision & Order, *Akimoto v. Gutierrez*, No. CV1011-02, at 9 (Super. Ct. Jan. 12, 2006).

[6] Judge Unpingco's wife was represented by the Lujan firm from 2001 to 2005 in the civil matter *Reyes v. Tainatongo*, No. CV2005-01 (Guam Super. Ct.).[6]

[7] The Lujan firm requested Judge Unpingco's disqualification in *People v. Yingling*, No. CF0454-03 (Guam Super. Ct.), based upon the Lujan firm's connections to Judge Unpingco's relatives. *See* Petition, Ex. 2(A)(1), Objection to Judge Steven S. Unpingco Acting as Judge Herein, No. CF0454-03, at 5-6 (Guam Super. Ct. Mar. 15, 2005). The court refused to voluntarily recuse itself, providing a heated response to the Lujan firm's request:

> Here we go again. When things are not going well for litigants, they move to recuse the judge! When litigants want to delay the proceedings and not allow justice to prevail, they move to recuse the judge! When the litigants do not like a judge or the way he maintains order, respect and solemnity in court proceedings, they move to recuse the judge! The extent to which litigants will go in order to gain a favorable outcome in court proceedings is incredible, and this particular objection is nothing more than a classic case of sour grapes – at the expense of my integrity and subjecting my family to the public spectacle of embarrassment and ridicule.
>
> A motion like this is not even worth the paper on which it is written, baseless and tasteless to the point that it should not even dignify a response. It is an absolute shame that some detractors take a perverse joy in executing underhanded tactics, as opposed to making sound legal arguments within the bounds of law and ethics, in their desperation to escape justice. It would be a disgrace to the bench to allow attorneys to make motions to recuse and in so doing destroy a judge's livelihood, stain his family's reputation, and offend the dignity of the courts.

Petition, Ex. 2(A)(2), Answer to Yingling's Objection & Mot. for Recusal, *People v. Yingling*, No. CF0454-03, at 1 (Guam Super. Ct. Mar. 21, 2005).

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[6] *Cf.* Petition, Ex. 2(A)(4), Memorandum, *People v. Tainatongo*, No. CF0060-04 (Guam Super. Ct. Mar. 17, 2004) (Unpingco, J.) (disqualifying himself because "an immediate relative . . . may have a pending civil lawsuit against one of the defendants in this criminal case").

[8] Judge Unpingco's answer contained additional attacks on the Lujan firm. He accused Lujan of representing clients despite a conflict of interest, stating that "[i]t is ludicrous that a Lujan Perez partner would concern himself with a judge's ethics, while [those] antagonistic interests of his firm's clients may present a conflict in terms of loyalty to those clients' representation." *Id.* at 5-6. The Judge also questioned Mr. Lujan's veracity:

> Mr. Lujan admits that he recalled 'during trial' that he represented Mrs. Unpingco, and Yingling suddenly must vociferously object. It is suspicious that Mr. Lujan managed to bury that important information deep in his heart until after the verdict. The Court has to wonder if the information would have remained buried had the jury acquitted his client. . . .
> More disturbing is the fact that even if we assume that Lujan is telling the truth that he recalled 'during trial' that he represented my spouse, he did not immediately bring it to the Court's attention.

Id. at 11. Based on the request for disqualification made by the Lujan firm, he accused the firm's client, Yingling, of "making untenable and disingenuous legal arguments in a quest to escape righteous judgment" by requesting his disqualification. *Id.* at 13. He also implied that the Lujan firm and Yingling had disrespected his family, and requested that the people of Guam pray for him, stating: "I ask the people of Guam, especially the legal community, for their prayers during this most trying time. . . . I ask for nothing more than respect for the judicial process and respect for my family." *Id.* at 15.

[9] In ruling on the request for disqualification in *Yingling*, Judge Maraman found that "[a] reasonable person has cause to question his ability to remain impartial during the further proceedings of this trial," and that disqualification was warranted. Petition, Ex. 2(A)(3), Decision & Order, *People v. Yingling*, No. CF0454-03, at 8 (Guam Super. Ct. June 15, 2005). The ruling was based on how "passionately and angrily" he opposed the request, and "how deeply and personally Yingling's motion has affected the Judge and his family." *Id.* at 7, 8.

[10] In subsequent rulings, Judge Unpingco declined to interpret the *Yingling* ruling to require his disqualification in other cases involving the Lujan firm, instead dismissing "Judge Maraman's [disqualification] ruling" as being "predicated on an erroneous recounting of the facts as well as the misapplication of (if not complete disregard for) Guam law." Petition, Ex. 2(A)(5), Decision & Order, *Akimoto v. Gutierrez*, No. CV1011-02, at 6 (Super. Ct. Dec. 22, 2005). He further suggested that Judge Maraman may be biased by connections between herself and the Lujan firm, and by alleged disputes between Judge Unpingco and Judge Maraman:

> [A]ny attorney or litigant could make the case that Judge Maraman could not be impartial regarding the Lujan firm because she is closely associated with Lujan's sister, Julie Torres, who is coincidentally the former secretary of Presiding Judge Lamorena. Additionally, at some time, Judge Maraman employed close relatives and the law partner of Attorney David Lujan in her chambers as law clerks. Naomi Lujan is the niece of David Lujan, who served Judge Maraman as a summer intern in 1998, also serving as Judge Maraman's Senior Law Clerk from December 1999 to July 2001. Ignacio Aguigui is [a] current law partner of David Lujan, and he served as Judge Maraman's law clerk from October 1998 to October 1999. Those facts would have been more than enough, under the rules set forth in her *Yingling* decision, and the arguments the Lujan firm puts forth here, to keep her from hearing any cases involving the Lujan firm. Further, one could make the case that Judge Maraman could not be impartial regarding the recusal of this Court, since Judge Maraman did not at all appreciate this Court's advocacy of a computerized, random assignment of cases which spread the workload equally among all the judges of the Superior Court instead of allowing the unfettered assignment of cases by the Presiding Judge, which had a result she evidently resented . . . .
> . . . This [C]ourt could cite further relationships between Judge Maraman and the Lujan firm, and query whether Judge Maraman makes the disclosures of all these conflicts in the manner she would impose upon other Guam judges . . . .

Id. at 32-33.

[11] Judge Unpingco has also made additional statements critical of the Lujan firm subsequent to the *Yingling* disqualification ruling. For example, he accused the Lujan firm of "judge-shopping," *id.* at 27 n.12, and "adroitness at humbuggery," *id.* at 30. He accused the firm of using the media to the detriment of himself and his family. Petition Ex. 2(A)(6), Decision &

Order, *Akimoto v. Gutierrez* at 15 (Jan. 12, 2006) ("[E]ven before the Court was ever aware a motion to disqualify had been filed, the Defense team contacted the media in an effort to ensnare this Court and my family in the buzzing beehive of journalistic inquisition."). He also stated that the Lujan firm's failure in one case to properly verify a statement of objection on its first two attempts "further demonstrates that the Defendant and Defense Counsel refuse to swear under penalty of perjury to the existence of any facts that give rise to an appearance of partiality, and merely provide innuendo and speculation in support of Defendant's motion." *Id.* at 18.

[12] The underlying case here came before Judge Unpingco on a Petition to Correct or Modify the Arbitration Award in the Superior Court of Guam filed by Van Dox, who is represented by the Lujan firm. The case was filed on April 10, 2006, assigned to Judge Unpingco on April 17, 2006, and on August 18, 2006, the Lujan firm filed a "Motion to Reassign Proceeding to the Honorable Michael J. Bordallo, Judge, Superior Court, Alternative Verified Motion to Disqualify Judge." Without a hearing, Judge Unpingco denied the motion to disqualify "for untimeliness and lack of [a] legal basis to disqualify." Petition, Ex. 1, Decision & Order at 6 (Super. Ct. Sept. 6, 2006). Judge Unpingco further ordered that the court and the clerk of court not refer the question of disqualification to another judge to render a ruling on the recusal request unless otherwise ordered by the Guam Supreme Court. Alternatively, Judge Unpingco ruled that "in the event the Guam Supreme Court determines that this motion somehow rises to a level of factual allegation legally sufficient to pass the case on to another judge to rule upon the disqualification of this Court, then this Court files this Decision as this Court's Answer denying Defendant's motion, and incorporates its prior rulings in *Johnny*, *Akimoto*, and *Yingling* as part of that Answer." *Id.* at 7.

[13] The Lujan firm then filed its Petition for Writ of Prohibition or Mandamus in this court. The real party in interest, David Alcorn, has taken no position on the issue of disqualification. The Respondent, Superior Court of Guam, filed a two-page Answer pointing to certain cases in which the Lujan firm did not object to Judge Unpingco's participation, stating that the firm's inconsistency in requesting his disqualification "indicates the engagement of judge shopping." Answer to Petition, at 2 (Nov. 22, 2006). Oral argument on the Petition was not scheduled and we find that none is required. *See* Guam R. App. P. 24(b)(5).

II.

[14] We have original jurisdiction over a petition for writ of mandamus pursuant to 7 GCA § 3107(b) (2005) and 48 U.S.C. § 1424-1(a)(3) (Westlaw through Pub. L. 110-198 (excluding Pub. L. 110-181) 2007).

III.

[15] "[A] party may seek review of a judge's decision to strike a statement of objection through a writ proceeding." *People v. Johnny*, 2006 Guam 10 ¶ 21. A writ of prohibition may be granted if a tribunal acted in excess of its jurisdiction, such as improperly refusing to refer a statement of objection to another judge. *Id.* (citing *People v. Super. Ct.* (*Laxmana*), 2001 Guam 26 ¶ 16). A writ petition seeking review of the denial of a request for disqualification is reviewed for an abuse of discretion. *See In re Billedeaux*, 972 F.2d 104, 105 (5th Cir. 1992) (applying an abuse of discretion standard to a petition for writ of mandate or prohibition related to a lower court judge's decision not to disqualify); *United States v. Parilla Bonilla*, 626 F.2d 177, 179 n.2 (1st Cir. 1980) ("Whether treated as an exercise of our mandamus power, . . . or as an exercise of appellate jurisdiction, the question before us is the same: whether the district court abused its discretion in denying the recusal motion.") (citation omitted); *cf. Long-Term Credit Bank of*

Japan v. Super. Ct., 2003 Guam 10 ¶ 28 ("When appealing a denial of a motion for a judge's disqualification after final judgment, this court reviews the decision for an abuse of discretion."). The interpretation of the recusal statutes is reviewed *de novo*. *Long-Term Credit Bank*, 2003 Guam 10 ¶ 28 (citing *Mesngon v. Gov't of Guam*, 2003 Guam 3 ¶ 8; *Dizon v. Super. Ct.*, 1998 Guam 3 ¶ 10).

IV.

[16] Petitioner initiated his request to disqualify Judge Unpingco with a "Motion to Reassign Proceeding to the Honorable Michael J. Bordallo . . . Alternative Verified Motion to Disqualify Judge." (Petition, Ex. 2). Although styled as a motion, we treat a motion for judicial disqualification as a written statement of objection, which is governed by 7 GCA § 6107, and not by the usual law and rules governing motion practice. *See Johnny*, 2006 Guam 10 ¶¶ 3, 9.

[17] Pursuant to 7 GCA § 6107, if a judge does not recuse himself, then a party may, "at the earliest practicable opportunity," "file . . . a written statement objecting to the . . . Judge." 7 GCA § 6107 (2005). The written statement must "set[] forth the fact or facts constituting the ground of the disqualification of such . . . Judge," and must be served on the Judge. *Id.* Within "ten (10) days after the service . . . or . . . filing of any statement, whichever is later in time," a Judge may file a "written answer," which must be "verified in the manner prescribed for the verification of pleadings." *Id.* If the Judge opposes his own disqualification, then "the question of the . . . Judge's disqualification shall be heard and determined by some other Judge." *Id.*

[18] Substantive grounds for disqualification are governed by 7 GCA § 6105. If the parties object to the Judge, he should be disqualified if "he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the

proceeding." 7 GCA § 6105(b)(1) (2005). He should also be disqualified "in any proceeding in which his or her impartiality might reasonably be questioned." 7 GCA § 6105(a).

[19] Petitioner argues that Judge Unpingco waived his opposition to Petitioner's motion for disqualification because he did not file a verified answer within ten days of Petitioner's written statement of objection. Judge Unpingco responds that, even if his answer was procedurally inadequate, he was not required to file an answer because Petitioner's written statement was legally and procedurally inadequate. Specifically, Judge Unpingco contends that the substantive grounds for disqualification set forth in 7 GCA § 6105 have not been met, and that Petitioner's written statement was untimely because it was not filed "at the earliest practicable opportunity." 7 GCA § 6107.

[20] We will first address whether Judge Unpingco's Answer was properly filed, and will then address whether Petitioner's statement of objection was legally and procedurally adequate.

A. Adequacy of Judge Unpingco's Answer

[21] If a judge does not file an answer as prescribed by Section 6107 within ten days, then he is deemed to have consented to his disqualification. 7 GCA § 6107; *Long-Term Credit Bank*, 2003 Guam 10 ¶ 46 ("Because [the] Judge . . . failed to file an answer within the ten days required under the statute, disqualification was mandated under section 6107.").

[22] The answer must be "verified in the manner prescribed for the verification of pleadings." 7 GCA § 6107. If an answer is not verified, then the answer is inadequate and may be disregarded. *See Johnny*, 2006 Guam 10 ¶ 11 (finding that statements of objection may be stricken or disregarded if they are not properly verified); Petition, Ex. 2(A)(5), Decision & Order, *Akimoto v. Gutierrez*, CV1011-02, at 5-6 (Guam Super. Ct. Dec. 22, 2005) (striking statement of objection because it was not properly verified).

[23] This court has held that a verification required by 7 GCA § 6107 "must be verified in the manner set forth in 6 GCA § 4308." *Johnny*, 2006 Guam 10 ¶ 15 (citing *Long-Term Credit Bank*, 2003 Guam 10, ¶ 42 n.16). Section 4308 requires that the verification must be a signed and dated declaration "under penalty of perjury that the foregoing is true and correct." 6 GCA § 4308 (2005).[7]

[24] Petitioner asserts that Judge Unpingco did not verify his answer "in the manner prescribed for the verification of pleadings," as required by section 6107, and that he is therefore deemed to have consented to his disqualification. Petition, p. 4 (Sept. 21, 2006). Judge Unpingco signed and dated his Decision and Order, but did not state "under penalty of perjury that the foregoing is true and correct," or any words to that effect. 6 GCA § 4308. His answer is therefore procedurally defective. If his striking of the statement of objection was an abuse of discretion, then he will be deemed to have waived his answer and consented to his disqualification.[8] 7 GCA § 6107; *Long-Term Credit Bank*, 2003 Guam 10 ¶ 46.

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[7] Guam Code of Civil Procedure § 446 also provides a procedure for verification, but that provision may no longer be in effect. *See* Guam Code of Civ. Proc. § 123 ("The Judicial Council shall have the power to prescribe by general rules . . . the practice and procedure of the courts of Guam . . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); Guam R. Civ. P. 11(a) (2007) ("Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."); 7 GCA ch. 15, art. 6, cmt. (2005) ("NOTE: CCP § 446, *Verification of Pleadings*, has been superseded by Rule 11 of the Guam Rules of Civil Procedure."); Former Guam R. Civ. P. 89 (approved by the Judicial Council Nov. 28, 1989, submitted to the Guam Legislature Feb. 1, 1990, effective May 3, 1990) (codified at 7 GCA App. A) ("[T]he following sections of the Code of Civil Procedure shall be treated as having no further force or effect . . . § 446[.]"), *superseded by* Guam R. Civ. P. 89 cmt. ("The Committee believes [that] it is no longer necessary to delineate the rules that were abrogated by the GRCP."); 7 GCA § 1101 cmt. ("[Guam Public Law 21-147, codified at 7 GCA § 1101] puts the Legislative stamp of approval on Rule 89 of the Guam Rules of Civil Procedure, which state which sections of the former Code of Civil Procedure have been superseded by the Rules of Civil Procedure."). It appears that Rule 11 may have conflicted with only the first sentence of GCCP § 446 and that the Compiler's note stating that GCCP § 446 was superseded by Rule 11 may have been partially mistaken. *See* GCCP § 446 (providing, first, the circumstances under which pleadings must be verified, and second, the proper method for verification). Regardless, Judge Unpingco's Answer did not comply with the procedure for verification set forth in GCCP § 446.

[8] Judge Unpingco's Answer may have also failed to comply with the ten-day filing deadline, as it stated that it would only be effective, if at all, after this court's ruling. Petition, Ex. 1, Decision & Order, at 7 (Guam Super. Ct. Sept. 6, 2006) ("Alternatively, in the event the Guam Supreme Court determines that this motion rises to a Cont'd

B. Adequacy of Van Dox's Statement of Objection

[25] Normally, the question of a judge's disqualification "shall be heard and determined by some other Judge." 7 GCA § 6107; *see also Collins v. Nelson ("Collins I")*, 78 P.2d 758, 759 (Cal. Dist. Ct. App. 1938) (stating that Cal. Code Civ. P. § 170 manifestly contemplates that the issue of disqualification shall be addressed to another judge).[9] "A challenged judge would be acting in excess of its jurisdiction if it improperly refused to refer a statement of objection to another judge." *Johnny*, 2006 Guam 10 ¶ 21.[10] If, however, the petition is legally insufficient or formally defective, the judge can properly strike or disregard the statement of objection without referring it to another judge. *Johnny*, 2006 Guam 10 ¶¶ 12, 19, 22; *People v. Nolan*, 14 P.2d 880, 882-83 (Cal. Ct. App. 1932).[11]

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level of factual allegation legally sufficient to pass the case on to another judge to rule upon the disqualification of this Court, then this Court files this Decision as this Court's Answer . . . ."). A somewhat similar situation occurred in *Fine v. Superior Court*, in which the challenged judge filed an order striking the challenge, and attached an answer stating that "[i]n the alternative, if it is later found that a legal basis for challenge is stated, then [the judge] files the following verified answer." 119 Cal. Rptr. 2d 376, 382 n.3 (Ct. App. 2002). The appellate court, in addressing a challenge to the timeliness of the answer, stated that "the record makes clear that the verified answer was never intended to be filed unless a court of review later determined that the disqualification challenge required that it be heard by a judge." *Id.*

[9] *Compare People v. Gibbs*, 90 Cal. Rptr. 866, 872 (Cal. App. 1970) ("'No judge . . . who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge[.]'") (quoting Cal. Code Civ. P. § 170), *with* 7 GCA § 6107 ("No . . . Judge who shall deny his or her qualification shall hear or pass upon the question of his or her own disqualification, but in every case the question of the . . . Judges disqualification shall be heard and determined by some other Judge.").

[10] *Cf.* Richard E. Flamm, *Judicial Disqualification* § 17.6 (2d ed. 2007) ("[E]valuating one's own conduct or state of mind is one of the most difficult and exacting tasks a judge must perform – especially in the context of allegations of partiality or bias. Moreover, to some observers a judge's subjective evaluation of his own impartiality will inevitably appear suspect.") (footnote omitted).

[11] Title 7 GCA § 6107, which governs the procedure or disqualification, is derived from California law. 7 GCA § 6107, cmt. (stating that section 6107 "adopts those portions of California § 170 which deal with the procedure, but not substance of judicial disqualifications and they have been adapted to Guam"). Cases interpreting similar code provisions may be persuasive. *Johnny*, 2006 Guam 10 ¶ 15 n.6. Parties should be cautious, however, in citing California cases regarding the procedure for disqualification, as the current version of the corresponding California statute differs significantly from the Guam statute. *See Penthouse Int'l, Ltd. v. Super. Ct.*, 187 Cal. Rptr. 535, 538 (Ct. App. 1982) (discussing impact of 1981 amendments).

[26] But the challenged judge's review of the sufficiency of the statement is limited to determining whether the statement is formally defective or legally insufficient. *See Johnny*, 2006 Guam 10 ¶¶ 12, 19, 22. A statement is formally defective if it is improperly served, not verified, or untimely. *Id.* ¶¶ 11-14 (citing 7 GCA § 6107); *see also Krebs v. L.A. Ry. Corp.*, 61 P.2d 931, 933-34 (Cal. 1936) (affirming judge's striking of untimely request for disqualification).

1. Legal Sufficiency of Van Dox's Statement of Objection

[27] A statement is legally insufficient if, on its face, it fails to allege "any facts that would serve as grounds for disqualification under Guam law . . . ." *Johnny*, 2006 Guam 10 ¶ 19 (finding that 7 GCA § 6107's requirement that the statement of objection "'set[] forth the fact or facts constituting the ground of the disqualification of such Justice or Judge'" mandates that a statement of objection include facts that would serve as a ground for disqualification under 7 GCA § 6105) (quoting 7 GCA § 6107).

[28] Because the test is whether *any* facts supporting disqualification are alleged, it is irrelevant whether the allegations show "*probable* bias or prejudice." *Collins I*, 78 P.2d at 759 (emphasis added); *see also Ex Parte Harrington*, 197 P.2d 783, 784-85 (Cal. Dist. Ct. App. 1948) (requiring referral even though the statement of objection contained conclusions, because it also contained some factual allegations, namely, that extensive adverse pre-trial publicity had created a sentiment making an impartial trial before any judge in the county improbable, that the judge had ex parte conversations with a deputy district attorney and others about the case in connection with proceedings before another judge, and that the judge had thereby learned the facts of the case and nature of charges). A statement of objection may be sufficient to require referral, *Collins I*, 78 P.2d at 759, but insufficient to meet the higher standard required for disqualification after referral. *Collins v. Nelson ("Collins II")*, 106 P.2d 39, 41 (Cal. Dist. Ct. App. 1940)

(explaining that, after *Collins I* ordered remand and referral, the referral judge denied the motion for disqualification, but finding that the issue had been abandoned on appeal).

[29] If a statement fails to allege "*any* of the grounds for disqualification found in 7 GCA § 6105," it is legally insufficient and may be stricken by the challenged judge. *Johnny*, 2006 Guam 10 ¶ 20 (emphasis added). Further, a statement of objection is legally insufficient if it includes only conclusory or irrelevant statements, such as:

> [C]onclusions; references to copious transcripts without citation to specific excerpts; allegations of facts not pertinent or appropriate to the issues to be determined in the hearing; material not legally indicative of bias or prejudice, such as judicial opinions expressed in the discharge of litigation and legal rulings; judicial reactions based on actual observance in participation in legal proceedings; and references to circumstances so inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias or prejudice.

In re Morelli, 91 Cal. Rptr. 72, 88 (Ct. App. 1970); *see also People v. Sweeney*, 357 P.2d 1049, 1053 (Cal. 1961) ("A statement that contains nothing but conclusions and sets forth no facts constituting a ground of disqualification may be ignored or stricken from the files by the trial judge."); *People v. McCullogh*, 223 P.2d 37, 42 (Cal. Ct. App. 1950) (finding that referral was not required where the request was "based entirely upon a misconception of the law"); *People v. Nolan*, 14 P.2d 880, 883 (Cal. Dist. Ct. App. 1932) (finding that referral was not required where alleged facts supporting disqualification were "feeble and insignificant," namely judge's denial of motion for postponement of trial and his statement that he was opposed to having cases of this kind continued).

[30] In determining whether a statement of objection contains sufficient facts to require referral to another judge, a reviewing court cannot "take cognizance of the analysis and explanations of the trial judge," because these are "'the type of thing[s] that such another judge

would consider in resolving the issue if it were put to him.'" *In re Marriage of Lemen*, 170 Cal. Rptr. 642, 653 (Ct. App. 1980) (quoting *In re Morelli*, 91 Cal. Rptr. at 90).

[31] Title 7 GCA § 6105, which is derived from 28 U.S.C. § 455, provides the grounds for disqualification.[12] Petitioner argues that subsections 6105(a) and (b)(1) apply, and it is facially apparent that no other subsections apply. Subsections 6105(a) and (b)(1) state that, unless the judge completely discloses the reasons for disqualification and the parties agree to allow the judge to continue to hear the case, a judge is required to recuse himself, "(a) . . . in any proceeding in which his or her impartiality might reasonably be questioned . . . . [and] (b) (1) [w]here he or she has a personal bias or prejudice concerning a party . . . ." 7 GCA § 6105(a), (b)(1).

[32] Under subsection 6105(a), what matters is not "actual bias," but "the appearance of bias." *Dizon v. Super. Ct. (People)*, 1998 Guam 3 ¶ 10 n.3. The appearance of bias is judged from the standard of a "reasonable person" who knows all the facts, and understands the "contexts of the jurisdictions, parties, and controversies involved," including such "realities of the Guam judicial system" as the relatively small number of lawyers in the Guam bar and "the nature of Guam families." *Ada v. Gutierrez*, 2000 Guam 22 ¶¶ 12-13.

[33] In *Dizon*, for example, a superior court judge failed to disclose to the parties that he had received a letter from a Ninth Circuit judge encouraging a quick resolution of the case, and,

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[12] The comment to 7 GCA § 6105 explains that the statute originated from 28 U.S.C. § 455. Because Guam's statute governing the *grounds* for disqualification is derived from a federal statute, federal cases interpreting the analogous federal statute may be persuasive. Federal cases regarding the *procedure* for disqualification, however, interpret a statute that has significant differences from Guam's procedural statute. For example, in the federal courts, the judge trying the case generally has a duty to rule on the motion for disqualification. *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994); *United States v. Shibley*, 112 F. Supp. 734, 748 (S.D. Cal. 1953) ("The federal law does not allow, as does the California statute, another judge to be called in to pass on the question of disqualification.").

when confronted, the superior court judge delayed production of the letter. 1998 Guam 3 ¶ 3. Although there was no evidence of actual bias, this court found that there was an appearance of impropriety. *Id.* ¶ 15.

[34] Ordinarily, a judge's antipathy for or bias against an attorney is not sufficient grounds for disqualification of the judge. *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987). But "bias in favor of or against an attorney can certainly result in bias toward the party." *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir. 1976). For bias against an attorney to require disqualification, the bias must be "of a continuing and personal nature and not simply bias against the attorney because of his conduct." *In re Beard*, 811 F.2d at 830; *see also United States v. Donato*, 99 F.3d 426, 435 (D.C. Cir. 1996) ("[N]egative comments directed by a trial judge to a defendant or her counsel will warrant reversal 'if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.'") (quoting *Litecky v. United States*, 510 U.S. 540, 555 (1994)); *United States v. Jacobs*, 855 F.2d 652, 656 n.2 (9th Cir. 1988) ("These statutory provisions [governing disqualification, 28 U.S.C. §§ 144, 455] require such virulent personal bias or prejudice against the attorney as to amount to a bias against the party."); *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985) (affirming the trial court's denial of disqualification where bias or prejudice against attorney was "not so virulent here as to result in material harm to [the] defense"); *United States v. Panzardi-Alvarez*, 678 F. Supp. 353, 359 (D.P.R. 1988) ("[A] judge's perceived attitude or behavior toward an attorney could compel disqualification, since certainly such behavior could lead to an objective impression of partiality.").

[35] Similarly, disqualifying bias must normally stem from extrajudicial sources, but there may be an exception where "'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.'" *Whitehurst v. Wright*, 592 F.2d 834, 838 (5th

Cir. 1979) (quoting *Davis v. Bd. of Sch. Comm'rs of Mobile County* 517 F.2d 1044, 1051 (5th Cir. 1975)); *see also Litecky*, 510 U.S. at 554 ("[P]redispositions developed during the course of a trial will sometimes (albeit rarely) suffice."); *United States v. Whitman*, 209 F.3d 619, 625-26 (6th Cir. 2000) ("[T]here is no evidence that the district judge was actually swayed by bias in this matter . . . . However, the district judge's lengthy harangue [of counsel] in this case had the unfortunate effect of creating the impression that the impartial administration of the law was not his primary concern.").

[36] Further, "[a] judge is disqualified if he has stated that a party has willfully sworn falsely and that the judge would have no confidence in his testimony; or that defendant had deliberately perjured himself or had willfully misstated the facts or knowingly made false statements in an affidavit." *Taliaferro v. Taliaferro*, 21 Cal. Rptr. 864, 867 (Dist. Ct. App. 1962) (citations omitted).

[37] Petitioner's statement of objection sought to disqualify Judge Unpingco from presiding over the case "on the grounds and for the reasons stated in" prior motions to disqualify Judge Unpingco in *People v. Johnny*, CM0867-05, and in *Akimoto v. Gutierrez*, CV 1011-02, as well as the Petition for Writ and supporting memorandum in *Gutierrez v. Superior Court*, WRP06-001, which Petitioner attached and incorporated by reference. [13]

[38] Petitioner argues that disqualification is supported by the Lujan firm's prior representation of the judge's parents and employment of his brother. Normally, a judge need only be concerned about a party's affiliation to themselves and "those family members in their

[13] Petitioner's failure to cite specific excerpts of those documents might have been sufficient grounds to reject his statement of objection. *See In re Morelli*, 91 Cal. Rptr. at 88 (stating that a statement of objection providing only references to copious transcripts without citation to specific excerpts would be legally insufficient). The lower court did not strike the statement of objection on those grounds, and did not raise the issue in this court.

households." *Ada*, 2000 Guam 22 ¶ 20 n.3 (citing Model Code of Judicial Conduct Canon 3(E)(1)(c) (1990)). When a judge's child works for a law firm arguing in front of a judge, courts have held that disqualification is warranted only "if the child would receive future employment bonuses based upon his or her parent's favorable ruling for the firm or if the child has such a high position in the firm that a favorable ruling would directly benefit him or her . . . ." *Id.* ¶ 20. In *Ada*, for example, the court held that the judge's sister's former employment was not grounds for disqualification. *Id.* ¶ 21 ("Because Marilyn Manibusan's work for the Democratic Party has ended, we find that her past actions do not serve as a basis for recusing Judge Manibusan.").

[39] In *Yingling*, Judge Maraman determined that Judge Unpingco's impartiality could reasonably be questioned in a case involving the Lujan firm. While that ruling is not binding in this case, that judicial determination may contribute to an appearance of bias here, where the same law firm is involved. *See Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 170 (3d Cir. 2004) (finding appearance of partiality where judge had voluntarily recused himself in numerous other cases involving the same attorney and judge had indicated that he was upset by the attorney's personal attack). *But cf. United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986) (finding that judge's voluntary recusal without explanation in previous case involving the same defendant did not require recusal in present case because the facts did not suggest an appearance of partiality).

[40] Judge Maraman based her decision on intemperate comments in Judge Unpingco's answer to the Lujan firm's request for disqualification in *Yingling*, including a lengthy harangue of the Lujan firm that questioned the ethics and honesty of the firm and its client, and complained of the impact of the Lujan firm's motion on himself and his family. *See* Petition, Ex. 2(A)(3), Decision & Order, *People v. Yingling*, No. CF0454-03, at 6-8 (Guam Super. Ct. June 15,

2005).[14] These facts suggest that disqualification could potentially be warranted. *Whitman*, 209 F.3d at 625-26 (finding appearance of impropriety based partly on judge's "lengthy harangue" of counsel).[15]

[41] Judge Unpingco continued to express his displeasure with the Lujan firm even after the *Yingling* ruling. In *Akimoto*, for example, he accused the firm of judge-shopping and using the media to promote its motion to the detriment of the judge and his family, and he implied that the firm's statement of objection was false or misleading. Petition, Ex. 2(A)(5), Decision & Order, *Akimoto*, No. CV1011-02, at 27 n.12, 30; Petition, Ex. 2(A)(6), Decision & Order, *Akimoto*, No. CV1011-02, at 15. In his answer in the case before this court, dated November 22, 2006, Judge

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[14] In his *Yingling* Answer, Judge Unpingco indicated that his strongly-worded comments were not made out of bitterness, but out of a desire to teach attorneys to show greater respect to the judiciary. Petition, Ex. 2(A)(2), Answer to Yingling's Objection & Mot. for Recusal, *Yingling*, No. CF0454-03, at 1. After the *Yingling* decision, Judge Unpingco criticized Judge Maraman for not acknowledging this disclaimer. For example, Judge Unpingco wrote in *Akimoto* that:

> Judge Maraman[] blatantly ignored this Court's clear statements that "These words are written not out of bitterness, only hope for improved collegiality before the bar, and increased respect among attorneys, whose role as judicial officers should be remembered as they tread the solemn halls of justice," in the *Yingling Answer*, and "I wrote as I did, not to show disdain for the attorneys or their client, but to highlight the disregard they have shown for the judicial process in their manner of making such a motion[]" in the *A.B. Won Pat Disqualification Statement*. It is beyond this Court's comprehension how Judge Maraman could overlook or outright ignore my reasons for propounding a strongly worded *Answer* in *Yingling*, that is, to chastise unbecoming conduct in order to uphold respect for the judicial process.

Petition, Ex. 2(A)(5), Decision & Order, *Akimoto*, No. CV1011-02, at 27. In *Whitman*, a trial court judge similarly defended his intemperate remarks as being intended to "educat[e] the bar," and to "improve the practice of law." 209 F.3d at 625. In ordering reassignment of the case on remand, the Sixth Circuit responded:

> With all due deference to the district judge, the primary function of a judge is neither to "educat[e] the bar" nor to "improve the practice of the law." Above all else, the mission of a federal judge is to "administer justice without respect to persons, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . under the Constitution and laws of the United States." 28 U.S.C. § 453 (judicial oath of office).

Id.

[15] We note that "'an attorney [may not] be allowed to use her calculated personal attacks on a sitting judge as a technique to prevent that judge from presiding over any of her cases . . . .'" *Selkridge*, 360 F.3d at 168 (quoting *United States v. Roebuck*, 289 F. Supp. 2d 678, 682 (D.V.I. 2003)) (alterations in original). Rather, "[i]t is [the judge's] reaction to counsel's [provocation] that raises the difficult issues presented here." *Id.* at 169.

Unpingco again accused the Lujan firm of judge-shopping. In the *Akimoto* decision, he attacked Judge Maraman's ruling, and questioned whether her decision was based on her alleged bias in favor of the Lujan firm and her alleged bias against him. *Id.* at 32-33. Such remarks may provide a factual basis for disqualification, as they suggest that the bias may have been "pervasive," *Whitehurst*, 592 F.2d at 838, and "of a continuing and personal nature and not simply bias against the attorney because of his conduct," *In re Beard*, 811 F.2d at 830.[16]

[42] Judge Unpingco has suggested that the Lujan firm was dishonest or unethical, accusing the firm of: seeking disqualification in order to gain a tactical advantage at the expense of himself and his family, engaging in "underhanded" tactics; filing a "baseless and tasteless" motion, failing to make a reasonable inquiry into relevant facts, making representations that were "suspicious" or untrue; making "untenable and disingenuous" arguments, engaging in "judge-shopping", and relying on "innuendo and speculation" to support a motion. Petition, Ex. 2(A)(5), Decision & Order, *Akimoto*, at 9, 18, 30; Petition Ex. 2(A)(2), Answer to Yingling's Objection & Motion for Recusal, *Yingling*, at 1, 5-6, 11, 13. Judge Unpingco's statements question the veracity and integrity of the Lujan firm, and reflect his resentment against the firm. On its face, these statements allege "facts that would serve as grounds for disqualification under Guam law." *Johnny*, 2006 Guam 10 ¶ 19; *see also Taliaferro*, 21 Cal. Rptr. at 867 (stating that a judge may be disqualified if he has stated that a party has willfully misstated the facts, sworn

[16] While the allegations of bias against the Lujan firm support referral in this case, allegations of bias against an attorney may not always require referral. For example, if an attorney alleged only a single instance of bias against the attorney, he would have failed to allege facts supporting a finding of a continuing or pervasive bias. Even if two or more instances of bias were alleged against an attorney, the allegations may be so "feeble and insignificant" that referral is not required. *Nolan*, 14 P.2d at 883; *see also* Flamm, *Judicial Disqualification* § 17.6, p. 504 ("[T]ransfer is unlikely to be permitted . . . where the grounds that are alleged to warrant the requested relief are speculative, subjective, without foundation, or patently frivolous.") (footnotes omitted).

falsely, or deliberately perjured himself); *United States v. Meyerson*, 677 F. Supp. 1309, 1315 (S.D.N.Y. 1988) (granting disqualification where the judge questioned his ability to remain impartial in light of his resentment of the attorney's unsupported assertions and tactics in attempting to disqualify the judge).

[43] Based on the foregoing, we find that Judge Unpingco abused his discretion in finding that there were not any facts supporting disqualification. *Johnny*, 2006 Guam 10 ¶¶ 19-20. Petitioner's statement of objection alleges facts that would serve as grounds for recusal and therefore requires referral. We take no position, however, on the issue of whether the present facts would require disqualification. *See Collins I*, 78 P.2d at 759 (finding that "probable bias or prejudice" is irrelevant to whether statement of objection requires referral to another judge).

2. Timeliness of Van Dox's Statement of Objection

[44] Judge Unpingco also struck Van Dox's statement of objection because it was untimely, and therefore procedurally deficient. A trial court abuses its discretion when it erroneously denies as untimely a motion to disqualify. *Zilog, Inc. v. Super. Ct.*, 104 Cal. Rptr. 2d 173, 177 (Ct. App. 2001). Title 7 GCA § 6107 requires that disqualification motions "be presented at the earliest practicable opportunity after . . . discovery of the facts constituting the ground [for] disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such . . . Judge." 7 GCA § 6107. Similarly, the California statute governing the timeliness of statements of objection provides that the statement shall "be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." Cal. Code Civ. Proc. § 170.3(c)(1) (Westlaw through 2007). Further California Code of Civil Procedure § 170 is the source of 7 GCA § 6107. Therefore, California cases addressing the timeliness of a statement of objection may be persuasive.

[45] With respect to the statutory provision requiring that disqualification be urged at the "earliest practicable opportunity," the intention "is clear that failure to comply with the provision constitutes a waiver." *Caminetti v. Pac. Mut. Ins. Co. of Cal.*, 139 P.2d 930, 933 (Cal. 1943) (finding objection was waived where party failed to request disqualification until three months after the party was aware of the disqualifying facts and after an adverse ruling from the judge). But the timeliness requirement should be "liberally construed" to promote justice. *Eagle Maint. & Supply Co. v. Super. Ct.*, 16 Cal. Rptr. 745, 747 (Dist. Ct. App. 1961) (finding request for disqualification timely where it complied with specific statutory limitations defined by Cal. Code Civ. P. § 170.6(a)(2)); *see also Hollingsworth v. Super. Ct.*, 236 Cal. Rptr. 193, 196 (Dist. Ct. App. 1987) (stating that "latitude [is] accorded [to] the timeliness of a statement of disqualification").

[46] The rule that a request for disqualification should be submitted prior to any hearing in the matter before the challenged judge "rests on the principle that a party may not gamble on a favorable decision." *Urias v. Harris Farms, Inc.*, 285 Cal. Rptr. 659, 664 (Ct. App. 1991). Thus, a statement of objection is normally timely if it is submitted prior to any hearing before the challenged judge in the matter. *See Hollingsworth*, 236 Cal. Rptr. at 195-96 (holding that request for disqualification was timely despite requirement of filing at "earliest practicable opportunity" because request was made prior to the court's announcement of its tentative decision); Cal. Jur. Judges § 73 ("As a general rule, the statement should be filed before the matter involved is submitted for decision."); *cf. Urias*, 285 Cal. Rptr. at 664-65 (finding request for disqualification timely even though it was made post-judgment where party made request shortly after learning of potentially disqualifying facts and where challenged judge had not disclosed potentially disqualifying facts). But a statement may be untimely if a party waits until

the eve of trial to request disqualification based on information made known months earlier. *See People v. Panah*, 107 P.3d 790, 824 (Cal. 2005) (finding motion untimely where counsel was aware of facts as early as September but he waited to file until the eve of trial in November).

[47] Van Dox filed this case on April 10, 2006, and it was assigned to Judge Unpingco on April 17, 2006. The Lujan firm filed its statement of objection four months later, on August 18, 2006. At that time, no hearings had yet commenced in the action before Judge Unpingco, and the Lujan Firm had not improperly "gamble[d] on a favorable decision." *Urias*, 285 Cal. Rptr. at 664. Construing the timeliness requirement liberally, *see Eagle Maintenance*, 16 Cal. Rptr. At 747, we find that it was an abuse of discretion for Judge Unpingco to strike the statement of objection as untimely. *See Hollingsworth*, 236 Cal. Rptr. at 195-96.

V.

[48] Because Petitioner's statement of objection contains at least some facts supporting disqualification, and because it was not untimely, the statement should have been referred to another judge. Having failed to file a timely verified answer, Judge Unpingco waived his answer and consented to his disqualification. The Petition is therefore **GRANTED**, and the Superior Court shall not schedule any further proceedings in this case before Judge Unpingco, and shall reassign the case to another judge.

Alexandro C. Castro
ALEXANDRO C. CASTRO
Justice *Pro Tempore*

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice