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

SAIPAN LAU LAU DEVELOPMENT, INC., SHIMZU CORPORATION, and TOKIO MARINE & FIRE INS. CO., Petitioners, vs. SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Respondent, vs. JUAN M. SAN NICHOLAS, Real Party in Interest.	**ORIGINAL ACTION No. 00-001** **CIVIL ACTION NO. 97-1107** **ORDER DENYING MOTION FOR DISQUALIFICATION OF JUSTICE *PRO TEMPORE* ALBERTO C. LAMORENA III**

Cite as: *Saipan Lau Lau Development, Inc. v. Superior Court (San Nicolas),* 2000 MP 12

This matter comes before the court on the motion of Juan M. San Nicolas, Real Party in Interest, and Theodore R. Mitchell to disqualify Justice Pro Tempore Alberto C. Lamorena, III from further presiding over Civil Action No. 97-1107 (the "Motion"). Attorney Jeanne H. Rayphand appeared on behalf of San Nicolas and Mitchell, and Randall Todd Thompson, Esq. and Vicente T. Salas, Esq., represented Petitioners-Defendants Saipan Lau Lau Development, Inc., Shimizu Corporation, and Tokio Marine & Fire Insurance Co.. After considering the affidavits and memoranda filed by the parties as well as the arguments of counsel at hearing on this matter, the court now issues its ruling denying the motion to disqualify.

I. PROCEDURAL HISTORY

In the latest of a series of motions to disqualify the remaining member of the panel appointed to hear the underlying petition for a writ of mandamus,[1] San Nicholas and Mitchell filed the instant motion to recuse Justice *Pro Tempore* Alberto C. Lamorena, III. The declaration of counsel accompanying the motion asserts that in joining with Justices Castro and Atalig to affirm the July 14 and July 18 preliminary injunctions[2] and to suspend Mitchell from the practice of law,[3] Justice *Pro Tempore* Lamorena was motivated by animus towards Mitchell. *See* Declaration of Jeanne H. Rayphand ("Rayphand Decl.") at ¶ 10. As evidence of bias, the Declaration first points to this Court's Order of August 1, 2000 which, according to Mitchell and San Nicolas, evidences an unfavorable predisposition against them because it allegedly failed to address any of the facts, law, or issues raised in San Nicholas' motions. Rayphand Decl. at ¶ ¶ 3-4. San Nicholas and Mitchell then argue that Justice *Pro Tempore* Lamorena must be biased because he concurred in the summary suspension of Mitchell instead of referring the matter of Mitchell's misconduct to the CNMI Bar Ethics Committee. *Id.* at ¶ 7. Finally, San Nicholas and Mitchell point to Justice *Pro Tempore* Lamorena's role as a *pro tempore* judge in a proceeding where Justice Atalig is a litigant. *Id.* at ¶¶ 8-9.[4] Suggesting that Lamorena's role as presiding judge in the *Atalig* proceeding gives rise to some inference of impropriety, Mitchell and San Nicholas thus seek to disqualify Justice *Pro Tempore* Lamorena on grounds that his impartiality might reasonably be questioned by a reasonable objective member of the public as well as for personal bias and prejudice.

II. DISCUSSION

[1]In the Commonwealth, the authority for judicial disqualification is found at 1 CMC §§ 3308 and 3309 and in the Com. C. Judic. Cond. Canon 3(C) and 3(D). The Commonwealth Code sections are the equivalent of the federal disqualification statute found at 28 U.S.C. § 455, while Cannon 3 sets forth, with some modification, the affidavit procedure for disqualification derived from the federal procedure at 28 U.S.C. § 144. The court may therefore look to federal cases interpreting the equivalent provisions of

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1 *See* Order Denying Motions for Disqualification (July 31, 2000); Order Denying Second Motions for Disqualification of Associate Justice Castro and Justice *Pro Tem* Atalig (Aug. 25, 2000).

2 *See* Order Affirming Order Granting Motion for Preliminary Injunction (August 1, 2000).

3 *See* Order of Suspension and Order to Show Cause (August 1, 2000).

4 *See Commonwealth v. Atalig*, Civil Action No. 96-675 (N.M.I. Super. Ct. filed 1996).

federal law to determine the issues raised by the motion. *Commonwealth v. Kaipat*, App. No. 95-006 (N.M.I. Sup. Ct. Sept. 27, 1996).

[2,3]When, as here, a party claims that a personal bias exists on the part of the judge presiding, the affidavit procedure of Cannon 3(D)(c) applies.[5] To overcome the presumption that the judge is qualified to hear a case, the affidavit must first state facts evidencing personal bias with sufficient particularity.[6] Second, the facts must be such as to convince a reasonable person that a bias or prejudice exists. *Berger v. United States*, 255 U.S. 22, 33-34, 41 S.Ct. 230, 65 L.Ed.481 (1921). Third, the factual allegations must also show that the bias and prejudice is personal: that is, it stems from some extrajudicial source and would thus result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Finally, the affidavit must be filed by a party and may only be filed once in any case, no matter how many judges happen to successively preside over the proceeding. *See* Com. C. Judic. Conduct Canon 3D(c); *Giebe v. Pence*, 431 F.2d 942 (9th Cir. 1970); United *States v. Hoffa*, 245 F. Supp. 772 (E.D. Tenn. 1965).

[4,5]When a litigant moves for recusal under § 3308(a), however, a broader standard applies. This section derives from the 1974 version of 28 U.S.C. § 455(a), intended by Congress to supply an objective test of "a reasonable factual basis" for determining judicial bias and to provide a more flexible standard for judges to use in determining when to recuse themselves.[7] Under this standard, 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." *Kaipat, supra*, Slip Op.at 5 (*quoting United States v.*

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[5] Canon 3(D)(c) provides, in material part, that when personal bias or prejudice against or in favor of any party is asserted as the basis for disqualification, an affidavit must accompany the motion stating the facts and reasons for the belief that bias or prejudice exists. It further provides that "[a] party may file only one such affidavit in any case."

[6] Canon 3(D)(c) is unusual because it requires that the district judge accept the affidavit as true even though it may contain averments that are false and may be known to be so to the judge. *See United States v. Kelley*, 712 F.2d 884, 889 (1st Cir.1983). Courts have therefore insisted on a firm showing in the affidavit that the judge does have a personal bias or prejudice toward a party, as well as strict compliance with the procedural requirements of the section. *See, e.g., Glass v. Pfeffer*, 849 F.2d 1261, 1267 (10th Cir.1988); *Walberg v. Israel*, 766 F.2d 1071, 1077 (7th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985); *United States v. Womack*, 454 F.2d 1337, 1341 (5th Cir.1972).

[7] *See* C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction 2d § 3541 (2nd ed. 1984).

Chischilly, 30 F.3d 1144 (9th Cir. 1994)). Contrary to the affidavit procedure required under Canon 3(D)(c), there are no strict procedural requirements for bringing the matter before the court and the motion is not strictly construed against recusal. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 963 n.9 (5th Cir. 1980).

[6]With these standards in mind we now turn to the Motion presently before the Court. As in their previous motions to disqualify Justice Castro and Justice *Pro Tempore* Atalig, the affidavit is procedurally defective in that it has been signed by attorney Jeanne H. Rayphand and not, as Canon 3(D)(c) requires, by the party in this case.[8] In the Orders denying the prior motions to disqualify Justice Castro and Justice Pro Tempore Atalig, moreover, Movants and their counsel were put on notice that Canon 3(D)(c) permits the filing of only one affidavit of bias or prejudice in each case. *See* Order Denying Motions for Disqualification at 2; Order Denying Second Motions for Disqualification of Associate Justice Castro and Justice *Pro Tem* Atalig at 2; *see also Martin v. Texas Indem. Ins. Co.*, 214 F. Supp. 477 (N.D. Tex. 1962), *cert. denied*, 377 U.S. 971, 84 S.Ct. 1652, 12 L.Ed.2d 740 (1962) (when motion had been filed to disqualify one judge in the proceeding, subsequent motion to disqualify would be overruled because a party is entitled to file only one affidavit of prejudice against a judge in a case).

[7,8]Yet even if procedural prerequisites had been satisfied, when measured against the statutory requirements for disqualification, the affidavit is insufficient. First, a litigant's allegations challenging the court's rulings as unfair or wrongly decided cannot form the basis of a proper motion to disqualify a judge for prejudice or bias. *See Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474, 490 (1994). Further, attorney disciplinary rules are not the exclusive means for punishing attorney misconduct in actions pending before the Court. Movants' contention, that this Court lacks authority to suspend or dismiss attorneys directly for misconduct, is simply wrong.

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[8] *See Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, *cert. denied.*, 466 U.S. 972, 104 S.Ct. 2347, 80 L.Ed.2d 820 (1983) (the terms "party" does not include counsel); *Giebe*, 431 F.2d at 942. *But see In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997) (drafters of the statute expected that "a party" would possess the necessary knowledge showing of personal hostility of the judge against that party; where, however, plaintiffs' counsel "was much closer than his clients to being a firsthand witness to the events" and when plaintiffs would, therefore, only be repeating the same facts on a hearsay basis, underlying purpose of the recusal statute could be satisfied by an affidavit of counsel, rather than the parties).

[9,10]That courts have inherent powers--powers vested in the courts upon their creation,[9] and not derived from any statute[10]– to sanction attorneys is not disputed. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46, 111 S.Ct. 2123, 2132-34, 115 L.Ed.2d 27 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985); *see also Commonwealth v. Borja*, 3 N.M.I.156, 171 (1992); *Tenorio v. Superior Ct.*, 1 N.M.I. 112, 127 (1990) *(citing In re Villanueva*, 1 CR 952 (Dist. Ct. App. Div. 1984).[11] That courts may also suspend or dismiss an attorney as an exercise of their inherent powers is equally beyond cavil. *See, e.g., In re Snyder*, 472 U.S. 634, 643-644, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985); *Guam v. Palomo*, 35 F.3d 368, 375 (9th Cir. 1994*)*(suspension for tone and content of briefs and comments made during argument was not a disciplinary action requiring prior evidentiary hearing); *Zambrano v. Tafolla*, 885 F.2d 1473, 1478 (9th Cir. 1989) (District court may sanction attorneys for misconduct pursuant to its inherent authority). Commentators have also noted occasions in which, under its inherent power, a court has disbarred, suspended from practice, or reprimanded attorneys for abuse of the judicial process. *See, e.g.*, F. Stumpf, Inherent Powers of the Courts: Sword and Shield of the Judiciary (1994); Comment, Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power, 26 UCLA L. REV. 855, 856 (1979); Comment, Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight, 34 U. CHI. L. REV. 922, 937 n. 96 (1967); *accord Ex parte Wall*, 107 U.S. 265, 288-89, 2 S.Ct. 569, 588-89, 27 L.Ed. 552 (1883). These inherent powers derive from the absolute need of a judge to maintain order and preserve the dignity of the court, as well as the lawyer's role as an officer of the court that granted the attorney admission. *See In re Snyder*, 472 U.S. 634, 643, 105 S.Ct. 2874, 2880, 86

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[9] See *Michaelson v. United States*, 266 U.S. 42, 66, 45 S.Ct. 18, 20, 69 L.Ed. 162 (1924); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510, 22 L.Ed. 205 (1874); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227, 5 L.Ed. 242 (1821)

[10] *See, e.g., Link v. Wabash Railroad Co.*, 370 U.S. 626, 630, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812).

[11] *See* Reply to Opposition to Motion for disqualification of Justice Pro tempore Alberto C. Lamorena III at 10-14 (filed Aug. 25, 2000) (recognizing this Court's prerogative to define and regulate the practice of law; further acknowledging the general power of the court to manage the courtroom and to maintain proper decorum).

L.Ed.2d 504 (1985); *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct.390, 395, 69 L.Ed. 767 (1925).[12]

[11,12] Although Movants question the authority of this Court to discipline an attorney by suspending him from practicing law in the Commonwealth, neither the Court's authority to sanction Mitchell nor the propriety of the sanction imposed is at issue in this motion. The only issue before the Court is whether Justice *Pro Tempore* Lamorena's failure to refer the matter of Mitchell's misconduct to the Bar demonstrates bias against Movants. Given the overwhelming weight of authority recognizing this Court's inherent authority to remedy abuses of judicial process, the Court finds that the exercise of that authority, without more, does not in and of itself demonstrate bias. Moreover, even if Justice *Pro Tempore* Lamorena and the other Justices erred in imposing the sanction at issue, ruling against a party or committing an error of law is no basis for disqualification. *See Liteky v. United* States, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994); *Hagans v. Andrus*, 651 F.2d 622, 628 (9th Cir. 1981).

[13] Movants' passing reference to Justice *Pro Tempore* Lamorena's role as trial judge in a proceeding where Justice *Pro Tempore* Atalig is a defendant presents no grounds for disqualification either. Movants have not bothered to explain how this piece of information gives rise to even an inference of

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[12] *See also Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 772 (9th Cir.,1989), *cert. denied sub nom., Dombroski v. Peabody*, 496 U.S. 937, 110 S.Ct. 3216, 110 L.Ed.2d 663 (1990) (suspension from practice of law for not more than six months was reasonable sanction for attorney's frivolous filing of second removal petition, given finding of bad faith); *In re Disciplinary Action Boucher*, 837 F.2d 869, *modified* 837 F.2d 869 (9th Cir., 1988) (material misrepresentations of record on appeal warrant suspension from practice before appellate court for a period of six months); *Standing Committee on Discipline of U.S. Dist. Court for Southern Dist. of California v. Ross*, 735 F.2d 1168 (9th Cir.,1984), *cert. denied sub nom. Frontier Properties v. Elliott*, 469 U.S. 1081, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984) (violations of various disciplinary rules warrants suspension from practice in district court); *Matter of Tranakos*, 639 F.2d 492 (9th Cir.,1981) (suspension from practice was appropriate until attorney could demonstrate to the court knowledge of Federal Rules of Procedure and rules of court, and willingness to abide by orders of the court.); *In re Margolin*, 518 F.2d 551 (9th Cir., 1975) (undue delay of criminal appeal merits indefinite suspension from practice before Court of Appeals); *In re Edmondson*, 518 F.2d 552 (9th Cir.,1975) (failure to prosecute appeal with due diligence warrants six months' suspension.); *In re Chandler*, 450 F.2d 813 (9th Cir.1971) (knowing attempt to deceive court as to client's finances to obtain relief from default warrants suspension.). *See also RTC v. Bright*, 6 F.3d 336, 340 (5th Cir.1993) ("It is beyond dispute that a federal court may suspend or dismiss an attorney as an exercise of the court's inherent powers."); *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 557 (5th Cir.1964) (noting that appropriate "modes of discipline against the attorney might include: (1) a reprimand by the court, (2) a finding of contempt, or (3) a prohibition against practicing for a limited time before the court whose order was neglected or disregarded") (*quoting* Comment, Sanctions at Pre-Trial Stages, 72 YALE L.J. 819, 830 (1963).

impropriety.[13] None of the factual or legal issues in that case are remotely related to the case at bar. Nor have Movants provided the Court with any suggestion that the court's rulings in Civil Action No. 96-675 might impact on this proceeding. Therefore, even under the broad standard contained in 1 CMC § 3308, Movants have failed to demonstrate how the association between judge and litigant in an unrelated proceeding calls into question Justice *Pro Tempore* Lamorena's impartiality or explain how sitting as a judge in the unrelated proceeding would prevent Justice *Pro Tempore* Lamorena from presiding in a fair and impartial manner over the case at hand.

The Court therefore concludes that there is insufficient showing of any basis to disqualify Justice *Pro Tempore* Lamorena. For the foregoing reasons, the Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena, III is **DENIED.**

DATED this 8th day of September, 2000.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Justice *Pro Tem*

[13] Indeed, Movants themselves "do not know what to call it," but simply find it "odd" for Justices *Pro Tempore* Atalig and Lamorena to sit as judges in this case while Civil Action 96-475 is pending (Motion to Disqualify at 11-12).