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CLERK OF COURT



IN THE SUPERIOR COURT <sup>BY:</sup> OF GUAM

<p><b>PEOPLE OF GUAM,</b></p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p><b>ALEJO C. SABLAN <i>et al,</i></b></p> <p style="text-align: right;">Defendants.</p>	<p>Criminal Case No. <u>CF0447-23</u></p> <p style="text-align: center;"><b>DECISION AND ORDER</b> <b>(Disqualification</b> <b>Pursuant to 7 G.C.A. § 6107)</b></p>
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**INTRODUCTION**

This matter is before the Honorable Alberto E. Tolentino (“Judge Tolentino”), for the limited purpose of addressing Alejo C. Sablan’s (“Defendant”) Statement of Objection filed Aug. 22, 2023 pursuant to 7 G.C.A. § 6107. Defendant seeks to disqualify the Honorable Alberto C. Lamorena, III (“Presiding Judge Lamorena”) from presiding over the underlying case. Attorney Joaquin C. Arriola, Jr. represents Defendant. Pursuant to local rule CVR 7.1(e)(1), it has been decided that oral argument is unnecessary, and the Court hereby **DENIES** Defendant’s request to disqualify the presiding judge.

**BACKGROUND**

On July 3, 2023, the Grand Jury indicted Defendant on the following charges: (1) Theft By Complicity (As a Second Degree Felony); (2) Conspiracy For Misapplication Of Entrusted Funds (As a Third Degree Felony); (3) Misapplication Of Entrusted Funds (As a Misdemeanor); and (4) Official Misconduct (As a Misdemeanor) Indictment, July 3, 2023. The case was originally assigned to Judge Tolentino. Notice of Judge Assignment, July 27,

1 2023. The case was assigned to Presiding Judge Lamorena. Notice of Judge Assignment, July  
2 28, 2023. On August 22, 2023 Defendant filed the Statement of Objection. On August 25,  
3 2023, Presiding Judge Lamorena filed an Answer to Statement of Objection.  
4

## 5 6 DISCUSSION

7 Title 7 G.C.A. § 6105 governs whether substantive grounds exist for disqualification  
8 under 7 G.C.A. § 6107. *Van Dox v. Superior Ct.*, 2008 Guam 7 ¶ 17. A judge shall be  
9 disqualified from “any proceeding in which his or her impartiality might reasonably be  
10 questioned. . .” 7 G.C.A. § 6105(a). Such impartiality can be demonstrated:

- 11 (1) Where he or she has a personal bias or prejudice concerning a party, or  
12 personal knowledge of disputed evidentiary facts concerning the  
13 proceeding;
- 14 (2) Where in private practice he or she served as a lawyer in the matter in  
15 controversy, or a lawyer with whom he or she previously practiced law  
16 served during such association as a lawyer or either has been a material  
17 witness concerning the matter;
- 18 (3) Where he or she has served in governmental employment and in such  
19 capacity participated as counsel, advisor, or material witness concerning the  
20 proceeding or, as such government employee, expressed an official opinion  
21 concerning the merits of a particular matter in controversy;
- 22 (4) Where he or she knows that he or she, individual or as a fiduciary, or his or  
23 her spouse or minor child residing in his or her household, has a financial  
24 interest in the subject matter in controversy or is a party to the subject matter  
25 in controversy or is a party to the proceeding, or in any other interest that  
26 could be substantially affected by the outcome of the proceeding;
- 27 (5) Where he or she or his or her spouse, or a person within the third degree of  
relationship to either of them, or the spouse of such person:
  - (A) is a party to the proceeding, or an officer, director, or trustee of a party;
  - (B) is acting as a lawyer on the proceeding;
  - (C) is known by the Judge to have an interest that could be substantially  
affected by the outcome of this proceeding;

1 (D) is to the Judge's knowledge likely to be a material witness in the  
2 proceeding.

3 7 G.C.A. § 6105(b).

4 **I.**

5 Defendant seeks Presiding Judge Lamorena's disqualification from this case on the  
6 basis of an alleged bias towards the current Attorney General ("AG") of Guam, Douglas  
7 Moylan. Defendant argues that then-candidate AG Moylan listed Presiding Judge Lamorena as  
8 a "professional reference" on a resume posted to AG Moylan's public Facebook profile, and  
9 that this amounts to a tacit endorsement of AG Moylan's candidacy. Statement of Objection at  
10 5. The "professional reference" is based on AG Moylan's service as Presiding Judge  
11 Lamorena's law clerk thirty years prior. Statement of Objection at 4. Defendant further argues  
12 that Presiding Judge Lamorena's "endorsement of AG Moylan would likely be construed as the  
13 lending of the prestige of Presiding Judge Lamorena's judicial office to advance the interests of  
14 AG Moylan". *Id.* Defendant avers that the endorsement of AG Moylan is particularly relevant  
15 in this case, as it "relates to alleged "government corruption" and the political investigations of  
16 public officials" *Id.* The resume and the "professional reference" contained therein is still  
17 posted on AG Moylan's public Facebook page, which is currently being used to provide  
18 official announcements for the Office of the Attorney General. *Id.*

19 Presiding Judge Lamorena denies that Defendant provided a reasonable basis for  
20 disqualification. Presiding Judge Lamorena asserts that 1) he never publicly endorsed AG  
21 Moylan or any other candidate in the 2022 election cycle; (2) he has never knowingly or  
22 intentionally created a Facebook profile; and that (3) AG Moylan's resume and "professional  
23 reference" contained therein was a unilateral act by AG Moylan which Lamorena "gave no  
24 input or direction in". *Id.*

25 **II.**

1 Defendant does not allege that Presiding Judge Lamorena participated in the case as a  
2 lawyer in private practice, that he is a material witness concerning the matter, nor that he or  
3 some person within the third-degree relationship to him retains an interest in the proceeding.  
4 Instead, Defendant's objection rests exclusively on 7 G.C.A. § 6105(a); to wit, that Presiding  
5 Judge Lamorena has a personal bias or prejudice concerning AG Moylan. Thus, the issue is  
6 whether Judge Lamorena's impartiality might be reasonably questioned under Section 6105(a).  
7 When evaluating such a contention, the Supreme Court of Guam has instructed that "what  
8 matters is not 'actual bias,' but the 'appearance of bias.'" *Van Dox v. Superior Court of Guam*,  
9 2008 Guam 7 ¶ 32 (quoting *Dizon v. Superior Court of Guam*, 1998 Guam 3 ¶ 10, n.3). The  
10 appearance of bias is judged from the standard of a reasonable person given all the relevant  
11 facts in the controversy. *Id*; see also *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12.

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13  
14 **A.**

15 Title 7 GCA § 6105 is based on 28 U.S.C. § 455 and governs the substantive  
16 grounds for disqualification of judges. Section 6105 provides:

17 § 6105. Grounds of Disqualification.

- 18  
19 (a) Any judge shall disqualify himself or herself in any proceeding in  
20 which his or her impartiality might reasonably be questioned, but if,  
21 following complete disclosure to all parties in the proceedings of the  
22 reasons for disqualification, all parties agree to having the judge  
23 continue to sit in the proceedings, he or she need not disqualify himself  
24 or herself.

25 7 GCA § 6105(a) (2013) (emphasis added); See *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12,  
26 n.2. Section 6105(a) requires disqualification for the appearance of partiality, such as  
27 when a judge's "impartiality might reasonably be questioned." 7 GCA § 6105(a). In other  
words, "disqualification may occur even though a judge is not actually biased or  
prejudiced, and has no extrajudicial knowledge of disputed evidentiary facts." *US v.*

1 *Salemme*, 164 F.Supp.2d 49, 80 (D. Mass. 1998) (citation omitted). Actual bias is not a  
2 prerequisite for recusal, as the appearance of impropriety is enough. *See Liteky v. United*  
3 *States*, 510 U.S. 540, 548 (1994). "The standard for recusal is the appearance of  
4 impropriety and [ ] no actual showing of bias is necessary for recusal to lie." *Dizon v.*  
5 *Superior Ct.*, 1998 Guam 3 ¶ 32. The purpose of Section 455(a) "to promote public  
6 confidence in the integrity of the judicial process" and to avoid even the "appearance of  
7 impropriety." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).  
8 "Avoiding the appearance of impropriety is as important to developing public confidence  
9 in the judiciary as avoiding impropriety itself." *US v. Hollister*, 746 F.2d. 420, 425-26 (8th  
10 Cir. 1984); *See also* 28 U.S.C. § 455(a). "[J]udges and justices have 'as strong a duty to  
11 sit when there is no legitimate reason to recuse as [they] do[ ] to recuse when the law and  
12 facts require.'" *People v. Tennesen*, 2010 Guam 12 ¶ 49 (quoting *Nichols v. Alley*, 71 F.3d  
13 347,351 (10<sup>th</sup> Cir. 1995)).

## 16 B.

17 Courts often apply a reasonable person standard to determine whether impartiality  
18 or the appearance of impropriety must be reasonably questioned. This standard evaluates  
19 whether a reasonable person with knowledge of all the facts would conclude that a judge's  
20 impartiality might reasonably be questioned. *See United States v. Studley*, 783 F.2d 934,  
21 939 (9th Cir. 1986). The Supreme Court of Guam has adopted this objective standard and  
22 has held that "[t]he appearance of bias is judged from the standard of a 'reasonable person'  
23 who knows all the facts, and understands the 'contexts of the jurisdictions, parties, and  
24 controversies involved,' including such 'realities of the Guam judicial system' as the  
25 relatively small number of lawyers in the Guam bar and 'the nature of Guam families.'"  
26 *Van Doox*, 2008 Guam 7 ¶ 32 (quoting *Ada*, 2000 Guam 22 ¶¶ 12-13). Section 455(a)  
27

1 recusal cases are "extremely fact intensive and fact bound, and must be judged on its  
2 unique facts and circumstances more than by comparison to situations considered in prior  
3 jurisprudence." *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995).

### 4 III.

5 Generally, when a former law clerk appears before a judge for whom they once  
6 clerked, it is insufficient grounds to make a reasonable person question a judge's  
7 impartiality. *See In re Cooke*, 160 B.R. 701, 707 (D.Conn. 1993) (citation omitted). To  
8 cure the appearance of impropriety, some federal courts have adopted either rules or  
9 decided cases prohibiting former law clerks or judges from appearing before a judge for  
10 a period after their clerkship. A judge's recusal is also not required where there is  
11 insufficient evidence that an attorney worked on case during their clerkship. *See e.g.*,  
12 *Reilly by Reilly v. S.E. Pa. Transp. Auth.*, 479 A.2d 973 (Pa. Super. Ct.1984) (finding a  
13 judge's recusal unnecessary where the record did not suggest the attorney was involved in  
14 the case during his clerkship).  
15

16  
17 The United States Supreme Court, the First Circuit, and the Eighth Circuit have  
18 adopted recusal rules which prohibit former law clerks from practicing before their judge  
19 for a period after their clerkship. *See e.g.*, *Ghee v. Artuz*, 285 F.Supp.2d 328, 329  
20 (E.D.N.Y. 2003) (citing U.S. Sup. Ct. R. 7) (The U.S.S.C. prohibits a former law clerk  
21 from appearing for two years from their date of separation.); *In re Martinez-Catala*, 129  
22 F.3d 213,218 (1st Cir. 1997) (citing 1st Cir. R. 46) ("Courts often have prophylactic rules  
23 that forbid a former law clerk from appearing in that court for a year or more after the  
24 clerkship, but no such rule is claimed to have been violated in this case."). The Eighth  
25 Circuit prohibits law clerks from appearing for a period of one year after their clerkship.  
26 *See Patzner v. Burkett*, 779 F.2d 1363, 1372 (8th Cir. 1985). Initially, in *Hollister*, the  
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1 Eighth Circuit Court of Appeals reviewed a judge's refusal to recuse himself where the  
2 prosecutor completed her clerkship three months earlier. *See Hollister*, 746 F.2d. at 425.

3 The *Hollister* Court said that it refused to adopt a bright-line recusal or disqualification  
4 rule for judges, recommending a one-year insulation period before a judge could hear a  
5 case involving a former law clerk, and ultimately left recusal to the judge's discretion. *Id.*

6 In *Patzner*, the Eighth Circuit Court of Appeals later explained that it had promulgated a  
7 one-year rule for the recusal of former law clerks:  
8

9       In light of *Hollister*, the Eighth Circuit Court of Appeals has promulgated  
10 a rule providing that a circuit court law clerk may not 'after leaving  
11 employment participate in any way as an attorney in any case pending in  
12 this Court during his or her term of service, or appear at counsel table or  
on brief in any case heard during a period of one year following separation  
from service with the Court.'

13 *Patzner*, 779 F.2d at 1372 n.8. (quoting 8th Cir. R. 30). The *Patzner* Court noted the  
14 adoption of a recusal rule for law clerks but held, "We leave [the] question of a judge's  
15 [disqualification] to be resolved by the trial judge ...." *Id.* at 1372.

16       There are also federal district courts with case law establishing similar recusal  
17 rules applicable to judges and law clerks. *See e.g. Smith v. Pepsico*, 434 F.Supp. 524, 526  
18 (S.D.Fla. 1977) (recognizing that where judges and their former law clerks were  
19 concerned, the custom was a one-year recusal period in the district); *Duke v. Pfizer, Inc.*,  
20 668 F .Supp. 1031, 1036 (E.D.Mich. 1987) (citations omitted) ("[A] one- or two-year  
21 period of repose is enough to cure any possible appearance of impropriety."); *Ghee v.*  
22 *Artuz*, 285 F.Supp.2d 328, 329 (E.D.N.Y. 2003) (adopting a rule disqualifying former law  
23 clerks from appearing before the court for one year).  
24

25       The Defendant contends Presiding Judge Lamorena's impartiality might  
26 reasonably be questioned based on his former law clerk's appearance in this matter and  
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1 provides the following arguments: (1) that he and AG Moylan enjoyed a close professional  
2 relationship for approximately six months during his clerkship, and Presiding Judge  
3 Lamorena relied on AG Moylan to conduct research relating to his assigned docket and  
4 provide guidance on legal, procedural, and other issues; (2) that despite thirty years  
5 between AG Moylan's departure as Presiding Judge Lamorena's law clerk and his election  
6 to Attorney General, a reasonable person might question his impartiality, as it creates the  
7 appearance of impropriety requiring recusal. Objection at 3. The Defendant further  
8 contends that Presiding Judge Lamorena gave his tacit endorsement of then-candidate AG  
9 Moylan's campaign due to the former's name being listed as a "professional reference"  
10 on AG Moylan's personal Facebook profile. *Id.*

12 Presiding Judge Lamorena admits AG Moylan was his law clerk from 2001 to  
13 early 2002. Answer at 2. Presiding Judge Lamorena contends that the professional  
14 reference posted on Facebook indicates (1) that Doug Moylan served as his law clerk 30  
15 years ago, and (2) that as someone who employed him, he is knowledgeable of Moylan's  
16 ability as a lawyer. Answer at 2. Presiding Judge Lamorena further argues that the  
17 existence of the resume doesn't suggest his advocacy or endorsement of any specific  
18 skill/ability AG Moylan possesses, or of his 2022 campaign in general. *Id.*

20 Absent other indications of bias or prejudice, this Court will not assume that a  
21 reasonable person knowing all of the circumstances would question Presiding Judge  
22 Lamorena's impartiality based on AG Moylan's prior service as Presiding Judge  
23 Lamorena's law clerk thirty years prior.

26 **IV.**



1           Next, the court looks at the Defendant's allegation that Presiding Judge Lamorena  
2 endorsed AG Moylan's candidacy in the 2022 general election.

3           There are circumstances when a judge has a personal relationship with an attorney  
4 that would make it difficult for a judge to be impartial, or to be perceived as impartial by  
5 an objective observer. *See United States v. Murphy*, 768 F.2d 1518, 1538 (7th Cir. 1985).  
6 Courts have frequently noted that a "judge's friendship with counsel appearing before him  
7 or her does not alone mandate disqualification." *In re Cooke*, 160 B.R. 701, 708 (Bankr.  
8 D. Conn. 1993) (citing *Henderson v. Dep 't of Public Safety and Corrections*, 901 F.2d  
9 1288, 1295-96 (5th Cir. 1990)). "A prior co-counsel relationship accompanied by an  
10 additional association, such as a close personal or social involvement, or an ongoing  
11 financial relationship, may cause a reasonable person to question a judge's impartiality."  
12 *Bonelli v. Bonelli*, 570 A.2d 189, 192 15 (Conn. 1990) (citing *Potashnick v. Port City*  
13 *Construction Co.*, 609 F.2d 1101, 1114-15 (5th Cir. 1980) (holding that a judge with an  
14 extensive business and professional relationship with counsel should have disqualified  
15 himself).  
16 himself).

17           The Seventh Circuit has acknowledged that in contemporary legal culture,  
18 relationships between a judge and attorney are common. *See Murphy*, 768 F.2d at 1537.  
19 That court observed that "a judge need not disqualify himself just because a friend-even a  
20 close friend-appears as a lawyer." *Id.* The court, however, noted "that when the association  
21 exceeds 'what might reasonably be expected' in light of the associational activities of an  
22 ordinary judge, the unusual aspects of a social relation may give rise to a reasonable  
23 question about the judge's impartiality." *Id.* at 1538 (internal citation omitted). A judge's  
24 acquaintance with an attorney does not typically require disqualification, but there are  
25 cases where the degree of intimacy warrants disqualification. *Id.* at 1538 (finding that an  
26 cases where the degree of intimacy warrants disqualification. *Id.* at 1538 (finding that an  
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1 objective observer might reasonably question a judge's neutrality, where the judge and  
2 prosecutor were close friends and had undisclosed plans to go on a joint family vacation  
3 after trial). There are those cases that are inapposite. *See e.g., Jordan v. Henderson v.*  
4 *Dept. of Public Safety*, 901 F.2d 1288, 1296 (5th Cir. 1990) (finding recusal inappropriate  
5 where one party alleged the judge and opposing counsel were good friends and had known  
6 opposing counsel since he was a kid).

8 Presiding Judge Lamorena admits and contends the following: (1) that he never  
9 publicly endorsed AG Moylan or any other candidate in the 2022 election cycle; (2) that  
10 AG Moylan's resume and "professional reference" contained therein was a unilateral act  
11 by AG Moylan which Presiding Judge Lamorena "gave no input or direction in"; (3) that  
12 he has never knowingly or intentionally created a Facebook profile; (4) that the existence  
13 of a professional reference only indicates that AG Moylan once served as Presiding Judge  
14 Lamorena's law clerk, and that Presiding Judge Lamorena is knowledgeable of AG  
15 Moylan's abilities as a lawyer based on that prior employment. Answer at 2.

17 The present case is distinguishable from the cases cited above, as there are no  
18 unusual aspects of this relationship that may give rise to a reasonable question about the  
19 judge's impartiality. Unlike in *Murphy*, there were no plans to spend time together outside  
20 the context of their professional relationship as legal colleagues practicing in the same  
21 community. In the present case, Presiding Judge Lamorena neither had personal  
22 engagements with AG Moylan, nor did he attend political campaign functions on behalf  
23 of then-candidate AG Moylan. Like in *In Re Cooke*, the relationship between Presiding  
24 Judge Lamorena and AG Moylan will likely not cause a reasonable person to question the  
25 judge's impartiality even if that relationship was personal rather than professional in  
26 nature. Unlike in *Bonelli*, there is no business or financial relationship between Presiding  
27

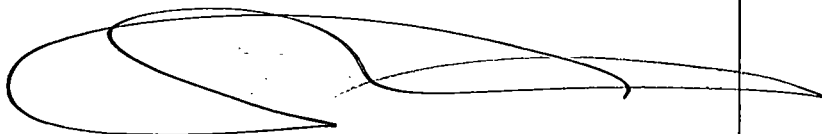
1 Judge Lamorena and AG Moylan. Finally, unlike in *Murphy*, the social relation  
2 established between Presiding Judge Lamorena and AG Moylan does not imply extensive  
3 personal contacts such that there would be a special willingness to rely on AG Moylan's  
4 representations as a prosecutor, nor a reluctance to hand a defeat to the Attorney General  
5 in a highly visible corruption case.  
6

7 Indeed, it appears Presiding Judge Lamorena was not even aware of the fact that  
8 AG Moylan was still using him as a professional reference thirty years after the latter's  
9 service as law clerk ended. This fact alone makes this case distinguishable from the cited  
10 cases, as the record is devoid of any ongoing personal or social relationship between Judge  
11 Lamorena and AG Moylan, nor does the record contain evidence that Judge Lamorena  
12 publicly supports AG Moylan's "tough on crime" political platform. Absent any facts to  
13 the contrary, a reasonable person would not find that Presiding Judge Lamorena's  
14 impartiality should "reasonably be questioned" to warrant disqualification.  
15

16 **CONCLUSION**

17 For the above reasons, the Court **DENIES** Defendant's request to disqualify the  
18 Presiding Judge.  
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20  
21 SO ORDERED, this \_\_\_\_\_ day of **SEP 08 2023** 2023.

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25 \_\_\_\_\_  
26 HONORABLE ALBERTO E. TOLENTINO  
27 Judge, Superior Court of Guam