IN THE SUPREME COURT OF GUAM

THE LONG-TERM CREDIT BANK OF JAPAN,
Petitioner

v.

SUPERIOR COURT OF GUAM,
Respondent

IWAO NOMOTO; INTERNATIONAL TRADING NETWORK, LTD.; ITN CORPORATION; EDUARDO A. CALVO; E.C. DEVELOPMENT; ALBERT WONG; CAPITAL INVESTMENT GROUP LTD.; LUXTON SERVICES, LTD; SUNBRIGHT MARSHALL ISLANDS; SUNBRIGHT PALAU; EIE AMERICAN CO., LTD.; HENSHAW GROUP LIMITED; EIE DEVELOPMENT (HONG KONG) LTD.; EIE GUAM CORPORATION; and JOHN DOES 1-20 INCLUSIVE,
Real Parties in Interest.

OPINION

Filed: May 16, 2003

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Supreme Court Case No.: WRP03-002
Superior Court Case No.: CV1365-99

Original Proceeding in the Supreme Court of Guam
Argued and submitted on April 8, 2003
Hagåtña, Guam

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BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Chief Justice (Acting)[1]; JOHN A. MANGLONA, Justice *Pro Tempore*[2]; RICHARD H. BENSON, Justice *Pro Tempore*.

PER CURIAM:

[1] The Petitioner The Long-Term Credit Bank of Japan ("Bank") requests that this court issue a peremptory writ of prohibition, commanding the Respondent Superior Court of Guam to cease and desist from scheduling any matters in *The Long-Term Credit Bank of Japan, Ltd. v. Iwao Nomoto, et al.*, Superior Court Case No. CV1365-99, before the Presiding Judge of the Superior Court, Alberto C. Lamorena, III. The Bank ultimately seeks review of the lower court's decision denying the Bank's request to recuse the Presiding Judge from presiding over that matter. This court issued an Alternative Writ of Prohibition granting the requested relief, and ordered the Respondent to appear and show cause as to why a peremptory writ should not be issued in this case. We also allowed the Real Parties in Interest to brief the matter. Upon due notice and hearing, and upon consideration of the papers, the court finds that a peremptory writ of prohibition should be issued to permanently restrain the Respondent from scheduling any matters in the above-mentioned proceeding before the Presiding Judge. Accordingly, the Petition is hereby granted and the reasons are set forth herein.

I.

[2] This case arises out of a motion presented by the Bank to disqualify Presiding Judge Alberto C. Lamorena, III (sometimes "Judge Lamorena" or "Presiding Judge") from presiding over the case *The Long-Term Credit Bank of Japan, Ltd. v. Iwao Nomoto, et al.*, Superior Court Case No. CV1365-99. The relevant facts as set forth in the Petition are as follows: The underlying action

[1] Chief Justice F. Philip Carbullido recused himself from this matter. As the senior member of the panel, Justice Frances Tydingco-Gatewood was appointed Acting Chief Justice.

[2] At the time this matter was heard, Justice Manglona was a Designated Justice of this court. His appointment has since expired and he was appointed Justice *Pro Tempore* prior to the issuance of this Opinion.

("Nomoto Action") was filed by the Bank against the Defendants (separately referred to as "EIE Guam" and "Nomoto defendants") to collect money which the Bank alleges was illegally transferred by EIE Guam to the Nomoto defendants.

[3] The Nomoto Action involves a longstanding dispute between the parties over money for the construction of the Hyatt Hotel Guam ("Hotel"). In the early 1990's, EIE Guam was involved in the construction of the Hotel and, as a result, was entitled to profits from the Hotel under a profit distribution plan ("Owner's Profit Distribution"). In 1994, as security for a construction loan from the Bank, EIE Guam executed a Security Agreement assigning its rights in the Owner's Profit Distribution to the Bank. The Bank alleges that EIE Guam has refused to pay the Bank any portion of the Owner's Profit Distribution since mid-1995, and has transferred funds from the Distribution to the Nomoto defendants.

[4] On August 2, 1995, EIE Guam filed a lawsuit in the Superior Court captioned *EIE Guam Corp. v. The Long-Term Credit Bank of Japan, et al.*, Case No., CV1190-95 (hereinafter "First Action"). The First Action was filed by EIE Guam to avoid payment of millions of dollars to the Bank and other banks involved in the construction of the Hotel. The Bank filed a counterclaim seeking to enforce the loans, guaranties and security agreements at issue in the suit, including its security interest in the Owner's Profit Distribution.[3]

[5] The First Action was assigned to retired Chief Justice (then Superior Court Judge) Benjamin J. F. Cruz. The Presiding Judge thereafter took the case from Judge Cruz and assigned it to himself. On April 2, 1996, Judge Lamorena *sua sponte* filed a Memorandum titled "Disqualification to Sit on CV1190-95," recusing himself from the case under Title 7 GCA §§6105 and 6108. In the Memorandum, he stated:

[3] The action was removed to the District Court in 2000 and is still pending resolution.

> In reviewing the memorandum and affidavits, I realized [sic] that I have received information regarding some facts of this case.

Civille Decl., Exhibit 5 (March 20, 2003).

[6] The First Action was thereafter assigned back to Judge Cruz, who entered summary judgment in favor of EIE Guam against the Bank in 1996. The decision was reversed by this court in 1998, and petitions for a writ of certiorari were thereafter denied by the Ninth Circuit in 1999 and the United States Supreme Court in 2000. The case was remanded to the Superior Court, and due to Judge Cruz's appointment to the Guam Supreme Court, the case was assigned to Judge Joaquin V.E. Manibusan, Jr.

[7] While the First Action was on appeal in 1999, the Bank allegedly discovered evidence that money from the Owner's Profit Distribution which EIE Guam assigned to the Bank was wrongfully converted, paid, and loaned to the Nomoto defendants. In order to preserve its causes of action, the Bank filed the instant underlying action, (the Nomoto Action), in the Superior Court. The Nomoto Action was initially assigned to Judge Manibusan but was stayed upon motion of the Nomoto defendants until resolution of the appeals in the First Action.

[8] After the conclusion of the appeals in 2000 and remand to the Superior Court, the First Action was removed to the District Court. Thereafter, the stay was lifted in the Nomoto Action and EIE Guam and the Nomoto defendants filed their Answers to the Bank's Complaint and discovery commenced. In July of 2000, the Bank filed a motion to stay the Nomoto Action until resolution of the First Action in the District Court. The motion to stay was denied. However, on January 22, 2001, upon joint request of the parties, the lower court took the case off calendar pending resolution of the First Action, which was set for trial in the District Court, or until any party requested that the case be placed on calendar.

[9] Shortly before the First Action was to go to trial in the District Court, the Bank and all defendants entered into a Term Sheet for Settlement, which contemplated the settlement of both the First Action and the Nomoto Action. The conditions of the Term Sheet were not met by the due date, and the settlement of the First Action did not close. The parties to the First Action thereafter filed various motions in the District Court claiming violations of the Settlement Term Sheet.

[10] Meanwhile, in the Superior Court, where the Nomoto Action was still pending, on December 20, 2001, the Nomoto defendants filed a motion to dismiss the Nomoto Action for failure to prosecute. At the time the motion to dismiss was filed, Judge Manibusan had since hired the daughter of one of the Nomoto defendants as his law clerk. Based on this fact, the Bank made a request that Judge Manibusan disqualify himself from the case, which was granted.

[11] On March 5, 2002, the Bank learned that Presiding Judge Lamorena assigned the Nomoto Action to himself. The following day, the Bank filed and served on the parties and Judge Lamorena an Objection to Hearing and Request for Recusal. The Bank served a copy of the Request on Judge Lamorena by leaving a copy with his chamber clerk. During a hearing on March 6, 2002, Judge Lamorena acknowledged receipt of the Request for Recusal and informed the parties that he would refer it to a recusal judge. Judge Lamorena thereafter instructed the parties to proceed with arguments on the Motion to Dismiss, but stated that he would not decide the Motion to Dismiss until after the recusal issue was decided.

[12] The Request for Recusal was assigned to Judge Steven Unpingco ("recusal judge"). The recusal judge ordered that supplemental statements regarding the recusal request be filed by April 25, 2002, and ordered Judge Lamorena to file an Answer within 10 days after that date. Judge Lamorena filed an unverified Answer on May 24, 2002, which was past the due date given by the recusal judge.

[13] On February 24, 2003, the recusal judge heard arguments on the recusal motion[4]. He denied the motion in a Decision and Order filed on March 19, 2003.[5]

[14] The Bank filed the instant Petition for Writ of Prohibition, and, or, Writ of Mandamus ("Petition") on March 20, 2003. In the Petition, the Bank requested that this court issue an alternative writ of prohibition, commanding the Respondent Superior Court to refrain from scheduling any matters before the Presiding Judge and instructing Judge Lamorena to cease and desist from presiding over and hearing any matters and taking further action in the Nomoto Action. On March 21, 2003, this court issued an Alternative Writ of Prohibition which arrested all proceedings and ordered the Respondent to show cause as to why a peremptory writ should not issue permanently enjoining the Superior Court from scheduling proceedings in the Nomoto Action before Judge Lamorena.

II.

[15] This court has original jurisdiction to issue writs of prohibition pursuant to Title 7 GCA §3107(b) (1993) ("[The Supreme Court's] authority . . . includes jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies to protect its appellate jurisdiction and to effectuate its supervisory authority over the courts below."). The qualification of a lower court judge to preside in a matter before that court is addressable under our jurisdictional grant to issue extraordinary writs because a determination of the issue is in aid of this court's appellate jurisdiction and relates to this court's supervisory authority over the Superior Court. *See Topasna v. Superior Court*, 1996 Guam 5, ¶ 5 ("[T]he writ of prohibition aids this appellate jurisdiction of ours by preventing a useless appeal in the event of a conviction in a prosecution, presided over by a trial

[4] The recusal request was for all intents and purposes treated as a motion to recuse in the lower court and is reviewed as such in the present case before this court.

[5] The grounds for denial are discussed later in this Opinion.

judge exercising a jurisdiction he does not possess.") (quoting *Connelly v. United States Dist. Court*, 191 F.2d 692, 693 n.1 (9th Cir. 1951). Thus, a petition for writ of prohibition "may be used to review an order upholding the qualifications of a judge presiding over a trial." *Id*. An order denying a request for recusal is appealable after final judgment; however, requiring a party to wait until after trial and judgment before challenging the denial of a recusal request leaves it "without a plain, speedy, adequate remedy." *Dizon v. Superior Court*, 1998 Guam 3, ¶ 6 (agreeing that a writ of prohibition was a proper channel for reviewing a denial of a motion to disqualify Presiding Judge Lamorena from presiding over a Superior Court case).[6] "While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separate harm to public confidence that [the recusal statute] . . . is designed to prevent." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 (3d Cir. 1993) (citation omitted).

III.

A. Sufficiency of the Petition and Alternative Writ.

[16] As an initial matter, the Respondent challenges the sufficiency of the Petition as well as the Alternative Writ of Prohibition issued by this court on March 21, 2003.

[6] We recognize that the cases which this court has previously permitted a writ proceeding in lieu of an appeal were criminal cases. The distinction here is that the Petitioner is not a criminal defendant. We herein find that a writ proceeding is appropriate to review the denial of a recusal request even in a civil case where there similarly exists a need to guarantee a fair and impartial trial. *See Texaco, Inc. v. Chandler*, 354 F.2d 655, 657 (10th Cir. 1965) ("The jurisdiction of this court to take action to guarantee a fair and impartial trial is no longer open to question. Upon an adequate showing, this court has held that it has the 'power and inescapable duty,' whether under the all writs statute, 28 U.S.C. § 1651, or under its inherent powers of appellate jurisdiction, 'to effectuate what seems to us to be the manifest ends of justice.'") (citations omitted). Whether the underlying case is civil or criminal in nature, an appeal after final judgment is an inadequate remedy at law. *See Keating v. Superior Court*, 289 P.2d 209, 210 (Cal. 1955) ("Prohibition is a proper remedy to test whether a judge is disqualified where, as here, the facts are without substantial conflict. . . . The order striking the petition for a change of judge is not immediately reviewable by appeal, and an appeal from a subsequent judgment is not an adequate remedy.") (citations omitted). We further note that a party seeking review of an interlocutory recusal decision may seek appellate review under this court's interlocutory jurisdiction. *See* Title 7 GCA §3108(b). The procedure by way of an interlocutory appeal is arguably the better route. Notwithstanding, a failure to seek interlocutory review does not preclude consideration of the instant Petition. *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 n.8 (3d Cir. 1993).

1. Service of the Petition.

[17] The Respondent first argues that the Petition should be dismissed because it was not properly served on Judge Lamorena as required under Rule 24(a) of the Guam Rules of Appellate Procedure.

[18] Rule 24(a) provides in relevant part:

> Application for a Writ of Mandamus or Writ of Prohibition directed to a judge or judges shall be made by filing a petition therefor with the Clerk of the Supreme Court with proof of service on the respondent judge or judges and on all parties to the action in the Superior Court.

GRAP 24(a). It is clear that under GRAP 24(a), service of the petition on the lower court judge is required. However, GRAP 24(a) is only relevant if the petition seeks a writ "directed to a judge." GRAP 24(a). Here, the Petitioner seeks a writ directed to the Superior Court. The Superior Court is the proper party respondent under the facts of this case because the Bank essentially seeks a review of a judicial act, that is, the recusal judge's decision denying the Bank's request to recuse Judge Lamorena. *See Albert v. United States Dist. Court*, 283 F.2d 61, 61-63 (6th Cir. 1960), *overruled on other grounds in* 919 F.2d 1136 (6th Cir. 1990) (recognizing that an order denying a request for disqualification is a judicial decision and thus a judicial action). In such a circumstance, the judge is not the appropriate party respondent. *See Gresham v. Superior Court*, 112 P. 2d 965, 967 (Cal. Dist. Ct. App. 1941) ("In an application for a writ of mandate directed to a court relative to a judicial act, the judge of the court is not a proper party respondent."); *see also Pettie v. Superior Court*, 3 Cal. Rptr. 267, 682-82 (sustaining a judge's demurrer to a petition which sought review of a judicial decision because while the petitioner sought "a writ of mandate directed individually to the judge of the respondent court . . . . the judge of the court is not a proper party respondent in such a proceeding").[7] Hence, a petition for extraordinary relief seeking review of a judicial decision does

[7] In certain circumstances, a judge is the proper party respondent. This includes where "the ground for the application is extrinsic to the merits of a decision," such as where the petitioner seeks to force a particular judge to rule on a motion or other request presented to him for a decision. *Rapp v. Van Dusen*, 350 F.2d 806, 813 (3d Cir. 1965).

not seek a writ directed to a judge of the Superior Court. Rather, such a petition is one which seeks a writ directed to the lower court.[8]

[19] Thus, because the Bank seeks a writ directed to the Superior Court, and not a particular judge, GRAP 24(a) does not govern this case. The question arises as to which rule governs the filing of the instant Petition. The answer is found in GRAP 24(c), which is the default rule and applies to all petitions for extraordinary relief not contemplated in GRAP 24(a) and (b). *See* GRAP 24(c). GRAP 24(c) provides:

> Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this Rule shall be made by petition filed with the clerk of this Court with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this Rule.

GRAP 24(c).[9]

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[8] The distinction here is not on the party *named*, in a literal sense, as the respondent in the petition. Admittedly, even a petition seeking a writ directed to a judge must not name the judge as the respondent. *See* GRAP 24(e) ("Petitions for Writs of Mandamus, Prohibition or other extraordinary relief *directed to a judge* shall bear the title of the Superior Court and not bear the name of the Superior Court judge or judges in the caption."). Rather, the distinction we identify is on whom the writ which is sought is *directed towards*. Where a petitioner seeks review of a judicial decision, the petitioner seeks a writ directed to the lower court, and not a judge.

[9] We favor a departure from the procedure announced in GRAP 24(a) in cases like the present one wherein the writ proceeding is brought to review a lower court's decision. *See Rapp v. Van Dusen*, 350 F.2d 806, 812 (3d Cir. 1965); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993) (finding that the recusal of a lower court judge was necessary because the judge's participation in the mandamus proceedings raised an appearance of partiality). "[W]here the purpose of [a writ proceeding] . . . is to secure what is in effect an interlocutory review of the intrinsic merits of a judicial act, the procedure should not be the same as that which is appropriate for complaint against a judge's conduct which is extrinsic to the merits of a decision." *Rapp v. Van Dusen*, 350 F.2d 806, 813 (3d Cir. 1965). In cases where a lower court's decision is challenged, the procedure adopted should be designed to prevent the lower court judge "from becoming entangled as an active party to litigation in which his role is judicial and in which he has no personal interest." *Id*. at 813-14. By preventing the judge from participating as a party, "[a] judge will thus be guarded from engaging in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation. . . . The procedure . . . will safeguard the administration of justice against even the appearance of loss of impartiality." *Id*. at 813-14; *see also Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 165 (3d Cir. 1993) (finding that the practice of not having the judge participate actively in a mandamus proceeding was "intended to prevent a district court judge from assuming, or being perceived to assume, an adversarial position."). "[A] judge's participation in a case must never reach the point where it appears, or is even perceived to appear, that the judge is aligned with any party in the pending litigation." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 166 (3d Cir. 1993); *see also* Fed. R. App. P. 21(a) (providing the procedure when a judicial act is being challenged in a writ proceeding); Comment, Fed. R. App. P. 21 (regarding 1996 amend.) ("Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. . . . In order to change the tone of the rule, the rule is amended so that the judge is not treated as a respondent.").

[20] GRAP 24(c) requires proof of service of the petition on the respondents. Here, the Respondent is the Superior Court, not Judge Lamorena. Therefore, the Bank was not required to serve a copy of the Petition on Judge Lamorena and the failure to serve the Petition on him is not fatal to the instant case.[10]

[21] Finally, we observe that GRAP 24(c) requires that the petition contain a proof of service on the respondent. Here, the Bank's Petition did not contain a proof of service on the Respondent Superior Court as required under GRAP 24(c).[11] Furthermore, the Alternative Writ was issued notwithstanding that a non-compliant proof of service was filed. From these circumstances, a question automatically arises as to whether the issuance of the Alternative Writ was proper. Our answer is yes. While GRAP 24(c) requires that the petition be accompanied by a proof of service on the respondent, this court clearly has the authority to issue an alternative writ without prior service of the petition on the respondent. *See* 7 GCA §31205 (1993). Section 31205 authorizes the court to issue an alternative writ *ex parte*, or without due notice. Therefore, the requirement in GRAP 24(c) that the petition for an alternative writ contain a proof of service is not jurisdictional. At most "due process requires notice and service of the petition at some point before the hearing on the merits," and not necessarily prior to the filing of the petition for an alternative writ. CALIFORNIA

GRAP 24(a), as currently written, reflects a procedure which is entirely proper in the rare case where the petitioner seeks a writ directed to the lower court *judge* as distinguished from the lower court. The procedure announced therein is not appropriate where the lower court is the proper respondent; that is, where the writ proceeding was brought to review a judicial decision. In such cases, like the present one, the better practice is to follow the default procedure outlined in GRAP 24(c). Compelling policy reasons support a departure from GRAP 24(a) in this case. Allowing the lower court judge to be a respondent and participate in the proceedings without this court's permission could place the lower court judge in an adversarial position and aligned with a particular party. Such alignment raises an appearance of partiality in the proceedings. Thus, by placing this proceeding within GRAP 24(c), we herein find that the lower court judge is not properly made a party to the writ proceeding. Ultimately, the appearance of an impartial tribunal is preserved.

[10] The requirement that the Petition be served on the Respondent Superior Court is consistent with 7 GCA §31205's requirement that in the case of an alternative writ, a copy of the petition must be served on "each person against whom the writ is sought." Title 7 GCA §31205 (1993). Here the writ was sought against the Superior Court.

[11] The proof of service indicated that the Petition was served on Judge Lamorena and the attorneys for the opposing parties.

CIVIL WRITS, § 11.3 (Elaine K. Frank ed., 1970). Therefore, the fact that an Alternative Writ was issued without the required proof of service does not render the Alternative Writ jurisdictionally defective. Moreover, the fact that a hearing was held prior to the filing of a proof of service on the Respondent Superior Court does not render these writ proceedings jurisdictionally defective. The Superior Court did not challenge service on the Respondent Superior Court in its opposition to the Petition.[12] Therefore, any defect in service on the Respondent Superior Court was waived. *See* Title 7 GCA §31501 (1993) (stating that the Rules of Civil Procedure constitute the rules of practice in proceedings for writs of mandamus and prohibition); Guam R. Civ. P. 12(h)(1) (stating that the failure to raise a defect in service in either a motion to dismiss or an initial pleading constitutes a waiver of the defect).

[22] The finding of a waiver makes it unnecessary to determine whether service on Judge Lamorena's chamber clerk is sufficient to satisfy the requirement that the petition be served on the Superior Court. We note, however, for the benefit of the parties, that service of the Petition on the Superior Court is properly accomplished by personally delivering a copy to the Clerk of Court of the Superior Court at his place of work. Furthermore, GRAP 24(c) does not require proof of service on the parties in the lower court who oppose the petitioner. We rule that if a petitioner seeks review of a judicial decision made in the lower court, the petition must be served on both the respondent Superior Court of Guam, as well as on all other parties in the lower court proceeding. In stating this new requirement, we are guided by the instruction in GRAP 24(c) that the procedure for filing petitions under subsection (c) should model as closely as practicable the requirements of GRAP 24 (a) and (b).[13] We will also require that a copy of the petition be provided to the judge that rendered the challenged decision. The judge need not be formally served with a copy of the petition. The

[12] The Superior Court only raised a challenge to the alleged defect in service of the petition on the Presiding Judge.

[13] Moreover, in cases where a lower court decision is challenged, the parties in the lower court proceedings, and not the lower court, are the proper parties to appear and argue the writ proceeding in this court.

petition can be left with a member of the judge's chamber team, who will be responsible for immediately transmitting the copy of the petition to the judge.

2. Answer by Respondent.

[23] The Respondent also challenges the sufficiency of the Alternative Writ of Prohibition issued by this court on March 21, 2003. The Respondent argues that Rule 24(b) of the Guam Rules of Appellate Procedure require that the court allow the respondent to file an answer before the issuance of a writ. GRAP 24 (b) provides in relevant part:

> If this court is of the opinion that the writ should not be granted, it shall deny the petition. *Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order*. . . .

GRAP 24(b) (2000) (emphasis added).

[24] The Respondent alleges that the court's failure to allow it to file an answer to the petition prior to the issuance of the Alternative Writ was in violation of GRAP 24(b) and constituted a violation of the Respondent's due process rights.

[25] As stated earlier, GRAP 24(a) and (b) do not govern the procedure in this case. Rather, the case is governed by GRAP 24(c), which does not contain a requirement that the respondent be allowed to file an answer prior to the issuance of an alternative writ.[14] Moreover, the Respondent's due process contention is tenuous because it is inconsistent with general writ practice. Specifically, alternative writs may generally be issued immediately, without awaiting a response, and may thus be issued *ex parte*. *See* CALIFORNIA CIVIL WRITS, § 5.46; 7 GCA § 31205 (providing that an alternative writ must first issue if the petition is filed without notice to the other party). An alternative writ of prohibition "is in the nature of an order to show cause . . . ." CALIFORNIA CIVIL

[14] In the Alternative Writ of Prohibition and Order of March 23, 2003, this court ordered Respondent Superior Court to file an opposition to the Petition pursuant to GRAP 24(b). After thorough review of GRAP 24, we find that GRAP 24(a) and (b), which treat the lower court judge as a party to the proceeding, are not the appropriate rules to govern this proceeding. Moreover, even assuming GRAP 24(b) applied to this proceeding, for the reasons stated in this paragraph we interpret the rule as requiring that the respondent judge be allowed to file an answer prior to the issuance of a *peremptory* writ, and not an alternative writ.

WRITS, § 5.46 (discussing alternative writs of mandate); *see also* Title 7 GCA §31204 (1993) (defining an alternative writ). When an alternative writ is issued, the respondent is allowed the opportunity to be heard on the date specified by the court. Thus, the issuance of an alternative writ before directing the respondent to file an answer does not raise due process concerns. This is in contrast to a peremptory writ, which is "an order commanding the respondent to immediately do the act required to be performed." CALIFORNIA CIVIL WRITS, § 5.47. Because of their final nature, peremptory writs may only issue "after notice, by either alternative writ or notice of motion, and only after a hearing on the merits." *Id*.; *see* 7 GCA §31205. Here, the Respondent was allowed to file a response in opposition to the Petition and was allowed to argue the matter at the hearing. Under these circumstances, we find that the Respondent's due process rights were not violated.

[26] In accordance with the foregoing, we reject the Respondent's challenges to the procedural aspects of this writ proceeding.

B. Merits of the Petition.

[27] We next decide whether a peremptory writ of prohibition should be issued. A writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Title 7 GCA §31301 (1993). The issue here is whether the Respondent Superior Court exceeded its jurisdiction in denying the Bank's motion to recuse Judge Lamorena. *See Topasna*, 1996 Guam 5 at ¶ 4.

[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. *See Ada v. Gutierrez*, 2000 Guam 22, ¶ 10. Because the Bank essentially seeks a review of the recusal judge's Order denying the Bank's recusal motion, we similarly review the denial for an abuse of discretion. *See 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); *Matter of Billedeaux*, 972 F.2d 104, 105 (5th Cir. 1992) (deciding whether a writ of mandate, and, or prohibition seeking disqualification of a lower court judge should be granted by asking whether the judge *abused her discretion* in denying a motion for her disqualification). This case also requires the court to interpret the local recusal statutes. We review issues of statutory interpretation, including the interpretation of the recusal statutes, *de novo. See Mesngon v. Government of Guam*Ä 2003 Guam 3, ¶ 8; *Dizon v. Superior Court*, 1998 Guam 3, ¶ 10.

[29] The Bank raises various issues relating to the recusal judge's procedural and substantive rulings. *See* Petition, pp. 11-14 (March 20, 2003). The Respondent and Real Parties in Interest similarly offer many challenges to the issuance of a peremptory writ in this case. Because the issues presented by the Bank and the opposing parties are numerous, we limit our discussion to those issues that are relevant to the resolution of the Petition. We first discuss the general rules governing the disqualification of a judge, and then present an analysis of the dispositive issues.

1. Disqualification Procedure.

[30] The procedure for disqualifying a judge is set forth in Title 7 GCA §6107. That section provides in relevant part:

> **Objection to competency; procedure.**
>
> Whenever a Justice or Judge who shall be disqualified under the provisions of this Chapter to sit or act as such in any action or proceeding pending before him or her neglects or fails to declare his or her disqualification in the manner provided by this Chapter, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a *written statement objecting* to the hearing of such matter or any trial of any issue of fact or law in such action or proceeding before such Justice or Judge, and setting forth the fact or facts constituting the ground of the disqualification of such Justice or Judge. Copies of such written statement shall forthwith be *served* by the presenting party on each party, or his or her attorney, who has appeared in the action or proceeding and *on the Justice or Judge* alleged in such statement to be disqualified.
>
> *Within ten (10) days after the service* of such statement as above provided, or ten (10) days after the filing of any statement, whichever is later in time, the Justice or Judge alleged therein to be disqualified may file with the clerk his or her

> consent in writing that the action or proceeding continue without him or her, or may file with the clerk his or her *written answer* admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his or her disqualification. . . . *Every such statement and every answer shall be verified in the manner prescribed for the verification of pleadings*. . . .
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> If such Judge admits his or her disqualification, or files his or her written consent that the action or proceeding be tried before another Judge, or *fails to file the answer within the ten (10) days allowed*, or if it shall be determined after the hearing that he or she is disqualified, *the action or proceeding shall be heard and determined by another Judge* of the Superior Court who is not disqualified. Such other Judge shall be assigned in the same manner as the Judge who was disqualified was assigned to hear the case initially.

Title 7 GCA §6107 (1993) (emphasis added). Title 7 GCA §6107 was taken from portions of California Code of Civil Procedure §170. *See* Comment, 7 GCA §6107 (1993). The corresponding California section has since been amended and the recusal procedures which are found in 7 GCA §6107 are now codified as California Civil Procedure Code § 170.3. *Compare* 7 GCA §6107, *with* Cal. Civ. Proc. Code § 170.3.

2. Analysis.

[31] The first procedural issue deals with the service requirement under 7 GCA §6107. The Bank argues that the recusal judge erred in holding that the Bank failed to properly serve the Request for Recusal on Judge Lamorena.

[32] Section 6107 provides that copies of a written disqualification statement "shall forthwith be served by the presenting party on each party, or his or her attorney, who has appeared in the action or proceeding and on the Justice or Judge alleged in such statement to be disqualified." 7 GCA §6107.

[33] The recusal judge interpreted section 6107 to require personal service. He offered several reasons supporting this interpretation. First, agreeing with the decision in *Guam Top Partners, Inc. v. Tanota Partners*, CV0558-99 (May 1, 2002), the recusal judge found that because 7 GCA §6107

requires service on the judge, and does not provide alternate means of service, "service must be made personally on the Judge." Petition, Exhibit 1 (Decision and Order, p. 5). Second, the recusal judge found that due to the importance of disqualification requests with regard to the legitimacy of the judicial system, the strict statutory requirements for recusal should be met. The court found that given the heavy workload of Superior Court judges, it is important that a judge receive the recusal request at the earliest possible time considering that they are required under section 6107 to file an answer to the disqualification request within ten days after being served the request. Thus, to facilitate a judge's ability to file an answer within ten days, the judge should be personally served. *See* Petition, Exhibit 1 (Decision and Order, pp. 6-7).

[34] The court then provided the manner in which personal service was to be accomplished. In doing so, the court found that the statute was "not so rigid" as to define personal service as "putting the written request into the judge's own hands." *See* Petition, Exhibit 1 (Decision and Order, p. 8). The court found that personal service was to be satisfied in accordance with the judge's "particular system for accepting service of recusal requests." Petition, Exhibit 1 (Decision and Order, p. 8). The recusal judge ultimately found that by leaving a copy of the request with Judge Lamorena's chamber clerk, the Bank failed to properly serve the recusal request on the Presiding Judge.

[35] As shown above, the recusal judge first found that section 6107 required personal service, but then found that "personal service" did not necessarily mean actual hand delivery to the judge. The Bank argues that the lower court erred in both interpreting the statute to require personal service and in defining personal service to mean the manner of service acceptable to the particular judge. The issue before this court is whether personal service is required under section 6107, and, if not, what type of service is required.

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[36] We initially recognize that section 6107 does not explicitly require "personal" service; rather, it requires that the disqualification motion be "served . . .on the judge . . . ." This is in contrast to the California Civil Procedure Code § 170 which after amendment now provides: "Copies of the statement [of disqualification] . . . shall be *personally* served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers." Cal. Civ. Proc. Code § 170.3(c)(1) (emphasis added). Thus, unlike the California statute, the Guam counterpart is silent as to whether "personal" service is required. Because section 6107 does not limit service on the judge to "personal" service, the statute is ambiguous thus requiring this court to employ other methods of statutory interpretation. *See Aguon v. Gutierrez*, 2002 Guam 14, ¶ 9 ("We find that the wording of the statute . . . can be subject to both parties' interpretations, and is therefore ambiguous. . . . A statute's context includes looking at other provisions of the same statute and other related statutes.") (citations omitted). "[T]he language of the statute cannot be read in isolation" and we therefore examine other provisions within section 6107 in determining legislative intent. *Id*.; *see also Sumitomo v. Government of Guam*, 2001 Guam 23, ¶ 17 ("[W]ords and people are known by their companions.") (quoting *Gutierrez v. Ada*, 528 U.S. 250, 255, 120 S. Ct. 740, 744, 145 L. Ed. 2d 747 (2000)).

[37] Viewing the statute as a whole, we find that personal service is in fact required under section 6107. As pointed out by EIE Guam, section 6107 provides for service of the recusal request on a party *or his attorney*, and then provides that service of the request is to be made on the judge. The fact that the statute provides for alternative means of service with regard to serving a party, but does not similarly provide for alternative means of serving the judge, indicates that personal service on the judge is required. Reference to California Civil Procedure Code § 170.3 illuminates this point. The California statute provides that a recusal request is to be served on the judge personally *or his clerk*. *See* Cal. Civ. Proc. Code § 170.3. By contrast, 7 GCA §6107 merely provides that service

is to be made on the judge. There is no mention in section 6107 of any other means of service. 7 GCA §6107. The fact that the statute does not provide any other method of service on a judge indicates that service must be made on the judge personally, i.e., personal service. *See* BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "personal service" as "actual delivery of the notice or process to the person to whom it is directed.").

[38] Moreover, as stated earlier, 7 GCA §6107 was taken from California Code of Civil Procedure § 170. Prior to amendment, the California section contained language identical to our section 6107. At the hearing on this matter, EIE Guam argued that the California statute was amended in 1984 to include the phrase *personal* service on the judge in an effort to distinguish the personal service rule under the former statute from the new requirement that service on a judge's chamber clerk is allowed. We agree. When the California section contained language similar to the language of 7 GCA §6107, and did not specify that *personal* service on the judge was required, the California statute was impliedly interpreted as requiring personal service of the recusal request on the judge. *See Bollotin v. Stockton Sav. & Loan Bank*, 277 P.2d 519, 520 (Cal. Dist. Ct. App. 1955) (finding that proceedings in the case were suspended when the disqualification statement was filed and "personal service" of the statement was made on the judge).

[39] Finally, the recusal judge found that personal service includes the judge's "particular system for accepting service of recusal requests." Petition, Exhibit 1 (Decision and Order, p. 8). This ruling in fact endorses substitute service, and not personal service *per se*. Service can be distinguished by both the manner in which service is accomplished (i.e., through hand-delivery vs. the mail), and who is served (i.e., the individual vs. their agent or representative). It is recognized that personal service is hand-delivery to the individual, whereas service by other means, however distinguished, is substitute service. *See* 5 AM. JUR. APPELLATE REVIEW § 345 (2002) (describing service by mail to be a substitute for personal service); *Sours v. State Dir. of Highways*, 175 N.E.2d 77, 78-79 (Ohio

(1961) (characterizing service by delivery at the individual's abode as substitute service). Thus, personal service is most accurately and basically defined as hand-delivery to the individual. *See Blankenship v. Kaldor*, 57 P.3d 295, 297 (Wash. Ct. App. 2002). This is consistent with the definition of "personal service" in Black's Law Dictionary as "actual delivery of the notice or process to the person to whom it is directed." BLACK'S LAW DICTIONARY (7th ed. 1999).[15] Because the recusal judge effectively interpreted section 6107 as permitting substitute service, this interpretation was erroneous and is clarified here.

[40] Moreover, the rule created by the recusal judge is undesirable because it creates inconsistent procedures governing proper service on a judge. Any rule regarding the method of service should be straightforward and consistently applied so that litigants know what is expected of them and may properly comply with the rule without having to make an independent investigation of the particular desires of a certain judge. A uniform rule would also allow the recusal judge and reviewing court to consider the sufficiency of service without the complications inherent in considering other variables which may change on a case-by-case basis. Thus, we find that under section 6107, a recusal statement must be served on the judge personally, into the judge's hands.

[41] Finally, we concur with the Bank's contention that, as a policy matter, the service requirement in section 6107 should not be limited to personal service on a judge. By providing that the judge be served, it is evident that the legislature intended that the judge against whom recusal is sought be given notice of the recusal request. While notice is obviously accomplished via personal service, a better rule would be to allow substitute service considering how unworkable it would be to require parties to seek out the judge whom service is directed. *See Clemens v. Dist. Court*, 390 P.2d 83, 87 (Colo. 1964) ("As frequently pointed out, there would be indefinite delays

[15] Note that the distinction between personal and substitute service has been blurred by court rules which define personal service to *include* certain types of substitute service, such as delivery to an agent. *See e.g.*, GRAP 10(c) (providing that personal service "includes" delivery to an employee at an attorney's office).

in administration of justice, the equivalent of a denial of justice, if some other mode of notice than the personal service of process was not authorized.") (citation omitted). Moreover, interpreting the service requirement under section 6107 as placing the document into the judge's hands is invariably impracticable considering that judges are often unapproachable due to courthouse security procedures. Some judges make themselves unapproachable even outside the courthouse by employing marshals to guard them. Considering the hurdles a party may be required to surpass to accomplish service by delivery into the hands of the judge, a better rule should allow for service in other ways which are reasonably calculated to give the judge notice of the recusal request. One option would be to allow service on a responsible person other than the judge, such as the Clerk of Court or the judge's chamber clerk. Notwithstanding our views on the matter, we are constrained by the legislative intent revealed in the statutory language.

[42] Here, the Bank served the recusal request on Judge Lamorena by delivery to his chamber clerk. In accordance with the foregoing, we find that the Bank failed to properly serve the request on the Presiding Judge. Nonetheless, we find that the defect in service of the request was waived.[16]

[43] We agree with the recusal judge's finding that because service was deficient, the Presiding Judge was not required to file an answer. However, Judge Lamorena did in fact file an answer, and in doing so, did not raise the defect in service of the recusal request. Thus, by answering the recusal request and failing to raise the defect in service in his answer, Judge Lamorena waived the defect. It is uniformly recognized that instances where service has been declared *jurisdictional*, (such as personal service of a complaint or summons), a defect in personal service can be waived. *See City of S. Pasedena v. Mineta*, 284 F.3d 1154, 1156 (9th Cir. 2002) ("[M]ost jurisdictional objections--

[16] At this juncture, we note the argument posited by the Real Parties in Interest that the Bank's recusal request was deficient because it was verified by the Bank's attorney and not the Bank as required under the recusal statute. We find that the recusal request complied with section 6107. *See* Guam Civ. Proc. Code §446; Title 6 GCA §4308; *cf. Hollingsworth v. Superior Court*, 236 Cal. Rptr. 193, 194-95 (Ct. App. 1987) (finding that the attorney's declaration, alleging the basis for the disqualification request and executed under the penalty of perjury, was sufficient to satisfy the verification requirement under section 170.3).

such as defects in personal jurisdiction, venue or service of process--are waived unless asserted early in the litigation.") (citations omitted). Waiver is found if a party appears in the proceeding without raising the objection either by motion or in a responsive pleading. *See* GRCP 12. We find no reason to not extend the waiver principles to the service requirement under section 6107. Accordingly, under the foregoing authorities, we find that Judge Lamorena waived the defect in service and the defect thus did not invalidate the Bank's disqualification request.[17]

[44] Having found that service on Judge Lamorena was waived, the issue is whether his failure to file an answer within ten days as required under section 6107 mandated the appointment of another judge. The answer is found in the statutory language. Section 6107 expressly provides that if a judge "fails to file the answer within the ten (10) days allowed, . . . the action or proceeding *shall be heard and determined* by another Judge." 7 GCA §6107. The statute could not be clearer in directing the remedy for failing to file an answer within ten days. *Cf. Lewis v. Superior Court*, 244 Cal. Rptr. 328, 329 (Ct. App. 1988) (finding that the judge's failure to file an answer mandated disqualification because the statute provided that "[a] judge who fails to file . . . [an] answer within time allowed shall be deemed to have consented to his or her disqualification") (citation and internal emphasis omitted). Where a statute is clear on its face, there is no need to look beyond the statutory language. *See Sky Enter. v. Kobayashi*, 2003 Guam 5 ¶ 11 ("When the language of a statute is unambiguous, the analysis stops there.") (citation omitted).

[45] We do note, however, that while Judge Lamorena's failure to file an answer would warrant disqualification under the statute, the recusal judge here allowed Judge Lamorena additional time to file an answer. In light of the presence of the ten-day requirement in the statute, it is evident that

[17] The Bank also argues that Judge Lamorena waived personal service because at a hearing on March 6, 2002, he acknowledged on the record that he received the recusal request which was filed and served on that day. We disagree. "[A]ctual notice does not constitute sufficient service." *Gerean v. Martin-Joven*, 33 P.3d 427, 431 (Wash. App. 2001) (finding that where the statute prescribed the manner of service, the statute could not be completely abandoned); *see also Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988) (finding that because service of process could only be made via personal service or service at the individual's abode, service on the individual's secretary at his or her place of work was insufficient notwithstanding that the individual received actual notice).

the legislature deemed it important that recusal issues be determined in a fairly expedited manner. An issue regarding the disqualification of a judge should never be the cause of an inordinate delay in proceedings. We sympathize with the case loads of Superior Court judges, however, the legislative intent is clear. Accordingly, we hold that the ten-day time frame for a judge to file an answer to a disqualification request, set forth in section 6107, cannot be extended.

[46] Because Judge Lamorena failed to file an answer within the ten days required under the statute, disqualification was mandated under section 6107. Accordingly, the recusal judge erred in finding that Judge Lamorena did not have to be disqualified.[18]

[47] Finally, we agree with the Bank that the recusal judge erred in finding that the Bank waived its right to challenge the untimeliness of Judge Lamorena's answer because it failed to seek a writ of mandate compelling the clerk to assign the case to another judge. Title 7 GCA §6107 provides the procedure for seeking the disqualification of a judge. It provides that "no Judge . . . shall hear or pass upon the question of his or her own disqualification, but in every case the question of the . . . Judge's disqualification *shall be heard and determined by some other Judge*." 7 GCA §6107 (emphasis added). Thus, because the statute contemplates that the issue of disqualification be determined by a recusal judge, it would be incongruous to require that the party seeking disqualification in accordance with this procedure utilize other avenues such as the filing of a writ of mandate to compel disqualification. EIE Guam argues that a recusal judge is only allowed to rule on the substantive merits of a recusal request, and cannot grant a disqualification request on procedural grounds. We disagree and find that a recusal judge is permitted to make a ruling

[18] The untimeliness of Judge Lamorena's answer does not preclude a finding that he waived a defect in service of the recusal motion. *See Dunklin v. First Magnus Fin. Corp.*, 86 S.W.3d 22, 23-24 (Ark. Ct. App. 2002) (affirming the entry of default judgment because the defendant's filed an untimely answer and did not raise the defect in service in the answer); *S. Transit Co. v. Collums*, 966 S.W.2d 906, 909 (Ark. 1998) (affirming the grant of a default judgment where the defendant filed an untimely answer to the complaint and did not raise a defect in process). By filing an answer and failing to raise the defect, Judge Lamorena appeared generally in the recusal proceedings and made himself amenable to a decision of the court. The law applicable here, specifically, 7 GCA §6107, requires that a new judge be appointed if the challenged judge files an answer after the ten day time limit.

mandating disqualification on procedural grounds. *See Urias v. Harris Farms, Inc.*, 285 Cal. Rptr. 659, 660-61 (Ct. App. 1991) (agreeing that the recusal judge properly granted a recusal request because the challenged judge failed to file an answer within ten days of service of a recusal request as required under California Civ. Proc. Code § 170.3).

[48] In the Petition, the Bank raises other issues supporting the issuance of a writ. The Bank argues that Judge Lamorena's answer to the recusal request was invalid because it was not verified, thus mandating disqualification. The Bank also contends that the recusal judge erred in not finding that Judge Lamorena should be disqualified on the merits under 7 GCA §6105 which mandates disqualification when a judge's impartiality may reasonably be questioned. In light of our holding above, it is unnecessary, for purposes of resolution of the Petition, to discuss these arguments the Bank raises.

IV.

[49] In accordance with the foregoing, we find that the recusal judge erred in finding that Judge Lamorena was not required to be disqualified from presiding over the underlying case. Judge Lamorena failed to raise a defect in service of the Bank's recusal request in his answer, thereby waiving the defect. Further, under 7 GCA §6107, a judge must file an answer to his disqualification within ten days after a recusal request is served upon him. A failure to file a timely answer mandates that a new judge be assigned to hear the proceeding. Because Judge Lamorena failed to file a timely answer, he should have been disqualified from hearing the matter and a new judge should have been assigned. Accordingly, the Bank's Petition is hereby granted and a Peremptory Writ of Prohibition shall be issued permanently restraining the Respondent Superior Court from scheduling any matters before Judge Lamorena in the case of *The Long-Term Credit Bank of Japan,*

Ltd. v. Iwao Nomoto, et al., Superior Court Case No. CV1365-99.

[50] Because the Presiding Judge has been disqualified to hear this matter, and because the statutes are "silent as to what procedure must be followed to designate a judge to perform the duties of assigning cases in a situation such as this, the Court hereby invokes its inherent power in so designating a judge." *Dizon*, 1998 Guam 3 at ¶ 18. The matter shall be assigned to the next most-senior judge of the Superior Court. "In the event that this judge is unavailable due to illness, absence, disqualification, conflict or recusal, the assignment shall then proceed to the next senior judge to him [or her] and so on and so forth as necessary." *Id* at ¶ 19.