IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
JUDICIAL DISCIPLINARY TRIBUNAL

IN THE MATTER OF
ASSOCIATE JUSTICE GREGORY DOLIN,

Respondent.

Cite as: 2021 Palau 40
Judicial Disciplinary Proceeding No. 21-023

Decided: December 30, 2021

Disciplinary Counsel	Siegfried B. Nakamura
Counsel for Respondent	R. Ashby Pate
	Lalii Chin Sakuma

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
KATHERINE A. MARAMAN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

DECISION AND ORDER

PER CURIAM:

[¶ 1] In late 2020, Associate Justice Gregory Dolin submitted an amicus curiae—Latin for "friend of the court"—brief in the U.S. Supreme Court without notice to the Chief Justice of the Palau Supreme Court. He identified himself in the brief as a law professor and Associate Justice of the Supreme Court of Palau. Usually, it would be unremarkable for a law professor focused on intellectual property to file an amicus brief in a case involving an important issue of intellectual property law, except in this case the law professor was on sabbatical leave and serving as a full time justice in the Appellate Division of the Supreme Court of Palau. We must determine whether, by authoring the amicus brief, Justice Dolin violated Canon 4.11 of the Palau Code of Judicial Conduct, which states that a "full-time judge shall not practice law while holding judicial office; provided, however, that a full-time judge may act pro se."

[¶ 2] We conclude that Justice Dolin did not violate the Palau Code of Judicial Conduct because he submitted the amicus brief on behalf of only himself, so his conduct was permissible under the provision of Canon 4.11 permitting judges to act pro se. However, we have serious concerns about his conduct. In our view, the pro se provision of Canon 4.11 is intended to allow judges to represent themselves when they are parties to litigation and their rights or interests are directly at stake. That is very different from submitting an amicus brief in a case that the judge is not a party to and in which the judge has only an indirect interest. A sitting judge in the Republic of Palau voluntarily injecting him or herself into litigation pending in another country does not reflect well on the Palau Judiciary, especially when the lawsuit does not enhance or promote the rule of law in Palau. Indeed, Canon 6.8 requires full-time judges, when not on leave, to be "at the courthouse or otherwise discharging duties during established working hours." So, although we hold that Justice Dolin did not violate the plain language of Canon 4.11 in this case, full-time judges in Palau should avoid submitting amicus briefs in other jurisdictions in the future.

BACKGROUND

[¶ 3] In December 2020, Justice Dolin, along with the Cato Institute, submitted a "Brief for the Cato Institute and Prof. Gregory Dolin as *Amici Curiae* Supporting Respondents" in *United States v. Arthrex, Inc.*, a case pending in the U.S. Supreme Court. *See* 2020 WL 7890489 (amicus brief). The cover of the brief lists Gregory Dolin (with the address for the University of Baltimore School of Law) and Ilya Shapiro, an attorney for the Cato Institute who was labeled "counsel of record." In the statement of interest, Justice Dolin states that he teaches at the University of Baltimore School of Law, notes that "his academic work lies at the nexus of intellectual property and constitutional law," and explains that he is "interested in preserving the separation of powers and, relatedly, ensuring fairness in patent-review proceedings." Justice Dolin also states that he is "currently serving as an associate justice of the Supreme Court of Palau."

[¶ 4] Shortly after the brief was filed, the Chief Justice received an unsigned complaint alleging that Justice Dolin violated the Palau Code of Judicial Conduct by submitting the amicus brief. Finding that further

development was required, the Chief Justice appointed disciplinary counsel and empaneled this Tribunal. And, following disciplinary counsel's report, we determined that a hearing was necessary and directed disciplinary counsel to file a complaint. That complaint alleges that "[b]y authoring or co-authoring an amicus brief, on behalf of himself *and* Cato Institute, in *U.S. v. Arthrex, Inc.*, Nos. 19-1434, 19-1452, and 19-1458, [Justice Dolin] violated Canon 4.11 of the Code, which prohibits a full-time judge from practicing law."

[¶ 5] Justice Dolin filed a motion to dismiss and for summary judgment. Although the Palau Code of Judicial Conduct generally contemplates a hearing for judicial disciplinary proceedings, *see* ROP Code of Judicial Conduct, ¶¶ 7.5, 7.9–7.10, and Justice Dolin has requested oral argument on his motion, the facts here are straightforward—focusing largely on the amicus brief that Justice Dolin undisputedly submitted—and it is doubtful that a hearing or oral argument would reveal any other relevant facts. To avoid wasting the time and resources of the parties and the Judiciary, we decide Justice Dolin's motion on the pleadings/brief.

STANDARD

[¶ 6] Allegations that a judge has violated the Palau Code of Judicial Conduct must be proven by clear and convincing evidence. ROP Code of Judicial Conduct, ¶ 7.8.

DISCUSSION

[¶ 7] In his motion to dismiss and for summary judgment, Justice Dolin argues that the disciplinary complaint is deficient for three reasons: (1) under the presumption against extraterritoriality, the Palau Code of Judicial Conduct should not be construed to bar the practice of law outside of Palau; (2) even if he was acting on behalf of the Cato Institute, his work authoring the amicus brief does not constitute the "practice of law" because he is not admitted to practice before the U.S. Supreme Court; and (3) he was acting pro se in authoring the amicus brief, which is permissible under the Palau Code of Judicial Conduct. We address each argument in turn.

I.

[¶ 8] Justice Dolin first argues that submitting an amicus brief in a United States court cannot violate the Palau Code of Judicial Conduct because of the presumption against extraterritoriality. The presumption against extraterritoriality, as applied by United States courts, is a canon of statutory interpretation rooted in the "longstanding principle" that a statute "is meant to apply only within the territorial jurisdiction of the United States" absent "clearly expressed" congressional intent to the contrary. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

[¶ 9] We reject this argument. *First*, Palau courts have not recognized the presumption against extraterritoriality. Justice Dolin argues that Palau courts have "implicitly" recognized the doctrine, but the Trial Division case he cites held only that Palau courts "are not bound by injunctions issued in United States District Courts." *Micronesian Indus. Corp. v. M/T Bowoon No. 7*, 1 ROP Intrm. 57, 61 (Tr. Div. 1982). Whether a *United States injunction* applies in Palau is a different question than whether a *Palau statute* applies to conduct outside of Palau. *Second*, Justice Dolin has not cited—and we have not found—any case from any jurisdiction applying the presumption against extraterritoriality in the context of judicial codes of conduct. To accept Justice Dolin's argument, then, we would need to chart new territory in at least two respects.

[¶ 10] We decline to reach these novel questions, however, because assuming that Palau would recognize the presumption against extraterritoriality and assuming it applies to the Palau Code of Judicial Conduct, that doctrine would not bar the complaint in this case. Even if a statute does not apply extraterritorially, U.S. courts still look to the "focus" of the statute to determine whether the case involves a domestic or foreign application of the statute. *See Morrison*, 561 U.S. at 266 (holding that the "focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States"). It is clear that Canon 4 of the Palau Code of Judicial Conduct, titled "Propriety"—of which Canon 4.11 is part—focuses not on the place where a judge's conduct occurs, but on how that conduct looks in the eyes of the Palau public. Bangalore Principles of Judicial Conduct, cmt. 111 ("How might this

look in the eyes of the public?").[1] In other words, "[w]hat matters more is not what a judge does or does not do, but what others think the judge has done or might do." *Id.*

[¶ 11] Justice Dolin concedes that certain conduct occurring abroad—such as committing a crime outside of Palau—may be subject to judicial disciplinary proceedings in Palau. We believe that maintaining a law practice outside of Palau (or submitting pro se amicus briefs in other jurisdictions) could similarly lead to the perception that a judge is not giving sufficient attention to his duties as a full-time judge in Palau and "create, in the mind of a reasonable observer, a perception that the judge's ability to carry out judicial responsibilities in that manner is impaired." Bangalore Principles of Judicial Conduct, cmt. 112 (describing test for impropriety); *see also* ROP Code of Judicial Conduct, Preamble (explaining importance of "public confidence in the judicial system"). Reading Canon 4.11 to prevent the practice of law outside Palau does not, as Justice Dolin argues, require judges from off-island to "cut all ties with the American legal community."[2] It simply ensures that, in the eyes of the Palau public, the judge is focusing his attention on his judicial responsibilities here instead of on practicing law or submitting briefs elsewhere.

[¶ 12] Thus, we conclude that even if Palau were to recognize the presumption against extraterritoriality, that doctrine does not require dismissal of the disciplinary complaint against Justice Dolin.

II.

[¶ 13] Next, Justice Dolin argues that even if he authored the amicus brief on behalf of the Cato Institute—which, as discussed below, we find he did

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[1] The comments to the Bangalore Principles of Judicial Conduct and the ABA Model Code of Judicial Conduct provide guidance for interpreting and applying the Palau Code of Judicial Conduct. ROP Code of Judicial Conduct, ¶ 8.3.

[2] For instance, the Palau Code of Judicial Conduct lists a number of law-related activities that full-time judges are free to engage in, such as writing or lecturing on legal matters, joining associations of lawyers, serving as a member of a governmental commission or advisory board, and engaging in other activities that do not interfere with the performance of their judicial duties. *See* ROP Code of Judicial Conduct, Canons 4.10.1, 4.10.3, 4.10.6, 4.12.

not—his work could not constitute the "practice of law" under Canon 4.11 because he was working under the supervision of Mr. Shapiro.

[¶ 14] As an initial matter, Justice Dolin misplaces reliance on what he deems the "ABA's model definition" of the phrase "practice of law." *See* ABA Task Force on the Model Definition of the Practice of Law, Draft Definition of the Practice of Law (Sept. 18, 2002), available at http://bit.ly/3n0tDD1. This definition is a *draft* definition proposed by an ABA task force that was never adopted by the task force or the ABA. As one commentator explained, "the proposed definition met an early death and never got beyond the preliminary draft stage." *See* Simon's N.Y. Rules of Prof. Conduct § 5.5:32. "Rather than revising the proposed definition, the ABA determined that a model definition was simply not a viable solution" and recommended that "all states adopt a definition of the practice of law." *See* Cristina L. Underwood, *Balancing Consumer Interests in A Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 Wash. L. Rev. 437, 449 (2004).

[¶ 15] Even accepting for purposes of this argument the ABA's draft definition—which creates an exception to the definition of practice of law for "[p]roviding services under the supervision of a lawyer in compliance with the Rules of Professional Conduct," ABA, Draft Definition of the Practice of Law § (d)(4)—Justice Dolin's argument fails.

[¶ 16] *First*, Justice Dolin argues that because he is not admitted to practice before the U.S. Supreme Court Bar, he could not file the amicus brief himself and thus must have been working under the supervision of Mr. Shapiro, the Cato Institute's attorney. It is true, as Justice Dolin notes, that the U.S. Supreme Court Rules state that "[a]n attorney seeking to file a document in [that] Court in a representative capacity must first be admitted to practice before [that] Court." U.S. Sup. Ct. R. 9.1. But those rules make it equally clear that the cover of a brief may also include "[t]he names of other members of the Bar of this Court or of the bar of the highest court of State acting as counsel." U.S. Sup. Ct. R. 34.1(f).[3] In other words, an attorney does not need

[3] As explained below, U.S. Supreme Court Rule 34.1(f) also requires the name of a pro se party to appear on the brief.

to be admitted to the U.S. Supreme Court Bar in order to "act[] as counsel"—a phrase we see as synonymous with practicing law—in that court.

[¶ 17] *Second*, nothing in the amicus brief itself—or the affidavits filed by Justice Dolin and Mr. Shapiro—indicates that Mr. Shapiro was somehow "supervising" Justice Dolin's work in authoring the amicus brief. Attorneys appearing on U.S. Supreme Court briefs will frequently have an asterisk next to their name explaining that they are practicing under the supervision of an attorney, but no such explanation is present on the amicus brief here. Indeed, contrary to Justice Dolin's argument, Mr. Shapiro affidavit states that Mr. Shapiro "signed the brief as Counsel of Record for the Cato Institute," while "Justice Dolin … authored and signed the brief only on behalf of himself." There is simply no evidence that Mr. Shapiro was supervising Justice Dolin's work on the amicus brief.

[¶ 18] In short, if Justice Dolin was in fact representing the Cato Institute—again, we reach the opposite conclusion below—it strains credulity to argue that he was not practicing law within the meaning of Canon 4.11 when he acted as counsel and submitted the amicus brief. Even under the definition Justice Dolin relies on, authoring an amicus brief involves "the application of legal principles and judgment" and "require[d] the knowledge and skill of a person trained in the law." ABA, Draft Definition of the Practice of Law § (b)(1).

III.

A.

[¶ 19] Finally, Justice Dolin argues that because he authored the amicus brief only for himself, his conduct is permissible under Canon 4.11, which provides that "a full-time judge may act pro se." The crucial question in this proceeding, then, is whether Justice Dolin submitted the amicus brief pro se. To act "pro se" means to act "[f]or oneself" or "on one's own behalf." *Black's Law Dictionary* (11th ed. 2019); *see*, *e.g.*, *Cavanaugh ex rel. Cavanaugh v. Cardinal Loc. Sch. Dist.*, 409 F.3d 753, 755 (6th Cir. 2005) ("[B]y definition, pro se means to appear on one's own behalf."). Disciplinary counsel argues that Justice Dolin was not acting pro se because (1) Justice Dolin authored the amicus brief on behalf of both himself *and* the Cato Institute, and (2) the

amicus brief supported the respondents in the underlying U.S. Supreme Court case. We reject both arguments.

[¶ 20] *First*, there is no evidence that, in submitting the amicus brief, Justice Dolin was representing himself *and* the Cato Institute. The cover of the amicus brief states that it was submitted for "the Cato Institute and Prof. Gregory Dolin" and lists two counsel: Mr. Shapiro, who represented the Cato Institute, and Justice Dolin. The mere fact that Justice Dolin's name appears on the cover of the amicus brief does not indicate that he was representing the Cato Institute. Indeed, U.S. Supreme Court Rule 34.1(f) requires that the name of a pro se party appear on the cover of any brief. And nothing in the amicus brief itself states or otherwise suggests that Justice Dolin was representing the Cato Institute. The affidavits signed by Justice Dolin and Mr. Shapiro—the only two witnesses with any knowledge of whether Justice Dolin was representing the Cato Institute—confirm as much. Mr. Shapiro explains that he "signed the brief as Counsel of Record for the Cato Institute," and Justice Dolin states that "signed the brief *only* on behalf of [himself]." In short, there is no evidence—and certainly not clear and convincing evidence—that Justice Dolin authored the brief on behalf of himself *and* the Cato Institute.

[¶ 21] *Second*, the fact that the amicus brief was submitted to "support[] respondents" in the underlying U.S. Supreme Court case does not, as disciplinary counsel argues, take Justice Dolin's representation outside of permissible pro se action. Again, the U.S. Supreme Court Rules require that the cover of an amicus brief "identify the party supported." U.S. Sup. Ct. R. 37.3(a). A similar provision in the Federal Rules of Appellate Procedure describe this requirement as a mere "administrative aid." Fed. R. App. P. 29 advisory committee's note to 1998 amendment. And although the arguments raised in the amicus brief supported the respondents' ultimate position, the purpose of an amicus brief is to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties." U.S. Sup. Ct. R. 37.1. Indeed, "an amicus ought to add something distinctive to the presentation of the issues, rather than serving as a mere conduit for the views of one of the parties." 16AA *Federal Practice & Procedure Jurisdiction* § 3975. So even though Justice Dolin and respondents were seeking a similar outcome, they provided different reasoning based on their different interests.

[¶ 22] Disciplinary counsel argues that t the Tribunal's decision in *In re Rechucher*, 2018 Palau 18, prohibits judges from acting pro se anytime they have a common interest with another party in the litigation (and claims that Justice Dolin's support of respondents was such an interest). We do not accept Disciplinary counsel's reading of *Rechucher* because in our view it is too expansive. There, Justice Rechucher represented himself and his family members as co-defendants in litigation prior to being appointed to the bench. *Id.* ¶¶ 2-4. After being appointed, Justice Rechucher withdrew as counsel for his family members, who then proceeded pro se, and he represented himself. *Id.* ¶ 4. In other words, the situation *after* Justice Rechucher was appointed essentially mirrored the situation *before* he was appointed—Justice Rechucher making arguments that advanced the interests of his family members and former clients. The Tribunal found that Justice Rechucher violated Canon 4.11 because, even though he was acting pro se, "for all practical purposes" he represented his family members in the case. *Id.* ¶ 16. The Tribunal noted that Canon 4.11 explicitly prohibits a judge from serving as a family member's lawyer and explained that it "is designed to allow a judge to defend his interests in court and, we think, his interests only" *Id.* ¶ 16.

[¶ 23] Here, by contrast, there is no risk of confusion over whether Justice Dolin represented, "for all practical purposes," the respondents in the U.S. Supreme Court case. Every party in that case was represented by their own lawyers and those other parties did not have to rely on Justice Dolin's legal arguments. The Tribunal in *Rechucher* explained that Justice Rechucher should have "afford[ed] some distance between himself and his family," 2018 Palau 18 ¶ 16, but there was no need for "distance" between Justice Dolin and the other parties in the U.S. Supreme Court because they had separate counsel, they were not Justice Dolin's family members, and Justice Dolin had never before represented them in that same case. Reading *Rechucher* as revoking a judge's ability to represent him or herself simply because the judge's interests happen to be aligned with other parties in the litigation would be contrary to the plain language of Canon 4.11 and relevant commentary permitting a judge to act pro se. *See* ABA Model Code of Judicial Conduct, cmt. to Rule 3.10 ("A judge may act pro se in all legal matters, including matters involving litigation."); Bangalore Principles of Judicial Conduct, cmt. 175 ("A judge has the right to act in the protection of his or her rights and interests, including by

litigating in the courts."). We limit the holding in *Rechucher* to the facts of that case and find that it did not prohibit Justice Dolin from authoring the amicus brief here.

[¶ 24] In short, the record shows that Justice Dolin was acting pro se—and was not representing any other party—when he authored and submitted the amicus brief. We find that, under the plain language of Canon 4.11, there is not clear and convincing evidence that Justice Dolin's conduct violated the Palau Code of Judicial Conduct.

B.

[¶ 25] Although we find no violation in this case, we write further to emphasize that full-time judges in Palau should not submit amicus briefs in other jurisdictions in the future. Canon 4.11, in our view, is intended to allow full-time judges to represent themselves when they are parties to litigation and their rights or interests are directly at stake. Even then, a judge "should be circumspect about becoming involved in personal litigation." Bangalore Principles of Judicial Conduct, cmt. 175. Exercising caution before entering the fray of litigation is particularly prudent when it comes to amicus briefs, because by definition the judge is not a party to the case and the case only indirectly impacts the judge's interests. *See In re Jud. Qualifications Comm'n Formal Advisory Opinion No. 241*, 799 S.E.2d 781, 783 (Ga. 2017) ("[W]hile individual judges are not absolutely barred from filing amicus briefs in pending litigation, they may only do so on rare occasion and with great caution.").

[¶ 26] Justice Dolin explained in the amicus brief that he was interested in the underlying case because it raised issues related to his academic work as a law professor. But when he submitted the brief, he was not a professor—he was a full-time associate justice for the Supreme Court of Palau. Whatever academic interest he may have had in litigation occurring overseas must yield to his duties as a sitting judge in the Republic of Palau. A full-time judge voluntarily and unnecessarily involving him or herself in foreign litigation as an amicus could raise serious concerns in the public's perception about "the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence, and competence." Bangalore Principles of Judicial Conduct, cmt. 112.

[¶ 27] So although we did not find a violation of Canon 4.11 in this case, Justice Dolin's conduct does not reflect well on the Palau Judiciary and full-time judges in Palau should not submit amicus briefs in other courts in the future, even if they are technically acting pro se.

CONCLUSION

[¶ 28] We find that Justice Dolin did not violate Canon 4.11, and thus we **GRANT** the motion for summary judgment and **ENTER** judgment for Associate Justice Gregory Dolin.