

**For Publication.**

**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

In the matter of the application of:

**ANNE ELDER KERSHAW,**

For *pro hac vice* admission to the Virgin Islands Bar.

**S. Ct. BA. No. 2018-0031**

Re: Super. Ct. Civ. No. 182/2015 (STX)

On Application for *Pro Hac Vice* Admission to the Virgin Islands Bar

Considered and Filed: February 8, 2019

Cite as: 2019 VI 5

**BEFORE:** **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

**OPINION OF THE COURT**

**PER CURIAM.**

¶1 This matter comes before this Court pursuant to the response of Karin A. Bentz, Esq. and Applicant Anne Elder Kershaw to this Court’s January 18, 2019 order, which required them to show cause, in writing, as to whether *pro hac vice* admission should be denied in light of an allegation that Kershaw has engaged in the unauthorized practice of law in the Virgin Islands. For the reasons that follow, we deny *pro hac vice* admission, and refer this matter to the appropriate authorities.

**I. BACKGROUND**

¶2 Bentz moved for the *pro hac vice* admission of Kershaw—a New York attorney—in early 2018 to represent the defendants in *De Leon v. Bentz*, Super. Ct. Civ. No. 182/2015 (STX). Although this Court granted the motion in a January 14, 2019 order, it stated that Kershaw’s *pro hac vice* admission would only take into effect “upon execution of the Oath with the Clerk of the Court.” On January 15, 2019, a representative from Bentz’s law office arranged for the Clerk to

administer the *pro hac vice* oath of office on January 25, 2019.

¶3 On January 17, 2019, Lee J. Rohn, Esq., counsel for the plaintiff in the *De Leon* matter, filed an emergency motion for this Court to reconsider Kershaw's *pro hac vice* admission because Kershaw had purportedly engaged in the unauthorized practice of law. The motion was accompanied by an affidavit in which Rohn swore, under penalty of perjury, that Kershaw had appeared as counsel for the defendants at a mediation that occurred on January 17, 2019, even though she had not taken the *pro hac vice* oath of office.

¶4 This Court, in a January 18, 2019 order, took judicial notice of the fact that Kershaw had never been administered the *pro hac vice* oath of office, and directed Kershaw and Bentz to respond to Rohn's filing, and to show cause, in writing, as to why this Court should not determine that Kershaw engaged in the unauthorized practice of law and take appropriate action, including denying *pro hac vice* admission. In the January 18, 2019 order, this Court also stayed its earlier January 14, 2019 order authorizing Kershaw to be administered the oath of office, pending this Court's resolution of the unauthorized practice of law allegation.

¶5 Bentz and Kershaw filed a joint response with this Court on January 23, 2019. In that response, they concede that Kershaw appeared as counsel for the defendants at the January 17, 2019 mediation, despite not having been administered the *pro hac vice* oath. However, they maintain that Kershaw was authorized to do so pursuant to American Bar Association Model Rule of Professional Conduct 5.5(c). On January 30, 2019, Rohn filed a reply to the joint response, to which Bentz and Kershaw filed a sur-reply on February 7, 2019.

## II. DISCUSSION

¶6 This Court, as the highest court of the Virgin Islands, possesses both the statutory and inherent authority to regulate the practice of law in the Virgin Islands. 4 V.I.C. § 32(e); *In re*

*Rogers*, 56 V.I. 618, 623 (V.I. 2012). Although allegations that individuals have engaged in, or aided and abetted, the unauthorized practice of law are ordinarily addressed by the Board on Unauthorized Practice of Law in the first instance, *see* V.I.S.Ct.R. 212, such issues are considered by this Court when the allegation is made with respect to an application for *pro hac vice* admission. *See In re Application of Gonzalez*, 59 V.I. 862, 865 (V.I. 2013).

¶7 In their consolidated response, Bentz and Kershaw concede that Kershaw appeared as counsel at the January 17, 2019 mediation even though she had not yet been administered the *pro hac vice* oath. However, they contend that Kershaw was authorized to represent the defendants at the mediation because her conduct falls within the purview of ABA Model Rule 5.5(c),<sup>1</sup> in that she “reasonably expect[ed]” to be authorized to participate as counsel in the matter.<sup>2</sup>

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<sup>1</sup> ABA Model Rule 5.5(c) provides, in its entirety, as follows:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

<sup>2</sup> In addition to citing ABA Model Rule 5.5, Bentz and Kershaw state in both their initial response and in their sur-reply that they believe Rohn filed her motion with this Court in bad faith because she purportedly wants to prevent the defendants from having representation at a February 14, 2019 hearing before the Superior Court. However, “[w]e do not see how the conduct of the plaintiffs or

¶8 Bentz and Kershaw’s reliance on the ABA Model Rules is misplaced. Although former Supreme Court Rule 203 did at one point provide that the ABA Model Rules governed the conduct of Virgin Islands attorneys, this provision was repealed effective February 1, 2014, and replaced with the Virgin Islands Rules of Professional Conduct. *In re Adoption of the Virgin Islands Rules of Professional Conduct*, S. Ct. Prom. No. 2013-001, slip op. at 1 (V.I. Dec. 23, 2013). Significantly, this Court expressly declined to adopt ABA Model Rule 5.5(c) when it enacted the Virgin Islands Rules of Professional Conduct; instead, the controlling Virgin Islands Rule only provides that

- (b) An individual who is not admitted to practice in this jurisdiction shall not:
  - (1) except as authorized by section 443 of title 4 of the Virgin Islands Code or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that he or she is admitted to practice law in this jurisdiction.

V.I.S.CT.R. 211.5.5(b). Title 4, section 443 of the Virgin Islands Code, which Virgin Islands Rule 211.5.5(b) incorporates by reference, provides, in pertinent part, as follows:

Except as otherwise provided by law or rule of court, and excepting court personnel acting in the performance of their court duties, the unauthorized practice of law shall be deemed to mean the doing of any act by a person who is not a member in good standing of the Virgin Islands Bar Association for another person usually done by attorneys-at-law in the course of their profession, and shall include but not be limited to:

the appearance, acting as the attorney-at-law, or representative of another person,

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their counsel is relevant to this proceeding, since such conduct would not in any way excuse the conduct of [Bentz and Kershaw] for which they have been required to show cause to this Court.” *In re Jindal*, S. Ct. BA. No. 2018-0018, \_\_ V.I. \_\_, 2018 WL 6267124, at \*3 n.2 (V.I. Nov. 29, 2018). Moreover, Rule 211.8.3 of the Virgin Islands Rules of Professional Conduct mandates that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” V.I.S.CT.R. 211.8.3(a). “That [Rohn] was the opposing attorney in the underlying case does not relieve [her] of [her] obligation to report the misconduct.” *Jindal*, 2018 WL 6267124, at \*3 n.2.

firm or corporation, before any court, referee, department, commission, board, judicial person or body authorized or constituted by law to determine any question of law or fact or to exercise any judicial power, or the preparation and/or filing of pleadings or other legal papers incident to any action or other proceeding of any kind before or to be brought before the same.

4 V.I.C. § 443(a).

¶19 Moreover, ABA Model Rule 5.5(c) was never applicable to the Virgin Islands in the first place. In its first unauthorized practice of law decision involving a bar applicant, this Court held that the statutory definition of the unauthorized practice of law codified in section 443 governed to the exclusion of the ABA Model Rules of Professional Conduct. *In re Campbell*, 59 V.I. 701, 711 (V.I. 2013) (“By its own terms, [former] Rule 203 establishes that the Model Rules govern the conduct of individuals who have actually been admitted to the Virgin Islands Bar, and makes no reference to extending the Model Rules to govern the conduct of nonmembers . . . . More importantly, Rule 203 expressly states that the Model Rules only supersede previously-promulgated *court rules* ‘pertaining to disciplinary enforcement,’ and does not purport to modify the *statutory* definition of unauthorized practice of law found in section 443.”) (emphases in original). Since then, this Court has repeatedly held that incorrect reliance on ABA Model Rule 5.5 is not a defense to the unauthorized practice of law in the Virgin Islands.<sup>3</sup> *See, e.g., In re Jindal*, S. Ct. BA. No. 2018-0018, \_\_ V.I. \_\_, 2018 WL 6267124, at \*3 (V.I. Nov. 29, 2018); *In re Nevins*, 60 V.I. 800, 804 (V.I. 2014). Consequently, ABA Model Rule 5.5(c) is wholly irrelevant to this matter.

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<sup>3</sup> That Kershaw and Bentz are apparently unaware of both the Virgin Islands Rules of Professional Conduct (first adopted in 2014) and title 4, section 443 of the Virgin Islands Code (first enacted in 1976), as well as the entirety of this Court’s unauthorized practice of law precedents, is especially troubling given that Supreme Court Rule 201 requires an applicant for *pro hac vice* admission, as well as the applicant’s sponsoring attorney, to agree to be bound by this Court’s disciplinary rules.

¶10 Applying Virgin Islands Rule of Professional Conduct 211.5.5 and section 443—the correct legal authorities—it is clear that Kershaw engaged in the unauthorized practice of law when she appeared as counsel at the January 17, 2019 mediation.<sup>4</sup> “[T]his Court has adopted the principle that the practice of law ‘encompasses all matters implicating the rights and remedies of clients.’” *Jindal*, 2018 WL 6267124, at \*3 (quoting *In re Motylinski*, 60 V.I. 621, 649 (V.I. 2014)). Representing a client in a mediation, the purpose of which is to attempt to settle a lawsuit, indisputably implicates the rights and remedies of that client so as to constitute the unauthorized practice of law when done by an individual not licensed to practice law in the Virgin Islands. See *In re Roswold*, 249 P.3d 1199, 1208 (Kan. 2011) (“Without admission *pro hac vice*, out-of-state attorneys appearing in Kansas courts, or actively participating in pretrial proceedings such as depositions or mediations, would be engaged in the unauthorized practice of law in this state.”); *In re Dox*, 152 P.3d 1183, 1187 (Ariz. 2007) (attorney not admitted in the state engaged in the unauthorized practice of law by representing a party in a private mediation in that state); *In re UPL Advisory Opinion 2003-1*, 623 S.E.2d 464, 464-65 (Ga. 2005) (representing a client in settlement discussions is the practice of law); *Cincinnati Bar Ass’n v. Telford*, 707 N.E.2d 462 (Ohio 1999) (same); accord, *Campbell*, 59 V.I. at 721 (“[P]lea negotiations fall squarely within the practice of the law.”).

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<sup>4</sup> In their response, Kershaw and Bentz note that Kershaw stated at the mediation that she had not taken the *pro hac vice* oath of office, and that Rohn did not object to her participation. However, this Court has previously held that it “emphatically reject[s] any implication that one can simply state ‘I’m not currently admitted into the Virgin Islands Bar,’ proceed to engage in precisely the activities forbidden by section 443, and then rely on those magic words as a talisman to escape liability under the statute.” *Campbell*, 59 V.I. at 724; see also *Jindal*, 2018 WL 6267124, at \*4 n.5 (disclosure in attorneys’ fee motion that *pro hac vice* applications were pending did not excuse the applicants’ unauthorized practice); *In re Nevins*, 60 V.I. at 804 (“The fact that the signature page . . . of Appellants’ Brief included the words ‘*pro hac vice* admission pending’ after Nevins’s name does not render his conduct any less improper.”).

¶11 Accordingly, we deny the petition to admit Kershaw *pro hac vice*. Since the underlying conduct may potentially warrant action beyond the denial of *pro hac vice* admission, we also refer this matter to the Office of Disciplinary Counsel, the Board on Professional Responsibility, the Board on Unauthorized Practice of Law, and the Virgin Islands Attorney General, for the purpose of taking any additional action which they may find appropriate with respect to Bentz and Kershaw's conduct in this matter.<sup>5</sup>

### III. CONCLUSION

¶12 For the foregoing reasons, we deny the *pro hac vice* application and refer this matter to the appropriate authorities for further action as appropriate.

**Dated this 8th day of February, 2019.**

**ATTEST:**

**VERONICA J. HANDY, ESQ.**  
**Clerk of the Court**

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<sup>5</sup> As this Court has previously explained, multiple entities may exercise concurrent jurisdiction to investigate and adjudicate unauthorized practice of law complaints, with different remedies being available to those entities. For instance, the Board on Professional Responsibility may impose attorney discipline on Bentz and Kershaw, whereas the Board on Unauthorized Practice of Law may obtain an order, enforceable by contempt, to direct that the unauthorized practice of law be ceased immediately. However, ultimately it is this Court that possesses the final word on what constitutes the unauthorized practice of law in the Virgin Islands, and whether the prohibition on unauthorized practice has been violated. Because we find that the prohibition on unauthorized practice has been violated in this case, any proceeding before the Board on Professional Responsibility or the Board on Unauthorized Practice of Law will be limited to the issue of remedy, and not the question of whether the prohibition on the unauthorized practice of law has been violated. *Jindal*, 2018 WL 6267124, at \*5 n.6.