For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE:	)	**S. Ct. Civ. No. 2020-0019**
	)	
WARREN T. BURNS, ESQ.	)	
Petitioner.	)	
	)	

On Petition for Writ of Mandamus

Considered: July 14, 2020
Filed: September 3, 2020

Cite as: 2020 VI 16

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

APPEARANCES:

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Attorney for Petitioner.

Tanisha Bailey-Roka, Esq.
Chief Disciplinary Counsel
St. Croix, U.S.V.I.
Attorney for Respondent.

OPINION OF THE COURT

PER CURIAM.

¶ 1 This matter comes before the Court pursuant to a petition for writ of mandamus filed by Warren Burns, Esq. on March 5, 2020, which requests that this Court issue a writ directing the Office of Disciplinary Counsel ("ODC") to either issue a ruling on Grievance No. 2018-26 or issue a scheduling order with firm dates for disposition. For the reasons that follow, we grant the petition.

I. BACKGROUND

¶2 On May 25, 2018, Mark W. Eckard, Esq. filed a grievance against Burns with the ODC. In his complaint, Eckard alleged that Burns told him to withdraw a motion for attorney's fees filed in *Gilbert v. U.S. Concrete, Inc.*, Super. Ct. Civ. No. 486/2017 (STT), on the ground that the fees sought were for work completed by five attorneys affiliated with a large Washington, D.C. law firm. Of those attorneys, three—Gorav Jindal, Corey Roush, and J. Matthew Schmitten—had applied for *pro hac vice* admission but had not taken the oath of office, while the other two had never applied for *pro hac vice* admission at all. According to the grievance, Burns told Eckard that the attorney's fees motion revealed that all of these individuals had committed the offense of unauthorized practice of law in the Virgin Islands and requested that the motion be withdrawn. Otherwise, Burns and his co-counsel would oppose the motion in the Superior Court based on the unauthorized practice of law and notify this Court of Jindal, Roush, and Schmitten's conduct in their pending *pro hac vice* admission proceedings. Although Eckard amended the attorney's fees motion to remove a misrepresentation that Jindal, Roush, and Schmitten were admitted *pro hac vice*, he did not withdraw the request that the Superior Court award attorney's fees for work performed by the unadmitted attorneys.

¶3 The ODC docketed Eckard's grievance against Burns and his co-counsel, J. Russell B. Pate, Esq., and advised Burns of the grievance through a June 22, 2018 letter, which requested that he file a written response within thirty days. In a July 19, 2018 letter, Burns advised the ODC that he had notified this Court of the unauthorized practice of law in Jindal, Roush, and Schmitten's *pro hac vice* proceedings and requested that consideration of the grievance be stayed until this Court issued a ruling or until September 30, 2018. On July 27, 2018, the ODC replied that it would extend the deadline to respond to August 30, 2018, but later granted a second extension to

September 28, 2018. Burns timely filed a response by that extended deadline.

¶4 On November 29, 2018, this Court issued its ruling in the *pro hac vice* admission proceeding. This Court determined that Jindal, Roush, Schmitten, and the other two attorneys had engaged in the unauthorized practice of law in the Virgin Islands throughout the *Gilbert* litigation, and that Eckard had facilitated their unauthorized practice. *In re Jindal*, 69 V.I. 942, 946-52 (V.I. 2018). In a footnote, this Court noted that Eckard and the applicants had argued that Burns had extorted them, but that "[w]e do not see how the conduct of the plaintiffs or their counsel is relevant to this proceeding, since such conduct would not in any way excuse the conduct of Eckard, Jindal, Roush, and Schmitten for which they have been required to show cause to this Court." *Id.* Nevertheless, citing Rule 11 of the Virgin Islands Rules of Civil Procedure and Rule 211.8.3 of the Virgin Islands Rules of Professional Conduct, the footnote continued that "we can discern nothing improper from plaintiffs' counsel granting Eckard the professional courtesy of advising him that he believed the motion violated the prohibition on the unauthorized practice of law and providing Eckard with an opportunity to withdraw the motion before reporting it to the court," and that "plaintiffs' counsel notif[ying] this Court only after he provided Eckard with an opportunity to both address his concerns and mitigate or rectify the misconduct is not evidence of an improper purpose, but wholly consistent with counsel taking his obligations under Rule 211.8.3 seriously." *Id*. Ultimately, this Court denied the *pro hac vice* applications and referred the matter to the ODC, the Board on Professional Responsibility, the Board on Unauthorized Practice of Law, and the Virgin Islands Attorney General. *Id.* at 952.

¶5 On December 4, 2018, Burns filed a supplemental response to the grievance, in which he referred to the language in the footnote of this Court's November 29, 2018 opinion. As he did not receive a response, on April 22, 2019, Burns submitted a letter to the ODC requesting a time frame

for either dismissal of the grievance based on this Court's November 29, 2018 opinion or further proceedings before the Preliminary Review Committee ("PRC"). Burns stated that he requested this update because he must disclose the grievance on his firm's malpractice insurance coverage renewals and on any future motions for *pro hac vice* admissions. In a May 15, 2019 letter from the Chief Disciplinary Counsel, the ODC advised Burns that the grievance had been re-assigned to Special Disciplinary Counsel Mike Holzknecht, Esq. and requested that he contact Attorney Holzknecht with any questions or concerns.

¶6 On July 9, 2019, Burns sent another letter to the ODC, addressed to the Chief Disciplinary Counsel, requesting that there be "some action or resolution in this matter," whether a dismissal or an order scheduling the matter. The Chief Disciplinary Counsel responded on behalf of the ODC in a July 10, 2019 letter stating that "Burns' complaint remains an open investigation before the ODC" and that "[i]t will be resolved in due time."[1] On September 24, 2019, Burns sent a letter directly to Holzknecht, which again requested dismissal, a scheduling order, "or some other substantive forward movement" on the grievance, or else he would file a petition for writ of mandamus.

¶7 Burns filed a petition for a writ of mandamus with this Court on March 5, 2020. In his petition, Burns contends that the delay in resolving the grievance has violated his due process rights and continues to cause him harm by requiring him to disclose the grievance each year on

[1] In its March 20, 2020 response, the ODC states that its "response of the case being determined 'in due time' was made upon advice by one of three wise jurists in a private March 2018 meeting, where this suggested response was to be given," and "was not intended to be dismissive, but to underline the simple truth that specific dates and times in disciplinary proceedings are difficult to determine." (Ans. 5.) We note, however, that in his July 9, 2019 letter Burns did not ask for a status update or for a specific date and time, but rather requested affirmative relief in the form of dismissal or the scheduling of a hearing before the PRC.

malpractice insurance renewals and on *pro hac* vice applications. This Court authorized the ODC to file an answer to the petition, which the ODC timely filed on March 20, 2020.[2] On April 1, 2020, Pate filed a "Notice of Joinder in Mandamus Petition," in which he requested to join in Burns's mandamus petition. On April 2, 2020, the ODC filed a response to Pate's notice of joinder,[3] which set forth additional arguments against the mandamus petition being granted but did not expressly oppose the request for joinder.[4]

[2] In addition to responding to the petition on the merits, the ODC represents that Holzknecht had conferred with the Chief Disciplinary Counsel on September 22, 2019, and determined that he would gather supplemental information because he concluded that the grievance was "on its face, sufficient to raise a reasonable inference of misconduct." V.I.S.CT.R. 207.9(a)(ii)(B). The ODC further represents that Holzknecht spoke with Burns's counsel on October 7, 2019, to request supplemental information, to which the ODC states "[a]ll attorneys responded promptly." (Ans. 6.) Although the ODC states that "it was not until March 10, 2020, that the requested evidence was finally recovered and provided to [Holzknecht,]" the ODC provides no explanation as to why Holzknecht did not receive the evidence until March 10, 2020, although it was previously stated that Burns "responded promptly." In any case, the record provided to this Court does not reflect any of these events. *Henry v. Dennery*, 55 V.I. 986, 994 (V.I. 2011) (observing that "unsworn representations of an attorney are not evidence," and concluding that a litigant's claim "was devoid of the minimum necessary evidentiary support" where the only support for it came from opposing counsel's unsworn representation).

[3] In its response to the notice of joinder, the ODC alleges that Burns and his counsel committed "a *per se* violation of the rules regarding petitions for Writs of Mandamus" by filing with this Court the letters they sent to the ODC as exhibits to the petition for writ of mandamus. (Resp. 3.) However, Rule 13 of the Virgin Islands Rules of Appellate Procedure requires that a mandamus petition be accompanied with the "parts of the record which may be essential to understand the matters set forth in the petition." V.I. R. APP. P. 13(a). Because the contents of the April 22, 2019, July 9, 2019, and September 24, 2019 letters to the ODC are directly relevant both to whether alternate untried means of attaining the desired relief exist and whether his right to have the grievance dismissed or referred to the PRC is clear and indisputable, Burns and his counsel acted in conformance with Rule 13 by filing them as exhibits.

[4] Because Pate has requested to join the mandamus petition, and the ODC has not objected to joinder, all references to Burns in this opinion shall be construed to refer to both Burns and Pate unless the context requires otherwise.

II. DISCUSSION

¶8 Pursuant to title 4, section 32(b) of the Virgin Islands Code, this Court has jurisdiction over original proceedings for mandamus. However, a writ of mandamus is a drastic remedy which should be granted only in extraordinary circumstances. *In re Le Blanc*, 49 V.I. 508, 516 (V.I. 2008)). To obtain a writ of mandamus, a petitioner must establish that he has no other adequate means to attain the desired relief and that his right to the writ is clear and indisputable. *Id.* at 517. Furthermore, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

¶9 We agree that Burns has established that he has no other adequate means to attain the desired relief. Because Burns alleges that the ODC has failed to take meaningful action to substantively resolve the underlying grievance, an appeal to this Court is not an adequate alternate remedy. *In re Elliot*, 54 V.I. 423, 428 (V.I. 2010). Moreover, the record reflects that Burns has repeatedly requested the ODC to either dismiss the grievance or set a hearing before the PRC and the ODC has not done so.[5] Therefore, Burns lacks any "practical avenues for seeking relief that

[5] In its answer and in its other filings in this matter, the ODC takes the position that Burns has violated the rules of professional conduct or otherwise acted inappropriately by initiating this mandamus proceeding, and in disclosing the existence of the grievance to his malpractice insurer, because in doing so he necessarily revealed the existence of Eckard's grievance. According to the ODC, Supreme Court Rule 207.13(a) provides that the official record in disciplinary proceedings is to be kept confidential, and reasons that this is so "because the work that is done is done under the cloak of confidentiality to protect the integrity of the regulatory construct." (Ans. 14.)

This Court has original jurisdiction to issue mandamus and other extraordinary writs. 4 V.I.C. § 32(b). This includes jurisdiction to issue such writs directed towards the ODC. *See, e.g.*, *In re Attorney Doe*, 58 V.I. 219, 222 (V.I. 2013). It is well-established that no court rule can be interpreted in a way that would limit the jurisdiction of this Court in contravention of a statute. *In re Najawicz*, S. Ct. Civ. No. 2012-0112, 2012 WL 4829227, at *1 (V.I. Oct. 10, 2012) (unpublished).

are untried."[6] *Id.* (quoting *Le Blanc*, 49 V.I. at 517).

The ODC's interpretation of the confidentiality rule is incorrect. The ODC is correct that Rule 207.13 provides for confidentiality and directs all participants to abide by the confidentiality provisions. But the confidentiality rule was adopted not to protect the ODC, but for the benefit of attorneys who have had grievances filed against them which may potentially be frivolous or unfounded. The confidentiality provisions in Rule 207.13 were modeled, with some modifications, after Rule 16 of the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement. The commentary accompanying ABA Model Rule 16 expressly provides that "[t]he confidentiality . . . is primarily for the benefit of the respondent, and protects against publicity predicated upon unfounded accusations." This intent is further reflected by Supreme Court Rule 207.13(e)(1), which expressly permits the respondent to unilaterally waive confidentiality in writing. In other words, the confidentiality provisions do not bind the respondent.

This interpretation of Rule 207.13 is also necessary in order for the confidentiality rule to remain consistent with the First Amendment of the United States Constitution. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978); *R.M. v. Supreme Court*, 883 A.2d 369, 378 (N.J. 2005). Moreover, Supreme Court Rule 207.13(e)(4) expressly allows disclosure to obtain the assistance of other agencies or organizations, which would certainly encompass filing a mandamus petition with this Court. Consequently, Burns did not violate Rule 207.13 or any provision of the Virgin Islands Rules of Professional Conduct by filing his mandamus petition with this Court, disclosing to his malpractice insurer that a grievance had been filed against him, or otherwise sharing information about the grievance with others.

[6] In its response, the ODC asserts that Burns "could have written a letter to the Chair of the Board on Professional Responsibility," but "did not." (Ans. 11.) The requirement that the petitioner not have other adequate means to obtain the desired relief, however, does not mandate that a petitioner formalistically pursue each and every theoretical avenue without any regard to whether relief is likely to be granted. *See Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 461 (3d Cir. 1996) (rejecting argument that petitioner was required to formally move for permission to take an interlocutory appeal prior to seeking mandamus relief). Importantly. "[t]he mere fact that there is another remedy will not prevent the issuance of the writ of mandamus . . . where it is doubtful whether or not there is an adequate specific remedy in the ordinary course of law." *State ex rel. Scott v. Dobson*, 135 P.2d 794, 796-97 (Or. 1943) (quoting 38 CORPUS JURIS, *Mandamus* § 561).

The question of what authority the Chair may exercise over the ODC is an issue of first impression. While the Chair has the power to "oversee implementation and coordination of procedures for the processing and disposition of disciplinary matters," V.I.S.CT.R. 207.1(c), there is no specific language granting the Chair the authority to overrule the ODC with respect to initial determinations in individual cases. Moreover, to the extent the relationship between the Board and the ODC is in some sense analogous to the relationship between a court and the prosecution, the gravamen of Burns's claim is that the ODC has not dismissed the grievance against him but has also not transmitted that grievance to the PRC.

But perhaps most importantly, both the ODC and the Board Chair ultimately receive their powers from the same source: this Court. It is for this reason that this Court has in a prior case

¶10 With respect to the second factor—that the right to the writ be clear and indisputable—the ODC maintains in its answer that "[t]here is no rule of the Supreme Court governing the ODC that mandates when a preliminary investigation must come to a close. None." (Ans. 11-12.) To the extent the ODC believes it has the unfettered authority to keep an investigation open indefinitely, it is mistaken. Attorney discipline matters are quasi-criminal proceedings to which the constitutional right to due process applies. *In re Maynard*, 60 V.I. 444, 451 & 452 n.5 (V.I. 2014); *see* 48 U.S.C. § 1561 (providing that "[n]o law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law" and further incorporating by reference the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution). This Court has previously held that the common law doctrine of laches applies to attorney discipline proceedings, and that grievances may be dismissed due to "unreasonable and unexplained" prejudicial delays. *In re Joseph*, 60 V.I. 540, 559-61 (V.I. 2014). Moreover, substantial delays in investigating, prosecuting, and adjudicating grievances are inconsistent with the primary purpose of the disciplinary system, which "is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." [7] *V.I. Bar v. Brusch*, 49 V.I. 409, 419 (V.I. 2008) (quoting STD'S FOR

addressed the merits of a mandamus petition directed against the ODC even after first determining that adequate alternate means, in the form of a direct appeal, were available. *In re Doe*, 58 V.I. 219, 222 (V.I. 2013).

[7] In its response to the notice of joinder, the ODC states that "[t]his case is still very young and still very much in its infancy." (Resp. 5.) We disagree with the characterization that a grievance which has been pending for nearly two years is "very young" or "in its infancy." While the grievance is in the very first stage of the disciplinary process where the ODC must decide whether to summarily dismiss the grievance or refer it to the PRC, the fact that the grievance is still in the

IMPOSING LAWYER SANCTIONS § III.A., Std. 1.1.)).

¶11 The duty owed to Burns and other respondents, however, is not the only duty implicated here. This Court possesses exclusive jurisdiction to regulate the practice of law in the Virgin Islands, including the attorney discipline system. 4 V.I.C. § 32(e). This Court created the ODC as an arm of the Court to assist it in exercising that exclusive jurisdiction. *See* V.I. S.CT.R. 203(c). As an arm of the Court, the powers of the ODC "are strictly limited to those plainly granted by the [C]ourt" and "cannot be broadened by implication." *In re Payton*, S. Ct. BA. No. 2007-0146, 2009 WL 763814, at *3 (V.I. Mar. 20, 2009) (unpublished) (quoting *Stone v. St. Louis Union Trust Co.*, 166 S.W. 1091, 1094 (Mo. Ct. App. 1914)). And "[a]s an agent of this court, the ODC can act only within the authority granted by this court, and separation of powers concerns do not require that we give the ODC the kind of deference given to legislatively created administrative agencies." *Breiner v. Sunderland*, 143 P.3d 1262, 1266 (Haw. 2006). In other words, "Disciplinary Counsel's duties are owed to the supreme court." *Id. See also The Florida Bar v. McCain*, 361 So.2d 700, 705 (Fla. 1978) ("The Florida Bar is an agency of this Court and under its direction. Whenever a lawyer feels that an unreasonable time has passed since the alleged misconduct for which the bar brings charges, this Court will be open to address that problem. After all, The Florida Bar acts for and is an agency of this Court. When the child falters the parent shall correct.").[8]

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screening stage despite the passage of nearly two years is precisely the conduct that Burns alleges warrants mandamus relief.

[8] In its response to the notice of joinder, the ODC objects to Pate's characterization of the ODC as "a quasi-judicial arm of the Court," instead maintaining that "[t]he powers and duties of the Chief Disciplinary Counsel are prosecutorial in nature." (Resp. 1.) We disagree. As a threshold matter, the ODC does not fulfill an exclusively prosecutorial function, in that it is empowered to unilaterally dismiss a grievance after it has been filed in lieu of referring it to the PRC after determining that it is frivolous or is otherwise not sufficient to raise a reasonable inference of misconduct. *See* V.I.S.CT.R. 207.9(a). Unquestionably, the decision to dismiss—or not to

¶12 The Virgin Islands Rules of Attorney Disciplinary Enforcement, adopted as Supreme Court Rule 207 in their current form effective January 1, 2015, were partially modelled after the ABA Model Rules for Lawyer Disciplinary Enforcement. Rule 207.9 establishes a comprehensive procedure for the screening, investigation, and adjudication of grievances. Upon receipt of a grievance against a lawyer subject to the disciplinary jurisdiction of this Court, "the ODC shall conduct an evaluation of the information regarding the lawyer." V.I.S.CT.R. 207.9(a)(ii). "If the information regarding the lawyer, on its face, is not sufficient to raise a reasonable inference of misconduct or incapacity, the ODC shall dismiss the matter"; otherwise, "the ODC shall gather supplemental information." V.I.S.CT.R. 207.9(a)(ii)(A)(B). Subsequently, "[i]f the aggregate of information gathered by the ODC is not sufficient to raise a reasonable inference of misconduct or incapacity, the ODC shall dismiss the matter"; otherwise, "the ODC shall conduct a formal investigation of the matter." V.I.S.CT.R. 207.9(a)(ii)(C)-(D). At the conclusion of this formal investigation, the ODC presents the evidence to the PRC, together with any written submissions

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dismiss—a case is a judicial act. *Johnson v. Thompson-Smith*, 700 Fed. Appx. 535, 537 (7th Cir. 2017) (citing *Forrester v. White*, 484 U.S. 219, 227 (1988)). Although there are parallels between the role of a prosecutor and the role of the ODC, a prosecutor exercises the authority of the executive branch when deciding whether to bring charges against a criminal defendant. *See In re Richards*, 213 F.3d 773, 483-84 (3d Cir. 2000). In contrast, the power to discipline attorneys and otherwise regulate the legal profession is unquestionably a judicial power to be exercised exclusively by the Judicial Branch. *See Kendall v. Russell*, 572 F.3d 126, 137-38 (3d Cir. 2009); *see also Pate v. Gov't of the V.I.*, 62 V.I. 271, 300-01 (V.I. Super. Ct. 2015). Consequently, courts have repeatedly determined that disciplinary counsel offices established by a jurisdiction's court of last resort are quasi-judicial entities. *See, e.g.*, *Moncier v. Jones*, 557 Fed. Appx. 407, 409 (6th Cir. 2014) (holding that the Chief Disciplinary Counsel of Tennessee "is entitled to absolute, quasi-judicial immunity"); *Capogrosso v. Supreme Court of N.J.*, 588 F.3d 180, 185 (3d Cir. 2009) (holding that attorneys employed in the New Jersey Supreme Court's Office of Disciplinary Counsel are entitled to quasi-judicial immunity); *Disciplinary Counsel v. Hickey*, 182 A.3d 1180, 1187 (Conn. 2018) ("[I]t is the exclusive duty of the Judicial Branch to regulate attorneys" and therefore "entities such as the committee and Disciplinary Counsel act as agents of the court when carrying out their regulatory and disciplinary functions.") (collecting cases).

the respondent elects to submit for the PRC's consideration. V.I.S.CT.R. 207.9(b). The PRC is an entity separate from the ODC, consisting of attorneys and members of the public who volunteered for such service. V.I.S.CT.R. 203(b)(2). Significantly, it is the PRC that makes the ultimate determination as to whether there is sufficient probable cause for the matter to proceed to a hearing before the Board on Professional Responsibility. V.I.S.CT.R. 207.9(b)(3). Thus, the PRC serves as a check on the power of the ODC to prosecute a grievance that has not been dismissed, in the same manner as a grand jury with respect to a prosecutor.

¶13 Although Rule 207.9 does not set forth specific time standards for each stage of the process, this Court did not contemplate that the period between the filing of a grievance and its dismissal or transmission to the PRC would encompass a substantial amount of time. While not binding on this Court, the comment accompanying Rule 11 the ABA Model Rules for Lawyer Disciplinary Enforcement—upon which this Court modelled the Rule 207.9 procedure—provides that the "[e]valuation, investigation, and the filing and service of formal charges or other disposition of routine matters generally should be completed within six months; complicated matters generally should be completed within twelve months." Moreover, the most recent ABA Survey on Lawyer Discipline Systems reflects that in the overwhelming majority of the 35 participating disciplinary jurisdictions—most of which have also adopted a variant of the ABA Rule 11 procedure—the period between the filing of a grievance with the ODC and a decision by the PRC to issue or not issue formal charges typically takes between six to twelve months.[9]

¶14 Here, the grievance against Burns has been pending before the ODC for more than two

[9] Am. Bar Ass'n, Standing Committee on Prof'l Resp., 2017 Survey on Lawyer Discipline Sys., https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2017-chart-6.pdf (last visited July 21, 2020).

years, yet it remains in the very first stage of the process – the determination by the ODC as to whether the grievance should be summarily dismissed or referred to the PRC for a determination of whether the grievance should proceed to formal hearing. The record reflects that Burns not only timely filed a response with the ODC but also filed a supplemental response to the grievance based on the language in of the footnote in our *Jindal* opinion, and then submitted follow-up letters to the ODC on April 22, 2019, July 9, 2019, and September 24, 2019, requesting either dismissal or a hearing before the PRC, as is provided for in Rule 207.9. The ODC, however, has neither dismissed the grievance nor referred it to the PRC, and has provided neither Burns nor this Court with any legitimate explanation for why this continues to be the case after more than two years. *See Breiner*, 143 P.3d at 1268.

¶15 The failure of the ODC to take any action is particularly troubling when the primary defense proffered by Burns is that the *Jindal* opinion resolved the question of whether his conduct was permissible. Because it exercises powers delegated to it by this Court, the ODC possesses an obligation to follow our decisions, even if it disagrees. *In re Rogers*, S. Ct. Civ. No. 2014-0024, 2014 WL 2211396, at *3 (V.I. May 27, 2014) (unpublished). The ODC, however, has not addressed the effect of the *Jindal* opinion, if any, in either its responses to Burns or in any of its filings with this Court in this mandamus proceeding.[10] It could very well be the case that the

[10] Because the ODC has not responded to Burns's claim that the *Jindal* footnote precludes it from prosecuting the underlying grievance, we have no way of knowing whether the ODC simply has not considered that argument during the two years the grievance has been before it or if believes that it is not bound by the language of the footnote. To the extent it is the latter, we note that the fact that a statement of law is made in a footnote rather than in the text of an opinion has no bearing on whether it is precedential. *See Ventura v. People*, 64 V.I. 589, 615 (V.I. 2016) (rejecting the Superior Court's characterization of a rule of law announced in a footnote as non-binding dicta).

We recognize, however, that because we stated earlier in the footnote that whether Burns's conduct was appropriate had no bearing on whether Eckard and the *pro hac vice* applicants engaged in the unauthorized practice of law, the portion of the footnote applying Rule 11 of the

language in the *Jindal* footnote does not necessarily preclude the ODC from prosecuting the grievance against Burns – for instance, if the ODC obtained new evidence in connection with its review of the grievance that was not submitted to this Court in the *Jindal* matter.[11] Since the ODC has provided no explanation to this Court, we have no way of knowing whether the ODC has a

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Virgin Islands Rules of Civil Procedure and Rule 211.8.3 of the Virgin Islands Rules of Professional Conduct could arguably be characterized as dicta. Although this Court has repeatedly acknowledged the general proposition that dicta is not binding, *see Walters v. Walters*, 60 V.I. 768, 777 n.11 (V.I. 2014), we have never had the occasion to consider whether this remains true in a subsequent proceeding involving the same parties. Other courts, however, have recognized such an exception. As the Michigan Court of Appeals has explained,

> The problem with dicta, and a good reason that it should not have the force of precedent for later cases, is that when a holding is unnecessary to the outcome of a case, it may be made with less care and thoroughness than if it were crucial to the outcome. Because the legal holdings in published cases are binding not only on the parties to those cases, but also on all later parties in all later cases, allowing dicta to be precedent would have the unfair effect of binding litigants who have never had the opportunity to argue the issue to a remark of the court, which may not be the best expression of the court's studies. The same argument, however, does not apply to the actual litigants before the court when the decision is made. These litigants have had an opportunity to argue the issue decided, if it is properly before the court. Courts make brief judgments all the time, but these judgments are nonetheless binding on the parties to the particular lawsuit. If an issue is properly before this Court, the Court's decision on the question is binding on the lower court and on any later panels which hear the case, under the doctrine of the law of the case.

Bauer v. City of Garden City, 414 N.W.2d 891, 895 (Mich. Ct. App. 1987). Assuming—without deciding—that the language in the *Jindal* footnote was dicta, it is nonetheless clear that both Eckard and Burns participated in the *Jindal* proceeding, and Eckard asserted Burns's conduct as a defense to the unauthorized practice of law allegations. Therefore, the issue was briefed by the parties and properly before the Court, even if its resolution may not have been strictly necessary to the ultimate decision. While this does not necessarily foreclose the ODC's prosecution—particularly if it has obtained relevant evidence that was not before this Court—it is a threshold issue that nevertheless must be considered at the earliest opportunity.

[11] Although this Court, in a March 10, 2020 order, granted the motion of the ODC to disclose any confidential materials necessary to respond to the mandamus petition, the ODC has not asserted that it possesses any such information.

valid reason for allowing the grievance to remain open. Regardless, even if the ODC were to determine that the *Jindal* decision has no relevance to this grievance and does not intend to dismiss the matter, it would be required under Rule 207.9 to refer the matter to the PRC, which would then determine whether the grievance should proceed to a hearing or be dismissed.

¶16 For these reasons, we conclude that Burns has a clear and indisputable right to the relief he has sought. Rule 207.9 requires that the ODC either dismiss a grievance or transmit it to the PRC for a hearing in a timely fashion; it does not give the ODC the option to simply hold on to a grievance indefinitely. As the Supreme Court of Hawai'i observed in a case in which it granted mandamus relief under very similar circumstances:

> [The first] grievance was brought before ODC as early as March 10, 2000, and [the second] grievance was brought before ODC as early as June 4, 2004. Yet the investigations are ongoing, formal petitions have not been filed, hearing officers or committees have not been appointed, hearings have not been conducted, and, given the pace and tenor of the investigations, there is no likelihood that the regular disciplinary avenues of oversight by this court will be available any time soon. We will not allow an attorney to be subjected to abusive investigative tactics while he or she waits for the opportunity to have such tactics reviewed in connection with a report and recommendation for discipline that may never be filed with this court.

Breiner, 143 P.3d at 1268. Thus, we conclude that the second mandamus factor has been satisfied.

¶17 We also find that issuance of a writ of mandamus is appropriate under the circumstances. The ODC acknowledges in its answer that "[t]he ODC . . . is working on a significant backlog of cases," (Ans. 5), and that the ODC and the Board on Professional Responsibility "have struggled with the backlog of cases that exist now." (Ans. 14.) To the extent new evidence or other circumstances would permit the ODC to prosecute Burns notwithstanding the language in *Jindal*, the failure of the ODC to refer the matter to the PRC despite the passage of two years is contrary to the very purpose of the disciplinary system, which is to protect the public from attorneys who have violated the rules of professional conduct. *Brusch*, 49 V.I. at 419. But if Burns is correct that

the *Jindal* footnote warrants dismissal, the public interest would not be served by permitting the ODC to use its limited resources to engage in a full-blown investigation of conduct that is permissible. Therefore, we grant the petition for a writ of mandamus.

III. CONCLUSION

¶18 Burns has demonstrated that he lacks adequate means of attaining his desired relief other than a writ of mandamus. Moreover, Burns possesses a clear and indisputable right to have the underlying grievance either dismissed or referred to the PRC. Since issuance of the writ is appropriate under the circumstances, we grant the petition and direct the ODC to within fourteen days either dismiss the grievance or refer it to the PRC.

Dated this 3rd day of September, 2020.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court