

FILED

December 23, 2021 04:39 PM

SCT-Misc-2021-0024
VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN THE MATTER OF THE PETITION	)	S. Ct. Misc. No. 2021-0024
OF	)	
	)	
VIRGIN ISLANDS BAR	)	
ASSOCIATION	)	
	)	
TO ADOPT AMERICAN BAR	)	
ASSOCIATION MODEL RULE OF	)	
PROFESSIONAL CONDUCT 5.5(c).	)	
	)	
	)	

Considered and Filed: December 23, 2021

Cite as: 2021 VI 24

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 a petition filed by the Virgin Islands Bar Association. In its petition, the Bar Association requests that this Court amend Supreme Court Rule 211.5.5, pertaining to multijurisdictional practice and the unauthorized practice of law, to include new language which would track Rule 5.5(c) of the American Bar Association Model Rules of Professional Conduct. For the reasons that follow, we deny the petition.

I. DISCUSSION

A. Authority for Filing of Petition

¶ 2 Before considering the merits of the Bar Association's request, we note that the Bar Association cites to no authority to support the filing of its petition to amend the Rules of this Court. This Court, as the court of last resort of the Virgin Islands, certainly possesses the

constitutional, statutory, and inherent authority to regulate all aspects of the practice of law in the Territory, as well as to adopt the rules of practice and procedure for the courts of the Virgin Islands, including those pertaining to the admission and conduct of attorneys. *See* 48 U.S.C. § 1611(c); 4 V.I.C. § 32(e); *In re Campbell*, 59 V.I. 701, 709 (V.I. 2013). However, as the Supreme Court of the United States has explained, when a court of last resort exercises its authority to promulgate rules of practice and procedure—including rules governing admission to the bar and the conduct of attorneys—it is not performing a judicial act or exercising a judicial power, but rather acts in a legislative capacity. *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980). Consequently, proceedings to effectuate the adoption, amendment, or repeal of a court rule, while perhaps bearing certain trappings of judicial proceedings, are not judicial proceedings at all, in that “[t]hey do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens.” *Id.* (internal citations omitted). For this reason, when exercising rulemaking authority, a court of last resort stands in place of a state legislature and the judicial officers who serve on it “are the State’s legislators,” and when engaging in such rulemaking may comport themselves as such. *Id.* at 734.

¶ 3 It is such a fundamental principle of American government as to not require citation that while private citizens, organizations, and other stakeholders may certainly lobby a legislature and its members to enact certain legislation, such groups have no right to file their proposed legislation as a bill directly with the legislature, force the legislature to hold a hearing on the bill, and then mandate that the members of the legislature debate the bill and vote on it. The same holds true for the rulemaking function of this Court. Recognizing the importance of considering the views from judicial officers, practicing attorneys, and the public, this Court has established an Advisory Committee on Rules and has charged it with continuously studying the rules of practice

and procedure, soliciting and receiving comments from the Bar Association and other stakeholders, and suggesting amendments and other rule changes for consideration by this Court. *See V.I. R. APP. P. 37(b)*. While some courts of last resort in other jurisdictions, such as Florida, have established a formal procedure to permit bar associations and others to file requests for rule changes directly with the court without any vetting by a rules committee or similar gatekeeper, this Court has not done so. Therefore, the Bar Association does not have an absolute right to file a petition with this Court requesting an amendment to a court rule with the expectation that the Court will even docket it, let alone act on it.

¶ 4 Nevertheless, while we emphasize that we are under no obligation whatsoever to consider, or even docket, the Bar Association's petition, we exercise our discretion to do so in this instance. The Bar Association is not an ordinary organization, but an arm of this Court, "created to assist the Court in regulating the practice of law in the territory." V.I.S.C.T.R. 205(a). The issues raised by the Bar Association in its petition go directly to the heart of this purpose. While it may have been preferable for the Bar Association to bring its proposal to the Advisory Committee on Rules prior to presenting it to this Court, we decline to mandate such action with respect to this particular proposal, since we wish to encourage, rather than discourage, the Bar Association from fulfilling its core mission. Therefore, in this instance, we will consider the Bar Association's request for this Court to amend Rule 211.5.5. However, we admonish and express caution that we may not do so with respect to future petitions that have not been properly vetted by the Advisory Committee.

B. The Proposed Amendment

¶ 5 Supreme Court Rule 211.5.5, titled "Unauthorized Practice of Law; Multijurisdictional Practice of Law," reads, in its entirety, as follows:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (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.

Except for the reference to title 4, section 443 of the Virgin Islands Code in Rule 211.5.5(b)(1), the language of Rule 211.5.5 largely tracks that found in American Bar Association Model Rule of Professional Conduct 5.5(a)-(b). However, in framing Rule 211.5.5 this Court did not adopt any portion of Model Rule 5.5(c)-(e). Model Rule 5.5 reads, in its entirety, as follows:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules 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 the lawyer is admitted to practice law in this jurisdiction.
- (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.
- (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house

counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires *pro hac vice* admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
 - (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.
- (e) For purposes of paragraph (d):
- (1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,
 - (2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

¶ 6 The decision to not adopt Model Rules 5.5(c)-(e) was a deliberate one. When this Court issued its October 10, 2013 order requesting public comments on the proposed Rule 211, the version of Rule 211.5.5 released to the public included a proposed Rule 211.5.5(c) that tracked Model Rule 5.5(c) nearly word-for-word, as well as a proposed Rule 211.5.5(d) that would have permitted practice without admission by in-house counsel, albeit using substantially different language than Model Rule 5.5(d). Moreover, the proposed Rule 211.5.5(b) circulated for comment did not reference section 443, but used language identical to that in Model Rule 5.5(b).

¶ 7 However, on October 25, 2013, this Court received extensive comments from the Office of Disciplinary Counsel (“ODC”) strongly opposing modeling Rule 211.5.5 after Model Rule 5.5. The ODC noted that the language in Model Rule 5.5(c) and proposed Rule 211.5.5(c) was directly contrary to the definition of the unauthorized practice of law set forth in section 443 and subsequently adopted by this Court in numerous decisions. In addition to the conflict with

section 443, the ODC also opposed both the proposed Rules 211.5.5(c) and (d) on policy grounds, noting that it would be impossible to regulate individuals practicing law pursuant to these provisions since there was no mechanism in place for them to register or otherwise announce their presence, so as to ensure that the ODC or this Court could verify that they were actually practicing within the bounds of those exceptions. Although the ODC's comments were part of the electronic public docket and were filed three weeks before the notice and comment period closed, neither the VIBA nor any other entity or individual filed any comments in response to the ODC's comments; in fact, the comments from the ODC were the only comments filed with the Court on any aspect of the proposed Rule 211.

¶ 8 Ultimately, this Court agreed with the ODC, and the provisions in Rule 211 that went into effect on February 1, 2014, adopted its recommendations in their entirety. This Court modified Rule 211.5.5(b) by adding an express cross-reference section 443 to ensure that adoption of the Rule did not erase or modify pre-existing case law pertaining to the unauthorized practice of law. This Court declined to adopt proposed Rules 211.5.5(c)-(d) and initiated a process to address the issues of temporary practice and in-house counsel admission through other rules. As a result of that process, this Court adopted Rule 202.1 to establish a formal process for the admission and registration of in-house counsel. And in direct response to a request from the Virgin Islands Bar Association, this Court amended Rule 201, pertaining to *pro hac vice* admission, to greatly liberalize the rule by repealing the lifetime limit of three *pro hac vice* appearances by a lawyer or law firm and to also repeal the requirement that a *pro hac vice* attorney pay a licensing fee.

¶ 9 The *pro hac vice* admission rule has remained a subject of continuing study, and in fact Rule 201 was recently amended to define the term "matter" to clarify that *pro hac vice* admission could be obtained for transactions, mediations, arbitrations, and other non-litigation matters, to

provide for reciprocal *pro hac vice* admission in the courts of the Virgin Islands for certain *pro hac vice* admissions granted by the United States District Court of the Virgin Islands, and to establish a system for a single attorney to obtain multiple *pro hac vice* admissions through a single consolidated application.

¶ 10 The liberalization of the *pro hac vice* rule occurred concurrently with other reforms to the bar admissions process. This Court adopted the Uniform Bar Exam and admission on motion without examination, resulting in the Virgin Islands being the only United States territory to adopt both. This Court also became one of the first in the nation to permit applicants for regular admission to the Virgin Islands Bar to practice under the supervision of a licensed Virgin Islands attorney as a certified legal intern while their applications for regular admissions are pending, years before other jurisdictions would adopt similar rules in response to the COVID-19 pandemic. Thus, this Court has mitigated the effects of both section 443 and the absence of Model Rule 5.5(c) by both eliminating the barriers to obtaining *pro hac vice* admission, as well as making it exponentially easier for attorneys admitted in other United States jurisdictions to become regularly admitted. As a result, in a mere five years the Virgin Islands went from being arguably one of the most restrictive jurisdictions in the United States with respect to admission to the practice of law, to arguably being one of the most open and inclusive.

¶ 11 It is with this context in mind that we consider the Bar Association's petition for us to exercise our rulemaking power to adopt Model Rule 5.5(c). The Bar Association does not acknowledge in its petition or any of the exhibits thereto the existence of section 443, let alone explain how Model Rule 5.5(c) could be reconciled with the definition of the unauthorized practice of law codified in that statute. Even if this omission is due to the Bar Association recognizing that this Court is not bound by section 443 and any rule promulgated by this Court pertaining to the

unauthorized practice of law would supersede section 443, *see World Fresh Markets, LLC v. Palermo*, 2021 VI 1 ¶ 18 (citing *Gerace v. Bentley*, 65 V.I. 289, 303 (V.I. 2016)), the Bar Association also does not acknowledge the extensive amendments to this Court's bar admissions rules—particularly the *pro hac vice* rule—that serve largely the same purpose as Model Rule 5.5(c). And perhaps most significantly, the Bar Association does not address the core objection to Model Rule 5.5(c) that the ODC emphasized in its October 25, 2013 objection to proposed Supreme Court Rule 211.5.5(c): namely, that allowing individuals to practice Virgin Islands law without obtaining *pro hac vice* admission or otherwise registering with this Court makes it impossible for this Court or the ODC to verify that those individuals are actually in compliance with the rule.¹

¶ 12 The Bar Association, however, does explain why it believes its proposed rule amendment is necessary. It maintains that its “members have expressed concern about the application of the UPL laws as they relate to transactional matters involving stateside counsel and local counsel and scenarios in which stateside counsel is engaged in or will be engaged in litigation in the Territory on a *pro hac vice* basis,” and that “the typical interactions between local and stateside counsel are impeded by the application of the recent [UPL] decisions in the transactional, litigation and pre-litigation settings.” (Pet. 1-2.) According to the Bar Association, “these

¹ For instance, Model Rules 5.5(c) and (d) only authorize temporary practice without admission for a lawyer who is admitted in another United States jurisdiction who is not suspended or disbarred. In one of this Court's earliest unauthorized practice of law cases, the respondent had claimed that Model Rules 5.5(c) and (d) authorized him to perform legal services in the Virgin Islands without obtaining regular or *pro hac vice* admission. However, the record reflected that despite his repeated invocation of Model Rules 5.5(c) and (d), the respondent had at all pertinent times been suspended or inactive and thus not eligible to practice under Model Rules 5.5(c) and (d) even if those provisions did apply to the exclusion of section 443. *See In re Motylinski*, 60 V.I. 621, 652 (V.I. 2014).

interactions are standard practice between lawyers in the mainland, who may be from differing states involved in the same type of interactions but yet do not run afoul of any UPL laws stateside.”² (Pet. 2.)

¶ 13 From these statements, it appears to this Court that the concerns of the Bar Association members referenced in the petition are not with Supreme Court Rule 211.5.5, section 443, or the precedents applying those authorities, but rather a misunderstanding of what does and does not constitute the unauthorized practice of law in the Virgin Islands and the rest of the United States. Neither Rule 211.5.5, section 443, nor any precedent of this Court prohibits an attorney licensed in another United States jurisdiction from interacting with a licensed Virgin Islands attorney. Supreme Court Rule 201, governing *pro hac vice* admission, limits *pro hac vice* admission only to those “who ha[ve] been retained or requested to represent any party in any legal matter in the Virgin Islands,” and requires that the applicant be sponsored by a regularly admitted attorney who agrees to be responsible for the prosecution of the matter to which *pro hac vice* admission is sought. Consequently, Rule 201 expressly requires that a *pro hac vice* applicant not only interact with the regularly admitted attorney and the client, but that the regularly admitted attorney and prospective *pro hac vice* applicant discuss the nature of the matter—whether it be litigation or transactional—

² It appears that the Bar Association uses the phrase “stateside counsel” to refer to individuals who are not members of the Virgin Islands Bar and “local counsel” to refer to individuals who are admitted to the practice of law in the Virgin Islands. However, for more than 30 years there has been no requirement that one be a resident of the Virgin Islands to be a member of the Virgin Islands Bar, *see Barnard v. Thorstenn*, 489 U.S. 546 (1989), and in fact a substantial number of the regular members of the Virgin Islands Bar reside outside of the Virgin Islands, particularly since this Court adopted the Uniform Bar Exam and admission on motion. To the extent there is any uncertainty, we remind the Bar Association that a regular member of the Virgin Islands Bar who resides outside of the Virgin Islands—whether it may be in the mainland United States, another United States territory, or even a foreign country—has the same rights and privileges as a regular member of the Virgin Islands Bar who resides in the Virgin Islands, including the right to serve as the sponsoring attorney for a *pro hac vice* applicant.

so that they can determine whether to mutually agree to this arrangement. Moreover, the Virgin Islands Rules of Professional Conduct—which bind both the regularly admitted attorney and the *pro hac vice* applicant—require that a lawyer provide competent representation; consult with and communicate with the client, including establishing the scope of the representation and fee; and take the required steps to avoid conflicts of interest. *See* V.I.S.Ct.R. 211.1.1, 211.1.2, 211.1.4; 211.1.4; 211.1.5; 211.1.7; 211.1.10. To comply with these ethical duties, both the regularly admitted attorney and the *pro hac vice* applicant would necessarily need to interact with the client, conduct research and become familiar with Virgin Islands law as a prerequisite to even filing an application for *pro hac vice* admission.

¶ 14 Nor is there a categorical ban on such interactions or related activities after a *pro hac vice* application has been filed but before the applicant has been administered the oath of admission. As this Court has repeatedly emphasized, “the practice of law encompasses all matters implicating the rights and remedies of clients.” *In re Kershaw*, 70 V.I. 859, 864 (V.I. 2019) (quoting *In re Jindal*, 69 V.I. 942, 949 (V.I. 2018)) (emphasis added). After making the decision to apply for *pro hac vice* admission, the *pro hac vice* applicant need not cease all interactions with the regularly admitted attorney or the client, decline to read transcripts or perform any legal research, and otherwise pretend that the matter does not exist. Researching Virgin Islands law for the purpose of achieving competence as required by Rule 211.1.1. does not implicate the rights and remedies of a client. Neither does continuing to become abreast of factual or procedural developments in the matter, including communicating with the client and the regularly admitted attorney. The same would certainly be true of a wide variety of other pre-admission activities.

¶ 15 Of course, as our precedents illustrate, there are a wide variety of activities in which one cannot engage prior to being administered the oath. For example, while a *pro hac vice*

applicant can research Virgin Islands law for the purpose of gaining competence, the applicant cannot appear in court or participate in a mediation or arbitration, since those activities clearly cross the line into implicating the rights and remedies of the client. *See, e.g., Kershaw*, 70 V.I. at 864-65; *Jindal*, 69 V.I. at 947; *In re Nevins*, 60 V.I. 800, 803 (V.I. 2014). In addition, although a *pro hac vice* applicant can communicate with the client and the regularly admitted attorney, the applicant cannot send a demand letter on behalf of the client to the opposing party. *See, e.g., In re De Luna*, 60 V.I. 683, 686 (V.I. 2014).

¶ 16 Moreover, to the extent that some members of the Bar Association may believe that the conduct this Court has identified as the unauthorized practice of law is permissible in most other jurisdictions, they are mistaken. *See, e.g., In re Roswold*, 249 P.3d 1199, 1208 (Kan. 2011); *Kennedy v. Bar Ass'n of Montgomery County, Inc.*, 561 A.2d 200, 208 (Md. 1989). We acknowledge, of course, that Model Rule 5.5(c)(2) would permit an attorney licensed in another jurisdiction to temporarily practice in the Virgin Islands if he or she “reasonably expects” to receive *pro hac vice* admission. But neither *pro hac vice* admission nor any bar admission for that matter can be dismissed as a mere formality that one can reasonably expect to have granted. This is particularly true given that *pro hac vice* admission in the courts of the Virgin Islands is not as of right, but a matter of judicial discretion, *see In re Motylinski*, 60 V.I. 621, 635 (V.I. 2014) (quoting V.I.S.Ct.R. 201(a)), and thus one cannot reasonably expect it to be granted. *See Leis v. Flynt*, 439 U.S. 438, 442-43 (1979).

¶ 17 Additionally, while many United States jurisdictions have adopted Model Rule 5.5, most have not done so without modification. In fact, the American Bar Association, through its Center for Innovation, recently released the results of a study of the disciplinary rules adopted by the 50 states and the District of Columbia which reflects that only 3.9% of those jurisdictions have

adopted Model Rule 5.5 as-is or with minor revisions, while a staggering 96.1% either have adopted it with “significant changes” or not at all.³ While many jurisdictions adopted Model Rule 5.5(c) and only changed other portions of the rule, a significant number of jurisdictions, including but not limited to Alabama, California, Connecticut, the District of Columbia, Kentucky, Mississippi, New Mexico, Nevada, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming, either deleted the “reasonably expects” language entirely or placed additional restrictions on its use that are not included in the Model Rule 5.5(c), such as limiting the number of matters on which one may work; conditioning the authorization on registration with, payment of a fee to, or obtaining a license from a court or disciplinary authority; mandating association with local counsel; or limiting the authorization only to attorneys from certain reciprocal jurisdictions or to the representation of a client in the jurisdiction the attorney is licensed. Given the substantial diversity in how United States jurisdictions address multijurisdictional practice and the unauthorized practice of law, this Court is not convinced that the rules we have already adopted are such a departure from “standard practice” so as to warrant amendment.

¶ 18 We are cognizant, however, of the importance of this issue to the Bar Association. Therefore, despite our doubt as to the advisability of the proposed rule amendment, we nevertheless refer the Bar Association’s request to the Advisory Committee on Rules pursuant to Rule 37(b) of the Virgin Islands Rules of Appellate Procedure. The Advisory Committee may, in its discretion and pursuant to its ordinary procedures, further study the matter, solicit and receive

³ AM. BAR ASS’N, CENTER FOR INNOVATION, LEGAL INNOVATION REGULATORY SURVEY, STATE CHANGES OF MODEL RULES (2019), available at <https://legalinnovationregulatorysurvey.info/state-changes-of-model-rules/> (last visited Dec. 15, 2021).

comments from the Bar Association and other stakeholders, and if appropriate suggest amendments or other changes to Rule 211.5.5 for consideration by this Court.

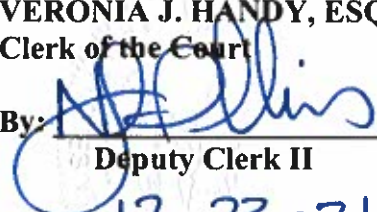
III. CONCLUSION

¶ 19 This Court commends the Virgin Islands Bar Association, its President, and its Board of Governors for bringing its concerns to our attention. We are mindful that virtually all members of the Bar take their ethical obligations seriously and that our decision not to incorporate the language in Model Rule 5.5(c) into Supreme Rule 211.5.5 could have contributed to uncertainty regarding what precisely those ethical obligations are when interacting with lawyers who are admitted in other jurisdictions but not the Virgin Islands. While we again decline to adopt Model Rule 5.5(c), we refer the matter to the Advisory Committee on Rules, and it is our sincere hope that our reasons for doing so will alleviate this uncertainty and further clarify what acts do, and do not, constitute the unauthorized practice of law in the Virgin Islands.

Dated this 23rd day of December, 2021.

ATTEST:

VERONIA J. HANDY, ESQ.
Clerk of the Court

By: 

Deputy Clerk II

Dated: 12-23-21