**For Publication.**

# IN THE SUPREME COURT OF THE VIRGIN ISLANDS

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| **IN THE MATTER OF THE APPLICATION OF**<br><br>**GORAV JINDAL**<br><br>**FOR *PRO HAC VICE* ADMISSION TO THE VIRGIN ISLANDS BAR.** | **S. Ct. BA. No. 2018-0018**<br>Re: Super. Ct. Civ. No. 486/2017 (STT) |
| **IN THE MATTER OF THE APPLICATION OF**<br><br>**COREY WILLIAM ROUSH**<br><br>**FOR *PRO HAC VICE* ADMISSION TO THE VIRGIN ISLANDS BAR.** | **S. Ct. BA. No. 2018-0019**<br>Re: Super. Ct. Civ. No. 486/2017 (STT) |
| **IN THE MATTER OF THE APPLICATION OF**<br><br>**JOHN MATTHEW SCHMITTEN**<br><br>**FOR *PRO HAC VICE* ADMISSION TO THE VIRGIN ISLANDS BAR.** | **S. Ct. BA. No. 2018-0020**<br>Re: Super. Ct. Civ. No. 486/2017 (STT) |

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

Considered and Filed: November 29, 2018

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

## OPINION OF THE COURT

**PER CURIAM.**

These matters come before this Court pursuant to the responses of Mark W. Eckard, Esq. and Applicants Gorav Jindal, Corey Roush, and John Matthew Schmitten to this Court's June 15, 2018 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 they have 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

Mark Eckard, Esq., moved for the *pro hac vice* admission of Jindal, Roush, and Schmitten—all affiliated with the Akin Gump LLP law firm—in early 2018 to represent defendant U.S. Concrete, Inc. in *Gilbert et al. v. Spartan Concrete, LLC et al.*, Super. Ct. Civ. No. 486/2017 (STT), a case in which U.S. Concrete and others were alleged to have violated the Virgin Islands Anti-Monopoly Law, the Virgin Islands Consumer Protection Law, and the Virgin Islands Consumer Fraud and Deceptive Business Practices Act. Although this Court granted those motions, it advised Attorney Eckard and the applicants that their authorization to practice on a *pro hac vice* basis would not commence until and unless they were administered the *pro hac vice* attorney oath. However, neither Jindal, Roush, nor Schmitten ever took the *pro hac vice* attorney oath.

On April 11, 2018, the Superior Court granted the plaintiffs' motion to voluntarily dismiss all claims against U.S. Concrete. On May 11, 2018, U.S. Concrete filed a motion for attorneys' fees and costs pursuant to 5 V.I.C. § 541 and Rule 54(d)(1) of the Virgin Islands Rules of Civil Procedure. The motion, which was signed by Attorney Eckard, requested attorneys' fees in the amount of $75,562.50. However, the motion was accompanied by affidavits from Jindal, Roush, and Schmitten, in which each identified themselves "as counsel in the above consolidated case on behalf of U.S. Concrete," that they "also represent co-defendant Heavy Materials, LLC," and set forth an itemized list of "legal services" provided to U.S. Concrete from December 22, 2017, to April 23, 2018, with respect to the *Gilbert* matter. These affidavits reflected that Jindal, Roush,

and Schmitten each performed, respectively, 34.5 hours, 9 hours, and 84.9 hours of legal services, resulting in legal fees, respectively, in the amount of $17,283.75, $6,750.00, and $39,418.75. In addition, the motion included affidavits from Amanda B. Lowe and Patrick O'Brien—two Virginia attorneys employed by Akin Gump, who are not admitted to practice in the Virgin Islands and who never applied to this Court for *pro hac vice* admission—in which they also stated that they represented U.S. Concrete and included itemized lists of "legal services" ranging from December 20, 2017, to April 3, 2018, consisting, respectively, of 18.1 hours and 9.1 hours, resulting in legal fees, respectively, in the amount of $8,507.00 and $3,468.00.

On May 23, 2018, the plaintiffs, through their counsel, filed with this Court, in Jindal, Roush, and Schmitten's pending *pro hac vice* cases, a document titled "Notice to Court of Possible Violation of *Pro Hac Vice* Order," which advised this Court that the five Akin Gump attorneys had requested $71,733.75 in legal fees in the *Gilbert* matter despite not being members of the Virgin Islands Bar, and that the documents supporting the attorneys' fees motion may qualify as violations of the *pro hac vice* orders, as well as the prohibition on the unauthorized practice of law codified at 4 V.I.C. § 443 and Rule 211.5.5 of the Virgin Islands Rules of Professional Conduct. On the same day, the plaintiffs filed a motion with the Superior Court to stay consideration of the attorneys' fees motion given that an unauthorized practice of law complaint had been filed with this Court.

Neither Attorney Eckard nor Applicants Jindal, Roush, or Schmitten responded to the May 23, 2018 unauthorized practice of law complaint. This Court, in a June 15, 2018 order, noted the seriousness of the allegations and directed Attorney Eckard and Applicants Jindal, Roush, and Schmitten to show cause, in writing, as to why their conduct (1) should not constitute the unauthorized practice of law or the aiding and abetting of the unauthorized practice of law; (2)

should not result in denial of the applications by Jindal, Roush, and Schmitten for *pro hac vice* admission; and (3) should not be referred to the Board on Unauthorized Practice of Law, the Board on Professional Responsibility, the Office of Disciplinary Counsel, the Virgin Islands Attorney General, or other authorities for further investigation and prosecution. Attorney Eckard and Applicants Jindal, Roush, and Schmitten filed their consolidated response with this Court on June 29, 2018.

## II. DISCUSSION

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 applicantion for *pro hac vice* admission. *See In re Application of Gonzalez*, 59 V.I. 862, 865 (V.I. 2013).

In their consolidated response, Eckard, Jindal, Roush, and Schmitten maintain that their actions did not violate the prohibition on the unauthorized practice of law.[1] Notably, they concede

[1] In their consolidated response, Eckard, Jindal, Roush, and Schmitten allege that the plaintiffs have used the unauthorized practice of law complaint for leverage in the underlying litigation because their counsel purportedly called Eckard the day after the attorneys' fees motion was filed and asked that it be withdrawn or else an unauthorized practice of law complaint would be filed. We 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. We note, however, that Rule 11 of the Virgin Islands Rules of Civil Procedure actually requires a party to advise an opposing party that a filing is improper before filing a motion for sanctions with the court, so as to allow that party to avoid sanctions by voluntarily withdrawing or correcting the filing within 21 days. V.I. R. CIV. P. 11(c)(2). Significantly, Eckard did respond to plaintiffs' counsel's phone call by filing a corrected attorneys' fees motion, which removed a reference to Jindal, Roush, and Schmitten

that "[t]here is no question that Gorav Jindal, Corey Roush, and Matthew Schmitten have engaged in the practice of law," (Resp. 7), that "the Applicants provided legal research, legal counseling, and drafted papers in support of U.S. Concrete," (Resp. 9), and that "[t]hrough the end of January, attorneys at Akin Gump, including Applicants, and Attorney Eckard worked together to devise a case strategy, develop legal theories, draft an answer on behalf of U.S. Concrete, and draft motions to dismiss." (Resp. 4.) Nevertheless, they maintain that these activities did not amount to the unauthorized practice of law because "[t]hey are antitrust counsel to U.S. Concrete and regularly provide it with antitrust advice," (Resp. 7), the acts were performed out of Akin Gump's office in Washington, D.C. rather than in the Virgin Islands, "[a]ll such papers were then filed by Attorney Eckard on behalf of U.S. Concrete in Virgin Islands court," (Resp. 9), and their activities were "consistent with ordinary cross-jurisdictional litigation practice." (Resp. 4.)

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actually being admitted *pro hac vice*. Although the plaintiffs ultimately did not seek sanctions under Rule 11, 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.

Moreover, we note that 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). Rule 211.8.3(a), like similar rules in many other jurisdictions, is adapted from American Bar Association Model Rule of Professional Conduct 8.3(a), and by its own terms creates an ethical obligation for an attorney to report certain misconduct by another attorney. That plaintiffs' counsel was the opposing attorney in the underlying case does not relieve counsel of his obligation to report the misconduct, nor does it in anyway mitigate the misconduct committed by Eckard, Jindal, Roush, and Schmitten. *In re Engel*, 177 P.3d 502, 506 (Mont. 2008). In fact, had plaintiffs' counsel failed to report the conduct to this Court, he may himself have been found to have committed misconduct. *See In re Himmel*, 533 N.E.2d 790, 794 (Ill. 1988) (suspending attorney for one year for failure to report the misconduct of another attorney as required by Illinois-equivalent of Rule 211.8.3(a)). That plaintiffs' counsel notified 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.

As a threshold matter, the claim that the acts performed by Jindal, Roush, and Schmitten were "consistent with ordinary cross-jurisdictional litigation practice," or that it is relevant that the acts were performed while they were physically present in Washington, D.C., is wholly without merit. (Resp. 4.) Rule 211.8.5 of the Virgin Islands Rules of Professional Conduct governs choice of law when attorneys engage in multi-jurisdictional practice, and provides that "for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits" shall apply. V.I.S.CT.R. 211.8.5(b)(1). This language is identical to Rule 8.5(b)(1) of the American Bar Association Model Rules of Professional Conduct, and has been adopted nearly verbatim in virtually all of the jurisdictions in which Jindal, Roush, and Schmitten are admitted to practice law.[2] Although Jindal, Roush, and Schmitten were physically based in Washington, D.C., their conduct clearly relates to the *Gilbert* case, which was pending before the Superior Court of the Virgin Islands. Moreover, when they applied for *pro hac vice* admission, Jindal, Roush, and Schmitten agreed to submit to the jurisdiction of this Court and to be bound by the disciplinary rules applicable to Virgin Islands attorneys. *See* V.I.S.CT.R. 201. Therefore, the Virgin Islands definition of the practice of law—including Virgin Islands rules and statutes relating to the unauthorized practice of law—apply to their conduct.

Unlike other jurisdictions, the Virgin Islands has not adopted American Bar Association Model Rule of Professional Conduct 5.5 or the American Bar Association Model Rule on Practice Pending Admission; rather, the prohibition on unauthorized practice of law is set forth in both Rule 211.5.5 of the Virgin Islands Rules of Professional Conduct and title 4, section 443 of the Virgin Islands Code. *In re Campbell*, 59 V.I. 701, 711-12 & n.5 (V.I. 2013). Nor has this Court ever

[2] *See* D.C. R. PROF'L COND. 8.5(b)(1); GA. R. PROF'L COND. 8.5(b)(1); OHIO R. PROF'L COND. 8.5(b)(1); N.J. R. PROF'L COND. 8.5(b)(1).

held that incorrect reliance on Model Rule 5.5 excuses the failure to comply with the provisions of Rule 211.5.5 or section 443. *In re Nevins*, 60 V.I. 800, 804 (V.I. 2014). Therefore, it is these authorities that govern whether an individual has engaged in the unauthorized practice of law in the Virgin Islands.

Rule 211.5.5 of the Virgin Islands Rules of Professional Conduct provides that

> (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.

Title 4, section 443 of the Virgin Islands Code further provides, in pertinent part, that

> Except as otherwise provided by law or rule of the Supreme 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, 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).

The position taken by Eckard, Jindal, Roush, and Schmitten—that an individual can "engage in any conduct he wishe[s] without obtaining Virgin Islands Bar membership, with the sole exception of signing motions in his own name and arguing in court without the presence of a licensed attorney"—has been expressly and emphatically rejected by this Court. *Campbell*, 59

V.I. at 739 n.25. Instead, this Court has adopted the principle that the practice of law "encompasses all matters implicating the rights and remedies of clients."[3] *In re Motylinski*, 60 V.I. 621, 649 (V.I. 2014) (internal quotation marks omitted).

In this case, Eckard, Jindal, Roush, and Schmitten have admitted to engaging in conduct that implicated the rights and remedies of U.S. Concrete in the Virgin Islands.[4] Section 443, by its own terms, prohibits "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 expressly identifies the preparation of pleadings and legal papers as one such activity. 4 V.I.C. § 443(a). Additionally, this Court has previously held that development of case strategy is the type of act that is "entrusted to the judgment of licensed attorneys." *Campbell*, 59 V.I. at 722.

This Court has previously observed—but did not hold—that it may be possible for

[3] In their response, Eckard, Jindal, Roush, and Schmitten argue that "a rule requiring every attorney who works on a matter that 'touches' the Virgin Islands to be admitted to the Virgin Islands Bar is unworkable" and would "cripple cross-border transactions and litigation." (Resp. 16.) However, the rule announced in *Motylinski* has now been in place for more than four years, and no evidence has been presented to support a claim that these matters have been "crippled" as a result.

[4] In their response, Eckard, Jindal, Roush, and Schmitten maintain that "U.S. Concrete understood that the Applicants were not Virgin Islands lawyers," that "the Applicants are practicing and experienced attorneys with specialized experience and knowledge in antitrust law" and "are more than competent to read and interpret statutes, cases, and ordinary pleadings," and that "U.S. Concrete's legal rights were not at risk from the Applicants' participation nor was U.S. Concrete misled by relying on the advice of these attorneys." (Resp. 19.) However, they cite to absolutely no authority—and this Court can find none—to support the proposition that individuals may engage in the unauthorized practice of law so long as the client is aware and satisfied. On the contrary, courts have repeatedly found that factors such as whether the client is satisfied or whether the client was aware that the individual is not licensed are "irrelevant" to the question of whether the unauthorized practice of law has occurred. *See, e.g., In re Rosario*, 493 B.R. 292, 337 (Bankr. D. Mass. 2013); *Patton v. Scholl*, Civ. No. A. 98-5729, 1999 WL 431095, at *9 (E.D. Pa. June 28, 1999) (unpublished).

individuals not licensed to practice law in the Virgin Islands to assist licensed Virgin Islands attorneys as paralegals or secretaries with respect to certain tasks without violating the prohibition on unauthorized practice of law. *Motylinski*, 60 V.I. at 650 n.14. Nevertheless, in one of its seminal unauthorized practice of law cases, this Court refused to find that an individual acted as a paralegal or secretary when performing such tasks if he held himself out as an attorney when doing so. *Id.*

In this case, the affidavits from Jindal, Roush, and Schmitten filed with the Superior Court in the *Gilbert* matter clearly demonstrate that they held themselves out as lawyers with respect to this matter. All three affidavits bore the caption of the *Gilbert* case, and stated that they "served as counsel in the above consolidated case on behalf of U.S. Concrete." Moreover, in their affidavits, Jindal, Roush, and Schmitten stated that their customary billing rates were—respectively—$825, $900, and $595 an hour, amounts far greater than that of a paralegal or secretary. And perhaps most importantly, the affidavits were filed in connection with a motion seeking attorneys' fees under 5 V.I.C. § 541 and Rule 54(d) of the Virgin Islands Rules of Civil Procedure. Therefore, it is clear that Jindal, Roush, and Schmitten had held themselves out as attorneys in connection with this matter—even if only in conjunction with the attorneys' fees motion—and that any work they claimed to have performed necessarily exceeded the acts—if any—that could permissibly be performed by a paralegal or secretary.[5]

[5] Although the Applicants vehemently deny holding themselves out as Virgin Islands attorneys, and in fact note that the attorneys' fee motion disclosed that their *pro hac vice* applications were pending, 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 In re Nevins*, 60 V.I. 800, 804 (V.I. 2014) ("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.").

Finally, we reject the proposition that the Akin Gump law firm is "antitrust counsel to U.S. Concrete and regularly provide it with antitrust advice," (Resp. 7), in any sense authorized Jindal, Roush, Schmitten, or any other Akin Gump lawyer to represent U.S. Concrete in this matter. The complaint in the *Gilbert* case did not raise a claim under federal antitrust law, or assert any federal claim for that matter. Rather, the complaint solely asserted causes of action arising under Virgin Islands statutory law – specifically, the Virgin Islands Anti-Monopoly Law, the Virgin Islands Consumer Protection Law, and the Virgin Islands Consumer Fraud and Deceptive Business Practices Act. But even if the *Gilbert* lawsuit involved a federal claim, the Supreme Court of the United States has held that "[t]here is no right of federal origin that permits . . . lawyers to appear in state courts without meeting that State's bar admission requirements." *Leis v. Flynt*, 439 U.S. 438, 443 (1979). Neither Supreme Court Rule 201, Virgin Islands Rule of Professional Conduct 211.5.5, section 443 of title 4 of the Virgin Islands Code, nor any other applicable Virgin Islands rule or statute codifies a federal practice exception to either the prohibition on the unauthorized practice of law or the requirement that one cannot practice law in the Virgin Islands without being a member of the Virgin Islands Bar, and we agree with the courts that have declined to recognize such an exception. *See Chandris, S.A. v. Yanakakis*, 668 So.2d 180, 184 (Fla. 1995) ("[W]e find no merit to [the] argument that there is a general federal law exception to Florida's bar admission requirement."); *Kennedy v. Bar Ass'n of Montgomery County, Inc.*, 561 A.2d 200, 208 (Md. 1989) ("[A]dvising clients by applying legal principles to the client's problem is practicing law . . . . This is so whether the legal principles [the attorney] was applying were established by the law of Montgomery County, the State of Maryland, some other state of the United States, the United States of America, or a foreign nation.").

Accordingly, we deny the petitions to admit Jindal, Roush, and Schmitten *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 the conduct of Eckard, Jindal, Roush, Schmitten, Lowe, O'Brien, and the Akin Gump law firm.[6]

## III. CONCLUSION

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

**Dated this 29th day of November, 2018.**

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

[6] 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 Eckard and the three applicants for *pro hac vice* admission, 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 occurred 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.