

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Investigation pursuant to 30 V.S.A. §§ 30 and )  
209 into whether the petitioner initiated site ) Case No. 20-1611-INV  
preparation at Apple Hill in Bennington, )  
Vermont, for electric generation in violation of )  
30 V.S.A. § 248(a)(2) )

**INTERVENORS' MOTION TO RECUSE**  
**ATTORNEY THOMAS MELONE**

**NOW COME** Intervenors Apple Hill Homeowners Association (“AHHA”), Mount Anthony Country Club (“MACC”), and Libby Harris, by and through their attorneys of the firm Valsangiacomo, Detora & McQuesten, P.C., and hereby request that Attorney Thomas Melone be recused as an attorney in this matter, pursuant to Vermont Rules of Professional Conduct Rule 3.7, which prohibits a dual advocate-witness role as follows:

**MEMORANDUM**

The Vermont Rules of Professional Conduct prohibit a lawyer from acting in a dual-role capacity as lawyer and witness. The rule states as follows:

**RULE 3.7. LAWYER AS WITNESS**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

VT R PROF COND Rule 3.7.<sup>1</sup>

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<sup>1</sup> [Amended June 17, 2009, effective Sept. 1, 2009.] *The Vermont Rules of Professional Conduct, adopted*

The official comment to the rule explains the several bases for the prohibition contained in Rule 3.7 which, in relevant part to the instant case, is to avoid prejudice to the rights of the opposing party and to protect the trier of fact from being misled or confused:

**Comment**

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

**Advocate-Witness Rule**

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. . . .<sup>2</sup>

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*March 9, 1999, effective September 1, 1999, replace the Vermont Code of Professional Responsibility, and apply to lawyer conduct after September 1, 1999. The Code of Professional Responsibility continues to apply to conduct prior to September 1, 1999.*

<sup>2</sup> The Comment to Rule 3.7 continues:

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

VT R PROF COND Rule 3.7 (Comment).

In the matter before the PUC, Thomas Melone, the attorney of record for all of the developer's entities, is also the sole owner of and directly controls all of developer's entities, including PLH, LLC which is the record-title owner of the Van Nostrand lands and Apple Hill Residential Development Lot #1 (referred to by Melone as the "Horticultural Lot") and PLH Vineyard Sky, LLC, which appears to be the successor entity of PLH, LLC.

Thomas Melone is the primary fact witness in this case and will be during the penalty phase as well. As sole owner of and directly controlling all of his corporate entities, Thomas Melone will be the source for information regarding the economic resources of the respondent for purposes of the civil penalty that will be imposed pursuant to 30 VSA §30. Thus, Melone has been and continues to be a material fact witness, who will be subpoenaed to testify by the Intervenors in the event he chooses not to voluntarily testify further in this matter. Therefore, Melone cannot continue to serve as counsel for the developer's entities because of his conflicting role of material fact witness, and attorney in the case, which makes it impossible to keep track of whether the words coming from Thomas Melone's lips are under oath as a sworn witness, or just the repetition of "facts" and argument. This is the very problem that Rule 3.7 is designed to avoid: confusion and prejudice arising from the loss of distinction between witness testimony and legal argument. Hence, why recusal is required.

The Vermont Supreme Court has recognized the problem that Rule 3.7 seeks to prevent and explained its view as follows:

Professional Rule of Conduct 3.7 recognizes the possible prejudice inherent in permitting an attorney to give testimony in a proceeding in which the attorney represents a client. As the comment to the rule states: "Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends

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on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses.” Comment, V.R.Pr.C. 3.7. In this case, MyWebGrocer argues that Tanzer's attorney effectively testified regarding settlement negotiations between the parties through the questions she asked MyWebGrocer's witness during cross-examination. We need not fully address this here, but we do note that Rule 3.7 counsels strongly against permitting an attorney to ask a witness questions that introduce the attorney's personal knowledge of the subject of the witness's testimony.

*Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, 209 Vt. 244, 267 (FN 2), 203 A.3d 1186, 1202 (2018)(emphasis supplied).

In the present case before the PUC, the dual roles sought to be played by Thomas Melone are prejudicial to the Intervenor, DPS and ANR as well as to the Tribunal. The difficulty in separating Thomas Melone's factual testimony and legal argument at any given time at any stage of this proceeding, no less in a penalty phase, will be significant. Thomas Melone himself will be the primary witness regarding his own deliberate actions and decisions, as well as to testify regarding the economic resources of his entities and the other statutory factors that the PUC will consider in determining the appropriate penalty. Because Thomas Melone will act as material fact witness, he should be recused as an attorney in this matter to avoid confusing and prejudicing the other parties, including but not limited to during the taking of depositions, the presentation of evidence at hearing or trial, and in order to protect the record and use of transcripts on appeal.

The confusion created and prejudice resulting as well as the clarity of the record itself is at stake with regard to whether statements made by Thomas Melone are in his capacity as a fact witness, or as a lawyer for the respondent. As the Comment to Rule 3.7 explains, “A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.” Permitting this dual-role practice

to continue would be an affront to the universally recognized safeguard contained in Rule 3.7, that is integral to the integrity of the judicial system and must be observed in this case to protect the Intervenors, PSB, ANR and the Tribunal.

The Federal District Court for the Southern District of New York explained the importance of Rule 3.7 as a safeguard to the integrity of the judicial system as follows:

New York's witness-advocate rule, which provides that a lawyer should not act as an advocate before a tribunal in a matter in which he is likely to be a witness on a significant issue of fact, aims to avoid the jury confusion that may occur when one individual assumes the role of both advocate and witness, and to guard against harm to the integrity of the judicial system. NY RPC 3.7.

*City of New York v. Tavern on the Green International LLC*, 351 F. Supp. 3d 680 (S.D. N.Y. 2018).

*See also In re Dow Corning Corp.*, 255 B.R. 445 (E.D. Mich. 2000)(Lawyers who would be required to serve as witnesses in proceeding may be excluded, under rules of ethics, from participating in any way in case.) The Supreme Court of Colorado described the prohibition as necessary to protect the integrity of the adversary process:

Basic reason for limitation under advocate-witness rule, under which a lawyer is prohibited to act as advocate at trial in which lawyer is likely to be a necessary witness, is to protect the integrity of the adversary process by separating the lawyer's role as an advocate from that of a witness. Col. R. Prof. Conduct 3.7(a).

*People v. Ehrnstein*, 2018 CO 40, 417 P.3d 813 (Colo. 2018). The Arkansas Supreme Court explained the unseemly and ineffective position that such inconsistent roles presented and called it out as a Code violation:

In closing, we cannot overlook the fact that the appellant's attorney, who represented him at most of the hearings below and continues to represent him here, took the witness-stand and testified about points of fact that were disputed by the appellee. We have repeatedly admonished the members of our bar against such conduct. *Montgomery v. First Nat. Bank of Newport*, 246 Ark. 502, 439 S.W.2d 299 (1969); *Old American Life Ins. Co. v. Taylor*, 244 Ark.

709, 427 S.W.2d 23 (1968); *Rushton v. First Nat. Bank of Magnolia*, 244 Ark. 503, 426 S.W.2d 378 (1968).

Since those decisions the principle has again been stated in the American Bar Association's Code of Professional Responsibility, adopted by this court by per curiam order on June 2, 1969. The new Code observes: 'An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.' Code, EC 5—9; also DR 5—101B. We are unwilling to let such a violation of the Code pass unnoticed.

*Dingledine v. Dingledine*, 258 Ark. 204, 206—07, 523 S.W.2d 189, 191 (1975)(emphasis supplied).

*See also Iqbal v. State*, 2011 Ark. App. 221, 382 S.W.3d 755 (2011) (“A lawyer is prohibited from mixing the role of advocate and witness.”).

The circumstances of this case demand that Thomas Melone be recused as an attorney to provide order to the process and clarity to the record. The PUC must not allow Thomas Melone to maintain his role as fact witness, as well as to act as attorney in this case, which will do harm to the interests of the other parties and threaten the integrity of the judicial process. It is, therefore, essential that Thomas Melone’s involvement in this case be limited to his factual testimony and that he be recused as an attorney representing any party in this matter.

Thomas Melone claims to be an attorney licensed to practice law in the states of Massachusetts, Florida, Connecticut, Pennsylvania and Vermont. Yet, each and every one of those jurisdictions has an identical or substantially similar provision contained in their Rule 3.7 prohibiting dual representation as attorney and material fact witness. The Massachusetts’ Supreme Judicial Court has clearly cautioned against the practice absent the most exceptional circumstances stating as follows:

Since the record supports the jury verdict, there was no error in the judge's denial of the plaintiff's motion for a new trial. Although there was no objection to defense counsel's acting as trial counsel and witness, we take this occasion

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to repeat our disapproval of this practice. “In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are Rare; And whenever they occur, they necessarily cause great pain to counsel of the right spirit” (emphasis added). *Kendall v. Atkins*, —Mass. —, — - —<sup>a</sup>, 372 N.E.2d 764, 766 (1978), *quoting from Potter v. Ware*, 1 Cush. 519, 524 (1848). See S.J.C. Rule 3:22, DR5-101(B), 359 Mass. 796, 814 (1972). The ethical problems raised by trial counsel acting as counsel and as a witness are most serious where, as here, counsel is an independent witness in a family dispute and the outcome of the case may well turn on his credibility.

In any event, judges should not permit this practice absent exceptional circumstances. Attorneys finding themselves in the position of trial counsel and witness should obtain substitute counsel well in advance of trial.

*Black v. Black*, 376 Mass. 929, 929, 381 N.E.2d 1304, 1304–05 (1978)(emphasis supplied).<sup>3</sup>

**WHEREFORE**, the Intervenors respectfully request that the PUC Recuse Thomas Melone, Esq. as an attorney in the above-captioned cause and Order that he may not act as an attorney representing any party in this matter.

**DATED AT** Randolph, County of Orange and State of Vermont this 21<sup>st</sup> day of February, 2021.

APPLE HILL HOMEOWNERS ASSOCIATION,  
MOUNT ANTHONY COUNTRY CLUB and  
LIBBY HARRIS, Intervenors

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<sup>3</sup> See also 35 A.L.R.4th 810 (Originally published in 1985) and the cases cited thereunder.