



are subject to fairly strict scrutiny, particularly motions' under the witness-advocate rule. *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989)." *Id.* "The movant, therefore, 'bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial.'" *Id.* "'Prejudice' in this context means testimony that is 'sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony. *Id.*'" *Id.*

Courts recognize that "the ability to deny one's opponent the services of capable counsel [] is a potent weapon." *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir. 1988). Because they are potential "techniques of harassment," motions for disqualification are "viewed with extreme caution." *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982). The Massachusetts Supreme Judicial Court has also recognized that motions to disqualify counsel are frequently used as harassment. *See, Adoption of Erica*, 426 Mass. 55, 64, 686 N.E.2d 967, 974 (1997). "The SJC has emphasized that "'disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary.'" *Adoption of Erica*, 426 Mass. 55, 58, 686 N.E.2d 967, 970 (1997) (quoting *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982)). Courts are also reluctant to grant motions to disqualify because they inevitably result in delay and added expense. *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir. 1983) (disqualification motions "inevitably cause delay").

**A. The Motion Fails To Demonstrate How And As To What Issues The Prejudice May Occur And That The Likelihood Of Prejudice To AHS Occurring Is Substantial.**

The Supreme Court of Vermont has noted that: "disqualification of counsel is only one of

several avenues available to a court ... and it is a drastic measure which courts should hesitate to impose except when absolutely necessary.” *Cody v. Cody*, 179 Vt. 90, 2005 VT 116, ¶ 23, 889 A.2d 733 (quotation omitted). *See also Stowell v. Bennett*, 169 Vt. 630, 632, 739 A.2d 1210, 1212 (explaining that in considering whether to disqualify attorney, court must be “solicitous of a client's right freely to choose his counsel” and mindful that the client may suffer loss of time and money in finding new counsel, as well as benefit of counsel's familiarity with case (quotation omitted) and that Courts have generally rejected the argument that an appearance of impropriety, standing alone, is a sufficient ground for disqualification of an attorney).

It is with this background in mind that we examine Rule 3.7(a) of the Vermont Rules of Professional Conduct which states that:

- (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.

The Intervenors have not addressed the basic pre-conditions for disqualification under Rule 3.7 and the Motion must be denied. The Motion fails to demonstrate specifically how and as to what issues in the case AHS may be prejudiced by the testimony of Thomas Melone.

The party seeking disqualification "carries a heavy burden of identifying projected testimony of the advocate-witness and demonstrating how it would be 'so adverse to the factual assertions or account of the events offered on behalf of the client as to warrant his disqualification.'" *Broadwhite Associates v. Truong*, 237 A.D.2d 162, 163, 654 N.Y.S.2d 144 (1st Dept. 1997), quoting, *Martinez v. Suozzi*, 186 A.D.2d 378, 379, 588 N.Y.S.2d 175 (1st Dept. 1992). Intervenors' theory of the case undermines the Intervenors' Motion. Intervenors' theory of the

case is that AHS and Thomas Melone are fully aligned in their interests. As such there is no danger that “prejudice may occur [to the witness-advocate's client] and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial.” *Lamborn v. Dittmer*, 873 F.2d at 531.

For that reason alone, the Motion is frivolous and must be denied.

**B. The Motion Fails To Identify Why Further Testimony From Melone Is Necessary.**

In Vermont, a threshold issue in determining whether a lawyer should be disqualified under the “advocate-witness” rule is whether the lawyer is likely to be a necessary witness in the case.

*See, Shahi v. Donnelly*, 2009 Vt. Super. LEXIS 11 (Vt. Super. Ct., May 7, 2009) at 19:

A “necessary witness” for purposes of the advocate-witness rule is one whose proposed testimony is relevant and material to the determination of the issues being litigated, and whose testimony is not cumulative. *Fognani v. Young*, 115 P.3d 1268 at 1273; *Beller v. Crow*, 274 Neb. 603, 742 N.W.2d 230, 234 (Neb. 2007). “Thus, determining whether the moving party has properly demonstrated that opposing counsel is 'likely to be a necessary witness' involves a consideration of the nature of the case, with emphasis on the subject of the lawyer’s testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues.” *Fognani*, 115 P.3d at 1274 (citations omitted).

Under Rule 3.7(a), the movant must meet the "heavy burden of establishing that [the lawyer's] testimony [is] necessary". *See, Campbell v McKeon*, 75 A.D.3d 479, 481, 905 N.Y.S.2d 589 (1st Dept. 2010). *See also, S & S Hotel Ventures*, 69 N.Y. 2d 437, 445-446, 515 N.Y.S.2d 735, 739 (stating “[d]isqualification may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary.”) (internal citations omitted.)

Here, Intervenors allege only that further testimony from Melone concerning the economic resources of AHS for purposes of the civil penalty would be necessary. Subsection 30(c) identifies eight factors that the Board *may* consider in determining the amount of a civil penalty. The

economic resources of the respondent are but one of the factors that the PUC *may* consider. There is no requirement that Respondents provide testimony on that factor and to the extent such information is required by the Commission in these proceedings, there is no requirement that it come from Thomas Melone. For that reason alone, Intervenor's Motion is frivolous and the Motion must be denied. *See, Blanche, Verte & Blanche, Ltd. v Joseph Mauro & Sons*, 91 A.D.3d 693; 936 N.Y.S.2d 571 (2d Dept 2012) (stating "[s]ince the [Intervenor] failed to offer any proof as to the content or subject matter of the testimony that might be elicited from the [plaintiff's] attorney, nor is it apparent from the record as to why it is necessary to call him as a witness, the [Intervenor] failed to demonstrate that the testimony of the [plaintiff's] attorney was necessary.") (internal quotations omitted.)

**C. There Is No Basis For Post-trial Disqualification.**

There is no basis for post-trial disqualification. *See, MSKCT Trust v. Paraneck Enterprises, Inc.*, 296 A.D.2d 769, 770; 746 N.Y.S.2d 86, 89 (3d Dept 2002). Disqualification, if appropriate, would only be at the actual trial. *Id.* Thomas Melone has already provided hours of testimony during the evidentiary hearings in these proceedings. None of that testimony was objected to. None of that testimony served to confuse the parties or the Commission. It is only at this late stage in the proceeding that Intervenor seeks to disqualify Thomas Melone simply for the sake of harassing AHS.

**D. The Motion Should Be Dismissed Because There is No Probability of the Commission Being Misled.**

Intervenor's reliance on *Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, 209 Vt. 244, 203 A.3d 1186, is misplaced. In that case, the attorney effectively provided her own testimony regarding settlement negotiations by asking questions of another witness during cross-examination, which led to a high probability that the lawyer's testimony would conflict with that

of other witnesses. Unlike the circumstances in *Tanzer* (which the Vermont Supreme Court never ruled on), it is highly unlikely that the Commission would be confused or misled in any respect by any further testimony by Thomas Melone. To date, all of Mr. Melone's testimony has been uncontested and not once has he sought to conflate his testimony with any other witnesses' testimony.

In addition, concerns about possible juror confusion are not relevant to post-trial proceedings. *See MSKCT Trust v. Paraneck Enterprises, Inc.*, 296 A.D.2d 769, 770; 746 N.Y.S.2d 86, 89 (3d Dept 2002) (disqualification, if appropriate, would only be at the actual trial.) Furthermore, there is no jury involved in this case.

## **II. The Motion Should Be Denied Because There is a *Pro Se* Exception to Rule 3.7.**

Thomas Melone is representing the interests of his direct and indirect wholly-owned companies in these proceedings. The Intervenors' theory of their Motion is that the real person of interest is Thomas Melone. The ethical canons do not prohibit a lawyer from representing himself or herself. *See, e.g., O'Neil v. Bergan*, 452 A.2d 337, 344 (D.C. App. 1982), and such *pro se* litigants often testify their own behalf. In addition, the rationales behind the advocate-witness rule do not apply to the attorney *pro se* litigant. As stated by the Supreme Judicial Court of Massachusetts in *Borman v. Borman*, 378 Mass. 775, 393 N.E.2d 847, 856 (1979) (footnote omitted) with respect to the former Massachusetts Disciplinary Rules 5-102, which corresponds to Rule 3.7 of the Massachusetts Rules of Professional Conduct:

To apply DR 5-102 when the testifying advocate is a litigant in the action miscomprehends the thrust of the rule. DR 5-102 regulates lawyers who would serve as counsel and witness for a party litigant. It does not address that situation in which the lawyer is the party litigant. Any perception by the public or determination by a jury that a lawyer litigant has twisted the truth surely would be due to his role as a litigant and not, we would hope, to his occupation as a lawyer. *See International Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir.1975). As a party litigant, moreover, a lawyer could represent himself if he so

chose.

Here, as regards to the *principles* underlying Rule 3.7, respondents are essentially proceeding *pro se*. Thus, the rationales behind the advocate-witness rule do not apply to the attorney *pro se* litigant. Furthermore, the Commission's rules expressly allow an officer representing a company to proceed *pro se*. See, PUC Rule 2.201(B).

## CONCLUSION

In Vermont, a court must be "solicitous of a client's right freely to choose his counsel", *Stowell v. Bennett*, 169 Vt. at 632, 739 A.2d at 1212. For the above stated reasons, the Intervenors' Motion is baseless and should be denied and AHS awarded legal fees.

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Respectfully submitted,

/s/Thomas Melone

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