

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY BOARD

PRB-124-2022, PRB-076-2023

In re: W. MICHAEL NAWRATH

RESPONDENT'S FIRST MOTION *IN LIMINE*
(JUDICIAL NOTICE OF ACT 250 RULES)

Respondent, W. Michael Nawrath, by and through counsel, hereby submits this Motion *In Limine* and accompanying memorandum of law respectfully requesting that the Panel take judicial notice of the State of Vermont Natural Resources Board's Act 250 Rules (**Ex. A**), effective December 4, 2015, for purposes of the final hearing on the merits and subsequent determination of the State's position.

MEMORANDUM OF LAW

The Panel is empowered to take judicial notice appropriate facts, such as the existence of promulgated regulations such as the Act 250 Rules (**Ex. A**). A.O. 9, Rule 20.B (applying the Vermont Rules of Evidence to discipline cases "except as otherwise provided in these rules"); V.R.E. 201(b), (d) (mandating judicial notice of an adjudicative fact when requested by a party and supplied with the necessary information, when such fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the [Panel] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") *See In re Burke*, PRB File No. 2020-040 (Sept. 14, 2021) (taking judicial notice of prior disciplinary actions); *In re Manby*, PRB File No. 2019-089 (June 29, 2022) (applying V.R.E. 201).

The Act 250 Rules as they currently exist were effective December 4, 2015, and therefore were in effect at all relevant times for purposes of the Benson matter before the Panel (No. 2023-076). While the Panel has yet to apply the Rules based on the definition of "unauthorized practice of law" under 3 V.S.A. § 127 and/or A.O. 41, § 1, the Rules' existence

and applicability to the Act 250 proceedings in No. 2023-076 are known within the territorial jurisdiction of the Panel (the State of Vermont) and readily capable of determination and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Therefore, Respondent requests that the Panel take notice of the Rules' applicability as it pertains to the representation of Act 250 parties by non-attorneys, specifically under Rule 14(C). In addition, for the benefit of the Panel, Respondent submits the following guidance for purposes of the final merits hearing and submits that Act 250 matters are a recognized exception to the general rule that litigants to a court or administrative action cannot be "represented" by non-lawyers.

Rule 14(C) provides that:

A party to a case before the District Commission may appear in person, or may be represented by an attorney or other representative of his choice. The District Commission shall enter on its docket and certificates of service the name of any representative who has appeared for a party or who has countersigned a party's pleadings. Any notice given to or by a representative of record for a party shall be considered in all respects as notice to or from the party represented.

Act 250 Rules, Rule 14(C).

The only provision in the Act 250 Rules that procedurally distinguishes between attorney and non-attorney representatives is that only a licensed attorney may compel by subpoena the attendance and testimony of witnesses and the production of books and records. *Id.* at Rule 4. This distinction is irrelevant given the facts alleged by the State. Non-attorney representatives are treated like attorney representatives for purposes of, for example, service of documents in a District Commission case. *Id.* at Rule 12(H). Nothing in the Act 250 Rules prohibits unrepresented parties or parties represented by a non-attorney to file memoranda of law with citations to case law, statutes, or regulations. In fact, the Rules specifically state that all memoranda in which findings of fact or conclusions of law are proposed "should state the location of the supporting evidence in the record and should discuss the applicable legal provisions." *Id.* at Rule 12(G).

No case law or other authority supports an argument that non-lawyer Rule 14(C) representatives cannot draft such memoranda or other papers on behalf of the party, even if

those papers involve significant legal research and drafting. Non-lawyers regularly conduct their own significant legal research and drafting when they are not represented by counsel, and Act 250 proceedings permit litigants the assistance of a non-lawyer representative.^[1] The District Commission maintains authority as to the matter before it, and may encourage parties with respect to “representation, presentation of evidence, or other matters in the interest of promoting judicial efficiency.” 10 V.S.A. § 6085(c)(4). Indeed, the Vermont Supreme Court has only cited to Rule 14(C) once to wit, as an example of nonlawyers “represent[ing] certain parties in some state administrative proceedings,” such as Act 250 matters before the District Commission. *In re Morales*, 2016 VT 85, ¶ 16.

In re N. E. Materials Grp., 2013 Vt. Super. 082101, No. 35-3-13 Vtec (Aug. 21, 2013) (**Ex. B**), lends some guidance to what Rule 14(C) representation entails. That case involved, *inter alia*, the determination of whether certain movants were entitled to “party status” under Act 250’s criteria for appeals from the District Commission to the Environmental Division—a critical right of parties. The movants did not appear before the District Commission but had an attorney represent them under Rule 14(C). The question was whether the representative “presented evidence or legal argument at the hearing on Movants’ behalf sufficient to constitute ‘participation’ on the merits under particular Act 250 criteria.” *Id.* at *4. The fact that the representative happened to be an attorney was irrelevant to the question posed. The Court denied appellate party status because the representative did not present “anything beyond the Movants’ requests for party status and some pre-filed (but not authenticated) materials.” *Id.* at *5.

Indeed, the Act 250 Rules not only allow parties to appear without any representative, see Act 250 Rules, Rule 14(C) (A party . . . “*may* appear in person, or *may* be represented”) (emphasis added), but *require all parties submitting any documents* to the Commission to comply with various procedural rules and briefing requirements. Act 250 Rules, Rule 12(C). As noted above, when parties request findings of fact or conclusions of law, briefing of the applicable legal provisions is required, regardless of the existence of a Rule 14(C) representative or whether that representative is an attorney or non-attorney. For purposes of this

^[1] While not directly pertinent for this memorandum of law, the facts at the final merits hearing will demonstrate that at all relevant times, Respondent was clear to the Bensons that he was not an attorney and that Respondent never charged the Benson for anything at any time, including for his role as a Rule 14(C) representative.

case and given *Morales*'s clear directive that Act 250 proceedings are those that permit non-lawyers to "represent" parties, Respondent submits that there is no unauthorized practice of law when a non-lawyer conducts legal research or cites to applicable law on behalf of the party. With that said, this information is only provided to assist the Panel at the final merits hearing, and this Panel need not make a determination as to the scope of Rule 14(C) or how it impacts the definition of the "unauthorized practice of law" under 3 V.S.A. § 127 or A.O. 41, § 1 at this time.

WHEREFORE Respondent respectfully requests that the Panel take judicial notice of the State of Vermont Natural Resources Board's Act 250 Rules (**Ex. A**), effective December 4, 2015, for purposes of the final hearing on the merits and subsequent determination of the State's position.

Submitted this 12th day of September 2024.



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CERTIFICATE OF SERVICE

Alexander M. Dean, Esq., Counsel for Respondent, hereby certifies that on the below date, a copy of Respondent's First Motion *In Limine*, with Exhibits A and B, was served upon Samantha Lednicky, Esq., Special Disciplinary Counsel, by way of email to Sam@catamountlaw.com, pursuant to PRB Rule 8B.

Dated: September 12, 2024



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