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Catherine Connors

Feb. 28, 2024

Mr. John A. McArdle, III
Committee on Judicial Conduct
PO Box 127
Augusta ME 04332

Re: Complaint from T. Cox

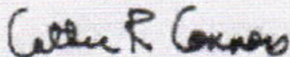
Dear Mr. McArdle:

This letter is in response to your letter dated February 20, 2024, which I received in the mail on February 26, indicating that the Committee on Judicial Conduct has reviewed a complaint filed against me by Thomas Cox asserting that I should have recused myself in the appeals of *Finch v. US Bank* and *JP Morgan Case Acquisition Corp. v. Moulton.* You provided a copy of Mr. Cox's complaint and supporting documentation and requested that I respond to his allegations within 30 days.

I have checked the Executive Clerk of the Law Court, Mattew Pollack, and, consistent with my recollection, no one moved for my recusal in either *Finch* or *Moulton.* You should feel free to ask Mr. Pollack for confirmation. I nevertheless asked the Judicial Ethics Committee whether I should recuse. Please find enclosed a copy of a memo I sent to the Judicial Ethics Committee on September 30, 2022, asking whether I should recuse in the above-referenced appeals, and its response, dated October 4, 20222, indicating that I need not do so.

If you have any further questions or need any further information, please let me know.

Sincerely



Catherine R. Connors

Encl.

To: James Martemucci, Chair Advisory Committee on Judicial Ethics
From: Catherine Connors

The guidance I seek from the Committee relates to my participation in pending mortgage foreclosure appeals. Given time constraints regarding pending matters, I seek an informal opinion.

Here is what I believe to be the relevant background:

- In 2017, the Law Court decided *Fannie Mae v. Deschaine*, 2017 ME 190. The Court held that res judicata barred a second foreclosure action when the initial action was dismissed with prejudice as a sanction. I, as a partner at Pierce Atwood, represented an amicus, the Maine Bankers Association, which argued that res judicata should not apply.

- In *Pushard v. Bank of America, NA*, 2017 ME 230, the Law Court held that when a foreclosure action has been rejected by the court for failure to follow statutory notice requirements, the borrowers in that case were entitled to a declaration that the bank's note and mortgage were unenforceable and they held title to the property free of the mortgage. I, as a partner at Pierce Atwood, represented the lender.

- I became a Justice on the Maine Supreme Judicial Court in 2020. Since that date, I have recused myself from any matter involving Pierce Atwood. Because of the publicity given to these mortgage cases, while I didn't think this was ethically required, I recused myself from any mortgage foreclosure appeal for two years.

- After that period, understanding that I am obligated not to recuse except when necessary, I started participating in mortgage foreclosures cases where Pierce Atwood was not representing any party, and where I had not personally previously represented any party.

- Currently pending before the Law Court is *Finch v. US Bank, NA*, Docket No. And-21-355. The appellant bank is challenging a judgment in favor of the borrower for declaratory and injunctive relief that the borrower holds title to the property unencumbered by the bank's mortgage. Because Pierce Atwood was not representing a party and I did not represent the bank in *Finch*, I have to date participated in the appeal, including oral argument.

- After that argument, the Court asked for supplemental briefing from the parties on the following issues:

    1. Should the Court reconsider its existing precedent that a foreclosure judgment in favor of the mortgagor based on the mortgagee's failure to comply with 14 M.R.S. § 6111 renders the note and mortgage unenforceable because a second foreclosure action is barred by principles of res judicata?

A. If so, upon what grounds, and to what extent, should principles of res judicata continue to apply? Should it make a difference if the second foreclosure action is based on a new default?
B. If the lender is barred from pursuing a second foreclosure action under principles of res judicata, does this inability render the note and mortgage unenforceable such that the lender may pursue alternative claims including, but not limited to, an unjust enrichment claim against the borrower consistent with Restatement (Third) of Restitution & Unjust Enrichment § 2(2)?

2. Should the court reconsider and repudiate the language in *Fed. Natl Mortg. Assn v. Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230, and *Pushard v. Bank of. Am., N.A.*, 2017 ME 230, ¶ 36, 175 A.3d 103, ordering that a failed foreclosure action barring a second foreclosure action on res judicata principles entitles the borrower to a discharge of the mortgage and title to the mortgaged property?

Supplemental briefs have been filed and the matter remains pending.

- Subsequent to the filing of the appeal in *Finch*, an appeal was filed in *J.P. Morgan Acquisition Corp. v. Moulton*, Docket No. OXF-21-412. Again, Pierce Atwood does not represent anyone in that appeal and I did not represent any of those parties. The Court asked for supplemental briefing from the parties on the same questions as it asked in *Finch* and also invited amici briefs on those questions.

- I've been told that the Maine Bankers' Association (not represented by Pierce Atwood) has now filed an amicus brief in *Moulton*. The matter remains pending.

My questions to you are whether I should I recuse in *Moulton*? In *Finch* as well?

Rule 2.1 requires recusal in any proceeding in which the judge's impartiality "might reasonably be questioned," which includes when the judge "served as a lawyer in the matter in controversy." Obviously, these pending appeals are not the same appeals in which I filed an amicus brief in *Deschaine* and represented a different bank in *Pushard*. *See* Blue Cross & Blue Shield of R.I. v. Delta Dental of R.I., 248 F. Supp. 2d 39, 42, 2003 U.S. Dist. LEXIS 3254, *8 (discussing cases examining the meaning of "matter in controversy"). Does it make a difference that I did not represent a party in *Deschaine*, but rather an amicus, and that amicus is now filing an amicus brief in a separate appeal, represented by a different firm? I took a quick look on Lexis and the closest decision I could find, summarizing the case law in some depth on the duty to recuse when previously representing an amici, is Hoke Cnty. Bd. of Educ. v. State, 2022 N.C. LEXIS 789, *7, 2022 WL 3575964.

I look forward to your guidance.

Thanks.

From: James Martemucci [redacted]
Date: Tue, Oct 4, 2022 at 8:19 AM
Subject: Fwd: Justice Connors' question
To: James Martemucci [redacted]

Hi Justice Connors

The Judicial Ethics Committee has carefully reviewed your inquiry and we unanimously opine that you do not need to recuse yourself. Please see the below analysis for more detail of our opinion. We also thank you for your analysis submitted with your inquiry.

Regards,

Jim Martemucci

We have reviewed Rule 2.11 of the ABA Model Code of Judicial Conduct, which is comparable to Maine Rule 2.11 which is the applicable rule at issue here. We understand why Justice Connors is hesitating here , as there are less than "six degrees of separation" between her amici cases and the ones now before the Court. Largely her hesitation is no doubt based on the fact that the Court is being asked to review a ruling that was made in a case where she represented amici advocating a position in those cases. After reading the applicable law and the Hoke decision we think this is not a matter necessitating recusal.

The two pending cases before the Law Court are totally separate from the Deschaine and Pushard matters decided five years ago. Justice Connor did not represent any of the parties in the pending litigation and her former law firm has not entered an appearance. The sole justifications for recusal would be either that (i) the legal issues raised in these cases are ones in which Justice Connor advocated a position representing a private client; or (ii) she previously represented an amicus in that same capacity in one of those earlier cases.

On the first point, the fact that a lawyer advocated a position for a client does not disqualify that lawyer from considering the same legal issue as a judge. If the law were otherwise, presumably former prosecutors or defense counsel could not hear criminal cases or, as was the case in Hoke County, a former civil rights lawyer could not hear such cases on the bench.

As for the second point, we agree with Justice Earls's analysis that representation of an amicus is qualitatively different than representation of a litigant. The fact that a client is serving a public role as a "friend of the court" by seeking to bring to the court's attention some of the broader implications of pending litigation ought not disqualify the lawyer who previously represented that client from subsequently considering purely legal issues raised in separate litigation before her as a judge. Indeed, were the law otherwise, it could discourage the filing of amicus briefs, which would be a disservice both to the courts and to the public.

From: **Catherine Connors** [redacted]
Date: Fri, Sep 30, 2022 at 2:22 PM
Subject: Recusal question for the Judicial Ethics Committee
To: James Martemucci [redacted]

First, please allow me to share condolences for your recent losses. I don't mean to bother you at this time, so if I should be contacting someone else with my recusal question, please let me know.

I think the attached memo covers the relevant information, but please contact me if you need anything else.

Thanks.

Catherine R. Connors
Associate Justice, Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04101
[redacted]

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James F. Martemucci
Judge, Maine District Court

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