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Catherine Connors
[redacted]

June 7, 2024

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

Re: Complaint from T. Cox (Docket No. 24-033) – response to letter dated May 28

Dear Mr. McArdle:

Thank you for your letter of May 28, 2024. I will try to address your questions as I understand them.

Timing

First, you have asked why I participated in the *Finch* oral argument in June 2024 before I asked the Advisory Committee on Judicial Ethics whether I should recuse. My answer is based on our general protocols, the public chronology of events, and what I can remember that I believe I can share.

Our general protocol is that after the appellant and appellee briefs have been filed, the clerk's office circulates an email that lists the cases, including the parties and the attorneys representing them, and asks the Justices whether they know of any reason why they need to recuse in that matter. At that point recusal decisions are based primarily on the identity of the parties and the attorneys. Justices generally don't become aware of the substance of the issues raised in an appeal until they read the briefs and the bench memoranda, which are typically prepared approximately two weeks before argument.

The initial briefs were filed in *Finch* in mid-March 2022. The initial briefs were filed in *Moulton* by May 31, 2022. Pierce Atwood represented no party in either appeal and I had not previously represented any of the parties. I saw no required recusal at that time. I also note that no one ever moved for my recusal in either case.

Oral argument in *Finch* was held in June. On August 23, 2022, the Court asked for supplemental and amici briefs in *Moulton* and supplemental briefing in *Finch* on the issue whether precedent should be re-visited. The amicus brief

of the Maine Bankers Association was submitted in the *Moulton* appeal on September 27, 2022. It was then that I questioned whether recusal was required, and that is when I sent my inquiry to the Ethics Committee, three days after the amicus brief was filed.

Recusal decision

The following reflects my thought process in making recusal decisions, including the decision I made regarding these two appeals.

When I became a Justice, I came with a long list of previous client representations. When a party in an appeal appeared on that list, initially, I automatically recused. Over time, I became more sensitive to the burden these recusals were imposing on my fellow Justices and my duty not to recuse unless required. Based on a growing appreciation of these factors, after two years, I concluded that, consistent with Rule 2.7, I should not recuse except when the Code really required disqualification.

I continue to recuse in any appeal in which Pierce Atwood represents a party or amicus because I retain a financial interest (albeit very small) in the firm. With respect to appeals involving former clients, my understanding is that recusal is not necessarily automatically required. Rather, the need for recusal attenuates over time, measured by considerations including the extent of the previous representation. Nonetheless, I generally do not participate in appeals involving a party that I previously represented, and not if my previous representation involved multiple matters over a significant period of time (such as my previous representation of Central Maine Power Company). With respect to other appeals, involving no financial interest and no previous representation, I believe that Rule 2.7 obligates me not to recuse unless required. *See In re Michael M.*, 2000 ME 204, ¶ 14 ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.") (citation omitted.)

As noted, the appeals in *Finch* and *Moulton* did not involve either Pierce Atwood or a party that I previously represented. It was only once the amicus brief was filed in *Moulton* by an association that I had previously represented as an amicus that I questioned whether this filing triggered a duty to recuse.

When I have a question in this area, I am grateful for the existence of the Advisory Committee on Judicial Ethics. As previously indicated, the Committee on Judicial Ethics told me that recusal was not warranted. Hence, again, I thought it was therefore my duty not to recuse.

Importantly, my understanding of the law and the position of the Committee on Judicial Ethics is that positions on legal issues argued on behalf of clients are

not grounds for recusal because although previous *party* representation can raise reasonable appearance questions as to client fealty, previous advancement on *issues* in court on behalf of clients is not viewed as a legitimate basis to recuse. I read Rule 2.11(A)(3) as reinforcing this conclusion. It states that impartiality might be questioned when a judicial candidate has made a public statement "*other than in a court proceeding*" that commits or appears to commit the judge to reach a particular result in the proceeding. I had represented multiple lenders during my practice, advancing their positions on legal issues in litigation, but I read this rule and the case law to mean that whether an appeal involves an issue as to which I previously represented clients in court is not a factor in the consideration whether to recuse. Recusal should occur only if the judge has a personal view on the subject matter, outside of her previous advocacy, which she cannot dislodge to act as a neutral decision-maker. I have and had no such personal views in the area of foreclosure law.

Also, I understand that whether a proceeding is one in which my impartiality might reasonably be questioned is an objective inquiry, mandating recusal "when a reasonable person, knowing all the facts, would question the judge's impartiality." *Allphin v. United States*, 758 F.3d 1336, 1344 (Fed. Cir. 2014). A prior association, without more, does not create a reasonable basis to question impartiality, and individual subjective beliefs about impartiality are irrelevant. *Id.*

In sum, I did not recuse in these two appeals because Pierce Atwood was not involved, I had not represented any of the parties, I had no personal view or inability to be impartial, and the Committee on Judicial Ethics agreed that my previous representation of an amicus did not warrant recusal. No party asked for my recusal, suggesting no party questioned my impartiality. Nothing in Rule 2.11(A) indicated a need to recuse, and I concluded that under such circumstances, I was dutybound not to recuse. I did not read the rules as requiring me to alter my conclusion when these appeals turned out not to be run-of-the-mill but to involve potential for re-visiting legal issues on which I had previously advocated for my clients' positions.

Judiciary Committee remarks

I understand you to be asking whether my remarks before the Judiciary Committee change the analysis set forth above.

Because it was and remains my understanding that a recusal decision cannot be based on whether the ultimate ruling on the merits will be disagreeable to a segment of the population or whether a ruling will overturn precedent, even if consistent to the position on an issue on which I previously represented clients in court, I understand the applicable question under Rule 2.11 to be whether my remarks before the Judiciary Committee disqualify me from participating in

any appeal involving foreclosure law for the duration of my term because, based on those remarks, one could reasonably question my impartiality in deciding appeals falling within this subject matter.

I believe that the answer is no because I do not harbor any personal bias for or against lenders or borrowers in foreclosures, I did not say that I could not be impartial, and I do not believe my remarks could be reasonably understood to indicate that I was saying that I could not be impartial in adjudicating appeals involving foreclosure law.

I also never intended my remarks before the Judiciary Committee to constitute a pledge not to participate in any appeals relating to foreclosure law over the entirety of the seven-year term. Instead, my intent was to communicate a commitment to adhere to the judicial rules of conduct regarding recusals and to share my prediction that, in the area of foreclosure appeals, this would result in a significant number of recusals – which prediction was accurate. I thought I was explaining to the Judiciary Committee that Pierce Atwood could represent lenders in foreclosure matters going forward, my representation had involved many lenders, and these factors would result in recusals. As noted above, I also have concluded that, after more than two years, I should start hearing foreclosure appeals when Pierce Atwood does not represent anyone and I had not represented a party. Apparently, my remarks were inartful and may have been unclear. I regret that the ethics of my subsequent conduct are being questioned based upon them.

Conclusion

If I did not analyze the right factors and if I misapprehended my duty such that I violated the Code, this was the opposite of my intent and contrary to my efforts to reach the right decision based on my understanding of the rules and my consultation with the Advisory Committee on Judicial Ethics.

As always, I am happy to answer any questions and to provide any more information that this Committee may seek.

Sincerely,

Catherine R Connors

Catherine R. Connors