

STATE OF MAINE
SUPREME JUDICIAL COURT

LAW DOCKET NO. JUD 24-3

IN RE: CATHERINE R. CONNORS

REPLY BRIEF OF THE MAINE COMMITTEE ON JUDICIAL CONDUCT

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ARGUMENT

I. Justice Connors Incorrectly Attempts to Restrict the Identity of the Reasonable Person to Judges, Lawyers and Legal Scholars.

In Section IB of her brief Justice Connors asserts that, in applying the reasonable person test to consider the appearance of impropriety, a reasonable person has knowledge of all significant facts, as well as familiarity with the nature of our legal system, applicable legal standards and the factual and legal context relevant under the circumstances. Connors Brief at p. 12. That assertion, if true, would limit the perspective of the reasonable person substantially to that of an attorney, judge or scholar having substantial familiarity with the legal system, as that information and knowledge is not common for someone who is not an attorney or judge.

Fortunately, Justice Connors' assertion is incorrect. The lens through which judicial conduct should be viewed in considering the appearance of impropriety is that of the average person who looks at the given circumstances and may reasonably question the judge's impartiality. No law degree or experience as an attorney or judge is required. Instead, the lens used is how the "average person on the street views a judge's participation in a case." *United Farm Workers of America, AFL-CIO v. Superior Court*, 170 Cal

App. 3d 97, 104 (1985). “If a reasonable man would entertain doubts concerning the judge’s partiality, disqualification is mandated.” *Id.*

Relatedly, the higher bar of actual impropriety need not exist for a reasonable and average person to perceive the appearance of impropriety which mandates recusal. The question is not whether the judge’s impartiality is, in fact, impaired but whether there is a reasonable basis for questioning the judge’s impartiality. *Tyson v. State*, 622 N.E.2d 457 (Ind. 1993).

II. Justice Connors Incorrectly Implies That the Judicial Ethics Advisory Committee Should be Deemed the “Reasonable Person” in Assessing Her Conduct.

In Section II of her brief, Justice Connors asserts that the Maine Judicial Ethics Advisory Committee is the “reasonable person” in this instance and tacitly implies that its informal opinion should control the evaluation of her conduct. Connors Brief at pp. 32-34. To support this argument, Justice Connors states that the Advisory Committee is comprised of three Judges or Justices, one Family Law Magistrate, one licensed attorney and one public member. *Id.* at pp.32-33. The voting members of the Committee on Judicial Conduct (the “CJC”) are comprised of three Judges (one each from the Superior, District and Probate Courts), three attorney

members and three public members. Accordingly, it represents an equal, if not greater, cross-section of individuals to evaluate Justice Connors' conduct. More importantly, unlike the Ethics Advisory Committee (which had limited information when it was queried and gave an informal opinion in an email exchange), the CJC was in possession of not only the information provided to and from the Ethics Advisory Committee but also substantial and additional information: Attorney Cox's complaint, brief and exhibits; Justice Connors' testimony to the Maine Standing Committee on the Judiciary regarding conflicts, the appearance of impropriety and recusal; and Justice Connors' responses to the CJC's specific questions, before it concluded that Justice Connors violated the Code of Judicial Conduct and should be sanctioned.

Fundamentally, perception of the average and reasonable person is the key to viewing and determining the appearance of impropriety, rather than an information opinion offered by the Ethics Advisory Committee which lacked certain key facts.

III. The Committee on Judicial Conduct Does Not Assert that Justice Connors Intentionally Concealed Information from the Ethics Advisory Committee but Rather Asserts the Omissions Were Errors.

On page 33 of her Brief, Justice Connors states: “the Committee appears to suggest that Justice Connors attempted to secret away the real question when she asked the Advisory Committee on Judicial Ethics for advice.... What the record shows, instead, is that she pointed the Advisory Committee on Judicial Ethics to the most direct possible conflict she could see, while inviting contact if the Advisory Committee on Judicial Ethics needed more information.” Connors Brief at p.33 (emphasis added). The CJC neither states nor implies that Justice Connors intentionally concealed facts and/or intentionally refused to ask them whether a reasonable person would question her impartiality. Instead, the CJC asserts that Justice Connors did not appreciate the appearance of conflict, and therefore she did not include all of the pertinent facts bearing on that issue in her inquiry nor focus on the appearance of conflict issue and particularly how all of the facts would appear to an average and reasonable person.

In her brief, Justice Connors states that she “pointed the Advisory Committee to the most direct possible conflict she could see.” Connors Brief

at p.33 (emphasis added). The CJC accepts that as true. However, that limited view fails to point the Advisory Committee to the issue of the appearance of impropriety and certain pertinent facts because she failed to see and appreciate them. Importantly and consequently, she received an inadequate informal opinion from the Ethics Advisory Committee.

IV. Despite Justice Connors' Assertion, Consideration of the Potential *Finch* Result was a Relevant Factor to Weigh in Considering Recusal.

At pages 16-18 of her brief, Justice Connors argues that the ultimate result in a case, like *Finch*, is not relevant or appropriate for the judge to consider in deciding whether to recuse. Connors Brief at pp. 16-18. Justice Connors' participation in *Finch* and *Moulton*, coupled with her ability to overturn *Pushard*, would look improper to a reasonable and average person. Factors that created the appearance of impropriety that Justice Connors should have considered include: her representation of banking interests in *Pushard*; her briefing and loss of the *Pushard* appeal, and her ability to find in favor of the bank in deciding the *Finch* appeal to overturn the case she previously lost. Given those facts and circumstances, it not only made sense for Justice Connors to consider the issues and potential outcome in *Finch* but it was incumbent on her to do so.

Justice Connors tries to support her argument by stating that “[I]litigants are not permitted to wait for the outcome to decide whether to move to recuse.” Connors Brief at p.16. That expressed concern does not apply here. The CJC’s intent and express duty is to enforce compliance with the Code of Judicial Ethics rather than provide a litigant with appellate review.

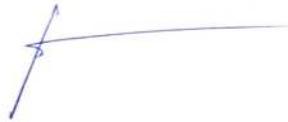
V. Justice Connors’ Assertion that Recusal Under Rule 2.11(A) is Discretionary is Incorrect.

In Section III of her brief, Justice Connors contends that Rule 2.11(A) of the Code allows her discretion on whether to recuse. Connors Brief at p. 34. To the contrary, Rule 2.11(A) mandates disqualification where the judge’s impartiality might be reasonably questioned. “The use of the word shall, rather than may, in the rule is a command. It means the disqualification is mandatory and leaves no room for discretion.” *In the Matter of Robert MA Nadeau* 2018 ME 1, ¶ 14.

CONCLUSION

For the foregoing reasons and those stated in its principal brief, the Committee on Judicial Conduct requests that the Panel sanction Justice Connors by issuing a reprimand.

DATED: October 8, 2025



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