Meeting Notice

Joint Board Meeting
June 25, 2024, Meeting of Coalition Communities 2.0

A. Meeting Time and Location

Date: June 25, 2024
Time: 2:00 P.M.
Location: Sheehan Phinney Capitol Group
2 Eagle Square
Concord, NH 03301

B. Meeting Agenda

1. Call to Order
2. Minutes Approval
3. Financial Report
4. Legislative Update
   a. Final Report on Bills from Current Session
   b. Study Committee Schedules
5. Legal Update
6. Communications Plan
7. Report on Meeting with Hampton Board of Selectmen
8. Discuss the renewal of the MOU
9. Discuss contracted services agreement renewal or RFP
10. Other Business
11. Adjourn.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2024-0138, Steven Rand & a. v. State of New Hampshire, the court on May 31, 2024, issued the following order:

The applications to appear pro hac vice filed by Attorneys Wendy Lecker, Aditi Padmanabhan, Alice Tsier, and Michael-Anthony Jaoude are granted.

On or before June 10, 2024, Attorney Jaoude shall register in the Supreme Court's electronic filing (e-filing) system. The address for the e-filing system is https://ctefile.nhecourt.us/login. The e-filing system is also accessible through the Electronic Services page of the New Hampshire Judicial Branch website: https://www.courts.nh.gov/resources/electronic-services/supreme-court/attorneys-self-represented-parties-and-other-non. Prior to registering, it is recommended that Attorney Jaoude call the clerk's office at 603-229-3759 to provide his New York bar number and then review the Quick Guide – Registering as an Attorney E-Filer, which is available on the Electronic Services page.

Attorneys John R. Munich, J. Nicci Warr, and Joshua D. Weedman are deemed non-participants because they have not filed pro hac vice applications in response to the March 14, 2024 order concerning compliance with Rule 33(1). Accordingly, they will be removed from the service and distribution list.

Transcript having been filed in the clerk's office, the Coalition Communities' brief and the State's brief must be filed on or before July 15, 2024. The plaintiffs' brief or memorandum of law must be filed on or before August 29, 2024.

> **NOTE:** Your brief must not exceed 9,500 words. See Rule 16(11). If you are the appealing party, you must submit a copy of any decision(s) being appealed with your brief in compliance with Rule 16(3)(i). If you are not the appealing party and you choose to file a memorandum in lieu of a brief, it must not exceed 4,000 words.
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> An appealing party is responsible for providing the court with the necessary record to decide the appeal. Failure to do so may result in dismissal of the appeal. For information about how to provide the

court with the record, review Rule 13 carefully. If you intend to file an appendix to your brief, review Rule 17.

This order is entered by a single justice (Countway, J.). See Rule 21(7).

Timothy A. Gudas,
Clerk

Distribution:
Wendy Lecker, Esq.
Samuel R.V. Garland, Esq.
Natalie J. Laflamme, Esq.
Aditi Padmanabhan, Esq.
Alice Tsier, Esq.
Joshua D. Weedman, Esq.
Michael-Anthony Jaoude, Esq.
Lawrence P. Gagnon, Esq.
John-Mark Turner, Esq.
John R. Munich, Esq.
John E. Tobin, Jr., Esq.
J. Nicci Warr, Esq.
Attorney General
Anthony J. Galdieri, Esq.
Andru H. Volinsky, Esq.
Abbygale Martinen, Esq.
File

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2024-0138, Steven Rand & a. v. State of New Hampshire, Chief Justice Gordon J. MacDonald on May 31, 2024, issued the following order:

Through their counsel, Andru Volinsky, Natalie Laflamme, John E. Tobin, Jr., Wendy Lecker, Alice Tsier, and Aditi Padmanabhan, the plaintiffs, Steven Rand, et al., move for my recusal on a number of grounds. Attorney Volinsky avers that the facts supporting the motion are true and accurate. Sup. Ct. R. 21A. For reasons set forth below, the motion is denied.

The issue of judicial disqualification is governed by the constitution, statute, and court rule. Part I, article 35 of the New Hampshire Constitution establishes "the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." RSA 492:1 (2010) provides: "A justice shall not sit in any case in which he has been concerned as party or attorney or in any appeal in which he has acted as judge in the court below, or act as attorney or be of counsel for either party or give advice in any matter pending or which may come before the court for adjudication." In 2011, New Hampshire joined many other jurisdictions in adopting the Code of Judicial Conduct (CJC). See Sup. Ct. R. 38. The CJC consists of four canons, numbered rules under each canon, and comments that follow and explain each rule. See id., Scope, par. 1. In addition to these authorities, decisions from federal and state courts interpreting and applying CJC provisions and secondary sources can provide persuasive guidance.

Upon taking the oath of office, a New Hampshire judge is obligated to fulfill the constitution's mandate of fair and impartial justice. That solemn duty is essential to the integrity of the judiciary and upholding the rule of law under our constitutional system. From this flows two principles. First, "the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." Hutchinson v. Railway, 73 N.H. 271, 275 (1905) (quotation omitted); see also Richard E. Flamm, Recusal and Disqualification of Judges, § 46.1 (2018) (judges are "ordinarily presumed to be impartial and unbiased in all matters that have come before them for disposition."). Second, a judge has a "duty to sit." As Rule 2.7 of the CJC provides, "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." (Emphasis added.) The word "shall" is mandatory, making it clear that a judge is required to hear matters properly assigned. See Rule 2.7, Comment ("Unwarranted disqualification may bring

public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.").

These principles must yield when disqualification is required. CJC Rule 2.11(A) sets forth circumstances requiring disqualification. The plaintiffs rely on two of its five subparts, 2.11(A)(1) and 2.11(A)(5). Those subparts provide:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
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> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> . . .
>
> (5) The judge:
>
> (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
>
> (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; or
>
> (c) was a material witness concerning the matter.

I first address issues potentially implicating Rule 2.11(A)(5). The relevant facts are as follows. In 2019, Contoocook Valley School District v. State (the ConVal case) was commenced. As originally filed, the ConVal case raised claims involving the constitutional adequacy of payments from the State to local communities in support of public education as well as the constitutionality of the statewide education property tax ("SWEPT"). The SWEPT-related claims were later dropped from the case. The ConVal case is on appeal. I served as Attorney General from April 2017 until March 2021, at which time I assumed my present position. The ConVal case was commenced in March 2019. The Department of Justice has represented the defendants from the outset, including during my service as Attorney General. I am disqualified from that case.

This case was commenced in 2022, well after I began service in my current role. As originally filed, this case raised claims about the constitutional adequacy of payments from the State to local communities as well as the constitutionality of SWEPT. The case was litigated separately from the ConVal case. The SWEPT-related claims in this case were briefed and resolved by an order on cross-

motions for summary judgment. See Coalition Communities' Notice of Appeal, at p. 7, n.1 (stating that the court delayed issuing the ruling "to afford the parties an opportunity to assess how or if that order [in the ConVal case] impacts the procedure in this case" and noting that the "SWEPT issue in [ConVal] was withdrawn by the plaintiff."). In a subsequent order, the trial court granted the State's assented-to motion under Superior Court Rule 46(c)(1) to direct that its order on cross-motions for summary judgment addressing the SWEPT claims be treated as a final order for purposes of this appeal. See id. at pp. 35-36. In granting the motion, the court observed: "[W]hile the SWEPT Order pertains to the manner in which the [Department of Revenue Administration] collects education tax revenues from local communities, the plaintiffs' remaining claims concern the sufficiency of the education funding the State provides to local communities. Those issues implicate distinct legal questions." Id. (citations omitted). Thus, this appeal concerns the constitutionality of SWEPT.

The plaintiffs, who bear the burden of proof and must overcome a presumption of impartiality, fail to address the governing legal standards. They overlook entirely RSA 492:1 and offer no developed argument under the CJC's applicable text.

Turning first to RSA 492:1, under its plain language, I conclude that disqualification is not required. This is not a "case" in which I have been "concerned as [an] attorney." As stated above, this case was commenced after I left the Attorney General's Office.

The analysis under CJC Rule 2.11(A)(5) turns on the meaning of "matter in controversy," and, specifically, whether this case and ConVal are the same "matter in controversy." The CJC does not define this term and this court has not previously construed it. Although the CJC could have, but did not, use the word "case" instead of "matter in controversy," there is significant textual support for the proposition that the two terms are, in fact, synonymous. The CJC does define both "impending matter" ("a matter that is imminent or expected to occur in the near future") and "pending matter" ("a matter that has commenced. A matter continues to be pending through any appellate process until final disposition"). See CJC, Terminology. As those terms are used in the Rules, it appears that a "matter" is no different than a "case." See CJC Rule 2.10(A) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."). On the other hand, some courts interpreting this term – or its federal analog – have interpreted the term more broadly. As one commentator summarizes the caselaw: "Many courts have indicated, however, that a judge is required to recuse herself not only when the prior and past matters are precisely the same, but whenever they are sufficiently related to each other to be considered so; or, as has sometimes been said, when the prior and present

matters are 'substantially related'." Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, § 39.3 (3d ed. 2017).

Under the circumstances of this case, it is not necessary to define the precise contours of "matter in controversy" as used in the CJC. This case was filed well after the ConVal case. The plaintiffs and counsel are different. The cases were litigated separately and proceeded on entirely different tracks. And, as the trial court observed in granting the assented-to relief under Superior Court Rule 46(c), the adequacy claims brought by the plaintiffs, and at the center of the ConVal case, present "distinct legal questions" from the SWEPT-related claims at issue in this appeal. I agree. For these reasons, I conclude that ConVal and Rand are separate, distinct and not related, much less "substantially" so, within the meaning of CJC Rule 2.11(A)(5).

The plaintiffs argue that disqualification is required because ConVal and Rand "overlap[]" and that there are "significant overlapping issues" between the two cases. Again, that is not the governing legal standard. However, to the extent that plaintiffs argue that disqualification is required because the issues originally raised in ConVal relating to SWEPT "overlap" with issues in this case, the argument fails. It is well established that the fact that a judge may have advocated with respect to a particular "issue," as an attorney or otherwise, is not a basis for disqualification. See N.H. Milk Dealers' Ass'n v. Milk Control Board, 107 N.H. 335, 339 (1966) ("[B]ias in the sense of [a] crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." (Quotation omitted)); see also Carter v. West Publishing Co., No. 99-11959-EE, 1999 WL 994997, at *9 (11th Cir. Nov. 1, 1999) (Tjoflat, J.) ("Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated in the case before the court.") (citing numerous cases); Cipollone v. Liggett Group, Inc., 802 F.2d 658, 659-60 (3d Cir. 1986) ("If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could be appointed to the bench.").

Having concluded that my disqualification is not required by CJC Rule 2.11(A)(5), I next address the plaintiffs' argument that I must disqualify myself pursuant to CJC Rule 2.11(A)(1) because Andru Volinsky, in his role as an Executive Councilor in 2019, voted against my first nomination as Chief Justice of this court. The motion refers to Attorney Volinsky's bases for opposing that nomination as well as statements by third parties about the nomination process. Yet, that does not address the standard under the Rule as to a judge's personal bias or prejudice concerning a party or a party's lawyer. To that end, and pursuant to CJC Rule 2.11(A)(1), I represent that I am prepared to discharge my duties under the constitution and that I have no bias or prejudice for or against

any of the parties or lawyers in this case. I will decide this case solely upon the facts and applicable law. See also N.H. CONST. pt. I, art. 35

Thus, under the circumstances, this case is governed by the general rule that a person's past opposition to a judge's nomination does not create a reasonable basis for questioning the judge's impartiality in cases involving that person. See Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, § 24.1, § 24.4 (collecting cases); see also Denardo v. Anchorage, 974 F.2d 1200, 1201 (9th Cir. 1992) ("Courts which have considered whether testimony regarding a judicial nomination mandates recusal have uniformly concluded that it does not."); United States v. Evans, 262 F. Supp.2d 1292, 1296 (D. Utah 2003) ("if opposition to a judicial nominee were sufficient grounds for recusal, lawyers would be in a position to manipulate the court").

Although not raised in the motion, another of the plaintiffs' attorneys, John E. Tobin, Jr., publicly supported my nomination in 2019 and, in 2017, I received an award named in his honor from a third-party organization supporting civil legal aid. The same principles apply. See In re Executive Office of the President, 215 F.3d 25, 25 (D.C. Cir. 2000) (Tatel, J.) ("Hearing a case involving the conduct of the President who appointed me will not create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that my ability to carry out judicial responsibilities with integrity, impartiality, and competence would be impaired." (quotation and brackets omitted)). To permit an attorney's unilateral conduct with respect to a judicial nomination to displace the presumption of impartiality exposes our judicial system to the potential threat of manipulation. See Evans, 262 F. Supp.2d at 1296. This conclusion serves another important objective: encouraging robust participation by attorneys in the judicial selection process. See N.H. R. Prof. Conduct 8.2, 2004 ABA Model Rule Comment [1] (noting that assessments by lawyers are relied on in evaluating the professional or personal fitness of those being considered for appointment to judicial office and that "[e]xpressing honest and candid opinions on such matters contributes to improving the administration of justice").

The plaintiffs also point to my status as a former officer of a "public advocacy group, the Josiah Bartlett Center," as grounds for my disqualification under CJC Rule 2.11(A)(1). According to the plaintiffs, the Josiah Bartlett Center is "strongly opposed to school funding adequacy and dedicated to the diversion of public education funds to private schools." The Josiah Bartlett Center is not a party in this case, and I am no longer a member or officer of that organization. The plaintiffs' argument therefore boils down to their "their view of [my] policy preferences." Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir. 2005) (en banc), overruled on other grounds, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). "If judges were subject to disqualification on such a basis, our judicial system would be paralyzed." Comfort, 418 F.3d at 27; see also N.H. Milk Dealers' Ass'n, 107 N.H. at 339.

Unable to demonstrate a specific basis in the CJC requiring my disqualification, the plaintiffs appear to advance a "totality of the circumstances" test in arguing that the "overall situation is controlling." I do not dispute the statement in Comment [1] to CJC Rule 2.11 that "a judge is disqualified [under the Rule] whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply." That statement, however, provides no support for the plaintiffs' motion. A judge's impartiality cannot reasonably be questioned when, as in this case, none of the asserted bases for recusal would cause "an objective, disinterested observer, fully informed of the facts, [to] entertain significant doubt that justice would be done in [this] case." In the Matter of Tapply & Zukatis, 162 N.H. 285, 302 (2011) (quotation omitted).

As reflected in our constitution, the issue of disqualification lies at the heart of the integrity of the judicial system. The record of my judicial service reflects that, when required, I have concluded that my duty to sit must yield. For the foregoing reasons, this is not such a case. A reasonable person, fully informed of the facts and the legal principles applicable to judicial disqualification, would not question my impartiality. I affirm that I have no bias in this case and will decide it on the facts and the law. The motion for my recusal is denied.

This order is entered by Chief Justice MacDonald pursuant to Rule 21A.

Timothy A. Gudas,
Clerk

Distribution:
Wendy Lecker, Esq.
Samuel R.V. Garland, Esq.
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Alice Tsier, Esq.
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