

Fix the Court's Recommendations to Amend Rule 2.11 of the ABA Model Code

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Fix the Court
January 2025

The American Bar Association's Model Code of Judicial Conduct, in Rule 2.11, proposes a standard for judicial recusals and lists circumstances that "shall" trigger a judge's disqualification. Although recusal rules vary from state to state, the Model Code serves as a polestar for state practices, and it's worth identifying where we believe the Rule can be improved. Revisions to the Code could reverberate into reforms in state policies across the country.

Fix the Court would recommend the following additions:

1. Specify what it means for a judge or their family members to have an "economic interest" in the legal dispute by explicitly including income, gifts and reimbursements.

In Rule 2.11(A)(3), the Model Code requires a judge to recuse if she knows that she, or a member of her family, "has an economic interest in the subject matter in controversy or in a party to the proceeding."

The ABA's 2020 [Comment](#) to this section defines economic interest as "ownership of more than a de minimis legal or equitable interest" and lists a few examples of what this provision does *not* cover.

Ideally, the Model Code would also provide additional guidance as to what the rule *does* cover. For example, under Sen. Whitehouse's proposed Supreme Court Ethics, Recusal, and Transparency (SCERT) Act of 2023, judges would have to recuse if, beginning six years before the judge was assigned to the case, "the justice or judge, their spouse, their minor child or a privately held entity owned by any such person received income, a gift, or reimbursement" from a party to the proceeding. Likewise, the Model Code should make clear that the receipt by a judge or a member of her family of any income, gifts or reimbursements from a party to a case necessarily creates an "economic interest" in that case requiring recusal — maybe not for all time, but we believe six years to be reasonable.

True, the Model Code is necessarily general. Not every possible ethical situation needs to, or even can, be anticipated in advance. But the definition of "economic interest" is a crucial component that could benefit from greater clarity, closing gaps that threaten to undermine the impression of judicial impartiality.

2. Require recusal when a party to the proceeding, or an affiliate of the party, lobbied for or against the judge's nomination or confirmation.

As it now stands, Rule 2.11(A)(4) of the Model Code calls for a judge to recuse if he "knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer" has donated to the judge's election campaign within a certain time period, leaving it to the implementing state to specify the contribution threshold and temporal cutoff. This is an important and commonsense rule. Monetary contributions to a judge's judicial campaign risk creating the appearance that the judge

is beholden to the contributor, thus tipping the scales in favor of the deep-pocketed donor who ends up in the judge's courtroom. Rule 2.11(A)(4) limits that risk.

But the Model Code does not similarly recommend recusal when a party to the case has lobbied for a judge's nomination or confirmation, even though, in states that appoint their judges instead of electing them, lobbying can serve essentially the same function as does a hefty campaign contribution: that is, winning allies and currying favor.

An improved version of the Model Code could incorporate a rule, again borrowing from the SCERT Act, that requires recusal "[w]here the justice or judge knows that a party to the proceeding or an affiliate of a party to the proceeding made any lobbying contact . . . or spent substantial funds in support of the nomination, confirmation, or appointment of the justice or judge." A party that lobbies *against* a judge's nomination should also be on the judge's recusal list — and again, maybe not for all time but at least for a significant number of years, as above.

3. Require on-the-record explanations of recusals.

Rule 2.11(C) of the Model Code indicates that a disqualified judge "*may* disclose on the record the basis of the judge's disqualification" (emphasis added). Leaving the disclosure decision to the judge's discretion could obscure information that the public has a right to know about the public servants tasked with administering justice. Making disclosure mandatory, and especially requiring judges to specify the source and nature of the conflict, would bolster judicial transparency, alerting parties who might later come before the judge of potential conflicts of interest.

On-the-record explanations should occur even in states where judges fill out "conflict sheets" fed into software that automatically skips a judge who draws a case that includes a party listed on their sheet.

4. Establish clear guidelines for recusal procedures.

Overall, the Model Code says little about the procedural features of recusal: who considers recusal motions, who reviews recusal decisions, and what happens after a judge is disqualified.

Although the exact answers to these questions will depend on each state court's structure, the ABA could consider setting forth general principles to guide recusal procedures, along the lines of those suggested in a 2016 [Brennan Center](#) report.

For instance, a judge should not be able to rule on motions for his or her own recusal. It would be better, instead, for the task to fall to a disciplinary board or to randomly assigned fellow judges who do not sit on the same court as the subject of the recusal motion (such as judges from the state's intermediate appellate court or its judicial discipline board if the recusal motion is aimed at a state supreme court justice). These individuals would be more likely to be impartial in making their decision.

Moreover, an exemplary recusal system would permit parties to appeal the denial of recusal motions and would have clear mechanisms in place for replacing recused judges. At the trial and intermediate levels, we would expect a court administrator to re-run the proverbial case assignment wheel, and at

the supreme court level, we might consider leaving the court with one fewer judge or recalling a retired justice if the active, non-recused justices are amenable to it.

Adding these recommendations to the Model Code could encourage fairness and predictability in recusal decisions — the same values that the judiciary as a whole strives to embody.