

DISQUALIFICATION OR RECUSAL OF JUDGES

The Supreme Court of Hawai'i seeks public comment regarding a proposal to amend Rules 2.7 and 2.11 of the Revised Code of Judicial Conduct. The proposal allows for discretionary recusal by a judge under certain circumstances when a commissioner of the Judicial Selection Commission is involved in a case before the judge. The proposed rules are attached hereto.

Comments about the proposed rules should be submitted, in writing, **no later than Monday, November 25, 2013**, to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the Judiciary's website.

Attachment

**PROPOSED AMENDMENTS TO THE
REVISED CODE OF JUDICIAL CONDUCT**

(Deleted material is bracketed and stricken; new material is underlined)

Rule 2.7. RESPONSIBILITY TO DECIDE

A judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required or permitted by Rule 2.11 or other law.*

Code Comparison

The Hawai'i Revised Code of Judicial Conduct modifies ABA Model Code Rule 2.7 by adding "recusal" consistent with Hawaii's distinction between disqualification and recusal. To accommodate discretionary recusal allowed by Rule 2.11(d), the phrase "or permitted" is also added to the rule.

COMMENT:

[1] Judges must be available to decide the matters that come before the courts. Although there are times when disqualification or recusal is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification or recusal 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 or recusal to avoid cases that present difficult, controversial, or unpopular issues.

[2] In addition to those situations where disqualification or recusal is required under Rule 2.11(a) or other law, this rule permits recusal as provided under Rule 2.11(d).

Rule 2.11. DISQUALIFICATION OR RECUSAL

(a) Subject to the rule of necessity, a judge shall disqualify or recuse himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice for or against a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner* of such a person is:

- (A) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (B) acting as a lawyer in the proceeding;
 - (C) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or
 - (D) likely to be a witness in the proceeding.
- (3) The judge knows* that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner,* parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.
- (4) RESERVED.
 - (5) RESERVED.
 - (6) 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;
 - (C) was a witness concerning the matter; or
 - (D) on appeal, previously presided as a judge over the matter in another court.

(b) A judge shall keep informed about the judge's personal and fiduciary* economic interests* and make a reasonable effort to keep informed about the personal economic interests* of the judge's spouse or domestic partner,* minor children, or any other person residing in the judge's household.

(c) A judge subject to disqualification or recusal under this Rule, other than for bias or prejudice under Rule 2.11(a)(1), may disclose on the record the basis of the judge's disqualification or recusal and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification or recusal. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified or recused, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(d) A judge of the trial courts may recuse himself or herself from a case if the judge has a petition for retention or an application for judicial office pending before the Judicial Selection Commission, and the judge knows* that a witness, party, or counsel for a party in the proceeding is a commissioner on the Judicial Selection Commission whose term of office does not expire before the anticipated date of consideration of the judge's petition or application.

Code Comparison

*The Hawai'i Revised Code of Judicial Conduct
modifies ABA Model Code Rule 2.11 by adding
"recusal" consistent with Hawaii's distinction*

between disqualification and recusal[-], and by adding paragraph (d) that allows for discretionary recusal by a judge under certain circumstances when a commissioner of the Judicial Selection Commission is involved in a case before the judge.

COMMENT:

[1] Under [~~this~~] Rule 2.11(a), a judge is disqualified or recused whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of Rules 2.11(a)(1) through (6) apply.

[2] A judge's obligation to disqualify or recuse himself or herself under these Rules applies regardless of whether a motion to disqualify or recuse is filed.

[3] As provided for in Rule 2.11(a), the rule of necessity may override the rule of disqualification or recusal. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification or recusal and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under Rule 2.11(a), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under Rule 2.11(a)(2)(C), the judge's disqualification or recusal is required.

[5] [~~RESERVED~~] Rule 2.11(d) was adopted to address the practical implications of Rule 5(Section 3)(B) of the Judicial Selection Commission Rules that requires recusal of a commissioner if that commissioner has a substantive matter pending before a judge who has a petition for retention pending before the commission. Paragraph (d) provides the judge with discretion to determine the appropriateness of the judge's continued participation in a proceeding involving a matter when the judge has a petition for retention or an application for judicial office pending and a commissioner is involved in the case. Recusal under this paragraph does not require a judge to find that the relevant circumstances give rise to an appearance of impropriety or that the judge's impartiality might reasonably be questioned.

[6] [RESERVED.] The fact that a judge has a petition for retention or application for judicial office pending does not impose an affirmative obligation upon the judge to review the record to determine whether a commissioner is involved in the case. Discretionary recusal under Rule 2.11(d) applies only upon a judge's actual knowledge of the commissioner's involvement in the proceedings (See definition of "knows" in Terminology of these Rules). A judge's decision to recuse himself or herself may be informed by a variety of factors, including the nature of the judge's calendar, the timing of expected judicial action in the case in relation to the date of the applicable proceeding before the Judicial Selection Commission, the effect of a recusal upon the timely disposition of the case, the ease of substitution of another judge, the position of counsel with respect to recusal, and the anticipated extent of the involvement of the judge and the commissioner in the case.

[7] Rule 2.11(d) is intended to ensure that a judge may exercise his or her informed discretion without consideration of a potential challenge to the recusal decision at a later point in the proceedings. Thus, there is no per se impropriety or appearance of impropriety where a commissioner on the Judicial Selection Commission appears before a judge as a witness, party, or counsel for a party in a proceeding.