

What is the difference between recusal and abstention, if any?

A very common mistake made by public board members is to equate recusal for conflict of interest with a vote to abstain.

To *recuse* means “To disqualify ... from participation in a decision on grounds such as prejudice or personal involvement.” *American Heritage Dictionary*, 1143 (3d ed., 1997).

To *abstain* means “To refrain from something by one’s own choice.” *Id.* at 6

Recusal is the proper response to a conflict of interest. When a conflict of interest exists, a member of a deliberative body must recuse him or herself from all participation in the matter, i.e. from discussing, questioning, commenting and voting. Ideally, the person should leave the room so that there is no way that she or he can influence the procedure (for instance by smiles, glares or other body language). All members who participate in a hearing must be and appear to be impartial in their judgment. *In Re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4 (1974).

Where the Municipal Administrative Procedures Act applies, members must recuse themselves, as would members of the judiciary who are subject to the judicial conflict of interest law. 12 V.S.A. § 61; 24 V.S.A. § 1203. Indeed, recusal is mandated for members of a body acting in any quasi-judicial proceeding, even in the absence of the Municipal Administrative Procedures Act. This is because 12 V.S.A. § 61 (a) states that no one shall “act in a judicial capacity ... as trier of a cause or matter in which he ... is interested....”

In contrast, a board member must abstain from voting in a case in which he or she has inadequate information on which to judge the merits. This may occur where the member has not had the opportunity to examine all of the evidence or to attend all of the hearing for reasons other than conflict of interest. For example, the Supreme Court, in a case involving the New Motor Vehicle Arbitration Board and Vermont’s “lemon law,” ruled that board members who had heard a tape of the hearing but had not participated in the test drive of the vehicle in question could not participate in the decision. *In re: Villeneuve*, No. 96-640 (Feb. 6, 1998). An individual may also abstain when he or she is simply unable to make a decision in the matter.

Please also note that it is not necessary for a board member to stay away from an **entire** meeting because he or she has a conflict of interest or because he or she wishes to abstain. The member should plan to attend the meeting and participate in all other agenda items. The business of local government can still proceed in spite of conflicts and abstentions!

In summary, a recused board member should not participate in a hearing or deliberation concerning a matter in which he or she has a conflict of interest. The recused member should not be present, and is not counted as one of those present or as an abstention. A vote to abstain would come after a member has participated in the hearing and deliberation. However, how that vote is counted is currently a question before the Vermont Supreme Court in *Reynolds v. Town of South Hero*, Docket No. 98-580. (See the February 1999 *VLCT News* Legal Corner column.) The Court’s decision will be reported in a future *VLCT News* Legal Corner as soon as it is rendered. *Stay tuned!*

VLCT News, March 1999