



SUPREME COURT OF NEW ZEALAND | TE KŌTI MANA NUI O AOTEAROA

Recusal Guidelines

The following guidelines are published in accordance with s 171(2) of the Senior Courts Act 2016.

1. These guidelines replace the Recusal Guidelines dated 1 March 2017.
2. The guiding principle of these guidelines is that a judge is disqualified from sitting if in the circumstances there is a real possibility that in the eyes of a fair-minded and fully informed observer the judge might not be impartial in reaching a decision in the case. An instance is where a judge has a material interest in the outcome of the appeal.
3. The test is a two-step one requiring consideration of:
 - (a) what are the circumstances relevant to the possible need for recusal because of apparent bias?
 - (b) whether those circumstances lead to a reasonable apprehension the judge may not be impartial.

The test requires ascertainment of, first, what it is that might possibly lead to a reasonable apprehension that the judge might decide the case other than on its merits and, secondly, whether there is a logical and sufficient connection between those circumstances and that apprehension.

4. Once leave to appeal to the Supreme Court has been sought, each judge has a duty to acquaint all colleagues in the Court with any known circumstances which may give rise to a concern among the litigants, or the public, that the judge might not be impartial in the case. Every judge is similarly under a duty to bring to the attention of all other colleagues any circumstances which may lead to such a concern in respect of any other judge.
5. If, after discussion of the circumstances with all other judges, the judge concerned is satisfied there is a real possibility that he or she cannot act impartially, or is satisfied that a fair-minded and fully informed observer might reach that view, the judge will decide not to sit on the appeal.
6. In any other case, after such discussions, the judge will, unless the other judges decide that this is unnecessary, issue a minute addressed to the

parties to the litigation drawing their attention to the relevant circumstances and inviting them to indicate if they have any views on whether the judge should sit on the appeal. The minute will indicate that, in addition to indicating their views and drawing the judge's attention to any additional matters thought relevant, if a party objects to the judge sitting on the grounds raised or any other grounds, counsel should say so. The minute should set a time for response by the parties.

7. If an objection is received, that will be determined by all the judges available, other than the judge who is the subject of the objection. Those judges may call for submissions and hear the parties as they think appropriate.
8. If no objection to the judge sitting is received, all judges will consider any material provided in response to the judge's minute but the judge concerned will decide whether or not to sit.
9. Where a party (of its own motion) considers there to be a possible conflict of interest, a memorandum must be filed at the earliest possible opportunity setting out the particular circumstances giving rise to the alleged conflict. The Court will (usually) ask for a response from the other parties. Subject to paragraph 10, the objection will be dealt with in terms of paragraphs 5 and 7 of these guidelines.
10. Recusal applications made at a hearing or close in time to the allocated hearing date of an application or an appeal are generally not appropriate. If an issue of conflict of interest is raised at this late stage, the Court hearing the application or the appeal will usually deal with the matter.
11. Where a possible conflict of interest arises or may arise after the hearing of an appeal but before the judgment is delivered, the judge (if aware of the possible conflict), or any other judges who are aware of the possible conflict, should raise the issue with the remainder of the panel. A party who becomes aware of a possible conflict after the hearing and before judgment is delivered should also immediately inform the Court. The procedures set out at paragraphs 6, 7 and 8, with necessary modification, will then apply.

Helen Winkelmann
Chief Justice

9 July 2020