

LEGISLATIVE ETHICS - LAWS AND RULES

INTRODUCTION

There is a difference between ethical behavior and legal behavior. Everyone has the duty to obey the law. Ethical behavior is a higher standard of conduct than merely not violating the law. Ethical behavior is following standards of moral duty and virtue in accordance with the accepted principles of conduct that govern in certain circumstances. In the circumstances of service as a member of the North Dakota Legislative Assembly, many of the accepted principles have been set in law or rules. This memorandum reviews constitutional and statutory provisions that apply particularly to legal and ethical behavior of legislators. This memorandum also reviews legislative rules that the Legislative Assembly has established as standards of ethical conduct that legislators are expected to meet.

NORTH DAKOTA LAWS RELATING TO LEGAL BEHAVIOR AND ETHICS OF LEGISLATORS

Constitutional Provisions

A number of provisions of the Constitution of North Dakota relate to behavior in legislative activities.

Section 6 of Article IV provides:

While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office that has been created by the legislative assembly. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office for which the legislative assembly has increased the compensation in an amount greater than the general rate of increase provided to full-time state employees.

Section 9 of Article IV provides:

If any person elected to either house of the legislative assembly shall offer or promise to give his vote or influence, in favor of, or against any measure or proposition pending or proposed to be introduced into the legislative assembly, in consideration, or upon conditions, that any other person elected to the same legislative assembly will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced into such legislative assembly, the person making such offer or promise shall be deemed guilty of solicitation of bribery. If any member of the legislative assembly, shall give his vote or influence for or against any measure or proposition, pending or proposed to be introduced into such legislative assembly, or offer, promise or assent so to do upon condition that any other member will give, promise or assent to give his vote or influence in favor of or against any other such measure or proposition pending or proposed to be introduced into such legislative assembly, or in consideration that any other member hath given his vote or influence, for or against any other measure or proposition in such legislative assembly, he shall be deemed guilty of bribery. And any person, member of the legislative assembly or person elected thereto, who shall be guilty of either such offenses, shall be expelled, and shall not thereafter be eligible to the legislative assembly, and, on the conviction thereof in the civil courts, shall be liable to such further penalty as may be prescribed by law.

Sections 10 and 12 of Article IV contain indirect references to ethical standards. Section 10 provides:

No member of the legislative assembly, expelled for **corruption**, and no person convicted of bribery, perjury or other infamous crime shall be eligible to the legislative assembly, or to any office in either branch thereof. **(emphasis supplied)**

Section 12 of Article IV refers to ethical standards and also provides for the legislative authority to expel members. Section 12 provides, in part:

Each house shall determine its rules of procedure, and may punish its members or other persons for **contempt or disorderly behavior in its presence**. With the concurrence of two-thirds of its elected members, either house may expel a member. **(emphasis supplied)**

Statutory Provisions

Several provisions of the North Dakota Century Code govern general activities of individuals and public officials.

Tampering With Public Records

Section 12.1-11-05 provides that it is a Class C felony if a public servant who has custody of a government record knowingly makes a false entry in or knowingly, without lawful authority, destroys the verity or availability of

a government record. "Government record" is defined as any record, document, or thing belonging to, or received or kept by the government for information or record, or any other record, document, or thing required to be kept by law pursuant to a statute that expressly invokes the penalty in that section.

Bribery - Unlawful Influence

Section 12.1-12-01 makes it a Class C felony to knowingly offer, give, or agree to give to another, or solicit, accept, or agree to accept a thing of value as consideration for the recipient's official action as a public servant or the recipient's violation of a known legal duty as a public servant.

Section 12.1-12-02 provides that any person who violates Section 9 of Article IV (giving vote or influence) or Section 10 of Article V (actions of Governor) of the Constitution of North Dakota is guilty of a Class C felony.

Section 12.1-12-03 makes it a Class A misdemeanor for a public servant to solicit, accept, or agree to accept a thing of pecuniary value from a nongovernmental source as compensation for advice or other assistance in preparing or promoting a matter that is or is likely to be subject to the public servant's official action, or for omitting or delaying official action.

Section 12.1-12-04 makes it a Class A misdemeanor to solicit, accept, or agree to accept, or offer, give, or agree to give, a thing of pecuniary value as consideration for approval or disapproval by a public servant or party official of a person for appointment, employment, advancement, or retention as a public servant or for designation or nomination as a candidate for elective office.

Section 12.1-12-05 makes it a Class A misdemeanor to knowingly offer, give, or agree to give, or solicit, accept, or agree to accept, a thing of pecuniary value for exerting, or procuring another to exert, special influence upon a public servant with respect to the public servant's legal duty or official action as a public servant.

Confidential Information - Conflict of Interest

Section 12.1-13-01 makes it a Class C felony for a public servant, in knowing violation of a public duty, to disclose any confidential information acquired as a public servant.

Section 12.1-13-02 makes it a Class A misdemeanor if during employment as a public servant, or within one year thereafter, in contemplation of official action by that person as a public servant or in reliance on information to which that person had access only in that person's capacity as a public servant, a public servant acquires a pecuniary interest in any property or enterprise which may be affected by such information or official action, speculates on the basis of such information or official action, or aids another to do any of these activities.

Section 12.1-13-03 makes it a Class A misdemeanor for a public servant who is authorized to sell or lease property to enter a contract to become interested individually in the sale or lease of that property or in that contract.

Interference with Elections

Sections 12.1-14-02 and 12.1-14-03 make it a Class A misdemeanor to interfere with another because that person is or has been voting for any candidate or issue or to make or induce any false voting registration or give a thing of pecuniary value to another as consideration for the recipient's voting or withholding the recipient's vote for or against any candidate or issue.

Theft

Section 12.1-23-03 provides that it is theft to intentionally obtain services, known to be available only for compensation, by deception, threat, false token, or other means to avoid payment for the services, or to permit another to use those services. Under Section 12.1-23-05, if a public servant violates Section 12.1-23-03 and the services exceed \$50 in value or is a government file or paper, the offense is a Class C felony.

Section 12.1-23-07 makes it a Class B misdemeanor to use property entrusted to a public servant in a manner that the user "knows is not authorized and that [the user] knows to involve a risk of loss or detriment to the owner of the property or to the government." The criminal offense classification increases as the value of the misapplied property increases.

Campaign Contribution Statements

Title 16.1 governs elections. In addition to general requirements for election to office, several provisions apply to the conduct of legislators and public employees.

Section 16.1-08.1-02 requires any candidate committee or candidate for legislative office soliciting or accepting contributions for any political purpose to make and file with the Secretary of State a detailed statement of all contributions received from each individual or political committee which exceed \$200 in the aggregate for the calendar year. Sections 16.1-08.1-03 and 16.1-08.1-03.8 contain similar requirements for contributions and expenditures for political parties and multicandidate political committees, respectively.

Statements of Interest

Section 16.1-09-02 requires every candidate for elective office to file a statement of interest along with the certificate of nomination or endorsement or the petition of nomination. Section 16.1-09-03 lists the requirements for the contents of the statement. Basically, the candidate must identify the principal source of income, entities in which the candidate or candidate's spouse has a financial interest, entities with which the candidate and candidate's spouse are closely associated and which may be affected by legislative action, and the identity of business relationships held by the candidate or candidate's spouse during the preceding calendar year.

Doing Business with the State

A statute that prohibited legislators and their spouses from doing business of more than \$10,000 in a calendar year with the state was held unconstitutional by the North Dakota Supreme Court in *Melland v. Johanneson*, 160 N.W.2d 107 (1968).

Title 12.1 governs crimes and identifies general criminal activities. Several provisions may have direct application to the conduct of legislators.

Corrupt Election Practices

Chapter 16.1-10 identifies corrupt practices.

Section 16.1-10-01 makes it a corrupt practice for any person to expend any money for election purposes contrary to the provisions of Chapter 16.1-10, engage in any of the practices prohibited by Section 12.1-14-02 or 12.1-14-03 (interference with elections, or use state or political subdivision services or property for political purposes).

Section 16.1-10-02 prohibits any person from using any property belonging to or leased by, or any service that is provided to or carried on by, the state or a political subdivision for any political purpose.

"Property" is defined as including motor vehicles, telephones, typewriters, adding machines, postage or postage meters, money, and buildings. (Although this definition is somewhat dated, e.g., typewriters and adding machines, the definition does not exclude computers, cell phones, and smartphones.)

"Services" is defined as including the use of employees during regular working hours for which the employees have not taken annual or sick leave or other compensatory leave. (Although the definition specifically identifies one type of service, the definition does not exclude any type of service, e.g., Internet service, which also could be considered a type of property.)

"Political purpose" is defined as any activity undertaken in support of or in opposition to **a statewide initiated or referred measure, a constitutional amendment or measure, a political subdivision ballot measure**, or the election or nomination of a candidate for public office whether the activity is undertaken by a candidate, political committee, political party, or any other person, but does not include the activities undertaken in the performance of a duty of state or political subdivision office. **Factual information may be presented regarding a ballot question solely for the purpose of educating voters if the information does not advocate for or against or otherwise reflect a position on the adoption or rejection of the ballot question.** (emphasis supplied)

Political Activities - State Cars - Mileage Expense

Section 39-01-03 prohibits an officer or employee of the state from using or driving any motor vehicle belonging to the state or any agency of the state for private use or while engaged in any political activity.

Section 39-01-04 defines political activity as "any form of campaigning or electioneering, such as attending or arranging for political meetings; transporting candidates or workers engaged in campaigning or electioneering; distributing campaign literature, political guide cards, or placards; soliciting or canvassing for campaign funds; transporting electors to the polls on election day; and any other form of political work usually and ordinarily engaged in by state officers and employees during primary and general election campaigns."

Section 39-01-05 prohibits any state officer or state employee who uses or drives any privately owned motor vehicle while engaged in political activity to collect or receive from the state any expense money for the use or operation of the motor vehicle while engaged in the political activity. The section also prohibits any state officer or employee from receiving any traveling expense reimbursement from the state for any time spent engaging in any political activity.

Public Officers Generally - Political Activities

Title 44 contains provisions generally applicable to public officers or employees.

Section 44-08-19 prohibits a public employee from engaging in political activities (as defined in Section 39-01-04) while on duty or in uniform.

Nepotism

Section 44-04-09 prohibits a state official or employee from serving in a supervisory capacity over, or enter a personal service contract with, that individual's parent, spouse, son, daughter, stepchild, brother, sister, brother-in-law, sister-in-law, son-in-law, or daughter-in-law. "Supervisory capacity" means the authority to appoint, employ, hire, assign, transfer, promote, evaluate, reward, discipline, demote, or terminate.

Public Records Generally

Article XI, Section 6, of the Constitution of North Dakota, provides that unless otherwise provided by law, "all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours."

Section 44-04-18 provides that unless otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. Section 44-04-17.1 defines a record as "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business." Section 44-04-17.1 further provides that a record includes preliminary drafts and working papers.

Legislative Records

Section 44-04-18.6 provides that certain legislative records (records of or relating to the Legislative Council, Legislative Management, Legislative Assembly, House of Representatives, Senate, or a member of the Legislative Assembly), regardless of form or characteristic, are not subject to the open records laws. Specifically identified are:

- A record of a purely personal or private nature;
- A record that is Legislative Council work product or is Legislative Council-client communication;
- A record that reveals the content of private communications between a member of the Legislative Assembly and any person; and
- Except with respect to a governmental entity determining the proper use of telephone service, a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved.

Specifically excluded from Section 44-04-18.6 are records distributed at a meeting subject to Section 44-04-19 and Article XI, Section 5, of the Constitution of North Dakota.

Public Meetings

Article XI, Section 5, of the Constitution of North Dakota, provides that unless otherwise provided by law, "all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public."

Section 44-04-19 provides that except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. Under Section 44-04-17.1, "meeting" is defined as including a formal or informal gathering of a quorum of the members of the governing body of a public entity regarding public business. "Public business" is defined as including all matters that relate or may foreseeably relate in any way to the performance of the public entity's governmental functions.

Note that the Attorney General has opined that the open meetings law is violated when a quorum of members of the Dickinson City Commission and of the South Heart City Council attended a presentation by Great Northern Power about its proposed coal gasification plant in Stark County. (Opinion 2008-O-11, Dickinson City Commission; South Heart City Council). The opinion discusses what constitutes public business and points out that information shared by Great Northern Power at the presentation concerned personnel requirements and likely economic impact of the proposed plant on the area which in turn could have a significant effect on the infrastructure needs that could foreseeably be brought before the governing bodies and thus related to public business.

Public Improvement Contracts

Section 48-01.2-08 prohibits a governing body or any member, employee, or appointee of a governing body from being pecuniarily interested or concerned in a contract for a public improvement entered by the governing body. A public improvement is defined as including any improvement for the good of the public and which is paid for with public funds.

Use of Great Seal

Section 54-02-01 makes it a Class B misdemeanor for any person to place the Great Seal of the state on any political badge, button insignia, pamphlet, folder, display card, sign, poster, billboard, or on any other public advertisement, or to otherwise use the Great Seal for any political purpose, as defined in Section 16.1-10-02. The Great Seal appears on legislative stationery. In a letter to Senator Bryce Streibel dated June 8, 1993, the Attorney General said it was her opinion that use of the Great Seal as a part of a letterhead or otherwise in a campaign constitutes a corrupt practice under Section 16.1-10-01.

Section 54-02-01 was amended in 1997 to allow use of the Great Seal on business calling cards of state officials and employees, regardless of whether the cards are paid for by the person or the state.

Legislative Lobbying

Chapter 54-05.1 governs legislative lobbying.

Section 54-05.1-02 defines lobbying as (1) attempts to secure the passage, amendment, or defeat of any legislation by the Legislative Assembly or the approval or veto of any legislation by the Governor, or (2) attempts to influence decisions made by the Legislative Management or by an interim committee of the Legislative Management.

Section 54-05.1-03(2) requires registered lobbyists to file annual expenditure reports by August 1 of each year (the annual registration period for lobbyists goes from July 1 through June 30). The report must include a statement as to each expenditure of **\$60 or more expended on any single occasion** on any **individual**, including a legislator's spouse or other family member, in carrying out the lobbyist's work. If the lobbyist does not make any such expenditures, the report must include a statement that no reportable expenditures were made during the reporting period.

Section 54-05.1-05 requires a lobbyist, on request of a legislator, to supply the legislator with the estimated cost of a non-information-bearing gift provided to the legislator or of a function sponsored by the lobbyist and allow the legislator to accept the gift or attend the function and pay the legislator's own share of the expense.

State Officials - Restrictions

Section 54-06-12 makes it a Class C felony for any state official to publish willfully any false statement in regard to any state department, institution, or industry which tends to deceive the public and create a distrust of any state official or employee in charge of such department, institution, or industry, or which tends to obstruct, hinder, and delay the various departments, institutions, and industries of the state.

Section 54-06-26 permits state officials and employees to use state telephones for local calls for essential personal purposes to the extent that use does not interfere with official functions. The section also allows limited long-distance telephone calls when an official or employee is away on state business.

Chapters 54-52 and 54-52.1 relate to public employee retirement and health insurance and contain several provisions making records on those subjects confidential. Some of those records are also confidential under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Section 54-35-02.8 provides that the Legislative Management is to appoint an ethics committee each biennium to consider or prepare a code of ethics. The Legislative Management has named the Legislative Procedure and

Arrangements Committee as the ethics committee. In 1997 that committee recommended the adoption of Joint Rules 1001 through 1004, which establish a legislative ethics policy.

LEGISLATIVE RULES AFFECTING ETHICS

House and Senate Rules 321 provide that any member who has a personal or private interest in any measure or bill must disclose the fact to the House or Senate and may not vote thereon without the consent of the House or Senate. The rules define "personal or private interest" as an interest that affects the member directly, individually, uniquely, and substantially.

House and Senate Rules 322 provide that when a member asks to be excused, or declines to vote, the member is required to state the member's reasons. Upon motion, the question must be put to the House or Senate "Shall the member, for the reasons stated, be permitted to vote?" The question is to be decided without debate, and the proceedings must occur before the taking of the vote.

Joint Rule 901 declares that the Legislative Assembly is committed to providing a healthy and appropriate work environment and that sexual harassment in any manner will not be tolerated.

Joint Rules 1001 through 1004, relating to ethics, provide as follows:

1001. Legislative ethics policy.

1. The Legislative Assembly always seeks a high reputation for progressive accomplishment where its members are public officers of integrity and dedication, maintaining high standards of ethical conduct.
2. The public interest is best served by attracting and retaining in the Legislative Assembly citizens of high caliber and attainment. The public interest will suffer if unduly stringent requirements deprive government of the services of well-qualified citizens.
3. Membership in the Legislative Assembly is not a full-time occupation and is not compensated on that basis. Continued membership is on an elected-term basis, requiring each member to recognize and contemplate that election will not provide any career tenure. These characteristics ensure that each member is rooted to a community and that legislation reflects the needs and values of citizens.
4. A member such as a teacher, administrator, state employee, farmer, labor leader, lawyer, independent business person, or any salaried employee must look to a source of income from other than legislative compensation for sustenance and support; moreover, every member must plan for return to that individual's regular employment, business, or profession.
5. The increasing complexity of public policy at all levels, with intervention into private affairs, makes conflicts of interest almost inevitable for every part-time public official, and particularly for a member who must vote on measures affecting the life of every citizen or resident of the state. Consequently, the adoption of standards of ethics does not impugn a member's integrity or dedication; rather, it recognizes the increasing complexity of government and private life and provides members with helpful advice and guidance when confronted with difficult problems in that gray area involving action that is neither clearly right nor clearly wrong.
6. Ethical conduct is expected of all who participate in the legislative process, including lobbyists, legislative staff, government employees, interest groups, the media, and others. All participants in the legislative process should recognize the importance of their role to support each member's ethical duty to make independent judgments.
7. If public confidence in the Legislative Assembly is to be maintained and enhanced, it is not enough that members avoid acts of misconduct. They also must avoid acts that may create an appearance of misconduct.

1002. Recognition of ethical standards. The resolution of ethical problems must rest largely in the individual conscience. The Legislative Assembly may and should, however, define ethical standards, as most professions have done, to chart the areas of real or apparent impropriety. Unless otherwise provided by law, no criminal penalty applies to a member who engages in conduct that is inconsistent with this section. However, in striving to maintain ethical standards, each member should recognize the importance of:

1. Complying with all other rules relating to ethics, including Joint Rule 901 regarding sexual harassment and Senate and House Rules 321 regarding disclosure of personal or private interest when voting.

2. Acknowledging that the public trust requires each member to make a consistent effort to be well-informed about legislative issues and legislative proposals and to resist influences that may bias the member's independent judgment.
3. Acknowledging that accountability requires members to maintain communication with constituents, to remain open to constructive comment, and to exercise leadership in helping constituents understand legislative issues.
4. Acknowledging that institutional responsibility requires members to remain committed to the integrity and maintenance of the legislative branch.
5. Not using or attempting to use the member's influence in any matter involving a substantial conflict between the member's personal interest and duties in the public interest.
6. Not using the member's official position to obtain financial gain for the member, the member's family, or a business associate or to secure privileges or exemptions in direct contravention of the public interest.

1003. Recognition of constitutional and statutory provisions. Members should apprise themselves of constitutional provisions and statutes that prohibit conduct for which criminal penalties may apply, including Article IV, Section 9, of the Constitution of North Dakota, which prohibits vote trading; Article IV, Section 10, of the Constitution of North Dakota, which provides for expulsion for corruption, bribery, perjury, or other infamous crimes; Article IV, Section 12, of the Constitution of North Dakota, which prohibits contempt or disorderly behavior; North Dakota Century Code Chapter 12.1-12, which prohibits bribery and unlawful influence of public servants; North Dakota Century Code Section 12.1-13-01, which prohibits disclosure of confidential information; North Dakota Century Code Section 12.1-13-02, which prohibits acquisition of a pecuniary interest in property or an enterprise in contemplation of official action or in reliance on information accessed as a public servant; North Dakota Century Code Section 12.1-13-03, which prohibits a public servant from becoming interested individually in the sale or lease of property or a contract for which the public servant is authorized to transact; North Dakota Century Code Sections 12.1-14-02 and 12.1-14-03, which prohibit interference with voting; North Dakota Century Code Sections 12.1-23-03 and 12.1-23-05, which prohibit theft to obtain services while a public servant; North Dakota Century Code Section 12.1-23-07, which relates to the use of property entrusted to a public servant; North Dakota Century Code Chapter 16.1-08.1, which relates to campaign contributions and campaign contributing statements; North Dakota Century Code Chapter 16.1-09, which relates to statements of interest; North Dakota Century Code Chapter 16.1-10, which relates to corrupt practices; North Dakota Century Code Sections 39-01-03 and 39-01-05, which prohibit the private or political use of state motor vehicles; North Dakota Century Code Section 44-08-19, which relates to political activities by public employees; North Dakota Century Code Section 48-01.2-08, which prohibits the interest in public contracts by a member of a governing board; North Dakota Century Code Section 54-02-01, which governs the use of the Great Seal; North Dakota Century Code Chapter 54-05.1, which relates to legislative lobbying; and North Dakota Century Code Section 54-06-12, which prohibits false statements regarding state departments, institutions, or industries.

1004. Legislative ethics classes - Publication of information relating to ethics. During each organizational session and at other times as deemed appropriate, the Legislative Council shall conduct classes on legislative ethics and laws governing the activities and conduct of public officials, including criminal laws, election practices, and conflicts of interest. Before each regular legislative session, the Legislative Council shall distribute a document to all members which includes constitutional provisions, statutes, legislative rules, and other pertinent information regarding ethical conduct in the legislative process.

2015 Legislative Rules Changes

It appears none of the legislative rules changes recommended by the Legislative Procedure and Arrangements Committee affect any provisions directly related to legislative ethics issues. However, the Legislative Process and Arrangements Committee adopted a revised *Policy on Use of Personal Computers by Legislators*. Because this policy sets out accepted principles of legislative conduct, it appears members of the Legislative Assembly are ethically obligated to comply.