



# North Dakota Legislative Council

Prepared for the Legislative Audit and  
Fiscal Review Committee  
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## **CONFLICTS OF INTEREST - MEMBERS OF THE LEGISLATIVE ASSEMBLY - BACKGROUND MEMORANDUM**

In accordance with the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management*, the Chairman of the Legislative Management assigned to the Legislative Audit and Fiscal Review Committee a study of the legislative rules, ethics rules, state statutory provisions, and constitutional provisions relating to potential conflicts of interest by a public official.

The study must include a review and assessment of whether the various constitutional provisions, statutory criminal provisions, legislative rules, and ethics rules are comprehensible, consistent, and precise, and serve the purpose and intent for which they were established. The study also must examine options for clarifying ambiguous language and correcting identified inconsistencies among provisions to ensure uniformity.

### **INTRODUCTION**

Ethical behavior is a higher standard of conduct than merely not violating the law. For members of the Legislative Assembly, many of the accepted principles governing ethical behavior, including the treatment of potential conflicts of interest, have been set in law and rules. This memorandum provides a review of constitutional provisions, statutory provisions, House and Senate Rules, and Ethics Commission rules relating to ethical behavior and the treatment of conflicts of interest.

This memorandum also highlights provisions that may require harmonization and clarification and potential solutions to minimize the risk of criminal liability to allow a legislator to take legal and ethical action confidently when conflicts arise.

### **CONSTITUTIONAL PROVISIONS**

#### **Article IV - Legislative Branch**

Sections 9, 10, and 12 of Article IV of the Constitution of North Dakota contain provisions relating to legislative ethics.

Section 9 provides any member of the Legislative Assembly who gives the member's vote or influence on a matter conditioned on another member's vote or influence on another matter is guilty of bribery and must be expelled.

Sections 10 and 12 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.

Section 12 refers to ethical standards and 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.

#### **Article XIV - Ethics Commission**

Article XIV of the Constitution of North Dakota contains several provisions related to government ethics applicable to lobbyists, legislators, other elected and appointed state officials, members of the Governor's cabinet, and employees of the legislative branch. The article provides "[l]aws may be enacted to facilitate, safeguard, or expand, but not to hamper, restrict, or impair, this article."

Article XIV requires public disclosure of the "ultimate and true source of funds" spent to influence statewide elections or elections for legislators, lobby, or otherwise influence state government action. The article requires directors, officers, commissioners, or other executives of agencies to avoid the appearance of bias. Article XIV prohibits:

1. A gift from a lobbyist to a public official;
2. A public official from being a lobbyist while holding office and for 2 years after holding office;
3. A lobbyist from knowingly delivering a campaign contribution made by another person;
4. A public official or candidate for statewide or legislative office from using a campaign contribution for personal use; and
5. A foreign national not lawfully admitted for permanent residence in the United States, a foreign government, and a foreign corporation from making contributions or expenditures for statewide or legislative campaigns.

Article XIV creates a state Ethics Commission with broad authority to adopt rules related to transparency, corruption, elections, and lobbying, which apply to lobbyists, public officials, and candidates for public office. The constitution grants the Ethics Commission authority to investigate alleged violations of Article XIV, related state laws, and the rules adopted by the Ethics Commission.

The five members of the Ethics Commission are appointed by consensus agreement of the Governor, Majority Leader of the Senate, and Minority Leader of the Senate. The members may not hold public office, or be lobbyists, candidates for public office, or political party officials. The Ethics Commission is required to maintain a confidential hotline to receive information from individuals. The Legislative Assembly is required to appropriate funds for the Ethics Commission.

## **STATUTORY PROVISIONS**

### **Criminal Code**

#### **Bribery - Unlawful Influence**

North Dakota Century Code (NDCC) 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 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 1 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. This section also makes it a Class A misdemeanor for a public servant to take official action likely to benefit the public servant as a result of one of those activities, in contemplation of the action.

Section 12.1-13-03 makes it a Class A misdemeanor for a public servant who is authorized to sell or lease property or to enter a contract in the public servant's official capacity, 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.

### **Open Records**

Section 44-04-17.1 defines terms used in open records laws, including "confidential record" which is defined as "all or part of a record or meeting that is either expressly declared confidential or is prohibited from being open to the public." This differs from an "exempt record" which may be disclosed at the discretion of the public entity.

Section 44-04-18.6 provides legislative records and information are not subject to open records requests under Section 44-04-18 and Section 6 of Article XI of the Constitution of North Dakota. Legislative records include purely personal or private records, legislative council work product, legislative council-client communication, and a record that reveals the content of communications between a legislator and any person (in the possession of a legislator or another public officer or employee).

Section 44-04-18.7 provides information related to active criminal investigations and active criminal intelligence is not subject to public records requests.

### **Legislative Management**

Section 54-35-02.8 requires the Legislative Management to appoint an ethics committee, consisting of members of the majority and minority parties of each house, to consider or prepare a legislative code of ethics each biennium. The committee also may recommend legislation relating to legislative ethics. The Legislative Procedure and Arrangements Committee has been designated as the ethics committee each biennium. The code of ethics has been adopted by the Legislative Assembly as Joint Rules 1001 through 1004.

### **Ethics Commission**

#### **Adopting Rules**

Section 54-66-11 provides the Ethics Commission must follow the applicable provisions in the Administrative Agencies Practice Act codified in Chapter 28-32. Not all provisions are applicable based on the commission's constitutional authority to adopt rules. For example, the commission is not required to submit rules to the Administrative Rules Committee for review before the rules become effective.

#### **Complaints**

Section 54-66-01(2) requires that an individual who makes a complaint to the Ethics Commission is:

- A North Dakota resident;
- Subject to licensing by a state agency or other public official subject to the jurisdiction of the commission; or
- A party to a quasi-judicial proceeding before a state agency or other public official subject to the jurisdiction of the commission.

Section 54-66-05 requires a complainant to provide the complainant's name, address, and telephone number. The commission must keep the complainant's identity confidential if the complainant wants to remain anonymous.

Section 54-66-01(3) limits a complaint to a verbal or written allegation against a lobbyist, public official, candidate for public office, political committee, or contributor for violation of Article XIV of the Constitution of North Dakota, Chapter 54-66, or another law or rule regarding transparency, corruption, elections, or lobbying.

Section 54-66-05 provides the commission may summarily dismiss a complaint or decline to proceed if the alleged violation:

- Does not fall within the commission's jurisdiction;
- Is insufficient to identify a possible violation; or
- Fails to comply with rules adopted by the commission.

Section 54-66-06 requires the commission to provide the accused individual a copy of the complaint (or a summary of the complaint, if the complainant's identity is confidential), any evidence included with the complaint, and notice of summary dismissal if applicable within 30 days. The accused individual may provide a written response to the complaint within 30 calendar days.

Section 54-66-07 provides if the commission has not summarily dismissed the complaint, the commission must attempt to facilitate an informal resolution between the accused individual and the complainant.

Section 54-66-08 provides if an informal resolution cannot be reached:

- The commission staff or an outside investigator may investigate the allegations in the complaint; or
- The commission may dismiss the complaint.

If the commission believes a complaint contains allegations of criminal conduct, the commission is required to coordinate with the appropriate law enforcement agency.

Section 54-66-09 provides if the commission completes an investigation, a copy of the evidence and findings of the investigation must be provided to the accused individual, who may respond in writing or in person. After the investigation, the commission determines whether a violation has occurred and whether to impose a penalty or refer the matter to the proper authority.

Section 54-66-10 provides an individual may appeal a finding of the commission to the district court.

#### **Advisory Opinions - Immunity**

Section 54-66-04.2 provides the commission may provide an advisory opinion upon request from a public official, candidate for elected office, or lobbyist. If an individual acts in good faith relying upon an advisory opinion and the material facts surrounding the conduct are substantially similar, criminal and civil penalties cannot be imposed on the individual.

#### **Confidentiality**

Section 54-66-12(1) provides confidential information may be disclosed as required by law or to investigate a complaint.

Section 54-66-12(1) provides unless the commission determines there has been a violation, and a court affirms the determination if appealed, the following constitutes a confidential record:

- Information revealing the contents of a complaint;
- Information that reasonably may be used to identify an accused individual; and
- Information relating to or created as part of an investigation of a complaint.

Section 54-66-12(2) provides if a complaint is informally resolved, the following are deemed confidential records:

- Information revealing the contents of a complaint;
- Information that reasonably may be used to identify an accused individual;
- Information relating to or created as part of the process leading to an informal resolution; and
- Information revealing an informal resolution.

Section 54-66-12(3) provides any information that reasonably may identify the complainant is confidential unless the complainant:

- Waives confidentiality;
- Authorizes disclosure; or
- Divulges information that reasonably would identify the complainant.

Section 54-66-12(4) provides the commission may disclose confidential information described in Section 54-66-12(1) and (2) if the accused individual agrees to the disclosure.

### Conflict of Interest

Section 54-66-18 requires each Legislative Assembly to adopt conflict of interest rules. If the rules are at least as restrictive as the conflict of interest rules adopted by the Ethics Commission, the disclosure process portion of the commission's rules do not apply to members of the Legislative Assembly. The legislative rules governing conflicts of interest must require the disclosure of a potential conflict of interest relating to any bill in which the member may have a direct, unique, substantial, or individual interest. The law also requires a mechanism to record and provide the public access to each disclosure. The conflict of interest rules have been adopted as House and Senate Rules 321 and 322.

## LEGISLATIVE RULES

House and Senate Rules 321 provide 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 when a member requests to be excused, or declines to vote, the member is required to state the member's reason. 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 Rules 1001 and 1002, relating to legislative 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.

Joint rule 1003 advises members of the Legislative Assembly to apprise themselves of constitutional provisions and statutes that prohibit conduct for which criminal penalties may apply. The provisions relevant to this study are:

- Section 9 of Article IV of the Constitution of North Dakota, which prohibits vote trading;
- Section 10 of Article IV of the Constitution of North Dakota, which provides for expulsion for corruption, bribery, perjury, or other infamous crimes;
- Chapter 12.1-12, which prohibits bribery and unlawful influence of public servants;
- 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; and
- 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.

Joint Rule 1004 provides:

**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.

### **ETHICS COMMISSION RULES**

The Ethics Commission is the body established under Article XIV of the Constitution of North Dakota to "strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government." Under Section 3 of Article IX, the commission may adopt ethics rules related to transparency, corruption, elections, and lobbying. All lobbyists, public officials, and candidates for public office are subject to the rules. The Ethics Commission has adopted administrative rules relating to gifts between a lobbyist and a public official, complaint rules, quasi-judicial proceedings rules, and conflict of interest rules.

#### **Complaint Rules**

North Dakota Administrative Code (NDAC) Article 115-02 provides the rules relating to a complaint to the Ethics Commission.

#### **Conflict of Interest Rules**

Article 115-04 provides the rules relating to conflicts of interest. Conflict of interest rules also are codified in NDCC Chapter 54-66, which is summarized in this memorandum.

#### **Potential Conflict of Interest**

North Dakota Administrative Code Section 115-04-01-01(2) defines "potential conflict of interest." A potential conflict of interest arises when a public official, as part of the public official's duties, must make a decision or take action in a matter in which the public official has:

- Received a gift from one of the parties.
  - "Gift" means a gift not otherwise permitted under Article XIV of the Constitution of North Dakota, NDCC Chapter 54-66, or NDAC Chapter 115-03-01. See NDAC Section 115-04-01-01(3).
- A significant financial interest in one of the parties or in the outcome of the proceeding.
  - "Significant financial interest" means a direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public;
  - It does not include investments in a widely held investment fund, including mutual funds, exchange-traded funds, participation in a public employee benefits plan, or lawful campaign contributions. See NDAC Section 115-04-01-01(8).
- A relationship in a private capacity with one of the parties.
  - "Relationship in a private capacity" means a past or present commitment, interest, or relationship of the public official in a matter involving:
    - The public official's immediate family (defined term);
    - Individual's residing in the public official's household;
    - The public official's employer, or employer of the public official's immediate family; or
    - An individual with whom the public official has a substantial and continuous business relationship. See NDAC Section 115-04-01-01(7).

#### **Requirements - Disclosure - Neutral Reviewer**

North Dakota Administrative Code Section 115-04-01-04 requires the disclosure of a conflict using the commission's form. However, the commission has determined the Legislative Assembly's journal entries and video recordings satisfy this requirement in Ethics Commission Advisory Opinion No. 23-01.

Section 115-04-01-05 provides any entity subject to the rules may adopt conflict of interest rules that are more restrictive than the commission's rules but may not adopt conflict of interest rules that are less restrictive.

Sections 115-04-01-02 and 115-04-01-03 apply if the adopted policy is less restrictive than the commission's rules. Therefore, any policy adopted by the Legislative Assembly must meet the following requirements at a minimum:

- A member of the Legislative Assembly must:
  - Disclose a potential conflict of interest before taking any action or making any decision in the matter.
  - Provide sufficient information concerning the potential conflict of interest.
  - Have the opportunity to voluntarily recuse themselves and abstain from further action in the matter, upon completion of the disclosure.
- If a member chooses to not recuse themselves from the matter, the member may consult with or defer to the neutral reviewer.
  - Section 115-04-01-01(5) defines "neutral reviewer" as the individual or committee whose duty is to receive disclosures of potential conflicts of interest and determine whether the potential conflict of interest is a disqualifying conflict of interest. The rule provides in the absence of a rule or policy designating a neutral reviewer, for a member of the legislative body, the remaining members of the legislative body shall be considered as the neutral reviewer.
- The neutral reviewer, if used,
  - Must evaluate the disclosure;
  - May request additional information from the member regarding the disclosure;
  - Must comply with the applicable requirements of NDCC Chapter 44-04 in reviewing the potential conflict of interest; and
  - Must make a determination regarding the potential conflict of interest and communicate to the public official one of the following:
    - The potential conflict of interest does not constitute a disqualifying conflict of interest, and the member may participate in the matter; or

- The potential conflict of interest does constitute a disqualifying conflict of interest, and the member shall recuse themselves and abstain from participating in the matter.
- The following standards, delineated in NDAC Section 115-04-01-03, must guide the review and decision of either a member or the neutral reviewer with respect to a member's potential conflict of interest.
  - Appropriate weight and proper deference must be given to the requirement that a public official perform the duties of elected or appointed office, including the duty to vote or otherwise act on a matter, provided the public official properly has disclosed the potential conflict of interest as required by the rule.
  - A decision that requires a public official to recuse or abstain from further action or decision in a matter only should occur in cases in which the independence of judgment of a reasonable person in the public official's situation would be materially affected by the disclosed potential conflict of interest.
  - The review of a potential conflict of interest and any decision that would require a public official to recuse themselves or abstain from further involvement in a matter shall consider any applicable North Dakota law which precludes the public official from recusal or abstention in the matter.
  - It is presumed a public official does not have a disqualifying conflict of interest if the public official would not derive any personal benefit which is greater than that accruing to any other member of the general public or any general business, profession, occupation, or group affected by the matter.
  - Any guidance issued by the Ethics Commission, including informal guidance, advisory opinions, rules, standards, and precedent.

If the rules adopted by the Legislative Assembly are more restrictive than the requirements above, then Sections 115-04-01-02 and 115-04-01-03 do not apply.

#### **Neutral Reviewer - Immunity**

A violation of Article XIV of the Constitution of North Dakota or these rules will not be found if:

- The public official consults with and adheres to the neutral reviewer's suggested course of action;
- The public official acts in good faith; and
- The disclosed material facts surrounding the potential conflict of interest are substantially the same as the facts presented in the complaint.

#### **Time is of the Essence**

North Dakota Administrative Code Section 115-04-01-02 provides "[i]n emergency or other exigent circumstances where time is of the essence, and a public official is not permitted or is otherwise unable to abstain from action in connection with the matter, the public official must disclose the potential conflict of interest and the action with the neutral reviewer in the manner requested by the neutral reviewer. The disclosure must occur within seven calendar days of the public official's action in the matter."

#### **Advisory Opinion No. 23-01**

The Legislative Council requested an advisory opinion from the Ethics Commission on January 17, 2023. The question presented was "whether the commission recognizes House and Senate Rules 321 govern conflict of interest disclosure for members of the Legislative Assembly and therefore the neutral reviewer and disclosure requirements of the commission rules do not apply to the Legislative Assembly." North Dakota Administrative Code Section 115-04-01-05 requires an entity subject to the commission's authority to adopt conflict of interest rules that are more restrictive than the commission's rules. Adherence to an advisory opinion of the commission provides safe harbor for an individual acting in good faith.

Following a detailed analysis, considering the scope of potential conflict of interests subject to the rule, the format and process of disclosure of a potential conflict of interest, the evaluation of the potential conflict of interest by the body, and the documentation of disclosure of potential conflicts of interest, the commission concluded:

1. The rules in the Senate and House Legislative Manual of the 68<sup>th</sup> Legislative Assembly can be harmonized with the conflict of interest rules in NDAC Article 115-04, specifically the applicable Senate, House, and Joint Rules can control the disclosure of conflict of interests, with the guidance provided in Article 115-04 to supplement the Senate and House Rules when those rules are quiet as previously discussed.
2. The disclosure requirement of NDAC Section 115-04-01-02 applies to the Legislative Assembly. The commission determined the mechanism used by the Legislative Assembly for documenting conflicts of

interest in journal entries and video-recordings is equivalent to the mechanism of documenting conflicts of interest in minutes to provide notice to the commission, thereby satisfying the disclosure requirement.

**Recommended Legislative Conflict of Interest Disclosure Process**

The Ethics Commission provided guidance for members of the Legislative Assembly if a potential conflict of interest arises by reviewing House and Senate Rules 321 and 322 and supplementing the rules with guidance published in Ethics Commission Advisory Opinion No. 23-01. The commission recommended the following to members of the Legislative Assembly:

1. Prior to taking action or making a decision in a matter, identify any potential conflicts you have.
2. On the floor, declare the potential conflict of interest. Provide enough facts for other legislators to understand the potential conflict.
3. You are automatically precluded from voting. Seek assistance from the neutral reviewer (the other members of the legislative body).
4. The neutral reviewer must review the five factors in NDAC Section 115-04-01-03(7). If the neutral reviewer determines:
  - o A disqualifying conflict of interest exists, recuse yourself. You do not need to fill out a form.
  - o There is no disqualifying conflict of interest, you may participate. You do not need to fill out a form.

**INCONSISTENCIES**

North Dakota Century Code Section 54-66-18 requires the Legislative Assembly to adopt conflict of interest rules that apply to "any bill in which the member may have a direct, unique, substantial, **or** individual interest" (**emphasis added**). The rule adopted by the Legislative Assembly, Rule 321, requires disclosure of "an interest that affects the member directly, individually, uniquely, **and** substantially" (**emphasis added**).

The following table highlights differences between the conflict of interest disclosure process found in the House and Senate Rules and the rules of the Ethics Commission, including Advisory Opinion No. 23-01.

Legislative Rules 321 and 322	NDAC Chapter 115-04-01	Advisory Opinion No. 23-01
Rule 321 requires a member to disclose a personal or private interest, which is defined as an interest affecting the member directly, individually, uniquely, and substantially.	Under Section 115-04-01-01(2), a potential conflict of interest arises when the public official must make a decision in a matter in which the public official has: <ul style="list-style-type: none"> <li>• Received a gift from one of the parties;</li> <li>• A significant financial interest in one of the parties or in the outcome of the proceeding; or</li> <li>• A relationship in private capacity with one of the parties.</li> </ul>	Although the language in the Legislative rules and Ethics Commission's rules is distinct, the commission opined the plain meaning of both encompass nearly identical interests and the language in Rule 321 is at least as restrictive in defining the scope of a potential conflict of interest.
Rule 322 requires the member to state the member's reason for asking to be excused.	Under Section 115-04-01-02(3), the disclosure must provide sufficient information concerning the matter and the public official's potential conflict of interest.	The commission opined the best practice is for a member to provide enough underlying facts when stating the reasons to be excused that the other members understand the potential conflict.
Rule 321 provides the member is automatically precluded from voting without the consent of the legislative body.	Under Section 115-04-01-02(5), the public official may voluntarily recuse themselves and abstain from further action in the matter without input from the remaining members of the legislative body.	The commission opined the automatic preclusion is more restrictive than the discretion granted under the commission's rules.
Rule 322 requires that upon motion, the question that must be put to the body is: "Shall the member, for the reasons stated, be permitted to vote?" The decision must be made without debate.	Under Section 115-04-01-03(2), the public official may consult with or defer to the neutral reviewer. The neutral reviewer will evaluate the conflict and may request further information.	The commission opined "[t]he best practice is to allow an opportunity for meaningful evaluation of the member's potential conflict of interest, giving deference to the language of Rule [1001(7)] prior to taking action."
Rules 321 and 322 are silent as to evaluating the circumstances surrounding the disclosure. However, Joint Rule 1001(7) requires members to avoid acts that may create an appearance of misconduct.	Under Section 115-04-01-03(7), the public official or neutral reviewer must consider five factors.	If the neutral reviewer considers Joint Rule 1001(7), the legislative rules are at least as restrictive as the commission's rules.

### **IMMUNITY - AFFIRMATIVE DEFENSE - CULPABILITY FOR CRIMINAL OFFENSES**

The Ethics Commission provides a safe harbor provision under NDAC Section 115-04-01-03(4) for an individual accused of violating the conflict of interest rules if the individual acted in good faith and in accordance with the neutral reviewer's recommendation, as long as the complaint does not bring any material facts the neutral reviewer was unaware of to light.

Similarly, under NDCC Section 54-66-04.2, for an individual acting in good faith and according to an advisory opinion, criminal and civil penalties may not be imposed if the material facts are substantially the same as the conduct presented in the opinion.

While these measures provide safe harbor for legislators in certain contexts, the risk of criminal liability remains. Establishing an affirmative defense or complete immunity from prosecution for legislators who adhere to the House and Senate Rules and the commission's rules may be appropriate to consider as a practical matter in light of our state's citizen legislature. An alternative solution may be creating a higher level of culpability for a criminal offense arising from an action taken by a member of the Legislative Assembly who was acting in good faith.