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Sources for Conflict of Interest rules, principles, and commentaries:

- Law Society of Nunavut, *Code of Professional Conduct* (May 2016) ["NU Code"]
- Canadian Bar Association, *Codes of Professional Conduct* (2009) ["CBA Code"]
- Canadian Bar Association, *Information to Supplement the Code of Professional Conduct: Guidelines for Practicing Ethically with New Information Technologies*

Topic	Key Principle	Further commentary & guidance
Basic Concepts		
Rule: Conflicts of interest	"A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code." (Nunavut Code 3.4-1: Duty to Avoid Conflicts of Interest)	**NU Code, Duty to Avoid Conflicts of Interest 3.4-1 Commentary** [1] Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the **bright line rule** as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the

		client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6]. [2] In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. [3] This rule applies to a lawyer's representation of a client in all circumstances in which the lawyer acts for, provides advice to or exercises judgment on behalf of a client. Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client: the lawyer's own interests, those of a current client, a former client, or a third party. **Examples of areas where conflicts of interest may occur** [11] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive. (a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter. (b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on

		an employment matter, thereby acting for clients whose legal interests are directly adverse. (c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client. i. A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client. (d) A lawyer has a sexual or close personal relationship with a client. i. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work (e) A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. i. These two roles may result in a conflict of interest or other problems because they may

		A. affect the lawyer's independent judgment and fiduciary obligations in either or both roles, B. obscure legal advice from business and practical advice, C. jeopardize the protection of lawyer and client privilege, and D. disqualify the lawyer or the law firm from acting for the organization. (f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. i. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association. […] [12] **These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings**. In that role, the courts apply fiduciary principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. **A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court dealing with the case may decline to order disqualification as a remedy.** Before disqualifying a lawyer and where appropriate, a court may consider balancing certain competing factors: (a) The reasonable mobility of lawyers; (b) The client's right to choice of counsel which, in remote regions or specialized areas of practice, may mean the choices are very limited; and

		(c) The interests of the administration of justice itself where, for example, prejudicial delay may occur or vulnerable parties may go unrepresented. ***** Case law: The **bright line** is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — even if the two mandates are unrelated — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.[1] However, NU Code Rule 3.4-3 provides a hard line that "a lawyer must not represent opposing parties in a dispute." The bright line rule in SCC case law: • applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting. • applies only when clients are adverse in <u>legal</u> interest (mainly civil & criminal proceedings) • cannot be successfully raised by a party who seeks to abuse it in a manner that is "tactical rather than principled", such as clients who intentionally create situations that will engage the bright line rule, as a means of depriving adversaries of their choice of counsel, forfeit the benefit of the rule. • does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against

[1] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para 29 ["Neil"]

		it in unrelated matters. […] Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment, and set aside the bright line rule when it appears that a client could not reasonably expect its application.[2]
Rule: Representing opposing parties	[A] lawyer must not represent opposing parties in a dispute. (NU Code, 3.4-3 Dispute)	**NU Code, Dispute 3.4-3, Commentary** [1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.
Rule: Acting against former clients	Unless the former client consents, a lawyer must not act against a former client in: (a) the same matter, (b) any related matter, or (c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client. (NU Code, 3.4-10 Acting Against Former Clients)	**NU Code, Acting Against Former Clients, 3.4-10, Commentary:** [1] This rule guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if

[2] *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at paras 32-37 ["Wallace"]

	When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if: (a) the former client consents to the other lawyer acting; or (b) the law firm has: (i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and (ii) advised the lawyer's former client, if requested by the client, of the measures taken. (NU Code, 3.4-11 Acting Against Former Clients)	previously obtained confidential information is irrelevant to that matter**.** **NU Code, 3.4-11, Commentary** **[1]** The Commentary to rules 3.4-17 to 3.4-23 regarding conflicts from transfer between law firms provide valuable guidance for the protection of confidential information in the rare cases in which it is appropriate for another lawyer in the lawyer's firm to act against the former client.
Definition: conflict of interest	"the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person" (NU Code, 1.1-1 Definitions)	When considering whether there is a disqualifying conflict of interest in order to determine whether to remove a solicitor from record, a court will consider: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client? The test is the possibility (not probability) of real mischief, the misuse of confidential information by a lawyer against a former client. The public, represented by the reasonably-informed person would be satisfied that no use of confidential information would occur.[3]

[3] *Macdonald Estate v. Martin*, [1990] 3 SCR 1235 at paras 22 & 47-48 ["*Macdonald*"]

		However, "the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role."[4]
Definition: Who is the client?	"**client"** means a person who: (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf. and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. (NU Code, 1.1-1 Definitions) See also section: Government & Conflict of Interest: Who is the client when dealing with government?	**NU Code, definitions** [1] A lawyer-client relationship may be established without formality. [2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing; [3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established. *** When a lawyer is hired to by a union to act for the union, the lawyer acts for the union, and not for the individual member.[5]
Rationale for COI rule	Grounded in lawyers' duties of/to: • loyalty grounded in the law governing fiduciaries (NU Code 3.4-1) • honesty and candour (NU Code 3.2-2) • confidentiality (NU Code 3.3-1), guarded by solicitor-client privilege • integrity (CBA Code)	**NU Code, Duty to Avoid Conflicts of Interest 3.4-1 Commentary** **The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests** [5] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as

[4] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para 17.
[5] *Mazhero v. Federation of Nunavut Teachers*, 2003 NUCJ 2, at paras 14 & 17

		a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests. [6] A client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship. The relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client. […] [9] The duty of candour requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer. **NU Code, Honesty and Candour, 3.2-2:** When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter. **Commentary** [1] A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer. [2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results. **NU Code, Confidential Information 3.3-1:** A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the

		professional relationship and must not divulge any such information unless: (a) expressly or impliedly authorized by the client; (b) required by law or a court to do so; (c) required to deliver the information to the Law Society; or (d) otherwise permitted by this rule. Commentary [1] A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence. [3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them. [4] A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. **A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter** (see rule 3.4-1 Conflicts). 3.3-7 A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only

		if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client. **Commentary** [1] As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice […] [5] As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing screens, the disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will: (a) limit access to the disclosed information; (b) not use the information for any purpose other than detecting and resolving conflicts; and (c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.
	The lawyer must discharge with integrity all duties owed to clients, the court or tribunal or other members of the profession and the public (**CBA Code, Rule on Integrity)**	**CBA Code, Commentary on Integrity:** **Guiding Principles** 1. Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If the client is in any doubt about the lawyer's trustworthiness, the essential element in the lawyer-client relationship will be missing. If personal integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.

		2. The principle of integrity is a key element of each rule of the Code **** Case law also affirms the values underlying issues of conflicts of interest: • duty of integrity[6] • duty of loyalty[7] • duty of commitment to client's cause[8] • duty of candour[9] • duty of confidentiality (protected by privilege)[10] "The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation.[11]

[6] *Macdonald Estate v. Martin*, [1990] 3 SCR 1235 at para 16
[7] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para 19; *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at para 19; *Strother v. 3464920 Canada Inc.,* 2007 SCC 24, [2007] 2 S.C.R. 177; *Salomon v. Matte-Thompson*, 2019 SCC 14 at para 71.
[8] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para 19; *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at paras 10 & 19
[9] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para 19; *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at paras 10 & 19
[10] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para 19; *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at para 19 & 24
[11] *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at para 23

		The lawyer's duty of candour towards the existing client must be reconciled with the lawyer's obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. If the new client refuses to grant this consent, the lawyer will be unable to fulfill his duty of candour and, consequently, must decline to act for the new client.[12] Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors. The defendant's witnesses ought not to have to worry in the course of being cross-examined that the cross-examiner's questions are prompted by information that had earlier been passed in confidence to the defendant's solicitors. Such a possibility destroys the level playing field and creates a serious risk to the integrity of the administration of justice.[13]
Other related duties arising from the duty of loyalty		**NU Code, Duty to Avoid Conflicts of Interest 3.4-1 Commentary** **Other Duties Arising from the Duty of Loyalty** [7] The lawyer's duty of confidentiality is owed to both current and former clients, with the related duty not to attack the legal work done during a retainer or to undermine the former client's position on a matter that was central to the retainer.

[12] *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at para 47
[13] *Celanese Canada Inc. v. Murray Demolition Corp*. 2006 SCC 36, [2006] 2 S.C.R. 189 at para 34

EXCEPTIONS AND LIMITATIONS TO THE BASIC CONFLICT OF INTEREST RULE		
Where all affected clients consent	A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client. (a) Express consent must be fully informed and voluntary after disclosure. (b) Consent may be inferred and need not be in writing where all of the following apply: i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel; ii. the matters are unrelated; iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and iv. the client has commonly consented to lawyers acting for and against it in unrelated matters. (NU Code, 3.4-2 Consent) Note limitations to this exception in NU Code Rule 3.4-3, where "Despite rule 3.4-2 a lawyer must not represent opposing parties in a dispute"	**NU Code, Consent, 3.4-2, Commentary:** Disclosure and consent [1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act. [2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter. [2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated. [3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the

		matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. Consent in Advance [4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. [5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter. Implied consent [6] In limited circumstances consent may be implied, rather than expressly granted. In some cases it may be unreasonable for a client to claim that it expected that the loyalty of the lawyer or

		law firm would be undivided and that the lawyer or law firm would refrain from acting against the client in unrelated matters. In considering whether the client's expectation is reasonable, the nature of the relationship between the lawyer and client, the terms of the retainer and the matters involved must be considered. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances. ***** Case law: In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied.[14]

[14] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para 28

		The more sophisticated the client, the more readily the inference of implied consent may be drawn. The thing the lawyer must not do is keep the client in the dark about matters he or she knows to be relevant to the retainer […] The client cannot be taken to have consented to conflicts of which it is ignorant. The prudent practice for the lawyer is to obtain informed consent.[15]
Short-term Summary Legal Services	**3.4-2A**: In rules 3.4-2B to 3.4-2D "Short-term summary legal services" means advice or representation to a client under the auspices of a pro bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter. **3.4-2B** A lawyer may provide short-term summary legal services without taking steps to determine whether there is a conflict of interest. **3.4-2C** Except with consent of the clients as provided in rule 3.4-2, a lawyer must not provide, or must cease providing short-term summary legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest. **3.4-2D** A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm. (NU Code: Short-term Summary Legal Services) Note limitations to this exception in Rule **3.4-3,** where "Despite rule 3.4-2 a lawyer must not represent opposing parties in a dispute"	**NU Code, 3.4-2A-D, Commentary:** Commentary [1] In principle, Rules 3.4-2A-2D are intended mainly to facilitate access to justice and the lawyer's duty to provide pro bono services. Short-term summary legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the short term summary services described in these rules are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. [2] The limited nature of short-term summary legal services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term summary legal services only if the lawyer has actual knowledge of a conflict of interest between the client receiving short-term summary legal services and an existing client of the lawyer or an existing client of the pro bono or not-for-profit legal

[15] *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177 at para 55

		services provider or between the lawyer and the client receiving short-term summary legal services. [3] Confidential information obtained by a lawyer providing the services described in Rules 3.4-2A-2D will not be imputed to the lawyers in the lawyer's firm or to non-lawyer partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services. [4] In the provision of short-term summary legal services, the lawyer's knowledge about possible conflicts of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the pro bono or not-for-profit legal services provider to receive its services.
Exception to exceptions of consent & short-term summary legal services	Despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute. (NU Code, Dispute 3.4-3)	**NU Code, Dispute 3.4-3 Commentary** [1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.
Where 2+ lawyers in same office concurrently representing	Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from	**NU Code, 3.4-4, Commentary:** [1] This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that

clients with competing interests	each client as confidential and not disclose it to the other clients, provided that: (a) disclosure of the risks of the lawyers so acting has been made to each client; (b) the lawyer recommends each client receive independent legal advice, including on the risks of concurrent representation; (c) the clients each determine that it is in their best interests that the lawyers so act and consent to the concurrent representation; (d) each client is represented by a different lawyer in the firm; (e) appropriate screening mechanisms are in place to protect confidential information; and (f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients. (NU Code, 3.4-4)	the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs. [2] An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact. [3] The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other. [4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 3.4-26).
Lawyers at the Legal Services Board of Nunavut	***Legal Services Act*, RSNWT 1988, c L-4** Conflicts of interest **48.1.** A lawyer employed by the Board or a regional committee does not commit a breach of a rule or the code of professional conduct of the Law Society relating to conflicts of interest by reason only of advising or representing a person	**NU Code, Duty to Avoid Conflicts of Interest 3.4-1 Commentary** [1A] In Nunavut, lawyers should be aware of s. 48.1 of the Legal Services Act

	in a dispute or case involving another person who is or has been advised or represented by another lawyer employed by the Board or a regional committee. S.Nu. 2013,c.23,s.3.	
Joint Retainers	Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that: (a) the lawyer has been asked to act for both or all of them; (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely. (NU Code, 3.4-5 Joint Retainers)	**NU Code 3.2-3 Commentary** [4] In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests **NU Code, 3.4-5 Joint Retainers, Commentary:** [1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other. [2] A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with rule 3.4-5. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will: (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer; (b) in accordance with Rule 3.3-1, the lawyer would be obliged to hold the subsequent communication in strict confidence and

		not disclose it to the other spouse or partner; and (c) the lawyer would have a duty to decline the new retainer, unless: (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be; (ii) the other spouse or partner had died; or (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions. [3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7. [4] Identifying Conflicts in Joint Retainers A joint retainer must be approached by a lawyer with caution, particularly in situations involving conflicting interests, rather than a potential conflict. It will generally be more difficult for a lawyer to justify acting in a situation involving actual conflicting interests. In each case, the lawyer must assess the likelihood of being able to demonstrate that each client received representation equal to that which would have been rendered by independent counsel. A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest. In appropriate circumstances, lawyers may act for clients who have conflicting interests or have a potential conflict. Clients may have conflicting interests where they have differing interests but there is no actual dispute. Examples include vendor and purchaser, mortgagor and mortgagee (see special notes below), insured and insurer, estranged spouses, and lessor and lessee. A potential conflict exists when clients are aligned in interest and there is no dispute among them in fact, but the relationship or

		circumstances are such that there is a possibility of differences developing. Examples are co-plaintiffs; co-defendants; co-insured; co-accused; shareholders entering into a unanimous shareholder agreement; spouses granting a mortgage to secure a loan; common guarantors; beneficiaries under a will; and a trustee in bankruptcy or court appointed receiver/manager and the secured creditor who had the trustee or receiver/manager appointed. This list is not exhaustive. [5] Assessing When the Joint Representation is in the Best Interests of the Parties Many lawyers prefer not to act for more than one party in a transaction. From the client's perspective, however, this preference may interfere with the right to choose counsel and may appear to generate unwarranted costs, hostility and complexity. In addition, another lawyer having the requisite expertise or experience may not be readily available, especially in smaller communities. Situations will therefore arise in which it is clearly in the best interests of the parties that a lawyer represents more than one of them in the same matter. In determining whether it is in the best interests of the parties that a lawyer act for more than one party where there is no dispute but where there is a conflict or potential conflict, the lawyer must consider all relevant factors, including but not limited to: • the complexity of the matter; • whether there are terms yet to be negotiated and the complexity and contentiousness of those terms; • whether considerable extra cost, delay, hostility or inconvenience would result from using more than one lawyer; • the availability of another lawyer of comparable skill; • the degree to which the lawyer is familiar with the parties' affairs;

		• the probability that the conflict or potential conflict will ripen into a dispute due to the respective positions or personalities of the parties, the history of their relationship or other factors; • the likely effect of a dispute on the parties; • whether it may be inferred from the relative positions or circumstances of the parties (such as a long-standing previous relationship of one party with the lawyer) that the lawyer would be motivated to favour the interests of one party over another; and • the ability of the parties to make informed, independent decisions. The requirement that the joint representation be in the clients' best interests will not be fulfilled unless the lawyer has made an independent evaluation and has concluded that this is the case. It is insufficient to rely on the clients' assessment in this regard. Although the parties to a particular matter may expressly request joint representation, there are circumstances in which a lawyer may not agree. Even if all the parties consent, a lawyer should avoid acting for more than one client when it is likely that a dispute between them will arise or that their interests, rights or obligations will diverge as the matter progresses. For example, it is not advisable to represent opposing arm's-length parties in complex commercial transactions involving unique, heavily negotiated terms. In these situations, the risks of retaining a single lawyer outweigh the advantages. If a lawyer proposes to act for a corporation and one or more of its shareholders, directors, managers, officers or employees, the lawyer must be satisfied that the dual representation is a true reflection of the will and desire of the corporation as a separate entity. Having met all preliminary requirements, a lawyer acting in a conflict or potential conflict situation must represent each party's interests to the fullest extent. The fact of joint

		representation will not provide a justification for failing to fulfill the duties and responsibilities owed by the lawyer to each client. [6] Informed Consent to Joint Representation If a lawyer determines that joint representation is permissible, then the consent of the parties must be obtained. Consent will be valid only if the lawyer has provided disclosure of the advantages and disadvantages of, first, retaining one lawyer and, second, retaining independent counsel for each party. Disclosure must include the fact that no material information received in connection with the matter from one party can be treated as confidential so far as any of the other parties is concerned. In addition, the lawyer must stipulate that, if a dispute develops, the lawyer will be compelled to cease acting altogether unless, at the time the dispute develops, all parties consent to the lawyer continuing to represent one of them. Advance consent may be ineffective since the party granting the consent may not at that time be in possession of all relevant information (see commentary to Rule 2.04(1)). Lawyers must disclose any relationships with the parties and any interest in or connection with the matter, if applicable. While it is not mandatory that either disclosure or consent in connection with joint representation be in writing, the lawyer will have the onus of establishing that disclosure was provided and that consent was granted. Therefore, it is advisable to document the communication between the lawyer and client and to obtain written confirmation from the client. This rule does not require that a lawyer advise the client to obtain independent legal advice about a conflicting interest. In some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend independent legal

		advice. If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter, the lawyer should advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.
Joint Retainers: When one client has a continuing relationship	If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer. (NU Code, 3.4-6 Joint Retainers)) When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent (NU Code, 3.4-7 Joint Retainers)	**NU Code, 3.4-6 Commentary:** [1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.
Joint Retainers: where a contentious issue arises	3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, a) the lawyer must not advise them on the contentious issue and must: (i) refer the clients to other lawyers; or (ii) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided: A. no legal advice is required; and B. the clients are sophisticated. (b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation (NU Code, 3.4-8 Joint Retainers)	**NU Code, 3.4-8, Commentary** [1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. [2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on noncontentious matters.

	3.4-9 Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer. (NU Code, 3.4-9 Joint Retainers)	**NU Code, 3.4-9, Commentary** [1] This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients. [2] When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.
Lenders & Borrowers	**NU Code, Acting for Borrower and Lender** Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction. (NU Code, 3.4-12) 3.4-13 In rules 3.4-14 to 3.4-16, "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business. (NU Code, 3.4-13) 3.4-14 Provided there is compliance with this rule, and in particular rules 3.4-5 to 3.4-9, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations: (a) the lender is a lending client; (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;	**NU Code, 3.4-5, Commentary:** [7] Joint Representation of Lenders and Borrowers See detailed Rules 3.4-12 to 3.4-16, Acting for Borrower and Lender. In appropriate circumstances, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction. Consent must be obtained from both clients at the outset of the retainer. A lender's acknowledgement of, and consent to, the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction, such as mortgage loan instructions, and the consent is generally acknowledged by a lender when the lawyer is requested by it to act.

	(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or (d) the lender and borrower are not at "arm's length" as defined in the Income Tax Act (Canada). (NU Code, 3.4-14) 3.4-15 When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction. (NU Code, 3.4-15) 3.4-16 If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the	**NU Code, 3.4-12 - 15, Commentary** [1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information. ***** Consider how the question of "who is the client" was dealt with in the borrower/lender scenario in *Granville Savings & Mortgage Corp. v. Slevin* [1993] 4 S.C.R. 279, [1993] S.C.J. No. 121, 108 D.L.R. (4th) 383 (SCC) where the court found that there was ample evidence to find that the law firm had been retained to act not just on behalf of its client the mortgagee, but also on behalf of the mortgage company. The evidence included correspondence making clear that the mortgagor was relying on the law firm to ensure the mortgage was a first charge on the property. As such, the law firm was required to exercise their skills on behalf of the mortgagor and advise the mortgagor of potential problems that could arise from the mortgagee. **NU Code, 3.4-16 Commentary** [1] Rules 3.4-15 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer

	lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to: (a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer, (b) provide the advice described in rule 3.4-6, or (c) obtain the consent of the lending client as required by rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing. (NU Code, 3.4-16)	is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act. [2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan
Representing 1 client in multiple roles		**NU Code, 3.4-5 Commentary** **[8] Single Client in Multiple Roles** Special considerations apply when a lawyer is representing one client acting in two possibly conflicting roles. For example, a lawyer acting for an estate when the executor is also a beneficiary must be sensitive to divergence of the obligations and interests of the executor in those two capacities. Such divergence could occur if the executor is a surviving spouse who is the beneficiary of only part of the estate. The individual may wish to apply to the court to receive a greater share of the estate. This course of action is, however, contrary to the interests of other beneficiaries and inconsistent with the neutral role of executor. The lawyer would accordingly be obliged to refer the executor elsewhere with respect to the application for relief which the individual is pursuing in a personal capacity. See as an example of a lawyer serving a client in multiple roles: *Salomon v. Matte-Thompson*, 2019 SCC 14 (S.C.C.), where lawyer served someone who "wore many different hats" as an executor of a will, a trustee, president and director of a company, and in her personal capacity.

In Practice: Keeping track of clients & potential clients		
How to check for/avoid conflicts of interest		**NU Code, Duty to Avoid Conflicts of Interest 3.4-1 Commentary** **Identifying Conflicts** [10] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. Factors for the lawyer's consideration in determining whether a conflict of interest exists include: (a) the immediacy of the legal interests; (b) whether the legal interests are directly adverse; (c) whether the issue is substantive or procedural; (d) the temporal relationship between the matters; (e) the significance of the issue to the immediate and long-term interests of the clients involved; and (f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.
When transferring between law firms	In rules 3.4-17 to 3.4-23, "matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation. (NU Code 3.4-17) Rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that: (a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or (b)	**NU Code, Commentary for 3.4-17 & 3.4-18:** Commentary [1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been

	(i) the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client ("former client"); (ii) the interests of those clients in that matter conflict; and (iii) the transferring lawyer actually possesses relevant information respecting that matter. (NU Code, 3.4-18)	taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client. [2] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge. [3] Law firms with multiple offices — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.
	Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government. (NU Code, 3.4-19)	**NU Code, Commentary for 3.4-19** [1] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.
	Law Firm Disqualification If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless: (a) the former client consents to the new law firm's continued representation of its client; or	**NU Code, Commentary for 3.4-20** [1] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information." Such measures may include timely and properly constructed confidentiality screens.

	(b) the new law firm has: (i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and (ii) advised the lawyer's former client, if requested by the client, of the measures taken. (NU Code, 3.4-20)	[2] For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable." [3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others. Guidelines: How to Screen/Measures to be taken 1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter. 2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm. 3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer. 4. The firm should take steps to preclude the screened lawyer from having access to any part of the file. 5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.

		6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information. How to Determine If a Conflict Exists Before Hiring a Potential Transferee [4] When a law firm ("new law firm") considers hiring a lawyer, or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. [5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms. [6] A lawyer's duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.
	Transferring Lawyer Disqualification	**NU Code, Commentary for 4.3-21 & 3.4-22**

	Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 must not: (a) participate in any manner in the new law firm's representation of its client in the matter; or (b) disclose any confidential information respecting the former client except as permitted by rule 3.3-7. (NU Code, 3.4-21) Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 except as permitted by rule 3.3-7. (NU Code 3.4-22) **Lawyer Due-diligence for non-lawyer staff** A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained: (a) complies with rules 3.4-17 to 3.4-23; and (b) does not disclose confidential information: i. of clients of the firm; or ii. any other law firm in which the person has worked. (NU Code 3.4-23)	[1] This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers and law firms to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked. [2] Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the lawyer/law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interests of the client of the former firm, have no involvement with and no access to information relating to the relevant client of the new firm.
Other practical considerations re: conflicts of interest		**NU Code, Duty to Avoid Conflicts of Interest 3.4-1 Commentary** **Other Duties Arising from the Duty of Loyalty** [8] The lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping a client to circumvent conflict of interest rules. The client may

		legitimately feel betrayed if the lawyer ceases to act for the client to avoid a conflict of interest. In addition to its duty to avoid conflicts of interest, a law firm is under a duty of commitment to the client's cause which prevents it from summarily and unexpectedly dropping a client in order to circumvent conflict of interest rules.[16]
Lawyer's outside interests	**Maintaining Professional Integrity and Judgment** A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence. (NU Code, 7.3-1) A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client. (NU Code, 7.3-2)	**NU Code, Commentary for 7.3-1** [1] A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client. [2] When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest. **NU Code, Commentary for 7.3-2** [1] The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society. [2] When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or

[16] *Wallace v. Canadian Pacific Railway* 2013 SCC 39 at para 10.

		the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.
	3. Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the lawyer, the integrity of the legal profession and the administration of justice as a whole. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, a governing body may be justified in taking disciplinary action Non-Professional Activities 4. Generally speaking, however, a governing body will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the integrity of the legal profession or the lawyer's professional integrity or competence. (CBA Code, Disciplinary Action)	
	"participation in online forums can pose concerns for […] conflicts of interest (Rules in Chapters V–VI; Commentary 6, to the Rule in Chapter VI)." (CBA, Information to Supplement the Code of Professional Conduct: Guidelines for Practicing Ethically with New Information Technologies, p.16)	**CBA, *Information to Supplement the Code of Professional Conduct:*** "Lawyers who communicate in online forums should ensure that they make clear when they are writing as a lawyer and offering legal services. In those instances, they should provide contact information, and be certain they are able to identify the person with whom they are communicating. Conflict traps lurk in cyberspace. Further, any statement concerning the client's affairs should be in the best interests of the client and within the scope of the retainer (Commentary 2 to Rule XVIII)." (p.17) *****

		Loyalty includes putting the client's business ahead of the lawyer's business.[17] Example of lawyer's personal interest as a conflict of interest: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177 at para 70 See also as an example: *Salomon v. Matte-Thompson*, 2019 SCC 14 (S.C.C.)
Technology	"Lawyers should ensure that electronic delivery of legal services is consistent with the Code principles on conflicts of interest and confidentiality." (CBA Supplement, page 15)	
Special considerations for other transactions with clients		
Other transactions with clients	**Transactions With Clients** A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client. (NU Code, 3.4-28) Subject to rules 3.4-30 to 3.4-36, where a transaction involves: lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, a lawyer must, in sequence, (a) disclose the nature of any conflicting interest or how a conflict might develop later; (b) consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and (c) obtain the client's consent to the transaction after the client receives such disclosure and legal advice. (NU Code, 3.4-29)	**NU Code, Commentary for 3.4-28 to 3.4-30** **[**1] The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client. [2] In some circumstances, the lawyer may also be retained to provide legal services for the transaction in which the lawyer and a client participate. A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that if the lawyer accepts the retainer the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able

[17] *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para 24.

	Rule 3.4-29 does not apply where: (a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest, or (b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business. (NU Code, 3.4-30)	to act for the client without having a material adverse effect on loyalty or the representation. [3] If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer. [4] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that independent legal advice was received by the client, where required, and that the client's consent was obtained. Documenting Independent Legal Advice [5] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by doing the following: (a) provide the client with a written certificate that the client has received independent legal advice, (b) obtain the client's signature on a copy of the certificate of independent legal advice; and (c) send the signed copy to the lawyer with whom the client proposes to transact business.
Borrowing from clients	A lawyer must not borrow money from a client unless (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or (b) the client is a related person as defined by the Income Tax Act (Canada) and the lawyer: (i) discloses to the client the nature of the conflicting interest; and	**NU Code, Commentary for 3.4-31 & 3.4-32:** [1] Whether a person is considered a client within rules 3.4-32 and 3.4-33 when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

	(ii) requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation. (NU Code 3.4-31) Subject to rule 3.4-31, if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrows money from a client, the lawyer must: (a) disclose to the client the nature of the conflicting interest; and (b) require that the client obtain independent legal representation. (NU Code, 3.4-32)	[2] Given the definition of "lawyer" applicable to these Doing Business with a Client rules, a lawyer's spouse or a corporation controlled by the lawyer would be prohibited from borrowing money from a lawyer's unrelated client. Rule 3.4-33 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, in the transactions described in the rule, the lawyer must make disclosure and require that the unrelated client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest is borrowing has independent legal representation.
Lending to clients	A lawyer must not lend money to a client unless before making the loan, the lawyer (a) discloses to the client the nature of the conflicting interest; (b) requires that the client (i) receive independent legal representation, or (ii) if the client is a related person as defined as defined in this Code, receive independent legal advice; and (c) obtains the client's consent. (NU Code 3.4-33)	
Guarantees by a Lawyer	Except as provided by rule 3.4-36, a lawyer retained to act with respect to a transaction in which a client is a borrower or a lender must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is the borrower or lender. (NU Code, 3.4-34) A lawyer may give a personal guarantee in the following circumstances: (a) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business, and the lender is directly or	

	indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child; (b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or (c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and: (i) the lawyer has complied with rules 3.4-28 to 3.4-36; and (ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation. (NU Code, 3.4-35)	
Payment for Legal services	When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a nonmaterial interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer (NU Code, 3.4-36)	**NU Code, Commentary for 3.4-36** [1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.
Gifts and testamentary instruments	A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice. (NU Code, 3.4-37) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate unless the client expressly instructs the lawyer to do so and the direction also confirms that the executor has the ultimate right to retain a lawyer of the executor's choice. (NU Code, 3.4-38) Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving	

	the lawyer a gift or benefit from the client, including a testamentary gift. (NU Code, 3.4-39)	
Judicial interim release	A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts. (NU Code 3.4-40) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate. (NU Code 3.4-41)	
Synechdochal Conflict: dealing with organizations		
Who is the client when dealing with organizations?	"Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services." (NU Code **3.2-3)**	**NU Code 3.2-3 Commentary:** [1] This rule should guide the conduct of lawyers in private practice serving corporate or government clients. While it may have some relevance for lawyers employed within organizations, such lawyers should generally refer to rule 3.2-3A. [2] For the purposes of rules 3.2-3, and 3.2-8, "organization" is to be interpreted broadly and includes a sole proprietor, partnership, joint venture, society and unincorporated association. [3] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the

		person giving instructions for the organization is acting within that person's actual or ostensible authority. **NU Code 3.2-3A Commentary:** [2] A lawyer in corporate or government service has a duty to act in the best interests of the corporation or government, as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics. A lawyer in government service may also have statutory duties under federal, provincial or territorial legislation, as well as broader general and ethical duties as a public servant. [3] The client of a lawyer employed by a corporation is the corporation itself and not the board of directors, a shareholder, an officer or employee, or another component of the corporation. […] As an internal matter, a corporate or government client usually provides specific instructions regarding the lawyer's duties and responsibilities. These instructions may include a direction to accept instructions from and report to a particular person or group within the client organization; to keep certain information confidential from other persons or groups within the client; or to act for more than one of its components, in circumstances that would constitute a multiple representation if the corporation or government as a whole were not the client. A corporate or government lawyer is entitled to act in accordance with such instructions until they are countermanded or rescinded by the client. [4] A corporate or government lawyer may be requested to perform legal services in circumstances in which another employee of the corporation or government expects that the lawyer will be protecting that person's interests. In some situations, it may appear that the corporation or government has no substantial interest in the matter, such as the purchase of a house by an employee. In other situations, such as the preparation of an employment contract, the corporation or government

		clearly has an interest that differs from that of the employee. In still others, such as the defence of both parties on a criminal or quasi-criminal charge, the corporation or government and the employee may seem to have a common interest. In any of these cases, however, the lawyer may acquire information from one party that could be significant to the other. Before the lawyer undertakes the representation, therefore, the parties must agree that there will be a mutual sharing of material information. The other requirements of rule 3.4-5 (conflicts of interest – joint retainers) must also be satisfied. For example, the lawyer must: • determine that the representation is in the best interests of both parties after consideration of all relevant factors; • stipulate that the lawyer will be compelled to cease to act in the matter if a dispute develops, unless at that time both parties consent to the lawyer's continuing to represent the corporation or government in the matter; • obtain the consent of the parties based on full and fair disclosure of the advantages and disadvantages of the lawyer's acting versus the engagement of outside counsel. If the employee involved is, for example, the president of a corporate client, the consent of the corporation should issue from someone other than the president, such as the board of directors. If the lawyer considers the risk of diverging interests to be high, or if one of the parties is unwilling to agree to the mutual sharing of material information, the employee must retain independent counsel. This commentary also applies in principle when a corporate or government lawyer is requested to represent a third party, such as an affiliated corporation, having an association with the corporation or government but not forming part of it.

		3.4 CONFLICTS Duty to Avoid Conflicts of Interest 3.4-1 Commentary: [11] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive. […] (b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse. **** When a lawyer is hired to by a union to act for the union, the lawyer acts for the union, and not for the individual member (*Mazhero v. Federation of Nunavut Teachers*, 2003 NUCJ 2, at paras 14 & 17)
Lawyer's interactions with officer/employees of organizations	A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization: (a) who has the authority to bind the organization; (b) who supervises, directs or regularly consults with the organization's lawyer; or (c) whose own interests are directly at stake in the representation, in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law. (NU Code, 7.2-8)	**NU Code, Commentary for 7.2-8** [1] This rule applies to corporations and other organizations. "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

		[2] A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of section 3.4 (Conflicts), and particularly rules 3.4-5 to 3.4- 9. A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.
Government & conflict of interest		
Who is the client when dealing with government?	"Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, **the lawyer must act for the organization** in exercising his or her duties and in providing professional services." (NU Code **3.2-3)** "A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client." (NU Code 3.2-3A)	**NU Code 3.2-3 Commentary:** [1] This rule should guide the conduct of lawyers in private practice serving corporate or government clients. While it may have some relevance for lawyers employed within organizations, such lawyers should generally refer to rule 3.2-3A. […] [3] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority. **NU Code 3.2-3A Commentary:** [1] "Government" is to be understood in its broadest sense. A lawyer working in a division or department of the government is

		considered to be working for the government as a whole. A corporation ultimately controlled by the government is generally regarded as independent of that government and may instruct the lawyer accordingly. [2] A lawyer in corporate or government service has a duty to act in the best interests of the corporation or government, as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics. A lawyer in government service may also have statutory duties under federal, provincial or territorial legislation, as well as broader general and ethical duties as a public servant. [3] […] the client of a lawyer employed by the government is the government itself and not a board, agency, minister or government corporation. As an internal matter, a corporate or government client usually provides specific instructions regarding the lawyer's duties and responsibilities. These instructions may include a direction to accept instructions from and report to a particular person or group within the client organization; to keep certain information confidential from other persons or groups within the client; or to act for more than one of its components, in circumstances that would constitute a multiple representation if the corporation or government as a whole were not the client. A corporate or government lawyer is entitled to act in accordance with such instructions until they are countermanded or rescinded by the client. [4] A corporate or government lawyer may be requested to perform legal services in circumstances in which another employee of the corporation or government expects that the lawyer will be protecting that person's interests. In some situations, it may appear that the corporation or government has no substantial interest in the matter, such as the purchase of a house by an employee. In other situations, such as the preparation

		of an employment contract, the corporation or government clearly has an interest that differs from that of the employee. In still others, such as the defence of both parties on a criminal or quasi-criminal charge, the corporation or government and the employee may seem to have a common interest. In any of these cases, however, the lawyer may acquire information from one party that could be significant to the other. Before the lawyer undertakes the representation, therefore, the parties must agree that there will be a mutual sharing of material information. The other requirements of rule 3.4-5 (conflicts of interest – joint retainers) must also be satisfied. For example, the lawyer must: • determine that the representation is in the best interests of both parties after consideration of all relevant factors; • stipulate that the lawyer will be compelled to cease to act in the matter if a dispute develops, unless at that time both parties consent to the lawyer's continuing to represent the corporation or government in the matter; • obtain the consent of the parties based on full and fair disclosure of the advantages and disadvantages of the lawyer's acting versus the engagement of outside counsel. If the employee involved is, for example, the president of a corporate client, the consent of the corporation should issue from someone other than the president, such as the board of directors. If the lawyer considers the risk of diverging interests to be high, or if one of the parties is unwilling to agree to the mutual sharing of material information, the employee must retain independent counsel. This commentary also applies in principle when a corporate or government lawyer is requested to represent a third party, such as an affiliated corporation, having an association with the corporation or government but not forming part of it.

Where the government client can consent to situations of conflict of interest	A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client. (a) Express consent must be fully informed and voluntary after disclosure. (b) Consent may be inferred and need not be in writing where all of the following apply: i. the client is a **government**, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel; ii. the matters are unrelated; iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and iv. the client has commonly consented to lawyers acting for and against it in unrelated matters. (**NU Code, 3.4-2)** Note limitations to this exception in Rule **3.4-3**	**NU Code, Consent, 3.4-2, Commentary:** Disclosure and consent [1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act. [2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter. [2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated. [3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and

		inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. Consent in Advance [4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. [5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter. Implied consent [6] In limited circumstances consent may be implied, rather than expressly granted. In some cases it may be unreasonable for a client to claim that it expected that the loyalty of the lawyer or law firm would be undivided and that the lawyer or law firm

		would refrain from acting against the client in unrelated matters. In considering whether the client's expectation is reasonable, the nature of the relationship between the lawyer and client, the terms of the retainer and the matters involved must be considered. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.
Confidential knowledge gained from government sources	**Confidential Information from Government Sources** 16. A lawyer who has information known to be confidential information about a person from government sources, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. (CBA Code, CHAPTER III: ADVISING CLIENTS)	
When in public office	A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those	**NU Code 7.4 THE LAWYER IN PUBLIC OFFICE Standard of Conduct, COMMENTARY:**

	required of a lawyer engaged in the practice of law. (NU Code 7.4, The Lawyer in Public Office)	**[**1] The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. [2] Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action. [3] Lawyers holding public office are also subject to the provisions of section 3.4 (Conflicts) when they apply.
After leaving public employment		**CBA Code, CHAPTER XIX: AVOIDING QUESTIONABLE CONDUCT, Guiding Principles** **Duty after Leaving Public Employment** 3. After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving because to do so would give the appearance of impropriety even if none existed. However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the particular public body or authority by which the lawyer had formerly been employed. With reference to confidential government information acquired when the lawyer was a public officer or employee, see commentary 14 of the Rule relating to confidential information (*Chapter IV*).[4]

GOVERNMENT INTEREST VS LAWYER CONFLICTS OF INTEREST: A COMPARISON

Relevant Authorities for Government COI (*not exhaustive)*

Government of Nunavut	**Government of Canada**
Public Service Act, S.NU 2013, c.26 *Public Service Regulations*, RRNWT (Nu) 1990 c P-28 *Nunavut Public Service Code of Values and Ethics* ["NuPSCVE"]) *Human Resources Manual, Directive 202: Conflict of Interest* *Human Resources Manual, Directive 203: Outside Activity* *Nunavut Employee Union Collective Agreement* *Government of Nunavut Excluded Employee's Handbook* *Senior Manager's Handbook* ["Sr Mgmt HB"]	*Conflict of Interest Act,* SC 2006, c 9, s 2 (public office holders) *Values and Ethics Code for the Public Sector* ["GoC VE Code"] *Directive on Conflict of Interest* *Policy on People Management*

Topic	**Lawyer**	**Government**	**Comparison notes**
COI Rule	A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code." (Nunavut Model Code 3.4-1)	(GN) **3.3 General Obligations:** Each public servant is responsible for assessing his or her own circumstances to determine whether a real, potential or apparent conflict of interest may exist and for avoiding activities or situations that may place them in real, potential or apparent conflict. (***Nunavut Public Service Code of Values and Ethics*, 3.3*)*** (GoC): **3. Integrity:** *Public servants shall serve the public interest by:* […] 3.3 Taking all possible steps to prevent and resolve any real, apparent or potential conflicts of interest between their official responsibilities and their private affairs in favour of the public interest. **(GoC, Values and Ethics Code for the Public Sector)**	Both rules are about generally avoiding conflicts of interest

		4.2 Persons employed are responsible for the following: 4.2.5 Refraining from having private interests and engaging in outside employment or activities that may subject them to demands incompatible with their official duties, or that could be seen to impair their ability to perform their duties and responsibilities in an objective and impartial manner; (GoC Directive on Conflict of Interest)	
Definition of COI	"the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person" (NU Model Code, 1-1 Definitions)	(GN) "A conflict of interest exists when a public servant has a private personal or financial interest that is inconsistent with his or her duties and the responsibility to act in the best interests of the public, because the public servant could benefit personally from a decision or action. The private interest may influence or have the potential to influence how the public servant carries out his or her GN duties." (***Nunavut Public Service Code of Values and Ethics*, 3.2*)*** (GoC): **"**A situation, whether real, apparent or potential, in which the person employed has private interests that could influence the performance of their official duties and responsibilities or in which the person employed uses their office for personal gain. […] **conflict of duties (taches conflictuelles)** A conflict, whether real, apparent, or potential, that arises not because of the private interests of a person employed in the core public administration, but as a result of one or more concurrent and competing official responsibilities." (GoC, for public office holders only): "a public office holder is in a conflict of interest when he or she exercises	For lawyers, the conflict is between the lawyer's duties to its client & something else (lawyer's own interest, another client, other) For public servants, the conflict is between their public duty and their private interest. Note also the potential varying standards for what constitutes a COI: For lawyers, a <u>substantial risk</u> that the duty would be <u>materially and adversely affected.</u> Government standards: For GN, it is a private interest that is inconsistent with duties because it <u>may influence</u>…

		an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests." (*Conflict of Interest Act*, s.4)	For GoC, any real, apparent or potential situation <u>that could influence</u>…
Rationale for rule	Grounded in lawyers' duties of/to: • loyalty grounded in **the law governing fiduciaries**. • honesty and candour (NU Model Code 3.2-2) • confidentiality (NU Model Code 3.3-1) • integrity (CBA Code)	(GN) Public service principles: o fairness, neutrality & impartiality (NuPSCVE 1.1, 1.4, 3.1; Sr Mgmt HB s.19) o duty of loyalty to GN & public of Nunavut (NuPSCVE 1.4) o confidentiality (preservation of personal information & privacy) (NuPSCVE 2.1) o efficiency & integrity (public perception, responsible use of public resources) (NuPSCVE 1.4, 3.1; Sr Mgmt HB s.19) o Inuit Qaujimajatuqangit Values & Guiding Principles (NuPSCVE 1.5, 3.1) (GoC) Values of the federal public service: o Respect for democracy (non-partison service to public interst) o Respect for people (transparency, treating every person with respect and fairness o Integrity (honesty, fairness, impartiality, avoiding personal advantages & conflicts, maintain employer's trust) o Stewardship (responsible use of public resources) o Excellence (**GoC Values and Ethics Code for the Public Sector; Policy on People Management, 3.1**)	Although the underlying values may seem similar, there are key differences. Integrity is present for both lawyers and government; but lawyers primarily have a duty of loyalty to advocate for their client, while public servants have a duty of impartiality & neutrality (to separate civil service from political) Confidentiality/use of information is also present for both, but for lawyers, confidentiality is based on the need for honest communication with client. For public servants, the concern is about improperly using information to advance one's own private interest.
Process for dealing w/ COI	"A lawyer should examine whether a conflict of interest exists not only	(GN) Public servants must:	While lawyers and public servants both must actively

	from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest." (NU Model Code, 3.4-1 Commentary [10]) "A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless: (a) expressly or impliedly authorized by the client; (b) required by law or a court to do so; (c) required to deliver the information to the Law Society; or (d) otherwise permitted by this rule." (NU Model Code, 3.3-1)	(c) disclose any real, apparent or potential conflict of interest; (e) resolve conflicts between private interests and public duties in favour of the public interest. (NuPSCVE 3.3) A public servant must notify his or her deputy head, in writing, of the details of any additional employment inside or outside the GN, and of any outside business activity or other activity for which taxable compensation is received, before accepting the additional employment or carrying on the business. A public servant who is beginning employment with the GN or beginning a different position within the GN and has additional employment, or is carrying on outside business activity or other activity for which taxable compensation is received, must notify his or her deputy head, in writing, of the details of the additional employment or activity without delay […]A public servant who was not aware that the activity they were involved in required disclosure must as soon as they become aware provide notice as described with explanation for not reporting earlier. (NuPSCVE 3.6) "On appointment to the public service each public servant must submit to his or her deputy head a disclosure report that includes: (b) a declaration of any assets and liabilities that could give rise to a conflict of interest; and (c) the details of his or her participation in outside employment and business and volunteer activities that could give rise to a conflict of interest. […]	monitor for conflicts of interest on an ongoing basis, the processes for dealing conflicts of interest are different. Public servants must notify their employer of their additional/outside activities/interests/assets, for the employer to assess whether there is a conflict of interest and what steps must be taken. Lawyers are bound by their duty of confidentiality and should not disclose who their clients are. They would therefore only reveal information on a need-to-know basis, sharing only what information is needed, and only where there is a conflict of interest (ie. that they cannot taken on a particular client due to a conflict of interest).

		A public servant who at any time has reasonable grounds to believe that a conflict of interest exists or is likely to arise in relation to his or her employment duties must: (a) disclose the circumstances to his or her deputy head without delay; and (b) refrain from attempting to influence any action or decision in respect of the matter. (NuPSCVE 8.3) (GoC) 4.2 Persons employed are responsible for the following: 4.2.2 Identifying, preventing and resolving: 4.2.2.1 Conflict of interest or conflict of duties situations during their employment in the public service; and 4.2.2.2 Conflict of interest situations when they leave the public service; 4.2.3 Reporting in writing to their deputy head all outside employment and activities, assets, liabilities and interests that might give rise to a real, apparent or potential conflict of interest in relation to their official duties and responsibilities; 4.2.4 Reporting in writing to their deputy head when concurrent or competing official responsibilities give rise to a conflict of duties situation; (**GoC Directive on Conflict of Interest**)	