A grayscale background image showing two hands, one from the left and one from the right, holding a caduceus (a staff with two snakes entwined and wings at the top). The hands are positioned as if presenting the symbol. The text is overlaid on this image.

Conflicts of Interest: Conflicts of Interest: Law, Ethics and Practice

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Continuing Professional Development Session

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Nunavut Code 3.4-1

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.

The moral and ethical basis for the rule and practice:

[6] A client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

from the Commentary to Rule 3.4-1

Basic Principles & Rules

Principle: A lawyer owes a duty of complete loyalty to each and every client.

Key Conflict of Interest Rules for Lawyers:

- A lawyer must not act or continue to act for a client where there is a conflict of interest (except as permitted under the Nunavut Code of Conduct)
- A lawyer must not represent opposing parties in a dispute.
- Unless the former client consents, a lawyer must not act against a former client in the same matter, any related matter, or any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.
- 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's legal work

loyalty

honesty &
candour

privilege

integrity

*lawyers' duties underlying the
rules for conflict of interest*

A few useful cases:

Macdonald Estate v. Martin, [1990] 3 SCR 1235

R. v. Neil, 2002 SCC 70, [2002] 3 S.C.R. 631

Wallace v. Canadian Pacific Railway, 2013 SCC 39

Salomon v. Matte-Thompson, 2019 SCC 14

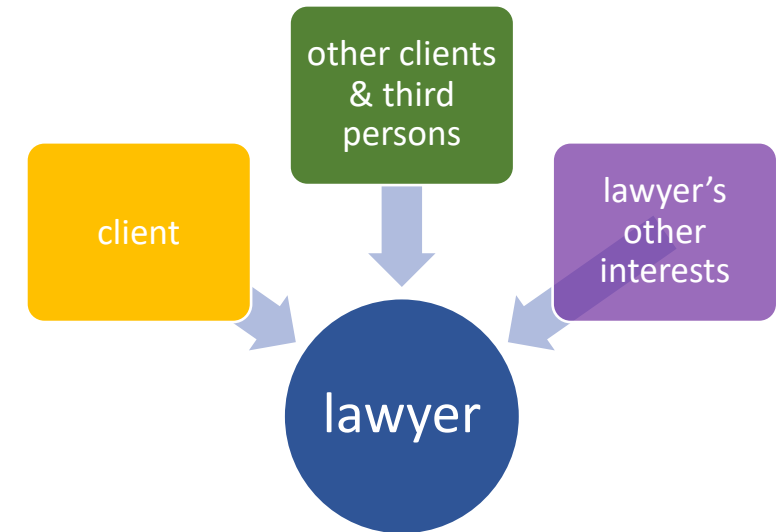
Definitions

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

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.



Exceptions & Limitations

Multiple lawyers in the same firm/office/program:

- 2+ lawyers in the same office concurrently representing clients with competing interests (with consent & conditions) NU Code, 3.4-4 et seq
- Another lawyer in the lawyer's firm can act against a lawyer's former client (with consent & with conditions)
- Lawyers at the Legal Services Board of Nunavut - *Legal Services Act*, RSNWT 1988, c L-4, s. 48.1
- "Short-term summary legal services" under the auspices of a pro bono or not for profit legal services provider NU Code: 3.4-2

Restrictions & conditions still apply to these situations



Exception to all exceptions: A lawyer must not represent opposing parties in a dispute NU Code 3.4-3

Exceptions & Limitations ctd

Restrictions & conditions still apply to these situations

NU Code 3.4-14 says it's okay to act for both lender and borrower when:

- (a) the lender is in the business of lending;
- (b) the lender is selling real property to the borrower and the mortgage is part of the purchase price;
- (c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain;

or

- (d) the lender and borrower are not at arm's length as defined in the Income Tax Act.

Loyalty to each client must always be whole and unimpaired, even if one of these exceptions applies.

In Practice

There are two reasons to be very careful about conflicts:

- To provide the best possible service, with undivided loyalty, to each client

and

- To protect oneself from unhappy clients/adverse parties.



There are special rules for changing firms, including students who change firms during or after articles.

NU Code 3.4-17 to 3.4-20

In a continuing practice the main issues are:


- Keeping track of clients/contacts – maintaining (and regularly consulting) the list.
- Staying alert to potential, prospective and evolving conflicts.
- Dealing with conflict or potential conflict at the earliest opportunity.



Keeping track of clients/contacts

You need a system: law office management software or an excel spreadsheet that lists all clients/contacts, opposing and affected parties, with file references. (In-house lawyers may want to keep one for soft conflicts)

AND



**System aint no
good if you
don't use it**

A standard file opening practice** that includes

- Listing all such on the new file.
- If somebody is already on the list, looking at previous interactions and considering each for possible conflict.
- Dealing appropriately with conflict or possible conflicts.

** by the lawyer, not the assistant

Joint retainers: Acting for two or more clients who want to do the same thing but might theoretically disagree later

NU Code 3.4-5:

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.

See sample plain language letter in materials

Joint retainers: acting for two or more clients who want to do the same thing but might theoretically disagree later - NU Model Code, 3.4-5

Two different situations:

Two or more parties with the same interest who might later disagree on the best way to proceed (example: two partners selling a house)



Two or more parties have worked out a deal (a business deal, a divorce, a sale of real property from one to the other, whatever) and want you to write it up. They **do not** have the same interest. It is not an exception under the rules. The deal is fair and makes sense; and they are both clear that this is what they want.



Dealing with it:

Potential conflict. Standard letter setting out what will happen should that occur.

This is an *actual* conflict. You cannot act for both. Identify one person as your client, recommend independent legal advice for the other. Put it in a letter to them. Be ready to introduce the non-client to a lawyer who will give ILA. Alternatively, get a waiver from non-client.

Independent Legal Advice (ILA)

See Commentary to NU Code 3.4-29

You want ILA not just to satisfy the ethical obligation but because a deal can be challenged later for the lack of informed agreement. You want a certificate of independent legal advice.

You should agree to give ILA if asked (assuming it's within your competence and you have no conflict) both as a matter of professional courtesy and because you might need a favour too one day.

ILAs generally facilitate matters that are not contentious. It is rare to find an error or egregious unfairness in the first lawyer's product, although it can happen.

The main job in giving ILA is making sure

- The first lawyer has all information relevant to your client's interests and
- The client is properly informed and understands what they are doing, and
- The ILA is properly documented.

Situation



Representing one client
in multiple roles

Dealing with it

The assessment of conflict has to be done for each role and file separately.

Possibly the client will have to retain a different lawyer for one of the matters or roles. *Salomon v. Matte-Thompson*, 2019 SCC 14 (S.C.C.)

Possibly the client is themselves in a role of conflict and should be advised accordingly.

Situation

A person talked to you about their issue, but either you or they decided not to proceed. (The adverse party might conceivably consult you about this or something else in the future.)



Dealing with it

Non-retainers can cause as much problem as actual clients for conflicts. Send a non-retainer letter setting out the topic, date of consult, and the decision not to retain. Enter them into conflict system and keep a file of non-retainer letters.

You may be unable to represent the adverse party on this matter going forward anyway.

Question: what if the adverse party has already retained you?

Stop them talking as soon as you know you aren't taking the file. The less you know, the better.

By Consent

NU Code, 3.4-2

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.*** [emphasis added]

(a) Express consent must be fully informed and voluntary **after disclosure****....

*Do not depend on this “implied”. Always get this consent in writing.

***after disclosure*. But recall, the solicitor/client relationship is itself a privileged fact requiring client permission to disclose.

Clearing Conflict by Consent

This is not for actual conflict, where your loyalty would be divided. This is for situations where there are some connections but as far as you are concerned there is no conflicting duty

BUT

- A client (on this file or on another file) may feel differently and may even know a fact you do not which creates more of a risk of actual conflict than you know
- or
- Client or adverse party might raise an objection at a later time.

Clearing Conflict by Consent

Examples of possible/perceived conflict:

- You have had some files with a big organization (examples: government, Inuit org) but nothing touching on this subject matter at all, and that big client is an adverse party in the new file.
- You drafted an employment contract for an employer last year, and now one of its employees is in front of you wanting to incorporate a company that might be competition to your former (and hopefully future) client.

Clearing Conflict by Consent

Examples of possible/perceived conflict:

- The prospective client has an ongoing dispute with a board you sit on. The dispute is not your field of law, you have not advised the board, and the board has a lawyer for that dispute. The dispute and the subject matter of the possible new file have nothing to do with each other.
- You advise a tribunal. A party before the tribunal is a mining company with a grant program for community organizations, and a tribunal member is on a board that has applied for such a grant.

Clearing Conflict by Consent

Two-step process:

1. First get permission to disclose your relationship with each affected client/person/organization.
2. Then disclose each existing/prospective relationship to the other party/ies and ask if they have any objection.

Assuming no objection, get the answers in writing, save together in findable format/place.

Clearing Conflict by Consent

This may mean you talk to the same client twice about the same thing, but quite often the person who gave you instructions on the old thing is not the person who has to clear conflict on the new thing.

Note: If another lawyer sends you such a request, respond promptly.

Option: If the thought of even asking makes you feel bad inside, don't take the file.

Beware of a situation that presents
as perfect harmony of interests.

It almost always means either that
somebody has lost objectivity, or that
somebody's interest is being
completely overlooked or denied.



Conflict of Interest ≠ Conflict

- Parent acting for themselves and for infant children when interests are not the same.

McAuley v. Sinclair Estate [\(2015\), 2015 CarswellMan 233](#) (Man. Q.B.) both heirs in a contentious estate

- When a business owner is also the directing mind of a non-profit with which it does business, and sees the objectives of both organizations as essentially harmonious.

Conflicts of interest don't always involve obvious conflicts: continued

- When a lawyer has a sexual or close personal relationship with a client.
- When a lawyer punches out a former client who is now an opposing party
- When a solicitor voluntarily assumes the role of candid friend advising both parties.

Developing Conflicts

(see commentary to Rule 3.4-1)

Even after a proper consideration of conflict on file opening, conflict can always develop

- On disagreement among multiple clients currently represented together,
- If the job/issue/retainer expands,
- On the arrival or discovery of any new party, major witness or any other significant player,
- On a deeper or better understanding of the situation, such as the emergence of new facts or a better understanding of a party's strategy.

Synecdochal conflict: between the part and the whole

- CEO or Chair of Board / corporation
- Minister / Government
- Employee who has been assigned to manage or inform the lawyer / employer
- Condo owner / condo corporation

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 Model Code 3.2-3

When there is a conflict

Nunavut Code 3.4-1

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.

If there is a joint retainer letter, follow the protocol set out in it.

In every case, do your best to find the ex-client(s) appropriate representation.

A lawyer must not summarily or unexpectedly drop a client to avoid a conflict of interest

NU Code, 3.4-1 Commentary

Doing Business With Clients

Generally speaking, don't.

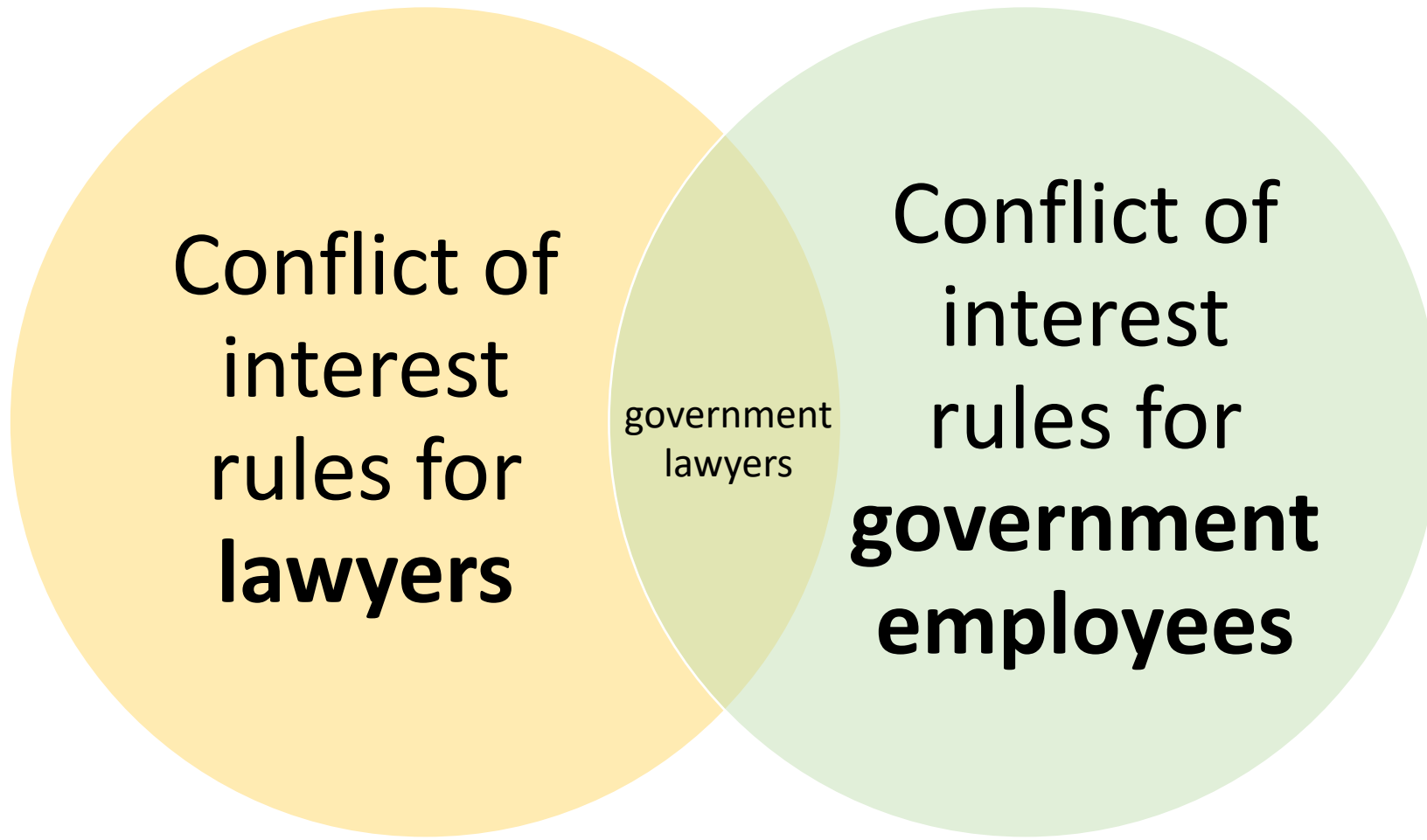
NU Code 3.4-28 - 3.4-41 sets out exceptions and conditions on transactions with clients including:

- Borrowing from or lending to clients
- Giving or acquiring an interest in a company or other entity, including payment for legal services
- Recommending an investment
- Entering into a common business venture
- Guarantees by a lawyer
- Receiving gifts and testamentary instruments
- Judicial interim release

Overriding rule:

NU Code 3.4-28:
A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client.

Government-based Conflict of Interest



Government-based Conflict of Interest

| Relevant Authorities for Government COI (not exhaustive) | |
|--|---|
| Government of Nunavut | Government of Canada |
| <ul style="list-style-type: none">• Public Service Act, S.NU 2013, c.26• Public Service Regulations, RRNWT (Nu) 1990 c P-28• Nunavut Public Service Code of Values & Ethics• Human Resources Manual, Directive 202: Conflict of Interest & Directive 203: Outside Activity• Nunavut Employee Union Collective Agreement• Government of Nunavut Excluded Employee's Handbook• Senior Manager's Handbook | <ul style="list-style-type: none">• <i>Conflict of Interest Act</i>, SC 2006, c 9, s 2 (for public office holders)• Values and Ethics Code for the Public Sector• Directive on Conflict of Interest• Policy on People Management |

Government-based COI vs Lawyer-based: Understanding the Difference

| | Comparison | |
|------------------------------|---|---|
| Basic COI rule | Both types of COI are about generally avoiding conflicts of interest | |
| Definition of COI | <i>For lawyers:</i> the conflict is between lawyers' duties to their client & something else (lawyer's own interest, other clients, etc.) | <i>For public servants:</i> the conflict is between their public duty & private interests |
| Rationale for rule | <i>For lawyers:</i> Duty of loyalty to client (including honesty & candour, privilege, & integrity) | <i>For public servants:</i> Principles of fairness, neutrality, impartiality, loyalty to the government & the public interest, responsible use of public resources |
| Process for dealing with COI | <i>For lawyers:</i> Assess COIs, disclose only what is necessary to preserve confidentiality and only with client consent | <i>For public servants:</i> Disclose all potential COI issues to employer, for employer to assess whether there is a COI |

NGOs, Boards, & Other Decision-Makers

Most NGO and Board COI policies have a basic rule/process:

- On any matter where someone knows they are in a conflict situation, they declare it and absent themselves from voting and usually from discussion.
- On any matter where they feel they can decide fairly, they disclose the situation and let the others decide.
- Some organizations have onboarding and/or annual disclosure practices.

NGOs, Boards, & Other Decision-Makers

For a lawyer advising a Board:

- COI policies should be clear about which family connections count
- COI policy should be clear what happens if somebody
 - is in conflict by simply being on the board or
 - if somebody continually fails to disclose.
- Somebody has to actually look at and assess the disclosures and follow through on conflicts.

Concluding Thoughts

Questions?