

Dakota Dilemmas:

A Practical Application of Conflict Rules



Agenda



- 01 Article XIV
- 02 Conflict Rules
- 03 Six-Step Process
- 04 Legislative Rules
- 05 Quasi-Judicial Rules

A Constitutional Amendment

2018 General Election

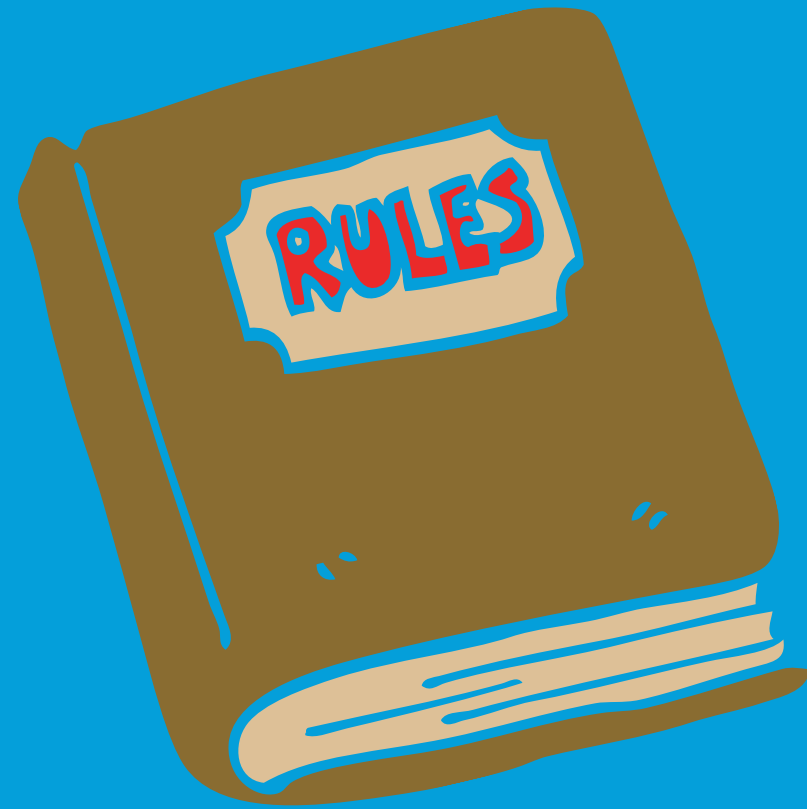
Established state ethics commission in
Article XIV of the North Dakota
Constitution

Commission has authority over
transparency, corruption, elections, and
lobbying



ND
ETHICS
COMMISSION

New Rules



The Complaint Process

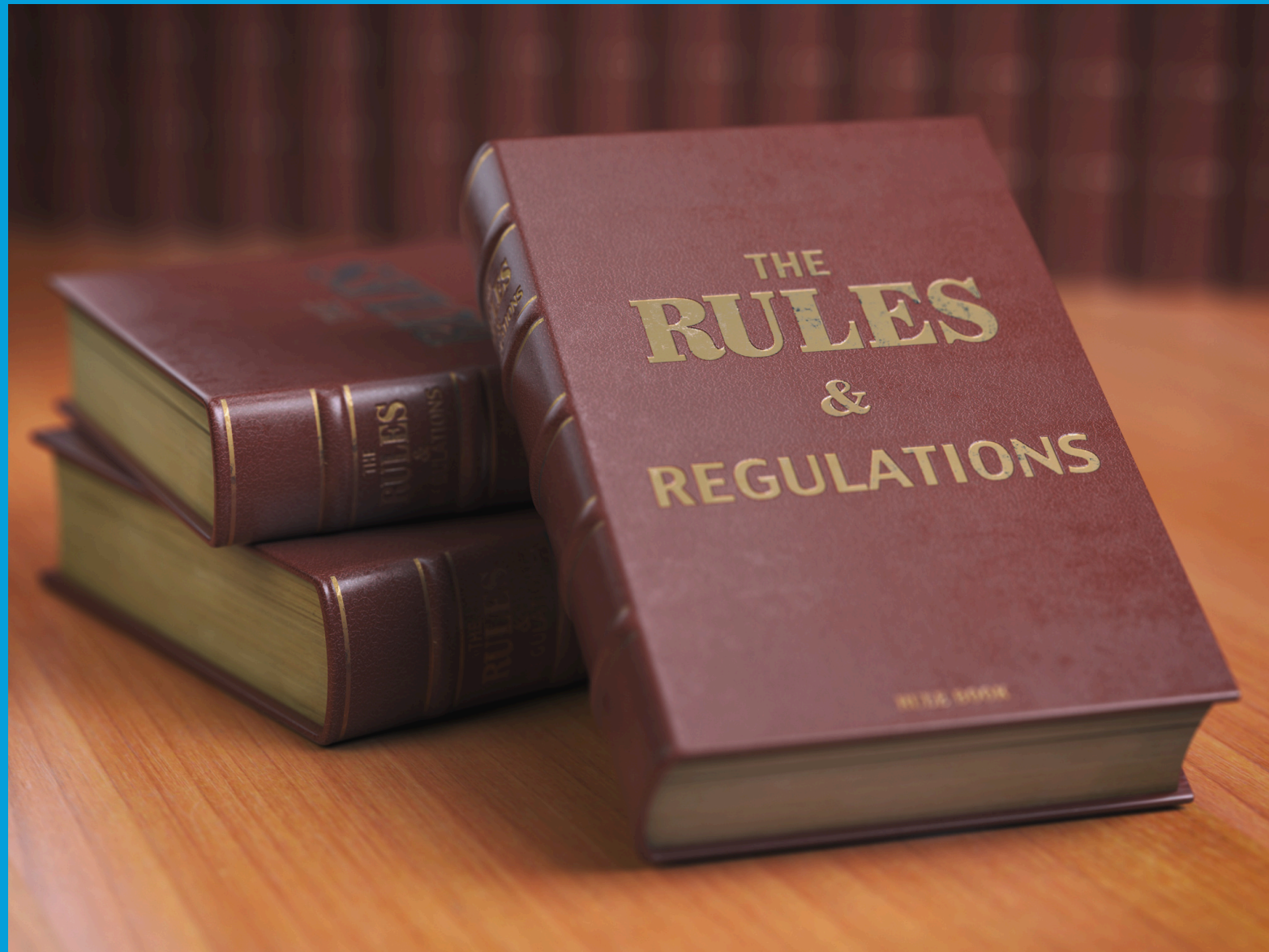
Lobbyist Gifts

Appearance of Bias

Conflicts of Interest

Financial and Travel Disclosure??

Rulemaking Authority



Ethics Commission authority - transparency, corruption, elections, and lobbying

Attorney General Opinion 2020-L-09

Read rules in harmony when reasonable and workable.

Conflict with other ethics rules?
Ethics Commission rules prevail.

City of Fargo v. Ruether, 490 N.W.2d 481 (N.D. 1992).

Rulemaking Process

Ethics Commission \neq Administrative Agency

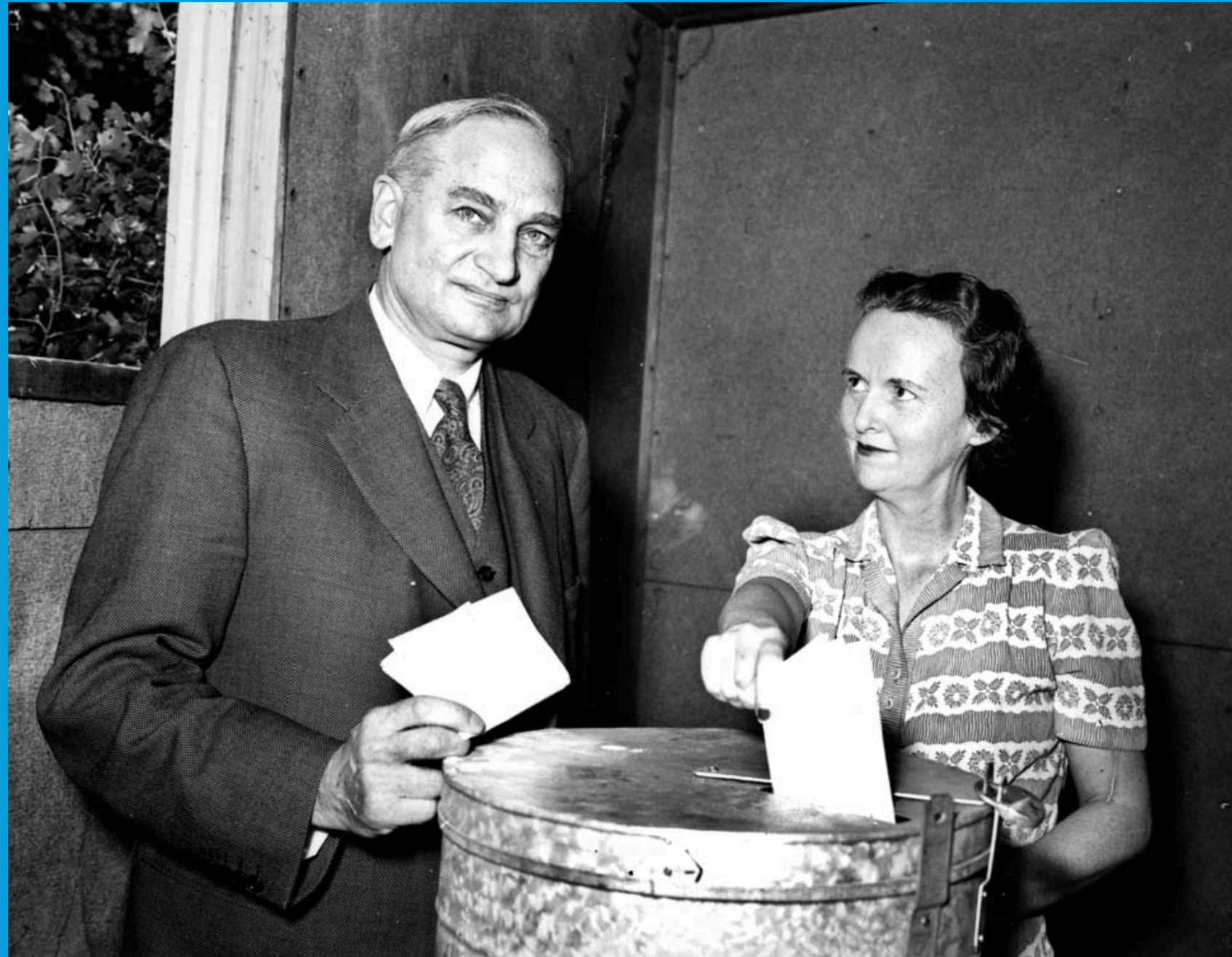
Administrative Agencies Practice Act
includes the Ethics Commission for specific sections

“Agency” and “commission”

Proposed Rule \rightarrow Notice \rightarrow Comments and Hearing
 \rightarrow Respond to Comments \rightarrow Final Approval \rightarrow
Publication



Recognizing Conflicts



SHSND 00038

William and Lydia Langer Voting 1934

Public Official =

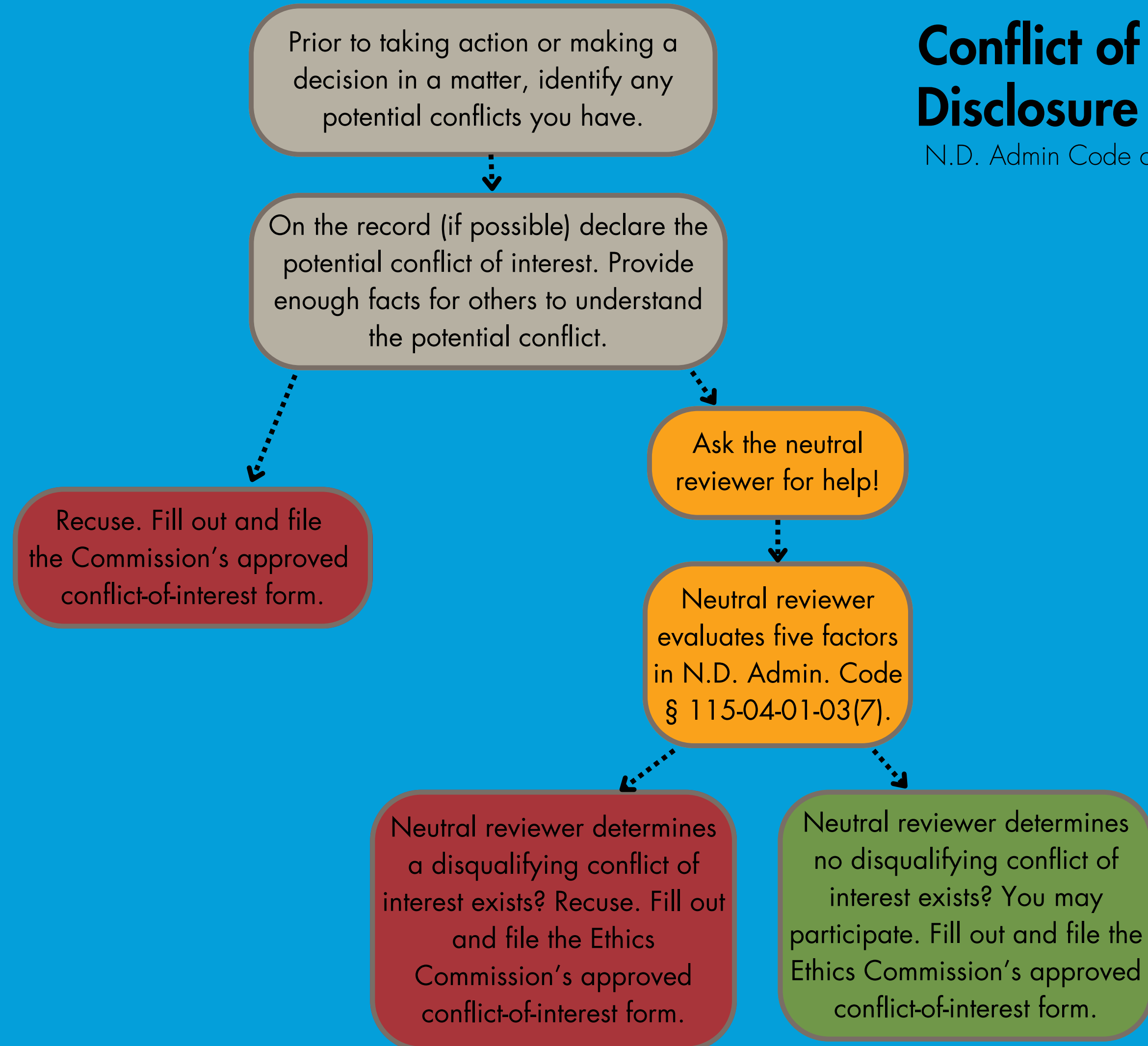
- elected or appointed members of legislative and executive branches
- members of the Ethics Commission
- legislative employees

When do the conflict-of-interest rules apply?

When public officials must make a decision or take action as part of their duties.

Conflict of Interest Disclosure Process

N.D. Admin Code ch. 115-04-01



Six-Step Process

Step 1 - Identify Potential Conflicts

“Potential conflict of interest” means a public official, as part of his or her duties, must make a decision or take action in a matter where the public official has:



1. received a gift from one of the parties;

2. a significant financial interest in one of the parties or the outcome of the proceeding; or



3. a relationship in a private capacity with one of the parties.

Step 2 - Declare the Potential Conflict



Declare any potential conflict on the record, if possible.

Provide enough facts for others to understand the potential conflict.

You must draw the connection from the potential conflict to the action or decision before you.

Step 3 - Two Options



After disclosure, two options to move forward.

- (1) Recuse and file the form; or
- (2) Ask the neutral reviewer for help.

Who is the neutral reviewer?

Identified by a government body's policy or rule.
If no policy or rule, Ethics Commission rules identify a default neutral reviewer.

Step 4 - Neutral Reviewer Evaluation

Neutral reviewer must evaluate 5 factors from
N.D. Admin. Code § 115-04-01-03(7).

- (1) Weight and deference to public official to perform duties
- (2) Materially affect the independence of judgment
- (3) Any law that would preclude recusal or abstention
- (4) The size of the personal benefit
- (5) Any guidance from the Ethics Commission



Step 5 - Neutral Reviewer Determination

Neutral reviewer determines whether a potential conflict of interest = a disqualifying conflict of interest.

No disqualifying conflict of interest exists?
The public official may participate.

A disqualifying conflict of interest exists?
The public official must recuse.

No ethics violation if:

- (1) consult and adhere to neutral reviewer;
- (2) public official acts in good faith; and
- (3) the disclosed material facts are substantially the same as any complaint allegations.



SHSND 00003

1967 Legislative Assembly

Six-Step Process

Step 6 - File the Form

Always file the Ethics Commission's approved form with your governing body and the Ethics Commission.

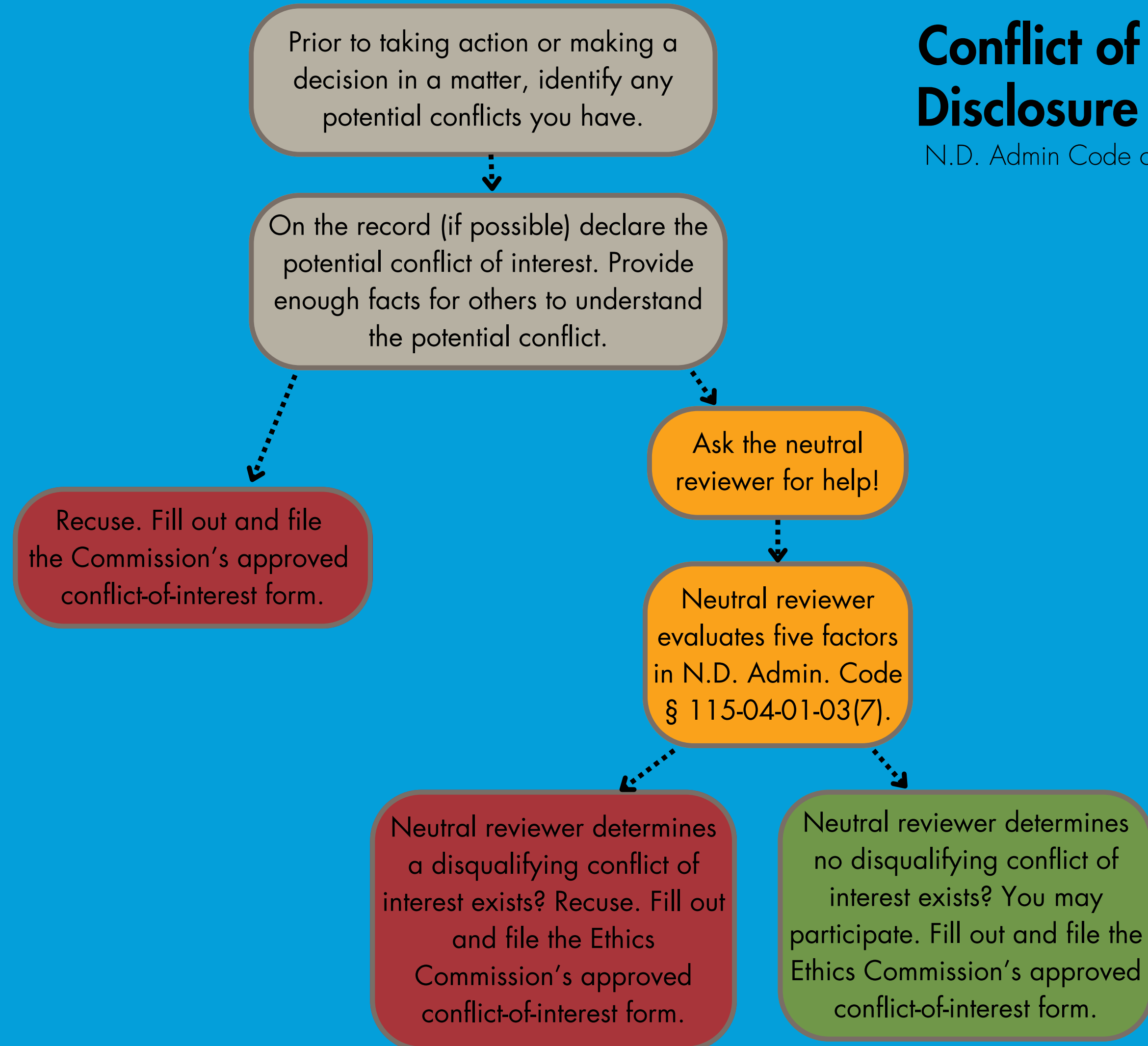
Minutes must document any recusal.

Form requirement does not apply in the legislative process.
See Ethics Commission Advisory Opinion 23-01.



Conflict of Interest Disclosure Process

N.D. Admin Code ch. 115-04-01



Six-Step Process

Legislative Conflict Rules

House and Senate Rules 321 and 322

Legislative process substantially similar to the Commission's rules.

Six steps to the legislative conflict of interest disclosure process.

Two Qualifiers

- (1) Legislative rules address a "personal or private interest"
- (2) Neutral reviewer determination done "without debate."

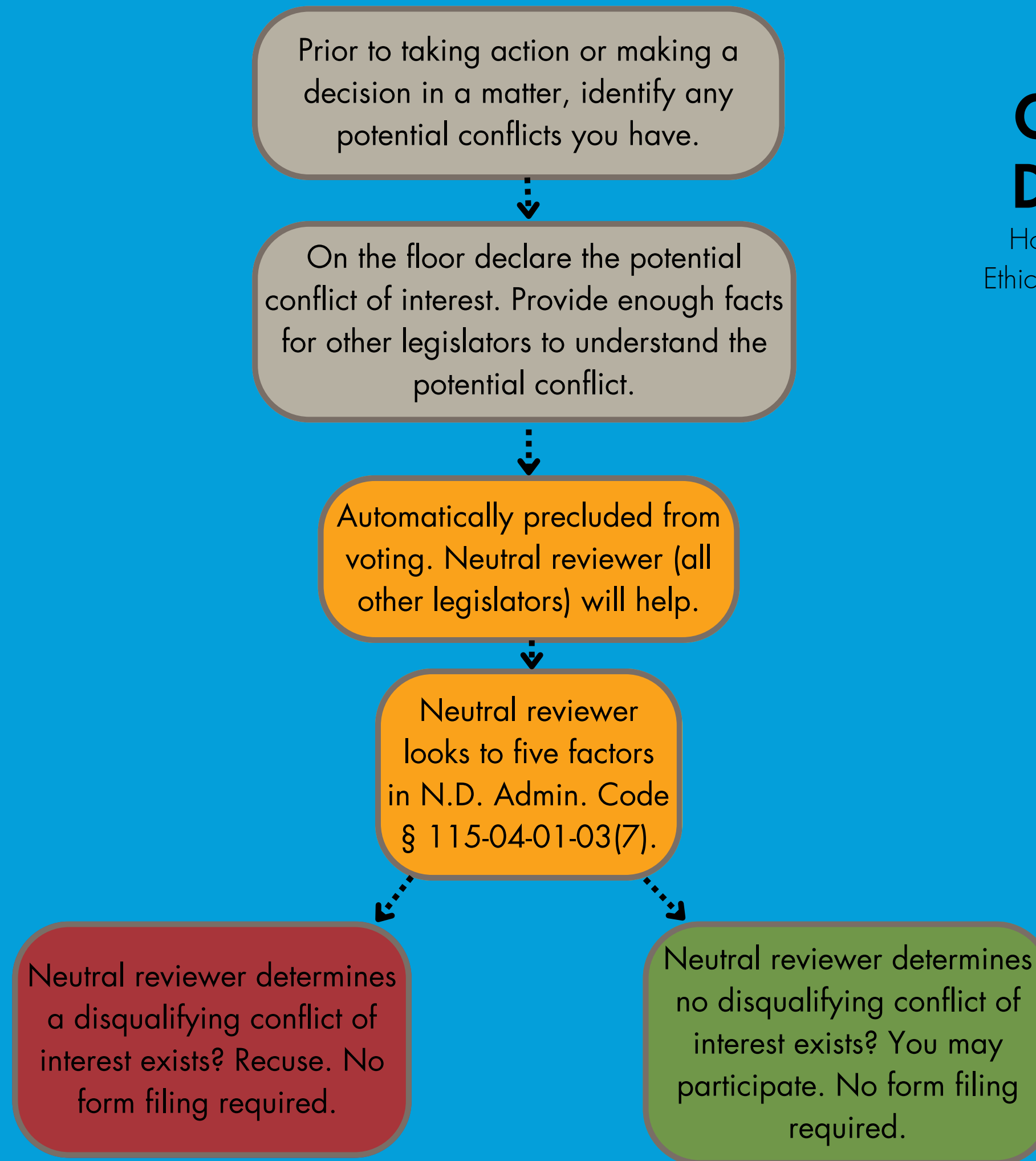


SHSND UNK0014

Governor Schafer before the 1997 Legislative Assembly

Legislative Conflict of Interest Disclosure Process

House and Senate Rules 321 and 322
Ethics Commission Advisory Opinion 23-01



Quasi-Judicial Bias Rules



SHSND 00477b

1977 Industrial Commission

Quasi-Judicial = resembles a court proceeding, but does not take place in a court of law

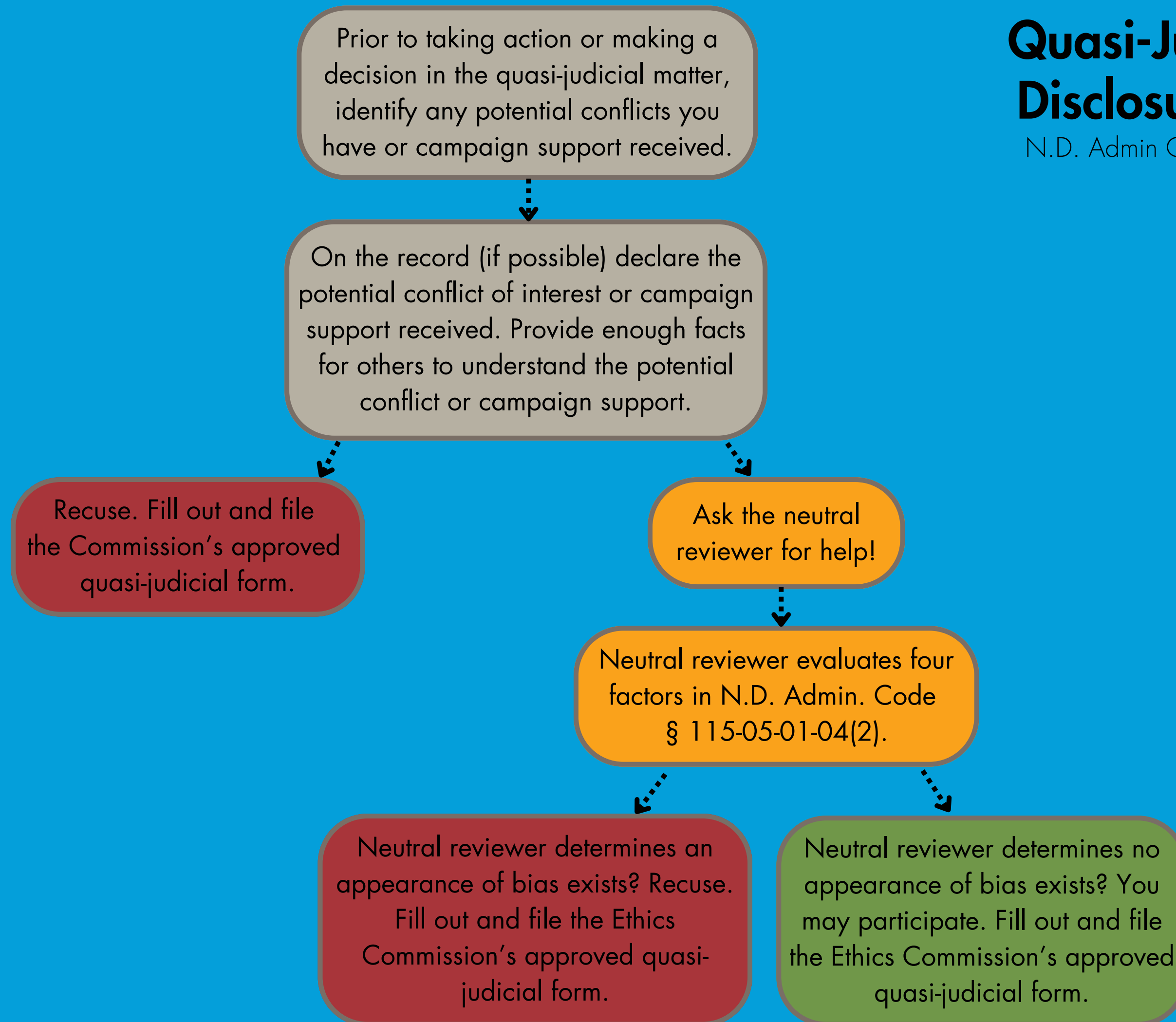
Differences from conflict-of-interest rules:

- (1) More broad - includes directors, officers, commissioners, heads, or other executives;
- (2) Consider potential conflicts of interest AND campaign support; and
- (3) Determination is whether the potential conflict of interest creates an appearance of bias.

Quasi-Judicial Rules

Quasi-Judicial Bias Disclosure Process

N.D. Admin Code ch. 115-05-01



Questions?





Thank
you!

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Ethics Commission