**5.2: Identifying Conflicts of Interest**

*I can't believe you had a life before me. I can't believe they let you run around free, just putting your body wherever it seemed like a good idea.*[[1]](#footnote-0)

**What is a Conflict of Interest?**

Attorneys must always watch for and avoid “conflicts of interest.” A conflict of interest exists whenever an attorney may have to choose between the interests of a client and some other interest. Under the fiduciary duty of loyalty, attorneys must always put the interests of their clients before any other interests, including their own. Accordingly, a conflict of interest exists whenever the interests of a client differ from the interests of:

* another client;
* the attorney; or
* a third party with a relationship to the attorney.

Broadly speaking, there are four categories of conflicts of interest, e.g. conflicts between the interests of a client and:

1. the lawyer’s own interests
2. the lawyer’s duties to another client
3. the lawyer’s duties to a former client
4. the lawyer's duties to a third person.

The conflict of interest rules are intended to ensure that attorneys observe the duty of loyalty by preventing them from representing clients with competing interests.

However, the term “conflict of interest” is hard to define with any precision, because the concept of a conflict of interest is both procedural and substantive. Not every formal conflict of interest presents a real conflict of interest. Some conflicts are trivial, and do not create a substantial concern. Others are merely speculative, and do not require analysis.

Formally, a conflict of interest exists whenever an attorney’s legal duties to a client actually or potentially conflict with the interests of the attorney, another actual or potential client, or a third party to whom the attorney has a legal duty. But substantively, perhaps not every formal conflict of interest should necessarily qualify as an actual conflict of interest. Many are trivial, and many more will never materialize. If a formal conflict does not present a substantive conflict, is it really a conflict at all?

Ultimately, the practical definition of a conflict of interest ought to depend on the purpose of the rules prohibiting conflicts of interest. If the purpose of the rules is to protect clients from their attorneys, then perhaps the rules should be interpreted and applied literally, in order to ensure that unscrupulous attorneys cannot avoid regulation. But if the purpose of the rules is to govern a business relationship between clients and their attorneys, then perhaps the rules should be interpreted and applied more flexibly, in order to help parties reach a mutually agreeable outcome.

| [**ABA Canons of Professional Ethics: Canon 6 (1908)**](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf) |
| --- |
| It is the duty of the lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.  It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.  The obligation to represent the client with undivided fidelity forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. |

| [**ABA Model Code of Professional Responsibility (1980)**](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf)  [**Canon 5: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client**](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf) |
| --- |
| The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. |

| [**Model Rule 1.7: Conflict of Interest: Current Clients**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/) |
| --- |
| 1. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:    1. the representation of one client will be directly adverse to another client; or    2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. 2. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:    1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;    2. the representation is not prohibited by law;    3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and    4. each affected client gives informed consent, confirmed in writing. |

| **Restatement (Third) of the Law Governing Lawyers § 121: The Basic Prohibition of Conflicts of Interest** |
| --- |
| A conflict of interest is involved if there is 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. |

| **CHECK YOUR KNOWLEDGE** |
| --- |
| 1. Model Rule 1.7 applies to “concurrent”conflicts of interest. Imagine that a wife had come to you seeking to file for divorce but shortly thereafter withdrew her request. Then, two years later her husband comes to you for the same reason. Does a conflict of interest exist? Why or why not? |
| 1. What if you represented a medical doctor in a medical malpractice suit and two years later the medical practice where the doctor is employed approaches you about representing them in a merger. Does a conflict of interest exist? Should the rules apply differently because the second client is a business? |

| [***Glueck v. Jonathan Logan, Inc.*, 653 F. 2d 746 (2d Cir. 1981)**](https://scholar.google.com/scholar_case?case=13582618002144588121) |
| --- |
| **Summary:** Jonathan Logan, Inc. fired Charles Glueck, who hired Phillips Nizer to represent him in a wrongful termination action. Logan filed a motion to disqualify Phillips Nizer because the firm represented the Apparel Manufacturers Association, Inc., a membership organization that includes one of Logan’s divisions. The district court granted the motion, because the relationship between Phillips Nizer and Logan resembled an attorney-client relationship, and the subject matter of Glueck’s action was “substantially related” to Phillips Nizer’s representation of the Association. The circuit court affirmed, because representing both Glueck and the Association would create a “realistic risk” of Phillips Nizer breaching its duty of loyalty. |

NEWMAN, Circuit Judge:

The issue on this appeal is whether in the circumstances of this case a law firm that represents an incorporated trade association may represent an individual client in a suit against a corporation one division of which is a member of the association. The District Court for the Southern District of New York ruled that the firm must be disqualified. We conclude that Judge Conner applied the correct standards of law and reached a result well within his discretion, and we therefore affirm.

The appellant, Charles Glueck, formerly employed as an executive of appellee Jonathan Logan, Inc., brought this suit against Logan, alleging that he was discharged in breach of his employment contract. Logan promptly moved to disqualify Glueck’s law firm, Phillips, Nizer, Benjamin, Krim & Ballon. The motion was based on the following undisputed facts. Phillips Nizer represents the Apparel Manufacturers Association, Inc., a not-for-profit incorporated trade association of dress manufacturers with more than 100 members. The sole function of the Association is to negotiate multi-employer collective bargaining agreements on behalf of its members with employees represented by the International Ladies Garment Workers’ Union. One of the Association’s members is R & K Originals, a division of Logan. The division’s president, Manny Eagle, is executive vice-president of the Association and a member of the Association’s negotiating committee. Eagle has had occasion to meet with lawyers from Phillips Nizer and discuss labor matters with them. On these facts, Judge Conner granted appellee’s motion to disqualify Phillips Nizer from representing Glueck in his suit against Logan. From that ruling, Glueck appeals.

Recognizing the serious impact of attorney disqualification on the client’s right to select counsel of his choice, we have indicated that such relief should ordinarily be granted only when a violation of the Canons of the Code of Professional Responsibility poses a significant risk of trial taint. That risk is encountered when an attorney represents one client in a suit against another client, in violation of Canon 5, or might benefit a client in a lawsuit by using confidential information about an adverse party obtained through prior representation of that party, in violation of Canon 4. Mindful of our standards, the parties have joined issue on whether Logan is a client of Phillips Nizer by virtue of the firm’s representation of the Association. Glueck contends that members of an incorporated trade association are not clients of the association’s lawyer and emphasizes that the retainer agreement between Phillips Nizer and the Association explicitly negates the firm’s representation of the Association’s members. Logan responds that the members of an incorporated association are the clients of the association’s lawyer and argues that Phillips Nizer’s retainer agreement only assures it the right to charge separate fees for legal work done specifically for an Association member.

We share Judge Conner’s view that the issue is not whether Phillips Nizer’s relationship to Logan is in all respects that of attorney and client, but whether there exist sufficient aspects of an attorney-client relationship “for purposes of triggering inquiry into the potential conflict involved in Phillips Nizer’s role as plaintiff's counsel in this action.”[[2]](#footnote-1) Having concluded that such inquiry should be made, Judge Conner then applied the strict standards that ordinarily prohibit representation of adverse interests, and determined that, in view of the relationship between the subject of Glueck’s lawsuit and the nature of the services rendered by Phillips Nizer to the Association and its members, Phillips Nizer had not demonstrated “that there will be no actual or apparent conflict in loyalties or diminution in the vigor of its representation.”

We reach the same conclusion, but analyze the issue in a slightly different way. We do not believe the strict standards are inevitably invoked whenever a law firm brings suit against a member of an association that the firm represents. If they were, many lawyers would be needlessly disqualified because the standards of Canon 5 impose upon counsel who seeks to avoid disqualification a burden so heavy that it will rarely be met. That burden is properly imposed when a lawyer undertakes to represent two adverse parties, both of which are his clients in the traditional sense. But when an adverse party is only a vicarious client by virtue of membership in an association, the risks against which Canon 5 guards will not inevitably arise. A law firm that represents the American Bar Association need not decline to represent a client injured by an automobile driven by a member of the ABA. Moreover, if Canon 5 were applicable to all suits against association members, there would be a temptation to water down the strict standards of Canon 5 and find them met more easily than in cases where the adverse parties are really clients of the same lawyer. In this case, Judge Conner, after finding Canon 5 applicable, applied what amounted to a “substantial relationship” test, and concluded that the subject of Glueck’s lawsuit was substantially related to Phillips Nizer’s representation of the Association. However, "the ‘substantial relationship’ test does not set a sufficiently high standard by which the necessity for disqualification under Canon 5 should be determined.” We think the standards of Canon 5 should be strict. We also believe those standards should apply to suits against association members only when the risks against which Canon 5 protects are likely to arise.

This approach leads us to use the “substantial relationship” test in determining when Canon 5 should be applied to suits brought by an association’s law firm against an association member. Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant. Moreover, although our concern is with the risk of tainting a trial, once that risk appears, it is appropriate to assess the risk that prosecution of a plaintiff’s lawsuit by an association’s law firm will inhibit the free flow of information from the defendant to the firm that is necessary for the firm’s proper representation of the association.

Though structured in a slightly different framework,[[3]](#footnote-2) Judge Conner’s findings fully justify disqualification under the approach we have outlined. Judge Conner relied upon the risk that the issue of whether Logan had cause to terminate Glueck might well arise in the course of collective bargaining discussions conducted by Phillips Nizer for the Association. He also noted the risk that in preparing for collective bargaining sessions, the law firm might learn of Logan’s policies or past practices bearing on the subject of Glueck’s termination. These risks demonstrate the requisite relationship between Glueck’s lawsuit and the subject matter of Phillips Nizer’s representation of the Association. Because of that relationship, the strict standards apply,[[4]](#footnote-3) and we agree with Judge Conner that appellant has not sustained the heavy burden of demonstrating that, under those standards, disqualification can be avoided. The entry of an order of disqualification was well within the proper exercise of discretion by the District Court.[[5]](#footnote-4) The order is affirmed.

| **CHECK YOUR KNOWLEDGE** |
| --- |
| 1. Why did Phillips Nizer have a conflict of interest? What kind of risks did the conflict present, if any? |
| 1. Why did the district court disqualify Phillips Nizer? Why did the circuit court disqualify Phillips Nizer? How did their reasoning differ, if at all? |
| 1. The court distinguished this case from *Board of Education v. Nyquist*. Do you find that distinction convincing? |
| 1. If the Association kicked out Logan, would Phillips Nizer still have a conflict of interest or be disqualified? |



| [***Gutting v. Falstaff Brewing Corp.*, 710 F. 2d 1309 (8th Cir. 1983)**](https://scholar.google.com/scholar_case?case=4506335581777863485) |
| --- |
| **Summary:** Ferdinand Gutting was the president of Falstaff Brewing, which gave him a life insurance policy, payable unless he was discharged for proper cause. Paul Kalmanovitz bought Falstaff and fired Gutting, and when Gutting died, Falstaff refused to pay his life insurance benefits. Virginia Gutting filed a breach of contract claim, and hired attorney James S. McClellan to represent her. Falstaff filed a motion to disqualify McClellan, because he had previously represented Falstaff. McClellan withdrew, and Gutting hired Harry B. Wilson. But Wilson also withdrew after identifying a conflict of interest, and Gutting hired David G. Dempsey. In the meantime. Falstaff filed a motion for summary judgment, arguing that Gutting had admitted all of the facts alleged in its complaint by failing to timely answer its request for admissions. The district court granted the motion, but the circuit court reversed, holding that the district court should have considered the disqualification of Gutting’s counsel. |

LAY, Chief Judge.

Virginia M. Gutting appeals from an order of the district court entering summary judgment in favor of Falstaff Brewing Corporation and denying her motion for summary judgment. Gutting’s primary argument on this appeal is based on the claim that the district court erred in denying her motion for leave to file answers out of time to Falstaff’s request for admissions and in ordering the matters set forth in the request deemed admitted. Because we conclude that the district court erred by not allowing Gutting to file late answers to the request for admissions, we reverse and remand.

Virginia Gutting is the widow of Ferdinand (Ferd) J. Gutting, former member of the Board of Directors and President of Falstaff. In 1972 Falstaff established an insurance plan for certain key employees. Pursuant to this plan, in January 1973, Ferdinand Gutting entered into a written agreement with Falstaff entitled Employee’s Death Benefit Agreement. The purpose of the agreement was to provide for Falstaff’s payment of a death benefit to Virginia Gutting, Ferd Gutting’s designated payee. Falstaff purchased three life insurance policies on Ferd Gutting’s life to secure this obligation. The agreement provided that all benefits would be forfeited if (1) the life insurance policies were contested successfully by the insurance company; (2) the employee left Falstaff’s employment voluntarily, subject to certain vesting provisions; or (3) the employee was discharged “for proper cause.”

In early 1975, Paul Kalmanovitz purchased voting control of Falstaff and became Chairman of the Board. Subsequently, for reasons in dispute in this lawsuit, Ferd Gutting’s employment with Falstaff was terminated and the Board of Directors voted to deny Ferd Gutting all benefits because his termination was for cause. Ferd Gutting died in December 1980. Falstaff has refused to pay the amounts due to Virginia Gutting pursuant to the terms of the Employee’s Death Benefit Agreement and she brought suit to recover the proceeds. Throughout this litigation Falstaff has asserted as an affirmative defense that Ferd Gutting was terminated for cause and thus forfeited all benefits due his beneficiary under the agreement. Virginia Gutting claims the termination was not for “proper cause” as that term is defined in the agreement.

Procedural History.

Virginia Gutting filed a complaint on July 8, 1981, through her attorney James S. McClellan. On September 30, 1981, Falstaff filed a motion to disqualify McClellan because he formerly had been a member of Falstaff’s Board of Directors and outside general counsel to Falstaff. Falstaff asserted that McClellan had material, firsthand knowledge of events relevant to Falstaff’s defense and that McClellan would likely be called as a witness. While the motion to disqualify was pending, on October 13, 1981, Falstaff filed its request for admissions, first interrogatories, and request for production of documents.[[6]](#footnote-5) Thereafter, the district court held a conference at which McClellan indicated he would withdraw voluntarily. On December 4, 1981, McClellan formally withdrew.

On December 11, 1981, Harry B. Wilson entered his appearance on behalf of Gutting. On January 4, 7, and 8, 1982, Falstaff served notices of 15 depositions to begin on February 8 in Providence, Rhode Island, and to continue throughout February and early March around the country. On January 7 counsel for Falstaff, Steven P. Sanders, sent a letter to Harry Wilson concerning the failure to respond to the request for admissions and asking for the answers. Wilson and Sanders discussed the request over the telephone several days later and Sanders agreed to wait an indefinite period of time.

According to an affidavit filed by Wilson he began to prepare for the upcoming depositions and to draft responses to discovery requests on January 29, 1982. Wilson further swore that on January 30 he concluded his firm had a serious conflict of interest because some of the scheduled deponents were current clients of the firm. These clients had on-going litigation matters with Falstaff. Wilson researched the nature of the conflict, discussed it with lead counsel in the case, and called Sanders on February 6, 1982, to inform him of the conflict of interest. On February 8 Wilson appeared before the district court and requested leave to withdraw. The motion evidently was pending throughout February and the scheduled depositions for February were postponed.

Falstaff alleges that on February 27, 1982, Wilson again telephoned Sanders to advise him that the depositions scheduled for the following week would have to be canceled. Sanders refused, in part due to a March 15 trial setting, and both parties appeared in court on March 1. Wilson sought a protective order asking the court to postpone the March 2 and 3 depositions because of his conflict of interest. The court indicated the depositions would not be delayed unless new counsel for Gutting entered an appearance. Later the same day, Gutting’s third attorney, David G. Dempsey, entered his appearance and the depositions were postponed one day. The court granted Wilson leave to withdraw and continued the trial setting until June 7, 1982.

On April 9, 1982, Dempsey filed several motions on behalf of Gutting, including a motion for leave to file answers to the request for admissions out of time. On the same date, Falstaff filed a motion for summary judgment on the theory that all fact issues in the case had been admitted by Gutting’s failure to make a timely response to the request. On April 21, the court denied Gutting’s motion for leave to file the answers and delayed ruling on Falstaff’s summary judgment motion. The case was still scheduled to proceed to trial on June 7, 1982, and Falstaff chose to proceed with 11 scheduled discovery depositions. On May 28, 1982, the district court granted Falstaff’s summary judgment motion. The court ruled there was no genuine issue of material fact that the death benefits had been properly withheld under the terms of the agreement because the matter of Ferd Gutting’s termination for cause had been deemed admitted.

Discussion

2. Conflicts of Interest of Gutting’s Counsel.

Gutting contends that the late responses should have been allowed because Falstaff’s motion to disqualify McClellan and Wilson’s withdrawal due to his conflict of interest rendered her without effective representation. The conflicts of interest experienced by McClellan and Wilson disrupted their professional duties to take actions best suited to furthering Gutting’s interests. Once the conflicts became apparent, each attorney became unable to exercise his independent professional judgment. Gutting seems to be arguing that she should not be penalized because of her attorney’s “inability” to take actions on her behalf. We agree that her counsels’ conflicts of interest should have been considered by the district court.

The rules of professional responsibility that prohibit an attorney from representing differing interests are designed to protect the client from the attorney’s potential abuses. It would appear to us that the purpose of such rules would be best furthered if an attorney discovering a conflict of interest took no action that may be inimical to the client’s interests. The existence of a conflict, if not actually tolling the time period for answering discovery requests, should at least be a factor when evaluating the reasons for an untimely response.

In the instant case, Falstaff first filed the motion to disqualify McClellan and then filed the request for admissions barely two weeks later. Falstaff could not expect Gutting to answer the request during the pendency of the motion to disqualify her attorney. Indeed, once McClellan agreed to withdraw, Falstaff agreed to wait for a response until a new attorney had entered an appearance and had an opportunity to review the file. Wilson entered an appearance on December 11, 1981; his appearance was formally accepted on December 17. Sanders, counsel for Falstaff, concedes that he advised Wilson the extension of time for a response was good for a reasonable period of time. In early January 1982 Sanders and Wilson again informally agreed that the time for answering the requests could be extended a little while longer. Falstaff admits that it would have accepted the answers through the end of January and perhaps during the first few days of February. In the affidavit of Wilson, he swears that he discovered a possible conflict of interest on January 30, 1982, as he was preparing responses to the discovery requests. He notified Sanders of the conflict of interest on February 6 and requested leave to withdraw on February 8. At the time Wilson discovered the existence of the conflict, Falstaff concedes that answers to the request still would have been accepted. It was sometime after January 30 that Falstaff began to consider the matters in the request admitted.

Falstaff contends that regardless of Wilson’s conflict of interest he could have responded to the request for admissions. Wilson’s conflict related only to certain upcoming depositions and did not affect his ability to answer the request. We disagree. As we read the conflict-of-interest rules, any actions taken by Wilson may have appeared to be inimical to Gutting's interests. Wilson could not have responded to the request as long as he was hindered by a conflict of interest in any aspect of his representation.[[7]](#footnote-6)

We do not mean to imply disapproval of the district court's use of discovery sanctions in appropriate cases. An attorney’s conflict of interest and his or her resulting inability to act must be distinguished from the situation in which the attorney’s failure to act was inexcusable. In Mrs. Gutting’s case it would be inequitable to deem the requests admitted and penalize her because of her attorney’s compliance with the rules of professional responsibility.

We reverse the judgment of the district court and remand for further proceedings with directions that the district court set a reasonable time period in which to allow Gutting to file answers to the request for admissions.

| **CHECK YOUR KNOWLEDGE** |
| --- |
| 1. What is the purpose of the conflict of interest rules? Who are they intended to protect? Who do they actually protect? |
| 1. Should Gutting’s attorneys have been disqualified? What if she consented to the conflict? |
| 1. Review the rules at the beginning of the chapter, has your understanding of “conflict” of interest changed after reading these cases? |

**Further Listening:**

* [Jill I. Gross](https://law.pace.edu/faculty/jill-gross), [*Professional Responsibility: Client Conflicts of Interest*](https://www.buzzsprout.com/138309/998707), Law to Fact: The Law School Podcast (March 19, 2019).

1. Liz Phair, *Jealousy*, Whip-Smart (1994). [↑](#footnote-ref-0)
2. We have previously held the standards of Canon 5 to be applicable even though the interests adverse to those of a law firm's client are not those of another client in the traditional sense. [↑](#footnote-ref-1)
3. Judge Conner, in effect, used the “substantial relationship” test to determine whether Phillips Nizer had met its burden under Canon 5; we use the test to determine whether Canon 5 is applicable. [↑](#footnote-ref-2)
4. We reject the appellant's contention that the result reached by Judge Conner is foreclosed by *Board of Education v. Nyquist*. That decision concerned a lawyer who represented male teachers in litigation adverse to the interests of female teachers, under circumstances where the lawyer was supplied to the male teachers pursuant to a legal service program supported in part by the union dues of both the male and female teachers. A disqualification order was reversed for lack of any risk that the lawyer’s loyalty to his male clients would be diminished or that he might gain unfair advantage through access to any privileged information from the female teachers. [↑](#footnote-ref-3)
5. We reject, as did Judge Conner, the appellant's contention that disqualification should not occur because Logan's division, R & K Originals, is a member of the Association, rather than Logan itself. The risks identified by Judge Conner are sufficient to warrant disqualification even though only Logan's division is a member of the Association. Nor do we accept the contention that it will be unduly burdensome for law firms that represent trade associations to inform themselves of the corporate identity of those members of an association that are constituent parts of a non-member corporation. [↑](#footnote-ref-4)
6. Falstaff's request for admissions strategically concerned the major contested factual issue in the case of whether Ferd Gutting had been discharged for cause. The request stated in full:

   1. Admit that the life insurance program set forth and discussed in your complaint allowed Falstaff to terminate all life insurance benefits with respect to any employee whose employment was terminated "for cause."

   2. Admit that if "cause" existed for the termination by Falstaff of Ferd Gutting's employment, Falstaff had the right to terminate all life insurance benefits otherwise available to Ferd Gutting and his heirs and beneficiaries.

   3. Admit that Ferd Gutting was told by Falstaff at the time of the termination of his employment by Falstaff that he was being discharged from his employment "for cause."

   4. Admit that Ferd Gutting was discharged from his employment with Falstaff "for cause." [↑](#footnote-ref-5)
7. We do not know why it took Wilson one week to inform Sanders of the conflict and another three weeks to withdraw formally from the case and have Mr. Dempsey enter his appearance. Falstaff complains of this time lag because it was required to cancel several depositions. Given the pending deposition schedule and trial setting, an expeditious substitution of counsel would have been appropriate. Nevertheless, our analysis of the conflict-of-interest problem remains the same. [↑](#footnote-ref-6)