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***195 INHERENT JUDICIAL AUTHORITY AND THE EXPERT DISQUALIFICATION DOCTRINE**

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***196 I. Introduction**

With its explosion across America's litigation landscape, expert witnessing has become a foundation for decision-making in virtually all significant cases. Described by some courts as a "cottage industry," [\[FN1\]](#) it has also become more lucrative than the usual day job for many professionals. With litigants and their counsel shopping relentlessly for key specialists, [\[FN2\]](#) and the experts themselves pursuing engagements aggressively, [\[FN3\]](#) the growth of expert consultations has spawned a proliferation of allegations concerning conflicts of interest. But expert conflicts of interest are not governed by specific procedural rules. [\[FN4\]](#) Nor is there, in general, specific guidance to be found in the ethical criteria of that expert's own profession. [\[FN5\]](#)

As a result, to address conflicts of interest for expert witnesses and consultants, federal courts have developed a distinctive jurisprudence that is not anchored upon the explicit terms of procedural rules, ethical strictures, or even Supreme Court precedent. Instead, a series of federal lower court decisions have crafted an expert-disqualification doctrine based upon a court's inherent authority to safeguard the integrity of the ***197** judicial process and maintain the public's confidence in the court system. Although critical differences have subsequently emerged in the way courts deploy this inherent authority, key features of the underlying doctrine are still widely followed, despite the lack of procedural rules or extensive appellate case law to direct these principles. [\[FN6\]](#)

This Article examines the doctrine for expert disqualification that has evolved during the last fifteen years based upon inherent judicial authority. [\[FN7\]](#) Beginning with a review of the Supreme Court's inherent power doctrine, the discussion turns to the origins of current disqualification methodology. Next, following a review of the principal criteria employed by the courts, analysis is undertaken of the substantive and procedural issues that arise in disqualification controversies. Finally, this paper concludes with observations concerning the current trends and future needs in this increasingly important area. [\[FN8\]](#)

II. Background: Inherent Authority-The Supreme Court Doctrine

Inherent powers have been reposed in the federal courts since the early nineteenth century. The premise of judicial authority to act, even without an enabling statute or rule, was often predicated upon the necessity of taking action to enforce court orders. To remedy acts of interference with essential court functions, inherent authority was recognized as a basis to ***198** discipline attorneys, [\[FN9\]](#) to require respectful and silent presence in the courtroom, [\[FN10\]](#) and to investigate, correct, and punish any fraud perpetrated upon the court. [\[FN11\]](#)

Thus, in *Link v. Wabash R.R. Co.*, [\[FN12\]](#) the Supreme Court approved the judicial authority of a trial court to dismiss a case as a sanction for egregious litigation abuses, stating:

The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to

avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and nonprosequitur entered at common law. [\[FN13\]](#)

Applying that analysis, the Court's ensuing decisions continued a path of selective validations of inherent power, including the assessment of fees against parties acting "vexatiously, wantonly, or for oppressive reasons," [\[FN14\]](#) for bad faith violations of court orders, [\[FN15\]](#) and egregious abuse of the litigation process. [\[FN16\]](#)

In 1991, the Court in *Chambers v. NASCO, Inc.* [\[FN17\]](#) applied the inherent authority doctrine to sanction bad-faith misconduct by a litigant, finding that "if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." [\[FN18\]](#) In *Chambers*, a television station purchaser resisted an action for specific performance [\[FN19\]](#) in which "his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the *199 court." [\[FN20\]](#) In holding that inherent authority can operate without the permission of rules or statutes, the Court observed that, "Courts of justice are universally acknowledged to be vested, by their very creation, with powers to impose silence, respect, and decorum in their presence, and submission to their lawful mandates." [\[FN21\]](#) Finding that, because of "their very potency, inherent powers must be exercised with strength and discretion," [\[FN22\]](#) the Court held that the availability of rules and procedural statutes did not displace inherent power to impose sanctions for "bad faith conduct . . . [because] . . . the inherent power extends to a full range of litigation abuses." [\[FN23\]](#) Therefore, even in settings where statutory criteria may generally apply, inherent authority is not preempted and, in any event, that authority "must continue to exist to fill in the interstices." [\[FN24\]](#)

Five years later, in *Degan v. United States*, [\[FN25\]](#) the Court underscored the limits to the power: "The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." [\[FN26\]](#) Thus, while recognizing that an overseas fugitive should not utilize his absence to resist the government's efforts to forfeit targeted assets, [\[FN27\]](#) the Court reversed a default judgment imposed pursuant to the fugitive-disentitlement doctrine. [\[FN28\]](#) By virtue of the existence of alternative means for protecting the government's interests, [\[FN29\]](#) the Court rejected absolute disentitlement. [\[FN30\]](#) Manifesting a philosophical recognition that, when the judicial branch "undertakes to define its own authority," self-restraint is an imperative, [\[FN31\]](#) the Court found that judicial remedies must be confined to those measures reasonably necessary to address the abuse. "Principles of deference counsel restraint in resorting to inherent power and require its use to be a reasonable response to the problems and needs that provoke it." [\[FN32\]](#) In the wake of these Supreme Court *200 holdings, circuit courts have applied inherent power with circumspection. Following *Chambers*, most circuits have concluded that a finding of bad faith is a prerequisite to a district court imposing sanctions pursuant to its inherent power. [\[FN33\]](#) Even before the Supreme Court amplified the need to examine alternative remedies in imposing inherent authority, circuit courts typically explored the viability of lesser punishments before exercising "inherent power sanctions that are fundamentally penal." [\[FN34\]](#) Thus, while inherent authority has evolved over almost two centuries as a permanent dimension of the judicial tapestry, it is a fabric threaded with caution.

III. Background: Expert Disqualification and the Attorney-Client Parallels

Before expert disqualification found footings in inherent authority, analogies to the attorney-client privilege dominated the field. [\[FN35\]](#) In *Conforti & Eisele, Inc. v. Division of Building & Construction, Department of Treasury*, [\[FN36\]](#) the Superior Court of New Jersey issued a conflict-based disqualification of an expert through an extension of the attorney-client privilege based on state law. [\[FN37\]](#) In that case, an expert who had previously worked on behalf of a state agency in an earlier phase of a construction dispute attempted afterwards to relocate his allegiance to the state's adversary concerning a later stage of the project. [\[FN38\]](#) Because the expert had worked for the state agency's counsel in a prior, related litigation, the court found that the expert, as counsel's former agent, was enveloped by the attorney-client privilege. [\[FN39\]](#) Relying

upon the principle that attorneys have a duty to prevent the disclosure of any attorney-client confidences that *201 would be known to the expert, the court issued an injunction against the expert's participation in litigation against his former client. [\[FN40\]](#)

Anchored upon the foundation of attorney-client privilege, the court in Conforti concluded that, "[i]t would be anomalous to hold that the State could claim the privilege as against its attorneys, yet have that privilege dissolve when their attorneys properly confide their client's communication to someone in their employ." [\[FN41\]](#) Pinpointing a concern that would continue to resonate in subsequent decisions, the New Jersey court emphasized the expert's access to the "mental impressions, opinions[,] and legal theories of the State's counsel." [\[FN42\]](#) Because the court found that the earlier exposure to this information could not be erased, the Conforti court reasoned that if the expert were allowed to work for the opposing party, that confidential information would "shape or effect, either consciously or unconsciously," the analysis provided to the second litigant. [\[FN43\]](#) Especially because this scenario would give the second litigant information through indirect means, which it was not entitled to obtain directly through discovery, the conflict would create an untenable situation for which "[n]o form of protection order could be truly effective in expunging this knowledge." [\[FN44\]](#) As a result, the only perceived option was to preclude the second litigant from employing the expert. [\[FN45\]](#)

A federal district court largely accepted the analysis of Conforti when it granted a disqualification motion in Marvin Lumber & Cedar Co. v. Norton Co. [\[FN46\]](#) In that case, the plaintiff challenged the defendant's attempt to use a sealant expert who had previously enjoyed a long-term relationship with the plaintiff, including extensive development work and access to sensitive product design information. [\[FN47\]](#) Although not attempting to switch sides in the same case, the sealant expert had participated in a prior, unrelated case for the same party it was later seeking to oppose. [\[FN48\]](#)

*202 In determining the disqualification issues, both parties appeared to agree upon the legal test, thus effectively stipulating that if the expert had been engaged in matters relevant to the same litigation, disqualification would be appropriate. [\[FN49\]](#) The court also embraced that analysis, finding that with experts, like attorneys, disqualification is conceived to protect against the potential breach of confidences, "even without any predicate showing of actual breach." [\[FN50\]](#) Thus, the court, applying attorney-client privilege criteria, stated that disqualification when "the matters involved in the pending suit are substantially related to the matters or cause of action" in the prior engagement, the expert will be disqualified. [\[FN51\]](#)

IV. Expert Disqualification: Paul v. Rawlings Sporting Goods Co.

While some decisions would continue to rely on the attorney-client analogy of Conforti and Marvin Lumber, [\[FN52\]](#) in 1988 a United States magistrate judge's opinion transformed expert-disqualification analysis and marked a new path that would be followed into the next millennium. [\[FN53\]](#) In Paul v. Rawlings Sporting Goods Co., [\[FN54\]](#) the court confronted a product-liability case where a Rawlings baseball helmet allegedly failed to protect an amateur player who suffered severe brain damage after being struck on the head by a pitched baseball. [\[FN55\]](#) Early in the case, defense counsel retained a leading engineering expert to perform a series of tests on baseball *203 helmets. [\[FN56\]](#) While there was some dispute as to whether the Paul litigation was specifically within the scope of that retention, there were clearly discussions between expert and defense counsel about the testing of helmets during meetings that lasted over an hour. [\[FN57\]](#)

In the course of these communications, the expert provided sufficient information to indicate that he might not be a helpful witness for the defense, and further exchanges with Rawlings ceased. [\[FN58\]](#) Seven months later, that same expert was contacted by the plaintiff's attorney who sent him extensive information along with the requested \$1,000.00 retainer. [\[FN59\]](#) After the expert prepared a report finding that the Rawlings helmet did not adequately protect the wearer against a wild pitch, Rawlings moved for disqualification. [\[FN60\]](#)

In considering the motion, the court's threshold inquiry was whether, "under any set of circumstances," the court had authority to disqualify an expert witness. [FN61] Assessing Conforti, the court in Paul concluded that the New Jersey decision was premised upon state law protections against the disclosure of attorney-client confidences. [FN62] Rather than follow Conforti's modality, though, the federal court turned to a separate source of authority and found that it possessed the "inherent power to preserve the public confidence in the fairness and integrity of . . . judicial proceedings." [FN63] Strikingly, in concluding that judicial powers inherently encompassed the prerogative of expert disqualification, the court did not refer to the Supreme Court's jurisprudence limiting inherent authority as a basis for sanctioning disobedience to court orders. [FN64] Indeed, in Paul, as in later cases applying Paul's expert-disqualification doctrine, there was no indication that the engagement by plaintiff of the expert, months after the defendant's consultation with that expert, violated any order of the court. [FN65] Moreover, in general, when a prior consulting expert for one side later attempts to serve as a consultant or trial expert for a second side, there is no violation of Rule 26 or any other provision of the Federal Rules of Civil Procedure. [FN66] Nor did Paul find direction from any code of expert ethical criteria. [FN67] In *204 contrast to attorneys, helmet experts, like most other professionals, are not subject to any detailed criteria that define when conflicting representations create a disqualifying impropriety. [FN68]

While standing in a field of limited judicial precedent [FN69] without footings in Supreme Court doctrine, procedural rules, or specific ethical criteria, the Paul court nevertheless fashioned a test for expert disqualification that relied upon general tenets of inherent authority. [FN70] In designing the mechanics for implementing this authority, the court identified three questions. [FN71] First, did the first party and the expert enter into a relationship that gave rise to an objectively reasonable expectation that the first party could impart confidential information to the expert? [FN72] The next inquiry centered upon whether the first litigant did, in fact, disclose confidential information to that expert. [FN73] The third question was whether the expert used or might use such information to the first litigant's disadvantage. [FN74]

In the event that all such questions were answered affirmatively, the court would then turn to ascertaining the appropriate remedy. [FN75] From these questions, a two-part test was distilled: "[F]irst, whether the attorney or client acted reasonably in assuming that a confidential or fiduciary relationship of some sort existed and if so, whether the relationship developed into a matter sufficiently substantial to make disqualification or some other judicial remedy appropriate." [FN76] Applying this two-part test to the helmet expert in Paul, the court rejected disqualification, finding that the first part of the test was likely met but that the second standard was not satisfied because "the parties never communicated on matters of particular substance relating to the Michael Paul case" [FN77] in the course of the first engagement. As a result, the court found no evidence that the plaintiff had been "unduly advantaged." [FN78]

*205 In emphasizing the lack of "demonstrable prejudice to Rawlings," [FN79] the court unmistakably articulated an actual-prejudice standard that did not presume that confidential communications were imparted solely by virtue of the prior relationship between an expert and client. [FN80] By discarding the presumption that ordinarily prevails in an attorney-client scenario, [FN81] the court distinguished attorneys from experts and, effectively, rejected the analogy that was central to the analyses in Conforti and Marvin Lumber. [FN82] Summarizing the attorney-client criteria, the court explained that once a confidential relationship is established, confidential communications are presumed for at least two reasons:

First, it eliminates the need for the client to demonstrate that potentially prejudicial information passed between him and his attorney by testifying to such information, which, of course, would then defeat the claim of privilege. It also is designed to preserve the public trust in the integrity of the judicial system by preventing an attorney from engaging in the unseemly practice of representing different parties to the same litigation at different times. [FN83]

In holding that expert disqualification would not mirror the criteria of attorney-conflict analysis, the court stressed several key distinctions. [FN84] The court found concerns that govern attorney conflict of interest cases less persuasive for experts,

because there are many communications between a client and expert witness which are not privileged, and because there is less stigma attached to an expert "changing sides" in the midst of litigation than an attorney, who occupies a position of higher trust, with concomitant fiduciary duties, to a client than does an expert consultant. [\[FN85\]](#)

As a result, rather than applying attorney ethical criteria that safeguard against even the potential for harmful impropriety, Paul espoused practical *206 considerations concerning a reasonable belief in a confidential relationship and a fact-based determination of whether any demonstrable prejudice is suffered by the first party when a second party retains the same expert. [\[FN86\]](#)

Recognizing that expert consultations, especially initial encounters, may create uncertainty over the present status of retention and future expectations of confidentiality, the court determined that "a formal, written contract establishing both the existence of the relationship and prohibiting the disclosure of any information gained by the expert" from the first litigant was preferable, but was not an absolute precondition to disqualification. [\[FN87\]](#) In the event that no such agreements are confirmed in writing, the court suggested that any ambiguities in the relationship between an expert and retaining counsel should be construed against the attorney:

Of the two participants in an attorney-expert relationship, however, the attorney, being an expert in legal matters, should be more aware of both the potential for privileged information to pass to the expert, and for the need to insure against such information finding its way into the hands of an adversary. [\[FN88\]](#)

As a result, the court concluded that the burden of ensuring that the expert understands the confidential, privileged nature of the relationship should fall upon counsel. [\[FN89\]](#)

In balancing the competing policy objectives, the court also expressed a concern that the first party's preliminary consultations might be unfairly exploited as a tool for disqualifying experts that a second party might legitimately need to present its case. [\[FN90\]](#) In the Paul scenario, the court noted that the challenged expert had published extensively in the area and appeared more logically to be a plaintiff's expert than a voice for defendants in like cases. [\[FN91\]](#) Without attributing bad motive to either side, the court nevertheless emphasized that

if experts are too easily the subject of motions to disqualify, unscrupulous attorneys or clients will be encouraged to engage in a race for expert witnesses, and to identify potentially harmful experts and to create some type of *207 inexpensive relationship with those experts, simply in order to keep them away from the other side. [\[FN92\]](#)

Misgivings about possible manipulation of the disqualification process would be a recurring theme in later cases, especially in highly specialized areas with a limited menu of truly qualified potential experts. [\[FN93\]](#)

V. Expert Disqualification: Paul's Two-Part Test in the Lower Courts

Two years later, Paul's two-part test was adopted by the district court in *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.* [\[FN94\]](#) In that case, the plaintiff requested disqualification of an opposing expert firm which employed a metallurgist that the plaintiff had previously consulted concerning a mechanical failure in a mining barge. [\[FN95\]](#) The court found, however, no informational connection between the two concerning the matter at issue. [\[FN96\]](#) Moreover, because the parties and their attorneys were aware of the relationship between the experts, the court found that they would be "in a position to prevent any improper disclosures in the future." [\[FN97\]](#) Recognizing the right of a litigant to choose its own expert, and the value of employment from the expert's standpoint, the court underscored the realities of expert services:

It is also not unusual for opposing experts in narrow fields of specialty to have had exposure to each other[']s work and theories or even to have worked together in the past. This is a fact of life where there is a limited number of experts in a given field, or limited experts with experience in a particular type of case. [\[FN98\]](#)

Thus, the court distinguished the circumstances of experts with a prior affiliation to an opposing party from the scenario of side-switching within the same case—a distinction, as this doctrine has evolved, which often proves to be critical. [\[FN99\]](#)

***208** One year later, another federal court cited Paul and Great Lakes to disqualify an expert based upon the now crystallized two-step inquiry concerning the confidentiality of the relationship and the information exposed to the expert. In *Wang Laboratories, Inc. v. Toshiba Corp.*, [\[FN100\]](#) the court enforced its inherent authority in accordance with the Paul criteria to impose disqualification in a case of side-switching by a patent expert. [\[FN101\]](#) Thus, the court described as "a clear case for disqualification" those scenarios where a consultant retained by one party becomes an expert for the opposing party after receiving confidential information. [\[FN102\]](#) To decide expert conflict of interest cases, the court phrased the two-part analysis of Paul and Great Lakes in oft-quoted terms: [\[FN103\]](#)

First, was it objectively reasonable for the first party who claims to have retained the consultant, in this case Scott on behalf of Wang, to conclude that a confidential relationship existed?

Second, was any confidential or privileged information disclosed by the first party to the consultant? . . . Affirmative answers to both inquiries compels disqualification. [\[FN104\]](#)

Although, as in Paul and Great Lakes, the court required a showing that confidential information was actually shared with the challenged expert, no measurement of these confidences was required in Wang. Instead, the court focused upon the nature, rather than the quantum of confidential communications, stating that, "[w]hile the value of the disclosures is debatable, their essential work-product nature is not. No experienced litigator would freely disclose these materials to opposing counsel." [\[FN105\]](#)

***209** VI. Expert Disqualification: The Balancing Test

In 1994, the court in *Cordy v. Sherwin-Williams Co.* [\[FN106\]](#) added a third component to the prevailing two-part test. [\[FN107\]](#) In addition to the dual components of confidential relationships and confidential information, the court in *Cordy* found it appropriate to "balance the competing policy objectives in determining expert disqualification." [\[FN108\]](#)

In describing the objectives to be weighed, the court began with the duty to maintain the integrity of the judicial process that could otherwise be compromised by serious conflicts of interest. [\[FN109\]](#) Additional factors included the need to ensure that litigants have access to expert witnesses and their specialized knowledge, the right of experts to pursue their professional calling, and the frequently stated concern that if experts become too easily subject to disqualification, unscrupulous litigants may attempt to create an inexpensive relationship with potentially harmful experts solely to make them inaccessible to their adversary. [\[FN110\]](#) After a review of multiple factors and focusing upon the expert's exposure to confidential information, including the first litigant's "trial strategy," [\[FN111\]](#) the court disqualified not only the expert, but the law firm that collaborated with the expert in his second employment. [\[FN112\]](#) Following *Cordy*'s addition of a balancing test to the original two elements, a number of decisions have included this third tier as an additional component of disqualification analysis. [\[FN113\]](#)

With the expert-disqualification doctrine enjoying increasing support among federal district judges, [\[FN114\]](#) further validation for Paul and its progeny ***210** followed in state appellate decisions in Colorado, [\[FN115\]](#) Connecticut, [\[FN116\]](#) and New York. [\[FN117\]](#) In 1996, the Fifth Circuit Court of Appeals endorsed the Paul and *Cordy* test in *Koch Refining Co. v. Jennifer L. Boudreaux, MV*, [\[FN118\]](#) a suit over a cargo-laden barge that sank amidst heavy seas. [\[FN119\]](#) Upon ascertaining sufficient support for the lower court's findings concerning the confidential relationship and confidential information, [\[FN120\]](#) the Fifth Circuit acknowledged that some lower courts further analyzed the public interest and thereupon conducted its own balancing of policy objectives with respect to expert disqualification, [\[FN121\]](#) including: [e]nsuring that parties have access to expert witnesses who possess specialized knowledge and allowing experts to pursue

their professional calling [C]oncern that if experts are too easily subjected to disqualification, unscrupulous attorneys and clients may attempt to create an inexpensive relationship with potentially harmful experts solely to keep them from the opposing party [W]hether another expert is available and whether the opposing party had time to hire him or her before trial. [\[FN122\]](#)

After reviewing the elements of the two-part test and balancing the public interest factors, the Koch court found that the lower court had not abused its discretion in disqualifying the expert "under this very limited and specific factual scenario." [\[FN123\]](#)

This acceptance of the expert-disqualification doctrine by the Fifth Circuit, adoption by state courts [\[FN124\]](#) and, in 1999, adoption in the Federal *211 Circuit, [\[FN125\]](#) indicates that it is safe to say that courts have adopted the Paul test. [\[FN126\]](#) Thus, in *United States v. Salamanca*, [\[FN127\]](#) the prosecution attempted to use the expert testimony of a translator who had previously provided interpretation services for the defendant and defense counsel during the course of twenty hours of attorney-client discussions. [\[FN128\]](#) Applying the two-part confidentiality test of the disqualification doctrine, and further finding no waiver of any privilege by the defendant, the court sustained the objection to the expert and found "Salamanca has met the test necessary to disqualify an expert: he objectively and reasonably believed that his communications with his attorney through the interpreter were confidential, these communications included privileged information, and Salamanca did not waive the attorney-client privilege." [\[FN129\]](#) Although not expressly characterizing the interpreter as a side-switcher, the court's discussion cited the underlying analysis concerning the risk of improper disclosure and the potential harm to the public's trust of the judicial system. [\[FN130\]](#)

On the other hand, in *Popular, Inc. v. Popular Staffing Services Corp.*, [\[FN131\]](#) the expert's initial interaction with the plaintiff with respect to the confidentiality of the relationship and the information was not substantial enough to create a cognizable conflict when that same expert was later retained by the defendant. [\[FN132\]](#) Also applying the Paul methodology, in *212 *Chamberlain Group, Inc. v. Interlogix, Inc.*, [\[FN133\]](#) the court rejected disqualification, finding that any information conveyed by the defendant in a previous case to its trial expert was not privileged because-as a previous trial expert-his information "would be an open book, available for the opponent to review." [\[FN134\]](#) Significantly, the factual circumstances of *Popular* and *Chamberlain* were pointedly distinguished from the conflict of interest implications that arise when an expert switches sides in the same litigation-the scenario that caused disqualification in *Salamanca*. [\[FN135\]](#)

Thus, while an expert's prior affiliation with its current adversary will not automatically warrant disqualification, [\[FN136\]](#) cases applying this analysis have increasingly emphasized the distinction between side-switching [\[FN137\]](#) and prior affiliation cases. [\[FN138\]](#) While the same legal standards apply to both *213 situations, one court described the judicial reaction to side-switching by stating that it generally creates a conflict of interest and that "[i]n such circumstances, courts have unanimously held that such an expert would be disqualified." [\[FN139\]](#) While, depending upon the facts, the reality is that some side-switching experts have not been disqualified, [\[FN140\]](#) the act clearly triggers exacting judicial scrutiny and frequent disqualifications. Conversely, although disqualification has also been granted in several cases lodged in the prior affiliation framework, [\[FN141\]](#) such outcomes are infrequent.

VII. Applying Disqualification Criteria: The Confidential Relationship Factor

While the outcomes and the analysis have varied at times, lower court decisions addressing expert disqualification have almost invariably applied concepts of inherent authority without any reference to the Supreme Court decisions that have developed the doctrine. [\[FN142\]](#) Instead, the decisions follow Paul to include the two-part analysis that examines first, whether a confidential relationship was reasonably believed to have been formed and second, whether the private information disclosed was sufficiently important to warrant suppression of an expert's testimony. [\[FN143\]](#) In general, decisions that look

only to these two factors have held that experts should be disqualified if both issues are answered affirmatively, and that disqualification is inappropriate if either part is not met. [\[FN144\]](#)

***214** With the test for confidential relationships, courts have delineated the legal analysis with relative consistency. In accord with Paul, [\[FN145\]](#) courts have generally rejected bright line standards that require a formal retention agreement before a confidential relationship can be substantiated. [\[FN146\]](#) One decision went as far as to find that "there is no 'right' way for an attorney to retain an expert for purposes of litigation." [\[FN147\]](#) Even decisions that reject disqualification based on the facts of the case have found that any actual retention requirement of the expert would amount to a "distinction without a difference." [\[FN148\]](#)

Thus, in *Stencel v. Fairchild Corp.*, [\[FN149\]](#) the court found that so long as a confidential relationship was relied upon reasonably, the relationship can ripen prior to the delivery of a retainer agreement. [\[FN150\]](#) In that case, the submission of a proposed retainer agreement, while not finalized, was nonetheless a sufficient development to constitute "persuasive evidence" that the litigant could reasonably rely on the confidentiality of its communications with an expert. [\[FN151\]](#) Also supportive of confidentiality in *Stencel* was the litigant's agreement to pay the expert for any research or conclusions. [\[FN152\]](#) Along the same line, an exchange of letters concerning an expert's anticipated retention, even if somewhat ambiguous, can corroborate the reasonableness of a litigant's reliance upon the confidentiality of its expert discourse. [\[FN153\]](#)

While formal agreements for retention are clearly not a prerequisite, [\[FN154\]](#) the absence of a specific agreement can be a factor in characterizing the nature of a controverted relationship. For some courts, an omission is seen ***215** as evidence that the parties had not reached a point at which it would be objectively reasonable for the litigant to believe it had entered into a confidential relationship with a prospective expert. Thus, in *Mayer v. Dell*, [\[FN155\]](#) the absence of a confidentiality agreement, or even a follow-up letter, at the time of a consultation was found to be critical in reaching an outcome that no disqualification should be ordered. [\[FN156\]](#) Along this line, in *Advanced Cardiovascular Systems, Inc. v. Medtronic, Inc.*, [\[FN157\]](#) the court found that a confidential relationship had not been established by the exchange of a draft agreement letter where the prospective expert had cautioned counsel not to disclose privileged information. [\[FN158\]](#)

In determining the confidentiality of a relationship, courts may also consider any relevant professional criteria that govern the challenged expert. Thus, in *United States ex rel. Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Systems, Inc.*, [\[FN159\]](#) the court found that a party's communications with an accounting expert were encircled by confidentiality based on a state law that prevented the voluntary disclosure of information gained through accounting services. [\[FN160\]](#) Further confirmation of this professional standard was found in the American Institute of Certified Public Accountants Rule 30 which provided that a "member in public practice shall not disclose any confidential information without the consent of the client." [\[FN161\]](#)

***216 VIII. Applying Disqualification Criteria: Confidential or Privileged Information Factor**

In adjudicating the first element of the expert-disqualification doctrine, [\[FN162\]](#) courts have largely concurred in a legal standard based on the objectively reasonable belief in the prior existence of a confidential relationship. [\[FN163\]](#) With the second element of analysis, legal tests have diverged in qualitative and quantitative respects: first, in defining the nature of confidential information that is critical; and second, in determining how substantially tainted information must be to trigger disqualification. [\[FN164\]](#)

A. The Nature of Protected Information

Definitional issues begin with the original wording in Paul, which addressed the disclosure to an expert of the first litigant's "confidential or privileged information." [\[FN165\]](#) The use of disjunctive phrasing can bear decisively upon outcomes, since information which some would consider confidential may often include facts and opinions that may not be privileged in a strict legal sense. For this reason, the district court in *United States v. Larkin, Hoffman, Daly & Lindgren* [\[FN166\]](#) emphasized that a bank seeking disqualification of a former employee serving as an opposing expert "need only prove that the information was either privileged or confidential." [\[FN167\]](#) Finding that the former employee, during his employment by the office of the Controller of the Currency, had gained access to the bank's "sensitive and confidential information," [\[FN168\]](#) the court refused to allow him to testify as an expert against that bank. [\[FN169\]](#) Although not characterized as privileged for evidentiary purposes, the court found that the financial information gained by the bank examiner was nonetheless confidential based on applicable federal regulations. [\[FN170\]](#) Along the same *217 line, a former government employee who had participated in discussions within a state agency concerning the defendant's billing practices was prohibited from serving as defendant's expert in later litigations against the same state agency due to the "actual confidences" [\[FN171\]](#) she obtained and the "clear conflict of interest." [\[FN172\]](#)

The premise that confidential has a broader meaning than privileged for expert-disqualification purposes has been endorsed by the Fifth Circuit in *Koch Refining*, and in most phrasings of the test among lower courts. [\[FN173\]](#) Some decisions, though, still ask if in meeting the second prong for the Paul test, the information must be "readily identified as either attorney work product or within the scope of attorney-client privilege." [\[FN174\]](#) Overwhelmingly, courts adhering to this narrower view of confidential information for expert-disqualification purposes "make a distinction between confidential business and financial records and confidential communications related to a particular litigation." [\[FN175\]](#) In a state court discussion underscoring the need to identify a "legally cognizable confidence," it was noted that the expert was "not a lawyer, doctor or priest," nor was he asked to "divulge classified military secrets." [\[FN176\]](#)

Similarly finding that prior access to a prior client's confidential information, without more, does not prevent experts from testifying for an adversary, a federal district court distinguished business confidences from the nature of information that is protectable, explaining that

[c]onfidential information, in the context of expert disqualification, includes: "discussion of the [retaining party's] strategies in the litigation, the kinds of expert [the party] expected to retain, [the party's] views of the strengths and weaknesses of each side, the role of each of the [party's] witnesses to be hired, and anticipated defenses." [\[FN177\]](#)

*218 For most courts, the mere expectation by a former client that information shared with an expert would be confidential is insufficient to disqualify that expert. For example, regardless of the client's sense of privacy about his or her communications with an expert, the delivery to an expert of matters of public record, including pleadings or other documents that are broadly available, would not meet a standard for confidential information that could support disqualification. [\[FN178\]](#) Along the same line, courts have said that the delivery to an expert of purely technical information would not support disqualification. [\[FN179\]](#) Similarly, if a party could obtain the information at issue through discovery, it is not "potentially prejudicial confidential information," [\[FN180\]](#) and therefore cannot lead to the disqualification of an expert. Accordingly, "disclosure of independently obtained, factual information which is subject to discovery anyway does not raise the same level of concern." [\[FN181\]](#)

As a result, to be considered confidential for expert-disqualification purposes, the information must be of a character that is not ordinarily discoverable. For that reason, courts have established that prior testifying experts are rarely subject to disqualification if they later reappear on the opposing side. [\[FN182\]](#) After all, an expert who actually testified previously was, in effect, an "open book" who was subject to cross-examination and required to disclose the information upon which he relied, [\[FN183\]](#) including *219 discussions and materials provided by the client or counsel. [\[FN184\]](#) Accordingly,

prior-testifying experts from an earlier case are ordinarily positioned to switch in later litigation to an opposing side against a former client in a fashion that might be considered reprehensible in the attorney-client context.

B. Information and Imputation of Knowledge

Because the judicial positions on confidential or privileged information have crystalized around an actual prejudice analysis, [\[FN185\]](#) confidential information that has not actually been communicated to an expert will not be imputed simply by virtue of his or her employment. [\[FN186\]](#) Thus, while imputation principles among employees is a settled legal doctrine in the world of corporate law, under an actual prejudice test, so long as there has been no exchange of information between the employees at issue, confidences known to one are not attributed to the challenged expert. [\[FN187\]](#) The reluctance to impute knowledge among co-workers in the expert scenario also diverges sharply from attorney-client analysis that deems all attorneys in a firm to be one lawyer for conflict of interest situations:

This distinction is inherent in the very nomenclature that describes the parties. A witness is one who has engaged in the activity of 'witnessing,' and is called to testify, truthfully and under oath, as to what he observed or what he knows. An expert witness is merely a witness with additional knowledge beyond the ken of the layman, who helps the trier of fact *220 understand scientific, technical or other specialized topics. . . . In contrast, an advocate is one who engages in the activity of advocating. To advocate does not mean to offer facts; it means to characterize and sculpt the facts Thus, the advocate is beholden to her client as much as she is to the truth. [\[FN188\]](#)

In a recent confirmation of this distinction, [\[FN189\]](#) the Central District of California in Stencel squarely rejected the adoption of an imputed-disqualification doctrine for experts, finding that "they perform a very different function in litigation than do lawyers." [\[FN190\]](#)

Rather than apply imputation principles to disqualify experts, [\[FN191\]](#) courts have embraced remedial measures, [\[FN192\]](#) including the imposition of screens *221 between different experts whenever members of the same firm have had contact with opposing litigants. [\[FN193\]](#)

While reluctant to attribute information between individuals who have had no actual exchanges, courts will likely not countenance prospective courtroom dueling between experts employed by the same company on opposite sides of a case. Should different experts from the same consulting firm remain active on opposite sides of the same case at the same time, disqualification may be required simply to avoid the unseemliness of having the one firm testify against itself in the same trial. [\[FN194\]](#)

C. Substantiality of Knowledge

Even when information has been shared which meets the standards for confidentiality or privilege, courts do not automatically disqualify. There is no presumption concerning a disqualifying taint [\[FN195\]](#) and, to the contrary, the burden of demonstrating an infectious exposure to non-discoverable, confidential information falls upon the party seeking disqualification. [\[FN196\]](#) While a few courts have indicated that merely the potential for infection from confidential information will suffice, [\[FN197\]](#) more frequently courts *222 require at least a reasonable probability that an expert received information deemed confidential for disqualification purposes. [\[FN198\]](#)

Assuming at least some protectable confidences have been overtly exposed, several courts have imposed disqualification even though the value of confidential information was "debatable" [\[FN199\]](#) due to the difficulty in qualifying the impact of the exposure. [\[FN200\]](#) As a result, so long as confidential or privileged information was clearly conveyed at an earlier time, the challenged expert's assertion that he has no recollection of any specifics will generally not eliminate the taint. In one reaction to the expert's alleged lack of recollection, the court reasoned, "However, the prejudice (of disqualification) is not

such that it overcomes the risk that [the expert] will minimally be subconsciously affected by the information he received from defense counsel." [\[FN201\]](#) Thus, the court in *Theriot v. Parish of Jefferson* [\[FN202\]](#) did not dissect the ingredients of specific, demonstrable *223 prejudice in disqualifying a political expert in a reapportionment case. [\[FN203\]](#) Finding that during the liability phase, his services for the defendant exposed him to strategy sessions that included confidential information, the court ruled that he was "simply too close and too intimately involved . . . in the very process" for side-switching to be countenanced. [\[FN204\]](#)

In close calls, disqualifications based on a lesser showing [\[FN205\]](#) usually entail prior discussions of: a party's strategies in litigation; the kinds of experts that the retaining party expected to employ; a party's views of the strengths and weaknesses of each side's case; the role of each of the litigant's expert witnesses to be hired; and anticipated defenses. [\[FN206\]](#) Thus, emphasizing the need to protect disclosures of "counsel's theory of the case, and counsel's mental impressions," [\[FN207\]](#) courts more readily impose disqualification when needed to protect against the disclosure of attorney-client communications. [\[FN208\]](#)

The court addressed closely related considerations in *W.R. Grace Co. v. Gracecare, Inc.*, [\[FN209\]](#) when the court considered whether to disqualify an attorney-expert in a trademark dispute. [\[FN210\]](#) Finding that "the duties of an attorney-expert are greater than the ordinary expert[.]" [\[FN211\]](#) the court did not require proof of actual prejudice, but instead found "a reasonable probability" that confidences were exchanged, [\[FN212\]](#) even if the direction of the relationship was "minimal" and amounted to "nothing more than a job interview." [\[FN213\]](#) In *Commonwealth Insurance Co. v. Stone Container *224 Corp.*, [\[FN214\]](#) on the other hand, the court found that engagement of an attorney as an expert did not create an attorney-client relationship. [\[FN215\]](#) Because the expert retention was unrelated to the attorney-client services for the client, the court denied disqualification. [\[FN216\]](#)

While provable disclosures of legal strategies and lawyer analysis have been the leading sources of disqualification, when controversies lie beyond the realm of attorney confidences, courts usually require proof that a substantial quantum of confidential information was actually received by the challenged expert. [\[FN217\]](#) These decisions accentuate the practical need to demonstrate an actual, tangible prejudice before the "drastic" remedy of disqualification can be granted. Underscoring this philosophy of reluctance, [\[FN218\]](#) one decision found that despite a relationship conducive to confidential disclosures, the objecting party had not imparted significant, confidential communications. [\[FN219\]](#) Accordingly, even if an expert's previous experience with a litigant results in general knowledge about its operations, absent knowledge of confidential products or procedures specific to the subject litigation, the expert ordinarily will not need to vacate the current assignment. [\[FN220\]](#) Just as clearly, the fact that the objecting party formerly employed an expert, [\[FN221\]](#) or that he worked for a litigant's counsel in previous litigation does not, by itself, warrant disqualification. [\[FN222\]](#)

*225 Thus, one party's prior use of a consultant on issues pertaining to an earlier litigation will not necessarily lead to disqualification when that expert later joins an opposing camp. [\[FN223\]](#) Even prior engagements that are related to the challenged subject matter often fail to trigger intervention. [\[FN224\]](#) Thus, in a patent dispute, the court rejected disqualification even though the expert currently engaged by the plaintiff had previously worked in the defendant's development of an operationally similar technology. [\[FN225\]](#) To sufficiently demonstrate the requisite "substantial relationship," the party seeking disqualification must show that the expert was privy to "confidential information concerning . . . the specific technology at issue in this lawsuit." [\[FN226\]](#)

IX. Applying Disqualification Criteria: Balancing Public Interest Considerations

Overwhelmingly, recent decisions have applied the expert-disqualification doctrine through a two-part test that, as discussed

earlier, requires a confidential relationship and a prior disclosure of confidential or privileged information. [\[FN227\]](#) In most cases, the inquiry is resolved if a party *226 seeking disqualification fails sufficiently to establish either of those elements. [\[FN228\]](#) A minority view holds that even without the requisite invasion of confidentiality, disqualification might be required "to protect the integrity of the adversary process." [\[FN229\]](#) The trend of recent decisions, however, speaks to a third tier of analysis that balances the competing policy considerations in determining whether an expert should be disqualified. [\[FN230\]](#)

Because the expert-disqualification doctrine is based upon the inherent authority to protect the integrity of the judicial process and promote public confidence in the legal system, the balancing analysis ordinarily defines these ethically-based considerations as important factors in any disqualification controversy. [\[FN231\]](#) Although some courts have referred to concerns about the "appearance of impropriety," [\[FN232\]](#) no court has *227 disqualified an expert merely upon the unseemliness of an engagement, even in blatant side-switching cases. [\[FN233\]](#) Nonetheless, side-switching experts are especially troubling to courts because of obvious concerns about conflicts of interest and the resulting improper appearance. In cases in which experts actually have billed two different sides for their services in the same litigation, the integrity and public confidence concerns become all the more compelling. [\[FN234\]](#) Indeed, an expert's attempt to return a payment received from his former client after he had switched sides in the litigation engendered more admonishment than appreciation. [\[FN235\]](#)

Related to this integrity concern is a recurring aversion to any attempts by litigants to manipulate the process in order to preempt an opponent from using a particular expert. As one court acknowledged, "Indeed, sometimes disqualification motions are brought for purely strategic purposes." [\[FN236\]](#) The prospect that a litigant will consult with an expert merely to disqualify him has been described as "abhorrent" by one court, [\[FN237\]](#) condemned as "unscrupulous" by another, [\[FN238\]](#) and roundly condemned throughout the history of the expert-disqualification doctrine. [\[FN239\]](#) In fact, in validating the prerequisite of confidential information, Wang explained: [\[FN240\]](#) "Were this not so, lawyers could then disable potentially troublesome experts merely by retaining them, without intending to use them as consultants. Lawyers *228 using this ploy are not seeking expert help with their case; instead, they are attempting only to prevent opposing lawyers from obtaining an expert." [\[FN241\]](#)

Indeed, in several cases in which an otherwise strong presumption for disqualification was present, courts rejected disqualification when it appeared that the movant had initially consulted with an expert who seemed manifestly better suited for the opponent's cause. Without making findings or proving bad faith, the courts in several cases pointedly observed that the experts had already taken public positions on issues that should have alerted the first litigant to the likelihood that the expert would not be of any positive value to that party's position in the litigation. [\[FN242\]](#)

In addition to integrity-based concerns, courts also focus on practical considerations in the third-tier balancing test. Courts consistently respect the expert's entitlement to pursue his or her own profession. [\[FN243\]](#) Correspondingly, courts recognize the validity of a party's right to select its own experts, [\[FN244\]](#) a prerogative which is obviously undermined by disqualification. [\[FN245\]](#) These factors become especially important in scenarios of highly specialized knowledge where relatively few experts are available to a litigant. [\[FN246\]](#) Just as courts have granted disqualification upon a finding that a number of other experts are available, [\[FN247\]](#) they have recognized, *229 conversely, that a scarcity of experts in a particular field militates against disqualification. [\[FN248\]](#) As a result, courts are less likely to disqualify experts with highly specialized knowledge or a long-standing relationship with the client presently using his or her services. [\[FN249\]](#) In all events, courts are properly adverse to the erasure of relevant expert testimony if a practicable substitute is unavailable. [\[FN250\]](#) Because a transcendent concern is the "desire for probative information," courts approach disqualification with understandable caution since "such a truth-finding mission favors the admission of testimony by an expert who could assist the trier of fact." [\[FN251\]](#)

In several decisions, the courts have also examined the professional criteria governing the expert at issue. While, in general, courts have not relied upon professional rules to establish a basis for disqualification, they have examined professional criteria to confirm that the expert will act responsibly to refrain from improper disclosures and to avoid conflicts of interest. Thus, in *City of Springfield v. Rexnord Corp.*, [FN252] the court, in rejecting disqualification of an engineering expert, quoted from the code of ethics for engineers in concluding that the engineering expert would be required to avoid any misuse of confidential information. [FN253] *230 Correspondingly, in *In re Ambassador Group, Inc., Litigation*, [FN254] the court examined professional criteria to conclude that because different accounting engagements were involved, Coopers & Lybrand could work against an insurance receivership even though the firm had earlier represented the same receiver concerning a different insolvent insurer. [FN255]

As with other issues of potential prejudice to litigants, courts typically examine the timing of disqualification motions. Certainly, attempts to seek disqualification, as with other motions, are usually more convincing when brought promptly after a party learns of grounds for that application. [FN256] Correspondingly, because prejudice is a cornerstone of disqualification analysis, [FN257] disqualification motions brought shortly before trial, creating a risk that a party may not be readily positioned to obtain a new expert, are less likely to be granted. [FN258]

Timing also bears upon a litigant's investment in an expert. [FN259] In respecting a party's right to select its own expert, courts recognize that the longer an expert has been employed, the greater the hardship of replicating the investment of time and money required to bring another expert up to speed in the litigation. [FN260]

*231 Courts also examine the measures being implemented to minimize any risk that confidences would be violated. [FN261] Moreover, litigants improve their position when, upon learning of the potential problem, they manifest sensitivity to the issue and inform the opponent of the concern. [FN262]

X. Disqualification Procedures and Presumptions

There is no presumption favoring expert disqualification and, to the contrary, courts uniformly state that the burden is imposed on the party seeking disqualification, [FN263] irrespective of which side is the party moving for judicial determination of the issue. [FN264] Several litigants whose experts face challenges have moved proactively for judicial guidance, structuring the motion as a motion to overrule plaintiff's objections, [FN265] a motion to prevent an improper attempt to disqualify an expert, [FN266] a motion to resolve objections, [FN267] or a motion to use and interview a challenged expert. [FN268] In general, courts have reacted positively to a litigant's initiative in taking affirmative steps to resolve the potential disqualification issue. [FN269] As one court observed, "if indeed there is a conflict mandating disqualification, it is best that be known sooner rather than later." [FN270] In all events, courts have made it clear that by affirmatively filing a motion, the movant does not assume the responsibility for carrying a burden to show that disqualification is inappropriate. [FN271] To the contrary, even when the party advocating disqualification is not the moving party, that party will, *232 nonetheless, retain the burden of demonstrating grounds for disqualification. [FN272]

In determining whether they should grant disqualification, courts require sworn evidence and have not granted this remedy upon unverified papers. [FN273] Because information that allegedly infected an expert may be confidential, courts have the option to review materials in camera at the trial court level [FN274] or on appeal. [FN275] Moreover, courts ordinarily do not grant disqualification based upon statements that are considered vague, [FN276] general, or conclusory. [FN277] Indeed, the greatest degree of specificity is needed to substantiate a request that an otherwise qualified expert, able to provide competent testimony on the merits, be jettisoned from a case. [FN278] As described earlier, some decisions, like *Greene, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, L.L.C.*, [FN279] insist on a specific showing that work-product or attorney-client materials are implicated by the consultation with the first litigant:

Nor can DuPont satisfy its burden by making conclusory assertions that the proposed experts were "privity to substantial confidential information related and unrelated to this litigation." . . . For example, DuPont's conclusory assertions that certain information is "not publicly available," without supporting evidence, is not enough to satisfy the burden of showing confidentiality and its non-waiver. [\[FN280\]](#)

***233** Adding a related burden, several courts have insisted that the party seeking disqualification must show not only that privileges were attached to the information at issue, but that the claimed confidentiality was not subsequently waived. [\[FN281\]](#)

Because disqualification controversies often present factual disputes, some decisions have, in substance, relied upon a virtual presumption in cases of ambiguous expert relations. [\[FN282\]](#) Thus, when the evidentiary record does not clearly resolve disputed factual issues about communications between counsel and the expert concerning the need for confidentiality, typically the gaps are construed against counsel and disqualification is denied. [\[FN283\]](#)

Thus, in construing ambiguities against counsel and rejecting disqualification, the court in English Feedlot emphasized that, "a lawyer seeking to retain an expert and establish a confidential relationship should make this intention unmistakably clear and should confirm it in writing." [\[FN284\]](#) Similarly, the court in Wyatt v. Hanan [\[FN285\]](#) observed that, as "repeat players," lawyers "know the rules by which everyone must play" and can assure that a "clear and unambiguous understanding" is established at the outset of any communication with potential experts. [\[FN286\]](#) Finding that lawyers must bear the consequences for misunderstandings or disagreements in close cases, the court lodged the burden upon counsel, and, presumably, placed a potential liability in the event that these misunderstandings become costly.

While citing to Wang in holding lawyers accountable for uncertainties, the district judge in English Feedlot and Wyatt did not refer to that decision's finding that, "so too must consultants take care to avoid conduct that contributes to a lack of clarity about the relationship." [\[FN287\]](#) Thus, while ***234** reiterating the need for lawyers to take the lead in minimizing confusion, the court in Wang had granted disqualification of an expert who could have avoided conflict of interest problems through his own exercise of greater care. In fact, Wang found that "silence in the face of receiving this information reinforces the reasonableness of (the attorney's) assumption that a confidential relationship existed." [\[FN288\]](#) Especially because expert testimony has become a cottage industry where many professionals bring extensive experience to the highly profitable field of litigation support, the more even-handed allocation of responsibility advocated in Wang seems just. As one state court observed, "Deloitte & Touche is in the business of providing litigation support and financial consulting services to law firms." [\[FN289\]](#)

Thus, while lawyers are certainly conversant with work-product issues, virtually all experienced experts-and most disqualification controversies do not swirl around novices-also know the rules of engagement and are also able to address any confidentiality problems before any significant information is exchanged. Thus, the present realities of the expert services industry may reduce the need for a presumption that largely prefers an expert's account over an attorney's differing recollection rather than an even-handed weighing of the credibility of discordant witnesses. While the presumption against counsel may avoid the need for evidentiary hearings to resolve conflicting factual accounts, it may not always assure a just outcome to the controversy.

By rejecting motions that lack a detailed sworn factual predicate, [\[FN290\]](#) and construing close cases against counsel, courts have largely avoided evidentiary hearings on expert-disqualification motions. [\[FN291\]](#) In fact, even ***235** when factual accounts seemingly differ, courts often avoid the need for live testimony by, among other things, careful scrutiny and interpretation of the written submissions. Any omission of specific details is seen as indicating that no further facts exist,

rather than demonstrating a need for an evidentiary hearing to develop a complete factual record to resolve the controversy. [\[FN292\]](#) In a similar vein, several decisions have found that a witness' statement that he or she has no recollection that a conversation took place is tantamount to acknowledging that the conversation might have occurred. [\[FN293\]](#)

XI. Analysis: Reconciling Inherent Authority and Expert Disqualification Under Paul

The virtual consensus among courts embracing the Paul disqualification doctrine is a compelling validation of a U.S. magistrate's 1988 opinion that transformed the jurisprudence in this critical area. This overwhelming support confirms not only the need for a consistent treatment of expert disqualification, but also the positive reaction to Paul's methodology. In some respects, the Paul doctrine attempts to blend a disqualification philosophy rooted in judicial disdain toward lawyers who *236 switch loyalties, with a proper recognition that experts are witnesses who should not be regulated by the attorney's ethical rules. [\[FN294\]](#)

Simply stated, the Paul disqualification doctrine has won almost universal acceptance because it is appealing and workable. But its popularity does not alter the fact that it is a judicial creation rather than an application of statutory authority. Nor does its seeming efficacy change the fact that the Paul court's notion of inherent power has lived a separate life from the Supreme Court's own criteria. Therefore, while Paul and its progeny rely explicitly upon this power source for disqualification, they fail to discuss Supreme Court decisions that, during the last decade, have circumscribed the parameters of inherent authority. Those Supreme Court decisions should not be side-stepped based on lower courts' enthusiasm for the practical methodology of Paul. Indeed, especially in the absence of governing rules, lower courts are not liberated from the definitional doctrine promulgated by the nation's highest court.

To date, none of the Court's inherent power decisions has expressly endorsed the judicial prerogative of disqualifying expert witnesses based on conflicts of interest. While the warrant conferred upon courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases" [\[FN295\]](#) could arguably be read to envelop conflicted experts, Supreme Court decisions to date have not mandated this type of extension. Expert disqualification is, after all, an exclusion of evidence that inflicts a harsh consequence upon the litigant. Even if never denominated as a "sanction," the impact of disqualification is tantamount to a punitive order striking that expert. In prior Court decisions, judicial erasures have been the result of a litigant's transgressions, like dismissal of an action for failure to prosecute, [\[FN296\]](#) barring a disruptive defendant from the *237 courtroom, [\[FN297\]](#) or assessing attorney's fees as a sanction for bad-faith conduct. [\[FN298\]](#) In contradistinction, disqualification under the Paul doctrine, another potentially devastating blow to the litigant, is allowable even in the absence of a violation of court orders or finding of bad faith.

Especially in light of the admonition in Degen that "these powers must be delimited with care, for there is danger of overreaching," [\[FN299\]](#) the lower courts' extension of inherent power to the province of expert disqualification, without the preconditions for intervention proscribed by the Court itself, is a remarkable innovation. While this initiative is understandable, it should not be insulated from the restraints proscribed in Chambers and Degen.

Thus, because disqualification is truly a drastic remedy that necessarily impedes, in varying degrees, the normal process for bringing relevant evidence to the trier of fact, complete elimination should not be imposed under inherent authority unless bad faith is found. While such a limitation could occasionally countenance unseemly expert engagements, several realities safeguard against substantial prejudice. Indeed, bad faith is a settled predicate for enforcing inherent powers, fully consonant with the teachings of the Supreme Court. [\[FN300\]](#) Additionally, if recognized privileges are violated by the actions of a side-switching expert, courts are already empowered to protect against privilege violations through injunctions and other recognized sanctions without needlessly loosening the reins that grip inherent authority.

Along with confining outright disqualification to the predicates recognized in Link and Chambers, future applications should also adhere to the duty to invoke alternative remedies. As was highlighted in Degen, "a federal court has at its disposal an array of means," and "the existence of these alternative means . . . shows the lack of necessity for the harsh sanction." [FN301] Certainly, through a combination of limiting judicial directives [FN302] and aggressive cross-examination, [FN303] any potential harm can be sharply reduced, and even eliminated. For example, in all events, courts can prohibit challenged experts from disclosing any confidences gained *238 from prior engagements. [FN304] Moreover, to avoid potential for an unfair discrediting of the original client's position, courts have ruled that the challenged expert may not identify the prior engagement during testimony, [FN305] even while allowing counsel to cross-examine them to expose any inconsistencies. [FN306] As with any confrontation with a skilled witness, cross-examination of an expert who had prior contact with an adversary can be perilous. [FN307] Nonetheless, in weighing the trade-off between excluding relevant evidence as opposed to heightening the challenges for counsel-challenges that likely could have been prevented in the first instance-the outcome is manifest.

XII. Conclusion

A faithful application of the Supreme Court's doctrine to expert-conflict controversies may almost never yield disqualification and will further test judicial resourcefulness in fashioning alternative safeguards. But those principles of inherent authority better serve the policies that welcome evidence when it is truly relevant and competent. Indeed, with the Court's intensified scrutiny of the reliability of expert testimony, [FN308] the *239 need to allow expert analysis that has been properly validated to reach the fact-finder is all the more clear. While, in most instances, this vehicle for expert disqualification has functioned adequately over the past decade, it is time for a more enduring treatment. [FN309] If a broad range of factors overwhelm judicial efforts to contain any fall-out from conflicted experts, courts could look to the explicitly conferred authority under *Fed. R. Evid. 403* to balance the probative value against unfair prejudice or confusion of the issues. [FN310] The promulgation of a rule, though, to prescribe criteria for conflict-based disqualification would address not only substantive standards, but also the procedure for determining which disputes must be litigated. Moreover, in addition to settling any lingering tension between the earlier attorney-based analogies of Conforti and the actual prejudice focus of Paul and its progeny, procedural rules could address the current one-sided presumptions that overwhelmingly favor experts in any factual controversies with counsel.

In the event an expert-disqualification rule were to be fashioned, few would advocate wholesale incorporation of attorney-client criteria due to the core differences between lawyer advocacy and expert testimony. [FN311] Even so, because the conflict issue has ordinarily centered upon the impact of a prior engagement, the ABA Model Rule of Professional Conduct 1.11 embodies several concepts that are critical to expert-disqualification analysis. In addressing successive government and private employment, the threshold for conflict under Rule 1.11 is not imputed or derived participation in the same matter, [FN312] but rather personal and substantial participation, a theme that is also manifested in most expert-disqualification cases. In the event that this standard is met, the rule nonetheless allows others in the firm to participate so long as the *240 disqualified individual is screened from any further participation and written notice is promptly given to the former client. [FN313] Although no analogy to attorney-client standards could be perfect, the balanced methodology of Rule 1.11 could be, like other analogous provisions, [FN314] a useful starting point for any effort to create a rule for expert disqualification.

Even more fundamentally though, the proper focus for the parties, their counsel, and the experts must be to avoid expert conflicts; disputes which, with rare exceptions, are eminently preventable. Early on, the court in Wang suggested questioning the expert about past employment to ascertain possible conflicts before proceeding with any discussions of confidential information. Other safeguards designated in Wang include advance explanations of any confidentiality issues, the deferral of disclosures until any ambiguities are resolved, the need for consultants and attorneys to raise questions in the event of any

doubt, and the advisability of documenting any understandings with respect to prospective services and the use of any information being exchanged. [\[FN315\]](#)

Moreover, while recognizing the role of experts as valuable sources of information in numerous fields of knowledge, the court nonetheless found that as participants in the adversary process, they too have a key role in averting conflict scenarios. Just as the court reminded lawyers of their obligation to inform consultants about the confidentiality of their relationships, [\[FN316\]](#) the Wang decision also allocated a corresponding responsibility to experts:

Just as lawyers must avoid ambiguity in the retention process, so too must consultants take care to avoid conduct that *241 contributes to a lack of clarity about the relationship. If a consultant has doubts that she or he wants to be retained, those doubts should be unequivocally expressed. Such consultants should decline to accept any disclosures. [\[FN317\]](#)

Thus, as litigants have been pointedly reminded, the "costly litigation of collateral issues concerning expert disqualification can be avoided." [\[FN318\]](#)

Accordingly, while the Paul disqualification doctrine has achieved remarkable acceptance, its support is based more on the persuasive force of its moderate message than the depth of its pre-existing legal foundation. Thus, so long as its prescription for preventative measures is chronically ignored, the need continues for analytical foundations with the firmest possible footings. Even without new rule-making, certainty and clarity in the increasingly crucial and fractious domain of expert testimony is furthered by bringing expert disqualification in line with Supreme Court holdings that elevate the truth-seeking mission of all courts.

[\[FNa1\]](#). Member, Coffey & Wright, L.L.P.; B.S., University of Florida; J.D., University of Florida; U.S. Attorney, Southern District of Florida, 1993-1996.

[\[FN1\]](#). [Cordy v. Sherwin-Williams Co.](#), 156 F.R.D. 575, 582 (D.N.J. 1994); see also [Eymard v. Pan Am. World Airways](#), 795 F.2d 1230, 1233 (5th Cir. 1986) ("Basic policy questions that affect the very nature of a trial lie behind decisions to receive expert testimony."); [United States v. Amaral](#), 488 F.2d 1148, 1152 (9th Cir. 1973) (stating that juries are readily swayed by expert testimony as a result of "its aura of special reliability and trustworthiness"); William S. Bailey, Expert Witnesses in the Sound-Bite Era, Trial, Feb. 1993, at 65, 69 ("Winning or losing at trial depends largely on the persuasiveness of experts If you win the battle of the experts, you are also likely to win the war.").

[\[FN2\]](#). L. Timothy Perrin, [Expert Witness Testimony: Back To The Future](#), 29 U. Rich L. Rev. 1389, 1415 (1995) ("[L]awyers shop for experts, ultimately choosing the one that talks right, looks right, has the right credentials, and will work with the lawyer in the development of her opinions.").

[\[FN3\]](#). See Gerry Spence, With Justice for None 270 (1989) ("[Expert work] has become . . . big business. . . . The swearing-for-hire business is immense and indispensable to nearly every case."); see also Anthony Champagne et al., [Expert Witnesses in the Courts: An Empirical Examination](#), 76 *Judicature* 5, 6- 7 (1992); Daniel W. Shuman et al., [An Empirical Examination of the Use of Expert Witnesses in the Courts-Part II: A Three City Study](#), 34 *Jurimetrics J.* 193, 205 (1994) (average fee of \$185.00 charged by expert witnesses).

[\[FN4\]](#). In [Palmer v. Ozbek](#), 144 F.R.D. 66 (D. Md. 1992), the district court observed that "[n]othing in the language of [Fed. R. Civ. P. 26\(b\)\(4\)\(B\)](#) precludes a party from retaining an expert previously consulted by his opponent." [Id.](#) at 67 (citing [Riley v. Dow Chem. Corp.](#), 123 F.R.D. 639, 640 (N.D. Cal. 1989)); see also [Proctor & Gamble v. Haugen](#), 184 F.R.D. 410, 411 (D. Utah 1999) ("The Rules of Civil Procedure do not create any privilege or basis for disqualification in this case."). An earlier decision approached the issue recognizing that "there is virtually nothing in print to guide my decision." [Healy v.](#)

[Counts, 100 F.R.D. 493, 495 \(D. Colo. 1984\)](#) ("This case presents an issue beyond the explicit language of [rule 26\(b\)\(4\)\(B\)](#).").

[FN5]. According to one critic, "[i]t is pointless to rely upon the professional ethics of experts, even where such a code exists, because most such codes have no binding effect and are often politely disregarded." Terry O'Reilly, [Ethics and Experts, 59 J. Air L. & Com. 113, 114 \(1993\)](#).

[FN6]. While conflicts of interest based on prior services or contacts are not directly addressed in the Federal Rules of Civil Procedure, some expert scenarios can implicate violations of [Rule 26](#). See [Erickson v. Newmar Corp., 87 F.3d 298, 301-04 \(9th Cir. 1996\)](#) (defense attorney's ex parte contact with plaintiff's expert witness, offering him employment in another case, constitutes witness tampering, warranting new trial and disciplinary action against defense counsel); see also [Campbell Indus. v. M/V Gemini, 619 F.2d 24, 26 \(9th Cir. 1980\)](#) (ex parte contact between opposing counsel and designated trial expert warranted disqualification); [Valassis v. Samelson, 143 F.R.D. 118, 120 \(E.D. Mich. 1992\)](#) (attorney contact with former employee did not violate Rule 4.2 of the Model Rules of Professional Conduct which prohibits contact between counsel and represented parties, including managerial personnel). Other [Rule 26](#) controversies over the use of experts have addressed the sufficiency of disclosures concerning the basis for opinions. See, e.g., [Fitz. Inc. v. Ralph Wilson Plastics Co., 184 F.R.D. 532, 538 \(D.N.J. 1999\)](#).

[FN7]. A related source of controversy is a litigant's attempt to subpoena for trial an expert initially retained as a consultant by the adversary but not utilized for testimonial purposes. See [Rubel v. Eli Lilly & Co., 160 F.R.D. 458, 462 \(S.D.N.Y. 1995\)](#) (disallowing use of adversary's consulting expert); see also [Peterson v. Willie, 81 F.3d 1033, 1037-38 \(11th Cir. 1996\)](#). Courts that permit the use of the opponent's consulting expert often disallow efforts to exploit the earlier engagement. Id.

[FN8]. For helpful discussions on several related ethical topics, see generally Audrey I. Benison, The [Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants, 13 Geo. J. Legal Ethics 699 \(2000\)](#); Steven Lubet, [Expert Witnesses: Ethics and Professionalism, 12 Geo. J. Legal Ethics 465 \(1999\)](#); Douglas R. Richmond, [Expert Witness Conflicts and Compensation, 67 Tenn. L. Rev. 909 \(2000\)](#).

[FN9]. Ex parte [Burr, 22 U.S. \(9 Wheat.\) 529, 530 \(1824\)](#).

[FN10]. [Anderson v. Dunn, 19 U.S. \(6 Wheat.\) 204, 227 \(1821\)](#).

[FN11]. [Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 \(1945\)](#) ("The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question.").

[FN12]. [370 U.S. 626 \(1962\)](#).

[FN13]. [Id. at 629-30](#) (citing 3 William Blackstone, Commentaries *295- 96); see also [id. at 630](#) ("The authority . . . to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs . . .").

[FN14]. [Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-60 \(1975\)](#).

[FN15]. [Hutto v. Finney, 437 U.S. 678, 695-96 \(1979\)](#) (explaining that the Eleventh Amendment does not prevent an award of attorney's fees against state functionaries who act in bad faith in failing to cure constitutional violations in a state prison due to "inherent authority of the Court in the orderly administration of justice") (quoting [Fairmont Creamery Co. v.](#)

[Minnesota, 275 U.S. 70, 74 \(1927\)](#)).

[FN16]. [Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 \(1980\)](#) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.").

[FN17]. [501 U.S. 32 \(1991\)](#).

[FN18]. [Id. at 50](#).

[FN19]. [Id. at 36](#).

[FN20]. [Id. at 50-51](#).

[FN21]. [Id. at 43](#) (quoting [Anderson v. Dunn, 19 U.S. \(6 Wheat.\) 204, 227 \(1821\)](#)).

[FN22]. [Id. at 44](#).

[FN23]. [Id. at 46](#).

[FN24]. [Id.](#)

[FN25]. [517 U.S. 820 \(1996\)](#).

[FN26]. [Id. at 823](#).

[FN27]. [Id. at 827](#).

[FN28]. [Id. at 829](#).

[FN29]. [Id. at 827](#) ("A federal court has at its disposal an array of means to enforce its orders, including dismissal in an appropriate case.").

[FN30]. [Id. at 829](#). The Court's reluctance was not fueled by any sympathy for a fugitive from justice. [Id. at 828](#) ("[W]e acknowledge disquiet at the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time, mailing papers to the court in a related civil action and expecting them to be honored.").

[FN31]. [Id. at 823](#).

[FN32]. [Id. at 823-24](#) (internal citation omitted).

[FN33]. [Moore v. Keegan Mgmt. Co. \(In re Keegan Mgmt. Co., Sec. Litig.\), 78 F.3d 431 \(9th Cir. 1996\)](#); [Martin v. Brown, 63 F.3d 1252 \(3d Cir. 1995\)](#); [Shimman v. Int'l Union of Operating Eng'rs, Local 18, 744 F.2d 1226 \(6th Cir. 1984\)](#). But see [United States v. Seltzer, 227 F.3d 36, 39-42 \(2d Cir. 2000\)](#) (specific finding of bad faith is not a precondition to exercise of inherent power to police the conduct of attorneys); [Carroll v. Jaques, 926 F. Supp. 1282 \(E.D. Tex. 1996\)](#).

[FN34]. [Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1478 \(D.C. Cir. 1995\)](#).

[FN35]. Traditionally, courts have tackled these issues amidst "a paucity of case law on the subject of disqualifying expert witnesses when conflicts of interest arise." [Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334, 336](#)

[\(N.D. Ill. 1990\)](#); see also [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 241-42 \(E.D.N.Y. 1994\)](#).

[\[FN36\]. 405 A.2d 487 \(N.J. Super. Ct. Law Div. 1979\)](#).

[\[FN37\]. Id. at 491](#). To the extent that privilege questions arise in disqualification scenarios, those issues are governed by state law. See [Fed. R. Evid. 501](#). Compare [Tucker v. John R. Steele & Assocs., Inc., No. 93 C 1268, 1994 WL 127246, at *2 \(N.D. Ill. Apr. 12, 1994\)](#) (adopting and applying state law for substantive physician-patient privilege rules), with [Butler-Tulio v. Scroggins, 774 A.2d 1209, 1216 \(Md. Ct. Spec. App. 2001\)](#) (recognizing no common law or statutory physician-patient privilege in Maryland).

[\[FN38\]. Conforti & Eisele, Inc., 405 A.2d at 489-90](#).

[\[FN39\]. Id. at 490](#).

[\[FN40\]](#). In addition to the attorney-client privilege, the court also relied upon a state law that protects former employers from attempted disclosures of trade secrets and confidential information by former employees. See [id. at 491-92](#). The court noted that "there is also a policy which is designed to protect employers against improper disclosures of information which their employees have received in confidence." [Id. at 491](#) (quoting [Sun Dial Corp. v. Rideout, 108 A.2d 442, 447 \(N.J. 1954\)](#)). Finding that "[t]he law will imply a relationship of confidence when it is just to do so," the court emphasized that the engineering expert was "privy to confidential documents regarding the legal aspects of the State's claims." [Id. at 492](#).

[\[FN41\]. Id. at 491](#).

[\[FN42\]. Id. at 492](#).

[\[FN43\]. Id.](#)

[\[FN44\]. Id.](#)

[\[FN45\]. Id.](#)

[\[FN46\]. 113 F.R.D. 588, 590 \(D. Minn. 1986\)](#).

[\[FN47\]. Id. at 590-91](#).

[\[FN48\]. Id. at 591](#).

[\[FN49\]. Id. at 590-91](#) (adopting and applying the reasoning of [Conforti & Eisele, Inc., 405 A.2d at 491-92](#)).

[\[FN50\]](#). [Id. at 591](#). Conforti had premised disqualification upon its determination that the expert constituted counsel's agent, thereby summoning attorney-ethical criteria. [405 A.2d at 489-90](#). However, the court in Marvin Lumber largely assumed the applicability of those disqualification criteria without determining whether the attorney-client privilege was directly at issue. See [Marvin Lumber & Cedar Co., 113 F.R.D. at 591](#).

[\[FN51\]. Marvin Lumber & Cedar Co., 113 F.R.D. at 591](#).

[\[FN52\]](#). See, e.g., [Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc., No. 83 Civ. 8898 \(MEC\), 1989 WL 31514, at *4 \(S.D.N.Y. Mar. 28, 1989\)](#). An analogous thesis of disqualifications was applied in [Miles v. Farrell, 549 F. Supp. 82, 84 \(N.D.](#)

[Ill. 1982](#)), based on state law regarding doctor-patient privilege. In Miles, plaintiff's treating physician was prohibited from serving as defendant's expert witness in a medical malpractice case. *Id.* at 85. Strikingly, after accepting the engagement on behalf of the defendant, the expert treated the plaintiff without informing him of the adverse relationship, assertedly through inadvertence. Compare *id.* at 84, with [Tucker v. John R. Steele & Assocs., Inc., No. 93 C. 1268, 1994 WL 127246 \(N.D. Ill. Apr. 12, 1994\)](#) (permitting treating veterinarian to serve as expert witness for defendant veterinarian, because in veterinary malpractice cases, state law confers no privilege).

[FN53]. Douglas R. Richmond, [Regulating Expert Testimony, 62 Mo. L. Rev. 485, 562 \(1997\)](#) ("As a matter of policy, courts must balance competing objectives, an approach first announced in *Paul v. Rawlings Sporting Goods Co.*").

[FN54]. [123 F.R.D. 271 \(S.D. Ohio 1988\)](#).

[FN55]. [Id. at 273](#).

[FN56]. [Id. at 273-74](#).

[FN57]. [Id. at 274-75](#).

[FN58]. [Id. at 275](#).

[FN59]. [Id. at 276](#).

[FN60]. [Id. at 273](#).

[FN61]. [Id. at 272-77](#).

[FN62]. *Id.*

[FN63]. *Id.* at 278.

[FN64]. See *id.*

[FN65]. See, e.g., [Chamberlain Group, Inc. v. Interlogix, Inc., No. 01 C 6157, 2002 WL 653893 \(N.D. Ill. Apr. 19, 2002\)](#).

[FN66]. [Proctor & Gamble Co. v. Haugen, 184 F.R.D. 410, 413 \(D. Utah 1999\)](#).

[FN67]. See [Paul, 123 F.R.D. at 281](#).

[FN68]. See *id.*

[FN69]. Even after Paul, courts have continued to recognize that the case law available on these issues is very limited. [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 241-42 \(E.D.N.Y. 1994\)](#); [Sells v. Wamser, 158 F.R.D. 390, 392 \(S.D. Ohio 1994\)](#); [English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1501 \(D. Colo. 1993\)](#) (noting that cases on this topic are "rare"); [Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334, 336 \(N.D. Ill. 1990\)](#) (noting the "paucity" of precedent for these issues).

[FN70]. [Paul, 123 F.R.D. at 278](#).

[\[FN71\]](#). Id.

[\[FN72\]](#). Id.

[\[FN73\]](#). Id.

[\[FN74\]](#). Id.

[\[FN75\]](#). Id.

[\[FN76\]](#). Id.

[\[FN77\]](#). Id. at 279.

[\[FN78\]](#). Id. at 280.

[\[FN79\]](#). Id.

[\[FN80\]](#). See id.

[\[FN81\]](#). Id. at 280-81.

[\[FN82\]](#). See id. at 281.

[\[FN83\]](#). Id. Thus, under the substantial-relationship test, attorneys are disqualified when there is a clear relationship between issues in prior and present cases. [Gov't of India v. Cook Indus., Inc., 569 F.2d 737, 739-40 \(2d Cir. 1978\)](#); see also [In re Am. Airlines, Inc., 972 F.2d 605, 614-16 \(5th Cir. 1992\)](#) (disqualifying counsel where prior representation has substantial relationship to current adverse position).

[\[FN84\]](#). [Paul, 123 F.R.D. at 280.](#)

[\[FN85\]](#). [Id. at 281.](#)

[\[FN86\]](#). Id.

[\[FN87\]](#). Id. at 279.

[\[FN88\]](#). Id.

[\[FN89\]](#). Id.

[\[FN90\]](#). Id. at 281-82.

[\[FN91\]](#). Id. at 281.

[\[FN92\]](#). Id.

[\[FN93\]](#). See infra discussion in Parts V & VI.

[FN94]. [734 F. Supp. 334 \(N.D. Ill. 1990\)](#). According to the plaintiff, the conflict was compounded by the fact that defendant's expert had often supervised plaintiff's metallurgist during other professional assignments. [Id. at 335](#).

[FN95]. [Id.](#)

[FN96]. [Id. at 338](#).

[FN97]. [Id. at 339](#).

[FN98]. [Id.](#)

[FN99]. [See id.](#)

[FN100]. [762 F. Supp. 1246 \(E.D. Va. 1991\)](#).

[FN101]. [Id. at 1248](#). The facts of Wang were clearly more troubling than the circumstances of Paul or Great Lakes. Wang's attorney had contacted a computer consultant and provided him with lengthy, detailed materials prepared by counsel about the litigation issues. [Id. at 1247](#). While the expert ultimately informed counsel that he thought the patents were invalid and he was not interested in serving as Wang's consultant, the consultant nevertheless submitted a \$1,540.00 invoice for his time. [Id.](#) Five months later, without informing Wang or its counsel, that same expert surfaced as the defense expert for the opposing party on patent-validity issues. [Id.](#)

[FN102]. [See id. at 1248](#).

[FN103]. [See, e.g., Popular Inc. v. Popular Staffing Servs., Corp., 239 F. Supp. 2d 150, 152 \(D.P.R. 2003\); Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1083 \(C.D. Cal. 2001\)](#).

[FN104]. [Wang Labs., Inc., 762 F. Supp. at 1248](#) (internal citations omitted).

[FN105]. [Id. at 1249](#). As with later cases that would grant disqualification, the Wang court did not find that any party acted improperly and, in granting disqualifications, the court offered suggestions to prevent misunderstandings in the future. [See infra](#) notes 287-88 and accompanying text.

[FN106]. [156 F.R.D. 575 \(D.N.J. 1994\)](#).

[FN107]. [Id. at 580](#).

[FN108]. [Id.](#) In developing this third component, the court referred to the discussion in Paul about competing policy interests. [Id.](#) Although the considerations discussed in Paul and other cases have underscored the distinction between expert disqualification and attorney-client analysis, prior to Cordy, courts have not articulated this balancing test as a third prong of the expert-disqualification determination.

[FN109]. [Id.](#)

[FN110]. [Id.](#)

[FN111]. [Id. at 584](#).

[FN112]. *Id.* Although a rare outcome, Cordy is not the only decision in which an expert's taint caused an infection warranting the removal of counsel. See, e.g., *B-C Hous. P'ship, L.P. v. Apollo, Ltd. P'ship*, Nos. A096780, [A096583](#), 2002 WL 31628763 (Cal. Ct. App. Nov. 21, 2002).

[FN113]. See, e.g., [Koch Ref. Co. v. Jennifer L. Boudreaux MV](#), 85 F.3d 1178, 1181-83 (5th Cir. 1996); [Stencel v. Fairchild Corp.](#), 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001); [Proctor & Gamble Co. v. Haugen](#), 184 F.R.D. 410, 414 (D. Utah 1999); [Space Sys./Loral v. Martin Marietta Corp.](#), Civ. No. 95- 20122 SW, 1995 WL 686369, at *2 (N.D. Cal. Nov. 15, 1995); [English Feedlot, Inc. v. Norden Labs., Inc.](#), 833 F. Supp. 1498, 1504-06 (D. Colo. 1993).

[FN114]. See [Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc.](#), No. 83 Civ. 8898 (MEC), 1989 WL 31514, at *4-*5 (S.D.N.Y. Mar. 28, 1989) (granting disqualification of securities expert, citing Marvin Lumber); see also [United States v. NHC Health Care Corp.](#), 150 F. Supp. 2d 1013, 1016 (W.D. Mo. 2001) (citing Marvin Lumber while declining to resolve which standard was proper); [Vikase Corp. v. W.R. Grace & Co.-Conn.](#), No. 90 C 7515, 1992 WL 13679, at *2-*3 (N.D. Ill. Jan. 24, 1992) (citing Wang and Marvin Lumber); [Stanford v. Kuwait Airways Corp.](#), Nos. 85 Civ. 0477 (SWK), 85 Civ. 2448 (SWK), 1989 WL 297860 (S.D.N.Y. July 10, 1989) (citing Paul and Marvin Lumber).

[FN115]. See, e.g., [City of Westminster v. MOA, Inc.](#), 867 P.2d 137, 139 (Colo. Ct. App. 1993) (granting disqualification of structural engineering expert based on two-part test as articulated in Wang).

[FN116]. See, e.g., [A & A Elec. Contractors, Inc. v. C.H. Nickerson & Co.](#), No. CV89 0369686 S, 1993 WL 524996, at *1-*3, *4 (Conn. Super. Ct. Dec. 8, 1993) (applying two-part test to disqualify expert while rejecting disqualification of counsel).

[FN117]. See, e.g., [Roundpoint v. V.N.A. Inc.](#), 621 N.Y.S.2d 161, 164 (App. Div. 1995) (rejecting disqualification of architectural expert since neither element of two-part analysis was satisfied).

[FN118]. [85 F.3d 1178 \(5th Cir. 1996\)](#).

[FN119]. *Id.* at 1180.

[FN120]. *Id.* at 1182.

[FN121]. *Id.*

[FN122]. *Id.* at 1183.

[FN123]. *Id.*

[FN124]. [Mitchell v. Wilmore](#), 981 P.2d 172, 175-77 (Colo. 1999) (applying two-part analysis to disqualify car accident reconstruction expert); [Nelson v. McCreary](#), 694 A.2d 897, 903-04 (D.C. 1997) (applying two-part test to deny disqualification of medical expert who had been paid by both sides, due to lack of confidential or privileged information). In [Heyde v. Xtraman, Inc.](#), 404 S.E.2d 607, 612 (Ga. Ct. App. 1991), the appellate court cited Paul and Marvin Lumber to affirm a trial court's expert disqualification based on the consultant's previous communications with opposing counsel in the formulation of expert opinions. In [Donovan v. Bowling](#), 706 A.2d 937, 941 (R.I. 1998), the Supreme Court of Rhode Island cited Cordy and Wang, but distinguished them as being inapplicable to the treating physician scenario.

[FN125]. See [Hanlon v. Sec'y of Health & Human Servs.](#), 191 F.3d 1344, 1349 (Fed. Cir. 1999); see also [Erickson v.](#)

[Newmar Corp., 87 F.3d 298, 300 \(9th Cir. 1996\)](#) (apparently approving expert-disqualification doctrine, but finding a different analysis to be applicable to the facts of that case).

[FN126]. See [Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 Civ. 8833 \(RPP\), 2000 WL 42202, at *4 \(S.D.N.Y. Jan. 19, 2000\)](#) (granting disqualification of oncology expert by applying two-part test plus balancing policy objectives); see also [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 249 \(D.N.J. 1997\)](#). In finding the application of the attorney-conflict standard to be inappropriate because of different roles in litigation, the court explained: "Experts act as sources of information and opinions in order to assist parties and triers of fact to understand evidence." *Id.*

[FN127]. [244 F. Supp. 2d 1023 \(D.S.D. 2003\)](#).

[FN128]. *Id.* at 1025.

[FN129]. *Id.* at 1026.

[FN130]. *Id.* (citing [Chamberlain Group, Inc. v. Interlogix, Inc., No. 01 C6157, 2002 WL 653893, at *5 \(N.D. Ill. Apr. 19, 2002\)](#)).

[FN131]. [239 F. Supp. 2d 150 \(D.P.R. 2003\)](#).

[FN132]. *Id.* at 152.

[FN133]. No. [01 C6157, 2002 WL 653893 \(N.D. Ill. Apr. 19, 2002\)](#).

[FN134]. *Id.* at *4 (quoting [Commonwealth Ins. Co. v. Stone Container, 178 F. Supp. 2d 938, 945 \(N.D. Ill. 2001\)](#)).

[FN135]. [Popular, Inc., 239 F. Supp. 2d at 152](#) (commenting that side-switching would be a "clear case for disqualification"); [Chamberlain Group, Inc., 2002 WL 653893, at *5](#) ("Under those circumstances, the risk of disclosure of confidential information is high and the public's trust in the integrity of the judicial system is at stake.").

[FN136]. [Viskase Corp. v. W.R. Grace & Co.-Conn., No. 90 C7515, 1992 WL 136792, at *1-*2 \(N.D. Ill. Jan. 24, 1992\)](#) (resin expert had been employed by Union Carbide six years earlier); [Stanford v. Kuwait Airways Corp., Nos. 85 Civ. 0477, 85 Civ. 2448, 1989 WL 297860, at *1 \(S.D.N.Y. July 10, 1989\)](#) (security expert had worked for International Air Transport Association four years before events at issue).

[FN137]. See, e.g., [In re Orthopedic Bone Screw Prods. Liab. Litig., No. MDL 1014, 1995 WL 925673, at *2-*3, *4 \(E.D. Pa. May 5, 1995\)](#) (denying disqualification); [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 241, 245 \(E.D.N.Y. 1994\)](#) (denying disqualification); [Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 578-79, 582 \(D.N.J. 1994\)](#) (granting disqualification); [Mayer v. Dell, 139 F.R.D. 1, 4 \(D.D.C. 1991\)](#) (denying disqualification); [Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1247, 1249 \(E.D. Va. 1991\)](#) (granting disqualification); [Turner v. Thiel, 553 S.E.2d 765, 766, 769 \(Va. 2001\)](#) (granting disqualification); [Mitchell v. Wilmore, 981 P.2d 172, 174, 177 \(Colo. 1999\)](#) (en banc) (denying disqualification); [Donovan v. Bowling, 706 A.2d 937, 939 \(R.I. 1998\)](#) (denying disqualification); [Nelson v. McCreary, 694 A.2d 897, 902 \(D.C. 1997\)](#) (denying disqualification); [A & A Elec. Contractors, Inc. v. C.H. Nickerson & Co., No. CV89 03696865, 1993 WL 524996, at *1, *3 \(Conn. Super. Ct. Dec. 8, 1993\)](#) (granting disqualification).

[FN138]. See, e.g., [City of Springfield v. Rexnord Corp., 111 F. Supp. 2d 71, 75-76 \(D. Mass. 2000\)](#); [Food Lion v. Capital](#)

[Cities/ABC, Inc., No. 6:92 cv00592, 1996 WL 575946, at *5 \(M.D.N.C. Sept. 6\)](#) (denying disqualification because "this is not a 'side-switching' case" but "involves experts . . . who are affiliated (i.e., in partnership within Price Waterhouse)"), [aff'd, 951 F. Supp. 1211 \(M.D.N.C. 1996\)](#); [Hansen v. Umtech Industrieservice Und Spedition, GMBH, Civ. A. No. 95-516MMS, 1996 WL 622557, at *3, *4, *5, *8 \(D. Del. July 3, 1996\)](#); see also, e.g., [Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426, 431-32 \(E.D. Pa. 2001\)](#); [Space Sys./Loral v. Martin Marietta Corp., Civ. No. 95-20122 SW, 1995 WL 686369, at *3-*4 \(N.D. Cal. Nov. 15, 1995\)](#); [Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334, 338-39 \(N.D. Ill. 1990\)](#); [Butler-Tulio v. Scroggins, 744 A.2d 1209, 1224 \(Md. Ct. Spec. App. 2001\)](#).

[FN139]. [United States v. NHC Health Care Corp., 150 F. Supp. 2d 1013, 1015 \(W.D. Mo. 2001\)](#) (citing [Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1171, 1181 \(5th Cir. 1996\)](#)).

[FN140]. See, e.g., [In re Orthopedic Bone Screw Prods. Liab. Litig., 1995 WL 925673, at *2-*3 \(E.D. Pa. 1995\)](#) (medical regulatory expert had several meetings with party and counsel and received payment before switching sides); [Nelson, 694 A.2d at 903](#) (denying disqualification even though side-switching medical expert had received payment from both parties). But see [Donovan, 706 A.2d at 937](#) (refusing to adopt defendant's assertion that defendant's paid consultation with plaintiff's treating physician disqualifies physician from serving as witness for the plaintiff).

[FN141]. [NHC Health Care Corp., 150 F. Supp. 2d at 1015-16](#); [United States v. Larkin, Hoffman, Daly & Lindgren, Civ. No. 3-92-789, 1994 WL 627569, at *2 \(D. Minn. Apr. 12, 1994\)](#); see also [Space Sys./Loral, 1995 WL 686369, at *2](#) (removing former Martin Marietta supervisor from serving as adverse expert due to "substantial confidential information" he had received).

[FN142]. [United States v. Salamanca, 244 F. Supp. 2d 1023, 1024 \(D.S.D. 2003\)](#) (relying on Paul); see also [Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1171, 1181 \(5th Cir. 1996\)](#) (citing various lower court decisions including [English, Feedlot and Wang](#)).

[FN143]. [Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1083 \(C.D. Cal. 2001\)](#) ("The burden of proof is on the party seeking disqualification to establish that both elements of the disqualification test have been established.").

[FN144]. [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 249 \(D.N.J. 1997\)](#). Cf. [In re Eagle-Picher Indus., Inc., 139 B.R. 869, 872 \(Bankr. S.D. Ohio 1992\)](#); [Mayer v. Dell, 139 F.R.D. 1, 3 \(D.D.C. 1991\)](#).

[FN145]. [Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 278 \(S.D. Ohio 1988\)](#).

[FN146]. [Turner v. Thiel, 553 S.E.2d 765, 768-69 \(Va. 2001\)](#) (ruling that no formal retention is required); [Shadow Traffic Network v. Superior Court, 29 Cal. Rptr. 2d 693, 699 \(Ct. App. 1994\)](#).

[FN147]. [Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 581 \(D.N.J. 1994\)](#) (citing [Paul, 123 F.R.D. at 279](#)).

[FN148]. [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 243 \(E.D.N.Y. 1994\)](#) (citation omitted); see also [Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc., Nos. C-95-03597 DLJ, C-96-00942 DLJ, 1998 WL 230981, at *2 \(N.D. Cal. Feb. 27, 1998\)](#) (denying disqualification while noting that formal retention is not needed and that "although the existence of a confidentiality agreement can be a relevant circumstance, the absence of such an agreement does not preclude a finding that attorneys reasonably considered a pre-retention interview to be confidential").

[FN149]. [174 F. Supp. 2d 1080 \(C.D. Cal. 2001\)](#).

[FN150]. [Id. at 1084](#). Thus, in a recent state supreme court decision, the court found that disqualification was proper based upon a confidential review by an expert who was paid for his time but ultimately never retained by the litigant or its counsel. [Turner, 553 S.E.2d at 767](#).

[FN151]. [Stencel, 174 F. Supp. 2d at 1084](#).

[FN152]. [Id.](#)

[FN153]. [Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248 \(E.D. Va. 1991\)](#).

[FN154]. [Turner, 533 S.E.2d at 768](#); see also [Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 CIV. 8833 \(RPP\), 2000 WL 42202, at *2 \(S.D.N.Y. Jan. 19, 2000\)](#) (disqualifying expert based on confidentiality agreement with Bristol).

[FN155]. [139 F.R.D. 1 \(D.D.C. 1991\)](#).

[FN156]. [Id. at 3](#). As a result, the court concluded that the meeting between the plaintiff's counsel and the challenged expert was "no more than a consultation to permit both plaintiff and Mr. Little to determine whether Mr. Little might later be retained." [Id.](#); see also [Commerce Indus. Ins. Co. v. E. I. duPont de Nemours & Co. \(In re Malden Mills Indus. Inc.\), 275 B.R. 670, 673 \(Bankr. D. Mass. 2002\)](#) ("There is no writing from the Plaintiffs, their lawyers or their consultant regarding confidentiality."); [Mayer, 139 F.R.D. at 3-4](#) ("[T]he meeting was a type of informal consultation rather than the commencement of a longterm [sic] relationship.").

[FN157]. Nos. C-95-03577 DLS, [C-9C-00942 DLJ, 1998 WL 230981 \(N.D. Cal. Feb. 27, 1998\)](#).

[FN158]. [Id. at *5](#); see also [In re Orthopedic Bone Screw Prods. Liab. Litig., No. MDL 1014, 1995 WL 925673, at *4-*5 \(E.D. Pa. May 5, 1995\)](#). In [Greene, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426 \(E.D. Pa. 2001\)](#), the court found that even with a confidentiality agreement signed by prior employees of DuPont, disqualification would be denied because of the lack of a sufficient showing "that he was privy to confidential information relevant to the alleged infringing products in this case." [Id. at 430](#) (emphasis added). In [Nikkal Industries, Ltd. v. Salton, Inc., 689 F. Supp. 187, 188, 190 \(S.D.N.Y. 1988\)](#), a ninety minute consultation was characterized by the U.S. magistrate as a "comprehensive employment interview" rather than "the commencement of a long term [sic] relationship." [Id. at 190](#).

[FN159]. [994 F. Supp. 244 \(D.N.J. 1997\)](#).

[FN160]. [Id. at 249-50](#).

[FN161]. [Id. at 250](#) (citing Am. Inst. of Certified Pub. Accountants, Code of Prof'l Conduct R. 30).

[FN162]. Plainly, there can be overlap between the first and second components of the test. For example, as observed in Wang: "But in more ambiguous circumstances, the disclosure of confidential information may serve to support the inference that the lawyer was objectively reasonable in assuming the existence of a confidential relationship." [Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248 n.3 \(E.D. Va. 1991\)](#).

[FN163]. See, e.g., [id. at 1248](#).

[FN164]. Some courts have further articulated a duty of the moving party to demonstrate that confidentiality, or if applicable, privilege, has not been waived. [English Feedlot, Inc. v. Norden Labs., Inc.](#), 833 F. Supp. 1498, 1503-04 (D. Colo. 1993).

[FN165]. [Paul v. Rawlings Sporting Goods Co.](#), 123 F.R.D. 271, 279 (S.D. Ohio 1998).

[FN166]. Civ. No. 3-92-789, [1994 WL 627569](#) (D. Minn. Apr. 12, 1994).

[FN167]. *Id.* at *2.

[FN168]. *Id.*

[FN169]. *Id.*

[FN170]. *Id.* at *1.

[FN171]. [United States v. NHC Health Care Corp.](#) 150 F. Supp. 2d 1013, 1016 n.1 (W.D. Mo. 2001). The expert had "considerable involvement" in prior investigations and was likely to be a fact witness. [Id.](#) at 1016.

[FN172]. *Id.*

[FN173]. [Koch Ref. Co. v. Jennifer L. Boudreaux MV](#), 85 F.3d 1178, 1182 (5th Cir. 1996).

[FN174]. [Commerce Indus. Ins. Co. v. E.I. du Pont de Nemours & Co. \(In re Malden Mills Indus., Inc.\)](#), 275 B.R. 670, 673 (Bankr. D. Mass. 2002).

[FN175]. [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.](#), 994 F. Supp. 244, 251 (D.N.J. 1997).

[FN176]. [Polensky v. Kyocera Int'l, Inc.](#), 53 Cal. Rptr. 2d 507, 513 (Ct. App. 1996), review granted and superseded on other grounds, 923 P.2d 88 (Cal. 1996). In [Butler-Tulio v. Scroggins](#), 744 A.2d 1209, 1216 (Md. Ct. Spec. App. 2001), the challenged expert for the defendant had been the treating physician for the plaintiff, but because Maryland did not recognize a physician-patient privilege, the information gained by the expert was not privileged and disqualification was rejected.

[FN177]. [Healthcare Rehab Sys., Inc.](#) 994 F. Supp. at 250 (citing [Koch Ref. Co.](#), 85 F.3d at 1182).

[FN178]. [In re Eagle-Picher Indus., Inc.](#), 139 B.R. 869, 872 (Bankr. S.D. Ohio 1992) (rejecting disqualification where only information given expert "was information available to everyone in the case" and prior services to former client were no longer relevant).

[FN179]. [Koch Ref. Co. v. Jennifer L. Boudreaux MV](#), 85 F.3d 1178, 1182 (5th Cir. 1996); [Mitchell v. Wilmore](#), 981 P.2d 172, 176 (Colo. 1999); see also [Mayer v. Dell](#), 139 F.R.D. 1, 4 (D.D.C. 1991) (finding "no more than 'a flow of information which was essentially technical'" (quoting [Nikkal Indus., Ltd. v. Salton, Inc.](#), 689 F. Supp. 187, 191 (S.D.N.Y. 1988))).

[FN180]. See [Palmer v. Ozbek](#), 144 F.R.D. 66, 68 (D. Md. 1992) (commenting that although defendant's medical expert was exposed to information during an earlier two hour meeting with plaintiff's experts, "this information was discoverable by defendants pursuant to [Fed. R. Civ. P. 26\(b\)\(1\)](#) and did not constitute potentially prejudicial confidential information") (footnotes omitted).

[FN181]. [Space Sys./Loral v. Martin Marietta Corp.](#), Civ. No. 95-20122 SW, 1995 WL 686369, at *5 (N.D. Cal. Nov. 15, 1995). The determinant is whether experts "had become privy to matters protected by the attorney-client and possibly work-product privileges." *Id.* at *4.

[FN182]. See [Agron v. Trs. of Columbia Univ., City of N.Y.](#), 176 F.R.D. 445, 449 (S.D.N.Y. 1997) (implying that while discovery is restricted concerning consulting experts, both sides have access to the reports and testimony of testifying experts); [Chrisjulbrian Co. v. Upper St. Rose Fleeting Co.](#), Civ. A No. 93-1879, 1994 WL 673440, at *2 (E.D. La 1994) (stating that as a testifying expert, the factual basis for the expert's report was discoverable, and therefore reliance on confidentiality could not be reasonable); see also [English Feedlot, Inc. v. Norden Labs., Inc.](#), 833 F. Supp. 1498, 1503 (D. Colo. 1993).

[FN183]. [Chamberlain Group, Inc. v. Interlogix, Inc.](#), No. 01 C 6157, 2002 WL 653893, at *4 (N.D. Ill. Apr. 19, 2002). Conversely, in [Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.](#), No. 95 Civ. 8833(RPP), 2000 WL 42202, at *4 (S.D.N.Y. Jan. 19, 2000), the court found that it was objectively reasonable for the moving party to have concluded that a confidential relationship existed with a non-testifying consultant.

[FN184]. As courts have repeatedly emphasized, [Fed. R. Civ. P. 26](#) makes it clear that "documents and information disclosed to a testifying expert in connection with his testimony are discoverable" irrespective of whether the expert relies on those documents and information. [In re Pioneer Hi-Bred Int'l, Inc.](#), 238 F.3d 1370, 1375 (Fed. Cir. 2001).

[FN185]. [Agron](#), 176 F.R.D. at 450; [Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.](#), 734 F. Supp. 334, 339 (N.D. Ill. 1990) (implying that unless truly confidential information is exposed, no prejudice occurs).

[FN186]. [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.](#), 944 F. Supp. 244, 250 (D.N.J. 1997) (accounting firm); see also [City of Springfield v. Rexnord Corp.](#), 111 F. Supp. 2d 71, 75 (D. Mass. 2000). But see [City of Westminster v. MOA, Inc.](#), 867 P.2d 137, 140 (Colo. Ct. App. 1993) ("Even if no disclosures occur, the court and the public are faced with the reality that a single firm has acted as a consultant for both sides in an adversarial situation.") (disqualifying structural engineering expert).

[FN187]. [Stencel v. Fairchild Corp.](#), 174 F. Supp. 2d 1080, 1087 (C.D. Cal. 2001); [Healthcare Rehab Sys., Inc.](#), 994 F. Supp. at 249; [Great Lakes Dredge & Dock Co.](#), 734 F. Supp. at 339; see also [Commonwealth Ins. Co. v. Stone Container Corp.](#), 178 F. Supp. 2d 938, 949 (N.D. Ill. 2001); [Food Lion, Inc. v. Capital Cities/ABC, Inc.](#), No. 6:42cv00592, 1996 WL 575946, at *5 (M.D.N.C. Sept. 6), *aff'd*, 951 F. Supp. 1211 (M.D.N.C. 1996). But see [City of Westminster](#), 867 P.2d at 140.

[FN188]. [Stencel](#), 174 F. Supp. 2d at 1086 (footnotes and citations omitted); see also [In re Ambassador Group, Inc., Litig.](#), 879 F. Supp. 237, 242 (E.D.N.Y. 1994) (noting that attorneys occupy positions of higher trust than other professionals, including accountants); [Chrisjulbrian Co. v. Upper St. Rose Fleeting Co., Inc.](#), Civ. A No. 93-1879, 1994 WL 673440, at *2 (E.D. La. Dec. 2, 1994) (noting that there is a "less stigma attached to an expert 'changing sides' in the midst of litigation than an attorney who occupies a position of higher trust"); [English Feedlot, Inc. v. Norden Labs., Inc.](#), 833 F. Supp. 1498, 1501 (D. Colo. 1993) ("Experts are not advocates in the litigation but sources of information and opinions.").

[FN189]. [Food Lion, Inc.](#), 1996 WL 575946, at *5 (noting that there was "absolutely no showing of the exchange of substantive information between ABC's experts and affiliated persons in Price Waterhouse"); see also [City of Springfield](#), 111 F. Supp. 2d at 75 (noting that there was "no evidence of any substantive communication between Haley & Aldrich employees working for Defendants and those working for . . . the landfill project"); see generally [Commerce Indus. Ins. Co. v. E. I. duPont de Nemours & Co. \(In re Malden Mills Indus., Inc.\)](#), 275 B.R. 670 (Bankr. D. Mass. 2002) (same firm

employs consulting expert for one side and testifying expert for other; routine tests by consulting expert were "'blind' and standardized" and did not constitute confidential information and were not imputed).

[FN190]. [174 F. Supp. 2d at 1088](#); see also [Hansen v. Umtech Industrieservice Und Spedition, GMBH, Civ. A No. 95-516MMS, 1996 WL 622557 \(D. Del. July 3, 1996\)](#). In Hansen, disqualification was denied where the same medical consulting firm, through different members unaware of the others' involvement, had been retained at different times on opposing sides in the same case. *Id.* at *2-*3.

[FN191]. [Food Lion, Inc., 1996 WL 575946, at *4](#). But see [City of Westminster, 867 P.2d at 140](#). In affirming disqualification in light of the need "to protect the integrity of the advisory process" the court reasoned: "Thus, two members of the same firm were involved in a complex and important subject. . . . Even if no disclosures occur, the court and the public are faced with the reality that a single firm has acted as a consultant for both sides in an adversarial situation." *Id.*

[FN192]. [Food Lion, Inc., 1996 WL 575946, at *5](#) (noting no "significant likelihood of future inadvertent disclosures"); see also [Viskase Corp. v. W.R. Grace & Co.-Conn., No. 90 C 7515, 1992 WL 13679, at *2 \(N.D. Ill. Jan. 24, 1992\)](#) (noting that operating procedures of Union Carbide restricted information to only those working within the subject division). When a consulting company's employees are situated in different offices, even in different states, any argument for imputation is weakened further. [Commonwealth Ins. Co. v. Stone Container Corp., 178 F. Supp. 2d 938, 949 \(M.D. Ill. 2001\)](#).

[FN193]. [In re Ambassador Group, Inc., Litig., 879 F. Supp. at 245](#) (explaining that measures to wall off information to prevent any inappropriate exchanges and "have been held sufficient to dispel fears of possible future disclosures of confidential information"). Another court summarized screening procedures, including:

"(1) instructions given to all members of the new firm, of the attorney's recusal and of the ban on exchange of information; (2) prohibited access to the files and other information on the case; (3) locked case files with keys distributed to a select few; (4) secret codes necessary to access pertinent information on electronic hardware; and (5) prohibited sharing in the fees derived from such" representation.

[Stencel, 174 F. Supp. 2d at 1086](#) (quoting [Cromley v. Bd. of Educ., 17 F.3d 1059, 1065 \(7th Cir. 1994\)](#)). The location of experts, employed by the same firm, but who were in different offices over 500 miles apart was also seen as a factor militating against disqualification. *Id.* at 1087; see also [Commonwealth Ins. Co., 178 F. Supp. 2d at 948](#); [B-C Hous. P'ship, L.P. v. Apollo Ltd. P'ship, Nos. A096780, A096583, 2002 WL 31628763, at *3 \(Cal. Ct. App. Mar. 21, 2002\)](#).

[FN194]. [Sells v. Wamser, 158 F.R.D. 390, 391-92 \(S.D. Ohio 1994\)](#). Confronting this dilemma, the court in Sells found that "[i]t would be unseemly, at best, to permit representatives of the same engineering firm to testify on opposite sides of the case, and to expect those persons to be objectively critical of each other's testimony." *Id.* at 393-94. Rather than remove both experts, the court opted to restore the status quo before the conflict occurred, thereby allowing the first retained expert to continue while disqualifying the second. *Id.* at 395.

[FN195]. [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 249 \(D.N.J. 1997\)](#).

[FN196]. Courts have articulated a further need to show that confidentiality has not been waived. See *id.*; see also [Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426, 430 \(E.D. Pa. 2001\)](#).

[FN197]. See [Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc., No. 83 Civ. 8898, 1989 WL 31514, at *4 \(S.D.N.Y. Mar. 28, 1989\)](#); see also [Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 Civ. 8833, 2000 WL 42202, at *5 \(S.D.N.Y. Jan. 19, 2000\)](#) (stating that oncology expert's prior discussions with objecting litigant "raise the potential for

breach of Bristol's confidences in those discussions"); [United States v. Larkin, Hoffman, Daly & Lindgren, Civ. No. 3-92-789, 1994 WL 627569, at *2 \(D. Minn. Apr. 12, 1994\)](#); [Turner v. Thiel, 553 S.E.2d 765, 768-69 \(Va. 2001\)](#); [Mitchell v. Wilmore, 981 P.2d 172, 175 \(Colo. 1999\)](#); [City of Westminster v. MOA, Inc., 867 P.2d 137, 140 \(Colo. Ct. App. 1993\)](#).

[FN198]. This standard is usually rejected because courts underscore the clear distinction between attorney-disqualification standards and the disqualification doctrine for experts. [Healthcare Rehab Sys., Inc., 994 F. Supp. at 244](#); [Wyatt v. Hanan, 871 F. Supp. 415, 420 \(M.D. Ala. 1994\)](#); [W.R. Grace & Co. v. Gracecare, Inc., 152 F.R.D. 61, 64 \(D. Md. 1993\)](#).

[FN199]. [Turner, 553 S.E.2d at 768](#) ("While we recognize that the value of the information that plaintiff's counsel disclosed to Sanders may be debatable, that fact does not negate our [c]onclusion that the letter contains the work product of plaintiff's counsel.").

[FN200]. [Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1249 \(E.D. Va. 1991\)](#). In [Mitchell, 981 P.2d at 177](#), the Supreme Court of Colorado found that:

The discussions that took place during the July 15, 1998 phone conference could very well have impacted Brault's subsequent participation on behalf of Mitchell, and it is difficult to say with confidence that Brault would have produced the same report and drawn the same conclusions if he had never spoken to counsel for Wilmore. . . . Once a court concludes that confidential information has been disclosed, it is this difficulty in determining conclusively what impact such information might have on the expert's analysis or subsequent testimony that justifies the invocation of the rule.

Id.

[FN201]. [Michelson, 1989 WL 31514, at *5](#). But see [Hansen v. Amdec Industrieservice Und Spedition, GMBH, Civ. A. No. 95-516, 1996 WL 622557, at * 7-*8 \(D. Del. July 3, 1996\)](#) (denying motion to disqualify expert who forgot about earlier discussions with counsel because there was "so little of substance" in jeopardy).

[FN202]. [Civ. A. No. 95-2453, 1996 WL 392149 \(E.D. La. July 8, 1996\)](#).

[FN203]. See generally id.

[FN204]. Id. at *2.

[FN205]. [Mitchell, 981 P.2d at 175](#) ("A particularly clear case for disqualification can be made when an expert is privy to explicit discussions of strategy related to the pending litigation."). See also [Commerce Indus. Ins. Co. v. E.I. du Pont de Nemours & Co. \(In re Malden Mills Indus. Inc.\), 275 B.R. 670, 673 \(Bankr. D. Mass. 2002\)](#) (nature of communications between an attorney and an expert is key) (citing [Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 279-80 \(S.D. Ohio 1988\)](#)); [B-C Hous. P'ship, L.P., v. Apollo Ltd. P'ship, Nos. A096780, A096583, 2002 WL 31628763 \(Cal. Ct. App. Nov. 21, 2002\)](#) (granting disqualification).

[FN206]. [Turner v. Thiel, 553 S.E.2d 765, 768 \(Va. 2001\)](#).

[FN207]. Id.; see also [Theriot, 1996 WL 392149, at *2](#). Compare [Proctor & Gamble Co. v. Haugen, 184 F.R.D. 410, 414 \(D. Utah 1999\)](#) (rejecting disqualification where mental impressions of counsel were only incidentally involved), with [Palmer v. Ozbek, 144 F.R.D. 66, 67 \(D. Md. 1992\)](#) (rejecting disqualification when expert was never contacted by attorneys).

[FN208]. See [MMR/Wallace Power & Indus., Inc. v. Thames Assoc., Inc., 764 F. Supp. 712, 724 \(D. Conn. 1991\)](#). Consistent with the prevailing authority, the court in MMR/Wallace disqualified counsel, which had contacted its adversary's

former employee to obtain "confidential or privileged information . . . pertaining to MMR's trial strategy and tactics in this case, thereby tainting the integrity of the trial process." Id.

[FN209]. [152 F.R.D. 61 \(D. Md. 1993\)](#).

[FN210]. [Id. at 63](#).

[FN211]. [Id. at 65](#).

[FN212]. [Id. at 66](#).

[FN213]. [Id. at 65-66](#) ("all doubts in favor of disqualification to avoid the appearance of impropriety and to preserve the integrity of this proceeding" in the attorney-expert context).

[FN214]. [178 F. Supp. 2d 938 \(N.D. Ill. 2001\)](#).

[FN215]. [Id. at 944](#).

[FN216]. [Id.](#)

[FN217]. [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 243 \(E.D.N.Y. 1994\)](#).

[FN218]. [Proctor & Gamble Co. v. Haugen, 184 F.R.D. 410, 413 \(D. Utah 1999\)](#) ("Where the federal discovery rules have no application, and there is no retained consultant relationship, the court should be very reluctant to impose disqualification.").

[FN219]. [Hanlon v. Sec'y of Health & Human Servs., 191 F.3d 1344, 1350 \(Fed. Cir. 1999\)](#) ("This does not mandate disqualification unless it is reasonable to conclude that Dr. Gomez possessed confidential information that would prejudice the Hanlons."); see also [Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1085 \(C.D. Cal. 2000\)](#) ("Plaintiff has not clearly asserted any prejudice it might suffer from Smegal's retention as expert.").

[FN220]. [Viskase Corp. v. W.R. Grace & Co., No. 90 C 7515, 1992 WL 13679, at *2 \(N.D. Ill. Jan. 24, 1992\)](#) ("He has general experience, but no experience specific to the products or patents in suit.").

[FN221]. [Id. at *2](#) (noting that the expert "had no involvement with the resins or patents directly at issue in this case"); see also [Stanford v. Kuwait Airways Corp., Nos. 85 Civ. 0477\(SWK\), 85 Civ. 2448 \(SWK\), 1898 WL 297860, at *1 \(S.D.N.Y. July 10, 1989\)](#). But see [B-C Hous. P'ship, L.P. v. Apollo Ltd. P'ship, Nos. A096780, A096583, 2002 WL 31628763 \(Cal. Ct. App. Nov. 21, 2002\)](#) (expressing serious reservations about the practice of retaining an adversary's former employee who has relevant inside knowledge as an expert).

[FN222]. [Hanlon, 191 F.3d at 1349](#) (stating that expert testimony for plaintiff's counsel in prior case does not disqualify expert); [Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C. 202 F.R.D. 426 \(E.D. Pa. 2001\)](#); [City of Springfield v. Rexnord Corp., 111 F. Supp. 2d 71, 74 \(D. Mass. 2000\)](#) (the fact that an engineering firm worked on different projects at two different locations does not support disqualification); [Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., No. Civ. A. 94-CV-0752, 1995 WL 376471 \(E.D. Pa. June 21, 1995\)](#); [Roundpoint v. V.N.A. Inc., 621 N.Y.S.2d 161, 163 \(App. Div. 1995\)](#).

[FN223]. [Bethlehem Iron Works, Inc., 1995 WL 376471, at *1](#) (stating that engagement in other litigation "does not relate to

this action"); see also [Hanlon, 191 F.3d at 1350](#) (ruling that prior testimony for opposing counsel in a different case years earlier did not justify removal of expert). In *Space Systems/Loral v. Martin Marietta Corp.*, a manufacturer of spinal-fixation devices confronting a series of product liability cases twice met with a consultant and the manufacturer's litigation counsel to discuss medical-regulatory issues. Civ. No. 95-20122, [1995 WL 686369 \(N.D. Cal. Nov. 5, 1995\)](#). Nonetheless, because the information conveyed earlier to the expert was not immune to civil discovery, disqualification was denied. *Id.* at *5.

[FN224]. See [Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 6:92cv00592, 1996 WL 575946 \(M.D.N.C. Sept. 6.\)](#), *aff'd*, [951 F. Supp. 1211 \(M.D.N.C. 1996\)](#).

[FN225]. See [Green, Tweed of Del., Inc., 202 F.R.D. at 430](#).

[FN226]. *Id.* (quoting [Space Sys./Loral, 1995 WL 686369](#)); see also [Bristol-Meyers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 Civ.8833\(PPP\), 2000 WL 42202, at *4 \(S.D.N.Y. Jan. 19, 2000\)](#) ("Confidential information [was] . . . so intertwined with that case as to make the confidential information relevant to his proposed testimony."); [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 244-45 \(E.D.N.Y. 1994\)](#) (finding that the objecting party had "not convincingly detailed . . . a substantial relationship"); [Viskase Corp. v. W.R. Grace & Co.-Conn., No. 90- C7515, 1992 WL 13679, at *1-*2 \(N.D. Ill. Jan. 24, 1992\)](#) (resin expert had held authoritative positions at Union Carbide but had left seven years earlier and had "general experience but no experience specific to the products or patents in suit").

[FN227]. [Greene, Tweed of Del., Inc., 202 F.R.D. at 428](#). Many cases only rely on the two-part test. See [Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc., No. 95-03577, 1998 WL 230981, at *2 \(N.D. Cal. Feb. 27, 1998\)](#); see also [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 249 \(D.N.J. 1997\)](#); [Hansen v. Amdec Industrieservice Und Spedition, GMBH, Civ. A. No. 95-516MMS, 1996 WL 622557 \(D. Del. July 3, 1996\)](#); [Bethlehem Iron Works, Inc., 1995 WL 376471, at *1](#); [Mayer v. Dell, 139 F.R.D. 1 \(D.D.C. 1991\)](#); [Nelson v. McCreary, 694 A.2d 897, 903-04 \(D.C. 1997\)](#).

[FN228]. See, e.g., [Greene, Tweed of Del., Inc., 202 F.R.D. at 429](#).

[FN229]. [City of Westminster v. MOA, Inc., 867 P.2d 137, 140 \(Colo. Ct. App. 1993\)](#); see also [City of Springfield v. Rexnord Corp., 111 F. Supp. 2d 71, 74 \(D. Mass. 2000\)](#).

[FN230]. See, e.g., [Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1085 \(C.D. Cal. 2001\)](#); [Healthcare Rehab Sys., Inc., 994 F. Supp. at 251](#). This analysis corresponds conceptually to the traditional duty found in [Fed. R. Evid. 403](#) to weigh the probative value of evidence against the prejudicial impact upon the trier of fact. [Fed. R. Evid. 403](#) provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

[FN231]. See [Theriot v. Parish of Jefferson, No. 95-2453, 1996 WL 392149, at *2 \(E.D. La. July 8, 1996\)](#) (disqualifying political expert who had been "too intimately involved" on behalf of his current opposition to prevent conflicts of interest and maintain the integrity of the judicial process); see also [Sells v. Wamser, 158 F.R.D. 390, 393 \(S.D. Ohio 1994\)](#) ("Paul establishes that the overall guiding principle is to preserve the integrity of court proceedings and that any remedy imposed in a case where an expert witness has a conflict of interest should promote fundamental fairness in the litigation process."); [W.R. Grace & Co. v. Gracecare, Inc., 152 F.R.D. 61, 65-66 \(D. Md. 1993\)](#) (granting disqualification of attorney-expert to avoid appearances of impropriety and protect the integrity of the proceeding); [English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1504 \(D. Colo. 1993\)](#) (stating that the main concerns favoring disqualification are avoiding conflicts of

interest and the integrity of the system); [Michelson v. Merrill Lynch Pierce Fenner & Smith, No. 83 CIV. 8898, 1989 WL 31514, at *5 \(S.D.N.Y. Mar. 28, 1989\)](#) ("Permitting him to testify would at best create an appearance of impropriety."). Several decisions have found that the exposure of confidential information known to a tainted expert so infected counsel that disqualification of both was required. *B-C Hous. P'ship, L.P. v. Apollo Ltd. P'ship, Nos. A096780, A096780, 2002 WL 31628763, at *11 (Cal. Ct. App. 2002)*; see also [United States v. NHC Health Care Corp., 150 F. Supp. 2d 1013, 1016-17 \(W.D. Mo. 2001\)](#) ("clear conflict of interest" required disqualification of former government employee even though decision did not specify the substantiality of actual prejudice); [City of Westminster, 867 P.2d at 140](#).

[FN232]. [Topps Co., Inc. v. Productos Stani Sociedad Anomina Industrial y Commercial, No. 99 Civ. 9437, 2001 WL 406193, at *2 \(S.D.N.Y. Apr. 20, 2001\)](#); see [In re Commerce Indus. Ins. Co. v. E. I. du Pont de Nemours & Co. \(In re Malden Mills Indus., Inc.\), 275 B.R. 670, 675 \(Bankr. D. Mass. 2002\)](#) (concluding that guarding the integrity of the system, absent impermissible disclosures, was "so nebulous" a basis for disqualification that a moving party might exploit the loose standard to secure tactical advantages).

[FN233]. But see [City of Westminster, 867 P.2d at 140](#). In that case, two different experts employed by the same consulting firm, had worked "for both sides in an adversarial situation." [Id. at 140](#). Even though no disclosures were exchanged, the appellate court affirmed disqualification. [Id. at 140, 143](#). Taking into account its duty to protect the integrity of the judicial process, the trial court could reasonably have concluded that a conflict of interest had arisen that was sufficient to justify disqualification. [Id. at 140](#).

[FN234]. See, e.g., [Turner v. Thiel, 553 S.E.2d 765, 767-68 \(Va. 2001\)](#).

[FN235]. But see [Proctor & Gamble Co. v. Haugen, 184 F.R.D. 410, 413 \(D. Utah 1999\)](#) ("The mere payment for consulting time does not make an expert per se a retained expert.").

[FN236]. [W.R. Grace & Co., 152 F.R.D. at 64](#).

[FN237]. [Id. at 64 n.4](#).

[FN238]. [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 242 \(E.D.N.Y. 1994\)](#); see also [Palmer v. Ozbek, 144 F.R.D. 66, 67 n.4 \(D. Md. 1992\)](#).

[FN239]. As the California court reasoned in *Shadow Traffic Network v. Superior Court*, while such may be "legitimate concern[s]," they should not define the outcome if nothing in the record suggests a like intention. [29 Cal. Rptr. 2d 693, 699 n.9 \(Ct. App. 1994\)](#). "If such a case were to develop, we believe a trial court will be able to resolve such a claim." *Id.*

[FN240]. See [Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248 \(E.D. Va. 1991\)](#); see also [Haugen, 184 F.R.D. at 413](#) (commenting that this manipulation could "defeat the quest for truth" and be "susceptible to corrupt use"); [Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 281-82 \(S.D. Ohio 1998\)](#); [English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1505 \(D. Colo. 1993\)](#).

[FN241]. [Wang Labs., Inc., 762 F. Supp. at 1248](#).

[FN242]. [Paul, 123 F.R.D. at 281-82](#). In *In re Orthopedic Bone Screw Products Liability Litigation*, an apparent case of side-switching, the court rejected disqualification sought by a litigant against an expert whose negative view concerning its spinal fixation system was widely publicized well before the litigant sought out that expert for consulting purposes. No. MDL

1014, [1995 WL 925673](#), at *1 (E.D. Pa. May 5, 1995); see also *English Feedlot, Inc.*, 883 F. Supp. at 1498.

[FN243]. [English Feedlot, Inc.](#), 833 F. Supp. at 1505; see also [Chamberlain Group, Inc. v. Interlogix, Inc.](#), No. 01 C 6157, 2002 WL 653893, at *4 (N.D. Ill. Apr. 19, 2002); [Stencel v. Fairchild Corp.](#), 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001).

[FN244]. See [Palmer v. Ozbek](#), 144 F.R.D. 66, 67-68 (D. Md. 1992) (denying disqualification of nationally recognized expert on hearing-impaired children because courts are especially reluctant to disqualify experts who "possess useful specialized knowledge"); [In re Eagle-Picher Indus., Inc.](#), 139 B.R. 869, 872 (Bankr. S.D. Ohio 1992) (rejecting disqualification of an economist valuing personal injury claims). In granting the motion to employ an expert, the court analogized to the right to choose counsel and said, "[t]he starting point in a proper analysis ought to be that generally a party should have the right to employ a professional of its choice, and with whom it has confidence, one in which it is comfortable." [Id.](#) at 871.

[FN245]. See [Roundpoint v. V.N.A. Inc.](#), 621 N.Y.S.2d 161, 163 (App. Div. 1995) ("As a general proposition, a party has the right to present the testimony that best supports its position.").

[FN246]. [Topps Co. v. Productos Stani Sociedad Anomina Industrial y Commercial](#), No. 93 Civ. 9-137, 2001 WL 406193, at *2-*3 (S.D.N.Y. Apr. 20, 2001); see also [Campbell Indus. v. M/V Gemini](#), 619 F.2d 24, 26 (9th Cir. 1980) (holding that disqualification of an expert tainted by ex parte contact not to be prejudicial since party had other experts who had examined the same boat); [English Feedlot, Inc.](#), 833 F. Supp. at 1505; [Palmer](#), 144 F.R.D. at 66.

[FN247]. *B-C Hous. P'ship, L.P. v. Apollo Ltd. P'ship*, Nos. A096780, A096583, 2002 WL 31628763, at *5 (Cal. Ct. App. Nov. 21, 2002) ("His expertise is not irreplaceable."); see also [Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.](#), No. 95 CIV. 8833 (RPP), 2000 WL 42202, at *5 (S.D.N.Y. Jan. 19, 2000) (stating that it was "not shown that there are not other experts in the treatment of ovarian cancer available to testify").

[FN248]. Thus, in *Agron v. Trustees of Columbia University, City of New York*, the court contrasted the circumstances of an expert possessing "unique evidence," with testimony that is overlapping and cumulative. [176 F.R.D. 445, 450 \(S.D.N.Y. 1997\)](#); see also [Topps Co.](#), 2001 WL 406193, at *2 (commenting that there are "very few people in the world who are knowledgeable in the area of chewing gum . . . [and] even fewer . . . in the area of gum base").

[FN249]. [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.](#), 994 F. Supp. 244, 252 (D.N.J. 1997).

[FN250]. As one court reasoned, "it should be underscored that to recognize such protection and allow disqualification frustrates the truth and deprives the litigation of relevant evidence." [Proctor & Gamble v. Haugen](#), 184 F.R.D. 410, 413 (D. Utah 1999) (rejecting disqualification of expert who had consulted several years earlier with objecting party).

[FN251]. [Agron](#), 176 F.R.D. at 450. In *Agron*, this concern was intensified by the passage of time that made psychiatric evaluation of the plaintiff's current condition less meaningful than during the alleged discrimination. "In that respect, Deutsch possesses knowledge that cannot be replicated by the new expert." [Id.](#) at 453; see also [Chamberlain Group, Inc. v. Interlogix, Inc.](#), No. 01 L 6157, 2002 WL 653893, at *4 (N.D. Ill. Apr. 19, 2002) (ruling that selection was not in bad faith since party had used patent expert in six other proceedings).

[FN252]. 111 F. Supp. 2d 71 (D. Mass. 2000).

[FN253]. [Id.](#) at 76 n.3. The court discussed Society of Professional Engineers canons and observed:

Among other obligations, engineers are prohibited from disclosing "confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent. In particular, engineers are forbidden 'without the consent of all interested parties' from participating in or representing 'an advisory interest in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge on behalf of a former client or employer.'"

Id.

[FN254]. [879 F. Supp. 237 \(E.D.N.Y. 1994\)](#).

[FN255]. [Id. at 245-46](#) (citing conflict of interest rules published by the American Institute of Certified Public Accountants). Based on accounting criteria and expert testimony, the court found that the two different insurance receiverships constituted different engagements with different clients for conflict purposes.

[FN256]. [English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1504 \(D. Colo. 1993\)](#) (denying disqualification where party waited eight months after expert's deposition before filing motion); see also [Brooks Shoe Mfg. Co. v. Suave Shoe Corp., 716 F.2d 854, 861 n.16 \(11th Cir. 1983\)](#) (in a decision prior to Paul, the circuit court affirmed a denial of disqualification requested by a party one month before trial and eight months after learning of the alleged conflict).

[FN257]. [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 251 \(D.N.J. 1997\)](#); see also [Fitz, Inc. v. Ralph Wilson Plastics Co., 184 F.R.D. 532, 539 \(D.N.J. 1999\)](#) ("[P]laintiff would be severally prejudiced if Mr. Fernandez was disqualified.").

[FN258]. See, e.g., [Commerce Indus. Ins. Co. v. E.I. du Pont de Nemours & Co. \(In re Malden Mills Indus., Inc.\), 275 B.R. 670 \(Bankr. D. Mass. 2002\)](#); see also [City of Westminster v. MOA, Inc., 867 P.2d 137, 140 \(Colo. Ct. App. 1993\)](#) (affirming disqualification but reversing order denying litigant opportunity to secure a replacement expert).

[FN259]. See [Malden Mills Indus., Inc., 275 B.R. at 675](#) ("Allowing the disqualification of Dr. Ebadat this close to the end of discovery without the Plaintiffs making the required showing for disqualification harms the Defendants' preparation of this case.").

[FN260]. See generally [Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc., Nos. C-95-03577 DLJ, C-96-00942 DLJ, 1998 WL 230981 \(N.D. Cal. Feb. 27, 1998\)](#) (disqualification denied concerning accounting firm that had performed over 700 hours of analysis); [Healthcare Rehab Sys., Inc., 994 F. Supp. at 251](#) (disqualification denied with respect to accounting expert).

[FN261]. See, e.g., [Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080 \(C.D. Cal. 2001\)](#); [Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 6:92cv00592, 1996 WL 575946 \(M.D.N.C. Sept. 6\)](#), aff'd, [951 F. Supp. 1211 \(M.D.N.C. 1996\)](#); [B-C Hous. P'ship, L.P. v. Apollo Ltd. P'ship, Nos. A096780, A096583, 2002 WL 31628763 \(Cal. Ct. App. Nov. 21, 2002\)](#).

[FN262]. [City of Springfield v. Rexnord Corp., 111 F. Supp. 2d 71, 75 \(D. Mass. 2000\)](#).

[FN263]. [Advanced Cardiovascular Sys., Inc., 1998 WL 230981](#); [Healthcare Rehab Sys., Inc., 994 F. Supp. at 249](#); [Nikkal Indus. Ltd. v. Salton, Inc., 689 F. Supp. 187, 191 \(S.D.N.Y. 1988\)](#).

[FN264]. [Malden Mills Indus., Inc., 275 B.R. at 673](#) (placing burden on party advocating disqualification even if other litigant is the movant); see also [Topps Co. v. Productos Stani Sociedad Anomina Industrial y Commercial, No. 99 Civ.](#)

[9437\(CSH\)\(GWG\), 2001 WL 406193 \(S.D.N.Y. Apr. 20, 2001\).](#)

[FN265]. [City of Springfield, 111 F. Supp. 2d at 71.](#)

[FN266]. [Malden Mills Indus., Inc., 275 B.R. at 670.](#)

[FN267]. [Topps Co., 2001 WL 406193](#) (granting motion and allowing expert in gum-based technology to testify).

[FN268]. [Valassis v. Samelson, 143 F.R.D. 118, 119 \(E.D. Mich. 1992\).](#)

[FN269]. [Malden Mills Indus., Inc., 275 B.R. at 670; City of Springfield, 111 F. Supp. 2d at 72](#) ("[T]he court agrees that, given the complex nature of this case, they did not have the luxury of waiting for plaintiff to file a motion to disqualify."); [Valassis, 143 F.R.D. at 118](#) (granting motion for use of challenged expert).

[FN270]. [City of Springfield, 111 F. Supp. 2d at 74.](#)

[FN271]. [Topps Co., 2001 WL 406193, at *1; Valassis, 143 F.R.D. at 118.](#)

[FN272]. [City of Springfield, 111 F. Supp. 2d at 72.](#)

[FN273]. [Malden Mills Indus., Inc., 275 B.R. at 674](#) (stating that party seeking disqualification was "unsupported by affidavits" and "full of conclusory remarks").

[FN274]. [Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426, 431 \(E.D. Pa. 2001\).](#)

[FN275]. [Turner v. Thiel, 553 S.E.2d 765, 768 \(Va. 2001\)](#) (overruling objection to engineering expert).

[FN276]. [In re Ambassador Group, Inc., Litig., 879 F. Supp. 237, 243 \(E.D.N.Y. 1994\)](#) ("Statements were vague and ambiguous and fail to support an argument that the Receiver would thereby be prejudiced.").

[FN277]. [Chamberlain Group, Inc. v. Interlogix, Inc., No. 01 C6157, 2002 WL 653893, at *3 \(N.D. Ill. Apr. 19, 2002\)](#) ("offers nothing more than conclusory affidavits that state Dr. Rhyne was exposed to confidential business strategy"); [Greene, Tweed of Del., Inc., 202 F.R.D. at 429](#) ("Furthermore, the party requesting disqualification may not meet its burden with 'mere conclusory or ipse dixit assertions.'"); [Topps Co. v. Productos Stan: Sociedad Anomina Industrial y Commercial, No. 99 Civ. 9437\(CSH\)\(GWG\), 2001 WL 406193 \(S.D.N.Y. Apr. 20, 2001\); In re Orthopedic Bone Screw Prod. Liab. Litig., No. MDL 1014, 1995 WL 925673 \(E.D. Pa. May 5, 1995\).](#)

[FN278]. See [United States v. NHC Health Care Corp., 150 F. Supp. 2d 1013 \(W.D. Mo. 2001\)](#) (detailed affidavit established basis for disqualification of health care billing expert); see also [Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., No. 95 CIV. 8833\(RPP\), 2000 WL 42202, at *4-*5 \(S.D.N.Y. Jan. 19, 2000\)](#) (detailed affidavit by objecting party overcame expert's conclusory response).

[FN279]. [202 F.R.D. at 430.](#)

[FN280]. Id.; see also [Nikkal Indus. Ltd. v. Salton, Inc., 689 F. Supp. 187, 191 \(S.D.N.Y. 1988\)](#) ("That burden is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship and any spurious claims could never be exposed.") (quoting [In re Borianno, 344 F.2d 830, 833 \(2d Cir. 1965\)](#)).

[FN281]. [English Feedlot, Inc. v. Norden Labs., Inc.](#), 833 F. Supp. 1498, 1501-02 (D. Colo. 1993); [Nikkal Indus. Ltd.](#), 689 F. Supp. at 191; see also [Greene, Tweed of Del., Inc.](#), 202 F.R.D. at 429; [United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.](#), 994 F. Supp. 244, 249 (D.N.J. 1997).

[FN282]. [Wyatt v. Hanan](#), 871 F. Supp. 415, 421-22 (M.D. Ala. 1994); [English Feedlot, Inc.](#), 833 F. Supp. at 1501-02; [Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.](#), 734 F. Supp. 334 (N.D. Ill. 1990); [Paul v. Rawlings Sporting Goods Co.](#), 123 F.R.D. 271 (S.D. Ohio 1988).

[FN283]. See [Mayer v. Dell](#), 139 F.R.D. 1 (D.D.C. 1991); see also [Wyatt](#), 871 F. Supp. at 420.

[FN284]. 833 F. Supp. at 1505.

[FN285]. 871 F. Supp. at 420 ("[A]bsent compelling equitable reasons to the contrary, any substantial ambiguity regarding whether there is a confidential relationship between an attorney and an expert should be resolved against the attorney seeking to invoke the relationship.").

[FN286]. *Id.* at 421.

[FN287]. For that reason, the courts have insisted that consultants should express unequivocally any doubts about confidentiality obligations. Moreover, in the event that prospective experts are unwilling to accept confidentiality restraints, they "should decline to accept any disclosures." [Wang Labs., Inc. v. Toshiba Corp.](#) 762 F. Supp. 1246, 1249-50 (E.D. Va. 1991).

[FN288]. *Id.* at 1248. But see [Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.](#), No. 90-1477-A, 1998 WL 230981, at *3 (N.D. Cal. Feb. 27, 1998) (an expert's silence does not corroborate confidentiality absent explicit indications or designated by counsel).

[FN289]. [Shadow Traffic Network v. Superior Court](#), 29 Cal. Rptr. 2d 693, 702 n.11 (Ct. App. 1994).

[FN290]. [Topps Co. v. Productos Stani Sociedad Anomina Industrial y Commercial](#), No. 99 Civ 9437, 2001 WL 406193, at *1 (S.D.N.Y. Apr. 20, 2001). In *Topps*, the single affidavit stating "without elaboration" that the challenged expert received "significant disclosures of confidential information," failed to give an example of "a specific piece of information." *Id.* The court further noted that the objecting party opted to rely on the written submissions and did not request an evidentiary hearing. *Id.* at *2 n.2.

[FN291]. See [Palmer v. Ozbek](#), 144 F.R.D. 66, 67 (D. Md. 1992) (finding "no need for a hearing"); [Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc.](#), No. 83 Civ 8898(MEL), 1989 WL 31514, at *4 (S.D.N.Y. Mar. 28, 1989); see generally [Koch Ref. Co. v. Jennifer L. Boudreaux MV](#), 85 F.3d 1178 (5th Cir. 1996) (finding no need for an evidentiary hearing); [Topps Co.](#), 2001 WL 406193, at *2 n.2 (evidentiary hearing not requested). But see [Nikkal Indus. Ltd. v. Salton, Inc.](#), 689 F. Supp. 187, 188 (S.D.N.Y. 1988) (resolving diverging factual accounts between expert and counsel through evidentiary hearing before U.S. magistrate). In the event of a hearing, courts may assess credibility among attorneys and other professionals—a process that was criticized as "unseemly" by a disappointed litigant, but which may be unavoidable in fairly resolving factual controversies. *Id.* at 190.

[FN292]. [Advanced Cardiovascular Sys., Inc.](#), 1998 WL 230981, at *3 ("Testimony that one does not recall an event is not testimony that the event did not happen."); see also [Michelson](#), 1989 WL 31514, at *5 (finding that evidentiary hearing was

unnecessary; expert "did not flatly deny having received such information; he only stated that he did not remember any"); [Shadow Traffic Network, 29 Cal. Rptr. 2d at 693](#) ("[T]he failure to recollect is pregnant with the concession that the event in question may in fact have occurred but that the declarant has no immediate memory of it.").

[FN293]. Disqualification appeals follow traditional criteria. [Hanlon v. Sec'y of Health & Human Servs., 191 F.3d 1344, 1349 \(Fed. Cir. 1999\)](#); [Nikkal Indus. Ltd., 689 F. Supp. at 189-90](#) (magistrate's report adopted unless clearly erroneous or contrary to law and apply abuse of discretion standards in appeals); [Nelson v. McCreary, 694 A.2d 897, 903 \(D.C. 1997\)](#); [City of Westminster v. MOA, Inc., 867 P.2d 137, 140 \(Colo. Ct. App. 1993\)](#). However, prior to final judgment, extraordinary remedies might be considered. [In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1373-74 \(Fed. Cir. 2001\)](#) ("However, a writ of mandamus 'may be sought to prevent the wrongful exposure of privileged communications.'"). "In general, a mandamus petitioner must establish that the right to the writ is clear and undisputable . . . and that it lacks adequate alternative means to obtain the relief sought." *Id.*; see also [In re Am. Airlines, Inc. 972 F.2d 605, 607-08 \(5th Cir. 1992\)](#) (exceptional circumstances warrant mandamus requiring disqualification of former counsel representing antitrust competitor); *B-C Hous. P'ship, L.P. v. Apollo Ltd. P'ship, Nos. A096780, A096583, 2002 WL 31628763, at *2 (Cal. Ct. App. Nov. 21, 2002)* (finding order of disqualification remarkable as either injunction or as a final order on a collateral matter). An erroneous ruling concerning expert disqualification can also result in reversal of a jury verdict. [Turner v. Thiel, 553 S.E.2d 765 \(Va. 2001\)](#).

[FN294]. Further complicating the disqualification framework for experts is the reality that while ostensibly independent, expert witnesses are increasingly viewed in practical terms as an integral part of the legal team. While courts continue to characterize them as witnesses contributing specialized knowledge for the benefit of the trier of fact, most courtroom duels with top trial experts seemingly defy any thesis that experts are not advocates. E.g., [Eymard v. Pan Am. World Airways \(In re Air Crash Disaster at New Orleans, La. on July 9, 1982\), 795 F.2d 1230, 1233 \(5th Cir. 1986\)](#) (stating that some experts "become nothing more than an advocate of policy before the jury"). Other courts have been even more blunt. [Va. Tech Found. Inc. v. Family Group Ltd., 666 F. Supp. 856, 858 \(W.D. Va. 1987\)](#) ("(T)he hired guns did what they were hired to do."); [Clement v. Griffin, 634 So. 2d 412, 426 \(La. Ct. App. 1994\)](#) (It is "almost common knowledge that many experts were available to the highest bidder; in other words, they will testify favorably to whomever pays for their services."); [State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 61 \(Mo. Ct. App. 1992\)](#) (There is widespread concern about the use of "mercenary" experts because they are "likely to be a greater hindrance to a fair trial than a biased lay witness.").

[FN295]. [Chambers v. NASCO, Inc., 501 U.S. 32, 40 \(1991\)](#) (citing [Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 \(1962\)](#)).

[FN296]. [Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 \(1962\)](#).

[FN297]. [Illinois v. Allen, 397 U.S. 337, 343 \(1970\)](#).

[FN298]. [Chambers, 501 U.S. at 44-45](#).

[FN299]. [Degen v. United States, 517 U.S. 820, 823 \(1996\)](#).

[FN300]. A district court noted "that the jilted party is not without a remedy against the faithless expert, since the party may pursue a claim in contract." [Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1086 n.11 \(C.D. Cal. 2001\)](#).

[FN301]. [Degen, 517 U.S. at 827](#).

[FN302]. [Agron v. Trs. of Columbia Univ., City of N.Y., 176 F.R.D. 445, 451 \(S.D.N.Y. 1997\)](#); [Space Sys./Loral v. Martin Marietta Corp., Civ. No. 95- 20122 SW, 1995 WL 686369 \(N.D. Cal. Nov. 15, 1995\)](#).

[FN303]. [Stencel, 174 F. Supp. 2d at 1086.](#)

[FN304]. Cf. [Valassis v. Samelson, 143 F.R.D. 118, 126 \(E.D. Mich. 1992\).](#)

[FN305]. Cf. [Peterson v. Willie, 81 F.3d 1033, 1037-38 \(11th Cir. 1996\):](#)

Once a witness has been designated as expected to testify at trial, there may be situations when the witness should be permitted to testify for the opposing party. In such situations, however, we believe that a party should not generally be permitted to establish that the witness had been previously retained by the opposing party.

Id. (footnote omitted).

[FN306]. [Chamberlain Group, Inc. v. Interlogix, Inc., No. 01C6157, 2002 WL 653893, at *4 \(N.D. Ill. Apr. 19, 2002\); Agron, 176 F.R.D. at 451-454; Donovan v. Bowling, 706 A.2d 937 \(R.I. 1998\).](#)

[FN307]. In [Agron, 176 F.R.D. at 451](#), the court, quoting [Granger v. Wisner, 656 P.2d 1238, 1243 \(Ariz. 1982\)](#), stated:

If the plaintiff sought to attack the expert's qualifications or credentials, he might well have some concern that the defendant would attempt to rehabilitate the witness by showing that plaintiff's counsel had thought well enough of the witness to consult him on this very case Further, he might be put in the position of having to impeach the expert's testimony by showing it differed in some material way from statements made in the report that the same consultant had made to plaintiff's counsel Cross-examination is a difficult art which is not made easier when counsel must perform it on a tightrope.

Id.

[FN308]. [Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 \(1993\)](#) ("[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); see also [Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 \(1997\)](#).

[FN309]. [Chambers v. NASCO, Inc., 501 U.S. 32, 50 \(1991\)](#) (stating that when sanctionable conduct is within the scope of the rules of civil procedure, the court ordinarily should rely on the Rules rather than inherent power); [Bank of Nova Scotia v. United States, 487 U.S. 250, 254 \(1988\)](#) (finding that inherent supervisory power does not circumvent [Fed. R. Crim. P. 52\(a\)](#)); see also [Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 206 \(1958\)](#) (inherent authority should defer to [Fed. R. Civ. P. 37](#)).

[FN310]. [Fed. R. Evid. 403.](#)

[FN311]. See supra notes 188, 195, 198, and accompanying citations and discussion.

[FN312]. "Matter" is defined as follows:

(d) As used in this rule, the term "matter" includes:

- (1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
- (2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

Model Rules of Prof'l Conduct R 1.11(d) (2003).

[FN313]. Id. R. 1.11 provides, in part, that:

(b). [N]o lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom;

and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

[FN314]. For example, the conflict of interest restrictions governing former federal officers and employees, which encompass criminal sanctions and employ a range of safeguards, including time restrictions, [18 U.S.C. § 207\(a\)\(2\) \(2003\)](#) (certain former officers prohibited from dealing with agency for two years); id. [§ 207\(b\)](#) (one year post-termination prohibition with respect to certain activities where former officer or employee had "access" to relevant information), and, in limited circumstances, permanent restrictions for certain matters "in which the person participated personally and substantially." Id. [§ 207\(a\)\(1\)](#).

[FN315]. [Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248-49 \(E.D. Va. 1991\)](#).

[FN316]. Id. at 1248.

[FN317]. Id. at 1250.

[FN318]. In [English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1505 \(D. Colo. 1993\)](#), the articulation of the problem-avoidance proposals included a summary adopted from Wang:

First, a lawyer seeking to retain an expert and establish a confidential relationship should make this intention unmistakably clear and should confirm it in writing. The writing should define clearly the consultant's confidentiality obligation. If a consultant does not want to be bound by such confidentiality requirement, he should decline the engagement. Similarly, counsel seeking to retain a consultant should inquire specifically whether the consultant's past employment presents any confidentiality problems.

Id. (internal citation omitted). END OF DOCUMENT

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C INHERENT JUDICIAL AUTHORITY AND THE EXPERT DISQUALIFICATION DOCTRINE, 56 Fla. L. Rev. 195 (Jan 2004)

Citing References

Secondary Sources (U.S.A.)

15B Wash. Prac. Series s 702.14, Disqualification of Expert by Court (2005)

25B Wash. Prac. Series s 702.55, Law Review Articles and Other Commentary on Rule 702 (2005)

C 3ECONOMIC AUTHORITY AND THE LIMITS OF EXPERTISE IN ANTITRUST CASES, 90 Cornell L. Rev. 617, 703 (2005)