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New Rules of War in the Battle of the Experts

AMENDING THE EXPERT WITNESS DISQUALIFICATION TEST FOR CONFLICTS OF INTEREST

“Treat your friend as if he will one day be your enemy, and your enemy as if he will one day be your friend.”¹

INTRODUCTION

Picture this: a law firm is representing a group of residents who brought a class action lawsuit against a multimillion-dollar corporation, alleging that the corporation contaminated the community’s drinking water by releasing a hazardous chemical into a tower cooling system. The polluted water, according to the complaint, caused severe medical complications and physical defects in over 600 residents. Imagine further that the law firm hired—for the class action plaintiffs—an expert, Dr. Anderson, to help prepare for the case and to testify on the community members’ behalf about the toxicity to humans of the chemical released into the water supply.² Dr. Anderson signed a retention letter with a confidentiality clause.³ The law firm provided Dr. Anderson with confidential documents, including a memorandum that specified the facts and background of the case, scientific methodology used in the litigation, and counsel’s view on key issues and trial strategies.⁴ In addition, the law firm’s assigned attorney had nearly 30 telephone conversations with Dr. Anderson, during which the lawyers discussed in detail highly confidential

¹ CHAS. W. FREEMAN, JR., *THE DIPLOMAT’S DICTIONARY* (1993) (quoting Laberius, c. 45 B.C.).

² This portion of the hypothetical is based on the facts of *Rhodes v. E.I. Du Pont de Nemours & Co.*, 558 F. Supp. 2d 660, 663 (S.D.W. Va. 2008).

³ *Id.* at 668 (“The retention letter, written by the Firms, states: ‘This letter confirms that you have been retained by the [Firms] on behalf of their clients, to provide expert services for the Plaintiffs in connection with the referenced litigation The expert services you are performing are confidential.’” (quoting Retention Letter, Mem. Supp. Pls.’ Mot. Disqualify, ex. A)).

⁴ *Id.*

trial strategies.⁵ After months of these discussions, Dr. Anderson suddenly notified the law firm that she no longer wished to serve as its expert witness and suggested that the law firm hire her colleague, Dr. Gray—which the law firm ultimately does.⁶

Now imagine that a number of plaintiffs who were originally included in the litigation—and whose confidential information was disclosed to Dr. Anderson—were unable to proceed in the class action due to a technicality.⁷ The plaintiffs who are unable to proceed in the first case then file a separate class action, which is practically indistinguishable from the first litigation. They sue the same defendant, retain the same law firm, and allege that the defendant engaged in the same tortious conduct.⁸ Finally, these plaintiffs get their day in court.

Dr. Gray, who was the expert for the first class of plaintiffs, is also hired by this class of plaintiffs. The law firm anticipates that the defendant will employ its own expert. But to its shock and dismay, the law firm discovers that the defendant's testifying expert is none other than Dr. Anderson—the same expert that the law firm had previously retained—but more significantly, the same expert who was given access to the law firm's confidential files relating to the case and who knows the law firm's trial strategy. The plaintiffs file a motion to disqualify Dr. Anderson from testifying against them, which in turn causes them significant financial costs, interrupts the trial proceeding, and leaves the law firm and the plaintiffs feeling betrayed. This particular scenario is not difficult to envision; in fact, this is exactly what happened in *Rhodes v. E.I. Du Pont De Nemours & Co.*⁹ In that case, the U.S. District Court for the Southern District of West Virginia granted plaintiffs' motion to disqualify Dr. Anderson.¹⁰ The plaintiffs in *Rhodes* were successful at precluding their former expert—to whom they disclosed confidential information—from using that same confidential information to the plaintiffs' detriment. This particular outcome, however, is quite rare, as courts frequently hold that expert disqualification is a drastic remedy.¹¹

⁵ *Id.*

⁶ *Id.* at 669.

⁷ These plaintiffs were unable to proceed in this class action because the chemical's presence in their water supply was either undetectable or fell below the average concentrations in the other plaintiffs' water supply. *Id.* at 670.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 672.

¹¹ *Bone Care Int'l, LLC v. Pentech Pharm., Inc.*, No. 08 c 1083, 2009 WL 249386, at *1 (N.D. Ill. Feb. 2, 2009) ("The disqualification of experts is 'a drastic measure

Although the expert in *Rhodes* was disqualified for a conflict of interest, courts currently lack guidance from statutory law or procedural rules that would assist them in determining when an expert has conflicting interests. As a result, there is uncertainty in the expert disqualification test. The confusion that has developed surrounding expert disqualifications can have costly consequences in an area of litigation that is already expensive.¹² In civil litigation, the “big business” of retaining experts has corrupted the adversarial process and undermined the role that expert testimony plays at trial. Attorneys relentlessly shop for experts,¹³ knowing that the winner of “the battle of the experts”¹⁴ often determines the winner of the war. A litigant choosing to hire an expert witness understands that this choice will often be the difference between winning or losing—making expert witnesses “rare commodities”¹⁵ in a “cottage industry.”¹⁶

As federal and state dockets have become flooded with more complex and technical litigation,¹⁷ expert witnesses have inundated the courtroom. Expert witnesses are indispensable in

which courts should hesitate to impose except when absolutely necessary.” (quoting *Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir. 1993)); *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 500 F. Supp. 2d 957, 960 (N.D. Ill. 2007); *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 199 (D. Mass. 2004) (“[C]ourts are generally reluctant to disqualify expert witnesses . . .”); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 339 (N.D. Ill. 1990) (“The court perceives no need to exercise the *extreme* remedy of disqualifying an expert in this situation. . . .” (emphasis added)).

¹² See *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1505 (D. Colo. 1993) (“[C]ostly litigation of collateral issues concerning expert disqualification can be avoided.”).

¹³ Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 486 (1997); L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1415 (1995). This note uses “experts” to refer to expert witnesses hired to testify at trial, as opposed to consulting witnesses.

¹⁴ *Id.* at 1395 n.38 (citing William S. Bailey, *Expert Witnesses in the Sound-Bite Era*, 29 TRIAL, Feb. 1993, at 65, 69).

¹⁵ Maya M. Eckstein & Paul Nyffeler, *The Expert of My Enemy Is My Expert: Conflicts of Interest Amongst Expert Witnesses*, 17 VA. ST. B. LITIG. NEWS, Summer 2012, at 1.

¹⁶ *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 582 (D.N.J. 1994). The demand for expert witnesses in civil litigation has spurred an industry of “professional witnessing.” The term “professional witnesses” refers to expert witnesses who are not just experts in their respective field but who are also experts (in the nonlegal sense) in testifying. Professional witnesses have perfected the art of testifying and use their “position and authority to maximum effect” in favor of their clients. RICHARD O. LEMPERT ET AL., *A MODERN APPROACH TO EVIDENCE* 1152-53 (5th ed. 2013).

¹⁷ *Mitsubishi Elec. Corp. v. Ampex Corp.*, 190 F.3d 1300, 1313 (Fed. Cir. 1999) (“It is well recognized that the persuasiveness of the presentation of complex technology-based issues to lay persons depends heavily on the relative skill of the experts.”); David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIG. 1, 3 (2013).

civil litigation,¹⁸ and important trial strategy decisions are often behind the decision to tender an expert witness.¹⁹ Just recently, Apple, Inc. brought an action against its competitor, Samsung Electronics Co., alleging infringement of several patents relating to smartphones and tablets.²⁰ Samsung countersued, alleging that it was Apple that infringed on Samsung's patents. What followed was a lengthy and expensive battle of the experts. Both telecommunications giants presented dozens upon dozens of expert witnesses, whose areas of expertise ranged from wireless communication systems²¹ to mobile computing²² to computer graphics.²³ The expert-witness fees for both sides were staggering²⁴—Apple alone spent over \$2.5 million on expert witnesses.²⁵ Although Apple is a multibillion-dollar corporation,

¹⁸ Rhodes v. E.I. Du Pont De Nemours & Co., 558 F. Supp. 2d 660, 662 (S.D.W. Va. 2008) (“Litigants, courts, and juries have certainly benefitted greatly by the guidance and direction provided by expert testimony.”).

¹⁹ Eymard v. Pan Am. World Airways, 795 F.2d 1230, 1233 (5th Cir. 1986); Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 TENN. L. REV. 909, 909 (2000) (“Many cases could not be tried without expert witnesses to testify as to the applicable standard of care, the reconstruction of accidents, or the value of a plaintiff’s damages.”) [hereinafter Richmond, *Expert Witness Conflicts*].

²⁰ Apple, Inc. v. Samsung Elecs. Co., 678 F.3d 1314, 1319 (Fed. Cir. 2012).

²¹ Apple retained Edward William Knightly, Ph.D., as an expert in wireless communication systems and networking protocols. Testimony of Plaintiff’s Expert Witness, Edward William Knightly, Ph.D. at 3438, Apple Inc. v. Samsung Elecs. Co., 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920061.

²² Apple retained Mani Bhushan Srivastana, Ph.D., as an expert in mobile computing. Testimony of Plaintiff’s Expert Witness, Mani Bhushan Srivastava, Ph.D. at 3290, Apple Inc. v. Samsung Elecs. Co. 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920059.

²³ Samsung hired Andries Van Dam, Ph.D., as an expert in computer graphics. Testimony of Defendants’ Expert Witness, Andries Van Dam, Ph.D. at 2850-51, Apple Inc. v. Samsung Elecs. Co., 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920051.

²⁴ Charles Babcock, *Apple, Samsung Expert Witnesses Reap Big Bucks*, INFO. WK. (Aug. 23, 2012, 12:07 AM), <http://www.informationweek.com/mobile/mobile-devices/apple-samsung-expert-witnesses-reap-big-bucks/d/d-id/1105935?> [<http://perma.cc/W2D5-SKBU>]; see *infra* note 26 and accompanying text.

²⁵ The aggregate amount of experts’ fees was calculated by adding individual experts’ compensation, a number acquired from public sources. It is likely that the aggregate amount is significantly higher, since public records state that other experts testified on behalf of Apple, but their compensation was not disclosed during trial testimony. Additionally, it is highly plausible that both sides hired consulting experts whose compensation was not disclosed. Apple’s expert witnesses and their compensation include (1) Susan Kare, Ph.D., an expert in the design of icons and screen graphics, who was compensated \$80,000 for her testimony (Testimony of Plaintiff’s Expert Witness Susan Kare, Ph.D. at 1363, 1477, Apple Inc. v. Samsung Elecs. Co., 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920041); (2) Edward William Knightly, Ph.D., an expert in wireless communication systems and networking protocols, whose 300 hours of preparation at a \$475 hourly rate was worth \$140,000 (Testimony of Plaintiff’s Expert Witness Edward William Knightly, Ph.D. at 3438-39, Apple Inc. v. Samsung Elecs. Co., 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920061); (3) Paul Dourish, Ph.D., an expert in the field of user interface technology for computer-based embedded systems, whose 200 hours at \$400 per hour was worth \$80,000

the fees its experts charged are not extraordinary; these experts' hourly rates fall within the standard range of expert compensation. Expert witnesses often charge their clients anywhere from \$500 to \$1,000 an hour,²⁶ making "expert witnessing"²⁷ a rather lucrative profession.²⁸

The burgeoning expert-witness business raises concerns about the integrity of the adjudication process, especially in civil litigation.²⁹ Due to the specialized role of expert witnesses and a rising demand for expert testimony,³⁰ it is common for the same expert to testify for opposing clients in different cases on "similar or identical issues."³¹ Some experts intentionally switch sides in the midst of a trial, taking their former clients' confidential information with them to their former clients' adversaries. This situation creates the potential that such experts will—intentionally

(Testimony of Plaintiff's Expert Witness Paul Dourish, Ph.D. at 3191, *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920057); (4) Dr. Tony Givargis, an expert in the field of software design and embedded systems, whose 400 hours of preparation at \$275 per hour was worth \$110,000 (Testimony of Plaintiff's Expert Witness Dr. Tony Givargis at 3223, *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920058); (5) Mani Bhushan Srivastana, Ph.D., an expert in the field of mobile computing, whose 225 hours of preparation at a \$425 hourly rate was worth \$95,625 (Testimony of Plaintiff's Expert Witness Mani Bhushan Srivastana, Ph.D. at 3290-91, *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920059); (6) Ravin Balakrishnan, Ph.D., an expert in the field of computer science and human-computer interaction, whose hourly rate is \$430, gave testimony worth \$150,000 (Testimony of Plaintiff's Expert Witness Ravin Balakrishnan, Ph.D. at 1726-27, *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920044); (7) Hyong Kim, Ph.D., an expert in wireless communications and networks, whose 500 hours of preparation at a \$450 hourly rate was worth \$225,000 (Testimony of Plaintiff's Expert Witness Hyong Kim, Ph.D. at 3326, *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920060); (8) Dr. Russell S. Winer, an expert in marketing, gave testimony worth \$50,000 (Testimony of Plaintiff's Expert Witness Dr. Russell S. Winer at 1498, 1531, *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920042); (9) Terry Musika, an expert in intellectual property damages, who calculated Samsung's infringement damage to Apple, was paid \$1.75 million (Testimony of Plaintiff's Expert Witness, Terry Musika at 2037-38, 2052, *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (N.D. Cal. 2012) (No. C-11-01846 LHK), 2012 WL 10920047).

²⁶ Sonenshein & Fitzpatrick, *supra* note 17, at 6-7. In a survey of almost 1,000 expert witnesses, the average hourly fee reported for testifying in court was \$451; the highest hourly fee for court testimony in the sample was \$5,000. JAMES J. MANGRAVITI ET AL., SEAK INC., SURVEY OF EXPERT WITNESS FEES 6 (2014).

²⁷ Rhodes v. E.I. Du Pont De Nemours & Co., 558 F. Supp. 2d 660, 662 (S.D.W. Va. 2008) (citing Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 196 (2004)).

²⁸ *Id.*; see also LEMPET ET AL., *supra* note 16, at 1130 ("Many [experts] . . . advertise their services . . . and earn substantial sums of money from this line of work.").

²⁹ See Rhodes, 558 F. Supp. 2d at 662 ("The increased use and importance of experts in litigation has raised numerous questions regarding conflicts of interest.").

³⁰ See *id.*

³¹ LEMPET ET AL., *supra* note 16, at 1130.

or inadvertently—share this information with their new client to the detriment of the former client. Situations where an expert witness switches allegiances midtrial—to testify in the same litigation for which the former client retained the expert—regularly warrant the expert’s disqualification³² and serve as the exception to the common notion that disqualification of experts is an extreme measure.³³ Many conflicts of interest, however, naturally arise without any indication of ill intent but nonetheless pose the threat of unauthorized disclosure of confidences.

Most conflicts of interest among experts stem from instances where Client X retains an expert witness to testify against Client Y, after which the expert terminates the engagement with Client X only to serve as an expert witness for Client Y in the same or substantially similar case against Client X. This was the scenario presented in *Rhodes*.³⁴ In *Rhodes*, a law firm that represented community residents who brought a class action tort claim against Du Pont Co., a chemicals company, hired an expert, Dr. Anderson. After the community residents disclosed confidential information to Dr. Anderson relating to the case, Dr. Anderson terminated this engagement and was later retained by Du Pont to defend its case against the community residents. This scenario illustrates an expert conflict of interest that warrants disqualification—a remedy not easily granted by federal or state courts.³⁵ When a client chooses to hire an expert previously retained by that client’s adversary, a conflict of interest arises because the expert has been chosen twice: once by the first client and once by that client’s adverse party. The risk of a conflict is magnified when the expert leaves a former client and takes that client’s confidential information to that client’s adversary. This note focuses on the scenario in which adverse parties have, at one point, retained the same expert to testify in the same or substantially similar case—triggering the expert disqualification test for conflicts of interest.

To ensure fairness and integrity in the adjudication process, the American Bar Association (ABA) and state legislatures have established Rules of Professional Conduct governing conflicts of interest among attorneys. While strict rules regulate such conflicts, similar statutory or procedural rules governing conflicts

³² *Rhodes*, 558 F. Supp. 2d at 666 (“[N]o one . . . seriously contend[s] that blatant side-switching by an expert within the same litigation should be permitted.” (quoting *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991))).

³³ See *supra* note 11 and accompanying text.

³⁴ See *supra* notes 1-11 and accompanying text.

³⁵ See *supra* note 11 and accompanying text.

of interest among experts are virtually nonexistent.³⁶ There is no federal or state law that governs the disqualification of expert witnesses, and neither the Federal Rules of Civil Procedure³⁷ nor any of their state equivalents discuss expert disqualification. Furthermore, expert witnessing does not adhere to any professional ethical code.³⁸ Indeed, aside from a small amount of precedent, “there is virtually nothing in print to guide” courts in assessing conflicts of interest among experts.³⁹

Currently, the only avenue to disqualify an expert for a conflict of interest is through the inherent judicial authority of presiding judges.⁴⁰ Yet most state and federal courts do not conform to one set of controlling or guiding principles to analyze conflicts of interest among expert witnesses. The lack of procedural rules or professional standards to regulate expert disqualification is a recipe for disaster. Judges often must speculate about how to interpret the expert disqualification test, which contributes to contradictory rulings and precedent. The absence of clearly articulated standards to govern expert disqualification—and inconsistent guidelines for retaining experts—have led to undue

³⁶ *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410, 413 (D. Utah 1999); Eckstein & Nyffeler, *supra* note 15; see Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 196, 205 (2004).

³⁷ Coffey, *supra* note 36, at 197 n.6 (“[C]onflicts of interest based on prior services or contracts are not directly addressed in the Federal Rules of Civil Procedure . . .”). Federal Rule of Civil Procedure 26(b)(4)(B) provides that “Rule 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2).” Federal Rule of Civil Procedure 26(b)(3)(A) protects the disclosure of “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Federal Rule of Civil Procedure 26(b)(3)(B) specifies that the protection from disclosure extends to “mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” But in reference to expert witnesses, Rule 26(b)(4)(B) severely limits the aforementioned protections. See FED. R. CIV. P. 26(b)(4)(B); *Palmer v. Ozbek*, 144 F.R.D. 66, 67 (D. Md. 1992) (“Nothing in the language of Fed. R. Civ. P. 26(b)(4)(B) precludes a party from retaining an expert previously consulted by his opponent.” (footnote omitted) (quoting *Riley v. Dow Chem. Corp.*, 123 F.R.D. 639, 640 (N.D. Cal. 1989))).

³⁸ Coffey, *supra* note 36, at 196; Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 467 (1999) (“A few organizations have attempted to draft codes of conduct for expert witnesses, but none have achieved broad acceptance.” (footnote omitted)).

³⁹ *Healy v. Counts*, 100 F.R.D. 493, 495 (D. Colo. 1984); see *In re Ambassador Grp., Inc., Litig.*, 879 F. Supp. 237, 241-42 (E.D.N.Y. 1994) (“[T]here is relatively little authority on expert disqualification.”); *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991) (“Circumstances similar to those at bar [motion to disqualify] are not common. Not surprisingly, therefore, the parties have cited no controlling authority directly on point.”); *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 277 (S.D. Ohio 1988) (“There appears to be little case law dealing with the issue of disqualification of expert witnesses.”).

⁴⁰ Coffey, *supra* note 36, at 196-97; *In re Ambassador Group, Inc., Litig.*, 879 F. Supp. at 241.

delayed proceedings, additional litigation expenses, and general distraction from the substantive matters at trial.⁴¹ Ambiguities in how courts apply the disqualification test result in a failure to preserve client confidentiality and threaten the “integrity of the judicial process as a whole.”⁴² Chief Judge Goodwin of the U.S. District Court for the Southern District of West Virginia criticized the current lack of direction, stating that “clarification of the proper standard is . . . [to] ensure that attorneys and experts have a clear idea of what conduct will result in disqualification; without detailed guidance, experts may be disqualified for conduct they did not know was inappropriate.”⁴³ The dissonance among courts calls into question the wisdom and application of the disqualification test.

This note proposes a clear and comprehensive standard that courts should adopt to resolve the current confusion surrounding expert disqualification due to conflict of interest. Part I of this note provides background information on the rules governing conflicts of interest among expert witnesses. This discussion further demystifies the traditional two-prong expert disqualification test, which applies when (1) opposing clients retain the same expert to testify in separate cases against each another; or (2) one party retains an expert formerly retained by the adverse party to testify in the same case. Part II explores the consequences that the lack of a bright-line rule—or at least a workable standard—has for expert disqualification and highlights the impracticality of the traditional test. Part III advocates for the modification of the traditional expert disqualification test. First, it proposes a two-prong disqualification test meant to ameliorate the current ambiguities in the disqualification test by mandating disqualification only where a client and expert are in a contractual relationship and the client discloses confidential information on the subject matter of the challenged litigation. Next, Part III argues that the ABA should establish preventive measures for experts and attorneys in order to avoid situations where the disqualification test must apply.

⁴¹ See SECTION OF LITIG., ABA, ABA GUIDELINES FOR RETENTION OF EXPERTS BY LAWYERS (2012) [hereinafter ABA GUIDELINES DRAFT], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session10_aba_guidelines_for_retaining_experts_4-18-12.authcheckdam.pdf [<http://perma.cc/RG77-QWAP>] (draft as of April 18, 2012, later withdrawn from consideration).

⁴² See *id.* at 6.

⁴³ Rhodes v. E.I. Du Pont De Nemours & Co., 558 F. Supp. 2d 660, 666 (S.D.W. Va. 2008).

Given the “big business”⁴⁴ of expert witnesses and the consequences of variations in the application of the disqualification test, there is a need to reform the current disqualification test for expert witnesses. The current state of confusion among federal and state courts regarding the disqualification test undermines the integrity of court proceedings, notions of fairness, and consistency in court rulings. The dissonance among judges in their interpretation of the standard expert witness disqualification, coupled with the ever-rising use of expert testimony in civil litigation, compels the need to modify the current expert disqualification test.

I. TRADITIONAL TEST FOR EXPERT WITNESS DISQUALIFICATION

A series of federal trial court decisions analyzing conflicts of interest among expert witnesses paved the way for the expert witness disqualification test. The seminal case of *Paul v. Rawlings Sporting Goods Co.*⁴⁵ established a two-prong expert disqualification test, which—at least conceptually—both federal and state courts have accepted as the governing test to resolve conflicts of interest in the expert witness context. Under this traditional analysis, courts consider (1) whether it was objectively reasonable for the moving party to conclude that a confidential relationship existed between client and expert, and (2) whether the moving party disclosed confidential or privileged information to the expert.⁴⁶ The two prongs of the traditional test are independent inquiries, both of which must be answered in the affirmative to warrant disqualification of the expert.⁴⁷ In other words, to disqualify an expert for a conflict of interest, the court must find the existence of a confidential relationship between the expert and the former client, during which the former client disclosed confidential or privileged information to the expert.⁴⁸

The burden to prove both a confidential relationship and disclosure of confidential information falls on the party seeking disqualification.⁴⁹ The moving party thus has a high burden of

⁴⁴ Richmond, *Regulating Expert Testimony*, *supra* note 13, at 486.

⁴⁵ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988).

⁴⁶ *See, e.g., id.* at 278; *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1182 (5th Cir. 1996); *Mayer v. Dell*, 139 F.R.D. 1, 3 (D.D.C. 1991).

⁴⁷ *Rhodes*, 558 F. Supp. 2d at 666; *Koch Ref. Co.*, 85 F.3d at 1181.

⁴⁸ *Gordon v. Kaleida Health*, No. 08-CV-378S(F), 2013 WL 2250506, at *5 (W.D.N.Y. May 21, 2013).

⁴⁹ *Id.* A minority of courts place an additional burden on the moving party to prove that the alleged confidentiality was not subsequently waived by the client.

proof, and the movant cannot meet its burden with “mere conclusory or *ipse dixit* assertions.”⁵⁰ If either of the two propositions are answered in the negative—for example, if disclosures of privileged or confidential material were made without a reasonable expectation of a confidential relationship,⁵¹ or if a confidential relationship existed but no significant disclosures were undertaken⁵²—it would be “inappropriate for the court to dictate to the expert or his new employer that his participation in the case be limited or eliminated.”⁵³ Additionally, the mere existence of a confidential relationship does not presume that confidential information was exchanged.⁵⁴ Conversely, the disclosure of confidential or privileged information does not presume a confidential relationship.⁵⁵ Since the widespread adoption of this two-prong test, critical differences have emerged among courts in their application and interpretation of the two prongs.

A. *Defining a Confidential Relationship*

The first prong of the disqualification test—whether counsel was objectively reasonable in perceiving the existence of a confidential relationship—is an area of disagreement among courts. Across jurisdictions, courts agree that the moving party’s subjective belief that it has established a confidential relationship

Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426, 429 (E.D. Pa. 2001); United States *ex rel.* Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 249 (D.N.J. 1997); English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1501-02 (D. Colo. 1993); Nikkal Indus., Ltd. v. Salton, Inc., 689 F. Supp. 187, 191 (S.D.N.Y. 1988).

⁵⁰ *Greene, Tweed of Del., Inc.*, 202 F.R.D. at 429; *Nikkal Indus. Ltd.*, 689 F. Supp. at 191 (“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.”).

⁵¹ *See, e.g.*, *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991) (citing *Estate of George S. Halas, Sr. v. Comm’r*, 94 T.C. 570, 577 (1990) (expert not disqualified where no confidential relationship existed between an appraiser and the taxpayer)).

⁵² *See, e.g.*, *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 201 (D. Mass. 2004) (finding the existence of a confidential relationship, but denying disqualification for failure to satisfy the second prong of the test).

⁵³ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 278 (S.D. Ohio 1988).

⁵⁴ *Northbrook Digital LLC v. Vendio Servs., Inc.*, No. 07-2250 (PJS/JJG), 2009 WL 5908005, at *2 (D. Minn. Aug. 26, 2009) (“[W]here the moving party cannot show a reasonable expectation of a confidential relationship with an expert, it is immaterial whether that expert received confidential information from the moving party.”); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 337-38 (N.D. Ill. 1990).

⁵⁵ *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004) (“[A] confidential relationship is not necessarily established just because some information concerning the litigation is shared.”).

with the challenged expert is irrelevant to the inquiry.⁵⁶ Similarly, the expert's perception of a confidential relationship with the movant is immaterial. Beyond this, however, courts have rarely agreed on a consistent standard for analyzing the first prong of the disqualification test.

Federal and state courts have considered many factors in determining whether a confidential relationship exists between an expert and the moving party. Some judges will not inquire beyond the existence of a confidentiality agreement, while others explicitly reject this limited inquiry.⁵⁷ For example, a magistrate judge in the Southern District of Ohio criticized the contract-based "blanket disqualification."⁵⁸

Under certain circumstances, it might be reasonable for an attorney or his principal to communicate privileged or confidential matters to an expert witness even in the absence of a formal contractual relationship. On the other hand, there may be situations where, despite the existence of a formal contractual relationship, so little of substance occurs during the course of the relationship that neither the integrity of the trial process, nor the interests of the party who retained the expert, would be served by blanket disqualification.⁵⁹

Although only a few courts have adopted the view that a contractual relationship should exist to satisfy the first prong of the disqualification test,⁶⁰ courts—even those that reject the contract-based "blanket disqualification"⁶¹ of experts—give significant weight to a formal agreement.⁶²

⁵⁶ See *Northbrook Digital LLC*, 2009 WL 5908005, at *3 (denying disqualification and finding that the moving party's subjective belief that it was disclosing confidential information to the expert was not enough to prove the existence of a confidential relationship); *Hewlett-Packard*, 330 F. Supp. 2d at 1096 (denying disqualification even though the moving party asserted that it believed that the expert "would hold in confidence all of [their] discussions and not disclose them without [] permission"); *Lacroix*, 339 F. Supp. 2d at 198 (denying disqualification even though it was undisputed that the challenged expert "signed a Confidential Non-Disclosure Agreement," which provided that the expert "may have access to certain information that may be confidential or proprietary in nature and that he agrees not to disclose or use the information outside of [the instant] matters").

⁵⁷ See *Paul*, 123 F.R.D. at 277; *Lacroix*, 339 F. Supp. 2d at 200 ("[D]isqualification may not be warranted even if the expert witness has signed a confidentiality agreement with the adversary.").

⁵⁸ *Paul*, 123 F.R.D. at 278.

⁵⁹ *Id.*

⁶⁰ *Bristol-Myers Squibb Co. v. Rhône-Poulenc Rorer, Inc.*, No. 95 CIV. 8833(RPP), 2000 WL 42202, at *4 (S.D.N.Y. Jan. 19, 2000) (disqualifying an expert based on a confidentiality agreement signed with the client and receipt of confidential information).

⁶¹ *Id.*

⁶² *Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660, 667-68 (S.D.W. Va. 2008). In *Rhodes*, although the court did not apply the blanket disqualification principle, it granted disqualification where the expert in question signed a retention agreement that included a confidentiality clause. *Id.*; see *Northbrook*

Beyond the existence of formal contractual relationships, courts have also considered the following factors in evaluating whether a confidential relationship exists: (1) whether the client and expert had a long-standing relationship,⁶³ (2) whether the client and expert engaged in frequent contacts,⁶⁴ (3) whether the client intended to or has called the expert as a witness at trial,⁶⁵ (4) whether an actual exchange of attorney work product occurred,⁶⁶ (5) “whether the expert was paid a fee,”⁶⁷ (6) “whether the expert was asked not to discuss the case with the opposing parties or counsel,”⁶⁸ and (7) “whether the expert derived any of his specific ideas from work done under the direction of the retaining party.”⁶⁹ Problematically, some judges do not accord the same weight to all of these factors, and some do not even list which specific factors they consider when determining whether a

Digital LLC v. Vendio Services, Inc., No. 07–2250 (PJS/JJG), 2009 WL 5908005, at *2 (D. Minn. Aug. 26, 2009) (holding that the first prong of the disqualification test was not satisfied where “[t]here is no written agreement, or even an informal letter, to suggest that sensitive information was at stake”); *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1093 (N.D. Cal. 2004). Although the court in *Hewlett-Packard* noted that disqualification of an expert “may not be warranted even if the expert witness has signed a confidentiality agreement with the adversary,” it held that it was objectively reasonable for a moving party to believe that it was in a confidential relationship with the expert witness from the date that the expert signed a confidentiality agreement until the date that the expert withdrew from the engagement. *Id.* at 1094, 1096; *see also* *Mayer v. Dell*, 139 F.R.D. 1, 3 (D.D.C. 1991) (“Upon consideration of the first component of the two-step inquiry, the court finds that it was not reasonable for plaintiff to conclude that a confidential relationship existed . . . [C]ounsel never proffered a confidentiality agreement for [the expert’s] consideration nor sent a letter after their single meeting confirming any understanding regarding confidentiality . . .”).

⁶³ *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1182 (5th Cir. 1996); *Northbrook Digital*, 2009 WL 5908005, at *2; *Rhodes*, 558 F. Supp. 2d at 666 (citing *Hewlett-Packard*, 330 F. Supp. 2d at 1093); *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 201 (D. Mass. 2004) (finding the existence of a “significant” confidential relationship between movant and client where the expert served as movant’s consultant and as an expert witness for several years, but denying disqualification for failure to satisfy the second prong of the test); *Hewlett-Packard*, 330 F. Supp. 2d at 1097 (denying disqualification where the movant “has not explained how it could have disclosed confidential detailed elements of its litigation strategy during such a short conversation in which several patents were discussed”); *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001).

⁶⁴ *Rhodes*, 558 F. Supp. 2d at 666 (citing *Hewlett Packard*, 330 F. Supp. 2d at 1093).

⁶⁵ *Id.*; *Stencel*, 174 F. Supp. 2d at 1083.

⁶⁶ *Rhodes*, 558 F. Supp. 2d at 667 (citing *Hewlett-Packard*, 330 F. Supp. 2d at 1093).

⁶⁷ *Id.*; *see Stencel*, 174 F. Supp. 2d at 1084 (“[T]he fact that any research or resulting conclusions that [the expert] made would be paid for by Plaintiff also supports an objectively reasonable expectation of confidentiality.”).

⁶⁸ *Hewlett-Packard*, 330 F. Supp. 2d at 1093.

⁶⁹ *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 200 (D. Mass. 2004).

confidential relationship exists.⁷⁰ Rather, some judges will simply “imply a relationship of confidence when it is just to do so.”⁷¹

The judge does not need to determine whether the client indeed retained the expert; the only question is whether a confidential client-expert relationship existed—one that would permit the client to reasonably expect that all communication with the expert would be confidential.⁷² Several courts have found “that a confidential relationship exists when the record supports a longstanding series of interactions, which have more likely than not coalesced to create a basic understanding of [the retaining party’s] modus operandi, patterns of operations, decision-making process, and the like.”⁷³ Accordingly, in *Koch Refining Co. v. Jennifer L. Boudreaux MV*,⁷⁴ the Fifth Circuit, in upholding the disqualification of an expert, found that the first prong of the disqualification test was satisfied where counsel and the expert had a long-standing relationship that created a reasonable expectation of confidentiality that continued even after the expert was discharged.⁷⁵

Conversely, where the exchange between the expert and counsel only lasted several hours, courts are reluctant to find the existence of a confidential relationship requiring disqualification.⁷⁶ For instance, in *Mayer v. Dell*,⁷⁷ a magistrate judge for the U.S. District Court for the District of Columbia denied disqualification where the movant and the expert had only one meeting, during which the expert “was not retained, was not supplied with specific data relevant to the case, and was not requested to perform any services.”⁷⁸ Where a reasonable expectation of confidentiality does not exist (thus failing to satisfy the first prong of the disqualification test), any disclosure of confidential or privileged

⁷⁰ See, e.g., *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep’t of Treasury*, 405 A.2d 487 (N.J. Super. Ct. Law Div. 1979).

⁷¹ See, e.g., *id.* at 492.

⁷² *Hewlett-Packard*, 330 F. Supp. 2d at 1093; *Shadow Traffic Network v. Superior Court of L.A. Cty.*, 29 Cal. Rptr. 2d 693, 701 (Cal. Ct. App. 1994).

⁷³ *Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660, 667 (S.D.W. Va. 2008) (citing *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1182 (5th Cir. 1996)).

⁷⁴ *Koch Ref. Co.*, 85 F.3d at 1178.

⁷⁵ *Id.*

⁷⁶ *Palmer v. Ozbek*, 144 F.R.D. 66, 67 (D. Md. 1992) (involving a single two-hour consultation); *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 274 (S.D. Ohio 1988) (involving a single meeting lasting one hour and fifteen minutes).

⁷⁷ *Mayer v. Dell*, 139 F.R.D. 1 (D.D.C. 1991).

⁷⁸ *Id.* at 3.

information “is essentially a waiver of any existing privilege.”⁷⁹ The lack of clarity and uniformity among courts—in addition to the absence of statutory guidance—in defining what constitutes an objectively reasonable belief that a confidential relationship exists contributes to erroneous decisionmaking by attorneys and experts. This is particularly so since counsel and experts alike do not, and arguably cannot, appreciate the consequences of their decisions. Thus, clients and attorneys who mistakenly believe that they are in a confidential relationship with an expert, and who choose to disclose confidential or privileged information to the expert based on this flawed assumption, inadvertently waive the right to prevent the expert from using such information to the detriment of the client.

B. Disclosure of Confidential Information to the Expert

When a client hires an expert to testify, the expert may be privy to the client’s confidential information and attorney work product.⁸⁰ Additionally, experts may have an opportunity to observe counsel’s “mental impressions, opinions and legal theories” of the case.⁸¹ There are two major sources of disagreement between the courts in determining whether confidential or privileged information was disclosed to the expert, which is the second prong of the disqualification test. First, judges disagree drastically on the definition of “confidential information.” Second, they disagree about whether the information disclosed to the expert in a previous case must sufficiently relate to the subject matter of the case at issue.

1. Courts Do Not Conform to a Single Definition of Confidential Information

In analyzing the second prong of the expert disqualification test, disclosure of privileged or confidential information, courts have clashed over the definition of what constitutes confidential information and to what extent the disclosure—or potential for disclosure—warrants disqualification.⁸² Some courts have simply

⁷⁹ *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991); *see also English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1504 (D. Colo. 1993) (denying disqualification where the moving party implicitly waived its confidentiality).

⁸⁰ *Eckstein & Nyffeler*, *supra* note 15, at 4.

⁸¹ *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep’t of Treasury*, 405 A.2d 487, 492 (N.J. Super. Ct. Law Div. 1979).

⁸² *See infra* Section II.B.2.

not defined the term.⁸³ By merely asking whether any confidential or privileged information was disclosed to the expert, without offering a definition, these courts create precedent that offers little guidance to future courts deciding the issue.

Most trial courts have defined confidential information as “information ‘of either particular significance or . . . which can be readily identified as either attorney work product or within the scope of the attorney-client privilege.’”⁸⁴ Under the majority view, unless the disclosed information meets this stringent standard, courts will deny a motion to disqualify an expert.⁸⁵ Other courts have held that information that is public or that will be disseminated to the adverse party through mandatory disclosures or discovery will not constitute confidential information for the purposes of the disqualification test’s second prong.⁸⁶ Furthermore, others have noted that communication about technical matters, as opposed to legal ones, will fall outside the purview of confidential information.⁸⁷

The Western District of New York has adopted another definition of “confidential information”: “[s]pecific and *unambiguous* disclosures that if revealed would prejudice the party.”⁸⁸ But determining what constitutes an “unambiguous disclosure[]”⁸⁹ is anything but unambiguous in practice.

Judges have incorporated numerous factors in forming their definition of confidential information, including whether counsel and expert have discussed, *inter alia*, (1) litigation strategy or a theory of the case,⁹⁰ (2) the moving party’s views on

⁸³ See, e.g., *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 338 (N.D. Ill. 1990).

⁸⁴ *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004) (quoting *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 279 (S.D. Ohio 1988)).

⁸⁵ *Paul*, 123 F.R.D. at 279 (denying a motion to disqualify the expert where there was a “lack of communication of any information [to the expert] . . . which can be readily identified as either attorney work product or within the scope of the attorney-client privilege”).

⁸⁶ *Chrisjubrian Co. v. Upper St. Rose Fleeting Co.*, No. Civ. A. 93-1879, 1994 WL 673440, at *2 (E.D. La. Dec. 2, 1994) (holding that the moving party did not satisfy its burden of proving a confidential relationship with the expert where the information disclosed to the expert was discoverable pursuant to Federal Rule of Civil Procedure 26); *Palmer v. Ozbek*, 144 F.R.D. 66, 68 (D. Md. 1992); see also *Brian Burke, Disqualifying an Opponent’s Expert When the Expert Is Your Client’s Former Employee*, 66 DEF. COUNS. J. 69, 72 (1999) (citing *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, (D. Colo. 1993)).

⁸⁷ *Nikkal Indus., Ltd. v. Salton, Inc.*, 689 F. Supp. 187, 191-92 (S.D.N.Y.1988).

⁸⁸ *Gordon v. Kaleida Health*, No. 08-CV-378S(F), 2013 WL 2250506, at *5 (W.D.N.Y. May 21, 2013) (emphasis added).

⁸⁹ *Id.*

⁹⁰ *Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660, 666 (S.D.W. Va. 2008) (citing *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178,

each side's strengths and weaknesses,⁹¹ (3) the types of witnesses the moving party expects to retain⁹² and the roles of such witnesses,⁹³ (4) approach to discovery,⁹⁴ (5) potential defenses,⁹⁵ and (6) counsel's mental impressions.⁹⁶ The disagreement on an applicable standard regarding the definition of confidential information, however, is not the only layer of debate surrounding the disqualification test's second prong.

2. Courts Disagree on Whether Confidential Information Must Sufficiently Relate to the Subject Matter of Litigation

Although courts diverge in their definition of confidential information, they agree that confidential or privileged information must be disclosed to the expert to warrant disqualification. For instance, courts in the Northern District of Illinois have been adamant that nothing short of actual disclosure of confidential information to the expert would satisfy the second prong of the expert disqualification test. The court first announced this position in *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*,⁹⁷ in which it expressly declined to find that existence of a confidential relationship would create a presumption that disclosures of confidential information were made to the expert.⁹⁸ The court further noted that such a presumption exists in the

1181 (5th Cir. 1996)); *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 581 (D.N.J. 1994) (disqualifying an expert where the expert conceded that he was told the theory of the case); *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410, 414 (D. Utah 1999) (denying disqualification where "no strategic thoughts or impressions of counsel were communicated" to the expert); *Palmer*, 144 F.R.D. at 67; *Mitchell v. Wilmore*, 981 P.2d 172, 174 (Colo. 1999).

⁹¹ *Rhodes*, 558 F. Supp. 2d at 666 (citing *Koch Ref. Co.*, 85 F.3d at 1181).

⁹² *Id.* at 667.

⁹³ *Koch Ref. Co.*, 85 F.3d at 1182 (citing *Mayer v. Dell*, 139 F.R.D. 1, 4 (D.D.C. 1991)).

⁹⁴ *Mitchell*, 981 P.2d at 174.

⁹⁵ *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1249 (E.D. Va. 1991) (disqualifying an expert where it was indisputable that the expert received confidential work product, and noting that a memorandum detailing potential defenses was one of the "clearest examples" of confidential information that satisfies the second prong of the disqualification test); *Rhodes*, 558 F. Supp. 2d at 667 (citing *Koch Ref. Co.*, 85 F.3d at 1181).

⁹⁶ *Mitchell*, 981 P.2d at 174; *Turner v. Thiel*, 553 S.E.2d 765, 768 (Va. 2001) (granting motion for disqualification where client disclosed "mental impressions and trial strategies" to the expert). *But see* *Chamberlain Grp., Inc. v. Interlogix, Inc.*, No. 01 C 6157, 2002 WL 653893, at *3 (N.D. Ill. Apr. 19, 2002) (analyzing the first prong of the disqualification test and noting that "an attorney's mental impressions communicated to a [testifying] expert are not protected by the work-product doctrine").

⁹⁷ *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334 (N.D. Ill. 1990).

⁹⁸ *Id.* at 337-38; *see* *Northbrook Digital LLC v. Vendio Servs., Inc.*, No. 07-2250 (PJS/JJG), 2009 WL 5908005, at *2 (D. Minn. Aug. 26, 2009).

attorney disqualification analysis and does not belong in the expert disqualification context.⁹⁹ Over a decade later, the court in *Chamberlain Group, Inc. v. Interlogix, Inc.*,¹⁰⁰ reiterated this position. Denying a motion to disqualify an expert, the court held that “[a]n expert cannot be disqualified without evidence that privileged or confidential information was received by the expert during the relationship.”¹⁰¹ The court posited that this strict standard prevents attorneys from engaging in gamesmanship by forming a confidential relationship with an expert solely to preclude the opponent’s retention of that expert.¹⁰²

While a majority of courts agree that to warrant disqualification, confidential or privileged information must have been disclosed to the expert, a minority of courts have required that “[t]he confidential information must also be sufficiently related to the instant litigation to merit disqualification.”¹⁰³ For instance, in *Bone Care International, LLC v. Pentech Pharmaceuticals, Inc.*, the district court held that the moving party, who bears a high burden of proof, must establish that confidential information was disclosed and that there was an “overlap between the technical subject matter of the litigations” in order to warrant disqualification.¹⁰⁴ Other courts, however, have neglected to consider whether the subject matter of the lawsuit in question is sufficiently related to the disclosed confidential information to warrant disqualification.¹⁰⁵ Problematically, other judges have expressly rejected this additional step. For example, a U.S. District Court for the Eastern District of Virginia has specified that once the judge determines

⁹⁹ *Great Lakes Dredge & Dock Co.*, 734 F. Supp. at 338.

¹⁰⁰ *Chamberlain Grp. Inc. v. Interlogix, Inc.*, No. 01 C 6157, 2002 WL 653893 (N.D. Ill. Apr. 19, 2002).

¹⁰¹ *Id.* at *3. But see *Great Lakes Dredge & Dock Co.*, 734 F. Supp. 334, where although the judge agreed that confidential information must be disclosed to warrant disqualification, he nonetheless asked whether “a relationship between the experts pose[d] a significant risk of such disclosure and resulting prejudice.” *Id.* at 339 (emphasis added).

¹⁰² *Chamberlain Grp.*, 2002 WL 653893, at *3 (citing *Wang Labs. Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991)); see also *United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys. Inc.*, 994 F. Supp. 244, 251 (D.N.J. 1997) (denying motion to disqualify expert based on inferences that confidential information could have been passed from client to expert).

¹⁰³ *Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660, 667 (S.D.W. Va. 2008) (citing *Cherry Hill Convalescent Ctr., Inc.*, 994 F. Supp. at 251); see *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1096 (N.D. Cal. 2004).

¹⁰⁴ *Bone Care Int’l, LLC v. Pentech Pharm., Inc.*, No. 08 c 1083, 2009 WL 249386, at *3 (N.D. Ill. Feb. 2, 2009).

¹⁰⁵ See *id.* (denying disqualification); *Atlantic City Assocs., LLC v. Carter & Burgess Consultants, Inc.*, No. 05-3227(NLH), 2007 WL 63992, at *1-2 (D.N.J. Jan. 5, 2007) (denying disqualification of an expert retained by opposing clients in different cases because the court found that the subject matter of the cases was substantially unrelated and no confidential information was exchanged).

that there were disclosures of work product, “the value of the disclosures” is irrelevant.¹⁰⁶

Not considering the relatedness of previously disclosed information makes little sense, given how courts generally treat conflicts of interest for attorneys. In the attorney disqualification test, a lawyer who represented a client in a lawsuit is forbidden—absent informed consent—from representing another client “in the same or a substantially related matter.”¹⁰⁷ Although logic dictates that courts should similarly scrutinize the interrelatedness of such cases in determining whether to disqualify an expert, such an analysis does not neatly fit into the traditional expert disqualification test. As a result, judges often do not consider this factor in the expert disqualification analysis. Introducing this level of analysis could lead to the preclusion of experts from testifying in certain cases. At least one court has stated that preventing experts from pursuing their professional calling merely because the expert at one time represented an adverse party “would be both unintended and undesirable since in the ordinary situation an expert can remain fully loyal to his client without affecting the rights of other clients.”¹⁰⁸ But where the matters being litigated are significantly similar, the potential for abuse of confidential information is magnified and therefore justifies limiting an expert’s ability to testify.

Judges that have scrutinized the relatedness of cases in which the expert has testified on behalf of adverse parties have generally declined to disqualify experts when the subject matter of the information disclosed in the previous case does not sufficiently relate to the present dispute.¹⁰⁹ The court in *Lacroix v. BIC Corp.* denied disqualification where it was clear that the expert was not exposed to confidential information relevant to the

¹⁰⁶ *Wang Labs., Inc.*, 762 F. Supp. at 1249.

¹⁰⁷ MODEL RULES OF PROF’L CONDUCT r. 1.9(a) (AM. BAR ASS’N 2013).

Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

Id. r. 1.9 cmt. 3.

¹⁰⁸ *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep’t of Treasury*, 405 A.2d 487, 492 (N.J. Super. Ct. Law Div. 1979).

¹⁰⁹ *See, e.g., Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, No. CIV. A. 94-CV-0752, 1995 WL 376471, at *1-2 (E.D. Pa. June 21, 1995) (denying disqualification where the expert’s former retention did not relate to the challenged action); *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 279 (S.D. Ohio 1988) (denying disqualification where “the parties never communicated on matters of particular substance relating to the . . . case”).

case at issue.¹¹⁰ This court applied the two-prong disqualification test and under the second prong evaluated whether the confidential information discussed with the expert sufficiently related to the subject matter of the case in question. In *Lacroix*, BIC Corp., a corporation that manufactured lighters, among other things,¹¹¹ hired an expert witness in fire dynamics and disclosed to the expert confidential information relating to BIC's lighter manufacturing process.¹¹² Several years after this engagement, another client hired the expert to testify in a personal injury case—unrelated to the prior case against BIC—stemming from the alleged explosion of a BIC lighter.¹¹³ Relying on the confidentiality agreement that the expert previously signed with BIC, the corporation moved to enjoin the expert from testifying against BIC in the instant litigation. The district court denied disqualification, noting that it was “undisputed that the parties never communicated on matters of any substance relating to the specifics of this case,” and the information that BIC disclosed to the expert during their former engagement was not “specific to the current litigation.”¹¹⁴ The court acknowledged that where the former client discloses to the expert confidential information unrelated to the subject matter of the instant litigation, the former client is not prejudiced, because the former client's adversary will not be able to use such unrelated information to its benefit or to the former client's detriment. This additional inquiry under the second prong of the disqualification test recognizes the practical implications of disclosure: if the client's disclosed information is irrelevant to the litigation in question, the opposing side cannot use the information to the client's detriment. There is simply no prejudice to the former client if the information cannot be used to harm the former client's interests.

Along the same line of reasoning, the court in *Bone Care International, LLC* concluded that having the same expert testify both for and against the same company in different trials was permissible, despite the apparent conflict, because the patented technologies that were at issue in the previous case involved different patents and underlying technologies.¹¹⁵ The

¹¹⁰ *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 201 (D. Mass. 2004).

¹¹¹ Defendant's Memorandum in Support of Motion to Disqualify Plaintiff's Expert, *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 201 (D. Mass. 2004) (No. 02-40037-CBS), 2004 WL 5316225.

¹¹² *Lacroix*, 339 F. Supp. 2d at 198.

¹¹³ *Id.*

¹¹⁴ *Id.* at 201.

¹¹⁵ *Bone Care Int'l, LLC v. Pentech Pharm. Inc.*, No. 08 c 1083, 2009 WL 249386, at *2-3 (N.D. Ill. Feb. 2, 2009). In *Bone Care International, LLC*, the patent at

court posited that had the disclosed information related to the same particular patent at issue, or the same underlying technology, the outcome of the disqualification motion would have been different.¹¹⁶ The court reasoned that although the expert was exposed to his former client's confidential information, the former client would not be disadvantaged, because the two lawsuits were substantially unrelated.

Unlike *Bone Care International, LLC*, in which the subject matter of the cases involved substantially different patents with different underlying technologies, the court in *Rhodes v. E.I. Du Pont de Nemours & Co.*¹¹⁷ disqualified an expert who was retained by adverse parties to testify in different cases, because the subject matter of the two cases involved the very same chemical that allegedly contaminated the water supply of the plaintiffs in both suits.¹¹⁸ Since both cases involved the same tort claims against the defendants, and the expert was to render an opinion on a particular chemical's toxicity to humans, the district court found that the issues were so "intertwined"¹¹⁹ that these two cases were essentially one and the same, and disqualification was required to preserve judicial integrity.¹²⁰

Federal courts are not the only ones that have inquired into the relatedness of subject matter. The Superior Court of New Jersey held in *Conforti & Eisele, Inc. v. Division of Building and Construction*¹²¹ that where the subject matter of litigation is substantially related, "the potential abuse of its former client's confidences and [the expert's] own inability to render [his current client] an objective expert report [makes participation] both legally and morally impossible."¹²² In *Conforti & Eisele, Inc.*, the defendant retained an expert for its defense in a case involving an

issue in the first case related to "steroid-containing pharmaceutical compositions for treating scalp psoriasis," while the patent in question in the second case related to "a method of treating hyperparathyroidism." *Id.* at *3; 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) (denying motion to disqualify an expert who "had no involvement with the resins or patents directly at issue in this case [and] . . . no experience specific to the products or patents in suit"); *Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C.*, 202 F.R.D. 426, 430 (E.D. Pa. 2001) (refusing to disqualify an expert where the "documents [did] not show that he was privy to confidential information relevant to the alleged infringing products in this case").

¹¹⁶ *Bone Care Int'l, LLC*, 2009 WL 249386, at *2.

¹¹⁷ *Rhodes v. E.I. Du Pont de Nemours & Co.*, 558 F. Supp. 2d 660 (S.D.W. Va. 2008).

¹¹⁸ See *supra* notes 2-10 and accompanying text.

¹¹⁹ *Rhodes*, 558 F. Supp. 2d at 670.

¹²⁰ *Id.* at 671.

¹²¹ *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep't of Treasury*, 405 A.2d 487, 492 (N.J. Super. Ct. Law Div. 1979).

¹²² *Id.*

early phase of a multiphase construction project.¹²³ The plaintiff then hired the same expert to testify in a suit involving the later phases of the same project.¹²⁴ The court disqualified the expert on the premise that the expert could be consciously or unconsciously affected by his prior service to the defendant.¹²⁵ Although the defendant only retained the expert to testify about the construction project's earlier phases, the defendant provided the expert with confidential information relating to the later phase of the project—the subject matter of the litigation in question. Since, in the first case, the defendant provided the expert with information that easily could be used by the plaintiff (the expert's new employer) against the defendant in the second case, the risk of prejudice was significant.

The inquiry into the relatedness of the subject matter of the former case and the case in question promotes fairness in expert disqualification decisions and further aligns the disqualification test with its purpose—to prevent unauthorized disclosure of a client's confidential information to the detriment of that client. Furthermore, this inquiry—unlike the balancing of public policy considerations¹²⁶—does not replace the requirements of the disqualification test's two prongs. Unless during a confidential relationship, the client actually disclosed confidential information to the expert, the relatedness of the cases' subject matter, regardless of how overwhelming it may be, will not warrant disqualification. For instance, in *English Feedlot, Inc. v. Norden Laboratories, Inc.*,¹²⁷ although the subject matter of the lawsuits involved a similar piece of equipment, the district court did not disqualify the expert. The court held that because the information disclosed to the expert was also disclosed to the public, it was not confidential and thus did not satisfy the test's second prong.¹²⁸ This additional inquiry provides much-needed clarity to the disqualification test and serves the purpose of the test, which is to prevent exploitation of clients' confidential information.

As the review of the relevant case law demonstrates, courts have not applied the traditional two-prong test consistently. Courts cannot even agree on what constitutes

¹²³ *Id.* at 488.

¹²⁴ *Id.*

¹²⁵ *Id.* at 492. Although the different phases of construction involved independent buildings, "all phases were interrelated." *Id.*

¹²⁶ See *infra* Section II.A.

¹²⁷ *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498 (D. Colo. 1993).

¹²⁸ See Brian Burke, *Disqualifying an Opponent's Expert When the Expert is Your Client's Former Employee*, 66 DEF. COUNS. J. 69, 72 (1999) (discussing *English Feedlot, Inc.*, 833 F. Supp. 1498).

“confidential information,” let alone on when experts’ exposure to that information should lead to disqualification. The next part explores more fully the consequences that have resulted from courts exercising their inherent judicial authority to disqualify experts. This discretion, lacking the guidance of any statute or rule, has led to unpredictable application of the law. And unpredictability in the law leads to higher costs to litigants as they attempt to retain experts in their cases.

II. THE LACK OF A WORKABLE STANDARD TO RESOLVE CONFLICTS OF INTEREST AMONG EXPERTS

Federal and state courts are vested with the inherent authority to disqualify experts and attorneys.¹²⁹ This authority “derives from the court’s ‘judicial duty to protect the integrity of the legal process’”¹³⁰ and serves to “preserve the public confidence in the fairness and integrity of the judicial proce[ss].”¹³¹ The disqualification test for experts, unlike that for attorneys,¹³² is not codified in federal or state statutes, nor is it found in procedural rules governing civil litigation.¹³³ There are also no guiding principles in the Model Rules of Professional Conduct, which apply to attorneys, or in their state equivalents. Additionally, experts are rarely subject to ethical codes of conduct in their professions.¹³⁴ Ethics standards for most industries are either nonexistent, or where they do exist, are not binding and “are often politely disregarded” by experts in the field.¹³⁵ Thus, the only protection that litigants

¹²⁹ Coffey, *supra* note 36, at 196-97; *In re Ambassador Grp., Inc., Litig.*, 879 F. Supp. 237, 241 (E.D.N.Y. 1994).

¹³⁰ *In re Ambassador Grp., Inc., Litig.*, 879 F. Supp. at 241 (quoting *Wang Labs, Inc. v. Toshiba Corp.* 762 F. Supp. 1246, 1248 (E.D. Va. 1991)); see *Gordon v. Kaleida Health*, No. 08-CV-378S(F), 2013 WL 2250506, at *5 (W.D.N.Y. May 21, 2013) (citing *Eastman Kodak Co. v. Kyocera Corp.*, No. 10-CV-6334 CJS, 2012 WL 4103811, at *7 (W.D.N.Y. Sept. 17, 2012)); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 336 (N.D. Ill. 1990).

¹³¹ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 278 (S.D. Ohio 1988).

¹³² MODEL RULES OF PROF'L CONDUCT r. 1.7, r. 1.9, r. 1.10 cmt. (AM. BAR ASS'N 2013).

¹³³ Coffey, *supra* note 36, at 197 n.6 (“[C]onflicts of interest based on prior services or contracts are not directly addressed in the Federal Rules of Civil Procedure . . .”).

¹³⁴ Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1399 (2006) (noting that only 7 out of 36 specialty organizations surveyed had established ethical provisions governing expert witnesses (citing *Aubrey Milunsky, Lies, Damned Lies, and Medical Experts: The Abrogation of Responsibility by Specialty Organizations and a Call for Action*, 18 J. CHILD NEUROLOGY 413, 416 (2003))).

¹³⁵ Coffey, *supra* note 36, at 196 n.5 (citing *Terry O'Reilly, Ethics and Experts*, 59 J. AIR L. & COM. 113, 114 (1993)).

have in ensuring that an expert does not use their own confidential information against them is the discretion of the trial court judge.

Although judges appreciate the need to regulate the conduct of expert witnesses,¹³⁶ federal and state courts alike do not have comprehensive rules on expert disqualification and further lack “extensive case law”¹³⁷ to guide them. Although the two-prong test announced in *Paul v. Rawlings Sporting Goods Co.*,¹³⁸ has been widely accepted as the traditional disqualification test, subsequent trial courts’ interpretations of this test have created numerous variations—in some jurisdictions, making the disqualification test almost unrecognizable as the one announced in *Paul*. Discord between federal and state judges in analyzing the disqualification test should be resolved with a comprehensive expert disqualification test to govern conflicts of interest.

A. *The Expert Disqualification Test: Two or Three Prongs?*

In determining whether an expert’s conduct warrants disqualification, several jurisdictions have added a third prong to the traditional two-prong test. The traditional test asks whether it was objectively reasonable to conclude that a confidential relationship existed between the client and the expert and whether confidential information was indeed disclosed to the expert. Courts that have adopted a three-prong approach first determine whether the traditional two prongs have been fulfilled and then proceed to a third step. Following the traditional inquiry, this added third step further requires judges to “balance the competing policy objectives in determining expert disqualification.”¹³⁹ In applying this prong, judges have drastically disagreed on how to balance competing public policy considerations. First, courts disagree on whether the applicable disqualification standard is the traditional two-prong test that is

¹³⁶ The question of how to best regulate expert witnesses has been asked for over a century. Consider the remarks of Judge Learned Hand: “No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best.” Learned Hand, *Expert Testimony, Historical and Practical Considerations Regarding*, 15 HARV. L. REV. 40, 40 (1901); see also *Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660, 666 (S.D.W. Va. 2008) (“Given the ever-growing significance of expert witnesses, clarification of the proper standard is needed.”); *Austin v. Am. Ass’n of Neurological Surgeons*, 253 F.3d 967, 973 (7th Cir. 2001) (“More policing of expert witnessing is required, not less.”).

¹³⁷ Coffey, *supra* note 36, at 197; see *supra* note 40 and accompanying text.

¹³⁸ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988).

¹³⁹ *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 580 (D.N.J. 1994).

exclusive of public policy considerations or whether it is the three-prong test that considers public policy.¹⁴⁰ Second, those courts that have adopted the three-prong test do not agree about which public policy interests should be evaluated, and they further convolute the analysis by only balancing public policy factors (i.e., the third prong) under certain circumstances.

Courts that adopt the three-prong test have considered many public policy factors. Some examples include (1) any prejudice that might occur to either party if an expert is disqualified,¹⁴¹ (2) the appearance of a conflict of interest or impropriety,¹⁴² (3) the burden associated with obtaining a replacement expert,¹⁴³ (4) the availability of another expert possessing relevant specialized expertise,¹⁴⁴ (5) the importance of allowing experts to pursue their profession,¹⁴⁵ and (6) whether counsel has formed a relationship with an expert solely to prevent the adverse party from using that expert.¹⁴⁶ Despite the existence

¹⁴⁰ See *infra* Section II.B.

¹⁴¹ *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410, 414 (D. Utah 1999) (“Examination for some legitimate claim of prejudice to the party seeking disqualification of the expert from trial is appropriate.”); *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001).

¹⁴² *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1093, 1095 (N.D. Cal. 2004).

¹⁴³ See *id.* at 1095 (“Consideration of prejudice is especially appropriate at late stages in the litigation, at which time disqualification is more likely to disrupt the judicial proceedings.”); *United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.*, 994 F. Supp. 244, 251 (D.N.J. 1997); *Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, No. 83 CIV. 8898 (MEL), 1989 WL 31514, at *5 (S.D.N.Y. Mar. 28, 1989) (granting disqualification where ample “time remain[ed] . . . to find and prepare a new expert” in lieu of the disqualified expert).

¹⁴⁴ *English Feedlot, Inc. v. Norden Labs.*, 833 F. Supp. 1498, 1505 (D. Colo. 1993).

¹⁴⁵ *Id.*; *Hewlett-Packard*, 330 F. Supp. 2d at 1098 (denying disqualification, noting that disqualification “would impair [the expert’s] interest in pursuing his trade as an expert witness”).

¹⁴⁶ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 280-81 (S.D. Ohio 1988); *Hewlett-Packard*, 330 F. Supp. 2d at 1098 (denying disqualification, stating that “[p]ermitting one party to lock up all or most of the best experts might interfere with the proper interpretation of claim language—a task that potentially has preclusive effect with respect to future litigation—as well as fair evaluation of the merits of claims of infringement”); see also *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1249 n.6 (E.D. Va. 1991) (disqualifying an expert after applying the traditional two-prong disqualification test, but noting that “[w]ere there evidence of misconduct or abuse of the process a different result might obtain”). Without labeling this a public policy consideration, the court further expressed this concern:

[L]awyers could . . . disable potentially troublesome experts merely by retaining them, without intending to use them as consultants. Lawyers using this ploy are not seeking expert help with their case; instead, they are attempting only to prevent opposing lawyers from obtaining an expert. This is not a legitimate use of experts, and courts should not countenance it by employing the disqualification sanction in aid of it.

Wang Labs., Inc., 762 F. Supp. at 1248.

of these various factors, many courts do not disclose which factors they considered in deciding whether to disqualify an expert, and they thus fail to provide attorneys, clients, and experts with any notice of the criteria being used to determine whether and under what circumstances disqualification is warranted.

A major obstacle to achieving consistency in this area stems from disagreement among judges on whether to apply the traditional two-prong test or a three-prong test that is inclusive of public policy considerations. There is even disagreement among the courts that apply the same approach. Specifically, courts that utilize the three-prong test disagree on the order in which to apply the three prongs of the test. While some courts will only apply the balancing prong after determining that the first two inquiries—whether a confidential relationship existed and whether confidential or privileged information was exchanged—are answered in the affirmative, others intertwine policy considerations into the analysis of the first two questions.¹⁴⁷ Judges who use the latter approach and combine public policy considerations into their analysis of the traditional two prongs place great emphasis on the practical policy considerations. Some judges even permit such considerations to supersede the traditional inquiry into the existence of a confidential relationship and exchange of confidential information. Significantly, some courts' reliance on public policy factors has rendered the traditional disqualification test practically useless, as the heightened focus on public policy trumps the other considerations. This provides attorneys, litigants, and experts with little guidance on what conduct will warrant disqualification, making it nearly impossible to determine in advance if an expert might be disqualified.

B. *Demystifying Public Policy Considerations*

The balancing prong of the three-prong disqualification test fails to provide guidance to state and federal judges because courts across jurisdictions neither agree nor specify the public policy factors to balance in determining whether to disqualify an expert. The dissonance among judges regarding the general application of the disqualification test, combined with confusion

¹⁴⁷ *Hewlett-Packard*, 330 F. Supp. 2d at 1093 (“In addition to these *two factors* [the two-prong disqualification test], the Court also should consider whether disqualification would be fair to the affected party and would promote the integrity of the legal process.” (emphasis added)). It is clear from the court’s reference to the prongs of the expert disqualification test as *factors* that the court gave equal, if not greater, weight to the public policy considerations.

regarding which policy factors should apply, further underscores the need for a uniform disqualification test. Ambiguity stemming from the use of public policy considerations in the expert disqualification analysis is further magnified when judges combine several independent policy considerations under the umbrella term “fundamental unfairness.”¹⁴⁸

For example, in *Gordon v. Kaleida Health*,¹⁴⁹ the U.S. District Court for the Western District of New York summarized the third, balancing prong for disqualification as follows:

Disqualification of an expert . . . is justified by the need to avoid the “risk of prejudice from possible disclosure and use of confidential client communications” and the *fundamental unfairness* that would arise if “an expert hired by a party, who at that party’s expense obtains specific knowledge and expertise in the issues involved in the litigation, [were permitted] to then be hired by the opposing party and allow the opposing party to reap the benefits of that work.”¹⁵⁰

Judges often use the terms “fundamental unfairness” and “prejudice” as fillers in opinions that otherwise do not provide guidance about what factors they consider. Although such terms are meaningful when resolving certain legal matters,¹⁵¹ they are neither consequential nor useful in setting precedent on expert disqualification, since vague notions of fundamental fairness do not provide meaningful direction for future courts. Additionally, the weight of any individual factor cannot be quantified because judges often do not provide guidance when they favor one public policy over another. For example, in *Paul v. Rawlings Sporting Goods Co.*,¹⁵² the court merely inquired whether, “under any set of circumstances,”¹⁵³ the court could disqualify the expert. The balancing prong of this test contributes to inconsistent and often contradictory precedent. Certain public policy factors, including the burden associated with replacing a disqualified expert and the

¹⁴⁸ *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 200 (D. Mass. 2004) (“In analyzing the disqualification issue, the court also balances competing policy objectives and considers concerns of fundamental fairness.”); *Gordon v. Kaleida Health*, No. 08-CV-378S(F), 2013 WL 2250506, at *6 (W.D.N.Y. May 21, 2013); *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep’t of Treasury*, 405 A.2d 487, 491-92 (N.J. Super. Ct. Law Div. 1979).

¹⁴⁹ *Gordon*, 2013 WL 2250506.

¹⁵⁰ *Id.* at *6 (quoting *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 336 (N.D. Ill. 1990)) (emphasis added).

¹⁵¹ Federal Rule of Evidence 403 allows judges, as gatekeepers of evidence, to exclude relevant evidence where “the probative value is substantially outweighed by a danger of . . . unfair prejudice.” In deciding substantive matters, including the disqualification of experts, however, the inquiry is immensely more complex than the balancing of prejudice and probative value.

¹⁵² *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988).

¹⁵³ *Id.* at 277.

appearance of impropriety, have received particular attention in the expert disqualification debate.

1. The Burden of Finding a Replacement Expert

Some judges, in refusing to disqualify expert witnesses, have emphasized the prejudice to and burden on the nonmoving party in having to find and retain a replacement expert upon disqualification.¹⁵⁴ Courts are generally reluctant to grant disqualification when an expert possesses particularly specialized knowledge or when an expert is nationally recognized in his or her chosen field, because this would create a particularly significant burden for the nonmoving party.¹⁵⁵ But in areas of common expertise, such as medicine, engineering, and business,¹⁵⁶ “lawyers have unparalleled power to select their expert witnesses from a large pool.”¹⁵⁷ This lowers the burden associated with finding a replacement witness and increases the chances that the court will disqualify an expert witness.¹⁵⁸

Other courts have rejected the notion that they should consider the burden and expense to the nonmoving party of acquiring a replacement expert. For example, in *Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, the U.S. District Court for the Southern District of New York granted a defendant’s motion to disqualify an expert, even though the plaintiff contended that he spent hundreds of hours with the expert and could not afford to find an adequate replacement.¹⁵⁹ The court held that disqualification was warranted due to a sufficient possibility that the expert could compromise the trial by providing his new client with his former client’s confidential information.¹⁶⁰

¹⁵⁴ See *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498 (D. Colo. 1993); *Great Lakes Dredge & Dock Co.*, 734 F. Supp. 334.

¹⁵⁵ *Palmer v. Ozbek*, 144 F.R.D. 66, 67 n.3 (D. Md. 1992) (in denying disqualification, the court specifically noted that the expert in question “is a nationally recognized expert on the psychological needs and characteristics of hearing impaired children”); cf. *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep’t of Treasury*, 405 A.2d 487, 488 (N.J. Super. Ct. Law Div. 1979) (granting disqualification of the expert witness even though the expert’s testimony “involve[d] highly technical matters in the field of civil engineering and construction”).

¹⁵⁶ Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1119 (1991).

¹⁵⁷ LEMPET ET AL., *supra* note 16, at 1128.

¹⁵⁸ *Bristol-Myers Squibb Co. v. Rhône-Poulenc Rorer, Inc.*, No. 95 CIV. 8833 (RPP), 2000 WL 42202, at *5 (S.D.N.Y. Jan. 19, 2000) (disqualifying an expert, noting that it was “not shown that there are no[] other experts in the treatment of ovarian cancer available to testify”).

¹⁵⁹ *Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, No. 83-cv-8898 (MEL), 1989 WL 31514, at *5 (S.D.N.Y. Mar. 28, 1989).

¹⁶⁰ *Id.*

The court determined that the hardship on the nonmoving party to replace the expert did not outweigh the risk that the expert would “be subconsciously affected” by the confidential information received from the former client.¹⁶¹ Similarly, in *Conforti & Eisele, Inc.*, the court balanced the expert’s “right to pursue [his] professional calling and the economic hardship [he] would suffer” if disqualified against the need to protect the former client’s confidences from exposure to “his adversary.”¹⁶² It ultimately held that the expert’s “interest is comparatively weak.”¹⁶³ The subjective nature of this policy inquiry breeds unpredictability in judicial decisionmaking and offers little insight to litigants, experts, and future courts as to what public policies should be considered under the disqualification test.

2. The Appearance of Impropriety

Another area of disagreement among courts is the use of the “appearance of impropriety” factor when balancing public policy interests under the alternative three-prong test. Courts that adopt the traditional two-prong disqualification test do not consider the “appearance of impropriety” as a viable factor in the analysis. But courts that adhere to the third prong’s balancing act heavily consider the appearance of impropriety as a factor in favor of disqualification, on the premise that even a mere appearance of impropriety threatens the public’s trust in the judicial process. In *Michelson*, the court disqualified an expert retained by adverse parties, because allowing the expert to testify “would at best create an appearance of impropriety and at worst compromise the proceeding by providing plaintiff with confidential information.”¹⁶⁴ Although there was no evidence to indicate that the expert ever received confidential information or disclosed any confidences,¹⁶⁵ the court nonetheless disqualified the expert, noting that permitting the expert to testify would seem improper and would leave the former client vulnerable to “a potential future breach” of that client’s confidentiality.¹⁶⁶

In the context of attorney disqualification for conflicts of interest, however, many courts have disqualified attorneys due to

¹⁶¹ *Id.*

¹⁶² *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep’t of Treasury*, 405 A.2d 487, 489-90 (N.J. Super. Ct. Law Div. 1979).

¹⁶³ *Id.*

¹⁶⁴ *Michelson*, 1989 WL 31514, at *5.

¹⁶⁵ *Id.* at *4.

¹⁶⁶ *Id.*

the mere appearance of impropriety.¹⁶⁷ In such cases, courts have not considered whether the attorney actually received confidential information from the former client.¹⁶⁸ Rather, courts have found that “[t]he appearance of impropriety is enough to foster the disqualification of an attorney”¹⁶⁹ and “requires prompt remedial action by the court.”¹⁷⁰ For expert disqualification, however, most judges ask for more, requiring that other public policy factors favor disqualification in addition to the appearance of impropriety.¹⁷¹

C. *Courts Erroneously Apply the Attorney Disqualification Test to Experts*

Courts have the authority to disqualify attorneys and experts alike,¹⁷² but the disqualification tests governing attorneys and experts are not one and the same. The two tests do not follow the same analysis and do not conform to the same principles, as the roles of experts and attorneys in our legal system are drastically different. While nearly all federal and state courts have adopted the traditional expert disqualification test, a select few have further convoluted the standard for expert disqualification by adopting a different approach: applying the attorney disqualification test in the realm of expert witness disqualification. This alternative approach is in direct contrast with the two-prong expert disqualification test and further diverges from a uniform application of the traditional test.

In *Conforti & Eisele, Inc.*,¹⁷³ the court disqualified an expert by applying the attorney-client privilege to the expert

¹⁶⁷ *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 565, 575 (2d Cir. 1973); *Oswall v. Tekni-Plex, Inc.*, 691 A.2d 889, 893 (N.J. Super. Ct. App. Div. 1997).

¹⁶⁸ *Emle Indus., Inc.*, 478 F.2d at 571.

¹⁶⁹ *Oswall*, 691 A.2d at 893.

¹⁷⁰ *Emle Indus., Inc.*, 478 F.2d at 565.

¹⁷¹ *United States v. Ta*, 938 F. Supp. 762, 765 (D. Utah 1996) (stating “mere appearance of impropriety is not sufficient for disqualification”); *Gleason v. Zocco*, 941 F. Supp. 32, 35 (S.D.N.Y. 1996) (stating that unusual circumstances must exist to disqualify based solely on appearance of impropriety); *Parkland Corp. v. Maxximum Co.*, 920 F. Supp. 1088, 1093-94 (D. Idaho 1996) (finding a possible breach of confidence and the need to minimize the appearance of impropriety are compelling factors in disqualification decisions); *In re Airport Car Rental Antitrust Litig.*, 470 F. Supp. 495, 507 (N.D. Cal. 1979) (stating that the court will not base a disqualification decision solely on the basis of the appearance of impropriety); *Arizona v. Sustaita*, 902 P.2d 1344, 1347 (Ariz. Ct. App. 1995) (requiring more than a showing of the appearance of impropriety).

¹⁷² *Coffey*, *supra* note 36, at 196-97; *In re Ambassador Grp., Inc., Litig.*, 879 F. Supp. 237, 241 (E.D.N.Y. 1994).

¹⁷³ *Conforti & Eisele, Inc. v. Div. of Bldg. and Constr., Dep’t of the Treasury*, 405 A.2d 487 (N.J. Sup. Ct. Law Div. 1979).

witness.¹⁷⁴ The court focused its analysis on the principle that attorneys are mandated to take reasonable precautions to safeguard their clients' confidential information from disclosure and held that extension of the attorney-client privilege was necessary to "uphold this duty."¹⁷⁵ In issuing an injunction to prevent the expert from testifying against his former client, the court stated that

[i]t would be anomalous to hold that the [client] could claim the privilege as against its attorneys, yet have that privilege dissolve when their attorneys properly confide their . . . communication to someone in their employ. The client is the holder of the privilege and should be entitled to demand the silence of any party in his employ who could disclose what he reveal[s] in confidence.¹⁷⁶

Similarly, in *Marvin Lumber & Cedar Co. v. Norton Co.*,¹⁷⁷ the district court applied the stringent standard applicable to attorney disqualification for conflicts of interest and disqualified an expert "without any predicate showing of actual breach."¹⁷⁸ The rigid attorney disqualification test is wholly inconsistent with the traditional expert disqualification test, and its application in the expert context particularly offends the established principle that actual disclosure of confidential information is a prerequisite to expert disqualification.¹⁷⁹ Furthermore, applying the attorney disqualification test to expert witnesses fails to appreciate the different roles of attorneys and experts in our legal system.

In fact, several courts have considered and explicitly rejected the extension of the attorney-client privilege to expert witnesses. In *Paul v. Rawlings Sporting Goods Co.*,¹⁸⁰ the court denied a defendant's motion to disqualify, stating that while the attorney-client privilege 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," there are many communications between a client and expert witness that are not privileged.¹⁸¹ Further, the court reasoned, "there is less stigma

¹⁷⁴ *Id.* at 489 ("The attorney-client privilege, set out in *N.J.S.A. 2A:84A-20*, protects not only communications between an attorney and his client but also extends to communications made to any agent of the attorney." (citing *N.J. STAT. ANN. 2A:84A-20*)).

¹⁷⁵ *Id.* at 491.

¹⁷⁶ *Id.*

¹⁷⁷ *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588 (D. Minn. 1986).

¹⁷⁸ *Id.* at 591.

¹⁷⁹ See *supra* notes 98-103 and accompanying text.

¹⁸⁰ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988).

¹⁸¹ *Id.* at 281.

attached to an expert ‘changing sides’ in the midst of litigation than [there is for] an attorney” who switches sides.¹⁸²

Other federal and state courts have similarly rejected the application of the attorney-client privilege to expert witnesses because experts and attorneys serve different roles in the judicial process, and they “rightly justify differing standards.”¹⁸³ Specifically, while “[e]xperts act as sources of information and opinions in order to assist parties and triers of facts to understand evidence,” attorneys are advocates for their clients.¹⁸⁴ This alternative to the traditional test ignores critical distinctions between the roles and responsibilities of attorneys and experts and further highlights the need for a uniform test for experts.¹⁸⁵

III. RESOLVING DISPARITIES IN THE EXPERT DISQUALIFICATION TEST

The judiciary has utilized its power to prevent and correct abuses arising from the conduct of expert witnesses. Yet some judges have refrained from exercising their discretion, which has contributed to courts’ reticence to disqualify experts.¹⁸⁶ Due to concerns about separation of powers, the Supreme Court in *Degen v. United States* urged trial judges to engage in self-restraint¹⁸⁷ and limit the use of their inherent authority only to “reasonable reponse[s] to the problems and needs that provoke it.”¹⁸⁸ The vast consequences stemming from the currently ambiguous disqualification test indeed provoke the need for judicial intervention. Unlike the myriad of tools available to judges to disqualify attorneys,¹⁸⁹ inherent judicial authority remains the

¹⁸² *Id.*

¹⁸³ *Mitchell v. Wilmore*, 981 P.2d 172, 175 (Colo. 1999).

¹⁸⁴ *United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.*, 994 F. Supp. 244, 249 (D.N.J. 1997).

¹⁸⁵ See *infra* Section III.A.4.

¹⁸⁶ *Degen v. United States*, 517 U.S. 820, 823 (1996) (“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.”). Appreciating their vast discretionary power and the potential for abuse, courts have rarely relied on their inherent judicial authority to disqualify expert witnesses. See, e.g., *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1181, 1183 (5th Cir. 1996).

¹⁸⁷ *Degen*, 517 U.S. at 823; see also *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.”).

¹⁸⁸ *Degen*, 517 U.S. at 823-24; see Coffey, *supra* note 36, at 200 (“[W]hile inherent authority has evolved over almost two centuries as a permanent dimension of the judicial tapestry, it is a fabric threaded with caution.”).

¹⁸⁹ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). The Supreme Court noted that inherent judicial authority to sanction attorneys is only one of many

only viable option for judicial regulation of conflicts of interest among expert witnesses.

To preserve the public's confidence in the judicial process, courts must adhere to a uniform set of rules to determine when a conflict of interest warrants disqualification of an expert. To safeguard the integrity of the judicial system, the judiciary should amend the expert disqualification test to eliminate the ambiguities present in the current test and to ensure uniformity across jurisdictions. To achieve this end, the judiciary should first narrow the definition of a confidential relationship and only disqualify experts when a formal contractual relationship exists. Second, to resolve the confusion regarding the meaning of the traditional disqualification test's second prong, judges should inquire into whether confidential or privileged information was disclosed to the expert that sufficiently relates to the subject matter of the case at issue. Additionally, courts should strictly limit their analysis to the two prongs of the proposed disqualification test and exclude ambiguous public policy considerations from their analysis.

A. *Amending the Traditional Expert Disqualification Test*

The traditional disqualification test has been criticized for creating arbitrary, and often contradictory, precedent that offers little guidance to litigators, experts, and judges. To resolve the current discrepancies in judicial decisions in the area of expert disqualification, the traditional two-prong test must be amended to promote clarity, consistency, and uniformity in how courts apply the test. First, the criteria for disqualification should only subject experts to disqualification where a contractual relationship exists between the client and expert. Second, judges should only grant disqualification if the client disclosed to the expert confidential or privileged information that substantially relates to the litigation at issue. The proposed framework governing conflicts of interest among expert witnesses should not supersede a party's informed consent.¹⁹⁰ These revisions to the current two-prong approach would eliminate the need for courts to evaluate public policy considerations in determining whether to

"mechanisms," including statutes and rules, that courts may utilize to discipline attorneys, and it held that the availability of statutes and rules governing attorney sanctions do not displace courts' inherent power to impose sanctions. *Id.*

¹⁹⁰ See ABA GUIDELINES DRAFT, *supra* note 41, at 1, 5. In the context of disqualification of attorneys for conflicts of interest, the affected clients may provide informed consent and waive the right to seek disqualification of the attorney for a conflict of interest. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4) (AM. BAR ASS'N 2013).

disqualify an expert witness. The proposed disqualification test offers a concrete solution to ensure that only those experts who could harm their former clients are disqualified. Additionally, the proposed disqualification test will align the expert disqualification framework with the attorney disqualification test, while appreciating the different roles of attorneys and experts.

1. Only a Contractual Relationship Should Create Confidentiality

The first inquiry of the traditional test for expert witness disqualification—whether it is objectively reasonable for the movant to conclude that a confidential relationship existed with the expert—is ambiguous, which contributes to inconsistent court rulings on this prong. In addition, due to disparities in how they analyze this prong, courts have failed to notify parties about what constitutes inappropriate behavior or what behavior would even impart a duty of confidentiality on the expert. Courts should require a moving party to show a contractual relationship between the movant and the expert witness to resolve current ambiguities surrounding the disqualification test’s first prong.

Limiting the scope of the first prong of the traditional test to the existence of a contractual agreement that includes a confidentiality clause would eliminate situations that have led courts to grant disqualification even when neither party intentionally acted inappropriately.¹⁹¹ Defining a confidential relationship as a contractual one “would be an ideal way to eliminate questions”¹⁹² of what constitutes an objectively reasonable confidential relationship and the need for hindsight to determine whether the attorney explicitly told the expert not to disclose confidential information.¹⁹³ Instead, all such requests should be placed into a “formal, written contract establishing both the existence of the relationship and prohibiting the disclosure of any [confidential] information gained by the expert during the course of the relationship.”¹⁹⁴

Securing a contractual agreement between client¹⁹⁵ and expert will enable the expert to appreciate his obligation to

¹⁹¹ *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1249 (E.D. Va. 1991).

¹⁹² *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 279 (S.D. Ohio 1988).

¹⁹³ *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d. 1087, 1093 (N.D. Cal. 2004).

¹⁹⁴ *Paul*, 123 F.R.D. at 279.

¹⁹⁵ Although this contract may theoretically be made between the expert and the attorney who is hiring the expert on behalf of the client or between the expert and the client, for the purposes of this note, the contract—and accordingly, the contractual relationship—is described as existing between the client and the expert. In the common

protect all information that the client or client's attorney provides is confidential.¹⁹⁶ Additionally, before retaining an expert, counsel should inquire about the expert's "prior retention or attempted retention and the nature of all disclosures"¹⁹⁷ to enable the hiring attorney to identify the expert's potential involvement with attorneys that may represent parties who are adverse to the litigation at issue. To clarify an expert's obligations, attorneys who seek to create a confidential relationship with an expert "should make this intention unmistakably clear and should confirm it in writing."¹⁹⁸ Furthermore, the contract between attorney and expert should include a confidentiality clause that explains the expert's confidentiality obligation and describes conditions of retention.¹⁹⁹ Specifically, the retention letter "should define the relationship, including its scope and limitations, and should outline the responsibilities of the testifying expert, especially regarding the disclosure of client confidences."²⁰⁰ Mandating that in order to satisfy the first prong of the expert disqualification test expert and client must enter a contractual relationship will enable experts to avoid prohibited or unethical conduct and empower the courts to follow an unambiguous standard in analyzing this prong.

2. Subject Matter Should Be Related

Upon the satisfaction of the first prong, the second prong would determine whether the moving party has revealed to the expert confidential information, the nature of which substantially relates to the subject matter of the litigation at issue. Unless the disclosed information relates to the case at issue, the revised disqualification test would not preclude an expert "hired by one attorney in a particular type of litigation . . . from offering his services to that particular attorney's adversary in an unrelated matter."²⁰¹ The proposed second prong of the test would broadly construe "confidential information" under the work-product test to encompass "an attorney's mental processes reflected in

scenario, which is the focus of this note, the retention of the expert is handled by the attorney on behalf of the client. The practical and legal ramifications of the contract being entered into by the expert and the client, however, would be identical to the contract being created between the expert and the attorney.

¹⁹⁶ See ABA GUIDELINES DRAFT, *supra* note 41, at 6.

¹⁹⁷ Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1250 (E.D. Va. 1991).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ ABA Standing Comm. on Prof'l Conduct, Formal Op. 97-407 (1997).

²⁰¹ Conforti & Eisele, Inc. v. Div. of Bldg. & Constr., Dep't of Treasury, 405 A.2d 487, 492 (N.J. Super. Ct. Law Div. 1979).

‘interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible . . . materials.’²⁰² To protect confidence, attorneys should explicitly label all work-product communications with the expert as confidential attorney work product.²⁰³ To warrant disqualification, however, the disclosed confidential or privileged information must bear on the subject matter of the case at issue. This approach to the second prong of the disqualification test would promote fairness and enable experts to pursue their trade while protecting clients’ confidences.

If a court determines that a relationship of confidence existed between client and expert and confidential information was disclosed, the court should not disqualify the expert unless it determines that the subject matter of the challenged litigation is substantially similar to a prior or concurrent case. Although numerous courts have applied this approach,²⁰⁴ its fundamental inquiry has not gained widespread adoption or incorporation into the traditional disqualification test. As a result, judges have often ignored it. In the context of conflict of interest among attorneys, judges have deemed matters substantially related “when it is likely that confidential information . . . obtained while representing the former client can be used against . . . [that client] in the present representation.”²⁰⁵ Under the proposed expert disqualification test, if the moving party sufficiently demonstrates the existence of a contractual relationship and that the client disclosed to the expert confidential information relating to the instant litigation, then a court should enjoin the expert from testifying against the former client. Where the subject matter of the current and previous cases is sufficiently similar to present a risk of harm to the former client, the disclosure of confidential information relevant to the case at hand “makes it impossible to conceive of a situation in which [the expert] could conscientiously” expunge this knowledge while serving the opposing side.²⁰⁶

Thus, to disqualify an expert under the proposed framework, a court must find that the expert had a contractual agreement with the first client and that the client disclosed confidential information related to the case at hand. Both prongs

²⁰² *People v. Martinez*, 970 P.2d 469, 475 (Colo. 1998) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

²⁰³ *Wang Labs., Inc.*, 762 F. Supp. at 1250.

²⁰⁴ *See supra* notes 104-06, 110-26 and accompanying text.

²⁰⁵ John Leubsdorf, *Conflicts of Interest: Slicing the Hot Potato Doctrine*, 48 SAN DIEGO L. REV. 251, 253 (2011).

²⁰⁶ *Conforti & Eisele, Inc.*, 405 A.2d at 492.

would be weighed equally. The court's finding that one prong is satisfied would not create a presumption in favor of the other. For instance, in *Lacroix v. BIC Corp.*, although it was clear that the expert and his former client entered into a contractual arrangement mandating confidentiality (satisfying the first prong of the proposed test),²⁰⁷ the court properly denied disqualification because the former client did not disclose information directly bearing on the subject matter of the litigation at issue.

Furthermore, judges should refrain from using the often imprecise public policy considerations as a separate prong, because such considerations will be implicitly incorporated into the substance of the test.²⁰⁸ This test will allow experts to pursue their professional calling by enabling them to accept engagements from opposing clients so long as the subject matter of the cases is sufficiently different. At the same time, the proposed test is mindful of the need to protect client confidentiality. This test will not punish experts by virtue of their dual retention by opposing clients; rather, it will disqualify experts because of their receipt of confidential or privileged information that they could use to the detriment of their former client in a closely related case. And unlike in an amorphous balancing test where a judge is free to weigh different factors according to preference, a bright-line rule will provide clarity and predictability to this area of law, which will make the already expensive task of retaining experts that much less costly.

Finally, the proposed expert disqualification test would not displace a party's informed consent.²⁰⁹ When adverse parties become aware of a potential conflict of interest, the parties may discuss the apparent conflict and consent to the arrangement. A party's informed consent should be specified in writing, however, to avoid subsequent motions to disqualify the expert. In *Great Lakes Dredge & Dock Co.*, the court reasoned that since the parties were aware of the relevant relationships with the expert, they were in a position to prevent any improper future disclosures.²¹⁰ Thus, with proper consent, it would be inappropriate for the court to interfere with one party's choice of expert or force an expert to decline employment.

²⁰⁷ *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 201 (D. Mass. 2004).

²⁰⁸ See *infra* Section III.C.

²⁰⁹ For a discussion of informed consent in the attorney disqualification context, see *supra* note 191 and accompanying text.

²¹⁰ *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 339 (N.D. Ill. 1990).

B. Implications of the Proposed Disqualification Test

If both prongs of the proposed disqualification test are satisfied, the court should not consider public policy concerns, because such considerations will be implicitly incorporated into the substance of the test. The proposed first prong of the disqualification test would protect expert witnesses' livelihood and the pursuit of their professional calling. By limiting the inquiry to whether there is a contractual relationship, the test precludes disqualification of experts who received privileged information "in the absence of a formal contractual relationship."²¹¹ If an expert witness "has doubts that she or he wants to be retained, those doubts should be unequivocally expressed" prior to an expert's formal retention.²¹² If those doubts remain unsettled, the expert should decline to accept the engagement. By narrowing the scope of the first prong, however, the burden is on the hiring client or attorney to ensure "that the expert understands the type of relationship which exists[] and the need to keep information disclosed during the course of that relationship confidential."²¹³

Thus, by limiting the notion of a confidential relationship to a contractual one, an expert would not face the prospect of disqualification unless the expert signs a contract. This would eliminate ambiguities in the current definition of a confidential relationship between counsel and expert and provide guidance to litigants, experts, and judges on this subject. The expert would be free to meet and consult with clients, even adverse ones, and weigh the benefits of prospective retention before choosing to enter into a binding contract with a confidentiality clause and establishing a confidential relationship within the meaning of the first prong of the disqualification test. This solution to the first prong of the test would prevent experts from being preemptively disqualified because of ambiguous standards. Remarkably, this would enable experts to predict in advance when they would be disqualified and would protect litigants from retaining an expert they might later be required to replace.

Unlike the current test, which allows for disqualification when an expert receives confidential information completely unrelated to the case at issue, the proposed second prong of the expert disqualification test prevents disqualification unless the disclosed information is so intertwined with the case in question

²¹¹ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 278 (S.D. Ohio 1988).

²¹² *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1250 (E.D. Va. 1991).

²¹³ *Paul*, 123 F.R.D. at 279.

that the information can be used to the detriment of the expert's former client. On one hand, the proposed amendment to the second prong implicitly incorporates public policy considerations against the movant because the rigorous test would require the movant to show more than what is required under the current framework. On the other hand, the proposed test protects the nonmovant from frivolous disqualification motions.

Under the proposed second prong, the movant bears a high burden to show that the expert entered into a contractual relationship and received confidential and privileged information and that the disclosed information substantially relates to the litigation in question. At the same time, the proposed disqualification test eliminates the concern that the movant may form a confidential relationship with an expert solely to prevent adversaries from using the same expert. Even if a litigant goes as far as entering into a contractual relationship with an expert to preclude his or her retention by opposing counsel, the expert will not be disqualified solely because a contractual relationship exists. Without a robust disqualification test, attorneys may use a ploy to “disable potentially troublesome experts merely by retaining them . . . to prevent opposing lawyers from obtaining an expert.”²¹⁴ Under the proposed test, to warrant disqualification, the moving party must show that the client disclosed confidential information to the expert that the expert could exploit to the detriment of the client. The proposed test disables parties from using the disqualification test as a procedural weapon.²¹⁵

C. *Rejecting the Attorney Disqualification Test*

The proposed two-prong disqualification test should be the only test governing conflict of interest disputes between experts and clients. The few courts that have applied the attorney disqualification test to expert witnesses have ignored established precedent and drastically diverged from the principles and purposes of the expert disqualification test. The duties and obligations imparted on attorneys by the Model Rules of Professional Conduct require attorneys to protect their current and former clients' confidential information.²¹⁶ Experts have different roles and serve different functions in the judicial system

²¹⁴ *Wang Labs., Inc.*, 762 F. Supp. at 1248.

²¹⁵ Richmond, *Expert Witness Conflicts*, *supra* note 19, at 928.

²¹⁶ MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2013).

than do attorneys.²¹⁷ Experts do not serve as advocates for their clients,²¹⁸ and thus they do not owe their clients the “undivided loyalty that a lawyer owes his clients.”²¹⁹ Although lawyers work closely with experts and assist them in preparing their trial testimony, it is necessary “to maintain a sharp distinction between their roles.”²²⁰ Specifically, attorneys are zealous advocates for their clients.²²¹ Experts’ role in the judicial process is quite the opposite: experts serve as independent sources of information to assist triers of facts in making sense of technical and complex evidence.²²² Accordingly, to remain independent, experts must stay “detached, if not wholly aloof, from the client’s goals.”²²³ Recognizing this critical distinction, the U.S. District Court for the Southern District of New York expressly “decline[d] to extend the same prophylactic rule governing attorneys to experts.”²²⁴

The application of the attorney-client privilege to expert witnesses ignores critical distinctions between the roles and responsibilities of attorneys and experts and further highlights the need for a uniform disqualification test for experts. The proposed two-prong expert disqualification test appreciates the different roles of attorneys and experts while protecting against the disclosure of clients’ confidences that may be used to those clients’ detriment. Furthermore, the proposed expert disqualification test will facilitate frank communication between clients, attorneys, and experts without imposing the strict obligations imposed on attorneys.

Under the Model Rules of Professional Conduct, lawyers are prohibited from “us[ing] information relating to representation of a client to the disadvantage of the client unless the client gives informed consent.”²²⁵ The proposed expert disqualification test will

²¹⁷ EEOC v. Locals 14 & 15, Int’l Union of Operating Eng’rs, No. 72 Civ. 2498 (VLB), 1981 WL 163, at *4 (S.D.N.Y. Feb. 11, 1981).

²¹⁸ *Id.*

²¹⁹ Richmond, *Expert Witness Conflicts*, *supra* note 19, at 911; see ABA Standing Comm. on Prof’l Conduct, Formal Op. 97-407 (1997) (“A duty to advance a client’s objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert.”).

²²⁰ Lubet, *supra* note 38, at 468.

²²¹ United States *ex rel.* Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 249 (D.N.J. 1997).

²²² *Id.*; Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1250 (E.D. Va. 1991) (“Experts, strictly speaking, are not advocates; they are sources of information and opinions in technical, scientific, medical or other fields of knowledge.”).

²²³ Lubet, *supra* note 38, at 474; see Justin P. Murphy, *Expert Witnesses at Trial: Where Are the Ethics?*, 14 GEO. J. LEGAL ETHICS 217, 230 (2000).

²²⁴ EEOC v. Locals 14 & 15, Int’l Union of Operating Eng’rs, No. 72 Civ. 2498 (VLB), 1981 WL 163, at *5 (S.D.N.Y. Feb. 11, 1981).

²²⁵ MODEL RULES OF PROF’L CONDUCT r. 1.8(b) (AM. BAR ASS’N 2013).

achieve the same goal without overburdening experts with stringent standards that do nothing more than prevent useful expert knowledge from reaching juries. By limiting disqualification to situations where an expert receives confidential information reasonably related to the case in question, the proposed test will preclude experts from using confidential information to the former client's disadvantage, thus alleviating the need to apply the stringent attorney disqualification test.

D. Amending the ABA's Model Rules of Professional Conduct

The proposed test offers a feasible solution to the ambiguity currently plaguing expert disqualification. To avoid the need for judicial intervention, however, the ABA should amend its Model Rules of Professional Conduct to include provisions related to conflicts of interest among expert witnesses. This preventive approach would work in conjunction with the proposed disqualification test. While the proposed test would offer clear and consistent guidelines for resolving disqualification disputes, the amended Model Rules would enable litigants and experts to proactively avoid conflicts of interest that warrant disqualification. The ABA's Task Force on Expert Model Rules of Ethics drafted a cohesive set of rules to govern experts' conduct in "ABA Guidelines for Retention of Experts by Lawyers."²²⁶ But the ABA's House of Delegates withdrew the proposal from consideration, leaving the field of conflicts of interest among experts unaddressed.²²⁷ The ABA should reconsider several provisions from its guidelines in order to provide direction to lawyers when hiring experts, consequently preventing future disqualification motions.²²⁸ The proposed additions to the Model Rules would not distort the current obligations that attorneys have to their clients. Rather, the additions would supply attorneys with preventive measures to avoid potential conflicts of interest leading to disqualification. Although the conduct of attorneys and experts alike have contributed to conflicts of interest, the ABA proposal focuses on the attorney's role and responsibilities since the

²²⁶ ABA GUIDELINES DRAFT, *supra* note 41, at 7.

²²⁷ Robert Ambrogio, *ABA Rejects Proposed Expert Witness Guidelines*, BULLSEYE BLOG (Sept. 18, 2012), <http://www.ims-expertservices.com/bullseye/september-2012/aba-rejects-proposed-expert-witness-guidelines/> [<http://perma.cc/8S9C-RF5Q>].

²²⁸ *Id.*

Model Rules only govern the conduct of attorneys (and not expert witnesses).²²⁹

To prevent the need for disqualification, first, the ABA should adopt the following proposed provision, “Conflicts of Interest”: “Unless the client provides informed consent, the lawyer should take steps to ensure that the expert’s acceptance of the engagement will not create a conflict of interest.”²³⁰ The hiring lawyer should conduct a conflict of interest check to ensure that the expert’s retention will not be “materially limited by the expert’s duties to other clients, the expert’s relationship to third parties, or the expert’s own interests.”²³¹

Second, the ABA should adopt a provision, “Disclosure,” that would state, “Prior to retention of an expert witness, attorneys should require experts to disclose existing relationships with current clients and other parties that may cause an expert’s conflict of interest.”²³² The retaining lawyer should inquire into all potential conflicts to ferret out problematic engagements.²³³ Additionally, attorneys should impose a continuing obligation on the expert to disclose any potential conflicts of interest that may arise during the course of the expert’s retention and until the expert’s engagement is terminated.²³⁴

The proposed “Disclosure” provision would further instruct lawyers, prior to formally retaining an expert, to inquire about all of the witness’s prior testimony given in the last seven years,²³⁵ as well as former engagements where the witness was retained but did not testify. A conflict of interest check that inquires into the expert’s previous formal and prospective employments would enable all parties to avoid inadvertent conflicts warranting disqualification. In *Wang Laboratories, Inc. v. Toshiba Corp.*, the court suggested that prior to retaining an expert, a lawyer should inquire about past retentions, and “if the second retention is effected, the fact should be promptly disclosed to opposing counsel and the matter discussed thoroughly in an effort to resolve the dispute before it is raised in court.”²³⁶ Thus, to avoid the need to

²²⁹ The ABA Model Rules of Professional Conduct establish clear rules for attorney conduct but do not have the force of law. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 33 (3d ed. 2012). State and local bar associations independently draft and publish Rules of Professional Conduct, which must then be adopted by the highest court of the state. *Id.* at 31, 33.

²³⁰ ABA GUIDELINES DRAFT, *supra* note 41, at 7.

²³¹ *Id.*

²³² *See id.* at 7-8.

²³³ Richmond, *Expert Witness Conflicts*, *supra* note 19, at 927.

²³⁴ ABA GUIDELINES DRAFT, *supra* note 41, at 8.

²³⁵ *See id.* at 7.

²³⁶ *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1250 (E.D. Va. 1991).

file a motion to disqualify an expert, a lawyer should specifically instruct the expert witness to disclose prior testimony and engagements that directly bear on the subject matter in question.²³⁷

This requirement would prevent attorneys from discovering a conflict of interest long after the attorney retains the expert. Early discovery of conflicts is especially important because expert witnesses face extensive cross-examination about their qualifications, opinions and sources of such opinions, and prior testimony.²³⁸ Although the Federal Rules of Civil Procedure merely require counsel to disclose to the adverse party all cases in which the expert witness has testified in the past four years,²³⁹ nothing precludes opposing counsel from finding additional cases to discredit the expert. Particularly, experts “may be vulnerable because of inconsistencies in statements on the same subject in testimony in unrelated cases,”²⁴⁰ regardless of when the expert made such statements. In other words, expert witnesses expose themselves to impeachment for prior inconsistent statements even if their opinion has reasonably changed since the time of the prior statement.²⁴¹ If opposing counsel discovers inconsistent positions in the expert’s testimony—especially testimony bearing on the subject matter of the challenged litigation—the adverse party is likely to introduce such statements during cross-examination to discredit the expert’s opinion in the challenged litigation.²⁴² Thus, “to inform the retaining lawyer of materials that may be useful to the other side in cross examination” of the expert, the ABA should expand the expert’s “disclosure obligation[s] to retaining lawyers . . . beyond those required”²⁴³ by the Federal Rules of Civil Procedure.

Finally, the ABA should adopt the proposed “Confidentiality” provision:

The lawyer must assure that the expert treats any information received or work product produced by the expert during an engagement as confidential, and secure an understanding from the expert that he or she shall not disclose any such information except as

²³⁷ *Id.*

²³⁸ LEMPERT ET AL., *supra* note 16, at 1149. The scope of cross-examination of experts often extends beyond what is expected—and permitted—during cross-examination of lay witnesses. *Hope v. Arrowhead & Puritas Waters, Inc.*, 344 P.2d 428, 433 (Cal. Ct. App. 1959).

²³⁹ FED. R. CIV. P. 26(a)(2)(B)(v).

²⁴⁰ LEMPERT ET AL., *supra* note 16, at 1149.

²⁴¹ *Hope*, 344 P.2d at 433.

²⁴² See Ben B. Rubinowitz & Evan Torgan, *Trial Advocacy, Impeachment with a Prior Inconsistent Statement*, N.Y.L.J., Jan. 6, 2006.

²⁴³ ABA GUIDELINES DRAFT, *supra* note 41, at 8.

required by law, as retaining counsel shall determine and advise, or with the consent of the client.²⁴⁴

Of course, a client and expert may agree to include such a provision in the expert's retention letter.²⁴⁵ But, nonetheless, adopting this provision would considerably prevent potential conflicts of interest, thus diminishing the chances that an expert may be subject to a disqualification motion.

If the ABA reconsiders and adopts the aforementioned guidelines, the rules of the expert's profession (if such rules exist) should guide the expert's conduct.²⁴⁶ For instance, some experts in medicine, accounting, and psychotherapy must abide by ethical standards governing their profession.²⁴⁷ But notably absent from such ethical codes are provisions relating to conflicts of interest.²⁴⁸ Thus, to ensure that a stringent standard governs experts' conduct, when a given profession has no code of ethics, or if the ABA guidelines are more lenient than the proposed ethical code in the profession, the more stringent standard should govern experts' behavior.²⁴⁹

²⁴⁴ *Id.* at 5.

²⁴⁵ Lubet, *supra* note 38, at 475.

²⁴⁶ ABA GUIDELINES DRAFT, *supra* note 41, at 2.

²⁴⁷ Lubet, *supra* note 38, at 467 nn. 11-12, 14 (citing CODE OF PROFESSIONAL CONDUCT (Am. Inst. of Certified Pub. Acct. 1997); PRINCIPLES OF MEDICAL ETHICS (Am. Med. Ass'n 1996); ETHICAL PRINCIPLES AND CODE OF CONDUCT § 7 (AM. PSYCHOLOGICAL ASS'N 1992)).

²⁴⁸ Sonenshein & Fitzpatrick, *supra* note 17, at 19 (2013) ("Even if these guidelines can help the testifying expert, they still do little to solve the ethical problems of expert testimony.").

²⁴⁹ ABA GUIDELINES DRAFT, *supra* note 41, at 2. For example, the American Institute of Certified Public Accountants' Code of Professional Conduct (AICPA Code) and the National Society of Professional Engineers' Code of Ethics for Engineers (NSPE Code) provide comprehensive guidelines for expert witnesses belonging to those organizations. The AICPA Code mandates that the Institute's members be "free of conflicts of interest." AICPA Code § 54.01 (2009).

A conflict of interest may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product, or service that could, in the member's professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the member's objectivity. If the member believes that the professional service can be performed with objectivity, and the relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, the rule shall not operate to prohibit the performance of the professional service.

AICPA Code § 102.03. Furthermore, members are forbidden from disclosing clients' confidential information without their consent. AICPA Code § 301.01. The NSPE Code prohibits its members from disclosing "facts, data or information without the prior consent of the client." NSPE Code § II.1.c. "Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services." NSPE Code § II.4.a. "Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the

CONCLUSION

The expert disqualification test currently used in federal and state courts has muddied the traditional test used to resolve conflicts of interest in the expert witness context. The current test is vague, confusing, and provides little in the way of guidance to attorneys and experts alike. Trial courts have struggled to interpret the two-prong disqualification test announced in *Paul v. Rawlings Sporting Goods Co.*,²⁵⁰ which has resulted in unpredictable rulings and inconsistent precedent. The lack of statutory guidance, coupled with judicial discord regarding the appropriate standard for disqualification, threatens the integrity of the judicial system and imposes costly uncertainty on litigants. To prevent further conflict among the courts and confusion among litigants and experts alike, a clear and comprehensive approach to expert disqualification is necessary.

To alleviate the current concerns presented by the disqualification test, this note advocates for modification of the traditional expert disqualification test. The proposed test would provide a narrowly tailored, two-prong inquiry. This test would warrant disqualification of experts only if the expert was in a contractual relationship with the moving party *and* if the moving party disclosed confidential or privileged information that significantly related to the subject matter of the litigation. The proposed two-prong expert disqualification test would eliminate the need for a three-prong test that includes public policy considerations, since this proposal incorporates the courts' various attempts to balance the desire to preserve relevant expert testimony against the need to protect clients' confidentiality. This solution would adequately protect clients' confidentiality while recognizing the different roles of attorneys and experts.

In addition to the proposed two-prong approach to expert disqualification, this note also advocates for amendments to the Model Rules of Professional Conduct. These amendments would bring consistency and clarity to the current Rules and would work in tandem with the proposed expert disqualification test to prevent conflicts of interest. The amended Rules would serve as a preventive measure and one that would make certain that attorneys and experts have meaningful guidance to help shape

same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties." NSPE Code § II.4.b.

²⁵⁰ *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988).

their behavior, thus decreasing the overall frequency of, and need for, disqualification proceedings.

Due to the proliferation of expert testimony in civil litigation, without a clear and strict standard governing the disqualification of experts, the integrity of the judicial system will remain at stake, and parties to litigation will be challenged to find competent and conflict-free expert witnesses. These proposed new rules of war in the battle of the experts will provide certainty to an area of litigation that has thus far been marred by costly uncertainty.

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