

# Ethical Duties and Standards in Disqualifying, Retaining, and Communicating with Expert Witnesses

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## TIP

Before retaining an expert, lawyers need to research an expert's background, the expert's former clients, and the expert's relationship with the opposing party to avoid conflict of interest problems.

Expert testimony often proves essential to a successful claim or defense in complex litigation. The growing importance of this area of procedural and evidence law has prompted continual revisions to federal rules and affects counsel's ethical duties under the rules of professional conduct. Ethical standards not only attach to counsel's conduct in retaining or communicating with an expert witness, but are also important when counsel seeks to disqualify or exclude an expert. Within these distinct areas of case law, a failure to adhere to ethical guidelines can result in a potentially outcome-determinative sanction for a litigant: exclusion of the expert's testimony from trial.

## **Daubert Challenges: Striking Expert Testimony**

The most frequently litigated issues related to expert testimony involve its admissibility, so it is not surprising that motions to exclude expert testimony are one area where ethical concerns frequently arise. The standard device for excluding an adverse expert in the federal system is a "Daubert challenge," named for the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>1</sup> *Daubert* set forth a new analysis, whereby the courts are to serve as gatekeepers and exclude expert testimony based on unreliable or improperly applied scientific methods. Many states, however, continue to employ the prior generally used standard, set forth in 1923 by the D.C. Circuit in *Frye v. United States*, which discusses whether a given scientific method is generally accepted as a basis for admissibility.<sup>2</sup> As of 2013, 34 states have expressly adopted the *Daubert* standard through legislation or judicial decision.<sup>3</sup>

The ethical principles governing a *Daubert* or *Frye* challenge to the admissibility of expert testimony are generally the same as with any other motion before a court. In federal practice, a *Daubert* challenge will be subject to the strictures of both Federal Rule of Civil Procedure 11, which prohibits frivolous motions and pleadings, and the background ethics rules pertaining to communications with the tri-

bunal. The Model Rules of Professional Conduct, particularly Rule 3.3—the duty of candid, honest communications to the court—would apply in any *Daubert* challenge, and to any showing by the non-movant in defense of the expert testimony.

If a party were to set forth a *Daubert* motion in violation of Rule 11, the possible sanction by the court could extend to striking the motion, in effect, preventing a challenge to the admissibility of the expert's testimony.<sup>4</sup> In this sense, Rule 11 provides a relatively modest hurdle when the moving party is relying on claimed weaknesses in the expert's methodology or the scientific principles which underlie that methodology. The Rule 11 standard is essentially one of reasonableness—did a party have a reasonable factual or legal basis for bringing the motion at the time it was filed?<sup>5</sup> This requires a certain amount of pre-motion factual investigation or research.<sup>6</sup> For example, a challenge to the validity of an adverse expert's methodology would have to be rooted in the relevant standards for that profession or industry. Note, however, that Rule 11 does not provide much of a barrier to raising a *Daubert* or *Frye* challenge, as it only requires a reasonable basis to bring the motion rather than a special or heightened standard for claims about experts or scientific testimony.

One area where Rule 11 and *Daubert* intersect, however, is a situation where an expert's opinion changes. A *Daubert* hearing is premised on testing the validity of the expert's methods and conclusions, and thus a change in conclusions that would prompt a party to withdraw the expert cannot be disclosed too late in the process. For example, in a 2010 decision, the U.S. District Court for the Western District of Louisiana imposed Rule 11 sanctions on the plaintiff's counsel for neglecting to withdraw their expert until the day of the *Daubert* hearing, after the expert had recanted his initial conclusions at an earlier deposition.<sup>7</sup> *Daubert* proceedings thus present a specific scenario where a failure to update opposing counsel and the court could make Rule 11 sanctions more likely to occur, given the amount of preparation involved in challenging the validity of an expert's methods or opinions.

*Daubert* and *Frye* are not the only means by which a litigant can bar an expert's testimony. Additional bases for disqualifying an expert are available, which generally turn on either conflict-of-interest principles or contracts between the parties.

### **Alternative Methods for Disqualifying an Expert**

Even though a litigant has little chance of successfully challenging the scientific reliability of an expert's testimony, this does not necessarily mean the expert's testimony will be heard by a jury. A party may seek to disqualify an expert using either a federal common-law doctrine based on an adverse expert's prior relationship with that party, or by invoking the opposing party's failures to comply with discovery rules, in particular Rule 26 and Rule 35 of the Federal Rules of Civil Procedure.

### **Expert Disqualification Doctrine: A Federal Common-Law Approach**

Of the alternatives to *Daubert* for disqualifying an expert, one that is frequently litigated involves a conflict-of-interest analysis that employs similar reasoning to the American Bar Association's Model Rules of Professional Conduct (Model Rules). Despite a relative lack of appellate court comment on or approval of this doctrine, federal trial courts have invoked their inherent power to safeguard the judicial system to strike experts who have received confidential information from opposing parties in litigation, a situation similar to when an attorney has conflicting duties to prior and current clients.<sup>8</sup> In

both its reasoning and impact, this doctrine functions much like the Model Rules governing imputed disqualification of an attorney's firm when a conflict of interest disqualifies that attorney from participating in a particular case.

**Disqualification doctrine standard.** The disqualification doctrine flows from the basic premise that an expert witness cannot provide testimony in a trial when his or her prior relationship with the opposing side resulted in access to that party's confidential information about disputed issues in the case. When the retained expert had a prior confidential relationship with the opposing party, that prior relationship results in a conflict of interest, which the courts have remedied by disqualifying the expert. The doctrine turns on the application of a two-part inquiry, commonly quoted from *Wang Laboratories, Inc. v. Toshiba Corp.*: "First, was it objectively reasonable for the first party who claims to have retained the [expert] . . . to conclude that a confidential relationship existed? Second, was any confidential or privileged information disclosed by the first party to the [expert]?"<sup>9</sup>

A threshold issue, then, is defining the interactions of the party and the expert prior to the expert's hiring by an adverse party. *Wang Laboratories* appeared to set forth a "bright line" whereby, once it is established that relevant confidential information had been passed to the expert during the prior relationship, that expert must be disqualified.<sup>10</sup> Subsequent applications of the test, however, have employed a more flexible analysis that also encompasses public policy considerations, such as unfairly burdening a specific class of experts by permitting parties to strategically disqualify unfavorable experts in a small scientific community.<sup>11</sup> One could expect this argument to apply with particular force when a court is considering experts from a niche scientific field, such as specialized types of genetic research.

First, courts have required indicia of a confidential relationship between a party and the expert that exceeds a mere consultation. To make this determination, courts look at factors such as "whether there was a formal confidentiality agreement; whether the expert was retained; the number of times the expert met with the attorney; . . . whether the attorney provided documents to the expert; whether the expert received a fee; and whether the expert formed any specific ideas about the case."<sup>12</sup>

Second, confidential information allegedly provided to the expert by the moving party must be identified with specificity: there is no presumption that the expert received disqualifying information during the prior relationship.<sup>13</sup> In considering this second element, the question of whether information is sufficiently "confidential" has sometimes been narrowed to whether it was related specifically to litigation or was privileged.<sup>14</sup> Other courts have carved out large exceptions that cannot serve as bases for disqualification, such as transmission of purely technical information or information that would be discoverable in litigation even in the absence of the expert's current relationship with the adverse party.<sup>15</sup> Once the movant demonstrates that confidential information relevant to the current suit has been transferred, courts have proven reluctant to second-guess the movant's claims and independently assess the value of the information provided to the expert, erring on the side of disqualification.<sup>16</sup>

**Model Rules' parallel reasoning to disqualification doctrine.** A comparison between the disqualification doctrine and attorney ethical standards suggests that the Model Rules provide a useful ethics-based source for arguments regarding the disqualification of experts. A natural starting point is to consider how the Model Rules govern both the disqualification of individual attorneys due to conflicts

of interest between current and former clients and the extent to which that disqualification is imputed to the firm. In comparison, the expert disqualification doctrine resembles the rules governing disqualification of firms, rather than individual attorneys, because it is organized around a showing of actual harm through the transmission of confidential information.

The Model Rules are far more likely to lead to the disqualification of an individual lawyer than the entire firm that employs that lawyer. Model Rule 1.9 prevents an attorney from representing a client when his or her prior representation of the adverse party took place in “the same or a substantially related matter.”<sup>17</sup> Rule 1.9 limits this principle as applied to firms, however. If the current client’s interests are materially adverse to a client of the attorney’s former firm and the current dispute is the same or a substantially related matter, the attorney is only disqualified if he or she gained confidential information from that former client.<sup>18</sup> The comments to Rule 1.9 specifically identify a scenario that would have a clear expert-witness analogue: when an attorney’s prior representation of a client gave him or her access to a large volume of private financial information, the rule is construed as preventing that same attorney from representing that client’s spouse in a suit for divorce.<sup>19</sup> The logical equivalent of this in an expert witness context would be, for example, a scientific expert who was exposed to a large volume of information about how a company researched and obtained its patents, who then later assists a plaintiff in challenging those patents’ validity.

The Model Rules address the general question of firm disqualification in Rule 1.10, and here again limit disqualification based on concerns about actual transmission of confidential information, not the mere possibility of such transmission. Rule 1.10 touches on this concern in two ways: screening procedures and an actual knowledge standard akin to the one discussed above in Rule 1.9. First, a firm can avoid being disqualified, even if one of its attorneys now represents a party adverse to one of the attorney’s former clients, if the firm effectively isolates the attorney from any work done on behalf of the current client.<sup>20</sup> Here the goal is preventative: the rules seek to create a mechanism that will prevent the use or transmission of confidential client information. Second, once an attorney leaves the firm, the firm is able to represent clients with interests adverse to that attorney’s client while at the firm, provided that no remaining attorney possesses confidential information about the former client.<sup>21</sup> The comments to Rule 1.9 suggest that certain facts about how the firm operates should give rise to inferences about whether remaining attorneys possess confidential information, such as who has access to client files or attended meetings where the matter was discussed within the firm.<sup>22</sup>

In this way, the Model Rules employ a more exacting standard for individual attorneys and a somewhat more relaxed standard for firms, and these ethical constraints have parallels in the bases for expert disqualification. This observation has doctrinal implications for the disqualification of experts. First, it may serve as a basis for arguing in favor of screening procedures in cases where multiple experts from the same consulting firm appear on opposing sides in litigation or in different, albeit closely related, cases. The Eastern District of New York has endorsed such an approach.<sup>23</sup> Second, the inferences that are employed in analyzing whether attorneys within a firm are likely to possess confidential information might also be valid inferences to draw in an expert disqualification motion. For example, when an expert had a certain degree of involvement with litigation-related discussions or preparation—i.e., the expert was in a position to acquire confidential information—it would therefore be proper to argue for at least a rebuttable presumption that the expert received confidential data even if the data that the expert received cannot now be identified with specificity.

**Doctrine in application.** There are two situations that generally give rise to a motion to disqualify an expert based on conflicts of interest. The first is when the expert was previously retained by the adverse party and switched sides during litigation or immediately prior to litigation. The second common situation is when the expert was retained by the adverse party in a prior matter or for another purpose prior to litigation, such that relevant confidential information is now in the expert's possession.

Motions to disqualify the expert are most successful in cases where the expert switched sides during the existence of the dispute. A straightforward example of this scenario arose in *In re Diet Drugs Products Liability Litigation*.<sup>24</sup> Defense counsel for the drug manufacturers Wyeth Inc. and Wyeth Pharmaceuticals initially contacted a potential expert witness and retained his services for evaluating issues in the case, which resulted in multiple meetings with the partner supervising the litigation team and conversations regarding the defense's theories for handling the diet drug litigation. The expert also signed an agreement stating that his consulting work would be exclusively for the Wyeth companies. The defendant companies then learned that he had been consulted by the plaintiff's counsel and were notified that he would be appearing as an expert witness against the defendants in the plaintiff's products liability suit.<sup>25</sup>

The court easily found that disqualification was necessary on these facts. In applying the two-factor test, the court found that the combination of the extensive meetings with defense counsel and the signed consultancy agreement made it clear that confidential information would be exchanged as part of the relationship and that confidential, litigation-related information had been disclosed to the expert. Accordingly, the court held that the expert could not serve as an expert witness for the plaintiff and could not have further contact with the plaintiff's counsel.<sup>26</sup>

In contrast, motions to disqualify an expert under this doctrine will often fail when the connection between the movant and the expert is too attenuated, or where no side-switching has taken place. For example, in *Allstate Insurance Co. v. Electrolux Home Products, Inc.*, the trial court in the Northern District of Illinois denied a motion to disqualify an expert in part because his prior access to confidential information stemmed from his testimony on behalf of a third party adverse to the movant in another proceeding.<sup>27</sup> In the absence of a prior direct relationship between the expert witness and the movant, the appropriate remedy was to ensure his present reports made no reference to any information obtained during the earlier case.<sup>28</sup>

Similarly, courts have declined to disqualify non-side-switching experts when the nature of the information disclosed is insufficiently related to the present dispute. The dividing line is difficult to draw, but two decisions, *Bone Care International, LLC v. Pentech Pharmaceuticals, Inc.*, and *Rhodes v. E.I. DuPont de Nemours & Co.*, attempt to do so. In *Bone Care International*, the Northern District of Illinois concluded that having the same experts testify both for and against the same company in different trials was permissible, despite the apparent conflict, because the patented technologies at issue involved very different, highly specific information about the human genome.<sup>29</sup> On the other hand, in *Rhodes*, the Southern District of West Virginia disqualified an expert because of prior access to information about whether a particular chemical was toxic to humans. Because the current litigation involved the

same chemical and the same defendant, the court concluded it was as though the expert was involved “in the same case.”<sup>30</sup> The less relevant the information the expert received about the movant, the less likely it is that the court will disqualify the expert.<sup>31</sup>

### **Contractual Theories of Expert Disqualification**

Another method for disqualifying an expert can be described as a “breach of contract” theory for preventing testimony based on noncompliance with court-approved rules for expert examinations or evaluations. This approach to removing an expert will principally arise in situations where the parties negotiate a medical examination of a party’s mental or physical condition under Federal Rule of Civil Procedure 35, and either the court approves the limits set by the parties, or the parties proceed without initially involving the court. The resulting terms can be characterized as a binding contract, and a subsequent violation of those terms by the party seeking the examination in turn becomes a breach of that contract. Rule 35 specifically provides that the examination must produce either a written report or some other record, if the parties so agree, which permits the parties to contract without a court order for the conditions under which a medical examination of a party may take place.<sup>32</sup> Further, as noted above, Rule 26 requires disclosure of the material upon which an expert bases his or her opinions.<sup>33</sup> Thus, a departure from the agreed-upon terms that prevents production under Rule 26 constitutes a violation of discovery rules. The resulting remedy—preventing the introduction of the expert’s testimony or report at trial—then falls within the court’s power to sanction violations of discovery rules under Rule 37.<sup>34</sup> Additionally, Rule 35 itself provides a basis to strike an expert’s testimony when the report required by Rule 35 is not produced.<sup>35</sup>

A case study of this principle at work arose in *Zelaya v. UNICCO Service Co.*<sup>36</sup> The defendant sought an independent medical examination of the plaintiff, who was alleging severe emotional distress as a result of a supervisor’s repeated sexual harassment during her pregnancy. The parties agreed, in order to avoid the need for the defendant to obtain a court order, that the psychiatric examination would be subject to the following conditions: the examination would be of similar scope and duration as Zelaya’s experts’ examination, which was six hours; that the defendants would disclose the name of the person administering the examination; that only accepted validated tests, published by a recognized publisher, would be administered; and that most importantly, in lieu of the plaintiff’s counsel being present, the session would be recorded and the tapes subsequently produced pursuant to the agreement and Rule 26.<sup>37</sup> The defendant retained a third-party expert and a third-party recording service, but the resulting examination did not conform to the agreement. The initial six-hour session ran over, resulting in a second unauthorized session the following day. Not only was the second session not recorded, but the first day’s session was not recorded due to a problem with the recording equipment. As a result, the defendant could not produce the audiotapes as required by the agreement, and there was no objective record of the plaintiff’s conversations with the psychiatrist. The latter point became particularly important as the plaintiff disputed the psychiatrist’s description of the meeting with her.

Based on this breach of the agreement, the plaintiff moved to strike the expert’s testimony and any resulting reports based on the examination of the plaintiff. The court granted the motion, and specifically relied on the contractual nature of a Rule 35 analysis. In particular, the court concluded that when “the parties agree otherwise,” Rule 35 requires additional disclosures beyond its default terms—a written report and accompanying notes or documents. Perhaps most strikingly, the court did not excuse the defendant or its expert simply because the lack of a record was the result of a third party’s

negligence. The court thus invoked both the contractual nature of Rule 35 and the discovery duties of Rule 26 as bases for striking the psychiatrist as an expert and barring her report or testimony from any subsequent proceedings.<sup>38</sup>

The broader lesson of *Zelaya* is that medical examinations afford adverse parties a rare opportunity to evaluate the claimed bases for an expert's opinion against what materials the expert's examination actually produces. Using the contractual nature of a Rule 35 agreement in lieu of a court order, a party can use a "breach" that results from a failure to produce a required report or record as a basis to strike an expert, even in the absence of another clear Rule 26 violation.

### **Communicating with Adverse Experts**

Counsel should generally avoid attempting to communicate with the opposing party's expert witnesses, because ex parte communications outside of the discovery process have been held to be unethical and subject to court sanction. Although the textual basis for a prohibition on ex parte contact with adverse experts, formerly part of Rule 26, appears to have been removed or modified by amendments to the rule, federal courts have continued to prohibit ex parte contact.

The Ninth Circuit Court of Appeals concluded in 1980, in *Campbell Industries v. M/V Gemini*, that ex parte contact with an opposing party's expert witness violated Rule 26, based on a specific reading of the rule's text. The court looked to the then-effective text of the rule, which stated that discovery on expert witnesses may "only" be taken using interrogatories, and with leave of the court, depositions.<sup>39</sup> Based on such a construction, any contact with an adverse expert outside of Rule 26's strictures violated the rule and opened that party to possible sanctions.<sup>40</sup> This analysis has an ethics rule component as well: Model Rule 3.4(c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal."<sup>41</sup> In the decades that have followed, this reading of Rule 26 has been expressly accepted by several other courts outside of the Ninth Circuit and even prompted an American Bar Association formal opinion in 1993.<sup>42</sup>

Yet during the intervening decades, the text of the rule has been revised, and those revisions appear to undermine the court's reasoning in *Campbell Industries*. In particular, the language specifying the "only" methods of conducting discovery was removed in 1993, and replaced by language that permits the taking of depositions of expert witnesses after the filing of an expert report. The rule therefore abandons the pre-1993 standard, which required leave of the tribunal.<sup>43</sup> Nonetheless, in 2006 in *Carlson v. Monaco Coach Corp.*, the Eastern District of California reaffirmed that the Ninth Circuit's decisions and subsequent case law stand for the proposition that ex parte contact with an adverse expert is a "flagrant violation" of Rule 26 and thus also a violation of counsel's ethical responsibilities to follow the rules of the tribunal.<sup>44</sup>

Perhaps the simplest reading of the more recent precedent, such as *Carlson*, is that courts have concluded that the Ninth Circuit's reading of Rule 26 does not hinge on an enumerated list of permissible discovery devices or the use of the term "only," but rather on the need to safeguard the processes that control access to expert witnesses. The *Carlson* court expressed precisely this concern: "Moreover, the careful scheduling of experts' disclosures and discovery by the district court would be for naught if the parties could back door these provisions with informal contacts of an adversary's experts."<sup>45</sup>

In light of courts' continuing invocation of this rule and tendency to couch it in ethical terms as well as a basis for discovery sanctions, best practices dictate that counsel should refrain from contacting adverse expert witnesses during discovery. Although some states appear to permit such contact under their respective ethics rules,<sup>46</sup> in the federal system at least, this prohibition appears to have outlived its original statutory basis.

### **Expert Witness Fees**

Another area in which ethics concerns affect expert witness preparation and testimony is the compensation of the expert for his or her time and work product. These concerns arise in two ways: whether payment of the expert can be tied to the outcome of the case, and how the burden of paying the expert for a deposition is allocated between the plaintiff and the defendant.

**Payment of expert tied to outcome.** There is a broad consensus that contingency fee payments to experts are unethical because they compromise the expert's objectivity.<sup>47</sup> Individual jurisdictions, however, do not necessarily follow this rule when the fee differs from a classic contingency fee—i.e., a direct link between recovery at trial and the amount of payment. Notably, the District of Columbia permits a “success fee” for expert witnesses paid upon victory at trial, so long as the amount of the fee is not a percentage of the total recovery.<sup>48</sup> Another exception to this principle is when the expert's payment is indirect. For example, in *Webb v. Hyman*, the U.S. District Court for the District of Columbia concluded that even though a treating physician who testified as an expert would be paid from the proceeds of the plaintiff's recovery, the absence of any fee agreement with the plaintiff's counsel and lack of expectation of payment on the expert's part in originally treating the plaintiff took the case outside of the prohibition.<sup>49</sup> Perhaps most important to litigants, the remedy for a violation of this ethics rule is not necessarily excluding the expert's testimony.<sup>50</sup>

**Allocating costs of expert depositions between parties.** As to the second issue, the Federal Rules of Civil Procedure provide some guidance, but the rules are far from clear. The general rule is found in Rule 26, which provides that when a party seeks discovery from an adverse expert witness, that party must pay the expert “a reasonable fee” for time and effort spent responding to discovery, whether in a deposition or by answering interrogatories.<sup>51</sup> A particular problem arises, however, when an expert does not charge the party who retained him or her for time expended on litigation, but does charge the adverse party for time spent responding to discovery, a scenario that can be described as “fee favoritism.” When the expert will not be called at trial, such that the expert's work is purely for case preparation, this would not necessarily present a problem. Rule 26 already contemplates allocating the cost of obtaining discovery to the adverse party and even requires that the retaining party be reimbursed for fees it expended in hiring the expert.<sup>52</sup>

This problem does rear its head, however, when the court rules on what is a “reasonable fee” to award to the expert for his or her time spent responding to discovery. In several decisions, courts have looked to what the expert charged the retaining party or other litigants for his or her time and refused to award the full amount of fees claimed when a clear disparity existed. For example, in perhaps the most widely cited opinion for assessing the appropriate fee owed to an adverse party's expert, *Jochims v. Isuzu Motors, Ltd.*, the Southern District of Iowa refused to award an expert \$500 per hour, based in part on the fact that his highest hourly rate for work performed for the plaintiff's counsel was \$250.<sup>53</sup> Yet at the same time, a court generally cannot refuse to award an expert a fee of some amount for time

spent responding to the adverse party's discovery requests.<sup>54</sup> The *Jochims* rationale would seem to require that the larger the disparity in charges to the retaining party and the party seeking discovery, the greater the reduction in the court's award of fees to the expert.

### Conclusion

Retaining, communicating with, and disqualifying expert witnesses present the litigator with a host of interconnected ethical responsibilities. Despite changes to the formal rules of procedure or evidence, these core ethical responsibilities remain essentially the same. As a primary example, although the text of Federal Rule of Civil Procedure 26 has been revised over the past two decades, courts continue to enforce a prohibition on ex parte contact with adverse expert witnesses, and the common-law doctrine of expert witness disqualification continues to develop independently from formal rulemaking or statutory amendment. The essential principles for navigating the above-mentioned rules continue to be the following: Conclusively determine on whose behalf your expert has testified previously; exercise diligence and candor with respect to any factual claims about your expert or the opposing side's expert; avoid improper contact with or influence upon any adverse experts; and disclose fully your financial arrangement with any expert witnesses whose testimony you intend to offer.

### Notes

1. 509 U.S. 579 (1993).
2. 293 F. 1013 (D.C. Cir. 1923).
3. Currently, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Vermont, West Virginia, Wisconsin, and Wyoming follow *Daubert*. See, e.g., Robert Ambrogi, *Two More States Adopt Daubert, Bringing Total to 32*, BULLSEYE (Oct. 7, 2011), [www.ims-expertservices.com/blog/2011/two-more-states-adopt-daubert-bringing-total-to-32/](http://www.ims-expertservices.com/blog/2011/two-more-states-adopt-daubert-bringing-total-to-32/); *The "Daubert Statute,"* ALA. ST. BAR, [www.alabar.org/publications/Alabama-Version-of-Daubert.pdf](http://www.alabar.org/publications/Alabama-Version-of-Daubert.pdf) (last visited September 24, 2013); Maggie Tamburro, *Florida Says "Good-Bye Frye" & "Hello Daubert"—Who's Next?*, BULLSEYE (July 1, 2013), [www.ims-expertservices.com/blog/2013/fl-says-good-bye-frye-hello-daubert/](http://www.ims-expertservices.com/blog/2013/fl-says-good-bye-frye-hello-daubert/). There is an ongoing division among commentators as to the exact count, however, because it is possible for a state to implicitly adopt *Daubert* without using the language of the federal rules or citing the decision.
4. FED. R. CIV. P. 11(c).
5. FED. R. CIV. P. 11 advisory committee's note to 1993 amend.
6. *Id.*
7. *Rollins v. St. Jude Med., Inc.*, No. 08-0387, 2010 WL 3790654, at \*3-6 (W.D. La. Aug. 25, 2010).
8. For a helpful overview of the doctrine and the different strands of case law that have employed it, see Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195 (2004).
9. 762 F. Supp. 1246, 1248 (E.D. Va. 1991).
10. See *id.*; see also *Rhodes v. E.I. DuPont de Nemours & Co.*, 558 F. Supp. 2d 660, 664-65 (S.D. W. Va. 2008) (discussing the lack of clarity surrounding *Wang's* formulation of the standard).
11. See, e.g., *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994).
12. *Veazey v. Hubbard*, No. 08-00293 HG-LEK, 2008 WL 5188847, at \*3 (D. Haw. Dec. 11, 2008).

13. *See, e.g.*, *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 267 F.R.D. 9, 12–13 (D.D.C. 2010); *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1087 (C.D. Cal. 2001).
14. *United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.*, 994 F. Supp. 244, 251 (D.N.J. 1997); *Butler-Tulio v. Scroggins*, 774 A.2d 1209, 1216 (Md. Ct. Spec. App. 2001) (basing analysis in part on whether physician expert’s treatment of party was subject to a physician-patient privilege and concluding that in the absence of such a privilege, disqualification was not warranted).
15. *See, e.g.*, *Palmer v. Ozbek*, 144 F.R.D. 66, 68 (D. Md. 1992); *Mayer v. Dell*, 139 F.R.D. 1, 4 (D.D.C. 1991).
16. *See, e.g.*, *Theriot v. Parish of Jefferson*, No. 95-2453, 1996 WL 392149, at \*2 (E.D. La. July 8, 1996).
17. MODEL RULES OF PROF’L CONDUCT R. 1.9(a).
18. *Id.* at R. 1.9(b).
19. *Id.* at R. 1.9 cmt. [3].
20. *Id.* at R. 1.10(a)(2).
21. *Id.* at R. 1.10(b).
22. *Id.* at R. 1.9 cmt. [6].
23. *See In re Ambassador Grp., Inc., Litig.*, 879 F. Supp. 237, 245 (E.D.N.Y. 1994).
24. No. 07-20144, 2009 WL 1886131 (E.D. Pa. 2009).
25. *Id.* at \*3–4.
26. *Id.*
27. 840 F. Supp. 2d 1072, 1084 (N.D. Ill. 2012).
28. *Id.*
29. *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).
30. *Rhodes v. E.I. DuPont de Nemours & Co.*, 558 F. Supp. 2d 660, 670–71 (S.D. W. Va. 2008).
31. *See, e.g.*, *Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C.*, 202 F.R.D. 426 (E.D. Pa. 2001); *Viskase Corp. v. W.R. Grace & Co.*, No. 90 C 7515, 1992 WL 13679, at \*2 (N.D. Ill. Jan. 24, 1992).
32. FED. R. CIV. P. 35.
33. FED. R. CIV. P. 26(a)(2)(B)(ii).
34. *See, e.g.*, FED. R. CIV. P. 37(c)(1).
35. FED. R. CIV. P. 35(b)(5).
36. Memorandum and Order, *Zelaya v. UNICCO Serv. Co.*, No. 07-2311 (RCL) (D.D.C. Aug. 20, 2010), ECF No. 68.
37. *See* FED. R. CIV. P. 37(c)(1).
38. *Zelaya*, No. 07-2311 (RCL), slip op. at 3–5.
39. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 26–27 (9th Cir. 1980).
40. *See, e.g.*, *Erickson v. Newmar Corp.*, 87 F.3d 298, 301–02 (9th Cir. 1996).
41. MODEL RULES OF PROF’L CONDUCT R. 3.4(c).
42. *See, e.g.*, *Sanderson v. Boddie-Noell Enters., Inc.*, 227 F.R.D. 448, 452–53 (E.D. Va. 2005); *Sewell v. Md. Dep’t of Transp.*, 206 F.R.D. 545, 547 (D. Md. 2002); *see also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-378 (1993).
43. FED. R. CIV. P. 26(b)(4) advisory committee’s note to 1993 amend.
44. No. CIV. S-05-181 LKK/GGH, 2006 WL 1716400, at \*4 (E.D. Cal. June 21, 2006).
45. *Id.*

46. Oregon, for example, has distinguished between civil and criminal discovery in the ethics rules governing *ex parte* contact with an adverse expert. *Compare* Or. State Bar, Formal Op. 2005-131 (permitting *ex parte* contact with expert in criminal law discovery), *with* Or. State Bar, Formal Op. 2005-132 (looking to the Ninth Circuit’s decisions and concluding that a similar prohibition applies under Oregon’s rules in civil cases).

47. MICHAEL H. GRAHAM, 5 HANDBOOK OF FEDERAL EVIDENCE § 702:3 (7th ed. 2011) (“It is improper for an expert to be compensated on a contingent fee basis. In responding to arguments based upon right to access to courts, the prohibition has been upheld on the ground that the inducement placed upon the expert by a contingent fee to tailor his testimony is too great.”).

48. *See* D.C. RULES OF PROF’L CONDUCT R. 3.4 cmt. [8].

49. 861 F. Supp. 1094, 1115 n.4 (D.D.C. 1994).

50. *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir. 1988) (“[Although it] is unethical for a lawyer to employ an expert witness on a contingent-fee basis, . . . it does not follow that evidence obtained in violation of the rule is inadmissible.” (citation omitted)).

51. FED. R. CIV. P. 26(b)(4)(E).

52. *Id.*

53. 141 F.R.D. 493, 497 (S.D. Iowa 1992); *see also* *Dish Network, LLC v. Sonicview USA, Inc.*, No. 09-1553-L(WVG), 2011 WL 4862499 (S.D. Cal. Oct. 13, 2011); *Anthony v. Abbott Labs.*, 106 F.R.D. 461, 465 (D.R.I. 1985).

54. *See, e.g., United States v. City of Twin Falls*, 806 F.2d 862, 879 (9th Cir. 1986).