

WHEN SHOULD EDISCOVERY VENDORS BE DISQUALIFIED?

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Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.**

I. INTRODUCTION

As a general proposition, courts have inherent authority to disqualify parties and their representatives and consultants from participating in litigation.¹ Attorneys, expert witnesses, and litigation consultants may face disqualification motions in the event of a conflict of interest.² With the rapid expansion of the eDiscovery industry,³ however, a new question has arisen: If an eDiscovery vendor has a potential conflict of interest, when should it be disqualified? What standard should apply?

To put the problem in perspective, imagine that you manage discovery at a law firm representing the defendant in a contentious wage and hour dispute, and you recently hired an eDiscovery vendor to assist you in scanning and coding

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** *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.).

1. Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 202 (2004); see also *In re BellSouth Corp.*, 334 F.3d 941, 959 (11th Cir. 2003) (noting the court's inherent power to disqualify); *Koch Refining Co. v. Boudreaux M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996) (noting that courts have the inherent power to disqualify experts); *Coffelt v. Shell*, 577 F.2d 30, 32 (8th Cir. 1978) (noting the court's inherent power to disqualify); *Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660, 664 (S.D.W. Va. 2008) ("A federal court has the inherent power to disqualify experts."); *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993) (noting "the court's inherent power to disqualify experts"); *State Emp. Relations Bd. v. Cleveland*, 665 N.E.2d 693, 698 (Ohio Ct. App. 1995) (noting "the inherent authority of dismissal or disqualification from a case if an attorney cannot, or will not, comply with the Code of Professional Responsibility when representing a client").

2. See *Roosevelt Irrigation Dist. v. Salt River Project Agric. Improvement & Power Dist.*, 810 F. Supp. 2d 929, 986 (D. Ariz. 2011) (disqualifying attorney); *Rhodes*, 558 F. Supp. 2d at 672 (disqualifying expert); *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 592 (D. Minn. 1986) (disqualifying consultant laboratory).

3. See THE RADICATI GROUP, INC., EDISCOVERY MARKET, 2013-2017 4 (Sarah Radacati ed., 2013) (noting a projected growth rate over 28% for four year period between 2013-2017).

your client's documents, at a cost of \$50,000. Two months later, you receive notice from your vendor that the plaintiff's counsel has requested its services in connection with the same case. How would you react? Would you expect a court to disqualify the vendor if it accepted the engagement? This scenario occurred in *Gordon v. Kaleida Health*,⁴ resulting in the first judicial order squarely addressing vendor disqualification. The *Kaleida Health* court ultimately denied the defendant's motion to disqualify, allowing the vendor to continue participating in the case.⁵

Part II of this Article will discuss and critically examine the *Kaleida Health* order, which currently stands as the *de facto* leading authority on vendor disqualification. Part III will compare two existing standards for disqualification: rules applying to experts or consultants and rules applying to attorneys. Part IV of this Article will argue in favor of courts adopting key features of the law of attorney disqualification, especially the presumption of shared confidential communication and imputation of shared confidences, when considering whether to disqualify vendors. Part V, the conclusion, will synthesize the lessons learned from *Kaleida Health* with the arguments for adopting a less permissive disqualification standard for vendors.

II. DISCUSSION OF *GORDON V. KALEIDA HEALTH*

Kaleida Health arose out of a now commonplace dispute between a hospital and its hourly employees under the Fair Labor Standards Act ("FLSA").⁶ The plaintiffs, a group of hourly employees, sued the defendant, Kaleida Health, a regional hospital system, claiming they were not paid for work time during meal breaks, shift preparation, and required training, in violation of FLSA.⁷

Kaleida Health's attorneys, Nixon Peabody, LLP ("Nixon"), hired D4 Discovery ("D4"), an eDiscovery vendor, to scan and code documents for use in the litigation.⁸ In connection with the work, Nixon and D4 executed a confidentiality agreement.⁹ D4 was to "objectively code" the documents using categories based on characteristics of the document, such as the author and the

4. *Gordon v. Kaleida Health*, No. 08-CV-378S(F), 2013 WL 2250506, at *1-4 (W.D.N.Y. May 21, 2013) (order).

5. *Id.* at *28.

6. *Id.* at *1. Recently, similar FLSA claims by hourly employees against hospitals have been on the rise. See *FLSA Gives Hospitals Trouble*, HR.BLR.COM (Nov. 6, 2013), <http://hr.blr.com/HR-news/Compensation/FLSA-Fair-Labor-Standards-Act/FLSA-gives-hospitals-trouble>.

7. *Kaleida Health*, 2013 WL 2250506, at *1.

8. *Id.*

9. *Id.*

type of document.¹⁰ The coded documents would then be used by Nixon in preparing for upcoming depositions.¹¹

Two months later, plaintiffs' counsel, Thomas & Solomon, LLP ("Thomas"), requested D4 to provide ESI consulting services to it in connection with the same case.¹² D4 notified Nixon, who promptly objected based on the scanning and coding services D4 provided the defendant during the litigation.¹³ D4 then provided assurances that Kaleida Health's documents would not be used in consulting the plaintiffs and that an entirely different group of employees would work with the plaintiffs' counsel.¹⁴ Nixon, on behalf of Kaleida Health, persisted in its objection to D4 working for the plaintiffs and ultimately filed a motion to disqualify the vendor.¹⁵

Magistrate Judge Foschio's analysis began by outlining the standard governing the disqualification of experts and consultants. According to the court, the entity sought to be disqualified must be an expert or a consultant, defined as a "source[] of information and opinions in technical, scientific, medical or other fields of knowledge" or "one who gives professional advice or services" in that field.¹⁶ After the moving party makes this initial showing, it must meet two further requirements. First, the party's counsel must have had an "objectively reasonable' belief that a confidential relationship existed with the expert or consultant."¹⁷ Second, the moving party must also show "that . . . confidential information was 'actually disclosed' to the expert or consultant."¹⁸

10. *See id.* at *2-3.

11. *See id.*

12. *Id.*

13. *See id.* at *3.

14. *See id.*

15. *Id.* at *4.

16. *Id.* at *7 (quoting *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1250 (E.D. Va. 1991); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 490 (1993)). I do not present the court's formulation as a three-part test because it appears that other courts have not required the initial showing of qualification as an expert or consultant—or at least they have not done so explicitly. *See, e.g.*, *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1078 (N.D. Ill. 2012); *Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660, 664-69 (S.D.W. Va. 2008); *Wang Labs.*, 762 F. Supp. at 1248-50; *Mitchell v. Wilmore*, 981 P.2d 172, 175 (Colo. 1999); *Nelson v. McCreary*, 694 A.2d 897, 902-04 (D.C. 1997); *Winzelberg v. 1319 50th St. Realty Corp.*, 940 N.Y.S.2d 854, 856 (N.Y. Sup. Ct. 2012); *Kitt v. Crosby*, 672 S.E.2d 851, 857 (Va. 2009). For further discussion on this point, see *infra* Part III.A.

17. *Kaleida Health*, 2013 WL 2250506, at *5 (quoting *Topps Co. v. Productors Stani Sociedad Anomina Indus. y Commercial*, 2001 WL 406193, at *1 (S.D.N.Y. Apr. 20, 2001)).

18. *Id.*

Applying this standard, Judge Foschio ultimately found that because the scanning and objective coding services performed by D4 did not require specialized knowledge or skill and were of a “clerical nature,” D4 was not an “expert” or “consultant.”¹⁹ Further, the court determined that the defendant failed to prove that it provided confidential information to D4 because it did not show “any direct connection between the scanning and coding work . . . and Defendants’ production of [its] ESI.”²⁰

Rejecting Kaleida Health’s argument, the court declined to apply to D4 and other eDiscovery vendors the presumption of confidential communications, imputation of shared confidences, and vicarious disqualification applicable in the context of attorney disqualification when a party “switches sides.”²¹ The court—as an alternative basis to its finding that D4 did not act as an expert or consultant—held that disqualification was improper because no “prior confidential relationship” existed between Kaleida Health and D4.²²

Because *Kaleida Health* represents the first significant attempt at exploring the issues surrounding vendor disqualification, whether later courts should follow *Kaleida Health*’s lead in exclusively applying the disqualification rules for experts and consultants to vendors becomes the main issue in its wake. To come to a conclusion on this point, one must first explore the different schemes that courts may apply when considering disqualification.

III. COMPARISON OF DISQUALIFICATION LAW FOR EXPERTS AND CONSULTANTS AND DISQUALIFICATION LAW FOR ATTORNEYS

A. *Expert and Consultant Disqualification*

As applied by the *Kaleida Health* court, but not in other case law, the standard for the disqualification of experts and consultants requires the party seeking to disqualify a person or entity from litigation to make an initial showing that the person or entity is an “expert or consultant.”²³ *Kaleida Health* defined “experts” as “sources of information and opinions in technical, scientific, medical or other fields of knowledge.”²⁴ The court consulted a dictionary to define a

19. *Id.* at *9.

20. *Id.* at *10.

21. *See id.* at *12-13.

22. *See id.* at *13-20.

23. *Id.* at *7. As discussed *supra* note 16, and *infra* notes 26-28 and accompanying text, other courts have not explicitly required an initial showing that a party is an expert or consultant.

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

“consultant” as one “who gives professional advice or services regarding matters in the field of his [or her] special knowledge or training’ like an expert.”²⁵

While the expert–consultant requirement may seem at first blush like a broad, catch-all category for non-attorneys, the *Kaleida Health* court notably found that eDiscovery vendors acting in a “clerical” capacity do not qualify as experts or consultants.²⁶ It remains unclear to what extent other jurisdictions would (or should) follow this logic—especially because the court used a dictionary definition of “consultant” instead of one tied to precedent. Many other courts considering the disqualification of experts or consultants, although otherwise following the test articulated by *Kaleida Health*, have not applied its threshold expert–consultant requirement.²⁷ And the court provides no support for denying disqualification on this ground except a glancing cite to Federal Rule of Evidence 702.²⁸

If the threshold expert–consultant requirement is met, or if it is not applied as with most courts, then the party seeking disqualification must make two further showings. First, the party must prove that its counsel had an “objectively reasonable” belief that it had a confidential relationship with the expert or consultant.²⁹ After satisfying this prong, the party must then show that disclosure of “confidential or privileged information to the expert that is relevant to the current litigation” actually occurred.³⁰ Courts across jurisdictions tend to uniformly apply the requirements of an objectively reasonable belief of a

25. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 490 (1993)) (alteration in original).

26. *Id.* at *8-9.

27. *See, e.g.,* Allstate Ins. Co. v. Electrolux Home Prods., Inc., 840 F. Supp. 2d 1072, 1078 (N.D. Ill. 2012); Rhodes v. E.I. Du Pont De Nemours & Co., 558 F. Supp. 2d 660, 664-69 (S.D.W. Va. 2008); *Wang Labs.*, 762 F. Supp. at 1248-50; Mitchell v. Wilmore, 981 P.2d 172, 175 (Colo. 1999); Nelson v. McCreary, 694 A.2d 897, 902-04 (D.C. 1997); Winzelberg v. 1319 50th St. Realty Corp., 940 N.Y.S.2d 854, 856 (N.Y. Sup. Ct. 2012); Kitt v. Crosby, 405, 672 S.E.2d 851, 857 (Va. 2009). Indeed, even the case the court cited defining “expert” did so in the last paragraph of the opinion and made no indication that meeting this definition was required to bring an individual or entity into the disqualification standard it applied in the decision. *See Wang Labs.*, 762 F. Supp. at 1250.

28. *See Kaleida Health*, 2013 WL 2250506, at *7, *28 (citing Rule 702’s requirement of “knowledge, skill, experience, training, or education” for qualifying expert witnesses in support of its assertion that D4 “lacked status as an expert or consultant” for purposes of disqualification).

29. *Id.* at *5, *14; *see also Allstate*, 840 F. Supp. 2d at 1078; *Rhodes*, 558 F. Supp. 2d at 664-69; *Wang Labs.*, 762 F. Supp. at 1248-50; *Mitchell*, 981 P.2d at 175; *Nelson*, 694 A.2d at 902-04; *Winzelberg*, 940 N.Y.S.2d at 856; *Kitt*, 672 S.E.2d at 857.

30. *Kaleida Health*, 2013 WL 2250506, at *5 (quoting Eastman Kodak Co. v. Agfa-Gevaert N.V., No. 02-CV-6564, 2003 WL 23101783, at *1 (W.D.N.Y. Dec. 4, 2003)).

confidential relationship and actual disclosure of confidential information to the disqualification of experts and consultants.³¹

The disqualification analysis for consultants and experts, then, really focuses on the existence of a confidential relationship. With its requirement to prove actual disclosure of confidential information, this analysis by itself likely makes good sense in the context of an expert witness and other non-vendor consultants. Expert witnesses typically have access to a limited and defined set of information, and most non-testifying experts provide services in relation to a discreet issue in or aspect of a case. This allows for a simpler determination of whether the litigant shared confidential information with the expert than is possible when clients disclose large amounts of information across subject matter. Even assuming *Kaleida Health*'s expert–consultant requirement applies, it will be relatively easy to determine whether an expert witness or other non-vendor consultant is an “expert” for purposes of disqualification—litigants typically hire them precisely for their background in a particular area related to a specific issue or discreet set of issues in a case.³² As discussed *infra* in Part IV, these rationales begin to evaporate when considering eDiscovery vendors, who have access to information across the full scope of a case, virtually always including confidential information.

B. *Attorney Disqualification Based on Conflict of Interest*

In general, disqualifying an attorney carries a substantially lower burden than disqualifying an expert or consultant. The first requirement of attorney disqualification is the existence of an attorney-client relationship.³³ While this may seem at first analogous to *Kaleida Health*'s expert–consultant requirement, it actually more closely resembles the “confidential relationship” element of the standard because it focuses on the relationship between the attorney and its client,

31. See, e.g., *Allstate*, 840 F. Supp. 2d at 1078; *Rhodes*, 558 F. Supp. 2d at 664-69; *Wang Labs.*, 762 F. Supp. at 1248-50; *Mitchell*, 981 P.2d at 175; *Nelson*, 694 A.2d at 902-04; *Winzelberg*, 940 N.Y.S.2d at 856; *Kitt*, 672 S.E.2d at 857.

32. A strong argument can be made, however, that litigants hiring eDiscovery vendors do so for their expertise in some particular area: data management, broadly speaking, or, for a narrower example, predictive coding. This perhaps suggests that the expert–consultant requirement in *Kaleida Health* draws a false distinction between “consultants” and “experts” on the one hand, and those performing “clerical duties” on the other, at least in the context of vendors.

33. E.g., *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1384 (10th Cir. 1994); *SuperGuide Corp. v. DirecTV Enters., Inc.*, 141 F. Supp. 2d 616, 621 (W.D.N.C. 2001); *Town of Oyster Bay v. 55 Motor Ave. Co., LLC*, 970 N.Y.S.2d 798, 799 (N.Y. 2013); *Verizon W. Va., Inc. v. Matish*, 740 S.E.2d 84, 94 (W. Va. 2013).

not on any particular qualifications or expertise.³⁴ Also, unlike *Kaleida Health's* expert–consultant requirement, parties can easily establish an attorney–client relationship in most cases.³⁵

After the party seeking disqualification has established an attorney–client relationship, it must then make one of two additional showings. The attorney may be disqualified where (1) “the challenged attorney is concurrently representing adverse interests so that the attorney’s vigor in pursuing one of them may be challenged” or (2) “the attorney has successively represented adverse interests, raising the possibility that confidences or secrets derived from the former representation may be used in the current representation to the former client’s detriment.”³⁶ At their core, these standards require a likelihood that the representation will prejudice the client.³⁷

Beyond these basic requirements, attorney disqualification has a few special features that, as discussed *infra* in Part IV, would make sense to apply to eDiscovery vendor disqualification as well. First, courts will presume that confidential information was communicated to the attorney.³⁸ This eliminates the

34. Compare *Ramada Franchise Sys. v. Hotel of Gainesville Assocs.*, 988 F. Supp. 1460, 1463–67 (N.D. Ga. 1997) (engaging in an extensive analysis of whether an attorney–client relationship existed that focused on the “facts and circumstances involved” in the relationship), with *Kaleida Health*, 2013 WL 2250506, at *7 (focusing on “the nature of the scanning and objective coding services” D4 provided rather than its relationship with Kaleida Health).

35. See *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982) (“[N]either a written agreement nor the payment of fees is necessary to create an attorney–client relationship.”); *Nuccio v. Chi. Commodities, Inc.*, 440, 628 N.E.2d 1134, 1137 (Ill. Ct. App. 1993) (“An attorney/client relationship can be created at the initial interview between the prospective client and the attorney, and it is possible that confidential information passed during the interview sufficient to disqualify the attorney from representing the opposing party in related litigation.”); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 975 P.2d 231, 236 (Kan. 1999) (noting that an attorney–client relationship is “sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession”).

36. *Papyrus Tech. Corp. v. N.Y. Stock Exch., Inc.*, 325 F. Supp. 2d 270, 275 (S.D.N.Y. 2004); see also *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Alticor, Inc.*, 472 F.3d 436 (6th Cir. 2007) (order); *Eternal Pres. Assocs., LLC v. Accidental Mummies Touring Co., LLC*, 759 F. Supp. 2d 887, 892 (E.D. Mich. 2011); *U.S. Football League v. Nat’l Football League*, 605 F. Supp. 1448, 1452 (S.D.N.Y. 1985).

37. See *Morin v. Me. Educ. Ass’n*, 993 A.2d 1097, 1100 (Me. 2010) (“[W]e require a showing that continued representation by the attorney would result in actual prejudice to the party seeking that attorney’s disqualification.”).

38. See, e.g., *In re Am. Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992); *Gen. Elec. Co. v. Valeron Corp.*, 608 F.2d 265, 267 (6th Cir. 1979); *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977); *Beltran v. Avon Prods., Inc.*, 867 F. Supp. 2d 1068, 1077 (C.D. Cal. 2012); *Fiduciary Trust Int’l of*

need to establish actual sharing of confidential information because of the close link attorneys have with information about their clients' cases and the risk of prejudice to clients or former clients from being forced to reveal that information in a disqualification motion.³⁹ Second, courts will impute client confidences to other members of the challenged attorney's firm.⁴⁰ In many situations, this rule then provides for vicarious disqualification of attorneys who work with the challenged attorney because of the sharing of information—including client confidences—that regularly occurs as a feature of firm practice.⁴¹ Third, although ethical rules do not govern disqualification, courts typically find them, especially those covering conflicts of interest, persuasive when deciding disqualification motions.⁴² When read together, Model Rules of Professional Conduct 1.6 through 1.10 and 1.16 and their state equivalents provide that attorneys may not engage in conflicting representations except in limited circumstances.⁴³ As discussed below, a similar standard has been adopted in Electronic Discovery

Cal. v. Superior Court, 160 Cal. Rptr. 3d 216, 228 (Cal. Ct. App. 2013), *reh'g denied* (Aug. 20, 2013), *rev. denied* (Oct. 16, 2013).

39. See *India v. Cook Indus., Inc.*, 569 F.2d 737, 740 (2d Cir. 1978) (noting that requiring proof that the client shared confidential information with the attorney “would put the former client to the Hobson’s choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether”).

40. See, e.g., *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005); *Reynolds v. Chapman*, 253 F.3d 1337, 1343 (11th Cir. 2001); *San Francisco v. Cobra Solutions, Inc.*, 135 P.3d 20, 25 (Cal. 2006); *Allied Sound, Inc. v. Neely*, 58 S.W.3d 119, 124 (Tenn. Ct. App. 2001).

41. See, e.g., *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988); *Miroglio, S.P.A. v. Morgan Fabrics Corp.*, 340 F. Supp. 2d 510, 514 (S.D.N.Y. 2004); *Farris v. Fireman’s Fund Ins. Co.*, 14 Cal. Rptr. 3d 618, 622 (Cal. Ct. App. 2004); *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d 819, 826 (Tex. 2010). Sometimes, however, there will be no vicarious disqualification, especially where the firm takes proper screening measures. See *In re Cnty. of Los Angeles*, 223 F.3d 990, 997 (9th Cir. 2000); *SLC Ltd. V v. Bradford Grp. W., Inc.*, 999 F.2d 464, 468-69 (10th Cir. 1993); *Daines v. Alcatel, S.A.*, 194 F.R.D. 678, 682 (E.D. Wash. 2000).

42. See, e.g., *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994) (“[M]otions to disqualify are governed by the ethical rules announced by the national profession and considered in light of the public interest and the litigants’ rights. (internal quotation marks omitted)); *Am. Airlines*, 972 F.2d at 610 (“In reviewing a motion to disqualify, “we consider the motion governed by the ethical rules announced by the national profession in light of the public interest and the litigants’ rights.” (quoting *In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir.1992)); *Amparano v. ASARCO, Inc.*, 93 P.3d 1086, 1092 (Ariz. Ct. App. 2004) (“The courts have, of course, looked to the ethical rules for guidance on disqualification issues.”).

43. See MODEL RULES OF PROF’L CONDUCT, R. 1.6–1.10, 1.16(a)(1) (2013) (defining attorneys’ confidentiality obligations, describing when impermissible conflicts of interest exist, and providing that attorneys must decline representation or withdraw when “the representation will result in violation of the rules of professional conduct or other law”).

Reference Model's Model Code of Conduct, providing courts a guidepost in considering vendor action.⁴⁴

IV. KEY ASPECTS OF ATTORNEY DISQUALIFICATION LAW SHOULD APPLY TO eDISCOVERY VENDORS

Because of the special role vendors play in litigation, several aspects of the rules governing attorney disqualification are a better fit for eDiscovery vendors than those governing experts or consultants. Keeping in mind that parties can agree to allow vendors to engage in conflicting representations, courts should incorporate some components of the attorney rules when considering motions to disqualify vendors—especially the presumption of confidential communication and the imputation of shared confidences—into their analysis for several reasons.

eDiscovery vendors typically have broad access to confidential and sensitive litigation documents. For example, vendors frequently code documents based on whether they are relevant to litigation or responsive to a discovery request.⁴⁵ Vendors in this context work intimately with the key documents in a case. Accordingly, strong reasons arise to presume that a client shares confidential information when it hires a vendor. But this presumption need not be cabined to times when vendors provide coding services—having access to sensitive client information should be sufficient due to the risks of prejudice. Virtually every document set given to vendors contains confidential information, including attorney–client privileged documents.⁴⁶ While the vast majority of vendors and their employees are undoubtedly honest and trustworthy, disqualification motions exist to guard clients against the severe prejudice that can occur where those with access to sensitive information stand in a position to play fast and loose with it.⁴⁷ Every time a client sends a document set to a vendor, then, a presumption of confidential communication should travel with it.

44. *See* MODEL CODE OF CONDUCT, Principle 3, Guideline 9 (Elec. Discovery Reference Model, 2011) (providing that vendors “should not proceed with an engagement where one or more conflicts have been identified until those conflicts have been resolved and the resolution is adequately memorialized to the satisfaction of all parties involved”). However, no jurisdiction has yet enacted this code.

45. MATTHEW I. COHEN ET AL., BEST PRACTICES FOR THE SELECTION OF ELECTRONIC DISCOVERY VENDORS: NAVIGATING THE VENDOR PROPOSAL PROCESS 21-25 (2007).

46. KERMIT L. KENDRICK, GUARDING THE PRIVILEGE: BEST PRACTICES FOR ELECTRONIC DOCUMENT PRODUCTION 3-8 (2009).

47. *See* Carreno v. City of Newark, 834 F. Supp. 2d 217, 228 (D.N.J. 2011) (holding that “access to confidential information” was sufficient for a finding that an attorney “received confidential information” for purposes of disqualification); Schwed v. Gen. Elec. Co., 990 F. Supp. 113, 116

Allowing a vendor who has made a commitment of confidentiality to a client to also work on a directly adverse party's case unless the client specifically pointed to confidential information shared would produce a perverse result—either the client would have to disclose the information or it would run the risk that the vendor would disclose it. This sort of Hobson's choice is the exact result the presumption of shared confidences seeks to avoid.⁴⁸ This dilemma cannot be solved by merely looking to the services a vendor provided to establish knowledge of confidential information because mere access to sensitive documents entails the ability to view and use them. For example, a vendor who collected and processed documents and created a database but did not code the documents could still have viewed them or retained electronic copies. This vendor may be able to rebut the presumption of confidential communication by affirmatively showing it did not or, because of the process and technology used, could not access documents. But as the party in the best position to prove whether or not document it did or could access documents, the vendor should be required to actually make the showing.

Moreover, these concerns of prejudice to clients do not apply to expert witnesses, who are required to disclose the basis of their opinions—including the otherwise confidential information they have—upon examination by an opposing party.⁴⁹ Clients have notice that information disclosed to expert witnesses will be revealed. For other non-vendor consultants, clients know the information they provide and can (and should) limit it to reduce the possibility of prejudice.⁵⁰ Like expert witnesses, information provided to non-testifying consultants can in some circumstances be subject to discovery,⁵¹ but eDiscovery vendors are engaged specifically to work with large document sets with unknown contents that include

(N.D.N.Y. 1998) (“Disqualification is warranted where an attorney had access to confidential information.”); *Hallmark Cards, Inc. v. Hallmark Dodge, Inc.*, 616 F. Supp. 516, 521 (W.D. Mo. 1985) (noting that an attorney’s “access to . . . confidential files” went to the “ultimate question” in the disqualification motion); *Heringer v. Haskell*, 536 N.W.2d 362, 366 (N.D. 1995) (“Because [attorney] had access to the confidential information, he is deemed to have material information under Rule 1.10(c)(3) and is therefore disqualified . . .”).

48. *See India v. Cook Indus., Inc.*, 569 F.2d 737, 740 (2d Cir. 1978) (noting that requiring proof that the client shared confidential information with the attorney “would put the former client to the Hobson’s choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether”).

49. *See* FED. R. EVID. 703.

50. *See* James A. Keyte, *A Risk-Averse Guide for Working with Non-Testifying Consultants or Experts*, ANTITRUST, Spring 2003, at 30-32.

51. *Id.*; *see also* FED. R. CIV. P. 26(b)(4)(D)(ii) (providing that non-testifying consultants may be deposed in “exceptional circumstances” where the information is otherwise unattainable); Maggie Tamburro, *Consulting Experts – The Danger of Discovery*, IMS EXPERT SERVICES, (Apr. 23, 2013), <http://www.ims-expertservices.com/blog/2013/consulting-experts-discovery/>.

confidential information. Further, applying the presumption to vendors could reduce the cost of litigating disqualification motions without changing many outcomes. For example, if the vendor has proof that it did not access confidential information, it can come forth with it as the lowest cost provider, and if not, no resources will be used trying to prove that confidential communications actually occurred.

Confidential communications should also be imputed to all employees of the vendor, not just those who worked directly for the client. In general, courts are hesitant to impute confidences from an expert to co-workers and require showing that information was actually shared.⁵² Because vendors have access to large amounts of data containing client confidences in each matter they work on, however, risks of internal information-sharing support imputing client confidences to employees not directly involved in the case. Vendor employees working on conflicting matters may work together on other matters, and, depending on internal information controls, employees working one side of a conflicting matter may be able to access the other side's documents. As with attorney conflicts arising out of lateral moves, however, vendors may be able to overcome imputation where they can show they have implemented sufficient screening measures.⁵³ Indeed, some decisions indicate that any conflicting representation between experts in a firm, at least a professional one, requires implementing proper screening measures.⁵⁴ Again though, vendors are in a better position to prove the adequacy of screening measures they have taken than clients are to prove their inadequacy. Considering this and the potential for prejudice to the client if employees share information, the burden should be on the vendor or

52. Coffey, *supra* note 1, at 219-21 (“[S]o long as there has been no exchange of information between the employees at issue, confidences known to one are not attributed to the challenged expert.”).

53. When attorneys move between firms, conflicts from their former clients are not imputed to other attorneys in their new firm if, among other requirements, the conflicted attorney “is subject to screening measures adequate to eliminate participation by that lawyer in the representation.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124(2) (2000). While this does not apply in the context of attorneys in a firm currently representing conflicting parties, as contemplated here for vendors, one would expect screening to significantly reduce the possibility of vendor employees sharing confidential information even where a current conflict exists. In the context of vendor disqualification, effective screening measures would, at a minimum, require restricting access to documents, notifying employees of the conflict, and explicitly prohibiting sharing information.

54. *See, e.g.,* Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1087 (C.D. Cal. 2001) (“[E]ven though the two experts in this case are both employed by [the same firm], a proper screen satisfactorily addresses the policy goal of protecting . . . confidentiality . . .”).

the party opposing disqualification. Courts should therefore explicitly provide that vendors must take proper screening measures to avoid imputation.

Adopting these standards would not prevent parties from sharing vendors where it may promote cost-savings. If opposing parties consented to the vendor working on both sides of the case, disqualification would not be proper, assuming the vendor did not act beyond what the parties consented to.⁵⁵ This would allow the parties to have a “neutral” vendor where collaboration makes sense—perhaps where it would be economical to create a single database of all documents produced in litigation or where a large volume of documents from a third party needed to be digitized. Further, this would also make it possible for the parties to waive disqualification for specified collaborations between the parties’ existing vendors.

Clients need stronger safeguards and oversight for vendors because there are no professional licensing or enforceable ethics rules for them.⁵⁶ As noted above, vendors often perform work traditionally performed by attorneys. Unlike attorneys, however, vendors are subject to little oversight beyond what their clients or larger market forces impose on them.⁵⁷ Although disqualification is based on the court’s inherent authority to oversee litigation and not on violation

55. See MODEL CODE OF CONDUCT, Principle 3, Guideline 6 (“Once a conflict of interest is identified and disclosed, the impacted parties should work together in a timely manner to determine if such a conflict can be mitigated.”); cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122(1) (“A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer’s representation.”). While one may argue by analogy that the general prohibition on representation of parties to the same suit contained in Model Rule 1.7(b)(3) would foreclose such collaboration, a nuanced reading of the rule shows otherwise. Model Rule 1.7(b)(3) provides that an attorney’s conflict of interest cannot be waived where it involves “the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.” MODEL RULES OF PROF’L CONDUCT, R. 1.7(b)(3) (2013). In this case, however, the vendors would not be asserting claims before the tribunal. This type of engagement does not pose the same threats to “the institutional interest in vigorous development of each client’s position.” See *id.* at R. 1.7(b)(3), cmt. 17.

56. MODEL CODE OF CONDUCT, Introduction (Elec. Discovery Reference Model, 2011) (“This Model Code of Conduct . . . sets forth aspirational guidelines intended to serve as a basis for ethical decision making by all participants in the electronic discovery process. . . . Adherence to the [Model Code] is voluntary.”).

57. See *id.* (“Many have referred to the electronic discovery industry as the ‘Wild West,’ where rules and ethical boundaries for interactions between Clients and Service Providers or Service Providers and other Service Providers are constantly changing to reflect shifting whims. While some would argue that the market will operate to address these issues, time has shown that for a market to mature, ethical boundaries must be clearly delineated and industry participants must agree to be bound by them.”).

of ethics rules,⁵⁸ the lack of an enforceable system of ethics for eDiscovery vendors would make disqualification a useful tool for preventing conflicts of interest. Courts generally view ethics rules (and ethical considerations) as persuasive in disqualification questions based on conflicts of interest.⁵⁹ Although it does not carry the force of law, the Electronic Discovery Reference Model's Model Code of Conduct Principle 3, Guideline 9 provides a source courts can look to that is analogous to the Rules of Professional Conduct: "Service Providers should not proceed with an engagement where one or more conflicts have been identified until those conflicts have been resolved and the resolution is adequately memorialized to the satisfaction of all parties involved. . . ."⁶⁰ The Model Code of Conduct further provides that "[c]onflicts of interest that cannot reasonably be mitigated must be avoided" and that "[a]bsent superseding contractual obligations, Service Providers should withdraw from an engagement to avoid a conflict of interest that cannot be otherwise resolved."⁶¹ Under this standard, vendors would risk disqualification if they engaged in a conflicting engagement such as the one in *Kaleida Health*.

V. CONCLUSION

If key parts of the law on attorney disqualification had been applied to the *Kaleida Health* case, the outcome would likely have been different. The court could have presumed that confidential information had been shared, imputed those confidences to the rest of D4, and disqualified D4 from participating on behalf of the plaintiffs. At a minimum, the court would have needed to ensure that D4 implemented screening measures, instead of merely relying on their assertion that no employees would divulge potentially confidential information.

More broadly, adoption of more strict disqualification rules for eDiscovery vendors will discourage unethical conflicts of interest by putting vendors and adverse parties on notice that disqualification is a real possibility. Parties will still be able to agree to use a joint vendor where that makes economic sense. Further, presuming confidential information is shared with vendors and imputing those confidences to all of a vendor's employees unless it implements

58. See cases cited *supra* note 1.

59. See cases cited *supra* note 42.

60. See MODEL CODE OF CONDUCT, Principle 3, Guideline 9 (Elec. Discovery Reference Model, 2011); cf. MODEL RULES OF PROF'L CONDUCT, R. 1.7, 1.9 (2013).

61. See MODEL CODE OF CONDUCT, Principle 3, Guidelines 7, 13 (Elec. Discovery Reference Model, 2011).

sufficient safeguards will reflect more accurately the critical role that eDiscovery vendors have in modern litigation.