



EXPERT WITNESSES IN THE CURRENT LEGAL
ENVIRONMENT

September 2008

Nancy E. Rafuse, Esq.

ASHE, RAFUSE & HILL, LLP

1355 Peachtree Street, N.E., Suite 500

Atlanta, Georgia 30309-3232

(404) 253-6000

www.asherafuse.com

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**Nancy E. Rafuse, Esq.
Ashe, Rafuse & Hill, LLP
Atlanta, Georgia**

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A. Daubert and progeny.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) – Before Daubert, federal courts required proponents of expert testimony to demonstrate that the basis for the testimony was “generally accepted” in the relevant scientific community. The Supreme Court held that Rule 702 precluded courts from relying solely on the “general acceptance” test when determining the admissibility of expert testimony. Instead, courts must determine whether expert testimony is based on scientific knowledge, by assessing whether the underlying reasoning or methodology is scientifically valid and therefore reliable. Several nonexclusive factors assist judges in this gatekeeping function: (1) whether a theory can (and has been) tested; (2) whether a theory has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the theory’s application, and (4) whether a theory has been generally accepted in the relevant scientific community, or whether it is a “known technique that has been able to attract only minimal support within the community.”

Two important conclusions in Daubert: (1) the trial court “exercises more control over experts than other witnesses,” and (2) the trial court must “ensure expert testimony rests on reliable foundation and is relevant to the task at hand,” *i.e.*, to be admissible, expert testimony must be **RELIABLE AND RELEVANT**.

The analysis focuses on “principles and methodology, not on the conclusions that they generate.” See also, Meister v. Medical Eng’g Co., 267 F.3d 1123, 1126 (D.C. Cir. 2001) (same).

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) – Plaintiffs’ case rested largely on opinion of “tire failure analyst,” who testified that defect in design of tire caused blow out, which caused the fatal accident. **HOLDING:** Daubert requirement that expert testimony be relevant and reliable “applies to all expert testimony.” This includes non-scientific testimony of all sorts. As the gatekeeper on expert issues, the trial court must apply the Daubert factors as relevant to the particular situation.

General Elec. Co. v. Joiner, 522 U.S. 136 (1997) (Breyer, J., concurring) – The gatekeeper function means that the district

court has a “‘special obligation’ to determine the relevance and reliability of [an] expert’s testimony.” In meeting this function, the district court may need “to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer[.]”

Daubert analysis at class certification stage: Courts acknowledge their gatekeeping function with respect to expert reports offered at the class certification stage. Many courts reject the use of the “full Daubert analysis,” yet proceed to analyze whether the offered report is reliable and relevant, and therefore admissible:

Dukes v. Wal-Mart, Inc., 222 F.R.D. 189 (N.D. Cal. 2004) – Courts do not apply the “full Daubert ‘gatekeeping’ standard” at the class certification stage. Instead, the standard is “whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met.” See also, Anderson v. The Boeing Co., 222 F.R.D. 521 (N.D. Okla. 2004) (defining the test of admissibility at the class certification stage as “whether [the expert testimony is] so fatally flawed as to be inadmissible as a matter of law”); Gutierrez v. Johnson & Johnson, No. 01-5302, 2006 WL 3246605 (D.N.J. Nov. 6, 2006) (same); Hnot v. Willis Group Holdings Ltd., 228 F.R.D. 476 (S.D.N.Y. 2005) (explaining that the party proffering the expert testimony need only set forth a “plausible position” at the class certification stage); In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001), cert. denied, 122 S. Ct. 2382 (2002), (affirming district court’s denial of motion to strike expert report at class certification stage; when considering an expert report at the class certification stage, a “district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law;” court reviews why the district court was correct in determining that the report at issue was both reliable and relevant—in essence a Daubert analysis).

B. Federal Rules of Evidence.

1. Federal Rule 702 – Testimony by Experts: Unlike other FREs, 702 permits opinion testimony, if it will assist with understanding the evidence.¹

a. Experts must first be found to be qualified “by knowledge, skill, experience, training, or education.”

Elcock v. Kinart Corp., 233 F.3d 734 (3d Cir. 2000) – Defendant challenged testimony of Plaintiff’s vocational expert on several grounds. **HOLDING:** Despite challenges from defense counsel to Plaintiff’s expert’s qualifications, the district court held that the expert was properly qualified, because he possessed “substantially more knowledge than an average lay person regarding employment opportunities for disabled individuals.” The expert in question lacked formal training in vocational rehabilitation, but was a trained psychologist, which the court noted was a related field. He also had some practical experience in various aspects of vocational rehab. The appeals court emphasized that, because of the “thinness” of qualifications, it would have affirmed the district court had it chosen not to qualify the expert, but due to the abuse of discretion standard, the appeals court was deferential to the district court decision. Nevertheless, the appeals court held that the expert’s testimony should be excluded pending a Daubert hearing upon remand. The Court noted that there were several factors that called into question the admissibility of the expert’s testimony under Daubert. Based on the trial testimony offered in the initial trial, the expert appeared to use several different widely accepted methods of analysis in a subjective and otherwise unaccepted fashion. Additionally, the manner in which the expert exercised judgment to reach a disability rating appeared to lack reliability, because it could not be replicated by others. The court further held that, while the limited nature of the expert’s qualifications was a factor the jury could consider, it was not relevant to an analysis of the expert opinion under Daubert.

McCulloch v. H.B. Fuller Co., 61 F.3d 1038 (2d Cir. 1995) – Defendant argued that Plaintiff’s consulting engineer was not qualified to testify as an expert because he had no formal education

¹ FRE 702 was amended in 2000 in response to Daubert and other subsequent cases, such as Kumho Tire Co. See FED. R. EVID. 702 (2000 Amendments).

in the area in which he proposed to testify, and he did not know the chemical constituents of the fumes he testified had harmed Plaintiff. **HOLDING:** Expert was qualified by virtue of his “extensive practical experience,” and that instead of disqualifying the expert, Defendant could bring out his shortcomings and lack of formal education on cross-examination.

Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994) – Plaintiff argued that Defendant’s cardiologist should not have been allowed to testify to the relationship between heart problems and the cause of death, because he was a cardiologist and cause of death falls within the expertise of pathology. **HOLDING:** Although Plaintiff’s pathologists might be more precisely qualified to testify to the cause of death, Defendant’s cardiologist was properly admitted as an expert on this issue, and Plaintiff’s arguments went only to the weight of the evidence presented by the cardiologist.

King v. Enterprise Rent-A-Car Co., 231 F.R.D. 255 (E.D. Mich. 2004) – Defendant moved to exclude the testimony of Plaintiff’s statistician, arguing that the expert’s general experience in statistics did not qualify him to render an opinion. **HOLDING:** District court excluded the expert, in part, because he did not have specific experience or education in employment statistics.

Simmons v. City of Kansas City, No. 88-2603-0, 1992 WL 403096 (D. Kan. Dec. 7, 1992) - Plaintiffs’ statistical “expert” had only fifteen hours of college level education in statistics and no training or experience in the areas of employment discrimination or Title VII. **HOLDING:** Plaintiffs’ “expert” was permitted to testify, but not surprisingly, the “expert” made numerous errors in the statistical analysis, and the court stated that the conclusions were not reliable. Nonetheless, the court did not disqualify the expert.

b. Testimony must assist the trier of fact to understand the evidence or determine a fact in issue.

Smith v. Ford Motor Co., 215 F.3d 713 (7th Cir. 2000) - Plaintiff motorist sued car manufacturer for alleged defects in automobile that led to accident. The manufacturer alleged that purported expert testimony should not be admitted, because Plaintiff’s experts were not specifically experts in the field of automobile manufacture, and their theories had not been published by peer review journals. **HOLDING:** District court’s exclusion of expert testimony reversed.

Plaintiff's experts were mechanical and metallurgical engineers with extensive experience in accident reconstruction, which qualified them to serve as experts with regards to manufacturing deficiencies. Although the experts could not provide testimony regarding the ultimate issue of flaws in the product's manufacture, they could provide evidence as to various aspects of the accident. This was sufficient to enlighten the jury.

Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498 (10th Cir. 1996) – The district court refused to allow Plaintiff's expert to testify about the validity of the personality and aptitude tests her employer had used. **HOLDING:** District court abused its discretion when not allowing validation expert to testify, because evaluating the Wonderlic and Hartman Value Profile tests is beyond the common experience of the jury. "This kind of value/aptitude testing is a science, and it is the paradigmatic role of experts to help juries understand the application of science."

Mehus v. Emporia State Univ., 222 F.R.D. 455 (D. Kan. 2004) – Plaintiff in employment discrimination case argued that a qualified expert's summary of survey data would not be helpful to the jury, because the jury would receive relevant portions of the survey for its own review. **HOLDING:** The examination of the voluminous data would be aided by the expert's accurate summary.

c. The subject of an expert's testimony must be relevant and reliable "scientific knowledge." (The "Daubert factors").

Frazier v. Consol. Rail Corp., 851 F.2d 1447 (D.C. Cir. 1988) – Plaintiffs chose not to use experts and presented the statistical evidence of adverse impact of a test directly to the trial court, including results of numerical calculations performed by counsel. The trial court consequently found the statistics to be meaningless, and proceeded on its own intuition to find that there was no adverse impact. **HOLDING:** Affirmed, noting that statistical calculations performed on data in discrimination cases are not probative of anything without support from an underlying statistical theory.

Mukhtar v. Cal. State Univ., 299 F.3d 1053 (9th Cir. 2002) – Plaintiff's trial expert sought to offer an expert opinion regarding the appropriateness of Defendant's refusal to grant him tenure. On appeal, Defendant university conceded the relevance of the expert's

testimony, but challenged its reliability. **HOLDING:** The district court committed reversible error by not explicitly considering the reliability of the proffered testimony. A separate hearing on reliability is unnecessary, but it is a key factor that must be addressed before allowing the testimony to be considered by the jury.

1.) Ability to be tested

Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000), cert. denied, 532 U.S. 921 (2001) – On appeal, Plaintiff challenged the court’s decision to disallow the testimony of Plaintiff’s expert witnesses in a products liability case. **HOLDING:** Court of Appeals affirmed on several grounds. First, it noted that one of the experts had not tested his theories with regard to alternate product design and that his position that the designs would have prevented injury was purely hypothetical. The “testability” of a hypothesis is a crucial requirement of expert testimony. The expert’s testimony was also properly excluded, because he failed to consider a variety of alternatives with regards to the source of the injury or the repercussions of his proposed changes. The court also noted that the opinion was lacking in reliability because of the failure to consider alternatives, and because the expert’s ultimate conclusions were based solely on his practical experience, which in this situation was insufficient. Failure to use any testing or calculus with regard to the forces involved in the accident resulted in the expert’s opinion being nothing more than intuition.

NutraSweet Co. v. X-L Eng’ g Co., 227 F.3d 776 (7th Cir. 2000) – Property owner sued owner of adjacent property for pollution in violation of various CERCLA provisions. On appeal, Defendants argued that Plaintiff’s expert’s opinions were not based on reliable scientific methods and techniques. Specifically, Defendants claimed that, although the expert relied on established techniques, his opinion was unreliable, because he did not directly observe the property, doing so only through photos. **HOLDING:** The court held that it was fully acceptable to use established scientific techniques in conjunction with photographic analysis, chemical testing, and reliance on substantial experience in the relevant scientific areas. As an expert witness, the individual could use his specialized knowledge to analyze materials; direct personal experience was unnecessary.

Joiner, 522 U.S. at 146; Kumho Tire, 526 U.S. at 15: An expert's own conclusions as to the accuracy or reliability of his or her opinion do not carry much weight. ("Nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993) – Defendant appealed his murder conviction, alleging that the techniques the FBI used for DNA matching were not accurately tested. The FBI responded with results of internal proficiency testing and validation studies. The trial court noted that, although there were some serious deficiencies in the FBI tests, Defendant was merely attempting to attack the results of the test used. **HOLDING:** Affirmed, noting that Defendants had in fact conceded that DNA matching could be tested, because the dispute was over how the results have been tested, not over whether the results can be or have been tested.

Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565 (N.D. Ill. 1993) – Plaintiff, who was injured by an exposed saw blade manufactured by Defendant, used a mechanical engineer to testify, as an expert witness, that the tool could be redesigned to lessen exposure to the blade. Plaintiff's expert testified that he thought about a redesign concept for about an hour, but offered no testable design to support his concept. **HOLDING:** "The history of engineering and science is filled with finely conceived ideas that are unworkable in practice." In response to Plaintiff's complaint that he would have to pay his expert \$20,000 to \$40,000 to develop a workable design, the court stated that, "it is the very nature of Rule 702 and Daubert that require these expenditures."

Adams v. Indiana Bell Tel. Co., 2 F. Supp. 2d 1077 (S.D. Ind. 1998), aff'd in part, rev'd in part, 231 F.3d 414 (7th Cir. 2000) – Cautioning that statistical evidence "may be useful in a discrimination case, but only when the quality of the data can be verified . . . Because 'statistics are so manipulable that some skepticism may be justified when they are offered in the evidentiary context'" (quoting Coates v. Johnson & Johnson, Inc., 756 F.2d 524, 429 (7th Cir. 1985)).

Oglesby v. GMC, 190 F.3d 244 (4th Cir. 1999) – Plaintiff argued that the court improperly granted summary judgment to Defendant in a products liability case and should not have refused to consider its expert mechanical engineer’s opinion. **HOLDING:** Expert’s opinion was properly excluded, because it was not supported by any test data or relevant literature in the field. The opinion was not sufficiently reliable, because the expert was not familiar with the manufacturing process of the product, or the materials from which the product was made, nor did he attempt any testing or apply any scientific process to support his opinion as to the product’s defects.

2.) Peer Review and Publication

First Tenn. Bank Nat’l Ass’n. v. Barreto, 268 F.3d 319 (6th Cir. 2001) – Plaintiff lender sued the Small Business Administration to compel it to meet an alleged contractual obligation on defaulted loan. Defendant offered as an expert a retired banker with over forty years of experience in various aspects of lending operations to testify to the conduct of reasonably prudent lender. **HOLDING:** Trial court did not err in certifying the proffered individual as an expert on credit matters, despite the fact that individual had not been involved in the exact type of transaction at issue in this matter. His unfamiliarity with the specific area could be weighed by the jury as an aspect of his credibility. The court further held that, despite the fact that the expert’s opinion had not been subject to peer view and its validity could not be confirmed through statistical analysis, in this context it was not unreliable or inadmissible. Opinions of this sort do not lend themselves to scholarly review or initial scientific evaluation.

Smith v. Ford Motor Co., 215 F.3d 713 (7th Cir. 2000) – Plaintiff motorist sued car manufacturer for alleged defects in automobile that led to accident. The manufacturer asserted that purported expert testimony should not be admitted, because Plaintiff’s experts were not specifically experts in the field of automobile manufacture, and that their theories had not been published by peer review journals. **HOLDING:** District court’s exclusion of expert testimony reversed. Plaintiff’s experts were mechanical and metallurgical engineers with extensive experience in accident reconstruction, which qualified them to serve as experts with regards to manufacturing deficiencies. That their work had not been published in peer review journals was not vital to their

expertise in the context of the field of accident reconstruction. Peer review is only dispositive in fields in which such review is typical.

Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311 (9th Cir. 1995) – On remand from the Supreme Court, the Ninth Circuit evaluated whether Plaintiffs had proffered expert evidence that Benedictin caused their birth defects. **HOLDING:** Plaintiffs’ expert evidence was inadmissible; the only review and publication received by Plaintiffs’ experts was in the courtroom. The evidence was inherently less reliable, because it had been prepared expressly for litigation. Because no one else in the scientific community had ever bothered to publish or even refute Plaintiffs’ experts’ findings, the court stated that, “what’s going on here is not science at all, but litigation.”

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993) – In response to Defendants’ challenge to FBI methodology of testing DNA, the government produced published articles about the FBI methodology in the relevant scientific community, although the articles were not subject to peer review beforehand. **HOLDING:** Flaws in the FBI’s methodology revealed by the articles go to the weight, not the admissibility, of the FBI technique for matching DNA. Moreover, the general theory of DNA matching had received extensive peer evaluation.

Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985) – Plaintiffs challenged a civil service test and agility test given to firefighter applicants. **HOLDING:** Fact that Defendant’s validation study was prepared as a defense to litigation should not affect its validity, because it would be impossible to validate the test until after the job performance of successful applicants was measured.

Pipitone v. Biomatrix, Inc., 288 F.3d 239 (5th Cir. 2002) – Plaintiff who contracted salmonella infection after receiving injection of fluid in his knee joint brought products liability action against the manufacturer of the fluid. On appeal, Plaintiff challenged the exclusion of purported expert testimony from the orthopedist who treated his knee injury and the infectious disease specialist who treated the infection. **HOLDING:** Orthopedist’s testimony as to cause of infection was properly excluded as being irrelevant. Testimony was admittedly based on “no scientific evidence.” In fact, it was essentially nothing more than opinion testimony.

Epidemiologist's testimony was not properly excluded for failure to perform a study or lack of support in the relevant scientific literature. Court of Appeals reversed the decision with regard to the epidemiologist's testimony, because it concluded that the testimony was scientifically reliable in terms of relevant literature and that it was appropriate for an expert to determine, based on his experience, that the infection had been caused by the product as opposed to other possible sources. The Court of Appeals stated that the testimony was sufficiently reliable to be weighed by the fact finder, and not the trial court when performing its Daubert gatekeeper function.

3.) Rate of Error and Controlling Standards

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994), cert. denied, 115 S. Ct. 1253 (1995) – Court explained that, under Daubert, the grounds for the expert's opinions merely have to be good; they do not have to be perfect. Thus, even if the court thinks that a particular methodology has some flaws, or believes grounds exist for an alternate conclusion, the expert evidence should be admitted.

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) – Plaintiff appealed the district court's denial of his motion in limine to admit the expert report of a statistician in an employment discrimination case.

HOLDING: Court of Appeals reversed, finding that the statistical evidence was not irrelevant simply because it did not consider the relative qualifications of applicants in analyzing racial bias in the promotion process. Defendant's attacks on the expert's failure to consider certain variables go to weight of the testimony, not to its admissibility.

Anderson v. Westinghouse Savannah River Co., 406 F.3d 248 (4th Cir. 2005) cert. denied, 126 S. Ct. 1431 (2006) – On appeal, Plaintiff challenged the exclusion of the expert testimony of a statistician in an employment discrimination case. **HOLDING:** Exclusion of the expert was not an abuse of discretion, because the expert did not compare similarly-situated employees. The expert's opinion that Defendant's job ratings process, upon which merit raises were based, had a disparate impact on African-American employees was based, in part, on EEO job groupings, which improperly grouped employees in various job categories and pay levels, despite fact that there were differences in Defendant's ratings forms within the

groups and Defendant used the ratings to rank employees within a single division, not company wide. Regression analysis in the employment context must consider all major factors influencing the challenged decision.

Currier v. United Techs. Corp., 393 F.3d 246 (1st Cir. 2004) – Defendant in an employment discrimination case, challenged on appeal the admission of Plaintiff’s expert testimony on the ground that the expert analyzed the entire workforce, as opposed to limiting his analysis to the pool of employees who were actually at risk for reduction in force. **HOLDING:** Court of Appeals affirmed the district court’s decision to admit the expert, finding that the expert was properly admitted at the time that he testified. Although subsequent trial testimony revealed that the pool of employees at risk for reduction in force was 44, rather than the 182 analyzed by the expert, the testimony was not thereby rendered unreliable and irrelevant because the jury could have reasonably interpreted the layoff process to have initiated with the entire pool of employees and to have been narrowed down to a pool to 44 employees through decisionmaking that was itself affected by age bias.

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993) – Defendants argued that the scientific community considers external blind tests indispensable, and that the FBI internal tests did not account for potential laboratory errors. **HOLDING:** Even though the deficiencies in the internal FBI tests are “troubling” and the rate of error “a negative factor,” the court admitted the FBI’s DNA results based on the other Daubert factors.

United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995), cert. denied, 115 S. Ct. 2631 (1995) – Defendant attempted to use the testimony of forensic anthropologist to establish that he could not have been the individual in bank surveillance photographs. **HOLDING:** The court rejected the proposed evidence, because it was not based on scientific knowledge. Specifically, the court noted that the rate of error for this evidence was potentially very high, because the experts placed several express conditions on their conclusions, such as the unknown angle of the camera.

EEOC v. Ethan Allen, Inc., 259 F. Supp. 2d 625 (N.D. Ohio 2003) – The EEOC argued for the exclusion of Defendant’s ink-dating expert in an employment discrimination case on the ground of his potential for error. The expert used a minimum threshold for

statistical significance of 1 standard deviation, even though conceding that the error rate was 1 in 3. **HOLDING:** The expert was excluded because the rate of error from his methodology was too high to satisfy Daubert.

4.) Generally Accepted

Nelson v. Tenn. Gas Pipeline Co., 243 F.3d 244 (6th Cir. 2001), cert. denied, 122 S. Ct. 56 (2001) – Plaintiffs sued Defendant for toxic tort liability involving exposure to chemicals used at pipeline compressor station. The trial court excluded Plaintiff’s expert testimony for failure to satisfy the Daubert requirements.

HOLDING: The court held that the testimony was properly excluded, because the theories upon which it was based were not subject to peer review and had not been accepted by the relevant scientific literature. The court disregarded Plaintiff’s claim that the theories were novel and at the forefront of toxicology. The court noted that the facts upon which the study was based were developed in connection with the litigation and that the experts’ work had been funded by Plaintiffs’ counsel did not weigh in favor of Plaintiffs’ claims of scientific validity.

Black v. Food Lion, Inc., 171 F.3d 308 (5th Cir. 1999) – Defendant argued that expert testimony that slip and fall in grocery store caused hormonal damage that led to fibromyalgia should be excluded as insufficiently reliable. **HOLDING:** Court of Appeals concluded that the offered opinion was inadmissible, because it was not supported by the degree of intellectual rigor that is required by Daubert. The court noted that the medical community in general had not reached a consensus as to the causes of fibromyalgia and that various commentators had cited conflicting sources for the condition. In light of this high degree of scientific uncertainty, Plaintiff’s expert opinion could not be admitted.

Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311 (9th Cir. 1995) – For Plaintiffs to use experts who would testify that Benedictin caused birth defects, the experts must point to some objective source (such as a treatise, public statement of a professional association, or a published article in a reputable journal) to demonstrate that they have followed the scientific method “as it is practiced by (at least) a recognized minority of scientists in their field.” **HOLDING:** The proposed testimony was inadmissible; evidence accepted by a minority in the scientific community may be

admitted under Daubert, although the fact that one party's experts represent a minority position may be a proper basis for impeachment at trial.

United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995), cert. denied, 115 S. Ct. 2631 (1995) – In the course of rejecting the testimony of two forensic anthropologists as insufficient, the court noted that this type of evidence was not widely accepted in the scientific community and in fact had only been previously offered twice in similar cases.

Glaser v. Thompson Med. Co., 32 F.3d 969 (6th Cir. 1994) – Plaintiff's medical expert testified that Plaintiff's ingestion of Dexatrim could have caused acute hypertension leading to a stroke. Plaintiff's expert relied on several published studies which in turn had been criticized in other published studies. The expert admitted disagreement in the field, but distinguished the contrary studies based on what he perceived as flaws in their methodology.

HOLDING: "Such differences in opinions among medical experts do not invalidate [an expert's] opinion, but rather create material issues of fact which must be resolved by the jury."

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993) - Defendant offered evidence that the relevant scientific community disagreed about the appropriate methodology for DNA matching. Specifically, Defendant offered evidence that DNA matching by the FBI laboratory, which had placed him at the murder scene, had been criticized in a report issued by the National Academy for the Sciences because it failed to take ethnic population substructures into account. **HOLDING:** The "general acceptance" test applies to both the underlying theory of DNA profiling as well as the specific FBI methodology for conducting DNA testing. Although there appeared to be substantial disagreement over the latter, the court stated that unanimity was not required for a practice to be generally accepted; in fact, several different theories concerning one type of scientific evidence may all be generally accepted. "Only when a theory or procedure does not have the acceptance of most of the pertinent scientific community, and in fact a substantial part of the scientific community disfavors the principle or procedure, will it not be generally accepted."

Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985), cert. denied, 106 S. Ct. 1516 (1986) – A test for firefighter applicants was

challenged as having a disparate impact against blacks and Hispanics. **HOLDING:** The County proved, through its validation study, that the test was job-related. Although the validation study did not comply with the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607, *et seq.*, the court noted that a number of validation techniques are professionally acceptable. The Ninth Circuit also affirmed the trial court's reliance on the testimony of the defense expert, because the trial court found the testimony of Plaintiff's expert to be unconvincing as "contra the consensus of professionals in his field," and he insisted on testing for differential validity, although this theory lacked support in the scientific community.

Yapp v. Union Pac. R.R. Co., 301 F. Supp. 2d 1030 (E.D. Mo. 2004) – Plaintiffs challenged the reliability of a survey underlying the defense experts' statistical analysis in an employment discrimination case, arguing that it was not an independent survey, given defense counsel's involvement in selecting subjects and interviewees and in conducting interviews. **HOLDING:** The court excluded the experts' report, finding their methodology "inherently unreliable" and rejecting Defendant's argument that a scientific survey was unnecessary to support the experts' conclusions.

Mehus v. Emporia State Univ., 222 F.R.D. 455 (D. Kan. 2004) – Plaintiffs argued for the exclusion of the expert testimony of an economist in an employment discrimination case on the ground that the expert's methodology was unreliable. **HOLDING:** Although Defendant's expert did not explain his methodology or whether his opinion was based on methods accepted in his field, Plaintiffs' failure to assert an argument regarding why the methodology was unreliable led the court to conclude that "a Daubert hearing would serve no purpose." Plaintiffs' attacks on the expert's methodology could be advanced at trial.

McReynolds v. Sodexo Marriot Servs. Inc., 349 F. Supp. 2d 30 (D.D.C. 2004) – Defendant argued that statistician's expert testimony must be excluded in an employment discrimination case because the expert relied on his assistants to run computer tests that he designed. **HOLDING:** The expert's reliance on assistants to perform the analysis was permissible under Fed. R. Evid. 703, because it was data "of a type reasonably relied upon by experts in

the particular field.” That the expert was not a computer programmer and had to rely on the accuracy of others was a matter for the jury to consider and did not affect the admissibility of his testimony under Daubert.

2. Federal Rule 706: Court-Appointed Experts

Rule 706 permits the court to appoint its own expert, either on its own motion or on the motion of a party. The Advisory Committee Notes indicate that the purpose behind Rule 706 is to address concerns relating to “[t]he practice of shopping for experts, the venality of some experts and the reluctance of many reputable experts to involve themselves in litigation.”

TechSearch, L.L.C. v. Intel Corp., 286 F.3d 1360 (Fed. Cir. 2002), cert. denied, 123 S. Ct. 436 (2002) – Patent owner sued competitor for patent infringement. On appeal, Plaintiff challenged the district court’s use of a technical advisor to provide input with regard to various issues.

HOLDING: The district court was within its power to use a technical advisor; however, such advisors should only be used sparingly and in the most exceptionally technical cases. In order to limit the technical advisor’s influence, the court should select the advisor through a fair and open procedure and should delineate the bounds of his authority in writing. The court should issue a report detailing the nature of the advice provided and should guard against the introduction of evidence that is outside the record in the case.

Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086 (9th Cir. 2002) – Parents brought action under the Individuals with Disabilities Act, challenging school district’s assessment that child was not disabled. The district court appointed an independent expert to evaluate the child.

HOLDING: The district court was within its authority under Rule 706 to order the losing party (here Plaintiffs) to pay the costs of the court-appointed expert.

Ass’n of Mexican-American Educators v. California, 231 F.3d 572 (9th Cir. 2000) (en banc) – Plaintiffs challenged use of technical advisor by the district court to provide technical support and information regarding testing and test-validation procedures. **HOLDING:** Court rejected Plaintiffs’ argument that technical advisors were subject to cross-examination and were required to provide written reports as required by Fed. R. Evid. 706. In the event that the technical advisor had provided testimony, he would have been subject to cross-examination pursuant to

Rule 706. Because there was no evidence in the record that the technical advisor was a source of evidence for the district court, the appeals court affirmed the district court's refusal to submit him to cross-examination.

Walker v. Am. Home Shield Long-Term Disability Plan, 180 F.3d 1065 (9th Cir. 1999) – Plaintiff challenged administrator of ERISA plan's termination of his long-term disability benefits. **HOLDING:** The district court did not abuse its discretion when appointing an expert to assist with interpretation of complicated medical evidence related to Plaintiff's condition of fibromyalgia, because evidence introduced regarding the matter was confusing, conflicting, and involved a disease whose cause is unknown.

Reynolds v. Ala. Dep't of Transp., 955 F. Supp. 1428 (M.D. Ala. 1997) – District court appointed its own expert in mathematics and statistics to assist it with calculating back pay eligibility formula for class members.

C. The Federal Rules of Civil Procedure

1. Rule 26(a)(2): Disclosure of Expert Testimony

Parties must disclose the identities of experts who may be used at trial, as well as provide a written report prepared and signed by the expert. Among other information, the report must include “a complete statement of all opinions [to be expressed] and the basis and reasons [therefore; and] the data or other information considered by the witness in forming [the opinions.]” The disclosure of expert testimony must be made at a time directed by the court, or at least 90 days before the trial date.

Mems v. City of St. Paul, 327 F.3d 771 (8th Cir. 2003), cert. denied, 124 S. Ct. 1052 (2004) – Plaintiffs argued on appeal that the district court abused its discretion by excluding its expert on emotional damages in an employment discrimination case. **HOLDING:** Court of Appeals affirmed exclusion of the expert as a sanction under Fed. R. Civ. P. 37. The expert re-interviewed each plaintiff during a recess in trial, taking notes of these meetings which included symptoms and factual allegations not previously disclosed. No disclosure of the meetings or notes was made until after the close of business on the evening before the expert's scheduled trial testimony, thus violating both Fed. R. Civ. P. 26(a)(2)(B) and the pretrial order. The district court did not abuse its discretion in excluding the expert as a sanction for the plaintiffs' “egregious abuse of the discovery process.”

LaPlace-Bayard v. Batlle, 295 F.3d 157 (1st Cir. 2002) – Patient and husband brought medical malpractice claim in diversity action against surgeon alleging that surgeon breached the duty of care owed to patient when he failed to timely diagnose her condition and perform immediate remedial surgery. The district court excluded the testimony of Plaintiffs’ expert, who was not disclosed until a week before trial and whose report and curriculum vitae were not provided until three days before trial. **HOLDING:** Exclusion of expert testimony affirmed.

Primus v. United States, 389 F.3d 231 (1st Cir. 2004) – Patient brought medical malpractice suit against military doctor pursuant to the Federal Tort Claims Act alleging that the doctor’s misdiagnosis and substandard care caused her breast cancer to progress undetected to a serious level. When Plaintiff filed her response to Defendant’s summary judgment motion, nearly two months after Defendant filed its moving brief and three months after the deadline for designating new expert witnesses, she, for the first time, sought to designate an additional expert witness to supplement the testimony of her previously-designated expert witness and rebut Defendant’s expert. Although Plaintiff argued that Defendant would suffer no prejudice from the late submission, while Plaintiff would suffer substantial harm as a result of the exclusion, the court was concerned about the resources Defendant had expended preparing its summary judgment motion (work that was also relevant for trial preparation) in reliance on Plaintiff’s prior expert disclosures. The court also relied on Plaintiff’s representation that her previously-designated expert could adequately respond to Defendant’s expert (although Plaintiff tried to explain that she only made such admission in an effort to stave off summary judgment). **HOLDING:** The district court did not abuse its discretion in excluding the expert’s testimony from trial; exclusion of expert testimony affirmed.

Melendez v. Ill. Bell Tel. Co., 79 F.3d 661 (7th Cir. 1995) – Company’s expert conducted study of Basic Skills Abilities Test (“BSAT”), correlating test scores with actual job performance, and also directly examined the BSAT by race for ability to predict job performance. Development of replacement test continued during the pendency of litigation, but was never revealed to Plaintiff. Finally, two days before trial, in response to a stipulation sought by Plaintiff, counsel for Illinois Bell revealed the existence of the revised test (BAST-R) and produced documents related to it. **HOLDING:** Following a hearing, the district court concluded that Illinois Bell, its counsel and its expert should have known that the issue of the replacement test was relevant to previous discovery requests, and as a

result sanctioned the company by preventing their only expert witness from testifying at trial. District Court then found in favor of Plaintiffs, holding that Plaintiffs proved adverse impact and Defendant did not carry burden of proving job-relatedness.

Dukes v. Wal-Mart, Inc., 222 F.R.D. 189 (N.D. Cal. 2004) – Where the expert filed an amended report three days before deposition, Plaintiffs failed to show prejudice as required for exclusion under Fed. R. Civ. P. 37(c)(1).

a. Preliminary Drafts of Testifying Experts' Reports are Discoverable.

Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001) – The draft reports and notes of testifying experts are not privileged work product and are therefore discoverable.

W.R. Grace & Co. v. Zotos Int'l, Inc. No. 98-CV-838S, 2000 WL 1843258 (W.D.N.Y. Nov. 2, 2000) – Parties may be subject to sanctions for testifying expert's destruction of preliminary versions of his expert report and notes. Although there were no pending discovery requests for this material at the time it was destroyed, the case law is well established that it is relevant and discoverable.

Hewlett-Packard Co. v. Bausch & Lomb, Inc., 116 F.R.D. 533 (N.D. Cal. 1987) – Testifying experts must produce all drafts of reports or memoranda generated or examined in the process of forming opinion to which the expert will testify at trial.

Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594 (D. Conn. 1977) – In a “highly technical” lawsuit resulting from a helicopter crash, the trial court ordered production of all drafts or preliminary versions of a testifying expert's reports and data summaries. “Discovery of the reports of [testifying] experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date.”

b. All Materials Furnished to a Testifying Expert May Be Discoverable.

Aniero Concrete Supply Co., Inc. v. New York City Sch. Constr. Auth., No. 94 Civ. 9111 (CSH)(FM), 2002 WL 257685 (S.D.N.Y. Feb. 2, 2002) – In a contract action arising out of a construction project, Plaintiff sought copies of various materials provided to Defendant's

expert by in-house counsel. Defendant resisted production of these materials on the grounds they reflected the mental impressions of counsel. **HOLDING:** Plaintiff's motion to compel was granted, because the work product privilege is waived by the expert's review. Production can be prevented if the material is not actually reviewed by the expert, but lacking any evidence of this, it must be granted.

Suskind v. Home Depot Corp., No. 99-10575, 2001 WL 92183 (D. Mass. Jan. 2, 2001) – Even “core” attorney work product provided to an expert witness must be produced if it is reviewed by that witness. Cases that hold to the contrary either precede the 1993 amendments to Rule 26, or do not consider them.

Johnson v. Gmeinder, 191 F.R.D. 638 (D. Kan. 2000) – Work product privilege governing photographs, videotape, and an “opinion report” created by non-testifying expert were subject to disclosure, because they were reviewed by testifying expert.

Karn v. Ingersoll Rand, 168 F.R.D. 633 (N.D. Ind. 1996) – In a personal injury action, Plaintiff provided testifying expert with two documents created by Plaintiff's attorney, a medical chronology and a deposition summary. Plaintiff refused to produce the documents because they were opinion work product. **HOLDING:** Full discovery of all materials considered by the testifying experts, even though the experts claimed they did not rely on the documents in forming their opinions. Rule 26(a)(2) mandates full discovery of those materials reviewed by an expert witness, regardless of work product status or other privileges. “Without pre-trial access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert's testimony.”

2. Rule 26(b)(4)(B): Discovery of Consulting Experts

In order to obtain discovery of experts retained in anticipation of litigation, but who are not expected to be called as a witness at trial, the party seeking discovery must demonstrate “exceptional circumstances,” such that it would be “impracticable . . . to obtain facts or opinions on the same subject by other means.”

The policy underlying the limited discovery of consulting experts is one of fairness. This rule is designed to prevent a party from developing its own case by utilizing the opponent's expert. Brown v. Ringstad, 142 F.R.D. 461 (S.D. Iowa 1992). Instead, each party is encouraged to retain

and rely upon its own expert. In re Pizza Time Theatre Sec. Litig., 113 F.R.D. 94 (N.D. Cal. 1986). The effect of the protection given to consulting experts is to allow parties to select which expert and what findings to present to the fact-finder. See Eliassen v. Hamilton, 111 F.R.D. 396, 401 (N.D. Ill. 1986) (“Even if we assume that plaintiffs chose not to use [the consulting expert] because he did not tell them what they wanted to hear, this is not only perfectly permissible, but [...] the very purpose of the rule is to protect plaintiffs from having [the consulting expert’s] testimony used by their opponent”).

a. Consulting Expert Status

Advisory Committee Notes to Rule 26(b)(4)(B) state that general employees of a party who are not specially employed on the case cannot qualify as consulting experts. Courts have recognized, however, that “in-house” experts may wear two hats, and thus may be subject to discovery on information they obtained as regular employees but protected from discovery for information learned when they were specially assigned to a matter in anticipation of litigation.

Spearman Indus. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148 (N.D. Ill. 2001) – Consultant expert was hired in anticipation of litigation where consultant was hired as a part of appraisal process and that process was itself the subject of litigation. Existence of this litigation demonstrates that litigation was more than a remote possibility.

Messier v. Southbury Training Sch., No. 3:94CV1706, 1998 WL 422858 (D. Conn. June 29, 1998) – Where an expert is retained as both a consultant and a testifying witness, the work product doctrine may be invoked to protect work completed by the expert in his consultative capacity as long as there exists a clear distinction between the two roles.

Grindell v. Am. Motors Corp., 108 F.R.D. 94 (W.D.N.Y. 1985) – In a product liability case, Plaintiffs sought to depose an outside consultant retained by Defendant. AMC had retained the consultant in 1981, both in anticipation of litigation and to evaluate the vehicle for general product improvement. Plaintiffs sought to depose the consultant only as to the facts he learned in his role of improving the vehicle generally. **HOLDING:** The fact that the retention of

the consultant fulfilled dual purposes did not remove the consultant from the protection of Rule 26(b)(4)(B). Thus, all facts and opinions learned by the consultant in both his roles were protected by Rule 26(b)(4)(B), and because Plaintiffs did not show exceptional circumstances, discovery was not permitted.

In re Sinking of Barge “Ranger I” etc., 92 F.R.D, 486 (S.D. Tex. 1981) – In the aftermath of a barge sinking, a party sought to obtain discovery of in-house experts who had assisted in the post-casualty investigation of the collapse of the barge. **HOLDING:** While recognizing that regular employees may be specially employed in anticipation of trial, and thus protected as consulting experts, the court allowed full discovery, apparently because the prospect of litigation was not sufficiently clear at the time of the barge sinking.

Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1979) – In a lawsuit involving violations of federal price regulations, Plaintiff sought discovery of an in-house consultant hired by Defendant. Defendant originally hired the consultant to furnish reports on the energy industry generally; however, after Plaintiff filed a charge with an administrative agency, Defendant expanded the consultant’s role to assist in preparation for litigation. **HOLDING:** “[O]ne may simultaneously be a litigational expert with Rule 24(b)(4) protection as to some matters and simply an unprotected actor or witness as to others[.]” The appeals court affirmed the trial court’s ruling that Plaintiff could have discovery of facts known or opinions held by the consultant before he was specially assigned to the litigation.

USM Corp. v. Am. Aerosols, Inc., 631 F.2d 420 (6th Cir. 1980) – Breach of contract and warranty action arising out of sale of Spray Glue that developed clogging problems. **HOLDING:** The court denied discovery of the opinion of an outside consultant to whom Defendant’s president had sent a letter requesting his “unbiased and analytical evaluation of what in fact went wrong.” Because the consultant never received compensation for his opinion and had expressed unwillingness to get involved in litigation, the court held that he was an “informally retained” expert against whom discovery was absolutely prohibited.

b. Exceptional Circumstances Required to Overcome Protection of Rule 26(b)(4)(B).

FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023 (E.D. Cal. 2002) – Exceptional circumstances did not exist where Plaintiff's counsel could make no showing that Defendant's non-testifying experts possessed unique expertise or the work they performed could not be replicated.

Moore U.S.A., Inc. v. Standard Register Co., 206 F.R.D. 72 (W.D.N.Y. 2001) – In patent infringement action, Plaintiffs sought discovery of materials generated by competitor's third-party laboratory. **HOLDING:** Exceptional circumstances did not exist which justified production of requested information. Although Plaintiffs claimed that they could not replicate the experiments of non-testifying witness, the essence of their claim was that they could not identify which experiments were considered necessary by Defendant's counsel. This does not satisfy the inability to replicate requirement.

Johnson v. Gmeinder, 191 F.R.D. 638 (D. Kan. 2000) – Exceptional circumstances existed that supported deposition of non-testifying expert. Plaintiff was entitled to depose custodian of records for outside consultants who provided various materials to testifying expert because outside consultants had waived work product privilege. Custodian could be deposed about the materials that were required to be produced.

Shoemaker by Embree v. General Motors Corp., 154 F.R.D. 235 (W.D. Mo. 1994) – In a products liability action, court held that the following arguments did not qualify as exceptional circumstances that would permit Plaintiffs to be present at all tests conducted by Defendant: (1) fear that, without Plaintiffs' presence, the integrity of the tests would be in doubt, and (2) concern that GM would conduct numerous tests to achieve one positive result.

Coates v. AC & S Inc., 133 F.R.D. 109 (E.D. La. 1990) – In a lawsuit where the cause of death was in issue, Plaintiff sought to discover reports of consulting experts to whom Defendant had sent tissue samples of the decedent. Plaintiff argued that the possibility of expert shopping provided the exceptional circumstances necessary to order depositions and other discovery of the consulting experts. **HOLDING:** The court agreed, expressing concern that the jury

could be misled if Defendant only presented experts favorable to its case and did not call consulting experts who may have made unfavorable findings. The court also noted that it could have appointed its own expert under Rule 706 to deal with its concerns about objectivity, but decided that full disclosure of all consulting experts would have the same result.

Eliassen v. Hamilton, 111 F.R.D. 396 (N.D. Ill. 1986) – Plaintiff retained consulting expert (“Gray”) to determine the value of oil and gas leases in a securities action. Gray’s report was produced after it was read by the testifying expert. Defendant then argued that full discovery of Gray was merited by exceptional circumstances, because it was necessary to discover “what methodology Gray actually used and why.” **HOLDING:** The court rejected this argument; instead, Defendants could only depose Gray under the “unusual circumstances” that there were no other available experts in the field of valuation of oil and gas leases.

Crockett v. Va. Folding Box Co., 61 F.R.D. 312 (E.D. Va. 1974) – Employees challenged employer’s use of aptitude tests for promotion, and sought discovery of an industrial psychologist retained by the employer as a consulting expert. The employees argued that exceptional circumstances, in the form of an anticipated good faith defense by the company, warranted full discovery of the consulting expert. **HOLDING:** The court granted the company’s motion for a protective order, noting that Plaintiffs had retained their own expert and had not shown substantial need sufficient to outweigh the policies behind the protection of Rule 26(b)(4)(B) for consulting experts.

c. Possible Loss of Protection of Rule 26(b)(4)(B) by Providing Reports to Testifying Experts

Herman v. Marine Midland Bank, 207 F.R.D. 26 (W.D.N.Y. 2002) – Associate of testifying expert who performed a substantial portion of the work upon which expert’s report was based may be compelled to testify via deposition. Such individuals are not consulting experts who are exempt from discovery under Rule 26(b)(4)(B).

Eliassen v. Hamilton, 111 F.R.D. 396 (N.D. Ill. 1986) – In a securities case, Plaintiffs retained two experts, one consulting and one testifying. The report of the consulting expert was provided to the testifying expert, who reviewed it but declined to use or rely on it.

Pursuant to a magistrate's order, Plaintiffs produced the report. Defendants then sought to depose the consulting expert and obtain documents relating to the development of the consulting expert's report. **HOLDING:** While materials provided by the consulting expert to the testifying expert may lose their protection, the consulting expert is always protected by Rule 26(b)(4)(B). Deposition of the consulting expert was allowed only to the extent necessary to establish that no information other than the report was provided to the testifying expert, and to the extent that it inquired into information obtained by the consulting expert before it was retained by Plaintiff.

Heitmann v. Concrete Pipe Mach., 98 F.R.D. 740 (E.D. Mo. 1983) – Once the report of a consulting expert is given to a testifying expert and is considered by him in making his own report, it must be produced under Rule 26(b)(4)(A). The court also ordered Plaintiff to pay a fair portion of the development expense for the consulting expert's report - in this case, one-third.

3. The Applicability of Attorney-Client Privilege to Experts

The attorney-client privilege protects confidential disclosures by a client to an attorney in order to obtain legal assistance. United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 159 (E.D.N.Y. 1994) (citation omitted). Communications between in-house experts employed by the client and legal counsel may be protected by the attorney-client privilege, to the extent that the matter being litigated falls within the experts' scope of employment, and the experts are aware that the information they provide to the attorney is confidential and necessary for their employer to obtain legal advice. See Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981) (holding that communications between corporate employees and legal counsel were privileged, because they concerned matters within the scope of the employees' duties, and were made at the direction of their supervisors in order to secure legal advice for the corporation). An outside expert may also be protected by the attorney-client privilege if he or she is hired to assist the attorney in providing legal advice to the client. See Federal Practice and Procedure, Wright & Graham, § 5482 (1986).

Colindres v. QuietFlex Mfg., 228 F.R.D. 567 (S.D. Tex. 2005) – Defendant's expert in an employment discrimination case sent defense counsel an unsolicited email addressing questions raised by the court in a hearing concerning class certification. Defendant moved for a protective

order to preclude disclosure of the email. **HOLDING:** The court held that disclosure was required and rejected Defendant's argument that the email was protected by the work-product doctrine, because the expert was acting in a consulting capacity in writing the email. The court noted that expert's failure to rely on the email in his report did not protect the email from disclosure and that disclosure would be required had defense counsel sent the email to the expert. All documents created by the expert relating to his responsibility as a testifying witness are discoverable.

United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156 (E.D.N.Y. 1994) – Plaintiff sued seller of land for breach of warranty relating to removal of toxic waste from land. Defendant hired two environmental consultants, in 1985 and 1989, to conduct remediation studies of the polluted land, and Plaintiff sought to discover communications between the consultants and Defendant's in-house counsel. **HOLDING:** These outside consultants could not be considered agents of the attorney, and thus were not protected by the attorney-client privilege. The court explained that the consultants were not hired to assist the attorneys in rendering legal advice; rather, they were retained to develop independent factual information that they generated through their own environmental studies and observations of physical conditions on the land. Therefore, this information did not originate in client confidences. "Such underlying factual data can never be protected by the attorney client privilege and neither can the resulting opinions and recommendations."

Nakajima v. General Motors Corp., 857 F. Supp. 100 (D.D.C. 1994) – Injured passenger sued bus manufacturer and sought to compel testimony from a former employee of Defendant who had conducted tests on the defect in question as an outside consultant. **HOLDING:** Attorney-client privilege did not protect any communications between the former employee and Defendant. The court explained that the Upjohn requirements were not met, because the outside consultant was not an employee at the time he investigated the accident in question, and Defendant had not alleged that the consultant was aware he was being questioned for legal advice or that the communications were considered to be confidential.

In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992), cert. denied, 113 S. Ct. 2997 (1993) – In a criminal investigation of a contractor, the contractor's in-house counsel directed several employees to conduct an analysis of costs. **HOLDING:** No privilege attached to the analysis, because to hold otherwise would permit counsel to protect relevant

information. Underlying facts cannot be protected from discovery even if they are gathered by employees at the behest of counsel.

Gerrits v. Brannen Banks of Fla., Inc., 138 F.R.D. 574 (D. Colo. 1991) – Shareholders in a securities fraud suit sought to discover communications between a former attorney of Defendant and an outside consultant hired to value Defendant’s stocks. **HOLDING:** This information was not privileged, because Defendant had not shown that legal advice was being sought, or that the advice sought was the lawyer’s rather than the professional’s.

McCaugherty v. Siffermann, 132 F.R.D. 234 (N.D. Cal. 1990) – In a fraud action, Plaintiffs sought to discover communications between outside consultants retained by Defendant and Defendant’s attorneys to help arrange for the sale of a Savings and Loan to the Plaintiffs. **HOLDING:** The communications between the outside consultants and the attorneys were privileged, because the outside consultants were the “functional equivalent” of employees of Defendant and thus the protection described in Upjohn applied. The court noted that the consultants worked in an environment dense in regulations and that it was necessary for the consultants to provide information to Defendant’s attorneys so that legal advice could be given to the client. It would also be necessary for the attorneys to provide legal advice to the consultants so that they could understand the legal environment in which they worked.

D. Practical considerations when testifying as an expert

United Black Firefighters Ass’n v. City of Akron, No. 5:90 CV 1678, 1994 WL 774510 (N.D. Ohio Aug. 31, 1994), aff’d, 81 F.3d 161 (6th Cir. 1996) – Although an opinion which several times disparages the evidence presented by experts, even noting that “experts supply sophisticated charts and statistical results, usually with little or no explanation as to how they arrived at those results, or as to why the results are or are not significant,” the court adopted as its standard the four-fifths rule of the EEOC’s Uniform Guidelines, finding it “adequate and understandable.” It further found this rule to be “simple and straightforward and well within the Court’s competence.” Under the four-fifths rule, the results of the overall promotion process showed no evidence of adverse impact on blacks, as the promotion rate for blacks was 85.4% that of whites.

Simmons v. City of Kansas City, No. 88-2603-0 1992 WL 403096 (D. Kan. Dec. 7, 1992) – Plaintiffs challenged the merit-based evaluation system, which included a written test, as discriminatory. **HOLDING:** Plaintiffs

failed to prove disparate impact, in part because of the dismal performance of their statistical expert. Among other errors, the expert double counted promotions for white officers, failed to differentiate separate test components, and sometimes included Hispanics with whites.

Hamer v. Atlanta, 872 F.2d 1521 (11th Cir. 1989) – In a case challenging the validity of a written test used for promotion to fire lieutenant, the Eleventh Circuit affirmed trial court’s judgment for Defendant, noting that the defense experts were more persuasive. The inexperienced expert for Plaintiffs had shrunk an already small sample size (from 89 to 25), by picking out the worst examples of correlation to include in the smaller sample.

EEOC v. Atlas Paper Box Co., 868 F.2d 1487 (6th Cir. 1989), cert. denied, 110 S. Ct. 68 (1989) – The Sixth Circuit reversed trial court’s judgment for employer in a case challenging the use of the Wonderlic Personnel test for clerical and office applicants. The Sixth Circuit specifically noted that Defendant’s expert witness never visited the Atlas office and never studied the nature and content of the jobs involved; moreover, it suggested that the expert’s testimony that the Wonderlic test was valid under a generalization theory was not consistent with professional standards in test validation. A concurring judge also criticized Defendant’s use of the validity generalization approach, and noted that in response to expert testimony on the validity generalization theory, the trial court had only stated that, “it is extremely difficult to make any sense out of the evidence on adverse impact.”

Vulcan Pioneers, Inc. v. New Jersey Dep’t of Civil Serv., 625 F. Supp. 527 (D.N.J. 1985), aff’d, 832 F.2d 811 (3d Cir. 1987) – District court found Defendant’s expert’s testimony to be “extremely enlightening, helpful and candid,” but nevertheless rejected many of his conclusions because he was misinformed about several significant facts of test development and relied on faulty assumptions provided by Defendant.

VanAken v. Young, 541 F. Supp. 448 (E.D. Mich. 1982), aff’d, 750 F.2d 43 (6th Cir. 1984) – White plaintiffs challenged an affirmative action plan for firefighters, which included hiring without reference to rank-order produced by a written test given to all applicants. Plaintiffs expert testified that the written exam was content valid and that hiring should be carried out in strict rank order. The district court, however, found that this expert’s testimony lacked credibility and completely disregarded it:

“He admitted he knew nothing specific about the Detroit Fire Department Academy [. . .], and stated that the ability to be a firefighter depended just as much upon fast reading ability as agility and ability to climb ladders and do other physical tasks that firefighters perform. He was unable to explain how a person in a wheelchair, who could get the highest grade on the written exam, could be an active firefighter.”

United States v. Chicago, 411 F. Supp. 218 (N.D. Ill. 1976), aff'd in relevant part, 549 F.2d 415 (7th Cir. 1977) – Plaintiffs challenged the job validity of written tests for promotion within the police department. The district court noted that the burden of persuasion on Defendant included the credibility of its expert witnesses. The district court expressed misgivings about one of Defendant’s experts because he sought to change his testimony twice on the stand and once after the hearing, and rejected Defendant’s contention that the changes were mere “computational errors.” Defendant’s second expert was effectively impeached by his contradictory testimony for Plaintiffs in other cases; for example, the expert testified that a paper and pencil test could be used to test for judgment and other psychological characteristics, and it was then revealed he had testified to precisely the opposite point of view in another recent case.

James v. Stockham Valves & Fittings Co., 394 F. Supp. 434 (N.D. Ala. 1975), rev'd and remanded on other grounds, 559 F.2d 310 (5th Cir. 1977), cert. denied, 98 S. Ct. 767 (1978) – District court finds that industrial psychologist’s “objectivity has been compromised by his close and sympathetic identification with plaintiffs’ position.” In coming to this conclusion, the court noted that the expert had appeared on behalf of Plaintiffs in 31 employment cases and had never testified on behalf of an employer.