



THE CONTINUING LEGAL EDUCATION  
SOCIETY OF BRITISH COLUMBIA

# Dealing with Expert Reports and Cross-Examination of Experts

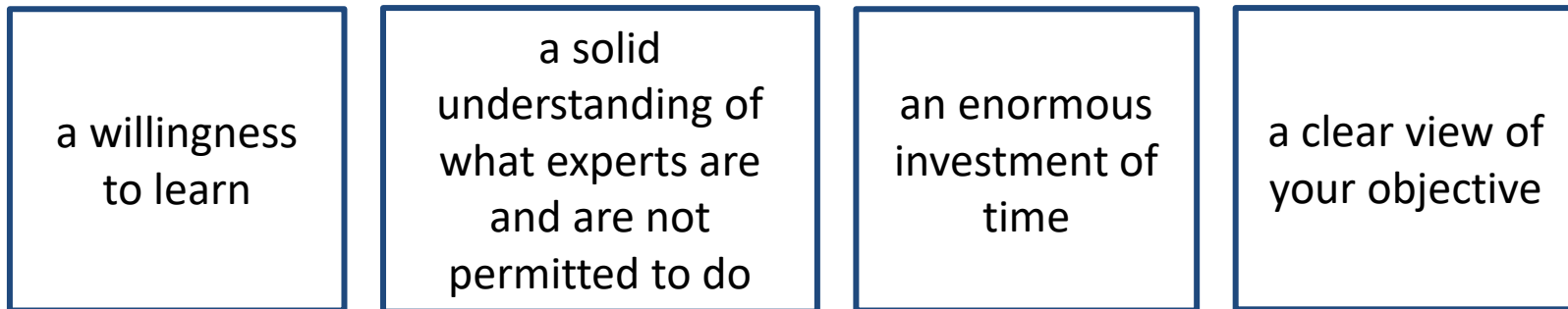
**Justice Brook Greenberg**, *Supreme Court of British Columbia*

**Andrew I. Nathanson, KC**, *Fasken Martineau DuMoulin LLP*

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# Introduction

- Effectively cross-examining experts is one of an advocate's most **professionally challenging and important functions**.
- It requires:



- Done well, expert cross-examination is enormously helpful to the court and is a source of great professional satisfaction.

# Outline

1. Identify the high-level issues and trends in admissibility of expert opinion evidence.
2. Explain the importance of establishing concrete and realistic objectives for the expert cross-examination.
3. Offer practical advice on preparation of the cross-examination, approaches, areas to explore, and structure.
4. Highlight the problem of expert bias and how to respond to it.
5. Identify and briefly discuss ethical issues that arise in cross-examining experts.

# Challenges and Cautions

- Few things are more challenging than cross-examining an experienced, balanced expert.

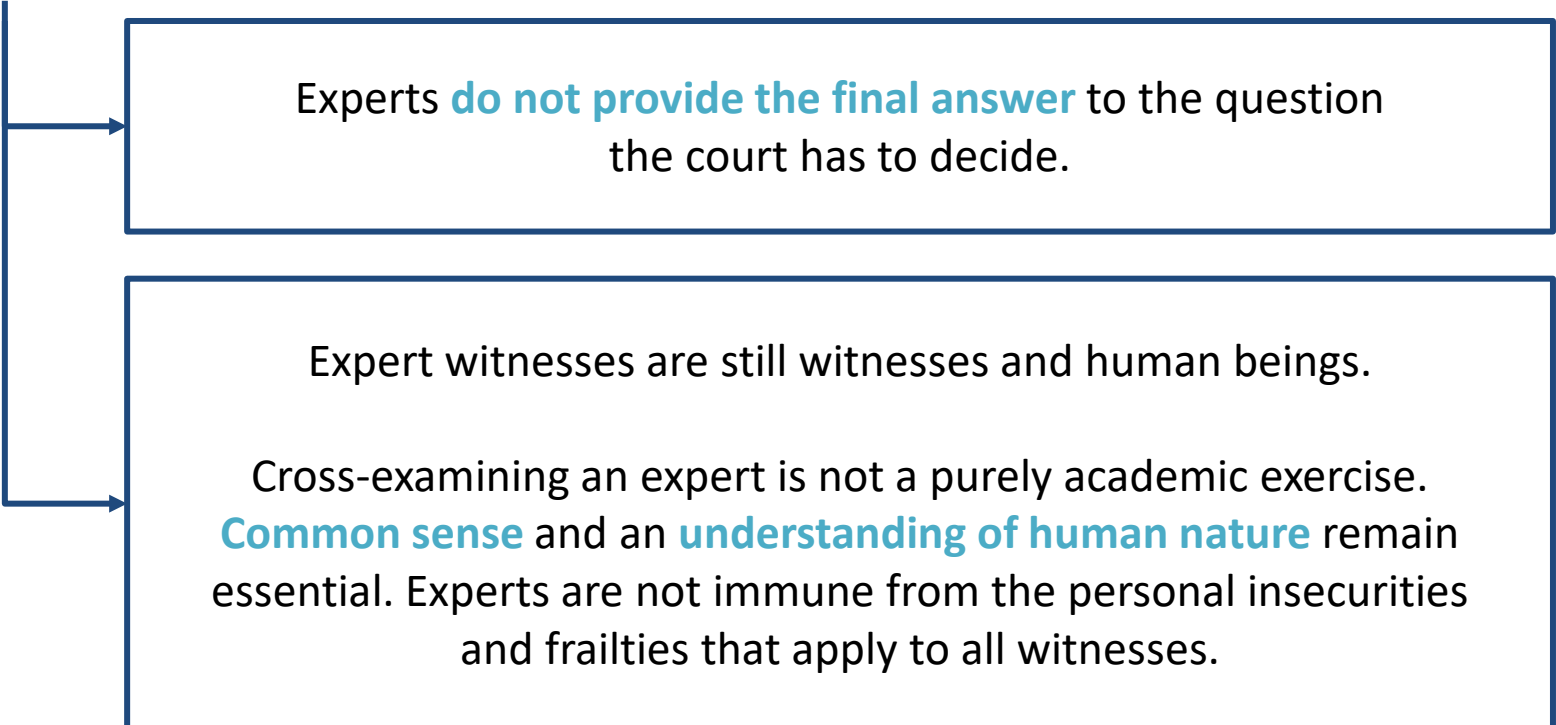
The impossibility  
of fully  
overcoming the  
**knowledge gap.**

**Danger lurks  
everywhere:**  
beware of  
making things  
worse.

**Never  
underestimate  
an expert.**

# Challenges and Cautions

- Remember:



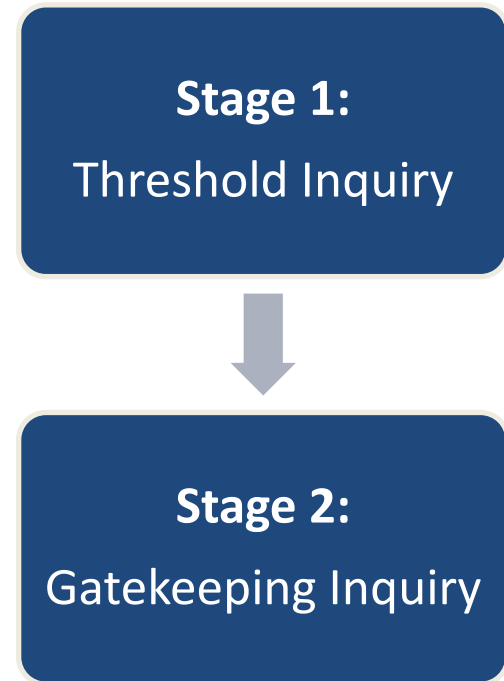
Experts **do not provide the final answer** to the question the court has to decide.

Expert witnesses are still witnesses and human beings.

Cross-examining an expert is not a purely academic exercise. **Common sense** and an **understanding of human nature** remain essential. Experts are not immune from the personal insecurities and frailties that apply to all witnesses.

# Admissibility of Expert Opinion Evidence

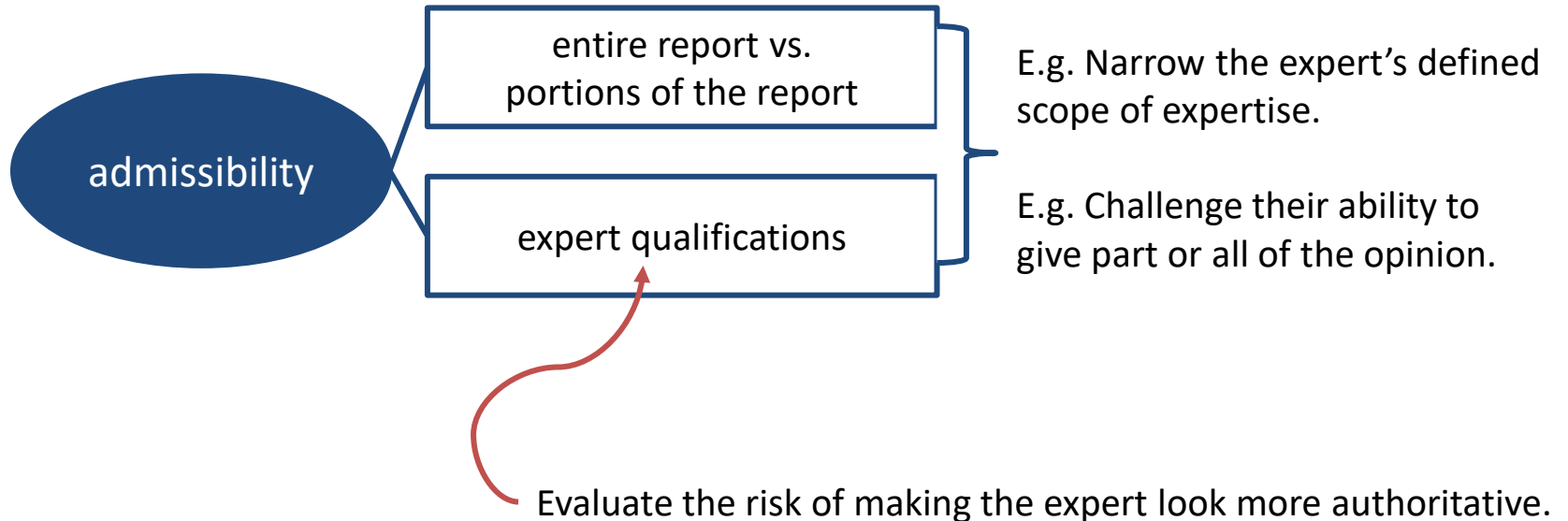
- *White Burgess* is the dominant analysis for expert admissibility, incorporating the *Mohan* factors.
- Judges remain the gatekeepers of expert evidence throughout a trial and are increasingly suspect of questionable expert evidence.
  - In the case of novel or contested science, trial judges must evaluate the reliability of the underlying science for that purpose.



*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23;  
*R v. Mohan*, [1994] 2 S.C.R. 9.

# Admissibility of Expert Opinion Evidence

- Consider when to challenge admissibility vs. focusing on the weight of the opinion.
- Strategic considerations when challenging admissibility:



# Admissibility of Expert Opinion Evidence

- Sources for further reading:
  - Michael Parrish & Theresa Iandiorio, K.C., “Expert Evidence 2025 Case Law Update” (March 4, 2025), *CLEBC*.
  - The Honourable Andras Schreck, “Challenging Expert Evidence for Bias” (January 25, 2020), *Law Society of Ontario*.

# Objectives of the Cross-Examination

- The cross-examination must proceed from— and advance— your strategy and theory of the case:

**What story do you want to tell with your cross-examination?**

- For example:
  - Is the expert honest but mistaken?
  - Is the expert shading or overreaching in their opinion?
  - Is the expert relying on faulty or incomplete assumed facts? Worse, is the expert purporting to find facts?
  - Is the expert partial?
  - Is the expert straying beyond the scope of their true expertise?

# Objectives of the Cross-Examination

- You must meet the essential points made by the expert... but **do not try to do more than what is needed.**

It is all about the **audience**:

the court must understand the significance of the points elicited on cross-examination, or they are wasted.

# Preparation

The cardinal rule...

Do your homework.

- You must fully understand the nature and effect of the expert's evidence before you can effectively attack it.
- Sopinka J.: **Be schooled by an equally competent expert.**
  - Consider if a consulting expert, rather than your testimonial expert, is necessary.
  - Be certain you understand **why** the opposing expert has reached different conclusions than your expert. Understanding the differences between the opinions will help develop your strategy and effective lines of questioning.

# Preparation

- Carefully review the **instructions and assumptions**.
- Obtain and study the expert's **working papers**.
- Pay particular attention to:

Materials  
consulted

Investigations  
and tests

Communications  
with instructing  
counsel, the  
litigant, or other  
sources of  
influence

Evolution of  
drafts of the  
report

- Be familiar with the expert's governing **professional standards**.
- Research the expert's **past writings and reports**, where available.

# Approaches to Preparation

**Ensure adherence to first principles.**

- Helpfully summarized in *The Ikarian Reefer*, [1993] 2 Lloyd's Rep 68 at 81-82.

**Go at the reasoning.**

- What carries weight in expert opinions is the reasoning, not the conclusion: *Kennedy v. Cordia (Services) LLP*, [2016] UKSC 6 at para. 48.

# Approaches to Preparation

1.	Become an expert.
2.	Challenge the qualifications.
3.	Challenge the methodology.
4.	Challenge the assumptions.
5.	Use the leading literature.
6.	Use the expert's prior statements.

Monique Jilesen, "Cross Examination of Experts" in *Expert Evidence for Litigators*, Law Society of Upper Canada Continuing Professional Development, 2014.

# Areas to Explore in Cross-Examination

The expert's **qualifications** and **real-world experience**.

The **leading literature** in the expert's field of study and any sources that should have been considered, but were not.

The **factual underpinnings** of the opinion, including the facts the expert was instructed to assume and any other assumptions the expert made on their own.

The **analysis, investigations, or testing** the expert could or should have performed, but did not; or work completed, but not described in the report.

# Areas to Explore in Cross-Examination

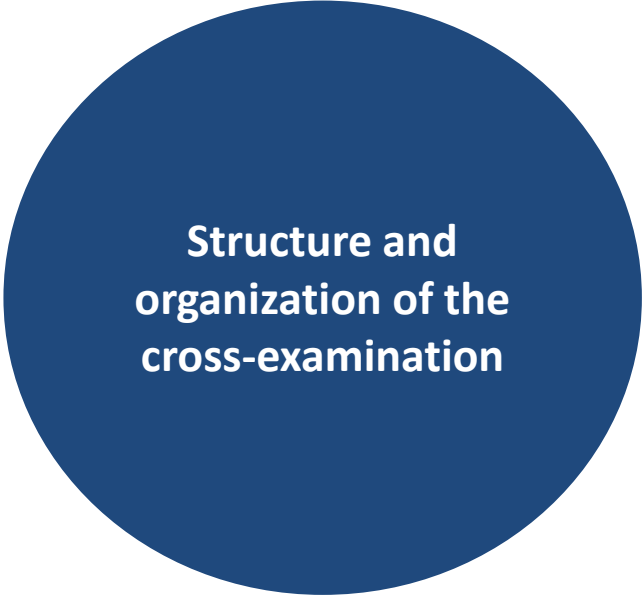
The **reliance on a technique or mode of analysis** that was not appropriate in the circumstances, or which was not properly carried out or applied.

The **limits of the opinion** and the degree of **uncertainty** attached to it.

When faced with an **excessively confident or dogmatic** expert, consider enlarging and emphasizing those features of the testimony.

The expert's **bias or partiality**: more on this below.

# Opportunities to Enhance Your Own Case



**Structure and  
organization of the  
cross-examination**



**Manner and tone**

# Structure and Organization of the Cross-Examination

- Don't leave the trier behind:



Be clear.

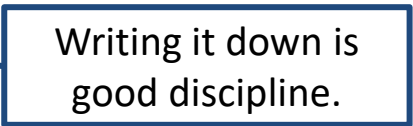
Don't move too quickly.

Use headlines.

- Make sure the trier understands any technical terms and is oriented in the material.
- Consider the use of **photographs, models, or visual presentations**. If potentially controversial, discuss with your friend in advance.

# Structure and Organization of the Cross-Examination

- Organize the cross-examination **logically**, not chronologically.
- Each section of the cross-examination should have a **specific goal**.
- **Primacy and recency**: begin and end on strong points.



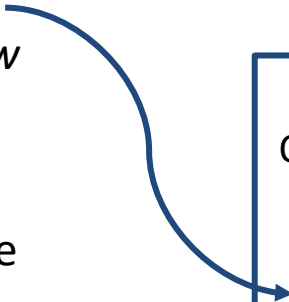
Writing it down is  
good discipline.

**“To control and set the tone early,  
always start a cross-examination on a point you will not lose.”**

- Tom Curry

# Manner and Tone

- **Civility** is the best form of advocacy. It enhances persuasion, efficiency, and rationality: *Groia v. Law Society of Upper Canada*, 2018 SCC 27.
- Be polite, respectful, and fair— especially when the expert is not.
- Keep your composure.
- If you are losing a point, or losing control, move on.



Or, as Tom Curry says,  
“**professionalism is good for results**”.

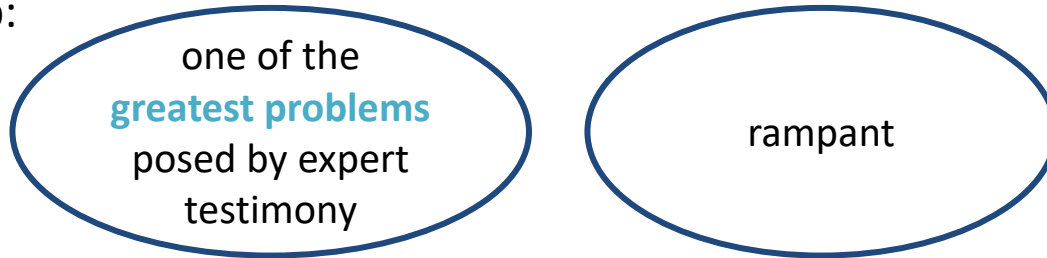
# The Problem of Expert Bias

**“No one likes to disappoint a patron.”**

- Professor John Langbein

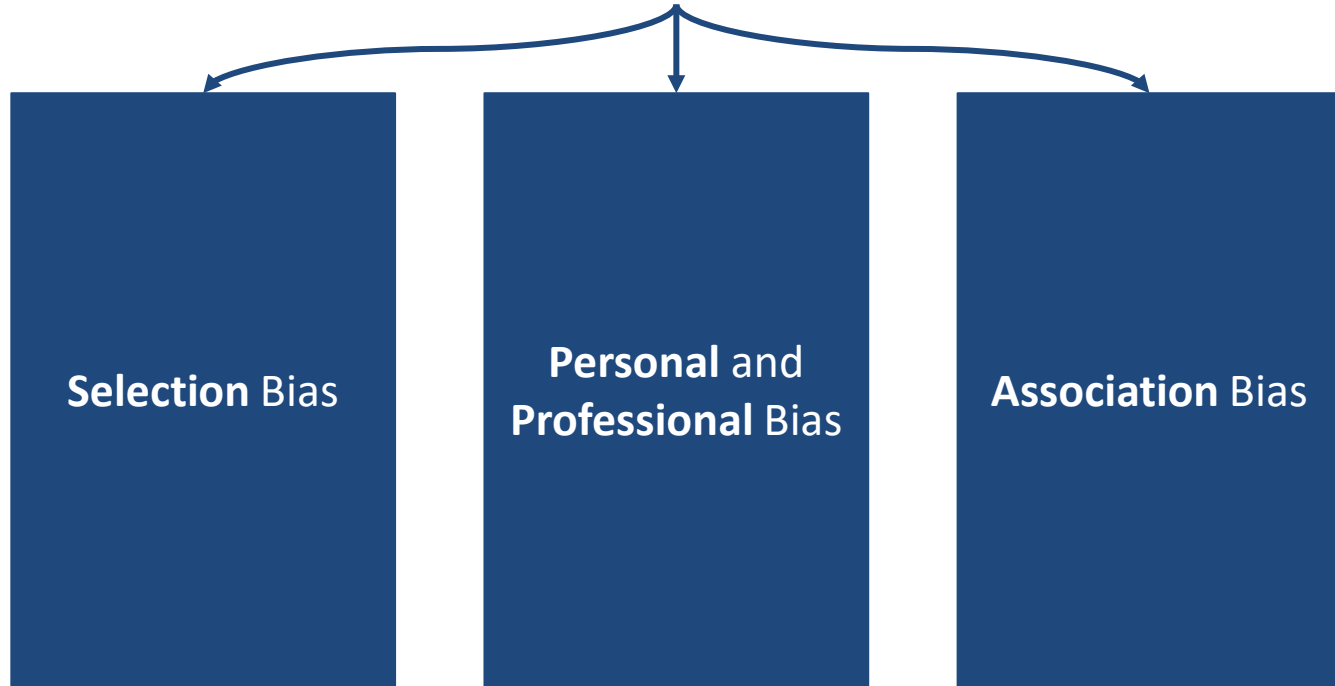
# The Problem of Expert Bias

- Paciocco J.A. helpfully conceptualizes experts' special duty as “a duty of impartial advice that is **fiduciary** in its intensity”.
- The vast majority of experts are persons of integrity and conscientiously seek to do their duty.
- Unconscious expert bias is, however, a **widespread** problem.
- Writing in 2009, Professor David Paciocco (now Paciocco J.A.) called expert partisanship:



- The Woolf, Goudge, and Osborne Reports also referred to this problem.

# Unearthing the Problem of Expert Bias



David Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34 Queen's LJ 565 (**Paciocco, "Unplugging Jukebox Testimony"**); see also Carla MacLean, Lynn Smith & Itiel Dror, "Experts on Trial: Unearthing Bias in Scientific Evidence" (2020) 53 UBC Law Rev 100.

# Unearthing the Problem of Expert Bias

## Selection Bias

- Was the expert chosen from far away?
- Or, with marginal credentials, when many other well credentialed experts were readily available?

# Unearthing the Problem of Expert Bias

## Personal and Professional Bias

- Does the expert have an **interest** in promoting the opinion?
- Do they have a **personal or professional interest** in the theory or technology relied on?
- Do they have **firm, preconceived views** that prevent them from open mindedly considering the relevant question, or a distinct ideological perspective?

“The **more ownership** the expert claims over the expertise offered, the greater the risk that he or she will be biased in favour of it”.

# Unearthing the Problem of Expert Bias

## Association Bias

- Has the expert given **contradictory opinions** in other cases?
  - This can show a willingness to tailor the opinion to the needs of the case and the retaining party.
- What **influences** has the expert been subject to?
  - Disclosing to the expert the theory of the case or the litigant's expectations of what the expert will conclude is one of the biggest dangers in forensic practice.
  - Exposure to prejudicial facts that are not necessary to the opinion are also a leading cause of distortion in expert testimony.

# Unearthing the Problem of Expert Bias

## Association Bias

- Has the expert **readily accepted** selective information?
- Have they made **unreasonable assumptions** favourable to the retaining party?
- Have they **disregarded or failed to seek out** necessary information that undermines their opinion?
- Did they have **unhelpful information** that they did not mention in their report?
- Did they **volunteer the deficiencies or uncertainties** inherent in the opinion, or in the information on which it was based?

# Unearthing the Problem of Expert Bias

## Association Bias

- Is the **language of the report** adversarial or argumentative?
- Did the expert **exceed** their expertise or proper role?
  - Getting on the team, purporting to assign legal responsibility or decide ultimate issues, or a preoccupation with the opposing party's motivations, may reflect partiality or that the expert was influenced by the cause, rather than by proper considerations.

# Ethical Issues

- A lawyer should treat adverse witnesses, including experts, with fairness and courtesy: BC Code, Rules 2.1-3(d); see also Rule 5.1-5.
- Lawyers have a duty to provide competent services: BC Code, Rule 3.1-2.

“The buck stops with the lawyers. In an adversarial system,  
**it is lawyers** who need to expose bias, partiality, and influence.”

- Professor Paciocco  
- (“Unplugging Jukebox Testimony” at 571)

- The failure of lawyers to properly challenge misleading expert evidence has led to **miscarriages of justice**. The Goudge Report cautions lawyers not to take cases beyond their competence where they involve central and highly technical expert evidence.

# Key Takeaways

Preparation	Expert Bias	Ethics
<p><b>Define your goals.</b> Clear objectives should guide the structure and flow of your cross-examination.</p>	<p><b>Selection bias.</b> Assess the reasons why an expert was selected (or others not selected).</p>	<p><b>Professionalism and respect.</b> Civility is the best form of advocacy. Be polite, respectful, and fair, even when the expert is not.</p>
<p><b>Do your homework.</b> Focus on the reasoning behind the opinion. Scrutinize underlying methodology, assumptions, and facts.</p>	<p><b>Personal and professional bias.</b> Entrenched views or a stake in the outcome may prevent an expert from performing their duty.</p>	<p><b>Ethical obligations.</b> It is the lawyer's role to uncover partiality.</p>
<p><b>Plan and organize with intention.</b> Thematic structure outperforms chronology—lead and end on strong points.</p>	<p><b>Association bias.</b> Consider whether the expert's approach or proximity to the parties, counsel, facts, or cause suggests a willingness to tailor their opinion.</p>	



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