

# Avoiding Bias and Remaining Objective as an Expert Witness

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In litigation, the role of the expert witness is to provide clarity in complex financial and technical matters. Courts rely on experts not to advocate for one side, but to apply their specialized knowledge objectively. Yet, despite our training and professional standards, every expert must confront a universal truth: we all carry biases. The challenge is to recognize them and take steps to prevent them from clouding our analysis and testimony.

This article explores four common cognitive biases that affect expert witnesses: anchoring, availability, confirmation, and overconfidence. It shares strategies to mitigate their impact, reviews the consequences of biased testimony under the Federal Rules of Evidence, and provides practical approaches to maintain credibility and admissibility in the courtroom. Most state's evidentiary rules are similar.

## The Challenge of Bias in Expert Testimony

The rules governing expert testimony—such as the Federal Rules of Evidence, the NACVA Professional Standards, the ASA Principles of Appraisal Practice and Code of Ethics, and the AICPA Code of Professional Conduct—require objectivity. Courts, however, are often skeptical when they perceive experts leaning toward the side that retained them. As one judge famously remarked to valuation professional Jim Hitchner:

When you walk into my courtroom, I already know you are biased toward the side that hired you. I also know the other expert is biased toward the side that hired him. My job is to determine which of you is the least biased.

That sobering statement underscores a reality: credibility rests on an expert's ability to show awareness of bias and demonstrate steps to remain objective while forming opinions.

## Understanding Bias: Four Key Types

### 1. Anchoring Bias

Anchoring bias occurs when an expert clings to an initial piece of information, often a first impression, that influences later judgment. Even when attempting to adjust away, the starting point anchors the final opinion. For example, an expert valuing a private equity general partner's interest may subconsciously "anchor" on assumptions—formed in earlier cases—that most general partners are (or are not) trustworthy, influencing the expert's analysis of the new case. Moreover, it is often easy to become biased based on the manner in which retaining counsel explains the facts and merits of the case during the first phone call or meeting.

### 2. Availability Bias

Availability bias arises when one relies too heavily on information that is most readily recalled. For experts, this may mean defaulting to a valuation or damages methodology used successfully in a recent case, even when the facts of the current case demand a different approach. For example, an expert may think, "I recently calculated lost profits in a case using the 'before and after' method and my opinion prevailed. I had better use that method again on this new lost profits case." But what if the sales projection method is more suitable in the new case? Just because an approach is top-of-mind does not make it the best fit.

### 3. Confirmation Bias

Confirmation bias is perhaps the most insidious. Experts may form early preferences or hypotheses and then seek evidence that supports them, while discounting contradictory information. Confirmation bias may be indicated when an expert (1) discounts or ignores bad news (evidence that contradicts the narrative offered by the client or attorney), (2) places too much weight on good news (evidence that supports that narrative), (3) stops gathering evidence once the preferred conclusion appears to be supported, (4) continues searching when the evidence is unfavorable, or (5) interprets ambiguous news as good. Experts tend to collect just enough evidence to maintain, for themselves, the illusion of objectivity.

When attorneys emphasize certain facts, the temptation is to lean into that narrative. If unexamined, confirmation bias undermines objectivity and credibility.

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#### 4. Overconfidence Bias

Most of us overestimate our judgment and abilities. Overconfidence can lead experts to take on too many cases, overpromise on deadlines, overlook alternative approaches, fail to check work against professional standards, ignore legal or ethical counterarguments, or present testimony with unwarranted certainty. Courts recognize that financial analysis often involves assumptions and uncertainties. Overconfidence that masks these realities diminishes credibility.

#### The Consequences of Biased Testimony

The dangers of bias extend beyond credibility, and they can determine admissibility. The Federal Rules of Evidence set strict standards:

- **Rule 104:** Judges decide whether an expert is qualified and whether evidence is admissible. Biased reasoning can undermine both.
- **Rule 403:** Relevant evidence may be excluded if it risks unfair prejudice, confuses issues, or misleads the jury.
- **Rule 702:** Expert testimony must be based on sufficient facts, reliable methods, and their proper application to the case. Recent changes to Rule 702 reinforce the judge's role as gatekeeper; as a result, more experts' testimonies are being rejected for lack of reliability or relevance.

Recent studies<sup>1</sup> confirm that accountants, appraisers, and economists face the highest exclusion rates in Rule 702/*Daubert* challenges against financial experts, with lack of reliability and lack of relevance as the top reasons. During 2021, appraisers and accountants had the highest exclusion rates (38 percent and 32 percent, respectively) of the three most common financial experts. For valuation and forensic experts, the message is clear: objectivity is not optional. It is essential for admissibility.

#### Mitigating Biases and Decision Traps

Biases cannot be eliminated, but they can be managed. Awareness is the first step. By recognizing the tendencies, experts can adopt strategies to counteract them:

- **Anchoring bias:** Consider multiple starting points, involve colleagues not exposed to the same initial information, and deliberately test alternative assumptions.
- **Availability bias:** Pause before defaulting to familiar methods. Ask whether the most recent or memorable approach truly fits the facts of the case.
- **Confirmation bias:** Actively seek disconfirming evidence. Build the opposing party's case as an internal check on your own opinions.
- **Overconfidence bias:** Engage in "pre-mortem" thinking. For example, imagine your opinion failed in court and identify the likely reasons. Double-check methods against professional standards.

Incorporating peer review, documenting limitations, and maintaining transparency with counsel are additional safeguards. Credibility is enhanced, not diminished, when experts acknowledge uncertainty and the boundaries of their opinions.

#### Practical Applications for Expert Witnesses

**Case preparation:** During discovery and analysis, adopt a systematic approach to test assumptions. Use structured checklists that prompt consideration of alternative explanations and contrary evidence.

**Client communication:** Be clear with retaining counsel that your role is not to advocate but to analyze objectively. Setting expectations early reduces pressure to conform opinions to client narratives.

<sup>1</sup> <https://www.pwc.com/us/en/services/consulting/deals/assets/daubert-study-2022.pdf>



**Courtroom testimony:** When presenting, explain your methodology and why alternative approaches were considered but not used. Acknowledge limitations openly. Judges and juries value candor over certainty.

**Professional development:** Younger professionals should cultivate habits of objectivity early. Ask, “What would weaken my opinion?” Seek mentors or colleagues to provide perspective. For seasoned experts, humility and continual learning are key to sustaining credibility.

## Conclusion

Bias is a natural part of human judgment, but for expert witnesses, unmanaged bias can mean exclusion from the courtroom and damage to one’s professional reputation. Anchoring, availability, confirmation, and overconfidence biases are ever-present risks. By recognizing them, applying mitigation strategies, and adhering to professional standards, experts can preserve their objectivity and credibility.

In the end, the goal is not to eliminate bias—that is impossible—but to demonstrate awareness, transparency, and sound judgment. Courts, counsel, and clients depend on experts who bring clarity, not advocacy, to the stand. **VE**



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