Ultimately, an attorney should exercise great diligence and care when locating and selecting an expert, and the expert's qualifications should always be determined at the outset. Counsel should remain mindful of how the expert will come across in court and what value he or she will bring to the presentation.

III.
Managing the Expert

During preparation for a trial, it is important to properly manage an expert's work. Even an expert who is persuasive and articulate on the stand can be a poor choice if the cost is so exorbitant it breaks the proverbial bank. To ensure that the expert does not over-work the case, counsel should stay in regular communication with the expert and develop a personal relationship with him. This contact will make it easier for the attorney to touch base with the expert frequently on budget expectations and carefully monitor the work that is being done. Additionally, counsel should be specific in giving assignments so that both the attorney and the expert know what is to be done, how long it is likely to take, and what it is likely to cost.

IV.
Preparing the Expert to Testify

A. *General Considerations*

Due to the expense and importance of expert testimony at trial, the attorney must take proper care to prepare the expert. This preparation includes such considerations as ensuring that the expert understands the legal elements of the case, reviewing substantive testimony with the expert, practicing a clear explanation of exhibits, if necessary, and framing questions in a way to make the expert's job as easy as possible.

Rehearsal of question and answers in preparation for trial is as important with the expert as it is with the lay witness, and special care should be taken to ensure that the expert will adequately testify.[19]

To ensure favorable expert testimony, the attorney must be certain that the expert understands the legal elements that must be proven in order to win the case and how his or her expert testimony will support this effort.[20] It is imperative that this discussion take place at the beginning of preparation to determine whether the expert will be able to testify truthfully to opinions that will establish the elements necessary to prevail.[21]

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[19] Danner & Varn, *supra* note 18, at § 1:147; Thomas A. Mauet, Fundamentals of Trial Techniques, § 4.8 (2d ed. 1988).

[20] Deborah J. Gander, *Prescription for Powerful Expert Testimony,* 43 Trial 40, 40 (May 2007).

[21] *Id.*

Another important consideration is the expert witness's credentials and experience. Just as with a lay witness, much time should go into the preparation of an expert's testimony. However, additional time will be devoted to "developing the expert's professional background in order to qualify him to render an opinion."[22] Not only is the preliminary testimony regarding his background necessary to establish the expert's competency, but this preliminary testimony also creates credibility with the jury.[23]

B. *Reviewing Testimony*

During a preparation session with an expert witness it is often tempting to simply review the substance of the testimony and indicate that the expert will be asked about his or her education, background and training.[24] This technique is especially tempting when the expert is paid on an hourly basis. If the witness has had experience in the courtroom, this technique might prove adequate provided the witness is also very informed about the facts of the case prior to trial. However, the testimony and effectiveness of the witness will still be enhanced if the preparation session is an *actual* dress rehearsal of the in-court testimony.[25] A principal benefit of an actual dress rehearsal is that the examiner and witness can align the theory of the case. Additionally, the attorney can ensure that the expert understands the questions, and likewise that the attorney understands the answers. If counsel prepares by simulating the trial testimony, the actual examination will be superior and more persuasive than one where the expert is entirely unfamiliar with the surroundings or the procedure of the court.

In addition to practicing direct examination, preparing the witness for cross-examination in a "mock trial" setting may also prove helpful. Deborah J. Gander suggests having someone whose trial abilities you respect cross-examine your expert before the trial.[26] She further suggests that "[a] mock cross-examination with someone who can act as the expert's worst nightmare will help minimize surprises at trial. When you actually face each other in the courtroom, the preparation will help you start off strong."[27] This preparation will also ensure that the witness is not surprised and does not get flustered at trial.

A mock trial exercise is also an opportunity to identify issues with the expert's clothing. For example, is she wearing slacks and a manly blazer in a Southern courtroom where women are best perceived in a skirt? Office staff can also sit in on the exercise and offer their input on the expert's demeanor, language, mannerisms or other unhelpful quirks.

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[22] Mogill, *supra* note 6, at § 6:14.

[23] *See id.* at §§ 6:21-6:26.

[24] *See id.* at § 6:15.

[25] *See id.* at §§ 3:6-3:10.

[26] Gander, *supra* note 20, at 40.

[27] *Id.*

C. *Demonstrative Exhibits*

"Charts, models, bodily demonstrations, and in-court experiments often make up some of the most dramatic and informative parts of an expert's testimony."[28] Not only do these exhibits catch the eyes of the jury, but they also offer a break from the monotony of questions and answers between the examiner and expert.[29] Demonstration of exhibits will often require the witness to leave the stand in order to explain an exhibit, conduct an experiment, or even handle a treatise.[30] In all circumstances where exhibits are known in advance, choreographing these portions of the exam allows the testimony to have a uniform and cohesive outcome.[31]

D. *Framing Questions*

Some courts previously required that the "expert state that he holds the opinion with a reasonable degree of (e.g., scientific or medical) 'certainty'[32] or 'probability.'"[33] Although the Federal Rules of Evidence no longer require such rhetoric, many lawyers continue to follow this tradition in framing their questions.[34] In order to avoid confusing the witness, it is essential that the examiner forewarn him about the possibility of such questions. Attorneys should "[m]ake sure that the expert understands the standard of proof that their testimony must meet."[35] "For example, in the state of Florida, the 'reasonable probability' or 'more likely than not' standard is defined as more than 50 percent."[36] However, in another state, this standard could be different, and the same testimony could fail to meet the necessary standard of proof. Further, is it good practice to "arm [an] expert with any legal language that the evidence rules require, and make sure he or she is comfortable using it."[37] After the necessary time and diligent care is utilized in preparing an expert to testify, the next consideration for an attorney is the actual direct-examination.

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[28] Mogill, *supra* note 6, at § 6:18.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See, e.g.*, Measday v. Kwik-Kopy Corp., 713 F.2d 118 (5th Cir. 1983); Eberle v. Brenner, 475 N.E.2d 639 (Ill. App. Ct. 1985), *appeal after remand*, 505 N.E.2d 691 (Ill. App. Ct. 1987).

[33] *See, e.g.*, Jones v. Ortho Pharmaceutical Corp., 209 Cal. Rptr. 456 (Ct. App. 1985); Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. Ct. App. 1983).

[34] *Id.*

[35] Gander, *supra* note 20, at 40.

[36] *Id.*

[37] *Id.*