

CHAPTER 1

100 Days Before Trial

I have watched the reflection of the rising sun on my computer screen many a morning while my opponents have slept their lives away peacefully, so peacefully.

—Gerry Spence

Introduction

When the trial date is set, first script the trial in your mind. Determine the legal theory: the skeleton of the case. Also identify the beating heart of the case—the reason why your position is the right one for the judge to embrace. Think of trial preparation as a giant jigsaw puzzle that includes documents, witnesses, the law, and procedure. Use your imagination. Visualize the scene depicted in the puzzle and collect all of the pieces. By seeing the case unfold in your mind first, you can prepare for the actual trial in an efficient, focused, and productive manner.

Master the Facts of Your Case

Edward Bennett Williams captured the essence of trial work: “There is no substitute for knowing everything.” When your trial date is set, read your entire client file. Read the pleadings, documents produced, deposition transcripts or notes, subpoena replies, research memos, and any other information in your case file. This exercise, while mundane, gives you both a context for the case and will help germinate the impressions, theories, and themes you will use to prepare for trial.

Much of the early preparation is mental, and the impressions that are obtained from a simple reading of the case file will help guide both the preparation and the presentation of the case. In your trial journal (discussed on page 5), write down reminders to yourself, tasks to complete, thoughts, and general annotations prompted by your review of the case file.

Study the Law

Despite all of the swirling emotions in a family law case, never lose sight that it is a legal proceeding. Know the law and procedure. When entering a new case, the great trial lawyer David Boies gathers all of the important decisions related to the case and rereads them—and so should you. Due to our familiarity with our statutes and important cases in our jurisdiction, we assume we know the law and don't bother researching unless it becomes absolutely necessary. This is a mistake. The law is the foundation: the place where we should start. Read the applicable statute and the commentary. Look at its history and how it has evolved. Read the pertinent case law and see if you can determine any trends from the recent decisions. Find secondary authorities that comment on the particular issues. The law offers many opportunities for persuasion if you just make the time to study it.

Prepare an Outcome Narrative

After the trial date is scheduled, and you have reviewed your file and the pertinent law, start preparing by thinking about the *end* of the case. A focus on the end of the case will guide the preparation. By the time that trial is set, most of the discovery and investigation should be complete and the issues well defined. Hopefully, by now you have ascertained and clarified your client's specific goals. That is your target, and all aspects of preparation should point to that objective. Always keep the goals and outcomes in mind. A focused approach to the case prioritizes and streamlines preparation and also helps evaluate any future settlement offers.

Write down the specific outcome to make it concrete. Unlike the more detailed proposed findings and orders discussed later in this chapter, the outcome narrative is a short reminder of your ultimate

goals for the case. Summarize the exact result you are seeking on behalf of your client. For example:

James Martin is awarded primary residential custody of Sally and Tommy Martin. He is awarded alimony from Angelica Martin in the amount of \$10,000 per month. He is awarded as his separate property the marital residence.

Write your outcome statement in the present tense. Goal setting experts advocate making your goals affirmatively, as though they have already happened. As success coach Tony Robbins states, “Setting goals is the first step in turning the invisible into the visible.” By writing your goals, your brain will subconsciously develop strategies to help you achieve the desired result. Learn to harness the power of your subconscious as well as your conscious mind.

This exercise serves two purposes. First, it will serve as the first page of your trial notebook, keeping the desired result in the front of your mind throughout both the preparation and trial of the case. Second, it serves as the starting point for the preparation of the proof chart, which will be discussed later in this chapter.

Prepare a Case Notebook

Once you have read the case file and studied the law, if you have not done so earlier, prepare a case notebook. This notebook will evolve into the trial notebook. The case notebook is different from the client file containing the pleadings, orders, correspondence, etc. The case notebook is a resource to assist you in both planning and analysis of the issues in the case. Creation and maintenance of a case notebook allows you to quickly and easily access important information during trial preparation. Using the case notebook throughout the planning process is just as important as using one to keep you organized at the trial itself. Use the notebook to retain thoughts and ideas about the case.

Development of the Case Notebook

The case notebook must be prepared well before trial, but how early should you prepare it? Each case is different; the level of complexity and issues vary, and the creation of the notebook will depend on those variables. Notebooks started earlier in the case will evolve over