Preparing for a family court trial

1. Intro
   1. Different levels of preparation for “ready to negotiate” versus “read to try”
   2. Waste client’s money if you get “ready to try” before negotiation/mediation
   3. However takes three months to go from one level of preparation to the next
   4. Trial retainers in initial fee agreements
2. What preparation has to be done at the start of the case
   1. Preserve evidence of date of filing values of assets and debts
   2. If pre-marital or non-marital assets were comingled or transmuted during marriage, want to establish evidence of value at date of marriage (or date of acquisition if gifted during marriage) and develop records showing all contributions to that asset during marriage
      1. May need financial expert to do evaluation
   3. Initial discovery—at a minimum standard interrogatories and requests to produce all exhibits that might be used at trial
3. Three months before trial—First trial prep meeting with client
   1. Outline trial issues
      1. Each contested issues (alimony; equitable distribution; custody)
      2. Within each contested issue what factors to highlight/defend
      3. With equitable distribution, how to establish value and date of filing and how to address changes in value since filing
      4. Within each of those sub issues, what evidence to marshal to establish that fact
         1. Active versus passive gain (or loss) and who is responsible
   2. Determine who will testify at trial--begin issuing trial subpoenas vial email
      1. Ask witnesses to accept service
      2. Ask witnesses if they are available during those dates
      3. If not available
         1. Depose for trial
         2. Forgo the testimony
         3. See if others can make this witness merely cumulative
      4. If reluctant
         1. See if one can convince they to be more willing
         2. See if others can make this witness merely cumulative
         3. Serve subpoena and prepare for reluctant witness
      5. Out of state witnesses
         1. Will they come for trial
         2. If not, telephonic depositions
         3. If other party will not agree to telephonic deposition, motion to authorize telephonic depositions [SCRCP 30(b)(7)](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=30.0&subRuleID=&ruleType=CIV)
   3. Authenticity of documents
      1. Requests to admit the authenticity of documents—unlimited [SCRCP 36](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=36.0&subRuleID=&ruleType=CIV)
      2. Certificates of authenticity [SCRE 903](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=903.0&subRuleID=&ruleType=EVD); [SCRE 902(8)](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=902.0&subRuleID=&ruleType=EVD)
      3. Client authentication [SCRE 901(b)(1)](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=901.0&subRuleID=&ruleType=EVD)
   4. Guardian ad litem
      1. Review initial report
         1. What new areas does guardian need to investigate?
         2. Any follow up investigation
         3. Is guardian’s investigation incomplete in some areas?
         4. Ask guardian, in writing, to conduct additional investigation
   5. Review client’s discovery responses
      1. What is no longer accurate and needs to be amended? [SCRCP 26](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=26.0&subRuleID=&ruleType=CIV) notes to 1996 amendment
      2. What is incomplete and needs to be supplements [SCRCP 26(e)](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=26.0&subRuleID=&ruleType=CIV)
         1. Time to think about adding witnesses
            1. Experts?

Financial expert

Earning capacity expert

* + - 1. Time to think about additional trial exhibits
  1. Review opposing party’s discovery responses
     1. What is incomplete
     2. What needs to be supplemented? [SCRCP 26(e)](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=26.0&subRuleID=&ruleType=CIV)
     3. What supplemental discovery requests need to be issued
  2. Has enough time been set aside for trial?
     1. If not, see if court can grant more time by adding days at end of trial?
     2. Better to seek more time three months out than on eve of trial or during trial

1. Five weeks after initial meeting—second meeting with client
   1. Issue supplemental discovery responses
   2. Check on status of acceptance of service of trial subpoenas
   3. Check on status of other side’s discovery responses
      1. Time to file motion to compel
      2. Issue even more supplemental discovery requests?
   4. Notice depositions of unavailable witnesses
   5. Take deposition of opposing party?
   6. Issue trial subpoenas to additional witnesses
   7. Begin thinking about testimony outline for client and opposing party
      1. Similar to outline for trial issues
      2. Add notes when exhibits will be introduced and list exhibit
      3. Add notes when evidence may be contested and note applicable rule of evidence
      4. Anticipate cross examination of client
         1. What is certain to be covered--address on direct and remove some of the sting
         2. What is likely to be covered—address on direct?
   8. Check on status of guardian investigation
   9. Begin crafting final financial declaration
2. Five weeks to two weeks before trial
   1. Depositions
   2. Follow up with guardian about investigation
   3. Follow up on discovery responses—[motion to compel](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=37.0&subRuleID=&ruleType=CIV)
   4. Follow up on certificates of authenticity
   5. Follow up on witnesses’ acceptance of trial subpoenas
      1. Get sheriff or process server to serve subpoenas
   6. Further supplementation of client’s witness list and trial exhibits
   7. Continue crafting deposition outlines of parties
   8. Consider second mediation
   9. Final settlement proposal
      1. Goal it to meet or beat it at trial and obtain attorney’s fees
      2. Consider whether one is willing to settle part of the case if one cannot settle all of the case
3. Week to day before trial
   1. Designate portions of deposition(s) to be read into the record. [SCRCP 32(a)(5)](http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=32.0&subRuleID=&ruleType=CIV)
   2. What order to call witnesses?
      1. If Plaintiff, will one call Defendant
      2. If Defendant, prepare client to be called as witness
      3. Typically prefer to call own client last
      4. Typically prefer to call opposing party first
      5. Other witnesses
         1. Convenience
         2. Coherence
   3. Talk to witnesses
      1. Preferably with client present
         1. Client and witness can jog each other’s memory and suggest issues to cover
      2. Prepare trial testimony outlines similar to party outlines but covering fewer topics
         1. Who witness is—why credible
         2. How witness knows parties—why knowledgeable
         3. Facts versus opinion
            1. Inherently biased witnesses should stick to facts (opinion undermines credibility)
      3. Discuss process of trial testimony
      4. Discuss likely cross examination
      5. Stress credibility
      6. When should witness arrive?
   4. Prepare testimony outline of guardian
      1. Is guardian’s investigation insufficient?
         1. Preserve communications where one asked guardian to conduct investigation that the guardian did not investigate
      2. List questions where guardian’s investigation differs (unfavorably) to what one believes the testimony and evidence will show
      3. Pick out portions of guardian’s report that are favorable to client and ask guardian questions that highlight those portions
   5. Finalize client’s financial declaration
   6. Finalize testimony outlines of client and opposing party
      1. Collate trial exhibits
   7. Discuss with opposing counsel submitting fee affidavits last day of trial
      1. If no agreement, prepare fee affidavit