



Brainstorming your way to a winning case strategy

By Greg Krehel

This white paper addresses the use of team brainstorming in complex cases to develop a winning case strategy.

Managing Case Complexity

Complex cases obstruct effective thinking. Complex cases involve dozens of witnesses and organisations, hundreds of critical facts, and hundreds, if not thousands, of documents.

Brainstorming sessions can help deal with case complexity problems. Early in case preparation, brainstorming helps flesh out the critical factual disputes, and set goals for discovery. As trial approaches, brainstorming helps assess case strengths and weaknesses, develop themes and finalise trial strategies.

Effective brainstorming requires far more than getting the trial team together to share ideas. One should hold brainstorming sessions even if there is only one attorney working on a case. Brainstorming is about adopting a particular method of analysing a case; a method that promotes clear thinking, helps capture that thinking and enables action. The method, not the number of people, is what makes it brainstorming.

An effective brainstorming methodology analyses a case on an issue-by-issue basis. Rather than trying to analyse the case as a whole, it is dealt with in manageable portions. It is much easier to think effectively by taking an issue-driven approach to case analysis.



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Schedule a number of brainstorming sessions in working up a case. When representing the plaintiff, hold the initial brainstorming session before filing the case. And when representing the defendant, hold the session within weeks of filing (or even pre-filing in instances when a suit is imminent).

The first brainstorming session should focus on mapping out the key facts, the cast of characters and the issues in the case. Develop a resource that can be explored long after the brainstorming session is over, and that is a tremendous aid to others on the trial team, and to the client.

Subsequent brainstorming sessions should extend and refine the case knowledge base. In progressing towards trial, the thrust of brainstorming will shift to evaluating the facts and issues, developing trial themes, and finalising trial strategy. One of the later brainstorming sessions should be devoted to determining the content and basic design of the demonstrative evidence to be used

during trial.

What follows is a plan of action for a first brainstorming session to build an initial map of the new matter. In under five hours, endeavor to create four invaluable documents: an issue list; a cast of characters; a chronology that contains both known and wished for facts; and a question/to-do list.

Brainstorming Session Preparation

As with any event, careful planning increases the likelihood of success. To get the most out of a brainstorming session, limit the attendance to six members of the trial team, and the length to four to five hours. If the session runs longer than half a day, the quality of thinking drops sharply.

Choose a date and location conducive to working without interruption. Consider holding the session on a weekend and/or offsite.

Create an agenda that illustrates how the time in the brainstorming session will be allocated among various tasks (see example below).

Develop a set of ground rules: Adhere to the agenda. No calls. No unscheduled breaks. No sidebars.

Distribute the agenda and ground rules to all attendees in advance of the session. If attendees are new to brainstorming, consider sending them a copy of this article as well.

Inform one of invitees that he or she will be the scribe, i.e., the individual who will record the information developed as the



session proceeds. Alternatively, invite a support person to attend the session and fill this role.

Have the appropriate equipment on hand. This includes a large whiteboard and poster pad paper. Ideally, use a computer, an LCD projection unit and a screen. The scribe will capture all attendees ideas on the white board/poster pad or on the computer where they will be displayed on the screen. Literally seeing the thinking uncovers places where refinement become obvious.

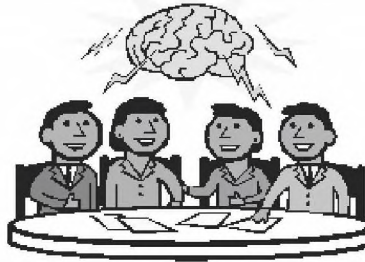
Conducting the Session

1. Review goals, agenda, and ground rules – 10 minutes

Discuss the goals of the session: To develop a question list, a cast of characters, an issue list, and a chronology, and to make an initial assessment of case risk. Review the session agenda and ground rules.

2. Develop a question list throughout the remainder of the session.

Brainstorming is not solely about organizing and exploring existing knowledge. It's also a way to identify questions that need to



be answered to ensure complete discovery.

Develop the question list throughout the session. Each time a question arises that can't be answered, make sure to get it down on paper or into the computer. In addition to capturing the question itself, evaluate how critical it is to get an answer. Use a simple A (extremely critical), B, C, and D scale.

3. Build an initial Cast of Characters – 20 minutes

List the obvious members of the cast of characters. This task allows the group to practise before plunging into the more difficult job of defining case issues.

Include key witnesses, organisations, documents, and other pieces of physical evidence. Capture each player's name and role in the case (i.e., a succinct description of why the person, organisation, or piece of physical evidence is important).

4. Produce an issue list – 30 minutes

Define a list of case issues. Capture the name of each issue and a more detailed description of it (a description that would permit any new member of the trial team to quickly grasp the issue).

Don't limit thinking to issues tied directly to legal claims. Include factual disputes and any other dimensions of the case that will exert an important influence on juror thinking. For example, assume one is representing the defendant in a product liability matter. In such a case, one might want to include this issue in the list: The plaintiff is motivated by greed, not a desire for justice. Even though it is highly unlikely one would ever make such an argument explicitly, it would be interesting to track which facts point to plaintiff greed, allowing jurors to reach such a conclusion on their own.

5. Expand the cast of characters and capture issue relationships – 30 minutes

Return to the cast of characters with

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the issue list in hand. Take the first issue in the list. Think about any and all people, organisations and documents that will be important to this specific dimension of the case. Add to the cast of characters any new players identified. Repeat this process for each issue.

Once the cast of characters is completed, work back through it listing the name of each issue to which a witness, organisation, or document relates. This step enables the filtering of the cast of characters by issue. Rather than printing the entire cast of characters, it will be easy to pull a list of just those players associated with a specific issue.

6. Break –10 minutes -- No phones. Listening to voice mails will distract the team during the next part of the session.

7. Create a chronology of key facts –1 hour 20 minutes

Begin this step in the brainstorming process by creating a chronology that contains the most obvious case facts.

Next, use the issue list to help you dredge up facts that might otherwise be overlooked. Work through the list one issue at a time. What are the key facts of which the team is aware regarding this issue? Are they in the chronology already? If not, add them.

This is one place where issue-driven brainstorming method is very effective. A chronology created by thinking globally about a case is never as complete as one created working issue by issue. Moreover, when developing the hardest hitting case, identify the best possible facts vis-à-vis each case issue. Taking an issue-driven approach to building a chronology helps the team understand the relationships

between facts and issues, and makes it easy to spot gaps in the available evidence.

When building the chronology, list the fact and the date on which it occurred. When there are facts for which there is only partial date information, substitute a question mark for the portion of the date that's undetermined (e.g., 3/?/99, ?/?/98).

Consider trapping the source, or sources, of the fact and an indication of whether it is disputed or undisputed. Definitely capture the name of the issue or issues on which each fact bears.

8. Break – 10 minutes--No phone calls.

9. Add prospective facts to the chronology – one hour

This could be the most important phase of the brainstorming session. In step seven, focus was placed capturing the known facts. In this step, brainstorm about the facts the team wishes they knew, as well as the facts the opposition is probably hoping to develop.

To keep the case at a manageable level, work one issue at a time. Think about an issue. Given prior litigation experience, what are the unknown facts needed to prove the position regarding it? Next, stand in the opponents shoes. What are the facts they'll be looking to develop for this issue? Enter these prospective facts into the chronology, and, if possible, list potential sources for each.

There's no guarantee that the team will succeed in developing sources for the prospective facts on the unknown fact wish list. But the odds of hitting the target is much higher if there is a reasonable idea of the map coordinates. The fact wish list developed in this

brainstorming session should be a valuable guide for your discovery efforts.

10. Wrap up – 20 minutes

Draw conclusions about the overall state of case knowledge. Make an assessment of the strengths or weakness of the case.

Review the items on the question list developed during the session. Assign responsibility for obtaining answers to the critical questions, and dates by which answers are due.

Following the session, provide each member of the trial team and the client, with copies of the key documents you developed. Seek feedback.

The documents begun are "living" ones. As the case heads towards trial, keep the issue list, cast of characters, chronology and the question list up to date. Use this work product to facilitate the next brainstorming session.

About the Author

Greg Krehel is the Vice President for LexisNexis CaseMap, and the co-founder of CaseSoft. He directs CaseMap product development efforts at LexisNexis' Ponte Vedra Beach, Florida offices. Prior to starting CaseSoft in 1996, Greg spent 15 years managing trial consulting firms that offered jury research and demonstrative evidence preparation services. Recently acquired by LexisNexis, CaseMap provides the workflow platform into which all of the key products that make up the LexisNexis Total Litigator suite are linked and integrated.

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