

Brainstorming Your Way to a Winning Case Strategy



By Greg Krehel

Brainstorming makes it easy to think clearly about complex cases. Here are some ideas that will help you get the most out of your brainstorming sessions.



Managing Case Complexity

Complexity obstructs effective thinking. And your cases are complex. They involve dozens of witnesses and organizations, hundreds of critical facts, and hundreds, if not thousands, of documents.

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

Now, let's not confuse brainstorming with bull shooting. Effective brainstorming requires far more than getting the trial team together to swap ideas. In fact, you should hold brainstorming sessions even if you're the only attorney working on a case. That's because brainstorming is about adopting a particular method of analyzing your case; a method that helps you think clearly, and helps you capture your thinking and act on it. The method, not the number of people, is what makes it brainstorming.

My partners at DecisionQuest and I have spent the past 15 years conducting jury research studies on all manner of civil and criminal cases. In the course of working with our jury research clients, we developed what we feel is a particularly effective brainstorming methodology. Our method asks you to analyze your case on an issue-by-issue basis. Rather than trying to swallow the case whole, you deal with it in manageable chunks. I believe you'll be surprised by how much easier it is to think effectively when you take this issue-driven approach to case analysis.

Plan to hold a number of brainstorming sessions as you work up a case. If you represent the plaintiff, you should hold your initial brainstorming session before filing the case. And if you represent the defendant, you should hold this session within weeks of filing (or even pre-filing in those many instances when you know that a suit is imminent).

Your first brainstorming session should focus on mapping out the key facts, the cast of characters, and the issues in the case. You'll develop a resource that you can explore long after your brainstorming session is over and that is a tremendous aid to others on the trial team and to your client.

Subsequent brainstorming sessions should extend and refine your case knowledge base. As you progress towards trial, the thrust of your brainstorming will shift to

evaluating the facts and issues, developing trial themes, and finalizing trial strategy. One of your 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 your first brainstorming session, the one in which you build an initial map of your new matter. In under five hours, you'll have created 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.

Preparing For Your Brainstorming Session

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. Too many cooks spoil the broth. And, in our experience, if the session runs longer than half a day, the quality of thinking drops precipitously.

Choose a date and location conducive to working without interruption. Consider holding your 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. Here are my favorites: Adhere to the agenda. No calls. No unscheduled breaks. No sidebars. No calls. Rule infractions? Miscreants pay \$100 a person to other attendees.

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 also.

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.

Round up the appropriate equipment. You'll need a large whiteboard and plenty of butcher-block paper. Better yet, use a computer, an LCD projection unit, and a screen. The scribe will capture all attendees' ideas on the white board/butcher block or in the computer where they will be displayed on the screen. When you literally see your thinking, places where it needs 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 your existing knowledge. It's also a great way to identify questions that need to be answered to ensure complete discovery.

Develop your Question List throughout the session. Each time you bump into a question you can't answer, make sure to get it down on paper or into your 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 limber up before plunging into the more difficult job of defining case issues.

Include key witnesses, organizations, 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, organization, 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 your thinking to issues tied directly to legal claims. Include factual disputes and any other dimensions of the case that you feel will exert an important influence on juror thinking. For example, assume you are representing the defendant in a product liability matter. In such a case, you might want to include this issue in your list: The Plaintiff is Motivated by Greed, Not a Desire for Justice. Even though it is highly unlikely you 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 your Cast of Characters with your Issue List in hand. Take the first issue in the list. Think about any and all people, organizations, and documents that will be important to this specific dimension of the case. Add to the Cast of Characters any new players you identify. Repeat this process for each issue.

Once you have completed the Cast of Characters, work back

through it listing the name of each issue to which a witness, organization, or document relates. This step will put you in a position to filter 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. Take a break – 10 minutes

No phones. If you listen to 15 voice mails, your thinking will be distracted 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.

In the course of working with our jury research clients, we developed what we feel is a particularly effective brainstorming methodology. Our method asks you to analyze your case on an issue-by-issue basis. Rather than trying to swallow the case whole, you deal with it in manageable chunks.

Next, use your Issue List to help you dredge up facts you might otherwise overlook. Work through the list one issue at a time. What are the key facts of which you're aware regarding this issue? Are they in the Chronology already? If not, get them in.

This is one place where I feel our issue-driven brainstorming method really pays off. A Chronology created by thinking globally about a case is never as complete as one created working issue by issue. Moreover, when we talk about developing the hardest hitting case, don't we mean identifying the best possible facts vis-à-vis each case issue? Taking an issue-driven approach to building a chronology helps us understand the relationships between facts and issues, and makes it easy to spot gaps in the available evidence.

As you build your Chronology, list the fact and the date on which it occurred. When you have facts for which you have 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. Take a break – 10 minutes

I see you with that cell phone – don't do it.

9. Add prospective facts to your Chronology – 1 hour

This is likely to be the most important phase of your brainstorming session. In Step 7, we focused on capturing the known facts. In this step, we're going to brainstorm about the facts we wish we had, as well as the facts the opposition is probably hoping to develop.

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

Of course, there's no guarantee that you'll succeed in developing sources for the prospective facts on your wish list. But aren't the odds of hitting a target much higher if you have a reasonable idea of its map coordinates? The fact wish list you develop 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 strength or weakness of the case.

Review the items on the Question List you've 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 your client with copies of the key documents you developed. Seek feedback.

The documents you've begun are "living" ones. As you head towards trial, keep your Issue List, your Cast of Characters, your Chronology, and your Question List up to date. Use this work product to facilitate your next brainstorming session.

About the Author

Greg Krehel is CEO of DecisionQuest's CaseSoft division (www.casesoft.com). CaseSoft is the developer of litigation software tools including CaseMap and TimeMap. CaseMap makes it easy to organize and explore the facts, the cast of characters, and the issues in any case. TimeMap makes it a cinch to create chronology visuals for use during hearings and trials, client meetings and brainstorming sessions. In addition to his background in software development, Mr. Krehel has over 15 years of trial consulting experience.

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