

Creating and Using Issue Analysis Memos

Of the hundreds of hours you invest in a case, the handful needed to work up an issue analysis memo could easily be the most valuable. Make this simple case analysis tool a standard for every matter and you'll always have a tight grip on issues and arguments.

Introduction

The ownership of case details acquired during the issue analysis process permeates all critical pretrial activities: taking depositions, drafting briefs, evaluating facts, reviewing documents, and so on. Creating issue analysis memos also results in numerous less obvious benefits, e.g., dramatically enhanced demonstrative evidence.

Recommendations for developing issue analysis memos and for using them to great effect follow. A disclosure before proceeding: The ideas presented in this white paper do not require our CaseMap® case analysis tool to implement and the article makes no further mention of CaseMap. However, the CaseMap issue spreadsheet does make it easy to create issue analysis memos, so I'm not a neutral party. That said, I hope and believe you'll find that my issue analysis recommendations are built on solid reasoning and that this logic shaped the design of CaseMap.

Creating Issue Analysis Memos

Here are a dozen pointers for conducting effective issue analysis and developing a great issue memo work product.

A Complaint is Not the Answer

For the better part of two decades, I managed a jury research firm that conducted mock trials on 1,000+ matters. Our consulting efforts always began by requesting background materials that would educate us about the case and its issues. In the vast majority of instances, the latest Amended Complaint and Amended Answer provided the closest approximation to a summary of case issues. However, even though such pleadings list claims, they're no substitute for a true issue analysis memo.

Once the cycle of amendments ends, the Complaint and Answer become frozen in time. In contrast, an issue analysis memo is a working document that will capture the team's evolving thinking over the months or years leading to trial.

The Complaint and Answer focus exclusively on the top-level legal issues. They rarely specify the elements required to prove each claim. Also, since pleadings are guaranteed to fall into enemy hands, we're certainly not going to use them to organize our thinking regarding best arguments and hardest-hitting evidence. In the many Answers, the defense's position regarding each claim is succinctly presented as "Denied." This tactic makes complete sense given the Answer's true purpose, but also demonstrates why pleadings can't be substituted for an actual issue analysis report.

Any case worth filing or fighting deserves a purpose-built issue analysis memo that makes thinking regarding issues and arguments explicit.

Begin Before the Beginning

The filing of a Complaint is the gunshot that starts a case. However, as plaintiff counsel authors this pleading, they've obviously been thinking about the matter and its claims for an extended period beforehand. Frequently, defense counsel has also been stewing on the potential case long before a Complaint is filed, as the soon-to-be defendant is normally well aware of the dispute that is trending towards litigation. Start an issue analysis memo for each new case as soon as your thinking on the matter begins. It only takes a few minutes to write up your initial impressions of case issues. Get down not only your own issues, but also the claims, counterclaims, and cross-claims other parties are likely to introduce. Capture the elements of each claim and any arguments that you already know could be made about them.

Use early drafts of the issue memo to frame the Complaint or Answer. Keep this case analysis tool hard at work until the case is resolved by settlement or trial.

"Issue analysis memos should be formatted as outlines, not as flat lists."

The World of Issues and Arguments Isn't Flat

Issue analysis memos should be formatted as outlines, not as flat lists.

An outline makes it easy to capture the hierarchical relationships among legal claims and their elements. Visual presentation mirrors legal reality: elements appear nested below the claims to which they relate.

In contrast, a flat list masks the connections between parent claim and child elements. Consider a fraud claim. Proving fraud requires a showing of these elements: intent, reliance, and loss. In a flat list of issues, the intent, reliance, and loss elements would be displayed on equal footing with the fraud claim—a counterintuitive presentation for those who understand the law and an extremely misleading one for clients and others who don't.

An outline structure also provides the best way to organize thinking regarding arguments and themes. Arguments are typically marshaled in support of our position on a claim or one of its elements. In an outline, arguments are easily binned under the claim or element to which they relate. A flat list conceals the relationship between an argument and the legal issues.

Another problem with using a flat list to organize issue thinking is that it quickly becomes unwieldy. A list just gets longer and longer as elements and arguments are added. An outline tames the growing set of issues. View it fully expanded or collapsed so that it hides all child nodes below a chosen depth.

Don't Let the Pendulum Swing Too Far

A multi-level outline beats the pants off a flat list. Does it follow that an issue outline with many levels is better than one with just a few? Definitely not. Don't expect a six-level outline to be twice as good as a three-level one. In fact, a six-level outline is likely to be counterproductive overkill.

It's rare for the evidence to be clear or for the trial team's thinking to have jelled in the first months of working up a case. Thus, avoid needless rework and the possibility of spooking others on the trial team by keeping your outline simple at this early stage—two levels in most areas, maybe three levels in a few.

An issue outline can and should gain depth as the case proceeds towards trial. Nonetheless, even the most complicated case rarely requires an outline that's over four levels deep. Three levels is sufficient to capture claims as the top tier, the elements of each claim as the second, and arguments that can be made in support of each element as the third.

Pardon Our Permanent Dust

An issue analysis memo is, by design, an unending work in progress. If everyone on the trial team understands this fact, you'll be free to use the outline to foster communication and thinking. If expectations aren't properly set, you'll get a fraction of the possible benefit from this case analysis tool. You'll tinker with the outline, but won't share it with clients and other trial team members for fear of their negative reactions to something rough hewn. Or, you'll limit the issues listed to the most obvious and the least controversial.

Why not include in each issue analysis memo an introduction that helps set expectations? Perhaps something like:

"Pardon Our Dust! Please note that the following issue analysis memo is a draft. We expect it to evolve substantially over the months leading to trial. We use this document to capture even the roughest ideas so they may be shared, evaluated, and improved. Don't be surprised to discover that different portions of the outline are at varying stages of refinement. Again, please understand that this memo isn't intended to be a polished report—it's a tool that helps us think. It also provides a way to receive your valuable input. Thank you."

Include Key Factual Disputes

A case may involve dozens, if not hundreds, of disputed facts. Isn't a disputed fact really a type of issue? We claim a fact is true. The opposition claims it isn't. All parties can present evidence regarding the disputed fact in an attempt to persuade the factfinder to see things the right way. Most disputed facts aren't critical to the way the factfinder is likely to decide the matter, but there are typically a handful that emerge as case linchpins. These critical disputed facts should be treated as full-fledged issues and entered in the outline. Add less important disputed facts to the case's fact chronology and flag their status as disputed by one party or another.

... And Extralegal Issues, Too

The bulk of every issue analysis memo will be devoted to legal claims and the elements and arguments related to these claims. But your outlines should also trap thinking regarding the extralegal dimensions that may influence the way jurors and even the judge respond to a case.

Such extralegal issues are typically tied to the emotional reactions evoked by the plaintiff, the prosecution, and/or the defendant. Has the plaintiff sustained such grievous injuries that jurors' cognitive processes could be swamped by sympathy? Does a corporate defendant have a stained reputation in the community? If so, your issue outline deserves an issue on the topic.

Extralegal issues don't have to be of the "Elephant in the Room" class. Assume, for example, that you represent the defendant in a toxic tort matter where the plaintiff's damage demands seem excessive. In such a case, there might be good cause to include a Plaintiff Greed issue in your outline. Greed obviously isn't a legal issue in the case. And it certainly isn't one that you're likely to argue at trial. However, by including a Greed issue in the analysis memo, you're in a position to consider what facts, if any, would prompt jurors to see the plaintiff as motivated by avarice.

"Use issue analysis memos to validate the demonstrative evidence ideas."

Short & Sweet

One challenge when working up an issue outline is how to phrase or name each issue. The first instinct of many new issue analysts is to use a descriptive statement as the issue's name, e.g., "Third National Bank Breached its Fiduciary Duty to Hawkins." There's nothing per se wrong with such lengthy names, but why not drop the formality and adopt whatever name the trial team would find most natural to employ when discussing the case?

To create issue names that are easy to use during conversations, plug each name candidate into this sentence: "Did you learn anything important about the X issue at the Lang depo today?" Let's employ this test using the hypothetical issue discussed above. "Did you learn anything important about the Third National Bank Breached its Fiduciary Duty to Hawkins issue at the Lang depo today?" That flunks. How about, "Did you learn anything about the Fiduciary Duty issue at the Lang depo today?" Much better.

The move to simpler issue names is made at the expense of having the name itself indicate such details as who allegedly wronged whom. However, as explained in the following topic, this knowledge is best captured in ways that won't result in a monster moniker.

Put Some Meat on the Bones

An issue analysis memo needs to be more than a skeleton outline of issue names. Flesh out your thinking by capturing a detailed description of each issue and argument. Explain legal jargon and provide a summary of the key evidence regarding the issue. Even if you're the only individual working on a case, it's worth spending the few minutes necessary to develop these issue descriptions. They're of great value to the client and to expert witnesses. And the very process of writing up a description clarifies your thinking. Creating descriptions also provides a way to test the issues you've defined. If you struggle to pen a good description, it may mean that the issue needs to be recast.

The Good, the Bad & the Ugly

In addition to trapping issue descriptions, get down a paragraph or two explaining how you expect the evidence on each issue to cut. Is your position on the issue weak or strong and why do you feel this way?

Sometimes we get queasy about making our evaluations explicit. Once our thinking is out in the open, others get to play the critic. But any client worth having will appreciate the fact you're pushing the analysis process forward. Kudos to you for sparking a debate that's best held well before trial.

Here's a strategy to consider if you agree that evaluating case issues is critical, but don't want to be the first up to the tee: conduct a brainstorming session devoted to evaluating the strengths and weaknesses of our position on each case issue. This type of meeting forces everyone to lay their cards down at the same time. Your issue analysis memo provides both the structure to guide the brainstorming discussion and the location to capture the group's thinking.

Off-Off-Broadway

While thinking about case issues, you'll no doubt come up with new twists that don't fit neatly into the existing issue hierarchy. Provide a home for these thoughts by adding a top-level item named "Ideas" at the bottom of each issue outline. Visit the Ideas node frequently to see if the issues in it can be developed and eventually promoted into the primary outline structure.

Does this Ideas node recommendation imply that only fully-formed "perfect" issues deserve to appear elsewhere in the outline? No, an issue analysis memo should be considered an Off-Broadway production. Think of the Ideas node as being Off-Off-Broadway. The Ideas node is another big plus that stems from using an outline to organize issue thinking. It's easy to create a location where extra-rough ideas can be captured and explored without cluttering up the primary issue structure.

Employed at Will

An outline makes it possible to deal gracefully with a large number of issue ideas. Still, there's no reason to burden readers with issues that aren't pulling their weight or are largely redundant.

Barring the judge's granting of some portion of a Motion for Summary Judgment, claims and their elements have a guarantee of lifetime employment in the outline. But arguments and extralegal issues are employed at will. Review them semi-annually and make sure they should be retained. If giving an issue the pink slip makes you uncomfortable, transfer it out of the primary outline to the Idea category described in the "Off-Off-Broadway" topic above.

Putting Issue Analysis Memos to Work

Let's now shift gears from crafting an effective issue analysis memo to using it. Here are some of the ways an issue and argument outline can be put to work.

Thinking Clarified

What's the most important reason to make issue analysis memos standard on every case? The very process of creating these reports crystallizes your thinking. Our minds are incredible thinking machines. But try to consider more than a handful of items at once and that amazing machine is sure to be overwhelmed. Getting ideas out of your head and into an issue analysis memo makes it possible to deal with case issues in mind-sized bites.

Team Educated

Want a great way to give clients, experts, and new trial team members an understanding of the case? Use your issue analysis memo as an instructional aid. Distribute it for independent reading or use it as a prop that structures a verbal case overview. If the matter warrants, why not create a PowerPoint® presentation based on your issue outline?

Consensus Built

Interested in a tool that helps the trial team achieve a common understanding regarding issues and arguments—both what they are and how they cut? An issue analysis memo acts as a central repository for the team’s thinking and makes areas of agreement and disagreement readily apparent. The task of reaching consensus becomes far easier once it’s clear where thinking diverges.

Case Closed

Why not add a great new tool to your practice development kit? When meeting with prospective clients, pass out samples of the issue analysis memos you’ve developed for completed matters. Why not also distribute a first swipe at the issue outline for the prospective case? The five minutes of work needed to create this draft could yield tens of 1000s in revenue.

Demonstratives Vetted

Looking to make the most of courtroom graphics and keep the cost of these visual aids under control? Use issue analysis memos to validate demonstrative evidence ideas before they’re produced for display in court.

How? Before giving the green light to begin production of courtroom graphics, print the case’s issue analysis memo and complete the following steps:

1. Obtain a list of all demonstrative evidence ideas the team plans to have produced for use in court.
2. Consider the first graphic idea on the list. Review your issue analysis memo and determine which issues this visual helps communicate. Jot the name of these issues down next to the name of the visual. Repeat this process for each demonstrative idea.
3. When you bump into a visual that doesn’t appear to support any issue, ask what purpose that graphic is going to serve. If there isn’t a darn good answer, strike the idea and save \$500 or more in graphics costs.

4. Once all demonstrative ideas have been coded with the names of the issues they help communicate, tally the number of visuals that relate to each issue. Review the resulting counts and see if they make sense. It’s a good bet that some issues will have too many visuals devoted to them and that others will be naked of demonstrative support. Take remedial action as needed. Follow this method for carefully choosing how demonstratives are distributed across case issues and you’ll end up with a particularly persuasive set of courtroom graphics.

New Associates Productive

Could you use a method for leveraging the impact of new associates, while providing them with superb training? Turn issue analysis memos into batons that pass analysis responsibility along to new hires. Here’s the process:

1. Ask new associates to read this article and to review issue analysis memos from a handful of prior cases.
2. Give them the Complaint and Answer from an ongoing matter and task them to draft an issue outline for this case. Take a red pen to their efforts and also give them the actual issue analysis memo for the case so they can compare it to their draft. Repeat this procedure as required.
3. Assign your apprentice issue analysts to a new matter that’s relatively simple and for which no issue analysis memo yet exists. Have them create a first draft. Provide feedback, but make these associates responsible for developing the issue analysis memo over the life of the case.

Facts and Documents Organized

Any case that merits an issue analysis memo also deserves a fact chronology and a document index. Want an easy way to enhance the value of these other critical case analysis reports?

Add a Linked Issues column to your fact chronology spreadsheet. Use it to capture the names of the issues on which each fact bears. Include an equivalent column in the case's document index.

Assuming the fact chronology resides in a database program, once facts have been linked to issues, the chronology can be filtered down from all facts to just those that bear on a particular issue. Ditto for your document index.

Warning: some trial teams create a list of case issues on the fly as they issue-code facts and documents. This is a recipe for disaster. Be sure to work up a solid issue analysis memo and to have trial team buy-in on the issue structure before the process of issue-coding facts and documents begins.

Future Cases Leveraged

Could you use an analysis tool that becomes more valuable over time? If you make issue outlines standard practice, you'll have one.

The usefulness of an issue analysis memo doesn't end when the case for which it was originally drafted is resolved. Your memo becomes a resource that helps jumpstart thinking on any analogous future matter.

Conclusion

Please don't spend another minute pondering the issue analysis memo concept. Select a case and draft an issue outline for it today.

I hope you found this article useful. Please write me at greg.krehel@lexisnexis.com with reactions and suggestions. I would be honored if you were interested in my other case analysis white papers, e.g., "Chronology Best Practices" and "The Bell Curve and Document Imaging/Indexing." They are available at www.casesoft.com/articles.shtml. Thank you.

About the Author

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