



CPR



RESOURCES FOR NAVIGATING COMPLEX BUSINESS DISPUTES

Corporate Early Case Assessment Toolkit

Produced by the Corporate Early Case Assessment Commission
of the International Institute for Conflict Prevention and Resolution



CPR assembled a commission of leading corporate counsel, attorneys and academics to collaborate in the production of an Early Case Assessment tool which could be used across a broad spectrum of commercial disputes. The organization gratefully acknowledges the individuals who contributed their expertise and insights to this project.

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*Titles and affiliations reflect participants' positions at the time of drafting (2009).
The views expressed in these ECA Guidelines do not reflect the views of the participating
CPR Members' companies.*

Fundamentals of Early Case Assessment



CPR Definition: Early Case Assessment

CPR's Early Case Assessment Toolkit (ECA) outlines a simple conflict management process designed to facilitate more informed and expedited decision-making at the early stages of a dispute. The process calls for a team working together in a specified time frame to gather the key facts of the dispute, identify the key business concerns, assess the various risks and costs the dispute poses for the company, and make an informed choice or recommendation on how to handle the dispute.

While one of the possible recommendations could be to settle or resolve the dispute, CPR wishes to emphasize that these Guidelines are not about settlement, although that could be one possible outcome of Early Case Assessment. Instead, these Guidelines focus on evaluating the dispute so that an appropriate strategy can be formulated, whether that is settlement, full-bore litigation, or something in between, with an eye toward reducing or eliminating disputes as soon and as inexpensively as possible.

Benefits of Using Early Case Assessment

In today's highly litigious business climate there are numerous business and legal trends supporting the use of Early Case Assessment. These trends include an increasing volume of claims and litigation, the increasing complexity and protraction of claims, and the resulting higher legal fees and settlements. In this climate, many legal departments have worked to develop new definitions of "value" and "win" by treating disputes as a business process, and protracted litigation as a defect to be remedied. One effective tool for controlling disputes and reducing or eliminating litigation is the ECA process.



There are numerous potential benefits of implementing an Early Case Assessment program, including:

- Enhanced, early case analysis
- Enhanced, early risk identification and analysis
- Enhanced, early evaluation of potential end-game solutions
- Enhanced ability to gauge business needs and solutions, and improved client relations
- A reduction in legal costs and expenses
- A reduction in settlement and resolution costs
- A reduction in the “claim-through-resolution” cycle time

Setting the Stage for Successful Early Case Assessment

The growing adoption of Early Case Assessment programs arises from the mandate of in-house legal departments to better and more effectively manage litigation, in terms of outcome and cost, and to do so with better calculation of the business interests and objectives implicated by that litigation.

In addition, in-house legal departments have at their disposal more and better tools for gathering necessary data to assess litigation risks and solutions, measure progress, communicate lessons learned, and track successful strategies and solutions. Early identification of risks, business prerogatives, likely outcomes, and potential alternative resolutions should be a part of every Early Case Assessment program.

Using CPR’s ECA Toolkit

CPR’s ECA Guidelines provide a structured approach for conducting early evaluation of a dispute. It is intended to be a flexible tool that may be adjusted by in-house counsel to meet the particular needs of their business. It can be applied in whole or part depending on dispute circumstances to conduct early, rapid and consistent analysis of a dispute to find the most effective resolution path geared toward limiting corporate expenditures, serving business concerns and utilizing the most appropriate conflict resolution process.

Many companies employ a computerized matter management system for purposes of tracking litigation, claims, government investigations, and related legal matters. The ECA is not intended to take the place of a matter management system; however, one may usefully become a component of the other. Therefore, corporate users are encouraged to tailor these guidelines and tools to their particular needs and requirements.

CPR's ECA Toolkit comprises:

- A detailed, step-by-step guide for users who are less familiar with the concept of ECA and seek a comprehensive analytical model.
- A short Executive Summary form for sophisticated users who are familiar with the elements of the ECA process. See Appendix A.

For more assistance with your ECA process, contact info@cpradr.org. To download materials in an electronic format, please visit CPR's website at www.cpradr.org.

About CPR

The International Institute for Conflict Prevention and Resolution (CPR) is an independent, nonprofit think tank that promotes innovation in commercial dispute prevention and resolution. By harnessing the expertise of leading minds in ADR and benchmarking best practices, it is the resource of choice for multinational corporations with billions of dollars at risk. CPR is also a trusted and respected destination for lawyers seeking superior arbitrators and mediators and cutting-edge ADR tools and training. Our elite membership includes General Counsel from global corporations, attorneys from the top law firms in the world, sitting and retired judges, highly-experienced neutrals and ADR practitioners, and leading academics.

ECA Step-by-Step Analysis

- 1 Capture Matter Information & Assemble Team
 - 2 Informal Factual Review
 - 3 Business Concerns
 - 4 Forum & Adversary Analysis
 - 5 Risk Management Analysis
 - 6 Legal Analysis
 - 7 Cost / Benefit Analysis
 - 8 Determine Settlement Value
 - 9 Establish Settlement Strategy
 - 10 Develop Preliminary Litigation Plan
- Post-Resolution: Loop-Back Process (Prevention)

STEP 1

Capture Matter Information & Assemble Team



Describe the Matter

- Parties: Claimant/Plaintiff; Respondent/Defendant; Third Parties
- Nature of dispute
- Apparent amount at risk
- Background and relationships of parties
- How company learned of matter
- Status of insurance and any related indemnity agreements
- Identification of other applicable contracts, pre-dispute agreements, and agreements regarding how disputes may be handled

Identify the Stage of Development and Contractual Requirements

Note: Do not duplicate matter management system which may contain some of this data.

- Status of negotiations
- Review relevant dispute resolution provisions of contract
 - Negotiation
 - Two-tiered negotiation in company
 - Mediation
 - Arbitration
 - Other

| |
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- If arbitration will commence, identify
 - ADR provider
 - Applicable arbitration rules
 - Arbitrators
 - Commencement date
 - Causes of action
 - Damages/remedies

- If litigation filed, attach the complaint and identify:
 - Court/Location
 - Judge
 - Docket no.
 - Date filed (*By whom*)
 - Cause(s) of action
 - Damages/other remedies sought (*Claim for Injunctive/Prelim.Relief*)
 - Court-ordered mediation required/completed
 - Dispositive motions filed (*When/Outcome?*)
 - Filing deadlines approaching
 - Jury trial matter

Note: May be omitted if the Complaint is attached or if the matter is a repeating matter, such as a class action or mass tort.

Identify Counsel and Team for Company, Other Party and Third Parties

- Inside counsel
- Outside counsel
- Business unit/person(s) involved/affected
- Insurance representatives

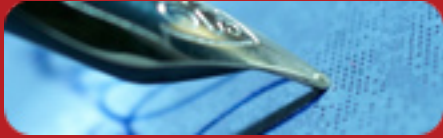
Assign Duties and Time Frame to Complete ECA Process

The key benefit of a systematic ECA review is to assemble the information and focus the team on the issues that may be most relevant to settlement before the astronomical costs of discovery and motion practice begin.

How early can it be done? Depending on the complexity of the case, the lawyers who use these methods regularly believe that the review should be completed within the first 30-90 days.

The purpose of the ECA is not to conduct an exhaustive legal and factual analysis, but to collect essential information, understand the basic strengths and weakness of the legal positions and use that information to conduct an early cost/benefit analysis. The ECA redefines what the essential information is in order to value the case quickly and as effectively as possible.

With an ECA policy in place, it is even better if all the parties can agree to stay discovery and the filings in the case until the ECA is complete. In pattern cases, or situations where both sides are willing to have further discussions before discovery, an agreement to postpone discovery may be more likely.



STEP 2

Informal Factual Review

1 Capture Matter Information & Assemble Team

2 | Informal Factual Review

3 Business Concerns

4 Forum & Adversary Analysis

5 Risk Management Analysis

6 Legal Analysis

7 Cost / Benefit Analysis

8 Determine Settlement Value

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Post-Resolution: Loop-Back Process (Prevention)

Conduct Internal Interviews

- Information gathered from discussions with company, law firm, and other lawyers with knowledge of the matter
- Information gathered from client business contacts with knowledge of the matter

Collect Internal Documents

- Hard copy documents
- Electronic documents, including number, type, format, media, cost of storage and production, and possible role for e-discovery expert

Identify Witnesses and Experts

- Identify the fact witnesses and their location
- Evaluate role of experts, if any
- Provide a summary of the interviews with witnesses
- Assess witness capability and credibility

Contacts with Opposing Counsel

- Information garnered
- Agreements on informal discovery or information exchange

Review Relevant Company and Industry Historical Information

- History of similar claims in the company (if any)
- Average number of days to resolution of such claims
- Special circumstances differentiating this case from other similar cases
- In-house, law firm, and other lawyers with relevant experience on similar matters
- Business client contacts with knowledge of similar matters
- Relevant company files and/or databases
- Similar matters in the industry/industry concerns/history
- Damages awards and settlements
- Length of litigation process and procedural issues
- Other relevant public data/records or information that might be available

Identify Essential Information Needed

- If key information is currently unavailable that is essential in selecting resolution strategy, describe informal routes to acquire that information



STEP 3 Business Concerns

1 Capture Matter Information & Assemble Team

2 Informal Factual Review

3 | Business Concerns

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6 Legal Analysis

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Post-Resolution: Loop-Back Process (Prevention)

Identify Client's Priority Business Concerns and Interests

- Protecting sensitive data
- Legal (*E.g., Need new precedent; need TRO or PI; etc.*)
- Economic: short term, long term
- Timing
- Relationships (including confidentiality)
- Publicity and reputation
- Psychological (*E.g., understand occurrences; receive apology; be heard by authority figures; vindicate action; clear name; change policies for others in similar situation; etc.*)
- Other special/unique/sensitive concerns affecting disposition strategy:
 - Corporate survival/treasury at risk
 - Business relationship at stake
 - Reputation/public relations/stock price
 - Repetitive claim/floodgates issue/class action
 - New product under scrutiny
 - New or existing legal precedent
 - Technical issue, e.g. intellectual property
 - Location of proceedings: forum, venue, jury issues
 - Industry concerns; possible co-defendants
 - Possible criminal liability; corporate governance; compliance; government oversight; RICO
 - International matter, FCPA, or foreign political concerns
 - High level executive testimony required

Assess Opponent's Likely Priority Business Concerns and Interests

- Protecting sensitive data
- Legal (*E.g., Precedent; PI; etc.*)
- Economic: short term, long term
- Timing
- Relationships (including confidentiality)
- Reputation
- Psychological (*E.g., understand occurrences; receive apology; be heard by authority figures; vindicate action; clear name; change policies for others in similar situation; etc.*)
- Other

Define Successful Resolution from a Business Perspective

NOTE: Identification of mutual concerns and interests may lead to dialogue with opponent and possible Early Case Resolution through collaborative negotiation.

A good ECA process should evaluate the business interests of both parties in the resolution of the dispute. Interest-based questions, which typically give rise to opportunities to find common ground, are often not explored until actual settlement discussions were underway. Lawyers using the usual adversarial practices often fail to uncover elements of the dispute that might be relevant to settlement but may be unrelated to the legal claims in front of them. For example, considerations which focus on the relationship of the parties and business strategy and goals should be analyze and reviewed.



STEP 4

Forum & Adversary Analysis

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Forum Analysis

- Judge’s profile (*including circuit or state court rulings out of sync with majority on relevant issues*)
- Potential jury pool
- Mediator’s profile
- Arbitrator’s profile

Opposing Counsel Analysis

- Reputation or experience of opposing counsel:
 - Negotiation reputation
 - Trial reputation
- Counsel’s incentives to settle early
- Similar claims litigated against the opposing lawyer? What was outcome and what approach was used by opponent?

Opposing Party Analysis

- Any continuing business relationship with adversary (*Anything over \$_____ requires business or other higher level approval of case strategy*)
- Specify financial and legal resources of the adversary
- Immediate needs of adversary that might support use of an early settlement process (*E.g., financial crisis; etc.*)
- Signatory to CPR Pledge®?

STEP 5

Risk Management Analysis



Legal Hold Notice Issuance, Date and List of Recipients

- Documents
- E-mails
- Length of hold; renewal reminders
- Expansion of document custodians

Insurance

- Is the claim insured or self-insured?
- If insured, has the carrier been notified? Has the carrier accepted coverage, disputed coverage or issued a reservation of rights?
- If the carrier has not been notified, who is responsible for giving notice and when will notice be given?
- Have all potentially applicable policies been located?
- Who is responsible for locating all potentially applicable policies?

| | |
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STEP 6

Legal Analysis

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Ascertain and Narrow Scope of Claims and Defenses

Conduct Risk Assessment of Each Claim and Defense

Estimate Possible Damages Spectrum

Identify Additional Information Necessary to Evaluate Damages

Determine Whether and Type of Damages Experts that will be Required

Estimate Costs to Completion

- Outside counsel fees
- Other litigation expenses and “hard” costs
- Anticipated expenditure of internal resources and “soft” costs, including
 - In-house lawyer time
 - Business professional time
 - Witness time

STEP 7

Cost/Benefit Analysis



| DISPOSITION STRATEGY AS APPLICABLE | Percentage Likelihood of Success/Loss | External Legal Costs | Internal Costs High (H); Medium (M); Low (L) | Time to Complete | Does Strategy Advance Priority Business Concerns or Not? |
|---|---------------------------------------|----------------------|--|------------------|--|
| Dispositive Motion | | | | | |
| Negotiate (without any mediator) | | | | | |
| Mediate (with a mediator) | | | | | |
| Arbitrate | | | | | |
| Discovery or E-Discovery & E-Discovery Vendor Use, if any | | | | | |
| Experts | | | | | |
| Trial | | | | | |
| Other: Dual Track; Appeal; etc. | | | | | |
| TOTALS | | | | | |



STEP 8

Determine Settlement Value

1 Capture Matter Information & Assemble Team

2 Informal Factual Review

3 Business Concerns

4 Forum & Adversary Analysis

5 Risk Management Analysis

6 Legal Analysis

7 Cost / Benefit Analysis

8 | Determine Settle Value

9 Establish Settlement Strategy

10 Develop Preliminary Litigation Plan

Post-Resolution: Loop-Back Process (Prevention)

Identify the range of monetary settlement that would be a good result and identify any non-monetary solutions with the potential to resolve the dispute. Consider attaching a decision-tree or similar analysis. A detailed overview of Decision-Trees can be found [here](#).

STEP 9

Establish Settlement Strategy



Review Negotiation History and Current Demand/Offer

Assess Settlement Barriers to Determine if Mediation is Warranted

- The following common settlement barriers can be effectively addressed via mediation:
 - Unassisted negotiations have already failed
 - Communication difficulties and past history foreclose dialogue
 - Emotional barriers to settlement exist between parties or counsel
 - Psychological barriers exist such as partisan perceptions, attribution biases, face-saving needs, reactive devaluation, etc.
 - Process barriers exist such as no settlement event, lack of settlement authority, positional bargaining limitations, etc.
 - Cultural barriers to effective dialogue exist
 - Merit barriers exist such as unrealistic expectations, insufficient key information to settle, etc.
- The following more difficult settlement barriers often foreclose settlement. However, even these barriers have been overcome in mediation:
 - Fundamental corporate or other principle at stake that cannot be settled
 - Need for new precedent is critical
 - Managerial responsibility at center of matter including corporate finance or reorganization cannot be settled
 - Public message needed including defending claims that may open the floodgates to similar claims

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- Public vindication sought
- Extreme power disparities between parties foreclose ability to bargain
- Absence of resources that can be used for trade-offs in negotiation

Determine Form of Early Resolution Best Suited to Advance Interests and Business Concerns

The final step is to use the information and analysis gathered through the process to evaluate whether the matter can be settled through one of many ADR techniques, which can include any of the following, alone or in combination:

- Negotiation by:
 - management
 - in-house counsel
 - outside litigation or settlement counsel
 - collaboratively trained lawyer(s)
 - other third-party skilled or technical facilitator
- Early Neutral Evaluation
- Early Discovery Exchange
- Competitive Mock Trial
- Shared Focus Study
- Mediation
 - Court conducted mediation
 - Private mediation
 - General or technically trained mediator
- Summary Jury Trial
- Arbitration
 - Non-binding
 - Binding for all or some of the claims

Alternatively, the case could simply be kept on a litigation track heading toward a court trial on the merits.

Secure Resolution Authority

STEP 10

Develop Preliminary Litigation Plan



Plan Adjudication Route if Settlement Path is Not Successful

Identify Future Opportunities to Reconsider Settlement

Establish Initial Budget and Timeline of Activities

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POST-RESOLUTION Loop-Back Process (Prevention)



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Post-Production: Loop-Back Process (Prevention)

Once a dispute is resolved, the collaborative team may well benefit by engaging in a “lessons learned” exercise, not only to capture the valuable insights gained from any dispute for application to another, but also to identify appropriate business practice corrections, which may include contract or policy or procedure revisions, enhanced training programs or revised business processes to prevent recurrence.

Appendix A: Executive Summary

Date prepared: _____

Date last updated: _____

Matter/Dispute

Claimant

Type of Claim

Amount of Claim

Business Unit(s) Affected

Current Status: *Court* *Arbitration* *Mediation* *Unassisted Negotiation*
 Other (specify): _____

Assessment of Issues and Outcomes including Rationale

(Include goals and objectives for all parties to the dispute)

Identification of Interests: Ours/Theirs/Joint

Assessment of Settlement Value

(Identify the range of monetary settlement that would be a good result and identify any non-monetary solutions with the potential to resolve the dispute)

Proposed Resolution Strategy and Rationale including Special Circumstances Affecting Strategy

Use decision tree analysis or summarize:

- Resolution phases
- Time frames
- Preliminary litigation management plan
- Budget/costs including counsel fees, forum fees, and liability estimates
(Total budget for short matters; 12 month budget with “ballpark” totals for prolonged matters)

(Optional: Attach Decision Tree Analysis, if appropriate)