
Using Early Case Assessment as a Tool for Triaging Disputes

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When a dispute first surfaces, the extent of the risk to an organization and the level of resources required to resolve it may not be readily apparent. Some disputes seem to require immediate attention, but ultimately don't present significant risks or require significant resources, while others seem less exigent, but involve major risks and require a long-term investment of resources. Triaging can help businesses prioritize disputes, determine the best approach to take in each case, and ultimately help manage risks in both the short- and long-term. Early case assessment (ECA) is an effective tool for triaging disputes.

ECA and its Benefits

ECA is a systematic approach for investigating, collecting and analyzing information related to a dispute. Inherent in the ECA analysis is an evaluation of the risks involved, including their nature (e.g., money damages, injunctive relief, reputational harm), scope (e.g., impact on entire business, business unit or product line) and urgency. ECA is a powerful tool for evaluating whether and on what terms to settle, or whether to pursue litigation or an alternative dispute resolution (ADR) process.

Performed effectively, ECA can substantially reduce the drain on company resources associated with long-term litigation, and early and more-informed settlements often result. The cost of most litigation includes not only the significant expense of hiring outside resources, but also the huge disruption and drain on internal resources. Instead of focusing on business objectives, employees must spend time assisting lawyers with discovery, briefs and testimony. Using ECA to comprehensively examine the dispute early on, companies focus their resources on those disputes that truly warrant the most attention. If a dispute does not settle early, ECA will educate decision-makers about the risks of litigating the particular dispute, help focus and manage the litigation, and facilitate outside counsel's preparation of a realistic litigation budget.

Getting Started — An ECA Framework

The first step in the process is to determine to what extent the organization has an established ECA policy or practice, and if so, determine whether it applies to the particular dispute and when it is to be used (e.g., both early and later in the dispute, if the case does not settle). Using an established framework not only will save time and money, but the framework likely reflects accepted corporate and legal policies. If the established ECA policy contains a prescribed framework, evaluate whether the framework is suitable for the particular dispute. If adjustments are advisable, communicating and obtaining sign-off on them may be necessary or prudent.

If an organization does not have an established ECA framework, resources are available that can be adopted or modified to suit many different disputes. For example, the CPR International Institute for Conflict Prevention and Resolution, an independent, nonprofit think tank that promotes innovation in commercial dispute prevention and resolution, offers the "Corporate Early Case Assessment Toolkit" at <http://www.ablr.biz/resources.html>.

Issues to Consider for an ECA Framework

CPR's Toolkit identifies a comprehensive list of factors for conducting ECA that can be adapted to cases of varying subject matter, size and complexity. Those include:

- Collecting key information about the dispute and the disputants.
- Performing a factual investigation by conducting internal interviews, collecting internal documents, identifying relevant witnesses and experts, and collecting information about similar disputes involving the client.
- Identifying business concerns (e.g., sensitive information, need for court remedies, economic, timing, relationship, publicity).
- Analyzing the influence of the forum, your adversary and opposing counsel on resolving the dispute.
- Assessing your client's risk management vulnerabilities in areas like electronic discovery and insurance.
- Analyzing the legal strengths and weaknesses of your and your opponent's case (i.e., risk assessment), including the costs (soft/hard) of achieving litigation objectives, and the spectrum of damages.
- Performing a comprehensive cost-benefit analysis that compares the costs and benefits associated with key disposition strategies.
- Determining what value your client is willing to ascribe to the case — the settlement value.
- Establishing a settlement strategy.
- Developing a preliminary litigation plan should the settlement strategy prove unsuccessful.

For cases that are complex and in which the stakes are high, addressing all of the issues in this analysis on an expedited basis represents a significant amount of work in a short timeframe. For smaller cases, the level of work will be less. The key benefit of addressing all the factors, regardless of the size or complexity of the dispute, is the same — decision-makers will have the valuable information they need.

Choosing The ECA Team

ECA requires the collaboration between individuals inside and outside the organization who must gather relevant information from internal and external sources, objectively analyze that information, and organize it in a way that decision-makers can readily understand and use it to evaluate risks and options for resolving the dispute. Because the ECA analysis is crucial to risk management and strategic decisions, the makeup of the ECA team is critical. Team members must have the requisite knowledge and experience to handle the tasks, understand the importance of ECA to management decisions, commit to accomplishing the process within the necessary timeframe, and competently address each factor. ECA is not administrative work, despite the ministerial nature of some of the tasks, and organizations should not delegate it to individuals who do not understand the importance of the information and the consequences of an incomplete or inaccurate collection; otherwise, the analysis may suffer, as will the decisions that are based on it.

No formula exists for determining the size and makeup of an ECA team. A core team can be relatively small and still be very effective. Depending upon the nature of the dispute, an ECA team may consist of one in-house attorney assisted by a paralegal, or it can include in-house counsel, a business decision-maker, outside counsel and an in-house finance manager to perform risk analyses and damages calculations, for example. Larger or more complex cases may require additional experts, and if insurance coverage is involved, representatives from the insurance company and the organization's risk management department should be included.

When including outside counsel on the team, consider using the same attorney who would handle the case in litigation

or in an ADR process because they already will be well-educated about the facts and legal and business issues.

How to Organize the ECA Output

While the results of ECA do not have to take any particular form, a structured "report" for briefing decision-makers will produce far better results than simply an unstructured recitation of the case details. The format of the information depends on the diverse purposes for which it might be used. The report may be to brief decision-makers, memorialize key information, and document the need for additional information, so some narrative is necessary to present background, analyze data or set forth a conclusion. Important information should never be buried in text, however. Timelines, tables, charts or graphs are more effective tools for presenting key information in a clear, logical and effective way, which is useful both for the ECA team in conducting further investigation and for decision-makers in making important decisions. Summarizing conclusions or analyses using bullet points presents information in a format familiar to executives, and adding an executive summary may also be helpful.

Time-stamping the report indicating when the report was prepared and subsequently updated helps corporate management understand whether the information, analyses and recommendations are current. If a dispute does not resolve early, changing circumstances can affect the analysis and recommendations, and a document that predates any significant changes signals that at least portions of the ECA (and the document) should be updated before making any decisions. Similarly, if a company has an ECA policy, and a case does not settle after the earliest assessment and recommendation, the policy may require periodic updates. Keeping track of when assessments occur ensures compliance with corporate policy, and the report becomes a living document for the company that can be revisited and updated.

A Powerful Tool

ECA is a disciplined approach for investigating, collecting and analyzing information. Adaptable to many different disputes, it is a powerful tool for triaging, evaluating, managing, strategizing and settling both the occasional dispute and those that frequently arise. •

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