



International Institute for Conflict Prevention & Resolution-
CPR Institute

CPR Early Case Assessment
“ECA”
Guidelines

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CPR Corporate ECA Commission

CPR gratefully acknowledges the CPR Members who contributed their expertise and insights to this project. The views expressed in these ECA Guidelines do not reflect the views of the Members' companies.

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Early Case Assessment (“ECA”)

CPR Definition

CPR's Early Case Assessment Guidelines set forth a process designed to help businesses decide early on how to manage disputes. These disputes are generally with other businesses or individuals, but could also include internal disputes, and may or may not involve litigation. The CPR Early Case Assessment model calls for a team, typically led by in-house counsel, or a non-lawyer employee or outside counsel appropriate for the dispute, which works 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 Early Case Resolution (ECR), which is but one possible outcome of Early Case Assessment. Instead, these Guidelines focus on evaluating the dispute so that an appropriate handling strategy can be formulated, whether that be settlement, full bore litigation, or something in between (ADR), with an eye toward reducing or eliminating disputes as soon and as inexpensively as practicable.

Early Case Assessment is a simple conflict management process designed to facilitate informed decision-making at the early stages of a dispute. Early Case Assessment is not the same as Early Case Resolution ("ECR"), but may include ECR components. ECA can be an important and effective tool regardless of whether the matter proceeds to mediation, arbitration or litigation, and regardless of whether there is an early resolution. Typically, it is a collaborative process between in-house counsel, outside counsel and the business client. At the outset of the dispute, this team assembles information pertinent to the dispute (e.g., key facts, business concerns, legal analysis, etc.) in order to make as informed and disciplined a decision as possible at that time concerning the handling of the dispute, whether by negotiation, mediation, dispositive motion, trial or otherwise, despite imperfect data and without engaging in formal discovery.

Many companies employ a computerized matter management system for purposes of tracking litigation, claims, government investigations and related legal matters. Such systems are useful in financial and SEC reporting, corporate compliance requirements, internal and external auditing functions (e.g. setting contingency reserves), dealing with insurers, etc. ECA is not intended to take the place of a matter management system; however, one may usefully become a component of the other. For example, information compiled for a particular case to satisfy the requirements of the matter management system may be referenced or substituted for the case identification and background requirements of ECA.

Benefits of Utilizing 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" in the legal environment 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 described above.

There are numerous potential benefits of implementing an early case assessment program. They include:

- Enhanced, early case analysis
- Enhanced, early risk identification and analysis
- Enhanced, early evaluation of potential end-game solutions, including, potentially, alternative dispute resolution
- 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

CPR Rationale for Developing the ECA Guidelines

CPR assembled a Commission of primarily corporate members to collaborate and produce Early Case Assessment Guidelines that can be used across a broad spectrum of disputes. 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. The ECA Guidelines can be adjusted and updated as a dispute unfolds.

Setting the Stage for Successful Early Case Assessment

The growing adoption of early case assessment programs, and other litigation management initiatives, 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 a 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. Successful early case assessment, and, possibly, resolution, is contingent upon conducting a more informed and expedited decision-making exercise at the outset of a dispute. It should be a collaborative process between in-house counsel, outside counsel and the client.

At the other end of the spectrum, once a dispute is resolved, the collaborative team may well benefit by engaging in a “lessons learned” exercise (also known as an after action review process), 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 (such as the implementation of an early warning system). This exercise might well include the review of the initial early case assessment itself, as well as the ultimate disposition of the dispute, whether by litigation, settlement or otherwise.

Utilizing the CPR ECA Guidelines

The CPR ECA Guidelines provide a structured approach for conducting early evaluation of a dispute. They can be tailored to meet a particular company's objectives, management style or litigation experience. Within a company, they can be adopted, as tailored, for certain types of litigation, but not others, as the company chooses, or for disputes involving a predetermined dollar value or exposure.

The Guidelines consist of the ECA Executive Summary (or "Short Form") and the ECA Detailed Analysis (or "Long Form"). The Short Form is intended for sophisticated users who are familiar with the elements of the Long Form and who may have routinely employed ECA for many years. The Long Form is intended for users who are less familiar with the concept of ECA and who seek a comprehensive analytical model. Corporate users are encouraged to tailor the Long Form to their particular needs and requirements. Over time and with experience dealing with the Long Form, users may gradually migrate to the Short Form or develop their own version of such a form.

CPR's ECA Detailed Analysis Form lists illustrative factors for consideration by counsel in developing the ECA Executive Summary, or other report, whether written or oral, for discussion with the business or "client." The ECA Detailed Analysis Form is designed to be flexible; applying any particular component of the form, or adjusting the form, may, in the company's determination, depend on the specific matter or dispute for which it is being utilized.

EXECUTIVE SUMMARY ("Short Form")

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

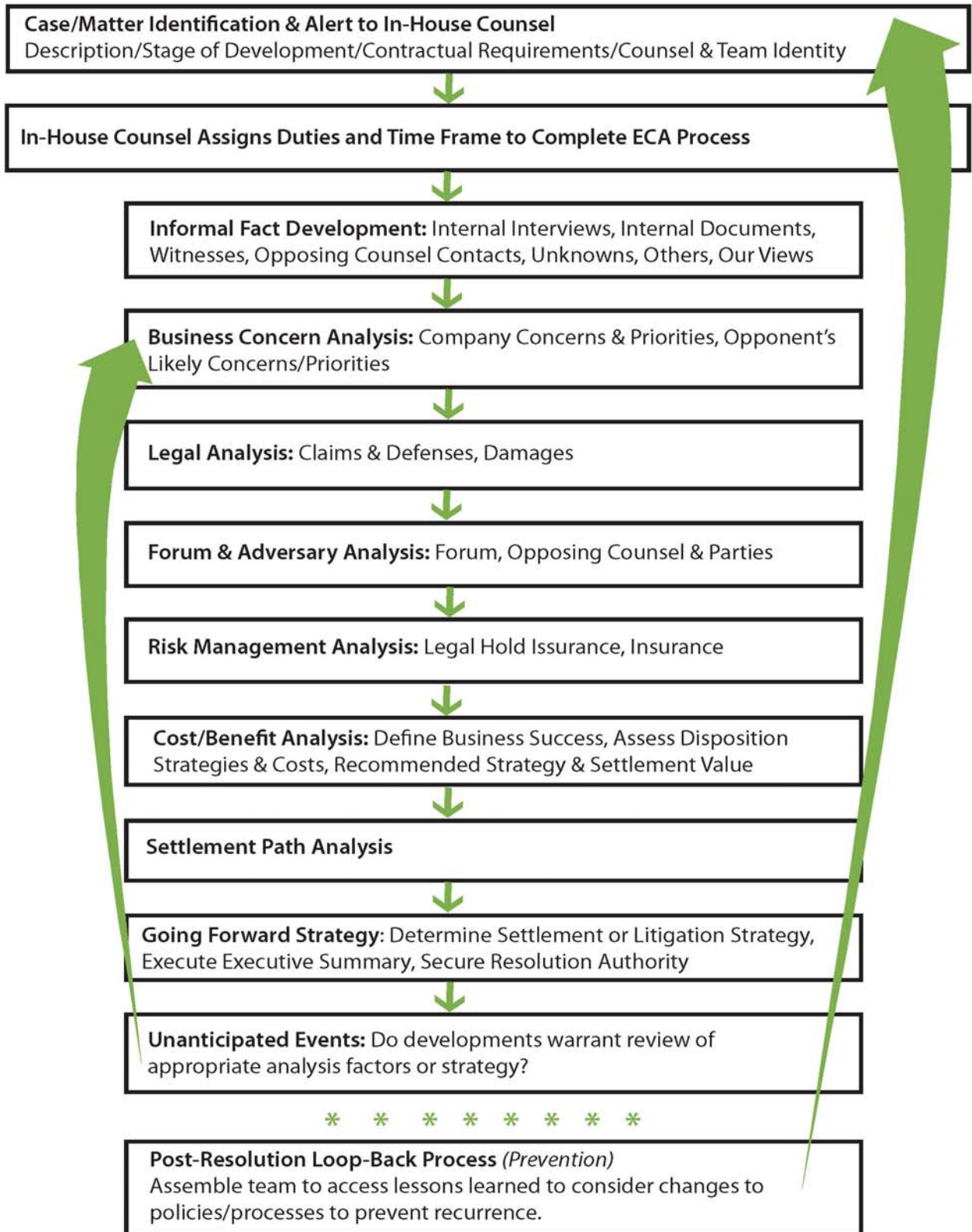
(Identify the range of monetary settlement that would be a good result and identify any non-monetary solutions with the potential to resolve the dispute)

Proposed Resolution Strategy & 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)

ECA Flow Chart



ECA Detailed Analysis ("Long Form")

Date Prepared: _____

Last Updated: _____

A. IDENTIFICATION DATA

1. Brief description of matter or dispute

- Parties: Claimant/Plaintiff; Respondent/Defendant; Third Parties
- Type of Matter
- Background
- 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

2. Stage of development (*Do not duplicate matter management system which may contain some of this data*).

No Litigation or Arbitration Filed at Present

Arbitration Commenced

- Identify ADR Provider, applicable arbitration rules, arbitrators, date commenced, causes of action, damages/remedies, schedule

Litigation Filed (*Attach Complaint*)(*This field may be omitted if the Complaint is attached or if the matter is a repeating matter, such as a class action or mass tort.*)

- 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

3. Contractual requirements (*Consider attaching relevant Dispute Resolution Provisions of Contract*)

- Negotiation
- Two-Tiered Negotiation in Company
- Mediation
- Arbitration
- Other

4. Counsel and team identification

Identification	Our Company	Other Party	Third Parties, if any
Inside Counsel			
Outside Counsel			
Business Unit/Person(s) Involved/Affected			
Insurance Representatives			

B. INFORMAL FACT DEVELOPMENT & RESULTS (*Assemble factual and documentary information without formal discovery*)

1. Summary of 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

2. Summary of Internal Document Review (*Consider attaching key documents, if appropriate*)

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

3. Summary of Witness Identification and Interviews

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

4. Results of contacts with opposing counsel

- Information garnered
- Agreements on informal discovery or information exchange (*Consider attaching key documents, if appropriate*)

5. 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

6. Identify key unknown information

- Identify key information not known
- If key information is currently unavailable that is essential in selecting resolution strategy, describe informal routes to acquire it.

C. BUSINESS CONCERNS

1. 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

2. 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:

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

D. LEGAL ASSESSMENT (*Consider attaching decision-tree or similar analysis, if appropriate, and reference time frames, and costs of phases of adjudication*)

- 1. Ascertain and narrow scope of claims and defenses**
- 2. Conduct risk assessment of each claim and defense**
- 3. Estimate possible damages spectrum, identifying probable point**
- 4. Identify additional information necessary to pinpoint damages**
- 5. Determine whether and type of damages experts that will be required**
- 6. Determine best estimate of:**
 - 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

E. FORUM & ADVERSARY FACTORS

1. Forum

- 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

2. Opposing counsel

- 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?

3. Opposing party

- Any on-going 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.*)

F. RISK MANAGEMENT ANALYSIS

1. Legal hold notice issuance, date and list of recipients

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

2. Insurance (*Attach relevant insurance contract provisions, if appropriate*)

- 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?

G. CASE COST/BENEFIT ANALYSIS (*Consider attaching decision-tree or similar analysis, if appropriate; consider inserting appropriate data on Executive Summary*)

1. Define successful resolution from business perspective

2. Assessment of disposition strategies

Disposition Strategy as Applicable	Percentage Likelihood of Success/Loss	External Legal Costs	Internal Costs High (H); Medium(M); or Low(L)	Time to Complete	Strategy Advances 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	N/A				
Trial <i>(See Section D, above)</i>					
Other: Dual Track; Appeal; etc.					
TOTALS					

3. Recommended strategy

4. Recommended settlement value (for use whenever settlement opportunities arise)

H. SETTLEMENT PATH ANALYSIS

1. Review negotiation history and current demand/offer

2. Assess settlement barriers to determine if mediation rather than unassisted negotiation is warranted (utilize CPR's ADR Suitability Screen if needed)

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
- Merits barriers exist such as unrealistic expectations, insufficient key information to settle, etc.

The following more difficult settlement barriers often foreclose settlement but 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
- Public vindication sought
- Extreme power disparities between parties foreclose ability to bargain
- Absence of resources that can be used for trade-offs in negotiation

3. Plan negotiation or mediation strategy to advance interests and business concerns

4. Plan adjudication route if settlement path is not successful in the short term

I. CONSIDER RESERVES

APPROVAL

SUBMITTED BY: _____

Date: _____

APPROVED: _____

[CLIENT]