

How to Conduct an Early and Periodic Case Assessment*

Conducting early and periodic case assessments is a valuable investment of time that enables a company to reach earlier, more cost-effective and efficient resolutions.

This 'How To' summarizes the advantages and steps to take as part of this process. It is written for those who may have limited familiarity with the process, although we hope that even veterans of the ECA process will find some useful insights.

Advantages of conducting an effective early case assessment

A reliable assessment of the possible outcomes of the dispute will enable you to better perform the following tasks:

- **Decide whether to retain outside counsel** and, if counsel are to be retained, which to select
- **Plan how to pursue the company's goals** relative to the dispute
- **Determine whether to set a reserve on the company's financial statements** and, if so, how to set them
- **Assure that litigation and disputes are managed consistently** across the company's operations
- **Develop a meaningful plan to manage the dispute** more assuredly toward a desirable, or at least acceptable, outcome
- **Report to corporate management**, with greater certainty, the status of the company's legal affairs and their potential outcomes and impacts on the company
- **Make decisions on the use of litigation experts**
- **Understand possible implications of the dispute** for other aspects of the company's business operations
- **Permit periodic historical review of the company's dispute history** and the significance of those matters, to determine whether the company is effectively implementing lessons learned and continuously improving

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Getting Started: Things to Consider

Conducting an effective early case assessment requires the right people and the right approach. Following are some things to consider as you map your own process for conducting early case assessments.

- **Staffing-** identifying the right people to participate in the early case assessment. Determine whether the assessment will be performed entirely in-house or whether to include external counsel. In-house counsel are more familiar with the internal dynamics of the enterprise, the personnel whose actions may have been implicated in the dispute, the corporate policies relevant to the business operation in question and other internal facts and forces. Consider potential risks if the assessment may be conducted by in-house counsel who are not litigators. External counsel may be able to draw on experience from representing other clients and case outcomes to inform his or her analysis of a dispute and may have more familiarity with local court rules, rulings and perspectives, all of which may have implications for the company's litigation posture.
- **Timing-** the sooner the assessment can be conducted, the sooner its output can be taken into account to manage the dispute
- **Objective Review-** the assessment needs to be objective, and needs to include a review of the facts, company objectives, merits of the case, precedential impact, costs and the opposing party's arguments together with the merits of those arguments and consequences of an adverse outcome (see below for more on criteria to assess).
- **Be flexible-** the case evaluation method should be flexible; not all cases are alike. Methods and level of detail in conducting early case assessments may vary; so may the level of detail in the analysis and conclusions.
- **Use systematic platform for data to help access information and analyze trends-** whatever method a company adopts should lead to data that can be captured in a database. While it is useful to evaluate a case effectively in order to manage that case properly, more value lies in being able periodically to review one's experience in multiple cases. Analysis of an overall risk profile for a company, limited to one or a few types of cases or across the board, can help identify trends in litigation and risk exposure. An example of a case evaluation form can be accessed [here](#).
- **Develop guidelines for conducting early case assessments-** this increases the consistency and reliability of the assessments conducted on the company's behalf. The guidelines should outline the company's perspective on the factors to be considered (see below list of possible factors) plus other considerations that may be relevant (including whether the company strongly favors arbitration,

whether the company leans towards a 'no settlement policy' generally, language used in the early case assessment and how this may impact any reserve determinations, any factors relevant for the industry, etc.).

Determine what criteria should be reviewed

The first step in conducting an assessment of a dispute is to determine which factors to review and how to take them into account in assessing the company's potential exposure. While cases vary, certain criteria generally have an acknowledged likelihood of affecting the outcome of the dispute. At a minimum, those criteria should be reviewed for each matter.

The ultimate goal of early case assessments is simple: achieve a more consistent examination of the strengths and weaknesses in a company's litigation position and develop a systematic means to determine whether and which cases should be settled and at what cost. Clearly, while the specifics of each case may be different, having a consistent methodology should help drive valuable analysis and consistent, robust consideration of relevant factors.

Following is a list of possible factors to consider:

- The opposing party
- The identity and competence of the other party's counsel
- The identity of the judge (if identified) and any of that judge's known decisions or predilections regarding disputes such as the one in question, as well as relevant precedent of the particular court
- Existence of third parties involved in the dispute and whether their interests coincide with those of your company or its opponent
- Cause(s) of action relevant to the dispute
- Existence and strengths of affirmative defenses for either party
- Elements and amounts of damage in question and whether the parties agree as to such
- Likely witnesses and their expected testimony
- Evidence and documents in each party's possession and their materiality and relevance to the parties' claims
- Amount of cost of potential discovery, including e-discovery

Periodic Re-assessment

While an early case/dispute assessment lays the groundwork for effective management of that matter, circumstances can change, even dramatically. Disputes do not remain static over their life spans.

Changes in the factual context of the dispute may have significant implications for the matter. [Examples of changes internal to the matter include: changes in the parties, newly discovered facts that undermine earlier expectations based on previously known facts, etc. Examples of changes external to the matter include: new court or administrative decisions, etc.]

The initial early case assessment will always be based on less than complete information since you will not have seen any evidence from other parties, witnesses will not have been deposed, and so forth. Having all information is not a prerequisite to assessing the information that is available. The information that is available will change during the pendency of the dispute. For that reason, the case assessment should be on-going and the form and analysis updated from time to time.