Early Case Evaluation

Joe Ortego **Nixon Peabody (New York, NY)**
jortego@nixonpeabody.com | 212.940.3045
http://www.nixonpeabody.com/joseph_j_ortego

Early Evaluation of Toxic Tort Cases from the Defense Perspective[1]

By Samuel Goldblatt and Joseph Ortego[2],
Nixon Peabody, LLP

Introduction

Early evaluation of toxic tort and other cases is important from the perspective of both the plaintiff and defense. Recent statistics suggest that less than 3% of all cases disposed of in the federal courts are disposed of by trial. In fact, of the 215,297 cases filed, only 5,530 were disposed of by trial.[3] In our State (New York) more than two-thirds of all cases are disposed of before discovery is completed and the case is listed for a trial date. Of the balance, only 4% go to verdict or decision. The rest are settled between completion of trial and verdict (22%), disposed of by alternate dispute resolution (6%) or motioned.[4] Similar statistics exist for other states. In other words, 96-97% of all federal and state cases are resolved by motion to dismiss, motion for summary judgment, voluntary dismissal or settlement following negotiation, mediation or other dispute resolution technique. The cost to the parties is tremendous and there is great potential for economic leverage in the discovery and pre-trial process. The odds of going to trial, let alone seeing a verdict, are slim.

In our experience, for plaintiffs most of the information to evaluate the case is available before the complaint is filed. Good plaintiff attorneys usually complete most of their investigation before the complaint is filed. They employ formal discovery to fill in gaps, create exposure and preserve evidence for trial while they wait for the defense to play catch-up.

Although at the outset, the information tablet is biased in favor of the plaintiff's side, the playing field can be leveled if defense counsel immediately brings the Company's superior knowledge and resources regarding its product to bear on the evaluation of the case and aggressively employs "informal discovery" to obtain case information. All too often, unfortunately, defense attorneys rely upon formal pre-trial and discovery procedures to investigate cases and obtain information. Reliance on formal discovery takes substantial time and is too costly. The only sin worse than that is the failure to promptly evaluate that information upon receipt.

Although there are no reliable statistics on point, our nearly 50 years of experience defending companies in toxic tort cases suggests that there is truth in the maxim that most of the information needed to evaluate the case, at least preliminary, can be obtained from the client and informal sources, and without

resort to formal discovery procedures. In this article we will outline our thoughts regarding early evaluation and make the case that by following those suggestions defense counsel and the client will often be able within the first 90 days to gather sufficient information to determine whether the case will likely fall on the 3% or 97% side of the ledger and to design a better path toward resolution (e.g., voluntary dismissal, dispositive motion, negotiation and settlement, alternate dispute resolution or trial by jury). At a minimum, these recommendations should enable defense counsel to plan a more cost efficient litigation.

Early Evaluation: What it means

The term early evaluation signifies the dual concepts of timing and process. "Early" from the defense perspective means the first 30-90 days following notice of the case. We believe that it is possible to obtain and evaluate a significant percentage of the case information through informal discovery during the first 60-90 days of suit; particularly where plaintiff's counsel will cooperate in making medical information available. (If plaintiff's counsel is uncooperative, defense counsel may be well advised to use compulsory process (subpoenas) to obtain hospital and other medical records instead of waiting to interpose a request for production or authorizations and to proceed to obtain records by letter.) It connotes an abbreviated period of time during which every effort must be made to catch-up with the plaintiff's attorneys who often have had the case for several years before suit is filed. In substantial damages cases, and in cases involving pattern litigation, plaintiff's counsel has often visited with and evaluated the fact witnesses, retained experts, evaluated the product or substance at issue, and has often had access to the defendant's documents and prior deposition testimony of defense witnesses before in-house counsel learns about the case and has a chance to retain outside counsel. Plaintiff's attorneys usually have formed a judgment about the potential value of the case, the likelihood of success and how much money they are willing to invest in its prosecution. The analysis from the defense perspective is not markedly different, although there are often other factors in pattern litigation and significant cases about creating precedents or encouraging other suits that bear on the defense analysis.

The term "evaluation" assumes that there is case information to consider and that defense counsel (and the client) actually considers the information, determines its significance in the context of the issues and forms an opinion regarding the merits. Unfortunately, the human condition seems to predispose some attorneys to action, rather than thought, when the premium should be on thinking and planning. In our experience, at least as much time, and arguably more, should be invested in evaluating information, thinking about the case and planning the litigation than in executing specific tasks. Shame on the attorney who looks at case documents only when preparing for the first deposition in the case. The failure to evaluate, think and plan can have tragic consequences for the case and the client. In the past year we were asked to take over for trial a case after an expensive and time-consuming Daubert challenge to the plaintiff's experts and causation opinion had been rejected by the court, only to learn that a number of

witnesses had not been interviewed and leads pursued. Interviews of those witnesses revealed that the plaintiff had not been exposed to the product at issue but, rather, to another product with an entirely different toxicity profile. Unfortunately, the pre-trial statement had been filed, thereby setting the scene for trial on an entirely different issue. Early evaluation would have altered this course.

A concerted effort must be made to quickly and cost effectively marshal the facts in the context of the issues, evaluate the available witnesses and make informed judgments about the likelihood of succeeding on those questions that will be determinative of the client's liability. Formal discovery should be eschewed and informal discovery pursued in the first instance. In so doing, defense counsel should be careful to earmark for subsequent formal discovery specific information that is missing and will bear on the determination of that question. This will be most helpful later when counsel designs a focused formal discovery plan.

Early evaluation also requires an assessment of the costs involved in bringing the case to resolution. A senior member of the trial team must be involved in developing the investigation and discovery plan and in estimating the costs involved in executing the tasks. Counsel must be frank with the client in discussing costs in terms of attorney and expert fees and out-of- pocket expenses. Bad news about the overall cost of taking the case to trial should not be deferred for subsequent reports.

It is also helpful at this early stage to obtain information about the forum and your adversary. In addition to information about plaintiff's counsel, the client will appreciate information about the forum and the jurors that will likely be called upon to decide the case if tried to verdict. As soon as basic information about the plaintiff's injury is obtained, it is advisable to conduct a verdict and settlement search for guidance regarding the potential value of the case and to formulate an opinion on the estimated verdict range in the forum in which the case will be tried.

The transaction cost information should be presented to the client in the context of the estimated verdict potential and settlement value of the case. Early evaluation is like a three-legged stool -- it requires an understanding of the transaction costs, the potential cost of an adverse verdict (direct and indirect), and an informed intuition on the likelihood of succeeding on the merits. All three elements are necessary for the client, with the advice of counsel, to decide whether the case should be tracked for dispositive motion, negotiation and settlement, alternate dispute resolution, trial, or some staggered approach to these possibilities.

Early evaluation also involves identification of both legal and factual issues. We will speak to both subjects in the following pages. Before we move into a discussion of fact investigation, we want to briefly touch upon the legal framework for these claims and some of the legal issues that typically must be examined.

Legal Investigation

If your practice is concentrated in the defense of toxic tort cases you are presumably familiar with the elements of the claims and defenses and generally familiar with the law in your state that is applicable to the substantive causes of action. A working knowledge of the following is a prerequisite to evaluating toxic tort cases:

(1) The United States Supreme Court's decision in Daubert and its progeny;
(2) Federal Rules of Evidence 702, 703 and the corresponding state rules governing qualification of expert witnesses, reliability of expert testimony, and admissibility of opinion evidence;
(3) Basic principles of epidemiology, animal toxicology, the use of in vivo and in vitro studies;
(4) The process by which scientists evaluate the strength of an association between an agent and an affect and formulate an opinion or reach a conclusion regarding causation (sometimes referred to as Koch's Postulates or Hill's Criteria).
(5) For purposes of a particular case, you will also need to develop a working knowledge of the at-issue disease process and the underlying science.
(6) Those persons who are new to the area are well advised to invest time studying the applicable Pattern Jury Instructions and the key cases in your state. The Reference Manual on Scientific Evidence, Federal Judicial Center 1994, is an excellent source of information regarding the science and law that is often involved in toxic tort cases.

Defenses

In toxic tort cases, there are a number of defenses that are often triggered and should be evaluated. You should evaluate, for example, possible application of the statute of limitations, a statute of repose, and the idiosyncratic reaction, learned intermediary, sophisticated user and bulk supplier doctrines. Other defenses may be available under state law. If the case involves a claim for punitive damages, there are a host of other defenses that must be raised and assessed as the case proceeds. These defenses must be identified and earmarked for fact investigation along with other substantive issues.

You should also evaluate whether the complaint states a claim or cause of action upon which relief can be granted or if the pleading is subject to immediate attack by Rule 12(b)(6) motion. In some jurisdictions, a motion for a more definite statement may be appropriate or a motion attacking the particularity with which certain causes of action (i.e., fraud) are pled. If class action allegations are lodged, or multiple claims have been joined, a motion addressed to those issues may be appropriate. There may be other preliminary motions in your jurisdiction that merit early evaluation and action.

Procedural Issues

There are also procedural issues that must be touched upon during the first 30 days. They include such things as the following:

(1) Jurisdiction -- Does the court have subject matter and in personam jurisdiction over all of the parties and other persons or entities that should be made parties to the case? Was service of process properly made and, if not, is a substantive right affected by rejecting or waiving service?
(2) Venue -- Is the case properly venued? Should the case be removed to federal court if it is pending in state court? If pending in state court, was the case commenced in a proper forum or is there a more appropriate forum such that a forum non-conveniens motion should be considered?
(3) Joinder—Have the claims of multiple plaintiffs been improperly aggregated? Is the case appropriate for class action treatment?

With that in mind, it is time to begin focusing on the elements of the plaintiff's causes of action and the necessary fact investigation that must be performed to evaluate the likelihood of succeeding on the merits. The first step in that process is to spot the issues and develop the preliminary defense themes.

Issue Spotting

Notwithstanding modern notice pleading, the complaint, and often the first notice of claim, contains a wealth of information that should enable defense counsel to spot the issues and develop a list of working themes with which to structure investigation and discovery. This is not unlike the process followed by scientists in developing one or more hypotheses to test.

There is a conceptual framework to most toxic tort cases that involves elements of the following issues and sub-issues:

(1) Product Identification -- Was the plaintiff exposed to the product or substance allegedly at issue, or was the plaintiff exposed to other things that could have played a role in the illness?
(2) Exposure -- What was the nature of the plaintiff's exposure (i.e., acute, intermittent, prolonged, etc.); what was the exposure pathway (i.e. inhalation, dermal, ingestion); and what was the quantity or dose to which the plaintiff was exposed and how was it determined or reconstructed?
(3) Injury -- What is the nature of the plaintiff's injury or illness; when was the onset; what were the symptoms; and when was the plaintiff first diagnosed with this condition?
(4) Causation -- Is there an association in the scientific literature between exposure to the substance allegedly at issue and the plaintiff's injury and what is the strength of that association in general? If there is an association, was the plaintiff hurt because of the at-issue exposure? Alternatively, does the injury flow from another cause or is it impossible to determine what caused the specific injury to this individual?
(5) Warning--Was the defendant's use, handling and precautionary information adequate and reasonably communicated to product users,

or intermediaries such as suppliers, purchasers, employers and medical professionals?

(6) Culpable Conduct – What, if anything, did the plaintiff do wrong that led to his exposure or contributed to his injury? What could the plaintiff have done to avoid the exposure or injury?

(7) Damages -- Does the case involve injury to a single or multiple plaintiffs? Are damages being sought for medical monitoring or surveillance in addition to money damages for personal injuries? Is there a punitive damages claim?

Working Themes

Before we embark an investigation and discovery, we always find it helpful to state the case in terms of possible defense themes. By doing so, we are better able to decide what information is missing and to evaluate the significance of information received in the context of the issues that are likely to be determinative of liability and damages. We realize that this may seem counterintuitive to some, or be a departure from the practice that has often followed by the defense; however, we have found that it works well for us and that other team members involved in the defense of the case find it helpful in carrying-out their assignments when they know how their efforts "fit" in the case. By way of example, the following is a list of some of the working themes that might emerge from the liability issues outlined above. At the risk of stating the obvious, these are "working" themes that are intended to be developed and refined as the case proceeds. They are not the last word on the subject.

(1) Product Identification: The plaintiff was not exposed to "x"; he or she was exposed to something else instead. The plaintiff's attorney has fingered the wrong product and is blaming the wrong people.

(2) Injury: The plaintiff was not injured as he claims. The disease has been misclassified or misdiagnosed and the foundation upon which this case has been fabricated is flawed.

(3) Exposure: The plaintiff's exposure to "x" is exaggerated.

(4) Exposure: Exposure to substance "x" does not cause illness "y". There is no association between exposure to "x" and "y" or the strength of the association is too weak to be deemed the cause of the illness by credible scientists. Alternatively, injury "y" was caused by "c", and not by "x" (where science supports existence of multiple causes).

(5) Culpable Conduct: The plaintiff caused his own injury by improperly using "x" or because he failed to follow the client's instructions for the safe use and handling of "x". For the same reasons, the plaintiff was overexposed to "x" and that led to his injury.

(6) Conduct of Others: Plaintiff's (over) exposure and injury occurred because the employer, or some other intermediary, failed to act properly.

(7) Statue of Limitations: The plaintiff knew of his injury and discovered its cause more than “x” years before suit was brought and, therefore, the action is untimely.

As should be self-evident, the issues can be spotted and preliminary defense themes developed at the onset of the case. Counsel should not wait until discovery is launched or, worse yet, the case listed for trial, before articulating how they intend to portray the case. Indeed, you should have an outline of how you intend to try the case before your launch into fact investigation. Only then are you in a position to assess the facts in the context of the issues, to decide what is disputed and non-disputed and to assess the likelihood of prevailing.

Who Should Investigate

In our judgment, investigation should be conducted by a member of the trial team, preferably an attorney, or, at minimum, by an investigator who has worked with the trial team on other toxic tort matters and has been properly acquainted with the case issues, themes and procedures to be followed for developing facts while preserving work product.

Traditional reliance on the case method to teach the practice of law to students, and particularly the use of appellate cases, has led some commentators to question whether law schools adequately teach skills that prepare students to practice law in today’s environment. Fact investigation is an important skill. It is crucial to the trial lawyer and it is crucial to early evaluation of cases. It assumes knowledge of what to look for, where to look for it, how to look for it, and the necessary people skills to motivate people to share information even when they may be biased against your client’s position. While it is beyond the scope of this article to teach everything there is to know about conducting fact investigation in toxic tort cases, there are several important sources of information that can be tapped during the first 30-60 days of the case that often bear fruit. They are: (a) the plaintiff’s attorney; (b) the client and the client’s representatives and published an unpublished research regarding the underlying science; (c) percipient and other witnesses who saw, heard or know something about what occurred; and (d) public authorities and investigative bodies.

Information From The Plaintiff’s Attorney

The information in the complaint or first notice letter can often be supplemented by interviewing the plaintiff’s attorney. Plaintiff’s attorneys are often willing to talk about the case with defense counsel and have an interest in sharing case information; particularly if there is a relationship between plaintiff’s counsel and defense counsel and plaintiff’s counsel is convinced that the defense has a sincere interest in early evaluation.

Your initial conversation with the plaintiff’s attorney should be approached as if it were an opportunity to interview the person in the best position to tell you what the opposing side’s case is all about; what it is or will be claimed your client did wrong; the nature of plaintiff’s injury; the economic losses that have been sustained; and to identify the hospitals at which he or she was treated and the

principal treating physicians. Oftentimes the plaintiff's attorney will volunteer to provide otherwise discoverable information on an expedited basis, such as hospital records, reports of treating physicians, x-rays or tissue samples. In some cases the plaintiff's attorneys will disclose the identity of the expert witnesses with whom they have consulted, and the nature and basis for their opinions. From the defense point of view, there is seldom harm in asking for as much case information as possible. The plaintiff's attorney is the first and best avenue for quickly obtaining information that will help level the playing field. At a minimum, defense counsel should try to discover the facts supporting plaintiff's identification of the product involved, the nature and extent of the plaintiff's exposure to that product, and the circumstances surrounding the exposure, the plaintiff's injury, its onset, and symptomatology, and the scientific basis for the plaintiff's belief that the exposure caused the injury in general and in fact. You should ask whether samples of the product and its packaging are available and what public authorities investigated the matter (i.e., the Occupational Safety and Health Administration, Department of Transportation, State Department of Labor or Health, etc.). Defense counsel is well advised to inquire whether the plaintiff's attorney is aware of other claims and lawsuits against the client or others involving the same allegations. Defense counsel should ask whether the plaintiff's attorney has obtained documents or other information from the client through other sources and, if so, whether he or she claims work product privilege with respect to those items.

Information From The Client

The client is often the best source for information about the product or substance at issue, its use or handling, its toxicity, and the underlying science that is implicated by the case. The client is often the best source for information regarding product identification and the written and oral information that will bear upon the warnings-issues in the case. Client representatives with knowledge about the use of the product and its use in the environment are also helpful in understanding the plaintiff's role in causing the injury and the role of employers, suppliers, medical providers and other third parties.

While it is beyond the scope of this article to list or summarize all of the information that can and should be obtained from the client during the initial interview process, suffice it to say that the client by virtue of its superior resources and people with technical knowledge and expertise, may be the best source for leveling the playing field with the plaintiff's attorney. The client is also the source for most information that is not in the possession of the plaintiff's attorney.

At a minimum, inside counsel should identify for outside counsel the likely persons to serve as testimonial sponsor for the product and those persons who have knowledge and can assist outside counsel regarding product identification; use and handling of the product; the applicable precautionary information; sale and distribution of the product; pre-marketing research, development and regulatory approval of the product; the science involved, including published and unpublished research; and learned persons who might serve as consulting or

testifying expert witnesses. Those client representatives should be interviewed during the initial client meeting and every effort should be made to schedule that meeting, at least by telephone or videoconference, within the first 30 days of assignment.

Efforts should be made to locate records regarding sale or distribution of the product to the plaintiff or the plaintiff's employer or other person and to reconstruct the product literature (on-product warning, packaging information, brochures, material safety data sheets, package inserts, etc.), and other sources of information regarding the product's toxicity.

Persons with knowledge about the underlying science should be interviewed about the plaintiff's injury; the association between exposure to the product and that injury; the strength of the association; the exposure routes (and means for reconstructing dose); the mechanisms of injury at issue, and the leading published and unpublished research that will bear on causation.

Needless to say, defense counsel should obtain copies of pertinent product information, specimens of written materials regarding the product, copies of key test studies and evaluations, and copies of applicable regulations, industry standards, and codes. Counsel must learn the process followed by the client in formulating, testing and marketing the product and obtaining regulatory approval. Defense counsel must also query the client regarding other similar claims, lawsuits, or allegations and the nature and extent of client information that has been produced in other cases, is accessible to other plaintiff's lawyers, or is otherwise presumed to be in the public domain.

If regulatory approval or compliance with standards and regulations is an issue, efforts should be made to secure documentary evidence validating those processes and decisions. Where the product has been the subject of other litigation, there must be a candid discussion about those outcomes, the lessons learned from those cases, the people involved, the available information, and the things that defense counsel should do the same or differently.

While it is sometimes desirable to involve outside experts in the early evaluation of the case, it is often possible for in-house technical experts to evaluate the science involved in the case and make preliminary assessments about exposure, injury and causation. Consideration should also be given to retaining consultants to assist in this process -- people who may, but need not necessarily, serve as expert witnesses. The client's in-house representatives are usually in a position to identify the leading scientists in the areas of concern to the case.

Information From Eyewitnesses

All too often defense counsel fails to interview the eyewitnesses before trial. We can only assume that this is due to oversight or cost constraints. In any event, we believe that witness interviews during the first few months of the lawsuit are critical to the early evaluation of the case. Persons who worked with the plaintiff or were involved in use and handling of the product or substance should be questioned closely regarding their observations, knowledge, procedures, etc. Where witnesses refuse to cooperate with the defense, their non-cooperation should be documented and resort to compulsory process considered. Efforts

should be made to document counsel's impressions regarding the credibility of the witnesses and a photograph of the witness should be taken if he or she will permit.

Information From Public Sources

All governmental and media reports of the incident should be obtained and reviewed for reference to witnesses, photographs or other evidence. Where an acute incident is involved, it is often advisable to interview the responding police, emergency, fire, and other personnel. The people and organizations involved and their role in the case should be recorded in your "cast of characters" and the information shared with other team members.

All sources of documentary evidence should be contacted and pertinent items obtained (e.g., police reports; fire reports; reports of emergency calls; dispatcher logs; search and rescue reports; reports of regulatory agencies; publicly filed landownership records and plans and drawings for the structures at which the exposures took place; DOT, FDA and other governmental records; NOAA weather data if outdoor exposures are involved; industry standards and regulations; med line, tox line and other database information about the substances, illnesses and diseases involved, the treating and examining physicians, and expert witnesses). Reports and other documentary evidence, as well as real and demonstrative evidence should be logged in your evidence log, the source identified, the present location recorded, and reviewed for significance.

Conclusion

It is possible to evaluate cases early in their life cycle. It is possible to do so on an informed basis within 60-90 days of notice of case if outside and inside counsel are committed to the task and are prepared to dedicate the necessary resources to gather and assess the information referred to in the preceding pages. In most cases, that information will be sufficient to make a preliminary assessment of the case and to determine the likely path it will follow towards resolution.

In an age where less than 3% of all cases are disposed of by trial, it is not economically feasible to prepare every case for trial or to evaluate every case as if the only possible disposition was a jury verdict. This is not to suggest that trial lawyers are in danger of extinction or that those skills are not invaluable to the process. To the contrary, we believe that today's trial lawyers must bring to bear the full arsenal of their skills because there are several outcomes -- indeed, most other outcomes -- besides a successful verdict after trial. That said, all parties -- plaintiff and defense -- are well advised to evaluate their cases early (and often) and to recognize that there are multiple outcomes that must be considered in the planning process.

[1]

[2] Samuel Goldblatt is a partner in Nixon Peabody's Buffalo, New York office and is the Chair of the firm's Products, Toxic and Mass Tort Team. Joseph J. Ortego is a partner in Nixon Peabody's New York, New York and Garden City, New York offices and practice in the Products, Toxic and Mass Tort Team with Sam. Both authors are nationally recognized as skilled litigators and try toxic tort and product liability cases throughout the United States. Mr. Goldblatt and Mr. Ortego are sustaining members of the Product

Liability Advisory Council and active in the Defense Research Institute, American Bar Association and the American Law Institute.
[3] 1999 Report of the Director of the Administrative Office of the U.S. Courts (Judicial Business of the United States Courts).
[4] 21st Annual Report of the Chief Administrator of the New York Courts (1998).

Corporate Early Case Assessment Toolkit Resources for Navigating Complex Business Disputes

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

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.

Lawrence N. Chanen - Senior Vice President & Associate General Counsel - JPMorgan Chase
Dan S. Dunham - Senior Corporate Counsel - Pfizer, Inc.
Anurag Gulati - Assistant General Counsel - General Mills, Inc.
J. Andrew Heaton - Associate General Counsel - Ernst & Young LLP
Paula A. Johnson - Senior Counsel - ConocoPhillips Janet S. Kloenhamer - President, Discontinued Operations - Fireman's Fund Insurance Co.
Patrick Lamb - Valorem Law Group
Prof. John Lande - Director, Program in Dispute Resolution - University of Missouri School of Law Melanie Lewis - Director, Solutions Program - Coca-Cola Enterprises, Inc.
Duncan R. MacKay - Assistant General Counsel, Dispute Resolution - Northeast Utilities
Deborah Masucci - Vice President & Director of Dispute Resolution - American International Group
Julie S. Mazza - Senior Counsel - Citigroup Inc.
Barbara McCormick - Assistant General Counsel - Johnson & Johnson
Richard N. Papper - Vice President & Senior Litigation Counsel - Bank of New York/Mellon
Roland Schroeder - Senior Counsel, Litigation & Legal Policy - General Electric Company
Beth Trent - Legal Director - Schering-Plough Corporation
Patricia Caycedo-Smith - Associate General Counsel, Litigation - Duke Energy Corporation
Nancy L. Vanderlip - Vice President & General Counsel, Electronic Components - ITT Corporation
Jennifer Boyens Victor - The Victor Law Firm
Thomas R. Woodrow - Holland & Knight LLP
Kathy Bryan - President & CEO – CPR
Cathy Cronin-Harris - Senior Consultant – CPR
Thomas L. Aldrich - Senior Consultant- CPR

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 oreliminating 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 11. Post-Resolution: Loop-Back Process (Prevention)

STEP 1:
Capture Matter Information and 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
- 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

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

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 and Adversary Analysis

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?

STEP 6:
Legal Analysis

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

STEP 8:
Determine 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. Consider attaching a decision-tree or similar analysis.

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
  - 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:
Forum and Adversary Analysis
Plan Adjudication Route if Settlement Path is Not Successful
Identify Future Opportunities to Reconsider Settlement
Establish Initial Budget and Timeline of Activities

POST-RESOLUTION:
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.

About Joseph Ortego

Partner | Nixon Peabody | New York, NY 212.940.3045 | jortego@nixonpeabody.com

Joe Ortego has approximately thirty years of litigation and business experience and practices in the firm’s New York City and Long Island offices. He has tried over 100 cases to verdict for major privately held and public corporations ranging from financial institutions to chemical companies.

Joe focuses on the areas of commercial disputes, health effects litigation, environmental, employment, intellectual property, product liability matters, and insurance matters. He serves as national trial counsel for
a number of clients who desire a consistent approach to class action and aggregate litigation matters filed in multiple states, and represents small, mid-size, and publicly traded companies; he is the firm's national practice group leader for the Products: Class Action, Trade and Industry Representation group. A frequent author and speaker, both domestically and internationally, as well as a legal consultant on network television, Joe serves on the faculty of ABA Tips National Trial Academy, a diverse program combining the latest technology with the country's top trial lawyers as faculty members and trial judges.
Joe also chairs NP Trial®, an international team of the firm's most successful and experienced trial lawyers. By pairing NP Trial lawyers with clients at the onset of the engagement, this initiative has enhanced the client's opportunity to resolve matters early on their terms or to prevail at trial.

Recognition
Joe has earned the Martindale-Hubbell Law Directory's AV rating, the directory's highest accolade, and has been selected as a "SuperLawyer." Joe is recognized as a New York local litigation star in the 2012 edition of Benchmark Litigation, the definitive guide to America's leading litigation firms and attorneys

Education
- Boston University School of Law, J.D.
- Syracuse University, B.A., with honors