

# SPECIAL SECTION

## Controlling Legal Costs

## CPR's ECA Toolkit – A Great Contribution To Controlling Litigation Costs

The Editor interviews PD Villarreal, Vice President and Associate General Counsel, Litigation and Conflict Management, Schering-Plough Corporation.

**Editor: What are your responsibilities?**

**Villarreal:** I am responsible for all company litigation on a global basis except for IP litigation, which is done by our IP group.

**Editor: What are the key elements of early case assessment?**

**Villarreal:** Any credible early case assessment program has got to be – let's not forget the word – *early*. It has to be instituted and completed within a relatively short time frame after recognition of a controversy. That recognition may be the filing of a lawsuit or the identification within a company of a conflict. However, enough time must be taken to get a reasonably reliable result – be it 60 days, 90 days or even 120 days.

There should be some discipline around the early assessment of a case. The ECA must provide the information that an experienced litigator would want to know about a matter before giving advice to a company about how it should address the matter.

First, I need an assessment of the facts. What happened? What is the story?

Secondly, I need an assessment of the legal framework for evaluating the factual issues.

Then, I need to know about the witnesses and the documents. Because the story ultimately is told through people, I need to know not only what they will be saying, but are they credible? Are they likeable? What is their background?

I need to look at the documents and what is likely to be turned up in e-discovery. If there is a contractual issue, what does the contract say?

And there are other things I need to know as well such as what's at stake for the company in the controversy and the venue situation?

The thing about lawyers is that by mindset and by training, they will want to collect facts and analyze them forever because every additional piece of information adds to their understanding of the situation and to their assessment of the case.

Early case assessment imposes the discipline of cutting that process short. Experience teaches us that if you conduct a very good early case assessment that looks at the facts and the law and the witnesses and the documents that you will know when you complete your ECA, you will know 80 percent of all you will ever know about this case. Is that perfect knowledge? Well by definition "no," but it is adequate and sufficient knowledge upon which to make decisions about the direction in which you want to go to resolve most controversies.

Most businesses make important deci-



PD Villarreal

sions all the time on less than perfect information. Only lawyers, or maybe doctors, operate in a world of perfect information. Business people operate in a world in which they have to make decisions on incomplete, but good enough, information. ECA imposes the same process on a company's lawyers. The essence of ECA is that it gets you from point A to point B in the most efficient and most effective manner.

**Editor: Do you feel it is important to have a formal system for early case assessment? Why?**

**Villarreal:** In my experience it is absolutely critical to have a formal, mandatory program in place because it not only imposes discipline with respect to what needs to be done but also makes it far easier for management to accept the

process because they've been through it before.

**Editor: Some law firms offer their own ECA process. Do you use theirs or yours?**

**Villarreal:** I've never had to face that situation; but, I am pretty confident that I know how I would handle it. If I were to hire a firm that said it had its own early case assessment program that allowed them to get an early case assessment done in less time and for less money and that it would uncover the kind of information I needed to know, then I would say, "fine, let's use yours." I would applaud them for taking the initiative because for the most part this has been a client-driven initiative rather than a law firm-driven initiative.

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**Some Of The Above Partner With Corporate Counsel By Providing Us With Financial And Editorial Support.**

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## Controlling Legal Costs – Corporate Counsel

# ECA: Perspectives Of Members Of CPR's Corporate ECA Commission

The Editor interviews **Lawrence Chanen**, Senior Vice President, Associate General Counsel in the Litigation Department and Head of the Workout and Bankruptcy Practice Group, JP Morgan Chase, and **Duncan MacKay**, Deputy General Counsel, Northeast Utilities.

*Editor's Note: As members of CPR's Corporate ECA Commission, Messrs. Chanen and MacKay contributed their expertise and insights in connection with the development of CPR's Early Case Assessment Guidelines (CPR's ECA Toolkit).*

**Editor: How extensively do you use early case assessment (ECA)? Are there types of disputes which are not suitable for ECA?**

**Chanen:** Here at JPMorgan, we encourage all lawyers to make an early assessment of the risks of a case, which is obviously advantageous from a risk management and a cost-saving point of view. We are dedicated to effectively managing risk and ECA provides a structure that helps us do that.

There are types of disputes which are far more suitable for ECA than others, particularly where you have business people on both sides seeking a rational solution to the dispute. And, we do have cases of that nature where we utilize ECA either informally or through our own formal ECA program. As head of workout and bankruptcy litigation for JPMorgan in the litigation department, I sometimes encounter situations where one or more of the parties is intent on making irrational

demands rather than engage in a realistic risk analysis. ECA, if viewed as a path to early case resolution, cannot accomplish that objective in those situations.

**MacKay:** At Northeast Utilities, we use ECA (both formally and informally) with respect to virtually all commercial (business-to-business) disputes, disputes that implicate our core business interests, and on any matters that may generate interest by, or attention from, our external stakeholders. I say that we use ECA "formally and informally" because our in-house lawyers generally always perform an informal (read "unwritten") assessment of most matters that come in to the Legal Department, as part of our normal evaluation and triage of disputes involving the company.

Where the ECA takes on more formality is with respect to larger, more complex disputes involving the company, in which cases the ECA is typically embodied in formal written memoranda. I believe that, with the exception of routine types of matters (i.e., foreclosures, collections, smaller tort matters, etc.), most disputes lend themselves to some form of ECA. Indeed, one of the main reasons we have in-house counsel handling and involved in disputes relating to the company is their unique understanding of the business context in which a particular dispute has arisen and their ability – using that insight – to quickly and effectively develop (or assist outside litigation counsel develop) a case management plan that assesses the strengths, weaknesses and business implications of a dispute. Without an ECA and

development of a case management plan, the company potentially loses an opportunity to position a dispute for early (and cost-effective) resolution through ADR, and leaves itself largely at the mercy of wherever expensive, time-consuming, and relationship-cratering discovery takes it.

**Editor: Have you found that use of ECA reduces litigation costs or improves outcomes? Is management supportive of its use?**

**Chanen:** If you have rational business people on both sides, even if they're angry at one another, ECA, whether formal or informal, will reduce litigation costs and improve outcomes. If ECA is applied early enough it can result in the dispute being resolved before it ripens into litigation. The threat of expensive discovery can even be an important force in bringing the parties together to seek a solution.

**MacKay:** ECA does reduce the costs of litigation and provides better opportunities sooner for improved outcomes. Because ECA places an emphasis on a meaningful assessment of the factual and legal issues relevant to a dispute early on in a case, strategies and tactics can be developed more quickly, efficiently and cost-effectively. Additionally, our approach to ECA considers whether ADR may provide an appropriate path for resolving a dispute earlier in a dispute's life-cycle, with our default assumption being that it does. Accordingly, many disputes can be positioned for early resolution on commercial terms through negoti-

ation, mediation or arbitration, thus saving the costs of discovery and prolonged motion practice. As we are not in the business to litigate, management is supportive of a process that will result in more predictable, cost-effective and timely resolutions of disputes.

**Editor: To what extent should CPR promote the use of ECA by corporations that may be opposing parties? What are the advantages to use of ECA by each party to a dispute?**

**Chanen:** If you are dealing with rational people, ECA can be an effective tool to get to the heart of a dispute, particularly if used as a precursor to mediation. You may have some relatively high costs at the outset, but it can be a way ultimately to manage cost. Encouraging ECA can further inculcate in our corporate culture the idea that it is an effective way to manage legal risk and control legal expense. I think it's something that CPR should promote.

**MacKay:** CPR should promote the use of ECA by member companies involved in a dispute because it will facilitate a more meaningful engagement by them in dispute resolution. Parties with a well-developed understanding of the legal and factual issues in their dispute are better poised to consider commercial solutions. This does not mean that all such cases can or will be resolved through ADR; however, the process will enable a narrowing of issues, making adjudication of the dispute more cost and time efficient, and the possibility of a later resolution through ADR more likely.

## CPR's ECA Toolkit

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**Editor: Does your ECA program reduce total legal costs or provide a better outcome?**

**Villarreal:** It lowers the costs, although it does require an upfront investment. Much of what is done during the ECA process represents expenditures that would have to be made later in any event. Also, the information developed during that process puts you in a superior position to manage the case going down the road and to make decisions about the case at an earlier point. It should also provide you with an informational advantage that may help bring about an earlier resolution of the case at a cost that is acceptable and realistic for your client. As with so many things, money spent wisely earlier ends up saving you money down the road.

**Editor: What happens if the ECA reveals that the firm that you selected was not the best choice?**

**Villarreal:** We reserve the right to have the early case assessment done by firm A, but the work done by firm B. An early case assessment should be viewed by a law firm as an opportunity for the client to audition their ability to put together a plan for the case.

**Editor: How do you measure the success of an ECA?**

**Villarreal:** ECA is used in all significant matters for which it's called for in our convergence program. In measuring its success in a particular case, we look at costs, timeliness and how it has been executed. We also look at a fourth measure, which is more subjective and more qualitative: that is, do the in-house counsel involved feel that the early case assessment has been useful and has fulfilled its function of serving as a kind of projected trajectory for the case.

**Editor: What do you like about the CPR's ECA Toolkit?**

**Villarreal:** CPR has taken best practices and then built them into their program. I applaud CPR's emphasis on alternative dispute resolution in the resolution path. Optimally, what an ECA program should do is to drive you to explore early resolution possibilities.

**Editor: How do you train your lawyers to use ECA?**

**Villarreal:** We have our own custom-built template of how we want the early case assessment process applied. Our lawyers train on the job. After they have had experience applying ECA to one or two cases, they then become not students but teachers of the process. It becomes a part of how they practice law. They realize that ECA is simply a self-discipline tool to apply the skills they have already spent years learning. The same is true of the lawyers at the law firms that work for us.

I've had many outside lawyers tell me that they have gone to another completely unrelated client and said, "This is what we've learned; it works for other clients, how about we do something like this for you?"

**Editor: How does your management feel about ECA?**

**Villarreal:** We get nothing but kudos. One of the things that I have really enjoyed is how the concepts and terminology of ECA have gotten baked into the thinking of our executives.

Management feels it's a very business-like approach. One of the things that bothers them about lawyers is that lawyers have not historically been comfortable with an approach that enables them to get their hands around an issue in a relatively quick time frame.

**Editor: Does CPR's ECA Toolkit represent a greater interest by CPR in all aspects of dispute resolution?**

**Villarreal:** That is true absolutely. I have observed that change and participated in it as a member of the CPR's board of directors. It is a natural and welcome progression. Back in the founding days of CPR, it was a huge accomplishment to get the world thinking about mediation as an important tool for the resolution of disputes. Clearly, that mission has been largely accomplished.

Where CPR is headed now is towards a broader understanding of the concepts of

conflict management, and the ECA Toolkit reflects that. Initially my job was "Vice President for Litigation" and I asked that "and Conflict Management" be added to my title. It represents the broadening of the concept of what litigators do. They are increasingly involved in a kind of cradle-to-grave function of managing conflict generally within a company and not just waiting for a lawsuit. CPR, I think, is really just reflecting the evolution.

**Editor: What is the most significant issue facing corporate litigators today?**

**Villarreal:** Increases in litigation costs. These are a symptom of a much bigger phenomenon. Cost issues are really driven by changes in the way the world perceives corporations and on the demands placed on corporations.

Pharmaceutical companies are at the center of this in the sense that more and more demands are being made upon the industry. Greater scrutiny is being focused on their actions.

As the importance of corporations to the world increases, we can expect to see a commensurate increase in the level of scrutiny and attention paid to their actions. Inevitably some of that scrutiny will translate into issues requiring the attention of lawyers. The fundamental challenge to in-house law departments is to rise to that challenge and to help corporations adjust to the increased level of scrutiny that they are likely to see in this next generation, which translates into increased legal costs. But, legal costs are simply a symptom of a much bigger phenomenon.