

Early Case Assessment (ECA) has gained momentum recently as ediscovery matures and clients look to improve their ability to not just respond but detect and assess issues proactively. The unfortunate truth is that the strong majority of proposed ECA solutions or products are nothing more than ediscovery accelerators. What is being sold is not necessarily ECA but a quicker more robust ediscovery process. The fact is that ECA has been around for decades and it is not something that can be addressed by technology alone or by speeding up the ediscovery process (though this could be useful at times.)

According to the [International Institute for Conflict Prevention & Resolution](#) ("CPR") "[ECA] is a simple conflict management process designed to facilitate informed decisions-making at the early stages of a dispute." In providing these guidelines the stated purpose of CPR is actually a better definition of what ECA should be.

"[To] set forth a process designed to help businesses decide early on how to manage disputes, including identifying key business concerns, assessing risks and costs, and making an informed choice or recommendation on how to handle the dispute."

Notice use of the word "dispute" rather than "case." ECA is often deployed prior to any formal action being taken by a party. In many ways proper ECA could be called "Early Matter Identification," "Early Issue Detection," or "Early Scoping & Strategy." There are many other names as well. The point is that with ECA, there does not need to be an actual case at hand. It can be proactive, a self-diagnosis or evaluation of the party or position, or it can be reactionary, used to take inventory on resources, strength of opposition, variables in play, etc.

Lawyers have been practicing ECA arguably since the profession first came into existence. It is a process of gathering information on the client and issue(s) to determine the nature and scope of the matter (potential or real). It is the initial fact gathering that can occur on the first meeting between client and attorney. Obviously in today's market, this process can be complicated and protracted by such factors as size of the corporate client, nature of the issue(s), number of potential parties, volume and location of potential evidence, and the complexity of any potentially applicable laws, regulations, etc. But the essence of ECA is simple - learn what you can as quick as you can to determine if and how to proceed. To put it into the human context it could be analogous to the "fight or flight" response that is triggered in a given situation by all the information our senses take in at a given moment. Though typically not as dramatic or swift, ECA is similar – based on what we know now what should we do? And what more do we need to learn?

It has been stated that conducting "very good" ECA often results in learning at the front-end roughly [80% of all that you will ever know about a matter](#). This means looking at "the facts and the law and the witnesses and the documents" according to [PD Villarreal](#), the head of litigation for Schering-Plough. It has also been noted that where ECA is performed the results can be significant for the matter overall leading to a favorable [outcome 75% of the time and halving litigation costs](#).

Therefore, ECA spans a greater spectrum of practices and concerns than ediscovery. Though it can aid in coming to the meet and confer better prepped on the ediscovery issues of a matter it does not necessarily lead or need to be on the front end of ediscovery. It can be used to assess potential issues, conduct preliminary investigations/audits, determine strategy and inform settlement prospects – all prior to and sometimes voiding the need for ediscovery.

ECA is a combination of practices and tools. The current market is certainly offering a greater mix of potentially useful tools in this matter but none alone can nor should be labeled ECA. It is being marketed really just as the next generation of the ESI review process – more condensed, more powerful and faster. These tools are indeed helpful and offer strong advantages but true ECA is not simply about getting more relevant data (presumably less volume) in front of reviewers more quickly.

There are millions of dollars being spent on marketing the idea that automated and robust ECA is here today. My view is that this is just marketing hype – wrapping an ediscovery accelerator with the label of early case assessment.