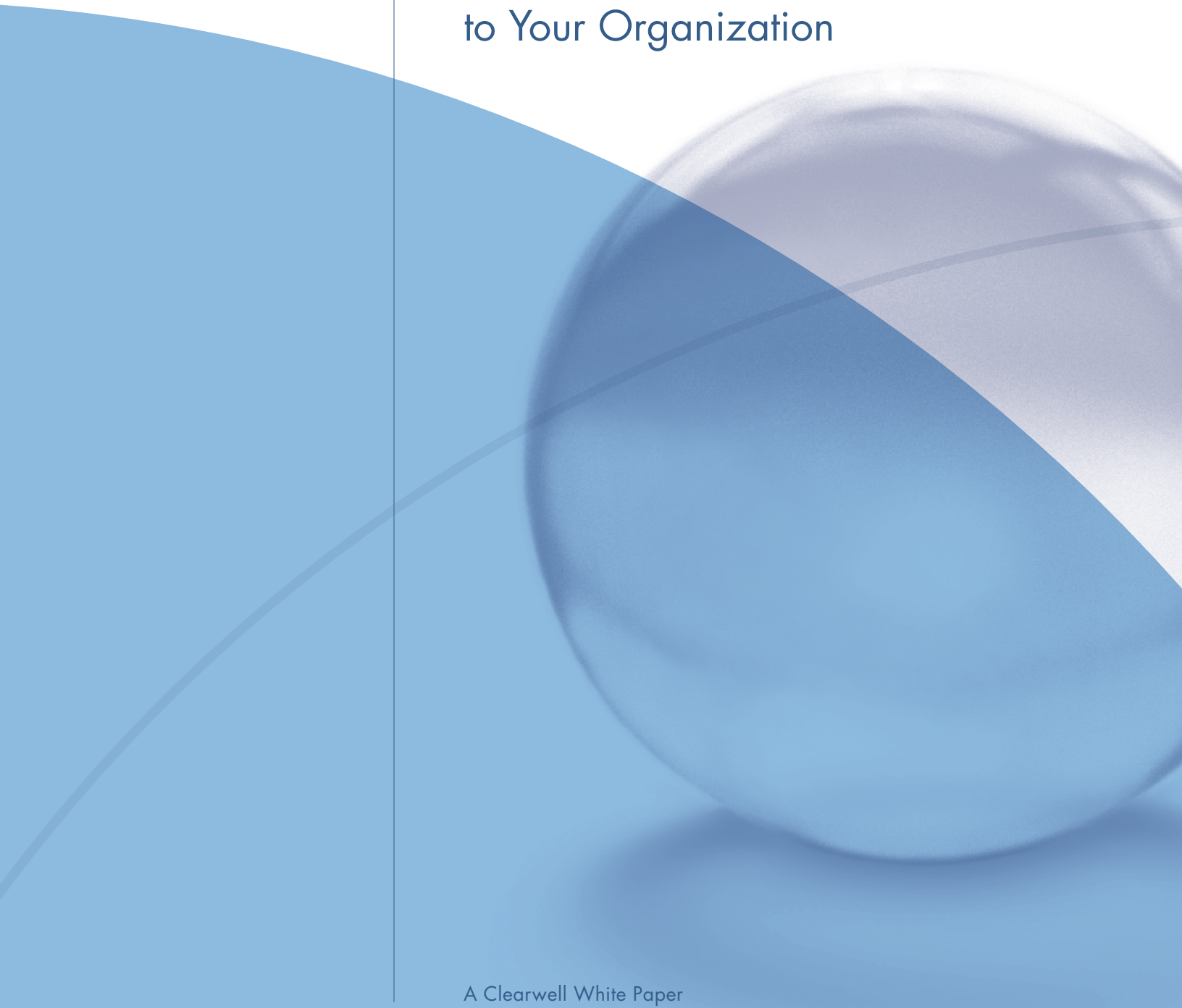
Clearwell

UNDERSTANDING THE IMPACT OF EARLY CASE ASSESSMENT

to Your Organization



A Clearwell White Paper

Table of Contents

"In 60 days, you will know 80 percent of what you will ever know about a case."

Schering-Plough's
VP of Litigation & Conflicts

Introduction

Much has been written about the early case assessment methodology, which has emerged as a critical way to quickly understand case facts, assess risk and lower both review and data processing costs. But, ECA as an initial step of the case management process hasn't always been on the scene to help control risk and litigation costs.

It wasn't until 1992 when DuPont created a "Legal Model" designed to develop procedures to save time and money on DuPont lawsuits that the concept of early case assessments first came on the scene. The initial foray was improved upon in 1994 when Thomas L. Sager, DuPont's vice president and general counsel for litigation, began to emphasize a new litigation-management process then largely unheard of in corporate legal departments. They called it "early case assessment" (or ECA) and ever since it's been a cornerstone of DuPont's legal approach. In fact, they now publicly tout their ability to reduce their litigation budget and reach better resolution of lawsuits due to adoption of these litigation management techniques.

Not surprisingly, during DuPont's early days of ECA the necessary products and processes were basically non-existent. As a result, there was significant room for improvement, meaning the adoption of the process by both inside and outside counsel was reluctant at best. But, over time the process incrementally approved and the benefits have now been confirmed via a number of independent studies. At DuPont, the cases where ECA was rigorously performed resulted in higher satisfaction from the business units, faster cycle times, and an average of 28 percent less cost.

In other studies[1], outside DuPont, similar benefits have also been described:

- **Successful outcomes**: Attorneys responded that, on average, performing ECA results in a favorable outcome in 76% of cases.
- **Strategic planning:** 87% of respondents said ECA is beneficial for determining the best way to proceed with a case.
- **Reducing expenses:** Respondents indicated that conducting ECA enables attorneys to reduce the litigation expenses in 50% of their cases on average.
- **Managing budgets:** More than half of attorneys surveyed (57%) find ECA assists in their ability to prepare a more accurate litigation budget.

ECA Defined

While the benefits of an ECA approach have been established, it does beg the question, how is ECA defined in practice?

> *An early case assessment is a case management approach designed to assemble, within 60 days, enough of the facts, law, and other information relevant to the dispute to evaluate the matter, to develop a litigation strategy, and to formulate a settlement plan if appropriate.*

Axiomatic to an ECA is the notion that that methodology must be performed early. But, in litigation where cases can often last years, early may be a relative term. Nevertheless, the above definition prescribes a 60 day window, which for most is a relatively aggressive time frame. But, it does also lead to questions about the trigger date—i.e., when does the 60 day time frame begin?

Many ECA practitioners might think that the timing for an ECA approach should start when the complaint is filed—and using the complaint to frame the initial contours of the ECA approach certainly can be helpful. While this isn't a bad trigger date, per se, the better approach may often be to begin the clock at the time litigation becomes "reasonably likely"—versus later dates such as when the complaint is filed or when discovery is propounded. This near term ECA trigger is also the same for launching preservation obligations and a host of interrelated activities, such as electronically stored information (ESI) identification, which makes the matter kick-off more synchronized.

The benefits of doing this work up front really came into clear focus with the 2006 amendments to the Federal Rules of Civil Procedure (FRCP). When the FCRP was amended, the most significant changes were to many of the procedural rules surrounding the meet & confer process, the goal of which was to get the opposing litigants to discuss e-discovery prior to disputes forming:

- **Rule 16(b):** Amended to add to the scheduling order provisions for disclosure or discovery of ESI within 120 days of the lawsuit.
- **Rule 26(a)(1)(B):** Requires ESI to be on the list of items included in a party's initial disclosures.
- **Rule 26(f):** Adds the requirement to meet & confer about the preservation, disclosure, and discovery of ESI into the existing timetable, which requires the parties to confer "… as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due…".

As the foregoing Rules demonstrate, these explicit timelines mean that ultimately one of the biggest drivers for ECA is the need prepare for the FRCP meet & confer sessions.

However, "early" can be a relative term. Certainly, ECA is best leveraged and will be most valuable when performed at the outset of litigation. But, there are scenarios where an ECA methodology would still generate value even if performed later in the mater. For instance, with class action lawsuits initial discovery about the class certification may occur months before discovery on the merits. In this scenario, using a "later" ECA approach would still make sense since discovery about the case facts may not have been possible earlier on. Similarly, later ECA may still hold value when new parties or claims are added to an existing lawsuit, or when there's a substantial change in case direction, data, or custodians.

Over time, the ECA value proposition has become clearer, but also more diverse. Most agree that an ECA approach is critical to solving three key needs at the outset of litigation:

A: Estimating the scope (i.e., duration and cost) of the e-discovery effort

B: Assessing case facts to evaluate risk and settlement value

C: Preparing for meet & confer conferences

A: ESTIMATING THE SCOPE OF E-DISCOVERY

The first value that ECA can provide is the ability to scope the e-discovery project both in terms of time and cost. It's the cost element that is often required to form the foundation for more holistic case assessments because the cost to defend a matter must inherently play a central role in the decision to defend or settle a lawsuit.

It now goes without saying that e-discovery constitutes a substantial portion of the costs to defend (or prosecute) a given matter. Therefore, scoping the e-discovery initiative is a foundational step in the ECA process since vendors usually charge on a data volume basis. Traditionally, without leveraging an ECA approach, it has been very difficult to estimate the scope of e-discovery—often producing substantial sticker shock at the end of the data processing step. Historically, all the data was collected and then processed via hosted service providers who would charge per gigabyte of collected data. Oftentimes this workflow wasn't phased or iterative, thus making e-discovery an all or nothing proposition for many.

Today, the scoping process has been revolutionized by the ECA methodology and, as a result, has become quicker and much more accurate. The first phase is to "right-size" the discovery initiative by ensuring that the collection component isn't unduly restrictive (too few custodians) or overly broad (too many custodians). ECA often plays a particularly valuable role here since one of the main functions of any enterprise class ECA product is the ability to rapidly process and analyze case data to help legal teams determine the most likely set (i.e., amount and form) of relevant ESI. Using "pre-processing" functionality to estimate (i) total data volumes, (ii) files types and (iii) date ranges allows legal teams to better estimate the duration and cost of downstream e-discovery phases.

B: ASSESSING CASE FACTS

After an initial budget, data volumes, and project timelines are assessed, the next logical step in the ECA process is to begin analysis of the case facts to determine an early posture for the matter—meaning an assessment of the merits of the claims contained in the complaint (whether formal or not). The goal here is to create a formula where the end client can analyze the costs of e-discovery and litigation collectively, weighing them against the amount in controversy and the likely outcome. For example, if a given piece of commercial litigation is estimated to have $1,000,000 of exposure and the likelihood of winning is at 50% then it's probably not a wise risk management decision to spend $750,000 defending the matter.

This fact assessment process is one where coordination among internal counsel, business stakeholders, and outside counsel becomes critical because any one constituent may be unable to interpret the objective data with enough insight to form the appropriate strategies. Therefore, the parties must work in concert to review information and select targeted key words and data types to make sure that the initial

snapshots of the ESI aren't misrepresented samples from the data corpus. This phase should be well supported by data analytics and statistical sampling to ensure that decisions on a limited data population can reasonably be extrapolated from the entire data corpus.

While it may sound complex, in reality the process is often fairly straight forward assuming the right parties are involved, the right products are employed, and the team has a clear mission. A real-world example from a human resources (HR) context can be illustrative regarding how ECA can be used to assess case facts. Say, for example, that an employee from a large pharmaceutical company has just resigned. During their exit interview they make explicit and unambiguous claims about how their departure was due to a hostile and offensive workplace caused by a long pattern of sexual harassment from their supervisor. They further claim that they have retained counsel in order to file an EEOC claim and a civil lawsuit. A traditional (non-ECA) approach might suggest waiting until the EEOC claim or lawsuit was filed before taking any action. But, instead an ECA methodology would suggest that the sexual harassment claims rose to the level that litigation was "reasonably likely" and as such a legal hold should be placed over the key players (i.e., the alleged victim and her supervisor). Once that hold was in place, the next step would be to leverage an ECA product to quickly review documents and emails between the key custodians to assess:

- **Initial keywords** that may hone in on relevant correspondence, typically using terms to identify inappropriate language/conduct. While the stemmed keyword "harass*" is a prototypical term that probably should still be used, it's important to note that in many instances such legalese isn't often as valuable as other slang terms.
- The **timeline of specific incidents** that may bracket the beginning and end of the alleged harassment. Such timelines are very important to establish the duration and severity of the alleged conduct, because in this HR context one isolated incident may not rise to the level of a hostile workplace.
- Determining the **"key players"** since in this scenario it will be important to see if the harassment was limited to the complainant, versus occurring across a larger set of employees, who might also be subsequent plaintiffs. ECA products that analyze participants and their interactions are particularly helpful to graphically demonstrate linkages amongst certain individuals referencing select topics. Analyzing email threads is also an effective way to see how individuals are discussing topics and to see if other, new custodians are involved in potentially damaging conversations.

For implementation of this process, instead of starting with a very broad collection effort, best practices are emerging where enterprises begin on a smaller scale and effectively widen the scope as objective insights into the data indicate if/when expansion is appropriate. This iterative process helps ensure that the discovery initiative is appropriately balanced, since it's nearly impossible to hit the bull's-eye with the first blind scoping effort. This type of iteration as a discovery best practice is becoming more common and is strongly recommended by the Sedona Conference.

In one real-world example, a corporation uses a "rule of ten" as a starting place for any collection effort. Using functionality such as email threading and participant analysis they're able to make objective decisions about the key players expanding only when the data leads them in specific directions. In practice it means that their collection effort might ultimately exceed the initial ten custodians, but whether ten is the

correct number for a particular matter is less important. The important value of this process is that the effort starts small, by viewing data from the most likely key players. It then lets the ECA process lead the effort once the objective data suggests otherwise.

In total, this quick, objective view into the case data should give the team enough information to make several key decisions, such as whether to retain outside counsel, when to interview additional witnesses, whether they should alert senior management, and if they should make a preemptive settlement offer. All of these insights, if gained early, will often add tremendous value since the longer a matter takes to mature the more downstream costs typically mount up.

C: PREPARING FOR THE MEET & CONFER

As discussed above, another benefit of using an ECA approach is the ability to become better prepared for the initial meet & confer conferences, either mandated by the FRCP or pursuant to local court rules. In a recent Sedona publication, entitled A Practitioner's Guide to Rule 26(f) Meet & Confer: A Year After the Amendments (Rosenthal, Cowper), the authors lay out the list of items that should be covered in the conference:

> *Rule 26(f) Conference will address preservation, scope of production, production format and privilege, both inside and outside counsel need to take the time to educate themselves regarding: (i) the information technology systems at issue; (ii) where and on what systems the ESI is located; (iii) who are the custodians/owners of the data; (iv) the steps undertaken by the party to preserve the relevant data; and (v) the scope of production that the party is willing to undertake (i.e. will search terms or date restrictions be used to narrow the universe of documents?); (vi) the ultimate form of production (tiff, pdf., et cetera); (vii) privacy considerations (i.e. is the data located outside of the U.S.?); (viii) and other considerations such as 'clawback' provisions, privilege, and possible cost shifting.*

What's hard to imagine is how counsel could possibly be prepared to address many of these concerns (safely and defensibly) without using an ECA methodology to develop objective insights into date ranges, data types, custodians, and potential keyword strategies. These objectives can be accomplished by generating ECA must have's such as detailed topics, participants, search terms and timeline reports.

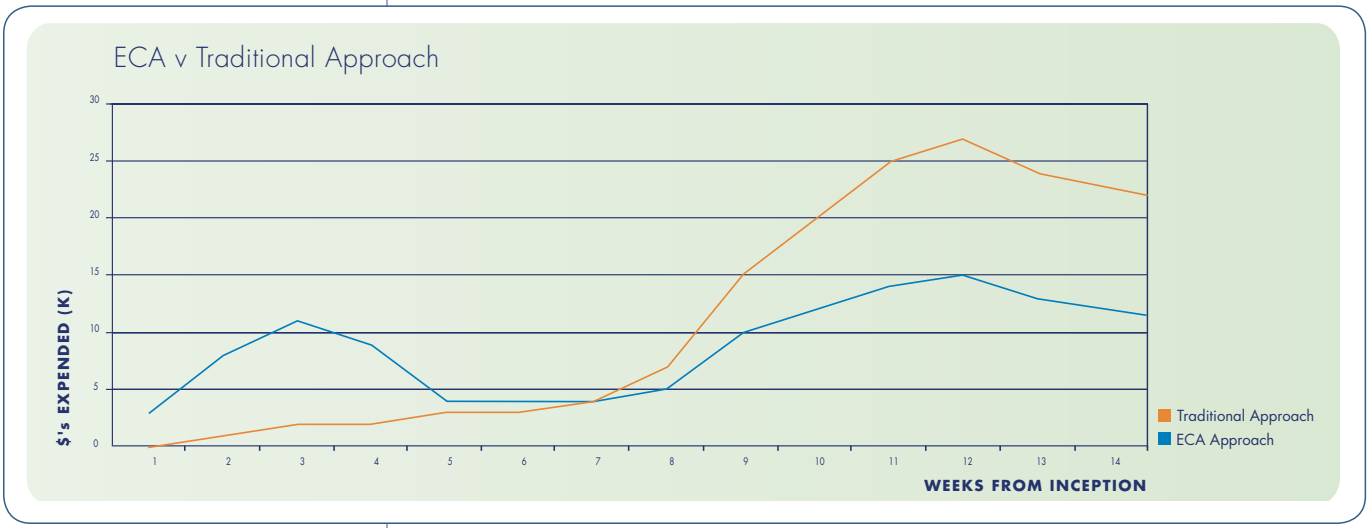
For example, the opposition in a given matter may come to the meet & confer with a laundry list of search terms and key players. Counsel who isn't leveraging an ECA methodology is then forced to negotiate key words in a vacuum, typically with only hit counts and without looking at the actual data. This approach simply isn't effective and often paints both parties into a corner because the negotiated list is not likely to accurately reflect a search protocol with the requisite levels of precision and recall.

This type of minefield was seen in *William A. Gross. Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 2009 WL 724954 (S.D.N.Y. Mar. 19, 2009) where Judge Peck (a Sedona devotee) issued a "wake-up" call to the bar about the need for "careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other electronically stored information ('ESI')." In *Gross*, Judge Peck had to mediate an e-discovery dispute where the requesting party propounded a blatantly over-inclusive search request. Summing up the problem by citing *Victor Stanley* he stated: "This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails." He further noted: "[w]hile this message has appeared in several cases from outside this Circuit, it appears that the message has not reached many members of our Bar."

Justifying the Early Case Assessment Process

While the foregoing suggests a panoply of benefits that inure to ECA practitioners, adding ECA to an existing e-discovery process requires the ability to overcome a common litigation mindset: i.e., the desire to avoid costs for as long as possible since there's often a perceived chance that the matter will settle, and then any early costs were in essence unnecessary. Although avoiding early costs makes some sense on its face, the fact is that spending a small amount of money early on (for budgetary and case assessment purposes) will in most instances reduce the overall litigation budget. It's the classic "you can pay me now, or pay me later" situation. Counsel (and their clients who pay the bills) must understand that while some costs are incurred early in the ECA process, the benefits are crystal clear: i.e., determining customized case strategies early in the matter to decide whether to fight or settle.

This graph from a recent high technology company shows results from a comparison of costs from two similar commercial lawsuits. It revealed statistically how their initial ECA investment actually paid for itself over the life of the litigation. While initial costs were higher in the ECA methodology, after a few months into the process the ECA matter was running substantially less expensive versus the traditional approach, with the end result being 30-40% cheaper over the life of the engagement.



Clients wanting to deploy ECA methodologies (like DuPont did in the early days) would be wise to quantify the savings along several factors such as unit costs, timelines, attorney review costs, positive outcomes, etc.

While ECA tools can be great accelerators of the process, the products won't perform an ECA by themselves since there's simply too much subjective decision making involved in the assessment process. Therefore, involving the right people is critically important -- not only in terms of their experience performing this analytical work, but also in their ability to capably testify about the underlying decision making process. It's also important to be able to follow a repeatable and defensible processes to show that the "recipe" used was aligned with industry best practices and wasn't created as a one-off for a particular engagement. All of these ingredients must be in place to have an ECA process stand up to downstream judicial scrutiny.

Conclusion

The early casement assessment methodology has rapidly evolved from its inception at DuPont over a dozen years ago. It's gone from a "nice to have" to a "must have" as legal practitioners have realized that they must be able to quickly and accurately estimate the scope of e-discovery, prepare for meet & confer conferences, and assess case facts to evaluate risk and settlement value. While there is no singular approach to a viable ECA methodology, it is clear that three important ingredients are required: a defined workflow, trained ECA practitioners who can testify about the process, and enterprise grade ECA tools that make the process simple, transparent, and readily documented. Bringing all three together has been a much easier process of late and now the rewards for clients and attorneys alike are close at hand.

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1. Cogent Research, 2007.

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