

# Cost Containment Guidelines

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## Purpose of the guidelines

The bar is faced with congested trial dockets, cries for tort reform, an angry public that cannot understand why it takes so long for disputes to be resolved, and a judiciary that has declared that judges rather than lawyers run the trial dockets. It is better to improve the system voluntarily from within than to be forced to accept remedies that may improve statistics but not promote the ends of justice. It is in every trial lawyer's interest to put aside the myths, antagonisms, and wounds of the past, and to participate constructively in dialogue designed to improve our system. The delay between the time of filing a case and final disposition contributes significantly to the cost of litigation. These guidelines are offered for use by all litigators. Following these guidelines will result in substantial savings for all parties, particularly in a state that does not allow prejudgment interest in tort cases.

## The guidelines

At the beginning of litigation, tender this list to opposing counsel and ask if they are willing to process the case using these guidelines as supplemented by the Rules of Civil Procedure. Such an approach provides a set of agreed-upon ground rules.

1. Seek early agreement of counsel for a voluntary exchange of information without the paper chase of motions.
2. Avoid unnecessary motion practice. Submit to opposing counsel a proposed responsive pleading with a letter in lieu of a motion, setting forth any objections you may have to the adversary's pleadings that would normally be raised by motion. Determine if your objections can be resolved by mutual agreement or reserved until trial.
3. Use telephone conferences with the court to resolve matters that cannot be handled by mutual agreement.
4. Depositions:
  - a. Set depositions by mutual agreement with the aid of legal secretaries or assistants. Avoid the waste of time of noticing depositions at times selected arbitrarily.
  - b. Depositions should be to the point. A little preplanning will save time. Encourage associates taking depositions to set reasonable time limits, though it is recognized that discovery depositions necessarily take time and some exploration.
  - c. Use telephone depositions where appropriate for discovery or perpetuation, particularly where the cost of producing the party or witness is excessive. You might also use telephone testimony at trial. Many courts have this capability, or equipment may be installed temporarily.

5. In multiparty or potential multiparty cases, early discovery is particularly important. Limit the use of cross-claims and third-party actions by using alternative procedures:
  - a. Stipulate to a division of responsibility in the event of plaintiff's judgment.
  - b. Coordinate the defense without prejudice and stipulate that the trial judge can decide any indemnity and contribution issues, if necessary, based upon evidence submitted during the primary trial and any additional evidence submitted by defendants or third-party defendants.
6. A face-to-face conference between counsel, with an exchange of discoverable information, will often enhance settlement more than motions and depositions. It may be appropriate to interview plaintiff, defendant, or witnesses in lieu of taking formal depositions. In liability cases, early settlement conferences (which need not involve the court) can keep costs down.
7. Try to agree on discovery plans with opposing counsel, so that the parties know early whether the case must be tried or settled. Avoid last-minute flurries of discovery.
8. Seek court sanctions for discovery abuses if personal communication between counsel fails to resolve the problem.
9. Avoid set overs. If you know you will need a continuance, notify the court and other parties promptly. Do not wait until the last minute. Verify the availability of witnesses and counsel immediately upon receipt of a trial date, and notify all parties immediately if set overs are anticipated.
10. Create an office research bank and index it carefully. The same is true with jury instructions and unusual pleadings.
11. Use paralegals or law clerks when appropriate; but control the number of associates, clerks, and paralegals and the time allowed for them to complete assignments. Unrestricted use of assistants generally increases the cost of legal service for both sides.
12. Always consider non-binding mediation. In my judgment, it is always productive, irrespective of whether the case settles. You always learn so much.

These suggestions are intended as guidelines for use by busy trial lawyers, with the dual purpose of cutting the cost of litigation and making the process more pleasant and expeditious without sacrificing the efficiencies of courts. They are an alternative to the imposition of rules that sometimes make the process more cumbersome, time-consuming, and costly. These are ideas from experienced trial lawyers for both the plaintiff and the defendant. Readers are urged to amplify and add practices to the list, since it is not exhaustive.