

ATTACKING EXCESSIVE COSTS REQUESTS

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Biography

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Ed Upenieks is a partner in the Brampton law firm of Lawrence Lawrence Stevenson LLP. He has been involved as counsel in some of Ontario's leading costs cases, having represented over 40 law firms on costs matters. He is certified as a Specialist in Civil Litigation and has extensive trial and appellate experience before the courts and specialized administrative tribunals.

Ed has lectured on costs to the Ontario Bar Association, the Law Society of Upper Canada, The Advocates Society, the Ontario Trial Lawyers Association, the Peel Law Association, and the Institute of Law Clerks of Ontario.

Ed co-authored *Enforcing Judgments and Orders*, a standard textbook that includes a section on costs awards, solicitors' liens, and charging orders, and is working on a practical costs textbook.

Ed was called to the Ontario Bar in 1983 and is a graduate of Osgoode Hall Law School.

INTRODUCTION

The trial judge found in favour of the Plaintiff and awarded damages following a 5-day trial of over \$100,000. To make matters worse, Plaintiff's counsel has now provided his Bill of Costs which seeks substantial indemnity costs of over \$150,000.00, together with a premium of \$50,000.00. How does one go about attacking the costs sought?

This paper will provide some guidance for responding to excessive costs requirements not only following a trial, but also following a motion.

Before doing so, it is necessary to consider entitlement to costs, scale of costs and other general costs principles.

COSTS ARE DISCRETIONARY

Costs generally follow the event; typically, the successful litigant recovers at least some of their costs. However, an award of costs is not automatic and costs remain subject to the discretion of the Court and the applicable rules of Court.¹ This important principle is codified in the *Courts of Justice Act*.² The Supreme Court of Canada has affirmed the principle that costs awards made by trial judges should be accorded a high degree of deference.³ The court will “set aside a costs award only if the trial judge has made an error in principle or if the costs award is plainly wrong.”⁴ This broad discretion makes it all the more important that counsel provide compelling costs submissions to the trial judge.

Refusing Costs to a Successful Party

The Court has the discretion to refuse entirely or reduce the amount of costs that would normally be recoverable upon the conclusion of a successful lawsuit. The discretion must

¹ Orkin, *Costs*, looseleaf (Canada Law Book, 2005) at 1-1 and 1-2.

² R.S.O. 1990 c. C.43 section 131(1)

³ *Walker v. Ritchie* (2006), 2006 SCC 45, J.E. 2006-1997 at para.17 [*Walker*]

⁴ *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303 (S.C.C.) at para. 27.

be exercised only if the interests of justice require it and then only for very good reason.⁵ As there is a general expectation that a successful litigant will be awarded costs, the successful party will be deprived of costs only in rare cases.⁶ Such cases are those in which there is fault to be found.⁷ In those instances, the Court can consider the conduct of the party both during litigation and prior to it.⁸

Awarding Costs Against the Successful Party

Rule 57.01(2) of the *Rules of Civil Procedure*⁹ allows the Court to award costs against the successful party where it is so warranted.¹⁰ In *King v. Golf Canada Ltd.*¹¹, although the Appellant was not successful on appeal or at trial, the Court of Appeal found that it was reasonable for the Appellant to have brought the action and awarded substantial indemnity costs to the Appellant on the basis that the Respondent had conducted itself reprehensibly prior to litigation.

PARTIAL INDEMNITY COSTS

The basic rule is that a successful party in a proceeding is usually entitled to costs on a partial indemnity basis.¹² This scale of costs is intended to compensate a successful party for a portion of the legal costs incurred in an action or step in a proceeding.¹³

Partial indemnity costs were part of an entirely new costs regime, including a costs grid that was enacted on January 1, 2002. The costs grid was revoked in July, 2005, and the Costs Subcommittee of the Civil Rules Committee recommended a new set of guidelines based on the costs grid.¹⁴ The Subcommittee published guidelines which provided a

⁵ Orkin, *supra* note 1 at 2-35.

⁶ Orkin, *supra* note 1 at 2-35.

⁷ Orkin, *supra* note 1 at 2-39.

⁸ Orkin, *supra* note 1 at 2-37.

⁹ [Rules].

¹⁰ Orkin, *supra* note 1 at 2-35.

¹¹ 45 C.C.E.L. 238 (C.A.) [King].

¹² *Joncas v. Spruce Falls Power Company*, [2001] O.J. No. 1939 (C.A.) [Joncas], Kenneth J. Peacocke, *The Judicial Fixing of Costs* (The Litigation Resource Centre, January 2005) at 3-13.

¹³ Peacocke, *supra* note 12 at 3-4.

¹⁴ Orkin, *supra* note 1 at 1-7.

“minigrid”, which meant to provide guidance to counsel and judges. This minigrid is as follows:

| | |
|--|------------------------------|
| Law Clerks | Maximum of \$80.00 per hour |
| Student-at-law | Maximum of \$60.00 per hour |
| Lawyer (less than 10 years) | Maximum of \$225.00 per hour |
| Lawyer (10 or more but less than 20 years) | Maximum of \$300.00 per hour |
| Lawyer (20 years and over) | Maximum of \$350.00 per hour |

This minigrid does not have any statutory validity.¹⁵ These guidelines or minigrid do not even have the authority of a Practice Direction.¹⁶ Although the minigrid does not bind the Court and is only a guideline, it does assist judges in ensuring costs consistency in costs awards.¹⁷

Because there are so many different hourly rates charged by lawyers across the province, it is possible that a party can seek costs on a partial indemnity basis that would exceed the amount actually paid to the lawyer, effectively resulting in a windfall to the party receiving costs. The courts have ruled that it would be inappropriate to grant costs in an amount that is equivalent to or exceeds counsel’s bills to the client. Courts have also ruled that it would be inappropriate to provide costs in such a quantum that, although the amount intended is partial indemnity costs, the actual amount awarded is closer to substantial indemnity costs.

Therefore, it becomes all the more important to consider the hourly billing rates charged and the fees actually billed to the client to ensure that counsel do not claim more than the amount actually being charged to the client.¹⁸ To prevent this abuse, Form 57B now contains a notation that reads “Specify the rate being charge to the client for each person

¹⁵ Orkin, *supra* note 1 at 1-8.

¹⁶ A. Dychtenberg, “After the Cost Grid – What’s Next, The Civil Litigator’s Roadmap” in *After the Cost Grid – What’s Next? The Civil Litigator’s Roadmap* (Continuing Legal Education, Nov. 1, 2005) at 4-13

¹⁷ Resch v. Canadian Tire Corp. (2006), 2006 WL 2006399 (S.C.J.) at para 36 [*Resch*].

¹⁸ *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, [2004] O.J. No. 2102 (C.A.) at para. 98 [*Stellarbridge*].

identified in column 2.” The solicitor must attest to the truth and accuracy of the hours spent and the rate charged to the client by signing the form.

Representing the unsuccessful party, it is always necessary to obtain the other side’s dockets and to see the hourly rates that are actually being charged and ultimately billed to the file. It should be remembered, however, that the account rendered to the client is only one factor for the court to consider in making a costs award. Where counsel reduces the bill to the client, the court may also examine the reason behind the reduction.¹⁹

SUBSTANTIAL INDEMNITY COSTS

Originally termed “solicitor and client” costs, this level of costs was intended to provide complete indemnification for all costs reasonably incurred in the course of prosecuting or defending an action or proceeding.²⁰ However, it should be noted that while one term was substituted for the other, substantial indemnity costs are something less than the former solicitor and client costs, although it is unclear how much less.²¹ Complete indemnification for all costs reasonably incurred is not what is intended by the new term.²²

Substantial indemnity costs must be distinguished from full indemnity costs. Rule 57.01(4)(d) allows the Court as of July, 2005, to award costs in an amount that represents “full indemnity”, which, unfortunately, is not defined. No doubt as an aid to quantifying partial indemnity and substantial indemnity costs, subrule 1.03(1) has effectively fixed “substantial indemnity” costs in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A. Costs on a “substantial indemnity basis” has a corresponding meaning²³. That is, substantial indemnity costs amount to 1.5 times partial indemnity and conversely, partial indemnity costs are two-thirds of substantial indemnity costs.

¹⁹ Peacocke, *supra* note 12 at 3-5b.

²⁰ *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Gen.Div.) at para. 13 [Apotex].

²¹ Orkin, *supra* note 1 at 1-6.

²² Orkin, *supra* note 1 At 1-14, Peacocke, *supra* note 12 at 3-5a

²³ *Rules*, r. 1.03(1).

Solicitor and client costs are generally awarded only where there has been irreprehensible, scandalous or outrageous conduct on the part of one of the parties.²⁴

There are typically three specific circumstances in which substantial indemnity costs are awarded:

1. rejection of a favourable Rule 49 offer by the unsuccessful party;
2. an unproven allegation of fraud, bad faith or misconduct against another party; and
3. improper conduct by a party during the course of the litigation.²⁵

The Courts will generally award substantial indemnity costs to compensate a party for the other party's conduct during the course of litigation, rather than compensating for conduct prior to litigation.²⁶ This, however, is not a hard and fast rule and substantial indemnity costs may be sought in relation to conduct that occurred prior to litigation so long as damages sought are not in reference to the same conduct.

Our Court of Appeal reached two different conclusions on whether misconduct can lead to concurrent awards of substantial indemnity costs and punitive costs, or whether the two are mutually exclusive. In *Plester v. Wawanesa Mutual Insurance Co.*, the Court of Appeal left the award of punitive damages, but reduced the costs award to partial indemnity costs on the basis that there should not be double recovery and suggesting that costs should only be awarded in reference to conduct that occurred during litigation.²⁷ On the other hand, in *Keays v. Honda Canada Inc.*²⁸, the Court of Appeal granted both punitive damages and substantial indemnity costs.

²⁴ *Young v. Young*, [1993] 4 S.C.R. 3 at para. 66

²⁵ Kenneth J. Peacocke, *supra* note 12 at 3-13.

²⁶ Peacocke, *supra* note 12 at 3-15.

²⁷ (2006), 2006 CarswellOnt 3241, 39 C.C.L.I. (4th) 44 (eC) [*Plester*].

²⁸ (2006), 2006 CarswellOnt 5885 [*Keays*]

PREMIUMS

The Supreme Court of Canada has, in the matter of a few years, refused leave to appeal a Court of Appeal decision endorsing the trial judge's award of a premium. It has recently, in *Walker v. Ritchie*, greatly restricted the opportunities to award a premium²⁹.

In a more recent decision, *Debora v. Debora*, our Court of Appeal overturned a \$150,000.00 premium based on the risk of non-payment and instead awarded generous costs of the appeal to the party that lost the premium, of \$75,000.00.

FACTORS AFFECTING THE COSTS AWARD

The overriding principle, as suggested by the Court of Appeal for Ontario, is that costs should be fixed at an amount that is fair and reasonable.³⁰

It is a fundamental concept in fixing and assessing costs that the award must reflect "more what the Court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs of the successful litigant".³¹ Rule 57.01(1) sets out factors that a Court may consider as follows:

Factors in Discretion

57.01(1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

²⁹ (2006), 2006 S.C.C. 45, J.E. 2006 - 1997

³⁰ *Zesta Engineering Ltd. v. Cloutier* (2002) 22 C.C.E.L. (3d) 161, O.J. No. 4495 (C.A.) at para. 4.

³¹ *Fratton-Masuy Environmental Technologies Inc. (c.o.b. Ecoflo Ontario) et al. v. Building Materials Evaluation Commission* [2003] O.J. No. 1658 (Div.Ct.) at para. 16.

- (b) *the apportionment of liability;*
- (c) *the complexity of the proceeding;*
- (d) *the importance of the issues;*
- (e) *the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;*
- (f) *whether any step in the proceeding was,*
 - (i) *improper, vexatious or unnecessary, or*
 - (ii) *taken through negligence, mistake or excessive caution;*
- (g) *a party's denial of or refusal to admit anything that should have been admitted;*
- (h) *whether it is appropriate to award any costs or more than one set of costs where a party,*
 - (i) *commenced separate proceedings for claims that should have been made in one proceeding, or*
 - (ii) *in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and*
- (i) *any other matter relevant to the question of costs.*

It is important to note that Rule 57.01 is permissive, not mandatory, and that the factors are not closed as subrule 57.01(1)(i) states “any other matter relevant to the question of costs”.

With the recent rule change, two new factors have been added to the list. The first, (0.a) speaks to the principle of indemnity including experience of the lawyer entitled to costs, as well as rate charged and hours spent. This subrule makes it clear that costs are to indemnify the successful party and no more, and counsel must disclose the actual rate being charged to the client. No longer can counsel request payment by way of partial indemnity costs in excess of the costs being charged to one's client.³²

³² *Dychtenberg, supra* note 16 at 4-3.

The second new factor, (0.b) speaks to the reasonable expectations of the unsuccessful party. Certainly obtaining the other party's costs outline or bill of costs would be helpful before deciding this, but how do we take away the loser's argument that no one would have expected a costs claim in such an amount? This would be more so the case where there is an unrepresented party.

HOURLY RATES

The Court of Appeal has not provided much guidance as to how to decide upon the appropriate rate for senior and junior counsel or the appropriate scale. In *Celanese*³³, the Court stated "the trial judge is to assess the seniority of counsel and the significance of the case in monetary jurisprudential and procedural terms, and to decide on a case by case basis the appropriate rate for senior and junior counsel on the applicable scale."³⁴ Not terribly helpful. We are left to consider the rates comparing the rate to the client and the grid rate.

Where the issues were complex and the trial judge deemed counsel's work to be of high quality and necessary, the Court of Appeal declined to lessen the costs award solely on the basis that it is arguably excessive.³⁵

When considering earlier decisions, be mindful of the timing of costs decisions. Courts appeared very liberal in their awards from 2002 to 2005.

THE COURT'S PROCEDURE TO ASSESS COSTS

There has emerged a three step process to assess or fix costs. The starting point is with the dockets and the hourly rates and a critical analysis of them. The second step is to step back and to determine what is fair and reasonable, and the third step is to determine the reasonable expectations of the losing party.

³³ *Celanese*, (2005), 2005 Carswell Ont. 1124 (Ont. C.A.) [*Celanese*] at para. 61.

³⁴ *Celanese*, *supra* note 33 at para. 61.

³⁵ *Hunt v. TD Securities, Inc.* (2003), 175 O.A.C. 19, 229 D.L.R. (4th) 609 (Ont. C.A.)

In *Murano v. Bank of Montreal*³⁶ the Court of Appeal indicated that the fixing of costs requires a critical examination of the work performed.

A critical examination should include a responsible analysis of the work done, a review of the elements of the work, a testing of the dockets and an overall weighing of the value of the work, taking into account the factors enumerated in the Rules.³⁷

One approach to critical examination, which is endorsed by various cases,³⁸ is that put forward by Justice Nordheimer in *Pearson v. Inco Ltd.*:³⁹

“First, I will review the amounts sought in the bills of costs and set amounts which appear appropriate in light of the provisions of the cost grid. I will then address whether the resulting amounts are reasonable to fix as the costs in light of the factors in rule 57.01(1) as well as a consideration of what is a reasonable amount for costs in the overall context. This latter consideration must play a role in fixing costs.”⁴⁰

As the Court of Appeal states in the leading case of *Boucher v. Public Accountants Council (Ontario)*, the fixing of costs does not begin and end with a calculation of hours times rates.⁴¹

Perhaps Justice Farley put it best in one of his decisions:

“I have been on record for a long time counselling against the prevalence of legal accounts being the product of a mindless multiplicand of an hourly rate times docketed hours. It may look precise – but it is not functionally accurate. It rewards inefficient work. It tolerates diversionary work. It presumes there is no wheelspinning. It does not recognize that there should be a premium in certain cases where there is a beneficial and timely (early) resolution of matters (beneficial not only in the sense of the narrow limits of the legal case, but also something which allows the party to get on with its (personal or business) life without the uncertainty and frustration of a lawsuit overhead. Rather essentially the

³⁶ (1998), 41 O.R. 3rd 222, [1998] O.J. No. 2897 C.A.

³⁷ *BNY Financial Corp. Canada v. National Automotive Warehousing Inc.*, [1999] O.J. No. 1273 (Ont.Gen.Div. [Commercial List], at para. 7.

³⁸ See, for instance, *Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band*, 2004 CarswellOnt 2106 [*Anishnabe*].

³⁹ [2002] O.J. No. 3532 (S.C.J.).

⁴⁰ *Anishnabe*, *supra* note 38 at para 5.

⁴¹ 71 O.R. (3d) 291 [*Boucher*].

question to be considered is what is the case reasonably worth in the circumstances.”⁴²

In your analysis, it is not enough to baldly assert that the costs claimed are excessive. You must convince the judge why the number of hours and hourly rates claimed must be reduced. Done properly, this is a meticulous exercise.

As a starting point, losing counsel should request copies of all dockets from the winning party’s counsel and should carefully scrutinize the dockets and challenge any vague descriptions. For example, often the descriptions simply are “preparation for trial” or “telephone call”. As well, it is necessary to look for double docketing of time and also to look for duplication of effort, not only for having two or more people perform the same task, but also for in-house conferences for two or more people. Look for copying of e-mails to two or more people as well. This is the modern version of duplication of effort.

As counsel for the losing party, you should request proof of billable rates by the other counsel. This would include not only copies of draft statements, including the hourly rates and the total time values, but also proof that the full amount of the time was billed and, as well, a copy of the retainer agreement.

Areas to review in the dockets include:

- number and seniority of the docketers;
- duplication of effort;
- learning curve for new docketers/new lawyers;
- time spent on:
 - research
 - “review”
 - “preparation” individually and cumulatively
- are there costs awards on the motions;
- docketing errors;

⁴² *BNY, supra* note 37 at para. 5.

- time spent reporting to the client or managing the solicitor and client relationship; and
- travel time.

If your time is much less, you may produce your own dockets as a yardstick against which to measure the other side's costs.

Judges have a *duty* to fix costs at reasonable amounts and to make sure that the hours spent can be reasonably justified.⁴³ The Court is not to merely rubber stamp when engaged in the act of fixing costs.⁴⁴ I was recently given leave to appeal by the Court of Appeal on a case where the trial judge granted trial costs in the amount claimed, to the penny. The Court should not give its stamp of approval to whatever dockets are presented to it; instead the Court should undertake a critical examination of the time spent, the amount actually billed to the client and any discounts or other accommodations in billing.⁴⁵

Increasingly, outside counsel are retained to assist with costs submissions.

Costs on Motions

This paper has focused on costs following trials. A few comments specifically in relation to costs following motions are necessary.

Rule 57.03 requires the judge or master to fix the costs of a motion at the time of the hearing of the motion, unless it is an "exceptional case" and costs are to be assessed by an assessment officer. As well, rule 57.01(7) provides that the Court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs.

Rule 57.01(6) requires that a costs outline (Form 57B) be prepared for every step in the proceeding, whether a motion, application, pre-trial or trial.

⁴³ *Anishnabe*, *supra* note 38 at para. 25.

⁴⁴ *Anishnabe*, *supra* note 38 at para. 14; *MacRae v. Simpson*, 2003 CarswellOnt 404, 36 R.F.L. (5th) 376 at para. 6(eC)[*MacRae*].

⁴⁵ *MacRae v. Simpson*, 2003 CarswellOnt 404, 36 R.F.L. (5th) 376 at para. 6 (eC) [*MacRae*].

A Bill of Costs (Form 57A) is not required except on:

- trials
- motions that dispose of a proceeding (for example a successful summary judgment motion or a successful motion to dismiss the action) and
- applications

This means that you are always required to prepare a costs outline, but for the above proceedings, you must prepare both a bill of costs and a costs outline.

Although the forms are similar in substance, one important difference is that counsel are required to serve and file the Bill of Costs but are not required to file the costs outline, although the costs outline should be provided to opposing counsel.

Rule 57.01(6) requires that a costs outline be prepared for every step in the proceeding.

The court has ruled that on future motions, counsel must comply with the requirement for a costs outline, or they may find their request to fix costs will be rejected.⁴⁶

In another case, Justice Ducharme stated as follows:

“There is no excuse for a party’s failure to file costs submissions in the proper form as required by the *Rules*. Where a party fails to do so, a court can disallow some or all of the costs claimed based on the lack of specificity of the claim or the inadequacy of the supporting material.”⁴⁷

In Central West Region, the Senior Regional Judge Durno recently issued a Notice to the Profession and Self Represented Litigants regarding costs orders in civil and family law motions and applications. The notice starts by indicating that too frequently counsel are attending motions and applications without costs outlines. Senior Regional Judge Durno’s Notice provides “All counsel appearing on motions and applications should

⁴⁶ *Beneficial Investment, (1990) Inc. v. Hong Kong Bank of Canada* [2006] J. No. 1428 (S.C.J.)

⁴⁷ *Sherman v. 21 Degrees Heating & Air Conditioning Inc.* (2006), 2006 CarswellOnt 4587, 2006 WL 2065506 (S.C.J.)(eC) at para. 9 [*Sherman*].

attend the hearing with their costs outline in accordance with Rule 57.01 available, to provide to the presiding judge. If the outline is not available to be given to the presiding judge, the judge may decline to make any costs award.” The full text of the Central West Region Notice is attached at Schedule “A”.

It is also important to follow any direction from the court regarding the length of any submissions. In a recent decision, Justice Flinn noted that he had specifically ordered that the costs submission shall not exceed 3 pages in length, but counsel for one of the parties submitted a much longer volume containing 13 different tabbed documents. Justice Flinn ordered costs against the estate trustee and their solicitor personally in that case.⁴⁸

As noted above there is no formal service required under the Rules, but counsel must provide copies of the costs outline to all parties prior to beginning of the proceeding.

On the flip side, if you are successful following a trial or motion, I would caution you to not overreach and instead not charge for all of the time, but expressly indicate that in your costs submissions. As well, before providing any dockets, make sure that anything privileged or sensitive is deleted from the dockets.

⁴⁸ *Re Van Spengen Estate*, (2006), 80 O.R. 3rd 317 (S.C.J.)

SCHEDULE "A"

ONTARIO

NOTICE TO THE PROFESSION and SELF-REPRESENTED LITIGANTS

REGARDING

COSTS ORDERS IN CIVIL AND FAMILY LAW MOTIONS

AND APPLICATIONS

Rule 57.0 1(6) of The Rules of Civil Procedure requires that, unless the parties have agreed on costs:

every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length.

This is to permit the presiding judge, where feasible, to summarily determine the issue of costs. The overriding principle is that "the court shall devise and adopt the simplest, least expensive, and most expeditious process for fixing costs ..." Rule 57.01(7).

While Rule 24 of the Family Law Rules in addressing costs does not refer to costs outlines or bills of costs, Rule 1(7) states that if a matter is not covered by the rules, the court may give direction, and the practice shall be decided by analogy to these rules, by reference to the *Courts of Justice Act* and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*.

Too frequently counsel are attending motions and applications without costs outlines, and seeking to make submissions regarding the costs to be awarded. When judges ask for the outlines or bills of costs, counsel often seek to file written submissions as to costs. This is contrary to the intention of the Rules, delays the determination of the issue, and requires judges to determine costs issues for motions and applications that were often decided months before.

All counsel appearing on motions and applications should attend the hearing with their costs outline in accordance with Rule 57.01 available, to provide to the presiding judge. If the outline is not available to be given to the presiding judge, the judge may decline to make any costs award.

B. Durno
Regional Senior ludge

December 1, 2006