

# **Table of Contents**

## **Volume 1**

### **CHAPTER 1. OVERVIEW**

#### **I. PERSONAL INJURY LITIGATION, IN GENERAL**

- § 1:1 Louisiana Personal Injury Practice Guide coverage
- § 1:2 Initial considerations
- § 1:3 Theories of liability
- § 1:4 Evaluation of damages

#### **II. THE PROGRESS OF A PERSONAL INJURY CASE**

- § 1:5 Prelitigation investigation, analysis, and employment of experts
- § 1:6 Settling the case
- § 1:7 Filing suit
- § 1:8 Discovery
- § 1:9 Arbitration
- § 1:10 Preparing for trial; pretrial
- § 1:11 Trial
- § 1:12 Proving the case
- § 1:13 Submitting the case
- § 1:14 Judgment
- § 1:15 Post-trial motions and appeals
- § 1:16 Collecting the judgment
- § 1:17 Sample cases

### **CHAPTER 2. INITIAL CONSIDERATIONS**

#### **I. THE INITIAL CLIENT CONTACT AND INTERVIEW**

- § 2:1 Introduction
- § 2:2 —Considerations when contacted by injured claimant
- § 2:3 — —Ethics consideration—Solicitation
- § 2:4 —Considerations when retained to defend a party
- § 2:5 —Considerations when engaged by insurance carrier
- § 2:6 —Considerations when case referred
- § 2:7 — —Referral by former client

LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 2:8 — —Referral by other counsel
- § 2:9 — —Referral by the State Bar Referral Service
- § 2:10 Response to initial client contact
- § 2:11 —Schedule immediate appointment
- § 2:12 —Preliminary phone advice
- § 2:13 — —Don't discuss the incident with the other party or  
that party's representative
- § 2:14 — —Don't talk about the incident on social media
- § 2:15 — —If injury, advise client to see a doctor immediately
- § 2:16 — —Memorialize the sequence of events
- § 2:17 — —Take precautionary steps to preserve proof
- § 2:18 — — —Tangible evidence
- § 2:19 — — —Evidence of the injuries
- § 2:20 —Advice to claimant regarding documents and  
tangible items needed at meeting
- § 2:21 —Follow up with confirmation letter
- § 2:22 Use of "Information Report" at First Office  
Consultation
- § 2:23 —Purpose
- § 2:24 —General contents
- § 2:25 — —Claimant's background information
- § 2:26 — —Description of the accident
- § 2:27 — —Description of the injuries
- § 2:28 — —Identity of potential defendants
- § 2:29 — —Identity of potential third party joint tortfeasors  
or indemnitors
- § 2:30 — —Identity of potential witnesses
- § 2:31 — —Identity of accident reports
- § 2:32 — —Identity and scope of claimant's insurance  
coverage
- § 2:33 — —Identity of all health care provided as a result of  
the injury
- § 2:34 —Methodology
- § 2:35 Information to elicit during interview
- § 2:36 —Claimant's account of incident
- § 2:37 — —Video interview
- § 2:38 — —Privileged communication
- § 2:39 —Claimant's account of injuries
- § 2:40 —Claimant's medical and claim history
- § 2:41 — —Prior injuries
- § 2:42 — —Prior claims
- § 2:43 —Claimant's employment and earnings history,  
including lost earnings to date
- § 2:44 —Verification of police and other accident reports
- § 2:45 Review claimant's insurance coverage

## TABLE OF CONTENTS

- § 2:46 —Claims under own insurance
- § 2:47 — —Death cases
- § 2:48 —Evaluating subrogation potential and effect on case
- § 2:49 —Evaluating damages
- § 2:50 —Ascertaining potential liability on part of insurer
- § 2:51 Review defendant's insurance
- § 2:52 Discuss fee arrangement
- § 2:53 Evaluate venue, jurisdiction, and choice of law

## **II. INITIAL EVALUATION OF THE CASE: DECISION TO ACCEPT OR REJECT EMPLOYMENT, UNDERTAKE FURTHER EVALUATION OF CLAIM, OR REFER MATTER TO OTHER COUNSEL**

- § 2:54 Alternatives
- § 2:55 —No potential recovery
- § 2:56 — —Ethical obligation to decline meritless actions
- § 2:57 — — —No malpractice liability for declining meritless  
cause of action
- § 2:58 — — —Risk of sanctions for pursuing a meritless  
cause
- § 2:59 — — —Statute of limitations concerns
- § 2:60 — —Caution: Confirm rejection in writing
- § 2:61 — —Caution: Once accepted, handle matter diligently
- § 2:62 —Case with clear value warranting legal action
- § 2:63 —Case with potential value
- § 2:64 — —Caution: Document limited scope of undertaking
- § 2:65 — —Caution: Early claim filing may be required to  
preserve rights to sue
- § 2:66 Referring the case out
- § 2:67 Factors to consider in making decision
- § 2:68 —Liability vs. damages
- § 2:69 — —Probability of establishing third-party liability
- § 2:70 — —Extent of damages
- § 2:71 —Probability of satisfying a recovery
- § 2:72 —Claimant's personality
- § 2:73 —Complications of the case
- § 2:74 — —Costs
- § 2:75 — — —Example
- § 2:76 — —Competence and case referral
- § 2:77 — — —Competence required
- § 2:78 — — —Fee sharing with attorney of different firm;  
client consent required
- § 2:79 — —Time-bar problems

- § 2:80 —Subrogation rights and liens
- § 2:81 — —Medicare mathematical calculation
- § 2:82 — —Future indemnity benefits
- § 2:83 Conflict of interest limitations on accepting employment
- § 2:84 —Use of confidential information prohibited
- § 2:85 —Prohibited transactions
- § 2:86 —Interests of another client may impair lawyer’s independent judgment
- § 2:87 — —Consultation with multiple clients in a single matter
- § 2:88 —Former clients
- § 2:89 —Imputed disqualification
- § 2:90 —Attorney as a potential witness
- § 2:91 — —Attorney as a potential witness for own client
- § 2:92 — — —Exceptions
- § 2:93 — — —Examples
- § 2:94 — —Law firm associate as potential witness
- § 2:95 —Special conflict of interest concerns affecting representation of insured defendants
- § 2:96 — —Potential conflicts
- § 2:97 — — —Conflict from possibility of excess recovery
- § 2:98 — — —Conflict from defense “with reservation of rights”
- § 2:99 — — —Conflict from subrogation rights of carrier
- § 2:100 —Successive government and private employment
- § 2:101 —Attorney a former judge, arbitrator, or law clerk
- § 2:102 —Conflict may disqualify entire firm
- § 2:103 —Standing to seek disqualification
- § 2:104 —Waiver of disqualification
- § 2:105 Claimant’s consultations with other attorneys as impacting on employment decision

### **III. FORMATION OF ATTORNEY-CLIENT RELATIONSHIP: THE EMPLOYMENT AGREEMENT**

- § 2:106 In general
- § 2:107 —Need for written agreement
- § 2:108 —Make sure that client reads and understands the agreement
- § 2:109 — —Ambiguities favor client
- § 2:110 — —Informed consent
- § 2:111 —Contents
- § 2:112 Work to be performed

## TABLE OF CONTENTS

§ 2:113	—The unknown precludes specificity
§ 2:114	— —Don't guarantee results
§ 2:115	—Duration of undertaking
§ 2:116	— —Obligation to prosecute or defend an appeal
§ 2:117	Attorney's fees provisions
§ 2:118	—General ethical limitations on amount of fee
§ 2:119	— —Clearly excessive or unreasonable fees
§ 2:120	— —"Illegal" fees
§ 2:121	— —Cannot unilaterally collect more than agreed to
§ 2:122	—Agreements in bodily injury cases are typically for a contingent fee
§ 2:123	— —Rationale for the contingent fee
§ 2:124	— —Compare—Alternative fee arrangements may be appropriate in special cases
§ 2:125	— —Guidelines regarding contingency fee contracts
§ 2:126	— — —The straight contingency fee agreement
§ 2:127	— — —The graduated contingency fee agreement
§ 2:128	— — —The declining contingency fee agreement
§ 2:129	— — —The net contingency fee agreement
§ 2:130	—Attorney's lien agreements
§ 2:131	— —Contractual charging liens
§ 2:132	— —Creating the lien
§ 2:133	— —Recording
§ 2:134	— —Priority of lien
§ 2:135	—Fees in the event of premature attorney discharge or withdrawal
§ 2:136	— —Contingency fee agreement
§ 2:137	— —Contract recovery if agreement fixes fees
§ 2:138	— —Quantum meruit recovery where contract does not provide for early termination
§ 2:139	— — —Determining fee
§ 2:140	— — —Entitlement to entire contract fee
§ 2:141	— — —Limitation—In contingency fee cases, contingency still controls
§ 2:142	— — —Pro-rata sharing where several quantum meruit claims
§ 2:143	— — —No or limited recovery due to attorney's blatantly unprofessional conduct
§ 2:144	Provisions for payment of costs
§ 2:145	—Authority to incur expenses
§ 2:146	— —Prior approval of extraordinary expenses
§ 2:147	—Client's responsibility for payment
§ 2:148	— —Advances from client
§ 2:149	— —Advances to client
§ 2:150	— — —Ethical limitation

- § 2:151 —Payment from ultimate recovery—Method of computation
- § 2:152 Division of attorney-client authority
- § 2:153 —Procedural/tactical decisions are for counsel to make
- § 2:154 —“Substantive” decisions belong to the client
- § 2:155 —Scope of authority delegated by client and insurance company when insurance company is bound to provide a defense
- § 2:156 — —Possible conflicts between client and liability insurer
- § 2:157 —Form of agreement
- § 2:158 — —Standardized agreement usually the norm
- § 2:159 — —Letter agreements

#### **IV. ADVICE TO CLIENT UPON ACCEPTING EMPLOYMENT: EXECUTION OF NECESSARY AUTHORIZATIONS**

- § 2:160 Maintain confidentiality
- § 2:161 —Communicating with adverse party
- § 2:162 — —Written or recorded statement by client
- § 2:163 — —What if a statement has already been given to the opposition
- § 2:164 —Communicating with potential witnesses
- § 2:165 Claimant’s medical status
- § 2:166 —Emphasize importance of medical care
- § 2:167 — —Failure to obtain or continue treatment can be used as evidence of no injury
- § 2:168 — — —May also be used to reduce damages
- § 2:169 — — —Compare—Do not encourage unnecessary treatment
- § 2:170 — —Evaluation of claim depends in part on medical bills incurred
- § 2:171 — —Medical reimbursement from claimant’s insurance carrier or other sources
- § 2:172 — —Claimant should not feel embarrassed about substantial medical bills
- § 2:173 —Selecting a physician
- § 2:174 Claimant’s employment status
- § 2:175 —Explain that lost earnings are compensable damages
- § 2:176 —When to return to work
- § 2:177 —Compare—Do not encourage unnecessary absence from employment
- § 2:178 Realistic expectations

## TABLE OF CONTENTS

§ 2:179	—Discuss applicable law
§ 2:180	— —When applicable, alert client to effect of comparative fault
§ 2:181	—Overview compensable damages
§ 2:182	— —Advise claimant that there is no guarantee of actual recovery
§ 2:183	—Counsel’s role
§ 2:184	—Explain the uncertainties of litigation
§ 2:185	—Alert client to length of time involved
§ 2:186	—Matters NOT to discuss
§ 2:187	— —Chances of success
§ 2:188	— —Amount that will be recovered
§ 2:189	—All client’s medical records
§ 2:190	—Client’s employment records from past and present employers
§ 2:191	—Any other documents that may be helpful in prosecuting the claim on client’s behalf
§ 2:192	Keeping records
§ 2:193	—Bills and correspondence
§ 2:194	—Diary of relevant events
§ 2:195	Stress importance of maintaining contact
§ 2:196	—Use of periodic report
§ 2:197	— —Contents of periodic report

## V. SETTING UP THE CLIENT’S FILE

§ 2:198	Organize the file immediately
§ 2:199	Methodology—Adapt file to nature of the case
§ 2:200	—Single file system for routine cases
§ 2:201	—Supplemental file added as case “grows”
§ 2:202	—Multiple file system in complex cases
§ 2:203	— —Categorized files
§ 2:204	— — —Correspondence file
§ 2:205	— — —Investigation file
§ 2:206	— — —Address file
§ 2:207	— — —Legal research file
§ 2:208	— — —Pleadings file
§ 2:209	— — —Discovery file
§ 2:210	— — —Experts
§ 2:211	— — —Witness file
§ 2:212	— — —Evidence
§ 2:213	— — —Damages file
§ 2:214	— — —Liability file
§ 2:215	— — —Thoughts for opening, closing, and voir dire
§ 2:216	— —Indexing the files

- § 2:217 —Computer filing system
- § 2:218 Coordinate and implement a docket system
- § 2:219 —Use backup procedures
- § 2:220 —Central control
- § 2:221 —Regular status reports

## VI. CHECKLISTS

- § 2:222 Documents and things the client should bring to the interview
- § 2:223 Considerations before the initial interview and information to be obtained from the client
- § 2:224 Considerations during the initial interview
- § 2:225 Special considerations during the initial interview:  
Time limitations and conflicts
- § 2:226 Fee agreement preparation
- § 2:227 Checklist for educating the client about litigation
- § 2:228 Matters counsel should not communicate to the client

## VII. FORMS

- § 2:229 Letter to claimant confirming consultation  
appointment and preliminary phone advice
- § 2:230 Client information report
- § 2:231 Client interview sheet: Personal injury—Workers'  
compensation cases
- § 2:232 Employment-rejection confirmation letter
- § 2:233 Letter confirming limited investigation undertaking
- § 2:234 Client consent to joint representation and fee sharing
- § 2:235 Conflict of interest disclosure and client consent to  
representation
- § 2:236 Employment agreement provision regarding work  
performed
- § 2:237 Employment agreement for a contingency fee contract
- § 2:238 Employment agreement for 50% medical malpractice  
contingency fee
- § 2:239 Employment agreement provision defining attorney-  
client authority
- § 2:240 General authorization for release of all relevant  
documents to attorney
- § 2:241 Authorization to furnish medical information
- § 2:242 Client authorization to obtain medical records
- § 2:243 Authorization to furnish employment information
- § 2:244 Client authorization to obtain employment records
- § 2:245 Client authorization to obtain tax records



## **CHAPTER 3. PRELITIGATION INVESTIGATION, ANALYSIS, AND EMPLOYMENT OF EXPERTS**

### **I. INTRODUCTION—WHY THE “INFORMAL” INVESTIGATION**

- § 3:1 To facilitate decision to undertake representation
- § 3:2 To facilitate effective prosecution or defense of the claim
- § 3:3 —Plaintiff’s task
- § 3:4 —Defendant’s task

### **II. GENERAL INVESTIGATION TACTICS**

- § 3:5 When to commence investigation
- § 3:6 Who should conduct the investigation
- § 3:7 —The attorney
- § 3:8 — —Visit the accident scene
- § 3:9 — — —Purposes
- § 3:10 — — —If possible, take client with you
- § 3:11 — — —Photograph and diagram the scene
- § 3:12 — —Confer with expert in appropriate case
- § 3:13 — —Talk to the treating physician
- § 3:14 — — —Contemplate thorough examination by the defense
- § 3:15 — — —Stress importance of all possibly relevant tests
- § 3:16 — — —Inquire about specialists
- § 3:17 — —Advise plaintiff to keep personal records
- § 3:18 — —Determine theories of liability
- § 3:19 — —Determine ability of prospective defendants to respond in damages; ascertain existence and extent of insurance coverage
- § 3:20 — — —First notice to insurance carrier where carrier’s identity known
- § 3:21 — — —First notice to potential defendant where carrier identity unknown
- § 3:22 —Professional investigators
- § 3:23 — —Conflict of interest concerns may demand that professionals be used
- § 3:24 — — —Application—Obtaining the witness statements
- § 3:25 — — — —Taking photographs
- § 3:26 — —Setting the parameters for professional investigation
- § 3:27 — — —Establish guidelines
- § 3:28 — — —Keep costs in mind—Fix deadlines

- § 3:29 —Client as investigator
- § 3:30 Ascertaining the scope of the investigation
- § 3:31 Particular investigation procedures
- § 3:32 —Photograph the accident scene
- § 3:33 —Diagram or survey the accident scene
- § 3:34 —Scale location survey
- § 3:35 —Obtain and preserve all physical evidence
- § 3:36 —Notice to custodian
- § 3:37 —Photographs as a precaution
- § 3:38 —Timing of expert’s examination
- § 3:39 —Obtain and examine official investigation reports
- § 3:40 —Extrapolating pertinent information
- § 3:41 —Follow-up interview with investigating officer
- § 3:42 —Obtain information on witnesses, parties, causes of action
- § 3:43 —Obtain and examine all relevant medical reports
- § 3:44 —Obtain and examine employment records
- § 3:45 —All relevant records
- § 3:46 —Obtain witness statements
- § 3:47 —Statements from particular witnesses
- § 3:48 — — —Potential adverse parties
- § 3:49 — — —Corporate employees
- § 3:50 — — —Potential adverse witnesses
- § 3:51 —Statement methodology—Oral vs. written statements
- § 3:52 — — —Statements obtained from in-person interviews
- § 3:53 — — —Written statements
- § 3:54 — — —Recorded statement
- § 3:55 — — —Statements obtained by letter
- § 3:56 —Information to elicit by witness statement
- § 3:57 — — —Date and identify the statement
- § 3:58 — — —Identify the witness
- § 3:59 — — —Description of the accident scene
- § 3:60 — — —Where was the witness?
- § 3:61 — — —Explain what occurred
- § 3:62 — — —Describe the surrounding conditions
- § 3:63 — — —Identify the injuries and property damage observed
- § 3:64 — — —What statements were made at the site?
- § 3:65 — — —Obtaining “negative statements”
- § 3:66 —Locating missing witnesses
- § 3:67 Polygraph tests

### **III. SPECIAL CONSIDERATIONS WITH PRODUCT LIABILITY INVESTIGATIONS**

- § 3:68 Areas to investigate in a products liability suit

## TABLE OF CONTENTS

- § 3:69 Obtain the product or its facsimile
- § 3:70 —Obtain remnants if product destroyed
- § 3:71 —Product in defendant’s custody
- § 3:72 — —Temporary restraining order as precautionary measure
- § 3:73 — —Discovery to compel production
- § 3:74 —Product unavailable
- § 3:75 Research product history
- § 3:76 —Newer products
- § 3:77 —Older products
- § 3:78 — —Maintenance and repair
- § 3:79 —Design changes and other subsequent “remedial measures”
- § 3:80 Determine if product has caused injury to others
- § 3:81 —Purposes
- § 3:82 — —To take advantage of results obtained in related litigation
- § 3:83 — —To establish proof of liability
- § 3:84 —Identifying other claimants
- § 3:85 Obtain relevant warning and use instructions
- § 3:86 —Types of relevant literature
- § 3:87 —Pertinent information
- § 3:88 Determine if manufacturing complied with industrial standards
- § 3:89 —Examples
- § 3:90 —Relevance of information
- § 3:91 Applicability of maritime law

## IV. EMPLOYMENT OF EXPERTS

- § 3:92 Need for expert consultant
- § 3:93 Need for expert testimony
- § 3:94 —When expert testimony is required
- § 3:95 —When expert opinion is permissible
- § 3:96 Circumstances under which experts should be employed
- § 3:97 —Making the determination
- § 3:98 —Application—Product liability and professional malpractice cases
- § 3:99 —Other examples
- § 3:100 — —Typical “slip-and-fall”
- § 3:101 — —Auto accident cases
- § 3:102 — —Wage and economic loss calculations by actuary, economist or CPA
- § 3:103 — —Loss of companionship and mental pain and suffering damages

- § 3:104 Time to employ experts
- § 3:105 How to locate and select the right experts
- § 3:106 —Identifying potential experts
- § 3:107 — —WestlawNext
- § 3:108 — —Internet
- § 3:109 — —Jury verdict sheets
- § 3:110 — —Attorney colleagues
- § 3:111 — —Plaintiff or defense associations
- § 3:112 — —Colleges and universities
- § 3:113 — —Special publications
- § 3:114 — —Competitors and ex-employees
- § 3:115 — —News reports
- § 3:116 — —Exhibitors at seminars and specialty conventions
- § 3:117 — —Other miscellaneous sources
- § 3:118 —Selecting the most effective experts
- § 3:119 — —Qualifications
- § 3:120 — — —Emergency room physicians
- § 3:121 — — —Mechanical engineers
- § 3:122 — —Bodily injury claim experience
- § 3:123 — —Credibility as a witness
- § 3:124 — —Location
- § 3:125 — —Consultation and witness fees
- § 3:126 — —Literature authored in the field
- § 3:127 — —Daubert considerations
- § 3:128 Initial contact with potential expert
- § 3:129 —Information to provide the potential expert
- § 3:130 —Obtain expert’s input
- § 3:131 Retaining the expert
- § 3:132 —Capacity in which expert retained
- § 3:133 —Formalizing the employment
- § 3:134 —Corresponding with the expert while case is pending
- § 3:135 Initial meeting with expert consultant
- § 3:136 —Purpose of initial meeting
- § 3:137 —Preparing for the initial meeting
- § 3:138 —Elicit the expert’s initial advice and input
- § 3:139 Maintaining a continuing relationship with experts

## **V. CHECKLISTS**

- § 3:140 Locating missing persons checklist

## **VI. FORMS**

- § 3:141 First notice to insurance carrier

## TABLE OF CONTENTS

- § 3:142 Notice of claim to adverse party
- § 3:143 Letter asking for witness statement
- § 3:144 Plaintiff Profile Form

## CHAPTER 4. THEORIES OF LIABILITY

### I. NEGLIGENCE

- § 4:1 Preliminary considerations
- § 4:2 Establishing prima facie case of negligence
- § 4:3 —Defendant owed duty toward plaintiff to use care or to take some affirmative action
- § 4:4 —Defendant breached duty
- § 4:5 —Breach of duty was both cause-in-fact and legal cause of plaintiff's injury
- § 4:6 —Duty-risk analysis
- § 4:7 Determining existence of duty
- § 4:8 —Several types
- § 4:9 —Statutory duty and fault
- § 4:10 —Duty to use care in activities from which harm might reasonably be anticipated
- § 4:11 —Duty, in particular circumstances, to act affirmatively to warn or protect others or to control conduct of others
- § 4:12 —Injuries from animals; dogs
- § 4:13 —Foreseeability of harm to injured party and duty-risk analysis in establishing duty
- § 4:14 Determining duties owed to particular plaintiffs
- § 4:15 —Duty of care owed to rescuers as foreseeable parties when defendant's negligence endangers someone else
- § 4:16 —Duty of a custodian of an inmate
- § 4:17 —Emergency medical services practitioner liability limits for negligence in treatment
- § 4:18 — —When inapplicable
- § 4:19 —Mardi Gras
- § 4:20 —Affirmative duty to protect child where special relationship exists between parent and child
- § 4:21 Determining duties owed by particular defendants
- § 4:22 —Emergency vehicle drivers
- § 4:23 —Corporate officers
- § 4:24 —Employers
- § 4:25 —Negligent hiring
- § 4:26 —Negligent entrustment
- § 4:27 —Possessors and owners of land
- § 4:28 — —Status of person entering on land

LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 4:29 — —Duty to protect against harmful acts of third parties
- § 4:30 —Providers of alcoholic beverages
- § 4:31 — —Social hosts
- § 4:32 — —Commercial provider of alcoholic beverages to intoxicated adult
- § 4:33 — —Commercial provider of alcoholic beverages to minor
- § 4:34 —Intoxicated spouse
- § 4:35 —Psychiatric care professionals
- § 4:36 — —Limited duty to protect victims from threat of physical violence by psychotherapist's patient
- § 4:37 —Other health care professionals may have duty to protect third parties from patients
- § 4:38 —School districts
- § 4:39 — —Limitation on tort actions against school employees
- § 4:40 — —Duty to supervise students
- § 4:41 — — —Bullying
- § 4:42 — —Duty to protect students from harmful acts of third parties or school employees
- § 4:43 — —Duty at sporting and similar events
- § 4:44 — —Duty to students not on school property
- § 4:45 —Day care centers
- § 4:46 —Good Samaritans
- § 4:47 — —Limitations on liability
- § 4:48 — —Health care workers
- § 4:49 —Persons who create danger have duty to warn and protect endangered persons
- § 4:50 —Rescuers
- § 4:51 —Volunteer firefighters
- § 4:52 —Additional special relationship creating affirmative duties
- § 4:53 Establish standard of care
- § 4:54 —The standard
- § 4:55 — —Custom and practice in relevant community as evidence but not determinative of standard of care
- § 4:56 —Particular circumstances affecting standard of care
- § 4:57 — —Highways and roads
- § 4:58 — —Public utility
- § 4:59 — —Medical malpractice
- § 4:60 — —Vehicles, poor visibility
- § 4:61 — —Carriers of persons for reward
- § 4:62 — —Professionals and specialists
- § 4:63 — —Children

## TABLE OF CONTENTS

- § 4:64 — —Persons with impaired physical faculties
- § 4:65 Establishing cause-in-fact and legal cause
- § 4:66 —Tests for determining cause-in-fact
- § 4:67 — —“But for” test
- § 4:68 — —“Substantial factor” test
- § 4:69 —Legal cause requires a substantial relationship
- § 4:70 —Multiple or successive accidents
- § 4:71 Defenses
- § 4:72 —Statute of limitations
- § 4:73 — —Medical malpractice
- § 4:74 —Comparative fault
- § 4:75 — —Avoidance of danger
- § 4:76 — —Avoidable consequences
- § 4:77 — —“Sudden emergency doctrine”
- § 4:78 — —Comparative fault of minors
- § 4:79 — —For cases brought under Federal Employers’  
Liability Act
- § 4:80 —Imputed negligence
- § 4:81 —Statutory immunity
- § 4:82 Negligent infliction of emotional distress claim
- § 4:83 —Physical injury not required
- § 4:84 —Proof required
- § 4:85 —Injury to another
- § 4:86 —Damages available
- § 4:87 —Other statutes

## II. INTENTIONAL TORTS

- § 4:88 Assault and battery
- § 4:89 —Assault defined
- § 4:90 — —Burden of proof
- § 4:91 — —Statute of limitations
- § 4:92 — —Establishing cause of action
- § 4:93 — — —Intent
- § 4:94 — — —Threat of injury and apprehension
- § 4:95 — — —Imminent threat of injury
- § 4:96 — —Crime of assault and battery and civil action
- § 4:97 — —Defenses
- § 4:98 — — —Lack of intent
- § 4:99 — — —No threat of injury; words alone insufficient
- § 4:100 — — —Conduct of defendant failed to create  
reasonable apprehension of immediate injury in  
mind of the plaintiff
- § 4:101 — — —Threats of future injury are not actionable as  
assault

# LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 4:102 — — —Provocation as element in mitigation of damages only
- § 4:103 — — —Minors
- § 4:104 — — —Insurance consideration
- § 4:105 — — —Damages
- § 4:106 — — —Factors
- § 4:107 — — —Mitigation
- § 4:108 — — —Nominal or compensatory damages
- § 4:109 — — —Exemplary or punitive damages
- § 4:110 — — —Comparative fault
- § 4:111 —Battery defined
- § 4:112 — — —Intent; harmful or offensive contact
- § 4:113 — — —Types of battery
- § 4:114 — — —Medical battery
- § 4:115 — — —Sexual touching
- § 4:116 — — —Horseplay or practical joke and intent requirement
- § 4:117 — — —Excessive force in making arrest
- § 4:118 — — —Defenses
- § 4:119 — — —Privilege; defense of another
- § 4:120 — — —Provocation
- § 4:121 — — —Self-defense
- § 4:122 — — —Consent
- § 4:123 — — —Defense of property
- § 4:124 — — —Damages
- § 4:125 — — —Comparative fault
- § 4:126 — — —Mitigation
- § 4:127 False Imprisonment
- § 4:128 —Definition and proof
- § 4:129 — — —Intent
- § 4:130 — — —Malice
- § 4:131 — — —Unlawfulness
- § 4:132 — — —Restraint of person or property
- § 4:133 —Color of legal authority
- § 4:134 —Defenses
- § 4:135 — — —Lack of intent
- § 4:136 — — —Legality
- § 4:137 — — —Voluntary restraint; consent
- § 4:138 — — —Privilege
- § 4:139 —Damages
- § 4:140 Intentional infliction of emotional distress
- § 4:141 —Proof required
- § 4:142 — — —Intentional or reckless conduct
- § 4:143 — — —Severe emotional distress
- § 4:144 — — —Outrageous, extreme, and intolerable conduct



## TABLE OF CONTENTS

§ 4:145	—Factual considerations
§ 4:146	— —Outrageous conduct between individuals
§ 4:147	— —Outrageous conduct based on knowledge of sensitivity or condition
§ 4:148	— —Outrageous conduct based on relationship
§ 4:149	—Defenses
§ 4:150	— —Lack of intent or recklessness
§ 4:151	— —Lack of causation; foreseeability of result; bystander rule
§ 4:152	— —Lack of severe emotional distress
§ 4:153	— —Lack of outrageous, extreme, or intolerable conduct
§ 4:154	— —Consent
§ 4:155	Conversion
§ 4:156	—Definition
§ 4:157	— —Circumstances proving conversion
§ 4:158	— —Intentional act
§ 4:159	— —Demand and refusal
§ 4:160	— —Assertion of ownership
§ 4:161	—Acts which will constitute conversion
§ 4:162	— —Dispossession
§ 4:163	— —Destroying or altering chattel
§ 4:164	— —Using a chattel
§ 4:165	— —Disposal of chattel
§ 4:166	— —Refusal to surrender chattel
§ 4:167	—Defenses
§ 4:168	— —Good faith
§ 4:169	— —Consent
§ 4:170	— —Waiver, ratification, or estoppel
§ 4:171	— —Interest of the defendant
§ 4:172	—Damages
§ 4:173	Domestic abuse

## III. PREMISES LIABILITY

§ 4:174	Merchants
§ 4:175	—Reasonable care
§ 4:176	— —Falling merchandise
§ 4:177	—Constructive notice
§ 4:178	—Unreasonable risk of harm
§ 4:179	— —Defect
§ 4:180	—Acts of God
§ 4:181	Determining use of land and buildings
§ 4:182	—Construction and condition of stairways and steps
§ 4:183	—Condition and maintenance of entryway and common areas

- § 4:184 —Condition and maintenance of sidewalks
- § 4:185 —Excavation
- § 4:186 —Ruin, vice, defect, or neglect
- § 4:187 —Attractive nuisance
- § 4:188 — —General considerations
- § 4:189 — —Ponds, lakes, reservoirs, and the like
- § 4:190 — —Construction site
- § 4:191 Determining duties owed
- § 4:192 —Invitees
- § 4:193 —Licensees
- § 4:194 —Trespassers
- § 4:195 —Lessees
- § 4:196 —Recreational property, limitation of liability
- § 4:197 —Criminal acts of third persons
- § 4:198 —Elevators

#### **IV. WRONGFUL DEATH AND SURVIVAL**

- § 4:199 Code provisions; distinction between actions
- § 4:200 Wrongful death—Who may bring the action
- § 4:201 —Prescription
- § 4:202 —Proof, causation, and liability
- § 4:203 —Damages
- § 4:204 —Compromise, settlement, and release
- § 4:205 —Distribution of recovery
- § 4:206 Survival action—Who may bring the action
- § 4:207 —Prescription
- § 4:208 —Damages

#### **V. PRODUCTS LIABILITY**

- § 4:209 Louisiana Products Liability Act
- § 4:210 —Definition of “manufacturer”
- § 4:211 —Exclusivity
- § 4:212 —Prerequisites required
- § 4:213 —Burden of proof
- § 4:214 — —Elements of proof and test
- § 4:215 — — —Unreasonably dangerous product
- § 4:216 — — —Reasonably anticipated use
- § 4:217 — — —Proximate cause
- § 4:218 —Unreasonably dangerous construction or composition
- § 4:219 —Unreasonably dangerous design
- § 4:220 — —Following instructions
- § 4:221 —Inadequate warning

## TABLE OF CONTENTS

§ 4:222	— —Warning not required
§ 4:223	— — —User's familiarity with product
§ 4:224	— —Later acquired knowledge of dangerous characteristic
§ 4:225	— —Cause of action
§ 4:226	— —Required showing of reasonably anticipated use
§ 4:227	—Nonconformity to express warranty
§ 4:228	— —Parties
§ 4:229	—Design defenses
§ 4:230	— —Inadequate warning defense
§ 4:231	Consideration of persons liable
§ 4:232	—Market share liability
§ 4:233	—Solidary liability
§ 4:234	—Successor liability
§ 4:235	Defenses
§ 4:236	—Risk-utility test
§ 4:237	— —Special immunity
§ 4:238	—Lack of causation
§ 4:239	—State of the art
§ 4:240	—Misuse
§ 4:241	—Modification or alteration
§ 4:242	—Assumption of risk no longer a defense
§ 4:243	—Comparative fault
§ 4:244	—Last clear chance
§ 4:245	—Sealed containers
§ 4:246	—Statutes of limitation
§ 4:247	— —Amendment; relation back
§ 4:248	—Statutes of repose
§ 4:249	—Compliance with standards
§ 4:250	—Failure to mitigate damages
§ 4:251	—Learned intermediary/sophisticated user
§ 4:252	—Obviousness
§ 4:253	—Preemption
§ 4:254	—Privity
§ 4:255	—Puffing
§ 4:256	—Unavoidably unsafe product
§ 4:257	—Failure to read/heed warning
§ 4:258	—Immunity
§ 4:259	Investigation and development of factual evidence
§ 4:260	—Product information
§ 4:261	—Design and manufacturing information
§ 4:262	—Marketing and labelling of product
§ 4:263	—Remedial measures
§ 4:264	—State of the art/industry standards

- § 4:265 —Investigations, reports; witnesses
- § 4:266 —Useful life
- § 4:267 Damages
- § 4:268 —Medicals
- § 4:269 — —Medical monitoring
- § 4:270 —Impairment of earning capacity
- § 4:271 —Lost income
- § 4:272 —Pain and suffering
- § 4:273 —Emotional distress/mental anguish
- § 4:274 —Loss of consortium
- § 4:275 —Economic loss
- § 4:276 —Indemnification of marine, motorcycle, all-terrain vehicle, or recreational vehicle dealers
- § 4:277 Consideration of experts and scientific evidence
- § 4:278 —Experts generally
- § 4:279 —Scientific evidence and procedures
- § 4:280 —Expert testimony
- § 4:281 — —Opinions or inferences
- § 4:282 — — —Foundation
- § 4:283 — —Court-appointed experts
- § 4:284 —Discovery considerations
- § 4:285 — —Testifying experts
- § 4:286 — —Nontestifying experts; consultants
- § 4:287 — —Request for production of documents
- § 4:288 — —Request for admissions
- § 4:289 — —Interrogatories
- § 4:290 — —Depositions and reports
- § 4:291 — —Inspection of scene/product

## **VI. MEDICAL MALPRACTICE**

- § 4:292 What is medical malpractice?
- § 4:293 Medical Malpractice Act
- § 4:294 Medical malpractice versus general negligence
- § 4:295 Standard of care
- § 4:296 —Specialists
- § 4:297 —Circumstances which affect determination of standard of care
- § 4:298 — —Degree of experience
- § 4:299 — —Locality or place of practice
- § 4:300 — —Established modes of practice
- § 4:301 — —State of medical knowledge at time of treatment
- § 4:302 — —School of thought
- § 4:303 — —Elective surgery

## TABLE OF CONTENTS

§ 4:304	—Circumstances which do not determine standard of care—Mistake in judgment
§ 4:305	— —Oral assurances
§ 4:306	— —Success or failure of treatment
§ 4:307	— —Consultation, or lack thereof, with other physicians
§ 4:308	Can causation be established
§ 4:309	Determining duties of physicians
§ 4:310	—Duty to fully inform patient
§ 4:311	—Duty to notify patient of result of diagnosis or test
§ 4:312	—Duty to inform patient of need for different treatment
§ 4:313	—Duty to refer patient to a qualified physician or specialist
§ 4:314	—Duty to continue medical care until proper termination of physician-patient relationship
§ 4:315	Informed consent
§ 4:316	—Statutory provisions: Uniform Consent Law
§ 4:317	—Definition and requirements
§ 4:318	—Evidence
§ 4:319	—Theory of recovery
§ 4:320	—Louisiana Medical Disclosure panel: lists of procedures and risks
§ 4:321	—Exception—Emergency
§ 4:322	— —Exposure to HIV or other infectious agent
§ 4:323	Damages
§ 4:324	—Wrongful conception, wrongful pregnancy, or unwanted pregnancy
§ 4:325	—Wrongful birth or wrongful life
§ 4:326	—Adequacy or excessiveness of damages
§ 4:327	—Breach of duty
§ 4:328	—Corrective surgery
§ 4:329	—Loss of chance of survival
§ 4:330	Defenses
§ 4:331	—Lack of cause
§ 4:332	—Acceptable medical standards followed
§ 4:333	—Honest mistake in judgment
§ 4:334	—Circumstances beyond the control of physician or surgeon
§ 4:335	—Prescription—One-year, three-year
§ 4:336	—Therapeutic privilege
§ 4:337	—Actual or implied consent
§ 4:338	—Comparative fault of patient
§ 4:339	—The Louisiana Health Emergency Powers Act

## **CHAPTER 5. EVALUATION OF DAMAGES**

### **I. INTRODUCTION**

- § 5:1 Damages evaluation methodology
- § 5:2 —Starting point is at the first client interview
- § 5:3 —Evaluation depends on the proof
- § 5:4 Recoverable damages—In general
- § 5:5 —Compensatory damages
- § 5:6 — —Prima facie showing for damages recovery
- § 5:7 — —General damages
- § 5:8 — —Special damages
- § 5:9 — —Past, present, and future damages
- § 5:10 — — —Discounted to present value
- § 5:11 — — —Alternative methods of payment
- § 5:12 — — —Jury vs. judge determinations
- § 5:13 — —Effect of death prior to full payment
- § 5:14 —Attorney's fees generally not an element of compensatory damages, absent statute or contract
- § 5:15 —Collateral source rule
- § 5:16 — —Subrogation or reimbursement rights of collateral source
- § 5:17 Use of damages evaluation checklist
- § 5:18 Governmental defendants
- § 5:19 —Immunity
- § 5:20 —Limitation on trial by jury
- § 5:21 —Multiple governmental defendants
- § 5:22 —Multiple claims
- § 5:23 —Effect of insurance coverage
- § 5:24 —Payment of damages; reversionary trusts
- § 5:25 Birth-related neurological injuries

### **II. POTENTIAL CLAIMANTS IN A BODILY INJURY CASE**

- § 5:26 The physically injured party
- § 5:27 —Injured minor or incompetent
- § 5:28 Spouse or other relatives
- § 5:29 —Loss of consortium
- § 5:30 —Negligent infliction of emotional distress
- § 5:31 — —Proof
- § 5:32 —Alternative to injured party's recovery
- § 5:33 — —Reimbursement of medical expenses
- § 5:34 — —Lost earnings and services
- § 5:35 The injured party's estate

## TABLE OF CONTENTS

- § 5:36 —Recoverable damages
- § 5:37 —Distinguished from wrongful death claim
- § 5:38 The injured party's employer
- § 5:39 Hospital having lien rights

## III. SPECIFIC ITEMS OF COMPENSATORY DAMAGES

- § 5:40 Medical expenses
- § 5:41 —Past expenses—Requirements and proof
- § 5:42 — —Evidence in support of claim
- § 5:43 — — —Medical bills
- § 5:44 — — —Doctor's testimony
- § 5:45 — — —Medical reports
- § 5:46 — — —Plaintiff's testimony
- § 5:47 — — —Lay testimony
- § 5:48 — —Defense attack on medical claims
- § 5:49 — — —Claimant is a malingerer
- § 5:50 — — —Incompetent treatment
- § 5:51 — — —Failure to obtain prompt treatment
- § 5:52 — — —Pre-existing injury
- § 5:53 — — —Causation
- § 5:54 — —Reduction for expenses paid by collateral sources
- § 5:55 —Future medical expenses—Requirements and proof
- § 5:56 — —Evidence supporting future medical claims
- § 5:57 — — —Establishing reasonable certainty of future medical expenses
- § 5:58 — — —Establishing reasonable value of future medical care
- § 5:59 — —Defense attack on future medicals
- § 5:60 Loss of earnings
- § 5:61 —Proving past earnings loss
- § 5:62 — —Plaintiff's testimony should be corroborated
- § 5:63 — —Defense attack
- § 5:64 — —Self-employed claimants
- § 5:65 — — —Lost profits as evidence of damages
- § 5:66 — — —Diminished earnings as evidence of damages
- § 5:67 — —Unemployed claimants
- § 5:68 — —Housekeeping services
- § 5:69 —Proving loss of future earnings
- § 5:70 — —Requirements and proof
- § 5:71 — —Defense attack
- § 5:72 — — —Inability to work conjectural
- § 5:73 — — —Alternative employment

LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 5:74 — —Calculating prospective earnings loss damages—  
Economic adjustments
- § 5:75 — — —Discount to present value
- § 5:76 — — —Effect of inflation
- § 5:77 — — —Deduction from “lost years” awards for “saved  
necessities”
- § 5:78 —Special considerations regarding unemployed  
claimants
- § 5:79 — —Adult claimants
- § 5:80 — — —Intent to find employment
- § 5:81 — — —Employment obtainable
- § 5:82 — — —Employment duration and earnings rates
- § 5:83 — — —Relevance of work history
- § 5:84 — —Minor claimants
- § 5:85 Impaired earning capacity
- § 5:86 —Nature of impaired earning capacity award
- § 5:87 — —Actual earnings not determinative
- § 5:88 — —Voluntary termination of employment
- § 5:89 —Proof required
- § 5:90 — —Lost opportunities for job advancement
- § 5:91 — — —Realistic expectations
- § 5:92 — — —Lost opportunities not speculative
- § 5:93 — —Inability to achieve occupational goals or change  
jobs
- § 5:94 — — —Evidence of intent and job potential
- § 5:95 — — —Interference with career goal not speculative
- § 5:96 — — —Work disability programs
- § 5:97 — — —Special concerns re very young children
- § 5:98 —Economic adjustments to award
- § 5:99 Pain and suffering
- § 5:100 —What constitutes physical pain and suffering
- § 5:101 — —Physical impact requirement
- § 5:102 — —Fright and nervousness
- § 5:103 — —Wrongful birth
- § 5:104 —Verdict that fails to include compensation for pain  
and suffering inadequate as a matter of law
- § 5:105 —Proving past pain and suffering
- § 5:106 — —Claimant’s own testimony
- § 5:107 — — —Scope of testimony
- § 5:108 — — —Using plaintiff’s diary
- § 5:109 — —Demonstrative evidence
- § 5:110 — —Medical testimony
- § 5:111 — —Medical records
- § 5:112 — —Testimony of family, friends, and co-workers
- § 5:113 —Proof regarding infant claimants



## TABLE OF CONTENTS

§ 5:114	—Proving future pain and suffering
§ 5:115	—Defense attack on pain and suffering claims
§ 5:116	— —Evidence of conduct inconsistent with claim
§ 5:117	— —Conflicting expert opinion
§ 5:118	— —Compare—Claimant’s peculiar sensitivities are no defense
§ 5:119	— —Failure to mitigate pain and suffering with remedial treatment
§ 5:120	—Calculating pain and suffering damages
§ 5:121	— —Unconstitutionality of statutory limitation on amount of recovery in medical malpractice actions
§ 5:122	—Specific items of nonpecuniary damages
§ 5:123	— —Generally
§ 5:124	— —Loss of enjoyment of life
§ 5:125	— — —Proof
§ 5:126	— —Disfigurement
§ 5:127	— — —Proving humiliation and embarrassment from disfigurement
§ 5:128	— —Shortened life expectancy
§ 5:129	— — —Application—Minor plaintiffs
§ 5:130	— — —Compare—Shortened work-life expectancy
§ 5:131	— —Fear of recurring illness or injury
§ 5:132	Compensation for intentional mental distress where no physical contact
§ 5:133	—Proof
§ 5:134	— —Intent
§ 5:135	— —Mental distress damages
§ 5:136	—Negligent infliction of emotional distress
§ 5:137	Damage to personal property
§ 5:138	—Measure of damages
§ 5:139	— —Property lost or destroyed
§ 5:140	— —Property repairable
§ 5:141	— —Additional recovery for loss of use
§ 5:142	— — —Limitation
§ 5:143	—Proof of property damage
§ 5:144	— —Repair estimates or bills
§ 5:145	— —Expert testimony
§ 5:146	— —Evidence of value
§ 5:147	Lost chance of survival

## IV. LIMITATIONS ON RECOVERY

§ 5:148	In general
§ 5:149	Statutory limitations
§ 5:150	Where liability is derivative

- § 5:151 Mitigation of damages
- § 5:152 —Burden of proof on mitigation
- § 5:153 —Failure to mitigate
- § 5:154 Allocation of fault
- § 5:155 Work-related claims

## **V. PUNITIVE DAMAGES**

- § 5:156 Generally not recognized
- § 5:157 —Denial of punitive damages except in specific cases
- § 5:158 —Exceptions
- § 5:159 —Preclusion
- § 5:160 —Insurance policy exclusion
- § 5:161 —Solidary obligations
- § 5:162 —Conflict of laws
- § 5:163 Nature and purpose of punitive damages
- § 5:164 —Evidentiary showing for claim
- § 5:165 —Challenging claim
- § 5:166 —Amendment of complaint
- § 5:167 —Discovery
- § 5:168 —Jury instruction
- § 5:169 —Constitutionality
- § 5:170 —Remittitur and additur
- § 5:171 — —Remittitur
- § 5:172 — —Additur
- § 5:173 Amount of punitive damages award
- § 5:174 —Circumstances warranting award
- § 5:175 —Factors considered generally
- § 5:176 —Appellate review

## **VI. INDEPENDENT DAMAGES CLAIMS**

- § 5:177 Wrongful death and survival actions
- § 5:178 —Persons entitled to recover for wrongful death
- § 5:179 — —Survivors defined in statute
- § 5:180 — —Illegitimate children
- § 5:181 — —Putative spouse
- § 5:182 — —Adopted minor children
- § 5:183 — — —Death of natural parent
- § 5:184 — — —Death of adoptive parent
- § 5:185 — —Adoptive parents
- § 5:186 — —Divorce
- § 5:187 — —Unborn children
- § 5:188 —Victims for whose death claim will lie
- § 5:189 —Prior adjudication

## TABLE OF CONTENTS

§ 5:190	—Recovery in survival action
§ 5:191	— —Loss of earnings
§ 5:192	— —Instantaneous death
§ 5:193	— —Pain and suffering
§ 5:194	—Compensable damages for wrongful death action
§ 5:195	— —Loss of support and services
§ 5:196	— —Family and children
§ 5:197	— —Surviving spouse
§ 5:198	— —Parent of deceased child
§ 5:199	— —Medical and funeral expenses
§ 5:200	— —Other damages recoverable by personal representative
§ 5:201	—Calculating wrongful death damages
§ 5:202	— —Factors considered in calculating wrongful death damages
§ 5:203	— — —Factors for death of a child
§ 5:204	— — —Loss of support and services
§ 5:205	— —Effect of remarriage of decedent's spouse
§ 5:206	— —Discount to present value
§ 5:207	— —Decedent's settlement with joint tortfeasor
§ 5:208	— —Contributory negligence
§ 5:209	—Proof of wrongful death damages
§ 5:210	— —Direct pecuniary losses
§ 5:211	— — —Example
§ 5:212	— — —Recovery by spouse
§ 5:213	— — —Recovery by a child
§ 5:214	— —Recovery by parent
§ 5:215	— —Loss of services and support
§ 5:216	— — —Tangible and intangible losses compensable
§ 5:217	— — —Evidence of value of lost services
§ 5:218	— — —Recovery by spouse
§ 5:219	— — —Recovery by child
§ 5:220	— — —Recovery by parent
§ 5:221	— —Loss of love, affection, society, and companionship; mental pain and suffering damages
§ 5:222	— — —Recovery by spouse
§ 5:223	— — —Recovery by child
§ 5:224	— — —Recovery by parent
§ 5:225	Loss of consortium
§ 5:226	—Recovery traditionally limited to spouses
§ 5:227	— —Applicability to parent-child relationship
§ 5:228	—Governing law
§ 5:229	—Awardable damages
§ 5:230	— —Proof

- § 5:231 Physical consequences of emotional distress from  
witnessing injury to others
- § 5:232 —Traditional impact doctrine
- § 5:233 —Policy of doctrine
- § 5:234 —Guidelines to test recovery
- § 5:235 —Significant discernible physical injury  
requirement
- § 5:236 —Foreseeability requirement
- § 5:237 — — —Direct involvement of plaintiff in the event  
witnessed
- § 5:238 — — —Emotional attachment
- § 5:239 — — —Family member

## **VII. CHECKLISTS**

- § 5:240 Damages evaluation checklist

## **CHAPTER 6. SETTLING THE CASE**

### **I. GENERAL CONSIDERATIONS**

- § 6:1 Most cases will settle
- § 6:2 Factors motivating settlement
- § 6:3 —Public policy factors
- § 6:4 —Client's concerns
- § 6:5 — —Avoiding delay
- § 6:6 — —Reducing costs
- § 6:7 — —Minimizing trial uncertainty risks
- § 6:8 — —Efficient law practice
- § 6:9 —Insurance company concerns
- § 6:10 — —Unfair or deceptive practices
- § 6:11 — — —Claims settlement
- § 6:12 — — —No private action against insurer
- § 6:13 — —Duty of good faith and fair dealing
- § 6:14 — —Economic factors
- § 6:15 — — —Expenses to insurance carrier
- § 6:16 — — —Inflationary verdicts
- § 6:17 — — —Reserves placed on claim
- § 6:18 — — —Possible disincentives
- § 6:19 Proving settlement
- § 6:20 Effect of settlement
- § 6:21 Class action settlements—Court approval

### **II. DETERMINING SETTLEMENT VALUE OF A BODILY INJURY CLAIM**

- § 6:22 Factors affecting settlement value

## TABLE OF CONTENTS

§ 6:23	—Liability factors
§ 6:24	— —Effect of “malicious” or “wanton and willful misconduct” allegations
§ 6:25	— — —Settlement may be less likely where conduct is tantamount to “intentional misconduct”
§ 6:26	— —Effect of charging “malice, oppression, or fraud”
§ 6:27	—Bodily injury factors
§ 6:28	—Other relevant factors
§ 6:29	— —Venue
§ 6:30	— —“Target” defendants
§ 6:31	— —Number of defendants
§ 6:32	— —“Sympathetic” plaintiffs
§ 6:33	— —Policy limits and defendant’s assets
§ 6:34	— —Reputation and ability of attorneys
§ 6:35	— —The economic realities of litigation
§ 6:36	Methods used to evaluate claim
§ 6:37	—Jury verdict sheets
§ 6:38	— —Subscription services available
§ 6:39	— —Information included
§ 6:40	—WestlawNext
§ 6:41	—Advice from other lawyers
§ 6:42	— —Evaluation of maximum claim
§ 6:43	— —Discount for liability
§ 6:44	— —Discount for jurisdiction, venue, and judge
§ 6:45	— —Discount for time value of money
§ 6:46	— —Discount for ability of opposition

## III. EFFECTIVE SETTLEMENT NEGOTIATIONS

§ 6:47	When to commence settlement negotiations
§ 6:48	Negotiations with insurance claims representative
§ 6:49	—Identifying the claims representative
§ 6:50	—Claimant’s counsel should open settlement negotiations
§ 6:51	—Information to provide the claims representative
§ 6:52	— —Reports and records of damages
§ 6:53	— —Compare information NOT to provide the carrier
§ 6:54	— — —Client’s account of the accident
§ 6:55	— — —Witness statements
§ 6:56	— — —Claimant’s past medical history
§ 6:57	—Making the initial demand
§ 6:58	— —Ascertaining initial demand amount
§ 6:59	— — —Have a bottom line figure in mind
§ 6:60	— — —Where to start—“High-low” range
§ 6:61	— —Involving claimant in the initial demand process

LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 6:62 — — —Obtain client’s express authority to settle
- § 6:63 — — —Keeping claimant informed at initial demand stage
- § 6:64 —Tips on negotiating with claims representative
- § 6:65 — —Prepare for negotiations
- § 6:66 — —Know the details of the claim
- § 6:67 — —Focus on uniqueness of claim
- § 6:68 — —Avoid overstating facts
- § 6:69 — —Appear ready and be ready to litigate
- § 6:70 — —Emphasize defendant’s exposure
- § 6:71 — —Avoid take-it-or-leave-it demands
- § 6:72 — —Do not retreat from initial demand too hastily
- § 6:73 — —Treat the claims representative as a professional
- § 6:74 —Responding to the demand counteroffer; when to terminate negotiations and file suit
- § 6:75 — —Offer equaling fair settlement value
- § 6:76 — —Offer below fair settlement value
- § 6:77 — —No offer made, but carrier willing to pay something
- § 6:78 — —Offer to settle for “nuisance value”
- § 6:79 — —Acceptable offer not forthcoming—Time to file suit
- § 6:80 — —Caveat—Keep the client informed
- § 6:81 — — —Malpractice trap
- § 6:82 Negotiations with defense counsel after suit is filed
- § 6:83 —Insurer’s duty to defend
- § 6:84 —Things to know about insurance defense counsel—  
“In-house” vs. “independent” counsel
- § 6:85 —Advantages of negotiating with defense counsel
- § 6:86 —When to negotiate with defense counsel
- § 6:87 —Defense counsel’s authority
- § 6:88 Other opportunities to settle
- § 6:89 —At deposition
- § 6:90 —After defense medical examination
- § 6:91 —After discovery is complete
- § 6:92 —At the settlement conference
- § 6:93 — —Settlement brochure
- § 6:94 —After focus groups or mock trial
- § 6:95 —During trial
- § 6:96 —After the jury retires
- § 6:97 —After the verdict or judgment
- § 6:98 — —To circumvent delayed satisfaction of judgment at trial level
- § 6:99 — —To avoid appeal risks
- § 6:100 —On appeal

TABLE OF CONTENTS

**IV. TECHNIQUES WHERE SETTLEMENT NOT FORTHCOMING**

- § 6:101 Sending bad-faith letter
- § 6:102 —Contents
- § 6:103 — —Introduction
- § 6:104 — —Factual summary
- § 6:105 — —Injuries sustained
- § 6:106 — —Medical bills
- § 6:107 — —Lost wages and impairment of future earning capacity
- § 6:108 — —Conclusion
- § 6:109 —Impact
- § 6:110 Unfair claims settlement
- § 6:111 —Penalties for rejection of statutory offer or demand
- § 6:112 — —Plaintiff's failure to accept settlement offer or demand
- § 6:113 — —Defendant's failure to accept settlement
- § 6:114 — —Imposition of conditions in offer or demand
- § 6:115 — —Specificity of offer or demand
- § 6:116 — —Tolling of response time
- § 6:117 —Rejection of offer or demand generally not admissible
- § 6:118 "Piecemeal settlements" in multidefendant cases
- § 6:119 —Risk of "empty chair" argument to jury
- § 6:120 —Economic feasibility of going to trial against remaining defendant
- § 6:121 —Impact of piecemeal settlement on defendant's rights
- § 6:122 — —Nonsettling defendants entitled to set off for amount of settlement
- § 6:123 — — —Set-off appropriate against independent tortfeasor liable for the same tort
- § 6:124 — —Good-faith settlement discharges settling defendant from liability for contribution
- § 6:125 — —Compare—Indemnification or equitable subrogation rights of defendant
- § 6:126 — — —Equitable subrogation
- § 6:127 —Good-faith limitation on piecemeal settlements
- § 6:128 — —Burden of proof on good faith issue
- § 6:129 —Form of the piecemeal settlement
- § 6:130 — —Credit

**V. SPECIAL CONSIDERATIONS REGARDING "STRUCTURED SETTLEMENTS"**

- § 6:131 Nature of a "structured settlement"

- § 6:132 —Attorney’s ethical obligation
- § 6:133 — —Attorney’s fee
- § 6:134 Advantage to claimant
- § 6:135 —Avoids risk of mismanagement
- § 6:136 —Tax-free periodic payments
- § 6:137 — —Limitations
- § 6:138 — — —Fixed and determinable payments
- § 6:139 — — —Plaintiff cannot have actual or “constructive receipt” of the present value
- § 6:140 — —Compare—Taxable lump-sum settlements
- § 6:141 — —Guarantees
- § 6:142 Advantages to defense—Insurance company savings
- § 6:143 Caveat—Potential disadvantages and pitfalls for claimant
- § 6:144 —Annuity insurer
- § 6:145 —Risk of inflation
- § 6:146 —Tax considerations
- § 6:147 —Conflict of interest with client regarding attorney’s fees
- § 6:148 — —Separate negotiations for fees
- § 6:149 — —Contingency fee complications
- § 6:150 — — —Percentage of what amount?
- § 6:151 — — —Lump-sum or periodic payments?
- § 6:152 —Malpractice concerns

## **VI. CONCLUDING AND ENFORCING THE SETTLEMENT**

- § 6:153 Concluding settlements
- § 6:154 —Obtaining insurer’s consent
- § 6:155 Consent judgments
- § 6:156 Concluding settlements—Settlements reached before complaint filed—Execution of “release”
- § 6:157 — —Nature of release
- § 6:158 — — —Variations
- § 6:159 — — —Effect on other tortfeasors
- § 6:160 — — —Effect on insurer
- § 6:161 — —Drafting the release
- § 6:162 — —Reformation of release
- § 6:163 —Settlements reached after complaint filed—Release and dismissal of action
- § 6:164 — —Request for dismissal
- § 6:165 — — —Procedure
- § 6:166 — —Settlements concluded at in-court conference—Putting the settlement on the record



## TABLE OF CONTENTS

- § 6:167 — — —Purposes
- § 6:168 — — —Procedure
- § 6:169 —Settlement where claimant is a minor or incompetent
- § 6:170 — —Court approval of settlement required
- § 6:171 — — —Procedures for court approval
- § 6:172 — — —Settlement order
- § 6:173 — —Wrongful death actions concerning minors
- § 6:174 Enforcing settlement agreements
- § 6:175 —Motion to comply
- § 6:176 —Motion for final judgment
- § 6:177 —Contract action
- § 6:178 —Collection of settlement proceeds
- § 6:179 Interest
- § 6:180 —Rate and calculation
- § 6:181 —Attorney's fee and expenses
- § 6:182 —Rescinding or setting aside compromise
- § 6:183 —More serious injury

## VII. "MARY CARTER" AGREEMENTS

- § 6:184 "Mary Carter" agreements, generally

## CHAPTER 7. FILING SUIT

### I. WHEN TO SUE

- § 7:1 Applicability of statutes of limitations (prescription) and repose (preemption)
- § 7:2 Applicability of statutes of limitations (prescription) and repose (preemption)—General statute of limitations
- § 7:3 —Statutes of repose
- § 7:4 — —Actions against physicians
- § 7:5 — —Immovables
- § 7:6 — —Professional insurance agent
- § 7:7 — —Products liability
- § 7:8 —Dismissals for nonaction
- § 7:9 —Special statutes
- § 7:10 — —Medical malpractice
- § 7:11 — —Attorney malpractice
- § 7:12 — —Accountant liability
- § 7:13 — —Products liability
- § 7:14 — —Architects and contractors
- § 7:15 — —Trustee liability

LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 7:16 Accrual of causes of action
- § 7:17 —Tort actions, generally
- § 7:18 —Injury to person or rights of another
- § 7:19 — —Malicious prosecution
- § 7:20 — —Negligence, generally
- § 7:21 — —Emotional distress
- § 7:22 —Medical malpractice
- § 7:23 — —Contra non valentum
- § 7:24 — — —Required showing
- § 7:25 — — —Neglect
- § 7:26 — —Knowledge
- § 7:27 — —Pleading
- § 7:28 — —Discovery of foreign object
- § 7:29 —Attorney and accountant malpractice
- § 7:30 —Defective goods or products
- § 7:31 —Wrongful death
- § 7:32 Counseling the plaintiff on when statute has run or is about to run
- § 7:33 Postponement or suspension of statute; tolling
- § 7:34 —Absent persons, incompetents, minors, and interdicts
- § 7:35 —Disability or incapacity
- § 7:36 — —Contra non valentum and disability
- § 7:37 —Mental incapacity
- § 7:38 —Loss of memory
- § 7:39 —Minority
- § 7:40 —Imprisonment
- § 7:41 —Death of a party
- § 7:42 —Pending litigation
- § 7:43 —By agreement or contract
- § 7:44 —Acknowledgment of right
- § 7:45 —Continuing torts
- § 7:46 — —Representation by attorneys, accountants, etc.
- § 7:47 Commencing proceedings to stop running of statute
- § 7:48 —Duration of interruption
- § 7:49 —Abandonment, voluntary dismissal, or a failure to prosecute
- § 7:50 —Time computation
- § 7:51 —Filing complaint
- § 7:52 — —Defective or incomplete filing
- § 7:53 —Counterclaim and cross claim
- § 7:54 —Relation back of amendments
- § 7:55 —Burden of proof
- § 7:56 —Pleading cause of action
- § 7:57 —Nonsuit and involuntary dismissal
- § 7:58 —Effect of cause of action arising outside of state

## TABLE OF CONTENTS

### II. PARTIES

§ 7:59	Who can sue
§ 7:60	—Real party in interest
§ 7:61	— —Parties to an incidental demand
§ 7:62	—Capacity to sue
§ 7:63	—Necessity of indicating status as agent or representative
§ 7:64	—Effect of variance in names
§ 7:65	—Standing
§ 7:66	— —Subrogation claims
§ 7:67	Parties defendant
§ 7:68	—Necessity of naming parties defendant with exactitude
§ 7:69	—Failure to designate legal capacity or status of defendant
§ 7:70	— —Waiver of capacity
§ 7:71	— —Curatorship
§ 7:72	—Who are potential parties to lawsuit?
§ 7:73	— —Person causing injury
§ 7:74	— —Other causes which may bring in other parties
§ 7:75	— —Medical malpractice
§ 7:76	— —Products liability
§ 7:77	— — —Who are manufacturers?
§ 7:78	— — —Who are sellers?
§ 7:79	— —Premises liability
§ 7:80	Joinder of parties
§ 7:81	—Practical considerations: who may be joined?
§ 7:82	— —If products liability, bring in seller and manufacturers?
§ 7:83	— —Employers
§ 7:84	— —If medical malpractice
§ 7:85	— — —Anesthetist
§ 7:86	— — —Nurse
§ 7:87	— — —Referring physician
§ 7:88	— —Court must have jurisdiction over party to be joined
§ 7:89	— —Particular purposes for joinder
§ 7:90	— —Time for joinder
§ 7:91	— —Misjoinder
§ 7:92	— —Nonjoinder
§ 7:93	—Necessary or compulsory joinder
§ 7:94	— —Insurer or insured as necessary party
§ 7:95	— —Wrongful death claimants
§ 7:96	—If joinder not feasible

- § 7:97 —Permissive joinder
- § 7:98 — —Who to sue under permissive joinder
- § 7:99 — — —“Deep pockets” as a consideration
- § 7:100 — — —Suing all possible tortfeasors
- § 7:101 Third-party practice
- § 7:102 —Service of citation and pleadings
- § 7:103 —When defendant may bring in third party
- § 7:104 — —Products liability
- § 7:105 — — —Chain of distribution
- § 7:106 — — —Contribution of defendants
- § 7:107 — —Employer-employee
- § 7:108 —When plaintiff may bring in a third party
- § 7:109 —Joining state as third-party defendant
- § 7:110 —Necessity that third party be liable for all or part of claim
- § 7:111 —Directed verdicts in relation to third-party claims
- § 7:112 —Effect of failure to bring in third party
- § 7:113 Intervention; is it a possibility?
- § 7:114 —Connection required
- § 7:115 —Parties
- § 7:116 —Prescription
- § 7:117 Class actions
- § 7:118 —Requisites of a class action
- § 7:119 —“Common character”
- § 7:120 — —Similarly situated

### III. JURISDICTION AND VENUE

- § 7:121 What is the proper court?
- § 7:122 In general, subject matter jurisdiction
- § 7:123 —Not conferred by consent
- § 7:124 —Effect of lack of subject matter jurisdiction
- § 7:125 —When subject matter jurisdiction dependent
- § 7:126 —Objections to jurisdiction
- § 7:127 — —Time to raise
- § 7:128 Personal jurisdiction
- § 7:129 —Grounds
- § 7:130 — —Waiver of objections
- § 7:131 —Manner of exercising personal jurisdiction
- § 7:132 —Nonresident service
- § 7:133 — —Notice required
- § 7:134 Quasi in rem jurisdiction
- § 7:135 —Not limited to nonresidents
- § 7:136 —Attachment
- § 7:137 Venue

## TABLE OF CONTENTS

- § 7:138 —Exceptions
- § 7:139 —Motion to change venue
- § 7:140 — —Change of proper venue
- § 7:141 Conflict of laws
- § 7:142 —Federal versus state court?
- § 7:143 —Conflict between states
- § 7:144 — —Renvoi
- § 7:145 — —Substantive matters
- § 7:146 —Delictual and quasi-delictual actions
- § 7:147 — —Products liability

## IV. PLEADINGS

- § 7:148 General pleading considerations
- § 7:149 —Pleadings allowed
- § 7:150 — —Summary proceedings
- § 7:151 — —Improper pleading designation
- § 7:152 — —Construction of pleadings
- § 7:153 Form and content
- § 7:154 —Caption; names of parties
- § 7:155 —Adoption by reference
- § 7:156 —Exhibits
- § 7:157 —Paragraphs
- § 7:158 —Statements in pleadings; pleading in the alternative
- § 7:159 — —Notice and fact theories of pleading
- § 7:160 — —Stating demand for monetary relief
- § 7:161 — —Stating defenses; denials
- § 7:162 —Evidentiary effect of statements in pleadings
- § 7:163 — —Effect of admission of fact in pleadings; instructions to jury
- § 7:164 Responsive pleadings
- § 7:165 Pleading special matters; avoidance and affirmative defenses
- § 7:166 —Capacity and authority to sue
- § 7:167 —Fraud, mistake, or condition of mind
- § 7:168 —Conditions precedent
- § 7:169 —Official document or act
- § 7:170 —Judgment, decision, or ruling
- § 7:171 —Time and place
- § 7:172 —Items of special damage
- § 7:173 —Libel and slander
- § 7:174 —Prayer for relief; relief granted
- § 7:175 Joinder of claims
- § 7:176 —Splitting of cause of action

- § 7:177 —Cumulation by single plaintiff against single defendant
- § 7:178 —Cumulation by plural plaintiffs or plural defendants
- § 7:179 —Effect of improper cumulation
- § 7:180 — —Pleading improper cumulation
- § 7:181 —Separate trials
- § 7:182 Verification of pleadings
- § 7:183 —Required for application for new trial
- § 7:184 Signing of pleadings
- § 7:185 —Pleading not signed
- § 7:186 —Good-faith filing requirement
- § 7:187 —Sanctions; disciplinary actions
- § 7:188 — —Hearing required
- § 7:189 — —Time for sanction
- § 7:190 — —Indecent or scandalous material and violations
- § 7:191 Demand for jury trial
- § 7:192 —Time for demand
- § 7:193 —Withdrawal of demand
- § 7:194 —Waiver of jury trial
- § 7:195 — —Manner of waiver
- § 7:196 Petition
- § 7:197 —In general
- § 7:198 — —Contents
- § 7:199 —Designation of parties
- § 7:200 — —Failure to identify parties
- § 7:201 — —Ambiguous designation of defendant
- § 7:202 — —Corporations
- § 7:203 — —Partnerships and joint ventures
- § 7:204 — —Sole proprietor
- § 7:205 — —Persons acting in representative capacity
- § 7:206 — —Effect of John Doe pleading
- § 7:207 —Filing
- § 7:208 —Allegations, generally
- § 7:209 — —Negligence, generally
- § 7:210 — —Negligent infliction of emotional distress
- § 7:211 — —Violation of statute
- § 7:212 — —Comparative fault
- § 7:213 — —Damages
- § 7:214 — —Legal malpractice
- § 7:215 — —Medical malpractice
- § 7:216 — — —Loss of chance of survival
- § 7:217 — — —Failure to diagnose
- § 7:218 — — —Lack of consent
- § 7:219 — — —Prescription

## TABLE OF CONTENTS

§ 7:220	— — —Products liability
§ 7:221	—Construction of allegations in the petition
§ 7:222	—Sufficiency of allegations in petition
§ 7:223	—Striking of petition
§ 7:224	— —Must be timely
§ 7:225	—Filing by out-of-state attorney
§ 7:226	—Alternative relief
§ 7:227	Form: Sample petition
§ 7:228	Answer
§ 7:229	—Time for answer
§ 7:230	—Form of answer
§ 7:231	—Incidental actions
§ 7:232	—Defense of prescription
§ 7:233	—Denials, affirmative defenses, and alternative defenses
§ 7:234	Reply
§ 7:235	Reconventional demands
§ 7:236	—Forms
§ 7:237	—Misdesignation of reconvention
§ 7:238	—Libel in petition
§ 7:239	—Contribution and indemnity
§ 7:240	—Adding new defendants
§ 7:241	—Actions maturing or acquired after pleading
§ 7:242	Cross claims in incidental actions
§ 7:243	—Additional parties

## V. SERVICE

§ 7:244	Citation, generally
§ 7:245	—Time for request of service
§ 7:246	—Form of citation including petition
§ 7:247	—Who may make service
§ 7:248	—Service of a subpoena
§ 7:249	—Claim of insufficiency of service or citation
§ 7:250	—Return of service
§ 7:251	—Methods of effecting service
§ 7:252	— —Service on natural persons
§ 7:253	— — —At place of business
§ 7:254	— — —Where made
§ 7:255	— —Domiciliary service
§ 7:256	— —Service on a representative
§ 7:257	— — —Service on attorney
§ 7:258	— — —Multiple defendants
§ 7:259	— —Service on doctor who is not a party
§ 7:260	— —Service on unincorporated associations

- § 7:261 — —Service on governmental entities
- § 7:262 — —Service on corporations
- § 7:263 — — —Domestic or foreign corporations
- § 7:264 — — —Service on Secretary of State
- § 7:265 — — —Service on a foreign corporation by Secretary  
of State
- § 7:266 — — —Service on banks
- § 7:267 — — —Service on insurance companies
- § 7:268 — —Service on nonresidents in actions to recover for  
negligent operation of automobiles in state
- § 7:269 — — —Death of nonresident before service
- § 7:270 — —Service regarding operation of watercraft by  
nonresident
- § 7:271 — —Supplementary rules of service
- § 7:272 — —Nonresident defendant service
- § 7:273 — — —Inability to serve nonresident
- § 7:274 —Abuse of process, generally
- § 7:275 — —Not an abuse of process
- § 7:276 — —Ulterior purpose

## VI. CHALLENGING PLEADINGS

- § 7:277 Exceptions and motions
- § 7:278 —Exceptions, generally
- § 7:279 — —Types of exceptions allowed
- § 7:280 — —Functions of exceptions
- § 7:281 — — —Declinatory exception
- § 7:282 — — —Dilatory exception
- § 7:283 — — —Peremptory exception
- § 7:284 — — —No cause of action
- § 7:285 — —Form of exceptions
- § 7:286 — —Time to plead exception
- § 7:287 — —Trial of the exceptions
- § 7:288 —Motions, generally
- § 7:289 — —Form or motions
- § 7:290 — — —Motion to strike and exceptions
- § 7:291 — — —Motion for judgment on the pleadings
- § 7:292 — — —Motion for summary judgment
- § 7:293 Defenses, generally
- § 7:294 —Defenses of third-party defendant
- § 7:295 —Solidary obligor defenses
- § 7:296 —Defenses and assumption of obligations
- § 7:297 —Defenses of a promisor
- § 7:298 —Waiver of defenses
- § 7:299 —Effect of dismissal of some claims on remaining  
claims



## TABLE OF CONTENTS

- § 7:300 —Defense of failure to state claim
- § 7:301 —Comparative fault, generally
- § 7:302 — —Acts by intentional tortfeasors
- § 7:303 — —Knowledge and appreciation of danger
- § 7:304 — —Medical malpractice
- § 7:305 — —Products liability
- § 7:306 — —Proximate cause; avoidable consequences

## VII. DEFAULTS

- § 7:307 Nature of default
- § 7:308 —How default obtained
- § 7:309 —Distinction between entry of default and default judgment
- § 7:310 —Pleading default
- § 7:311 —Time for default judgment
- § 7:312 —Prima facie case
- § 7:313 —Confirmation of default
- § 7:314 —Scope of the judgment
- § 7:315 —Procedural requirements
- § 7:316 —Res judicata

## CHAPTER 8. DISCOVERY

### I. INTRODUCTION

- § 8:1 Nature and purpose of discovery
- § 8:2 —Formal fact acquisition
- § 8:3 —Discovery purposes
- § 8:4 Overview of discovery tools
- § 8:5 —Depositions
- § 8:6 —Interrogatories
- § 8:7 —Requests for admissions
- § 8:8 —Production of documents and things
- § 8:9 —Entry on land
- § 8:10 —Examination of persons
- § 8:11 Sequence and timing of discovery
- § 8:12 Signing of discovery requests, responses, and objections
- § 8:13 Supplementation of responses
- § 8:14 —When supplementation required

### II. THE RIGHT TO CONDUCT DISCOVERY

- § 8:15 Generally
- § 8:16 Exceptions

### **III. DISCOVERY AND PRETRIAL CONFERENCES**

- § 8:17 Generally
- § 8:18 —Pretrial or discovery order
- § 8:19 —Failure to obey order, failure to appear at the pretrial or scheduling conference, if substantially unprepared, or failure to participate in good faith

### **IV. SCOPE OF DISCOVERY**

- § 8:20 Generally
- § 8:21 —Discretion of court
- § 8:22 Adequacy of discovery
- § 8:23 Discovery of insurance agreements
- § 8:24 Discovery of trial preparation materials
- § 8:25 Discovery of party's or person's own statement
- § 8:26 Discovery of expert information
- § 8:27 Relevancy requirement
- § 8:28 —Construction of relevancy requirement
- § 8:29 —Effect of inadmissibility at trial
- § 8:30 —Application
- § 8:31 — —Nontrial expert witness
- § 8:32 — —Financial situation
- § 8:33 — —Insurer's file and information
- § 8:34 — —Tax records
- § 8:35 — —Settlement
- § 8:36 — —Blood test
- § 8:37 — —Surveillance videotape
- § 8:38 — —Identifying tangible evidence
- § 8:39 — —Information about witnesses
- § 8:40 — — —Exchange of witness lists
- § 8:41 — — —Identity of expert trial witnesses
- § 8:42 — —Witness credibility
- § 8:43 —Reports of other accidents or lawsuits
- § 8:44 — —Accident reports and other information
- § 8:45 —Adversary's opinions and contentions
- § 8:46 —Burdensomeness of production

### **V. SCOPE OF DISCOVERY, PRIVILEGES**

- § 8:47 Applicable privileges, generally
- § 8:48 —Burden on party claiming privilege
- § 8:49 —Lawyer-client privilege
- § 8:50 — —Presence of a third person
- § 8:51 — —Legal services
- § 8:52 — —Holder of the privilege

## TABLE OF CONTENTS

§ 8:53	— — Confidential communication
§ 8:54	— — Communications that are not privileged
§ 8:55	— — Information between insurers
§ 8:56	— — Collateral or pre-existing documents
§ 8:57	— Waiver
§ 8:58	— — Voluntary disclosure
§ 8:59	— — Involuntary disclosure
§ 8:60	— — Anticipatory waiver
§ 8:61	— — Selective disclosure
§ 8:62	— — Joint holders
§ 8:63	— Attorney work-product privilege
§ 8:64	— — Scope of privilege
§ 8:65	— — Opinion work product
§ 8:66	— — Witness statements
§ 8:67	— — Surveillance videos or photos
§ 8:68	— — Blood alcohol tests
§ 8:69	— — Claim by lawyer against client
§ 8:70	— — Inadvertent disclosure
§ 8:71	— — Treating physician
§ 8:72	— — Health care provider—patient privilege

## VI. CREATION OF DISCOVERY PLAN

§ 8:73	Determining what discovery should be conducted
§ 8:74	— Analysis of the case
§ 8:75	— — Determine legal elements
§ 8:76	— — Identification of facts to establish elements
§ 8:77	— — Determine sources of proof
§ 8:78	— — Identification of contested matters
§ 8:79	— Analysis of opponent's case
§ 8:80	— — Determination of adversary's claims or defenses
§ 8:81	— — Consideration of elements, facts, and sources of proof
§ 8:82	— — Ascertainment of necessary counterproof
§ 8:83	Choosing appropriate discovery tools
§ 8:84	— Practical concerns—Weighing discovery costs against the value of the case
§ 8:85	— — — Value of the case
§ 8:86	— — — Cost of discovery
§ 8:87	— Weighing pros and cons of each discovery tool
§ 8:88	— Depositions
§ 8:89	— — — Advantages
§ 8:90	— — — Disadvantages
§ 8:91	— — Interrogatories
§ 8:92	— — — Advantages

- § 8:93 — — —Disadvantages
- § 8:94 — —Requests for admissions
- § 8:95 — — —Advantages
- § 8:96 — — —Disadvantages
- § 8:97 — —Discovery of documents and things for inspection
- § 8:98 — —Physical and mental examinations
- § 8:99 —Considering sequence of use
- § 8:100 — —Clarify claims and contentions
- § 8:101 — —Obtain documents early
- § 8:102 — —Depositions following other discovery
- § 8:103 —Coordination of use of discovery tools
- § 8:104 — —Interrogatories coupled with request to produce
- § 8:105 — —Deposition coupled with document production
- § 8:106 — —Request for admissions coupled with  
interrogatories

## **VII. DISCOVERY TOOLS PERTINENT TO BODILY INJURY LITIGATION**

- § 8:107 Depositions, generally
- § 8:108 —Depositions before commencement of action
- § 8:109 —Petition
- § 8:110 — —Use is extraordinary
- § 8:111 — —Notice and service
- § 8:112 — —Order and examination
- § 8:113 — —Use of deposition
- § 8:114 —Depositions pending appeal
- § 8:115 — —Order
- § 8:116 — —Deposition in aid of execution of a judgment
- § 8:117 —Persons before whom depositions may be taken
- § 8:118 — —Video deposition
- § 8:119 — —Foreign jurisdictions, depositions in
- § 8:120 — —Uniform Interstate Depositions and Discovery  
Act
- § 8:121 — —Stipulation by parties
- § 8:122 —Depositions by telephone or other remote electronic  
means
- § 8:123 Depositions on oral examination
- § 8:124 —When depositions may be taken, generally
- § 8:125 — —When leave of court required
- § 8:126 —Notice
- § 8:127 — —Contents of notice
- § 8:128 — —Place of deposition
- § 8:129 — — —Resident witness
- § 8:130 — — —Nonresident witness

## TABLE OF CONTENTS

§ 8:131	—Deposition of an organization or corporation
§ 8:132	— —Designation of deponent
§ 8:133	—Depositions of persons confined in prisons
§ 8:134	—Depositions of minors
§ 8:135	Subpoenas
§ 8:136	—Witness expenses and fees
§ 8:137	—Issuance and service of subpoenas and subpoenas duces tecum
§ 8:138	—Nonresident witness
§ 8:139	—Effect of failure to comply with subpoena
§ 8:140	— —Effect of failure to attend deposition after subpoena served
§ 8:141	Procedures for examination
§ 8:142	—Method of taking deposition
§ 8:143	— —Deposition by telephone
§ 8:144	—Examination and cross-examination
§ 8:145	— —Oath and recording
§ 8:146	— —Objections
§ 8:147	— — —Instruction not to answer
§ 8:148	—Written deposition
§ 8:149	—Motion for termination of or limiting deposition
§ 8:150	— —Resuming the deposition
§ 8:151	—Submission of transcript to deponent
§ 8:152	— —Signing
§ 8:153	— —Use of unsigned deposition
§ 8:154	—Certification and filing of deposition
§ 8:155	— —Not filed but made available
§ 8:156	— —Exhibits and copies
§ 8:157	—Effect of failure to attend
§ 8:158	Deposition on written questions
§ 8:159	—Service and notice
§ 8:160	—Written deposition procedure
§ 8:161	— —Cross, redirect, and recross questions
§ 8:162	Use of depositions
§ 8:163	Admissibility of deposition as evidence
§ 8:164	—Expert fees and expenses
§ 8:165	—Objections to admissibility
§ 8:166	—Effect of taking or using depositions
§ 8:167	— —Depositions of attorneys of record
§ 8:168	—Notice irregularities
§ 8:169	—Irregularities regarding deposition officer
§ 8:170	—Objection to the competency of witnesses, relevancy of testimony, and manner or form of taking deposition

- § 8:171 —Irregularities in completion and return of deposition
- § 8:172 Interrogatories, generally
- § 8:173 —When to propound
- § 8:174 —Number of interrogatories allowed
- § 8:175 —Interrogatory procedure
- § 8:176 — —Time for answer and service
- § 8:177 —Scope of interrogatories
- § 8:178 —Option to produce business records as substitute for answer
- § 8:179 — —Business record must be sufficiently specified
- § 8:180 —Failure to serve interrogatory answers
- § 8:181 —Refusal to answer interrogatories
- § 8:182 —Failure to amend interrogatory response
- § 8:183 Production of documents or things and inspection of property
- § 8:184 —Request and service
- § 8:185 —Response
- § 8:186 —Requests to persons who are not parties
- § 8:187 — —Subpoena duces tecum
- § 8:188 — —Notice
- § 8:189 — — —Notice to deponent regarding production
- § 8:190 Physical and mental examination of persons
- § 8:191 —Order for examination
- § 8:192 — —Necessity of showing good cause
- § 8:193 — —Notice
- § 8:194 —Report of examining physician
- § 8:195 — —Waiver of privileges
- § 8:196 Requests for admissions
- § 8:197 —Service
- § 8:198 — —When to serve
- § 8:199 — —Requirement that each admission be separately set out
- § 8:200 —Effect of requests and time to serve objections
- § 8:201 — —Objections
- § 8:202 — —Answers—Admissions and denials
- § 8:203 — — — —Lack of information or knowledge
- § 8:204 — — — —Issue for trial
- § 8:205 — —Sufficiency of responses
- § 8:206 — —Other orders and expenses of response
- § 8:207 —Effect of admission

## **VIII. PROTECTIVE ORDERS**

- § 8:208 Generally

## TABLE OF CONTENTS

§ 8:209	—Motion made by party or person from whom discovery sought
§ 8:210	—Good cause requirement
§ 8:211	—What party may be protected from
§ 8:212	— —Personnel file disclosure
§ 8:213	— —Excessive travel expense
§ 8:214	— —Destructive product testing
§ 8:215	— —Privileged or confidential information or documents
§ 8:216	— —Identification of persons
§ 8:217	Failure to seek protective order
§ 8:218	Frivolous protective orders
§ 8:219	Orders that may be issued
§ 8:220	—Discovery may not be had
§ 8:221	—Discovery only under specific conditions
§ 8:222	—Discovery only by method other than the one selected by the seeking party
§ 8:223	—Scope is limited or certain matters may not be inquired into
§ 8:224	—Discovery conducted only in presence of designated persons
§ 8:225	—Deposition that is sealed may only be opened by court order
§ 8:226	—Trade secrets or other confidential information may not be disclosed or disclosed only in a limited fashion
§ 8:227	—Parties simultaneously file documents or information that is sealed and can only be opened at the court's direction
§ 8:228	Ordering discovery when protection order is denied
§ 8:229	Public hazards
§ 8:230	Affected persons and news media
§ 8:231	Stay of discovery by district attorney in related criminal matter

## IX. ENFORCEMENT OF DISCOVERY RIGHTS

§ 8:232	Motion for order compelling discovery
§ 8:233	—Appropriate court for motion
§ 8:234	—Reasons for motion
§ 8:235	— —Evasive or incomplete answer
§ 8:236	—Protective order where motion denied
§ 8:237	—Award of expenses of motion
§ 8:238	— —Award when motion granted
§ 8:239	— —Award when motion denied

- § 8:240 — —Award when motion granted in part and denied  
in part
- § 8:241 Justification for failure to obey
- § 8:242 —Privilege against self-incrimination
- § 8:243 Sanctions for particular acts
- § 8:244 —Failure to comply with order compelling discovery
- § 8:245 — —Motion for sanctions
- § 8:246 —Failure to respond to discovery request
- § 8:247 —Failure to attend deposition, serve answers, or  
respond to a request for inspection
- § 8:248 —Violation of requirements as to signing of papers
- § 8:249 —Failure to identify expert witnesses
- § 8:250 —Failure to admit
- § 8:251 — —Order required
- § 8:252 —Sanctions in court in which action is pending
- § 8:253 — —Dismissal or default judgment
- § 8:254 — — —Motion to dismiss
- § 8:255 — — —Factors for granting default
- § 8:256 — — —Distinction between failure to comply and  
disobedience of court order to comply
- § 8:257 — — —Dismissal sanction
- § 8:258 — —Contempt
- § 8:259 — — —Acts subject to contempt
- § 8:260 — — —Penalty for contempt
- § 8:261 Spoliation of evidence

## Volume 2

### CHAPTER 9. ARBITRATION AND MEDIATION

#### I. INTRODUCTION

- § 9:1 Arbitration, in general
- § 9:2 Mediation, in general
- § 9:3 Governing authority and 1997 revisions
- § 9:4 —Louisiana Binding Arbitration Law
- § 9:5 —Louisiana Mediation Act
- § 9:6 —Additional 1997 revisions
- § 9:7 —Civil Code
- § 9:8 —Federal Arbitration Act and pre-emption
- § 9:9 Foreign arbitration
- § 9:10 —Pilot Mediation Program
- § 9:11 —Court rules



## TABLE OF CONTENTS

- § 9:12 — —Plead as affirmative defense
- § 9:13 —De novo trial right
- § 9:14 —Compulsory arbitration not permitted
- § 9:15 —Ethical consideration

## II. TACTICAL CONSIDERATIONS AND PREPARATION

- § 9:16 Plaintiff's considerations
- § 9:17 —Faster monetary recovery
- § 9:18 —Cost and expense savings
- § 9:19 —Potential for a higher recovery
- § 9:20 —Potential risks
- § 9:21 Defense considerations
- § 9:22 —Cost and expense savings
- § 9:23 —Potential ceiling for insurance carrier exposure
- § 9:24 Tactical considerations
- § 9:25 —Arbitration by agreement
- § 9:26 —Refusal to arbitrate
- § 9:27 —General consideration

## III. ARBITRATION PURSUANT TO PRIVATE AGREEMENTS

- § 9:28 Agreement to arbitrate, generally
- § 9:29 —Signature
- § 9:30 —Knowledge of the agreement
- § 9:31 —Scope of the agreement
- § 9:32 Application to personal injury cases
- § 9:33 Louisiana Binding Arbitration Law
- § 9:34 —Requirement of a writing
- § 9:35 — —Nature and construction
- § 9:36 —Effect of agreement on right to seek judicial relief
- § 9:37 — —Stay of court proceeding
- § 9:38 Appointment of arbitrators
- § 9:39 —Power of arbitrator
- § 9:40 —Capacity to be an arbitrator
- § 9:41 —Disagreement among arbitrators
- § 9:42 Proceedings to compel or stay arbitration
- § 9:43 —Actions to compel and staying civil court proceedings
- § 9:44 — —Court action
- § 9:45 — —Matters covered by the arbitration agreement
- § 9:46 —Actions to stay arbitration
- § 9:47 —Waiver of right to arbitrate
- § 9:48 —Who may decide waiver issue

- § 9:49 —Particular actions and lack of prejudice
- § 9:50 Matters arbitrable
- § 9:51 Hearing
- § 9:52 —Parties and representation by attorney
- § 9:53 —Evidence and witnesses
- § 9:54 —Arbitrator opinion
- § 9:55 Award
- § 9:56 —Time limitation
- § 9:57 — —Waiver
- § 9:58 —Fees, expenses, and interest
- § 9:59 —Judgment or decree on award
- § 9:60 —Conclusiveness of award
- § 9:61 —Small claims
- § 9:62 —Violation of due process
- § 9:63 Applications to court to confirm, vacate, or modify  
award
- § 9:64 —Confirmation of award
- § 9:65 —Challenge to award
- § 9:66 —Vacation of award
- § 9:67 —Resubmission to arbitrators
- § 9:68 —Modification or correction
- § 9:69 —Notice
- § 9:70 —Required filing
- § 9:71 Appeals of award and scope of review
- § 9:72 —Appealable orders
- § 9:73 — —Denial of application to compel arbitration
- § 9:74 — —Order confirming or denying award
- § 9:75 — —Order modifying or correcting an award
- § 9:76 — —Order vacating an award without directing a  
rehearing
- § 9:77 — —Judgment and decree pursuant to arbitration and  
award statute
- § 9:78 —Manner of appeal

#### **IV. MEDIATION**

- § 9:79 Generally
- § 9:80 Agreement of the parties
- § 9:81 Actions not referable to mediation
- § 9:82 Selection of a mediator
- § 9:83 —When the parties do not agree to mediator
- § 9:84 —Complex cases
- § 9:85 Required attendance and participation
- § 9:86 Written materials
- § 9:87 Time limitation

## TABLE OF CONTENTS

- § 9:88 Costs of mediation
- § 9:89 —Payment of costs
- § 9:90 Oral and written communications
- § 9:91 —Testimony in other proceedings
- § 9:92 —Nonconfidential communications
- § 9:93 Settlement agreement

## CHAPTER 10. PREPARING FOR TRIAL; PRETRIAL

### I. GENERAL CONSIDERATIONS

- § 10:1 Becoming familiar with local court rules and customs
- § 10:2 —Need to exchange exhibits and the like
- § 10:3 Informing the client and witnesses that trial is upcoming
- § 10:4 —Checking own, client's, and witnesses' schedules for conflicts
- § 10:5 — —Resolution of date conflicts
- § 10:6 Organizing files
- § 10:7 —Updating litigation control system, as necessary
- § 10:8 —Maintaining and indexing files
- § 10:9 — —Correspondence
- § 10:10 — —Pleadings
- § 10:11 — —Discovery documents
- § 10:12 — —Work papers and legal research
- § 10:13 — —Exhibits
- § 10:14 — —Files on witnesses
- § 10:15 Trial preparation
- § 10:16 Finalizing theories in light of facts discovered
- § 10:17 Final review of pleadings
- § 10:18 —Making sure necessary claims, defenses, or theories are properly pleaded
- § 10:19 —Review pleadings in light of information obtained through discovery
- § 10:20 — —Are there claims or defenses that should be dropped?
- § 10:21 — —Are there new claims or defenses that should be added?
- § 10:22 —Amending pleadings when necessary
- § 10:23 — —By plaintiff
- § 10:24 — —By defendant
- § 10:25 — —All other situations—By leave or by consent
- § 10:26 — —Discretion of court—Pretrial conferences and orders

# LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 10:27 — — — —Leave granted when justice so requires
- § 10:28 — — — —When pleader wishes to change theories
- § 10:29 — — — —Amendment to circumvent time limitations
- § 10:30 — — — —Not allowed after judgment
- § 10:31 — —Pleading in response to amended petition
- § 10:32 —Did events or injuries occur after the filing of the original pleading?
- § 10:33 — —Need for supplemental pleading
- § 10:34 — —Distinction from amended pleadings
- § 10:35 Any change of parties?
- § 10:36 —Advisability of dismissing parties when discovery indicates that liability is questionable
- § 10:37 — —Consider the possibility of sanctions where claim appears frivolous
- § 10:38 — —Voluntary dismissal
- § 10:39 — — —When opponent has counterclaim or other claims for affirmative relief
- § 10:40 — — —With or without prejudice
- § 10:41 — —Plaintiff fails to appear—Involuntary dismissal
- § 10:42 — —Failure of all parties to appear; settlement
- § 10:43 —Substitution
- § 10:44 — —Death
- § 10:45 — —Action against public officer or entity
- § 10:46 — —How accomplished
- § 10:47 —Need to bring in third parties at this stage
- § 10:48 — —Failure to bring in third party
- § 10:49 Reviewing sufficiency of discovery
- § 10:50 —Take into account impending nature of trial; short deadlines for any further discovery
- § 10:51 — —Demands for final witness lists
- § 10:52 — — —Experts
- § 10:53 —Any last minute witnesses to depose?
- § 10:54 —Possibility of further admissions
- § 10:55 —All requested documents produced?
- § 10:56 —Any outstanding medical examinations?
- § 10:57 —Supplementing or updating prior responses
- § 10:58 — —Duty to supplement imposed
- § 10:59 Consulting with experts
- § 10:60 —Consult with existing experts
- § 10:61 —Need for additional testifying experts
- § 10:62 —Do they recommend additional discovery?
- § 10:63 Attempt to settle in light of facts developed in discovery
- § 10:64 Alternative dispute resolution possibilities
- § 10:65 —Enlisting the aid of a mediator

## TABLE OF CONTENTS

§ 10:66 —Minitrial

## II. SUMMARY JUDGMENT

- § 10:67 Can summary judgment be used to avoid a trial in a personal injury case?
- § 10:68 —Disputed factual issues usually exist
- § 10:69 — —What is a material issue of fact?
- § 10:70 — —Sufficient admission of negligence in pleadings
- § 10:71 —Situations where a defendant may be entitled to judgment as a matter of law
- § 10:72 — —Statute of limitations
- § 10:73 — —Comparative fault as a matter of law
- § 10:74 — —Release
- § 10:75 — —Lack of expert's affidavit in malpractice case
- § 10:76 Can it be used to limit issues to be tried—Partial summary judgment?
- § 10:77 — —Partial summary judgment on the issues of liability and damages
- § 10:78 Can opposition affidavits be used as discovery?
- § 10:79 Procedure
- § 10:80 —Motion and affidavits
- § 10:81 —Supporting documents discovery materials
- § 10:82 —Time periods for filings and hearings; continuances
- § 10:83 —Burden of proof; burden of producing evidence
- § 10:84 —Response in opposition
- § 10:85 —Bad faith
- § 10:86 —Ruling by the court
- § 10:87 Appeal from denial of summary judgment

## III. PRETRIAL CONFERENCE

- § 10:88 When is pretrial required
- § 10:89 —Desirability in personal injury cases
- § 10:90 Importance
- § 10:91 —Settling the case
- § 10:92 — —Authority of attorneys to settle for client
- § 10:93 —Establishing dollar range of settlement
- § 10:94 —Simplifying the issues
- § 10:95 — —Desirability and use of stipulations
- § 10:96 Pretrial order
- § 10:97 —Components
- § 10:98 —Motions in limine

## IV. FINAL PREPARATION

- § 10:99 Determining if witnesses will be available

LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- § 10:100 —Any witnesses need to be subpoenaed?
- § 10:101 — —Procedure for obtaining and serving subpoenas
- § 10:102 — — —Service
- § 10:103 — —Payment of witness fees and expenses
- § 10:104 Developing the trial “theme”
- § 10:105 —Storyboard
- § 10:106 —Focus groups and mock trials
- § 10:107 —Minitrial
- § 10:108 Preparing witnesses
- § 10:109 —General instruction regarding appearance and demeanor
- § 10:110 —Rehearsing direct and cross
- § 10:111 —Do not put words in the witness’ mouth
- § 10:112 —Reviewing prior statements and records with witnesses
- § 10:113 —Areas where recollection may need to be refreshed
- § 10:114 Preparing experts
- § 10:115 —Discussing or rehearsing proposed testimony and cross-examination
- § 10:116 —Re-examining documents or other basis of opinion
- § 10:117 —Hypothetical questions
- § 10:118 Collecting and identifying real evidence
- § 10:119 Preparing any necessary demonstrative aids
- § 10:120 —Obtaining medical diagrams
- § 10:121 —Diagrams of the accident scene
- § 10:122 —Day in the life or surveillance videos
- § 10:123 —Preparing computer simulations
- § 10:124 —Demonstrating how a product functions
- § 10:125 —Obtaining necessary display devices
- § 10:126 — —Make sure courtroom can accommodate the display devices
- § 10:127 Making sure the product has been thoroughly tested
- § 10:128 Creating a trial book
- § 10:129 —Function
- § 10:130 —Contents
- § 10:131 — —Motions to be made
- § 10:132 — —Proposed voir dire
- § 10:133 — —Outline of opening statement
- § 10:134 — —Witnesses
- § 10:135 — — —Identification
- § 10:136 — —Exhibits
- § 10:137 — —Jury charge
- § 10:138 Preparing a trial brief
- § 10:139 —Function
- § 10:140 —Contents

## TABLE OF CONTENTS

- § 10:141 — —Contentions
- § 10:142 — —Supporting authorities

## V. CHECKLISTS

- § 10:143 File organization checklist
- § 10:144 Trial preparation checklist
- § 10:145 Trial notebook checklist

## CHAPTER 11. TRIAL

### I. TRIAL SCHEDULING

- § 11:1 Calendaring the case; anticipating scheduling conflicts
- § 11:2 —Time it usually takes to get a personal injury case to trial
- § 11:3 — —Acceleration is exceptional
- § 11:4 —Placing the case on the calendar
- § 11:5 — —Notice to attorneys
- § 11:6 — —Attorney's duty to stay abreast of calendar
- § 11:7 Need to estimate length of trial
- § 11:8 Continuances
- § 11:9 —Discretionary continuances
- § 11:10 —Peremptory continuances
- § 11:11 —When to ask for a continuance
- § 11:12 —When continuances are likely to be granted or denied
- § 11:13 — —Need to complete discovery
- § 11:14 — —Unpreparedness of counsel
- § 11:15 — —Additional evidence
- § 11:16 — —Unavailability of witness
- § 11:17 — — —Party or witness still injured or in hospital
- § 11:18 — —Absence of counsel
- § 11:19 —Motion for continuance and hearing
- § 11:20 Separation or consolidation of trials
- § 11:21 —Consolidation
- § 11:22 — —No consolidation
- § 11:23 —Separation
- § 11:24 — —Jury trial
- § 11:25 — —Insurance coverage

### II. DISQUALIFICATION OF ASSIGNED TRIAL JUDGE

- § 11:26 Right to unbiased judge

- § 11:27 Recusal
- § 11:28 Possible conflicts of interest
- § 11:29 —Judge and attorney relationship
- § 11:30 —Judge and witness relationship
- § 11:31 —Ownership interest in defendant
- § 11:32 —Vigorous participation in settlement negotiations
- § 11:33 Judge as witness
- § 11:34 Motion to disqualify or recuse
- § 11:35 —Timing
- § 11:36 —Judge hearing motion
- § 11:37 —Improper motion; judge shopping
- § 11:38 Waiver

### III. SELECTING THE JURY

- § 11:39 Stipulation of jury of less than twelve
- § 11:40 —Advisability of doing so in a personal injury case
- § 11:41 —Right to cross-section
- § 11:42 — —Burden of proof
- § 11:43 Voir dire
- § 11:44 —Procedure, generally
- § 11:45 — —Pitfall to avoid
- § 11:46 —By the court
- § 11:47 —By the parties or attorneys
- § 11:48 —Regulation of manner by the court
- § 11:49 —Addressing the panel
- § 11:50 — —Introducing yourself and the client
- § 11:51 — —How to describe the case
- § 11:52 —Areas of inquiry
- § 11:53 — —Competency of juror
- § 11:54 — — —Discretion of court
- § 11:55 — —Educational or technical background
- § 11:56 — —Publicity about the case
- § 11:57 — —Prior contacts or prejudices
- § 11:58 — — —Acquaintance with party or witness
- § 11:59 — — —Service in similar case
- § 11:60 — — —Use of same or similar product
- § 11:61 — — —Familiarity with the premises
- § 11:62 — — —Patient of same doctor or hospital
- § 11:63 — — —Work for insurance company
- § 11:64 — — —Had similar accident or suffered similar injury
- § 11:65 — — —Has similar suit pending
- § 11:66 — — —Preconceived views on propriety of punitive damages; damages for pain and suffering



## TABLE OF CONTENTS

- § 11:67 — — —Belief that corporate defendants or insurance companies have “deep pockets”
- § 11:68 — —Understanding the burden of proof
- § 11:69 —Objections to improper questions
- § 11:70 Challenges for cause
- § 11:71 —Grounds
- § 11:72 —How exercised
- § 11:73 —Challenge after juror was accepted
- § 11:74 Peremptory challenges
- § 11:75 —Number
- § 11:76 — —Jury of six
- § 11:77 — —Jury of twelve
- § 11:78 —How exercised
- § 11:79 —Use of jury consultant
- § 11:80 — —Are there plaintiff’s or defendant’s jurors?
- § 11:81 Request that juror be excused and alternate substituted
- § 11:82 —Grounds
- § 11:83 — —Sleeping
- § 11:84 Juror late

## IV. OPENING STATEMENTS

- § 11:85 Right of each party
- § 11:86 Time for presenting; order of presentation
- § 11:87 Nature and purpose
- § 11:88 —Establishing rapport
- § 11:89 Control by court
- § 11:90 —Objections to improper statement
- § 11:91 Content
- § 11:92 —What the evidence will show
- § 11:93 —Dealing with comparative fault and similar defenses
- § 11:94 —Explaining technical matters
- § 11:95 — —Importance in product liability and medical malpractice cases
- § 11:96 —Effect of law on evidence
- § 11:97 —Propriety of mentioning insurance
- § 11:98 —Argument about injuries
- § 11:99 — —Describing the physical problems caused by the injury
- § 11:100 — —Pre-existing or other important medical conditions
- § 11:101 —Discussion of damages
- § 11:102 — —Mentioning detailed description of damages

- § 11:103 Tips regarding effective communications and presentation style
- § 11:104 —Communication
- § 11:105 — —Personal appearance
- § 11:106 — —Posture and speaking ability
- § 11:107 — —Counsel's position during opening
- § 11:108 — —Communication style
- § 11:109 — —Distracting conduct and eye contact
- § 11:110 — —Manifest self-confidence
- § 11:111 — —Don't argue
- § 11:112 —Presentation
- § 11:113 — —Models, charts, diagrams
- § 11:114 — —Practice use of demonstrative aid
- § 11:115 — —Videotape the opening in practice
- § 11:116 — —Limitation—Must be admissible evidence

## **CHAPTER 12. PROVING THE CASE**

### **I. ORDER OF TRIAL AND PROOF**

- § 12:1 Determination of matters to be tried first
- § 12:2 —Dependent on the burden of proof
- § 12:3 —Discretion of court to vary
- § 12:4 —Order of presentation in multiparty case (e.g., multiple or third-party defendants)
- § 12:5 Severance of issues; bifurcated trial
- § 12:6 —Severable issues (such as liability from damages)
- § 12:7 — —Issues that cannot be severed
- § 12:8 —Motion to sever
- § 12:9 —Discretion of judge

### **II. BURDEN OF PROOF, PRIMA FACIE CASE, OR DEFENSE**

- § 12:10 Burden as between plaintiff and defendant, generally
- § 12:11 —Who has the burden
- § 12:12 —Prima facie case
- § 12:13 — —Tortious conduct
- § 12:14 —Information primarily within defendant's control
- § 12:15 —Comparative fault and similar defenses
- § 12:16 — —Rescue or imminent peril as negating comparative fault
- § 12:17 Presumptions and inferences
- § 12:18 —Use and rebuttal
- § 12:19 — —Effect of legal presumptions

## TABLE OF CONTENTS

§ 12:20	— —Fact presumptions and effect
§ 12:21	—Res ipsa loquitur
§ 12:22	—Presumption of due care
§ 12:23	—Failure to produce evidence
§ 12:24	Evidence required to make prima facie case
§ 12:25	—Duty of care and breach
§ 12:26	— —Premises liability
§ 12:27	— —Malpractice
§ 12:28	— —Product liability
§ 12:29	— —Automobile negligence
§ 12:30	—Foreseeability
§ 12:31	—Proximate cause
§ 12:32	—Duty-risk causation (“but for,” “substantial factor,” “cause in fact”)
§ 12:33	—Res ipsa loquitur
§ 12:34	—Last clear chance
§ 12:35	—Existence of injury and amount of damages
§ 12:36	— —Proof of medical malpractice
§ 12:37	— —Proof of medical expenses incurred
§ 12:38	— —Proof of shortened life expectancy; use of mortality tables
§ 12:39	— —Proof of lost earnings (tax returns, pay stubs, job benefit booklets, union contracts and the like)
§ 12:40	— —Proof of diminished earning capacity
§ 12:41	— —Proof of cost of future care
§ 12:42	Motion for directed verdict at close of plaintiff’s case
§ 12:43	—Directed verdict versus involuntary dismissal
§ 12:44	—Time and manner of presenting
§ 12:45	—Grounds
§ 12:46	—Denial of motion; harmless error
§ 12:47	— —Absence of disputed question of fact
§ 12:48	— — —What does not constitute fact issue
§ 12:49	— — —What constitutes fact issue
§ 12:50	— —Plaintiff failed to establish prima facie case
§ 12:51	— — —What happens if plaintiff does establish prima facie case?
§ 12:52	—Right (and advisability) of presenting evidence if motion denied
§ 12:53	Rebutting plaintiff’s case
§ 12:54	—Establishing lack of duty
§ 12:55	— —Plaintiff as a trespasser or the like
§ 12:56	— —Obvious danger
§ 12:57	—Establishing conformity to standard of care
§ 12:58	—Mitigation of damages
§ 12:59	— —Pre-existing condition

- § 12:60 — —Proof of malingering
- § 12:61 Evidence required to make out a defense
- § 12:62 —Comparative fault
- § 12:63 —Informed consent to treatment
- § 12:64 —Product misuse
- § 12:65 —Susceptibility

### III. PRESENTATION OF EVIDENCE, GENERALLY

- § 12:66 Relevancy
- § 12:67 —Admissibility
- § 12:68 —Exclusion of relevant evidence
- § 12:69 —Law of evidence
- § 12:70 —Preliminary determination by the court
- § 12:71 — —Conditionally relevant evidence
- § 12:72 —Relevance of particular types of evidence in a personal injury case
- § 12:73 — —Subsequent conditions or repairs
- § 12:74 — — —Strict liability
- § 12:75 — — —Pattern or custom
- § 12:76 — — —Feasibility
- § 12:77 — —Similar accidents
- § 12:78 — —Custom; customary methods of practice
- § 12:79 — —Violation of statute
- § 12:80 — —Deviation from government or industry codes
- § 12:81 — —Compliance with industrial safety standards
- § 12:82 — — —Safety Standards
- § 12:83 — — —Government reports
- § 12:84 — —Existence of insurance
- § 12:85 — — —Collateral source rule and insurance
- § 12:86 — —Offer of compromise
- § 12:87 — —Medical records
- § 12:88 Objections
- § 12:89 —Need to object to preserve record and bring objection to court's attention
- § 12:90 — —Failure to object is waiver
- § 12:91 —Grounds for objection
- § 12:92 — —On appeal
- § 12:93 — —When evidence is admissible in part or for certain purposes
- § 12:94 — —Objection that proof was not within the issues raised by the pleadings
- § 12:95 — — —Allowance of amendment to conform to the proof
- § 12:96 — — —Otherwise issue tried by consent of the parties

## TABLE OF CONTENTS

§ 12:97	—Continuing objection to line of questions
§ 12:98	Motion to strike
§ 12:99	—Use
§ 12:100	—Time to make
§ 12:101	—Admonition to jury; effectiveness
§ 12:102	Making record of excluded evidence
§ 12:103	—Offer of proof
§ 12:104	— —Refusal to permit offer of proof
§ 12:105	— —Necessity
§ 12:106	— —Content
§ 12:107	— —Procedure
§ 12:108	Using admissions in pleadings
§ 12:109	—Judicial admission or confession
§ 12:110	—Ordinary admissions
§ 12:111	—Surplusage
§ 12:112	—Evidence of admission
§ 12:113	Using information gained through discovery
§ 12:114	—Admissions
§ 12:115	—Admissibility of depositions and affidavits

## IV. EXAMINATION OF WITNESSES

§ 12:116	Strategic considerations
§ 12:117	—Should client testify?
§ 12:118	—Order of presenting witnesses
§ 12:119	— —Accommodating doctors and other experts
§ 12:120	— —Request for exclusion of witnesses; effect
§ 12:121	— — —Violation of exclusion order
§ 12:122	—Who should call
§ 12:123	— —Court
§ 12:124	— — —When court may not call
§ 12:125	— —Opponent calling adverse witnesses
§ 12:126	Competency
§ 12:127	—Assumption that all witnesses are competent
§ 12:128	— —Establishing that witness has personal knowledge
§ 12:129	— —Testing the witness' ability to perceive
§ 12:130	—Children
§ 12:131	—Persons having difficulty expressing themselves or of limited mental capacity
§ 12:132	—Competency of spouses
§ 12:133	—Objection to competency
§ 12:134	— —Determination by court
§ 12:135	Privilege
§ 12:136	—Waiver in malpractice case

- § 12:137 Method of examination
- § 12:138 —General tips regarding demeanor and style
- § 12:139 —Examining a witness
- § 12:140 —Scope of direct, cross, and redirect
- § 12:141 —Form of question; leading questions
- § 12:142 —How to make objections
- § 12:143 — —Types of objections
- § 12:144 Cross-examination
- § 12:145 —Objective
- § 12:146 —Form of questions
- § 12:147 —Techniques and recommendations
- § 12:148 Impeachment
- § 12:149 —When worthwhile
- § 12:150 —Methods
- § 12:151 — —Use of prior deposition testimony
- § 12:152 —Rehabilitation

## **V. EXPERT WITNESSES**

- § 12:153 Need and right to call
- § 12:154 —Permissible when scientific, technical, or specialized knowledge required
- § 12:155 —Need in malpractice cases
- § 12:156 — —Requirement of expert testimony in professional malpractice cases
- § 12:157 —Need in product liability cases
- § 12:158 —Use of accident reconstructionists
- § 12:159 —Use of forensic meteorologist
- § 12:160 —Use of forensic economist or actuary
- § 12:161 —Lifecare specialist
- § 12:162 —To determine the nature and extent of injury and damages
- § 12:163 — —Cause of death
- § 12:164 — — —Death certificate
- § 12:165 — —Plaintiff's ability to work
- § 12:166 — —Pain and suffering
- § 12:167 — — —Psychological distress
- § 12:168 — —Need for future treatment
- § 12:169 How to locate an expert
- § 12:170 Qualifications
- § 12:171 —How to establish expertise
- § 12:172 — —In medical malpractice cases
- § 12:173 — — —Testimony by member of different school of medicine, nonspecialist, or nurse
- § 12:174 —Objections

## TABLE OF CONTENTS

§ 12:175	—Necessity for hearing
§ 12:176	Basis for opinion
§ 12:177	—Disclosure of underlying facts
§ 12:178	—Cross-examination
§ 12:179	Use of hypothetical questions
§ 12:180	—Form
§ 12:181	—Assumptions on which hypothetical question is based
§ 12:182	— —Facts not supported by evidence
§ 12:183	—Sufficiency of facts to enable expert to form opinion
§ 12:184	Scope of expert testimony
§ 12:185	—Opinion on ultimate issue
§ 12:186	Expert witness fees

## VI. USING REAL OR DEMONSTRATIVE EVIDENCE

§ 12:187	Using exhibits, generally
§ 12:188	—Marking exhibits
§ 12:189	— —Premarking exhibits may be required
§ 12:190	—Necessity that exhibits be introduced into testimony
§ 12:191	— —How to introduce
§ 12:192	— —Foundation
§ 12:193	— —Establishing that an exhibit is unchanged since accident
§ 12:194	Using photographs, videotapes, and the like
§ 12:195	—Tape recordings
§ 12:196	—Particular photographs or videos
§ 12:197	— —Of injuries
§ 12:198	— —Of vehicles involved in a collision
§ 12:199	— —Of scene of accident
§ 12:200	— —Automobile cases
§ 12:201	— —Premises liability cases
§ 12:202	— —Day in the life or surveillance video
§ 12:203	— — —Use by defense to show plaintiff's capabilities
§ 12:204	— — —Use by plaintiff to show extent of injuries
§ 12:205	— — —Use to illustrate testimony
§ 12:206	— — —For impeachment
§ 12:207	— —Staged photographs
§ 12:208	—Foundation for use
§ 12:209	—Discretion of trial judge
§ 12:210	— —Excessive number
§ 12:211	— —Gruesome nature of injuries

- § 12:212 — — —Test
- § 12:213 Using X-rays
- § 12:214 —Foundation
- § 12:215 Using diagrams, models, maps, blackboard sketches,  
and similar evidence
- § 12:216 —Purpose
- § 12:217 —Foundation
- § 12:218 Using records of weather conditions
- § 12:219 Using the results of experiments and tests
- § 12:220 —Admissibility, generally
- § 12:221 — —Foundation
- § 12:222 —In-court demonstrations
- § 12:223 — —Advisability
- § 12:224 — —Discretion of the trial court
- § 12:225 —Computer simulation of accident
- § 12:226 —Particular situations
- § 12:227 — —Product liability
- § 12:228 — — —Mechanical or other defect regarding vehicle
- § 12:229 — —Visibility and ability to hear
- § 12:230 — —In slip-and-fall cases

## **VII. REQUESTING A JURY VIEW**

- § 12:231 Purpose—Viewing accident scene
- § 12:232 —Usefulness in personal injury action
- § 12:233 —Discretion of court

## **CHAPTER 13. SUBMITTING THE CASE**

### **I. ROLE OF COURT AND JURY**

- § 13:1 Determination of issues of law by court and fact by  
jury
- § 13:2 —What is an issue of law in a personal injury case?
- § 13:3 — —Pleadings
- § 13:4 —Mixed questions of law and fact
- § 13:5 Determination of sufficiency of evidence by court
- § 13:6 —Test

### **II. MOTIONS AT CLOSE OF CASE**

- § 13:7 Applicable motions
- § 13:8 —Directed verdict in a jury case
- § 13:9 — —Standard
- § 13:10 — — —Credibility
- § 13:11 — —Motion denied



## TABLE OF CONTENTS

- § 13:12 — —Form and content
- § 13:13 —Involuntary dismissal in nonjury case
- § 13:14 — —Standard
- § 13:15 —Motion for judgment notwithstanding the verdict

## III. FINAL ARGUMENT

- § 13:16 Right to present; discretion of court
- § 13:17 Sequence
- § 13:18 —Multiparty cases
- § 13:19 Scope of argument
- § 13:20 Matters that should or should not be mentioned in a personal injury case
- § 13:21 —Settlement
- § 13:22 —Wealth of the defendant
- § 13:23 —Defendant is large corporation or government entity
- § 13:24 —Missing expert witnesses
- § 13:25 —Damages; pain and suffering and life expectancy
- § 13:26 Techniques
- § 13:27 —Use of exhibits and illustrative charts
- § 13:28 Objecting to opponent's improper argument
- § 13:29 —Failure to object
- § 13:30 —Duty of judge to rectify
- § 13:31 — —Factors
- § 13:32 —When to make
- § 13:33 —Waiver of objection
- § 13:34 —Sufficiency of objection
- § 13:35 —Sufficiency of admonition

## IV. INSTRUCTING THE JURY

- § 13:36 Instruction conference
- § 13:37 Submitting requests for jury instructions
- § 13:38 —Court action
- § 13:39 —Objection
- § 13:40 —Form
- § 13:41 — —Jury now allowed written instructions
- § 13:42 — —Statement on credibility of witnesses
- § 13:43 — —Definition of terms
- § 13:44 — —Exhibits not entered into evidence
- § 13:45 —Particular instructions in a personal injury case
- § 13:46 — —Burden of proof
- § 13:47 — —Degree and standard of care
- § 13:48 — —Negligence per se
- § 13:49 — —Comparative fault and similar defenses

- § 13:50 — —Legal cause—Cause in fact
- § 13:51 — —Foreseeability
- § 13:52 — —Inferences; res ipsa loquitur
- § 13:53 — —Weight of expert testimony
- § 13:54 — —Damages
- § 13:55 — —Loss of chance of survival
- § 13:56 —Acceptance, modification, or refusal of tendered instruction by court
- § 13:57 — —Standard
- § 13:58 — — —Substance covered by other instructions
- § 13:59 — — —Instruction correct only in part
- § 13:60 — —When refusal is prejudicial error
- § 13:61 — —When error is waived
- § 13:62 —Objections to instructions given by judge
- § 13:63 — —Mandatory
- § 13:64 — —Time allowed for review of instructions
- § 13:65 — —Particular objections
- § 13:66 — — —Erroneous statement of law
- § 13:67 — — —Erroneous allocation of burden of proof
- § 13:68 — — —Conflicting instructions
- § 13:69 — — —Contentions of parties misstated
- § 13:70 — —Sufficiency of objection and preserving for appeal
- § 13:71 — —Sufficiency of curative instruction
- § 13:72 Additional or supplemental instructions in response to jury questions while deliberating
- § 13:73 Instruction when jury appears deadlocked

## **V. FORM OF VERDICT**

- § 13:74 General and special verdicts
- § 13:75 —Distinctions
- § 13:76 —Advisability of each form in a personal injury case
- § 13:77 Framing issues submitted for special verdicts
- § 13:78 —Omission as waiver of jury trial on issue
- § 13:79 —Objections
- § 13:80 —Effect of court's refusal to tender issue
- § 13:81 Requests for special findings
- § 13:82 —Findings that may be requested according to the issues in a personal injury case
- § 13:83 —Effect of inconsistency between findings and general verdict
- § 13:84 Presence of counsel when verdict rendered
- § 13:85 Right to poll the jury
- § 13:86 —Manner of polling

## TABLE OF CONTENTS

### **VI. ACCEPTANCE, REJECTION, OR MODIFICATION OF VERDICT**

- § 13:87 When issues may be resubmitted; inconsistency
- § 13:88 Quotient verdict
- § 13:89 Motion for judgment notwithstanding verdict
- § 13:90 —When appropriate in personal injury case
- § 13:91 —Form of motion
- § 13:92 — —Joinder with motion for new trial
- § 13:93 —Standard for granting
- § 13:94 Request for remittitur or additur of verdict
- § 13:95 —Assent of opposing party

### **VII. FINDINGS IN NONJURY CASE**

- § 13:96 Necessity
- § 13:97 —Findings contents; personal injury actions
- § 13:98 —Must be timely filed
- § 13:99 —Noncompliance by court
- § 13:100 —Power of court to accept or reject submitted findings
- § 13:101 —On appeal

## **CHAPTER 14. JUDGMENT**

### **I. ENTRY OF JUDGMENT**

- § 14:1 Manner of entry
- § 14:2 —Contents of entry
- § 14:3 —General and special verdicts
- § 14:4 —Written judgment
- § 14:5 —Findings of fact
- § 14:6 —Approval and entry of proposed written judgment
- § 14:7 Amendment of judgment
- § 14:8 Notice of judgment
- § 14:9 Effect of entry
- § 14:10 —Motion for new trial
- § 14:11 —Judgment notwithstanding the verdict
- § 14:12 —Relief from judgment

### **II. COSTS**

- § 14:13 Right of prevailing party to recover
- § 14:14 Effects of settlement offer
- § 14:15 Items taxed
- § 14:16 —Court fees

- § 14:17 —Expert witness fees
- § 14:18 —Depositions and discovery costs
- § 14:19 —Service of process and sheriff's fees
- § 14:20 —Interpreters

### **III. ATTORNEYS' FEES FOR PREVAILING PARTIES**

- § 14:21 Generally
- § 14:22 Statutory basis
- § 14:23 Conditions on granting
- § 14:24 —Effect of contingent fee contract
- § 14:25 —Appeal
- § 14:26 Discretion of the court

### **IV. INTEREST ON JUDGMENT**

- § 14:27 Accrues from date of judicial demand
- § 14:28 —Actions against the state
- § 14:29 —Medical malpractice actions
- § 14:30 —Interest on award for expert witness fees
- § 14:31 Amount and payment
- § 14:32 —Legal rate
- § 14:33 Award on costs

## **CHAPTER 15. POSTTRIAL MOTIONS AND APPEALS**

### **I. MOTION FOR NEW TRIAL**

- § 15:1 Nature of motion
- § 15:2 Peremptory grounds
  - § 15:3 —Newly discovered evidence
  - § 15:4 — —Proof required
  - § 15:5 — —Due diligence
  - § 15:6 — —Probability of different result
  - § 15:7 — —Noncumulative nature
  - § 15:8 — —Competent and material
  - § 15:9 —Juror misconduct
  - § 15:10 — —Manifest disregard of instructions
- § 15:11 Inconsistency in the jury verdict form
- § 15:12 Discretionary grounds
  - § 15:13 —Misconduct
  - § 15:14 —Admission or exclusion of evidence
  - § 15:15 —Verdict contrary to law

## TABLE OF CONTENTS

§ 15:16	—Comparative fault
§ 15:17	—Excessive or inadequate damages
§ 15:18	—Surprise
§ 15:19	Presentation of motion
§ 15:20	—Need for motion
§ 15:21	—Time
§ 15:22	—Form and content
§ 15:23	— —Affidavits
§ 15:24	— —Opposing affidavits
§ 15:25	Assignment when granted
§ 15:26	—Procedure regarding witness testimony and evidence
§ 15:27	Appeal
§ 15:28	Interlocutory judgments

## II. MOTION FOR RELIEF FROM JUDGMENT; JUDGMENT NOTWITHSTANDING THE VERDICT

§ 15:29	Motion for judgment notwithstanding verdict
§ 15:30	—When appropriate in a personal injury case
§ 15:31	—Relationship to motion for new trial
§ 15:32	— —Time for filing motion for new trial
§ 15:33	Grounds
§ 15:34	—Question of law
§ 15:35	—Duty, breach, and fault
§ 15:36	—Conflicting evidence
§ 15:37	—Witness credibility
§ 15:38	—Damage awards
§ 15:39	—Inconsistency
§ 15:40	Procedure
§ 15:41	—Time for filing
§ 15:42	—Form of motion
§ 15:43	Request for remittitur or reduction of verdict; Additur
§ 15:44	Request for remittitur or reduction of verdict— Different standard
§ 15:45	—Assent of opposing party
§ 15:46	Appeal

## III. APPEAL

§ 15:47	Determining whether to appeal a judgment in a personal injury case
§ 15:48	—Effect of standard of review
§ 15:49	—Advice to client

- § 15:50 — —Client decision in writing
- § 15:51 Standard of review
- § 15:52 —Findings of fact
- § 15:53 —Mixed questions of law and fact
- § 15:54 —Questions of law
- § 15:55 —Discovery
- § 15:56 —Directed verdicts
- § 15:57 —Negligence and standard of care
- § 15:58 —Comparative fault and similar defenses
- § 15:59 —Unreasonable risk of harm
- § 15:60 —Medical malpractice
- § 15:61 —Qualifications of expert
- § 15:62 —Damages
- § 15:63 — —Excessiveness or inadequacy
- § 15:64 —Administrative agencies; licensing boards
- § 15:65 Record on appeal—Designating and reviewing
- § 15:66 — —Assignment of errors and statement of points
- § 15:67 — —Correction
- § 15:68 — —Have objections been preserved?
- § 15:69 Potential costs and delays of appeal
- § 15:70 Will filing appeal encourage settlement?
- § 15:71 Order of appeal
- § 15:72 —Obtaining an order
- § 15:73 —Contents of order
- § 15:74 —Notice of appeal
- § 15:75 —Time—Suspensive appeal
- § 15:76 — —Devolutive appeal
- § 15:77 —Form
- § 15:78 Additional considerations
- § 15:79 —Abandonment
- § 15:80 —Answer
- § 15:81 —Cross appeals
- § 15:82 —Frivolous appeals
- § 15:83 —Limitations on appeals

## **CHAPTER 16. COLLECTING THE JUDGMENT**

### **I. ENFORCING THE JUDGMENT**

- § 16:1 Recourse against defendant's liability insurer
- § 16:2 —Suit against insurer alone
- § 16:3 — —Effect of "no action" clause
- § 16:4 — —Settlement with tortfeasor

## TABLE OF CONTENTS

§ 16:5	— —Effect of judgment against insured of insurer
§ 16:6	— — —Excess judgment
§ 16:7	— —Default judgment
§ 16:8	— — —Default judgment against insured
§ 16:9	— — —Default judgment against insurer
§ 16:10	—Maintenance of action by insured or its insurer as subrogee
§ 16:11	— —Notice
§ 16:12	—Insurance company's defenses
§ 16:13	— —Lack of coverage
§ 16:14	— — —Waiver
§ 16:15	— —Cancellation of policy
§ 16:16	— —Lack of notice
§ 16:17	— —Breach of cooperation clause
§ 16:18	Recourse when defendant is uninsured or underinsured
§ 16:19	Supplemental proceedings
§ 16:20	—Examination of judgment debtor
§ 16:21	— —Proper court
§ 16:22	— —Motion, service, and order
§ 16:23	— —The examination
§ 16:24	— —Costs
§ 16:25	— —Refusal to appear
§ 16:26	—Reachable assets
§ 16:27	Execution
§ 16:28	—Wrongful or improper seizure

## II. COLLECTION FROM MULTIPLE DEFENDANTS

§ 16:29	Solidary liability
§ 16:30	—Distinguished from theories of vicarious liability
§ 16:31	—Independent tortfeasor and doctor committing malpractice
§ 16:32	—Practical effect
§ 16:33	Contribution among tortfeasors
§ 16:34	—Liability for pro-rata share
§ 16:35	—Inability of one to pay
§ 16:36	—Effect of settlement by one tortfeasor
§ 16:37	—Separate action to enforce
§ 16:38	— —Time for commencing
§ 16:39	— —Binding effect of prior judgment in favor of injured party
§ 16:40	— — —Prescription
§ 16:41	— —Cross claims in underlying action
§ 16:42	— —Complaint for contribution

- § 16:43 — — —Medical malpractice
- § 16:44 — — —Answer and defenses
- § 16:45 — — —Evidence
- § 16:46 — — —Judgment

### **III. SATISFACTION AND RELEASE OF JUDGMENT**

- § 16:47 Satisfaction in lump sum or in installments
- § 16:48 Form of satisfaction or release
- § 16:49 Payment to clerk as satisfaction

### **IV. PROPERLY APPLYING THE PROCEEDS**

- § 16:50 Joint check to attorney and client and recovery of fee
- § 16:51 —Proper use of trust account
- § 16:52 — —Discharge of attorney's lien
- § 16:53 — —Discharging liens of health care providers and the like
- § 16:54 — —Subrogation interests in award
- § 16:55 Advising the client on investment of proceeds
- § 16:56 —Attorney-client privilege
- § 16:57 —Assuring that judgment is applied to continuing care needs

## **CHAPTER 17. SAMPLE CASES**

- § 17:1 Petition for damages: Auto accident—Rear-end collision
- § 17:2 Petition for damages: Slip and fall in supermarket
- § 17:3 Plaintiff interrogatories to defendant auto insurance company
- § 17:4 Summation by plaintiff: Where two accidents produce soft tissue damages
- § 17:5 Plaintiff rebuttal: Where two accidents cause soft tissue injuries
- § 17:6 Class action petition: Recovery of damages caused by explosion
- § 17:7 Plaintiff request for production of documents in plant explosion case
- § 17:8 Plaintiff interrogatories to defendant in plant explosion case
- § 17:9 Complaint for medical malpractice and request for medical review panel: Failure to diagnose
- § 17:10 Plaintiff interrogatories to physician defendant: Medical negligence case
- § 17:11 Plaintiff request for production of documents to physician defendant: Medical negligence case



## TABLE OF CONTENTS

§ 17:12	Plaintiff request for interrogatories to be answered by hospital defendant: Medical negligence case
§ 17:13	Plaintiff request for production of documents to hospital defendant: Medical negligence case
§ 17:14	Sample direct examination of plaintiff in medical negligence case
§ 17:15	Sample direct examination of medical expert with reference to authoritative medical text
§ 17:16	Deposition examination of adverse medical expert with reference to authoritative text
§ 17:17	Sample cross-examination of adverse medical witness with reference to authoritative text
§ 17:18	Sample cross-examination of adverse medical witness from authoritative text
§ 17:19	Products liability petition against gun manufacturers, retailers and organizations
§ 17:20	Products liability/premises liability petition: Escalator accident
§ 17:21	Plaintiff's interrogatories and request for production to building owner and operator: Escalator accident
§ 17:22	Petition for wrongful death and survival action: Pedestrian-police car collision
§ 17:23	Petition for injunction and order to preserve evidence in automobile collision case
§ 17:24	Order to preserve evidence in pedestrian/police car collision
§ 17:25	Petition for damages: Auto accident/highway design defect suit
§ 17:26	Second amending petition: Auto accident/highway design defect case
§ 17:27	Third amending petition: Auto accident/highway design defect
§ 17:28	Plaintiff's request for production to State DOTD: Auto accident/highway design defect
§ 17:29	Plaintiff's request for interrogatories to State DOTD: Auto accident/highway design defect
§ 17:30	Petition for damages: Auto/train collision
§ 17:31	Jury order
§ 17:32	First supplemental petition: Auto/train collision
§ 17:33	Plaintiff interrogatories to defendant railroad company
§ 17:34	Plaintiff's request for production of documents to defendant railroad company
§ 17:35	Petition for wrongful death and survival damages: Auto/train collision
§ 17:36	Defendant State of Louisiana DOTD's answer to

## LOUISIANA PERSONAL INJURY PRACTICE GUIDE

- petition for wrongful death and survival damages:  
Auto/train collision
- § 17:37 Defendant railroad and railroad employees' exceptions to plaintiff's petition for wrongful death and survival damages: Auto/train collision
- § 17:38 Petition for appointment of tutrix over minor plaintiffs
- § 17:39 Order appointing tutrix over minor plaintiffs
- § 17:40 Letters of tutorship
- § 17:41 Petition to place minor's property in trust
- § 17:42 Trust created for minor's benefit
- § 17:43 Order authorizing deposit of minor's property in trust
- § 17:44 Petition for authority to settle minor's claim
- § 17:45 Judgment authorizing settlement of minor's claim
- § 17:46 Settlement agreement: Curator on behalf of interdict
- § 17:47 Release
- § 17:48 Petition for authority to manage settlement funds on behalf of interdict
- § 17:49 Order authorizing planned management of settlement
- § 17:50 Petition for Concursus
- § 17:51 Answer to petition for concursus
- § 17:52 Defendant's requested jury charges in automobile accident lawsuit
- § 17:53 Plaintiffs' memorandum in support of motion for partial summary judgment in automobile accident case

### **Table of Laws and Rules**

### **Table of Cases**

### **Index**