Table of Contents

Volume 1

CHAPTER 1. ESTABLISHING THE ATTORNEY/ CLIENT RELATIONSHIP AND INVESTIGATING THE CASE

§ 1:1 Scope note
§ 1:2 Preliminary considerations
§ 1:3 —Meeting the client
§ 1:4 —Preparation for the first meeting with the client
§ 1:5 —The first meeting with the client
§ 1:6 — —The client interview questionnaire and interview checklist
§ 1:7 —Determining a cause of action
§ 1:8 —Establishing a right of action
§ 1:9 —Evaluating the evidence
§ 1:10 — —Witnesses
§ 1:11 —Assessing damages
§ 1:12 —Calculating the costs
§ 1:13 —Consolidating or going alone
§ 1:14 —Selecting the forum
§ 1:15 Objectives of preliminary investigation
§ 1:16 —Filing a well-founded complaint
§ 1:17 —Identify other plaintiffs and counsel
§ 1:18 —Identifying the defendants
§ 1:19 —Identifying co-defendants
§ 1:20 —Identifying the insurers
§ 1:21 —Identifying other resources
§ 1:22 —Finding liability precedents
§ 1:23 —Finding damages awards precedents
§ 1:24 —Assembling the experts
§ 1:25 Objectives of the fact investigation
§ 1:26 —Commanding the investigation
§ 1:27 —Assembling the team
§ 1:28 —Mapping the defendant
§ 1:29 —Accessing and securing the scene
§ 1:30 —Protecting the evidence
§ 1:31 —Tapping into ancillary resources
§ 1:32 —Investigating with traditional methods, including professional investigators
§ 1:33 —Sharing findings
§ 1:34 Computers, the internet and the future of investigations

§ 1:35 —Learning what is available
§ 1:36 —Accessing what is available
§ 1:37 —Protecting what is proprietary
§ 1:38 —Profiling the opposing party
§ 1:39 —Profiling the court and circuit
§ 1:40 —Establishing jurisdiction and venue
§ 1:41 —Establishing causation
§ 1:42 —Establishing industry knowledge
§ 1:43 —Verifying discovery responses
§ 1:44 —Exposing fraud and spoliation
§ 1:45 Protecting client interests and information
§ 1:46 —Guarding client information
§ 1:47 —Guarding work product and attorney-client information
§ 1:48 —Encrypting out-of-office communications
§ 1:49 —Protecting in-house communications
§ 1:50 —Protecting the fax machine
§ 1:51 —Protecting the cell phone
§ 1:52 —Protecting the "Palm Pilot"
§ 1:53 —Protecting yourself
§ 1:54 Use of the findings
§ 1:55 Practice checklist
§ 1:56 Illustrative forms
§ 1:57 —Follow-up letter to client regarding initial appointment
§ 1:58 —Interview questionnaire I
§ 1:59 —Client interview questionnaire II
§ 1:60 —Interview checklist
§ 1:61 —Letter confirming limited investigation undertaking
§ 1:62 —Instructions to the plaintiff from the plaintiff's attorney
§ 1:63 —Motion requesting order to preserve evidence and order granting motion
§ 1:63.30 —Itemized form letter
§ 1:63.70 —Proof of loss form letter
§ 1:64 Outline of major steps in processing a lawsuit

CHAPTER 2. CRITERIA FOR CASE SELECTION

§ 2:1 Scope note
§ 2:2 Why become a personal injury lawyer
§ 2:3 Business principles in case selection
§ 2:4 Strategy and objectives of case selection
§ 2:5 Elements of a successful case
§ 2:6 Case acceptance rule # 1: Every case must have liability, causation, damages and coverage
§ 2:7 Case acceptance rule # 2: If only one element is unknown, proceed with caution
§ 2:8 Secondary considerations

§ 2:9 Procedures for case evaluation
§ 2:10 Evaluating liability
§ 2:11 —Burden of proof
§ 2:12 —Negligence: The liability factor
§ 2:13 —Proximate cause
§ 2:14 —Culpable conduct
§ 2:15 —Considerations when potential client has amnesia
§ 2:16 —Considerations when potential client is an infant or small child
§ 2:17 Evaluating damages
§ 2:18 —General damages considerations
§ 2:19 —Sources for evaluating value
§ 2:20 — —General insurance coverage considerations
§ 2:21 — —Supplemental under-insured motorist coverage (SUM)
§ 2:22 — —Uninsured motorist coverage
§ 2:23 —Non-collectable judgment
§ 2:24 —Assets beyond insurance
§ 2:25 —Bad faith negotiation cases
§ 2:26 Economic factors in case selection
§ 2:27 —Computing the potential fee
§ 2:28 —The contingent fee agreement
§ 2:29 —What makes a case profitable
§ 2:30 —How to compute the value of time
§ 2:31 — —Determine the hourly value of an individual's work
§ 2:32 —How much time is really spent on a case
§ 2:33 —Stage One: Pre-litigation settlements
§ 2:34 — —Stage One tasks
§ 2:35 —Special circumstances tasks
§ 2:36 —Stage Two: Early litigation settlements
§ 2:37 — —Early litigation tasks
§ 2:38 —Stage Three: Post-discovery settlements
§ 2:39 — —Tasks to complete discovery
§ 2:40 —Stage Four: Court-assisted settlements
§ 2:41 — —Tasks prior to jury selection
§ 2:42 —Stage Five: Trial
§ 2:43 — —Trial tasks
§ 2:44 —Exceptions to economic case selection rules
§ 2:45 Summary and practice pointers checklist

CHAPTER 3. FORUM SELECTION: ISSUES OF VENUE, JURISDICTION, FORUM NON CONVENIENS AND CHOICE OF LAW

§ 3:1 Scope note
§ 3:2 Forum selection from a plaintiff's perspective
§ 3:3 —Practical and strategic considerations in forum selection
§ 3:4 —Assessment of defendants' potential attacks on venue and jurisdiction
§ 3:5 Waiver of objections to jurisdiction and venue

§ 3:6 Venue as a threshold issue
§ 3:7 —Venue from a plaintiff's perspective
§ 3:8 —Dismissal or transfer of suit filed in improper venue
§ 3:9 —Sanctions against plaintiff for filing in improper venue
§ 3:10 — —Judge shopping
§ 3:11 Jurisdiction
§ 3:12 —Subject matter jurisdiction
§ 3:13 —Personal jurisdiction
§ 3:14 — —Basis component of personal jurisdiction
§ 3:15 — —Process component of personal jurisdiction
§ 3:16 —Defending against a motion to dismiss for lack of personal jurisdiction
§ 3:17 —Uncertainty surrounding legal analysis of personal jurisdiction
§ 3:18 The common law doctrine of forum non conveniens
§ 3:19 —Forum non conveniens in the federal courts
§ 3:20 —Forum non conveniens in state courts
§ 3:21 Choice of law
§ 3:22 Multidistrict litigation
§ 3:23 Class actions
§ 3:24 Modern communications technology
§ 3:25 Insurance coverage declaratory judgments
§ 3:26 Checklists of essential forum selection issues for plaintiffs' attorneys
§ 3:27 Illustrative forms
§ 3:28 —Affidavit by plaintiff's attorney in collision case, opposing defendant's motion for transfer [28 U.S.C.A. §§ 1391(A), 28 U.S.C.A. §§ 1404(A)]
§ 3:29 —Affidavit opposing defendant's motion for transfer, averring that witnesses enumerated in defendant's supporting affidavit unnecessary [28 U.S.C.A. § 1404(a)]
§ 3:30 —Affidavit of plaintiff's attorney in opposition to defendant's motion for transfer of action, averring that venue was proper in federal action against common carrier
§ 3:31 —Declaration of plaintiff's attorney opposing defendant's motion to transfer action ("convenience of witnesses" ground) (Cal. Code Civ. Proc., § 397, subd. (c))
§ 3:32 —Plaintiff's brief in opposition to defendants' motions to dismiss on grounds of forum non conveniens
§ 3:33 —Plaintiff's brief in products liability suit in opposition to defendant's motion to dismiss for lack of jurisdiction over non-resident manufacturer
§ 3:34 —Plaintiff's opposition to defendant's pre-trial motion for choice-of-law determination on comparative negligence rule to apply in state case

CHAPTER 4. LEGAL RESEARCH

§ 4:1 Scope note
§ 4:2 Analytical legal research defined

§ 4:3 Legal research benefits and costs
§ 4:4 —Reducing uncertainty and litigation risk
§ 4:5 —Higher settlement value case study
§ 4:6 —Sample research budget
§ 4:7 —Factors limiting research
§ 4:8 Professional duty to perform legal research
§ 4:9 Delegating research effectively
§ 4:10 —Recognizing the seven habits of highly effective research attorneys
§ 4:11 —Seven criteria for evaluating outsourced legal research companies
§ 4:12 —Mechanics of assigning the research project
§ 4:13 Overview of legal research techniques for tort litigation
§ 4:14 —Taking advantage of existing expertise
§ 4:15 —Legal research prior to filing the complaint
§ 4:16 —Assessment of damages and case valuation
§ 4:17 —Preliminary assessment of causes of action and defenses
§ 4:18 —Forum selection
§ 4:19 —Determining the statute of limitations
§ 4:20 —Drafting the demand letter, notice of claim, and complaint
§ 4:21 —Research in aid of discovery in tort actions
§ 4:22 —Legal research in support of motion practice
§ 4:23 —Legal research in support of settlement
§ 4:24 —Legal research in the heat of trial
§ 4:25 —Legal research for tort practice development
§ 4:26 Summary and practice pointers checklist
§ 4:27 Sample research assignment form

CHAPTER 5. PARTIES

§ 5:1 Scope note
§ 5:2 Strategic concerns
§ 5:3 The right plaintiff
§ 5:4 —Real party in interest, capacity to sue, and standing
§ 5:5 —The real party in interest
§ 5:6 — —Assignments of claims
§ 5:7 — —Subrogation
§ 5:8 —Capacity to sue
§ 5:9 —Capacity to be sued
§ 5:10 Injured child
§ 5:11 —Proper representation of an injured child
§ 5:12 —Citizenship and capacity to sue of representative
§ 5:13 —Types of representatives
§ 5:14 Incapacitated adults
§ 5:15 Loss of consortium
§ 5:16 —Eligible loss of consortium claims
§ 5:17 —Choice of law
§ 5:18 —Extended family members
§ 5:19 —Considerations

§ 5:20 Wrongful death
§ 5:21 —Procedure
§ 5:22 —Eligibility to sue
§ 5:23 —Limits on wrongful death recovery
§ 5:24 —Survival actions
§ 5:25 Multiple plaintiffs
§ 5:26 —Liberal standard for permissive plaintiffs joinder
§ 5:27 —Strategic concerns
§ 5:28 —Compulsory joinder
§ 5:29 —Misjoinder
§ 5:30 —Nonjoinder
§ 5:31 Choosing the right defendant
§ 5:32 —The pros and cons of naming multiple defendants
§ 5:33 —Defeating diversity
§ 5:34 —Learned intermediary problems
§ 5:35 — —Impact on party liability
§ 5:36 — —Exceptions to the learned intermediary doctrine
§ 5:37 Parent corporation liability
§ 5:38 —Limited liability principle
§ 5:39 —Control and domination of the subsidiary by the parent
§ 5:40 —Subsidiary as an agent of the parent
§ 5:41 —Nailing down the correct defendant
§ 5:42 When to use John Does
§ 5:43 Expansion of litigation to new parties
§ 5:44 Interpleader
§ 5:45 —Statutory interpleader
§ 5:46 —Rule interpleader
§ 5:47 —Challenging interpleader
§ 5:48 Intervention
§ 5:49 —Intervention as of right
§ 5:50 —Permissive intervention
§ 5:51 —Procedure for intervention
§ 5:52 Substitution of parties
§ 5:53 —Transfer of interest initiated by a party
§ 5:54 Third-party practice
§ 5:55 —Worker's compensation issues
§ 5:56 —Liabilities
§ 5:57 —Joint tortfeasors
§ 5:58 —Insurers/guarantors
§ 5:59 Practice pointers checklist
§ 5:60 Illustrative forms
§ 5:61 —Motion to amend plaintiff's complaint to assert claim against third-party defendant [Fed. R. Civ. P. 14]
§ 5:62 —Notice of motion and motion for leave to amend complaint—Copy not served with motion [Fed. R. Civ. P. 15(a)]
§ 5:63 —Motion for leave to amend complaint—Asserting lack of knowledge of facts at time of original complaint [Fed. R. Civ. P. 15(a)]

§ 5:64 —Motion for substitution of plaintiff and dropping certain defendants [Fed. R. Civ. P. 17(a)]
§ 5:65 —Petition for appointment of guardian ad litem for minor plaintiffs to institute action, consent, and affidavit [Fed. R. Civ. P. 17(c)]
§ 5:66 —Petition for appointment of guardian ad litem for incompetent plaintiff to institute action [Fed. R. Civ. P. 17(c)]
§ 5:67 —Consent of proposed guardian ad litem for plaintiff [Fed. R. Civ. P. 17(c)]
§ 5:68 —Allegation of reason for omitting party who should be joined under Rule 19—Because not subject to jurisdiction of court [Fed. R. Civ. P. 19(c)]
§ 5:69 — —Because joinder would deprive court of jurisdiction [Fed. R. Civ. P. 19(c)]
§ 5:70 —Allegation joining as defendant a party who must be joined but who refuses to join as plaintiff—General form [Fed. R. Civ. P. 19(a) and (b)]
§ 5:71 —Motion by plaintiff to join additional party defendants under Rule 19 and order [Fed. R. Civ. P. 21]
§ 5:72 —Complaint joining several plaintiffs asserting rights to relief severally arising out of automobile collision [Fed. R. Civ. P. 20(a)]
§ 5:73 —Complaint joining principal and agent as defendants in alternative [Fed. R. Civ. P. 20]
§ 5:74 —Motion by plaintiffs to join additional party defendants and to file supplemental complaint [Fed. R. Civ. P. 21]
§ 5:75 —Motion by plaintiff to join additional party defendants under Rule 19 and order [Fed. R. Civ. P. 21]
§ 5:76 —Memorandum in opposition to motion for intervention—Another form [Fed. R. Civ. P. 24(c)]
§ 5:77 —Motion by executor of plaintiff—Substitution as plaintiff [Fed. R. Civ. P. 25(a)(1)]
§ 5:78 —Motion by plaintiff—Substitution of executor of deceased defendant [Fed. R. Civ. P. 25(a)(1)]
§ 5:79 — —Substitution of guardian of defendant who has become incompetent [Fed. R. Civ. P. 25(b)]
§ 5:80 —Motion for substitution as plaintiff [Fed. R. Civ. P. 25(c)]

CHAPTER 6. THE COMPLAINT

§ 6:1 Scope note
§ 6:2 Strategies, objectives, and preliminary considerations in drafting complaints
§ 6:3 —Audience considerations, generally
§ 6:4 —Exposing public interest concerns to the public and press
§ 6:5 —Educating the court and anticipating dismissal motions
§ 6:6 —Creating a settlement environment
§ 6:7 —Controlling the answer and grounds of defense

§ 6:8 —Discovery scope implications
§ 6:9 —"Tipping plaintiff's hand"
§ 6:10 —Unavailable and unknown factual information
§ 6:11 —The relation back rule
§ 6:12 Pleading requirements, generally; Notice pleading
§ 6:13 "Short and plain statement" requirement; Facts and conclusions
§ 6:14 Pleading jurisdiction
§ 6:15 —Diversity of citizenship
§ 6:16 —Federal question
§ 6:17 —Special statutes
§ 6:18 Pleading alternatively, hypothetically, or inconsistently
§ 6:19 Construction; "Substantial justice"
§ 6:20 Rule 11 certification
§ 6:21 —Reasonable inquiry under the circumstances
§ 6:22 —Anticipation of future evidentiary support
§ 6:23 Exhibits to the complaint
§ 6:24 Adoption by reference
§ 6:25 Pleading of particular matters: Capacity, authority, and legal existence
§ 6:26 —Fraud, mistake, and condition of mind
§ 6:27 —Time and place
§ 6:28 —Special damages
§ 6:29 —Conditions precedent
§ 6:30 —Official document or act; Judgment or decision from another court
§ 6:30.50 Pleading directed at affirmative defenses
§ 6:31 Style and organization of the complaint
§ 6:32 —Designation of parties, generally
§ 6:33 —Fictitious name for plaintiff or defendant
§ 6:34 —Paragraphs and counts
§ 6:35 Demand for judgment and request for relief
§ 6:36 Demand for a jury trial
§ 6:37 Amendments to the complaint
§ 6:38 —Relation back of amendments
§ 6:39 Supplements to the complaint
§ 6:40 Challenges to the sufficiency of the complaint under Fed. R. Civ. P. 12
§ 6:41 Checklist of considerations in drafting and filing complaint
§ 6:42 Illustrative forms
§ 6:43 —Complaint for auto collision and personal injury
§ 6:44 —Complaint for product liability
§ 6:45 —Complaint for wrongful termination based on public policy: Refusing to participate in illegal conduct
§ 6:46 —Complaint for medical negligence—State jurisdiction

CHAPTER 7. REMOVAL TO FEDERAL COURT

§ 7:1 Scope note

§ 7:2 New developments
§ 7:3 Preliminary considerations
§ 7:4 Overview of removal jurisdiction
§ 7:5 Diversity jurisdiction as basis for removal
§ 7:6 —Joinder of nondiverse parties
§ 7:7 — —Fraudulent joinder
§ 7:8 — —Fraudulent misjoinder
§ 7:9 — —Post-removal joinder
§ 7:10 — —Dismissal of nondiverse party
§ 7:11 —Fictitiously designated defendants
§ 7:12 —Amount in controversy
§ 7:13 — —Aggregation of damages in multiple plaintiff cases
§ 7:14 — —Class Action Fairness Act of 2005
§ 7:15 Federal question jurisdiction as basis for removal
§ 7:16 —Preemption and removal under particular statutes
§ 7:17 —Pendent jurisdiction of state claims
§ 7:18 Separate and independent claims
§ 7:19 Joint removal right and third-party defendants
§ 7:20 Waiver by defendant of right to remove
§ 7:21 Sua sponte removal
§ 7:21.50 Procedure for removal, generally; notice of removal
§ 7:22 Time for removal
§ 7:23 —One-year limitation on removal in certain diversity cases
§ 7:24 Venue
§ 7:25 Remand—Timing of, and grounds for, motion
§ 7:26 — —Lack of diversity
§ 7:27 —Sua sponte remand
§ 7:28 —Waiver by non-removing party and estoppel
§ 7:29 —Attorney's fees and costs
§ 7:30 —Procedure for requesting fees and costs
§ 7:31 —Binding effect of federal rulings in state court
§ 7:32 Summary and practice pointers checklist
§ 7:33 Illustrative forms-Plaintiffs' Memorandum in Support of Motion to Remand
§ 7:34 Sample motion to remove

CHAPTER 8. MULTIDISTRICT LITIGATION

§ 8:1 Scope note
§ 8:1.50 Author's note
§ 8:2 When MDL may be considered
§ 8:3 How to form an MDL
§ 8:4 Preliminary definitions and practice considerations
§ 8:5 Petition to the judicial panel on multidistrict litigation
§ 8:6 The Judicial Panel on Multidistrict Litigation
§ 8:7 The office of the panel/Clerk
§ 8:8 Statistical background
§ 8:9 Procedure before Panel

§ 8:10 Who decides to transfer?
§ 8:11 Identification of topic
§ 8:12 Coordination of efforts
§ 8:13 Form of motion and other filings
§ 8:14 —Form
§ 8:15 —Caption and headings
§ 8:16 —Page limitations
§ 8:17 —Body
§ 8:18 —Service
§ 8:18.50 Corporate disclosure statement
§ 8:19 Establishment of MDL
§ 8:20 —Selection of court
§ 8:21 —Initial contact
§ 8:22 Formation of the MDL
§ 8:23 —Assignment to single judge
§ 8:23.50 — —The effect of the multiparty, multiforum trial jurisdiction act of 2002 on multidistrict litigation
§ 8:24 — —Conflict free judge, investment portfolio
§ 8:25 —Defining the related litigation
§ 8:26 —Role of U.S. magistrates and special masters
§ 8:27 —Role of counsel
§ 8:28 — —Liaison counsel
§ 8:29 — —Lead counsel
§ 8:30 — —Committees
§ 8:31 — —Compensation
§ 8:32 Transfer of actions
§ 8:33 —Conditional transfer order
§ 8:34 — —Transferor court role
§ 8:35 — — —Interim action by court
§ 8:36 — —Status conferences
§ 8:37 — — —Dismissal for want of prosecution inappropriate
§ 8:38 — —Transferee court role
§ 8:39 —Partial transfers
§ 8:40 Procedure
§ 8:41 —Initial conference
§ 8:42 Orders
§ 8:43 —Initial case management plan and order
§ 8:44 —Scheduling order
§ 8:45 Discovery
§ 8:46 —Discovery plan
§ 8:47 —Disclosure
§ 8:48 — —Resolution of discovery disputes
§ 8:49 — —Privilege
§ 8:50 — —Protective orders
§ 8:51 —Documents
§ 8:52 — —Depository
§ 8:53 — —Analysis
§ 8:54 — —Objective/subjective coding

§ 8:55 — —Identification
§ 8:56 — —Evidentiary foundations
§ 8:57 — —Computerized data
§ 8:58 — —Non-party discovery
§ 8:59 —Depositions
§ 8:60 —Coordination
§ 8:61 —Scheduling
§ 8:62 —Cross-notice
§ 8:63 —Discovery abuse
§ 8:64 — —Control
§ 8:65 — —Sanctions
§ 8:65.50 The effect of the multiparty multiforum act on removal jurisdiction in multidistrict litigation
§ 8:66 Choice of law; Multidistrict litigation and the law of the case
§ 8:67 Motions
§ 8:68 —Summary judgment
§ 8:69 — —Standard
§ 8:70 — —Binding on all cases
§ 8:71 —Motions in limine
§ 8:72 — —Appropriate forum
§ 8:73 — —*Daubert*/*Joiner*/*Kumho* challenges
§ 8:74 Remand of actions
§ 8:75 —Role of transferee court
§ 8:76 —Role of transferor court
§ 8:77 —Role of counsel
§ 8:78 Trial
§ 8:78.30 —The effect of the multiparty multiforum act on triable issues in multidistrict litigation
§ 8:79 —Reconsideration and redefinition of counts of the complaint
§ 8:80 —Proposed jury instructions
§ 8:81 —Expediting evidentiary presentation
§ 8:82 —MDL depositions at trial
§ 8:83 Appellate issues
§ 8:84 Appendix A—Cumulative summary of multidistrict litigation
§ 8:85 Appendix B—Listing all active MDL dockets as of December 31, 2002
§ 8:86 Appendix C—Pretrial order 22 from In re Diet Drugs (phentermine/fenfluramine/dexfenfluramine) products liability litigation MDL-1203
§ 8:87 Appendix D—Order No. 2, designation of lead counsel
§ 8:88 Appendix E—Order establishing plaintiff's litigation expense fund
§ 8:89 Appendix F—Order modifying amount of common benefit fund assessment
§ 8:90 Appendix G—Pretrial and revised case management order

CHAPTER 9. MASS TORT CLASS ACTIONS

§ 9:1 Scope note
§ 9:2 Background of the mass tort class action
§ 9:3 Class certification criteria and procedure under Federal Rule 23: A short course on the basics
§ 9:4 Numerosity under Rule 23(a)(1)
§ 9:5 Commonality under Rule 23(a)(2)
§ 9:6 Typicality under Rule 23(a)(3)
§ 9:7 Adequacy of representation/appointment of class counsel under Rule 23(a)(4) and Rules 23(g) and (h)
§ 9:8 Criteria for Rule 23(b)(1) and Rule 23(b)(2) certification
§ 9:9 The Rule 23(b)(1) "limited fund" class
§ 9:10 The Rule 23(b)(1)(b) standard in the punitive damages context: The "limited punishment" theory
§ 9:11 Rule 23(b)(3) criteria: Predominance, superiority, and manageability
§ 9:12 Mixing and matching: The "hybrid" class structure
§ 9:13 Issue certification" and subclassing under Rule 23(c)(4) and (c)(5)
§ 9:14 Class action notice criteria, content, and dissemination under Rule 23(c)(2)
§ 9:15 Corrective/protective class notice under Rule 23(d)(1)(B)
§ 9:16 The court's authority to regulate communications with class members
§ 9:17 Opt-out rights of class members
§ 9:18 Integrating class techniques into progressive plaintiffs' tort practice
§ 9:19 *Amchem* and *Ortiz*: The Supreme Court establishes new ground rules for the certification and settlement of mass tort class actions
§ 9:20 *Amchem* reaffirms the class action's utility in consumer tort cases
§ 9:21 What goes around comes around: *Amchem*/*Ortiz* accelerated a trend toward state court class actions that culminated in the Class Action Fairness Act of 2005 ("CAFA") expansion of federal diversity jurisdiction over class actions
§ 9:22 Post-*Amchem* and *Ortiz* settlement classes survive
§ 9:23 Post-*Amchem* and *Ortiz* litigation and trial classes
§ 9:24 Forum selection: Federal vs. state
§ 9:25 Standing to assert non-resident class members' claims in state court nationwide classes
§ 9:26 The Class Action Fairness Act of 2005 ("CAFA")
§ 9:27 —Effective date of CAFA
§ 9:28 —Findings and purposes of CAFA
§ 9:29 —The "consumer class action bill of rights"
§ 9:30 —Pre-CAFA federal class action jurisdiction
§ 9:31 —CAFA expands the diversity jurisdiction of federal courts
§ 9:32 —CAFA's single-state exception for in-state defendants, Part II

§ 9:33 CAFA "mass actions"
§ 9:34 —Expansion of removal, mass actions, and appeals of remand orders
§ 9:35 —Judicial conference study of, and report on, class action settlements
§ 9:36 —Everything you know about CAFA may be wrong: Provisions of earlier versions of bill that disappeared from CAFA
§ 9:37 —CAFA's impact on judicial caseload
§ 9:38 CAFA's constitutional/federalism concerns
§ 9:39 Choice-of-law in the multistate class action context
§ 9:40 The fate of similar class actions in different courts
§ 9:41 Federal-state cooperation and coordination
§ 9:42 Binding effect of class adjudication on full faith and credit
§ 9:43 Tolling the statute of limitations
§ 9:44 Class action trial structures and trial plans
§ 9:45 —Liability trial plans; severing and certifying generic causation: *Bendectin* and *Velsicol*
§ 9:46 The *Exxon Valdez* four-phase trial plan
§ 9:47 The *Copley* "albuterol" trial plan
§ 9:48 *Naef v. Masonite*: Nationwide trial of defect, fraud, and warranty issues in state court
§ 9:49 *Spitzfaden v. Dow Corning*: A statewide personal injury class trial in state court
§ 9:50 The *Marcos* litigation: "trifurcation" and the validation of statistical damages methodology
§ 9:51 *Simon v. Philip Morris*: Rule 23(c)(4)(A), the Seventh Amendment, and a classwide punitive damages trial plan
§ 9:52 Class-wide determination of punitive damages
§ 9:53 *Jenkins* and *Cimino*: The alpha and omega of asbestos injury multi-phase trials
§ 9:54 Trial plan alternatives: *Jenkins* and *Marcos* try punitive damages on the "front end"
§ 9:55 Mass tort class action case study: The *Telectronics* litigation
§ 9:56 The *Telectronics* medical monitoring class and its subclasses
§ 9:57 The telectronics negligence subclass structure
§ 9:58 Strict *Telectronics* liability subclasses
§ 9:59 Policy considerations articulated by the *Telectronics* court
§ 9:60 Summary jury trial and settlement of the *Telectronics* litigation
§ 9:61 Settlement, take 1: The *Telectronics* mandatory class settlement fails to survive *Ortiz* on appeal
§ 9:62 Settlement, take 2: The *Telectronics* class settlement is approved on a Rule 23(b)(3) opt-out basis
§ 9:63 The *Diet Drugs* litigation: 1997–2002
§ 9:64 The *Diet Drugs* court's medical monitoring class certification decision and its progeny
§ 9:65 The *Diet Drugs* court denies approval to a partial limited fund settlement

§ 9:66 The *Diet Drugs* court approves a $4.75 billion multiple opt-out class settlement
§ 9:67 Appeals from class certification orders: Rule 23(f) standards and evolving jurisprudence
§ 9:68 Class action attorneys' fees
§ 9:69 to 9:71 *[Deleted]*

CHAPTER 10. *[Reserved]*

CHAPTER 11. ALTERNATIVE DISPUTE RESOLUTION

§ 11:1 Scope note
§ 11:2 An overview of ADR for the personal injury plaintiff's lawyer
§ 11:3 Advantages and disadvantages of using ADR
§ 11:4 Deciding whether to use ADR
§ 11:5 Types of ADR
§ 11:6 —Mediation
§ 11:7 —Arbitration
§ 11:8 —Summary jury trials
§ 11:9 —Moderated settlement conferences
§ 11:10 —Mini-trials
§ 11:11 —Hybrid forms of ADR
§ 11:12 Advantages and disadvantages of mediation
§ 11:13 Timing for mediation
§ 11:14 Getting to mediation
§ 11:15 —Factors to consider in selecting a mediator
§ 11:16 —Facilitative or evaluative approach
§ 11:17 —Expertise in the subject matter
§ 11:18 —Parties' trust in the mediator
§ 11:19 —Mediation format and protocol
§ 11:20 Preparing the attorney for mediation
§ 11:21 Preparing the client for mediation
§ 11:22 Preparing the mediator
§ 11:23 Overview of the mediation process
§ 11:24 Advocacy in mediation
§ 11:25 —Opening statements
§ 11:26 —The negotiation stage
§ 11:27 — —Identifying the settlement goal/valuing the case
§ 11:28 — —Decide upon an opening demand
§ 11:29 — —Make appropriate concessions
§ 11:30 — —Tactics for maximizing the recovery
§ 11:31 Settlement agreements
§ 11:32 Enforcing the settlement agreement
§ 11:33 Confidentiality agreements
§ 11:34 Confidentiality of the mediation process
§ 11:35 Advantages and disadvantages of binding arbitration
§ 11:36 Sources of arbitration

§ 11:37 The Federal Arbitration Act
§ 11:38 State statutory authority
§ 11:39 Federal preemption
§ 11:40 Procedure for compelling arbitration
§ 11:41 —Who decides whether the parties have agreed to arbitrate?
§ 11:42 Appealing the court's ruling compelling or denying arbitration
§ 11:43 Strategies for resisting enforcement of mandatory arbitration clauses
§ 11:44 Legal grounds for challenging mandatory arbitration clauses
§ 11:45 —Unconscionability
§ 11:46 —Lack of mutuality
§ 11:47 —Fraud
§ 11:48 —Waiver
§ 11:49 —Conflict with statutory causes of action
§ 11:49.50 —Duress
§ 11:50 —Non-arbitrability of certain claims
§ 11:50.50 —Invalidity under state arbitration laws
§ 11:51 Selecting an arbitrator
§ 11:52 Pre-hearing procedure
§ 11:53 —Pleadings/notice of claim
§ 11:54 —Preliminary hearing/scheduling conference
§ 11:55 —Discovery
§ 11:56 The hearing
§ 11:57 —Opening statements
§ 11:58 —Presenting the case
§ 11:59 —Evidentiary matters
§ 11:60 —Final arguments/post-submission briefs
§ 11:61 The award
§ 11:62 —Confirming the award
§ 11:63 —Judicial review of the award
§ 11:64 Class actions and arbitration
§ 11:65 Punitive damages and arbitration
§ 11:66 Advantages and disadvantages of summary jury trials
§ 11:67 —Implementing the summary jury trial
§ 11:68 —Procedure for summary jury trials/confidentiality
§ 11:69 —Advocacy in summary jury trials
§ 11:70 Mini-trials
§ 11:71 —Conducting a mini-trial
§ 11:72 Moderated settlement conferences
§ 11:73 —Procedure
§ 11:74 —Strategies
§ 11:75 Hybrid forms of ADR
§ 11:76 Summary and practice pointers checklist
§ 11:77 Illustrative form—Model mediation instructions to client
§ 11:78 —Preliminary settlement agreement

§ 11:79 —Petition to compel arbitration
§ 11:80 —Application to confirm arbitration award
§ 11:81 —Sample settlement agreement and release
§ 11:82 —High-low agreement for binding arbitration

CHAPTER 12. THEMING

§ 12:1 Scope note
§ 12:2 The pervasiveness and persuasiveness of themes
§ 12:3 Themes in daily life
§ 12:4 —Television and theater
§ 12:5 —Radio
§ 12:6 —Newspapers and other printed material
§ 12:7 —Marketing
§ 12:8 Importance of themes in jury trials
§ 12:9 Importance of themes in bench trial
§ 12:10 Crafting trial themes
§ 12:11 Regional or local expressions
§ 12:12 General themes
§ 12:13 Case-specific themes
§ 12:14 —Accountability/personal responsibility
§ 12:15 —Amputation
§ 12:16 —Blindness
§ 12:17 —Brain injury
§ 12:18 —Broken bones
§ 12:19 —Burns
§ 12:20 —Business/commerce
§ 12:21 —Circumstantial evidence
§ 12:22 —Civil assault
§ 12:23 —Contributory negligence
§ 12:24 —Contracts
§ 12:25 —Credibility
§ 12:26 —Damages
§ 12:27 —Deafness
§ 12:28 —Deception/fraud
§ 12:29 —Defamation
§ 12:30 —Defense themes
§ 12:31 —Discrimination
§ 12:32 —Dram shop action
§ 12:33 —Elderly
§ 12:34 —Expert witness
§ 12:35 —Fear of cancer
§ 12:36 —Incontinence
§ 12:37 —Insurance: Contract
§ 12:38 — —Suicide
§ 12:39 —Interested witness
§ 12:40 —Medical negligence
§ 12:41 —Mistake
§ 12:42 —Necessity

§ 12:43 —Negligence
§ 12:44 —Negligent hiring
§ 12:45 —Nursing home
§ 12:46 —Pain
§ 12:47 —Paralysis
§ 12:48 —Pollution
§ 12:49 —Premises
§ 12:50 —Product liability
§ 12:51 —Reputation
§ 12:52 —Scar
§ 12:53 —Wrongful death
§ 12:54 —Miscellaneous
§ 12:55 Summary and practice pointers checklist

Volume 2

CHAPTER 13. PROVISIONAL AND EXTRAORDINARY REMEDIES

§ 13:1 Scope footnote
§ 13:2 Strategy for use of provisional remedies in tort litigation
§ 13:3 Injunctions and restraining orders
§ 13:4 —Types of injunctions
§ 13:5 —Tort actions in which injunctions can be invoked
§ 13:6 — —In any tort action to preserve evidence before suit or pending trial
§ 13:7 — —Enjoining enforcement of unconstitutional statutes
§ 13:8 — —Assault, battery, and domestic violence
§ 13:9 — —Constitutional torts and civil rights cases
§ 13:10 — —Nuisance, environmental, and toxic torts
§ 13:11 — —Trespass
§ 13:12 — —Business torts
§ 13:13 —Parties
§ 13:14 —Grounds and requirements
§ 13:15 — —Burden of proof
§ 13:16 — —Irreparable injury or inadequate remedy at law
§ 13:17 — —Balancing hardships
§ 13:18 — —Likelihood of success on the merits
§ 13:19 — —Public interest
§ 13:20 — —Equitable defenses
§ 13:21 —Injunction proceedings—Jurisdiction
§ 13:22 — —Application or motion for injunctive relief
§ 13:23 — —Hearing
§ 13:24 — —Order
§ 13:25 — —Modification or dissolution of injunction
§ 13:26 —Enforcement
§ 13:27 —Due process concerns
§ 13:28 —Liability for wrongful injunctive relief; security bonds

§ 13:29 Mandamus—Overview and definitions
§ 13:30 —Using mandamus in tort litigation
§ 13:31 — —Challenging non-appealable trial court rulings in federal courts
§ 13:32 — —Challenging non-appealable trial court rulings in state courts
§ 13:33 —Mandamus in tort actions—Actions against non-judicial public officials
§ 13:34 —Substantive requirements
§ 13:35 — —Public official's failure to perform ministerial duty or usurpation of office
§ 13:36 — —Violation of clear legal right
§ 13:37 — —No adequate remedy at law
§ 13:38 — —Statutory review by writ of mandamus
§ 13:39 — —Defenses
§ 13:40 —Procedural requisites for mandamus
§ 13:41 — —Jurisdiction
§ 13:42 — —Parties
§ 13:43 — —Initiation of mandamus proceeding
§ 13:44 — —Hearing and burden of proof
§ 13:45 — —Content and issuance of the writ
§ 13:46 — —Enforcement and amendment
§ 13:47 — —Appeal
§ 13:48 Pre-judgment attachment and garnishment—Overview and definitions
§ 13:49 —Using attachment and pre-judgment garnishment as provisional remedies in tort actions
§ 13:50 —Constitutional due process limitations
§ 13:51 —Grounds for attachment or pre-judgment garnishment
§ 13:52 —Property subject to, or exempt from, pre-judgment attachment or garnishment
§ 13:53 —Jurisdiction to issue pre-judgment attachment or garnishment order
§ 13:54 —Pre-judgment attachment or garnishment procedure
§ 13:55 Checklists—Injunctions and restraining orders
§ 13:56 —Mandamus
§ 13:57 —Pre-judgment attachment and garnishment
§ 13:58 Illustrative forms—Complaint in federal court for temporary restraining order, preliminary injunction, and permanent injunction
§ 13:59 —Complaint, petition or declaration in state court for temporary restraining order, preliminary injunction, and permanent injunction prohibiting trespass and property damage
§ 13:60 —Motion and notice to advance and consolidate trial on merits with hearing on motion for preliminary injunction
§ 13:61 —Petition or application for writ of mandamus
§ 13:62 —Motion and notice in federal court for writ of attachment
§ 13:63 —Attachment affidavit—Tort claim against non-resident for property damage

§ 13:64 —Praecipe in federal court for issuance of writ of execution for sale of property seized under prior attachment
§ 13:65 —Motion and notice in federal court for writ of garnishment
§ 13:66 —Garnishment affidavit

CHAPTER 14. DISCOVERY STRATEGY AND PRIVILEGES

§ 14:1 Scope note
§ 14:2 Overview of discovery devices and strategies in using them
§ 14:3 Goals, objectives, and preliminary considerations
§ 14:4 Determine your ultimate and intermediate goals
§ 14:5 Determine the defendant's knowledge, contentions, and goals
§ 14:6 Investigation before and after filing
§ 14:7 The Internet
§ 14:8 Autopsies and other means to preserve evidence
§ 14:9 Pre-filing preparation
§ 14:10 Formal discovery before filing
§ 14:11 Depositions before action, pending appeal, or under urgent circumstances after filing
§ 14:12 Entry upon land and production of documents before suit
§ 14:13 Complaint
§ 14:14 Formal discovery after filing
§ 14:15 Scope of discovery
§ 14:16 Mandatory disclosures
§ 14:17 Meeting with opposing counsel regarding planning for discovery and mandatory disclosures
§ 14:18 Scheduling conference with the court and laying the groundwork for future discovery
§ 14:19 Sequence of discovery
§ 14:20 Cost of discovery as related to the value of the case
§ 14:21 Obtaining records and indexes thereto
§ 14:22 Resolution of legitimate discovery disputes
§ 14:23 The effect of *Daubert*
§ 14:24 Preserving testimony
§ 14:25 Interrogatories
§ 14:26 Requests for production of documents, entry on land, testing, and sampling
§ 14:27 Requests for admissions
§ 14:28 Depositions
§ 14:29 —Deposing defendant and defendant's witnesses
§ 14:30 Discovery from defendant's experts
§ 14:31 Independent medical examinations
§ 14:32 Motions for summary judgment
§ 14:33 Stipulations regarding discovery procedure
§ 14:34 Obtain both hard copy and electronic information
§ 14:35 Supplementation of disclosures and responses

§ 14:36 Privileges
§ 14:37 —Trade secrets
§ 14:38 —Work product protection
§ 14:39 —Attorney-client privilege
§ 14:40 —Physician-patient privilege
§ 14:41 —Privilege log
§ 14:42 —In-camera inspection
§ 14:43 Protective orders
§ 14:44 Confidentiality orders: Defendant has burden of proof
§ 14:45 —Confidentiality order usually not justified
§ 14:46 Discovery abuse
§ 14:47 —Stonewalling by the defendant
§ 14:48 —Dump truck discovery
§ 14:49 Motions to compel and sanctions
§ 14:50 Destruction and spoliation of evidence
§ 14:51 Summary and practice pointers checklist
§ 14:52 Illustrative forms—First set of interrogatories and request for production of documents
§ 14:53 —Notice to take deposition of expert witness
§ 14:54 —Notice of deposition in asbestos action
§ 14:55 —Machine (pinch point) case—Request for admissions
§ 14:56 — —Interrogatories
§ 14:57 —Interrogatories and requests for production to be filed with vehicle collision complaint
§ 14:58 —Notice of deposition in store trip and fall case
§ 14:59 —Motion in limine in defective wheelchair case
§ 14:60 Motion to compel inspection of vehicle

CHAPTER 15. DOCUMENT DISCOVERY

§ 15:1 Scope note
§ 15:2 Preliminary considerations—Fed. R. Civ. P. 34
§ 15:3 —What is a document?
§ 15:4 —Tailoring document discovery to the needs of the tort case
§ 15:5 —Potential uses of documents in tort cases
§ 15:6 Potential sources of documents
§ 15:7 —Existing work product
§ 15:8 —Public records
§ 15:9 —Mining the Web and its resources
§ 15:10 —Third party and experts' records
§ 15:11 —Records under the control of the defendant
§ 15:12 Formulating a document discovery plan and case management order
§ 15:13 —Imaged paper and electronic discovery
§ 15:14 —A numbering system that makes sense
§ 15:15 —Software considerations
§ 15:16 —Secrecy and confidentiality orders
§ 15:17 Drafting the document request

§ 15:17.50 —Electronic information requests
§ 15:18 Subpoenas to third parties
§ 15:19 Enforcing document discovery
§ 15:20 —Analyzing the response
§ 15:21 —Creating a record to support a motion to compel
§ 15:22 —Motions to compel
§ 15:23 Responding to defense requests for production
§ 15:24 —Client privacy and First Amendment concerns
§ 15:25 Summary and practice pointers checklist
§ 15:26 Illustrative forms—Confidentiality order
§ 15:27 —Request for production of documents—Propulsid case
§ 15:28 — —Slip and fall case
§ 15:28.50 Plaintiff's Request for Production—Contaminated produce case
§ 15:29 Illustrative forms—Letters to opposing counsel—Demanding response to requests for production
§ 15:30 — —Outlining deficiencies in responses to requests for production
§ 15:31 —Letter to plaintiff's employer demanding that employer maintain privacy of plaintiff's employment records

CHAPTER 16. INTERROGATORIES

§ 16:1 Scope note
§ 16:2 Interrogatory rules of procedure
§ 16:3 Practical objectives behind interrogatories
§ 16:4 Whether or not to send a particular interrogatory
§ 16:5 Strategies for determining areas of inquiry
§ 16:6 Nature of defendant as affecting strategy
§ 16:7 Interrogatories seeking factual basis behind contentions
§ 16:8 Interrogatory definitions and instructions
§ 16:9 Drafting interrogatories
§ 16:10 Answering interrogatories
§ 16:10.30 —Electronically stored information and other records
§ 16:10.70 —Supplementing interrogatory answers
§ 16:11 Expert interrogatories
§ 16:12 Limiting testimony based on interrogatory answers
§ 16:13 Scope of interrogatory requests
§ 16:14 Interrogatory objections
§ 16:15 Keeping track of interrogatories
§ 16:16 Summary and practice pointers checklist
§ 16:17 Illustrative forms—Employment discrimination interrogatories
§ 16:18 —Automobile torts interrogatories
§ 16:19 —Medical malpractice interrogatories
§ 16:20 —Products liability interrogatories

CHAPTER 17. REQUESTS FOR ADMISSION

§ 17:1 Scope note

§ 17:2 Purpose of requests for admission
§ 17:3 Scope of requests for admission
§ 17:3.50 —Electronically stored information
§ 17:4 Distinctions between Fed. R. Civ. P. 36 requests for admission and other discovery devices
§ 17:5 Using requests for admission in conjunction with discovery devices
§ 17:6 Steps to consider prior to drafting requests for admission
§ 17:7 Effective drafting considerations
§ 17:8 Timing of use of requests for admissions
§ 17:9 Requests for admission in the context of summary judgment motions
§ 17:10 Requests for admission in pretrial conferences
§ 17:11 Reading requests for admission at the commencement of trial
§ 17:12 Referring to admissions in the opening statement
§ 17:13 Introducing admissions in the case in chief
§ 17:14 Effect of admission in other proceedings
§ 17:15 Objections
§ 17:16 Protective orders
§ 17:17 Responding to requests for admission
§ 17:18 —Admission
§ 17:19 —Denial
§ 17:20 —Admit part, deny part (qualified answer)
§ 17:21 —Unable to either admit or deny
§ 17:22 — —Duty to inquire of third parties
§ 17:23 Sanctions
§ 17:24 Failure to respond to requests for admission
§ 17:25 Amending or withdrawing answers
§ 17:26 Determining the sufficiency of answers
§ 17:27 Late answers
§ 17:28 Summary and practice pointers checklist
§ 17:29 Illustrative forms—Request to admit
§ 17:30 —Another request to admit
§ 17:31 —Another request to admit
§ 17:32 —Amended request to admit

CHAPTER 18. DEPOSITIONS

§ 18:1 Scope note
§ 18:2 Preliminary considerations—Strategy, objectives and purposes of deposition
§ 18:3 Preparing for taking the deposition
§ 18:4 Reading depositions at trial and live teleconferencing
§ 18:5 —Using exhibits while reading depositions at trial
§ 18:6 Timing for taking depositions; Generally
§ 18:7 —Specific order of depositions not required—Deposing plaintiff prior to defendant
§ 18:8 —Using the scheduling order

§ 18:9 —Circumstances warranting early or immediate depositions
§ 18:10 Depositions on written interrogatories
§ 18:11 Deposition preparation
§ 18:12 —Counseling the deponent—The pre-deposition meetings
§ 18:13 — —Meeting the deponent at home or office
§ 18:14 — —Tell the truth
§ 18:15 — —Document review; taking notes
§ 18:16 — —Preview deposition process
§ 18:17 — —Recognizing the limits of knowledge
§ 18:18 — —Answering only the question
§ 18:19 —Lawyer's preparation—Knowing the deponent
§ 18:20 Objections
§ 18:21 Protective orders
§ 18:22 Harassment
§ 18:23 Privilege
§ 18:24 Exhibits
§ 18:25 Law and procedure—Notice, form and other considerations
§ 18:26 —Circumstances requiring leave of court
§ 18:27 —Method of recording the deposition
§ 18:28 —Production of documents at deposition
§ 18:29 —Designated deponent and "persons knowledgeable"
§ 18:30 —Notice requirements
§ 18:31 —Place of deposition
§ 18:32 —Enforcing the designation of a proper deponent
§ 18:32.50 —Enforcing the appearance of the deponent
§ 18:33 Telephone, teleconference and video depositions
§ 18:34 —Telephone depositions
§ 18:35 — —Recording the deposition
§ 18:36 — —Location of the deposition
§ 18:37 —Video depositions
§ 18:38 — —Preparation for the video deposition
§ 18:39 — —Stipulation for video deposition
§ 18:40 — —Preparation of the deponent witness for video deposition
§ 18:41 — —Lawyer's preparation for video deposition
§ 18:42 — —Video deposition to perpetuate testimony
§ 18:43 — —Use of video depositions at trial
§ 18:44 Conducting depositions on the Internet
§ 18:45 Depositions prior to the commencement of litigation or pending appeal
§ 18:46 Scope of inquiry at depositions
§ 18:47 The written deposition record
§ 18:48 Identification of exhibits on the record
§ 18:49 —Making a record of distances and directions
§ 18:50 —Marks on exhibits, sketches and diagrams by deponent

§ 18:51 Effective questioning on direct examination
§ 18:52 Cross-examination
§ 18:53 —Deposition cross-examination techniques
§ 18:54 —Conceptual guidelines for cross-examination
§ 18:55 Deposing the opposing expert
§ 18:56 —Benefits of deposing the opposing expert
§ 18:57 Procedures and considerations for using depositions at trial
§ 18:57.50 Addressing "dirty tricks" during a deposition
§ 18:58 Checklist for foundation for *Daubert/Kumho* challenges to experts
§ 18:59 Checklist for preparing an expert for deposition by the opponent
§ 18:60 Checklist for deposition of defendant driver or doctor
§ 18:61 Illustrative forms—Notice for deposition duces tecum of defendant's laboratory director in malpractice case
§ 18:62 —Rule 30(b)(6) notice in a premises negligence case
§ 18:63 —Rule 30(b)(6) deposition notice for product manufacturer/certifier
§ 18:64 —Petition, with supporting brief, for deposition to perpetuate testimony
§ 18:65 —Notice for videoteleconference deposition

CHAPTER 19. MOTIONS IN LIMINE

§ 19:1 Scope note
§ 19:2 Definition of motions in limine
§ 19:3 Types of motions in limine
§ 19:4 —Overview of the practical impacts of definitive order on a motion in limine
§ 19:5 Use of motions in limine in jury and bench trials
§ 19:6 Availability of motions in limine in federal and state courts generally
§ 19:7 —Authorization for use in federal courts
§ 19:8 —Authorization for use in state courts
§ 19:9 Strategic litigation purposes of motions in limine
§ 19:10 —Motions in limine to protect movant's case
§ 19:11 Potential disadvantages of motions in limine
§ 19:12 Advantages of written, versus oral, motions in limine
§ 19:13 Rules and strategic considerations governing timing of motions in limine
§ 19:14 Preliminary steps for preparing a motion in limine
§ 19:15 —Gather information from client
§ 19:16 —Achieve working familiarity with legal and evidentiary issues
§ 19:17 —Review and analyze pleadings and discovery
§ 19:18 Preparation and effective drafting of motions in limine
§ 19:19 —Scope: Draft motions in limine on all inadmissible issues
§ 19:20 —Avoid inappropriate issues
§ 19:21 —Clearly present each issue

§ 19:22 —Clearly set out requested relief
§ 19:23 —Briefs in support of motions in limine: General considerations and timing
§ 19:24 — —Effective drafting techniques
§ 19:25 Necessity of drafting proposed orders
§ 19:26 —Effective drafting techniques
§ 19:27 Seek agreement of counsel
§ 19:28 Responding to motions in limine, generally
§ 19:29 —Failure to respond to motions in limine
§ 19:30 Dealing with objections to motions in limine
§ 19:31 Hearings on motions in limine
§ 19:32 Orders on motions in limine, generally
§ 19:33 —Preserving a record
§ 19:34 —Objections
§ 19:35 Effect of orders on motions in limine on trial proceedings, generally
§ 19:36 —Need to renew motion or objection at trial to preserve issue for appeal
§ 19:37 Violations of motions in limine
§ 19:38 —Reviewability of motions in limine
§ 19:39 —Standard of review
§ 19:40 Practice checklist
§ 19:41 Illustrative forms
§ 19:42 —General form of motion in limine
§ 19:43 —Routine items for all cases
§ 19:44 —Sample trial brief in support of motion in limine
§ 19:45 —Sample motion in limine taken from deposition testimony
§ 19:46 —Sample motion in limine to exclude testimony concerning family circumstances and trial brief in medical malpractice case
§ 19:47 —Sample motion in limine to exclude portions of videotape and testimony concerning possible fault of another defendant or party and trial brief in a medical malpractice case
§ 19:48 Sample motion in limine to exclude expert testimony in products liability case

CHAPTER 20. SANCTIONS

§ 20:1 Scope note
§ 20:2 Strategy, objectives, and preliminary considerations
§ 20:3 —Strategic considerations in deciding whether to seek sanctions
§ 20:4 —Obtaining sanctions
§ 20:5 —Avoiding sanctions
§ 20:6 Overview of the law
§ 20:7 Improper, frivolous, or unsupported pleadings, motions, and other papers: Fed. R. Civ. P. 11
§ 20:8 —Persons and conduct subject to Rule 11

§ 20:9 —"Safe harbor" provision
§ 20:10 —Sanctions for violation of Rule 11
§ 20:11 — —Mitigating and aggravating factors
§ 20:12 Unwarranted, improper, unreasonable, or unduly burdensome or expensive disclosure or discovery request, response, or objection: Fed. R. Civ. P. 26(g)
§ 20:13 —Persons and conduct subject to Rule 26(g)
§ 20:14 —Sanctions for violation of Rule 26(g)
§ 20:15 Failure to make disclosure or cooperate in discovery: Fed. R. Civ. P. 37
§ 20:16 —Persons and conduct subject to Rule 37
§ 20:17 —Sanctions for violation of Rule 37
§ 20:18 Unreasonable and vexatious multiplication of proceedings: 28 U.S.C.A § 1927
§ 20:19 —Persons and conduct subject to 28 U.S.C.A. § 1927
§ 20:20 —Sanctions for violation of 28 U.S.C.A. § 1927
§ 20:21 Frivolous appeals: Fed. R. App. P. 38 and 28 U.S.C.A. § 1912
§ 20:22 —Persons and conduct subject to sanctions
§ 20:23 —Sanctions for violation
§ 20:24 Failure to appear at, or participate in, pretrial conference or to obey pretrial order: Fed. R. Civ. P. 16(f)
§ 20:25 —Persons and conduct subject to Rule 16(f)
§ 20:26 —Sanctions for violation of Rule 16(f)
§ 20:27 Presenting summary judgment affidavits in bad faith or solely for the purpose of delay: Federal Rule of Civil Procedure 56(h)
§ 20:28 Failure to prosecute, or to comply with Federal Rules of Civil Procedure or any court order: Federal Rule of Civil Procedure 41(b)
§ 20:29 —Persons and conduct subject to Rule 41(b)
§ 20:30 —Sanctions for violation of Fed. R. Civ. P. 41(b)
§ 20:31 The inherent power of the federal courts to sanction
§ 20:32 —Persons and conduct subject to courts' inherent power
§ 20:33 —Sanctions pursuant to court's inherent power for abusive litigation practices
§ 20:33.50 Appellate review in federal courts for Rule 37 sanctions
§ 20:34 Checklist—Practice pointers
§ 20:35 Illustrative forms
§ 20:36 —Rule 11—Notice and motion for sanctions
§ 20:37 — —Memorandum in support of motion
§ 20:38 — —Declaration in support of motion
§ 20:39 —Rule 11 and 28 U.S.C.A. § 1927—Notice of motion and motion for sanctions
§ 20:40 — —Brief in support of motion
§ 20:41 —Rule 37—Motion for sanctions for failure to appear at deposition
§ 20:42 —Affidavit in support of motion for contempt based on

failure to comply with order to answer questions at deposition
§ 20:43 —Motion for attorney's fees and costs associated with discovery misconduct relating to depositions
§ 20:44 —Motion for award of expenses incurred to prove matter opponent failed to admit pursuant to Rule 36
§ 20:45 —Motion to strike answer or dismiss action for failure to comply with order requiring answer to interrogatories
§ 20:46 —Motion for sanctions for failure to properly answer interrogatories
§ 20:47 —Rule 16(f)—Notice of motion for sanctions for failure to meet and confer prior to pretrial conference
§ 20:48 Order imposing sanctions under Rule 37 for discovery violations

CHAPTER 21. SELECTION OF EXPERTS, EXPERT DISCLOSURE AND THE PRETRIAL EXCLUSION OF EXPERTS

§ 21:1 Scope note
§ 21:2 Experts for case evaluation
§ 21:3 Determining the need for expert testimony
§ 21:4 Finding an expert
§ 21:5 —University faculty
§ 21:6 —Directories, lists, treatises, and other publications
§ 21:7 —Internet
§ 21:8 —Former employees of a defendant
§ 21:9 —Networking
§ 21:10 Evaluating the expert
§ 21:11 Retaining the expert
§ 21:12 Billing and fees; budgeting
§ 21:13 Using multiple experts
§ 21:14 Preparing the case with the expert
§ 21:15 —Expert's access to information
§ 21:16 —Summarizing depositions and reports
§ 21:17 —Inspection of physical evidence
§ 21:18 —Tests and measurements
§ 21:19 —Photographs
§ 21:20 —Preparing experts for their reports and depositions
§ 21:21 —Meeting with all experts
§ 21:22 Expert disclosures and reports
§ 21:23 —Identification and assignment
§ 21:24 —Stating the expert's qualifications in the report
§ 21:25 —Identifying the materials reviewed by the expert
§ 21:26 —Detailing the expert's analysis and its basis
§ 21:27 — —Defining the problem under investigation
§ 21:28 — —Method used in the analysis
§ 21:29 — — —Differential diagnosis; Scientific method

§ 21:30 — —Statistical analysis
§ 21:31 —Footnotes to supporting documentation; Photographs
§ 21:32 —Identification of inconsistent and rejected data
§ 21:33 —Standard practice for reporting opinions of technical experts
§ 21:34 The expert deposition
§ 21:35 Pretrial challenges to expert witnesses
§ 21:36 Checklists—Disclosures regarding experts
§ 21:37 —Points to cover in establishing admissibility of expert testimony
§ 21:38 —Steps in seeking exclusion of defense expert's testimony
§ 21:39 Illustrative forms—Brief in opposition to defense motion to exclude expert testimony
§ 21:40 —Expert's report

CHAPTER 22. MEDICAL EXPENSES AND RELATED SPECIAL DAMAGES

§ 22:1 Scope note
§ 22:2 Strategic overview
§ 22:3 —Relationship of medical expenses claims to theme of plaintiff's case
§ 22:4 —Decisions on using expenses
§ 22:5 Issues to raise with clients
§ 22:6 —Medical records
§ 22:7 —Soft tissue injuries
§ 22:8 —Brain injuries and mental illnesses
§ 22:9 —Lack of medical treatment and cooperation of plaintiff
§ 22:10 —Subrogation
§ 22:11 Pre-trial issues
§ 22:12 —Demand letter
§ 22:13 —Insurance adjusters
§ 22:14 —Settlement negotiations
§ 22:15 — —Structuring award or settlement
§ 22:16 Types of medical expenses
§ 22:17 —Special medical services
§ 22:18 — —Ways expenses can help other claims of family members
§ 22:19 —Family living expenses
§ 22:20 —Special diets
§ 22:21 —Medical expenses for diagnosis
§ 22:22 —Medical expenses for treatment
§ 22:23 —Medical expenses for trial preparation—The IME (independent medical examination)
§ 22:24 — —The DME (defense's medical examination)
§ 22:25 —Future medical expenses
§ 22:26 — —At-risk conditions
§ 22:27 — —Medical monitoring
§ 22:28 — —Developing treatment plans and determining expenses

§ 22:29 Demonstrative aids
§ 22:30 Dealing with bad facts in case
§ 22:31 Plaintiff's writing and diaries
§ 22:32 Stipulations
§ 22:33 —Requests for admissions
§ 22:34 Plaintiff's burden of proof with respect to medical expenses
§ 22:35 —Procuring and preparing medical experts
§ 22:36 — —Using medical experts
§ 22:37 —Procuring and using non-medical experts
§ 22:38 — —Lay witnesses
§ 22:39 —Issues with causation
§ 22:40 — —Preexisting injury and "eggshell plaintiff" rule
§ 22:41 — —Subsequent intervening accident
§ 22:42 — — —Single injury rule
§ 22:43 —Expenses must be reasonable and necessary
§ 22:44 — —Plaintiff's duty to mitigate
§ 22:45 — —Plaintiff's failure to mitigate
§ 22:46 — — —Mitigation and expert testimony
§ 22:47 Introduction of evidence of collateral source
§ 22:48 Jury instructions and closing argument
§ 22:49 Appeals
§ 22:50 Future trends in methods of proof and standards of admissibility
§ 22:51 —Streamlining foundation and proof required
§ 22:52 —Increasing acceptance of nontraditional medical expenses
§ 22:53 Checklist of essential allegations and defenses
§ 22:54 —Determine damages
§ 22:55 —Maintain list
§ 22:56 —Allege damages
§ 22:57 —Assert damages
§ 22:58 Illustrative forms—Client intake sheet
§ 22:59 —Letter to doctor
§ 22:60 —Letter of protection
§ 22:61 —Demand letter in medical malpractice case
§ 22:62 —Instructions to client
§ 22:63 Jury instructions
§ 22:64 Jury Instructions—Reasonable medical expenses
§ 22:65 —Present value of future medical expenses

CHAPTER 23. LOSS OF EARNINGS AND IMPAIRMENT OF EARNING CAPACITY

§ 23:1 Scope note
§ 23:2 The psychology of the damages presentation when dealing with income-related losses
§ 23:3 Categories of income-related damages
§ 23:4 Evidence and witnesses generally required to prove lost earnings/lost time

§ 23:5 —Use of "before and after witnesses" on income loss issues
§ 23:6 —Expert testimony
§ 23:7 —The vocational economic assessment
§ 23:8 —Use of quality of life assessment scale to bolster lost earning capacity damages
§ 23:9 —Use of "pain equilibration" to bolster lost earning capacity damages
§ 23:10 Income-related damages and the gourmet chef
§ 23:11 Income-related damages and the initial client interview
§ 23:12 —Purpose and function of initial client interview
§ 23:13 Steps in preparing your damages case prior to filing suit
§ 23:14 Pleadings and written discovery relating to income loss issues
§ 23:15 —The complaint
§ 23:16 —Interrogatories
§ 23:17 —Request/demand to produce
§ 23:18 —Request for admissions
§ 23:19 Depositions
§ 23:20 Jury research
§ 23:21 Checklist of essential information when proving loss of earnings and impairment of earning capacity
§ 23:22 Illustrative forms—Questionnaire for initial interview
§ 23:23 —Allegation: Loss of past earnings
§ 23:24 —Allegation: Loss of future earnings
§ 23:25 —Allegation: Impairment of earning capacity
§ 23:26 —Demand to produce
§ 23:27 —Request for admission related to income loss

CHAPTER 24. PAIN AND SUFFERING AND NON-ECONOMIC DAMAGES

§ 24:1 Scope note
§ 24:2 Initial interview sets the stage
§ 24:3 Obtain the medical records and examine them
§ 24:4 Right to recover for pain and suffering
§ 24:4.50 Increased risk of future injury
§ 24:5 Disfigurement
§ 24:6 Disability
§ 24:7 Loss of enjoyment of life
§ 24:8 Preparing plaintiff for deposition
§ 24:9 Medical records as sources of proof
§ 24:10 Developing lay witnesses
§ 24:11 Presenting non-economic damages in opening statement
§ 24:12 Proof of pain and suffering at trial
§ 24:13 Proof of loss of enjoyment of life at trial
§ 24:14 —Use of an expert
§ 24:15 Direct examination of the plaintiff
§ 24:16 Direct examination of the plaintiff on noneconomic damages

§ 24:17 Direct examination of the treating physician
§ 24:18 Direct examination of members of the treatment/rehabilitation team
§ 24:19 Use of day-in-the-life films or serial photographs
§ 24:20 Proof of non-economic damages in final argument
§ 24:21 —Itemized verdicts
§ 24:22 —Per diem arguments
§ 24:23 Pleadings
§ 24:24 Defenses to non-economic damages claims
§ 24:25 Checklist of essential allegations and defenses
§ 24:26 Sources of proof of essential allegations and defenses—Client questionnaire/initial interview (damages issues)
§ 24:27 —Medical records
§ 24:28 Checklists for direct examination—Treating physician
§ 24:29 —Floor nurses
§ 24:30 —Physical therapists
§ 24:31 —Occupational therapists
§ 24:32 —Speech pathologists
§ 24:33 —Psychologists
§ 24:34 —Vocational therapists
§ 24:35 —Respiratory therapists
§ 24:36 Illustrative forms—Authorization for release of medical records
§ 24:37 —Authorization for release of hospital records *[Deleted]*
§ 24:38 —Authorization for release of psychiatric records
§ 24:39 —Letter requesting medical records from physician
§ 24:40 —Letter requesting medical records from hospital
§ 24:41 —Subpoena for deposition
§ 24:42 —Notice of subpoena
§ 24:42.50 Sample qualified protective order
§ 24:43 Illustrative jury instructions—General instructions for non-economic damages
§ 24:44 —Aggravation of a preexisting condition
§ 24:44.50 —Exemplary or punitive damages distinguished from compensatory damages for mental suffering
§ 24:45 Illustrative verdict forms

CHAPTER 25. LOSS OF CONSORTIUM

§ 25:1 Scope note
§ 25:2 Consortium defined
§ 25:2.50 Loss of consortium in wrongful death cases
§ 25:3 Considerations for consortium claims
§ 25:3.50 Nature of loss of consortium claim: derivative or independent
§ 25:4 Investigating spousal consortium claims
§ 25:5 Effect of counsel's failure to obtain informed consent and/or overlooking the uninjured spouse or family member
§ 25:6 The right of consortium plaintiffs to separate counsel

§ 25:7 —Benefits of separate counsel
§ 25:8 Matters affecting recovery—Liability insurance coverage
§ 25:9 —Settlement and release by tort victim
§ 25:10 The history of consortium—From the Middle Ages to the Married Women's Acts of the 1950's
§ 25:11 —From the 1950's to the present
§ 25:12 The "heartbalm" twins: Alienation of affections and criminal conversion/conversation
§ 25:13 Consortium rights of particular persons—Uninjured or "deprived" spouse
§ 25:14 —One who is engaged to or cohabitating with an injured plaintiff
§ 25:15 —Persons in same-sex "marriages," civil unions, or domestic partnerships
§ 25:16 —Child's right to loss of parental consortium
§ 25:17 —Parents' right to recover for loss of child's consortium (filial consortium)
§ 25:18 — —"In loco parentis" plaintiffs, including stepparents and grandparents
§ 25:19 — —Medical expenses for an injured child
§ 25:20 — —Loss of a minor child's services and income
§ 25:21 — —Nursing care and services by and for family members
§ 25:22 — —Intentional or direct interference with parent-child relationship
§ 25:23 —Loss of services of a "key family business employee"
§ 25:24 Related theories of recovery—The bystander's cause of action
§ 25:25 —The "zone of danger" plaintiff
§ 25:26 Joinder of consortium cause of action with primary cause of action
§ 25:27 Ante litem tort claim notices
§ 25:28 Proof and advocacy of consortium damages
§ 25:29 Jury selection
§ 25:30 The four prongs of proof—The quality of the relationship
§ 25:31 —The character of the uninjured spouse
§ 25:32 —The magnitude of the loss
§ 25:33 —The credibility of the trial lawyer
§ 25:34 Six additional factors for proving parental, filial and spousal consortium—The nature and quality of the family relationship
§ 25:35 —"Worthwhileness"
§ 25:36 —The "Back to the Future" or "Fiddler on the Roof" proofs and experts
§ 25:37 —"Special needs," emotional and physical characteristics
§ 25:37.50 —Loss of "golden years," "grand tours" & "plans or dreams for the future"

§ 25:38 —Substitute consortium relationships
§ 25:39 —Credibility and appearances
§ 25:40 Particular defenses—Statute of limitations
§ 25:41 —Comparative or contributory negligence of the injured plaintiff
§ 25:42 —Comparative or contributory negligence of the consortium plaintiff
§ 25:43 —Lack of standing
§ 25:44 Trial strategy—Using the consortium plaintiff as a witness only
§ 25:45 Sources of proof
§ 25:46 Lay witnesses
§ 25:47 Expert witnesses
§ 25:48 Documents, databases and exhibits
§ 25:49 Use of bottom line, time unit, and per diem figures in closing argument
§ 25:50 —Devices to guide jurors in assessing damages
§ 25:51 —Visual strategy for summation
§ 25:52 — —Time unit measurements
§ 25:53 —Itemized chart of damages: "The Grisly Audit"
§ 25:54 —Time unit visual aids
§ 25:55 Poems, songs, popular movies and shows: If words could make wishes come true
§ 25:56 Jury instructions—Illustrative deficient instructions
§ 25:57 —A better form of instructions
§ 25:58 Special jury verdict
§ 25:59 Checklist of consortium proofs
§ 25:60 Checklist of consortium experts and exhibits
§ 25:61 Illustrative forms—Consortium plaintiff interview form
§ 25:62 —Interview form for bystander/emotional distress claim
§ 25:63 —Consortium pleading
§ 25:64 —Chart of itemized economic and non-economic damages for summation
§ 25:65 —Chart of itemized past and future damages for summation—Injured plaintiff
§ 25:66 — —Consortium plaintiff
§ 25:67 —Tort claim notice
§ 25:68 —Carnival/amusement ride tort claim notice
§ 25:69 Illustrative jury instructions—Plaintiff's request for jury instruction re loss of spousal consortium

CHAPTER 26. WRONGFUL DEATH AND SURVIVAL ACTIONS

§ 26:1 Scope note
§ 26:2 Historical background—Wrongful death actions
§ 26:3 —Survival actions
§ 26:3.50 Limitations on damages—Caps
§ 26:4 Nature and objectives of wrongful death and survival actions

§ 26:5 Initial steps in litigation—Choosing a forum
§ 26:6 —Determining the limitations period
§ 26:7 —Determining the real party in interest; personal representatives
§ 26:8 —The complaint
§ 26:9 —Proceeding promptly
§ 26:10 Medical issues and investigation—The difference between "cause of death" and "mechanism of death"
§ 26:11 —Autopsies
§ 26:12 — —Disinterment and subsequent autopsy
§ 26:13 — — —Obtaining authorization for disinterment
§ 26:14 —Tissue slides
§ 26:15 Maximizing damages
§ 26:16 —Determining life expectancy
§ 26:17 —Utilizing the autopsy to prove conscious pain and suffering
§ 26:18 —The "moment of extremis"
§ 26:19 — —Utilizing the autopsy and medical testimony to distinguish the moment of extremis from an instantaneous death
§ 26:20 —Prolonged knowledge of impending death
§ 26:21 —Evaluating the case with a focus group
§ 26:22 —Damages for the grief and bereavement of the next of kin
§ 26:23 — —Stages of grief
§ 26:24 — —Pathological grief
§ 26:25 — —Aggravation of grief due to another's misconduct
§ 26:26 — —Death of a child
§ 26:27 — — —Impact of parent's bereavement
§ 26:28 — — —Newborn and very young children; Adult children
§ 26:29 —Punitive damages
§ 26:30 —Preserving a case of aggravated liability
§ 26:31 Anticipating and countering defenses
§ 26:32 —Causation-related defenses and "the short life expectancy" defense
§ 26:33 —Defenses aimed toward mitigating loss of consortium and grief damages
§ 26:34 —Defenses grounded in contributory fault and "lack of relationship"
§ 26:35 Settling the case before trial
§ 26:36 —Settlement video
§ 26:37 Trial and proof strategies—Motions in limine
§ 26:37.50 —Effect of remarriage
§ 26:38 —Voir dire
§ 26:39 —Presenting and arguing damage claims
§ 26:40 — —Pecuniary loss
§ 26:41 — —Employment witnesses and records
§ 26:42 — —Economist testimony

§ 26:42.50 — — —Adjustment to economic loss for personal consumption
§ 26:43 — —Bringing the decedent alive
§ 26:44 — —Before and after witnesses
§ 26:45 — —Testimony of a family member
§ 26:46 — —The missed event
§ 26:46.50 — —Maximizing earning capacity with emotional intelligence
§ 26:47 —Closing argument
§ 26:48 Checklist of essential steps in a wrongful death and survival case
§ 26:49 Wrongful death and survival complaint
§ 26:50 Jury instructions and sample interrogatories to jury

CHAPTER 27. *[Reserved]*

Volume 3

CHAPTER 28. PUNITIVE DAMAGES

§ 28:1 Scope note
§ 28:2 Strategy, objectives, and preliminary considerations
§ 28:3 Initial considerations and issues to raise with clients
§ 28:4 —Advantages of punitive damages claims
§ 28:5 —Difficulties and disadvantages of punitive damages claims
§ 28:6 —Deciding where to file the case
§ 28:7 Pleading punitive damages
§ 28:8 —Initial pleading
§ 28:9 —Amendment to state a claim
§ 28:10 Preparing a punitive damages case
§ 28:11 —Investigation
§ 28:12 —Discovery
§ 28:13 — —Conduct warranting punitive damages
§ 28:14 — —Corporate liability
§ 28:15 — —Pattern and practice of misconduct
§ 28:16 — — —Privacy concerns
§ 28:17 — —Impact on state's interest
§ 28:18 — —Defendant's wealth
§ 28:19 —Trial themes
§ 28:20 Law of punitive damages, generally
§ 28:21 History of punitive damages
§ 28:22 Public policy justifying punitive damages
§ 28:23 Constitutional issues and determinative factors as to amount of damages
§ 28:24 —Due process, generally
§ 28:25 —Fair notice of penalty; factors considered
§ 28:26 — —Reprehensibility of defendant's conduct, generally

§ 28:27 — —Type of wrongdoing and resulting harm
§ 28:28 — —Conduct within and outside the state
§ 28:29 — —Pattern and practice of misconduct
§ 28:30 — —Mitigation of amount of punitive damages
§ 28:31 — — —Multiple awards, generally
§ 28:32 — — —Class actions
§ 28:33 — — —Mitigation of harm by defendant
§ 28:34 — — —Plaintiff's conduct
§ 28:35 — —Ratio between compensatory and punitive damages
§ 28:36 — —Difference between punitive damages imposed and criminal or civil sanctions
§ 28:37 — —Wealth of the defendant
§ 28:38 Adequate procedural safeguards
§ 28:39 —Jury instructions
§ 28:40 —Trial court review
§ 28:41 —Appropriate appellate review
§ 28:42 Standards of conduct
§ 28:43 —Breach of contract cases versus tort cases
§ 28:44 —Intentional conduct
§ 28:45 — —Wilful and wanton misconduct
§ 28:46 — —Malice
§ 28:47 — —Fraud
§ 28:48 — —Oppression
§ 28:49 Corporate liability for punitive damages
§ 28:50 —Reckless employment or retention of an unfit employee
§ 28:51 —Corporate ratification or authorization
§ 28:52 —Managerial capacity
§ 28:53 —Alter ego and enterprise liability
§ 28:54 — —"Standard" alter ego considerations
§ 28:55 — —A narrow application of the alter ego doctrine solely for purposes of punitive damages
§ 28:56 — — —Unity of interest analysis
§ 28:57 — — —Interests of justice analysis
§ 28:58 — —Enterprise liability
§ 28:59 —Liability of successor corporations
§ 28:60 — —Due diligence requirements as a basis for imposing successor liability
§ 28:61 Punitive damages in particular types of cases
§ 28:62 —Products liability
§ 28:63 —Insurer's bad faith
§ 28:64 —Drunk driving
§ 28:65 —Employment law
§ 28:66 —Professional negligence
§ 28:67 Standards of proof
§ 28:68 —Clear and convincing evidence
§ 28:69 Methods of proof
§ 28:70 —Proof by circumstantial evidence
§ 28:71 —Testimony of defendant's employees
§ 28:72 —Expert testimony

§ 28:73 Defense of punitive damages claims
§ 28:74 —Pleadings
§ 28:75 —SLAPP motion
§ 28:76 —Discovery
§ 28:77 —Motions in limine
§ 28:78 —Bifurcation
§ 28:79 —Trial
§ 28:80 —Post-trial motions
§ 28:81 Tort "reform" proposals
§ 28:82 —Criticisms
§ 28:83 —Suggested changes regarding punitive damages
§ 28:84 Checklist of essential allegations and defenses
§ 28:85 Checklist of sources of proof of essential allegations and defenses
§ 28:86 Illustrative forms—Complaint in wrongful death and survival/dram shop action, including claim for punitive damages
§ 28:87 —Alter ego interrogatories
§ 28:88 —Plaintiffs' notice of motion and motion to compel response to special interrogatories; memorandum of points and authorities
§ 28:89 —Plaintiffs' reply to defendants' opposition to motion to compel production
§ 28:90 Illustrative jury charges—Liability for punitive damages
§ 28:91 —Amount of punitive damages to award

CHAPTER 29. CHALLENGING THE CONSTITUTIONALITY OF TORT "REFORM"

§ 29:1 Scope note
§ 29:2 Preliminary considerations
§ 29:3 State versus federal constitutional challenges
§ 29:4 —How to develop a state constitutional challenge
§ 29:5 The need for advance research
§ 29:6 Developing evidence on the constitutional issue
§ 29:7 The importance of constitutional history
§ 29:8 Choosing a constitutional theory
§ 29:9 Constitutional construction and tort reform challenges
§ 29:10 Determining the plaintiffs to make the challenge
§ 29:11 Attacking omnibus legislation
§ 29:12 Separation of powers
§ 29:13 —Application to tort reform legislation
§ 29:14 — —Changing procedural and evidentiary rules
§ 29:15 Right to a complete remedy; Open courts
§ 29:16 Special legislation
§ 29:17 Other limits on legislative power
§ 29:18 —Title of bill
§ 29:19 —Single-subject rule
§ 29:20 Caps on damages, generally

§ 29:21 —Equal protection challenges
§ 29:22 Caps on damages, generallyEqual protection challenges—Applicability of caps to accrued causes of action
§ 29:23 Caps on damages, generally—Substantive due process challenges
§ 29:24 —Right to jury trial challenges
§ 29:25 Caps on punitive damages
§ 29:26 —Separation of powers challenges
§ 29:27 —Special legislation challenges
§ 29:28 —Equal protection and due process challenges
§ 29:29 —Unconstitutional taking of property
§ 29:30 Collateral source rule
§ 29:31 Joint and several liability
§ 29:32 —Right to remedy challenges
§ 29:33 —Due process and equal protection challenges
§ 29:34 "Empty chair" defense
§ 29:35 Statutes of limitation and statutes of repose
§ 29:36 —Equal protection challenges
§ 29:37 —Special legislation challenges
§ 29:38 —Due process challenges
§ 29:39 —Right to remedy/Open courts challenges
§ 29:40 Government rules defense
§ 29:41 Rebutting defense arguments regarding common law rights and remedies
§ 29:42 —Remedy guarantees are merely "mandates to the judiciary"
§ 29:43 —Remedy guarantees protect only "accrued" or "procedural" rights
§ 29:44 —Legislative adoption of common law gives legislature control over common law
§ 29:45 Current trends and results
§ 29:46 Practice checklist

CHAPTER 30. COLLATERAL SOURCE/THIRD-PARTY PAYOR; DUTY TO MITIGATE DAMAGES

§ 30:1 Scope note
§ 30:2 The collateral source rule: Its purposes and underlying concept of coordinating benefits
§ 30:3 The collateral source rule under attack
§ 30:4 —Differing state law practices
§ 30:5 — —Preclusion of application in medical malpractice cases
§ 30:6 —Conflict with ERISA
§ 30:7 Strategies and objectives for litigating collateral source issues
§ 30:8 —Actions taken in discovery that will assist at trial
§ 30:9 —Advice to clients about the rule and its various applications

§ 30:10 —Client-provided information as a basis for strategic planning of the plaintiff's case
§ 30:11 —How to avoid opening the door to collateral source evidence
§ 30:12 —Shielding the collateral source
§ 30:13 —Tailoring the damages claim to avoid collateral source issues
§ 30:14 Admissibility of collateral source information
§ 30:15 —Impact of disclosure on recovery
§ 30:16 Effect of remarriage of plaintiff in wrongful death action
§ 30:17 Violation of the collateral source rule
§ 30:18 The theory of double recovery
§ 30:19 Exceptions to the collateral source rule
§ 30:20 Payment of medical bills by settling co-tortfeasors
§ 30:21 Admissibility of specific types of collateral source benefits
§ 30:21.50 Treatment of "write offs" by medical care providers
§ 30:22 Collateral source issues and strategies at trial
§ 30:23 Rights of third-party payors—Subrogation, liens, coordination of benefits, and recoupment
§ 30:24 Duty to mitigate—Types of evidence plaintiff must present to show duty fulfilled
§ 30:25 —Examples of efforts plaintiff must make
§ 30:26 —Failure to undergo surgery
§ 30:27 —Failure to combat obesity
§ 30:28 —Other violations of the duty to mitigate
§ 30:29 Conflicts between collateral source and subrogation rules
§ 30:30 Payments received from settling joint tortfeasor
§ 30:31 Contributory and comparative negligence
§ 30:32 When is plaintiff excused from a failure to mitigate?
§ 30:33 —Seat belt defense
§ 30:34 Burden of proof
§ 30:35 Illustrative forms
§ 30:36 —Motion in limine to exclude references at trial to collateral source payments and mitigation of damages, and memorandum of law in support thereof
§ 30:37 —Motion in limine—Collateral source benefits (alternative form)
§ 30:38 —Motion in limine to exclude at trial references to plaintiff's remarriage in wrongful death case

CHAPTER 31. SUMMARY JUDGMENT

§ 31:1 Scope note
§ 31:2 Strategy, objectives, and preliminary considerations
§ 31:3 History of federal summary judgment rule
§ 31:4 Comparison of summary judgment to other dispositive motions

§ 31:5 Motion for continuance in order to obtain additional discovery
§ 31:6 Challenge of evidence offered in support of the motion for summary judgment
§ 31:7 Admissibility of evidence
§ 31:8 Affidavits
§ 31:9 —Personal knowledge
§ 31:10 —Facts only
§ 31:11 —Affidavits contradicting previous testimony
§ 31:12 —Attorneys' affidavits
§ 31:13 —Experts' affidavits
§ 31:14 —Affidavits made in bad faith
§ 31:15 —Motions to strike the affidavit
§ 31:16 Other evidence offered in support of motion for summary judgment
§ 31:17 Movant's burden
§ 31:18 —Materiality of the facts
§ 31:19 —Genuineness of dispute
§ 31:20 —Specific citations to the record
§ 31:21 Non-movant's affidavits
§ 31:22 Non-movant's burden of production
§ 31:23 Partial summary judgment
§ 31:24 Cross-motions for summary judgment
§ 31:25 Motions made in bad faith
§ 31:26 Conduct of the summary judgment hearing
§ 31:27 Appeal from the grant of summary judgment
§ 31:28 Checklist: Summary and practice pointers
§ 31:29 Illustrative forms—Motion to strike portions of defendant's affidavit filed in support of defendant's motion for summary judgment
§ 31:30 —Motion to delay hearing
§ 31:31 —Affidavit of counsel for the plaintiff in support of motion to delay hearing
§ 31:32 —Memorandum in opposition to motion to delay hearing
§ 31:33 —Order on plaintiff's motion to delay hearing
§ 31:34 —Plaintiff's motion to strike defendant's motion for summary judgment for failure to comply with Rule 56 requirement that motion be accompanied by concise statement of undisputed facts

CHAPTER 32. SCHEDULING AND PRE-TRIAL CONFERENCES AND ORDERS

§ 32:1 Scope note
§ 32:2 Preliminary considerations
§ 32:3 —Purpose of Rule 16
§ 32:4 —Evolution of Rule 16
§ 32:5 —Overview of Rule 16
§ 32:6 Objectives and strategies
§ 32:7 Scheduling orders and conferences

§ 32:8 —Purpose
§ 32:9 —Required topics in the scheduling order
§ 32:10 —Standard for modification
§ 32:11 —Timing of the scheduling order
§ 32:12 —Optional subjects under Rule 16(b)
§ 32:13 —Relationship to Rule 26 discovery obligations
§ 32:14 —Scheduling conference
§ 32:15 —Impact of early motions
§ 32:16 —Sanctions for failure to comply with orders
§ 32:17 —Exempt cases under local rules
§ 32:18 Case management conference
§ 32:19 —Purpose
§ 32:20 —When appropriate
§ 32:21 —Objectives
§ 32:22 —Sanctions
§ 32:23 —Various discovery issues
§ 32:24 —Issues addressed
§ 32:25 Final pretrial conference
§ 32:26 —Purpose
§ 32:27 —Preparation
§ 32:28 —Scheduling
§ 32:29 —Settlement revisited
§ 32:30 —Amendment of pleadings
§ 32:31 —Summary judgment motions
§ 32:32 —Stipulations and admissions
§ 32:33 —Motions in limine
§ 32:34 —Trial issues
§ 32:35 —Jury instructions
§ 32:36 —Final pretrial order
§ 32:37 Alternative dispute resolution
§ 32:38 Complex cases
§ 32:39 State court practices
§ 32:40 Sanctions
§ 32:41 Appellate review
§ 32:42 Illustrative forms—Motion for pretrial conference
§ 32:43 —Pretrial order (general form)
§ 32:44 —Pretrial order in an asbestos liability summary jury trial

CHAPTER 33. SETTLEMENTS

§ 33:1 Scope note
§ 33:2 Advantages of settling
§ 33:3 Valuing the case, generally
§ 33:4 —Factors to consider
§ 33:5 —Using focus groups
§ 33:6 Preparing and assessing the case before making a settlement demand
§ 33:7 —Insurance coverage issues
§ 33:8 — —Amount of insurance coverage

§ 33:9 —Type of case
§ 33:10 —Venue, generally
§ 33:11 —Judge
§ 33:12 —Plaintiff
§ 33:13 — —Pre-existing injuries
§ 33:14 —Damages
§ 33:15 —Defendant
§ 33:16 — —Negative reputation or practices
§ 33:17 —Defense attorney
§ 33:18 —Witnesses
§ 33:19 —Determining your client's "bottom line"
§ 33:20 —Obtaining your client's consent to settle the case
§ 33:21 The value of appointing a guardian for a seriously injured child
§ 33:22 Timing of settlement demands
§ 33:23 —Initiating settlement negotiations
§ 33:24 Policy limits settlement demand
§ 33:25 The opening demand
§ 33:26 High-low settlements
§ 33:27 Presenting the settlement demand
§ 33:28 —Demand letter
§ 33:29 —Settlement brochure
§ 33:30 — —Contents
§ 33:31 —Videotape settlement demands
§ 33:32 —Computerized presentations
§ 33:33 Ways to settle a case
§ 33:34 —Telephone negotiations
§ 33:35 —Settlement conference without a mediator
§ 33:36 —Mediation
§ 33:37 —Internet (online) negotiations
§ 33:38 Negotiation strategies
§ 33:39 —Do not give ultimatums
§ 33:40 —Never accept the first offer
§ 33:41 —Never lose your cool or your control
§ 33:42 —Who really has sufficient monetary authority to settle your case?
§ 33:43 —Getting the most money you can
§ 33:44 —Listen
§ 33:45 —Always keep the dialogue going
§ 33:46 —Be willing to walk out of a settlement conference
§ 33:47 Strategies used by adjusters and defense attorneys
§ 33:48 Structured settlements
§ 33:49 —Advantages and disadvantages of structured settlements
§ 33:50 —Situations in which structured settlements should be considered
§ 33:51 —Situations in which structured settlements may not be a good idea
§ 33:52 —Taxation questions

§ 33:53 —Attorney fees
§ 33:54 —Types of structured settlements
§ 33:55 Ethical considerations
§ 33:55.50 Judicial approval of some settlements
§ 33:55.70 —Class action settlements
§ 33:56 Illustrative forms—Demand letter
§ 33:57 —Memorandum of settlement
§ 33:58 —Client's memorandum of consent to settlement
§ 33:59 —Settlement agreement and release
§ 33:60 —Statement of distribution
§ 33:61 —Consent judgment approving settlement

CHAPTER 34. JURY SELECTION TECHNIQUES AND LAW OF JURY SELECTION

§ 34:1 Scope note
§ 34:2 Preliminary considerations
§ 34:3 —Know the judge
§ 34:4 —Know the time limitations
§ 34:5 —Jury consultants
§ 34:6 Know the law of your jurisdiction
§ 34:7 —Challenges for cause
§ 34:8 — —Bias and prejudice
§ 34:9 — — —Rehabilitation
§ 34:10 — —Preserving error
§ 34:11 —Peremptory challenges
§ 34:12 *Batson* challenges
§ 34:13 —Elements
§ 34:14 — —Prima facie case
§ 34:15 — —Neutral explanation
§ 34:16 — —Purposeful discrimination
§ 34:17 —How to conduct a *Batson* hearing
§ 34:18 —Strategy
§ 34:19 —Remedies for violation
§ 34:20 —Future extension of protections
§ 34:21 Analyzing dynamics of potential jury members
§ 34:22 Jury note-taking
§ 34:23 Preparing voir dire questions
§ 34:24 —Obtain your opponent's previous voir dires
§ 34:25 —Jury questionnaires
§ 34:26 Juror impanelment methods
§ 34:27 Beginning voir dire
§ 34:28 —Introducing your legal theory
§ 34:29 —Explaining the law
§ 34:30 —Using analogies
§ 34:31 —Using visual aids
§ 34:32 —Do not fear contaminating the jury panel
§ 34:33 —Dealing with fears about specific jurors
§ 34:34 —Handling defenses

§ 34:35 —Handling damages
§ 34:36 —An actual "beginning" in an asbestos case
§ 34:37 Attorney body language and attitude
§ 34:38 —Body language
§ 34:39 —Eye contact
§ 34:40 —Wardrobe color
§ 34:41 —Demeanor
§ 34:42 Ending voir dire
§ 34:43 Summary and practice pointers checklist
§ 34:44 Illustrative forms—Jury questionnaire
§ 34:45 Jury questionnaire in asbestos case
§ 34:46 —Visual aids
§ 34:47 Illustrative jury instructions on note-taking

CHAPTER 35. JUROR BIAS

§ 35:1 Scope note
§ 35:2 Historical roots
§ 35:3 Educating judges about jury bias
§ 35:4 Defining bias
§ 35:5 The juror bias model
§ 35:6 The importance of utilizing the juror bias rhetoric
§ 35:7 Utilizing tort reform rhetoric
§ 35:8 The "suspicion" bias
§ 35:9 —The roots of the suspicion bias
§ 35:10 —The importance of suspicion categories
§ 35:11 —The suspicion rhetoric
§ 35:12 —An anti-lawsuit bias
§ 35:13 —Suspicion rhetoric creates sympathy for the defendant
§ 35:14 —Voir dire using the suspicion rhetoric
§ 35:15 The "victimization" bias
§ 35:16 —The trial lawyer must act as if jurors are victims
§ 35:17 —Utilizing victim rhetoric during voir dire
§ 35:18 The "personal responsibility" bias
§ 35:19 —Utilizing the personal responsibility bias
§ 35:20 —The attribution of responsibility
§ 35:21 —Voir dire utilizing personal responsibility rhetoric
§ 35:22 The "stuff happens" bias
§ 35:23 —Clues to identifying the "stuff happens" juror
§ 35:24 —Voir dire utilizing "stuff happens" rhetoric
§ 35:25 The "blame-the-plaintiff" bias
§ 35:25.50 Other biases
§ 35:26 Illustrative focus group deliberations
§ 35:27 Sample motion and memorandum in support of motion for new trial including denial of adequate jury voir dire as grounds

CHAPTER 36. FOCUS GROUPS

§ 36:1 Scope note

§ 36:2 What is a focus group?
§ 36:3 Origins, development, and contemporary uses of focus groups
§ 36:4 Uses and purposes of focus groups in litigation
§ 36:5 —Taking the case
§ 36:6 —Requesting a change of venue
§ 36:7 —Organizing discovery
§ 36:8 —Choosing the language
§ 36:9 —Choosing a presentation style
§ 36:10 —Conducting voir dire
§ 36:11 —Developing a supplemental juror questionnaire
§ 36:12 —Writing the opening statement
§ 36:13 —Designing the story
§ 36:14 —Preparing witnesses
§ 36:15 —Developing convincing evidence.
§ 36:16 —Creating persuasive visuals
§ 36:17 —Determining damages
§ 36:18 —Negotiating a settlement
§ 36:19 Types of focus groups
§ 36:20 —Discovery
§ 36:21 —Perception
§ 36:22 —Trial preparation
§ 36:23 —Trial simulation
§ 36:24 —Shadow juries
§ 36:25 Designing a focus group
§ 36:26 —Choosing the appropriate type
§ 36:27 —Choosing the most appropriate size
§ 36:28 —Choosing the venue
§ 36:29 —Choosing the facility
§ 36:30 —Recruiting participants
§ 36:31 —Screening participants
§ 36:32 —Hiring a professional facilitator
§ 36:33 Developing presentations
§ 36:34 —Identifying test-worthy issues and evidence
§ 36:35 —Neutral case overview
§ 36:36 —Deciding the speakers
§ 36:37 —Live versus videotaped presentation
§ 36:38 Developing information questionnaires; What to measure
§ 36:39 —Open-ended and closed-ended questions
§ 36:40 —Ranking versus rating questions
§ 36:41 —Creative approaches to developing information
§ 36:42 Organizing deliberations
§ 36:43 —Determining role of facilitator
§ 36:44 —Jury instructions
§ 36:45 —Designing verdict form
§ 36:46 Conducting a focus group
§ 36:47 —Setting up the facility
§ 36:48 —Initial proceedings

§ 36:49 —Welcome remarks
§ 36:50 —Schedule of events
§ 36:51 —Final proceedings
§ 36:52 Analyzing the results
§ 36:53 Discoverability of results; Measures to protect confidentiality
§ 36:54 Future trends and potential of focus groups

CHAPTER 37. OPENING STATEMENT

§ 37:1 Scope note
§ 37:2 Law governing opening statements
§ 37:3 —Difference between opening statement and closing argument
§ 37:4 —Objectionable matters in opening statement
§ 37:5 The importance of the opening statement
§ 37:6 The jury's perspective
§ 37:7 Constructing the opening
§ 37:8 —Common mistakes
§ 37:9 —Why a story?
§ 37:10 —The elements of a good story
§ 37:11 The principles of storytelling
§ 37:12 —Start strong
§ 37:13 —Arouse the listener's curiosity
§ 37:14 —Set the scene
§ 37:15 —Present compelling characters
§ 37:16 —Paint a vivid picture of what happened
§ 37:17 —Employ a consistent point of view
§ 37:18 —Use the active voice
§ 37:19 —Tell the story in the present tense
§ 37:20 —Use simple, ordinary words and phrases
§ 37:21 —Use evocative language that transforms actions and concepts into memorable images
§ 37:22 —Involve the audience
§ 37:23 —Appeal to all the senses
§ 37:24 —Employ a theme
§ 37:25 —Identify a moral to motivate the audience
§ 37:26 —View the story as a circle
§ 37:27 Discussing legal concepts in opening statement
§ 37:28 Establishing expectations
§ 37:29 Humanizing counsel and the plaintiff
§ 37:30 "Inoculating" arguments during opening statements
§ 37:31 —Potential problems with the plaintiff's case
§ 37:32 —Potential personal characteristics of plaintiffs and witnesses that may be perceived as "negative"
§ 37:33 —Facts in plaintiff's case that may be perceived as weaknesses in the case
§ 37:34 —Dealing with potential problems in the plaintiff's case through opening statements
§ 37:35 —Dealing with defenses

§ 37:36 Arguing damages
§ 37:37 —Should plaintiff specify the amount sought
§ 37:38 —Facts bearing on damage
§ 37:39 —Mentioning the legal elements of damages
§ 37:40 Persuasive techniques for the courtroom storyteller
§ 37:41 —The cognitive subplot
§ 37:42 —The self-fulfilling plot
§ 37:43 —Backfilling the plot
§ 37:44 —Hold something back
§ 37:45 —Stories within stories
§ 37:46 —Labels
§ 37:47 —Metaphors
§ 37:48 —Similes and clichés
§ 37:49 —Analogies
§ 37:50 Use of visual aids
§ 37:51 The length of the opening statement
§ 37:52 Concluding the opening statement
§ 37:53 The non-verbal aspects of the opening statement
§ 37:54 —Appearance
§ 37:55 —Posture, gestures, and movement
§ 37:56 —Demeanor
§ 37:57 —Vocal mechanics
§ 37:58 Summary and practice pointers checklist
§ 37:59 Illustrative opening statement—Truck auto collision
§ 37:60 —Medical malpractice—Birth trauma
§ 37:61 —Premises liability—Unsafe ladder
§ 37:62 —Medical malpractice—Misdiagnosis of cancer

CHAPTER 38. PRESENTATION OF THE CASE IN CHIEF

§ 38:1 Scope note
§ 38:2 Strategy, objectives, and preliminary considerations—Getting the facts out early
§ 38:3 —Know what facts and issues to prove
§ 38:4 —Dealing with issues not in dispute
§ 38:5 —Introduction of formal and informal admissions
§ 38:6 —How to organize the proof
§ 38:7 —Minimizing the "warts"
§ 38:8 —Importance of being honest with the jury
§ 38:9 —Reviewing pattern jury instructions and other source material
§ 38:10 —Developing a theme
§ 38:11 Evaluation of jury
§ 38:12 Presenting cases involving imminent peril
§ 38:13 Preparation of witnesses
§ 38:14 —Preparation for cross-examination
§ 38:15 —Appearance of witnesses
§ 38:16 Problem witnesses

§ 38:17 —Young children
§ 38:18 —Physically handicapped witnesses
§ 38:19 Order of proof—The first witnesses
§ 38:20 —Changing the order of witnesses
§ 38:21 —Liability first vs. damages first
§ 38:22 —Theory of liability
§ 38:23 Scope of examination
§ 38:24 Attorney location
§ 38:25 Timing
§ 38:26 The client as witness
§ 38:27 The exercise of privileges
§ 38:28 The client at the counsel table
§ 38:29 —The profoundly injured client
§ 38:30 Anticipating objections
§ 38:31 The use of demonstrative exhibits
§ 38:32 Courtroom experimental evidence
§ 38:33 Offers of proof
§ 38:34 Motions to strike
§ 38:35 Anticipating impeachment
§ 38:36 Redirect examination
§ 38:37 Testimony through depositions
§ 38:38 —Videotaped depositions
§ 38:39 —Video editing
§ 38:40 Video conferencing and satellite appearances
§ 38:41 Jury view
§ 38:42 Rebuttal evidence
§ 38:43 Summary and practice pointers checklist

CHAPTER 39. DIRECT EXAMINATION OF LAY WITNESSES

§ 39:1 Scope note
§ 39:2 Case intake and investigation
§ 39:3 —Liability witnesses and evidence
§ 39:4 — —Investigate the scene immediately
§ 39:5 — —Preserve evidence
§ 39:6 — —Look for similar occurrences
§ 39:7 —Damages witnesses and evidence
§ 39:8 — —Interim loss
§ 39:9 — —Identification of damages witnesses
§ 39:10 — — —By activity
§ 39:11 — —Photo albums, home videos, and other keepsakes
§ 39:12 — —Evidence to counter pre-existing condition defense
§ 39:13 — —Preserve evidence
§ 39:14 —Witness contact lists
§ 39:15 Trial planning and selection of lay witnesses
§ 39:16 —Prima facie case
§ 39:17 —Ultimate issue
§ 39:18 —Theme

§ 39:19 —Purposes for which lay witnesses may testify
§ 39:20 — —Laying a foundation for expert or demonstrative evidence
§ 39:21 — —Establishing damages
§ 39:22 —Competency of witnesses
§ 39:23 —Considerations in evaluating witnesses
§ 39:24 —Ranking the helpfulness of lay witnesses
§ 39:25 —Using unhelpful or "problem" witnesses
§ 39:26 —Casting a witness
§ 39:27 —Establishing the personality or "flavor" of a witness
§ 39:28 —Select the witnesses you need, not just the most obvious
§ 39:29 —Accreditation witnesses
§ 39:30 —Backup or "fill-in" witnesses
§ 39:31 —Dealing with testimonial privileges
§ 39:32 —Witness lists or tables
§ 39:33 —Organization of direct examination materials
§ 39:34 —Plan your direct around your closing argument
§ 39:35 Preparation of witnesses
§ 39:36 —Making and maintaining contact with witnesses
§ 39:37 — —Propriety of contact
§ 39:38 — —Arrangements for appearance in court
§ 39:39 —Meet with witness early
§ 39:40 — —Liability witnesses
§ 39:41 —Overview the "big picture" with witnesses
§ 39:42 — —Explanation of the trial process
§ 39:43 —Witness empowerment
§ 39:44 —Investigate background of witness
§ 39:45 —Providing documents to witness
§ 39:46 —Examination dry runs
§ 39:47 —Individual or group preparation
§ 39:48 —Problems typical of lay witnesses
§ 39:49 — —Dealing with the "poor" witness, generally
§ 39:50 — —Dress and grooming
§ 39:51 — —Stereotypes
§ 39:52 — —Anxiety
§ 39:53 — —Imperfect memory
§ 39:54 — —Memorizing testimony
§ 39:55 — —Courtroom etiquette and behavior
§ 39:56 —Choice of words
§ 39:57 —Mine the witness's memory and experiences
§ 39:58 —Preparing witnesses for cross-examination and impeachment
§ 39:59 — —Questions about "possibility"
§ 39:60 — —Problems with memory or perception
§ 39:61 — —Unfavorable testimony
§ 39:62 — — —Improbable or inconsistent statements
§ 39:63 —Witness called by adverse party
§ 39:64 Planning and conduct of direct examination

§ 39:65 —General considerations—Let the facts tell a story
§ 39:66 — —Telegram
§ 39:67 — —Details
§ 39:68 — —Follow up
§ 39:69 — —Listen to your opponent's opening statement
§ 39:70 — —Listen to the witnesses' answers
§ 39:71 — —Be courteous and unobtrusive
§ 39:72 — —Be yourself
§ 39:73 — —Find out the judge's preferences
§ 39:74 —Organization and content of examination
§ 39:75 — —Structure of individual examination, generally
§ 39:76 — —Introduction and background of witness
§ 39:77 — —Establishing witness credibility
§ 39:78 — —Use concrete illustrations; Anecdotes
§ 39:79 — — —Focus on what the plaintiff has missed, gone through, and done
§ 39:80 — —Story within a story
§ 39:81 — —Comparison and contrast
§ 39:82 — —Begin and end on a high note
§ 39:83 — —Order of witnesses
§ 39:84 — — —Leading off with an adverse witness
§ 39:85 — —Economy in the use of witnesses
§ 39:86 — —Repetition
§ 39:87 — —Maximum proof
§ 39:88 —Sequestering lay witnesses
§ 39:89 —Timing of examination
§ 39:90 —Control techniques; Pace of examination and presentation
§ 39:91 —Examination through interpreter
§ 39:92 —Choice of language
§ 39:93 — —Use common language
§ 39:94 — —Formalistic style
§ 39:95 — —Defining technical terms and jargon
§ 39:96 — —Use words with impact, imagery, and feeling
§ 39:97 — —Avoid misdirectors
§ 39:98 — —Avoid qualifiers
§ 39:99 — —Don't talk down to the jury
§ 39:100 — —Other matters of language
§ 39:101 —Types of questions
§ 39:102 — —Leading questions
§ 39:103 —Particular examination techniques—Voice inflection
§ 39:104 — —Sequencing
§ 39:105 — —Foreshadowing, suspense, and revelation
§ 39:106 — —Flagging
§ 39:107 — —Pause
§ 39:108 — —Adoption
§ 39:109 — —"Follow-up", "come around", or "loop back"
§ 39:110 — —Paddleball
§ 39:111 — —Segues and transition sentences

§ 39:112 — —Marking, anchoring, or staking claim
§ 39:113 —Maintaining visual and auditory contact with jurors
§ 39:114 —Checking in with jurors
§ 39:115 —Use of exhibits and demonstrative items
§ 39:116 — —Foundation, identification, and admission, generally
§ 39:117 — —Documents
§ 39:118 — — —Best evidence rule
§ 39:119 — —Real and demonstrative evidence and aids
§ 39:120 — —Foundation
§ 39:121 — — —Courtroom creations
§ 39:122 — — —Using exhibit to repeat details of testimony
§ 39:123 —Demonstrations and experiments, generally
§ 39:124 —Exhibition of person or body
§ 39:125 —Handling the "stoic" witness
§ 39:126 —Handling the nervous, confused, or forgetful witness
§ 39:127 — —Refreshing recollection
§ 39:128 — — —Writings and prior statements
§ 39:129 — —Past recollection recorded
§ 39:130 —Examination of hostile or adverse witness
§ 39:131 —Impeaching your own witness
§ 39:132 —Lay opinions
§ 39:133 —Hearsay issues
§ 39:134 — —Admissions and declarations against interest
§ 39:135 — —Self-serving declarations
§ 39:136 — — —Prior consistent statements
§ 39:137 — —Deposition or other former testimony
§ 39:138 —Anticipate and defuse cross-examination
§ 39:139 —Redirect examination
§ 39:140 —Dealing with objections
§ 39:141 —Creating a record and offers of proof
§ 39:142 Special types of witnesses—Child witness
§ 39:143 —Elderly witness
§ 39:144 — —Proving damages for injury to elderly person
§ 39:145 —Business witness
§ 39:146 — —Examination of witness
§ 39:147 Summary and practice pointers checklist
§ 39:148 Illustrative forms—Sample letter for initial interview
§ 39:149 —Sample trial notice
§ 39:150 Pamphlet—"How to be a good witness"

Volume 4

CHAPTER 40. CROSS-EXAMINATION

§ 40:1 Scope note
§ 40:2 Preliminary considerations
§ 40:3 Preparation
§ 40:4 Master the facts

§ 40:5 Identification of potential factual pitfalls
§ 40:6 Investigate the witness' background, history, and prior testimony
§ 40:7 Professional ethical standards provide cross-examination material
§ 40:8 *Daubert* motions as cross examination preparation
§ 40:9 Organize the materials necessary for cross-examination
§ 40:10 Prepare all necessary exhibits and demonstrative material
§ 40:11 Determine whether to cross-examine
§ 40:12 Define the objectives of the cross-examination
§ 40:13 Formulate the examination
§ 40:14 Determine the appropriate style and strategy
§ 40:15 Rules and statutes applicable to and controlling cross-examination
§ 40:16 Other federal rules controlling cross-examination
§ 40:17 Necessity for a good faith basis for impeachment
§ 40:18 The sixth amendment
§ 40:19 Basic techniques
§ 40:20 When to abandon the basic techniques
§ 40:21 Know when to say when
§ 40:22 Impeaching the witness with prior testimony
§ 40:23 Impeaching the witness with prior inconsistent statements (not depositions)
§ 40:24 Impeaching the witness with prior oral statements
§ 40:25 Impeaching the witness with criminal records/criminal convictions
§ 40:26 Impeaching the witness with prior bad acts
§ 40:27 Impeaching the witness with omissions
§ 40:28 Impeaching the witness with treatises, journals, and other publications
§ 40:29 Control of the recalcitrant witness
§ 40:30 Advanced techniques
§ 40:31 Summary
§ 40:32 Practice pointers checklist

CHAPTER 41. DIRECT AND CROSS-EXAMINATION OF EXPERT WITNESSES

§ 41:1 Scope note
§ 41:2 Preliminary considerations on direct examination
§ 41:3 Preparation for direct examination
§ 41:4 Introducing the expert
§ 41:5 Qualifying the expert
§ 41:6 —Using qualification to educate the judge and jury
§ 41:7 —Tendering the expert as qualified
§ 41:8 Presenting the expert's opinion
§ 41:9 Explaining the bases for the expert's opinion
§ 41:10 Anticipating areas of cross-examination
§ 41:11 Redirect and rehabilitation

§ 41:12 Preliminary considerations on cross-examination
§ 41:13 Objectives on cross-examination
§ 41:14 —Simplicity and brevity
§ 41:15 —Control the examination
§ 41:16 —Appearance is everything
§ 41:17 Preparing for and conducting the cross-examination
§ 41:18 Impeachment strategies—Attacking the expert's training, qualifications and experience
§ 41:19 —Attacking opinion's trustworthiness by establishing bias or prejudice
§ 41:20 —Attacking the factual bases of the expert's opinion
§ 41:21 —Establishing that the expert has ignored critical facts or issues
§ 41:22 —Establishing the expert's lack of first-hand knowledge
§ 41:23 —Exposing the overstatement
§ 41:24 —Using publications to impeach the expert
§ 41:25 —Eliciting facts and opinions favorable to your case
§ 41:25.50 — —Another example
§ 41:26 Using hypotheticals
§ 41:27 Sample direct examination and cross-examination of biomechanical engineer in products liability case
§ 41:28 Sample questions to expert concerning pain management and vocational disability—Direct examination
§ 41:29 —Cross examination
§ 41:30 Sample questions to insurance expert—Direct examination
§ 41:31 Sample Direct Examination of Plaintiff's Expert Witness

CHAPTER 42. DEMONSTRATIVE AND DOCUMENTARY EVIDENCE IN CONTEMPORARY TORT LITIGATION

§ 42:1 Scope note
§ 42:2 "Demonstrative evidence": Origins and purpose
§ 42:3 Documentary evidence
§ 42:4 The power and persuasiveness of demonstrative and documentary evidence
§ 42:5 Development and use of demonstrative and documentary evidence at various stages of the case
§ 42:6 Strategizing, organizing, and preparing demonstrative and documentary evidence
§ 42:7 Admissibility issues arising with demonstrative evidence
§ 42:8 Recouping the expense of demonstrative and documentary evidence
§ 42:9 Types of demonstrative evidence
§ 42:10 —Photography
§ 42:11 — —Digital photography
§ 42:12 — —Stock photography

§ 42:13 — —Aerial photographs
§ 42:14 —Medical models and illustrations
§ 42:15 —Charts and graphs
§ 42:16 —Enlargements
§ 42:17 —Video
§ 42:18 — —Video depositions and teleconferencing
§ 42:19 — —"Day in the life" films and videos
§ 42:20 — —Property inspections
§ 42:21 — —Video re-enactments
§ 42:22 — —Surveillance videos
§ 42:23 —Computer-generated graphics
§ 42:24 — —Foundation for admissibility of computer-generated graphics
§ 42:25 —Experiments
§ 42:26 —Adversary's videos and demonstrative aids
§ 42:27 Effectively using documentary evidence
§ 42:28 —Foundational elements
§ 42:29 —Summaries
§ 42:30 Presentation of documentary evidence at trial—Equipment and technology
§ 42:31 —Other methods of presentation
§ 42:32 Jury books
§ 42:33 Settlement brochures
§ 42:34 Summary and practice pointers checklist

CHAPTER 43. THE ART AND STRATEGY OF OBJECTIONS

§ 43:1 Scope note
§ 43:2 Preliminary matters
§ 43:3 Whether to object
§ 43:4 Style of making objections
§ 43:5 Manner of making an objection
§ 43:6 Appellate review of objections
§ 43:7 Motions in limine
§ 43:8 Objections relating to substance of evidence—Relevancy and materiality
§ 43:9 —Hearsay
§ 43:10 —Lack of foundation
§ 43:11 —Speculation
§ 43:12 —Improper conclusion, generally
§ 43:13 —Improper opinions of a lay witness
§ 43:14 —Improper opinion of an expert witness
§ 43:15 —Authenticity of documents or other evidence
§ 43:16 —The best evidence rule
§ 43:17 —Real evidence
§ 43:18 — —Person
§ 43:19 — —Place
§ 43:20 — —Thing

§ 43:21 — —Chain of custody
§ 43:22 —Demonstrative evidence
§ 43:23 —Privileged communications
§ 43:24 —Presentation of evidence or witness in violation of court order
§ 43:25 —Danger of unfair prejudice outweighing probative value of evidence
§ 43:26 Objections relating to the form, manner, or scope of questioning-leading the witness
§ 43:27 —Vague or confusing questions, generally
§ 43:28 —Multiple or compound questions
§ 43:29 —Questions calling for narrative answers
§ 43:30 —Questions that assume unproven facts or misstate facts
§ 43:31 —Harassment of the witness, generally
§ 43:32 —Argumentative questions
§ 43:33 —Repetitious questions
§ 43:34 —Interrupting the witness
§ 43:35 —Exceeding proper scope of cross or re-direct examination
§ 43:36 Objections to argument by counsel-in opening statement
§ 43:37 —In closing argument
§ 43:38 —In rebuttal to closing argument
§ 43:39 Checklist for defending and making objections
§ 43:40 Illustrative forms
§ 43:41 —Plaintiff's multiple-issue motion in limine to exclude mention or evidence of various matters
§ 43:42 —Plaintiffs' motion in limine to exclude computer program results and to strike witnesses
§ 43:43 —Plaintiffs' memorandum in support of motion in limine to exclude computer program results and to strike witnesses
§ 43:44 —Defendant's memorandum in support of motion in limine to exclude FAA documents
§ 43:45 Defendant's memorandum in support of motion in limine to exclude FAA documents—Memorandum in support of plaintiffs' motion to strike letter

CHAPTER 44. FINAL ARGUMENTS IN JURY AND BENCH TRIALS

§ 44:1 Scope note
§ 44:2 Preliminary considerations—What makes a great closing
§ 44:3 —Handling problems during closing argument
§ 44:4 —Impermissible arguments
§ 44:5 —Arguments to avoid
§ 44:6 Preparation for closing—Refine your case theme
§ 44:7 —Your guide: The outline
§ 44:8 —Keep objectives in mind
§ 44:9 —Check local rules and the judge's preferences
§ 44:10 —Practice makes perfect
§ 44:11 —Right to present closing argument

§ 44:12 — —Circumstances affecting the right to argue
§ 44:13 Order and elements of closing, generally
§ 44:14 —Elements of closing argument
§ 44:15 — —Start with statement of case
§ 44:16 — —Summary of facts and issues
§ 44:17 — —Explain the burden of proof
§ 44:18 — —Discuss the law
§ 44:19 — —Review the evidence with the jury
§ 44:20 — —Explain verdict forms
§ 44:21 — —Concluding your closing: The final five
§ 44:22 Delivering the closing
§ 44:23 —Length of closing
§ 44:24 —Arguing the law
§ 44:25 — —How to argue the law
§ 44:26 —Arguing causation and liability
§ 44:27 —Arguing damages
§ 44:28 — —Arguing the different types of damages in personal injury cases
§ 44:29 — —Mathematical and per diem arguments
§ 44:30 — —The golden rule argument
§ 44:31 — —Arguing for punitive damages
§ 44:32 —Commenting on evidence and matters not in evidence
§ 44:33 — —Reading transcripts and pleadings to the jury
§ 44:34 — —Reading from publications and discussing matters of common knowledge
§ 44:35 —Language and style for closing argument
§ 44:36 — —Rhetorical techniques
§ 44:37 — —Style and demeanor
§ 44:38 —Visual aids
§ 44:39 Rebuttal
§ 44:40 Objecting to closing argument
§ 44:41 Checklist of closing argument dos, don'ts and maybes
§ 44:42 Illustrative closing argument—Defective bicycle case
§ 44:43 — —Rebuttal
§ 44:44 — —Another version
§ 44:45 —Defective power-saw

CHAPTER 45. *[Reserved]*

CHAPTER 46. TRIAL AND POST-TRIAL MOTIONS

§ 46:1 Scope note
§ 46:2 Strategies and related considerations
§ 46:3 Motions relating to the jury
§ 46:4 —Number and exercise of peremptory challenges
§ 46:5 —Conduct of, and communication with, jurors
§ 46:6 Motions relating to opening and closing statements
§ 46:7 Other motions during trial

§ 46:8 —Motions to amend the pleadings to conform to the evidence
§ 46:9 —Motion for judgment as a matter of law (directed verdict)
§ 46:10 Renewal of motion for judgment as a matter of law—After entry of judgment (judgment notwithstanding the verdict)
§ 46:11 Motion for a new trial
§ 46:12 —Grounds for motion
§ 46:13 Motion for relief from a judgment
§ 46:14 Motion to alter or amend the judgment, generally
§ 46:15 Motions affecting a damage amount in a judgment
§ 46:16 Checklist for motions during trial and concerning a judgment
§ 46:17 Illustrative forms—Plaintiffs' motion for entry of judgment
§ 46:18 —Judgment against defendant
§ 46:19 —Plaintiffs' motion for new trial and for judgment notwithstanding the verdict
§ 46:20 —Plaintiffs' motions for new trial and for relief from judgment
§ 46:21 —Petitioner's Motion to Reconsider Denial of Certiorari
§ 46:22 Order denying cetiorari
§ 46:23 Motion for reconsideration
§ 46:24 Order granting cetiorari

CHAPTER 47. APPEALS

§ 47:1 Scope note
§ 47:2 Types of appeals
§ 47:3 Standards of appellate review
§ 47:4 Whether to appeal
§ 47:5 Commencement of appeals
§ 47:6 Attorneys involved in the appellate process
§ 47:7 Preparation for appeals
§ 47:8 —Preparation for pre-trial appeals
§ 47:9 —Preparation for post-trial appeals
§ 47:10 — —Pre-trial preparation for post-trial appeals
§ 47:11 — —Preparation for post-trial appeals during trial
§ 47:12 — —Preparation for post-trial appeals after trial
§ 47:12.50 —Record on appeal; transcripts; digests and index
§ 47:13 Drafting of briefs
§ 47:13.50 Drafting briefs—Cross-appeals
§ 47:14 Preliminary statement
§ 47:15 Questions presented
§ 47:16 Statement of facts
§ 47:17 Legal argument
§ 47:18 —Discussion of the law
§ 47:19 —Application of facts
§ 47:20 Conclusion of the brief
§ 47:21 Reply briefs
§ 47:22 Oral argument of appeals
§ 47:23 Summary and practice pointers checklist

CHAPTER 48. *[Reserved]*

CHAPTER 49. THE 50 ETHICAL COMMANDMENTS FOR TORT LAWYERS

I. INTRODUCTION

§ 49:1 Scope note
§ 49:2 The commandments, generally
§ 49:3 Codes of ethics

II. THE COMMANDMENTS

A. GETTING THE CASE

§ 49:4 Commandment 1. Thou shalt not falsely promise the client the world in order to get the case
§ 49:5 Commandment 2. Thou shalt not pay money to the ambulance driver for the next case
§ 49:6 Commandment 3. Thou shalt not advertise falsely
§ 49:7 Commandment 4. Thou shalt not bribe the media to make you the biggest name in town
§ 49:8 Commandment 5. Thou shalt not solicit a stranger in person or by telephone
§ 49:9 Commandment 6. Thou shalt not solicit business in writing when you are nothing but a broker who only refers cases to real lawyers
§ 49:10 Commandment 7. Thou shalt not claim to be a specialist even if you are because it might offend general practitioners

B. TAKING THE CASE

§ 49:11 Commandment 8. Thou shalt not take a case which is hopeless even for your best friend
§ 49:12 Commandment 9. Thou shalt not raise a defense merely to harass
§ 49:13 Commandment 10. Thou shalt not be a witness as well as an advocate
§ 49:14 Commandment 11. Thou shalt not serve more than one master (even if they are physicians)
§ 49:15 Commandment 12. Thou shalt not betray a former client
§ 49:16 Commandment 13. Thou shalt not take a case which is beyond you, even if it's very lucrative
§ 49:17 Commandment 14. Thou shalt not take so many cases that you neglect them

C. CHARGING FOR THE CASE

§ 49:18 Commandment 15. Thou shalt not charge a fee of 60 percent no matter how sorely tempted

§ 49:19 Commandment 16. Thou shalt not share a fee with a lawyer who does no work and takes no responsibility

D. LIVING WITH THE CASE

§ 49:20 Commandment 17. Thou shalt fairly represent even the most wretched of clients
§ 49:21 Commandment 18. Thou shalt not stand by idly while a client makes known an intention to commit a crime
§ 49:22 Commandment 19. Thou shalt not buy a piece of your client's case
§ 49:23 Commandment 20. Thou shalt keep your clients informed and certainly tell them of all offers even ridiculously little ones
§ 49:24 Commandment 21. Thou shalt not demand sex—From a client that is

E. WATCHING THE OFFICE AS WELL AS THE CASE

§ 49:25 Commandment 22. Thou shalt not look the other way when a scoundrel works for you
§ 49:26 Commandment 23. Of course, thou shalt not co-mingle
§ 49:27 Commandment 24. Thou shalt maintain records

F. STARTING THE CASE

§ 49:28 Commandment 25. Thou shalt not assert a frivolous claim

G. WITHDRAWING FROM THE CASE

§ 49:29 Commandment 26. Thou shalt withdraw when a claim or defense has been asserted merely to harass
§ 49:30 Commandment 27. Thou shalt withdraw when too ill to continue
§ 49:31 Commandment 28. Thou shalt withdraw when the client insists upon conduct which is dishonorable

H. DISCOVERING THE CASE

§ 49:32 Commandment 29. Thou shalt not communicate with an opposing party represented by counsel no matter how important you are
§ 49:33 Commandment 30. Thou shalt not hide behind a common-interest arrangement
§ 49:34 Commandment 31. Thou shalt not bury the killer documents

I. TRYING THE CASE

§ 49:35 Commandment 32. Thou shalt not seek out jurors in advance who may be selected in your case
§ 49:36 Commandment 33. Thou shalt honor the Chinese Wall between you and jurors during the trial

§ 49:37 Commandment 34. Thou shalt neither present false evidence nor coach a witness to be false
§ 49:38 Commandment 35. Thou shalt not lie
§ 49:39 Commandment 36. Thou shalt not suppress evidence you are bound to reveal
§ 49:40 Commandment 37. Thou shalt cite all known pertinent cases, even the case that kills you
§ 49:41 Commandment 38. Thou shalt not ask an unfair killer question, even if you would gain the whole world
§ 49:42 Commandment 39. Thou shalt not offer your own opinion on the justness of a case (but the jurists who insist upon this rule are easily placated)
§ 49:43 Commandment 40. Thou shalt not use publicity to sneak in the inadmissible
§ 49:44 Commandment 41. Thou shalt not pay a witness to get lost
§ 49:45 Commandment 42. Thou shalt not ex parte the judge
§ 49:46 Commandment 43. Thou shalt not violate a court order, even when it is wrong and dumb
§ 49:47 Commandment 44. Thou shalt keep the court informed

J. SETTLING THE CASE

§ 49:48 Commandment 45. Thou shalt neither propose nor accept a confidentiality agreement which tends to conceal a public danger
§ 49:49 Commandment 46. Thou shalt not agree to never again take a similar case
§ 49:50 Commandment 47. Thou shalt not settle cases by the bulk unless all clients consent
§ 49:51 Commandment 48. Thou shalt not threaten criminal charges to get a good settlement
§ 49:52 Commandment 49. Thou shalt not sell a structured settlement or a judgment

K. THE GREATEST COMMANDMENT

§ 49:53 Commandment 50. Thou shalt be civil and fair in all your dealings
§ 49:54 Conclusion
§ 49:55 Checklist of questions concerning ethical conduct to ask yourself
§ 49:56 Resources for researching ethical issues

CHAPTER 50. STRATEGIES IN LITIGATING INTENTIONAL TORT CASES

§ 50:1 Scope note
§ 50:2 Evaluating the intentional tort case
§ 50:3 —Client issues and the importance of the client interview

§ 50:4 —Pre-suit discovery
§ 50:5 —Insurance coverage and indemnification
§ 50:6 Discovery issues
§ 50:7 —Protective orders
§ 50:8 —Obtaining personnel files and internal affairs division investigations
§ 50:9 —Inspect and photograph
§ 50:10 —Depositions
§ 50:11 —Electronic discovery
§ 50:12 Analyzing damages in intentional tort cases
§ 50:13 —Compensatory damages
§ 50:14 —Punitive damages
§ 50:15 —Attorney's fees
§ 50:16 —Injunctive relief
§ 50:17 Settlement issues
§ 50:18 —Nondisclosure of settlement or litigation
§ 50:19 Trial themes
§ 50:20 Use of experts at trial
§ 50:21 Motions in limine
§ 50:22 Vicarious liability for intentional torts
§ 50:23 —Liability for intentional acts of employees
§ 50:24 — —The scope of employment
§ 50:25 Civil suits for assault and battery against individuals
§ 50:26 —Defenses
§ 50:27 False imprisonment and false arrest
§ 50:28 —Defenses
§ 50:29 —Shoplifting cases
§ 50:30 —Damages
§ 50:31 Malicious prosecution and malicious institution of civil proceedings
§ 50:32 —Institution of civil or criminal proceedings
§ 50:33 —Liability of lawyers
§ 50:34 —Termination of the proceeding in favor of the defendant or accused
§ 50:35 —Lack of probable cause
§ 50:36 — —Effect of rulings and orders in the underlying case
§ 50:37 —Malice
§ 50:38 —Defenses
§ 50:39 Abuse of process
§ 50:40 Intentional infliction of emotional distress
§ 50:40.10 Intentional interference with contract
§ 50:41 Civil rights violations
§ 50:42 —False arrest
§ 50:43 —Malicious prosecution
§ 50:44 —Unreasonable force
§ 50:45 —Municipal and supervisory liability
§ 50:46 —Racial profiling
§ 50:47 —Qualified immunity defense
§ 50:48 —Absolute immunity defense

§ 50:49 Checklist of sources of proof to support allegations
§ 50:50 Checklist of sources of proof to support damages
§ 50:51 Illustrative forms
§ 50:52 —Complaint against police officer for § 1983 violations, false imprisonment, and state civil rights act violations
§ 50:53 —Complaint against police officer and city for § 1983 violations, state civil rights act violations, malicious prosecution, and negligence
§ 50:54 —Complaint against police officer, city and bar for § 1983 violations, state civil rights act violations, intentional infliction of emotional distress, and negligence
§ 50:55 —Request for production of documents to bar
§ 50:56 —Request for production of documents to city
§ 50:57 —Request for production of documents to police officer
§ 50:58 —Interrogatories to bar
§ 50:59 —Interrogatories to police officer and bar
§ 50:60 —Interrogatories to police officer, city, and bar
§ 50:61 Illustrative jury instructions-Consciousness of liability
§ 50:62 —Deprivation of constitutional rights by unreasonable force
§ 50:63 —Intentional infliction of emotional distress
§ 50:64 —State tort law of malicious prosecution
§ 50:65 —Municipal liability for policy of deliberate indifference
§ 50:66 —Full set of instructions as to action against police officer

CHAPTER 51. FIREARMS

§ 51:1 Scope note
§ 51:2 Preliminary considerations
§ 51:3 —Much legislation/Little regulation
§ 51:4 —Pro-industry legislation
§ 51:5 —Pro-safety efforts
§ 51:6 Jury selection
§ 51:7 Juror bias
§ 51:8 Expert witness issues
§ 51:9 Examination of a firearm
§ 51:10 Firearms designs
§ 51:11 Industry standards
§ 51:12 Evidence
§ 51:13 Law, generally
§ 51:14 Traditional product liability; Parts of a firearm
§ 51:15 —Fire control system
§ 51:16 —Safety mechanism
§ 51:17 —Firearm action
§ 51:18 —Barrel/Chamber explosions
§ 51:19 —Miscellaneous problems
§ 51:20 Factual defenses

§ 51:21 —Post-manufacture modifications
§ 51:22 —Inadvertent trigger pull
§ 51:23 —Product misuse
§ 51:24 —Ten Commandments of firearms safety
§ 51:25 —Impossibility
§ 51:26 —Other defenses
§ 51:27 Suing the shooter
§ 51:28 Post-incident changes
§ 51:29 Legal defenses
§ 51:30 Foreign defendants
§ 51:31 Negligence cases—Shooter negligence
§ 51:32 —Point of sale negligence
§ 51:33 —Owner/parental negligence
§ 51:34 —Publisher negligence
§ 51:35 Liability for intentional shootings
§ 51:36 Saturday night special cases: Defective concept?
§ 51:37 Assault weapon cases—Long Island Railroad shootings
§ 51:38 —California law office shooting
§ 51:39 Simple negligence and market share liability
§ 51:40 Product liability
§ 51:41 Public nuisance
§ 51:42 Municipal litigation
§ 51:43 Checklists—Pre-acceptance investigation
§ 51:44 —Pre-filing investigation
§ 51:45 —Pretrial discovery
§ 51:46 —Pretrial preparation
§ 51:47 —Causes of action and elements
§ 51:48 Illustrative forms—Short complaint alleging personal injury caused by firearm's defective cartridge loading mechanism
§ 51:49 —Long complaint alleging personal injury caused by explosion of barrel of firearm
§ 51:50 —Complaint against multiple defendants in chain of distribution, parent and subsidiary, and corporate successor in interest
§ 51:51 Illustrative jury instructions
§ 51:52 Illustrative form: memorandum in support of motion in limine to exclude testimony regarding "absence of accidents"

CHAPTER 52. SOFT TISSUE INJURIES (CONNECTIVE TISSUE TRAUMA CASES)

§ 52:1 Scope note
§ 52:2 Preliminary considerations
§ 52:3 From small to "substantial"—A conceptual approach
§ 52:4 The connective tissue trauma case and the 21st century jury
§ 52:5 Screening the case

§ 52:6 The five keys to a successful connective tissue trauma case
§ 52:7 The initial client interview
§ 52:8 What the lawyer needs from the client
§ 52:9 Evaluating the case—Liability
§ 52:10 —Damages
§ 52:10.50 — —Trauma as effecting permanent injury
§ 52:11 —Collectability
§ 52:12 The case game plan
§ 52:13 Investigating the connective tissue trauma case
§ 52:14 Medical aspects of a connective tissue trauma case
§ 52:15 The team approach to medical treatment
§ 52:16 Filing suit in the connective tissue trauma case
§ 52:17 Discovery in a connective tissue trauma case
§ 52:18 —Interrogatories
§ 52:19 —The defendant's deposition
§ 52:20 —Preparing the plaintiff for deposition
§ 52:21 —Handling the defense physical expert
§ 52:22 Plaintiff's use of experts—Types of experts
§ 52:22.50 Defendant's use of experts
§ 52:23 Trying the connective tissue case
§ 52:24 —The trial as theater
§ 52:25 —The american jury after 9–11
§ 52:26 —Opening statement in the connective tissue trauma case
§ 52:27 —What makes jurors respond positively
§ 52:28 Direct examination of the plaintiff in the connective tissue trauma case
§ 52:29 Lay witnesses
§ 52:30 Presenting the medical proof
§ 52:31 Cross-examining the defense medical expert
§ 52:32 Summation
§ 52:33 Illustrative forms—Contract for attorney services
§ 52:34 —Case game plan
§ 52:35 —Authorization to release medical records
§ 52:36 —Interrogatories to defendant
§ 52:37 —Direct examination of orthopaedic surgeon in neck sprain case

CHAPTER 53. BRAIN INJURIES

§ 53:1 Scope note
§ 53:2 Epidemiology of brain injury
§ 53:3 Special considerations in identifying and litigating brain injury cases
§ 53:4 —Pediatric cases
§ 53:5 How to successfully litigate a brain injury case
§ 53:6 General evaluation and diagnostic recommendations
§ 53:7 Voir dire—Special problems with a closed brain injury case

§ 53:8 The plaintiff's direct case
§ 53:9 The trial consultant
§ 53:10 Before and after witnesses
§ 53:11 The witnesses—The biomechanical engineer
§ 53:12 —The neurologist
§ 53:13 —The neuropsychologist
§ 53:13.50 — —Third-party observers during neuropsychological testing
§ 53:14 — —Choosing a neuropsychologist
§ 53:15 —The neuro-otologist
§ 53:16 —The physiatrist
§ 53:17 —The neuropsychiatrist
§ 53:18 —The vocational rehabilitation expert
§ 53:19 —Life care planner
§ 53:19.30 — —Hiring the life care planner
§ 53:19.50 — —*Daubert* and the admissibility of expert LCP testimony
§ 53:19.70 — —Presenting the life care planner in court
§ 53:20 —The plaintiff
§ 53:21 —The economist
§ 53:22 Plaintiff and defense tactics
§ 53:23 Cross-examination of the defendant's experts
§ 53:24 Summation in brain injury cases
§ 53:25 Checklist of essential information when litigating a brain injury case
§ 53:26 Illustrative forms—Client medical history questionnaire
§ 53:27 —Client letter providing list of health care providers
§ 53:28 —Authorization to release medical records
§ 53:29 —Authorization to obtain employment records
§ 53:30 —Deposition of vocational economist
§ 53:31 —Deposition of neuro-otologist
§ 53:32 —Deposition of neuropsychologist
§ 53:32.20 —Deposition of biomechanical engineer
§ 53:32.30 —Notice of motion to compel the production of the defense neuropsychologist's raw data
§ 53:32.40 —Certification of attorney for plaintiff
§ 53:32.50 —Order compelling defendant to produce the neuropsychological testing raw data, all computer-generated reports and all scoring summary sheets
§ 53:32.60 Plaintiff's motion objecting to neuropsychological testing
§ 53:32.70 Plaintiff's motion to exclude evidence of plaintiff's prior psychological treatment
§ 53:33 Illustrative jury instructions

CHAPTER 54. SEXUAL ABUSE

§ 54:1 Scope note
§ 54:2 Nature of sexual abuse claims
§ 54:3 Nature of sexual abuse litigation

§ 54:4 Case selection—Accepting and rejecting cases
§ 54:5 The client's need for honesty and support
§ 54:6 Maintaining proper boundaries
§ 54:7 Context of abuse—Child and adolescent victims
§ 54:8 —Adult victims
§ 54:9 Offenders—Psychiatric classification and personality
§ 54:10 —Child sexual abuse
§ 54:11 —Psychotherapists and health care professionals
§ 54:12 —"Grooming" the victim
§ 54:13 Repressed and recovered memory
§ 54:14 Statutes of limitation
§ 54:15 —Factors to consider
§ 54:16 Insurance coverage—Professional policies
§ 54:17 —Intentional acts exclusion and coverage for negligent supervision or failure to protect
§ 54:18 —Stacking of policies
§ 54:19 —Making or filing a claim
§ 54:20 Multiple victim-plaintiffs
§ 54:21 —Other potential plaintiffs: Spouses and parents
§ 54:22 Multiple defendants
§ 54:23 Claims against perpetrators—Intentional torts, generally
§ 54:24 —Assault and battery
§ 54:25 —Intentional infliction of emotional distress
§ 54:26 —Breach of fiduciary duty
§ 54:27 —Negligence, generally
§ 54:28 —Negligent infliction of emotional distress
§ 54:29 —Malpractice, generally
§ 54:30 Statutory bases of liability
§ 54:31 Third party liability—Respondeat superior
§ 54:32 —Apparent authority
§ 54:33 —Special duty to victim
§ 54:34 Direct liability of third parties
§ 54:35 —Negligent hiring and retention
§ 54:36 —Negligent supervision
§ 54:37 —Duty to warn
§ 54:38 —Breach of fiduciary duty
§ 54:39 Claims against particular individuals and organizations
§ 54:40 —Therapists
§ 54:41 —Physicians
§ 54:42 —Clergy
§ 54:43 —Teachers, youth leaders, and custodians
§ 54:43.30 —Prison officials and supervisors of work-release programs
§ 54:43.70 Failure to protect children: foster care negligence and wrongful adoption
§ 54:44 Defenses of denial and avoidance—False allegation
§ 54:45 —No duty to plaintiff
§ 54:46 —Outside scope of employment

§ 54:47 —Causation
§ 54:48 Affirmative defenses—Consent
§ 54:49 —Contributory negligence and comparative fault
§ 54:50 Damages—Elements
§ 54:51 —Expert evaluation of the plaintiff
§ 54:52 —Effects of sexual abuse and trauma
§ 54:53 —"Thin-skull plaintiff," preexisting condition, and indivisible injury
§ 54:54 Rule 35 evaluations of plaintiff and defendant
§ 54:54.50 Proof of other wrongs by perpetrator
§ 54:55 Juror bias in sexual abuse cases
§ 54:56 Use of focus groups in sexual abuse cases
§ 54:57 Checklist of essential allegations and defenses
§ 54:58 Checklist of sources of proof
§ 54:59 Illustrative forms—Complaint against church and minister for personal injuries resulting from sexual abuse by minister

CHAPTER 55. PREMISES LIABILITY

§ 55:1 Scope note
§ 55:2 Client interview
§ 55:3 Investigation
§ 55:4 Ascertaining potential defendants and claims
§ 55:5 Ascertaining insurance coverage
§ 55:6 Anticipating defenses
§ 55:7 Pre-suit negotiations
§ 55:8 Statutes of limitation
§ 55:9 Choice of forum
§ 55:10 The complaint
§ 55:11 —Punitive damages claims
§ 55:12 Discovery considerations
§ 55:13 Trial preparation—Importance of persuasive trial theme
§ 55:14 —Expert witnesses
§ 55:15 —Lay witnesses
§ 55:16 —Exhibits and demonstrative evidence
§ 55:17 — —Real evidence
§ 55:18 — —Demonstrations
§ 55:19 —Evidence of subsequent remedial measures
§ 55:20 —Trial notebook
§ 55:21 —Focus groups
§ 55:22 Jury
§ 55:23 Trial—Plaintiff's opening statement
§ 55:24 —Presenting the plaintiff's case
§ 55:25 —Cross-examination of defense witnesses
§ 55:26 —Plaintiff's closing argument
§ 55:27 Duties and liabilities—Generally
§ 55:28 — —Duty as affected by status of entrant
§ 55:29 — — —Invitees

§ 55:30 — — —Licensees
§ 55:31 — — —Trespassers
§ 55:32 — — —Abolition of common law distinctions
§ 55:33 — — —Public safety officers
§ 55:34 — —Landlord/tenant
§ 55:35 —Acts of third persons; Criminal acts
§ 55:36 — —Open and obvious dangers
§ 55:37 —Recreational use statutes
§ 55:38 —Particular places or hazards—Commercial/retail establishments
§ 55:39 — —Dogs
§ 55:40 — — —Provocation
§ 55:41 — —Dram shop and "social host" liability
§ 55:42 — —Health clubs and similar facilities
§ 55:43 — — —Exculpatory agreements
§ 55:44 — —Hospitals
§ 55:45 — —Parking areas
§ 55:46 — —Potholes
§ 55:47 — —Sidewalk snow and ice
§ 55:48 — —Swimming pools
§ 55:49 Checklist of essential allegations and defenses
§ 55:50 Illustrative forms—Sample complaint
§ 55:51 —Request for admissions
§ 55:52 —Opening statement
§ 55:53 —Closing statement
§ 55:54 Illustrative jury charges

Volume 5

CHAPTER 56. LEAD PAINT

§ 56:1 Scope note
§ 56:2 Preliminary considerations
§ 56:3 Lead
§ 56:4 Sources of lead
§ 56:5 How lead is detected
§ 56:6 XRF analysis
§ 56:7 Laboratory analysis of paint chips
§ 56:8 Lead dust
§ 56:9 How lead poisons
§ 56:10 How lead poisoning is diagnosed
§ 56:11 Useful resources
§ 56:12 Lead law library
§ 56:13 Technical library
§ 56:14 Medical library
§ 56:15 Expert library
§ 56:16 Case evaluation: Economics
§ 56:17 Profile of lead paint plaintiffs generally

§ 56:18 Statute of limitations
§ 56:19 Importance of initial client interview
§ 56:20 Maintain contact with client
§ 56:21 Interview and maintain contact with key fact witnesses
§ 56:22 The issue of parental responsibility
§ 56:23 Injury and causation
§ 56:24 Types of damages
§ 56:25 Evidence of causation/damages: Documentary evidence
§ 56:26 Defendants' use of documentary evidence
§ 56:27 Expert witnesses
§ 56:28 Defendants' use of experts
§ 56:29 Expert witness discovery
§ 56:30 Litigation: Initial considerations
§ 56:30.50 Public nuisance theory
§ 56:31 Consider the proper plaintiffs
§ 56:32 Consider the proper defendants
§ 56:33 Consider the proper allegations
§ 56:34 Consider the proper allegations: Notice
§ 56:35 General considerations: The prima facie case
§ 56:36 Proving the duty
§ 56:37 Proving breach of duty
§ 56:37.50 Negligence per se
§ 56:38 Proving the injury and the causal connection
§ 56:39 Consider possible defenses
§ 56:40 Consider the necessary discovery
§ 56:41 Insurance issues
§ 56:42 Trigger of coverage: Which policies provide coverage for the claim
§ 56:43 Pollution exclusions
§ 56:44 Lead exclusions
§ 56:45 Discovery goals
§ 56:46 Evaluation of material
§ 56:47 Importance of periodic reevaluation of the case
§ 56:48 Jury selection
§ 56:49 Trial strategies
§ 56:50 Jury instructions and interrogatories
§ 56:51 Appeals
§ 56:52 State and local legislation and regulations
§ 56:53 The challenge of proving notice
§ 56:54 Actual notice
§ 56:55 Constructive notice
§ 56:56 Relaxation of the burden of proving notice by the courts
§ 56:57 Relaxation of the burden of proving notice by statute
§ 56:58 Effect on the notice requirement of the rise in general awareness of the problem of infant lead poisoning
§ 56:59 Parental liability
§ 56:60 Governmental liability
§ 56:60.50 Medical malpractice claims in lead poisoning cases
§ 56:61 Federal statutes and regulations

§ 56:62 The Lead-Based Paint Poisoning Prevention Act
§ 56:63 Title X: The Residential Lead-Based Paint Hazard Reduction Act of 1992
§ 56:64 Title X's amendments to the Lead-Based Paint Poisoning Prevention Act
§ 56:65 Title X: The Lead Disclosure Law
§ 56:66 Title X's amendments to the Toxic Substances Control Act
§ 56:66.30 —EPA regulations
§ 56:66.50 Consumer Product Safety Improvement Act of 2008
§ 56:67 The RLBPHRA's Lead Disclosure Rules
§ 56:68 The Lead Disclosure Law's impact on state law: Negligence per se and evidence of negligence
§ 56:69 The Lead Disclosure Law's impact on constructive notice
§ 56:70 24 C.F.R. Part 35
§ 56:71 Section 8 rental assistance
§ 56:72 Checklist of essential allegations and defenses
§ 56:73 Checklist of information to be obtained from client
§ 56:74 Checklist of critical documentary evidence to get from client or through discovery
§ 56:75 Illustrative forms—Sample complaint
§ 56:76 —Lead poisoning intake sheet
§ 56:77 —Freedom of Information Law Request from Department of Health
§ 56:78 —Sample Title X pleading language
§ 56:79 —Illustrative interrogatories
§ 56:80 — —Another example
§ 56:81 Illustrative jury instructions

CHAPTER 57. AUTOMOBILE CASES

§ 57:1 Scope note
§ 57:2 Preliminary considerations—Read your own auto insurance policy
§ 57:3 —Screening telephone calls
§ 57:4 —Initial interview
§ 57:5 First party insurance coverage and policy requirements
§ 57:6 —Policy benefits
§ 57:7 Initial contact with the defendant's insurance company
§ 57:8 Investigation
§ 57:9 —Use of private investigators
§ 57:10 Staff resources
§ 57:11 Effective case management
§ 57:12 Questionable and conflicting claims
§ 57:13 Creating a medical summary
§ 57:14 Evaluating the case
§ 57:15 Proposed settlement or demand package
§ 57:16 Particular types of collisions—"Low impact" collisions

§ 57:17 —Rear end collisions (or sudden, unsignalled stops and turns)
§ 57:18 —Passing vehicles
§ 57:19 —Multiple-crash cases
§ 57:20 —Collisions between automobile and pedestrian or bicyclist
§ 57:21 —Hit and run cases
§ 57:22 Impaired or disabled drivers
§ 57:23 Guest-passenger cases
§ 57:24 Defenses—Contributory and comparative negligence; The "seat belt defense"
§ 57:25 —Last clear chance
§ 57:26 —Assumption of the risk
§ 57:27 Considerations before filing suit—Parties plaintiff
§ 57:28 —Parties defendant
§ 57:29 —Vicarious liability
§ 57:30 — —Parental or spousal liability
§ 57:31 —Road construction contractor
§ 57:32 —Governmental entities
§ 57:33 Complaint and answer
§ 57:34 Discovery; Requests for admission
§ 57:35 Checklist of essential allegations and defenses
§ 57:36 Illustrative forms—Jacket folder
§ 57:36.50 —Sample complaint
§ 57:37 —Contingent fee agreement
§ 57:38 —Medical authorization form
§ 57:39 —Request for ambulance report
§ 57:40 —Wage and salary verification form
§ 57:41 —Request for police report
§ 57:42 —Settlement evaluation form
§ 57:43 —Demand for policy limits
§ 57:44 —Motor vehicle collision deposition checklist
§ 57:45 —Sample interrogatories
§ 57:46 —Sample request for production of documents
§ 57:47 Model jury instructions
§ 57:48 Sample jury instruction where defendant alleges sudden emergency

CHAPTER 58. MODERN PRODUCTS LIABILITY

§ 58:1 Scope note
§ 58:2 Evaluating a potential case
§ 58:3 —Client interview
§ 58:4 —Witness interviews
§ 58:5 —Product research
§ 58:6 —Ascertain non-case specific facts
§ 58:7 —Identify the defendants
§ 58:8 —Selection of experts

§ 58:9 Filing the lawsuit
§ 58:10 —Strategy
§ 58:11 —Selecting causes of action and drafting the complaint
§ 58:12 Selection of forum
§ 58:13 Spoliation of evidence
§ 58:14 —How to try the case without the key evidence
§ 58:15 —Remedies for spoliation
§ 58:16 Discovery
§ 58:17 —Sources of information
§ 58:18 —Conducting discovery
§ 58:19 —Use of definitions
§ 58:20 —Interrogatories
§ 58:21 —Requests for production
§ 58:22 —Requests for admission
§ 58:23 —Protective orders
§ 58:24 Depositions
§ 58:25 —Electronic discovery
§ 58:26 — —Standards
§ 58:27 — —Sources
§ 58:28 — —Computer forensics
§ 58:29 — —Spoliation of electronic evidence
§ 58:30 — —Cost of electronic discovery
§ 58:31 Expert testimony
§ 58:32 Preparing for trial
§ 58:33 —The trial notebook
§ 58:34 — —File index
§ 58:35 — —Time line
§ 58:36 — —Financial tracking information
§ 58:37 — —Things to do
§ 58:38 — —Trial documents
§ 58:39 — —Motions
§ 58:40 — —Jury information
§ 58:41 — —Opening statement
§ 58:42 — —Plaintiff testimony
§ 58:43 — —Defense testimony
§ 58:44 — —Closing argument
§ 58:45 Preparation and presentation of demonstrative evidence
§ 58:46 —Cautions
§ 58:47 —Cost and time
§ 58:48 —Using demonstrative evidence
§ 58:49 —Tests and experiments
§ 58:50 —Using technology
§ 58:51 —Admissibility of computer presentations
§ 58:52 —Computer-generated imagery
§ 58:53 —Teleconferencing
§ 58:54 —Electronic documents
§ 58:55 —The digital divide
§ 58:56 Jury simulation and evidence evaluation

§ 58:57 —Shadow juries
§ 58:58 —Jury simulation
§ 58:59 —Focus groups
§ 58:60 Trial
§ 58:61 —Theme
§ 58:62 —Presentation of evidence
§ 58:63 —Comparative fault
§ 58:64 —Demonstrating the defect at trial
§ 58:65 Theories of liability and defenses
§ 58:66 —Negligence, generally
§ 58:67 —Foreseeability
§ 58:68 —Strict liability
§ 58:69 — —Defective design test
§ 58:70 —Misrepresentation
§ 58:71 —Statutes of limitation
§ 58:72 — —Discovery rule
§ 58:73 —Statutes of repose
§ 58:74 —Comparative fault and assumption of risk
§ 58:75 —Awareness of defect
§ 58:76 —Unforeseeable use and misuse
§ 58:77 —Intervening act
§ 58:78 —Alteration or modification of product
§ 58:79 —Open and obvious danger
§ 58:80 —Statutory violation by plaintiff
§ 58:81 —State of the art
§ 58:82 —Federal preemption
§ 58:83 —Government contractor immunity
§ 58:84 —Sophisticated user/buyer
§ 58:85 —Learned intermediary
§ 58:86 —Unavoidably unsafe products
§ 58:87 —Breach of warranty
§ 58:88 — —Sales
§ 58:89 — —Disclaimers
§ 58:90 — —Third-party intervention
§ 58:91 —Alternative designs
§ 58:92 Proof of defect
§ 58:93 —Res ipsa loquitur
§ 58:94 —Defendant's failure to comply with standards or statutes
§ 58:95 Chain of liability
§ 58:96 —Market-share liability
§ 58:97 Checklists—Essential allegations and defenses
§ 58:98 —Special considerations for closing arguments
§ 58:99 —Products liability client
§ 58:100 —Products liability case
§ 58:101 Illustrative forms—Sample counts for complaint in medical device case
§ 58:102 —Sample counts for complaint in Ford/Firestone case
§ 58:103 —Sample interrogatories in medical device case

§ 58:104 —Sample interrogatories in Ford/Firestone case
§ 58:105 — —Regarding issue of personal jurisdiction
§ 58:106 —Request for production in medical device case
§ 58:107 —Request for production in Ford/Firestone case
§ 58:108 — —Regarding issue of personal jurisdiction
§ 58:109 —Requests to admit—Ford/Firestone case
§ 58:110 —Notice of 30(b)(6) deposition
§ 58:111 —Defendant's Motion to Compel Vehicle Inspection and Permit the Download of Supplier Data
§ 58:112 —Plaintiffs' motion for protective order

CHAPTER 59. AUTO DESIGN DEFECT

§ 59:1 Scope note
§ 59:2 Analytical framework: Recognizing the auto design defect case
§ 59:3 Accident-causing versus injury-causing defects
§ 59:4 The crashworthiness doctrine
§ 59:5 Principles of crashworthy design
§ 59:6 —Prevent ejection and maintain occupant survival space
§ 59:7 —Absorb, cushion, and distribute forces
§ 59:8 —Immobilize contents to avoid contact and provide ride-down
§ 59:9 —Transmit forces to strongest parts of contents
§ 59:10 —Prevent post-collision fire
§ 59:11 Preliminary considerations
§ 59:12 Common indicators that expert auto defect analysis is warranted
§ 59:13 —Injury more serious than seems warranted by impact severity
§ 59:14 —Disparate levels of injuries
§ 59:15 —Occupant injured where there is significant compromise of the occupant compartment
§ 59:16 —Serious injury to a belted occupant
§ 59:17 —Ejection of an occupant
§ 59:18 —Occupant contact with remote components despite restraint
§ 59:19 —Injury caused by safety equipment
§ 59:20 —Burn injuries
§ 59:21 —Observable components causing injury
§ 59:22 —Loss of control without explanation
§ 59:22.50 —Sudden acceleration
§ 59:23 —Rollover on smooth pavement
§ 59:24 Investigation
§ 59:25 —Client and injuries
§ 59:26 —Accident
§ 59:27 —Vehicle
§ 59:28 Expert witness considerations
§ 59:29 Selected types of defects

§ 59:30 —Vehicle instability causing rollover
§ 59:31 —Restraint system defects
§ 59:32 — —Lap belt only
§ 59:33 — —Shoulder belt only
§ 59:34 — —Door-mounted belts and other passive restraint systems
§ 59:35 — —Inertial unlatching, false latching and inadvertent unlatching
§ 59:36 — —Webbing failure
§ 59:37 — —Retractor defects and other lock-up problems
§ 59:38 — —Poor geometry
§ 59:39 — —Slack inducing devices
§ 59:40 — —Lack of various restraint system safety devices
§ 59:41 —Airbag defects
§ 59:42 — —Child deaths
§ 59:43 — —Aggressivity, late deployment, low-deployment threshold and other problems
§ 59:44 —Rollover crashworthiness
§ 59:45 — —A system approach to occupant protection in rollover
§ 59:46 — —Roof integrity
§ 59:47 — —Effective restraint
§ 59:48 —Side impact protection
§ 59:49 —Ejection protection: Door and lift gate latches, and glazing
§ 59:50 —Fuel system defects
§ 59:51 —Seat defects
§ 59:52 — —Seat backs
§ 59:53 — —Head restraints
§ 59:54 —Conversion van defects
§ 59:55 —Tire defects
§ 59:56 —Structural defects
§ 59:56.50 —Cruise control defects
§ 59:57 Legal issues specific to automobile design defect cases
§ 59:58 —Crashworthiness doctrine/apportionment of fault
§ 59:59 —Challenges to expert testimony
§ 59:60 Causes of action
§ 59:61 Defenses
§ 59:62 —Driver error/cause of the accident
§ 59:63 —Seatbelt defense
§ 59:64 —Compliance with safety standards
§ 59:65 —Preemption
§ 59:66 —State of the art
§ 59:67 —Misuse
§ 59:68 —Assumption of risk
§ 59:69 —Product modification
§ 59:70 Checklists—Allegations
§ 59:71 —Sources of proof of essential allegations and defenses
§ 59:72 — —Proof of manufacture and sale

§ 59:73 — —Proof of defect and negligence
§ 59:74 — —Proof of injury enhancement
§ 59:75 Illustrative forms—Complaint alleging lack of crashworthiness (occupant compartment intrusion)
§ 59:76 —Complaint alleging lack of stability
§ 59:77 —Complaint alleging vehicle fire
§ 59:78 —Complaint alleging seat belt failure
§ 59:79 —Complaint alleging roof crush/lift gate failure
§ 59:80 Illustrative interrogatories and requests for production—Occupant survival space/rear impact crashworthiness
§ 59:81 —Rollover stability
§ 59:82 —Seat belts
§ 59:83 —Roof crush
§ 59:84 Illustrative jury charges—Strict product liability

CHAPTER 60. DRUGS AND MEDICAL DEVICES

I. INTRODUCTION

§ 60:1 Scope note
§ 60:2 Overview of FDA regulation of the pharmaceutical industry

II. TYPES OF CASES

§ 60:3 Prescription drugs, generally
§ 60:4 Over-the-counter drugs
§ 60:5 Herbal or dietary supplements
§ 60:6 Vaccines
§ 60:7 Medical devices

III. PRELIMINARY CONSIDERATIONS

§ 60:8 Preliminary considerations, in general
§ 60:9 Statutes of limitation and repose
§ 60:10 Record-gathering
§ 60:11 Record review and client interviews
§ 60:12 Retention of experts after Daubert
§ 60:13 Identifying the product and manufacturer
§ 60:14 Non-manufacturing defendants
§ 60:15 Dealing with the prescribing physician and ex parte Interviews by defense counsel
§ 60:16 Choice of forum and choice of expert witnesses after Daubert

IV. LITIGATING THE DRUG OR MEDICAL DEVICE CASE

§ 60:17 Proof of causation

§ 60:18 Theories of liability
§ 60:19 —Negligence
§ 60:20 —Failure to warn
§ 60:21 Theories of liabilityFailure to warn—Post-sale warnings
§ 60:22 Theories of liability—Failure to warn—Overpromotion
§ 60:23 — —Off-label use
§ 60:24 —Strict liability
§ 60:25 — —Failure to warn
§ 60:26 — —Manufacturing defect
§ 60:27 —Design defect in the Restatement Third, Torts
§ 60:28 —Breach of express and implied warranty
§ 60:29 —Duty to test
§ 60:30 —Fraudulent misrepresentations
§ 60:31 —Alternative liability, concert of action, enterprise liability, and market-share doctrine
§ 60:32 —Restitution and unjust enrichment
§ 60:33 —Medical monitoring
§ 60:34 Unavoidably unsafe products
§ 60:35 Exceptions to the learned intermediary doctrine
§ 60:36 Defenses—Compliance with FDA regulations
§ 60:37 —Preemption
§ 60:38 —Assumption of the risk
§ 60:39 Obtaining evidence through corporate witnesses and documents during discovery
§ 60:40 Discovery against the FDA and other governmental agencies
§ 60:41 Punitive damages and the profit motive
§ 60:42 Coordination of cases involving multiple plaintiffs
§ 60:43 Settlement of cases involving multiple plaintiffs
§ 60:44 Checklist of essential allegations and defenses with respect to drug manufacturer
§ 60:45 Checklist of essential allegations and defenses with respect to medical device maker
§ 60:46 Sources of proof of essential allegations and defenses with respect to drug manufacturer
§ 60:47 Illustrative form—Request for production of documents
§ 60:48 Illustrative forms—Interrogatories

CHAPTER 61. MEDICAL NEGLIGENCE

§ 61:1 Scope note
§ 61:2 Meeting the client
§ 61:3 Obtaining medical records
§ 61:3.50 Electronic Medical Records
§ 61:4 Evaluating medical records
§ 61:5 The necessity of expert review
§ 61:6 The role of the treating physician
§ 61:7 Sources for expert witnesses
§ 61:8 Rejecting or accepting the case
§ 61:9 —Can you establish liability and causation?

§ 61:10 —Are the damages significant?
§ 61:11 —Are there problems with the clients?
§ 61:12 —Is there a problem with the defendant healthcare provider?
§ 61:13 —Is there another reason to take the case?
§ 61:14 —Declining the case
§ 61:15 Statutes of limitations
§ 61:16 —Discovery rule
§ 61:17 —Continuing course of treatment
§ 61:18 —Fraudulent concealment
§ 61:19 —Foreign objects
§ 61:20 —Tolling events
§ 61:21 Elements of a medical negligence case
§ 61:22 —Standard of care/Liability
§ 61:23 —Proximate cause
§ 61:24 —Damages
§ 61:25 General theories of liability
§ 61:26 —Failure to diagnose
§ 61:27 —Failure to treat
§ 61:28 —Failure to monitor
§ 61:29 —Unnecessary treatment
§ 61:30 —Known complications
§ 61:31 —Incompetence
§ 61:32 —Informed consent
§ 61:33 —Loss of chance
§ 61:34 —Violation of the federal Emergency Medical Treatment and Active Labor Act (EMTALA)
§ 61:35 —Psychiatric malpractice
§ 61:36 —Negligent credentialing
§ 61:36.50 —Prenatal torts
§ 61:37 Damages
§ 61:38 —Assessing damages
§ 61:39 Discovery
§ 61:40 —Interrogatories
§ 61:41 —Requests for production of documents
§ 61:42 —Depositions
§ 61:43 —Discovery of information from outside sources
§ 61:44 Focus groups
§ 61:45 Checklists—Preparing the medical malpractice case for trial
§ 61:45.50 —Information specific to medical malpractice regarding plaintiff and defendant
§ 61:46 —Essential allegations and potential defenses
§ 61:47 —Damages
§ 61:48 —Potential sources of information—Print
§ 61:49 — —Internet
§ 61:50 Illustrative forms—Triage
§ 61:50.50 —Medical malpractice complaint on behalf of minor plaintiff

§ 61:51 —Declination letter
§ 61:52 Illustrative interrogatories
§ 61:53 Illustrative chronologies—Pertinent facts
§ 61:54 —Medical records
§ 61:55 Illustrative jury instructions—Caption
§ 61:56 —Preliminary instructions—Before trial
§ 61:56.50 —Post-trial preliminary statement—General Jury Instructions in Medical Malpractice Case
§ 61:57 — —Duties of judge and jury
§ 61:58 —Statements of counsel and judge
§ 61:59 —Rulings on objections to evidence
§ 61:60 —Notes taken by jurors
§ 61:61 —Direct and circumstantial evidence
§ 61:62 —Evaluation of testimony—Credibility of witnesses
§ 61:63 —Evaluation of deposition evidence
§ 61:64 —Impeachment
§ 61:65 —Textbooks and articles
§ 61:66 —Expert testimony
§ 61:67 —Burden of proof
§ 61:68 —Negligence and Reasonable Care—Basic Definitions
§ 61:69 —Duty of (doctor) (dentist)
§ 61:70 —Duty of doctor to refer
§ 61:71 —Duty of (doctor) (dentist)—Specialist
§ 61:72 —Duty of nurse
§ 61:73 — —Specialist
§ 61:74 —Duty of hospital
§ 61:75 —Direct cause
§ 61:76 —Concurring cause
§ 61:77 —Joint enterprise
§ 61:78 —Compensatory damages—Personal and property damages—Definition
§ 61:79 — — —General instruction
§ 61:80 —Items of personal damage—Past damages—Bodily and mental harm
§ 61:81 —Items of personal dmage—Past damages—Loss of earnings
§ 61:82 —Items of personal damage—Past damages—Medical supplies, hospital and medical expenses
§ 61:83 — —Future damages—Bodily harm and mental harm
§ 61:84 — —Child's action—Future medical supplies, hospital and medical expenses
§ 61:85 — —Future damages—Loss of future earning capacity
§ 61:86 —Life expectancy tables
§ 61:87 —Adjustment of future damages—Present cash value
§ 61:88 —Deliberation and return of verdict

CHAPTER 62. HMO LITIGATION

§ 62:1 Scope note
§ 62:2 The health maintenance organization

§ 62:3 Preliminary considerations
§ 62:4 Types of cases—Denial of care
§ 62:5 —Quality of care
§ 62:6 —Consumer
§ 62:7 —Provider
§ 62:8 Employee Retirement Income Security Act (ERISA)
§ 62:9 —Enforcement proceedings
§ 62:10 Preemption of state law claims—By ERISA
§ 62:11 —By the Medicare Act
§ 62:12 —By the Federal Employees Health Benefits Act (FEHBA)
§ 62:13 Exhaustion of administrative remedies
§ 62:14 Corporate negligence, apparent or implied agency, and respondeat superior
§ 62:15 Types of claims—Civil RICO
§ 62:16 —Anti-trust
§ 62:17 —Americans with Disabilities Act (ADA)
§ 62:18 —Patients' "Bill of Rights" or "Right to Sue" statutes
§ 62:19 —Bad faith
§ 62:20 Checklists—Potential arguments and themes
§ 62:21 —Sources of proof
§ 62:22 Illustrative forms—Complaint in denial of care cases
§ 62:23 —Petition in quality of care cases
§ 62:24 —Consumer cases—General allegations
§ 62:25 — —ERISA allegations (failure to disclose incentives)
§ 62:26 — —Civil RICO allegations (unlawful subrogation practices)
§ 62:27 —Petition in provider cases
§ 62:28 Illustrative jury instructions—Corporate negligence
§ 62:29 —Respondeat superior
§ 62:30 —Apparent or implied agency
§ 62:31 —Bad faith

CHAPTER 63. NURSING HOME LITIGATION

§ 63:1 Scope note
§ 63:2 Historical background
§ 63:3 Federal and state regulation of nursing homes
§ 63:4 State enforcement
§ 63:5 Preliminary screening
§ 63:6 Ethical considerations
§ 63:7 Resident status
§ 63:8 Communication with the client
§ 63:9 Reporting abuse to authorities
§ 63:10 Case investigation—Obtain nursing home and medical records
§ 63:11 — —Admission contract arbitration clauses
§ 63:12 — — —Is there a valid contract?
§ 63:13 — — —Whose claim is it?
§ 63:14 — — —Right to arbitration waived?

§ 63:15 — — —Specific arbitrator
§ 63:16 — — —Impact of federal law
§ 63:17 —The Affordable Care Act
§ 63:18 —Nursing consultant
§ 63:19 —Analyze cause of injury or death
§ 63:20 —Criminal history
§ 63:21 —Obtain the complete survey and licensure file from state agency
§ 63:22 —Complaints and investigations
§ 63:23 —Financial status of the facility
§ 63:24 —Newspaper accounts and internet research
§ 63:25 —Former employees and other claims
§ 63:26 —Ombudsman
§ 63:27 Common injuries
§ 63:28 —Pressure sores/decubitus ulcers
§ 63:29 —Malnutrition and dehydration
§ 63:30 —Falls
§ 63:31 —Elopement and wandering
§ 63:32 —Physical assault and sexual abuse
§ 63:33 —Improper use of restraints
§ 63:34 —Medication errors
§ 63:35 Expert witnesses
§ 63:36 Causes of action
§ 63:37 —Negligence and negligence per se
§ 63:38 —Res ipsa loquitur
§ 63:39 —Breach of contract
§ 63:40 —Breach of fiduciary duty
§ 63:41 —"Vulnerable adult" statutes
§ 63:42 —False claims (qui tam)
§ 63:43 —Medical malpractice
§ 63:44 —Products liability
§ 63:45 Direct participant liability in causes of action for corporate negligence
§ 63:46 Statute of limitations
§ 63:47 Survival of claim
§ 63:48 Discovery
§ 63:49 Punitive damages
§ 63:50 Liens and subrogation
§ 63:51 Preserving public benefits
§ 63:52 Checklist: Nursing home case management
§ 63:53 Federal and state resources
§ 63:54 Illustrative forms—Initial intake questionnaire
§ 63:55 —Sample letter requesting nursing home file
§ 63:56 —Authorization for nursing home records
§ 63:57 —Complaint
§ 63:58 —Discovery requests

CHAPTER 64. PROFESSIONAL NEGLIGENCE

§ 64:1 Scope note

§ 64:2 Preliminary considerations in attorney negligence
§ 64:3 Evaluating the prospective client who wants to sue his attorney
§ 64:4 Clients who raise "red flags" in attorney negligence cases
§ 64:5 The "case within a case" of attorney negligence
§ 64:6 Investigating close to the expiration of the statute of limitations in attorney negligence
§ 64:7 Your feelings on suing an attorney for negligence
§ 64:8 Likelihood of collecting damages
§ 64:9 Likely outcome of the attorney negligence case
§ 64:10 Using the term "negligence" or "malpractice"
§ 64:11 Strategies in the attorney negligence case
§ 64:12 Picking the jury
§ 64:13 Themes in the legal negligence case
§ 64:14 Who is a professional?
§ 64:15 Attorney negligence or second-guessing
§ 64:16 Specific errors or acts constituting negligence
§ 64:17 Expert testimony normally required to prove attorney negligence
§ 64:18 Standard of care in attorney negligence cases
§ 64:19 Privity with attorney
§ 64:20 Attorney malpractice insurance
§ 64:21 Damages in attorney negligence cases
§ 64:22 Legal ethics and the model rules
§ 64:23 Defenses to the legal negligence case
§ 64:24 Defendant attorney as witness
§ 64:25 The internet and the attorney-client relationship
§ 64:26 Statute of limitations in attorney negligence cases
§ 64:27 Multidisciplinary practices (MDP)
§ 64:28 Attorney negligence in professional service corporations and professional limited liability companies
§ 64:29 Multijurisdictional practice
§ 64:30 Jury or bench trial in legal negligence cases; bifurcation
§ 64:31 Negligence of other professionals
§ 64:32 Checklist of essential allegations and defenses
§ 64:33 Checklist of sources of proof of essential allegations and defenses
§ 64:34 Illustrative forms—Form letter declining to take case, generally
§ 64:35 Form letter declining to take case with statute of limitations warning
§ 64:36 Form letter investigating the case
§ 64:37 Sample jury instructions: negligence of attorney; causation
§ 64:38 Sample jury instructions: negligence of attorney; title examination
§ 64:39 Sample complaint in attorney negligence case
§ 64:40 Sample risk management analysis

CHAPTER 65. CONSTRUCTION INJURIES

§ 65:1 Scope note

§ 65:2 The parties to a construction project
§ 65:3 —Owner
§ 65:4 —The general contractor
§ 65:5 —The construction manager
§ 65:6 —The subcontractor
§ 65:7 —The project superintendent
§ 65:8 —The project manager
§ 65:9 —The foreman
§ 65:10 —The design professionals
§ 65:11 —Inspectors
§ 65:12 —The plaintiff
§ 65:13 The documents
§ 65:14 —Bid documents
§ 65:15 —Contract documents
§ 65:16 General conditions
§ 65:17 —Drawings
§ 65:18 —Progress meeting minutes
§ 65:19 —Change orders
§ 65:20 —Progress photographs
§ 65:21 —Superintendent's and supervisor's job diaries
§ 65:22 —Daily job reports
§ 65:23 —Inspection reports
§ 65:24 —Insurance and loss control reports
§ 65:25 —Subcontractor or vendor files
§ 65:26 —Safety documents
§ 65:27 Published standards—Occupational Safety Health Act
§ 65:28 —Association of General Contractors of America
§ 65:29 —Army Corps of Engineers
§ 65:30 Particular construction incidents—Falls
§ 65:31 — —Roof and wall opening falls
§ 65:32 —Electrocution and electrical incidents
§ 65:33 —Trench collapse
§ 65:34 —Cranes and aerial lifts
§ 65:35 —Struck by vehicle
§ 65:36 Procedural matters—Investigation of a construction injury case
§ 65:37 —The complaint
§ 65:38 —Request for production of documents
§ 65:39 —Interrogatories
§ 65:40 —Request for admissions
§ 65:41 —Depositions
§ 65:42 Liability of owner for acts of contractors or conditions created by contractors
§ 65:43 —Control by owner
§ 65:44 —Negligent hiring
§ 65:45 —Special dangers and peculiar risks: Restatement Sections 416 and 427
§ 65:46 —Liability of owner for existing conditions on the property
§ 65:47 —The extent of the duty owed

§ 65:48 — —Obvious versus latent conditions of the property
§ 65:49 —Risk inherent in the work contracted
§ 65:50 —Applicability of building codes to the issue of liability
§ 65:51 General contractor liability of workers on the construction site
§ 65:52 —Contractor's standard of care
§ 65:53 —Compliance with specifications; Government defense contracts
§ 65:54 —Injuries to third parties from construction activity
§ 65:55 Subcontractor liability
§ 65:56 Liability of design professionals: Architects and engineers
§ 65:57 Liability of construction managers
§ 65:58 Checklist of essential allegations and defenses
§ 65:59 Checklist of sources of proof of essential allegations and defenses
§ 65:60 Illustrative forms—Request for production by plaintiff to defendant architect in action for personal injuries
§ 65:61 —Request for production of documents for inspection and copying; Construction incident
§ 65:62 —Illustrative complaint against owner to recover for construction worker's fall in hole

Volume 6

CHAPTER 66. GOVERNMENT TORT LIABILITY

§ 66:1 Scope note
§ 66:2 Overview
§ 66:3 Notice of claim
§ 66:4 —Time for giving notice
§ 66:5 —To whom notice should be given
§ 66:6 —Determining which claims require notice
§ 66:7 —Sufficiency of notice
§ 66:8 Exhaustion of administrative remedies under FTCA
§ 66:9 —Requisites of administrative claim
§ 66:9.50 —Time for presenting claim
§ 66:10 —Final administrative denial
§ 66:11 Jurisdiction
§ 66:12 —Under FTCA
§ 66:12.50 —Under ATCA
§ 66:13 Parties
§ 66:14 —Under FTCA
§ 66:15 Service of process
§ 66:16 —Under FTCA
§ 66:17 Pleadings—Allegations negating immunity
§ 66:18 —Allegations of notice
§ 66:19 —Government's failure to raise immunity

§ 66:20 Trial; Right to jury
§ 66:21 Damages
§ 66:22 —Costs, fees, and interest
§ 66:23 —Punitive damages
§ 66:24 —Damages under FTCA
§ 66:24.50 — —Limitation to amount sought in administrative claim; Exceptions
§ 66:25 —Attorney's fees under FTCA
§ 66:26 The barrier: Sovereign or governmental immunity
§ 66:27 —Schools
§ 66:28 —Public officers and employees
§ 66:29 Defeating sovereign or governmental immunity
§ 66:30 —Federal Tort Claims Act (FTCA)
§ 66:31 — —Effect of other statutes
§ 66:32 — —Exception for military service claims
§ 66:33 — —Exclusions
§ 66:34 — — —Acts or omissions in executing laws; Discretionary functions
§ 66:35 — — —Postal services
§ 66:36 — — —Collection of taxes or customs duty; Detention of goods
§ 66:37 — — —Intentional torts
§ 66:38 — — —Claims arising in foreign country
§ 66:39 — — —Other exclusions
§ 66:40 —State tort claims acts
§ 66:41 — —Effect on local governments
§ 66:42 —Judicial abrogation or limitation
§ 66:43 —Liability or indemnity insurance
§ 66:44 —Governmental or proprietary functions
§ 66:45 — —Determining nature of function
§ 66:46 —Discretionary or ministerial act
§ 66:47 — —Determining nature of function as discretionary or ministerial
§ 66:48 —Special relationship
§ 66:49 Bases of liability
§ 66:50 —Constitutional torts
§ 66:51 —Respondeat superior
§ 66:52 — —Under the FTCA
§ 66:53 Particular acts or omissions—Law enforcement
§ 66:54 — —Hiring, training, and supervision of officers
§ 66:55 — —Failure to protect; Special relationship
§ 66:56 — —Arrest, detention and imprisonment
§ 66:57 — — —False arrest
§ 66:58 — —Excessive force
§ 66:59 — —Chase or pursuit of suspect
§ 66:59.50 —Emergency rescue services
§ 66:60 —Fire protection and control
§ 66:61 — —Fire control vehicles
§ 66:62 —Schools—Supervision of students

§ 66:63 — —Condition of buildings and grounds
§ 66:64 — —Transportation of students
§ 66:65 — —Extracurricular activities
§ 66:66 —Public property; Buildings and grounds
§ 66:66.30 — —Sidewalks and crosswalks
§ 66:66.70 — —Highways and roads
§ 66:67 — —Public parks; Recreational use statutes
§ 66:68 —Public transportation
§ 66:69 —Licenses, permits and franchises
§ 66:70 — —Driver's licenses
§ 66:71 —Public utilities
§ 66:72 —Garbage collection and disposal
§ 66:73 —Sewers, drains and waterways
§ 66:74 Checklists—Matters that should be alleged in complaint, petition, or declaration in action for personal injuries against public entity
§ 66:75 —Matters that should be alleged in complaint under Federal Tort Claims Act
§ 66:76 Illustrative forms—Notice of claim
§ 66:77 —Claim by parent or guardian and minor against school district for injuries to minor resulting from negligence of school bus driver
§ 66:78 —Claim by parent or guardian and minor against school district for injuries to minor resulting from negligence of teacher
§ 66:79 —Complaint under FTCA alleging negligent operation of vehicle by government employee
§ 66:80 —Answer to FTCA complaint

CHAPTER 67. ENVIRONMENTAL TORT LITIGATION

§ 67:1 Scope note
§ 67:2 Preliminary considerations
§ 67:3 Interests protected
§ 67:4 Plaintiffs
§ 67:5 Common law causes of action
§ 67:6 —Trespass
§ 67:7 —Nuisance
§ 67:8 —Negligence
§ 67:9 —Strict liability
§ 67:10 —Misrepresentation, fraudulent concealment, or nondisclosure
§ 67:11 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), generally
§ 67:12 Elements of CERCLA liability
§ 67:13 CERCLA petroleum exclusion
§ 67:14 CERCLA defenses
§ 67:14.30 —De micromis exemption
§ 67:14.50 —Municipal solid waste exemption

§ 67:14.70 — —Definition of "municipal solid waste"
§ 67:15 CERCLA defendants
§ 67:15.30 —Owners of contiguous property
§ 67:15.70 —Bona fide prospective purchasers
§ 67:16 Contribution
§ 67:17 Successor liability
§ 67:18 Parent and subsidiary
§ 67:19 Lender liability
§ 67:20 Damages for injury to property
§ 67:21 Response costs
§ 67:22 —Consistency with National Contingency Plan
§ 67:23 Damages for injury to natural resources
§ 67:24 Medical monitoring
§ 67:25 Increased risk of future disease
§ 67:26 Emotional distress damages
§ 67:27 Punitive damages
§ 67:28 Attorney's fees
§ 67:29 Statute of limitations issues
§ 67:30 —Discovery rule
§ 67:31 —Continuing trespass, nuisance, or tort
§ 67:31.50 Defenses other than statute of limitations
§ 67:32 Establishing liability, generally
§ 67:33 Causation
§ 67:34 Expert testimony
§ 67:35 —As to toxic causation of personal injury
§ 67:36 —As to contamination of land
§ 67:37 Lay witnesses
§ 67:38 Class actions
§ 67:39 Citizen suits under the Resource Conservation and Recovery Act (RCRA)
§ 67:40 Citizen suits under the Clean Water Act (CWA)
§ 67:40.50 Citizen suits under other federal statutes
§ 67:41 Checklist of essential allegations and defenses
§ 67:41.50 Checklist of Exposure and injuries
§ 67:42 Illustrative forms—Complaint for release of chemical waste
§ 67:42.50 Illustrative Forms—Exposure to contaminated food or beverage
§ 67:43 Illustrative forms—Requests for production of documents
§ 67:44 —Interrogatories and requests for production
§ 67:45 Illustrative jury instructions

CHAPTER 68. FRAUD

§ 68:1 Scope note
§ 68:2 Initial assessment of fraud cases—The plaintiff
§ 68:3 —The defendant
§ 68:4 —Conduct by the defendant

§ 68:5 —Damages
§ 68:6 —Forum selection
§ 68:7 Investigating the facts in fraud cases—Information from the client
§ 68:8 —Pre-suit gathering of information from public and private sources
§ 68:9 Assessing the facts
§ 68:10 Formal discovery—Requests for production and interrogatories
§ 68:11 —Depositions of the defendant
§ 68:12 —Deposing the "know-nothing" fraud defense witness
§ 68:13 —Preparing for the defendant's depositions and cross-examination of the plaintiff
§ 68:14 Trial considerations—Develop compelling themes
§ 68:15 —Jury selection issues
§ 68:16 —Demonstrative and documentary evidence
§ 68:17 —Order of witnesses
§ 68:18 —Cross-examination of defendant
§ 68:19 —Final argument
§ 68:20 Proving the fraud case—Essential allegations
§ 68:21 —Misrepresentations of existing fact
§ 68:22 —Falsity of facts
§ 68:23 —Materiality of facts
§ 68:24 —Reliance
§ 68:25 — —Justifiable reliance
§ 68:26 — —Reasonable reliance
§ 68:27 —Damage or injury
§ 68:28 —State of mind of representor
§ 68:29 — —Intentional misrepresentations
§ 68:30 — —Reckless misrepresentations
§ 68:31 — —Negligent misrepresentations
§ 68:32 — —Constructive fraud
§ 68:33 —Concealment or suppression
§ 68:34 — —Duty to disclose
§ 68:35 Compensatory damages
§ 68:36 Punitive damages
§ 68:37 Statute of limitations
§ 68:38 Checklist of essential allegations and defenses
§ 68:39 —Allegations of complaint
§ 68:40 —Allegations of defenses
§ 68:41 Checklist of sources of proof
§ 68:42 Illustrative forms—Complaint
§ 68:43 Illustrative jury instructions

CHAPTER 69. CRUISE SHIP AND MARITIME LITIGATION

§ 69:1 Scope note
§ 69:2 Maritime jurisdiction—Preliminary considerations

§ 69:3 —Strategy and objectives
§ 69:4 —Law
§ 69:5 Remedies of seamen under the Jones Act—Preliminary considerations
§ 69:6 —Strategy and objectives
§ 69:7 —Location at the time of injury
§ 69:8 —Employer's fault or negligence
§ 69:9 —Seaman's status
§ 69:10 —The fleet doctrine
§ 69:11 —Vessel status
§ 69:12 Remedies of seamen—Warranty of seaworthiness
§ 69:13 —Maintenance and cure
§ 69:14 —Daily maintenance rate
§ 69:15 —Attorney's fees
§ 69:16 —Punitive damages
§ 69:17 Maritime wrongful death
§ 69:18 —Wrongful death claimants
§ 69:19 —Law
§ 69:20 Cruise ship litigation—Preliminary considerations
§ 69:21 —Legal analysis
§ 69:22 —Defenses
§ 69:23 —Forum selection clauses
§ 69:24 —Choice of law clauses
§ 69:25 —Notice of claim
§ 69:26 —Release of claims forms
§ 69:27 Forum non conveniens
§ 69:28 Checklists
§ 69:29 —Essential allegations and defenses—Maritime jurisdiction
§ 69:30 — —Allegations in federal court complaint
§ 69:31 — —Allegations in state court complaint
§ 69:32 — —Existence of maritime jurisdiction
§ 69:33 — —Defenses
§ 69:34 Checklist of essential allegations and defenses in Jones Act cases
§ 69:35 —Allegations
§ 69:36 —Checklist of unseaworthy conditions
§ 69:37 —Defenses
§ 69:38 Illustrative forms
§ 69:39 —Complaint for personal injury and loss of consortium against cruise ship operators
§ 69:40 —Jones Act complaint
§ 69:41 —Answer to Jones Act complaint
§ 69:42 —Wrongful death petition—State court
§ 69:43 —Interrogatories for maritime claim
§ 69:44 —Request for production of documents in maritime claims
§ 69:45 —Interview form for seaman's claim
§ 69:46 —Questionnaire in longshoreman's case

§ 69:46.50 Motion to remove pursuant to arbitration provision of collective bargaining agreement
§ 69:47 Illustrative jury charges

CHAPTER 70. RAILROAD CROSSING COLLISION LITIGATION

§ 70:1 Scope note
§ 70:2 History and background
§ 70:2.50 Federal Railroad Safety Act, generally
§ 70:3 Federal preemption of state tort law governing railroad crossings: *Norfolk Southern Ry. Co. v. Shanklin*
§ 70:3.50 Federal preemption of state tort law governing railroad crossings; 2007 statutory amendments
§ 70:4 Federal preemption of state tort law governing railroad crossings, generally—Effect on case evaluation and strategy
§ 70:5 Evidence required for Shanklin preemption
§ 70:6 Handling the crossing collision case under preemption
§ 70:7 Initial client interview
§ 70:8 Selection and notification of defendants
§ 70:9 Preventing spoliation of evidence
§ 70:10 Witness identification and interviews
§ 70:11 Photographs and measurements at scene
§ 70:12 The complaint
§ 70:13 Scope of railroad's duty
§ 70:14 Maintenance of tracks and right-of-way
§ 70:15 Contributory or comparative negligence of plaintiff
§ 70:16 Fault of third parties
§ 70:17 Punitive damages
§ 70:18 Interrogatories and production of documents—Information about the train and its operation
§ 70:19 —Information about the crossing
§ 70:20 — —Prior incidents at the crossing
§ 70:21 —Information about the collision
§ 70:22 Operating rules, safety rules, and corporate policies and procedures
§ 70:23 —Identification of defense witnesses and expert witnesses
§ 70:24 Illustrative forms—Complaint
§ 70:25 —Interrogatories
§ 70:26 —Request for production and copying of documents
§ 70:27 —Spoliation letter

CHAPTER 71. FEDERAL EMPLOYERS LIABILITY ACT

§ 71:1 Scope note
§ 71:2 Overview of FELA
§ 71:3 Applicability of FELA

§ 71:4 —Is the defendant a railroad?
§ 71:5 —Is the plaintiff a railroad employee?
§ 71:6 —Employee acting within scope of employment at time of injury
§ 71:7 —Connection to interstate commerce
§ 71:8 Interpreting FELA
§ 71:8.50 Resisting defense mischaracterizations of FELA
§ 71:9 Governing law
§ 71:10 —Relationship to state procedural law
§ 71:11 Railroad "negligence" defined
§ 71:12 Scope of the railroad's duty
§ 71:13 —Specific duties
§ 71:13.50 Evidence of alternative work methods or tools
§ 71:14 Violation of safety laws
§ 71:14.50 —Plaintiff's violation of federal safety laws
§ 71:15 —Safety appliances requirements
§ 71:16 —Locomotive safety requirements
§ 71:16.50 —"In use" limitations
§ 71:17 —Other federal requirements
§ 71:18 Causation under FELA
§ 71:19 Wrongful death and survival claims
§ 71:20 Occupational illnesses and disorders
§ 71:21 Damages
§ 71:22 Defenses
§ 71:23 —Contributory and comparative negligence
§ 71:24 —Assumption of the risk not a defense
§ 71:24.50 —Violation of company rules
§ 71:25 —Release
§ 71:25.50 —"Pre-emption" and claim preclusion
§ 71:26 Concurrent jurisdiction of state and federal courts
§ 71:27 Forum selection
§ 71:28 Statute of limitations
§ 71:29 —Accrual of the cause of action in occupational disease and injury cases
§ 71:29.50 Set-off
§ 71:30 Managing a FELA case
§ 71:31 —Initial client interview; Interview checklist
§ 71:32 —Notifying the railroad; Contacts by railroad with plaintiff
§ 71:33 —Contact with witnesses and limitations on contact
§ 71:34 —Collection and preservation of evidence; Checklist
§ 71:35 —Expert testimony
§ 71:36 —Case management
§ 71:37 Checklist of essential allegations
§ 71:38 Checklist of defenses
§ 71:39 Checklist of sources of proof
§ 71:40 Illustrative forms
§ 71:41 —Sample FELA complaint for accidental injury

§ 71:42 — —Supplemental allegations for violation of safety laws
§ 71:43 — —Alternative allegations for wrongful death
§ 71:44 — —Alternative allegations for occupational disease or illness
§ 71:45 —Interrogatories
§ 71:46 —Document requests
§ 71:47 —Requests for admission
§ 71:48 Illustrative jury charges

Table of Laws and Rules

Table of Cases

Index