LOUISIANA

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1. What are the venues/areas in your State that are considered dangerous or liberal?

Louisiana is comprised of 64 parishes. Overall, Louisiana is an unfavorable state for defendants. Orleans Parish is notorious for excessive plaintiff verdicts. The most dangerous parishes for defendants include: Orleans, St. Mary, Assumption, Livingston, Iberville, West Baton Rouge, Pointe Coupee, Avoyelles, Concordia, East Carroll, Red River, Desota and Caddo. Numerous other parishes are "somewhat unfavorable".

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

In *Cavalier v. Rivere,* 35645 (unreported case decided before Judge Fallon, Eastern District of La, on March 29, 2018), plaintiff was rear-ended by defendant, who was driving a tractor-flatbed trailer. Defendant averred that the wreck was caused by plaintiff when he suddenly cut in front of the tractor-trailer. This was a low-impact case. Defendant further argued that the wreck was too minor to have caused a compensable injury. The case was tried and the jury exonerated the defendant on liability.

In Duplessis v. Metro Disposal, 15-4256 (unreported case decided before Judge Griffin, Civil District Court for the Parish of Orleans on April 10, 2018), both plaintiff and defendant were driving garbage trucks whereupon a head-on collision ensued at a landfill. Plaintiff sustained a disc injury. Plaintiff treated conservatively for 2 years and ultimately underwent a fusion repair. The surgery was only 50% effective. There was also proof that plaintiff would require future Rhizotomy procedures. Plaintiff settled with the primary insurer for $975,500 where it had a $1,000,000.00 policy limit. Plaintiff proceeded to trial against the excess insurer. The jury awarded $6.47 million in general damages.

In *Evans v. Koren Trucking*, et al, 634588 (unreported case), Plaintiff was rear-ended, resulting in an aggravation of his pre-existing spinal condition. The collision resulted in minor damage. Defendants conceded fault, focusing instead on challenging causation and plaintiff's credibility due to her significant history of prior accidents. The matter was tried to a 1-day bench trial. The Judge only awarded special damages for her emergency room visit and general

damages of $2,500.00. The total verdict awarded $3,734.00, which was significantly less than the total medicals only.

In *Stutes v. Greenwood Motor Lines, Inc.,* 2017-52 (La.App. 3 Cir. 11/22/17), 234 So.3d 75, plaintiff filed suit due to a collision that occurred between a pickup truck and an 18-wheeler tractor-trailer when the driver of the 18-wheeler drove across an intersection in dense fog that limited the vision of both drivers. The driver of the pickup truck suffered catastrophic injuries. After a jury trial, the jury found the driver of the 18-wheeler at fault and awarded the plaintiff damages exceeding $30 million.

In *Franklin v. AIG Cas. Co*., 2013 La. App. Unpub. LEXIS 431, plaintiff was sitting in his rig at a gas station, waiting in a line of trucks exiting the parking lot. At the same time, Defendant was operating his tractor-trailer in the same parking lot. Defendant's rig somehow rolled out of its parked position and collided with Plaintiff's tractor, allegedly causing injury to Plaintiff's neck and lower back. Plaintiff underwent two back surgeries for herniated discs. The Court affirmed the jury award of $1,557,079.10 in damages for past and future physical pain and suffering, past and future medical expenses, past and future lost wages, past and future mental anguish, loss of earning capacity, and loss of enjoyment of life.

3. Are accident animations and/or computer-generated evidence admissible in Louisiana?

Louisiana Courts determine the admissibility of computer-generated videos in the same manner as it would in determining the admissibility of any other videotape. *See Wakefield v. Reliance Nat. Indem. Co.*, 02-1173 (La. App. 5 Cir. 04/29/03); 845 So.2d 1238, 1245. The determination of whether videotapes are admissible is largely within the discretion of the trial court. The admissibility of a videotape is determined on a case-by-case basis depending on the individual facts and circumstances of each case. *Fryson v. Dupre Transport, Inc.,* 2000-0858 (La. App. 4 Cir. 8/29/01); 798 So.2d 1012. The factors to be considered in order to determine admissibility of a videotape are as follows: (1) whether the videotape accurately depicts what it purports to represent, (2) whether it tends to establish a fact of the proponent's case, and (3) whether it will aid the jury's understanding. *Id.*

In *Gold, Weems, Bruser, Sues, & Rundell v. Granger,* 06–589, p. 9–10 (La.App. 3 Cir. 12/29/06), 947 So.2d 835, 843, *writ denied*, 07–0421 (La.4/27/07), 955 So.2d 687 (*citations omitted),* the Third Circuit ruled that a trial court is given vast discretion in its ruling on the admissibility of evidence. Accordingly, the district court is given vast discretion in its decisions on evidentiary rulings and its decision to admit or exclude evidence will not be reversed on appeal unless it is clearly shown that it has abused that discretion. Therefore, more specifically, the court found that the introduction of videotape evidence is within the discretion of the trial court and, absent an abuse of discretion, it will not overrule the lower court's ruling regarding the admissibility of evidence. Lee v. Autom. Cas. Ins. Co., 96–517 (La.App. 3 Cir. 11/6/96), 682 So.2d 995, writ denied, 96–2949 (La.1/31/97), 687 So.2d 409.

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in- cab videos**.**

There are no significant retention and/or spoliation decisions or trends within the past 2 years regarding retention and spoliation of in-cab videos. But, the state of Louisiana spoliation law should be understood according to subsection 5 and the following principles:

a. What is the rule regarding spoliation of evidence in your state?

The theory of "spoliation" of evidence refers to an intentional destruction of evidence for the purpose of depriving opposing parties of its use. *Barthel v. State, Dep't of Transp. and Dev*., 2004-1619 (La. App. 1st Cir. 6/10/05), 917 So.2d 15, 20. Historically, Louisiana courts have found that a litigant's failure to produce evidence within his reach renders it appropriate to presume that the evidence would have been detrimental to his case. *See Randolph v. General Motors Corp.*, 93-1983 (La. App. 1st Cir. 11/10/94), 646 So.2d 1019, 1026, writ denied, 95-0194 (La. 3/17/95), 651 So.2d 276. *Holloway v. Midland Risk Insurance Co*., 36,262 (La. App. 2d Cir. 10/30/02), 832 So. 2d 1004, writ denied, 2002-3247 (La. 03/28/03), 840 So. 2d 571.

Louisiana applies the "adverse inference rule" in the spoliation context. Pursuant to this rule, "when a litigant destroys, conceals, or fails to produce evidence within his or her control, it gives rise to an adverse presumption that had the evidence been produced, it would have been detrimental to the litigants case." *Allstate Ins. Co. v. Ford Motor Co*., 772 So. 2d 339, 342-343 (La. App. 3 Cir. 2000) (citations omitted). Nevertheless, this presumption or inference is not appropriate when a reasonable explanation exists for the spoliator's failure to produce the evidence. *Id. See Also Lewis v. Albertson's Inc*., 41,234 (La.App. 2 Cir. 6/28/06), 935 So.2d 771, 774 ("A presumption may arise in the theory of spoliation of evidence when it is an intentional destruction of evidence for the purpose of depriving the opposing parties of its use.")

b. Is there a duty to preserve evidence absent a specific demand?

Louisiana jurisprudence recognizes that a duty to preserve evidence exists without the imposition of a statutory duty or regulation and in the absence of a demand to do the same. *Bethea v. Modern Biomedical Services, Inc*., 97-332 (La. App. 3 Cir. 11/19/97), 704 So.2d 1227, writs denied, 97-3169, 97-3170 (La. 2/13/98), 709 So.2d 760, 761; *Longwell v. Jefferson Parish Hosp. Service Dist. No. 1*, 07-259, p. 7 (La. App. 5 Cir. 10/16/07). The obligation or duty to preserve evidence can arise from the foreseeability of the need for the evidence in the future. *Dennis v. Wiley*, 2009-0236 (La. App. 1st Cir. 9/11/09), 22 So. 3d 189, 195, writ denied, 2009- 2222 (La. 12/18/09), 23 So. 3d 949. In determining if a duty exists, the court considers whether the obligation arises "from a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence?" *Longwell, supra*; *Dennis v. Wiley*, 22 So. 3d 189, 195 (La.App. 1 Cir. 2009).

c. Does your state allow direct actions against responsible parties for spoliation?

Yes, as discussed in subsection (1)(b) above in an answer to question 5 below. Louisiana recognizes the tort or an independent cause action for spoliation.

d. Admissibility of in-cab video footage

The Louisiana Supreme Court has set forth the standard for the use of gruesome photographs and videos at trial, holding that the issue of the admissibility of a video is similar to the issue of the admissibility of a photograph. A video, like a photograph, may be admitted into evidence to corroborate other testimony in a case such as the location of the body, the manner of death, the specific intent to kill, the number, location and severity of wounds, and the cause of death. *State v. Davis*, 92–1623 (La.5/23/94), 637 So.2d 1012, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994).

"Generally, photographs are admissible in evidence when they are shown to have been accurately taken, to be a correct representation of the subject in controversy, and when they shed light upon the matter before the court." *State v. Strickland*, 398 So.2d 1062, 1065 (La.1981).

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data.

In 2007, the Louisiana legislature amended articles 1424, 1425, 1460, 1461, and 1462 of the Code of Civil Procedure (dealing with the general discovery and general dispositions) to clarify their application to discovery of electronically stored information. In 2009, further revisions went into effect concerning electronically stored information pertaining to subpoena duces tecums, the loss of information as a result of routine, good faith operation of an electronic information system, and the relevance of electronically stored information to a scheduling conference. *See* La. C.C.P. Art. 1354, 1471(B), & 1551(6) (respectively). Many of these rules are modeled after the Federal Rules of Civil Procedure. As such, in Louisiana, both federal and state courts recognize that Electronically Stored Information (ESI) can also be subject to the doctrine of spoliation.

Further, Louisiana jurisprudence has recognized a cause of action for spoliation where the defendant had an obligation to preserve the evidence and resolves such claims by employing the duty—risk analysis generally applicable to negligence claims in Louisiana. *Carter et al. v. Exide Corp., et al*., 27,358 (La. App. 2 Cir. 9/29/95), 661 So.2d 698; *Perkins v. Entergy Corp.*, 00-1372 (La. 3/23/01), 782 So.2d 606. "The tort of spoliation of evidence has its roots in the evidentiary doctrine of "adverse presumption," which allows a jury instruction for the presumption that the destroyed evidence contained information detrimental to the party who destroyed the evidence unless such destruction is adequately explained." *Pham v. Contico International Inc.*, 99-945, p. 4 (La. App. 5 Cir. 3/22/00), 759 So.2d 880, 882. (Citations omitted). This cause of action is premised on the right of a plaintiff to be free from interference in pursuing and/or proving his or her civil lawsuit. *See Robertson v. Frank's Super Value Foods, Inc.*, 08-592 (La. App. 5 Cir. 1/13/09), 7 So.3d 669, 672-674.

Thus, Louisiana jurisprudence recognizes that a duty to preserve evidence can exist without the imposition of a statutory duty or regulation and in the absence of a demand to do the same. *Bethea v. Modern Biomedical Services, Inc.*, 97-332 (La. App. 3 Cir. 11/19/97), 704 So.2d 1227, writs denied, 97-3169, 97-3170 (La. 2/13/98), 709 So.2d 760, 761. *Longwell v. Jefferson Parish Hosp. Service Dist. No. 1*, 07-259, p. 7 (La. App. 5 Cir. 10/16/07). Specifically, in Louisiana, the obligation or duty to preserve evidence can arise from the foreseeability of the need for the evidence in the future. *Dennis v. Wiley*, 2009-0236 (La. App. 1st Cir. 9/11/09), 22 So. 3d 189, 195, writ denied, 2009-2222 (La. 12/18/09), 23 So. 3d 949. Factors courts consider in making this determination are as follows: "[d]id the defendant have a duty to preserve the evidence for the plaintiff, whether arising from a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence?" *Longwell v. Jefferson Parish Hosp. Service Dist. No. 1*, 07-259 (La. App. 5 Cir. 10/16/07), 970 So.2d 1100, 1104-1105, writ denied, 07-2223 (La. 1/25/08), 973 So.2d 756 (emphasis added); *Dennis v. Wiley*, 22 So. 3d 189, 195 (La.App. 1 Cir. 2009). However, the failure to identify evidence that was intentionally destroyed to deprive its use where the defendant had a duty to collect such evidence is detrimental to plaintiffs claim for spoliation. *See Jackson v. Home Depot, Inc.*, 2004-1653 (La. App. 1st Cir. 6/10/05), 906 So.2d 721, 728. *Lewis v. Albertson's, Inc.*, 935 So. 2d 771, 774-775 (La.App. 2 Cir. June 28, 2006).

In the face of accountability of another spoliator, another entity may be determined liable for the destruction of evidence of another. For example, courts have applied a veil-piercing analysis to hold a member of a Louisiana LLC personally liable for the LLC's obligations. *See, e.g., Hamilton v. AAI Ventures, L.L.C.,* 768 So. 2d 298 (La. Ct. App. 1st Cir. 2000); *Hollowell v. Orleans Regional Hosp.*, 1998 WL 283298 (E.D. La. 1998), aff' d, 217 F.3d 379 (5th Cir. 2000). Another mechanism for imposition of liability is a master/servant relationship, also called respondeat superior or vicarious liability. As such, liability is imposed upon the employer without regard to his own negligence or fault; it is a consequence of the employment relationship. *Sampay v. Morton Salt Co*., 395 So.2d 326, 328 (La.1981). The employer's liability is secondary or derivative in the sense that the employer is not himself a wrongdoer or tortfeasor. *Id.* But, in the absence of some legal relationship between parties, culpability for spoliation will not be imputed to others.

a. What is the rule of spoliation of evidence specifically relating to telematics data or otherwise electronically stored data?

There are no reported Louisiana cases that have specifically applied the theory of "spoliation" to the destruction of telematics data or otherwise electronically stored information (ESI); however, Louisiana does not exempt electronic data from preservation simply because it is electronically stored. So, it is likely that a court would resolve such a situation by applying amended articles 1424, 1425, 1460, 1461, and 1462 of the Code of Civil Procedure which clarified the state's position regarding discovery of electronically stored information.

Additionally, additional code articles concerning electronically stored information pertaining to subpoena duces tecums, the loss of information as a result of routine, the good faith operation of an electronic information system, and the court's ability to regulate issues relating to

the disclosure of electronically stored information during pre-trial and scheduling conferences would likely be applied to address any issue of spoliation of electronic data. *See* La. C.C.P. Art. 1354, 1471(B), & 1551(6) (respectively).

b. What has been your experience with its application to onboard equipment like Drivecam?

Drivecam will likely be treated in accordance with the general rules of spoliation; however, many companies do not store or maintain Drivecam data which is instead held by a third party vendor. For liability of a third party vendor, see section (c) below.

c. Any requirement that third party vendors be placed on notice of spoliation/retention letters?

In the absence of some duty to preserve or request to preserve, there is no culpability for failing to preserve and/or intentionally destroying evidence. In Daotheuang v. El Paso Production Oil & Gas Co.Eyeglasses, 2006-403 (La.App. 3 Cir. 9/27/06), 940 So.2d 752, the Third Circuit ruled that an employer (third party to a separate tort action) had no duty to preserve gasket on oilfield equipment that failed, allegedly resulting in employee's injuries, and, thus employer's failure to preserve the gasket did not give rise to action for spoliation of evidence. The employer is only liable for workers' compensation benefits, and the gasket was only important in employee's tort claims against third parties, and employee did **not** ask employer to produce gasket for two years following accident. *Id.*

More specifically, in a case involving a third party's negligent spoliation of evidence, the Louisiana Supreme Court recently decided definitively that in Louisiana, neither "legislative will" nor "policy considerations" support "recognition of the tort of negligent spoliation" of evidence. *Reynolds v. Bordelon*, 14–2362, p. 13 (La.6/30/15), 172 So.3d 589, 600 (emphasis added). However, in concluding its comprehensive analysis, the Reynolds court explained that part of its logic was based upon the existence of alternative remedies for plaintiffs in Louisiana. In discussing those alternative remedies, the court stated: "Discovery sanctions and criminal sanctions are available for first-party spoliators. Additionally, Louisiana recognizes the adverse presumption against litigants who had access to evidence and did not make it available or destroyed it." Id. (emphasis added).

In *Reynolds, supra,* the court reasoned that "the act of negligently spoliating evidence is so unintentional an act that any recognition of the tort by the courts would not act to deter future conduct, but would, rather, act to penalize a party who was not aware of its potential wrongdoing in the first place, [which] is particularly true in the case of negligent spoliation by a third party, who is not vested in the ultimate outcome of the underlying case, and thus, has no motive to destroy or make unavailable evidence that could tend to prove or disprove that unrelated claim."

Thus, regarding negligent spoliation by third parties, the plaintiff who anticipates litigation can enter into a contract to preserve the evidence and, in the event of a breach, avail himself of those contractual remedies. Therefore, absent some legal agreement, Louisiana law does not recognize a duty to preserve evidence in the context of negligent spoliation. In the

absence of a duty owed, we find there is no fault under La.Civ.Code art. 2315 or under any other delictual theory in Louisiana.

6. Is a positive post-accident toxicology result admissible in a civil action?

The admissibility of post-accident toxicology results is primarily guided by whether the evidence is relevant, meaning any evidence that has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.

Secondarily, before blood-alcohol tests can be admitted in a civil proceeding, the party seeking to introduce the evidence must lay a proper foundation. This is accomplished by showing a connection between the specimen and the source, that the specimen was properly labeled and preserved, properly transported for analysis, properly taken by an authorized person, and properly tested. *Lee v. Missouri Pacific R. Co.,* 566 So.2d 1052 (La.App. 2d Cir.1990), writ denied; *Bufkin v. Mid-American Indem. Co.,* 528 So.2d 589 (La.App. 2d Cir.1988).

Finally, although relevant with a proper foundation, evidence of a witness' post-accident blood alcohol content may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. Unfair prejudice means "an undue tendency to suggest decision on an improper basis." The Court has "broad discretion to weigh the relevance, probative value, and prejudice of the evidence in determining its admissibility under Rule 403." United States v. Allard, 464 F.3d 529, 534 (5th Cir. 2006).

7. Is post-accident investigation discoverable by adverse counsel?

In order to avoid production, the post-accident investigation by or on behalf of an insurance file materials must be considered *privileged*. According to the Louisiana Code of Civil Procedure Article 1424, a "writing" may be immune from discovery if it has been obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent *in anticipation of litigation or in preparation for trial*."

But, this is not an absolute ban on discovery and production. An exception to this *in anticipation of litigation or in preparation for trial* immunity is made by Article 1424 if the trial court is "satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice." Nevertheless, Article 1424 absolutely prohibits the production "of any part of the writing that reflects the mental impressions, conclusions, opinions, or theories of an attorney or an expert."

Article 1424 requires a two-fold inquiry for determining whether documents sought to be discovered are protected as privilege: (1) were the articles obtained or prepared in anticipation of litigation or in preparation for trial? and (2) will the party seeking production be unfairly prejudiced or subject to undue hardship or injustice by denial of the discovery request? *Smith v. Travelers Ins. Co*., 418 So. 2d 689 (La. Ct. App. 4th Cir. 1982), judgment rev'd on other grounds, 430 So. 2d 55 (La. 1983).

A decision on whether a particular document falls under the work-product doctrine depends, not on the date or time the document was prepared, but on the content, nature, and purpose of the document. *Sonier v. Louisiana Power & Light Co.,* 272 So. 2d 32 (La. Ct. App. 1st Cir. 1973). Courts have specifically ruled that recorded statements and reports given to employers and insurance adjusters immediately following an accident that occurred while the driver was in the course and scope of his employment are considered to have been prepared in anticipation of litigation and thus are privileged under La. Code Civ. Proc. Ann. art. 1424. *Sass v. National Union Fire Ins. Co.,* 689 So. 2d 742 (La. Ct. App. 4th Cir. 1997).

These rules differ slightly in cases concerning suits by first party claimants against their insurer, such as UM carriers, because courts hold that Article 1424 privilege is not designed to allow an one to avoid inspection of his file by his own client. Rather, it is designed to permit discovery by an adverse party in the proceedings between the party seeking discovery and the party against whom discovery is sought. *Hodges v. Southern Farm Bureau Casualty Insurance Company*, 433 So.2d 125 (La.1983).

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

In May 2018, Louisiana ACT 310 was enacted, effectively amending several Louisiana laws to regulate platooning. *See* Attached ACT 310.

Act 310 was enacted to amend and reenact R.S. 32:81(B) and (C) and to enact R.S. 32:1(95) and 81(D), (E), and (F), relative to vehicle platooning; to authorize non-lead motor vehicles in a platoon to follow other motor vehicles in a platoon closely; to exempt non-lead motor vehicles in a platoon from operating such vehicle in a manner that allows sufficient space to enable any other vehicle to enter and occupy the space between any motor vehicle in a platoon; to authorize platoon operation upon approval of an operational plan by the Department of Public Safety and Corrections and the Department of Transportation and Development; to provide for rulemaking authority; to provide for a prohibition against platoon operation; to provide for definitions; and to provide for related matters.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

Recently, the Louisiana legislature enacted the following laws restricting the use of mobile devices:

The Louisiana legislature has enacted three specific provisions in the Louisiana Revised Statutes to expressly address the appropriate use of hand-held phones while operating motor vehicles in this state, namely Louisiana Revised Statute § 32:300.5, Louisiana Revised Statute § 32:300.6, and Louisiana Revised Statute § 32:300. Of the 3 provisions, only La. R.S. § 32:300.5 applies to commercial drivers, which expressly prohibits all drivers from writing, sending and/or reading text messages while operating any motor vehicle. It does not so restrict a driver's use of wireless communications devices to talk or listen on a wireless telecommunication device.

Regarding the use of hand held phones or other devices for the purpose of texting, Louisiana Revised Statute § 32:300.5 explicitly *prohibits* all drivers from using wireless telecommunications devices, namely mobile phones, *for purposes of writing, sending and/or reading text messages*, and specifically provides in Subsection A:“ no person shall operate any motor vehicle upon any public road or highway of this state while using a wireless telecommunications device to write, send, or read a text-based communication.”

Subsection A statute defines “Write, send, or read a text-based communication" as using the device “to manually communicate with any person by using a text-based communication referred to as a text message, instant message, or electronic mail.” Additionally, a driver who is only “reading, selecting, or entering a telephone number or name in a wireless telecommunications device for the purpose of making a telephone call” is not deemed to be writing, reading, or sending a text message according to Subsection A. Finally, Subsection A expressly defines a "wireless telecommunications device" to mean “a cellular telephone, a text- messaging device, a personal digital assistant, a standalone computer, or any other substantially similar wireless device that is readily removable from the vehicle and is used to write, send, or read text or data through manual input.” Thus, a driver’s ability to use “any device or component that is permanently affixed to a motor vehicle, including “citizens band radios, citizens band radio hybrids, commercial two-way radio communication devices, or electronic communication devices with a push-to-talk functions,” is not prohibited by this statute according to Subsection A.

Subsection B enumerates the remaining exceptions to the texting prohibition of Subsection A. Specifically, Subsection B exempts any law enforcement officer, firefighter or ambulance driver to the extent they are actually engaged in performing their official duties. Further, Subsection B permits texting by an operator of a moving motor vehicle only to: “(a) Report illegal activity; (b) Summon medical or other emergency help; (c) Prevent injury to a person or property; (d) Relay information between a transit or for-hire operator and that operator's dispatcher, in which the device is permanently affixed to the vehicle; and (e) Navigate using a global positioning system.”

With respect to using hand held phones or devices for any purpose aside from texting**,** Louisiana Revised Statute § 32:300.6 *prohibits* any persons who hold either a Class "E" learner's license or intermediate license from using any wireless telecommunications device to talk or listen on a wireless telecommunication device while operating a motor vehicle on any public road or highway of this state. However, these two statutes clarify that no such prohibition applies to “hands-free wireless telephone” devices. The exceptions to this rule are applicable if the call was made to: “(1) Report a traffic crash, medical emergency, or serious road hazard;
(2) Report a situation in which the person believes his or her personal safety is in jeopardy;
(3) Report or avert the perpetration or potential perpetration of a criminal act against the driver or another person; or where the driver engages in a call while being lawfully parked.

Violations of any of the above prohibitions are deemed “moving violations,” where the first violation shall punishable by a maximum fine of one hundred seventy-five dollars ($175.00), and each subsequent violation shall be punishable by a maximum fine of five hundred dollars ($500.00). However, these fines are doubled if the driver is involved in a crash at the time

of the violation. Further, these statutes require any officer who investigates crash to indicate on the accident report whether any driver was "using a wireless communication at the time of the crash."

Lastly, Louisiana Revised Statute § 32:300.7 solely applies to any person who is seventeen years old or younger and subjects these "minors" to the same driving prohibitions listed above; however, this section reduces the maximum fines applicable to minor drivers to one-hundred dollars ($100.00) for the first violation and to two-hundred dollars ($200.00) for all subsequent violations.

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel.

There are no specific rules prohibiting the use of the reptile theory at trial. Instead, the propriety of an argument is determined based upon the facts of the particular matter, the conduct and atmosphere of that particular trial and the arguments of opposing counsel." *Luquette v. Bouillion*, 184 So.2d 766 (La.App. 3 Cir. 1966) and *Bourque v. Gulf Marine Transp., Inc.*, 480 So.2d 337 (La.App. 3 Cir. 1985). That said, great latitude is permitted in argument before a civil jury. *Temple v. Liberty Mutual Insurance Company*, 316 So.2d 783 (La.App. 1 Cir.1975), rev'd on other grounds, 330 So.2d 891 (La. 1976).

In spite of the "broad latitude" afforded counsel, Louisiana courts recognize a prohibition against making the "Golden Rule" argument in closing argument. For example, in *Duerden v. PBR Offshore Marine Corp.*, 471 So.2d 1111 (La.App. 3 Cir. 1985), writ denied 476 So. 2d 355 (La.1985), the plaintiff asserted as error the defense counsel's use of the "Golden Rule Argument." The objectionable part of defendant's argument was as follows:

> . . . Common sense tells you, ladies and gentlemen, that if a floor is wet and you just finished soaking it down you don't sit there and go back in there. You wait until it dries. And he didn't do that. And if that's not contributory negligence I don't know what is. I put the water there; I slip and fall in it. If somebody does that on your property, they put something slippery and they slip and fall in it, do you become automatically responsible just because they did something wrong? No. The court is going to look to . . .

Id. at 1114. The *Duerden* court relied upon the United States Fifth Circuit Court of Appeals' decision in *Burrage v. Harrell*, 537 F.2d 837 (5th Cir. 1976) ("The rationale for prohibiting such an argument is that the jury's sympathy will be unfairly aroused, resulting in a disproportionate award of damages.") The *Duerdan* court then concluded that defense counsel's arguments were directed to the reasonableness of some action taken by the plaintiff rather than directed to the issue of damages and thus found no prejudicial error in the defendants' use of a Golden Rule argument in the context within which it was used. *Duerden*, 471 So.2d at 1114.

Conversely, in *Boutte v. Winn-Dixie Inc.*, 95-1123, p. 12 (La.App. 3 Cir. 4/17/1996), 674 So.2d 299, 306, in closing Winn-Dixie suggested that a finding of liability on its part would cause the cost of goods for its consumers, including the jurors, to rise. The plaintiff objected on the basis of the Golden Rule prohibition. On appeal, the court agreed with plaintiff, stating that "[a]lthough a litigant is afforded some license in closing argument, here Winn-Dixie, by deliberately resorting to local prejudice and unsupported generalities, clearly crossed its bounds…Since its counsel's 'testimony' was not given under oath or subject to cross- examination, it should not have been allowed."

In *Tingle v. Am. Home Assur. Co.*, 40 So.3d 1169, 1175-1176 (La.App. 3 Cir. 2010), the appellants contended that Plaintiffs' counsel violated the Golden Rule prohibition by asking the jury to put themselves in the Plaintiffs' shoes, by appealing to local prejudice, and by emphasizing that the Defendant was an out-of-state trucker thereby impermissibly attempting to "home cook" the out-of-state Defendants. The *Tingle* court held that the closing argument was not particularly inflammatory and that the trial court cured any potential prejudice by instructing the jury not to base its award on emotion. Id.

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

The advantages of federal versus state courts is that state courts officials are often elected and may make decisions based on self-preservation and federal judges are appointed for life and not influenced by job security. Federal courts usually have more of a "rocket-docket" ensuring that most matters do not pend for an excessive period of time.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

    a. Are citations admissible in the civil litigation?

The Louisiana Supreme Court has consistently rejected the doctrine of negligence *per se*. *See Galloway v. State,* 94-2474 (La. 5/22/95); 654 So.2d 1345, 1347 ("The doctrine of negligence per se has been rejected in Louisiana"); (*Faucheaux v. Terrebonne Consol. Govt.,* 615 So.2d 289, 292 (La. 1993)("The terminology 'negligence per se' has been rejected in Louisiana"); *Boyer v. Johnson,* 360 So.2d 1164, 1169 (La. 1978)("A violation of a criminal statute does not automatically create liability in a particular civil case'); *Laird v. Travelers Ins. Co.,* 263 LA 199, 267 So.2d 714, 717 (La. 1972) ("[A] violation of a criminal statute in combination with some resultant harm does not, in and of itself, impose civil liability."); *see* also 12 La. Civ. L. Treatise, Tort § 14:7 (2d ed.)("Louisiana does not recognize negligence per se as a consequence of the violation of [criminal motor vehicle] statutes.") This rejection has been recognized in civil actions arising from incidents in which the defendant allegedly violated a traffic statute. Despite this rejection, courts in Louisiana look to these statutes as guidance for fixing civil liability. The relevant inquiry is whether the prohibition in the traffic statute is designed to protect from the harm or danger which ensues from its violation. *Id.*

b. How does a guilty plea or verdict impact civil litigation? Pleas of no contest?

When a defendant pleads guilty to a traffic violation, this admission constitutes competent evidence in a subsequent civil trial, but is not conclusive of negligence. *See Shepard v. Scheele,* 96-1690 (La. 10/21/97); 701 So.2d 1308, 1315 ("A guilty plea to a traffic offense is admissible to show fault"); *Arceneaux v. Dominque,* 365 So.2d 1330, (La. 1978)("A plea of guilty is an admission against interests by the driver, and is admissible as relevant evidence to show fault"); *Wall v. Alleman,* (519 So.2d 155, 160 (La. App. 2nd Cir. 1987)(concluding that paying a traffic ticket is not conclusive evidence of negligence); *Georgie v. Harford Accident & Indem. Co.,* 348 So.2d 186, 188-89 (La. App. 1977)("However, such an admission, while competent evidence, is not conclusive.") When there is evidence demonstrating that a defendant pled guilty to a traffic violation, not because he or she was guilty, but because it was more convenient and/or expedient to do so, courts have held that the negligence suggested by such plea is vitiated. *See, e.g. Wall v. Alleman,* 519 So.2d at 160 (finding payment of a traffic ticket inconclusive as to negligence where defendant testified he paid the ticket because he would be out of state on the court date.) *Gregorie v. Hartford Accident & Indem. Co.,* 348 So. 2d 186, 189 (La. App. 1977)(recognizing that a party's explanation that he pleaded guilty solely for the sake of convenience and expediency, since it was easier and less expensive to pay the relatively small fine than to contest the charge, vitiated any admission of negligence by that party in pleading); *Am. Cas. Co. v. Lennox,* 169 So.2d 707 (La. App. 1964)(affirming decision of trial court finding defendant was not negligent on the basis that the defendant's sworn testimony as to the incident was more credible than the guilty plea arising from the same accident).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable.

Generally, a plaintiff is entitled to recover medical bills (special damages) stemming from an accident.

a. Does the benefit of medical insurance limit the amount of recoverable medical bills?

Pursuant to Louisiana's "benefit of the bargain" approach to the collateral source rule, evidence of medical expense write-offs is inadmissible to reduce a plaintiff's recovery for past medical expenses provided the plaintiff has paid some consideration for the benefit of the written off amount. *See Bozeman v. State*, 879 So. 2d 692 705-706 (La. 2004); *see also Griffin v. La. Sheriff's Auto Risk Ass'n*, 1999-2944 (La. App. 1 Cir. 6/22/01); 802 So. 2d 691, 715, *writ denied*, 2001-2117 (La. 2001); 801 So. 2d 376. Thus, the entire amount of medical bill is recoverable and evidence of reductions or contractual write-offs is not admissible to reduce the plaintiff's recovery. Conversely, Medicaid write-offs are admissible to limit recovery as participants do not provide consideration for any benefits. *See Bozeman*, at 705-706.

14. Describe any statutory caps in your State dealing with damage awards.

Pursuant to La. C.C. articles 1999 and 2324.1, the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, is left to the discretion of the judge or jury.

Generally, there are no personal injury damages caps. However, there is a $500,000 cap on general damages against the state or its political subdivisions pursuant to the Louisiana "Governmental Claims Act." *See* La. R.S. § 13:5106(B)(1) (limiting damages for personal injury to any one person at $500,000 exclusive of property damages, medical care and related benefits, and loss of earnings and future earnings). Similarly, medical malpractice damages against a qualified health care provider are capped at $500,000 per patient, excluding future medicals. *See* La. R.S. § 40:1299.43.