CHAPTER 805

CIVIL PROCEDURE — TRIALS

805.01 Jury trial of right. (1) RIGHT PRESERVED. The right of trial by jury as declared in article I, section 5 of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.

(2) DEMAND. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the pretrial conference. The demand may be made either in writing or orally on the record.

(3) WAIVER. The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

History: Sup. Ct. Order, 67 W (2d) 689; 1975 c. 218.

Judicial Council Committee's Note, 1974: Sub. (1) is the counterpart of s. 270.07 and Federal Rule 38 (a). It does not purport to provide an answer to the constitutional question of under what circumstances the right to jury trial or trial to the court exists. The resolution of the question so often requires subtle and complex analysis for which case law is a more reliable authority than statutes that no attempt was made to codify the law in this field. The reference to trial by the court is included because Wisconsin, unlike most states, has long recognized a constitutional right to trial by the court in appropriate cases. See Callanan v. Judd, 23 Wis. 343 (1868). [Re Order effective Jan. 1, 1976]

Just as legal counterclaim in equitable action does not necessarily entitle counterclaimant to jury trial, amendment by plaintiff from equity to law does not necessarily entitle defendant to jury trial, if equitable action was brought in good faith. Tri-State Home Improvement Co. v. Mansavage, 77 W (2d) 648, 253 NW (2d) 474.

The new Wisconsin rules of civil procedure: Chapters 805—807. Graczyk, 59 MLR 671.

805.02 Advisory jury and trial by consent. (1) In all actions not triable of right by a jury, the court upon motion or on its own initiative may try any issue with an advisory jury.

(2) With the consent of both parties, the court may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

History: Sup. Ct. Order, 67 W (2d) 690.

Judicial Council Committee's Note, 1974: This section is based on Federal Rule 39 (c). [Re Order effective Jan. 1, 1976]

805.03 Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

History: Sup. Ct. Order, 67 W (2d) 690.

Judicial Council Committee's Note, 1974: This section, generally based on Federal Rule 41 (b), replaces s. 269.25. Because of the harshness of the sanction, a dismissal under this section should be considered appropriate only in cases of egregious conduct by a claimant. See Link v. Wabash R. Co., 370 U.S. 626 (1962), Latham v. Casey & King Corp., 23 Wis. 2d 311, 127 N.W. 2d 225 (1964). [Re Order effective Jan. 1, 1976]

Complaint was dismissed for non-compliance with pre-trial order to produce medical report. Trispel v. Haefer, 89 W (2d) 725, 279 NW (2d) 242 (1979).

805.04 Voluntary dismissal: effect thereof. (1) BY PLAINTIFF; BY STIPULATION. An action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or mo-

tion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) BY ORDER OF COURT. Except as provided in sub. (1), an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subsection is not on the merits.

(3) COUNTERCLAIM, CROSS-CLAIM AND 3RD PARTY CLAIM. This section applies to the voluntary dismissal of any counterclaim, cross-claim, or 3rd party claim. A voluntary dismissal by the claimant alone shall be made before a responsive pleading is served, or if there is none, before the introduction of evidence at the trial or hearing.

(4) COSTS OF PREVIOUSLY DISMISSED ACTION. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it deems proper and may stay proceedings in the action until the plaintiff has complied with the order.

History: Sup. Ct. Order, 67 W (2d) 691.

Judicial Council Committee's Note, 1974: Sub. (1) is generally equivalent to Federal Rule 41 (a) (1). However, whereas under the Federal Rule, it is only required that the plaintiff file the notice of dismissal prior to the service of answer or motion, this section requires both filing and service of the notice to effect a voluntary dismissal.

Subs. (2), (3) and (4) are derived from Federal Rule 41 (a) (2), (c) and (d) respectively. [Re Order effective Jan. 1, 1976]

Assessment of attorney's fees as condition of voluntary dismissal without prejudice was within trial court's discretion. Dunn v. Fred A. Mikkelson, Inc. 88 W (2d) 369, 276 NW (2d) 748 (1979).

805.05 Consolidation; separate trials. (1) CONSOLIDATION. (a) When actions which might have been brought as a single action under s. 803.04 are pending before the court, it may order a joint hearing or trial of any or all of the claims in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) When actions which might have been brought as a single action under s. 803.04 are pending before different courts, any such action may be transferred upon motion of any party or of the court to another court where the related action is pending. Transfer under this paragraph shall be made only by the joint written order of the transferring court and the court to which the action is transferred.

(2) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04 (2) (b), may order a separate trial of any claim, cross-claim, counterclaim or 3rd party claim, or of any number of claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.

History: Sup. Ct. Order, 67 W (2d) 692.

Judicial Council Committee's Note, 1974: This section is based in large part on Federal Rule 42.

Unlike Federal Rule 42, sub. (2) does not permit bifurcation of issues, but only separate trial of discrete claims. The consolidation provisions of sub. (1) are tied into the statute governing permissive joinder of parties, s. 803.04.

Sub. (1) (a) permits, in proper circumstances, either joint hearing or trial (which is sometimes referred to as consolidation for purpose of hearing or trial) or a true consolidation of actions (where the parties in each case become parties in the other and a single judgment is appropriate). Specific consolidation provisions are found in s. 801.54 (4) and s. 895.04 (3). Section 269.59 is repealed. [Re Order effective Jan. 1, 1976]

805.06 Referees. (1) A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate. The fees to be allowed to a referee shall be fixed by the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court, as the court may direct. The referee shall not retain the referee's report as security for compensation; but if the party ordered to pay the fee allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party.

(2) A reference shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(3) The order of reference to the referee may specify or limit the referee's powers and may direct the referee to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before the referee and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order. The referee may require the production

of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The referee may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may personally examine them and may call the parties to the action and examine them upon oath. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as a court sitting without a jury.

(4) (a) When a reference is made, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to the parties and the referee, may apply to the court for an order requiring the referee to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(b) The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas. If without adequate excuse a witness fails to appear to give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in ss. 885.11 and 885.12.

(c) When matters of accounting are in issue, the referee may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the referee directs.

(5) (a) The referee shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report. The referee shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(b) In an action to be tried without a jury the court shall accept the referee's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction.

(c) In an action to be tried by a jury the referee shall not be directed to report the evidence. The referee's findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(d) The effect of a referee's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

History: Sup. Ct. Order, 67 W (2d) 693; 1975 c. 218.

Judicial Council Committee's Note, 1974: This section is based on Federal Rule 53. It replaces ss. 270.34 through 270.37. [Re Order effective Jan. 1, 1976]

Trial court properly refused to admit additional evidence on issue of fact which referee was appointed to resolve. Kleinstick v. Daleiden, 71 W (2d) 432, 238 NW (2d) 714.

805.07 Subpoena. (1) ISSUANCE AND SERVICE. Subpoenas shall be issued and served in accordance with ch. 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding.

(2) SUBPOENA REQUIRING THE PRODUCTION OF MATERIAL. A subpoena may command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein.

(3) PROTECTIVE ORDERS. Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, the court may (a) quash or modify the subpoena if it is unreasonable and oppressive or (b) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things designated therein.

(4) FORM. (a) The subpoena shall be in the following form:

SUBPOENA

STATE OF WISCONSIN

.... County

THE STATE OF WISCONSIN, To .....:

Pursuant to section 805.07 of the Wisconsin Statutes, you are hereby commanded to appear in person before [..... designating the court, officer, or person and place of appearance], on [.... date] at .... o'clock ....M., to give evidence in an action between ....., plaintiff, and ....., defendant. [Insert clause requiring the production of material, if appropriate]. Failure to appear may result in punishment for contempt. Issued this .... day of ....., 19...

[*Handwritten Signature*]
Attorney for [identify party]
(or other official title)
[Address]
[Telephone Number]

(b) For a subpoena requiring the production of material, the following shall be inserted in the foregoing form: You are further commanded to bring with you the following: [describing as accurately as possible the books, papers, documents or other tangible things sought].

(5) SUBSTITUTED SERVICE. A subpoena may be served in the manner provided in s. 885.03 except that substituted personal service may be made only as provided in s. 801.11 (1) (b) and except that officers, directors, and managing agents of public or private corporations subpoenaed in their official capacity may be served as provided in s. 801.11 (5) (a).

History: Sup. Ct. Order, 67 W (2d) 697; 1979 c. 110.

Judicial Council Committee's Note, 1974: Sub. (1) permits subpoenas to be issued by attorneys of record in civil cases. Sub. (2) is derived from Federal Rule 45 (b). Sub. (4) is designed to make the meaning of the subpoena as clear as possible to the person served. Sub. (5) is designed to make the service provisions respecting summonses and subpoenas more nearly identical. [Re Order effective Jan. 1, 1976]

805.08 Jurors. (1) QUALIFICATIONS, EXAMINATION. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

(2) ALTERNATE JURORS. If the court is of the opinion that the trial of the action is likely to be protracted, it may call an alternate juror or jurors. They shall be drawn in the same manner and have the same qualifications as regular jurors and shall be subject to like examination and challenge. The alternate jurors shall take the oath or affirmation and shall be seated next to the regular jurors and shall attend the trial at all times. If the regular jurors are kept in custody, the alternates shall also be so kept. If before the final submission of the cause a regular juror dies or is discharged, the court shall order an alternate juror to take the regular juror's place in the jury box. If there are 2 or more alternate jurors, the court shall select one by lot. Upon entering the jury box, the alternate juror becomes a regular juror.

(3) NUMBER OF JURORS DRAWN; PEREMPTORY CHALLENGES. A sufficient number of jurors shall be called in the action so that the number applicable under s. 756.096 (3) (b) shall remain after the exercise of all peremptory challenges to which the parties are entitled as provided in this subsection. Each party shall be entitled to 3 such challenges which shall be exercised alternately, the plaintiff beginning; and when any party declines to challenge in turn, the challenge shall be made by the clerk by lot. The parties to the action shall be deemed 2, all plaintiffs being one party and all defendants being the other party, except that in case where 2 or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, in its discretion, may allow peremptory challenges to the defendant or defendants on each side of the adverse interests, not to exceed 3. Each side shall be entitled to one peremptory challenge in addition to those otherwise allowed by law if alternate jurors are to be impaneled.

(4) JURY VIEW. On motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision. The moving party shall pay the expenses of the view. The expenses shall afterwards be taxed like other legal costs if the party who incurred them prevails in the action.

History: Sup. Ct. Order, 67 W (2d) 698; 1975 c. 218; 1977 c. 318; 1977 c. 447 s. 210.

Judicial Council Committee's Note, 1974: Sub. (1) is based on s. 270.16. To the list of disqualifying conditions enumerated in that statute has been added relation by blood or marriage to any attorney appearing in the case.

Sub. (2) is nearly identical to the alternate juror statute in the code of criminal procedure, s. 972.05, except that the court is not restricted to a maximum of 2 alternate jurors.

Sub. (3) is virtually identical to s. 270.18, except that the last sentence is new. The present statutes contain no special provisions respecting the number of peremptory challenges when alternate jurors are called.

Sub. (4) is derived from s. 270.20. [Re Order effective Jan. 1, 1976]

Case law makes clear that challenge for principal cause cannot be predicated on a ground not delineated in (1). Therefore, disqualification because of a juror's affiliation or interest in the insurance industry requires proof of bias or prejudice. Nolan v. Venus Ford, Inc. 64 W (2d) 215, 218 NW (2d) 507.

Trial court did not abuse discretion in failing to strike for cause 3 veniremen who were friends of a prosecution witness where there was no showing of probable prejudice. Nyberg v. State, 75 W (2d) 400, 249 NW (2d) 524.

Mere expression of predetermined opinion as to guilt during voir dire does not disqualify juror per se. Hammill v. State, 89 W (2d) 404, 278 NW (2d) 821 (1979).

Disproportionate representation of group in one array is insufficient to establish systematic exclusion. State v. Pruitt, 95 W (2d) 69, 289 NW (2d) 343 (Ct. App. 1980).

805.09 Juries of fewer than 12; five-sixths verdict. (1) JURY. The jury shall consist of a number of persons determined under s. 756.096 (3) (b).

(2) VERDICT. A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions.

History: Sup. Ct. Order, 67 W (2d) 700; 1977 c. 318; 1977 c. 447 s. 210.

805.10 Examination of witnesses; arguments. Unless the judge otherwise orders, not more than one attorney for each side shall examine or cross-examine a witness and not more than 2 attorneys on each side shall sum up to the jury. The plaintiff shall be entitled to the opening and final rebuttal arguments. Plaintiff's rebuttal shall be limited to matters raised by any adverse party in argument. Waiver of argument by either party shall not preclude the adverse party from making any argument which the adverse party would otherwise have been entitled to make. Before the argument is begun, the court may limit the time for argument.

History: Sup. Ct. Order, 67 W (2d) 701; 1975 c. 218.

Judicial Council Committee's Note, 1974: This section is substantially equivalent to s. 270.205. The latter statute provides that the party having the affirmative shall be entitled to the opening and closing argument. The 2nd and 3rd sentences of this section more accurately express the intendment of that provision of s. 270.205. [Re Order effective Jan. 1, 1976]

Attorney's concession during closing argument that client was negligent could not be construed as binding admission. Kuzmic v. Kreutzmann, 100 W (2d) 48, 301 NW (2d) 266 (Ct. App. 1980).

805.11 Objections; exceptions. (1) Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error. An objection is not necessary after a ruling or order is made.

(2) A party raising an objection must specify the grounds on which the party predicates the objection or claim of error.

(3) Exceptions shall never be made.

(4) Evidentiary objections are governed by s. 901.03.

History: Sup. Ct. Order, 67 W (2d) 701; 1975 c. 218.

Judicial Council Committee's Note, 1974: The "exception" became an empty formality with the appearance at trials of shorthand reporters. The device has no place in the context of modern litigation.

Making a proper objection is not the only requirement for preserving error. The objecting party must avoid a waiver by conduct inconsistent with his objection, must move for a new trial after verdict [but not after findings in a trial to the court (s. 805.17 (2))], and must take the appropriate steps on appeal to protect his claim of error. [Re Order effective Jan. 1, 1976]

805.12 Special verdicts. (1) USE. Unless it orders otherwise, the court shall direct the jury to return a special verdict. The verdict shall be prepared by the court in the form of written questions relating only to material issues of ultimate fact and admitting a direct answer. The jury shall answer in writing. In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent. The court may also direct the jury to find upon particular questions of fact.

(2) OMITTED ISSUE. When some material issue of ultimate fact not brought to the attention of the trial court but essential to sustain the judgment is omitted from the verdict, the issue shall be deemed determined by the court in conformity with its judgment and the failure to request a finding by the jury on the issue shall be deemed a waiver of jury trial on that issue.

(3) CLERK'S ENTRIES AFTER VERDICT. Upon receiving a verdict, the clerk shall make an entry on the minutes specifying the time the verdict was received and the court's order setting time for motions after verdict under s. 805.16. The verdict and special findings shall be filed.

History: Sup. Ct. Order, 67 W (2d) 702; 1975 c. 218.

Judicial Council Committee's Note, 1974: Sub. (1) is based on a recognition that in Wisconsin practice, the special verdict is the rule and not the exception. A party desiring the use of a general verdict should be required to make an appropriate motion. Section 270.27, on which this section is generally based, contains rather restrictive language on the use of special verdicts and thus is not expressive of the actual practice in the state presently.

Sub. (2) is substantially equivalent to s. 270.28. [Re Order effective Jan. 1, 1976]

If court can find as matter of law that party is causally negligent, contrary to jury's answer, and jury attributes some degree of comparative negligence to that party, court should change causal negligence answer and permit jury's comparison to stand. Ollinger v. Grall, 80 W (2d) 213, 258 NW (2d) 693.

See note to 805.15, citing Fouse v. Persons, 80 W (2d) 390, 259 NW (2d) 92.

See note to 751.06, citing Schulz v. St. Mary's Hospital, 81 W (2d) 638, 260 NW (2d) 783.

Where evidence conflicts and inconsistent theories on cause of event are advanced, instructions on both theories should be given. Sentell v. Higby, 87 W (2d) 44, 273 NW (2d) 780 (Ct. App. 1978).

Special verdict formulation in Wisconsin. Decker and Decker, 60 MLR 201.

Product liability verdict formulation in Wisconsin. Slattery et al. 61 MLR 381.

805.13 Jury instructions; note taking; form of verdict. (1) STATEMENTS BY JUDGE. After the trial jury is sworn, all statements or comments by the judge to the jury or in their presence relating to the case shall be on the record.

(2) PRELIMINARY INSTRUCTIONS AND NOTE TAKING. (a) After the trial jury is sworn, the court shall determine if the jurors may take notes of the proceedings:

1. If the court authorizes note-taking, the court shall instruct the jurors that they may make written notes of the proceedings, except the closing arguments, if they so desire and that the court will provide materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.

2. If the court does not authorize note-taking, the court shall state the reasons for the determination on the record.

(b) The court may give additional preliminary instructions to the jury which instructions may again be given in the charge at the close of the evidence.

(3) INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

(4) INSTRUCTION. The court shall instruct the jury before or after closing arguments of counsel. Failure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error. The court shall provide the jury with one complete set of written instructions providing the substantive law to be applied to the case to be decided.

(5) REINSTRUCTION. After the jury retires, the court may reinstruct the jury as to all or any part of the instructions previously given, or may give supplementary instructions as it deems appropriate.

History: Sup. Ct. Order, 67 W (2d) 703; 1975 c. 218; 1979 c. 128; 1981 c. 358.

Judicial Council Committee's Note, 1974: This section replaces s. 270.21.

The equivalent of sub. (1) is found in s. 270.21.

The equivalent of sub. (2) is found in s. 270.19.

Subs. (3) and (4) are new. The requirements that requested instructions be reduced to writing and be accepted or rejected in full by the court is abolished. A party's written motion may refer to standard instructions so long as there is no uncertainty concerning the instruction. Thus, if a standard instruction contained alternative clauses, or blanks which required the insertion of information, or was in any other way ambiguous or incomplete, a motion requesting the use of such standard instruction would be fatally imprecise unless it specified the clause to be used, the words to be inserted in the blanks, or otherwise obviated the ambiguity or incompleteness.

Sub. (5) replaces s. 270.23. [Re Order effective Jan. 1, 1976]

Specific evidentiary facts may be incorporated into instruction provided they do not lead jury to believe court has prejudged evidence. State v. Dix, 86 W (2d) 474, 273 NW (2d) 250 (1979).

See note to 895.045, citing Brons v. Bischoff, 89 W (2d) 80, 277 NW (2d) 854 (1979).

Under (3), failure to object waives errors of substance as well as of form. Gyldenvand v. Schroeder, 90 W (2d) 690, 280 NW (2d) 235 (1979).

Jury was properly instructed that it need not consider lower grade of offense if it found defendant guilty of higher one. State v. McNeal, 95 W (2d) 63, 288 NW (2d) 874 (Ct. App. 1980).

Although failure to object at conference to substantive defect in verdict constituted waiver, failure to object does not preclude court's consideration of defect under 751.06. Clark v. Leisure Vehicles, Inc. 96 W (2d) 607, 292 NW (2d) 630 (1980).

Although objection at conference was not specific enough to preserve appeal, supreme court reversed trial court under 751.06. Air Wisconsin, Inc. v. North Cent. Airlines, Inc. 98 W (2d) 301, 296 NW (2d) 749 (1980).

805.14 Motions challenging sufficiency of evidence; motions after verdict. (1) TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

(2) NONSUIT ABOLISHED; MISDESIGNATION OF MOTIONS. (a) The involuntary nonsuit is abolished. If a motion for involuntary nonsuit is made, it shall be treated as a motion to dismiss.

(b) When a party mistakenly designates a motion to dismiss as a motion for directed verdict, or vice versa; or mistakenly designates a motion to change answer as a motion for judgment notwithstanding the verdict, or vice versa; or otherwise mistakenly designates a motion challenging the sufficiency of evidence as a matter of law, the court shall treat the motion as if there had been a proper designation.

(3) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in

trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

(4) MOTION AT CLOSE OF ALL EVIDENCE. In trials to the jury, at the close of all evidence, any party may challenge the sufficiency of the evidence as a matter of law by moving for directed verdict or dismissal or by moving the court to find as a matter of law upon any claim or defense or upon any element or ground thereof.

(5) MOTIONS AFTER VERDICT. (a) *Motion for judgment.* Any party who would recover a favorable judgment if judgment were entered on the verdict may move the court for judgment on the verdict.

(b) *Motion for judgment notwithstanding verdict.* A party against whom a verdict has been rendered may move the court for judgment notwithstanding the verdict in the event that the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment.

(c) *Motion to change answer.* Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer.

(d) *Motion for directed verdict.* A party who has made a motion for directed verdict or dismissal on which the court has not ruled pending return of the verdict may renew the motion after verdict. In the event the motion is granted, the court may enter judgment in accordance with the motion.

(e) *Preliminary motions.* It is not necessary to move for a directed verdict or dismissal prior to submission of the case to the jury in order to move subsequently for a judgment notwithstanding the verdict or to change answer.

(6) GROUNDS TO BE STATED WITH PARTICULARITY. In any motion challenging the sufficiency of evidence, the grounds of the motion shall be stated with particularity. Mere conclusory statements and statements lacking express reference to the specific element of claim or defense as to which the evidence is claimed to be deficient shall be deemed insufficient to entitle the movant to the order sought. If the court grants a motion challenging the sufficiency of the evidence, the court shall state on the record or in writing with particularity the evidentiary defect underlying the order.

(7) EFFECT OF ORDER OF DISMISSAL. Unless the court in its order for dismissal otherwise specifies for good cause recited in the order, any dismissal under this section operates as an adjudication upon the merits.

(8) NONWAIVER. A party who moves for dismissal or for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdict.

(9) INVOLUNTARY DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM OR 3RD PARTY CLAIM. This section applies to counterclaims, cross-claims and 3rd party claims.

History: Sup. Ct. Order, 67 W (2d) 704; Sup. Ct. Order, 67 W (2d) ix; 1975 c. 218; Sup. Ct. Order, 73 W (2d) xxxi.

Judicial Council Committee's Note, 1974: This section is designed to bring together under one heading the most basic rules governing motions challenging the sufficiency of the evidence. Sub. (1) restates the test for sufficiency that is used on all motions challenging sufficiency. See J. Conway, Wisconsin and Federal Civil Procedure s. 48.10 (1966).

Sub. (2) (a) abolishes the involuntary nonsuit. The nonsuit is functionally equivalent to a motion to dismiss and there is no need for a special designation for such a motion made at the close of a plaintiff's case in chief. Sub. (2) (b) is designed to ensure that misdesignation of a motion challenging sufficiency of the evidence will not, by itself, render the motion ineffective. If the relief sought by the movant and the grounds of this motion are clear, the court should disregard the misdesignation and proceed as if the motion had been properly designated.

The motion to dismiss under sub. (3) replaces the motion for involuntary nonsuit.

Under sub. (4), a party may seek not only a directed verdict or a dismissal, but also a partial directed verdict. The motion for partial directed verdict is the analogue of the motion for partial summary judgment under s. 806.04 (1) and the motion to change answer under sub. (5) (c) of this section.

Sub. (5) (b) restricts the use of the motion for judgment notwithstanding the verdict to cases in which the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment. When, after a verdict is returned, a party wishes to challenge the sufficiency of the evidence to support the answers in the verdict, the proper procedure is to interpose a motion to change answer(s) under sub. (5) (c) or to renew his motion for directed verdict under sub. (5) (d). See J. Conway, Wisconsin and Federal Civil Procedure s. 55.06 (1966). Sub. (5) (c) abolishes the necessity of preliminary motions as prerequisites for the making of motions for judgment N.O.V. or to change answer. The practice of taking presubmission motions under advisement pending the return of the verdict is so common in modern litigation that the preliminary motions frequently serve no purpose other than laying the formal basis for the motions to be made after verdict.

Motions challenging the sufficiency of evidence call for analysis of the evidence. Under sub. (6), the movant is required to bring to the attention of the court the specific defect of which he complains.

Sub. (8) deals with the modern equivalent of the common law "joinder in demurrer to the evidence". The effect of such a joinder at common law was to withdraw the case from the jury as if by waiver. Section 270.26 has the same effect. This section, like Federal Rule 50 (a), abolishes the waiver rule. [Re Order effective Jan. 1, 1976]

Judicial Council Committee's Note, 1976: Sub. (3) applies only to trials to the jury, codifying Household Utilities, Inc. v. Andrews Co., 71 Wis. 2nd 17 (1976). The standard for granting a motion under sub. (3) is found in sub. (1). Motions made by a defendant for dismissal after a plaintiff has completed presenting his evidence in trials to the court is governed by s. 805.17 (1). [Re Order effective Jan. 1, 1977]

805.15 New trials. (1) MOTION. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

(2) ORDER. Every order granting a new trial shall specify the grounds therefor. No order granting a new trial shall be valid or effective unless the reasons that prompted the court to make such order are set forth on the record, or in the order or in a written decision. In such order, the court may grant, deny or defer the awarding of costs.

(3) NEWLY-DISCOVERED EVIDENCE. A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

(a) The evidence has come to the moving party's notice after trial; and

(b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and

(c) The evidence is material and not cumulative; and

(d) The new evidence would probably change the result.

(4) ALTERNATE MOTIONS; CONDITIONAL ORDER. If the court grants a motion for judgment notwithstanding the verdict, or a motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for new trial. If the motion for a new trial is thus conditionally granted and the judgment has been reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(5) APPEAL. If the court denies a motion for judgment notwithstanding the verdict, or a motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict, the party who prevailed on that motion may, as appellee, assert for the first time, grounds which entitle the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict or motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict. If the appellate court reverses the judgment, nothing in this section precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(6) EXCESSIVE OR INADEQUATE VERDICTS. If a trial court determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount. If the option is not accepted, the order for new trial shall be deemed final for purposes of appeal on the last day of the option period.

History: Sup. Ct. Order, 67 W (2d) 708; 1975 c. 218; 1979 c. 110.

Judicial Council Committee's Note, 1974: The first sentence of sub. (1) restates the grounds on which new trials have been allowed in Wisconsin under ss. 270.49-.50. The 2nd sentence reverses the rule in Guptill v. Roemer, 269 Wis. 12, 68 N.W. 2d 579 (1955), to the effect that, standing alone, the fact that a verdict is against the weight of the evidence is not a ground for new trial.

Sub. (3) is based on the case law associated with s. 270.50. See, e.g., Erickson v. Clifton, 265 Wis. 236, 239, 61 N.W. 2d 329 (1953).

Sub. (4) is derived from Federal Rule 50 (c). It deals with the alternative motion to set aside the verdict (or an answer thereof) and render judgment for the movant or for a new trial. The trial court must rule on both branches of the alternative motion. Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940). "If the court grants judgment notwithstanding the verdict and fails to act on the alternative motion for a new trial, litigation will be needlessly protracted should the appellate court find that the grant of judgment was erroneous. In that case it must remand so that the trial court can rule on the new trial motion". Wright and Miller, Federal Practice and Procedure, s. 2539 at 610 (1971).

Sub. (5) is derived from Federal Rule 50 (d). If the motion for judgment by the verdict-loser is denied, the verdict-winner may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the verdict-loser's motion.

Sub. (6) establishes a standard time limit of 10 days within which additur and remittitur options must be accepted to avoid a new trial on the issue of damages. See Lucas v. State Farm Mut. Ins. Co., 17 Wis. 2d 568, 117 N.W. 2d 660 (1962). [Re Order effective Jan. 1, 1976]

Statement that verdict is contrary to the weight of evidence will not support order granting new trial in interest of justice. DeGroff v. Schmude, 71 W (2d) 554, 238 NW (2d) 730.

In personal injury action it is not grounds to grant new trial merely because expert listed under pretrial order is not called as witness at trial and expert's report is admitted. Karl v. Employers Ins. of Wausau, 78 W (2d) 284, 254 NW (2d) 255.

Where answer to one material question shows that jury made answer perversely, court should set aside entire verdict unless satisfied that other questions were not affected by such perversity. Fouse v. Persons, 80 W (2d) 390, 259 NW (2d) 92.

If there is a reasonable basis for the trial court's determination under (6) as to the proper amount, it will be sustained. See note to 907.02, citing Koele v. Radue, 81 W (2d) 583, 260 NW (2d) 766.

Where jury award of damages was so inadequate as to indicate prejudice, trial court did not abuse discretion by ordering new trial on all issues. Larry v. Commercial Union Ins. Co. 88 W (2d) 728, 277 NW (2d) 821 (1979).

Order for new trial under 805.15 (6) is not a final order and is not appealable as of right under 808.03 (1). Earl v. Marcus, 92 W (2d) 13, 284 NW (2d) 690 (Ct. App. 1979).

Sub. (6) establishes commencement of 10-day appeal period. Wick v. Mueller, 105 W (2d) 191, 313 NW (2d) 799 (1982).

805.16 Time for motions after verdict. Upon rendition of verdict, the judge shall in open court set dates for serving and filing motions and briefs and for arguing motions. No notice of motion need be served for motions after verdict. The dates for hearing arguments on motions shall be not less than 10 nor more than 60 days after verdict. If an order granting or denying a motion challenging the sufficiency of evidence or for a new trial is not entered within 90 days after verdict, the motion shall be deemed denied. Notwithstanding the foregoing, a motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict. Unless an order granting or denying the motion is entered within 30 days after hearing, the motion shall be deemed denied.

History: Sup. Ct. Order, 67 W (2d) 711.

Judicial Council Committee's Note, 1974: This section is designed to prevent unnecessary protraction of litigation. It should be read with the provisions of s. 801.15 (2) on extensions of time and s. 802.01 (2) (e), which defines the time at which motions are deemed "made". [Re Order effective Jan. 1, 1976]

Motions for directed verdicts and motions to dismiss made at close of plaintiff's case are motions challenging sufficiency of evidence under this section. Jansen Co. v. Milwaukee Area Dist. Board, 105 W (2d) 1, 312 NW (2d) 813 (1981).

805.17 Trial to the court. (1) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

(2) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall file its findings and conclusions prior to or concurrent with rendering judgment. In granting or refusing interlocutory injunctions the court shall similarly file its written findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee may be adopted in whole or part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

(3) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial.

(4) APPEAL. In actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has objected in the trial court to such findings or moved for new trial.

History: Sup. Ct. Order, 67 W (2d) 712; Sup. Ct. Order, 73 W (2d) xxxi; Sup. Ct. Order, 107 W (2d) xiii.

Judicial Council Committee's Note, 1974: Based on Federal Rule 52, this section replaces s. 270.33. Just as in a trial to a jury, the court must frame the verdict in terms of material issues of ultimate fact under s. 805.12 (1), in a trial to the court the findings should be framed in terms of ultimate fact.

Sub. (3) is new. Since judges are able to deliberate, with the aid of briefs prepared by counsel, before making findings, the findings should reflect the considered judgment of the court. That is to say, findings, unlike many rulings during trial, are not "shoot from the hip" affairs. (cf. Wells v. Dairyland Mut. Ins. Co., 274 Wis. 505, 516, 80 N.W. 2d 380 (1957)). Thus, in trials to the court, almost all motions for new trial based on alleged insufficiency of the evidence are denied. Since such motions become mere formalities, they are not required under the new code. However, there is nothing in this code to prevent a party from moving for a new trial after a trial to the court if such a motion seems appropriate. [Re Order effective Jan. 1, 1976]

Judicial Council Committee's Note, 1976: Sub. (1) is based on the language in Federal Rule 41b, and governs how a court as the trier of the facts handles a motion by a defendant for dismissal after the plaintiff has completed the presentation of his evidence. This adoption of the Federal Rule was the approach taken by the Wisconsin Supreme Court in the case of Household Utilities, Inc. v. Andrews Co., 71 Wis. 2nd 17 (1976). [Re Order effective Jan. 1, 1977]

Judicial Council Note, 1982: Sub. (2) has been amended to allow the filing of the findings and conclusions concurrent with the rendering of the judgment. The changes are intended to eliminate doubts as to the propriety of combining the findings, conclusions and judgment in a single document, simplifying paperwork, minimizing storage space requirements and

reducing the likelihood of errors. [Re Order effective July 1, 1982]

See note to 806.07, citing In Matter of Estate of Smith, 82 W (2d) 667, 264 NW (2d) 239.

805.18 Mistakes and omissions; harmless error. (1) The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.

(2) No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of drawing, selection or misdirection of jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

History: Sup. Ct. Order, 67 W (2d) 714.

Judicial Council Committee's Note, 1974: This section is substantially equivalent to ss. 269.43 and 270.52. [Re Order effective Jan. 1, 1976]

Where defective summons does not prejudice defendant, non-compliance with 801.09 (2) (a) is not jurisdictional error. Canadian Pac. Ltd. v. Omark-Prentice Hydraulics, 86 W (2d) 369, 272 NW (2d) 407 (Ct. App. 1978).