CHAPTER 802

CIVIL PROCEDURE — PLEADINGS, MOTIONS AND PRETRIAL PRACTICE

NOTE: Chapter 802 was created by Sup. Ct. Order, 67 W (2d) 585, 614 (1975), which contains Judicial Council Committee notes explaining each section. Statutes prior to the 1983–84 edition also have these notes.

802.01 Pleadings allowed; form of motions. **(1)** PLEADINGS. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross–claim, if the answer contains a cross–claim; a third–party complaint, if a person who was not an original party is summoned under s. 803.05, and a third–party answer, if a third–party complaint is served. No other pleading shall be allowed, except that the court may order a further pleading to a reply or to any answer.

(2) MOTIONS. (a) *How made.* An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. Unless specifically authorized by statute, orders to show cause shall not be used.

(b) *Supporting papers.* Copies of all records and papers upon which a motion is founded, except those which have been previously filed or served in the same action or proceeding, shall be served with the notice of motion and shall be plainly referred to therein. Papers already filed or served shall be referred to as papers theretofore filed or served in the action. The moving party may be allowed to present upon the hearing, records, affidavits or other papers, but only upon condition that opposing counsel be given reasonable time in which to meet such additional proofs should request therefor be made.

(c) *Recitals in orders.* All orders, unless they otherwise provide, shall be deemed to be based on the records and papers used on the motion and the proceedings theretofore had and shall recite the nature of the motion, the appearances, the dates on which the motion was heard and decided, and the order signed. No other formal recitals are necessary.

(d) *Formal requirements.* The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers in an action, except that affidavits in support of a motion need not be separately captioned if served and filed with the motion. The name of the party seeking the order or relief and a brief description of the type of order or relief sought shall be included in the caption of every written motion.

(e) *When deemed made.* In computing any period of time prescribed or allowed by the statutes governing procedure in civil actions and special proceedings, a motion which requires notice under s. 801.15 (4) shall be deemed made when it is served with its notice of motion.

(3) DEMURRERS AND PLEAS ABOLISHED. Demurrers and pleas shall not be used.

History: Sup. Ct. Order, 67 W (2d) 585, 614 (1975); Sup. Ct. Order, 104 W (2d) xi (1981); Sup. Ct. Order, 171 W (2d) xix (1992).

Judicial Council Committee's Note on sub. (1), 1981: See 1981 Note to s. 802.02 (4). [Re Order effective Jan. 1, 1982]

802.02 General rules of pleading. **(1)** CONTENTS OF PLEADINGS. A pleading or supplemental pleading that sets forth a claim for relief, whether an original or amended claim, counterclaim, cross claim or 3rd–party claim, shall contain all of the following:

(a) A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.

(b) A demand for judgment for the relief the pleader seeks.

(1m) RELIEF DEMANDED. (a) Relief in the alternative or of several different types may be demanded. With respect to a tort claim seeking the recovery of money, the demand for judgment may not specify the amount of money the pleader seeks.

(b) This subsection does not affect any right of a party to specify to the jury or the court the amount of money the party seeks.

(2) DEFENSES; FORM OF DENIALS. A party shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. The pleader shall make the denials as specific denials of designated averments or paragraphs, but if a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

(3) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of a condition subsequent, failure or want of consideration, failure to mitigate damages, fraud, illegality, immunity, incompetence, injury by fellow servants, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, superseding cause, and waiver. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall permit amendment of the pleading to conform to a proper designation. If an affirmative defense permitted to be raised by motion under s. 802.06 (2) is so raised, it need not be set forth in a subsequent pleading.

(4) EFFECT OF FAILURE TO DENY. Averments in a pleading to which a responsive pleading is required, other than those as to the fact, nature and extent of injury and damage, are admitted when not denied in the responsive pleading, except that a party whose prior pleadings set forth all denials and defenses to be relied upon in defending a claim for contribution need not respond to such claim. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(5) PLEADINGS TO BE CONCISE AND DIRECT; CONSISTENCY. (a) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(b) A party may set forth 2 or more statements of a claim or defense alternatively or hypothetically, either in one claim or

defense or in separate claims or defenses. When 2 or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in s. 802.05.

(6) CONSTRUCTION OF PLEADINGS All pleadings shall be so construed as to do substantial justice.

History: Sup. Ct. Order, 67 W (2d) 585, 616 (1975); 1975 c. 218; Sup. Ct. Order, 82 W (2d) ix (1978); Sup. Ct. Order, 104 W (2d) xi (1981); 1987 a. 256; 1993 a. 486.

Cross–references: For effect of demand for judgment or want of such demand in the complaint in case of judgment by default, see s. 806.01 (1) (c).

As to the effect of not denying an allegation in the complaint of corporate or partnership existence, see 891.29 and 891.31.

Judicial Council Committee's Note, 1977: Sub. (1) is amended to allow a pleading setting forth a claim for relief under the Rules of Civil Procedure to contain a short and plain statement of any series of transactions, occurrences, or events under which a claim for relief arose. This modification will allow a pleader in a consumer protection or anti–trust case, for example, to plead a pattern of business transactions, occurrences or events leading to a claim of relief rather than having to specifically plead each and every transaction, occurrence or event when the complaint is based on a pattern or course of business conduct involving either a substantial span of time or multiple and continuous transactions and events. The change is consistent with Rule 8 (a) (2) of the Federal Rules of Civil Procedure. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1981: Sub. (4) has been amended and s. 802.07 (6) repealed to limit the circumstances in which a responsive pleading to a claim for contribution is required. A claim for contribution is a claim for relief under sub. (1) which normally requires an answer, reply or third–party answer. The amendment to sub. (4), however, eliminates this requirement where the party from whom contribution is sought has already pleaded all denials and defenses to be relied upon in defending the contribution claim. [Re Order effective Jan. 1, 1982]

See note to 802.07, citing S & M Rotogravure Service, Inc. v. Baer, 77 W (2d) 454, 252 NW (2d) 913.

In action for injuries allegedly sustained as result of 3 separate surgical procedures performed by 2 unassociated doctors residing in different counties, separate places of trial were required and joinder of separate causes of action was improper. Voight v. Aetna Casualty & Surety Co. 80 W (2d) 376, 259 NW (2d) 85.

Sub. (2) doesn't authorize denials for lack of knowledge or information solely to obtain delay; answer was frivolous under 814.025 (3) (b). First Federated Sav. v. McDonah, 143 W (2d) 429, 422 NW (2d) 113 (Ct. App. 1988).

Insurers must plead and prove their policy limits prior to verdict to restrict the judgment to the policy limits. Price v. Hart, 166 W (2d) 182, 480 NW (2d) 249 (Ct. App. 1991).

802.03 Pleading special matters. (1) CAPACITY. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. If a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge, or by motion under s. 802.06 (2).

(2) FRAUD, MISTAKE AND CONDITION OF MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(3) CONDITIONS PRECEDENT. In pleading the performance or occurrence of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance or occurrence, but it may be stated generally that the party duly performed all the conditions on his or her part or that the conditions have otherwise occurred or both. A denial of performance or occurrence shall be made specifically and with particularity. If the averment of performance or occurrence is controverted, the party pleading performance or occurrence shall be bound to establish on the trial the facts showing such performance or occurrence.

(4) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with the law.

(5) JUDGMENT. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi–judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(6) LIBEL OR SLANDER. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

(7) SALES OF GOODS, ETC. In an action involving the sale and delivery of goods or the performing of labor or services, or the furnishing of materials, the plaintiff may set forth and number in the complaint the items of the plaintiff's claim and the reasonable value or agreed price of each. The defendant by the answer shall indicate specifically those items defendant disputes and whether in respect to delivery or performance, reasonable value or agreed price. If the plaintiff does not so plead the items of the claim, the plaintiff shall deliver to the defendant, within 10 days after service of a demand therefor in writing, a statement of the items of the plaintiff's claim and the reasonable value or agreed price of each.

(8) TIME AND PLACE. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

History: Sup. Ct. Order, 67 W (2d) 585, 619 (1975); 1975 c. 218.

Effect of (8) discussed. Schweiger v. Loewi & Co., Inc. 65 W (2d) 56, 221 NW (2d) 882.

"American rule" of absolute judicial immunity from liability for libel or slander discussed. Converters Equip. Corp. v. Condes Corp. 80 W (2d) 257, 258 NW (2d) 712.

Where libel action is based on conduct rather than words, (6) is not applicable. Starobin v. Northridge Lakes Development Co. 94 W (2d) 1, 287 NW (2d) 747 (1980).

802.04 Form of pleadings. (1) CAPTION. Every pleading shall contain a caption setting forth the name of the court, the venue, the title of the action, the file number, and a designation as in s. 802.01 (1). If a pleading contains motions, or an answer or reply contains cross–claims or counterclaims, the designation in the caption shall state their existence. In the complaint the caption of the action shall include the standardized description of the case classification type and associated code number as approved by the director of state courts, and the title of the action shall include the names and addresses of all the parties, indicating the representative capacity, if any, in which they sue or are sued and, in actions by or against a corporation, the corporate existence and its domestic or foreign status shall be indicated. In pleadings other than the complaint, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(2) PARAGRAPHS; SEPARATE STATEMENTS. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate claim or defense whenever a separation facilitates the clear presentation of the matters set forth. A counterclaim must be pleaded as such and the answer must demand the judgment to which the defendant supposes to be entitled upon the counterclaim.

(3) ADOPTION BY REFERENCE; EXHIBITS. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

History: Sup. Ct. Order, 67 W (2d) 585, 621 (1975); 1975 c. 218; Sup. Ct. Order, 171 W (2d) xix (1992).

802.05 Signing of pleadings, motions and other papers; sanctions. (1) (a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name, state bar number, if any, telephone number, and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name. A party who is not represented by an attorney shall subscribe the pleading, motion or other paper with the party's handwritten signature and state his or her address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affida-

vit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well–grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

(b) If the attorney who signed a pleading, motion or other paper without reading the paper or making the determinations required by this subsection is representing a party under a contract made between a 3rd person and the party that requires that representation, and the 3rd person has actual knowledge that the pleading, motion or other paper is not well–grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or is used to harass, delay or increase the cost of litigation, the court may impose a similar appropriate sanction on the 3rd person.

(c) The requirement of a handwritten signature subscribing pleadings, motions or other papers filed in court may be satisfied by a duplicate, as defined in s. 910.01 (4), if a handwritten signature appears on the original document and the signing party or his or her attorney retains the original document.

(2) It is not a violation of sub. (1) if a pleading includes as a party a person who is later dismissed from that action, and the party responsible for including that person acted reasonably in doing so and moves for or agrees to a dismissal of that person within a reasonable time after the party knew or should have known that the person was not a proper party to the action.

History: Sup. Ct. Order, 67 W (2d) 585, 622 (1975); 1975 c. 218; 1987 a. 256; Sup. Ct. Order, 161 W (2d) xvii (1991); Sup. Ct. Order, 171 W (2d) xix (1992).

Judicial Council Note, 1991: Pleadings, papers and other documents filed in court are required to be subscribed with the handwritten signatures of parties or counsel. Sub. (1) (c) is created to clarify that copies of the original papers may be filed in court with the same effect as originals. [Re Order eff. 7–1–91]

This section does not allow a "good faith" defense, but requires affirmative duty of reasonable inquiry before filing; party prevailing on appeal in defense of award under this section is entitled to further award without showing that appeal itself is frivolous under 809.25(3). Riley v. Isaacson, 156 W (2d) 249, 456 W (2d) 619 (Ct. App. 1990).

802.06 Defenses and objection; when and how presented; by pleading or motion; motion for judgment on the pleadings. **(1)** WHEN PRESENTED. A defendant shall serve an answer within 20 days after the service of the complaint upon the defendant. If a guardian ad litem is appointed for a defendant, the guardian ad litem shall have 20 days after appointment to serve the answer. A party served with a pleading stating a cross–claim against the party shall serve an answer thereto within 20 days after the service upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer. The state or an agency of the state or an officer, employe or agent of the state in an action brought within the purview of ss. 893.82 and 895.46 shall serve an answer to the complaint or to a cross–claim or a reply to a counterclaim within 45 days after service of the pleading in which the claim is asserted. If any pleading is ordered by the court, it shall be served within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under sub. (2) alters these periods of time as follows, unless a different time is fixed by order of the court: if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(2) HOW PRESENTED. (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross–claim, or 3rd–party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

1. Lack of capacity to sue or be sued.
2. Lack of jurisdiction over the subject matter.
3. Lack of jurisdiction over the person or property.
4. Insufficiency of summons or process.
5. Untimeliness or insufficiency of service of summons or process.
6. Failure to state a claim upon which relief can be granted.
7. Failure to join a party under s. 803.03.
8. Res judicata.
9. Statute of limitations.
10. Another action pending between the same parties for the same cause.

(b) A motion making any of the defenses in par. (a) 1. to 10. shall be made before pleading if a further pleading is permitted. Objection to venue shall be made in accordance with s. 801.51. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted, or on a motion asserting the defenses described in par. (a) 8. or 9., matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

(3) JUDGMENT ON THE PLEADINGS. After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings. Prior to a hearing on the motion, any party who was prohibited under s. 802.02 (1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by s. 802.08.

(4) PRELIMINARY HEARINGS. The defenses specifically listed in sub. (2), whether made in a pleading or by motion, the motion for judgment under sub. (3) and the motion to strike under sub. (6) shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred until the trial. The hearing on the defense of lack of jurisdiction over the person or property shall be conducted in accordance with s. 801.08.

(5) MOTION FOR MORE DEFINITE STATEMENT. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may

fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(6) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, scandalous or indecent matter.

(7) CONSOLIDATION OF DEFENSES IN MOTIONS. A party who makes a motion under this section may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this section but omits therefrom any defense or objection then available to the party which this section permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in sub. (8) (b) to (d) on any of the grounds there stated.

(8) WAIVER OR PRESERVATION OF CERTAIN DEFENSES. (a) A defense of lack of jurisdiction over the person or the property, insufficiency of process, untimeliness or insufficiency of service of process or another action pending between the same parties for the same cause is waived only 1) if it is omitted from a motion in the circumstances described in sub. (7), or 2) if it is neither made by motion under this section nor included in a responsive pleading.

(b) A defense of failure to join a party indispensable under s. 803.03 or of res judicata may be made in any pleading permitted or ordered under s. 802.01 (1), or by motion before entry of the final pretrial conference order. A defense of statute of limitations, failure to state a claim upon which relief can be granted, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under s. 802.01 (1), or by a motion for judgment on the pleadings, or otherwise by motion within the time limits established in the scheduling order under s. 802.10 (3) (b).

(c) If it appears by motion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(d) A defense of lack of capacity may be raised within the time permitted under s. 803.01.

(9) TELEPHONE HEARINGS. Oral argument permitted on motions under this section may be heard as prescribed in s. 807.13 (1).

History: Sup. Ct. Order, 67 W (2d) 585, 623 (1975); 1975 c. 218; Sup. Ct. Order, 73 W (2d) xxxi; Sup. Ct. Order, 82 W (2d) ix; 1977 c. 260; 1977 c. 447 ss. 196, 210; 1979 c. 110 ss. 51, 60 (7); 1979 c. 323 s. 33; 1981 c. 390 s. 252; Sup. Ct. Order, 112 W (2d) xi (1983); 1983 a. 228 s. 16; Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 256; 1993 a. 213.

Judicial Council Committee's Note, 1976: Subs. (2) (e) and (8) make clear that, unless waived, a motion can be made to claim as a defense lack of timely service within the 60 day period that is required by s. 801.02 to properly commence an action. See also s. 893.39. Defenses under sub. (8) cannot be raised by an amendment to a responsive pleading permitted by s. 802.09 (1). [Re Order effective Jan. 1, 1977]

Judicial Council Committee's Note, 1977: Sub. (1) which governs when defenses and objections are presented, has been amended to delete references to the use of the scheduling conference under s. 802.10 (1) as the use of such a scheduling procedure is now discretionary rather than mandatory. The time periods under s. 802.06 are still subject to modification through the use of amended and supplemental pleadings under s. 802.09, the new calendaring practice under s. 802.10, and the pretrial conference under s. 802.11. [Re Order effective July 1, 1978]

Judicial Council Note, 1983: Sub. (1) is amended by applying the extended response time for state agencies, officers and employes to state agents. The extended time is intended to allow investigation of the claim by the department of justice to determine whether representation of the defendant by the department is warranted under s. 893.82 or 895.46, Stats. [Re Order effective July 1, 1983]

Judicial Council Note, 1988: Sub. (9) [created] allows oral arguments permitted on motions under this section to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Motion under (2) (f) usually will be granted only when it is quite clear that under no conditions can plaintiff recover. Wilson v. Continental Insurance Cos., 87 W (2d) 310, 274 NW (2d) 679 (1979).

Under (2) (f), claim should only be dismissed if it is clear from the complaint that under no conditions could plaintiff recover. Morgan v. Pennsylvania General Ins. Co., 87 W (2d) 723, 275 NW (2d) 660 (1979).

Plaintiff need not prima facie prove jurisdiction prior to evidentiary hearing under (4). Bielefeldt v. St. Louis Fire Door Co., 90 W (2d) 245, 279 NW (2d) 464 (1979).

Since facts alleged in complaint stated claim for abuse of process, complaint was improperly dismissed under (2) (f) even though theory of abuse of process claim was not pleaded or argued in trial court. Strid v. Converse, 111 W (2d) 418, 331 NW (2d) 350 (1983).

Counsel's appearance and objection, affidavit and trial brief were adequate to raise issue of defective service of process; if not in form, in substance they were the equivalent of a motion under sub. (2). Honeycrest Farms, Inc. v. A. O. Smith Corp., 169 W (2d) 596, 486 NW (2d) 539 (Ct. App. 1992).

Pleading failure to secure proper jurisdiction or alternatively failure to obtain proper service was sufficient to challenge sufficiency of summons and complaint served without proper authentication. Studelska v. Avercamp, 178 W (2d) 457, 504 NW (2d) 125 (Ct. App. 1993), 213.

802.07 Counterclaim and cross–claim. (1) COUNTERCLAIM. A defendant may counterclaim any claim which the defendant has against a plaintiff, upon which a judgment may be had in the action. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. Except as prohibited by s. 802.02 (1m), the counterclaim may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(2) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving the pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(3) CROSS CLAIM. A pleading may state as a cross claim any claim by one party against a coparty if the cross claim is based on the same transaction, occurrence, or series of transactions or occurrences as is the claim in the original action or as is a counterclaim therein, or if the cross claim relates to any property that is involved in the original action. Except as prohibited by s. 802.02 (1m), the cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(4) JOINDER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross–claim in accordance with ss. 803.03 to 803.05.

(5) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in s. 805.05 (2), judgment on a counterclaim or cross–claim may be rendered in accordance with s. 806.01 (2) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

History: Sup. Ct. Order, 67 W (2d) 585, 628 (1975); 1975 c. 218; Sup. Ct. Order, 104 W (2d) xi; 1987 a. 256.

Counterclaim based on contract must aver either satisfaction of any contractual condition precedent or an excuse, such as waiver, for not satisfying it. S & M Rotogravure Service, Inc. v. Baer, 77 W (2d) 454, 252 NW (2d) 913.

Defendant may not join opposing counsel in counterclaims, but claims may be asserted against counsel after the principal action is completed. Badger Cab Co. v. Soule, 171 W (2d) 754, 492 NW (2d) 375 (Ct. App. 1992).

This section does not contain mandatory counterclaim language but, res judicata bars claims arising from a single transaction which was the subject of a prior action and could have been raised by counterclaim in the prior action if the action would nullify the initial judgment or impair rights established in the initial action. ABCG Enterprises v. First Bank Southeast, 184 W (2d) 465, 515 NW (2d) 904 (1994).

Where collateral estoppel compels raising a counterclaim in an equitable action, that compulsion does not result in the waiver of the right to a jury trial. Norwest Bank v. Plourde, 185 W (2d) 377, 518 NW (2d) 265 (Ct. App. 1994).

802.08 Summary judgment. (1) AVAILABILITY. A party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10, move for summary judgment on any claim, counterclaim, cross–claim, or 3rd party claim which is asserted by or against the party. Amendment of pleadings is allowed as in cases where objection or defense is made by motion to dismiss.

(2) MOTION. Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least five days before the time fixed for the hearing. Prior to a hearing on the motion, any party who was prohibited under s. 802.02 (1m) from specifying the amount of money sought in the demand for judgment shall specify that

amount to the court and to the other parties. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(3) SUPPORTING PAPERS. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(4) WHEN AFFIDAVITS UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(5) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees.

(6) JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.

(7) TELEPHONE HEARINGS. Oral argument permitted on motions under this section may be heard as prescribed in s. 807.13 (1).

History: Sup. Ct. Order, 67 W (2d) 585, 630 (1975); 1975 c. 218; Sup. Ct. Order, 82 W (2d) ix; Sup. Ct. Order, 141 W (2d) xix; 1987 a. 256; Sup. Ct. Order, 168 W (2d) xxii; 1993 a. 490.

Judicial Council Committee's Note, 1977: Sub. (1) is revised to allow a party at any time within 8 months after the summons and complaint are filed or the time established in a scheduling order under s. 802.10 to move for a summary judgment. The 8–month time period has been created as the old procedure requiring a party to move for summary judgment not later than the time provided under s. 802.10 can no longer apply in most cases as the use of such a scheduling order is now completely discretionary with the trial judge. The 8–month time period is subject to enlargement under s. 801.15 (2) (a). [Re Order effective July 1, 1978]

Judicial Council Note, 1988: Sub. (7) [created] allows oral arguments permitted on motions for summary judgment to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Judicial Council Note, 1992: The prior sub. (2), allowing service of affidavits opposing summary judgment up to the date of hearing, afforded such minimal notice to the court and moving party that a plethora of local court rules resulted. Community Newspapers, Inc. v. West Allis, 158 Wis. 2d 28, 461 N.W. 2d 785 (Ct. App. 1990). Requiring such affidavits to be served at least 5 days before the hearing is intended to preclude such local rules and promote uniformity of practice. Courts may require earlier filing by scheduling orders, however. [Re Order effective July 1, 1992]

Respondents in appeals from orders denying summary judgment motion are invited to move for summary affirmance under s. 251.71, 1973 stats. [see s. 809.21]. Am. Orthodontics Corp. v. G. & H. Ins. 77 W (2d) 337, 253 NW (2d) 82.

Where plaintiff had signed release, and where another illness subsequently developed, question of whether plaintiff consciously intended to disregard possibility that known condition could become aggravated was question of fact not to be determined on summary judgment. Krezinski v. Hay, 77 W (2d) 569, 253 NW (2d) 522.

Summary judgment procedure is not authorized in proceedings for judicial review under ch. 227. Wis. Environmental Decade v. Public Service Comm. 79 W (2d) 161, 255 NW (2d) 917.

Where insurance policy unambiguously excluded coverage relating to warranties, factual question whether implied warranties were made was immaterial and trial court abused discretion in denying insurer's summary judgment motion. Jones v. Sears Roebuck & Co. 80 W (2d) 321, 259 NW (2d) 70.

Sub. (2) mandates more exacting appellate scrutiny of trial court's decision to grant or deny judgment. Wright v. Hasley, 86 W (2d) 572, 273 NW (2d) 319 (1979).

See note to 807.05, citing Wilharms v. Wilharms, 93 W (2d) 671, 287 NW (2d) 779 (1980).

Existence of new or difficult issue of law does not make summary judgment inappropriate. Maynard v. Port Publications, Inc. 98 W (2d) 555, 297 NW (2d) 500 (1980).

Conviction for injury by conduct regardless of life does not establish injury was intentional or expected and entitle insurer to summary judgment on policy exclusion issue. Poston v. U.S. Fidelity & Guarantee Co. 107 W (2d) 215, 320 NW (2d) 9 (Ct. App. 1982).

See note to 804.11, citing Bank of Two Rivers v. Zimmer, 112 W (2d) 624, 334 NW (2d) 230 (1983).

Appellate court reviews trial court's decision by applying same standards and methods as did trial court. Green Spring Farms v. Kersten, 136 W (2d) 304, 401 NW (2d) 816 (1987).

Where only issue before court requires expert testimony for resolution, trial court on summary judgment may determine whether party has made prima facie showing that it can, in fact, produce favorable testimony. Dean Medical Center v. Frye, 149 W (2d) 727, 439 NW (2d) 633 (Ct. App. 1989).

See note to 48.13 citing In Interest of F.Q. 162 W (2d) 607, 470 NW (2d) 1 (Ct. App. 1991).

A moving party's own inconsistent pleadings, admissible during trial as an admission, may be used to raise an issue of material fact. Gouger v. Hardtke, 167 W (2d) 504, 482 NW (2d) 84 (1992).

Summary judgment does not apply to cases brought under the criminal code. State v. Hyndman, 170 W (2d) 198, 488 NW (2d) 111 (Ct. App. 1992).

Involuntary commitment may not be ordered on summary judgment. Matter of mental condition of Shirley J.C. 172 W (2d) 371, 493 NW (2d) 382 (Ct. App. 1992).

In trial to the court, the court may not base its decision on affidavits submitted in support of a summary judgment. Proof offered in support of summary judgment is for determining if an issue of fact exists; when one does, summary judgment proof gives way to trial proof. Berna–Mork v. Jones, 173 W (2d) 733, 496 NW (2d) 637 (Ct. App. 1992).

A party's affidavit which contradicted that same party's earlier deposition raised an issue of fact making summary judgment inappropriate. Wolski v. Wilson, 174 W (2d) 533, 497 NW (2d) 794 (Ct. App. 1993).

Four step methodology for determining and reviewing summary judgment motion stated; use of trial material to sustain a grant or denial of summary judgment is inconsistent with this methodology. Universal Die & Stampings v. Justus, 174 W (2d) 556, 497 NW (2d) 797 (Ct. App. 1993).

Where expert testimony is required to establish a party's claim, evidentiary material from an expert is necessary in response to a summary judgment motion. Holsen v. Heritage Mut. Ins. Co. 182 W (2d) 457, 513 NW (2d) 690 (Ct. App. 1994).

The court of appeals has authority to grant a summary judgment motion on appeal which was denied by the trial court. Interest of Courtney E. 184 W (2d) 592, 516 NW (2d) 422 (1994).

802.09 Amended and supplemental pleadings.

(1) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires. A party shall plead in response to an amended pleading within 20 days after service of the amended pleading unless (a) the court otherwise orders or (b) no responsive pleading is required or permitted under s. 802.01 (1).

(2) AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(3) RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original

pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

(4) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(5) TELEPHONE HEARINGS. Oral argument permitted on motions under this section may be heard as prescribed in s. 807.13 (1).

History: Sup. Ct. Order, 67 W (2d) 585, 632 (1975); 1975 c. 218; Sup. Ct. Order, 82 W (2d) ix (1978); Sup. Ct. Order, 141 W (2d) xiii (1987).

Judicial Council Committee's Note, 1977: Sub. (1) has been amended to allow a party to amend pleadings once as a matter of course at any time within 6 months of the time the summons and complaint are filed or within a time established in a scheduling order under s. 802.10. The 6–month time period has been established as the previous procedure stating that a party is allowed to amend pleadings once as a matter of course at any time prior to the entry of a scheduling order is no longer applicable in most cases. The use of a scheduling order is now discretionary under s. 802.10.

Sub. (1) also clarifies that leave of the court may be given at any stage of the action for amendment of pleadings when justice requires

Sub. (3) has been amended to adopt language consistent with revised s. 802.02 (1). See note following s. 802.02 (1). [Re Order effective July 1, 1978]

Judicial Council Note, 1988: Sub. (5) [created] allows oral arguments permitted on motions under this section to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Amendment should not be allowed 8 years after accident and 5 years beyond statute of limitations. Drehmel v. Radandt, 75 W (2d) 223, 249 NW (2d) 274.

Trial court abused discretion in prohibiting amendment to pleading on 2nd day of trial to plead quantum meruit as alternative to substantial performance of contract. Tri–State Home Improvement Co. v. Mansavage, 77 W (2d) 648, 253 NW (2d) 474.

Under (2), complaint will be treated as amended, even though no amendment has been requested, where proof has been submitted and accepted. Goldman v. Bloom, 90 W (2d) 466, 280 NW (2d) 170 (1979).

Sub. (3) is identical to FRCP 15 (c). "Changing the party" includes adding a defendant where requirements of (3) are met. State v. One 1973 Cadillac, 95 W (2d) 641, 291 NW (2d) 626 (Ct. App. 1980).

In products liability action, new cause of action for punitive damages brought after statute of limitations expired related back to date of filing original pleading. Wussow v. Commercial Mechanisms, Inc. 97 W (2d) 136, 293 NW (2d) 897 (1980).

See note to 893.02, citing Lak v. Richardson–Merrell, Inc. 100 W (2d) 641, 302 NW (2d) 483 (1981).

While circuit court was correct in holding that it had power to amend complaint on its own motion after presentation of evidence, court erred in not granting parties opportunity to present additional evidence on complaint as amended. State v. Peterson, 104 W (2d) 616, 312 NW (2d) 784 (1981).

Amended pleading adding separate claim by different plaintiff related back to date of filing of original complaint. Korkow v. General Cas. Co. of Wisconsin, 117 W (2d) 187, 344 NW (2d) 108 (1984).

"Interests of justice" determinations under (2) discussed. Zobel v. Fenendael, 127 W (2d) 382, 379 NW (2d) 887 (Ct. App. 1985).

Whether an amendment "relates back" to the original complaint date depends on whether the opposing party had notice of the claim from the original complaint. An insurer who insures more than one party involved in an accident does not, as a matter of law, have notice of separate claims under different policies from a complaint against one of its insureds, but it may have notice of a claim against more than one insured if they are covered by the same policy. Biggart v. Barstad, 182 W (2d) 421, 513 NW (2d) 681 (Ct. App. 1994).

802.10 Calendar practice. (1) This section applies to all actions and special proceedings except appeals taken to circuit court, actions seeking the remedy available by certiorari, habeas corpus, mandamus, prohibition and quo warranto, actions in which all defendants are in default, provisional remedies, and actions under ss. 49.90 and 66.12 and chs. 48, 102, 108, 227, 348, 767, 778, 799 and 812, and proceedings under chs. 851 to 882.

(2) Unless excepted under sub. (1), all actions and special proceedings are deemed ready for trial one year after the summons and complaint are filed. Within 60 days after the expiration of one year, the court shall by order set dates for a pretrial conference and for trial. At any time before the expiration of one year from the filing of the summons and complaint, on motion of a party for cause shown, or upon stipulation of the parties, the court may by order set dates for a pretrial conference and for trial. Any order made under this section may on the court's own motion, or upon motion of a party for cause shown, be amended.

(3) (a) *Scheduling conference.* The court may on its own motion or upon motion of a party, in lieu of the provisions of sub. (2), not earlier than 90 days after the summons and complaint are filed call a scheduling conference upon at least 10 days written notice by mail to all attorneys of record and to all parties who have appeared of record and are not represented by counsel. The conference shall either be conducted by telephone or held at a time and place designated by the judge. The conference shall be participated in by the judge, at least one attorney of record for each represented party to the action, and any unrepresented party who has appeared, personally or by its officer or agent. After consultation, the judge shall set:

1. The time at which a motion for default judgment may be heard;

2. The times within which discovery must be completed;

3. The time, prior to the pretrial conference, within which impleader shall be completed and within which pleadings may be amended;

4. A time at or prior to the pretrial conference within which motions before trial shall be served and heard;

5. A date for the pretrial conference and a date for trial as soon as practicable after the pretrial conference.

(b) *Scheduling order.* The judge shall issue a written order which recites the schedules established. Such order when entered shall control the course of the action, unless modified as herein provided. If at any time it appears that such schedules cannot reasonably be met, the judge may amend the order upon timely motion of any party. Whenever the judge shall determine that he or she cannot reasonably meet the pretrial date or trial date established, the judge may amend the order on his or her own motion.

(c) *Use of telephone and mail; standard order.* In lieu of a scheduling conference under par. (a), the judge may obtain scheduling information by telephone, mail or otherwise and enter a scheduling order on the basis of the information so obtained or may serve upon the parties a standard scheduling order. Such orders are subject to amendment as provided in sub. (2). If a standard scheduling order is entered, it shall be entered within 150 days after commencement of the action.

(d) *Sanctions.* Violation of a scheduling order is subject to s. 805.03.

(4) This section shall become effective as to all actions and special proceedings pending on or after July 1, 1978, provided that any scheduling order entered prior to July 1, 1978 shall remain in effect.

History: Sup. Ct. Order, 67 W (2d) 585, 634 (1975); 1975 c. 218; Sup. Ct. Order, 82 W (2d) ix (1978); 1979 c. 32 s. 92 (4); 1979 c. 89, 177; 1981 c. 289; 1985 a. 29 s. 3202 (23); Sup. Ct. Order, 141 W (2d) xiii (1987); 1993 a. 486.

Judicial Council Committee's Note, 1977: Section 802.10 governs calendar practice for most actions or special proceedings in the courts of Wisconsin. Prior calendaring procedures have been substantially modified. The section applies to all actions and special proceedings except those actions and proceedings to which the section is specifically made not applicable as enumerated in sub. (1).

Sub. (2) provides that unless exempted under sub. (1), all actions and special proceedings are deemed to be ready for trial one year after the summons and complaint are filed. The trial court will within 60 days after the expiration of the one–year period after the summons and complaint are filed set dates for both a pretrial conference and a trial. The court may set dates for a pretrial conference and a trial at a time earlier than 60 days after the expiration of one year after the filing of the summons and complaint if upon either a motion of a party for cause shown or upon stipulation of all parties the court is asked to establish an earlier pretrial and trial date. Any order made by a court under sub. (2) establishing dates for a pretrial conference and a trial may on the court's own motion or upon motion of a party for cause shown be modified.

Sub. (3) allows a court, in lieu of the provisions of sub. (2), to not earlier than 90 days after the summons and complaint are filed on its own motion or upon motion of a party call a scheduling conference. The manner in which the scheduling conference is conducted and the items set at the conference remain unchanged from prior law. The use of a standard scheduling order in sub. (3) (c) also remains unchanged from prior law.

Sub. (4) requires that the new calendaring practice established by s. 802.10 become effective to all actions and special proceedings pending on or after July 1, 1978. Any scheduling order entered prior to that date shall remain in effect. [Re Order effective July 1, 1978]

Judicial Council Note, 1981: The reference in sub. (1) to "writs" of certiorari, habeas corpus, mandamus, prohibition and quo warranto has been removed because these remedies are now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613–A]

Judicial Council Note, 1988: Sub. (3) (a) is amended to allow scheduling conferences to be conducted by telephone. [Re Order effective Jan. 1, 1988]

Trial court properly granted default judgment against party failing to appear at scheduling conference. Damage amount, however, was not supported by record. Gaertner v. 880 Corp., 131 W. (2d) 492, 389 NW (2d) 59 (Ct. App. 1986)

802.11 Pretrial conference. (1) SCOPE. In all contested civil actions and contested special proceedings except those under ss. 49.90 and 767.42 and chs. 48, 345, 769, 778 and 799, the judge shall, unless waived by the parties with the approval of the judge, and in all other civil actions and special proceedings the judge may, direct the attorneys for the parties to appear before the judge for a pretrial conference to determine whether an order should be entered on any or all of the following matters:

(a) Definition and simplification of the issues of fact and law;

(b) Necessity or desirability of amendment to the pleadings;

(c) Stipulations of fact and agreements concerning the identity of or authenticity of documents which will avoid unnecessary proof;

(d) Limitation of the number of expert witnesses and the exchange of the names of expert witnesses;

(e) Whether issues shall be tried by court or jury;

(f) Advisability of preliminary reference of issues for findings to be used as evidence when the trial is to be by jury;

(g) Number of jurors to be impaneled, voir dire examination, and the number of strikes to be allowed;

(h) Order of proof and order of argument;

(i) Separation or consolidation of claims for trial;

(j) Jury views and the costs thereof;

(k) Disclosure of insurance policy limits;

(L) Filing and exchanging of trial briefs; and

(m) Such other matters as may aid in the disposition of the action.

(2) TIME; PARTICIPANTS. The date and time for the pretrial conference shall be set in the scheduling order as provided in s. 802.10 (3) (b). At least one attorney planning to take part in the trial shall participate in the pretrial conference on behalf of each of the parties. Attorneys participating in the conference must have authority to enter stipulations.

(3) ADDITIONAL CONFERENCES. If necessary or advisable, the judge may adjourn the pretrial conference from time to time or may order an additional pretrial conference.

(4) PRETRIAL ORDER. The judge shall make an order which recites the action taken with respect to the matters described in sub. (1) and which sets or confirms the final trial date. The order when entered shall control the subsequent course of action, unless modified thereafter on motion of a party or the court for good cause. If for any reason, the action is not tried on the date set in the scheduling order or the pretrial order, the judge shall, within 30 days after the date set in the scheduling order or pretrial order, set another date for trial on the earliest available trial date.

(5) SANCTIONS. If without just excuse or because of failure to give reasonable attention to the matter, any party fails to participate in a pretrial conference, whether conducted in open court, in the judge's chambers or by telephone, or if an attorney is grossly unprepared to participate in the conference, the judge may, in his or her sound discretion:

(a) Reschedule the conference and order the payment by the delinquent attorney or, when just, by the party the attorney represents of the reasonable expenses, including reasonable attorney fees, to the aggrieved party;

(b) Conduct the conference and enter the pretrial order without participation by the delinquent attorney;

(c) Order dismissal or entry of a default judgment.

(6) Conferences under subs. (1) and (3) may be conducted by telephone under s. 807.13 (3), or a party may be permitted to participate therein by telephone, upon the court's own motion or request of any party, unless good cause to the contrary is shown.

History: Sup. Ct. Order, 67 W (2d) 585, 634 (1975); 1975 c. 218; Sup. Ct. Order, 82 W (2d) ix (1970); 1977 c. 447 s. 210; 1979 c. 32 s. 92 (8); 1985 a. 29 s. 3202 (23); Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 403; 1993 a. 326, 490.

Judicial Council Committee's Note, 1974: Sub. (1) is more explicit than s. 269.65 in listing the matters which should be considered at the pretrial conference. The expanded list should not be considered exhaustive.

Subs. (2) and (5) are designed to lessen the problem of unprepared "participants" at a pretrial conference.

The last sentence of sub. (4) is designed to maintain to the extent possible the reliability of the original trial date. [Re Order effective Jan. 1, 1976, as affected by Order effective July 1, 1978]

Judicial Council Note, 1988: Sub. (2) is amended to reflect the authorization for telephone pretrial conferences created by s. 802.11 (6).

Sub. (5) is amended to apply the sanctions for failure to participate in pretrial conferences to those conducted by telephone.

Sub. (6) [created] allows pretrial conferences to be conducted by telephone, or a party to be permitted to participate by telephone, upon motion of the court or request of any party, unless good cause to the contrary is shown. [Re Order effective Jan. 1, 1988]

See note to 805.15, citing Karl v. Employers Ins. of Wausau, 78 W (2d) 284, 254 NW (2d) 255.

Failure of party to seek modification of pretrial stipulations does not constitute waiver of right to challenge trial court's construction of the stipulations. Milw. & Sub. Trans. v. Milw. County, 82 W. (2d) 420, 263 NW (2d) 503.

Trial court properly dismissed claim where plaintiff inexcusably failed to comply with pretrial order. Carlson Heating, Inc. v. Onchuck, 104 W (2d) 175, 311 NW (2d) 673 (Ct. App. 1981).

Default judgment as sanction for failure to appear at pretrial conference is inappropriate in absence of court finding that party or counsel acted egregiously or in bad faith. Schneider v. Ruch, 146 W. (2d) 701, 431 NW (2d) 756 (Ct. App. 1988)

The authority under sub. (1) (a) to define issues of fact and law empowers the court to exclude evidence that does not provide a basis for granting relief. Boyle v. Chrysler Corp. 177 W. (2d) 207, 501 NW (2d) 865 (Ct. App. 1993)

802.12 Alternative dispute resolution. (1) DEFINITIONS. In this section:

(a) "Binding arbitration" means a dispute resolution process that meets all of the following conditions:

1. A neutral 3rd person is given the authority to render a decision that is legally binding.

2. It is used only with the consent of all of the parties.

3. The parties present evidence and examine witnesses.

4. A contract or the neutral 3rd person determines the applicability of the rules of evidence.

5. The award is subject to judicial review under ss. 788.10 and 788.11.

(b) "Direct negotiation" means a dispute resolution process that involves an exchange of offers and counteroffers by the parties or a discussion of the strengths and weaknesses or the merits of the parties' positions, without the use of a 3rd person.

(c) "Early neutral evaluation" means a dispute resolution process in which a neutral 3rd person evaluates brief written and oral presentations early in the litigation and provides an initial appraisal of the merits of the case with suggestions for conducting discovery and obtaining legal rulings to resolve the case as efficiently as possible. If all of the parties agree, the neutral 3rd person may assist in settlement negotiations.

(d) "Focus group" means a dispute resolution process in which a panel of citizens selected in a manner agreed upon by all of the parties receives abbreviated presentations from the parties, deliberates, renders an advisory opinion about how the dispute should be resolved and discusses the opinion with the parties.

(e) "Mediation" means a dispute resolution process in which a neutral 3rd person, who has no power to impose a decision if all of the parties do not agree to settle the case, helps the parties reach an agreement by focusing on the key issues in a case, exchanging information between the parties and exploring options for settlement.

(f) "Mini–trial" means a dispute resolution process that consists of presentations by the parties to a panel of persons selected and authorized by all of the parties to negotiate a settlement of the dispute that, after the presentations, considers the legal and factual

issues and attempts to negotiate a settlement. Mini–trials may include a neutral advisor with relevant expertise to facilitate the process, who may express opinions on the issues.

(g) "Moderated settlement conference" means a dispute resolution process in which settlement conferences are conducted by one or more neutral 3rd persons who receive brief presentations by the parties in order to facilitate settlement negotiations and who may render an advisory opinion in aid of negotiation.

(h) "Nonbinding arbitration" means a dispute resolution process in which a neutral 3rd person is given the authority to render a nonbinding decision as a basis for subsequent negotiation between the parties after the parties present evidence and examine witnesses under the rules of evidence agreed to by the parties or determined by the neutral 3rd person.

(i) "Settlement alternative" means any of the following: binding arbitration, direct negotiation, early neutral evaluation, focus group, mediation, mini–trial, moderated settlement conference, nonbinding arbitration, summary jury trial.

(j) "Summary jury trial" means a dispute resolution process that meets all of the following conditions:

1. Attorneys make abbreviated presentations to a small jury selected from the regular jury list.

2. A judge presides over the summary jury trial and determines the applicability of the rules of evidence.

3. The parties may discuss the jury's advisory verdict with the jury.

4. The jury's assessment of the case may be used in subsequent negotiations.

(2) (a) A judge may, with or without a motion having been filed, upon determining that an action or proceeding is an appropriate one in which to invoke a settlement alternative, order the parties to select a settlement alternative as a means to attempt settlement. An order under this paragraph may include a requirement that the parties participate personally in the settlement alternative. Any party aggrieved by an order under this paragraph shall be afforded a hearing to show cause why the order should be vacated or modified. Unless all of the parties consent, an order under this paragraph shall not delay the setting of the trial date, discovery proceedings, trial or other matters addressed in the scheduling order or conference.

(b) The parties shall inform the judge of the settlement alternative they select and the person they select to provide the settlement alternative. If the parties cannot agree on a settlement alternative, the judge shall specify the least costly settlement alternative that the judge believes is likely to bring the parties together in settlement, except that unless all of the parties consent, the judge may not order the parties to attempt settlement through binding arbitration, nonbinding arbitration or summary jury trial or through more than one of the following: binding arbitration, early neutral evaluation, focus group, mediation, mini–trial, moderated settlement conference, nonbinding arbitration, summary jury trial.

(c) If the parties cannot agree on a person to provide the settlement alternative, the judge may appoint any person who the judge believes has the ability and skills necessary to bring the parties together in settlement.

(d) If the parties cannot agree regarding the payment of a provider of a settlement alternative, the judge shall direct that the parties pay the reasonable fees and expenses of the provider of the settlement alternative. The judge may order the parties to pay into an escrow account an amount estimated to be sufficient to pay the reasonable fees and expenses of the provider of the settlement alternative.

(3) ACTIONS AFFECTING THE FAMILY. In actions affecting the family under ch. 767, all of the following apply:

(a) All settlement alternatives are available except focus group, mini–trial and summary jury trial.

(b) If a guardian ad litem has been appointed, he or she shall be a party to any settlement alternative regarding custody, physical placement, visitation rights, support or other interests of the ward.

(c) If the parties agree to binding arbitration, the court shall, subject to ss. 788.10 and 788.11, confirm the arbitrator's award and incorporate the award into the judgment or postjudgment modification order with respect to all of the following:

1. Property division under s. 767.255.

2. Maintenance under s. 767.26.

3. Attorney fees under s. 767.262.

4. Postjudgment orders modifying maintenance under s. 767.32.

(d) The parties, including any guardian ad litem for their child, amy agree to resolve any of the following issues through binding arbitration:

1. Custody and physical placement under s. 767.24.

2. Visitation rights under s. 767.245.

3. Child support under s. 767.25 or s. 767.51.

4. Modification of subd. 1., 2. or 3. under s. 767.32 or 767.325.

(e) The court may not confirm the arbitrator's award under par. (d) and incorporate the award into the judgment or postjudgment modification order unless all of the following apply:

1. The arbitrator's award sets forth detailed findings of fact.

2. The arbitrator certifies that all applicable statutory requirements have been satisfied.

3. The court finds that custody and physical placement have been determined in the manner required under ss. 767.045, 767.11 and 767.24.

4. The court finds that visitation rights have been determined in the manner required under ss. 767.045, 767.11 and 767.245.

5. The court finds that child support has been determined in the manner required under s. 767.25 or 767.51.

(4) ADMISSIBILITY. Except for binding arbitration, all settlement alternatives are compromise negotiations for purposes of s. 904.08 and mediation for purposes of s. 904.085.

History: Sup. Ct. Order No. 93–13, 180 W (2d) xv.

Judicial Council Note, 1993: This section provides express statutory authority for judges to order that litigants attempt settlement through any of several defined processes. The parties may choose the type of process, the service provider, and the manner of compensating the service provider, but the judge may determine these issues if the parties do not agree.

Subsection (2) (b) prohibits the judge from requiring the parties to submit to binding arbitration without their consent; this restriction preserves the right of trial by jury. Nor may the judge order nonbinding arbitration, summary jury trial or multiple facilitated processes without consent of all parties; these restrictions allow the parties to opt out of the typically more costly settlement alternatives.

Lawyers have a duty to their clients and society to provide cost–effective service. The State Bar encourages lawyers to provide volunteer service as mediators, arbitrators and members of settlement panels.

Subsection (3) sets forth several special considerations for family actions. Even when the parties consent to binding arbitration, the court retains the responsibility of ensuring that the arbitration award in custody, placement, visitation and support matters conforms to the applicable law. The court is not bound to confirm the arbitrator's award. Rather, it must review the arbitrator's decision in light of the best interest of the child. If following this review the court finds that the arbitration process and its outcome satisfy the requirements of all applicable statutes, the court may adopt the decision as its own. Miller v. Miller, 620 A. 2d 1161, 1166 (Pa. Super. 1993). Reasons for deviating from child support guidelines must be in writing or made part of the record.

The Judicial Council has petitioned the Supreme Court to conduct a review and evaluation of this rule after it has been in effect for three years.

Hanging Up the Gloves of Confrontation? Tenenbaum. Wis. Law. Aug. 1994.

Resolving Conflicts Outside Wisconsin Courtrooms. Soeka & Fullin. Wis Law. Aug. 1994.