CHAPTER 802

CIVIL PROCEDURE — PLEADINGS, MOTIONS AND PRETRIAL PRACTICE

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NOTE: Chapter 802 was created by Sup. Ct. Order, 67 Wis. 2d 585, 614 (1975), which contains explanatory notes. Statutes prior to the 1983−84 edition also contain 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 3rd−party complaint, if a person who was not an original party is summoned under s. 803.05, and a 3rd−party answer, if a 3rd−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 Wis. 2d 585, 614 (1975); Sup. Ct. Order, 104 Wis. 2d xi (1981); Sup. Ct. Order, 171 Wis. 2d xix (1992); 2005 a. 253; 2007 a. 97.

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

In the absence of an answer to a cross claim and in the absence of any other responsive pleadings, a court may deem facts alleged in the cross claim and submissions filed in connection with a summary judgment motion admitted for purposes of summary judgment. Daughtry v. MPC Systems, Inc., 2004 WI App 70, 272 Wis. 2d 260, 679 N.W.2d 808, 02−2424.

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

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

Cross–reference: See ss. 891.29 and 891.31 as to the effect of not denying an allegation in the complaint of corporate or partnership existence.

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]

Sub. (2) does not authorize denials for lack of knowledge or information solely to obtain delay. An answer that does so is frivolous under former s. 814.025 (3) (b), 1985 stats. First Federated Savings Bank v. McDonah, 143 Wis. 2d 429, 422 N.W.2d 113 (Ct. App. 1988).

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

A claim for punitive damages on a tort claim is subject to sub. (1m) (a). A demand for a specific amount in violation of sub. (1m) (a) is a nullity. Apex Electronics Corp. v. Gee, 217 Wis. 2d 378, 577 N.W.2d 23 (1998), 97–0353.

The effect of the court striking a defendant's answer is that the defendant failed to deny the plaintiff's allegations and, therefore, is deemed to have admitted them. An insured's answers do not inure to an insurer's benefit. Such a proposition is contrary to the direct action statute, s. 632.24. Estate of Otto v. Physicians Insurance Co. of Wisconsin, Inc., 2007 WI App 192, 305 Wis. 2d 198, 738 N.W.2d 599, 06–1566. Affirmed. 2008 WI 78, 311 Wis. 2d 84, 751 N.W.2d 805, 06–1566.

The plain language of sub. (3) indicates that affirmative defenses, except the ten enumerated defenses in s. 802.06 (2) (a), must be raised in a responsive pleading. *Lentz,* 195 Wis. 2d 457 (Ct. App. 1995), is overruled because it allows a defendant to initially raise by motion an affirmative defense not listed in s. 802.06 (2). Maple Grove Country Club Inc. v. Maple Grove Estates Sanitary District, 2019 WI 43, 386 Wis. 2d 425, 926 N.W.2d 184, 16–2296.

Data Key Partners, 2014 WI 86, did not create a new, heightened pleading standard in this state. That pleading standard is consistent with the pleading standard in *Strid*, 111 Wis. 2d 418 (1983). Cattau v. National Insurance Services of Wisconsin, Inc., 2019 WI 46, 386 Wis. 2d 515, 926 N.W.2d 756, 16–0493.

A complaint's success does not depend on accurate labeling, but that does not mean a court may treat causes of action and remedies as if they are the same thing. A cause of action is distinguished from a remedy which is the means or method whereby the cause of action is effectuated. This distinction is important, especially at the summary judgment stage, because the court must determine whether the alleged facts comprise one or more causes of action. Tikalsky v. Friedman, 2019 WI 56, 386 Wis. 2d 757, 928 N.W.2d 502, 17–0170.

Under sub. (5) (b), a party may plead claims for relief in the alternative. Claims pleaded in the alternative need not be consistent with one another. Nevertheless, a plaintiff may recover under only one of those claims. If there is a contract between the parties, the plaintiff may recover in contract but not in equity. In this case, when a contract existed and the jury awarded damages for its breach, the plaintiff could not also collect damages for unjust enrichment based on the same underlying conduct or subject matter. Mohns Inc. v. BMO Harris Bank National Ass'n, 2021 WI 8, 395 Wis. 2d 421, 954 N.W.2d 339, 18–0071.

Threshold Issues in State Court Civil Litigation. Hoffer. Wis. Law. Jan. 2019.

What Is Wisconsin's Pleading Standard? Nusslock. Wis. Law. Sept. 2019.

802.025 Pleadings, discovery, and damages in certain personal injury actions.

(1) DEFINITIONS. In this section:

(a) "Asbestos trust" means a trust, qualified settlement fund, compensation fund, or claims facility created as a result of an administrative or legal action, bankruptcy, agreement, or other settlement or pursuant to 11 USC 524 (g) or 49 USC 40101, that is intended to provide compensation to claimants alleging personal injury claims as a result of harm, also potentially compensable in the immediate action, for which the entity creating the trust, qualified settlement fund, compensation fund, or claims facility is alleged to be responsible.

(b) "Personal injury claim" means any claim for damages, loss, indemnification, contribution, restitution or other relief, including punitive damages, that is related to bodily injury or another harm, including loss of consortium, society, or companionship, loss of support, personal injury or death, mental or emotional injury, risk or fear of disease or other injury, or costs of medical monitoring or surveillance and that is allegedly caused by or related to the claimant's exposure to asbestos. "Personal injury claim" includes a claim made by or on behalf of the person who claims the injury or harm or by or on behalf of the person's representative, spouse, parent, minor child, or other relative. "Personal injury claim" does not include a claim compensable by the injured patients and families compensation fund or a claim for compensatory benefits pursuant to worker's compensation or veterans benefits.

(c) "Trust claims materials" means all documents and information relevant or related to a pending or potential claim against an asbestos trust. "Trust claims materials" include claims forms and supplementary materials, proofs of claim, affidavits, depositions and trial testimony, work history, and medical and health records.

(d) "Trust governance document" means any document that determines eligibility and payment levels, including claims payment matrices, trust distribution procedures, or plans for reorganization, for an asbestos trust.

(2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) Within 45 days after March 29, 2014, or within 45 days after joinder of issues in an action subject to this section, whichever is later, the plaintiff shall provide to all parties a sworn statement identifying each personal injury claim he or she has filed or reasonably anticipates filing against an asbestos trust. The statement for each claim shall include the name, address, and contact information for the asbestos trust, the amount claimed by the plaintiff, the date that the plaintiff filed the claim, the disposition of the claim and whether there has been a request to defer, delay, suspend, or toll the claim against the asbestos trust.

(b) Within 60 days after March 29, 2014, or within 60 days after joinder of issues in an action subject to this section, whichever is later, the plaintiff shall provide to all parties all of the following:

1. For each personal injury claim he or she has filed against an asbestos trust, a copy of the final executed proof of claim, all trust documents, including trust claims materials, trust governance documents, any documents reflecting the current status of the claim and, if the claim is settled, all documents relating to the settlement of the claim.

2. A list of each personal injury claim he or she reasonably anticipates filing against an asbestos trust, including the name, address, and contact information for the asbestos trust, and the amount he or she anticipates claiming against the trust.

(c) The plaintiff shall supplement the information and materials he or she provides under pars. (a) and (b) within 30 days after the plaintiff files an additional claim or receives additional information or documents related to any claim he or she makes against an asbestos trust.

(3) DISCOVERY; USE OF MATERIALS. (a) Trust claims materials and trust governance documents are admissible in evidence. No claims of privilege apply to trust claims materials or trust governance documents.

(b) A defendant in a personal injury claim may seek discovery against an asbestos trust identified under sub. (2) or (4). The plaintiff may not claim privilege or confidentiality to bar discovery, and the plaintiff shall provide consents or other expression of permis-

sion that may be required by the asbestos trust to release information and materials sought by the defendant.

(4) DEFENDANT'S IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE ASBESTOS TRUSTS. (a) If any defendant identifies an asbestos trust not named by the plaintiff against which the defendant reasonably believes the plaintiff should file a claim, upon motion by the defendant, the court shall determine whether to order the plaintiff to file a claim against the asbestos trust. The defendant shall provide all documentation it possesses or is aware of in support of the motion.

(b) The court shall establish a deadline for filing a motion under par. (a). The court shall ensure that any deadline established pursuant to this paragraph affords the parties an adequate opportunity to investigate the defendant's claims.

(c) If the court orders the plaintiff to file a claim with the asbestos trust, the court shall stay the immediate action until the plaintiff swears or affirms that he or she has filed the claim against the asbestos trust and the plaintiff provides to the court and to all parties a final executed proof of claim and all other trust claims materials relevant to each claim the plaintiff has against an asbestos trust.

(d) The court may allow additional time for discovery or may stay the proceedings for other good cause shown.

(e) Not less than 30 days prior to trial, the court shall enter into the record a trust claims document that identifies each personal injury claim the plaintiff has made against an asbestos trust.

(5) USE OF TRUST CLAIM MATERIALS AT TRIAL. Trust claim materials that are sufficient to entitle a claim to consideration for payment under the applicable trust governance documents may be sufficient to support a jury finding that the plaintiff may have been exposed to products for which the trust was established to provide compensation and that such exposure may be a substantial factor in causing the plaintiff's injury that is at issue in the action.

(6) DAMAGES; ASSIGNMENT OF CLAIMS. (a) If a verdict is entered in favor of the plaintiff in an action subject to this section and the defendant is found to be 51 percent or more causally negligent or responsible for the plaintiff's entire damages under s. 895.045 (1) or (3) (d), the plaintiff may not collect any amount of damages until after the plaintiff assigns to the defendant all pending, current, and future rights or claims he or she has or may have for a personal injury claim against an asbestos trust.

(b) If a verdict is entered in favor of the plaintiff in an action subject to this section and the defendant is found to be less than 51 percent causally negligent or responsible for the plaintiff's entire damages under s. 895.045 (1) or (3) (d), the plaintiff may not collect any amount of damages until after the plaintiff assigns to the defendant all future rights or claims he or she has or may have for a personal injury claim against an asbestos trust.

(7) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to timely provide all of the information required under sub. (2) or (4) is subject to ss. 802.05, 804.12, 805.03, and 895.044.

History: 2013 a. 154; 2015 a. 195 s. 83.

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.

(9) FORECLOSURE. In an action for foreclosure of real property, the complaint may not name a tenant of residential real property as a defendant unless the tenant has a lien or ownership interest in the real property.

History: Sup. Ct. Order, 67 Wis. 2d 585, 619 (1975); 1975 c. 218; 2009 a. 28.

Sub. (8) subjects claims lacking averments of time to motions for a more definite statement and not to motions to dismiss for failure to state a claim. Schweiger v. Loewi & Co., 65 Wis. 2d 56, 221 N.W.2d 882 (1974).

The "American rule" of absolute judicial immunity from liability for libel or slander provides that writings made by an attorney of record in a pending lawsuit apply in this state if the statements made are relevant to the matters being considered and are made in a procedural context recognized as affording absolute privilege. Converters Equipment Corp. v. Condes Corp., 80 Wis. 2d 257, 258 N.W.2d 712 (1977).

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

Sub. (2) does not prevent the trial court from amending the pleadings to conform with the evidence pursuant to s. 802.09 as long as the parties either consent or have the chance to submit additional proof. Meiers v. Wang, 192 Wis. 2d 115, 531 N.W.2d 54 (1995).

Sub. (2) requires specification of the time, place, and content of an alleged false representation. Allegations were too general that did not specify the particular individuals who made the representations and did not specify where, when, and to whom the representations were made. Friends of Kenwood v. Green, 2000 WI App 217, 239 Wis. 2d 78, 619 N.W.2d 271, 00−0680.

The heightened pleading standard set forth by sub. (2) for claims of fraud does not apply to claims made under s. 100.18. Hinrichs v. DOW Chemical Co., 2020 WI 2, 389 Wis. 2d 669, 937 N.W.2d 37, 17−2361.

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. Every pleading commencing an action under s. 814.61 (1) (a) or 814.62 (1) or (2) and every complaint filed under s. 814.61 (3) shall contain in the caption, if the action includes a claim for a money judgment, a statement of whether the amount claimed is greater than the amount under s. 799.01 (1) (d).

(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 Wis. 2d 585, 621 (1975); 1975 c. 218; Sup. Ct. Order, 171 Wis. 2d xix (1992); 1995 a. 27; 2007 a. 97.

802.045 Limited scope representation permitted — process. (1) AUTHORIZED. An attorney's role in an action may be limited to one or more individual proceedings or issues in an action if specifically so stated in a notice of limited appearance filed and served upon the parties prior to or simultaneous with the proceeding. Providing limited scope representation of a person under this section does not constitute a general appearance by the attorney for purposes of s. 801.14.

(2) NOTICE OF LIMITED APPEARANCE. The notice of limited appearance shall contain the following information:

(a) The name and the party designation of the client.

(b) The specific proceedings or issues within the scope of the limited representation.

(c) A statement that the attorney will file a notice of termination upon completion of services.

(d) A statement that the attorney providing limited scope representation shall be served with all documents while providing limited scope representation.

(e) Contact information for the client including current address and phone number.

(3) SERVICE. Service shall be made under s. 801.14 (2m).

(4) TERMINATION OF LIMITED APPEARANCE. At the conclusion of the representation for which a notice of limited appearance has been filed, the attorney's role terminates without further order of the court upon the attorney filing with the court, and serving upon the parties, a notice of the termination of limited appearance. A notice of termination of limited appearance shall contain all of the following information:

(a) A statement that the attorney has completed all services within the scope of the notice of limited appearance.

(b) A statement that the attorney has completed all acts ordered by the court.

(c) A statement that the attorney has served the notice of termination of limited appearance on all parties, including the client.

(d) Contact information for the client including current address and phone number.

(5) FORMS. The director of state courts shall provide the clerk of circuit court in each county forms for use in filing notices required under this section.

History: Sup. Ct. Order No. 13–10, 2014 WI 45, 354 Wis. 2d xliii.

802.05 Signing of pleadings, motions, and other papers; representations to court; sanctions. (1) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, electronic mail address, and state bar number, if any. Any attorney or party signing a paper under this section shall designate and provide the court with a primary electronic mail address and shall be responsible for the accuracy of and any necessary changes to the electronic mail address provided to the court. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(2) REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

(a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(2m) ADDITIONAL REPRESENTATIONS TO COURT AS TO PREPARATION OF PLEADINGS OR OTHER DOCUMENTS. An attorney may draft or assist in drafting a pleading, motion, or document filed by an otherwise self–represented person. The attorney is not required to sign the pleading, motion, or document. Any such document must contain a statement immediately adjacent to the person's signature that "This document was prepared with the assistance of a lawyer." The attorney providing such drafting assistance may rely on the otherwise self–represented person's representation of facts, unless the attorney has reason to believe that such representations are false, or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

(3) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

(a) *How initiated.* 1. 'By motion.' A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2). The motion shall be served as provided in s. 801.14, but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

2. 'On court's initiative.' On its own initiative, the court may enter an order describing the specific conduct that appears to vio-

late sub. (2) and directing an attorney, law firm, or party to show cause why it has not violated sub. (2) with the specific conduct described in the court's order.

(b) *Nature of sanction; limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subds. 1. and 2., the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation subject to all of the following:

1. Monetary sanctions may not be awarded against a represented party for a violation of sub. (2) (b).

2. Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(c) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(4) PRISONER LITIGATION. (a) A court shall review the initial pleading as soon as practicable after the action or special proceeding is filed with the court if the action or special proceeding is commenced by a prisoner, as defined in s. 801.02 (7) (a) 2.

(b) The court may dismiss the action or special proceeding under par. (a) without requiring the defendant to answer the pleading if the court determines that the action or special proceeding meets any of the following conditions:

1. The action or proceeding is frivolous, as determined by a violation of sub. (2).

2. The action or proceeding is used for any improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.

3. The action of proceeding seeks monetary damages from a defendant who is immune from such relief.

4. The action or proceeding fails to state a claim upon which relief may be granted.

(c) If a court dismisses an action or special proceeding under par. (b) the court shall notify the department of justice or the attorney representing the political subdivision, as appropriate, of the dismissal by a procedure developed by the director of state courts in cooperation with the department of justice.

(d) The dismissal of an action or special proceeding under par. (b) does not relieve the prisoner from paying the full filing fee related to that action or special proceeding.

(5) INAPPLICABILITY TO DISCOVERY. Subsections (1) to (3) do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to ss. 804.01 to 804.12.

History: Sup. Ct. Order, 67 Wis. 2d 585, 622 (1975); 1975 c. 218; 1987 a. 256; Sup. Ct. Order, 161 Wis. 2d xvii (1991); Sup. Ct. Order, 171 Wis. 2d xix (1992); 1997 a. 133; Sup. Ct. Order No. 03–06, 2005 WI 38, 278 Wis. 2d xiii; Sup. Ct. Order No. 03–06A, 2005 WI 86, 280 Wis. 2d xiii; 2005 a. 253; Sup. Ct. Order No. 13–10, 2014 WI 45, 354 Wis. 2d xliii; 2017 a. 317; 2019 a. 30; Sup. Ct. Order No. 19–16, 2020 WI 38, 391 Wis. 2d xiii.

Comments: When adopted in 1976, former ss. 802.05 was patterned on the original version of Rule 11 of the Federal Rules of Civil Procedure (FRCP 11). Subsequently, the legislature adopted in 1978 s. 814.025, entitled costs upon frivolous claims and counterclaims. Circuit courts have used essentially the same guidelines in the determination of frivolousness under both sections. See *Jandrt v. Jerome Foods*, 227 Wis. 2d 531, 549, 597 N.W.2d 744 (1999). Section 814.025(4), adopted in 1988, provided that "to the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies." Subsection (4) was adopted pursuant to 1987 Act 256, the same Act that updated section 802.05 to conform with the 1983 amendments to FRCP Rule 11. However, FRCP 11 has since undergone substantial revision, most recently in 1993. The court now adopts the current version of FRCP 11, pursuant its authority under s. 751.12 to regulate pleading, practice and procedure in judicial proceedings. The court's intent is to simplify and harmonize the rules of pleading, practice and procedure, and to promote the speedy determination of litigation on the merits. In adopting the 1993 amendments to FRCP 11, the court does not intend to deprive a party wronged by frivolous conduct of a right to recovery; rather, the court intends to provide Wisconsin courts with additional tools to deal with frivolous filing of pleadings and other papers. Judges and practitioners will now be able to look to applicable decisions of federal courts since 1993 for guidance in the interpretation and application of the mandates of FRCP 11 in Wisconsin.

802.05 (3) Sanctions. Factors that the court may consider in imposing sanctions include the following: (1) Whether the alleged frivolous conduct was part of a pattern of activity or an isolated event; (2) Whether the conduct infected the entire pleading or was an isolated claim or defense; and (3) Whether the attorney or party has engaged in similar conduct in other litigation. Sanctions authorized under s. 802.05(3) may include an award of actual fees and costs to the party victimized by the frivolous conduct.

802.05 (4) Prisoner litigation. On April 17, 1998, the legislature amended [former] section 802.05 as part of the Prisoner Litigation Reform Act. 1997 Act 133, s. 14. The legislature added language that requires courts to perform an initial review of pleadings filed by prisoners and permits dismissal if the pleadings are frivolous, used for an improper purpose, seek damages from a defendant who is immune, or fail to state a claim. This language has been retained in s. 802.05, as repealed and recreated by this Sup. Ct. Order.

1993 Federal Advisory Committee Notes to Rule 11 of the Federal Rules of Civil Procedure. The 1993 Federal Advisory Committee Notes to Rule 11 of the Federal Rules of Civil Procedure are printed for information purposes and have not been adopted by the court.

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book–length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); J. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop–and–think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting" — and hence certifying to the district court under Rule 11 — those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for

purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty–head pure–heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, s. 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi–count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost–shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons — whether attorneys, law firms, or parties — who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co–counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., 503 U.S. 131 (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., 498 U.S. 533 (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case–by–case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney–client privilege or the work–product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney–client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11 — whether the movant or the target of the motion — reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court–initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what — if any — sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for

the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. s. 1927. See Chambers v. NASCO, 501 U.S. 32 (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11 — notice, opportunity to respond, and findings — should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

NOTE: Sup. Ct. Order No. 19−16 states that "the Comment to Wis. Stat. § 802.05 (2m) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment to s. 802.05 (2m), 2020: A previous version of s. 802.05(2m) required an attorney to include his or her name and state bar number on documents prepared under s. 802.05(2m). This requirement was removed because of its chilling effect on the effectiveness of limited scope representation. However, attorneys are reminded that, even in the context of limited scope representation, all of the rules of professional conduct for attorneys apply, and limited scope cases should be conducted consistent with the attorney's professional obligations, including SCR 20:1.1 (competence) and SCR 20:3.1 (meritorious claims and contentions). Lawyers are reminded to be wary that the client is not using the lawyer's limited assistance to assert meritless claims. Providing limited scope representation will not insulate a lawyer from the potential disciplinary consequences of violation of applicable rules. Sua sponte or on motion to the court, a court may order a litigant to disclose the name of the attorney who assisted with preparation of the document, if known, and may direct the attorney to appear before the court to respond to the concerns raised. This comment is intended as a reminder of the existing ethical obligations imposed on all attorneys and an avenue for relief if a court is confronted with meritless filings submitted under this rule.

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

An unsigned summons served with a signed complaint is a technical defect, which in the absence of prejudice does not deny the trial court personal jurisdiction. This section places a personal obligation on the attorney to assure that there are grounds for the contents of the pleading, which is satisfied by the signing of the complaint. Gaddis v. La Crosse Products, Inc., 198 Wis. 2d 396, 542 N.W.2d 454 (1996), 94−2121.

The return of a writ of certiorari is an "other document" under this section. Attorney failure to verify its correctness before signing the return was ground for sanctions. State ex rel. Campbell v. Town of Delavan, 210 Wis. 2d 239, 565 N.W.2d 209 (Ct. App. 1997), 96−1291.

In determining the reasonableness of an attorney's inquiry, a court must consider: 1) the amount of time the attorney had to investigate the claims; 2) the extent to which the attorney had to rely on the client for the underlying facts; 3) whether the case was accepted from another attorney; 4) the complexity of the facts; and 5) whether discovery would benefit the factual record. At minimum some affirmative investigation is required. Belich v. Szymaszek, 224 Wis. 2d 419, 592 N.W.2d 254 (Ct. App. 1999), 97−3447.

A plaintiff need not as a matter of course exhaust outside sources of information before embarking on formal discovery. However, a plaintiff may not rely on formal discovery to establish the factual basis of its cause of action, thereby escaping the mandates of s. 802.05 and former s. 814.025, 1997 stats., when the required factual basis could be established without discovery. Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 597 N.W.2d 744 (1999), 98−0885.

A stamped reproduction of a signature does not satisfy s. 801.09 (3), and correcting the signature a year after receiving notice of the defect is not timely under sub. (1) (a). The error must be promptly corrected, or else the certification statute and the protection it was intended to afford is rendered meaningless. Novak v. Phillips, 2001 WI App 156, 246 Wis. 2d 673, 631 N.W.2d 635, 00−2416. But see Schaefer v. Riegelman, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d N.W.2d 715, 00−2157.

The standard for determining whether a claim may be dismissed under sub. (3) (b) 4. is the same standard applied in a normal civil case for failure to state a claim upon which relief can be granted. A case should be dismissed only if it is quite clear that under no circumstances can a plaintiff recover. State ex rel. Adell v. Smith, 2001 WI App 168, 247 Wis. 2d 260, 633 N.W.2d 231, 00−0070.

A summons and complaint signed by an attorney not licensed in the state contained a fundamental defect that deprived the circuit court of jurisdiction even though the signature was made on behalf and at the direction of a licensed attorney. Schaefer v. Riegelman, 2002 WI 18, 250 Wis. 2d 494, 639 N.W.2d N.W.2d 715, 00−2157.

The failure to sign a notice of appeal can be corrected and does not compel immediate dismissal. State v. Seay, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437, 00−3490.

The handwritten signature on a summons and complaint of an attorney of record who had been suspended from the practice of law was a fundamental defect. The defect was not cured when an amended complaint was filed with new counsel's signature but when no amended or corrected summons was ever filed. Town of Dunkirk v. City of Stoughton, 2002 WI App 280, 258 Wis. 2d 805, 654 N.W.2d 488, 02−0166.

The circuit court's sua sponte dismissal of a petition for a writ of certiorari did not violate the right to due process or equal protection. Due process was satisfied because of constructive notice under sub. (3) (b), together with post−dismissal procedures available to the prisoner. Equal protection was satisfied because the initial pleading review procedure satisfied the rational basis test. Schatz v. McCaughtry, 2003 WI 80, 263 Wis. 2d 83, 664 N.W.2d 596, 01−0793.

When petitioners and their counsel knew events related in their petition had not occurred when the petition was signed and sworn to and had not occurred when they filed the petition with the court, the trial court could reasonably decide that constituted a violation of the obligation to make a reasonable inquiry to insure that their petition was well−grounded in fact. The court properly rejected their rationale that the event did come about as expected. Robinson v. Town of Bristol, 2003 WI App 97, 264 Wis. 2d 318, 667 N.W.2d 14, 02−1247.

Sub. (1) expressly authorizes sanctions against a represented client who has not signed a pleading and does not require the signing attorney to personally have the improper purpose. Lack of evidence that a signing attorney was or should have been aware the client was using the complaint for an improper purpose does not result in the conclusion that the complaint was not used for an improper purpose, but is relevant to whom to sanction. Wisconsin Chiropractic Ass'n v. Chiropractic Examining Board, 2004 WI App 30, 269 Wis. 2d 837, 676 N.W.2d 580, 03−0933.

In order to confer jurisdiction on the court of appeals, a notice of appeal filed by counsel must contain the handwritten signature of an attorney authorized to practice law in Wisconsin. Counsel cannot delegate the duty to affix a signature on a notice of appeal to a person not authorized to practice law in Wisconsin. When a notice of appeal is not signed by an attorney when an attorney is required, the notice of appeal is fundamentally defective and cannot confer jurisdiction. Brown v. MR Group, LLC, 2004 WI App 121, 274 Wis. 2d 804, 683 N.W.2d 804, 03−2309.

To avoid permitting prisoners to easily avoid the judicial screening requirement that is central to the purpose former sub. (3), 2003 stats., prisoners may not amend their initial pleadings as a matter of course under s. 802.09 (1). A prisoner's amendment of an initial pleading is subject to the judicial screening requirement of former sub. (3), 2003 stats., and a court must review the proposed amended pleading under that subsection before granting the prisoner leave to amend. Lindell v. Litscher, 2005 WI App 39, 280 Wis. 2d 159, 694 N.W.2d 396, 03−2477.

If a pleading that does not conform to the subscription requirement of sub. (1) (a) is characterized as containing a fundamental defect that normally deprives the court of jurisdiction, that pleading is curable. Rabideau v. Stiller, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108, 05−2868.

The Effect of *Jandrt* on Satellite Litigation. Geske & Gleisner. Wis. Law. May 2000.

Frivolous Sanction Law in Wisconsin. Geske & Gleisner. Wis. Law. Feb. 2006.

NOTE: The above annotations cite to s. 802.05 as it existed prior to its repeal and recreation by Sup. Ct. Order No. 03−06.

This section is a procedural rule and procedural rules generally have retroactive application. However, this section, as affected by Supreme Court Order No. 03−06, is not to be applied retroactively when the new rule diminishes a contract, disturbs vested rights, or imposes an unreasonable burden on the party charged with complying with the new rule's requirements. Trinity Petroleum, Inc. v. Scott Oil Co., 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1, 05−2837.

Sub. (3) (a) 1. requires the party seeking sanctions to first serve the motion on the potentially sanctionable party, who then has 21 days to withdraw or appropriately correct the claimed violation. The movant cannot file a motion for sanctions unless that time period has expired without a withdrawal or correction. A postjudgment sanctions motion does not comply with sub. (3) (a) 1. It would wrench both the language and the purpose of the rule to permit an informal warning to substitute for service of the motion. Ten Mile Investments, LLC v. Sherman, 2007 WI App 253, 306 Wis. 2d 799, 743 N.W.2d 442, 06−0353.

Under sub. (1), every motion filed in court must be signed by an attorney or it shall be stricken. Sub. (1) required the circuit court to strike from the record an affidavit and proposed order submitted by a child support agency that was not executed by an attorney. Teasdale v. Marinette County Child Support Agency, 2009 WI App 152, 321 Wis. 2d 647, 775 N.W.2d 123, 08−2827.

Ch. 767 does not prohibit civil sanctions for frivolous proceedings under this section. Therefore, a motion for sanctions under subs. (2) and (3) in a divorce action under ch. 767 is governed by civil procedure because ch. 767 does not preclude such motions. Wenzel v. Wenzel, 2017 WI App 75, 378 Wis. 2d 670, 904 N.W.2d 384, 16−1771.

802.06 Defenses and objection; when and how presented; by pleading or motion; motion for judgment on the pleadings.

(1) WHEN PRESENTED. (a) Except when a court dismisses an action or special proceeding under s. 802.05 (4), 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, employee, or agent of the state 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. If a defendant in the action is an insurance company, or if any cause of action raised in the original pleading, cross claim, or counterclaim is founded in tort, the periods of time to

serve a reply or answer shall be 45 days. 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.

(b) Upon the filing of a motion to dismiss under sub. (2) (a) 6., a motion for judgment on the pleadings under sub. (3), or a motion for more definite statement under sub. (5), all discovery and other proceedings shall be stayed for a period of 180 days after the filing of the motion or until the ruling of the court on the motion, whichever is sooner, unless the court finds good cause upon the motion of any party that particularized discovery is necessary.

(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. If a defendant in the action is an insurance company, if any cause of action raised in the original pleading, cross–claim, or counterclaim is founded in tort, or if the moving party is the state or an officer, agent, employee, or agency of the state, the 20–day time period under this subsection is increased to 45 days.

(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 if any of the following conditions is met:

1. The defense is omitted from a motion in the circumstances described in sub. (7).
2. The defense 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).

(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 Wis. 2d 585, 623 (1975); 1975 c. 218; Sup. Ct. Order, 73 Wis. 2d xxxi; Sup. Ct. Order, 82 Wis. 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 Wis. 2d xi (1983); 1983 a. 228 s. 16; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 256; 1993 a. 213; Sup. Ct. Order No. 95–04, 191 Wis. 2d xxi (1995); 1995 a. 225, 411; 1997 a. 133, 187; 1999 a. 32; 2001 a. 16; Sup. Ct. Order No. 03–06A, 2005 WI 86, 280 Wis. 2d xiii; 2005 a. 442; 2007 a. 97; 2017 a. 235.

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 employees 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]

A motion under sub. (2) (f) [now sub. (2) (a) 6.] usually will be granted only when it is quite clear that under no condition can the plaintiff recover. Wilson v. Continental Insurance Cos., 87 Wis. 2d 310, 274 N.W.2d 679 (1979).

Under sub. (2) (f) [now sub. (2) (a) 6.], a claim should only be dismissed if it is clear from the complaint that under no condition can the plaintiff recover. Morgan v. Pennsylvania General Insurance Co., 87 Wis. 2d 723, 275 N.W.2d 660 (1979).

A plaintiff need not prima facie prove jurisdiction prior to an evidentiary hearing under sub. (4). Bielefeldt v. St. Louis Fire Door Co., 90 Wis. 2d 245, 279 N.W.2d 464 (1979).

Since facts alleged in the complaint stated a claim for abuse of process, the complaint was improperly dismissed under sub. (2) (f) [now sub. (2) (a) 6.] even though an abuse of process claim was not pleaded or argued in the trial court. Strid v. Converse, 111 Wis. 2d 418, 331 N.W.2d 350 (1983).

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

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

Motions for sanctions under this section must be filed prior to the entry of judgment. Northwest Wholesale Lumber, Inc. v. Anderson, 191 Wis. 2d 278, 528 N.W.2d 502 (Ct. App. 1995).

A party does not waive the defense of lack of jurisdiction when two answers are filed on its behalf by two different insurers and only one raises the defense. Honeycrest Farms, Inc. v. Brave Harvestore Systems, Inc., 200 Wis. 2d 256, 546 N.W.2d 192 (Ct. App. 1996), 95−1789.

Trial courts have the authority to convert a motion to dismiss to a motion for summary judgment when matters outside the pleadings are considered. Schopper v. Gehring, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), 96−2782.

A defendant may file a motion to dismiss for failure to state a claim after filing an answer. A defendant who raises the defenses of failure to state a claim or the statute of limitations in an answer does not forfeit the right to bring those defenses on for disposition by subsequent motion. Eternalist Foundation, Inc. v. City of Platteville, 225 Wis. 2d 759, 593 N.W.2d 84 (Ct. App. 1999), 98−1944.

Sub. (2) (b) requires the court to notify parties of its intent to convert a motion to dismiss for failure to state a claim to one for summary judgment and to provide the parties a reasonable opportunity to present material made pertinent by the application of s. 802.08. CTI of Northeast Wisconsin, LLC v. Herrell, 2003 WI App 19, 259 Wis. 2d 756, 656 N.W.2d 794, 02−1881.

Sub. (8) (b), as applied to certiorari proceedings in which there is no pretrial conference, allows a party who has unsuccessfully moved to dismiss on other grounds to still seek dismissal grounded on claims preclusion at any time before the court has considered the merits of the petitioner's claims. Barksdale v. Litscher, 2004 WI App 130, 275 Wis. 2d 493, 685 N.W.2d 493, 03−0841.

The plaintiff is normally entitled to an evidentiary hearing when a defendant challenges personal jurisdiction, even if the plaintiff does not demonstrate that an evidentiary hearing is necessary. The burden of going forward with the evidence, as well as the burden of persuasion, on the issue of jurisdiction is on the plaintiff. There is no rule that the plaintiff's burden to prove prima facie the facts supporting jurisdiction must be met by affidavit or in any manner prior to the evidentiary hearing. Kavanaugh Restaurant Supply, Inc. v. M.C.M. Stainless Fabricating, Inc., 2006 WI App 236, 297 Wis. 2d 532, 724 N.W.2d 893, 06−0043.

Sub. (2) (b) serves as an exception to the summary judgment procedure laid out in s. 802.08. Sub. (2) (b) allows the circuit court to convert a defendant's motion to dismiss for failure to state a claim into a summary judgment motion when the defendant has not filed an answer even though s. 802.08 requires that the pleadings be complete before a court can review a summary judgment motion. Alliance Laundry Systems LLC v. Stroh Die Casting Co., 2008 WI App 180, 315 Wis. 2d 143, 763 N.W.2d 167, 07−2857.

Sub. (2) (b) requires the court to provide both parties with reasonable notice that it will or might convert a motion to dismiss into a summary judgment motion, but it does not require the court to request additional briefs or affidavits. Notice depends on the facts in each case and need not state that the court will, in fact, convert. Alliance Laundry Systems LLC v. Stroh Die Casting Co., 2008 WI App 180, 315 Wis. 2d 143, 763 N.W.2d 167, 07−2857.

When the facts and circumstances of a pending lawsuit and a new lawsuit are the same, simply naming a different party in the new lawsuit is not enough to get around sub. (2) (a) 10. Such a situation leads to a waste of judicial resources and is simply nonsensical. RBC Europe, LTD v. Noack, 2014 WI App 33, 353 Wis. 2d 183, 844 N.W.2d 643, 13−1105.

An exception to the conversion−to−summary−judgment requirements under subs. (2) and (3) is adopted in this case. Under the incorporation by reference doctrine a court may consider a document attached to a motion to dismiss or for judgment on the pleadings without converting the motion into one for summary judgment if the document was referred to in the plaintiff's complaint, is central to the plaintiff's claim, and its authenticity has not been disputed. Soderlund v. Zibolski, 2016 WI App 6, 366 Wis. 2d 579, 874 N.W.2d 561, 14−2479.

To facilitate effective and efficient appellate review, a circuit court must properly identify the motion that is before it and structure its analysis under the correct, applicable standard. Alternatively, the circuit court should direct the movants to clarify under which type of dispositive motion they intend to proceed. Procedural posture matters. In many cases, it materially impacts the outcome of disputes. Andruss v. Divine Savior Healthcare Inc., 2022 WI 27, 401 Wis. 2d 368, 973 N.W.2d 435, 20−0202.

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 Wis. 2d 585, 628 (1975); 1975 c. 218; Sup. Ct. Order, 104 Wis. 2d xi; 1987 a. 256; 2007 a. 97.

Section 806.02 (2) provides that the plaintiff may move for default judgment according to the demand of the complaint. This section gives no indication that the appellations "plaintiff" and "defendant" may be reversed for purposes of a counterclaim. Pollack v. Calimag, 157 Wis. 2d 222, 458 N.W.2d 591 (Ct. App. 1990).

A 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 Wis. 2d 754, 492 N.W.2d 375 (Ct. App. 1992).

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

When 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 Wisconsin Eau Claire, N.A. v. Plourde, 185 Wis. 2d 377, 518 N.W.2d 265 (Ct. App. 1994).

In an automobile injury action by an injured party naming the driver of the other car and the injured party's own insurance company as defendants, the court was not competent to proceed on a default judgment motion by the insurer against the other defendant when the insurer had filed an answer, but no cross claim against the other defendant. A default judgment entered in favor of the insurer was void. Tridle v. Horn, 2002 WI App 215, 257 Wis. 2d. 529, 652 N.W.2d 418, 01−3372.

Cross−claims are generally permissive in Wisconsin. Wisconsin Public Service Corp. v. Arby Construction, Inc., 2011 WI App 65, 333 Wis. 2d 184, 798 N.W.2d 715, 10−0878.

The general rule in Wisconsin is that when a defendant may interpose a counterclaim but fails to do so, the defendant is not precluded from maintaining a subsequent action on that claim. *A.B.C.G. Enterprises*, 184 Wis. 2d 465 (1994), established a narrow, common law exception to the permissive counterclaim rule as a means of reconciling the tension between that rule and claim preclusion. A counterclaim is compulsory only if claim preclusion would otherwise apply and a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action. Hull v. Glewwe, 2019 WI App 27, 388 Wis. 2d 90, 931 N.W.2d 266, 17−2485. But see Teske v. Wilson Mutual Insurance Co., 2019 WI 62, 387 Wis. 2d 213, 928 N.W.2d 555, 17−1269.

When a defendant obtains judgment on a counterclaim, the judgment extinguishes the defendant's right to recover on other counterclaims arising from the same transaction. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc. v. General Star Indemnity Co., 32 F. Supp. 2d 1059 (1999).

Landing in *A.B.C.G.* Soup: The Compulsory Counterclaim Trap. Bach. Wis. Law. Mar. 2006.

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 5 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 Wis. 2d 585, 630 (1975); 1975 c. 218; Sup. Ct. Order, 82 Wis. 2d ix; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 256; Sup. Ct. Order, 168 Wis. 2d xxi (1992); 1993 a. 490; 1997 a. 254; 2005 a. 253; 2007 a. 97.

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]

When the plaintiff had signed a release, and when another illness subsequently developed, whether the plaintiff consciously intended to disregard the possibility that a known condition could become aggravated was a question of fact not to be determined on summary judgment. Krezinski v. Hay, 77 Wis. 2d 569, 253 N.W.2d 522 (1977).

Summary judgment procedure is not authorized in proceedings for judicial review under ch. 227. Wisconsin's Environmental Decade, Inc. v. PSC, 79 Wis. 2d 161, 255 N.W.2d 917 (1977).

When an insurance policy unambiguously excluded coverage relating to warranties, a factual question whether implied warranties were made was immaterial, and the trial court abused its discretion in denying the insurer's summary judgment motion. Jones v. Sears Roebuck & Co., 80 Wis. 2d 321, 259 N.W.2d 70 (1977).

Use of the mandatory language in sub. (2) that "judgment shall be rendered" means that trial courts do not have wide latitude in deciding summary judgment motions and that appeals of decisions to grant or deny summary judgment be given exacting scrutiny. Wright v. Hasley, 86 Wis. 2d 572, 273 N.W.2d 319 (1979).

When a stipulation to the facts of a case did not satisfy the formal requirements of s. 807.05, summary judgment was improper. Wilharms v. Wilharms, 93 Wis. 2d 671, 287 N.W.2d 779 (1980).

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

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

Summary judgment can be based upon a party's failure to respond to a request for admissions, even if the admissions would be dispositive of the entire case. Bank of Two Rivers v. Zimmer, 112 Wis. 2d 624, 334 N.W.2d 230 (1983).

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

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

CHIPS proceedings are controlled by the Code of Civil Procedure unless ch. 48 requires a different procedure, and summary judgment is available. N.Q. v. Milwaukee County Department of Social Services, 162 Wis. 2d 607, 470 N.W.2d 1 (Ct. App. 1991).

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

Involuntary commitment may not be ordered on summary judgment. Shirley J.C. v. Walworth County, 172 Wis. 2d 371, 493 N.W.2d 382 (Ct. App. 1992).

In a 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 Wis. 2d 733, 496 N.W.2d 637 (Ct. App. 1992).

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

Stating a four–step methodology for determining and reviewing a summary judgment motion. The use of trial material to sustain a grant or denial of summary judgment is inconsistent with this methodology. Universal Die & Stampings, Inc. v. Justus, 174 Wis. 2d 556, 497 N.W.2d 797 (Ct. App. 1993).

When 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 Mutual Insurance Co., 182 Wis. 2d 457, 513 N.W.2d 690 (Ct. App. 1994).

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

Trial courts have the authority to convert a motion to dismiss to a motion for summary judgment when matters outside the pleadings are considered. Schopper v. Gehring, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), 96–2782.

If a litigant who is not the subject of a motion for summary judgment has reason to dispute facts supporting the motion, the litigant has a duty to appear and object to the motion. If summary judgment is granted, the facts underlying the judgment are binding on all parties to the suit as a matter of issue preclusion. Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank, 224 Wis. 2d 288, 592 N.W.2d 5 (Ct. App. 1998), 97–3029.

The federal "sham affidavit rule" is adopted. An affidavit that directly contradicts prior deposition testimony generally does not create a genuine issue of fact for trial unless the contradiction is adequately explained. Yahnke v. Carson, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 102, 99–0056.

Generally review of a summary judgment is de novo, but when a summary judgment is based on an equitable right, legal issues are reviewed de novo while equitable relief, which is discretionary with the trial court, will be overturned only if there is an absence of the exercise of discretion. Pietrowski v. Dufrane, 2001 WI App 175, 247 Wis. 2d 232, 634 N.W.2d 109, 00–2143.

Summary judgment procedure is inconsistent with, and unworkable in, ch. 345 forfeiture proceedings. State v. Schneck, 2002 WI App 239, 257 Wis. 2d 704, 652 N.W.2d 434, 02–0513.

Summary judgment is inapplicable in ch. 343 hearings. State v. Baratka, 2002 WI App 288, 258 Wis. 2d 342, 654 N.W.2d 875, 02–0770.

In the absence of an answer to a cross claim and in the absence of any other responsive pleadings, a court may deem facts alleged in the cross claim and submissions filed in connection with a summary judgment motion admitted for purposes of summary judgment. Daughtry v. MPC Systems, Inc., 2004 WI App 70, 272 Wis. 2d 260, 679 N.W.2d 808, 02–2424.

At summary judgment, an affidavit setting forth an expert's opinion is evidence of a factual dispute as long as the opinion is expressed on a matter that is appropriate for

expert opinion and the affiant is arguably an expert. Mettler v. Nellis, 2005 WI App 73, 280 Wis. 2d 753, 695 N.W.2d 861, 04−1216.

The plaintiff is normally entitled to an evidentiary hearing when a defendant challenges personal jurisdiction, even if the plaintiff does not demonstrate that an evidentiary hearing is necessary. The burden of going forward with the evidence, as well as the burden of persuasion, on the issue of jurisdiction is on the plaintiff. However, there is no rule that the plaintiff's burden to prove prima facie the facts supporting jurisdiction must be met by affidavit or in any manner prior to the evidentiary hearing. Kavanaugh Restaurant Supply, Inc. v. M.C.M. Stainless Fabricating, Inc., 2006 WI App 236, 297 Wis. 2d 532, 724 N.W.2d 893, 06−0043.

Sub. (2) was amended in 1992 to preclude local rules and to provide a statewide remedy and uniformity of practice. A conflicting local rule was precluded by the uniform rule contained in sub. (2), and the circuit court improperly applied the law when it relied exclusively upon the local rule in refusing to consider a party's submissions. David Christensen Trucking & Excavating, Inc. v. Mehdian, 2006 WI App 254, 297 Wis. 2d 765, 726 N.W.2d 689, 05−2546.

When a trial court enters a scheduling order, it may, in its discretion, deviate from the requirements of sub. (2) for cause shown and upon just terms. There was no exercise of discretion when a standard attachment to a scheduling order recited local court rules at odds with the five−day rule of sub. (2). With regard to scheduling orders, trial courts that deviate from the statutory time requirements for responding to a motion for summary judgment should explain on the record why that deviation is necessary and appropriate. Hunter v. AES Consultants, Ltd., 2007 WI App 42, 300 Wis. 2d 213, 730 N.W.2d 184, 06−0872.

The circuit court erred when it sua sponte granted summary judgment when it failed to give the notice required by sub. (2). Larry v. Harris, 2008 WI 81, 311 Wis. 2d 326, 752 N.W.2d 279, 05−2935.

Scheduling orders may trump sub. (2). By contrast, local court rules may not trump the deadlines in sub. (2). A scheduling order that attempts to apply a void rule in conflict with sub. (2) by attaching it to the order is invalid. In the absence of some specific dispute, there is no need for the court to explain scheduling decisions on the record. Hefty v. Strickhouser, 2008 WI 96, 312 Wis. 2d 530, 752 N.W.2d 820, 06−1094.

Findings of fact are determinations by a court from the evidence of a case concerning the facts asserted by one party and denied by another. Summary judgment is only granted when there is no genuine issue as to any material fact, when facts are not being asserted by one party and denied by the other. Therefore, formal findings of fact are not part of the summary judgment calculus. Camacho v. Trimble Irrevocable Trust, 2008 WI App 112, 313 Wis. 2d 272, 756 N.W.2d 596, 07−1472.

Section 802.06 (2) (b) serves as an exception to the summary judgment procedure laid out in this section. Section 802.06 (2) (b) allows the circuit court to convert a defendant's motion to dismiss for failure to state a claim into a summary judgment motion when the defendant has not filed an answer even though this section requires that the pleadings be complete before a court can review a summary judgment motion. Alliance Laundry Systems LLC v. Stroh Die Casting Co., 2008 WI App 180, 315 Wis. 2d 143, 763 N.W.2d 167, 07−2857.

At the summary judgment stage, a court must determine whether the alleged facts comprise one or more causes of action. The substantive law governing a cause of action tells the court what types of facts a plaintiff must allege. If the facts satisfy all of the constitutive elements of the claim, then the complaint has stated a good cause of action and the court's summary judgment analysis may proceed. The cause of action is important, therefore, because it is the standard against which the court measures the sufficiency of the complaint's factual allegations. Tikalsky v. Friedman, 2019 WI 56, 386 Wis. 2d 757, 928 N.W.2d 502, 17−0170.

To facilitate effective and efficient appellate review, a circuit court must properly identify the motion that is before it and structure its analysis under the correct, applicable standard. Alternatively, the circuit court should direct the movants to clarify under which type of dispositive motion they intend to proceed. Procedural posture matters. In many cases, it materially impacts the outcome of disputes. Andruss v. Divine Savior Healthcare Inc., 2022 WI 27, 401 Wis. 2d 368, 973 N.W.2d 435, 20−0202.

101: Refresher: Wisconsin's Summary Judgment Methodology. Loudenslager. Wis. Law. Apr. 2020.

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). If a defendant in the action is an insurance company, if any cause of action raised in the original pleading, cross−claim, or counterclaim is founded in tort, or if the party pleading in response is the state or an officer, agent, employee, or agency of the state, the 20−day time period under this subsection is increased to 45 days.

(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 Wis. 2d 585, 632 (1975); 1975 c. 218; Sup. Ct. Order, 82 Wis. 2d ix (1978); Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1997 a. 187; 2001 a. 16; 2005 a. 442.

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]

Amendments should not be allowed eight years after an accident and five years beyond the running of the statute of limitations. Drehmel v. Radandt, 75 Wis. 2d 223, 249 N.W.2d 274 (1977).

The trial court abused its discretion in prohibiting amendment of the pleadings on the second day of trial to plead quantum meruit as an alternative to substantial performance of the contract. Tri−State Home Improvement Co. v. Mansavage, 77 Wis. 2d 648, 253 N.W.2d 474 (1977).

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

Sub. (3) is identical to Federal Rule of Civil Procedure 15 (c). "Changing the party" includes adding a defendant when the requirements of sub. (3) are met. State v. One 1973 Cadillac, 95 Wis. 2d 641, 291 N.W.2d 626 (Ct. App. 1980).

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

When an action against an unnamed defendant under s. 807.12 was filed on the last day of the limitation period and amended process naming the defendant was served within 60 days after filing, the action was not barred. Relation back requirements of sub. (3) were inapplicable. Lak v. Richardson−Merrell, Inc., 100 Wis. 2d 641, 302 N.W.2d 483 (1981).

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

An amended pleading adding a separate claim by a different plaintiff related back to the date of filing the original complaint. Korkow v. General Casualty Co. of Wisconsin, 117 Wis. 2d 187, 344 N.W.2d 108 (1984).

Implied consent under sub. (2) requires that the parties understood that evidence was aimed at unpleaded issues. Even after a finding of no implied consent an "interests of justice" determination, which is essentially a determination of prejudice, must be made. Zobel v. Fenendael, 127 Wis. 2d 382, 379 N.W.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 Wis. 2d 421, 513 N.W.2d 681 (Ct. App. 1994).

A plaintiff's response to a motion for a more definite answer, no matter how termed, cannot extinguish the right to amend within six months as a matter of course. Kox v. Center for Oral & Maxillofacial Surgery, S.C., 218 Wis. 2d 93, 579 N.W.2d 285 (Ct. App. 1998), 97–3045.

An amended complaint that makes no reference to or incorporates any of the original complaint supersedes the original complaint when the amended complaint is filed in court. When such a complaint was filed prior to the time for answering the original complaint had run, it was improper to enter a default judgment on the original complaint. Holman v. Family Health Plan, 227 Wis. 2d 478, 596 N.W.2d 358 (1999), 97–1490.

Sub. (3) requires receipt of notice of the institution of the action within the statute of limitation period. Grothe v. Valley Coatings, Inc., 2000 WI App 240, 239 Wis. 2d 406, 620 N.W.2d 463, 00–0524.

"Changing the party" under sub. (3) can mean: 1) substitution of a new defendant for the present defendant; 2) addition of a defendant; 3) changing the stated capacity of the defendant; or 4) changing a misdescription or misnaming of the defendant. To add a party there must have existed a mistake concerning the identity of the proper party being added when the original pleading was filed. Identity includes an individual's name and physical characteristics that distinguish that person from another. Confusion about a person's role in a negligent act is not a question of identity and an amendment to include that person does not relate back. Estate of Hegarty v. Beauchaine, 2001 WI App 300, 249 Wis. 2d 142, 638 N.W.2d 355, 00–2144.

Absent a showing of prejudice, the trial court did not erroneously exercise its discretion by sua sponte amending the pleadings to apply the evidence before it. Schultz v. Trascher, 2002 WI App 4, 249 Wis. 2d 722, 640 N.W.2d 130, 00–3182.

The second sentence of sub. (3) refers only to a party against whom a claim is asserted and is not applicable in deciding under what circumstances a court may properly allow an amendment adding a plaintiff to relate back. Gross v. Woodman's Food Market, Inc., 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718, 01–1746.

"At any stage of the action" in sub. (1) is broad enough to include one week after a motion for summary judgment is granted. For a motion to amend a complaint filed after a motion for summary judgment has been granted, the party seeking to amend must present a reason for granting the motion that is sufficient to overcome the value of the finality of judgment. Why the party has not acted sooner, the length of time since the filing of the original complaint, the number and nature of prior amendments, and the nature of the proposed amendment are all relevant considerations, as is the effect on the defendant. Mach v. Allison, 2003 WI App 11, 259 Wis. 2d 686, 656 N.W.2d 766, 02–0928.

If the original pleading was filed within the statute of limitations and the conditions of sub. (3) are met, the fact that a statute of limitations has expired between the filing of the summons and complaint and the motion to amend is not a reason to deny the motion. Town of Campbell v. City of La Crosse, 2003 WI App 247, 268 Wis. 2d 253, 673 N.W.2d 696, 02–2541.

Despite being named in the original action, because a defendant was never served in the original action, that defendant could not have been a party to the original action. By including the defendant in the amended complaint, the plaintiffs added a new party, which runs afoul of the relation back provisions of sub. (3). When the statute of limitations on the claim expired prior to filing the amended claim, the claim was time barred. Bartels v. Rural Mutual Insurance Co., 2004 WI App 166, 275 Wis. 2d 730, 687 N.W.2d 84, 03–3393.

The circuit court erroneously exercised its discretion by granting an after–verdict motion to amend the pleadings to include the plaintiff's new claim. There was no express or implied consent by the defendants to try the issues raised by the claim, and the circuit court did not properly apply the necessary balancing test when it allowed the amendment of the pleadings. Hess v. Fernandez, 2005 WI 19, 278 Wis. 2d 283, 692 N.W.2d 655, 03–0327.

To avoid permitting prisoners to easily avoid the judicial screening requirement that is central to the purpose of former s. 802.05 (3), 2003 stats., prisoners may not amend their initial pleadings as a matter of course under sub. (1). A prisoner's amendment of an initial pleading is subject to the judicial screening requirement of former s. 802.05 (3), 2003 stats., and a court must review the proposed amended pleading under that subsection before granting the prisoner leave to amend. Lindell v. Litscher, 2005 WI App 39, 280 Wis. 2d 159, 694 N.W.2d 396, 03–2477.

When the plaintiff timely named a defendant, who had been a predecessor company's employee, and an unknown defendant in a complaint, she did not give the successor company, who had never employed the named defendant, adequate notice that it would have to investigate and defend against her claims. Plaintiff's theory that there was sufficient constructive notice to the successor company to meet the notice requirements of sub. (3) failed. Dakin v. Marciniak, 2005 WI App 67, 280 Wis. 2d 491, 695 N.W.2d 867, 04–0754.

Filing a new action is not an alternate way to amend a complaint. A lawsuit may be dismissed solely because there is already another action pending between the same parties for the same cause under s. 802.06 (2) (a) 10. A party may not circumvent a ruling it does not like in one case by filing a new action unless the second action is based on claims that could not have been brought in the first action. Aon Risk Services, Inc. v. Liebenstein, 2006 WI App 4, 289 Wis. 2d 127, 710 N.W.2d 175, 04–2163. See also Barricade Flasher Service, Inc. v. Wind Lake Auto Parts, Inc., 2011 WI App 162, 338 Wis. 2d 144, 807 N.W.2d 697, 11–0064.

In sub. (2), "tried" requires a trial. Arbitration is not a trial and an amendment to conform to evidence produced in arbitration is not allowed. Thom v. OneBeacon Insurance Co., 2007 WI App 123, 300 Wis. 2d 607, 731 N.W.2d 657, 06–1617.

Plaintiff's amended claim did not relate back under sub. (3) when the plaintiff passenger's original claim was against the insurer of the driver of the vehicle for coverage under an underinsured motorist provision for the negligence of a third–party driver and the amended claim was against the same insurer under the same policy for the negligence of the insurer's insured. Thom v. OneBeacon Insurance Co., 2007 WI App 123, 300 Wis. 2d 607, 731 N.W.2d 657, 06–1617.

Once the circuit court issued an order dismissing a complaint in its entirety and the plaintiff appealed that final order, the circuit court no longer had jurisdiction over the case. The court of appeals decision to reverse and remand would have restored the circuit court's jurisdiction if the decision had not been appealed, but when the defendant petitioned the supreme court and was granted review, the court of appeals also lost jurisdiction. When the supreme court reversed the court of appeals affirming the circuit court's dismissal, neither the circuit court nor the court of appeals had authority to grant leave to amend the complaint without a clear directive from the supreme court. Tietsworth v. Harley–Davidson, Inc., 2007 WI 97, 303 Wis. 2d 94, 735 N.W.2d 418, 04–2655.

In the absence of a remand order in the mandate line or some other clear directive from the appellate court ultimately deciding the appeal, a trial court whose judgment or final order has been affirmed by the appellate court on the merits has no authority to reopen the case for an amended complaint. Tietsworth v. Harley–Davidson, Inc., 2007 WI 97, 303 Wis. 2d 94, 735 N.W.2d 418, 04–2655.

To amend a pleading within six months of when the original summons and complaint are filed, a party must only serve the amended pleading upon the parties within that time frame. The amended pleading must then be filed within a reasonable time after service. Schuett v. Hanson, 2007 WI App 226, 305 Wis. 2d 729, 741 N.W.2d 292, 06–3014.

Despite the fact that additional plaintiffs added by an amended complaint were making the same legal claims against the defendant, that did not give the defendant sufficient notice as to the specific factual occurrences with respect to the additional victims or any notice that these victims would even be making a claim for their injuries. As such, the amended complaint adding the plaintiffs did not relate back to the original complaint. Barnes v. WISCO Hotel Group, 2009 WI App 72, 318 Wis. 2d 537, 767 N.W.2d 352, 08–1884.

Relation back of an amendment to add a party depends on what the party to be added knew or should have known, not on the plaintiff's knowledge or timeliness in seeking to amend the pleading. A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him or her has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he or she escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his or her identity. Tews v. NHI, LLC, 2010 WI 137, 330 Wis. 2d 389, 793 N.W.2d 860, 09–0828.

When the plaintiff's original complaint asserted claims against a roller rink business but did not assert any claims against the building owner, the building owner should not have expected to be added as a defendant pursuant to sub. (3) because it had no role in owning, operating, or managing the rink business. For this same reason, the plaintiff did not make a "mistake" with respect to the addition of the building owner as the plaintiff knew that the business operator was a separate entity from the building owner for nearly a year before the statute of limitations expired. As such, the plaintiff's claim against the building owner did not relate back to the original complaint. Wiley v. M.M.N. Laufer Family Limited Partnership, 2011 WI App 158, 338 Wis. 2d 178, 807 N.W.2d 236, 10–2789.

The doctrine that pleadings should be deemed amended to conform to the evidence only applies when evidence related to the issue has been presented at trial. At the pleadings stage, the applicable statute is s. 802.02 (1). Soderlund v. Zibolski, 2016 WI App 6, 366 Wis. 2d 579, 874 N.W.2d 561, 14–2479.

Although the complaint in this case was devoid of any reference to a cause of action for civil liability theft under s. 895.446, the circuit court properly determined that the defendant had ample notice of the plaintiff's claim for statutory theft based upon the defendant's agreement to instruct the jury on civil liability theft, and the submission of a special verdict question on the issue of the defendant's theft under that statute to the jury. Estate of Miller v. Storey, 2016 WI App 68, 373 Wis. 2d 643, 896 N.W.2d 360, 14–2420.
Affirmed in part and reversed in part on other grounds. 2017 WI 99, 378 Wis. 2d 358, 903 N.W.2d 759, 14–2420.

If a plaintiff was required to join a party holding a "constituent part" of a cause of action under s. 803.03 (2) (a) but failed to do so, then the unjoined subrogation, derivative, or assigned claims were deemed timely when made by the other party by virtue of the sub. (3) relation–back doctrine—as long as such claims were asserted in the original action. However, if the plaintiff was not required to join the other party's cause of action under s. 803.03 (2) (a)—i.e., the other party's claims did not arise by subrogation, derivation, or assignment, and therefore were not part of the plaintiff's claim in chief—the other party's claims do not relate back to the date of the original filing and are time–barred. Town of Burnside v. City of Independence, 2016 WI App 94, 372 Wis. 2d 802, 889 N.W.2d 186, 16–0034.

802.10 Calendar practice. (1) APPLICATION. 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 s. 66.0114 and chs. 48, 54, 102, 108, 227, 348, 767, 778, 799 and 812, and proceedings under chs. 851 to 882.

(3) SCHEDULING AND PLANNING. Except in categories of actions and special proceedings exempted under sub. (1), the circuit court may enter a scheduling order on the court's own motion or on the motion of a party. The order shall be entered after the court consults with the attorneys for the parties and any unrepresented party. The scheduling order may address any of the following:

(a) The time to join other parties.

(b) The time to amend the pleadings.

(c) The time to file motions.

(d) The time to complete discovery.

(e) The time, not more than 30 days after entry of the order, to determine the mode of trial, including a demand for a jury trial and payment of fees under s. 814.61 (4).

(f) The limitation, control and scheduling of depositions and discovery, including the identification and disclosures of expert witnesses, the limitation of the number of expert witnesses and the exchange of the names of expert witnesses.

(g) The dates for conferences before trial, for a final pretrial conference and for trial.

(h) The appropriateness and timing of summary judgment adjudication under s. 802.08.

(i) The advisability of ordering the parties to attempt settlement under s. 802.12.

(j) The need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems.

(jm) The need for discovery of electronically stored information.

(k) Any other matters appropriate to the circumstances of the case, including the matters under sub. (5) (a) to (h).

(5) PRETRIAL CONFERENCE. At a pretrial conference, the court may consider any matter that facilitates the just, speedy and inexpensive disposition of the action, including the matters under pars. (a) to (h) and sub. (3) (a) to (k). At a pretrial conference, the court may consider and take appropriate action with respect to all of the following:

(a) The formulation and simplification of the issues.

(b) The elimination of frivolous claims or defenses.

(c) The possibility of obtaining party admissions or stipulations that will avoid unnecessary proof.

(d) Any pretrial rulings on the admissibility of evidence, including limitations on the use of expert testimony under s. 907.02.

(e) The identification of witnesses, exhibits and tangible demonstrative evidence.

(f) The need and schedule for filing and exchanging pretrial briefs.

(g) The dates for further conferences and for trial.

(h) The disposition of pending motions.

(6) AUTHORITY OF PARTICIPANTS. An attorney for each party participating in any pretrial conference shall have the authority to enter stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. The court may require that a party or the party's representative be present or reasonably available by telephone to consider possible settlement of the dispute.

(7) SANCTIONS. Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12, 805.03, and 895.044.

History: Sup. Ct. Order, 67 Wis. 2d 585, 634 (1975); 1975 c. 218; Sup. Ct. Order, 82 Wis. 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 Wis. 2d xiii (1987); 1993 a. 486; Sup. Ct. Order No. 95−04, 191 Wis. 2d xxi (1995); 1999 a. 150 s. 672; 2001 a. 30 s. 108; 2005 a. 387; Sup. Ct. Order No. 09−01, 2010 WI 67, filed 7−6−10, eff. 1−1−11; 2011 a. 2.

Judicial Council Note, 2010: Sub. (3) has been amended to encourage courts to be more active in managing electronic discovery. Pursuant to Wis. Stat. s. 805.06, the court also may appoint a referee to report on complex or expensive discovery issues, including those involving electronically stored information. [Re Order effective Jan. 1, 2011]

The trial court properly granted default judgment against a party failing to appear at a scheduling conference, but the damage amount was not supported by the record. Gaertner v. 880 Corp., 131 Wis. 2d 492, 389 N.W.2d 59 (Ct. App. 1986).

Sub. (7) and s. 805.03 apply in criminal cases. A court has power to sanction a tardy attorney under these sections. Failure to delineate the reasons for the sanctions is an erroneous exercise of discretion. Anderson v. Circuit Court, 219 Wis. 2d 1, 578 N.W.2d 633 (1998), 96−3281.

The scheduling questionnaire used by the circuit court in this case was sufficient to satisfy former sub. (3), 2005 stats. The form was a convenient means to ascertain important scheduling information. Although the form consisted of a single sheet, it addressed many of the basic scheduling questions faced by a circuit court attempting to accommodate the potentially complex timing needs of several parties and their counsel. Hefty v. Strickhouser, 2008 WI 96, 312 Wis. 2d 530, 752 N.W.2d 820, 06−1094.

The excusable neglect standard set forth in s. 801.15 (2) (a) does not apply to untimely motions to enlarge scheduling order deadlines. Rather, this section provides the applicable standards and procedures courts apply to such motions. Parker v. Wisconsin Patients Compensation Fund, 2009 WI App 42, 317 Wis. 2d 460, 767 N.W.2d 272, 07−1542.

A party cannot unilaterally extend the deadline to abide by a scheduling order simply by stating that it reserves the right to do so. 260 North 12th Street, LLC v. DOT, 2010 WI App 138, 329 Wis. 2d 748, 792 N.W.2d 572, 09−1557.
Affirmed. 2011 WI 103, 338 Wis. 2d 34, 808 N.W.2d 372, 09−1557.

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. 767.61.

2. Maintenance under s. 767.56.

3. Attorney fees under s. 767.241.

4. Postjudgment orders modifying maintenance under s. 767.59.

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

1. Custody and physical placement under s. 767.41, 767.804 (3), 767.805 (4), 767.863 (3), or 767.89 (3).

2. Visitation rights under s. 767.43.

3. Child support under s. 767.511, 767.804 (3), 767.805 (4), 767.863 (3), or 767.89 (3).

4. Modification of subd. 1., 2. or 3. under s. 767.451 or 767.59.

(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. 767.405, 767.407 and 767.41.

4. The court finds that visitation rights have been determined in the manner required under ss. 767.405, 767.407 and 767.43.

5. The court finds that child support has been determined in the manner required under s. 767.511 or 767.89.

(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 Wis. 2d xv; 1995 a. 225; 1997 a. 191; 1999 a. 9; 2005 a. 443, s. 265; 2019 a. 95.

Comment, 2008: See s. 807.05, formal requirements to render binding agreements reached in an action or special proceeding. In some cases, such as family law cases, court approval is required for an agreement to be effective.

NOTE: Sup. Ct. Order No. 05–05, 2008 WI 2, states that "the comments to Wis. Stat. §§ 807.05 and 802.12 are not adopted but will be published and may be consulted for guidance in interpreting and applying the statutes."

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.

When multiple plaintiffs had similar claims against a single defendant, it was not appropriate to conduct a test case then grant summary judgment, based on the test case results, to the plaintiffs who were not part of the test case. Leverence v. PFS Corp., 193 Wis. 2d 317, 532 N.W.2d 735 (1995).

This section does not authorize a trial court to require resolution of an action, nor does it require any party to abandon a legal position or to settle a case. Gray v. Eggert, 2001 WI App 246, 248 Wis. 2d 99, 635 N.W.2d 667, 01–0007.

Sub. (3) (c) cannot limit a circuit court's power to consider the equity of agreements in confirming an arbitrated property division. However, circuit courts must give greater deference to an arbiter's award of a property division under sub. (3) (c) than they would to other types of agreements. Franke v. Franke, 2004 WI 8, 268 Wis. 2d 360, 674 N.W.2d 832, 01–3316.

Wisconsin's New Court–Ordered ADR Law: Why It Is Needed and Its Potential for Success. Weinzierl. 78 MLR 583 (1995).

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