Article 6.

Trials.

Rule 38. Jury trial of right.

(a) Right preserved. – The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.

(b) Demand. – Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.

(c) Demand – Specification of issues. – In his demand a party may specify the issues which he wishes so tried; otherwise, he shall be deemed to have demanded trial by jury for all the issues so triable. If a party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the last pleading directed to such issues or within 10 days after service of the demand, whichever is later, or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues in the action.

(d) Waiver. – Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action.

(e) Right granted. – The right of trial by jury as to the issue of just compensation shall be granted to the parties involved in any condemnation proceeding brought by bodies politic, corporations or persons which possess the power of eminent domain. (1967, c. 954, s. 1; 1973, c. 149.)

Rule 39. Trial by jury or by the court.

(a) By jury. – When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

(b) By the court. – Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right, the court in its discretion upon motion or of its own initiative may order a trial by jury of any or all issues.

(c) Advisory jury and trial by consent. – In all actions not triable of right by a jury the court upon motion or if its own initiative may try any issue or question of fact with an advisory jury or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. In either event the jury shall be selected in the manner provided by Rule 47(a). (1967, c. 954, s. 1.)

Rule 40. Assignment of cases for trial; continuances.

(a) The senior resident superior court judge of any superior court district or set of districts as defined in G.S. 7A-41.1 may provide by rule for the calendaring of actions for trial in the superior court division of the various counties within his district or set of districts. Calendaring of actions for trial in the district court shall be in accordance with G.S. 7A-146. Precedence shall be given to actions entitled thereto by any statute of this State.

(b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly or the Rules Review Commission. (1967, c. 954, s. 1; 1969, c. 895, s. 9; 1985, c. 603, s. 8; 1987 (Reg. Sess., 1988), c. 1037, s. 43; 1997-34, s. 10.)

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof. –

(1) By Plaintiff; by Stipulation. – Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(2) By Order of Judge. – Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

(b) Involuntary dismissal; effect thereof. – For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order

for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

(c) Dismissal of counterclaim; crossclaim, or third-party claim. – The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

(d) Costs. – A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action. (1967, c. 954, s. 1; 1969, c. 895, s. 10; 1977, c. 290.)

Rule 42. Consolidation; separate trials.

(a) Consolidation. – Except as provided in subdivision (b)(2) of this section, when actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. When actions involving a common question of law or fact are pending in both the superior and the district court of the same county, a judge of the superior court in which the action is pending may order all the actions consolidated, and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate trials. –

(1) The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(2) Upon motion of any party in an action that includes a claim commenced under Article 1G of Chapter 90 of the General Statutes involving a managed care entity as defined in G.S. 90-21.50, the court shall order separate discovery and a separate trial of any claim, cross-claim, counterclaim, or third-party claim against a physician or other medical provider.

(3) Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars ($150,000), the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial.

Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.

(4) Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate. (1967, c. 954, s. 1; 2001-446, s. 4.8; 2011-400, s. 2; 2014-100, s. 18B.16(c); 2016-125, 4th Ex. Sess., s. 23(a).)

Rule 43. Evidence.

(a) Form. – In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules.

(b) Examination of hostile witnesses and adverse parties. – A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party. A party may call an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a public or private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party,

and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

(c) Record of excluded evidence. – In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.

(d) Affirmation in lieu of oath. – Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on motions. – When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. (1967, c. 954, s. 1.)

Rule 44. Proof of official record.

(a) Authentication of copy. – An official record or an entry therein, when admissible for any purpose, may be evidence by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is without the State of North Carolina but within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) Proof of lack of record. – A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) Other proof. – This rule does not prevent the proof of official records specified in Title 28, U.S.C. §§ 1738 and 1739 in the manner therein provided; nor of entry or lack of entry in official records by any method authorized by any other applicable statute or by the rules of evidence at common law. (1967, c. 954, s. 1.)

Rule 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or by other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Chapter 8 of the General Statutes and State law. The court's determination shall be treated as a ruling on a question of law. (1995, c. 389, s. 5.)

Rule 45. Subpoena.

(a) Form; Issuance. –

(1) Every subpoena shall state all of the following:

a. The title of the action, the name of the court in which the action is pending, the number of the civil action, and the name of the party at whose instance the witness is summoned.

b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, electronically stored information, or tangible things in the possession, custody, or control of that person therein specified.

c. The protections of persons subject to subpoenas under subsection (c) of this rule.

d. The requirements for responses to subpoenas under subsection (d) of this rule.

(2) A command to produce records, books, papers, electronically stored information, or tangible things may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(3) A subpoena shall issue from the court in which the action is pending.

(4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. Any judge of the superior court, judge of the district court, magistrate, or attorney, as officer of the court, may also issue and sign a subpoena.

(b) Service. –

(1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.

(2) Service of copy. – A copy of the subpoena served under subdivision (b)(1) of this subsection shall also be served upon each party in the manner prescribed by Rule 5(b).

(3) Subdivision (b)(2) of this subsection does not apply to subpoenas issued under G.S. 15A-801 or G.S. 15A-802.

(c) Protection of Persons Subject to Subpoena. –

(1) Avoid undue burden or expense. – A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. – Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.

b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
c. The subpoena subjects a person to an undue burden or expense.
d. The subpoena is otherwise unreasonable or oppressive.
e. The subpoena is procedurally defective.

(4) Order of court required to override objection. – If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. – A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. – When a court enters an order compelling a deposition or the production of records, books, papers, documents, electronically stored information, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, electronically stored information, or tangible things specified in the subpoena.

(7) Trade secrets; confidential information. – When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. – When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties in Responding to Subpoenas. –

(1) Form of response. – A person responding to a subpoena to produce records, books, documents, electronically stored information, or tangible things shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(2) Form of producing electronically stored information not specified. – If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms.

(3) Electronically stored information in only one form. – The person responding need not produce the same electronically stored information in more than one form.

(4) Inaccessible electronically stored information. – The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, after considering the limitations of Rule 26(b)(1a). The court may specify conditions for discovery, including requiring the party that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved.

(5) Specificity of objection. – When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(d1) Opportunity for Inspection of Subpoenaed Material. – A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.

(e) Contempt; Expenses to Force Compliance With Subpoena. –

(1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).

(2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion was unreasonable or was made for improper purposes such as unnecessary delay.

(f) Discovery From Persons Residing Outside the State. –

(1) Any party may obtain discovery from a person residing in another state of the United States or a territory or an insular possession subject to its jurisdiction in any one or more of the following forms: (i) oral depositions, (ii) depositions upon written questions, or (iii) requests for production of documents and tangible things. In doing so, the party shall use and follow any applicable process and procedures required and available under the laws of the state, territory, or insular possession where the discovery is to be obtained. If required by the process or procedure of the state, territory, or insular possession where the discovery is to be obtained, a commission may issue from the court in which the action is pending in accordance with the procedures set forth in subdivision (2) of this subsection.

(2) Obtaining a commission. –

a. The party desiring a commission to obtain discovery outside the State shall prepare and file a motion indicating the party's intent to obtain a commission and requesting that the commission be issued.

b. The motion shall indicate that the moving party has conferred, or describe fully the moving party's good faith attempts to confer, with counsel for all other parties regarding the request and shall indicate whether the motion is unopposed. The motion shall also attach a copy of any proposed subpoena, notice of deposition, or other papers to be served on the person from whom the moving party is seeking to obtain discovery.

c. The motion shall indicate that counsel for the moving party has read the applicable rules and procedures of the foreign state and that the moving party will comply with those rules and procedures in obtaining the requested discovery.

d. If the motion reflects that it is unopposed or indicates that the moving party has made reasonable, good faith efforts to confer with all other parties and that no other party has indicated that it opposes the motion, the motion shall immediately be placed on the calendar for a hearing within 20 days before the court in which the action is pending where the commission shall be issued. However, if the court determines, in its discretion, that the moving party has failed to make reasonable, good faith efforts to confer with all other parties prior to filing the motion, the

court shall refuse to issue the commission, and the motion shall be denied.

e. If the motion does not reflect that it is unopposed or that the moving party has made reasonable, good faith efforts to confer with all other parties and that no other party has indicated that it opposes the motion, any party wishing to oppose the motion shall file written objections to issuance of the commission within 10 days of being served with the motion, and the motion shall immediately be placed on the calendar for a hearing to be held within 20 days before the court in which the action is pending. The hearing may be held by telephone in the court's discretion. The court may refuse to issue the commission only upon a showing of substantial good cause to deny the motion.

f. If the court, in its discretion, determines that any party opposing the motion did so without good cause, the court shall require the party opposing the motion to pay the moving party the reasonable costs and expenses incurred in obtaining the order, including attorneys' fees, unless circumstances exist which make an award of expenses unjust.

(3) In addition to any terms required by the foreign jurisdiction to initiate the process of obtaining the requested discovery, the commission shall:

a. State the time and place at which the requested discovery is to occur;

b. State the name and address of the person from whom the discovery is sought, if known, and, if unknown, a general description sufficient to identify the person or the particular class or group to which he or she belongs; and

c. Attach a copy of any case management order, discovery order, local rule, or other rule or order establishing any discovery deadlines in the North Carolina action. (1967, c. 954, s. 1; 1969, c. 886, s. 1; 1971, c. 159; 1975, c. 762, s. 3; 1983, c. 665, s. 1; c. 722; 1989, c. 262, s. 1; 2003-276, s. 1; 2007-514, s. 1; 2011-199, s. 6; 2011-247, s. 3.)

Rule 46. Objections and exceptions.

(a) Rulings on admissibility of evidence. –

(1) When there is objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified, it shall be deemed that a like objection has been made to any subsequent admission of evidence from the witness in question. Similarly, when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning.

(2) If there is proper objection to the admission of evidence and the objection is overruled, the ruling of the court shall be deemed excepted to by the party making the objection. If an objection to the admission of evidence is sustained or if the court for any reason excludes evidence offered by a party, the ruling of the court shall be deemed excepted to by the party offering the evidence.

(3) No objections are necessary with respect to questions propounded to a witness by the court or a juror but it shall be deemed that each such question has been properly objected to and that the objection has been overruled and that an exception has been taken to the ruling of the court by all parties to the action.

(b) Pretrial rulings, interlocutory orders, trial rulings, and other orders not directed to the admissibility of evidence. – With respect to pretrial rulings, interlocutory orders, trial rulings, and other orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position. If a party has no opportunity to object or except to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice that party.

(c) Repealed by Session Laws 2001-379, s. 6. (1967, c. 954, s. 1; 2001-379, s. 6.)

Rule 47. Jurors.

Inquiry as to the fitness and competency of any person to serve as a juror and the challenging of such person shall be as provided in Chapter 9 of the General Statutes. (1967, c. 954, s. 1.)

Rule 48. Juries of less than twelve – majority verdict.

Except in actions in which a jury is required by statute, the parties may stipulate that the jury will consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. (1967, c. 954, s. 1.)

Rule 49. Verdicts.

(a) General and special verdicts. – The judge may require a jury to return either a general or a special verdict and in all cases may instruct the jury, if it renders a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. A general verdict is that by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only.

(b) Framing of issues. – Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reducing to writing, before or during the trial.

(c) Waiver of jury trial on issue. – If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

(d) Special finding inconsistent with general verdict. – Where a special finding of facts is inconsistent with the general verdict, the former controls, and the judge shall give judgment accordingly. (1967, c. 954, s. 1.)

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) When made; effect. – A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order granting a motion for a directed verdict shall be effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict. –

(1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.

(2) An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b)(1) or the trial judge on his own motion granted, denied or redenied the motion for a directed verdict in accordance with Rule 50(b)(1).

(c) Motion for judgment notwithstanding the verdict – Conditional rulings on grant of motion. –

(1) If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. In case the motion for new trial has been conditionally denied, the

appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Motion for judgment notwithstanding the verdict – Denial of motion. – If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate division concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate division reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. (1967, c. 954, s. 1; 1969, c. 895, s. 11.)

Rule 51. Instructions to jury.

(a) Judge to explain law but give no opinion on facts. – In charging the jury in any action governed by these rules, a judge shall not give an opinion as to whether or not a fact is fully or sufficiently proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence. If the judge undertakes to state the contentions of the parties, he shall give equal stress to the contentions of each party.

(b) Requests for special instructions. – Requests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them. Such requests for special instructions must be submitted to the judge before the judge's charge to the jury is begun. The judge may, in his discretion, consider such requests regardless of the time they are made. Written requests for special instructions shall, after their submission to the judge, be filed with the clerk as a part of the record.

(c) Judge not to comment on verdict. – The judge shall make no comment on any verdict in open court in the presence or hearing of any member of the jury panel; and if any judge shall make any comment as herein prohibited or shall praise or criticize any jury on account of its verdict, whether such praise, criticism or comment be made inadvertently or intentionally, such praise, criticism or comment by the judge shall for any party to any other action remaining to be tried constitute valid grounds as a matter of right for a continuance of any action to a time when all members of the jury panel are no longer serving. The provisions of this section shall not be applicable upon the hearing of motions for a new trial or for judgment notwithstanding the verdict. (1967, c. 954, s. 1; 1985, c. 537, s. 2.)

Rule 52. Findings by the court.

(a) Findings. –

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional

remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(b) Amendment. – Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

(c) Review on appeal. – When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings. (1967, c. 954, s. 1; 1969, c. 895, s. 12.)

Rule 53. Referees.

(a) Kinds of reference. –

(1) By Consent. – Any or all of the issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue.

(2) Compulsory. – Where the parties do not consent to a reference, the court may, upon the application of any party or on its own motion, order a reference in the following cases:

a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

c. Where the case involves a complicated question of boundary, or requires a personal view of the premises.

d. Where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action.

(b) Jury trial. –

(1) Where the reference is by consent, the parties waive the right to have any of the issues within the scope of the reference passed on by a jury.

(2) A compulsory reference does not deprive any party of his right to a trial by jury, which right he may preserve by

a. Objecting to the order of compulsory reference at the time it is made, and

b. By filing specific exceptions to particular findings of fact made by the referee within 30 days after the referee files his report with the clerk of the court in which the action is pending, and

c. By formulating appropriate issues based upon the exceptions taken and demanding a jury trial upon such issues. Such issues shall be tendered at the same time the exceptions to the referee's report are filed. If there

is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee.

(c) Appointment. – The parties may agree in writing upon one or more persons not exceeding three, and a reference shall be ordered to such person or persons in appropriate cases. If the parties do not agree, the court shall appoint one or more referees, not exceeding three, but no person shall be appointed referee to whom all parties in the action object.

(d) Compensation. – The compensation to be allowed a referee shall be fixed by the court and charged in the bill of costs. After appointment of a referee, the court may from time to time order advancements by one or more of the parties of sums to be applied to the referee's compensation. Such advancements may be apportioned between the parties in such manner as the court sees fit. Advancements so made shall be taken into account in the final fixing of costs and such adjustments made as the court then deems proper.

(e) Powers. – The order of reference to the referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. Subject to the specifications and limitations stated in the order, every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. The referee shall have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the judge and upon the same terms and with like effect. The referee shall have the same power as the judge to preserve order and punish all violations thereof, to compel the attendance of witnesses before him by attachment, and to punish them as for contempt for nonattendance or for refusal to be sworn or to testify. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 45.

(f) Proceedings. –

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

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

(3) Testimony Reduced to Writing. – The testimony of all witnesses must be reduced to writing by the referee, or by someone acting under his direction and shall be filed in the cause and constitute a part of the record.

(g) Report. –

(1) Contents and Filing. – The referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted. If required to make findings of fact and conclusions of law, he shall set them forth separately in the report. He shall file the report with the clerk of the court in which the action is pending and unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Before filing his report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The clerk shall forthwith mail to all parties notice of the filing.

(2) Exceptions and Review. – All or any part of the report may be excepted to by any party within 30 days from the filing of the report. Thereafter, and upon 10 days' notice to the other parties, any party may apply to the judge for action on the report. The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions. No judgment may be rendered on any reference except by the judge. (1967, c. 954, s. 1; 1969, c. 895, s. 13.)