Managing Civil Trials

North Carolina Judicial College – May 9-11, 2007

Jury Selection, Instruction, and Management Materials

I. Right to Jury Trial: Assertion and Waiver

A. Key rules, statutes, and constitutional provisions:

N.C. Rules of Civil Procedure 38-39, N.C. Const. Art. I § 25 (text in appendix)

B. Right to jury trial

"Article I, § 25 of the North Carolina Constitution preserves intact the right to trial by jury in all cases where the prerogative existed at common law or by statute at the time the 1868 Constitution was adopted." *North Carolina State Bar v. DuMont*, 304 N.C. 627, 641 (1982); *Kiser v. Kiser*, 325 N.C. 502, 507 (1989).

A right to trial by jury can be created by statute even though the right is not constitutionally protected. Rule 38(a); Kiser v. Kiser, 325 N.C. 502, 508 (1989).

C. Time for demand

A party must demand a jury trial by serving on the other parties a written demand at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue for which a jury trial is sought. The demand may specify the issues on which the party demands a jury trial; if no specification, party is deemed to have demanded jury trial on all issues. Rule 38(b).

If a party demands a jury trial only with respect to particular 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, may serve a demand for trial by jury of any other or all of the issues in the action. The court may shorten this time period by order. Rule 38(b).

D. Withdrawal of demand

A demand for trial by jury may not be withdrawn without the consent of the parties who have pleaded or otherwise appeared in the action. Rule 38(d).

E.g., Where defendant had not filed an answer and clerk entered default, plaintiff could not unilaterally withdraw demand for jury trial after defendant filed motion to set aside the default. Defendant's motion constituted an appearance in the action. *Cabe v. Worley*, 140 N.C. App. 250, 536 S.E.2d 328 (2000)

E. Waiver

Rule 38(d): "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 A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action."

The parties may not stipulate to waive a jury trial if one is required by statute.

Examples:

1. Failure to make timely demand: Party waives by not serving written demand on other parties no later than ten days after service of the last pleading directed to the issue on which a jury trial is demanded. N.C. Rule Civ. P. 38(d); *Whitfield v. Todd,* 116 N.C. App. 335, 447 S.E.2d 796 (1994) (demand waived when defendant first served demand 11 months after serving his answer; although trial court had discretion to allow late demand, failure to do so was not abuse of discretion)

2. Failure to appear at trial: *Morris v. Asby*, 48 N.C. App. 694, 269 S.E.2d 729 (1980) (in action to impose constructive trust on mobile home, where defendant failed to show for properly noticed trial, defendant waived right to jury trial).

3. Stipulation by attorney: *Wachovia Bank & Trust Co., N.A. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc.,* 109 N.C. App. 352 (1993).

4. No waiver where statute requires jury trial: *Matter of Dunn*, 129 N.C. App. 321 (1998) (parties may not waive jury trial of contested issues in caveat proceeding).

F. Discretion to conduct jury trial after waiver: Even if there has been a waiver, the court has the discretion, on motion or its own initiative, to order a jury trial. Rule 39(b)

G. Advisory Juries: In actions in which there is no right to a jury trial, the judge, on his or her own motion or initiative, may: (1) try any issue or question of fact with an advisory jury, **or** (2) with the parties' consent, order a jury trial. In the latter case, the jury's verdict has the same effect as if the jury trial had been of right. In either case, the jury shall be selected as provided by Rule 47(a). Rule 39(c).

F. Juries of fewer than 12/Unanimous juries

Except in actions where a jury is required by statute, the parties may stipulate that (1) the jury shall consist of any number less than 12 or (2) that a verdict or finding of a stated majority shall be binding. Rule 48.

II. Jury Selection

N.C. Rule Civ. P. 47: "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."

A. Qualifications (G.S. § 9.3). Fitness and competency of jurors is governed by G.S. § 9-3. Persons not qualified under this section may be challenged for cause.

1. Citizens of the State and residents of the county.
2. Have not served as juror during the preceding 2 years.
3. Are 18 years of age or older.
4. Are physically and mentally competent.
5. Can hear and understand the English language.
6. Have not been convicted of a felony or pled guilty or no contest to a felony without having had citizenship restored.
7. Have not been adjudged non compos mentis.

B. Excuses

A judge hearing applications for excuses from jury duty must excuse any person disqualified under G.S. § 9-3.

Although the chief district court judge promulgates procedures for receiving, hearing, and ruling on applications for excuses from jury duty before the date of a superior or district court session, the presiding judge has discretion to excuse jurors at the beginning of or during a court session. G.S. § 9-6(f).

C. Voir dire – purpose and conduct

"The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged." G.S. § 9-15(a).1

Purpose: Select impartial jury

> The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for cause; and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. *In re Will of Worrell*, 35 N.C. App. 278 (1978); *see also Simmons v. Parkinson*, 119 N.C. App. 424, 427, 458 S.E.2d 726, 728 (1974).

Counsel has wide latitude in examining jurors, subject to court's discretion to regulate extent and manner of inquiry:

> The trial court is responsible for overseeing the voir dire of prospective jurors and for resolving all issues concerning their fitness to serve. In this capacity, the judge has discretion to regulate the extent and manner of voir dire. *State v. Anderson*, 350 N.C. 152 (1999); *In re Will of Worrell*, 35 N.C. App. 278 (1978); *Karpf v. Adams*, 237 N.C. 106, 112 (1953). Nevertheless, counsel is allowed wide latitude in examining jurors.

Simmons v. Parkinson, 119 N.C. App. 424, 426, (1974); *In re Will of Worrell*, 35 N.C. App. 278, 282, (1974).

Examples:

In medical malpractice case, plaintiff's counsel advised jury that the court, to avoid juror embarrassment, would hear answers from prospective jurors out of the presence of other jurors. A juror approached plaintiff's counsel after a recess and indicated that he wished to say something outside the presence of other jurors, but the trial court declined to allow plaintiff's counsel to conduct individual voir dire. Plaintiff elected not to conduct further voir dire. Later, during voir dire by the defendant's lawyer, the potential juror indicated that his wife had previously been treated to her satisfaction by the defendant physician. The trial court then denied a request by plaintiff's counsel to re-examine or peremptorily challenge the juror. The court of appeals held that the trial court had not abused its discretion by refusing to allow individual voir dire, but had abused its discretion by refusing to re-open voir dire. *Simmons v. Parkinson*, 119 N.C. App. 424, 426, (1974).

In will contest, trial court erred by refusing to allow voir dire into jurors' attitudes towards statutory right to make a will, but error was not prejudicial because court had instructed jury that testatrix had right to leave her property to whomever she wished. *In re Will of Worrell*, 35 N.C. App. 278, 282, (1974).

Trial court to decide all competency questions. *See* G.S. § 9-14.

Reopening voir dire

Until the jury is empanelled, the trial court may, in its discretion, reopen voir dire if it determines that a juror made an incorrect statement during voir dire or that some other good reason exists. The court may permit further voir dire to determine whether there is a basis for removing the juror for cause, and parties may use any remaining peremptory challenges to remove juror.

Example: *Simmons v. Parkinson*, 119 N.C. App. 424, 427 (1974) (described more fully above: Error not to reopen voir dire where, in medical malpractice action, after plaintiff's counsel passed on juror but during voir dire by defense counsel, potential juror revealed that juror's wife had been defendant's patient and had been satisfied with defendant's services.).

D. Challenges for cause

Grounds for challenge (examples)

1. Does not have the qualifications required by G.S. § 9-3.
2. Juror has a suit pending and at issue in the court where juror is called to serve. G.S. § 9-15(c).
3. Juror is incapable by reason of mental or physical infirmity of rendering jury service.
4. Family, business, employment, or other connection between juror and someone involved in the case may constitute cause for challenge.

   E.g., *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971-72 (4th Cir. 1971) (shareholder of company that is a party to litigation not competent to sit as juror); *State v. Campbell*, 359 N.C. 644, 666 (juror who knows a witness but states that juror can follow judge's instructions is not automatically subject to removal for cause.).
5. Juror prejudice or opinion renders incapable of rendering a fair and impartial verdict.
6. For any other cause is unable to render a fair and impartial verdict.

   Whether to grant a challenge for cause on the ground that the prospective juror is unable to render a fair and impartial verdict is a matter left to the sound discretion of the trial court. State v. Jaynes, 353 N.C. 534, 546 (2001).

E. Peremptory challenges

Before jury is impaneled, clerk reads names of prospective jurors in hearing of parties or counsel. Parties or counsel may question prospective jurors and may challenge eight jurors without a showing of cause. Jurors so challenged must be excused. G.S. § 9-19).

Cases with multiple defendants (G.S. § 9-20).

If it appears that multiple defendants have antagonistic interests, presiding judge has discretion to:

(1) apportion eight peremptory challenges among the defendants, or

(2) increase number of peremptory challenges to no more than six per defendant or class of defendants representing the same interest.

In either case, number of peremptories must be the same for each defendant or class of defendants representing the same interest.

Judge's decision as to nature of interests and number of peremptory challenges is final.

Example: Trial court erred when, after finding that defendants physician and hospital had antagonistic interests, it granted eight peremptory challenges to each defendant. Statute authorized a maximum of six peremptory challenges for each defendant with antagonistic interests. However, objecting party must demonstrate prejudice from the additional challenges. *Shuford by Shuford v. McIntosh*, 104 N.C. App. 201 (1991).

F. Alternate jurors (G.S. § 9-18).

Presiding judge may select one or more alternate jurors in the same manner as the regular trial panel in the case.

Each party is entitled to two peremptory challenges for each alternate juror, in addition to any peremptory challenges remaining from selection of the regular panel.

Alternate jurors must be sworn and seated near the jury with equal opportunity to see and hear proceedings; they must attend trial at all times with jury and obey judge's orders and admonitions for the jury.

If a juror dies, becomes incapacitated, or disqualified, or is discharged for any reason, alternates become part of the jury in the order in which they were selected.

Alternate jurors who do not become part of the jury are discharged upon submission of the case to the jury.

Example: *York v. Northern Hosp. Dist. of Surry County*, 88 N.C. App. 183 (1987) (in malpractice action, trial court dismissed juror who had car accident and been treated at defendant hospital, and had discretion to substitute alternate juror even though court had previously commented on alternate's inattentiveness).

III. Opening Statements and Closing Arguments

Opening Statements: At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense. The parties may elect to waive opening statements. Opening statements shall be subject to such time and scope limitations as may be imposed by the court. Rule 9, General Rules of Practice.

Closing Arguments: In all cases, civil and criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final. . . . In a civil case, where there are multiple defendants, if any defendant introduces evidence, the

closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise. Rule 10, General Rules of Practice.

General rules governing argument:

Counsel has wide latitude (subject to court's discretion_ in arguing to the jury: *Burchette v. Lynch*, 139 N.C. App. 756, 766 (2000). Counsel "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case." Control of argument is left to discretion of trial judge. *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 97-98 (1999).

Limits to permissible argument; need to intervene even without objection: However, "[c]ounsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence. It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene, ex mero motu." *State v. Covington*, 290 N.C. 313 (1976). "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. Moreover, if the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse ex mero motu." *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 98 (1999).

Impermissible argument:

Standards:

Lawyer may not allude to matters the lawyer does not reasonably believe are relevant or that will not be supported by admissible evidence; assert personal knowledge of facts in issue except when testifying as a witness; ask irrelevant questions intended to degrade a witness; or state a personal opinion about the justness of a cause, the credibility of a witness, or the culpability of a civil litigant. Rule 3.4(e), Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 3.4(e).

Counsel should conduct themselves with dignity and propriety, should not allude to the personal history or peculiarities of opposing counsel, should avoid colloquies between counsel, and should treat adverse witnesses and suitors with fairness and due consideration. Abusive language or offensive personal references are prohibited. The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Rule 12, General Rules of Practice for the Superior and District Courts.

Examples:

Calling witness/party a liar - improper, and may be so grossly improper so as to entitle a party to a new trial when the court fails to intervene *ex mero motu*. *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 98 (1999).

> In *Couch*, plaintiff's counsel made a number of comments about the truthfulness of defense witnesses, including: (1) "There is nothing worse than a liar because you can't protect yourself from a liar.... [T]hese people, and all the doctors that they paraded in here who told you lie, after lie, after lie"; (2) "They lied to your face, blatantly. They didn't care. They tried to make fools of everybody in the courtroom"; (3) "In your face lies"; (4) " ... they knew before they put their hands on the Bible that they were going to tell those lies and [Defendants' attorney] put them up anyway. That's heavy. That's a heavy accusation"; (5) "Well, I don't know what you call it but that's a lie. That's not even-that's not shading the truth ... How is that not a lie? How is that not a lie?"; (6) "So you see, when I say a lie, okay, I want the record to reflect that I mean a lie"; (7) "Now let me ask you this, how do you think that they intend to get out from under all these lies?"; (8) "This is another blatant lie"; (9) "When they parade these witnesses in one after another and lied to your face. I mean, they were not even smooth about it." Defendants only objected to one of these comments. As to that comment, the Court of Appeals held that "[t]his comment alone is not sufficiently prejudicial to entitle the defendants to a new trial." The court then held that the other statements were not so grossly improper as to entitle defendants to a new trial because the court failed to intervene *ex mero motu.*
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> ***Couch* was affirmed by the Supreme Court but stripped of its precedential value. All of the participating Justices viewed counsel's conduct as grossly improper and in violation of Rule 12 of the General Rules of Practice and the Rules of Professional Conduct, and the Court remanded the case for an appropriate sanction. The Justices all agreed that the court erred in not granting the defendant's objection and not intervening *ex meru motu*, but split 3:3 as to whether the error was prejudicial. 351 N.C. 92.**

Reading facts and decision of other cases – Counsel may read from published opinions, and even recount some of their facts, but may not use these to suggest that the jury should return a favorable verdict: "Counsel may not properly argue: The facts in the reported case were thus and so; in that case the decision was that there was no negligence (or was negligence); the facts in the present case are the same or stronger;

therefore, the verdict in this case should be the same as the decision there." *Wilcox v. Glover*, 269 N.C. 473, 479 (1967).

References to insurance – During the trial of a case it is improper to mention insurance in either a positive or negative manner. *Scallon v. Hooper*, 58 N.C. App. 551, 556 (1982); Rule 411, N.C. Rules of Evidence. For example, it was unfair and improper for defendant's counsel, in a wrongful death action, to say that the defendant would be "legally obligated to pay every single dollar of [the] verdict" and that the jury should deal "cautiously and fairly with the estate and the property" of the defendant. References to the relative wealth or poverty of the parties are generally improper (unless relevant, for example, to punitive damages), and statements also implied that defendant lacked insurance. *Id.* at 556.

Wealth or poverty of parties – Impermissible unless relevant to the dispute (e.g., to punitive damages). *E.g.*, *Watson v. White*, 309 N.C. 498 (1983) (Trial court erred in failing to sustain plaintiff's objection to the following references to the defendant's family: "Can you imagine what a low jury verdict would do to that family…. Can you imagine what a jury verdict, a low jury verdict, a little one, five thousand dollars, would do to that little family."); *Scallon*, 58 N.C. App. at 556 (reference to relative wealth of parties improper).

References to matters outside the record – Counsel may not go outside the record and inject into his argument facts of his own knowledge, or other facts not included in the evidence. *Wilcox v. Glover*, 269 N.C. 473, 480 (1967). For example, defense counsel may not argue that uncalled defense witnesses would have supported defendant's testimony. *Crutcher v. Noel*, 284 NC 568 (1974).

Impugning a party's character and motives/personal attack: Trial court erred by refusing to grant a new trial in wrongful death and personal injury actions. During closing argument, defense counsel argued:

> (i) Any money that you will award will go to the lawyers; this is a lawyers case, money, money, money! The lawyers brought this case, it is for their benefit. All I see is their financial benefit. What is the world coming to? It is all for money.
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> (ii) Is it Christian to sue for money? Is it Christian for a stepdaughter to sue her stepfather who was going to take care of her? It's as unchristian as Jim and Tammy Bakker.
>
> (iii) Defense counsel pointed to the 10 commandments and said: Suits like this should not be brought.
>
> (iv) There will be a reckoning on Judgment Day for persons who are greedy and how will these people defend this.

Although plaintiff objected to this argument, and the trial court sustained the objection, the court of appeals held that a new trial was warranted: "[T]his personal assault on plaintiffs, calculated to interject religious values and criticism of the legal profession into an automobile negligence action, is in no way supported by the evidence and constituted an abuse of counsel's privilege to argue his case. Counsel has no privilege to humiliate and degrade plaintiffs in the eyes of the jury." *Corwin v. Dickey*, 91 N.C. App. 725 (1988).

Curative instruction:

When an objection is made to improper argument, it is not sufficient for the court merely to stop the argument – the court should plainly and unequivocally instruct the jury not to consider the improper argument, either at the time or when instructing the jury. *Wilcox v. Glover*, 269 N.C. 473, 478 (1967) (Where plaintiff objected to defense counsel's improper reading from other cases, "the trial judge should have promptly sustained the objection, directed counsel to desist from so comparing the facts of the reported cases with the one on trial and instructed the jury to disregard this portion of counsel's argument, or he should have so instructed the jury in his charge so specifically as to leave no doubt in the minds of the jurors that such excerpts from the former decisions … were not to be considered by them in determining whether or not these plaintiffs were injured by the negligence of [defendant].").

IV. Jury Instructions

Charge Conference

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference. Rule 21, General Rules of Practice.

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. Requests must be submitted

before the judge begins to charge the jury; however, the judge has discretion to consider requests whenever they are made. After submission to the judge, requests should be filed with the clerk as part of the record. G.S. § 1-181; Rule 21, General Rules of Practice; *E.g., Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331 (2000) (judge had discretion, after completing jury charge, to elicit requests for special instructions from the parties and to receive a handwritten request for a particular instruction from a party).

"[W]hen a request is made for a specific instruction, correct in itself and supported by evidence," the court need not adopt the precise language of the requested instruction but must give the instruction in substance. *Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 335 (2000).

To show that the trial court erred in refusing to give a particular instruction, plaintiff must show: (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury. *Carrington v. Emory*, 635 S.E.2d 532 (N.C. Ct. App. 2006).

The court should not inform the jury that a particular instruction is being given at the request of a party. *McDougald v. Doughty*, 27 N.C. App. 237, 238-39 (1975).

Examples:

> *Robinson v Seaboard S. R., Inc*., 87 NC App 512 (1987): Although defendant was correct that a violation of its own internal safety rules was only evidence of negligence, and not negligence *per se*, trial court was not required to adopt proposed instruction exactly as submitted. The court gave the substance of the instruction by instructing jurors that "obstructions [reducing visibility in violation of defendant's internal safety rules] in themselves do not constitute negligence."
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> *Love v. Pressley*, 34 N.C. App. 503, 513 (1977): Trial court properly gave "greater weight of the evidence" instruction following language in pattern jury instructions, rather than in language requested by party.
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> *McDougald v. Doughty*, 27 N.C. App. 237, 238-39 (1975): In giving negligence charge, court should not have prefaced instruction by saying, "I have been asked by counsel to read to you the following…" However, there was no prejudicial error when charge as a whole made clear that this was the court's instruction on the law and not merely the contention of one party.

Jury Instructions – Particular Issues

Stating parties' contentions

In instructing jury, the court need not state the contentions of the parties, but it is not error to do so. However, if the court states the contentions of one party, it must give equal stress to those of the opposing party. *Daniels v. Jones*, 42 N.C. App. 555, 558 (1979); N.C. Rule Civ. P. 51(a); *Searcy v. Justice*, 20 N.C. App. 559, 564 (1974) (court erred by discussing plaintiff's evidence carefully and at considerable length but summarizing defendant's evidence in only two sentences).

Expressing opinion on evidence

In charging the jury, the 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. N.C. Rule Civ. P. 51(a).

Examples:

Searcy v. Justice, 20 N.C. App. 559 (1974): Trial court erred by suggesting that more weight should be attached to plaintiff's testimony than to evidence submitted by defendant.

Mack Fin. Corp. v. Harnett Transfer, Inc., 42 N.C. App. 116, 123 (1979): Trial court did not improperly express opinion on evidence by instructing jury to "examine [plaintiff's exhibit] very carefully."

Worrell v. Hennis Credit Union, 12 N.C. App. 275 (1971): Trial court conveyed an opinion on evidence and gave unequal stress to parties' contentions; among other things, court sustained its own objection to 10 questions posed by defense counsel to a defense witness and one question posed by defense counsel on cross-examination, and by striking certain testimony introduced by defendant, without voicing any objection to questions or evidence offered by plaintiff. Although court may control and regulate the conduct of trial, including striking evidence without objection, court's actions suggested "judicial leaning" towards plaintiff.

Henderson v. Matthews, 26 N.C. App. 280, 282-83 (1975), *vacated on other grounds*, 290 N.C. 87 (1976): During jury instructions, trial court improperly expressed an opinion on the evidence by referring to "some discrepancy" in the testimony of a witness, and again referring to "contradictory testimony."

Williford v. Jackson, 29 N.C. App. 128 (1976): Court's statement that one witness's testimony "corroborated to a considerable extent" the testimony of a second witness improperly expressed an opinion on the evidence.

Additional instructions after submission of case; deadlocked juries

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. Rule 21, General Rules of Practice.

In cases where the jury is deadlocked, the court may ask it to resume deliberations but may not give an instruction that may coerce a verdict.

Examples:

County of Lenoir ex rel. Dudley v. Dawson, 60 N.C. App. 122 (1982): Court erred by instructing jury, upon failure to reach a verdict, that a mistrial would mean that another jury would have to be selected to hear the case again and that it would take another week or more of the court's time to hear the case again.

Cozart v. Chapin, 39 N.C. App. 503 (1979): No error in the following instruction, among others: "I would say to the jury then, that I know that there are occasions where reasonable men and women simply cannot agree. At this point, however, the law requires me to instruct you that it is your duty, if you can do so, to resolve any differences between yourselves as reasonable men and women, And without doing damage or injury to your own scruples, to reach a verdict in this matter, if it is possible for you to do so. (It will be very expensive for both parties in this matter to retry this case. If you are not able to reach a verdict in the matter, then I will have no choice but to declare a mistrial and to order a retrial of the matter before another jury at another session of court. The matter is important to both the plaintiff and the defendant, and as I said, the retrial will be an expensive matter. So, I'm going to ask you please to go back to the jury room again and reconsider the matter, consider it further and see if you can reach a verdict in the matter. You have been out for some period of time now that is approaching one complete day, but I would like for you to consider the matter further, if you will. If you have not reached a verdict by five o'clock this afternoon, when we would normally recess for the day, I intend to bring you back at that point and we'll decide where to go from there, but you may retire now and resume your deliberations."

Sample instruction: (N.C.P.I. – Civil 150.50)

> Members of the jury, I am going to ask you to resume your deliberations in an attempt to return a verdict. I have already instructed you that your verdict must be unanimous [unless parties have agreed to a non-unanimous verdict under Rule 48]--that is, each of you must agree on the verdict. I shall give you these additional instructions:
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.
>
> Second, each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
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> Third, in the course of your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.
>
> Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> Please be mindful that I am in no way trying to force or coerce you to reach a verdict. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences, if such is possible without the surrender of conscientious convictions, and to reach a verdict.
>
> I will now let you resume your deliberations.

Objections to charge

> At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection. Rule 21, General Rules of Practice.

To properly preserve a challenge to jury instructions for appellate review, a party must object to the instruction, and state the grounds for the objection, before the jury retires to consider its verdict. Rule 10(b)(2), N.C Rules of Appellate Procedure. This presumes the party had the opportunity to make the objection out of the hearing of the jury and, on request of a party, out of the presence of the jury. *See id.*; *Lumley v. Capoferi*, 120 N.C. App. 578 (1995) (plaintiff failed to preserve objection to proximate cause instruction by failing to object during charge conference and also failing to object when, after charging jury, trial court asked whether the parties had anything further).

A request made at the charge conference to submit a particular instruction is sufficient to preserve the issue for appeal. *Roberts v. Young*, 120 N.C. App. 720, 726 (1995).

IV. Jury Deliberations and Verdict – Particular Issues

Exhibits in jury room

Trial exhibits introduced into evidence can only be submitted to the jury room during deliberations if both parties consent. *Bass v. Johnson*, 149 N.C. App. 152, 162 (2002) (affirming trial court's decision to submit to the jury only the three interrogatories that defendant agreed to have submitted); *Nunnery v. Baucom*, 135 N.C. App. 556, 559 (1999).

Failure to object does not waive the error – specific consent of both parties is required. *Nunnery v. Baucom*, 135 N.C. App. 556, 559 (1999). Nevertheless, party must show prejudice to obtain new trial. *Id.* at 560.

Justification for the rule: "The jury ought to make up their verdict upon evidence offered to their senses, *i.e.,* what they see and hear in the presence of the court, and should not be allowed to take papers, which have been received as competent evidence, into the jury room, so as to make a comparison of hand-writing, or draw any other inference which their imaginations may suggest, because the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court." *Watson v. Davis*, 52 N.C. 178, 181 (1859).

Proper procedure: "We find no authority, however, which prohibits the court from permitting the jury to view the exhibits in the courtroom in its presence and in the presence of the parties. In that setting, where subject to objections by the parties and supervision by the court, the viewing may aid the fact-finding process." *Nelson v. Patrick*, 73 N.C. App. 1, 14 (1985) (after jury requested to view plaintiff's medical bills during deliberations, and defendant objected to sending bills to jury room, court had discretion, over defendant's objection, to allow jurors to return to courtroom to view the evidence). *See also Surrayt v.*

Newton, 99 N.C. App. 396, 409 (1990) (no error in allowing jury to return to open court to examine exhibits without communication among jurors).

Comment on verdict prohibited

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. N.C. Rule Civ. P. 51(c).

Not reversible error unless comments deprive litigant of right to fair trial – unlikely after verdict has been reached. *Haymore v. Thew Shovel Co.,* 116 N.C. App. 40 (1994) (no prejudice in following comment after verdict: "Since you're not going to be involved in any other matters, I say to you I agree particularly with your verdict with respect to the third issue on negligence and the Court felt like it was very close to being a matter of law, there was insufficient evidence to take the showing of negligence as to the defendant and third-party defendants beyond the realm of conjecture and speculation and surmise.").

General and Special Verdicts; Inconsistency

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. N.C. Rule Civ. P. 49(a).

Judgment should not be entered on an inconsistent verdict. *Pitcock v. Fox*, 119 N.C. App. 307, 311 (1995). When jury's findings are indefinite or inconsistent, judge may give additional instructions and direct jurors to retire again to bring in a proper verdict, but may not tell jurors what their verdict should be. *Southern Nat'l Bank v. Pocock*, 29 N.C. App. 52, 59 (1976).

Where a special finding of facts is inconsistent with the general verdict, the former controls, and the judge shall give judgment accordingly. N.C. Rule Civ. P. 49(d).

Examples:

Pitcock v. Fox, 119 N.C. App. 307 (1995): Trial court erred in entering judgment on inconsistent verdict. Jury found that plaintiffs did not trespass on defendants' property but also found that plaintiffs owed $430 in damages. "The jury having answered the issue of trespass in favor of plaintiffs, it follows that defendants were not entitled to recover damages, and the jury's answer to Issue 3 awarding damages must be stricken."

Kindred of North Carolina, Inc. v. Bond, 160 N.C. App. 90 (2003): Verdict not inconsistent where jury could permissibly find seller not liable for unfair trade practices but liable on misrepresentation claim.

Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 59 (1976): Where court noted inconsistency in jury's answers to questions relating only to amount of damages, court had discretion either to resubmit all issues or to resubmit only on issues related to damages.

Polling jury & juror dissent

Parties have the right to have the jury polled to ensure that the verdict is the unanimous decision of the jurors. "The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the unanimous verdict …. If it is found by such poll that one juror does not assent to the verdict as tendered, such verdict cannot be accepted, for it is not as a matter of law the unanimous decision of the jury." *Lipscomb v. Cox*, 195 N.C. 502, 505 (1928).

When polling reveals that the verdict is not unanimous, the court should not accept the verdict but may direct the verdict to deliberate further. *Norburn v Mackie*, 264 NC 479 (1965).

Examples:

Holstein v Etna Oil Co., 36 NC App 258 (1978): Plaintiff entitled to a new trial where polling did not establish unanimous verdict – juror did not clearly and unequivocally assent to verdict:

> CLERK: . . . you have answered the first issue no. Is this your answer and do you still assent thereto?
>
> JUROR NO. 2: Well, it was not proven beyond a reasonable doubt. If you're saying that, then I would have to say no.
>
> …
>
> CLERK: . . . you have answered the first issue "No." Is this your answer and do you still assent thereto?
>
> JUROR NO. 2: I would still say no.

Nolan v Boulware, 21 N.C. App. 347 (1974): Although juror expressed some indecision, he clearly and unequivocally indicated assent to the verdict:

> ASSISTANT CLERK: Is this your verdict?
>
> JUROR: Yes, ma'am.
>
> ASSISTANT CLERK: Do you still assent thereto?
>
> JUROR: (after a pause): May I ask a question?
>
> THE COURT: No, just answer the question.
>
> JUROR: (There is a pause and no answer.)
>
> THE COURT: Do you understand the question?
>
> JUROR: Yes, sir, I understand the question. I'm sorry, I don't mean to-I misunderstand some aspects of this case. I will have to admit that, and I'm sorry, I'm not very sure, I rendered a verdict. I said "yes," and I guess I will stand before it.
>
> THE COURT: Would you repeat the question again, please.
>
> ASSISTANT CLERK: Your foreman has returned a verdict of "yes" to the third issue. Is this your verdict?
>
> JUROR: Yes, ma'am.
>
> ASSISTANT CLERK: Do you still assent thereto?
>
> JUROR: Yes, ma'am.

Sheppard v Andrews, 7 N.C. App. 517 (1970): In suit for breach of option contract to convey land, the jury poll revealed a unanimous verdict, even though one juror initially attempted to condition his assent to the verdict. Initially, the juror answered that he agreed with the verdict "with the understanding that tender means money not offer." The judge explained that the juror could not accept the verdict with any conditions, and the juror ultimately stated that he had agreed to the verdict and still assented to it.

Appendix of rules and statutory provisions

Rules of Appellate Procedure

N.C. Rule App. Pro. 10 (Assigning Error on Appeal)

…

(b) Preserving Questions for Appellate Review.

…

(2) *Jury Instructions; Findings and Conclusions of Judge*. A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

Rules of Civil Procedure

N.C. Rule Civ. P. 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.

N.C. Rule Civ. P. 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 of 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).

N.C. Rule Civ. P. 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.

N.C. Rule Civ. P. 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.

General Rules of Practice for the Superior and District Courts

RULE 9. Opening Statements

At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense.

The parties may elect to waive opening statements.

Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

RULE 10. Opening and Concluding Arguments

In all cases, civil and criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question

arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor.

In a civil case, where there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise.

RULE 12. Courtroom Decorum

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court….Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration.

Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators.

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court.

RULE 21. Jury Instruction Conference

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted.

Revised Rules of Professional Conduct

Rule 3.4 – Fairness to opposing party and counsel

A lawyer shall not …

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

Constitutional Provisions

N.C. Constitution, Article I § 25: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

General Statutes

G.S. § 1-181. Requests for special instructions

(a) Requests for special instructions to the jury must be—

(1) In writing,
(2) Entitled in the cause, and
(3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same.

G.S. § 9-3. Qualifications of prospective jurors

All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who can hear and understand the English language, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony (or if convicted of a felony or having pleaded guilty or nolo contendere to an indictment charging a felony have had their citizenship restored pursuant to law), and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause.

§ 9-14. Jury sworn; judge decides competency

The clerk shall, at the beginning of court, swear all jurors who have not been selected as grand jurors. Each juror shall swear or affirm that he will truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before him and render true verdicts according to the evidence. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any juror; and if by reason of such challenge any juror is withdrawn from a jury being selected to try a case, his place on that jury shall be taken by another qualified juror. The presiding judge shall decide all questions as to the competency of jurors.

§ 9-15. Questioning jurors without challenge; challenges for cause

(a) The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.

(b) It shall not be a valid cause for challenge that any juror, regular or supplemental, is not a freeholder or has not paid the taxes assessed against him.

(c) In civil cases if any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge. In criminal cases challenges are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes.

§ 9-18. Alternate jurors

(a) Civil Cases. Whenever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial panel of jurors in the case. Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have after the selection of the regular trial panel. Alternate jurors shall be sworn and seated near the jury with equal opportunity to see and hear the proceedings and shall attend the trial at all times with the jury and shall obey all orders and admonitions of the court to the jury. When the jurors are ordered kept together in any case, the alternate jurors shall be kept with them. An alternate juror shall receive the same compensation as other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. If more than one alternate juror has been selected, they shall be available to become a part of the jury in the order in which they were selected.

…

§ 9-19. Peremptory challenges in civil cases

The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the prospective jurors in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court.

§ 9-20. Civil cases having several defendants; challenges apportioned; discretion of judge

When there are two or more defendants in a civil action, the presiding judge, if it appears that there are antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law, or he may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final.

§ 7A-97. Court's control of argument.

In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.