

tion 504(b)(1)(C) of Title 5, and to civil actions and adversary adjudications described in section 2412 of Title 28, Judiciary and Judicial Procedure, which are pending on, or commenced on or after Oct. 1, 1981, see section 208 of Pub. L. 96-481, set out as an Effective Date note under section 504 of Title 5, Government Organization and Employees.

TITLE VI. TRIALS

Rule 38. Right to a Jury Trial; Demand

(a) **RIGHT PRESERVED.** The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) **DEMAND.** On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) **SPECIFYING ISSUES.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) **WAIVER; WITHDRAWAL.** A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) **ADMIRALTY AND MARITIME CLAIMS.** These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (act of June 19, 1934, 48 Stat. 1064, U.S.C., Title 28, §723c [see 2072]), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill.Rev.Stat. (1937) ch. 110, §188; 6 Tenn.Code Ann. (Williams, 1934) §8734; compare Wyo.Rev.Stat. Ann. (1931) §89-1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn.Gen.Stat. (1930) §5624; Hawaii Rev.Laws (1935) §4101; 2 Mass.Gen.Laws (Ter.Ed. 1932) ch. 231, §60; 3 Mich.Comp.Laws (1929) §14263; Mich.Court Rules Ann. (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r.r. 2 and 6; and Ontario Jud.Act (1927) §57(1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz.Rev.Code Ann. (Struckmeyer, 1928) §3802; Calif.Code Civ.Proc. (Deering, 1937) §631, par. 4; Iowa Code (1935) §10724; 4 Nev.Comp.Laws (Hillyer, 1929) §8782; N.M.Stat. Ann. (Courtright, 1929) §105-814; N.Y.C.P.A. (1937) §426, subdivision 5 (applying to New York, Bronx, Richmond,

Kings, and Queens Counties); R.I.Pub.Laws (1929), ch. 1327, amending R.I.Gen.Laws (1923) ch. 337, §6; Utah Rev.Stat. Ann. (1933) §104-23-6; 2 Wash.Rev.Stat. Ann. (Remington, 1932) §316; England (4 days after notice of trial), Administration of Justice Act (1933) §6 and amended rule under the Judicature Act (The Annual Practice, 1937), O. 36, r. 1; Australia High Court Procedure Act (1921) §12, Rules, O. 33, r. 2; Alberta Rules of Ct. (1914) 172, 183, 184; British Columbia Sup.Ct.Rules (1925) O. 36, r.r. 2, 6, 11, and 16; New Brunswick Jud. Act (1927) O. 36, r.r. 2 and 5. See James, *Trial by Jury and the New Federal Rules of Procedure* (1936), 45 Yale L.J. 1022.

Rule 81(c) provides for claim for jury trial in removed actions.

The right to trial by jury as declared in U.S.C., Title 28, §770 [now 1873] (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies U.S.C., Title 28, [former] §773 (Trial of issues of fact; by court).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

See Note to Rule 9(h), supra.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Language requiring the filing of a jury demand as provided in subdivision (d) is added to subdivision (b) to eliminate an apparent ambiguity between the two subdivisions. For proper scheduling of cases, it is important that jury demands not only be served on other parties, but also be filed with the court.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 38 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Rule 39. Trial by Jury or by the Court

(a) **WHEN A DEMAND IS MADE.** When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) **WHEN NO DEMAND IS MADE.** Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) **ADVISORY JURY; JURY TRIAL BY CONSENT.** In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of

right, unless the action is against the United States and a federal statute provides for a nonjury trial.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The provisions for express waiver of jury trial found in U.S.C., Title 28, [former] § 773 (Trial of issues of fact; by court) are incorporated in this rule. See rule 38, however, which extends the provisions for waiver of jury. U.S.C., Title 28, [former] § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co. v. Condon Nat. Bank*, 260 U.S. 235 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif.Code Civ.Proc. (Deering, 1937) § 592; 1 Colo.Stat. Ann. (1935) Code Civ.Proc., ch. 12, § 191; Conn.Gen.Stat. (1930) § 5625; 2 Minn.Stat. (Mason, 1927) § 9288; 4 Mont.Rev.Codes Ann. (1935) § 9327; N.Y.C.P.A. (1937) § 430; 2 Ohio Gen.Code Ann. (Page, 1926) § 11380; 1 Okla.Stat. Ann. (Harlow, 1931) § 351; Utah Rev.Stat. Ann. (1933) § 104-23-5; 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 315; Wis.Stat. (1935) § 270.07. See [former] Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U.S.C., Title 28, [former] § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co. v. Savannah River Lumber Co.*, 280 Fed. 358 (C.C.A.4th, 1922); *Fed. Res. Bk. of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n*, 8 F.(2d) 922 (C.C.A.9th, 1925), cert. den. 270 U.S. 646 (1926); *Watt v. Starke*, 101 U.S. 247, 25 L.Ed. 826 (1879).

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 39 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

U.S.C., Title 28, [former] § 769 (Notice of case for trial) is modified. See [former] Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also [former] Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see U.S.C., Title 28, § 47 [now 1253, 2101, 2325] (Injunctions as to orders of Interstate Commerce Commission); § 380 [now 1253, 2101, 2284] (Injunctions alleged unconstitutionality of state statutes); § 380a [now 1253, 2101, 2284] (Same; Constitutionality of federal statute); [former] § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, [former] § 44 (Proceedings in equity under interstate commerce laws; expedition of suits).

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 40 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The best methods for scheduling trials depend on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is

not useful to limit or dictate the provisions of local rules.

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

- (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
- (ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) DISMISSING A COUNTERCLAIM, CROSSCLAIM, OR THIRD-PARTY CLAIM. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

- (1) before a responsive pleading is served; or
- (2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) COSTS OF A PREVIOUSLY DISMISSED ACTION. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

- (1) may order the plaintiff to pay all or part of the costs of that previous action; and
- (2) may stay the proceedings until the plaintiff has complied.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). Compare Ill.Rev.Stat. (1937) ch. 110, § 176, and *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 26.