

## Alabama Rules of Civil Procedure

### VI. TRIALS

#### Rule 38.

##### Jury trial of right.

(a) *Right Preserved.* The right of trial by jury as declared by the Constitution of Alabama or as given by a statute of this State 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 the commencement of the action and not later than thirty (30) days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party, and such demand shall be deemed to be a demand for a struck jury.

In all actions in the circuit court brought by appeal or certiorari from any judgment of an inferior court, the party filing the notice of appeal or action for writ of certiorari 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 not later than ten (10) days after filing said notice or petition; and any other party may demand a trial by jury of any issue triable of right by a jury by, not more than ten (10) days after that party has been served with such notice of appeal or petition for writ of certiorari, serving upon the remaining parties a demand therefor in writing. Such demand may be indorsed upon said notice or petition or other pleading of the party.

(c) *Same: Specification of issues.* In the demand a party may specify the issues which the party wishes so tried; otherwise, the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within ten (10) days after service of the demand 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 of fact in the action.

(d) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties except where an opposing party is in default under Rule 55(a). The failure to appear, in person or by counsel, at the trial is a

waiver of trial by jury. A party seeking affirmative relief may withdraw that party's demand for a jury as to any defaulting party without the consent of that party and have that party's damages assessed by the court without a jury.

(dc) *District court rule.* Rule 38 does not apply in the district courts.

[Amended 2-9-82; Amended eff. 10-1-95.]

### **Committee Comments on 1973 Adoption**

In form this rule is similar to Federal Rule 38. Indeed it differs from that rule only in an alteration of the language of subdivision (a), the provision for jury trial in review of inferior court decisions, and the addition of an exception as to default matters to subdivision (d). Nevertheless, the rule is generally consistent with present Alabama procedure.

Subdivision (a) is identical with Constitution 1901, § 11, and thus preserves the right to jury trial precisely as it has been known heretofore in Alabama. See generally Jones, *Trial by Jury in Alabama*, 8 Ala.L.Rev. 274 (1956). Because law and equity are now to be merged, there will be cases in which issues to be tried to the jury are combined with issues to be tried to the court. But the basic test is clear: if an issue is of a sort which heretofore would have been tried to a jury, then the party has a constitutional right, expressly reaffirmed by Rule 38(a), to have it tried to a jury under the merged procedure. See 5 Moore's *Federal Practice*, §§ 38.11, 38.16-38.29 (2d ed. 1971). See also, Donaldson and Walls, *Merger of Law and Equity in Alabama*, 33 Ala.Law 134 (1972).

Subdivision (b) requires a party wishing a jury trial to demand this mode of trial in writing not later than 30 days after the service of the last pleading directed to the issue. Failure to make a timely demand for a jury is a waiver of the right to jury trial. Rule 38(d). A party may specify which issues he wishes tried to the jury; in the absence of such a specification, he is deemed to have demanded jury trial as to all the issues triable to the jury. Though some details differ, this general scheme is already in effect in Alabama by virtue of Code 1940, Tit. 7, §§ 260, 265. Note that the Rule treats a jury demand to be a demand for a struck jury.

Title 7, § 265, Code of Alabama (1940) provided that a jury demand could not be withdrawn without the consent of the opposing parties. Tit. 7, § 260 permitted the plaintiff to withdraw his demand for jury trial when the defendant is in default. Prior to adoption of the latter statute, it had been held in Alabama that damages must be determined by the jury if a jury was once demanded. *Ex parte*

*Bozeman*, 213 Ala. 223, 104 So. 402 (1925). This rule alters prior practice somewhat in that it treats default as a waiver of a prior jury demand. It preserves the right of the Plaintiff to withdraw his jury demand upon the Defendant's default. However, it treats the default itself as a waiver of the defending party's prior demand.

**Committee Comments to October 1, 1995,  
Amendment to Rule 38**

The amendment is technical. No substantive change is intended.