

## Alabama Rules of Civil Procedure

### VI. TRIALS

#### Rule 39.

##### **Trial by jury or by the court.**

(a) *By jury.* When trial by jury has been demanded 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 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 record, 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 of this state.

(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 jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

(c) *Advisory jury and trial by consent.* The court upon motion or of its own initiative may try with an advisory jury any issue not triable of right by a jury or for which a jury trial has been waived, or, in any case with the consent of both 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.

(dc) *District court rule.* Rule 39 does not apply in the district courts.

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

Rule 39 implements the union of law and equity by providing that issues as to which there is a right to jury trial and a jury has been properly demanded shall be tried to the jury, while other issues are tried to the court. The purpose of the rule is to remove the former expensive and time-losing requirement of two separate suits to give a litigant his legal as well as his equitable relief. *Bruckman v. Holzner*, 152 F.2d 730 (9<sup>th</sup> Cir.1946). As to the procedure under the rule, see Wright & Miller, *Federal Practice and Procedure, Civil*, § 2331 et seq. (1971). See also Rule 2 and comments thereto.

Note that the Rule 39(b) power for court ordered trial by jury can only occur upon motion of a party.

Rule 39(c) permits the court to impanel an advisory jury where it desires such assistance. The verdict of the advisory jury is merely for the purpose of “enlightening the conscience of the Chancellor.” The trial judge continues to have the responsibility for decision, and must prepare his own findings of fact and conclusions of law, pursuant to Rule 52(a). Such an advisory jury is already a part of Alabama practice. *Hill v. Lindsey*, 223 Ala. 550, 137 So. 395 (1931); *Lucas v. Scott*, 247 Ala. 183, 24 So.2d 540 (1945). The language of Rule 39(c) differs from that of the corresponding federal rule in order to provide specific authorization for impaneling of an advisory jury where the parties have waived jury trial, as well as in cases where they had no right to jury trial. Federal cases have been divided as to whether an advisory jury can be used in such circumstances. Compare *Lumbermen’s Mutual Casualty Co. v. Timms & Howard, Inc.*, 108 F.2d 497 (2d Cir.1939), and *Brock v. Farmer*, 291 S.W.2d 531, 534 (Ky.1956), with *Hargrove v. American Central Ins. Co.*, 125 F.2d 225 (10<sup>th</sup> Cir.1942) and *Cudmore v. Smith*, 260 F.Supp. 760 (D.Conn.1966).

The final half of Rule 39(c) allows the court to submit the case to a jury as if jury trial were of right. In the rare case where this procedure is utilized, the jury must be chosen, instructed, and its verdict received exactly as if jury trial had been a matter of right. This procedure may be used only with the consent of the court and of all the parties.