VI. TRIALS

RULE 38. JURY TRIAL OF RIGHT IN THE SUPERIOR COURT

(a) Right Preserved; Number. The right of trial by jury as declared by the Constitution of the State of Maine or as given by a statute shall be preserved to the parties inviolate.

(b) Demand. In an action in the Superior Court, any plaintiff may demand a trial by jury of any issue triable of right by a jury by filing a demand and paying the fee therefor as required by the scheduling order entered by the court. For cases required to have an alternative dispute resolution conference pursuant to Rule 16B, payment of the jury fee shall be made as required by Rule 16B(i).

(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 a plaintiff demands trial by jury for none or only some of the issues, the defendant shall file within 10 days a demand for trial by jury of any other or all of the issues of fact in the action and, in the absence of a demand by the plaintiff, pay the jury fee upon filing the demand.

(d) Waiver. The failure of a party to make a demand and pay the fee as required by this rule constitutes a waiver by that party of trial by jury; provided that for any reason other than a party's own neglect or lack of diligence, the court may allow a party to file and serve a demand upon all other parties within such time as not to delay the trial.

(e) Withdrawal. A demand for trial by jury made as provided in this rule may not be withdrawn without the consent of all parties.

Advisory Notes
July 2003

Rule 38(a) is amended to strike the last sentence, which duplicates provisions regarding numbers of jurors that also appear in M.R. Civ. P. 48(b). Concurrently, Rule 48(b) is being amended to recognize changes to 14 M.R.S.A. § 1204 governing numbers of jurors. Those changes are discussed in the advisory notes to the amendment to Rule 48(b).

Advisory Committee's Note
May 16, 2001

The stricken language was a transition provision relating to cases filed prior to May 1, 1999. It is no longer relevant, as all cases filed prior to May 1, 1999, would have, by now, proceeded through the pretrial scheduling statement and jury fee payment process. The added language, effective January 1, 2002, recognizes that for cases subject to court-connected ADR in accordance with Rule 16B, payment of the civil jury fee is deferred, in accordance with M.R. Civ. P. 16B(i), until 150 days after the date of the scheduling order entered in accordance with M.R. Civ. P. 16(a). Cases which are exempt from court-connected ADR by the provisions of Rule 16B or by court order, must continue to pay the jury fee with the demand for the jury trial or upon exemption, as presently.

Advisory Committee's Notes
May 1, 1999

Amendments are made to subdivisions (b), (c) and (d) to conform jury demand practice to the procedure that would be in effect under Rule 16 and the scheduling order issued under the authority of that rule. Parties will no longer file pretrial scheduling statements. Under the new Rule 16, the court issues a scheduling order automatically. That order requires a plaintiff requesting a trial by jury to file a demand for jury trial and pay the required fee within 20 days after the date of the order. In cases filed before May 1, 1999, the demand is made in the pre-trial scheduling statement and the fee is paid when the statement is filed. If the plaintiff does not request a trial by jury or requests a jury trial on only some of the issues, subdivision (c) now requires the defendant to file a demand for jury trial within 10 days. The scheduling order requires that the party demanding a jury trial on any issue pay the jury fee at the time of the demand. In short, Rule 38 and the scheduling order assign the plaintiff the initial responsibility to demand a jury trial. If the plaintiff demands a trial by jury, the defendant need do nothing further. If the plaintiff does not demand a trial by jury or limits the demand to certain issues, the defendant desiring the jury trial must respond promptly by filing the demand under subdivision (c) and, if the plaintiff made no demand, paying the fee. As subdivision (d) makes clear, the failure to make the demand and to pay the fee waives the right to trial by jury.

Advisory Committee's Notes
1988

Rule 38 is amended simultaneously with the amendments incorporating the Civil Case Flow Expedition Administrative Order in Rule 16 to provide a procedure for making a demand for trial by jury consistent with those amendments.

Rule 38(b) is amended to provide that a jury demand by any party is to be made in the pretrial scheduling statement as provided in new Rule 16(b)(1), rather than in the pretrial memorandum as formerly. Thus, language concerning cases in which no pretrial memorandum is filed has been eliminated.

Rule 38(c) requires the plaintiff in preparing the pretrial scheduling statement to include a jury demand or any specification of issues for jury trial requested by another party because the plaintiff has not made such a request. Language referring to the pretrial memorandum is eliminated.

Rule 38(d) provides that the right to trial by jury is waived by the failure of a party to include, or cause to be included, a jury demand in the pretrial scheduling statement. To assure that no party is deprived of the right by lack of opportunity to make such a request, or by failure of the plaintiff to comply with a request duly made, the rule provides that in such a case the court may allow a demand to be filed and served "within such time as not to delay the trial."

Rule 38(e) carries forward the present final sentence of subdivision (d) in a separate subdivision for purposes of clarity.

Advisory Committee's Note
January 3, 1978

This amendment is intended to implement the provisions of Chap. 102 of the Laws of 1977 which provides as follows

14 M.R.S.A. § 1204, last ¶, as amended by P.L.1975, c. 41, § 1, is repealed and the following enacted in its place:

> The Supreme Judicial Court may by rule provide for the trial of civil actions by juries of 6, 7 or 8 jurors ; provided that the parties to a civil action may stipulate that the jury may consist of any number of jurors less than provided by such rule; and provided further that any party to a civil action shall have the right to a jury consisting of 8 jurors if such party so requests before the day of the trial.

The change is intended to recognize the right of any party to a jury consisting of eight jurors. Amendments to Rules 47(c)(1), 47(c)(3), 47(d) and 48(b) deal with related matters, such as the number of peremptory challenges, the selection of alternate jurors and the stipulation for a jury consisting of less than eight jurors, and should be consulted in connection with this rule.

The Advisory Committee urges that in the interest of administrative economy, counsel continue to utilize, wherever possible, the six person jury. This can be done under the provisions of Rule 48(b) as amended this date. The Committee further suggests that the Justice conducting the final pre-trial conference make it a point to raise the matter of jury size for discussion at the final pre-trial conference and attempt to obtain a stipulation to a six person jury in accordance with the provisions of Rule 48(b).

Advisory Committee's Note
October 1, 1975

This amendment and corresponding changes in Rules 47 and 48 are made to implement 1975 Laws, c. 41, which amended the last sentence of 14 M.R.S.A. § 1204 to provide that civil actions might be tried "by juries of not less than 6 jurors" instead of the present minimum of eight. The exception already in the rule referring to the right of the parties to stipulate a smaller number under Rule 48(b) is in accord with language virtually identical to that rule which was added to § 1204 by the same amendment. *See* Advisory Committee's Notes to Rules 47, 48.

Advisory Committee's Note
May 15, 1974

This amendment, with accompanying amendments of Rules 16 and 39, clarifies an important area. When the rules were adopted in 1959, the prior Maine practice of setting a case for jury trial in the absence of an affirmative waiver thereof was retained in Rule 38, instead of the federal rule requiring a demand. See Field, McKusick and Wroth, *Maine Civil Practice* §§ 38.3, 38.5 (2d ed. 1970). The pre-trial memorandum practice adopted in the 1967 amendment of Rule 16, however, required that a jury be demanded in the pre-trial memorandum. The result has been in practical effect the adoption of the federal practice. The present amendments clarify any doubts as to the mechanics and effect of the jury demand by adopting pertinent provisions of the federal rules, with modifications to bring them in line with Maine practice.

Rule 38(b) sets forth the basic requirement of the demand, and makes clear that the demand is to be made in the pre-trial memorandum in the first instance, whether made by a moving party under Rule 16(a)(3) or a responding party under Rule 16(a)(4). In this respect., the rule works an improvement over Federal Rule 38(b), which requires that a demand be made within 10 days after service of the last pleading. Under the Maine rule, parties will be discouraged from making jury demands routinely in every case, because the demand is to be made at a time when the issues are clear enough to permit a realistic assessment of the practical need for, as well as the right to, jury trial in the case; moreover, unnecessary demands will be discouraged by the imminence of judicial scrutiny at the pre-trial conference. Where under Rule 16 the court under special circumstances specifically excuses the filing of a pre-trial memorandum, the jury demand must be made in a separate writing served within 7 days after the court excuses the pre-trial memorandum.

Rule 38(c) provides that a party may limit his jury demand to certain issues. In such a case an opposing party may make a demand for jury trial of other issues. If the original demand was made in a moving party's pre-trial memorandum, the opposing party's demand must be made in that party's responding memorandum. If the original demand was itself made in a responding memorandum or in a separate writing where pre-trial memoranda have been specifically excused by the court, any subsequent demand for jury trial on additional issues must be made by service of a separate writing within three days after service of the memorandum.

Rule 38(d) makes clear that failure to demand a jury as provided in subdivisions (b) and (c) is a waiver of the right to a jury. The rule further provides that a demand once made may be withdrawn only with the consent of the parties. This provision is to protect other parties, also wishing a jury, who may have relied on the first party's demand.

Advisory Committee's Note
January 1, 1973

The Special Session of the 105th Legislature enacted 1971 Laws, c. 581 to become effective June 9, 1972. Section 1 added the following sentence to 14 M.R.S.A. § 1204:

> The Supreme Judicial Court may by rule provide for the trial of civil actions only by juries of 8 jurors.

Section 2 of the Act added the following sentence to 14 M.R.S.A. § 1354:

> If the Supreme Judicial Court has by rule provided for the trial of civil actions by juries of 8 jurors, then 6 jurors may agree on a verdict and return it into court as the verdict of the jury, and the trial judge shall so instruct the jury.

Thus the principle of the 9-3 majority verdict permitted in civil cases by a 1969 enactment (14 M.R.S.A. § 1354, added by 1969 Laws, c. 310) was carried over by the Legislature into the jury reduced in size.

The amendments being made simultaneously to Rules 38, 47 and 48 are designed to implement this permissive 1972 statute authorizing the Court to institute 8-member juries (with 6-juror majority verdicts). Rule 38(a) is amended to conform with amended 14 M.R.S.A. § 1204, but preserves the present power of the parties to agree on a smaller jury.

In evaluating the policy considerations involved in reducing the size of the jury, the memorandum dated November 29, 1971, issued by Judge Edward T. Gignoux in connection with the adoption by Local Rule of 6-member civil juries in the Federal Court for the District of Maine states the advantages to be derived, as follows:

> The six-member jury will expedite the trial of civil cases by saving time in calling, impaneling, and otherwise managing the jury panel. The voir dire examination will not consume the time it now does. An appreciable saving of time will also result in the jurors' examination of exhibits during trial. And, quite probably, the length of jury deliberation will be shortened. These benefits will result in a saving of time to the Court and to counsel.
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> Not the least significant benefit of the change to a six-member jury will be the substantial financial saving to the government. Federal Jury costs have been rising rapidly each year. Federal jurors now receive statutory compensation of $20 per day and a mileage and maintenance allowance, which in this District frequently runs into substantial sums because of the distances involved. The Report of the Director of the Administrative Office of the United States Courts shows that for the fiscal year 1971, jury fees and allowances in the federal courts amounted to almost $14,000,000. It is estimated that

> the six-member civil jury can reduce jury costs by at least $3,000,000 per year.
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> There is every reason to believe that six-member juries will function as effectively and fairly as 12-member juries. Such experiments which have been conducted support this conclusion, and the judges and trial lawyers in those districts which now provide for six-member juries have expressed satisfaction with them in practice.

See 2 Field, McKusick and Wroth, *Maine Civil Practice* 59, 60-61 (1972 Supp.).

In opinions announced on May 22, 1972, the United States Supreme Court in 5-4 decisions, with numerous concurring and dissenting opinions, has held that Louisiana's and Oregon's constitutional provisions permitting less than unanimous verdicts in certain criminal cases do not violate the Due Process Clause of the Fourteenth Amendment. *Johnson v. Louisiana*, 40 U.S.Law Week 4524 (9-3 verdicts) [406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)] and *Apodaca v. Oregon*, 40 U.S.Law Week 4528 (10-2 verdicts) [406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972)]. The purpose of the Louisiana provision was to "facilitate, expedite and reduce expense in the administration of justice." Thus so far as the United States Constitution is concerned, the states are free to institute (even in criminal cases) either both juries of less than 12, *Williams v. Florida, [supra]*, 399 U.S. 78, [90 S.Ct. 1893, 26 L.Ed.2d 446] (1970), and less than unanimous verdicts, *Johnson* and *Apodaca* cases, supra. In passing it should be noted that the Article I, Section 7 of the Maine Constitution, in quiring trial by jury in *criminal* cases, specifies that the jury "usual number and unanimity . . . shall be held indispensable." No such restriction appears in the *civil* jury provision of the Maine Constitution, Article I, Section 20. See Field, McKusick & Wroth, Maine Civil Practice § 48.1.

The Advisory Committee carefully considered recently expressed views in opposition to either reducing the size of the jury or permitting less than unanimous verdicts, Zeisel, "The Waning of the American Jury", 58 A.B.A. Journal 367 (April, 1972), and questioning the power of federal district courts to adopt six-member juries, Gibbons, "The New Minijuries: Panacea or Pandora's Box", 58 A.B.A.Journal 594 (June, 1972). The Committee found Judge Gignoux's practical arguments compelling, however, and felt that any constitutional question was removed by the recent Supreme Court decisions.

Reporter's Notes
December 1, 1959

This rule departs from the federal counterpart, under which the waiver of jury trial is automatic unless timely demand for it is made. The Maine practice of having a trial by jury unless the right is affirmatively waived is preserved.

Rule 38(c) is designed to alleviate one purely administrative problem arising out of the merger of law and equity. The constitutional right to jury trial has always been construed to mean the right to jury trial of issues so triable when the constitution was adopted. *Farnsworth v. Whiting*, 106 Me. 430, 76 A. 909 (1910). There may be a doubt whether the jury right exists as to a particular case or issue in a case brought under the merged system. If the parties are not called upon to specify their request for a jury, the mechanics of reaching a decision whether to place the action on a jury or nonjury trial list will pose some difficulties. Most cases will, of course, be either plainly legal or plainly equitable, and presumably it would not occur to counsel to make an agreement for waiver of jury in a case of an equitable nature.

Subdivision (c) seeks to solve this problem by essentially reversing the federal process. It provides that a party believing the case to be one in which there is no jury right may demand trial without jury. This demand may be endorsed upon the party's pleading. If there is no counter-demand for a jury, the action will be tried without jury. If there is such counter-demand, the court will have to decide whether a jury right exists.

It is to be assumed that in the typical case demanding equitable relief the plaintiff's pleading will be endorsed with a demand for nonjury trial, which the adversary will recognize as sound and file no counter-demand. The case will then be tried without jury. As a further aid to administration the court is empowered to make this determination on its own initiative. It is believed that this scheme will not be onerous to the bar and that it will effectively meet a major objection to the preservation of the jury right without an affirmative demand.