FILED
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CLERK OF THE SUPREME COURT
STATE OF MONTANA

| Rule 38 | |
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| **Present Montana Chapter Title and Rule:** | **Recommended Montana Chapter Title and Rule:** |
| **VI. TRIALS**<br><br>**Rule 38. Jury trial of right** | **TITLE VI. TRIALS**<br><br>**Rule 38. Right to a Jury Trial; Demand** |
| Rule 38(a). Right reserved. The right of trial by jury as declared by The Constitution of the State of Montana or as given by a statute of the state of Montana shall be preserved to the parties inviolate. | **(a) Right Preserved.** The right of trial by jury as declared by the Montana Constitution — or as provided by a Montana statute — is preserved to the parties inviolate. |
| Rule 38(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 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party. | **(b) Demand.** On any issue triable of right by a jury, a party may demand a jury trial by:<br><br>**(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<br><br>**(2)** filing the demand in accordance with Rule 5(d). |
| Rule 38(c). [Demand] -- 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 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. | **(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. |

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| Rule 38(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 waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. | **(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. |

## COMMITTEE NOTES

The language of Rule 38 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are both substantive and stylistic. The language of Federal Rule 38 was amended as necessary to replace federal references and statutes with the appropriate state references and statutes. The 10-day periods in Rules 38 (b) and (c) have been changed to 14 days to correspond to the counterpart Federal Rule.

Rule 38(b) includes the Rule 5(d) compliance that was formerly incorporated in previous Rule 38(d). The change is stylistic only.

Rule 38(d) wholly adopts the simplified language of Federal Rule 38(d). It drops the sentence of previous Rule 38(d), which states that "A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The language of Rules 38 and 39 clearly states the mechanisms for demanding a jury trial. This change does not, therefore, imply that a waiver may be revoked in the absence of the present explicit prohibition.

Rule 38 does not adopt Federal Rule 38(e), pertaining to admiralty and maritime claims.

| RULE 39 | |
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| **Present Montana Rule:** | **Recommended Montana Rule:** |
| **Rule 39. Trial by jury or by the court** | **Rule 39. Trial by Jury or by the Court** |
| Rule 39(a). By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions 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. | **(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:<br><br>**(1)** the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or<br><br>**(2)** the court, on motion or on its own, finds that on some or all of those issues there is no right to a jury trial. |
| Rule 39(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 upon motion or of its own initiative may on 10 days' notice to the parties order a trial by a jury of any or all issues. | **(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. |
| Rule 39(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 with an advisory jury or, the court, 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. | **(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:<br><br>**(1)** may try any issue with an advisory jury; or<br><br>**(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. |

## COMMITTEE NOTES

The language of Rule 39 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are both substantive and stylistic. The language of Federal Rule 39 was amended as necessary to replace federal references and statutes with the appropriate state references and statutes.

Rule 39(b) requires a motion before allowing the court to order jury trial upon an issue for which it might have been granted. The previous Rule 39(b) gives the court discretion to so order upon its own initiative.

| RULE 40 | |
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| **Present Montana Rule:** | **Recommended Montana Rule:** |
| **Rule 40. Assignment of cases for trial.** The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deem expedient. Precedence shall be given to actions entitled thereto by any statute of the state of Montana. | **Rule 40. Scheduling Cases for Trial**<br><br>Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a Montana statute. |

## COMMITTEE NOTES

The language of Rule 40 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are intended to be stylistic only. The language of Federal Rule 40 was amended as necessary to replace federal references and statutes with the appropriate state references and statutes.

| Rule 41 | |
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| **Present Montana Rules:** | **Recommended Montana Rules:** |
| **Rule 41. Dismissal of actions** | **Rule 41. Dismissal of Actions** |
| Rule 41(a). Voluntary dismissal -- effect thereof. (1) By plaintiff -- by stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the state of Montana, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, which ever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.<br>(2) By order of court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice. | **(a) Voluntary Dismissal.**<br><br>**(1)** ***By the Plaintiff.***<br><br>**(A)** *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2 and 66 and any applicable state statute, the plaintiff may dismiss an action without a court order by filing:<br><br>**(i)** a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or<br><br>**(ii)** a stipulation of dismissal signed by all parties who have appeared.<br><br>**(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.<br><br>**(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, |

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| | 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. |
| Rule 41(b). Involuntary dismissal -- effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to join a party under Rule 19, operates as an adjudication upon the merits. | **(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. |
| Rule 41(c). Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served, or, if there is none, before the introduction of evidence at the trial or hearing. | **(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:<br><br>**(1)** before a responsive pleading is served; or<br><br>**(2)** if there is no responsive pleading, before evidence is introduced at a hearing or trial. |
| Rule 41(d). Costs of previously-dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order. | **(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:<br><br>**(1)** may order the plaintiff to pay all or part of the costs of that previous action; and |

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| | **(2)** may stay the proceedings until the plaintiff has complied. |

## COMMITTEE NOTES

The language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are primarily stylistic. The language of Federal Rule 41 was amended as necessary to replace federal references and statutes with the appropriate state references and statutes.

Rule 41(a)(1)(A) includes the updated references to Rules 23.1(c) and 23.2 of the 2007 revision of the Federal Rules.

Rule 41(a)(1)(B) includes the federal language relating to the dismissal as an adjudication on the merits.

| Rule 42 | |
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| **Present Montana Rules:** | **Recommended Montana Rules:** |
| **Rule 42. Consolidation -- separate trials** | **Rule 42. Consolidation; Separate Trials** |
| Rule 42(a). Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. | **(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may:<br><br>**(1)** join for hearing or trial any or all matters at issue in the actions;<br><br>**(2)** consolidate the actions; or<br><br>**(3)** issue any other orders to avoid unnecessary cost or delay. |
| Rule 42(b). Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. | **(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third party claims. When ordering a separate trial, the court must preserve any constitutional right to a jury trial. |

## COMMITTEE NOTES

The language of Rule 42 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are primarily stylistic. The language of Federal Rule 42 was amended as necessary to replace federal references and statutes with the appropriate state references and statutes.

Rule 42(b) adopts the federal language, which adds "to expedite and economize" as justifications for ordering separate trials. It also adds language preserving the right to jury trial in reflection of Article II, Section 26 of the Montana Constitution and the Seventh Amendment to the US Constitution. In light of the dual state and federal constitutional guarantees of jury trial, Rule 42(b) substituted "constitutional right to a jury trial" in place of "state right to a jury trial."

| Rule 43 | |
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| **Present Montana Rules:** | **Recommended Montana Rules:** |
| **Rule 43. Evidence** | **Rule 43. Taking Testimony** |
| No present equivalent Montana Rule | **(a) In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a Montana statute, the Montana Rules of Evidence, these rules, or other rules adopted by the Montana Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. |
| Rule 43(d). Affirmation in lieu of oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof. | **(b) Affirmation Instead of an Oath.** When these rules require an oath, a solemn affirmation suffices. |
| Rule 43(e). Evidence on motions. Except as otherwise provided in Rule 56, when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. | **(c) Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. |
| Rule 43(f). Interpreters. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court. | **(d) Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs. |

## COMMITTEE NOTES

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are both substantive and stylistic. The language of Federal Rule 43 was amended as necessary to replace federal references and statutes with the appropriate state references and statutes.

Rule 43(a) adopts the federal language, with state specific revisions. There is no present Montana equivalent rule.

Rule 43(b) is previous Rule 43(d).

Rule 43(c) adopts the federal language, which does not include the preface to the equivalent previous Rule 43(e), which states, "Except as otherwise provided in Rule 56,... ."

Rule 43(d) is previous Rule 43(f).

| Rule 44 | |
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| **Present Montana Rules:** | **Recommended Montana Rules:** |
| **Rule 44. Proof of official record** | **Rule 44. Proving an Official Record** |
| Rule 44(a). Authentication. (1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purposes, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office. | **(a) Means of Proving.**<br><br>**(1)** ***Domestic Record.*** Each of the following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:<br><br>**(A)** an official publication of the record; or<br><br>**(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal:<br><br>**(i)** by a judge of a court of record in the district or political subdivision where the record is kept; or<br><br>**(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept. |
| (2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the | **(2)** ***Foreign Record.***<br><br>**(A)** *In General.* Each of the following evidences a foreign official record — or an entry in |

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| attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties. | it — that is otherwise admissible:<br><br>**(i)** an official publication of the record; or<br><br>**(ii)** the record — or a copy — that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.<br><br>**(B)** *Final Certification of Genuineness*. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. |
| | **(C)** *Other Means of Proof*. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:<br><br>**(i)** admit an attested copy without final certification; or |

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| | **(ii)** permit the record to be evidenced by an attested summary with or without a final certification. |
| Rule 44(b). Lack of record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry. | **(b) Lack of Record.** A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii). |
| Rule 44(c). Other proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law. | **(c) Other Proof.** A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law. |

## COMMITTEE NOTES

The language of Rule 44 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are intended to be stylistic only.

| Rule 44.1 | |
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| **Present Montana Rules:** | **Recommended Montana Rules:** |
| Rule 44.1. Determination of foreign law. A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Montana Rules of Evidence. The court's determination shall be treated as a ruling on a question of law. | **Rule 44.1. Determining Foreign Law**<br><br>A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law. |

**COMMITTEE NOTES**

The language of Rule 44.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes have also been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules. These changes are intended to be stylistic only.