
Is Contractually Waiving Trial By Jury A Good Thing? By: Jean A. Weil, Esq.

As a longtime litigator, my mantra has been “never waive jury.” Of course, the parties must first look to the contract to determine if there is a provision that dictates who will adjudicate the dispute. Such provisions typically call for a judge, an arbitrator, or panel of arbitrators.

A thoughtful decision whether to waive jury is both complex and nuanced. A conscientious litigator should consider and weigh the following questions and concerns:

- Where is my case venued?
- What will be the likely composition of the jury pool: education; socio-economic background; age; ethnicity; military service; employment; and political affiliations?
- Can I forecast if the pool of jurors will be more likely to identify with my client or with the opposing party?
- Who is my trial judge and what is his or her background and experience including practice area before taking the bench?
- What is the judge’s reputation in the view of the bench and bar?
- Is the judge willing and able to make hard decisions and follow the law?
- What is my evaluation of the strengths and weaknesses of my case versus my opponent’s case?
- How sympathetic is the opposing party? How likeable is my client?
- What are the financial implications of a judge trial versus a jury trial, understanding that jury trials always take longer?
- Is a jury trial justifiable where the amount in dispute is relatively modest as compared to the costs of defense?
- What is the degree of complexity of my case? Is the case so complex, that no lay juror, even if well educated, will be able to grasp the scientific or technical testimony at trial? (No lawyer wants to see jurors nodding off during critical, direct, or cross examination.)
- How will a lengthy trial affect my ability to select and keep choice jurors when such jurors typically have commitments that preclude them from serving on a long-cause trial?

Regardless of whether the parties seek a jury trial or agree to waive jury; there is no guarantee that the judge who initially presides over the case will be the one who presides over the case at time of trial. Cases are commonly moved from judge to judge depending on availability when parties answer ready for trial.

Even if the litigator decides to waive jury, it takes two to tango. Plaintiff’s counsel will typically not waive jury, particularly in emotional cases such as catastrophic personal injury, discrimination, employment, and when a David is up against a Goliath.

Moreover, there are often multiple plaintiffs, defendants, and cross-defendants in any given complex case. With the addition of every new party to the case, the likelihood of a unanimous agreement to waive jury becomes more remote.

In short, our jury system, while not perfect, is usually better than the other options. A prudent litigator must weigh all the issues outlined above before recommending that his or her client waive the important right to a jury trial.

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