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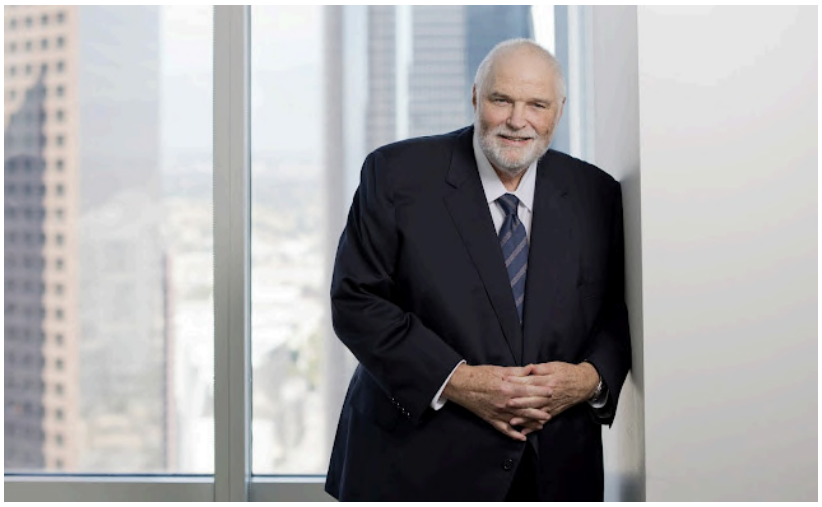
Perspectives from Pioneers: Kenneth C. Gibbs



Pioneers are not only skilled practitioners, but boundary-setters. Those who have helped define what is possible in their field. Their voices offer both experience and foresight. In this inaugural edition of Perspectives from Pioneers, I asked Kenneth C. Gibbs, Esq., widely regarded as the Dean of Construction Dispute Resolution, to share insights from his extensive career mediating, arbitrating and conducting neutral evaluations in multi-million-dollar construction, energy, insurance and other business disputes. Ken, a pillar in the construction industry, has successfully mediated more than 2,500 cases and arbitrated over 200 cases in 25 states involving bridges, dams, arenas, highways, subways, tunnels, airports, hospitals, hotels, office buildings and other major projects.

Globally, you are considered a pillar of the construction mediation and arbitration industry. How did you achieve this?

Being considered a "pillar" or a "pioneer" of the construction ADR community is a bit embarrassing for me, as I still consider myself a simple country lawyer.

I've been extremely fortunate in my career. In 1974, upon graduation from law school, I was immediately involved in, at that point, one of the largest construction disputes in California history—the construction of the Cedars-Sinai Medical Center in Los Angeles—where I was the co-first chair in the representation of the general contractor and its subcontractors. Immediately following that, I led a team to a successful result involving a major construction project at the San Francisco Airport. So, at 32 years old, I was an "expert" construction litigator with a growing reputation.

Through promotional efforts and word of mouth, the firm that I started in 1978 with two attorneys quickly grew; by 1988, we had about 40 attorneys. By that point, I had attracted 5 of the 10 largest contractors in California as clients and had also attracted a large number of public agencies, including counties, cities and various school, water and other districts. Meanwhile, I co-authored a text titled *California Construction Law*, which was cited in several court cases. I traveled around the country giving seminars on construction law with, of course, an emphasis on California.

Because of these efforts, by the 1990s I had acquired a reputation as one of the top practitioners of construction law in the country, and my firm had become the largest "boutique" law firm specializing in construction west of the Mississippi.

Throughout my career, I had always dabbled in arbitration. I was on the large and complex construction panel of the American Arbitration Association (AAA) and was one of AAA's "go-to guys" in California for high-value construction cases. Beginning in the late 1970s, I did about four arbitrations per year and received positive reviews. By the late 1980s, it became clear that mediation was emerging as an efficient way to resolve complex construction

disputes. In the late '80s and into the '90s I appeared as an advocate, representing clients in many construction mediations, and I very much enjoyed the process and the results I obtained. There were fewer mediators back then, and fewer still who understood construction law, so my "mentor"—unbeknownst to him—was the legendary Coley Fannin of JAMS. He came across as knowledgeable but relaxed, and just watching him in action taught me a lot. He drilled into my head that "the first thing you've got to do is to identify the impediments to resolution." That line has stuck with me ever since.

By 1999, I decided that I really wanted to shift the direction of my career, so I sent a message to every attorney I knew around the country announcing that I was going to do ADR full time. I started off doing two mediations per month, which rather quickly became two mediations per week. This snowballed to the point where I was doing three or four mediations per week, as well as arbitrations. I joined JAMS in 2007, and I've now handled mediations and arbitrations in 25 states.

Do you have any advice on how to become a knowledgeable and highly respected construction neutral?

I think there are three keys to becoming a highly respected construction ADR neutral: subject matter knowledge, demeanor and the ability to read the room.

Not only does the construction industry have its own jargon and ways of doing things, but so too do advocates who come before you. Construction projects, and the disputes that can arise from them, are complex; it is essential that that neutral have sufficient subject matter knowledge to separate the wheat from the chaff. Knowledge of scheduling and cost principles, together with knowledge of applicable case and statutory law, is essential, whether in arbitration or mediation, for the neutral to get to the heart of a matter.

Another commonality between arbitration and mediation is the neutral's demeanor. Calmness and control are needed in both to guide the process in an efficient and effective manner. I make every effort to listen and not show emotion or tip my hand when hearing disputes. In fact, in mediations, I generally start by going room to room to hear what the parties and their counsel have to say, without injecting too many of my thoughts as to the merits. I do ask "devil's advocate" questions to find out information and demonstrate that I know the issues of the dispute, but a calm and thoughtful demeanor is necessary to gain the trust of all concerned.

Finally—and this is something that cannot be taught very easily—during mediations, a neutral needs to read the room by listening to what is said and noting what is not said, and even reading body language. Anyone can shuttle offers and counteroffers back and forth, but it takes highly skilled neutral to evaluate the true positions of the parties and figure out what will work and what won't. If I have strength as a mediator, it is derived from my ability in this regard.

In the ADR community, it is generally accepted that not every mediator is a great arbitrator and, likewise, not every arbitrator is a great mediator. Despite this, you have managed to master both. What are the commonalities and differences in the practices? What are your suggestions to those who want to pursue both practices?

I completely agree with the proposition that not every mediator is a great arbitrator and not every good arbitrator is a good mediator.

Although there are commonalities in both practices, I think that there are also some different skill sets that come into play in arbitrations versus mediations. The general common skills in mediation and arbitration are subject matter knowledge, the ability to weigh the facts and know the law and the ability to listen. The additional general arbitration skills are general knowledge of rules of procedure, award writing, and firm control of the process so that the matter is heard timely and in an efficient manner. The additional general mediation skills are risk evaluation, keen people discernment and observation, humility, and empathy. These skills, while important in mediation, are less important in arbitrations. The person who is able to blend the skills of both practices as well as the embrace the differences based upon the type of proceeding is more likely to find success as a both mediator and an arbitrator.

While generalities are always dangerous, I have found that judges who come off the bench usually make better arbitrators than mediators, perhaps because their adjudication techniques have been honed over years of hearing cases. I have also found that mediators tend to be more generalists and may not have practiced construction law.

I've found that lawyers who were in the trenches make the best mediators of construction disputes because they can recognize the strengths and weaknesses of the parties' positions, having been there and done that. I think that is one of my strengths, and I think that it is a necessary element of being a top-notch construction mediator. There is no substitute for subject matter knowledge, and while a construction arbitration can certainly be handled by an individual—such as a former judge—who is used to hearing and evaluating arguments, the traits of a mediator in effectuating resolutions are much more subject matter oriented.

There is no real need to read people in arbitrations other than to establish the veracity of the testimony they give. In mediations, it's my opinion that reading people is one of the chief skills necessary. So, while there is crossover regarding evaluating the merits of a given matter, there is a different skill required to have the parties recognize

the risks they run if the case goes to trial. This risk evaluation, coupled with the art of convincing the parties to realistically evaluate their risks, is the key to the mediation process and the key to being an outstanding mediator.

In your practice, what do you see evolving due to technology, supply chain issues, global stability, etc.? How are the industries in which you practice changing based upon the world today, and how is the ADR community adjusting to these changes?

ADR has certainly evolved in the last six years. In 2019, the thought of conducting virtual mediations and arbitrations via Zoom or other applications was way out there, and almost all ADR hearings were conducted in person. Today, more than 50% of mediations conducted by JAMS are virtual, and even those conducted in person usually have some participants appearing virtually in a hybrid hearing. Interestingly, my personal practice seems to bucking the trend. I estimate that 75% of my mediations are conducted in person, probably because the stakes of my mediations are usually very high.

Another major factor that is going to change the way ADR, and particularly arbitrations, proceeds is the introduction of AI into the process. I'm not an expert, but there is no doubt that AI will play a growing role.

Supply chain issues, tariffs and the global economy will continue to have an impact on construction projects and disputes arising therefrom. Whether an event is force majeure or a delay chargeable to a particular party in the construction process is certainly going to be up for debate as we go through the uncertainties of the current environment.

As you reflect on your body of work and your stellar career, what are some of the pivotal or significant moments, and what did you learn from those moments?

My 52-year career can be divided almost exactly in half: the first 26 years representing clients on major construction projects and the second 26 acting as an arbitrator or mediator of claims regarding construction. I had great luck and attracted some wonderful general contractor and design professional firms to represent early in my legal career. I formed a strong team, which included scheduling and forensic accounting firms, and we were successful on many projects, including major hotels, hospitals, prisons, office buildings, wastewater treatment plants and transportation projects. As my career progressed, I was given the opportunity to represent virtually every county in Southern California and at least 10 major cities around the state. One of my most memorable assignments was representing the Metropolitan Water District of Southern California when it constructed the seventh-largest earth fill dam in the world. My takeaway from all that work is to build a strong team, delegate work appropriately and always have your client's best interest in mind.

It's hard to pick out one or two matters that I've mediated or arbitrated, but I take great pride in having helped resolve issues relating to airport construction in Los Angeles, Seattle, Salt Lake City, Dallas-Ft. Worth and New York. Additionally, I've enjoyed working on subway and light rail projects in New York, Los Angeles, Houston, Denver, San Francisco and Seattle. The saying "A mediation is not an event; it's a process" comes to mind. All of the matters listed above took multiple efforts over a significant number of sessions. The lessons learned can be summarized by the thought that a mediator should never give up trying and should always follow up to see if circumstances have changed or evolved and may allow for a settlement.

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*Author and Interviewer **Lisa D. Love, Esq., FCIArb.** is an accomplished arbitrator, mediator and neutral evaluator with JAMS who brings to her work as a neutral extensive experience as a complex commercial transactions attorney. Ms. Love has served as a neutral in a wide range of complex commercial transactions and legal disputes, including those focused on investments, corporate finance, securities, mergers and acquisitions, construction and infrastructure projects and development, energy, life sciences, licensing and technology transfers, franchises, commercial real estate, antitrust, government and public agency, and corporate governance matters.*