Building Agreement

Mediator Kenneth Gibbs often uses mini-trials as foundations for public project settlements.

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A 405 Freeway widening project most Angelenos remember for causing the anticipated “carmageddon” traffic jam of 2011 may not have created the massive disruption they were expecting, but it did spawn a years-long dispute over scheduling delays, design changes and cost overruns ending with a nearly $300 million settlement.

The contractor, Kiewit Corp, accused the Metropolitan Transportation Authority of mismanaging the project and causing delays. Facing the prospect of a long, drawn-out arbitration, the parties brought in construction specialist Kenneth C. Gibbs, whose reputation for settling city projects and public works disputes that take too long and cost too much, had reached a national level.

To settle a dispute of this magnitude, Gibbs employed a seldom-used technique, often referred to as a mini-trial, which ended with him handing the parties a 75-page non-binding written opinion, initially intended to be used as a simple negotiation tool.

“I was supposed to issue this non-binding opinion, they would read it and then get back to negotiating. Well they decided to adopt my non-binding opinion and it became the settlement of the case,” Gibbs recalled in a recent interview.

Attorneys presented PowerPoint presentations with no cross-examination before the opposing parties were given a half day to make rebuttal arguments, Gibbs said. He then questioned the experts the following day and about three weeks later, handed the parties the non-binding opinion.

Gibbs has successfully used this technique in about 15 other disputes around the country, he said.

“It’s been very effective on some of these big cases where public entities want a quasi-black robe to weigh in and to give their opinion; similarly insurance companies involved often want a non-binding opinion from a quasi-black robe” he said. “It forms a basis for doing something that’s not just ‘We’re giving away money for this or that, it forms the basis for why we’re doing something.’”

Throughout his 46-year career as a mediator and attorney, Gibbs has narrowly focused his practice on construction and engineering disputes, not to be confused with construction defect, he said.

“When a construction project takes too long and costs too much, there are significant cost overruns, and the old phrase, ‘Time is money’ comes into play,” he explained.

While construction claims are the centerpiece of his practice, Gibbs also mediates wildfire-related and insurance subrogation disputes.

After graduating from UCLA School of Law, Gibbs began as an associate at the now-defunct Most & Bertram law firm in 1974 and became partner two years later. At 27, Gibbs was chosen as one of the lead attorneys in a high profile case involving the construction of the Cedars-Sinai hospital in West Los Angeles. After achieving a successful result representing the contractors, Gibbs received yet another such outcome in litigation involving construction of the San Francisco Airport.

In 1988, Gibbs formed his own construction-centric firm, Gibbs Giden Locher & Turner LLP, which in its early days represented five of the top 10 contractors in the state but eventually started representing public entities.

“At one point we represented virtually every Southern California city and county with the exception of Los Angeles,” Gibbs said.

Through his practice, Gibbs cemented himself as one of the leading practitioners in the country and came to be known as the man who wrote the book on construction law, not only because of his legal prowess but also because he, along with co-author Gordan Hunt of Hunt Ortmann Pulfy Nieves Darling & Mah Inc, wrote a book on construction law in 1989.
Marcia Scully, general counsel for the Metropolitan Water District of Southern California, said Gibbs considers the merits and will give an honest assessment of the strengths and weaknesses of a case.

“Some neutrals will tell you that a jury might vote against you because they didn’t like your suit that day. Well, we all know that already. I don’t need a neutral to tell me that,” Scully said. “But he will tell you where you might have some real problems because of ‘A, B, and C.’ I think that is helpful to make you think about things you may not have relating to legitimate weaknesses in your case.”

Gibbs, who has been with JAMS since 2006, has successfully mediated more than 2,500 cases and has arbitrated over 200 in 25 states, according to his JAMS biography web page.