

VERDICTS & SETTLEMENTS

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Building Agreement

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

By Blaise Scemama
Daily Journal Staff Writer

A 405 Freeway widening project most Angelenos remember for causing the anticipated “carnageddon” 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 PowerPoints, witness and expert narratives 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 wild fire-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

Kenneth C. Gibbs

JAMS
Los Angeles

Areas of specialty:
engineering and
construction, wildfire,
insurance, real estate

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 Ortman Palfy Nieves Darling & Mah Inc, wrote a book on construction law in 1989.

“California Construction Law” is in its 18th edition and is widely considered the Bible of construction law, attorneys say.

While some mediators solely focus their efforts on encouraging parties to settle and are less concerned with parties reaching a number believed to be the true evaluation of a case, Gibbs strives not only to settle but to settle for what he believes it is truly worth, he said.

“When my head hits the pillow at night, I want to know I was intellectually honest with myself and with the parties, and so I don’t artificially manufacture numbers because I think it gets to a settlement as opposed to trying to give an honest evaluation of what I think,” Gibbs said. “However I don’t come down hard and fast and say, ‘The value of your claims is \$12 million.’ I much prefer to say, ‘Look, there is a range where this thing comes out and it may well depend on what the trier of fact thinks about this guy or that guy or this testimony or this expert,’ as opposed to, ‘Here is Ken Gibbs’ bottom line. Meet it or beat it.’”

Best Best & Krieger LLP

partner Mary Beth Coburn, who routinely works with public agencies on public works and infrastructure construction law, said she seeks out Gibbs as a mediator specifically for his evaluative style.

“In my experience with him, he knows I am dealing with public money and he knows I am going to have to stand in front of a city council or governing board and explain why we should either accept a settlement or pay a settlement. And my clients take their fiduciary duty very seriously and they are not going to overpay with public money and they are not going to accept a low ball offer just for the sake of settlement, and Ken understands that,” Coburn said. “If we’re down to a small difference, he understands I have to go for that small difference because I’m dealing with public money. That doesn’t mean he won’t push to cut a deal.”

Construction lawyer Christine E. Drage of Weil & Drage APC, said Gibbs recently helped settle a dispute involving a major infrastructure and mixed use project in a large city. After other mediators failed to

resolve the dispute, Gibbs was able to secure the resolution and global client and carrier consent to resolution, Drage said.

“The depth and breadth of his knowledge and experience with all manner and types of construction issues makes him hard to compete with,” Drage said. “He’s seen it all, done it all, heard it all, and thus has the ability to cut to the core issues, causes and appropriate results more quickly and credibly than most.”

Mark S. Roth of Cozen O’Connor, who handles mostly fire-related insurance subrogation suits, said while Gibbs’ large stature can be somewhat intimidating at first, he is able to “feel out the temperature in multiple rooms” and is especially adept at wrangling numerous parties in large and complex disputes.

“Ken is really good with multi-party cases,” Roth said. “I have brought him in on very complex cases with a number of parties with a lot of moving parts. Ken is able to quickly decide which buttons to push and which people to move and what room to go to next. He’ll never tell me his tricks but I

kind of look at him as a magician, because after he goes into the rooms and decides who he needs to push and who he needs to pull, inevitably he comes back to my room with a number in my range.”

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 weakness 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 have 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.

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