



ASKED &
ANSWERED

Staff photo by Kevin Harnack

Mitby builds on construction past to give companies legal aid

Long before John Mitby established himself as a construction attorney, he built air strips and roads in Southeast Asia.

Just after earning his undergraduate degree, Mitby was on an ROTC commission with the Army Corps of Engineers, during which he oversaw a construction company building projects for special forces in Thailand and Cambodia.

“The one good thing about being in the construction business,” he said, “is, at some point, you can sit back and look and see what a company has done or been a part of.”

The experience shaped his interest in construction law, and when he graduated in 1971 from the University of Wisconsin Law School, he said, it was obvious his practice would focus on architecture, engineering and construction.

“With that background,” Mitby said, “it was a natural fit.”

A former managing partner with Axley Brynerson LLP, Madison, Mitby at the start of the year became a senior partner at the Madison law firm Hurley Burish & Stanton SC. He has spent the past 40 years working with start-ups, looking over contracts, mediating disputes and helping juries understand everything from construction defects to on-site accidents.

“A construction practice can be overwhelming,” Mitby said. “There’s a lot of people involved — the owners, the contractors, the subcontractor, the architect — and the government regulations, all the different aspects that you have to feel comfortable with.”

An added complication is clients’ expectations for quick answers, he said.

“You don’t have the advantage of 10 or 15 years ago, when something would be faxed to you or mailed, and you had time to get back to them,” Mitby said. “Nowa-

days, they call and they have an expectation that you’re intimately familiar with AIA contracts or AGC contracts or you’ve seen this problem before, whether it’s an OSHA problem or a subcontracting issue.

“You don’t have the advantage of saying, ‘Can I see the file? Let me do the research and get back to you.’”

But his respect for the construction process is what keeps him interested, Mitby said.

“It’s fun to work with people who are doing things ... the supervisors and the bricklayers and the people who do the drywall and the plumbers and the electricians, all those disciplines work together to create something,” he said. “I’m not there on site doing it, but I’m there at the beginning and the end of the tunnel.”

Wisconsin Law Journal: What would you change about the construction industry?

John Mitby: I think the biggest thing is the contracts. I think there’s way, way too many differences in contracts. As a result, we’ve got way too many court cases that really don’t help, I don’t think, in terms of solving problems like indemnification clauses, delayed damages and the economic-loss doctrine. The legal concepts I don’t think have kept up with the practical world. There’s way too much time and cost being spent on the contractual side, unnecessarily, with court cases and legislation and insurance law. They have made contractual obligations not consistent with what’s really going on or should go on. And I’m not sure it’s cost-effective.

WLJ: What job would you not like to do?

Mitby: I guess I really would not like to have the responsibility inside the company to deal with personnel-type issues. I think that’s complicated and hard to do. Personnel in any construction company is a challenge.

WLJ: What is the most useful thing you’ve learned since starting your job?

Mitby: I think patience. Patience is extremely important. And what separates a good lawyer from a great lawyer, assuming intelligence and integrity and the judgment you have to have, is timing. Timing is so important. You can be absolutely dead right on what should be done. But is the timing correct to put forth that answer or proposition, or is it just the opposite?

WLJ: What do you wish you’d learned sooner?

Mitby: I think the hard part is experience. You can’t teach experience. You have to experience things. At one point in time, I thought to be a good construction lawyer, I had to know all there was about contracts and all there was about how to try a lawsuit. Then somebody said, ‘You’ve got to know about insurance law, and you’ve got to know how all the disciplines work together and the mediation aspect.’ To be able to sit down and, basically, when you handle a complex case, pull it all together, it’s like a Clue course. It’s like continuing legal education.

WLJ: What would your colleagues be surprised to find out about you?

Mitby: Because I had two daughters, I was always very passionate about sports. I played a little bit of basketball at the University of Wisconsin, and I followed men’s basketball and men’s football. When I had my daughters, I spent a lot of time with all-city swimming, helping put that together, tri-county basketball, getting girls hockey in the high schools. And I spent 10 years or so with the Olympic Development program with girls’ soccer in the state of Wisconsin.

— Jessica Stephen