

Mediating tragedy: deciding who gets what when disaster strikes

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Kenneth Feinberg is a mediator who sleeps well every night after getting countless victims of America's most notorious tragedies to "yes." Feinberg, a lawyer, mediator, and author of the new book, "Who Gets What: Fair Compensation after Tragedy and Financial Upheaval," concedes that sometimes he wishes he also held degrees in

divinity and psychology.

Feinberg was first called on in 1984, by his friend and mentor, federal judge Jack B. Weinstein, to serve as special master over the 250,000 member class action brought by Vietnam veterans and their families who had become ill due to exposure to the herbicide known as "Agent Orange." Six weeks later, the entire class action was settled for the unprecedented amount of \$180 million.

Over the past 30 years, Feinberg has mediated asbestos claims, the DES birth defect claims, claims brought for the loved ones killed in the 9/11 attacks and, more recently, the Penn State sex abuse cases, the Aurora, Colorado shootings and those at Virginia Tech. He recently administered 574,881 claims over about 16 months for damages caused by the BP oil spill in the Gulf of Mexico. That claim resulted in Feinberg and a large staff parceling out \$6.14 billion to businesses and individuals who were harmed by that environmental disaster.

Feinberg reveals that in mediating these mass disputes, there are hard questions which call into play an ambiguity and dichotomy foreign to the conventions of law. For example, these compensation programs essentially do away with the requirements of proof of liability and causation. If a victim is a member of the class, then Feinberg and his team are only involved in the question of "Who gets what?" He raises rhetorical questions in the book about "how do you parse the ethical, legal and economic issues fairly?" And "how do you manage to maintain your sanity in the face of criticism and challenges to your decisions?"

Though it is hard to comprehend for some, Feinberg stands by his conviction that he is not called on to wrestle with the larger issues of which disasters get this kind of relief and how huge sums of money get divided justly. Speaking at the annual Conference of the Southern California Mediation Association, Feinberg argued with other prominent mediators who admitted that occasionally the unfairness or unjust result of a mediation, even after the parties reach an accord, keeps them awake at night. Just as he has become perhaps the most celebrated mediator in America, he also has mastered the zen of mediation: he can live with the ambiguity, knowing that he has accomplished what the parties hired him (or, in the case of the 9/11 Fund, he volunteered) to do by reaching an agreement that will provide some measure of financial relief - and sooner than it would through a court system.

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Still, he tells compelling stories that might cause a mediator to struggle. He recounts the jockeying between the fianc (C)e of a 9/11 victim and his biological family, who contended he was not going to go through with the wedding. Feinberg had to draw distinctions about whether the wealthy families of stockbrokers should get more of the fund than the poor, immigrant families of window washers. He had to decide if a New York City policeman who suffered a fatal heart attack after helping 9/11 victims reach safety aboard the Staten Island Ferry qualified or whether death benefits would be limited to those who lost their lives in the buildings themselves.

Feinberg believes that sometimes litigation can be too complex, time consuming, inefficient and uncertain to meet the urgent needs of victims of major disasters. In these cases, business as usual simply will not do. A true mediator, Feinberg sees the greater good in settling claims quickly, getting closure efficiently and remaining neutral in the internal wrestling match that invariably arises out of comparisons, personal passions and the ultimate finality of an outcome where limited resources need to be matched against limitless loss.

In certain cases, Feinberg finds that the burden of proof is so high that despite the undoubted injuries and suffering of sometimes millions of claimants, it would be extremely difficult to obtain redress and relief in the absence of a government-funded, creative program which divides up a set fund among all claimants based on some logical - albeit somewhat arbitrary - criteria.

Indeed, in this age of mass torts coupled with mass budget cuts to the judicial system, the time honored adversarial system can be cumbersome and inefficient. As anyone who has mediated a tough case knows, mediation is often the most practical way to eliminate the expense and uncertainty of litigation - even when the outcome does not closely mirror the prospective result in trial.

The New York Times review of "Who Gets What?" calls Feinberg's work "saintly." Author Fred Andrews says Feinberg is "made for moments of national catastrophe." Though Feinberg portrays himself as impervious to the difficult choices between competing claims, he is equally driven by a sense of magnanimity, preferring generous programs, compassionately delivered.

Still, the notion of finiteness is not lost on Feinberg, who suggests that it is unfair that certain citizens are compensated for particular tragedies, while others are left to their individual claims. It calls into question bigger philosophical issues of the role of money in society and the role of government in healing traumatic, collective wounds. He asks probing questions about whether money can ever represent justice.

For Feinberg, giving survivors and victims a safe place to air their grievances and to grieve their losses is an invaluable service to country and individuals. Sparing them and our court system from endless litigation has its own reward. Many local mediators, and the lawyers who retain them, would certainly agree.

Kenneth R. Feinberg, "Who Gets What: Fair Compensation after Tragedy and Financial Upheaval" (PublicAffairs 2012).

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