

An Interview with Kenneth R. Feinberg

ASHISH JOSHI

The author is with Joshi: Attorneys + Counselors, Ann Arbor, Michigan, and is the editor in chief of *LITIGATION*.

Kenneth R. Feinberg is one of the singular figures in the American legal community. As Jack B. Weinstein, the federal judge in Brooklyn who appointed Feinberg to his first major mediation case in the 1980s, famously said, “[i]f he were a painter or an artist, he would be the Picasso of the legal field.”

Feinberg has been called upon again and again—by presidents, attorneys general, and other public officials—to administer compensation for victims and survivors of America’s most spectacular disasters and heartbreaking tragedies: Agent Orange. 9/11. Virginia Tech. The BP Gulf oil spill. Sandy Hook. Aurora. The Boston Marathon bombing. And the list goes on.

Upon graduating from NYU Law School in 1970, Feinberg clerked for New York Court of Appeals Judge Stanley Fuld. Then he joined the U.S. Attorney’s Office in Manhattan. A stint with Senator Edward M. Kennedy’s office followed; he rose to become the senator’s chief of staff.

In 1984, Feinberg was appointed as a special settlement master by Judge Weinstein to help settle a years-long dispute between Vietnam veterans and the makers of Agent Orange, the herbicide tactically used during the Vietnam War. That experience set the stage for his future role as a special mediator in other headline-grabbing cases across America.

While Feinberg officially functions as a special master, he came to be known as the “Pay Czar,” a term he dislikes. He

occupies a unique niche: administering compensation programs to allocate billions of dollars in compensation to victims of America’s tragic disasters.

To his admirers, Feinberg runs an efficient mechanism. As he puts it, “there’s quick, efficient, and certain compensation” without the “roll of dice in the courtroom.”

To his detractors, he is a corporate shill with extraordinary powers that privatize justice.

Yet, there is little debate that few lawyers are called upon to do what Feinberg does. Working as a lawyer and mediator rolled into one, Feinberg wrestles not just with practical details of designing and running compensation programs to the tune of billions of dollars but also with far bigger philosophical questions: What is “compensation”? Why should public funds or private money be used to compensate certain citizens while others are left out in the cold? Who gets what? And finally, what’s a life worth?

Feinberg was thoughtful, humble, candid, and articulate. Throughout our interview, opera played in the background.

ASJ: What is it like being a special master, deciding and distributing compensation in cases such as Agent Orange, the 9/11 attacks, the 2008 financial crisis, and the BP Gulf oil spill?

KRF: Well, on the substantive legal side, it’s not particularly

difficult. I think that thousands, or maybe even hundreds of thousands, of lawyers in this country could do exactly what I do. What makes it challenging is the emotion—dealing with innocent people who are the innocent victims of horror and tragedy. The pathos—that is the challenging part. Whenever I’m asked to design or administer a compensation claims program, I say to myself brace yourself for the anger, the frustration, the sorrow, the pity. That’s the tough part.

ASJ: How do you decide what’s fair?

KRF: Let’s be careful about using words like “fair” or “just.” There is nothing about these tragedies that I find to be fair or just. Rather, this is all about mercy—the community coming to the rescue of people who are financially at sea—and it’s difficult to decide questions such as who is eligible to receive compensation, how much compensation, what proof entitles someone to compensation, what due process rights accompany a claim. Those are issues we mull over, wrestle with, and usually come up with credible answers to.

These programs are aberrations. They’re not the wave of the future.

When people say to me, “Ken, what is a life worth?” I say to them, “I will calculate what a life is worth, just like a judge or a jury would do every day in this country.” What would the victim have earned over a lifetime but for the tragedy? What’s the economic loss? Supplement that with pain and suffering, emotional distress. I do what courts and juries do every day in every city, village, and hamlet in this country.

ASJ: It’s one thing when a judge or a jury does it. But how do you, as a private citizen, explain to a father that his fireman son’s life is worth less than that of a banker who happened to die in the same tragic accident?

KRF: I say to that person that is the American system. The American system recognizes—fortunately or unfortunately—that the waiter, the busboy, the cop, the fireman, the soldier does not get as much compensation as the stock broker, the banker, the attorney, the accountant. That’s the American system.

Now, if that person does not believe me, he need not participate in the program. Every program in which I’m engaged is purely voluntary. Nobody is compelled to come into these compensation programs. Everybody has to make a choice.

Invariably, 90–97 percent of eligible claimants participate. Why? Because there is quick, efficient, and certain compensation. *Certain*—that’s very important. No roll of the dice in the courtroom. No legal fees. No delays. No inefficiencies. You decide—do you want this system or the conventional system? It’s your choice.

ASJ: Do you think this system is better than the conventional system?

KRF: Absolutely not; quite the contrary. Our rule of law and the conventional legal system are much better. But every once in a while, there is an aberration, an exception. These programs are aberrations. They’re not the wave of the future. Rather, they are exceptions to the conventional way—the right way—that we resolve disputes.

I don’t select or decide on these programs. Policy makers, presidents, Congress—they set up these programs. And when they come to me and say, “We want you to do this,” they already have decided that they are doing this, that this is going to be done this way.

“You’re in charge,” they say. And I do what most citizens would do—I say yes.

ASJ: Let’s talk a little about your first case, Agent Orange. I was intrigued to read in your book, *Who Gets What*, of your travels around the country with Judge Weinstein, holding meetings in town halls and talking to veterans about the compensation program. What was it like?

KRF: It was a fabulous experience. First, Judge Weinstein is one of the best lawyers I’ve ever known. He’s not only very smart and a brilliant jurist, but also he could take a very complex case—such as the Agent Orange case or the tobacco case or the gun regulation cases—and manage it in a way that was efficient.

Very often, we have judges who are really smart, but can they truly manage complex tort litigation? That was just as much Judge Weinstein’s genius as it was his legal skills, which are known by everybody. He decided that before that settlement was accepted by the court as fair and reasonable, he wanted to hear, not from the lawyers, but from the Vietnam veterans themselves.

Now, today we don’t have to travel around the country like we did 30 years ago. Today, we’ve got the internet, we’ve got conference calls involving hundreds of people, we’ve got live videoconferencing; today there are electronic means to reach out to class members and for them to be heard.

But back then—in 1986—Judge Weinstein decided that he wanted to hear from the Vietnam veterans directly. He wanted their views about the terms, conditions, fairness, and reasonableness of that settlement. So we went around the country and held hearings everywhere. It was very successful.

ASJ: Do you think actually meeting people in person gave them a sense of due process or made them feel important?

KRF: Absolutely yes. It was essential. One lesson I learned from the 9/11 compensation fund is that nothing helps attract claimants to a program better than their opportunity to be heard. In both public town hall meetings around the country and in private one-on-one meetings that I held with about 950 people, one of the critical keys to success was the hearings. Giving innocent, grieving victims the opportunity to be heard is very important.

ASJ: Is it just a question of showing empathy? Or is it also a matter of strategy?

KRF: It is both. Showing empathy—yes—but also understanding that the claimants welcome the opportunity to vent and know that somebody is listening. It's interesting—when I hold private hearings with individual claimants, rarely does the subject of money come up. Compensation is seldom the issue. Instead, the issue usually is either venting about life's unfairness (that's what you hear—"Why my daughter, Mr. Feinberg? She was an angel, 23 years old; now she's gone. Why? There is no god. No god would allow this to happen."); or claimants come to me to validate the memory of a lost loved one ("Mr. Feinberg, I was married for 25 years to my wife. She died in the World Trade Center. Thank you for this hearing. I want to start this hearing by showing you a video of our marriage 25 years ago. I want you to see what those murderers did to my wife.").

That really happened—the man played his wedding video. It's an amazing thing—human nature and the human spirit.

ASJ: Was your experience talking to people in the 9/11 case different from your experience talking to people in the BP case?

KRF: Actually, no; it was not very different. Except 9/11 was traumatic death and injury, and BP was largely business interruption and economic damages. Yes, there were many who died or were injured on the rig, but we received about 1,200,000 claims from around the world and almost all of them involved allegations of economic harm rather than the emotion of death or physical injury.

ASJ: In America, we distinctly tie the concept of compensation to the fact of monetary compensation. We don't seem to place any value, or certainly sufficient value, on things like an apology, for example. Nor do we set up, for instance, a Truth and Reconciliation Committee, as they do in South Africa. How do you define compensation?

KRF: Well, America is a capitalist society and here it has always been about money. Money is the great leveler, the ultimate vehicle for evaluating wrong and quantifying damage. It has always been that way, from the founding of the republic. I do not know if it's the best way, but I must say it is the most

historical way that we go about trying to recognize that damage equals some degree of financial payment designed to temper and alleviate that damage. That's the system; that's our system.

ASJ: Was there ever a case in which money just was not enough?

KRF: Yes. In Agent Orange, we set up a special veterans' benefit program as a supplement to the moneys paid to individuals. The program funded projects designed to help *all* Vietnam veterans, not just those receiving an eligibility check. But other than that one, when I think of the other cases, it's all about the money that goes to the individuals who are eligible for the claim.

ASJ: What do you say to the critics of this system? Some say that it gives too much power to a single individual, that there are no checks and balances. And some have gone so far as to denounce the entire mechanism as being anti-American. Your thoughts?

KRF: You know, I tend to agree with that. I tend to agree that under the guise of goals of efficiency, cost-effectiveness, speed, and certainty, there's also unfettered delegation. And there's no effective appeal, no right to go to court to challenge the award.

So I think there's a lot to that criticism. But I would say this: Lower your voices as critics because this system is *not* the wave of the future. The number of cases or disputes or tragedies in which I am asked to create out of whole cloth—and design and administer—a compensation fund, we can count on one hand: 9/11, BP, GM ignition switch, Volkswagen. And with even Volkswagen and Agent Orange, that has all been subject to the courts' umbrella. All of us functioned under the Rule 23 umbrella of the court.

So the programs in which I'm really acting *independent* of a court are very rare. Those programs do not come along every day. And those instances do not pose a true threat to our conventional legal system. They're aberrations.

ASJ: What made the 9/11 tragedy so different in terms of compensation? Why, for instance, did we not see the same level of generosity for when Hurricane Katrina struck?

KRF: One word: Patriotism. 9/11 was a foreign attack. It was a terrorist attack, from abroad, on our own shores. And in response, we as a nation said, "Let's demonstrate to the world two things: First, our fist—we will go find Bin Laden and we will bring him to justice. And, second, our open hand—let's show the world how we take care of our own; let's show the world how we are one community. Not Republican. Not Democrat. Not liberal. Not conservative. Not red state, blue state."

When it comes to something like that, we are one. It made my job much easier.

ASJ: How?

KRF: *Everybody* was behind me. *Everybody* supported me. *Everybody* wanted the program to succeed. President Bush; Senator Kennedy—while on opposite sides politically, together they supported me. Attorney General [John] Ashcroft—he’s my hero. I will forever be in his debt for the way he backed me up in that program. He made it happen.

ASJ: You have opined that the 9/11 fund and the whole mechanism that was set up during that time should *not* be used as a precedent in the future; that it was a one-off case—an aberration—and that it should not be replicated.

KRF: That’s absolutely correct.

ASJ: Why?

KRF: Because, first of all, that program involved the expenditure of public taxpayer money. Now, bad things happen to good people every day in this country, and there is no public expenditure for compensation from the taxpayer to the victim.

You should read the letters I received during my administration of the 9/11 fund. “Dear Mr. Feinberg, my son died in Oklahoma City; where is my check?” “Dear Mr. Feinberg, I don’t get it. My daughter died in the basement of the World Trade Center in the original 1993 attacks committed by the very same type of people; where’s my check?” And it wasn’t just terrorism. “Dear Mr. Feinberg, you have to explain something to me. Last year, my wife saved three little girls from drowning in the Mississippi River, and then she drowned. She was a true heroine. Where’s my check?”

In that fund administration, we were carving out a very special, generous compensation for a certain group of innocent victims. But to everybody else, we said, “Go fend for yourself; hire a distinguished trial lawyer and go for it.”

Well, that’s not the American way. And I think I have been proven right. The 9/11 fund has not been replicated in Katrina or tornadoes or hurricanes, and I don’t think it should be.

ASJ: What does it take to be a special master in these cases?

KRF: I must say you’ve got to have a secure sense of self. Because I guarantee, if you want to do what I do, don’t expect a thank-you, don’t seek gratitude, don’t look for appreciation or praise.

We are dealing with people who have suffered a terrible loss. The sheer inhumanity of it! Expect nothing. Any expression of appreciation is, I think, a bonus.

This is tough slogging. But there is tremendous professional and personal satisfaction. In seeing people sign up. In getting the money out. There’s evidence of real success in the statistics.

So you take pride in your work. But you better have a constitution and fortitude to deal with the emotion. It’s the emotion that is absolutely debilitating.

ASJ: Were there times when you felt you were being treated like a human piñata?

KRF: Frequently; yes, frequently. But this is something that I learned from Judge Weinstein: Don’t respond with more words and arguments. Instead, get the money out to the claimant. As swiftly as possible. There simply is no substitute for prompt payment.

Once the money begins to flow and people see that the program is legitimate and generous, the criticisms quickly die down. I’ve seen it happen over and over.

ASJ: How do you keep your balance? What makes you keep going day after day?

KRF: In the background right now, you hear classical music. Eighteen hours a day—opera, symphonies, chamber works. In my line of work, during the day you’re dealing with the horrors of civilization. And at night you go to a concert, an opera—the height of civilization. That helps keep you sane.

And you’d better have a loving family, as I do; and friends who back you up, circle the wagons around you, and protect you. I have benefited from all that, as well.

Also, you have to maintain some degree of professionalism. You have been asked to do a job. As a teenager growing up in Massachusetts, I remember President Kennedy saying that every individual can make a difference. That’s what you try to do—make a difference.

ASJ: What would you consider your most significant achievement?

KRF: Well, professionally, I think my most significant achievement was securing participation of over 90 percent of all of the plaintiffs in these various cases. I take pride in having attracted voluntary participation in all those matters. I find that very rewarding.

My personal success is that I have a wonderful family—a wife, three children, four grandchildren. That’s pretty good.

ASJ: Any regrets?

KRF: Another lesson from Judge Weinstein was about regrets: Keep looking forward. Don’t look back. They may be gaining on you.

I try to remember that. ■