



## ADR STRATEGIES

### JOAN B. KESSLER, JD, PHD



You are receiving this communication as a result of your interest in alternative dispute resolution.

- Below is my September 2013 CAALA Advocate article **Interview: Kenneth Feinberg**. As you may know, Mr. Feinberg is a nationally prominent mediator and arbitrator. I think you will enjoy the interview.
- Also, the Daily Journal is currently compiling its annual list of the Top Neutrals. As you know, there are many California neutrals who should be recognized. Share your choices with the Daily Journal by sending an email to [ADR@dailyjournal.com](mailto:ADR@dailyjournal.com). Balloting ends this Friday, September 13<sup>th</sup>, at 5:00 p.m. The results will be published on Wednesday, October 16, 2013 in the Daily Journal.
- Please let me know how I may assist you in economically resolving a case through mediation or arbitration.

40 years ago I received a Ph.D. from the University of Michigan in Communications. Before I went to law school I taught interpersonal relations, group interaction, conflict resolution, intercultural communication courses and served as a jury consultant. I apply the communication issues and solutions I taught, coupled with over 25 years of legal practice experience to my alternative dispute resolution practice.

#### THINK ABOUT THIS PRIOR TO YOUR NEXT MEDIATION/ARBITRATION

Please contact me to discuss your next mediation. You may call me on my direct line: (310) 552-9800 or e-mail me on my personal e-mail: [jkessler@adrservices.org](mailto:jkessler@adrservices.org).

To schedule a mediation or arbitration please call my case manager Eve Thorstens at (310) 201-0010 at ADR Services, Inc. If the date you desire is not available please call me on my direct dial number (310) 552-9800 and **WE WILL MAKE IT HAPPEN.**

Please visit my website: [www.joanbkessler.com](http://www.joanbkessler.com)

To change your address or remove your name from my list call me at (310) 552-9800 or just send me an email to [jkessler@adrservices.org](mailto:jkessler@adrservices.org).

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Joan B. Kessler  
Associate Editor, ADR Issue

## Interview: Kenneth Feinberg

The government's go-to guy for arbitrating victims' funds tries to treat individuals with empathy and not as assembly-line cogs



Feinberg

*Kenneth Feinberg was designated by the Obama Administration and British Petroleum (BP) to serve as Administrator, Gulf Coast Claims Facility. He served as the Special Master for TARP Executive Compensation, and served as the Special*

*Master of the Federal September 11th Victim Compensation Fund. He was also one of three arbitrators selected to determine the fair market value of the original Zapruder film of the Kennedy assassination and was one of two arbitrators selected to determine the allocation of legal fees in the Holocaust slave labor litigation. Mr. Feinberg was designated "Lawyer of the Year" by the National Law Journal. He is listed in "The 100 Most Influential Lawyers in America."*

*Mr. Feinberg has a BA from the University of Massachusetts and a JD from NYU. He is the managing partner of Feinberg Rozen, LLP. He was a Law Clerk for Chief Judge Stanley H. Fuld; and Administrative Assistant to Senator Edward M. Kennedy.*

On a cold Washington, D.C., afternoon in March when flights were being delayed or cancelled due to a threat of a snowstorm, it was warm and cozy in Ken Feinberg's D.C. law office. Ken Feinberg has mediated settlements of the 9/11 Victim Compensation Fund, Agent Orange claims, asbestos claims, and many other major disputes.

Operatic music played in the background and walls were covered with articles, pictures and tributes to a world-class mediator – a truly remarkable man and a fascinating interview.

**JK: What is it in your family background that led you to this career?**

**KF:** It's hard to pinpoint any one event. I grew up in a middle-class environment, in a blue collar town in Brockton,

Massachusetts, in the early 1960s, when a fierce son of Massachusetts was President of the United States and I think my Jewish upbringing, in a time when optimism reigned supreme, you know after World War II, when a small, vibrant Jewish community in Brockton believed in the communitarian effort to help one another. We can all succeed as a group, if you put your mind and your body to the task. And I always think that, that upbringing in Brockton infused in me (1) an interest in public service (2) a desire to reach out and help the underdog, the less fortunate, the 8 ball, behind the 8 ball victim, and (3) I think, to do it in a communitarian way, that we have an obligation as a society, not as individuals alone, to come to the help of our fellow citizens. And all of that was part of that upbringing in Brockton after World War II and to the late 1960s.

**JK: Ken, when you say help others as a communitarian, what do you mean by that?**

**KF:** I think that government, at the local, state, and federal level does have an important role to play. I think the churches and the synagogues have an important role to play. Charity is an important facet of this. I think that we have an obligation, as best we can, as individuals as well as members of society, to reach out and help others less fortunate.

**JK: Like it takes a village?**

**KF:** Like it takes a village.

**JK: How did you prepare for this extraordinary career as a mediator?**

**KF:** You don't prepare for a career like mine. You really don't. You go to college and you go to law school. You never plan for this. And what you learn is you can't plan. The best laid plans get skewed by events, by circumstance and that's what

happened to me. I never planned this career. I never planned in college or law school to be a mediator or a dispute resolver. Events overtook my plan.

**JK: How did you get your first big mediation? I know you discuss this in your book, *Who Gets What: Fair Compensation after Tragedy and Financial Upheaval*, which was very interesting.**

**KF:** The first big mediation I ever did was Agent Orange, involving Vietnam veterans in 1984. Almost 30 years ago, when a federal district judge, who's still sitting in Brooklyn, Jack Weinstein, asked me to be a very public mediator in the Agent Orange class action involving Vietnam veterans.

**JK: What do you think it was that Judge Weinstein saw about you?**

**KF:** We had clerked for the same judge, 30 years apart. I had known Judge Weinstein, every year when the clerks met to celebrate the courtship. And he saw my previous experience as Chief of Staff to Senator Ted Kennedy as a big plus in my credibility and political contacts in Washington. And he thought that the Vietnam Veterans would benefit from that and he called on me to participate.

**JK: What training did you have in Alternative Dispute Resolution, if any?**

**KF:** None, no training. They didn't even teach ADR at NYU Law School in the 1960s. It wasn't even a clinical program. It wasn't on anybody's radar screen. This was a practice that I developed really on my own.

**JK: Can you describe, Ken, what are some of the skills that you use; you're a personable fellow, I'm sure you use that to your benefit.**

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**KF:** I think I'm asked all the time, what are the characteristics of an effective mediator, in my case, *competence*, you have to understand the issues. There's no substitute for immersing yourself in the issues, competence. *Creativity*, finding different ways to get to yes. Hand in glove with creativity is *flexibility*. Avoid rigidity, always look at how the other person sees it. Try and fashion some grey areas that combine objectives sought by the litigants. *Doggedness*, do not lose optimism. Be prepared to hunker down and stay at it until we get to yes. Those are some of the characteristics

**JK:** And when you say understanding the issues, is listening an important part of that?

**KF:** Empathy and listening are very important. Put yourself in the other guy's shoes. How does she see it, how does he see it? What does she think of the strengths and weaknesses of the case? What does he think of the strengths and weaknesses of the case? I think it's very important to empathize with both sides in a complex dispute.

**JK:** What about the timing, Ken, of the mediation, how does that impact the mediation process? I know you talk about proximity to trial date, or maybe during a trial?

**KF:** What's very important is that the parties understand when they will begin the mediation and when it will end. Timing is critical. You're more likely to be successful in a mediation if there is a trial date looming, where you lose control of your own destiny, you see. And I've also found that mediations are usually successful in the last two or three hours when there's an agreed upon deadline about to be met. It's either, settlement, or it's over. And very often the mediation participants wait until the "laaast" minute until they think this is the "laaast" chance and then they reach a settlement.

**JK:** It's interesting you say that because a lot of times I'll tell people I have to leave at a certain time and people say "don't say that; go as long as it takes", but I like to put a deadline, it sounds like you are saying that.

**KF:** I agree, when you have a deadline, you accelerate the likelihood of success by getting the parties to negotiate under the threat of the clock. And I find that that's very successful. In the 9/11 Victim Compensation Fund, Joan, over two-thirds of all the applications came in, in the last 60 days. But the fund existed for 33 months. For 33 months, and two-thirds of the applications came in the last 60 days when people realized they couldn't hesitate any longer. That by statute, the program was about to expire.

**JK:** You talk in your book about putting a purse together when you have a variety of defendants, and you are trying to get money from various defendants and get these parties to put a purse together. What techniques do you use to get people to pitch in?

**KF:** Well one thing you don't do is, what I learned the hard way, you don't put all contributors in a room at the same time because, as you know better than most, when you put everybody in the room together, everybody counts other people's money. It's not just about how much will it take to settle, it's also about allocation. Who pays what of that settlement pot? I found that, a very important technique is to meet separately with each contributor and discuss on the merits a formula, transparent formula, anybody can see it, that can translate into what each contributor should get.

**JK:** When you say a "transparent formula," Ken, are you talking about in the early stages of putting a purse together, do you let people know?

**KF:** Well, in Agent Orange there were eight chemical companies. Let's look at a formula that is based on volume of sales, Part One, coupled with the amount of Dioxin that you included in your preparation of the herbicide. So it's not only quantity and volume, it's also quality of poison. How much of that volume included Dioxin, the chemical that was essential to the success of the herbicide? And everybody, "Here is the formula." Now you got to apply the formula to your own statistics and data concerning sales. But, there it is, for everybody to see and now I'll meet privately with each party. Full

transparency on the formula, private confidential information about data of each individual company. In Agent Orange, that worked. In 9/11 the statute creating the fund, mentioned the formula. It was right there in the statute. In BP we published, in the BP oil spill, we published the formula. Here's the formula we're going to be using to calculate damages. Everybody sees it. Now apply it to your own confidential statistics and data. It worked.

**JK:** But, you still like to work with people individually to put pressure on them and to encourage them?

**KF:** Encourage them and explain, you know, why contribution is better than the uncertain alternatives, yes.

**JK:** It's not just alternatives, you are showing them a downside risk?

**KF:** It's the downside risk of litigation more than anything.

**JK:** How do you convince those people they have a downside risk?

**KF:** It's not hard to convince them of the downside; it's much more difficult to convince them to participate in the known risk that is the fund.

**JK:** What do you mean by that?

**KF:** The devil you know: "Look Ken. You don't have to tell us about the downside risk of litigation, we live that every day. But what we don't know is what are the risks associated with participating in your program? It's a unique program, it's creative, it's new, and we don't have a track record that we can examine of your program. With litigation we know what we are buying for all of its problems and minefields. But with you, we don't have any track record and we're not sure."

**JK:** Do you rely then on your historic records?

**KF:** Yes, rely on our stated success and we also try and provide as such transparency and certainty about our new program and new mediated proposals that the parties may not have any experience with, but it seems to be laid out for all to see.

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**JK: Ken, what kinds of non-mass cases did you get after Agent Orange?**

**KF:** Thousands, after Agent Orange, we got insurance coverage disputes, employment discrimination disputes, contract disputes, environmental disputes, individual tort cases, RICO, you name it. Over the years we have had experience with all sorts of mediations.

**JK: How do you do it? How many people do you have here?**

**KF:** Myself and one other. We pick our mediations very, very carefully. We have part-time people and when we do these big cases, involving 9/11, or BP, you know, not the small individual cases, but the large class actions, and the large claims, we subcontract out to claims companies, accountants, and law firms. We staff up these big cases.

**JK: With the mass cases, you talk about that in your book, how do you settle large cases and avoid an “assembly line” feel?**

**KF:** That is very, very difficult. On the one hand, justice delayed is justice denied. You cannot in a mass case simply anticipate trying the cases one at a time. You can't. So you've got to come up with an efficient way to settle the aggregate.

**JK: How do you do that?**

**KF:** That's not hard, you meet with the company and the lawyers, class-action lawyers, and you work out an aggregate settlement. 100 million, 200 million, 50 million, whatever it is. Now, you've got the aggregate part, the defendants are gone, how do you treat each individual class member, or each individual claimant so that it's not assembly-line justice? Judge Weinstein in Brooklyn has taken the lead in this through education, hearings, individual hearings, if he can do it, as he did in 9/11. Town hall meetings, where you invite people to come, a gathering to understand a case. Those are some of the steps you try and take to democratize the process to avoid assembly line justice. It's very difficult.

**JK: How do you make the individuals feel satisfied in such large matters?**

**KF:** Very, very difficult. The best way I've learned over the years is by giving each individual claimant, these individuals, an opportunity to be heard. Do not underestimate the power and persuasion of giving people the right, giving them a voice. Either collectively, in large town hall type meetings, or in private confidential meetings with a mediator where you listen to them, empathize with them, explain to

them what you can do and can't do. It's very hard. But this is an area, Joan, the tension between aggregated justice, mass settlements, and individualized tailored treatment, not assembly line cog in a machine, is very important tension and it's got to be dealt with.

*Joan Kessler, a full time mediator and arbitrator at ADR SERVICES, INC., received her Ph.D. in Communication, before she attended law school. She practiced law for over 25 years, was a jury consultant and taught Communications. Many of the communication strategies she taught, her extensive experience as a litigator and her training at the U.S. Army War College enhance her mediation and arbitration practice. She specializes in Employment, Real Estate, Trust/Estate, Business, Commercial, Entertainment and Insurance Cases. Ms. Kessler may be reached at: [jkessler@adrservices.org](mailto:jkessler@adrservices.org) or direct telephone number (310) 552-9800. Ms. Kessler is also on the American Arbitration Association Panel of Arbitrators and a member of the USDC Mediator Panel. Visit her Web site at [www.joanbkessler.com](http://www.joanbkessler.com).*

