

PRO BONO

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to the Community
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Kenneth R. Feinberg: A Profile in Public Service

By Jeff McDermott



Kenneth Feinberg has been involved with nearly every major mass tort action in the past several decades and has demonstrated his commitment to pro bono work by volunteering to serve as special master for both the September 11 Victim Compensation Fund and the Hokie Spirit Memorial Fund.

Kenneth R. Feinberg, the pro bono special master for both the September 11 Victim Compensation Fund and the Hokie Spirit Memorial Fund (which offered assistance to the victims of the 2007 Virginia Tech shooting) is a living example of the difference that a lawyer can make. He was involved in several other major legal issues of the past century, including litigation over the harmful effects of Agent Orange and asbestos and even the determination of the fair market value of the Zapruder film of President Kennedy's assassination. Feinberg's professional experiences and his pro bono work have provided inspiration to lawyers and nonlawyers alike.

Feinberg grew up in Brockton, Mass., a blue-collar suburb of Boston. His father owned a tire store and his mother was a bookkeeper. Kenneth Feinberg will always consider himself a "Brockton boy," and he still speaks with a distinctive Boston accent. He attended the University of Massachusetts, where he caught the theatrical bug and performed in college plays, such as *Othello* and *Zoo Story*. He initially

considered an acting career, but his father advised him that law might be a more stable career choice and that he could "play Hamlet in front of juries." Feinberg took his father's advice, graduated with honors with a degree in history, and got accepted to the New York University Law School.

In law school, Feinberg was fascinated with the analytical vigor of the law as well as by its connection to social and political issues. He became an editor of the *Law Review* and after graduation was selected for a two-year clerkship for Judge Stanley H. Fuld, the chief judge of the state of New York whom Feinberg credits for teaching him the value of "hard work and legal craftsmanship." After his clerkship, Feinberg opted against going to work at a law firm and instead spent the next three years as a federal prosecutor in the office of the U.S. attorney in Manhattan. He litigated numerous trials in criminal cases involving bank robbery, securities fraud, tax evasion, and drug trafficking, as well as a pre-Watergate trial of former Attorney General John Mitch-

ell on corruption charges. As a prosecutor, Feinberg learned the value of preparation and following his instincts—lessons that would guide him throughout his career.

In 1975, Feinberg took on another position in the public sector as counsel to the Senate Judiciary Committee. When he interviewed with the committee's chairman, Sen. Edward Kennedy (D-Mass.), Feinberg confessed to being an admirer of the senator but admitted that they had some differences of opinion on criminal law; after all, Feinberg was a prosecutor. Kennedy offered him the job, because he was seeking someone who could challenge him on the issues and who would offer wise counsel and independent thinking. Feinberg accepted the job immediately and had to break the news to his wife, Diane, on their honeymoon.

As a committee counsel, Feinberg was involved in many high-profile public policy debates, such as criminal law reform, immigration policy, and the rules of evidence. He drafted major pieces of legislation and learned the intricacies of the legislative process from Sen. Kennedy, whom Feinberg regards as "a true legislator." For example, Feinberg worked with Attorney General Edward Levi and a young Justice Department attorney named Antonin Scalia to draft the Foreign Intelligence Surveillance Act, which created a federal court and special procedures for collecting domestic intelligence. Feinberg also worked with fellow Judiciary Committee staffer and future Supreme Court Justice Stephen Breyer on legislation creating the U.S. Sentencing Commission and the sentencing guidelines. After only two years with the committee, Feinberg had so impressed Sen. Kennedy that the senator elevated him to be his chief of staff. Feinberg managed more than 80 of Kennedy's staffers but found that the administrative demands of the chief of staff position were not nearly as interesting as the legislative work on the Judiciary Committee.

In 1980, after Sen. Kennedy's unsuccessful presidential run, Feinberg decided to join the private sector. He had young children and thus financial security had become more of a priority. The New York-based firm of Kaye, Scholer, Fierman Hays & Handler was looking for an attorney to open an office in Washington, D.C. Feinberg accepted the challenge and began a successful practice that included lobbying, litigation, and work on government contracts and federal regulatory issues. He became a much-sought-after attorney and served on the firm's Compensation and Executive Committees.

Feinberg was soon to become an expert on alternative dispute resolution, although he fell into the role almost by accident. Judge Jack Weinstein, a federal district judge in New York and also a former clerk for Judge Fuld, was handling the Agent Orange litigation, which was brought by Vietnam War veterans who had suffered injuries that they claimed were the result of exposure to the herbicide that had been used by the military. Starting in the 1970s, thousands of veterans had filed suit against Dow, Monsanto, and other chemical companies that produced Agent Orange. In 1983, the cases were consoli-

dated under Judge Weinstein into one class action, which was still novel in the field of tort law. Two months before the cases were to go to trial, Weinstein appointed Feinberg as special master in the case and charged him with trying to reach a settlement between the parties. Feinberg readily admits that he had no experience in dispute resolution, but Weinstein trusted his judgment and believed Feinberg had the political skills to mediate the dispute. Feinberg spent the next six weeks negotiating between the two parties and finally reached a settlement of \$180 million the day before the jury was to be impaneled. Feinberg also had to work to come up with a formula for how much each chemical company would contribute to the settlement and how much each veteran would receive. Judge

Weinstein's foresight was proven correct: in only six weeks, Feinberg brought an end to contentious litigation that had dragged on for six years.

Feinberg's accomplishment did not go unnoticed. More and more clients came to Kaye Scholer seeking his dispute resolution skills. Mass torts, which were unheard of just a few years earlier, grew as a field of practice for lawyers and as a field of study in law schools. In 1988, Feinberg's talents were again used in another precedent-breaking class action. Hundreds of thousands of women had filed suit against the A.H. Robins Company, alleging that the Dalkon Shield intrauterine contraceptive device had resulted in health problems ranging from infections to infertility. The company filed for bankruptcy, and in those proceedings, more than \$2 billion was set aside in a trust fund to compensate

the claimants. Feinberg was appointed as a trustee charged with disbursing those payments. The case involved claimants from around the world, and again Feinberg had very little precedent on which to rely in determining how the compensation should be paid. Indeed, the only guideline that he had to follow was to seek settlements in order to avoid litigation. Once again, Feinberg succeeded in resolving litigation that had consumed the courts for nearly 15 years; a large percentage of the plaintiffs received compensation promptly, at the same time avoiding the expensive and time-consuming process of litigating their individual cases.

In the early 1990s, the federal courts were faced with a large number of cases brought by individuals seeking compensation for injuries caused by asbestos, the heat-resistant fiber that was used in shipyards, foundries, and electrical plants. Judge Weinstein was presiding over the asbestos cases brought by former workers at the Brooklyn Navy Yard and again appointed Feinberg as a special master. Feinberg was also appointed special master by a Baltimore court overseeing nearly 4,000 asbestos cases brought by workers in Maryland. In 1992, after Feinberg helped settle thousands of cases, the New York federal courts reported that they were virtually free of claims related to asbestos. Prompt compensation was important for many of the asbestos plaintiffs who were seriously ill and might not have



lived through a lengthy litigation process.

Shortly thereafter, Feinberg founded his own law firm, the Feinberg Group, which quickly became a pre-eminent expert in the negotiated settlement of complex litigation. The firm specializes in coming up with innovative and creative ways to resolve legal disputes.

In 1997, Feinberg chaired a task force put together by the American Arbitration Association on alternative dispute resolution and mass torts. The task force produced a report that included groundbreaking recommendations on how to incorporate alternative dispute resolution into every stage of a mass tort action. The recommendations helped the federal court system take advantage of dispute settlement techniques to provide fairer and more equitable results that minimized expense and delay.

Feinberg handled another fascinating negotiation process in 1999, when he was selected as a member of an arbitration panel that helped settle a dispute between the Zapruder family and the federal government over the value of the film of President Kennedy's assassination. The Kennedy Assassination Review Board declared the film to be public property, and as such, the Zapruder heirs were owed just compensation for the film. Initially, the Department of Justice and the family were millions of dollars apart on their estimation of the film's value. The two sides agreed to submit the dispute to arbitration, and, after significant testimony and research, Feinberg's arbitration panel valued the film at \$16 million.

Perhaps no experience could rival Feinberg's service as the special master for the September 11 Victim Compensation Fund. After the 9/11 attacks, the airline industry rushed to Congress to request assistance to stabilize the industry and to reassure the public that it was safe to travel. On Sept. 21, 2001, Congress passed, and a day later the President signed into law, the Air Transportation Safety and System Stabilization Act, which provided financial compensation and loan guarantees to the airline industry. The act also created the September 11 Victim Compensation Fund, which provided an unlimited appropriation to compensate the individuals who had been injured as well as the families of the individuals who had been killed in the terrorist attacks for both their economic and noneconomic losses. The act charged the attorney general with appointing a special master to administer the fund and to determine each claimant's compensation based on the "harm to the claimant, the facts of the claim, and the individual circumstances of the claimant." In return for accepting compensation from the fund, the claimants would have to surrender the right to file a civil action for damages resulting from the attacks.

When Feinberg read that a special master was to be appointed for the fund, he immediately contacted Sen. Chuck Hagel (R-Neb.), a friend whom Feinberg had known from the Agent Orange case when Hagel was a deputy administrator of the Veterans Administration. Hagel recommended Feinberg for the position, and he interviewed for the appointment twice with Attorney General John Ashcroft, who was initially suspicious as to why a former staffer for Sen. Kennedy would want a job in a Republican administration. Feinberg replied that millions of Americans were searching for a way to help their nation after September 11 and that serving as special

master would allow him to use his talents to make a contribution. However, Ashcroft warned him, "Nothing you did before will prepare you for administering this statute." After the initial interview, Feinberg decided that he wanted to contribute to the relief efforts in an even more meaningful way and offered to serve without compensation. On Nov. 26, 2001, Ashcroft announced the appointment of Feinberg as special master for the September 11 Victim Compensation Fund.

Like many of his prior experiences, this assignment provided Feinberg with very little precedent or guidance. The statute outlined only vague standards as to how each claimant was to be compensated; therefore, Feinberg's first task was to write regulations that would govern the program. Feinberg and his staff wrestled with thorny issues, such as whether to compensate engaged and same-sex partners of deceased victims and whether to compensate the families of undocumented workers who had been killed in the attacks. He also tried to minimize gross disparities in the awards so as to maintain public support for the fund. After all, a consideration of purely economic losses would result in monumental differences between the amounts received by the families of stockbrokers and firefighters, for example.

Feinberg conducted public meetings with the victims' families, many of which were, at least initially, confrontational and emotional. He listened to even the most bitter of critics, and, in the end, many of those initial critics offered nothing but praise for the way Feinberg administered the fund. Feinberg borrowed lawyers from several federal agencies and together they conducted more than 1,500 hearings (a right guaranteed to victims and their families by the statute) in a period of less than two years. Feinberg noted that about three-quarters of the families were represented by lawyers, most of whom offered their services on a pro bono basis: "My fellow attorneys played an enormous role in helping thousands of victims navigate a terribly difficult time, a gesture of public service of which our profession should be very proud."

Although the hearings were often emotionally exhausting, Feinberg found that they were tremendously important. Most families simply wanted the opportunity to express their love for the victim and to explain the magnitude of their loss. Feinberg explained that "these stories of love often helped me through the day, when hearing after hearing stretched late into the night."

Both statistics and the families' testimonials demonstrate that Feinberg's administration of the fund was an amazing accomplishment. Of eligible families who suffered a loss on Sept. 11, 97 percent entered the program; in total, they received almost \$6 billion in tax-free compensation. In addition, more than 4,400 of those who had been physically injured on Sept. 11 applied to the fund for compensation. Administrative costs amounted to just 1.2 percent of the total funds disbursed. The families were impressed by Feinberg's humanity and willingness to listen. For example, Charles Wolf, who lost his wife in the World Trade Center attack, initially launched a Web site entitled "Fix the Fund"; impressed with Feinberg's management, Wolf later changed the title to "The Fund is Fixed."

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