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Dispute Resolution Update

December 2012

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Dispute Resolution Update

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Dear Friends and Colleagues:

This edition of Dispute Resolution Update features recent mediation-related court decisions, as well as news describing dispute resolution initiatives in this country and throughout the world. The information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediators' newsletter.

2012 KBA Alternative Dispute Resolution CLE

On June 16, 2012, ADR, LLC, business partners Larry Rute and Patrick Nichols served as presenters at the Annual Kansas Bar Association ADR CLE in Topeka, Kansas. Patrick Nichols served on a panel with (moderator) Kathy Perkins, Esq., Kathy Perkins LLC, Lawrence, Karen Shumate, COO, Lawrence Memorial Hospital, Lawrence, and Eunice Lee-Ahn, KU Med-Legal Partnership Clinic, Lawrence, Kansas, in presenting *Dispute Resolution in Health Care-Real Opportunities to make a Difference*.

Larry Rute moderated *Mediating the Multi-Party Fair Labor Standards Act Case* with Michael A. Hodgson, The Hodgson Law Firm, LLC, Overland Park, and Heather M. Lake, Constangy, Brooks & Smith LLP, Kansas City, Missouri. Readers desiring more information regarding these subjects are encouraged to contact Patrick at pnichols@adrmidwest.com or Larry at larry@adrmediate.com. Finally, we encourage readers to contribute articles or other dispute-resolution related information for future publication in Dispute Resolution Update. In addition, should the reader know of someone who would like to receive the newsletter, simply notify us at info@adrmediate.com.

We wish our readers a wonderful holiday season!




Larry Rute




Patrick Nichols

Distinguished Fellows
of the International Academy of Mediators

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Mediation Quote

"In deciding who gets what in American society, money is almost always the vehicle of exchange. . . . Public memorials may be erected to signify and symbolize loss; a formal government or private apology may follow an admission of wrongdoing; and emotional, legal, and educational assistance may be a worthy substitute for cash in certain situations. . . .But when we discuss how to compensate innocent victims of wrongdoing or determine the value of corporate employment, Americans rely upon money. It's a natural outgrowth of our free market, capitalist history. . . . [I]n an important sense, the exchange of money constitutes public acknowledgement of injustice and loss. It can serve as an expression of citizen support, the community standing as one with the victim."

- Kenneth R. Feinberg, *Who Gets What: Fair Compensation after Tragedy and Financial Upheaval* (PublicAffairs 2012) at 186-87.

Test

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Recent Mediation Cases & Resolutions

Complex Mediated Settlement Founders on Court's Concerns for Absent Class Members

Five months of mediation resulted in a sophisticated settlement to resolve a large class action against Sprint for charging flat-rate early termination fees to consumers for canceling cell phone service, which provided \$17.5 million to the class, prohibited the objectionable charges for two years, and expressly resolved ten other lawsuits. The class was certified and the settlement approved by the District Court in New Jersey, but the U.S. Court of Appeals for the Third Circuit vacated its order and remanded the case due to concerns over certification of the class and adequate notification of the settlement.

The appellate court noted the considerable efforts put into settling the class action, but emphasized the judicial duty to protect absent class members.

[Larson v. AT&T Mobility, LLC](#), No. 10-1285/1477/1486/1587 (U.S.C.A. 3d Cir., June 29, 2012)

California Mediation Confidentiality Statute Shield Legal Malpractice

A California appellate court held that whether plaintiffs intend to settle their claims at mediation is "mediation related" and thus barred by California's strict mediation confidentiality provisions, preventing plaintiffs' claim that their attorneys improperly took their signatures from a confidentiality form at mediation and appended them to a settlement agreement that plaintiffs did not authorize. The trial court dismissed the complaint based on the 2011 decision of the California Supreme Court in [Cassel v. Superior Court](#), and the appellate court affirmed.

[Hadley, et al. v. The Cochran Firm, et al.](#), No. B233093 (Cal. App., 2d Dist., August 3, 2012)

Negotiating Financial Terms in Mediation Not Sufficient for Attorney to Get Paid

Counsel who withdrew from a case he was handling on a contingency fee basis prior to finalizing the settlement terms reached in mediation is not entitled to any fees according to a federal court.

Counsel's assertion that the parties were merely fighting over financial terms that he worked out in the mediation did not persuade the court since the agreement was incomplete and did not result in his client receiving any payment.

[Neely v. Zimmer](#), No. 2:11-cv-00444 (U.S.D.C. S.D. W. Va., August 2, 2012)

Netflix Mediated Settlement Approved by Court

A federal court in California gave preliminary approval to a settlement reached by Netflix in mediation, resolving a class action which alleged violations of the federal Video Privacy Protection Act due to Netflix maintaining customer viewing histories longer than necessary and disclosing information to third parties without consent. Netflix agreed to pay \$9 million, which after paying fees and costs will go to nonprofits that provide education on protection of privacy and personal information, and also committed to change its practices going forward. The court mentioned in concluding that the settlement was the result of arm's length negotiation.

[In re Netflix Privacy Litigation](#), No. 5:11-CV-00379 (U.S.D.C. N.D. Cal., July 5, 2012)

Ninth Circuit Courts Must Be Reasonable when Requiring Government Representatives to Appear with "Full Settlement Authority"

The U.S. Court of Appeals for the Ninth Circuit

concluded that it was an abuse of discretion to require the Assistant Attorney General (AAG) in charge of the Tax Division of the U.S. Department of Justice personally to attend a settlement conference relating to a \$5 million tax refund, even though no one below her has full settlement authority exceeding \$2 million. The court issued a writ of mandamus to reverse lower court orders requiring attendance in person, noting that participation by telephone or even in person in future settlement negotiations might be reasonable. The court recognized that the Tax Division has over 500 civil cases pending in which the controversy exceeds \$2 million, which might result in more settlement conferences than would be physically possible for the AAG to attend in person. In addition, the court acknowledged the need for centralized decision-making in significant cases,

especially when even the AAG's decisions over \$2 million must be reviewed by the Congressional Joint Committee on Taxation. The judges on the appellate panel contrasted their experience in settling cases with the settlement judge's statement that he had never achieved a settlement in 29 years without having a person with full authority present for each side.

[U.S. v. U.S. Dist. Ct. for N. Mariana Islands](#), No. 11-72940 (U.S.C.A. 9th Cir., September 12, 2012)

New York Court Maintains High Bar for Accessing Confidential Mediation Materials

A federal district court in New York considered when a party may access confidential mediation materials and reversed the magistrate's decision that "special need" for the material had been demonstrated. Importantly, the court concluded that a confidentiality agreement among participants in a private mediation was to be treated no differently than mediations in which confidentiality was ordered by a court. Here, the confidential materials were from a prior private mediation in Singapore between plaintiffs and some of the defendants. Defendants sought to use prior mediation statements of plaintiffs to impeach them, but plaintiffs sought a protective order to shield the materials. The court concluded that impeachment was not a "special need" or "compelling need" as required to modify a protective order and thus did not meet the test established in

[In re Teligent, Inc.](#), 640 F.3d 53 (U.S.C.A. 2d Cir., May 5, 2011), without even analyzing the other two elements of unfairness from lack of discovery and the need for the evidence outweighing the interest in maintaining confidentiality.

[Dandong v. Pinnacle Perf. Ltd.](#), No. 10 Civ. 8086 (U.S.D.C. S.D.N.Y., October 9, 2012).

Advising Court of Settlement in New Jersey Waives Mediation Confidentiality over Terms

After litigants reached agreement in mediation, they permitted the mediator to tell the court that settlement had been achieved, but neglected to prepare or sign a written settlement agreement. When the parties disagreed on the settlement terms a week later, mediation confidentiality under the Uniform Mediation Act was raised in an effort to block enforcement of the oral settlement agreement. The trial court upheld the oral settlement after permitting testimony to establish the terms, on the theory that the "actual mediation" ended with the negotiations, and a final joint mediation session to discuss and finalize the terms was therefore not confidential. Without criticizing that rationale, the appellate court affirmed enforcement of the settlement on the basis of express waiver of confidentiality since the parties permitted the mediator to advise the court that the matter was settled. Having disclosed that there was a settlement, the court held that either party was permitted to disclose the terms and seek enforcement of the settlement.

[Rutigliano v. Rutigliano](#), No. A-2797-11T1 (NJ Sup. Ct. App. Div., October 15, 2012)

Delay by Insurer in Payment of Mediation Settlement Triggers Penalty

An insurer that agreed to settle a disputed claim in mediation, but delayed payment beyond 30 days was penalized \$5,000 for failure to make timely payment, but avoided a \$125,000 penalty that would have been due if the delay followed the insurer receiving satisfactory proof of loss. Since the insurer had denied liability for the claim, the mediation settlement was not considered proof of loss, so the lower statutory penalty applied.

[Katie Realty Ltd. v. Louisiana Citizens Prop. Ins.](#), No. 2012-C-0588 (La., October 16, 2012)

- The U.S. Office of Special Counsel successfully mediated the Whistleblower Protection Act claim of a U.S. Border Patrol agent who was harassed for refusing overtime pay when there was no work to be performed and then briefing Congress. The Office of Special Counsel has also mediated three cases for Operation Fast and Furious whistleblowers at the Bureau of Alcohol, Tobacco, Firearms and Explosives. [Government Accountability Project](#) (October 24, 2012)
- The University of California has agreed in mediation to pay \$30,000 and give a personal written apology to each of 21 UC Davis students and alumni who were pepper sprayed at close range by campus police during a peaceful protest. A report about campus responses to civil disobedience urged UC administrators to use mediation in place of

confrontation in the future, but indicated that pepper spray might still be needed as a last resort. [Business Insider](#) (September 26, 2012); [Los Angeles Times](#) (September 13, 2012).

- The New York Times has reached a tentative deal with the Newspaper Guild through mediation, in an effort to avoid a proposed byline strike. After 18 months of talks, Times negotiators walked out of negotiations earlier in October and threatened to present their "final offer" at the next meeting, but then agreed to try mediation. Mediation with a trusted mediator made progress, eventually resulting in the tentative deal. [Poynter News](#) (October 28, 2012); [Talking Points Memo](#) (October 22, 2012); [NY Guild](#) (October 10, 2012)

Dispute Resolution News & Initiatives

OSHA Begins Mediation Pilot Program for Whistleblower Complaints

The U.S. Department of Labor's Occupational Safety and Health Administration is launching an alternative dispute resolution pilot program for whistleblower complaints, offering a choice of mediation or early resolution to assist complainants and employers in finding quicker relief and finality. In early resolution, the parties seek to resolve the whistleblower complaint with the assistance of an OSHA regional ADR coordinator prior to OSHA launching an investigation. The pilot program is beginning in two regional offices covering ten states. OSHA is responsible for the whistleblower provisions of 22 statutes and receives about 2,500 whistleblower complaints a year. [Mediation World](#) (October 4, 2012); [OSHA Pilot Program Information](#) (October 1, 2012)

Spain Expands Commercial Mediation Through Chambers of Commerce

Spanish judges and Chambers of Commerce entered into a formal agreement in October to implement a system of mediation in which commercial and trial courts can send cases for mediation to the 88 Chambers of Commerce in Spain. Model regulations and a standard training program for mediators have been developed to implement mediation legislation in Spain that took effect in July, which is the first national civil and commercial mediation act in Spain. Importantly, the Spanish mediation legislation goes beyond the EU Directive requiring cross-border mediation, which Spain adopted in March, to provide a general approach to mediation in all civil and commercial matters in the country.

[Lexology](#) (October 30, 2012); [ADR Quadro Treviso](#) (July 7, 2012)

Italy's Mandatory Mediation Legislation Held Unconstitutional

The Italian Constitutional Court declared Italy's mandatory civil and commercial mediation legislation unconstitutional on October 24, a year and a half after it took effect. The legislation had been highly contentious, but at this point over 800 mediation centers have been established and over 30,000 matters submitted to mediation. The court has not yet announced the basis for its decision.

[JAMS International](#) (October 30, 2012); [Business Conflict Blog](#) (October 24, 2012); [West: Welfare, Society, Territory](#) (October 25, 2012) [Business Conflict Blog](#) (October 15, 2012).

Comprehensive Mediation Act in Czech Republic Takes Effect

The new Mediation Act of the Czech Republic took effect on September 1, implementing the EU Directive on civil and commercial mediation. The Act is among the most comprehensive and detailed mediation statutes in Europe, with stringent requirements for registration of mediators, fines for breach of mediation duties, and court authority to order mandatory mediation sessions.

[Kluwer Mediation Blog](#) (October 9, 2012)

Romania Mandates Mediation Prior to Litigation

Effective October 1, Romanians are required to participate in mediation before going to court in disputes of RON 50,000 (US\$14,000) or more. Matters already in litigation must also be mediated and, if resolved, generally will have their filing fees returned. Parties who go to court without mediating first may be fined by the court.

Romania-Insider.com (September 14, 2012)

Taiwan Considering Mandatory Mediation for Medical Malpractice Disputes

Taiwan's Department of Health proposed regulations mandating mediation of medical disputes before filing malpractice litigation. Under the proposal, city and county governments will form mediation committees of medical experts and public health officials to help parties reach settlements prior to litigation. Mediation is viewed as an important solution to rising malpractice litigation that is causing serious shortages of medical staff in internal medicine, surgery, gynecology and other departments.

China Post (October 6, 2012)

Other International Mediation Developments

- The Dubai Chamber of Commerce and Industry in the **United Arab Emirates** is handling increasing numbers of commercial disputes through mediation: 200 mediation cases in 1996 increased to nearly 400 in 2005 and over 850 last year; the Chamber has begun an online mediation application process and recently presented a mediation seminar in association with the Singapore Mediation Centre. AMEinfo.com (September 24, 2012); Khaleej Times (September 16, 2012)
- The importance of mediation and other forms of alternative dispute resolution for accelerating economic development was emphasized at the Sekondi-Takoradi Chamber of Commerce and Industry in **Ghana**. Daily Guide Newspaper (August 23, 2012).
- Delhi, **India** is commissioning two new mediation centers this year for a total of ten, but needs to move towards its goal of twenty centers, according to the Chief Minister, to help address a growing judicial backlog. Business Standard (September 28, 2012)
- **Greek** and **Chinese** companies are finding success in mediating disputes between them under a collaborative process that began 18 months ago. Greek Reporter (October 16, 2012)
- Courts in Shanghai, **China** will continue the principle of "Mediation First" in dealing with foreign-related cases, including those involving parties from Hong Kong, Taiwan and Macau;
- the number of foreign-related cases continues to grow due to the ongoing global financial crisis. English Eastday.com (September 14, 2012)
- Mediation is expanding in **Hong Kong** following Civil Justice Reforms and a new Mediation Ordinance that will take effect on January 1; a Hong Kong panel of 18 mediators has been launched by CEDR Asia Pacific, a division of the Centre for Effective Dispute Resolution. Source Wire (October 22, 2012); China.org.cn (October 19, 2012)
- The first alternative dispute resolution conference in **Singapore** was recently held at the Supreme Court and attended by 600 people, including policymakers from 15 countries; the Chief Justice encouraged mediation and a "culture of holistic resolution of disputes." Asia One (October 7, 2012)
- The mediation unit of the Ministry of Labour in **Fiji** is increasingly successful, due to training provided by the Singapore Mediation Centre, which is providing additional training, including a one-day training for judges and magistrates. The Fiji Times Online (September 11, 2012)

Other Notable News Items

- An expert panel at the Community Association Institute's annual Legal Forum emphasized mediation as a "best practice" and superior to litigation for resolving disputes between homeowner associations, management companies and residents. The experts noted that, in mediation, preparation by the association board, clarity about the delegation of authority, and trust in the representative are critical to success. [Tipp News Daily](#) (October 22, 2012)
- Use of mediation continues to gain popularity in Hawaii, resulting in a declining number of civil lawsuits, saving both time and money. [Biz Journals](#) (October 30, 2012)
- St. Johns County is the fifth county in Florida to develop a Citizens Dispute Mediation Program that allows community and neighbor disputes to be mediated directly without having to be referred to mediation by a court. The mediators are volunteers and there is no charge to the parties. [Jacksonville.com](#) (September 10, 2012)

Update on Home Foreclosure Mediation

UPDATE ON HOME FORECLOSURES

- Statistics about foreclosure mediation programs across the **U.S.** have been compiled by the Resolution Systems Institute in a 19-page report, [Foreclosure Dispute Resolution by the Numbers](#). The data show a wide variation in programs across the country. For example, the percentage of foreclosures mediated ranges from over 60% in Philadelphia to single digits, while the percentage of foreclosure mediations reaching agreement ranges from over 80% in Connecticut to barely 20% in Maine. [Foreclosure Dispute Resolution by the Numbers](#) (September 2012); www.AboutRSI.org
- The foreclosure mediation program in **Springfield, Massachusetts** was upheld by a federal court against a constitutional challenge by banks claiming that the state was the exclusive regulator of the foreclosure process, so a city could not create a foreclosure mediation program without state approval. The court determined that the program did not significantly alter the foreclosure process or the relationship between lender and borrower, but merely sought to soften the crisis. If successful, the challenge would have threatened many other mediation programs around the country. [Just Court ADR](#) (August 23, 2012)
- In **Missouri**, a commercial bank filed a class-action lawsuit against a new ordinance in St. Louis County that requires banks to mediate prior to foreclosing on homes. While the sponsor of the ordinance is confident it will be upheld, she also has introduced legislation to tweak the new law. A public protest in favor of foreclosure mediation and against the bank that brought suit was held by members of Missourians Organizing for Reform and Empowerment. [LoanSafe](#) (September 19, 2012); [St. Louis Local](#) (October 22, 2012)
- Oral arguments over the constitutionality of the foreclosure mediation program in **Nevada** were heard by the Nevada Supreme Court, which is also responsible for the mediation program - a potential conflict of interest that was raised by one justice. [Reno Gazette-Journal](#) (October 7, 2012) (Subscription Required)

- **Maryland** has tweaked its home foreclosure law, with new regulations taking effect on October 1, which among other things will allow borrowers to request mediation even before lenders file to foreclose on a loan, resulting in earlier mediation. In addition, a mediation checklist has been developed to ensure that short sales and other options are always considered by lenders during mediation. [Herald-Mail.com](#) (September 2, 2012)
- A federal judge in **Rhode Island** is seeking recommendations on improving the foreclosure mediation process that many say is not working well and needs time limits. The judge had appointed a former CEO of Rhode Island Bank to be special master and mediate hundreds of foreclosure disputes; the special master has held 130 settlement conferences and expects more. Settlements have not been reached in most cases, but many requests for loan modifications are still pending. [Boston.com](#) (October 9, 2012)
- The foreclosure mediation program in **Oregon** that took effect in July is severely underutilized, as most large banks have refused to participate for various reasons and nonjudicial foreclosure filings have dried up. Advocates for lenders as well as homeowners are seeking a legislative solution to allow judges to send judicial foreclosures to mediation. [Oregon Live.com](#) (September 14, 2012)
- **Florida** bankruptcy court's foreclosure mediation program that began in Jacksonville in January is off to a slow start, but is working to allow some homeowners to stay in their homes. To participate, homeowners must file for Chapter 13 personal bankruptcy and then seek to participate in the mediation program through their bankruptcy attorney. [Jacksonville Business Journal](#) (October 25, 2012); [Jacksonville Business Journal](#) (October 26, 2012)

Other Mediation News

Check These Out:

Worth Noting:

Former British Prime Minister Tony Blair earned \$1 million in less than three hours as a mediator in late-night talks over a £50 billion mining deal that was about to crash. Blair was brought in for his mediation skills after the head of Swiss commodities giant Glencore and the Qatar Prime Minister had reached impasse over Glencore's plans to merge with Swiss mining group Xstrata in which Qatar has a stake large enough to block the merger.

[Pune Mirror.in](#) (September 11, 2012)

On Forbes.com: Lawyers have hijacked mediation and made it into another contentious means for resolving disputes - pressing people to do what they don't want to do - rather than the way mediation began, which was to find out what people actually wanted to do and help them achieve their goals. [Forbes.com](#) (October 31, 2012)

Online Dispute Resolution is coming, so mediators should begin developing ways to incorporate it into their mediation practices to be able to build trust and rapport online, ensure online communications are secure, and develop online ground rules and etiquette.

[Modria Blog](#) (October 12, 2012)

Events & Gatherings

The American Bar Association celebrated Mediation Week (October 14-20) with over 50 events around the country and the world, including a luncheon at the National Press Club in Washington, D.C. moderated by IAM Distinguished Fellow John Bickerman. U.S. Department of Justice representatives spoke at the Washington event and noted that mediation is increasingly important during times of tightening government budgets, giving the example of DOJ spending \$1 million in mediation expenses which saved \$13 million in discovery costs and 1,500 months of litigation in cases resolved in mediation.

[States NewsService](#) (October 19, 2012)

The 17th gathering of the World Forum of Mediation Centers was held in Zagreb, Croatia in October and included passionate discussion of mediation styles. Participants attended from the U.S., Canada, the U.K., Spain, France, Belgium, Netherlands, Germany, Austria, Czech Republic, Croatia, Slovenia, Italy, Russia, Lebanon, India, Cameroon and Hong Kong. The next meeting will be in June 2013 in Prague.

[Business Conflict Blog](#) (October 15, 2012)

The International Chamber of Commerce considers its International Commercial Mediation Competition to be its biggest educational event of the year with teams of university students competing in mock sessions guided by leading professional mediators.

[International Chamber of Commerce](#) (October 2012)

FINRA held its Fourth Annual Securities Dispute Resolution Triathlon in October in which students from various law schools demonstrated their advocacy skills in mediation, negotiation and arbitration of a securities dispute.

[FINRA](#) (October 2012)

Other Cases & Resolutions:

Sigma Pharmaceuticals Ltd. agreed in mediation to pay nearly A\$60 million (US\$62 million) to settle a shareholder class action case against it, pending approval of the federal court.

[4 Traders](#)(October 23, 2012)

NewPage Corporation has reached an agreement in principle with its major creditor groups through court-ordered mediation and hopes to soon emerge from Chapter 11 bankruptcy.

[NewPage News Releases](#)(October 1, 2012)

Mediation resulted in a \$9.9 million settlement for a brain-injured woman thrown from an amusement park ride, along with a tearful apology from an owner of the defendant company.

[Law Firm Newswire](#) (October 9, 2012)

Springfield, Massachusetts agreed to pay \$575,000 after a two-day mediation of a vicious police beating caught on video; the police officer had been fired and jailed for 18 months.

[Boston.com](#)(September 6, 2012)

Mediation just before trial has resolved all issues in litigation against a regional medical center by a deliveryman for neck and back injuries after a level collapsed.

[Madison/St. Cloud Record](#)(September 4, 2012)

Mediation over water rate increases by Aqua Texas has resulted in progress and hope for resolution at the next mediation session; water rates for some consumers doubled as regional rates were implemented.

[My San Antonio](#) (October 24, 2012)

Arcelor Mittal South Africa and Sishen Iron Ore Company are mediating to ensure a continuing supply of iron ore until a long-awaited arbitration hearing can occur in the second half of 2013. [Engineering News](#) (October 31, 2012); [Engineering News](#) (October 17, 2012)

Storm Financial clients are set to begin mediation with Macquarie Bank over investor losses estimated at A\$830 million (US\$ 860 million). [The Australian](#) (October 23, 2012)

A Swedish international development agency and a Tanzanian non- governmental organization have agreed to mediation in an effort to resolve litigation over termination of funding for a three-year project. [All Africa](#) (October 25, 2012)

Commissioners of Holiday Island, Arkansas voted to pursue mediation in lawsuits against the district. [Carroll County News](#) (October 26, 2012)

Hundreds of claimants seeking millions of dollars from the Eastern Livestock cattle brokerage bankruptcy will be able to participate in a global mediation, according to the Kentucky Department of Agriculture. [Kentucky.com](#) (October 7, 2012)

Book Review

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

Book review by Jan Frankel Schau (ADR Services, jfschau@schaummediation.com)

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 thirty years, Feinberg has mediated asbestos claims, the DES birth defect claims, claims brought for the loved ones killed in the 9/11 World Trade Center 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.

Still, he tells compelling stories that might cause a mediator to struggle. He recounts the jockeying between the fiancée 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.

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