During the CPR Institute’s 2019 Annual Meeting earlier this year, three of the nation’s top neutrals—all best known for tackling mass torts and cases involving the government—spoke in a roundtable discussion, in person and by telephone, with Alternatives’ then-publisher Noah Hanft and editor Russ Bleemer.

The discussion participants included:

- Kenneth R. Feinberg, who heads his own Washington, D.C., law firm, and has worked on many settlement claims facilities, including the Sept. 11 Victims Compensation Fund and BP’s Deepwater Horizon oil spill remediation; currently, he is administering a $50 million facility for families of victims of crashes involving Boeing’s 737 MAX airplanes;
- Eric Green, of Resolutions LLC in Boston, who has handled major bank monitoring cases for the Justice Department, overseen many tort compensation schemes, and mediated the antitrust claims in U.S. v. Microsoft; and
- Francis McGovern, a law professor at the Duke University School of Law in Durham, N.C., who has acted as a court-appointed special master or neutral in matters including DDT toxic exposure, the Dalkon-Shield controversy, and, currently, on the multidistrict litigation in Cleveland involving the sale and distribution of opioids.

For links to the participants’ biographies, see the accompanying box on page 123. [Hanft stepped down from his publisher post, and as president and chief executive officer of the CPR Institute, last month. For details see CPR News, 37 Alternatives 98 (July/August 2019) (available at http://bit.ly/30DuZWf)]. The CPR Institute co-publishes this newsletter with John Wiley & Sons, Inc.]

The discussion participants’ cases, old and new, often involve not just mediation of individual matters, but the construction, administration, and distributions in settlement facilities intended to avoid full-blown court litigation. The discussion dives into the techniques the participants have deployed in their work as special masters and mediators stretching back to the 1970s, and the approaches they use today that make them so successful in mediation—as well as avenues taken that haven’t worked.

Not surprisingly, Green, Feinberg and McGovern mostly declined to talk about specifics of current matters. But their frank discussion explores the reasons for using mediation and the ways to make it work in the most difficult mass cases, which in turn makes the case for wider use of mediation to settle business disputes across the board.

The following is an edited version of the Feb. 27 discussion.

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Russ Bleemer: We know that cases almost always settle and very rarely go to
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trial. And we know that these settlement facilities now in the big tort cases have been around for so long that people should be used to the fact that this is the way a case is going to go. In terms for our Alternatives audience, and in terms for a general legal audience, are there aspects of this that some attorneys are not getting, still? Where is their reticence today? Are there things that they still do not understand about alternative dispute resolution? What are they still most resistant to?

Kenneth Feinberg: They were taught otherwise in law school. They feel “it’s mass aggregation, assembly-line justice, trying to resolve cases.” I mean, if you go back as far back as the original asbestos cases with Justice Ginsburg commenting on how important it is that every individual get their day in court, that’s the way people are taught. [See Amchem Products Inc. v. Windsor, 117 S. Ct. 2231 (1997) (available at http://bit.ly/2JPEHOP).] I’m not surprised that lawyers don’t quite get it all the time.

Francis McGovern: Let me push on Ken’s point just a little bit further. The paradigm of litigation, which is what is taught in law school, seeks to define a dispute in terms of binary questions to which a jury can answer yes or no. The fundamental problems associated with complex cases, be it mass tort or other kinds of cases, is that there’s a slightly different goal.

What you’re trying to do with settlement is move up in the “Northeast quadrant” to try to satisfy each side as much as possible for the various issues that they consider the most important. So conceptually, it’s a slightly different goal.

And as Ken correctly indicated, that’s not really taught very much in law school. So the paradigm that lawyers have in mind is inconsistent with the paradigm for using special masters and neutrals to resolve complex cases.

Eric Green: In addition, in the way the profession is organized, in the United States especially, it is the lawyer’s duty to get as much as he or she can for his or her individual client in all of these cases. Lawyers are trained to do that. They feel that is their duty and that’s what they should focus on.

That may be fine in court, although it can lead, of course, to years of fighting before anything can get resolved. What these processes try to do is to replace that model and subordinate the individual-interest maximization approach to one where there’s more of a commonality of interest. What we’re trying to do with settlement is move up in the “Northeast quadrant” to try to satisfy each side as much as possible for the various issues that they consider the most important. So conceptually, it’s a slightly different goal.

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That may be fine in court, although it can lead, of course, to years of fighting before anything can get resolved. What these processes try to do is to replace that model and subordinate the individual-interest maximization approach to one where there’s more of a commonality of interest focused on fairness for similarly situated people all around. And that’s unusual for what lawyers are asked to do in our adversarial system.

Bleemer: Is reining this effect in the first step that you’ve got to tackle in the mass torts and the facility cases? How do you address that initially—the resistance, reticence, and training that goes in the other direction?

Feinberg: Well, it certainly helps to have a judge who understands it—I’ll tell you that. That goes part of the way. And then the parties have to make an evaluation to determine that it’s in their interest to try to receive some sort of global peace rather than piecemeal resolution. It’s an old-fashioned selling job.

McGovern: The concept again is that we tend to think that a compromise that can use issues in a different way from litigation will at the end of the day get a better result than you could possibly get in the binary resolution process of litigation.

And so as Ken and Eric both have said, you are re-educating the lawyers to a different paradigm so that they can focus on the benefits of having a global resolution, rather than just the interest of their own clients, when their clients will actually be better off with a global resolution.

Green: And I think one of the first challenges, which continues throughout these assignments, is the administrative/management task. I find that when I am inserted into one of these mega cases, the first task is to try to understand the scope and dimensions of it, identify all the stakeholders and all the different legal and procedural issues that might be involved.

It’s a tremendous management problem to organize these cases, and it’s exhausting. And so management skills are required of the neutral on top of all the other kinds of skills that ordinarily come into play as a neutral.

Oftentimes, you are managing a huge

THE MEDIATORS’ BIOS

The trio of neutrals discussing their views of the profession in the accompanying roundtable have been at the center of the highest profile settlement-facility cases over the past 30 years, acting as court-appointed special masters, mediators, or neutral experts.

Their cases include Dalkon Shield and Agent Orange, securities class actions, the Enron accounting fraud, the Deepwater Horizon oil spill, automakers’ consumer conflicts through the years, and continue now with recent man-made and natural disasters including school shootings, massive casualty losses, environmental disasters, and recession-related financial recovery plans.

In addition to the links to some matters in the accompanying discussion, you can find full biographies with case details for:

• Kenneth Feinberg at the website of the Law Offices of Kenneth R. Feinberg in Washington: https://feinberglawoffices.com,
• Eric Green at the website of his Boston-based firm, Resolutions LLC: http://bit.ly/2LMSFU0, and
• Francis McGovern at his Duke University School of Law faculty page: http://bit.ly/2JCAEoE.

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You have a team of people helping you—all kinds of people. You have economists. You have scientists. You have auditors. You have claim administrators. You have notice experts. You have lien resolution experts. You have investment advisers and you have tax lawyers. You have a team of people helping you—all kinds of people. You have to set up structures to manage all of this.

It’s an immense management challenge as well as a straightforward dispute resolution process design problem.

McGovern: The problem with the judges is their role is typically to simplify the issues to a series of binary questions. Whereas, as Eric correctly indicated, most of these complex cases involve all kinds of issues that are not susceptible to reduction to those kinds of questions. And so being able to have someone like a neutral who has the time—which judges typically do not have—to immerse themselves in all of those kinds of details and try to fashion a result that will give an outcome beneficial to everybody is one of the key differences.

Bleemer: Let’s move to what supports or hurts the efforts across the board—the rules, the structure, the political system, all the various institutions. Ken talked about the judge being a good push. What is it in approaching one of these big matters that you most rely on, and what is it that makes you roll your eyes and think “This is going to be a problem”? Feel free to pick out any of those … the existing legal rules, the administrative structure, the politics, the institutions as well the courts, the settlement companies, the ADR providers, the media, government agencies, the counsel, and/or the parties.

Feinberg: All of the above.

McGovern: And it’s not just all of the above but being able to design a role for all of the above that fits the larger goal of global resolution. That is to say, it takes someone who understands all of the above and to be able to look at it from 100,000 feet and to be able to design the role that each

should play in coming up with an optimal kind of result.

And so the perspective that a neutral has is very different from the perspective of any one of the parts. And that is the beneficial use of having someone whose goal is to reach an optimal resolution for all the complexity in the case.

Bleemer: Let me ask you the same ques-

The Biggest Cases

The Special Masters: National mediators Eric Green, Kenneth Feinberg, and Francis McGovern.

The topic: How do you manage the massive cases?

The conversation: We have read about many of these matters for years. Now we hear directly from the special masters how they managed these crisis cases using negotiation, diligence, salesmanship, and perhaps some luck. This first of two parts has a lesson in persistence that translates directly to whatever part of the ADR world you operate in.

‘One more essential quality I think … is that you have to be a little bit crazy to take on some of these huge challenges.’
a lot of interesting ideas.

In my experience, being open to listening to those ideas, being able to capture them and use them—borrowing from the best ideas is really important because I can’t just invent them, coming into the latest disaster.

Let’s say it’s 150 homes impacted by explosions in three towns in Massachusetts. I parachute into the case, and there are people already there who have been working on it and thinking about it from the day it happened. And they have ideas—be it the judge, the lawyers, the companies—whoever. [For more on the Columbia Gas explosions, see Jacey Fortin, “After Gas Explosions in Massachusetts, Gas Company Settles for $80 Million,” N.Y Times (May 7, 2019) (available at https://nyti.ms/2PP4OYH). Eric Green returns to the cases in Part 2 next month.]

So I think it’s really important that the neutral be able to patiently listen to these ideas, sift through them, borrow from them and use the best of them to try to meet the needs of the situation. So I think you get a lot of these great ideas that can be put into play from the parties, the lawyers, the judge, colleagues, and others.

Now, I think the neutral also has to recognize limits to his or her role as well. You’re kind of like a conductor of a symphony. But you need a string section and you need a horn section and you need all the different players to make it work. If people play their role, then it works well. So a lot of it is just getting people to play their role. When people don’t play their role, including the neutral exceeding his or her role, that’s when bad things happen.

**Bleemer:** I had wanted to ask you about the most important skill. I think Ken wrote in one of his books, and most management books have it, and that’s listening. [See Kenneth Feinberg, Who Gets What: Fair Compensation after Tragedy and Financial Upheaval (Public Affairs 2012).] That was what you just mentioned there.

But there’s a huge management role as well. One of you alluded to your firms.

**McGovern:** When you look at me, Russ, you’re looking at my office. I think Ken is absolutely right. Eric … can address this for institutional perspective, but I’ve never seen the institutional role—it’s ad hoc. I think you’re absolutely correct, that in certain circumstances, you bring in expertise to assist in resolving a problem. But fundamentally, it is more of an individual effort rather than something that is transferrable to lots of other folks as you do with institutions. But Eric knows about that better than I do.

**Green:** I agree. For the three of us, it’s really an individual thing. You build an ad hoc structure for each situation, depending upon what you need. I know that Ken and Francis have been tremendously assisted by colleagues who worked with them over the years on various matters, as have I. One skill that Ken and Francis share is being wonderful at working with and empowering others, whether it’s a co-special master or someone else in their office. But, in my experience, in these cases you have to build the structure from a lot of different pieces.

There are different models. For example, in the Madoff case, there’s the large law firm model that the master or the trustee …

**Feinberg:** Irving Picard …

**Green:** … Yes, that he used, and that’s different. [For information on the Madoff Recovery Initiative and Picard, see http://bit.ly/2LPi27G.] In the Takata airbag restitution fund, the nominated special master before I became the special master was going to be Robert Mueller, until he received a slightly different assignment, and he was also going to use the law firm model—he was at the time a partner in WilmerHale’s Washington, D.C. office—in a conventional law firm way. [For information on Green’s role in the Takata airbag recall case, see www.takataspecialmaster.com/about.]

And there are some other examples of that, but that is not my model even though I have a small but very talented staff at Resolutions. I think that in most of the cases the three of us do, it has really been putting together almost from scratch whatever is needed for the particular [matter].

And I would like to mention that another of the things I’ve watched Ken and Francis demonstrate, at the outset of these cases, is a tremendous, exceptional grasp of the strategic issues facing the neutral and the ability to see into the future how it all might play out, coupled with tremendous political instincts.

I’ve always said that Francis McGovern

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is the best instinctual mediator I’ve ever seen because he’s a natural with profound political sense.

Ken has an unparalleled ability strategically to go right to the heart of what the issue is at the beginning and not be distracted by a lot of other noise going on. He stays absolutely focused on the crux of the matter. These two guys possess that leadership skill, which is really important in these cases with so many forces pulling on you in different directions.

**BLEEMER:** I asked the question because so much of the coverage over the years of what you’ve all done has focused on you as individuals. So I was wondering if you as individuals have become institutions on your own. Apparently, you don’t see it that way but that’s probably a good segue to the most fundamental question: Prof. McGovern, Ken, what are the most important skills as neutrals you bring to these cases?

**FEINBERG:** You have to ask the parties. I think what I try to bring is an enthusiasm and a doggedness. And like Francis says, creativity to try to get everybody to yes. It’s infectious if you can do that.

Now the problem is that Eric can do it and Francis can do it, and I can do it, and then maybe a handful of other people can do it, but I must say I’m not sure how these questions and these answers are helpful across a very narrow group of people who might want to do what we do now. Now it may be very helpful to the consumers of the product—defendants, plaintiffs, actuaries, accountants, appraisers, auditors, a whole subcontracting empire.

But I really sometimes question myself because if this isn’t Eric and it isn’t Francis and it isn’t Ken and it isn’t a handful of others, I don’t know if this is an institutionalized product or not. I see the same people doing all the good work.

**MCGOVERN:** In trying to answer your question, the word that comes to mind for me is “trust.” That is to say, what Ken can do and what Eric can do is create trust on the part of all of the parties, all of the factors, and all of the people involved.

‘Failure is a real possibility—massive, public, humiliating failure could happen at any time. These cases are tough and complex. So you need a willingness to take on risk and to put yourself in the middle of a firestorm.’

Not only that the neutral is going to be neutral. Not only that the neutral is going to be fair. Not only that the neutral is going to be honest. Not only that the neutral will come up with ideas. Not only that the neutral is someone that they want to work with. That he is someone that they trust can lead. This is a factor that is very, very difficult whether you want to be proactive or less active. And sometimes you have to lead from the front, and sometimes you lead from behind.

But the parties have to trust the person—that they’re going in a direction that makes some sense. The enthusiasm—I mean, Ken is a force of nature and dogged is an understatement of his perseverance. Eric’s intellectual ability to grasp all of the issues. Everybody trusts both of them going in.

So when Ken said that a lot of these cases end up in the same hands, it’s because there is a trust that has been built up by the bar, by the judges—that the folks who can assist them in achieving a global resolution are people that all the parties can trust.

**GREEN:** So, the trust is important, but the quality that I think is vital, in addition to the ones we’ve mentioned, and that I hear associated with Francis’s name and Ken’s name all the time, is integrity. They’ve demonstrated unquestioned integrity throughout their careers and that’s essential.

Without it, you can’t do this, because you won’t get appointed by a judge, or asked by whoever is in charge, unless they have complete confidence in your integrity. And you won’t be able to do your job with all the different parties unless you have that quality.

These guys have it. Their integrity is beyond question. They’re not driven by self-interest or greed or anything like that to do these jobs. They do the hard jobs, pro bono where appropriate, and everybody trusts them because they have integrity.

So that’s one essential quality. One more essential quality I think to have—and I see it in Ken and Francis—and my friends and family tell me that I exhibit it also—is that you have to be a little bit crazy to take on some of these huge challenges.

Failure is a real possibility—massive, public, humiliating failure could happen at any time. These cases are tough and complex. So you need a willingness to take on risk and to put yourself in the middle of a firestorm.

I’m not sure exactly what it is that motivates a person to do that—intellectual curiosity, guts, a need for challenge? Grandiosity? But you have to be willing to take on these tough cases on despite a lot of people saying to you, “Are you really sure you want to do this one?” and “You shouldn’t do that one,” and “Why do you want that?”

For Ken to accept some of the assignments he’s taken on is just amazing. They can be so difficult, all consuming, exhausting, and fraught. And Francis, too, has taken on the most intractable disputes and been willing to stay with them.

So that capacity for challenge, and integrity, I think are essential qualities that those two guys demonstrate repeatedly.

**McGovern:** In trying to answer your question, the word that comes to mind for me is “trust.” That is to say, what Ken can do and what Eric can do is create trust on the part of all of the parties, all of the factors, and all of the people involved.