

REPORT SUMMARY

This is the tenth annual report the Office of the Independent Administrator (OIA) has issued on the arbitration system between Kaiser Foundation Health Plan and its affiliated groups of physicians and hospitals (collectively Kaiser) and its members.¹ Since 1999, the OIA has administered such arbitrations. Sharon Oxborough is the Independent Administrator. The data and analyses presented allow readers to gauge how well the OIA system is meeting its goals of providing arbitration that is fair, timely, lower in cost than litigation, and protects the privacy of the parties. For example:

- A majority of the neutral arbitrators said the OIA administered arbitration system was better than going to court.
- Parties express satisfaction with the neutral arbitrators and would recommend them to others.
- None of the cases closed late and overall, they closed within 15 months, the fastest since 2003.
- With the consent of claimants, Kaiser paid all the neutral arbitrators fees in 85% of the cases.
- The average neutral arbitrators fees dropped from 2007.
- The number of neutral arbitrators in the pool remains large, even as the number of demands for arbitrations has dropped, giving parties a large choice.
- A significant percent of claimants continue to bring cases without an attorney.

These and other factors are discussed in greater detail below and in the report.

Developments in 2008

While the system has been relatively stable, the OIA and the Arbitration Oversight Board (AOB) strive to improve it and to provide more information about it to the public. The items below are consistent with these goals.

- 1. New Evaluation of OIA and Arbitration System.** The OIA created a one page form that will ask counsel and *pro pers* to evaluate the OIA and the arbitration

¹Kaiser has arbitrated disputes with its California members since 1971. In the 1997 *Engalla* case, the California courts criticized Kaiser's arbitration system, saying that it fostered too much delay in the handling of members' demands and should not be self-administered.

system. It will also ask whether they had any difficulties in obtaining medical records. See page 4.

2. **Opportunity to Opt Out of Mandatory Arbitration.** Kaiser began offering new individual Senior Advantage members the opportunity to opt out of mandatory arbitration. The OIA is receiving and tracking the forms. See page 4.
3. **Geographic Analysis of Cases.** The OIA analyzed differences in how cases close and how neutral arbitrators are chosen based on geographical area. See page 49 and Exhibit D.

Status of Arbitration Demands

The types of demands and the proportion where a claimant is not represented by an attorney is almost identical to last year. The number of demands for arbitration dropped by 55 last year.

4. **Demands for Arbitration.** After declining from 1,053 in 2002 to 861 in 2004, and then to 823 in 2007, the number of demands significantly declined again in 2008 to 768. This is 55 fewer than the OIA received in 2007. See page 46.
5. **Medical Malpractice Claims.** Ninety-one percent of the cases the OIA administered in 2008 involved allegations of medical malpractice. Less than 1% presented benefit and coverage allegations. Lien cases made up 6%. The remaining cases were based on allegations of premises liability, other torts, or unknown. See page 11. The percentage of cases involving medical malpractice allegations has been consistent since the OIA began operations.
6. **Lien Claims.** Lien claims are those demands for arbitration brought by Kaiser to recover money for services provided to the consumer for which Kaiser contends the consumer has been reimbursed in a lawsuit against a third party; for example, in a driver in a car accident. This is the first year lien cases constituted more than five percent.
7. **Proportion of Claimants Without Attorneys.** Nearly a quarter (23.5%) of the claimants were not represented in 2008. See pages 12, 47.

How Cases Closed

The purpose of an arbitration is to resolve a claim. The parties themselves resolved the vast majority of cases in the system. Neutral arbitrators decided the remaining cases; almost always with a single neutral arbitrator.

8. **Three-Quarters of Cases Closed by the Parties' Action.** During 2008, the parties settled 44% of the closed cases. The claimants withdrew 27% and abandoned another 5% by failing to pay the filing fee or get the fee waived. See pages 27 - 28.
9. **One-Quarter Closed by Decision of Neutral Arbitrator.** 8% were closed through summary judgment, 3% were dismissed by neutral arbitrators, and 13% of cases closed after an arbitration hearing. In the cases that went to arbitration hearing, claimants prevailed in 32%.
10. **Nearly All Cases Heard by a Single Neutral Arbitrator Instead of a Panel.** Most hearings involved a single neutral arbitrator rather than a panel composed of one neutral and two party arbitrators. A panel of three arbitrators signed only two awards made after a hearing in 2008. A single neutral decided the other 96. See pages 21 - 22.
11. **Almost Half of Claimants Received Some Compensation.** The most common way cases close is by the parties settling the dispute and the claimant receiving some money from Kaiser. In addition to this 44%, 4% win after an arbitration hearing. The average award was \$349,431. The range was from \$10,000 to \$2,060,569. See page 29.

Meeting Deadlines

The timely selection of the neutral arbitrator is crucial to the timely resolution of the case. Nevertheless, the desire for efficiency must be balanced by the needs of the parties in particular cases. The OIA *Rules* allow the parties to delay the selection process and extend the completion date. Requests for delays are all made by claimants. Even with such requests, the process is expeditious.

12. **Slightly More than Half of Neutral Selections Proceeded with No Delay; the Other Neutral Selections Had Delays Requested by Claimants.** Slightly more than half (53%) of the neutral arbitrators were selected without the parties exercising options that delay the process. In the other cases, the selection deadline was postponed (41%), a neutral arbitrator was disqualified (3%), or both (3%). Claimants requested all of the postponements. They also made 85% of the disqualifications. See pages 19 - 20. The percentage of cases in which the parties chose to postpone the deadline has increased over the years from 17% the first year of operation to 41% in 2008. See pages 19, 48 - 49.
13. **Overall Average Length of Time to Select Neutral Arbitrator Decreased One Day.** The average time to select a neutral arbitrator was 67 days, one less day than last year. For the cases without a disqualification or postponement (26 days) or only a postponement (114 days), the neutral arbitrators were selected in one

more day than last year. The 67 days to select a neutral arbitrator in 2008 is more than ten times faster than that described by the *Engalla* case. See pages 19, 20.

14. **Cases Closed on Time and Time to Close Decreased in All Categories Except Settlements.** In 2008, the cases closed, on average, in 325 days, or 11 months, down from 336 days in 2007. All cases closed on time. Over 90% of the cases closed within 18 months (the deadline for most cases) and 65% closed in a year or less. See pages 25 - 27.
15. **Hearings Completed Within Fifteen Months.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 455 days (less than 15 months), down from 520 days in 2007. This average includes cases that were designated complex or extraordinary or that received a Rule 28 extension because they needed extra time. “Regular cases” closed in 276 days, or 9 months down , from 282 days in 2007. See pages 29, 30 - 31.

OIA's Pool of Neutral Arbitrators

A large and balanced pool of neutral arbitrators, among whom work is distributed, is a crucial ingredient to a fair system. It prevents the appearance and likelihood of a captive pool of neutral arbitrators, beholden to Kaiser for their livelihood. Neutral arbitrators continue to serve after making large awards against Kaiser. The two methods of selecting a neutral arbitrator – strike and rank or joint selection – allow parties the freedom to select anyone they collectively want. The vast majority of neutral arbitrators the parties jointly select are in the OIA pool.

16. **Large Neutral Arbitrator Pool.** The OIA has 286 neutral arbitrators in its pool. Forty percent of them, or 114, are retired judges. See page 5.
17. **Applications Reveal Balanced Pool of Neutral Arbitrators.** The applications filled out by the members of the OIA pool show that 133 arbitrators, or more than 45%, spend all of their time acting in a neutral capacity. The remaining members divide their time almost equally between claimants’ side and respondents’ side work. See pages 5 - 7.
18. **Applications Reveal Medical Malpractice Experience by Neutral Arbitrators.** Neutral arbitrators’ applications and updates also show that 262 of the arbitrators have medical malpractice experience. That is more than 90%. See page 6.
19. **Large Percentage of Arbitrators Served on Arbitrations and Heard Cases.** Fifty-eight percent of the neutral arbitrators in the OIA pool served on a case in 2008. Arbitrators averaged two assignments each in 2008. Seventy-two different neutrals, including arbitrators not in the OIA pool, decided the 98 awards made in 2008. See page 7.

- 20. Seventy percent of Neutral Arbitrators Selected by Strike and Rank.** The parties chose more than 70% of neutral arbitrators through the strike and rank process, and jointly selected the remaining 29%. Seventy-three percent of the arbitrators jointly selected were members of the OIA pool. In 27%, the parties chose a neutral arbitrator who was not a member of the OIA pool. See page 14.

Neutral Arbitrator Fees

While the OIA arbitration fee is less than the comparable court filing fee, claimants in arbitration can be faced with neutral arbitrator fees, which do not exist in court. Claimants in OIA cases, however, can and do shift the responsibility to pay the neutral arbitrator's fees to Kaiser.

- 21. Kaiser Paid the Neutral Arbitrator's Fees in 84% of Cases Closed in 2008.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. For the cases that closed in 2008, Kaiser paid the entire fee for the neutral arbitrators in 84% of those cases that had fees. See page 34.
- 22. Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from \$125/hour to \$800/hour, with an average of \$374. For the 577 cases that closed in 2008 and for which the OIA has information, the average total fee charged by neutral arbitrators was \$4,753.37. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average was \$5,274.41. The average fees in cases decided after a hearing were \$15,887. See pages 34 - 35.

Evaluations

The parties continue to give their neutral arbitrators positive evaluations. Similarly, the neutral arbitrators report that the system itself works well. More than half of the parties returned their evaluations, while almost all neutral arbitrators returned theirs.

- 22. Positive Evaluations of Neutral Arbitrators.** In 2008, the great majority of both claimants and counsel for both sides reported that they would recommend their neutral arbitrator to another individual with a similar case. See page 37.
- 23. Positive Evaluations of the OIA.** Neutral arbitrators continue to evaluate OIA procedures positively. More than 53% said that the OIA experience was better than a court system, and 45% said it was about the same. See pages 37 - 38.

The OIA's Ten Years of Operation

This report marks the tenth anniversary of the OIA. During its existence, the OIA has collected and published a remarkable amount of data about this arbitration system. Thus, the report includes a section discussing trends and data over the last ten years.

- 25. Most aspects of the system remain stable.** For example, the number of neutral arbitrators on the panel, the percent of claimants represented by counsel, how neutral arbitrators are selected, and how cases close have all remained relatively stable. See pages 41 - 45.

- 26. A few elements have changed over time.** The most remarkable change is the decline in the number of demands for arbitration, mentioned above. Other changes in trends may be the result of parties becoming more familiar and comfortable with the system. For example, in the first year, only 17% of cases had a postponement of the selection of the neutral arbitrator. In 2008, 41% of the claimants choose a postponement. See pages 41, 43 - 44.