

## REPORT SUMMARY

This is the annual report the Office of the Independent Administrator (OIA) for 2010. It discusses the arbitration system between Kaiser Foundation Health Plan and its affiliated groups of physicians and hospitals (collectively Kaiser) and its members.<sup>1</sup> 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:

- Over 90 percent of the neutral arbitrators and the parties said the OIA administered arbitration system was better than or the same as going to court.
- Most parties express satisfaction with the neutral arbitrators and would recommend them to others.
- With the consent of claimants, Kaiser paid all the neutral arbitrators' fees in 88% of the cases.
- Cases close, on average, in less than 12 months.
- The number of neutral arbitrators in the pool remains large, even as the number of demands for arbitrations has dropped.
- Approximately 25 percent of claimants bring cases without an attorney.

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

### Developments in 2010

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

1. **Revised Handout for Claimants who are not Represented by Counsel.** The Arbitration Oversight Board (AOB), and the OIA again revised the handout sent to *pro pers* to further refine it and make it more complete. See Exhibit C.

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<sup>1</sup>Kaiser 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.

2. **OIA Contract.** The AOB extended its contract with the OIA for another two years, to March 28, 2013.
3. **Comparison of Lien and Non-Lien Cases.** The AOB asked the OIA to analyze whether combining lien cases – brought by Kaiser – with the other cases – brought by members against Kaiser – affected the accuracy of the statistics in the annual report. The analysis showed there was no meaningful effect, given the small number of lien cases. See Exhibit D. Nevertheless, given the procedural differences between lien and non-lien cases, lien cases have been segregated out and are now discussed in a separate section. See Section IX.
4. **Background of Neutral Arbitrators.** The OIA sent a form asking the neutral arbitrators about their racial and ethnic background. See page 4.
5. **Solicitation of Women and Minority Neutral Arbitrators.** The OIA sent a notice to 49 minority and women’s bar organizations in California advising them of the opportunity to apply to the pool, along with copies of the application and qualifications. See page 4.

#### **Status of Arbitration Demands**

The number of demands for arbitration continued to decline. Almost all of the claims are for medical malpractice. About 25% of claimants are not represented by counsel.

6. **Demands for Arbitration.** The number of demands continued to decline in 2010, when the OIA received 681 demands. This is 45 fewer than the OIA received in 2009. See pages 9 and 46.
7. **Types of Claims.** Almost 94% of the cases the OIA administered in 2010 involved allegations of medical malpractice. Less than 1% presented benefit and coverage allegations. Lien cases made up less than 4%. The remaining cases were based on allegations of premises liability and other torts, or unknown. The percentage of cases involving medical malpractice allegations has been consistent since the OIA began operations. See pages 9 and 48. Because lien cases differ significantly from cases brought by members, the statistics in this summary, like most of the statistics in the report, exclude lien cases.
8. **Proportion of Claimants Without Attorneys.** Nearly a quarter (24%) of the claimants were not represented in 2010. See pages 10 and 48.

## 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.

9. **Three-Quarters of Cases Closed by the Parties' Action.** During 2010, the parties settled 44% of the closed cases. The claimants withdrew 25% and abandoned another 4% by failing to pay the filing fee or get the fee waived. See pages 26 – 27.
10. **One-Quarter Closed by Decision of Neutral Arbitrator.** Eleven percent were closed through summary judgment, 3% were dismissed by neutral arbitrators, and 12% of cases closed after an arbitration hearing. In the cases that went to arbitration hearing, claimants prevailed in 33%. See pages 27 – 28.
11. **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 one award made after a hearing in 2010. A single neutral decided the other 75. See pages 19 – 20.
12. **Half of Claimants Received Some Compensation.** The most common way cases close (44%) is by the parties settling the dispute and the claimant receiving some money from Kaiser. Since one third of claimants win after an arbitration hearing, an additional 4% of all claimants received compensation. The average award was \$392,461, the median was \$250,000, and the range was from \$20,000 to \$2,110,000. See page 28 and Exhibit G.

## 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. Even with such requests, the process is expeditious.

13. **Almost Half of Neutral Arbitrator Selections Proceeded with No Delay; the Other Neutral Selections Had Delays Requested by Claimants.** Almost half (47.7%) of the neutral arbitrators were selected without the parties exercising options that delay the process. In the other cases, the selection deadline was postponed (44.9%), a neutral arbitrator was disqualified (3.5%), or both (3.9%). Claimants requested all of the postponements. They also made 86% of the disqualifications. See pages 17 – 18. The percentage of cases in which the parties

chose to postpone the deadline has been roughly consistent since 2003. In 2010, it was 48.8%. See pages 18 – 19 and 49 – 50.

14. **Average Length of Time to Select Neutral Arbitrator Decreased for Most Parties.** The time to select a neutral in cases with no delay or no disqualification decreased by one to three days from 2009. Because of a few cases with multiple disqualifications, however, the average length of time to select a neutral arbitrator increased by one day. In comparison with the time described in the *Engalla* case, the 71 days to select a neutral arbitrator in 2010 is nine times faster. See pages 19 and 50.
15. **Cases Close, on Average, in Less than Twelve Months.** In 2010, the cases closed, on average, in 336 days, or 11 months, down from 357 days in 2009. One case closed late. Nearly 90% of the cases closed within 18 months (the deadline for most cases) and 65% closed in a year or less. Fourteen percent of the cases that closed in 2010 were designated complex or extraordinary or had their 18 month deadline extended by the neutral arbitrator. See pages 26 – 29 and 51.
16. **Hearings Completed Within Sixteen Months.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 483 days (less than 16 months). 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 386 days, or less than 13 months. See pages 28, 29, and 30.

### **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 minimizes the likelihood of a captive pool of neutral arbitrators, beholden to Kaiser for their livelihood. The two methods of selecting a neutral arbitrator – strike and rank or joint selection – allow parties the choice to select anyone they collectively want. The vast majority of neutral arbitrators the parties jointly select are in the OIA pool.

17. **Neutral Arbitrator Pool.** The OIA has 299 neutral arbitrators in its pool. Thirty-nine percent of them, or 117, are retired judges. See page 5.
18. **Neutral Arbitrator Backgrounds.** The applications filled out by the members of the OIA pool show that 146 arbitrators, or 49%, spend all of their time acting as a neutral arbitrator. The remaining members divide their time almost equally between plaintiff’s side and defendant’s side work, though not necessarily medical malpractice litigation. Neutral arbitrators’ applications and updates also show that 268 of the arbitrators have medical malpractice experience. That is 90%. See pages 5 – 6.

19. **Fifty-Five Percent of Arbitrators Served on Arbitrations and Heard Cases.** Fifty-five percent of the neutral arbitrators in the OIA pool served on a case in 2010. Arbitrators averaged two assignments each in 2010. Sixty-three different neutrals, including arbitrators not in the OIA pool, decided the 83 awards (including lien awards) made in 2010. See pages 7 – 8.
20. **Sixty-Eight Percent of Neutral Arbitrators Selected by Strike and Rank.** The parties chose 68% of neutral arbitrators through the strike and rank process, and jointly selected the remaining 32%. Two neutral arbitrators were appointed by the court. Fifty-nine percent of the arbitrators jointly selected were members of the OIA pool. In the other cases, the parties chose a neutral arbitrator who was not a member of the OIA pool. See page 13.

### **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 Arbitrators' Fees in 88% of Cases Closed in 2010.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. For the cases that closed in 2010, Kaiser paid the entire fee for the neutral arbitrators in 88% of those cases that had fees. See page 33.
22. **Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from \$150/hour to \$900/hour, with an average of \$400. For the 479 cases that closed in 2010 and for which the OIA has information, the average fee charged by neutral arbitrators was \$6,256.25. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average was \$6,557.42. The average fee in cases decided after a hearing was \$22,897.15. See pages 33 – 34.

### **Evaluations**

The OIA sends the parties and neutral arbitrators evaluations in cases which have neutral arbitrator participation. They ask the neutral arbitrators to evaluate the OIA system and the parties to evaluate their neutral arbitrators, and, beginning in 2009, the OIA system. The parties continue to give their neutral arbitrators positive evaluations. Similarly, the neutral arbitrators report that the system itself works well. Less than half of the parties returned their evaluations, while almost all of the neutral arbitrators returned theirs.

23. **Positive Evaluations of Neutral Arbitrators.** In 2010, the great majority of counsel for both sides reported that they would recommend their neutral arbitrator to another individual with a similar case. See page 41.
24. **Positive Evaluations of the OIA by Neutral Arbitrators.** Neutral arbitrators continue to give OIA procedures positive evaluations. Fifty-eight percent said that the OIA experience was better than a court system, and 41% said it was about the same. See pages 41 – 43.
25. **Positive Evaluations of the OIA by Parties.** Forty-four percent of attorneys and *pro pers* said that the OIA system was better than the court system, and 48% said they were the same. See page 45.