

REPORT SUMMARY

This is the annual report the Office of the Independent Administrator (OIA) for 2013. It discusses 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. From the data and analyses in this report, readers may gauge how well the OIA system meets its goals of providing arbitration that is fair, timely, lower in cost than litigation, and protective of the privacy of the parties. In brief:

- In 2013, the OIA received 657 demands, an increase of 8 from the prior year. This marked the end of more than a decade during which the number of demands for arbitration declined.
- In approximately 25 percent of the cases, the claimants did not have attorneys.
- Cases closed, on average, in less than 12 months; hearings completed, on average, in less than 19 months.
- Three-quarters of the cases closed through action by the parties (settlement, withdrawal, or abandonment), while the other quarter were decided by the neutral arbitrator (after a hearing, summary judgment, or dismissal).
- With the consent of claimants, Kaiser paid the neutral arbitrators' fees in 90% of the cases.
- Parties who responded to OIA questionnaires expressed satisfaction with the neutral arbitrators and would recommend them to others, with an average rating of 4.3 on a 5 point scale.
- Almost 50% of the responding parties and attorneys reported that the OIA administered arbitration system was better than going to court, another 38% reported that it was the same, 14% reported it was worse.

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

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.

Status of Arbitration Demands

The total number of demands for arbitration increased by eight from the previous year. Almost all of the claims were for medical malpractice. About 25% of claimants were not represented by counsel.

- 1. Number of Demands for Arbitration.** In 2013, the OIA received 657 demands. This is eight more than the OIA received in the prior year. 2013 was the first year since 2002 that the number of demands did not decline. See pages 10 and 45.
- 2. Types of Claims.** Ninety-seven percent of the OIA administered cases in 2013 involved allegations of medical malpractice. Slightly less than one percent presented benefit and coverage allegations. Lien cases made up less than one percent. The remaining cases were based on allegations of premises liability and other torts. The percentage of cases involving medical malpractice allegations has been consistent since the OIA began operations. See pages 10 and 46. Because lien cases differ significantly from cases brought by members, the statistics in this summary, and most of the statistics in the report, exclude lien cases. They are reported separately in Section IX.
- 3. Proportion of Claimants Without Attorneys.** A quarter of the claimants in 2013 were not represented by counsel. See pages 12 and 46.

How Cases Closed

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

- 4. Three-Quarters of Cases Closed by the Parties' Action.** During 2013, the parties settled 44% of the closed cases. Claimants withdrew 27% and abandoned another 5% by failing to pay the filing fee or get the fee waived. See pages 27 – 28.
- 5. One-Quarter Closed by Decision of Neutral Arbitrator.** Eleven percent of cases closed after an arbitration hearing, nine percent were closed through summary judgment, and three percent were dismissed by neutral arbitrators. In the cases that went to an arbitration hearing, claimants prevailed in 37%. See pages 28 – 29.
- 6. Almost Half of Claimants Received Some Compensation.** Claimants receive compensation either when their cases settle or when they are successful after a hearing. The most common way cases closed (44%) was by the parties settling the dispute. An additional four percent of all claimants won after a hearing. The

average award was \$499,027, the median was \$210,000, and the range was from \$10,510 to \$4,950,527. See page 29 and Exhibit E.

- 7. All Cases Heard by a Single Neutral Arbitrator Instead of a Panel.** All of the hearings in 2013 involved a single neutral arbitrator rather than a panel composed of one neutral and two party arbitrators. See page 21.

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 delays, the process was expeditious.

- 8. Half of Neutral Arbitrator Selections Proceeded Without any Delay; the Other Neutral Selections Had Delays Requested by Claimants.** Half (48%) of the neutral arbitrators were selected without the parties exercising options that delay the process. In the other cases, the selection deadline was postponed (45%), a neutral arbitrator was disqualified (2%), or both (5%). Claimants requested all but three of the postponements. They also made 76% of the disqualifications. See pages 19 – 21.
- 9. Average Length of Time to Select Neutral Arbitrator Stayed the Same.** The time to select a neutral in cases with no delay or with a 90 day postponement stayed the same as in 2012. It declined by 4 days in cases with in cases with disqualifications and by 13 days in the cases with both postponements and disqualifications. In comparison with the time described in the *Engalla* case, the 69 days to select a neutral arbitrator in 2013 is nearly ten times faster. See pages 19 – 21.
- 10. Cases Closed, on Average, in Less than Twelve Months.** In 2013, cases closed, on average, in 325 days, or 11 months, slightly less than 2012's 340 days. One case closed late. Nearly 90% of the cases closed within 18 months (the deadline for most cases) and more than 60% closed in a year or less. Sixteen percent of the cases that closed in 2013 were designated complex or extraordinary or had their 18 month deadline extended by the neutral arbitrator. See pages 25, 26, 30 – 31 and Table 8.
- 11. Hearings Completed, on Average, Within Nineteen Months.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 538 days (less than 19 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 408 days (less than 14 months). See pages 29 and 50.

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 majority of neutral arbitrators the parties jointly selected were from the OIA pool.

12. **Size of the Neutral Arbitrator Pool.** The OIA has 274 neutral arbitrators in its pool. Forty-one percent of them, or 113, are retired judges. See page 5.
13. **Neutral Arbitrator Backgrounds.** The applications filled out by the members of the OIA pool show that 153 arbitrators, or 56%, spend all of their time acting as neutral arbitrators. The remaining members divide their time by representing plaintiffs and defendants, though not necessarily in medical malpractice litigation. More than 90% of the neutral arbitrators report having medical malpractice experience. See pages 5 – 6.
14. **Fifty-Five Percent of Arbitrators Served on a Case.** Fifty-five percent of the neutral arbitrators in the OIA pool served on a case in 2013. Arbitrators averaged two assignments each in 2013. Fifty-two different neutrals, including arbitrators not in the OIA pool, decided the 73 awards (including lien awards) made in 2013. See pages 7 – 8.
15. **Seventy-Four Percent of Neutral Arbitrators Selected by Strike and Rank.** The parties chose 74% of neutral arbitrators through the strike and rank process, and jointly selected the remaining 26%. Seventy 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 pages 14 – 15.

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. These fees, however, can be shifted to Kaiser.

16. **Kaiser Paid the Neutral Arbitrators' Fees in 90% of Cases Closed in 2013.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. For the cases that closed in 2013, Kaiser paid the entire fee for the neutral arbitrators in 90% of those cases that had fees. See pages 33 – 34.
17. **Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from \$150/hour to \$800/hour, with an average of \$430. For the 518 cases that closed in

2013 and for which the OIA has information, the average fee charged by neutral arbitrators was \$6,296.12. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average was \$6,683.18. The average fee in cases decided after a hearing was \$26,938.24. See page 34.

Evaluations

When cases are concluded, the OIA sends the parties or their attorneys questionnaires asking them about the OIA system and, if the cases closed due to neutral arbitrator action, an evaluation of the neutral arbitrators. Of those responding, the parties gave their neutral arbitrators and the OIA system positive evaluations. When cases close because of neutral arbitrator action, the OIA sends the neutral arbitrators a questionnaire about the OIA system. The neutral arbitrators reported that the OIA system works well. Slightly less than half of the parties returned their evaluations, while almost all of the neutral arbitrators returned theirs.

18. **Positive Evaluations of Neutral Arbitrators by Parties.** In 2013, the great majority of counsel for both sides reported that they would recommend their neutral arbitrator to another individual with a similar case. See pages 38 – 40.
19. **Positive Evaluations of the OIA by Neutral Arbitrators.** Sixty-seven percent said that the OIA experience was better than a court system, and 32% said it was about the same. See pages 40 – 42.
20. **Positive Evaluations of the OIA by Parties.** Forty-eight percent of attorneys and unrepresented claimants said that the OIA system was better than the court system, and 38% said it was the same. See pages 42 – 44.

Developments in 2013

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.

21. **Change in Membership of AOB.** Charles Sabatino, retired Vice President of Claims for Kaiser, and Lark Galloway-Gilliam, Executive Director of Community Health Councils, Inc., resigned from the AOB at the end of 2013. Both had been members of the AOB since its inception. See Section XII.
22. **Independent Administrator Provided Comments to Proposed Assembly Bill AB 802.** The OIA analyzed a bill that would have amended California Code of Civil Procedure § 1281.96, which specifies the information arbitration provider organizations, including the OIA, must provide on their website. The bill went through several revisions, but was not passed in 2013.

23. **AOB Amends Arbitration Rules.** The AOB amended Rule 54 to try to improve the information given to *pro pers* about the arbitration process. See Exhibit B, Rule 54.
24. **The OIA Modified Its Procedures for Evaluations and Questionnaires.** In an attempt to obtain more meaningful evaluations of neutral arbitrators and the OIA and its arbitration system, the OIA modified its criteria as to who received the various forms. See Section X.
25. **The OIA Analyzed Proposed Changes to the Ethics Standards.** The California Judicial Council proposed amending the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Ethics Standards). The proposed amendments would have modified the process for selecting neutral arbitrators by requiring neutral arbitrators to notify parties in open cases if they were going to accept another case in the OIA system and give the parties an opportunity to object. The OIA, as well as many other organizations and individuals, provided comments. In response, the Judicial Council substantially changed its amendments. Now neutral arbitrators must provide the parties with notice of offers and acceptances of new work, with the risk of subsequent vacature of awards if notice is not timely made. The parties, however, have no right to object to the neutral arbitrator accepting new work. The changes become effective July 1, 2014.

A Note About Numbers

There are a lot of numbers in this report. To make it somewhat easier to read, we offer the following information.

We often give average, median, mode, and range. Here are definitions of those terms:

- Average: The mean. The sum of the score of all items being totaled divided by the number of items included.
- Median: The midpoint. The middle value among items listed in ascending order.
- Mode: The single most commonly occurring number in a given group.
- Range: The smallest and largest number in a given group.

We have rounded percentages. Therefore, the total is not always exactly 100%.

If there are items which you do not understand and would like to, call us at 213-637-9847, and we will try to give you answers.