The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement

submitted by

The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration

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January 5, 1998

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Executive Summary

In July of 1997, Dr. David Lawrence, Chairman and Chief Executive Officer of Kaiser Foundation Health Plan, Inc. and Kaiser Foundation Hospitals, assembled a three-member Blue Ribbon Panel to advise him on how to improve the Kaiser Permanente system of medical malpractice arbitration. This request came immediately after a decision of the California Supreme Court that was extremely critical of the Kaiser Permanente system.

The Panel analyzed the Kaiser Permanente arbitration system and attempted to compare that system to those used by other health care providers. The Panel also sought to understand how arbitration was being used in the health care industry today. The Panel conducted numerous discussions with interested parties and organizations in an effort to understand how the medical malpractice arbitration system actually works.

These recommendations seek to improve the Kaiser Permanente arbitration system for all participants. However, the Panel believes that any system which is designed to resolve disputes about the quality and practice of medicine must, first and foremost, assure a fair approach to protecting the rights of members to adequate compensation in the event of medical malpractice.

Ultimately, the Panel sought to identify the goals of the Kaiser Permanente arbitration program and make recommendations that would align its structure, processes and operations in order to achieve those goals. Kaiser Permanente has told its members and physicians that arbitration guarantees fairness, timely resolution, a less costly process, relative informality, privacy, definite awards, and protection of the rights of individuals to adequate compensation in the event of malpractice or other legitimate claims. As the sponsor of a mandatory system of arbitration, Kaiser Permanente must assure a fair system to their members, physicians and staff.

The Panel has proposed recommendations which may be grouped into the following general categories:

- An Independent Administrator to supervise the medical malpractice

arbitration system. (Recommendations 1 to 3)

- A permanent Advisory Committee to assist in this independent administration. (Recommendation 4)

- A clear statement of the goals of arbitration and communication of these goals to members, physicians and employer-purchasers. (Recommendations 8 and 32)

- An expedited, efficient and fair process for arbitration. (Recommendations 5 to 24 and 33)

- Encouragement of early settlement discussions. (Recommendations 25 and 26)

- Incentives to promote the use of single arbitrators. (Recommendation 27)

- Methods to audit and monitor the progress of the Independent Administrator and to conduct research and evaluate the fairness and effectiveness of the arbitration system. (Recommendations 28 to 30)

- Creation of an ombudsperson program to assist members in navigating the system of dispute resolution. (Recommendation 31)

- A short time period to accomplish the major changes. (Recommendations 34 to 36)

Many of the Panel's recommendations would put Kaiser Permanente, once again, at the forefront of change in American health care. The Panel sees this as a positive result, one fully consistent with the history and philosophy of the organization. Kaiser Permanente has led in the field of health care for many years; there is no reason it should not do the same in the area of arbitration.

I. Introduction

In July of 1997, David M. Lawrence, M.D., Chairman and Chief Executive Officer of the Kaiser Foundation Health Plan, Inc. and Kaiser Foundation Hospitals, assembled this Blue Ribbon Advisory Panel on Arbitration. Our mandate was to "*. . . evaluate the arbitration process and to recommend improvements to that process.*"[1]

The genesis of this Advisory Panel was the decision of the California Supreme Court in *Engalla vs. Permanente.*[2] In harsh terms, the court criticized the Kaiser Permanente[3] arbitration plan for failing to guarantee the rapid appointment of a neutral arbitrator. The Court also observed that the average time taken to conclude most arbitrations was too long and inconsistent with Kaiser Permanente's promise to its members of a speedy process.

Since our appointment we have conducted weekly meetings, and held discussions with Kaiser Permanente physicians, staff, in-house and retained attorneys and management of the organization. In addition, we have met with

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[1]A copy of our mandate from Kaiser Permanente is attached as Exhibit A.

[2]*Engalla v. Permanente Medical Group*, 64 Cal.Rptr.2d 843 (1997). This case has been remanded to Superior Court for further proceedings.

[3]The health care institution commonly known as "Kaiser" is actually a combination of organizations. First, the Kaiser Foundation Health Plan, Inc. is a California nonprofit health benefit corporation, and a federally qualified HMO. The Health Plan arranges for medical benefits by contracting exclusively with The Permanente Medical Group, Inc. (Northern California) and the Southern California Permanente Medical Group. Hospital services are provided by contract with Kaiser Foundation Hospitals, another California nonprofit public benefit corporation.

The Health Plan, Kaiser Foundation Hospitals and the Medical Groups work collaboratively as the Kaiser Permanente Medical Care Program or "Kaiser Permanente." Throughout our report we have used the description "Kaiser Permanente". Although perhaps not legally accurate in every case, we find that designation important. We have learned that the joint efforts of the Kaiser administration and the physician medical groups have a long history. We view the relations as a collaborative effort, for the benefit of members. Thus, our use of this joint name.

attorneys for Kaiser Permanente members, consumer advocates, academics and researchers, state agencies and state legislators,[4] and have attempted to understand the available research relating to arbitration. We have also reviewed court decisions, statutes, academic research and various public agency reports. In addition, we have studied material submitted by Kaiser Permanente.[5]

This report contains our conclusions and recommendations to Kaiser Permanente. However, we wish to make note of what we have *not* done.

First, we have not attempted to resolve the question of whether the arbitration of medical malpractice disputes is a desirable or undesirable option - whether viewed from the position of Kaiser Permanente, the members of that health plan, or the general public. That is, surely, a worthy question, but beyond the scope of our activity.

Second, we have not attempted to re-evaluate the *Engalla* decision. We believe, however, many of the concerns raised by the Court are addressed by our recommendations.

Third, we deliberately did not pursue the question of the cost of arbitration for Kaiser Permanente, its members, physicians or employer-purchasers. Cost is important, but our mandate was to recommend needed change, not to weigh financial considerations against the need for such change.

Fourth, in the limited time available we were only able to examine the Kaiser Permanente arbitration system in California. Whether any of these recommendations are applicable elsewhere in the nation was a question we lacked the time to answer.

Our recommendations therefore assume that Kaiser would continue some form of arbitration of malpractice and other disputes. Our mandate was to study the present system and suggest changes.

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[4]Panel member Phil Isenberg has not participated in meetings or conversations with legislators or legislative staff. As a former legislator, the "revolving door" provisions of state law covered him for one year after leaving office.

[5]A list of the individuals, groups and organizations that provided us with information is attached. We express our deep appreciation to all of those who participated in our discussions.

II. Kaiser Permanente: A Unique Health Plan

As the largest HMO in America, and the trend setter for the managed care revolution in this country, Kaiser Permanente is unique. It started as an experiment in prepaid health care for American workers, first at Grand Coulee Dam, then for the hundreds of thousands of workers who came to the shipyards and factories of Kaiser during World War II. Some suggest that the creation of an employment-based health system was a hardheaded calculation by Henry J. and Edgar Kaiser that good health for workers was good for business. Whatever the reason, Kaiser Permanente is, in many ways, the prototype of the modern American health system.[6]

Today, Kaiser Permanente operates in 19 states and the District of Columbia. As of September 1997 it served 8,840,936 members who were provided benefits through 86,499 different employers. Kaiser Permanente employs approximately 90,000 people; over 10,000 physicians provide care to Kaiser Permanente members. The combined assets of the organization are $12.4 billion.[7] Sixty percent of all Kaiser Permanente members are in California.

Kaiser Permanente has always been at the cutting edge of the health care industry. For decades, organized medicine resisted the presence of prepaid health plans, preferring the traditional fee-for-service system.[8] Elements of this controversy continue today. It appears to us that much of the current debate about managed care and medical malpractice focuses on the problems that exist in the delivery of quality health care in America,[9] not just within Kaiser Permanente.

During this process, we were also drawn into a brief examination of the ways in which medical malpractice might be avoided and how dispute resolution

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[6]Mark S. Foster, *Henry J. Kaiser: Builder in the Modern American West* (1989), University of Texas Press, Austin, Texas. See pp. 211-231.

[7]*Kaiser Permanente Statistics for October 1997,* Communications Department, Kaiser Permanente.

[8] Paul Starr, *The Social Transformation of American Medicine* (1982), Basic Books, Inc., New York, NY, pp. 320-327.

[9]Mark R. Chassin, "Assessing Strategies for Quality Improvement," *Health Affairs*, May/June 1997, pp. 151-161.

procedures affect quality assurance in the medical setting. While not part of our mandate, we were impressed with some of the work in this field.[10] The approach is based on the notion that the traditional fault-finding method of our court system and traditional arbitration might not be the best way to prevent the occurrence of medical malpractice. Those interested in this field suggest that an alternative is to develop an environment where blame is avoided, the duty to report mistakes is taken for granted and ways are found to change the medical system to avoid the mistakes in the future.

It would be of immense value if Kaiser Permanente would expand its efforts in this area.

III. Background on Kaiser Permanente and Arbitration

Kaiser Permanente is California's single biggest HMO user of binding arbitration to resolve malpractice claims.[11] This practice started in 1971 and its use today is the universal form of required dispute resolution for Kaiser Permanente.

Even more singular, the Health Plan contracts to defend and indemnify the physicians and Permanente Medical Groups for medical malpractice. Given the current national and California efforts to impose health plan liability, it is worth noting that Kaiser Permanente already assumes that contractual obligation.

The Kaiser Permanente arbitration system is used for a variety of disputes between patients, family members and the Kaiser system itself. Although modified over the years, the current language on binding arbitration provides that a claim must arise from or be related

> *. . . to an alleged violation of any duty incident to or arising out of or relating to this Agreement, including any claim for medical or hospital malpractice, for premises liability, or relating to the*

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[10] A fascinating discussion is found in Lisa Belkin's article, *How Can We Save the Next Victim?* The New York Times Magazine, June 15, 1997.

[11] Testimony of the California Association of Health Plans (formerly CAHMO), Assembly Judiciary Committee hearing on "HMO Malpractice: Engalla, ERISA and Protecting Patients Rights," August 14, 1997.

coverage for, or delivery of, services or items pursuant to this Agreement, irrespective of the legal theories upon which the claim is asserted.[12]

Although arbitration is available for medical malpractice cases, it is also used for premises liability and coverage disputes. We were told that approximately 90% of all arbitration cases allege medical malpractice. We note a concern expressed by some that the system might face increasing complaints relating to benefits or coverage. While an intriguing possibility, we were unable to address that question for lack of evidence. However, we do suggest that the unique characteristics of coverage or benefit cases may demand a far more speedy system than one designed for medical malpractice - though all arbitration should be speedy in our view.

During our investigation we were also interested to learn that the California Public Employees Retirement System (CalPERS or PERS) and apparently other employers, have an independent course of adjudication for their members with benefit and coverage disputes. PERS members, for example, are advised that for these purposes they ". . . *can choose to appeal to CalPERS rather than going through binding arbitration.*"[13] Likewise, PERS members who receive Medicare benefits, but supplement them through Kaiser Permanente, have alternative means of resolving benefit and coverage matters. We asked about the number of PERS members who were choosing this alternative over arbitration, but the information was not available.[14]

A. Why was binding arbitration adopted?

When Kaiser Permanente adopted its system of arbitration, a number of benefits were suggested to its members:

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[12]*Group Medical and Hospital Service Agreement* (Northern California Region) 1997, 8A(3), p.15.

[13]*Health Care Service Plan Decision Guide* (1998), CalPERS, p. 19.

[14]Discussion with PERS representatives Margaret T. Stanley, Assistant Executive Officer, Health Benefit Services; Fred Steinmetz, Division Chief, Health Plan Administration Division and Laura Rosenthal, Legal Department, November 4, 1997.

• Arbitration was asserted to be *faster* than the traditional court system.

• Arbitration was asserted to be *less expensive* than the traditional court system.

• Arbitration was asserted to be *better able to protect the privacy* of the health plan enrollees as well as the physicians involved than the traditional court system.

• Arbitration was believed to be *more flexible* and better able to accommodate the schedules of parties and expert witnesses, than the court system.

• Arbitration was alleged to be both *more fair and sound in decisions* and awards than the court system.

• Arbitration, or at least binding arbitration, *was final* and not subject to court review except in limited circumstances

• Arbitration was able to provide a fair approach to *protecting the rights of individuals to adequate compensation* in the event of medical malpractice.[15]

We discuss later in this report whether these original assertions still apply today.

We have previously noted that Kaiser is California's primary user of arbitration to resolve medical malpractice claims. It is unclear why the rest of the health care system in California is not also using arbitration for malpractice cases. However, many suggest, and we agree with this assessment, that the passage of The Medical Injury Compensation Reform Act of 1975 (MICRA) may be the reason. Certainly, the limitation of attorney fees and pain and suffering awards imposed by MICRA makes it less likely that medical malpractice litigation or arbitration is started. In addition, beginning in 1987 the courts of California have been engaged in an experiment designed to expedite the court process. Called "Fast Track," this legislatively mandated effort has achieved some notable success in reducing the delay in civil cases.

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[15] *Planning for Health*, Winter, 1975, Kaiser Foundation Health Plan, Inc.

B. How much arbitration occurs at Kaiser Permanente?

To put this issue into context we asked Kaiser Permanente for information on arbitrations filed in recent years. From 1992 to September 1997 there were a total of 5,313 Demands for Arbitration filed (including some court-filed Summons and Complaints). The charts provided to us follow.

Arbitration Statistics - California Division
Professional Liability Claims by Calendar Year

Chart 1:

	1992	1993	1994	1995	1996	1997*
Number of Demands for Arbitration and Summons & Complaints	855	822	819	886	958	973

Chart 2:

	1992	1993	1994	1995	1996	1997*
No. of Settlements	306	302	315	249	304	264
No. of Abandonment/ Dismissals	227	476	502	512	490	639
No. of Arbitrations	88	126	134	117	151	105

*For data ending September 30, 1997.

Chart 2 reflects activity in each of the listed categories for a given calendar year and includes activity in cases that were commenced in prior years.

Kaiser Permanente advises us that these figures are not totally reliable. The Northern and Southern divisions have merged this year. Prior to that time each division kept its statistics independently, apparently with different formats and characterization of issues and outcome. This chart represents the best estimate of Kaiser Permanente staff at this time.

An examination of the figures suggests the following:

• The actual number of Demands for Arbitration (or court filed Complaints, most of which end in arbitration) began to rise in 1995.

• The proportion of Kaiser Permanente members actually filing a Demand for Arbitration is quite small, approximately two hundredths of one percent (.02%) of the annual membership in 1996.[16]

• Both the number of settlements and the number of Demands which are abandoned or dismissed appears consistent. However, we did note the high number of abandoned or dismissed Demands for 1997. We are advised that the reason for the increase is the higher level of attention now paid to expediting these cases, undoubtedly attributable to increased activity after the *Engalla* decision. In other words, Kaiser Permanente appears to be clearing a backlog of cases.[17]

• Figures for 1992 appear to be low in the number of abandonments or dismissals. However, this may be attributable to poor data systems.

Although some attorneys representing Kaiser Permanente members have suggested to us that the relatively high rate of abandoned or dismissed claims proves the existence of a problem - either too high costs for arbitration, or the belief that the system is weighted in favor of Kaiser Permanente - we do not believe that conclusion can be reached without more information. As the next few sections of this report indicate, needed additional information is in short supply. Nonetheless, many of our recommendations are directed at the assertion that the system is too

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[16]In 1996, the Kaiser Permanente membership was 4,987,289. That year 958 Demands for Arbitration (or Summons & Complaints) were filed.

[17]A memorandum describing some of the changes in administration of the Kaiser Permanente arbitration system since November of 1994 is attached as Appendix C to this report.

heavily weighted in favor of Kaiser Permanente. Whether the charge of unfairness is real or perceived makes little difference - any changed system must be fair to all parties.

One of the encouraging steps taken by Kaiser Permanente immediately prior to this study has been the merger of the legal departments of their Northern and Southern California Regions. We believe this will assist in a number of ways: 1) more consistent record-keeping processes and data systems, 2) monitoring of time deadlines and the progress of cases and 3) hopefully a greater use of settlement tools in an effort to expedite and resolve these matters.

C. How does Kaiser Permanente's arbitration compare to other health plans?

We attempted to determine whether the facts we had, standing alone, suggest the presence of any major problem in the Kaiser Permanente arbitration system. We sought comparisons that might exist with other systems of arbitration. For example, is Kaiser Permanente's system slower than others? It is more or less costly? Is there a higher level of member satisfaction with other systems? These and many other questions are ways to determine if this arbitration system works.

Additionally, we were looking for a prototype of the ideal system of arbitration for medical malpractice. Unfortunately, we found none. Our discussions with arbitration providers, attorneys for plaintiffs and for Kaiser Permanente, academics and consumer groups has made one thing quite clear: **there is no body of information available which allows us to meaningfully compare the Kaiser Permanente system of arbitration to systems run by other health plans or to the civil court system.**

Likewise, there is nothing like the recommended court case processing standards developed and advocated by the American Bar Association and incorporated into California's Fast Track judicial rules. As previously noted, the California Association of Health Plans (formerly CAHMO) reported that virtually no other health plan in California has a party-administered or self-executing arbitration system. So, in some sense, no real comparison can be found in California.

Whatever else this report leads to, we hope it promotes the development of information, research and evaluation which can answer some of the questions that stymied us. We believe that Kaiser Permanente is able to promote such research and benefit from the results.

D. Current research on medical malpractice arbitration in California

The most current information on health care arbitration in California comes from a pending study by the RAND Institute for Civil Justice (RAND).[18] RAND generously discussed with us their findings, as well as prior research on court-supervised arbitration.

RAND requested we not release the details of their new study until it is published. However, we are able to discuss the general conclusions of the report. These conclusions surprised us.

• RAND found that the use of arbitration in health care is not common.

• RAND found that even though used infrequently, it is far more common for HMOs to use arbitration than for individual physicians, hospitals or other forms of health organizations.

• RAND found that even among HMOs that use arbitration, only a few (including Kaiser), use it for medical malpractice cases.

Finally, RAND found that there is little information available upon which to judge the performance of any particular arbitration system. Nothing we found during our work suggests conclusions different from those of RAND.

E. Does other information suggest problems with Kaiser Permanente's arbitration?

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[18] Elizabeth A. Rolph, Erik Moller and John E. Rolph, *Arbitration Agreements in Health Care: Myths and Reality*, Law and Contemporary Problems, forthcoming.

(1) The California Department of Corporations Complaint Program: a regulatory view

In search of other information that might give us some indication of whether or not a significant problem exists in the Kaiser Permanente arbitration system, we reviewed the Health Care Service Plan Enrollees Complaint Data reports for 1995 and 1996.[19] These reports are based on a toll-free 800 number program established on October 10, 1995. The Commissioner of Corporations notifies all health plan members in California that this service is available. In addition, health plans are required to regularly advertise the availability of such a complaint system.

The Complaint Data reports use a complicated set of thirty-two (32) complaint categories ("Requests for Assistance" in the vernacular of the Department.) These complaints are grouped in four generic areas: Accessibility, Benefits/Coverage, Claims and Quality of Care. Since the program is relatively new, it is difficult to determine whether the information is statistically significant.[20] In general, it appears to show no significant problems associated with Kaiser Permanente. This survey does not, however, directly focus on dispute resolution.

(2) PERS Report Card: an employer-purchasers view

A significant number of Kaiser Permanente members in California are also members of the California Public Employees Retirement System (PERS). On a regular basis, PERS surveys its members to identify any quality of care concerns with their HMOs and PPOs. This information, in the form of a quality of care report card, is regularly made available to PERS members. The most recent survey was published in September 1997.[21]

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[19] *Health Care Service Plan Enrollee Complaint Data*, California Department of Corporations, 1995 and 1996.

[20] In 1995 only 1,964 enrollee Requests for Assistance were received (from over 17,000,000 members of 39 HMOs); in 1996 the Requests for Assistance increased to 2,321 (from over 19,000,000 enrollees.) The Department of Corporations expects this total to expand as knowledge of the program grows.

[21] *Health Care Plan Decision Guide*, pp.4-10.

According to the latest report, Kaiser Permanente ranks among the highest performing HMOs, based on preventive medical care (childhood immunizations, cholesterol screening, prenatal care, cervical cancer screening, breast cancer screening, diabetic eye examinations, etc.) Although important and relevant to population-based health outcomes and the quality of Kaiser Permanente health care, the studies provide no direct information on arbitration or dispute resolution.

PERS also surveyed their members to determine general levels of satisfaction with health plans, whether HMOs or PPOs. PERS members were asked about satisfaction with their physician, the health plan itself, ability to be referred to specialists, and their view of their own specialists. In this comparison Kaiser was rated highly in every category.

Finally, when asked the question of whether a member "Would Recommend My Health Plan To A Friend?" Kaiser members said yes by a substantial margin - 93% to 95% for the Basic Plan members; 97 to 98% for the Medicare Plan members.

(3) Kaiser Permanente surveys: members' views

We also reviewed some member satisfaction surveys conducted by Kaiser Permanente. Unfortunately, a 1991 survey of Southern California members was the only Kaiser Permanente survey which directly addressed the subject of dispute resolution:[22]

• When asked if a "serious problem" had occurred during the study period, fourteen percent (14%) of Kaiser Permanente members surveyed said yes; eighty-six percent (86%) said no.

• Only sixty-two percent (62%) of the complaining members (8.7% of the total members surveyed) even contacted Kaiser Permanente to discuss the problem.

• Twenty-five percent (25%) of those with a problem spoke to their physician; another sixteen percent (16%) to a nurse or other staff; seventeen percent

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[22] *Inter-Regional Member Services Conference, Complaint Resolution Survey (1991),* Southern California Region

(17%) spoke to Member Services; five percent (5%) spoke to Patient Assistance; fifteen percent (15%) spoke to "other health plans" and twenty-two percent (22%) gave other responses or just didn't know with whom they spoke.

• Sixty-one percent (61%) of complaints referred to something other than physician care. Thirty-four percent (34%) complained about making appointments; sixteen percent (16%) had a complaint about Administration; seven percent (7%) had some general service issue and four percent (4%) complained about staff care and services. (Complainants for non-medical care represented 5.3% of the total members surveyed.)

• Thirty-nine percent (39%) of the Kaiser Permanente members who complained (representing 3.39% of the members surveyed) did so about a physician. Unfortunately, there was no information available that would help us discover the precise nature of the complaint, nor whether an allegation of medical malpractice was involved.

• There is no information on how many of these complaints ever resulted in a Demand for Arbitration.

4) Recent public opinion polls

As this report was being completed a series of new public opinion surveys were published. In one form or another the surveys asked about member satisfaction with managed care health plans. None of the studies directly dealt with Kaiser Permanente. They included national, state and regional surveys of managed care in general. Nonetheless, they generated a great deal of press attention and we briefly examined the reports.[23]

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[23] *Preliminary Findings: Survey of Consumer Experiences in Managed Care*, prepared by The Lewin Group for the Kaiser Family Foundation, the Sierra Health Foundation and the California Wellness Foundation (November 1997); *Kaiser/Harvard National Survey of Americans' View of Managed Care*, Kaiser-Harvard Program on the Public and Health/Social Policy, conducted by the Princeton Survey Research Associates (December 1997); *Preliminary Findings of 1997 Survey of Californians' Experiences with Managed Care*, conducted for California's Managed Health Care Improvement Task Force by the Field Research Corporation (November 1997) and a news report in the *Los Angeles Times*, December 5, 1997, p. D1.

We sought in vain for information on medical malpractice arbitration. The recent federal study of Medicare recipient dropout rates from managed care, for example, seemed to show California in a favorable light. The *Los Angeles Times* reported that thirteen percent (13%) of Medicare recipients left their HMO in 1996. For California the overall figure was 10.6%. In addition the "disenrollment" rate for Kaiser Permanente was extremely low at 2.6% in Northern California and 3.8% in Southern California.

The more pertinent of the surveys involved a study of managed care members in the Sacramento region. Titled *"Preliminary Findings: Survey of Consumer Experiences in Managed Care,"*[24] this report focused on the prevalence of difficulties that members have had with health plans. The report found that twenty-seven percent (27%) of all those surveyed had some problem with their managed care plan in the last twelve months. Those insured by Medicaid reported the highest level of problems at forty-two percent (42%) and those insured by Medicare reported the lowest at seventeen percent (17%.) Almost thirty percent (30%) of those with complaints took no action on their complaint. However, the report did find that sixty-nine percent (69%) of those with complaints had no loss of income associated with the problem; sixty-eight percent (68%) had no loss of time from work, school or other major activities and sixty-one percent (61%) said there was no potential for physical injury associated with their complaint.

The types of difficulties reported were delay or denial of coverage (42%), difficulty getting a physician (32%), inappropriate care (11%), customer service issues (9%), enrollment or eligibility problems (7%) and billing questions (5%).

Focusing on complaint resolution, the survey also showed that forty-five percent (45%) of those who complained were satisfied with the outcome; nineteen percent (19%) were dissatisfied and thirty-five percent (35%) had not yet resolved the problem. Part of the focus of the study was to determine whether managed care patients would have appreciated more assistance in resolving their complaints, and sixty-six percent (66%) said yes.

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[24] *Supra* note 22.

Individuals with fee-for-service medical coverage and those with no insurance protection whatsoever were excluded from the survey. As a result, it is quite difficult to make comparisons between types of health care systems, their problems and the ways of resolving those problems.

These reports add to a growing body of information about managed care and Americans' views of health care in general. Unfortunately, none is directed at medical malpractice arbitration and, with limited exceptions, the study of specific dispute resolution methods is in short supply.

Regretfully, we have concluded that until better information is available, few arguments about arbitration will be resolved by reference to facts and evidence.

IV. The Kaiser Permanente Dispute Resolution System (Before arbitration)

Long before any individual chooses to file a Demand for Arbitration there is a formal and informal dispute resolution structure within the Kaiser Permanente system. The following summary is largely taken from a variety of Kaiser documents made available to members.[25]

While we have summarized the dispute resolution process as we understand it, we have found the grievance process difficult to understand. In spite of what would appear to be a good faith attempt to explain the system, and provide printed information to members, we were left with no clear view of the process.

We are informed that in 1997, the two California Health Plan organizations began to consolidate into a single organization. We believe much of the confusion in understanding the process stems from differences between the pre-existing

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[25]Group Medical and Hospital Service Agreement (1997), Kaiser Foundation Health Plan, Inc., Northern California Region; *Member Rights and Responsibilities* (1997), Kaiser Permanente; *Your Plan Coverage: Disclosure Plan & Evidence of Coverage* (1997), Kaiser Permanente, Senior Advantage; *Services & Benefits: Disclosure Form & Evidence of Coverage* (1998), Kaiser Permanente; *The Guidebook to Kaiser Permanente Services* (1997), Kaiser Permanente, Southern California Region; *Combined Evidence of Coverage & Disclosure Form, Basic Plan & Managed Medicare Plan*, CalPERS and Kaiser Permanente (1998); Discussions with Lisa Kolton and Leslie King, Regulatory Services & Member Services, Kaiser Permanente.

organizations. While not a major part of our recommendations, there is a need to better explain the grievance procedure to members.

A. Conversation with the provider of care

The Kaiser Permanente system encourages members to first discuss their clinical complaints with the treating physician. In addition, it appears that members are also encouraged to register their complaints with other medical employees, if appropriate.

We noted with interest a new Service Guarantee Program in Northern California which offers to refund up to $25 of a co-payment if the member is not satisfied with the services rendered. For those members who do not have a co-payment, a $5 voucher for over-the-counter pharmaceuticals is available. A similar program is now underway in San Diego.[26]

B. Conversation with higher levels of local health providers or local administrators

Additional steps are also available - talking to the next level of medical professionals or facility managers. In this case, the member can talk to the Chief of Service, the physician in charge of the unit or department where the care was provided. A nurse or lay administrator is also available for conversations. There is also the possibility of talking to the Medical Group Administrator or the Hospital Director of Services (if care in a hospital is at issue).

Having briefly described the possible informal avenues of discussion we cannot help but note that the public information available to members only gives passing reference to these options. We have no doubt that they exist and suspect that many members talk to their health care providers directly about perceived problems. However, this does not appear to the be a formal part of the dispute resolution system.

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[26] *Planning for Health: San Diego Member News*, 1997, p. 4.

C. Customer Service or Patient Assistance

The first formal contact is with a *Customer or Member Service Representative* (for the health plan) or a *Patient Assistance Coordinator* (for the medical group). These officials receive complaints both orally and in writing and, we are told, the complaints cover a wide range of subjects, from increased parking rates, to delays in answering telephone calls, to more serious matters.[27]

There is also a *Customer Service Call Center (1.800.464.4000 in English and 1.800.788.0616 in Spanish)* available in the Kaiser Permanente system. Although more focused on cost and coverage questions, this call system is another point for members to request assistance on problems they have with Kaiser Permanente.

As complaints are processed through the system they are often resolved or abandoned by the member, according to the report of Kaiser Permanente staff. Unfortunately, there is no hard evidence about the entire universe of complaints - although limited information suggests that cost, coverage and service questions are far more common than complaints of inadequate medical care.

D. Review steps at the local level

The member may submit a grievance to the facility Customer/Member Service Representative. Receipt is to be acknowledged in writing within five (5) business days. A *Member/Patient Grievance Committee* will make a decision within thirty (30) days of receipt of the grievance, although an extension to sixty (60) days can be allowed if additional information is required.[28]

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[27] On occasion, some Kaiser Permanente printed material also refers people to a *Members Services* office, which we assume is the same as the mentioned Representative or Coordinator. To further complicate things, CalPERS information refers to *Customer Service* in Northern California, *Member Services* in Southern California and a *Regional Reconsideration Committee.* We are advised that within the last thirty days an attempt to standardize the Kaiser Permanente lexicon is in progress.

[28] A somewhat confusing process follows. Apparently, the member may request reconsideration of a decision, although it is not clear whether the reconsideration is with the Grievance Committee or the Grievance Appeal Committee.

E. Review steps at the regional level

If the member objects to the decision of the Grievance Committee, an appeal can be filed with the *Regional Grievance Appeals Committee*. It appears that at least sixty (60) days are allowed for filing an appeal. However, we did not have the opportunity to examine any of the individual contracts for health care services signed by Kaiser Permanente and purchasers, nor did we attempt to understand the different rules imposed by the California Department of Corporations and the federal government, under the Medicare program. We are told by Kaiser Permanente legal staff that there are varying deadlines for some of these categories. We highlight this point only to suggest that a clear explanation of the precise process is necessary.

The appeal will be resolved by a written decision mailed to the member within thirty (30) days of the receipt of the notice of appeal.

The member may attend both the Grievance Committee and the Appeals Committee hearing, although a confusing mention of the Member/Patient *Initial Grievance Committee* remains unexplained.

As part of the regional review process there are expedited reviews of out-of-Plan emergency matters, appeals of Medicare members, some involvement in out-of-area case management, and a relatively new *Ombudsman Program*, which is limited to the review of new technology for experimental procedures. Naturally, there are also reviews ordered by the senior executives of Kaiser Permanente, any number of whom may receive complaints from Kaiser Permanente members.

F. Related matters

Additional points of review and contact deserve mention. For example, there is a special *process for Medicare beneficiaries* focusing on the permitted length of patient stay and quality of care in hospitals. In addition, there are the normal, longstanding Kaiser Foundation Health Plan *quality review process* and Permanente Medical Group *peer review process.*

The exhaustion of these informal and formal grievance procedures leaves a dissatisfied member with only one option: demanding arbitration.

V. The Kaiser Permanente Arbitration System

The formal Kaiser Permanente arbitration system is a complex and involved process. Once it begins, both sides gear up with a host of attorneys, expert witnesses, medical personnel and arbitrators. We have spoken to many who fill these positions. Without exception they appear to be rational and reasonable individuals, concerned with reaching a fair result in arbitration.

However, we are also struck with how easily all participants fall into traditional litigation patterns. Once formal arbitration begins they all develop their arbitration plans, read records, conduct discovery, prepare testimony and behave as if a court trial were the end result.

This is not unexpected. However, the original goals of arbitration seem to fade into the background, to be replaced with the values of a legal system that prizes procedural formalism and winning over other virtues.

We believe the operation of a system of arbitration should be consistent with the values, purposes and goals set for it. At regular intervals Kaiser Permanente, its members and physicians should ask themselves whether their own goals are being met. We discuss later how and in what ways we believe the Kaiser Permanente system must be organized to be consistent with its articulated goals.

This brief discussion of the procedural steps in arbitration describes the current Kaiser Permanente practice, as we understand it. The system has, of course, changed in many ways in recent years - as the result of statutory requirements, court decisions and internal actions of Kaiser Permanente.[29]

A. Demand for arbitration and $150

A member files a written Demand for Arbitration. The preferred method is to

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[29]There are still many minor differences between the arbitration procedures used in Northern California and Southern California. We have not tried to describe most of these differences. It is our hope that the merger of the two separate Kaiser Permanente Regions, unification of the legal departments, and implementation of our recommendations, will soon lead to a single process throughout California.

send the Demand to the legal office of the Kaiser Health Plan. Kaiser Permanente informed us that they will accept any form of written notification.

Simultaneously with receipt of the Demand, the member is required to deposit $150. This sum, together with a like amount from Kaiser Permanente, is deposited in a trust account (non-interest bearing, for some reason) and used to cover the costs of arbitration.[30]

All California health plans utilizing arbitration to resolve member disputes are required to assume a share of fees and expenses of arbitration except ". . . *in cases of extreme hardship.*" The decision on the hardship application is made by a neutral arbitrator selected by the parties, or by the Superior Court if they cannot agree.[31]

B. Confirmation of receipt of the Demand

The Legal Department acknowledges receipt of the Demand within ten (10) days. At approximately the same time an outside attorney for Kaiser Permanente is selected and the medical records are forwarded to that attorney. *We believe that at the moment Kaiser Permanente's attorney receives these records, the member's attorney should receive them as well.* As with most businesses retaining outside attorneys, Kaiser Permanente periodically provides information, instructions and rules of conduct for their attorneys.

C. Selection of the party arbitrators and the neutral arbitrator

Although many other things occur in the early stages of arbitration, the next formal step is for the parties to select their *party arbitrators*, and for the party arbitrators to select a *neutral arbitrator*. This process is constrained by a number of California statutes that govern health plan arbitration.

The Kaiser Permanente system does not utilize the services of any firm that provides neutral arbitrators. Instead, the party arbitrators trade lists of names that

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[30] *Services & Benefits: Disclosure Form and Evidence of Coverage* (1998), Kaiser Permanente, p. 37

[31] California Health & Safety Code Section 1373.20 (c).

are deemed acceptable. Eventually a neutral arbitrator is appointed by agreement. However, there is no appointment unless one side, usually the member's attorney, demands the appointment. As a result of the *Engalla* case, Kaiser Permanente has started to demand the appointment of the neutral arbitrator at an early stage in the proceeding.

Other than participating in the selection of the neutral arbitrator, and attending the actual arbitration hearing, the party arbitrators apparently play no other role in the process. Attorneys for Kaiser Permanente and the members handle the rest of the arbitration.

(1) Arbitration for cases of $200,000 or less

Under California law, effective January 1, 1997, any dispute where claims do not exceed $200,000 shall be heard by a single neutral arbitrator, unless the parties agree to the contrary in writing. Because Kaiser Permanente does not currently utilize an independent dispute resolution service, should the parties not be able to agree upon a neutral arbitrator, any party can immediately request the Superior Court to appoint the neutral arbitrator.[32]

(2) Arbitration for cases involving more than $200,000

When cases involve more than $200,000, a three-person arbitration panel is standard (although the parties can agree to a single neutral arbitrator). The three-person panel is composed of one neutral arbitrator and two party arbitrators. Each party selects one of the party arbitrators to represent their views. The neutral arbitrator is selected by the party arbitrators within 30 days after service of a written demand for selection by either party.[33]

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[32]California Health & Safety Code Section 1373.19. See California Code of Civil Procedure Section 1281.6 for the method of request and selection.

[33]*Combined Evidence of Coverage & Disclosure Form, Basic Plan & Managed Medicare Plan*, Kaiser Permanente, for CalPERS (1998), p. 34; California Health & Safety Code Section 1373.20.

If the party arbitrators cannot agree on a neutral arbitrator, then any party can petition the Superior Court to make the appointment.[34] Under California Code of Civil Procedure Section 1373.19, inability to select a neutral arbitrator creates a conclusive presumption that the Superior Court may act to make the appointment. However, it should be noted that involvement of the Superior Court, under California Code of Civil Procedure Section 1281.6, is not automatic. One of the parties must petition the court to appoint the neutral arbitrator.

To answer one question raised repeatedly by attorneys for members: Yes, Kaiser Permanente does maintain a list of acceptable party arbitrators (at least in Southern California).[35] We saw no such list for neutral arbitrators and are advised by Kaiser Permanente staff that no such list exists. However, we have no doubt that Kaiser Permanente has a very good idea of the particular neutral arbitrators they would prefer handle their cases. We also have no doubt they act on that preference.

And, yes, attorneys for members apparently also have access to background and rating analysis of arbitrators, which provides similar but not identical information.[36] We have no doubt that the attorneys for members also act to achieve their preferences.

D. Controlling the progress of the case

Once the neutral arbitrator is selected, he or she decides all motions relating to discovery and makes other judgments appropriate under statute.

Our discussions with attorneys, arbitrators and Kaiser Permanente administrators left us with the strong impression that unless the member's attorney or the neutral arbitrator pushes a case forward, little may happen. In many cases attorneys for either side may not be interested in pushing for a speedy resolution. These decisions to delay may be for good and proper tactical reasons. However, the

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[34] *Id.*

[35] *Southern California Litigation Manual*, Revised February 1997, p. 11.

[36] *Arbitrators, Paralegal Legal Secretary Publications, Consumer Attorneys Association of Los Angeles (CAALA), 1996.* (101-page book in which arbitrators are rated by CAALA members. Includes ratings and comments.)

Engalla court thought the long average duration of Kaiser Permanente arbitration cases troubling. We agree and suggest the absence of independent administration of the system may explain much of this delay.

E. Discovery

Discovery is conducted in arbitration as in court, under the provisions of California Code of Civil Procedure Sections 1283.05, *et seq.*. Apparently production of medical records is accomplished fairly promptly in most cases (we believe that should be a standard for all cases). We are told that depositions of complaining members are often done at an early stage of the proceeding.

Our discussions with practitioners, however, suggest that both parties tend to delay the depositions of expert witnesses until late in the arbitration process. We suspect that some of the delay in case processing is attributable to this delay in aggressively pursuing discovery. Delaying depositions of expert witnesses is common in court litigation and is generally caused by the high cost of deposing such experts.

F. The arbitration hearing

The final formal step in arbitration is the hearing itself. There is no deadline for holding the hearing. Some neutral arbitrators, we are told, aggressively move the case forward, even over the objections of attorneys for the parties. This does not appear to be the ordinary practice. A common refrain among the attorneys and neutral arbitrators to whom we spoke is the difficulty of scheduling hearings to meet the convenience of attorneys, expert witnesses, the parties, both party arbitrators and the neutral arbitrator. Just listing the number of people involved suggests the scheduling complexity.

Once a hearing is commenced it is usually resolved in no more than three (3) days, although no statistical information exists to prove this claim. However, that was represented to be the average time for hearing by both attorneys for members and attorneys for Kaiser Permanente.

One complaint registered by some is that, on occasion, a hearing will be discontinuous; part of the hearing on one day, the rest some time later. If true, this seems to us a troublesome fact.

G. Arbitration awards and reports to government agencies

At the end of the arbitration the neutral arbitrator will make a decision. The party arbitrators sit in during the actual hearing or, in some cases, meet together with the neutral arbitrator to talk about the case. It seems to be commonly recognized that the neutral arbitrator actually makes the decision and one or the other party arbitrator goes along with that decision.

Usually the decision is a brief statement of the award, although some neutral arbitrators prepare a more formal document. There is no requirement in the Kaiser Permanente system for a written award including reasoning for the decision. Whatever written award is given is provided to the parties and is not otherwise available.

Closing the case involves more than writing a settlement check. Perhaps as important are the mandatory reporting requirements of state and federal law. In California, reports of arbitration awards or settlements of more than $30,000 are required to be reported to appropriate medical regulatory boards ". . . *for damages for death or personal injury caused by that person's negligence, error, or omission in practice, or rendering of unauthorized professional services.*"[37] There are also federal reporting requirements under the Health Care Quality Improvement Act of 1986, PL 99-660.

VI. The Legal Culture

One striking feature of the Kaiser Permanente arbitration system - replicated in other arbitration systems in the United States - is the strong presence of attorneys and the legal culture they bring with them. The able attorneys who represent Kaiser Permanente members, and the equally competent attorneys who represent Kaiser Permanente and their physicians, dominate arbitration. Likewise, the presence of *party arbitrators*, who are almost always attorneys, and *neutral arbitrators*, who

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[37] California Business & Professions Code Sections 800, *et seq.*

are commonly retired judges, strongly affects the system we have been asked to study.

Earlier in this report we listed the benefits of arbitration asserted by Kaiser Permanente. It is clear those claims assumed arbitration was always better than the traditional California court system. To us, the Kaiser Permanente arbitration we studied seems to be becoming more and more like the court process. While arbitration is somewhat more low-keyed than a court trial, it is as adversarial and does not necessarily process cases any more rapidly. The evidence is unclear on the comparative costs of arbitration versus court, but many have suggested to us that the hard dollar costs may be roughly equal. The Kaiser Permanente arbitration system is clearly run to meet the schedules and competing demands of the attorneys who are arbitrators and those attorneys who represent clients - as the court system is run by and for the procedural convenience of judges and attorneys.

Unfortunately, it appears that the sum of individual arbitrations "managed" by attorneys for members and attorneys for Kaiser Permanente does not automatically produce an overall system which is speedy, low cost and just. We then asked ourselves these questions: can the attorneys for the parties really regulate and control the Kaiser Permanente arbitration system? And even if they are expected to manage the system through their work on individual cases, can they do so in the best interests of the millions of Kaiser Permanente members, the physicians, and the organization itself?

We have concluded that the present system is essentially unmanaged. And we have come to believe it is unrealistic to expect individual attorneys to be responsible for managing the Kaiser Permanente arbitration system. That has led us to at least one strong recommendation of this report: the selection of an Independent Administrator for the system.

Attorneys who represent clients are under a clear ethical and legal duty to represent their clients and to pursue their interests before any other.[38] They have no choice in the matter and in the American system of civil justice we would have it no other way.

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[38] *ABA Model Rules of Professional Conduct*, Preamble, paragraph 2; Rule 3-300, *Rules of Professional Conduct of the State Bar of California* and Discussion.

We also believe that complicated medical malpractice, benefit and coverage cases require the presence of legal counsel. It would be an extraordinary person, or someone quite unrealistic, who would alone assume the duty of evaluation, collection of complicated medical evidence and understanding of the legal system, all without an attorney. We are concerned, however, that talented practitioners in the court system might unconsciously bring with them some of the less desirable features of litigation - contrary to the goals of those who created the Kaiser Permanente system of arbitration.

There are consequences to a system that so completely relies on attorneys. And these consequences lead us to many of our recommendations.

VII. Arbitration and the Duty of Kaiser Permanente

It is clear to us that the dispute about Kaiser Permanente's arbitration system is more than just a discussion of an appropriate legal process, time frame and manner of decision. Imposing a mandatory arbitration system means that Kaiser Permanente is implicitly representing to its members that the system is fair, reasonable and just. We strongly believe that Kaiser Permanente must honor this representation.

Just as strongly, we believe that the employers who contract with Kaiser Permanente have an obligation to see that the medical malpractice arbitration system is fair to their employees.

An injured member may choose to leave Kaiser Permanente and select another health plan. However, the limited evidence available suggests that many Kaiser Permanente members stay with the system even after arbitration. Many members may have no realistic, economical alternative to continued medical care with Kaiser Permanente. In addition, their employers may offer no additional choices.[39] Continuing to provide medical care to a member pursuing arbitration

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[39]Sandra Robinson and Mollyanne Brodie, "Understanding The Quality Challenge for Consumers: The Kaiser/AHCPR Survey," *The Joint Commission Journal on Quality Improvement*, 1997; Joel C. Cantor, Stephen H. Long and Susan Marquis, "Private Employment-Based Insurance in Ten States," *Health Affairs*, Summer 1995; KPMG Peat Marwick, *Health Benefits in 1996* (Montvale, NJ: 1996).

imposes special strain and obligation on Kaiser Permanente.

It is not enough for Kaiser Permanente to transfer responsibility for managing arbitration to an independent party. It is essential that Kaiser Permanente, and its employer representatives, guarantee that the system established is a fair and reasonable one. The most effective way to do this is to specify exactly what the arbitration system is expected to deliver.

We suggest that Kaiser Permanente owes a number of duties to its members and physicians:

- A duty to *publicly identify the goals* of a fair arbitration system;
- A duty to *inform their members and physicians* of these goals;
- A duty to guarantee the goals of *a speedy arbitration process, low costs and essential fairness;*
- A duty to *select a truly independent administrator* who will control the process of arbitration in accord with these goals;
- A duty to see that *the Independent Administrator guarantees* the goals are met;
- A duty to establish *regular audits and reviews* of the system to examine whether the goals have been met;
- A duty to provide Kaiser Permanente members and physicians with enough *information and facts* to allow them to understand the actual operation of the arbitration system; and
- A duty to develop a plan for *research and evaluation* of the arbitration system so that the assumptions upon which it is based may be judged, reviewed and, if necessary, changed in the future.

A final note: many of our recommendations would put Kaiser Permanente, once again, at the forefront of change in American health care. We see this as a

positive result, one fully consistent with the history and philosophy of the organization. A certain risk is inherent in these recommendations, and some will suggest that nothing should be done "until every other health plan has to do the same thing." We reject that argument.

Kaiser Permanente has led in the field of health care for many years; there is no reason it should not do the same in the area of arbitration.

VIII. Recommendations

A. Independent Administration

1) An Independent Administrator should manage the Kaiser Permanente Arbitration System[40] and the individual cases within it. The Kaiser Foundation Health Plan, Inc. should fund the Independent Administrator.

2) The mission of the Independent Administrator should be to ensure that the Kaiser Permanente arbitration process is fair, speedy, cost-effective, and protects the privacy interests of the parties. These goals should be reflected in the contract with the Independent Administrator and made available to all members and employer-purchasers.

3) The Independent Administrator selected should not be a provider of neutral arbitrators or mediators.

Rationale: The creation of an independent, accountable administrator for the Kaiser Permanente arbitration system is the Panel's starting recommendation. The perception of bias created by Kaiser Permanente's "self-administration" has been a primary concern raised by the consumer representatives, members' counsel, legislators and academics who spoke with the Panel as well as by the California Supreme Court in the *Engalla* case.

The Panel concluded that the present arbitration system is not truly being managed by anyone and is left, by default, to the control of the attorneys, whose legal and ethical responsibilities are to their respective clients. The Panel feels that Kaiser Permanente's arbitration cases must be actively managed by an accountable individual or organization rather than be left to the "management" of adversarial attorneys.

The Independent Administrator should manage the arbitration program and the individual arbitration cases in a way that will achieve the program's goals-- to

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[40]The phrase "Kaiser Permanente Arbitration System" in these recommendations refers only to cases within California, which was the geographic scope of the Panel's inquiry.

provide a fair, timely, low cost process that protects the privacy interests of all parties. The process must be fair first and foremost to the individual Kaiser Permanente member who has a valid claim and a right to adequate compensation. In addition, the system must be fair to physicians and other health care providers. The costs of the system should be sufficiently low as to enable members, regardless of income, to effectively assert valid claims and to allow Kaiser Permanente to effectively defend claims. These goals serve as the foundation for all of the Panel's recommendations.

One suggestion for independent administration has been to select one, existing arbitration organization to handle all Kaiser Permanente cases. The Panel considered and rejected this option for two reasons. Employment of arbitrators from only one organization creates the appearance of a "captive" provider, who is beholden to Kaiser Permanente for repeat business and therefore perceived to favor Kaiser Permanente. In addition, exclusive use of one arbitration panel denies both parties the benefit of the widest range of available, talented neutral arbitrators.

B. Advisory Committee

4) Kaiser Permanente should establish a small, on-going, volunteer Advisory Committee[41], comprised of representatives from Kaiser membership, Permanente Group physicians, Kaiser health care personnel, employer-purchasers of Kaiser Permanente services, an appropriate consumer advocacy organization and the plaintiffs' and defense bar involved in medical malpractice in the Kaiser Permanente arbitration system. Kaiser Permanente should consult with the Advisory Committee prior to the selection of the Independent Administrator and at other critical points described later in this report.

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[41]Our recommendation in this area benefited greatly from the work of Professor Thomas B. Metzloff, Duke University School of Law, Durham, N.C. and attorney Robert A. Stein, of Washington D.C., who developed the "Model Grievance Procedure for Planning Councils and Grantees" under Title I of the Ryan White Care Act. In addition, our Chair and Reporter had independent experience with the Civil Justice Reform Act Advisory Group for the United States District Court, Northern District of California.

Rationale: Although the Panel has made a number of recommendations on ways to improve the Kaiser Permanente arbitration system, there are many specifics to be resolved and adjusted based on experience.[42] An Advisory Committee comprised of knowledgeable representatives of the affected parties will best be able to work with Kaiser Permanente and the Independent Administrator to design and implement a process that meets the program's goals in a way that will work effectively for all parties.

The Panel anticipates that the Advisory Committee would have major input prior to the selection of the Independent Administrator. However, it will also play an important ongoing role, assessing the evaluations of the arbitration program and identifying possible areas for improvement.

In order to function effectively, the Advisory Committee should be as small as possible, consistent with the goal of representing each of the designated groups.

C. Goals of a Revised Kaiser Permanente Arbitration System

Time frame for resolution

5) The Independent Administrator, after consultation with Kaiser Permanente and the Advisory Committee, should establish arbitration process deadlines, which will serve as publicly stated benchmarks for the program.

6) The Independent Administrator should supervise the progress of each case and should communicate regularly with the neutral arbitrator (and the parties, when appropriate) to assure that each case moves as expeditiously as possible. To this end, the Independent Administrator should encourage continuous hearings.[43]

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[42]For example, the present $150 administrative fee may need to be adjusted somewhat to reflect the increased cost of administering the new system. If adjusted, however, the fee must remain reasonable, in keeping with the important goal that the arbitration process not be cost-prohibitive for members.

[43]The Panel was concerned to learn that California's superior courts may not treat arbitration hearing dates as conflicts for trial setting purposes. It will be difficult to expedite the arbitration process unless courts are willing to show flexibility in scheduling trials when a counsel

7) **Although all cases should move as swiftly as possible, special expedited procedures, including for appointing the neutral arbitrator and setting arbitration hearing dates, should be established for cases in which the member is terminally ill or in other catastrophic circumstances.**

Rationale: Throughout its investigation the Panel asked the individuals with whom it spoke if there was a "gold standard" or accepted time frame for efficient, fair processing of medical malpractice cases in arbitration. No one could provide the Panel with such a benchmark.

A number of individuals who spoke with the Panel believed that uniform arbitration deadlines are not feasible because each case is unique. Some cases will require additional time for discovery, to retain and consult with experts or to wait for stabilization of medical condition.

Although the Panel concluded that it would be unreasonable to recommend a firm deadline for all cases, the Panel believes that only by establishing program benchmarks, similar to the California state court "fast track" targets, can Kaiser Permanente system goals be achieved. For example, the program could be expected to resolve 85% of cases within 18 months of the Demand For Arbitration, another 10% within 24 months and the remaining 5% within 36 months. These examples are for illustration only; the appropriate targets should be developed by the Independent Administrator after consultation with Kaiser Permanente and the Advisory Committee and could be subsequently adjusted, if needed, in light of actual experience. The Panel believes that establishing such time frames will speed case resolution and reduce the need to micromanage individual cases.

Several witnesses noted that significant delays occur when arbitration hearings are recessed and rescheduled, sometimes repeatedly. The Panel recommends that the Independent Administrator strongly encourage neutral arbitrators to work with counsel and parties to schedule continuous hearings.

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has a previously set, conflicting arbitration date. The Panel urges the California Judicial Council, as the policymaker for the state courts, to promulgate a rule treating a conflicting arbitration date with the same respect as a conflicting trial date.

All Demands for Arbitration, and other pleadings and notices that initiate arbitration, should be promptly forwarded to the Independent Administrator.[44] The Panel recognizes that some demands never go beyond the filing stage and remain inactive on the arbitration docket for an extended period. The Independent Administrator should manage these cases so that they can be removed from the program at the earliest appropriate time.

Documentation and availability of procedures

8) The Independent Administrator should formalize and make available Kaiser Permanente's new arbitration goals and procedures in writing and take actions, where necessary, to assure all participants are properly informed.

Rationale: The Panel envisions a system in which the Independent Administrator would publish and disseminate to members, all participating attorneys and other interested parties, a clear statement of the goals and rules of the arbitration system.

Establishing a list of qualified arbitrators

9) The Independent Administrator should develop the largest possible list of qualified neutral arbitrators.

10) The Independent Administrator should solicit applications from firms and individuals in California who provide neutral arbitration services and who are interested in serving in Kaiser Permanente cases. The qualifications for applicants should be established by the Independent Administrator after discussions with the Advisory Committee and Kaiser Permanente.

11) The Independent Administrator should select those applicants who meet standards of qualification and experience and who demonstrate that they will implement the program's goals of fairness, timeliness, low cost and protection of the parties' privacy interests.

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[44] *See* Recommendation 12, *infra*.

Rationale: Making the largest number of qualified neutral arbitrators available to hear Kaiser Permanente arbitrations is in the interest of all parties and is critical to speeding up the Kaiser Permanente arbitration process. A number of members' attorneys believe that Kaiser Permanente will only agree to a small number of neutral arbitrators and that the small size of that group is one of the greatest causes of arbitration delay. The Independent Administrator should design the application and screening process after consulting with the Advisory Committee and Kaiser Permanente. The arbitrators should be selected on the basis of their ability to meet the program's stated goals and other specific qualifications the Independent Administrator may establish in areas such as experience, training and expertise.

While the Panel lacked the time to determine the ideal qualifications for neutral arbitrators, it believes that the quality of the neutral arbitrator is critical to maintaining the fairness and success of this dispute resolution option. Recognizing that there may be disagreement as to how much and what type of experience the neutral arbitrators need, the Panel urges the Independent Administrator to resolve this issue after consultation with the Advisory Committee and Kaiser Permanente.

Prompt selection of the neutral arbitrator

12) Kaiser Permanente should be required to send the Demand for Arbitration, or other notice of arbitration, to the Independent Administrator within five (5) business days of receipt.

13) The neutral arbitrator should be selected within thirty (30) days of the Independent Administrator's receipt of the arbitration demand.

14) The parties should have a short period within which they may agree upon any neutral arbitrator of their choosing.

15) If no arbitrator is selected within that period, the Independent Administrator should select the neutral arbitrator by providing a list of names to the parties and giving them ten (10) days to strike some number of those names. The procedure for this striking process should be established by the Independent Administrator.

16) In creating lists of potential neutral arbitrators, the Independent Administrator should rotate among the qualified neutral arbitrators.

17) A one-time, delay in appointment of up to ninety (90) days may be allowed by the Independent Administrator upon written request of the plaintiff. Counsel requesting a delay should be required to provide a copy of the written request to his or her client.

18) The Independent Administrator should be able to grant further continuances in unusual circumstances.

Rationale: Delay in appointment of the neutral arbitrator is a significant contributor to delay in the Kaiser Permanente arbitration process, as noted by many of the individuals with whom the Panel spoke and the Court in *Engalla*. A number of those who spoke with the Panel strongly urged a *striking system* as the most efficient way to select a neutral arbitrator, avoiding the time-consuming, expensive and inefficient resort to court appointment.

The Panel recommends establishing a clear, short time period within which the parties will be encouraged to agree on a neutral arbitrator of their own choosing. Any neutral arbitrator chosen must agree to abide by the Independent Administrator's rules and be subject to her or his supervision.

If no agreement on a neutral arbitrator is reached within that time frame, the Independent Administrator should provide a list of names from which each side would exercise some number of strikes. The specifics of the striking system - the number of names on the list, the number of strikes and the timing and method for selecting the neutral arbitrator from the remaining names - should be established by the Independent Administrator.

In creating the lists, the Independent Administrator should rotate among the eligible arbitration organizations and individuals on the screened panel. For example, case 1 could be sent a list selected from the roster of a qualified arbitration organization; case 2 could be sent a list from a second qualified organization; and case 3 could be sent a list selected from the qualified individual neutral arbitrators. This rotation would diminish the reliance of any one set of neutral arbitrators for

Kaiser Permanente cases and should decrease the risk and perception of possible "repeat player" bias towards Kaiser Permanente by neutral arbitrators.

While urging speedy appointment, the Panel recognizes that delays are sometimes needed. A number of plaintiffs' counsel informed the Panel that some cases come to them just as the statute of limitations is about to run and that they need additional time to investigate their cases.

Arbitration management

19) The neutral arbitrator should promptly convene an arbitration management conference, in person or by phone, to set deadlines for key events, establish the date of the arbitration hearing and assist in resolving any issues that might impede the progress of the case. The neutral arbitrator should hold additional conferences as necessary to assure that the case continues to move expeditiously. The Independent Administrator should monitor the cases and supervise the neutral arbitrators to assure efficient progress.

Rationale: Arbitration cases need active management in order to move efficiently. The neutral arbitrator should serve as the primary arbitration manager and would need regular, periodic contact with the attorneys in order to keep the case moving forward. The Independent Administrator should be responsible for monitoring the progress of the case and keeping the neutral arbitrators on track. The system should use phone conferences whenever possible in order to save time and expense.

Disclosures by potential arbitrators

20) The Independent Administrator should maintain a list of all qualified neutral arbitrators and arbitration organizations and maintain a file on each. An individual neutral arbitrator's file should contain the history of the arbitrator's rulings in Kaiser arbitrations, written decisions (if any) in those cases, a biography and any additional information necessary to enable parties to screen for bias and possible conflicts of interest.

21) These files should be made available to parties and counsel in pending Kaiser Permanente arbitrations. When a list of potential neutral

arbitrators is sent to parties and counsel, a summary of the file information on the proposed neutral arbitrators should be included in that mailing.

Rationale: A major criticism of the Kaiser Permanente arbitration system has been that Kaiser Permanente, as the repeat party, has greater knowledge of the past performance of potential neutral arbitrators. Although it appears that experienced medical malpractice plaintiffs' counsel have substantial access to information, due to their own experience and professional networks, less experienced counsel and unrepresented parties are at a disadvantage. This set of recommendations is designed to rectify this imbalance in access to important information.

The Independent Administrator should maintain a file on each qualified neutral arbitrator containing the information that would be of interest to a party or counsel seeking to select a neutral arbitrator for a case. Counsel and parties in a pending Kaiser Permanente arbitration must have timely access to this information. The mechanics of distributing or otherwise making this information available should be determined by the Independent Administrator in consultation with the Advisory Committee and Kaiser Permanente.

The Panel recommends that a neutral arbitrator's past rulings and written decisions in Kaiser Permanente arbitrations be included in his or her file. (The Panel's recommendation regarding creation of written decisions is set forth below.) Until a substantial number of decisions are created under this new system, Kaiser should make its best efforts to extract relevant information about cases over the last three years from its records and make that information available for inclusion in the Independent Administrator's files. This task may be difficult because such a collection of data does not exist at this time, to the Panel's knowledge. The Panel does not intend that the implementation process be slowed by the task of assembling this information but urges Kaiser Permanente to work actively and in good faith to create this record as soon as possible.

Written decisions

22) Neutral arbitrators should be required to issue brief written decisions to the parties in Kaiser Permanente arbitrations and the Independent Administrator. These decisions should include the name of the prevailing

party; the amount and other relevant terms of the award, if any; and reasons for the judgment rendered.

23) The Independent Administrator should maintain a complete set of the written decisions in Kaiser Permanente arbitration cases. In addition, a copy of a neutral arbitrator's decision should be kept in that arbitrator's file. These documents should be made available, as described above, to parties and counsel in pending Kaiser Permanente arbitrations.

Rationale: The purpose of the requirement of brief written decisions is to better inform the parties of the reasons for the arbitrator's ruling and to enhance the quality of information available to counsel and parties who are selecting neutral arbitrators for pending cases. The decisions should be brief in order to keep down arbitrators' fees and reduce the delay involved in writing detailed decisions.

Protection of privacy

24) In developing principles to govern the Independent Administrator and the neutral arbitrators who will serve in Kaiser Permanente cases, Kaiser Permanente and the Advisory Committee should give substantial care to ensure the privacy of members, physicians and Kaiser personnel. Prior to making past awards and written decisions available, as recommended above, the Independent Administrator should remove the names of parties, members, physicians and Kaiser Permanente personnel, as well as the name and location of the Kaiser facility.

Rationale: A major benefit of arbitration is the privacy it provides to Kaiser members and Kaiser Permanente personnel. The goal of providing substantially more information on past cases to counsel and parties selecting arbitrators in pending cases could undermine the goal of maintaining party privacy. Therefore, the Panel recommends that any information that could be used to identify an individual party be removed from documents placed in the Independent Administrator's files for review.

Enhancement of settlement opportunities

25) The Independent Administrator should ensure that the neutral arbitrator schedules, but does not attend, an early meeting between the parties to consider settlement, either through direct negotiations or with the assistance of a mediator.

26) Within twelve (12) months of this report, Kaiser Permanente should consult with the Independent Administrator and the Advisory Committee and begin implementation of a mediation program.

Rationale: The present Kaiser Permanente arbitration system provides no formal opportunities for settlement discussions. Sometimes the adversary nature of arbitration makes early initiation of settlement talks difficult. For instance, individual counsel are sometimes reluctant to raise the issue of settlement for fear of appearing weak to their client or their opponent. In addition, some plaintiffs' counsel believe that Kaiser Permanente is sometimes reluctant to have early settlement discussions. The Panel does not know if this criticism is valid, but believes that increasing opportunities for settlement talks will benefit all parties. These recommendations give the Independent Administrator the responsibility of encouraging both direct and mediated settlement discussions early in the case.

The Panel also believes that a voluntary, mediation program would enhance and complement the available grievance and arbitration options, perhaps enabling earlier resolution in some cases and avoiding the necessity of the arbitration hearing. Presentations made to the Panel described how mediation can enable the parties to be more directly involved in resolving their dispute and, in some cases, can result in creative, tailored solutions that meet the needs of the parties better than an arbitrated solution. The Panel acknowledges that mediation will not be appropriate in all cases.

Encouraging use of the sole arbitrator

27) If the member requests a single, neutral arbitrator, Kaiser Permanente should consent and pay the full fee of the neutral arbitrator. If Kaiser Permanente insists upon a tripartite panel in these circumstances, it

should pay for all fees of the neutral arbitrator as well as its own party arbitrator.

Rationale: The major costs of the Kaiser Permanente arbitration system are the fees of the arbitrators, substantial costs which do not exist in court cases. Historically, most medical malpractice cases have been heard by a panel of three: two "party" arbitrators (one selected by each side) and a "neutral" arbitrator, usually selected by the party arbitrators, sometimes in consultation with their clients.

When there is a three-person panel under the present system, each side pays the full cost of its party arbitrator and half of the cost of the neutral arbitrator. The Panel learned that the cost of medical malpractice party arbitrators (usually attorneys) may run from $0 (when plaintiffs' attorneys serve as party arbitrators as a courtesy to colleagues) to $150 per hour for Kaiser arbitrators and $200 to $350 per hour for some plaintiffs' arbitrators. Neutral arbitrators may run as high as $400 per hour or more.

The Panel has serious concerns about whether the value added by the two party arbitrators justifies the significant expense. With the exception of attorneys, the individuals who spoke with the Panel generally viewed the three-person panel as an anachronism and felt that a sole arbitrator was sufficient in the vast majority of cases. The purpose of this recommendation is to create incentives for the use of sole arbitrators and significantly reduce the cost of arbitration process. Cases with sole arbitrators will also avoid the delay of obtaining and scheduling two additional participants in the arbitration process.

Oversight and monitoring

28) The Independent Administrator should report annually to Kaiser Permanente and the Advisory Committee. The report should discuss the actions taken to achieve the program's goals and whether those goals are being met. The annual report shall be made available to the Advisory Committee and, upon request, to Kaiser Permanente members, employer/purchasers and the general public.

29) No less than every five years, an independent audit of the Independent Administrator should be undertaken. This audit shall also be

made available to the Advisory Committee and, upon request, to Kaiser Permanente members, employer/purchasers and the general public.

30) Kaiser Permanente should conduct on-going, internal research to assess the extent to which the arbitration system is meeting its stated goals.

Rationale: A major criticism of the Kaiser Permanente arbitration program and a major challenge to our Panel has been the lack of complete and reliable information with which to assess the program's operations and results. These recommendations would improve data collection, monitoring and reporting, enable the Independent Administrator to improve the system and assure Kaiser Permanente, its members, employer/purchasers and the public that the program's goals of fairness, timeliness, low cost and privacy are being met.

Objective evaluation and public dissemination of this information are critical to the development of public confidence in a private, mandated arbitration system.

D. Improvement of the Pre-arbitration System

31) Kaiser Permanente should establish and fund a formal Ombudsperson program[45] to assist members in the complaint and grievance processes.

32) The Kaiser Permanente dispute resolution system should be standard across all facilities in California and should be communicated more clearly and directly, in writing, to its members.

Rationale: In spite of excellent presentations by Kaiser Permanente personnel, the Panel found the pre-arbitration grievance and complaint system extremely difficult to understand and can only assume that many Kaiser members have the same reaction. Kaiser Permanente should institute an ombudsperson program to aid members in solving their problems and navigating the large, complex Kaiser

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[45]The Panel studied with great interest the paper of Peter V. Lee, J.D. and Carol Scott, J.D., *Managed Care Ombudsman Programs: New Approaches to Assist Consumers and Improve the Health Care System*, Center for Health Care Rights, Los Angeles, California, December, 1996.

Permanente organization. The ombudsperson could also be of invaluable assistance to unrepresented parties, who are the most vulnerable potential participants in the arbitration process.

With regard to this proposal, the Panel notes that Kaiser Permanente has recently joined with the American Association of Retired Persons, Families USA, Group Health Cooperative of Puget Sound and HIP Health Insurance Plans in proposing Consumer Protection Standards in managed care.[46] This agreement includes the provision of an ombudsperson for assistance in a variety of areas, including complaints, grievances and appeals.

The Panel did not have sufficient time to decide whether to recommend a role for the ombudsperson in the arbitration process. The Panel is very concerned about the near impossibility of unrepresented parties adequately presenting an arbitration case and believe that there may be a constructive role for the ombudsperson to play in assisting these vulnerable parties prior to and perhaps in connection with arbitration.

E. Cases Not Involving Medical Malpractice

33) Kaiser Permanente should consult with the Advisory Committee and the Independent Administrator to determine whether different arbitration procedures are needed for benefits and coverage cases and other matters other than medical malpractice.

Rationale: According to the information provided by Kaiser, approximately 90% of all Kaiser Permanente arbitrations are medical malpractice cases, and the Panel's recommendations have been developed in that context. However, the Panel believes that there may be a need for different standards or procedures in other types of cases, particularly benefits and coverage cases in which obtaining a prompt decision may have special urgency. The Panel recommends that Kaiser Permanente explore and reach some determination on this issue with the Advisory Committee and the Independent Administrator.

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[46] "Kaiser Permanente Internal News", Public Affairs and Communications Department - Program Offices (1997).

F. Speed of Implementation

34) The Advisory Committee should be appointed no later than February 1, 1998.

35) The Independent Administrator should be selected no later than April 1, 1998.

36) Kaiser Permanente should develop and publish an implementation schedule for these recommendations as rapidly as possible.

Rationale: Kaiser Permanente should move as swiftly as possible to establish its Advisory Committee and hire its Independent Administrator. While the Panel appreciates that this timetable is ambitious, the Panel feels it is necessary in order to restore confidence in its arbitration process.

Respectfully submitted,

Hon. Eugene F. Lynch (ret.)

Sandra R. Hernández, M.D.

Phillip L. Isenberg, Esq.

Kaiser Permanente is committed to providing its members with medical care of the highest quality. In that context, it is essential that differences of opinion regarding care or service be resolved in a sensitive and humane manner. To help resolve questions about the effectiveness of binding arbitration as it is now employed in Kaiser Permanente, we are seeking suggestions for improvements in the process from a blue ribbon panel of outside experts.

Background

Kaiser Foundation Health Plan, Inc. ("Health Plan") is a California nonprofit public benefit corporation and a federally qualified health maintenance organization. It arranges for the provision of medical services to its members through a contract with The Permanente Medical Group, Inc., a California professional corporation, in Northern California and the Southern California Permanente Medical Group, a professional partnership, in Southern California. Hospital services are provided to members through contracts with Kaiser Foundation Hospitals, a California nonprofit public benefit corporation. The entities, together "Kaiser Permanente," have used binding neutral arbitration for more than 25 years to resolve disputes with Health Plan members.

Kaiser Permanente is committed to the use of binding neutral arbitration because it provides a system of dispute resolution which can be less expensive and more efficient than traditional courtroom litigation. Equally as significant, the process is less adversarial, and consequently more appropriate for the resolution of disputes with persons who will continue in most cases to be Health Plan members.

A copy of a white paper on the Health Plan arbitration process is attached as Exhibit 1.

A copy of the Health Plan Service Agreement, Section 8 of which is the arbitration provision, is attached as Exhibit 2.

The Engalla Case

The Health Plan arbitration process was criticized by the Supreme Court of the State of California in the recent case of Engalla v. The Permanente Medical Group, Inc. A copy of that decision is attached as Exhibit 3.

The Panel

In light of the criticism which has been directed at the arbitration process, Dr. David Lawrence, Chief Executive Officer of the Health Plan, has directed that a blue ribbon panel be formed to evaluate the arbitration process and to recommend improvements to that process. In accordance with that directive, all Kaiser Permanente personnel have been instructed to cooperate with the work of the panel. The Panel will have access to all documents related to the arbitration process except those which are legally privileged. Any other confidential documents and information provided to the Panel will remain confidential.

The Charge

To suggest improvements to the process by which Kaiser Permanente arbitrates cases of alleged medical malpractice with its members in order to provide an arbitration system that is sensitive to the members and fair to all parties involved. The panel will provide its recommendations to Dr. Lawrence no later than November 1, 1997.

APPENDIX B

Recommendations Considered but Not Adopted by the Panel

A. "Loser pays"

The Panel considered whether to recommend a "loser pays" rule, in which the losing party in an arbitration would pay the winning party's costs. The Panel considered two versions of such a rule: one that would award only those costs that would be granted to the winning party by a court and one that would award all costs of the winning party, including attorneys' fees and all arbitrators' fees. The possible benefits of a "loser pays" system are two-fold. By increasing the cost of losing, such a system may discourage the filing of frivolous or weak claims. In addition, the winning party is fully compensated, obtaining reimbursement for its attorneys fees and arbitrator costs. The Panel ultimately rejected both versions of this option, unanimously, out of concern that such any such rule could seriously inhibit members' willingness to pursue arbitration, even in legitimate cases, for fear of incurring substantial debt if they should lose. The Panel was also concerned that when Kaiser Permanente prevailed, it would be in the difficult position of pursuing collection efforts against individual members with whom it hopes to have a positive, continuing relationship.

B. Variant of California Code of Civil Procedure Section 998

To encourage settlement, the Panel also considered recommending that Kaiser Permanente's arbitration program include a rule patterned on California Code of Civil Procedure Section 998, which provides that a party who refuses a written settlement offer and fails to achieve a better result at trial will pay certain costs incurred by the offering party. This option failed to receive unanimous support because of concerns that it, too, could discourage members from bringing legitimate claims and, as with "loser pays", would make Kaiser Permanente a creditor of its members in some cases.

C. Specific qualifications for neutral arbitrators

The Panel was unanimous in its belief in the need for qualified neutral arbitrators. It discussed but did not reach a conclusion on what those specific qualifications should be. Possibilities discussed include an ability to understand complex medical information. Whether necessary experience should include prior

work as an advocate, judge or arbitrator in medical malpractice cases or, more broadly, in tort cases was also considered. In a desire to avoid micromanagement, the Panel leaves resolution of this question to the Independent Administrator in consultation with the Advisory Committee and Kaiser Permanente.

D. Pilot program comparing arbitration cases with court cases

The Panel discussed the idea that a well managed, accountable, arbitration system could be a superior option to the civil court system for members with legitimate claims. Kaiser is often maligned for mandating arbitration, yet the Panel considered whether it was possible and perhaps even likely that members, given an option at the time a malpractice action was commenced, might choose arbitration if it were perceived as fair, independent, speedy, less intimidating and affordable.

In order to test whether arbitration would be selected voluntarily by members, the Panel considered recommending a pilot program, perhaps in one region or hospital system, in which members for a limited period of time could choose arbitration or the traditional court process for their disputes. Such a pilot would allow assessment of member satisfaction, costs, time frames and outcomes under the two systems. The malpractice environment is quite different today than it was when the arbitration system was established, due to MICRA and court "fast track" legislation. A well-designed pilot program could reveal a great deal about the merits of medical malpractice arbitration in the current environment.

KAISER PERMANENTE

MEMORANDUM

Date: December 17, 1997

To: Blue Ribbon Panel

From: Pauline Fox

Re: **Post-November 1994 Process Changes**

Pursuant to your request, this memorandum will summarize some of the changes made to the processes used by this department since I joined Kaiser as Chief Counsel of Medical-Legal (Northern California) in November 1994. Relevant changes include:

(1) Developed specific processes for managing cases in which the claimant is terminal;

(2) Developed and implementing a process pursuant to which indigent or low income claimants could obtain relief from the payment of some arbitration costs;

(3) Developed documentation to obtain written consent by all parties to defer appointment of arbitrators while, at the same time, ensuring that discovery can continue;

(4) Developed guidelines regarding continuances of arbitration hearings;

(5) Supported legislation to improve the disposition time of arbitration hearings, reduce the cost of arbitration cases, and provide legislative avenues for indigent claimants to prosecute arbitration cases;

(6) Consulted with representatives of the plaintiffs' bar to discuss potential improvements to the arbitration process, e.g., fax service of demands for arbitration, compilation of a list of neutral arbitrators generally acceptable to both sides. Began work designed to determine the efficacy of the latter idea;

(7) Investigated the utility of retaining the services of a third party ADR administrator to expedite the appointment of arbitrators preserving the open panel approach; and

(8) Moved to get arbitrators appointed in all cases.

The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration
c/o Hon. Eugene F. Lynch (ret.)
P.O. Box 1341
Ross, California 94957

January 5, 1998

David M. Lawrence, M.D.
Chairman and Chief Executive Officer
Kaiser Foundation Health Plan, Inc.
and Kaiser Foundation Hospitals
One Kaiser Plaza- 27th Floor
Oakland, California, 94612

Dear Dr. Lawrence:

We submit for your consideration this report on the Kaiser Permanente system of arbitration. It was an honor to be asked to study your system. Although the time frame given us was short, we hope that our comments and recommendations are helpful to you.

Our recommendations are primarily aimed at helping the members of Kaiser Permanente deal with their health plan. At the same time we believe that fairness and justice must be extended equally to the physicians and staff of Kaiser Permanente. We have come to believe that the interests of the Kaiser Permanente arbitration system transcend the individual cases in arbitration. Accordingly, we seek changes in the system itself, not just the avoidance of old errors in new cases. Kaiser Permanente and its members and physicians are in a relationship of trust and mutual obligation. We believe our recommendations reinforce that mutual trust and obligation.

We are unanimously in support of the specific recommendations in this report. Frankly, we were surprised and pleased to discover that we agreed on all significant issues.

We recognize that Kaiser Permanente is a non-profit health plan interested in providing quality health care at an affordable price. In a competitive health care market the need to control costs and simultaneously guarantee the quality of medical care are vital goals of the system. Within this context lies the medical malpractice arbitration system developed by Kaiser Permanente.

Kaiser Permanente has already taken steps to improve its arbitration system. We have attached a memorandum provided to us outlining these changes. Our work goes substantially beyond these preliminary steps, but moves in the same direction.

Although our recommendations are broad - some would say they are fundamental changes in the system - we have suggested a very short period of time for implementation of the most significant changes. We know this will cause great difficulty for Kaiser Permanente. However, the controversy over arbitration should be resolved rapidly.

Finally, as we worked through this report we were conscious that several of us have some involvement with Kaiser Permanente or with parties potentially interested in the results of our deliberations. In the interest of candor we wish to note that Eugene Lynch handles mediation and arbitration with JAMS/Endispute, Phil Isenberg has been a plan member of Kaiser Permanente his entire adult life and Stephanie Smith, our Reporter, has a brother-in-law who is a physician with The Permanente Medical Group and a sister-in-law who is a Kaiser nurse.

We believe our recommendations stand on their own merit.

Sincerely,

Hon. Eugene F. Lynch (ret.)

Sandra R. Hernández, M.D.

Phillip L. Isenberg, Esq.

APPENDIX E

Individuals Who Presented Information to the Panel or Had Discussions with a Panel Member or the Reporter

Steven Anthony, Esq.
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Senator John Burton
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In addition, Panel members interviewed other individuals on a requested confidential basis.

APPENDIX F

Disclosures and Biographical Information about the Panel

A. Disclosures:

In connection with this report, the members of the Panel and the Reporter wish to make the following disclosures. Judge Eugene Lynch is a private mediator and arbitrator who works through JAMS/Endispute, a private dispute resolution provider. Phil Isenberg is a lifelong Kaiser member. Stephanie Smith has a brother-in-law who is a physician with The Permanente Medical Group and a sister-in-law who is a Kaiser nurse. All of the panelists and the reporter were paid for their time by the Kaiser Foundation Health Plan, Inc.

B. Biographical information:

Hon. Eugene F. Lynch (ret.) (Chair)- Judge Lynch is a private mediator and arbitrator, recently retired from fifteen years of service as a judge of the U.S. District Court for the Northern District of California. He served as judge on the Municipal and Superior Courts of San Francisco from 1971 to 1982. For thirteen (13) years prior to becoming a judge, he was a San Francisco trial attorney whose practice included jury trials of medical malpractice cases. He has authored numerous books and articles on negotiation and settlement and serves on the Advisors Committee for the Restatement of Law, Third for Torts. Judge Lynch has lectured and taught for numerous organizations including California Continuing Education of the Bar, The Rutter Group, University of California-Hastings College of the Law and the Practicing Law Institute. He is a graduate of Santa Clara University and University of California-Hastings College of the Law.

Sandra R. Hernández, M.D.- Dr. Hernández is Chief Executive Officer and Director of The San Francisco Foundation and the former Director of the Department of Public Health for the City and County of San Francisco. She is an Assistant Clinical Professor at the University of California, San Francisco, School of Medicine. Dr. Hernández is a member of the President's Commission on Consumer Protection and Quality in the Healthcare Industry and serves as Chair of the Board of the San Francisco Health Authority (a non-profit HMO). She was recently named by *Modern Healthcare Magazine* as one of ten "Healthcare Leaders for the Next Century: 1997 Up and Comers." Dr. Hernández is a graduate of Yale University and the Tufts University School of Medicine. She also attended the John F. Kennedy

School of Government Local and State Executive Program under a W.K. Kellogg Fellowship (1992.)

Phillip L. Isenberg, Esq.- Mr. Isenberg is the former Mayor of Sacramento and was a member of the California State Assembly for fourteen (14) years, chairing the Assembly Judiciary Committee for seven (7) years. He was the author of legislation to regulate the conversion of nonprofit health care facilities to profit-making status and a significant participant in the fight over the conversion of Blue Cross of California into a profit-making health plan. Isenberg also chaired three conference committees allocating more than two billion dollars worth of cigarette tax money, resulting from the passage of Proposition 99. During his legislative tenure he authored legislation in the areas of state and local financing, local government organization and financing, arbitration and dispute resolution, and water and environmental matters. Isenberg was a member of the California Constitution Revision Commission (1995-1996) and the University of California Commission on Graduate Medical Education (1966.) He is associated with the Sacramento law firm of Hyde, Miller, Owen and Trost but continues to lecture on health care issues for the Agency for Health Care Policy and Research, U.S. Public Health Service and the National Conference of State Legislatures (Forum for State Health Policy Leadership.) In addition, he lectures at the Graduate School of Public Policy, University of California Berkeley, and in the Government Department and the School of Public Policy, Administration and International Affairs at California State University, Sacramento (CSUS). Mr. Isenberg is a graduate of the CSUS and the Boalt Hall School of Law.

Reporter for the Panel:

Stephanie E. Smith- Ms. Smith teaches at Stanford Law School and Hastings College of the Law and is a dispute resolution consultant, trainer and mediator based in Oakland, California. She has served on the faculty of ADR programs sponsored by numerous organizations, including the U.S. Department of Justice, the American Bar Association, Harvard Law School and the Center for Public Resources. She has also conducted trainings in Jordan, India and Canada and has worked with Palestinian judges and lawyers from Gaza and the West Bank. From 1991 through 1996 she served as Director of ADR Programs for the U.S. District Court for the Northern District of California, in charge of the court's arbitration, mediation and early neutral evaluation programs. Prior to joining the court, Ms. Smith was a partner at the San Francisco law firm of Jackson, Tufts, Cole and Black. She is the former chair of the ADR Committee of the Individual Rights and

Responsibilities Section of the ABA. She is a graduate of Wellesley College and Harvard Law School.