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GUEST COLUMN

Navigating Kaiser Permanente's arbitration process

When patients bring claims against Kaiser Permanente in California, they face a unique and complex arbitration system--one born of controversy, reshaped by reform and best navigated with strategic use of mediation.

By Mark Pierce

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When individuals suffer injury at the hands of medical professionals, they often seek restitution in court or through out-of-court settlements. But if their claims involve the Kaiser Permanente health care system, they will find themselves governed by an entirely different playbook.

Since the 1970s, Kaiser's California programs have mandated arbitration for any and all claims asserted against the company. Whether the case involves malpractice or a slip-and-fall in the parking lot, membership in the state's Kaiser system constitutes agreement to arbitrate almost all grievances through the healthcare giant's process. This is no minor matter: More than 9.5 million Californians rely on Kaiser for their medical care.

The *Engalla* case

So when the California Supreme Court ruled in 1997 that Kaiser may have engaged in fraudulent conduct toward a member who filed a claim against it, notice was taken. The case, *Engalla v. Permanente Medical Group* ((1997) 15 Cal. 4th 960), was troubling. Fifty-one-year-old Alfredo Engalla was misdiagnosed over a long period of time by Kaiser doctors before being correctly diagnosed with terminal lung cancer. Instead of expediting the process, Kaiser dragged it out, finally appointing an arbitrator one day after Engalla's death.

Kaiser's arbitration process, the court noted, was designed, written, mandated and administered by Kaiser. No independent third parties were involved in its administration; there was no oversight or evaluation of the system's performance. That the program was adversarial was a fact not disclosed to Kaiser members. Delays occurred in 99% of cases; on average, it took almost two and a half years to reach a hearing.

The *Engalla* decision shined a spotlight on a system that was poorly administered, unfairly stacked against claimants, and accountable to no one. It was a wake-up call for Kaiser and a legal community that was largely unaware of the Kaiser playbook. Things have significantly changed over the past 25 years, but the Kaiser arbitration system remains a mystery to many legal practitioners.

Changes after *Engalla*

Following *Engalla*, Kaiser substantially revamped its process. It established the Office of Independent Administrator, or OIA, a neutral third party charged with overseeing the program. Safeguards were adopted to make hearings fairer, and process changes were introduced to minimize delays.

Annual OIA reports show that in every year since reforms were adopted, there have been significant improvements in the speed and outcome of cases. According to the most recent report, the average number of days it took to select a neutral arbitrator in all cases was 58 days. This compares with a system average of 674 days cited in the *Engalla* opinion.

In 2024, more than half of the cases settled; almost one quarter were closed by a decision of the arbitrator. Only 5% of cases actually went to a hearing, most were heard by a single neutral arbitrator, and claimants prevailed in 44% of those

cases. Ultimately, more than half of the claimants received some compensation.

Process basics

The OIA Rules spell out how Kaiser arbitrations are initiated, the process by which arbitrators are selected, how proceedings progress, and the arbitration time frame. The process starts when a claimant serves the company with a Demand for Arbitration. The demand will typically include an estimated case value, which helps the OIA manage neutral assignments.

Once filing fees are paid, the OIA sends the parties a list of twelve neutrals selected at random from its database. A single neutral arbitrator hears and decides cases valued at less than $200,000; for larger claims, one neutral and two party arbitrators may decide the case. If the neutral cannot be chosen jointly by the parties, a "rank and strike" selection process is used. Parties can also agree to use a neutral who is not on the OIA list; if available, that person will be confirmed by the OIA.

An arbitration management conference is held within 60 days of the arbitrator's appointment. The parties select an arbitration date and schedule a mandatory settlement meeting. At the settlement meeting, the parties can consider resolving the case short of arbitration and discuss other relevant matters. Discovery may begin before a neutral is selected, but it can be postponed until the neutral is appointed. The arbitrator has authority to modify the scope, terms and conditions of discovery.

Arbitration hearings are conducted in the same manner as civil trials, with judgment rendered by one or more arbitrators. Standard rules of evidence and civil procedure apply. Hearings may be conducted in-person, over video, or in a hybrid (in-person and video) manner. Video hearings are more likely to include doctors and other medical personnel who would not attend in-person proceedings.

Arbitrator decisions are final and binding unless "obtained by corruption, fraud or other undue means." The time frame for rendering decisions was recently increased by the OIA: "Unless otherwise specified by law, the Neutral Arbitrator shall serve the Award in Extraordinary and Complex cases, no later than forty-five (45) days after the closing of the Arbitration Hearing, and in all other cases, no later than thirty (30) days after the date of the closing of the Arbitration Hearing."

Suggestions for navigating the Kaiser process

Arbitrators

Selection of the neutral arbitrator is perhaps the most important step in the process, but it doesn't have to be a difficult one. Upon request, the OIA will provide claimants with a wealth of information about the neutrals on their list, including resumes, prior cases and other helpful data.

Although larger cases qualify for party arbitrators, there should never be a reason to engage them. As long as the parties can agree upon a single neutral arbitrator whom they both trust to render a fair judgment, party arbitrators are unnecessary, even for cases valued at more than $200,000.

Using a single arbitrator, even for large cases, can be a huge benefit for claimants. Expenses and fees for the neutral arbitrator are typically shared by the parties, but when a claimant waives the right to select a party arbitrator, Kaiser pays all neutral fees and costs. According to the most recent OIA report, hourly rates for neutral arbitrators ranged from $200/hour to $1,600/hour, with an average of $764/hour. For 538 cases that closed last year, the average arbitrator fee was $10,756. The average fee in cases that were decided after a hearing was $72,110. Kaiser paid the entire cost of the neutral arbitrator in 96% of cases that closed. This alone should be an incentive for claimants to forgo party arbitrators.

Medical malpractice cases can be extremely expensive. Experts often run to six figures, and no hearing is complete without their testimony. When claimants talk with the arbitrator early in the process, they have an opportunity to resolve issues that would otherwise consume precious time and resources. With fewer matters to be decided, the arbitration process can be far more efficient.

Mediation

Arbitration may be mandated for Kaiser disputes, but most claims against the company can - and should - be resolved with far less process. When claimants have strong cases, they should reach out to Kaiser early in the process to discuss settling their matters. Kaiser is generally open to considering early resolution, especially when the alternative is a significant judgment coupled with expert fees, arbitrator costs and expenses.

For so many reasons, early settlement of claims through mediation can be the best course for both parties. Kaiser is open to settling such claims whenever possible, and a good mediator can help both parties cut through the complexities to reach a mutually satisfactory resolution.

Even if they are unable to settle their case in mediation, parties can save significant time and money by working with the mediator to focus on key issues and narrow the scope of arbitration. Mediation of Kaiser disputes - whether medical malpractice or premises liability - should help both sides achieve early resolution of otherwise costly and lengthy proceedings.

Conclusion

Given the complexities, costs, and scheduling challenges that often arise when claims are made against Kaiser Permanente, the best course of action may be for claimants to negotiate settlement of their matters with the guidance of a knowledgeable and experienced medical malpractice mediator. A skilled mediator can help parties understand critical issues and, even when more than one mediation is needed, can help them save significant time and money.

Hon. Mark H. Pierce (Ret.) *is a neutral with Signature Resolution. He previously served for 15 years on the Santa Clara County Superior Court bench. Prior to his appointment to the bench, Judge Pierce represented clients in business, employment, medical malpractice, personal injury and real estate matters. He can be reached at mpierce@signatureresolution.com.*