

CAN MANDATORY ARBITRATION OF MEDICAL MALPRACTICE CLAIMS BE FAIR? THE KAISER PERMANENTE SYSTEM

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In recent years, there has been a dramatic increase in the inclusion by businesses of mandatory arbitration clauses in contracts with consumers. Rarely are such clauses the subject of bargaining between the parties, mainly because the business simply inserts the provision in a take-it-or-leave-it form contract. Indeed, many consumers don't even know that the clause is there when they make their purchase, in some cases because the contract arrives in the mail with the product being acquired.

Many consumers, their lawyers, and consumer advocacy organizations oppose mandatory arbitrations because they deny consumers their right to go to court. There are many reasons for that opposition, including limitations on tools that are available in court, such as discovery, and additional costs that are not incurred in court—mainly fees for the arbitrators. Many arbitrations do not require a statement of reasons for the decision, and there are limited rights to appeal an unfavorable arbitration ruling. Finally, many people oppose giving up their right to a trial by jury, at which a state official serves as the judge, and the public can watch the proceedings.¹

The question that this paper seeks to answer is whether, leaving aside the absence of a public trial before a jury, can one category of mandatory arbitrations—claims of medical malpractice—be operated

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¹ Any discussion of arbitration must take into account the dominant role played by the Federal Arbitration Act of 1925, which the Supreme Court has construed to have broad applicability and to preempt most state laws designed to protect individuals from unwanted and unfair arbitration procedures. For a detailed discussion and list of key cases, see <http://www.citizen.org/Page.aspx?pid=2512>.

in a manner in which those who must use it to resolve their claims receive a fair hearing and a reasonable opportunity to recover their damages? To seek to answer that question, this paper examines the mandatory arbitration system used by the Kaiser Foundation Health Plan, Inc., which operates the Kaiser Permanente medical delivery system for its approximately 7.4 million members that it had in California as of December 31, 2014.² The current arbitration program, which has been in operation since 1999, received 657 demands for arbitration in 2013.³ It follows one that was heavily criticized by the California Supreme Court in *Engalla v. Permanente Medical Group*, 64 Cal. Rpt 843, 938 P.2d 903, 15 Cal 4th 951 (1997), for the lack of an independent manager outside of Kaiser and for excessive delays in the appointment of neutral arbitrators and the holding of arbitration hearings.⁴

After *Engalla* was decided, Kaiser could have litigated it further or attempted to make only the changes identified by the Court in its arbitration system. Instead, Kaiser chose to appoint a Blue Ribbon Panel that recommended sweeping changes in the system, which Kaiser accepted. The most significant change was to shift responsibility for managing the arbitration system from Kaiser to the Office of Independent Administrator (OIA), and the creation of an Arbitration Advisory Council, which later became the Arbitration Oversight Board (the Board). Working with Kaiser Permanente, the Administrator and the Council prepared and then approved the Rules that are now the basis of the current arbitration system.⁵

² <http://share.kaiserpermanente.org/article/fast-facts-about-kaiser-permanente> (visited May 28, 2015).

³ 2013 Annual Report (“AR”) at ix. The reports are prepared by the Office of the Independent Administrator and reviewed by the Arbitration Oversight Board, which are described *infra* at 6. The reports for each year, as well as the Arbitration Rules and much other useful information, can be found on the Administrator’s website. www.oia-kaiserarb.com.

⁴ *Engalla* allowed the Kaiser Permanente member to maintain a defense to Kaiser’s efforts to compel arbitration on the ground that Kaiser had engaged in fraudulent conduct by misrepresenting various aspects of the arbitration system. Whether that decision, as well as other features of California law relating to arbitration, would be preempted under the FAA is an open question that is beyond the scope of this paper.

⁵ That history is described in the First Annual Report of the OIA, which is on its website. That report also contains the report of the Blue Ribbon Panel as an appendix, followed by a report on the status of its recommendations, almost all of which were adopted. That annual report also contains the then-current Rules for the arbitration system, as do all the

The research for this paper is mainly based on discussions with the Independent Administrator and review of the Annual Reports that are on the Office's public website. There were also conversations with officials at Kaiser-Permanente who have responsibility for the arbitration program, and they and the Independent Administrator read and commented on drafts of this paper. They also participated in a small meeting at the National Academy of Sciences on December 2, 2014, where an earlier version of this paper was discussed by outside commenters, including several attorneys who represent plaintiffs in medical malpractice actions. There was neither the time nor the budget to conduct interviews with other participants in the arbitration program at Kaiser Permanente in order to obtain a more complete picture of it. Nor, for the same reasons, was I able to obtain the perspectives of others, such as medical personnel, arbitrators, lawyers on both sides of these cases, and patients, both represented and unrepresented.

Kaiser Permanente has plans in five other regional operations, all of which operate similar medical delivery systems, but it has a malpractice arbitration system like this only in California, which is by far its largest operation. The others had memberships as of the end of 2014 ranging from about 231,000 to about 627,000. <http://share.kaiserpermanente.org/article/fast-facts-about-kaiser-permanente/> (visited May 28, 2015). Kaiser Permanente has a malpractice arbitration system in Hawaii, but I did not examine its operation, and the website for that region, www.kpinhawaii.org, did not have any information about it. One of the questions that supplemental research would address is the characteristics of a health delivery system that make it desirable and feasible to establish an arbitration system like the one in California.

Although the Kaiser Permanente arbitration system applies to all disputes that members have with Kaiser Permanente, including matters such as billing and coverage, almost all the claims are for moderate to serious injuries arising from alleged medical malpractice. These cases are generally quite complicated, almost always require expert testimony, raise factual issues that differ from case to case, and the amounts awarded, especially where there is pain and suffering, are significant. As explained below, the Kaiser Permanente arbitration

subsequent reports issued by the OIA. Rules changes are often necessitated by changes in California law, as well as from lessons learned in operating the arbitration system.

system contains significant due process-like protections that would not be cost-justified for claims with much smaller amounts at stake. This paper does not take a position on whether mandatory arbitration systems that govern other cases brought by individuals, such as consumers or employees, provide basic fairness to those required to use them.⁶

Before turning to the specifics of the Kaiser Permanente system, there is one argument made by opponents of mandatory arbitration that merits a mention. Opponents contend that if an arbitration system is fair for both sides, then it need not be mandatory, because both sides will agree to it. That contention is not an argument about whether a particular arbitration system is fair, but about whether mandatory arbitration should be permitted. Given the FAA and the manner in which the Supreme Court has construed it, that argument is one that must be addressed to Congress. Moreover, on its own terms, the fact that some claimants may choose to arbitrate and others may prefer going to court says little about the fairness of an arbitration system, but only whether a particular party believes that one system or the other is more advantageous for that party. Thus, in small dollar cases, in which an individual claimant cannot easily obtain a lawyer, arbitration might be the claimant's preferred forum, whereas the defendant might prefer a court where an unrepresented party would have serious difficulties meeting the formal requirements of litigation. Conversely, in larger value cases, the courtroom, with a jury, might well favor the interests of the claimant, but the defendant would prefer arbitration. Thus, the fact that the Kaiser-Permanente system is mandatory says nothing conclusive about its objective fairness, but it does underscore that Kaiser believes that, on an overall basis, using the system is advantageous to Kaiser.

⁶ In addition to malpractice claims, if a Kaiser member is injured by a third party, and Kaiser provides the member medical services, Kaiser may have a lien on the member's recovery from that third party for the value of the services Kaiser provided. If Kaiser's claim is not resolved when the member tries or settles the case, Kaiser may enforce its lien only in its arbitration system, which it did four times in 2013. AR at 35. Kaiser prevailed in three of those cases in 2013, receiving amounts between \$13-\$20,000. AR at 93. These cases are more complicated than one involving a billing dispute, but less than the malpractice case itself. Kaiser also requires its members to arbitrate other tort claims, such as a fall on a wet floor, but those claims almost never get to arbitration. For simplicity, this paper will disregard all non-malpractice cases. In addition, malpractice cases are not appropriate for class actions, and nothing in this paper should be read to support mandatory arbitration provisions that forbid class actions in or out of arbitration.

I. THE CALIFORNIA KAISER PERMANENTE MEDICAL SYSTEM

There are several very important features of the Kaiser Permanente medical delivery system that must be understood in order to evaluate its malpractice arbitration program and to understand how any lessons learned might or might not be applicable in other situations. First, the Kaiser Foundation Health Plan, Inc. is a self-insured umbrella health maintenance organization that individuals and groups join, but provides no services itself. Rather, it operates independent regional plans, which each have a contract with a Permanente Medical Group (PMG). The groups, in turn, employ the doctors and other staff who provide complete medical care for the Kaiser members in that region. Under Kaiser's contracts with its members, with the exception of emergencies, all medical care is provided only by doctors, nurses, technicians, etc. who work for their PMG. The individual providers are all salaried, and their incomes do not depend on the success or failure of their PMG or of their Kaiser Permanente plan as a whole. In addition, with very few exceptions, to be covered under the plan, a Kaiser member must go to a hospital or other facility that it has an exclusive contract with Kaiser Permanente for the region in which the person is a member. Thus, Kaiser has created a closed system in both directions. For convenience, this paper will refer to this health care delivery system, as it refers to the arbitration system, as Kaiser Permanente's. In addition, because this arbitration system operates only in California, all references to Kaiser Permanente are to the two regional Kaiser Permanente plans in Northern and Southern California.

Second, virtually every California Kaiser member, as part of joining the program, must sign an agreement to arbitrate all claims of medical malpractice under the Kaiser Permanente system. There are a few members who joined Kaiser before the current system was put in place and who have not yet agreed to arbitrate their claims under this system, but that number is dwindling. In addition, Kaiser is apparently allowing some recent members to opt out of arbitration although the reason for that needs further exploration. In any event, that number is small, and it does not appear to have any impact on the overall conclusions as to the fairness of the arbitration system.

Third, Kaiser's doctors, nurses, and other medical staff are relieved of all liability for malpractice (and need not obtain malpractice insurance), and Kaiser Permanente is solely responsible for all claims

and is the only proper defendant in any arbitration. In exchange, Kaiser Permanente is given the exclusive authority to determine whether to contest a claim and whether to settle and, if so, in what amount. The Kaiser Permanente officials who make those litigation decisions consult with the persons who allegedly caused the claimant's injury and take their views into account. However, unlike a doctor in private practice with an insurance carrier, a doctor who works for Kaiser Permanente does not have the right to refuse to allow his or her employer to pay a claim and to insist on arbitrating it. This kind of single decisionmaker arrangement is available outside of a closed system like Kaiser's only if all potential defendants are represented by the same insurance carrier, with the same policies and coverage, and if they all agree to be bound by the decisions of a designated agent. As discussed *infra* regarding the mandatory reporting of awards and certain settlements against Kaiser, the decision to settle a claim against a Kaiser Permanente doctor may have adverse consequences for that doctor, but that possibility is part of the bargain that doctors make when they go to work for Kaiser.⁷

II. DEFINING A SUCCESSFUL CLAIMS RESOLUTION SYSTEM

Before describing the Kaiser Permanente arbitration system in detail, and as part of the process of attempting to evaluate its success, it is essential to identify which criteria are relevant. No one disputes that there are some claims that should be paid and that there are others that should not. Thus, payment of a claim (or not) is not, alone, a proper measure of success; some more neutral criteria must be used. In fact, there is a neutral statement that provides a good start for assessing any claims system. Rule 1 of the Federal Rules of Civil Procedure states the goal of those Rules to be the "just, speedy, and inexpensive determination" of cases decided under them. The Kaiser Permanente system has similar goals: "to provide a fair, timely, and low cost arbitration system that respects the privacy of the parties."⁸ Of the three features in Federal Rule 1, cost and speed of individual cases in arbitration can easily be measured, although the OIA has

⁷ In theory, a Kaiser Permanente doctor could engage in conduct, such as performing surgery while intoxicated or sexually abusing a patient, which could give rise to a claim for punitive damages. The Independent Administrator is aware of no such cases, and hence the liability of Kaiser Permanente and/or the doctor under those circumstances has not arisen.

⁸ AR at 2, citing to Arbitration Rules 1 and 3.

been unable to find comparable data for the duration of cases currently litigated in the California court system.⁹ Determining whether an outcome is “just” is much more subjective, but, as discussed below, the OIA has attempted to gather reactions from the various participants that at least say something about whether the arbitration process produces results viewed as just by them.

Moreover, and perhaps more important, in the real world, there is an almost inevitable tradeoff among the three goals. Thus, an arbitration system can be made speedy and quite inexpensive, by setting abbreviated deadlines, denying all discovery, and conducting a hearing in one day, with no written explanation of the decision. But in those circumstances, the likelihood of a just result is substantially diminished. By contrast, where there is a genuine dispute about whether a doctor’s negligence caused the patient permanent and serious injuries, extensive discovery and a two week trial with a dozen experts and perhaps a jury is more likely to produce a just or fair result, but at a greater cost and with additional delay.

On the other hand, if the patient suffered losses of at most \$50,000, no sensible person would think that the monetary tradeoff in terms of cost and time consumed in a two-week trial is worth the price of accuracy for a claim of that magnitude. The Kaiser Permanente system includes both claims for quite modest amounts and also regularly produces substantial arbitration awards. For example, in 2013, there were twenty-six awards in favor of claimants, representing 37% of the cases that went to an arbitration hearing and decision.¹⁰ Recoveries ranged from \$10,510 to \$4,950,527, with an average of \$499,027 and a median of \$210,000.¹¹ Thus, its overall evaluation must be done with the full range of claims covered by it in mind.¹²

⁹ AR at 55, n. 83.

¹⁰ The numbers on plaintiff win rates in med-mal cases in court are a bit divergent. According to one source, a study, reported on in 2012, conducted by researchers at Mass General found that plaintiffs won only 20% of the medical malpractice cases that were decided by a jury. See <http://www.medpagetoday.com/PracticeManagement/Medicolegal/32692>. A study for FY 2002-03 by the Federal Judicial Center found a plaintiff win rate in medical malpractice cases of 36.7% See <http://www.searcyllaw.com/wp-content/themes/paperstreet/files/Statistics%20Show%20Medical%20Malpractice%20Cases%20Are%20Not%20an%20Easy%20Windfall%20for%20Plaintiffs.pdf>. The degree to which those rates are comparable to those under the Kaiser Permanente arbitration system would require further study.

¹¹ AR at 29.

¹² One measure of the range of complexity in the claims that go to final award is the amount of time the arbitrator spent on the case. Such time can be estimated by the range

There are three other factors that should be taken into account in assessing whether a particular claims resolution system is appropriate, and, on all of them, arbitration is less desirable than litigation in court. One of the bedrocks of our justice system is a trial by jury, presided over by a neutral public servant chosen under state law, which, by definition, is not available in arbitration. Trial by jury is valued because many believe that, whether an allegedly negligent doctor should have to pay for harm that the doctor caused, should be determined in a public forum by a jury composed of members of the community. Although Kaiser's arbitration system follows the substantive laws of California on medical malpractice, it eliminates the jury trial. Many believe that the opportunity for a trial by jury is so central to our justice system that its absence alone is a reason for forbidding the use of mandatory arbitration generally, and certainly for barring its use for resolving personal injury claims.

The second feature of court litigation also denied in arbitration is an open forum where interested members of the public may observe what transpires. For some, openness is an independent value, and because arbitrations are closed to the public, they are ill-advised for that reason alone. Others see openness as one means of assuring fairness and that, while other protections can offset the closed nature of arbitration, they cannot cure the problem entirely. By contrast, some people (including those who designed the Kaiser Permanente arbitration system¹³) believe that the closed nature of arbitration, which protects the privacy of the claimants and the medical personnel involved, is a reason to favor it. For those who favor privacy, any public interest in observing the resolution of medical malpractice claims is more than offset by the interest of many, if not all, participants in proceeding resolving the conflict in private rather than in open court. However, while Kaiser Permanente arbitrations are not open to the public, claimants are free to disclose the bases for their claims as well as any other aspect of the process.

Last, although most cases under both systems either settle or are voluntarily dismissed, arbitrations do not produce precedents as some court decisions do. Arbitration awards cannot be cited in future cases, and there are no appeals to clarify uncertain areas of the law. Jury

of fees that the arbitrator charged, based on their rates described *infra* at 8. In 2013, for the cases in which a written award was made, the average fee was \$26,938.94, with a range of fees from \$1715 to \$160,455.63 and a median fee of \$20,800. AR at 34.

¹³AR at 2.

verdicts do not constitute formal precedent, but they are reported and known in the legal community so that they influence future litigation, in part by their impact on settlements. However, there is a significant amount of information about Kaiser arbitration awards available, and so the lack of precedent is more significant on the law rather than on the damages side.¹⁴

As may have become clear already, the values sought in any given claims resolution system do not point in only one direction. Moreover, not everyone agrees that each of the factors cited is, on its own, a positive good. Similarly, even if everyone agreed on whether a factor, such as speed, was desirable, people will differ on how much should speed matter, as compared to other considerations, let alone what relative weights should be assigned to each of the factors. In the end, in constructing a claims resolution system, there are inevitable and necessary tradeoffs, and there is no formula that will produce a single “right” answer. But whoever is to make these tradeoffs should at least understand what the facts are and, for medical malpractice arbitration, how at least the Kaiser Permanente system in California fares on whether it is “just, speedy, and inexpensive.”

III. THE KAISER PERMANENTE CALIFORNIA ARBITRATION SYSTEM

A. The Board and the Independent Administrator

The central feature of the Kaiser Permanente arbitration system, which was created in the wake of the California Supreme Court’s stinging criticism of Kaiser’s prior arbitration system in *Engalla*, is that there is a separate independent entity—the Office of the Independent Administrator—that manages all the arbitrations, but does not conduct them. It, in turn, is under the overall supervision of the Arbitration Oversight Board. That Board, which is self-perpetuating, has thirteen members, no more than four of whom may have any current or prior association with Kaiser.¹⁵ The Board has retained Sharon Oxborough and her firm to serve as the Independent

¹⁴ Arbitration rulings regarding discovery issues might provide useful precedent, if Kaiser-Permanente agreed to treat them as such. For example, if an arbitrator rejected a claim of privilege or undue burden in discovery, Kaiser-Permanente could agree to abide by that principle generally, so that future claimants would not have to re-litigate that issue.

¹⁵ AR at 52 (including the names of the Board members and their affiliations).

Administrator. She has a contract with the Board that in turn negotiates with Kaiser Permanente to provide the funds for both the Board and the Administrator. The current payment to her firm is about \$350,000 per quarter, plus the expenses of the Board's meetings and its operational costs, including audits of the OIA, to pay for a system that closed 645 cases in 2013.¹⁶ In theory, Kaiser could refuse to fund the Board at the level needed to carry out its functions, but the Board appears satisfied with the existing level of funding, as is Ms. Oxborough and her law firm. The Board could have been stacked at the outset with individuals unfavorably disposed to helping claimants, but that did not happen.

The Board also has the power to amend the Rules governing all aspects of the arbitration process. The Rules were originally drafted by the OIA and negotiated with Kaiser and the Board's predecessor.¹⁷ Currently, while Kaiser Permanente and the OIA may suggest Rules changes, the Board makes the final decision on amendments, which require a vote of two-thirds of the entire Board.¹⁸ There is no evidence that Kaiser has exercised undue influence over the development of the Rules.¹⁹

B. The Arbitrators

In the interest of convenience, the OIA has divided its program into three separate regions, Northern, Southern, and San Diego, but with no differences beside geography. As of December 31, 2013, there were 274 panel members of whom 41% (113) were retired judges.²⁰ They are listed by region, with a title of Judge or Justice, where appropriate.²¹ Would-be arbitrators, who must be lawyers, apply to OIA to become part of one or more of the arbitration panels under

¹⁶ Email from Ken Richardson, Kaiser Foundation Health Plan, Inc., October 29, 2014, to Anne-Marie Mazza (on file with author).

¹⁷ AR at 56.

¹⁸ AR at 52.

¹⁹ The Board's comments on the 2013 Annual Report include a list of the Essential Elements of a Model Arbitration System: "Independent Administration; Rules; Oversight; Accessibility; Qualified Arbitrators, Fairly Selected; Timeliness; Performance Measures; Evaluation; Cost Effectiveness; Convenience; Clarity; Audit; Transparency; & Continuous Improvement." AR at 115-16. Although some of those elements are more means than ends, they are generally consistent with the approach of Rule 1 of the Federal Rules.

²⁰ AR at 5.

²¹ AR at 82-90.

criteria established by the OIA. To be eligible, the lawyer must not have any discipline issues and either have served as a judge or have substantial litigation experience, defined in the qualification requirements, which are set forth on the OIA website.²² The litigation experience need not be in medical malpractice cases, although 94% of the arbitrators have such experience.²³ A majority of panel members do not do paid legal work, other than serving as arbitrators in the Kaiser or other arbitration or mediation programs.²⁴ Of the lawyers who do legal work outside the arbitration program, there are about the same number who represent plaintiffs and defendants.²⁵ Arbitrators need not be members of the formal panel so long as the parties agree on the person and that person agrees to follow the OIA Rules. There are some arbitration programs in which all of their arbitrators must be approved by the program, whereas others—such as AAA and JAMS in some parts of the country—do not impose that requirement except for the neutral arbitrator who is chosen by the other two.²⁶

After an arbitration claim has been filed with the Administrator, and the filing fee is either paid or waived, her office sends to each side a list of twelve potential arbitrators randomly selected from the panel for that area. The parties are provided with three types of documents regarding each potential arbitrator: the potential arbitrator's application, which reveals significant information about the nature of the lawyer's practice (especially on which side the lawyer usually appeared); copies of any prior awards rendered by the potential arbitrator, with the claimant's name redacted; and copies of any post-arbitration evaluations of the performance of the arbitrator.²⁷ The parties may agree on an arbitrator from that list or from the full panel or from outside the panel, as they did in 26 % of the cases in 2013.²⁸ If the parties cannot agree on an arbitrator, each side may strike four names from the list and rank the remaining names on the list in order of preference. The OIA then selects the highest ranked arbitrator and

²² <http://www.oia-kaiserarb.com/pdfs/NA-Qualifications-Amended-02-27-14.pdf>.

²³ AR at 6.

²⁴ Of the 274 current arbitrators on the panels, 153 do no other compensated work beyond arbitration. AR at 6.

²⁵ *Id.*

²⁶ Email dated October 30, 2014 from Honorable James Robertson to author (on file with author).

²⁷ The evaluations are discussed further *infra* at 15.

²⁸ AR at 14.

provides additional disclosures to the parties who have the right to disqualify that person without cause. Those supplemental disclosures may include information about the activities of the person's spouse or the work of that person's law firm. Persons selected as the preferred arbitrator may be disqualified by either party until the parties accept one, or under section 1281.6 of the California Code of Civil Procedure, a party asks a state court judge to appoint an arbitrator.²⁹

No process can ever eliminate all biases of arbitrators, but this system seems to address the most significant objection to many consumer arbitration programs: the fear that the sponsoring company (defendant) controls the selection of arbitrators, and thus their decisions tend to favor the company because the arbitrators wish to be re-appointed (for compensation) in the future. In this system, Kaiser Permanente has no say over who is on the arbitration panels in the first instance, the panels are not exclusive, and Kaiser Permanente has no more say over who will be an arbitrator in a given case than does the claimant. Thus, on the front end, the neutrality of the arbitrators is reasonably assured.

C. Expenses of Arbitration

One of the objections to consumer arbitration is the cost, mainly for the fees of the arbitrator, who are generally high priced lawyers or retired judges. In theory, arbitrators have every incentive to spend more time on the case because they get paid more that way. Where arbitration fees are shared, the defendant company is generally much better able to absorb the cost, and indeed cost may be a reason why an individual would simply take a pass if arbitration is the only option.

That objection could apply to the Kaiser Permanente arbitration system, but Kaiser has taken several steps that significantly reduce the likelihood that cost will discourage those who believe that they have a valid claim. First, the filing fee is only \$150, which compares favorably with other filing fees: the filing fee in federal court is \$400 and in California Superior Court it is \$435 for claims over \$25,000 and \$370 for those between \$10-25,000.³⁰ In addition, the filing fee can also be waived by the OIA, and that seems to help those most in need.³¹ Second, in Superior Court there are substantial additional

²⁹ AR at 17.

³⁰ See e.g., Superior Court of San Diego filing fees at http://www.sdcourt.ca.gov/portal/page?_pageid=55,1057199&_dad=portal&_schema=PORTAL.

³¹ AR at 31-33.

charges for filing motions and other papers, as well as the considerable daily fees for juries and the per page charges for court reporters, none of which apply to Kaiser Permanente arbitrations.³²

Third, and this is the most significant, although claimants are obligated under California law to pay one half of the single arbitrator's fees, Kaiser Permanente paid the full cost of the arbitrator's fee in 90% of the cases in 2013.³³ Kaiser does that if the claimant agrees not to object that the arbitration was unfair because Kaiser paid all of the arbitrator's fees, and if a claimant agrees to waive the right to a three person arbitration, which is required under California Health & Safety Code, Section 1373.19 if a claimant seeks more than \$200,000. Very few claimants turn down this offer. The idea to encourage single person arbitrations came from the Blue Ribbon Panel that recommended creation of this system because it concluded that three arbitrators were not only more expensive, but slowed down the process considerably.³⁴

Arbitrators set their own fees, which are given to the parties when selecting an arbitrator. Most bill by the hour, although some charge on a per day basis. They may change their rates once a year for new cases. In 2013, the hourly rates averaged \$430, with the range from \$150 to \$800 per hour; daily rates ranged from \$1200 to \$8000 a day, with an average of \$3688.³⁵ Even the total fees charged by arbitrators are modest. In 2013, excluding the 30 closed cases in which no fee was charged, the average fee was \$6,683.18; in cases that included a written award, the average was \$26,938.24, with a median of \$20,800, and that average was significantly raised by one complex case in which the fees were \$160,455.62.³⁶ Two other fee-related matters are worth noting: if an arbitrator charges excessive fees (either because of high rates or spending more time than is reasonable), Kaiser Permanente, which generally pays all of their fees, can strike or disqualify that person from the list without explanation in future cases. Finally, unlike other arbitration provider services, all of the fees go to the arbitrator and no portion is paid to the OIA.

³² *Id.* at items 44-48 & 50; also items 63-66 for jury and court reporter fees.

³³ AR at 33-34.

³⁴ <http://www.oia-kaiserarb.com/pdfs/BRP-Report.pdf> at 41-42.

³⁵ AR at 34.

³⁶ AR at 34.

There are other potential cost savings in arbitration, but there is no hard evidence as to whether they exist and, if so, in what amounts. They are related to the discussion in the next section on speed: if there is a hearing, it will consume less time than would a trial in a court. It is also possible that using arbitration may produce other cost savings. First, paid experts might be willing to work for less, or end up having to be paid less, because there is less likelihood of having to wait around while a judge handles other matters. In addition, an appearance before an arbitrator can be better scheduled and may require less time to get through the testimony than would a case tried to a jury. Second, additional trial (or hearing) days always entail additional expenses, such as more trips to court, more lunches in mid trial, and more nights for hotels for witnesses, not to mention items such as jury consultants and fancy exhibits used to persuade a jury, but which are of little utility before an arbitrator. Third, it is possible that a party may be willing to forego a deposition of a witness (expert or otherwise), or do it in less time, or use fewer experts, if the case is going to arbitration rather than to court. These hypotheses would require further study and interviews with counsel for claimants and Kaiser. Whether there will be any of these savings will depend on the specifics of the case, and the savings in most cases will probably not be great. But there is no likelihood that arbitration will cause an *increase* in any of these expenses, and coupled with Kaiser's decision to absorb the full cost of the payments to the arbitrator in almost all cases, the expense factor decidedly favors Kaiser's arbitration system as compared to the California state courts.

D. Speedy Resolution

In general, delay is more of a problem for claimants than for defendants, including Kaiser Permanente, and it was the major problem that the Court found in *Engalla*. To be sure, delay creates business uncertainty, and in some situations that can be harmful for a defendant. In the Kaiser Permanente system, a doctor accused of malpractice may be anxious over whether she will be vindicated, but that concern is probably reduced because his or her employer will pay any award or settlement. For claimants, delay in getting paid means that the value of the money that is eventually received is less than had it been paid sooner, especially if the delay is significant. Delay in payment for claimants who have immediate needs can also cause them to settle sooner and for lesser amounts than they would receive if a speedy resolution were likely.

The Board's Rules on timely resolution of all cases, and the active way in which the OIA assures compliance with them, results in quite speedy determinations of all malpractice claims against Kaiser Permanente, a marked improvement over what the Court found in *Engalla*. First, there are a series of deadlines on matters such as selecting the arbitrators, holding a management conference, and having a mandatory settlement conference (without the arbitrator).³⁷ The staff enforces them by keeping a close eye on each case to be sure that the parties and the arbitrator comply with the overall mandate of speedy processing. Second, there are several checkpoints along the way to trial, and they too are monitored by the staff. And third, there is the stated goal, also carefully monitored by the staff, that all cases must be completed and awards rendered within 18 months of filing,³⁸ unless an exception is sought by one or both parties and granted by the arbitrator, which happened in only 16% of the cases closed in 2013.³⁹ To meet the final deadline, arbitrators are required to submit their award within 15 days after the hearing is concluded, unless there are post-hearing briefs, in which case the 15 days runs from when the briefs are submitted.⁴⁰ Except for the seven closed cases that had been designated extraordinary, the average time for completion for the cases for which more time was granted was just 22 months.⁴¹

According to the public data maintained by the Administrator, virtually all cases not designated for special treatment are resolved within the 18 month window. Indeed, the average in 2013 was 11 months for all cases, with 60% resolved in less than a year.⁴² Monitoring the conduct of parties and the arbitrators is essential to keeping to this schedule, and arbitrators who fall behind may lose their place on the panel. In 2013, even the 70 cases that went to hearing were concluded in an average of 538 days, which is still within the 18 month target. The Board's Rules require that the arbitrator give reasons for every award, including findings of fact and conclusions of law,⁴³ a requirement consistent with Section 632 of the

³⁷ AR at 22-23.

³⁸ AR at 71, Rule 24a.

³⁹ AR at 30-31.

⁴⁰ AR at 76, Rule 37a.

⁴¹ AR at 30-31.

⁴² AR at 25-26.

⁴³ AR at 76, Rule 38a.

California Code of Civil Procedure in cases tried without a jury. Moreover, once an arbitration is concluded by a final award, it is really final and not subject to appeal (and further delay including possibly a re-trial), except in the most extraordinary of circumstances.

There is no published data on the time to resolve medical malpractice cases in the California court system, but a national study of such cases, in which 39.7% of them were from California, is of some use in making comparisons.⁴⁴ The study has many findings and conclusions, but for these purposes its data demonstrates that the time to resolve claims in the Kaiser Permanente arbitration system is much faster than in courts generally:

The mean [sic, median] claim took 20.3 months to be resolved (twenty-fifth percentile: 7.0 months; seventy-fifth percentile: 28.3 months; Exhibit 1). The mean time from the incident date and the date the claim was filed was 22.8 months. Putting these data together, the average claim was not resolved until forty-three months after the incident.

There are many variables in the court statistics that make direct comparison with the Kaiser system imprecise, but it is clear that claims brought by Kaiser patients are resolved through arbitration much more rapidly than they would be in court. The study also suggests that speedier resolution is important to others besides claimants and their lawyers:

Lengthier time to resolution affects physicians through added stress, work, and reputational damage, as well as loss of time dealing with the claim instead of practicing medicine. (Citation omitted).⁴⁵

Another positive for arbitrations on the issue of speedy resolution is the amount of time it takes to try an arbitration case in contrast to the time taken to try the same case before a jury. Because no two cases are identical, and judges and arbitrators are not fungible in terms of speedy completions of hearings and jury trials, any comparisons are

⁴⁴ <http://content.healthaffairs.org/content/32/1/111.abstract?sid=230a9515-bfc7-4fe5-b6a2-504fdcf7b5f8> (analyzing closed claims between 1995 and 2005).

⁴⁵ That study also suggests, perhaps improbably, that “lengthy time to resolution may also impose delays on physicians’ ability to learn from medical errors” and, even less likely, that “Physicians and their institutions may also be delayed in implementing changes in quality-and safety-related procedures to prevent similar adverse events from occurring again.” *Id.*

necessarily rough. The OIA is not provided information on the number of days that hearings require, or even an average number of hearing days. In addition, the number of hearing days for arbitrations is an imprecise measure of time spent by an arbitrator, in part because the hearings need not take place on consecutive days and may occupy only a portion of the day. Among the reasons for longer court trials are the time spent on jury selection, the need for the lawyers to explain their case to the jury, and the judge's time instructing the jury on the law. Longer jury trials are also caused by time spent on objections made to prevent a jury from hearing certain evidence that would not be made if a judge were sitting alone, to side bar conferences, to waiting for jurors to arrive or return from breaks, and the actual jury deliberation itself. Although there is little doubt that the total time required for an arbitration hearing is less than for a jury trial, the amount of the difference is uncertain.

In addition to the harm caused by the delay while awaiting a trial, more time in court has another set of adverse effects. First, a claimant in a tort case will have to be present in court for the entire trial so that the jury does not think he or she has lost interest in the case. That may mean lost time from work that will not be compensated even if the claimant prevails. Second, most claimants' lawyers work on a contingency fee basis, and they do not get a larger percentage if the trial takes five weeks than if it takes five days. Third, longer trials may make lower value cases not economical to bring in court because they consume too much of the lawyer's time for too little compensation. And for the claimants' lawyers who lose malpractice cases after trial, a longer trial produces more uncompensated time than would a shorter arbitration hearing.

On the defense side, more trial days mean larger bills for the defendant, especially if counsel are paid on an hourly or daily basis.⁴⁶ Whether longer trials also impose other additional costs for the defense of the kind discussed above is unclear. But it is clear that, if a Kaiser doctor sat through an entire trial in order to represent the defense to the jury—something that is less likely to be done in an arbitration—he or she would continue to be paid, and someone else would have to be paid

⁴⁶ Kaiser has salaried in house counsel, but does not use them to handle cases in which a demand for arbitration has been filed. Kaiser pays its outside counsel either on the basis of flat fees subject to special adjustments or on the basis of hourly rates, depending on the case. Richardson email, *supra*, note 17.

to step in and do the doctor's work in his or her absence. With shorter hearings, there are also lower costs of this kind.

Although not all costs can be quantified, it appears likely that Kaiser's arbitration significantly reduces costs to both parties and in the process makes it more likely that a claimant with a modest value claim will be able to find an attorney to take the case.

E. Just Results

Perhaps the strongest evidence to support the Kaiser-Permanente arbitration system comes from the participants. At the conclusion of each case, the lawyers for the parties, and the claimants who do not have counsel, are asked to fill out evaluations of the system and of the arbitrator's performance. These evaluations, which are anonymous, are reviewed by the Administrator's office and, with the claimant's name redacted, forwarded to future claimants and their lawyers, and to Kaiser, to help them evaluate the attorneys on the list of 12 panel members they are provided at the outset of the arbitration selection process. In addition, the arbitrators are also asked to complete evaluation forms regarding the process and in particular how it compared to court proceedings. The 2013 evaluation forms and the statistics on responses are in the exhibits to the Annual Report at 94-110.⁴⁷

A large majority of the 207 lawyers from both sides in 2013 who responded supported the process and found the arbitrator to be fair on aspects such as treating parties with respect, explaining procedures clearly, and understanding the case.⁴⁸ Unlike some arbitration systems that are criticized because they have no or only limited discovery, the Kaiser Permanente system has no such restrictions, with discovery available as if the case were in state court.⁴⁹ On perhaps the most significant question—recommending the arbitrator to another lawyer

⁴⁷ Prior to 2013, evaluation forms were sent out in every case that was open for a considerable period of time, generally a year. That was changed in 2013 so that they are now only sent out where the case has been ended by a decision of the arbitrator. AR at 39. This change, which results in fewer submissions, will make it somewhat more difficult to make year to year comparisons for a few years, although using averages may lessen that problem. However, the change is expected to provide more meaningful information down the road for those arbitrators who are evaluated. In addition, in every case where an arbitrator has been selected, the parties and the arbitrator are asked to evaluate how the OIA handled the process.

⁴⁸ AR at 39-40.

⁴⁹ AR at 73, Rule 37a.

or claimant—the average score for claimant’s counsel was 4.0 (out of 5) and 4.6 for respondent’s (Kaiser’s) counsel. There were similarly high scores on the evaluation of the system by counsel,⁵⁰ although some claimants’ counsel found that obtaining access to medical records was unduly difficult, which is the responsibility of Kaiser, not the Administrator or the arbitrator. These are lawyers who try cases in and out of arbitration and hence have some basis for comparison. By contrast, the responses from claimants without counsel (*pro pers*) was, not surprisingly, much less favorable, almost certainly because of the difficulties that they encounter in the process.⁵¹

The evaluations from the arbitrators, 41% of whom are former judges,⁵² are also very positive.⁵³ The final question on the evaluation form is whether the arbitration system was better than, equal to, or worse than that in court. For the sixth year in a row, a majority (this time 67%) answered better, with 32% in 2013 answering the same. And for the one who answered “worse,” it appears from the respondent’s answers to the other questions that the negative response may have been a mistake.⁵⁴

There can be no doubt that Kaiser’s actions make clear that it believes that it is obtaining just results for Kaiser under its arbitration system. If it were not, it could end it tomorrow (after a transition period) and do what everyone else does: let the courts resolve these disputes. But it has not abandoned arbitration, and its willingness to pay for the substantial cost for the Independent Administrator, as well as the lesser costs for the Board, plus the claimant’s half of the arbitrator’s fees in most cases, removes any doubt that, given the existing state of the law on medical malpractice, it believes that its overall interests are best served by staying the course.

Part of the explanation for Kaiser’s support of arbitration is related to a broader attitude that it has toward resolving claims of its members. Kaiser’s stated policy is to investigate all claims of adverse medical outcomes immediately and fully and to take appropriate

⁵⁰ AR at 42-44.

⁵¹ There are some individuals whose contracts require arbitration, but do not specify the Kaiser Permanente arbitration system, but who choose to use it in preference to another one. AR at 10, n. 21.

⁵² AR at 5.

⁵³ AR at 40-42.

⁵⁴ *Id.*

corrective measures, which includes an offer to compensate negligently injured parties for their losses without waiting for a demand for arbitration to be made. Indeed, the 2013 Board's comments on the Administrator's annual report noted this policy as a reason why the demands for arbitration had dropped so significantly since the program was started, even with a slight uptick in 2013.⁵⁵ As Chart 18 illustrates,⁵⁶ demands for arbitration went from a high of 1053 in 2002 to 649 in 2012. "Doing the right thing" is made easier because the injured person is a participant in the Kaiser Permanente system and is entitled to the additional medical services at no extra charge as long as she or he continues to be a Kaiser member. Moreover, while the literature is inconclusive on the effects on admitting fault and/or expressing regret following adverse medical outcomes, it surely make sense that a person whose medical problems have been addressed at no additional cost is less likely to file a demand for arbitration, or to file a lawsuit if that were permitted, than one whose complaints have been ignored or brushed aside as frivolous. Put another way, assuring that members are treated fairly, from the time of initial complaint of harm through the arbitration process, is seen by Kaiser as helping achieve its overall goal of providing quality health care at a reasonable cost.

The fact that Kaiser prefers arbitration to the point where it insists on it as the exclusive means of resolving malpractice claims against it might suggest that the results for claimants are not fair or just. Aside from the objection that mandatory arbitrations are never fair to the party whose choice is restricted, there is no concrete evidence of unjust results for claimants, and there is some evidence to the contrary in addition to the post-hearing evaluations discussed above. In contrast to Kaiser, which could shut down its arbitration system any time it wanted to do so, there is no concrete action that the seven million or so patients could take, short of going to a different provider, which would express displeasure with the arbitration system. However, as far as I found, there have been no significant protests made to the Board, the OIA, Kaiser Permanente, or anyone in the California government, complaining that the system is not working well. To be sure, it may be that there is no critical mass of problems that have come to the surface, but with 7.4 million patients, silence may be of some modest significance.

⁵⁵ AR at 113.

⁵⁶ AR at 45.

The outcomes of demands for arbitration also tend to support the conclusion that the system is working reasonably well for claimants. Of the 645 cases closed in 2013, 44% were settled, which is defined to mean a payment to the claimant from Kaiser, including twenty to claimants who did not have counsel.⁵⁷ This is in addition to settlements made before a demand is filed when Kaiser's stated policy is to attempt to resolve all claims involving alleged negligent medical treatment outside of arbitration. The Administrator is not informed what these amounts are, and the case files are not available except through Kaiser or counsel for each individual claimant. But even if those files were available, there is no way of assessing whether those settlements were "fair" because there is no objective definition of fair in cases like this. However, the fact that there was a settlement when the claimant could have had a hearing before an arbitrator (or continued one already underway) is at least some evidence that the results were at least no less fair than might be true for settlements in court.⁵⁸

On the other side, approximately 35% of the cases in which a demand was filed were withdrawn, abandoned, or dismissed for reasons such as failure to respond to hearing notices or other Rules violations.⁵⁹ In addition, in 61 cases (9%) summary judgment was entered against the claimant, but the claimant was unrepresented in 47 (77%) of these adverse rulings.⁶⁰

There were hearings in 70 cases in 2013, with the claimant prevailing in 37%,⁶¹ which would seem to be a reasonably good percentage given Kaiser's positive settlement policy. All of the amounts of the awards in 2013 in favor of claimants, with names redacted, are set forth as an exhibit to the Annual Report at 92. Of

⁵⁷ AR at 27.

⁵⁸ As required by Section 1281.96 of the California Code of Civil Procedure, a full list of the results, with amounts of awards, but with names redacted, of all the cases that have been resolved under the Kaiser system since the law went into effect on January 1, 2003, is posted on the Administrator's website. <http://www.oia-kaiserarb.com/pdfs/Ethics-Received-7-2-14.PDF>. There is also another Table that provides information on all Kaiser Permanente arbitration cases in which an arbitrator has rendered a decision on or after July 1, 2002, with the amount of the award, if any. [Http://www.oia-kaiserarb.com/41/consumer-case-information/disclosures-about-arbitrations-closed-on-or-after-july-1-2002-by-a-neutral-arbitrator](http://www.oia-kaiserarb.com/41/consumer-case-information/disclosures-about-arbitrations-closed-on-or-after-july-1-2002-by-a-neutral-arbitrator).

⁵⁹ AR at 28.

⁶⁰ AR at 28-29.

⁶¹ AR at 29.

course, a claimant who prevails may receive only a small award, but there is no objective way to determine whether the amount was appropriate. While many of the awards are for modest amounts, four of them in 2013 were for \$500,000 or more, which is consistent with the record since 1999, showing that there have been 102 awards of \$500,000 or more, with the highest at \$8,973,836.⁶² According to the OIA, the fact of making a high award did not preclude an arbitrator from being chosen again by Kaiser.⁶³

One other fact that relates to California law works to help claimants in arbitration. Since 1978, all medical malpractice cases in California have been subject to a cap of \$250,000 on pain and suffering damages, which is not indexed for inflation. This law is enforced in arbitration as well as court litigation, but with one wrinkle. Arbitrators know of the cap and are careful not to award more than the cap, whereas for juries, a dollar is a dollar since they are not told of the cap to guide them in their deliberations. By being aware of the cap in a case where its application may seem unfair, arbitrators can be, and according to anecdotal information are, as generous as legally permissible on uncapped damages, such as future lost wages and other expenses, in effect, to offset the cap on pain and suffering, which they must follow.⁶⁴

Because of the many rules applicable to medical malpractice cases in the California courts, no claimant who does not have counsel can hope to survive long enough to reach trial. That is not the case in Kaiser Permanente's arbitration system, where five claimants without counsel went to trial in 2013, although none prevailed. However, the Annual Reports from 2008-12 show that in three of those five years a claimant received some award after a hearing. Overall, in 2013, 26% of the claimants were without counsel.⁶⁵ Even if, as is usually the case, an unrepresented claimant loses after trial or on a pre-trial motion, he or she at least has been able to present that claim to someone who listened and issued a decision explaining why the

⁶² AR at 8.

⁶³ AR at 8-9.

⁶⁴ In 2014, the California voters rejected by 67% to 33% an initiative that would have raised the cap to account for inflation since 1978. <http://vote.sos.ca.gov/returns/ballot-measures>.

⁶⁵ AR at 12.

claimant did not recover. That is not as good as winning, but the ability to be heard is a positive outcome to many claimants.⁶⁶

Another reason for claimant satisfaction is that Rule 38(a)⁶⁷ requires that each decision include a brief statement of reasons that is sufficient to inform the parties of the basis for it. There is no data on the average number of pages per decision. However, a person at Kaiser Permanente who is knowledgeable on this matters had “no recollection of seeing a single page award [,] that most awards following evidentiary hearings are more than 2 pages, [that he] personally recall[s] many that exceeded 5 pages, and some that went beyond 10 pages.”⁶⁸ This is more than is required under many arbitration systems, and, while there is no mechanism by which anyone can compel a fuller statement of reasons when the arbitrator has not adequately explained a particular award, future parties can strike that person’s name from a list of prospective arbitrators if their prior statements of reasons, which they are provided, seem superficial or unconvincing. Moreover, in extreme cases, the Administrator may remove the lawyer from the panel of eligible arbitrators.⁶⁹

To be sure, on the issue of claimant satisfaction, further investigation should be undertaken, and with sufficient funds, time, and access to lawyers and parties, more accurate conclusions could be drawn. Nonetheless, the evidence to date supports the conclusion that the results for low and modest value claims under this arbitration system are as just as they are likely to be in the court system and surely entail less delay and lower costs to claimants. As for higher value claims, the benefits of speed and cost apply as well, and there are substantial awards made by the arbitrators every year. It is impossible to assess how well the claimant who arbitrated a claim in that system did as compared with a hypothetical outcome in court, let alone how less delay and lower costs factor into an overall evaluation of the fairness of the two systems.

⁶⁶ Approximately 24% of the arbitrators on the panel will not handle cases with claimants who do not have counsel. AR at 7, n.18.

⁶⁷ AR at 76.

⁶⁸ Richardson email, *supra*, note 17.

⁶⁹ Redacted summaries of each decision are also published by the California Department of Managed Healthcare: <http://www.dmhc.ca.gov/LicensingandReporting/HealthPlanFilingsandReporting/ArbitrationDecisions.aspx#.VCXB1BF0wdU>.

F. Loss of Accountability

One potentially negative aspect of a closed arbitration, in which the only proper defendant is a corporation (Kaiser Permanente), is that no individual is found to be responsible for any harm that occurred. If a Kaiser Permanente doctor has been negligent, the concern is that he or she may be negligent again, and any award against the employer will do little to address that possibility. There are two responses to that concern. First, Kaiser Permanente itself appears to be concerned about that problem as an internal matter. Its policy is to try to figure out what went wrong in all situations in which there is an adverse event, to be transparent with the patient as to what happened, and to determine whether there was a systems failure and which individuals, if any, were responsible. It does this whether or not there is a claim for compensation. Whether its follow-up actions are sufficient is a matter of judgment, and may vary from case to case, but Kaiser Permanente's apparent commitment to fix quality of care problems is at least a partial response to questions about individual accountability.

The second aspect is that the review is not just done by Kaiser. Under California law, whenever there is a malpractice award against a medical provider, whether in court or in arbitration, or there is a settlement payment of \$30,000 or more, the appropriate licensing authority must be informed and—this is the key part—one individual must be personally identified as the most responsible person.⁷⁰ Thus, when Kaiser settles a case, or there is an award against it, Kaiser has to report the name of the doctor who is, in effect, the main culprit. This creates some internal tension, but because the obligation is clear, and because Kaiser Permanente has the legal right to settle all claims against it, the doctor has no choice in the matter. Again, whether what the State does with this information suffices is not the question (although it would also be worthy of study) because the State's role is the same whether the claim was brought in court or in arbitration. But this reporting is at least a partial response to the possibility that careless doctors will avoid accountability because Kaiser Permanente is the sole defendant.

⁷⁰ California Business & Professions Code § 801.1.

IV. CONCLUSION

Although I am an arbitration skeptic, the Kaiser Permanente arbitration system is almost certainly less expensive for claimants and faster than court litigation, and neither its speed nor its low cost seems to interfere with a claimant's ability to present his or her case fully. On the output side, the results seem reasonably just, and there is no evidence that claimants would be happier (and win more often and/or obtain larger verdicts) in the civil justice system, in the same time frames and at the same costs. It also appears that, for small and medium size claims, Kaiser Permanente's arbitration program makes it more possible for them to be brought there than in court. The loss of a public trial before a jury is a negative, but whether it outweighs the positives is a question that will not be answered in the same way by everyone. What can be said is that Kaiser Permanente's arbitration system has a number of very positive aspects to it, and almost no obvious negatives beyond constraining the choice of forum, which suggests that it deserves further study.⁷¹

⁷¹ One area of arbitration in which there has been a recent detailed study of closed cases involves disputes between employees and their employers. Alexander J.S. Colvin and Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed*, 29 Ohio St. J. on Dispute Resolution 59 (2014). That study was intended to be descriptive of the process, but includes some judgments, explicit and implicit, some expected and some surprising. Doing a similar study for medical malpractice claims would be much more challenging, both because of privacy concerns on both sides and the difficulty of assessing the value of malpractice claims in an objective manner. Nonetheless, any future study of medical malpractice arbitrations would learn a great deal from examining the methods used in this employment dispute study. In any such study, it would be important to gather information from a variety of groups, including Kaiser-Permanente and the Kaiser Health Foundation; lawyers who defend Kaiser in medical arbitrations; lawyers who represent claimants in Kaiser medical arbitrations; patients who were represented and those who had no lawyers; lawyers and retired judges who have served in Kaiser arbitrations; and organizations with substantial numbers of Kaiser members.

