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The nuts and bolts of Kaiser medical-malpractice arbitrations

THE BASICS OF PROSECUTING MEDICAL-MALPRACTICE CASES AGAINST KAISER PERMANENTE

While physician-patient arbitration agreements have generally seen a marked drop in popularity over the past several years, Kaiser Permanente remains a strong adherent of arbitration in medical-malpractice cases. As Kaiser Permanente is the largest managed-care organization in the United States, counting approximately 9.3 million members, 36 hospitals, and 17,410 physicians between its Northern and Southern California operations, plaintiffs' attorneys who practice medical-malpractice litigation in California are highly likely to come into contact with the Kaiser arbitration system and its unique rules and procedures.

Some elements of the Kaiser arbitration process and the rules for Kaiser Permanente member arbitrations are similar to their relative counterparts in Superior Court litigation, while other elements are substantially different. This article will briefly discuss the basis for Kaiser Permanente mandatory arbitrations and provide insights into certain aspects of the Kaiser arbitration system and how cases proceed through it.

The Kaiser entities and the Office of the Independent Administrator (OIA)

Kaiser Permanente is not a single, monolithic entity, but a system of interconnected organizations that provide healthcare services to its members. In California, these include Kaiser Foundation Health Plan, Inc., the corporate entity that provides and furnishes the health insurance plans provided to Kaiser members; the Kaiser Foundation Hospitals, the entity that owns and operates Kaiser's community hospitals and outpatient facilities; the Permanente Medical Group, the entity that employs Kaiser's physicians, nurses, therapists, health care technicians, and other clinical staff in Northern California; and the Southern California Permanente Medical Group, the entity that employs Kaiser's physicians, nurses, therapists, health care technicians, and other clinical staff in Southern California.

In arbitrations versus Kaiser, these are the entities that will generally be the respondent parties. Notably, Kaiser physicians and other individual healthcare providers are employees, not independent contractors, of the medical groups, either the Permanente Medical Group or the Southern California Permanente Medical Group depending on whether they are located in Northern or Southern California.

The Kaiser arbitration system is not overseen by any of the aforementioned entities. Instead, it is administered by a neutral third party: the Office of the Independent Administrator, often simply referred to by its initials, "OIA." OIA publishes the Rules for Kaiser Permanente Member Arbitrations [hereinafter "Rules"], which are freely downloadable from its website [https://www.oia-kaiserarb.com], and coordinates Kaiser member arbitrations in accordance with those Rules. OIA processes arbitration demands, initiates arbitration proceedings, confirms the appointment of neutral arbitrators, and generally supervises Kaiser arbitration cases to ensure that they close within the applicable time frames prescribed by the Rules.

The basis for arbitrations involving Kaiser Permanente members

Kaiser Permanente's membership agreements, evidence of coverage documents, and applications for health coverage generally contain language that compels Kaiser members to arbitrate certain disputes instead of bringing them in court actions. Indeed, a typical Kaiser health-coverage application will contain a page entirely dedicated to the arbitration agreement that therein explicitly states that all claims arising out of an "alleged violation of any duty arising out of or related to membership in [Kaiser Foundation Health Plan, Inc.], including any claim for medical or hospital malpractice (a claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered), for premises liability, or relating to the coverage for, or delivery of, services or items, irrespective of legal theory, must be decided by binding arbitration under California law and not by lawsuit or resort to court process."

While there is typically an exception for small-claims cases, Kaiser members are otherwise generally warned in their membership paperwork that they are giving up the right to a jury or court trial.

As with other consumer arbitrations, including arbitrations between healthcare providers and patients that do not involve Kaiser, the statutory basis for Kaiser arbitrations is derived from the California Arbitration Act (CAA), codified as Code of Civil Procedure section 1280, et seq. The CAA generally makes written agreements to submit disputes solely to binding arbitration valid and enforceable.

Furthermore, in medical-malpractice cases before a Superior Court versus Kaiser and non-Kaiser providers, one cannot escape Kaiser's mandatory arbitration provision by relying on the consolidation provisions of Code of Civil Procedure section 1281.2, subdivision (c). Kaiser can petition to have the action against them moved into arbitration and the action involving the other defendants stayed pending resolution of the arbitration. (§ 1281.4.)

This is not to say that Kaiser cases are always and without exception subject to binding arbitration. If it can be shown the member-plaintiff was not given proper disclosure of the arbitration clause

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as required by Health and Safety Code section 1363.1 and Code of Civil Procedure section 1295, it may be possible to avoid arbitration and proceed in Superior Court. But Kaiser will attempt to enforce the arbitration agreement and likely prevail if it can produce the application form that contains the arbitration clause.

The rules for Kaiser Permanente member arbitrations

As its name suggests, the Rules for Kaiser Permanente Member Arbitrations govern Kaiser arbitration proceedings, effectively acting as a substitute for the California Rules of Court or Code of Civil Procedure where applicable. As noted earlier, OIA publishes and maintains the Rules and makes them available to the public on its website. It is expected that anyone participating in a Kaiser arbitration will abide by the Rules, which govern, among other things, how arbitrations are initiated, the process by which arbitrators are selected, how proceedings are generally meant to progress, and within what time frame arbitration matters are to be completed. Knowledge of the rules is essential when litigating within the context of a Kaiser arbitration.

Initiation of arbitration with Kaiser – the Demand for Arbitration

Under Rule 8, medical-malpractice arbitrations with Kaiser are initiated by serving a Demand for Arbitration on the Kaiser Foundation Health Plan, Inc.'s legal department at either its Oakland address or its Pasadena address if the matter is arising out of care and treatment rendered in Northern California or Southern California respectively. OIA advises on its website that there is no required form or format for a Demand for Arbitration, outright stating that "a letter to Kaiser Permanente is sufficient."

The Demand must include the words "Demand for Arbitration" on the document. The Demand must also identify all Respondent parties and the basis of the claims asserted. To that point, it is a good practice in medical-malpractice matters to always name as Respondents Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals; *and* the applicable medical group.

As described earlier, the different Kaiser entities have different functions and may possess different documents and materials that one may want during litigation. For instance, the Health Plan keeps insurance information and payment records for the Claimant member. It also maintains a member services file that contains communications that the member has had with the Plan and any written grievances that the Plan has received. Meanwhile, the clinical-care entities, such as the medical groups, will possess medical records, diagnostic radiology, and physician-patient communications maintained within the Kaiser electronic medical-records system.

As the Permanente Medical Group and Southern California Permanente Medical Group directly employ the individual health care providers who work for Kaiser, such as physicians and nurses, it is not always necessary to explicitly identify individual providers as Respondent parties in the arbitration demand. The applicable group will be vicariously liable for any professional negligence committed by individual providers given that their professional health care services would fall squarely within the course and scope of their employment.

The Demand for Arbitration is required to set forth the amount of damages being sought. In practice though, it is not always feasible to do so, for the determination of damages in medical-malpractice cases often requires expert input, such as the calculation of lost past and future earnings by an economist or future care needs by a life care planner. This is asked, however, because the total damages sought do bear on the arbitrator selection process. Thus, one should be prepared to state whether more or less than $200,000 in damages is being claimed. That said, it is highly unlikely that OIA would decline to process an arbitration demand for failure to state the total damages sought and there is usually little issue with noting that damages will be according to proof at the time of arbitration. A simple compromise is to just state, where applicable, that non-economic damages will be sought up to the statutory maximum (see Civ. Code, § 3333.2) and that economic damages will be according to proof.

After the service of the Demand for Arbitration, pursuant to Rule 11, the Health Plan will transmit the Demand to OIA using a document called the Transmission Form. Within 75 days of the date of the Transmission Form, the Claimants must also submit a filing fee of $150.00 to OIA payable to the "Arbitration Account" (unless the Claimants qualify for a fee waiver due to poverty), effectively the counterpart of a filing fee for a complaint. It is also possible to simply include the filing fee with one's Demand for Arbitration. Once the filing fee is paid, OIA will process the demand and within three days send a list of potential neutral arbitrators to the Claimants and Respondents per Rule 16, officially starting the arbitration process.

Arbitrator selection

Under Rule 14, in cases where the amount in controversy is less than $200,000, only a single neutral arbitrator will hear and decide the case. In cases where more than $200,000 is claimed in the Demand for Arbitration, three arbitrators shall hear the case: one neutral and two party arbitrators. The neutral arbitrator is not appointed by OIA, but instead is selected in one of two ways, either through the rule's "rank and strike" process or through joint selection by both parties.

As noted, once OIA has processed the Demand for Arbitration, it will send out a list of possible neutral arbitrators to both sides. Said list will contain twelve potential neutrals selected at random from OIA's database of possible arbitrators for the region in which the cause of action arose (San Diego, Southern, or Northern California).

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The parties, however, are not required to select arbitrators from this list. If Claimants and Respondents can jointly agree to a particular person to serve as the neutral arbitrator, then pursuant to Rule 17, they can submit a form to OIA with the name and contact information of the jointly selected arbitrator. OIA will then contact the prospective neutral. If the selected person agrees to serve, OIA will confirm that person as the neutral arbitrator.

If joint selection is not possible, then from the list of potential arbitrators, each party may strike up to four objectionable names and then rank the remaining in order of preference pursuant to Rules 16 and 18. After going through the "rank and strike," the parties must return their respective selections to OIA by the applicable deadline. Whoever was most strongly preferred by both parties will become the neutral arbitrator if they are able to serve.

The ability to stipulate to a neutral arbitrator, the effective equivalent of jointly picking one's judge and jury well ahead of any hearings, let alone trial, is perhaps one of the most intriguing and unique elements of Kaiser arbitrations. OIA explicitly encourages the parties to do joint selections in the Rules and it can be very advantageous to select a solid and reliable arbitrator versus the relative randomness of the "rank and strike." Indeed, the authors would strongly recommend joint selection whenever possible and identifying potentially favorable, but fair, arbitrators for consideration. Additionally, attorneys handling these cases would be well served cultivating civil relations with their opposing counsel such that productive discussions can be had concerning who should hear the case.

Payment of the neutral arbitrator's fees and costs

By default, under Rule 15(c), the fees and expenses of the selected neutral arbitrator shall be paid equally by the Claimants and Respondents. However, if the Claimant waives any objection to Kaiser's payment of the neutral arbitrator's fees and expenses in a case where there is only a single neutral arbitrator, then under Rule 15(a), Kaiser will pay all of the fees and costs incurred by the neutral arbitrator during the entire course of the arbitration proceedings.

In cases where one would be otherwise obligated to use *party* arbitrators, they too can be waived by signing the applicable waiver forms and serving them on OIA and the Respondents before the Arbitration Management Conference. Thus, in any Kaiser arbitration, even those with damages claims exceeding $200,000, it is possible to shift the costs of the neutral arbitrator back to Kaiser. Doing so is strongly recommended if joint selection of a solid neutral was achieved, as this can provide massive cost savings.

Case management, hearings, discovery, and the arbitration

Once selected, the neutral arbitrator is obligated to hold an Arbitration Management Conference, the effective counterpart to an initial case management conference in Superior Court. Per Rule 25, this conference must be held within 60 days of the date of the letter from OIA confirming the arbitrator's appointment. At this conference, the parties will confer with the neutral to select an arbitration date; schedule a Mandatory Settlement Meeting, at which time the parties are supposed to meet and confer about resolving the case short of arbitration; and discuss other relevant matters, such as any anticipated motions and discovery issues.

Under Rule 27, discovery may commence as soon as the Health Plan has served the Claimants with the Transmission Form. However, if there is an objection to starting discovery by any party prior to selection of the neutral, then discovery will commence once the neutral is appointed, consistent with Code of Civil Procedure sections 1283.05 and 1283.1. Per those same sections, the arbitrator does have the authority to alter the scope, terms, or conditions of discovery not dissimilar to the issuance of a Case Management Order. Different arbitrators may have different preferences on how much notice they require for getting motions or hearings scheduled. In the absence of any expedition orders or agreements by the arbitrator though, discovery and law and motion practice in Kaiser arbitrations is generally handled the same as in Superior Court.

The arbitration hearing itself is very much akin to a civil trial. The primary difference is that the trier of fact is the neutral arbitrator, or a panel of three arbitrators if party arbitrators were not waived. Thus, the California Evidence Code and Code of Civil Procedure will continue to apply.

Most arbitrators are experienced civil litigators or retired judges who undoubtedly have far more experience with complex legal matters, and especially medical-malpractice matters, than the average juror. One should take that into account when preparing witnesses, an arbitration brief (if the arbitrator so invites), and arguments.

Case closure and appeals

Generally, after the close of the arbitration hearing, under Rule 37, the neutral arbitrator must issue the arbitration award on the parties and OIA within 15 business days. The arbitrator's award is usually final and not subject to judicial review with only extremely narrow exceptions, such as where the award was obtained by "corruption, fraud, or other undue means." (Code Civ. Proc., § 1286.2.) If those circumstances are present, the arbitration award can be vacated, but this is profoundly rare. Indeed, the fact that these cases usually cannot be appealed further underscores the critical importance of selecting a good neutral arbitrator.

A note on the MICRA amendment

On May 23, 2022, landmark legislation (AB 35) was signed into law that will revamp California's medical-malpractice regime thanks to the

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monumental efforts of CAOC, Nick and Courtney Rowley, Consumer Watchdog, and other coalition members and sponsors. A discussion of AB 35's changes goes beyond the scope of this article, but it is worth noting that Kaiser medical-malpractice arbitration cases will be affected by the changes to Business & Professions Code section 6146 (contingency fee maximums) and Civil Code section 3333.2 (noneconomic damages maximums).

Conclusion

There are additional matters covered by the Rules that litigators may need to review depending on the particularities of their cases, but the concepts and procedures described above are seen in basically every Kaiser arbitration case. Litigators who understand the Rules and their provisions, especially the ability to pick the neutral arbitrator if agreement can be reached with opposing counsel, can accrue substantial benefits throughout the arbitration proceeding.

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