Arlan A. Cohen
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It seemed like a good idea at the time

HOW KAISER PERMANENTE CAPTURED 40% OF INSURED CALIFORNIANS IN A MEDICAL-MALPRACTICE JUDICIAL SYSTEM PROFOUNDLY TILTED AGAINST INJURED PATIENTS

The gravamen of this article is this: The Kaiser Permanente Arbitration system is one in which *every* arbitration decision is made by a "neutral" arbitrator whose personal interest in the outcome meets the criteria *for disqualification* under California and federal law because every neutral arbitrator has a personal financial interest either in finding for respondent Kaiser or in low-balling any award for the claimant.

Every claimant award, particularly if it is full value, is grounds for Kaiser to reject that judge when his or her name comes up as a possible future neutral arbitrator. Kaiser can summarily, totally and permanently end a neutral arbitrator's future income from Kaiser arbitrations simply by exercising the veto power embedded in the Office of Independent Administrator (OIA) disqualification rules. An arbitrator's decision against Kaiser therefore risks losing what analysis reveals is a potentially massive source of income in that arbitrator's retirement.

The genesis of this system was the state legislature's unwise acceptance of what was put before them as "accepted wisdom:" that arbitrations are faster, cheaper and fairer than civil trials. None of these three assertions has proven true. And the price paid by 40% of insured Californians (a current estimate of Kaiser Permanente's market share) is compulsory adjudication of legitimate medical-malpractice claims in front of judges whose future income depends entirely on remaining in Kaiser's good graces.

Unless the system is radically changed, to permit neutral arbitrators to give awards based only on their assessments of the facts and the law, without fear of jeopardizing their ongoing income, the state will continue to have a two-tiered system of justice in medical malpractice: One in which the finders of fact and appliers of the law are selected for impartiality, and another where the judges are economically dependent on the defendants for a large share of their retirement income.

This system is particularly objectionable because many patients become Kaiser insureds not through personal choice, but because employers or government programs may require it.

Financial interest of a judge is normally grounds for disqualification

For more than 200 years it has been clear that any system in which the judge deciding the outcome has a personal financial interest in the result cannot possibly be impartial but must inevitably favor the parties whose victories promise future enrichment to the judge.

As James Madison wrote in Federalist paper #10, in 1787: "No man is to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

California law holds that grounds for disqualification of a judge exist, according to Code of Civil Procedure 170.1 if:

> (3)(A) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding," or "(8)(A) The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in that employment or service, and any of the following applies: "(8)(A)(i) The arrangement is, or the prior employment or discussion was, with a party to the proceeding." (8)(B)(iii) "Dispute resolution neutral" means an arbitrator, mediator…

These state grounds for disqualification target both actual and potential ethical lapses by including the financial interests of both the judge and their spouses and children living at home. (§ 3(B).)

A handful of cases reinforce the principle that past and *potential future employment* by a party is a presumed and unavoidable substrate for judicial bias. In *Haas v. County of San Bernardino* (2000) 27 Cal.4th 1017, a forced recusal of a hearing officer in an appeal of license revocation by an officer appointed by the county was upheld because of the hearing officer's financial interest in the outcome through continued employment by the county, *and* because the officers' prospects for obtaining future ad hoc appointments depended solely on the county's good will. Similarly, in *Grabowski v. Kaiser Foundation Health Plan, Inc.* (2000) 64 Cal.App.5th 67, the failure to fully disclose repeated employment in Kaiser arbitrations was accepted as one of the multiple dispositive factors showing bias.

Federal law and Bar Association Codes of Judicial Conduct echo these ethical principles. Title 28 United States Code section 455 provides as follows:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

The California Judicial Counsel, in the Judges Benchguide section on "Disqualification and Disclosure (2023)" reasserts the need to comply with Code of Civil Procedure section 170.1, and further, in section 2.3 cites constitutional Due Process justification for avoiding any situation that creates a predisposition to find against a plaintiff:

> The Due Process Clause [of the United States Constitution]entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the

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> promotion of participation and dialogue by affected individuals in the decision-making process [Citation.] The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law [Citation]. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done [Citation] by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with the assurance that the arbiter is not predisposed against him.

(*Bennett v. Bodily* (1984) 211 Cal.3d 133, 141 n.7.)

The United States Supreme Court reiterated this principle in *Williams v. Pennsylvania* (2016) 579 US 1: "Due process guarantees 'an absence of actual bias' on the part of a judge." Quoting *In Re Marchison* (1955) 349 US 133, 136, "…the Court asks not whether a judge harbors an actual, subjective bias, but whether, as an objective matter, 'the average judge' in his or her position is 'Likely to be neutral' or whether there was an unconstitutional 'potential for bias.'"

There should be no defense, therefore, of a system that regularly requires all judges to decide cases in which a substantial economic advantage to finding for one party is built in.

This raises the next question: Is the financial reward for finding in Kaiser's favor in the current system sufficient to create a "potential for bias" in "the average judge?" The amount of money at issue is so great that the answer must be "yes."

Kaiser, as a "frequent user," greatly influences the arbitrator's income stream

Kaiser Arbitration Procedure is straightforward. A pool of potential neutral arbitrators is selected from applications filed with OIA. Appointment to this pool does *not* require experience in medical-malpractice law. However, the rules exclude any attorney who has tried a case or been a party arbitrator against Kaiser within five years – assuring Kaiser that experienced medical-malpractice plaintiffs' attorneys are diverted out of the "potential neutral arbitrator" pool.

When an arbitration demand is filed, the OIA's computer spits out 12 names of "potential neutral arbitrators." Their background and experience is available to the litigants in summary form. Each side then "strikes" four of the 12 and ranks the other eight in order of preference. The computer erases the names of all "stricken" panelists and chooses as neutral the survivor who does best after combining the rankings of the two sides. The parties receive a disclosure statement from the selected neutral and, within 15 days of the disclosure**,** may disqualify the designated neutral without cause. The OIA then submits a new panel for ranking. This right to disqualify any designated neutral without cause after has no numerical limit. Therefore, even if a proposed neutral makes it though the "strike and choose" process, and is designated as the neutral, he may still be disqualified. There is no escape from disqualification for a disfavored potential neutral arbitrator.

On its face, this procedure seems to give the two sides equally effective rights to secure a truly "neutral" judge. However, the vast majority of medical-malpractice arbitrations are against Kaiser Permanente. And here Kaiser's "frequent user" power becomes dispositive.

Offending any single plaintiff's attorney by a low/no Kaiser award costs the arbitrator no income, because the arbitrator is prohibitively unlikely ever to need that attorney's approval again. A plaintiff lawyer's discontent, leading to a decision never again to agree to that neutral, is what my professors used to call a "bruten fulmen," empty noise.

But if, after an award favoring the claimant, Kaiser resents the victory or is unhappy that the award reflected damages actually suffered, Kaiser's disaffection with the neutral arbitrator shuts down that arbitrator's future income from any Kaiser arbitrations completely and potentially permanently.

Having a lot to lose

Virtually all lawyers seeking to become neutral arbitrators have given up active trial or judicial practice and are seeking ongoing supplemental income in their retirement from arbitration. Therefore, under the current system, a full and honest award favoring the claimant can impoverish the neutral.

Does this actually happen? Does Kaiser discipline potential neutrals for plaintiff-favorable decisions? Kaiser leaves no tracks, and the data it publishes are clearly caressed. But personal experience over the years, shared by many in the plaintiffs' bar, shows that revenge is real and the neutral arbitrators understand and fear it.

One neutral I knew gave a seven-figure award and then disappeared from arbitration for almost two years, returning chastened and with a new approach to decision-making. Another, who gave my firm a seven-figure award, observed "I guess I'm going to be doing a lot of fishing for a year or two." He ended up doing just that.

Another told me of diminishing what he had planned as a claimant's award to make sure it didn't exceed the plaintiff's rejected §998 offer because "I need to keep working, and giving this award is risky enough without adding interest and expert fees."

Yet another told me he "had just received an advisory call about the case from 'my Lord and Master.'" Another, before voting for Kaiser on a clear claimant's case, begged the Kaiser attorney to settle the case because "I just can't see a justification for some form of compromise verdict; I'll have to go all for plaintiff or all for defendant…please help me out."

Human nature and personal experience require understanding that when the judge's future income hangs in the balance, impartiality is impossible. Indeed, given that the expenses of arbitration materially exceed those of civil litigation, why would Kaiser continue to

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require arbitration if it did not gain more financially thereby than the expenses it incurred?

A change in Kaiser's tactics

A recent change in Kaiser tactics highlights its reliance on constant reminders of the "frequent user" issue. For years, Kaiser Permanente in Southern California used the same party arbitrator on all large cases. Neutral arbitrators came to know him well. He was the "human reminder of the frequent user problem." When he died several years ago, Kaiser decided to save the expenses of a party arbitrator and began going forward without party arbitrators, i.e., with a single neutral arbitrator. But within the last two years, a couple of seven-figure arbitration awards came down. Remedial action was required. And it was applied: Kaiser chose a replacement "human reminder," who now appears in virtually every significant-damages Kaiser case. The purpose: to reinforce the understanding that Kaiser receives immediate, future-decision-influencing reports about compliance or noncompliance with Kaiser interests.

This raises a pragmatic issue: Just how much can a busy neutral arbitrator earn?

But how much does the neutral stand to lose?

How much money are we talking about? Is it in the ballpark of the usual hourly trial practice, or a judicial salary? Or does it involve sums like those about which the late Senator Everett Dirksen famously joked, "A million here, a million there, before you know about it, we're talking real money."

The last three neutral arbitrators whose fees came to my attention during the last week charged $1,000/hour, $1,200/hour, and $1,400/hour. These arbitrators' fees have jumped substantially over the last four or five years, when Kaiser cited a "mean or median" fee of about $550/hour in a yearly report. In one UIM case now in progress outside of Kaiser but informative about how arbitrator's income is rising, the neutral arbitrator required $2,000/hour.

Consider this: one four-day arbitration, eight hours per day.

At $1,200/hour, for four days, 32 hours of actual trial work, this arbitrator would earn a fee of $38,400. But before the trial, the arbitrator must work on his disclosures, conduct status and trial-setting conferences, deal with discovery and substantive motions, and read through, with concentration, the arbitration briefs. Another 20 hours of billing for these tasks is not unusual, bringing the fee up to $60,000-$65,000 for the case.

Many cases settle along the way, but a total neutral arbitator's fee of $50,000 for a case is common. Kaiser's Annual Report for 2020 states that where an award was issued, "the average neutral arbitrator fee was $49,625. The range was $19,725-$163,280," with an average hourly fee of $555. Three years later, experience on the ground tells us that the average neutral arbitrator's hourly fee and total fee for decided cases has increased substantially.

If a neutral arbitrator is favored by both sides, hence gets regular assignments and commands this fee, and does *only two four-day cases/month*, the fees generated come to $1.2 to $1.5 million per year, without any of the costs of overhead but for the fee to the Alternate Dispute Resolution firm that markets the neutral. *Even one such case per month would yield an annual income of $500,000 to $750,000.*

In this setting, where offending the claimant carries no cost, and offending Kaiser potentially closes the income spigot, what else but clear, unavoidable bias could plausibly be expected of "the average judge"? Even Dirksen would be impressed with the income that a "retired" judge or litigator can generate by becoming an arbitration staple for Kaiser.

Invulnerability to appeal erases an important check on flawed outcomes

If an arbitration award is radically inconsistent with the evidence, or if it frankly misinterprets established California law, the statutory invulnerability to appeal of arbitration awards ensures that the neutral arbitrator pays no embarrassing or reputation-diminishing "correction from above." This device, an engineered Kaiser failsafe, permits profoundly flawed arbitration awards to remain binding and the flaws to go unpublished.

Kaiser's potential rebuttal and plaintiff's counter punch

Kaiser's arguments that their system is equitable would likely be these:

1. The legislature and judiciary have recognized this system as fairer, faster and cheaper than civil litigation. That's why it is "favored." That recognition is based in fact.
2. Kaiser's outcomes are no different in arbitration than they would be in civil court. See our disclosed annual reports.

The *plaintiff's replies* to this defense are short but not sweet.

First, arbitrations are not fairer, faster, or less expensive than civil cases. These assertions, repeated by rote in a number of judicial decisions, do not survive scrutiny.

Arbitrations are usually substantially more expensive than civil trials. All the expenses of a medical-malpractice civil trial are present in Kaiser arbitration. But arbitration carries additional five-figure expenses for shared large neutral arbitrator fees, and potentially, further, for party arbitrators. The costs for a judge and a jury, absorbed by the civil system, are paid out of pocket by arbitration litigators.

Arbitrations could theoretically be fairer than jury trials because neutral arbitrators likely have more experience with medical malpractice than jurors. But the failure to *require* medical-malpractice experience of Kaiser arbitrators, the massive pro-Kaiser bias created by limits on allowing plaintiffs-side lawyers to become Kaiser neutrals, and the financial consequences of the frequent-user problem far outweigh any potential advantage of arbitration from "experience."

Finally, arbitrations are not always or even often faster than civil litigation. Favored neutral arbitrators are now, in September 2023, booked until mid or late 2025. And though civil judges have the

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right to set a trial date and insist that it holds, arbitration neutrals will almost always give civil trials priority over arbitration. In my most recent arbitration – a single-issue case, all contested conduct occurring within a 48-hour period, which could have been tried within months after filing, was set for arbitration 16 months out…and that setting was a much-appreciated favor from the neutral arbitrator for an 80-year-old claimant. His normal schedule would have set it 28 months out.

Finally, the assertion of equal outcomes in civil court and arbitration is at best highly suspect. For starters, the only data we have is that which Kaiser has decided to publish. Even this caressed data shows skewing of awards away from the higher jury verdicts. Further, at least one study done several years ago, by the Al Jazeera network, unfortunately unpublished, showed that when Kaiser arbitration results are compared with those of bench trials in civil court in California and throughout the country, Kaiser's results showed a clear decrease both in the frequency and the amounts of plaintiff verdicts. It showed very occasional neutral arbitrators willing to issue a substantial award being "disappeared" for many months or altogether, and to more than a handful of "neutral" arbitrators whose entire career, amounting to more than a dozen cases, passed without a single plaintiffs' award. And it showed an inordinate percentage of cases ending in summary judgment against the claimant, a relatively rare occurrence in courtrooms.

The Kaiser Report

The Kaiser Report showed that "Cases with Neutral Arbitrators Selected 10 or More Times in 2020" went for the claimant only *one third as often as "Cases with Other Neutral Arbitrators"*: one case out of nine, compared to one case out of three. A reasonable inference is that this statistic shows *how* you become an "Arbitrator selected 10 or More Times" in one year.

My experience on the ground, typical for the plaintiffs' bar, confirms the illusory nature of the claim of impartiality or of agnosticism of arbitrators and of defense counsel about the influence of current decisions on future income. In one case of mine, when the neutral scotched a Kaiser counsel's attempt to put on duplicative expert witnesses, the defense reply was not legal or factual argument, but this assertion to the neutral: "Well, I'll have to speak to my people about this ruling later, Judge."

Further, some neutral arbitrators *are* experienced in medical-malpractice litigation, making their decisions on central issues, when inconsistent with the evidence, explicable only by consideration of non-evidentiary concerns. In one case, an experienced neutral, after years of practice as a plaintiff's medical-malpractice attorney, accepted a physician's decision to forgo life-extending treatment, causing the patient's death, by accepting a consent for that lethal decision from a family member he knew was without legal standing to consent, bypassing the legal guardian who had the medical power of attorney, present in the chart.

In another, the experienced neutral accepted the pathology interpretation of an OBGYN expert with no credentials in pathology over the expert opinion of the Chief of Pathology at UCI. In another, the neutral, dealing with a conflict of experts over whether or not one portion of an operation leading to harm was necessary, disregarded the pathology exhibit which showed that the surgery was unnecessary, and that its lack of necessity was determinable with a five-minute pre-operative ultrasound. The point is not merely that these decisions went wrongly for the claimant; that happens. It is that all the people who made these decisions were experienced medical-malpractice litigators, who most certainly knew better.

The assertion of impartiality denies the existence of significant financial interest for the neutrals in finding for Kaiser; it denies human nature; and it disregards a foundational question: Why would Kaiser insist on an expensive system if the advantages conferred by it did not materially exceed those costs?

The remedy

There is no need to dismantle the Kaiser arbitration system altogether. The fourth asserted benefit of mandatory arbitration – that by dealing with many cases, it lifts a burden from an overworked civil judiciary – is a legitimate benefit to the State. The injustice arises only because the burden is then shifted to Kaiser patients or their surviving families.

Further, though outcomes vary widely among neutrals, there are attorneys who do their best to fight against the economic push imposed by the current system, despite being subject to economic vengeance. All plaintiffs' medical-malpractice lawyers have their particular heroes in this regard, many of whom Kaiser subsequently summarily rejects. These heroes' attempts to be fair are unremittingly uphill fights, punctuated by periods of unemployment.

I suggest a path to making this two-tiered system of justice equitable while retaining its ability to decrease the civil courts' caseloads.

It begins with a rational method of choosing potential neutral arbitrators by actively recruiting attorneys with significant experience with medical-malpractice trials and caselaw, including those lawyers now precluded by the OIA "five-year wait rule." Members of this new panel should be approved jointly by representatives of the plaintiff and defense bars, not randomly chosen by an application that disregards relevant experience. We would then have a panel both sides felt could begin the process fairly. A 3-5-year panel term would permit periodic re-appraisal by the two bars and keep the appointment from becoming a sinecure.

Further, the costs of litigation should not be completely up to Kaiser. Now, for claims over $200,000, unless a plaintiff proves extreme poverty to a court, half the costs of the neutral arbitrator, and, at the discretion of Kaiser, all the costs of a party arbitrator fall upon the plaintiff and his attorney. As noted, Kaiser has recently begun insisting on three-arbitrator panels, with party arbitrators, driving up the cost of making a claim and, as collateral damage, significantly decreasing the Kaiser insureds' ability to find counsel. If the claimants do not see a need for a

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party arbitrator, that cost should not be forced upon them at Kaiser's whim.

But the most important modification, the *sine qua non*, must be that a neutral cannot lose his or her place on the panel because of an award to the plaintiff. Continued employment should not be extinguishable because of the judge's decisions. And once a panel of qualified neutrals is identified and approved by plaintiff and defense bars, they should be randomly selected for each case, with *one* potential rejection by each party and no more, rather than the "four rejections per case" and "later post disclosure disqualification" now available to Kaiser.

If the neutral arbitrator can follow the evidence and the law without losing substantial income, justice may *yet* be possible in a medical malpractice arbitration system. If not, not.

Conclusion

The Kaiser arbitration system is deeply dysfunctional because of the profound economic rewards given to neutral arbitrators for finding in Kaiser's favor. No system whose structure makes every one of its nominated judges clearly subject to disqualification for personal economic interest should be permitted to exist.

The legislature and the judiciary accepted initial assertions of speed, fairness, and lessening of expense to justify the mandatory relinquishment of a constitutional right to a jury trial. These justifications have proven false. Appropriate remedies should be enacted.

Until this system is restructured to permit competent neutral arbitrators to make their decisions based on facts and law rather than the prospect of loss of personal enrichment, the many millions of California patients insured by Kaiser will continue to be markedly disadvantaged and deprived of a fully impartial means of redress for Kaiser's professional negligence.

Arlan Cohen, M.D. practiced medicine for more than 12 years before attending Harvard Law School from which he graduated magna cum laude in 1990. He practices plaintiffs' law, litigating HMO malpractice, wrongful death, and personal-injury lawsuits in which the extent and cause of injury/health impairment are central to the case.