

FOURTH ANNUAL REPORT

of the

OFFICE OF THE INDEPENDENT ADMINISTRATOR

of the

**KAISER FOUNDATION HEALTH PLAN, INC.
MANDATORY ARBITRATION SYSTEM**

for

DISPUTES WITH HEALTH PLAN MEMBERS

January 1, 2002 - December 31, 2002

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REPORT SUMMARY

Kaiser Foundation Health Plan, Inc., has arbitrated disputes with its California members since 1971. In the 1997 *Engalla* case, the California courts criticized Kaiser's system, saying that it should not be self-administered and fostered too much delay in the handling of member's claims. In response, Kaiser appointed a distinguished Blue Ribbon Panel ("BRP") to study the system. Implementing BRP recommendations, Kaiser first named a citizen advisory board, and then Kaiser and the board selected the Law Offices of Sharon Lybeck Hartmann to create the Office of the Independent Administrator ("OIA") and operate the system. This is the fourth annual report on the results of the OIA's independent administration. It describes the system as it stood on December 31, 2002. Here are some of the highlights:

- 1. OIA Contract Assigned to Arbitration Oversight Board.** To institutionalize the independence of the OIA, in June 2002, Kaiser assigned its contract with the OIA to the Arbitration Oversight Board ("AOB"). The AOB is an unincorporated association registered with the Secretary of State that is composed of stakeholders in the system and distinguished public members. A separate trust, established and fully funded by Kaiser, provides the source of the money with which the AOB can meet the contractual obligations to the OIA for payment. See pages 2, 50-51.
- 2. New Independent Administrator Selected.** This year, Sharon Lybeck Hartmann gave notice to the AOB and to Kaiser that she planned to retire and, therefore would not renew her contract as Independent Administrator when it expired in March 2003. The AOB, with input from Hartmann and Kaiser, selected Sharon Oxborough as the new Independent Administrator. Oxborough, a highly experienced and accomplished California attorney, has worked on the OIA system since its inception. Oxborough's contract contains guarantees of independence, just as Hartmann's did. Oxborough will retain the same address, phone number, staff and tracking software for the OIA. However, she will have a new website, www.oia-kaiserarb.com. See pages 2-3, 52.
- 3. State Adopts Mandatory Ethics Standards for Neutral Arbitrators.** In July 2002, California implemented the first mandatory ethics code for arbitrators in the country. As the legislature directed, the Standards were drafted by the Judicial Council. In December, the Judicial Council amended the Ethics Standards in major ways. In response, the OIA *Rules* which had not changed since the system came into existence were amended twice in 2002 to meet the changing requirements of the Standards. See pages 3, 6-7.
- 4. 52 Day Average to Selection of Neutral Arbitrator.** At the end of 2001, there was a 50 day average to selection of a neutral arbitrator in the total of all cases ever handled by the OIA. At the end of 2002, this same overall average is 52 days. The OIA is moving thirteen times faster than the 674 day period to perform the same task, which

the *Engalla* Court reported was average for the old Kaiser system. However, the OIA selection process was significantly slowed down in the last six months of 2002 by a single provision of the new Ethics Standards implemented in July. This section was eliminated in December amendments. However, in the short six months of its existence, the provision slowed the OIA from an average of 54 days to appointment in the first half of 2002 to an average of 81 days in the second half of the year. We are grateful that provision was deleted by the Judicial Council or our time to appointment of a neutral arbitrator would have been greatly lengthened by the time of the next annual report. See pages 3-4, 26-27.

5. **Number of Annual Arbitration Demands Remains Stable.** Between 1999 and 2002, Kaiser forwarded a total of 4,021 demands for arbitration to the OIA. This averages to about 89 a month. In the year 2002, we received 1,053 demands or an average of 88 a month. The average reported in 2001 was 90 a month. These numbers have remained relatively constant over the past four years even though Kaiser's California membership has risen. See page 17.
6. **Increase in Open Cases.** As of December 31, 2002, the OIA was administering 912 open cases, a rise from 766 open cases at the end of 2001 and 617 cases at the end of 2000. This rise may be due to the fact that 89% of the open cases at the end of 2002 had been brought under contracts which required the use of the OIA as administrator, as opposed to requiring use of the old Kaiser system of administration as the former contracts did. See pages 18, 34.
7. **Hearings Completed Within a Year.** Arbitrators have closed cases by making a decision following an evidentiary hearing in 15% of all closed OIA cases (350 of 2,292 cases). At the OIA, the hearing ended an average of 345 days after the demand was received. Under the old Kaiser system, the *Engalla* Court stated that such a hearing did not begin on average until 863 days after the demand was received and that thereafter hearings were often interrupted and therefore conducted over lengthy periods. Almost without exception, OIA evidentiary hearings are completed on successive days. See pages 39-40, 62.
8. **Cases Close on Time.** The average time to closure of all OIA cases is 273 days, or 9 months. This overall average is about the same as it was at the end of 2001. All but six of the closed cases have closed on time under OIA *Rules*; four of the six late cases were less than a week beyond their deadline. See pages 35-36.
9. **Two-Thirds of Cases Settled or Withdrawn; About One Third Closed by Decision of Neutral Arbitrator.** Of the closed cases, 44% settled. This has been

the average percentage for three years now. Another 22% were withdrawn by the claimants. Twelve percent were closed through summary judgment and 3% were dismissed. As noted above, only 15% of cases closed after an evidentiary hearing. In the cases which went to such a hearing, claimants prevailed in 39%, and respondent prevailed in 61%. See pages 37-40.

10. **Large Neutral Arbitrator Panel in Active Service.** We have 297 neutral arbitrators on our panel. Ninety-three of them, or 31%, are retired judges. Eighty-seven percent of them have served on a case in the OIA system. Arbitrators have averaged eight assignments each in 45 months. See pages 11-14.
11. **Claimants Elect to Have Kaiser Pay the Neutral Arbitrator.** Claimants have elected to have Kaiser pay the cost of the neutral arbitrator in at least 43% of all cases administered by the OIA. See page 45.
12. **Nearly All Cases Heard by a Single Neutral Arbitrator Instead of a Panel.** Most OIA cases are proceeding with a single neutral arbitrator rather than a panel of three, composed of one neutral and two party arbitrators. Only 27 of the 350 awards made after a hearing – about 8% -- have been signed by party arbitrators. The other 323 were decided by a single neutral. See pages 44-45.
13. **Most Cases Medical Malpractice.** Approximately 90% of the cases in our system are medical malpractice. Only 2% present benefits and coverage issues. See pages 27-29.
14. **One Quarter of Claimants Do Not Have Attorneys.** Twenty-five percent of claimants are not represented by counsel. This percentage has been stable for about three years. At pages 37 to 40 we report the types of outcome for them. See pages 30, 37-40.
15. **Positive Party Evaluation of Neutral Arbitrators.** At the end of each case, all parties are asked to evaluate their neutral anonymously. About half accept the invitation. For the third year, both claimants' and respondents' counsel reported that they would recommend their neutral to another individual with a similar case. See pages 14-17.
16. **Positive Evaluation of OIA Procedures by Neutrals.** Neutral arbitrators continue to evaluate OIA procedures positively. For example, we ask them at the end of each case whether they have experience in a similar Superior Court case, and if so, whether they would rank their experience in the particular OIA case just closed as better, worse, or about the same. In 774 OIA cases, neutrals responded that they had such

parallel experience. Forty percent said that the OIA experience was better. Fifty-eight percent said it was about the same. Only two percent of those responding said the OIA experience was worse. See pages 46-49.

17. **Most Blue Ribbon Panel Recommendations Achieved.** The Blue Ribbon Panel convened by Kaiser after *Engalla* made 36 recommendations for change in the arbitration system. Thirty-two of those recommendations have been essentially accomplished. Only two have not been, those involving mediation and the audit of the OIA. About two we have no information since they do not involve the OIA. See Exhibit B throughout, and page 74.

Complete copies of this report are available to the public. Hard copies can be obtained from the OIA at (213) 637-9847 or the report can be read at or downloaded from the OIA website, www.slhartmann.com/oia.

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A Note About Numbers

There are a lot of numbers in this report. To make it somewhat easier to read, we offer the following information.

For most items reported we give average, median, mode and range. Here are definitions of those terms:

Average: The mean. The sum of the score of all items being totaled divided by the number of items included.

Median: The midpoint. The middle value among items listed in ascending order.

Mode: The single most commonly occurring number in a given group.

Range: The smallest and largest number in a given group.

We have rounded percentages. Therefore, the total is not always exactly 100%.

If there are items which you do not understand and would like to, call us at 213-637-9847, and we will try to give you answers.

I. INTRODUCTION & OVERVIEW

This is the fourth annual report issued by the Office of the Independent Administrator (“OIA”),¹ describing an arbitration system that handles claims brought by Kaiser members against Kaiser Foundation Health Plan, Inc. (“Kaiser”) or its affiliates.² The Law Offices of Sharon Lybeck Hartmann has acted as the OIA since October 1998, when Kaiser and the Arbitration Advisory Committee first contracted with the firm to act as the independent administrator of Kaiser’s mandatory member arbitration system in California. The OIA began accepting demands for arbitration in 1999.

Under that contract, which was assigned to the Arbitration Oversight Board in 2002, the OIA maintains a pool of neutral arbitrators qualified to hear Kaiser cases and independently administers arbitration cases brought by Kaiser members. It works, as well, to assure that the system conforms with newly enacted legislation. The contract also requires that the OIA write an annual report describing the arbitration system. The report must describe the goals of the system, the actions being taken to achieve them, and the degree to which are being met.³ This fourth report focuses on our work from January 1 through December 31, 2002 and compares that activity with the OIA’s earlier years.⁴ It finds that the system is continuing to achieve the goals set by the Blue Ribbon Panel in 1998.

¹Since its creation, the OIA has been located within the Law Offices of Sharon Lybeck Hartmann, 3580 Wilshire Boulevard, Suite 2020, Los Angeles, California 90010, 213.637.9847 (telephone), 213.637.8658 (facsimile), ويا@slhartmann.com (e-mail). The OIA has a website, www.slhartmann.com/ويا, where this report can be downloaded, along with our first, second and third annual reports, and our rules, forms, procedures and much other information, including that required by new statutes, enacted or effective in 2002. A firm profile and a description of the OIA’s staff are attached as Exhibit A.

²Kaiser Foundation Health Plan, Inc. is a California nonprofit health benefit corporation and a federally qualified HMO. Since 1971, it has required that its members use binding arbitration to resolve disputes. Kaiser arranges for medical benefits by contracting exclusively with the The Permanente Medical Group, Inc. (Northern California) and the Southern California Permanente Medical Group. Hospital services are provided by contract with Kaiser Foundation Hospitals, another California nonprofit public benefit corporation.

³Contract §D(15)(i) at 10. Copies of the contract may be obtained from the OIA.

⁴The first annual report covered the period from March 29, 1999 through March 28, 2000. The second report covered the remainder of calendar year 2000, March 29, 2000 through December 31, 2000. The third annual report covered January 1, 2001 through December 31, 2001.

A. Background Information

In 1997, the California Supreme Court criticized Kaiser's longstanding arbitration system in *Engalla v. Permanente Medical Group*.⁵ In part, the Court said that Kaiser should not administer the system itself, as it had done in the past, and that there was too much delay in the handling of members' claims. In a voluntary response to the Court's evaluation, Kaiser convened a Blue Ribbon Panel of outside experts to examine the entire process and recommend improvements. The Blue Ribbon Panel issued its report in January 1998.⁶ It recommended 36 specific changes in how the system operated. Kaiser accepted the recommendations, and in implementing them, created the Arbitration Advisory Committee ("AAC") in 1998 to assist it in the process. Seeking an independent administrator for the system, Kaiser and the AAC issued a widely advertised Request for Proposal, interviewed a number of those who responded, and selected the Law Offices of Sharon Lybeck Hartmann to create and operate the new system.

In 2001, Kaiser publicly announced the appointment of the Arbitration Oversight Board ("AOB"), made up of thirteen representatives of stakeholder interests and distinguished public members. The AOB replaced and expanded upon the role of the AAC. The AOB, an unincorporated association registered with the California Secretary of State, will permanently provide ongoing oversight of the independently administered system.

B. Major Events of 2002 at the OIA

In 2002, Kaiser established a trust to fund the Arbitration Oversight Board, and the contract which formerly existed between Hartmann and Kaiser was then assigned by Kaiser to the AOB. At the same time, the final authority for rule-making for the OIA rules was transferred from the OIA to the AOB. The AOB was created and funded to ensure that the OIA would remain independent of Kaiser in the future. AOB members meet quarterly, receive regular reports on the operation of the system, visit the OIA offices, speak regularly with OIA staff, and review and comment upon copies of this annual report before its general release.⁷

Also in 2002, Sharon Lybeck Hartmann informed Kaiser and the AOB that she planned to retire soon, and thus she did not wish to continue in her role as Independent Administrator beyond the end of her present contract term which expires on March 28, 2003. The AOB, with input from Kaiser

⁵15 Cal.4th 951, 64 Cal Rptr.2d 843, 938 P.2d 903.

⁶ Copies of the Blue Ribbon Panel's report can be obtained from the OIA. It contains 36 recommendations for improvement in the old Kaiser arbitration system. Exhibit B to this Fourth Annual OIA Report contains the full text of all the Panel's recommendations along with an item by item response on what has been accomplished.

⁷The composition and role of the AOB is further discussed at section V.A-B, p. 49 below.

and Hartmann, sought a new Independent Administrator and selected California attorney Sharon Oxborough. She has worked with Hartmann for twenty years, has been Of Counsel to the Hartmann law firm since 1994 and has consulted on the OIA project from its inception. Oxborough drafted the original *Rules*, Guidelines and forms for the OIA system and understands it thoroughly.⁸ Oxborough will become Independent Administrator of the OIA system on March 29, 2003, and will continue to operate at the same address and phone number and with the staff previously employed by Hartmann. Oxborough's contract with the OIA will be available from the OIA by request, as Hartmann's always has been. It is the expectation of all concerned that the OIA will continue to operate in the future as it has in the past.

Another major event of the year 2002 was California's promulgation and implementation of mandatory ethics standards for neutral arbitrators. At the direction of the legislature, the Judicial Council created the *Ethics Standards for Neutral Arbitrators in Contractual Arbitrations* ("Ethics Standards").⁹ The California Judicial Council is an administrative unit of the state courts appointed by the Chief Justice and chaired by him.

The Ethics Standards went into effect July 1, 2002, but were subsequently amended in mid-December. The OIA commented extensively in both of the comment periods which the Council afforded to the public. The mandatory standards, which are the first of their kind in the United States, greatly expanded the neutral arbitrator's duties of disclosure, and in so doing, increased the possibility that arbitration awards could be vacated.¹⁰ The OIA staff has been heavily involved this past year in insuring that all OIA arbitrators were informed about these changes and understood what they meant in our system.¹¹ OIA *Rules* were changed twice this past year, first, when the Ethics Standards were adopted and then again when they were amended, in order to stay in step. The biggest news of our year is how much the initial version of the Standards slowed down the OIA system. The following chart on page 4 illustrates the delay.

⁸As set forth in the First Annual Report, the *Rules* and the Guidelines were the product of extensive consultation between the OIA, the AAC and Kaiser. However, Oxborough was the primary researcher, the draftsperson and the reporter on this project. She has also drafted all the amendments to the *Rules* made since.

⁹A copy of the second version of the Ethics Standards approved by the Judicial Council in December 2002, and effective January 1, 2003 (hereafter "2003 Ethics Standards") is attached as Exhibit F and is available at the OIA website as well as in hard copy as Division VI of the Appendix to the *California Rules of Court*.

¹⁰Cal. Code of Civil Proc. §§1281.9 & 1286.2.

¹¹See Exhibit H, Memo to Arbitrators and Exhibit N, "Out in the Open: California's new ethics code for arbitrators, the country's first, sets standards for disclosure and disqualification throughout the process" an article about the Ethics Standards written for the *Los Angeles Daily Journal*, May 31, 2002 by Hartmann.

**Impact of Standard 10 of the 2002 Ethics Standards
on
Average Time to Appointment of Arbitrators**

	2001	Jan-June 2002	July-Dec 2002	1999-2002 TOTAL
Most Cases (No Postponement; No Disqualification)	23 Days	22 Days	34 Days	25 Days
Cases with Postponement Only	104 Days	106 Days	121 Days	109 Days
Cases with Disqualification Only	61 Days	53 Days	78 Days	64 Days
Cases with Postponement & Disqualification	143 Days	159 Days	167 Days	160 Days
ALL CASES	50 Days	54 Days	81 Days	52 Days

At the end of 2002, the OIA also prepared and posted on its website the organizational disclosures required by the Ethics Standards and prepared certain other reports of information to be given to parties at the outset of each case. Details of these changes and their impact on our system will be taken up below.

Finally, the California legislature entertained a large number of statutes that impacted the OIA this past year. Hartmann and Dr. David Werdegar, the Chair of the AOB, testified on the operation of the OIA system as neutral committee witnesses before a joint session of the Assembly Judiciary and Health Committees in March. Thereafter, the Judiciary Committee issued a package of five bills, several of which were ultimately enacted, although in modified form. Keeping track of these bills and their potential effects on the system took much time in 2002. Their eventual major impact on the OIA was to require the posting on the internet in computer searchable format a great deal of information about cases decided including arbitrator, attorneys, award, time elapsed to decision, etc.¹² The OIA

¹²Cal. Code Civ Pro §1281.96; some of this material duplicates the requirements of Standard 8 of the January 1, 2003 Ethics Standards (hereafter “2003 Ethics Standards”) which we also posted, effective January 1, 2003. However, the two sets of requirements differ from each other in significant ways and are posted separately on the OIA website.

began its posting on January 1, 2003, having spent considerable time, in the fourth quarter of 2002, modifying its software in order to perform this task.

These events have created a great deal of extra work and are reported on in detail later in the report in areas where they have affected operation. Suffice it to say at this point, that the OIA has been in full conformity at the implementation date of each of these requirements and has been recognized as a leader in compliance in each area.¹³

C. Goals of the OIA System

Consistent with the recommendations of the Blue Ribbon Panel, the OIA attempts to offer a fair, timely, low cost arbitration process that respects the privacy of all who participate in it within the new requirements of the law for the posting of certain information. These goals are set out in Rules 1 and 3 of the OIA system.¹⁴ As set out in the balance of this report, we believe that the goals are presently being achieved.

II. DEVELOPMENT AND CHANGES IN THE SYSTEM

A. Rules for Kaiser Member Arbitrations Overseen by the OIA

In previous reports we have described the creation and development of the OIA *Rules*. They consist of 53 rules in a fifteen page booklet and are available in English, Spanish and Chinese. They are attached as Exhibit C. Some important features they contain include:

Procedures under which claimants may choose to have Kaiser pay all the fees and expenses of the neutral arbitrator;¹⁵

Deadlines requiring that the majority of cases be resolved within eighteen months;¹⁶

¹³Exhibit H; *see also*, Exhibit N.

¹⁴The OIA *Rules* are attached as Exhibit C and are always available on the OIA website. Exhibit C is underlined to mark the rule changes which were made in 2002 and which have survived into 2003. We have not included a set of the *Rules* in effect between July and the end of December 2002 which met the initial requirements of the Ethics Standards. However, if you would like such a set, contact the OIA.

¹⁵Exhibit C, Rules 14 and 15; *see also* Exhibit B, recommendation 7.

¹⁶Exhibit C, Rule 24.

Procedures to shorten or lengthen time for cases that require either less or more than eighteen months;¹⁷

Deadlines requiring that most cases must have an arbitrator in place as rapidly as the law permits after the OIA receives the demand for arbitration.¹⁸

The *Rules* were not changed at all for three years. However, in 2002, the OIA, the AOB and Kaiser consulted together to amend them *twice*, once effective on July 1, 2002 and a second time on January 1, 2003.¹⁹ Urgent changes were driven by the promulgation of the new Ethics Standards for neutral arbitrators which were first implemented in July and then significantly amended in December. Other rule amendments were required by new statutes first enacted in September and effective only three months later in January 2003. A third group of changes was made in response to comments which the OIA has received over the years.

In both July and January, the newly amended *Rules* were immediately mailed to all neutral arbitrators and to all parties in open cases. Thereafter, the OIA staff spent considerable time on the phone answering questions both about our own rule amendments and about the underlying legislation and regulation which had required the changes.

1. Rule Changes Caused by the Ethics Standards

Major changes were made in the *Rules* in July to accommodate the Ethics Standards and particularly the notice and objection requirements of Ethics Standard 10(d). In January, those amendments were removed from the *Rules* when Standard 10(d) was dropped from the code by the Judicial Council.²⁰ We also changed Rule 4 to require that neutral arbitrators use the state mandated Ethics Standards, but left in place the use of the AAA *Code of Ethics for Arbitrators in Commercial Disputes* for party arbitrators and for neutrals appointed before July 1, 2002, since they are not covered by the state's new code. We lengthened the deadline by which the arbitration scheduling conference must be held from 45 to 60 days after selection of a neutral in order to avoid the neutral having to schedule a meeting before it was certain that s/he would be handling the case.²¹ We

¹⁷Exhibit C, Rules 24 and 33.

¹⁸Exhibit C, Rules 16 and 18 and Guideline 14b. The total time the OIA sets for routine placement of a case is 33 days. The present average OIA time for such placements is 25 days. See section IV.A, p. 20 below. Rule 43 explains how days are counted in the system. There are various exceptions to the 33 day rule.

¹⁹None of the changes affected the features listed above.

²⁰The record of how much delay 10(d) caused in the OIA system is set forth at note 32, p. 9 and section IV.A, pp. 20-27 below. Among the *OIA Rules* affected were 16 through 19.

²¹Rule 25.

specified that our cases are consumer arbitrations within the meaning of the Ethics Standards to avoid any contrary finding by a neutral.²² We added the requirement that parties list more than one joint selectee as arbitrator.²³ We required that parties making a joint selection also submit strike and ranked lists. Finally, we added a provision to Rule 53 to inform parties of the organizational data that the Ethics Standards now require be made public and to state that the OIA would post this on its website.²⁴ These changes and others not listed here are discussed elsewhere in this report at the points when they become relevant.

2. Rule Changes Caused by New Statutes

This was a busy year in the legislature as far as arbitration was concerned, and our rule changes reflect that fact. We changed Rule 12 on filing fees to reflect that a person may now waive our \$150 filing fee merely by submitting a statement that the household earns less than 300% of the federal poverty level.²⁵ We changed Rule 3 on confidentiality to say that we would disclose information about individual arbitrations as required by law. Formerly, we promised confidentiality. Now, the state requires that much information be posted on the internet or given to subsequent parties. However, individual names need not be revealed although a number of other facts about specific cases must be.²⁶ We amended Rule 53 to inform parties of the statutory reporting requirement.²⁷ Finally, we changed Rule 48 to require that neutral arbitrators tell the OIA what they have charged in specific cases and to which party they allocated their fees and expenses²⁸ since those are items of information which we must now post.

3. Rule Changes Requested by Arbitrators and Parties

As for other more general rule changes, they were largely house-keeping matters. For example, in response to requests from the neutral arbitrators, the OIA changed Rule 37 to enlarge the time in which a neutral must serve an award on the parties from ten days after the close of the hearing to fifteen business days. It also clarified the definition of the close of a hearing. Rules 25 and 26 were

²²Exhibit C, Rule 2.

²³Exhibit C, Rule 17.

²⁴2003 Ethics Standards at 8. See also note 26 below.

²⁵Cal. Code Civ. Pro. §1284.3.

²⁶Cal. Code Civ. Pro. §1281.96; 2003 Ethics Standard 8 also requires public disclosure of certain types of information by organizations which supply arbitrators. Both sets of disclosures appear on the OIA website.

²⁷Cal Code Civ. Pro. §1281.96

²⁸Cal. Code Civ. Pro. §1281.96

changed from requiring the presence of both attorneys and parties at the arbitration scheduling conference and the mandatory settlement meeting to permitting only the attendance of attorneys. The OIA's memo of advice to claimants representing themselves ("*pro pers*") has now become part of Rule 54. Rule 28, permitting extensions of time for extraordinary circumstances, was amended to require a motion procedure and to make it clear that the failure of an individual to keep the scheduled hearing date free of other appointments does not constitute such a circumstance.

Finally, Rule 50 was changed to transfer the authority to make rule changes from the OIA to the AOB, except in emergency circumstances. The power has been transferred to the Arbitration Oversight Board in consultation with the OIA and Kaiser as the rule now states. That change is in keeping with the construct that the AOB is an independent body composed of stakeholders and public interest members who now control the system and are funded by a trust.

B. Maintenance of the Panel of Neutral Arbitrators

The first three annual reports discussed the creation, expansion and organization of our panel of neutral arbitrators. The panel is large in response to a recommendation of the Blue Ribbon Panel.²⁹ As of December 31, 2002, we had 297 neutral arbitrators. Most of these neutrals joined our panel during the first and second years of the OIA. However, throughout our existence, we have continued to recruit neutrals and admit them to our panel. In 2002, we received 37 requests for applications, fifteen of which were completed and returned (40% of those requested).³⁰ Individuals who had made their requests previously also submitted applications. Through this process, we added fifteen new neutrals to our panel in 2002.³¹

²⁹Exhibit B recommendation 9.

³⁰A copy of the application is attached as Exhibit D and one is available on the website.

³¹Overall, about 77% of all arbitrators who have completed and returned the application have been admitted to the OIA panel (411 of 531). When the OIA receives a completed application, it applies the criteria which were jointly decided upon at the outset, and makes the decision on admission. The qualifications are posted on the website.

Total Number of Application Requests Received:	2,219
Total Number of Completed Applications Received:	531
Total Number of Arbitrators in the OIA Panel:	297*
Southern California Total:	168
Northern California Total:	110
San Diego Total:	42

***The three regions total 320 because 23 neutral arbitrators are on two panels.**

The overall number of neutral arbitrators on our panel has decreased by nine since December 31, 2001. Nine died, retired, asked for temporary leave or were removed for violation of the rules. Fifteen resigned. At one point in the year, we thought that a much higher number of our neutrals might leave because of requirements of the Ethics Standards dealing with work for repeating parties.³² In

³²Standard 10 in the July 1, 2002, version of the Ethics Standards (“2002 Ethics Standards”) caused most of the controversy. It required that when an arbitrator planned to entertain offers of additional work from a party or law firm then before him/her, the neutral had to initially disclose that fact. The parties could then disqualify the neutral on that basis alone. If the neutral did not make such a disclosure s/he was barred from accepting any such new work for the balance of the pending case. 2002 Ethics Standard 10(b). If such work was subsequently offered, the arbitrator had five days after each offer to inform the parties in prior cases, and they then had seven days to object to the neutral accepting the new work. If a party objected, the neutral could not accept the new case. 2002 Ethics Standard 10(d). Since all cases in the OIA system have Kaiser as a repeating party, and a number of our arbitrators have more than one case, this provision, with its extensions of time for mailing, could extend the time to appoint a neutral by 22 days even if nobody made an objection. Such an extension threatened to double the OIA’s time to place an arbitrator in a routine case. If objections began, the extension of time could be well-nigh infinite as one arbitrator after another was objected to.

Attorneys criticized Standard 10 on the basis that third parties could deprive them of their jointly selected neutrals. Arbitrators objected to this provision on the basis of the amount of paperwork it generated and the elaborate conflict checking it required since all kinds of alternative dispute resolution work was covered. (Formerly, such disclosure had been limited to arbitration only.) Several OIA neutrals resigned and others put themselves on temporary suspension while they overhauled their office procedures and altered their software. In its comments to the Judicial Council, the OIA pointed out the potential for delay in appointment of neutrals before the Standards were initially implemented. Nevertheless, the Council put Standard 10 into place in July. When the Council reopened the public comment period on the Standards after initial adoption, criticism of Standard 10 poured in.

June, when the first set of standards appeared, three did ask to be removed on that basis. However, in December, the Council reversed itself on the controversial portion, and all three returned. Five of the panelists who resigned did so because of the Judicial Council's new policy that a retired judge may no longer both sit by assignment in the courts and serve as a private arbitrator for compensation. That policy took effect on January 1, 2003, as did the resignations.

1. Qualifications

The OIA qualifications for neutral arbitrators did not change in 2002. They are attached as Exhibit E and available from the OIA website. However, in 2002, members of both the claimants' and respondents' bars approached the OIA about changes which might broaden the pool of prospective applicants. Therefore, the qualifications may be reviewed and altered somewhat in 2004.

In keeping with the Blue Ribbon Panel's recommendations in this area, the qualifications are broad and designed to recruit a large, diverse, unbiased panel. They include the following:

- Arbitrators must have been admitted to the practice of law for at least ten years and have substantial litigation experience;
- they must provide satisfactory evidence of their ability to act as arbitrators based upon judicial, trial or other experience or training;
- they must not have served as attorneys of record or party arbitrators either for or against Kaiser within the last five years.

In order to make the panel as large as possible, and also to approximate the experience of parties in a courtroom setting, the qualifications do not contain a requirement that the potential arbitrator have medical malpractice experience.

Notwithstanding this decision, many parties and their counsel prefer to have an arbitrator who is experienced in malpractice matters. To that end, defense and claimants' attorneys often make joint selections, and both bars have inquired about whether the provision eliminating anyone who has appeared either for or against Kaiser in the past five years could be shortened in time or altered in some other fashion to make available for service a group of attorneys who occasionally handle Kaiser matters

On December 12, 2002, only six months after its first appearance, the Council amended it, making the change effective in only three weeks, on January 1, 2003. While the Council retained the original disclosure of willingness to entertain new work, it eliminated entirely the provision requiring the parties to be informed and giving them the opportunity to object. 2003 Ethics Standard 12. The Council reasoned that making the initial disclosure and giving parties the opportunity to disqualify then on this basis provided an adequate safeguard.

and therefore have malpractice experience. The OIA and the AOB have been informed that such a proposal will be made in 2003, and they look forward to its arrival.

2. Application

The application to join the OIA pool of arbitrators is extensive.³³ Applicants must provide education, work experience, legal and arbitration experience and detailed information about any previous involvement with Kaiser. They must provide names and contact information from all parties in five recent arbitrations. At the outset of a new case, when the OIA provides parties with a list of 12 possible arbitrators so that they can strike names and rank their selections, each party receives a complete copy of each arbitrator's application.

At the same time, the parties also receive the arbitrator's terms of payment. Neutrals may not change their fees in the course of a given year or during the entire pendency of a specific case. Annually, they are given one opportunity to set new fees for the coming year in new cases. Other than these requirements, they are free to set their fees as they see fit. The range is very wide.³⁴

3. The Panel as of December 31, 2002

For the convenience of the parties and to reduce the cost of arbitration, the panel of neutral arbitrators maintained by the OIA is divided into three parts, Northern California, Southern California and San Diego.³⁵ As of December 31, 2002, there were 297 neutral arbitrators admitted to the OIA panel, 110 in Northern California, 168 in Southern California and 42 in San Diego.³⁶ Thirty-one percent, or 93 members of the total panel, are retired judges. There are 41 retired judges in the Northern California division, or 37%; there are 46 retired judges in the Southern California division, or 27%. There are eleven retired judges in the San Diego division, or 26%. In comparison with 2001, the percentage of judges overall and in each division has fallen slightly.³⁷

³³It is attached as Exhibit D and is on the website.

³⁴Claimants may also elect to have Kaiser pay the entire cost of the neutral arbitrator. Exhibit C, Rules 14 and 15, and section IV. L, p. 45 below for further information.

³⁵For the history of the San Diego Panel, see Third Annual Report at p. 7, note 24.

³⁶The total number of neutrals in the three panels equals 320 because 23 of the 297 arbitrators serve on more than one panel.

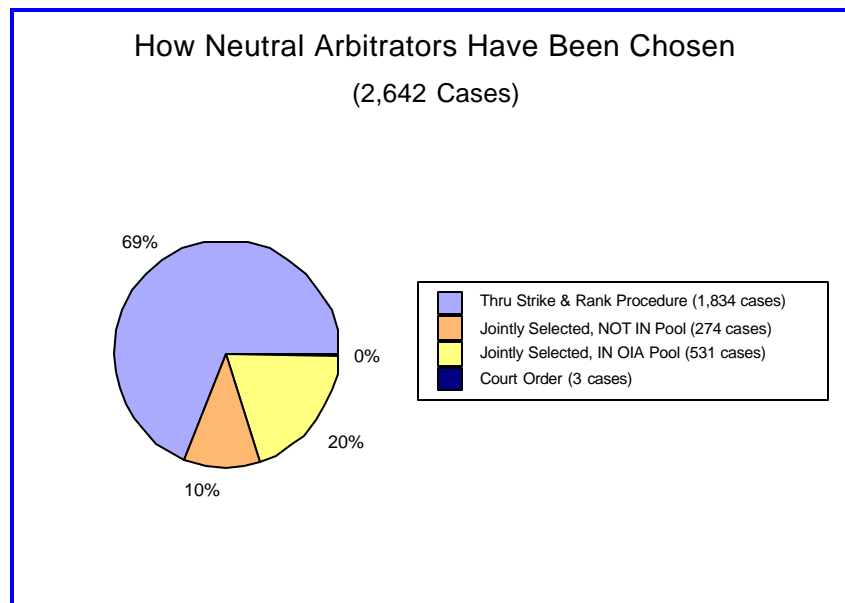
³⁷The 2001 percentages and numbers of retired judge-arbitrators were: statewide: 33% or 102 ex-judges; Northern California: 46 judges or 39%; Southern California: 47 judges or 29% and San Diego: 9 judges or 32%.

A complete list of neutral arbitrators as of December 31, 2002 is attached as Exhibit G. It also appears on the OIA website and is updated regularly there.

Under the *Rules*, the parties can either jointly select any person who agrees to follow the *Rules* to act as the neutral arbitrator, or they can each strike and rank the list of twelve names provided by the OIA.³⁸ Since the OIA first began operation, a neutral has been selected in 2,642 cases. In 805 of these cases, or about 31%, the parties have jointly selected the neutral arbitrator, while in 1,834 of these cases, or about 69%, the parties have used the list supplied by the OIA. The state court has appointed arbitrators in three cases, none of them in 2002.

In 2002, a neutral was selected in 804 cases. Of the 804, 220 were joint selections (27%) and 584 of the 804 were strike and rank (73%).

The parties have jointly selected 805 arbitrators since the OIA began operating. Of that group, 66% belong to the OIA's panel (531 of 805), although they may not have appeared on the specific list generated for that particular case. The remaining 34% of jointly selected arbitrators (274 of 805), are not part of the OIA's pool.³⁹ In 2002, 141 of the 220 jointly selected neutrals or 64% were in the OIA panel and 79 of 220, or 36%, were not.



³⁸Exhibit C, Rules 16-18; see also Exhibit B at Recommendations 14 and 15.

From June to December, the OIA *Rules* provided for a list of fourteen names because of the potential for disqualification and objection stemming from Ethics Standard 10, described in note 32 pp. 9-10 above. When Standard 10 was altered in December, the *Rules* were changed to return to a list of twelve potential arbitrators.

³⁹The OIA has always invited neutral arbitrators who are jointly selected and not part of our pool to complete an application for membership. Some have. Others do not because they believe that they already have enough work. A number of them have served as neutrals in OIA cases more than once.

4. Materials Available to Help Parties Make Their Selection of a Neutral

As noted above, parties receive copies of each potential arbitrator's application whenever their names appear on a randomly computer generated list of possible arbitrators. In addition, if a listed potential arbitrator has previously decided a case in the OIA system, copies of each written decision (with the names of individuals removed) are also sent to the parties. Furthermore, after a case closes, the OIA asks both of the parties to evaluate anonymously their experience with the neutral. We include copies of all of the completed evaluations that the OIA has received in the packets sent to the parties at the time that they make their selection.

If parties are considering joint selection of an arbitrator who is not on their list, but who is in our pool, and they ask us for that person's file, we supply it. If they ask us specific questions about any individual's service in this system, we do our best to give them the information.

Finally, before his/her final appointment, the statutes of California require that a selected arbitrator make elaborate disclosures within ten days of his/her selection and serve them on the parties.⁴⁰ The content of the disclosures has been greatly expanded by the Ethics Standards this past year.⁴¹ Furthermore, the new requirements impose a duty of continuing disclosure during the pendency of the arbitration and state the penalty for failure to disclose as the vacating of the award.⁴² Parties are free to disqualify an arbitrator on the basis of any disclosure made without stating a reason as long as the disqualification is served within ten days of the date of the disclosure.⁴³ All of these provisions maximize the information about the neutral arbitrator which is in the hands of parties before an arbitrator begins to hear their matter and during the pendency of the entire case. If an arbitrator is disqualified, the selection process begins again.⁴⁴

5. How Many of the Panel of Arbitrators Have Served?

One of the recurring concerns expressed about arbitration of this type is the possibility of a "captive," defense-oriented pool of arbitrators. The theory is that defendants are repeat players whereas claimants are not; defendants therefore have the capacity to bring more work to arbitrators where claimants do not. If the pool is small, some arbitrators may become dependent on the defense

⁴⁰ Cal. Code of Civ. Proc. §1281.9.

⁴¹Exhibit N (citing statutes and standards); Exhibit F, 2003 Ethics Standards 7-8

⁴²Exhibit F, 2003 Ethics Standards 7 (f); see also Standard 1 Comment; Cal. Code of Civ. Proc. §1286.2(a)(6)(A).

⁴³Exhibit F, 2003 Ethics Standards 8 & 10(b); Cal. Code Civ. Proc. §1281.91.

⁴⁴Exhibit C, Rule 18.g.

for their livelihood. A large pool of people available to serve as neutrals, and actively serving as such, is therefore an important tool to avoid this problem. If the cases are spread out, nobody depends on the defendant for his/her income and impartiality is better served. On December 31, 2002, 87% of the OIA panel (258 of 297) had served or were serving as neutral arbitrators in a case overseen by the OIA. In 2002 alone, 67%, have been appointed to serve in a case (199 of 297). Both of these percentages are somewhat higher than they were last year.

The number of individual assignments to cases on the OIA's panel ranges from zero to 86. Parties have *jointly selected* the neutral arbitrator who is at the high end of this range 66 times. The average number of appointments per neutral is eight. The median number of appointments is four. The mode is zero. The parties' actions – in how they strike and rank their choices, whom they jointly select, and whether they disqualify a proposed neutral arbitrator – ultimately control how many times each panelist serves as a neutral arbitrator.

In the year 2002, the range of assignments per arbitrator was zero to 20. The average number of appointments per arbitrator was three. The median number was one. The mode was zero.

All but one of our neutrals have been named at least once on a list of possible arbitrators sent to the parties by the OIA.⁴⁵ The average number of Northern California arbitrators appearing on a list is 95; the median number is 102, and the mode is 131. The range of appearances is from one to 158 times.⁴⁶ In Southern California, the average number of appearances is 54; the median is 61, and the mode is 79. The range is from zero to 113. In San Diego, the range of appearances is from four to 64. The average is 38; the median is 35, and the mode is 53.

6. The Parties or Their Counsel Evaluate the Neutral Arbitrators

Under Rule 49, at the close of an arbitration in which a neutral arbitrator has been appointed and held an arbitration management conference, the OIA sends an evaluation form to each attorney, or to the claimant if that person does not have an attorney. The form asks them to evaluate their experience with the neutral appointed in the matter in eleven different categories including fairness, impartiality, respect shown for all parties, timely response to communications, understanding of the law and facts of the case, and fees charged.⁴⁷ Most important, they are asked whether they would

⁴⁵The one neutral who has not been listed joined the panel on December 26, 2002, just five days before the cut off date for this report.

⁴⁶The range is affected by how long a given arbitrator has been in the pool. Some have been here since we started; others have joined within a week of this report date. The number of times an arbitrator is selected also depends on whether the individual will hear cases where the claimant has no attorney (*pro per* cases). Thirteen percent of the panel will not.

⁴⁷A copy of the evaluation form is attached to this report as Exhibit L along with an analysis of the responses.

recommend this neutral to another person with a similar case. All inquiries appear in the form of statements, and all responses appear on a scale of agreement to disagreement with 5 being agreement and 1 disagreement.

On December 31, 2002, the OIA had received responses from about 47% of the parties who had been sent evaluations (1,433 returned of 3,034 mailed). Four hundred and ninety-six or 36% identified themselves as claimants (84) or claimants' counsel (412), and 885 or 64% identified themselves as respondent's counsel.⁴⁸

Considering only those evaluations sent out this year, 53% responded (358 of 682). Of the 358 received, 36% (130) were from claimants (21) and claimants' counsel (108), and 60% or 216 of 358 were from respondent's counsel.⁴⁹

The responses have been quite positive overall, and they are encouragingly similar for both claimants and respondents.

Here are the responses to some of the inquiries.

Respond from 5 (Agree) to 1 (Disagree).

Item 2: "The neutral arbitrator treated all parties with respect." – 4.7 Average

The average of all responses is 4.7 out of a possible maximum of 5. Claimants counsel averaged 4.7. *Pro pers* averaged 4. Respondents counsel averaged 4.9. For the year 2002, the average for all parties for the year is 4.7. Claimants counsel averaged 4.6. *Pro pers* averaged 4, and respondents counsel averaged 4.9.⁵⁰ The median and the mode in all three groups for both the total and the annual groups is 5.⁵¹

⁴⁸Fifty-two did not specify a side. Their responses are tabulated separately and included only in the total.

⁴⁹Thirteen did not identify as one side or the other.

⁵⁰The responses from *pro pers*, while positive, are lower than those from attorneys on either side. This is consistent with the results for the past two years. We believe that this lower score arises from a lesser understanding of the process – how it will work, and what is possible within it. At least some *pro pers* seem to enter arbitration for purposes which approximate therapy. For example, *pro pers* sometimes tell us that they want an opportunity to tell their account of what happened, regardless of the neutral arbitrator's decision in the case. Arbitration is poorly suited to such a goal. In June 2001, the OIA began distributing an information sheet prepared especially for *pro per* claimants. We send it to them when we first receive their demands, and then again when we send the list of potential arbitrators. We comment on it when they call the office with questions. Effective in July 2002, it appears at the end of the *Rules*. See Exhibit C, Rule 54 and following material. While many *pro pers* have thanked us for it, and said that they found it helpful, we still find that many have not read it. We are considering other techniques to call it to their attention. See also the arbitrator's comments below at section IV.M p. 49.

⁵¹When the median and mode are both five, it means that a large number of people responding gave that number as their answer. It was our highest score. This is another measure of satisfaction with our neutral

Item 5: “The neutral arbitrator explained procedures and decisions clearly.” – 4.6 Average

The average of all responses was 4.6 with the median and the mode both at 5. Claimants counsel averaged 4.4. *Pro pers* averaged 3.8. Respondents counsel averaged 4.7. The median and the mode was 5 in all three subgroups.

Just for the year 2002, the overall average was 4.5. Claimant’s counsel averaged 4.2. *Pro pers* averaged 3.5. Respondents counsel averaged 4.7. The median and mode in all groupings was 5.

Item 7: “The neutral arbitrator understood the facts of my case.” – 4.5 Average

The average of all responses was 4.5 with the median and mode both at 5. Claimants counsel averaged 4.4. *Pro pers* averaged 3.5. Respondents counsel averaged 4.6. The median and the mode were 5 for both claimants and respondents counsel. *Pro pers* had a median of 4 and a mode of 5.

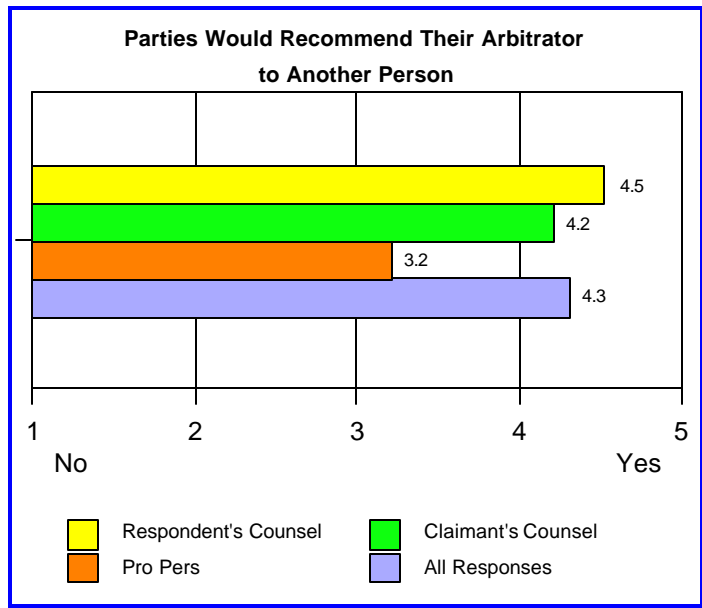
In the year 2002, the overall average was 4.4 with the median and mode both at 5. Claimants counsel averaged 4.2. *Pro pers* averaged 3.2. Respondents counsel averaged 4.6. For both groups of attorneys the median and the mode were both 5. For *pro pers*, the median was 4 and the mode was 5.

Item 11: “I would recommend this arbitrator to another person or another lawyer with a case like mine.” – 4.3 Average

The average on all responses to this question was 4.3. Both the median and mode were 5. Claimant attorneys gave an average response of 4.2. *Pro pers* averaged 3.2. Respondents counsel averaged 4.5. The median and the mode in all subgroups was 5.

In 2002, the average of all parties was 4.2. Claimants attorneys averaged 4.0. *Pro pers* averaged 3.3. Respondents counsel averaged 4.4. The median and mode in all subgroups was 5.

arbitrators.



III. DEMANDS FOR ARBITRATION SUBMITTED BY KAISER TO THE OIA

The OIA began operations on March 29, 1999. Since then Kaiser has submitted three types of demands for arbitration to us: pre-OIA opt ins, post-OIA opt ins and mandatory cases.⁵² Opt-ins predominated through the end of the year 2000. In 2001 and 2002, mandatory demands have become the most common ones. In the entire period of OIA existence, Kaiser has submitted a total of 4,021 demands for arbitration to the OIA. In the year 2002, we received 1,053.

Since the inception of the OIA, we have received 1,928 demands from Northern California, 1,843 demands from Southern California, and 250 demands from San Diego. In the year 2002, 476 demands for arbitration have come from Northern California; 478 have come from Southern California, and 99 have come from San Diego.

⁵²The categories are defined as follows. **Opt-ins**: Until 2001, almost all the demands Kaiser sent to the OIA were opt-ins, that is cases where the claimant could choose to remain here or return to Kaiser for administration of the case. **Pre-OIA opt-ins** are cases where Kaiser received the demand before we came into existence. **Post-OIA opt-ins** are cases where Kaiser received the demand after 3/29/99, when the OIA came into existence. **Mandatory cases** are those which arose under contracts dated after 1/1/00, when Kaiser began changing the arbitration clause of its contracts to make the use of the OIA mandatory as opposed to the self-administration which it used to do.

The following sections of this report describe how long it has taken Kaiser to submit demands for arbitration to the OIA after they received them from claimants, the number of cases that are mandatory, and opt-in cases.

A. Length of Time Kaiser Takes to Submit Demands to the OIA

Under the *Rules*, Kaiser must submit a demand for arbitration to the OIA within ten days of receiving it.⁵³ Throughout our existence, the average length of time that Kaiser has taken to submit mandatory and post-OIA demands to the OIA is eight days, the same as it was in our last report. The mode is zero which means that usually Kaiser sends the OIA a demand on the day it is received. The median is four days. The range is zero to 330 days.⁵⁴ Considering only demands made in 2002, the average is eight days. The mode is one day. The median is five days, and the range is zero to 247 days.

B. Mandatory Cases

As we reported last year, throughout the year 2000, Kaiser amended all its California contracts, covering about six million members, to require that the OIA act as arbitration system administrator.⁵⁵ All Kaiser disputes with its members arising from events that occur after December 31, 2000 are subject to OIA administration. On December 31, 2000, 101 claims in the OIA system were mandatory. On December 31, 2001, 826 claims in the system were mandatory. On December 31, 2002, there were 1,748 mandatory claims at the OIA. Of the total, 922 mandatory cases were submitted to the OIA in 2002. Only 131 opt-in cases were submitted in 2002.

C. Opt In Cases⁵⁶

Since it began operation, the OIA has received 2,273 demands for arbitration made by members whose contracts did not require use of the OIA. Of the total, 64% (1,456) have chosen to opt in to OIA administration. Only 44 have affirmatively refused to join the OIA system. However, the

⁵³Exhibit C, Rule 11.

⁵⁴The 330 day demand arrived in 2000 and is explained in the Third Annual Report at page 12, note 37.

⁵⁵Previously, Kaiser self-administered the arbitration system.

⁵⁶**Pre-OIA Opt Ins.** Between March 29, 1999 and December 31, 2002, Kaiser submitted 230 cases to the OIA in which the demand for arbitration was made before March 29, 1999 before the OIA came into existence. The only such case received this year had been with Kaiser for 1,616 days (4.4 years) before arriving at the OIA. The average time for forwarding during the entire OIA period is 482 days; the median is 361 days and the mode is 13 days. On December 31, 2002, there were only two such cases left open at the OIA.

OIA has returned 744 demands (33%) to Kaiser for self-administration under the old process because the claimants or their counsel never informed the OIA that they wished to enter the system.⁵⁷

In 2002, Kaiser forwarded 131 new demands that fell into the opt in category. Of these, 76 or 58% chose to join our system.⁵⁸ One affirmatively refused to join and was returned to Kaiser. The OIA returned the remainder to Kaiser because there had been no response to its letters.

IV. REPORTING ON CASES ADMINISTERED BY THE OIA

This section provides a detailed account of the cases administered by the OIA.⁵⁹ Section VI.A is particularly notable because it describes the average length of time it takes for neutral arbitrators to be selected in this system.

Other information included in this section provides the number and types of cases, the number of cases with and without attorneys representing claimants, and the number of cases where claimants have sought and obtained fee waivers. This section also provides the number of cases where the parties jointly selected a neutral arbitrator as opposed to using the strike and rank system, the status of cases currently pending in the OIA system, and the number of cases resolved thus far and types of resolutions reached. It discusses awards. This section also reports the number of cases using special procedures, the number of cases in which claimants have elected to have Kaiser pay the neutral arbitrator's fees and expenses, the number of cases in which parties have waived party arbitrators, and the number of cases proceeding with party arbitrators. Finally, it reports the results of neutral arbitrator evaluation of the OIA system as it has worked in specific cases thus far.

A. Length of Time for a Neutral Arbitrator to Be Selected

The *Rules* and *Guidelines* set a 33 day timetable for the steps through which an arbitrator must be selected in a routine case.⁶⁰ These times may be extended for various reasons. First, under OIA

⁵⁷Kaiser settled eight cases and seventeen claimants withdrew their claims before they faced the deadline for deciding whether to opt in.

⁵⁸In 2002, no cases were settled and five withdrew their claims before the deadline. On 12/31/02 four cases were in the process of deciding whether to join the system.

⁵⁹The phrase "cases administered by the OIA" excludes those where the parties are in the process of deciding whether to opt in and those which have been returned to Kaiser. When we refer to cases administered during 2002, we mean that such cases were open for some portion of that year.

⁶⁰*See e.g.*, Exhibit C, Rules 16 and 18, Guideline 14(b). All the measurements of time, including the time to select a neutral arbitrator, begin on the date the OIA received a mandatory claim or a claimant opted in AND the OIA received the \$150 filing fee or granted a fee waiver application.

Rules a claimant has an absolute right to request a one-time 90 day continuance of the arbitrator selection process.⁶¹ A second form of delay in selection can occur when parties choose more than one arbitrator because the first arbitrator selected is disqualified. As specified by statute and the Ethics Standards, neutral arbitrators make lengthy disclosures about themselves, their families, their legal associates and their past work within the first ten days after they are selected.⁶² Each party then has fifteen days in which to disqualify the arbitrator. When such a disqualification occurs, the process begins again. Third, in a small number of cases, both these types of delay have occurred; that is, a party has requested a 90 day postponement and disqualified a neutral arbitrator.⁶³

Parties have selected neutral arbitrators in 2,521 out of 3,011 cases administered by the OIA, where the neutral arbitrator selection process has begun.⁶⁴ The following table and chart summarize the time to selection of neutral arbitrators. The table compares neutral arbitrator selections in different reporting periods.

⁶¹Exhibit C, Rule 21. Respondents may also obtain such a 90 day delay, but only with the consent of the Claimant. Claimant does not have to obtain consent.

⁶²Cal.Code Civ. Pro. §1281.9; Exhibit F, Ethics Standards 7-8. Exhibit C, Rule 20.

⁶³However, the disqualification and/or postponement does not increase the eighteen month time period in which the case must be resolved unless the parties subsequently request and the neutral arbitrator grants a longer timeframe under Rule 24 or 28.

⁶⁴In these 3,011 cases, the claim is either mandatory or the claimant has opted in, and the \$150 filing fee has been paid or waived. See Exhibit C, Rules 12 and 13. Once these events occur, the OIA begins the neutral selection process by sending a list of possible arbitrators to the parties. In 369 of these cases, the time for appointing a neutral had not expired on December 31, 2002 or the case was closed before a neutral was selected.

As of December 31, 2002, in addition to the 3,011 cases where the fee had been paid or waived, the OIA had in house 193 cases where neither had occurred. Under Rule 12, the claimant has 75 days to pay the fee or obtain a waiver of it.

**COMPARISON
of
Average Number of Days to Selection of Neutral Arbitrator
1999 to 2002**

	1999-2000	2001	2002	TOTAL
Majority of Cases (No Postponement; No Disqualification)	25 Days 798 Cases 79%	23 Days 507 Cases 66%	27 Days 410 Cases 54.7%	25 Days 1,705 Case 68%
Cases with Postponements Only	106 Days 157 Cases 16%	104 Days 199 Cases 26%	115 Days 283 Cases 37.7%	109 Days 639 Cases 25%
Cases with Disqualification Only	73 Days 44 Cases 4%	61 Days 44 Cases 6%	62 Days 27 Cases 3.6%	64 Days 116 Cases 5%
Cases with Postponement & Disqualification	167 Days 7 Cases 1%	143 Days 23 Cases 3%	164 Days 30 Cases 4%	160 Days 61 Cases 2%
ALL CASES	41 Days 1006 Cases	50 Days 773 Cases	67 Days 750 Cases	52 Days 2,521 Cases ⁶⁵

While this table is complicated, it shows a number of important facts that are worthy of discussion.

First, if we compare years, we see that in 2001 the time to place a neutral declined from that taken earlier in every single category. However, in the year 2002, the length of time to select a neutral arbitrator increased in every category no matter what procedure was followed. The range of increase is from one day to 21 days. The total average increase is seventeen days from 50 to 67 days, or about one third. This is disheartening given the emphasis which the OIA has always placed on getting a case to a neutral arbitrator rapidly.

⁶⁵“All Cases” actually total to 2,529, rather than 2,521. There are eight cases which are double counted in the 2001 - 2002 totals. If you would like an explanation, please call!

However, the major factor in this increase was the impact of Standard 10(d) of the 2002 Ethics Standards which imposed a twelve to 22 day waiting period in any case where the arbitrator already had another case in our system and thus had to obtain the consent of those prior parties before s/he could accept a new case.⁶⁶ Given that our system always has a repeating party, the OIA was aware from the first appearance of the draft Ethics Standards in January 2002 that this potential existed. We pointed out the possibility in our third annual report⁶⁷ and in both sets of our 2002 comments to the Judicial Council. We believe that this seventeen day gain in the average shows that our concern was valid. However, as noted above, this provision of the Ethics Standards was only in effect from July through December 2002, and was then removed. Therefore, if Standard 10(d) was the primary cause of the increased delay reported here – as the detailed analysis in our following sections strongly suggests that it was -- the year 2003 should once again show a decline in the number of days to appointment by category.⁶⁸

The second major factor shown in this chart continues a trend we commented on last year. Parties are continuing to make increasing use of the options to postpone the selection of a neutral arbitrator that the *Rules* permit. That raises the overall average of time to put an arbitrator into place.⁶⁹ As long as this trend continues, next year's overall average will increase although it should fall within categories.

In 2002, the percentage and number of cases requesting a 90 day postponement in the process of selecting an arbitrator rose substantially over 2001 (from 26% percent of all cases to 38% of all cases) and both are higher than the previous time period (16%). However, the percentage of disqualification of arbitrators actually declined somewhat. This is remarkable since the new Ethics Standards greatly expanded the information which an arbitrator must disclose, imposed a duty of continuing disclosure, and reopened the disqualification period whenever a new disclosure was made. Therefore, one would have thought that disqualification was more likely rather than less so. This reduction, rather than a rise, may be a function of the increased number of 90 day postponements. Parties may be taking more time to make the initial selection of the neutral and thus have less need to disqualify.

It is also true, as noted in past reports,⁷⁰ that many of our disqualifications appear to arise from the failure of one party to return a strike and rank list of potential arbitrators on time. Under the *Rules*,

⁶⁶ See discussion note 32, pp. 9-10.

⁶⁷ Third Annual Report at pp. 21 and 42.

⁶⁸ See also, chart on page 34 above.

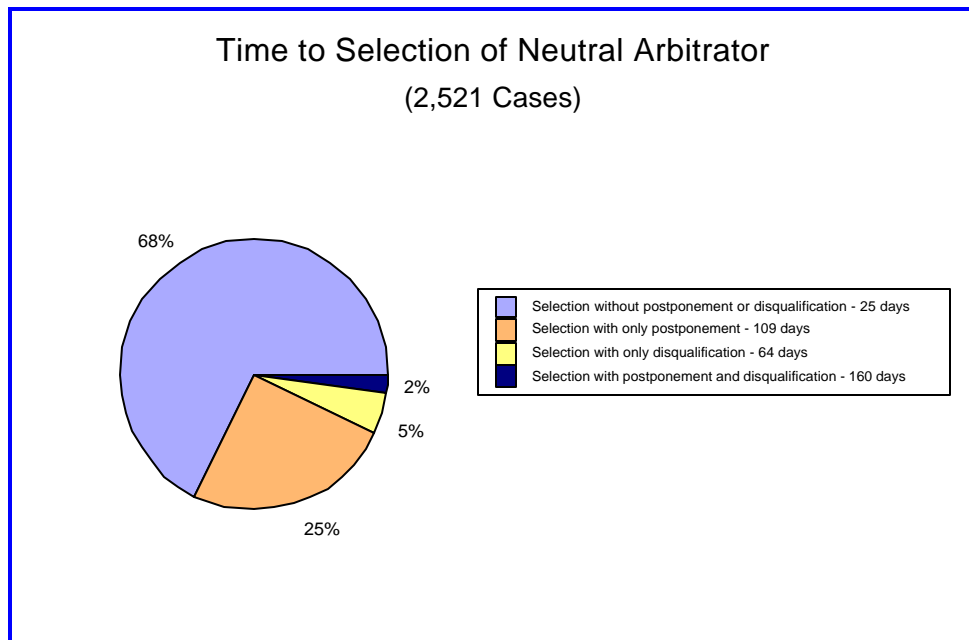
⁶⁹ Third Annual Report at pp. 20-21.

⁷⁰ Third Annual Report at page 18, note 46.

often a disqualification entered by the untimely side and the process begins anew. All of this is in accord with California statutes. In the effort to avoid this lost time and the bad feeling which it sometimes engenders, fifteen months ago, the OIA began to telephone parties late in the 20 day period which they are allotted to strike and rank lists in order to remind them of the upcoming deadline and of the possibility of a 90 day postponement if they are not yet ready to make a selection. We also call parties who have received the 90 day postponement shortly before the end of the period to remind them of the upcoming deadline. In 2002, the first full year of operation under this procedure, we had fewer missed deadlines and fewer disqualifications. We think that this change in our procedure has made the system a friendlier one for many and has saved time in some instances.

Returning to the table above, those cases with both 90 day postponements and disqualifications remained few in number and low in percentage, 3% in 2001 and 4% in 2002. However, there were 30 in 2002; there had been only 30 in the existence of the OIA before 2002 began. This is a matter for concern since these cases take the longest of all to appointment of a neutral, averaging 160 days.

The number of days it takes to get an arbitrator into place is a sensitive matter for the OIA since it was a focal point of the *Engalla* Court's criticism. Our present average of 52 days is still far below the 674 days to appointment cited and criticized there. However, we will be monitoring this closely and will report on it again next year. Throughout the coming year, we will work to once again see it decline in each category and, we hope, overall.



1. The Majority of Cases

If we look at the majority of cases since the OIA began – those where the parties select the neutral arbitrator without seeking a postponement or disqualifying the neutral, 68% of our cases (1,705 of 2,521) – neutrals were placed in an average of 25 days from the date the OIA received the demand and arbitration fee. This is one day slower than the 24 day average reported last year. The mode is 22 days. The median is 24 days. The range is zero to 101 days.

This number is important because it reports on most of the OIA's cases. In the year 2002, 55% of the OIA's cases fell into this category (410 of 750). The neutral was appointed without a 90 day postponement and without a disqualification. While the percentage is high, it has steadily declined over our reporting periods from a high of 79% originally to 66% in 2001 to 55% in 2002.

In 2002, the year-long average is 27 days to appointment of a neutral, 4 days slower than the 23 days we reported in 2001. The 2002 mode is 22 days. The median is 24 days. The range is zero to 86 days.

As noted above, the Ethics Standards came into effect on July 1, 2002. Here are the numbers for the first and second halves of the year. From January through June of 2002, in the period before the Ethics Standards came into effect with the delay of Standard 10(d), the OIA placed a neutral in an average of 22 days, a day faster than it had in 2001. The median for the first six months was 22 days. The mode was 22 days. The range was zero to 86 days.

For the second half of 2002, with Standard 10(d) in effect, the OIA average for placing a neutral with no postponement and no disqualification was 34 days, a twelve day increase over the first half of the year. The median was 34 days. The mode was 21 days. The range was seven to 62 days.

As noted above, Standard 10(d) has been eliminated. The loss of time attributable to it should be regained in 2003.

2. Cases with 90 Day Postponements

Under Rule 21, claimants may obtain a postponement to select a neutral arbitrator simply by serving a timely request for it on the OIA and the respondent. However, respondents may obtain the postponement only if the claimant agrees in writing. To date, 639 out of 3,011 cases, or about 21%, have sought and received postponement as their only delay in the completed appointment of an

arbitrator.⁷¹ Almost all postponements were obtained by claimants. Only eleven have been obtained by respondents.

There are 639 total OIA cases with postponements only, that is the only delay in appointment of a neutral arbitrator was a 90 day delay permitted under the *Rules*. In these cases, the average time to appointment of a neutral is 109 days. The mode is 112 days. The median is 113 days. And the range is from 20 to 262 days.

In 2002, there were 283 “postponement only” cases. For these cases the average days to appointment was 115. The mode is 112 days. The median is 115. The range was 23 to 242 days.

However, the story does not end there. Here are the numbers for the first and second halves of the year. From January through June of 2002, in the period before the Ethics Standards came into effect with the delay of Standard 10(d), the OIA placed a neutral in a case with a postponement only in an average of 106 days, two days slower than it had in 2001. The median for the first six months was 112 days. The mode was 112 days. The range was 23 to 242 days.

For the second half of 2002, with Standard 10(d) in effect, the OIA average for placing a neutral with a postponement only was 121 days, a fifteen day increase over the first half of the year. The median was 129 days. The mode was 112 days. The range was 34 to 163 days.

This delay attributable to Standard 10(d) will be set forth throughout this section of our report and appears in table form on page 4 above.

3. Cases Where the Parties Disqualified Arbitrators

This section discusses cases in which the parties disqualified one or more neutral arbitrators and did not request a postponement under Rule 21. In these cases, parties have chosen more than one neutral arbitrator because one of them disqualified an earlier choice under the statutory procedure. Each time a neutral is disqualified, the entire selection process begins again, including the requirement that the neutral serve disclosures, and the option for the parties to disqualify.⁷²

⁷¹More cases – 993 of 3,011 or 31% – have obtained postponements but have not yet appointed a neutral, or have been settled or withdrawn before appointment, or have experienced other forms of delay as well.

⁷²In some cases, more than one neutral arbitrator has been disqualified. In 188 cases, the parties have disqualified one arbitrator. In 20 cases, they have disqualified two. In one case, they have disqualified three. In two cases, they have disqualified four, and in one case they have disqualified five.

When one neutral arbitrator is disqualified, the total time to select a neutral arbitrator allowed by rule and statute is 116 days.⁷³ In the 116 cases with one or more disqualifications, the average number of days to appointment of a neutral is 64 days. The median is 59 days. The mode is 56 days and the range is 26 to 236 days. In 2002, there were 27 such cases, and they averaged 62 days to appointment. Once again, in the second half of the year, under the Ethics Standards, appointment took longer than the first six months. In the first half of the year, the average was 53 days for 17 of the 27 cases. In the second half of the year, it was 78 days for 10 of the 27 cases.

4. Cases with Postponements and Disqualifications

Since the OIA began, the parties in 61 cases have both requested postponements and disqualified one or more neutral arbitrators. During 2002, there were 30 such cases, up from 23 in 2001. The thirty cases this year equals the total of the previous three reporting periods. However, this category remains small, only 4% of the cases this year and 2% of the total.

When a single neutral arbitrator is disqualified and a party has requested a 90 day postponement, the time to select a neutral arbitrator may be extended to 206 days.⁷⁴ For our 61 cases we average 160 days to appointment. The median is 155 days; the mode is 141 days and the range is from 78 to 383 days.

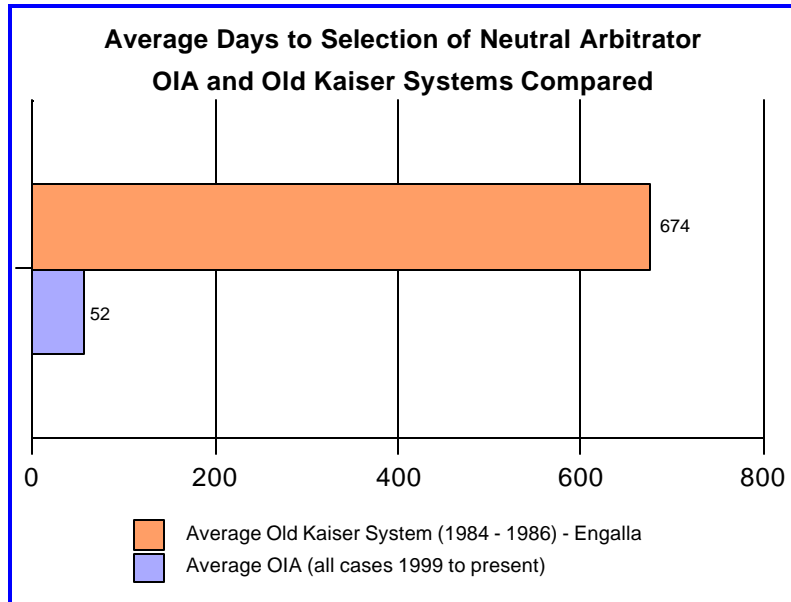
In 2002, the average to appointment in such cases was 164 days. The median was 160 days; the mode was 141 days, and the range was 91 to 232 days. Again, it was slower in the second half of the year with the Ethics Standard 10(d) in place. In the first half of the year, the average was 159 days, while in the second half it was 167 days.

5. Average Time to Selection of Neutral Arbitrator for All Cases Administered by the OIA

The average time to the selection of a neutral arbitrator is 52 days in all OIA cases ever handled, if we average together all types of cases discussed in the previous four sections. For purposes of comparison, the *Engalla* decision reported that the old Kaiser system averaged 674 days to the selection of a neutral arbitrator in all cases over a study period of two years. Thus far, as the following chart of shows, in the 45 months of its existence, the OIA system is about 13 times faster.

⁷³This is composed of two 33 day periods to get two neutrals into place, and the 25 statutory day period of disclosure and disqualification for each of them. This calculation does not include the additional time permitted under former Ethics Standard 10(d).

⁷⁴The 206 days is the sum of the 90 day postponement and the 116 days set forth in note 73.



In the year 2002 alone, the OIA average was 67 days, fifteen days higher than the overall average. However, as analysis throughout this section and the table on page 3 have shown, Ethics Standard 10(d) had a significant slowing effect in the last six months of 2002. That will not be present in 2003, and so we believe that time to selection will be more rapid in 2003.

In summary, the OIA system is alleviating one of the Supreme Court’s primary concern in *Engalla* and achieving one of the major goals of the Blue Ribbon Panel by ensuring that neutral arbitrators are selected quickly in Kaiser arbitrations. The rationale of both the Court and the Blue Ribbon Panel was that a case only really begins to move once the neutral arbitrator is in place. The parties, however, are able to significantly influence the speed with which a neutral is selected.

B. Types of Cases

Since 1999, the OIA has administered or is now administering a total of 3,204 Kaiser cases. We categorize the cases as medical malpractice, premises liability (“trip and falls”), other tort, or benefits and coverage cases. In addition, a group of cases are categorized as unknown because the demand for arbitration does not describe the nature of the claim. Medical malpractice cases are the most common, making up 90% of the cases in the OIA system (2,873 of 3,204). Benefits and coverage cases represent only 2% of the system (55 of 3,204).

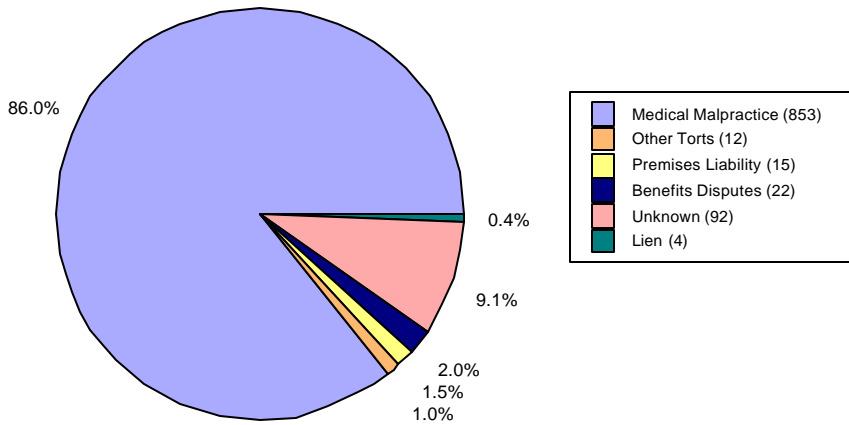
During this reporting period, the percentage of medical malpractice cases was 86%, once again somewhat down from last year when it was 89%.⁷⁵ However, it is also possible that in each year the actual number of medical malpractice claims was somewhat masked by the expanding percentage of “unknown claims” – 6% in 2001, and 9% in 2002. This issue should be clarified in the coming year. One of the statutes enacted in 2002 requires posting on the internet of the number and type of claims received⁷⁶, and as a consequence, the OIA has set in place new procedures which will help to identify the nature of claims sent to it even when the demand does not make that clear. We will report on this trend in the next annual report.

The following charts show the types of claims received at the OIA for both the total period of time and for 2002 alone:

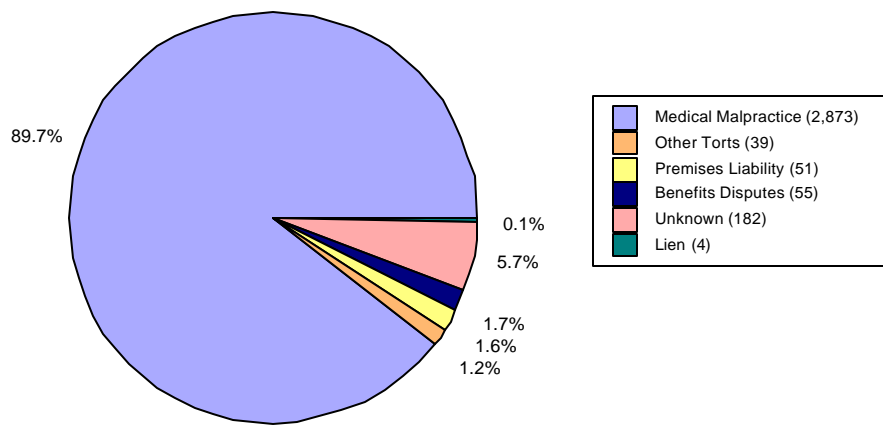
⁷⁵In the year 2001, 89% (816 of 916 cases.) In the year 2002, 86% (853 of 998 cases.)

⁷⁶Cal. Code of Civ. Proc. § 1281.96.

Types of Cases - Received in 2002
(998 Cases)

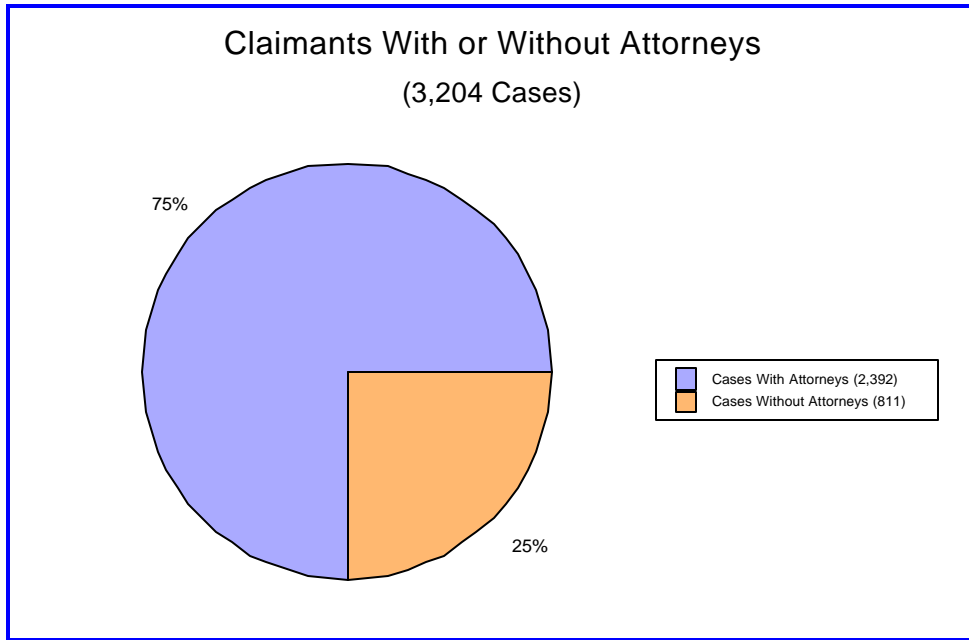


Types of Cases - Total Received
(3,204 Cases)



C. Claimants With and Without Attorneys (“Pro Pers”)

In 75% of the total cases administered by the OIA, the claimants are represented by counsel (2,392 of 3,204). In the 25% of cases remaining, the claimants are representing themselves or acting in *pro per*. In 2002, there were 23% of the cases in our system where claimants were representing themselves (225 of 998).



D. Number of Cases Involving Fee Waiver Applicants

As of December 31, 2002, 335 claimants have requested applications for fee waivers from the OIA. Two hundred and forty five (245) applications have been completed and returned.⁷⁷ The OIA has granted waivers in 226 cases, and denied them in 15 cases.⁷⁸ Three of the fifteen denied applicants subsequently failed to pay their filing fees and had their cases closed as

⁷⁷Of the total number of claimants who asked for fee waiver applications and did not return them, only fifteen have subsequently left the system as cases abandoned for non-payment of the fee. Four of these cases occurred in 2002. Exactly what these numbers are is somewhat confused. We know how many applications we have been asked for, and we know how many are returned completed. However, people obtain copies from other places.

⁷⁸See Exhibit C, Rule 13, for information about fee waiver applications and Exhibit I for the fee waiver forms and instructions.

once in 2002. Of these four, the OIA granted two and denied two. A copy of the fee waiver information sheet and application are attached as Exhibit I. The application is identical to the one used in the California courts.

During 2002, 65 claimants requested fee waiver applications, all of which were completed and returned. In 2002, 65 applications were granted and three were denied. There were three pending at the beginning of the year. Kaiser objected to the grant of one application. This is only the second year that Kaiser has objected to fee waivers.

This year California has enacted a new statute which requires the waiver of organizational filing and administrative fees (but not the cost of the arbitrator) if the claimant completes a sworn statement that his/her family income is less than three times the federal poverty guideline.⁷⁹ The statute mandates placement of this provision in the rules and in the initial communication with the claimant. The OIA has complied with this requirement.⁸⁰ The revised form appears as part of Exhibit I. We began to distribute it on January 1, 2003.

E. Number of Cases Where Parties Use the OIA List of Arbitrators or Choose to Jointly Select a Neutral Arbitrator

Under the *Rules*, parties can either jointly select a neutral arbitrator or use the list of possible arbitrators provided by the OIA to strike and rank names. In 69% of the total cases where parties have selected a neutral, they used the list (1,834 of 2,642 cases). In 31% of the cases, they made a joint selection (805 of 2,642 cases). Of the 805 joint selections, 531 of the cases (about 66%) chose a neutral who was also on the OIA panel although not necessarily on the list received by the selecting parties.⁸¹

During 2002, parties used the list 73% of the time to make the selection of arbitrator (584 of 804 cases). The use of the list is up slightly from 2001, when it stood at 70%. This year, in the 27% of the cases where the parties used joint selection (220 of 804), nearly two thirds of the arbitrators they chose were members of the OIA panel (141 of 220). We believe that the high use of OIA lists indicates confidence in the quality of the pool, as does the steady joint selection of neutrals who are already members of our pool.

⁷⁹Cal. Code of Civ. Proc. §1284.3.

⁸⁰See Exhibit C, amended Rule 13, and revised form in Exhibit I.

⁸¹To date, three neutrals have been chosen by the courts, none of them in 2002.

F. Maintaining the Case Timetable

Through its software, the OIA tracks whether the key events set out in the *Rules* – service of the arbitrator’s disclosure statement, the arbitration management conference, the mandatory settlement meeting, and the hearing – occur on time. The OIA’s approach for monitoring compliance is summarized here.

If arbitrators fail to notify us that a key event has taken place by its deadline, the OIA contacts them by phone, fax or e-mail and asks for confirmation that it has occurred. In most cases, it has and arbitrators confirm in writing. When it has not it is rapidly scheduled. In some cases, the OIA has sent a second letter and/or made a phone call asking for confirmation. The second letter and/or phone call warns arbitrators that, if they do not provide confirmation that the event took place, the OIA will remove their names from its panel until confirmation is received.

In a few cases, neutral arbitrators have not responded to a second communication. In those cases, the OIA removes the neutral arbitrators’ names from its panel until they provide the required confirmation. This has occurred a total of 25 times in four years. In the complications that surrounded the implementation of the Ethics Standards this past year, this reviewing and confirming task became a very time consuming and serious one. At one point in 2002, the OIA suspended an entire organization which supplies arbitrators and all of its individual neutrals for a period of weeks because the organization was failing to meet the time lines and other requirements of the Ethics Standards and of the OIA *Rules*. However, the organization’s neutrals were restored to the OIA panel early in 2003 when the organization was able to get its procedures into conformity.

1. Neutral Arbitrator’s Disclosure Statement

Once neutral arbitrators have been selected, they must make written disclosures to the parties within ten days.⁸² The OIA *Rules* require that this office be served with a copy of these disclosures and has always monitored them for timeliness. Since its inception, six neutrals have been suspended from our panel for failure to serve timely disclosures, two of them in 2002.⁸³

However, in 2002, for the first time, a portion of the content of the disclosures became an OIA concern. The Ethics Standards greatly expand the number of matters which have to be disclosed. Furthermore, Standard 10(b) of the 2002 Standards required that if an arbitrator intended to entertain offers of additional work from parties or attorneys before him/her in an earlier case, the neutral had to give notice of that intention in the initial disclosures made in a later case. If the neutral did not make the disclosure, s/he was barred from accepting additional work from a party or an attorney for the

⁸²See Cal. Code of Civ. Proc. §1281.9 and Exhibit C, Rule 20.

⁸³Five have since been re-instated.

pendency of that case. The Standard appeared to require that this disclosure be made in the initial ten days. If omitted, it appeared to bar the neutral from accepting any further work. All of our cases have one repeating party, Kaiser. Our panel has nearly 300 arbitrators in it, but we handle nearly a thousand cases a year. If any significant number of arbitrators simply forgot to make the Standard 10(b) statement within the ten day period, our pool could have been decimated. We therefore spent a great deal of time in May and June warning our panelists of the requirement. In June, we began reviewing all disclosure statements for its presence. Where we received service within the ten day period and the 10(b) statement was missing, we contacted neutrals or their staff, asked if it was a deliberate omission, and where it was not, asked them to re-serve immediately. Notwithstanding this review on our part, we lost the services of 24 neutrals for some part of 2002 through the operation of Standard 10(b).

That was round one of former Standard 10.

In the cases where a neutral had given the Standard 10(b) statement initially, and was then offered another Kaiser case, Standard 10(d) then came into effect.⁸⁴ The neutral then had five days to give notice to the parties in any previous case(s) that s/he had been offered such work and give the parties in the earlier case seven days in which to object. This notice had to be given in writing to every party in every previous case where Kaiser or an attorney was repeating. The two time periods were also extended by the statutory additional time for mailing so that time elapsed for this one step could be 22 days. Many of our neutrals had more than one Kaiser case open at a given time. The OIA supplied the neutrals with names of the OIA cases where the Standard 10(d) notices were required and tracked both the time periods and the objections on a case by case basis. When a neutral failed to serve a 10(b) notice timely or an objection was received, the OIA immediately contacted the next neutral selected so as to minimize the loss of time. It was always possible that the next selectee would also have to serve Standard 10(d) notices.

This procedure is what accounts for the greatly slowed times in getting arbitrators into place reflected in the numbers reported above at Section IV.A, pages 20 to 27 and the table on page __. As already noted, the Judicial Council amended the Ethics Standards to remove Standard 10(d) in December 2002. This should be the first and last time that we report on it.

2. Arbitration Management Conference

The *Rules* formerly required the parties to have an arbitration management conference (“AMC”) within 45 days of the neutral arbitrator’s selection. In December 2002, the OIA amended the *Rules* to enlarge the time period to 60 days since neutrals were reluctant to contact parties in order to schedule this event during the period when disqualification was possible. They preferred to wait to calendar it until it was clear that they would be the arbitrator.

⁸⁴These provisions applied only from July 1, 2002 through December 31, 2002.

The neutral returns the AMC form to the OIA within five days after the conference. The schedule set forth there controls dates for the rest of the case and allows the OIA to see that the case has been scheduled for completion within the time allowed by the *Rules*, usually eighteen months. Receipt of the form is therefore important. Eight neutrals have been suspended for failure to return an AMC form. Six have been re-instated. Four of them were suspended in 2002; two have been re-instated.

3. Mandatory Settlement Meeting

The parties hold a mandatory settlement meeting (“MSM”) within six months of the AMC.⁸⁵ Consistent with the Blue Ribbon Panel recommendation, the *Rules* state that the neutral arbitrator is not present at this meeting. The OIA provides the parties with an MSM form to fill out and return, stating that the meeting took place and its result. We have received notice from the parties in 1,004 cases that they have held an MSM. We received notice in 357 of these cases in 2002. On the other hand, in 440 cases neither party returned the MSM form to the OIA despite repeated requests. The MSM form was due in 184 of these cases during 2002.⁸⁶

4. Hearing

The neutral arbitrator is responsible for ensuring that the hearing occurs and an award is served within the time limits set out in the *Rules*. For almost all cases, this means that the OIA must receive the award no later than eighteen months after it received the demand and the filing fee.⁸⁷ We suspended two neutrals for failure to submit a timely award, both of them in 2002.

G. Status of Open Cases Currently Administered by the OIA

As of December 31, 2002, the OIA was administering 912 open cases. In 40 of these cases, the OIA was waiting for the payment of the filing fee or submission of paperwork which would waive it.⁸⁸ In 146 cases, the parties were in the process of selecting a neutral arbitrator. In 726 cases, the

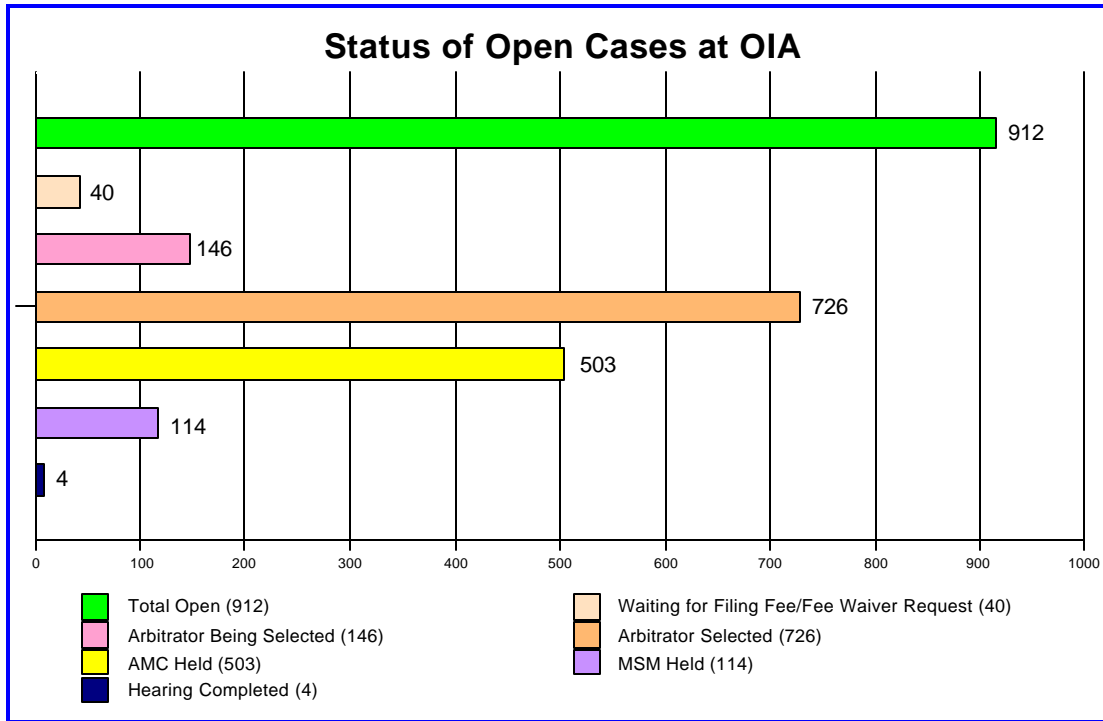
⁸⁵Exhibit C, Rule 26.

⁸⁶The settlement conference is supposed to be conducted without the appointed neutral and in a form agreed to by the parties. There are problems surrounding this, most notably that the OIA has no real way to track whether the event has occurred except for receiving the forms from the parties, which as the report notes, we often do not. We have no power to compel them to report.

⁸⁷Exceptions to the 18 month rule are discussed below in section IV.J pp 41-43.

⁸⁸Effective January 1, 2003, claimants may either fill out a fee waiver application or a statement that their income is less than 300% of the federal poverty guidelines. However, on December 31, 2002, only the fee waiver option was available. See Exhibit I; Report at IV.D pp. 30-31 and Exhibit C, Rule 12.

the parties had held the mandatory settlement meeting. In four cases, the hearing had been held but the OIA had not yet been served with the decision. There were 2,292 closed cases. The following graph illustrates the status of open cases:



The number of open cases at year end continues to grow. At the end of 2002, there were 912 open cases, 89% of which were mandatory (812). At the end of 2001, there were 766, with 72% mandatory (551). At the end of 2000, there were 617, only 16% of which were mandatory (100).

H. Number of Cases Resolved and Types of Resolutions

Under the Rules, most cases must be completed within eighteen months of the OIA receiving them.⁸⁹ The OIA has been accepting claims for 45 months. During our existence thus far, 72% of all our cases have closed (2,292 of 3,204).⁹⁰ This is an increase from December 2001, when 65% of our cases had closed. In all OIA closed cases, only six have not closed

⁸⁹Expedited, complex and extraordinary cases may be resolved in more or less than eighteen months. See Rules 24 and 33. Those cases are discussed in this report at section IV.J, pp. 41-42.

⁹⁰847 cases closed in 2002.

cases had closed. In all OIA closed cases, only six have not closed within the time allowed by the *Rules*. Three occurred in 2002. They were between one and three days late.⁹¹

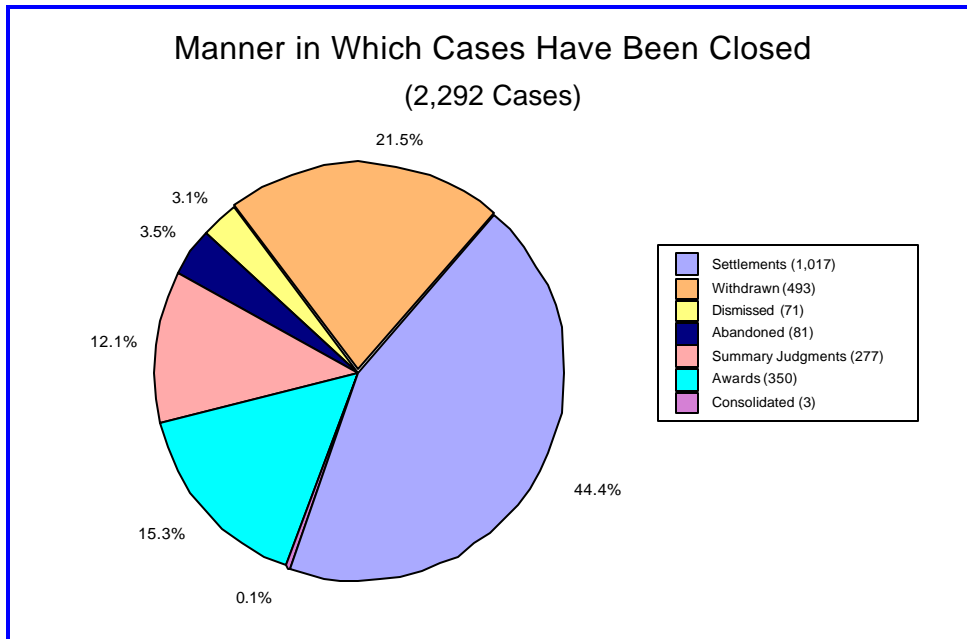
The following sub-sections discuss the various ways in which cases have been resolved, the length of time it took to close them based upon category, and the reasons for closure when the case was closed by summary judgment. The chart on page 41 shows the length of time, again by manner of closure.⁹²

The average amount of time for a case to close increased somewhat in 2002 to 273 days, or about 9 months. In the third annual report, closed cases averaged 259 days, or about 8.6 months. When the year 2002 is considered alone, the average was 296 days; in the year 2001 it was 281 days. Such an increase is to be expected in a system as young as this one. Easier cases or those with less contentious parties settled early. As the system becomes fully mandatory, as it nearly is now (89% of cases now open), the period to close a case should first lengthen and then stabilize.

We also noted last year that the Ethics Standards implemented during 2002 for the first time allowed for disqualification late in a case in a way not possible under previously applicable law. That is because arbitrators must now make continuing disclosures and each time they do, the opportunity to disqualify reopens. When an arbitrator is disqualified late in a case, there is a distinct possibility that the case may last longer than it would have done had the first neutral remained. The Standards are only applicable to cases where the neutral was appointed after July 1, 2002. So we have not yet had time to see whether this will occur. However, so far so good. As noted above, the number of disqualifications actually fell in 2002.

⁹¹In 2001, the OIA had a case which was seven months late (220 days). This remains our most tardy case. The delay was caused by the withdrawal of the arbitrator only days before the scheduled hearing and the eighteen month deadline. See Third Annual Report at page 27, note 61.

⁹²There are twenty cases that have been closed either because the claimant died or the case was consolidated with another one. As they represent less than one percent of the total of all closed cases, they are not further discussed in this section.



1. Settlements – 44% of Closures

At the end of 2002, 44% of the OIA’s cases had settled (1,017 of 2,292). The average time to settlement was 271 days, or nine months. The median was 262 days; the mode was 231 days. The range was 4 to 986 days. In 91 settled cases, the claimant was in *pro per*.

During 2002, 381 of 847 cases settled, which represents 45% of the cases closed during the year. The average time to settlement was 300 days, or about ten months. The median was 288; the mode was 363 and the range was 17 to 986 days.⁹³ In 24 settled cases, the claimant was in *pro per*.

2. Withdrawn Cases – 22% of Closures

The OIA has received notice that 493 out of 2,292 claimants have withdrawn their claims. In 205 of these cases, the claimant was in *pro per*. Withdrawals take place for many reasons, but the OIA has only anecdotal information on this point. We use this classification when a claimant writes us a letter withdrawing the claim, or when we receive a dismissal without prejudice. When we receive a dismissal with prejudice, we call the parties to ask whether the case was “withdrawn” meaning voluntarily dismissed or “settled” and enter the closure accordingly. About 22% of closed cases have been withdrawn.

⁹³The case that took 986 days had been designated complex by the arbitrator and also received a Rule 28 extension for complicated discovery.

The average time to withdrawal of a claim after the case entered the OIA system is 203 days for all cases. The median is 176 days. The mode is 112 days, and the range is 3 to 1,036 days.

During 2002, about 23% of closed cases were withdrawn (197 of 847). The average time to withdrawal of a claim was 222 days. The median was 193 days. The mode was 120 days, and the range was from 3 to 1,036 days.

3. Dismissed and Abandoned Cases – 7% of Closures

Neutrals have dismissed 71 of 2,292 cases, or about 3%, often for claimant's repeated failure to respond to hearing notices or otherwise to conform to the *Rules* or the applicable statutes. In 39 of the 71 cases, claimants were in *pro per*. Eighty-one (81) of the 2,292 closed cases, or 4% of closed cases, were deemed abandoned for claimant's failure to pay the filing fee of \$150 or obtain a fee waiver.⁹⁴ Claimants in 50 of the abandoned cases were in *pro per*.

In 2002, neutral arbitrators dismissed 27 of the 847 cases closed in that year, about 3%. Eleven of these were *pro per* cases. Twenty-nine of 847 closed cases, about three percent, were deemed abandoned for claimant's failure to pay the filing fee or obtain fee waiver. Claimants in 14 of the 29 cases were in *pro per*.

4. Summary Judgment – 12% of Closures

Twelve percent of all the OIA's closed cases (277 of 2,292) have been decided by summary judgment granted to the respondent. In 197 of these cases, the claimant was in *pro per*.

OIA attorneys have tracked the reasons given by the neutrals in their written decisions for the grant of summary judgment. Of the total, 108 or 39% have been granted because claimant lacked an expert witness, a requirement in a California medical malpractice case in nearly all instances. Another 86 or 31% were granted because claimant filed no opposition. In 23 cases (8%), summary judgment was granted because the case was beyond the statute of limitations. In 18 cases (6%), the claimant failed to show causation. In 40 cases (14%), the neutral held that there was no triable issue of fact without stating a specific reason.

In the year 2002, the summary judgment results are similar to the total figures. Eleven percent of cases were closed by summary judgment (93 of 847). In 63 cases, claimants were in *pro per*.

⁹⁴Before claimants are excluded from this system for not paying the filing fee, they receive four notices from our office and are offered the opportunity to apply for fee waivers. Those excluded have either refused to apply or have failed to qualify. The fee is a uniform \$150 irrespective of how many claimants there may be in a single case. This is lower than court filing fees except for small claims court. If a Kaiser member's claim is below the small claims ceiling amount of \$5,000, the member is free to go there. Both the OIA and Kaiser inform these claimants of their right to go to Small Claims Court.

Twenty-four summary judgments (26%) were granted because the claimant did not have an expert witness. Thirty five (38%) were granted because no opposition was filed. Six (6%) were granted because the case was beyond the statute of limitations. Six (6%) were granted because causation was not shown. One was granted on the basis of waiver or release. And 21 or 23% were granted because claimant failed to show a triable issue of fact without stating a specific reason.

All of these are common reasons for the grant of summary judgment in the courts. It is also important to note that this arbitration system, like most, has no equivalent to the court system's demurrer or motion to dismiss where a case is closed very shortly after it is first filed because, construed in all ways favorable to plaintiff, it fails to state claim for recovery. Since there is no complaint filed in Kaiser arbitration, there is no opportunity to move to dismiss. A case filed beyond the statute of limitations, for example, can be closed through a motion to dismiss in the court system. In arbitration, claims with such defects must be dealt with through summary judgment.

As for timing, for total cases the average number of days to closure of a case by summary judgment was 286 days. The median was 271 days. The mode was 153. The range was 77 to 769 days. For the year 2002, the average number of days to grant of summary judgment was 280 days. The median was 271 days. The mode was 286 days. The range was 108 to 533 days.

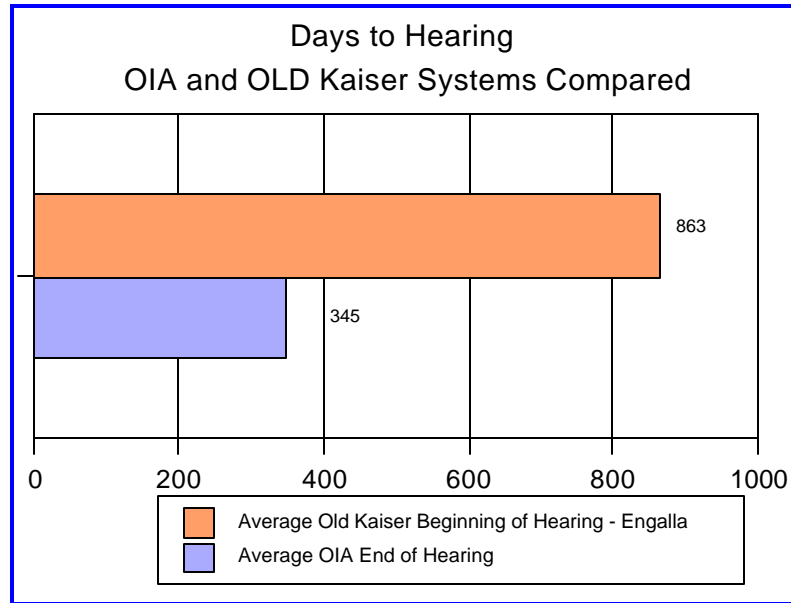
5. Cases Decided After Hearing – 15% of Closures

About 15% of all cases (350 of 2,292) have proceeded through a full hearing to an award. Judgment was for Kaiser in 212 of these cases, or 61%. In 58 of these cases, the claimant was in *pro per*. The claimant prevailed in 39% percent of the cases decided by hearing (138 of 350). In nine of these cases, the claimant was in *pro per*.

The 350 awards were decided by 176 different neutral arbitrators. Ninety-one of the arbitrators made a single award, while 42 decided only two. Forty-three different arbitrators decided the remaining 175 cases with a range of three to ten cases each over the period of 45 months that the OIA has been in operation.

In the cases that have gone to hearing thus far in at the OIA, it has taken an average of 345 days from the time the case entered the system until the end of the hearing. The California Supreme Court in *Engalla* noted that under the old Kaiser system, the hearing did not begin until 863 days, on average, after a case entered the system. The Court noted as well that thereafter the hearing was often conducted over a lengthy period with the taking of evidence being interrupted by lengthy periods. OIA hearings are usually held contiguously.⁹⁵ The following chart illustrates the difference between old Kaiser and OIA hearings.

⁹⁵See Exhibit B, Recommendation 6 and status report.



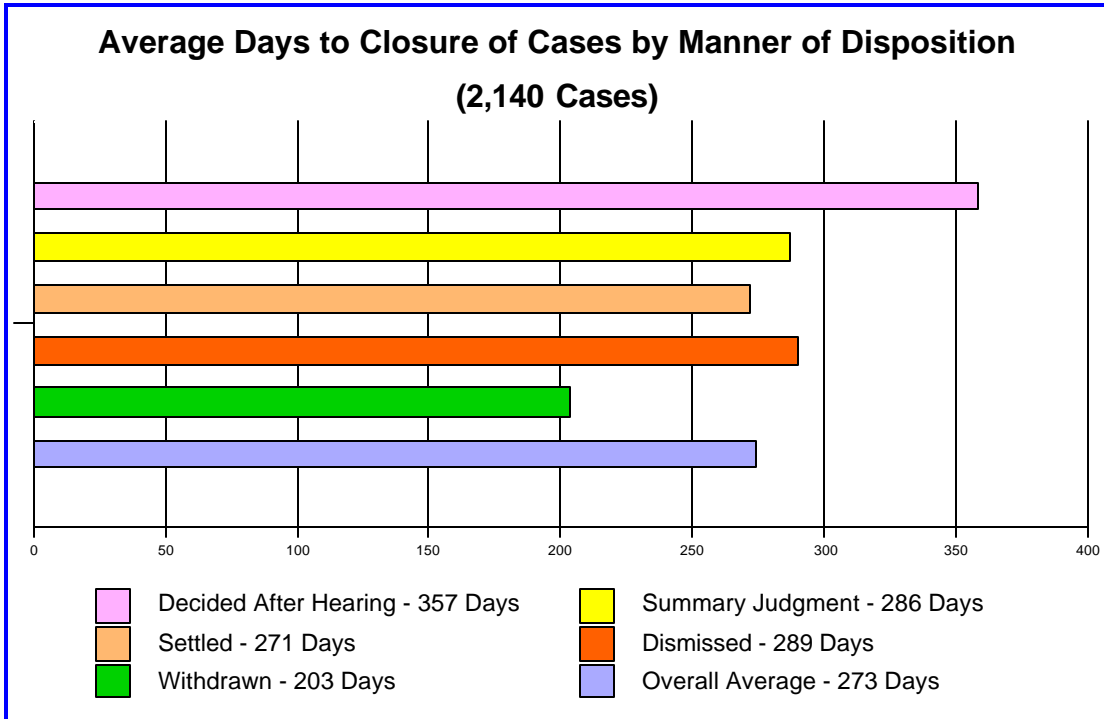
The 350 total cases that have proceeded to a hearing thus far averaged 357 days from the time they entered the OIA to closure. That’s about a year. The median is 334 days. The mode is 288 days. The range is 39 to 1,181 days.

In 2002, there were 119 cases decided by hearing. That’s about 14% of the closed cases (119 of 847). About 57% of these cases were decided in favor of Kaiser (68 of 119). In 14 of these cases, the claimant was in *pro per*. In 43% of these cases, claimant prevailed (51 of 119); in four of these cases, the claimant was in *pro per*. The 119 cases decided by hearing in 2002 averaged 410 days to closure. The median was 370 days. The mode was 264 days. The range was 128 to 1,181 days.

6. The Average Time to Closure of All OIA Cases

All closed cases at the OIA average 273 days to closure, or about nine months. The median is 264 days. The mode is 274 days. The range is 3 to 1,181 days.⁹⁶

⁹⁶The case which took 1,181 days to close was denominated “extraordinary” and is described at section IV. J.3 below. The longest regular case which went to hearing took 1,126 days to close. It first obtained a Rule 28 extension to reopen discovery close to the hearing date. The neutral withdrew shortly afterward because of illness. A new neutral granted a second Rule 28 extension because claimant was ill and under treatment.



During 2002, all closed cases averaged 296 days to completion or about ten months. The median was 281 days. The mode was 274 days. The range was from 3 to 1,181 days.

I. Amounts of Awards – See Exhibit J

Of the 350 cases that have gone to hearing, there have been 138 awards to claimants, which is 39% of such cases. One was in the amount of \$5.6 million. The average amount of an award was \$277,000. The median was \$96,000. The mode was \$175,000. The range was \$500 to \$5.6 million.

During 2002, of the 119 cases that have gone to hearing, there have been 51 awards to claimants, or 43% of awards. The average amount of an award to a claimant was \$399,000. The median was \$168,000. The mode was \$30,000. The range was from \$500 to \$3.8 million.

A list of all awards in chronological order is attached as Exhibit J.

J. Number of Cases Using Special Procedures

The *Rules* include provisions for cases which need to be expedited, that is, resolved in less time than eighteen months. Grounds for expedition include a claimant’s illness or condition

medical doubt of survival, a claimant's need for a drug or medical procedure, or other good cause.⁹⁷ The *Rules* also include provisions for cases which need more than eighteen months to resolution. They are called complex and extraordinary cases. Complex cases need 24 to 30 months for resolution, while extraordinary cases are those that need more than 30 months for resolution.⁹⁸ This section discusses those cases.

1. Expedited Procedures

A total of 42 claimants have requested that their cases be resolved in less than the standard eighteen months, and 31 have received such status.⁹⁹ The OIA received 34 of those requests from claimants before a neutral was selected in the case. In such cases, under Rule 34, the OIA makes the decision. The OIA granted 26 and denied eight without prejudice to the claimant's ability to raise the matter again before the neutral arbitrator. Kaiser objected to seven of the requests for expedited status. The OIA granted five and denied two of the requests to which Kaiser objected. Neutral arbitrators have received eight such requests and have granted seven and denied one. One of the requests granted by a neutral had previously been denied by the OIA.

During 2002, nine claimants requested expedited procedures, eight from the OIA and one from a neutral arbitrator. The OIA granted seven and denied one without prejudice. Of the nine requests, Kaiser objected to one. The OIA granted that one. One neutral arbitrator received and granted one such request. The request had not previously been made to the OIA.

The 31 expedited cases in the OIA system thus far are one percent of the total case load (31 of 3,011). Two remained open at the end of 2002. One expedited case closed in 20 days, through settlement. Another closed after a hearing, in 39 days with judgment for respondent. All closed expedited cases have been decided within the time period set for the case. Those which remain open appear to be on schedule for a timely finish. The average length of time in which they have been decided is 149 days, or five months. The median has been 117 days. The mode has been 104 days. The range has been 20 to 476 days.

In 2002, the average number of days that an expedited case remained open was 101 days, or a bit over three months. The median was 86 days. The range was 41 to 217 days.

As noted previously, 55 cases at the OIA involve benefits and coverage issues, about 2% of the caseload. When this category of the rules was created, the thinking was that many expedited cases

⁹⁷Exhibit C, Rules 33-36 (expedited cases).

⁹⁸Exhibit C, Rule 24(b) (complex cases), and Rule 24(c) (extraordinary cases.)

⁹⁹Two more were granted expedited status but returned to regular status when the claimant died.

would involve benefits and coverage issues, particularly those where claimants were seeking a particular treatment or procedure. However, only two such cases have ever been expedited. Both closed in 2001 in three to four months. There were none so designated in 2002.

2. Complex Procedures

Neutral arbitrators have notified the OIA in 54 cases that they have designated the cases as complex and therefore that they would be resolved in 24 to 30 months. Thirty were so designated in 2001. Only fourteen were designated complex in 2002. The designation does not have to occur at the beginning of a case but may be made as the case proceeds and the parties get a better sense of the information that may be required. The parties and the neutral arbitrator must inform the OIA if a case has been designated as complex. Forty-one complex cases have closed, eighteen of them in 2002. The average length of time for complex matters to close thus far is 632 days, about 21 months. The median is 617 days. The mode is 679 days. The range is from 228 to 1,036 days.

Twenty four cases have been designated as complex because of complex medical issues; eighteen have been so designated because of complex discovery. Nine have been designated as complex by stipulation of the parties, and three have been designated by order of the neutral. Complex medical issues include cases where multiple liability issues exist, or the nature or amount of damages is difficult to ascertain. Complex discovery includes cases involving large document productions, many depositions, or extensive travel to complete discovery.

3. Extraordinary Procedures

The OIA has notice that three cases have been designated as extraordinary and therefore will take more than 30 months for resolution. Two were so designated in 2001, and one was so designated in 2002. One such case has closed. It took 1,181 days, or 39 months. It involved a claimant who was undergoing diagnostic testing for both nature of injury and extent of damage. Expert witnesses were not able to formulate opinions until shortly before the case closed.

4. Rule 28 Postponements Extending Case Length

Through December 31, 2002, the neutral arbitrators had made Rule 28 determinations of “extraordinary circumstances” in a total of 110 cases and extended these cases beyond their month limit.¹⁰⁰ Forty-three such rulings were made in 2001. Fifty-five were made in 2002.¹⁰¹ Of the total 110 cases, 72 remain open, and 38 are closed. The average time to closure for cases so extended

¹⁰⁰In 2002, Rule 28 was amended to state explicitly, “Failure of the parties to prepare for a scheduled hearing or to keep the hearing dates free from other commitments does not constitute extraordinary circumstances.”

¹⁰¹Of these 55 cases, 35 were open at the end of 2002, and 20 were closed.

under Rule 28 is 639 days, about 21 months. The median is 604 days. The mode is 476 days, and the range is 292 to 1,126 days.

In the past, when neutral arbitrators granted a Rule 28 postponement they did not have to explain the circumstances that gave rise to it. However, in July 2002, the rule was amended to require a written order which states the reason and is served on the OIA. Through this mechanism we hope to have more information about this process in the future. Anecdotally, we know that in the past Rule 28 extensions have been granted because of the death of a neutral arbitrator, the death of a party, and health problems of a party or an attorney. They have also been granted pending the outcome of parallel actions which were in the courts.

K. Number of Cases in Which Claimants Have Elected to Proceed with a Single Arbitrator

The Blue Ribbon Panel Report recommended that Kaiser pay the neutral arbitrator's fees and expenses when a claim proceeds with a single neutral arbitrator.¹⁰² The panel made this recommendation both to lower the cost of arbitration to the claimant and because it questioned whether the value added by party arbitrators justified their expense and the additional delay of obtaining and scheduling two more participants in the arbitration process.¹⁰³ Such delay and rescheduling lengthens cases and raises costs for all parties. In the interest of increased speed and lowered expense, the Panel suggested that the system create incentives for cases to proceed with one neutral arbitrator.¹⁰⁴

This recommendation must be balanced with a California statute which gives parties in cases where the claimed damages exceed \$200,000 a statutory right to proceed with three arbitrators, one neutral arbitrator and two party arbitrators.¹⁰⁵ In our system, Rules 14 and 15 try to strike this balance and give the incentive urged by the Panel. Kaiser will pay the full cost of the neutral arbitrator if the claimant will waive the statutory right to a party arbitrator as well as waiving any court challenge to the arbitrator on the basis that Kaiser's paid him/her. If both Kaiser and the claimant waive, the case proceeds with a single neutral arbitrator. Thus far, in all our cases where claimant has waived, Kaiser has also waived. However, even if Kaiser elected not to waive, the claimant would only have to pay his/her own party arbitrator. The full cost of the neutral arbitrator would be paid by Kaiser, if the claimant elected to have Kaiser do so.

¹⁰²Blue Ribbon Panel Report at 41-42, Exhibit B at Recommendation 27.

¹⁰³Blue Ribbon Panel Report at 42.

¹⁰⁴Blue Ribbon Panel Report at 42.

¹⁰⁵California Health & Safety Code §1373.19.

There are also cases where claimants elect to pay their half of the neutral's cost but proceed with a single arbitrator.

At this point, it appears that few party arbitrators are being used in our system. In only 27 cases of the 350 (about 8%) in which we have received an award after hearing, have party arbitrators also signed the award. That means that the remaining 323 cases were decided by a single arbitrator.

We presently have only 25 cases of the 912 now open in which at least one party has designated party arbitrators. In only seven have both sides designated party arbitrators.

L. Cases in Which Claimants Have Elected to Have Kaiser Pay the Fees and Expenses of the Neutral Arbitrator

As noted in the previous section, the Blue Ribbon Panel recommended that all cases be heard by a single neutral arbitrator. While members with claims under \$200,000 do not have a statutory right to a panel of three, they have always had the opportunity to request one. Therefore the OIA *Rules* in implementing the Blue Ribbon Panel's recommendation, also contain provisions to shift the cost of the full payment to Kaiser for those lesser claims. The procedures are simple and voluntary and rely entirely on the claimant's election.¹⁰⁶ For claims under \$200,000, the claimant must waive his/her right to subsequently attack the award in court on the sole basis that Kaiser paid the neutral arbitrator. For claims over \$200,000, the claimant must waive that right and the statutory right to a party arbitrator. The execution of these two waivers transfers the fees and expenses of the neutral arbitrator to Kaiser.

Of total cases at the OIA, 1,300 cases of 3,011 or 43% have executed the waivers that transfer the payment of the neutral to Kaiser. In 314 of these cases (about 24%) the claimant was a *pro per*. In 2002, 407 cases elected to have Kaiser pay the neutral's fees. In 78 of the 2002 cases (about 19%), the claimant was in *pro per*.

However, 43% is a floor rather than a ceiling. Kaiser may be paying in more cases. Many cases settle or are withdrawn early before there is much activity by the neutral. Therefore, claimants may never have found it necessary to file the waivers either because little or no expense was incurred or because the cost was transferred by the settlement agreement. In the future, the OIA will have more information on this point. A statute first effective in 2003 requires that provider organizations report both how much arbitrators are paid in a given arbitration and how the payment is allocated between the parties.¹⁰⁷ The OIA will post this information on the web as well as including it in future annual reports.

¹⁰⁶See Exhibit C, Rules 14 and 15.

¹⁰⁷Cal. Code Civ Pro. §1281.96

M. Neutral Arbitrators' Evaluations of the OIA System

Under Rule 48, when cases close, the neutral arbitrators complete questionnaires about their experiences with the Rules and with the overall system.¹⁰⁸ The information is solicited to evaluate and improve the system. The OIA designed this form with input and comment from Kaiser and the AAC, and began using it during 2000. At the end of the year 2002, the form had been returned by 1,277¹⁰⁹ arbitrators in 1,517 closed cases¹¹⁰ for a response rate of 84%. We received 286 substantive responses¹¹¹ during 2002 (out of 341 sent), for a response rate of 84%. Considering either all of the responses, or just the responses from 2002, the results continue to show a high degree of approval of, and satisfaction with, the *Rules* and the OIA.

The questionnaires sent to the neutral arbitrators include three statements and ask them to state whether, on a scale from 1 to 5, they agree or disagree. As it does on the form sent to parties and their attorneys, 5 represents the highest level of agreement.

The neutrals averaged 4.7 in saying that the procedures set out in the Rules had worked well in the specific case. The responses averaged 4.9 in saying that based on this experience they would participate in another arbitration in the OIA system. They averaged 4.9 in saying that the OIA had accommodated their own questions and concerns in the specific case. The median and the mode for each of these three responses was five. In the year 2002 alone, the averages are the same or higher, and the median and mode for each item remain five.

The questionnaires also include two questions that ask arbitrators to check off features of the system which worked well or poorly in the specific case. The vast majority of those who responded were positive about all areas except one, the timing of the award, which received mixed results. While some who returned these forms left some or all of these questions blank, these are the responses of those who did not:

¹⁰⁸The form and an analysis of responses is attached as Exhibit M.

¹⁰⁹The actual number returned was 1,385; however 108 were blank. They are not included in the following discussion.

¹¹⁰The total number of closed cases, 2,292, is higher. The number in the text is of those cases to which we mailed questionnaire forms. The OIA does not send arbitrator questionnaires to closed cases where a neutral was never appointed, or where the case was closed before an arbitration scheduling conference was held. This eliminates cases that settle early or are withdrawn shortly after the arbitrator is selected. This policy took effect after our first year of mailing them when large numbers of questionnaires were returned blank with a note from the neutral saying s/he had never met with the parties and had nothing to say about the case.

¹¹¹Twenty-two were returned blank.

The manner of a neutral's appointment was checked as working well by 936 neutrals, while only 22 thought it needed improvement.

[In year 2002, 224 said working well; five said needed improvement.]

The early management conference was checked as working well by 989 neutrals and as needing improvement by only 28.

[In year 2002, 235 said working well; seven said needed improvement.]

The availability of expedited procedures was checked as working well by 351 neutrals and as needing improvement by seven.

[In year 2002, 91 said working well; two said needed improvement.]

The claimant's ability to have the respondent pay the cost of the neutral was checked as working well by 475 neutrals and as needing improvement by 31.

[In year 2002, 119 said working well; nine said needed improvement.]

The system's rules overall were seen as working well by 789 and as needing improvement by 28.

[In year 2002, 200 said working well; seven said needed improvement.]

The requirement that a hearing be held in eighteen months was marked as working well by 442 neutrals and as needing improvement by 28.

[In year 2002, 110 said working well; five said needed improvement.]

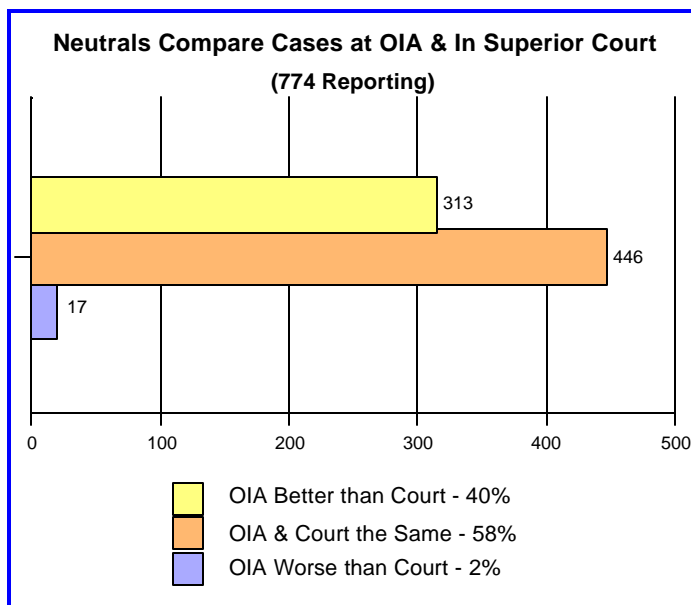
The availability of complex/extraordinary procedures was marked as working well by 86 neutrals and as needing improvement by eleven.

[In year 2002, 34 said working well; three said needed improvement.]

Only one area was controversial. The *Rules* formerly required that a written decision be served on the parties and OIA within ten calendar days after a hearing. Neutral arbitrators have telephoned the OIA about this rule and have been late in serving decisions. On this questionnaire, 93 marked "award within ten days of hearing" as needing improvement. However, 285 marked the award within ten days of hearing as working well. In the year 2002, 30 marked this as needing improvement and 84 marked it as working well. That 40% request for change in this area is the same percentage seeking

37 was amended to expand the time of service of the decision on parties and the OIA to 15 business days rather than 10 calendar days. The time for complex and extraordinary cases was expanded to 30 business days.

Finally, the questionnaires asked the neutrals whether they had experienced a similar case in the Superior Court, and if so, whether they would rank the OIA experience as better, worse, or about the same. Seven hundred seventy-four (774) neutrals responded that they had such parallel experience and made the comparison. Three hundred and thirteen or 40% said the OIA experience was better. Four hundred and forty-six or 58% said it was about the same. Only seventeen — 2% of those responding — said the OIA experience was worse. In 2002, the percentages are almost identical.¹¹²



The neutrals offered a number of suggestions for improvement in the system. Technological change was high on the list. They asked that the OIA communicate by e-mail. We are happy to do so when the neutral has an e-mail address, and could not possibly have accomplished as much as we did in this year of the Ethics Standards without it. However, a number of our neutrals have told us that they do not use e-mail. We encourage any neutral with an e-mail address to make sure that the OIA has it. We also communicate with a number of attorneys and *pro pers* by e-mail. Another neutral suggested that the OIA provide the possibility

¹¹²In 2002, 168 neutrals made the comparison. Sixty-four or 38% said the OIA process was better than court; 102 or 60% said it was about the same. Four or about 2% said it was worse.

mail. Another neutral suggested that the OIA provide the possibility of filling out required forms on its website. We are researching this capability for possible use in the future.

The neutrals have also commented often that *pro pers* in the system need more help. These comments should be considered against the background information that a quarter of the claimants are *pro pers*, and 13% of our neutral arbitrations (39 of 297) have declined to hear their cases; some have reported that *pro pers* need help which the neutral cannot provide. The neutrals have suggested the following: that an independent attorney confer with *pro pers*; that an ombudsperson exist for *pro pers*; that *pro pers* should be provided with an advocate, perhaps a law student; that perhaps *pro pers* could be given a way to survive summary judgment; that *pro pers* should automatically be provided with a copy of the relevant medical records, and that *pro pers* generally need a better way of understanding what is happening in arbitration.

V. THE ROLE OF THE ARBITRATION OVERSIGHT BOARD (AOB)

A. Membership

As we reported last year, in April 2001, Kaiser announced the formation of a new oversight board for the arbitration system with its members. The Arbitration Oversight Board (AOB) replaced the earlier Arbitration Advisory Committee which had served for over two years. The AOB is chaired by David Werdegar, M.D. Dr. Wedegar is the former director of California's Office of Statewide Health Planning and Development and is Professor of Family and Community Medicine, *Emeritus*, at the University of California, San Francisco, School of Medicine. The Vice-Chair of the AOB is Cornelius Hopper, M.D., Vice President for Health Affairs, *Emeritus*, of the University of California System.

The membership of the AOB is a distinguished one. There are eleven board members, besides the two officers. All were originally chosen by Dr. Werdegar, after consultation with others. They represent various stakeholders in the system, such as members, doctors, nurses, employers and lawyers. There are also outstanding public members. No more than four of the complete board of thirteen may be Kaiser affiliated. All will serve staggered terms. They are, in alphabetical order:

Terry Bream, R.N., M.N. Administrator, Department of Clinical Services, Southern California Permanente Group. Pasadena.
(Formerly served on the AAC).

Lark Galloway-Gilliam, MPA, Executive Director, Community Health Councils, Inc., Los Angeles.

Tessie Guillermo, President and CEO, Community Technology Foundation of California, San Francisco.

Dan Heslin, former Director of Employee Benefits at Boeing, Murrieta. (Formerly served on the AAC).

Mary Patricia Hough, medical malpractice attorney representing plaintiffs, San Francisco.

Bruce R. Merl, M.D., Director of The Permanente Medical-Legal/Risk Management/Patient Safety Group, Oakland.

Rosemary Manchester, MBA, a member of Kaiser for many years. She is a volunteer counselor with HICAP, the Health Insurance and Counseling Program, which does Medicare counseling. Sebastopol.

Kenneth Pivo, medical malpractice attorney representing respondents, practicing in Irvine. (Formerly served on the AAC).

Honorable Cruz Reynoso, Professor of Law, King Hall School of Law, University of California, Davis, and former California Supreme Court Justice. Davis.

Charles Sabatino, Vice-President, Claims, Kaiser Foundation Health Plan, Oakland.

Honorable Linda Sanchez-Valentine, Member of the United States House of Representatives, formerly Executive Secretary-Treasurer, Orange County Labor Council. Santa Ana.

B. Assignment of the OIA Contract

In June 2002, the contract between Kaiser and Sharon Lybeck Hartmann, under which the OIA was created and has since operated, was assigned to the AOB, with the consent of both parties. A separate trust was also established and fully funded by Kaiser providing the source of the money with which the AOB can meet the contractual obligations to the OIA for payment. Simultaneously, the *OIA Rules* were modified to transfer to the AOB the final authority to make changes in them.¹¹³ That final rule-making power was formerly held by the Independent Administrator, although it was always to be exercised in consultation with Kaiser and the AOB. However, since the AOB now exists as an oversight group independent of Kaiser, it seemed proper for the final power to rest with it. The

¹¹³Exhibit C, Rule 50.

consultation provisions for rule making remain. The basis on which the *Rules* may be changed by the AOB is carefully defined in the final version of the group's by-laws which are attached to this report.¹¹⁴

The AOB takes an active role. It meets at least quarterly to review operation of the OIA and receive reports from OIA staff. It also discusses with the OIA staff problems and challenges for the system, overall policy and goals. Officers of the AOB are in regular contact with the OIA by e-mail and by telephone. For example, AOB officers read and commented upon advance drafts of the OIA's comments to the Judicial Council on the Ethics Standards before those comments were submitted this past year. Both Hartmann and Dr. Werdergar appeared before the legislature in March 2002 as invited committee witnesses to present neutral testimony about the operation of the OIA system to a joint hearing of the Assembly Health and Judiciary Committees held to consider mandatory arbitration of health care disputes. After this hearing, the Assembly Judiciary Committee produced the package of legislation that made its way into law this past year. AOB officers Doctors Werdegar and Hopper have both visited the OIA for day long periods, met with all of its staff and observed its operations. All members of the AOB are welcome to visit at any time and all have been invited to do so.

The AOB also reviews the draft annual report and comments upon it with particular reference to how well the OIA is achieving the goals formulated by the Blue Ribbon Panel, which is, in effect, its mission statement. Exhibit P is the AOB Review of this Report. Last year, it noted that the Ethics Standards would soon be arriving, and stated that it would be working closely with the OIA to assure that the *Rules* and OIA operations were in conformity with the code.¹¹⁵ The AOB was busy this year working with the OIA on those needed changes and the others prompted by legislative action. Significant portions of this report reduce to writing the oral reports that the OIA staff have been making to the AOB in the course of the year about the interaction between the Ethics Standards, proposed legislation and the *OIA Rules*.

Last year in its letter of comment on the Third Annual Report, the AOB said:

The body of information provided by the OIA reports provides stimulus for future Board deliberations: What are the best bench marks for following trends in the arbitration system? What further evaluations of the system are necessary? Would surveys of health plan users be useful? Can the system be improved in terms of language accessibility? Can "pre-arbitration" procedures be enhanced? Would modifications of procedures or approaches to arbitration be useful for pro per cases? These and other pertinent questions arising in the course of discussion of the OIA report will be matters for future Board consideration.

As this report makes clear, all those issues remain relevant.

¹¹⁴See Exhibit K, sections 2.1(f) and 2.3(f).

¹¹⁵Third Annual Report, Exhibit N at 168-170.

C. Selection of New Independent Administrator

In March 2002, Sharon Lybeck Hartmann also gave notice to the AOB and to Kaiser that she planned to retire and, as a consequence, did not wish to renew her contract to act as Independent Administrator when it expired on March 28, 2003. Hartmann gave a year's notice so that there would be ample time to select another Independent Administrator.

After consideration, the AOB decided upon Sharon Oxborough, a California attorney, who has been Of Counsel with the Hartmann firm since 1994. She drafted and was one of the negotiators of the original *Rules* and forms used by the OIA. She has consulted on issues throughout the existence of the OIA, and in 2001 she acted as Director of the OIA when Marcella Bell was on maternity leave. She has twenty years of experience in general civil litigation, appeals and alternative dispute resolution. She is a graduate of Hamline University, *summa cum laude*, and of Harvard Law School, *cum laude*, where she was an editor of the law review. Immediately thereafter, she served as a federal law clerk to the Honorable Edward Rafeedie, United States District Court Judge, in the Central District of California. Oxborough plans to keep the OIA at the same address, with the same phone numbers and has licensed from Hartmann the software for tracking cases at the OIA that the Hartmann firm created and has used. The same staff remains. For users of the system, the change should be close to transparent. Oxborough will have a new website, www.oia-kaiserarb.com. People will be directed there from the earlier OIA website.

VI. CONCLUSION

In keeping with the recommendations of the California Supreme Court and the Blue Ribbon Panel on Kaiser Permanente Arbitration, the Office of the Independent Administrator has created, and in co-operation with the Arbitration Oversight Board, is operating an independently administered system of arbitration for Kaiser and its members that is fair, fast, low cost and confidential.

This report describes the degree to which these goals are being met. The OIA, the AAC and Kaiser originally set qualifications for neutral arbitrators hearing Kaiser arbitrations. Applying them, the OIA has recruited a panel of 297 neutral arbitrators willing to hear Kaiser cases throughout the state of California. The OIA, Kaiser and the AOB negotiated and amended a set of rules that provide deadlines and procedures for Kaiser arbitrations and meet the requirements of applicable statutes and regulations. The AOB provides on-going oversight of the OIA. So far a total of 3,204 claimants have entered the system governed by the *Rules* and administered by the OIA. In the OIA system, neutral arbitrators are selected as quickly as applicable statutes will permit. This year we were somewhat slowed by a single provision of the Ethics Standards, but that has now been removed. Parties and arbitrators are holding early management conferences and setting hearing dates at the outset of cases which are largely adhered to. The OIA is monitoring cases to ensure that hearings and other events are being completed by their deadlines. Thus far, in the cases we have administered, all but six of 2,292 closed cases have met their final deadlines. Of those six, four have been less than a week late.

Of particular note, the OIA system has greatly reduced the amount of time that elapses from the time the health plan receives a demand for arbitration until a neutral arbitrator is selected. In the OIA system, the average for all cases combined is 52 days. This is 13 times faster than the average of 674 days to appointment of a neutral arbitrator in the old Kaiser system as reported by the California Supreme Court in *Engalla v. Permanente Group*. Similarly, *Engalla* reported that the old system was taking 863 days to begin a hearing. The OIA average to the end of a hearing is now 345 days.

We have also made great efforts to make our system fair. We collect large amounts of information about our arbitrators, including decisions rendered in our system and evaluations of parties who have previously used a given neutral. We make that information available to all parties before they select their neutral arbitrator. We supply our arbitrators with all of the information listed by the Ethics Standards for provider organizations so that they can make full disclosure about the OIA. We also monitor some aspects of the disclosure statements which neutrals serve after their appointment to be certain that they are revealing information as required by California's Ethics Standards. We have also posted on the internet much of the provider organization information listed by the Ethic Standards in a computer searchable format. This makes it available to the general public as well as to parties in our cases.

The OIA system has existed for 45 months. The data provided in this report show that thus far the OIA, in cooperation with the AOB, is ensuring that the deadlines and procedures found in the *Rules* are being followed in all of the Kaiser arbitrations it is administering and that the goals set in the Blue Ribbon Panel Report are being realized.