

THIRD 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, 2001 - December 31, 2001

REPORT SUMMARY

Kaiser Foundation Health Plan, Inc., has arbitrated all disputes with its members since 1971. In the 1997 *Engalla* case, the California courts criticized Kaiser's system, saying that it should not be self-administered and that there was too much delay in the handling of members' claims. In response, Kaiser and its citizen advisory board selected the Law Offices of Sharon Lybeck Hartmann to create the Office of the Independent Administrator ("OIA") and operate this system. This is the third report on the results of the independent administration and describes the system as of December 31, 2001. Here are some of the highlights:

1. **Number of New Demands Forwarded to the OIA.** To date, Kaiser has forwarded 2,968 demands for arbitration to the OIA from its six million members in California. This averages to about 90 demands a month, which is the same average that we reported in the second annual report. In 2001 alone, we received 1,030 demands from Kaiser. See pages 11-12.
2. **Increase in Demands Making Use of the OIA Mandatory.** Until 2001, almost all of the demands Kaiser sent to the OIA were cases where claimants could choose whether they wanted to be part of our system or remain in the old Kaiser system. During 2000, Kaiser amended all of its contracts with members to make the use of our office mandatory. Now all disputes arising under the amended contracts are subject to OIA administration. As of December 31, 2001, 825 claims in the OIA system were mandatory as compared to one year earlier when only 101 claims were mandatory. Of the demands forwarded to the OIA during 2001, 70% were mandatory (724 out of 1,030). Of the 766 open cases, 551 are mandatory (72%). See pages 11-12, 26.
3. **Increase in Open Cases.** On December 31, 2001, the OIA had 766 open cases. This is an increase of 24% since last year, when we had 617 open cases, and results from the rising number of mandatory cases. See page 26.
4. **Average of 44 Days to Selection of a Neutral Arbitrator.** The OIA continues to move quickly in selecting neutral arbitrators. For purposes of comparison, the California Supreme Court said that under Kaiser's old system, it averaged 674 days to select a neutral arbitrator. Through December 31, 2001, the OIA averaged 44 days to select a neutral arbitrator in all cases. In cases where the parties did not seek a postponement or disqualify a neutral arbitrator the OIA averaged 24 days. Claimants were responsible for approximately 70% of the disqualifications and for nearly all postponements. See pages 14-16, 18-19.

5. **Hearings.** Arbitrators have made a total of 228 awards since the OIA system began. There were 104 awards in the first 21 months and 122 awards in 2001 alone. The average time to complete these 228 cases is 328 days or about 11 months, which is 50 days longer than reported last year. According to the *Engalla* decision, the “old Kaiser system” average to the first day of hearing was 863 days, or 2 years and 4 months. See page 30.
6. **Closed Cases.** Of the closed cases, 44% have settled, which is about the same as last year. Our average time to closure of all cases is 259 days, about nine months, which is about one month longer than reported last year. All but one of the closed cases have met their deadlines for completion under OIA *Rules*. See pages 27, 28, 31.
7. **Expedited Cases.** There have been a total of 22 expedited cases in the OIA system thus far, a total of 1% of our caseload. Twenty of these cases are closed, and two remain open. One case settled in 20 days, while another closed after a hearing in 39 days. The average length of time in which expedited cases have been decided is 149 days, or 5 months. All closed cases were decided within the accelerated timetable set for the case. See pages 32-34.
8. **Neutral Arbitrators.** We have 306 neutral arbitrators on our panel. One third, or 102, of the panel are retired judges. Seventy-nine percent (79%) of all neutral arbitrators on our panel, or 241 out of the 306, have served at least once. Since the OIA began, on average, each neutral arbitrator has served five times. See pages 3-4, 6-7, 9.
9. **Claimants Elect to Have Kaiser Pay the Neutral Arbitrator.** Claimants have elected to have Kaiser pay the neutral arbitrator’s fees and expenses in at least 43% of all cases administered by the OIA. This is an increase of three percent from the second annual report. See pages 36-37.
10. **Party Arbitrators Rarely Used.** Few party arbitrators are being used in our system; therefore most cases are proceeding with a single neutral arbitrator, rather than a panel of three. We have received designations of party arbitrators in only 14 of the 228 cases decided by hearing (6%). The remaining 214 (94%) were decided by a single neutral arbitrator. We have received a designation of party arbitrator in only 20 of the 766 open cases (3%). See page 36.
11. **Types of Cases.** Approximately 90% of all the cases in our system are medical malpractice cases. The remaining demands concern premises liability, benefits, other torts, or do not specify the basis of the claim. Benefit disputes make up less than two percent of the cases. See pages 21-22.

12. **Claimants.** Approximately 25% of the claimants are not represented by counsel. This percentage has remained stable. See page 22. In discussing the manners in which cases are resolved, the report states, for each category, the number of cases in which the claimant was not represented by counsel. See pages 23, 27-30.
13. **Positive Party Evaluation of Neutrals.** Party evaluations of the neutral arbitrators continue to be very positive. The average responses of claimant attorneys increased slightly during 2001. See pages 9-11.
14. **Positive Neutral Evaluation of OIA Procedures.** Neutral arbitrators continue to evaluate the OIA positively. Among other things, we ask whether the neutrals have experience in a similar Superior Court case, and if so, whether they would rank this particular OIA experience as better, worse or about the same. In 2001, of the 302 neutral arbitrator responses, 131 (43%) said the OIA experience was better, 165 (55%) said it was the same, and only 6 (2%) said it was worse. See pages 38-40.
15. **New Ethics Code for Neutral Arbitrators.** During this reporting period, the California Legislature passed a statute mandating the Judicial Council to draft a code of ethics for neutral arbitrators, effective July 1, 2002. At the time of this writing, the standards have not been finalized. They may create certain obligations for neutral arbitrators, for example, to obtain permission of the parties in current cases before accepting an additional case, or rights for the parties, for example, the right of continuing automatic disqualification. This would affect the OIA system, require amendments to our *Rules*, and may increase the time needed to select a neutral arbitrator and/or to arbitrate a case. See page 42.
16. **Most Blue Ribbon Panel Recommendations Achieved.** After the *Engalla* decision, Kaiser convened a Blue Ribbon Panel to study its arbitration system and recommend improvements. The Blue Ribbon Panel Report, which brought the OIA system into being, made 36 recommendations for change in the old Kaiser arbitration system. In Exhibit B of this report, we have set forth in full all 36 of those recommendations along with the status of each. We conclude that 27 have been completed and another 4 are essentially on-going in nature. Two have not been done. About three, we have no knowledge since we are not involved in their implementation. See pages 47-59.
17. **Arbitration Oversight Board.** The Arbitration Oversight Board (“AOB”) is composed of stakeholders in the Kaiser Permanente System and members representing the public. The AOB was formed in 2001 to replace the former Arbitration Advisory Committee and is designed to oversee this office and the Kaiser arbitration system. The AOB met three times in 2001 and has reviewed the draft of this report. See pages 41-42.

Complete copies of this report are available to Kaiser members, the public and the media. They can be obtained from the Kaiser Permanente Member Service Customer Center, (800) 464-4000, or from the OIA at (213) 637-9847. The report can also be read 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.

The report has rounded percentages and averages. Therefore, the percentages may not always total exactly 100%.

We provide both numbers for the entire time covered by the report (March 29, 1999 to December 31, 2001) – sometimes called the total period—and for just the year 2001.

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

This third annual report, issued by the Office of the Independent Administrator (“OIA”),¹ describes an arbitration system that handles claims brought by Kaiser members against Kaiser Foundation Health Plan, Inc. (“Kaiser”) or its affiliated entities. The Law Offices of Sharon Lybeck Hartmann has acted as the OIA since October 1998, when Kaiser and the Arbitration Advisory Committee selected it to act as the independent administrator of Kaiser’s mandatory member arbitration system in California.² Under that contract, in 2001 the OIA has maintained its pool of neutral arbitrators qualified to hear Kaiser cases and independently administered arbitration cases brought by Kaiser members. The contract also requires that the OIA write an annual report describing the arbitration system it administers. The report must describe the goals of the system, the actions being taken to achieve the system’s goals, and the degree to which those goals are being met.³ Our third annual report covers our activity through December 31, 2001.⁴

A. Background Information

In 1997, the California Supreme Court criticized Kaiser’s arbitration system in *Engalla v. Permanente Medical Group*.⁵ In this opinion, the Court said that the system should not be self-administered and that there was too much delay in the handling of members’ claims. In response, Kaiser convened a Blue Ribbon Advisory Panel to evaluate its arbitration process and recommend improvements. The Blue Ribbon Panel

¹ The OIA is 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 where this report, our first and second reports, *the Rules for Kaiser Permanente Member Arbitrations Overseen by the Office of the Independent Administrator*, and much other information can be downloaded. It is located at www.slhartmann.com/ويا. A firm profile and a description of the OIA’s staff are attached as Exhibit A.

² Kaiser 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 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.

³ *Agreement Between Kaiser Foundation Health Plan, Inc. and the Law Offices of Sharon Lybeck Hartmann Creating the Office of the Independent Administrator of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System for Disputes with Health Plan Members*, Section D(15)(i) at 10. Copies of the entire contract and its amendments may be obtained from the OIA.

⁴ The 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. This annual report covers calendar year 2001, January 1 through December 31, 2001.

⁵ See *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 64 Cal. Rptr.2d 843, 938 P.2d 903 (1997).

issued a report in January 1998.⁶ In response to this report, Kaiser created the Arbitration Advisory Committee (“AAC”) to help enact the recommendations the Blue Ribbon Panel made. Kaiser and the AAC issued an RFP, interviewed candidates, and selected the Law Offices of Sharon Lybeck Hartmann to create and operate its system.

On April 13, 2001, Kaiser announced the appointment of the Arbitration Oversight Board (“AOB”), made up of representatives of stakeholder interests and public members, which replaced the AAC.⁷ The AOB provides ongoing oversight of the independently administered system. As part of this task, the AOB reviewed a draft of the third OIA annual report before its general release.

B. Goals of the OIA System

Consistent with the critique of the California Supreme Court and the recommendations of the Blue Ribbon Advisory Panel, the OIA attempts to offer a fair, timely, low cost arbitration process that respects the privacy of all who participate in it. These goals are set out in Rules 1 and 3 of the *Rules for Kaiser Member Arbitrations Overseen by the Office of the Independent Administrator* (“Rules”).⁸ As documented in the balance of this report, we believe that the goals are currently being realized.

II. Creation and Development of the System

A. Rules for Kaiser Member Arbitrations Overseen by the OIA

The first annual report discussed the creation and development of the *Rules*. They consist of 53 rules in a 15 page booklet, and are available in English, Spanish, and Chinese. They are attached as Exhibit C. Some important features contained in the *Rules* include:

Deadlines requiring that most cases be resolved within 18 months from the date that the OIA receives a claimant’s demand for arbitration and filing fee;⁹

⁶ The Panel’s report is entitled *The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement* (“Blue Ribbon Panel Report”). It is a 45-page document containing a description of Kaiser’s arbitration system through 1997, including historical background, and the Panel’s 36 recommendations for improvement. Each of the Panel’s recommendations and a brief discussion of their status is set forth in Exhibit B to this Report. The Blue Ribbon Panel Report itself is available from Barbara Nelson, Kaiser Foundation Health Plan, Legal Department, 1950 Franklin Street, 17th Floor, Oakland, California 94612.

⁷ The formation and role of the AOB is further discussed in section V, page 41.

⁸ The *Rules* are attached as Exhibit C.

⁹ Exhibit C, Rule 24.

Deadlines requiring that most cases must have neutral arbitrators in place no later than 33 days after the OIA receives a claimant's demand for arbitration and filing fee;¹⁰

Procedures under which claimants may choose to have Kaiser pay the fees and expenses of the neutral arbitrator;¹¹

Timing options for cases that require more or less time than 18 months for resolution.¹²

The *Rules* have not changed since they were first adopted in March 1999. During 2001, the OIA consulted with Kaiser and the AOB about amendments to the *Rules*. We expect these changes to be completed shortly.¹³ Additionally, proposed ethics standards for neutral arbitrators currently being formulated by the Judicial Council will also require that the *Rules* be modified to comply with and accommodate them.¹⁴ The new ethics standards will take effect on July 1, 2002, and the new *Rules* will be issued before then. They will be posted on the OIA website as soon as they are available.

B. Maintenance and Expansion of the Panel of Neutral Arbitrators

The first annual report discussed the creation and development of our panel of neutral arbitrators. As of December 31, 2001, we had 306 neutral arbitrators in service. Most of these neutral arbitrators joined our panel during the first and second years of the OIA. However, in 2001, we received 76 requests for applications, 24 of which were completed and returned (32% of those requested).¹⁵ Individuals who requested

¹⁰ Weekends and holidays sometimes increase the number of days. Rule 43 explains how days are counted in the system. The 33 day deadline does not apply to cases where claimants obtain a 90 day postponement to select a neutral arbitrator or to cases where a party disqualifies the neutral arbitrator under statutory provisions. *See* Exhibit C, Rules 20 and 21.

¹¹ Rules 14 and 15 explain how claimants may shift the responsibility to pay all of a neutral arbitrator's fees and expenses to Kaiser. *See also* Exhibit B at Recommendation 27.

¹² *See* Rules 24 and 33; *see also* Exhibit B at Recommendation 7.

¹³ None of the changes will alter the features highlighted above.

¹⁴ *See* section VI, page 41.

¹⁵ About 23% of the applications requested were completed and returned to the OIA in its first and second years. The arbitrator application is long. Some potential neutrals do not want to take the time to complete the application, and some do not want to give references drawn from past arbitrations or trials in which they have participated. A copy of the application is attached as Exhibit D.

applications last year or had previously submitted incomplete applications, also returned applications in 2001. Forty-two (42) neutral arbitrators were added to our panel in 2001.¹⁶

Total Number of Application Requests Received:	2182
Total Number of Completed Applications Received:	514
Total Number of Arbitrators in the OIA Panel:	306*
Southern California Total:	169
Northern California Total:	117
San Diego Total:	40
*The three regions total 326 because 20 neutral arbitrators are on two panels.	

The number of neutral arbitrators on our panel has decreased by 43 since December 31, 2000. There are three reasons for this decrease. First, 34 neutral arbitrators were removed from our panel because they failed to provide updated information to their applications.¹⁷ Second, 29 neutral arbitrators died, resigned, or retired, and one was terminated from our panel.¹⁸ Third, since the second annual report, we have modified how we report the total number of neutral arbitrators on our panel. We previously added the number of neutral arbitrators serving in each of our geographic regions, Southern California, Northern California, and San Diego. Some neutral arbitrators serve in two regions, and were thus counted twice in this total. We no longer do this. Twenty (20) of the 306 neutral arbitrators on our panel serve on two panels.

¹⁶ Overall, about 77% of all arbitrators applying to the OIA have been admitted to the panel (395 of 514). When it receives a completed application, the OIA applies the criteria, which were jointly decided upon at the outset, and makes the decision on admission. Anyone not admitted has failed to meet one or more of the published qualifications. The letter of rejection cites the specific qualification(s).

¹⁷ See section II.B.3, page 6, *infra*.

¹⁸ The neutral arbitrator was terminated because he notified our office that he was representing a claimant in a matter in our system. Neutral arbitrators on the OIA panel may not serve as attorney of record for or against Kaiser for a period of five years prior to serving as a neutral arbitrator or while serving on the OIA panel. This includes service as a party arbitrator. See Exhibit E, paragraph 6.

1. Qualifications

Except for one addition,¹⁹ the qualifications for neutral arbitrators have remained the same since the inception of the system. The list of qualifications is attached as Exhibit E, and is also available from the OIA website, www.slhartmann.com/oia.

In keeping with the Blue Ribbon Panel's recommendations in this area, the qualifications are broad and were designed to recruit a large, diverse, unbiased panel. The qualifications include the following: neutral arbitrators cannot have served as attorneys of record or as party arbitrators for or against Kaiser within the last five years; arbitrators must have been admitted to the practice of law for at least ten years, with substantial litigation experience; and arbitrators must provide satisfactory evidence of their abilities to act as arbitrators based upon judicial, trial, or other legal experience or training. In order to make the panel as broad as possible, and also to approximate the experience of the parties in a courtroom setting, the qualifications do not contain a requirement that the potential arbitrator have medical malpractice experience.

2. Application

The application to join the OIA pool of neutral arbitrators is attached as Exhibit D. It is a lengthy document. Prospective arbitrators must provide a wide range of information, including their educational background, employment history, a summary of their legal experience, and information about their arbitration experience. They must provide detailed information about prior involvement in Kaiser cases. They are required to provide references from the last five matters where they acted as an arbitrator, attorney, or other role. They also list any languages they speak or in which they would be willing to hold an arbitration. When the OIA provides the parties in a case with a list of 12 possible arbitrators, for the purpose of striking and ranking their selections, the parties receive a complete copy of each arbitrator's application.

The application also includes a document called "Schedule of Fees and Costs." In this section, neutral arbitrators set out information related to their charges for services. The OIA also sends this to the parties. Neutral arbitrators in the OIA pool may not change the fees listed on their Schedule of Fees and Costs during an operating year or

¹⁹ The second qualification originally read:

Neutral arbitrators shall not have received public discipline or censure from the state bar of California or any other state bar in the past five years.

A second sentence has been added, which explicitly applies this restriction to former judges:

In the case of former judges, they shall not have received public discipline or censure from any government body that has authority to discipline judges in the past five years.

during the pendency of a specific case. Neutral arbitrators on the OIA panel are otherwise free to set their rates as they see fit. The range in rates is quite wide.²⁰

3. Annual Update to Application

Once a year, we send a letter to all panelists asking them to update their application information and offering an opportunity to change their Schedule of Fees and Costs. This updated information is included in the material sent to parties.²¹ In 2001, since many members of the pool had been there since its inception, and the reference information could be more than two years old, the updating of information was mandatory.

In May 2001, we sent a letter to the 334 panelists, requiring them to complete a Statement of Annual Update Form²² and permitting them to complete a new Schedule of Fees and Costs. A month later, the OIA sent a second letter to those panelists who had failed to send in a Statement of Annual Update Form and informed them that if they failed to respond by July 20, 2001, they would be removed from the panel. Prior to this deadline, we called and e-mailed panelists who did not respond to these two mailings.

Two-hundred eighty-four (284) panelists (85%) provided the requested information. Thirty-four (34) neutral arbitrators (10%) chose not to update their information and thus were removed from our panel. None of the panelists who were removed had open cases in our system, and only four had ever been selected to serve as a neutral arbitrator on a matter in our system. Sixteen (16) neutral arbitrators (5%) resigned prior to the deadline to return the Update Form.²³

4. The Panel of December 31, 2001

For the convenience of the parties and for ease of administration, the panel of neutral arbitrators maintained by the OIA is split into three parts, Northern California,

²⁰ Under Rules 14 and 15, claimants may elect to have Kaiser pay all of the neutral arbitrator's fees and expenses. Section IV.K, page 36-37, *infra*, of this report discusses how many claimants have elected to follow the procedures set out in Rules 14 and 15.

²¹ If neutral arbitrators choose to change their fees, the updated schedule of fees and expenses replaces the original. If such neutral arbitrators have already been selected for cases, their original schedule still applies throughout those cases.

²² The Statement of Annual Update Form asked for updated information to two sections of the application, Sections XIII, Previous Involvement in Kaiser Cases, and XVIII, References, as well as any other information needed to update the application. A copy of the Statement of Annual Update Form is included as Exhibit F.

²³ Six of these neutral arbitrators had never had a case in the OIA system, six had one case each, and two had two cases each. One of the neutral arbitrators with two cases resigned because he accepted a position with a law firm that represents Kaiser in arbitrations in our system. One neutral arbitrator who resigned had seven cases, and one had nine cases. These two neutrals resigned for reasons unrelated to the updating requirement.

Southern California, and San Diego.²⁴ As of December 31, 2001, there were 306 neutral arbitrators on the OIA panel, which includes 117 in Northern California, 169 in Southern California and 40 in San Diego.²⁵ Thirty-three percent (33%), or 102 members, of the total panel are retired judges. There are 46 retired judges on the Northern California part of the panel, or 39%; 47 retired judges on the Southern California part of the panel, or 29%; and 9 retired judges in the San Diego panel, or 32%.²⁶ The percentages of retired judges available within each segment of the panel increased slightly during this reporting period.²⁷

Under the *Rules*, the parties can either jointly agree on any person who agrees to follow the *Rules* to act as the neutral arbitrator or they can each strike and rank the 12 names provided by the OIA.²⁸ Since the OIA first began operation, a neutral has been selected in 1,851 cases. In 588 of these cases, or about 32%, the parties have jointly selected the neutral arbitrator, while in 1,260, or 68%, the parties have used the list supplied by the OIA. The state court appointed the neutral arbitrators for three cases.

In 2001, a neutral was selected in 809 cases. The percent of cases where the neutral arbitrator was jointly selected was about the same as the percent of joint selections since the OIA began operation. In 2001, the parties jointly selected the neutral arbitrator in 242 cases, or 30% of the selections, while in the remaining 565, or 70%, the neutral arbitrator was the result of the strike and rank process. The neutral arbitrator for two cases were court ordered.

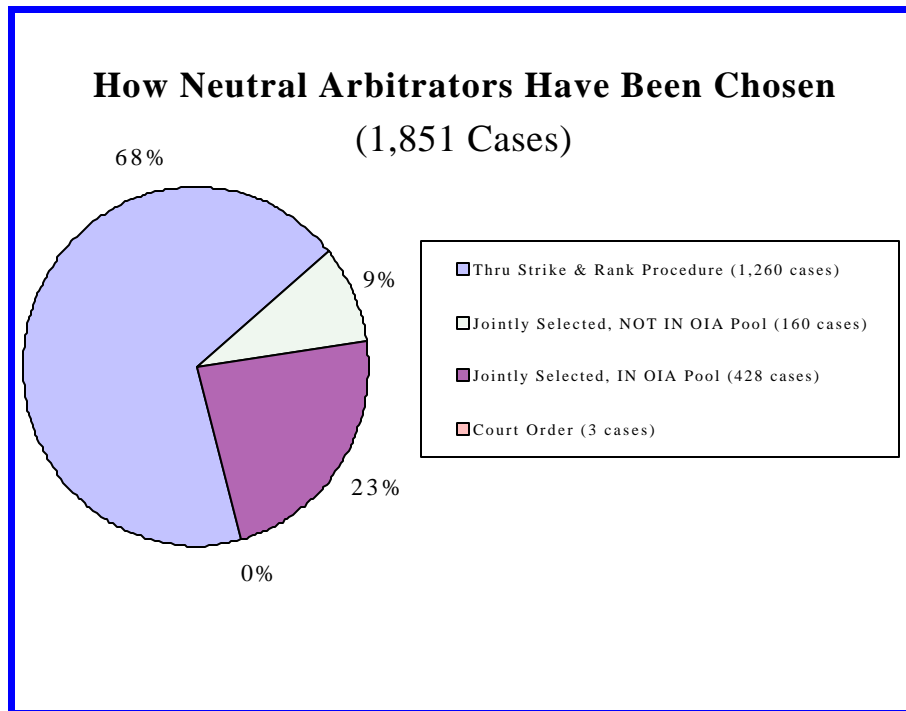
²⁴ The San Diego panel was created in May 2000, following requests from counsel for claimants in that area. It followed the boundaries of the United States District Court for the Southern District of California, which includes San Diego and Imperial Counties. In July 2001, 5 of the 33 members of the San Diego panel were removed for failing to provide updated information to their application according to the process described in the prior section. In order to increase the number of neutral arbitrators available to serve on San Diego cases, we asked nine members of our Southern California panel, who are based in cities close to San Diego and Imperial Counties, to serve on San Diego as well as Southern California matters. All nine agreed to do so. Therefore, our San Diego panel now also includes neutral arbitrators from Orange and Riverside counties.

²⁵ The total number of neutral arbitrators in the three panels equals 326, because, as noted in section II.B, page 4, 20 of the 306 neutral arbitrators serve on more than one panel.

²⁶ A list showing the complete panel of OIA arbitrators as of December 31, 2001 is attached as Exhibit G. The list of the current pool is available from the OIA's website at www.slhartmann.com/oia. The lists posted on the website are updated regularly as arbitrators are added to or leave the panel.

²⁷ As of December 31, 2000, the Northern California part of the panel included 35% retired judges, the Southern California panel included 25% retired judges, and the San Diego panel included 29% retired judges. Second annual report at 6.

²⁸ See Exhibit C, Rules 16-18; see also Exhibit B at Recommendations 14 and 15.



Of the 588 arbitrators jointly selected by the parties since the OIA began operating, 428 of them, or 73%, belong to the OIA's pool, although they may not have appeared on the specific list generated for a particular case. The remaining 160 jointly selected arbitrators, or 27%, are not part of the OIA's pool.²⁹ In 2001, 69% (166) of those jointly selected were in the pool and 31% (76) were not in the pool.

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

As noted above, copies of the potential neutral arbitrators' applications are sent to both parties whenever their names appears on a randomly computer generated list of possible arbitrators. In addition, if potential neutral arbitrators have previously decided cases in the OIA system, copies of each written decision, without the names of parties involved, are also sent to the parties. Finally, after a case is closed, the OIA asks both of the parties to evaluate anonymously their experience with the neutral. We also include copies of the completed evaluations in the packets sent to the parties.³⁰

²⁹ We have invited neutral arbitrators who are jointly selected and not part of our pool to complete an application to serve on our pool. Some of these neutral arbitrators have completed an application, met the qualifications, and joined our panel.

³⁰ In addition to the information the OIA provides, the California arbitration disclosure statute, Code of Civil Procedure §1281.9, requires that a neutral complete and mail disclosures to both parties within ten days of being selected.

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

One of the concerns expressed about arbitrations is the possibility of a “captive,” and therefore defense oriented, pool of arbitrators. A large pool of people available to serve, and serving, as neutral arbitrators is an important tool to avoid this problem. Seventy-nine percent (79%) of all neutral arbitrators on the OIA’s panel on December 31, 2001, (241 out of 306), had served or were serving as neutral arbitrators on arbitrations overseen by the OIA. In 2001 alone, 62% of the neutral arbitrators in the pool have been appointed as neutral arbitrators on cases overseen by the OIA (191 out of 306).

The number of individual assignments to cases on the OIA’s panel ranges from 0 to 76. Parties have jointly selected the arbitrator who is at the high end of this range 59 times. The average number of appointments per neutral is five. The median is two and the mode is zero. The parties’ actions – in how they rank their choices, who they jointly select, and whether they disqualify a proposed neutral arbitrator – ultimately control how many times each panelist serves as a neutral arbitrator.

All of our panelists have been named at least once on a list of possible arbitrators sent to the parties by the OIA. The range for Northern California arbitrators appearing on a list is from 8 to 107 times. The average number of appearances is 66; the median number of appearances is 69, and the mode is 39.³¹ In Southern California, the range is from 1 to 72 times. The average number of appearances is 36; the median is 42; and the mode is 44. In San Diego, the range of appearances is from 1 to 34 times. The average, median and mode are 11, 12, and 12 appearances, respectively.

7. The Parties and 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 counsel, or to the claimant if unrepresented by counsel. 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.³² Most important, they are asked whether they would 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.

³¹ The range is affected by how long a given arbitrator has been in the panel. Some have been panelists since the pools inception, while others have only recently joined. For example, the three neutral arbitrators who have appeared on 107 lists of possible arbitrators have served on the panel since its inception. The number of times an arbitrator is selected is also affected by whether the neutral is willing to hear cases where claimants have no attorneys (*pro per* cases). Many are not.

³² A copy of the Evaluation Form is attached to this report as Exhibit L along with analyses of the responses to each question.

On December 31, 2001, the OIA had received responses from about 46% of the parties who had been sent evaluations (1,074 forms returned of 2,354 mailed). Three-hundred sixty-seven (367) of those responding identified themselves as claimants (63) or claimants' counsel (304), and 668 were respondent's counsel. Considering only those evaluations sent out in 2001, 51%, or 635 out of 1,244 responded. Of the 635 received, 223 identified themselves as claimants (37) or claimants' counsel (186), 390 were respondent's counsel, and 22 did not identify any category.

The responses have been very positive overall. The agreement numbers are high, and they are encouragingly similar for both claimants and respondents.

Here are responses to some of the inquiries:

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

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

The average of all 947 responses was 4.8 out of a maximum of 5 with the median and mode both at 5. Claimants' counsel averaged 4.7. Pro pers averaged 4.0.³³ Respondent's counsel averaged 4.9. The median and mode for all three subgroups was 5.³⁴

Item 5: "The neutral arbitrator explained procedures and decisions clearly."

The average of all responses was 4.6 with the median and mode both at 5. Claimants' counsel averaged 4.5. Pro pers averaged 3.9. Respondent's counsel averaged 4.7. The median and mode for all three subgroups was once again 5.

Item 7: "The neutral arbitrator understood the facts of my case."

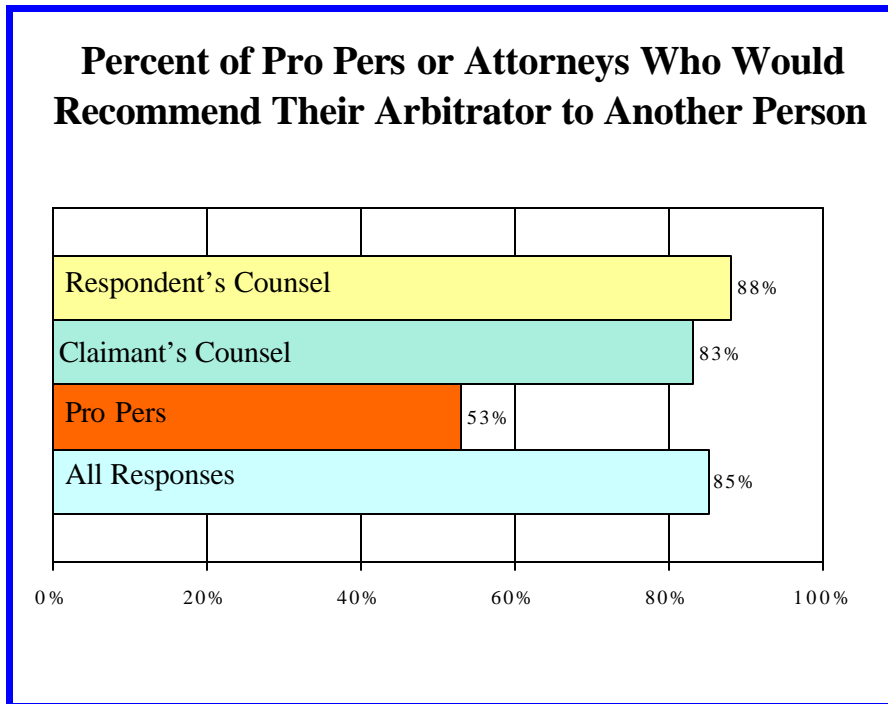
The average of all responses was 4.5 with the median and mode both at 5. Claimants' counsel averaged 4.4 with the median and mode both 5. Pro pers averaged 3.6 with the median 4 and the mode 5. Respondent's counsel averaged 4.6 with the median and mode both 5.

³³ The responses from *pro per* claimants consistently show a lower level of agreement than the responses from claimants' counsel and respondents' counsel. This is consistent with the results reported in the second annual report. We believe it arises from a lesser understanding of the process. In June 2001, the OIA began distributing an information sheet to *pro per* claimants, which we hope will help them understand the arbitration process better. However, many, if not most, of the claimants who have returned evaluations thus far did not receive a copy of this document, since it is usually mailed when a claim first enters the system, and most of the claimants who have returned evaluations entered the system prior to June 2001. We will continue to monitor *pro per* claimants' evaluation of the system.

³⁴ When the median and mode are both 5, it means that a large number of people responding gave that number as their answer. Five was our highest score, and it was the median and mode on nearly all of the 11 questions the evaluation contained. This was also true across subgroups. It is another measure of satisfaction with neutral arbitrators.

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

The overall average on all 910 responses to this questions was 4.4. Both the median and the mode were 5. Claimant attorneys gave an average response of 4.3. Pro pers gave an average of 3.1, with the median 4.0 and the mode 5. Respondent’s counsel had an average of 4.5, with the median and mode both 5. Claimant attorneys’ average response rose slightly in 2001.



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 for administration. Until 2001, almost all of the demands Kaiser sent to the OIA were cases where claimants could choose whether they wanted to be part of our system. In 2000, Kaiser changed the arbitration clause in all of its contracts with members to make the use of our office mandatory. The class of cases in which the claimant can choose whether to use our office (“opt in”) can be further divided between “pre-OIA” and “post-OIA” cases. “Pre-OIA” cases are cases where Kaiser first received a demand for arbitration before the OIA started administering Kaiser cases, i.e., prior to March 29, 1999. “Post-OIA” cases are cases where Kaiser first received a demand for arbitration on or **after** March 29, 1999.

In total, Kaiser has submitted 2,968 demands for arbitration. It submitted 1,030 demands in 2001. These cases were about evenly divided throughout the state.

Considering the entire period, 1,453 were from Northern California; 1,364 were from Southern California; and 151 were from San Diego. During 2001, 474 were from Northern California; 465 were from Southern California; and 91 were from San Diego.

The following sections describe how long it has taken Kaiser to submit demands to the OIA after they received them from claimants (section III.A), the number of cases that are mandatory (section III.B), and opt-in cases, both pre-OIA and post-OIA cases (section III.C).

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 10 days of receiving it.³⁵ The average length of time that Kaiser has taken to submit mandatory and post-OIA Demands for Arbitration to the OIA is eight days.³⁶ The mode is zero. The mode at zero means that most commonly Kaiser sends the OIA a claimant's demand for arbitration on the same day that it is received at Kaiser. The median is 4 days, and the range is from 0 to 330 days.³⁷ Considering only the demands submitted in 2001, the average is 8, the mode is 1, the median is 4, and the range is between 0 and 234 days.

B. Mandatory Cases

As we reported in our last report, in 2000 Kaiser amended all its contracts in California, which cover about six million Californians, to require that the OIA act as the arbitration system administrator. This was accomplished December 30, 2000. All Kaiser disputes with its members arising after that date are subject to OIA administration. As of December 31, 2000, 101 claims in the OIA system were mandatory.³⁸ As of December 31, 2001, however, 825 claims in the OIA system were mandatory. This represents an increase of 724 claims (717%) from one year earlier. Of the cases Kaiser submitted to the OIA this year, 724 were mandatory and 306 were opt in.

³⁵ See Exhibit C, Rule 11.

³⁶ The length of time Kaiser takes to submit pre-OIA cases is discussed in section III.C.1, page 13, *infra*.

³⁷ Kaiser sent the case which took 330 days to the OIA in July 2000. It was initially filed in the superior court; Kaiser had to file a petition to compel arbitration in order to bring it to the OIA. The court order was not forwarded to the OIA for sometime after it was entered.

³⁸ The second annual report stated that the OIA had received 100 mandatory claims. (Second annual report at 13.) An additional case received in 2000 initially identified as an opt in claim was actually mandatory.

C. Opt In Cases

1. Pre-OIA Cases

Between March 29, 1999 and December 31, 2001, Kaiser submitted 229 cases to the OIA in which the demand for arbitration was made before March 29, 1999. Almost all of the pre-OIA cases were sent to the OIA in its first year of operation and were received by Kaiser before the OIA began operations (213 out of 229). Kaiser submitted only seven pre-OIA cases in 2001. All were cases where the claimants belatedly decided that they wanted the case to be administered by the OIA.

Almost by definition, the average length of time these cases were with Kaiser before being forwarded to the OIA continues to increase. The second annual report stated that the average was 453 days, with a mode of 13, median of 344, and a range from 3 to 2,409 days. For the 7 pre-OIA cases Kaiser submitted to the OIA this year, the average is 1,374 days. The median is 1,408 days, the range is 1,020 to 1,782 days, and there is no mode. If the entire period is considered, the average is 477 days, the mode is 13 days, the median is 360 days, and the range is 3 to 2,409 days.

At the beginning of this reporting period, 42 pre-OIA cases were open. Thirty-two (32) of these cases closed in 2001, including three of the pre-OIA cases that we received in 2001. Thus, only 10 pre-OIA cases in our system are still open.

2. Post-OIA Cases

Between March 29, 1999 and December 31, 2001, Kaiser submitted 1,914 demands that they received on or after the OIA began accepting cases from members who could chose whether to use the OIA system. The OIA received 299 such demands in 2001.

3. Opt in Process

The OIA has received 2,143 demands from Kaiser since March 29, 1999 involving members whose contracts did not mandate the OIA. One thousand three-hundred seventy-four (1,374) have chosen to opt in to the OIA. Only 43 claimants have affirmatively refused to join the OIA system. Kaiser settled 8 cases and 12 claimants withdrew their demands for arbitration before they faced the deadline for deciding whether to opt in. However, the OIA returned 698 claims to Kaiser for handling under the old process because the claimants or their counsel never informed the OIA that they wished to enter the OIA's system.

During this reporting period, Kaiser forwarded 306 new Demands that fell into the opt-in category. Of these Demands, 192 chose to join the new system and proceed under the OIA's *Rules*. Three claimants affirmatively refused to join the OIA system, and seven claimants withdrew their demands. The OIA returned 96 claims to Kaiser to handle because the claimants or their counsel never told the OIA that they wished to enter the OIA's system. As of December 31, 2001, there were eight cases in the process of deciding whether or not to opt in to the OIA system.

We reported in our second annual report that, as of December 31, 2000, there were 70 cases in the process of deciding whether or not to opt in to the OIA system. Of these 70 cases, 34 opted in and 36 did not opt in. Of the 34 that opted in, 24 have closed and 10 remain open.

IV. Description of Cases Administered by the OIA

This section provides a detailed description of the cases administered by the OIA.³⁹ Of particular note is section A, which describes the average length of time for neutral arbitrators to be selected in the new system.

Other information included in this section provides the number and type 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, the status of cases currently pending in the OIA system, as well as the number of cases resolved thus far and the types of resolutions. 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. Average Length of Time for a Neutral Arbitrator to be Selected

The *Rules* set a 33-day timetable by which neutral arbitrators must be selected. Weekends and holidays may extend this timetable.⁴⁰ The *Rules*, however, also permit the 33-day time frame for selecting a neutral arbitrator to increase for several reasons. First, the *Rules* permit claimants to obtain a 90 day postponement to select a neutral arbitrator upon request. Second, in some cases, parties chose more than one neutral arbitrator because one of the parties disqualified a neutral arbitrator after receiving his/her statutorily required disclosures.⁴¹ Neutrals send these disclosures only after they are provisionally selected. When such a disqualification occurs, the entire process of selecting a neutral arbitrator begins again, as does the statutory opportunity to disqualify

³⁹ The phrase "administered by the OIA" excludes those cases where Kaiser has submitted a demand to the OIA, but the claimant has not yet opted in, whether or not it has been returned to Kaiser. When we refer to cases the OIA has administered during 2001, it means that such cases were open for some period of 2001.

⁴⁰ All the measurements of time, including time to select a neutral arbitrator, begin on the date the OIA received a mandatory claim or claimant opted in and the OIA received the \$150 filing fee or granted a fee waiver application.

⁴¹ See California Code of Civil Procedure §1281.9 and Rule 20.

the second neutral arbitrator.⁴² In a small number of cases, both these types of delay have occurred; that is, a party has requested a postponement and disqualified a neutral arbitrator.

Parties have selected neutral arbitrators in 1,779 out of 2,071 cases administered by the OIA, where the neutral arbitrator selection process has begun.⁴³ The following table and chart summarize the time to selection of neutral arbitrators. The table compares neutral arbitrator selections that occurred from March 29, 1999 through December 31, 2000 to selections that occurred in 2001. The pie chart on page 17 illustrates how selections have been made over the entire period of time.

Average Number of Days to Selection of Neutral Arbitrator

First 21 Month Period and 2001 Compared⁴⁴

	3/29/99 through 12/31/00		1/1/2001 through 12/31/2001	
	Number of Days To Select	Number and Percent of Cases	Number of Days To Select	Number and Percent of Cases
Majority of Cases (No Postponement or Disqualification)	25	798 (79%)	23	507 (66%)
Cases with Postponement	106	157 (16%)	104	199 (26%)
Cases with Disqualification	73	44 (4%)	61	44 (6%)
Cases with Postponement and Disqualification(s)	167	7 (1%)	143	23 (3%)
All Cases	41	1,006 (100%)	50	773 (100%)

While this table is complicated, it shows several important facts which are discussed in greater detail in the subsections that follow. First, the length of time to

⁴² However, the disqualification and replacement of one or more neutrals does not extend the 18 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.

⁴³ In these 2,071 cases, the claim is either mandatory or the claimant has opted in, and the \$150 filing fee has been paid or waived. See Rules 12 and 13. Once either event occurs, the OIA begins the neutral selection process by sending a list of possible arbitrators to the parties. In 220 of these cases, the time for appointing a neutral had not expired on December 31, 2001 or the case was closed before a neutral was selected.

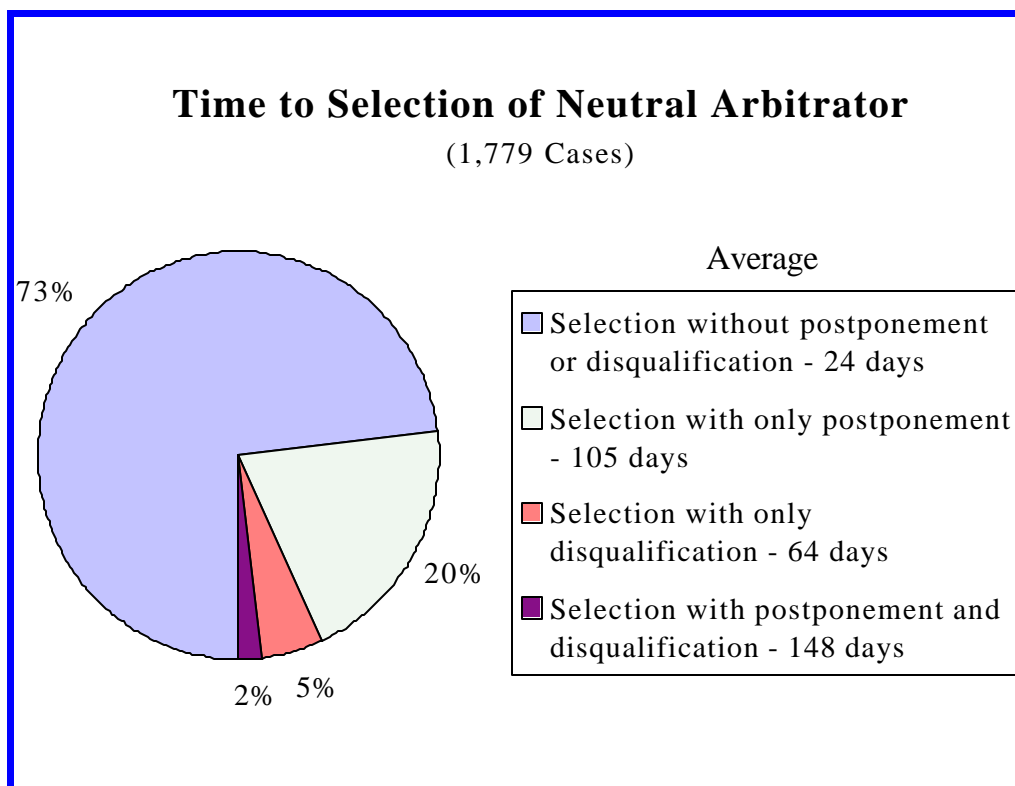
As of December 31, 2001, in addition to the 2,071 where the fee has been paid or waived, the OIA was administering 128 cases where the fee had not been paid or waived. Under Rule 12, the claimant has 75 days to pay the filing fee or obtain a waiver of the fee.

⁴⁴ Twenty cases which had a neutral selected in 2000, and were counted in last year's numbers, had a neutral selected again in 2001 after a disqualification or recusal by the neutral arbitrator. Thus the numbers for the first 21 month period differ slightly from those set out in last year's report.

select a neutral arbitrator – no matter what procedure is followed – decreased at least 2 days in 2001 when compared to the first 21 months. Second, the number and percentage of cases in which the parties exercised a right that lengthened the time to appointment increased in 2001. The latter fact means that even though the time to select a neutral in any one category decreased, the overall average time to select a neutral actually increased because the number of more complicated selections increased so significantly. The following sections provide additional information about each average.⁴⁵

We cannot report on the reasons for the increasing use of the 90 day postponement or statutory right to disqualify a neutral arbitrator. When claimants or claimant's attorneys seek a postponement, they are not required to give a reason for the postponement and we do not track the reason when one is given. Similarly, parties are not required to give a reason when they disqualify a neutral after receipt of the neutral's disclosures. Claimants or their counsel make almost all of the requests for postponements and approximately 70% of all disqualifications. The increasing use of these mechanisms may reflect greater familiarity by the bar with our rules and systems. It could also reflect the change of the OIA system to a mandatory system, and a desire by counsel to slow down the procedure to select the neutral arbitrator.

⁴⁵ There are also cases in which neutrals remove, or recuse, themselves in the course of the matter. This has happened because the neutral became sick or disabled, became a judge or government official or otherwise changed occupations, or died. The length of time to select the ultimate neutral arbitrator, in cases involving a recusal, is not included in the averages. Since the OIA began operation, neutrals have recused themselves in 72 cases. It occurred 37 times in 2001.



1. The Majority of Cases

If we look at the majority of cases since the OIA began where the parties select the neutral arbitrator without seeking a postponement or disqualifying the neutral -- 73% of our cases (1,305 out of 1,779) -- neutral arbitrators were placed in an average of 24 days after the date the OIA received the demand and arbitration fee. This is one day faster than the 25 day average reported in the second annual report. The mode is 22 days, the median is 24 days, and the range is from 0 to 101 days.

In those cases where the neutral was selected in 2001, neutral arbitrators were placed in 23 days. This is two days faster, on average, than the number we reported in the second annual report. For 2001 selections, the mode is 22 days, the median is 23 days, and the range is from 0 to 94 days.

As mentioned above, the percent of cases with neither a postponement for disqualification has declined, from 77% reported in the second annual report, to 73% as of December 31, 2001, and to 66% when just 2001 is considered.

2. Cases With 90 Day Postponements

Under Rule 21, claimants may obtain a postponement to select a neutral arbitrator simply by serving a request for it on the OIA and the respondent. Respondents may

obtain the postponement only if the claimant agrees in writing. To date, parties have obtained the 90 day postponement in 26% of the total number of cases administered by the OIA (538 of 2,071). Almost all of the postponements, 530, were obtained by claimants. Only eight postponements were obtained by respondents. Requests for postponements have risen in this reporting period. We received 113 in the first year (21% of the cases then administered by the OIA) and 122 in the second report period (23%), which was only 9 months. In 2001, parties have obtained postponements in 35% of the cases (303 of 879). Of these postponements, 301 were obtained by claimants and 2 by respondents. In 82 of these cases, a neutral arbitrator had not yet been selected as of December 31, 2001.

In 356 cases with postponements, that is the only delay in selecting a neutral arbitrator. When a party obtains a 90 day postponement, the time to select an arbitrator is extended to 123 days. For these 356 “postponement only” cases, the average time to selection of a neutral arbitrator is 105 days. The mode is 112 days; the median is 113 days; and the range is from 20 to 141 days. During 2001, there were 199 “postponement only” cases in which a neutral has been selected. For these cases, the average time to appointment of a neutral arbitrator is 104 days. The mode is 113 days; the median is 113 days; and the range is from 20 to 137 days.

3. Cases in Which the Parties Disqualified the Neutral 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 arbitrator is disqualified, the entire process of selection begins again, including the requirement that the neutral serve disclosures, and the option for the parties to disqualify the neutral.⁴⁶

There were 88 cases where the parties disqualified one or more proposed neutral arbitrators but did not request a postponement. As with postponements, the frequency of disqualifications is increasing. Half of the cases with disqualifications involve a disqualification in 2001. Of the 88 cases, claimants have disqualified a neutral 63 times, and respondents have disqualified a neutral 33 times.⁴⁷ During 2001, of the 44 cases, claimants disqualified a neutral 31 times, and respondents disqualified a neutral 14 times.

⁴⁶ In some cases, more than one neutral arbitrator has been disqualified. In 120 cases, the parties disqualified 1 neutral arbitrator; in 14 cases, the parties disqualified 2 neutral arbitrators; and in 1 case, the parties disqualified 4 neutral arbitrators.

Disqualifications do not have to be based on the content of the neutral’s disclosures. In 2001, parties disqualified neutral arbitrators in 67 cases. In approximately 75% of these 2001 cases, one or both parties failed to respond to the list of possible arbitrators by the deadline. Thus, disqualifications seem to be used most often as a way to correct a mistake.

⁴⁷ The total number of disqualifications is greater than the number of cases because some of these cases have had more than one disqualified neutral arbitrator. See footnote 46, *supra*.

When a single neutral arbitrator is disqualified, the time to select a neutral arbitrator may take 96 days.⁴⁸ For the 88 cases, the average number of days to selection of the current neutral arbitrator is 64 days. The mode is 56 days; the median is 60 days; and the range is from 28 to 161 days. In 2001, the average number of days to selection of the current neutral arbitrator when there is a disqualification is 61 days. The mode is 56 days; the median is 58 days; and the range is from 28 to 161 days.

4. Cases With Postponements and Disqualifications

Since the OIA began, the parties in 30 cases have both requested postponements and disqualified one or more neutral arbitrators. During 2001, there were 23 such cases. This is a significant increase over the 7 such cases that occurred in the first 21 months, although the numbers involved are still very small.

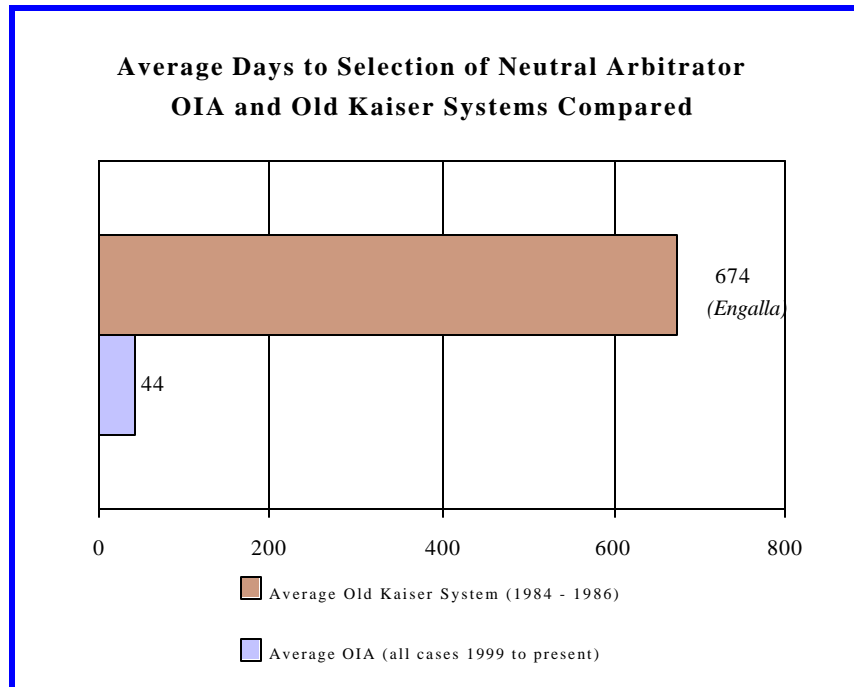
When a single neutral arbitrator is disqualified and a party has requested a 90 day postponement, the time to select a neutral arbitrator may be extended to 186 days.⁴⁹ For the 30 cases, the average number of days to selection of the neutral arbitrator is 148 days. The median is 147 days. The mode is 144, and the range is from 78 to 253 days. During 2001, for the 23 cases, the average number of days to selection of the neutral arbitrator is 143 days. The median is 146 days. The mode is 144, and the range is from 78 to 172 days.

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

The average time to the selection of the neutral arbitrator is 44 days, if we average together all 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 over a period of two years. Thus far, as the chart on page 20 shows, in the 33 months of its existence, the OIA system overall is about 15 times faster.

⁴⁸ The 96 days is comprised of 33 days to select the first neutral arbitrator, 33 days to select the second neutral arbitrator, and 30 days for the statutory periods for disclosure, disqualification, and service, pursuant to the California Code of Civil Procedure. The amount of time, of course, increases if there is more than one neutral disqualified.

⁴⁹ The 186 days is the sum of the 90 day postponement and the 96 days which result from a disqualification. See footnote 48.



During 2001, the average time to selection of the neutral arbitrator is 50 days, if we average together all cases. This is about 13.5 times faster than the old Kaiser system.

The length of time to select a neutral arbitrator as measured in each of the four preceding sections has decreased both when the first 21 months is compared to the entire time and when 2001 is compared to either of these periods.⁵⁰ However, the average time to select a neutral in all cases has increased from 41 days in the second annual report to 44 days in this report and 50 days when 2001 alone is considered. This increase in the average occurred because the percentage of cases with a postponement and/or disqualification has increased significantly. During the first 21 months, only 23% of all cases had a postponement and/or disqualification. For the entire time, 27% of all cases had a postponement and/or disqualification. When 2001 alone is considered, the percentage of cases in this category increased to 34%. The increased percentage of cases with postponements or disqualifications or both has increased the average time to select a neutral arbitrator overall.

The average number of days to select a neutral arbitrator decreased under each set of circumstances discussed in the preceding four sections at the same time that the number of cases in which neutral arbitrators were selected increased significantly. In the first 21 months of operation, the OIA selected neutral arbitrators in 1,006 cases, for an average of 48 cases per month. During 2001, the OIA selected neutral arbitrators in 773 cases, for an average of 64 cases per month – a 33% increase over the previous 21

⁵⁰ As our second annual report states, as of December 31, 2000, the average time to select a neutral arbitrator was 25 days in cases with no postponements or disqualifications, 106 days for cases with postponements, 73 days for cases with disqualifications, and 167 days for cases with both postponements and disqualifications.

months. In addition, a higher percentage of these 2001 cases had postponements, disqualifications, or both, compared to the previous 21 months. Yet, the OIA managed to reduce the average number of days to select a neutral under each set of circumstances – no postponement or disqualification, postponement, disqualification, and both postponement and disqualification.

It is quite possible that in the future even more parties and their counsel will exercise their rights to obtain a postponement or to disqualify a neutral arbitrator. If so, the average overall length of time to select a neutral arbitrator may become less important, and the average time to select a neutral based upon the parties' actions will become more important. In any case, we expect that the overall average time to select a neutral will increase. Moreover, ethics standards which will first take effect July 1, 2002, discussed in section VI., page 42, *infra*, may further expand parties' rights to disqualify neutral arbitrators. We will continue to track and report on these developments.

In summary, the OIA system is alleviating the Supreme Court's primary concern in *Engalla* and achieving one of the major goals set by 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 control the speed at which a neutral arbitrator is selected.

B. Types of Cases

Since 1999, the OIA has administered, or is now administering, a total of 2,199 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 91.5% of the cases seen in the OIA system, or 2,012 of 2,199. Benefits and coverage cases represent only 1.5% (32 of 2,199).

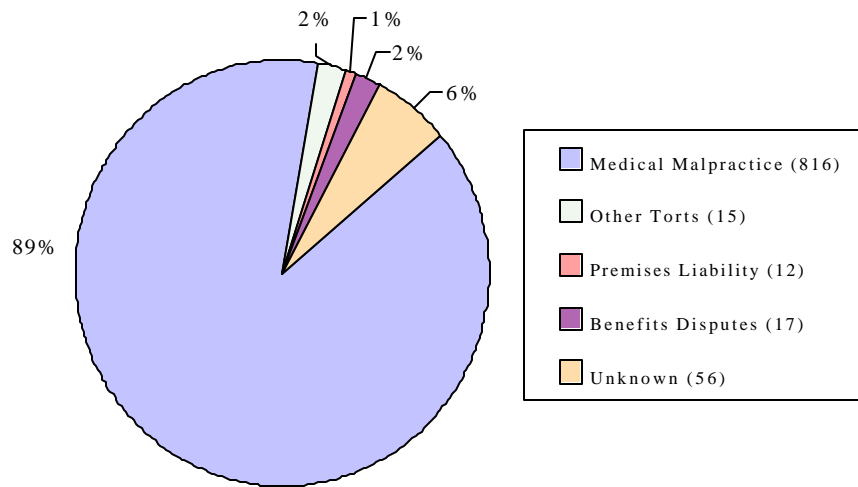
During this reporting period, the percentage of medical malpractice cases may have declined slightly.⁵¹ We reported in the second annual report that such cases constituted 95% of all demands we administered. In 2001, however, 89% of the cases Kaiser sent us were medical malpractice (816 of 916). The remaining 11% includes 2% benefits and coverage (17 of 916); 1% premises liability (12 of 916); 2% other tort (15 of 916); and 6% unknown (56 of 916).

The following charts shows the breakdown of all cases by type for both the total period of time and for 2001 alone:

⁵¹ It is also possible that this difference merely reflects the increase in the "unknown" category, and less specific demands.

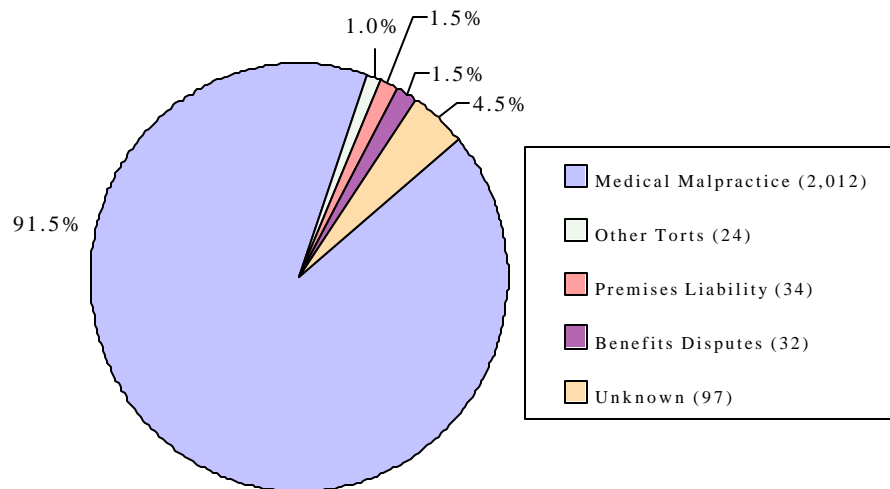
Types of Cases - Received in 2001

(916 Cases)



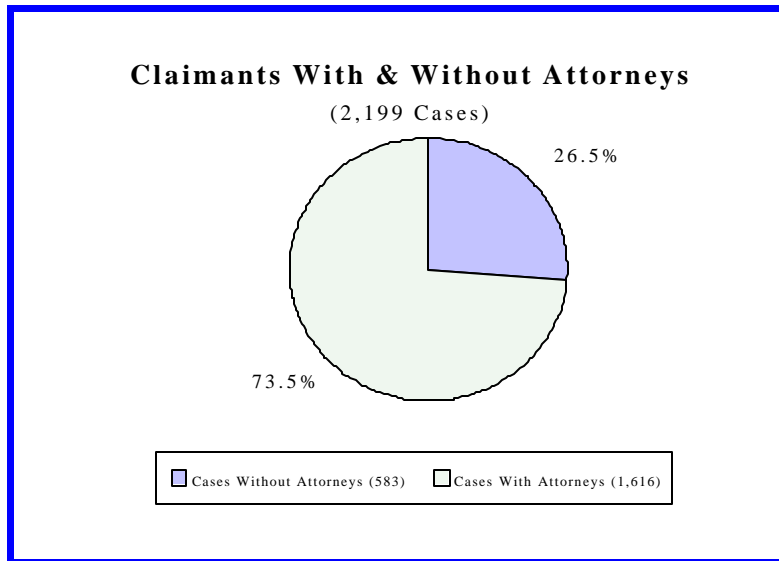
Types of Cases - Total Received

(2,199 Cases)



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

In almost three-quarters (73.5%) of the 2,199 cases administered by the OIA, the claimants are represented by counsel (1,616 of 2,199). In the remaining, the claimants are representing themselves or acting in *pro per*. In 2001, 25% of the cases Kaiser sent us that became part of our system have claimants who are representing themselves (233 of 916). The following chart shows a breakdown of cases according to whether the claimant is represented by counsel or is proceeding in *pro per*:



In June 2001, the OIA began sending claimants in *pro per* a two-page form entitled, “Information for Claimants Who Do Not Have Attorneys.”⁵² A copy of this form is attached as Exhibit H. This form is included with the initial letters sent to *pro per* claimants, including the letters sent in opt-in cases and letters explaining the requirement to pay the filing fee in mandatory cases. We include the form again with the list of possible arbitrators sent to *pro per* claimants. Anecdotally, the response to this form has been positive. A number of *pro per* claimants who have called us with questions have commented that the form was helpful in providing information about the arbitration process and explaining the need for expert testimony under state law.

In addition to this written information, *pro per* claimants often call this office for information and explanation about the process and the *Rules*. Several members of our staff, including the person responsible for answering the phones and fielding questions, are fluent in Spanish.

⁵² The AAC had recommended in the last report that we prepare such a document.

D. Number of Cases Involving Fee Waiver Applications

As of December 31, 2001, 271 claimants have requested applications for fee waivers from the OIA. One hundred eighty (180) applications have been completed and returned.⁵³ We have granted waivers in 161 cases and denied 11.⁵⁴ Two of the 11 denied applicants subsequently failed to pay the fee, and their cases were closed as abandoned, both in 2001. Kaiser has objected to three applications for a fee waiver all in 2001. Of these three, one was granted and two were denied. The remaining eight applications were still pending. A copy of the fee waiver information sheet and application are attached as Exhibit I. It is identical to the one used in the California courts.

During 2001, 88 claimants have requested applications for fee waivers, of which 66 have been completed and returned. In addition, there were four applications pending at the beginning of 2001. During this year, we granted 56 and denied 6 applications. As noted above, Kaiser objected to three applications and eight applications were still pending on December 31, 2001. This was the first year Kaiser has objected to any fee waiver requests.

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, and strike and rank names. In 1,260 out of 1,851 cases, or about 68% of the cases where parties have selected neutral arbitrators, the parties used the list provided by the OIA. In 588 cases (32%), the parties have jointly selected a neutral arbitrator. Of these 588 cases, 428 (73%) of them have selected an arbitrator who is on the OIA's panel.⁵⁵

During 2001, in 565 out of 809 cases, or about 70% of the cases where parties have selected neutral arbitrators, the parties used the list provided by the OIA. In the 242 cases where parties have jointly selected a neutral arbitrator this reporting period, 166 (69%) of them have selected an arbitrator who is on the OIA's panel.⁵⁶

F. Administration of Cases

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 with the deadlines established by the *Rules* was described in detail in the second annual report, and thus, it is only summarized in this section. If arbitrators fail to

⁵³ Of the 104 claimants who asked for fee waiver applications and did not return them, only 11 have left the system as cases abandoned for non-payment of the fee. Five of these cases occurred in 2001.

⁵⁴ See Exhibit C, Rule 13, for information about fee waiver applications.

⁵⁵ Three neutrals were appointed by the courts.

⁵⁶ Two neutrals were appointed by the courts.

notify us that a key event has taken place by its deadline, the OIA contacts them and asks for confirmation that the event has occurred. In most cases, neutral arbitrators respond by sending in confirmation. 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 very few cases, neutral arbitrators have not responded to a second letter and/or phone call. In those cases, the OIA removes neutral arbitrators' names from its panel until they provide the required confirmation.

1. Neutral Arbitrator's Disclosure Statement

Once neutral arbitrators have been selected, they must make disclosures within ten days.⁵⁷ Neutral arbitrators are required to provide a copy of their disclosure statements to the OIA. The OIA has temporarily removed four neutral arbitrators for failure to timely serve disclosures. Two of these neutral arbitrators were temporarily removed during 2001. All have been reinstated.

2. Arbitration Management Conference

The *Rules* require the parties and the neutral arbitrator to have an arbitration management conference ("AMC") within 45 days of the neutral arbitrator's selection. The neutral arbitrator returns the Arbitration Management Conference Form to the OIA within five days after the conference. The OIA has temporarily removed four neutral arbitrators for failure to submit a timely AMC form. One of these neutral arbitrators was removed during 2001. All have been reinstated.

3. Mandatory Settlement Meeting

The parties hold a mandatory settlement meeting ("MSM") within six months of the AMC. 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 649 cases that they have held a MSM. We received notice in 332 of these cases in 2001. On the other hand, in 267 cases, neither party returned the MSM Form to the OIA, despite our repeated requests. The MSM form was due in 139 of these cases during 2001.

4. Hearing

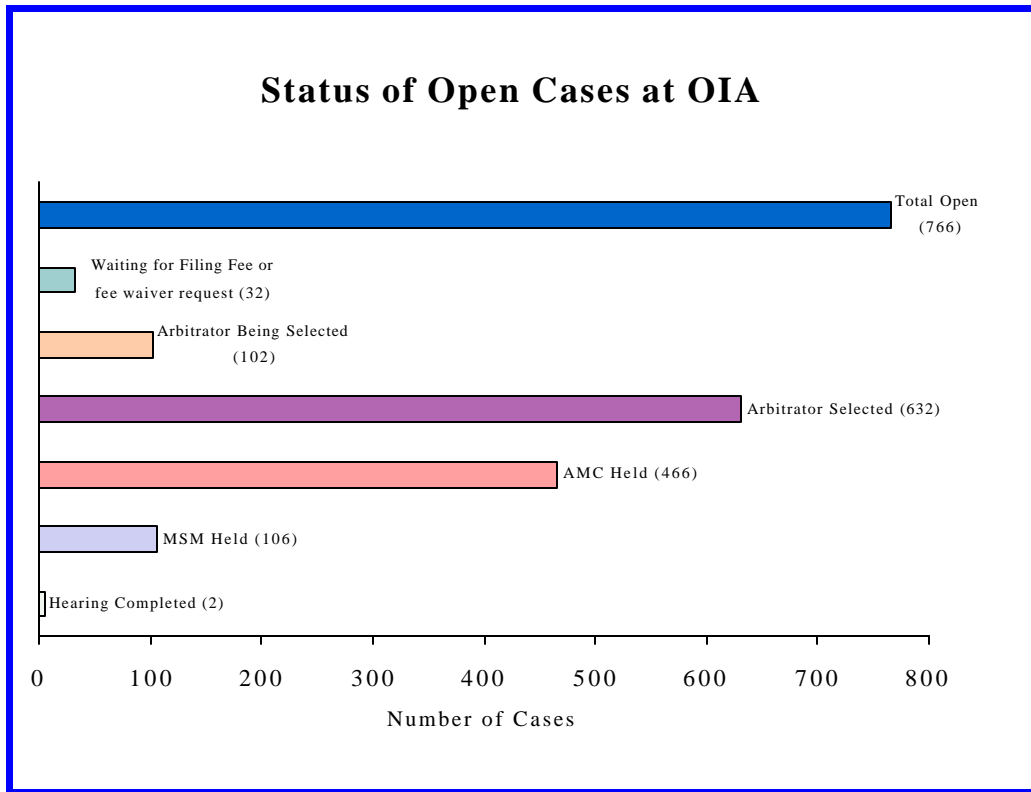
The neutral arbitrator is responsible for ensuring that the hearing occurs and an award is served within the time limits set out in the *Rules*. For almost all cases, this means that the OIA must receive the award no later than 18 months after the OIA

⁵⁷ See California Code of Civil Procedure §1281.9 and Rule 20.

received the demand and filing fee.⁵⁸ We have never suspended an arbitrator for failure to submit an award.⁵⁹

G. Status of Open Cases Currently Administered by the OIA

As of December 31, 2001, the OIA was administering 766 open cases. In 32 of these cases, the OIA was waiting for payment of the filing fee or submission of a fee waiver application. In 102 cases, the parties were in the process of selecting a neutral arbitrator. In 632 cases, the neutral had been selected. In 466 of the 632 open cases, or 74%, the parties and the neutral arbitrator had held the arbitration management conference. In 106 open cases, the parties had held the mandatory settlement meeting. In two cases, the hearing had been held, but the case had not yet been decided. There were 1,433 closed cases. The following graph illustrates the status of open cases:



The number of open cases on December 31, 2001 (766) is larger than that on December 31, 2000 (617). This is to be expected of a system that is now predominantly mandatory. Of the 766 open cases, 551 are mandatory (72%).

⁵⁸ Exceptions to the 18 month rule are discussed in section IV.J, pages 32-35, *infra*.

⁵⁹ The award must be served within ten days of the closing of the hearing. Pages 38-39, *infra*, discuss the 10 day rule.

H. Number of Cases Resolved and Types of Resolutions

Under the *Rules*, most cases must be completed within 18 months of the OIA receiving them.⁶⁰ The OIA has been accepting claims for 33 months. During our existence thus far, 65% of all OIA cases have closed (1,433 of 2,199). This is an increase from December 31, 2000, when 50% of all OIA cases had closed. All but one of these met the deadlines contained in the *Rules*.⁶¹ All case closure deadlines that occurred during 2001 have been met.

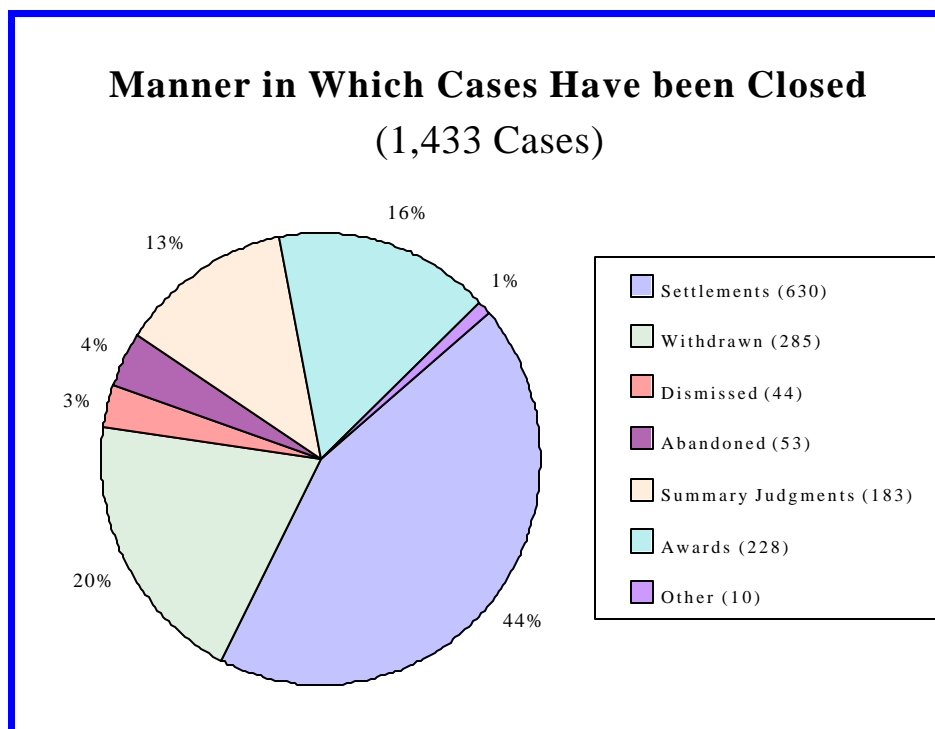
The following sub-sections discuss the various manners in which cases have been resolved, the length of time it took to close cases based upon category, and the reasons for closure when the case was closed by summary judgment. The chart on page 28 shows the distribution of closed cases by manner of closure, while the chart on page 32 shows the length of time, again by manner of closure.⁶²

The amount of time for a case to close increased in 2001. In the second annual report, closed cases averaged 229 days to complete, or approximately eight months. As of December 31, 2001, this average had increased one month, to 259 days. When just 2001 is considered, the average is 281 days, or just over 9 months. Such an increase is not unexpected in a system as young as this. Easier cases, or cases with less contentious parties, would be expected to settle earlier. As the system becomes completely mandatory, the period of time to close a case will presumably lengthen somewhat and then stabilize. The new ethic standards that take effect July 1, 2002, may allow for disqualifications late in a case. This could expand the time needed to complete an arbitration. See section VI, page 42, *infra*.

⁶⁰ Expedited, complex, and extraordinary cases may be resolved in more or less than 18 months. See *Rules* 24 and 33. Those cases are discussed at section IV.J, pages 32-35, *infra*, of this report.

⁶¹ In the second annual report, we explained that one open case had failed to meet the 18 month deadline, when the first neutral arbitrator withdrew only days before the hearing date which had been continued several times to a date very close to the 18 month deadline. That case closed on August 6, 2001, following the second neutral arbitrator granting respondents' motion for summary judgment. It closed just over seven months after its December 29, 2000 deadline.

⁶² There are ten cases that have been closed either because the claimant died or the case was consolidated with another case. 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

As of December 31, 2001, 630 of 1,433 closed cases, or about 44%, settled. The average time to settlement was 253 days. The median was 253 days and the mode was 119 days. The range in settlement time was 4 to 802 days. In 65 settled cases, the claimant was in *pro per*.

During 2001, 350 of 805 cases settled, which represents 44% of the cases closed this period. The average time to settlement was 278 days. The median was 273 days and the mode was 119 days. The range in settlement time was 11 to 802 days.⁶³ In 39 settled cases, the claimant was in *pro per*. Thus, almost two-thirds of the cases in which *pro pers* settled their cases occurred during 2001.

2. Withdrawn Cases – 20% of Closures

The OIA has received notice that 285 out of 1,433 claimants have withdrawn their claims. In 131 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” or “settled” and enter the closure accordingly. About 20% of closed cases have been withdrawn.

⁶³ In the case that closed in 802 days, the neutral extended the deadline to complete the case beyond 18 months pursuant to Rule 28.

The average time to withdrawal of a claim is 190 days after the case entered the OIA system. The median is 165 days, and the mode is 112 days. The range is 5 to 744 days.

During 2001, 157 of 805 claims were withdrawn, and 72 of these claimants were in *pro per*. About 20% of the cases closed this period were withdrawn. The average time to withdrawal of a claim during 2001 is 199 days. The median is 160 days, and the mode is 245 days. The range is 5 to 744 days.

3. Dismissed and Abandoned Cases –7% of Closures

Neutral arbitrators have dismissed 44 of the 1,433 closed cases, 3%, often for claimant's repeated failure to respond to hearing notices or otherwise to conform to the *Rules* or applicable statutes. Twenty-eight (28) of the 44 were in *pro per*. Fifty-three (53) of 1,433 cases, 4%, have been deemed abandoned for claimant's failure to pay the filing fee of \$150.⁶⁴ Thirty-six (36) of the 53 were in *pro per*.

In 2001, neutral arbitrators dismissed 23 of the 805 closed cases, about 3 percent of the cases closed this period. In 13 of these cases, claimants were in *pro per*. Thirty-eight (38) of the 805 cases this period, about 5 percent, were deemed abandoned for claimant's failure to pay the filing fee. Twenty-nine (29) of the 38 were in *pro per*.

4. Summary Judgment – 13% of Closures

One hundred eighty-three (183) cases of 1,433, or 13%, have been decided by summary judgment, which was granted to the respondent. In 133 of these cases, claimants were in *pro per*.

An OIA attorney has reviewed the reasons given by the neutrals in their written dispositions for the grant of summary judgment. The most common reason (84 cases) for orders granting summary judgment is that the claimant had not obtained an expert witness, a requirement of California law in nearly all medical malpractice cases. In another 52 cases, the claimant filed no opposition to the motion for summary judgment. In 16 cases, summary judgment was granted because the case was beyond the statute of limitations. In 12 cases, summary judgment was granted because claimant failed to show causation. All of these cases state common reasons for the grant of summary judgment in the court system.⁶⁵ In 18 additional cases, the neutral arbitrator held that there was no

⁶⁴ Before claimants are excluded from this system for not paying the filing fee, they 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.

⁶⁵ This arbitration system (like most) has no equivalent to the court system's demurrer or motion to dismiss where a case is closed at the outset because, construed in all ways favorable to the plaintiff, the complainant fails to state a claim for recovery. Since there is no complaint filed in Kaiser arbitration, there is no opportunity to demur or move to dismiss. Claims with such defects must be dealt with by summary judgment.

triable issue of fact. In one case, the matter was *res judicata*, i.e., it had been decided in a previous litigation.

The average time to entry of a summary judgment is 289 days after the case entered the OIA system. The median is 271 days, and the mode is 221 days. The range is 77 to 767 days.⁶⁶

During 2001, 109 cases of 805 cases closed, or 14%, have been decided by summary judgment for respondent. In 77 of these cases, claimants were in *pro per*. In 50 cases, claimant had not obtained an expert witness; in 30 cases, claimant filed no opposition to the motion; in 12 cases, claimant failed to show causation; in 10 cases, the case was beyond the statute of limitations; and in 7 cases, the neutral held that there was no triable issue of fact. The average time to entry of a summary judgment in 2001 is 299 days after the case entered the OIA system. The median is 271 days, and the mode is 163 days. The range is 96 to 767 days.

5. Cases Decided After Hearing – 16% of Closures

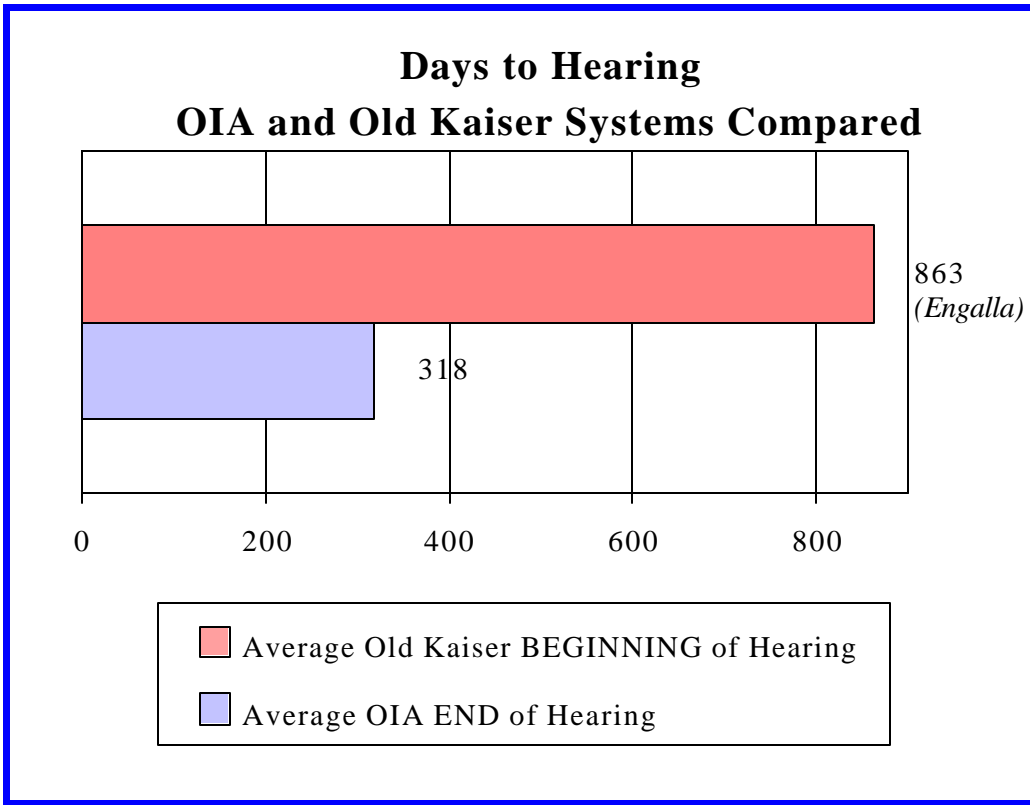
About 16% of all cases (228 of 1,433) have proceeded through a full hearing to an award. Judgment was for Kaiser in 144 of these cases, or 63%. In 44 of these cases, the claimant was in *pro per*. In 84 of these cases, or 37%, the claimant prevailed. In five of these cases, the claimant was in *pro per*.

The 228 awards were decided by 136 different neutral arbitrators. Seventy-eight (78) of the arbitrators decided a single award, while 36 arbitrators decided two awards. Twenty-two (22) arbitrators decided the remaining awards, from 3 to 6 each. The 8 arbitrators who decided the greatest number of awards made 36, or 16%, of them. Considering only the awards made by these 8 neutral arbitrators, 64% were in favor of Kaiser.⁶⁷

In the cases that have gone to hearing thus far in the OIA system, it has taken an average of 318 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 Kaiser system, the hearing did not begin until 863 days, on average, after a case entered the system. The following chart displays this difference.

⁶⁶ The summary judgment time average is only 39 days less than the average award in a case decided by hearing.

⁶⁷ An article in the March 18, 2002 *Sacramento Bee* reported that according to the California Research Bureau, the arbitration claims in 1999 on file with the California Department of Managed Health showed 30% of Kaiser cases decided by just 8 arbitrators and that 6 of the 8 ruled in Kaiser's favor in 80% of the cases.



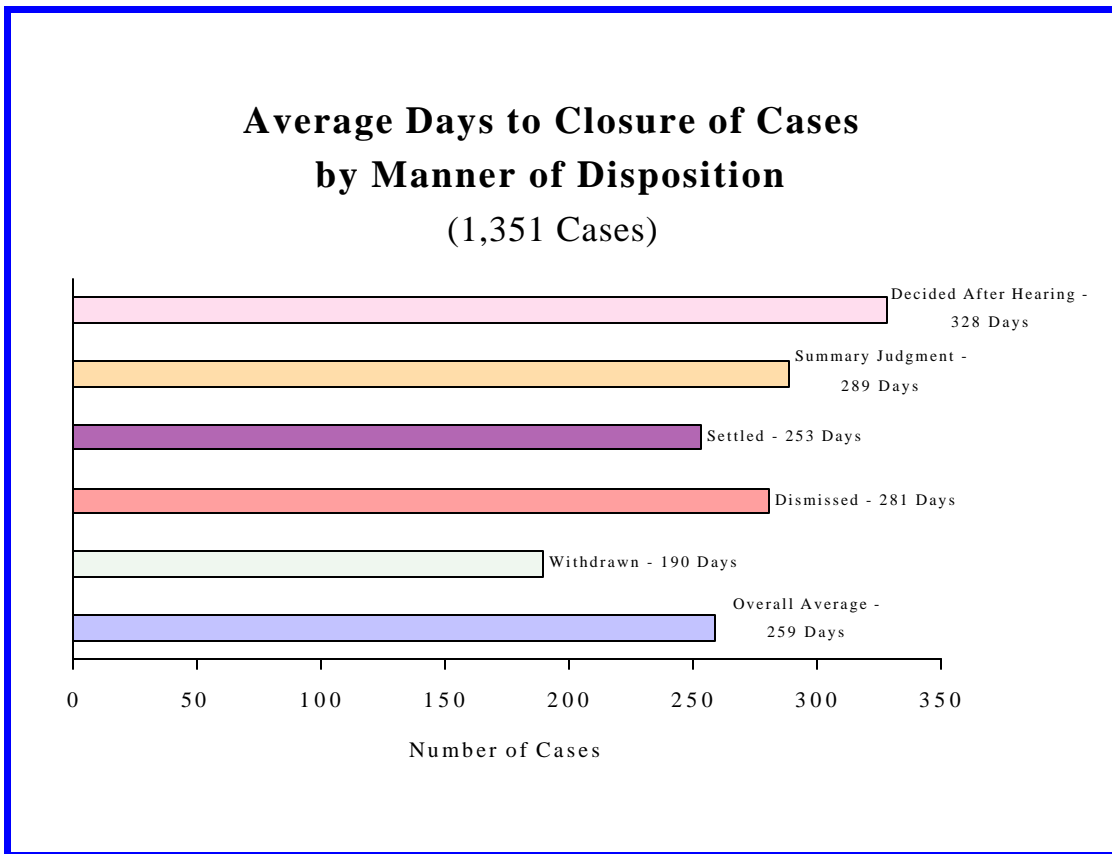
The 228 cases that have proceeded to a hearing thus far show an average of 328 days from the time the OIA began its process until the date the cases were resolved. That is almost 11 months. The median is 315 days, and the mode is 288 days. The range is from 39 to 737 days. One non-expedited case closed after a hearing in 45 days.

During 2001, 15% of all cases (122 of 805) have proceeded through a full hearing to an award. Judgment was for Kaiser in 76 cases, or 62% of the cases that went to hearing. In 18 (24%) of these cases, the claimant was in *pro per*. In 46 cases, or 38%, the claimant prevailed. In four, or nine percent, of these cases, the claimant was in *pro per*.

The 122 cases that proceeded to a hearing during 2001 showed an average of 372 days from the time the OIA began its process until the date the cases were resolved, or about 12 months. The median is 352 days and the mode is 265 days. The range is from 88 to 737 days.

6. Average Time to Closure of All OIA Cases

All closed cases at the OIA average 259 days to completion or slightly less than 9 months. The median is 252 days. The mode is 288 days, and the range is from 4 to 802 days.



During this reporting period, all closed cases average 281 days to completion or slightly more than 10 months. The median is 271 days. The mode is 251 days, and the range is from 5 to 802 days.

I. Amounts of Awards

Of the 228 cases that have gone to hearing, there have been 84 awards to claimants, which is 37% of such cases. One was in the amount of \$5.6 million. The average amount of an award was \$207,571. The median was \$80,421. The mode was \$175,000. The range was \$2,500 to \$5,594,605.

During 2001, of the 122 cases that have gone to hearing, there have been 46 awards to claimants, or 38% of awards. The average amount of an award was \$156,001. The median was \$79,024. The mode was \$175,000. The range was \$2,500 to \$1,100,000.

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 18 months. Grounds for expedited procedures include a

claimant's illness or condition raising substantial medical doubt of survival, a claimant's need for a drug or medical procedure, or other good cause.⁶⁸ The *Rules* also include provisions for cases which need more than 18 months for resolution. Complex cases are those that need 24 to 30 months for resolution, while extraordinary cases are those that need more than 30 months for resolution.⁶⁹ This section discusses those cases.

1. Expedited Procedures

A total of 32 claimants have requested to have their cases resolved in less than the standard 18 months and 22 have received such status. The OIA received 26 of those requests from claimants before a neutral arbitrator was selected in the case. In such cases, under *Rule 34*, the OIA makes the decision. The OIA granted requests in 19 cases,⁷⁰ and denied 7 without prejudice to the claimant's ability to raise the issue again before the neutral arbitrator. Of the 26 requests made to the OIA, Kaiser objected to 6. The OIA denied two where Kaiser objected and granted four. Neutral arbitrators have granted four out of seven requests made to them for expedited status. One of those granted had previously been denied without prejudice by the OIA.

During 2001, ten claimants have requested expedited procedures, eight from the OIA, and two from neutral arbitrators. The OIA granted requests in seven cases,⁷¹ and denied one without prejudice to the claimant's ability to raise the issue before the neutral arbitrator. Of the eight requests made to the OIA, Kaiser objected to three. The OIA granted all three of these requests. Neutral arbitrators have granted one out of two requests for expedited status.⁷² These claimants had not previously requested expedited procedures from the OIA.

The 22 expedited cases in the OIA system thus far⁷³ equal 1% of our total caseload. Two of the 22 remain open. One case was closed in 20 days. While this case was settled, one expedited case closed after a hearing in 39 days. All closed cases were decided within the accelerated timetable set for the case. The two remaining open appear to be on schedule for a timely finish. The average length of time in which they have been

⁶⁸ Exhibit C, Rules 33-36 (expedited cases).

⁶⁹ Exhibit C, Rule 24(b) (complex cases), and Rule 24(c) (extraordinary cases).

⁷⁰ In one case where the OIA granted a request for expedited procedures, the neutral arbitrator later removed the expedited status. See footnote 71, *infra*.

⁷¹ One of these cases was the one where the neutral arbitrator and the parties subsequently decided it did not require expedited status.

⁷² However, the claimant subsequently died in this case, and the neutral arbitrator removed the expedited status. The demand for arbitration was amended to wrongful death, and the heirs substituted in as claimants.

⁷³ This does not include the two cases discussed in footnotes 71 and 72, which were initially granted expedited procedures, but subsequently returned to regular status.

decided is 149 days, or 5 months. The range has been from 20 days to 436 days, or not quite 15 months.

As noted previously, 32 cases at the OIA involve benefits and coverage issues, about 1.5% percent of the caseload. Two of them are expedited. In one, the neutral served the award for the respondent in 118 days (4 months) after the case began. The other case settled in 104 days (about 3 months). All expedited benefits cases have been completed within the time period agreed to by the parties or set by the neutral arbitrator.

2. Complex Procedures

Neutral arbitrators have notified the OIA in 40 cases that they have designated the cases as complex and therefore that they would be resolved in 24 to 30 months. Two were so designated in the first year, 8 were so designated in the second 9 month period, and 30 during 2001. 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 complex. Twenty-three (23) complex cases have closed. Twenty-two (22) complex cases have closed in 2001. The average length of time for complex matters to close thus far is 576 days; the median is 596 days, and the range is 228 to 798.

Cases are designated complex because they involve complex medical issues or complex discovery issues, by stipulation of the parties, or by order of the neutral arbitrator. The 40 complex cases include 17 designated complex based on complex medical issues and 14 based on complex discovery issues. Cases with complex medical issues include those where multiple liability issues exist, or the nature and quantification of damages is difficult to ascertain. Cases with complex discovery issues include those involving large document productions, many depositions, or extensive travel to complete discovery.

3. Extraordinary Procedures

The OIA has notice that two cases have been designated extraordinary and therefore will take more than 30 months for resolution. Both cases were designated extraordinary during this reporting period. These two cases are still open. Both cases were designated extraordinary because the damages or injuries could not be ascertained within the thirty month deadline required for complex cases under Rule 24.

4. Rule 28 Postponements

Through December 31, 2000, the neutral arbitrator had made a Rule 28 determination of "extraordinary circumstances" in 11 cases and extended these cases beyond their 18 month limit. During 2001, neutral arbitrators made such rulings in 43 cases. Of the total 54 cases, 22 are open, and 32 are closed. The average length of time for cases postponed under Rule 28 to close is 583 days (about 19 months), the median is 593 days (about 20 months), and the range is 292 days to 802 days (27 months).

When neutral arbitrators grant a Rule 28 postponement, they do not have to explain the circumstances that give rise to the postponement, although sometimes neutral arbitrators do provide this information.⁷⁴ Neutral arbitrators have granted Rule 28 postponements extending the 18 month deadline for a number of reasons. In some cases, the postponement was based on the death of a prior neutral arbitrator. In other cases, the postponement was based on the death or health problems of one of the parties or counsel for the parties. Other postponements were granted where the claimant's attorney withdrew close to the hearing date. In two cases, the postponements were granted because parallel court actions based on the same incident or facts were pending, and the parties agreed that the court action needed to be resolved prior to the arbitration. In other cases, the postponements were based on the availability of witnesses and other discovery issues.

In 21 cases, the neutral arbitrator has postponed the Arbitration Management Conference under Rule 28, without extending the case beyond its 18 month limit. Twenty (20) of these postponements occurred in 2001, and one occurred in 2000. Neutral arbitrators have granted postponements of the AMC because a related court case was pending; to allow a *pro per* claimant additional time to find an attorney and to allow the parties to designate their party arbitrators. They have also granted extra time because of illness or because there was a pending court action and the parties needed to determine the logical order of the hearing in the court action and the arbitration.

Neutral arbitrators in five other matters granted Rule 28 postponements in the proceedings, which did not extend the 18 month deadline. Three of these postponements occurred in 2001. In one of the 2001 cases, the neutral arbitrator granted a six month postponement in the matter due to claimant's physical and mental health. In a second case, the neutral arbitrator granted a postponement to schedule the hearing, to allow time to locate a doctor who had left Kaiser. In the third case, the neutral arbitrator postponed the hearing to a later date within the 18 month period.

In four cases, all in 2001, the OIA granted Rule 28 postponements to claimants who requested additional time to pay their \$150 filing fee. One of these claimants requested the additional time to complete her chemotherapy. The claimant did not pay her filing fee or request a waiver of the fee, and the matter was closed as abandoned under Rule 12. Two of the claimants requested the postponement in order to look for new attorneys. In the other case, the claimant attorney requested the postponement so that he could further investigate the merits of the case. These three claimants had not yet paid the filing fee, and the deadlines to do so had not expired by December 31, 2001.

In five cases, the OIA granted Rule 28 postponements to claimants who requested additional time to select a neutral arbitrator. Two of these postponements occurred in 2001.⁷⁵ In one case, the claimants received a 60 day postponement to allow the parties to

⁷⁴ The amendments to the *Rules* that have been discussed in 2001 will require neutral arbitrators to provide reasons.

⁷⁵ Claimants in both cases had already received 90 day postponements under Rule 21.

resolve whether or not a doctor was bound to arbitration. In the other case, the OIA granted a 30 day postponement based on the claimant's medical condition.

K. Number of Cases in Which Claimants Have Elected to Have Kaiser Pay the Fees and Expenses of the Neutral Arbitrator and 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.⁷⁶ 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 extra delay of obtaining and scheduling two additional participants in the arbitration process.⁷⁷ 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.⁷⁸ This recommendation intersects with a California statute which gives the 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.⁷⁹

At this point, it appears that few party arbitrators are being used in our system, and most cases are proceeding with a single neutral.⁸⁰ In only 14 of the 228 cases in which we have received an award after a hearing have we received a designation of a party arbitrator. That would mean that a single neutral arbitrator decided the remaining 214 cases.

We have received a designation of a party arbitrator from one or both parties in only 20 of the 766 open cases. In 4 of these 20 cases, we have received designations from both parties. In 5 cases, we have received a party arbitrator designation from claimant only, and in 11 cases, we have received a party arbitrator designation from respondent only.

In implementing the Blue Ribbon Panel's recommendation that Kaiser for pay the neutral, the *Rules* include procedures that allow claimants to shift the responsibility for payment to Kaiser.⁸¹ The procedures are simple, voluntary, and rely entirely upon the

⁷⁶ Blue Ribbon Panel Report at 41-42, Exhibit B at Recommendation 27.

⁷⁷ Blue Ribbon Panel Report at 42.

⁷⁸ Blue Ribbon Panel Report at 42.

⁷⁹ See California Health & Safety Code §1373.19.

⁸⁰ It could be that the greatest inducement to proceed with a single arbitrator which the *Rules* provide is a fast, workable way to appoint the neutral. Formerly, the party arbitrators were picked first, and they selected the neutral.

⁸¹ Rules 14 and 15 explain how claimants may shift responsibility for payment of the neutral arbitrator's fees and expenses to Kaiser.

claimant's election. Claimants making claims of \$200,000 or less can have Kaiser pay by signing a waiver of objection to the respondent paying the neutral arbitrator's fees and expenses. This waiver means that if Kaiser pays the neutral arbitrator's fees and expenses, the claimant cannot later claim that the arbitration was unfair because Kaiser paid these fees.

Additionally, Kaiser will pay the fees and expenses of the neutral arbitrator if claimants with a claim greater than \$200,000 waive their right to a party arbitrator and waive any objection to Kaiser's payment of the fees. Once claimants have done this, Kaiser will pay the neutral arbitrator's fees and expenses even if it declines to waive its right to a party arbitrator.⁸² In this way, the *Rules* create a financial incentive for claimants who are entitled to proceed with a tripartite panel of arbitrators to proceed with a single neutral arbitrator as the BRP recommended.

Through execution of the appropriate waiver forms, claimants have shifted the responsibility for paying the neutral arbitrator's fees and expenses to Kaiser in 891 cases out of a total of 2,071 cases, or 43% of all cases administered by the OIA. This is a rise of three percent from the second annual report. In 240 of these cases, the claimant is in *pro per*. In 651 of these cases, the claimant is represented by counsel.

During 2001, claimants have elected to have Kaiser pay the neutral arbitrator's fees and expenses in 400 cases. In 92 of these cases, the claimant is in *pro per*. In 308 of these cases, the claimant is represented by counsel. The 400 cases in 2001 is 45% of all cases in which a designation has been made, so it may be becoming more frequent.

These numbers are somewhat fluid. This is graphically illustrated by the statement which opened this section – that in only 14 cases in which we have received an award after hearing has the OIA received signed statements of agreement to serve from party arbitrators. Until we receive those executed forms, we cannot truly say that a panel of three will be used in a given case. It is possible that although neither side affirmatively waives the right to proceed with a party arbitrator, the case actually proceeds with a single neutral. This would be true, for example, in cases where both sides wish to proceed with a single neutral arbitrator or in cases seeking less than \$200,000, but claimant does not elect to have Kaiser pay the fees and expenses of the neutral arbitrator. In these cases, there would be no need for the OIA to receive notice that either side waives party arbitrators.

⁸² As far as we know, in all cases where claimant has waived the right to a party arbitrator, Kaiser has also waived its right to a party arbitrator.

L. Number of Cases in Which Kaiser Has Agreed to Waive Its Party Arbitrator

In a total of 386 cases, 147 of them open and 239 of them closed, the OIA has received notice that Kaiser has agreed to proceed without a party arbitrator. Two hundred and forty-two (242) of these notices were received during this reporting period. Claimants have notified the OIA that they are waiving party arbitrators in 673 cases. This includes 331 notices this reporting period.

Several factors may account for the difference in these two numbers. First, claimants usually give notice that they are willing to waive their party arbitrators before respondents, in order to gain the benefit of having Kaiser pay the neutral arbitrator's fees and expenses. In some of these cases, Kaiser is in the process of deciding whether or not to waive its party arbitrator. Second, the statutory right to proceed with a panel of three arbitrators belongs to both parties. Under Rules 14 and 15, respondent pays the neutral arbitrator's fees and expenses when a claimant waives party arbitrators, whether or not respondent also agrees to waive its right to proceed with party arbitrators. When a claimant waives the right to a party arbitrator and the respondent does not, the matter proceeds with a tripartite panel. However, respondent still pays the neutral arbitrator's fees and expenses. As far as we know, this has not occurred in our system.

M. Neutral Arbitrator 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.⁸³ 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 2001, the form had been returned by 964 arbitrators⁸⁴ in 1,177 closed cases⁸⁵ for a response rate of 82%. We received 493 of these responses during 2001 (out of 622 sent), for a response rate of 79%. Considering either all of the responses, or just the responses from 2001, the results show a high degree of approval of and satisfaction with the *Rules* and the OIA.

⁸³ The form and the entire analysis of responses to it are attached as Exhibit M.

⁸⁴ There were an additional 25 forms returned blank and marked to indicate that because the case closed so early the neutral had no reportable involvement with it. And an additional 59 were simply returned blank. The total returned was thus 1,048, or 89%, but the discussion above concerns only those with substantive responses above.

⁸⁵ The 1,177 closed cases include all those in which a questionnaire was mailed to the neutral arbitrator. We do not send questionnaires to neutral arbitrators in cases that close before the neutral arbitrator has held the arbitration management conference. This eliminates cases that settle or are withdrawn by claimants shortly after the neutral arbitrator is selected.

The questionnaires sent to the neutral arbitrators include three statements and ask the neutral arbitrators to state whether, on a scale from 1 to 5, they agree or disagree. Once again, 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; 705 out of the 931 answering this question rated the *Rules* a “5.” The responses averaged 4.9 in saying that they would participate in another arbitration in the OIA system; 849 out of the 930 answering this question responded with a “5.” They averaged 4.9 in saying that the OIA had accommodated their own questions and concerns in the specific case; 615 out of the 903 answering this questions responded with a “5.” The 4.9 average is the same average as the responses in 2000.⁸⁶ The median and mode overall for the responses to each of these statements was 5.

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, which received mixed results. While some left these questions completely blank, these are the responses of those who did not:

The manner of a neutral arbitrator’s appointment was checked as working well by 693 neutrals, while only 17 thought it needed improvement.

The early management conference was checked as working well by 734 neutrals and as needing improvement by only 21

The availability of expedited procedures was checked as working well by 257 neutrals and as needing improvement by 5.

The claimant’s ability to have the respondent pay the cost of the neutral was checked as working well by 349 neutrals and as needing improvement by 22.

The system’s *Rules* overall were seen as working well by 574 and as needing improvement by 20.

The requirement that a hearing be held in 18 months was marked as working well by 321 neutrals and as needing improvement by 23.

Only one area was controversial. The *Rules* require that a written decision be served on the parties and the OIA within ten days after a hearing. Neutral arbitrators have called the OIA about this rule, and have been late in serving decisions.⁸⁷ On this survey, 62 marked the category “award within 10 days of hearing” as needing

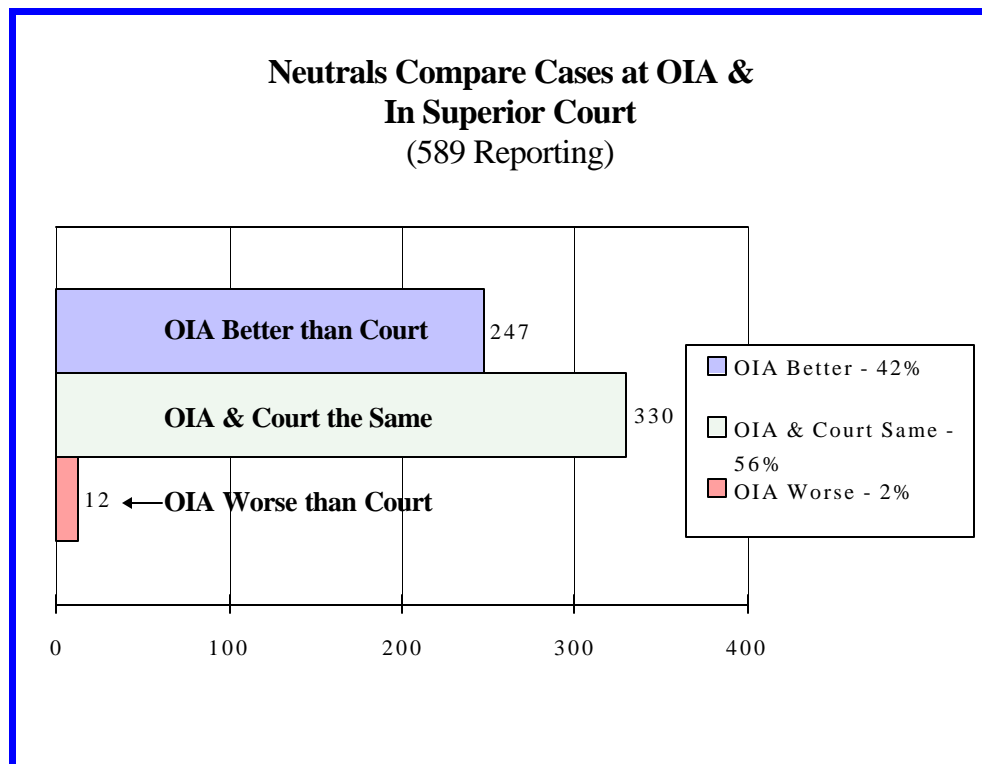
⁸⁶ The last report incorrectly reported this number due to an error in generating the computer reports. The correct numbers for last year are included in Exhibit M.

⁸⁷ Of our 228 decisions following a hearing, neutrals have been beyond the 10 day limit for service of decision in 103 of them (45%). Fifty-one (51) of these late decisions were received in 2001.

improvement, and 66 commented that the time for final decision should be increased to a period greater than 10 days. However, 193 neutrals marked the award within 10 days of hearing as working well. The neutral arbitrators' opinions about the 10 day rule have remained consistent over the two years we have measured it. In the last annual report, 41% of the neutral arbitrators who responded to the issue said that the award within 10 days of hearing needed improvement (28 out of 150) or commented that the time for final decision must be increased (33 out of 150). This year, 40% of the neutral arbitrators so responded.

One of the modifications to the *Rules* the OIA discussed with the AOB and Kaiser in 2001 concerns the ten day deadline for serving awards. Under the amended rule, awards in ordinary cases will be due in 15 business days after an arbitration hearing closes and awards in extraordinary and complex cases will be due in 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. Five hundred eighty-nine (589) neutrals answered saying that they had such parallel experience and made the comparison. Two hundred forty-seven (247) said that the OIA experience was better, and 330 said it was the same. Only 12 – 2% of those responding to this question – said that the OIA experience was worse.



V. The Role of the Arbitration Oversight Board (AOB)

On April 13, 2001, Kaiser announced the formation of a new oversight board. The Arbitration Oversight Board (“AOB”) replaced the earlier Arbitration Advisory Committee, which had served for over two years and from which several members had resigned due to life changes. The AOB is headed by David Werdegar, M.D. Dr. Werdegar is the former director of Office of Statewide Health Planning and Development and Professor of Community Medicine, Emeritus, at the UCSF School of Medicine. The board members were chosen by Dr. Werdegar and several previously served on the AAC.

The board members are:

Terry Bream, RN, Manager of Clinical Services at Kaiser Foundation Hospitals (served on the AAC);

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

Cornelius Hopper, M.D., Vice President for Health Affairs, Emeritus, University of California;

Tessie Guillermo, Executive Director of the Asian & Pacific Islander American Health Forum and former Commissioner to President’s Advisory Commission on Asian Americans and Pacific Islanders;

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

Mary Patricia Hough, a plaintiff’s attorney practicing in San Francisco;

Phil Madvig, M.D., Associate Executive Director for Quality at Permanente Medical Group (served on the AAC);

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

Honorable. Cruz Reynoso, Professor of Law at UC Davis School of Law and former California Supreme Court Justice;

Charles Sabatino, Vice President, Claims at Kaiser Foundation Health Plan; and

Linda Sanchez-Valentine, Executive Secretary-Treasurer, Orange County Labor Council and member of Workforce Investment Board of the City of Santa Ana.

The AOB had three board meetings in 2001 that the OIA attended to discuss the operation of its systems, answer questions, and consult about proposed changes to the *Rules*. During these meetings, the AOB also became familiar with the pre-arbitration, dispute resolution procedures at Kaiser, as well as some of its quality assurance mechanisms. The AOB has drafted its bylaws. A draft copy of its bylaws is attached as Exhibit K.

Early in 2001, Dr. Werdegar also spent two days in the OIA office observing how it operates and speaking with its staff. The OIA has invited all AOB members to visit its office.

The AOB has reviewed a draft of this report. The AOB discussed the draft report with us at its March 12, 2002 board meeting. Its written response is attached as Exhibit N.

VI. Significant Event During 2002: State Mandated Ethics Code for Neutral Arbitrators

During this reporting period, the California Legislature passed a statute mandating the Judicial Council to draft a code of ethics for neutral arbitrators. Neutral arbitrators must follow them beginning July 1, 2002. Because no state ethical standards had previously existed, our *Rules* require all arbitrators to follow the AAA Code of Ethics for Arbitrators in Commercial Disputes. Our *Rules* will be amended to include the state's new code.

We contemplate, however, that the need for rule changes may be more extensive than that. While a panel of experts was named in November 2001 to advise the Judicial Council in drafting the guidelines, no draft circulated to the public during 2001. Indeed, a final version of the code is not expected until April 2002. It is possible that the code may create certain obligations for neutral arbitrators (to obtain permission of the parties in current cases before accepting an additional case) or rights for the parties (of continuing automatic disqualification) that require that our *Rules* be modified and may increase the time needed to select a neutral arbitrator and/or to arbitrate a case. We may also need to increase the number of individuals in our pool and/or limit the number of cases a neutral arbitrator can have at any time, even if jointly selected.

The AOB and Kaiser are aware of the upcoming ethics code and are prepared to work quickly in consultation with the OIA to fashion any immediate changes that will be required. Obviously, we will be carefully following the effects of the code, and we will report fully in the 2002 annual report.

VII. 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 is operating an independently administered system of arbitration for Kaiser and its members that is fast, fair, low cost, and confidential.

This report describes the degree to which these goals are being met. The OIA, the AAC, and Kaiser set qualifications for neutral arbitrators hearing Kaiser arbitrations. The OIA has created a panel of 306 neutral arbitrators willing to hear Kaiser cases throughout the state of California. The OIA, the AAC, and Kaiser negotiated a set of rules that provide deadlines and procedures for Kaiser arbitrations. The AOB provides ongoing oversight of the OIA. So far, a total of 2,199 claimants have entered the system governed by the *Rules* and administered by the OIA. In the OIA system, neutral arbitrators are selected quickly. Parties and arbitrators are holding early management conferences and setting hearing dates at the outset of the cases, and 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 one have met their final deadlines.

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 44 days. This is 15 times faster than the average of 674 days to appointment of a neutral arbitrator reported by the California Supreme Court in *Engalla v. Permanente Medical Group*.

The OIA system has existed for 33 months. The data provided in this report show that thus far the OIA is ensuring that the deadlines and procedures found in the *Rules* are being followed in all of the Kaiser arbitrations it is administering.