ELEVENTH 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, 2009 - December 31, 2009

REPORT SUMMARY

This is the annual report the Office of the Independent Administrator (OIA) for 2009 regarding the arbitration system between Kaiser Foundation Health Plan and its affiliated groups of physicians and hospitals (collectively Kaiser) and its members.[1] Since 1999, the OIA has administered such arbitrations. Sharon Oxborough is the Independent Administrator. The data and analyses presented allow readers to gauge how well the OIA system is meeting its goals of providing arbitration that is fair, timely, lower in cost than litigation, and protects the privacy of the parties. For example:

- A majority of the neutral arbitrators and a plurality of the parties said the OIA administered arbitration system was better than going to court.
- Most parties express satisfaction with the neutral arbitrators and would recommend them to others.
- Cases closed, on average, within 12 months.
- With the consent of claimants, Kaiser paid all the neutral arbitrators fees in 85% of the cases.
- The number of neutral arbitrators in the pool remains large, even as the number of demands for arbitrations has dropped.
- A significant percent of claimants continue to bring cases without an attorney.

These and other factors are discussed in greater detail below and in the report.

Developments in 2009

While the system has been relatively stable, the OIA and the Arbitration Oversight Board (AOB) continuously strive to improve it and to provide more information about it to the public. The items below are consistent with these goals.

1. **Party Evaluation of the OIA and Arbitration System.** At the suggestion of the Arbitration Oversight Board (AOB), the OIA began sending the evaluations out in

[1] Kaiser has arbitrated disputes with its California members since 1971. In the 1997 *Engalla* case, the California courts criticized Kaiser's arbitration system, saying that it fostered too much delay in the handling of members' demands and should not be self-administered.

2009. A plurality of responses said the OIA was better than trying a similar case in Superior Court. See pages 4, 43 - 45 and Exhibit J.

2. **New AOB Members.** After two members resigned in 2009, they were replaced by Doris Cheng, Esq., and Richard J. Spinello. See pages 4 and 52 - 53.

3. **New Kaiser Permanente Insurance Corporation Products with OIA Administered Arbitration.** KPIC began selling insurance and self-funded products. Kaiser will administer these programs. The policies include a mandatory arbitration clause. The OIA will administer these arbitrations. See page 4.

4. **Changes in OIA Rules.** The AOB approved changes to the OIA Rules. The changes reflect the possibility of arbitrations involving KPIC, specifically accommodate lien cases, and make miscellaneous refinements and clarifications. See page 4 and Exhibit B.

5. **Changes in the Explanation of Waivers and Waiver Forms.** The AOB has edited these to make them easier for *pro pers* to understand and use. See pages 4 - 5 and Exhibit C.

6. **Analysis of Lien Cases.**[2] The OIA analyzed lien cases for the AOB. See page 5 and Exhibit D.

7. **AOB Votes to Ask OIA to Obtain Background Information about Neutral Arbitrators.** The AOB asked the OIA to create a form that will seek information about the racial and ethnic background of neutral arbitrators. See page 5.

Status of Arbitration Demands

The number of demands for arbitration continued to decline last year.

8. **Demands for Arbitration.** The number of demands continued to decline in 2009, when the OIA received 726 demands. This is 42 fewer than the OIA received in 2008. See pages 11 and 45.

9. **Types of Claims.** Ninety-one percent of the cases the OIA administered in 2009 involved allegations of medical malpractice. Less than 2% presented benefit and coverage allegations. Lien cases made up less than 5%. The remaining cases

[2]Lien claims are those demands for arbitration brought by Kaiser to recover money for services provided to the consumer for which Kaiser contends the consumer has been reimbursed in a lawsuit against a third party; for example, a driver in a car accident.

were based on allegations of premises liability and other torts, or unknown. The percentage of cases involving medical malpractice allegations has been consistent since the OIA began operations. See pages 12 and 46.

10. **Proportion of Claimants Without Attorneys.** Nearly a quarter (23%) of the claimants were not represented in 2009. See pages 13 and 46 - 47.

How Cases Closed

The purpose of an arbitration is to resolve a claim. The parties themselves resolved the vast majority of cases in the system. Neutral arbitrators decided the remaining cases; almost always with a single neutral arbitrator.

11. **Three-Quarters of Cases Closed by the Parties' Action.** During 2009, the parties settled 46.5% of the closed cases. The claimants withdrew 25.6% and abandoned another 4.3% by failing to pay the filing fee or get the fee waived. See pages 29 - 30.

12. **One-Quarter Closed by Decision of Neutral Arbitrator.** 7% were closed through summary judgment, 2.4% were dismissed by neutral arbitrators, and 13% of cases closed after an arbitration hearing. In the cases that went to arbitration hearing, claimants prevailed in 29%. See pages 30 - 31.

13. **Nearly All Cases Heard by a Single Neutral Arbitrator Instead of a Panel.** Most hearings involved a single neutral arbitrator rather than a panel composed of one neutral and two party arbitrators. A panel of three arbitrators signed only two awards made after a hearing in 2009. A single neutral decided the other 101. See pages 23 - 24.

14. **Half of Claimants Received Some Compensation.** The most common way cases close (46.5%) is by the parties settling the dispute and the claimant receiving some money from Kaiser. In addition, 4% won after an arbitration hearing. The average award was $811,657, the median was $377,589, and the range was from $13,900 to $5,000,000. See page 31 and Exhibit G.

Meeting Deadlines

The timely selection of the neutral arbitrator is crucial to the timely resolution of the case. Nevertheless, the desire for efficiency must be balanced by the needs of the parties in particular cases. The OIA *Rules* allow the parties to delay the selection process and extend the completion date. Even with such requests, the process is expeditious.

15. **Half of Neutral Selections Proceeded with No Delay; the Other Neutral Selections Had Delays Requested by Claimants.** Half of the neutral arbitrators were selected without the parties exercising options that delay the process. In the other cases, the selection deadline was postponed (43%), a neutral arbitrator was disqualified (3%), or both (4%). Claimants requested all but one of the postponements. They also made 91.5% of the disqualifications. See pages 18 - 19. The percentage of cases in which the parties chose to postpone the deadline has been roughly consistent since 2003. In 2009, it was 47%. See pages 20 - 22 and 47 - 48.

16. **Overall Average Length of Time to Select Neutral Arbitrator Increased Three Days.** The average time to select a neutral arbitrator was 70 days, three more than last year and the same as 2005. In comparison with the time described in the *Engalla* case, the 70 days to select a neutral arbitrator in 2009 is nine times faster. See pages 22, 23, and 50.

17. **Almost All Cases Closed on Time, Although Time to Close Increased in All Categories.** In 2009, the cases closed, on average, in 357 days, or 12 months, up from 325 days in 2008. Three cases closed late. Nearly 85% of the cases closed within 18 months (the deadline for most cases) and 59% closed in a year or less. Twenty percent of the cases that closed in 2009 were designated complex or extraordinary or had their 18 month deadline extended by the neutral arbitrator. See pages 27 - 29 and 50.

18. **Hearings Completed Within Seventeen Months.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 503 days (less than 17 months). This average includes cases that were designated complex or extraordinary or that received a Rule 28 extension because they needed extra time. "Regular cases" closed in 278 days, or 9 months. See pages 28, 29, and 31.

OIA's Pool of Neutral Arbitrators

A large and balanced pool of neutral arbitrators, among whom work is distributed, is a crucial ingredient to a fair system. It minimizes the likelihood of a captive pool of neutral arbitrators, beholden to Kaiser for their livelihood. Neutral arbitrators continue to serve after making large awards against Kaiser. The two methods of selecting a neutral arbitrator – strike and rank or joint selection – allow parties the choice to select anyone they collectively want. The vast majority of neutral arbitrators the parties jointly select are in the OIA pool.

19. **Neutral Arbitrator Pool.** The OIA has 275 neutral arbitrators in its pool. Forty percent of them, or 109, are retired judges. See page 6.

20. **Neutral Arbitrator Backgrounds.** The applications filled out by the members of the OIA pool show that 130 arbitrators, or more than 45%, spend all of their time acting in a neutral capacity. The remaining members divide their time almost equally between plaintiff's side and defendant's side work, though not necessarily medical malpractice litigation. See pages 7 - 8. Neutral arbitrators' applications and updates also show that 247 of the arbitrators have medical malpractice experience. That is 90%. See pages 7 - 8.

21. **Fifty-Nine Percent of Arbitrators Served on Arbitrations and Heard Cases.** Fifty-nine percent of the neutral arbitrators in the OIA pool served on a case in 2009. Arbitrators averaged two assignments each in 2009. Seventy-four different neutrals, including arbitrators not in the OIA pool, decided the 103 awards made in 2009. See page 9.

22. **Sixty-seven percent of Neutral Arbitrators Selected by Strike and Rank.** The parties chose 67% of neutral arbitrators through the strike and rank process, and jointly selected the remaining 33%. One neutral arbitrator was appointed by the court. Sixty-three percent of the arbitrators jointly selected were members of the OIA pool. In 37%, the parties chose a neutral arbitrator who was not a member of the OIA pool. See page 15 - 16.

Neutral Arbitrator Fees

While the OIA arbitration fee is less than the comparable court filing fee, claimants in arbitration can be faced with neutral arbitrator fees, which do not exist in court. Claimants in OIA cases, however, can and do shift the responsibility to pay the neutral arbitrator's fees to Kaiser.

23. **Kaiser Paid the Neutral Arbitrator's Fees in 85% of Cases Closed in 2009.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. For the cases that closed in 2009, Kaiser paid the entire fee for the neutral arbitrators in 85% of those cases that had fees. See pages 36 - 37.

24. **Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from $175/hour to $800/hour, with an average of $390. For the 616 cases that closed in 2009 and for which the OIA has information, the average total fee charged by neutral arbitrators was $5,921.87. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average was $6,456.41. The average fee in cases decided after a hearing was $21,093.64. See pages 37 - 38.

Evaluations

The OIA sends the parties and neutral arbitrators evaluations in cases which have neutral arbitrator participation. They ask the neutral arbitrators to evaluate the OIA system and the parties to evaluate their neutral arbitrators, and, beginning in 2009, the OIA system. The parties continue to give their neutral arbitrators positive evaluations. Similarly, the neutral arbitrators report that the system itself works well. Less than half of the parties returned their evaluations, while almost all of the neutral arbitrators returned theirs.

25. **Positive Evaluations of Neutral Arbitrators.** In 2009, the great majority of counsel for both sides reported that they would recommend their neutral arbitrator to another individual with a similar case. See pages 39 - 40.

26. **Positive Evaluations of the OIA.** Neutral arbitrators continue to give OIA procedures positive evaluations. More than 56% said that the OIA experience was better than a court system, and 43% said it was about the same. See pages 41 - 42. Forty-six percent of the parties who answered this question in the new form sent to attorneys and *pro pers* said that the OIA system was better than the court system, and 44% said they were the same. See page 44.

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A Note About Numbers

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

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

Average:	The mean. The sum of the score of all items being totaled divided by the number of items included.
Median:	The midpoint. The middle value among items listed in ascending order.
Mode:	The single most commonly occurring number in a given group.
Range:	The smallest and largest number in a given group.

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

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

I. INTRODUCTION & OVERVIEW

The Office of the Independent Administrator (OIA) issues this report for 2009.[1] It describes an arbitration system that handles claims brought by Kaiser members against Kaiser Foundation Health Plan, Inc. (Kaiser) or its affiliates.[2] Sharon Oxborough, an attorney, is the Independent Administrator. Under her contract with the Arbitration Oversight Board, the OIA maintains a pool of neutral arbitrators to hear Kaiser cases and independently administers arbitration cases brought by Kaiser members. The contract also requires that Ms. Oxborough write an annual report describing the arbitration system. The report describes the goals of the system, the actions being taken to achieve them, and the degree to which they are being met. While this report mainly focuses on what happened in the arbitration system during 2009, one section compares 2009 with earlier years. The final section finds that the system is continuing to achieve its goals.

The Arbitration Oversight Board (AOB), an unincorporated association registered with the California Secretary of State, provides ongoing oversight of the OIA and the independently administered system. Its activities are discussed in Section XI.

The arbitrations were controlled by the *Rules for Kaiser Permanente Member Arbitrations Administered by the Office of the Independent Administrator Amended as of January 1, 2007 (Rules)*. The *Rules* consist of 54 rules in a 21 page booklet and are available in English, Spanish, and Chinese.[3] Some important features they contain include:

Procedures for selecting a neutral arbitrator rapidly;[4]

Deadlines requiring that the majority of cases be resolved within 18 months;[5]

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[1]The OIA has a website, www.oia-kaiserarb.com where this report can be downloaded, along with the prior annual reports, the *Rules*, various forms, and much other information, including organizational disclosures. A description of the OIA's staff is attached as Exhibit A. The OIA can be reached by calling 213-637-9847, faxing 213-637-8658, or e-mailing oia@oia-kaiserarb.com.

[2]Kaiser is a California nonprofit health benefit corporation and a federally qualified HMO. Since 1971, it has required that its members use binding arbitration. Kaiser arranges for medical benefits by contracting with the The Permanente Medical Group, Inc. (Northern California) and the Southern California Permanente Medical Group. Hospital services are provided by contract with Kaiser Foundation Hospitals, a California nonprofit public benefit corporation. Almost all of the demands are based on allegations against these affiliates.

[3]The *Rules* are also available from our website. As discussed in Section II.C, the AOB voted to amend the *Rules* in 2009. These changes took effect January 1, 2010. A redlined version of the *Rules* is attached as Exhibit B. This allows the reader to see the *Rules* as they existed in 2009, the changes made, and the *Rules* as they will exist going forward.

[4]Exhibit B, Rules 16 and 18.

[5]Exhibit B, Rule 24.

Procedures to adjust these deadlines when required;[6] and

Procedures under which claimants may choose to have Kaiser pay all the fees and expenses of the neutral arbitrator.[7]

The 18 month timeline that the *Rules* establish for most cases is displayed on the next page. Details about each step in the process are discussed in the body of this report.

A. Goals of the Arbitration System Between Members and Kaiser

The system administered by the OIA is expected to provide a fair, timely, and low cost arbitration process that respects the privacy of all who participate in it. These goals are set out in Rules 1 and 3. The data in this report are collected and published to allow the AOB and the public to determine how well the arbitration system meets these goals.

B. Format of This Report[8]

The report first discusses developments in 2009. The next sections look at the OIA's pool of neutral arbitrators and the number and types of cases the OIA received. The parties' selection of neutral arbitrators is next discussed. That is followed by a short section on the monitoring of open cases, and a longer analysis of how cases are closed and the length of time to closure. The next section discusses the cost of arbitration in the system. The parties' evaluations of their neutral arbitrators and the parties and neutral arbitrators' evaluations of the OIA system are summarized in the following sections. The report next compares the operation of the system over time. Finally, the report describes the AOB's membership and activities during 2009.

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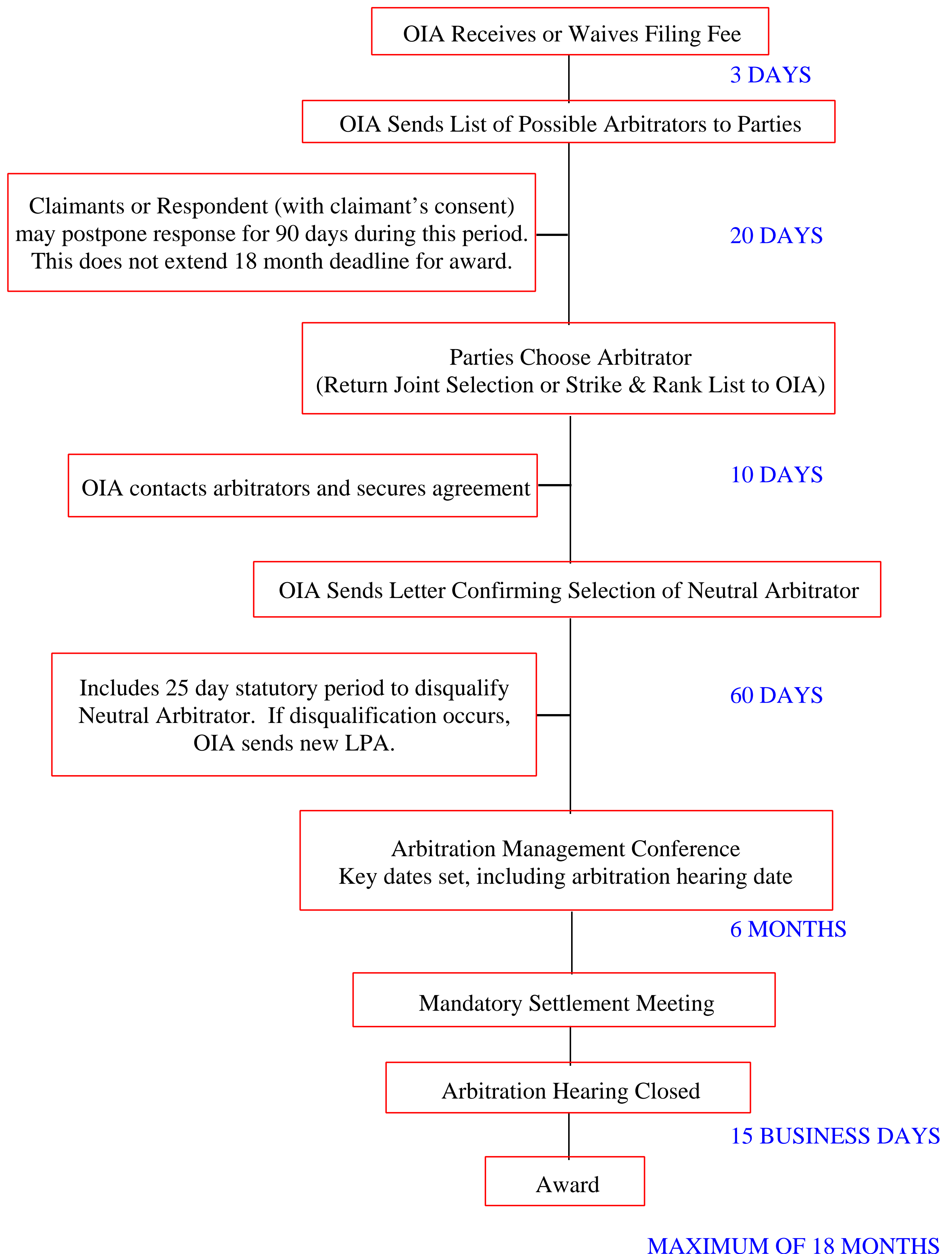
[6]Exhibit B, Rules 24, 28 and 33.

[7]Exhibit B, Rules 14 and 15; *see also* Section VIII.

[8]For a discussion of the history and development of the OIA and its arbitration system, please see prior reports. The OIA was created in response to the recommendation of a Blue Ribbon Panel (BRP). The Law Offices of Sharon Lybeck Hartmann served as the OIA from its inception until March 28, 2003. Sharon Oxborough has served as the Independent Administrator since then. The OIA met all of the recommendations that pertain to it since its first operating year. A full copy of the BRP report is available from the OIA website. In addition, a separate document that sets out the status of each recommendation is also available from the website.

Timeline for Arbitrations Using Regular Procedures



II. DEVELOPMENT AND CHANGES IN THE SYSTEM IN 2009

A. Party Evaluation of the OIA and the Arbitration System

A form for the parties to evaluate the OIA and arbitration system was developed in 2008. The OIA began sending it out in January 2009 to the attorneys and *pro per* parties at the end of cases along with the evaluation of the neutral arbitrator. In 2009, 996 people received the evaluations and 349 evaluations were returned. The results are described in Section IX.C.

B. New Arbitration Oversight Board Members

Two members of the AOB stepped down in 2009, Mary Patricia Hough, Esq., and Dan Heslin.[9] They were replaced by Doris Cheng, Esq., and Richard J. Spinello. See Section XI for further details.

C. New Kaiser Permenente Insurance Corporation Products with OIA Administered Arbitration

Kaiser Permanente Insurance Corporation (KPIC) began selling insurance products and self-funded products in 2009 in addition to the HMO policies sold by Kaiser. Kaiser will administer KPIC's programs and the insureds will receive care from the same Kaiser physicians, hospitals and clinics as Kaiser HMO members. The insurance policies contain the same type of mandatory arbitration clause as Kaiser's HMO policies. Any resulting arbitrations will be administered by the OIA and subject to OIA *Rules*.

D. Changes to OIA *Rules*

The OIA suggested and the AOB refined and ultimately approved amendments to the *Rules*. Amendments to Rule 8.a - b, 27.c and 38.b recognize the possibility of arbitrations involving KPIC. Amendments 15.e, 21.d, and 39.d adjust the *Rules* as needed for lien cases, in which Kaiser, rather than the members, brings the demand for arbitration. Amendments to *Rules* 8.e, 9.b, 18.f, 25.b, 25.c, and 25.d make miscellaneous refinements or clarifications in light of minor issues that have arisen over the years.

E. Changes in the Explanation of Waivers and Waiver Forms

Over the past two years, the AOB has worked on improving and simplifying the explanation of how members can waive either the $150 arbitration fee, the neutral arbitrator's fees and expenses, or both, as well as the form used for claimants who seek to have both waived based on extreme financial hardship. The interplay of the waivers is complicated in part because several state laws or regulations apply in this area. Additionally, the Blue Ribbon Panel, whose recommendations led to the creation of the OIA, recommended that Kaiser condition its payment

[9] Mr. Heslin had been a member of the AOB's predecessor, the Arbitration Advisory Committee, which had helped to create the rules and the neutral arbitrator qualifications when the OIA was first established.

of the neutral arbitrator's fees and expenses on the claimant's waiver of a party arbitrator, in cases where one could be used. A copy of the waiver explanation and forms is attached as Exhibit C. Waivers are more fully discussed in Section VIII.B.

F. Analysis of Lien Cases

The prior annual report noted that lien cases, in which Kaiser seeks to recover money for services provided to a member for which Kaiser contends the member was compensated in a lawsuit against a third party, constituted more than five percent of the demands for arbitration for the first time in 2008. The OIA analyzed these cases for the AOB. The analysis is attached as Exhibit D. As a result, the *Rules* were modified to explicitly accommodate lien cases. The OIA also discovered that it did not have copies of redacted awards made by neutral arbitrators in lien cases. That omission was corrected and the redacted decisions are now part of the respective neutral arbitrators' packets.

G. Background of Neutral Arbitrators

The AOB requested the OIA to develop a form for neutral arbitrators to voluntarily report their racial or ethnic background. See Section XI.

III. POOL OF NEUTRAL ARBITRATORS

A. Turnover in 2009 and the Size of the Pool at Year-End

On December 31, 2009, there were 275 people in the OIA's pool of possible arbitrators. Of those, 109 were former judges, or 40%.

Members of the OIA pool are distributed into three geographic panels: Northern California, Southern California, and San Diego. Members who agree to travel without charge may be listed on more than one panel. Exhibit E contains the names of the members of each panel.

Number of Neutral Arbitrators by Region

Total Number of Arbitrators in the OIA Pool:	**275**
Southern California Total:	**139**
Northern California Total:	**122**
San Diego Total:	**53**

***The three regions total 314 because 34 arbitrators are in more than one panel; 24 in So. Cal & San Diego, 4 in No. Cal & So. Cal, 1 in No. Cal & San Diego, and 5 in all three panels.**

On January 1, 2009, the OIA had 286 people in its pool of possible arbitrators. During the year, 44 people left the pool. The number who left the pool is larger than in 2008 because in 2009, neutral arbitrators were required to update their applications. This happens every two years. These updates allow the parties to see recent cases in which the neutral arbitrator acted as a neutral arbitrator or mediator for Kaiser.[10] Historically, some members of the pool who have rarely or never served as a neutral arbitrator decide not to complete the update process and thereby leave the pool. This year 30 people left the pool during this process. Twenty had never served or had not served for a long time. In addition, six neutral arbitrators missed the deadline for submitting the update - despite several reminders - and will be allowed to rejoin in six months.

[10]For a more detailed discussion of the information provided to the parties about individuals listed on the List of Possible Arbitrators, see Section V.A.

Twenty-eight arbitrators joined the pool in 2009.[11] The OIA rejected four applicants because they failed to meet the qualifications.[12]

B. Practice Background of Neutral Arbitrators

OIA applications ask the applicants to allocate the amount of their practice spent in various professional endeavors. Based on these responses, the "average" neutral arbitrator in the OIA pool spends 62% of his or her time acting as a neutral arbitrator, less than 1% acting as a respondent's party arbitrator, a claimant's party arbitrator, or an expert, 12% as a respondent (or defense) attorney, 10% as a claimant (or plaintiff) attorney, and 13% in other forms of employment, including non-litigation legal work, teaching, mediating, etc. One of the interesting facts about the "average" member of the OIA pool is that the amount of plaintiff work and defense work is closely balanced.

There is, of course, no such "average" neutral arbitrator, in part because a very substantial percentage of the pool spends 100% of their practice acting as neutral arbitrators. More than 47% of the pool, 130 members, report that they spend 100% of their time that way.[13] The remainder are distributed as shown below.

Percent of Practice Spent As a Neutral Arbitrator

Percent of Time	0%	1 - 25%	26 - 50%	51 - 75%	76 - 99%	100%
Number of NAs	**11**	**79**	**32**	**10**	**13**	**130**

The members of the OIA pool who are not full time arbitrators primarily spend their time as litigators. Significantly, they are relatively balanced on both sides.

[11]The application can be obtained by calling the OIA or by downloading it from our website. If the application is accessed from the OIA website, it can be filled in on-line rather than by hand or typewriter.

[12]The qualifications for neutral arbitrators are attached as Exhibit F. If the OIA rejects an application, we inform the applicant of the qualifications which he or she failed to meet.

[13]One hundred-nine members of the OIA pool are retired judges.

Percent of Practice Spent As an Advocate

Percent of Practice	Number of NAs Reporting Plaintiff Counsel Practice	Number of NAs Reporting Defendant Counsel Practice
0%	**206**	**207**
1 - 25%	**29**	**20**
26 - 50%	**26**	**25**
51 - 75%	**4**	**7**
76 - 100%	**10**	**16**

Finally, while the qualifications do not require that members of the OIA pool have medical malpractice experience, 90% of them do. At the time they filled out or updated their applications, 247 reported that they had such experience, while 28 stated they did not. Members of the pool who have served on a Kaiser case since they joined the pool have most likely acquired medical malpractice experience since their initial report to us.[14]

C. How Many in the Pool of Arbitrators Have Served?[15]

One of the recurring concerns expressed about mandatory consumer arbitration is the possibility of a "captive," defense-oriented pool of arbitrators. The theory is that Kaiser is a "repeat player" but claimants are not; Kaiser therefore has the capacity to bring more work to arbitrators than claimants. Moreover, if the pool from which neutral arbitrators are drawn is small, some arbitrators could become dependent on Kaiser for their livelihood. A large pool of people available to serve as neutral arbitrators, and actively serving as such, is therefore an important tool to avoid this problem. If the cases are spread out among many neutrals, no one depends on Kaiser for his or her income and impartiality is better served. Thus, the large size of the OIA pool from which the OIA randomly compiles a List of Possible Arbitrators (LPA) and the ability for parties to jointly select arbitrators from both within and outside the pool are the two main factors which minimize possible bias.

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[14]Of the 28 who reported no medical malpractice experience in their applications, 15 of them have served as a neutral arbitrator in an OIA case. Six of these neutral arbitrators have decided one to five cases. While some of these could have been decided on purely procedural grounds, their reports of medical malpractice experience may be outdated. Five of the 13 who had never served joined the pool in 2009.

[15]The procedure for selecting neutral arbitrators for individual cases is described below in Section V.A.

1. The Number Who Served in 2009

In 2009, 192 different neutral arbitrators were selected to serve as neutral arbitrators in 619 OIA cases. The great majority (162) were members of the OIA pool. Thus, in 2009, 59% of the OIA pool served in a case. The number of times a neutral in the OIA pool served ranged from 0 to 22. The neutral arbitrator at the highest end was jointly selected 6 times. The average number of appointments for members of the pool in 2009 is 2, the median is 1, and the mode is 0.

2. The Number Who Wrote Awards in 2009

The group of neutral arbitrators deciding awards after hearing is similarly diverse. The 103 awards made in 2009 were decided by 74 different neutral arbitrators. Fifty-seven of the arbitrators made a single award, while ten decided two. Four other neutral arbitrators decided 3 cases each, one neutral arbitrator decided four, and two decided five. Four of these 7 neutral arbitrators wrote awards in favor of both sides; 3 neutral arbitrators made a total of 11 awards only in favor of Kaiser. One of the three neutral arbitrators was not in the OIA pool, but was jointly selected. In 4 of the 11 cases, the claimant was *pro per*.

3. The Number Who Have Served After Making a Large Award

Critics have claimed that Kaiser will not allow neutral arbitrators who have made large awards to serve in subsequent arbitrations; its attorneys accomplishing this result by striking them from LPAs or disqualifying them if selected. The last five annual reports have looked at what has happened to neutral arbitrators after making an award of $500,000 or more.

Since the OIA has existed, 61 different neutral arbitrators have made 75 awards of $500,000 or more in favor of claimants. Ten of these awards were made in 2009.[16] The awards have ranged from $500,000 to $6,000,236. Since they made their awards, they have served 663 times; 338 times because the parties jointly selected them.

Of the 61 neutral arbitrators, 9 were never members of the OIA pool and 20 have left the pool for various reasons. Thus, at the end of 2009, there were 32 neutral arbitrators in the pool who have made awards of $500,000 or more. Twenty-five of the 32 neutral arbitrators made awards prior to 2009. Only seven of them have not served again. Six of them are in Southern California.

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[16] Nine of the neutral arbitrators who made large awards in 2009 were neutral arbitrators who had not made such an award in the past. Five of them already served as neutral arbitrators again in 2009 and one is not in the pool (though he has served since). The other three made their awards in August and November.

4. Comparison of Cases Closed by Neutral Arbitrators Selected Ten or More Times in 2009 with Cases Closed by Other Neutral Arbitrators

There were 14 neutral arbitrators who were selected 10 or more times in 2009. To compare their cases, the OIA reviewed the cases these arbitrators closed in 2008 and 2009 with the other cases that closed in those years with a neutral arbitrator in place. The following table shows the results.

Comparison of Cases Closed with Neutral Arbitrators Selected 10 or More Times in 2009 vs. Closed with Other Neutral Arbitrators

Cases Closed 2008 - 2009	Cases with Neutral Arbitrators Selected 10 or More Times in 2009		Cases with Other Neutral Arbitrators	
Settled	135	48.6%	535	50.5%
Withdrawn	63	22.7%	237	22.4%
Summary Judgment	25	9%	91	8.6%
Awarded to Respondent	36	12.9%	105	9.9%
Awarded to Claimant	8	2.9%	53	5%
Dismissed	8	2.9%	30	2.8%
Other	3	1.1%	8	.8%
Total	278		1059	

5. The Number Named on a List of Possible Arbitrators in 2009

All of the neutral arbitrators in the OIA pool were named at least once on a List of Possible Arbitrators (LPA) sent to the parties by the OIA in 2009. The average number of Northern California arbitrators appearing on an LPA is 36, the median number is 38, and the mode is 37. The range of appearances is from 7 to 57 times.[17] In Southern California, the average number of appearances is 21, the median is 23, and the mode is 23. The range is from 1 to 36. In San Diego, the average is 11, the median is 12, and the mode is 3. The range of appearances is from 0 to 23. One member of the pool joined November 6, 2009, and was added

[17] In addition to chance, the range is affected by how long a given arbitrator has been in the pool, the number of members in each panel, and the number of demands for arbitration submitted in the geographical area for that panel. Some have been in the OIA pool since it started; one joined December 1, 2009, four weeks before the end date for this report. The number of times an arbitrator is selected also depends on whether the individual will hear cases where the claimant has no attorney (*pro per* cases). Slightly less than 20% of the pool will not.

to both the San Diego and Southern California panels. He was listed on a Southern California LPA, but not a San Diego LPA.

D. "One Case Neutral Arbitrators"

Standard 12 of California's Ethics Standards for Neutral Arbitrators requires neutral arbitrators to disclose whether they will accept additional work from the parties or attorneys in the case while the case remains open. If a neutral arbitrator fails to disclose that he or she will accept such work, that neutral arbitrator is barred from doing so until the case closes or the neutral arbitrator resigns from it. Moreover, this particular disclosure must be made timely – a late disclosure is the same as no disclosure. A neutral arbitrator may also inform the parties that he or she will not accept any future work from the parties or attorneys while the present case remains open and some do. Neutral arbitrators who either fail to serve timely Standard 12 disclosures or who state that they will not accept such future work while the case is open are considered "one case neutral arbitrators."

The OIA tracks Standard 12 disclosures and temporarily removes "one case neutral arbitrators" from the pool while their cases are open. During 2009, twelve neutral arbitrators were "one case neutral arbitrators" for part of the year. At the end of 2009, one remained a "one case neutral arbitrator."

IV. DEMANDS FOR ARBITRATION SUBMITTED BY KAISER TO THE OIA

Kaiser submitted 726 demands for arbitration in 2009.[18] Geographically, 380 demands for arbitration came from Northern California, 289 came from Southern California, and 57 came from San Diego.[19]

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

Under the *Rules*, Kaiser must submit a demand for arbitration to the OIA within ten days of receiving it.[20] In 2009, the average length of time that Kaiser took to submit demands to the

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[18] A few of these demands do not proceed further in the system because they are "opt in" – based on a contract that required arbitration but not the use of the OIA. There were nine "opt ins" in 2009. Six of the claimants chose to have the OIA administer their claims. One (a lien case) affirmatively opted out of the OIA. Another one settled before the deadline to opt in. For the last case, the deadline had not expired by the end of the year. These 3 explain the difference between the 726 claims submitted and the 723 claims administered.

[19] The allocation between Northern and Southern California is based upon Kaiser's corporate division. Roughly, demands based upon care given in Fresno or north are in Northern California, while demands based upon care given in Bakersfield or south are in Southern California or San Diego. Rule 8 specifies different places of service of demands for Northern and Southern California, including San Diego.

[20] Exhibit B, Rule 11.

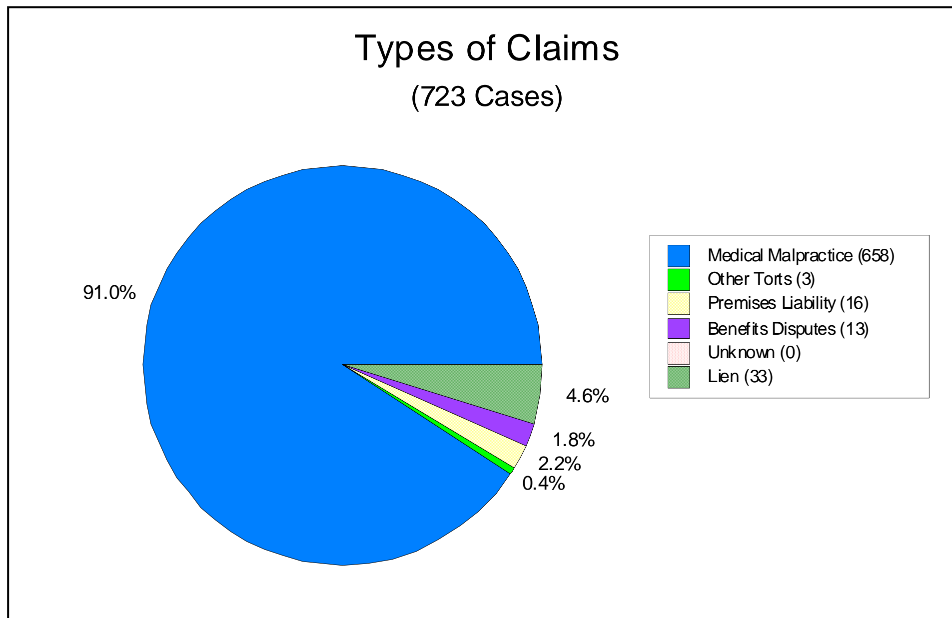
OIA is 3 days. The mode is one. This means that usually Kaiser sent the OIA a demand on the day after Kaiser received it. The median is 2 days. The range is 0 to 35 days.

There were 28 cases in 2009 in which Kaiser took more than ten days to submit the demand to the OIA. If only these "late" cases are considered, the average is 17 days, the median is 15 and the mode is 14 days. Twenty-three of the 28 "late" cases were lien cases, which means Kaiser, not a member, is bringing the demand for arbitration.

B. Types of Claims

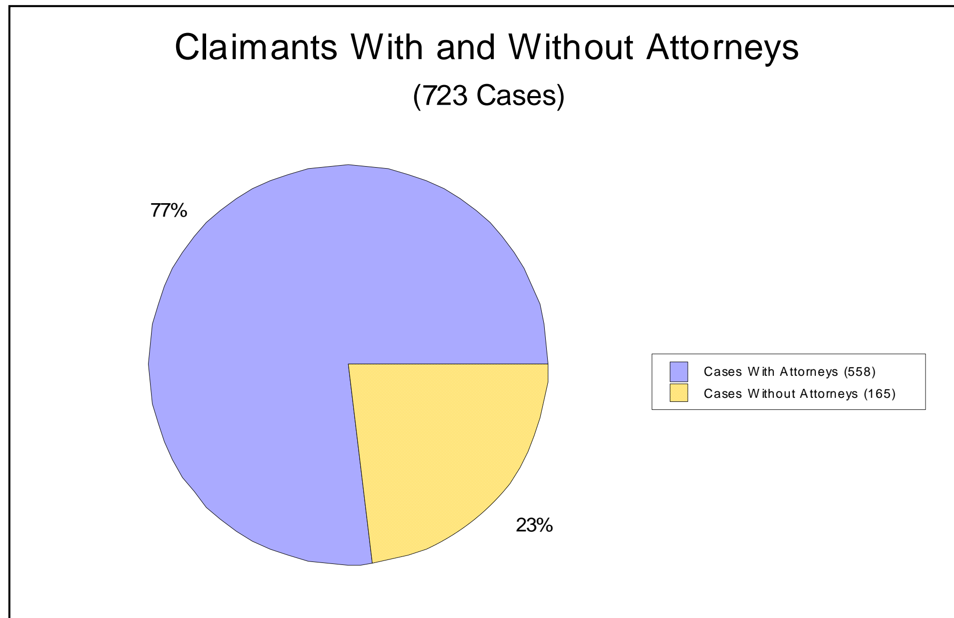
In 2009, the OIA administered 723 cases. The OIA categorizes cases by the subject of their claim: medical malpractice, premises liability, other tort, lien, or benefits and coverage cases. Medical malpractice cases make up 91% (658 cases) in the OIA system. Benefits and coverage cases represent less than two percent of the system (13 cases).

The chart below shows the types of claims the OIA administered during 2009.



C. Claimants With and Without Attorneys

Claimants were represented by counsel in 77% of the cases the OIA administered in 2009 (558 of 723). In 23% of cases, the claimants represented themselves (or acted in *pro per*).[21]



V. SELECTION OF THE NEUTRAL ARBITRATORS

One of the most important steps of the arbitration process occurs at the beginning: the selection of the neutral arbitrator. This section of the report first describes the selection process in general. The next four sub-sections discuss different aspects of the selection process in detail: 1) the manner in which the parties selected the neutral arbitrator – jointly agreeing or based upon their separate responses to the List of Possible Arbitrators (LPA); 2) the cases in which the parties - almost always the claimant - decided to delay the selection of the neutral; 3) the cases in which the parties - again, usually the claimant - disqualified a neutral arbitrator; and 4) the amount of time it took the parties to select the neutral arbitrator. Finally, the report examines cases in which parties have selected party arbitrators.

[21]In lien cases, the member is the respondent. Nevertheless, in those cases where the report distinguishes between claimants and respondents (or consumers and non-consumers), the member in a lien case is still considered to be the claimant for statistical purposes. This applies to statistics concerning representation by counsel, to requests for postponements or extensions of time, disqualifications, prevailing party, and fee shifting. It does not apply to evaluation at the end of a case. Those are anonymous.

A. How Neutral Arbitrators are Selected

The process for selecting the neutral arbitrator begins after a demand has entered the OIA system[22] and a claimant has either paid the $150 arbitration fee or received a waiver of that fee. The OIA sends both parties in the case an LPA. This LPA contains the names of 12 members from the appropriate panel of the OIA pool of neutral arbitrators. The names are generated randomly by computer.

Along with the LPA, the OIA sends the parties information about the people named on the LPA. At a minimum, the parties receive:

1) a copy of each neutral arbitrator's application and fee schedule, and

2) subsequent updates.

If a neutral arbitrator has served in any earlier, closed OIA case, the parties may also receive:

1) copies of any evaluations previous parties have submitted about the neutral, and

2) redacted copies of any awards or decisions granting summary judgment the neutral has prepared.

The parties have 20 days to respond to the LPA.[23] Parties can respond in one of two ways. First, both sides can jointly decide on the person they wish to be the neutral arbitrator. Such a neutral arbitrator does not have to be one of the names included in the LPA, be in the OIA pool, or meet the OIA qualifications.[24] Provided the person agrees to follow the OIA *Rules*, the parties can jointly select anyone they want to serve as neutral arbitrator.

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[22] "Entered the OIA system" means that the case is mandatory or the claimant has opted-in. The OIA can take no action in a non-mandatory case before a claimant has opted in except to return it to Kaiser to administer.

[23] A member of the OIA staff contacts the parties before their responses to the LPA are due to remind them of the deadline.

[24] Some neutral arbitrators who do not meet our qualifications – for example, they might have served as a party arbitrator in the past three years for either side in a Kaiser arbitration – do serve as jointly selected neutral arbitrators. There is, however, one exception: If a neutral arbitrator is considered a "one case neutral arbitrator" and we know the case is still open, the OIA would not allow the person to serve as a neutral arbitrator in a subsequent case. Section III.D explains "one case neutral arbitrators."

On the other hand, if the parties do not jointly select a neutral arbitrator, each side submits a response to the LPA, striking up to four names and ranking the rest, with "1" as the top choice. When the OIA receives the LPAs, the OIA eliminates any names who have been stricken by either side and then totals the scores of the names that remain. The person with the best score[25] is asked to serve. This is called the "strike and rank" procedure.

A significant number of OIA administered cases close before a neutral arbitrator is selected, and even before that process is begun. In 2009, 85 cases either settled (27) or were withdrawn (58) without a neutral arbitrator in place.[26] Before a neutral has been selected, the parties can request a postponement of the LPA deadline under Rule 21 of up to 90 days. In addition, after the neutral arbitrator is selected, but before he or she actually begins to serve, California law allows either party to disqualify the neutral arbitrator.

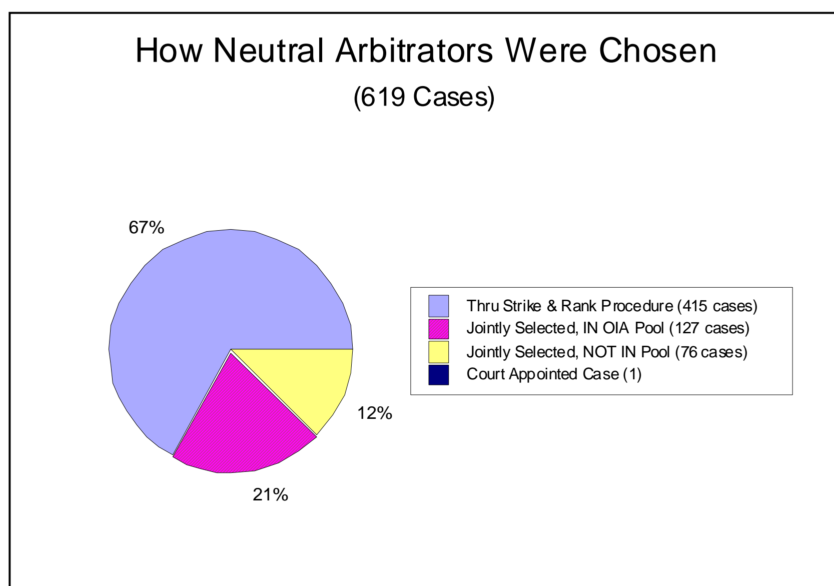
B. Joint Selections vs. Strike and Rank Selections

Of the 619 neutral arbitrators selected in 2009, 203 were jointly selected by the parties (33%) and 415 (67%) were selected by the strike and rank procedure. One neutral arbitrator was selected by Court order. Of the neutral arbitrators jointly selected by the parties, 127 (63%), were members of the OIA pool, though not necessarily on the LPA sent to the parties. In 76 cases (37%), the parties selected a neutral arbitrator who was not a member of the pool. Six neutral arbitrators account for 55 of these joint selections.[27]

[25]For example, a person who was ranked "1" by both sides, for a combined score of "2," would have the best score.

[26]These 85 cases included both cases with attorneys and cases where the claimant was in *pro per*. The disposition varied however. In the 26 *pro per* cases that closed without a neutral arbitrator selected, 3 settled and 23 were withdrawn. In the 59 cases with an attorney, 24 settled and 35 were withdrawn.

[27]While they have been invited, they prefer not to join the OIA pool. All belong to alternative dispute resolution organizations in southern California.



C. Cases with Postponements of Time to Select Neutral Arbitrators

Under Rule 21, a claimant has a unilateral right to a 90 day postponement of the deadline to respond to the LPA.[28] If a claimant has not requested one, the respondent may request such a postponement, but only if the claimant agrees in writing. The parties can request only one postponement in a case – they cannot, for example, get a 40 day postponement at one point and a 50 day postponement later on. The postponement, however, does not have to be 90 days; it can be shorter, and many are. In addition to Rule 21, Rule 28 allows the OIA, in cases where the neutral arbitrator has not been selected, to extend deadlines. The OIA has used this power occasionally to extend the deadline to respond to the LPA. Generally, parties must use a 90 day postponement under Rule 21 before the OIA will extend the deadline under Rule 28. A Rule 28 extension is generally short – two weeks if the parties say that they have settled or the case is being withdrawn[29] – though it may be longer if, for example, it is based on the claimant's medical condition.

Claimants do not have to give a reason for why they want a 90 day postponement under Rule 21, though there must be a reason for a Rule 28 extension. The reasons for a Rule 28 extension are often the same as claimants volunteer for why they use Rule 21. In some cases, the parties are seeking to settle the case or to select a neutral arbitrator jointly. Some claimants

[28]One of the amendments to the *Rules* clarifies that in lien cases, this right still attaches to the consumer, even if he or she is now the respondent. See Exhibit B, Rule 21.d.

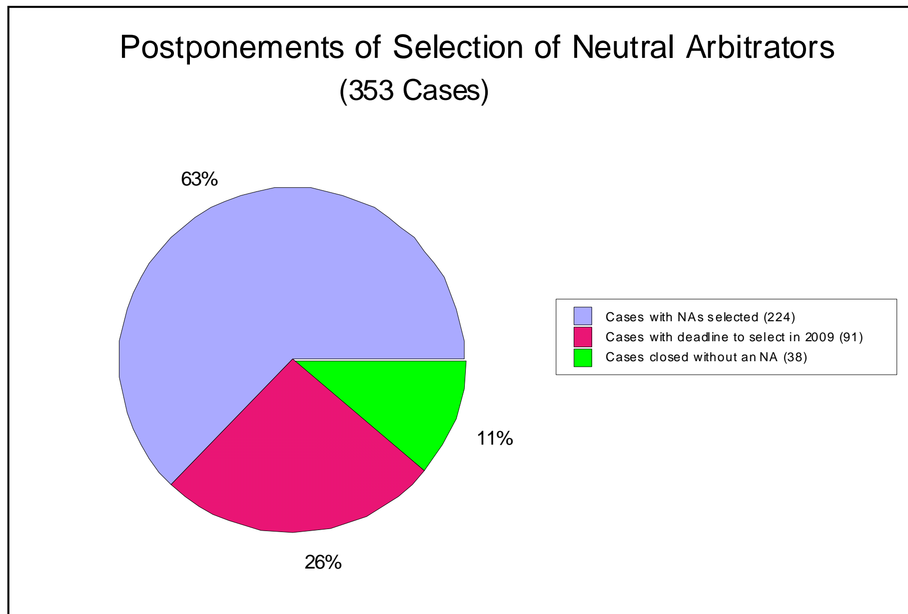
[29]The extension allows the claimant to send in a written notice of settlement or withdrawal without a neutral arbitrator being selected and sending out disclosure forms, reducing expenses generally.

or attorneys want a little more time to evaluate the case before incurring the expense of a neutral arbitrator. As noted above, parties in 85 cases either settled or withdrew them before a neutral arbitrator was put in place. Some claimants who do not have an attorney want time to find one. Occasionally the OIA has discovered at the deadline that an attorney no longer represents a claimant. There are also some unrepresented claimants who request more time for health reasons. One reason for Rule 21 postponements that does not justify a Rule 28 extension is that the claimants or their attorneys simply want more time to submit their LPA responses.

There were 353 cases in 2009 where the parties obtained either a Rule 21 postponement, a Rule 28 extension of the time to return their responses to the LPA, or both. In 338 cases, the claimants requested Rule 21 postponements. Respondents made one request. Requests for a Rule 28 postponement were made in 27 cases. In some, the Rule 21 request was made in prior years. There were four cases where Rule 28 extensions were given without a prior Rule 21 postponement.[30]

The following chart shows what has happened in those 353 cases. Two-hundred-twenty-four (224) of them (63%) now have a neutral arbitrator in place. Thirty-eight of them closed before a neutral arbitrator was ever selected. For the remaining 91 cases, the deadline to select a neutral arbitrator is after December 31, 2009.

[30]Two were lien claims. In both, the consumer's attorney contacted the OIA after being served with Kaiser's demand for arbitration and the LPA. The attorneys protested that their clients were not subject to arbitration and asked for copies of the enrollment form. The OIA extended the deadline to select the neutral arbitrator and asked Kaiser's attorney for copies. After several extensions of the time to provide the documents, the OIA closed the cases. In the third case, the claimant attorney had been seeking medical records from Kaiser and argued that he should not have to use his one 90 day extension to delay the neutral arbitrator selection until after he received the records. In the last case, the OIA granted the respondent attorney's request for a postponement so he could petition the state court to appoint a neutral arbitrator in a case where the claimant disqualified five neutral arbitrators.



D. Cases with Disqualifications

California law gives the parties in an arbitration the opportunity to disqualify neutral arbitrators at the start of a case.[31] Neutral arbitrators are required to make various disclosures within ten days of the date they are selected.[32] After they make these disclosures, the parties have 15 days to serve a disqualification of the neutral arbitrator. Additionally, if the neutral arbitrator fails to serve the disclosures, the parties have 15 days after the deadline to serve disclosures to disqualify the neutral arbitrator. Absent court action, there is no limit as to the number of times a party can disqualify neutral arbitrators in a given case.[33]

Multiple disqualifications occur infrequently. In 2009, neutral arbitrators were disqualified in 52 cases. Thirty-six cases had a single disqualification. Seven cases had two disqualifications, four had three, one case had four, one case had five, three cases had more than

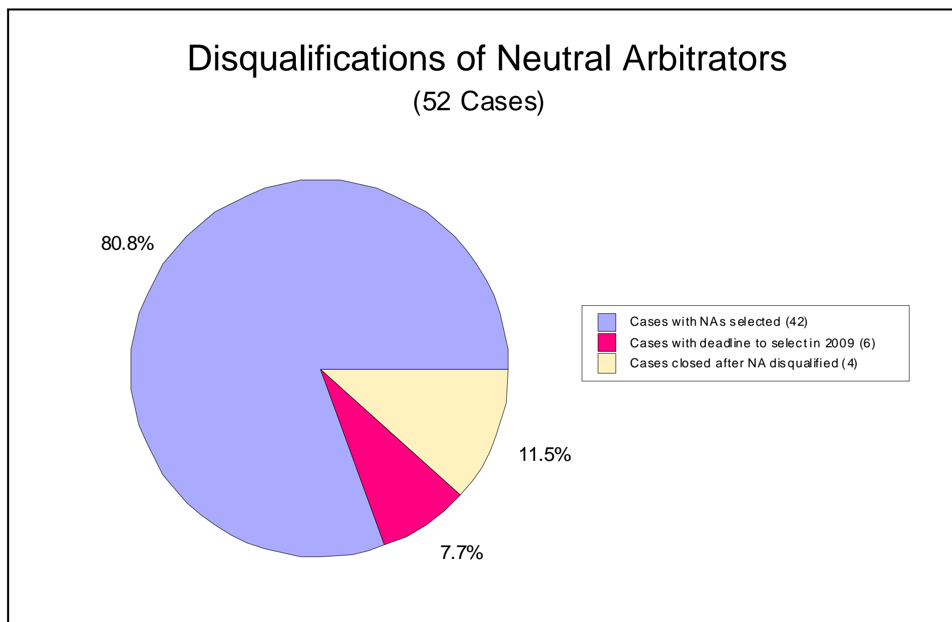
[31]California Code of Civil Procedure § 1281.91; see also Exhibit B, Rule 20.

[32]California Code of Civil Procedure § 1281.9, especially California Code of Civil Procedure § 1281.9(b). In the OIA system, the ten days are counted from the date of the letter confirming service which we send to the neutral arbitrator, with copies to the parties, after the neutral arbitrator agrees to serve.

[33]Under Rule 18.f, after two neutral arbitrators have been disqualified, the OIA randomly selects subsequent neutral arbitrators, rather than continuing to send out new LPAs.

six.[34] In 42 cases with a disqualification, a neutral arbitrator had been selected at the end of 2009. In six cases with a disqualification, the time for the neutral arbitrator selection had not expired by the end of the year. Four cases closed by the parties after a neutral arbitrator was disqualified.

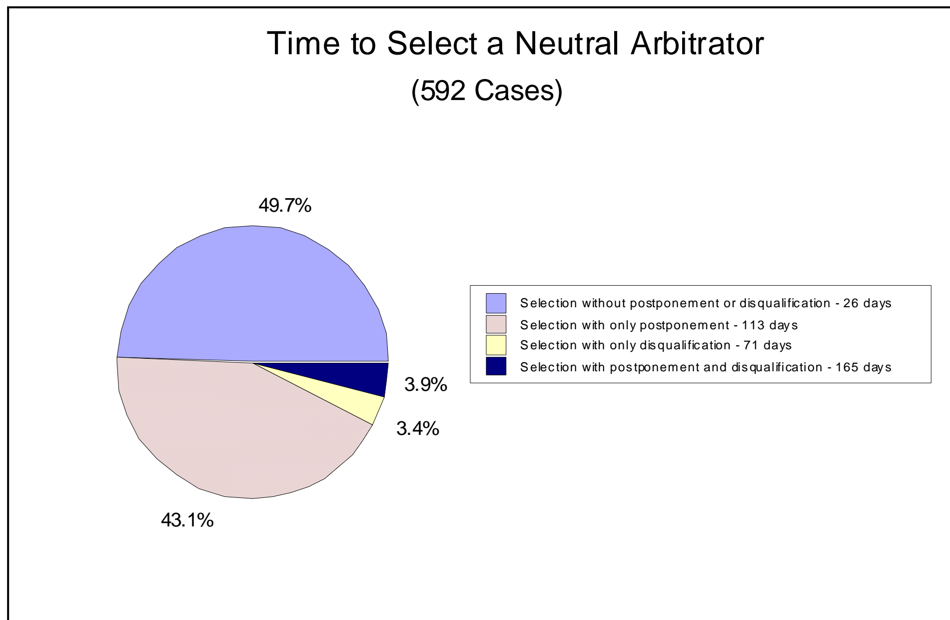
Because of these multiple disqualifications, these 52 cases represent 94 neutral arbitrators who were disqualified in 2009. The neutrals were disqualified by the claimants' side 86 times, and by Kaiser 8 times.



[34]In cases with multiple disqualifications, one of the parties may petition the California Superior Court to select a neutral arbitrator. If the court grants the petition, a party is only permitted to disqualify one neutral arbitrator without cause; subsequent disqualifications must be based on cause. California Code of Civil Procedure §1281.9. This happened in one case where a *pro per* claimant disqualified seven neutral arbitrators before the respondent attorney went to court and the court selected a neutral arbitrator. In two other cases, the same claimant attorney brought two different cases in which he disqualified ten and seven neutral arbitrators, respectively. The cases ultimately were settled and withdrawn.

E. Length of Time to Select a Neutral Arbitrator

This section considers 592 cases in which a neutral arbitrator was selected in 2009.[35] Because parties can postpone the deadline and disqualify a neutral arbitrator, the report divides the selections into four categories when discussing the length of time to select a neutral arbitrator. The first is those cases in which there was no delay in selecting the neutral arbitrator. The second category is those cases in which the deadline for responding to the LPA was extended, generally because the claimant requested a 90 day postponement before selecting a neutral arbitrator. The third category is those cases in which a neutral arbitrator was disqualified by a party and another neutral arbitrator was selected. The fourth category is those cases in which there was both a postponement of the LPA deadline and a disqualification of a neutral arbitrator. Finally, we give the overall average for the 592 cases. The four categories are displayed in the chart below.



[35]Twenty-seven cases in which a neutral arbitrator was selected in 2009 are not included in this section. In these cases, a neutral arbitrator had previously been appointed, had begun acting as the neutral arbitrator, but had subsequently been removed as the neutral arbitrator. These include cases where a neutral arbitrator died, became seriously ill, was made a judge, or made disclosures in the middle of a case - because of some event occurring after the initial disclosure -and was disqualified. In another case, discussed in footnote 34, seven neutral arbitrators were disqualified, and the respondent attorney obtained a stay, and petitioned the court to select a neutral arbitrator. Because we count time from the first day that the case entered the OIA system, those cases are not included in these computations of length of time to select a neutral arbitrator.

1. Cases with No Delays

There were 294 cases where a neutral arbitrator was selected in 2009 in which there was no delay. Under the *Rules,* the maximum number of days to select a neutral arbitrator when there is no delay is 33 days. The average number of days to select a neutral arbitrator in those cases is 26 days, the mode is 28 days, the median is 26 days, and the range is 6 - 62 days.[36] This category again slipped below 50% for the first time since 2005.

2. Cases with Postponements

There were 255 cases where a neutral arbitrator was selected in 2009 and the only delay was a 90 day postponement and/or an OIA extension of the deadline under Rule 28. This includes cases where the request for the postponement was made in prior years, but the neutral arbitrator was actually selected in 2009. Under the *Rules,* the maximum number of days to select a neutral arbitrator when there is only one 90 day postponement is 123 days. The average number of days to select a neutral arbitrator in those cases is 113 days, the mode is 114 days, the median is 116 days, and the range is 29 - 234 days.[37] This category represents slightly more than 43% of all cases which selected a neutral arbitrator in 2009.

3. Cases with Disqualifications

There were 20 cases where a neutral arbitrator was selected in 2009 and the only delay was that one or more neutral arbitrators were disqualified by a party. Again, this includes cases where a disqualification was made in prior years. Under the *Rules*, the maximum number of days to select a neutral arbitrator is 96, if there is only one disqualification.[38] The average

[36]The case that took 62 days to select a neutral arbitrator is a lien case, that is a case in which Kaiser serves a demand for arbitration against a member who, in a separate matter against a third party, recovered money for services Kaiser provided to the member. This means that Kaiser's attorney serves the consumer and/or the consumer's former attorney with the demand for arbitration and gives the OIA a proof of service with contact information. In this case, the LPA sent to the consumer was returned because there was no mail receptacle. The OIA was unable to locate any other address for the consumer. Kaiser's attorney initially stated that the undeliverable address was the only address he had. When the LPA was returned a second time, Kaiser's attorney provided a second address, which was not returned. Each time the OIA resent the LPA, the consumer was given 20 days to respond.

[37]The case that took 234 days to select a neutral arbitrator began with a state court order compelling arbitration. After the claimant attorney paid the arbitration fee and requested a 90 day extension, he filed a writ with the court of appeal, challenging the order compelling arbitration. The OIA learned this when reminding the claimant attorney of the LPA deadline. The arbitration was stayed while the writ and a subsequent appeal to the California Supreme Court were being decided. Once both were denied, a neutral arbitrator was selected.

[38]The 96 days is comprised of the 33 days to select the first neutral arbitrator; the 30 days for the statutory periods for disclosure, disqualification, and service under the California Code of Civil Procedure; and then 33 days to select the second neutral arbitrator. The amount of time increases if there is more than one disqualification.

number of days to select a neutral arbitrator in the 20 cases is 71 days, the median is 67 days, the mode is 55, and the range is 31 - 182[39] days. Disqualification only cases represent slightly more than 3% of all cases which selected a neutral arbitrator in 2009.

4. Cases with Postponements and Disqualifications

There were 23 cases where a neutral arbitrator was selected in 2009 after a postponement and the disqualification of a neutral arbitrator. Again, this includes cases where a postponement or disqualification was made in prior years. Under the *Rules*, the maximum number of days to select a neutral arbitrator if there is both a 90 day postponement and a single disqualification is 186 days. The average number of days to select a neutral arbitrator in these cases is 165 days, the mode is 148, the median is 167 days, and the range is 76 - 252 days.[40] These cases represent slightly less than 4% of all cases which selected a neutral arbitrator in 2009.

5. Average Time for All Cases

The average number of days to select a neutral arbitrator in all of these cases is 70 days. For purposes of comparison, the California Supreme Court stated in *Engalla vs. Permanente Medical Group*[41] that the old Kaiser system averaged 674 days to select a neutral arbitrator over a period of two years in the 1980's. Thus, as shown on the following chart, in 2009, the OIA system was more than 9 times faster.

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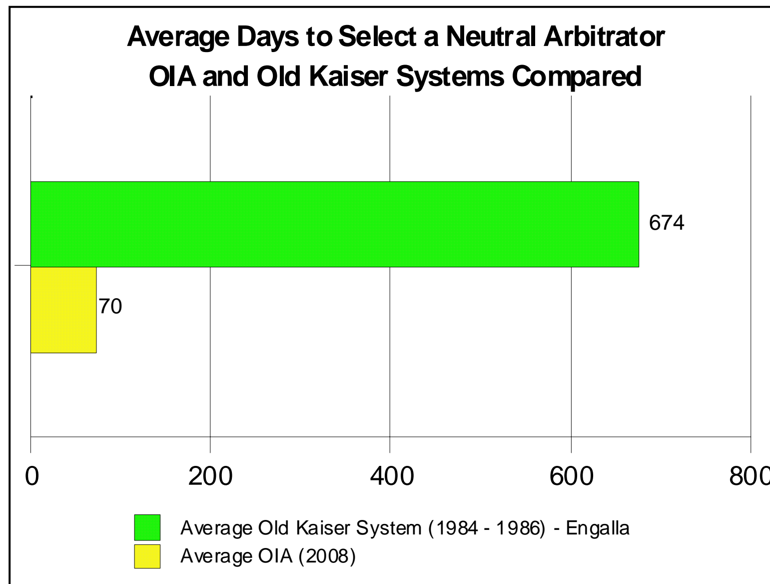
[39]The case that took 182 days to select a neutral arbitrator is referred to in footnote 34. The claimant attorney disqualified ten neutral arbitrators before the claimant attorney stopped disqualifying neutral arbitrators. The case settled before the AMC.

[40]In the case that took 252 days to select a neutral arbitrator, the claimant first requested a 90 day postponement and then disqualified the first three neutral arbitrators.

[41]15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903. The California Supreme Court's criticism of the then self-administered Kaiser arbitration system lead to the creation of the Blue Ribbon Panel.



F. Cases With Party Arbitrators

In medical malpractice cases in which the claimed damages exceed $200,000, a California statute gives parties a right to proceed with three arbitrators: one neutral arbitrator and two party arbitrators.[42] The parties may waive this right. The Blue Ribbon Panel (BRP) that gave rise to the OIA questioned whether the value added by party arbitrators justified their expense and the delay associated with two more participants in the arbitration process. The BRP therefore suggested that the system create incentives for cases to proceed with one neutral arbitrator, by having Kaiser pay the neutral arbitrators' fees if the arbitration proceeds with a single neutral arbitrator.

Rules 14 and 15 provide such an incentive. Kaiser pays the full cost of the neutral arbitrator if the claimant waives the statutory right to a party arbitrator, as well as any court challenge to the arbitrator on the basis that Kaiser paid him/her. If both Kaiser and the claimant waive party arbitrators, the case proceeds with a single neutral arbitrator. Thus far, in all the cases where claimant has waived, Kaiser has also waived.

Few party arbitrators are being used in our system. In 2009, party arbitrators signed the award in only 2 of the 103 cases in which the neutral arbitrator made an award.[43] The remaining 101 cases were decided by a single arbitrator. The two cases with party arbitrators closed in 363

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[42] California Health & Safety Code §1373.19.

[43] In addition, one case that was settled also had party arbitrators.

and 620 days.[44] The arbitrators found for the claimants in one of those cases, awarding $5,000,000.

Of the 650 cases that remained open at the end of 2009, party arbitrators had been designated in 10 of them. In five of those, the OIA had designations from both parties; in the other five, only one side had designated a party arbitrator.

VI. MAINTAINING THE CASE TIMETABLE

This section briefly summarizes the methods for monitoring compliance with deadlines and then looks at actual compliance with deadlines at various points during the arbitration process.

The OIA monitors its cases in two different ways. First, when a case enters the system, the OIA computer system calendars a reminder for 12 months. As discussed in Section VII, most cases close before then. For those that remain, however, OIA attorneys call the neutral arbitrators to ensure that the hearing is still on calendar and the case is on track to be closed in compliance with the *Rules*. In addition, the Independent Administrator holds monthly meetings to discuss the status of all cases open more than 15 months. Cases that fall into this category generally require more OIA contact for a number of reasons, *e.g.*, a claimant with a continuing medical problem which makes scheduling the hearing and maintaining scheduled dates difficult or the recusal or death of the neutral arbitrator late in the case and/or right before the scheduled hearing. OIA attorneys also review a neutral arbitrator's open cases when they offer him or her new cases.

In addition, through its software, the OIA tracks whether the key events set out in the *Rules* – service of the arbitrator's disclosure statement, the arbitration management conference, the mandatory settlement meeting, and the hearing – occur on time. If arbitrators fail to notify us that a key event has taken place by its deadline, the OIA contacts them by phone, letter, or e-mail and asks for confirmation that it has occurred. In most cases, it has and arbitrators confirm in writing. When it has not, it is rapidly scheduled. In some cases, the OIA sends a second letter and/or makes 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 the OIA panel until confirmation is received.

In a few cases, neutral arbitrators have not responded to a second communication. In those cases, the OIA removes the neutral arbitrators' names from the OIA panel until they take the necessary action. Thus, a neutral is not listed on any LPA when he or she is suspended and cannot be jointly selected by the parties. As detailed in the following sections, 16 different neutral arbitrators were suspended 33 times in 21 cases in 2009. Nine neutral arbitrators were

[44] Cases with party arbitrators often take longer to have the arbitration hearing. The average for all cases to close is 503 days. (See generally Section VII.)

still suspended at the end of the year.[45] Most of the suspensions were caused by the neutral arbitrator's failure to hold a timely Arbitration Management Conference (AMC).

A. Neutral Arbitrator's Disclosure Statement

Once neutral arbitrators have been selected, they must make written disclosures to the parties within ten days. The *Rules* require neutral arbitrators to serve the OIA with a copy of these disclosures. The OIA monitors all cases to ensure that timely disclosures are made. In 2009, one neutral arbitrator was suspended until he made his disclosures. He was still suspended at the end of the year.

B. Arbitration Management Conference

The *Rules* require the neutral arbitrator to hold an arbitration management conference (AMC) within 60 days of his or her selection.[46] It was the feature of the OIA system that neutral arbitrators rated second highest in their questionnaire responses. (See Section IX.B.)

The neutral returns the AMC form to the OIA within five days after the conference. The schedule set forth on the form establishes the deadlines for the rest of the case. It also allows the OIA to see that the case has been scheduled to finish within the time allowed by the *Rules*, usually 18 months. Receipt of the form is therefore important. Seven neutrals were suspended in nine cases for failing to return an AMC form and one, who had been suspended in the prior year, was still suspended in January 2009. All but one had complied by the end of the year.

C. Mandatory Settlement Meeting

Rule 26 instructs the parties to hold a mandatory settlement meeting (MSM) within six months of the AMC. It states that the neutral arbitrator is not present at this meeting.[47] The OIA provides the parties with an MSM form to fill out and return, stating that the meeting took place and its result. In 2009, the OIA received notice from the parties in 318 cases that they have held an MSM. Forty-nine of them reported that the case had settled at the MSM. Four of these cases involved *pro per* claimants. In 20 cases, neither party returned the MSM form to the OIA by the end of 2009.

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[45]This includes the six who failed to submit timely updates to their applications. Five of these six, however, had previously been suspended in 2009 either for failing to hold an AMC or for failing to serve the award.

[46]Exhibit B, Rule 25.

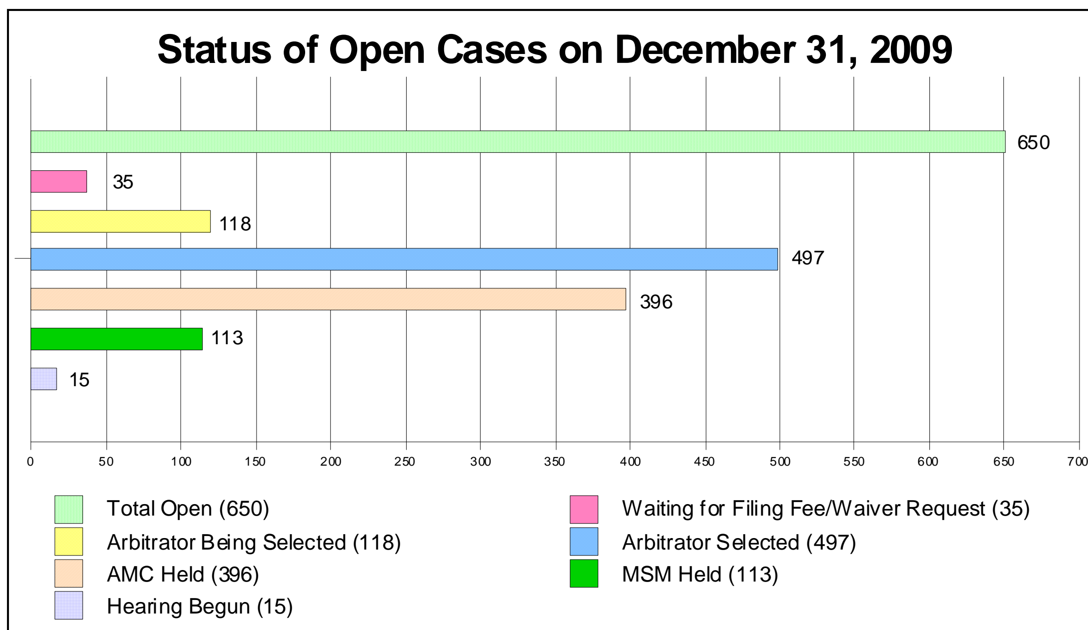
[47]As the settlement meeting is supposed to be conducted without the appointed neutral arbitrator and in a form agreed upon by the parties, the OIA has no real way to track whether the event has occurred except for receiving the forms from the parties. The OIA has no power to compel them to report or to meet. A neutral arbitrator, on the other hand, can order the parties to meet if a party complains that the other side refuses to do so.

D. Hearing, Award, and the Aftermath

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*. The OIA suspended one neutral arbitrator for failing to set a hearing date. He was reinstated. Five neutrals were suspended for failing to serve their awards within the *Rules*' time limits. Five neutral arbitrators were suspended in seven cases for failing to provide the fee and fee allocation information required by California Code of Civil Procedure § 1281.96. Three of these also failed to return a questionnaire after a case closed. All but one had complied by the end of 2009.

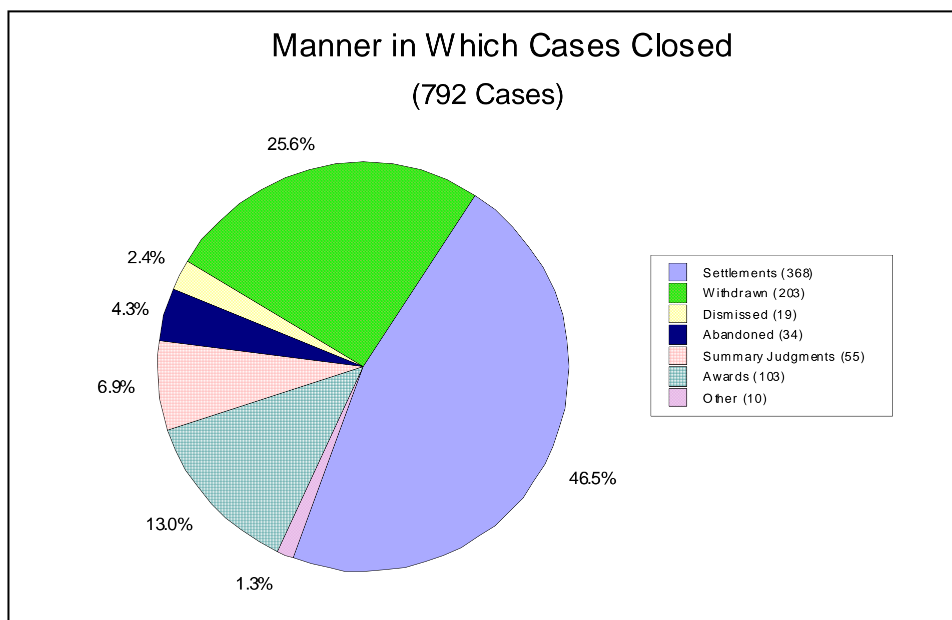
E. Status of Open Cases Administered by the OIA on December 31, 2009

On December 31, 2009, there were 650 open cases in the OIA system. In 35 of these cases, the claimant had not yet sent in either the filing fee or the paperwork to waive it so the LPA could be sent. In 118 cases, the parties were in the process of selecting a neutral arbitrator. In 497 cases, a neutral arbitrator had been selected. Of these, an arbitration management conference had been held in 396. This is 61% of all open cases. In 113 cases, the parties had held the mandatory settlement meeting. In 15 cases, the hearing had begun, but either there were additional hearing days or the OIA had not yet been served with the award. The following graph illustrates the status of open cases.



VII. THE CASES THAT CLOSED

In 2009, 792 cases closed. Cases close either because of (1) action by the parties (cases that are settled, withdrawn, or abandoned for non-payment of fees), or (2) action of the neutral arbitrator (cases are dismissed, summary judgment is granted, or cases are decided after a hearing). This discussion begins on page 29 and looks at each of these methods, how many closed, and how long it took. The discussion of cases that closed after a hearing also includes the results: who won and who lost. The following chart displays how cases closed, while the graph on page 28 shows the length of time to close, again by manner of closure.[48]

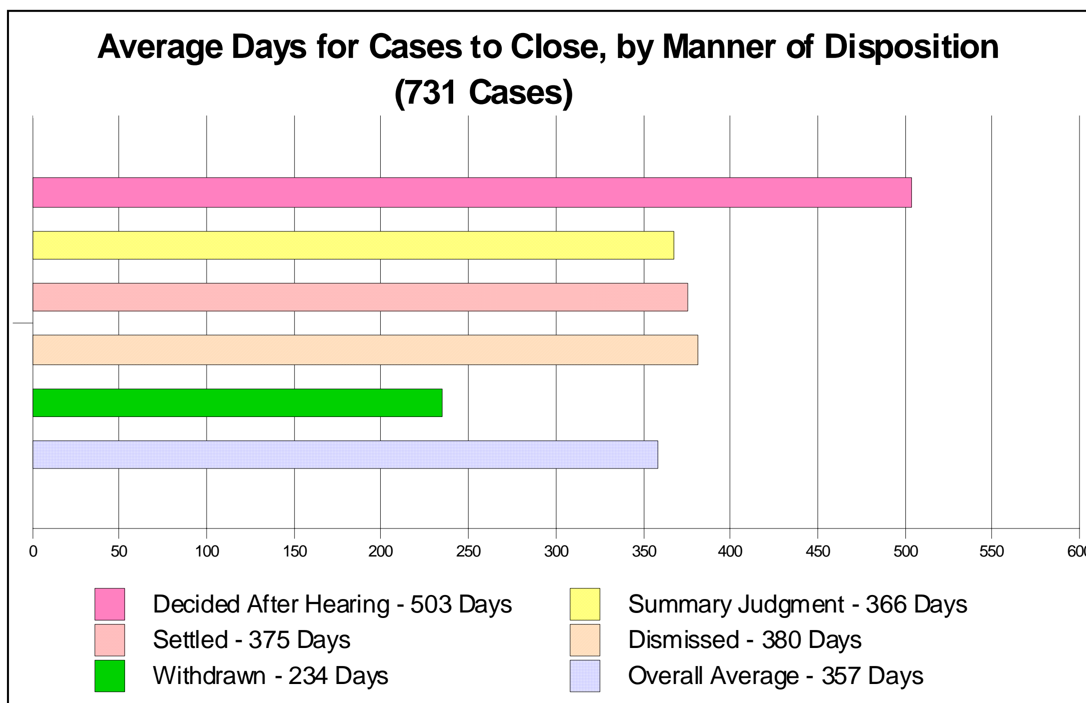


As shown on the following chart, cases closed on average in 357 days, or less than 12 months.[49] This includes all cases regardless of procedure: regular, expedited, complex,

[48]There were ten cases that closed because the case was consolidated with another, had a split outcome, or judgment on the pleadings. (A split outcome means that there was more than one claimant and they had different outcomes.) As they represent less than two percent of the total of all closed cases, they are not further discussed in this section.

[49]As mentioned before, the OIA does not begin measuring the time until the fee is either paid or waived. Therefore, the next chart refers to 731 closed cases, not 792. It excludes 34 abandoned cases, 23 cases that were withdrawn or settled before the fee was paid, and 4 consolidated cases.

extraordinary, and cases whose deadlines were extended under Rule 28. The median is 320 days. The mode is 741 days. The range is 3 to 2,193 days. Three cases closed late.[50]

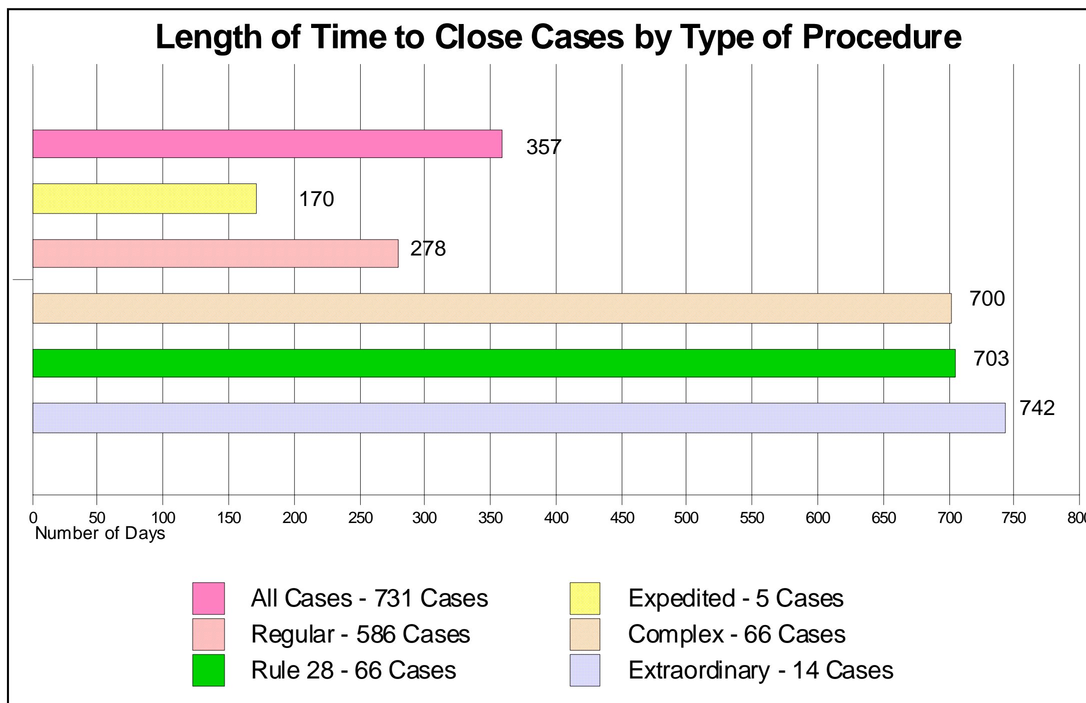


The second half of this section discusses cases that employed special *Rules* to either have the cases decided faster or slower than most. This begins on page 32. Under the *Rules*, cases ordinarily must be completed within 18 months. Nearly 85% of the cases are closed within this period, and nearly sixty percent (59%) close in a year or less. If a claimant needs a case decided in less time, the case can be expedited. If the case needs more than 18 months, the parties can

[50]One of the late cases was a lien case in which the consumer party, who was an attorney, disqualified 29 neutral arbitrators. A neutral arbitrator was finally appointed in September 2008 and the case was closed on April 21, 2009, slightly more than seven months after there was a neutral arbitrator in place. Because this was a contentious case, its status was never changed from "regular." The other two cases had Rule 28 extensions, but closed 12 and 30 days beyond those deadlines. The first resulted in an award in favor of the claimant for more than $700,000 (the neutral arbitrator first found liability and then took more evidence and 3 months to quantify damages). The second was dismissed for failure to prosecute in a case where the claimant attorney ultimately lost contact with his client.

classify the case as complex or extraordinary, or the neutral arbitrator can order the deadline to be extended under Rule 28.[51]

The following graph shows the average time to close based by type of procedure.



A. How Cases Closed

1. Settlements – 46% of Closures

During 2009, 368 of the 792 cases settled. This represents 46% of the cases closed during the year. The average time to settlement was 375 days, or about twelve months. The

[51]Complex cases can also be the subject of a Rule 28 extension if it turns out the case requires more than 30 months to close. They are also included in the discussion of complex cases. Six cases that closed in 2009 were both complex and the subject of a Rule 28 extension. They are included in both Sections VII.B.2 and VII.B.4 and in the chart on this page.

median is 329, the mode is 741, and the range is 6 to 2,193 days.[52] In 27 settled cases (7%), the claimant was in *pro per*. Forty-nine of these cases closed at the mandatory settlement meeting.

2. Withdrawn Cases – 26% of Closures

In 2009, the OIA received notice that 203 claimants had withdrawn their claims. In 49 (24%) 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 categorize a case as withdrawn when a claimant writes us a letter withdrawing the claim, or when we receive a dismissal without prejudice from the parties. When we receive a "dismissal with prejudice," we call the parties to ask whether the case was "withdrawn," meaning voluntarily dismissed, or "settled" and enter the closure accordingly. Twenty-six percent of closed cases were withdrawn.

The average time for a party to withdraw a claim in 2009 is 234 days. The median is 185 days. The mode is 84 days, and the range is 3 to 766 days.[53]

3. Abandoned Cases – 4% of Closures

Claimants failed to either pay the filing fee or obtain a waiver in 34 cases.[54] These were therefore deemed abandoned for non-payment. In 23 of the 34 cases (68%), the claimants were in *pro per*. Before claimants are excluded from this system for not paying the filing fee, they receive four notices from the OIA and are offered the opportunity to apply for fee waivers. In five cases, we denied the fee waiver applications. In those cases, the claimants paid the $150 fee and continued with the arbitration.

4. Dismissed Cases - 2% of Closures

In 2009, neutral arbitrators dismissed 19 cases. Neutral arbitrators dismiss cases if the claimant fails to respond to hearing notices or otherwise to conform to the *Rules* or applicable statutes. Eleven of these closed cases (58%) involved *pro pers.*

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[52] The case that took 2,193 days to settle had three sets of claimant attorneys who spent a long time deciding whether to take the case and, for two of them, whether to resign from it. The hearing was originally scheduled for May 2005. A single neutral arbitrator handled the case until health problems forced him to recuse himself in 2008. The parties settled the case in September 2009. This is the longest case to close in OIA history.

[53] The case that was withdrawn after 766 days had been designated extraordinary because the claimant had cancer and an uncertain prognosis. The claimant was further injured in a fall at a Kaiser facility, requiring the hearing dates to be vacated. The case was ultimately withdrawn.

[54] The arbitration filing fee is $150 regardless of the number of claimants or claims. This is significantly lower than court filing fees except for small claims court. If a Kaiser member's claim is within the small claims court's jurisdiction of $7,500, the claim is not subject to arbitration. Both the OIA and Kaiser inform these claimants of their right to go to small claims court.

5. Summary Judgment – 7% of Closures

In 2009, 55 cases were decided by summary judgments granted to the respondent. In 40 of these cases (73%), the claimant was in *pro per.* Failing to have an expert witness (16 cases), failing to file an opposition (22 cases), exceeding the statute of limitations (3 cases), and no triable issue of fact (10 cases) were the most common reasons given by the neutrals in their written decisions for the grant of summary judgment. The reasons parallel summary judgments granted in the courts.

The average number of days to closure of a case by summary judgment in 2009 is 366 days. The median is 344 days. The mode is 385. The range is 218 to 810 days.[55]

6. Cases Decided After Hearing – 13% of Closures

a. Who Won

About 13% of all cases closed in 2009 (103 of 792) proceeded through a full arbitration hearing to an award. Judgment was for Kaiser in 73 of these cases, or 71%. In 19 of these cases, the claimant was in *pro per.* The claimant prevailed in 30 of them, or 29%.[56] None was a *pro per* claimant.

b. How Much Claimants Won

Thirty cases resulted in awards to claimants. One claimant was awarded $5,000,000. The range of relief is $13,900 to $5,000,000. The average amount of an award is $811,657. The median is $337,589. There is no mode. A list of the awards made in 2009 is attached as Exhibit G.

c. How Long It Took

The 103 cases that proceeded to a hearing in 2009, on average, closed in 503 days. The median is 476 days. The mode is 266 days. The range is 176 to 1,294 days.[57]

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[55] The case that was decided by summary judgment after 810 days was designated complex after the claimant attorney retired and the claimant requested time to find new counsel. The claimant remained in *pro per.* A year later, the neutral arbitrator granted a summary judgment motion.

[56] In this section, "claimant" means "member." Lien cases, where Kaiser makes the demand for arbitration and receives an award for money if successful, are counted as part of the 73 cases decided in Kaiser's favor. Kaiser prevailed in each of the 15 lien cases that went to hearing. Its awards range from $130 to $33,333.33.

[57] The case that took 1,294 days to close after a hearing was designated complex, and then continued under Rule 28 primarily because of the claimant's illness, though it was continued at times due to illness by the respondent attorney and neutral arbitrator as well. The hearing occurred in November 2008 and resulted in an award for Kaiser in January 2009.

B. Cases Using Special Procedures

1. Expedited Procedures

The *Rules* include provisions for cases which need to be expedited, that is, resolved in less time than 18 months. Grounds for expedition 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.[58]

In 2009, six claimants requested that their cases be resolved in less than the standard eighteen months. The OIA received four of those requests from claimants before a neutral was selected in the case, while neutral arbitrators received the other two. All were granted. Kaiser did not object to any of the requests.[59]

The OIA had three open expedited cases on January 1, 2009.[60] Five expedited cases closed in 2009, including the three cases that were open at the beginning of the year. Three cases settled, one was withdrawn, and the last was decided after a hearing with the award in favor of the claimant. The average for the 5 cases to close is 170 days (less than six months), the median is 157 days, and the range is from 126 to 221 days.[61] Four expedited cases remained open at the end of 2009.

Although originally designed in part to decide benefit claims quickly, none of the expedited cases in 2009 involved benefit or coverage issues.

2. Complex Procedures

The *Rules* also include provisions for cases that need more time. In complex cases, the parties believe that they need 24 to 30 months.[62] In 2009, 32 cases were designated as complex. The designation does not have to occur at the beginning of a case. It may be made as the case proceeds and the parties develop a better sense of what evidence they need. In addition to the 32 cases designated in 2009, at the beginning of 2009, there were 61 open cases designated as

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[58]Exhibit B, Rules 33 - 36.

[59]If the OIA denies a request for expedited status, it is usually because the claimant failed to give a time frame to the OIA for the closure of the case. This denial is without prejudice and the claimant can make another request to the neutral arbitrator.

[60]The last annual report stated that four expedited cases were open at the end of 2008. In mid-January 2009, the OIA was notified that one case had closed in mid-December 2008.

[61]In the case that took 221 days to close, the OIA granted expedited status. The hearing was set within the time requested by the claimant attorney and resulted in an award for the claimant.

[62]Exhibit B, Rule 24(b).

complex.[63] Sixty-six complex cases closed in 2009 and the designation of four cases were changed to extraordinary. The average length of time for complex matters to close in 2009 is 700 days, about 23 months. The median is 736 days. The mode is 741. The range is from 352 to 1,417[64] days (about 44 months).

3. Extraordinary Procedures

Extraordinary cases need more than 30 months for resolution.[65] Ten cases were designated extraordinary in 2009. There were ten extraordinary cases open at the beginning of 2009.[66] Fourteen cases closed this year, 11 settled, 2 were withdrawn, and 1 was decided after a hearing with an award for respondent. The average number of days for an extraordinary case to close is 741.5 days, or 24 months. The range is 454 to 1,201 days (34 months).[67]

4. Rule 28 Extensions of Time to Close Cases

Rule 28 allows neutral arbitrators to extend the deadline for a case to close past the eighteen month deadline if there are "extraordinary circumstances" that warrant it. In 2009, the neutral arbitrators made Rule 28 determinations of "extraordinary circumstances" in 61 cases and extended these cases beyond their limit. In addition, 44 such cases remained open at the beginning of 2009.[68] At the end of 2009, 37 cases remained open, with 68 cases having closed during the year. The average time in 2009 to close cases with a Rule 28 order is 703 days, about 23 months. The median is 622 days. The mode is 539 days. The range is 221 to 2,193 days.[69]

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[63] The last annual report stated that 62 complex cases were open at the end of 2008. In mid-January 2009, however, the OIA was notified that one case had closed in mid-December 2008.

[64] The complex case that took 1,417 days to close was given a complex designation at the parties' request and subsequently a Rule 28 extension. The first claimant attorney left the case after a year due to illness. New hearing dates were set to accommodate the second claimant attorney. After that, the parties continued the hearing dates seven times, from January 2007 to May 2009, once due to illness of the respondent attorney. It settled in May 2009.

[65] Exhibit B, Rule 24(c).

[66] The last annual report stated that 12 extraordinary cases were open at the end of 2008. In January 2009, however, the OIA was notified that two cases had closed in 2008.

[67] The case that closed after 1,201 days was first designated complex and then extraordinary by the parties because a minor was involved. A hearing was first set for April 2007 and moved to February 2009. While the parties settled in February, the case remained open until a minor's compromise was approved.

[68] The prior report stated that there were 45 cases. In 2009, the OIA received notice that two cases had closed in 2008 and that the extension in the third had actually occurred in 2008.

[69] The case that closed in 2,193 days is discussed in footnote 52.

According to the neutral arbitrator orders granting the extension, the claimants side requested 16, respondents side requested 1, and the parties stipulated 8 times. The neutral arbitrator ordered it on his or her own 36 times. Extensions were ordered nine times over the respondents' objections and once over the claimants' objections. Twelve orders noted that there was no objection. Thirty-one orders merely recited there was good cause or extraordinary circumstances. Where neutral arbitrators gave specific reason, the most common reason (ten orders) was unanticipated scheduling conflicts.

VIII. THE COST OF ARBITRATIONS IN THE OIA SYSTEM

A. What Fees Exist in OIA Arbitrations

Whether a claimant is in court or in private arbitration, a claimant faces certain fees. In an OIA arbitration, in addition to attorney's fees and fees for expert witnesses, a claimant must pay a $150 arbitration filing fee and half of the neutral arbitrator's fees. State law provides that neutral arbitrator's fees should be divided equally between the claimant and the respondent.[70] In addition, state law provides that if the claim is for more than $200,000, the arbitration panel will consist of three arbitrators – a single neutral arbitrator and two party arbitrators, one selected by each side. Parties may waive their right to party arbitrators.

The OIA system provides mechanisms for a claimant to request a waiver of either the $150 arbitration filing fee and/or the claimant's portion of the neutral arbitrator's fees and expenses. These provisions are discussed below. When claimants ask for waiver information, they receive information about the types of waiver and the waiver forms. The claimants can thus choose which they want to submit.

B. Mechanisms Claimants Have to Avoid These Fees

There are three mechanisms for waiving some or all of these fees. The first two are based on financial need and required by statute. The third is open to everyone, and is voluntary on Kaiser's part.

1. How to Waive Only the $150 Arbitration Filing Fee

This waiver is available to individuals whose gross monthly income is less than three times the national poverty guidelines. If granted, the OIA's $150 arbitration fee is waived. We inform claimants of the existence of this waiver in the first letter we send to them. They have 75 days to submit the form, from the date the OIA receives their demands for arbitration. This waiver was

[70] California Code of Civil Procedure § 1284.2.

created in 2003.[71] According to statute and Rule 12, this completed form is confidential and only the claimant and claimant's attorney know if a request for the waiver was made or granted.

2. How to Waive Both the Arbitration Filing Fee and the Neutral Arbitrator's Fees and Expenses

This type of fee waiver, which has existed since the OIA was created and is required by state law, depends upon the claimants' ability to afford the cost of the arbitration filing fee and the neutral arbitrator's fees. Claimants must disclose certain information about their income and expenses. If this waiver is granted, the claimant does not have to pay either the neutral arbitrator's fees or the OIA $150 arbitration filing fee, even if the claimant has a party arbitrator. This waiver form is based on the form used by the state court to allow a plaintiff to proceed *in forma pauperis,* but changed to make it simpler to understand. According to the *Rules*, the form is served on both the OIA and Kaiser. Kaiser has the opportunity to object before the OIA decides whether to grant this waiver.[72] A claimant who obtains this waiver is still entitled to have a party arbitrator, but must pay for the party arbitrator.

3. How to Waive Only the Neutral Arbitrator's Fees and Expenses

As discussed above, the *Rules* contain provisions to shift the cost to Kaiser for the full payment of neutral arbitrators' fees and expenses.[73] For claims under $200,000, the claimant must agree in writing not to object later that the arbitration was unfair because Kaiser paid the fees and expenses of the neutral arbitrator. For claims over $200,000, the claimant must also agree not to use a party arbitrator.[74] No financial information is required. These forms are served on Kaiser, the neutral arbitrator, and the OIA.

C. Number of Cases in Which Claimants Have Shifted Their Fees

1. The $150 Arbitration Filing Fee

In 2009, the OIA received 35 completed forms requesting waiver of the $150 filing fee. The OIA granted 30 and denied 5.[75] Nineteen of these claimants received both a waiver of the

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[71] California Code of Civil Procedure §1284.3; Exhibit B, Rule 12.

[72] See Exhibit B, Rule 13.

[73] See Exhibit B, Rules 14 and 15.

[74] While it has never happened, if a claimant waived and Kaiser elected not to waive, the claimant would be able to have a party arbitrator, whom he or she would have to pay, but Kaiser would still pay the full cost of the neutral arbitrator.

[75] All five stayed in the system. Two paid the $150 fee and three had the fee waived through the other waiver.

$150 arbitration filing fee and the waiver of the filing fee and neutral arbitrator's fees and expenses. By obtaining the waiver of the filing fee, the neutral arbitrator selection process can begin immediately, without waiting for the second waiver to be granted.

2. The $150 Arbitration Filing Fee and the Neutral Arbitrator's Fees and Expenses

In 2009, the OIA received 51 completed fee waiver applications and one remained from the prior year. The OIA granted 50 waivers of the arbitration filing fee and neutral arbitrator fees, denied 1,[76] and 1 remains to be decided. Kaiser did not object to any request.

3. The Neutral Arbitrators' Fees and Expenses

Arbitration providers such as the OIA are required to disclose neutral arbitrators' fees and fee allocation for closed cases that they received after January 1, 2003.[77] We received fee information from neutral arbitrators in 616 cases that closed in 2009.

Of these 616 cases, 481 (78%) reported that fees were allocated 100% to Kaiser. Fifty-one (8%) reported that no fees were charged. The claimant paid nothing in these cases. Eighty-four (14%) reported that the fees were split 50/50. Of the 565 cases where the neutral arbitrators charged fees, Kaiser paid all of the neutral arbitrators' fees in 85% of the cases. As shown in the following chart, claimants paid neutral fees in only 14% of cases that closed in 2009.

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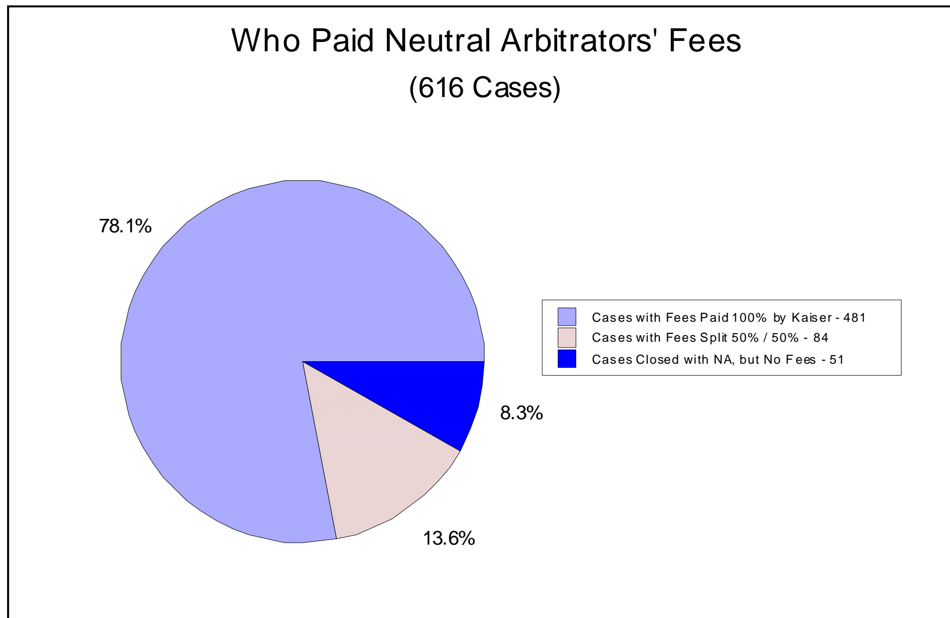
[76] The claimant paid the filing fee.

[77] California Code of Civil Procedure §1281.9.



D. The Fees Charged by Neutral Arbitrators

Members of the OIA pool set their own fees. They are allowed to raise their fees once a year, but the increases do not affect cases on which they have begun to serve. The fees range from $175/hour to $800/hour. The average hourly fee is $390, the median is $390, and the mode is $400.[78] Neutral arbitrators also often offer a daily fee. This ranges from $1,000/day to $8,000/day. The average daily fee is $3,298, the median is $3,000, and the mode is $2,000.

Looking at the 565 cases in which neutral arbitrators charged fees, the average neutral arbitrator's fee is $6,456.41. The median is $1,590.70 and the mode is $725. This excludes the 51 cases in which there are no fees. The average for all cases, including those with no fees, is $5,921.87.

[78] According to the 2004 RBZ Law Firm compensation Survey for Southern California, the average billing was $390/hour.

The arbitrators' fees described in the last paragraph include many cases where the neutral arbitrator performed very little work. If only the cases where the neutral arbitrator wrote an award are considered, the average neutral arbitrator fee is $21,093.64, the median is $17,307.50, and the mode is $1,600. The range is $656 to $104,440.[79]

IX. EVALUATIONS OF NEUTRAL ARBITRATORS AND THE OIA SYSTEM

At the end of a case where a neutral arbitrator has been selected, the OIA sends forms to the parties to allow them to evaluate the neutral arbitrator. It also sends a different form to the neutral arbitrator to ask his or her opinions about the OIA system, suggestions for improvement, and comparison between the OIA and the court system. Beginning in 2009, the OIA began sending the parties an abbreviated form similar to the form sent to the neutral arbitrators. This section discusses the highlights of the responses we received in 2009 from the parties and the neutrals. The complete statistics and copies of the forms are set out in Exhibits H, I, and J, respectively.

A. The Parties Evaluate the Neutral Arbitrators

Under Rule 49, at the close of an arbitration in which a neutral arbitrator has been appointed and held an arbitration management conference, the OIA sends an evaluation form to each attorney. If the claimant did not have an attorney, we send an evaluation to the claimant. The form asks them to evaluate their experience with the neutral arbitrator 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. Most important, they are asked whether they would recommend this neutral to another person with a similar case. The 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. The evaluations are anonymous, though the people filling it out are asked to identify themselves by category and how the case closed.

During 2009, the OIA sent out 996 evaluations and received 423 responses in return, or 42%.[80] One-hundred-sixty-nine identified themselves as claimants (17) or claimants' counsel (152), and 239 identified themselves as respondent's counsel. Fifteen did not specify a side.[81]

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[79]Hearings in lien cases are generally simple cases, without the need for medical testimony. Fees in these cases range from $656 to $8,207. If these cases are excluded, the average neutral arbitrator fee is $24,437.20 and the range is $3,520 to $104,440.

[80]The response rate has climbed from 28% in 2005, but declined from last year's 52% response rate.

[81]Their responses are included only in the overall averages.

The responses have been quite positive overall, and they are encouragingly similar for both sides. In 2009, the mode and median for almost all people for the following questions was 5.[82] The mode is important because it means that the most common answer to all the questions was the most favorable response possible.

Here are the responses to some of the inquiries.

Item 2: "The neutral arbitrator treated all parties with respect." – 4.8 Average

The average of all responses is 4.8 out of a possible maximum of 5. Claimants counsel average 4.8. *Pro pers* average 3.7. Respondents counsel average 4.9.

Item 5: "The neutral arbitrator explained procedures and decisions clearly." – 4.7 Average

The average of all responses is 4.7. Claimants counsel average 4.6. *Pro pers* average 3.5. Respondents counsel average 4.9.

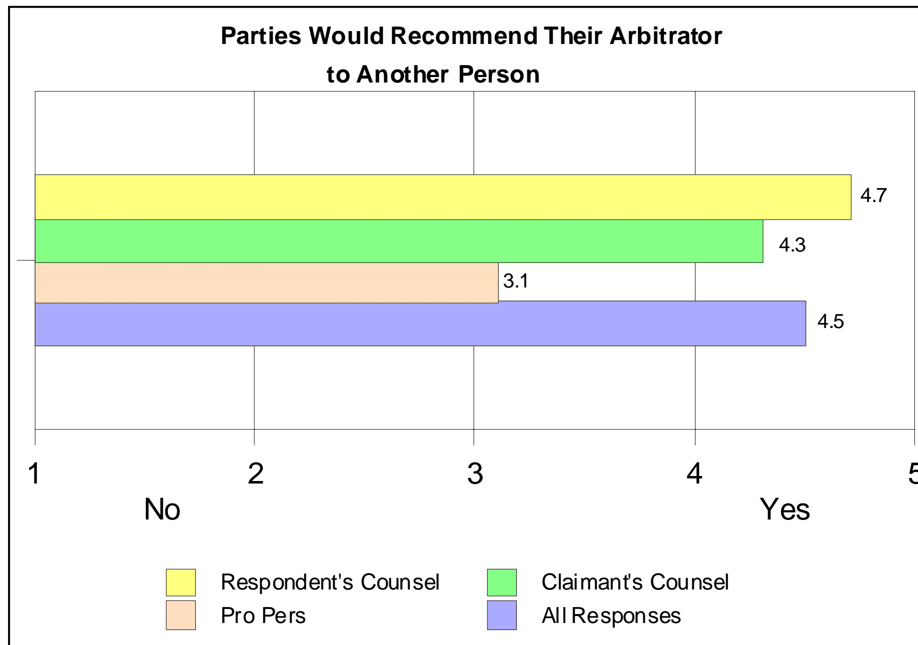
Item 7: "The neutral arbitrator understood the facts of my case." – 4.5 Average

The average of all responses is 4.5. Claimants counsel average 4.4. *Pro pers* average 3.1. Respondents counsel average 4.7. The median for *pro pers* is 4.0 and the mode is 1.0.

Item 11: "I would recommend this arbitrator to another person or another lawyer with a case like mine." – 4.5 Average

The average on all responses to this question is 4.5. Claimants counsel average 4.3. *Pro pers* average 3.1. Respondents counsel average 4.7. The median for *pro pers* is 3.0. The responses are shown on the following chart.

[82]As discussed below, in two questions, the median response by *pro pers* was not 5. Additionally, in one question, the mode response by *pro pers* was not 5.



B. The Neutral Arbitrators Evaluate 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. The information is solicited to evaluate and improve the system. During 2009, the OIA sent questionnaires in 498 closed cases and received 402 responses.[83] The results continue to show a high degree of approval of, and satisfaction with, the *Rules* and the OIA.

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

[83]This report has previously reported that 792 cases closed in 2009. The OIA does not send questionnaires if the case closes without a neutral arbitrator in place or if the case closes soon after an arbitration management conference is held. This eliminates cases that settle or are withdrawn shortly after the arbitrator is selected. This policy took effect after the first year of mailing them. Large numbers of questionnaires were returned blank with a note from the neutral saying he or she had never met with the parties and had nothing to say about the case.

The actual number returned in 2009 was 476. Seventy-four were blank and are not included in the following discussion.

The neutrals average 4.8 in saying that the procedures set out in the *Rules* had worked well in the specific case. The responses average 4.9 in saying that based on this experience they would participate in another arbitration in the OIA system. They average 4.9 in saying that the OIA had accommodated their own questions and concerns in the specific case. The median and the mode for all questions are 5.

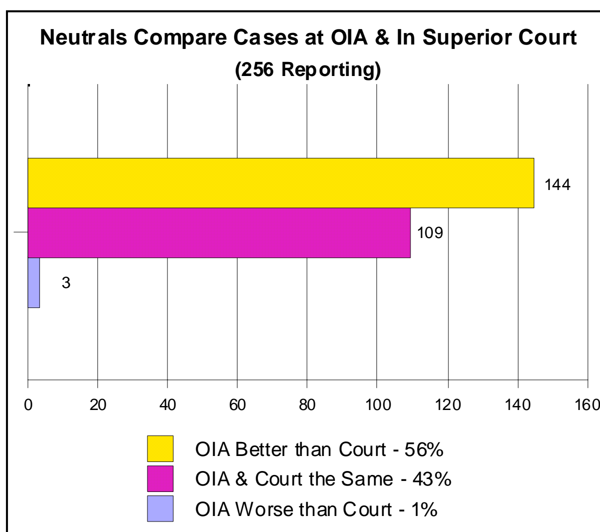
The questionnaires also include two questions that ask arbitrators to check off features of the system which worked well or poorly in the specific case. The vast majority of those who responded were positive.

Neutral Arbitrators' Opinions Regarding OIA System

Feature of OIA System	Works Well	Needs Improvements
Manner of NA's appointment	300	1
Early Management Conference	278	2
Availability of expedited proceedings	86	2
Award within 15 business days of hearing closure	83	12
Claimants' ability to have Kaiser pay NA	230	11
System's rules overall	260	8
Hearing within 18 months	111	4
Availability of complex/extraordinary proceedings	50	5

Finally, the questionnaires ask the neutrals whether they would rank the OIA experience as better or worse than or about the same as a similar case tried in court. For the second year in a row, a majority of the neutral arbitrators judged the system to be better than a court trial. Two-hundred fifty-six of the neutral arbitrators (256) made the comparison. One-hundred-forty-four, or 56%, said the OIA experience was better. One-hundred-nine, or 43%, said it was about the same. Only three - one percent - said the OIA experience was worse. Those who believe it was better said it was faster, more convenient, and economical, and praised its flexibility to accommodate the needs of individual cases. Three neutral arbitrators specifically praised the attorneys involved in the arbitrations, calling them more competent and professional, better

prepared, and staying abreast of the case. One of the neutral arbitrators who rated it worse complained that the *Rules* were not clear whether the neutral arbitrator could approve the appointment of a *guardian ad litem* or a minor's compromise. The second complained of confusion in a case with three complainants, each of whom had a different last name and suggested an "originating document" with everyone's full name.[84] The third said the arbitration was faster and less expensive than the state court. Overall, the three rated the OIA's system and service highly. Other than the above comments, there were no comments about improvements.



The vast majority of the comments of the neutral arbitrators were compliments on how well the *Rules*, system, or the OIA staff works or assurances that no changes need to be made. The next most common other comment was that 15 business days is too short for awards in complicated cases (5). Though varied in content, six neutral arbitrators commented about lien cases, suggesting that Kaiser pursue the consumer's attorney in civil court, that a neutral ombudsman handle the cases, or a default procedure be established. Two addressed the difficulties in getting paid if the consumer did not appear to sign the waivers.[85] Three comments referred to difficulties involved with *pro per* claimants. There were five comments concerning the billing process and Kaiser, excluding the lien cases. Six comments referred to e-mail, either obtaining the attorneys' e-mail addresses, getting documents by e-mail rather than hard copies, or getting evaluations from the website. Four neutral arbitrators praised holding frequent status conferences by telephone.

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[84]The Agreement to Serve and the Letter Confirming Service, both sent by the OIA at the beginning of the neutral arbitrator's service, set out the full names, as did the demand for arbitration.

[85]One of the *Rule* amendments addresses this. See Rule 15.e.iii.

C. The Parties Evaluate the OIA System and Obtaining Medical Records

As previously mentioned, in 2009 the OIA began sending the parties who received an evaluation of the neutral arbitrators an additional one page evaluation of the OIA system and the ease of obtaining medical records. The form is similar to the form sent to the neutral arbitrators, differing in that it does not ask about items that work well or need work and does ask how well the procedures for obtaining medical records worked.

Once again, the form asks the recipients, on a scale from 1 to 5, whether they agree or disagree. A "5" is the highest level of agreement.

The OIA sent 996 evaluations and received 312 responses (31%).[86] One hundred forty–three identified themselves as either claimants (12) or claimant attorneys (131), and 193 identified themselves as respondent's counsel. Thirteen did not specify a side.[87]

The responses for whether the procedures in general worked well and whether the OIA was responsive were quite positive for the attorneys, with both modes and means of 5. Both *pro pers* and claimant attorneys gave much lower ratings to the statement about obtaining medical records.

Item 1: "The procedures worked well in this particular case." 4.5 average

The overall average is 4.5 out of 5. The average for claimant attorneys is 4.2, for *pro pers* 3.1, and for respondent attorneys 4.8. The mode and median for both sets of attorneys are 5. For *pro pers*, the mode is 1 and the median is 3.5.

Item 2: "The procedure for obtaining medical records worked well." 4.1 average

The average is 4.1 for all responses. The average for claimant attorneys is 3.2; for *pro pers*, 2.8, and respondent attorneys, 4.8. The mode for all attorneys is 5. But while the median for respondents attorneys is 5, it is 3 for claimant attorneys. For *pro pers*, the mode is 1 and the median is 3.

Item 3: "The OIA was responsive to my questions and concerns." 4.7 average

The overall average is 4.7. The average is 4.5 for claimant attorneys, 3.7 for *pro pers*, and 4.9 for respondent attorneys. The median and mode for all groups is 5.

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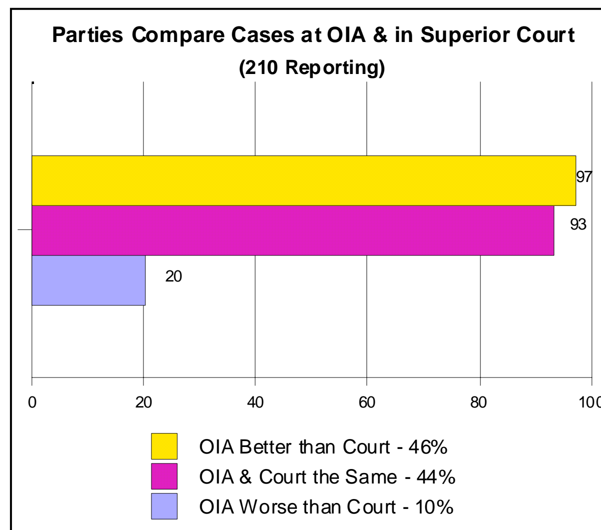
[86] In addition, 37 people returned blank forms.

[87] Their responses are included only in the overall averages.

The form also asked the parties if they have had a similar experience in Superior Court and, if so, to compare the two. Of the 210 people who made the comparison, a plurality (97) said it was better. Another 93 said it was the same. Only 20 said it was worse. None of the *pro pers* who answered this question said it was worse.



Those who said the OIA system was better for the most part gave reasons similar to the neutral arbitrators, saying it was faster, less expensive, and more flexible. A few gave different reasons, saying that neutral arbitrators were not as busy as judges and willing to give cases the time they needed, there were no unwilling jurors deciding the case, there was less paperwork, and Kaiser was more willing to settle. For the most part, the twenty who said it was worse did not like mandatory arbitration in general, thought neutral arbitrators had economic interest which made them biased toward Kaiser, or thought the system was unfair. A majority had problems obtaining documents. Three, however, had other specific concerns (not as many management conferences as in court, the neutral arbitrator wanted to read all the discovery, and Kaiser should have to pay all of the neutral arbitrators' fees) and one praised the OIA system as easier for scheduling than court.

As with the neutral arbitrator form, the parties are invited to give comments and suggestions. The most common comment concerned obtaining medical records, calling the system of getting them from Kaiser expensive, time consuming, and/or confusing and resulting in incomplete records that differed from those of other counsel or physicians. Some criticized neutral arbitrators for failing to sanction counsel for not providing complete or timely records.

Other common complaints included the fact that claimants could delay the neutral arbitrator selection for 90 days (5), that Kaiser had to pay for the neutral arbitrator (5), and about conferences in general (5). These thought that there should be more, that the MSM was in the wrong time frame, or that they should be in person. Three people wanted to discontinue neutral arbitrator

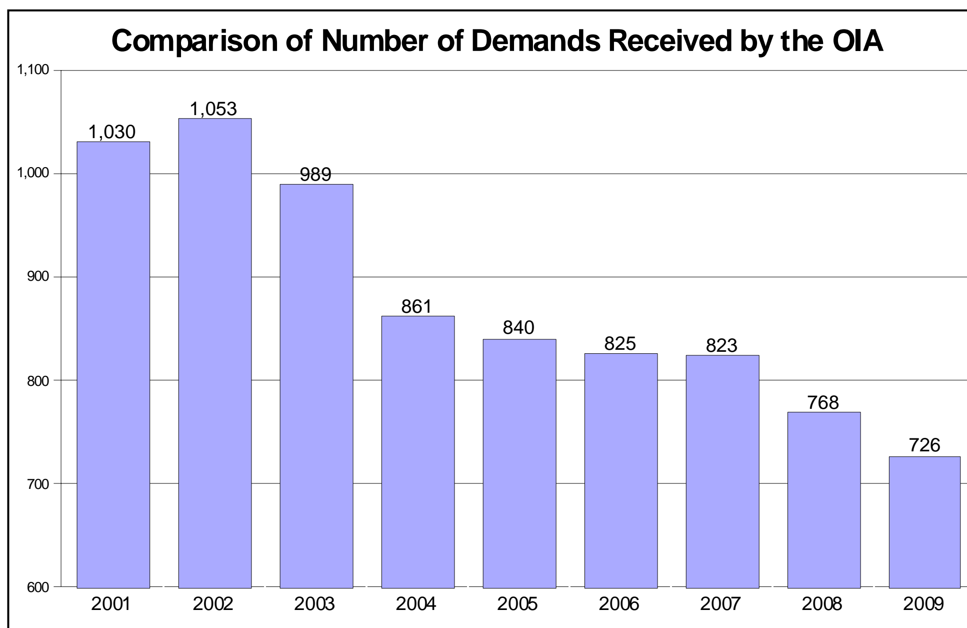
selection by strike and rank and only have joint or court selection. While some objected to mandatory arbitration and said that economic self-interest lead to biased neutral arbitrators, there were only a few suggestions for ameliorating this alleged problem: to limit the number of cases a neutral arbitrator could have at one time, to have more plaintiff attorneys in the pool of neutral arbitrators, and to have the OIA, rather than Kaiser, pay the neutral arbitrators (with the OIA being reimbursed by Kaiser). Three *pro per*s specifically said that they needed more help and wanted lawyers. There were also many comments that the *Rules* did not have to be changed and that the OIA was helpful.

X. TRENDS AND DATA OVER THE OIA'S YEARS OF OPERATION

This section uses the remarkable amount of data that has been collected and published about this arbitration system to consider those elements that have shown change as well as the many more that have been relatively stable.[88] For example, the number of neutral arbitrators, the percentage of neutral arbitrators who are retired judges, how neutral arbitrators are selected, the percent of claimants represented by counsel, and how cases close all have remained relatively stable.

A. The Number of Demands for Arbitration Has Dropped

One of the most striking facts is the extent to which the number of demands for arbitrations has declined since 2002. The number reached a high of 1,053 in 2002. In 2009, the OIA received 726. As the following graph shows, the sharpest decline occurred between 2003 and 2004 (a decrease of 128), with significant further decreases in 2008 and 2009.



[88]If readers want a copy of the tables that contain statistics set out in the prior reports, as well as the statistics for this report, they are available from the OIA.

B. The Number of Neutral Arbitrators has Remained Relatively Stable

Even though the number of demands for arbitration has declined, the number of neutral arbitrators has stayed relatively stable. For the most part, the pool has contained between 280 - 310 people and 30 - 40% have been retired judges. The pool has ranged from 349 at the end of 2000 to 275 in 2009.

The percentage of neutral arbitrators who have served in any given year has dropped with the number of demands, since there are fewer opportunities to serve. It reached a high of 70% in 2003, when the OIA received 989 demands for arbitration and had 287 neutral arbitrators in its pool.[89] For the most part, the percent of neutral arbitrators who have served in any given year has been 57 - 63%. If the entire time is considered, 87% of the pool in 2009 has served at some time and the average number of selections is 17, or slightly more than 1.5 appointments a year. The number of neutral arbitrators who have written awards also remained high, ranging from 72 (in 2008) to 93 (in 2004). During the OIA's existence, 335 different neutral arbitrators have written awards. Equally important, the vast majority of those neutral arbitrators, 68 - 79%, only wrote a single award in any year.[90] This wide spread distribution of work among members of the pool and corresponding lack of concentration protect against "captive" neutrals, a key concern when the OIA was created.

C. Claims Overwhelmingly Allege Medical Malpractice

The overwhelming majority of demands for arbitration are, and have always been, claims that allege medical malpractice. This has ranged from 86 - 94%.[91] Benefit claims are generally less than two percent. In 2008, lien cases comprised more than 5% for the first time. In 2009, it fell to 4.6%. Although the Blue Ribbon Panel gave much attention to benefit claims, there have actually been more lien cases (195) than benefit cases (140), most in the past few years.

D. Approximately Seventy-Five Percent of Claimants Have an Attorney

The percent of cases with claimants who are not represented by an attorney has generally remained between 20 - 25%, reaching 29% the first year and dropping to 17% in 2004. Dealing with the concerns raised by *pro per* claimants has been a continuing issue for the OIA, the AOB,

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[89]In 2009, by contrast, there were 726 demands for arbitration and 275 neutral arbitrators in its pool.

[90]If the entire period is considered, 109 of the 335 neutral arbitrators, or 33%, have written only one.

[91]The range may actually be smaller because during the early years the OIA categorized a larger percentage of demands as "unknown" when they gave no specifics. Now, Kaiser provides information as to the type of claim being made.

and neutral arbitrators. Both the AOB and the OIA have revised forms and the "*pro per* hand out"[92] to make them easier for *pro pers* to understand.

E. The Parties Select the Neutral Arbitrators by Strike and Rank in Sixty-Seven Percent of the Cases

The percentage of neutral arbitrators chosen by strike and rank versus those jointly selected has ranged from 65% (the first year) to 74% (2003). From 2001 to 2008, it was 70% or more. In 2009, it fell to 67%. Similarly, the percentage of neutral arbitrators jointly selected who are members of the OIA pool has ranged from 62% (again, the first year) to 82% (2006).[93]

F. Half of the Claimants Use Procedures Contained in OIA Rules and State Law to Delay Selecting the Neutral Arbitrator, but Time to Select Remains Consistent

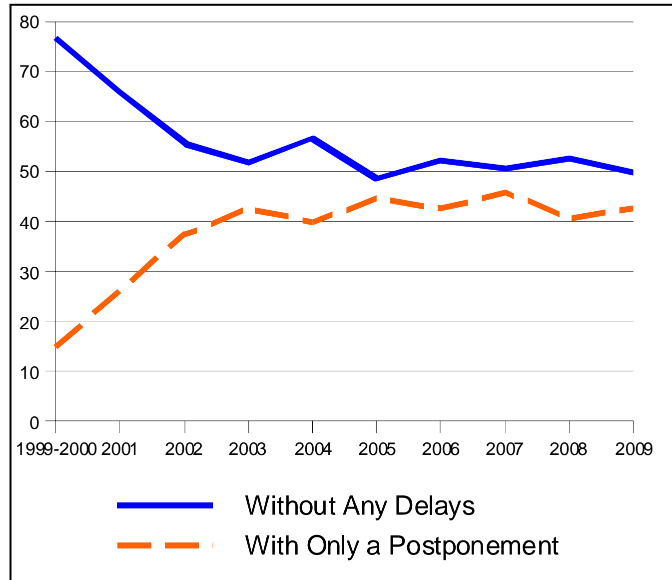
This is a second area where there has been a marked change from the first few years. In the first years, use of these tools (postponement and disqualification) that allow more time to select a neutral arbitrator[94] was not that common. Since 2003, 43 - 51% of the cases had one or both. In 2000, only 23% did. Claimants made almost all of the postponements (3,589 out of 3,608) and the vast majority of disqualifications (566 out of 683). These trends are graphed on the following chart:

[92] This is included as part of Rule 54, Exhibit B.

[93] There have only been nine cases in which the parties had to go to court to have a neutral arbitrator selected.

[94] We also began calling the parties to remind them of the deadline to return the list of possible arbitrators. During this call, we remind claimants or their attorneys that they may seek a postponement if they are not able to return their responses by the deadline.

Comparison of Percentage of Neutral Arbitrators Selected Without Delay vs. Neutral Arbitrators Selected With Only A Postponement



The length of time to select a neutral arbitrator, however, has remained consistent since 2003: 24 - 26 days for cases with no postponements and 111 - 114 days for cases where the claimants seek a 90 day postponement. The following table compares the differing forms of selecting a neutral arbitrator since 2003.

Comparison of No Delay vs. Delays and Average Number of Days to Select Neutral Arbitrators

	2003	2004	2005	2006	2007	2008	2009	1999 - 2009
No delay	25 days 52%	24 days 57%	24 days 49%	25 days 53%	25 days 51%	26 days 53%	26 days 50%	25 days 57%
Only Postponement	114 days 43%	111 days 40%	111 days 45%	111 days 43%	113 days 46%	114 days 41%	113 days 43%	112 days 37%
Only Disqual.	75 days 2%	51 days 1.5%	68 days 2.3%	59 days 2%	72 days 1%	58 days 3%	71 days 3%	65 days 3%
Postponement & Disqual	162 days 4%	160 days 1.5%	173 days 3.7%	171 days 2%	155 days 2%	157 days 3%	165 days 4%	161 days 3%
Total Selections	69 days	61 days	70 days	66 days	68 days	67 days	70 days	62 days

G. The Parties Consistently Close Most Cases Themselves

The most common way cases close has always been settlement (40 - 49%). This is followed by cases withdrawn by the claimant (20 - 28%); cases decided after a hearing (12 - 16%); and summary judgment (7 - 14%). The remaining cases were abandoned by the claimant at the beginning or dismissed by the neutral arbitrator. The following table displays the statistics since 2003.

Comparison of How Cases Closed

	2003	2004	2005	2006	2007	2008	2009
Settlements	49 %	41%	40%	42%	42%	44%	46.5%
Withdrawn	23 %	27%	27%	28%	26%	27%	25.6%
Abandoned	4 %	4%	4.5%	5%	5%	5%	4.3%
Dismissed	2 %	4%	2%	3%	3%	3%	2.4%
Summary Judgment	9 %	8%	9%	8%	10.5%	8%	7%
Awards	12 %	16%	16%	13%	13.5%	13%	13%

H. The Results After a Hearing

In those cases in which the claimant won after a hearing, the awards have ranged from a single dollar to more than $6,000,000. The average is $376,966. Because the number of cases in any given year is small, the average can fluctuate quite a bit from year to year. The lowest average, $156,001, occurred in 2001, when the largest award was over $1,000,000. The largest average, $811,657, was in 2009, which had five awards of more than a million, of which one was $5,000,000.

The percent of cases in which members prevailed after a hearing fell to 29% in 2009. This is the lowest percentage since 1999. One reason for this is that 15 lien cases went to hearing in 2009,[95] and all of them were decided in Kaiser's favor. If these 15 cases are excluded, members prevailed after a hearing 34% of the time in cases they brought. This is still the lowest percentage since 2004, which was also 34% of claimants won after a hearing.

[95] Before 2008, only eight lien cases total had gone to hearing.

I. Cases Close in Less Than A Year

For the most part, the length of time for cases to close has been increasing steadily - though slowly - over the years. This can be seen by looking at the averages for all cases, regardless of the type of closure. The average for all cases (which is the least susceptible to the influence of a single old case closing in a year) - was 319 in 2003 and reached 357 (the longest) in 2009. Since the number of cases in which parties believe that more than 18 months is needed to close increases, it is not surprising that the average then increases as it did in 2009, for cases with an award. One of the cases closed after more than 2000 days. More than 20% of the cases closed in 2009 were designated complex, extraordinary or had a Rule 28 extension.

Comparison of Average Number of Days to Close, by Disposition

	2003	2004	2005	2006	2007	2008	2009	All
Settlements	317 days	320 days	311 days	325 days	337 days	340 days	375 days	316 days
Withdrawn	231 days	247 days	254 days	262 days	242 days	227 days	234 days	234 days
Summary Judgment	333 days	355 days	377 days	355 days	333 days	324 days	366 days	326 days
Awards	461 days	456 days	470 days	533 days	520 days	455 days	503 days	444 days
All Cases	319 days	326 days	330 days	342 days	336 days	325 days	357 days	315 days

The OIA closely follows each case that is still open after 15 months to make sure that the neutral arbitrator is managing it and that the case is not drifting. Because of this type of diligence by the neutral arbitrators and the OIA, only 36 cases – less than half of one percent – have closed late.

J. Claimants Shift Cost of Arbitration to Kaiser in Vast Majority of Cases

California law provides that, absent any other arrangement by the parties, the fees of the neutral arbitrator will be split evenly between the parties. The OIA *Rules*, however, provide several ways to shift those fees to Kaiser and most claimants use them. Thus, Kaiser has paid all of the neutral arbitrators' fees in 80 - 85% of the cases.[96] This is done most easily, and most commonly, by the claimants signing a form and agreeing not to use party arbitrators. However, each year in 5 - 8% of the cases, the claimants have requested a waiver based on financial hardship which also

[96] Statistics for costs really only exist for demands received after January 1, 2003, when state law required the OIA to disclose the amount of neutral arbitrators' fees and how the fees were split and therefore required the neutral arbitrators to inform the OIA. Prior to this, the OIA relied on the number of requests to waive these expenses for financial hardship.

exempts them from paying the $150 filing fee or giving up the right to party arbitrators. In addition, a waiver created in 2003 by the California Legislature allows claimants who meet certain tests to avoid the $150 filing fee.[97] While some claimants file for both waivers, between 12 and 19 claimants each year request that only the $150 fee be waived, relying on the standard forms to shift the neutral arbitrators' fees to Kaiser.

K. Neutral Arbitrators and the OIA System Consistently Receive Positive Evaluations

Since 2000, the OIA has been sending out evaluations of the neutral arbitrators and the OIA. After the first year, the response rate was in the 50 percent range for the two years, dropping to the 40 percent range for the next two years, until it fell to 28% in 2005. After the OIA called the parties to request greater participation, the response rate returned to the 50 percent range again. In 2009, however, it fell to 42%. While still impressive as some of the attorneys have participated in the system for years, giving many evaluations of the same neutral arbitrators, the OIA will again contact attorneys to try to increase the response rate.[98]

The evaluations ask, among other things, whether the neutral arbitrator treated them with respect, explained the process, and understood the facts and whether the parties would recommend them to others. The responses to the evaluations have generally been quite positive, especially from the attorneys. For them, the average for most questions range between 4.3 and 4.8, quite close to 5 (on a 1 - 5 range). The differences between years are quite small,[99] while the modes and medians are 5. This means that the most common response is the most positive. Fewer *pro per* claimants return the evaluations,[100] and thus the average responses are more susceptible to a few lower rated evaluations. The averages are traditionally lower than responses from attorneys, though the modes and medians are generally 5.

The OIA began asking neutral arbitrators to evaluate the OIA system in 2000. The questions ask them to identify whether particular features are useful or not, whether the OIA is helpful or responsive, and to compare the OIA system with the court system. The neutral arbitrators' evaluations have always been positive. Response rates average in the 80 percent range. With respect to the question asking whether particular features worked well or not, there were some potentially interesting changes from last year. More neutral arbitrators considered the availability of expedited, complex, and extraordinary proceedings to work well, which is consistent with the

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[97]The filing fee has not increased during the OIA's operation.

[98]The OIA is also interested in discovering whether the drop in the response rate is connected to the fact that the OIA began sending out a third piece of paper in 2009, asking them to review the OIA, procedures, and process for obtaining medical records.

[99]For example, an average would change from 4.7 to 4.8 or 4.6.

[100]In 2006, for example, only 15 responded.

larger number of cases that closed in those ways.[101] The number of neutral arbitrators who thought the claimants' ability to have Kaiser pay the neutral arbitrator worked well significantly increased. Finally, even though there were more postponements and disqualifications this year, the number of neutral arbitrators who thought the manner of neutral arbitrator selection worked well also markedly increased.

Based upon comments by neutral arbitrators, the time to prepare the award was changed in 2002 from 10 calendar days to 15 business days, essentially doubling the time. While almost all of the neutral arbitrators who compare the OIA system with court say that it is as good or better, in 2008 and 2009, a majority answered that it was better.

XI. THE ROLE OF THE ARBITRATION OVERSIGHT BOARD

A. Membership

The Arbitration Oversight Board (AOB) is chaired by David Werdegar, M.D. M.P.H. Dr. Werdegar is the former director of California's Office of Statewide Health Planning and Development and is Professor of Family and Community Medicine, *Emeritus*, at the University of California, San Francisco, School of Medicine. The Vice-Chair of the AOB is Cornelius Hopper, M.D., Vice President for Health Affairs, *Emeritus*, of the University of California System.

The membership of the AOB is a distinguished one. There are eleven board members, besides the two officers. The members represent various stakeholders in the system, such as Kaiser Health Plan members, employers, labor, plaintiff bar, defense bar, physicians, and hospital staff. There are also outstanding public members. Only three of the thirteen are attorneys. No more than four may be Kaiser affiliated. Changing the *Rules* requires the agreement of two-thirds of all the members of the AOB, as well as a majority of the non-Kaiser related board members.

During 2009, two members stepped down from the AOB, Mary Patricia Hough, Esq., and Dan Heslin.[102] They were replaced by Doris Cheng, Esq. and Richard J. Spinello. Ms. Cheng is a plaintiffs attorney in Northern California and has brought many cases in OIA arbitration. Mr. Spinello is the Executive Director of Financial Risk and Development at Children's Hospital of Orange County.

The members are, in alphabetical order:

> **Terry Bream**, R.N., M.N. Administrator, Department of Clinical Services, Southern California Permanente Group, Pasadena.

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[101] Consistent with that, the number of neutrals who thought having the hearing within 18 months worked well declined.

[102] Mr. Heslin had been a member of the AOB's predecessor, the Arbitration Advisory Committee, which had helped to create the *Rules* and neutral arbitrator qualifications when the OIA was first established.

Doris Cheng, medical malpractice attorney representing plaintiffs, San Francisco.

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

Tessie Guillermo, President and CEO, ZeroDivide, San Francisco.

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

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

Kenneth Pivo, medical malpractice attorney representing respondents, Costa Mesa.

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

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

Richard J. Spinello, Executive Director of Financial Risk and Insurance, CHOC Children's Hospital.

Al Ybarra, a former Secretary-Treasurer, Orange County Central Labor Council, AFL-CIO, Orange.

B. Activities

The AOB takes an active role. It meets quarterly to review operation of the OIA and receive reports from OIA staff. This includes quarterly reports of statistics similar to those included in the annual reports.

Under Rule 50, the AOB has authority to amend the *Rules*. During 2009, the AOB discussed, refined, and voted to accept amendments to the *Rules*. These amendments adjusted the *Rules* as needed given the possibility of demands for arbitration involving Kaiser Permanente Insurance Corporation; the change in the role of the parties in lien cases; and various miscellaneous clarifications of the *Rules*.

The AOB completed its work editing the explanation of the types of waivers available to claimants to shift the cost of the neutral arbitrator or the arbitration filing fee to Kaiser and the forms used by claimants to do so. The Board was particularly concerned that they be as clear and easy to use as possible. A copy of the explanation and forms is attached as Exhibit C. The OIA began sending them out in 2009.

During 2009, the AOB had several discussions concerning lien cases. Although they are a relatively small percentage of the demands for arbitration the OIA receives, they differ in posture from the other cases. A copy of the memo the OIA prepared for the AOB is attached as Exhibit D.

During conversations regarding the pool of neutral arbitrators, the AOB queried its racial and ethnic background. The AOB asked the OIA to solicit this information from the neutral arbitrators. Providing this information would be voluntary and the information would remain confidential.

Officers of the AOB are in regular contact with the OIA by e-mail and by telephone. The AOB also reviews the draft annual report and comments upon it. Exhibit J is the AOB Comments on the Annual Report for 2009.

XII. CONCLUSION

This report describes a mature arbitration system. While continually subject to further refinements, these improvements are often small and subtle. As far as the data are able to measure the arbitration process, this report shows the goals of a fair, timely, low cost arbitration system that protects the privacy interests of the parties are being met.

Timeliness is the easiest to measure. The time to select a neutral arbitrator and to go through the arbitration process is many times faster than the pre-OIA system, and delay has largely disappeared as an issue. The fact that only three cases closed after its time limit is good evidence that the arbitration process meets expectations of timeliness.

Cost is an area the OIA now measures. The $150 filing fee is lower than court filing fees (other than small claims). In 2009, only five claimants who sought a waiver of this fee were denied and they continued their cases. In 85% of the cases with fees that began after January 1, 2003 and ended in 2009, the neutral arbitrators were paid by Kaiser.

The OIA continues to protect the confidentiality of the parties in this system. The OIA publishes information about cases on its website in response to California law, but no names of individual claimants or respondents are included, only corporate entities.

Finally, the *Rules* and OIA procedures seek to promote fairness in the arbitration process and in its outcomes.

The selections are distributed to a large number of neutral arbitrators. This includes a large number who preside over hearings. Spreading the work helps reduce the possibility of neutral arbitrators being dependent upon Kaiser for work.

The *Rules* give both parties the power to determine who their neutral arbitrator will be – or at least who their neutral arbitrator will not be. The OIA gives both parties identical information about the neutral arbitrators. This includes evaluations of the neutral arbitrators by the parties in earlier cases and redacted awards. The parties can jointly select anyone who agrees to follow the *Rules*, and either party can timely disqualify a neutral arbitrator after the selection.

The California Legislature and the Judicial Council have decided that disclosures about organizations involved in arbitrations helps promote fairer arbitrations. The OIA posts this information on our website for all to see and helps the neutral arbitrators comply with their obligations. The amount of information available to the parties has increased dramatically over the years.

The composition of the pool of neutral arbitrators is balanced between those who have plaintiff's side experience and those who have defendant's side experience. Ninety percent report medical malpractice experience.

The system is easier than a court system to access: the fee is only $150, no particular forms are required to demand arbitration, most documents can be faxed or e-mailed to the OIA (or arbitrators), and the neutral arbitrators’ fees can be and generally are paid by Kaiser.

The OIA is evaluated by neutral arbitrators and the parties at the conclusion of cases. Almost all who answered rated it better than or as good as Superior Court.

The OIA reports to the AOB regularly about the arbitration process.

The OIA publishes this report on the internet and sends a copy to the California Legislature and others who ask for it. The annual reports provide more information about arbitrations involving Kaiser Permanente than any other arbitration system provides about its arbitrations.