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, 2011 - December 31, 2011

REPORT SUMMARY

This is the annual report the Office of the Independent Administrator (OIA) for 2011. It discusses 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. From the data and analyses in this report, readers may gauge how well the OIA system meets its goals of providing arbitration that is fair, timely, lower in cost than litigation, and protective of the privacy of the parties. For example:

- Over 90 percent of the neutral arbitrators and the parties said the OIA administered arbitration system was better than or the same as going to court.
- Most parties express satisfaction with the neutral arbitrators and would recommend them to others.
- With the consent of claimants, Kaiser paid the neutral arbitrators' fees in 87% of the cases.
- Cases close, on average, in less than 12 months.
- The number of neutral arbitrators in the pool remains large, even as the number of demands for arbitrations has dropped.
- Approximately 25 percent of claimants bring cases without an attorney.

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

Status of Arbitration Demands

The total number of demands for arbitration declined by four from the previous year, reflecting fewer lien cases. If only the demands brought by members are considered, the number of demands for arbitration rose slightly. Almost all of the claims are for medical malpractice. About 25% of claimants are not represented by counsel.

1. **Demands for Arbitration.** The number of demands continued to decline in 2011, when the OIA received 677 demands. This is 4 fewer than the OIA

[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.

received in 2010. If only demands brought by members are considered, the number rose from 658 to 665. See pages 9 and 46.

2. **Types of Claims.** More than 95% of the OIA administered cases in 2011 involved allegations of medical malpractice. Less than 1% presented benefit and coverage allegations. Lien cases made up less than 2%. The remaining cases were based on allegations of premises liability and other torts. The percentage of cases involving medical malpractice allegations has been consistent since the OIA began operations. See pages 9 and 47. Because lien cases differ significantly from cases brought by members, the statistics in this summary, and most of the statistics in the report, exclude lien cases. They are reported separately in a separate section.

3. **Proportion of Claimants Without Attorneys.** Nearly a quarter (24%) of the claimants in 2011 were not represented. See pages 11 and 47.

How Cases Closed

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

4. **Three-Quarters of Cases Closed by the Parties' Action.** During 2011, the parties settled 44% of the closed cases. Claimants withdrew 26% and abandoned another 3% by failing to pay the filing fee or get the fee waived. See pages 26 – 27.

5. **One-Quarter Closed by Decision of Neutral Arbitrator.** Eleven percent of cases closed after an arbitration hearing, 11% were closed through summary judgment, and 4% were dismissed by neutral arbitrators. In the cases that went to an arbitration hearing, claimants prevailed in 31%. See pages 27 – 28.

6. **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 one award made after a hearing in 2011. A single neutral decided the other 73. See page 20.

7. **Almost Half of Claimants Received Some Compensation.** The most common way cases close (44%) is by the parties settling the dispute and the claimant receiving some money from Kaiser. Since one third of claimants won after an arbitration hearing, an additional 3% of all claimants received compensation. The average award was $823,692, the median was $274,039, and the range was from $7,500 to $8,973,836. See page 28 and Exhibit F.

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 delays, the process is expeditious.

8. **Less than Half of Neutral Arbitrator Selections Proceeded Without any Delay; the Other Neutral Selections Had Delays Requested by Claimants.** Less than half (43%) of the neutral arbitrators were selected without the parties exercising options that delay the process. In the other cases, the selection deadline was postponed (49%), a neutral arbitrator was disqualified (2%), or both (6%). Claimants requested all but one of the postponements. They also made 74% of the disqualifications. See page 18.

9. **Average Length of Time to Select Neutral Arbitrator Stayed the Same for Most Parties.** The time to select a neutral in cases with no delay stayed the same as in 2010 and declined by 8 or 15 days in cases with disqualifications. It increased by one day in cases with only a postponement. In comparison with the time described in the *Engalla* case, the 75 days to select a neutral arbitrator in 2011 is nine times faster. See page 19 – 20.

10. **Cases Closed, on Average, in Less than Twelve Months.** In 2011, cases closed, on average, in 339 days, or 11 months, almost the same as 2010's 336 days. One case closed late. Nearly 90% of the cases closed within 18 months (the deadline for most cases) and more than 60% closed in a year or less. Fifteen percent of the cases that closed in 2011 were designated complex or extraordinary or had their 18 month deadline extended by the neutral arbitrator. See pages 23 – 25 and 51.

11. **Hearings Completed, on Average, Within Nineteen Months.** Cases that were decided by a neutral arbitrator making an award after a hearing closed on average in 555 days (less than 19 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 423 days (less than 14 months). See pages 28, 29, and 30.

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. 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 majority of neutral arbitrators the parties jointly select are in the OIA pool.

12. **Size of the Neutral Arbitrator Pool.** The OIA has 251 neutral arbitrators in its pool. Forty-three percent of them, or 107, are retired judges. See pages 4 – 5.

13. **Neutral Arbitrator Backgrounds.** The applications filled out by the members of the OIA pool show that 135 arbitrators, or 54%, spend all of their time acting as a neutral arbitrator. The remaining members divide their time between plaintiff's side and defendant's side work, though not necessarily medical malpractice litigation. Neutral arbitrators' applications and updates also show that 241 of the arbitrators have medical malpractice experience. That is 96%. See pages 5 – 6.

14. **Sixty Percent of Arbitrators Served on Arbitrations.** Sixty percent of the neutral arbitrators in the OIA pool served on a case in 2011. Arbitrators averaged two assignments each in 2011. Fifty-nine different neutrals, including arbitrators not in the OIA pool, decided the 75 awards (including lien awards) made in 2011. See pages 7 – 8.

15. **Sixty-Eight Percent of Neutral Arbitrators Selected by Strike and Rank.** The parties chose 68% of neutral arbitrators through the strike and rank process, and jointly selected the remaining 32%. No neutral arbitrator was appointed by the court. Fifty-five percent of the arbitrators jointly selected were members of the OIA pool. In the other cases, the parties chose a neutral arbitrator who was not a member of the OIA pool. See pages 13 – 14.

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. These can be shifted to Kaiser.

16. **Kaiser Paid the Neutral Arbitrators' Fees in 87% of Cases Closed in 2011.** Claimants can choose to have Kaiser pay the entire cost of the neutral arbitrator. For the cases that closed in 2011, Kaiser paid the entire fee for the neutral arbitrators in 87% of those cases that had fees. See pages 32 – 33.

17. **Cost of Arbitrators.** Hourly rates charged by neutral arbitrators range from $150/hour to $900/hour, with an average of $416. For the 493 cases that closed in 2011 and for which the OIA has information, the average fee charged by neutral arbitrators was $6,050.02. In some cases, neutral arbitrators reported that they charged no fees. Excluding cases where no fees were charged, the average was $6,442.03. The average fee in cases decided after a hearing was $24,654.73. See pages 33 – 34.

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. Beginning in 2009, the parties were also asked to evaluate the OIA system. The parties continue to give their neutral arbitrators positive evaluations. The neutral arbitrators report that the system itself works well. Parties also give the OIA system positive evaluations. Slightly less than half of the parties returned their evaluations, while almost all of the neutral arbitrators returned theirs.

18. **Positive Evaluations of Neutral Arbitrators.** In 2011, 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 – 41.

19. **Positive Evaluations of the OIA by Neutral Arbitrators.** Neutral arbitrators continue to give OIA procedures positive evaluations. Sixty-five percent said that the OIA experience was better than a court system, and 34% said it was about the same. See pages 41 – 43.

20. **Positive Evaluations of the OIA by Parties.** Forty-one percent of attorneys and *pro pers* said that the OIA system was better than the court system, and 48% said they were the same. See pages 43 – 45.

Developments in 2011

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.

21. **The Independent Administrator Participated in a Conference About Medical Malpractice Arbitration Held by a Federally Funded Organization.** The National Academy of Sciences' Committee on Science, Technology and the Law, meeting in Washington, D.C., invited Ms. Oxborough to speak at a conference that focused in part on medical malpractice arbitration. See Section II B.

22. **New Member of the Arbitration Oversight Board (AOB).** Donna L. Yee joined the AOB. See Section II A and Exhibit C.

23. **Amended Rule.** The AOB amended Rule 4 to clarify that party arbitrators must comply with the American Arbitration Association Code of Ethics.

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Exhibits

Charts & Tables

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.

We often 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 2011.[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 between Kaiser members and Kaiser. The contract 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 2011, one section compares 2011 with earlier years. The final section concludes 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 XII.

The arbitrations are controlled by the *Rules for Kaiser Permanente Member Arbitrations Administered by the Office of the Independent Administrator Amended as of January 1, 2012 (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 expediously;[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 attached as Exhibit B

[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 2011. 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. These four sections exclude lien cases.[9] The next section presents all the analyses for lien cases. The parties' evaluations of their neutral arbitrators and the parties and neutral arbitrators' evaluations of the OIA system are summarized in the following sections.[10] The report then compares the operation of the system over time. Finally, the report describes the AOB's membership and activities during 2011.

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

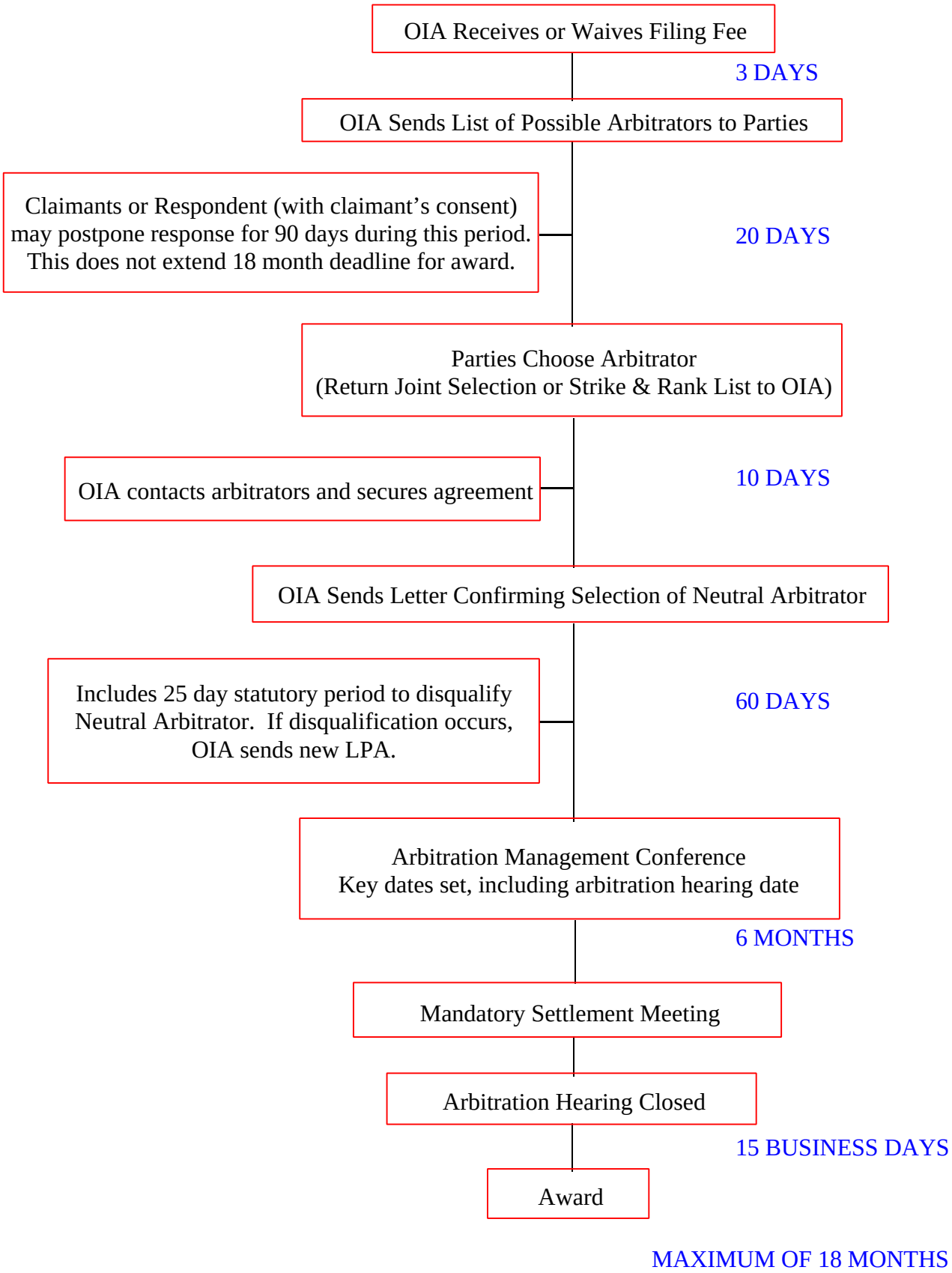
[7]Exhibit B, Rules 14 and 15; *see also* Section VIII.

[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) and began operating March 28, 1999. Sharon Oxborough has served as the Independent Administrator since then March 28, 2003. 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 available from the website.

[9]Lien cases are brought by Kaiser against its members. The vast bulk of the system's cases are brought by members against Kaiser and allege medical malpractice.

[10]Because these are anonymous, all of the evaluations are considered together, regardless of the type of cases.

Timeline for Arbitrations Using Regular Procedures



II. DEVELOPMENT AND CHANGES IN THE SYSTEM IN 2011

A. New Member of AOB

Donna L. Yee, the Chief Executive Officer of the Asian Community Center of Sacramento Valley, became a member of the AOB. She replaced Tessie Guillermo, who resigned in 2010.[11]

B. Independent Administrator Spoke at the National Academy of Sciences' Committee on Science, Technology and the Law (CSTL) Conference

The CSTL's April 2011 Conference focused in part on medical malpractice arbitration. Ms. Oxborough presented data about the OIA system, possibly the largest arbitration system of medical malpractice claims in the United States. The data mirrored that published in Annual Reports.

C. AOB Amends Arbitration Rule

The AOB amended Rule 4, which dictates the code of ethics that apply to arbitrators in the OIA system. It now states that "party" arbitrators, rather than merely "other" arbitrators, must comply with the AAA Code of Ethics. See Exhibit B, Rule 4.

III. POOL OF NEUTRAL ARBITRATORS

A. Turnover in 2011 and the Size of the Pool at Year-End

On December 31, 2011, there were 251 people in the OIA's pool of possible neutral arbitrators. Of those, 107 were former judges, or 43%.

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 D contains the names of the members of each panel.

[11] A copy of Ms. Yee's resume is attached as Exhibit C.

Number of Neutral Arbitrators by Region

Total Number of Arbitrators in the OIA Pool:	**251**
Southern California Total:	**131**
Northern California Total:	**115**
San Diego Total:	**56**

The three regions total 302 because 39 arbitrators are in more than one panel; 24 in So. Cal & San Diego, 3 in No. Cal & So. Cal, and 12 in all three panels.

On January 1, 2011, the OIA pool of possible arbitrators contained 299 names. During the year, 18 people left the pool and 54 were removed because they failed to return their update by the deadline.[12] Twenty-three arbitrators joined the pool in 2011.[13] The OIA rejected one applicant because the person failed to meet the qualifications.[14]

B. Practice Background of Neutral Arbitrators

OIA applicants allocate on their applications the amount of their practice spent in various professional endeavors. Overall, neutral arbitrators in the OIA pool spend their time as follows: 68% of his or her time acting as a neutral arbitrator, 11% as a respondent (or defense) attorney, 10% in other forms of employment, including non-litigation legal work, teaching, mediating, etc., 7% as a claimant (or plaintiff) attorney, and less than 1% acting as a respondent's party arbitrator, a claimant's party arbitrator, or an expert.

There are, of course, no such "average" neutral arbitrators, in part because a very substantial percentage of the pool spends 100% of their practice acting as neutral arbitrators. More than half of the pool, 135 members, report that they spend 100% of their time that way.[15] The full distribution is shown below.

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[12]Most of the NAs who failed to return their updates had never had a case or had not had a case for many years.

[13]The application can be obtained by calling the OIA or by downloading it from our website.

[14]The qualifications for neutral arbitrators are attached as Exhibit E. If the OIA rejects an application, we inform the applicant of the qualification(s) which he or she failed to meet.

[15]One-hundred-seven members of the OIA pool are retired judges.

Percent of Practice Spent As a Neutral Arbitrator

Percent of Time	0%	1 – 25%	26 – 50%	51 – 75%	76 – 99%	100%
Number of NAs	**8**	**67**	**16**	**5**	**20**	**135**

The members of the OIA pool who are not full time arbitrators primarily work as litigators.

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%	**201**	**200**
1 – 25%	**21**	**12**
26 – 50%	**18**	**20**
51 – 75%	**7**	**4**
76 – 100%	**4**	**15**

Finally, while the qualifications do not require that members of the OIA pool have medical malpractice experience, 96% of them do. At the time they filled out or updated their applications, 241 reported that they had such experience, while 10 did not. Members of the pool who have served on a Kaiser case since they joined the pool may have acquired medical malpractice experience since their initial report to us.[16]

C. How Many in the Pool of Arbitrators Have Served?[17]

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

[16]Of the ten who reported no medical malpractice experience in their applications, five of them have served as a neutral arbitrator in an OIA case.

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

depends on Kaiser for his or her income and impartiality is better served. Thus, three factors that minimize possible biases are: 1) the large size of the OIA pool from which the OIA randomly compiles a List of Possible Arbitrators (LPA), 2) the ability of parties to jointly select arbitrators from both within and outside the pool, and 3) the ability of a party to disqualify any neutral arbitrator after selections.

1. The Number Who Served in 2011

In 2011, 179 different neutral arbitrators were selected to serve as neutral arbitrators in 579 OIA cases. The great majority (150) were members of the OIA pool. Thus, in 2011, 60% of the OIA pool served in a case. The number of times a neutral in the OIA pool was selected ranged from 0 to 16[18]. The neutral arbitrator at the highest end was jointly selected 12 times. The average number of appointments for members of the pool in 2011 is 2, the median is 1, and the mode is 0.

2. The Number Who Wrote Awards in 2011

The group of neutral arbitrators deciding awards after hearing is similarly diverse. Fifty-nine different neutral arbitrators wrote 75 awards made in 2011. Forty-five of the arbitrators made a single award, while 12 decided 2. Two other neutral arbitrators decided three cases each, both writing awards in favor of both sides.

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 seven annual reports have looked at what has happened to neutral arbitrators after making an award of $500,000 or more.

Since the OIA began operations, 72 different neutral arbitrators have made 92 awards of $500,000 or more in favor of claimants. The awards have ranged from $500,000 to $8,973,836. Neutral arbitrators made nine awards for more than $500,000 in 2011.

Neutral arbitrators who have made awards of more than $500,000 have continued to be selected. Specifically, they have served 987 times. In more than half of these cases (490) the parties jointly selected the neutral arbitrator. In 2011, 27 of the neutral arbitrators were selected in 139 cases, being jointly selected 68 times.

Of the 72 neutral arbitrators who have made awards for more than $500,000, 36 remained in the pool at the end of 2011. Nine of the 72 neutral arbitrators have never been members of the

[18]One neutral arbitrator, who is not a member of the OIA pool, was jointly selected by the parties 35 times in 2011.

OIA pool and 27 have left the pool for various reasons. Thirty-four of the 36 neutral arbitrators made awards prior to 2011. Eight of them have not served again.

4. Comparison of Cases Closed by Neutral Arbitrators Selected Ten or More Times in 2011 with Cases Closed by Other Neutral Arbitrators

There were 8 neutral arbitrators who were selected 10 or more times in 2011. The OIA compared the cases these arbitrators closed in 2010 and 2011 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 2011 vs. Cases Closed with Other Neutral Arbitrators

Cases Closed 2010 – 2011	**Cases with Neutral Arbitrators Selected 10 or More Times in 2011**		**Cases with Other Neutral Arbitrators**	
Settled	80	50%	454	45.5%
Withdrawn	39	24.4%	230	23%
Summary Judgment	13	8.1%	128	12.8%
Awarded to Respondent	15	9.4%	96	9.6%
Awarded to Claimant	7	4.4%	41	4.1%
Dismissed	5	3.1%	36	3.6%
Other	1	.6%	13	1.3%
Total	160		998	

5. The Number of Neutral Arbitrators Named on a List of Possible Arbitrators in 2011

All but three 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 2011. The average number of Northern California arbitrators appearing on an LPA is 28, the median number is 29, and the

mode is 29. The range of appearances is from 3 to 50 times.[19] In Southern California, the average number of appearances is 21, the median is 22, and the mode is 22. The range is from 0 to 38. In San Diego, the average is 9, the median is 10, and the mode is 11. The range of appearances is from 0 to 20. Three members of the pool who joined in November 2011, were not named on an LPA.

IV. DEMANDS FOR ARBITRATION SUBMITTED BY KAISER TO THE OIA

Kaiser submitted 677 demands for arbitration in 2011. Geographically, 336 demands for arbitration came from Northern California, 280 came from Southern California, and 61 came from San Diego.[20]

A. Types of Claims

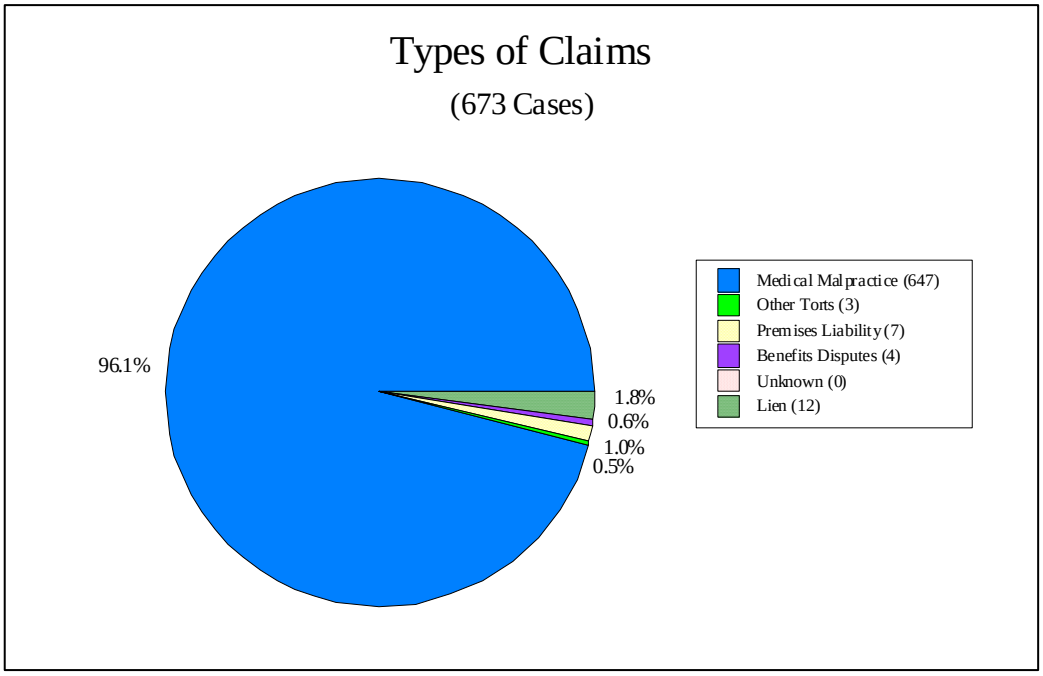
In 2011, the OIA administered 673 cases.[21] The OIA categorizes cases by the subject of their claim: medical malpractice, premises liability, other tort, lien, or benefits and coverage. Medical malpractice cases make up 96% (647 cases) in the OIA system. Benefits and coverage cases represent less than one percent of the system (four cases).

[19]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; three joined in November 2011. 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). Eighteen percent of the pool will not.

[20]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.

[21]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 11 "opt ins" in 2011. Seven of the claimants chose to have the OIA administer their claims. None affirmatively opted out of the OIA. Two cases never responded, and were therefore returned to Kaiser. In two cases, the deadline to respond had not passed by the end of 2011. These 4 explain the difference between the 677 claims submitted and the 673 claims administered.

The following chart shows the types of claims the OIA administered during 2011.



As discussed in Section I.B., the rest of this report, with the exception of Sections IX and X, excludes lien cases from its analysis and concentrates on the 661 mainly malpractice demands the OIA administered in 2011. Lien cases are discussed in Section IX.

B. 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.[22] In 2011, the average length of time that Kaiser took to submit demands to the OIA is three 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 two days. The range is 0 – 89 days.

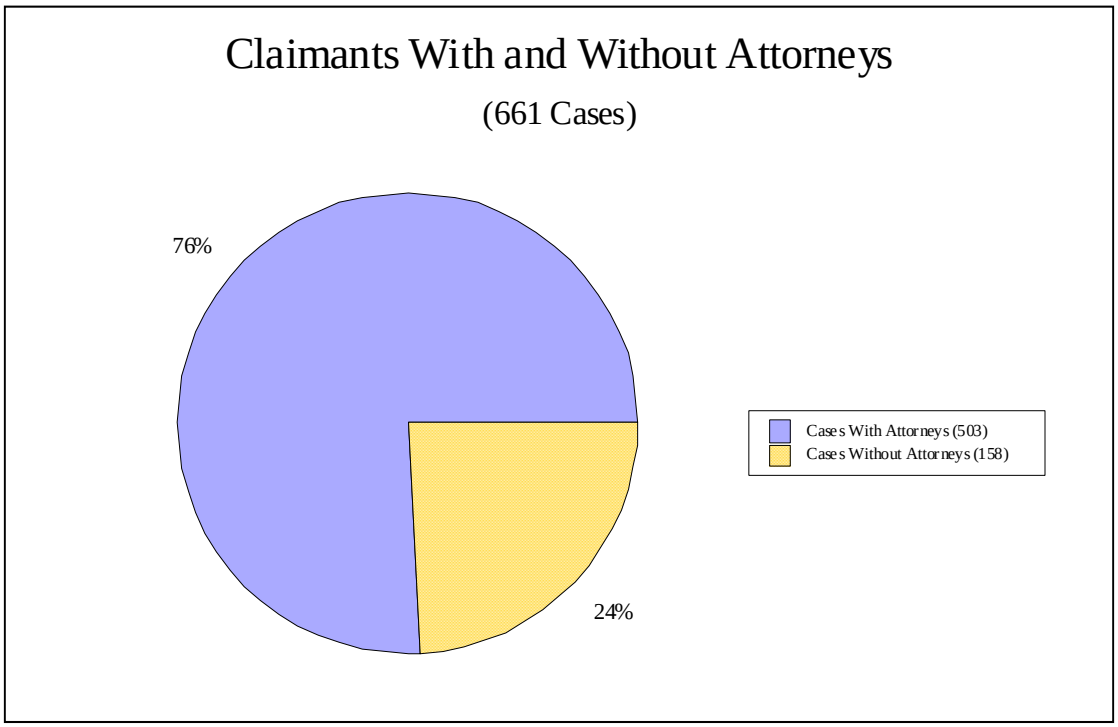
There were 13 cases in 2011 in which Kaiser took more than 10 days to submit the demand to the OIA.[23] If only these "late" cases are considered, the average is 28 days, the median is 17, and the mode is 12. The range is 12 to 89 days.

[22]Exhibit B, Rule 11.

[23]Only one late case was from Northern California. Two were from San Diego, and the rest from Southern California.

C. Claimants With and Without Attorneys

Claimants were represented by counsel in 76% of the cases the OIA administered in 2011 (503 of 661). In 24% of cases, the claimants represented themselves (or acted in *pro per*).



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.

A. How Neutral Arbitrators are Selected

The process for selecting the neutral arbitrator begins after a demand has entered the OIA system[24] 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.[25] 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.[26] Provided the person agrees to follow the OIA *Rules*, the parties can jointly select anyone they want to serve as neutral arbitrator.

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

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[24]"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.

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

[26]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 pursuant to California's ethical standards for neutral arbitrators, a neutral arbitrator has promised not to take another case with the parties while the first remains open 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.

side and then totals the scores of the names that remain. The person with the best score[27] 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 begins. In 2011, 78 cases either settled (39) or were withdrawn (39) without a neutral arbitrator in place.[28] 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.

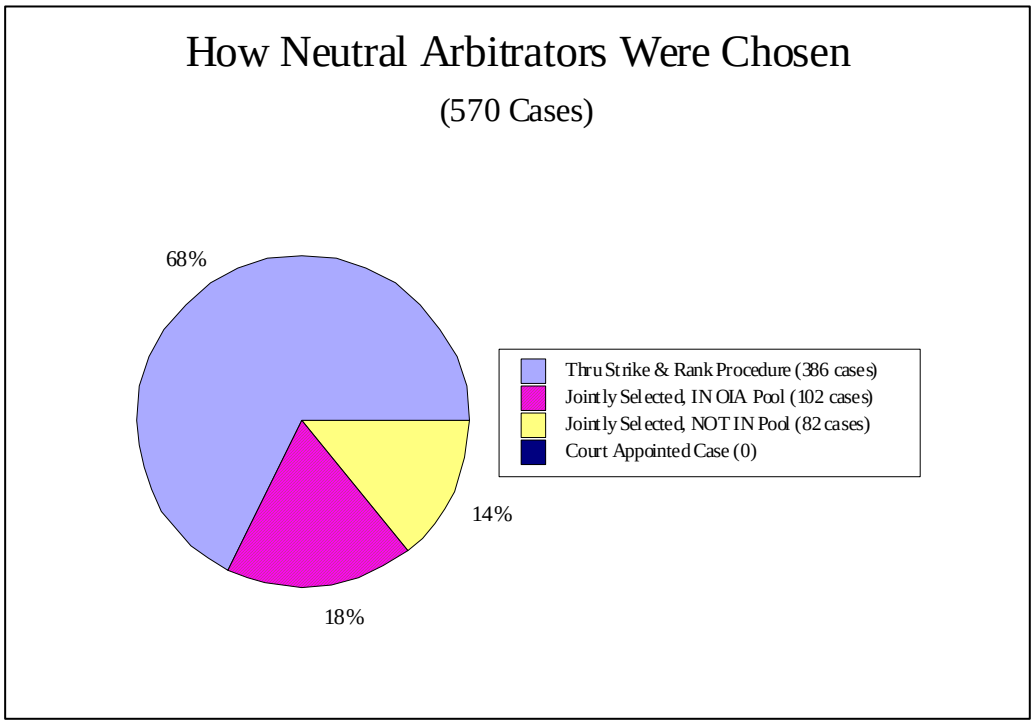
B. Joint Selections vs. Strike and Rank Selections

Of the 570 neutral arbitrators selected in 2011, 184 were jointly selected by the parties (32%) and 386 (68%) were selected by the strike and rank procedure. No neutral arbitrator was selected by court order. Of the neutral arbitrators jointly selected by the parties, 102 (55%), were members of the OIA pool, though not necessarily on the LPA sent to the parties. In 82 cases (45%), the parties selected a neutral arbitrator who was not a member of the pool. Six of these neutral arbitrators account for 71 of the joint selections.[29]

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

[28]These cases included both cases with attorneys and cases where the claimant was in *pro per*. The disposition varied however. In the 24 *pro per* cases that closed without a neutral arbitrator selected, 6 settled and 18 were withdrawn. In the 54 cases with an attorney, 33 settled and 21 were withdrawn. The other cases were abandoned, consolidated, or returned to Kaiser.

[29]While they have been invited, they prefer not to be in the OIA pool. All but one 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. 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. Many parties request a postponement of less than 90 days. 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 authority 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 the case is settled or withdrawn[30] – though it may be longer if, for example, it is based on the claimant's medical condition, or a party has gone to court for some reason.

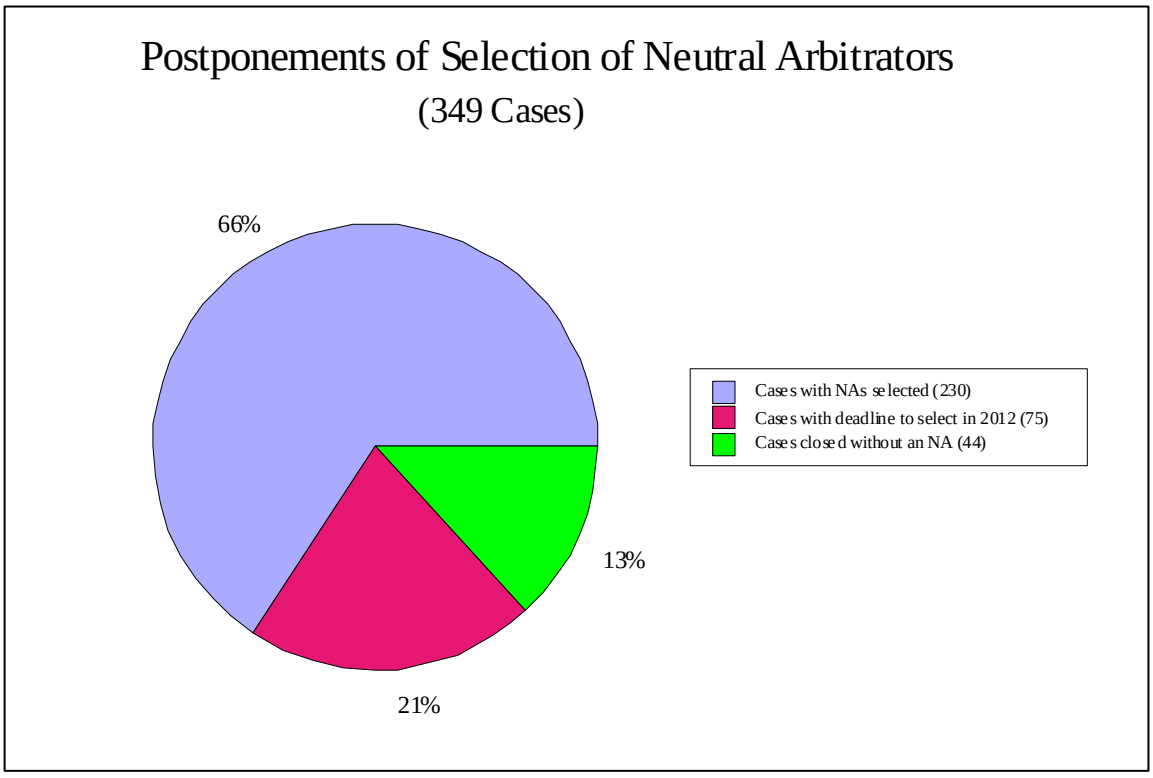
Under Rule 21, claimants do not have to give a reason to obtain a 90 day postponement. For a Rule 28 extension, however, they must provide a reason. The reasons for a Rule 28 extension are often the same as claimants volunteer for why they use Rule 21. In some cases, the parties are seeking to settle the case or to jointly select a neutral arbitrator. Some claimants or attorneys want a little more time to evaluate the case before incurring the expense of a neutral arbitrator. As noted above, parties in 78 cases either settled or withdrew them before a neutral

[30]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.

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.

In 2011, there were 349 cases 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. The claimants made all but one of the requests for Rule 21 postponements. Requests for a Rule 28 extension were made in 17 cases. In some, the Rule 21 request was made in prior years. There was no case where a Rule 28 extension was given without a prior Rule 21 postponement.

The following chart shows what happened in those 349 cases. Two-thirds of them (230) now have a neutral arbitrator in place. Forty-four of them closed before a neutral arbitrator was selected. For the remaining 75 cases, the deadline to select a neutral arbitrator is after December 31, 2011.



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. However, 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.

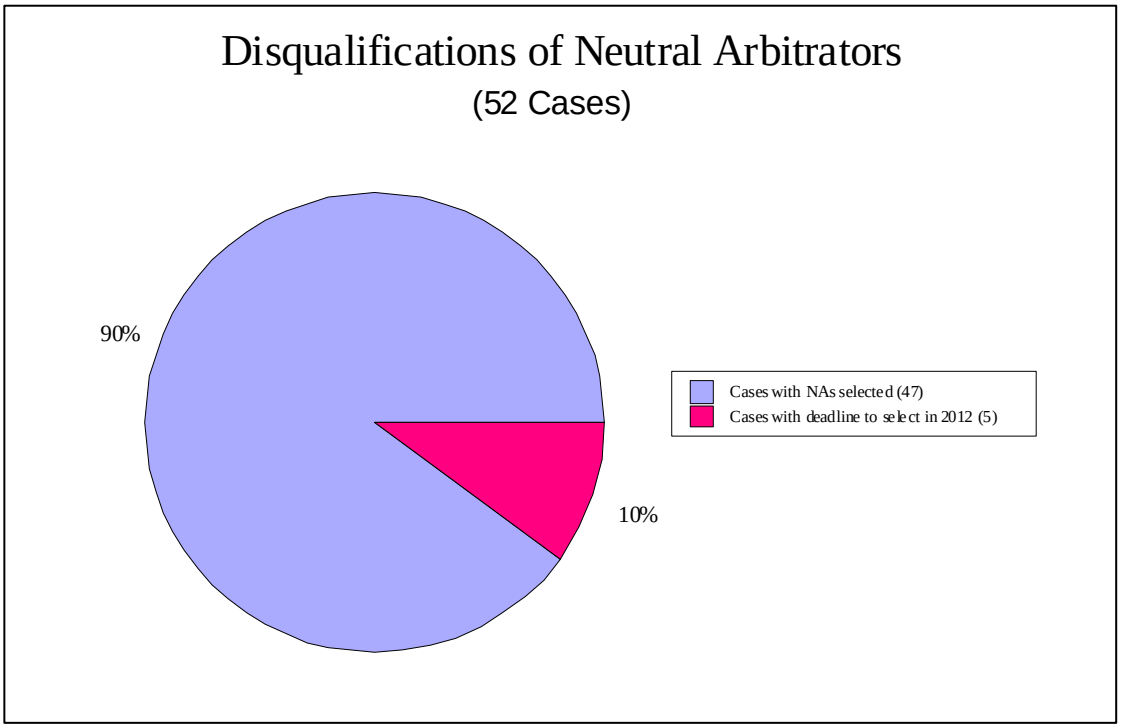
Multiple disqualifications occur infrequently. In 2011, neutral arbitrators were disqualified in 52 cases. Forty-two cases had a single disqualification. Three cases had two disqualifications, one case had three, three cases had four, two cases had five, and one case had eight disqualifications.[33] In 47 cases with a disqualification, a neutral arbitrator had been selected at the end of 2011. In five cases with a disqualification, the time for the neutral arbitrator selection had not expired by the end of the year.

Because of multiple disqualifications in some cases, these 52 cases represent 81 neutral arbitrators who were disqualified in 2011. The neutrals were disqualified by the claimants' side 60 times, and by Kaiser 21 times.

[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.

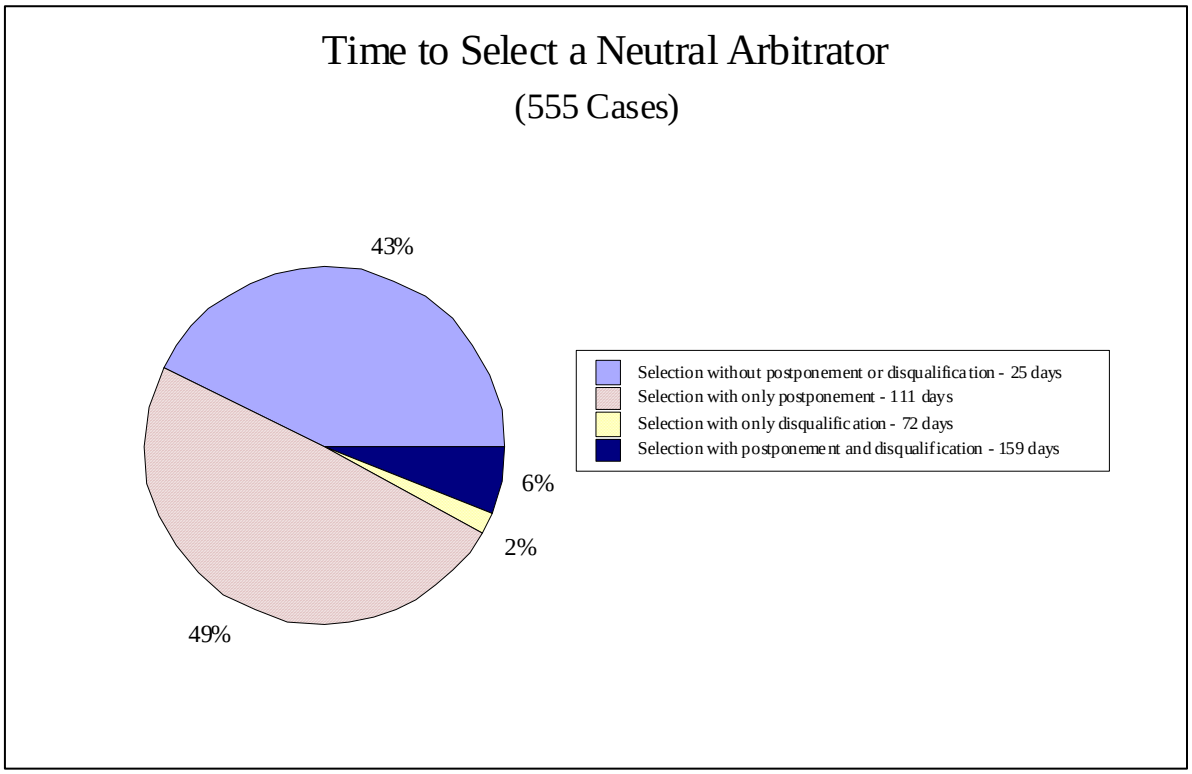
[33]In cases with multiple disqualifications, one of the parties may petition the California Superior Court to select a neutral arbitrator. If the court grants the petition, a party is only permitted to disqualify one neutral arbitrator without cause; subsequent disqualifications must be based on cause. California Code of Civil Procedure §1281.9.



E. Length of Time to Select a Neutral Arbitrator

This section considers 555 cases in which a neutral arbitrator was selected in 2011.[34] 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 555 cases. The four categories are displayed in the following chart.

[34] Fifteen cases in which a neutral arbitrator was selected in 2011 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. 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 240 cases where a neutral arbitrator was selected in 2011 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 25 days, the mode is 28 days, the median is 25 days, and the range is 6 – 33 days. This category represents 43% of all neutral arbitrators selected in 2011.

2. Cases with Postponements

There were 271 cases where a neutral arbitrator was selected in 2011 and the only delay was a 90 day postponement and 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 2011. 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 111 days, the mode is 114 days, the median is 115 days, and the range is 23 – 189 days.[35] This category represents 49% of all cases which selected a neutral arbitrator in 2011.

[35] In the case which took 189 days to select a neutral arbitrator with a postponement, the claimant was represented by counsel. After requesting a 90 day postponement, the attorney filed a complaint in State court. The Kaiser counsel requested additional time under Rule 28 so he could file a petition to compel. After the petition was granted, a neutral arbitrator was selected.

3. Cases with Disqualifications

There were 13 cases where a neutral arbitrator was selected in 2011 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.[36] The average number of days to select a neutral arbitrator in the 13 cases is 72 days, the median is 62 days, the mode is 57, and the range is 29 – 203 days.[37] Disqualification only cases represent 2% of all cases which selected a neutral arbitrator in 2011.

4. Cases with Postponements and Disqualifications

There were 31 cases where a neutral arbitrator was selected in 2011 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 159 days, the mode is 162, the median is 154 days, and the range is 38 – 293 days.[38] These cases represent 6% of all cases which selected a neutral arbitrator in 2011.

5. Average Time for All Cases

The average number of days to select a neutral arbitrator in all of these cases is 75 days. For purposes of comparison, the California Supreme Court stated in *Engalla vs. Permanente Medical Group*[39] 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 2011, the OIA system is nine times faster.

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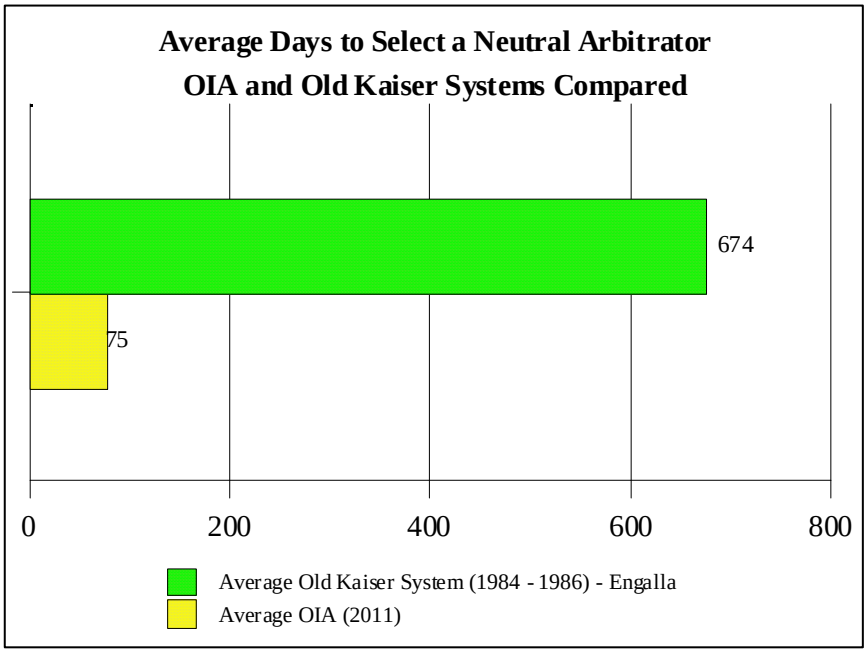
[36]The 96 days is comprised of the 33 days to select the first neutral arbitrator; the 30 days for the statutory periods for disclosure, disqualification, and service under the California Code of Civil Procedure; and then 33 days to select the second neutral arbitrator. The amount of time increases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

[37]In the case which took 203 days to select a neutral arbitrator, the claimant was represented by counsel, who disqualified 10 neutral arbitrators. The Kaiser counsel disqualified two additional neutral arbitrators. They eventually jointly selected an arbitrator who is member of the OIA pool.

[38]In the case where it took 293 days to select a neutral arbitrator, the complainant was in *pro per*. She obtained a 90 day postponement, disqualified a total of 4 neutral arbitrators, and Kaiser disqualified 1, before the parties accepted a randomly selected neutral arbitrator.

[39]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.[40] 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.

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.

Few party arbitrators are being used in our system. In 2011, party arbitrators signed the award in only 1 of the 74 cases in which the neutral arbitrator made an award. The remaining 73 cases were decided by a single arbitrator. The one case with party arbitrators closed in 516 days after a hearing that was decided in favor of Kaiser.[41]

Of the 611 cases that remained open at the end of 2011, party arbitrators had been designated in 5 of them. In three of those, the OIA had designations from both parties; in the other two, only one side had designated a party arbitrator.

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[40] California Health & Safety Code §1373.19.

[41] Cases with party arbitrators often take longer to have the arbitration hearing. The average for all cases to close is 339 days. (See generally Section VII.)

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 contacts neutral arbitrators a second time, asking for confirmation. The second notice 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 neutral arbitrators are suspended -- ie, the OIA removes the neutral arbitrator's name from the OIA panel until -- they take the necessary action. Thus, neutrals are not listed on any LPA when they are suspended and cannot be jointly selected by the parties. As detailed in the following sections, 10 different neutral arbitrators were suspended 15 times in 12 cases in 2011. No neutral arbitrator was still suspended at the end of the year. Most of the suspensions were caused by the neutral arbitrator's failure to hold a timely Arbitration Management Conference (AMC) or to provide fee information as required by California law. See Section VIII.C.3.

A. Neutral Arbitrator's Disclosure Statement

Once neutral arbitrators have been selected, California law requires that they 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 2011, one neutral arbitrator was suspended until he made his disclosures. He had complied by the end of the year.

B. Arbitration Management Conference

The *Rules* require the neutral arbitrator to hold an AMC within 60 days of his or her selection.[42] It was the feature of the OIA system that neutral arbitrators rated second highest in their questionnaire responses. (See Section X.B.)

Neutrals return the AMC form to the OIA within five days of 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. Four neutrals were suspended in four cases for failing to return an AMC form. All 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.[43] The OIA provides the parties with an MSM form to fill out and return, stating that the meeting took place and its result. In 2011, the OIA received notice from the parties in 327 cases that they have held an MSM. Forty-three of them reported that the case had settled at the MSM. One of these cases involved a *pro per* claimant. In 28 cases, neither party returned the MSM form to the OIA by the end of 2011.

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*. Two neutrals were suspended until they set a date for their hearings. One neutral was suspended until he served his late award. Four neutral arbitrators were suspended in four cases for failing to provide the amount of their fee and the fee allocation required by California Code of Civil Procedure § 1281.96 and, for three of them, their questionnaire. All had complied by the end of 2011.

E. Status of Open Cases Administered by the OIA on December 31, 2011

On December 31, 2011, there were 611 open cases in the OIA system. In 46 of these cases, the claimant had not yet sent in either the filing fee or an application to waive it so the LPA could be sent. In 108 cases, the parties were in the process of selecting a neutral arbitrator. In 457 cases,

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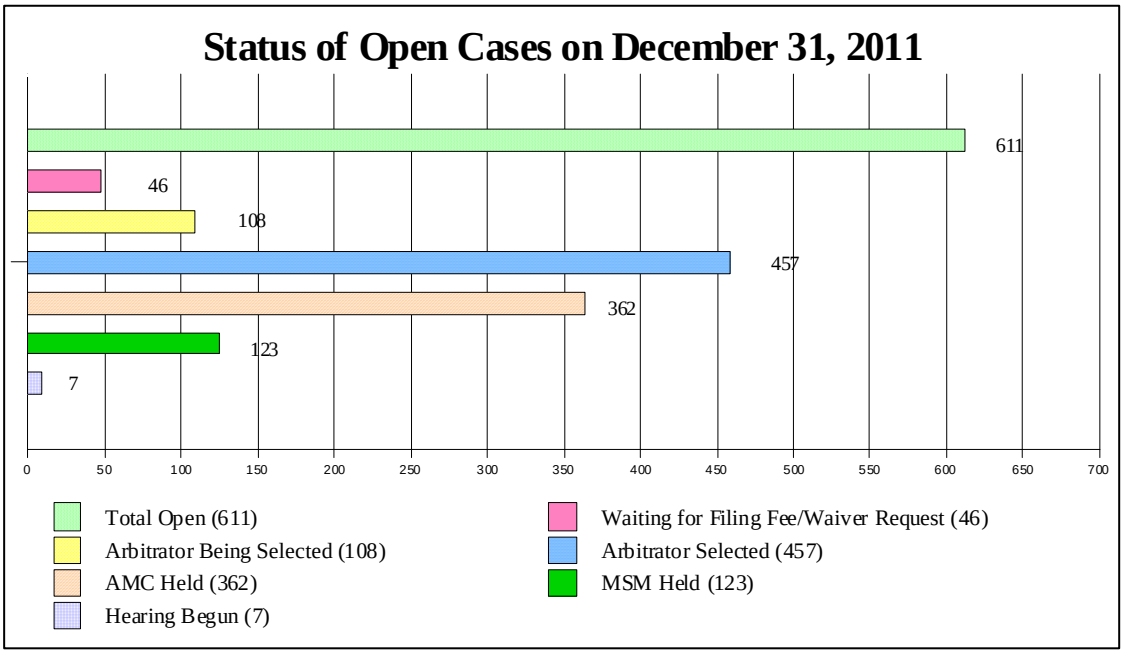
[42]Exhibit B, Rule 25.

[43]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. While letters are sent to 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.

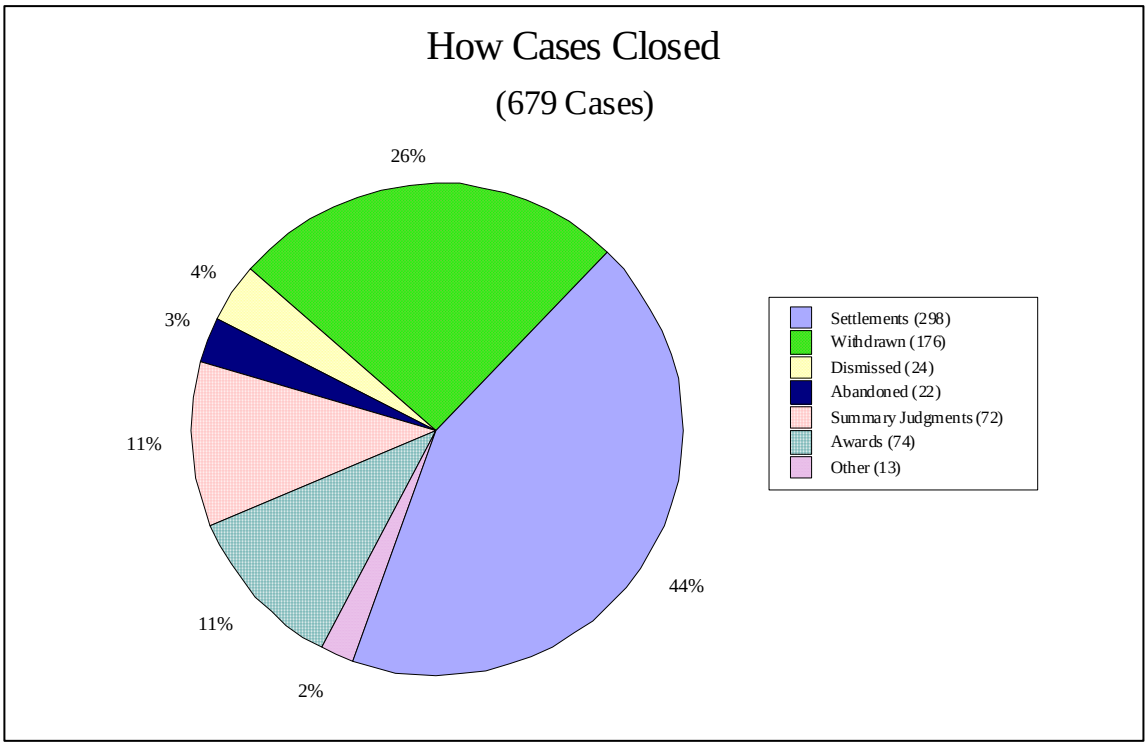
a neutral arbitrator had been selected. Of these, the AMC had been held in 362. This is 59% of all open cases. In 123 cases, the parties had held the MSM. In seven cases, the hearing had begun, but either there were additional hearing days or the OIA had not yet been served with the award. The following chart illustrates the status of open cases.



VII. THE CASES THAT CLOSED

In 2011, 679 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 26 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 chart on page 25 shows the length of time to close, again by manner of closure.[44]

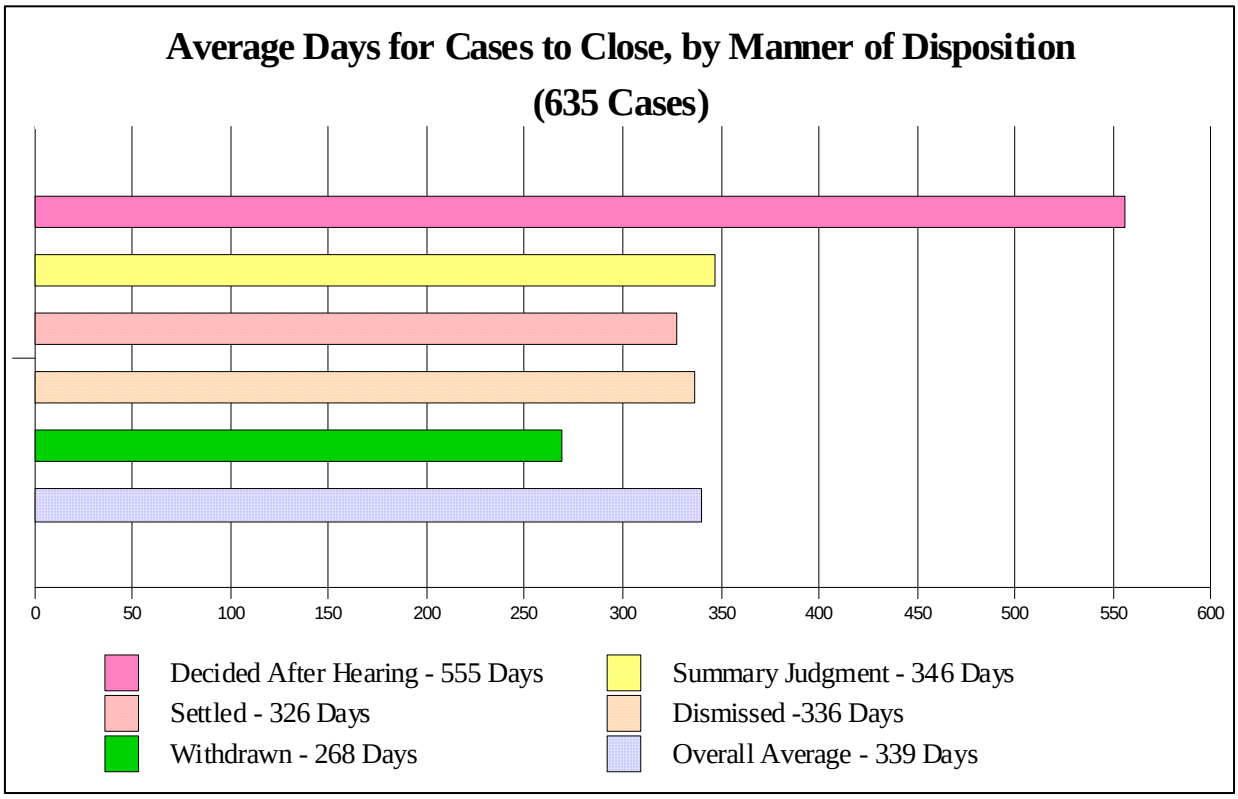
[44]There were 13 cases that closed because the case was consolidated with another, had a split outcome, or judgment on the pleadings. (A split outcome means that there was more than one claimant and they had different outcomes.) As they represent less than two percent of the total of all closed cases, they are not further discussed in this section.



As shown on the following chart, cases closed on average in 339 days, or 11 months.[45] This includes all cases regardless of procedure: regular, expedited, complex, extraordinary, and cases whose deadlines were extended under Rule 28. The median is 321 days. The mode is 188 days. The range is 2 – 1,491 days. One case closed late.[46]

[45] 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 635 closed cases, not 679. It excludes 22 abandoned cases, 15 cases that were withdrawn or settled before the fee was paid, and 7 cases that were consolidated or closed other ways.

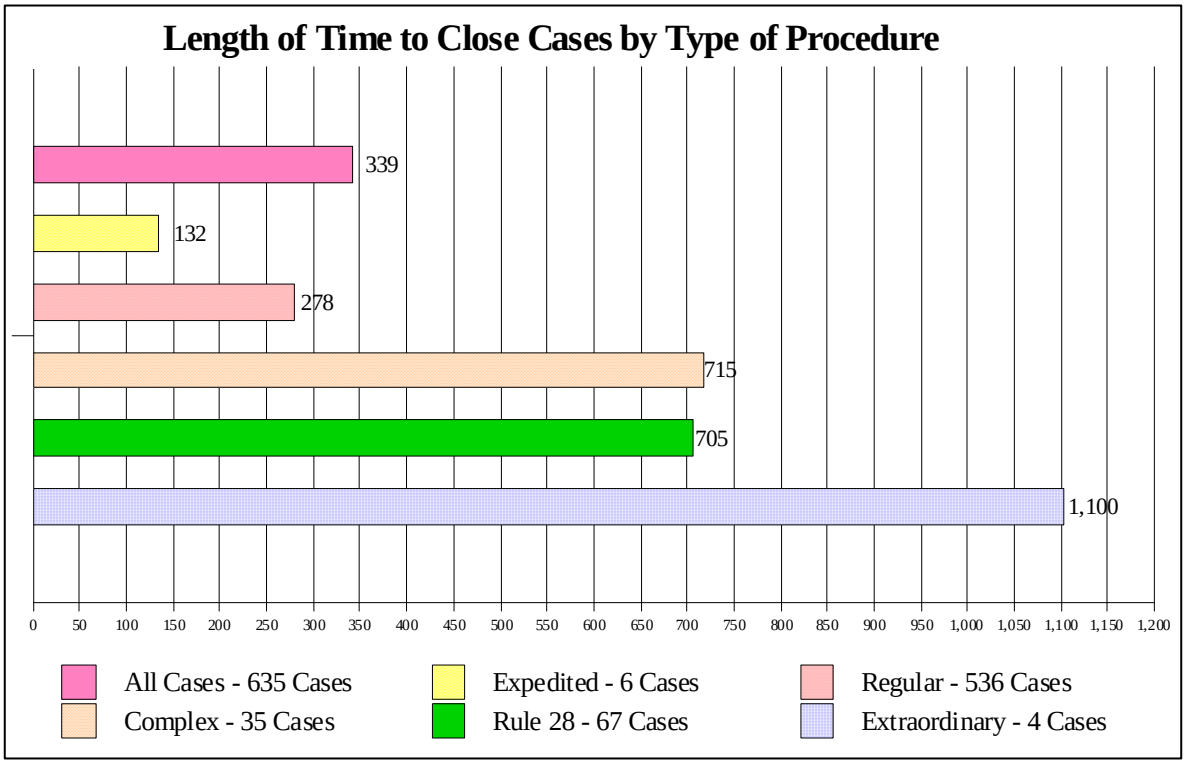
[46] The one case that closed late closed in 593 days. While the parties reached a settlement before the 18 month deadline, the completion of that settlement was delayed because Medicare had a lien but would not disclose the amount of that lien. It took several months to resolve this issue.



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 28. Under the *Rules*, cases ordinarily must be completed within 18 months. Nearly 90% of the cases are closed within this period, and more than 60% 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 classify the case as complex or extraordinary, or the neutral arbitrator can order the deadline to be extended under Rule 28.[47]

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

[47]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. Thirteen cases that closed in 2011 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 the following page.



A. How Cases Closed

1. Settlements – 44% of Closures

During 2011, 298 of the 635 cases settled. This represents 44% of the cases closed during the year. The average time to settlement was 326 days, or about 11 months. The median is 312, the mode is 188, and the range is 2 – 1,239 days.[48] In 17 settled cases (6%), the claimant was in *pro per*. Forty-three cases closed at the mandatory settlement meeting.

2. Withdrawn Cases – 26% of Closures

In 2011, the OIA received notice that 176 claimants had withdrawn their claims. In 54 (31%) of these cases, the claimant was in *pro per*. Withdrawals take place for many reasons. 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.

[48]The case that took 1,239 days to settle was designated extraordinary. The claimant had an attorney. The case was set for hearing in June 2010, and was continued because of pending settlement discussions.

The average time for a party to withdraw a claim in 2011 is 268 days. The median is 246 days. The mode is 116 days, and the range is 13 – 875 days.[49]

3. Abandoned Cases – 3% of Closures

Claimants failed to either pay the filing fee or obtain a waiver in 22 cases.[50] These were therefore deemed abandoned for non-payment. In 15 of the 22 cases, 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.

4. Dismissed Cases – 4% of Closures

In 2011, neutral arbitrators dismissed 24 cases. Neutral arbitrators dismiss cases if the claimant fails to respond to hearing notices or otherwise to conform to the *Rules* or applicable statutes. Nineteen of these closed cases involved *pro pers.*

5. Summary Judgment – 11% of Closures

In 2011, 72 cases were decided by summary judgments granted to the respondent. In 59 of these cases (82%), the claimant was in *pro per*. Failing to have an expert witness (23 cases), failing to file an opposition (24 cases), exceeding the statute of limitations (6 cases), and no triable issue of fact (16 cases) were the most common reasons given by the neutrals in their written decisions for granting 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 2011 is 346 days. The median is 341 days. The mode is 343. The range is 135 – 767 days.[51]

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[49]The case that was withdrawn after 875 days, the claimant was originally represented by counsel. The case was originally continued because of the claimant attorney's illness. He was subsequently suspended from the State Bar and the case was designated complex. The claimant did not participate in a conference call, of which she received notice and which was delayed at her request. The neutral arbitrator issued an order to show cause and extended the deadline of the case under Rule 28. Respondent attorney filed a motion for summary judgment and the claimant withdrew the case.

[50]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 $10,000, the claim is not subject to arbitration. Both the OIA and Kaiser inform these claimants of their right to go to small claims court.

[51]The claimant in the case that took 767 days to close by summary judgment was initially represented by counsel. After he disqualified the first nine neutral arbitrators, the parties jointly selected a neutral. Claimants then requested an extension under Rule 28. Counsel withdrew from the case in September 2011, and a motion for summary judgment was granted.

6. Cases Decided After Hearing – 11% of Closures

a. Who Won

Eleven percent of all cases closed in 2011 (74 of 635) proceeded through a full arbitration hearing to an award. Judgment was for Kaiser in 51 of these cases, or 69%. In six of these cases, the claimant was in *pro per*. The claimant prevailed in 23 of them, or 31%. One was a *pro per* claimant.

b. How Much Claimants Won

Twenty-three cases resulted in awards to claimants. One claimant was awarded $8,973,836. The range of relief is $7,500 – $8,973,836. The average amount of an award is $823,692. The median is $274,039. A list of the awards made in 2011 is attached as Exhibit F.

c. How Long It Took

The 74 cases that proceeded to a hearing in 2011, on average, closed in 555 days. The median is 477 days. The mode is 406 days. The range is 190 – 1,491 days.[52] Cases that go to a hearing are the most likely to employ the special procedures discussed in section VII B to give the parties extra time. If only regular cases are considered the average is 423 days.

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 expediting a case 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.[53]

In 2011, claimants in 10 cases requested that their cases be resolved in less than the standard 18 months. Eight of the requests were made to the OIA, which granted five of them. Three were denied. The claimants could have, but did not, renew their request to their neutral arbitrators. The other two requests were made to the neutral arbitrators, who granted them. Kaiser objected to none of the requests.

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[52]The case that took 1,491 days to close after a hearing was designated extraordinary. The neutral arbitrator had been jointly selected. The deadline to close was originally continued under Rule 28 because the claimant was medically unstable. It was subsequently continued and designated extraordinary. After being continued a final time due to a calendar conflict, the hearing went forward.

[53]Exhibit B, Rules 33 – 36.

The OIA had three open expedited cases on January 1, 2011. Six expedited cases closed in 2011, including two of the three cases that were open at the beginning of the year.[54] Four cases settled, one was withdrawn, and one was decided after a hearing in favor of the claimant. The average for the six cases to close is 132 days (less than five months), the median is 114 days, and the range is from 79 to 197 days, or six and one-half months. Three expedited cases remained open at the end of 2011.

Although originally designed in part to decide benefit claims quickly, none of the expedited cases in 2011 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 – 30 months.[55] In 2011, 39 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. There were additional complex cases open that had been previously designated. Thirty-five complex cases closed in 2011. The average length of time for complex matters to close in 2011 is 715 days, about 24 months. The median is 703 days. The mode is 647. The range is from 433 to 1,144 days (about 38 months).[56]

3. Extraordinary Procedures

Extraordinary cases need more than 30 months for resolution.[57] Ten cases were designated extraordinary in 2011 and there were additional cases open that had been previously designated. Four cases closed this year. Two settled and two were decided after a hearing with awards for respondent. The average number of days for an extraordinary case to close is 1,100 days, or 36 months. The range is 585 – 1,491 days (48 months).[58]

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[54]The third had its designation changed in 2011.

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

[56]The complex case that took 1,144 days to close was designated complex, in part because of the claimant's surgery. The OIA was informed in January 2010 that the case had settled. It then took 15 months for the claimants' attorney to get the State court to grant first a *guardian ad litem* and then a minor's compromise before the case could close.

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

[58]The extraordinary case that took 1,491 days to close is discussed in footnote 53.

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 2011, the neutral arbitrators made Rule 28 determinations of "extraordinary circumstances" in 63 cases and extended these cases beyond their limit. In addition, 50 such cases remained open at the beginning of 2011. At the end of 2011, 42 cases remained open, with 69 cases having closed during the year. The average time in 2011 to close cases with a Rule 28 order is 689 days, about 23 months. The median is 662 days. The mode is 546 days. The range is 123 – 1,178 days.[59]

According to the neutral arbitrator orders granting the extension, the claimant's side requested 12, respondent's side requested 2, and the parties stipulated 9 times. Extensions were ordered 11 times over the respondents' objections and never over the claimants' objections. Twelve orders noted that there was no objection. Forty-eight orders recited there was good cause or extraordinary circumstances. Where neutral arbitrators gave specific reason, the most common reason (five orders) was unexpected trial schedules.

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.[60] In addition, state law provides that if the claim is for more than $200,000, the matter will be heard by an arbitration panel, which consists 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 waiver(s) they want to submit.

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[59]In the case with a Rule 28 extension that took 1,178 days to close, the hearing was extended six times. The hearing ultimately resulted in an award for respondent.

[60]California Code of Civil Procedure § 1284.2.

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. It was created by statute after the OIA began. 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.[61] 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 Arbitrators' 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 arbitrators' fees. Claimants must disclose certain information about their income and expenses. If this waiver is granted, a 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.[62] A claimant who obtains this waiver is still entitled to have a party arbitrator, but must pay for the party arbitrator.

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

[62]See Exhibit B, Rule 13.

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

As discussed above, the *Rules* contain provisions to shift to Kaiser the claimants' portion of the neutral arbitrators' fees and expenses.[63] 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.[64] No financial information is required. The waiver 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 2011, the OIA received 35 completed forms requesting waiver of the $150 filing fee. The OIA granted 32 and denied 3.[65] Sixteen of these claimants received both a waiver of the $150 arbitration filing fee and the waiver of the filing fee and neutral arbitrators' 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 Arbitrators' Fees and Expenses

In 2011, the OIA received 55 completed fee waiver applications and one remained from the prior year. The OIA granted 52 waivers of the arbitration filing fee and neutral arbitrators' fees, denied 0, and 4 remain to be decided. Kaiser objected to one request which the OIA granted.

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.[66] We received fee information from neutral arbitrators in 493 cases that closed in 2011.

Of these 493 cases, 401 (81%) reported that fees were allocated 100% to Kaiser. Thirty (6%) reported that no fees were charged. The claimant paid nothing in these cases. Sixty-one

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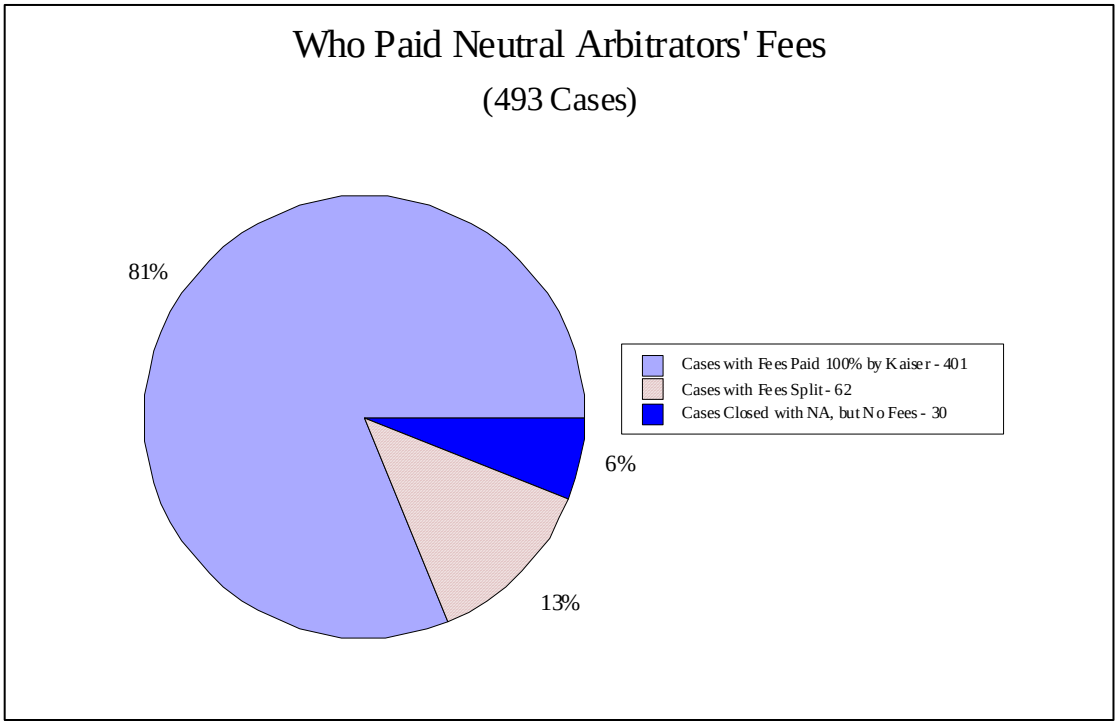
[63]See Exhibit B, Rules 14 and 15.

[64]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.

[65]One had the other fee waiver granted, one paid the fee, and the third withdrew the demand.

[66]California Code of Civil Procedure §1281.9.

(12%) reported that the fees were split 50/50. There was also one case in which fees were allocated in some other arrangement. Of the 463 cases where the neutral arbitrators charged fees, Kaiser paid all of the neutral arbitrators' fees in 87% of the cases. As shown in the following chart, claimants paid neutral fees in only 13% of cases that closed in 2011 with a neutral arbitrator in place.



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 $150/hour to $900/hour. The average hourly fee is $416, the median is $400, and the mode is $400.[67] Neutral arbitrators also often offer a daily fee. This ranges from $1,000/day to $9,000/day. The average daily fee is $3,616, the median is $3,200, and the mode is $3,000.

Looking at the 463 cases in which neutral arbitrators charged fees, the average neutral arbitrator fee is $6,442.03. The median is $1,860 and the mode is $725. This excludes the 30 cases in which there are no fees. The average for all cases, including those with no fees, is $6,050.02.

[67] 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 relatively little work. If only the cases where the neutral arbitrator wrote an award are considered, the average neutral arbitrator fee is $24,654.73, the median is $17,200 and the mode is $14,620. The range is $2,430 – $140,353.22.

IX. ANALYSIS OF STATISTICS FOR LIEN CASES

This section applies only to the lien cases that are in the OIA system. In lien cases, unlike the other demands for arbitration, Kaiser makes the demand against a member to recoup the costs of its medical care where Kaiser asserts the member has recovered something from a third party, as in a car accident. Kaiser submitted 12 demands for arbitration based on liens in 2011. Geographically, all of them came from Northern California

A. Demands for Arbitration Submitted by Kaiser to the OIA

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

Under the *Rules*, Kaiser must submit a demand for arbitration that it initiates to the OIA within 10 days of serving the demand on the member. In 2011, the average length of time that Kaiser took to submit demands to the OIA is 53 days. The mode is 14. The median is 46 days. The range is 11 – 121 days. Thus, none of the lien cases were submitted to the OIA in a timely manner. It takes Kaiser longer to submit these demands than the demands it receives from members.

2. Members With and Without Attorneys

Members were represented by counsel in 67% of the lien cases the OIA administered in 2011 (8 of 12). In 33% of cases, the members represented themselves.

B. Selection of the Neutral Arbitrators

In 2011, neutral arbitrators were selected in 10 cases. For an explanation of the selection process, please see Section V. In 2011, Kaiser did not pay the fee in one case and withdrew two cases without a neutral arbitrator in place. The parties settled five other cases without a neutral arbitrator in place. In two of the cases that settled, the member was not represented by counsel.

1. Joint Selections vs. Strike and Rank Selections

None of the neutral arbitrators selected in 2011 in lien cases were jointly selected.

2. Cases with Postponements of Time to Select Neutral Arbitrators

There were seven cases in 2011 where the parties obtained either a Rule 21 postponement, or a Rule 28 extension of the time to return their responses to the LPA. The members requested five of Rule 21 postponements, and Kaiser requested one. Kaiser requested one of the Rule 28 extensions. There was one case where a Rule 28 extension was given without a prior Rule 21 postponement.[68]

Of the seven cases where the parties received a postponement to select a neutral arbitrator, one case (14%) now has a neutral arbitrator in place. The other six cases (86%) closed before a neutral arbitrator was ever selected.

3. Cases with Disqualifications

In 2011, one neutral arbitrator was disqualified. In that case, the member disqualified the neutral arbitrator. The parties subsequently selected a neutral arbitrator.

4. Length of Time to Select a Neutral Arbitrator

This section sets out the length of time to select a neutral arbitrator in 10 cases based upon how the neutral arbitrators were selected: those with no delay in selecting the neutral arbitrator deadline, with a postponement, and with a disqualification. Finally, we give the overall average for the 10 cases.

a. Cases with No Delays

There were four cases where a neutral arbitrator was selected in 2011 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 27 days, the median is 27 days, and the range is 23 – 28 days. This category represents 40% of all selections.

[68] In this case, the member's attorney asked Kaiser's attorney to produce a copy of the contract that contained the arbitration requirement. He requested a delay until he received it. The OIA granted the request. When the contract was not delivered, the case was closed.

b. Cases with Postponements

There were five cases where a neutral arbitrator was selected in 2011 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 2011. 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 116 days, the median and mode are 116 days, the range is 113 – 120 days. This category represents 50% of all cases which selected a neutral arbitrator in 2011.

c. Cases with Disqualification

There was one case where a neutral arbitrator was selected in 2011 and the only delay was that a prior neutral arbitrator had been disqualified. (10%). In that case, the neutral arbitrator was selected in 74 days.

d. Average Time for All Cases

The average number of days to select a neutral arbitrator in all of these cases is 76 days.

5. Cases With Party Arbitrators

No lien case has ever had party arbitrators.

C. Maintaining the Case Timetable

1. Suspensions

No neutral arbitrator was suspended in a lien case in 2011.

2. Mandatory Settlement Meeting

The OIA received notice from the parties in four cases that they held an MSM. None reported that the case had settled at the MSM.

3. Status of Open Lien Cases Administered by the OIA on December 31, 2011

On December 31, 2011, there were 3 open lien cases in the OIA system. All have neutral arbitrators selected. An arbitration management conference had been held in one.

D. The Cases That Closed

In 2011, 22 lien cases closed. Cases close either because of (1) action by the parties (cases that are settled, withdrawn, or abandoned), or (2) action of the neutral arbitrator (cases are decided after a hearing). No case was dismissed or decided by summary judgment. This discussion 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 how much.

Cases closed on average in 270 days, or 9 months. The median is 221 days. The mode is 109. The range is 20 – 1,071 days. No case closed late.

1. How Cases Closed

a. Settlements – 59% of Closures

During 2011, 13 of the 22 cases settled. The average time to settlement was 190 days, or less than seven months. The median is 217, and the range is 20 – 412 days. In four settled cases (31%), the member was in *pro per*.

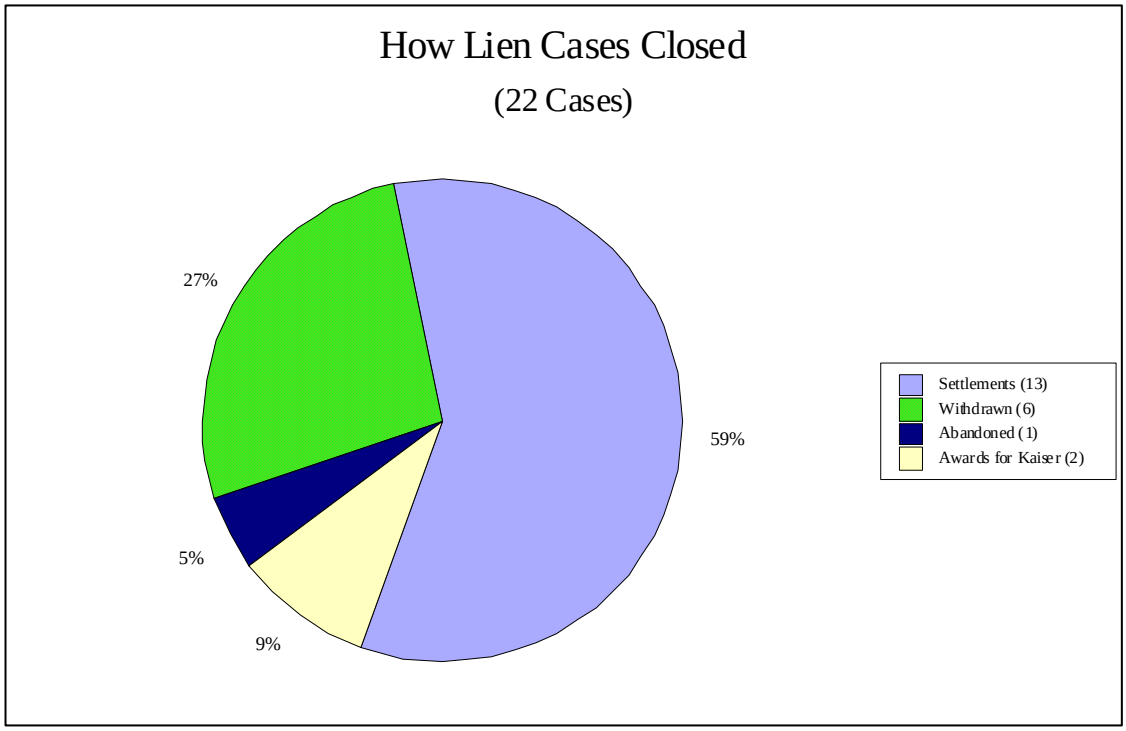
b. Withdrawn Cases – 27% of Closures

In 2011, the OIA received notice that Kaiser withdrew six claims. The member was in *pro per* in one case. The average time for Kaiser to withdraw a claim in 2011 is 424 days. The median is 280 days. The range is 22 – 1,071 days.[69]

c. Abandoned Cases - 5% of Closures

In 2011, the OIA closed one lien case because Kaiser did not pay the filing fee.

[69] In the case that was withdrawn after 1,071 days, the member was represented by counsel. The hearing date was continued multiple times as Kaiser considered whether to waive its lien. The parties stipulated to continue the closing date, and Kaiser ultimately withdrew the claim.



d. Cases Decided After Hearing – 9% of Closures

i. Who Won

Kaiser won both cases that proceeded through a full arbitration hearing to an award. In one, the member was in *pro per*. In the other, some of the respondents were represented and some were not.

ii. How Much Kaiser Won

Kaiser received awards for $5,000 and $28,580.07. See Exhibit F.

iii. How Long It Took

The two cases that proceeded to a hearing in 2011 closed in 302 and 344 days.

2. Cases Using Special Procedures

For a discussion of expedited, complex, and extraordinary procedures or Rule 28 extensions, see Section VII.B. No lien case has ever been designated expedited or extraordinary.

a. Complex Procedures

No lien case used complex procedures in 2011.

b. Rule 28 Extensions of Time to Close Cases

In 2011, neutral arbitrators did not make any Rule 28 determinations of "extraordinary circumstances." There were two such cases open at the beginning of 2011, and they closed in 826 days and 1,071 days.[70]

E. The Cost of Arbitrations in the OIA System

1. Number of Lien Cases in Which Members Have Shifted Their Neutral Fees

We have fee information in 14 cases. Of these 14 cases, 12 (86%) reported that fees were allocated 100% to Kaiser. Two (14%) reported that the fees were split 50/50.[71]

2. The Fees Charged by Neutral Arbitrators

The average neutral arbitrator's fee is $1,490.09. The median is $1,337.50 and there is no mode. Fees range from $514.25 to $3,312.50. In the two cases where the neutral arbitrator wrote an award, the fees were $1,470 and $2,507.50.

X. 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 2011 from the parties and the arbitrators. The complete statistics and copies of the forms are set out in Exhibits G, H, and I, respectively. This section considers all evaluations returned in all cases, including lien claims.

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

[70]The case that closed in 1,071 days is discussed in footnote 70.

[71]If the member fails to appear in a lien arbitration, Kaiser will pay the neutral arbitrators's entire fee. See Exhibit B, Rule 15.e.iii.

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 11 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 2011, the OIA sent out 680 evaluations and received 328 responses in return, or 48%.[72] One-hundred-six identified themselves as claimants (19) or claimants' counsel (87), and 215 identified themselves as respondent's counsel. Seven did not specify a side.[73]

The responses have been quite positive overall, and they are encouragingly similar for both sides. In 2011, the mode and median for all attorneys for all questions was 5. The mode for all *pro per* claimants was also 5 in all but two questions, though the median varied. 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 4.7. *Pro pers* average 4.1. 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 4.5. *Pro pers* average 3.9. Respondents counsel average 4.8.

Item 7: "The neutral arbitrator understood the facts of my case." – 4.6 Average

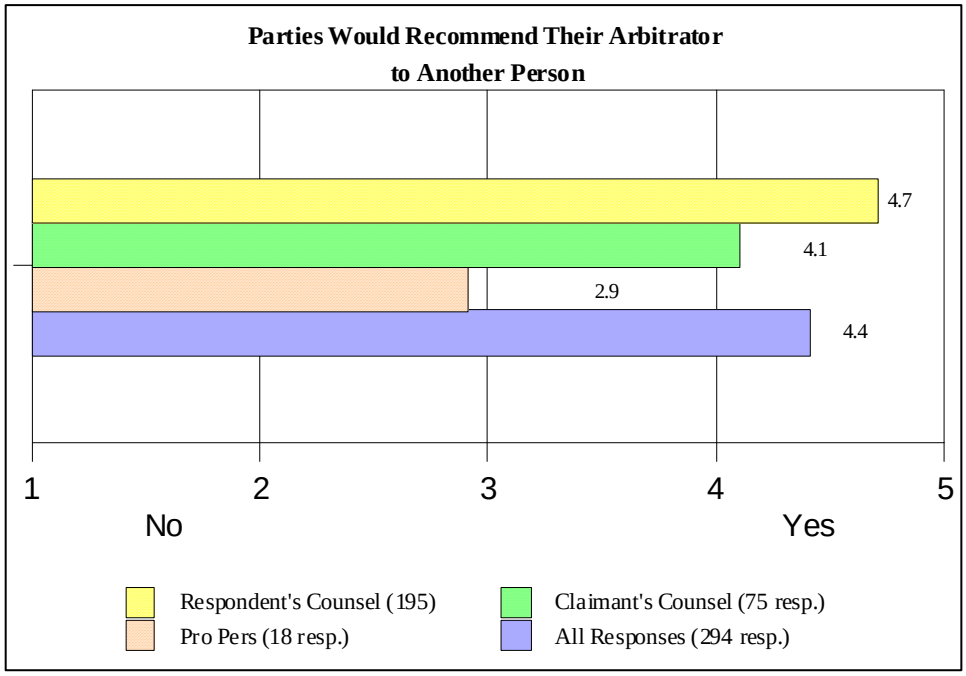
The average of all responses is 4.6. Claimants counsel average 4.2. *Pro pers* average 3.3. Respondents counsel average 4.8. The median for *pro pers* is 4.0.

[72]The response rate has climbed from 28% in 2005.

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

Item 11: "I would recommend this arbitrator to another person or another lawyer with a case like mine." – 4.4 Average

The average on all responses to this question is 4.4. Claimants counsel average 4.1. *Pro pers* average 2.9. Respondents counsel average 4.7. The median for *pro pers* is 3.0 and the mode is 1. The responses are shown on the following chart.



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 2011, the OIA sent questionnaires in 340 closed cases and received 314 responses.[74] The results continue to show a high degree of approval of, and satisfaction with, the *Rules* and the OIA.

[74]This report has previously reported that 679 cases closed in 2011. 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 the parties and had nothing to say about the case.

The actual number returned in 2011 was 346. Thirty-two 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 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.

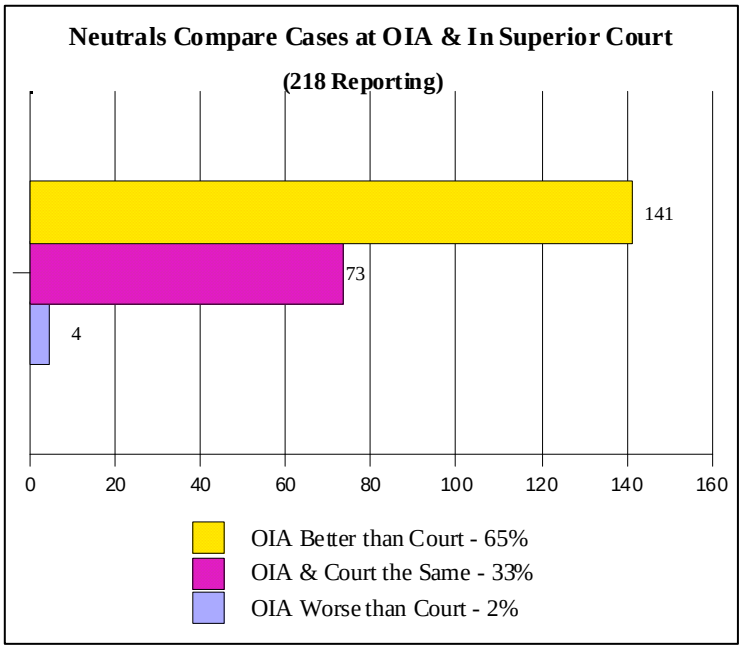
Neutral Arbitrators' Opinions Regarding OIA System

Feature of OIA System	Works Well	Needs Improvements
Manner of Neutral arbitrator's appointment	242	2
Early Management Conference	234	2
Availability of expedited proceedings	82	1
Award within 15 business days of hearing closure	79	7
Claimants' ability to have Kaiser pay Neutral arbitrator	183	6
System's rules overall	203	0
Hearing within 18 months	84	1
Availability of complex/extraordinary proceedings	27	1

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 fourth year in a row, a majority of the neutral arbitrators judged the system to be better than a court trial. Two-hundred-eighteen of the neutral arbitrators (218) made the comparison. One-hundred-forty-one, or 65%, said the OIA experience was better. Seventy-three, or 33%, said it was about the same. Only four (two 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. Two neutral arbitrators specifically praised the attorneys involved in the arbitrations, and five said that it was easier to

present evidence, particularly expert testimony in arbitration, with one neutral arbitrator describing the testimony as "more cohesive." Two of the neutral arbitrators who rated it worse cited specific incidents in their particular cases. The other two said no changes were needed or gave no comments. All four gave "5" as the answer to almost all of the questions.



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 arbitrator 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 but 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 680 evaluations and received 255 responses (38%).[75] Ninety-six identified themselves as either claimants (18) or claimant attorneys (78), and 157 identified themselves as respondent's counsel. Twelve did not specify a side.[76]

[75]Forty people returned blank forms. The response rate is down from 40% last year.

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

The responses for whether the procedures in general worked well and whether the OIA was responsive were quite positive for the attorneys. The mode and median is 5 for the question about the OIA. The mode is 5 and the median either 4 or 5 for the question about procedures. 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." 4.3 average

The overall average is 4.3 out of 5. The average for claimant attorneys is 3.9, for *pro pers* 2.9, and for respondent attorneys 4.9. The mode for both sets of attorneys are 5. The median is 4.0 for claimant attorneys and 5.0 for respondent attorneys. For *pro pers*, the mode is 1 and the median is 3.0.

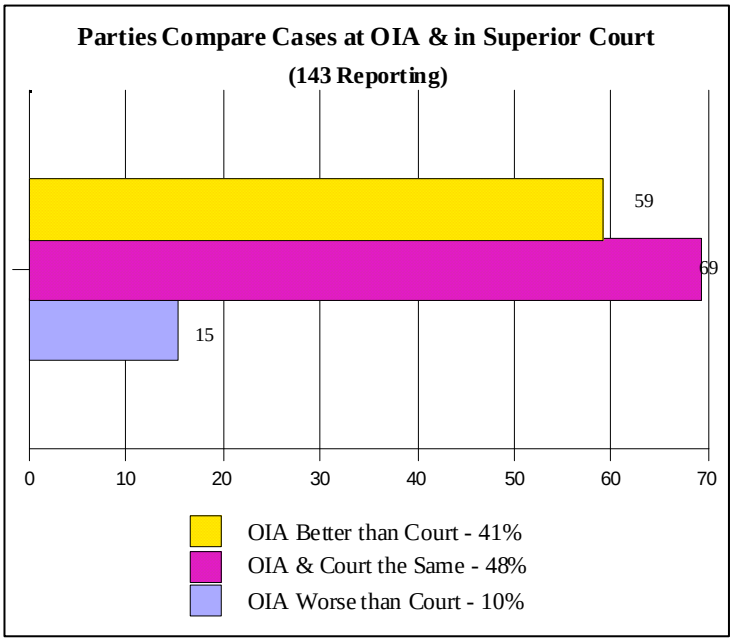
Item 2: "The procedure for obtaining medical records worked well." 4.0 average

The average is 4.0 for all responses. The average for claimant attorneys is 3.3; for *pro pers*, 2.9; and respondent attorneys, 4.7. The mode for *pro pers* is 1.0, while it is 5.0 for claimant and respondent attorneys. The median is 4.0 for claimant attorneys, 3.0 for *pro pers*, and 5.0 for respondent attorneys.

Item 3: "The OIA was responsive to my questions and concerns." 4.6 average

The overall average is 4.6. The average is 4.5 for claimant attorneys, 3.9 for *pro pers*, and 4.9 for respondent attorneys. The median and mode for all groups is 5, except the *pro pers* median is 4.0.

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 143 people who made the comparison, 59 said it was better. Sixty-nine said it was the same. Fifteen (12 claimant attorneys) said it was worse.



Those who said the OIA system was better for the most part did not give reasons. Those who did gave reasons similar to the neutral arbitrators, saying it was faster, less expensive, and more flexible. Many of the 15 who said it was worse did not give reasons, but gave their neutral arbitrators low marks on his/her evaluation or explicitly complained about the neutral arbitrator or rulings. Three complained about the lack of a jury and three complained about a particular neutral arbitrator.

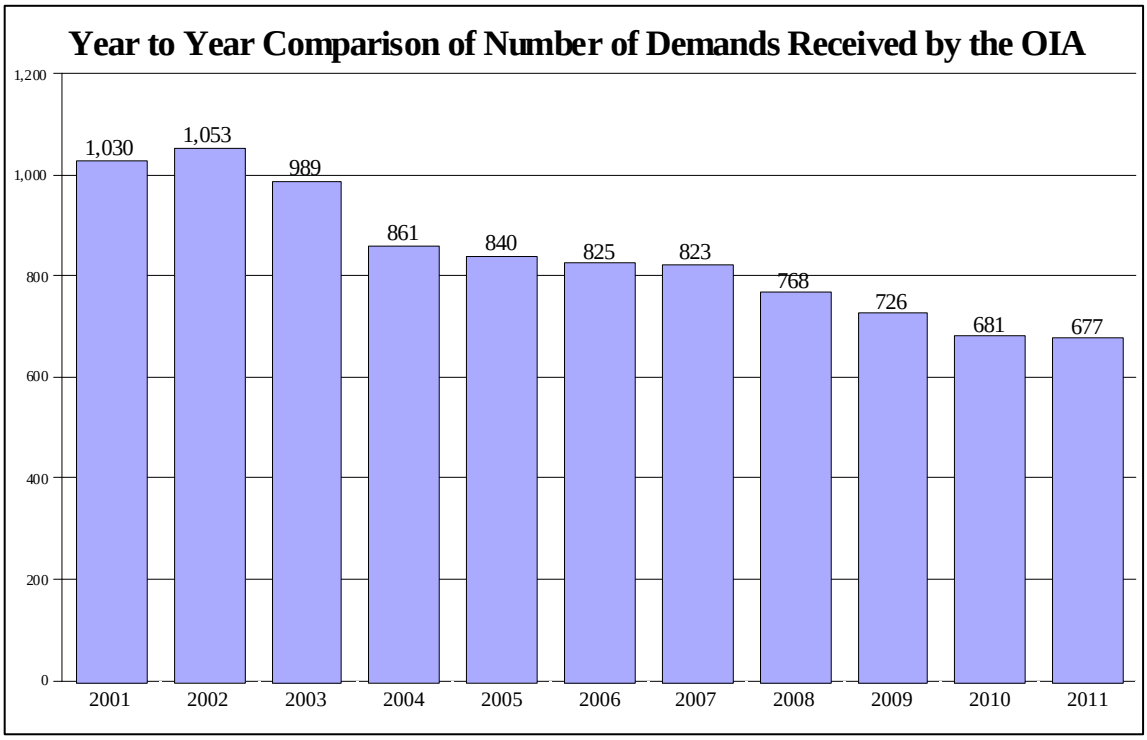
In general, the most common comment concerned obtaining medical records, calling the system of getting them from Kaiser expensive, time consuming, and/or confusing and resulting in incomplete records that differed from those of other counsel. The most common proposed remedy is for both sides to get identical, bate-stamped records at the beginning or electronic copies. The next most common comment concerned the neutral arbitrator pool and opinions that it should be more diverse. Finally, the *pro per* claimants once again expressed their frustration in navigating a legal system without a lawyer. Several told the OIA not to allow unrepresented claimants.

XI. TRENDS AND DATA OVER THE YEARS OF OPERATION OF THE OIA

Using the data that the OIA has published in prior reports, this section considers the operation of the OIA over time, highlighting those elements that have changed as well as those that have remained relatively stable. For example, the percentage of neutral arbitrators who are retired judges, how neutral arbitrators are selected, the percentage of claimants represented by counsel, and how cases close all have remained relatively stable. As in the preceding sections, lien cases are only considered in the first three Sections (A, B, and C) and the last (K).

A. After Years of Declining, The Number of Demands for Arbitration Remained Almost the Same in 2011

The number of demands for arbitrations has declined since 2002. The number reached a high of 1,053 in 2002. In 2011, however, the OIA received 677, only 4 fewer than in 2010. As the following chart shows, the sharpest decline occurred between 2003 and 2004 (a decrease of 128), with significant further decreases from 2008 to 2010.



The decline from 2010 to 2011 resulted from Kaiser bringing fewer lien cases (from 23 to 12). The number of non-lien demands for arbitration actually rose slightly between 2010 and 2011 (from 658 to 665).

B. The Number of Neutral Arbitrators Dropped in 2011 Following the Update

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 251 in 2011.[77] Forty-three percent of the pool in 2011 were retired judges. The number of neutral arbitrators normally drops every two years, when neutral arbitrators do not return the required update.

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.[78] For the most part, the percentage of neutral arbitrators who have served in any given year has been 57 – 63%. If the entire time is considered, 92% of the pool in 2011 has served at some time and the average number of selections is 20, or approximately 2 appointments a year. The number of neutral arbitrators who have written awards also remained high, ranging from 59 (in 2011) to 93 (in 2004). During the OIA's existence, 358 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. 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 to 96%.[79] Benefit claims are generally less than two percent.

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

The percentage 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, and neutral arbitrators. Both the AOB and the OIA have revised forms and the "*pro per* hand out" to make them easier for *pro pers* to understand. See Exhibit B, Rule 54.

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[77]The next smallest pool was in 2009 – 275 – again following an update.

[78]In 2011, by contrast, there were 312 fewer demands for arbitration but only 36 fewer neutral arbitrators in the pool.

[79]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.

E. The Parties Select the Neutral Arbitrators by Strike and Rank in Approximately Two Thirds 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). Similarly, the percentage of neutral arbitrators jointly selected who are members of the OIA pool has ranged from 55% (2011) to 82% (2006).[80]

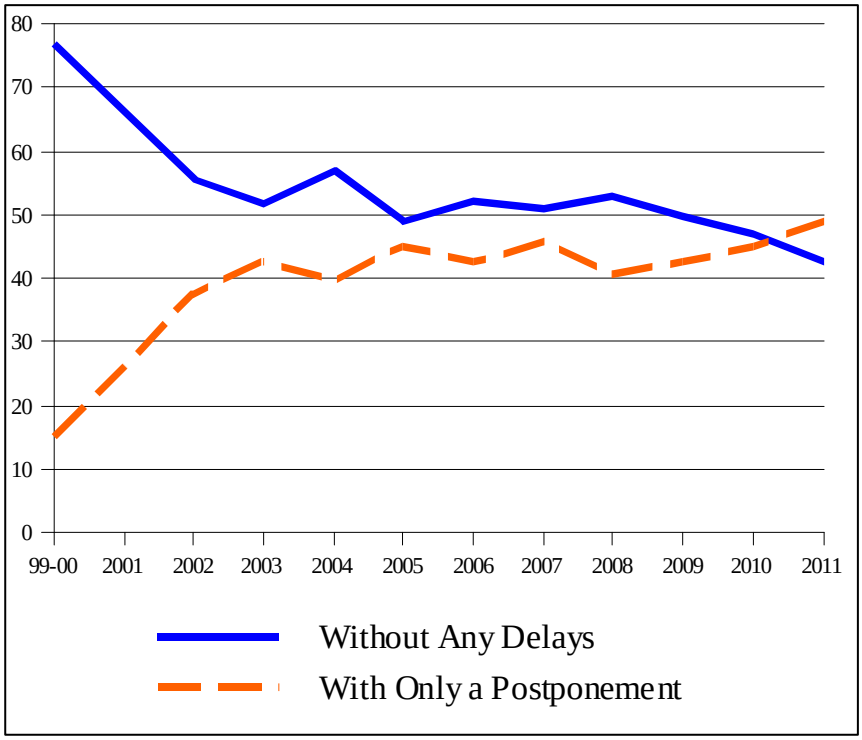
F. Half of the Claimants Use Procedures Contained in OIA Rules and State Law to Delay Selecting the Neutral Arbitrator, but Time to Select Remains Consistent

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 was not that common.[81] Since 2003, 43 – 57% of the cases had one or both. In 2000, only 21% did. Claimants made almost all of the postponements (4,163 out of 4,182) and the vast majority of disqualifications (646 out of 794). These trends are graphed on the following chart:

[80]There have only been 11 cases in which the parties had to go to court to have a neutral arbitrator selected.

[81]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.

Year to Year 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 110 – 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.

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

	2003	2004	2005	2006	2007	2008	2009	2010	2011
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 47.7%	25 days 43%
Only Postponement	114 days 43%	111 days 40%	111 days 45%	111 days 43%	113 days 46%	114 days 41%	113 days 43%	110 days 44.9%	111 days 49%
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%	80 days 3.5%	72 days 2%
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%	174 days 3.9%	160 days 6%
Total Selections	69 days	61 days	70 days	66 days	68 days	67 days	70 days	71 days	75 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 (11 – 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.

Year to Year Comparison of How Cases Closed

	2003	2004	2005	2006	2007	2008	2009	2010	2011
Settlements	49%	41%	40%	42%	42%	44%	46.5%	44%	44%
Withdrawn	23%	27%	27%	28%	26%	27%	25.6%	25%	26%
Abandoned	4%	4%	4.5%	5%	5%	5%	4.3%	4%	3%
Dismissed	2%	4%	2%	3%	3%	3%	2.4%	3%	4%
Summary Judgment	9%	8%	9%	8%	10.5%	8%	7%	11%	11%
Awards	12%	16%	16%	13%	13.5%	13%	13%	12%	11%

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 nearly $9,000,000. The average is $396,350. 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, $823,692, is in 2011, which had an award of $8,973,836.

After 2000, the percent of cases in which members prevailed after a hearing ranges from 29% (2009)[82] to 43% (2002, 2005, and 2008). In 2011, 31% of members prevailed in non-lien cases.

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 days in 2003 and reached 357 days in 2009.

Year to Year Comparison of Average Number of Days to Close, by Disposition

	2003	2004	2005	2006	2007	2008	2009	2010	2011
Settlements	317 days	320 days	311 days	325 days	337 days	340 days	375 days	341 days	326 days
Withdrawn	231 days	247 days	254 days	262 days	242 days	227 days	234 days	242 days	268 days
Summary Judgment	333 days	355 days	377 days	355 days	333 days	324 days	366 days	351 days	346 days
Awards	461 days	456 days	470 days	533 days	520 days	455 days	503 days	483 days	555 days
All Cases	319 days	326 days	330 days	342 days	336 days	325 days	357 days	336 days	339 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 37 cases – less than half of one percent – have closed late.

[82] In 2009, lien cases were included and all of those cases were decided in Kaiser's favor. If the 15 lien cases were excluded, members prevailed after a hearing 34% of the time in cases they brought.

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 81 – 88% of the cases. This is done most easily, and most commonly, by the claimants signing a form and agreeing not to use party arbitrators. Each year, however, in 5 – 10% of the cases, the claimants have requested a waiver based on financial hardship which also 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.[83] While some claimants file for both waivers, others request only that 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 to the parties of the neutral arbitrators and the OIA. The evaluations ask, among other things, whether the neutral arbitrator treated the parties with respect, explained the process, and understood the facts and whether the parties would recommend the arbitrator 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 4.2 and 4.9, quite close to 5 (on a 1 – 5 range). The differences between years are quite small,[84] 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,[85] 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. The percent response rate averages in the 80s. Ninety-eight percent of the neutral arbitrators and 90% of the parties who answer the question rated the OIA system as good as or better than the state court system in 2011.

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[83]Unlike California Superior Courts, the filing fee has not increased during the OIA's operation.

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

[85]In 2011, for example, only 19 responded.

XII. 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.

The members are, in alphabetical order:

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

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

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

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, 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, Orange.

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

Donna L. Yee, MSW, Ph.D., Chief Executive Officer of the Asian Community Center of Sacramento Valley, Sacramento.[86]

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.

The AOB amended Rule 4 to clarify the ethics code for party arbitrators. See Exhibit B, Rule 4.

During 2011, the AOB had several discussions concerning desirable qualities for neutral arbitrators, the appropriate size of the pool (which had stayed at 300 until the update, even as the number of demands decreased), and possible additional methods to evaluate and provide feedback to the neutral arbitrators.

The AOB also reviews the draft annual report and comments upon it. Exhibit J is the AOB Comments on the Annual Report for 2011.

[86]Ms. Yee joined the AOB in 2011.

XIII. CONCLUSION

This report describes a mature arbitration system, though one continuously subject to further improvement. 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 in 2011 only one case closed after its time limit is good evidence that the arbitration process meets expectations of timeliness.

Cost is an area the OIA measures. The $150 filing fee is lower than court filing fees (other than small claims) and can be waived. In 87% of the cases with neutral arbitrator fees that began after January 1, 2003 and ended in 2011, the fees 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.

A large number of individuals serve as 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 neutral arbitrators 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 its website for all to see and helps the neutral arbitrators comply with their obligations. The amount of information available to the parties and the public has increased dramatically over the years.

The composition of the pool of neutral arbitrators includes those who have plaintiff's side experience and those who have defendant's side experience. Ninety-six percent report medical malpractice experience.

The system is easier than a court system to access: the filing 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), many parties communicate by email, 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 its arbitrations than any other arbitration system provides about its arbitrations. The wealth of this information was recognized by the National Academy of Science's Committee on Science Technology and the Law when it requested the Independent Administrator participate in its session on medical malpractice arbitration.